# ENCYCLOPEDIA of the AMERICAN CONSTITUTION

VOLUME 1

SECOND EDITION

# Encyclopedia of the American Constitution

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# *Encyclopedia of the American Constitution*

**SECOND EDITION**


Edited by
**Leonard W. Levy**
and
**Kenneth L. Karst**

**Adam Winkler**, Associate Editor for the Second Edition

**Dennis J. Mahoney**, Assistant Editor for the First Edition
**John G. West, Jr.**, Assistant Editor for Supplement I



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# *Preface*

(1986)

In the summer of 1787 delegates from the various states met in Philadelphia; because they succeeded in their task, we now call their assembly the Constitutional Convention. By September 17 the delegates had completed the framing of the Constitution of the United States. The year 1987 marks the bicentennial of the Constitutional Convention. This Encyclopedia is intended as a scholarly and patriotic enterprise to commemorate the bicentennial. No encyclopedia on the Constitution has heretofore existed. This work seeks to fill the need for a single comprehensive reference work treating the subject in a multidisciplinary way.

The Constitution is a legal document, but it is also an institution: a charter for government, a framework for building a nation, an aspect of the American civic culture. Even in its most limited sense as a body of law, the Constitution includes, in today's understanding, nearly two centuries' worth of court decisions interpreting the charter. Charles Evans Hughes, then governor of New York, made this point pungently in a 1907 speech: "We are under a Constitution, but the Constitution is what the judges say it is." Hughes's remark was, if anything, understated. If the Constitution sometimes seems to be chiefly the product of judicial decisions, it is also what Presidents say it is—and legislators, and police officers, and ordinary citizens, too. In the final analysis today's Constitution is the product of the whole political system and the whole history of the many peoples who have become a nation. "Constitutional law is history," wrote Professor Felix Frankfurter in 1937, "But equally true is it that American history is constitutional law."

Thus an Encyclopedia of the American Constitution would be incomplete if it did not seek to bridge the disciplines of history, law, and political science. Both in identifying subjects and in selecting authors we have sought to build those bridges. The subjects fall into five general categories: doctrinal concepts of constitutional law (about fifty-five percent of the total words); people (about fifteen percent); judicial decisions, mostly of the Supreme Court of

the United States (about fifteen percent); public acts, such as statutes, treaties, and executive orders (about five percent); and historical periods (about ten percent). (These percentages are exclusive of the appendices—printed at the end of the final volume—and bibliographies.) The articles vary in length, from brief definitions of terms to treatments of major subjects of constitutional doctrine, which may be as long as 6,000 words, and articles on periods of constitutional history, which may be even longer. A fundamental concept like "due process of law" is the subject of three 6,000-word articles: Procedural Due Process of Law (Civil), Procedural Due Process of Law (Criminal), and Substantive Due Process of Law. In addition, there is a 1,500-word article on the historical background of due process of law. The standard length of an article on a major topic, such as the First Amendment, is 6,000 words; but each principal component of the amendment—Freedom of Speech, Freedom of the Press, Religious Liberty, Separation of Church and State—is also the subject of a 6,000-word article. There are also other, shorter articles on other aspects of the amendment.

The reader will find an article on almost any topic reasonably conceivable. At the beginning of the first volume there is a list of all entries, to spare the reader from paging through the volumes to determine whether particular entries exist. This list, like many another efficiency device, may be a mixed blessing; we commend to our readers the joys of encyclopedia-browsing.

The Encyclopedia's articles are arranged alphabetically and are liberally cross-referenced by the use of small capital letters indicating the titles of related articles. A reader may thus begin with an article focused on one feature of his or her field of inquiry, and move easily to other articles on other aspects of the subject. For example, one who wished to read about the civil rights movement of the 1950s and 1960s might begin with the large-scale subject of Civil Rights itself; or with a particular doctrinal topic (Desegregation, or Miscegenation), or an article focused on a narrower factual setting (Public Accommodations, or Sit-Ins). Alternatively, the reader might start with an important public act (Civil Rights Act of 1964), or with a biographical entry on a particular person (Martin Luther King, Jr., or Earl Warren). Other places to start would be articles on the events in particular eras (Warren Court or Constitutional History, 1945–1961 and 1961–1977). The reader can use any of these articles to find all the others, simply by following the network of cross-references. A Subject Index and a Name Index, at the end of the last volume, list all the pages on which the reader can find, for example, references to the freedom of the press or to Abraham Lincoln. Full citations to all the judicial decisions mentioned in the Encyclopedia are set out in the Case Index, also at the end of the final volume.

The Encyclopedia's approximately 2,100 articles have been written by 262 authors. Most of the authors fall into three groups: 41 historians, 164 lawyers (including academics, practitioners, and judges), and 53 political scientists. The others are identified with the fields of economics and journalism. Our lawyer-authors, who represent about three-fifths of all our writers, have produced about half the words in the Encyclopedia. Historian-authors, although constituting only about sixteen percent of all authors, produced about one-third of the words; political scientists, although responsible for only one-sixth of the words, wrote more than a quarter of the articles. Whether this information is an occasion for surprise may depend on the reader's occupation.

In addition to the interdisciplinary balance, the reader will find geographical balance. Although a large number of contributors is drawn from the

School of Law of the University of California, Los Angeles, the Claremont Colleges, and other institutions in California, most come from the Northeast, including twelve from Harvard University, thirteen from Yale University, and nine from Columbia University. Every region of the United States is represented, however, and there are many contributors from the South (Duke University, University of Virginia, University of North Carolina, University of Texas, etc.), from the Midwest (University of Chicago, University of Notre Dame, University of Wisconsin, University of Michigan, etc.), and from the Northwest (University of Oregon, Portland State University, University of Washington, etc.). There are several contributors from foreign countries, including Austria, Canada, and Great Britain.

Every type of academic environment is represented among the eighty-six colleges and universities at which the authors work. The contributors include scholars based at large public universities smaller state colleges, Ivy League universities, private liberal arts colleges, and religiously affiliated institutions. Not all of the authors are drawn from academia; one is a member of Congress and nine are federal judges. In addition, other government offices, research institutions, libraries, newspaper staffs, and law firms are represented.

Each article is signed by its author; we have encouraged the authors to write commentaries, in essay form, not merely describing and analyzing their subjects but expressing their own views. On the subject of the Constitution, specialists and citizens alike will hold divergent viewpoints. In inviting authors to contribute to the Encyclopedia, we have sought to include a range of views. The reader should be alert to the possibility that a cross-referenced article may discuss similar issues from a different perspective—especially if those issues have been the subject of recent controversy. We hope this awareness will encourage readers to read more widely and to expand the range of their interests concerning the Constitution.

Planning of the Encyclopedia began in 1978, and production began in 1979; nearly all articles were written by 1985. Articles on decisions of the Supreme Court include cases decided during the Court's October 1984 term, which ended in July 1985. Given the ways in which American constitutional law develops, some of the subjects treated here are moving targets. In a project like this one, some risk of obsolescence is necessarily present; at this writing we can predict with confidence that some of our authors will wish they had one last chance to modify their articles to take account of decisions in the 1985 term. To minimize these concerns we have asked the authors of articles on doctrinal subjects to concentrate on questions that are fundamental and of enduring significance.

We have insisted that the authors keep to the constitutional aspects of their various topics. There is much to be said about abortion or antitrust law, or about foreign affairs or mental illness, that is not comprehended within the fields of constitutional law and history. In effect, the title of every article might be extended by the phrase ". . . and the Constitution." This statement is emphatically true of the biographical entries; every author was admonished to avoid writing a conventional biography and, instead, to write an appreciation of the subject's significance in American constitutional law and history.

We have also asked authors to remember that the Encyclopedia will be used by readers whose interests and training vary widely, from the specialist in constitutional law or history to the high school student who is writing a paper. Not every article will be within the grasp of that student, but the vast majority of articles are accessible to the general reader who is neither historian nor lawyer nor political scientist. Although a constitutional specialist

on a particular subject will probably find the articles on that specialty too general, the same specialist may profit from reading articles in other fields. A commerce clause expert may not be an expert on the First Amendment; and First Amendment scholars may know little about criminal justice. The deluge of cases, problems, and information flowing from courts, other agencies of government, law reviews, and scholarly monographs has forced constitutional scholarship to become specialized, like all branches of the liberal arts. Few, if any, can keep in command of it all and remain up to date. The Encyclopedia organizes in readable form an epitome of all that is known and understood on the subject of the Constitution by the nation's specialist scholars.

Because space is limited, no encyclopedia article can pretend to exhaust its subject. Moreover, an encyclopedia is not the same kind of contribution to knowledge as a monograph based on original research in the primary sources is. An encyclopedia is a compendium of knowledge, a reference work addressed to a wide variety of interested audiences: students in secondary school, college, graduate school, and law school; scholars and teachers of constitutional law and history; lawyers; legislators; jurists; government officials; journalists; and educated citizens who care about their Constitution and its history. Typically, an article in this Encyclopedia contains not only cross-references to other articles but also a bibliography that will aid the reader in pursuing his or her own study of the subject.

In addition to the articles, the Encyclopedia comprises several appendices. There is a copy of the complete text of the Constitution as well as of George Washington's Letter of Transmittal. A glossary defines legal terms that may be unfamiliar to readers who are not lawyers. Two chronologies will help put topics in historical perspective; one is a detailed chronology of the framing and ratification of the Constitution and the Bill of Rights, and the other is a more general chronology of American constitutional history. Finally, there are three indexes: the first is an index of court cases, with the complete citation to every case mentioned in the Encyclopedia (to which is attached a brief guide to the use of legal citations); the second is an index of names; and the third is a general topical index.

For some readers an encyclopedia article will be a stopping-point, but the articles in this Encyclopedia are intended to be doorways leading to ideas and to additional reading, and perhaps to the reader's development of independent judgment about the Constitution. After all, when the American Constitution's tricentennial is celebrated in 2087, what the Constitution has become will depend less on the views of specialists than on the beliefs and behavior of the nation's citizens.

Leonard W. Levy
Kenneth L. Karst
Dennis J. Mahoney

# *Acknowledgments*

(1986)

The editors are grateful to our authors, to our editorial board, and to our advisory committee (all listed in the early pages of the Encycloiedia) for their labors and advice during these seven years.

The editors acknowledge with utmost appreciation the financial support given to this project by four institutions. The National Endowment for the Humanities made a major grant which the Weingart Foundation of Los Angeles matched. The Macmillan Publishing Company and The Claremont Graduate School also handsomely underwrote this encyclopedia. The earliest private funds came from a small group of southern California attorneys and foundations: The Times Mirror Foundation; James Greene, Judge Dyson William Cox and Janice T. Cox, Robert P. Hastings, James E. Ludlam, and J. Patrick Waley; Musick, Peeler & Garrett; and The Ralph B. Lloyd Foundation.

The Claremont Graduate School and University Center also provided facilities and logistical support for the Encyclopedia. Former President Joseph B. Platt gave the project his encouragement. Executive Vice-President Paul A. Albrecht significantly assisted our grant applications from the outset and remained helpful throughout the project. Associate Dean Christopher N. Oberg has seen to the efficient management of administrative aspects of the project. Sandra Glass, now of the Keck Foundation, provided invaluable aid while she was associated with The Claremont Graduate School. We are also grateful for the unflagging support of the School of Law of the University of California, Los Angeles, and its deans, William D. Warren and Susan Westerberg Prager.

A succession of graduate students at The Claremont Graduate School worked on the project as editorial assistants, research assistants, typists, and proofreaders. First was Dr. David Gordon, who also acted as assistant editor for one year, and who wrote over one hundred of the articles before going on to law school. Dr. Michael E. DeGolyer and Susan Marie Meyer served

ably as editorial assistants. Others who worked on the project were Michael Walker, Kenneth V. Benesh, Susan Orr, Suzanne Kovacs, Dr. Steven Varvis, Dr. Patrick Delana, and Paul R. Huard.

The secretaries in the History Department of The Claremont Graduate School have typed thousands of letters and hundreds of articles, in addition to performing numerous other small tasks to keep the project going; particular thanks are due to Lelah Mullican. The Claremont Graduate School Academic Computing Center and its director, Gunther Freehill, showed us how to automate our record keeping and provided facilities for that purpose.

Most important, we gratefully acknowledge the support of Charles E. Smith, Vice-President and Publisher, Professional Books Division, Macmillan Publishing Company, and of Elly Dickason, our editor at Macmillan. Mr. Smith actively and continuously supported the project from its early days and by his prodding kept us on a Stakhanovite schedule. Ms. Dickason performed arduous labors with supreme professional skill and unfailing good humor.

Finally, we thank Elyse Levy and Smiley Karst for their own indispensable contributions to this project. A personal dedication page seems inappropriate for a reference work, otherwise this Encyclopedia would have been dedicated to them. Natalie Glucklich, Renee Karst, Aaron Harris, and Adam Harris, the grandchildren of the senior editors, entered the world without realizing that the Encyclopedia project was underway. They assisted not a whit, but we acknowledge our pleasure in seeing their names in print.

# *Preface*

## (1992)

The continuing deluge of problems and developments concerning the Constitution makes an updating of the *Encyclopedia of the American Constitution* desirable. The Supreme Court decides at least 250 cases annually, about 150 of them with full opinions. Before the bicentennial of the ratification of the Bill of Rights concludes, the Court will have decided about 1,500 cases since we finished the manuscript for the four-volume edition in mid-1985. New opinions of the Court are having a substantial impact on most of American constitutional law and the public policies that it reflects.

The Court itself is undergoing major changes in personnel. Chief Justice Warren Burger and Justices Lewis H. Powell, William J. Brennan, and Thurgood Marshall have retired. William H. Rehnquist now sits in the center seat; Antonin Scalia succeeded to Rehnquist's former position; Anthony Kennedy became Powell's successor; David H. Souter holds Brennan's old chair; and Clarence Thomas succeeds Marshall. Changes in personnel herald additional and significant changes in constitutional law. For example, the Senate Judiciary Committee hearings on the nomination of Robert H. Bork, in itself a landmark event, reflected a national concern on all sides for the integrity and impartiality of the Court and its interpretation of the Constitution.

As we finished editorial work on the Encyclopedia in 1985, the Department of Justice intensified a broad attack on the "judicial activism" of the Supreme Court, the finality of its decisions, and its incorporation doctrine, which makes the Bill of Rights applicable to the states. Soon after, the protracted Iran-Contra inquiries raised some of the most important constitutional issues since Watergate. New, important, and even sensational developments of concern to the Constitution have become almost common.

This Supplement to the Encyclopedia has enabled us to present many topics that we had originally neglected and to cover all major developments and decisions since 1985; it includes articles on the full range of develop-

ments in constitutional law. Because we wanted the Supplement to be a free-standing volume, as well as an additional volume to the original work, we instructed contributors to introduce each article with a short background to its topic and to write as if the Encyclopedia did not exist. In addition to articles on concepts such as abortion, affirmative action, establishment of religion, equal protection, and free speech, we have included analyses of major cases. We have treated new developments conceptually, topically, biographically, historically, and by judicial decision.

We continued our policy of getting a wide range of scholarly opinions. For the sake of variety, generally we did not ask the authors of the original articles to "update" their contributions; we sought different authors, sometimes of differing constitutional persuasions. The Supplement is an independent reference work.

The Supplement enables us to include articles on topics that we had omitted from the four-volume set, either as a result of editorial neglect or because some authors failed to produce the articles and too little time remained to replace them. As comprehensive as the Encyclopedia is, it has gaps that we have sought to close with this Supplement (e.g., Court-packing plans, the Judicial Conference of the United States, original intent, constitutional remedies, special prosecutors, entitlements, constitutional fictions, the civil rights movement, gender rights, legal culture, law and economic theory, ratifier intent, textualism, unenumerated rights, the Senate Judiciary Committee, and so on). The Supplement also gave us the opportunity to treat at greater length a variety of topics to which we originally allocated insufficient space. Although 1,500,000 words for the four-volume set was a huge amount, we found the publisher's limitations on length to be too constraining. An additional volume of over 400,000 words, which Macmillan approved for the Supplement, gave us space to redo overbrief articles, to repair omissions, and to update the entire work.

For the most part, the Supplement covers wholly fresh topics, not only those omitted from the original set but those that have come to attention since then. When we planned the Encyclopedia in the late 1970s, for example, the subject of original intent was far less discussed than it was a decade later. Other comparatively new topics include the relation of capital punishment to race, the anti-abortion movement, children and the First Amendment, critical legal studies, the right to die, vouchers, independent counsel, the balanced budget amendment, the controversy over creationism, Iran-Contra, ethics in government, criminal justice and technology, political trials, the Gramm-Rudman Act, patenting the creation of life, government as proprietor, the Attorney General's Commission on Pornography, the Boland Amendment, feminist theories, drug testing, joint-resolutions, constitutional realism, the Bail Reform Act of 1984, recent appointees to the Court, low-value speech, unenumerated rights, private discrimination, visas and free speech, and the Rehnquist Court. The updating of old topics, covering the period since 1985, also, of course, presents new material. We estimate that about seventy-five percent of the entries in the Supplement consist of new topics. Of the total 320 articles in this volume, 247 present entries not in the original Encyclopedia. Nevertheless, any encyclopedia is merely an epitome of knowledge, and we again labored under practical constraints on word lengths. Space is always limited. We do not mislead ourselves or readers by suggesting that we have managed to cover everything.

The articles in this Supplement, as in the original edition, are intended primarily to be doorways leading to ideas and to additional reading. Thus,

all articles in this Supplement are elaborately cross-referenced to other related articles within the same covers and to articles in the original four-volume edition. Cross-references are indicated by words set in small capitals. . . .

As in the original edition, we believe readers will find any article on almost any topic reasonably conceivable or a cross-reference to related topics. The Supplement contains articles by 178 contributors. Most of the contributors are academic lawyers who teach constitutional law, but other professors of law have made contributions, as well as a few lawyers in private practice and five federal judges. In addition many historians and political scientists are among the contributors, as are ten deans and three associate deans. We sought as much interdisciplinary balance as the entries themselves permitted and, with respect to the location of the contributors, we sought geographical balance by recruiting authors from the whole of the nation, as well as from different sorts of institutions. The University of California, Los Angeles, continues to be the institution with the largest number of contributors, followed by Harvard University, University of Michigan, Yale University, University of Minnesota, University of Southern California, Georgetown University, University of Chicago, New York University, and Stanford University, in that order. All together, eighty-five institutions have been represented.

Every article is signed by its author. We have encouraged the authors to write commentaries in essay form, not merely describing and analyzing their subjects but expressing their own views. Specialists and ordinary citizens alike hold divergent viewpoints on the Constitution. Readers should be alert to the likelihood that a cross-referenced article may discuss similar issues from a different perspective, especially if the issues have been the subject of recent controversy.

Leonard W. Levy
Kenneth L. Karst
John G. West, Jr.

# *Acknowledgments*

(1992)

We are grateful to our authors as well as to the members of the Editorial Board. We acknowledge with utmost appreciation the support given to this project by the Earhart Foundation, by The Claremont Graduate School and University Center and its officers, President John D. Maguire, former Vice-President Jerome Spanier, and especially former Vice-President Christopher Oberg. Three graduate students of The Claremont Graduate School served, indispensably, as editorial assistants: Mary Bellamy, Dana Whaley, and Jeffrey Schultz. The Macmillan Reference Division, headed by Philip Friedman, his editor in chief, Elly Dickason, and Senior Project Editor Martha Goldstein have done extraordinarily well and generously by us, earning our appreciation.

As before, the grandchildren of the senior editors assisted not a whit, but we acknowledge our pleasure in remembering them and especially in seeing in print the names of those who came into this world since Aaron, Renee, Natalie, and Adam. The new ones are Elon Glucklich, Jacob Harris, and Elijah Dylan Karst. We are pleased, too, to thank our wives, Elyse Levy and Smiley Karst, to whom this work might have been dedicated if a personal dedication page were appropriate for a reference work. Along with their names would be that of John West's sister Janet, a plucky woman who graduated from law school and passed her bar exam during the life of this project despite medical adversities.

# *Preface*

## (2000)

This second edition of the *Encyclopedia of the American Constitution* represents the compilation of twenty years' work. It gathers together in one source all of the articles written for the original four-volume set published in 1986; articles in the supplementary volume published in 1992; and new articles on developments in the 1990s. Our initial intention was to publish a second supplementary volume, but as publication drew near it became clear that the combination of the original work with two supplements, each with articles of relevance to researchers and students of particular topics, would be unwieldy. For example, one looking for an overview of Freedom of Speech would have had to look up articles in three separate volumes to form a complete picture. With this second edition, all articles on a single topic are placed together and dated, for easy retrieval in one search.

This edition contains 361 new articles by 237 authors. Some of these authors contributed to the original Encyclopedia or Supplement I or both, but we have sought to expand the list to include a new generation of scholars. As before, most of the contributors are academic lawyers, yet some articles are written by judges, practicing lawyers, historians, or political scientists. Every article is signed by its author. We have continued to encourage writers to use the essay form, expressing their own views as they wish. We recruited authors with the purpose of presenting a wide range of views. For new articles on some controversial subjects we have sought to provide contrasting views under the same title (e.g., Same-Sex Marriage, I and II; Workplace Harassment and Freedom of Speech, I and II).

The substantial new material of this edition focuses mainly on the constitutional issues arising since the publication of Supplement I in 1992. During this time, two new Justices have joined the U.S. Supreme Court: Justice Ruth Bader Ginsburg replaced Justice Byron R. White, and Justice Stephen G. Breyer replaced Justice Harry A. Blackmun. We have been saddened during these years by the deaths of Chief Justice Warren E. Burger, and Justices

William J. Brennan, Jr., Thurgood Marshall, Lewis F. Powell, Jr., and Harry A. Blackmun.

We have not only updated topics covered in earlier volumes, but also included a great many articles on topics not previously covered. Some of these articles represent relatively new subject matter (e.g., DNA testing and genetic privacy, the Internet and freedom of expression, the Twenty-Seventh Amendment). Others offer new perspectives on doctrinal or historical subjects of longer standing (e.g., deliberative democracy, economics of affirmative action, jury service as a political right, the Seneca Falls Convention).

During the past decade, the constitutional philosophy of the Rehnquist Court has become more identifiable, clarified by many decisions of significant constitutional import. Although easily labeled as "conservative," the Court has in fact been as activist as its recent predecessors in setting forth new doctrine. Nowhere is this more evident than in the Rehnquist Court's rulings scaling back the ability of criminal defendants to use the writ of habeas corpus to obtain federal judicial review, and its rulings in the area of federalism, where expansive notions of states' rights have cabined federal power for the first time since the days of the New Deal. In a notable decision, the Court refused to create a new constitutional right to die with the aid of a physician; in another, it clearly held for the first time that people using the public streets have a constitutional right to loiter without police interference. In other areas of vibrant national interest, such as free speech, abortion, voting rights, and affirmative action, the Court has continued generally along the paths of its predecessors, although often reshaping the precise contours of controlling doctrine.

Although the courts remain the primary subject of constitutional analysis, we have broadly defined the subject of this Encyclopedia to include legislative developments on issues of constitutional import (e.g., welfare rights); historically significant incidents that evaded judicial review (e.g., the impeachment of President William J. Clinton); and developments in the realm of theory (e.g., critical race theory). Such an approach corresponds to a recently expanded body of scholarly work challenging the view that the judiciary is the sole interpreter of the Constitution. The original volumes of the Encyclopedia shared this broad definition of constitutional law.

To encourage browsing we have continued the original practice of incorporating extensive cross-referencing into the articles. A cross-reference is indicated by small capitals, enabling the reader to know where he or she can turn to discover more on related topics. Often the reader who follows these signs will find the issues discussed from a different perspective. With only a handful of exceptions, this second edition's coverage of topics ended in mid-1999, when we "closed the book" at the end of the Supreme Court's October 1998 term.

We are grateful to Elly Dickason and Brian Kinsey of Macmillan Reference for their unfailing help throughout the planning and the editorial process that produced this second edition. We are indebted as well to the numerous authors who contributed to this project; both their patience and insight were requisite for the project's fulfillment. Finally, we owe everything to our loving wives, Elyse Levy, Smiley Karst, and Melissa Bomes, for their support and encouragement throughout the long years of editing this Encyclopedia.

Leonard W. Levy
Kenneth L. Karst
Adam Winkler

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# *List of Contributors*

(1986)


Benjamin Aaron
*Professor of Law, Emeritus*
University of California, Los Angeles

Labor and the Antitrust Laws

Henry J. Abraham
*James Hart Professor of Government and Foreign Affairs*
University of Virginia

Affirmative Action
Appointment of Supreme Court Justices
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Norman Abrams
*Professor of Law*
University of California, Los Angeles

Ballew v. Georgia
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Jury Size
Jury Unanimity
Law Enforcement and Federal–State Relations

David Adamany
*Professor of Law and Political Science, and President*
Wayne State University

Campaign Finance
Elections, Regulation of
Political Parties in Constitutional Law
Primary Election

Lee A. Albert
*Professor of Law*
State University of New York, Buffalo

Federal Grants-in-Aid

Francis A. Allen
*Edson R. Sunderland Professor of Law*
University of Michigan

Right to Counsel

Reginald Alleyne
*Professor of Law*
University of California, Los Angeles

Employment Discrimination

George Anastaplo
*Professor of Law*
Loyola University of Chicago Law School
*Lecturer in the Liberal Arts*
University of Chicago

Political Philosophy of the Constitution

Alison Grey Anderson
*Professor of Law*
University of California, Los Angeles

Securities Law and the Constitution

David A. Anderson
*Rosenberg Centennial Professor of Law*
University of Texas, Austin

Gag Order
New York Times Co. v. Sullivan
Seditious Libel

Michael Asimow
*Professor of Law*
University of California, Los Angeles

National Police Power
Sixteenth Amendment

James R. Asperger
*United States Attorney*
Los Angeles

Arrest Warrant
Overruling
Search Warrant
Vagrancy Laws

Carl A. Auerbach
*Professor of Law*
University of Minnesota, Twin Cities

Subversive Advocacy

Barbara Allen Babcock
*Ernest W. McFarland Professor of Law*
Stanford Law School

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Stewart Abercrombie Baker
*Attorney*
Steptoe & Johnson, Washington, D.C.

Stevens, John Paul

Lance Banning
*Professor of History*
University of Kentucky

Madison, James

Sotirios A. Barber
*Professor of Government*
University of Notre Dame

Checks and Balances
Delegation of Power
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Edward L. Barrett, Jr.
*Professor of Law*
University of California, Davis

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Paul M. Bator
*John P. Wilson Professor of Law*
University of Chicago

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Maurice G. Baxter
*Professor of History*
Indiana University

Webster, Daniel

Derrick A. Bell
*Professor of Law*
Harvard Law School

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Herman Belz
*Professor of History*
University of Maryland

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Paul Bender
*Dean and Professor of Law*
Arizona State University

Retroactivity of Judicial Decisions

Michael Les Benedict
*Professor of History*
Ohio State University

Constitutional History, 1865–1877

Raoul Berger
*Professor of Law, Emeritus*
Harvard Law School

Impeachment

Walter Berns
*John M. Olin Distinguished Scholar in Constitutional and Legal Studies*
American Enterprise Institute
*Professorial Lecturer*
Georgetown University

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Richard B. Bernstein
*Research Curator, U.S. Constitution Exhibition*
The New York Public Library

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Brant, Irving
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Cohen, Morris R.
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Swisher, Carl Brent
Ten Broek, Jacobus
Tugwell, Rexford G.
Wigmore, John Henry

Scott H. Bice
*Professor of Law and Dean of the Law Center*
University of Southern California

Legislative Intent

Joseph W. Bishop, Jr.
*Richard Ely Professor of Law*
Yale Law School

Declaration of War
Military Justice
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Charles L. Black, Jr.
*Sterling Professor of Law, Emeritus*
Yale Law School
*Professor of Law*
Columbia University

Admiralty and Maritime Jurisdiction
Equity
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Vincent Blasi
*Corliss Lamont Professor of Civil Liberties*
Columbia University

Demonstration
Public Forum

Albert P. Blaustein
*Professor of Law*
Rutgers-Camden School of Law

Influence of the American Constitution Abroad

Maxwell Bloomfield
*Professor of History and Law*
Catholic University of America

COMMENTATORS ON THE CONSTITUTION

Grace Ganz Blumberg
*Professor of Law*
University of California, Los Angeles

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Lee C. Bollinger
*Professor of Law*
University of Michigan

BURGER, WARREN E.

Robert H. Bork
*Judge*
United States Court of Appeals for the District of Columbia Circuit

JUDICIAL REVIEW AND DEMOCRACY

Paul Brest
*Kenneth and Harle Montgomery Professor of Clinical Legal Education*
Stanford Law School

CONSTITUTIONAL INTERPRETATION
LEGISLATION

Ralph S. Brown
*Simeon E. Baldwin Professor of Law, Emeritus*
Yale Law School

LOYALTY OATH
LOYALTY-SECURITY PROGRAMS

Barbara Brudno
*Attorney*
*Former Professor of Law*
University of California, Los Angeles

WEALTH DISCRIMINATION

Harold H. Bruff
*John S. Redditt Professor of Law*
University of Texas, Austin

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Robert A. Burt
*Southmayd Professor of Law*
Yale University

FAMILY AND THE CONSTITUTION
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MENTAL RETARDATION AND THE CONSTITUTION

Paul D. Carrington
*Professor of Law and Dean of the Law School*
Duke University

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Robert L. Carter
*Judge*
United States District Court, Southern District of New York

UNITED STATES DISTRICT COURTS

Gerhard Casper
*William B. Graham Professor of Law and Dean of the Law School*
University of Chicago

CONSTITUTIONALISM

Donald S. Chisum
*Professor of Law*
University of Washington, Seattle

PATENT

Jesse H. Choper
*Dean and Professor of Law*
University of California, Berkeley

SEPARATION OF CHURCH AND STATE

William Cohen
*C. Wendell and Edith M. Carlsmith Professor of Law*
Stanford Law School

CLERKS
DOUGLAS, WILLIAM O.
PREEMPTION

Henry Steele Commager
*Professor of History, Emeritus*
Amherst College

STORY, JOSEPH (with Richard B. Bernstein)

Richard C. Cortner
*Professor of Political Science*
University of Arizona

Constitutional History, 1961–1977

Robert M. Cover
*Chancellor Kent Professor of Law*
Yale Law School

Taft Court

Archibald Cox
*Carl M. Loeb University Professor, Emeritus*
Harvard University

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William J. Cuddihy
Claremont, California

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David P. Currie
*Harry N. Wyatt Professor of Law*
University of Chicago

Judicial Power

Thomas Curry
*Vicar for Priests*
Archdiocese of Los Angeles

Backus, Isaac
Hooker, Thomas
Leland, John
Williams, Roger

Richard Danzig
*Attorney*
Latham, Watkins & Hills, Washington, D.C.

Conscription (with Ira Nerken)

Robert Dawidoff
*Associate Professor of History*
Claremont Graduate School

Adams, Henry
Randolph, John

Howard E. Dean
*Professor of Political Science*
Portland State University

Judicial Policymaking
Mechanical Jurisprudence
Thayer, James Bradley

Walter Dellinger
*Professor of Law*
Duke University

Amending Process

John Patrick Diggins
*Professor of History*
University of California, Irvine

Progressive Constitutional Thought

Norman Dorsen
*Stokes Professor of Law*
New York University
*President*
American Civil Liberties Union

American Civil Liberties Union
Civil Liberties
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Flag Desecration

Robert F. Drinan, S.J.
*Professor of Law*
Georgetown University
*Former Member of Congress* (1971–1981)

Civil Disobedience

Murray Dry
*Professor of Political Science*
Middlebury College

Anti-Federalist Constitutional Thought
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Patrick Dutton
*Attorney*
Vinnedge, Lance & Glenn, Ontario, California

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Frank H. Easterbrook
*Judge*
United States Court of Appeals for the Seventh Circuit
*Former Lee and Brena Freeman Professor of Law*
University of Chicago

Rehnquist, William H.

Theodore Eisenberg
*Professor of Law*
Cornell University

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Daniel J. Elazar
*President*
Center for the Study of Federalism
*Professor of Political Science*
Temple University

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Ward E. Y. Elliott
*Professor of Government*
Claremont McKenna College

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Richard E. Ellis
*Professor of History*
State University of New York, Buffalo

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Cushing, William
Duvall, Gabriel
Ellsworth, Oliver
Iredell, James
Jay, John
Paterson, William
Todd, Thomas
Washington, Bushrod

Thomas I. Emerson
*Augustus E. Lines Professor of Law, Emeritus*
Yale Law School

Freedom of Speech
Freedom of the Press

David F. Epstein
*Analyst*
United States Department of Defense, Washington, D.C.

Federalist, The

Edward J. Erler
*Professor of Political Science*
California State University, San Bernardino

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Robert K. Faulkner
*Professor of Political Science*
Boston College

Bickel, Alexander M.
Locke, John
Marshall, John

John D. Feerick
*Professor of Law and Dean of the Law School*
Fordham University

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Don E. Fehrenbacher
*Professor of History*
Stanford University

Constitutional History, 1848–1861
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David Fellman
*Vilas Professor of Political Science, Emeritus*
University of Wisconsin, Madison

Criminal Procedure
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Martha A. Field
*Professor of Law*
Harvard Law School

Abstention Doctrine
Fortas, Abe

Paul Finkelman
*Professor of History*
State University of New York, Binghamton

Arthur, Chester A.
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Bingham, John A.
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Birney, James G.
Black, Jeremiah S.
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Louis Fisher
*Specialist in American National Government*
Congressional Research Service, The Library of Congress

Carter, Jimmy
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Owen M. Fiss
*Alexander M. Bickel Professor of Public Law*
Yale Law School

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David H. Flaherty
*Professor of History*
University of Western Ontario

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Caleb Foote
*Elizabeth Josselyn Boalt Professor of Law*
University of California, Berkeley

Bail

George Forsyth
Claremont, California

Adams, John Quincy

Marvin E. Frankel
*Attorney*
Kramer, Levin, Nessen, Kamen & Frankel
*Former Judge*
United States District Court, Eastern District of New York

Grand Jury

John Hope Franklin
*James B. Duke Professor of History, Emeritus*
Duke University

Slavery and the Constitution

Paul A. Freund
*Carl M. Loeb University Professor, Emeritus*
Harvard Law School

Supreme Court (History)

Gerald E. Frug
*Professor of Law*
Harvard Law School

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Jaime B. Fuster
*Member of Congress*
Puerto Rico
*Professor of Law*
University of Puerto Rico

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David J. Garrow
*Associate Professor of Political Science*
City College of New York and City University Graduate School

King, Martin Luther, Jr.

William Gillette
*Professor of History*
Rutgers University

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Ruth Bader Ginsburg
*Judge*
United States Court of Appeals for the District of Columbia Circuit

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Robert Jerome Glennon
*Professor of Law*
University of Arizona

Brown, Henry Billings
Frank, Jerome N.

Carole E. Goldberg-Ambrose
*Professor of Law*
University of California, Los Angeles

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Abraham S. Goldstein
*Sterling Professor of Law*
Yale Law School

Right to Be Informed of Accusation

Joel K. Goldstein
*Attorney*
Goldstein & Price, St. Louis

Vice-Presidency

David Gordon
*Attorney*
D'Ancona & Pflaum, Chicago

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William B. Gould
*Charles A. Beardsley Professor of Law*
Stanford Law School

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Henry F. Graff
*Professor of History*
Columbia University

Nixon, Richard M.

Kent Greenawalt
*Cardozo Professor of Jurisprudence*
Columbia University

Conscientious Objection
Incitement to Unlawful Conduct

Jack Greenberg
*Professor of Law*
Columbia University
*Former General Counsel*
NAACP Legal Defense & Educational Fund

Civil Rights
NAACP Legal Defense & Educational Fund

Linda Greenhouse
*Staff Writer*
The New York Times

Goldberg, Arthur J.

Eugene Gressman
*William Rand Kenan, Jr., Professor of Law*
University of North Carolina, Chapel Hill

Judicial Code
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Stay of Execution
Supreme Court Practice

Thomas C. Grey
*Professor of Law*
Stanford Law School

Higher Law

Erwin N. Griswold
*Partner*
Jones, Day, Reavis & Pogue, Washington, D.C.
*Former Dean*
Harvard Law School
*Former Solicitor General of the United States*

Solicitor General

Gerald Gunther
*William Nelson Cromwell Professor of Law*
Stanford Law School

Dowling, Noel T.
Hand, Learned
Judicial Review

Nathan Hakman
*Professor of Political Science*
State University of New York, Binghamton

Interest Group Litigation

Kermit L. Hall
*Professor of History and Law*
University of Florida

Bond, Hugh Lennox
Brewer, David J.
Campbell, John A.
Circuit Courts
Cranch, William
Grier, Robert C.
Grosscup, Peter S.
Hastie, William Henry
Morrow, William W.
Nelson, Samuel
Pardee, Don Albert
Peters, Richard
Polk, James Knox
Sawyer, Lorenzo

Catherine Hancock
*Associate Professor of Law*
Tulane University

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Louis Henkin
*University Professor*
Columbia University

Foreign Affairs

Harold W. Horowitz
*Vice Chancellor for Faculty Relations and Professor of Law*
University of California, Los Angeles

Choice of Law

A. E. Dick Howard
*White Burkett Miller Professor of Law and Public Affairs*
University of Virginia

Burger Court
Magna Carta

Samuel P. Huntington
*Director, Center for International Affairs*
*Eaton Professor of the Science of Government*
Harvard University

Civil–Military Relations

James Willard Hurst
*Vilas Professor of Law, Emeritus*
University of Wisconsin, Madison

Freedom of Contract
Treason

Harold M. Hyman
*William P. Hobby Professor of History*
Rice University

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Clyde E. Jacobs
*Professor of Political Science, Emeritus*
University of California, Davis

Eleventh Amendment
Sovereign Immunity

Henry V. Jaffa
*Henry Salvatori Research Professor of Political Philosophy*
Claremont McKenna College and Claremont Graduate School

Lincoln, Abraham

Alan R. Jones
*Professor of History*
Grinnell College

Cooley, Thomas M.

Sanford H. Kadish
*Morrison Professor of Law*
University of California, Berkeley

Procedural Due Process of Law, Criminal

Yale Kamisar
*Henry K. Ransom Professor of Law*
University of Michigan

Police Interrogation and Confessions

John Kaplan
*Jackson Eli Reynolds Professor of Law*
Stanford Law School

Clark, Tom C.
Drug Regulation
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Harmless Error

Kenneth L. Karst
*Professor of Law*
University of California, Los Angeles

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Don B. Kates, Jr.
*Attorney*
Benenson & Kates, San Francisco

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Andrew L. Kaufman
*Charles Stebbins Fairchild Professor of Law*
Harvard Law School

Cardozo, Benjamin N.

David Kaye
*Professor of Law*
Arizona State University

Social Science in Constitutional Litigation (with Hans Zeisel)

Morton Keller
*Spector Professor of History*
Brandeis University

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James H. Kettner
*Professor of History*
University of California, Berkeley

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Edward Keynes
*Professor of Political Science*
Pennsylvania State University

Vietnam War

Louis W. Koenig
*Professor of Political Science*
New York University

Cabinet

Donald P. Kommers
*Professor of Government and International Studies*
University of Notre Dame

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Sheldon Krantz
*Professor of Law and Dean of the School of Law*
University of San Diego

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James E. Krier
*Professor of Law*
University of Michigan

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Samuel Krislov
*Professor of Political Science*
University of Minnesota, Twin Cities

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Philip B. Kurland
*William R. Kenan Distinguished Service Professor*
University of Chicago

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Stanley I. Kutler
*Fox Professor of American Institutions*
University of Wisconsin, Madison

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Wayne R. LaFave
*David C. Baum Professor of Law*
*Professor in the Center for Advanced Study*
University of Illinois, Urbana-Champaign

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Jacob W. Landynski
*Professor of Political Science*
New School for Social Research

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William Letwin
*Professor of Economics*
London School of Economics and Political Science

Economic Regulation
Evidentiary Privilege

Betsy Levin
*Professor of Law and Dean of the Law School*
University of Colorado

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Leonard W. Levy
*Andrew W. Mellon All-Claremont Professor of the Humanities*
*Chairman, Graduate Faculty of History*
Claremont Graduate School

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Wendy E. Levy
*Deputy District Attorney*
Los Angeles County

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Anthony Lewis
*Columnist*
The New York Times
*Lecturer on Law*
Harvard Law School

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Hans A. Linde
*Justice*
Supreme Court of Oregon

State Constitutional Law

Charles Lister
*Attorney*
Covington & Burling, Washington, D.C.

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Charles A. Lofgren
*Crocker Professor of American Politics and History*
Claremont McKenna College

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Gerald P. López
*Professor of Law*
Stanford Law School

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Richard Loss
Evanston, Illinois

Corwin, Edward S.

Daniel H. Lowenstein
*Professor of Law*
University of California, Los Angeles

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Theodore J. Lowi
*John L. Senior Professor of American Institutions*
Cornell University

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Dennis J. Mahoney
*Assistant Professor of Political Science*
California State University, San Bernardino

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Daniel R. Mandelker
*Stamper Professor of Law*
Washington University, St. Louis

Zoning (with Barbara Ross)

Everett E. Mann, Jr.
*Associate Professor of Public Policy and Administration*
California State College, Bakersfield

Freedom of Information Act

Burke Marshall
*Nicholas deB. Katzenbach Professor of Law*
Yale Law School
*Former Solicitor General of the United States*

Attorney General and Department of Justice

Alpheus Thomas Mason
*McCormick Professor of Jurisprudence, Emeritus*
Princeton University

Roberts, Owen J.
Stone, Harlan F.
Taft, William Howard

Charles W. McCurdy
*Associate Professor of History and Law*
University of Virginia

Blatchford, Samuel
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Gary L. McDowell
*Associate Professor of Political Science*
Newcomb College of Tulane University

Congress and the Supreme Court

Carl McGowan
*Senior judge*
United States Court of Appeals for the District of Columbia Circuit

United States Courts of Appeals

Robert B. McKay
*Professor of Law*
New York University

Reapportionment

Daniel J. Meador
*James Monroe Professor of Law*
University of Virginia

Coke, Edward

Bernard D. Meltzer
*Distinguished Service Professor of Law, Emeritus*
University of Chicago

Right-to-Work Laws

Wallace Mendelson
*Professor of Government*
University of Texas, Austin

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Frank I. Michelman
*Professor of Law*
Harvard Law School

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Abner J. Mikva
*Judge*
U.S. Court of Appeals for the District of Columbia Circuit

Preventive Detention

Arthur S. Miller
*Professor of Law, Emeritus*
George Washington University

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Paul J. Mishkin
*Emanuel S. Heller Professor of Law*
University of California, Berkeley

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Robert H. Mnookin
*Professor of Law*
Stanford Law School

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Henry P. Monaghan
*Thomas Macioce Professor of Law*
Columbia University

Constitutional Common Law

Donald G. Morgan
*Professor of Politics*
Mount Holyoke College

Johnson, William

Edmund S. Morgan
*Sterling Professor of History*
Yale University

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Richard E. Morgan
*William Nelson Cromwell Professor of Constitutional Law and Government*
Bowdoin College

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Paul L. Murphy
*Professor of History and American Studies*
University of Minnesota

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Walter F. Murphy
*McCormick Professor of Jurisprudence*
Princeton University

Judicial Strategy
Judicial Supremacy

William P. Murphy
*Paul B. Eaton Professor of Law*
University of North Carolina, Chapel Hill

Fair Labor Standards Act
Maximum Hours and Minimum Wages Legislation

John M. Murrin
*Professor of History*
Princeton University

British Constitution

William E. Nelson
*Professor of Law*
New York University

Fourteenth Amendment (Framing)

Ira Nerken
*Attorney*
Latham, Watkins & Hills, Washington, D.C.

Conscription (with Richard Danzig)

Burt Neuborne
*Professor of Law, New York University*
Director of Litigation, American Civil Liberties Union

Blackmun, Harry A.
Litigation Strategy

Roger K. Newman
*Attorney*
New York

Black, Hugo L.
Cahn, Edmond

R. Kent Newmyer
*Professor of History*
University of Connecticut

Baldwin, Henry
Barbour, Philip P.
McKinley, John
McLean, John
Taney Court
Trimble, Robert

Melville B. Nimmer
*Professor of Law*
University of California, Los Angeles

Copyright
Privacy and the First Amendment
Symbolic Speech

W. John Niven
*Professor of History*
Claremont Graduate School

Van Buren, Martin

John T. Noonan, Jr.
*Judge*
United States Court of Appeals for the Ninth Circuit
*Former Professor of Law*
University of California, Berkeley

Reagan, Ronald

John E. Nowak
*Professor of Law*
University of Illinois

Breach of the Peace
Felony
Subpoena
Trespass

David M. Oshinsky
*Professor of History*
Rutgers University

McCarthyism

Lewis J. Paper
*Attorney*
Washington, D.C.

Brandeis, Louis D.

Michael E. Parrish
*Professor of History*
University of California, San Diego

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Byrnes, James F.
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White, Edward D.
Whittaker, Charles
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J. Francis Paschal
*Professor of Law*
Duke University

Sutherland, George

Michael J. Perry
*Professor of Law*
Northwestern University

Abortion and the Constitution

Merrill D. Peterson
*Thomas Jefferson Professor of History and Former Dean of Faculty*
University of Virginia

Adams, John
Alien and Sedition Acts
American System
Bank of the United States Acts
Calhoun, John C.
Clay, Henry
Constitutional History, 1789–1801
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Jackson, Andrew
Jefferson, Thomas
Louisiana Purchase Treaty
Proclamation of Neutrality
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Whiskey Rebellion

Leo Pfeffer
*Professor of Constitutional Law*
Long Island University
*Former General Counsel American Jewish Congress*

American Jewish Congress
Child Benefit Theory
Cults and the Constitution
Government Aid to Religious Institutions
Released Time
Religion and Fraud
Religion in Public Schools
Religious Liberty
Religious Test for Public Office
Religious Use of State Property
Sunday Closing Laws

Louis H. Pollak
*Judge*
United States District Court, Eastern District of Pennsylvania

Voting Rights

Robert C. Post
*Professor of Law*
University of California, Berkeley

Brennan, William J., Jr.

Monroe E. Price
*Professor of Law and Dean*
Cardozo School of Law, Yeshiva University of New York

BROADCASTING
FAIRNESS DOCTRINE
PRISONERS' RIGHTS
STEWART, POTTER J.

C. Herman Pritchett
*Professor of Political Science, Emeritus*
University of California, Santa Barbara

CONGRESSIONAL MEMBERSHIP
VINSON COURT

A. Kenneth Pye
*Samuel Fox Mordecai Professor of Law*
Duke University

SPEEDY TRIAL

David M. Rabban
*Professor of Law*
University of Texas, Austin

ACADEMIC FREEDOM

Jeremy Rabkin
*Professor of Political Science*
Cornell University

LEGISLATIVE POWER

Norman Redlich
*Dean and Judge Edward Weinfeld Professor of Law*
New York University

NINTH AMENDMENT

Willis L. M. Reese
*Charles Evans Hughes Professor of Law, Emeritus*
Columbia University

FULL FAITH AND CREDIT

Donald H. Regan
*Professor of Law and Professor of Philosophy*
University of Michigan

PHILOSOPHY AND THE CONSTITUTION

John Phillip Reid
*Professor of Law*
New York University

COLONIAL CHARTERS
DOE, CHARLES

Deborah L. Rhode
*Professor of Law*
Stanford Law School

EQUAL RIGHTS AMENDMENT
NINETEENTH AMENDMENT

Charles E. Rice
*Professor of Law*
University of Notre Dame

FREEDOM OF PETITION

Kenneth F. Ripple
*Judge*
United States Court of Appeals for the Seventh Circuit
*Professor of Law*
University of Notre Dame

CHIEF JUSTICE, ROLE OF THE

John P. Roche
*Professor of Civilization and Foreign Affairs and Former Dean of the Fletcher School of Law and Diplomacy*
Tufts University

CONSTITUTIONAL CONVENTION OF 1787

Donald M. Roper
*Professor of History*
State University of New York, New Paltz

KENT, JAMES
LIVINGSTON, HENRY BROCKHOLST
THOMPSON, SMITH

Arthur Rosett
*Professor of Law*
University of California, Los Angeles

ANTITRUST LAW
PLEA BARGAINING
REED, STANLEY F.
UNCONSTITUTIONAL CONDITIONS

Barbara Ross
*Attorney*
Ross & Hardies, Chicago

ZONING (with Daniel R. Mandelker)

Ralph A. Rossum
*Alice Tweed Tuohy Professor of Government*
Claremont McKenna College

DENATURALIZATION
DEPORTATION
EXPATRIATION
NATURALIZATION
WILSON, JAMES

Eugene V. Rostow
*Sterling Professor of Law, Emeritus*
Yale Law School
*Distinguished Visiting Research Professor of Law and Diplomacy*
National Defense University

COMMANDER-IN-CHIEF
WAR, FOREIGN AFFAIRS, AND THE CONSTITUTION

W. W. Rostow
*Professor of Economics and History*
University of Texas, Austin

JOHNSON, LYNDON B.

Wilfrid E. Rumble
*Professor of Political Science*
Vassar College

LEGAL REALISM
POUND, ROSCOE
SOCIOLOGICAL JURISPRUDENCE

Robert A. Rutland
*Editor-in-Chief, Papers of James Madison*
University of Virginia

RATIFICATION OF THE CONSTITUTION

Stephen A. Saltzburg
*Professor of Law*
University of Virginia

REASONABLE DOUBT

Joseph L. Sax
*Philip A. Hart Distinguished University Professor of Law*
University of Michigan

TAKING OF PROPERTY

Frederick Schauer
*Professor of Law*
University of Michigan

NEW YORK TIMES CO. V. UNITED STATES

Harry N. Scheiber
*Professor of Law*
University of California, Berkeley

AFFECTED WITH A PUBLIC INTEREST
COMPETITIVE FEDERALISM
COOPERATIVE FEDERALISM
DUAL FEDERALISM
EMINENT DOMAIN
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GRANGER CASES
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STATE POLICE POWER
VESTED RIGHTS
WEST RIVER BRIDGE COMPANY V. DIX

Arthur M. Schlesinger, Jr.
*Schweitzer Professor in the Humanities*
City University of New York

ROOSEVELT, FRANKLIN D.

Benno C. Schmidt, Jr.
*President*
Yale University

COMMERCIAL SPEECH
FREE PRESS/FAIR TRIAL
LIBEL AND THE FIRST AMENDMENT
PRIOR RESTRAINT AND CENSORSHIP
REPORTER'S PRIVILEGE
SHIELD LAWS
WHITE COURT

Gary T. Schwartz
*Professor of Law*
University of California, Los Angeles

ECONOMIC ANALYSIS AND THE CONSTITUTION

Herman Schwartz
*Professor of Law*
Washington College of Law, American University

ALDERMAN V. UNITED STATES
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Murray L. Schwartz
*Professor of Law*
University of California, Los Angeles

Vinson, Fred M.

David L. Shapiro
*William Nelson Cromwell Professor of Law*
Harvard Law School

Erie Railroad Co. v. Tompkins
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Martin Shapiro
*Professor of Law*
University of California, Berkeley

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Steven Shiffrin
*Professor of Law*
University of California, Los Angeles

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Bernard H. Siegan
*Distinguished Professor of Law*
University of San Diego

Economic Liberties and the Constitution

Stanley Siegel
*Professor of Law*
University of California, Los Angeles

Postal Power

Jay A. Sigler
*Distinguished Professor of Political Science*
Rutgers University

Double Jeopardy

Thomas B. Silver
*President*
Public Research Syndicated

Coolidge, Calvin
Harding, Warren G.

Aviam Soifer
*Professor of Law*
Boston University

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Theodore J. St. Antoine
*James E. and Sarah A. Degan Professor of Law*
University of Michigan

Boycott
Picketing

Robert L. Stern
*Attorney*
Mayer, Brown & Platt, Chicago

Commerce Clause
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Gerald Stourzh
*Professor of History*
University of Vienna

Hamilton, Alexander

Frank R. Strong
*Cary C. Boshamer University Distinguished Professor of Law, Emeritus*
University of North Carolina

Fundamental Law and the Supreme Court
Law of the Land

Philippa Strum
*Professor of Political Science*
City University of New York (Brooklyn College and the Graduate Center)

Political Question Doctrine

William F. Swindler
*John Marshall Professor of Law*
Marshall-Wythe School of Law, College of William and Mary

Blackstone, William

Nathan Tarcov
*Associate Professor of Political Science*
University of Chicago

Popular Sovereignty in Democratic Political Theory

Telford Taylor
*Nash Professor of Law, Emeritus*
Columbia University
*Dr. Herman George and Kate Kaiser Professor of Constitutional Law*
Cardozo College of Law, Yeshiva University of New York

Legislative Investigation

Glen E. Thurow
*Associate Professor of Politics*
University of Dallas

Dormant Powers
Exclusive Powers

Laurence H. Tribe
*Tyler Professor of Constitutional Law*
Harvard Law School

Substantive Due Process

Phillip R. Trimble
*Professor of Law*
University of California, Los Angeles

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Mark Tushnet
*Professor of Law*
Georgetown University

Marshall, Thurgood

Arvo Van Alstyne
*Professor of Law*
University of Utah

Inverse Condemnation
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Public Use

William W. Van Alstyne
*Perkins Professor of Law*
Duke University

Implied Powers
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Jonathan D. Varat
*Professor of Law*
University of California, Los Angeles

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M. J. C. Vile
*Professor History*
University of Kent, Canterbury

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Clement E. Vose
*John E. Andrus Professor of Government*
Wesleyan University

Test Case

Kim McLane Wardlaw
*Attorney*
O'Melveny & Myers, Los Angeles

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Stephen L. Wasby
*Professor of Political Science*
State University of New York, Albany

Supreme Court Decisions, Impact of

Lloyd L. Weinreb
*Professor of Law*
Harvard Law School

Fair Trial
Warrantless Search

Robert Weisberg
*Professor of Law*
Stanford Law School

Capital Punishment

Harry H. Wellington
*Sterling Professor of Law*
Yale Law School

Labor and the Constitution

Peter Westen
*Professor of Law*
University of Michigan

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Burns H. Weston
*Bessie Dutton Murray Professor of Law*
University of Iowa

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G. Edward White
*Professor of Law*
University of Virginia

Holmes, Oliver Wendell, Jr.
Warren Court

James Boyd White
*L. Hart Wright Professor of Law and Professor of English Language and Literature*
University of Michigan

Arrest
Burden of Proof
Federal Rules of Criminal Procedure
Jury Discrimination

Charles H. Whitebread
*George T. Pfleger Professor of Law*
University of Southern California

Discovery
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Voir Dire

William M. Wiecek
*Congdon Professor of Public Law and Legislation*
Syracuse University

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Abolitionist Constitutional Theory
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Wayne, James M.

J. Harvie Wilkinson III
*Judge*
United States Court of Appeals for the Fourth Circuit

Powell, Lewis F., Jr.

Peter Woll
*Professor of Politics*
Brandeis University

Bureaucracy

C. Vann Woodward
*Sterling Professor of History, Emeritus*
Yale University

Compromise of 1877

L. Kinvin Wroth
*Professor of Law and Dean of the School of Law*
University of Maine

Common Law (Anglo-American)
Rule of Law

Stephen C. Yeazell
*Professor of Law*
University of California, Los Angeles

Administrative Law
Class Action
Collateral Attack
Contempt Power, Judicial
Fair Hearing
Injunction
Institutional Litigation (with Theodore Eisenberg)
Jurisdiction
Notice

Hans Zeisel
*Professor of Law, Emeritus*
University of Chicago

Social Science in Constitutional Litigation (with David Kaye)

John Zvesper
*Professor of Politics*
University of East Anglia, Norwich

Right of Revolution

# *List of Contributors*

(1992)

Henry J. Abraham
*James Hart Professor of Government and Foreign Affairs*
University of Virginia

Appointments Clause

Norman Abrams
*Professor of Law*
University of California, Los Angeles

Federal Criminal Law

T. Alexander Aleinikoff
*Professor of Law*
University of Michigan

Immigration and Alienage (Update 1)

Ronald J. Allen
*Professor of Law*
Northwestern University

Procedural Due Process of Law, Criminal (Update)

Albert W. Alschuler
*Professor of Law*
University of Chicago

Bail (Update)
Third-Party Consent

Akhil Reed Amar
*Professor of Law*
Yale Law School

Amendment Process (Outside Article V)

Alison Grey Anderson
*Professor of Law*
University of California, Los Angeles

Sobeloff, Simon E.

Peter Arenella
*Professor of Law*
University of California, Los Angeles

Fourth Amendment

Lance Banning
*Professor of History*
University of Kentucky

Federalists

Edward L. Barrett
*Professor of Law*
University of California, Davis

Intergovernmental Tax Immunities

Norma Basch
*Professor of History*
Rutgers University

Woman Suffrage
Women in Constitutional History

Sara Sun Beale
*Professor of Law*
Duke University

Grand Jury (Update)

Michael R. Belknap
*Professor of Law*
California Western School of Law

Political Trials

Herman Belz
*Professor of History*
University of Maryland

Constitutional History, 1980–1989

Robert W. Bennett
*Dean and Professor of Law*
Northwestern University of Law

Interpretivism
Poverty Law

Walter Berns
*John M. Olin University Professor*
Georgetown University

Conservatism

Scott H. Bice
*Professor and Dean of the Law Center*
University of Southern California

Delegation of Power (Update)

Lee C. Bollinger
*Dean and Professor of Law*
University of Michigan

Commercial Speech (Update 1)
Extremist Speech

Richard J. Bonnie
*John S. Battle Professor of Law*
University of Virginia

Drug Regulation (Update 1)

Craig M. Bradley
*Professor of Law and Harry T. Ice Faculty Fellow*
Indiana University

Rehnquist, William H. (Update 1)

Harold H. Bruff
*John S. Redditt Professor of Law*
University of Texas, Austin

Judicial Review of Administrative Acts

David P. Bryden
*Professor of Law*
University of Minnesota

Judicial Role

Robert A. Burt
*Southmayd Professor of Law*
Yale University

Mental Illness and the Constitution (Update)
Patients' Rights

John O. Calmore
*Program Officer, Rights and Social Justice*
Ford Foundation

Residential Segregation

Lincoln Caplan
*Staff Writer*
New Yorker Magazine, Inc.

Solicitor General (Update)

Clayborne Carson
*Director and Senior Editor, The Martin Luther King, Jr., Papers Project*
Stanford University

Civil Rights Movement

Stephen L. Carter
*Professor of Law*
Yale University

Racial Discrimination (Update 1)
Science, Technology, and the Constitution

Erwin Chemerinsky
*Professor of Law*
University of Southern California

Habeas Corpus (Update 1)

Jesse H. Choper
*Dean and Professor of Law*
University of California, Berkeley

Government Aid to Religious Institutions (Update 1)

William Cohen
*C. Wendell and Edith M. Carlsmith Professor of Law*
Stanford University

Economic Due Process
Economic Equal Protection
Fourteenth Amendment, Section 5 (Judicial Construction)

Ruth Colker
*C. J. Morrow Professor of Law*
Tulane University

Abortion and the Constitution (Update 1a)

Daniel O. Conkle
*Professor of Law*
Indiana University School of Law

Establishment Clause

Kimberlé Crenshaw
*Professor of Law*
University of California, Los Angeles

Antidiscrimination Legislation (Update 1)
Civil Rights (Update 1)

Michael Kent Curtis
*Associate Professor of Law*
Wake Forest University

Fourteenth Amendment, Section 5 (Framing)
Incorporation Doctrine and Original Intent

George Dargo
*Assistant Professor of Law*
Duke University

Jeffersonianism

Walter Dellinger
*Professor of Law*
Duke University

Advice and Consent to Supreme Court Nominations (with Madeline Morris)
Article V Conventions Clause
School Prayers

George W. Dent
*Professor of Law*
Case Western University

Religion in Public Schools (Update 1)
Vouchers

David Dolinko
*Professor of Law*
University of California, Los Angeles

Right Against Self-Incrimination (Update)

Rochelle C. Dreyfuss
*Professor of Law*
New York University School of Law

Computers (with David W. Leebron)

Robert F. Drinan, S.J.
*Professor of Law*
Georgetown University

House of Representatives

Donald A. Dripps
*Associate Professor of Law*
University of Illinois

Miranda Rules (Update)

Ronald Dworkin
*Professor of Law*
New York University and University College, Oxford

Jurisprudence and Constitutional Law

Peter B. Edelman
*Associate Dean and Professor of Law*
Georgetown University

Welfare Rights

Theodore Eisenberg
*Professor of Law*
Cornell University

Constitutional Remedies

Richard E. Ellis
*Professor of History*
State University of New York, Buffalo

Jacksonianism

Edward J. Erler
*Chair and Professor of Political Science*
California State University, San Bernardino

Capital Punishment and Race
Race-Consciousness

Samuel Estreicher
*Professor of Law*
New York University

Substantive Due Process (Update 1)
Supreme Court's Work Load

Julian N. Eule
*Professor of Law*
University of California, Los Angeles

Direct Democracy
Dormant Commerce Clause
Temporal Limits on Lawmaking Powers

Richard Fallon
*Professor of Law*
Harvard University

Powell, Lewis F., Jr. (Update)

Daniel A. Farber
*Henry J. Fletcher Professor of Law*
University of Minnesota

Environmental Regulation and the Constitution (Update 1)
Taking of Property (Update 1)

Paul Finkelman
*Professor of Law*
Brooklyn Law School

Republican Party
Whig Party

Edwin B. Firmage
*Professor of Law*
University of Utah

Congressional War Powers

Peter Graham Fish
*Professor of Political Science and Law*
Duke University

Judicial Conference of the United States

Louis Fisher
*Senior Specialist, Congressional Research Service*
The Library of Congress

Federalism and Shared Powers
Line-Item Veto
Nonjudicial Interpretation of the Constitution
Senate Judiciary Committee

William A. Fletcher
*Professor of Law*
University of California, Berkeley

Eleventh Amendment (Update 1)

William E. Forbath
*Professor of Law*
University of California, Los Angeles

Labor Movement

Richard S. Frase
*Professor of Law*
University of Minnesota

Criminal Justice System

Paul A. Freund
*Karl M. Loeb University Professor, Emeritus*
Harvard University

Wyzanski, Charles E., Jr.

Barry Friedman
*Professor of Law*
Vanderbilt University

Conditional Spending (with Thomas R. McCoy)

Lawrence M. Friedman
*Professor of Law*
Stanford University

Legal Culture

Robert Diderot Garcia
*Professor of Law*
University of California, Los Angeles

Racketeer Influenced and Corrupt Organizations Act

Tom Gerety
*President*
Trinity College

RIGHT OF PRIVACY (UPDATE)

Michael J. Gerhardt
*Associate Professor of Law*
Marshall-Wythe School of Law, College of William and Mary

KENNEDY, ANTHONY M.

Stephen Gillers
*Professor of Law*
New York University

GOVERNMENT SECRECY

Ruth Bader Ginsberg
*United States Circuit Judge*
United States Court of Appeals, District of Columbia Circuit

MCGOWAN, CARL

Michael J. Glennon
*Professor of Law*
University of California, Davis

SENATE AND FOREIGN POLICY

Robert D. Goldstein
*Professor of Law*
University of California, Los Angeles

BALANCED-BUDGET AMENDMENT
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DRUG TESTING

Robert A. Goldwin
*Resident Scholar*
American Enterprise Institute

GENDER RIGHTS

Gary Goodpaster
*Professor of Law*
University of California, Los Angeles

AUTOMOBILE SEARCH (UPDATE)
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VISAS

Joseph D. Grano
*Professor of Law*
Wayne State University

ABORTION AND THE CONSTITUTION (UPDATE 1B)

Erwin N. Griswold
*Attorney at Law*
Jones, Day, Reavis, & Pogue, Washington, D.C.

SUPREME COURT BAR

Walter Hellerstein
*Professor of Law*
University of Georgia

FRIENDLY, HENRY J.
STATE AND LOCAL GOVERNMENT TAXATION

Lawrence Herman
*President's Club Professor of Law*
Ohio State University

BODY SEARCH

A. E. Dick Howard
*White Burkett Miller Professor of Law and Public Affairs*
University of Virginia

STATE CONSTITUTIONS

Shirley Hufstedler
Hufstedler, Miller, Kaus, & Beardsley, Los Angeles

FEDERAL JUDICIAL APPOINTMENTS, TENURE, AND INDEPENDENCE

James Hutson
The Library of Congress

CONSTITUTIONAL CONVENTION, RECORDS OF

Gary J. Jacobsohn
*Woodrow Wilson Professor of Government*
Williams College

PRAGMATISM

John P. Kaminski
*Professor of History and Director of the Center for the Study of the American Constitution*
University of Wisconsin

FIRST CONGRESS

Kenneth L. Karst
*Professor of Law*
University of California, Los Angeles

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Evan J. Kemp, Jr.
*Chairman*
United States Equal Employment Opportunity Commission

Americans with Disabilities Act

Randall Kennedy
*Professor of Law*
Harvard University

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Charles R. Kesler
*Associate Professor of Government and Director of the Henry Salvatori Center for the Study of Freedom in the Modern World*
Claremont McKenna College

Reagan, Ronald (Update)

Kit Kinports
*Associate Professor of Law*
University of Illinois

Blackmun, Harry A. (Update 1)

Douglas W. Kmiec
*Professor of Law*
Notre Dame University

Zoning (Update)

Neil K. Komesar
*James E. & Ruth B. Doyle-Bascom Professor of Law*
University of Wisconsin

Politics

Alex Kozinski
*United States Circuit Judge*
United States Court of Appeals, Ninth Circuit

Administrative Search (Update)

Seth F. Kreimer
*Associate Professor of Law*
University of Pennsylvania

Entitlement

James E. Krier
*Earl Warren Deland Professor of Law*
University of Michigan

Eminent Domain (Update)

Philip B. Kurland
*Professor of Law*
University of Chicago

Iran-Contra Affair

Philip A. Lacovara
*Managing Director & General Counsel*
Morgan, Stanley, & Co., Inc.

Independent Counsel

Wayne R. LaFave
*David C. Baum Professor of Law*
University of Illinois, Urbana-Champaign

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Kenneth Lasson
*Professor of Law*
University of Baltimore

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Michael Laurence
Washington, D.C.

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David W. Leebron
*Professor of Law*
Columbia University

Computers (with Rochelle C. Dreyfuss)

William E. Leuchtenberg
*Professor of History*
University of North Carolina, Chapel Hill

Court-Packing Plans

Martin Lyon Levine
*UPS Professor of Law, Gerontology and Psychiatry, and the Behavioral Sciences*
University of Southern California

Psychiatry and Constitutional Law

Sanford Levinson
*Professor of Law*
University of Texas, Austin

Constitution as Civil Religion

Leonard W. Levy
*Andrew W. Mellon All-Claremont Professor of the Humanities, Emeritus*
Claremont Graduate School

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Hans A. Linde
*Herman Phleger Visiting Professor of Law*
Stanford University

Spending Power

Christine A. Littleton
*Professor of Law*
University of California, Los Angeles

Comparable Worth
Feminist Theory

Charles A. Lofgren
*Crocker Professor of American Politics and History*
Claremont McKenna College

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Daniel H. Lowenstein
*Professor of Law*
University of California, Los Angeles

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Ira C. Lupu
*Professor of Law*
George Washington University

Separation of Church and State (Update)

Stephen Macedo
*Assistant Professor of Government*
Harvard University

New Right

Paul Marcus
*Dean and Professor of Law*
University of Arizona

Conspiracy Law

John Marini
*Professor of Political Science*
University of Nevada, Reno

Budget Process

Michael W. McConnell
*Professor of Law*
University of Chicago

Religious Liberty (Update 1)

Thomas R. McCoy
*Professor of Law*
Vanderbilt University

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Frank I. Michelman
*Professor of Law*
Harvard University

Property Rights
Republicanism and Modern Constitutional Theory

Abner J. Mikva
*United States Circuit Judge*
United States Court of Appeals, District of Columbia Circuit

Legislative Purposes and Motives

Martha Minow
*Professor of Law*
Harvard University

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Madeline Morris
*Assistant Professor of Law*
Duke University

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Robert P. Mosteller
*Professor of Law and Senior Associate Dean for Academic Affairs*
Duke University

Double Jeopardy (Update 1)
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Paul L. Murphy
*Professor of Law*
University of Minnesota

World War I

Gene R. Nichol
*Dean and Professor of Law*
University of Colorado

Civil Liberties (Update 1)
Damages Claims

Marlene Arnold Nicholson
*Professor of Law*
DePaul University

Campaign Finance (Update 1)

John E. Nowak
*Professor of Law*
University of Illinois

Police Interrogation and Confessions (Update 1)

David M. O'Brien
*Professor of Government and Graduate Advisor*
University of Virginia

Supreme Court at Work

Phillip S. Paludan
*Professor of History*
University of Kansas

Civil War

Donald J. Pisani
*Professor of History*
Texas A & M University

Economy
Progressivism

Robert C. Post
*Professor of Law*
University of California, Berkeley

Federalism and Civil Rights
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L. A. Powe, Jr.
*Professor of Law and Anne Regents Chair*
University of Texas, Austin

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Jeremy Rabkin
*Professor of Political Science*
Cornell University

Bush, George H. W.
Racial Preference

Jack N. Rakove
*Professor of History*
Stanford University

Original Intent

Norman Redlich
*Judge Weinfeld Professor of Law, Emeritus, and former Dean*
New York University Law School
*Counsel*
Wachtell, Lipton, Rosen, & Katz, New York City

Religious Symbols in Public Places

Donald H. Regan
*Professor of Law*
University of Michigan

State Regulation of Commerce (Update 1)

Judith Resnik
*Orrin B. Evans Professor of Law*
University of Southern California

Procedural Due Process of Law, Civil (Update 1)

Donald A. Ritche
*Associate Historian*
United States Senate

Senate
Senate Subcommittee on Constitutional Rights

John P. Roche
*John M. Olin Distinguished Professor of American Civilization and Foreign Affairs*
Tufts University

Liberal Constitutional Construction

Ralph A. Rossum
*President*
Hampden-Sydney College

Prisoners' Rights (Update 1)

Eugene V. Rostow
*Sterling Professor of Law, Emeritus*
Yale University and Distinguished Fellow, United States Institute of Peace

Congress and Foreign Policy
Executive Power

Ronald D. Rotunda
*Professor of Law*
University of Illinois

Welfare State

Lawrence G. Sager
*Professor of Law*
New York University

Jurisdiction, Federal

Terrance Sandalow
*Edison R. Sunderland Professor of Law*
University of Michigan

Local Government
McCree, Wade Hampton, Jr.

Frederick Schauer
*Frank Stanton Professor of the First Amendment*
Harvard University

Bork Nomination
Children and the First Amendment

Harry N. Scheiber
*Associate Dean and Professor of Law*
University of California, Berkeley

New Deal

Pierre Schlag
*Professor of Law*
University of Colorado

First Amendment (Update 1)

Arthur M. Schlesinger, Jr.
*Albert Schweitzer Chair in Humanities*
City University of New York (Graduate School and University Center)

Kennedy, Robert F. (Update)

Peter H. Schuck
*Simeon E. Baldwin Professor of Law*
Yale University

Citizenship (Update 1)
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Stephen J. Schulhofer
*Frank and Bernice J. Greenberg Professor of Law*
University of Chicago

Sentencing

Jeffrey D. Schultz
Georgetown University

Judicial Power and Legislative Remedies
Meese Commission

Gary T. Schwartz
*Professor of Law*
University of California, Los Angeles

Punitive Damages
Wright, J. Skelly

Herman Schwartz
*Professor of Law*
American University

Criminal Justice and Technology

Martin Shapiro
*Coffroth Professor of Law*
University of California, Berkeley

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Suzanna Sherry
*Professor of Law*
University of Minnesota

O'Connor, Sandra Day (Update 1)

Steven Shiffrin
*Professor of Law*
Cornell University

Low-Value Speech
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Pornography and Feminism

Larry G. Simon
*W. H. Armstrong Professor of Constitutional Law and Associate Dean of The Law Center*
University of Southern California

Rehnquist Court

David M. Skover
*Professor of Law*
University of Puget Sound

Political Question Doctrine (Update 1)
State Action (Update 1)

Rogers M. Smith
*Professor of Political Science*
Yale University

Constitution and Civic Ideals
Deconstruction

Rodney A. Smolla
*James Gould Cutler Professor of Constitutional Law and Director of the Institute of Bill of Rights Law*
College of William and Mary

Private Discrimination

Aviam Soifer
*Professor of Law*
Boston University

Constitutional Fictions
Cover, Robert M.

Rayman L. Soloman
*Associate Dean and Professor of Law*
Northwestern University

Scalia, Antonin

Frank J. Sorauf
*Professor of Political Science*
University of Minnesota

Political Action Committees

Theodore J. St. Antoine
*Degan Professor of Law*
University of Michigan

LABOR AND THE CONSTITUTION (UPDATE)

Kate Stith
*Professor of Law*
Yale University

SEARCH AND SEIZURE (UPDATE 1)
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Geoffrey R. Stone
*Dean and Professor of Law*
University of Chicago

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FREEDOM OF SPEECH (UPDATE 1)

David A. Strauss
*Professor of Law*
University of Chicago

SOUTER, DAVID H.

Kathleen M. Sullivan
*Professor of Law*
Harvard University

AFFIRMATIVE ACTION (UPDATE 1)

James L. Sundquist
*Senior Fellow, Emeritus*
The Brookings Institution

CONSTITUTIONAL REFORM

Athan Theoharis
*Professor of History*
Marquette University

FEDERAL BUREAU OF INVESTIGATION

Phillip R. Trimble
*Professor of Law*
University of California, Los Angeles

EXECUTIVE PREROGATIVE
PRESIDENT AND THE TREATY POWER

Louise G. Trubek
*Clinical Professor of Law*
University of Wisconsin

PUBLIC INTEREST LAW

Mark Tushnet
*Professor of Law*
Georgetown University

CONSTITUTIONAL THEORY
CRITICAL LEGAL STUDIES
INTEREST GROUPS

Gerald F. Uelman
*Dean and Professor of Law*
Santa Clara University

CONTROLLED-SUBSTANCE ABUSE
ELECTED JUDICIARY

Melvin I. Urofsky
*Professor of History*
Virginia Commonwealth University

POPULISM
RECONSTRUCTION
WORLD WAR II

William W. Van Alstyne
*William R. and Thomas S. Perkins Professor of Law*
Duke University

FEDERALISM, CONTEMPORARY PRACTICE OF

Jonathan D. Varat
*Professor of Law*
University of California, Los Angeles

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Joseph Vining
*Hawkins Professor of Law*
University of Michigan

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Silas Wasserstrom
*Professor of Law*
Georgetown University

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John G. West, Jr.
*Ph.D. Candidate*
Claremont Graduate School

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James Boyd White
*Hart Wright Professor of Law and Professor of English*
University of Michigan

Constitution as Literature

Charles H. Whitebread
*George T. Pfleger Professor of Law*
University of Southern California

Eyewitness Identification

Christina Brooks Whitman
*Professor of Law*
University of Michigan

Sex Discrimination (Update 1)

Stephen F. Williams
*United States Circuit Judge*
United States Court of Appeals, District of Columbia Circuit

Law and Economics Theory

Ralph K. Winter
*United States Circuit Judge*
United States Court of Appeals, Second Circuit

Originalism

Gordon S. Wood
*Professor of History*
Brown University

American Revolution and Constitutional Theory
Republicanism

Anne Woolhandler
Georgetown University

Torts (with Silas Wasserstrom)

Mark G. Yudof
*Dean and James A. Elkins Centennial Chair in Law*
University of Texas, Austin

Education and the Constitution (Update)

Franklin Zimring
*Professor of Law and Director of the Earl Warren Legal Institute*
University of California, Berkeley
*Director of the Death Penalty Project*
American Civil Liberties Union of Northern California

Capital Punishment (Update 1) (with Michael Laurence)

# *List of Contributors*

(2000)


Kathryn Abrams
*Professor of Law*
Cornell University

Ginsburg, Ruth Bader

Norman Abrams
*Vice Chancellor for Academic Personnel and Professor of Law*
University of California, Los Angeles

Federal Criminal Law (Update)
Law Enforcement and Federal–State Relations (Update)

Jeffrey Abramson
*Louis Stulberg Chair in Law and Politics*
Brandeis University

Communitarianism

T. Alexander Aleinikoff
*Professor of Law*
Georgetown University

Citizenship (Update 2)

Larry Alexander
*Warren Distinguished Professor of Law*
University of San Diego

Nonjudicial Interpretation of the Constitution (Update) (with Frederick Schauer)
Stare Decisis (Update)

Akhil Reed Amar
*Southmayd Professor of Law*
Yale University

Bill of Rights in Modern Application
Fourteenth Amendment as a New Constitution

Vikram D. Amar
*Professor of Law*
University of California, Hastings College of the Law, San Francisco

Jury Discrimination (Update)
Jury Service as a Political Right
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Michael Asimow
*Professor of Law*
University of California, Los Angeles

Administrative Agencies (Update)

Ian Ayres
*William K. Townsend Professor of Law*
Yale University

Economics of Affirmative Action

Larry Catá Backer
*Professor of Law*
University of Tulsa

Welfare Rights (Update)

Randy E. Barnett
*Austin B. Fletcher Professor of Law*
Boston University

Ninth Amendment (Update)

Hugh Baxter
*Associate Professor of Law*
Boston University

Lemon Test (Update)

Martin H. Belsky
*Dean and Professor of Law*
University of Tulsa

Schwartz, Bernard

Herman Belz
*Professor of History*
University of Maryland, College Park

Lincoln and Constitutional Theory

Thomas C. Berg
*Professor of Law*
Samford University

Lee v. Weisman
Religious Liberty (Update 2)

Vivian Berger
*Nash Professor of Law*
Columbia University

Capital Punishment (Update 2)
Payne v. Tennessee

Richard B. Bernstein
*Adjunct Professor of Law*
New York University

Twenty-Seventh Amendment

G. Robert Blakey
*William and Dorothy O'Neil Professor of Law*
University of Notre Dame

Free Speech and RICO

Vincent Blasi
*Corliss Lamont Professor of Civil Liberties*
Columbia University
*Massee Professor of Law*
University of Virginia

Brandeis and the First Amendment
Mill and Freedom of Expression
Milton and Freedom of Expression

Grace Ganz Blumberg
*Professor of Law*
University of California, Los Angeles

Foster Families

Scott R. Bowman
*Assistant Professor of Political Science*
California State University, Los Angeles

Corporate Citizenship

Lynn S. Branham
*Visiting Professor of Law*
University of Illinois, Urbana-Champaign

Prisoners' Rights (Update 2)

Robert Brauneis
*Associate Professor of Law*
George Washington University

Property Rights (Update)

Kevin Brown
*Professor of Law*
Indiana University

Afrocentric Schools

Rebecca L. Brown
*Professor of Law*
Vanderbilt University

Political Question Doctrine (Update 2)

Alan E. Brownstein
*Professor of Law*
University of California, Davis

Anti-Abortion Movement (Update)

Victor Brudney
*Weld Professor of Law, Emeritus*
Harvard University

Compelled Speech

Dan L. Burk
*Professor of Law*
Seaton Hall University

DNA Testing and Genetic Privacy

Robert A. Burt
*Alexander M. Bickel Professor of Law*
Yale University

Right to Die (Update)

Paul Butler
*Associate Professor of Law*
George Washington University

Race and Criminal Justice

Jay S. Bybee
*Professor of Law*
University of Nevada, Las Vegas

Child Support Recovery Act
Domestic Violence Clause

Evan H. Caminker
*Professor of Law*
University of Michigan, Ann Arbor

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Penelope Canan
*Associate Professor of Sociology*
University of Denver

Strategic Lawsuits Against Public Participation in Government (with George W. Pring)

Devon W. Carbado
*Acting Professor of Law*
University of California, Los Angeles

Race and Sex in Antidiscrimination Law

Mary M. Cheh
*Elyce Zenoff Research Professor of Law*
George Washington University

Drug Regulation (Update 2)
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Erwin Chemerinsky
*Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science*
University of Southern California

Abstention Doctrine (Update)
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Ronald K. Chen
*Associate Dean of Law*
Rutgers University, Newark

Sex Offender Notification Laws

Jesse H. Choper
*Earl Warren Professor of Public Law*
University of California, Berkeley

Lockhart, William B.
Religion Clauses in Interaction

Morgan Cloud
*Professor of Law*
Emory University

Search and Seizure (Update 2)

Dan T. Coenen
*Associate Professor of Law*
University of Georgia

Dormant Commerce Clause (Update)

William Cohen
*C. Wendell and Edith M. Carlsmith Professor of Law, Emeritus*
Stanford University

Right to Travel (Update)

David Cole
*Professor of Law*
Georgetown University

Terrorism Control and the Constitution

Ruth Colker
*Heck-Faust Memorial Chair in Constitutional Law*
Ohio State University

Americans with Disabilities Act (Update)
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Thomas F. Cotter
*Associate Professor of Law*
University of Florida

Pragmatism (Update)

Kimberlé Crenshaw
*Professor of Law*
Columbia University

Critical Race Theory (with Neil Gotanda, Gary Peller, and Kendall Thomas)

David B. Cruz
*Associate Professor of Law*
University of Southern California

Same-Sex Marriage, I
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Michael Kent Curtis
*Professor of Law*
Wake Forest University

Slavery and Civil Liberties

Barry Cushman
*Professor of Law*
University of Virginia

New Deal (Constitutional Significance)

Chandler Davidson
*Professor of Sociology and Political Science*
Rice University

Race and Voting
Voting Rights Act of 1965 and Its Amendments (Update)

Julie Davies
*Professor of Law*
University of the Pacific

Civil Rights Practice

Vine Deloria, Jr.
*Professor of History*
University of Colorado, Boulder

American Indians and the Constitution (Update)

Neal Devins
*Goodrich Professor of Law*
College of William and Mary

Clinton, William Jefferson

William S. Dodge
*Associate Professor of Law*
University of California, Hastings College of the Law, San Francisco

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International Law and Federal–State Relations

Michael C. Dorf
*Professor of Law*
Columbia University

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Davison M. Douglas
*Professor of Law and Director of the Institute of Bill of Rights Law*
College of William and Mary

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Ellen Carol DuBois
*Professor of History*
University of California, Los Angeles

Anthony, Susan Brownell
Seneca Falls Convention
Stanton, Elizabeth Cady
Woman Suffrage Movement

Earl C. Dudley, Jr.
*Professor of Law*
University of Virginia

Contempt Power, Judicial (Update)

Lynne A. Dunn
*Attorney at Law*
Hiering, Dupignac, & Stanzione, Toms River, N.J.

Police Pursuits and Constitutional Rights

Theodore Eisenberg
*Henry Allen Mark Professor of Law*
Cornell University

Bray v. Alexandria Women's Health Clinic
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Constitutional Remedies (Update)
Immunity of Public Officials

Christopher L. Eisgruber
*Professor of Law*
New York University

Birthright Citizenship
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David E. Engdahl
*Professor of Law*
Seattle University

Taxing and Spending Powers (Update)

Peter D. Enrich
*Associate Dean for Academic Affairs and Professor of Law*
Northeastern University

State Tax Incentives and Subsidies to Business

Richard A. Epstein
*James Parker Hall Distinguished Service Professor of Law*
University of Chicago

Antidiscrimination Legislation (Update 2a)
Regulatory Takings

Cynthia L. Estlund
*Professor of Law*
Columbia University

Employee Speech Rights (Private)

Daniel A. Farber
*Henry J. Fletcher Professor of Law*
University of Minnesota

Economic Regulation (Update)

Katherine Hunt Federle
*Associate Professor of Law and Director of the Justice for Children Project*
Ohio State University

Juvenile Curfew Laws

Louis Fisher
*Senior Specialist in Separation of Powers*
Congressional Research Service, The Library of Congress

Constitutional History, 1989–1999
Line-Item Veto (Update)
Presidential War Powers

James S. Fishkin
*Darrell K. Royal Regents Chair in Government*
University of Texas, Austin

Deliberative Democracy

Catherine L. Fisk
*Professor of Law*
Loyola Law School, Los Angeles

Filibuster (with Erwin Chemerinsky)

Owen M. Fiss
*Sterling Professor of Law*
Yale University

Judicial Independence

Martin S. Flaherty
*Visiting Professor of Law*
China University of Political Science and Law, Beijing

History in Constitutional Argumentation

William A. Fletcher
*Richard W. Jennings Professor of Law*
University of California, Berkeley

Jurisdiction, Federal (Update)
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William E. Forbath
*Angus Wynne, Sr., Professor of Civil Jurisprudence and Professor of History*
University of Texas, Austin

Constitutional Dualism

Maria Foscarinis
*Executive Director*
National Law Center on Homelessness and Poverty, Washington, D.C.

Homelessness and the Constitution

Jody Freeman
*Acting Professor of Law*
University of California, Los Angeles

Environmental Regulation and the Constitution (Update 2)

Steven I. Friedland
*Professor of Law*
Nova Southeastern University

Sexual Predator Laws

Barry Friedman
*Professor of Law*
Vanderbilt University

Neutral Principles

Joel Wm. Friedman
*Professor of Law*
Tulane University

Wisdom, John Minor

Lawrence M. Friedman
*Marion Rice Kirkwood Professor of Law*
Stanford University

Hurst, J. Willard

Leon Friedman
*Joseph Kushner Distinguished Professor of Civil Liberties Law*
Hofstra University

Executive Privilege (Update)

Stephen Gardbaum
*Professor of Law*
University of California, Los Angeles

Preemption (Update)

Cliff Gardner
*Attorney at Law*
Gardner & Derham, San Francisco, Calif.

Habeas Corpus (Update 2)

Elizabeth Garrett
*Assistant Professor of Law*
University of Chicago

Term Limits

Michael J. Gerhardt
*Professor of Law*
College of William and Mary

Clinton v. Jones
Presidential Immunity

Howard Gillman
*Associate Professor of Political Science*
University of Southern California

Living Constitution

Michael J. Glennon
*Professor of Law*
University of California, Davis

Separation of Powers (Update)

Carole Goldberg
*Professor of Law*
University of California, Los Angeles

Tribal Economic Development and the Constitution

Joseph Goldstein
*Sterling Professor Emeritus of Law and Derald H. Ruttenberg Professorial Lecturer in Law*
Yale University

Public Understanding of Supreme Court Opinions

Robert D. Goldstein
*Professor of Law*
University of California, Los Angeles

Chandler v. Miller
Planned Parenthood v. Casey

Gary Goodpaster
*Professor of Law*
University of California, Davis

Procedural Due Process of Law, Civil (Update 2)

Joel M. Gora
*Professor of Law*
Brooklyn Law School

Communications Decency Act
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Neil Gotanda
*Professor of Law*
Western State University

Critical Race Theory (with Kimberlé Crenshaw, Gary Peller, and Kendall Thomas)

Mark A. Graber
*Associate Professor of Government and Politics*
University of Maryland, College Park

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Joseph D. Grano
*Distinguished Professor of Law*
Wayne State University

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Linda Greenhouse
*The New York Times*
Washington, D.C.

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Bernard Grofman
*Professor of Political Science*
University of California, Irvine

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Janet E. Halley
*Professor of Law and Robert E. Paradise Faculty Scholar*
Stanford University

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Marci A. Hamilton
*Professor of Law*
Yeshiva University

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Ian F. Haney López
*Acting Professor of Law*
University of California, Berkeley

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Bernard E. Harcourt
*Associate Professor of Law*
University of Arizona

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Cheryl I. Harris
*Professor of Law*
University of California, Los Angeles

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Erica Harris
*Associate*
Susman Godfrey, L.L.P., Houston, Texas

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John C. Harrison
*Professor of Law and Class of 1966 Research Professor*
University of Virginia

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Hendrik Hartog
*Class of 1921 Bicentennial Chair in the History of American Law and Liberty*
Princeton University

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Richard L. Hasen
*Associate Professor of Law*
Loyola Law School, Los Angeles

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Louis Henkin
*University Professor, Emeritus*
Columbia University

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Lawrence Herman
*Professor of Law, Emeritus*
Ohio State University

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Susan N. Herman
*Professor of Law*
Brooklyn Law School

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Morton J. Horwitz
*Charles Warren Professor of the History of American Law*
Harvard University

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Herbert Hovenkamp
*Ben V. and Dorothy Willie Professor of Law and History*
University of Iowa

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A. E. Dick Howard
*White Burkett Miller Professor of Law and Public Affairs*
University of Virginia

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Ruth-Arlene W. Howe
*Professor of Law and Advisor to the Black Law Student Association and* Third World Law Journal
Boston College

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Dennis J. Hutchinson
*Professor and Senior Lecturer in Law and editor of* The Supreme Court Review
University of Chicago

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Keith N. Hylton
*Professor of Law*
Boston University

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Scott C. Idleman
*Assistant Professor of Law*
Marquette University

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Samuel Issacharoff
*Visiting Professor of Law*
Columbia University

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Vicki C. Jackson
*Professor of Law*
Georgetown University

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Robert J. Kaczorowski
*Professor of Law*
Fordham University

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Elena Kagan
*Visiting Professor of Law*
Harvard University

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Jerry Kang
*Acting Professor of Law*
University of California, Los Angeles

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Daniel Kanstroom
*Associate Professor of Law*
Boston College

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Kenneth L. Karst
*David G. Price and Dallas P. Price Professor of Law*
University of California, Los Angeles

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Andrew L. Kaufman
*Professor of Law*
Harvard University

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William K. Kelley
*Associate Professor of Law*
University of Notre Dame

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Michael J. Klarman
*James Monroe Professor of Law and F. Palmer Weber Research Professor of Civil Liberties & Human Rights*
University of Virginia

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Lisa A. Kloppenberg
*Associate Professor of Law*
University of Oregon

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Andrew Koppelman
*Assistant Professor of Law and Political Science*
Northwestern University

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J. Morgan Kousser
*Professor of History and Social Science*
California Institute of Technology

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Candace Saari Kovacic-Fleischer
*Professor of Law*
American University

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Harold J. Krent
*Professor and Associate Dean*
Chicago-Kent College of Law

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Wayne R. LaFave
*David C. Baum Professor of Law, Emeritus*
University of Illinois, Urbana-Champaign

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Kurt T. Lash
*Professor of Law and W. Joseph Ford Fellow*
Loyola Law School, Los Angeles

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Stanley K. Laughlin, Jr.
*Professor of Law and Adjunct Professor of Anthropology*
Ohio State University

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Frederick M. Lawrence
*Professor of Law*
Boston University

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Evan Tsen Lee
*Professor of Law*
University of California, Hastings College of the Law, San Francisco

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Andrew D. Leipold
*Professor of Law*
University of Illinois, Urbana-Champaign

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Laurie L. Levenson
*Professor of Law and William M. Rains Fellow*
Loyola Law School, Los Angeles

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*W. St. John Garwood and W. St. John Garwood, Jr., Centennial Chair in Law and Professor of Government*
University of Texas, Austin

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Leonard W. Levy
*Retired*
Brandeis University

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Hans A. Linde
*Senior Judge*
Oregon Supreme Court

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Donald E. Lively
*Dean and Professor of Law*
Florida Coastal School of Law

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Daniel H. Lowenstein
*Professor of Law*
University of California, Los Angeles

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Ira C. Lupu
*Louis Harkey Mayo Research Professor of Law*
George Washington University

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Jonathan R. Macey
*J. DuPratt White Professor of Law and Director of the John M. Olin Program in Law and Economics*
Cornell University

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Catharine A. MacKinnon
*Elizabeth A. Long Professor of Law*
University of Michigan, Ann Arbor

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Deborah C. Malamud
*Professor of Law*
University of Michigan

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Earl M. Maltz
*Distinguished Professor of Law*
Rutgers University, Camden

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Nancy S. Marder
*Associate Professor of Law*
University of Southern California

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Gregory A. Mark
*Professor of Law and Member of the Graduate Faculty in History*
Rutgers University, Newark

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Calvin R. Massey
*Professor of Law*
University of California, Hastings College of the Law, San Francisco

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Christopher N. May
*Professor of Law and James P. Bradley Chair of Constitutional Law*
Loyola Law School, Los Angeles

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William T. Mayton
*Thomas J. Simmons Professor of Law*
Emory University

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University of Southern California

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Charles J. McClain
*Vice Chair of the Jurisprudence and Social Policy Program*
University of California, Berkeley

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Michael W. McConnell
*Presidential Professor of Law*
University of Utah

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John O. McGinnis
*Professor of Law*
Yeshiva University

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Elizabeth Mensch
*Professor of Law*
State University of New York, Buffalo

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Douglas E. Mirell
*Partner*
Loeb & Loeb, Los Angeles

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Rachel F. Moran
*Robert D. and Leslie-Kay Raven Professor of Law*
University of California, Berkeley

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Eric L. Muller
*Associate Professor of Law*
University of North Carolina, Chapel Hill

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Gerald L. Neuman
*Herbert Wechsler Professor of Federal Jurisprudence*
Columbia University

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Roger K. Newman
*Research Scholar*
New York University

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Gene R. Nichol
*Dean and Burton Craige Professor of Law*
University of North Carolina, Chapel Hill

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Marlene Arnold Nicholson
*Professor of Law*
DePaul University

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John T. Nockleby
*Professor of Law*
Loyola Law School, Los Angeles

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Dawn C. Nunziato
*Associate Professor of Law*
George Washington University

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James L. Oakes
*Senior Circuit Judge*
United States Court of Appeals for the Second Circuit

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David M. O'Brien
*Leone Reaves and George W. Spicer Professor of Government and Foreign Affairs*
University of Virginia

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James M. O'Fallon
*Associate Dean for Academics and Frank Nash Professor of Law*
University of Oregon

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Robert M. O'Neil
*Director*
Thomas Jefferson Center for the Protection of Free Expression, Charlottesville, Virginia

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Karen Orren
*Professor of Political Science*
University of California, Los Angeles

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Joel R. Paul
*Professor of Law*
University of Connecticut

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Michael Stokes Paulsen
*Briggs and Morgan Professor of Law*
University of Minnesota

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Anthony A. Peacock
*Assistant Professor of Political Science*
Utah State University

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Gary Peller
*Professor of Law*
Georgetown University

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Robert V. Percival
*Robert Stanton Scholar, Professor of Law, and Director of the Environmental Law Program*
University of Maryland, Baltimore

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Cornelia T. L. Pillard
*Associate Professor of Law*
Georgetown University

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David G. Post
*Associate Professor of Law*
Temple University

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Anne Bowen Poulin
*Professor of Law*
Villanova University

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Monroe E. Price
*Professor of Law*
Yeshiva University

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George W. Pring
*Professor of Law*
University of Denver

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Jack N. Rakove
*Professor of American History*
Stanford University

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Michael B. Rappaport
*Professor of Law*
University of San Diego

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Jamin Raskin
*Professor of Constitutional Law*
American University

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Judith Resnik
*Arthur Liman Professor of Law*
Yale University

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William L. Reynolds
*Jacob A. France Professor of Judicial Process*
University of Maryland

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William M. Richman
*Distinguished University Professor of Law*
University of Toledo

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Dorothy Roberts
*Professor of Law*
Northwestern University

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Robert E. Rodes, Jr.
*Professor of Law*
University of Notre Dame

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Daniel B. Rodriguez
*Dean and Professor of Law*
University of San Diego

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Gerald N. Rosenberg
*Associate Professor of Political Science and Lecturer of Law*
University of Chicago

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Thomas D. Russell
*Professor of Law and History*
University of Texas, Austin

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David K. Ryden
*Assistant Professor of Political Science and Towsley Research Scholar*
Hope College

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*William Nelson Cromwell Professor of Jurisprudence and Political Science, President of the Law and Society Association, and Chair of the Working Group on Law, Culture, and the Humanities*
Amherst College

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Frederick Schauer
*Frank Stanton Professor of the First Amendment*
John F. Kennedy School of Government, Harvard University

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Harry N. Scheiber
*Stefan Riesenfeld Professor of Law and History*
University of California, Berkeley

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Pierre Schlag
*Byron R. White Professor of Law*
University of Colorado, Boulder

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Gary T. Schwartz
*William D. Warren Professor of Law*
University of California, Los Angeles

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Maimon Schwarzschild
*Professor of Law*
University of San Diego
*Barrister*
Lincoln's Inn, London

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Robert A. Sedler
*Professor of Law*
Wayne State University

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Louis Michael Seidman
*Professor of Law*
Georgetown University

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Peter M. Shane
*Professor of Law*
University of Pittsburgh

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Gene R. Shreve
*Richard S. Melvin Professor of Law*
Indiana University, Bloomington

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Mark Silverstein
*Professor of Political Science*
Boston University

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David A. Sklansky
*Acting Professor of Law*
University of California, Los Angeles

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Bradley A. Smith
*Professor of Law*
Capital University

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*Professor of Criminal Justice*
Michigan State University

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Steven D. Smith
*Robert and Marion Short Professor of Law*
University of Notre Dame

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Aviam Soifer
*Professor of Law*
Boston College

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Clyde Spillenger
*Professor of Law*
University of California, Los Angeles

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Kirk J. Stark
*Acting Professor of Law*
University of California, Los Angeles

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Maxwell L. Stearns
*Professor of Law*
George Mason University

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Carol S. Steiker
*Professor of Law*
Harvard University

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Richard H. Steinberg
*Acting Professor of Law*
University of California, Los Angeles

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Geoffrey R. Stone
*Provost and Harry Kalven, Jr., Distinguished Service Professor of Law*
University of Chicago

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Marcy Strauss
*Professor of Law*
Loyola Law School, Los Angeles

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Kathleen M. Sullivan
*Dean, Richard E. Lang Professor of Law, and Stanley Morrison Professor of Law*
Stanford University

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*Professor of Law*
Columbia University

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Amy L. Toro
*Visiting Professor of Law*
University of California, Davis

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Robert N. Treiman
*Partner*
Loeb & Loeb, Los Angeles

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Phillip R. Trimble
*Vice Provost for International Studies and Professor of Law*
University of California, Los Angeles

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Mark Tushnet
*Carmack Waterhouse Professor of Constitutional Law*
Georgetown University

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Melvin I. Urofsky
*Professor of History and Director of the Doctoral Program in Public Policy & Administration*
Virginia Commonwealth University

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William W. Van Alstyne
*William R. Perkins and Thomas C. Perkins Professor of Law*
Duke University

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Jon M. Van Dyke
*Professor of Law*
University of Hawai'i, Manoa

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Michael Vitiello
*Director of the Appellate Advocacy Program and Professor of Law*
University of the Pacific

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Eugene Volokh
*Professor of Law*
University of California, Los Angeles

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*Professor of Law*
Brigham Young University

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Jonathan Weinberg
*Professor of Law*
Wayne State University

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James Weinstein
*Amelia Lewis Professor of Constitutional Law*
Arizona State University

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Robin West
*Professor of Law*
Georgetown University

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G. Edward White
*John B. Minor Professor of Law and History*
University of Virginia

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Keith E. Whittington
*Assistant Professor of Politics*
Princeton University

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David C. Williams
*Professor of Law and the Charles L. Whistler Faculty Fellow*
Indiana University, Bloomington

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Adam Winkler
*Ph.D. Candidate*
University of California, Los Angeles

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John Yoo
*Professor of Law*
University of California, Berkeley

Independent Counsel (Update)

James B. Zagel
*U.S. District Judge*
Northern District of Illinois

Prosecutorial Discretion and Its Constitutional Limits

# A

## *ABBATE v. UNITED STATES*

See: *Bartkus v. Illinois*

## *ABINGTON TOWNSHIP SCHOOL DISTRICT v. SCHEMPP*

374 U.S. 203 (1963)

A Pennsylvania statute required that at least ten verses from the Holy Bible be read, without comment, at the opening of each public school day. A child might be excused from this exercise upon the written request of his parents or guardian.

In ENGEL V. VITALE (1962) the school prayer held unconstitutional had been written by state officials. The question in *Schempp* was whether this made a difference—there being no claim that Pennsylvania was implicated in the authorship of the holy scripture.

Justice TOM C. CLARK concluded that the Pennsylvania exercise suffered from an establishment-clause infirmity every bit as grave as that afflicting New York's prayer. Clark's opinion in *Schempp* was the first strict separationist opinion of the Court not written by Justice HUGO L. BLACK, and Clark formulated a test for establishment clause validity with a precision that had eluded Black. A state program touching upon religion or religious institutions must have a valid secular purpose and must not have the primary effect of advancing or inhibiting religion. The Pennsylvania Bible reading program failed the test on both counts.

Justices WILLIAM O. DOUGLAS and WILLIAM J. BRENNAN concurred separately in opinions reflecting an even stricter separationism than Clark's. Justice ARTHUR J. GOLDBERG also filed a brief concurring opinion.

Justice POTTER STEWART dissented, as he had in *Engel*, arguing that religious exercises as part of public ceremonies were permissible so long as children were not coerced to participate.

*Schempp*, along with *Murray v. Curlett* (decided the same day), settled whatever lingering question there may have been about the constitutionality of RELIGION IN PUBLIC SCHOOLS.

RICHARD E. MORGAN
(1986)

## *ABLEMAN v. BOOTH*

21 Howard 506 (1859)

*Ableman v. Booth*, Chief Justice ROGER B. TANEY's last major opinion, was part of the dramatic confrontation between the Wisconsin Supreme Court, intent on judicial nullification of the FUGITIVE SLAVE ACTS, and the Supreme Court of the United States, seeking to protect the reach of that statute into the free states.

For his role in organizing a mob that freed Joshua Glover, an alleged fugitive, Sherman Booth was charged with violation of the Fugitive Slave Act of 1850. After trial and conviction, he was released by a writ of habeas corpus from the Wisconsin Supreme Court, which held the Fugitive Slave Act unconstitutional, the first instance in which a state court did so. The Wisconsin court instructed its clerk to make no return to a WRIT OF ERROR from the United States Supreme Court and no entry on the records

of the court concerning that writ, thus defying the United States Supreme Court.

The Court took JURISDICTION despite the procedural irregularity. In a magisterial opinion for a unanimous Court, Taney condemned the obstruction of the Wisconsin court and reaffirmed federal JUDICIAL SUPREMACY under section 25 of the JUDICIARY ACT OF 1789. Because the state's sovereignty "is limited and restricted by the Constitution of the United States," no state court process, including habeas corpus, could interfere with the enforcement of federal law. Taney also delivered two significant dicta. He anticipated the later doctrine of DUAL SOVEREIGNTY, which was to hamper state and federal regulatory authority in the early twentieth century, when he wrote that though the powers of the state and federal governments are exercised within the same territorial limits, they "are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres." Taney concluded his opinion by declaring the Fugitive Slave Act of 1850 to be "in all of its provisions, fully authorized by the Constitution."

A reconstituted Wisconsin Supreme Court later conceded the validity of Taney's interpretation of section 25 and apologized to the United States Supreme Court, conceding that its earlier actions were "a breach of that comity, or good behavior, which should be maintained between the courts of the two governments."

WILLIAM M. WIECEK
(1986)

## ABOLITIONIST CONSTITUTIONAL THEORY

American abolitionists developed comprehensive but conflicting theories about the place of slavery in the American constitution. Though these ideas did not positively influence political and legal debate until the 1850s, they exercised profound influence over subsequent constitutional development, merging with constitutional aspirations of nonabolitionist Republicans after the CIVIL WAR to provide the basis for what one writer has called the "Third Constitution": the THIRTEENTH through FIFTEENTH AMENDMENTS. From abolitionist constitutional ideals embedded in section 1 of the FOURTEENTH AMENDMENT, there emerged some principal trends of constitutional development in the century after the Civil War: SUBSTANTIVE DUE PROCESS, equality before the law, protection for the privileges of national and state CITIZENSHIP.

By the time abolitionists began systematically to expound constitutional ideas in the 1830s, the constitutional aspects of the controversy over slavery were well developed. Even before American independence, Quakers in the Middle Colonies and some Puritan ministers in New England had attacked slavery on religio-ethical grounds. In SOMERSET'S CASE (1772) WILLIAM MURRAY (Lord Mansfield), Chief Justice of King's Bench, suggested that slavery could be established only by positive law and that, as a legal institution, it was "odious." The American Revolution witnessed the total abolition, exclusion, or disappearance of slavery in some northern jurisdictions (Vermont, Massachusetts and Maine, New Hampshire, the Northwest Territory) and its gradual abolition in the rest (Pennsylvania, New York, New Jersey, Connecticut, Rhode Island). Early antislavery groups, federated as the American Convention of Abolition Societies, worked in legal and paternalistic ways to protect freed blacks and provide them jobs and education. Yet these Revolutionary-era inhibitions on slavery were offset by gains slavery made in the drafting of the United States Constitution, in which ten clauses promoted slavery's security, most notably in the federal number clause (Article I, section 2, clause 3), the slave trade clause (Article I, section 9, clause 1), and the fugitive slave clause (Article IV, section 2, clause 3).

Constitutional controversy flared over slavery in several early episodes: the federal abolition of the international slave trade and its incidents, the Missouri crisis (1819–1821), the disputes over federal aid to colonization of free blacks, Denmark Vesey's slave revolt (Charleston, 1822), and the Negro Seamen's Acts of the southern coastal states (1822–1830). But not until the ideas of immediate abolition rejuvenated the antislavery movement did abolitionists begin a systematic constitutional assault on slavery. When they organized the American Anti-Slavery Society (AASS) in 1833, abolitionists, in a document drafted by WILLIAM LLOYD GARRISON, pledged themselves to tolerate the continued existence of slavery in the states and rejected the possibility that the federal government could abolish it there. But they insisted that slavery should be abolished immediately, that blacks should not suffer legal discrimination because of race, and that Congress should abolish the interstate slave trade, ban slavery in the DISTRICT OF COLUMBIA and the TERRITORIES, and refuse to admit new slave states.

The newly reorganized movement promptly encountered resistance that directed its thinking into constitutional modes. Federal efforts to suppress abolitionist mailings and to gag abolitionists' FREEDOM OF PETITION, together with mobbings throughout the northern states, diverted abolitionists briefly from the pursuit of freedom for blacks to a defense of CIVIL LIBERTIES of whites. At the same time, they assaulted slavery's incidents piecemeal, attempting to protect fugitive slaves from rendition, and seeking repeal of statutes that permitted sojourning masters to keep their slaves with them for limited periods of time in northern states. They secured enactment of PER-

SONAL LIBERTY LAWS: statutes that protected the freedom of black people in the northern states by providing them HABEAS CORPUS relief when seized as fugitives and by prohibiting state officials or public facilities from being used in the recapture of fugitives.

In 1839–1840, the unified antislavery movement split apart into three factions. Ironically, this organizational disaster stimulated abolitionists' systematic constitutional theorizing and broadcast their ideas widely outside the movement. Because of theological and tactical disagreements, the movement first broke into Garrisonian and political action wings, the Garrisonians condemning conventional electoral politics and the activists organizing a third party, the Liberty party, which ran its own presidential candidate in 1840 and 1844. The political action group subsequently split into those who believed slavery to be everywhere illegitimate and who therefore sought to have the federal government abolish slavery in the states, and those who continued to maintain the position of the original AASS Constitution, namely, that Congress lacked constitutional power to abolish slavery in the states. The Garrisonians, meanwhile, had concluded that the United States Constitution supported slavery and therefore called on northern states to secede from the Union and on individuals to disavow their allegiance to the Constitution.

Those who always maintained slavery's universal illegitimacy relied first on the DUE PROCESS clause of the Fifth Amendment, arguing that slaves were deprived of life, liberty, and property without legal justification, but they soon broadened their attack, ingeniously interpreting nearly a third of the Constitution's clauses, from the PREAMBLE to the TENTH AMENDMENT, to support their untenable thesis that slavery had usurped its preferred constitutional status. The 1840 publication of JAMES MADISON's notes of proceedings at the CONSTITUTIONAL CONVENTION OF 1787 was an embarrassment to them, disclosing as it did the concessions the Framers willingly made to the political power of slavery. Exponents of the universal-illegitimacy theory included Alvan Stewart, G. W. F. Mellen, Lysander Spooner, Joel Tiffany, and later, Gerrit Smith, JAMES G. BIRNEY, Lewis Tappan, and Frederick Douglass. Their principal contributions to later constitutional development included: their insistence on equality before the law irrespective of race; their vision of national citizenship protecting individuals' rights throughout the Union; their reliance on the PRIVILEGES AND IMMUNITIES clause (Article IV, section 2, clause 1) as a protection for persons of both races; and their uncompromising egalitarianism, which led them to condemn all forms of RACIAL DISCRIMINATION. They were scorned as extremists in their own time, even by fellow abolitionists, and modern scholars such as Robert Cover dismiss their ideas as "utopian."

Political action abolitionists who conceded the legality of slavery in the states remained closest to the mainstream of American politics and established a political alliance with like-minded men outside the abolitionist movement to create the Free Soil party in 1848. Their insistence that, as the federal government could not abolish slavery, neither could it establish it, led them to proclaim the doctrines of "divorce" and "freedom national." "Divorce" called for an immediate and absolute separation of the federal government from the support of slavery (for example, by abolishing the interstate slave trade and repealing the Fugitive Slave Act of 1793), coupled with an aggressive attack on the political bases of slavery's strength (repeal of the federal number clause, refusal to appoint slaveholders to federal posts). "Divorce" provided the doctrinal basis of the three-way Free Soil coalition of 1848, comprised of Conscience Whigs, Barnburner Democrats, and former Libertymen. Liberty leaders in the Free Soil group included SALMON P. CHASE (later Chief Justice of the United States), Gamaliel Bailey, STANLEY MATTHEWS (a future justice of the United States Supreme Court), Representative Owen Lovejoy, and Joshua Leavitt.

Stimulated by the widespread popularity of the WILMOT PROVISO (1846) in the north, which would have excluded slavery from all territories acquired as a result of the Mexican War, the abolitionist Free Soilers demanded "nonextension": the refusal to permit slavery in any American territories, and the nonadmission of new slave states. This became transformed into "freedom national," a constitutional doctrine holding that, under *Somerset*, freedom is the universal condition of humans, and slavery a local aberration created and continued only by local positive law. These ideas were cordially received by Whigs who formed a nucleus of the Republican party after the demise of the Free Soilers and the fragmentation of the regular parties as a result of the KANSAS-NEBRASKA ACT (1854): Joshua Giddings, CHARLES SUMNER, Charles Francis Adams, and Horace Mann. Other Republicans such as ABRAHAM LINCOLN and WILLIAM SEWARD refused to accept "divorce" but made nonextension the cornerstone of Republican policy. "Freedom national" even influenced anti-abolitionists such as Lewis Cass and then STEPHEN A. DOUGLAS, who promoted a modified version of it as the FREEPORT DOCTRINE of 1858.

Garrisonians dismissed the United States Constitution as the "covenant with death and agreement with hell" denounced by Isaiah, but they too influenced later constitutional development, principally through their insistence that the proslavery clauses of the Constitution would have to be repealed or nullified, and the federal government fumigated of its contamination with support of slavery. Though they included competent lawyers (Wendell Phillips, William I. Bowditch), the Garrisonians were distinguished chiefly by literary and polemical talent (Edmund

Quincy, Lydia Maria Child) and consequently made little contribution to systematic constitutional exposition.

The crises of the union in the 1850s, beginning with enactment of the Fugitive Slave Act in 1850, leading through the dramatic fugitive recaptures and rescues, the Kansas-Nebraska Act (1854) and "Bleeding Kansas," and culminating, constitutionally, in DRED SCOTT V. SANDFORD (1857), ABLEMAN V. BOOTH (1859), and the pending appeal of *People v. Lemmon* (1860), together with legislative activity (chiefly enactment of ever broader personal liberty laws, including Vermont's Freedom Act of 1858), enabled abolitionists to work together toward common goals, and to overcome or survive their sectarian quarrels of the 1840s. Though fragmented as a distinct movement, abolitionists permeated the press, parties, and the churches, diffusing their ideas widely among persons who had not been theretofore involved in the antislavery movement. Thus egalitarians like Sumner and THADDEUS STEVENS, conservative lawyers like JOHN BINGHAM and William Lawrence, and political leaders like WILLIAM PITT FESSENDEN and ROSCOE CONKLING were influenced by abolitionist constitutional ideas, appropriating them after the war and injecting them into the Constitution and its interpretation, both in cases and in statutes.

WILLIAM M. WIECEK
(1986)

Bibliography

DUMOND, DWIGHT L. 1961 *Antislavery.* Ann Arbor: University of Michigan Press.

FEHRENBACHER, DON 1978 *The Dred Scott Case: Its Significance in American Law and Politics.* New York: Oxford University Press.

GRAHAM, HOWARD J. 1968 *Everyman's Constitution.* Madison: State Historical Society of Wisconsin.

TEN BROEK, JACOBUS 1965 *Equal under Law.* New York: Collier Books.

WIECEK, WILLIAM M. 1977 *The Sources of Antislavery Constitutionalism in America, 1760–1848.* Ithaca, N.Y.: Cornell University Press.

## ABOLITION OF SLAVERY

See: Slavery and the Constitution; Thirteenth Amendment

## *ABOOD v. DETROIT BOARD OF EDUCATION*
431 U.S. 209 (1977)

*Abood* is one of the cases where union or agency shop agreements create speech and association problems, because individuals must join unions in order to hold jobs and then must pay dues to support union activities with which the individuals may not agree. Here the union represented public employees. The Supreme Court has consistently held that there is no right *not* to associate in a labor union for the purposes of COLLECTIVE BARGAINING but that a union must develop methods of relieving a member of those portions of union dues devoted to union ideological activities to which he objects.

MARTIN SHAPIRO
(1986)

(SEE ALSO: *Freedom of Assembly and Association; Freedom of Speech; Labor and the Constitution.*)

## ABORTION AND THE CONSTITUTION

The story of abortion and the Constitution is in part an episode in the saga of SUBSTANTIVE DUE PROCESS. During the period from the early 1900s to the mid-1930s, the Supreme Court employed the principle of substantive due process—the principle that governmental action abridging a person's life, liberty, or property interests must serve a legitimate governmental policy—to invalidate much state and federal legislation that offended the Court's views of legitimate policy, particularly socioeconomic policy. In the late 1930s and early 1940s, the Court, with a new majority composed in part of Justices appointed by President FRANKLIN D. ROOSEVELT, reacted to the perceived judicial excesses of the preceding generation by refusing to employ substantive due process to invalidate any state or federal legislation. During the next quarter century—the period between the demise of the "old" substantive due process and the birth of the "new"—the Court did not formally reject the principle of substantive due process; from time to time the Court inquired whether challenged legislation was consistent with the principle. But the Court's substantive due process review was so deferential to the legislation in question as to be largely inconsequential, as, for example, in WILLIAMSON V. LEE OPTICAL CO. (1955).

Then, in the mid-1960s, the Court changed direction. In GRISWOLD V. CONNECTICUT (1965) the Court relied on a constitutional RIGHT OF PRIVACY to rule that a state could not ban the use of contraceptives by married persons. In *Eisenstadt v. Baird* (1972), on EQUAL PROTECTION grounds, it ruled that a state may not ban the distribution of contraceptives to unmarried persons. Despite the rhetoric of the Court's opinions, there is no doubt that both were substantive due process decisions in the methodological (if not the rhetorical) sense: in each case the Court invali-

dated legislation that offended not any specific prohibition of the Constitution but simply the Court's views of the governmental policies asserted in justification of the states' regulations.

If any doubt remained about whether the Court had returned to substantive due process, that doubt could not survive the Court's decision in ROE V. WADE (1973), which employed substantive due process in both the rhetorical and the methodological senses. The Court ruled in *Roe* that the due process clause of the FOURTEENTH AMENDMENT prohibited a state from forbidding a woman to obtain an abortion in the period of pregnancy prior to the fetus's viability. Indeed, in *Roe* the Court applied a particularly strong version of the substantive-due-process requirement: because the criminal ban on abortion challenged in *Roe* abridged a "fundamental" liberty interest of the woman—specifically, her "privacy" interest in deciding whether to terminate her pregnancy—the Court insisted that the legislation not merely serve a legitimate governmental policy but that it be *necessary* to serve a COMPELLING STATE INTEREST. The Court concluded that only after viability was government's interest in protecting the life of the fetus sufficiently strong to permit it to ban abortion.

Obviously the written Constitution says nothing about abortion, and no plausible "interpretation" or "application" of any determinate value judgment fairly attributable to the framers of the Fourteenth Amendment prohibits state government from forbidding a woman to obtain an abortion. In that sense, the Supreme Court's decision in *Roe v. Wade* is an exemplar of JUDICIAL ACTIVISM. Thus, it was not surprising that the decision—the Court's constitutionalization of the matter of abortion—ignited one of those periodic explosions about the legitimacy of judicial activism in a democracy. (Earlier such explosions attended the Court's activism in the period from *Lochner v. New York* (1905) to the late 1930s and, more recently, the Court's decision in *Brown v. Board of Education* (1954) outlawing racially segregated public schooling.)

Many critics of the Court's decision in *Roe* complained about the judicial activism underlying the decision. In the view of most such critics, *Roe v. Wade* is simply a contemporary analogue of the almost universally discredited *Lochner v. New York* (1905), and no one who opposes the activist mode of judicial review exemplified by *Lochner* can consistently support the activist mode exemplified by *Roe.* Of course, the force of this argument depends on one's perception of what is wrong with *Lochner:* the activist mode of review exemplified by it or simply the Court's answer in *Lochner* to the question of economic liberty addressed there. There is no inconsistency in opposing *Lochner's* doctrinal conclusions and supporting the activist mode of review exemplified by *Roe* (and by *Lochner*). Indeed, one might support the activist mode of review exemplified by *Roe* and at the same time oppose *Roe's* reasoning and result.

A second, distinct criticism of the Court's decision in *Roe* concerns not the legitimacy of judicial activism but the soundness of the Court's answer to the political-moral question it addressed. Because many persons believe, often on religious grounds, that the Court gave the wrong answer to the question whether state government should be permitted to ban abortion, there was, in the decade following *Roe,* a vigorous political movement to overrule *Roe* legislatively—either by taking away the Court's JURISDICTION to review state abortion laws, or by constitutional amendment or even simple congressional legislation to the effect that a fetus is a person within the meaning of the Fourteenth Amendment and that therefore state government may ban abortion to protect the life of the fetus. The proposals to limit the jurisdiction of the Court and to overrule *Roe* by simple congressional legislation, as opposed to constitutional amendment, became subjects of vigorous political and constitutional controversy.

The vigor of the political controversy over abortion cannot be fully comprehended—indeed, the Court's decision to constitutionalize the matter of abortion cannot be fully comprehended—without reference to an important development in American society that gained momentum in the 1970s and 1980s: a fundamental shift in attitudes toward the role of women in society. Many of those who opposed abortion and the "liberalization" of public policy regarding abortion did so as part of a larger agenda based on a "traditional" vision of woman's place and of the family. Many of those on the other side of the issue were seeking to implement a different vision—a feminist vision in which women are free to determine for themselves what shapes their lives will take, and therefore free to determine whether, and when, they will bear children.

Not surprisingly, this basic shift in attitudes toward women—from patriarchal to feminist—has been an occasion for deep division in American society. "Abortion politics" was merely one manifestation of that division (although an important one, to be sure). Thus, a controversy that sometimes seemed on the surface to consist mainly of a philosophical-theological dispute over the question, "When does 'life' begin?," actually involved much more. The complexity of the abortion controversy was dramatically evidenced by the fact that even within the Roman Catholic Church in the United States, which was the most powerful institutional opponent of abortion, attitudes toward abortion were deeply divided precisely because attitudes toward women were deeply divided.

As a consequence of its decision in *Roe v. Wade,* the Court has had to resolve many troublesome, controversial issues regarding abortion. For example, in PLANNED PAR-

ENTHOOD OF MISSOURI V. DANFORTH (1976) the Court ruled that a state may not require a woman to obtain the consent of her spouse before she terminates her pregnancy. The Court's rulings with respect to parental-consent and parental-notification requirements have not been a model of clarity, in part because the rulings have been fragmented. In *Bellotti v. Baird* (1979), for example, an 8–1 decision striking down the parental consent requirement, the majority split 4–4 as to the proper rationale. This much, however, is clear: state government may not require *every* minor, whatever her level of independence or maturity, to obtain parental consent before she terminates her pregnancy.

Undoubtedly the most controversial issue concerning abortion that the Court has addressed since *Roe v. Wade* involved abortion funding. In MAHER V. ROE (1977), the Court ruled that a state government that spends welfare funds to subsidize medical expenses incident to pregnancy and childbirth may decline to subsidize medical expenses incident to nontherapeutic abortion even if its sole reason for doing so is to discourage abortion. In a companion case, *Poelker v. Doe* (1977), the Court ruled that a public hospital that provides medical services relating to pregnancy and childbirth may decline to provide nontherapeutic abortions even if its sole reason for doing so is to discourage abortion. Three years later, in HARRIS V. MCRAE (1980), the Court sustained the HYDE AMENDMENT (to appropriations for the Medicaid program), which prohibited federal funding of abortion, including therapeutic abortion, even though the sole purpose of the amendment was to discourage abortion.

Some commentators have claimed that, notwithstanding the Court's arguments to the contrary, these abortion-funding cases cannot be reconciled with *Roe v. Wade*. They reason that the Court's decision in *Roe* can be satisfactorily explained only on the ground that government may not take action predicated on the view that abortion (in the pre-viability period) is morally objectionable, but that the governmental policies sustained in *Maher*, *Poelker*, and *McRae* were all manifestly predicated on just that view. There is probably no final explanation of the Court's decisions in the abortion-funding cases except in terms of judicial *Realpolitik*—that is, as an effort to retrench in the face of vigorous, often bitter, and widespread criticism of its decision in *Roe v. Wade* and threats to overrule *Roe* legislatively.

Its decision, in *Roe v. Wade*, to constitutionalize the deeply controversial issue of abortion represents one of the Supreme Court's most problematic ventures in recent times. Other moves by the Court were as controversial when initially taken—for example, the Court's choice in *Brown v. Board of Education* (1954) to begin to disestablish racially segregated public schooling—but few have been so persistently controversial. Whatever their eventual fate, *Roe* and its progeny have served as an occasion for some of the most fruitful thinking in this century on the proper role of the Supreme Court in American government.

MICHAEL J. PERRY
(1986)

(SEE ALSO: *Anti-abortion Movement; Reproductive Autonomy.*)

Bibliography

ELY, JOHN HART 1973 The Wages of Crying Wolf: A Comment on *Roe v. Wade*. *Yale Law Journal* 82:920.

PERRY, MICHAEL 1980 Why the Supreme Court was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on *Harris v. McRae*. *Stanford Law Review* 32:1113–1128.

REGAN, DONALD 1979 Rewriting *Roe v. Wade*. *Michigan Law Review* 77:1569–1646.

TRIBE, LAURENCE H. 1978 *American Constitutional Law*. Pages 921–934. Mineola, N.Y.: Foundation Press.

## ABORTION AND THE CONSTITUTION
(Update 1a)

Abortion LEGISLATION rarely, if ever, demonstrates concern for the well-being of women. It usually represents the state using coercive measures to persuade women to bear children rather than have abortions. As long as American society treats women and their reproductive capacity with disrespect by not funding prenatal care, postnatal care, paid pregnancy leave, effective and safe forms of BIRTH CONTROL, or child care, it is hard to imagine that a legislature that respects the well-being of women could enact restrictions on abortion. Thus, when we read abortion legislation or an abortion decision by the courts, we should ask ourselves whether that legislature or that court could have reached the decision that it reached if it fully respected the well-being of women. Under such a framework, we would have to conclude that the Missouri legislature that enacted the abortion legislation challenged in WEBSTER V. REPRODUCTIVE HEALTH SERVICES (1989) did not respect the well-being of women, especially poor or teenage women. Nevertheless, no member of the Supreme Court in *Webster*, including the dissenters, demonstrated a real grasp of the significance of the Missouri legislation on the lives and well-being of poor women and teenage women.

In *Webster*, the Supreme Court was asked to consider the constitutionality of a Missouri statute that contained four provisions arguably restricting a woman's ability to have an abortion. Two provisions received most of the

Court's attention: first, a requirement that a physician ascertain whether a fetus is viable prior to performing an abortion on any woman whom he or she has reason to believe is twenty or more weeks pregnant; and, second, a prohibition against using public employees or facilities to perform or assist an abortion not necessary to save the mother's life.

Chief Justice WILLIAM H. REHNQUIST wrote the opinion for the Court. His opinion was joined by four other Justices—BYRON R. WHITE, SANDRA DAY O'CONNOR, ANTONIN SCALIA, and ANTHONY M. KENNEDY—with respect to the second provision. Rehnquist's conclusion that this part of the statute was constitutional was an extension of the Court's earlier decisions in the Medicaid abortion-funding cases. Rather than apply the more stringent test that had been developed in ROE V. WADE (1973), Rehnquist applied the more lenient standard developed in HARRIS V. MCRAE (1980)—asking whether the state legislature had placed any obstacles in the path of a woman who chooses to terminate her pregnancy. Rehnquist concluded that the state's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the state had chosen not to operate any public hospitals at all. As in *Harris v. McRae*, Rehnquist acknowledged that a state was permitted to make a value judgment favoring childbirth over abortion and to implement that judgment in allocating public funds and facilities.

Justice HARRY BLACKMUN's dissent, which was joined by Justices WILLIAM J. BRENNAN and THURGOOD MARSHALL, argued that Missouri's public facility provision could easily be distinguished from *Harris v. McRae* because of the sweeping scope of Missouri's definition of a public facility. (Justice JOHN PAUL STEVENS dissented separately.) Under Missouri's broad definition, any institution that was located on property owned, leased, or controlled by the government was considered to be public. Thus, the essentially private Truman Medical Center, which performed ninety-seven percent of abortions in the state after sixteen weeks of pregnancy, would be prohibited from performing abortions under the state statute. Even under the more lenient test developed by the Court in *Harris*, Justice Blackmun concluded that the funding provision should be held unconstitutional.

Justice Blackmun's discussion of the public facility provision comes only in a footnote and is not the primary focus of his decision. In order to understand the full impact of this provision on women's lives and health, it is useful to consider the AMICUS briefs filed on behalf of women of color and teenage women. These briefs noted that poor women and teenage women are more likely than other women to seek abortions at public health facilities because they do not have private physicians. They are also more likely to have second-trimester abortions because they delay having abortions until they save the necessary amount of money or find out how to get an abortion. When Blackmun noted that the health-care provider that performs nearly all of the second-trimester abortions will not be able to do so, he could have observed that poor women and teenagers would be disproportionately unable to procure legal abortions. Given the relationship between teenage pregnancy and the cycle of poverty, the inability to procure an abortion often has dramatic consequences in the life of a poor, teenage woman. Although Justice Blackmun was certainly correct to note that the public facility ban "leaves the pregnant woman with far fewer choices, or, for those too sick or too poor to travel, perhaps no choice at all," it would have been better if he had described the impact of this regulation in the race-, class-, and age-based way in which it is most likely to operate.

Justice Blackmun's discussion of the public facility provision skirted the question whether *Harris v. McRae* should be overturned. He tried to distinguish *Harris* from *Webster* rather than call for its reconsideration. The amicus brief submitted by women of color was not so subtle. They often used exactly the same information that they had provided the Supreme Court in *Harris* to argue that the well-being of poor women cannot be protected unless the government ensures that legal abortions are available to poor women on the same basis as middle-class women. A chart in an amicus brief submitted by an international women's health organization showed that the United States stands alone in the world in permitting abortion to be lawful but not funding any abortions for poor women unless their very lives are endangered. Although not all countries fund "abortion on demand" for poor women, all countries that make abortion lawful also fund therapeutic abortions for poor women. These comparative data show that the United States stands alone in the world in its disrespect for the lives and well-being of poor women. Unlike other Western countries, the United States fails to fund prenatal care, postnatal care, pregnancy leave, and child care but then tries to tell poor women that it "prefers" childbirth to abortion. The most logical explanation for this position of both the United States government and the state of Missouri is that government officials have not bothered to educate themselves on the impact that funding and public facility restrictions have on the lives of poor women. And, as long as poor women have virtually no political power, it seems unlikely that government officials will focus on their needs.

Both the majority and dissenting opinions in *Webster* did focus on the first provision of the Missouri statute. Chief Justice Rehnquist's discussion of this provision only received the support of Justices White and Kennedy, but the seperate concurrences of Justices O'Connor and Scalia

made a majority for the conclusion that the provision was constitutional. The provision presented both technical and substantive difficulties. Technically, the provision appeared to require physicians to perform viability tests that were contrary to accepted medical practice, such as performing amniocentesis on a fetus that was under twenty-eight weeks old. If that had been the actual meaning of the statute, most of the Justices would have been compelled to find it unconstitutional even under the most lenient standard of review used by courts—the RATIONAL BASIS test—because the statute would have rationally served no public purpose. In order to avoid that conclusion, Rhenquist offered a somewhat strained interpretation of the statute so that a physician would have the discretion to perform only tests that were medically appropriate.

Having overcome this technical hurdle, Rehnquist then turned to the substantive difficulties posed by the provision. Under the Court's prior doctrine, as articulated in *Roe v. Wade*, a state was permitted to impose abortion restrictions to protect fetal life only in the third trimester of pregnancy. Because the viability-testing requirement took effect as early as twenty weeks, four weeks before the beginning of the third trimester, Rehnquist faced a seeming conflict with *Roe*.

Rehnquist concluded that the *Roe* trimester framework was too rigid and that if the state has an interest in preserving potential human life after viability, it also has an interest in preserving that potential life before viability. Although Rehnquist's statement about preserving potential human life might be read to mean that states could outlaw abortions before the twenty-fourth week and thereby overturn *Roe*, he refrained from reaching that conclusion, because that question was not before the Court.

A fourth vote for the majority position was cast by Justice Scalia. Scalia, unlike Rehnquist, concluded that *Roe* should be overturned and that states should be free to regulate or criminalize abortion at any stage of pregnancy.

The fifth vote for the majority position was cast by Justice O'Connor. Unlike the other members of the majority, she did not argue that *Roe* needed to be overturned, or even modified, to reach the conclusion that the viability provision was constitutional. O'Connor reinterpreted the Court's prior decisions to require that states "not impose an undue burden on a woman's abortion decision." Because she concluded that the viability tests could be performed without markedly increasing the cost of abortion, O'Connor concluded that the undue burden test had been satisfied. O'Connor's framework, unlike that of Rehnquist or Scalia, made it clear that states could not criminalize abortion as they had in the pre-*Roe* era because a criminal penalty certainly would constitute an "undue burden." What other kinds of regulations would impose an undue burden, however, is unclear from O'Connor's opinion.

Justice Blackmun wrote a blistering opinion for the dissenters. He accused Justice Rhenquist of being deceptive in not acknowledging that he was really overturning *Roe*. Moreover, he chided Rhenquist for not giving the Court a usable framework to evaluate future abortion cases. Blackmun said that he feared "for the liberty and equality of the millions of women who have lived and come of age in the sixteen years since *Roe* was decided" and "for the integrity of, and public esteem for, this Court." Substantively, he accused the Court of offering no rationale for its rejection of the trimester framework, saying that the Court used an "it is so because we say so" jurisprudence. The trimester framework, he argued, does make sense because it reflects the developmental view that one is more entitled to the rights of CITIZENSHIP as one increases one's ability to feel pain, to experience pleasure, to survive, and to react to one's environment. Finally, he criticized the test purportedly used by the majority—whether the regulation "permissably furthers the State's interest in protecting potential human life"—as circular and meaningless. He argued that the standard of whether a regulation "permissably furthers" the state's interest was itself the *question* before the Court; it therefore could not be the *standard* that the Court applied in resolving the question.

Although Justice Blackmun wrote his dissent in strong language and even mentioned that the majority's opinion would have a dramatic effect on the "liberty and equality" of women's lives, there is no specific discussion of that effect. Blackmun spent most of his opinion explaining why there was no good reason to change the course of using the RIGHT OF PRIVACY on which the Court had commenced in his opinion in *Roe*.

One of the most disappointing parts of Blackmun's opinion is his conclusion that if the majority's technical interpretation of the provision were correct, he "would see little or no conflict with *Roe*." In other words, he appeared to agree with Justice O'Connor that such a provision would not constitute an undue burden on a woman's abortion decision. Blackmun dissented from the majority because he disagreed with its technical interpretation of the viability-testing provision, not because he fundamentally disagreed about the impact that requirement would have on women's lives and well-being.

If Justice Blackmun had truly considered the "liberty and equality" interests of sixteen million women, he would not have been so easily satisfied. As the briefs that were presented to the Court by women of color and teenage women dramatically showed, raising the cost of abortion, even marginally, has a marked impact on the ability of poor women to purchase abortions. And because women of

color and teenage women are more likely to delay abortion decisions, they will be hit harder by the viability-testing requirement than are other women. For poor women, even the requirement that they pay for their own abortions is an undue burden on their reproductive decision making. Raising the cost of abortion presents an even greater—and even more undue—burden.

From the perspective of protecting the well-being of women, *Webster* is doubly discouraging. Not only did the majority of the Court not seem to understand the meaning of abortion regulations in women's lives, but even the dissenters did not display much understanding or sensitivity. They seemed more determined to protect the integrity of their prior decisions than to consider the reality of new abortion restrictions on women's lives.

RUTH COLKER
(1992)

(SEE ALSO: *Anti-abortion Movement; Feminist Theory; Reproductive Autonomy.*)

Bibliography

COLKER, RUTH 1989 Abortion and Dialogue. *Tulane Law Review* 63:1363–1403.

JAGGAR, ALISON 1974 Abortion and a Woman's Right to Decide. *Philosophical Forum* 5:347.

JUNG, PATRICIA BEATTIE and SHANNON, THOMAS A., eds. 1988 *Abortion and Catholicism: The American Debate.* New York: Crossroad Press.

MCDONNELL, KATHLEEN 1984 *Not An Easy Choice: A Feminist Re-examines Abortion.* Boston: South End Press.

## ABORTION AND THE CONSTITUTION
(Update 1b)

With President RONALD REAGAN's elevation of Justice WILLIAM H. REHNQUIST to CHIEF JUSTICE and his appointment of Justices ANTONIN SCALIA and ANTHONY M. KENNEDY, many expected the Supreme Court to revisit its decision in ROE V. WADE (1973), which struck down laws against abortion. Tension mounted when the Supreme Court noted probable jurisdiction in WEBSTER V. REPRODUCTIVE HEALTH SERVICES (1989). Relying on *Roe*, the lower court in *Webster* had held unconstitutional several provisions of a Missouri statute regulating abortions, including a statement from its preamble that human life begins at conception, a requirement that the aborting physician perform a viability test when he or she has reason to believe the woman is at least twenty weeks' pregnant, and a prohibition on the use of public employees or public facilities to perform an abortion that is not necessary to save the mother's life. In its appeal, Missouri, joined by the Department of Justice as AMICUS CURIAE, argued not only that the invalidated provisions should be upheld under *Roe* and the Court's subsequent abortion cases but, more significantly, that *Roe* itself should be overruled.

Without passing on the constitutional validity of all the statutory provisions that had been challenged, the Court, in a 5–4 decision, reversed the lower court and gave the prolife movement its first major legal victory since *Roe* was decided. Whether *Webster* will prove a truly significant victory for this movement, however, remains to be seen. First and most encouraging for prochoice advocates, the Court once again found no occasion to revisit *Roe*'s controversial conclusion that the right to an abortion is protected by the Constitution's DUE PROCESS clauses. Second, although the Court's judgment of reversal garnered majority support, portions of Chief Justice Rehnquist's opinion did not obtain five votes. Particularly noteworthy was Justice SANDRA DAY O'CONNOR's refusal to join important sections of the opinion. Third, the extraordinary media publicity surrounding *Webster* may have contributed to exaggerated perceptions by both sides of what the Court actually held.

In upholding Missouri's restriction on the use of public employees or facilities to perform abortions, the *Webster* majority relied on the Court's previous abortion-funding cases. The Court emphasized, as it had done before, that as long as the states do not actually restrict the abortion decision, the Constitution allows them to make the value judgment that childbirth is preferable to abortion. In denying the use of public employees and facilities for abortions, Missouri did not place any obstacles in the path of women who choose to have an abortion; that is, Missouri's restriction left pregnant women with the same choices they would have had if the state had not chosen to operate public hospitals at all. In short, although the Constitution, as interpreted by *Roe*, may not allow the states to prohibit abortions, it does not give either doctors or women a right of access to public facilities for the performance of abortions.

Many prochoice commentators have criticized this aspect of the Court's holding in *Webster* because of its alleged effect on the availability of abortions for certain women. The Court's task, however, was to decide not whether Missouri made a wise or good policy choice but whether anything in the Constitution invalidated the choice that Missouri made through its democratic process. Viewed in this light, *Webster* and the previous abortion-funding cases are consistent with prevailing constitutional doctrine. Few would argue, for example, that because the state may not prohibit parents from sending their children to private schools, the state must fund private education for those parents who cannot afford it.

The statute's viability-testing requirement gave the Court more difficulty. The section of Chief Justice Rehnquist's opinion regarding this requirement, which was joined by only two other Justices, said that the constitutionality of the viability-testing requirement was called into doubt by the rigid trimester system established in *Roe* and followed in the Court's other abortion cases. The Chief Justice reached this conclusion because mandatory testing when the physician reasonably believes the pregnancy is at least in the twentieth week may impose burdens on second-trimester abortions involving fetuses who have not yet become viable. Taking the position that STARE DECISIS has less force in constitutional law than elsewhere, the plurality then abandoned *Roe*'s trimester framework as unsound in principle and unworkable in practice.

The plurality emphasized that the concepts of trimesters and viability are not found in the Constitution's text or in any other place one might expect to find a constitutional principle, thus describing the Court's previous holdings as resembling an intricate code of regulations more than a body of constitutional doctrine. The plurality also questioned why the state's interest in protecting potential human life should come into existence only at the point of viability. Finally, eschewing STRICT SCRUTINY, the plurality upheld Missouri's testing requirement by concluding that it permissibly furthers the state's legitimate interest in protecting potential life. Without otherwise purporting to disturb *Roe*, the plurality thus modified and narrowed it.

Justice HARRY A. BLACKMUN, the author of *Roe*, wrote a stinging dissent contending that *Roe* could not survive the plurality's analysis. Justice Scalia wrote a concurring opinion agreeing with Justice Blackmun that the plurality's analysis effectively would overrule *Roe*, something he was prepared to do explicitly. Nevertheless, a majority of the Court did not accept Justice Scalia's invitation. Even assuming that the three Justices in the plurality share the view that their anlaysis is devastating to *Roe*—and it is not clear that they do—it requires five votes, not four, to overrule *Roe*. On the fundamental issue of whether *Roe* should be totally overruled, the still unresolved question is where Justice O'Connor stands.

Although she had strongly attacked the trimester system in her dissent in *Akron v. Akron Center for Reproductive Health Services* and had defended the position that the state's interest in protecting potential life exists throughout all the stages of pregnancy, Justice O'Connor did not join the plurality's rejection of the trimester system in *Webster*. Instead, she criticized the plurality for unnecessarily reaching out to modify *Roe*, and insisted that the viability-testing requirement was constitutional even when considered under the Court's previous cases. In her view, the testing requirement did not unduly burden the woman's abortion decision, and only on this ground did she vote to sustain the testing requirement. Prochoice advocates thus may have reason to hope that Justice O'Connor has had a change of heart since *Akron*. In contrast, prolife advocates may take heart that Justice O'Connor indicated that she both continues to view the trimester framework as problematic and would find it appropriate to reexamine *Roe* in a case involving a statute whose constitutionality actually turned on its validity.

Because the plurality's reasoning in *Webster* tracks rather closely Justice O'Connor's dissent in *Akron*, it is fair to question, as Justices Blackmun and Scalia did, whether that reasoning, if explicitly endorsed in the future by a Court majority, would effectively overrule *Roe*. From the standpoint of logic, the position that *Webster* completely undermines *Roe* has considerable force. If the state's interest in protecting potential life exists equally at all stages of pregnancy, it would seem that the state should be able to prohibit abortions not simply in the third trimester, as *Roe* held, but throughout pregnancy. As Justice O'Connor stated in *Akron*, "potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward." In Justice Blackmun's dissenting words, "if the Constitution permits a State to enact any statute that reasonably furthers its interest in potential life, and if that interest arises as of conception," then it is difficult to see why any statute that prohibits abortion is unconstitutional. The Court can escape the force of this reasoning only by repudiating the reasoning in the plurality's opinion in *Webster*.

It is curious that the future of *Roe* might turn on how a Court majority ultimately views the validity of the trimester framework. The fundamental jurisprudential issue in both *Roe* and *Webster*, as Justice Blackmun correctly recognized, is whether the Constitution protects an "unenumerated" general RIGHT OF PRIVACY or, at least, whether such an UNENUMERATED RIGHT properly includes the right to terminate a pregnancy. The Court rejected *Roe*'s trimester framework in part because the concepts of trimesters and viability cannot be found in the Constitution's text, but this can equally be said of the right of privacy in general and of the right to terminate a pregnancy in particular. If the Constitution's text must be the source of constitutional rights, more than the trimester system is illegitimate about *Roe*. However, if the Court continues to adhere to the view that the Constitution can protect unenumerated rights and if one of these protected unenumerated rights is the right to terminate a pregnancy, Justice Blackmun would seem correct in finding it irrelevant that the Constitution does not refer to trimesters or viability. How could it, when it does not refer to abortion at all?

The debate about unenumerated rights is important because of its implications for the Court's proper role in constitutional interpretation. Viewed in these terms, the debate about *Roe* is a debate not about abortion as such but about the Court's role and the role of JUDICIAL REVIEW under the form of government established by the Constitution. Those who oppose the Court's use of unenumerated rights to invalidate statutes essentially argue that such action constitutes an abuse of authority, one that allows the Court to substitute its own value judgments for those of the politically accountable branches of government. Justice Scalia, who alone in *Webster* was prepared to overrule *Roe,* thus insisted that the Court in *Roe* had entered an area that, because of the Constitution's silence, demands political answers. He observed that both sides had engaged in street demonstrations and letter-writing campaigns to influence the Court's decision—the kind of activity, in his view, that should be directed at elected legislators rather than at judges who hold life tenure and who are sworn to uphold the Constitution even against majority will. From this perspective, *Roe* is no more defensible than the now infamous decision in LOCHNER V. NEW YORK (1905), which invalidated economic reform legislation on the basis of rights that could not be found in the Constitution's text.

*Roe* has been attacked even by some who defend the existence of unenumerated rights that the judiciary may enforce. One argument contends that *Roe* improperly rejected a natural law position with regard to human existence by permitting the state, through the device of law, to define human life in a way that excludes fetuses. Under this view, laws banning abortions are not simply constitutionally permissible but constitutionally required. Whatever the present Court does regarding the abortion issue, it does not seem prepared to embrace such an argument.

Shortly after deciding *Webster,* the Court agreed to decide cases raising issues concerning abortion statutes in other states. In these cases, the Court upheld parental notification without making further modifications of *Roe.* Whether or not the Court uses future cases to reexamine *Roe*, it is clear that a majority of the Court is now inclined to permit the states greater leeway in regulating abortions. How much additional regulation the states will enact, if so permitted, is not easy to predict. After *Webster*, abortion became a key issue in several political races, and the prochoice side of the debate came away with some resounding political victories. Perhaps these elections have something to say to those who would substitute JUDICIAL ACTIVISM for the political process. At the least, the up-or-down choice presented by *Roe*'s constitutionalization of abortion seems to have precluded the various states from achieving through democratic means the political compromises that many other societies have reached on the abortion question.

JOSEPH D. GRANO
(1992)

(SEE ALSO: *Abortion and the Constitution; Anti-Abortion Movement; Reproductive Autonomy.*)

Bibliography

BOPP, JAMES, JR. 1989 Will There Be a Constitutional Right to Abortion After Reconsideration of *Roe v. Wade?* *Journal of Contemporary Law* 15:131–173.

BORK, ROBERT J. 1989 *The Tempting of America*, pages 110–116. New York: Free Press.

FARBER, DANIEL 1989 Abortion After Webster. *Constitutional Commentary* 6:225–230.

GLENDON, MARY ANN 1987 *Abortion and Divorce in Western Law.* Cambridge, Mass.: Harvard University Press.

GRANO, JOSEPH 1981 Judicial Review and a Written Constitution in a Democratic Society. *Wayne Law Review* 28:1–75.

HIRSHMAN, LINDA 1988 Bronte, Bloom and Bork: An Essay on the Moral Education of Judges. *University of Pennsylvania Law Review* 137:177–231.

LOEWY, ARNOLD 1989 Why *Roe v. Wade* Should Be Overruled. *North Carolina Law Review* 67:939–948.

NOONAN, JOHN 1984 The Root and Branch of *Roe v. Wade*, *Nebraska Law Review* 63:668–679.

## ABORTION AND THE CONSTITUTION
(Update 2a)

Politically and jurisprudentially, PLANNED PARENTHOOD V. CASEY (1992) is a complex case whose strengths are inextricably intertwined with its weaknesses. Those strengths include a political PRAGMATISM that helped to mute abortion conflict, combined with a PRECEDENT constrained and sensitively nuanced DUE PROCESS methodology rooted in COMMON LAW tradition and the legacy of the second Justice JOHN MARSHALL HARLAN. Weaknesses include the failure to articulate a clear, principled STANDARD OF REVIEW and a logically satisfying theory of abortion rights.

The decades prior to *Casey* had been marked by bitter abortion controversy. The promise of autonomy and gender equality implicit in abortion rights confronted a tradition-based insistence that the value of human life is not a subject appropriately open, relativistically, to unfettered personal choice. In 1973, ROE V. WADE had announced a fundamental RIGHT OF PRIVACY to choose abortion throughout the first two trimesters (protected by a STRICT SCRUTINY standard of review for restrictions during the first trimester, and allowing only restrictions rationally

related to maternal health during the second). But *Roe* had exacerbated conflict, not molded consensus, and by 1992 many expected *Roe* to be OVERRULED. Only three Justices of the *Roe* Court remained on the bench, and two were *Roe* dissenters. Five sitting Justices were appointed by either President RONALD REAGAN or President GEORGE H. W. BUSH, both of whom ran on high-profile pro-life platforms. Meanwhile, in WEBSTER V. REPRODUCTIVE HEALTH SERVICES (1989), the Supreme Court had upheld not only a highly restrictive public facilities ban but also a viability test requirement effective at twenty weeks, thereby undercutting the trimester framework of *Roe*. Justices HARRY A. BLACKMUN and ANTONIN SCALIA (respectively, the author of *Roe* and the harshest critic of *Roe*) argued that *Webster* effectively overruled *Roe*, although a majority refused to take that step explicitly. Then the Court, in subsequent cases, upheld parental notification requirements and allowed a forty-eight–hour waiting period while still refusing to overrule *Roe*.

Justice SANDRA DAY O'CONNOR emerged as the pivotal figure in the Court's abortion law. O'Connor had consistently criticized the trimester framework of *Roe* and had argued that states could legitimately regulate abortion any time after conception so long as the resulting restrictions did not impose an "undue burden" on a woman's choice to abort before viability. O'Connor refused, however, to argue that *Roe* should be overruled, thereby inviting Scalia's scathing contempt.

In *Casey*, O'Connor's undue burden test became the definitive "middle ground" between those voting to uphold *Roe* in its purity (Blackmun and JOHN PAUL STEVENS) and those voting to overrule it (Scalia, WILLIAM H. REHNQUIST, BYRON R. WHITE, and CLARENCE THOMAS). Joined only by DAVID H. SOUTER and ANTHONY M. KENNEDY and denounced by both sides in the bitter abortion controversies, O'Connor's approach became controlling law and probably resonated with the moral ambivalence most Americans felt about abortion. At issue were five provisions of a Pennsylvania statute: informed consent, a twenty-four–hour waiting period with counseling, parental consent, spousal notification, and mandatory reports and records. Upholding all but the spousal notification provision, the joint opinion reaffirmed *Roe* by recognizing a constitutionally protected liberty interest in the choice to abort prior to viability, but also stated that this interest was balanced from the time of conception by the state's legitimate interest in the potential life of the unborn. As mediator between those two interests, the undue burden test meant the state could regulate abortions at any time after conception if the regulation did not have the "purpose or effect" of placing a "substantial obstacle in the path of a woman seeking an abortion prior to viability."

O'Connor's approach to *Roe* is characteristic of her methodology, paralleling, for example, her approach to ESTABLISHMENT CLAUSE jurisprudence in the contentious public display cases. It entails situating herself between two extreme approaches to controversial precedent—rigid application and complete overruling. She instead identifies a core purpose or meaning within the existing DOCTRINE which can be affirmed without categorical application of the prior rule. For *Roe*, that meant protecting a woman's ultimate choice, but not an unrestricted choice and not within the trimester framework.

This almost Llewellynesque common law approach to precedent—constrained but not mechanically bound—resonates with the SUBSTANTIVE DUE PROCESS jurisprudence of the second Justice Harlan, and Part II of the *Casey* joint opinion draws extensively on Harlan's DISSENTING OPINION in *Poe v. Ullman* (1961), probably the Court's most elegantly articulated defense of a tradition-guided conception of personal liberty. Harlan recognized a responsibility to give content to open-ended values like "liberty" yet at the same time stayed rooted in precedent and historical tradition—a tradition conceived not statically but as a "living process." The joint opinion in *Casey* effectively relocates reproductive rights within that substantive due process tradition, from which they had become disconnected given the absoluteness of the individual "privacy right" rationale of earlier decisions. Notably, while the substantive due process approach of *Casey* disappointed many by its failure to provide absolute protection, its nuanced contextualism opened space for a surprisingly sensitive judicial account of the actual effect of unwanted pregnancies, recognizing that the "liberty of the woman is at stake in a sense unique to the human condition and unique to the law."

While the joint opinion justified locating abortion within due process guarantees, the three Justices did not say *Roe* was correctly decided. The margin that keeps *Roe* intact is precedent, which provides not an "inexorable command" but important "prudential and pragmatic" constraints to guide courts. One constraint is reliance, and here the joint opinion almost lays out an equality argument, stating that after *Roe* women have shaped their thinking and choices with abortion as an option. "The ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives." The Court recognizes it cannot recapture 1973, as if *Roe* had never been part of the contentious reality of recent history. Instead, *Roe* had helped to form that reality, which included greater gender equality. Through the back door, so to speak, while discussing precedent, the joint opinion suggests gender quality as a foundation for abortion rights.

Refusing to find *Roe* in the same category as LOCHNER V. NEW YORK (1905) or PLESSY V. FERGUSON (1896), the three

Justices nevertheless proceed to reinterpret it, in the manner so typical of O'Connor, by separating out its core meaning from its more rigid (and, by implication, artificial) applications. *Roe* is now taken to mean only that the "ultimate" decision to abort is the woman's, so that states may regulate even when the "incidental effect is added difficulty or expense." A strength of this reinterpretation is its recognition that abortion is a serious moral question with a legitimately public dimension, a point *Roe* never conceded. Nevertheless, a woman's capacity to cope well with her own life is also at stake, and the actual context of a woman's life may in fact make a particular restriction "unduly burdensome" in a moral sense. *Casey* is an acknowledgement of that ethical complexity, as the contextual description of women facing domestic violence makes abundantly clear. Even for restrictions the Court upholds, further data are invited for reevaluation.

Nevertheless, facts cannot supply standards. The line between permissible and impermissible restriction presumably lies somewhere between "added difficulty or expense" and "undue burden" or "substantial obstacle." Which burdens are "undue"? Increased health risks? Economic hardships? How great must they be? Some courts, applying *Casey*, simply have resorted to surface analogies to the restrictions *Casey* upheld, justifying their treatment of similar restrictions in like manner. This mechanical approach to decisionmaking represents a failure to do the particularized factual analysis *Casey* requires; yet, the burden now on challengers to produce enough facts to satisfy this still-undefined standard is a heavy one.

Interpretation is further complicated by an uncertain standard of review for facial attacks, the norm in abortion cases. The joint opinion found the spousal notification provision unconstitutional because, to a "large fraction" of the cases to which it would be relevant, the restriction would impose a substantial obstacle. This was an unexplained departure from the more restrictive test for facial challenges that requires there be "no set of circumstances" under which the law could be applied constitutionally. Some courts, without clear Supreme Court guidance, have applied this restrictive test, making successful facial challenge almost impossible. Yet the more appropriate "large fraction" standard requires, like the undue burden test itself, an extensive factual record and a more nuanced consideration of the law's effect.

Scalia's dissent pointed to this lack of clarity in the novel undue burden test. He also pointed, sarcastically, to the vacuous phrases used to justify finding a liberty interest, such as the linking of abortion choice to one's "concept of existence, of meaning, of the universe, and of the mystery of human life." Empty phrases are cold comfort to those who think abortion is equivalent to murder—equally a statement about one's concept of existence and the mystery of human life—although arguably our traditional respect for freedom of conscience is not constitutionally irrelevant.

The joint opinion never meets Scalia's challenge. If the Court cannot resolve the value choices at the heart of the abortion controversy, why should it seize control from the democratic process? Conversely, too, if abortion is a legitimate choice, why should it be obstructed in ways that burden most heavily the young and the poor? At the core of *Casey* lies a still troubling lack of resolution. Nevertheless, faced with a moral, political, and constitutional question of extraordinary difficulty, the joint opinion at least represents a workable compromise and an invitation for further dialogue.

Since *Casey*, abortion controversy at the Supreme Court level has focussed on clinic violence and access problems caused by protestors in the ANTI-ABORTION MOVEMENT. For example, the Court has allowed application of federal racketeering law to an alleged conspiracy of anti-abortion activists and upheld a fifteen-foot fixed buffer zone around accesses to clinics while striking down a fifteen-foot floating buffer zone around persons and vehicles as too burdensome on FREEDOM OF SPEECH.

Meanwhile, many pro-life activists have focused energy on opposing so-called partial-birth abortions. In 1997 the U.S. SENATE passed a ban on partial-birth abortions only three votes short of a veto-proof majority. While President WILLIAM J. CLINTON vetoed the ban, he supported a defeated compromise bill banning all postviability abortions except in cases where a woman faces risk of death or "grievous injury" to health. Such laws have wide popular support. By January 1999, twenty-eight states had banned partial-birth abortions, although eighteen bans have been enjoined, chiefly on VAGUENESS grounds because language used to define the procedure (e.g., "partial vaginal delivery" of a "living" human infant) could be construed to apply to some constitutionally protected procedures, and even to medical help with spontaneous abortions. Notably, however, cases describing medical details of various abortion procedures for purposes of vagueness analysis make for grisly reading, a stark reminder of the key insight of *Casey*—abortion is, in fact, a complex ethical issue, which does not lend itself to clear and definitive legal resolution.

ELIZABETH MENSCH
(2000)

Bibliography

COLKER, RUTH 1992 *Abortion Dialogue: Pro-Choice, Pro-Life, and American Law.* Bloomington: University of Indiana Press.

CONDIT, CELESTE MICHELLE 1989 *Decoding Abortion Rhetoric: Communicating Social Change.* Urbana: University of Illinois Press.

DWORKIN, RONALD 1993 *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom.* New York: Knopf.

GLENDON, MARY ANN 1989 *Abortion and Divorce in Western Law.* Cambridge, Mass.: Harvard University Press.

GRABER, MARK 1996 *Rethinking Abortion: Equal Choice, the Constitution, and Reproductive Politics.* Princeton, N.J.: Princeton University Press.

LUKER, KRISTIN 1984 *Abortion and the Politics of Motherhood.* Berkeley: University of California Press.

MENSCH, ELIZABETH and FREEMAN, ALAN 1993 *The Politics of Virtue: Is Abortion Debatable.* Durham, N.C.: Duke University Press.

TRIBE, LAURENCE 1990 *Abortion: The Clash of Absolutes.* New York: W. W. Norton.

## ABORTION AND THE CONSTITUTION
(Update 2b)

The usual rationales for abortion may be characterized as the "Blob Theory" and the "Limpet Theory." According to the Blob Theory, the unborn child is a blob of tissue, an excrescence on the body of a woman. Her decision to excise it is nobody's business but her own. According to the Limpet Theory, the unborn child is a human being, but one inexplicably parasitic on a woman, who should be able to shed the burden if she chooses. The state can appropriate people's resources for the sustenance of other people, but appropriating their bodies goes too far. The Limpet Theory, being less subject to empirical refutation, has gradually gained ground over the Blob Theory since the early 1990s.

The shift is hinted at in some of the language of Justices SANDRA DAY O'CONNOR, ANTHONY M. KENNEDY, and DAVID H. SOUTER in their joint opinion in PLANNED PARENTHOOD V. CASEY (1992). They occasionally speak of "the life of the unborn" instead of mere "potential life," and at one point they say that the state may inform a woman of the "consequences to the fetus" if she has an abortion. In the end, though, like Justice HARRY A. BLACKMUN in ROE V. WADE (1973), they fix "viability" (i.e., ability to survive outside the womb) as the point at which the state can allow the child's interest in remaining alive to outweigh the mother's interest in ending the pregnancy.

Although only three Justices adopted the joint opinion in its entirety, it has become the last word from the Supreme Court on abortion, because the other opinions cancel each other out. So the prevailing doctrine is that the state can require a woman to retain a child in her womb only if the life of the child does not depend on her doing so. Until viability the state can place no "undue burden" on a woman's exercise of her right to an abortion, whereas after viability any restraint is acceptable if it does not endanger the woman's life or health.

The devil, of course, is in the details. There is not space here to cover all the nuances of the subject—parental permission, waiting periods, informed consent, and so on—that *Casey* touched upon but mainly left loose to rattle around a judicial system where most judges think either that no burden on abortion is undue or that any burden is.

The most important decision since *Casey* is *Women's Medical Professional Corporation v. Voinovich* (1997), in which the U.S. Court of Appeals for the Sixth Circuit struck down Ohio's attempt to limit postviability abortions in general and "partial-birth" abortions in particular. The court found three major defects in the statute. (1) It defined the partial-birth procedure in such a way as to inhibit a number of previability abortions. (2) Its restrictions on postviability abortions failed to include an exception for mental, as distinct from bodily, health. (3) It inhibited medical decisions regarding viability and health risk by subjecting such decisions to a requirement of reasonableness, and therefore of peer review. Having made these determinations, the court used a tendentious expansion of the concept of facial invalidity and an equally tendentious contraction of the principle of severability to invalidate the whole statute. There was also a provision for using whenever possible a procedure that would spare the life of a viable child. By holding the provisions of the statute not to be severable, the court made this provision inoperative without ever passing on it.

It is this last provision, passed over in silence, that seems most in keeping with the logic of *Casey,* such as it is. If there is doubt as to whether an unborn child can survive outside the womb, the obvious thing to do is to bring her out alive and let her try. Only in very rare cases will doing so pose more danger to a woman's health than bringing the child out in pieces. This is especially the case when the danger is to mental health. Generally, that danger comes not from the trauma of delivery but from the responsibility of parenthood. It continues at least through the child's late adolescence, and it affects the father as well as the mother.

Judge Danny Boggs, dissenting in *Voinovich,* likened legislators trying to comply with *Casey* to the comic character Charlie Brown, trying in vain to kick a football held by his friend Lucy:

> Charlie Brown keeps trying, but Lucy never fails to pull the football away at the last moment. Here, our court's judgment is that Ohio's legislators, like poor Charlie Brown, have fallen flat on their backs. I doubt that the lawyers and litigants will ever stop this game. Perhaps the Supreme Court will do so.

Judging by *Casey*, this hope in the Supreme Court is painfully misplaced. Note first that the two "prolife" opinions (by Chief Justice WILLIAM H. REHNQUIST and Justice ANTONIN SCALIA—each joining in the other's opinion, with Justices BYRON R. WHITE and CLARENCE THOMAS joining in both) do not reflect the moral claim of the life at stake. The Chief Justice says that a woman's interest in having an abortion is a liberty interest supported by the FOURTEENTH AMENDMENT, but is not strong enough to outweigh the state's interest in protecting the unborn. Nothing is said of the interest of the unborn in being protected. Scalia says that if reasonable people can disagree on an issue the courts should butt out unless there is a text inviting them in. He is probably right that the ultimate solution to such a question as this must be political, but his opinion is disappointing in its lack of moral focus.

The one morally serious opinion is Blackmun's, and it is dead wrong. He rightly accuses the Chief Justice of construing "personal-liberty cases as establishing only a laundry list of particular rights rather than a principled account." But he totally ignores the humanity of the unborn and regards all limitations on abortion as reducing women to production agents for the state.

Justice JOHN PAUL STEVENS goes along with much of the joint opinion, but objects to allowing the state "to inject into a woman's most personal deliberations its own view of what is best." (Contrast JOHN STUART MILL, *On Liberty* (1859): "Considerations to aid his judgment . . . may be offered to him, even obtruded on him, by others, but he himself is the final judge.")

The joint opinion is mainly notable for its innovative treatment of STARE DECISIS. It creates a special category of cases, those in which the Court "calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." It says that only a substantial change in surrounding circumstances would warrant overruling such a case. It appeals to two examples from the twentieth century (by limiting itself to this particular century, it conveniently avoids the overruling of DRED SCOTT V. SANDFORD (1857) at Appomattox): (1) the overruling of PLESSY V. FERGUSON (1896) allowing race SEGREGATION by BROWN V. BOARD OF EDUCATION (1954), and (2) the overruling of ADKINS V. CHILDREN'S HOSPITAL (1923) forbidding wage regulation by WEST COAST HOTEL V. PARRISH (1937). In both cases, the joint opinion gets the history wrong. These cases were not overruled because of changed circumstances. They were overruled because they were morally bankrupt when they came down, and were finally recognized to be so. That segregation was a badge of inferiority for Blacks was known at the time of *Plessy* by the first Justice JOHN MARSHALL HARLAN in dissent, by every Black person in the United States, and by every segregationist in the South. The idea that it was first discovered in connection with *Brown* was characterized as a "dangerous myth" by Edmond Cahn, writing in 1955. The myth proved here how dangerous it was. *Adkins* and *Parrish* both dealt with whether the support of the working poor was a task of their employers or a task of the state. The economic conditions of the time had no effect whatever on the question. The four Justices from the *Adkins* majority who were still on the Court dissented in *Parrish* for the same reasons they voted with the majority in *Adkins*. Chief Justice CHARLES EVANS HUGHES, for the majority in *Parrish*, uttered the same condemnation of "sweating" employers that Chief Justice WILLIAM HOWARD TAFT, dissenting, had uttered in *Adkins*. The moral status of these cases had not changed between decision and overruling; what had changed was the membership of the Court. Those who see *Roe* as another example of moral bankruptcy can only wait for a comparable change.

ROBERT E. RODES, JR.
(2000)

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

IN SCHENCK V. UNITED STATES (1919) Justice OLIVER WENDELL HOLMES introduced the CLEAR AND PRESENT DANGER test in upholding the conviction under the ESPIONAGE ACT of a defendant who had mailed circulars opposing military CONSCRIPTION. Only nine months later, in very similar circumstances, the Supreme Court upheld an Espionage Act conviction and Holmes and LOUIS D. BRANDEIS offered the danger test in dissent. *Abrams* is famous for Holmes's dissent which became a classic libertarian pronouncement.

Abrams and three others distributed revolutionary circulars that included calls for a general strike, special appeals to workers in ammunitions factories, and language suggesting armed disturbances as the best means of protecting the Russian revolution against American intervention. These circulars had appeared while the United States was still engaged against the Germans in WORLD WAR I. Their immediate occasion was the dispatch of an American expeditionary force to Russia at the time of the Russian revolution. The majority reasoned that, whatever their particular occasion, the circulars' purpose was that of hampering the general war effort. Having concluded that "the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war" and that they urged munitions workers to strike for the purpose of curtailing the production of war materials, the opinion upheld the convictions without actually addressing any constitutional question. The majority obviously believed that the Espionage Act

might constitutionally be applied to speech intended to obstruct the war effort.

Justice Holmes mixed a number of elements in his dissent, and the mixture has bedeviled subsequent commentary. Although it is not clear whether Holmes was focusing on the specific language of the Espionage Act or arguing a more general constitutional standard, his central argument was that speech may not be punished unless it constitutes an attempt at some unlawful act; an essential element in such an attempt must be a specific intent on the part of the speaker to bring about the unlawful act. He did not read the circulars in evidence or the actions of their publishers as showing the specific intent to interfere with the war effort against Germany that would be required to constitute a violation of the Espionage Act.

His *Abrams* opinion shows the extent to which Holmes's invention of the danger rule was a derivation of his thinking about the role of specific intent and surrounding circumstances in the law of attempts. For in the midst of his discussion of specific intent he wrote, "I do not doubt . . . that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. . . . It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion. . . ."

Over time, however, what has survived from Holmes's opinion is not so much the specific intent argument as the more general impression that the "poor and puny anonymities" of the circulars could not possibly have constituted a clear and present danger to the war effort. At least in contexts such as that presented in *Abrams*, the clear and present danger test seems to be a good means of unmasking and constitutionally invalidating prosecutions because of the ideas we hate, when the precautions are undertaken not because the ideas constitute any real danger to our security but simply because we hate them. Although the specific intent aspect of the *Abrams* opinion has subsequently been invoked in a number of cases, particularly those involving membership in the Communist party, the *Abrams* dissent has typically been cited along with *Schenck* as the basic authority for the more general version of the clear and present danger standard that became the dominant FREEDOM OF SPEECH doctrine during the 1940s and has since led a checkered career.

Justice Holmes also argued in *Abrams* that the common law of SEDITIOUS LIBEL has not survived in the United States; the Supreme Court finally adopted that position in NEW YORK TIMES V. SULLIVAN (1964).

The concluding paragraph of the *Abrams* dissent has often been invoked by those who wish to make of Holmes a patron saint of the libertarian movement:

> Persecution for the expression of opinions seems to me perfectly logical . . . but when men have realized that time has upset many fighting faiths, they may come to believe even more the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech."

Sensitized by the destructive powers of such "fighting faiths" as Fascism and communism, subsequent commentators have criticized the muscular, relativistic pragmatism of this pronouncement as at best an inadequate philosophic basis for the libertarian position and at worst an invitation to totalitarianism. The ultimate problem is, of course, what is to be done if a political faith that proposes the termination of freedom of speech momentarily wins the competition in the marketplace of ideas and then shuts down the market. Alternatively it has been argued that Holmes's clear and present danger approach in *Abrams* was basically conditioned by his perception of the ineffectualness of leftist revolutionary rhetoric in the American context of his day. In this view, he was saying no more than that deviant ideas must be tolerated until there is a substantial risk that a large number of Americans will listen to them. The clear and present danger test is often criticized for withdrawing protection of political speech at just the point when the speech threatens to become effective. Other commentators have argued that no matter how persuasive Holmes's comments may be in context, the clear and present danger approach ought not to be uncritically accepted as the single freedom of speech test, uniformly applied to speech situations quite different from those in *Abrams*. Perhaps the most telling criticism of the Holmes approach is that it vests enormous discretion in the judge, for ultimately it depends on the judge's prediction of what will happen rather than on findings of what has happened. Subsequent decisions such as that in FEINER V. NEW YORK

(1951) showed that judges less brave than Holmes or less contemptuously tolerant of dissident ideas, might be quicker to imagine danger.

MARTIN SHAPIRO
(1986)

Bibliography

CHAFEE, ZECHARIAH 1941 *Free Speech in the United States.* Cambridge, Mass.: Harvard University Press.

## ABSOLUTISM
### (Freedom of Speech and Press)

In the 1950s and 1960s, some Justices of the Supreme Court and some commentators on the Court's work debated an abstract issue of constitutional theory pressed on it by Justice HUGO L. BLACK: Is the FIRST AMENDMENT an "absolute," totally forbidding government restrictions on speech and the press that fall within the Amendment's scope, or is the FREEDOM OF SPEECH properly subject to BALANCING TESTS that weigh restrictions on speech against governmental interests asserted to justify them? With Black's retirement in 1971, the whole airy question simply collapsed.

The argument that the First Amendment "absolutely" guaranteed speech and press freedoms was first raised in the debate over the Sedition Act (1798) but did not become the focus of debate in Supreme Court opinions for another century and a half. The occasion was presented when the Court confronted a series of cases involving governmental restrictions on SUBVERSIVE ACTIVITIES. For ALEXANDER MEIKLEJOHN, First Amendment absolutism was built into the structure of a self-governing democracy. For Justice Black, it was grounded in the constitutional text.

Black argued that "the Constitution guarantees absolute freedom of speech"—he used the modern locution, including the press when he said "speech"—and, characteristically, he drew support from the First Amendment's words: "Congress shall make no law . . . abridging the freedom of speech, or of the press." He viewed all OBSCENITY and libel laws as unconstitutional; he argued, often supported by Justice WILLIAM O. DOUGLAS, that government could not constitutionally punish discussions of public affairs, even if they incited to illegal action. But Black never claimed that the First Amendment protected all communications, irrespective of context. He distinguished between speech, which was absolutely protected, and conduct, which was subject to reasonable regulation. So it was that the First Amendment absolutist, toward the end of his life, often voted to send marchers and other demonstrators to jail for expressing themselves in places where he said they had no right to be.

First Amendment absolutism fails more fundamentally, on its own terms. A witness who lies under oath surely has no constitutional immunity from prosecution, and yet her perjury is pure speech. Most observers, conceding the force of similar examples, have concluded that even Justice Black, a sophisticated analyst, must have viewed his absolutism as a debating point, not a rigid rule for decision. In the Cold War atmosphere of the 1950s, a debating point was sorely needed; there was truth to Black's charge that the Court was "balancing away the First Amendment." As Judge LEARNED HAND had argued many years previously, in times of stress judges need "a qualitative formula, hard, conventional, difficult to evade," if they are to protect unpopular political expression against hostile majorities. A "definitional" technique has its libertarian advantages. Yet it is also possible to "define away" the First Amendment, as the Court has demonstrated in its dealings with obscenity, FIGHTING WORDS, and some forms of libel and COMMERCIAL SPEECH.

Even when the Court is defining a category of speech out of the First Amendment's scope, it states its reasons. Thus, just as "balancers" must define what it is that they are balancing, "definers" must weigh interests in order to define the boundaries of protected speech. Since Justice Black's departure from the Court, First Amendment inquiry has blended definitional and interest-balancing techniques, focusing—as virtually all constitutional inquiry must ultimately focus—on the justifications asserted for governmental restrictions. Justice Black's enduring legacy to this process is not the theory of First Amendment absolutes, but his lively concern for the values of an open society.

KENNETH L. KARST
(1986)

Bibliography

KALVEN, HARRY, JR. 1967 Upon Rereading Mr. Justice Black on the First Amendment. *UCLA Law Review* 14:422–453.

## ABSTENTION DOCTRINE

All the abstention doctrines refer to circumstances in which federal courts, having JURISDICTION over a case under a congressional enactment, nonetheless may defer to state tribunals as decision makers. Federal courts may not abstain simply because they believe that particular cases, on their facts, would more appropriately be heard in state courts; they have a general obligation to exercise jurisdiction in cases Congress has placed before them. Abstention is justified only in exceptional circumstances, and then only when it falls within a particular abstention doctrine.

There are several abstention doctrines; they differ in

their consequences and in their requirements. *Colorado River Water Conservation District v. United States* (1976) suggests a general doctrine that federal courts have power to defer in favor of ongoing state proceedings raising the same or closely related issues. This type of deference to ongoing proceedings often is not identified as abstention at all, and courts have not spelled out its requirements other than general discretion.

When a federal court does defer under this doctrine, it stays federal proceedings pending completion of the state proceedings. If the state does not proceed expeditiously, or if issues remain for decision, the federal court can reenter the case. When it does not abstain and both state and federal forums exercise their CONCURRENT JURISDICTION over a dispute, the JUDGMENT that controls is the first to become final. Federal courts deferring in favor of ongoing state proceedings avoid this wasteful race to judgment, but the price paid is that the federal plaintiff may lose the federal forum she has chosen and to which federal law entitles her.

In reconciling the competing interests, federal courts are much more likely to defer to prior state proceedings, in which the state plaintiff has won the race to the courthouse, than they are when the federal suit was first filed.

Deference, even to previously commenced state proceedings involving the same parties as the federal suit, is by no means automatic; it is discretionary—justified by the court's INHERENT POWER to control its docket in the interests of efficiency and fairness—and the Supreme Court has said that it is to be invoked sparingly. In *Colorado River Water Conservation District v. United States* the Court stated that the inherent problems in duplicative proceedings are not sufficient to justify deference to the state courts because of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."

This doctrine permitting deference serves as a backdrop to other doctrines that the Supreme Court more consistently calls "abstention." The most important of these today is the doctrine of YOUNGER V. HARRIS (1971). The doctrine started as a principle against enjoining state criminal prosecutions, but it has grown enormously. It has been expanded to bar not only suits for federal injunction but also suits for federal declaratory judgment concerning the constitutionality of an enactment involved in a pending prosecution; and today some believe it goes so far as to bar a federal damage action against state officials that might decide issues that would interfere with a state prosecution. Moreover, the doctrine has grown to protect state civil proceedings as well as criminal ones. Most remarkably, as the Court held in *Hicks v. Miranda* (1975), the doctrine now allows abstention even if the federal action is first filed, so long as the state commences prosecution "before any proceedings of substance on the merits" have occurred in federal court. That rule effectively deters federal suit; a federal plaintiff who wins the race to the courthouse may simply provoke his own criminal prosecution. These developments together have turned *Younger* into a doctrine that permits federal courts to dismiss federal constitutional challenges to state criminal prosecution (or quasi-criminal) enactments whenever a state criminal prosecution (or other enforcement proceeding) provides a forum for the federal constitutional issue. The state forum in theory must be an adequate one, but courts applying the doctrine often overlook this aspect of the inquiry.

Courts abstaining under the *Younger* doctrine generally dismiss the federal suit rather than retaining jurisdiction. Federal plaintiffs who are left to defend state proceedings generally cannot return to federal court for adjudication of the federal or any other issues, and the state court's decision on the constitutional issue and others may control future litigation through collateral estoppel. Litigants do, of course, retain the possibility of Supreme Court review of the federal issues they raise in state court, but the chances that the Supreme Court will hear such cases are slim.

The *Younger* doctrine therefore often deprives the federal plaintiff of any federal forum—prior, concurrent, or subsequent to the state proceeding against him—for his CIVIL RIGHTS action against state officials. This contradicts the apparent purpose of SECTION 1983, TITLE 42, UNITED STATES CODE and its jurisdictional counterpart (section 1343, Title 28) that such a forum be available. Some of those convicted in state criminal prosecutions may later raise federal issues in federal HABEAS CORPUS proceedings, but ACCESS to habeas corpus is itself increasingly limited. (See STONE V. POWELL; WAINRIGHT V. SYKES.)

The *Younger* doctrine does have exceptions. If the federal court finds state courts inadequate on the facts of the particular case (because of what the Court in *Younger* termed "bad faith, harassment, or any other unusual circumstance that would call for equitable relief"), it will exercise its jurisdiction. But this approach turns around the usual rule that it takes exceptional circumstances to decline jurisdiction, not to justify its exercise. To avoid this conflict with the usual rules allowing Congress, not the courts, to determine the appropriate cases for federal jurisdiction, *Younger* abstention should be cut back, at least by limiting it to cases in which state proceedings began before the federal one. Such an approach would assimilate *Younger* abstention to the general doctrine of deference to ongoing state proceedings, discussed above.

In the meantime the expanded version of the *Younger* doctrine has largely displaced what had been the key form of abstention, formulated in RAILROAD COMMISSION OF TEXAS V. PULLMAN COMPANY (1941). *Pullman* abstention ap-

plies to cases involving federal constitutional challenges to state law. It allows (but does not require) federal judges to refrain from deciding highly uncertain questions of state law when resolution of the questions may avoid or affect the federal constitutional issue.

*Pullman* today is the only abstention doctrine in which deference to state courts is limited to state law issues. When the federal court abstains under the *Pullman* doctrine, it holds the case while the parties seek declaratory relief on the state law issues in state court. Unless the parties voluntarily submit federal along with state issues to the state court, they have a right to return to federal court after the state adjudication is completed, for decision of the federal issues and for federal factfinding. In this respect *Pullman* abstention is a narrower intrusion on federal court jurisdiction than the *Younger* doctrine is, although the cost of shuttling back and forth from state to federal court dissuades many federal plaintiffs from retaining their federal forum. *Pullman* also differs from *Younger* because the federal plaintiff generally initiates the proceedings in state court, and they are declaratory judgment proceedings rather than criminal prosecutions or civil enforcement proceedings.

As *Younger* has expanded to include some civil enforcement proceedings and to allow abstention in favor of later-filed state proceedings, it has reduced the area for *Pullman* abstention. Both doctrines typically apply to constitutional litigation against state officials. In many cases where *Pullman* abstention could be at issue, *Younger* is operative because a state enforcement proceeding against the federal plaintiff is a possibility as long as the federal plaintiff has violated the law she challenges. If, however, the federal plaintiff has not violated the enactment she challenges, *Younger* abstention cannot apply, for the state is unable to bring a prosecution or civil enforcement proceeding against her and thereby displace the federal forum. *Pullman*, therefore, is the applicable doctrine for pre-violation suits and for challenges to state enactments that do not involve state enforcement proceedings. Many of those cases, however, will be dismissed before abstention is considered; where the plaintiff has not violated the enactment she complains of, she may have trouble showing that her controversy is justiciable. (See RIPENESS.)

While *Pullman* abstention has therefore become less and less important, a new area has recently been created for a *Pullman*-like abstention. PENNHURST STATE SCHOOL V. HALDERMAN (1984), restricting federal courts' pendent jurisdiction, requires federal litigants in suits against state governments to use state courts to pursue any related state causes of action they do not wish to forfeit. *Pennhurst* thus creates the equivalent of a mandatory *Pullman* abstention category—where state courts must be given certain state law questions to adjudicate even while a federal court exercises jurisdiction over the rest of the case. This new category is not, however, dependent upon uncertainty in state law.

Another abstention doctrine, administrative abstention, was first articulated in *Burford v. Sun Oil Company* (1943). The *Burford* doctrine allows a federal court with jurisdiction of a case to dismiss in favor of state court adjudication, ongoing or not. Like *Younger* abstention, *Burford* abstention displaces federal jurisdiction; if abstention is ordered, state courts adjudicate all issues, subject only to Supreme Court review. The Court has never clearly explained which cases are eligible for administrative abstention. The doctrine is typically employed when a state administrative process has dealt with a controversy in the first instance and the litigant then asks a federal district court to exercise either its federal question or diversity jurisdiction to review that administrative interpretation. The federal court's ability to abstain under this doctrine may be limited to situations in which state statutes concentrate JUDICIAL REVIEW of the administrative process in a particular state court so that it becomes "an integral part of the regulatory process," as the Court said in *Alabama Public Service Commission v. Southern Railway* (1951), or to situations involving complex factual issues. There is no requirement that legal issues, state or federal, be unclear for this abstention to be ordered, or that the case contain any federal issues.

*Burford* abstention does not apply when state administrative remedies have been skipped altogether and the litigant has sued first in federal court. The only issue then is whether state administrative remedies must be exhausted. There is no overlap between *Burford* and the *Younger* or *Pullman* abstention doctrines, because exhaustion of administrative remedies has not been required in suits under section 1983, which today includes all constitutional litigation. The Court recently affirmed this exception to the exhaustion requirement in *Patsy v. Board of Regents* (1982). If the Court were to modify the section 1983 exception to the exhaustion requirement, retreat from the *Burford* doctrine would seem to follow. Otherwise, *Burford* would mandate state judicial review after deference to state administrative proceedings, so federal jurisdiction would be altogether unavailable in section 1983 cases whenever an administrative agency was available.

A final minor category of abstention, which seems to have been limited to EMINENT DOMAIN cases involving unclear state issues, is reflected in *Louisiana Light & Power Company v. Thibodaux* (1959). In contexts other than eminent domain, abstention is not proper simply to clarify difficult state law issues. (In states that provide for certification, however, a federal court without more can certify difficult state issues to the state supreme court.)

All these theories of abstention are judge-made rules, without any statutory authority; they avoid jurisdiction in cases where Congress has given it. By contrast, Congress itself has provided for deference to state processes in narrow categories of cases, most notably cases involving INJUNCTIONS against state rate orders and tax collections. And in the Anti-Injunction Act, Congress has generally prohibited federal injunctions against state proceedings. This prohibition is limited by explicit statutory exceptions, however, and by some judge-made exceptions, and since the area outside the prohibition also is limited, by the judge-made abstention doctrines, the statute apparently has little effect.

MARTHA A. FIELD
(1986)

Bibliography

FIELD, MARTHA A. 1974 Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine. *University of Pennsylvania Law Review* 122:1071–1087.

——— 1981 The Uncertain Nature of Federal Jurisdiction. *William & Mary Law Review* 22:683–724.

FISS, OWEN 1977 Dombrowksi. *Yale Law Journal* 86:1103–1164.

LAYCOCK, DOUGLAS 1977 Federal Interference with State Prosecutions: The Need for Prospective Relief. *Supreme Court Review* 1977:193–238.

## ABSTENTION DOCTRINE
(Update)

In recent years, the Supreme Court has clarified three aspects of the abstention doctrines. First, *Quackenbush v. Allstate Insurance Co.* (1996) made it clear that abstention is not appropriate in suits for monetary damages, but rather only as to claims for injunctive or declaratory relief. The petitioner, Charles Quackenbush, the California Insurance Commissioner, sued Allstate Insurance Company in state court seeking money damages for breach of contract and torts. Allstate removed the matter to federal court based on DIVERSITY JURISDICTION.

The federal district court remanded the case to state court on the basis of *Burford v. Sun Oil Co.* (1942), which provides for federal court abstention when unified state proceedings are needed. The Supreme Court unanimously reversed. The Court concluded that "the power to dismiss under the *Burford* doctrine, as with other abstention doctrines, derives from the discretion historically enjoyed by courts of equity." Thus, abstention was inappropriate in the suit for money damages. Although the case dealt with only one type of abstention, it contained a broad statement that abstention is not appropriate in suits brought solely for money damages.

Second, in *Arizonans for Official English v. Arizona* (1997), the Court stressed the importance of federal courts' using state CERTIFICATION procedures when they are available. Many states have laws that allow a federal court to certify questions and send them to the state court for resolution. In a case involving a challenge to Arizona's English-only law, the Court said that certification should be used when there are "novel, unsettled questions" of state law. The Court said that "[t]aking advantage of certification made available by a State may greatly simplify an ultimate adjudication in federal court."

The Court indicated that federal courts should be more willing to abstain when certification procedures exist. The Court emphasized that certification does not involve the delays, expense, and procedural complexity that generally attend the abstention decision.

Finally, in *Wilton v. Seven Falls Co.* (1995) the Court ruled that in suits for DECLARATORY JUDGMENTS federal courts have discretion whether to defer to duplicative state proceedings. Wilton, an insurance underwriter, filed a suit for a declaratory judgment in federal court, seeking a ruling that it was not liable to Seven Falls Co. under insurance policies. Seven Falls then filed a suit in state court against Wilton and asked the federal court to dismiss or stay the state court proceedings. The district court granted the stay to avoid duplicative litigation and both the court of appeals and the U.S. Supreme Court affirmed.

Although the exceptional circumstances warranting abstention were not present, the Supreme Court unanimously concluded that the federal court had discretion to abstain under the federal Declaratory Judgment Act. The Court emphasized that the act is written in discretionary terms and that it has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants. The Court, however, offered little guidance as to the criteria that a federal court should apply in deciding whether to defer to state proceedings when there is a request for a federal declaratory judgment.

None of these decisions creates new abstention doctrines or dramatically changes existing ones. But each clarifies an important aspect of abstention doctrines.

ERWIN CHEMERINSKY
(2000)

Bibliography

REHNQUIST, JAMES C. 1994 Taking Comity Seriously: How to Neutralize the Abstention Doctrine. *Stanford Law Review* 46:1049–1114.

YOUNG, GORDON G. 1993 Federal Courts Abstention and State

Administrative Law from *Burford* to *Ankenbrandt*. *DePaul Law Review* 42:859–982.

## ACADEMIC FREEDOM

Although academic freedom has become a FIRST AMENDMENT principle of special importance, its content and theoretical underpinnings have barely been defined. Most alleged violations of academic freedom can be sorted into three catagories: claims of individual professors against the state, claims of individual professors against the university administration or governing board, and claims of universities against the state. Judicial decisions have upheld claims in all three contexts.

The Supreme Court, however, has not developed a comprehensive theory of academic freedom comparable to its recent elaboration of freedom of association as a distinctive First Amendment DOCTRINE. The relationship between "individual" and "institutional" academic freedom has not been clarified. Nor has the Supreme Court decided whether academic freedom is a separate principle, with its own constitutional contours justified by the unique roles of professors and universities in society, or whether it highlights but is essentially coextensive with the general First Amendment rights of all citizens. Similarly unsettled is the applicability, if any, of academic freedom in primary and secondary schools. While acknowledging that teachers, unlike university professors, are expected to inculcate societal values in their students, the Supreme Court in BOARD OF EDUCATION V. PICO (1982) expressed concern about laws that "cast a pall of orthodoxy" over school as well as university classrooms. Student claims of academic freedom also remain unresolved.

This uncertainty about the constitutional definition of academic freedom contrasts with the internal understanding of the university community, which had elaborated its meaning before any court addressed its legal or constitutional significance. The modern American conception of academic freedom arose during the late nineteenth and early twentieth centuries, when the emerging research university eclipsed the religious college as the model institution of higher education. This structural change reflected an equally profound transformation of educational goals from conserving to searching for truth.

Academic freedom became associated with the search for truth and began to define the very idea of the university. Its content developed under the influence of Darwinism and the German university. The followers of Charles Darwin maintained that all beliefs are subject to the tests of inquiry and that apparent errors must be tolerated, and even expected, in the continuous search for truth. The German academic influence reinforced the growing secular tendencies in the United States. Many attributed the international preeminence of German universities to their traditions of academic freedom. As universities in the United States strove for similar excellence, they adapted these traditions.

This adaptation produced several major changes. The clear German differentiation between great freedom for faculty members within the university and little protection for any citizen outside it did not take hold in America. The ideal of FREEDOM OF SPEECH, including its constitutional expression in the First Amendment, and the philosophy of pragmatism, which encouraged the participation of all citizens in social and political life, prompted American professors to view academic freedom as an aspect of more general CIVIL LIBERTIES. The traditions of powerful administrators and lay boards of governors in American universities posed threats to academic freedom that did not exist in Germany, where universities were largely governed by their faculties. As a result, American professors sought freedom from university authorities as well as from external interference. And academic freedom, which in Germany encompassed freedom for both students and professors, became limited to professors in the United States.

The first major codification of the American conception of academic freedom was produced in 1915 by a committee of the nascent American Association of University Professors (AAUP). Subsequent revisions culminated in the 1940 *Statement of Principles on Academic Freedom and Tenure*, jointly sponsored by the AAUP and the Association of American Colleges, and currently endorsed by over 100 educational organizations. The 1940 *Statement* defines three aspects of academic freedom: freedom in research and publication, freedom in the classroom, and freedom from institutional censorship or discipline when a professor speaks or writes as a citizen. Many colleges and universities have incorporated the 1940 *Statement* into their governing documents. In cases involving the contractual relationship between professors and universities, courts have recently begun to cite it as the COMMON LAW of the academic profession. This contractual theory has provided substantial legal protection for academic freedom without the support of the First Amendment, whose applicability to private universities is limited by the doctrine of STATE ACTION.

The emergence of academic freedom as a constitutional principle did not begin until the McCarthy era of the 1950s, when public and university officials throughout the country challenged and investigated the loyalty of professors. Although earlier decisions had imposed some limitations on governmental intrusions into universities and

schools, no Supreme Court opinion explicitly referred to academic freedom until Justice WILLIAM O. DOUGLAS, dissenting in ADLER V. BOARD OF EDUCATION (1952), claimed that it is contained within the First Amendment.

The Supreme Court endorsed this identification of academic freedom with the First Amendment in SWEEZY V. NEW HAMPSHIRE (1957), which reversed the contempt conviction of a Marxist scholar who had refused to answer questions from the state attorney general regarding his political opinions and the contents of his university lecture. A plurality of the Justices concluded that the state had invaded the lecturer's "liberties in the areas of academic freedom and political expression." Both the plurality and concurring opinions in *Sweezy* emphasized the importance to a free society of the search for knowledge within free universities and warned against governmental interference in university life. Justice FELIX FRANKFURTER's concurrence included a particularly influential reference to academic freedom that has often been cited in subsequent decisions. Quoting from a plea by South African scholars for open universities, Frankfurter identified " 'the four essential freedoms of a university'—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

The opinions in *Sweezy* indicated that academic freedom and political expression are distinct yet related liberties, and that society benefits from the academic freedom of professors as individuals and of universities as institutions. Yet neither in *Sweezy* nor in subsequent decisions did the Supreme Court untangle and clarify these complex relationships. Throughout the 1950s, it alluded only intermittently to academic freedom in cases involving investigations of university professors, and reference to this term did not necessarily lead to protective results. Even the votes and reasoning of individual Justices fluctuated unpredictably. During this period, many within the academic community resisted the advocacy of academic freedom as a constitutional principle, fearing that a judicial definition might both weaken and preempt the one contained in the 1940 *Statement* and widely accepted throughout American universities.

Supreme Court opinions since the 1950s have emphasized that academic freedom is a "transcendent value" and "a special concern of the First Amendment," as the majority observed in KEYISHIAN V. BOARD OF REGENTS (1967). Justice LEWIS F. POWELL's opinion in REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE (1978) reiterated the university's academic freedom to select its student body, but the Court has held in *Minnesota State Board for Community Colleges v. Knight* (1984) that academic freedom does not include the right of individual faculty members to participate in institutional governance. By eliminating the RIGHT-PRIVILEGE DISTINCTION, which had allowed dismissal of PUBLIC EMPLOYEES for speech otherwise protected by the First Amendment, the Supreme Court during the 1960s and 1970s dramatically expanded the rights of all public employees, including university professors, to speak in ways that criticize or offend their employers. Yet none of these decisions has refined the relationships between "individual" and "institutional" academic freedom or between "academic freedom" and "political expression," issues posed but not resolved in *Sweezy*. The Supreme Court's continuing reluctance even to recognize issues of academic freedom in cases decided on other grounds underlines the primitive constitutional definition of this term.

Cases since the early 1970s have raised novel issues of academic freedom. University administrators and governing boards have asserted the academic freedom of the university as an institution to resist JUDICIAL REVIEW of their internal policies and practices, which have been challenged by government agencies seeking to enforce CIVIL RIGHTS laws and other statutes of general applicability, by citizens claiming rights to freedom of expression on university property, and by professors maintaining that the university violated their own academic freedom or their statutory protection against employment discrimination. Faculty members have even begun to make contradictory claims of academic freedom against each other. Professors have relied on academic freedom to seek a constitutionally based privilege against compelled disclosure of their deliberations and votes on faculty committees to junior colleagues who want this information to determine whether they were denied reappointment or tenure for impermissible reasons, including reasons that might violate their academic freedom. These difficult issues may force the courts to address more directly the meaning and scope of academic freedom and to resolve many of the lingering ambiguities of previous decisions.

DAVID M. RABBAN
(1986)

(SEE ALSO: *Creationism; Tennessee v. Scopes.*)

Bibliography

HOFSTADTER, RICHARD and METZGER, WALTER 1955 *The Development of Academic Freedom in theUnited States.* New York: Columbia University Press.

LOVEJOY, ARTHUR 1937 Academic Freedom. In E. Seligman, ed., *Encyclopedia of the Social Sciences*, Vol. 1, pages 384–388. New York: Macmillan.

SYMPOSIUM 1963 Academic Freedom. *Law & Contemporary Problems* 28:429–671.

VAN ALSTYNE, WILLIAM 1972 The Specific Theory of Academic Freedom and the General Issue of Civil Liberty, In E. Pincoffs, ed., *The Concept of Academic Freedom*, pages 59–85. Austin: University of Texas Press.

## ACCESS TO THE COURTS

Writing for the Supreme Court in BOUNDS V. SMITH (1977), Justice THURGOOD MARSHALL spoke confidently of "the fundamental constitutional right of access to the courts." In one sense, such a right has been a traditional and noncontroversial part of our constitutional law; barring unusual circumstances, anyone can bring a lawsuit, or be heard in his or her own defense. Justice Marshall, however, was referring to another kind of access. "Meaningful" access to the courts, *Bounds* held, gave state prisoners a right to legal assistance; the state must provide them either with law libraries or with law-trained persons to help them prepare petitions for HABEAS CORPUS or other legal papers. The modern constitutional law of access to the courts, in other words, is focused on the affirmative obligations of government to provide services to people who cannot afford to pay their costs. In this perspective, Justice Marshall's sweeping characterization goes far beyond the results of the decided cases.

The development began in the WARREN COURT era, with GRIFFIN V. ILLINOIS (1957) (state must provide free transcripts to convicted indigents when transcripts are required for effective APPEAL of their convictions) and DOUGLAS V. CALIFORNIA (1963) (state must provide appellate counsel for convicted indigents). GIDEON V. WAINWRIGHT (1963) interpreted the RIGHT TO COUNSEL to require state-appointed trial counsel in FELONY cases. The *Griffin* plurality had rested on both DUE PROCESS and EQUAL PROTECTION grounds, but by the time of *Douglas* equal protection had become the Court's preferred doctrine: the state, by refusing to pay for appellate counsel for some indigent defendants, had drawn "an unconstitutional line . . . between rich and poor." By the close of the Warren years, the Court seemed well on the way to a broad equal protection principle demanding strict judicial scrutiny of WEALTH DISCRIMINATIONS in the criminal justice system, including simple cases of inability to pay the costs of services needed for effective defense.

The Court remained sharply divided, however; the dissenters in *Griffin* and *Douglas* argued in forceful language that nothing in the Constitution required the states to take affirmative steps to relieve people from the effects of poverty. They saw no principled stopping-place for the majority's equality principle, and they objected to judicial intrusion into state budgetary processes. Even so, the same Justices found no difficulty in joining the 8–1 decision in BODDIE V. CONNECTICUT (1971), holding that a state could not constitutionally bar an indigent plaintiff from its divorce court for failure to pay a $60 filing fee. The *Boddie* majority, however, rested on a due process ground. The marriage relationship was "basic," and the state had monopolized the means for its dissolution; thus fundamental procedural fairness demanded access to the divorce court irrespective of ability to pay the fee.

From *Boddie* forward, the Court has dealt with constitutional claims of access to justice by emphasizing due process considerations of minimal fairness, and deemphasizing the equal protection notion that animated the Warren Court's decisions. At the same time, the Court has virtually ended the expansion of access rights. Thus ROSS V. MOFFIT (1974) pounced on language in *Douglas* about the "first appeal as of right," and refused to require state-appointed counsel to pursue discretionary appeals or Supreme Court review. And in *United States v. Kras* (1971) and *Ortwein v. Schwab* (1971) the Court, emphasizing the "monopoly" aspects of *Boddie*, upheld the application of filing fees to deny indigents access to a bankruptcy court and to judicial review of the denial of WELFARE BENEFITS. A similarly artificial line was drawn in the BURGER COURT's decisions on the right to counsel. The *Gideon* principle was extended, in ARGERSINGER V. HAMLIN (1972), to all prosecutions resulting in imprisonment. Yet in LASSITER V. DEPARTMENT OF SOCIAL SERVICES (1981) a 5–4 Court refused to hold that due process required a state to provide counsel for an indigent mother in a proceeding to terminate her parental rights, absent a showing of complexity or other special circumstances. Behind all these flimsy distinctions surely lay the same considerations urged from the beginning by the *Griffin* and *Douglas* dissenters: keep the "floodgates" closed; keep judges' hands off the allocation of public funds.

An access principle of minimal fairness is better than nothing. Yet in a great many contexts the essence of the access claim is an interest in equality itself. To have one's effective say is to be treated as a respected, participating member of the society. An effective hearing in court is more than a chance to influence a judge's decision; it is a vivid symbol of equal citizenship.

KENNETH L. KARST
(1986)

Bibliography

GOODPASTER, GARY 1970 The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts. *Iowa Law Review* 56:223–266.

MICHELMAN, FRANK I. 1973, 1974 The Supreme Court and Litigation Access Fees. Part 1, *Duke Law Journal* 1973:1153–1215; Part 2, *Duke Law Journal* 1974:527–570.

## ACCOMMODATION OF RELIGION

In the seminal case of EVERSON V. BOARD OF EDUCATION (1947), the Supreme Court asserted that the FIRST AMENDMENT contains a principle of SEPARATION OF CHURCH AND STATE that in turn entails a prohibition on GOVERNMENTAL AID TO RELIGIOUS INSTITUTIONS. But the Justices have also cautioned that an excessive emphasis on separation might amount to public hostility, or "callous indifference," toward religion. This concern soon led the Court to qualify the "separation" theme by explaining that the First Amendment contemplates governmental "accommodation" of religion. In ZORACH V. CLAUSON (1952), for example, Justice WILLIAM O. DOUGLAS wrote for the Court that government "follows the best of our tradition" when it "respects the religious nature of our people and accommodates the public service to their spiritual needs." The early cases thus established the two poles that have shaped modern debate about RELIGIOUS LIBERTY, and around which opposing legions of "separationists" and "accommodationists" have aligned themselves.

A central difficulty has been to explain how mere accommodation differs from the "advancement" or "endorsement" of religion that the Court has declared impermissible. Thus far, neither judges nor legal scholars have managed a satisfactory account of this distinction. The Court has said that a law is a permissible accommodation if it merely lifts a government-created burden on religion without affirmatively assisting religion. But in an era of pervasive governmental regulation and subsidization, both direct and indirect, this line is difficult to discern. So, for example, the Court struck down a state provision exempting religious publications from sales tax—surely a government-imposed burden—on the ground that the exemption impermissibly advanced religion.

As an alternative, Justice SANDRA DAY O'CONNOR has suggested that the appropriate distinction is between those accommodations that "endorse" religion and those that do not. But of course some citizens will likely perceive almost any official accommodation of religion as an endorsement. Consequently, the application of O'Connor's test turns on highly artificial discussions of whether a hypothetical "reasonable" and properly, but not excessively, informed observer would perceive an endorsement.

Recently, some scholars have suggested that distinctions should be drawn in accordance with a policy of "substantive neutrality"—a position based on the premise that the constitutional objective is to prevent government from influencing people, pro or con, in matters of religion. In some contexts, this position would mean that religion should be treated in the same way that nonreligion is. So if government pays for students to attend secular public schools, for example, the same subsidy should be given to individuals who desire to attend religious schools. But where a government policy (a military conscription law, for example) would impose a special burden on some citizens' exercise of religion, substantive neutrality would require government to accommodate religious objectors by granting them a free-exercise exemption from the law unless there is a COMPELLING STATE INTEREST in requiring them to comply.

During the 1990s, the Court has moved in the direction of this substantive neutrality position in some respects. For example, the Court has held that a deaf student in a religious school is entitled to a state-supplied sign language interpreter that would be supplied under federal law for a deaf student in a public school. And the Court ruled that a Christian student newspaper at a state university could not be excluded from funding that nonreligious publications received. In other respects, however, the Court has moved away from the substantive neutrality position. Thus, in EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990), the Court repudiated the view that in some contexts religious objectors are constitutionally entitled to free-exercise exemptions from generally applicable laws.

Moreover, critics of the position argue that the label "substantive neutrality" is misleading. In a religiously diverse society, almost any controversial governmental action will correspond to some religious viewpoints and will conflict with other religious viewpoints. Hence, particular policies and outcomes can be made to seem neutral only by marginalizing or misrepresenting incompatible religious views.

The underlying problem, it seems, is that modern religion-clause jurisprudence has not developed any clear idea about why the baseline position that accommodation serves to qualify—the position, that is, of separation or no aid—is constitutionally required in the first place. Like the *Everson* Court, modern separationists typically take it for granted, on highly dubious historical grounds, that the First Amendment imposes a no aid principle. Consequently, they make little effort to articulate the rationale for that principle. Without a clear understanding of why government aid to religion is normally impermissible, however, it is difficult to consider why and when limited forms of government help should be treated as an exception to the general rule.

STEVEN D. SMITH
(2000)

## ACT OF STATE DOCTRINE

Recognized by English courts as early as 1674, the act of state DOCTRINE prohibits United States courts from ex-

amining the validity of foreign acts of state. Chief Justice JOHN MARSHALL mentioned a doctrine of noninvolvement in 1808, but the Supreme Court did not accord it formal recognition until *Underhill v. Hernandez* (1897). Initially, the doctrine strongly resembled the doctrine of SOVEREIGN IMMUNITY which protects the person or acts of a sovereign. In fact, the act of state doctrine may have been invented to deal with technical deficiencies in sovereign immunity.

The act of state doctrine received renewed attention in *Banco Nacional de Cuba v. Sabbatino* (1964) where an 8–1 Supreme Court held that it applied even when the foreign state's sovereign act violated international law. Justice JOHN MARSHALL HARLAN's majority opinion rejected earlier assertions that the "inherent nature of sovereign authority" underlay the doctrine; instead it arose out of the SEPARATION OF POWERS. Justice BYRON R. WHITE, dissenting, read Harlan's opinion to declare "exclusive absolute [executive] control" of foreign relations. Acknowledging executive control, White claimed that "this is far from saying . . . that the validity of a foreign act of state is necessarily a POLITICAL QUESTION." The Court had, in fact, dismissed a specific executive branch request, contending that it need not be bound by executive determinations; the Court repeated this position in *Zschernig v. Miller* (1968) and unequivocally denied such executive control in *First National City Bank v. Banco Nacional de Cuba* (1972) (where two majority Justices joined four dissenters to so argue).

In an effort to harmonize the act of state doctrine with that of sovereign immunity, Justice White tried to create a commercial act exception to the act of state doctrine in *Alfred Dunhill of London, Inc. v. Cuba* (1976), but he failed to convince a majority on this issue. Because the case had involved no formal governmental decree, White would not have allowed the act of state defense. Even had an act of state been shown, White opposed the doctrine's extension to "purely commercial" acts of a sovereign or its commercial instrumentalities. He relied on the notion, accepted ever since *Bank of the United States v. Planters' Bank of Georgia* (1824), that a government's partnership in a commercial business does not confer sovereign status on that business.

Also in 1976, Congress passed the Foreign Sovereign Immunities Act which authorized American courts to determine foreign claims of sovereign immunity, thus approving judicial—as opposed to executive—decisions on the validity of such claims. Although the act established a general rule of immunity of foreign states from the jurisdiction of American courts, its "exceptions" were wide-ranging. Immunity is denied, for example, when the foreign state engages in commercial activity, or takes certain property rights in violation of international law, or is sued for damages for certain kinds of injury to person or property.

DAVID GORDON
(1986)

Bibliography

GORDON, DAVID 1977 The Origin and Development of the Act of State Doctrine. *Rutgers Law Journal* 8:595–616.

## *ADAIR v. UNITED STATES*
208 U.S. 161 (1908)

After the Pullman strike, which paralyzed the nation's railroads, a federal commission blamed the antiunion activities of the railroads and recommended legislation which Congress enacted in 1898. The ERDMAN ACT sought to free INTERSTATE COMMERCE from railroad strikes by establishing a railroad labor board with arbitration powers and by protecting the right of railroad workers to organize in unions. This second objective was the subject of section ten of the act, which prohibited YELLOW DOG CONTRACTS, blacklisting union members, and discharging employees solely for belonging to a union. The act applied to carriers engaged in interstate commerce. Adair, a manager of a carrier, fired an employee solely because of his union membership; a federal court found Adair guilty of violating section ten. On appeal the Supreme Court, by a vote of 6–2, found section ten unconstitutional for violating the Fifth Amendment's DUE PROCESS clause and for exceeding the powers of Congress under the COMMERCE CLAUSE.

Justice JOHN MARSHALL HARLAN, who spoke for the Court, usually wrote broad commerce clause opinions, but this one was constricted. He could see "no legal or logical connection" between an employee's membership in a labor organization and the carrying on of interstate commerce. The Pullman strike, the federal commission, and Congress's finding that such a connection existed meant nothing to the Court. A week later the Court held, in LOEWE V. LAWLOR (1908), that members of a labor organization who boycotted a manufacturing firm, whose products were intended for interstate commerce, had restrained interstate commerce in violation of the SHERMAN ANTITRUST ACT. In *Adair*, however, the Court found no constitutional authority for Congress to legislate on the labor affairs of interstate railroads.

Most of Harlan's opinion dealt with the due process issue. He found section ten to be "an invasion of the personal liberty, as well as the right to property," guaranteed by the Fifth Amendment. It embraced the right of employers to contract for labor and the right of labor to contract for its services without government intervention. In his exposition of FREEDOM OF CONTRACT, which is a doctrine

derived from SUBSTANTIVE DUE PROCESS, Harlan contended that "it is not within the functions of government . . . to compel any person, in the course of his business and against his will, to accept or retain the personal services of another. . . ." The right of the employee to quit, said Harlan, "is the same as the right of the employer, for whatever reason, to dispense with the services of such employee." The Court forgot the more realistic view it had expressed in HOLDEN V. HARDY (1898), and held that "any legislation" disturbing the "equality of right" arbitrarily interferes with "the liberty of contract which no government can legally justify in a free land." Justice JOSEPH MCKENNA dissented mainly on the ground that the Court "stretched to its extreme" the liberty of contract doctrine. The Court overruled *Adair* in 1949.

LEONARD W. LEVY
(1986)

Bibliography

LIEBERMAN, ELIAS 1950 *Unions Before the Bar.* Pages 44–55. New York: Harper & Row.

## ADAMS, HENRY
(1838–1918)

Born to a family whose service to the Constitution was matched by a reverence for it "this side of idolatry," Henry Brooks Adams served the Constitution as a historian of the nation it established. His great *History of the United States during the Administrations of Jefferson and Madison* as well as his biographies of JOHN RANDOLPH and ALBERT GALLATIN and his *Documents Relating to New England Federalism* remain standard sources for the events and characters of the early republican years during which the Constitution was being worked out in practice. Among the highlights of these works are Adams's ironic account of THOMAS JEFFERSON's exercise of his constitutional powers in the face of his particularist scruples, the Republican hostility to the federal judiciary, and the fate of STATES' RIGHTS views. In reply to HERMANN VON HOLST's criticism of the Constitution, Adams wrote in 1876, "the Constitution has done its work. It has made a nation." Adams's own disillusion with this nation affected his writings. Like others of his generation, he became more determinist as he became less sanguine, and the *History* shows this shift in his view as the Constitution is described becoming an engine of American nationalism, democracy, expansion, and centralization. In his novels, historical theory, letters, and *The Education of Henry Adams,* he came to regard the Constitution as almost a figment of human intention in a modern age—an age in which the kind of person it once was possible for an Adams to be has no role.

ROBERT DAWIDOFF
(1986)

Bibliography

SAMUELS, ERNEST 1948–1964 *Henry Adams.* 3 Vols. Cambridge, Mass: Harvard University Press.

## ADAMS, JOHN
(1735–1826)

Massachusetts lawyer and revolutionary leader, first vice-president and second President of the United States, John Adams was also a distinguished political and constitutional theorist. Born in 1735, the descendant of three generations of hardy independent farmers in Braintree, Massachusetts, near Boston, he attended Harvard College and after graduation studied law for several years, gaining admission to the bar in 1758. The practice of a country lawyer held no charms for him. He took delight in the study of law and government, however, and this scholarly pursuit merged imperceptibly with the polemics of the revolutionary controversy, which probed the nature and history of the English constitution. Adams made his political debut in 1765 as the author of Braintree's protest against the Stamp Act. Increasingly, from the pressures of politics as well as of business, he was drawn to Boston, moving there with his young family in 1768. Unlike his cousin SAMUEL ADAMS, he was not an ardent revolutionist. He worried about the "mischievous democratic principles" churned up by the agitation; he braved the popular torrent to defend Captain Thomas Preston and the British soldiers accused of murder in the Boston Massacre. For several years he was torn between Boston and Braintree, and the different worlds they represented. Only in 1773 did he commit himself fully to the Revolution.

The next year, during the crisis produced by the Intolerable Acts, Adams was elected one of the Massachusetts delegates to the FIRST CONTINTENTAL CONGRESS, in Philadelphia. Events had shaken his lawyerlike stance on the issues, and he championed the patriots' appeal to "the law of nature," as well as to the English constitution and COLONIAL CHARTERS, in defense of American liberties. He wrote the crucial fourth article of the congress's declaration of rights denying the authority of Parliament to legislate for the colonies, though acquiescing in imperial regulation of trade as a matter of convenience. Back in Boston he expounded his views at length in the series of *Novanglus* letters in the press. TREASON and rebellion, he argued, were on the other side—the advocates of parliamentary supremacy abroad and the Tory oligarchy at

home. He had no quarrel with George III, and he lauded the English constitution with its nice balance between king, lords, and commons and its distinctly republican character. Unfortunately, the constitution was not made for colonies. Denied REPRESENTATION in Parliament, they were deprived of the constitution's best feature. The proper relationship between the colonies and the mother country, Adams said, was the same as Scotland's before the Act of Union, that is, as an independent government owing allegiance to a common king. Had America been conquered, like Ireland, imperial rule would be warranted; but America was a discovered, not a conquered, country, and so the people possessed the NATURAL RIGHT to make their own laws as far as compatible with allegiance to the king.

In the Second Continental Congress Adams lost all hope of reconciliation on these terms, and he became a leading advocate of American independence. Although a member of the committee to draft the DECLARATION OF INDEPENDENCE, he made his greatest contribution when it came to the floor for debate. Before this he co-authored and championed the resolution—"a machine to fabricate independence" in opposition eyes—calling upon the colonies to form new governments. Nothing was more important to Adams than the making of new constitutions and the restoration of legitimate authority. He had read all the political theorists from Plato to Rousseau; now he reread them with a view to incorporating their best principles into the foundations of the polity. Government was "the divine science"—"the first in importance"—and American independence opened, in his eyes, a grand "age of political experiments." It was, he declared, "a time when the greatest lawgivers of antiquity would have wished to live. How few of the human race have ever enjoyed an opportunity of making an election of government—more than of air, soil, or climate—for themselves or their children!" To aid this work Adams sketched his ideas in an epistolary essay, *Thoughts on Government*, which was destined to have wide influence. Years later, in his autobiography, Adams said that he wrote to counteract the plan of government advanced by that "disastrous meteor" THOMAS PAINE in *Common Sense*. Paine's ideas, which gave shape to the new PENNSYLVANIA CONSTITUTION OF 1776, were "too democratical," mainly because they concentrated all power in a single representative assembly without mixture or balance. Adams, by contrast, proposed a "complex" government of representative assembly, council (or senate), and governor, each endowed with a negative on the others. The people would glide easily into such a government because of its close resemblance to the colonial governments they had known. It possessed additional merit for Adams as a thoroughly republican adaptation of the idealized balance of the English constitution. Even as he challenged the work of constitution-making, however, Adams was assailed by doubts. The new governments might be too free to survive. The essence of republics was *virtue*, that is, selfless devotion to the common weal, but Adams, still a Puritan under his republican skin, clung to a theory of human nature that emphasized man's capacity for selfishness, ignorance, and vice. The POPULAR SOVEREIGNTY that was the basis of republican government possessed the power to destroy it.

In 1779, after returning to the United States from the first of two diplomatic missions abroad, Adams had the opportunity to amplify his constitutional theory, indeed to become the Solon of his native state. Massachusetts continued to be governed by a revolutionary body, the provincial congress, without legitimate constitutional authority. Only in the previous year the citizenry had rejected a constitution framed by the congress. Now they elected a CONSTITUTIONAL CONVENTION for the specific purpose of framing a FUNDAMENTAL LAW, which would then be referred back to them for approval. (When the process was completed in 1780, the MASSACHUSETTS CONSTITUTION exhibited, for the first time anywhere, all the means by which the theory of "constituent sovereignty," one of the foundations of the American republic, was put into practice.) Elected Braintree's delegate, Adams was assigned the task of preparing a draft constitution for consideration by the convention, and this became, after comparatively few changes, its final product. The preamble reiterated the contractual and consensual basis of government. It was followed by a declaration of rights, derivative of the Virginia model but much more elaborate. Adams was not responsible for Article III—the most disputed provision—making it the duty of the legislature, and thus in turn of the various towns and parishes, to support religion; yet this was consistent with the aim of the constitution as a whole to keep Massachusetts a Christian commonwealth. For Adams religion was as essential to virtue as virtue was to republicanism. Thus he proposed a RELIGIOUS TEST for all elected officials. (The delegates voted to confine the test to the office of governor.) The strength and independence of the executive was an unusual feature of the constitution. Reacting against monarchy, most of the new state constitutions weakened and shackled the governors; but Adams believed that a kingly executive was necessary to control the conflicting passions and interests in the legislature. Accordingly, he proposed to vest the Massachusetts governor with an absolute negative on legislation. The convention declined to follow him, however, conferring a suspensive veto only. Adams ever after felt that the trimming of the governor's legislative power was the one serious error of the convention. Otherwise, with respect to the legislature, his principles were fully embodied in the constitution. Representation in the lower house was based

upon population, while representation in the upper house, being proportioned to the taxable wealth of the several senatorial districts, was based upon property. This system of giving representation to property as well as numbers had its principal source in the philosophy of James Harrington, whose axiom "power always follows property," Adams said, "is as infallible a maxim in politics as that action and reaction are equal in mechanics." Property was further joined to office by requiring wealth on an ascending scale of value to make representatives, senators, and governors eligible for their offices. Finally, the constitution retained the freehold qualification for the franchise. In these features it was a distinctly conservative document, and it would, Adams later complained, give him "the reputation of a man of high principles and strong notions in government, scarcely compatible with republicanism."

Adams was in France when the Massachusetts Constitution was ratified in 1780. After helping negotiate the treaty of peace, he was named by Congress the first minister of the United States to Great Britain. He did not return home until 1788. He had, therefore, no direct part in the formation of the United States Constitution. Of course, he took a keen interest in that event. Observing it from his station abroad, he was inevitably influenced by Europe's perception of the terrible weakness of the American confederation and by the tide of democratic revolution that, in his own perception, threatened to inundate the European continent.

Like many of the Americans who would attend the CONSTITUTIONAL CONVENTION OF 1787, Adams was alarmed by SHAY'S REBELLION in Massachusetts, and he took up his pen once again to show the way to constitutional salvation. His three-volume work, *Defence of the American Constitutions* (1787), was devoted to the classical proposition that the *"unum necessarium"* of republican government is the tripartite division of the legislative power, each of the branches embodying a distinctive principle and power—the one, the few, and the many, or monarchy, aristocracy, democracy—and the dynamics of the balance between them securing the equilibrium of the whole. The book's title was misleading. It was not actually a defense of the state constitutions, most of which Adams thought indefensible, but rather a defense of the true republican theory against the criticism of those constitutions by the French *philosophe* Robert Jacques Turgot and his school, who held that instead of collecting all authority at one center, as the logic of equality and popular sovereignty dictated, the American constitutions erred in dividing power among different social orders and principles of government in pale imitation of the English king, lords, and commons. Adams sought to demonstrate, of course, that this balanced government was founded in the law of reason and nature. He ransacked European history, carving huge chunks from the writings of philosophers and historians—about eighty percent of the text—and adding his own argumentative comments to prove his point. All societies are divided between the few and the many, the rich and the poor, aristocrats and commoners; and these two orders, actuated by passion and ambition, are constantly at war with each other. The only escape, the only security, is through the tripartite balance. It involves, primarily, erecting a third power, a monarchical executive, to serve as a balance wheel and umpire between the democracy and the aristocracy. It involves also constituting these two great orders in insulated chambers, wherein each may flourish but neither may dominate or subvert the other. Vice, interest, and ambition are rendered useful when these two orders are made to control each other and a monarchical executive is installed as the presiding genius over the whole.

With the publication of the *Defence*, Adams's political thought hardened into a system that placed him at odds with democratic forces and opinion in both Europe and the United States. In 1789 the French National Assembly rejected his doctrine. At home he was alienated from many former political friends. The subject of his apostasy from republicanism became, it was said, "a kind of political phenomenon." He denied any apostasy, of course, and his use of such galvanizing abstractions as "monarchy" and "aristocracy" undoubtedly opened him to misrepresentation. Nevertheless, the character of his thought had changed. During his sojourn abroad Adams became the captive of Old World political fears, which he then transferred to the United States, where they did not belong. Here, as he sometimes recognized, all men were of one order. Yet for several years after his return to the United States, Adams did not disguise his belief that hereditary monarchy and aristocracy must eventually prove as necessary to the American republic as they had to every other. They were, he said, the only institutions that could preserve the laws and liberties of the people against discord, sedition, and civil war.

These beliefs did not prevent Adams's election as vice-president in 1788. Long a friend of a national government, he approved of the Constitution and even imagined the *Defence* had influenced it. He wished the executive were stronger and feared the recurrent shocks to the system from frequent elections and the factions, turbulence, and intrigue they bred. For a time he toyed with the idea of a second convention to overcome these weaknesses. His concern for the authority and dignity of the government led him to propose in the First Congress a high-sounding title ("His Most Benign Highness") for the President and splendid ceremonies of state in order to awe the people. He reiterated those views and continued the argument of

the *Defence* in a series of articles (*Discourses on Davila*) in the *Gazette of the United States*, in Philadelphia. Since the articles also denounced the French Revolution, they were an American parallel to Edmund Burke's *Reflections on the Revolution in France*. When the doctrines were publicly labeled "political heresies" by Adams's old friend, THOMAS JEFFERSON, the secretary of state, the ideological division between them entered into the emerging party conflict. In this conflict Adams proved himself a loyal Federalist. Not wishing to cause further embarrassment to GEORGE WASHINGTON's administration, which the Republicans assailed as Anglican and monarchical, Adams put away his pen in 1791 and withdrew into the recesses of the vice-presidency.

Elected President in 1797, Adams at first sought political reconciliation with his Republican rival, Jefferson, but the effort foundered amidst intense partisanship and foreign crisis. The issue of war and peace with France absorbed his administration. Working to resolve it, Adams was handicapped both by the Republican opposition and by the High Federalists in his cabinet who took their orders from ALEXANDER HAMILTON. The collapse of negotiations with France was followed by frantic preparations for war in the spring of 1798. Adams favored naval defense—and the Navy Department was created. He distrusted Hamilton, who favored a large army, seeing in him a potential Caesar. When General Washington, called out of retirement to command the new army, demanded that the second place be given to Hamilton, Adams resisted, citing his prerogative as COMMANDER-IN-CHIEF, he but was finally forced to yield. He did not recommend and had no direct responsibility for the ALIEN AND SEDITION ACTS passed by Congress in July. Yet he contributed as much as anyone to the war hysteria that provoked this repressive legislation. In his public answers to the addresses of loyalty that poured into Philadelphia, Adams repeatedly condemned "the wild philosophy," "domestic treachery," and "spirit of party, which scruples not to go all lengths of profligacy, falsehood, and malignity in defaming our government." Thus branded disloyal by a President whose philosophy made no place for organized POLITICAL PARTIES, the Republican leaders became easy targets. Moreover, Adams cooperated in the enforcement of these laws. The Alien Law was not fully executed in a single instance, but Adams deserves little credit for this. He apparently approved the numerous prosecutions under the Sedition Law, and showed no mercy for its victims. In retrospect, when the impolicy of the laws was generally conceded, Adams still never doubted their constitutionality.

Despite the prescriptions of his political theory, Adams was not a strong President. Indeed, because of that theory, he continued to consider the office above party and politics, though the conception was already unworkable. In the end he asserted his authority and in one glorious act of statesmanship broke with the High Federalists and made peace with France. The domestic consequences were as important as the foreign. Adams sometimes said he made peace in order to squelch Hamilton and his designs for the army. Standing army, foreign adventurism, mounting debt and taxes—these dangers recalled to Adams the Whig doctrines of his youth. "All the declarations . . . of Trenchard and Gordon [see CATO'S LETTERS], Bolingbroke, Barnard and Walpole, Hume, Burgh, and Burke, rush upon my memory and frighten me out of my wits," he confessed. Patriotic, courageous, and wise, Adams's actions nevertheless split the Federalist party and paved the way for Jefferson's triumph in the election of 1800. Before he left office, Adams signed into law the JUDICIARY ACT OF 1801, creating many new federal courts and judgeships, which he proceeded to fill with faithful partisans. In the Republican view the Federalists retreated to the judiciary as a fortress from which to defeat every popular reform. Less noticed at the time but more important for the nation's constitutional development was the nomination and appointment of JOHN MASHALL as Chief Justice of the United States.

In retirement at Quincy, Adams slowly made peace with Jeffersonian Republicanism and watched his son JOHN QUINCY ADAMS, who broke with the Federalists in 1808, rise to become the sixth President of the United States. A compulsive and contentious reader, Adams never lost his enthusiasm for political speculation; and although he grew more and more hopeful about the American experiment, he continued to the end to warn the people against their own suicidal tendencies. In 1820 he attended the convention to revise the Massachusetts constitution he had drafted forty years before. When the reformers attacked the "aristocratical principle" of a senate bottomed on property, Adams spoke spiritedly in its defense. And, with most of the original constitution, it survived. The finest literary product of these years—one of the intellectual monuments of the age—was his correspondence with Thomas Jefferson, with whom he was reconciled in friendship in 1812. The correspondence traversed an immense field. In politics, the two men discoursed brilliantly on "natural aristocracy," further defining a fundamental issue of principle between them. Interestingly, Adams's political anxieties, unlike Jefferson's, never fixed upon the Constitution. He did not turn political questions into constitutional questions. He was a nationalist, of course, and spoke highly of the Union; but for all his work on constitutional government, Adams rarely uttered a complete thought on the United States Constitution. The amiability and learning, the candor and humor, with the occasional banter and abandon of his letters were all perfectly in character. In the often quoted observation of BENJAMIN FRANKLIN, John

Adams was "always an honest man, often a wise one, but sometimes, and in some things, absolutely out of his senses." He died, as did Jefferson, on the fiftieth anniversary of American independence, July 4, 1826.

MERRILL D. PETERSON
(1986)

Bibliography

ADAMS, CHARLES FRANCIS, ed. 1850–1856 *The Works of John Adams.* 10 Vols. Boston: Little, Brown.

BUTTERFIELD, LYMAN C., ed. 1961 *The Diary and Autobiography of John Adams.* 4 Vols. Cambridge, Mass.: Harvard University Press.

HARASZTI, ZOLTAN 1952 *John Adams and the Prophets of Progress.* Cambridge, Mass.: Harvard University Press.

HOWE, JOHN R., JR. 1966 *The Changing Political Thought of John Adams.* Princeton, N.J.: Princeton University Press.

KURTZ, STEPHEN G. 1957 *The Presidency of John Adams.* Philadelphia: University of Pennsylvania Press.

SMITH, PAGE 1962 *John Adams.* 2 Vols. Garden City, N.Y.: Doubleday.

## ADAMS, JOHN QUINCY
(1767–1848)

John Quincy Adams served the nation in its earliest days, contributing as diplomat, secretary of state, President, and congressman to the development of constitutional government in America. Throughout his career he sought to be a "man of the whole nation," an ambition that earned him enemies in his native New England and in the South during a period of political sectionalism. As congressman from Massachusetts between 1831 and 1848, he played a decisive role in the development of the WHIG theory of the United States Constitution. His speeches in this period inspired a whole generation of Americans to resist the expansion of SLAVERY and to defend the Union.

Adams's political career began at the age of fifteen, when he went as private secretary to his father, JOHN ADAMS, on the diplomatic mission that negotiated the Treaty of Paris (1783). In 1801 he was elected United States senator. He angered Federalists by his support of THOMAS JEFFERSON's acquisition of Louisiana and by his cooperation with the administration's policy of countering English and French attacks on American shipping by economic means. This policy resulted in the Embargo (1807) and gave rise to a SECESSION movement in New England (culminating in the HARTFORD CONVENTION of 1814–1815). Eighteen months before his term ended, the legislature elected a replacement and Adams resigned his Senate seat. He returned to private practice of the law, supporting the Yazoo claimants before the Supreme Court in FLETCHER V. PECK (1809). In the same year, President JAMES MADISON appointed him minister to Russia. As secretary of state under JAMES MONROE (1816–1824), Adams secured American territorial claims to the Pacific Northwest and defended ANDREW JACKSON's conduct in Florida during the Seminole Wars. Adams was the principal author of the MONROE DOCTRINE, defending the Latin American republics from fresh incursions by European imperialism.

In 1824 Adams was elected President by the House of Representatives, none of the major candidates (Adams, Jackson, William Crawford, and HENRY CLAY) having achieved a majority in the ELECTORAL COLLEGE. The 1824 election created a political enmity between Adams and Jackson that seriously undermined Adams's presidency. Jackson had received a large plurality of popular votes, and the general's supporters portrayed Adams's election as an antidemocratic "corrupt bargain" between Adams and Clay, whom Adams appointed as secretary of state. In spite of Adams's strong disapproval of partisan politics, his administration gave rise to the second party system: Jacksonian Democrats versus Whigs.

In addition to the conflict between "plain republicans" and "aristocrats"—a popular division recalling the rhetoric of the Jeffersonians—another conflict arising from Adams's presidency was that between partisans of "BROAD CONSTRUCTION" and of "STRICT CONSTRUCTION" of the constitutional powers of the federal government. This division arose from Adams's call for a vigorous program of nationally funded INTERNAL IMPROVEMENTS—roads, canals, harbors, naval facilities, etcetera—a program that Henry Clay named the AMERICAN SYSTEM. But at bottom the division resulted from fundamental disagreements about the character of the Union.

Defeated for reelection in 1828, Adams seemed at the end of his career. In 1829 he wrote the least prudent, if most interesting, of his many essays and pamphlets, an account of the events leading up to the convening of the Hartford Convention, implicating many of New England's most famous men in TREASON. In writing this long essay (published posthumously as *Documents Relating to New England Federalism, 1801–1815*) he developed a THEORY OF THE UNION that constituted the burden of his speeches and public writings until his death in 1848, and that became the political gospel of the new Republican party and its greatest leader, ABRAHAM LINCOLN.

According to Adams, the Constitution was not a compact between sovereign states but was the organic law of the American nation, given by the American people to themselves in the exercise of their inalienable right to consent to the form of government over them. The state governments derived their existence from the same act of consent that created the federal government. They did not exist before the federal government, therefore, and could not have created it themselves by compact. What is more,

the state governments, like the federal government, depended decisively on the truth of those first principles of politics enunciated in the DECLARATION OF INDEPENDENCE for their own legitimacy.

This Whig theory of the Constitution was politically provocative. By it slavery was a clear moral evil. Adams, like Lincoln after him, justified the compromise with slavery as necessary in the circumstances to the existence of a constitutional union in America, but Adams vehemently maintained the duty to prevent the spread of what was at best a necessary evil. While he advocated a scrupulous care for the legal rights of slavery where it was established, he insisted that the government of the United States must always speak as a free state in world affairs. He believed it to be a duty of the whole nation to set slavery, as Lincoln would later say, on the course of ultimate extinction.

This theory guided his words and deeds in the House of Representatives from 1831 until his death. For fourteen years he waged an almost single-handed war against the dominant Jacksonian Democratic majority in the House, a struggle focused on the GAG RULE. The gag rule was actually a series of standing rules adopted at every session of Congress from 1836 on. In its final form it read: "No petition, memorial, resolution, or other paper praying the abolition of slavery in the DISTRICT OF COLUMBIA or any State or Territory, or the slave trade between the States or Territories in which it now exists, shall be received by this House, or entertained in any way whatever."

The gag rule was part of a policy followed by the Democratic party in this period, on the advice of JOHN C. CALHOUN, among others, never in the least thing to admit the authority of Congress over slavery. Adams argued that the gag was a patent abrogation of the FIRST AMENDMENT's guarantee of FREEDOM OF PETITION. His speeches against the gag became a rallying point for the growing free-soil and abolition movements in the North, though Adams himself was cautious about endorsing the program of the radicals.

Through a long and varied career, Adams's statesmanship was guided by the twin principles of liberty and union. As a diplomat and architect of American foreign policy, Adams played a large part in the creation of a continental Republic. He believed that the westward expansion of the country was necessary if the United States was to minimize foreign interference in its domestic politics. Yet expansion brought the most powerful internal forces of disruption of the Union into play and prepared the way for the CIVIL WAR.

GEORGE FORSYTH
(1986)

Bibliography

BEMIS, SAMUEL F. 1949 *John Quincy Adams and the Foundations of American Foreign Policy.* New York: Knopf.

——— 1956 *John Quincy Adams and the Union.* New York: Knopf.

LIPSKY, GEORGE A. 1950 *John Quincy Adams: His Theories and Ideas.* New York: Crowell.

## ADAMS, SAMUEL
(1722–1803)

Samuel Adams was one of the greatest leaders of the AMERICAN REVOLUTION whose career flourished during the long struggle with Great Britain. His strength was in Massachusetts state politics; he was less successful as a national politician. His speeches and writings influenced the shape of American constitutional thought.

Adams's political career began in 1764 when he wrote the instructions of the Boston town meeting to Boston's representatives in the legislature. These included the first formal denial of the right of Parliament to tax the colonists: "If taxes are laid upon us in any shape without our having a legal representation where they are laid, are we not reduced from the character of free subjects to the miserable state of tributary slaves?"

The next year he was elected to the legislature and assumed leadership of the radical popular opposition to the governing clique headed by THOMAS HUTCHINSON. Adams maintained that he was defending not only the rights of British colonists but also the NATURAL RIGHTS of all men: "The leading principles of the British Constitution have their foundation in the Laws of Nature and universal Reason. . . . British rights are in great measure the Rights of the Colonists, and of all men else." Adams led the opposition to the Stamp Act and the TOWNSHEND ACTS. He denounced these acts as unconstitutional, since they involved TAXATION WITHOUT REPRESENTATION.

In the MASSACHUSETTS CIRCULATION LETTER of 1768 Adams wrote of constitutions in general that they should be fixed and unalterable by ordinary legislation, and that under no constitution could subjects be deprived of their property except by their consent, given in person or by elected representatives. Of the British Constitution in particular he argued that, although Parliament might legislate on imperial matters, only the colonial assemblies could legislate on local matters or impose special taxes.

When the British government landed troops at Boston, Adams published a series of letters denouncing as unconstitutional the keeping of a standing army in peacetime without the consent of the people of the colony. "The Americans," he wrote, "as they were not and could not be represented in Parliament, were therefore suffering under military tyranny over which they were allowed to exercise no control."

In the early 1770s, Adams worked to create a network

of committees of correspondence. In November 1772, on behalf of the Boston Committee of Correspondence, he drafted a declaration of the rights of the colonists. In three sections it proclaimed the rights of Americans as men, as Christians, and as British subjects. A list of infringements of those rights followed, including the assumption by Parliament of the power to legislate for the colonies in all cases whatsoever and the grant of a royal salary to Governor Thomas Hutchinson and the judges in Massachusetts.

In January 1773 Hutchinson, addressing the legislature, argued for acceptance of the absolute supremacy of the British Parliament and asserted that there was no middle ground between unqualified submission and independence. Samuel Adams, along with JOHN ADAMS, drafted the reply of the Assembly, arguing anew that under the British Constitution the colonial legislature shared power with Parliament.

Samuel Adams was an early proponent of a Continental Congress, and in June 1774 he was elected to the First Continental Congress. There he played a key role in the adoption of the ASSOCIATION. In the Second Continental Congress he moved, in January 1776, for immediate independence and for a federation of the colonies. In July 1776, he signed the DECLARATION OF INDEPENDENCE.

Adams remained a member of the Continental Congress until 1781. He was a member of the original committee to draft the ARTICLES OF CONFEDERATION. Suspicious of any concentration of power, he opposed creation of the executive departments of finance, war, and foreign affairs. In 1779–1780 he was a delegate to the Massachusetts CONSTITUTIONAL CONVENTION, which produced the first of the Revolutionary state constitutions to be ratified by popular vote.

Throughout the Revolutionary period Adams was a staunch supporter of unified action. When, in 1783, a Massachusetts convention was held to plan resistance to congressional enactment of a pension for army officers, Adams, who had opposed the pension, defended Congress's right to pass it and spoke out against those who would dishonor the state's commitment to pay continental debts.

In 1787, after SHAYS' REBELLION had broken out, Adams, then president of the state senate, proposed to invoke the assistance of the United States as provided in the Articles of Confederation, but his motion failed in the lower house. Later, opposing the pardon of the rebels, he argued that there is a crucial difference between monarchy and self-government and that any "man who dares to rebel against the laws of a republic ought to suffer death."

Adams was not named a delegate to the CONSTITUTIONAL CONVENTION OF 1787, but he was influential at the Massachusetts ratifying convention: "I stumble at the threshold," he wrote to RICHARD HENRY LEE, "I meet with a national government, instead of a federal union of sovereign states." He was troubled by the division of powers in the proposed federal system, which constituted "*Imperia in Imperio* [supreme powers within a supreme power] justly deemed a Solecism in Politicks, highly dangerous, and destructive of the Peace Union and Safety of the Nation." Ironically, he echoed the argument of his old enemy Hutchinson that SOVEREIGNTY was indivisible. But, after a meeting of his constituents passed a resolution that "any vote of a delegate from Boston against adopting it would be contrary to the interests, feelings, and wishes of the tradesmen of the town," Adams altered his position. In the end he supported a plan whereby Massachusetts ratified the Constitution unconditionally but also proposed a series of amendments, including a BILL OF RIGHTS.

Adams was defeated by FISHER AMES for election to the first Congress. Thereafter, although he remained active in state politics as a legislator and governor (1794–1797), he never again sought or held national office under the Constitution.

DENNIS J. MAHONEY
(1986)

Bibliography

MAIER, PAULINE 1980 *The Old Revolutionaries: Political Lives in the Age of Samuel Adams.* New York: Knopf.

MILLER, JOHN C. 1936 *Sam Adams: Pioneer in Propaganda.* Boston: Little, Brown.

WELLS, WILLIAM V. 1865 *Life and Public Services of Samuel Adams . . . With Extracts from His Correspondence, State Papers, and Political Essays.* Boston: Little, Brown.

## *ADAMS v. TANNER*
244 U.S. 590 (1917)

In a 5–4 decision, the Supreme Court declared unconstitutional a Washington state statute prohibiting individuals from paying employment agencies for their services. Although a loophole allowed prospective employers to pay the agencies' fees, Justice JAMES C. MCREYNOLDS nevertheless voided the law as a prohibition, not a regulation, of business. Citing ALLGEYER V. LOUISIANA (1897), McReynolds also declared the statute a violation of DUE PROCESS OF LAW. Justice LOUIS D. BRANDEIS dissented, joined by Justices OLIVER WENDELL HOLMES and JOHN H. CLARKE, demonstrating the "vast evils" that justified the legislature under STATE POLICE POWERS.

DAVID GORDON
(1986)

(SEE ALSO: *Olsen v. Nebraska ex rel. Reference & Bond Association; Ribnik v. McBride; Tyson & Brother v. Banton.*)

## *ADAMSON v. CALIFORNIA*
332 U.S. 46 (1947)

By a 5–4 vote the Supreme Court, speaking through Justice STANLEY F. REED, sustained the constitutionality of provisions of California laws permitting the trial court and prosecutor to call the jury's attention to the accused's failure to explain or deny evidence against him. Adamson argued that the Fifth Amendment's RIGHT AGAINST SELF-INCRIMINATION is a fundamental national privilege protected against state abridgment by the FOURTEENTH AMENDMENT and that the same amendment's DUE PROCESS clause prevented comment on the accused's silence. Reed, relying on TWINING V. NEW JERSEY (1908) and PALKO V. CONNECTICUT (1937), ruled that the Fifth Amendment does not apply to the states and that even adverse comment on the right to silence does not deny due process.

The case is notable less for Reed's opinion, which GRIFFIN V. CALIFORNIA (1965) overruled, than for the classic debate between Justices FELIX FRANKFURTER, concurring, and HUGO L. BLACK, in dissent, on the INCORPORATION DOCTRINE. Joined by Justice WILLIAM O. DOUGLAS, Black read the history of the origins of the Fourteenth Amendment to mean that its framers and ratifiers intended to make the entire BILL OF RIGHTS applicable to the states, a position that Justice FRANK MURPHY, joined by Justice WILEY RUTLEDGE, surpassed by adding that the Fourteenth Amendment also protected unenumerated rights. Frankfurter, seeking to expose the inconsistency of the dissenters, suggested that they did not mean what they said. They would not fasten on the states the requirement of the SEVENTH AMENDMENT that civil cases involving more than $20 require a TRIAL BY JURY. They really intended only a "selective incorporation," Frankfurter declared, and consequently they offered "a merely subjective test." Black, in turn, purporting to be quite literal in his interpretation, ridiculed Frankfurter's subjective reliance on "civilized decency" to explain due process. History probably supports Frankfurter's argument on the original intent of the Fourteenth Amendment, but the Justices on both sides mangled the little historical evidence they knew to make it support preconceived positions.

LEONARD W. LEVY
(1986)

## ADAMSON EIGHT-HOUR ACT
39 Stat. 721 (1916)

In 1916 major railway unions demanded an eight-hour working day and extra pay for overtime work. The railroads' refusal prompted a union call for a nationwide general strike. President WOODROW WILSON, fearing disastrous consequences, appealed to Congress for legislation to avert the strike and to protect "the life and interests of the nation." The Adamson Act mandated an eight-hour day for railroad workers engaged in INTERSTATE COMMERCE. The act also established a commission to report on the law's operation. Pending that report, the act prohibited reduction in pay rates for the shorter workday. Overtime would be recompensed at regular wages, not time and a half. Congress effectively constituted itself a labor arbitrator and vested its award with the force of law. The Supreme Court rejected the argument that Congress exceeded its constitutional authority in WILSON V. NEW (1917), sustaining the act. The Court distinguished LOCHNER V. NEW YORK (1905) by asserting that the Adamson Act did no more than supplement the rights of the contracting parties; the act did not interfere with the FREEDOM OF CONTRACT.

DAVID GORDON
(1986)

## *ADARAND CONSTRUCTORS, INC. v. PEÑA*
505 U.S. 200 (1995)

*Adarand Constructors, Inc. v. Peña*, which was an AFFIRMATIVE ACTION case decided in 1995 by a five-Justice majority of the Supreme Court, held that "all racial classifications, imposed by whatever federal, state or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." In so holding, the Court OVERRULED its decision in METRO BROADCASTING, INC. V. FCC (1990) that "benign" racial classifications are subject only to intermediate scrutiny. The Court also eliminated the distinction drawn by its opinion in RICHMOND (CITY OF) V. J.A. CROSON CO. (1989) between state and local race-based affirmative action programs (which were held subject to STRICT SCRUTINY in *Croson*) and federal affirmative action programs.

In *Adarand*, a federal contractor passed over the low bid submitted by Adarand Constructors in favor of a higher-bidding minority-owned subcontractor, because federal highway regulations gave the contractor a financial bonus for selecting subcontractors owned by "socially and economically disadvantaged individuals." Members of enumerated minority groups and women were presumed by the regulations to be socially disadvantaged. The Court viewed the presumption of social disadvantage based on race and ethnicity as a facially race-based classification, subject to strict scrutiny.

Not all affirmative action is necessarily subject to strict

scrutiny under *Adarand.* The Court held in *Adarand* that affirmative action is subject to the same level of scrutiny as garden-variety discrimination. The level of scrutiny in ordinary discrimination cases has varied—strict scrutiny applies to discrimination on the basis of race, intermediate scrutiny to gender classifications, and rationality review to classifications not recognized as subject to special constitutional protection (for example, SEXUAL ORIENTATION and age). Under *Adarand,* the same variation in levels of scrutiny appears to apply to affirmative action.

In discussing strict scrutiny, the Court expressed the "wish to dispel the notion that strict scrutiny is 'strict in theory but fatal in fact.' " The example the Court gave of an affirmative action program that would survive strict scrutiny was a program set in place by a governmental body to remedy its own past discrimination. The Court did not indicate whether governmental affirmative action programs that are not remedial in this narrow sense (and most are not) would be permissible.

The Court remanded the *Adarand* case to the lower courts, allowing them the first opportunity to decide whether the highway regulations survive strict scrutiny. The trial court invalidated the affirmative action program, subjecting it to strict scrutiny. While the case was pending on appeal, Adarand Constructors itself applied for and received certification as a socially and economically disadvantaged business. Holding that Adarand no longer had STANDING to challenge a program from which it could now benefit, the U.S. Court of Appeals for the Tenth Circuit dismissed the case as moot and vacated the district court's opinion. Thus, whether the program at issue in *Adarand* is constitutional remains unsettled.

In response to *Adarand,* President WILLIAM J. CLINTON stated that his policy towards federal affirmative action was "mend it, don't end it," and ordered federal agencies to reexamine their affirmative action programs in that light.

DEBORAH C. MALAMUD
(2000)

Bibliography

MISHKIN, PAUL J. 1996 The Making of a Turning Point: *Metro* and *Adarand. California Law Review* 84:875–886.

U.S. DEPARTMENT OF JUSTICE 1996 Proposed Reforms to Affirmative Action in Federal Procurement. *Federal Register* 61: 26042.

## *ADDERLEY v. FLORIDA*
385 U.S. 39 (1966)

A 5–4 Supreme Court, speaking through Justice HUGO L. BLACK, upheld TRESPASS convictions of CIVIL RIGHTS advocates demonstrating in a jail driveway, holding that where public property is devoted to a special use, FREEDOM OF SPEECH constitutionally may be limited in order to "preserve the property . . . for the use to which it is lawfully dedicated." This case signaled a new attention to the extent to which speakers have a right to carry their expressive activity onto private property and non-PUBLIC FORUM public property. It was also one of the first cases in which Justice Black exhibited the increasingly critical attitude toward demonstrations and other nontraditional forms of speech that marked his last years.

MARTIN SHAPIRO
(1986)

# ADEQUATE STATE GROUNDS

Although most decisions of state courts falling within the Supreme Court's APPELLATE JURISDICTION involve questions of both state and federal law, the Supreme Court limits its review of such cases to the FEDERAL QUESTIONS. Moreover, the Court will not even decide the federal questions raised by such a case if the decision below rests on a ground of state law that is adequate to support the judgment and is independent of any federal issue. This rule applies to grounds based on both state substantive law and state procedures.

In its substantive-ground aspect, the rule not only protects the state courts' authority as the final arbiters of state law but also bolsters the principle forbidding federal courts to give ADVISORY OPINIONS. If the Supreme Court were to review the federal issues presented by a decision resting independently on an adequate state ground, the Court's pronouncements on the federal issues would be advisory only, having no effect on the resolution of the case. It has been assumed that ordinarily no federal policy dictates Supreme Court review of a decision resting on an independent state substantive ground; the winner in the state court typically is the same party who has asserted the federal claim. The point is exemplified by a state court decision invalidating a state statute on both state and federal constitutional grounds. This assumption, however, is a hindrance to Justices bent on contracting the reach of particular constitutional guarantees. In *Michigan v. Long* (1983) the BURGER COURT announced that when the independence of a state court's judgment from federal law is in doubt, the Court will assume that the judgment does not rest independently on state law. To insulate a decision from Supreme Court review now requires a plain statement by the state court of the independence of its state law ground.

Obviously, the highest state court retains considerable control over the reviewability of many of its decisions in

the Supreme Court. If the state court chooses to rest decision only on grounds of federal law, as the California court did in REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE (1978), the case is reviewable by the Supreme Court. Correspondingly, the state court can avoid review by the Supreme Court by resting solely on a state-law ground, or by explicitly resting on *both* a state and a federal ground. In the latter case, the state court's pronouncements on federal law are unreviewable. Recently, several state supreme courts (Alaska, California, Massachusetts, New Jersey, and Oregon) have used these devices to make important contributions to the development of both state and federal constitutional law.

When the state court's decision rests on a procedural ground, the usual effect is to cut off a party's right to claim a federal right, because of some procedural default. The Supreme Court generally insists that federal questions be raised in the state courts according to the dictates of state procedure. However, when the state procedural ground itself violates the federal Constitution (and thus is not "independent" of a federal claim), the Supreme Court will consider the federal issues in the case even though state procedure was not precisely followed. Another exception is exemplified in NAACP V. ALABAMA (1964). There the Court reviewed the NAACP's federal claims although the state court had refused to hear them on the transparently phony ground that they had been presented in a brief that departed from the prescribed format. The adequate state ground rule protects judicial federalism, not shamming designed to defeat the claims of federal right.

A similar rule limits the availability of federal HABEAS CORPUS relief for state prisoners. (See FAY V. NOIA; WAINWRIGHT V. SYKES.)

KENNETH L. KARST
(1986)

Bibliography

FALK, JEROME B., JR. 1973 The Supreme Court of California, 1971–1972—Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground. *California Law Review* 61:273–286.

## *ADKINS v. CHILDREN'S HOSPITAL*
261 U.S. 525 (1923)

The *Adkins* case climaxed the assimilation of laissez-faire economics into constitutional law. At issue was the constitutionality of a congressional minimum wage law for women and children in the District of Columbia. (See DISTRICT OF COLUMBIA MINIMUM WAGE ACT.) The impact of the case was nationwide, affecting all similar state legislation. In the exercise of its police power over the District, Congress in 1918 established an administrative board with investigatory powers over wages and living standards for underprivileged, unorganized workers. After notice and hearing, the board could order wage increases by fixing minima for women and minors. The board followed a general standard set by the legislature: wages had to be reasonably sufficient to keep workers "in good health" and "protect their morals." A corporation maintaining a hospital in the District and a woman who had lost a job paying $35 a month and two meals daily claimed that the statute violated the Fifth Amendment's DUE PROCESS clause which protected their FREEDOM OF CONTRACT on terms mutually desirable.

The constitutionality of minimum wage legislation had come before the Court in STETTLER V. O'HARA (1917) but because Justice LOUIS D. BRANDEIS had disqualified himself, the Court had split evenly, settling nothing. In the same year, however, Professor FELIX FRANKFURTER won from the Court a decision sustaining the constitutionality of a state maximum hours law in BUNTING V. OREGON (1917). Although the Court sustained that law for men as well as for women and children, it neglected to overrule LOCHNER V. NEW YORK (1905). In that case the Court had held that minimum wage laws for bakers violated the freedom of contract protected by due process of law. Nevertheless, *Bunting* seemed to supersede *Lochner* and followed Justice OLIVER WENDELL HOLMES' *Lochner* dissent. The Court in *Bunting* presumed the constitutionality of the statute, disavowed examination of the legislature's wisdom in exercising its POLICE POWER, and asserted that the reasonableness of the legislation need not be proved; the burden of proving unreasonableness fell upon those opposed to the social measure.

Because *Bunting* superseded *Lochner* without overruling it, Frankfurter, who again defended the constitutionality of the statute, took no chances in *Adkins.* He relied on the principles of *Bunting,* the plenary powers of Congress over the District, and the overwhelmingly favorable state court precedents. In the main, however, he sought to show the reasonableness of the minimum wage law for women and children in order to rebut the freedom of contract DOCTRINE. In a BRANDEIS BRIEF, he proved the relation between the very low wages that had prevailed before the statute and the high incidences of child neglect, disease, broken homes, prostitution, and death.

A recent appointee, Justice GEORGE SUTHERLAND, spoke for the *Adkins* majority. Chief Justice WILLIAM HOWARD TAFT, joined by Justice EDWARD SANFORD, dissented also, separately. The vote was 5–3. Brandeis disqualified himself from participating because his daughter worked for the minimum wage board. Sutherland dismissed Frankfurter's brief with the comment that his facts were "interesting but only mildly persuasive." Such facts, said

Sutherland, were "proper enough for the consideration of lawmaking bodies, since their tendency is to establish the desirability or undesirability of the legislation; but they reflect no legitimate light upon the question of its validity, and that is what we are called upon to decide." The Court then found, on the basis of its own consideration of policy, that the statute was unwise and undesirable. Sutherland assumed that prostitution among the poor was unrelated to income. He claimed that the recently acquired right of women to vote had elevated them to the same status as men, stripping them of any legal protection based on sexual differences. That disposed of the 1908 ruling in MULLER V. OREGON. Consequently, women had the same right of freedom of contract as men, no more or less.

That freedom was not an absolute, Sutherland conceded, but this case did not fall into any of the exceptional categories of cases in which the government might reasonably restrict that freedom. Female elevator operators, scrubwomen, and dishwashers had a constitutional right to work for whatever they pleased, even if for less than a minimum prescribed by an administrative board. Employers had an equal right to pay what they pleased. If the board could fix minimum wages, employers might be forced to pay more than the value of the services rendered and might have to operate at a loss or even go out of business. By comparing the selling of labor with the selling of goods, Sutherland, ironically, supported the claim that capitalism regarded labor as a commodity on the open market. On such reasoning the Court found that the statute conflicted with the freedom of contract incorporated within the Fifth Amendment's due process clause. Paradoxically the Court distinguished away *Muller* and *Bunting* because they were maximum hours cases irrelevant to a case involving minimum wages, yet it relied heavily on *Lochner* as controlling, though it too was a maximum hours case. (See MAXIMUM HOURS AND MINIMUM WAGES.)

All this was too much for even that stalwart conservative, Chief Justice Taft, who felt bound by precedent to support the statute. Like Holmes, Taft perceived no difference in principle between a maximum hours law, which was valid, and a minimum wages law, which was not. Holmes went further. In addition to showing that both kinds of legislation interfered with freedom of contract to the same extent, he repudiated the freedom of conduct doctrine as he had in his famous *Lochner* dissent. He criticized the Court for expanding an unpretentious assertion of the liberty to follow one's calling into a far-reaching, rigid dogma. Like Taft, Holmes thought that *Bunting* had silently overruled *Lochner.* Both Taft and Holmes took notice of Frankfurter's evidence to make the point that the statute was not unreasonable. Holmes observed that it "does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living." Holmes also remarked that more than a women's suffrage amendment would be required to make him believe that "there are no differences between men and women, or that legislation cannot take those differences into account." Yet, the most caustic line in the dissenting opinions was Taft's: "it is not the function of this court to hold congressional acts invalid simply because they are passed to carry out economic views which the court believes to be unwise or unsound."

By this decision, the Court voided minimum wage laws throughout the country. Per curiam opinions based on *Adkins* disposed of state statutes whose supporters futilely sought to distinguish their administrative standards from the one before the Court in *Adkins.* Samuel Gompers, the leader of American trade unionism, bitterly remarked, "To buy the labor of a woman is not like buying pigs' feet in a butcher shop." A cartoon in the New York *World* showed Sutherland handing a copy of his opinion to a woman wage earner, saying, "This decision affirms your constitutional right to starve." By preventing minimum wage laws, the Court kept labor unprotected when the Depression struck. *Adkins* remained the law of the land controlling decisions as late as 1936; the Court did not overrule it until 1937. (See WEST COAST HOTEL V. PARRISH.)

LEONARD W. LEVY
(1986)

Bibliography

BERMAN, EDWARD 1923 The Supreme Court and the Minimum Wage. *Journal of Political Economy* 31:852–856.

POWELL, THOMAS REED 1924 The Judiciality of Minimum Wage Legislation. *Harvard Law Review* 37:545–573.

## *ADLER v. BOARD OF EDUCATION OF CITY OF NEW YORK*
342 U.S. 485 (1952)

*Adler* was one of the cases in which state statutes barring members of "subversive" organizations from public school and other public employment were upheld against FIRST AMENDMENT attack on the basis that public employment is a privilege not a right. Most of these decisions were effectively overruled by KEYISHIAN V. BOARD OF REGENTS (1967).

MARTIN SHAPIRO
(1986)

(SEE ALSO: *Subversive Activity.*)

# ADMINISTRATIVE AGENCIES

Administrative agencies, often called the "fourth branch," are entities of government that make decisions within par-

ticular substantive fields. Although these fields range over the full spectrum of public concern, the specificity of agencies' focus distinguishes them from other decision-making entities in the constitutional structure—the judiciary, the presidency, the Congress, indeed the individual citizen—each of which can be taken to have a scope of interest as broad as imagination will allow.

Agencies are perceived and known as such virtually without regard to their form or institutional location. They may be independent agencies—that is, not associated with any Article II executive department—which are generally administered by officials protected by law from the President's removal power. The Interstate Commerce Commission is such an agency, established over a century ago to decide entry, rates, and standards of service in the field of transportation. Alternatively, an agency may be found deep within an executive department, as the Food and Drug Administration is found within the Department of Health and Human Services. Or an agency may be identified with a cabinet officer in his or her capacity as administrator of a program. Agencies may have a handful of employees or they may have thousands. Large or small, they may speak through single individuals or through multimember collegial bodies, usually known as commissions.

The Administrative Procedure Act of 1946 serves as a second-level constitution for agencies of the federal government, specifying procedures and structural relations within and among them, and between them and other entities. But agencies are only presumptively subject to the Administrative Procedure Act—the Selective Service system, for example, has been exempted by Congress—and the act itself is in substantial part a restatement of the combination of COMMON LAW and constitutional law known as ADMINISTRATIVE LAW, which has been developing virtually since the beginning of the Republic in response to agencies' decision-making and enforcement activities.

Agencies have their origins as alternatives to Article III courts, making decisions in suits between individuals and to executive officials making decisions and seeking to enforce them in court suits. More recently agencies also have been seen as alternatives to decision making by legislative process through Congress and the President under Article I. Agencies have thus presented a difficulty for constitutional thinking under Articles I and III, arguably absorbing functions reserved to Congress, the President, and the judiciary. Agencies present a further difficulty under the due process clause of the Fifth Amendment when DUE PROCESS OF LAW is identified with legislative substance and court process.

The constitutional problem agencies pose has never reached any kind of closure. Instead, it has remained a tension in constitutional thought, unresolved because the creation and the maintenance of agencies have proceeded from inadequacies perceived in both legislative and judicial decision making.

Courts do not investigate or plan. Courts are not thought to display the resourcefulness of decision making committed to the achievement of a particular substantive end, such as workplace safety, nor the expertise of the specialists'. Courts other than the Supreme Court do not take initiative. There is widespread consensus, in fact, that courts should remain neutral and general. Moreover, the making of decisions in very large numbers of cases—those cases produced, for example, by disability benefit claims or the military draft—may be impeded by judicial process to the point that delay alone decides issues and legislated values are imperiled.

Congress also is not equipped to make any great number of particular decisions, and may be able to attend to a field of concern only at long intervals. Furthermore, where the unprecedented is faced, such as the discovery of radio waves or of nuclear energy, Congress often cannot do much more than define the field for decision. But legislators can foresee that failure to create a decision-making agency in the field effectively consigns the decisions of great public concern which will inevitably be made to individuals exercising powers under state laws of contract, property, and corporations.

Thus the existence and activity of agencies is rooted in felt necessity and is not the product of, or subject to, independent development of CONSTITUTIONAL THEORY. Nonetheless, SEPARATION OF POWERS, due process, and delegation concerns weave through determinations of internal agency structure and procedure made pursuant to statutes establishing particular agencies or under the Administrative Procedure Act. The same constitutional concerns underlie arrangement and rearrangement of the relations of the Judiciary, Congress, and the President to and through agencies. The concerns become acute and surface as explicit issues when Congress, seeking speed of decision or protection of an agency's initiative or planning, limits access to courts for review of agency decisions—partially or wholly precluding JUDICIAL REVIEW—or when the judiciary, for similar reasons, independently constricts STANDING to challenge an agency's action. The same concerns surface when Congress proves incapable of making even large choices of value within an agency's field of decision and again when the courts or Congress demand deference to agency choices of value—"deference," in this context, consisting of giving weight to what an agency says is the law because the agency says it. Constitutional questions constantly attend agency use of informal procedures in decision making. And constitutional questions both spark and restrain efforts by units within the office of the President, such as the OFFICE OF MANAGEMENT AND BUDGET, and by committees and individual members of Congress

to intervene in an agency's consideration of issues. The LEGISLATIVE VETO, now disapproved on constitutional grounds, is only one of the means of congressional and executive involvement extending beyond formal participation in agency processes or the processes of judicial review.

The demands on agencies often press them to issue statements, characterized as rules, explicitly limiting the factors to be taken into account in a decision of a particular kind. These rules may govern decisions by the agency itself or by individuals and corporate bodies within the agency's field. In their formation some public participation may be allowed. Rule-making, if not peculiar to agencies, is characteristic of them, and agencies make rules whether or not explicitly authorized by statute to do so. But inasmuch as relevant factors for decision may then be excluded and decisions in particular cases may not be made on their full merits under the governing statutes, constitutional questions of due process are presented when individuals affected by such decisions challenge them. Here, too, justification is grounded in felt necessity, the acceptance of rough justice as preferable to the entire failure of justice. In addition, the crystallization of an agency rule is viewed as facilitating congressional reentry into a field through debate of defined issues leading to focused statutory amendments.

The demands on agencies to do what other governmental bodies are not equipped to do have also led to bureaucratic hierarchies within agencies. BUREAUCRACY raises the fundamental question of responsibility in decision making. The constitutional shadow is that of arbitrariness—the making of decisions by individuals within an agency who have not been delegated authority to make them or responsibility for them, and the enforcement of decisions that are not deliberately made but are rather the outcome of contending forces within and outside the agency. Congress and the courts have responded by establishing a body of administrative law judges, by requiring records of evidence and explanations of decisions, by requiring personal decision making (one constitutional formula is "the one who decides must hear"), and by prohibiting various kinds of EX PARTE contacts with agency decision makers. These responses to administrative bureaucracy have led in turn to fears that modern agencies may be overjudicialized as a result of attention to constitutional concerns.

The principal influence of administrative agencies on constitutional law is the impact of the form of legal thought they have generated, which has differed from conventional doctrine over a substantial period of American legal history. "Legality" in agency administration is not the correctness of an outcome but rather the proper taking of factors or values into account in the making of a decision. There is little or no finality in administration: Decisions frequently remain open to revision and to justified reversal. There is no real distinction between agency action and agency inaction. The effects of agency decisions are examined and reexamined far beyond the bipolar limits of the judicial case. Values are routinely recognized—sometimes identified as noneconomic—to which no private claim can be made. In these respects, even though administrative law is evidently molded by constitutional concerns, administrative agencies may be considered seeds of anticonstitutional thought, for standard constitutional doctrine has maintained a markedly different structure of presuppositions and dichotomies. In judicial review of agencies the strong emphasis on the actualities of agency decision making, in contrast to acceptance of formal regularity in constitutional review of other decision-making bodies, contains further fundamental challenge. In large perspective, there is in administrative law a vision of agencies and courts joined with each other and with Congress in pursuit of evolving public values. This vision sits uneasily with an inherited vision, still alive in much constitutional thought, of government as invader of a private sphere of rights that it is the duty of courts to guard. The future of constitutional law will be guided in substantial part by the way these competing visions and modes of thought are integrated.

JOSEPH VINING
(1992)

(SEE ALSO: *Appointing and Removal Power, Presidential.*)

Bibliography

MASHAW, JERRY L. 1983 *Bureaucratic Justice.* New Haven, Conn.: Yale University Press.

STEWART, RICHARD B. and SUNSTEIN, CASS R. 1982 Public Programs and Private Rights. *Harvard Law Review* 95:1193–1322.

VINING, JOSEPH 1978 *Legal Identity: The Coming of Age of Public Law.* New Haven, Conn.: Yale University Press.

## ADMINISTRATIVE AGENCIES (Update)

Administrative agencies make government work. A statute that calls for government to provide benefits or to regulate the private sector will not achieve its goals unless a unit of government is given responsibility for implementing the statute. Such units are called administrative agencies. There are thousands of them in federal, state, and local governments.

Before undertaking to regulate the private sector, Congress or a state legislature must first determine that the

problem is not being dealt with adequately by the market or through COMMON LAW litigation. Sometimes, regulation is the right answer—the private sector cannot handle certain problems (like deciding which of several applicants can telecast over Channel 4 or making sure that new drugs actually work or that doctors are qualified to practice medicine). But in other cases, private sector solutions work better than does government. Government bureaucracy can stifle initiative, and agencies can be captured by the bodies they are supposed to regulate. In those situations, we have recently seen a good deal of deregulation (for example, of railroad, trucking, and airline fares or stock brokerage fees).

A hypothetical regulatory statute will illustrate some of the choices that are available to policymakers. Suppose that Congress decides to regulate the naming of INTERNET sites because it finds that the problem is not being handled adequately by the private sector. It might enact a statute ("The Internet Act") containing various vague provisions on the problem of internet site names. Most important, the Internet Act will create the Internet Board to administer the statute and will define the board's powers.

The Internet Board might have a single agency head (as does the Food and Drug Administration (FDA)) or it might have several agency heads who must act collegially (as does the Securities and Exchange Commission (SEC)). The board would probably be organizationally located within an executive branch cabinet department, as the FDA is situated within the Department of Health and Human Services. A few agencies, such as the SEC, are independent, meaning that they are not within an executive branch department. Generally, the president cannot discharge the head of an independent agency without good cause.

What will the Internet Board actually do? The board might have several powers. It might be especially concerned with cybersquatters—people who register popular names for their website, such as IBM.com, hoping to sell the name to IBM once IBM discovers that the name is taken. Thus the board might investigate the problem of cybersquatters, either commissioning studies from experts or performing research itself. It might operate a registry of internet names (a task presently performed in the private sector). It might also have a staff of investigators and prosecutors to receive complaints about violations of the act and to investigate those complaints.

Next the board might adopt rules (or regulations—the two words mean the same thing). For example, the board might adopt a rule defining cybersquatting, providing that the board can strip a name from the squatter without compensating the squatter. If the Internet Act delegates rulemaking power to the Internet Board, the board's rules will have binding effect, just like statutes.

The Administrative Procedure Act (APA) requires all federal agencies to notify the general public and invite and consider their comments before adopting rules. The APA was passed in 1946. It is an important statute that governs all aspects of federal agency operations. All of the states have their own APAs, but generally local governments do not have APAs.

The hypothetical Internet Act may also delegate adjudicatory power to the Internet Board. Thus, if board investigators unearth a case of cybersquatting that violates its rules, it may take action against the squatter. For example, it may decide that Mary, who registered the name "IBM.com," is a cybersquatter and enter an order that strips her of that name without compensation and transfers it to IBM. In addition, it may penalize Mary by requiring her to pay a civil penalty either to IBM or to the government.

The Constitution provides that government cannot deprive anyone of life, liberty, or PROPERTY without DUE PROCESS OF LAW. The Fifth Amendment applies the due process clause to the federal government and the FOURTEENTH AMENDMENT applies it to state and local government. Due process would require the Internet Board to give notice and a fair trial-type hearing before it takes adjudicatory action against Mary. Thus she would be entitled to present witnesses and to the RIGHT OF CONFRONTATION of the witnesses against her. The APA supplements the requirements of due process; it contains detailed provisions that ensure impartial decisionmakers and fair administrative hearings.

The Internet Board's hearings probably would be conducted by administrative law judges (ALJs), board staff members whose only job would be to hear the board's cases and write proposed decisions. However, an ALJ would not make the final board decision; the head or heads of the board would make the final decision, based on the record of the hearing. They may agree or disagree with the ALJ's proposed decision.

JUDICIAL REVIEW OF ADMINISTRATIVE ACTS is important and extremely common. Courts scrutinize agency rules and orders to assure that they meet standards of legality, rationality, and fair procedure. Again, the APA provides the ground rules for judicial review.

One section of the APA is called the FREEDOM OF INFORMATION ACT (FOIA). It was first passed in 1966 and has been repeatedly amended. The most important part of FOIA is that any person has the right to demand that any agency give it any document in the agency's possession. FOIA has some narrowly defined exceptions, but most information possessed by government agencies must be disclosed on demand. FOIA is rigorously enforced by the federal courts.

Under our constitutional system, an administrative

agency shares power with each of the three branches. When it makes rules, it legislates in a way similar to enactments of laws by Congress. When it investigates and prosecutes violations of the rules, it enforces the law, much as would the President or a state governor. When it adjudicates cases, its actions resemble those of a court. For this reason, agencies are sometimes referred to as the fourth branch of government—a branch not provided for in the Constitution. Nevertheless, the Supreme Court long ago dispelled doubts about the power of Congress to delegate legislative and adjudicatory power to agencies. Administrative agencies are an essential element of modern government, which could not possibly function without them.

MICHAEL ASIMOW
(2000)

Bibliography

ASIMOW, MICHAEL; BONFIELD, ARTHUR EARL; and LEVIN, RONALD M. 1998 *State and Federal Administrative Law*, 2nd ed. St. Paul, Minn.: West Publishing Co.

DAVIS, KENNETH C. and PIERCE, RICHARD J. 1994 *Administrative Law Treatise*, 3rd ed. Boston, Mass.: Little Brown & Co.

STRAUSS, PETER L. 1981 *An Introduction to Administrative Justice in the United States*. Durham, N.C.: Carolina Academic Press.

## ADMINISTRATIVE LAW

"Administrative law" describes the legal structure of much of the executive branch of government, particularly the quasi-independent agencies, and the procedural constraints under which they operate. Most of these constraints are statutory; those that do involve the Constitution flow chiefly from the doctrine of SEPARATION OF POWERS and the DUE PROCESS clause. To comprehend the effects of either of these on administrative law one must understand the growth of the administrative agency in the modern American state.

The early years of the twentieth century saw both a growth in the executive branch of the federal government and, perhaps more important, increased expectations about tasks it should perform. Some have seen these changes as a natural concomitant of industrialization; some as a growth in the power of a new professional class claiming to possess a nonpolitical expertise; some as the result of political pressure developed by farmers and small-town residents who looked to government to contain corporate juggernauts; some as the consequence of the desire of those very juggernauts to gain government sanction shielding them from the competitive forces of the marketplace. Whatever the causes, federal, state, and municipal governments took on new tasks in the closing decades of the nineteenth and the opening ones of the twentieth centuries.

Agencies such as the Interstate Commerce Commission, the Federal Trade Commission, the Food and Drug Administration, and the Federal Reserve Board bore witness to national perceptions that the existing economic and social mechanisms left something to be desired and that increased government intervention was the solution. At the local level the rise of social welfare agencies and zoning boards bespoke similar concerns.

With the coming of the Great Depression the federal government sought to revive the economy through numerous public programs designed both to coordinate sectors of the nation's industrial and commercial life (the WAGNER NATIONAL LABOR RELATIONS ACT, the AGRICULTURAL ADJUSTMENT ACT, the NATIONAL INDUSTRIAL RECOVERY ACT) and to create public jobs to reduce unemployment and increase consumer demand (the Civilian Conservation Corps, the Works Progress Administration, the Public Works Administration). Such agencies, generating regulations under the statutory umbrella of broad enabling legislation, came to be a standard feature on the American scene.

In a parallel development state governments created a number of agencies to coordinate and regulate everything from barbers to new car dealers, from avocado marketing to the licensing of physicians. Some of these boards appear to function chiefly as means of controlling entry into occupations and thereby shielding current practitioners from competition, but all function as branches of the government armed with at least some forms of regulatory power.

In some respects such state and national agencies represent not a new form of governmental power but a transfer to state and national levels of what had once been tasks of city government. The functioning of such municipal bureaucracies was, however, largely idiosyncratic and local—defined by the terms of the cities' charters and thus beyond the reach of national law. The migration of regulatory control from city to state and nation both enabled and necessitated the development of a new "administrative" law, which in America is almost entirely a creature of the twentieth century.

Most of that law is statutory, a function of the legislation that creates the board, agency, or commission and defines its tasks and powers. Citizens and enterprises wishing either to invoke or to challenge such powers use the statutorily specified procedures, which often involve both internal agency and external JUDICIAL REVIEW of administrative actions. At two points, however, the Constitution does speak to the structure and conduct of the agencies. In the formative years of the administrative state the Supreme Court expressed doubt about the place of the

agency in the divided federal system of government. Since the NEW DEAL the constitutional focus has turned to the processes employed by administrative agencies, and the courts have regularly required agencies' procedures to conform to the due process clause.

The Constitution establishes three branches of the national government, and the courts early decided that no branch should exceed its own powers or intrude on areas designated as the province of another branch. This principle, known as the separation of powers, applies to numerous activities of the federal government, but it impinges particularly on the operation of administrative agencies charged with the formation and enforcement of broad federal policy.

Congress could not possibly specify just what tasks it wishes federal agencies to accomplish and also exactly how to perform them. At the opposite extreme it would just as obviously violate the separation of powers if Congress were to throw up its hands at the task of forming policy and instead direct the President to hit on whatever combination of revenue collection and expenditure he deemed best to fulfill the needs of the country. The concern is that Congress, if it asks an administrative agency not just to carry out defined tasks but also to participate in the formation of policy, has impermissibly given—delegated—its legislative power to the agency (a part of the executive branch).

That concern surfaced in a pair of Supreme Court decisions invalidating New Deal legislation. PANAMA REFINING CO. V. RYAN (1935) struck down a portion of the National Industrial Recovery Act that permitted the President to ban the interstate shipment of petroleum; the Court's ground was that Congress had provided no guidance as to when the President should do so or what aims were to justify the ban. A few months later, in SCHECHTER POULTRY CORP. V. UNITED STATES, the Court held unconstitutional another section of the same act; its DELEGATION OF POWER permitted the President to create codes of fair competition for various industries. Congress had defined neither the content of such codes nor the conditions for their proclamation, and some members of the Court evinced concern that the absence of standards could pave the way for what amounted to a governmentally sanctioned system of industrial cartels.

Since these two cases the Court has not invalidated a congressional delegation of power, but some have argued that the memory of these cases has induced the legislature to indicate more clearly the goals it intends the agency to accomplish, the means by which they are to be accomplished, and the processes that should accompany their implementation.

Even though an administrative agency does not perform tasks that constitutionally belong only to Congress, it might nevertheless violate the constitutional structure of government by performing tasks belonging to the courts. The problem has several guises.

In some instances Congress in creating the agency has given it JURISDICTION that might otherwise have been exercised by the courts (for example, over maritime accidents). Did such congressional action, which could be viewed as a transfer of federal judicial jurisdiction to an agency, violate the constitutional structure of government or the rights of the parties? In *Crowell v. Benson* (1932) the Court concluded that if Congress established fair administrative procedures, the agency could hear and determine cases that might otherwise have been heard by the courts—with the saving proviso that the federal courts might review the agency's determination of questions of law.

That proviso pointed to another difficult question: the extent to which the courts might review agency decisions. Summarizing the history of this question, Louis Jaffe has said that we have moved from a nineteenth-century presumption of unreviewability to a twentieth-century presumption of reviewability. Such reviewability, however, flows from statutory interpretation rather than from constitutional compulsion: if Congress is sufficiently explicit, it can make an agency determination final and unreviewable—either because the statute explicitly says so or because it so clearly makes the decision in question a matter of agency discretion that there is no law to apply. For the most part, however, courts routinely scrutinize agency action for legality and at least minimal rationality and are prepared to give the agencies fairly great leeway in performing their tasks.

One measure of this leeway the agencies enjoy is the set of requirements imposed on litigants seeking to invoke federal judicial review of agency action. Such parties must satisfy the courts that they have STANDING (that is, actual injury caused by the agency action), that the dispute is ripe for judicial review (that is, that the case comes to the courts when it has sufficiently developed to render a judicial decision not merely abstract or hypothetical), and that they have exhausted their administrative remedies (that is, that they have sought such administrative redress as is available). Only the first two of these requirements—standing and RIPENESS—stem from the Constitution; all of them, however, condition the federal courts' exercise of judicial review.

Courts are prepared to grant such leeway, however, only to the extent that they are assured that the agency has complied with the requirements of due process in making its decisions. Due process plays two roles in administrative law. To the extent that agencies make rules only after extensive public participation in their deliberations, they address some of the concerns lying at the base

of the delegation doctrine—ill-considered and hasty action. Due process also plays a second, more traditional role of assuring adjudicatory fairness. To the extent that agencies take action against those violating their rules, courts have often required that the agencies afford the violators various procedural protections.

Because an increasing number of Americans, from defense contractors and television broadcasters to mothers of dependent children and disabled veterans, depend on state and federal government for their livelihood, such protections have become increasingly important. In the second half of the twentieth century the courts have held many of those interests to be property, thus giving their holders the right to due process—sometimes including a FAIR HEARING—before suffering their deprivation. Thus state and federal agencies must give welfare recipients an opportunity to know and to contest factual findings before ending benefits; public schools and colleges have to supply students some form of NOTICE and process before suspending or expelling them; and public employers must grant tenured employees an opportunity to contest their dismissal. Courts have left the agencies some discretion as to the form of such procedures, which need not, for example, always include a hearing, but the process must suit the circumstances.

Because such protections flow from the due process clauses, they apply equally to state and to federal government; indeed, an important consequence of the constitutionalization of administrative process is that it has penetrated to state bureaucracies, some of which were perhaps less than exemplary in their concern for those affected by their actions. As a result both state courts and state legislatures have directed attention to the procedures of their agencies.

In a large sense, to understand the relationship of the administrative state to the Constitution, one has to spell constitution with a small "c," for the difficulties have been less with specific constitutional provisions than with the general picture of how executive action—especially action in new spheres—fits into received understandings of the world. That question is still debatable, but the debates, at least in the last half of the twentieth century, have taken place at the level of desirable policy, not of constitutional legality: so long as the agencies operate fairly, that much, apparently, is assured.

STEPHEN C. YEAZELL
(1986)

Bibliography

DAVIS, KENNETH C. 1978 *Administrative Law Treatise.* San Diego, Calif.: Davis.

JAFFE, LOUIS 1965 *Judicial Control of Administrative Action.* Boston: Little, Brown.

KOLKO, GABRIEL 1963 *The Triumph of Conservatism: A Reinterpretation of American History, 1900–1916.* New York: Free Press.

WIEBE, ROBERT 1967 *The Search for Order, 1877–1920.* New York: Hill & Wang.

## ADMINISTRATIVE SEARCH

Safety inspections of dwellings by government officials, unlike police searches, are conducted to correct hazardous conditions rather than to secure EVIDENCE. Initially, therefore, the Supreme Court regarded such inspection as merely touching interests that were peripheral to the FOURTH AMENDMENT; the RIGHT OF PRIVACY of the householder must give way, even in the absence of a SEARCH WARRANT, to the interest in preserving a safe urban environment. *Frank v. Maryland* (1959) paradoxically granted greater protection under the Fourth Amendment to suspected criminals than to law-abiding citizens.

Later, the Court reversed itself in CAMARA V. MUNICIPAL COURT (1967), holding that the amendment was designed "to safeguard the privacy and security of individuals against arbitrary invasions by government officials," regardless of their purpose. However, because inspections would be crippled if the standard of proof needed for a warrant were the same as that required in a criminal case, the traditional PROBABLE CAUSE standard was discarded in favor of a flexible test based on the condition of the area and the time elapsed since the last inspection, rather than specific knowledge of the condition of the particular dwelling. After WYMAN V. JAMES (1971) WELFARE BENEFITS for support of a dependent child may be made conditional upon periodic visits to the home by a caseworker; a warrant is not required for such a visit.

The requirement of a warrant for inspections generally applies to business premises, as the Court held in *See v. City of Seattle* (1967). But in *Donovan v. Dewey* (1981) the Court held that coal mines, establishments dealing in guns and liquor, and other commercial properties that are comprehensively regulated by government may be inspected without a warrant, because an owner is obviously aware that his property will be subject to inspection.

JACOB W. LANDYNSKI
(1986)

Bibliography

LAFAVE, WAYNE R. 1967 Administrative Searches and the Fourth Amendment: The *Camara* and *See* Cases. *Supreme Court Review* 1967:2–38.

# ADMINISTRATIVE SEARCH
## (Update)

The Supreme Court has placed fewer checks on government searches pursuant to administrative schemes (health and safety inspections, for example) than it has placed on searches aimed at gathering evidence of criminal wrongdoing. Moreover, under current doctrine, government officials are less likely to need a SEARCH WARRANT for administrative searches of businesses than for similar searches of homes.

It is not at all obvious why this should be so. The FOURTH AMENDMENT, by its terms, protects people "in their persons, houses, papers, and effects, against unreasonable searches and seizures." The language of the amendment gives no indication that the reasonableness of a search should turn on whether the object of the search is evidence of a crime or of a safety code violation. Nor does it suggest that less protection is due papers and effects that are located in businesses rather than in homes. Nonetheless, the Supreme Court has shown a marked discomfort with the notions that safety inspections are to be subject to the same constitutional standard as criminal investigations and that businesses are entitled to the same protections as homes.

The Court first considered the administrative search in *Frank v. Maryland* (1959), holding that a homeowner could be arrested and fined for refusing a WARRANTLESS SEARCH of his home for health code violations. The majority made the remarkable assertion that the fundamental liberty interest at stake in the Fourth Amendment was the right to be free from searches for evidence to be used in criminal prosecutions, not a general RIGHT OF PRIVACY in one's home. The safety inspection, they said, touched "at most upon the peripery" of the interests protected by the Constitution. Justice WILLIAM O. DOUGLAS, writing for the four dissenters, argued that the Fourth Amendment was not designed to protect criminals only. He pointed out that, historically, much of the government action to which the Fourth Amendment was directed involved searches for violations of shipping regulations, not criminal investigations.

Justice Douglas was eventually vindicated, at least in part. CAMARA V. MUNICIPAL COURT (1967) held that Fourth Amendment protections do apply to administrative housing inspections and that such inspections require a warrant supported by PROBABLE CAUSE. While this is nominally the same standard as for criminal investigations, the Court explained that probable cause must itself depend upon a balancing of the need to search and the degree of invasion the search entails. To establish probable cause for administrative searches, government officials need satisfy only some reasonable legislative or administrative standard applicable to an entire area; they need not have specific information about a particular dwelling. The area warrant, as it is called, is thus based on a notion of probable cause very different from the traditional concept applicable in criminal cases. There is no probable cause for a search for evidence of a crime unless it is more likely than not that relevant evidence will be found at the specific dwelling searched. *See v. City of Seattle* (1967), the companion case to *Camara*, applied the area warrant requirement to the administrative inspection of businesses.

In arriving at its new balance for administrative searches, the *Camara* Court relied on three factors, none of which is wholly satisfactory. "First, [area inspections] have a long history of judicial and public acceptance." As an empirical matter, this statement was probably incorrect, as few of these cases had been to court, and none had previously made it to the Supreme Court. More important, the Court generally has found such historical justification insufficient to sustain government action that otherwise violates the Constitution.

"Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results." Is the same not true of criminal law enforcement? Could government officials justify searching an entire block looking for a crack house on the theory that "[no] other canvassing technique would achieve acceptable results"? Surely not.

"Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy." This reasoning has much in common with the majority's argument in *Frank*. Although the *Camara* language does support a more general right to privacy under the Fourth Amendment than *Frank* recognized, the Court apparently continues to see protection from unwarranted criminal investigation as more central to the amendment. Why this should be so remains a mystery; the individual's right to privacy and property protected by the Fourth Amendment should not vary according to the nature of the government's interest in the intrusion.

Another problem with the administrative search-criminal search distinction is that it is often difficult to tell one from the other. In many instances, health and safety regulations call for criminal penalties against offenders, and much administrative regulation of business is aimed at preventing criminal activity. A case in point is *New York v. Burger* (1987). When two police officers arrived to conduct an administrative inspection of Burger's automobile junkyard, Burger was unable to produce the required li-

cense and records. Proceeding without the traditional quantum of probable cause for a criminal investigation, the officers searched the yard and uncovered stolen vehicles, evidence used against Burger in a subsequent criminal prosecution. The Court held that the evidence could be used against Burger as the fruit of a valid administrative search, notwithstanding that the regulatory scheme was directed at deterring criminal behavior. By way of explanation, the Court offered a rather confusing distinction between administrative schemes, which set forth rules for the conduct of a business, on the one hand, and criminal laws, which punish individuals for specific acts of behavior, on the other.

The diminished safeguards applicable to administrative searches have been further eroded in cases involving businesses. Although *See* applied the area warrant requirement equally to searches of businesses and searches of homes, the Court has subsequently elaborated a distinction between the two. *Burger* is the present culmination of that line of cases. In *Burger*, not only was the search conducted with less than traditional probable cause, but the police officers did not have a warrant.

The Court began its move away from the *See* warrant requirement in *Colonnade Catering Corporation v. United States* (1970), where it upheld a conviction for turning away a warrantless inspection of a liquor storeroom. *United States v. Biswell* (1972) allowed a warrantless search of a gun dealer's storeroom. *Biswell* made it clear that the balancing approach of *Camara* and *See* would be applied not only in determining the quantum of probable cause necessary to support a warrant but also in deciding whether a warrant was necessary at all. In *Biswell* the Court argued that the effectiveness (and hence reasonableness) of the firearm inspection scheme depended on "unannounced, even frequent, inspections," which a warrant requirement could frustrate. No doubt we could reduce crime of all sorts if police were allowed to make "unannounced, even frequent, inspections" of everyone's home and business.

In addition to the familiar balancing approach, *Colonnade* and *Biswell* introduced another element into administrative search jurisprudence. The Court excused the warrant requirement, in part because those engaging in "closely regulated businesses," such as liquor vendors and firearms dealers, have a reduced expectation of privacy.

The Court at first seemed to limit the reach of *Colonnade* and *Biswell*, explaining in MARSHALL V. BARLOW'S, INC. (1978) that the closely regulated business exception to the warrant requirement was a narrow one. *Barlow's* established an area warrant requirement for searches pursuant to the federal Occupational Safety and Health Act, which applies to a wide range of businesses not necessarily subject to extensive government regulation.

The closely regulated exception returned, however, in *Donovan v. Dewey* (1981), which allowed warrantless inspection of mines pursuant to the federal Mine Safety and Health Act. The Court also returned to a balancing approach. Quoting *Biswell*, the Court stressed the need for unannounced and frequent inspection of mines, where "serious accidents and unhealthful working conditions" are "notorious."

In *Burger*, the most recent business search case, the Court summarized its case law and brought together the closely regulated and balancing approaches. Administrative searches of closely regulated businesses may be made without a warrant if three criteria are met: (1) there is a substantial government interest that informs the regulatory scheme; (2) warrantless inspections are necessary to further the regulatory scheme; and (3) the inspection program is of sufficient certainty and regularity as to limit the discretion of the inspecting officer and advise the business owner that the search is within the scope of the regulatory law.

Despite this latest attempt to refine the exception to the warrant requirement, the closely regulated distinction remains troubling. In essence, it is a form of implied consent theory: By voluntarily engaging in certain businesses, or seeking government licenses, business owners have agreed to give up a measure of their privacy. This line of reasoning is in apparent conflict with the doctrine of UNCONSTITUTIONAL CONDITIONS, where the Court, in other cases, has frowned upon the conditioning of government privileges on the surrendering of a constitutional right. There is indeed something anomalous in the notion that the government, by its own intrusive actions, can create a reduced expectation of privacy.

ALEX KOZINSKI
(1992)

(SEE ALSO: *Reasonable Expectation of Privacy; Search and Seizure.*)

Bibliography

KRESS, JACK M. and IANNELLI, CAROLE D. 1986 Administrative Search and Seizure: Whither the Warrant? *Villanova Law Review* 31:705–832.

LAFAVE, WAYNE R. 1987 *Search and Seizure: A Treatise on the Fourth Amendment.* St. Paul, Minn.: West Publishing Co.

## ADMIRALTY AND MARITIME JURISDICTION

In Article III of the Constitution, the JUDICIAL POWER OF THE UNITED STATES is made to extend "to all cases of admiralty and maritime jurisdiction." ALEXANDER HAMILTON says, in THE FEDERALIST #80, that "the most bigotted idol-

izers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes." There is no reason not to believe him. The First Congress, in the JUDICIARY ACT OF 1789, gave this JURISDICTION to the UNITED STATES DISTRICT COURTS, which were to have "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors, in all cases, the right of a COMMON LAW remedy, where the common law is competent to give it."

This language was verbally changed in the JUDICIAL CODE of 1948, but the change has had no effect, and was pretty surely not meant to have any, so that one may organize the subject (as it has, indeed, organized itself) around the two questions suggested by the original formula: (1) What is the content of the "exclusive cognizance" given the District Court? and (2) What is "saved" to suitors in the saving clause?

There is an admiralty jurisdiction in "prize"—a jurisdiction to condemn and sell, as lawful prize of war, enemy vessels and cargo. This jurisdiction was employed to effect a few condemnations after WORLD WAR II, but it has on the whole been very little used in this century. There is an admiralty jurisdiction over crime, but the admiralty clause serves in these cases solely as a firm theoretical foundation for American jurisdiction over certain crimes committed outside the country but on navigable waters; these cases are rarely thought of as "admiralty" cases, because INDICTMENT and trial are "according to the course of the common law," with such statutory and rule-based changes as affect all federal criminal proceedings. Normally, then, "admiralty jurisdiction" refers to jurisdiction over certain private-law concerns affecting the shipping industry—contracts to carry goods, charters of ships, marine insurance, ship collisions, seamen's or passengers' personal injuries, salvage, and so on.

The courts early followed the English rule limiting the jurisdiction to tidal waters, but a rather tortuous development around the middle of the nineteenth century extended this base to include first, the Great Lakes, then the Mississippi River, and at last all interior waters navigable in INTERSTATE or FOREIGN COMMERCE.

There was an early effort, moreover, to limit the jurisdiction to causes very strictly "arising" on these waters. Suits in marine insurance, for example, were thought to be outside the jurisdiction, because the contracts were made on land, and were to be performed (by payment) on land. On the other hand, some quite late cases extended the admiralty jurisdiction to events having no maritime flavor (e.g., an injury to a bather by a surfboard), on the basis of this same "locality" test. This "test," productive of ludicrous results, has often been abjured by the courts, but has a way of popping up again and again, in context after context.

The "saving clause" has been given an interpretation not at all of obvious correctness. The "common-law remedy" saved to suitors was held to comprise all IN PERSONAM causes of action. Thus, if a shipowner's ship is lost, and he claims indemnity from the insurance company, he is free to sue either in admiralty court or in a regular land-based court—and so on through the whole range of admiralty matters. What is *not* "saved to suitors," and is therefore really "exclusive" to the District Courts, is the suit IN REM, wherein a vessel, or other maritime property, is treated as the defendant party, and sued directly under its own name. In practice, this means that the plaintiff (or "libellant," as he used to be called) enjoys a high-priority security interest in the vessel, an interest called a "maritime lien."

The intricacies of admiralty procedure have been simplified in recent years. But one dominating peculiarity remains. Like EQUITY, admiralty (usually) does not use the jury. This fact is normally determinative of the plaintiff's choice, made under the "saving clause," between the admiralty forum and the land-bound court of law.

CHARLES L. BLACK, JR.
(1986)

Bibliography

GILMORE, GRANT and BLACK, CHARLES L., JR. 1975 *Admiralty*, 2nd ed. Mineola, N.Y.: Foundation Press.

ROBERTSON, DAVID W. 1970 *Admiralty and Federalism*. Mineola, N.Y.: Foundation Press.

## ADOPTION, RACE, AND THE CONSTITUTION

Since Massachusetts enacted the first "modern" state adoption statute in 1851, adoption in the United States has been both a state judicial process and a child welfare service to promote the "best interests" of children in need of permanent homes. State law and adoption agency practices have traditionally tried to mirror biology; same-race placements simply were presumed to serve a child's "best interests."

The Supreme Court in MEYER V. NEBRASKA (1923) deemed the guarantee of liberty in the FOURTEENTH AMENDMENT to include the right "to marry, establish a home, and bring up children," and subsequently rendered decisions defining various elements of family relations as "fundamental interests." Yet, it has not recognized a fundamental interest in adopting children.

During the latter half of the twentieth century, legal access to ABORTION and lessening social stigma associated with NONMARITAL CHILDREN resulted in dramatically fewer voluntary relinquishments of white infants—what most

prospective adopters initially seek. Instead, waiting children often had special needs, were older or minority children, or were part of large sibling groups who did not "match-up" with approved waiting families. A disproportionate number of these children were African American who remained in foster care longer periods of time than other children due to a shortage of approved African American homes.

Since the mid-1970s, two paradigm shifts in the adoption field set the stage for successful efforts in the 1990s to ban "same-race" placement preferences. First, the primary focus shifted from promoting the interests of children in need of homes to an emphasis on serving adults who seek to parent. Second, lawyers asserting rights of their clients to adopt any child were often the dominant professionals instead of social workers. Adoption was increasingly seen not solely as a specialized child-welfare service, but as a profitable business venture buoyed by a strong demand for babies of all colors. Legal scholars claimed that, in addition to frustrating the market for babies, statutory "same-race" placement preferences harmed African American children in violation of the EQUAL PROTECTION guarantee of the Fourteenth Amendment.

Because most forms of RACIAL DISCRIMINATION are unconstitutional and all racial criteria are subject to STRICT SCRUTINY, the question of what weight to give race in granting or denying adoption is a sensitive issue. According to Twila Perry, it has evoked acrimonious debate "between those who view transracial placements as positive for both the children and society as a whole and those who view them as injurious to Black children and Black communities." Some lower courts have held that using race as the sole factor in denying adoption or in placing children in foster homes violates the equal protection clause. Other courts, such as the District of Columbia Court of Appeals, in *Petition of R.M.G.* (1983), have ruled that race may be one of the relevant factors in a disputed adoption proceeding and that a court may consider how each contestant's race is likely to affect the child's development.

But the Supreme Court's 1984 decision in PALMORE V. SIDOTI (a suit by a white father seeking custody of his daughter because the custodial mother lived with and then married a black man) casts considerable doubt on the position taken in the *R.M.G.* case. In *Palmore* the Court recognized that racial and ethnic prejudices exist and might pose problems for a child living with a stepparent of a different race. Yet, the Court ruled that such problems could not justify a denial of constitutional rights nor the removal of the child from the custody of her mother. As Homer Clark, Jr., concluded, "fairly read, the opinion may be construed to say that the impact on a child caused by living in a mixed race household . . . is not a factor which the Constitution permits the courts to take into account."

Ten years after *Palmore*, state court judicial challenges to "same-race" placement preference practices and aggressive lobbying of Congress resulted in federal legislation that eviscerates adoption's traditional emphasis on the "best interests" of the child in favor of race matching. Those dissatisfied with Senator Howard Metzenbaum's 1994 MultiEthnic Placement Act criticized the latitude given agencies and courts to consider cultural or racial identity needs of a child and a prospective foster or adoptive parent's ability to meet those needs. But those same people applauded the law's 1996 repeal by LEGISLATION that absolutely banned consideration of race in child placement decisionmaking.

Under the 1996 law, no state or other entity in a state receiving federal funds and involved in adoption or foster care may (1) deny any person the opportunity to become an adoptive or a foster parent; or (2) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child involved. Noncompliance is a violation of Title VI of the CIVIL RIGHTS ACT OF 1964, and financial penalties may result. Additionally, any individual aggrieved by a state's or other entity's violation may seek relief in any U.S. District Court.

Some view the claim that "same-race" placement preferences victimize the increasing numbers of African American children entering foster care as a diversionary "smokescreen" strategy. These observers emphasize the systemic barriers to meeting the needs of African American children, their families, and the African American community. They also point out that eliminating race from placement decisionmaking opens up a new source of infants to satisfy the demands of waiting white applicants, given the increasing numbers of voluntarily relinquished, biracial, nonmarital children (many with one black and one white parent) that historically have been assigned the racial designation of "Black."

RUTH-ARLENE W. HOWE
(2000)

Bibliography

BARTHOLET, ELIZABETH 1991 Where Do Black Children Belong? The Politics of Race Matching in Adoption. *University of Pennsylvania Law Review* 139:1163–1256.

CLARK, JR., HOMER H. 1988 Race and Religion in Adoption Placement. Pages 912–915 in *The Law of Domestic Relations in the United States*, 2nd ed. St. Paul, Minn.: West Publishing Co.

HOWE, RUTH-ARLENE W. 1995 Redefining the Transracial

Adoption Controversy. *Duke Journal of Gender Law & Policy* 2:131–164.

——— 1997 Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo. *Boston University Public Interest Law Journal* 6:409–472.

PERRY, TWILA L. 1993–1994 The Transracial Adoption Controversy: An Analysis of Discourse and Subordination. *New York University Review of Law & Social Change* 21:33–108.

## ADVERSARY TRIAL

See: Rights of the Criminally Accused

## ADVERTISING

See: Commercial Speech

## ADVICE AND CONSENT

Under Article II, section 2, of the Constitution, the President's powers to make treaties and to appoint important public officials are to be exercised "by and with the advice and consent of the SENATE."

The formula "advice and consent" is an ancient one. It was used in British and American state papers and documents for over a thousand years prior to 1787. The use of these words in the Constitution was proposed by the Constitutional Convention's Committee on Remaining Matters, to which both the TREATY POWER and the APPOINTING POWER had been referred. The first proposal to associate the President and the Senate in the exercise of those powers was made by ALEXANDER HAMILTON, who wanted the Senate to act as a kind of PRIVY COUNCIL. In the debates over RATIFICATION OF THE CONSTITUTION opponents charged that the provision violated the principle of SEPARATION OF POWERS. But in THE FEDERALIST the practice was defended as an instance of CHECKS AND BALANCES and a means of involving the states in the making of important national policy.

In practice, the phrase "advice and consent" has come to have different meanings with respect to the two powers to which it is applied.

In the making of treaties, the advisory function has virtually disappeared. In August 1789, President GEORGE WASHINGTON sought to honor the letter of the Constitution by appearing in person before the Senate to ask its advice prior to negotiating an Indian treaty. When the Senate referred the matter to a committee, Washington walked out, and since that incident, no President has made such a formal request for advice in advance. The common modern practices by which Presidents include senators among American negotiators and consult with influential senators, the party leadership, and members of the Senate Foreign Relations Committee are better understood as political devices to improve the chances of obtaining consent than as deference to the constitutional mandate to obtain advice. In giving its consent to the President's making—or ratification—of a treaty, the Senate is not bound to accept or reject the whole document as submitted. The Senate may amend a treaty or attach reservations to it. Since either of these actions may compel renegotiation, they might be considered perverse forms of giving advice.

In the appointment of officers, the advisory function has become far more important. Nominees to the Supreme Court and to the most important executive and diplomatic posts are normally approved (or rejected) by the Senate on grounds of merit, integrity, and policy. In the case of other executive and judicial appointments, a practice known as "senatorial courtesy" has transformed the requirement for "advice and consent" into an instrument of senatorial control. Nominees cannot expect the Senate's consent to their appointment if it is not supported by senators of the President's party from their home states. If a federal appointee is to serve in a particular state, the senior senator of the President's party from that state (if there is one) customarily makes the actual selection.

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Advice and Consent to Supreme Court Nominations; Bork Nomination.*)

## ADVICE AND CONSENT TO SUPREME COURT NOMINATIONS

The proper scope of the SENATE's role in confirming Supreme Court nominees has been the subject of recurring and often heated debate. The Constitution provides simply that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . Judges of the Supreme Court." Although the Senate also has the constitutional responsibility of advising on and consenting to presidential appointments of ambassadors, lower federal court judges, and many executive branch officials, debates over the nature of the Senate's role have generally arisen in the context of Supreme Court nominations.

The central issues of controversy have concerned the criteria the Senate should consider in making confirmation decisions and the appropriate range of questions that may be posed to and answered by a nominee. Debated points regarding appropriate criteria for confirmation

have included the degree to which the Senate should defer to the President's preferred choice and whether it is appropriate to take a nominee's political views or judicial philosophy into account. The debate about the scope of questioning has centered on whether it is appropriate for senators to ask and nominees to answer questions about the nominee's political views and judicial philosophy and how these views and philosophy would apply to issues that may come before the Court.

Presidents and some members of the Senate have argued that selecting Justices is the President's prerogative and that, although the President may take a judicial prospect's philosophy into account, the Senate must limit its inquiry to whether the nominee has the basic qualifications for the job. These commentators maintain that the Senate should defer to the President's nomination of any person who is neither corrupt nor professionally incompetent. Others have contested this view and argued that the Senate, when it decides whether to consent to a nomination, is permitted to take into account the same range of considerations open to the President and to make its own independent determination of whether confirmation of a particular nominee is in the best interests of the country.

Presidents have often taken the position that the Senate should defer to the President's choice. President RICHARD M. NIXON, for example, claimed in 1971 that the President has "the constitutional responsibility to appoint members of the Court," a responsibility that should not be "frustrated by those who wish to substitute their own philosophy for that of the one person entrusted by the Constitution with the power of appointment." This view was echoed by President RONALD REAGAN, who asserted that the President has the "right" to "choose federal judges who share his judicial philosophy" and that the Senate should confirm Presidents' nominees "so long as they are qualified by character and competence."

Many of those who agree with Presidents Nixon and Reagan believe that the proper standard for Senate review of Supreme Court nominees is the deferential standard that the Senate has typically accorded to presidential nominations of executive officials, whose confirmation is generally expected unless the nominee is found to lack the character or competence necessary for the job. This analogy between executive and judicial appointments is not wholly apt. Whereas the President is entitled to have in the executive branch officials who share the President's philosophy and will carry out the chief executive's policies, judicial nominees are expected to exercise independent judgment. Those favoring a more active Senate role in the judicial confirmation process suggest that the proper analogy is to the Senate's role in ratifying or rejecting treaties or to the President's decision to sign or veto legislation—instances in which an independent exercise of judgment by each branch is thought appropriate.

The consideration of the APPOINTMENTS CLAUSE by the CONSTITUTIONAL CONVENTION OF 1787 offers some support for the position that senators should exercise their own independent judgment about whether to confirm a nominee. The convention considered the issue of judicial appointments separately from its consideration of the appointment of executive officers. For much of the summer of 1787, the evolving drafts of the Constitution gave the Senate exclusive authority to appoint judges. Suggestions for giving the appointing authority to the President alone rather than to the Senate were soundly defeated.

On May 29, 1787, the convention began its work on the Constitution by taking up the VIRGINIA PLAN, which provided "that a National Judiciary be established . . . to be chosen by the National Legislature. . . ." Under this plan, the executive was to have no role at all in the selection of judges. When this provision came before the Convention on June 5, several members expressed concern that the whole legislature might be too numerous a body to select judges. JAMES WILSON's alternative providing that the President be given the power to choose judges found almost no support, however. JOHN RUTLEDGE of South Carolina stated that he "was by no means disposed to grant so great a power to any single person." JAMES MADISON agreed that the legislature was too large a body, but stated that "he was not satisfied with referring the appointment to the Executive." He was "rather inclined to give it to the Senatorial branch" as being "sufficiently stable and independent to follow their deliberate judgments."

One week later on June 13, Madison rendered his inclination into a formal motion that the power of appointing judges be given exclusively to the Senate rather than to the legislature as a whole. This motion was adopted without objection. On July 18 the convention reconsidered and reaffirmed its earlier decision to grant the Senate the exclusive power of appointing judges. James Wilson again moved "that the Judges be appointed by the Executive." His motion was defeated, six states to two, after delegates offered, as GUNNING BEDFORD of Delaware said, "solid reasons against leaving the appointment to the Executive." LUTHER MARTIN of Maryland, stating that he "was strenuous for an appointment by the 2nd branch," argued that "being taken from all the States [the Senate] would be the best informed of character and most capable of making a fit choice." ROGER SHERMAN of Connecticut concurred, "adding that the Judges ought to be diffused, which would be more likely to be attended to by the 2d branch, than by the Executive." NATHANIEL GORHAM of Massachusetts argued against exclusive appointment by the Senate, stating that "public bodies feel no personal responsibility, and give full play to intrigue and cabal." He offered what was

to be the final compromise: appointment by the Executive "by and with the advice and consent" of the Senate. At this point in the convention, however, his motion failed on a tie vote.

The issue was considered once again on July 21. After a debate in which GEORGE MASON attacked the idea of executive appointment as a "dangerous prerogative [because] it might even give him an influence over the Judiciary department itself," the convention once again reaffirmed exclusive Senate appointment of judges of the Supreme Court. Thus the matter stood until the closing days of the convention. On September 4, less than two weeks before the convention's work was done, a committee of five reported out a new draft providing for the first time for a presidential role in the selection of judges: "The President . . . shall nominate and by and with the advice and consent of the Senate shall appoint Judges of the Supreme Court." Giving the President the power to nominate judges was not seen as tantamount to ousting the Senate from a central role. GOUVERNEUR MORRIS of Pennsylvania, a member of the Committee, paraphrased the new provision as one that retained in the Senate the power "to appoint Judges nominated to them by the President." With little discussion and without dissent, the Convention adopted this as the final language of the provision. Considering that the convention had repeatedly and decisively rejected any proposal to give the President exclusive power to select judges, it is unlikely that the drafters contemplated reducing the Senate's role to a ministerial one.

During the nineteenth century, the Senate took a broad view of the appropriate criteria to govern "advice and consent" decisions. During this period, the Senate rejected more than one of every four Supreme Court nominations. The Senate first rejected President GEORGE WASHINGTON's nomination of John Rutledge. The Senate went on to reject five of the nominees proposed by President JOHN TYLER and three of the four nominees put forward by President MILLARD FILLMORE. Since 1900, however, the rate of senatorial rejection of Supreme Court nominees has dropped sharply to a twentieth-century rejection rate of a mere one in thirteen.

Virtually all the parties to the twentieth-century debate on appropriate confirmation criteria agree on two threshold issues. The first is that it is appropriate for senators to consider "judicial fitness." No one contests that adequate judicial competence, ethics, and temperament are necessary conditions for confirmation and, therefore, appropriate criteria for senators to consider. The publicly stated bases of opposition to the nominations of LOUIS D. BRANDEIS, Judge Clement F. Haynsworth, and Judge George H. Carswell were presented in terms of these threshold, judicial-fitness criteria.

The unsuccessful opposition to Brandeis, nominated in 1916 by President WOODROW WILSON, based its public case against the nominee on alleged breaches of legal ethics. The successful opposition to confirmation of Judge Haynsworth, nominated to the Supreme Court by President Nixon in 1969, was articulated primarily in terms of charges that Haynsworth had violated canons of judicial ethics by sitting on cases involving corporations in which he had small financial interests. In addition to the ethics charges, some opponents raised objections to Haynsworth's CIVIL RIGHTS record. Two judicial-fitness objections formed the basis for the successful opposition to confirmation of Judge Carswell, nominated to the Supreme Court by President Nixon in 1970. The primary objection was that Carswell allegedly allowed racial prejudice to affect his judicial behavior. The second theme in the opposition to Carswell was that, as a matter of basic competence, he was at best a mediocre jurist.

Thus, in the Brandeis, Haynsworth, and Carswell nominations, opposition was presented as based on the judicial-fitness criteria of judicial temperament, ethics, and basic competence. In all three of these twentieth-century confirmation controversies, the acceptability of the judicialfitness criteria went unchallenged.

The second area of general agreement in the debate on appropriate criteria for confirmation decisions is that senators should not base their decisions on the nominee's predicted vote on a particular case or "single issue" likely to come before the Court. Supporters of the nomination of Judge John Parker, nominated to the Supreme Court by President HERBERT HOOVER in 1930, alleged that opposition to the nomination was based on a "single issue" of Parker's position on a particular labor-law question. Parker's opponents took pains to deny that their opposition was based on a single issue and argued that Parker's ruling in a previous case involving the question reflected Parker's own anti-union bias. This accusation—that, as a judge, Parker was biased in his rulings on such matters—was a way for the opponents of confirmation to frame their objection as one of judicial temperament and, thus, judicial fitness. The premise underlying the positions of both opponents and supporters of Parker was that a rejection based on a result-oriented single-issue criterion would be inappropriate.

Between the margins of agreement that judicial-fitness criteria are appropriate and that single-issue criteria are inappropriate lies the area of controversy. The debated issue is often framed as whether the nominee's "judicial philosophy" should be considered in the decision-making process. The term "judicial philosophy," when used in this context, refers to a range of concerns including the nominee's theory of judging (that is, the degree of judicial interference with legislative and executive decision making the nominee views as appropriate), the nominee's views

on the level of generality at which constitutional provisions should be interpreted, and the nominee's interpretation of specific constitutional clauses or doctrines (such as the applicability of the EQUAL PROTECTION clause to women or the existence of a constitutional RIGHT OF PRIVACY).

The bases of opposition to President LYNDON B. JOHNSON's 1968 nomination of Justice ABE FORTAS (to be Chief Justice) and to President Reagan's nomination of Judge Robert Bork to the Supreme Court were framed largely in terms of these controversial "judicial philosophy" criteria. Consequently, the confirmation battles in these cases raged as much around the appropriateness of the criteria applied as around the merits of the nominees themselves.

The attack on Fortas's judicial philosophy was based on charges that he was a "judicial activist" (meaning that his theory of judging envisioned excessive intervention in the discretion of the elected branches) and that his substantive interpretations (of the First, Fifth, Sixth, and Fourteenth amendments) were flawed. Supporters of the Fortas nomination responded both on the merits—defending Fortas's theory of judging and his substantive interpretations—and by assailing the judicial philosophy criterion as inappropriate considerations for advice and consent decisions. (Although some ethics charges were raised during the confirmation proceedings, the very serious ethics charges that resulted in Fortas's resignation did not arise until the spring of 1969, during the Nixon presidency, many months after President Johnson had withdrawn his nomination of Justice Fortas to become Chief Justice.)

Like the Fortas nomination, the nomination of Judge Robert Bork to the Supreme Court was opposed largely on judicial philosophy grounds. (Although some critics raised ethics issues, including Bork's role in the "Saturday Night Massacre" in which the special prosecutor in the WATERGATE affair was fired, these issues did not form a primary basis of opposition.) Judge Bork's theory of judging was assailed as an inadequate conception of the proper role of the Supreme Court in protecting individual and "unenumerated" constitutional rights. Objections were also presented in terms of Bork's interpretations of specific constitutional clauses and doctrines, including his position on the existence of a constitutional right to privacy, his previous and contemporaneous interpretations of the equal protection clause as regards the protections afforded to women, his interpretations of the FIRST AMENDMENT's free speech clause, and his positions on civil rights. Much of the defense of Judge Bork took the form of challenging the acceptability of these controversial criteria.

The contours of the areas of agreement and disagreement on appropriate advice-and-consent criteria are not surprising. The debate on appropriate criteria follows from the constitutional provisions that structure the process of appointments to an independent, principle-oriented, countermajoritarian judiciary in a way that requires the consent of an elected, representative, majoritarian body. Senators' views about the proper role of the judiciary inform their positions on the relevance and propriety of each category of advice-and-consent criteria.

A foundational precept of the role of an independent judiciary is that judges must render decisions based on the rigorous application of principles, not their personal preferences, much less their biases. The broad agreement about this precept underlies and is reflected in the broad consensus that judicial fitness is an acceptable category of criteria for consent decisions. Competence in legal reasoning, high ethical standards, and unbiased judicious temperament are prerequisites to the consistent rendering of rigorously reasoned and principled decisions of law.

The same precept—that the essence of the judicial function is to render decisions based on principles—underlies the broad consensus that single-issue result-oriented criteria are unacceptable. Because of the principle-based nature of the judicial function, a judicial nominee must be evaluated on the basis of the anticipated process of his or her application of principles, regardless of whether that process will produce a senator's preferred outcome in any particular case. The ability of elected Presidents and elected senators to exert some general influence on the future course of the nation's jurisprudence is an appropriate (and appropriately limited) popular check on the exercise of the power of JUDICIAL REVIEW, without which this institution might not be acceptable in a constitutional democracy. Nonetheless, for Presidents or senators to demand that the judiciary not render decisions based on principle but, rather, act as an agent of the legislature furthering particular preferences, and for senators to enforce this demand by the threat or reality of nonconfirmation, would subvert the independence of the judiciary and violate the spirit of the SEPARATION OF POWERS.

Rather than a continued focus on the appropriate criteria for advice-and-consent decisions, a different aspect of the debate over the appropriate role of the Senate in the confirmation process came to the fore during consideration of the nomination of Justice DAVID H. SOUTER. Souter's views on controversial judicial and political issues were little known. The prominent questions during the Souter confirmation, therefore, were (1) where relatively little is known about the nominee's thinking, how may the Senate properly learn more about the nominee; and (2) what questions may properly be posed to the nominee during the confirmation hearings? These questions are not merely derivative of the larger question of what decision-making criteria are legitimate. The core objection to direct questions to the nominee—even on issues that might constitute legitimate decision-making criteria, such as

substantive interpretation of particular constitutional clauses—is that, by offering an opinion on such issues, the nominee may thereafter feel bound to hold in subsequent cases in a manner consistent with the opinions stated during the confirmation hearings. Thus, the fear is that the nominee who opines on, say, the level of protection afforded to women by the equal protection clause during the confirmation hearing will, in effect, be "committed" to a certain outcome in future cases involving that issue.

But fear of judicial precommitment may be exaggerated. Surely there is no requirement that the individuals nominated to our highest court have never thought about—or reached tentative conclusions on—the important issues of law that face the country. So the only issue is whether sharing those thoughts with the senators during confirmation hearings would constitute a commitment not to change those views or not to be open to the arguments of parties litigating those issues in the future. There is no reason to believe that a statement of opinion during confirmation would constitute such a commitment. It would seem reasonable to suppose that an opinion mentioned during a confirmation hearing would be seen as not binding if it were generally understood that such statements are not binding. It would seem reasonable that a nominee might preface an opinion on such an issue with a statement that "these are my initial views on the issue, but they would certainly be open to change in the context of a case in which persuasive arguments were put forth by the parties." Justices would not be in any way committed to be "consistent" with their confirmation comments if it were understood that confirmation comments constitute nothing more and nothing less than frank statements by nominees of their best thinking on a particular issue to date.

MADELINE MORRIS
WALTER DELLINGER
(1992)

(SEE ALSO: *Appointing and Removal Power, Presidential; Bork Nomination.*)

Bibliography

MORRIS, MADELINE 1988–1989 The Grammar of Advice and Consent: Senate Confirmation of Supreme Court Nominees. *Drake Law Review* 38:863–887.

REES, GROVER, III 1983 Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution. *Georgia Law Review* 17:913–967.

TRIBE, LAURENCE H. 1985 God Save This Honorable Court. New York: Mentor.

# ADVISORY OPINION

Article III of the Constitution extends the JUDICIAL POWER OF THE UNITED STATES only to the decision of CASES OR CONTROVERSIES. Since 1793, when the Supreme Court declined, in the absence of a concrete dispute, to give legal advice to President GEORGE WASHINGTON on the correct interpretation of treaties with France and Britain, the Court has refused steadfastly to issue advisory opinions, finding them inconsistent with Article III. This refusal is required whether the request seeks advice on interpretation of existing law or on the constitutionality of pending LEGISLATION or anticipated action. The Justices' view is that the federal courts function not as lawyers giving advice but as judges limited to deciding cases presented by adverse parties with a real, not a hypothetical, dispute, one that is subject to judicial resolution and the granting of meaningful relief. The Court held in *Aetna Life Insurance Co. v. Haworth* (1937) that the prohibition against advisory opinions does not preclude declaratory relief, but there must be a concrete controversy between parties of adverse legal positions which a DECLARATORY JUDGMENT can settle.

If doubts exist about the constitutionality of a proposed government policy or the legality of a contemplated application of current law, an advisory opinion could prevent the interim harm that adoption and application of law subsequently found invalid would cause. Moreover, advisory opinions could save time, money, and effort in deliberation and enforcement by clarifying legal limitations before invalid action is taken. Clearing away unlawful options could also contribute to the quality and focus of public debate and accountability.

The rule against advisory opinions responds to different considerations, however. It limits workload, but the dominant concerns involve judicial competence to decide issues in an advisory context and the place of the federal judiciary in a regime characterized by SEPARATION OF POWERS. Fear that decision before a dispute arises would be premature and unwise, that is, made without relevant facts stemming from application of law or other experience and without the benefit of perspectives presented by already affected parties, combined with concern that the advisory opinion may prejudge unfairly the decision of later concrete cases raising the same questions, induces judges to avoid making nonessential and potentially vulnerable decisions that might weaken judicial legitimacy. In addition, the prevailing belief views advisory opinions as likely to stifle rather than clarify the deliberative process, to distort the obligations of legislative or executive officials to evaluate legal questions independently, thereby blurring accountability, and to deprive experimental proposals of an opportunity to prove themselves before being reviewed for the legality of their actual effects.

JONATHON D. VARAT
(1986)

Bibliography

FRANKFURTER, FELIX 1924 Note on Advisory Opinions. *Harvard Law Review* 37:1002–1009.

## AFFECTED WITH A PUBLIC INTEREST

The phrase "affected with a public interest," first used by the Supreme Court in *Munn v. Illinois* (1877), had a long and distinguished doctrinal lineage in the English COMMON LAW. The fountainhead of the modern development of that phrase was its formulation by Lord Chief Justice Matthew Hale, in his treatise *De Jure Maris*, written about 1670 and first published in 1787. In this work, Lord Hale discussed the basis for distinguishing property that was strictly private, property that was public in ownership, and an intermediate category of property (such as in navigable waters) that was private in ownership but subject to public use and hence a large measure of public control. In cases of business under a servitude to the public, such as wharves and cranes and ferries, according to Hale, it was legitimate for government to regulate in order to assure that the facilities would be available for "the common use" at rates that would be "reasonable and moderate." Once the public was invited to use such facilities, Hale wrote, "the wharf and the crane and other conveniences are affected with a publick interest, and they cease to be *juris privati* [a matter of private law] only." (See GRANGER CASES.)

When Chief Justice MORRISON R. WAITE, writing for the majority in *Munn*, cited Lord Hale, it was for the purpose of upholding rate regulation of grain elevators against a FOURTEENTH AMENDMENT defense that claimed that the elevator operator's vested property rights were being taken without JUST COMPENSATION. Explaining the *Munn* rule a year later, in his *Sinking Fund Cases* opinion, Justice JOSEPH P. BRADLEY pinned the "affectation" doctrine squarely to the concept of monopoly. The question in *Munn*, Bradley contended, was "the extent of the POLICE POWER in cases where the public interest is affected"; and the Court had concluded that regulation was valid when "an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizens; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort. . . ."

In the period immediately following the decision in *Munn*, the Court erected a series of new doctrinal bulwarks for property interests. Among them were the concept of FREEDOM OF CONTRACT, the requirement that regulation must be "reasonable" as judged by the Court, and the notion of PUBLIC PURPOSE as a test for the validity of tax measures. As a result, the concept "affectation with a public interest" was pushed into the background, placing in abeyance such questions as whether only "monopoly" business came within its reach or whether instead it could be invoked to cover regulation of businesses that were not of this character.

In the decade of the 1920s, state legislation directly regulating prices and charges for service was challenged in federal courts and led to revitalization of the "affectation" doctrine by the Supreme Court. The issue, as the Court confronted it, had been set forth succinctly by Justice DAVID J. BREWER in an earlier opinion (*Cotting v. Kansas City Stockyards Co.*, 1901), upholding a state's regulation of stockyard charges on the ground that the business was affected with a public interest no less than a grain elevator or railroad or wharf. Yet the question must be posed, Brewer insisted, "To what extent may this regulation go?" Did any limits pertain, even in clear cases such as a stockyard's operation? Were the yards' owners left in a position, constitutionally, that they could be deprived "altogether of the ordinary privileges of others in mercantile business?"

In the hands of a property-minded, conservative Court the case-by-case development of the principle at issue, responding to Brewer's challenge, resulted in the creation of a closed legal category: only a business "affected with a public interest" might have prices or charges for service regulated; other, "ordinary," businesses were outside that closed category and therefore *not* subject to price or rate regulation. Chief Justice WILLIAM H. TAFT took on the challenge of defining more precisely the closed legal category in his opinion for the Court in WOLFF PACKING CO. V. COURT OF INDUSTRIAL RELATIONS OF KANSAS. Price and rate regulation were constitutional, Taft asserted, in regard to businesses that were public utilities (under an affirmative duty to render service to the public), businesses that historically had been subject to price regulation, and, finally, a rather baffling category, businesses that "though not public at their inception [historically] may be said to have risen to be such." Over strong objections of dissenters—most consistently Justices OLIVER WENDELL HOLMES and LOUIS D. BRANDEIS—the Court in subsequent years relied on this refined "affectation" doctrine to rule that even businesses subject to regulation in other respects could not be regulated as to rates of charge unless they met the criteria set down by Taft in *Wolff*. Mandated price minima or maxima were found unconstitutional with respect to theater ticket agencies, dairy vendors, gasoline retailers, and manufacturers and sellers of ice.

Dissenting Justices objected that the phrase "affected with a public interest" was so "vague and illusory" (as Justice HARLAN F. STONE charged in his dissent in *Tyson v. Banton*, 1927) as to amount to *carte blanche* for the Court to impose arbitrarily its policy preferences. Holmes was more direct: the concept, he stated in his own dissent in *Tyson*, was "little more than a fiction intended to beautify what is disagreeable to the sufferers." In Holmes's view, Lord Hale's language had been misapplied and had become a contrived limitation on the state's legitimate police power. "Subject to compensation when compensation is due," Holmes declared, "the legislature may forbid or re-

strict any business when it has a force of public opinion behind it."

Along with freedom of contract, the VESTED RIGHTS concept, the public purpose concept, and the doctrine of DUAL FEDERALISM, the "affectation" concept became emblematic of doctrinaire formalism mobilized by practitioners of JUDICIAL ACTIVISM. Such doctrines could undermine entirely, critics argued, the capacity of government to respond to changing objective social conditions or to emergency situations that required sweeping legislative intervention. Building on Justice Holmes's views, for example, the legal scholar WALTON H. HAMILTON wrote a widely noticed, wholesale attack on the Court in 1930. Although Hamilton was wrong in his view of the alleged novelty and obscurity of Lord Hale's treatise when Waite used it in *Munn*, he provided an eloquent argument for abandoning the notion of a closed category of businesses immune from price regulation. It was imperative, he argued, for the law to recognize the transformation of industrial structure and the competitive order in the previous half-century; the "affectation" doctrine was a conceptual straitjacket.

The advent of the Great Depression, along with the enactment of extraordinary legislation to deal with a great variety of emergency situations in a stricken society, lent additional weight to the realist argument that Holmes and commentators such as Hamilton and FELIX FRANKFURTER had set forth. Ruling on the constitutionality of an emergency milk price control law, enacted by New York State at the depth of the Depression spiral, the Supreme Court dramatically terminated the use of the "affectation" doctrine as a defense against price regulation: In NEBBIE V. NEW YORK (1934), the Court concluded that the phrase from Lord Hale meant simply "subject to the exercise of the police power." After *Nebbia*, so long as the procedural requirements of DUE PROCESS were met, the legislature was left "free to adopt whatever economic policy may reasonably be deemed to promote public welfare."

HARRY N. SCHEIBER
(1986)

Bibliography

HAMILTON, WALTON 1930 Affectation with a Public Interest. *Yale Law Journal* 34:1089–1112.

SCHEIBER, HARRY N. 1971 The Road to *Munn:* Eminent Domain and the Concept of Public Purpose in the State Courts. *Perspectives in American History* 5:327–402.

# AFFIRMATIVE ACTION

The Supreme Court's momentous decisions in BROWN V. BOARD OF EDUCATION and BOLLING V. SHARPE (1954), and its subsequent implementation decision in *Brown II* (1955), were followed by a long string of rulings designed to render meaningful and effective the egalitarian promise inherent in the FOURTEENTH AMENDMENT. Compulsory racial SEGREGATION was at last no longer constitutionally permissible; the Fourteenth Amendment's guarantee of the EQUAL PROTECTION OF THE LAWS had become the effective law of the land for all levels of the public sector.

But in the judgment of a good many Americans, equality *qua* equality, even when conscientiously enforced with an even hand, would neither suffice to enable those previously deprived on racial grounds to realize the promises of equality of opportunity, nor would it atone, and provide redress, for the ravages wrought by two centuries of past discrimination. Consequently, as strongly urged by President LYNDON B. JOHNSON, programs were established in both the public and the private realms that were designed to go well beyond "mere" equality of opportunity and provide not only remedial but preferential compensatory action, especially in the worlds of EDUCATION and employment. Labeled "affirmative action"—as distinguished from "neutrality"—these programs were instituted to bring about increased minority employment opportunities, job promotions, and admissions to colleges and universities, among others. Understandably, affirmative action programs quickly became controversial because of their resort to RACIAL QUOTAS, also called euphemistically "goals" or "guidelines." Their proponents' justification has been that to provide an absolute measure of full equality of opportunity based upon individual merit does not suffice; that, given the injustices of the past, both preferential and compensatory treatment must be accorded through "affirmative action" that all but guarantees numerically targeted slots or posts based upon membership in racial groups or upon gender. Most critics of the policy's underlying philosophy have not necessarily objected to "affirmative action" policies such as aggressive recruiting, remedial training (no matter what the expense), and perhaps not even to what Justice LEWIS F. POWELL in REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE (1978) termed a justifiable "plus" consideration of race along with other equitable factors. They do, however, object strenuously to policies that represent, or may be regarded as sanctioning, "reverse discrimination," generally characterized by the resort to such devices as the *numerus clausus*, that is, rigid quotas set aside to benefit identifiable racial groups, as in the controversial case of UNITED STEELWORKERS OF AMERICA V. WEBER (1979); to double standards in grading, ranking, and similar requirements on the employment, educational, and other relevant fronts of opportunity; and to "set aside" laws that guarantee specified percentages of contracts to minority groups, as in FULLILOVE V. KLUTZNICK (1980).

The basic issue, while philosophically replete with moral and ethical considerations, was ultimately bound to be fought out on the legal and constitutional front, thus engendering judicial decisions. Several provisions of the CIVIL RIGHTS ACT OF 1964, as amended—for example, Titles IV, VI, VII, and IX—seemed quite specifically not only to forbid racial, sexual, and other discrimination per se but also to proscribe the use of racial and related quotas. The Supreme Court rapidly confronted five major opportunities to address the issue; in each instance it found itself seriously divided. Each of the five decisions involved "affirmative action" andor "reverse discrimination."

The first and second, DEFUNIS V. ODEGAARD (1974) and *Regents v. Bakke* (1978), dealt with preferential racial admissions quotas that by design advantaged nonwhite applicants and thereby ipso facto disadvantaged whites. In *De Funis* a five-member majority rendered a nondecision on the merits by ruling the case moot, because whatever the outcome of the case, Marco De Funis would be graduated by the University of Washington Law School. Justice WILLIAM O. DOUGLAS, dissenting from the MOOTNESS determination, warned that "the equal protection clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." In *Bakke* the Court did reach the merits of the racial quota established by the University of California (Davis) medical school, ruling 5–4 (in two diverse lineups, each headed by Justice Powell) that whereas the latter's rigid quota violated Allan Bakke's rights under the Constitution and the CIVIL RIGHTS ACT OF 1964, the use of race as a "plus" along with other relevant considerations in admissions decisions did not. The third case, *United Steelworkers v. Weber*, concerned an employer-union craft-training plan that, on its face, directly violated Title VII of the Civil Rights Act of 1964, which clearly, indeed literally, interdicts racial quotas in employment. However, with Justices Powell and JOHN PAUL STEVENS disqualifying themselves from sitting in the cases, Justice WILLIAM J. BRENNAN, speaking for a majority of five, ruled that although the letter of the law appeared to forbid the arrangement, its purpose, as reflected in the legislative history, did not. The fourth case, *Fullilove v. Klutznick*, raised the fundamental question whether Congress, notwithstanding the Fourteenth Amendment's equal protection clause, could constitutionally legislate a ten percent set-aside plan for minority-owned construction companies desirous of obtaining government contracts. "Yes," held a 6–3 plurality—actually, the Court split 3–3–3—finding such legislation to be within the federal legislature's spending and regulatory powers under Article I of the Constitution. In his scathing DISSENTING OPINION, which he read in full from the bench on the day of the decision, Justice Stevens charged that the law represented a "perverse form of reparation," a "slapdash" law that rewards some who may not need rewarding and hurts others who may not deserve hurting. Suggesting that such a law could be used simply as a patronage tool by its authors—it had, in fact, been written on the floor of the House of Representatives without having gone to committee for hearings—he warned that it could breed more resentment and prejudice than it corrected. Echoing the first Justice JOHN MARSHALL HARLAN's memorable phrase in dissent in PLESSY V. FERGUSON (1896), namely, that "our Constitution is color-blind and neither knows nor tolerates classes among citizens," Stevens asked what percentage of "oriental blood or what degree of Spanish-speaking skill is required for membership in the preferred class?" With deep feelings, he suggested sarcastically that now the government must devise its version of the Nazi laws that defined who is a Jew, musing that "our statute books will once again have to contain laws that reflect the odious practice of delineating the qualities that make one person a Negro and make another white." The fifth case, *Memphis Fire Department v. Stotts*, seemed to draw a line (although only by the narrowest of margins, 5–4) when the Justice White-authored majority opinion held that duly established bona fide nondiscriminatory seniority systems supersede affirmative action plans.

Depending upon interpretation, one person's "affirmative action" may well constitute another's "reverse discrimination." Nonetheless, it is possible to essay distinctions. Thus, "affirmative action" may be regarded as encompassing the following five phenomena, all of which would appear to be both legal and constitutional: (1) both governmentally and privately sponsored activity designed to remedy the absence of needed educational preparation by special, even if costly, primary, and/or secondary school level preparatory programs or occupational skill development, always provided that access to these programs is not bottomed upon race or related group criteria or characteristics, but upon educational or economic need; (2) special classes or supplemental training, regardless of costs, on any level of education or training from the prenursery school bottom to the very top of the professional training ladder; (3) scrupulous enforcement of absolute standards of nondiscrimination on the basis of race, sex, religion, nationality, and age; (4) above-the-table special recruiting efforts to reach out to those members of heretofore underused, deprived, or discriminated-against segments of the citizenry; (5) provided the presence of explicit or implicit merit, of bona fide demonstrated or potential ability, the taking into account of an individual's race, gender, religion as an equitable consideration—the "plus" of which Justice Powell spoke in *Bakke*—but *only* if "all other things are equal."

"Reverse discrimination," on the other hand, which is

acceptable neither legally nor constitutionally, would constitute the following quartet: (1) adoption of a *numerus clausus*, the setting aside of quotas, be they rigid or semirigid, on behalf of the admission, recruitment, employment, or promotion of individuals and groups identified and classified by racial, religious, sexual, age, or nationality characteristics; such characteristics are *non sequiturs* on the fronts of individual merit and ability and may well be regarded as an insult to the dignity and intelligence of the quota beneficiaries; (2) slanting of what should be neutral qualification examinations or requirements; double standards in grading and rating; double standards in attendance, retention, and disciplinary requirements; (3) those "goals" and "guidelines" that allegedly differ from rigid quotas, and thus presumably pass legal and constitutional muster, but that, in application, are all but synonymous with enforced quotas; (4) legislative or executive "set aside" programs, such as the one at issue in the *Fullilove* case, that mandate percentage-quotas of awards and activities based upon racial, gender, and related classifications.

"Reverse discrimination" purports to justify itself as atonement for past discrimination. It sanctions the call to children to pay for the sins of their forebears; it embraces a policy that two wrongs make one right, that "temporary" discrimination is "benign" rather than "invidious" when it is designed to remedy past wrongs. Since the "temporary" all too often becomes the "permanent," temporary suspensions of fundamental rights are fraught with permanent dangers and represent prima facie denials of the equal protection of the laws guaranteed by the Fourteenth Amendment and the DUE PROCESS OF LAW guaranteed by the Fifth.

The line between "affirmative action" and "reverse discrimination" may be thin and vexatious, but it does not lie beyond recognition and establishment in our constitutional constellation.

HENRY J. ABRAHAM
(1986)

Bibliography

DWORKIN, RONALD 1977 *Taking Rights Seriously.* Cambridge, Mass.: Harvard University Press.

GLAZER, NATHAN 1976 *Affirmative Discrimination.* New York: Basic Books.

O'NEILL, ROBERT M. 1975 *Discriminating against Discrimination.* Bloomington: Indiana University Press.

ROCHE, GEORGE C., III 1974 *The Balancing Act: Quota Hiring in Higher Education.* La Salle, Ill.: Open Court.

ROSSUM, RALPH A. 1980 *Reverse Discrimination: The Constitutional Debate.* New York: Marcel Dekker.

SOWELL, THOMAS 1975 *Affirmative Action Reconsidered: Was It Necessary in Academia?* Washington, D.C.: American Enterprise Institute.

# AFFIRMATIVE ACTION
## (Update 1)

Do constitutional guarantees of EQUAL PROTECTION command that government must be "color-blind" or only that government may not subordinate any group on the basis of race? The Supreme Court's equal protection decisions have long straddled these two different principles. The color-blindness approach deems race morally irrelevant to governmental decision making under all circumstances. The antisubordination approach, by contrast, sees racial distinctions as illegitimate only when used by government as a deliberate basis for disadvantage. The two approaches divide sharply on the permissibility of affirmative action: advocates of color blindness condemn the use of racial distinctions even to benefit previously disadvantaged racial groups, whereas those who view equal protection solely as a ban on racial subordination see affirmative action as constitutionally benign.

Since 1985, the Supreme Court has continued to steer between these two approaches rather than unequivocally embrace either one. In earlier decisions, the Court had upheld a variety of RACIAL PREFERENCES, including the use of race as a factor in university admissions (as long as rigid RACIAL QUOTAS were not employed) in REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978), the set-aside of places for blacks in an industrial skills-training program in UNITED STEELWORKERS OF AMERICA V. WEBER (1979), and the set-aside of public works construction projects for minority business enterprises in FULLILOVE V. KLUTZNICK (1980). These cases made clear that affirmative action would not be struck down as readily as laws harming racial minorities, but neither would it be lightly tolerated. Governments could successfully defend affirmative action programs, but only with an especially strong justification.

The affirmative action cases since 1985 have bitterly divided the Court, and their outcomes have signaled a partial retrenchment for affirmative action. With the appointments of Justices SANDRA DAY O'CONNOR, ANTONIN SCALIA, and ANTHONY M. KENNEDY, the Court veered off its middle course and more sharply toward the color-blindness pole. Although the Court readily upheld affirmative action as a court-imposed remedy for RACIAL DISCRIMINATION against minorities, as in *Local 28, Sheet Metal Workers International Association v. EEOC* (1986), the Court struck down two municipalities' efforts to impose affirmative action on themselves. In WYGANT V. JACKSON BOARD OF EDUCATION (1986) the Court invalidated a school district's plan to protect minority teachers against layoffs ahead of more senior white teachers. And in RICHMOND (CITY OF) V. J. A. CROSON CO. (1989), the Court struck down a city's reservation of a percentage of public works construction for minority

business enterprises—a set-aside modeled on the congressional program upheld in *Fullilove*. But METRO BROADCASTING V. FCC (1990), which upheld federal policies preferring minority broadcasters in the allocation of broadcast licenses, confounded those who thought *Croson* had sounded the death knell for affirmative action.

The central conflict in these cases was over what justification for affirmative action would suffice. Up until *Metro*, the Court accepted only narrowly remedial justifications. Affirmative action was upheld only as penance for particularized past sins of discrimination—not as atonement for "societal discrimination" as a whole. The Court treated affirmative action as a matter of corrective rather than distributive justice; minorities might be preferred for jobs, admissions, or contracts not to build a racially integrated future, but only to cure a racially discriminatory past.

The Court's account of affirmative action as a permissible remedy for past discrimination, however, left both sides unsatisfied. Opponents charged that affirmative action was a poor version of corrective justice because (1) unlike standard compensatory justice, affirmative action extends benefits beyond the specific victims of past discrimination; and (2) unlike standard retributive justice, affirmative action demands current sacrifice of persons who were not the actual perpetrators of past discrimination—persons the Court sometimes labels "innocent" whites. In the opponents' view, if affirmative action were truly remedial, neither would nonvictims benefit nor nonsinners pay. In contrast, advocates of affirmative action found the Court's requirements for proving remedial justification far too stringent. Governments are reluctant to confess to past sins of discrimination, advocates argued, and should be permitted to adopt affirmative action plans without official *mea culpa*s.

*Metro Broadcasting* departed from the sin-based approach by accepting a nonremedial justification for the Federal Communications Commission's (FCC) minority-ownership preference policies: increased minority ownership would help diversify broadcast program content. A majority of the Court had never endorsed such a justification before, although Justice LEWIS F. POWELL's crucial *Bakke* opinion had defended racial preferences in university admissions as producing diversity in the classroom and Justice JOHN PAUL STEVENS had persistently advocated similar diversity-based justifications for affirmative action, for example, in his *Wygant* dissent. Such justifications implicitly adopt the antisubordination rather than the color-blindness approach: using racial distinctions to increase diversity is not a constitutional evil because it does not use race to impose disadvantage. As Justice Stevens wrote in his *Metro* concurrence, "[n]either the favored nor the disfavored class is stigmatized in any way."

When *Wygant*, *Croson*, and *Metro* are considered together, it appears that the Court's affirmative action decisions continue to steer between the color-blindness and antisubordination poles. *Wygant* and *Croson* should not be overstated as victories for color blindness because those decisions left open the possibility that other governments might do better than the Jackson school board or the Richmond city council at tailoring affirmative action narrowly to remedy demonstrable discrimination in their past. After *Wygant* and *Croson*, state and local affirmative action plans face a high but not insurmountable hurdle: the clearer the paper trail of past discrimination, the more flexible or waivable the target, the shorter the plan's duration, and the less entrenched the reliance interests of the displaced whites, the more likely such a plan will be upheld. However, *Metro* should not be overstated as a victory for the antisubordination view because this decision turned heavily on the Court's deference to its coequal branches (Congress and the FCC) and low valuation of broadcasters' rights—two factors especially appealing to Justice BYRON R. WHITE, who cast the decisive vote despite his earlier negative votes on affirmative action.

The dissenting opinions in *Metro Broadcasting* may well be more portentous for the future of affirmative action than Justice WILLIAM J. BRENNAN's majority opinion—the last opinion he wrote before retiring from the Court. The dissenters made thinly veiled reference to the backlash against affirmative action evident in national politics since the 1980 elections. Justice O'Connor's dissent, joined by Chief Justice WILLIAM H. REHNQUIST and Justices Scalia and Kennedy, spoke of affirmative action as "contributing to an escalation of racial hostility and conflict," and Justice Kennedy's dissent, joined by Justice Scalia, compared the FCC's policies with those of South Africa and suggested that affirmative action makes whites feel wrongfully stigmatized. Justice Scalia wrote similarly in his *Croson* concurrence that "[w]hen we depart from" pure meritocracy, "we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns." To the *Metro* majority, these objections appeared wildly overstated, and affirmative action readily distinguishable from the evils of apartheid or Jim Crow. Which view will prevail in the wake of Justice Brennan's departure from the Court remains to be seen.

KATHLEEN M. SULLIVAN
(1992)

(SEE ALSO: *Johnson v. Transportation Agency; Paradise, United States v.; Race-Consciousness.*)

Bibliography

SULLIVAN, KATHLEEN M. 1986 Sins of Discrimination: Last Term's Affirmative Action Cases. *Harvard Law Review* 100: 78–98.

WILLIAMS, PATRICIA J. 1990 Metro Broadcasting, Inc v. FCC: Regrouping in Singular Times. *Harvard Law Review* 104: 525–546.

# AFFIRMATIVE ACTION
## (Update 2)

There is no single definition of "affirmative action," either in American politics or in American constitutional law. The core of the debate over affirmative action concerns the consideration of race, ethnicity, or gender as a factor in selecting among applicants, with the aim of increasing the presence of traditionally disadvantaged groups among those selected. Where opponents of affirmative action see "quotas" or "preferences" or improper efforts to engineer "proportional representation" that result in the selection of "unqualified" applicants, supporters of affirmative action see race and gender as no more than a "plus factor" employed to assure "diversity" among fully qualified applicants. The debate rages in the courts, in electoral politics, and in the policymaking of public bodies.

In ADARAND CONSTRUCTORS, INC. V. PEÑA (1995), the Supreme Court held that all "racial classifications," however benign their intent, are subject to STRICT SCRUTINY by the courts. Post-*Adarand* affirmative action decisions in the federal courts of appeal have begun to determine which racially conscious programs constitute "racial classifications" and whether they survive strict scrutiny.

In the field of student admissions, the leading pre-*Adarand* case is REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978), in which the separate but governing opinion of Justice LEWIS F. POWELL, JR., endorsed the use of race as one factor among many to assure diversity in a student body. In HOPWOOD V. TEXAS (1996), the Fifth Circuit Court of Appeals declared that Powell's opinion was not binding PRECEDENT and struck down the University of Texas Law School's use of affirmative action in student admissions. That decision has been subject to much appropriate criticism. Powell's opinion is best understood as having applied strict scrutiny, and thus *Adarand* provides no basis for questioning *Bakke*'s authority. Even when *Bakke* is recognized as controlling authority, however, courts are now taking a hard look at whether affirmative action programs in education are in fact narrowly tailored to address legitimate diversity needs. For example, an affirmative action program at the high school level was rejected on narrow tailoring grounds (among others) by the First Circuit Court of Appeals in *Wessman v. Gittens* (1998).

In the field of government contracting, where *Adarand* is the Supreme Court's most recent decision, controversy exists over whether outreach and self-monitoring programs are "racial classifications" subject to strict scrutiny. The Ninth Circuit Court of Appeals so held in *Monterey Mechanical Co. v. Wilson* (1998), which involved a California requirement that contractors make good faith efforts toward meeting minority hiring goals, a requirement that could be satisfied by a combination of outreach and data collection. The opinion triggered a vigorous dissent from several members of the court on a failed sua sponte request for rehearing en banc.

In the field of government employment, a plurality of the Supreme Court in WYGANT V. JACKSON BOARD OF EDUCATION (1986) rejected the use of race-based affirmative action in teacher layoffs. The plurality rejected two commonly asserted grounds for affirmative action in employment: the remedying of societal discrimination and the provision of minority role models. Consequently, and on the strength of the analogy between student admissions and teacher hiring, educational employers widely rely on "diversity" as their asserted COMPELLING STATE INTEREST in employment cases in which the employer has no demonstrable history of past discrimination. The availability of diversity as a constitutional justification may be weaker for noneducational employers, despite the wide popularity of affirmative action among businesses seeking to serve diverse domestic and global clienteles. Then again, the decision of the Seventh Circuit Court of Appeals in *Wittmer v. Peters* (1996) suggests that employers in one noneducational field—law enforcement and corrections—may be given especially broad leeway in experimenting with race-based hiring aimed at improving the ability of the state to diminish crime in minority communities.

As in the case of government contracting, the question of the applicability of strict scrutiny to outreach programs has received post-*Adarand* judicial attention in employment cases. In *Lutheran Church–Missouri Synod v. Federal Communications Commission* (1998), the District of Columbia Circuit Court of Appeals applied strict scrutiny to, and struck down, an FCC policy requiring radio stations to engage in outreach, to monitor the effects of their hiring practices on minorities and women, and to report the racial and gender composition of their workforces to the agency. The policy did not tie any penalty or benefit to the reported results. It was struck down nonetheless because, in the court's view, "[t]he entire scheme is built on the notion that stations should aspire to a workforce that attains, or at least approaches, proportional representation." As in *Monterey Mechanical,* several members of the court dissented from the denial of rehearing en banc, arguing that outreach and self-monitoring aimed at avoiding discrimination are not "racial classifications" subject to strict scrutiny under *Adarand.* In contrast, the Eleventh Circuit Court of Appeals, in *Allen v. Alabama State Board of Education* (1999), refused to see in *Adarand* grounds to challenge a CONSENT DECREE that required the Alabama

Board of Education to develop nondiscriminatory teacher certification tests using a methodology that required it to monitor the test items for disparate racial impact. Thus, the question of when permissible "race consciousness" crosses the border into suspect "racial classification" remains unsettled after *Adarand.*

In the current legal environment, trial courts may well engage in a searching analysis to determine which justifications for affirmative action are "compelling" in which settings and which forms of affirmative action, if any, are "narrowly tailored" to meet the government's goals. Between the use of strict scrutiny and federal courts' increasing scrutiny of scientific expert testimony in all types of cases pursuant to the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), the next generation of defenses of affirmative action programs will need to be fact-based and sophisticated in proving the validity of the government's means and ends.

DEBORAH C. MALAMUD
(2000)

Bibliography

CHIN, GABRIEL, ed. 1998 *Affirmative Action and the Constitution,* 3 vols. New York: Garland.

SYMPOSIUM 1998 Twenty Years After *Bakke:* The Law and Social Science of Affirmative Action in Higher Education. *Ohio State Law Journal* 59:663–1067.

## AFFIRMATIVE ACTION, ECONOMICS OF

See: Economics of Affirmative Action

## AFROCENTRIC SCHOOLS

As long as private afrocentric schools allow all students the opportunity to attend their schools on a nonracial basis, they do not violate federal CIVIL RIGHTS laws. The constitutionality of a public school district that seeks to establish and operate an afrocentric school is a much more difficult question.

School districts that have established afrocentric schools normally have kept them formally open to any student who wishes to attend, on a racially neutral basis. Teachers and administrators are also normally selected on a racially neutral basis. Even though afrocentric schools involve conscious regard to race in establishing schools and organizing their educational programs, attendance at or employment in an afrocentric school is the result of individual choice, not government classification. School districts also continue to operate their ordinary schools. Students who do not choose to attend or are not admitted into an afrocentric school still receive a free public education.

The Supreme Court's 1995 opinion in MILLER V. JOHNSON made it clear that STRICT SCRUTINY is triggered when government classifies its citizens based on their race or ethnicity. But an afrocentric school set up on a nonracial basis does not require government to classify and treat its citizens as members of a racial or ethinic group. In addition, it may be that afrocentric schools set up on a nonracial basis do not produce discriminatory effects. Therefore, the operation and establishment of an afrocentric school—on a racially neutral basis—does not necessarily trigger strict scrutiny.

There are additional reasons why strict scrutiny should not be applied to afrocentric schools. In *United States v. Fordice* (1992), the Supreme Court addressed the obligation of Mississippi to eradicate the vestiges of a segregated school system within the state's universities. One of the issues was the continued viability of historically black colleges that had been established as part of an earlier effort to maintain SEGREGATION. In a CONCURRING OPINION Justice CLARENCE THOMAS indicated that although Mississippi was not constitutionally required to maintain historically black colleges, there may exist sound educational justifications for operating a historically black college that is open to all on a nonracial basis. If so, the establishment of an afrocentric school could be a legitimate exercise of the school district's power to make educational judgments and not an exercise in RACIAL DISCRIMINATION warranting strict scrutiny. It should be noted, however, that no other Justice joined Thomas's opinion in *Fordice* and there are tensions between it and Justice SANDRA DAY O'CONNOR'S OPINION FOR THE COURT.

If the decision to establish an afrocentric school triggers strict scrutiny, then the school will not likely survive a constitutional challenge. The Supreme Court has already rejected societal discrmination and the need for black students to have role models as COMPELLING STATE INTERESTS. The only compelling state interest that a majority of the Justices have accepted is remedying the effects of identified racial discrimination. Even if a compelling interest could be provided, there would still be the hurdle of narrow tailoring to overcome.

KEVIN BROWN
(2000)

Bibliography

ASANTE, MOLEFI KETE 1998 *The Afrocentric Idea,* revised and expanded edition. Philadelphia: Temple University Press.

BROWN, KEVIN 1993 Do African Americans Need Immersion Schools? The Paradoxes Created by the Conceptualization by Law of Race and Public Education. *Iowa Law Review* 78: 813–881.

## *AFROYIM v. RUSK*
387 U.S. 253 (1967)

A section of the Nationality Act of 1940 stripped Americans of their CITIZENSHIP if they voted in a foreign political election. In PEREZ V. BROWNELL (1957) the Supreme Court upheld the constitutionality of this provision, 5–4. On the authority of *Perez*, the State Department refused a passport to Afroyim, a naturalized citizen, who had voted in an Israeli election. In *Afroyim*, however, a new five-Justice majority, speaking through Justice HUGO L. BLACK, overruled *Perez* and declared that the FOURTEENTH AMENDMENT's citizenship clause denied Congress authority to strip Americans of their citizenship without their consent. "Citizenship in this Nation is a part of a cooperative affair," Black wrote. "Its citizenry is the country and the country is its citizenry."

MICHAEL E. PARRISH
(1986)

# AGE DISCRIMINATION

The racial CIVIL RIGHTS revolution of the 1950s and 1960s generated interest in constitutional protection for groups other than racial and religious minorities. Enhanced constitutional scrutiny of SEX DISCRIMINATION may be a consequence of the civil rights struggle.

Discrimination on the basis of age, however, has not become constitutionally suspect. In MASSACUSETTS BOARD OF RETIREMENT V. MURGIA (1976) the Supreme Court held that some forms of age classification are not suspect and sustained against EQUAL PROTECTION attack a state statute requiring uniformed state police officers to retire at age fifty. In a PER CURIAM opinion, the Court concluded that the retirement did not affect a FUNDAMENTAL RIGHT, and characterized the affected class as uniformed police officers over age fifty. Perhaps intending to leave open heightened scrutiny of some age classifications, the Court stated that the requirement in *Murgia* did not discriminate against the elderly. In light of its findings with respect to the nature of the right and the relevant class, the Court held that mere rationality, rather than STRICT SCRUTINY, was the proper STANDARD OF REVIEW in determining whether the statute violated the equal protection clause. It found that the age classification was rationally related to furthering the state's interest of protecting the public by assuring physical preparedness of its uniformed state police.

In *Vance v. Bradley* (1979) the Court, in an opinion by Justice BYRON R. WHITE, again applied the RATIONAL BASIS test and held that Congress may require retirement at age sixty of federal employees covered by the Foreign Service retirement and disability system, even though it imposes no such limit on employees covered by the Civil Service retirement and disability system. In sustaining the mandatory retirement age, the Court emphasized Congress's special consideration of the needs of the Foreign Service. "Congress has legislated separately for the Foreign Service and has gone to great lengths to assure that those conducting our foreign relations will be sufficiently competent and reliable in all respects. If Congress attached special importance to high performance in these positions . . . it was quite rational to avoid the risks connected with having older employees in the Foreign Service but to tolerate those risks in the Civil Service."

But in the legislative arena, age discrimination did feel the effects of the constitutional egalitarian revolution. Section 715 of the CIVIL RIGHTS ACT OF 1964 required the secretary of labor to report to Congress on age discrimination in employment. In 1965 the secretary reported persistent arbitrary discrimination against older Americans. In 1967, upon the recommendation of President LYNDON B. JOHNSON, and relying on its powers under the COMMERCE CLAUSE, Congress passed the Age Discrimination in Employment Act (ADEA). The act, which has been amended several times, prohibits employment discrimination against persons between the ages of forty and seventy.

In EQUAL EMPLOYMENT OPPORTUNITY COMMISSION V. WYOMING (1983), prior to its OVERRULING of NATIONAL LEAGUE OF CITIES V. USERY (1976) in GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985), the Court sustained against a TENTH AMENDMENT attack the constitutionality of Congress's 1974 extension of the ADEA to state and local governments. In a 5–4 decision, the Court found that applying the act's prohibition to a Wyoming mandatory retirement age for game wardens would not interfere with integral state functions because the state remained free to apply reasonable standards of fitness to game wardens.

Building on a provision in Title VII of the Civil Rights Act of 1964, the ADEA allows employers to take otherwise prohibited age-based action when age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." In its early interpretations of this provision, the Court has not given the defense an expansive reading. In *Western Air Lines, Inc. v. Criswell* (1985), in an opinion by Justice JOHN PAUL STEVENS, the Court held that Congress's "reasonably necessary" standard requires something more than a showing that an age-based requirement is rationally connected to the employer's business. Relying on the heightened standard, the Court therefore rejected an airline's defense of its requirement that flight engineers retire at age sixty. In *Johnson v. Mayor & City Council of Baltimore* (1985) the Court held that a federal statute generally requiring federal fire fighters to retire at age fifty-five does not establish

that being under fifty-five is a bona fide occupational qualification under the ADEA for nonfederal fire fighters.

In the Age Discrimination Act of 1975 (ADA), following the racial antidiscrimination model of Title VI of the Civil Rights Act of 1964, Congress prohibited discrimination on the basis of age in programs or activities receiving federal financial assistance. The ADA thus joins Title IX of the EDUCATION AMENDMENTS OF 1972 and section 504 of the REHABILITATION ACT OF 1973, which prohibit, respectively, sex discrimination and discrimination against the handicapped in federally assisted programs. The ADA vests broad authority in the secretary of health and human services to promulgate regulations to effectuate the statute's antidiscrimination mandate. Like the ADEA, the ADA contains exceptions allowing discrimination on the basis of age when age is reasonably related to the program or activity. Other specific federal spending programs contain their own statutory prohibitions on age discrimination.

THEODORE EISENBERG
(1986)

Bibliography

SCHUCK, PETER H. 1979 The Graying of Civil Rights Law: The Age Discrimination Act of 1975. *Yale Law Journal* 89:27–93.

UNITED STATES DEPARTMENT OF LABOR 1965 *Report to the Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964.* Washington D.C.: Government Printing Office.

## AGE DISCRIMINATION
(Update)

Unique among the first generation of ANTIDISCRIMINATION LEGISLATION, the Age Discrimination in Employment Act (ADEA) did not provide enhanced statutory protection for what would otherwise be a constitutionally protected category. As the Supreme Court held in MASSACHUSETTS BOARD OF RETIREMENT V. MURGIA (1976), "old age does not define a 'discrete and insular group' . . . in need of extra protection for the majoritarian process. Instead, it marks a stage that each of us will reach if we live out our normal life span."

The ADEA emerged from reports to Congress that older workers were being systematically excluded from the workplace based on age. As reported by the Secretary of Labor in 1967, for example, half of all private job openings were barred to applicants over fifty five, and a quarter forbade applicants over forty five. The act makes it illegal for an employer "to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." As presently formulated, the act applies to all persons over forty years of age and its prohibitions now cover hiring practices and have essentially eliminated the practice of mandatory retirement.

Although the act was aimed at entry barriers to older employees, there is relatively little evidence of any success on that front. The ADEA's prohibitions did remove the formal barriers to entry for older employees. However, significant other barriers exist in the form of higher wages associated with the rising wage scales of American employment; the difficulty of assuming pension obligations; and the problems of superannuated skills in an evolving workplace. Thus, apart from issues of discrimination, the ADEA has had difficulty with the general trend that, as older workers age, they accumulate seniority, higher income level, and greater pension rights. All of these economic factors provide motivations for cost-conscious employers to avoid the employment of older workers. The Court considered the impact of economic factors correlated to age in *Hazen Paper Co. v. Biggins* (1993), but ruled that there is no age discrimination when the employer is motivated by some factor other than the employee's age—regardless of any correlation. This decision has produced considerable dissension among the lower courts, which must attempt to distinguish age-based motivations from age-related ones.

Instead of the initial focus on access to employment, the act became the primary tool for improving the position of older workers already in the workplace, particularly after the emergence of powerful lobbying agents such as the American Association of Retired Persons. Virtually all ADEA litigation now concerns end-of-career issues, oftentimes related to the availability of employee buyouts or the impact of reductions in force.

SAMUEL ISSACHAROFF
ERICA HARRIS
(2000)

Bibliography

ISSACHAROFF, SAMUEL and HARRIS, ERICA WORTH 1997 Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution. *New York University Law Review* 72:780–840.

POSNER, RICHARD A. 1995 *Aging and Old Age.* Chicago: University of Chicago Press.

## AGE DISCRIMINATION ACT
89 Stat. 728 (1975)

Enacted as Title III of the Older Americans Amendments of 1975, the Age Discrimination Act of 1975, like Title VI

of the CIVIL RIGHTS ACT OF 1964 and other laws, links ANTIDISCRIMINATION LEGISLATION to Congress's spending power. Subject to important but ambiguous exceptions, the act prohibits exclusion on the basis of age from federally financed programs. In covered programs, the act affords greater protection against AGE DISCRIMINATION than the Supreme Court has held to be required under the EQUAL PROTECTION clause. In MASSACHUSETTS BOARD OF RETIREMENT V. MURGIA (1976), in upholding a statute requiring police officers to retire at age fifty, the Court found age not to be a SUSPECT CLASSIFICATION. The Age Discrimination in Employment Act, as well as some state laws, protect against age discrimination in employment.

THEODORE EISENBERG
(1986)

Bibliography

SCHUCK, PETER H. 1979 The Graying of Civil Rights Laws: The Age Discrimination Act of 1975. *Yale Law Journal* 89:27–93.

## *AGNELLO v. UNITED STATES*
269 U.S. 20 (1925)

In *Agnello* the Supreme Court extended the scope of SEARCH INCIDENT TO ARREST from the person of the arrestee, previously authorized in WEEKS V. UNITED STATES (1914), to the premises on which the arrest was made. The precise extent of the allowable search was, however, not delineated; it became a matter of great judicial contention in later cases.

JACOB W. LANDYNSKI
(1986)

## *AGOSTINI v. FELTON*
521 U.S. 203 (1997)

In *Agostini v. Felton*, the Supreme Court took the remarkable step of OVERRULING one of its own decisions in a later iteration of the very same litigation. In AGUILAR V. FELTON (1985), the Court held that the ESTABLISHMENT CLAUSE prohibited the City of New York from using funds provided by the federal government under Title I of the Elementary and Secondary Education Act of 1965 to provide special education services to disadvantaged students on the sites of private sectarian schools. Under the test set forth in LEMON V. KURTZMAN (1971), the *Aguilar* Court concluded that the program presented an unacceptable risk of entanglement between government and religion.

In the wake of *Aguilar*, the district court entered a permanent INJUNCTION barring the use of any public funds to conduct on-site education programs at religiously affiliated schools. New York estimated that the costs of complying with that injunction—for example, by establishing trailers near the schools in which the services could be provided—amounted to $100 million over ten years. After several subsequent decisions of the Court appeared to undermine the premise of *Aguilar* that the Constitution forbade any expenditure of public funds to provide on-site educational services at religiously affiliated schools, and after a majority of the Court (in separate opinions in different cases) had expressed the view that *Aguilar* should be reconsidered, New York filed a motion for relief from the judgment and injunction.

The Court, in an opinion by Justice SANDRA DAY O'CONNOR, agreed that decisions since *Aguilar*, particularly *Zobrest v. Catalina Foothills School District* (1993) and WITTERS V. WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND (1986), had established that participation in government aid programs by sectarian schools did not necessarily advance religion nor excessively entangle government with religion. On the contrary, a program that allocates benefits based on neutral, nonreligious criteria, and that provides the same level of benefits to religious and secular beneficiaries alike, does not threaten the unconstitutional ESTABLISHMENT OF RELIGION. O'Connor concluded that the decision in *Aguilar* was inconsistent with these subsequent cases, and that the doctrine of STARE DECISIS did not require *Aguilar* to be retained. After concluding that the conditions for relief from the prior injunction were met, the Court granted the city relief. The four dissenting Justices objected both to the Court's decision to allow the federal rules of procedure to be used to gain relief from an injunction in this context, and to the Court's substantive establishment clause analysis.

Apart from its practical significance, the decision in *Agostini* provides important doctrinal support for those defending voucher programs in which the government provides financial assistance to individuals that can be used to defray the costs of private education, including education at religious schools. Whether such programs are permissible promises to be one of the most hotly contested and important establishment clause questions to come before the Court in a generation.

WILLIAM K. KELLEY
(2000)

(SEE ALSO: *Government Aid to Religious Institutions; Religion in Public Schools; Religious Liberty; School Choice.*)

## AGRICULTURAL ADJUSTMENT ACT OF 1933
48 Stat. 31

This act, the set piece of the NEW DEAL for agriculture, emphasized PRODUCTION controls in an effort to revive farming from its 1920s torpor. Stressing collective action, the act sought to boost farm prices. After WORLD WAR I ended, American farmers had found stiff new competition in the world market for the tremendously expanded U.S. farm output. As a result, surpluses ballooned and prices deflated. A modest recovery by 1923 had not taken firm hold, and the Depression in 1929 struck hard at farmers. Agricultural prices had dropped four times as far as industrial prices between 1929 and 1933. Shortly after FRANKLIN D. ROOSEVELT'S inauguration in March 1933, his secretary of agriculture, Henry Wallace, met with farm leaders to formulate a relief plan. The resulting bill, drafted in part by JEROME FRANK, was ready in five days. To secure wide support, REXFORD TUGWELL and others recommended that this "farm relief" measure comprise elements of plans already proposed. As a result, it established parity prices—a price level that would allow the purchasing power of income from a commodity to equal its purchasing power in the base period, 1909–1914.

The act's avowed purpose, "to relieve the existing national economic emergency by increasing agricultural purchasing power," would be accomplished primarily by raising prices of seven basic commodities to parity levels. Control of production would be the means of achieving this goal. The secretary of agriculture could exert control by regulating benefit payments to farmers who voluntarily reduced production, by imposing marketing quotas, and by providing for government purchase of surpluses. The government would fund these efforts by imposing on the primary processors of agricultural goods an EXCISE TAX based on the difference between farm and parity prices. Benefit payments were designed to entice cooperation although participation was theoretically voluntary.

Senate opposition gave way to substantial public pressure for action and a lack of workable alternatives. The act also granted the secretary of agriculture power to make regulations to enforce the act (subject to presidential approval), assess penalties, and (with the secretary of the treasury) to have ultimate say in issues of payments to farmers. By late 1935 the act and a drought had provided much relief (net farm income rose 250 per cent), forecasting a profitable recovery for American agriculture. In January 1936, however, a 6–3 Supreme Court invalidated the statute in UNITED STATES V. BUTLER. A determined Congress passed a second AGRICULTURAL ADJUSTMENT ACT in 1938.

DAVID GORDON
(1986)

## AGRICULTURAL ADJUSTMENT ACT OF 1938
50 Stat. 246

After the Supreme Court invalidated the AGRICULTURAL ADJUSTMENT ACT (AAA) OF 1933 in UNITED STATES V. BUTLER (1936), Congress passed a second AAA in 1938, citing the effect of farm PRODUCTION on INTERSTATE COMMERCE as the act's basis. Congress once again sought to achieve parity levels for principal commodities and maintain earlier soil conservation payments as well. The act retained voluntary participation and, acknowledging *Butler*, Congress now levied no processing taxes nor did it set up production quotas; instead the act inaugurated a system of marketing quotas. Such a quota applied only when two-thirds of a commodity's producers approved. Once a general quota was authorized, the secretary of agriculture could set specific quotas for individual farms and assess a penalty tax on violators. Moreover, approval of quotas made available special loans to help store surplus production. The 1938 act also provided means of increasing consumption to help alleviate surpluses, and created a Commodity Credit Corporation to make loans when income fell because of low prices, and a Federal Crop Insurance Corporation. The Supreme Court sustained the act in *Mulford v. Smith* (1939) and WICKARD V. FILBURN (1942).

DAVID GORDON
(1986)

## AGRICULTURAL MARKETING AGREEMENT ACT
50 Stat. 246 (1937)

In 1933 the first AGRICULTURAL ADJUSTMENT ACT (AAA) developed programs for marketing various commodities. Congress strengthened that act two years later and, in 1937, reenacted many of the AAA provisions and amended others. The Agricultural Marketing Agreement Act stressed regulation of marketing, not of PRODUCTION. Responding to Supreme Court decisions that cast doubt on the marketing agreement provisions of the AAA, Congress now emphasized the separability of those sections. The act authorized the secretary of agriculture to set marketing quotas and price schedules and to sign voluntary agreements with producers. If fifty percent of the handlers and two-thirds of the producers of a commodity approved, the secretary could issue marketing orders. All such agreements were exempted from federal antitrust laws. The AAA's earlier effort to achieve parity prices (a level providing income with buying power equivalent to that for 1909–1914) by balancing production with consumption

was now replaced by maintenance of "orderly marketing conditions for agricultural commodities in INTERSTATE COMMERCE." In addition, the 1937 act contained a broader definition of interstate and FOREIGN COMMERCE, declaring it to include any part of the "current" that is usual in the handling of a commodity. (See STREAM OF COMMERCE DOCTRINE.) The Supreme Court sustained the act in *United States v. Rock Royal Co-operative* (1939), finding that even a local transaction was "inextricably mingled with and directly affect[ed]" marketing in interstate commerce. The Court took similar action in WRIGHTWOOD DAIRY V. UNITED STATES (1942), even though that case involved purely INTRASTATE COMMERCE.

DAVID GORDON
(1986)

## AGRICULTURE

See: *Butler, United States v.;* Subjects of Commerce; *Wickard v. Filburn*

## *AGUILAR v. FELTON*
473 U.S. 402 (1985)

## *GRAND RAPIDS SCHOOL DISTRICT v. BALL*
473 U.S. 373 (1985)

In COMPANION CASES a 5–4 Supreme Court held unconstitutional the assignment of public school teachers to parochial schools for special auxiliary services. In the Grand Rapids "shared time" case, Justice WILLIAM J. BRENNAN for the majority concerned himself only with the possibility that the teachers might advance religion by conforming their instruction to the environment of the private sectarian schools. The evidence did not validate his fear. In *Aguilar,* Brennan expressed the same fear but focused on the "excessive entanglement of church and state" which he asserted was present in New York City's program to implement the ELEMENTARY AND SECONDARY EDUCATION ACT passed by Congress in 1965. Advancing religion and excessive entanglement show violations of the FIRST AMENDMENT'S SEPARATION OF CHURCH AND STATE as construed by the Court in LEMON V. KURTZMAN (1971), where it devised a test to determine whether government has passed a law respecting an ESTABLISHMENT OF RELIGION.

The New York City program employed guidance counselors, psychologists, psychiatrists, social workers, and other specialists to teach remedial reading, mathematics, and English as a second language, and to provide guidance services. They worked part-time on parochial school premises, using only materials and equipment supplied by secular authorities; and, they acted under a ban against participation in religious activities. They worked under supervision similar to that which prevailed in public schools; the city monitored instruction by having supervisory personnel make unannounced "monthly" and "occasional" visits. Almost three-fourths of the educators in the program did not share the religious affiliation of any school in which they taught.

Brennan for the majority traveled a far path to find infirmities in the city's program. He expressed concern that the program might infringe the RELIGIOUS LIBERTY of its intended beneficiaries. He saw government "intrusion into sacred matters" and the necessity of an "ongoing inspection" to ensure the absence of inculcation of religion in the instruction. The need for "a permanent and pervasive State presence in the sectarian schools receiving aid" infringed values protected by the establishment clause.

Thus, if government fails to provide for surveillance to ward off inculcation, its aid unconstitutionally advances the religious mission of the church schools; if government does provide for monitoring, even if only periodically, it gets excessively entangled with religion. Justice SANDRA DAY O'CONNOR, dissenting, declared that the conclusion that the religious mission of the schools would be advanced by auxiliary services provided by the public was "not supported by the facts of this case." The nineteen-year record of the program showed not a single allegation of an attempt to indoctrinate religiously at public expense. The decision adversely affected disadvantaged parochial school children who needed special auxiliary services not provided by their parochial schools.

LEONARD W. LEVY
(1986)

## *AGUILAR v. TEXAS*
378 U.S. 108 (1964)

The rule that an officer's affidavit supporting an application for a SEARCH WARRANT must contain more than the officer's "mere affirmation of suspicion" was established in *Nathanson v. United States* (1933). Probable cause requires a statement of "facts or circumstances" explaining the affiant's belief that criminal activity is afoot, thus allowing the magistrate to make an independent judgment. In *Aguilar* the same rule was applied to an affidavit based on information supplied by an informant.

The *Aguilar* affidavit stated that the officers "had received reliable information from a credible person" that narcotics were kept on the premises. Nothing in the affidavit allowed the magistrate to determine the accuracy of

the informant's conclusion. Though hearsay information can satisfy PROBABLE CAUSE, said the Court, the affidavit must give EVIDENCE that the informant spoke from personal knowledge, and explain the circumstances that led the officer to conclude that he "was "credible' or his information "reliable." The *Aguilar* rule was discarded in ILLINOIS V. GATES (1983).

JACOB W. LANDYNSKI
(1986)

## *AKE v. OKLAHOMA*
470 U.S. 68 (1985)

Following the PRECEDENTS of decisions holding that the RIGHT TO COUNSEL requires a state to provide a lawyer to an INDIGENT defendant, the Supreme Court held, 8–1, that the FOURTEENTH AMENDMENT's guarantee of PROCEDURAL DUE PROCESS requires a state to provide an indigent defendant access to such psychiatric examination and assistance necessary to prepare an effective defense based on the claim of insanity. Justice THURGOOD MARSHALL wrote the OPINION OF THE COURT. Chief Justice WARREN E. BURGER, in a CONCURRING OPINION, said that the decision was limited to capital cases. Justice WILLIAM H. REHNQUIST, dissenting, agreed that some such cases might require the state to provide psychiatric assistance, but argued that in this case, where the burden of proving insanity was on the defendant, the state had no such obligation.

KENNETH L. KARST
(1986)

## *AKRON v. AKRON CENTER FOR REPRODUCTIVE CHOICE*

See: Reproductive Autonomy

## *A. L. A. SCHECHTER POULTRY CORP. v. UNITED STATES*

See: *Schechter Poultry Corp. v. United States*

## ALBANY PLAN

See: Franklin, Benjamin

## *ALBERTS v. CALIFORNIA*

See: *Roth v. United States*

## *ALBERTSON v. SUBVERSIVE ACTIVITIES CONTROL BOARD*
382 U.S. 70 (1965)

This was one of several cases in which the WARREN COURT, on self-incrimination grounds, struck down compulsory registration provisions aimed at individuals who were members of inherently suspect groups. (See MARCHETTI V. UNITED STATES.) The Communist party failed to register with the government as required by the SUBVERSIVE ACTIVITIES CONTROL BOARD. The Board's order obligated all members of the party to register. By refusing, Albertson made himself liable to criminal penalties; he offered numerous constitutional objections. The Supreme Court decided only his claim that the order violated his RIGHT AGAINST SELF-INCRIMINATION.

Justice WILLIAM J. BRENNAN for an 8–0 Court observed, "Such an admission of membership may be used to prosecute the registrant under the membership clause of the SMITH ACT . . . or under . . . the Subversive Activities Control Act. . . ." The government relied on an old decision requiring all taxpayers to file returns, but Brennan answered that tax regulations applied to the public, not to "a highly selective group inherently suspect of criminal activities." The government also argued that a grant of immunity from prosecution for registrants supplanted the right against self-incrimination. Relying on COUNSELMAN V. HITCHCOCK (1892), Brennan ruled that unless the government provided "absolute immunity" for all transactions relating to coerced admissions, it failed to supplant the right. In KASTIGAR V. UNITED STATES (1972) the Court switched from transactional to use immunity. (See IMMUNITY GRANTS.)

LEONARD W. LEVY
(1986)

## ALCOHOL ABUSE

See: Punitive Damages

## *ALDERMAN v. UNITED STATES*
394 U.S. 165 (1969)

During the 1960s, the government admitted it had engaged in illegal electronic surveillance. Criminal defendants overheard in such surveillance sought the transcripts of the conversations to determine whether their convictions had been based on illegal surveillance and were therefore reversible. The government tried to limit the right to challenge electronic surveillance to persons ac-

tually overheard and to restrict disclosure of the transcripts to the judge.

The Supreme Court ruled that (1) anyone overheard, or anyone on whose premises conversations were overheard, could challenge the legality of the surveillance, but no one else; and (2) a person found to have been illegally overheard was entitled to see the transcripts to determine whether his conviction was based on illegal surveillance.

HERMAN SCHWARTZ
(1986)

## ALEXANDER, JAMES

See: Zenger's Case

## *ALEXANDER v. HOLMES COUNTY BOARD OF EDUCATION*
396 U.S. 19 (1969)

Part of the "southern strategy" that helped elect President RICHARD M. NIXON had been an assertion that the Supreme Court had been too rigid in its treatment of school SEGREGATION. Thus it was no surprise when, on the eve of the opening of the fall 1969 school year, the Justice Department proposed that thirty-three Mississippi school boards be given an extension until December 1 to present DESEGREGATION plans. The UNITED STATES COURT OF APPEALS agreed, and the next day the plaintiffs sought an order from Justice HUGO L. BLACK staying this decision. Justice Black refused the stay but suggested that the case be brought to the whole Supreme Court for an early decision. The Court promptly granted CERTIORARI, heard the case in late October, and before month's end issued its order. The time for ALL DELIBERATE SPEED in school desegregation had run out; the school boards had an obligation "to terminate dual school systems at once." The BURGER COURT would not be a "Nixon Court" on this issue.

KENNETH L. KARST
(1986)

## ALIEN

The status of aliens—persons who are not citizens of the United States—presented perplexing constitutional problems in this country only after the great waves of IMMIGRATION began in the nineteenth century. The question seems not to have troubled the Framers of the Constitution. JAMES MADISON, in THE FEDERALIST #42, defended the power of Congress to set a uniform rule of NATURALIZATION as a means for easing interstate friction. Absent such a congressional law, he argued, State A might grant CITIZENSHIP to an alien who, on moving to State B, would become entitled to most of the PRIVILEGES AND IMMUNITIES granted by State B to its citizens. Evidently it was assumed from the beginning that aliens were not protected by Article IV's privileges and immunities clause, and it is still the conventional wisdom—although not unchallenged—that aliens cannot claim "the privileges and immunities of citizens of the United States" guaranteed by the FOURTEENTH AMENDMENT.

Alienage has sometimes been treated as synonymous with dissent, or even disloyalty. The ALIEN AND SEDITION ACTS (1798), for example, were aimed not only at American citizens who opposed President JOHN ADAMS but also at their supporters among French and Irish immigrants. The PALMER RAIDS of 1919–1920 culminated in the DEPORTATION of hundreds of alien anarchists and others suspected of SUBVERSIVE ACTIVITIES. At the outbreak of WORLD WAR II, Attorney General FRANCIS BIDDLE was determined to avoid the mass internment of aliens; in the event, however, Biddle deferred to War Department pressure, and more than 100,000 persons of Japanese ancestry, alien and citizen alike, were removed from their West Coast homes and taken to camps in the interior. (See JAPANESE AMERICAN CASES, 1943–1944.)

When the KENTUCKY RESOLUTIONS (1798) protested against the Alien and Sedition Acts, they defended not so much the rights of aliens as STATES' RIGHTS. Indeed, the *rights* of aliens were not a major concern in the nation's early years. Even the federal courts' DIVERSITY JURISDICTION could be invoked in a case involving aliens only when citizens of a state were on the other side, as HODGSON V. BOWERBANK (1809) held. For this jurisdictional purpose, a "citizen" of a state still means a United States citizen who is also a state citizen. (An alien can sue another alien in a state court.) Thus, while a state can grant "state citizenship"—can allow aliens to vote, hold public office, or receive state benefits—that state citizenship does not qualify a person as a "citizen" within the meaning of the Constitution. Some states have previously allowed aliens to vote; even today, some states allow aliens to hold public office.

Most individual rights protected by the Constitution are not limited to "citizens" but extend to "people" or "persons," including aliens. An exception is the right to vote, protected by the FIFTEENTH, NINETEENTH, and TWENTY-SIXTH AMENDMENTS, which is limited to citizens. Aliens do not, of course, have the constitutional freedom of entry into the country that citizens have; aliens' stay here can be conditioned on conduct—for example, the retention of student status—that could not constitutionally be required of citizens. An alien, but not a citizen, can be deported for certain violations of law. In wartime, the property of enemy aliens can be confiscated. Yet aliens are

subject to many of the obligations fastened on citizens: they pay taxes along with the rest of us, and, if Congress so disposes, they are as susceptible as citizens to CONSCRIPTION into the armed forces.

Congress, by authorizing the admission of some aliens for permanent residence, accepts those admittees as at least limited members of the national community. The CIVIL RIGHTS ACT OF 1866, for example, protects a resident alien against state legislation that interferes with the alien's earning a livelihood. The vitality of the PREEMPTION DOCTRINE in such cases no doubt rests on two assumptions: that the national government, not the states, has the primary responsibility for the nation's dealings with foreign countries, and that the regulation of another country's nationals is likely to affect those dealings.

Throughout our history, state laws have discriminated against aliens by disqualifying them from various forms of public and private employment, and from receiving public assistance benefits. Early decisions of the Supreme Court mostly upheld these laws, ignoring their evident tensions with congressional policy and rejecting claims based on the Fourteenth Amendment's EQUAL PROTECTION clause. Two decisions in 1948, OYAMA V. CALIFORNIA and TAKAHASHI V. FISH & GAME COMMISSION, undermined the earlier precedents, and in the 1970s the Court made a frontal assault on state discriminations against aliens.

A legislative classification based on the status of alienage, the Court announced in GRAHAM V. RICHARDSON (1971), was a SUSPECT CLASSIFICATION, analogous to a racial classification. Thus, justifications offered to support the classification must pass the test of STRICT SCRUTINY. State restrictions of WELFARE BENEFITS, on the basis of alienage, were accordingly invalidated. Two years later, this reasoning was extended to invalidate a law disqualifying aliens from a state's civil service, SUGARMAN V. DOUGALL (1973), and a law barring aliens from the practice of law, IN RE GRIFFITHS (1973). The string of invalidations of state laws continued with *Examining Board v. Flores de Otero* (1976) (disqualification to be a civil engineer) and *Nyquist v. Mauclet* (1977) (limiting eligibility for state scholarship aid).

In the *Sugarman* opinion, the Court had remarked that some state discriminations against aliens would not have to pass strict judicial scrutiny. The right to vote in state elections, or to hold high public office, might be limited to United States citizens on the theory that such rights are closely connected with the idea of membership in a political community. By the end of the decade, these words had become the foundation for a large exception to the principle of strict scrutiny of alienage classifications. The "political community" notion was extended to a broad category of public employees performing "government functions" requiring the exercise of discretion and responsibility. Disqualification of aliens from such jobs would be upheld if it was supported by a RATIONAL BASIS. FOLEY V. CONNELIE (1978) thus upheld a law disqualifying aliens to serve as state troopers, and AMBACH V. NORWICK (1979) upheld a law barring aliens from teaching in public schools unless they had shown an intent to become U.S. citizens. *Cabell v. Chavez-Salido* (1982) extended the same reasoning to state probation officers.

At the same time, the Court made clear that when Congress discriminated against aliens, nothing like strict judicial scrutiny was appropriate. *Mathews v. Diaz* (1976) announced an extremely deferential standard of review for such congressional laws, saying that the strong federal interest in regulating foreign affairs provided a close analogy to the doctrine of POLITICAL QUESTIONS—which suggests, of course, essentially no judicial scrutiny at all.

It was argued for a time that the preemption doctrine provides the most complete explanation of the Court's results in alienage cases. The early 1970s decisions, grounded on equal protection theory, instead might have been rested on congressional laws such as the 1866 act. The decisions on "governmental functions," seen in this light, would amount to a recognition that Congress has not admitted resident aliens to the "political community." On this theory, because Congress has not admitted "undocumented" aliens for any purpose at all, state laws regulating them would be viewed favorably. In PLYLER V. DOE (1982), the Supreme Court rejected this line of reasoning and held, 5–4, that Texas had denied equal protection by refusing free public education to children not lawfully admitted to the country while providing it for all other children. The majority, conceding that Congress might authorize some forms of state discrimination, discerned no such authorization in Congress's silence.

The preemption analysis, no less than an equal protection analysis, leaves the key term ("political community") for manipulation; on either theory, for example, the school teacher case seems wrongly decided. And the equal protection approach has one advantage that is undeniable: it focuses the judiciary on questions that bear some relation to life—substantive questions about degrees of discrimination and proffered justifications—rather than on the metaphysics of preemption.

KENNETH L. KARST
(1986)

Bibliography

NOTE 1975 Aliens' Right to Teach: Political Socialization and the Public Schools. *Yale Law Journal* 85:90–111.

——— 1979 A Dual Standard for State Discrimination Against Aliens. *Harvard Law Review* 92:1516–1537.

——— 1979 The Equal Treatment of Aliens: Preemption or Equal Protection? *Stanford Law Review* 31:1069–1091.

——— 1980 State Burdens on Resident Aliens: A New Preemption Analysis. *Yale Law Journal* 89:940–961.

PRESTON, WILLIAM, JR. 1963 *Aliens and Dissenters: Federal Suppression of Radicals, 1903–1933.* Cambridge, Mass.: Harvard University Press.

ROSBERG, GERALD M. 1977 The Protection of Aliens from Discriminatory Treatment by the National Government. *Supreme Court Review* 1977:275–339.

## ALIENAGE

See: Immigration and Alienage

## ALIEN AND SEDITION ACTS

Naturalization Act
1 Stat. 566 (1798)
Alien Act
1 Stat. 570 (1798)
Alien Enemies Act
1 Stat. 577 (1798)
Sedition Act
1 Stat. 596 (1798)

These acts were provoked by the war crisis with France in 1798. Three of the four acts concerned ALIENS. Federalist leaders feared the French and Irish, in particular, as a potentially subversive force and as an element of strength in the Republican party. The Naturalization Act increased the period of residence required for admission to CITIZENSHIP from five to fourteen years. The Alien Act authorized the President to deport any alien deemed dangerous to the peace and safety of the United States. The Alien Enemies Act authorized incarceration and banishment of aliens in time of war. The Sedition Act, aimed at "domestic traitors," made it a federal crime for anyone to conspire to impede governmental operations or to write or publish "any false, scandalous, and malicious writing" against the government, the Congress, or the President.

While Republicans conceded the constitutionality, though not the necessity, of the Naturalization and Alien Enemies acts, they assailed the others, not only as unnecessary and unconstitutional but as politically designed to cripple or destroy the opposition party under the pretense of foreign menace. The constitutional argument received authoritative statement in the VIRGINIA AND KENTUCKY RESOLUTIONS. In defense of the Alien Act, with its summary procedures, Federalists appealed to the inherent right of the government to protect itself. The same appeal was made for the Sedition Act. Federalists denied, further, that the act violated FIRST AMENDMENT guarantees of FREEDOM OF SPEECH and PRESS, which they interpreted as prohibitions of PRIOR RESTRAINT only. They also claimed that the federal government had JURISDICTION over COMMON LAW crimes, such as SEDITIOUS LIBEL, and so could prosecute without benefit of statute. The statute, they said, liberalized the common law by admitting truth as a defense and authorizing juries to return a general verdict.

Despite the zeal of President JOHN ADAMS' administration, no one was actually deported under the Alien Act. (War not having been declared, the Alien Enemies Act never came into operation.) The Sedition Act, on the other hand, was widely enforced. Twenty-five persons were arrested, fourteen indicted (plus three under common law), ten tried and convicted, all of them Republican printers and publicists. The most celebrated trials were those of Matthew Lyon, Republican congressman and newspaper editor in Vermont; Dr. Thomas Cooper, an English-born scientist and political refugee, in Philadelphia; and James T. Callender, another English refugee, who possessed a vitriolic pen, in Richmond. All were fined upward to $1,000 and imprisoned for as long as nine months. Before partisan judges and juries, in a climate of fear and suspicion, the boasted safeguards of the law proved of no value to the defendants, and all constitutional safeguards were rejected.

The repressive laws recoiled on their sponsors, contributing to the Republican victory in the election of 1800. The Sedition Act expired the day THOMAS JEFFERSON became President. He immediately voided actions pending under it and pardoned the victims. In 1802 the Alien Act expired and Congress returned the NATURALIZATION law to its old footing. Only the Alien Enemies Act remained on the statute book. Nothing like this legislation would be enacted again until the two world wars of the twentieth century.

MERRILL D. PETERSON
(1986)

Bibliography

SMITH, JAMES MORTON 1956 *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties.* Ithaca, N.Y.: Cornell University Press.

## ALIEN REGISTRATION ACT

54 Stat. 670 (1940)

This measure, popularly known as the Smith Act, was destined to become the most famous of the anticommunist measures of the Cold War, McCarthy period. The act required all ALIENS living in the United States to register with the government, be fingerprinted, carry identification cards, and report annually. Persons found to have ties to

"subversive organizations" could be deported. The registration requirement was rescinded in 1982.

Such alien registration was only one of the various purposes of the act. It was directed primarily at SUBVERSIVE ACTIVITIES which were causing growing concerns on the eve of war, particularly communist-inspired strikes intended to injure American defense production. As the first federal peacetime SEDITION statute since 1798, the Smith Act in its most significant section made it a crime to "knowingly, or willfully, advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force and violence. . . ." Any attempts forcibly to overthrow the government of the United States by publication or display of printed matters, to teach, or to organize any group, or to become a "knowing" member of such an organization were forbidden. Section 3 forbade conspiracy to accomplish any of these ends. The act carried maximum criminal penalties of a $10,000 fine or ten years in prison or both; no one convicted under the law was to be eligible for federal employment during the five years following conviction.

The act, which did not mention the Communist party, attracted little attention at the time of its passage, and initial enforcement was spotty. Although five million aliens were registered and fingerprinted shortly following its passage, its antisubversive sections were not used until 1943, when a small group of Minneapolis Trotskyites were convicted. When the Cold War intensified, following 1947, the HARRY S. TRUMAN administration began a series of dramatic prosecutions of Communist party leaders. These and subsequent prosecutions eventually forced the Supreme Court to clarify the act's terms, starting with DENNIS V. UNITED STATES (1951), and extending through YATES V. UNITED STATES (1957), SCALES V. UNITED STATES (1961), and *Noto v. United States* (1961). As a result of these rulings, the measure's advocacy, organizing, and membership provisions were limited and made more precise.

PAUL L. MURPHY
(1986)

Bibliography

BELKNAP, MICHAEL R. 1977 *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties.* Westport, Conn.: Greenwood Press.

## ALIEN SUFFRAGE

CITIZENSHIP and voting are so closely linked in the modern political imagination that many Americans are shocked to learn that the United States once had a rich tradition of noncitizens' participating in local, state, and national elections. The practice first appeared in the colonies, which only required voters to be propertied white male residents—not British citizens. After the AMERICAN REVOLUTION and ratification of the Constitution, many of the states, like the Commonwealth of Virginia, continued to enfranchise propertied white male aliens in all state and therefore—under Article I of the Constitution—all federal elections. Congress also gave ALIENS the right to vote for representatives to their territorial legislatures when it reenacted the NORTHWEST ORDINANCE in 1789 and authorized the election of representatives to state constitutional conventions in Ohio, Indiana, Michigan, and Illinois. Although the War of 1812 upset alien suffrage in numerous states, the policy revived as the nation pressed westward in the 1840s and states such as Minnesota, Washington, Kansas, Nebraska, Nevada, Dakota, Wyoming, and Oklahoma tried hard to attract new residents by granting "declarant aliens"—those who had declared their intention to become citizens—VOTING RIGHTS and the symbolic standing they confer.

The CIVIL WAR polarized public sentiment around alien suffrage. Southerners attacked the political influence of immigrants, who generally arrived hostile to the institution of SLAVERY, while Northern states and politicians celebrated alien suffrage as a way to integrate newcomers to democratic life. The Union also drafted declarant aliens into the army on the theory that they were effectively state citizens, even if not yet citizens of the nation. Meanwhile, delegates to the Confederate constitutional convention in Montgomery, Alabama, wrote a blanket ban on alien voting into the CONFEDERATE CONSTITUTION. In the wake of Northern victory in the Civil War, thirteen new states adopted declarant alien suffrage, including Southern states now subject to RECONSTRUCTION governments eager to attract new blood and honor the valor of the many alien soldiers who fought for the Union. By the close of the nineteenth century, about half of the states and territories had experimented with giving aliens the right to vote alongside citizens.

The rise of anti-immigrant feeling at the turn of the twentieth century altered the political terrain that had nourished alien suffrage. Many states revised their constitutions and statutes by imposing a U.S. citizenship test for voting. By the time WORLD WAR I was over, the tide had shifted dramatically against alien suffrage, and the last state—Arkansas—gave it up in 1926. Thus, modern political nationalism and xenophobia displaced the natural rights logic that taxpaying aliens should be represented and the republican norm that communities benefit by participation of all members.

During the long history of alien suffrage, no court ever found noncitizen voting unconstitutional. On the contrary, state and lower federal courts consistently upheld the practice, and the Supreme Court repeatedly signaled its own acceptance of it. In 1874, in MINOR V. HAPPERSETT hold-

ing that women had no constitutionally protected right to vote, the Court invoked alien suffrage to prove that citizenship and suffrage are independent legal categories that do not necessarily imply one another. Again in 1904, in *Pope v. Williams*, the Court emphasized that states set voter qualifications themselves and have discretion to define persons who are not U.S. citizens as state and local citizens. As recently as 1973, the Court observed that U.S. citizenship is just a "permissible criterion" for voting rights, not a mandatory one. The Court's reading follows logically from the contrast between the Constitution's explicit U.S. citizenship requirements for service in Congress and its delegation of control over both state and federal qualifications for voting to the states themselves. Of course, alien suffrage is not constitutionally compelled—the Constitution's numerous suffrage provisions guarantee voting rights only to "citizens"—but it is clearly allowed, even today.

Whether alien suffrage has a vibrant future, as opposed to a past, remains to be seen. The practice survives as a remnant in numerous localities, and has found some renewed vitality in recent years. Both the New York and Chicago school systems permit noncitizens to vote in community school board elections. In 1992, the city of Takoma Park, Maryland, which borders Washington, D.C., conducted a referendum on whether to change its municipal charter to give all residents, regardless of citizenship status, the right to vote in city council, mayoral, and INITIATIVE elections. After rich debate on the subject, the measure passed and the City Council unanimously made the change. Proponents argued that immigrant populations are ignored by government if they lack votes, which are the hard currency of political power in democracy, and that noncitizen voting would become a pathway to full citizenship. They also invoked the pervasive European experience with noncitizen voting and the decision of the European Community to allow all citizens of member nations to vote in whatever local community they inhabit. It is possible that the disappearance of borders as barriers to capital investment and labor markets will increase the willingness of American communities to open up their political processes to new immigrants. But it is equally possible that globalization will make us cling harder to the twentieth century's nationalist marriage of voting with federal citizenship. At any rate, the issue of alien suffrage raises profound and interesting issues about the contested meanings of democracy, citizenship, and community membership.

JAMIN RASKIN
(2000)

Bibliography

NEUMAN, GERALD L. 1992 "We Are the People": Alien Suffrage in German and American Perspective. *Michigan Journal of International Law* 13:259–335.

RASKIN, JAMIN B. 1993 Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage. *University of Pennsyluzuia Law Review* 141:1391–1470.

ROSBERG, GERALD M. 1977 Aliens and Equal Protection: Why Not the Right to Vote? *Michigan Law Review* 75:1092–1136.

## ALL DELIBERATE SPEED

Chief Justice EARL WARREN achieved a unanimous decision in BROWN V. BOARD OF EDUCATION (1954) by assuring that enforcement of school DESEGREGATION would be gradual. Ordinarily, state officials found to be violating the Constitution are simply ordered to stop. *Brown II* (1955), however, instructed lower courts to insist only that offending school boards make "a prompt and reasonable start," proceeding toward full desegregation with "all deliberate speed."

This calculatedly elusive phrase was contributed by Justice FELIX FRANKFURTER, who had borrowed it from an old opinion by Justice OLIVER WENDELL HOLMES. Holmes attributed it to English EQUITY practice, but he may also have seen it in Francis Thompson's poem, "The Hound of Heaven." Whatever the phrase's origins, it was a thin cover for compromise. The objective presumably was to allow time for the white South to become accustomed to the end of SEGREGATION, in the hope of avoiding defiance of the courts and even violence. Robert Penn Warren, a southern man of letters who had not studied quantum mechanics, even tried to make gradualism in desegregation a historical necessity: "History, like nature, knows no jumps."

The South responded not with accommodation but with politically orchestrated defiance. A full decade after *Brown I*, two percent of southern black children were attending integrated schools. By 1969, the Supreme Court explicitly abandoned "all deliberate speed"; in ALEXANDER V. HOLMES COUNTY BOARD OF EDUCATION school boards were told to desegregate "at once."

No one pretends that the Supreme Court could have ended Jim Crow overnight, certainly not without support from Congress or the President. Yet the Court's decisions can command respect only when they are understood to rest on principle. *Brown* II, widely seen to be precisely the political accommodation it was intended to be, did not merely consign a generation of southern black school children to segregated schools. The decision weakened the Court's own moral authority in the very process gradualism was designed to aid.

KENNETH L. KARST
(1986)

Bibliography

WILKINSON, J. HARVIE, III 1979 *From Brown to Bakke.* New York: Oxford University Press.

## *ALLEN v. WRIGHT*
468 U.S. 737 (1984)

The parents of black school children in districts that were undergoing DESEGREGATION brought suit against officials of the Internal Revenue Service (IRS). Alleging that the IRS had not adopted standards and procedures that would fulfill the agency's obligation to deny tax-exempt status to racially discriminatory private schools, the plaintiffs argued that the IRS in effect subsidized unconstitutional school SEGREGATION. The Supreme Court, 5–3, held that the plaintiffs lacked STANDING to raise this claim.

Justice SANDRA DAY O'CONNOR, for the majority, said that the plaintiffs' claim that they had been stigmatized by the IRS conduct was insufficient as a specification of injury, amounting to little more than a general claim that government must behave according to law. The parents' second claim of injury was that they had been denied the right to have their children attend school in a system that was not segregated. Here the asserted injury was sufficient, Justice O'Connor said, but the injury was not fairly traceable to IRS conduct. The Court thus reinforced the "causation" requirement for standing established in *Warth v. Seldin* (1975). The three dissenters made the familiar charge that the "causation" line of inquiry disguised a rejection of the plaintiffs' claim without really addressing the constitutional issue. As in *Warth*, the Court rejected the plaintiffs' claim of injury without giving them the chance to prove their case.

KENNETH L. KARST
(1986)

## *ALLEN-BRADLEY COMPANY v. LOCAL UNION #3*
325 U.S. 797 (1945)

An 8–1 Supreme Court, dominated by appointees of FRANKLIN D. ROOSEVELT, held here that union actions that prompted nonlabor market control and business profits violated the SHERMAN ANTITRUST ACT. The union had obtained CLOSED SHOP agreements with New York City manufacturers of electrical equipment in return for a promise to strike or boycott any contractor who did not use the local manufacturers' equipment. Because out-of-city materials were cheaper, these agreements effectively restrained competition. Justice HUGO L. BLACK, for the Court, found that such action could be enjoined under the Sherman Act because neither the CLAYTON ACT nor the NORRIS-LAGUARDIA ACT protected union action not solely in its own interests.

DAVID GORDON
(1986)

## *ALLGEYER v. LOUISIANA*
165 U.S. 578 (1897)

The Louisiana legislature sought to encourage local business by forbidding state citizens from buying marine insurance from out-of-state companies. Justice RUFUS PECKHAM, building on a long line of dissents by Justice STEPHEN J. FIELD, expounded a broad concept of "liberty" including the idea of FREEDOM OF CONTRACT. Liberty, said the Court, "is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties." In thus circumscribing state authority over interstate business, *Allgeyer* represents the first invalidation of a state act as a deprivation of freedom of contract without violating the FOURTEENTH AMENDMENT guarantee of DUE PROCESS OF LAW.

DAVID GORDON
(1986)

## *ALLIED STRUCTURAL STEEL COMPANY v. SPANNAUS*
438 U.S. 234 (1978)

The modern revival of the CONTRACT CLAUSE began with UNITED STATES TRUST COMPANY V. NEW JERSEY (1977), a case in which the Supreme Court showed its willingness to make states live up to their own obligations as contracting parties. *Spannaus* carried the new doctrine further, imposing the contract clause as a significant limitation on the power of a state to regulate relations between private contracting parties.

Minnesota law required certain large employers, when they terminated pension plans or left the state, to provide for the funding of pensions for employees with ten years' service. Allied, in its pension plan, had reserved the right to terminate the plan and distribute the fund's assets to retired and current employees. On closing its Minnesota office, under the law Allied had to provide about $185,000 to fund pensions for its ten-year employees. The Supreme Court, 5–3, held the law unconstitutional as an impairment of the OBLIGATION OF CONTRACTS.

Justice POTTER STEWART wrote for the Court. Much of his opinion was devoted to distinguishing HOME BUILDING & LOAN ASSOCIATION V. BLAISDELL (1934). Here the law did not deal with a "broad, generalized economic or social problem" but focused narrowly, not on all employers or even all who left the state, but on those who previously had voluntarily established pension plans. The law did not merely temporarily alter contractual relationships but "worked a severe, permanent and immediate change in those relationships—irrevocably and retroactively." The law also "invaded an area never before subject to regulation by the State," thus invading reliance interests to a

greater degree than would result from a more common (and hence foreseeable) type of regulation.

Justice WILLIAM J. BRENNAN, for the dissenters, correctly noted that the Court's opinion amounted to a major change in the judicial role in supervising state economic regulation, demanding STRICT SCRUTINY under the contract clause to protect contract-based expectations.

*Spannaus* seemed to invite businesses to challenge all manner of ECONOMIC REGULATIONS on the ground of excessive interference with contractual expectations. In *Exxon Corp. v. Eagerton* (1983), however, the Court sought to exorcise the ghost of FREEDOM OF CONTRACT. *Exxon* sharply limited the *Spannaus* principle to laws whose "sole effect" is "to alter contractual duties."

KENNETH L. KARST
(1986)

## *ALMEIDA-SANCHEZ v. UNITED STATES*
413 U.S. 266 (1973)

A roving United States border patrol, without warrant or PROBABLE CAUSE, stopped and searched an automobile for illegal aliens twenty-five miles from the Mexican border. The Court ruled that while routine searches of persons and vehicles at the border are permissible, this search was conducted too far from the border to be reasonable under the FOURTH AMENDMENT.

JACOB W. LANDYNSKI
(1986)

## *ALVAREZ-MACHAIN, UNITED STATES v.*
504 U.S. 655 (1992)

The Constitution requires the President to "take Care that the Laws be faithfully executed." Those laws include both TREATIES and customary INTERNATIONAL LAW. In *United States v. Alvarez-Machain* (1992), however, the executive branch effectively ignored the obligations of the United States under international law, and still it was upheld by the Supreme Court.

Humberto Alvarez-Machain, a Mexican citizen, was indicted for participating in the kidnapping, torture, and murder of a U.S. Drug Enforcement Administration agent. Rather than seek Alvarez-Machain's extradition, the United States offered a reward for his abduction and delivery to the United States. Mexico protested that the abduction violated its extradition treaty with the United States, which provided that neither nation was bound to deliver up its own nationals but that each would have discretion to do so upon the request of the other.

In a 6–3 decision, the Supreme Court concluded that the treaty did not "specify the only way in which one country may gain custody of a national of the other country for the purposes of prosecution" and that, in the absence of an express prohibition, forcible abduction did not violate the treaty. The Court, in a MAJORITY OPINION authored by Chief Justice WILLIAM H. REHNQUIST, acknowledged that such an abduction might still violate "general international law principles," but held that the district court retained JURISDICTION because under the venerable *Ker–Frisbie* rule "the power of a court to try a person for a crime is not impaired by the fact that he has been brought within the court's jurisdiction by reason of a 'forcible abduction.' "

Unfortunately, *Alvarez-Machain* is not the only case in which the executive branch's decision to ignore its treaty obligations has been upheld by the Court. In *Sale v. Haitian Centers Council* (1993), the executive took the position that the United Nations Convention Relating to the Status of Refugees, which forbade its signatories to "return . . . a refugee in any manner whatsoever" to a country where that refugee would suffer persecution, did not prohibit the U.S. Coast Guard from returning refugees intercepted at sea to Haiti. The Court agreed. In *Breard v. Greene* (1998), the United States effectively conceded that the Vienna Convention on Consular Relations had been violated because Virginia had not notified a Paraguayan citizen arrested for murder of his right to consular access. The executive branch argued, however, that the Paraguayan citizen had defaulted this claim by not raising it earlier and that Paraguay was not entitled to bring suit in federal court for a violation of the treaty. The Court agreed. Such cases cast doubt not only on the President's commitment to "take Care that the Laws be faithfully executed" but on the reliability of the United States as a treaty partner as well.

WILLIAM S. DODGE
(2000)

Bibliography

GLENNON, MICHAEL J. 1992 State-Sponsored Abduction: A Comment on *United States v. Alvarez-Machain. American Journal of International Law* 86:746–756.

HALBERSTAM, MALVINA 1992 In Defense of the Supreme Court Decision in *Alvarez-Machain. American Journal of International Law* 86:736–746.

MANN, F. A. 1989 Reflections on the Prosecution of Persons Abducted in Breach of International Law. Pages 407–421 in Yoram Dinstein, ed., *International Law at a Time of Perplexity.* Dordrecht, The Netherlands: Martinus Nijhoff Publishers.

VAGTS, DETLEV F. 1998 Taking Treaties Less Seriously. *American Journal of International Law* 92:458–462.

## *AMALGAMATED FOOD EMPLOYEES UNION v. LOGAN VALLEY PLAZA*

See: Shopping Centers

## *AMBACH v. NORWICK*
441 U.S. 68 (1979)

*Ambach* completed the process, begun in FOLEY V. CONNELIE (1978), of carving out a major exception to the principle that discrimination against ALIENS amounts to a SUSPECT CLASSIFICATION, triggering STRICT SCRUTINY of its justifications. New York forbade employment as public school teachers of aliens who had not shown an intention to seek U.S. CITIZENSHIP. The Supreme Court held, 5–4, that this discrimination did not deny its victims the EQUAL PROTECTION OF THE LAWS.

Justice LEWIS F. POWELL, for the majority, concluded that *Foley*, following OBITER DICTA in SUGARMAN V. DOUGALL (1973), implied the exception in question. Where "governmental functions" were involved, the state need show only that the exclusion of aliens had a RATIONAL BASIS. Public school teachers, like police officers, have great individual responsibility and discretion; part of a teacher's function is to transmit our society's values and prepare children to be participating citizens. Under the RATIONAL BASIS standard, the state need not show a close fit between its classification and its objectives; the standard is met if it is rational to conclude that citizens generally would be better able than aliens to transmit citizenship values.

Justice HARRY A. BLACKMUN, author of the *Sugarman* opinion, led the dissenters, pointing out the indiscriminate sweep of the disqualification of aliens, and its tenuous connection with educational goals. (Private schools, for example, were permitted to use alien teachers, even though they were charged with transmitting citizenship values to eighteen percent of New York's children.)

KENNETH L. KARST
(1986)

## AMENDING PROCESS

Article V, which stipulates the methods by which the Constitution may be amended, reflects the Framers' attempt to reconcile the principles of the Revolution with their desire for stable government in the future. Early in the CONSTITUTIONAL CONVENTION OF 1787, GEORGE MASON, of Virginia suggested that inclusion in the Constitution of a specified mechanism for future amendments would help channel zeal for change into settled constitutional processes. "Amendments therefore will be necessary," he said, "and it will be better to provide for them, in an easy, regular and constitutional way than to trust to chance and violence." So viewed, the Article V amendment process is a somewhat conservative rendering of the revolutionary spirit that had claimed for the people an inalienable right to alter or abolish an inadequate government.

The Constitution sets out alternative methods both for proposing and for ratifying amendments. Amendments may be proposed by a two-thirds vote of both houses of Congress, or by a national constitutional convention. All of the amendments proposed thus far in our history have emanated from Congress. To become part of the Constitution, proposed amendments must gain the assent of three-fourths of the states. Article V gives Congress the power to choose whether proposed amendments (including any proposed by a constitutional convention) should be submitted to state legislatures or to state conventions for RATIFICATION. Congress has submitted every proposed amendment but one to the state legislatures.

Since 1789, over 5,000 bills proposing amendments to the Constitution have been introduced in Congress. Of these, only thirty-three received the necessary two-thirds vote of both houses of Congress and proceeded to the states for ratification. Twenty-six have been adopted; the remaining seven failed to be ratified. With only a few exceptions, the amendments proposed by Congress have come in clusters; virtually all of them arose during four brief periods.

The first of these periods ran from 1789 to 1804 and produced what may loosely be called the "Anti-Federalist amendments"—the BILL OF RIGHTS, the ELEVENTH AMENDMENT, and the TWELFTH AMENDMENT—each of which was, in part, a concession to Anti-Federalist or Jeffersonian interests. More than half a century passed before the Constitution was again amended. In 1865, sixty-one years after adoption of the Twelfth Amendment, Congress proposed and the states ratified the THIRTEENTH AMENDMENT, the first of the three RECONSTRUCTION amendments. The adoption of the FOURTEENTH AMENDMENT and the FIFTEENTH AMENDMENT followed in 1868 and 1870. A gap of almost another half-century intervened between the Reconstruction amendments and the next four amendments. These last grew out of the Populist and Progressive movements and provided for federal income taxation (the SIXTEENTH AMENDMENT, ratified in 1913), DIRECT ELECTION of senators (the SEVENTEENTH AMENDMENT, ratified in 1913), PROHIBITION (the EIGHTEENTH AMENDMENT, ratified in 1919), and WOMAN SUFFRAGE (the NINETEENTH AMENDMENT, ratified in 1920). A fifth Progressive amendment, the CHILD LABOR AMENDMENT, was proposed in 1924 but was not ratified.

Together, the first three periods accounted for all but three of the amendments adopted before 1960. (The only amendments that did not fall into one of these clusters were the TWENTIETH AMENDMENT, which limits the lame-duck session of Congress and was adopted in 1933; the TWENTY-FIRST AMENDMENT, which repealed prohibition and was adopted in 1933; and the TWENTY-SECOND AMENDMENT, which limits the President to two terms in office and was adopted in 1951). A fourth period of amendment activity lasted from 1961 to 1978. During these years, Congress proposed six amendments, four of which were adopted. The TWENTY-THIRD AMENDMENT gave the DISTRICT OF COLUMBIA three electoral votes in presidential elections. The TWENTY-FOURTH AMENDMENT abolished the POLL TAX for federal elections. The TWENTY-FIFTH AMENDMENT provided rules for presidential disability and PRESIDENTIAL SUCCESSION. The TWENTY-SIXTH AMENDMENT lowered the voting age to eighteen for both state and federal elections.

The fights over adoption of these twenty-six amendments, as well as battles over the proposed amendments that failed to be ratified, have produced conflicts over the proper procedures to be followed under the amendment article. The spare language of Article V leaves a number of questions unanswered. Between 1791 and 1931 the Supreme Court had occasion to address some of these issues. Arguments that there are implicit limits on the kind of amendments that may be adopted have not been accepted. In the *National Prohibition Cases* (1920) the Court rejected the argument that the Eighteenth Amendment (prohibition) was improper because of its interference with the states' exercise of their POLICE POWER. And in *Leser v. Garnett* (1922) the Court held that the Nineteenth Amendment's conferral of VOTING RIGHTS upon women was an appropriate exercise of the amendment power, rejecting the contention that "so great an addition to the electorate if made without the State's consent, destroys its autonomy as a political body."

In several decisions, the Court has given a broad reading to the power of Congress to propose amendments. In *Hollingsworth v. Virginia* (1798) the Court, sustaining the validity of the Eleventh Amendment, held that in spite of the veto clause of Article I, amendments proposed by Congress do not have to be submitted to the President for his signature. In the *National Prohibition Cases* (1920) the Court held that a two-thirds vote of a quorum of each house (rather than two-thirds of the entire membership) is sufficient to propose an amendment. In *Dillon v. Gloss* (1921) the Court held that Congress, when it proposes an amendment, has the power to set a reasonable time limit on ratification, and that seven years is a reasonable limit. The Court also rejected in *United States v. Sprague* (1931) the claim that amendments granting the federal government new, direct powers over the people may properly be ratified only by the people themselves acting through state conventions, and held that the mode of ratification is completely dependent upon congressional discretion. And when Congress does choose to submit an amendment to state legislatures, those legislatures are exercising a federal function under Article V and are not subject to the control of state law. Thus, in *Hawke v. Smith* (1919) the Court held that a state may not make the legislature's ratification of an amendment dependent upon subsequent approval by a voter REFERENDUM.

From 1798 to 1931 the Supreme Court assumed in decisions such as *Hollingsworth*, *Hawke*, and *Dillon* that issues of constitutional law arising under Article V were to be determined by the Court in the ordinary course of JUDICIAL REVIEW. In COLEMAN V. MILLER (1939), however, the Court refused to address several challenges to Kansas's ratification of the proposed Child Labor Amendment. Issues such as the timeliness of a ratification and the effect of a state's prior rejection of the validity of its ratification were held to be nonjusticiable questions committed to "the ultimate authority in the Congress of its control over the promulgation of the amendment." The *Coleman* decision suggests that judicial review is precluded for all issues that might be considered and resolved by Congress when, at the end of the state ratification process, Congress decides whether or not to "promulgate" the amendment.

Critics of the *Coleman* decision have disputed the Court's conclusion that "congressional promulgation" should preclude the judiciary from resolving challenges to the constitutional validity of an amendment. Critics even question the very notion of "congressional promulgation" as final, necessary step in the amendment process. The text of Article V notes only two stages for the adoption of an amendment: proposal by Congress (or a convention) and ratification by the states. There is no mention of any further action for an amendment to become valid. The Court had expressly held in *Dillon v. Gloss* (1921) what the language of Article V implies: that a proposed amendment becomes part of the Constitution immediately upon ratification by the last necessary state legislature. No further "promulgation" by Congress (or anyone else) appears to be necessary under Article V.

The only occasion upon which Congress ever undertook, at the end of a ratification process, to "promulgate" the adoption of an amendment was during Reconstruction when Congress passed a resolution declaring the Fourteenth Amendment to have been validly adopted despite disputed ratifications from two states that had attempted to rescind. In deciding *Coleman*, the Supreme Court treated the isolated Reconstruction precedent as a settled feature of the amendment process and held that congressional promulgation of an amendment would be binding on the Courts. *Coleman* remains the Court's last word on

how disputed amendment process issues are to be resolved. Unless *Coleman* is reconsidered, any challenges to the validity of the procedures used for amendment will be conclusively determined by the Congress sitting when the required number of ratifications are reported to have been received.

It is difficult to predict how unresolved questions concerning the amendment process might be answered. Among the more warmly disputed issues has been the question of whether a state that has ratified an amendment may validly rescind its ratification. The text of Article V is inconclusive; while it does not mention any right of rescission, such a right might be inferred from the right to ratify. However, most treatise writers and scholars of the nineteenth and twentieth centuries have assumed that ratification was final and rescission ineffective. OBITER DICTUM in *Coleman,* moreover, suggests that the Court might have affirmatively approved the decision of the Reconstruction Congress to ignore purported rescissions.

Arguments that rescission by a subsequent legislature ought to nullify a state's earlier ratification, or that ratifications should be considered valid only if they are sufficiently close in time to reflect a "contemporaneous consensus" among ratifying states, may reflect, in part, an unstated assumption that it ought to be very difficult to amend the Constitution. But even without a requirement that ratifications must remain unrescinded or must come within a confined period of time, an amendment will not become part of the Constitution as long as one chamber in thirteen of the fifty state legislatures simply does nothing. An amendment proposed by a supermajority of the national Congress, and formally accepted at some time by the legislatures of three-fourths of the states (even if some state legislatures also pass resolutions of "rescission"), has passed the tests Article V expressly requires. As JAMES MADISON noted in THE FEDERALIST #43, the amendment article was designed to guard "equally against that extreme facility, which would render the constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults."

To insure that the full range of future constitutional changes would be a viable possibility, the Framers sought to provide some means of constitutional change free of the control of existing governmental institutions. The Framers therefore included alternative mechanisms both for proposing and for ratifying amendments. From the earliest days of the Constitutional Convention, the delegates sought to avoid giving Congress the sole authority to propose amendments. If the proposal of all amendments ultimately depended upon Congress, George Mason argued, "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case." Other delegates, however, were apprehensive about the threat to national authority if state legislatures could effectively propose and ratify amendments without the involvement of some institution reflecting the national interest.

The solution to this dilemma was the "convention of the people." In addition to providing that amendments could be proposed by Congress, the final version of Article V provides that Congress must call "a Convention for proposing Amendments" whenever two-thirds of the state legislatures apply for one. Such a convention would be, like Congress, a deliberative body capable of assessing from a national perspective the need for constitutional change and capable of drafting proposed amendments for submission to the states for ratification. At the same time it would not be Congress itself, and therefore would not pose the threat of legislative self-interest's blocking needed reform of Congress.

No national convention for proposing amendments has ever been called. In recent years, however, a number of state legislatures have petitioned Congress to call a convention limited to proposing a particular amendment specified by the applying state legislatures. Some scholars consider these applications to be valid and argue that if similar applications are received from two-thirds of the state legislatures Congress should call the convention and seek to limit the convention to the particular amendment (or subject) specified in the state legislative applications. Others argue that such state applications are invalid because they erroneously assume that the agenda of the convention can properly be controlled by the applying state legislatures. These scholars argue that the only valid applications are those that recognize that a convention for proposing amendments is to be free to determine for itself what amendments should be proposed.

In addition to providing the alternative of a national convention for proposing amendments, Article V also provides an alternative method of ratifying amendments. For each amendment (whether proposed by Congress or by a national convention) Congress is free to choose whether to submit the amendment for ratification to state legislatures or to "conventions" in each state. By giving Congress this authority, Article V preserves the possibility of reforms restricting the power of state legislatures. The Constitution itself was submitted to ratifying conventions in each state, rather than to state legislatures. For thirty-two of the thirty-three proposed amendments Congress chose to submit its proposal to state legislatures. But the use of the convention method of ratification is not unprecedented: The Twenty-First Amendment repealing prohibition was submitted by Congress in 1933 to state conventions. Virtually every state chose to have delegates to its ratifying convention elected, and in every state the election of delegates was, for all practical purposes, a dis-

positive referendum on whether or not to ratify the amendment. In every state the voters' wishes were expeditiously carried out by the slate that had won election. In less than ten months from the time it was proposed by Congress, the amendment was ratified by elected conventions in three-fourths of the states.

The "convention of the people" was a familiar device in the eighteenth century. It now seems archaic, and the use of either a national convention for proposing amendments or state conventions for ratification are at present fraught with uncertainties. The convention device was nonetheless an imaginative effort to address a universal problem of constitution drafting: how to provide the means for future reform of governmental institutions when the only institutions readily available for proposing and approving changes are those already in existence, and possibly in need of reform themselves.

WALTER DELLINGER
(1986)

Bibliography

DELLINGER, WALTER 1984 The Legitimacy of Constitutional Change: Rethinking the Amendment Process. *Harvard Law Review* 97:386–432.

GRIMES, ALLEN P. 1978 *Democracy and the Amendments to the Constitution.* Lexington, Mass.: Lexington Books.

GUNTHER, GERALD 1979 The Convention Method of Amending the United States Constitution. *Georgia Law Review* 14: 1–25.

ORFIELD, LESTER BERNHARDT 1942 *The Amending of the Federal Constitution.* Ann Arbor: University of Michigan Press; Chicago: Callaghan & Co.

TRIBE, LAURENCE H. 1984 A *Constitution* We Are Amending: In Defense of a Restrained Judicial Role. *Harvard Law Review* 97:433–445.

## AMENDING PROCESS
(Update)

Formal amendment of the U.S. Constitution under the procedural SUPERMAJORITY RULES set forth in Article V has been a remarkably rare occurrence. Of the many thousands of amendment proposals that have entered public discussion, only thirty-three have been proposed by Congress. Of those, only twenty-seven have been ratified by the states—with fully half of those consisting of the BILL OF RIGHTS and the RECONSTRUCTION amendments. And the states have never initiated a CONSTITUTIONAL CONVENTION. This experience contrasts sharply with the constitutional practice of the state governments, whose constitutions have been so frequently amended that they have taken on "the prolixity of a legal code"—a vice Chief Justice JOHN MARSHALL, in MCCULLOCH V. MARYLAND (1819), praised the federal Constitution for avoiding.

Several explanations may be offered for this sparing use of the power to amend the federal Constitution. First, Article V's requirements of supermajority approval in the Congress and wide geographical consensus among the states are, as intended, politically daunting as compared with enactment of ordinary LEGISLATION. Second, beyond these structural constraints, a political culture of self-restraint toward the founding document has developed from roots in the framing period. To be sure, Article V made amendment easier than it was under the ARTICLES OF CONFEDERATION, which required the consent of every state. Still, as JAMES MADISON, a principal architect of Article V, cautioned in FEDERALIST No. 49, the amendment power was to be used only "for certain great and extraordinary occasions." This culture of self-restraint has been reinforced by such modern events as the failure of PROHIBITION: the EIGHTEENTH AMENDMENT, which restricted the sale of alcoholic beverages, is the only amendment ever to be repealed, and that repeal, by the TWENTY-FIRST AMENDMENT, was so arduous and time- consuming as to discourage other amendment efforts for a generation.

Third, the Supreme Court has interpreted the original document and its formal amendments with considerable latitude, enabling adaptation to new circumstances and to changes in social understanding without formal amendment. Marshall's capacious interpretation of the powers of the national government may be one reason why the Constitution was amended only twice between the Bill of Rights and Reconstruction. And during the NEW DEAL, constitutional strictures on the powers of the federal and state governments to engage in economic redistribution were relaxed by revisions in judicial interpretation rather than by amendment—a course that some scholars suggest the administration of President FRANKLIN D. ROOSEVELT sought deliberately out of concern that an attempt at formal amendment would be politically untenable.

Against this backdrop of sparse constitutional amendment, the 1990s have witnessed two notable developments. First, although no newly proposed amendment has been adopted since the TWENTY-SIXTH AMENDMENT in 1971, an amendment first proposed by the FIRST CONGRESS in 1789, in language drafted by James Madison, became the TWENTY-SEVENTH AMENDMENT to the Constitution in 1992. This amendment, which delays the effect of any congressional pay raise until after the next election, lay dormant between its initial ratification by six states and the 1980s, when a wave of further state ratifications occurred. Michigan became the thirty-eighth state to ratify on May 7, 1992, providing the needed approval of three-fourths of the state legislatures. The National Archivist certified the amendment as part of the Constitution without congres-

sional approval, and Congress voted thereafter to "accept" it. The apparent national consensus that the amendment was valid despite the two-century time lag between its first and last state ratification suggested that constitutional amendment does not depend on a contemporaneous expression of popular approval, but rather upon formal compliance with the procedures of Article V.

The second recent development is a striking and sudden proliferation of new constitutional amendment proposals that have gained serious consideration in Congress during the 1990s. This rash of constitutional amendment proposals represents the strongest concerted movement for constitutional change since the 1960s and 1970s, when over a dozen amendment proposals received serious consideration—including proposals to authorize SCHOOL PRAYERS, bar SCHOOL BUSING of students for purposes of racial integration, and outlaw ABORTION, none of which ultimately was enacted.

The amendment proposals that reached the floor of the U.S. HOUSE OF REPRESENTATIVES or the U.S. SENATE or both bodies during the 1990s included measures that would require congressional supermajority approval in order to depart from a BALANCED BUDGET; impose TERM LIMITS upon members of Congress; authorize the federal and state governments to punish FLAG DESECRATION; permit Congress greater latitude in regulating CAMPAIGN FINANCE; guarantee religious speech and participation in public programs; and require congressional supermajority approval of tax increases. Some of these amendment proposals, such as those on the balanced budget and flag desecration, failed by only one, two, or three votes in the Senate after passage in the House. Many other amendment proposals have received serious consideration in congressional committees, including measures that would guarantee victims' rights in criminal proceedings; give the President a LINE-ITEM VETO; and exclude the native-born children of illegal immigrants from CITIZENSHIP—as well as one that would amend the amendment process itself by making passage of amendments easier.

The recent amendment proposals have stirred debate between those who urge continued self-restraint and those who believe more frequent constitutional amendment appropriate. Opponents of ready resort to constitutional amendment argue that the function of the fundamental charter in providing NATIONAL UNITY and stability would be undermined if it were cluttered with expressions of momentary political bargains, responses to transient social concerns, or aspirational statements designed largely for symbolic effect—all of which would make it more difficult for the citizenry to distinguish between constitutional law and ordinary politics. On this view, needed constitutional change can be accomplished better through the deliberative process of judicial interpretation than through populist processes that are likely to give short shrift to the effect of amendments on future generations, on existing structural arrangements, and on the related body of constitutional law.

Those who favor readier constitutional amendment, by contrast, stress that the principle of POPULAR SOVEREIGNTY is at the core of American constitutionalism, and caution against idolatrous reverence for existing constitutional text, citing the admonition of THOMAS JEFFERSON against viewing the Constitution "like the ark of the covenant, too sacred to be touched." On this view, the elite and unelected body of the Supreme Court has no monopoly on constitutional wisdom, and its own interpretations merit correction by amendment when they deviate too far from popular will—as proponents of the flag desecration, campaign finance, or term limits amendments suggest the Court did in such decisions as *United States v. Eichman* (1990), BUCKLEY V. VALEO (1976), or *U.S. Term Limits v. Thornton* (1995).

The two camps agree that constitutional amendments ought not be used to solve problems that can be solved through ordinary legislation or the simple exercise of political will. They agree as well that constitutional amendments are sometimes appropriate to embody a compelling need for reform that responds to changed circumstances or consensus and is likely to be recognized as of abiding importance by future generations. They disagree on the scope of the amendment power on the continuum between these points.

KATHLEEN M. SULLIVAN
(2000)

(SEE ALSO: *Amendment Process (Outside Article V); Constitutional Dualism; Nonjudicial Interpretation of the Constitution; Transformation of Constitutional Law.*)

Bibliography

KYVIG, DAVID E. 1996 *Explicit and Authentic Acts: Amending the U.S. Constitution 1776–1995.* Lawrence: University of Kansas Press.

LEVINSON, SANFORD, ed. 1995 *Responding to Imperfection: The Theory and Practice of Constitutional Amendment.* Princeton, N.J.: Princeton University Press.

PAULSEN, MICHAEL STOKES 1993 A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment. *Yale Law Journal* 103:677–789.

SULLIVAN, KATHLEEN M. 1996 Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever. *Cardozo Law Review* 17:691–704.

## AMENDMENT PROCESS (OUTSIDE ARTICLE V)

Few constitutional rules are as important as those regarding amendment because these rules define the conditions

under which all other constitutional norms may be displaced. It is commonly believed that the words of Article V specify with precision the necessary and sufficient conditions for legitimate constitutional change:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other Mode of RATIFICATION may be proposed by the Congress; Provided that . . . no State, without its Consent, shall be deprived of its equal Suffrage in the SENATE.

Yet things are not so simple. First, the procedures seem far less precise than one might expect. Can Congress call for a CONSTITUTIONAL CONVENTION limited by subject matter? Does the President have any PRESENTMENT role? What voting rule must a convention follow? What apportionment ratio must it follow? Who sets the rules as to selection of delegates? The spare words of Article V are not very helpful in answering these and many other key questions. If determinate answers do exist, they lie outside of Article V: in other provisions of the Constitution, in the overall structure of the document, and in the history of its creation and amendment (and perhaps also the history of the creation and amendment of analogous legal documents, such as STATE CONSTITUTIONS).

Second, it is far from clear whether Article V lays down universally sufficient conditions for legitimate amendment. Could an amendment modify the rules of amendment themselves? (If so, the "equal suffrage" rules could easily be evaded by two successive "ordinary" amendments, the first of which repealed the "equal suffrage" rules of Article V and the second of which reapportioned the Senate.) Similarly, could a legitimate amendment generally purport to make itself (or any other random provision of the Constitution) immune from further amendment? But if not, what about an amendment that effectively entrenched itself from futher revision by, for instance, outlawing criticism of existing law? For answers, we must look beyond the words of Article V to the general structure of the Constitution and its overriding themes of POPULAR SOVEREIGNTY and republican government, which establish the preconditions for Article V itself. Thus, the rest of the document can help us distinguish between true constitutional amendments (changes within the preexisting deep structure of the document) and constitutional repudiations (which may formally seem to fit Article V, but in fact reject the Constitution's essence of deliberative popular sovereignty.)

Finally, it is also dubious whether Article V specifies universally necessary conditions for legitimate amendment. Two major theories of non-Article V amendment have recently emerged in legal scholarship. The first, championed by Professor Bruce Ackerman, begins by noting that the Philadelphia "Convention," which drafted Article V, was itself acting (in the name of "We, the People") in ways not expressly contemplated by the spare words of Article XIII of the ARTICLES OF CONFEDERATION. Like Article V, Article XIII at first seemed to specify absolutely necessary conditions for legitimate amendment, but Ackerman argues that the Philadelphia experience itself—the process by which our Constitution was framed and ratified—belies any such simplistic idea. And the same is true for Article V, especially given the Framers' self-referential use of the word "convention" in this article. Ackerman goes on to argue that the most important subsequent additions to our constitutional text, the Reconstruction Amendments, were not in fact adopted in strict compliance with Article V, and thus can only be legitimated if we properly recognize that "We, the People" may legitimately amend the Constitution by acting beyond the formal rules of Article V, but within the deep structure of popular sovereignty established by the document as a whole.

The second theory, propounded here, resembles Ackerman's, but differs in important respects. Whereas Ackerman focuses on Article XIII of the Articles of Confederation, this second theory begins by looking at state constitutions in effect in 1787. Virtually all the constitutions had amendment clauses similar to Article V, yet in none of these states was the federal Constitution ratified in strict conformity with the clauses. Like Article V, these clauses at first seemed to specify necessary conditions for amendment, but the events of 1787–89 belie such a simplistic reading. Subsequent developments in state constitutional law confirm the nonexclusivity of various amendment clauses; scores of amendments were adopted in the nineteenth century by means of popular ratification nowhere specified in the text of preexisting amendment clauses. These state clauses illuminate Article V. Like its state constitutional counterparts, Article V nowhere explicitly declares itself to be the only legitimate mechanism of constitutional amendment. Rather, Article V is best read as prescribing only the exclusive mechanism by which ordinary governmental entities—Congress and state legislatures—can amend the document that limits their powers. But Article V nowhere qualifies the right of the sovereign people themselves, acting outside of ordinary government in specially convened national conventions, to alter or abolish their governments at their pleasure. This reading of Article V draws support not only from the language of Article VII and the 1787–89 ratification process, but also from the specific words of, and the

popular-sovereignty ideology underlying, the PREAMBLE ("We, the People"); the FIRST AMENDMENT ("right of the People [collectively] to assemble" in conventions); and the NINTH AMENDMENT and the TENTH AMENDMENT (reserving to "the People" collective right to alter and abolish government). Only if a current majority of deliberate citizens can, if they desire, amend our Constitution, can the document truly be said to derive from "We, the People of the United States," here and now, rather than from the hands of a small group of white men ruling us from their graves. Any contrary reading of Article V would violate the Preamble's promise that the Framers' "posterity" would continue to enjoy "the blessings of liberty"—most importantly, the liberty of popular self-government.

In the end, a narrow clause-bound approach is no more satisfying in the Article V context than elsewhere. The rest of the document and its subsequent history must always be consulted—sometimes with, at first, surprising results.

AKHIL REED AMAR
(1992)

Bibliography

ACKERMAN, BRUCE 1984 The Storrs Lectures: Discovering the Constitution. *Yale Law Journal* 93:1013–1072.

——— 1989 Constitutional Politics/Constitutional Law. *Yale Law Journal* 99:453–547.

AMAR, AKHIL REED 1987 Philadelphia Revisited: Amending the Constitution Outside Article V. *University of Chicago Law Review* 55:1043–1104.

BLACK, CHARLES 1963 The Proposed Amendment of Article V: A Threatened Disaster. *Yale Law Journal* 72:957–966.

——— 1972 Amending the Constitution: A Letter to a Congressman. *Yale Law Journal* 82:189–215.

CAPLAN, RUSSELL 1988 *Constitutional Brinksmanship.* New York: Oxford University Press.

DELLINGER, WALTER 1979 The Recurring Question of a "Limited" Constitutional Convention. *Yale Law Journal* 88:1623–1640.

——— 1983 The Legitimacy of Constitutional Change: Rethinking the Amendment Process. *Harvard Law Review* 97: 386–432.

HALLETT, BENJAMIN FRANKLIN 1848 *Argument in the Rhode Island Causes on the Rights of the People.* Boston: Beale and Greene.

HOAR, ROGER SHERMAN 1917 *Constitutional Conventions.* Boston: Little, Brown.

JAMESON, JOHN ALEXANDER 1887 *A Treatise on Constitutional Conventions,* 4th ed. Chicago: Callaghan and Co.

VAN ALSTYNE, WILLIAM 1978 Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague. *Duke Law Journal* 1978:1295–1306.

——— 1979 The Limited Constitutional Convention—The Recurring Answer. *Duke Law Journal* 1979:985–998.

WOOD, GORDON 1969 *The Creation of the American Republic, 1776–1789.* Chapel Hill: North Carolina Press.

# AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union (ACLU) is the most important national organization dedicated to the protection of individual liberty. It was founded in 1920 by a distinguished group that included ROGER BALDWIN, Jane Addams, FELIX FRANKFURTER, Helen Keller, Scott Nearing, and Norman Thomas.

The principles of the ACLU are contained in the BILL OF RIGHTS: the right to free expression, above all, the freedom to dissent from the official view and majority opinion; the right to equal treatment regardless of race, sex, religion, national origin, or physical handicap; the right to DUE PROCESS in encounters with government institutions—courts, schools, police, bureaucracy—and with the repositories of great private power; the right to be let alone—to be secure from spying, from the unwarranted collection of personal information, and from interference in private lives.

The ACLU has participated in many controversial cases. It represented John Scopes when he was fired for teaching evolution; it fought for the rights of Sacco and Vanzetti; it defended the Scottsboro Boys, who were denied a FAIR TRIAL for alleged rape (see POWELL V. ALABAMA; NORRIS V. ALABAMA); it fought the Customs Bureau when it banned James Joyce's *Ulysses* (see UNITED STATES V. "ULYSSES"); it opposed the censorship of the Pentagon Papers (see NEW YORK TIMES V. UNITED STATES) and religious exercises in schools.

The ACLU has supported racial and religious minorities, the right of LABOR to organize, and equal treatment for women, and it has opposed arbitrary treatment of persons in closed institutions such as mental patients, prisoners, military personnel, and students.

The concept of CIVIL LIBERTIES, as understood by the ACLU, has developed over the years. For example, in the 1960s it declared that CAPITAL PUNISHMENT violated civil liberties because of the finality and randomness of executions; that military conscription, which substantially restricts individual autonomy, violated civil liberties except during war or national emergency; and that the undeclared VIETNAM WAR was illegal because of failure to abide by constitutional procedures for committing the country to hostilities.

On the other hand, while endorsing many legal protections for poor people, the ACLU has never held that poverty itself violated civil liberties. In addition, since a cardinal precept of the ACLU is political nonpartisanship, it does not endorse or oppose judicial nominees or candidates for public office.

The ACLU has been frequently attacked as subversive,

communistic, and even a "criminals' lobby." Its detractors have not recognized that by representing radicals and despised minorities the ACLU does not endorse their causes but rather the primacy and indivisibility of the Bill of Rights. This confusion cost the ACLU many members when in 1977 it secured the right of American Nazis to demonstrate peacefully in Skokie, Illinois.

The ACLU's national headquarters are in New York City; it maintains a legislative office in Washington, D.C., and regional offices in Atlanta and Denver. Its 250,000 members are organized in branches in all fifty states, which are tied to the national organization through revenue-sharing, participation in policy decisions, and united action on common goals. Each affiliate has its own board of directors and hires its own staff. The ACLU participates annually in thousands of court cases and administrative actions, legislative lobbying, and public education.

NORMAN DORSEN
(1986)

Bibliography

DORSEN, NORMAN 1984 The American Civil Liberties Union: An Institutional Analysis. *Tulane Lawyer* (Spring) 1984:6–14.

## *AMERICAN COMMUNICATIONS ASSOCIATION v. DOUDS*
339 U.S. 382 (1950)

In one of the first cases in which the Supreme Court gave constitutional approval to the anticommunist crusade, Chief Justice FRED VINSON upheld provisions of the TAFT-HARTLEY ACT denying National Labor Relations Board services to unions whose officers had not filed affidavits stating they were not members of the Communist party and that they did "not believe in . . . the overthrow of the . . . Government by force or by any illegal or unconstitutional methods." The opinion of the Court became a model for denying FIRST AMENDMENT protections to alleged subversives through the use of a balancing technique. The Court argued that the statute touched only a few persons and that the only effect even upon them was that they must relinquish their union offices, not their beliefs. It argued that banning communists from NLRB-supported labor negotiations was reasonably related to the legitimate congressional end of protecting INTERSTATE COMMERCE, given the nature of the Communist party and the threat of political strikes. The Court concluded that "Considering the circumstances . . . the statute . . . did not unduly infringe freedoms protected by the First Amendment."

MARTIN SHAPIRO
(1986)

## AMERICAN INDIANS AND THE CONSTITUTION

Indians are mentioned only three times in the Constitution. Yet the Supreme Court has developed a vast body of law defining the status of Indians and tribes in our federal system. This law makes use of constitutional sources but also draws heavily on the history between Indians and the federal government, including wars, conquest, treaties, and the assumption by the government of a protectorate relationship toward the tribes. It reveals that our government is not only, as is popularly believed, one of dual sovereigns, federal and state. There is also a third sovereign, consisting of Indian tribes, operating within a limited but distinct sphere.

The three references to Indians in the Constitution presage this body of law. Two of the three are found in Article I and the FOURTEENTH AMENDMENT, which exclude "Indians not taxed" from the counts for apportioning DIRECT TAXES and representatives to Congress among the states. The third reference is a grant of power to Congress in the COMMERCE CLAUSE of Article I to "regulate Commerce with . . . the Indian Tribes."

The phrase "Indians not taxed" was not a grant of tax exemption. Rather, it described the status of Indians at the time the Constitution was written. Indians were not taxed because generally they were treated as outside the American body politic. They were not United States citizens, and they were not governed by ordinary federal and state legislation. Tribal laws, treaties with the United States, and special federal Indian legislation governed their affairs. Only the few Indians who had severed their tribal relations and come to live in non-Indian communities were treated as appropriate for counting in the constitutionally mandated apportionment.

The phrase probably was chosen because the apportionment served partly to allocate tax burdens. That aspect of the apportionment has lost significance, however, since the SIXTEENTH AMENDMENT made it unnecessary for the federal government to apportion income taxes.

The exclusion of "Indians not taxed" from all aspects of apportionment has, in fact, been mooted by changes in the status of American Indians since ratification of the Fourteenth Amendment in 1868. Treaty-making with Indian tribes ended in 1871, and in 1924 all native-born Indians who had not already been made citizens by federal statute were naturalized. Indians were held subject to federal statutes, including tax laws, except where special Indian legislation or treaties offered exemptions. By 1940 the Department of the Interior officially recognized that there no longer were Indians who can properly be considered "Indians not taxed."

The commerce clause reference to Indians, by contrast, continues to have real force. Since the abandonment of federal treaty-making with Indian tribes in 1871, it has been the primary constitutional provision supporting exercises of federal power over Indians as such. Notwithstanding its reference to commerce "with the Indian Tribes," the clause also applies to transactions with individual tribal Indians, including some off-reservation transactions, and to non-Indians doing business on reservations. Congress's Article I power to regulate "the Territory or other Property belonging to the United States" supplements the treaty and Indian commerce clause powers. Most Indian lands are held in fee by the United States, subject to a beneficial tribal interest in reservations set aside by treaty or EXECUTIVE ORDER, and to the Indians' right of occupancy. Congress's power to make war was also invoked in the early years of dealing with the Indians.

This combination of powers, read together with the NECESSARY AND PROPER CLAUSE of Article I and the SUPREMACY CLAUSE of Article VI, has been the foundation of a complex structure of federal, state, and tribal relations. The federal government's power over Indian affairs is extensive and preemptive of state power. (See CHEROKEE INDIAN CASES, 1831–1832.) In the nineteenth century the courts called the federal power "plenary," and challenges to its exercise were labeled POLITICAL QUESTIONS. In fact this federal authority is a general POLICE POWER, comparable to Congress's power over the DISTRICT OF COLUMBIA and the TERRITORIES. In *Delaware Tribal Business Committee v. Weeks* (1977), the Court held that ordinary constitutional strictures apply to federal Indian legislation, and that, under the Fifth Amendment's DUE PROCESS CLAUSE in particular, such legislation must be reviewed to determine whether it is "tied rationally to the fulfillment of Congress's unique obligation toward the Indians." Even though this trust obligation has not prevented Congress from enacting laws contrary to the best interests of Indians, the Supreme Court now insists upon some determination that Indians will be protected when disadvantageous laws are passed. Thus, for example, Congress may not take Indian property for a non-Indian use without paying JUST COMPENSATION, and it may not arbitrarily give tribal assets to some tribal members but not others.

A law that satisfies the "tied rationally" test is not constitutionally defective under the EQUAL PROTECTION requirement of the Fifth Amendment's due process clause simply because it singles out Indians for special treatment. For example, Congress may establish a preference for employment of tribal Indians with the Bureau of Indian Affairs, or may subject Indians to harsher punishments than non-Indians would suffer in state court for doing the same acts. Such legislation is held not to constitute an otherwise forbidden racial classification, because of the separate status of Indians under the Constitution (i.e., their subjection to federal and tribal rather than state jurisdiction).

Although Congress has enacted laws governing a wide variety of activities on Indian reservations, there is no detailed code comparable to the District of Columbia's. In the absence of such federal legislation, states and Indian tribes have competed for control. The Supreme Court has repeatedly upheld tribal independence from state jurisdiction, basing its decisions on preemptive federal power over Indian affairs and the broad federal policy of setting aside lands for tribal self-government. Although in cases outside Indian law the Supreme Court has refused to apply the PREEMPTION DOCTRINE to exclude the operation of state law where congressional intent was doubtful, in Indian cases it has inferred preemptive intent from the general purposes of treaties and statutes to protect tribal resources and promote tribal sovereignty. Thus, absent clear and express congressional consent, states may not regulate non-Indian activities that affect tribal self-government. Despite their lack of authority over reservation Indians, states are prohibited by the Fourteenth Amendment from denying Indians rights available under state law.

Within their realm of authority, Indian tribes exercise powers of self-government, not because of any DELEGATION OF POWERS, but rather because of their original, unrelinquished tribal sovereignty. The Supreme Court recognized this sovereign status of Indian tribes in *United States v. Wheeler* (1978), which held that it would not constitute DOUBLE JEOPARDY to try an Indian in federal court after he had been convicted in tribal court because the court systems belong to separate sovereigns. The Constitution has never been invoked successfully to prevent Congress from abolishing tribal authority in whole or in part; but the Supreme Court has required a clear and specific expression of congressional intent before recognizing the termination of tribal powers. This canon of construction was established to implement the federal government's obligation to protect the Indian tribes. Some tribal powers were necessarily relinquished when the United States incorporated the tribes, such as the power to carry on foreign relations, the power to transfer Indian land without consent of the United States, and the power to prosecute non-Indians for crimes. These relinquished powers are few, however, and Congress could restore them if it chose.

Because the BILL OF RIGHTS limits only the federal government and the Fourteenth Amendment limits only the states, Indian tribes need not follow their dictates. However, in 1968, Congress enacted the Indian Civil Rights

Act, which conferred some but not all protections of the Bill of Rights on individuals subject to tribal authority.

CAROLE E. GOLDBERG-AMBROSE
(1986)

Bibliography

COHEN, F. 1982 *Handbook of Federal Indian Law.* Indianapolis: Bobbs-Merrill.

GETCHES, D. and WILKINSON, C. 1979 *Federal Indian Law: Cases and Materials.* St. Paul, Minn.: West Publishing Co.

PRICE, M. 1973 *Law and the American Indian: Readings, Notes and Cases.* Indianapolis: Bobbs-Merrill.

## AMERICAN INDIANS AND THE CONSTITUTION (Update)

American Indians are a casual part of the text of the Constitution. They are mentioned primarily in passing in the apportionment clause of section 2 and the COMMERCE CLAUSE of section 8 of Article I. The language of apportionment is again found in the FOURTEENTH AMENDMENT. In all three instances, the primary purpose was to define the powers of Congress and limitations on the states, not to provide a clear understanding of the relationship between the United States and the Indian tribes then living within and bordering the United States. Today, a large body of federal law governs relations among the federal government, the states, and the Indian tribes. The main constitutional foundations for these enactments are Congress's power to regulate commerce "with the Indian tribes" (construed to reach transactions with individual Indians), the NECESSARY AND PROPER CLAUSE, and the TREATY POWER.

In colonial times, the individual colonies dealt with Indians by royal authority or on their own initiative, and the power to deal with Indians on an individual state basis was preserved in the ARTICLES OF CONFEDERATION. Land purchases by states were permissible, but conducting war with Indian tribes required the consent of the CONTINENTAL CONGRESS. The English and French method for dealing with Indians had been the negotiation of treaties, and the United States continued the practice. The treaty clause of Article II, section 2 was employed to make treaties with Indian tribes, and the states were prohibited from making treaties by Article I, section 10. State treaties made with tribes before the Constitution was adopted remained valid, and in fact, some state treaties made before 1789 are still in force. While Indian treaty- making was a formal practice of the United States until 1871, Congress had been legislating concerning Indian affairs since the earliest days, beginning with the Non- Intercourse Act of 1793, which regulated trade with Indians.

In 1870, the SENATE JUDICIARY COMMITTEE issued a report that declared Indians to be subject to tribal JURISDICTION and to have allegiance to their own nations. The next year, however, the U.S. HOUSE OF REPRESENTATIVES insisted that the power of the President to recognize Indians for treaty-making purposes should be curtailed, and the U.S. SENATE agreed. Thereafter, agreements and contracts having the legal status of treaties were used to deal with Indians. More recently, congressional LEGISLATION has been used to resolve long-standing problems involving Indian rights and claims.

Two MARSHALL COURT decisions, *Cherokee Nation v. Georgia* (1831) and *Worcestor v. Georgia* (1832), created the concept of the "domestic dependent nation" which was used to characterize the status of Indian tribes with respect to the federal government. *Johnson v. McIntosh* (1823) bolstered the idea that the United States had a special responsibility for the welfare of American Indians. This responsibility took both legal and political forms. On the legal side, *Delaware Tribal Business Committee v. Weeks* (1977) held that the DUE PROCESS clause of the Fifth Amendment required Congress, in enacting Indian legislation, to show that it bore a rational relation to fulfilling the United States' trust obligation. This trust responsibility also produced a legal obligation of federal ADMINISTRATIVE AGENCIES to protect tribal interests when those interests might be compromised by government action, such as the licensing of a dam with adverse environmental effects. On the political side, the idea of trust responsibility gradually blossomed into massive programs to assist Indians in adjusting to the economic and political institutions of the West. The Supreme Court confused the issue considerably in *United States v. Kagama* (1886) when it invoked this trust responsibility as a basis of congressional power, even as it ruled that the commerce clause did not justify the establishment of a CRIMINAL JUSTICE SYSTEM on an Indian reservation. In concluding that the trust responsibility gave the federal government such powers, the Court appeared to give Congress virtually unlimited power over Indians.

The Constitution did not, of its own force, limit the powers of tribal governments. In *Talton v. Mayes* (1896), the Court upheld the laws of the Cherokee Nation regarding GRAND JURY composition on the grounds that the Cherokees were self-governing, and had been so since before the adoption of the Constitution. Therefore, only the powers the Indian nation had specifically surrendered were to be subject to constitutional protection. This theory was reaffirmed sixty years later by a lower federal court in *Native American Church v. Navajo Tribal Council* (1959),

laying the groundwork for modern tribal SOVEREIGNTY claims that tribes are separate political entities with a status higher than states.

The Indian Civil Rights Act of 1968 reduced this political isolation, imposing on tribes some of the guarantees of the federal Constitution in their dealings with individuals, including their own citizens. RELIGIOUS LIBERTY was the most notable constitutional guarantee not imposed on Indian tribes, because some of them were traditional theocracies. This law was enacted in response to a lower court ruling in 1965, *Colliflower v. Garland*, in which it was decided that an Indian could appeal a tribal court decision to a federal district court on the ground that the tribal court was partially a creation of the national government.

As a rule, constitutional guarantees have not been interpreted to protect American Indians directly. Although the THIRTEENTH AMENDMENT did away with SLAVERY, Congress had to pass a special act to prevent Navajo "peonage" and end the slave trade in captured children in the Southwest. *Elk v. Wilkins* (1884) ruled that even though Indians were born within the United States, they had to have a definite act by the United States to qualify as citizens and voters under the Fourteenth Amendment and the FIFTEENTH AMENDMENT; abandonment by the individual of tribal relations was insufficient by itself to sever his or her tribal membership. Neither the PROHIBITION amendment nor its repeal affected the sale of alcohol to American Indians, because treaties and federal statutes had already prohibited the activity.

The FIRST AMENDMENT guarantee of religious liberty has never been made effective for Indians. Church and state worked hand-in-hand to assimilate Indians, and for a long time missionaries were asked to provide educational opportunities that the federal government was bound to make available to the tribes. With the "peace policy" of President ULYSSES S. GRANT, churches were able to nominate Indian agents for the different reservations, eliminating any real distinction between state and church. In *Quick Bear v. Leupp* (1908), the Court ruled that it was permissible for the federal government to allocate tribal funds for sectarian education under the guise of granting religious freedom to the followers of certain Christian denominations. But the decision sought to circumvent federal statutory prohibitions on the use of public funds for religious education.

Persistent efforts were made to eliminate the use of peyote by Indians, beginning with congressional hearings in 1919 that sought to bring the cactus plant within prohibitions against alcoholic beverages. State courts were more reasonable in upholding the freedom of religion in the use of peyote until EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990), when the U.S. Supreme Court ruled that an Oregon anti-peyote statute could be applied constitutionally to the taking of peyote during Native American religious ceremonies. An earlier decision, *Lyng v. Northwest Indian Cemetery Protective Association* (1988), had found no violation of religious freedom in the federal government's authorization of a logging road through portions of a wilderness in California used by several tribes as vision quest and ceremonial sites. *Smith* and *Lyng*, considered together, constitute a serious impairment of American Indians' religious freedom. Recently, however, both Congress and some state legislatures have enacted laws that are more protective of Indian religious beliefs and practices.

Fifth Amendment protections of PROPERTY have also been impaired as a result of the complications introduced by treaties and land cessions of the late nineteenth century. One major problem has been to discover the primary role of the United States in these transactions. At the time of land cessions, did the government act as a purchaser or as the tribe's trustee? The Indian Claims Commission, in resolving long-standing land claims, had found that the Indians were paid unconscionably low sums for their lands. This conclusion led the courts to suggest, without clearly articulating the idea, that some land deals were in fact confiscations without JUST COMPENSATION. In *United States v. Sioux Nation of Indians* (1980), the Court reaffirmed that a transaction in which the United States acts as a "trustee," to advance a tribe's interests, is not subject to the just compensation clause of the Fifth Amendment. The Court made clear, however, that no presumption of congressional good faith could substitute for a careful judicial inquiry into that "factual" question. The cardinal rule in deciding these cases now seems to be that the government must identify which of two hats it will wear—trustee for the Indians or purchaser of land.

In the 1960s and 1970s, the trend in Indian affairs was to subcontract to tribal councils the administration of programs that the government would otherwise provide for reservation residents. A new line of thought, devised by the U.S. Bureau of Indian Affairs to slow the growth of this movement, has been to argue that either the APPOINTMENTS CLAUSE of Article II or a principle of nondelegation of powers prevents the federal government from surrendering any real decisionmaking to the tribes. Although this reasoning is contradicted by a century of administrative practices to the contrary, it illustrates the propensity of federal officials to rely on constitutional phrases to justify their positions.

In the early 1950s, Senator Patrick McCarran proposed a new constitutional amendment that would eliminate trade with Indian tribes from the commerce clause, but Congress rejected the amendment. His fellow legislators could not imagine another constitutional rubric under which the United States would have authority to deal with

Indian matters. The incident illustrates the extreme confusion and frustration involved in establishing a firm constitutional basis for treating Indians differently from other Americans. While the present structure of intergovernmental relations is based primarily on historical precedent, it is difficult to see how another structure, whether or not based on an amendment to the Constitution, could resolve the current conflicts of authority. One avenue would be to create a new property title for Indian lands, eliminating the so-called trust responsibility that rests on early international law and the doctrine of discovery. Indians as a group undoubtedly qualify for constitutional protection against state RACIAL DISCRIMINATION along the lines of BROWN V. BOARD OF EDUCATION (1954). Congressional discrimination presents more complicated issues; *Morton v. Mancari* (1974) upheld a hiring preference for qualified Indians in the federal Bureau of Indian Affairs.

VINE DELORIA, JR.
(2000)

(SEE ALSO: *Cherokee Indian Cases.*)

Bibliography

NEWTON, NELL JESSUP 1984 Federal Power Over Indians: Its Sources, Scope, and Limitations. *University of Pennsylvania Law Review* 132:195–288.

PEVAR, STEPHEN L. 1992 *The Rights of Indians and Tribes: The Basic ACLU Guide to Indian and Tribal Rights*, 2nd ed. Carbondale: Southern Illinois University Press.

STRICKLAND, RENNARD, ed. 1982 *Felix S. Cohen's Handbook of Federal Indian Law.* Charlottesville, Va.: Bobbs-Merrill.

WILKINSON, CHARLES F. 1987 *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy.* New Haven, Conn.: Yale University Press.

## *AMERICAN INSURANCE COMPANY v. CANTER*
1 Peters 511 (1828)

Although the Constitution authorizes Congress to govern the TERRITORIES of the United States, it does not authorize the acquisition of territories. Consequently THOMAS JEFFERSON had constitutional qualms when he acquired the Louisiana Territory by treaty. This case settled the authority of the United States to acquire territory by the WAR POWERS or TREATY POWER, and sustained the power of Congress to establish LEGISLATIVE COURTS with JURISDICTION extending beyond the JUDICIAL POWER OF THE UNITED STATES as defined by Article III, section 2.

LEONARD W. LEVY
(1986)

## AMERICAN JEWISH CONGRESS

Formed originally in 1918 as a temporary confederation of Jewish organizations to propose a postwar program by the Jewish people for presentation at the Versailles Peace Conference, the American Jewish Congress continued in existence and became fully organized under the chairmanship of Rabbi Stephen S. Wise in 1928. In the 1930s it emerged as a leading force in the anti-Nazi movement and in efforts to aid the victims of Hitlerism.

A new and still continuing chapter in its history was initiated in 1945 when, under the leadership of three socially minded lawyers, Alexander H. Pekelis, Will Maslow, and Leo Pfeffer, it established a Commission on Law and Social Action. The commission was based on two premises: that the security of American Jews is interdependent with that of all religions, races, and other national minorities, and that the security of all is dependent upon the integrity of the BILL OF RIGHTS and the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT.

Accordingly, the organization's legal staff have instituted litigation or submitted briefs AMICUS CURIAE in a wide variety of constitutional law cases, acquiring a status parallel to that of the AMERICAN CIVIL LIBERTIES UNION and the National Association for the Advancement of Colored People. Typical of these are suits challenging the constitutionality of the death penalty under the Eighth Amendment, racial SEGREGATION in public schools, anti-abortion legislation, racially RESTRICTIVE COVENANTS, LITERACY TESTS, for voters, disinheritance of illegitimate children, and denial of tax exemption to organizations advocating overthrow of government.

However, by far the majority of suits in which the organization has participated, either as amicus or as party, have involved either the establishment clause or the free exercise clause of the FIRST AMENDMENT, or the ban in Article VI of RELIGIOUS TESTS for public office. The commission's primacy in this arena is generally recognized among jurists, organizations, and scholars.

LEO PFEFFER
(1986)

Bibliography

PEKELIS, ALEXANDER H. 1950 *Law and Social Action.* Ithaca, N.Y.: Cornell University Press.

## AMERICAN REVOLUTION AND CONSTITUTIONAL THEORY

The era of the American Revolution was one of the greatest and most creative periods of CONSTITUTIONALISM in modern history. The American revolutionaries virtually es-

tablished the modern idea of a written constitution. There had, of course, been written constitutions before in Western history, but the Americans did something new and different. They made written constitutions a practical and everyday part of governmental life. They showed the world how written constitutions could be made truly fundamental and distinguishable from ordinary legislation and how such constitutions could be interpreted on a regular basis and altered when necessary. Further, they offered the world concrete and usable governmental institutions for carrying out these constitutional tasks.

Before the era of the American Revolution a constitution was rarely distinguished from the government and its operations. In the English tradition a constitution referred not only to FUNDAMENTAL RIGHTS but also to the way the government was put together or constituted. "By constitution," wrote Lord Bolingbroke in 1733, "we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed." The English constitution, in other words, included both fundamental principles and rights and the existing arrangement of governmental laws, customs, and institutions.

By the end of the revolutionary era, however, the Americans' idea of a constitution had become very different from that of the English. A constitution was now seen to be no part of the government at all. A constitution was a written document distinct from, and superior to, all the operations of government. It was, as THOMAS PAINE said in 1791, "a thing *antecedent* to a government, and a government is only the creature of a constitution." And, said Paine, it was "not a thing in name only; but in fact." For the Americans a constitution was like a Bible, possessed by every family and every member of government. "It is the body of elements, to which you can refer, and quote article by article; and which contains . . . everything that relates to the complete organization of a civil government, and the principles on which it shall act, and by which it shall be bound." A constitution thus could never be an act of a legislature or of a government; it had to be the act of the people themselves, declared JAMES WILSON in 1790, one of the principal Framers of the federal Constitution in 1787; and "in their hands it is clay in the hands of a potter; they have the right to mould, to preserve, to improve, to refine, and furnish it as they please." If the English thought this new idea of a constitution resembled, as Arthur Young caustically suggested in 1792, "a pudding made by a recipe," the Americans had become convinced the English no longer had a constitution at all.

It was a momentous transformation of meaning in a short period of time. It involved not just a change in the Americans' political vocabulary but an upheaval in their whole political culture.

The colonists began the imperial crisis in the early 1760s thinking about constitutional issues in much the same way as their fellow Britons. Like the English at home, they believed that the principal threat to the people's rights and liberties had always been the prerogative powers of the king, those ancient but vague and discretionary rights of authority that the king possessed in order to carry out his responsibility for governing the realm. Indeed, the whole of English history was seen as a perennial struggle between these two conflicting rights—between a centralizing monarchy trying to fulfill its obligation to govern, on the one hand, and, on the other, local-minded nobles and people, in the House of Lords and the House of Commons, trying to protect their liberties. Each of the great political events of England's past, from the Norman Conquest to the Glorious Revolution, marked a moment defining the proper relationship between these two sets of conflicting rights—between power and liberty.

The eighteenth-century colonists had no reason to think about government much differently. Time and again they had been forced to defend their liberties against the intrusions of royal prerogative power. Relying for their defense on their colonial assemblies, their miniature counterparts to the House of Commons, they invoked their rights as Englishmen and what they called their ancient COLONIAL CHARTERS as devices guaranteeing the rights of the people against their royal governors. In fact, the entire English past was littered with such charters and other written documents to which the English people had repeatedly appealed in defense of their rights against the crown's power. All these documents, from MAGNA CARTA to the BILL OF RIGHTS of 1689, were merely written evidence of those "fixed principles of reason" from which Bolingbroke had said the English constitution was derived.

Although eighteenth-century Englishmen talked about the fixed principles and the fundamental law of the constitution, few of them doubted that Parliament, as the representative of the nobles and people and as the sovereign lawmaking body of the nation, was the supreme guarantor and interpreter of these fixed principles and FUNDAMENTAL LAW. Parliament was in fact the bulwark of the people's liberties against the crown's encroachments; it alone defended and confirmed the people's rights. The PETITION OF RIGHT, the HABEAS CORPUS ACT OF 1679, and the Bill of Rights were all acts of Parliament, mere statutes not different in form from other laws.

For Englishmen, therefore, as WILLIAM BLACKSTONE, the great eighteenth-century jurist, pointed out, there could be no distinction between the "constitution or frame or government" and "the system of laws." All were of a piece:

every act of Parliament was part of the English constitution and all law, customary and statute, was thus constitutional. "Therefore," concluded the British theorist William Paley, "the terms *constitutional* and *unconstitutional* mean *legal* and *illegal.*"

Nothing could be more strikingly different from what Americans came to believe. Indeed, it was precisely on this distinction between "legal" and "constitutional" that the American and British constitutional traditions most obviously diverged at the Revolution. During the 1760s and 1770s the colonists came to realize that although acts of Parliament, like the Stamp Act of 1765, might be legal, that is, in accord with the acceptable way of making law, such acts could not thereby be automatically considered constitutional, that is, in accord with the basic rights and principles of justice that made the English constitution the palladium of liberty that it was. It was true that the English Bill of Rights and the Act of Settlement in 1689 were only statutes of Parliament, but surely, the colonists insisted in astonishment, they were of "a nature more sacred than those which established a turnpike road." Under this pressure of events the Americans came to believe that the fundamental principles of the English constitution had to be lifted out of the lawmaking and other processes and institutions of government and set above them. "In all free States," said the revolutionary leader SAMUEL ADAMS in 1768, "the Constitution is fixed; and as the supreme Legislature derives its Powers and Authority from the Constitution, it cannot overleap the Bounds of it without destroying its own foundation." Thus, in 1776, when Americans came to frame their own constitutions for their newly independent states, they inevitably sought to make them fundamental and to write them out explicitly in documents.

It was one thing, however, to define a constitution as fundamental law, different from ordinary legislation and circumscribing the institutions of government; it was quite another to make such a distinction effective. In the years following the DECLARATION OF INDEPENDENCE, many Americans paid lip service to the fundamental character of their STATE CONSTITUTIONS, but, like eighteenth-century Britons, they continued to believe that their legislatures were the best instruments for interpreting and changing those constitutions. The state legislatures represented the people, and the people, it seemed, could scarcely tyrannize themselves. Thus, in the late 1770s and the early 1780s several state legislatures, acting on behalf of the people, set aside parts of their constitutions by statute and interpreted and altered them, as one American observed, "upon any Occasion to serve a purpose." Time and again, the legislatures interfered with the governor's designated powers, rejected judicial decisions, disregarded individual liberties and PROPERTY RIGHTS, and in general, as one victim complained, violated "those fundamental principles which first induced men to come into civil compact."

By the mid-1780s many American leaders had come to believe that the state assemblies, not the governors as they had thought in 1776, were the political authority to be most feared. Legislators were supposedly the representatives of the people who annually elected them; but "173 despots would surely be as oppressive as one," wrote THOMAS JEFFERSON. "An *elective despotism* was not the government we fought for." It increasingly seemed to many that the idea of a constitution as fundamental law had no practical meaning at all. "If it were possible it would be well to define the extent of the Legislative power," concluded a discouraged JAMES MADISON in 1785, "but the nature of it seems in many respects to be indefinite."

No one wrestled more persistently with this problem of distinguishing between statutory and fundamental law than Jefferson. By 1779, Jefferson had learned from experience that assemblies "elected by the people for the ordinary purposes of legislation only have no power to restrain the acts of succeeding assemblies." Thus, he realized that to declare his great VIRGINIA STATUTE OF RELIGIOUS LIBERTY to be "irrevocable would be of no effect in law; yet we are free," he wrote into the bill in frustration, "to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right." But such a paper declaration was obviously not enough; he realized that something more was needed. By the 1780s, both he and Madison were eager "to form a real constitution" for Virginia; the existing one, enacted in 1776, was merely an "ordinance," with no higher authority than the other ordinances of the same session. They wanted a constitution that would be "perpetual" and "unalterable by other legislatures." But how? If the constitution were to be truly fundamental and immune from legislative tampering, somehow it would have to be created, as Jefferson put it, "by a power superior to that of the legislature."

By the time Jefferson came to write his *Notes on the State of Virginia* in the early 1780s, the answer had become clear: "To render a form of government unalterable by ordinary acts of assembly," said Jefferson, "the people must delegate persons with special powers. They have accordingly chosen special conventions to form and fix their governments." The conventions and congresses of 1775–1776 had been legally deficient legislatures made necessary by the refusal of the royal governors to call together the regular and legal representatives of the people. Now, however, these conventions were seen to be special alternative representations of the people temporarily given the exclusive authority to frame or amend constitutions. When

Massachusetts and New Hampshire wrote new constitutions in 1780 and 1784, the proper pattern of constitution making and altering was set: constitutions were formed or changed by specially elected conventions and then placed before the people for ratification. Thus, in 1787 those who wished to change the federal government knew precisely what to do: they called a CONSTITUTIONAL CONVENTION in Philadelphia and sent the resultant document to the states for approval. Even the French in their own revolution several years later followed the American pattern.

With the idea of a constitution as fundamental law immune from legislative encroachment more firmly in hand, some state judges during the 1780s began cautiously moving in isolated cases to impose restraints on what the assemblies were enacting as law. In effect, they said to the legislatures, as GEORGE WYTHE, judge of Virginia's highest court did in 1782, "Here is the limit of your authority; and hither shall you go, but no further." These were the hesitant beginnings of what would come to be called JUDICIAL REVIEW, that remarkable American practice by which judges in the ordinary courts of law have the authority to determine the constitutionality of acts of the state and federal legislatures.

In just these ways did Americans in the revolutionary era devise regular and everyday constitutional institutions both for controlling government and thereby protecting the rights of individuals and for changing the very framework by which the government operated.

GORDON S. WOOD
(1992)

(SEE ALSO: *Bill of Rights (United States); Constitutional Convention of 1787; Constitutional History Before 1776; Constitutional History, 1776–1789; Constitutionalism and the American Founding; Natural Rights and the Constitution; Social Compact Theory.*)

Bibliography

CORWIN, EDWARD S. 1955 *The "Higher Law" Background of American Constitutional Law.* Ithaca, N.Y.: Cornell University Press.

MCLAUGHLIN, ANDREW C. 1932 *Foundations of American Constitutionalism.* New York: Norton.

WOOD, GORDON S. 1969 *The Creation of the American Republic, 1776–1787.* Chapel Hill: University of North Carolina Press.

## AMERICANS WITH DISABILITIES ACT
104 Stat. 327 (1990)

The Americans with Disabilities Act (ADA) of 1990 is the high-water mark in the expansion of CIVIL RIGHTS initiated by the CIVIL RIGHTS ACT OF 1964. The tactics, language, and libertarian aims of the disability rights movement note this debt, especially in the ADA's references to ending "segregation," "discrete and insular minority" status, and "political powerlessness." Brought about through a remarkable coalition of activists concerned about diverse disabilities, the personal involvement of President GEORGE BUSH, and overwhelming support in Congress, the ADA proclaims that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals" with disabilities.

The ADA defines disability as a "mental or physical impairment that substantially limits one or more of the major life activities." The legislation also covers those who have had a disability or are "regarded as having" a disability.

The four major titles of the ADA deal with employment, state and local governmental services (including public transportation), public accommodations, and telecommunications, respectively. The ADA requires that hearing or speech-impaired persons be able to communicate with hearing persons through a telephone relay system. New commercial buildings and alterations to existing ones must be designed and constructed to be fully accessible. However, only "readily achievable" alterations need be made to existing places of public accommodation. Public accommodations include facilities ranging from those specifically covered in the 1964 act, such as restaurants and hotels, to gymnasiums and bowling alleys. As a general rule, people with disabilities must have "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." New buses, trains, and other transportation facilities will also have to be accessible.

The most important provision of the ADA is Title I, which is the analogue of Title VII, the EMPLOYMENT DISCRIMINATION section of the 1964 Civil Rights Act. Enforced as well by the U.S. Equal Employment Opportunity Commission, Title I strikes down barriers to employment and promotion found in job qualifications, examinations, and classifications. Particularly noteworthy is the requirement that an employer provide "reasonable accommodation" to an "otherwise qualified" individual with a disability—thus enabling performance of the "essential functions" of the position. An employer cannot, however, be asked to bear an "undue hardship" in accommodating an otherwise qualified person with a disability.

Disputes over the ADA focused largely on the costs it would impose on covered entities and the definition of disability. Proponents argued that most of the required modifications are a minor financial burden, particularly in light of the estimated $169.4 billion spent annually on pro-

grams that primarily promote dependency. Supporters predicted that the productivity unleashed by individuals now able to work would cease their being dependent.

The ADA presents a striking interpretation of the equality of NATURAL RIGHTS on which the Constitution rests. It seeks to halt the slow march toward the nightmare world of perfectly classified types depicted in Aldous Huxley's *Brave New World.* The law relies on the FOURTEENTH AMENDMENT and the COMMERCE CLAUSE for its constitutional authority. But it not only affirms the equal civil rights of all persons, including those with severe mental and physical disabilities; it requires as well the elimination of both physical and attitudinal barriers. The enforcement of the ADA should not produce the quotas and preferences that have hitherto plagued civil rights enforcement. Individuals with disabilities need to be accommodated on an individual basis, not treated as a group. In seeking entry into the mainstream of American life the disability rights movement has fought ceaselessly against exactly this thoughtless group classification.

EVAN J. KEMP, JR.
(1992)

Bibliography

HUXLEY, ALDOUS 1932, 1969 *Brave New World.* New York: Harper & Row.

U.S. COMMISSION ON CIVIL RIGHTS 1983 *Accommodating the Spectrum of Individual Abilities.* Washington, D.C.: U.S. Government Printing Office.

## AMERICANS WITH DISABILITIES ACT
### 42 U.S.C. 12101 (1990)
### (Update)

The Americans with Disabilities Act (ADA) was signed into law on July 26, 1990, and became effective two years later. Title I of the statute prohibits EMPLOYMENT DISCRIMINATION on the basis of disability in the private sector, Title II prohibits discrimination in the provision of goods or services by public entities, and Title III prohibits discrimination in the provision of goods or services by PUBLIC ACCOMMODATIONS including a requirement of removal of barriers to access.

To justify the constitutionality of ADA, Congress invoked "the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities" in its statement of purpose. Consistent with that declaration, it defined an employer under Title I as a "person engaged in an industry affecting commerce." Similarly, it defined a public accommodation in Title III as one of various entities like an inn or motel "if the operations of such entities affect commerce." Thus, Congress was careful to draft Titles I and III so that their constitutionality would be upheld under congressional power to regulate INTERSTATE COMMERCE.

Title II, however, could not be justified under the COMMERCE CLAUSE because it created a private right of action against state government. Because of the SOVEREIGN IMMUNITY of the states recognized by the ELEVENTH AMENDMENT, that kind of right can only be created pursuant to the FOURTEENTH AMENDMENT, SECTION 5 enforcement power. Hence, Congress also justified its authority for enacting ADA pursuant to the FOURTEENTH AMENDMENT.

Despite the care with which Congress drafted ADA to ensure its constitutionality, there have been numerous constitutional challenges to Title II of ADA. In each case, a state was sued by a private citizen under Title II and responded that the Eleventh Amendment barred suit for damages. The appellate courts rejected this argument, finding that Congress effectively abrogated states' Eleventh Amendment sovereign immunity from suits under ADA, pursuant to its Fourteenth Amendment enforcement power.

The Eleventh Amendment states: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This provision also prohibits suits brought against a state in federal court by its own citizens.

In *Seminole Tribe of Florida v. Florida* (1996), the Supreme Court held that the states' Eleventh Amendment sovereign immunity can only be overridden by Congress if it enacts LEGISLATION to regulate the states pursuant to its Fourteenth Amendment enforcement power. Further, the Court held that Congress must have intended to abrogate sovereign immunity by providing "a clear legislative statement" of its intent.

The federal circuit courts are in agreement that Congress has met this test with respect to ADA. Title II states explicitly that "A state shall not be immune under the eleventh amendment." Further, Congress specifically invoked its enforcement powers under the Fourteenth Amendment in enacting the statute. The remaining titles of ADA are readily justified by the commerce clause, and there have been no serious challenges to their constitutionality.

Nonetheless, the Court has recently strengthened the states' sovereign immunity recognized by the Eleventh Amendment. In the 1998–1999 term, the Court struck down three statutes that violated the states' sovereign immunity. None of these cases involved CIVIL RIGHTS statutes but they do raise some concerns about the constitution-

ality of such laws, including Title II of ADA. Moreover, at the time of this writing, the Court has agreed to hear argument in a case challenging the constitutionality of the Age Discrimination in Employment Act as violating state sovereign immunity in the 1999–2000 term. Thus, we can expect more activity from the Court in the area of sovereign immunity. It is possible that the Court will eventually side with the dissenting judges in the circuit courts, who have concluded that ADA Title II exceeds Congress's enforcement power under section 5 of the Fourteenth Amendment.

Outside the constitutional context, the Court has shown considerable interest in ADA. In the 1997–1998 term, it concluded that the term "individual with a disability" within ADA covers individuals who have HIV infection.

In the 1998–1999 term, it rendered decisions in five ADA cases. (The Court only rendered a total of seventy-five decisions by full opinion that term; so, five cases represented an unusual amount of attention by the Court for one statute.) In three of those cases, the Court accepted a narrow definition of the term "individual with a disability." Under that narrow definition, an individual is disabled (and thereby covered by ADA) if he or she has a physical or mental impairment that substantially limits that individual in one or more major life activities after the individual has had an opportunity to use mitigating measures such as medicines or prosthetic devices. Although the plaintiffs in those cases had hypertension and visual impairments, the Court's decisions raise the question whether individuals with mental illness, diabetes, or seizure disorders that are controllable with medication will be covered by ADA.

In another important case from the 1998–1999 term, the Court concluded that ADA Title II prohibits unnecessary institutional segregation so long as the state cannot show that, in the allocation of available resources, immediate integration for individuals with disabilities who live in institutional settings would be inequitable, given the responsibility the state has undertaken for the care and treatment of a large and diverse population of individuals with disabilities. This case is the equivalent of BROWN V. BOARD OF EDUCATION (1954) for the disability community. Nonetheless, its holding will not be sustainable if ADA Title II is struck down as unconstitutional.

RUTH COLKER
(2000)

## AMERICAN SYSTEM

"American System" was the name given by HENRY CLAY (in the HOUSE OF REPRESENTATIVES, March 30–31, 1824) to the national program of economic policy that centered on the protective tariff for the encouragement of domestic manufactures. It assigned the general government a positive role in promoting balanced economic development within the "home market." Each of the great sections would concentrate on the productions for which it was best suited: the South on staples like cotton, the West on grains and livestock, the Northeast on manufacturing. The tariff would protect the market; INTERNAL IMPROVEMENTS would facilitate exchanges and bind the parts together; the national bank would furnish commercial credit and ensure a stable and uniform currency. These measures were implemented in varying degrees, but the system was overtaken by the disintegrating sectionalism of the 1820s and finally buried by Jacksonian Democracy. Constitutionally, the American System posited a broad view of federal powers. It was attacked as dangerously consolidating, indeed unconstitutional in all its leading measures. Although the opposition had other and deeper sources, it tended to become a constitutional opposition, culminating in South Carolina's NULLIFICATION of the tariff in 1832.

MERRILL D. PETERSON
(1986)

Bibliography

GOODRICH, CARTER, ed. 1967 *The Government and the Economy, 1783–1861.* Indianapolis: Bobbs-Merrill.

## *AMERICAN TOBACCO COMPANY, UNITED STATES v.*

See: *Standard Oil Company v. United States*

## AMES, FISHER
(1758–1808)

An extreme Federalist, Fisher Ames published his "Camillus" essays to promote the idea of the CONSTITUTIONAL CONVENTION OF 1787. The French Revolution inspired his suspicion of democracy—"only the dismal passport to a more dismal hereafter"—and led him to call for a government run by an "aristocracy of talent." Ames also opposed the BILL OF RIGHTS as unnecessary and unwise. Representing Massachusetts in Congress from 1789 to 1797, he vigorously defended JAY'S TREATY and the ALIEN AND SEDITION ACTS, but, by 1802, his radical partisanship left him an embittered STATES' RIGHTS advocate.

DAVID GORDON
(1986)

## AMICUS CURIAE

(Latin: Friend of the Court.) The amicus curiae originally was a lawyer aiding the court. Today in American practice, the lawyers represent an organization, which is the amicus; the group's "friendship" to the court has become an artifice slightly disguising the fact that it is as much an advocate as any party. Although economic interests early employed the amicus brief, CIVIL LIBERTIES groups did not lag far behind. As early as 1904, a group representing Chinese immigrants participated in a Supreme Court case. By the 1940s, the activities of amici were extensive, well coordinated among sister organizations, and highly publicized. In the aftermath of several antisegregation decisions of the mid-1950s, southern legislators and other spokesmen criticized that participation as nonjudicial.

Prior to 1937 the Supreme Court had no formal rule governing amicus briefs. It was standard procedure first to seek consent of the parties to the filing of an amicus brief, but the Court almost invariably accepted an amicus brief irrespective of party consent. The 1937 rule required a request for party consent, but the same easy acceptance of participation continued. In 1949, in the face of criticism, the Court noted that consent of the parties would be expected; without such consent "such motions are not favored." For a decade thereafter denials exceeded granting of motions by a wide margin.

The rule has been retained in subsequent revisions. In practice, however, such motions are now virtually (though not quite) automatically granted, with or without party consent. It is rare for any amicus curiae other than the United States to be given leave to make an ORAL ARGUMENT.

The excitement over use of amicus briefs has died down. Most such presentations are well-coordinated with the main brief, serving chiefly to announce the positions of certain groups. The Court, however, seems well-served by broader sources of information, and some amicus briefs are more cogent or influential than the parties' briefs. Many potential amici curiae qualify for participation through intervention or CLASS ACTIONS. Critics of wider participation, therefore, concentrate their guns on those more significant targets.

SAMUEL KRISLOV
(1986)

(SEE ALSO: *Groups and the Constitution.*)

## AMNESTY

Amnesty is the blanket forgiveness of a group of people for some offense, usually of a political nature. Although there is a technical distinction between an amnesty, which "forgets" the offense, and a pardon, which remits the penalty, historical practice and common usage have made the terms virtually interchangeable. In the United States, amnesty may be granted by the President (under the PARDONING POWER) or by Congress (as NECESSARY AND PROPER to the carrying out of any of several powers). Amnesty may be granted before or after conviction, and may be conditional or unconditional. But neither Congress nor the President may grant amnesty for offenses against state law.

The first instance of amnesty under the Constitution was extended in 1801 by President THOMAS JEFFERSON to persons convicted or charged under the ALIEN AND SEDITION ACTS. Between 1862 and 1868, Presidents ABRAHAM LINCOLN and ANDREW JOHNSON issued a series of six proclamations of conditional amnesty for southern rebels. Congress specifically authorized the first three but repealed the authorizing statute in 1867; President Johnson issued the last three on his own authority alone. In the TEST OATH CASES (1867), the Supreme Court struck down, as an unconstitutional interference with the pardoning power, an attempt by Congress to limit the effect of Johnson's amnesty. In 1872, exercising its power under section 3 of the FOURTEENTH AMENDMENT, Congress passed the Amnesty Act restoring the CIVIL RIGHTS of most rebels.

President GERALD R. FORD granted conditional amnesty in 1974 to military deserters and draft evaders of the VIETNAM WAR period. The terms of the amnesty required case-by-case determination by a special Presidential Clemency Board empowered to direct performance by applicants of alternative public service. Ford acted on his own authority after Congress failed to approve any of several amnesty proposals.

DENNIS J. MAHONEY
(1986)

## ANCILLARY JURISDICTION

In some cases federal courts hear claims over which no statute confers federal JURISDICTION. Typically, this ancillary jurisdiction has been exercised in cases brought under the federal courts' DIVERSITY JURISDICTION. Suppose a California citizen sues an Arizona citizen in federal court, claiming a right to property. If another Californian claims the same property interest, no state court can take jurisdiction over the property under the federal court's control. It is thus necessary for the federal court to be able to hear that claim, even though the case of one Californian against another would not initially be within its jurisdiction. Similarly, a defendant sued in federal court can file a third-party claim against a co-citizen, which will be heard under the federal court's ancillary jurisdiction.

Ancillary jurisdiction is sometimes confused with PENDENT JURISDICTION, which permits a state *claim* to be heard in federal court along with a closely related FEDERAL QUESTION. Ancillary jurisdiction results in the addition of a *party* who otherwise would not fall within the federal court's jurisdiction. The Supreme Court has not been hospitable to the suggestion that a federal court in a federal question case should take "pendent" jurisdiction over a closely related state law claim against a new party.

KENNETH L. KARST
(1986)

Bibliography

WRIGHT, CHARLES ALAN 1983 *The Law of Federal Courts*, 4th ed. Pages 28–32. St. Paul, Minn.: West Publishing Co.

## ANNAPOLIS CONVENTION

In 1785 a few nationalists led by JAMES MADISON and ALEXANDER HAMILTON sought desperately to preserve the Union of the states under the ARTICLES OF CONFEDERATION. Congress seemed inept and powerless. The chances that the United States might "Balkanize" seemed likely. As early as 1782 Hamilton had proposed a convention of the states to reassess their union. In 1785 delegates from Maryland and Virginia met in Alexandria to reconcile their mutual interests in Chesapeake Bay and the Potomac River. Madison promoted the plan of a convention of delegates from all of the states to consider augmenting the powers of Congress over commerce. Maryland and Virginia agreed on the call of such a convention in Annapolis in September 1786, and they invited all the states to send delegates.

When the Annapolis Convention met, only five states were in attendance. Undaunted, Hamilton and Madison made the best of the situation by framing a report, which those in attendance unanimously adopted, critical of the inadequacies of the Articles of Confederation and urging still another convention of all the states to assemble in Philadelphia in May 1787. The purpose of that convention would be to "take into consideration the situation of the United States, to devise such other provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union," and to report recommendations to Congress for confirmation by the states.

Thus, the Annapolis Convention was significant for calling the meeting that became the Philadelphia CONSTITUTIONAL CONVENTION of 1787. SHAYS' REBELLION assisted the Confederation Congress in making up its mind to endorse the work of the Annapolis Convention. Confronted by the fact that the states were already electing delegates to the Philadelphia Convention, Congress saved face by issuing its own call for that convention in the language used by the Annapolis Convention.

LEONARD W. LEVY
(1992)

## ANNEXATION OF TEXAS

American settlers in the Mexican province of Texas revolted against the central government and established the independence of the Lone Star Republic in 1836. President ANDREW JACKSON was unable to effect annexation, however, because many feared war with Mexico and because abolitionists suspected a slaveholders' plot to increase the number of slave states. In 1842, President John Tyler revived annexationist efforts, abetted by a clique of proslavery expansionists, but an annexation treaty failed once again, due in part to the argument that the territories clause (Article IV, section 3) permitted annexation only of dependent TERRITORIES of other nations, not of independent nations themselves. Tyler then recommended annexation by JOINT RESOLUTION of Congress to obviate the constitutional requirement of a two-thirds Senate vote to ratify a treaty. This aroused further opposition, now including influential southern Whigs, who insisted that the issue involved grave foreign policy risks and hence was precisely the sort of question for which the Framers had required a super-majority. Despite this argument, congressional Democrats enacted a joint resolution in February 1845 declaring the Republic of Texas to be the twenty-eighth state.

WILLIAM M. WIECEK
(1986)

Bibliography

MERK, FREDERICK 1972 *Slavery and the Annexation of Texas.* New York: Knopf.

## ANONYMOUS POLITICAL SPEECH

Political speech, the Supreme Court has often indicated, is at the core of the protection afforded by the FIRST AMENDMENT, given its central role in the democratic process. But it takes on a somewhat different cast when it is delivered anonymously—without any attribution of authorship (true anonymity) or with false or fictitious attribution of authorship (pseudonymity). On the one hand, anonymous or pseudonymous speech can function as a "shield from the tyranny of the majority." Requiring listeners to assess the value of speech on its own merits—that is, without regard to the speaker's popularity or unpopularity—allows voices that might otherwise be

drowned out or dismissed to participate in and enrich the public debate. Moreover, insulating proponents of unpopular causes against retaliation encourages persecuted groups to speak without fear of reprisal. As the Court has noted on many occasions, anonymous political speech has a distinguished history in the political process of the United States, from colonial-era critics of the British Crown seeking protection from prosecution for SEDITIOUS LIBEL; to the authors of the eighty-five FEDERALIST essays (who published their contributions under the pseudonym "Publius"); to members of the National Association for the Advancement of Colored People protesting racial SEGREGATION in the 1950s. On the other hand, precisely because it is harder to trace the source of an anonymous or pseudonymous communication, distributors of false, fraudulent, or libelous information, or those seeking to use political contributions to corrupt the political process, might use anonymity as a shield to avoid accountability or public scrutiny.

The Court has had few opportunities to assess the constitutionality of government regulation of anonymous political speech. In *McIntyre v. Ohio Elections Commission* (1995), the Court made clear that such regulation was to be treated as a "content-based regulation . . . of pure speech" subject to the same "exacting scrutiny" as other attempts to regulate decisions concerning omissions or additions to the content of speech. As such, the Court will uphold regulation of this kind only where it is "narrowly tailored to serve an overriding state interest."

What is less clear from the limited PRECEDENT in this area is how the Court will strike the necessary balance so as to determine whether any particular state interest is sufficiently "overriding" to justify limitations on anonymous communication. In *McIntyre* itself the Court struck down Ohio's blanket ban on all anonymous campaign literature, finding the main interest asserted by the state—preventing the dissemination of fraudulent and libelous statements—insufficient to support so sweeping and "indiscriminate" a disclosure requirement. At the same time, the Court indicated that the state's interest might well justify a more limited identification requirement (although it gave no hint about what such a regulation would look like). At the same time, it strongly reaffirmed an earlier precedent—BUCKLEY V. VALEO (1976)— upholding disclosure requirements in the context of campaign contributions where the state interest in avoiding the appearance of corruption was served and the regulation was less intrusive on political self-expression.

DAVID G. POST
DAWN C. NUNZIATO
(2000)

(SEE ALSO: *Freedom of Speech.*)

Bibliography

FROOMKIN, A. MICHAEL 1996 Flood Control on the Information Ocean: Living With Anonymity, Digital Cash, and Distributed Databases. *Journal of Law & Commerce* 15:395–507.

POST, DAVID G. 1996 Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace. *University of Chicago Legal Forum* 1996:139–169.

## ANTHONY, SUSAN BROWNELL (1820–1906)

Susan B. Anthony was born in Adams, Massachusetts to a Quaker father and a Baptist mother. She never married and was a lifelong advocate of self-support for women. In 1850, she met ELIZABETH CADY STANTON, from whom she learned about women's rights, and became a passionate believer. Together they led the American women's rights movement for the next half-century. Their first goal was the establishment of basic economic rights for married women. Beginning in 1854, Anthony traveled across New York collecting petitions to the state legislature, which in 1860 passed a comprehensive Married Women's Property Act. Simultaneously, she was an organizer of the American Anti Slavery Society, and her women's rights and ABOLITIONIST sentiments were closely related.

After the Civil War and following the lead of the antislavery movement, Stanton and Anthony concentrated on equal citizenship and political rights for women. They tried but failed to get women included in the FOURTEENTH and FIFTEENTH AMENDMENTS, an effort which left them committed to a focus on political equality and the Constitution as the source of political rights. In 1869, they formed the National Woman Suffrage Association, precipitating a split with other women's rights activists not willing to criticize the Fifteenth Amendment or break with longtime abolitionist and Republican allies by doing so.

In the early 1870s, Anthony and Stanton advanced an innovative constitutional argument resting on the proposition that the Fourteenth Amendment included women when it established federal CITIZENSHIP. Inasmuch as the right to vote was patently the FUNDAMENTAL RIGHT of citizenship, they argued, woman suffrage was thus authorized by the Constitution. Accordingly, in November, 1872, Anthony took the most famous act of her life: she convinced Rochester, New York election officials to allow her to submit her ballot for President. For this she was found guilty of illegal voting in U.S. District Court, and fined $100, which she refused to pay. Two years later, the U.S. Supreme Court ruling on a related case, MINOR V. HAPPERSETT (1875), found decisively against the suffragists' constitutional construction.

From this point on, Anthony dedicated herself to securing a separate WOMAN SUFFRAGE amendment. In 1876, she presented a militant "Woman's Declaration of Rights" to the official Revolutionary Centennial in Philadelphia, condemning the refusal to extend the nation's democratic principles to women. In 1890, she oversaw the unification of the suffrage movement, and served as president of the newly created National American Woman Suffrage Association until 1900. Throughout the 1890s, Anthony, then in her seventies, traveled to California, Kansas, South Dakota, and Colorado to work for state suffrage REFERENDUMS and to England and France to organize suffragists internationally. In 1900, she retired and in 1906, she died. In 1920, her goal was finally realized with the ratification of the NINETEENTH AMENDMENT, known popularly as the Susan B. Anthony Amendment.

ELLEN CAROL DUBOIS
(2000)

(SEE ALSO: *Woman Suffrage Movement.*)

Bibliography

BARRY, KATHLEEN 1988 *Susan B. Anthony: A Biography of a Singular Feminist.* New York: Ballantine.

BUHLE, MARI JO and PAUL, eds. 1978 *Concise History of Woman Suffrage.* Urbana, Ill.: University of Illinois Press.

GORDON, ANN D., ed. 1997 *The Selected Papers of Elizabeth Cady Stanton and Susan B. Anthony.* Vol. 1. New Brunswick, N.J.: Rutgers University Press.

SHERR, LYNN 1995 *Failure is Impossible: Susan B. Anthony in Her Own Words.* New York: Times Books.

## ANTI-ABORTION MOVEMENT

After ROE V. WADE (1973), opponents of ABORTION scrambled to find restrictions on abortion that the Supreme Court would uphold. These included laws requiring a short "cooling off" period between the request for an abortion and its performance; informed-consent laws requiring disclosure of the medical risks of abortion to women considering the procedure; medical regulations requiring that second-trimester abortions be performed in hospitals or establishing professional standards for those who perform abortions; viability regulations that would establish a uniform definition for viability or that required a doctor to determine whether the unborn child was viable before performing an abortion; and parental and spousal consent provisions. All were invariably struck down in the federal courts, leading law professor Lynn Wardle to conclude in 1981: "The courts have carried the doctrine of abortion privacy to incredible extremes. . . . The abortion industry . . . has wrapped itself in the robes of *Roe v. Wade*, [has] challenged many simple and ordinary state regulations (from record-keeping laws to parental notification requirements) and today claims constitutional immunity from many medical regulations."

Given the judiciary's effective ban on any local abortion regulation during the 1970s, the anti-abortion movement soon sought other methods to achieve its goals, including the constitutional-amendment process. Several constitutional amendments dealing with abortion were introduced in Congress after the Republicans gained control of the Senate in 1980. The first would have defined the term "person" in the Fifth Amendment and the FOURTEENTH AMENDMENT as encompassing "unborn offspring at every stage of development" and provided that "[n]o unborn person shall be deprived of life by any person." Another proposal, dubbed the "Human Life Federalism Amendment," provided that a "right to abortion is not secured by this Constitution" and that "Congress and the several states shall have the concurrent power to restrict and prohibit abortions." The intent of the latter amendment was to restore to the legislative branch the power to enact laws dealing with abortion. Many in the anti-abortion movement were critical of this approach, however, believing that it did not go far enough.

When it became clear that no constitutional amendment dealing with abortion could muster sufficient support, some sought to overturn *Roe* by congressional statute. The "Human Life Statute" was the result; it would have provided a congressional finding of fact that human life begins at conception; it also would have used congressional power to curtail the jurisdiction of the lower federal courts to deal with abortion. The Human Life Statute attracted a great deal of controversy while it lasted, and it received scorching criticism from many in the legal community as an unconstitutional attack on federal JUDICIAL POWER. The statute's defenders included law professors John T. Noonan, Jr. (now a federal appellate judge) and Joseph Witherspoon. Both argued that the right to life guaranteed by the Fourteenth Amendment ought to apply to children in the womb as a matter of proper constitutional interpretation; Witherspoon went to great lengths to show that the Fourteenth Amendment was enacted during a time when stricter abortion laws were sweeping the nation, indicating a general regard for unborn infants as persons with certain rights.

Despite a flurry of hearings and public debate, none of these measures ever had a serious prospect of passing. Once the Republicans lost control of the Senate, even the most zealous members of the anti-abortion movement realized this fact, and so attention turned to executive-branch action. By the late 1980s, many in the movement had decided that their best chance of overturning *Roe v.Wade* lay in new appointments to the Supreme Court. Hence, both RONALD REAGAN and GEORGE BUSH received

widespread electoral support from abortion opponents, even though neither did much to promote anti-abortion legislation in Congress. Abortion opponents hoped Reagan and Bush would appoint Justices willing to undercut *Roe*. They did not hope in vain. In 1989 the Court finally upheld some minor abortion restrictions in WEBSTER V. REPRODUCTIVE HEALTH SERVICES, and Reagan-appointed Justices provided the decisive votes.

For many opponents of abortion, however, the change in the Court's direction came too late. Appalled by over fifteen million abortions since 1973 and alienated by a court system that they felt had disenfranchised them from the political system, a large segment of the anti-abortion movement turned from politics to mass CIVIL DISOBEDIENCE in the mid-1980s. Thousands became involved in a loose-knit organization known as "Operation Rescue," which staged nonviolent sit-ins to shut down abortion clinics. The magnitude of these protests is indicated by the number of protestors arrested, estimated at between twenty-eight and thirty-five thousand during one eighteen-month period. When tried for criminal trespass, members of Operation Rescue commonly invoke the necessity defense, arguing that they are compelled by a HIGHER LAW to engage in civil disobedience in order to save human life. A few courts have acquitted protestors on this basis, most notably one in Missouri that based its decision on a state law declaring that human life begins at conception.

As Operation Rescue protests have grown in size and number, some fairly drastic measures have been taken to stop the organization, including lawsuits based on the RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT (RICO). Operation Rescue protestors have also encountered widespread police brutality. In Buffalo male protestors were handcuffed, beaten with clubs, and dragged face-down down a flight of stairs. In Dobbs Ferry, New York, women protestors were strip-searched and photographed nude by prison guards. In Los Angeles police broke a nonresisting man's arm twice, pounded the faces of other peaceful protestors into the asphalt, and repeatedly inflicted pain on protestors who were trying to comply with police requests. In several cities abusive police have removed their badges and name plates to prevent identification by both protestors and the news media. Reports of police brutality became so widespread that in late 1989 the United States Commission on Civil Rights voted to launch an investigation. William B. Allen, then chairman of the commission, declared: "It is imperative that we as a nation assert our commitment to equal treatment before the law. Nonviolent protestors should all be accorded the same treatment no matter what the subject of protest. To do less is to destroy the most prized achievement of the CIVIL RIGHTS MOVEMENT—the recognition of the rights of everyone." The majority of public officials and members of the media, however, paid scant attention to the protestors' plight, and the brutality continued.

JOHN G. WEST, JR.
(1992)

(SEE ALSO: *Conservatism; Jurisdiction, Federal.*)

Bibliography

ALLEN, WILLIAM B. 1989 Police Brutality—But No Outrage. *The Wall Street Journal*, August 18.

SENATE COMMITTEE ON THE JUDICIARY 1982 *The Human Life Bill* (Hearings). 2 volumes. Washington, D.C.: U.S. Government Printing Office.

——— 1983 *Constitutional Amendments Relating to Abortion* (Hearings), 2 volumes. Washington, D.C.: U.S. Government Printing Office.

TERRY, RANDALL A. 1988 *Operation Rescue*. Springdale, Penn.: Whitaker House.

## ANTI-ABORTION MOVEMENT
### (Update)

In the 1980s and 1990s, protests by ABORTION opponents directed at clinics and physicians providing abortion services supplied a powerful impetus to doctrinal change in our understanding of the FIRST AMENDMENT. Anti-abortion activities ranged from "sidewalk counseling" of women seeking to enter clinics to residential picketing of the homes of abortion providers; aggressive expressive assaults against clinic patients and staff; mass protests; obstruction of clinic entrances; and threats and acts of violence. In response, clinics sought, and courts issued, injunctions creating protest-free buffer or bubble zones around the entrances of clinics. Local authorities enacted ordinances banning residential picketing or codifying clinic buffer zones. At the national level, Congress adopted the Freedom of Access to Clinic Entrances Act to protect clinic staff and patients from force, threats of force, and acts of obstruction.

As a general matter, expressive protests that do not involve unlawful conduct such as blocking entrances or assault are part of the robust debate on public policy issues that the First Amendment protects. Anti-abortion protests, however, raise special concerns that arguably justify more aggressive intervention and regulatory restrictions. While angry speech that causes anxiety and emotional distress does not lose its protected status, loud, accusatory demonstrations directed at the women seeking abortion services increase the medical risks of abortion procedures.

The state's interest in protecting the health of women

receiving abortion services was not the only justification offered for restricting anti-abortion protests. The line between protected, hurtful, and critical speech directed at individuals who do not want to hear a protestor's message and proscribable harassment has never been an easy one to draw, but at some point the following and badgering of patients and staff as they walk to and from clinics crosses that line and becomes subject to sanction. The state has a legitimate interest in enabling women to make medical choices free from harassment.

Moreover, a woman has a constitutional right to elect to have an abortion. When the exercise of rights comes into conflict, constitutional compromises sometimes have to be structured to allow sufficient "breathing room" for both protected interests. Courts and legislatures have attempted to take competing speech and privacy rights into account in regulating expressive activities outside of clinics.

Finally, the frequency and duration of anti-abortion protests have made them difficult to monitor and control. Unless police are stationed continually outside of clinics, harassment and obstruction can continue until police arrive, abate while authorities are present, and then resume after they depart. Regulations that have tried to prohibit only unprotected conduct, while permitting protestors to continue to engage in protected activities, have seemed easy to circumvent, and almost impossible to enforce effectively.

Lower courts and local authorities accepted many of these rationales in establishing buffer zones around clinics that prohibited protestors from engaging in virtually any expressive activity within a short radius of a clinic's entrance. The Supreme Court, however, focused almost exclusively on the enforcement justification in upholding the constitutionality of injunctions creating relatively narrow buffer zones in *Madsen v. Women's Health Center, Inc.* (1994) and *Pro-Choice Network of Western New York v. Schenck* (1997). To the Court, patients and staff were entitled to secure access to clinics. Accordingly, if lower court orders prohibiting obstruction and harassment were repeatedly violated by protestors, courts had the constitutional authority to issue more restrictive injunctions that precluded even nonobstructive expressive activities.

Injunctions that restricted anti-abortion protests beyond the narrow parameters of limited buffer zones, however, were held to violate the FREEDOM OF SPEECH. Moreover, the Court seemed to suggest that a pattern of prior obstruction and harassment by protestors was an essential precondition to the establishment of a buffer zone. Women's health concerns and RIGHT OF PRIVACY did not appear to be of sufficient weight to justify limits on the expressive activities of protestors.

ALAN E. BROWNSTEIN
(2000)

Bibliography

BROWNSTEIN, ALAN E. 1996 Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests. *UC Davis Law Review* 29:1163–1216.

JACOBS, LESLIE GIELOW 1996 Nonviolent Abortion Clinic Protests: Reevaluating Some Current Assumptions about the Proper Scope of Government Regulations. *Tulane Law Review* 70:1359–1443.

WEINSTEIN, JAMES 1996 Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination. *UC Davis Law Review* 29:471–543.

## ANTIDISCRIMINATION LEGISLATION

From its inception, antidiscrimination legislation has shaped and been shaped by the Constitution. Antidiscrimination legislation's very existence is attributable to developments in constitutional law. Enactment of such legislation usually reflects a relatively favorable atmosphere for the promise of equality embodied in the THIRTEENTH, FOURTEENTH, and FIFTEENTH AMENDMENTS. When the values underlying these amendments are in decline, antidiscrimination legislation is not enacted, and often is not enforced.

Federal antidiscrimination laws have been enacted during two time periods. During the first period, which commenced near the end of the CIVIL WAR, Congress enacted the CIVIL RIGHTS ACT OF 1866, the Civil Rights Act of 1870, the FORCE ACT OF 1871, the Civil Rights Act of 1871, and the CIVIL RIGHTS ACT OF 1875. These early provisions, portions of which survive, exemplify two basic forms of antidiscrimination legislation. Some provisions, such as section 1 of the 1871 act (now section 1983) and section 3 of the 1866 act were purely remedial. They provided remedies for violations of federal rights but created no new substantive rights. Other provisions, such as section 1 of the 1866 act and section 16 of the 1870 act (now sections 1981 and 1982), were express efforts to change substantive law by fostering greater equality between black and white Americans.

The COMPROMISE OF 1877 marks the end of the first era during which antidiscrimination legislation flourished. Afterward, congressional and judicial developments favored neither enactment nor enforcement of antidiscrimination legislation. In the CIVIL RIGHTS REPEAL ACT of 1894 the first Democratic Congress since the Civil War repealed the few effective remnants of post-Civil War antidiscrimination legislation. A favorable climate for legislative implementation of the post-Civil War constitutional amendments did not reemerge until the late 1950s and early 1960s.

There were no significant antidiscrimination statutes in the intervening years.

As the constitutional amendments were given new vigor by the WARREN COURT, however, antidiscrimination legislation experienced a renaissance. Modern statutes, including the CIVIL RIGHTS ACTS OF 1957, 1960, 1964, and 1968, protect against discrimination in voting, employment, education, and housing. They represent a second era of federal antidiscrimination legislation, sometimes called part of the second reconstruction.

As in the case of earlier antidiscrimination statutes, the primary reason for enactment was to protect blacks from RACIAL DISCRIMINATION. Again, two kinds of provisions were enacted. Some provisions, such as the 1957 and 1960 Acts and Title VI of the 1964 act, are remedial in tone (though not always so interpreted) and do not purport to create new substantive rights. Others, such as Title VII of the 1964 act, which prohibits private discrimination in employment, confer new substantive rights.

Modern antidiscrimination legislation contains a recognizable subcategory that has been the fastest growing area of antidiscrimination law. Until about 1960 or 1970, antidiscrimination legislation could be equated with laws prohibiting one or more forms of racial discrimination. Subsequently, however, legislation prohibiting discrimination surfaced in many areas. For example, the AGE DISCRIMINATION ACT OF 1975, the Age Discrimination in Employment Act, the REHABILITATION ACT OF 1973, the DEVELOPMENTALLY DISABLED AND BILL OF RIGHTS ACT, the Education of Handicapped Children Acts, the Equal Pay Act, and the EDUCATION AMENDMENTS OF 1972 provide substantial protection to the aged, to the handicapped, and to women. Building on a technique first employed in Title VI of the 1964 act, most of these provisions apply only to programs or entities receiving federal financial assistance.

Although constitutional values can be viewed as the raison d'être of antidiscrimination legislation, the relationship between the Constitution and antidiscrimination laws runs much deeper. Their more complex relationship may be divided into two parts. First, antidiscrimination legislation has been the setting for judicial and congressional decisions concerning the scope of congressional power. One of the few universally agreed upon facts about the history of the Fourteenth Amendment is that it was meant to place the first major antidiscrimination statute, the Civil Rights Act of 1866, on firm constitutional footing. Before ratification of the Fourteenth Amendment, doubts were expressed about Congress's power under the Thirteenth Amendment to ban racially discriminatory state laws. Many believe that the Fourteenth Amendment was meant primarily to constitutionalize the 1866 Act's prohibitions. With the Fourteenth Amendment in place by 1868, Congress reaffirmed the 1866 Act's bans by reenacting them as part of the Civil Rights Act of 1870. Some claim that the 1866 Act is so akin to a constitutional provision that its surviving remnants should be interpreted more like constitutional provisions than statutory ones.

Soon after this initial interplay between the Constitution and antidiscrimination laws, a foundation of constitutional interpretation grew out of litigation under antidiscrimination statutes. In a line of cases commencing with UNITED STATES V. CRUIKSHANK (1876) and culminating in UNITED STATES V. HARRIS (1883) and the CIVIL RIGHTS CASES (1883), the Court relied on what has come to be known as the STATE ACTION doctrine to invalidate antidiscrimination measures. The *Civil Rights Cases* invalidated the last piece of nineteenth-century civil rights legislation, the Civil Rights Act of 1875. In so doing the Court not only limited the Fourteenth Amendment to prohibiting state action but also rendered a narrow interpretation of the Thirteenth Amendment as a possible source of congressional power to enact antidiscrimination statutes.

The state action doctrine was not the only early limit on antidiscrimination legislation. In UNITED STATES V. REESE (1876) the Court found sections 3 and 4 of the Civil Rights Act of 1870, which prohibited certain interferences with voting, to be beyond Congress's power to enforce the Fifteenth Amendment because the sections were not limited to prohibiting racial discrimination. These limitations on antidiscrimination legislation carried over into the early twentieth century.

But some early antidiscrimination legislation survived constitutional attack and shifting political stances in Congress. For example, in EX PARTE YARBROUGH (1884) the Court sustained use of section 6 of the 1870 act (now section 241) to impose criminal sanctions against private individuals who used force to prevent blacks from voting in federal elections. And in *Ex parte Virginia* (1880), the Court sustained the federal prosecution of a state judge for excluding blacks from juries in violation of section 4 of the 1875 act. (See STRAUDER V. WEST VIRGINIA.)

The two lines of early constitutional interpretation of antidiscrimination laws have never been fully reconciled. As a result of the early limits on congressional power to enact antidiscrimination legislation, modern civil rights statutes have been drafted to reduce potential constitutional attacks. Thus, much of the Civil Rights Act of 1964 operates only on individuals and entities engaged in some form of INTERSTATE COMMERCE. Other portions of the 1964 act, and many other modern antidiscrimination laws, are based on Congress's TAXING AND SPENDING POWERS. By tying antidiscrimination legislation to the COMMERCE CLAUSE or the spending power, Congress hoped to avoid some of the constitutional problems that plagued early legislation enacted under the Thirteenth, Fourteenth, and Fifteenth Amendments.

A potential clash between the Court and Congress over the constitutionality of modern antidiscrimination legislation has not surfaced. The modern Court sustains antidiscrimination legislation even in the face of troublesome nineteenth-century precedents. In a landmark holding barely reconcilable with portions of the *Civil Rights Cases*, the Court in JONES V. ALFRED H. MAYER COMPANY (1968) found that Congress has power under the Thirteenth Amendment to ban private racial discrimination in housing. Later, in RUNYON V. MCCRARY (1976), the Court acknowledged Congress's power to outlaw racial discrimination in private contractual relations, including those relations involved in a child's attendance at a private segregated school. In GRIFFIN V. BRECKENRIDGE (1971) the Court relied on the Thirteenth Amendment to sustain a remnant of the 1871 act allowing for causes of action against private conspiracies to violate federal rights. The case undermined *United States v. Harris* and overruled an earlier contrary decision, *Collins v. Hardyman* (1948). Another antidiscrimination statute, the VOTING RIGHTS ACT OF 1965, provided the setting for important decisions in KATZENBACH V. MORGAN (1966) and SOUTH CAROLINA V. KATZENBACH (1966), which found Congress to have broad discretion to interpret and extend Fourteenth Amendment protection to situations which the judiciary had not found violative of the Fourteenth Amendment.

There is a second respect in which constitutional provisions and antidiscrimination legislation influence each other. From the beginning, their relationship has gone beyond one of merely testing the constitutionality of a particular antidiscrimination statute. Interpretation of one set of provisions has shaped the other. This interplay began with the Civil Rights Act of 1866. Soon after ratification of the Fourteenth Amendment, the question arose as to what constituted "the PRIVILEGES AND IMMUNITIES of citizens of the United States" referred to in the Fourteenth Amendment. In the SLAUGHTERHOUSE CASES (1873) the Court's first decision construing the Fourteenth Amendment, Justice STEPHEN J. FIELD argued in dissent that section 1 of the 1866 act provided Congress's interpretation of at least some of the privileges or immunities of United States citizens. Although Field's view did not prevail—the Court limited the privileges or immunities clause to a narrow class of rights—even the majority view of the privileges or immunities clause may have had a profound effect on subsequent development of antidiscrimination legislation.

This effect stems from the strong linguistic parallel between the Fourteenth Amendment's privileges or immunities clause and the rights listed as protected by many antidiscrimination laws. Sections 1983 and 242 protect persons against deprivations of their federal "rights, privileges or immunities." Section 1985(3) refers in part to "equal privileges and immunities." Section 241 refers to any federal "right or privilege." In subsequent cases brought under antidiscrimination statutes, federal courts, relying on the *Slaughterhouse Cases'* narrow interpretation of the Fourteenth Amendment's privileges or immunities clause, plausibly could render a similar narrow interpretation of the antidiscrimination statute. Not until MONROE V. PAPE (1961) did the Court settle that the rights, privileges, and immunities protected by section 1983 include at least all rights secured by the Fourteenth Amendment.

Just as CONSTITUTIONAL INTERPRETATION influenced early antidiscrimination laws and vice versa, modern antidiscrimination legislation influences constitutional interpretation. In GRIGGS V. DUKE POWER COMPANY (1971) the Court found that an employer's selection criteria with unintentional disparate effect on a minority could lead to a violation of Title VII of the Civil Rights Act of 1964. This and earlier Supreme Court cases generated pressure to find violative of the Fourteenth Amendment government action with uneven adverse effects on minorities. Not until WASHINGTON V. DAVIS (1976) and ARLINGTON HEIGHTS V. METROPOLITAN HOUSING DEVELOPMENT CORPORATION (1977) did the Court expressly reject the *Griggs* standard as a basis for constitutional interpretation. And in REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE (1978), a major theme of the opinions is the relationship between the antidiscrimination standards embodied in Title VI of the Civil Rights Act of 1964 and those of the Fourteenth Amendment.

Judicial hostility to the RECONSTRUCTION civil rights program and subsequent congressional inaction left much of the civil rights field to the states. Early Massachusetts legislation covered school desegregation and PUBLIC ACCOMMODATIONS, but few other states enacted protective laws prior to 1883 and some laws that had been enacted by southern Reconstruction legislatures were repealed.

The *Civil Rights Cases'* invalidation of the Civil Rights Act of 1875 triggered the first major group of state antidiscrimination laws. Within two years of the decision, eleven states outlawed discrimination in public accommodations. Modest further legislative developments occurred before WORLD WAR II, including legislation aimed at violence generated by the Ku Klux Klan, some northern prohibitions on school segregation, and some categories of employment discrimination.

The next widespread state civil rights initiative, which covered employment discrimination, drew upon experience under the wartime Committee on Fair Employment Practices. New York's 1945 Law Against Discrimination, the first modern comprehensive fair employment law, established a commission to investigate and adjudicate complaints and became a model for other states' laws. Resort

to administrative agencies, now possible in the vast majority of states, remains the primary state method of dealing with many categories of discrimination.

THEODORE EISENBERG
(1986)

Bibliography

BARDOLPH, RICHARD 1970 *The Civil Rights Record.* New York: Crowell.

KONVITZ, MILTON R. 1961 *A Century of Civil Rights.* New York: Columbia University Press.

MURRAY, PAULI 1961 *States' Laws on Race and Color.* New York: Woman's Division of Christian Service, The Methodist Church.

U.S. COMMISSION ON CIVIL RIGHTS 1970 *Federal Civil Rights Enforcement Effort.* Washington, D.C.: U.S. Government Printing Office.

## ANTIDISCRIMINATION LEGISLATION (Update 1)

Most antidiscrimination legislation forbids RACIAL DISCRIMINATION in such contexts as employment, housing, public accommodations, education, and voting. Similar legislation prohibits SEX DISCRIMINATION and, more recently, discrimination on the basis of age and handicap.

Enacted in response to racial unrest and mass civil protests, the CIVIL RIGHTS ACT OF 1964 was the first major federal antidiscrimination law in the modern era. Congress subsequently enacted the VOTING RIGHTS ACT OF 1965 and the Fair Housing Act of 1968. Each act has been amended several times.

The most ambitious titles of the 1964 Act—Title VII, prohibiting EMPLOYMENT DISCRIMINATION, and Title II, prohibiting discrimination in public accommodations—are now central features of the modern regulatory state. This legislation, however, initially faced stiff opposition. The opponents argued that the law represented undue federal intrusion into both the private sphere and state sovereignty and that the "law could not change what lies in the hearts of men." Modern antidiscrimination legislation rejects both these views. It effectively nationalizes nondiscrimination as a basic right of CITIZENSHIP, apparently laying to rest the post-Reconstruction view that the task of protecting CIVIL RIGHTS lay primarily within the powers of each state. Equally significant, the passage of antidiscrimination legislation seemed to embody a belief that law could significantly alter conduct and, eventually, "the hearts of men."

More recent developments suggest a fraying around the edges of antidiscrimination, both as national policy and as moral imperative. This fraying is suggested by debates over the status of antidiscrimination as a national priority, by judicial decisions limiting the reach of federal regulation, and by continuing racial hostilities that raise questions about the hearts of men and women.

Antidiscrimination law is not self-executing. Rather, its effectiveness is contingent upon the cooperation between the several branches of government and private citizens. Ideally, Congress creates the substantive protections and establishes the broad outlines of the enforcement framework, and the executive branch, ADMINISTRATIVE AGENCIES, and the judiciary elaborate these policies and apply them to specific contexts. The system works well when there is a general consensus about the importance of eliminating racial discrimination. In the last decade, however, the various governmental branches have been in conflict as to the scope, content, and priority of the antidiscrimination mandate. These conflicts not only reflect ideological differences with respect to race and racism, but hamper the development of a coherent and effective antidiscrimination law.

In the first seven years of the 1980s, the Civil Rights Division of the Justice Department opposed civil rights plaintiffs more often than it had in the previous two decades combined. A notable example is BOB JONES UNIVERSITY V. UNITED STATES (1982), in which the department, reversing the position of the administration of President JIMMY CARTER, argued against the decision of the Internal Revenue Service to deny tax-exempt status to private colleges that practiced racial discrimination. Other evidence of a declining consensus concerning antidiscrimination policy is found in the increase of cases in which the Justice Department has sided against plaintiffs in antidiscrimination suits and others in which it has intervened to support reopening discrimination cases that were believed settled with AFFIRMATIVE ACTION consent decrees.

Legislative activity manifesting the growing conflict is represented by the frequency in which Congress has considered overturning Supreme Court decisions narrowing the scope of a number of civil rights acts. In 1982, Congress amended the Voting Rights Act and, in 1988, enacted the Civil Rights Restoration Act, both of which were to overturn Supreme Court decisions. The latter was enacted over a presidential veto. Another bill was introduced to provide a statutory basis for challenging the racially disproportionate distribution of the death penalty, in response to the Court's rejection of an EQUAL PROTECTION claim in MCCLESKEY V. KEMP (1987). Although this bill failed, Congress did strengthen the Fair Housing Act and is currently considering an omnibus bill to overturn several civil rights decisions of 1989.

The clearest evidence of the disintegrating consensus over antidiscrimination policy is apparent in these Su-

preme Court decisions. The Court's interpretive choices are often of critical importance in facilitating the effective enforcement of basic antidiscrimination principles. In the first decade after the Civil Rights Acts of 1964, the Court frequently interpreted ambiguous provisions in a manner that strengthened the substantive protection of civil rights legislation. Guided by a principle that eliminating racial discrimination "root and branch" was the highest priority, the Court upheld the constitutionality of civil rights legislation in the face of unfavorable precedent. In JONES V. ALFRED H. MAYER CO. (1968) and RUNYON V. MCCRARY (1976) the Court even resurrected Reconstruction civil rights laws long buried under an interpretation that placed most private discrimination outside the scope of antidiscrimination law.

Recently, however, the Court has been hesitant to take such broad interpretive positions and has even been willing to narrow the reach of antidiscrimination law. *Grove City College v. Bell* (1984) exemplifies this shift. Title IX of the 1972 amendments to Title VI of the 1964 act prohibited sex discrimination in any educational "program or activity" receiving federal financial assistance. President Carter's Justice Department read the words "program and activity" broadly to require a cutoff of funds to an entire institution whenever a single program or activity (for example, a college financial aid office) was in violation of the statute. In 1984, the Supreme Court in *Grove City* took a contrary view, limiting the cutoff of funds to the specific department rather than the entire institution.

PATTERSON V. MCLEAN CREDIT UNION (1989) reflects a similar shift away from expansive readings of the scope of antidiscrimination law. In one of his first opinions for the Court, Justice ANTHONY M. KENNEDY determined that a part of the CIVIL RIGHTS ACT OF 1866 (section 1981) prohibiting racial discrimination in the making and enforcement of contracts applied only to the formation of an employment contract and not to subsequent racial harassment by the employer. The dissenters argued that the Court created a false dichotomy between an employer who discloses discriminatory intentions at the time the contract is formed and the employer who conceals those discriminatory intentions until after the plaintiff has accepted the employment. *Patterson*'s holding exemplifies a larger development: a partial deregulation of racial discrimination in employment.

Two primary reasons may explain the breakdown of the civil rights consensus and the increasing conflict over antidiscrimination law. First, the nature of radical discrimination in American society has changed. Antidiscrimination legislation has removed many formal barriers to full societal participation that previosly excluded some groups. In one view, the removal of these barriers justifies a presumption of nondiscrimination; hence, claims of discrimination must overcome high burdens of proof. In this view, the removal of formal barriers also gives weight to competing interets, such as the seniority of other employees, STATES' RIGHTS, and freedom from governemental oversight. Others argue that antidiscrimination law must seek to eliminate practices that effectively discriminate against tradtionally excluded groups, whether such discrimination is formal and intentional or informal and inadvertant.

A second factor increasing the civil rights conflict reflects the relationship between antidiscrimination law and electoral politics. In eight years, President RONALD REAGAN not only presided over a major shift in Justice Department enforcement policy, but also appointed three conservative Supreme Court Justices SANDRA DAY O'CONNOR, ANTONIN SCALIA, and ANTHONY M. KENNEDY, and elevated the most conservative Justice, WILLIAM H. REHNQUIST, to Chief Justice. In addition, he appointed 370 judges to the federal bench, nearly half the federal judiciary. Many of these jurists interpret laws against a background preference for states' rights and employer autonomy, a preference that readily translates into decisions narrowing the reach of antidiscrimination laws. The demise of formal barriers and the ideological shifts within the judiciary and Justice Department have produced both a more restrictive antidiscrimination jurisprudence and a stagnated enforcement record.

For many critics, the Supreme Court's recent decisions raise the specter of an evisceration of antidiscrimination law comparable to the fate of laws enacted during the first Reconstruction. Congress may yet prevent the full eroding of the antidiscrimination law. However, the persistence of racial discrimination and the reemergence of analytical frameworks and values that have historically blunted the impact of civil rights laws suggest that antidiscrimination victories are, at best, provisional.

KIMBERLÉ CRENSHAW
(1992)

(SEE ALSO: *Capital Punishment and Race; Race-Consciousness; Racial Preference.*)

Bibliography

AMAKER, NORMAN C. 1988 *Civil Rights and the Reagan Administration.* Washington, D.C.: Urban Institute Press.

FREEMAN, ALAN 1990 Antidiscrimination Law: The View from 1989. *Tulane Law Review* 64:1407–1441.

KARST, KENNETH L. 1989 Private Discrimination and Public Responsibility: *Patterson* in Context. *The Supreme Court Review* 1989:1–51.

# ANTIDISCRIMINATION LEGISLATION
(Update 2a)

The major piece of recent antidiscrimination legislation is the CIVIL RIGHTS ACT OF 1991. (The AMERICANS WITH DISABILITY ACT OF 1990 is outside the scope of this comment.) The 1991 act was passed chiefly in response to the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio* (1989). That decision undercut the disparate impact theories of discrimination (that is, those which look at the outcome of certain practices without regard to the employer's intention) that had been read into Title VII of the original CIVIL RIGHTS ACT OF 1964 in the Court's earlier decision in GRIGGS V. DUKE POWER COMPANY (1971). *Wards Cove* appeared to overturn the *Griggs* rule that employers could only escape disparate impact liability by showing a business necessity for a given practice. *Wards Cove* then allowed the employer to meet the lower standard of "reasonable business justification," transferring the burden of proof to the employee.

*Wards Cove* provoked a strong reaction from supporters of Title VII, who, after much negotiation and compromise, regained lost ground with the 1991 act. There Congress first found that *Wards Cove* "weakened the scope and effectiveness of Federal civil rights protections." In response, Congress added section 803(k)(1)(A) to the 1964 Civil Rights Act which provides that "a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." The 1991 act thus restores, perhaps in its entirety, the law on disparate impact as it was generally understood prior to *Wards Cove*, by reintroducing the notion of business necessity and by providing that both the burden of production and the burden of persuasion rest on the employer.

One issue left open by the 1991 act was the retroactive application of the 1991 act. That question was important because *Wards Cove* left in limbo disparate impact cases that were pending when the case was decided. If the 1991 act had applied retroactively, then employees in pending cases could have taken advantage of the 1991 act's provisions that allowed for compensatory and PUNITIVE DAMAGES provisions in a jury trial. These provisions represent a departure from Congress's decision in 1964 to ban punitive damages, cap damage awards to back-pay, and bar jury trials. In *Landgraf v. USI Film Products* (1994), the Court held, however, that the general RULE-OF-LAW presumption against retroactive decisions had not been overcome because the 1991 act was silent on the question.

Even though the act is not retroactive, the modifications it contains have removed any doubts as to the statutory ground of the disparate impact test. No longer is it possible to attack the entire notion on the ground that the original 1964 act was limited to cases of intentional discrimination only. Today disparate impact theories have become an indisputable part of the civil rights law. Yet the 1991 act has done nothing to resolve the difficult questions of determining the appropriate occupational and geographical market that defines the boundaries of the labor pool against which any disparate impact claim should be litigated.

Seven years after the 1991 act, disparate impact cases appear to loom less large than before the passage of the act. In part, the relative quiet along the disparate impact front results from heightened emphasis on disputes over AFFIRMATIVE ACTION and SEX DISCRIMINATION in the form of WORKPLACE HARASSMENT. Yet, the change in legal terrain also results in part because employers since *Griggs* have been made aware of the serious exposure to disparate impact cases (which easily lend themselves to CLASS ACTIONS). They have thus taken, even before *Wards Cove*, key steps to bring their practices in alignment with *Griggs*. Their vigilance did not decrease with *Wards Cove*, because the campaign to overrule it legislatively began in earnest the day it was handed down. In one respect, however, the 1991 act did strengthen the position of employers. Section 703(k)(3) of the act provides that disparate impact theory shall not be used with respect to the rule that applies to testing or use of illegal drugs; in those cases, the employer may be held liable only if the rule is applied "with an intent to discriminate" on the familiar grounds outlawed under the 1964 act.

The 1991 act also ushered in a number of other important changes. Section 703(1) prohibited the practice of "race norming," which reported the percentile scores of individual applicants only with reference to the particular racial group of that applicant. Prior to the act, some employment services would report that an applicant was in the *x* percentile of those tested, without making it clear that the percentage was adjusted to the applicant's racial group. In this perspective, a black candidate would appear to fall within the higher percentage group than a white candidate who received an equal score. After 1991, employment services must report all scores in relationship to a nation-wide pool. In addition, the 1991 act clarifies in section 703(m) that a case of intentional discrimination can be made by showing that the forbidden ground was "a motivating factor" even if not the sole factor behind the employment decision—a rule that does not apply retro-

actively. Finally, again on a prospective basis, the act as noted expands the rights to compensatory and punitive damages in jury trials.

Antidiscrimination legislation has continued to expand in ways that go far beyond the contours of the original 1964 Civil Rights Act. This legislation has spilled over into such areas as family leave, health, and disability law. The obvious challenge in this growing area is to find rationales that justify the increased levels of intervention when by all measures the levels of institutional discrimination have declined sharply since the 1960s. This task is compounded especially when it becomes ever more difficult to attribute improvements in wages and employment conditions to the aggressive enforcement of civil rights laws, now that the obvious legislative targets have been overcome. It appears that free entry into competitive markets, now more than ever before, provides the strongest systematic defense against all forms of discrimination, without the immense regulatory drag of the current legal structure.

RICHARD A. EPSTEIN
(2000)

(SEE ALSO: *Retroactivity of Legislation.*)

Bibliography

EPSTEIN, RICHARD A. 1992 *Forbidden Grounds: The Case Against Employment Discrimination Laws.* Cambridge, Mass.: Harvard University Press.

KELMAN, MARK 1991 Concepts of Discrimination in "General Ability" Job Testing. *Harvard Law Review* 104:1158–1247.

SYMPOSIUM 1993 The Civil Rights Act of 1991: Unraveling the Controversy. *Rutgers Law Review* 45:887–1141.

——— 1993 The Civil Rights Act of 1991: Theory and Practice. *Notre Dame Law Review* 1993: 911–1164.

## ANTIDISCRIMINATION LEGISLATION
(Update 2b)

Racial and gender EMPLOYMENT DISCRIMINATION has been a major factor in producing a condition of racial and gender inequality in the United States. Congress made a strong national commitment to bringing an end to racial and gender employment discrimination by the enactment of Title VII of the CIVIL RIGHTS ACT OF 1964. In the first two decades of its operation, the Supreme Court interpreted Title VII expansively in order to accomplish Congress's remedial purpose. The Court held that Title VII not only prohibited intentional discrimination, but also prohibited employment practices that were neutral in form, but that had a "disparate impact" on the employment opportunities of racial minorities and women. Under the rule of GRIGGS V. DUKE POWER COMPANY (1971), whenever an employment practice had such an impact, it violated Title VII unless the employer could show that the practice was justified by "business necessity." At the same time the Court held that because the underlying purpose of Title VII was to increase employment opportunities for racial minorities and women in areas from which they had traditionally been excluded, Title VII permitted employers to give express preference to racial minorities and women in hiring and promotions—that is, AFFIRMATIVE ACTION—where minorities or women were manifestly underrepresented in a traditionally segregated job category of the employer's workforce. Under UNITED STEELWORKERS OF AMERICA V. WEBER (1979) and JOHNSON V. TRANSPORTATION AGENCY (1987), such preferences must be reasonable and must not "unfairly trammel" the interests of white or male employees.

In its 1988–1989 term, the Court rendered a series of decisions that were widely perceived as making it more difficult for racial minorities and women to establish Title VII discrimination claims against employers, particularly in regard to "disparate impact" claims. Congress responded by enacting the CIVIL RIGHTS ACT OF 1991, which overruled aspects of all these decisions, and added other provisions that expanded significantly the protections against employment discrimination afforded by federal law. In regard to "disparate impact" claims for example, the 1991 act provides that employment practices having an identifiable "disparate impact" are prohibited unless the employer can establish that the challenged practice "is job-related for the position in question and consistent with business necessity." At the same time, despite the heated debate over "affirmative action," Congress did not modify Title VII to prohibit the use of express employment preferences for racial minorities and women that the Court had held to be permissible. Although Title VII does not permit the use of "quotas" or require "proportionality," it does ensure that racial minorities and women will not suffer direct or indirect discrimination in their employment opportunities.

A pernicious form of "discrimination with respect to conditions of employment" under Title VII takes the form of sexual harassment. While the victims of sexual harassment are usually women, they can be men as well and, under the rule of *Oncale v. Sundowner Offshore Services* (1998), can be of the same sex as the perpetrator. The Court has defined more precisely when workplace behavior of a sexual nature can amount to "discrimination with respect to conditions of employment" and so be violative of Title VII. One situation is *quid pro quo* sexual harassment, which occurs when an employer or supervisor makes an employee's submission to sexual demands a condition for conferring or withholding employment benefits,

and the employee either submits or suffers tangible employment harm because of the failure to do so. The other situation is *hostile environment* sexual harassment, which occurs when sexually objectionable behavior in the workplace is so "severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment."

In its 1998 term, the Supreme Court added some refinements to sexual harassment law. The employer is liable to the employee for a violation of Title VII whenever quid pro quo sexual harassment has been engaged in by an employer or a supervisor, and the employee has suffered tangible employment harm because of it. The employer is also liable for hostile environment sexual harassment engaged in by a supervisor, even though the employer had no knowledge of the behavior and was not negligent in employing the supervisor. However, the employer has a defense to such liability if (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. Thus, employers can protect themselves against Title VII liability for sexual harassment by establishing effective antiharassment policies and procedures, and communicating these policies and procedures to employees and supervisors. To the extent that employers establish and vigorously enforce effective antiharassment policies and procedures, there should be a significant decline in sexual harassment in the workplace.

ROBERT A. SEDLER
(2000)

(SEE ALSO: *Workplace Harassment.*)

Bibliography

ABRAMS, KATHRYN 1988 The New Jurisprudence of Sexual Harassment. *Cornell Law Review* 83:1169–1230.

BERNSTEIN, ANITA 1997 Treating Sexual Harassment with Respect. *Harvard Law Review* 111:445–527.

BROWNE, KINGSLEY R. 1993 The Civil Rights Act of 1991: A "Quota Bill," A Codification of *Griggs*, A Partial Return to *Wards's Cove*, or All of the Above. *Case Western University Law Review* 43:287–400.

FRANKE, KATHERINE M. 1997 What's Wrong with Sexual Harassment? *Stanford Law Review* 49:691–772.

GROVER, SUSAN S. 1996 The Business Necessity Defense in Disparate Impact Discrimination Cases. *Georgia Law Review* 30:387–430.

SEDLER, ROBERT A. 1992 Employment Equality, Affirmative Action, and the Constitutional Political Consensus. *Michigan Law Review* 90:1315–1337.

SPECIAL PROJECT 1995 Current Issues in Sexual Harassment Law. *Vanderbilt Law Review* 48:1009–1214.

SYMPOSIUM 1993 The Civil Rights Act of 1991: Theory and Practice. *Notre Dame Law Review* 68:911–1164.

# ANTI-FEDERALIST CONSTITUTIONAL THOUGHT

The men who opposed the Constitution's unconditional RATIFICATION in 1787–1788 were called Anti-Federalists, although they claimed to be the true federalists and the true republicans. Contrary to common opinion, their major contribution to the American founding lies more in their critical examination of the new form of FEDERALISM and the new form of republican government than in their successful argument for a BILL OF RIGHTS.

The federalism issue was complicated by an ambiguity in usage during the Confederation period and by changes in both the Federalist and Anti-Federalist conceptions of federalism during the ratification debates. HERBERT J. STORING has explained the ambiguity by showing how "federal" referred to measures designed to strengthen the national authority, as opposed to state authority, but also to the principle of state supremacy. In the CONSTITUTIONAL CONVENTION, the federal principle meant congressional reliance on state requisitions for armies and taxes, in contrast to the national principle of direct governmental authority over individuals. The Anti-Federalists argued that the Constitution, which strengthened the national authority, went beyond the federal principle by moving away from requisitions and state equality in representation. Supporters of the Constitution were able to take, and keep, the name Federalists by treating any recognition of the state governments in the Constitution (for example, election, apportionment, ratification, amendment) as evidence of federalism, thereby redefining the term. JAMES MADISON, in THE FEDERALIST #39, consequently called the Constitution partly federal, partly national. For their part, the authors of the two best Anti-Federalist writings, who wrote under the pseudonyms Brutus and Federal Farmer, conceded the need for some direct governmental authority over individuals, thereby acknowledging the inadequacy of traditional federalism.

The Anti-Federalists emphasized the need to restrict the national power to what was absolutely necessary to preserve the union. They proposed limiting the national taxing power to imported goods, relying on requisitions if that source was insufficient. Moreover, Brutus proposed limiting standing armies in time of peace to what was necessary for defending the frontiers. If it became necessary to raise an army to repel an attack, he favored a two-thirds vote by both houses of Congress.

As part of their argument that a consolidation of power in the general government was incompatible with repub-

licanism, the Anti-Federalists frequently cited Montesquieu for the proposition that republics must be small, lest the public good be sacrificed. But they agreed with the Federalists, against Montesquieu, that the first principle of republican government was the regulation and protection of individual rights, not the promotion of civic virtue. They also, with rare exceptions, assumed the necessity of representation, while Montesquieu mentioned it only in his discussion of England, not in his discussion of republics.

Defining republican government somewhere between a selfless dedication to the common good, on the one hand, and individualism plus the elective principle, on the other, the Anti-Federalists emphasized mildness in government as essential for public confidence. This mildness required a similarity "in manners, sentiments, and interests" between citizens and officials and among citizens themselves. This, in turn, made possible a genuine REPRESENTATION of the people. Federal Farmer called such representation and local jury trials "the essential parts of a free and good government."

When the Anti-Federalists examined the representation in Congress, they saw an emerging aristocracy. They claimed that the democratic class, especially the middle class or the yeomanry, would have little chance of gaining election against the aristocracy, the men of wealth and of political and professional prominence. Since the middle class was substantially represented in the state governments, the Anti-Federalists argued that the powers of Congress had to be restricted to produce a proper balance between the nation and the states.

The Anti-Federalist objections to the structure of the proposed government related either to federalism or to republicanism. As examples of the former, the Senate, despite state equality, did not satisfy federalism because the legislatures did not pay the senators and could not recall them, and because the voting was by individuals, not by state delegations. And Brutus, who viewed the JUDICIAL POWER as the vehicle of consolidation, objected to Congress's power to ordain and establish lower federal courts. He thought the state courts were adequate to handle every case arising under the Constitution in the first instance, and he favored a limited right of APPEAL to the Supreme Court. As examples of their republicanism, the Anti-Federalists feared the Senate, with its six-year term, plus reeligibility, and its substantial powers, especially regarding appointments and treaty-making, as a special source of aristocracy. The Anti-Federalists were only somewhat less critical of the executive. They favored the proposed mode of election but opposed reeligibility; they generally favored unity but wanted a separately elected council to participate in appointments; some supported and others opposed the qualified executive VETO POWER; and some expressed apprehension about the pardoning power and the COMMANDER-IN-CHIEF power. As for the judiciary, Brutus argued that the combination of tenure for GOOD BEHAVIOR plus a judicial power that extends to "all cases in law and EQUITY, arising under this Constitution," meant not only JUDICIAL REVIEW but JUDICIAL SUPREMACY. He preferred that the legislature interpret the Constitution, since the people could easily correct the errors of their lawmakers.

Finally, the Bill of Rights was as much a Federalist as an Anti-Federalist victory. The Anti-Federalists wanted a bill of rights to curb governmental power. When the Federalists denied the necessity of a federal bill of rights, on the ground that whatever power was not enumerated could not be claimed, the Anti-Federalists pointed to the Constitution's SUPREMACY CLAUSE and to the extensiveness of the enumeration of powers. Paradoxically, this decisive argument resulted in a bill of rights that confirmed the new federalism, with its extended republic. Neither the Anti-Federalist proposals to restrict the tax and WAR POWERS nor their proposal to restrict IMPLIED POWERS was accepted. Nevertheless, the Anti-Federalist concern about "big government" has continued to find occasional constitutional expression in the restrictive interpretation of the ENUMERATED POWERS, along with the TENTH AMENDMENT.

MURRAY DRY
(1986)

Bibliography

KENYON, CECELIA 1966 *The Antifederalists.* Indianapolis: Bobbs-Merrill.

STORING, HERBERT J. 1978 The Constitution and the Bill of Rights. Pages 32–48 in M. Judd Harmon, ed., *Essays on the Constitution of the United States.* Port Washington, N.Y.: Kennikat Press Corp.

——— 1981 *The Complete Anti-Federalist.* 7 Vols. Chicago: University of Chicago Press. (Volume 1 separately published in paperback as *What the Anti-Federalists Were For.*)

## ANTIPEONAGE ACT OF 1867

See: Peonage

## ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT
### 110 Stat. 1214 (1996)

On April 24, 1996, one year and five days after the Oklahoma City bombing, President WILLIAM J. CLINTON signed into law the Antiterrorism and Effective Death Penalty Act (AEDPA). The statute is extraordinarily far-ranging and implicates constitutional provisions from Ar-

ticle III to the suspension clause, the Fifth Amendment, and the FIRST AMENDMENT. AEDPA is also notoriously complex and not especially well-drafted. As Justice DAVID H. SOUTER put it in *Lindh v. Murphy* (1997), "in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting."

The two most immediately effective features of AEDPA—drastic restriction of federal court HABEAS CORPUS review of criminal cases and broad expansion of the power to exclude and deport certain non-citizens— bore virtually no relation to the terrorist act committed by U.S. citizens which had spurred its passage and inspired its name. A more relevant but constitutionally dubious section prohibits the provision of "material support or resources" to groups designated "terrorist organizations." Other sections deal with victim assistance and restitution, JURISDICTION for lawsuits against "terrorist states," prohibitions on "assistance to terrorist states," nuclear, biological, and chemical weapons restrictions, plastic explosives restrictions, and various criminal law modifications relating to terrorism.

The restrictions on habeas corpus review in AEDPA were, in many respects, a codification of DOCTRINES already created by the Supreme Court and, as such, they are unlikely to be found unconstitutional in our era. However, AEDPA addresses issues such as delay, second and successive petitions, and finality with unprecedented rigidity and force and therefore implicates due process and other constitutional rights in new and often distressing ways. A sketch of AEDPA's main JUDICIAL REVIEW features includes (1) special court of appeals gate-keeping mechanisms and severe restrictions relating to second or subsequent habeas corpus petitions, (2) unprecedented deference to state court factual and legal findings, (3) strict new time limitations both on filing deadlines and federal court action on habeas corpus petitions, (4) limitations on evidentiary hearings in habeas corpus cases, and (5) special restrictions on habeas corpus petitions filed by certain state prisoners facing CAPITAL PUNISHMENT including a filing limitation of 180 days. To date, these provisions have generally withstood constitutional challenge although certain aspects of AEDPA have been interpreted narrowly to avoid constitutional issues.

In the IMMIGRATION arena, AEDPA (1) purported to eliminate judicial review of certain types of deportation orders, (2) severely restricted a venerable discretionary waiver of deportability—so-called "Section 212(c) relief"—that had permitted a long-term legal permanent resident who was convicted of a crime to avoid deportation after consideration of a variety of humanitarian and other factors, (3) expanded criminal grounds of deportation and expedited deportation procedures for certain types of cases, (4) created a new system for the "summary exclusion" from the United States of certain asylum-seekers who lack proper documentation, with extremely limited judicial review, and (5) created a new type of radically streamlined "removal" proceeding— including the possibility of secret evidence—for noncitizens accused of "terrorist" activity. Some of these provisions were enhanced and many were superseded by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).

Federal courts have grappled with difficult interpretive and constitutional problems raised by the immigration law sections of AEDPA. The main points of contention have been over RETROACTIVITY, DUE PROCESS, and the nature and scope of judicial review of administrative immigration decisions. Ultimately, many of these questions will likely be resolved by the Supreme Court.

DANIEL KANSTROOM
(2000)

Bibliography

BENSON, LENNI B. 1997 Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings. *Connecticut Law Review* 29:1411–1494.

NOTE 1998 The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions. *Harvard Law Review* 111: 1578–1595.

SCAPERLANDA, MICHAEL 1996 Are We That Far Gone? Due Process and Secret Deportation Proceedings. *Stanford Law and Policy Review* 7:23–30.

TUSHNET, MARK and YACKLE, LARRY W. 1997 Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act. *Duke Law Journal* 47:1–86.

YACKLE, LARRY W. 1996 A Primer on the New Habeas Corpus Statute. *Buffalo Law Review* 44:381–449.

## ANTITRUST LAW

Federal antitrust law comprises a set of acts of Congress, administrative regulations, and court decisions that attempt to regulate market structure and competitive behavior in the national ECONOMY. The substance of this law is found in the first two sections of the SHERMAN ACT (1890), which forbid concerted action in "restraint of trade" and acts that seek to "monopolize" any part of commerce. The COMMERCE CLAUSE is the nexus between antitrust law and constitutional law.

There are several persistent uncertainties concerning the proper meaning of these prohibitions: the extent to which they embody a particular concept of economic efficiency as a primary value; the degree to which they are designed to protect competition by valuing a market com-

posed of a large number of small competitors rather than a few large units; and the extent to which they embody specific notions of consumer protection. Despite these disagreements, there is general consensus that the antitrust laws express a preference for free and open markets in which prices and production are set by competitive forces and in which neither restraint of trade nor monopolization determines important market conditions. The three most common forms of restraint of trade are competitor agreements to fix prices, to allocate customers and markets, and to exclude parties from the market by a boycott or group refusal to deal. Monopolization is behavior by a dominant firm in the relevant market designed to give the firm power to fix prices, set market conditions, and exclude potential competitors.

The antitrust laws have ancient roots in the English and American COMMON LAW. Most states have comparable laws which complement the congressional scheme with varying degrees of effectiveness. In addition, Congress has amended the original acts, most notably to deal with corporate mergers and consolidations and with price discrimination in the distribution of goods. After a generation of judicial interpretation of the Sherman Act's general prohibitions, Congress in 1914 adopted the CLAYTON ACT and FEDERAL TRADE COMMISSION ACT to supplement the Sherman Act with more specific prohibitions and to supplement judicial interpretation and enforcement with administrative agency rule-making and enforcement. Nonetheless, these additions are largely derivative; the Sherman Act's prohibitions of "restraints of trade" and "monopolization" remain the core of federal antitrust law.

Antitrust law bears a strong resemblance to constitutional law, both in the broad intentions and organic implications of its substantive law and in the methodology of its enforcement and interpretive growth. These laws have long been seen as more than simple statutes. The delphic demands of the Sherman Act are considered a structural imperative with social and political, as well as economic, implications. Justice HUGO L. BLACK summed up this perspective in *Northern Pacific Railroad v. United States* (1958): "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

The Sherman Act was a political response to the threats presented by economic power associated with the industrial revolution in the late nineteenth century. Certainly farmers, industrial workers, and tradespersons suffered from the concentrated economic power of the new order. From their beginning, however, these laws also identified threats presented by concentrated economic power to the social and political fabric. The specifics of the Sherman Act are not demanded by the constitutional text, but they can be seen as the economic corollaries of a constitutional commitment to individual autonomy, free association, and the separation and division of power within society. The antitrust laws seek to prevent economic power from becoming so highly concentrated that political freedom is unworkable.

As units of economic organization have grown in size and markets have become more concentrated over the past century, the antitrust laws have provided one alternative to extensive and detailed governmental ECONOMIC REGULATION. In most of the world's political systems, industrialization has been matched by growing control of the economy by bureaucratic *dirigisme.* Although the American economy has hardly been free from governmental intervention, this involvement has been more modest as a result of the emphasis on private planning and control over enterprises through a competitive market regime. In this perspective, excessive bureaucratic control is seen as the enemy of both economic efficiency and individual liberty.

Not only do antitrust law and constitutional law share comparable legislative approaches; their interpretive processes also show strong similarities—a tendency reinforced by the degree to which the Supreme Court is given broad powers to articulate basic norms in both areas.

The antitrust laws present a uniquely varied set of enforcement procedures. In addition to the sanctions available under state law, the basic federal antitrust norms may be enforced by the Department of Justice in federal court either by criminal prosecution or by civil suit for INJUNCTION relief or DAMAGES. The Federal Trade Commission enforces the same basic norms by administrative CEASE AND DESIST ORDERS backed up by civil penalties. A third level of enforcement is available to any private party aggrieved through a damage action in federal court in which treble damages may be awarded. Finally, legislation enacted in 1976 permits state officials to bring damage actions in federal court on behalf of their citizens.

Antitrust cases may be instituted in any one of the federal district courts and be appealed to a court of appeals. Administrative proceedings may also be reviewed in any one of the courts of appeals. Thus, no single agency has policy control over the bringing of antitrust suits, nor is there any coordination of the often contradictory decisions by local courts and agencies below the level of the Supreme Court. To a degree familiar to constitutional lawyers but atypical in other areas of federal law, a question of antitrust law is not considered settled until the Supreme

Court decides it. The Court accepts only a few antitrust cases each year for decision, and the doctrinal impact of these decisions is profound.

Both constitutional and antitrust law generate the "big case," that peculiarly American form of political controversy in the form of litigation. Although there is reason to doubt the actual influence of antitrust law on the grand issues of national economic structure, the bringing of a major case is properly seen as an important political event. The investment of personnel and resources needed to accumulate the economic data necessary to prove a claim under these laws has long presented a major constraint to full enforcement. A big case is likely to exceed the natural lifespan of the national administration that institutes the suit, and may extend beyond the professional career span of government attorneys. As a consequence, charges of monopolization and other abuses of dominant market position are relatively rare. Cases charging specific acts in restraint of trade—particularly price fixing, production limits, and other cartelization—are more common because they are more susceptible to proof within the limits of a judicial trial.

The constraint of the big case produce two kinds of attempts to avoid full trial of cases. First, the great majority of antitrust cases are settled by consent decrees in which the government or private plaintiff is granted substantial relief. Concerned about the consistency of this practice with public interest, Congress in 1976 amended the law to require fuller judicial examination and public scrutiny of proposed settlements. Second, the problems of the big case have promoted the development of other enforcement techniques. The Federal Trade Commission Act of 1914 and the short-lived COMMERCE COURT represent two efforts to move both legislation and enforcement out of court and into specialized forums. The Federal Trade Commission (FTC) has broad power to proscribe unfair and anticompetitive behavior by rule, but the full potential of this technique has never been realized. Recently a hostile Congress has suspended many of the more important FTC trade rules.

The FTC and the Justice Department have also issued guidelines stating when the government will bring antitrust suits against proposed mergers or other changes in industry structure perceived to threaten overconcentration or monopoly. Because the confidence of securities markets is normally crucial to a successful merger, the threat of a suit often forecloses such a transaction.

The Constitution and the Sherman Act both use language drawn primarily from English common law sources to respond to dimly perceived new social needs that were expected to extend far into the future. In both cases the choice of operative terms served effectively to delegate to the Supreme Court power to pour meaning into common law terms. As few would suggest today that the full meaning of DUE PROCESS OF LAW is found in eighteenth-century common law sources, few would suggest that the meaning of "restraint of trade" is to be found in congressional understanding (actually, misunderstanding) of that common law term at the time the Sherman Act was enacted.

This protean aspect of the Sherman Act has always engendered the complaint that the act provides inadequate guidance to the economic decision makers who are subject to the law's commands. Despite three generations of attempts to contain the law in more specific statutory prohibitions and to delegate its enforcement to administrative experts, antitrust law retains its strong similarity to the process of constitutional adjudication by judicial decision. Even in those few areas of antitrust enforcement marked by heavy reliance on the specifics of the Clayton Act or administrative rules, the Sherman Act's general concepts of restraint of trade and monopolization retain their influence, broadening and reshaping the narrower rules.

As in constitutional litigation, the shifting tides of antitrust interpretation follow major changes in American economic and social thought. The conception of "restraint of trade," for example, has been modified by a RULE OF REASON, which exempts reasonable restraints of trade from the antitrust laws. Most contracts of any duration restrain the freedom of the parties to enter the market by obligating the parties to deal with each other. By the middle of the eighteenth century, the common law prohibition on contracts in restraint of trade had been made into a rule prohibiting only unreasonable restraints. This rule, of course, vastly expanded the potential power of judges, who decide what is reasonable.

When Congress enacted the Sherman Act it certainly had in mind this common law doctrine—although perhaps not the doctrine's specifics. The text declares all contracts in restraint of trade illegal. A persistent interpretive theme from the beginning has been the extent to which the Sherman Act incorporates a rule of reason. During periods when the dominant political thought is permissive of consolidations or economic power, the rule of reason tends to enlarge, thus increasing the power of the lower federal judiciary, who typically have been sympathetic to business interests. This development complicates the trial of cases, for defendants are permitted to enlarge the inquiry with evidence that their behavior, while generally of a prohibited sort, was reasonable under the circumstances. In contrast, during periods of vigorous antitrust enforcement the rule of reason recedes in favor of a per se rule of violation.

The earliest period of interpretation of the Sherman Act was marked by the dominance of a per se approach: competitor agreements fixing prices or allocating markets were per se offenses and could not be justified by evidence that the prices fixed were reasonable, or that conditions in

the industry demanded efforts to stabilize market prices. The tone of majority opinions began to change with STANDARD OIL COMPANY V. UNITED STATES (1911), in which a general rule of reason standard was announced. Opposition to this vague standard during WOODROW WILSON's Democratic administration contributed to the enactment of the Clayton Act and the Federal Trade Commission Act. With the arrival of "normalcy" under President WARREN G. HARDING, a permissive rule of reason again flowered, and remained dominant for two decades.

Not until the late 1930s, when a new Supreme Court was in place and the NEW DEAL administration had turned away from unhappy experience with the *dirigisme* of the NATIONAL INDUSTRIAL RECOVERY ACT, did vigorous challenges to anticompetitive private market behavior again become popular. Per se rules forbidding a wide range of competitor collaboration and group refusals to deal were announced by the Court for the first time, or brought down from the attic in which they had lain since the Wilson era. This period lasted for a generation; toward its close in the late 1960s per se rules were extended beyond price fixing and competitor agreements to nonprice market allocations between manufacturers and distributors. The early 1970s brought changes in political climate and in the personnel of the Court, and again the course of antitrust doctrine changed. The new mood was apparent in a more restricted interpretation of merger policy, greater receptivity to distribution agreements, and the reassertion of the rule of reason in peripheral areas. As of the mid-1980s, however, the Court had not adopted the more radical shifts toward permissiveness urged by critics of the antitrust laws.

The Supreme Court's restrictive view of Congress's power under the commerce clause in the years following adoption of the Sherman Act produced an extremely narrow interpretation of the act in UNITED STATES V. E. C. KNIGHT COMPANY (1895). Manufacturing, said the Court, was not commerce; thus the act did not reach the stock transactions that gave one company almost complete control over sugar refining in the United States. Only "direct" restraints of interstate commerce itself were subject to the act, as the Court held in *Addyston Pipe & Steel Company v. United States* (1899). The "constitutional revolution" of the 1930s broadened not only the Court's conception of the commerce power but also its interpretation of the reach of the antitrust laws. By the time of SOUTH-EASTERN UNDERWRITERS ASSOCIATION V. UNITED STATES (1944), both changes were complete.

More recently, courts and commentators have noted a potential conflict between state authority to control alcoholic beverages under the TWENTY-FIRST AMENDMENT and claims that state regulatory authorities have participated in price fixing. This issue illustrates a more basic question: does the Sherman Act decree a national free market, or may the states depart from competitive structures for economic activity otherwise within their regulatory power? The issue has arisen in connection with state utility regulation, control of the legal and medical professions, and agricultural marketing programs, all of which operate on a franchise or monopoly regulation model rather than a free market model. In general, the Supreme Court has held that state action regulating a market does not violate federal law and those complying with state law are not in violation of federal law.

The antitrust laws raise other constitutional questions. The vague language of the Sherman Act has given rise to claims of unconstitutionality when that act is the basis of a felony prosecution. The "big case" raises a variety of due process concerns, for it presses the judicial model to the outer limits of its capacity. The meaning of the right to TRIAL BY JURY, for example, requires clarification in cases presenting the complexity and gargantuan size found in many antitrust suits.

Perhaps the most puzzling set of constitutional concerns involves the connections between the Sherman Act's prohibitions on collective behavior (which it describes as contracts, combinations, and conspiracies in restraint of trade) and the associational rights protected by the FIRST AMENDMENT. An agreement among competitors seeking to exclude other potential competitors from the market is a conspiracy under the Sherman Act, even if the competitors enlist government agencies in their effort. On the other hand, an agreement among members of an industry to petition the government for legal relief from the economic threat of their competitors is constitutionally protected political activity. Supreme Court opinions "distinguishing" between these two kinds of activity have resorted to a pejorative label to explain their results, finding the political activity immune from antitrust claims unless it is a sham.

Comparable tensions exist between the Sherman Act's prohibitions of economic boycotts—which are seen as concerted refusals to deal—and political boycotts. To maintain this distinction requires a worldview in which economics and politics are unconnected spheres. Yet boycotts are per se offenses under the Sherman Act and some courts have held that political boycotts are a protected form of political protest.

A third tension is found in the case of permissible "natural monopolies"—for example, the owners of the railway terminal at the only point on a wide river suitable for a railway crossing. For three quarters of a century the Court has held that such holders of monopoly power are obligated to share it fairly with others. Several of these decisions treat this obligation as one resembling governmental power which carries along with it an obligation of "due

process" procedural fairness. These decisions might be said to impose the constitutional obligation of government on those private accumulations of power that are found not to be prohibited outright by the Sherman Act. Together, the Constitution and the Sherman Act thus represent a total response to the problems of concentrated power in modern society: the Constitution controls governmental power, and the antitrust law controls concentrations of private economic power. At the seam between public and private organizations, the two bodies of law combine to limit the excesses of concentrated power.

ARTHUR ROSETT
(1986)

Bibliography

AREEDA, P. and TURNER, D. 1978–1980 *Antitrust Law: An Analysis of Antitrust Principles and their Application*, 5 vols. Boston: Little, Brown.

NEALE, A. D. and GOYDER, D. G. 1980 *The Antitrust Laws of the Usa*, 3rd ed. Cambridge: At the University Press.

SULLIVAN, L. 1977 *Antitrust*. St. Paul, Minn.: West Publishing Company.

## *APEX HOSIERY COMPANY v. LEADER*
310 U.S. 469 (1940)

Destroying the effect of CORONADO COAL COMPANY V. UNITED MINE WORKERS (1925), although not overruling it, this opinion marked the shift toward a prolabor sentiment in the Supreme Court. The Court reaffirmed the application of the SHERMAN ANTITRUST ACT to unions but held that even a strike that effected a reduction of goods in INTERSTATE COMMERCE was no Sherman Act violation if it furthered legitimate union objectives. (See ALLEN-BRADLEY COMPANY V. LOCAL #3.) A particularly violent sit-down strike at the Apex plant reduced the volume of goods in commerce and resulted in extensive physical damage. Did the act forbid the union's actions? Justice HARLAN FISKE STONE, for a 6–3 Court, condemned the union's conduct, declaring that the company had a remedy under state law, but held that restraints not outlawed by the Sherman Act when accomplished peacefully could not be brought within the law's scope because they were accompanied by violence. The Court also denied that the resulting restraint of trade fell under the act. The union was not proceeding illegally by acting to eliminate nonunion or commercial competition in the market, even though a production halt must accompany a strike and lead to a temporary restraint. Only if the restraint led to a monopoly, price control, or discrimination among consumers would a violation occur. The Court thus substituted a test of restraint in the marketplace for the test of intent previously announced in BEDFORD CUT STONE V. JOURNEYMEN STONECUTTERS (1927). In dissent, Chief Justice CHARLES EVANS HUGHES, joined by Justices OWEN ROBERTS and JAMES C. MCREYNOLDS, insisted that the earlier decisions governed and that they had not confined the test of restraint to market control. The Court had abandoned its earlier approach; the next year it would supplement *Apex*, excluding both jurisdictional strikes and SECONDARY BOYCOTTS from Sherman Act coverage in *United States v. Hutcheson* (1941).

DAVID GORDON
(1986)

(SEE ALSO: *Antitrust Law*.)

## *APODACA v. OREGON*

See: *Johnson v. Louisiana*

## *APPALACHIAN ELECTRIC POWER COMPANY v. UNITED STATES*
311 U.S. 377 (1940)

Until this decision, federal authority over waterways extended only to those that were navigable. In this case the Supreme Court agreed to review the scope of federal power over completely nonnavigable waters. The Appalachian Electric Company asserted that the WATER POWER ACT of 1920 did not apply to the New River because its waters were not navigable; moreover, the act imposed conditions dealing with neither navigation nor its protection. Justice STANLEY F. REED, for a 6–2 Court, concluded that it was sufficient that the river might eventually be made navigable, thus broadening the earlier definition of federal authority. The COMMERCE CLAUSE was the constitutional provision involved and navigation was merely one of its parts. "Flood control, watershed development, recovery of the cost of improvements through utilization of power [also renders navigable waters subject] to national planning and control in the broad regulation of commerce granted the Federal Government." Justice OWEN ROBERTS, joined by Justice JAMES C. MCREYNOLDS, dissented from Reed's expansion of the test for navigability: "No authority is cited and I think none can be cited which countenances any such test."

DAVID GORDON
(1986)

# APPEAL

An appeal is the invocation of the JURISDICTION of a higher court to reverse or modify a lower court's decision. Appeal

from the decision of a federal district court, for example, is normally taken to a federal court of appeals. In earlier federal practice, an appeal was taken by way of a WRIT OF ERROR; today, the term "appeal" has replaced references to the former writ. In the Supreme Court, "appeal" is a term of art, referring to the Court's obligatory APPELLATE JURISDICTION. In this sense, filing an appeal is distinguished from petitioning for a WRIT OF CERTIORARI, which is the method of invoking the Court's discretionary jurisdiction.

In a case coming to the Supreme Court from a state court, appeal is the appropriate remedy when the highest state court has rejected one of two types of claims based on federal law: either the state court has upheld a state law, rejecting the claim that the law violates the federal Constitution or a federal statute or treaty, or it has held invalid a federal statute or treaty. In those two kinds of cases, the Supreme Court is, in theory, obliged to review state court decisions; in all other cases, only the discretionary remedy of certiorari is available. A similarly obligatory review, by way of appeal, is appropriate when a federal court of appeals holds a state statute invalid. However, the overwhelming majority of court of appeals decisions reviewed by the Supreme Court lie within the Court's discretionary review, on writ of certiorari.

Whether a case is or is not an appropriate case for an appeal lies to some extent within the control of counsel, who may be able to cast the case as a challenge to the constitutionality of a state law as applied to particular facts. Yet some cases lie outside counsel's power to characterize; thus, a claim that a valid statute is being applied in a discriminatory manner, in violation of the equal protection clause, is reviewable only on certiorari.

With each passing year the practical distinction between appeal and certiorari has lessened. The Supreme Court often dismisses an appeal "for want of a substantial federal question" under circumstances strongly indicating the Court's determination, on a discretionary basis, that the appeal is not worthy of being heard. Furthermore, the Court has had the power since 1925 to treat improperly filed appeal papers as if they were a petition for certiorari. The same "RULE OF FOUR" applies to both appeal and certiorari: the vote of four Justices is necessary for a case to be heard. With these factors in mind, commentators have persistently urged Congress to abolish the Supreme Court's appeal jurisdiction entirely, leaving the Court in full discretionary control over the cases it will hear.

KENNETH L. KARST
(1986)

Bibliography

STERN, ROBERT L. and GRESSMAN, EUGENE 1978 *Supreme Court Practice*, 5th ed. Chaps. 2–5. Washington, D.C.: Bureau of National Affairs.

## APPELLATE JURISDICTION

A court's appellate jurisdiction is its power to review the actions of another body, usually a lower court. The appellate jurisdiction of our federal courts lies within the control of Congress. Article III of the Constitution, after establishing the Supreme Court's ORIGINAL JURISDICTION over certain cases, gives the Court appellate jurisdiction over all other types of cases within "the JUDICIAL POWER OF THE UNITED STATES" but empowers Congress to make "exceptions and regulations" governing that jurisdiction. In the JUDICIARY ACT OF 1789 Congress did not, formally, make exceptions to the Supreme Court's appellate jurisdiction; rather it purported to *grant* the Court jurisdiction to hear various types of cases on WRIT OF ERROR. The assumption has been that such an affirmative grant of appellate jurisdiction over specified types of cases is, by implication, an "exception," excluding the Court from taking appellate jurisdiction over cases not mentioned.

The Supreme Court itself accepted this line of reasoning in EX PARTE MCCARDLE (1869), stating that without a statutory grant of appellate jurisdiction it had no power to hear a case. Read broadly, this holding empowers Congress to undermine JUDICIAL REVIEW by withdrawing the Supreme Court's most important functions. Some commentators argue that Congress, in controlling the Supreme Court's appellate jurisdiction, is constitutionally bound to respect the Court's essential role in a system of SEPARATION OF POWERS. Other writers, however, reject this view, and the Supreme Court has been presented with no modern occasion to face the issue. (See JUDICIAL SYSTEM.)

Whatever the Constitution may ultimately require, Congress has acted on the assumption that it need not extend the Supreme Court's appellate jurisdiction to occupy the whole of the judicial power established by Article III. Until 1925, for example, the Court's appellate review of civil cases was limited by a requirement of a certain dollar amount in controversy. For the first century of the Court's existence, it had no general appellate jurisdiction over federal criminal cases, but reviewed such a case only on writ of HABEAS CORPUS or upon a lower court's certification of a division of opinion on an issue of law. Until 1914, the Supreme Court could review state court decisions only when they *denied* claims of federal right, not when they validated those claims. Although all these major limitations on the Court's appellate jurisdiction have now been eliminated, the halls of Congress perennially ring with calls for removing the Court's power over cases involving such emotion-charged subjects as SUBVERSIVE ACTIVITIES, school prayers, or ABORTION.

From the beginning the Supreme Court has reviewed cases coming from the lower federal courts and the state courts. The latter jurisdiction has been the source of po-

litical controversy, not only in its exercise but in its very existence. In a doctrinal sense, the power of Congress to establish the Court's appellate jurisdiction over state court decisions was settled early, in MARTIN V. HUNTER'S LESSEE (1816). In the realm of practical politics, the issue was settled when any serious thoughts of INTERPOSITION or NULLIFICATION were laid to rest by the outcome of the Civil War. (Ironically, the CONFEDERATE CONSTITUTION had provided a similar appellate jurisdiction for the Confederacy's own supreme court.) By the late 1950s, when the Court confronted intense opposition to school DESEGREGATION, its appellate jurisdiction was firmly entrenched; southern efforts to curb the Court failed miserably.

The Supreme Court's review of state court decisions is limited to issues of federal law. Even federal questions will not be decided by the Court if the state court's judgment rests on an ADEQUATE STATE GROUND. By congressional statute the Court is instructed to review only FINAL JUDGMENTS of state courts, but this limitation is now riddled with judge-made exceptions. The Court does, however, obey strictly its statutory instruction to review the decision of only the highest state court in which judgment is available in a given case. As *Thompson v. Louisville* (1960) shows, even a justice of the peace may constitute that "highest court" if state law provides no APPEAL from the justice's decision.

When the Supreme Court reviews a state court decision, all the jurisdictional limitations on the federal courts come into play. For example, although a state court may routinely confer STANDING on any state taxpayer to challenge state governmental action, the Supreme Court can take appellate jurisdiction only if the taxpayer satisfies the federal standards for standing.

Of the 4,000 cases brought to the Court in a typical year, only about 150 will be decided with full opinion. A large number of state criminal convictions raise substantial issues of federal constitutional law, but they largely go unreviewed in the Supreme Court. The WARREN COURT sought to provide a substitute federal remedy, facilitating access for state prisoners to federal habeas corpus. In the 1970s, however, the BURGER COURT drastically limited that access; in practical terms, a great many state convictions now escape review of their federal constitutional issues in any federal forum.

Final judgments of the federal district courts are normally reviewed in the courts of appeals, although direct appeal to the Supreme Court is available in a very few categories of cases. Usually, then, a case brought to the Supreme Court has already been the subject of one appeal. The Court thus can husband its resources for its main appellate functions: nourishing the development of a coherent body of federal law, and promoting that law's uniformity and supremacy.

For the Supreme Court's first century, its appellate jurisdiction was mostly obligatory; when Congress authorized a writ of error, the Court had no discretion to decline. The Court's second century has seen a progressive increase in the use of the discretionary WRIT OF CERTIORARI as a means of invoking Supreme Court review, with a corresponding decline in statutory entitlements to review on appeal. Today the Court has a high degree of discretion to choose which cases it will decide. Some observers think this discretion weakens the theoretical foundation of judicial review, expressed in MARBURY V. MADISON (1803). The Court there based its power to hold an act of Congress unconstitutional on the necessity to decide a case. If the Court has discretion whether to decide, the necessity disappears, and thus (so the argument goes) judicial review's legitimacy. Ultimately, that legitimacy may come to depend, both theoretically and politically, on the very power of congressional control so often seen as a threat to the Supreme Court's appellate jurisdiction.

KENNETH L. KARST
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Bibliography

BATOR, PAUL M.; MISHKIN, PAUL J.; SHAPIRO, DAVID L.; and WECHSLER, HERBERT, eds. 1973 *The Federal Courts and the Federal System*, 2nd ed. Chaps. 5, 11. Mineola, N.Y.: Foundation Press.

## APPOINTING AND REMOVAL POWER, PRESIDENTIAL

Article II, section 2, clause 2, of the Constitution provides in part that the President "shall nominate, and by and with the ADVICE AND CONSENT of the Senate, he shall appoint, Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law." It goes on to authorize Congress to provide for the appointment of "inferior officers" by the President, the courts, or the heads of departments. The only patent ambiguity is in the distinction between the appointment of "inferior officers" and those presidential appointments requiring advice and consent of the Senate. This problem has given little cause for concern, perhaps because Congress has erred on the side of requiring advice and consent appointments, so that even every officer in the armed forces receives such a presidential appointment.

The processes of the appointment power were canvassed by JOHN MARSHALL in MARBURY V. MADISON (1803), where he also addressed the question that has plagued the construction of Article II, section 2, clause 2, not the

meaning of the appointment provisions but what meaning they have for the removal power. The language of the Constitution is silent about removal, except for impeachment and the life tenure it gives to judges. Marshall said:

> Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.
>
> The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him. The right to the office is *then* in the person appointed, and he has the absolute, and unconditional power of accepting or rejecting it.
>
> Mr. Marbury, then, since his commission was signed by the president, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country.

Obviously, it was to Congress that Marshall ascribed the power to determine the length of the term, and the conditions for removal, except that all officers of the United States were removable by the process of IMPEACHMENT.

The question whether an appointment made by the President with the advice and consent of the Senate could be terminated by the executive without such senatorial approval was soon mooted. ALEXANDER HAMILTON had answered the question in THE FEDERALIST #77:

> It has been mentioned as one of the advantages to be expected from the cooperation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint. A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected, if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him, by the apprehension that a discountenance of the Senate might frustrate the attempt, and bring some discredit upon himself. Those who can best estimate the value of a steady administration, will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body, which from the greater permanence of its own composition, will in all probability be less subject to inconsistency than any other member of the government.

Thus spake the founding father most given to support a strong presidency.

In the very first Congress, however, when it was concerned with the creation of the office of secretary of state, there was extensive debate about whether the removal power was inherently an executive function and therefore not to be encumbered by the necessity for senatorial approval. It was conceded that the appointment power, too, was intrinsically an executive power and, but for constitutional provision to the contrary, would have remained untrammeled by legislative authority. JAMES MADISON thus construed the provision in his lengthy argument in the House of Representatives: the President did not need the acquiescence of the Senate to remove an official who had been appointed with its consent. The impasse that developed in the House was resolved not by choosing one side or the other of the controversial question but rather by omission of any provision concerning the power of removal. Madison's position at the CONSTITUTIONAL CONVENTION OF 1787 had been that the President, like the king, should have the appointment power without condition. He failed to carry the Convention on that point. He sought in the legislature to protect the President's exclusive power of removal. He failed there, too, although the point was not taken definitively against him as it had been at the Convention. But if he failed in 1789, he was nevertheless to be vindicated in MYERS V. UNITED STATES (1926).

The issue had not remained moribund in the interim. In 1833, when ANDREW JACKSON removed two secretaries of the treasury for refusing to withdraw government deposits from the BANK OF THE UNITED STATES and put ROGER B. TANEY in their place, motions of censure were moved and passed in the Senate, supported by DANIEL WEBSTER, HENRY CLAY, and JOHN C. CALHOUN. But Jackson had his way, as he usually did. The issue reached proportions of a constitutional crisis in 1867, when President ANDREW JOHNSON was impeached, largely on the ground that he had violated the TENURE OF OFFICE ACT which forbade the removal of a cabinet officer before his successor had been nominated and approved by the Senate. Johnson escaped a guilty verdict in the Senate because the vote fell one shy of the two-thirds necessary for conviction. There were other instances in which the courts were called upon for construction of the removal power, and for the most part the decisions sided with the President, but usually by statutory rather than constitutional construction.

The controlling Supreme Court decision came in the *Myers* case in 1926, which arose out of the removal by the President of a local postmaster. Here Chief Justice WILLIAM HOWARD TAFT, after his experience as chief magistrate,

was not prepared to tolerate the suggestion that a President could have foisted on his administration aides that he did not want, even if the aide were only a lowly postmaster. Perhaps Taft's first concern was that Congress would take over the execution of the laws by the creation of independent agencies over whose members the President would have no control at all if he could not exercise the power of removal. That was not the issue in *Myers*, but Taft wished to forestall future problems of independent agencies as well as to lay to rest the canard that the President could not remove those in the direct chain of command, such as a postmaster. He read the debates in the first Congress as establishing Madison's position rather than bypassing it. It took seventy pages of abuse of history to make Taft's point. The presidential power of removal thus became plenary. Justice OLIVER WENDELL HOLMES, in dissent, disposed of the Taft position in less than a page:

> We have to deal with an office that owes its existence to Congress and that Congress may abolish tomorrow. Its duration and the pay attached to it while it lasts depend on Congress alone. Congress alone confers on the President the power to appoint to it and at any time may transfer that power to other hands. With such power over its own creation, I have no more trouble in believing that Congress has power to prescribe a term of life for it free from any interference than I have in accepting the undoubted power of Congress to decree its end. I have equally little trouble in accepting its power to prolong the tenure of an incumbent until Congress or the Senate shall have assented to his removal. The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.

History, however, has been on the side of Taft and Madison rather than on that of Hamilton, Marshall, and Holmes. An exception has been carved by the Court from the President's power of removal where the incumbent is charged with duties that may be called judicial, even if mixed with legislative and executive discretion, such as those involved in HUMPHREY'S EXECUTOR V. UNITED STATES (1935). Thus, Taft's championing of the presidential removal power has been sustained, except in the situation that bothered him most, the independent administrative agencies where legislative, executive, and judicial powers are all exercised by the incumbent.

PHILIP B. KURLAND
(1986)

Bibliography

CORWIN, EDWARD S. 1927 Tenure of Office and the Removal Power under the Constitution. *Columbia Law Review* 27: 353–399.

KURLAND, PHILIP B. 1978 *Watergate and the Constitution*, chap. 5. Chicago: University of Chicago Press.

MILLER, CHARLES A. 1969 *The Supreme Court and the Uses of History*. Chap. 4. Cambridge, Mass.: Harvard University Press.

## APPOINTMENT OF SUPREME COURT JUSTICES

Under Article II, section 2, of the Constitution, Supreme Court Justices, like all other federal judges, are nominated and, with the ADVICE AND CONSENT of the SENATE, appointed by the President. No other textual mandate, either procedural or substantive, governs the Chief Executive's selection. However, section 1 of Article III—which deals exclusively with the judicial branch of the government—provides GOOD BEHAVIOR tenure for all federal judges; in effect, that means appointment for life. As additional security, that provision of the Constitution provides that the compensation of federal judges "shall not be diminished during their Continuance in Office." But neither the Constitution nor any federal statute provides any clue as to qualifications for office; neither a law degree nor any other proof of professional capability is formally required. But in practice none other than lawyers are appointable to the federal judiciary, in general, and the Supreme Court, in particular. All of the 102 individuals who sat on that highest tribunal through 1985 held degrees from a school of law or had been admitted to the bar via examination. Indeed, although all the Justices were members of the professional bar in good standing at the time of their appointment, it was not until 1922 that a majority of sitting Justices was composed of law school graduates, and not until 1957 that every Justice was a law school graduate. Once confirmed by the Senate, a Justice is removable only via IMPEACHMENT (by simple majority vote by the HOUSE OF REPRESENTATIVES) and subsequent conviction (by two-thirds vote of the Senate, there being a quorum on the floor). Only one Justice of the Supreme Court has been impeached by the House—Justice SAMUEL CHASE, by a 72–32 vote in 1804—but he was acquitted on all eight charges by the Senate in 1805. To all intents and purposes, once appointed, a Supreme Court Justice serves as long as he or she wishes—typically until illness or death intervenes.

Theoretically, the President has *carte blanche* in selecting his nominees to the Court. In practice, three facts of political life inform and limit his choices. The first is that it is not realistically feasible for the Chief Executive to designate a Justice and obtain confirmation by the Senate without the at least grudging approval by the two home state senators concerned, especially if the latter are members of the President's own political party. The time-honored practice of "Senatorial courtesy" is an omnipresent phenomenon, because of senatorial camara-

derie and the "blue slip" approval system, under which the Judiciary Committee normally will not favorably report a nominee to the floor if an objecting home-state senator has failed to return that slip. (Senator Edward Kennedy, during his two-year tenure as head of the Committee, abandoned the system in 1979, but it was partly restored by his successor, Senator Strom Thurmond, in 1981.) Although nominations to the Supreme Court are regarded as a personal province of presidential choice far more than the appointment of other judges, the Senate's "advice and consent" is neither routine nor perfunctory, to which recent history amply attests. In 1968, despite a favorable Judiciary Committee vote, the Senate refused to consent to President Johnson's promotion of Justice ABE FORTAS to the Chief Justiceship; in 1969 it rejected President RICHARD M. NIXON's nomination of Judge Clement Haynsworth, Jr., by 55 to 45; and in 1970 it turned down that same President's selection of Judge G. Harrold Carswell by 51 to 45. Indeed, to date the Senate, for a variety of reasons, has refused to confirm twentyseven Supreme Court nominees out of the total of 139 sent to it for its "advice and consent" (twenty-one of these during the nineteenth century).

The second major factor to be taken into account by the President is the evaluative role played by the American Bar Association's fourteen-member Committee on the Federal Judiciary, which has been an unofficial part of the judicial appointments process since 1946. The committee scrutinizes the qualifications of all nominees to the federal bench and normally assigns one of four "grades": Exceptionally Well Qualified, Well Qualified, Qualified, and Not Qualified. In the rare instances of a vacancy on the Supreme Court, however, the committee has in recent years adopted a different, threefold, categorization: "High Standards of Integrity, Judicial Temperament, and Professional Competence"; "Not Opposed"; and "Not Qualified."

The third consideration incumbent upon the Chief Executive is the subtle but demonstrable one of the influence, however *sub rosa* and *sotto voce*, of sitting and retired jurists. Recent research points convincingly to that phenomenon, personified most prominently by Chief Justice WILLIAM HOWARD TAFT. If Taft did not exactly "appoint" colleagues to vacancies that occurred during his nine-year tenure (1921–1930), he assuredly vetoed those unacceptable to him. Among others also involved in advisory or lobbying roles, although on a lesser scale than Taft, were Chief Justices CHARLES EVANS HUGHES, HARLAN F. STONE, FRED VINSON, EARL WARREN, and WARREN E. BURGER and Associate Justices JOHN MARSHALL HARLAN I, SAMUEL F. MILLER, Willis Van Devanter, LOUIS D. BRANDEIS, and FELIX FRANKFURTER.

A composite portrait of the 101 men and one woman who have been Justices of the Supreme Court provides the following cross-section: native-born: 96; male: 101 (the first woman, SANDRA DAY O'CONNOR, was appointed by President RONALD REAGAN in the summer of 1981); white: 101 (the first black Justice, THURGOOD MARSHALL, was appointed by President LYNDON B. JOHNSON in 1967); predominantly Protestant: 91 (there have been six Roman Catholic and five Jewish Justices—the first in each category were ANDREW JACKSON's appointment of Chief Justice ROGER B. TANEY in 1836 and WOODROW WILSON's of Louis D. Brandeis in 1916, respectively); 50–55 years of age at time of appointment (the two youngest have been JOSEPH STORY, 33, in 1812 and WILLIAM O. DOUGLAS, 41, in 1939); of Anglo-Saxon ethnic stock (all except fifteen); from an upper middle to high social status (all except a handful); reared in a nonrural but not necessarily urban environment; member of a civic-minded, politically aware, economically comfortable family (all except a handful); holders of B.A. and, in this century, LL.B. or J.D. degrees (with one-third from "Ivy League" institutions); and a background of at least some type of public or community service (all except Justice GEORGE SHIRAS). Contemporary recognition of egalitarianism and "representativeness" may alter this profile, but it is not likely to change radically.

Only the President and his close advisers know the actual motivations for the choice of a particular Supreme Court appointee. But a perusal of the records of the thirty-five Presidents who nominated Justices (four—W. H. Harrison, ZACHARY TAYLOR, ANDREW JOHNSON, and JIMMY CARTER—had no opportunity to do so) points to several predominating criteria, most apparent of which have been: (1) objective merit; (2) personal friendship; (3) considerations of "representativeness"; (4) political ideological compatibility, what THEODORE ROOSEVELT referred to as a selectee's "real politics"; and (5) past judicial experience. Appropriate examples of (1) would be BENJAMIN N. CARDOZO (HERBERT HOOVER) and JOHN MARSHALL HARLAN (DWIGHT D. EISENHOWER); of (2) HAROLD H. BURTON (HARRY S. TRUMAN) and ABE FORTAS (LYNDON JOHNSON); of (4) HUGO BLACK (FRANKLIN D. ROOSEVELT) and WILLIAM HOWARD TAFT (WARREN G. HARDING); of (5) OLIVER WENDELL HOLMES (THEODORE ROOSEVELT) and DAVID J. BREWER (BENJAMIN HARRISON). Deservedly most contentious is motivation (3), under which Presidents have been moved to weigh such "equitable" factors as geography, religion, gender, race, and perhaps even age in order to provide a "representative" profile of the Court. Of uncertain justification, it is nonetheless a fact of life of the appointive process. Thus geography proved decisive in Franklin D. Roosevelt's selection of WILEY RUTLEDGE of Iowa ("Wiley, you have geography," Roosevelt told him) and ABRAHAM LINCOLN's selection of STEPHEN J. FIELD of California. But given the superb qualifications of Judge Cardozo, despite the presence of two other New Yorkers (Hughes and Stone), the

former's selection was all but forced upon Hoover. The notion that there should be a "Roman Catholic" and "Jewish" seat has been present ever since the appointments of Taney and Brandeis. Although there have been periods without such "reserved" seats (for example, 1949–1956 in the former case and since 1965 in the latter), Presidents are aware of the insistent pressures for such "representation." These pressures have increased since the "establishment" of a "black" seat (Marshall in 1967, by Johnson) and a "woman's seat" (O'Connor, by Reagan, in 1981). It has become all but unthinkable that future Supreme Court lineups will not henceforth have "representatives" from such categories. That the Founding Fathers neither considered nor addressed any of these "representative" factors does not gainsay their presence and significance in the political process.

Whatever may be the merits of other criteria motivating presidential Supreme Court appointments, the key factor is the Chief Executive's perception of a candidate's "real" politics—for it is the nominee's likely voting pattern as a Justice that matters most to an incumbent President. To a greater or lesser extent, all Presidents have thus attempted to "pack" the bench. Court-packing has been most closely associated with Franklin D. Roosevelt. Failing a single opportunity to fill a Court vacancy during his first term (and five months of his second), and seeing his domestic programs consistently battered by "the Nine Old Men," Roosevelt moved to get his way in one fell swoop with his "Court Packing Bill" of 1937; however, it was reported unfavorably by the Senate Judiciary Committee and was interred by a decisive recommittal vote. Ultimately, the passage of time enabled him to fill nine vacancies between 1937 and 1943. Yet GEORGE WASHINGTON was able to nominate fourteen, of whom ten chose to serve, and his selectees were measured against a sextet of criteria: (1) support and advocacy of the Constitution; (2) distinguished service in the revolution; (3) active participation in the political life of the new nation; (4) prior judicial experience on lower tribunals; (5) either a "favorable reputation with his fellows" or personal ties with Washington himself; and (6) geographic "suitability." Whatever the specific predispositions may be, concern with a nominee's "real" politics has been and will continue to be crucial in presidential motivations. It even prompted Republican President Taft to award half of his six nominations to the Court to Democrats, who were kindred "real politics" souls (Horace H. Lurton, Edward D. White's promotion to Chief Justice, and JOSEPH R. LAMAR). In ten other instances the appointee came from a formal political affiliation other than that of the appointer, ranging from Whig President JOHN TYLER's appointment of Democrat SAMUEL NELSON in 1845 to Republican Richard M. Nixon's selection of Democrat LEWIS F. POWELL, JR. in 1971.

But to predict the ultimate voting pattern or behavior of a nominee is to lean upon a slender reed. In the characteristically blunt words of President Truman: "Packing the Supreme Court simply can't be done. . . . I've tried and it won't work. . . . Whenever you put a man on the Supreme Court he ceases to be your friend. I'm sure of that." There is indeed a considerable element of unpredictability in the judicial appointment process. To the question whether a judicial robe makes a person any different, Justice Frankfurter's sharp retort was always, "If he is any good, he does!" In ALEXANDER M. BICKEL's words, "You shoot an arrow into a far-distant future when you appoint a Justice and not the man himself can tell you what he will think about some of the problems that he will face." And late in 1969, reflecting upon his sixteen years as Chief Justice of the United States, Earl Warren pointed out that he, for one, did not "see how a man could be on the Court and not change his views substantially over a period of years . . . for change you must if you are to do your duty on the Supreme Court." It is clear beyond doubt that the Supreme Court appointment process is fraught with imponderables and guesswork, notwithstanding the carefully composed constitutional obligations of President and Senate.

HENRY J. ABRAHAM
(1986)

(SEE ALSO: *Advise and Consent to Supreme Court Nominations.*)

Bibliography

ABRAHAM, HENRY J. 1985 *Justices and Presidents: A Political History of Appointments to the Supreme Court*, 2nd ed. New York: Oxford University Press.

——— 1986 The Judicial Process: An Introductory Analysis of the Courts of the United States, England and France, 5th ed. New York: Oxford University Press.

DANELSKI, DAVID J. 1964 *A Supreme Court Justice Is Appointed.* New York: Random House.

SCHMIDHAUSER, JOHN R. 1960 *The Supreme Court: Its Politics, Personalities and Procedures.* New York: Holt, Rinehart Winston.

——— 1979 *Judges and Justices: The Federal Appellate Judiciary.* Boston: Little, Brown.

## APPOINTMENTS CLAUSE

Examining the debates of the CONSTITUTIONAL CONVENTION OF 1787, one finds that Article III, the Constitution's judicial component, proved to be its least controversial and the most readily draftable of all of its provisions. Delegates viewed the judiciary broadly as "the least dangerous branch," in the words of ALEXANDER HAMILTON, and such debate as did occur on the range and extent of the judi-

ciary's power was predominantly concerned with the appointment of judges. Under EDMUND RANDOLPH'S VIRGINIA PLAN, the appointment power would have been granted to Congress as a whole, but the delegates yielded to JAMES MADISON's countersuggestion to vest it in the SENATE alone. Further debate moved the delegates toward vesting the appointment power solely with the President. To resolve the impasse, a special committee of eleven delegates was constituted in late August. Its compromise report, suggesting presidential appointment "by and with the ADVICE AND CONSENT of the Senate," was promptly adopted by the convention in early September, and it became part and parcel of Article III, section 2, paragraph two of the Constitution. Unamended, this provision governs today.

Under the terms of the appointments clause, Presidents have nominated and the Senate has confirmed, thousands of federal jurists. Although there have been some rejections of lower federal court nominees, by and large the Senate has been a willing partner in the confirmation process—arguably even playing a perfunctory role at this level. At the apex of the judicial ladder, the Supreme Court of the United States, senators have taken their role far more seriously, rejecting or refusing to take on one-fifth of all nominees to the high court. Thus, of 145 nominations made by thirty-five Presidents from 1789 through 1990, twenty-eight were formally rejected, purposely not acted on, indefinitely postponed, or were withdrawn by the President involved. (Presidents William H. Harrison, ZACHARY TAYLOR, and JIMMY CARTER had no opportunity to choose any nominee; ANDREW JOHNSON saw all of his rejected by a hostile Senate.) Of the twenty-eight rejections, all but five occurred in the nineteenth century.

The five rejections of the twentieth century—not counting the never acted on nominations of Homer Thornberry (LYNDON B. JOHNSON, 1968) and Douglas H. Ginsburg (RONALD REAGAN, 1987)—were lower federal court judges John J. Parker (HERBERT C. HOOVER, 1930); Clement F. Haynsworth, Jr. (RICHARD M. NIXON, 1969); G. Harrold Carswell (Nixon, 1970); the aborted promotion of Justice ABE FORTAS to CHIEF JUSTICE by President Johnson in 1968; and most recently, President Reagan's nomination of United States Court of Appeals Judge Robert H. Bork in 1987, which was rejected by the decisive vote of 58–42 (see BORK NOMINATION).

Inevitably, the Senate's role in judicial appointments has frequently given rise to the questioning of its authority to weigh factors other than pure "competence" in considering a nominee's qualifications. Is it entitled to examine, for instance, political, personal, and ideological factors, or anything else that it may deem appropriate along the road to its ultimate judgment? The answer is clearly "yes," no matter how distasteful certain aspects of the senatorial investigative role in individual cases may seem to both lay and professional observers. That "politics" indubitably plays a role may be regrettable, but it is also natural under our system. It plays a distinct role at both ends of the appointment process.

Although only incumbent Presidents really know why they selected nominees to the Court (or gave the nod to members of their administrations to do the basic selecting for them), history does identify four reasons or motivations governing the selection process: (1) objective merit; (2) personal and political friendship; (3) balancing "representation" or "representativeness" on the Court; and (4) "real" political and ideological compatibility. Obviously, more than just one of these factors may have been present in most nominations, and in some, all four played a role; yet it is not at all impossible to pinpoint one as the overriding motivation. And, more often than not, it has been the fourth reason listed, namely, concern with a nominee's *real*, as opposed to his or her *nominal*, politics. This concern prompted Republican President WILLIAM HOWARD TAFT to give half of his six appointments to Democrats who were kindred political soulmates; it prompted Republican Nixon to appoint Democrat LEWIS F. POWELL, Jr.; it spurred Democrat FRANKLIN D. ROOSEVELT to promote Republican HARLAN F. STONE to the Chief Justiceship; and it caused Democrat HARRY S. TRUMAN to appoint Republican HAROLD H. BURTON—to cite just a few illustrations. Yet, as history has also shown, there is no guarantee that what a President perceives as "real" politics will not fade like a mirage. Hence CHARLES WARREN, eminent chronicler of the judiciary in general and the Supreme Court in particular, properly observed that "nothing is more striking in the history of the Court than the manner in which the hopes of those who expected a judge to follow the political views of the President appointing him are disappointed."

So why has the Senate chosen to reject or failed to confirm twenty percent of the presidential nominees? The record points to eight reasons: (1) opposition to the nominating President, not necessarily the nominee (for example, all of Andrew Johnson's selectees); (2) opposition to the nominee's perceived jurisprudential or sociopolitical philosophy (for example, Hoover's choice of Parker); (3) opposition to the record of the incumbent court, which, rightly or wrongly, the nominee presumably supported (for example, ANDREW JACKSON's initial nomination of ROGER BROOKE TANEY as Associate Justice; (4) "senatorial courtesy," which is closely linked to the consultative nominating process (for example, GROVER CLEVELAND's back-to-back unsuccessful nominations of William B. Hornblower and Wheeler H. Peckham); (5) a nominee's perceived "political unreliability" on the part of the political party in power (for example, ULYSSES S. GRANT's selection of Caleb Cushing); (6) the evident lack of qualification or limited ability of the candidate (for example, Nixon's "I'll show

the Senate" choice of Judge G. Harrold Carswell); (7) concerted, sustained opposition by interest and pressure groups (for example, the Hoover nomination of Parker and, most recently, Reagan's of Bork); and (8) the fear that the nominee would dramatically alter the Court's jurisprudential "line-up" (for example, the Bork nomination). Judge Bork's professional credentials were not in question; he lost overridingly because of his approach to constitutional law and CONSTITUTIONAL INTERPRETATION.

The appointments clause connotes a joint enterprise: informed by the Constitution's seminal provisions and providing for a SEPARATION OF POWERS and CHECKS AND BALANCES. The President selects; the Senate disposes. The Senate's role is second, but not secondary.

Arguably, Presidents' judicial appointments are their biggest "plums." Few if any other posts a President has the authority to fill possess the degree of influence, authority, and constitutionally built-in longevity that characterizes the judicial branch. But there are many other offices to be filled by presidential selection, including, by the language of Article II, section 2, paragraph two, "Ambassadors, other public Ministers and Consuls . . ., and all other Officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by Law. . . ." All such others are to be appointed "by and with the Advice and Consent of the Senate," but the Constitution adds an important caveat: "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

The huge number of federal employees—some 3,500,000 as of mid-1990, not counting the military—has required Congress to provide for appointments as constitutionally authorized in the above-quoted ultimate sentence of the appointment power. In addition to all federal judicial nominations, Congress has retained full "advice and consent" authority over top positions of the military and the diplomatic services; over CABINET and top subordinate cabinet-level selections (it has drawn a line above a certain salary level for other high departmental and agency heads); and over specifically law-designated officials, such as independent regulatory commisioners. However, congress has vested appointive authority over huge numbers of nominations in the President alone—for example, the bulk of that cast army of civil service employees and almost all of the members of the ARMED FORCES (whose letters of appointment or draft are headed, "Greetings"—the butt of many jokes—are signed by the president in his role of chief executive). Moreover, again in line with the above-noted authority. Congress has seen fit to utilize its authority to vest the power at issue in the "Courts of Law."

The latter power became a hotly debated issue when Congress, in the Ethics of Government Act of 1978, created an INDEPENDENT COUNSEL to investigate high-ranking officials in the executive branch. In accordance with the statute's provisions, the ATTORNEY GENERAL must request an independent counsel unless he or she "finds that there are no reasonable grounds to believe that further investigation or prosecution is warranted." The request for an independent counsel must be directed to a panel of three federal judges, who are authorized to appoint the counsel (also called a SPECIAL PROSECUTOR) and to delineate the counsel's JURISDICTION. The act, which provides for removal of a court-appointed counsel by the attorney general only "for cause," was challenged by the President on sundry constitutional grounds, including the doctrine of the separation of powers (the chief executive's duty to see that laws are "faithfully executed") and the presidential APPOINTING AND REMOVAL POWERS. The controversy reached the Supreme Court in its 1987–88 term after a three-member panel of the U.S. Courts of Appeals for the District of Columbia had declared the statute unconstitutional by a 2–1 vote. In a dramatic 1988 opinion by Chief Justice WILLIAM H. REHNQUIST, for a 7–1 majority in *Morrison v. Olson*, the high tribunal reversed the lower court, ruling that the provisions of the challenged law vesting appointment of independent counsels in the judiciary do not violate the appointments clause, that the powers exercised by the counsel do not violate the judicial article of the Constitution, and that the law does not violate the separation of powers principle by impermissibly interfering with the functions of the executive branch. In a lengthy stinging solo dissent, Justice ANTONIN SCALIA charged his brethren with a misreading and gross violation of the separation of powers.

Aspects of the appointment power will continue to be controversial. It is a joint enterprise, even if the presidency can usually count on having its way. That there are major exceptions, however, was tellingly demonstrated by the Senate's dramatic rejections of President Reagan's Supreme Court nominee Robert H. Bork in 1987 and that by President GEORGE BUSH of John Tower to be his Secretary of Defense in 1989. Even if it is exercised infrequently, the Senate's potential check on the presidential prerogative is indeed real.

HENRY J. ABRAHAM
(1992)

(SEE ALSO: *Appointment of Supreme Court Justices.*)

Bibliography

ABRAHAM, HENRY J. 1985 *Justices Presidents*, 3rd ed. New York: Oxford University Press.

FARBER, DANIEL A. and SHERRY, SUZANNA 1990 *A History of the American Constitution.* St. Paul, Minn.: West Publishing Co.
HARRIS, JOSEPH P. 1953 *The Advice and Consent of the Senate.* Berkeley: University of California Press.
SCHMIDHAUSER, JOHN R. 1979 *Judges and Justices.* Boston: Little, Brown.
SEGAL, JEFFREY 1987 Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics. *The Journal of Politics* 49:998–1015.
TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 1988 *Judicial Roulette.* New York: Priority Press.

## APPORTIONMENT

See: Reapportionment

## *APTHEKER v. SECRETARY OF STATE*
### 378 U.S. 500 (1959)

Two top leaders of the Communist party appealed the revocation of their passports under section 6 of the Subversive Activities Control Act of 1950.

Justice ARTHUR J. GOLDBERG, in a plurality opinion for a 6–3 Supreme Court, held that that section "too broadly and indiscriminately restrict[ed] the RIGHT TO TRAVEL" and therefore abridged the liberty protected by the Fifth Amendment. The section was overly broad on its face because it did not discriminate between active and inactive members of subversive groups or among the various possible purposes for foreign travel.

Justices HUGO L. BLACK and WILLIAM O. DOUGLAS, concurring, would have held the entire act unconstitutional.

DENNIS J. MAHONEY
(1986)

## *ARGERSINGER v. HAMLIN*
### 407 U.S. 25 (1972)

*Argersinger* culminated four decades of progression in RIGHT TO COUNSEL doctrine: from a DUE PROCESS requirement in CAPITAL PUNISHMENT cases, to application of the Sixth Amendment to the states in serious FELONIES, and finally, in *Argersinger*, to extension of the requirement to any case in which there is a sentence of imprisonment.

Argersinger, unrepresented by counsel, was convicted of a MISDEMEANOR and sentenced by a state court to ninety days in jail. The arguments in the Supreme Court were of an unusually practical rather than doctrinal nature. Much was made of the burden on state criminal justice systems that the extension of the right to counsel would cause. The state also argued that many misdemeanors, though carrying potential jail sentences, are exceedingly straightforward cases that a layperson could handle by him- or herself. Moreover, it was argued that people who can afford lawyers often do not hire them for such simple cases because the cost is not worth what a lawyer could accomplish. The Court rejected all these contentions and established imprisonment as a clear test for requiring the appointment of counsel.

Seven years later, in *Scott v. Illinois* (1979), the Court held that the appointment of counsel was not required for a trial when imprisonment was a possibility but was not actually imposed. The anomalous result is that a judge must predict before the trial whether he will impose imprisonment in order to know whether to appoint counsel.

BARBARA ALLEN BABCOCK
(1986)

## *ARIZONANS FOR OFFICIAL ENGLISH v. ARIZONA*

See: Mootness; "Official English" Laws

## *ARLINGTON HEIGHTS v. METROPOLITAN HOUSING DEVELOPMENT CORP.*
### 429 U.S. 252 (1977)

This decision confirmed in another context the previous term's holding in WASHINGTON V. DAVIS (1976) that discriminatory purpose must be shown to establish race-based violations of the EQUAL PROTECTION clause. The Supreme Court declined to strike down a village's refusal to rezone land to allow multiple-family dwellings despite the refusal's racially discriminatory adverse effects. Writing for the Court, Justice LEWIS F. POWELL elaborated on the nature of the showing that must be made to satisfy the purpose requirement announced in *Washington v. Davis.* A plaintiff need not prove that challenged action rested solely on racially discriminatory purposes. Instead, proof that a discriminatory purpose was a motivating factor would require the offending party to prove that it would have taken the challenged action even in the absence of a discriminatory purpose. Powell noted the types of evidence that might lead to a finding of discriminatory purpose: egregious discriminatory effects, the historical background of the governmental action, departures from normal procedure, legislative and administrative history, and, in some instances, testimony by the decision makers themselves.

THEODORE EISENBERG
(1986)

## ARMED FORCES

At the height of the Cold War, a doctor was drafted into the army; he was denied the commission usually afforded doctors because he refused to disclose whether he had been a member of any organization on the ATTORNEY GENERAL'S LIST of subversive organizations. Urging that he had a constitutional privilege to maintain the privacy of his associations, he sought a writ of HABEAS CORPUS in a federal court to compel the army either to discharge him or to award him a commission. The Supreme Court, in *Orloff v. Willoughby* (1953), first rejected his claim to a commission and then held that there was no right to JUDICIAL REVIEW "to revise duty orders as to one lawfully in the service." In discussing the latter point the Court remarked, almost as a throwaway line, "The military constitutes a specialized community governed by a separate discipline from that of the civilian."

The author of the *Orloff* opinion was Justice ROBERT H. JACKSON; one of his clerks that year, who would later become Chief Justice of the United States, was WILLIAM H. REHNQUIST. In PARKER V. LEVY (1974) and ROSTKER V. GOLDBERG (1981) Justice Rehnquist, writing for the Court, sought to make the "separate community" idea the foundation for a broad principle of deference—to military authorities and to Congress in military matters—that comes close to creating a "military exception" to the BILL OF RIGHTS.

*Parker* involved another drafted army doctor who was a bitter opponent of the VIETNAM WAR and who counseled enlisted men to refuse to go to Vietnam. He was convicted by a court-martial of "conduct unbecoming an officer" in violation of the Uniform Code of Military Justice (UCMJ). The court of appeals held this statutory language to be unconstitutionally vague in its application to speech, but the Supreme Court reversed. Parker's own speech was plainly beyond the pale, by any stretch of the FIRST AMENDMENT. The question was whether the VAGUENESS of the UCMJ entitled him to act, in effect, as a representative of officers not in court who might be deterred by the "conduct unbecoming" provision from engaging in speech that was constitutionally protected. Justice Rehnquist concluded that the answer was No; in applications of the UCMJ, the usual First Amendment standard of vagueness gave way to the looser standard for criminal laws regulating economic affairs. In discussing this issue he wrote at length on the theme of deference to the special needs of the military as a "separate community."

*Rostker* presented a quite different issue: whether Congress could constitutionally limit registration for the military draft to men, exempting women. Here too, Justice Rehnquist began by announcing an extreme form of deference—not to the judgment of military leadership or the President, both of whom had favored registering women as well as men, but to the judgment of Congress. Speaking of military affairs, Justice Rehnquist said, "perhaps in no other area has the Court accorded such deference to Congress." Furthermore, he said, courts have little competence in this area: "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive branches." The rest followed easily for Rehnquist: any future draft would be designed to produce combat troops; women were ineligible for combat; therefore, women and men were "not similarly situated" and need not be treated equally.

Both of these decisions have had influence beyond their immediate concerns. *Parker v. Levy* has been cited in support of the military's power to impose much more far-reaching restrictions on First Amendment claims. Examples are *Greer v. Spock* (1976), holding that the streets of Fort Dix, although open to the public, could constitutionally be closed to a political speaker, and *Brown v. Glines* (1980), upholding an Air Force regulation requiring a service member to get a base commander's approval before circulating a petition on the base. *Rostker v. Goldberg* is routinely cited in political arguments supporting the services' continuing segregation of women to noncombat positions—to their severe disadvantage in the competition for promotion to high leadership positions. Furthermore, *Rostker* has been cited by some lower federal courts in support of service regulations purporting to bar the enlistment or commissioning of lesbians and gay men.

The Constitution explicitly recognizes the existence of a separate system of MILITARY JUSTICE. And no one contends that a private has a First Amendment right to debate with the lieutenant as to whether the platoon should assault an enemy gun emplacement. Plainly, the requirements of military discipline and the military mission demand significant attenuations of constitutional rights that would be protected in analogous civilian contexts. As either Justice Jackson or his clerk wrote in *Orloff*, "judges are not given the task of running the Army." But arguments for judicial abdication lose much of their force when the question is one of equal access to service membership for all citizens. When the issue is the SEGREGATION of the armed forces, the idea of a military exception to the Constitution is deeply offensive to the principle of equal CITIZENSHIP.

When the military services practice discrimination based on race or sex or SEXUAL ORIENTATION, they do not merely reflect patterns in the larger society; they reinforce those patterns in ways both instrumental and expressive. In the United States as in Europe, effective citizenship

and eligibility for military service have gone hand in hand. Today the services are major educational institutions, serving as gateways to civilian employment and offering other educational benefits to veterans. Members and former members of the services are seen as having a special authority to speak on some of the most vital questions of national public policy. The services have historically performed a vital function in integrating into American life the members of diverse cultures. (In WORLD WAR I, for example, some twenty percent of draftees were foreign-born.) In short, the services not only shape the distribution of material and political advantages in our society; they are carriers of the flag, playing a special symbolic role in defining the nation.

Although President HARRY S. TRUMAN ordered the armed services (along with the federal civil service) to end racial segregation in 1948, the effective DESEGREGATION of the army was not accomplished until the KOREAN WAR—and then at the instance of battlefield commanders who recognized that their mission was jeopardized by the severe costs of segregation. Until that time, the army's leadership had resisted racial integration on two main grounds. First, they believed, as General George C. Marshall had put it in 1941, that "the level of intelligence and occupational skill of the Negro population is considerably below that of the white." Second, they believed that integration would be harmful to discipline, to morale, and to the mutual trust service members must have if they are to perform their missions successfully. In this view, blacks would make poor combat troops, and so whites would have little confidence in them. Korea proved otherwise; Vietnam proved otherwise. Today thirty percent of the army's enlisted personnel are black, and the army's General Colin Powell chairs the Joint Chiefs of Staff.

Still, the legacy of extreme judicial deference remains—attached not only to military judgments but to congressional judgments about military affairs, even when those judgments plainly are political, or sociological, or both. When the subject is discrimination, this sort of deference has no more justification than did judicial deference to the World War II orders that removed Japanese Americans from their West Coast homes and sent them to camps in the desert. Those orders, like today's discriminations against women and gays in the services, were advertised as a military necessity; the "military" judgment was summed up in the statement of General John DeWitt, who supervised the army's early administration of the program: "A Jap's a Jap."

Today the services have undertaken a massive educational program aimed at reducing racial and ethnic tensions. The myths of white supremacy have been discarded in a segment of American society that is crucial to the definition of equal citizenship. If and when the myths of masculinity are stripped away from the facts of service life and the services' missions in the 1990s, perhaps both Congress and the courts will recognize their responsibilities to end the services' continuing patterns of segregation by gender and sexual orientation. Until then, members of Congress and judges can ponder the comment of Justice HUGO L. BLACK, dissenting in *Orloff v. Willoughby:* "This whole episode appears to me to be one . . . to which Americans in a calmer future are not likely to point with much pride."

KENNETH L. KARST
(1992)

(SEE ALSO: *Sexual Orientation and the Armed Forces.*)

Bibliography

DALFIUME, RICHARD M. 1969 *Desegregation of the Armed Forces: Fighting on Two Fronts, 1939–1953.* Columbia: University of Missouri Press.

HIRSCHHORN, JAMES A. 1984 The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights. *North Carolina Law Review* 62:177–254.

KARST, KENNETH L. 1991 The Pursuit of Manhood and the Desegregation of the Armed Forces. *UCLA Law Review* 38: 499–581.

KORNBLUM, LORI S. 1984 Women Warriors in a Men's World: The Combat Exclusion. *Journal of Law and Inequality* 2:351–445.

STIEHM, JUDITH HICKS 1989 *Arms and the Enlisted Woman.* Philadelphia: Temple University Press.

ZILLMAN, DONALD N. and IMWINKELRIED, EDWARD J. 1976 Constitutional Rights and Military Necessity: Reflections on the Society Apart. *Notre Dame Lawyer* 51:396–436.

## ARMED FORCES AND SEXUAL ORIENTATION

See: Sexual Orientation and the Armed Forces

## *ARNETT v. KENNEDY*
416 U.S. 134 (1974)

A fragmented Supreme Court held, 6–3, that a federal civil service employee had no PROCEDURAL DUE PROCESS right to a full hearing before being dismissed. Justice WILLIAM H. REHNQUIST, for three Justices, concluded that because the governing statute had provided for removal of an employee to "promote the efficiency of the service," the employee's "property" interest was conditioned by this limitation. Thus due process required no predismissal hearing. The other six Justices rejected this view, concluding that the Constitution itself defined the protection re-

quired, once the guarantee of procedural due process attached. However, three of the six found no right to a predismissal hearing in the protection defined by the Constitution. The dissenters, led by Justice WILLIAM J. BRENNAN, argued that GOLDBERG V. KELLY (1970) demanded a predismissal hearing, and commented that Justice Rehnquist's view would revive the "right-privilege" distinction that *Goldberg* had rejected. In BISHOP V. WOOD (1976) the Rehnquist position came to command a majority of the Court.

KENNETH L. KARST
(1986)

## ARNOLD, THURMAN
(1891–1969)

Law professor, assistant attorney general, and federal judge, Thurman Arnold of Wyoming was a vigorous champion of both CIVIL LIBERTIES and ANTITRUST regulation. In 1930, when Arnold joined the Yale Law School faculty, which included WILLIAM O. DOUGLAS and WALTON HAMILTON, he had already developed a social and psychological approach to law. He had an extraordinary commitment to the concept of FAIR TRIAL in which he saw ritual significance, and, in *The Symbols of Government* (1935), Arnold described law as a mode of symbolic thinking that conditioned behavior. A witty and sarcastic writer, he described the interplay between CORPORATIONS and antitrust law in *The Folklore of Capitalism* (1937). The following year President FRANKLIN D. ROOSEVELT chose him to head the Antitrust Division of the Justice Department. Arnold was a zealous enforcer of antitrust legislation; he launched over 200 major investigations and saw his budget and personnel quadruple before his departure in 1943 to become a federal judge. Naturally unsuited for judicial office, he resigned within two years to enter private practice where ABE FORTAS soon joined him. Arnold welcomed controversial issues and represented defendants in loyalty cases of the late 1940s and the McCarthy era. Arnold was a spirited libertarian, and his career reflected his belief in the need to erase traditional intellectual boundaries and integrate disciplines and approaches.

DAVID GORDON
(1986)

Bibliography

KEARNY, EDWARD N. 1970 *Thurman Arnold, Social Critic.* Albuquerque: University of New Mexico Press.

## ARREST

The constitutional law of arrest governs every occasion on which a government officer interferes with an individual's freedom, from full-scale custodial arrests at one end of the spectrum to momentary detentions at the other. Its essential principle is that a court, not a police officer or other executive official, shall ultimately decide whether a particular interference with the liberty of an individual is justified. The court may make this judgment either before an arrest, when the police seek a judicial warrant authorizing it, or shortly after an arrest without a warrant, in a hearing held expressly for that purpose. The law of arrest gives practical meaning to the ideal of the liberty of the individual, by defining the circumstances in which, and the degree to which, that liberty may be curtailed by the police or other officers of the government; it is thus a basic part of what we mean by the RULE OF LAW in the United States.

The principal constitutional standard governing arrest is the FOURTH AMENDMENT. This amendment is one article of the original BILL OF RIGHTS, which was held in BARRON V. BALTIMORE (1833) to apply only to the federal government. But in MAPP V. OHIO (1961) the Fourth Amendment was held to be among those provisions of the Bill of Rights that are "incorporated" in the FOURTEENTH AMENDMENT and is thus applicable to arrests by state as well as federal officers. (See INCORPORATION DOCTRINE.) Even without such a holding, of course, the Fourteenth Amendment, which regulates state interference with individual liberty, would have required the development of a body of law governing state arrests. The law so made might have been no less protective of the individual than the law actually made under the Fourth Amendment. As things are, however, the "unreasonableness" standard of the Fourth Amendment has been the basis of the constitutional law governing arrests by both federal and state officers.

What seizures are "unreasonable"? One obvious possibility is that seizures of the person should be held subject to the warrant clause, as searches are, and should accordingly be found "unreasonable" unless a proper warrant has been obtained or, by reason of emergency, excused. For many years the court flirted with such a rule, as in *Trupiano v. United States* (1948) and TERRY V. OHIO (1968), but it never flatly required a warrant for arrests, and in *United States v. Watson* (1976) it rejected that rule at least for FELONIES. This decision rested partly upon a historical English COMMON LAW rule excusing the warrant for felonies, but despite the similarities of language the analogy is not precise. In English law the term "felony" was reserved for offenses punishable by death and forfeiture, which give rise to a high probability of an attempt to flee; with us "felony" is usually defined by statute as an offense for which the possible punishment exceeds one year's imprisonment. The other basis for *Watson* was a combination of convenience and probability: because a warrant will in fact be excused on emergency grounds in a large class of cases, it is wise to dispense with the requirement entirely, and

thus avoid the costs—improper arrests without warrants, delays to obtain unnecessary warrants—necessarily associated with close cases. The Court left open the possibility that arrest warrants may be required for MISDEMEANORS, at least (as at common law) for those not involving a BREACH OF THE PEACE nor committed in the presence of the arresting officer. This question is at present unresolved.

Somewhat more stable as a standard of reasonableness has been the substantive requirement that an arrest must be based upon PROBABLE CAUSE. This is not a term of scientific precision. It means essentially that an officer must demonstrate to a magistrate, before or after the arrest, that he has sufficient reason to believe in the guilt of the suspect to justify his arrest. Although probable cause is not susceptible of precise definition, the cases decided by the Court have gradually given it some content, especially where, as in SPINELLI V. UNITED STATES (1969), an officer's judgment rests on information received from another. In such cases the basic rule is that the officer must give the magistrate reason to trust the honesty of his informant, and reveal the grounds upon which the informant's charge rests—for example, that the informant saw a crime committed, or the suspect told him he had done it.

Probable cause is of course required only when there has been a "seizure" to which the Fourth Amendment speaks. The courts have found that term difficult to define as well, and difficult in ways that make the meaning of "probable cause" itself more uncertain. The world presents a wide range of police interferences with individual liberty, from minor detentions to full-scale incarceration, and it is widely agreed that some of these intrusions, at every level on the scale, are reasonable and appropriate and that others—again at every level—are inappropriate. Were every interference with liberty regarded as a "seizure" requiring demonstration of "probable cause," the Court would thus face a serious delemma: to hold minor intrusions invalid without a showing of traditional probable cause would outlaw an obviously important and generally accepted method of police work; but to permit them on probable cause grounds would water down the probable cause standard, greatly reducing the justification required to support a full-scale arrest. On the other hand, to hold that such intrusions were not "seizures" would seem to say that they are not regulated by the Fourth Amendment at all—nor under present doctrine, by the Fourteenth—and could therefore be inflicted upon a citizen at an officer's whim. In *Terry v. Ohio* the Court tried to deal with this problem by regarding some "seizures" (less than full-scale arrests) as not requiring "probable cause" but as nonetheless subject to the "reasonableness" requirement of the Fourth Amendment. *Terry* involved the detention of persons an officer reasonably suspected to be planning an armed robbery, during which he asked them their identity and frisked them for weapons. The Court took great pains to make clear that it was not establishing a general right to detain on less than probable cause, and that the "reasonableness" of the seizure validated there was closely tied to the protective nature of the officer's measures and to his realistic apprehension of danger. The Court intimated that no detention beyond that necessarily involved in the frisk would be valid. But cases since *Terry* have undercut that position deeply. In *Adams v. Williams* (1972), for example, the Court explicitly talked about a right to detain on suspicion, and in *United States v. Mendenhall* (1980) a plurality of the Court held that there is no seizure when officers merely approach a person and ask him questions, even if they intend to arrest him, unless he can establish "objective grounds" upon which a reasonable person in his position would have believed he was not free to go. On the other hand, *Dunaway v. New York* (1979) expressly refused to adopt the view that increasingly lengthy detentions were permissible on increasingly good justification (which would effectively eliminate the idea that probable cause is required before "arrest," except in the technical sense of full-custody arrest); and *Delaware v. Prouse* (1979) held that a person driving a car may be stopped upon less than probable cause, but only if there is reasonable suspicion of a violation of law.

The precedents come to this: some confrontations between officers and citizens are not seizures at all; others are seizures that must be justified by a "reasonableness" requirement; still others are "arrests" for which probable cause is required. But there are no clear lines between the categories, and the Supreme Court has not given adequate attention to the ways in which a "seizure" can grow into an "arrest," thus defeating the basic aim of the probable cause requirement.

JAMES BOYD WHITE
(1986)

Bibliography

HALE, MATTHEW (1685) 1972 *The Pleas of the Crown.* London: Professional Books.

LAFAVE, WAYNE R. 1978 *Search and Seizure: A Treatise on the Fourth Amendment.* Mineola, N.Y.: Foundation Press.

## ARREST WARRANT

Under the FOURTH AMENDMENT, arrest warrants, like SEARCH WARRANTS, may be issued only upon PROBABLE CAUSE, supported by oath or affirmation, and particularly describing the person to be seized. Much of the consti-

tutional doctrine governing search warrants is therefore applicable by analogy to arrest warrants.

At English COMMON LAW, a law enforcement officer was authorized to make a warrantless arrest when he had reasonable grounds to believe that a FELONY had been committed and that the person to be arrested was the perpetrator. A warrantless misdemeanor arrest, however, was permitted only when the misdemeanor was committed in the officer's presence. Consistent with this rule, Congress and almost all states have permitted warrantless arrests in public places since the beginning of the nation.

In view of this history, the Supreme Court held in *United States v. Watson* (1976) that the Fourth Amendment does not require a law enforcement officer to obtain a warrant for a felony arrest made in a public place even though there may be ample opportunity to obtain the warrant. Although recognizing that the preference for a neutral and detached magistrate applies to the issuance of arrest warrants, the Court reasoned that this judicial preference was insufficient to justify a departure from the common law at the time of the adoption of the Fourth Amendment and from the judgment of Congress and the states.

It may be argued that the preference for a warrant for searches should apply with equal, if not greater, force to arrests because of the significant infringement of personal liberty involved. Unless history is to be regarded as irrelevant in constitutional interpretation, however, the result in *Watson* is correct in view of the unambiguous history relating to warrantless arrests in public places. Moreover, the Court in *Gerstein v. Pugh* (1975) recognized that after a warrantless arrest a timely judicial determination of probable cause is a prerequisite to detention.

The Court has distinguished between arrests made in public places and those made in private homes. Because of, among other things, the historical importance attached to one's privacy at home and the uncertainty in the common law over warrantless arrests in private homes, a law enforcement officer may not enter a person's home to make an arrest without first obtaining a warrant. The distinction has been made in such cases as PAYTON V. NEW YORK (1980) and STEAGALD V. UNITED STATES (1981).

Probable cause in the context of arrest warrants means probable cause to believe that a crime was committed and that the person to be arrested committed it. Unlike a search warrant, an arrest warrant may be issued on the basis of a grand jury INDICTMENT, provided that the GRAND JURY is "properly constituted" and the indictment is "fair upon its face." The Court's willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to that grand jury's relationship to the courts and its historical role in protecting individuals from unjust prosecution. An INFORMATION filed by a prosecutor, by contrast, will not justify the issuance of an arrest warrant, for the prosecutor's role is inconsistent with that of a neutral and detached magistrate.

The particularity requirement, expressly applied to arrest warrants by the warrant clause, mandates that the warrant contain sufficient information to identify the person to be arrested. It is intended to preclude the use of a general or "dragnet" arrest warrant.

If a person is illegally arrested without a warrant, such an arrest will not prevent the person from being tried or invalidate his conviction. Any EVIDENCE obtained as a result of the arrest, however, including statements made by the person arrested, may be excluded under the FRUIT OF THE POISONOUS TREE DOCTRINE as applied in WONG SUN V. UNITED STATES (1963).

JAMES R. ASPERGER
(1986)

Bibliography

LAFAVE, WAYNE R. 1978 *Search and Seizure: A Treatise on the Fourth Amendment.* Vol. 2:215–260. St. Paul, Minn.: West Publishing Co.

## ARTHUR, CHESTER A.
(1830–1886)

A New York lawyer and politician, Chester Alan Arthur was nominated for vice-president in 1880 to placate the ULYSSES S. GRANT or "stalwart" branch of the Republican party. In September 1881 Arthur became President when President JAMES GARFIELD was assassinated. Although his previous political activities had revolved around the New York customs house and the distribution of Republican patronage, as President Arthur supported civil service reform and opposed unnecessary federal expenditures. He was denied the Republican nomination in 1884 by a combination of reformers, who did not trust him, and by party members opposed to any reforms.

PAUL FINKELMAN
(1986)

Bibliography

DUENECKE, JUSTIN D. 1981 *The Presidencies of James A. Garfield and Chester A. Arthur.* Lawrence: Regents Press of Kansas.

## ARTICLE III

See: Judicial Power

# ARTICLE III AND PUBLIC CHOICE THEORY

Article III of the Constitution limits federal JUDICIAL POWER to deciding actual CASES AND CONTROVERSIES. The Supreme Court has construed these terms to require that federal court claims be ripe and not moot, that litigants who seek relief have STANDING, and that the cases neither call for ADVISORY OPINIONS nor present POLITICAL QUESTIONS. Beginning in the early 1970s, with the BURGER COURT, and continuing throughout the REHNQUIST COURT, the standing barrier has proved the most significant—and elusive—of these JUSTICIABILITY barriers.

Under the guise of standing, the Court has prevented litigants from raising the claims of others, claims that are diffuse, and claims that present an attenuated causal linkage between allegedly unconstitutional government action and harm to plaintiff. The Court has fashioned three constitutional prerequisites to Article III standing, all drawn from the COMMON LAW of tort: injury in fact, causation, and redressability. In doing so, the Court has drawn criticism for applying the concept of injury in a seemingly inconsistent manner. In REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE (1978), for example, the Court conferred standing upon a medical school applicant who challenged a state AFFIRMATIVE ACTION program by characterizing his claimed injury as the opportunity to compete, even though he might have been rejected had the program not been in place. In contrast, by focusing on the attenuated causal linkage between the law challenged and the desired outcome, the Court in ALLEN V. WRIGHT (1984) denied standing to the parents of African American public-school children who challenged an Internal Revenue Service tax policy, which, they alleged, subsidized "white flight." Had the *Bakke* Court embraced the *Allen* Court's causal linkage analysis, it could have denied standing, and had the *Allen* Court embraced the *Bakke* Court's opportunity-injury analysis, it could have conferred standing.

Public choice theory (and specifically social choice) provides a basis for modeling standing and the closely related DOCTRINE of STARE DECISIS. As the following cases illustrate, under certain conditions, the preferences of Supreme Court Justices are prone to the anomaly that public choice theorists call "cycling." In *Washington v. Seattle School District No. 1* (1982), the Court struck down a Washington statewide ballot INITIATIVE limiting the circumstances under which local school boards could order racially integrative SCHOOL BUSING. In CRAWFORD V. BOARD OF EDUCATION (1982), decided on the same day, the Court upheld a California constitutional amendment limiting the circumstances under which state courts could order racially integrative busing. Despite these divided outcomes, five Justices, who split on the results of the two cases, formed an overlapping majority that viewed the cases as indistinguishable. If we assume strict adherence to PRECEDENT, when judicial preferences cycle as in these cases, the order—or path—in which cases are decided becomes critical to the substantive evolution of legal doctrine. Thus, had these two cases been decided a year apart, rather than on the same day, the outcomes in both would have depended on which case arose first, assuming that the Justices vote sincerely, meaning that they place precedent ahead of doctrinal preferences. While stare decisis thus renders legal doctrine "path dependent," that consequence is inevitable in a regime seeking stable doctrine. The greater problem, however, is the incentive among interest group litigants to try to manipulate the path of cases to influence doctrinal evolution.

The standing ground rules ameliorate the incentives to manipulate case orders as the vehicle to exert a disproportionate influence over doctrine, which is created by stare decisis. Each of the standing rules, and most notably the proscription on a third-party and diffuse-harm standing, can be translated into a presumptive requirement that the litigant be directly affected by a set of facts beyond his or her control as a precondition to litigating in federal court. *Bakke* and *Allen* are best understood as cases in which the Justices intuited whether factors commonly associated with path manipulation, or with traditional dispute resolution, predominated. While the standing ground rules do not prevent path dependency, an inevitable byproduct of stare decisis, they do ground the critical path of case decisions in fortuitous historical facts presumptively beyond the control of the litigants themselves. In an historical period when the Court's members were most prone to possessing cyclical preferences, the Court transformed its standing doctrine in a manner that substantially raised the cost to INTEREST GROUPS of attempting to manipulate the order of case decisions in an effort to exert disproportionate influence on the evolution of constitutional doctrine.

MAXWELL L. STEARNS
(2000)

Bibliography

FLETCHER, WILLIAM A. 1988 The Structure of Standing. *Yale Law Journal* 98:221–291.

STEARNS, MAXWELL L. 1995 Standing and Social Choice: Historical Evidence. *Univeristy of Pennsylvania Law Review* 144:309–462.

——— 1995 Standing Back from the Forest: Justiciability and Social Choice. *California Law Review* 83:1309–1413.

——— 2000 *Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making.* Ann Arbor: University of Michigan Press.

WINTER, STEVEN L. 1988 The Metaphor of Standing and the

Problem of Self Governance. *Stanford Law Review* 40:1371–1516.

## ARTICLE III COURTS

See: Constitutional Court

## ARTICLE V CONVENTIONS CLAUSE

Article V provides for two methods of proposing amendments to the Constitution. Congress may propose amendments by a two-thirds vote of both houses or "on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments." Any amendments proposed by a CONSTITUTIONAL CONVENTION, like those proposed by Congress, become part of the Constitution upon RATIFICATION by three-fourths of the states. No such convention has been called since the adoption of the Constitution. In the 1980s, however, more than thirty state legislatures applied to Congress for the calling of a "limited" convention restricted to proposing a BALANCED BUDGET AMENDMENT to the Constitution. Proponents claimed to be only a few states short of the thirty-four applications necessary to trigger such a constitutional convention. Other states have in recent years submitted applications for constitutional conventions limited to other single subjects, including ABORTION, SCHOOL PRAYER, and term limitations for members of Congress.

The issue of the validity of these applications has been a subject of sharp debate. Do the state legislatures have the power to control the agenda of a constitutional convention by limiting the convention to considering only one precise amendment or one defined subject? If the state legislatures do not have the authority to limit the convention to a single subject or a particular amendment, should state applications that contemplate a "limited" convention be treated as valid application for a more general convention? Some light is shed on these questions by the debates over the AMENDING PROCESS at the CONSTITUTIONAL CONVENTION OF 1787.

The drafters of the Constitution were generally in agreement that some provision should be made for future amendments and that Congress should be empowered to propose amendments. There was also agreement that Congress should not be the only body empowered to propose amendments. As GEORGE MASON of Virginia noted, exclusive congressional authority to propose amendments would pose a problem if Congress itself were in need of CONSTITUTIONAL REFORM. One alternative—allowing state legislatures to propose amendments—was rejected after ALEXANDER HAMILTON warned that "[t]he State Legislatures will not apply for alterations but with a view to increase their own powers." If state legislatures had the power to propose amendments that would then be returned to those same state legislatures for ratification, those legislatures could enhance their power at the expense of the national government without the active participation of any national forum.

The constitutional convention device created by Article V provided an institution in addition to Congress empowered to propose constitutional amendments. Such a convention would be, like Congress, a deliberative body capable of assessing, from a national perspective, the need for constitutional change and drafting proposals for submission to the states for ratification. At the same time it would *not* be Congress and therefore could not pose the threat of legislative self-interest blocking needed reform of Congress itself.

The essential characteristic of the constitutional convention is that it is free of the control of the existing institutions of government. The convention mode of proposing amendments was seen as avoiding both the problem of congressional obstruction of needed amendments and the problem posed by state legislative self-interest. To be sure, such a convention can be held only upon the petition of state legislatures; once properly convened, however, such a convention, in the view of many scholars, may properly determine its own agenda and submit for ratification the amendments it deems appropriate.

The most contentious question concerning constitutional conventions under Article V is whether state requests for a convention are valid applications if they presume to limit the convention to a single amendment specified in the application. Many of the applications submitted in the 1980s, for example, called for a convention for "the sole and exclusive purpose" of proposing an amendment requiring a balanced federal budget.

Some scholars and members of Congress argued that such "limited" applications were valid and that if a sufficient number of legislatures applied in this fashion Congress should call a "limited" convention. Some of those who consider the applications valid would have Congress limit the convention to the exact wording proposed by the state legislatures; others would have Congress broaden the subject matter to the "federal budget," for example, and limit the convention to this more general subject.

There is a substantial argument, however, that applications for a "limited" convention are simply invalid. The debates of the Framers suggest that any convention was to be free of controlling limits imposed either by Congress or by the state legislatures. Although the applying state legislatures are free, of course, to suggest amendments they desire a convention to consider, the convention itself

would have the final authority to determine what kinds of amendments to propose. If the state legislatures were to possess, in addition to the right to summon a convention into existence and to ratify any proposed amendments, the added power to control the convention's deliberations by specifying the amendment to be proposed, state legislatures would be given more authority over constitutional revision than the Framers contemplated.

The argument that state legislatures lack the power to control a convention's proposals does not preclude an applying state legislature from suggesting the amendment it desires the convention to consider or even from submitting a suggested draft, as long as the application is premised on an understanding that the convention has final control over the decision of what amendments to propose. Many state legislatures that applied in the 1980s made it clear that they opposed the calling of a convention if the convention could not be limited, and some explicitly deemed their applications "null and void" unless "the convention is limited to the subject matter of this Resolution." If it is the case that a "Convention for proposing Amendments" has the final authority under the Constitution to determine what amendments to propose, then state resolutions requesting a convention only if the convention is restricted by constraints that cannot constitutionally be imposed are not valid.

WALTER DELLINGER
(1992)

(SEE ALSO: *Amendment Process (Outside Article V).*)

Bibliography

CAPLAN, RUSSELL L. 1988 *Constitutional Brinksmanship: Amending the Constitution by National Convention.* New York: Oxford University Press.

DELLINGER, WALTER 1979 The Recurring Question of the "Limited" Constitutional Convention. *Yale Law Journal* 88: 1623–1640.

——— 1984 The Legitimacy of Constitutional Change: Rethinking the Amendment Process. *Harvard Law Review* 97: 386–432.

GUNTHER, GERALD 1979 The Convention Method of Amending the United States Constitution. *Georgia Law Review* 14: 1–25.

VAN ALSTYNE, WILLIAM W. 1979 The Limited Constitutional Convention—The Recurring Answer. *Duke Law Journal* 1979:985–998.

# ARTICLES OF CONFEDERATION

On March 1, 1781, Congress proclaimed ratification of the constitution for a confederation named "the United States of America." People celebrated with fireworks and toasts, and a Philadelphia newspaper predicted that the day would forever be memorialized "in the annals of America. . . ." Another newspaper gave thanks because the states had at last made perpetual a union begun by the necessities of war.

The war was only three months old when BENJAMIN FRANKLIN proposed the first continental constitution. He called it "Articles of Confederation and Perpetual Union," a name that stuck. Because the war was then being fought to achieve a reconciliation with England on American terms, Congress would not even consider Franklin's plan. But a year later, when Congress appointed a committee to frame a DECLARATION OF INDEPENDENCE, it also appointed a committee, consisting of one member from each state, to prepare "the form of a confederation to be entered into by these colonies." JOHN DICKINSON of Pennsylvania, whom the committee entrusted to draft the document, borrowed heavily from Franklin's plan and seems not to have been influenced by other committee members. One complained that Dickinson's plan involved "the Idea of destroying all Provincial Distinctions and making every thing of the most minute kind bend to what they call the good of the whole."

Dickinson was a "nationalist" in the sense that he believed that a strong central government was needed to build a union that could effectively manage its own affairs and compete with other nations. Congress, which was directing the war, became the hub of the Confederation. It was a unicameral house in which each state delegation had a single vote, making the states equal, and Dickinson proposed no change. Franklin, by contrast, had recommended that REPRESENTATION in Congress be apportioned on the basis of population, with each delegate having one vote. Dickinson carried over Franklin's generous allocation of powers to Congress, except for a power over "general commerce." Neither Franklin nor Dickinson recommended a general tax power. Congress requisitioned monies from each state for a common treasury, leaving each state to raise its share by taxation. Congress had exclusive powers over war and peace, armies and navies, foreign affairs, the decision of disputes between states, admiralty and prize courts, the coinage of money and its value, borrowing money on the credit of the United States, Indian affairs, the western boundaries of the states claiming lands to the Pacific, the acquisition of new territory and the creation of new states, standards of weights and measures, and the post office. Dickinson also recommended a "council of state" or permanent executive agency that would enforce congressional measures and administer financial, diplomatic, and military matters. Dickinson proposed many limitations on state power, mainly to secure effective control over matters delegated to Congress. The states could not, for example, levy IMPOSTS or

duties that violated treaties of the United States. Even the sovereign power of the states over their internal concerns was limited by the qualification in Article III, the crux of the Dickinson draft: "Each colony [Dickinson always referred to "colony" and not "state"] shall retain and enjoy as much of its present Laws, Rights and Customs, as it may think fit, and reserves to itself the sole and exclusive Regulation and Government of its internal police, in all matters that shall not interfere with the Articles of Confederation." Clearly Dickinson envisioned a confederation in which the states did not master the central government.

Nationalists who supported the Dickinson draft in Congress argued, as did JOHN ADAMS, that the purpose of the confederation was to meld the states into "one common mass. We shall no longer retain our separate individuality" on matters delegated to Congress. The four New England states had the same relation to Congress that "four counties bore to a single state," Adams declared. The states could build roads and enact poor laws but "they have no right to touch upon continental subjects." JAMES WILSON, another centralist, contended that the Congress should represent all the people, not the states, because "As to those matters which are referred to Congress, we are not so many states, we are one large state." Few Congressmen were nationalists, however, and few nationalists were consistent. Congressmen from Virginia, the largest state, rejected state equality in favor of proportional representation in Congress with each delegate voting; but because Virginia claimed a western boundary on the Pacific, it rejected the nationalist contention that Congress had succeeded to British SOVEREIGNTY with respect to the West and should govern it for the benefit of all. Congressmen from Maryland, a small state without western claims, adamantly held to that nationalist position but argued for state equality—one state, one vote—on the issue of representation. How requisitions should be determined also provoked dissension based on little principle other than self-interest.

The disputes over representation, western lands, and the basis for requisitions deadlocked the Congress in 1776. The next year, however, state supremacists who feared centralization won a series of victories that decisively altered the character of the confederation proposed by Dickinson and championed by Franklin, Adams, and Wilson. Dickinson's Article III was replaced by a declaration that "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." Thus, colonial control over internal police became state sovereignty over all reserved powers, and the central government received only "expressly delegated" powers rather than implied powers to control even internal police involving matters of continental concern. State supremacists also restricted the power of Congress to make commercial treaties: no treaty could prohibit imports or exports, and no treaty could prevent a state from imposing retaliatory imposts. The revised Articles also scrapped Dickinson's executive branch, accepted the state sovereignty principle that each state cast an equal vote, modified Congress's judicial authority to decide all intercolonial disputes, and denied the power of Congress to fix the western boundaries of states.

Maryland, however, refused to accept the decision on the boundary issue. Although Congress completed the Articles in November 1777, unanimous ratification by state legislatures came hard. By the beginning of 1779, however, Maryland stood alone, the only state that had not ratified, and Maryland was unmovable. As unanimity was necessary, Maryland had the advantage as well as a great cause, the creation of a national domain. In 1780 New York and Connecticut ceded their western lands to the United States. Congress then adopted a report recommending the cession of western claims by other states, and in October 1780, Congress yielded to Maryland by resolving that ceded lands should be disposed of for the common benefit of the United States and be formed into "republican states, which shall become members of the federal union" on equal terms with the original states. Virginia's acceptance in January 1781 was decisive. Maryland ratified.

When Congress had submitted the Articles for ratification its accompanying letter accurately stated that its plan was the best possible under the circumstances; combining "in one general system" the conflicting interests of "a continent divided into so many sovereign . . . communities" was a "difficulty." The Articles were the product of the AMERICAN REVOLUTION and constituted an extraordinary achievement. Congress had framed the first written constitution that established a federal system of government in which the sovereign powers were distributed between the central and local governments. Those powers that unquestionably belonged to Parliament were delegated to the United States. Under the Articles Congress possessed neither tax nor commerce powers, the two powers that Americans in the final stages of the controversy with Britain refused to recognize in Parliament. Americans were fighting largely because a central government claimed those powers, which Americans demanded for their provincial legislatures. Given the widespread identification of liberty with local autonomy, the commitment to limited government, and the hostility to centralization, the states yielded as much as could be expected at the time. Because Congress represented the states and the people of the states, to deny Congress the power to tax was not logical, but the opposition to centralized powers of taxation was so fierce that even nationalists supported the requisition

system. "It takes time," as JOHN JAY remarked, "to make sovereigns of subjects."

The sovereignty claimed by the states existed—within a limited sphere of authority. The Articles made the United States sovereign, too, within its sphere of authority: it possessed "sole and exclusive" power over fundamental matters such as foreign affairs, war and peace, western lands, and Indian affairs. The reservation of some sovereign powers in the states meant the surrender of other sovereign powers to the central government. Americans believed that sovereignty was divisible and divided it. In part, FEDERALISM is a system of divided sovereign powers. The Articles had many defects, the greatest of which was that the United States acted on the states rather than the people and had no way of making the states or anyone but soldiers obey. The failure to create executive and judicial branches, the requirement for unanimity for amendments, and the refusal to concede to Congress what had been denied to Parliament resulted in the eventual breakdown of the Articles. They were, nevertheless, a necessary stage in the evolution of the Constitution of 1787 and contained many provisions that were carried over into that document. (See CONSTITUTIONAL HISTORY, 1776–1789.)

LEONARD W. LEVY
(1986)

Bibliography

HENDERSON, H. JAMES 1974 *Party Politics in the Continental Congress.* New York: McGraw-Hill.

JENSEN, MERRILL 1963 (1940) *Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution.* Madison: University of Wisconsin Press.

RAKOVE, JACK N. 1979 *The Beginnings of National Politics: An Interpretive History of the Continental Congress.* New York: Knopf.

## ARTICLES OF IMPEACHMENT OF ANDREW JOHNSON (1868)

Eleven articles of IMPEACHMENT of President ANDREW JOHNSON were voted by the HOUSE OF REPRESENTATIVES in March 1868. The impeachment was largely a product of partisan dissatisfaction with Johnson's approach to RECONSTRUCTION of the South.

Nine of the articles concerned Johnson's attempt to remove Secretary of War EDWIN M. STANTON, supposedly in defiance of the TENURE OF OFFICE ACT of 1867—although, by its letter, the act did not apply to Stanton, who had been appointed by ABRAHAM LINCOLN. The charges ranged from simple violation of the act to conspiracy to seize the property of the War Department and to gain control over its expenditures. However far-fetched, each of the nine articles alleged a specific illegal or criminal act.

The last two articles were overtly political and reflected a different notion of the concept of impeachable offense. Based on accounts of Johnson's speeches, the articles charged that he ridiculed and abused Congress and had questioned the constitutional legitimacy of the Thirty-Ninth Congress.

The impeachment was tried to the SENATE which, in May 1868, failed by one vote to give a two-thirds vote for conviction of any of the articles, and so acquitted Johnson.

DENNIS J. MAHONEY
(1986)

Bibliography

BENEDICT, MICHAEL LES 1973 *The Impeachment and Trial of Andrew Johnson.* New York: W. W. Norton.

## ARTICLES OF IMPEACHMENT OF RICHARD M. NIXON (1974)

Three articles of IMPEACHMENT of President RICHARD M. NIXON were voted by the Committee on the Judiciary of the HOUSE OF REPRESENTATIVES between July 27 and July 30, 1974. The vote on the articles followed an extended investigation of the so-called WATERGATE affair, the President's knowledge of an involvement in that affair, and a prolonged controversy concerning what constitutes an "impeachable offense." All three articles, as voted, had reference to Watergate, and all charged breach of the oath of office.

The first article charged Nixon with having "prevented, obstructed, and impeded the administration of justice" by withholding evidence and participating in the "cover-up" of the Watergate affair. The nine specifications included making false statements to investigators, approving of others giving false testimony, condoning the payment of "hush money" to potential witnesses, and interfering with the conduct of the investigation.

The second article charged Nixon with misusing the powers of his office and with "repeated conduct violating the constitutional rights of citizens." Five specifications included misusing the Internal Revenue Service, Federal Bureau of Investigation, and Central Intelligence Agency; attempting to prejudice the right to a FAIR TRIAL (of one Daniel Ellsberg); and failing to act against subordinates who engaged in illegal activities.

The third article charged Nixon with disobeying subpoenas issued by the committee itself in the course of its investigation. This article was approved only narrowly

since some committee members argued that a good faith assertion of EXECUTIVE PRIVILEGE was not a constitutionally impeachable offense. Two other articles were defeated in the committee vote.

The articles of impeachment never came to a vote in the full House of Representatives. On August 9, 1974, facing the virtual certainty of impeachment and of conviction by the SENATE, Richard M. Nixon became the first president ever to resign.

DENNIS J. MAHONEY
(1986)

Bibliography

UNITED STATES HOUSE OF REPRESENTATIVES, COMMITTEE ON THE JUDICIARY 1974 *Impeachment of Richard Nixon, President of the United States.* Washington, D.C.: Government Printing Office.

## ARTICLES OF IMPEACHMENT OF WILLIAM J. CLINTON
(1998)

On December 19, 1998, the U.S. HOUSE OF REPRESENTATIVES voted two articles of IMPEACHMENT against President WILLIAM J. CLINTON. The House charged Clinton with perjury and obstruction of justice arising from the President's concealment of an intimate relationship with a White House intern, Monica Lewinsky.

The first article, approved by a vote of 228–205, accused Clinton of violating "his constitutional oath faithfully to execute the office of President" by "willfully [providing] perjurious, false and misleading testimony" to a federal GRAND JURY about his relationship with Lewinsky and his efforts to cover it up. The grand jury had been empaneled by the INDEPENDENT COUNSEL, Kenneth Starr, who as part of his wide-ranging (and, to many, partisan) investigation of Clinton was looking into allegations that Clinton lied and suborned perjury in a civil sexual harassment lawsuit.

The second article, approved by a 221–212 margin, charged Clinton with obstruction of justice in the civil lawsuit and in the grand jury proceedings. Among its seven specifications, the article accused Clinton of encouraging witnesses (Lewinsky and Betty Curry, the President's secretary) to commit perjury, securing job assistance for a witness (Lewinsky) to corruptly influence her testimony, and allowing his attorney (Robert Bennett) to make false statements to a federal judge.

Two additional articles were approved by the House Judiciary Committee but rejected by the full House.

The impeachment trial in the U.S. SENATE lasted five weeks. Neither article of impeachment garnered the two-thirds SUPERMAJORITY required to remove the President from office.

ADAM WINKLER
(2000)

## *ARVER v. UNITED STATES*

See: Selective Draft Law Cases

## *ASH, UNITED STATES v.*
413 U.S. 300 (1973)

The RIGHT TO COUNSEL did not apply when the prosecutor showed eyewitnesses to a crime an array of photographs, including that of the indicted accused. The photographic showing was merely a part of the prosecutor's trial preparation (that is, done in order to refresh recollection) and neither the defendant's nor his lawyer's presence was constitutionally required.

BARBARA ALLEN BABCOCK
(1986)

## *ASHTON v. CAMERON COUNTY WATER IMPROVEMENT DISTRICT*
298 U.S. 513 (1936)

This is one of the several cases of the period whose decision gave the impression that the United States was constitutionally incapable of combating the Great Depression. Over 2,000 governmental units ranging from big cities to small school districts had defaulted, and the CONTRACT CLAUSE prevented the states from relieving their subdivisions. Congress, responding to pressure from states and creditors, passed the Municipal Bankruptcy Act of 1934, authorizing state subdivisions to apply to federal bankruptcy courts to get their debts scaled down. In accordance with the statute, a Texas water district, supported by state law, applied for a bankruptcy plan that would make possible a final settlement of fifty cents on the dollar, the payment financed by a federal loan. The federal bankruptcy court controlled the bankruptcy plan, which could not be enforced unless approved by creditors holding at least two-thirds of the debt, as required by the statute.

The Supreme Court held the Municipal Bankruptcy Act to be an unconstitutional exercise of Congress's delegated BANKRUPTCY POWER. For a five-member majority, Justice JAMES C. MCREYNOLDS declared that that power was subject to state sovereignty, which cannot be surrendered or impaired by legislation. Congress had violated the TENTH AMENDMENT by infringing on state control over the

fiscal affairs of state subdivisions. That the act required state consent, here eagerly given, was irrelevant to the Court. Thus the Court protected the states and even creditors against their will. Justice BENJAMIN N. CARDOZO, for the dissenters, characterizing the majority opinion as "divorced from the realities of life," argued that Congress had framed the statute with sedulous regard for state sovereignty and the structure of the federal system. The Court retreated in *United States v. Bekins* (1938).

LEONARD W. LEVY
(1986)

## *ASHWANDER v. TENNESSEE VALLEY AUTHORITY*
297 U.S. 288 (1936)

*Ashwander* was part of a protracted litigation over the constitutionality of the Tennessee Valley Authority (TVA), a government development corporation established by the NEW DEAL. (See CONSTITUTIONAL HISTORY, 1933–1945; TENNESSEE VALLEY AUTHORITY ACT.) TVA was organized to develop the economy of a river valley by improving navigation and flood control and especially by generating cheap electric power for homes, farms, and industry. In *Ashwander* preferred shareholders in an existing power company sued in federal court to enjoin the company and TVA from carrying out a contract under which TVA would purchase much of the company's property and equipment, and TVA would allocate areas for the sale of power. The plaintiffs attacked the whole TVA program as exceeding the scope of congressional power. The district court granted the INJUNCTION, but the court of appeals reversed, upholding the contract. The Supreme Court, 8–1, affirmed the court of appeals.

Chief Justice CHARLES EVANS HUGHES, for the majority, concluded that Wilson Dam, where TVA was generating power, had been built in 1916 to provide power for national defense needs, including the operation of nitrate plants used in the making of munitions, and to improve navigation—both objectives concededly within the powers of Congress. If excess electricity were generated at the dam, Hughes said, Congress had the power to sell it, as it might sell any other property owned by the United States. Justice JAMES C. MCREYNOLDS, dissenting alone on the constitutional merits, pointed out the transparency of the majority's doctrinal clothing: TVA was in the power-generating business for its own sake, not as an adjunct to some military program long since abandoned.

Justice LOUIS D. BRANDEIS, dissenting in part, agreed with the majority's views on congressional power but argued that the plaintiffs' complaint should have been dismissed for want of STANDING. As preferred shareholders, they could show no injury to themselves from the contract. Brandeis went on, in *Ashwander*'s most famous passages, to discuss a series of "rules" under which the Supreme Court had "avoided passing upon a large part of all the constitutional questions pressed upon it for decision." Some of the "rules" flow from Article III of the Constitution, including the standing requirement Brandeis sought to effectuate in *Ashwander* itself. Others, however, express policies of preference for nonconstitutional grounds for decision, for formulating the narrowest possible constitutional grounds, for construing federal statutes to avoid constitutional questions, and the like.

Some modern commentators have read the Brandeis opinion in *Ashwander* to stand for a broad policy of judicial discretion to avoid deciding cases that might place the Court in awkward political positions. Brandeis himself, a stickler for principled application of the Court's jurisdictional requirements, surely had no such generalized discretion in mind. Nonetheless, some of his successors have found it convenient to cite his comments in *Ashwander* in support of far less principled avoidance techniques. (See POE V. ULLMAN.)

KENNETH L. KARST
(1986)

## ASIAN AMERICANS AND THE CONSTITUTION

Asians first arrived in the United States in substantial numbers in the mid-nineteenth century. Initially tolerated, these Chinese laborers were soon vilified, especially when the economy soured. By 1882, Congress enacted the CHINESE EXCLUSION ACT, the first federal race-based restriction on IMMIGRATION. Frustrated with what were viewed as loopholes, Congress passed the Scott Act in 1888, which retroactively denied reentry of tens of thousands of Chinese, even those who held official certificates guaranteeing their right to return. In CHAE CHAN PING V. UNITED STATES (1889) (the Chinese Exclusion Case), the Supreme Court explained that the DUE PROCESS rights of these Chinese were not violated. As an incident to SOVEREIGNTY, Congress could defend America against an "Oriental invasion" by revoking at will whatever residency permission previously granted.

In 1892, Congress took another drastic step by passing the Geary Act, which created a registration requirement for all Chinese laborers. Those found without proper papers could be summarily deported unless they could prove their legal residence through "at least one credible white witness." In *Fong Yue Ting v. United States* (1893), the Court upheld this act and emphasized that Congress's inherent power to exclude ALIENS—made clear in *Chae*

*Chan Ping*—also included the power to deport. In these and two other cases involving Asians, *Nishimura Ekiu v. United States* (1892) and *Yamataya v. Fisher* (1903), the Court established Congress's plenary power over immigration, the exercise of which remains subject to cursory JUDICIAL REVIEW.

Exclusion of Asian Americans reached beyond the physical border to the political border of CITIZENSHIP. The first naturalization statute, passed in 1790, restricted naturalization to "free white persons," and was amended after the CIVIL WAR to include persons of African descent. In *Ozawa v. United States* (1922), a person of Japanese ancestry argued that he should be eligible for citizenship because "white" was a catch-all category excluding only blacks and AMERICAN INDIANS. The Court rejected this argument and explained that white meant Caucasian, an equivalence "so well established" that it could not be disturbed.

The next year, an Asian Indian argued that under prevailing ethnological theories, he was in fact Caucasian and thus eligible for citizenship. In *United States v. Thind* (1923), the Court backed away from the equivalence it had drawn just one year before. Instead of interpreting "white" as Caucasian (considered to be a technical term of art), the Court now opted to interpret "white" in its popular sense. On this view, "white" meant people who looked Northwest European, who were "bone of their bone and flesh of their flesh." Thus, "white" would not include "Hindus" who would retain "indefinitely the clear evidence of their ancestry."

The one bright spot in the Court's immigration jurisprudence for Asian Americans is WONG KIM ARK V. UNITED STATES (1898). There, the Court first recognized that the FOURTEENTH AMENDMENT granted citizenship to all persons born on American soil—even to the unpopular Chinese.

The prejudices that fueled physical and political exclusion also burdened Asian Americans' daily lives. In the 1880s, for example, San Francisco manipulated facially neutral ordinances to close Chinese laundries while keeping White laundries open. Surprisingly, in YICK WO V. HOPKINS (1886), the Court held that this biased exercise of discretion violated the Fourteenth Amendment's EQUAL PROTECTION clause. This victory, however, was exceptional. Consider, for instance, the initial upholding of the alien land laws. Threatened by Japanese competition in farming, white agricultural interests persuaded Western state governments to forbid "aliens ineligible for citizenship" (the code phrase for Asians) from owning land. In *Terrace v. Thompson* (1923) and *Porterfield v. Webb* (1923), the Court concluded that these laws did not amount to RACIAL DISCRIMINATION and that states could limit PROPERTY ownership to citizens. Eventually, after WORLD WAR II and the related internment of Japanese Americans, the Court began to express doubts about the continuing constitutionality of alien land laws in OYAMA V. CALIFORNIA (1948) and of related laws barring "aliens ineligible for citizenship" from certain lines of work (such as fishing) in TAKAHASHI V. FISH AND GAME COMMISSION (1948). Following the Court's cues, various state supreme courts and legislatures removed these laws in the 1950s and 1960s.

As another example, consider how Asian Americans were often subject to educational SEGREGATION. When challenged on equal protection grounds, the Court held in GONG LUM V. RICE (1927) that a Chinese American girl could be forced to attend the "colored" school. On the authority of PLESSY V. FERGUSON (1896), separate was deemed equal for Asians as it was for blacks.

The Constitution's most tragic failure of Asian Americans occurred just one-half century ago with the internment of approximately 120,000 persons of Japanese descent. Over two-thirds were American citizens, mostly young children born on American soil. Blinded by prejudice, America could not distinguish between the enemy Japan and Americans who happened to be of Japanese descent.

The internment plan, which comprised curfew, evacuation, and detention orders, was challenged in the JAPANESE AMERICAN CASES. In *Hirabayashi v. United States* (1943) and *Yasui v. United States* (1943), the Court addressed only the narrow question of curfews and concluded that "[r]easonably prudent men" had "ample ground" and "[s]ubstantial basis" to believe that Japanese Americans might "aid a threatened enemy invasion." In KOREMATSU V. UNITED STATES (1943), the Court again refused to address the constitutionality of the total internment plan and addressed only the evacuation orders. The Court introduced what would evolve into the SUSPECT CLASSIFICATIONS doctrine of equal protection law, that "all legal restrictions which curtail the civil rights of any single racial group are immediately suspect." Despite this suggestion of heightened scrutiny, the Court deferred to the government's claims of military necessity. The majority insisted that Korematsu was evacuated not "because of hostility to him or his race . . . but because we are at war with the Japanese Empire." Perhaps the Court's misstep was caused by the government's suppression of exculpatory evidence, uncovered four decades later. On the other hand, even without such evidence, Justice FRANK MURPHY knew enough to call the MAJORITY OPINION a fall into "the ugly abyss of racism."

Only in the final case, *Endo v. United States* (1943), did the Court confront the issue of indefinite detention of concededly loyal Americans of Japanese descent. But even here, the Court avoided striking down such detention as unconstitutional. Instead, it decided the case on statutory grounds and declared that the War Relocation Authority,

which managed the internment camps, had gone beyond its delegated powers. In other words, indefinite detention was the work of rogue bureaucrats, not President FRANKLIN D. ROOSEVELT or the Congress. In sum, the Constitution has been an unreliable ally in the Asian American struggle for CIVIL RIGHTS.

JERRY KANG
(2000)

Bibliography

KIM, HYUNG-CHAN, ed. 1992 *Asian Americans and the Supreme Court.* New York: Greenwood Press.

MCCLAIN, CHARLES, ed. 1994 *Asian Americans and the Law.* New York: Garland Publishing.

## ASIAN IMMIGRANTS AND CONSTITUTIONAL HISTORY

Most Americans are aware that Asian immigrants have been the victims of racial prejudice and the objects of racially discriminatory laws repeatedly throughout our history. Less widely appreciated is the fact that they have been vigorous in challenging these laws in the courts and that these cases have contributed in important ways to the shaping of the American constitutional order.

Large numbers of Chinese immigrated to the Pacific coastal states, mainly California, during the second half of the nineteenth century. Their presence soon aroused intense racial antagonism, which in turn led to the enactment of numerous state laws and local ordinances designed to make their lives difficult and discourage them from staying. The Chinese tested many of these laws in state or federal court and were successful in having many of them overturned, either on the grounds that they conflicted with the Constitution, with federal CIVIL RIGHTS legislation, or with federal treaties.

In *Ho Ah Kow v. Nunan* (1879), Supreme Court Justice STEPHEN J. FIELD, sitting as a CIRCUIT COURT judge, nullified a San Francisco ordinance requiring all prisoners in the county jail to have their heads shaved to an inch of the scalp. The ordinance was aimed at humiliating Chinese prisoners who wore their hair in a long braided queue. Field ruled that the ordinance violated the Civil Rights Act of 1870, which forbade differential punishments based on race, and the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT, which, he declared, the Chinese, though ALIENS, were entitled to invoke. In the landmark case of YICK WO V. HOPKINS (1886), a San Francisco ordinance had required anyone operating a laundry in a wooden building to obtain the approval of the Board of Supervisors. Some two hundred Chinese laundry proprietors applied for permission but all were refused. Many continued to operate and were arrested, while some eighty Caucasians who did not have permits continued to operate laundries in wooden buildings with impunity. Two arrested Chinese laundrymen, with the support of the Chinese Laundrymen's League, brought separate actions in state and federal court attacking the constitutionality of the ordinance. The Supreme Court ruled that the ordinance as applied contravened the Constitution. The ordinance was suspect, the Court said, because it vested uncontrolled discretion in the supervisors. Such discretion was subject to abuse and here was an example of such abuse. From the evidence one could not help but conclude that the ordinance, though neutral in wording, was being applied in a racially discriminatory manner ("with an evil eye and an unequal hand") and this violated the equal protection clause. It was the first instance in which the Court affirmed that resident aliens, as well as citizens, were protected by the Fourteenth Amendment. Its provisions, the Court declared, applied "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."

In 1882 Congress passed the first of several CHINESE EXCLUSION ACTS. These acts suspended the coming of Chinese laborers into the country and regulated the rights of laborers already here. The Chinese mounted several legal challenges to these acts that reached the Supreme Court. Among the most noteworthy are CHAE CHAN PING V. UNITED STATES (the Chinese Exclusion Case) (1889) and *Fong Yue Ting v. United States* (1893).

In *Chae Chan Ping*, the Chinese plaintiffs challenged a feature of the 1888 act that had the effect of denying entry into the country of Chinese whose right to enter had been guaranteed by an 1880 treaty with China. But the Court held that the United States had plenary and virtually unconstrained power over IMMIGRATION, that Congress could abrogate the provisions of a treaty by a later law, and that any rights created under the treaty could similarly be cancelled by later LEGISLATION. In *Fong Yue Ting*, the Chinese plaintiffs successfully attacked many features of the 1892 exclusion act, including a section requiring all resident Chinese laborers to apply for and carry identity cards. The Court held that just as the federal government had unconstrained power to exclude foreigners seeking to enter the country it had "absolute" and "unqualified" power to control the residence of those already here. The federal government could set up a system of identification and registration and provide the most summary procedures for deportation. (In subsequent cases, some brought by Chinese immigrants, the Court has backed off somewhat from this extreme position.)

The first Chinese Exclusion Act forbade any state or federal court from granting NATURALIZATION to any person of Chinese ancestry. It remained unclear whether children

born in the United States to Chinese parents were citizens under the Fourteenth Amendment. According to section 1 of the amendment "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." In *United States v. Wong Kim Ark* (1896), the Court, relying heavily on COMMON LAW understandings of CITIZENSHIP, concluded that, save for the children of diplomats, children of whatever ethnicity born in the United States were American citizens.

By 1900 the Chinese population on the West Coast of the United States had diminished substantially, and the Chinese were ceasing to be the flash point for hostility. Attention shifted to another Asian immigrant group, the Japanese, whose numbers were increasing.

Many Japanese gained a foothold in farming. In response California and other Western states passed the Alien Land Laws, limiting the right to own or lease agricultural land to citizens and aliens eligible for citizenship. Japanese would-be purchasers and Caucasian would-be sellers challenged these laws, but in a pair of decisions handed down in 1923—*Terrace v. Thompson* and *Porterfield v. Webb*—the Court validated them all. It held that the states, absent a treaty, could legislate against ownership of real PROPERTY by foreigners and that they could differentiate between classes of foreigners in determining eligibility for ownership rights without violating the equal protection clause.

The most important twentieth-century cases involving Asians, and some of the most important cases in the history of American constitutional law, arose out of the forcible relocation and internment of over 100,000 Japanese Americans during WORLD WAR II. In the wake of the declaration of war on Japan military authorities on the West Coast, with the approval of President FRANKLIN D. ROOSEVELT and Congress, issued a series of orders, among other things, imposing a curfew on persons of Japanese ancestry, forbidding them to leave certain designated areas, and ordering them into assembly centers for removal to detention camps. The legitimacy of the orders was attacked in a series of cases brought by American citizens of Japanese ancestry. These tested, as perhaps never before or since, the power of the national government to curtail individual CIVIL LIBERTIES.

In *Hirabayashi v. United States* (1943), the Court upheld the curfew as a valid exercise of the federal government's broad discretion under the WAR POWER. In the exercise of that power, the government could infringe radically on civil liberties during wartime and could even do so on a racial basis so long as it could offer a rational justification for the decision. While acknowledging that racial distinctions were by their nature odious to a free people, the Court emphasized that the judiciary was not competent to second-guess the military's judgment.

In KOREMATSU V. UNITED STATES (1944), the Court affirmed the conviction of a Japanese American for remaining in a designated area against military orders. Korematsu argued that the order was part of an overall plan of forcible removal to detention camps, but the MAJORITY OPINION of Justice HUGO L. BLACK, over three dissents, refused to address that issue. (Justice FRANK MURPHY, noting the racial stereotyping that ran through the government's justification of its actions, characterized them as falling into the "ugly abyss of racism.") Significantly, the Court did say that racially discriminatory laws were "suspect," subject to "the most rigid [judicial] scrutiny," and could be justified only by "pressing public necessity." This statement implied clearly that the federal government was bound by the equal protection principle even if not, literally, by the Fourteenth Amendment equal protection clause itself. (It may be doubted whether the Court applied its own test in the *Korematsu* case.) In *Ex parte Endo* (1944), decided the same day, the Court, while again refusing to rule on the validity of the use of detention camps, held that the military could not continue to detain a Japanese American woman whose loyalty it had conceded.

Two cases involving the rights of Asian citizens or residents decided in the immediate post–World War II period deserve discussion. In *Oyama v. California* (1948), the Court revisited the Alien Land Laws. A Japanese national living in California had paid the purchase price for agricultural land and put title in the name of his U.S. citizen son. Under California law this transaction created a presumption that the purchase had been consummated with the intention of evading the Alien Land Law, and the state Attorney General began proceedings to forfeit the land. The Court ruled that the provision violated the equal protection rights of the citizen son. It refused, however, to invalidate the law itself.

A few months later the Court struck down another piece of anti-Japanese legislation. In TAKAHASHI V. FISH AND GAME COMMISSION (1948), the Court nullified a California law denying commercial fishing licenses to resident aliens ineligible for citizenship. (By this time virtually all other Asians had been made eligible for naturalization; thus, the law in practice affected only Japanese fishermen.) Aliens lawfully present in a state had the right to equal legal privileges with all citizens, the Court held. These legal privileges included the right to work for a living, and this right trumped the state's asserted interest in conserving fish within its territorial waters for the benefit of its citizens.

Cases brought by nineteenth-century Chinese immigrants helped establish several important and enduring Fourteenth Amendment principles, among them: (1) that persons born in the United States of alien parents are citizens of the United States, (2) that persons resident in the United States, whether citizens or not, are entitled to DUE

PROCESS OF LAW and the equal protection of the laws, making them immune from state-sponsored discrimination at least in most areas of life, and (3) that laws equal on their face can violate the equal protection clause if administered in a discriminatory manner. The Chinese Exclusion Act cases, as noted above, are the fundament on which the modern constitutional law of immigration was built.

The postwar and wartime JAPANESE AMERICAN CASES are significant milestones in the evolution of the modern constitutional order. *Oyama* and *Takahashi* extended Fourteenth Amendment equal protection analysis into areas of state regulation previously thought free from such scrutiny and are harbingers of the robust presence the equal protection clause was beginning to assume in constitutional law. The Japanese American curfew and relocation cases, on their face so inhospitable to the nondiscrimination principle, contributed in their own ironic way to the growth of that principle. Both *Hirabayashi* and *Korematsu* recognized that racial distinctions were odious. And in *Korematsu*, Justice Black, even while approving one of the most racially invidious classification schemes in our history, articulated a test that would eventually prove to be fatal when applied to racial classification schemes, whether sanctioned by the state or federal government.

CHARLES J. MCCLAIN
(2000)

(SEE ALSO: *Asian Americans and the Constitution; Racial Discrimination.*)

Bibliography

DANIELS, ROGER 1977 *The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion.* Berkeley, Calif.: University of California Press.

IRONS, PETER 1983 *Justice at War.* New York: Oxford University Press.

KIM, HYUNG-CHAN, ed. 1992 *Asian Americans and the Supreme Court: A Documentary History.* New York: Greenwood Press.

MCCLAIN, CHARLES J. 1994 *In Search of Equality: the Chinese Struggle Against Discrimination in Nineteenth-Century America.* Berkeley: University of California Press.

———, ed. 1994 *Asian Americans and the Law: Historical and Contemporary Perspectives*, 4 vols. New York: Garland Publishing.

SALYER, LUCY E. 1995 *Law Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law.* Chapel Hill: University of North Carolina Press.

## ASSISTANCE, WRIT OF

The term "writ of assistance" is applied to several distinct types of legal documents. Of greatest significance to American constitutional history was the writ of assistance issued to customs inspectors by the English Court of the Exchequer authorizing the search of all houses suspected of containing contraband. Such writs were first used no later than 1621, and their form was codified in 1662. They are still used regularly in Britain and in many nations of the British Commonwealth.

In colonial America, writs of assistance were used as GENERAL SEARCH WARRANTS and were authorized by a statute of the British Parliament. In a famous Massachusetts case, PAXTON'S CASE (1761), JAMES OTIS argued that the statute authorizing writs of assistance should be held invalid because it was contrary to MAGNA CARTA and the COMMON LAW; but his argument was rejected. The colonial experience with writs of assistance led to the requirement in the FOURTH AMENDMENT that SEARCH WARRANTS particularly describe the place to be searched and the object of the search.

WILLIAM J. CUDDIHY
(1986)

Bibliography

SMITH, M. H. 1978 *The Writs of Assistance Case.* Berkeley: University of California Press.

## *ASSOCIATED PRESS CO. v. NLRB*

See: Wagner Act Cases

## ASSOCIATION, THE

The Continental Association was created by the First Continental Congress on October 18, 1774. It was "a non-importation, non-consumption, and non-exportation agreement" undertaken to obtain redress of American grievances against the British Crown and Parliament. The Articles of Association were signed on October 20 by the representatives of twelve colonies, solemnly binding themselves and their constituents to its terms.

The articles listed the most pressing American grievances (TAXATION WITHOUT REPRESENTATION, extension of admiralty court jurisdiction, denial of TRIAL BY JURY in tax cases), enumerated the measures to be taken (cessation of commercial ties to Britain), prescribed the penalty for noncompliance (a total breaking off of communication with offenders), and established the machinery for enforcement (through committees of correspondence).

The Association was a major step toward the creation of a federal union of American states. It was the first prescriptive act of a national Congress to be binding directly on individuals, and the efforts at enforcement of or com-

pliance with its terms certainly contributed to the formation of a national identity. With but little exaggeration the historian RICHARD HILDRETH wrote: "The signature of the Association may be considered as the commencement of the American union."

DENNIS J. MAHONEY
(1986)

## *ATASCADERO STATE HOSPITAL v. SCANLON*
473 U.S. 234 (1985)

The opinions in this case made clear that PENNHURST STATE SCHOOL AND HOSPITAL V. HALDERMAN (1984) was a watershed in the Supreme Court's modern treatment of the ELEVENTH AMENDMENT. By the same 5–4 division as in *Pennhurst*, the Court here held that an individual could not obtain relief against a state agency in federal court for harm caused by the agency's violation of the federal REHABILITATION ACT of 1973. In an opinion by Justice LEWIS F. POWELL, the majority concluded that California had not waived its SOVEREIGN IMMUNITY under that amendment, and that Congress, in the act, had not lifted the state's immunity to suit by individual plaintiffs. The latter point carried the Court's restrictive reading of the Eleventh Amendment a step beyond even the *Pennhurst* opinion: a congressional purpose to lift state immunity, the majority said, cannot be found by implication from a statute's purposes, but only in an explicit statement in the statute itself.

The four dissenters, speaking primarily through Justice WILLIAM J. BRENNAN, made a vigorous and broad-ranging attack on the majority's recent approach to Eleventh Amendment issues. Justice Brennan, as before, accused the majority of misconceiving the purposes of the Framers in writing Article III, misreading the text and the purposes of the Eleventh Amendment, and generally twisting the fundamental premises of American FEDERALISM to "put the federal judiciary in the unseemly position of exempting the states from compliance with laws that bind every other legal actor in our nation."

It seems clear that the shock of *Pennhurst* persuaded some of the *Scanlon* dissenters to join Justice Brennan's campaign for a fundamental reorientation of Eleventh Amendment jurisprudence. Four Justices agreed that the recent majority's doctrine "intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct."

KENNETH L. KARST
(1986)

## ATOMIC ENERGY ACT
68 Stat 919 (1954)

The initial Atomic Energy Act (1946) had created an independent five-person Atomic Energy Commission (AEC) to exercise complete civilian control over the production of atomic energy and associated research programs. By the early 1950s, criticism of the statute mounted because it limited the role of private enterprise in the atomic energy field, overemphasized military phases, and created unwarranted secrecy, precluding the dissemination of technical information to other nations.

The 1954 Amendment addressed these concerns. Its overriding policy objective, strongly supported by President DWIGHT D. EISENHOWER, was to facilitate the commercial development and exploitation of nuclear power by private industry. The key provisions were: private ownership of nuclear facilities; private use of fissionable material (though the AEC still retained title, until revision in 1964); liberalized patenting rights; industrial access to needed technical information; and a program for international cooperation in developing peaceful applications of nuclear energy, particularly nuclear power. The principal focus of the act was to make the nuclear industry economically independent and internally competitive.

Regulatory provisions of the 1954 act authorized the AEC to license facilities and operators producing or using radioactive materials. This licensing process, subject to judicial review by the terms of the act, was to protect the public health, safety, life, and property. Little guidance or standards for licensure was provided, and the question of safety hazards from nuclear technology was not considered. Thus the AEC's administration of the act was slowly hammered out through the regulatory process; that situation continued after the Commission was folded into the Department of Energy in 1974.

PAUL L. MURPHY
(1986)

Bibliography

ROLPH, ELIZABETH S. 1979 *Nuclear Power and the Public Safety*. Lexington, Mass.: Lexington Books.

## ATTAINDER, BILL OF

See: Bill of Attainder

## ATTAINDER OF TREASON

Upon conviction of and sentencing for TREASON, a person is attainted: he loses all claim to the protection of the law.

Under English law attainder of treason worked "corruption of blood," depriving the traitor's descendants of the right to inherit property from or through him. The second clause of Article III, section 2, of the Constitution virtually abolishes attainder of treason. Because of that clause, ABRAHAM LINCOLN insisted that the forfeiture of ex-Confederates' property under the CONFISCATION ACT of 1862 be only for the lifetime of the owner. Construing the act and the constitutional provision in *Wallach v. Van Riswick* (1872), the Supreme Court held that the limitation on attainder of treason was solely for the benefit of the heirs.

DENNIS J. MAHONEY
(1986)

## ATTORNEY GENERAL AND DEPARTMENT OF JUSTICE

The job of attorney general for the United States, as it was then called, was created by the JUDICIARY ACT OF 1789. The last sentence of that remarkable statute called for the appointment (presumably by the President) of "a meet person, learned in the law, . . . whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and [who] shall receive such compensation for his services as shall by law be provided." The first attorney general was EDMUND RANDOLPH, and his salary was $1,500. He had no office or staff provided by his government.

There have been seventy-three attorneys general between Randolph's tenure and that of William French Smith (1981–1985), counting JOHN J. CRITTENDEN twice. From the beginning they have been members of the President's cabinet—fourth in rank after the secretaries of state, treasury, and war (now defense). Since 1870 the attorney general has also been head of the Department of Justice. For the most part, the attorneys general have been citizens of outstanding achievement and public service, although not necessarily of extraordinary professional and intellectual ability; the latter qualities have traditionally been associated with the SOLICITOR GENERAL. Nine attorneys general subsequently sat on the Supreme Court of the United States, two as Chief Justice (ROGER B. TANEY, 1831–1833, and HARLAN F. STONE, 1924–1925); three were nominated to that bench but never confirmed; one was confirmed but never took his seat (EDWIN M. STANTON, 1860–1861); and at least two turned down nominations to the Court (Charles Lee, 1795–1801, as Chief Justice, and LEVI LINCOLN, 1801–1805). Only three attorneys general have had their careers seriously eroded by personal and professional misconduct (Harry M. Daugherty, 1921–1924; John N. Mitchell, 1969–1972; and Richard G. Kleindienst, 1972–1974). Of these, Daugherty was acquitted of charges of attempting to defraud the United States in the Teapot Dome scandal, Mitchell served a prison term for a conspiracy to obstruct justice in connection with the WATERGATE affair, and Kleindienst entered a plea bargain of guilty to a MISDEMEANOR involving his veracity in congressional testimony.

The Department of Justice grew with government after 1870, but at an increasingly accelerated rate, expanding enormously in the 1970s and early 1980s. The budget of the Department for fiscal year 1984 was over three billion dollars; it had increased by almost fifty percent since the beginning of 1981. In addition to the attorney general, top officials now include one deputy attorney general, five deputy associate attorneys general, one associate attorney general, five deputy associate attorneys general, the solicitor general, ten assistant attorneys general, and ninety-four United States attorneys (with coordinate United States marshals), all appointed by the President and all bearing responsibility of some sort in the litigation and advice-giving functions of the Department. These officers are backed by the vast investigative resources of the FEDERAL BUREAU OF INVESTIGATION (FBI). In addition, the Department runs the Immigration and Naturalization Service, the Federal Bureau of Prisons, the Drug Enforcement Agency, and various research and public policy arms.

Public perception of the department as a major instrument of public policy, with a significant effect on the quality of American society, started roughly with the JOHN F. KENNEDY administration in the 1960s, when ROBERT F. KENNEDY (1961–1964) was appointed attorney general by his brother. Before that, the department mostly functioned as a professional law office charged with enforcing the few federal criminal statutes that existed, representing the government in other litigation, and giving advice to the President, especially on questions requiring construction of the Constitution. There had been sporadic periods, however, during which the department temporarily emerged as an important arm of federal government.

The department was established by Congress primarily as the instrument of government to work with the FREEDMEN'S BUREAU in implementing the CIVIL RIGHTS statutes that accompanied the passage of the Civil War amendments. The first attorneys general to run the Department—Amos T. Akerman (1870–1872) and George Henry Williams (1872–1875)—were accordingly deeply engaged in the temporary and unsuccessful efforts then to protect the ideal of racial equality through law. Charles J. Bonaparte (1906–1909), both under President THEODORE ROOSEVELT and in his professional life after that, was also active

in the cause of racial justice, using in part the technique of AMICUS CURIAE briefs. Bonaparte also actively enforced the SHERMAN ANTITRUST ACT of 1890, following the traditions of his immediate predecessors, PHILANDER C. KNOX (1901–1904) and WILLIAM H. MOODY (1904–1906). On the darker side, A. MITCHELL PALMER (1919–1921) brought the department into public controversy in the stunning PALMER RAIDS of 1919, in which more than 5,000 persons were taken into custody, their names apparently culled from lists of over 60,000 put together by the agency that became the FBI. No federal criminal charges were lodged against any of them, proposals for federal laws against peacetime SEDITION having failed to pass Congress, and the affair remains a moment of disgrace in the department's history.

The inescapable intertwining of law enforcement priorities and public policy has caused debate over the qualifications that attorneys general should meet. On the one hand, there is the tradition of the even-handed, objective, nonpolitical rule of law, implemented by an impartial Department of Justice. The department's own slogan exemplifies this strand of its work: "The United States wins its case whenever justice is done one of its citizens in the courts." Yet it is not possible to run the department without making choices that have wide public impact; not surprisingly, those choices reflect the political goals of the President. Since the mid-1950s the department's political role has been especially visible in civil rights matters, but it has been marked in antitrust policy, for example, since the passage of the Sherman Act of 1890. Even the work of the Lands Division, which is now also responsible for laws affecting ENVIRONMENTAL REGULATION and the use of natural resources, has strong political effects. The Criminal Division has devoted major energies to the control of organized crime as the result of new policy initiatives of the Kennedy administration in the early 1960s. The FBI, since the death of J. EDGAR HOOVER, has changed not only its direction—away from a concentration on perceived threats to internal security, for one part, and automobile thefts, for another—but also its techniques and training programs, by the initiation of elaborate undercover investigations called "scams."

In the mid-1970s, White House manipulation of the department during the Watergate scandal led Senator Sam J. Ervin of North Carolina seriously to examine, in a series of hearings, the possibility of separating the Department of Justice from presidential control. There were substantial constitutional objections to his plan, stemming from the undoubted constitutional power of the President to run the executive branch with people of his own choosing, at least in policymaking positions. The proposed legislation failed, partly for that reason, and partly because of principled opposition from many lawyers and former government officials who believed it not only inevitable but also appropriate that law enforcement priorities and policies be part of a presidential candidate's platform and a presidential program. No one, however, supported a presidential right to corruption, and Congress did create the office of a special prosecutor to be filled from time to time by appointment triggered by nonfrivolous charges against any presidential appointee or personal staff member. Such a special prosecutor is, by law, immunized against political accountability to the attorney general or the White House.

The creation of a statutory special prosecutor, in place of the ad hoc use of such a position at the time of Teapot Dome and Watergate, did not, of course, end discussion of the qualifications required of an attorney general. Robert F. Kennedy (1961–1964), John N. Mitchell (1969–1972), and Edwin Meese (1985–) had been campaign managers for the Presidents who appointed them, and Herbert Brownell (1953–1957), Griffin B. Bell (1977–1979), and William French Smith (1981–1985) were closely associated with their Presidents' political careers. The argument that close political associates should be disqualified from appointment as the nation's chief law enforcement officer is not borne out by the public careers of these men. Only one, Mitchell, was connected with corruption or scandal. Robert Kennedy, professionally the least qualified of all at the time of his appointment, was a spectacularly successful leader of the department; his tenure was marked by policy innovation and attention to career professionals, and scrupulously devoid of political favoritism. In short, it is difficult to generalize, from the record, on what background is best. A full commitment to the rule of law, an ability to command professional respect, the administrative skill to run a large and diverse bureaucracy, a constitutional regard for an independent judiciary, and the political habit of appropriate deference to the place of Congress in the constitutional scheme are the traits that the Senate must look for in giving its advice and consent. None of these qualifications is necessarily associated with any particular background.

There is implicit in the periodic debate about what qualifications are needed for an attorney general an ambivalence about the identification of his (or her) client. The legal profession has come to realize that the client-lawyer relationship imagined in lawyers' codes of professional responsibility does not fit the corporate-bureaucratic world. Lawyers who are used to concern about whether they represent the managers of a corporation, or some abstract corporate entity, or other financial interests find the problem even more acute in government service. The attorney general is the lawyer for the President, but he is also the lawyer for the United States, which includes the Congress, and which is governed by a Constitution. The conflicts inherent

in this multifaceted responsibility have been reflected, for example, in the department's use of WIRETAPPING and electronic surveillance. Both originated with ambiguous presidential approval, though neither was authorized by Congress nor controlled by explicit legislation. When the Supreme Court applied the exclusionary rule to surveillance by TRESPASS, and then to the product of taps, the response of the department was to confine the use of those devices to investigative work; they were not to be used as EVIDENCE in court. The combining of constitutional constraints on law enforcement behavior, legislative policy, and presidential direction did not take place until decades after the process started. Similar problems of ambiguity of duty are reflected whenever the Congress enacts legislation, or the Supreme Court announces constitutional rules, that the President wants to avoid.

The emergence, in the years since mid-century, of the federal role in ending racial discrimination is largely a product of Justice Department policymaking, mostly with, but sometimes ahead of, the approval of the President. Until recently, the department was consistently in advance of congressional policy. In 1939, without any statutory authority, Attorney General FRANK MURPHY (1939–1940) set up a Civil Rights Section in the Criminal Division to enforce the criminal code's civil rights provisions, which had not been used for years. For the first time, the FBI was thereby drawn, against its will, into the investigation of civil rights violations, particularly in police brutality cases. The section had no authority in civil matters, but its creation immediately created a focus inside the executive branch for the emerging civil rights constituency. The resulting tie between Justice Department policy and the civil rights movement lasted, with some erosion in the early 1970s, until 1981.

In 1948, under TOM C. CLARK (1945–1949), the department initiated a consistent practice of supporting civil rights groups through amicus curiae briefs in private litigation in the Supreme Court. The case was SHELLEY V. KRAEMER (1948), which held racially RESTRICTIVE COVENANTS to be unenforceable in state courts. The solicitor general filed important briefs thereafter in BROWN V. BOARD OF EDUCATION (1954) and its progeny, even though it was far from clear that President DWIGHT D. EISENHOWER supported the positions taken, and it was certain that a majority of Congress did not. In 1960 the department went a step further, although in a technically ambiguous fashion, when it urged reversal in one of the first SIT-IN cases to reach the Court, *Boynton v. Virginia* (1960). A total of twenty-five amicus curiae briefs were filed between 1955 and 1961. In the meantime, the department took the lead in persuading Congress to give it limited litigation authority in VOTING RIGHTS cases, through the CIVIL RIGHTS ACTS OF 1957 and 1960. It seems clear that the 1957 statute at least was drafted and steered through the Congress without the participation, and perhaps without the full understanding, of the President.

Under Robert Kennedy (1961–1964), the department increased its activity in the civil rights field, filing nine amicus curiae briefs in the Supreme Court in 1961, nineteen in 1962, and twenty-eight in 1963. The department at the same time drastically increased not only its own litigation in the lower federal courts in voting rights cases but also its intervention as a party in private suits. In one unusual case, despite the general duty of the attorney general to defend federal legislation, the department attacked the constitutionality of a federal statute that contemplated racially separate hospitals. Civil Rights Division lawyers effectively took over the litigation in crucial cases involving schools in New Orleans, Birmingham, and Montgomery; the University of Mississippi at Oxford in 1962; and the University of Alabama in Huntsville and Tuscaloosa in 1963. They also initiated an INJUNCTION suit to protect the Freedom Riders in 1961, and, following that incident, sought to persuade the Interstate Commerce Commission to require the immediate DESEGREGATION of all interstate bus and rail facilities. All these actions were taken with the approval of the President, but despite congressional refusal to authorize Department of Justice initiatives outside the voting area.

The comprehensive CIVIL RIGHTS ACT OF 1964 finally legitimated the kind of litigating activism the department had undertaken, and the VOTING RIGHTS ACT OF 1965 authorized massive federal intervention, outside the judicial system, into areas where racial discrimination in registration or voting persisted. In the meantime, the department was forced, on its own, to seek to protect the physical security of civil rights workers operating in severely hostile territories. The problem was never quite solved. United States marshals and special temporary deputies volunteering from other branches of the department, especially the Immigration and Naturalization Service, and on one occasion the Bureau of Prisons, served at the direction of the attorney general as ad hoc peace-keeping forces. The FBI, a natural source of manpower for such purposes, never let its people be used for police duty. Several times, starting with Little Rock in 1957, troops were required, with the authorization of the President. At such moments, the department was converted from a law office to a crisis-management center, with consequences for its public responsibility that still persist.

If the Department of Justice is free to participate actively in promoting one direction in the formulation of government policy, and of constitutional rule-making in the courts, it can also undertake to move in the opposite direction. Starting in 1981, the department did just that. In the area of civil rights, it opposed positions previously advocated by the government in school, employment, and voting rights matters, both in its own litigation and

through amicus curiae briefs. The civil rights organizations thus found themselves in legal combat with their national government. Further, the department moved far outside the scope of its mandated law enforcement function, filing briefs in constitutional litigation opposing assertions by private citizens of their RIGHT OF PRIVACY in abortion decisions in one line of cases, for example, and their rights under the religion clause of the FIRST AMENDMENT in another. The department's earlier role in civil rights matters had been different, because it had reflected not only the policies of several administrations but also the will of the nation as expressed in the RULE OF LAW, under the Reconstruction amendments, especially the EQUAL PROTECTION clause.

The department's new social mission, announced as official policy by Attorney General Smith in a speech in 1981, fortified the Senate in its questioning of what kind of attorney general is appropriate for a Department of Justice possessing the enormous power it now does. Whether the department should be confined to a traditional role of impartial law enforcement or should continue to press for shifts in social and legal policy is an issue that may never be cleanly and finally resolved. Yet the issue is important in a nation where, in the oft-quoted words of ALEXIS DE TOCQUEVILLE, "scarcely any political question arises . . . that is not resolved, sooner or later, into a judicial question."

BURKE MARSHALL
(1986)

Bibliography

BIDDLE, FRANCIS BEVERLEY 1962 *In Brief Authority.* Garden City, N.Y.: Doubleday.

CARR, ROBERT K. (1947) 1964 *Federal Protection of Civil Rights.* Ithaca, N.Y.: Cornell University Press.

CUMMINGS, HOMER STILLE and MCFARLAND, CARL 1937 *Federal Justice.* New York: Macmillan.

DEPARTMENT OF JUSTICE 1980 *Attorney General of the United States.* Washington, D.C.: Department of Justice.

HUSTON, LUTHER A. 1968 *The Department of Justice.* New York: Praeger.

HUSTON, LUTHER A.; MILLER, ARTHUR SELWYN; KRISLOV, SAMUEL; and DIXON, ROBERT G., JR. 1968 *Roles of the Attorney General of the United States.* Washington, D.C.: American Enterprise Institute for Public Policy Research.

NAVASKY, VICTOR S. 1971 *Kennedy Justice.* New York: Atheneum.

## *ATTORNEY GENERAL OF NEW YORK v. SOTO-LOPEZ*
476 U.S. 898 (1986)

The fragmentation of the Supreme Court in this case offered one more proof of the doctrinal disarray of the RIGHT TO TRAVEL. The Court, 6–3, held invalid a New York law giving military veterans a preference in hiring by the state civil service, but limiting the preference to veterans who had been New York residents when they entered the service. Justice WILLIAM J. BRENNAN, for four Justices, concluded that the law was a "penalty" on the right to free interstate migration and thus subject to the test of STRICT SCRUTINY; under this test, the law failed. Chief Justice WARREN E. BURGER and Justice BYRON R. WHITE each concurred separately, following the EQUAL PROTECTION rationale of *Zobel v. Williams* (1982) and concluding that the law's discrimination lacked a RATIONAL BASIS.

Justice SANDRA DAY O'CONNOR, for the three dissenters, argued as she had in *Zobel* that there is no "free-floating right to migrate" and that the proper question was whether the law violated the PRIVILEGES AND IMMUNITIES clause of Article IV. She answered this question in the negative. The law offered only a one-time preference to a relatively small number of applicants, who were treated the same as the vast majority of New Yorkers in seeking state jobs; the preference was not absolute, but added points to examination scores. Thus, the interest at stake could not be considered "fundamental" to interstate harmony. Addressing Justice Brennan's argument on its own terms, she said the same considerations showed that the discrimination was not a "penalty" on interstate travel.

The Brennan and O'Connor views each have a threshold test that requires some importance for the interest lost when a state prefers its own residents. Once past this threshold, however, Justice O'Connor would measure the law's validity against the privileges and immunities rhetoric of intermediate scrutiny rather than the rhetoric of strict scrutiny. Given that no Justice under eighty years of age joined Justice Brennan's opinion and that three members of the *Soto-Lopez* majority have retired from the Court, Justice O'Connor's view appears to be ascending. There is the embarrassment that the text of the privileges and immunities clause prohibits a state's discrimination, not against its own citizens, but against citizens of another state; however, the Court has confronted more serious textual embarrassments in the past, with only a trace of a blush.

KENNETH L. KARST
(1992)

## ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY

See: Meese Commission

## ATTORNEY GENERAL'S LIST

President HARRY S. TRUMAN's Executive Order 9835 inaugurated a comprehensive investigation of all federal em-

ployees and made any negative information a potential basis for a security dismissal. A list of subversive organizations was to be prepared by the attorney general, and membership in any listed group was a ground for REASONABLE DOUBT as to an employee's loyalty. The only guidelines the order provided were that any designated organization must be "totalitarian, Fascist, Communist, or subversive," or one "approving the commission of acts of force or violence to deny to others their constitutional rights." During the first year under the order, the attorney general so designated 123 organizations. Over time, and frequently as a result of protests, certain organizations were deleted; new ones were also added. By November 1950, 197 organizations had been so listed, eleven of which were labeled subversive, twelve as seeking to overthrow the government by unconstitutional means, and 132 as communist or communist front.

Critics questioned the constitutionality of the list's compilation and use, on FIRST AMENDMENT grounds, as an "executive BILL OF ATTAINDER" and as involving unfair procedures violating the DUE PROCESS CLAUSE of the Fifth Amendment. The Supreme Court in JOINT ANTI-FASCIST REFUGEE COMMITTEE V. MCGRATH (1951) raised serious questions regarding the fairness of the compilation procedure, and demands grew for suitable hearings to be granted organizations before their inclusion. No procedural changes were instituted in the Truman years, however, and the list continued to be used under the Eisenhower loyalty program. (See LOYALTY-SECURITY PROGRAMS.)

PAUL L. MURPHY
(1986)

Bibliography

BONTECOU, ELEANOR 1953 *The Federal Loyalty-Security Program.* Ithaca, N.Y.: Cornell University Press.

## ATTORNEY SPEECH

Restraints on communication have long been a central feature of the regulation of professional activities. The ancient offense of barratry, aimed at one who stirred up quarrels and suits, carried forward into modern regulation of lawyer conduct, including restrictions on advertising and other forms of solicitation of business. Justifications for the restraints cited the need to protect uninformed and vulnerable people from unscrupulous practitioners, as well as the need to preserve the professional character of legal practice. A common element of the notion of professionalism is the idea that the practice is driven, at least in part, by other than commercial values. Advertising of services was widely considered by bar associations that regulate the practice of law to elevate the commercial over the professional dimensions of the practice.

Prohibitions on lawyer advertising and solicitation were protected from constitutional attack so long as the Supreme Court generally adhered to the position that COMMERCIAL SPEECH was outside the ambit of FIRST AMENDMENT protection. However, when the Court abandoned that position in VIRGINIA STATE BOARD OF PHARMACY V. VIRGINIA CONSUMER COUNCIL (1976), it was soon confronted with claims that restrictions on advertising and solicitation by attorneys were unconstitutional. In BATES V. STATE BAR OF ARIZONA (1977), the Court concluded that newspaper advertising of prices associated with routine legal matters, such as uncontested divorces and simple personal bankruptcies, was constitutionally protected. The Court rejected the argument that the state's concern for the professionalism of the bar was adequate to justify prohibition on price advertising, as well as the claim that price advertising was inherently misleading because of the unpredictability of complicating factors in even the most mundane of legal matters. At the same time, the Court acknowledged that some regulation of lawyer advertising might be warranted, and so refused to articulate a broadly protective constitutional rule.

Regulation of client solicitation was presented by two cases decided in 1978. *Ohralik v. Ohio State Bar* (1978) involved the in-person solicitation of business from an accident victim. *Ohralik* displays an ambivalence about the protection of commercial speech that pervades doctrinal development of the subject. Commercial speech regulation brings together speech regulation, which is generally highly suspect, and commercial regulation, which is generally permissible on a showing that public ends are reasonably served. In *Bates,* the Court had emphasized the educational value of the advertising, and characterized the regulation as seeking to accomplish a legitimate end through the device of forcing ignorance on the consumer—kinds of arguments that are associated with standard speech-protective doctrine. In *Ohralik,* the Court emphasized the business regulation aspect of the ban on in-person solicitation, with a focus on the specific harms associated with the practice. It made clear that the move to bring commercial speech under the protection of the First Amendment did not place it on the same plane of importance as, for example, political speech. At least with regard to speech that was primarily concerned to propose a commercial transaction, the high degree of judicial scrutiny associated with core First Amendment values was not warranted.

*In re Primus* (1978) involved solicitation by letter of a woman who had been sterilized as a condition of receiving medical assistance from the state. The attorney was working with the AMERICAN CIVIL LIBERTIES UNION, and thus pre-

sented the Court with the special circumstances of ideological advocacy, where lawsuits are motivated by political considerations rather than pecuniary gain. The Court appeared to find the relation to traditional forms of protected speech controlling, though the effort to distinguish court-awarded fees from client-paid fees demonstrated the difficulty in maintaining a clean distinction between commercial and noncommercial forms of expression.

A few years after *Primus* and *Ohralik*, the Court set out a general approach for testing the regulation of commercial speech, in CENTRAL HUDSON GAS AND ELECTRIC COMPANY V. PUBLIC SERVICE COMMISSION (1980), requiring that regulations of nonmisleading commercial speech regarding legal activities serve a substantial governmental interest in a direct and narrowly focused way. Using the analytical framework established in *Central Hudson*, the Court struck down prohibitions on direct mail advertising, and advertising of special qualifications. More recently, in FLORIDA BAR V. WENT FOR IT, INC. (1995), the Court sustained a prohibition on direct mail solicitation of personal injury and wrongful death clients within thirty days of the event that was the basis for the claim. The Court was persuaded that protecting the sensibilities of accident victims and their families, and the reputation of the legal profession, were interests of sufficient importance to outweigh the attenuated First Amendment value of the interdicted communication.

The organized legal profession has reached an accommodation with the infusion of overt commercialism that followed from *Bates*. Nice questions regarding the balance between commercial and professional values may remain to be resolved, but it is unlikely that they will much alter the regime of lawyer advertising with which we have become familiar.

JAMES M. O'FALLON
(2000)

## *AUSTIN v. MICHIGAN CHAMBER OF COMMERCE* AND THE "NEW CORRUPTION"

The Supreme Court's lack of consistent doctrinal analysis in its treatment of the constitutionality of CAMPAIGN FINANCE regulation was dramatically illustrated in *Austin v. Michigan Chamber of Commerce* (1990). Justice THURGOOD MARSHALL, writing for the majority, upheld the application to the Michigan chamber of commerce of a ban on corporate political expenditures from treasury funds in candidate elections. The Michigan statute permitted such expenditures only when the funds used came from voluntary contributions to political committees (PACs). Articulating a rationale that Justice ANTONIN SCALIA in dissent scoffingly dubbed the "new corruption," the majority concluded that Michigan's purpose was compelling and that the statutory means were narrowly tailored.

Beginning with the seminal campaign finance case BUCKLEY V. VALEO (1976), the only interest the Court had found sufficient to support limits on campaign funding was preventing "corruption" and "improper influence." In subsequent cases the Court interpreted these terms quite narrowly, seemingly limiting their meaning to quid pro quo transactions with candidates. However, in *Austin*, Marshall explained that the statute prevented "a different type of corruption in the political arena: the corrosive and distorting effect of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."

A deviation from the Court's narrow definition of corruption had first been seen several years before *Austin* in *Federal Election Commission v. Massachusetts Citizens for Life (MCFL)* (1986). In that case the Court had invalidated the application of a federal restriction like that in *Austin* when applied to a nonprofit, purely ideological corporation, but suggested in *dicta* that the statute could be constitutionally applied to most other corporations. Quoting from *MCFL*, in *Austin* Marshall explained that corporate " 'resources amassed in the economic marketplace' . . . [permit corporations] to obtain 'an unfair advantage in the political marketplace.' "

The *Austin* majority emphasized that the act was not an "attempt 'to equalize the relative influence of speakers on elections,' " as Justice ANTHONY M. KENNEDY charged in his dissent. The equalization rationale had been consistently rejected by the Court as a basis for contribution and expenditure limitations since *Buckley*. Instead, Marshall explained that the act "ensures that expenditures reflect actual public support for the political ideas espoused by corporations." Such support cannot be assumed when corporate treasury funds rather than voluntary political committee funds are used, unless the corporation is formed purely for ideological purposes. Although the chamber of commerce was in part an ideological corporation, it also performed services for its members. Furthermore, many chamber members were business corporations rather than individuals; thus the chamber could serve as a conduit for corporate expenditures from other corporate treasuries.

By focusing on a lack of actual public support for corporate expression as a necessary element in its determination that the political influence caused by corporate political expenditures is "unfair," the majority in *Austin* seemingly assumed that unequal contributions or expenditures in political races are fair if they reflect inequality of support, but not if they reflect inequality in resources

between supporters of candidates. However, the Court had at least implicitly rejected this assumption in previous cases when it invalidated restrictions on individual expenditures on behalf of candidates, amounts candidates could spend on their own behalf, and limits on contributions in ballot measure elections.

Apparently recognizing that their "unfairness" rationale was not consistent with precedent, the *Austin* majority added another element to its doctrinal structure. Marshall explained "that the mere fact that corporations may accumulate large amounts of wealth is not the justification. . . rather [it is] the unique state-conferred corporate structure that facilitates the amassing of large treasuries." He described these advantages as "limited liability, perpetual life, and favorable treatment of the accumulations and distributions of assets."

The Court's attempt to limit the fairness rationale to corporations has been severely criticized. As the dissenting Justices pointed out, wealth accumulated by individuals and by unincorporated associations may also be facilitated by government actions. Furthermore, the Court had ignored the argument that receipt of government benefits justifies restrictions on corporate political expenditures when it invalidated bans on corporate expenditures in ballot measure elections in FIRST NATIONAL BANK OF BOSTON V. BELLOTTI (1978). Indeed, the majority and concurring opinions in *Austin* closely resemble the analyses of the *Bellotti* dissents.

Because the ban in *Bellotti* was significantly more restrictive than the requirement of using a political committee for expenditures, *Austin* is distinguishable. Nevertheless, the general themes of the majorities in both *Bellotti* and *Buckley* are strikingly inconsistent with the doctrinal structure created in *Austin.*

MARLENE ARNOLD NICHOLSON
(2000)

(SEE ALSO: *Corporations and the Constitution; Corporate Citizenship; Corporate Power, Free Speech, and Democracy.*)

Bibliography

EULE, JULIAN N. 1990 Promoting Speaker Diversity: *Austin* and *Metro Broadcasting. Supreme Court Review* 1990:105–130.

WINKLER, ADAM 1998 Beyond *Bellotti. Loyola of Los Angeles Law Review* 32:133–220.

## AUTOMOBILE SEARCH

Automobile searches constitute a recognized exception to the FOURTH AMENDMENT's requirement of a SEARCH WARRANT. When police have PROBABLE CAUSE to believe an automobile is transporting contraband, they may, under CARROLL V. UNITED STATES (1925) and BRINEGAR V. UNITED STATES (1941), conduct a WARRANTLESS SEARCH of the vehicle lest it disappear before a warrant can be obtained. Under CHAMBERS V. MARONEY (1970) the search may be delayed until the vehicle has been removed to a police station, though the emergency that attends a search on the road has dissipated. The rules governing automobile searches apply also to mobile homes, according to *California v. Carney* (1985).

Early cases stressed the vehicle's mobility as justification for a warrantless search, but most recent cases have also emphasized an individual's reduced expectation of privacy in an automobile. In contrast to a dwelling, an automobile usually does not serve as a repository of one's belongings; its interior is plainly visible from the outside; and it is commonly stopped by police enforcing inspection and licensing laws. Nonetheless, as the court held in COOLIDGE V. NEW HAMPSHIRE (1971), a car parked on private property may not be searched without a warrant.

Systematic stopping of automobiles at checkpoints for license and registration checks is permitted, but under the Court's decision in *Delaware v. Prouse* (1979), their random stopping is forbidden absent suspicious circumstances. And under *Opperman v. South Dakota* (1976) a lawfully impounded vehicle may be subjected to a warrantless inventory search to safeguard the owner's possessions and protect police from false property claims.

The scope of the warrantless automobile search is as broad as one a magistrate could authorize with a warrant. As the Court held in UNITED STATES V. ROSS (1982), the search may encompass "every part of the vehicle that might contain the object of the search," including the trunk, glove compartment, and closed containers. Furthermore, the Court has applied lenient standards in automobile search cases as to the EVIDENCE needed to establish probable cause. Justice JOHN MARSHALL HARLAN, dissenting in UNITED STATES V. HARRIS (1971), accurately remarked that the problem of automobile searches "has typically been treated as *sui generis* by this Court."

JACOB W. LANDYNSKI
(1986)

Bibliography

LAFAVE, WAYNE R. 1978 *Search and Seizure: A Treatise on the Fourth Amendment*, Vol. 2:508–544, 565–581. St. Paul, Minn.: West Publishing Co.

LANDYNSKI, JACOB W. 1971 The Supreme Court's Search for Fourth Amendment Standards: The Warrantless Search. *Connecticut Bar Journal* 45:30–39.

## AUTOMOBILE SEARCH
(Update)

The Supreme Court has interpreted the FOURTH AMENDMENT, which protects persons, houses, papers and effects from unreasonable governmental SEARCH AND SEIZURE, to mean that governments may not conduct unwarranted searches where people have a REASONABLE EXPECTATION OF PRIVACY. In general, to conduct a search invading protected privacy, governmental authorities must obtain a SEARCH WARRANT from a judicial officer, issued after showing there is PROBABLE CAUSE to conclude that EVIDENCE of a crime is discoverable at a certain place. There are some exceptions to this general rule requiring search warrants to conduct a search, and automobile searches constitute one of them.

Obtaining a warrant takes time, and the delay might permit an automobile to leave the JURISDICTION before a warrant was issued or police executed it. All mobile vehicles, including mobile homes capable of ready movement, thus present fleeting search targets. The Supreme Court has also concluded—not without substantial criticism—that because of automobile uses and pervasive governmental regulation of them, persons have a lesser expectation of privacy in automobiles than in homes or offices. Consequently, because of an automobile's mobility and the lesser privacy accorded it, where police have probable cause to believe an automobile is, or contains, evidence of a crime, they may stop it and seize it, or, in the latter case, search it, without a warrant.

Police retain this WARRANTLESS SEARCH authority even when the automobile is not immediately mobile or even likely to be moved. Furthermore, although an automobile is immobilized once seized, thus allowing time to obtain a warrant, the Supreme Court—reasoning that delayed vehicle searches involve no greater privacy invasion than immediate search at the scene—has permitted warrantless automobile searches after immobilization. A rule requiring warrants for delayed searches would incline police to conduct on-scene searches, causing traffic problems or creating other difficulties for the police, particularly in arrest cases involving prisoner transportation. Consequently, when police have probable cause to search an automobile, they may search it immediately on seizure or subsequently.

The nature of the probable cause, and the evidence the police seek, determine the legitimacy and the proper scope of an automobile search. For example, probable cause to believe that a suitcase in a car trunk encloses evidence of crime justifies stopping the car and seizing the suitcase from the trunk, but not a more general car search. By contrast, probable cause to think that an automobile contains marijuana may justify a close search of the entire automobile, including door panels, upholstery, and any containers within the car. Police may thus search any vehicle parts or containers—whether locked, hidden, or generally inaccessible—that may contain the evidence they have probable cause to seek.

Police may stop and search a car when they have probable cause to believe it contains evidence of a crime, whether or not they have probable cause to arrest the driver or passengers. They may also stop a car to arrest the driver or passengers, but probable cause to arrest does not necessarily give rise to probable cause to search the car for evidence of a crime. Arresting automobile occupants for a just-completed convenience-store robbery undoubtedly justifies an extensive search of their car for evidence related to the robbery. Arresting a driver for an outstanding traffic warrant, however, does not justify an automobile search, for the offense is not one involving evidence that might be in the car.

A separate rule governing SEARCHES INCIDENT TO AN ARREST, however, comes into play in automobile cases. To protect themselves and others from harm and to prevent the destruction of evidence, officers may, on taking persons into custody upon ARREST, search them and any areas the arrestees may immediately reach. In arresting automobile drivers or occupants officers may, at least when those arrested are in or near the automobile, search them and any place in the car they may reach. Generally speaking, this rule authorizes a search of any area within the passenger compartment or open to it.

Police may also search vehicles after impounding them. Police sometimes impound an automobile on arrest of the driver or when the vehicle is found unsafe, illegally parked, or abandoned. To protect the owner's property, and the police from property claims, police may, pursuant to standardized procedures, conduct warrantless inventory searches of impounded vehicles and secure the items found within them. The standardized-procedures requirement is designed to ensure that police do not use their inventory search authority as a pretext to search vehicles when they lack probable cause.

GARY GOODPASTER
(1992)

Bibliography

LAFAVE, WAYNE R. 1987 *Search and Seizure: A Treatise on the Fourth Amendment.* St. Paul, Minn.: West Publishing Co.

## AUTOMOBILE SEARCH AND TRAFFIC STOPS

See: Traffic Stops

## *AVERY v. MIDLAND COUNTY*
390 U.S. 474 (1968)

In this case, the Supreme Court held that the ONE PERSON, ONE VOTE rule required equal districts in a Texas county commissioners' court election. The decision, in effect, extended the rule's sway from the fifty states to such of the 81,304 units of government as possessed "general responsibility and power for local affairs." Justices JOHN M. HARLAN, ABE FORTAS, and POTTER STEWART dissented, arguing that the Court had overreached its APPELLATE JURISDICTION; that a rigidly uniform one person, one vote rule ignored the special needs functions of most local governments; and that it would discourage joint activity by metropolitan units, thereby undermining the practical benefits of state-level reapportionment.

WARD E. Y. ELLIOTT
(1986)

## AVOIDANCE DOCTRINE

The avoidance doctrine is a group of judicially created techniques employed to avoid CONSTITUTIONAL INTERPRETATION. The Supreme Court developed this special approach to JUDICIAL REVIEW to restrain federal courts from developing constitutional law unnecessarily. The avoidance theme dates back to the earliest days of the Court, when the Court identified the Article III judicial review power. Justice LOUIS D. BRANDEIS set out the modern avoidance doctrine in ASHWANDER V. TENNESSEE VALLEY AUTHORITY (1936). Avoidance is predicated on SEPARATION OF POWERS concerns; FEDERALISM concerns; the continued political viability of courts staffed with unelected, life-tenured judges; the final and delicate nature of judicial review; and the paramount importance of constitutional adjudication.

The avoidance doctrine consists of a series of seven rules that are closely related to other restraints on federal courts. Several of the rules mirror the constitutional and prudential aspects of the Court's heightened modern JUSTICIABILITY standards. One important avoidance rule encourages courts to look for nonconstitutional grounds to dispose of a lawsuit, even if jurisdiction exists.

Obviously, federal courts do render constitutional decisions. When they do so, another avoidance technique urges them to rule no more broadly than the precise facts require. Avoidance suggests using measured constitutional steps and narrowly framed relief. Avoidance cautions against general legal advice or broad rules to guide future conduct.

The Court's use of the avoidance doctrine has been inconsistent and at times politically driven. For example, Brandeis and Justice FELIX FRANKFURTER deemed the avoidance doctrine essential to promote deference to the NEW DEAL Congress and executive branch. These Justices were responding to the JUDICIAL ACTIVISM of the conservative Court during the *Lochner* era, which frequently struck down state and federal legislative and executive programs. One year prior to the COURT-PACKING plan of President FRANKLIN D. ROOSEVELT, Brandeis in *Ashwander* warned that fallible judges should use judicial review sparingly. As the liberal majority of the WARREN COURT recognized new constitutional rights, conservative judges and scholars praised avoidance as a foundational rule of judicial restraint.

Although avoidance techniques prove sound on occasion, sometimes avoidance fails to protect constitutional rights sufficiently. Avoidance can engender great delay and increased expense for securing rights. Narrowed rulings provide little guidance, so that constitutional rights are not protected uniformly. Some avoidance measures actually fail to promote deference to other decisionmakers by disguising the role of courts in interpreting the Constitution.

Additionally, the avoidance doctrine is a flexible approach to judicial review. Judges must determine when reaching a constitutional question is necessary. Courts invoke avoidance techniques more frequently in cases involving sensitive social issues such as RACIAL DISCRIMINATION or ABORTION, and in cases in which the Court's countermajoritarian role is an important protection against the more politically responsive areas of government. For example, the avoidance doctrine counsels that judges should interpret statutes to avoid constitutional problems. During the era of MCCARTHYISM the Court refused to clearly define FIRST AMENDMENT rights. Instead, it eventually used the avoidance doctrine to interpret narrowly a congressional act prohibiting SEDITION, concluding that Congress did not intend to prohibit mere words of Communist proponents. Although this avoided a direct collision with Congress, the Court was not deferential to congressional intent. Moreover, it did not offer speech constitutional protection, thus leaving open possibilities for future political targeting of unpopular speakers.

To protect themselves from charges of antidemocratic judicial activism, federal judges must take the avoidance doctrine seriously. But avoidance entails costs and it should be scrutinized carefully. When federal judges fail to exercise the power of judicial review in politically sensitive cases, they can abdicate their constitutional responsibility to protect enduring rights against temporal repressive majorities. And when judges use avoidance techniques inconsistently, they do not provide justice evenhandedly.

LISA A. KLOPPENBERG
(2000)

Bibliography

BICKEL, ALEXANDER M. 1986 *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd. ed. New Haven, Conn.: Yale University Press.

GINSBURG, RUTH BADER 1992 Speaking in a Judicial Voice. *New York University Law Review* 67:1185–1209.

GUNTHER, GERALD 1964 The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review. *Columbia Law Review* 64:1–25.

KLOPPENBERG, LISA A. 1996 Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns. *UC Davis Law Review* 30:1–93.

SCHAUER, FREDERICK 1996 *Ashwander* Revisited. *Supreme Court Review* 1995:71–98.

# B

## BACKUS, ISAAC
(1724–1806)

A Baptist minister in Massachusetts from 1756, Isaac Backus gained increasing recognition as an agent, chief spokesman, and campaigner for RELIGIOUS LIBERTY for his New England co-religionists, who were harassed by hostile local officials' narrow interpretation and restrictive implementation of laws exempting Baptists from contributing to the support of Congregational churches. In pamphlets and newspapers, in an appearance before the Massachusetts delegation to the First Continental Congress, and in promoting civil disobedience by encouraging Baptists not to comply with statutes dealing with support of churches, he struggled unsuccessfully to abolish public tax support for religion.

More pietist than civil libertarian, Backus sought religious freedom primarily to prevent state interference with the church. He supported his arguments by citing the Massachusetts Charter's grant of religious liberty to all Protestants and by pointing up the contrast between local oppression of Baptists and New Englanders' charges of English tyranny. By 1780, however, he had come to affirm religious liberty as a NATURAL RIGHT.

As a delegate to the Massachusetts ratifying convention, Backus supported the federal Constitution, convinced that its prohibition against tests precluded any ESTABLISHMENT OF RELIGION. He showed little or no interest in the passage of the FIRST AMENDMENT. Backus equated religious liberty almost entirely with voluntary choice of churches and voluntary support of ministers. He perceived America as a Christian country, did not object to Sabbath laws or to public days of prayer, and approved a Massachusetts law requiring legislators to profess Christianity. Such views typified contemporary evangelical opinion.

THOMAS CURRY
(1986)

Bibliography

MCLAUGHLIN, WILLIAM G. 1967 *Isaac Backus and the American Pietistic Tradition.* Boston: Little, Brown.

———, ed. 1968 *Isaac Backus on Church, State, and Calvinism: Pamphlets, 1754–1789.* Cambridge, Mass.: Harvard University Press.

## BADGES OF SERVITUDE

There was truth in the claim of SLAVERY's defenders that many a northern "wage slave" worked under conditions less favorable than those of his enslaved counterpart down South. The evil of slavery was not primarily its imposition of hard work but its treatment of a person as if he or she were a thing. The laws governing slaves carried out this basic theme by systematically imposing a wide range of legal disabilities on slaves, preventing them not only from entering into the public life of the community (by voting, being members of juries, or speaking in public meetings) but also from owning property, making contracts, or even learning to read and write. All these disabilities were designed not merely to preserve a system of bondage to service, but to serve as badges of servitude, symbolizing the slaves' degraded status. In a moment of racist candor, Chief Justice ROGER B. TANEY extended this view of the stigmatized status of slaves to all black persons, slave or

free. His opinion for the Supreme Court in DRED SCOTT V. SANDFORD (1857) spoke of blacks as "a subordinate and inferior class of beings," upon whom had been impressed "deep and enduring marks of inferiority and degradation."

Although slaves were often physically branded, the "marks" of which Taney spoke were metaphorical; they were the aggregate of legal restrictions imposed on slaves. When slavery was abolished by the THIRTEENTH AMENDMENT (1865), those marks did not disappear. The amendment, however, did not stop with the abolition of slavery and involuntary servitude; it also empowered Congress to enforce the abolition. From an early time it was argued that the amendment authorized Congress to enact laws to eradicate not only slavery itself but the "badges of servitude" as well. This view was at first accepted in principle by the Supreme Court, and then rejected in the early twentieth century. However, in JONES V. ALFRED H. MAYER CO. (1968), the Court reverted to the earlier interpretation, concluding that RACIAL DISCRIMINATION was the sort of "badge of servitude" that Congress could prohibit.

In the meanwhile, a parallel doctrinal development has become apparent. The CIVIL RIGHTS ACT OF 1866 and the FOURTEENTH AMENDMENT both recognized the CITIZENSHIP of the freed slaves. Both were designed to end the notion of superior and inferior classes of persons and to replace a system of sociopolitical subordination with the status of equal citizenship. (See EQUAL PROTECTION OF THE LAWS.) Because the principle of equal citizenship protects against the imposition of stigma, it often operates in the same symbolic universe that produced badges of servitude. To give full effect to the symbol and substance of equal citizenship is one of the major challenges of the nation's third century.

KENNETH L. KARST
(1986)

Bibliography

KINOY, ARTHUR 1967 The Constitutional Right of Negro Freedom. *Rutgers Law Review* 21:387–441.

## BAD TENDENCY TEST

In 1920 New York convicted Benjamin Gitlow of violating its statute prohibiting "advocating, advising or teaching the doctrine that organized government should be overthrown by force." Gitlow had published in the journal *Revolutionary Age* a "Left Wing Manifesto," thirty-four pages of Marxist rhetoric calling for class struggle leading to revolution and the dictatorship of the proletariat.

In GITLOW V. NEW YORK (1925) Gitlow's counsel argued in the Supreme Court that since the manifesto contained no direct INCITEMENT to criminal action, Gitlow must have been convicted under the "bad tendency test." That test was borrowed from the eighteenth-century English law of SEDITIOUS LIBEL which made criticism of government criminal because such criticism might tend to contribute to government's eventual collapse.

This bad tendency test ran counter to the CLEAR AND PRESENT DANGER test of SCHENCK V. UNITED STATES (1919). In *Gitlow* Justice EDWARD SANFORD virtually adopted the bad tendency test for instances in which a legislature had decided that a particular variety of speech created a sufficient danger. Even though there was no evidence of any effect resulting from the Manifesto's publication, the Court stressed that its language constituted advocacy of

> mass action which shall progressively foment industrial disturbances, and, through . . . mass action, overthrow . . . government. . . . The immediate danger is none the less real and substantial because the effect of a given utterance cannot be accurately foreseen. . . . A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. . . . [The State] cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to . . . imminent and immediate danger of its own destruction.

Justices OLIVER WENDELL HOLMES and LOUIS D. BRANDEIS dissented in *Gitlow*, invoking the clear and present danger test. When that test came to dominate the Court's FIRST AMENDMENT opinions in the 1930s and early 1940s, the bad tendency test seemed to be overthrown.

Nevertheless much of Sanford's approach survived. Judge LEARNED HAND's "discounting formula" as adopted in DENNIS V. UNITED STATES (1951) allows speech to be suppressed "where the gravity of the evil, discounted by its improbability" justifies suppression. As *Dennis* itself illustrates, if the danger is painted as sufficiently grave, speech may be suppressed even if there is a very low probability that the evil will occur or that the particular speech in question will contribute to that occurrence. In *Dennis* the Court replaced the present danger test with the requirement that where an organized subversive group exists, the group intends to bring about overthrow "as speedily as the circumstances would permit." Such an approach echoed Sanford's plea that the government need not wait until the danger of revolution is imminent.

MARTIN SHAPIRO
(1986)

(SEE ALSO: *Freedom of Speech; Subversive Activity.*)

Bibliography

CHAFEE, ZECHARIAH, JR. (1941) 1969 *Free Speech in the United States.* New York: Atheneum.

LINDE, HANS 1970 "Clear and Present Danger" Reexamined:

Dissonance in the Brandenburg Concerto. *Stanford Law Review* 22:1163–1186.

## *BAEHR v. LEWIN*
852 P.2d 44 (Hawai'i 1993)

Three same-sex couples claimed that Hawai'i had violated their rights by denying them MARRIAGE licenses. The Hawai'i Supreme Court agreed, holding that denying marriage licenses to same-sex couples is unconstitutional unless the state can show a compelling reason to do so. The court's argument rested on the EQUAL PROTECTION clause of the Hawai'i state constitution, which prohibits SEX DISCRIMINATION. The court held that the marriage statute imposed a sex-based classification, because it "restricts the marital relation to a male and a female." The court therefore held that the statute would be unconstitutional unless the state could show that this classification was necessary to some COMPELLING STATE INTEREST and remanded the case for a trial on that question. (Because the decision was based on the state constitution and raised no federal issues, it could not be appealed to the U.S. Supreme Court.)

In 1996, as expected, the state lost at trial. It appealed the case once more to the Hawai'i Supreme Court. While the appeal was pending, the INJUNCTION was stayed, so that SAME-SEX MARRIAGE continued to be effectively prohibited in Hawai'i. In November 1998, the Hawai'i electorate ratified an amendment to the state constitution providing that the legislature has the power to reserve marriage to opposite-sex couples. There was disagreement about whether the result in the case would be affected by the amendment absent new legislation, but in December 1999, the court held that the statute was now valid. The court did not, however, retract the analysis set forth in its earlier opinion.

The argument that persuaded the court is unfamiliar but clear. If Lucy is permitted to marry Fred, but Ricky may not marry Fred, then Ricky is being discriminated against on the basis of his sex. This argument, however, had always lost in court before *Baehr.* (The Hawai'i plaintiffs did not even bother to make it, and the court had to come up with the argument by itself.) One counterargument had always been made by courts in other states: if lesbians and gay men are equally discriminated against, then there is no sex discrimination. This counterargument continued to persuade the one dissenting judge in *Baehr.* The legal innovation in *Baehr* was that the court noticed that this counterargument was the same one the U.S. Supreme Court had rejected in LOVING V. VIRGINIA, the 1967 case in which it struck down a law forbidding interracial marriage. Virginia had defended its MISCEGENATION law with the argument that, although it was true that blacks were forbidden to marry whites, whites were equally forbidden to marry blacks. The U.S. Supreme Court firmly rejected this argument; if prohibited conduct is defined by reference to a characteristic, then the prohibition is not neutral with respect to that characteristic. If this argument is accepted in the same-sex marriage context, then it has important implications for federal constitutional law, for classifications based on sex require an "exceedingly persuasive justification" to be upheld. The principles established in *Baehr* thus imply presumptive invalidity for all laws that discriminate on the basis of SEXUAL ORIENTATION.

ANDREW KOPPELMAN
(2000)

## BAIL

Bail is the prevailing method by which American law has dealt with a puzzling problem: what to do with a person accused of crime during the time between arrest and trial? Imprisonment imposed before trial subjects one who has not been and may never be convicted to disabilities that have all the attributes of punishment, disrupts employment and family ties, hampers the preparation of a defense, increases pressures to plead guilty, and, compared with bailed defendants, may prejudice trial outcomes and lead to more severe sentences. The development of the institution of bail over centuries of English history and its acceptance and liberalization in colonial America was an attempt to mitigate these handicaps and, by affording an opportunity for pretrial release, to emphasize the values underlying the presumption of innocence while also minimizing the risk that an accused who was not jailed would flee and evade justice. Thus bail makes possible pretrial release if the accused can provide financial security, which is subject to forfeiture if the conditions of the bond are violated.

Traditionally, the amount of security is set in an amount deemed by the court to be sufficient to deter flight and enforce compliance with the court's orders. The defendant's own money or property may be put up for this purpose, but in modern times the prevalent method of providing the required security is the purchase by the defendant of a commercial bail bond for a premium, usually about ten percent of the prescribed security. Conditional release on bail may also be available at later stages of the criminal process, for example, pending APPEAL after conviction or pending a hearing on parole or probation revocation, but the predominant use of bail and the most difficult questions raised by its administration relate to the pretrial period.

A "right to bail" is not a right to pretrial release but

merely a right to have a court set the amount of the security to be required. A majority of criminal defendants have little or no financial ability to provide security. Furthermore, bondsmen can and often do refuse to bond those they regard as poor risks even if the amount of the premium is tendered. Thus a high rate of pretrial detention of those unable to provide bail has long been a characteristic feature of American criminal justice. Since the early 1960s a widespread bail reform movement has introduced procedures designed to reduce the dependence of the traditional system on the requirement of financial security, but these changes have supplemented rather than replaced money bail, which remains a dominant feature of the system.

The only direct reference to bail in the Constitution is the brief clause in the Eighth Amendment that "excessive bail shall not be required." There are serious problems in the interpretation of the scope of this limited clause and its application under modern conditions. On its face the language is only a restriction of the amount of security which a judge can require, and poses no constitutional barrier to legislative or judicial denial of bail. Alternatively, the clause has been read as necessarily implying a right to bail, as otherwise the clause is left with little significance.

There is no easy resolution of this problem. To infer from the clause a right to bail that is protected from legislative abrogation reads into it words that are not there and necessarily leaves the scope of such a right uncertain. But a literal interpretation renders the clause superfluous, as PROCEDURAL DUE PROCESS OF LAW would protect against judicial abuse of a legislatively granted right to bail. A narrow reading also takes no account of the long history of what the Supreme court in *Stack v. Boyle* (1951) called the "traditional right to freedom before conviction . . . secured only after centuries of struggle," and leaves in a constitutional vacuum a critical stage of the criminal process which has significant impact on the implementation of other constitutionally protected rights of defendants. For nearly two centuries the question has remained unresolved, for two main reasons. First, the transitory nature of detention and the poverty of most defendants unable to raise bail pose barriers to appellate review. Second, until 1984 federal statutory law and the constitutions or laws of most states guaranteed a pretrial right to bail in all but some capital cases, thereby rendering it unnecessary to reach the constitutional issue. Little direct evidence of what was intended by the framers of the clause can be found in the sparse and inconclusive legislative history of the Eighth Amendment's proposal by the First Congress. At the same time that Representative JAMES MADISON introduced the amendment in the House, a Senate committee was preparing the JUDICIARY ACT OF 1789, which included a right to bail in all but capital cases. Both bail provisions were uncontroversial and undebated, and both went their separate ways to enactment. There is no indication that anyone in Congress recognized the anomaly of incorporating the basic right governing pretrial practice in a statute while enshrining in the Constitution the derivative protection against judicial abuse of that right. The anomaly is compounded by Madison's insistence, in the House debates on the BILL OF RIGHTS, that whereas England's Bill of Rights raised a barrier only against the power of the Crown, "a different opinion prevails in the United States," where protection against abuse "must be levelled against the Legislative" branch. What we do know, however, about the origin of the clause and the context in which it arose sheds some light relevant to its interpretation.

The words of the bail clause were taken verbatim from the revolutionary VIRGINIA DECLARATION OF RIGHTS of 1776, drafted by GEORGE MASON, and by him taken, with the substitution of "shall" for "ought," from the 1689 English Bill of Rights. Mason states that his purpose in drafting the Virginia Declaration was to provide effectual securities for the essential rights of CIVIL LIBERTY, and it is difficult to believe that he intended to deal with the issue of pretrial liberty by words that, literally construed, offer no security against its denial. Although steeped in English constitutional history, Mason was not a lawyer, may not have understood the complexity of the English law, and may have thought that the clause encapsulated the whole subject. In its English context, however, the excessive bail clause in the 1689 Bill of Rights was the culmination of a chain of events that went back to MAGNA CARTA and of a long succession of detailed statutes that established the scope of the right to bail.

This development was climaxed in the seventeenth century by three important acts of Parliament which had been provoked by abuses in the administration of bail law. In 1628, by the PETITION OF RIGHT, the provision of Magna Carta that "no freeman shall be . . . detained in prison . . . unless by the law of the land" was made applicable to pretrial detention and thus was not limited, as the Crown had maintained in *Darnell's Case* (1627), to imprisonment only after conviction. Next, the HABEAS CORPUS ACT OF 1679, after referring to prolonged detentions caused by the inability of detainees to get any judge to set and take bail, mandated a speedy procedure for this purpose. Finally, the Bill of Rights of 1689 sought to curb the judicial abuse of requiring excessive bail. Thus the English structure was tripartite, and protection against denial of pretrial release through the prohibition of excessive bail must be read in the context not only of the extraordinary procedure provided by HABEAS CORPUS but also with reference to the long history of parliamentary bail statutes. Habeas corpus, of course, was included in the body of the American consti-

tution, but the substantive right to bail was omitted. The argument that this omission seems to have been inadvertent at a time when the Framers were preoccupied with other, more immediately pressing issues, and that such a substantive right must have been the intent of the clause, is the core of the historical case for a broad interpretation.

Beginning with the MASSACHUSETTS BODY OF LIBERTIES in 1641, most of the American colonies reduced the number of capital offenses and otherwise liberalized the English law of bail, and in 1682 Pennsylvania extended the right to bail to those charged with all offenses except those capital cases "where the proof is evident or the presumption great," language that was widely copied in state constitutions after Independence. Besides the Judiciary Act of 1789, the closest contemporary record reflecting what seems to have been a widespread political approach to the right to bail, at the time that the Bill of Rights was before the First Congress, was the enactment two years earlier by the CONTINENTAL CONGRESS of the NORTHWEST ORDINANCE for the governance of the territories beyond the Appalachians. In substantially the same language as that used in Pennsylvania nearly a century earlier, the ordinance made bailable as of right those charged with any except capital offenses.

Given the widespread right to bail that had been provided by federal statute and state law, it is not surprising that until recent years there has been a dearth of litigation asserting an Eighth Amendment constitutional right to pretrial bail. The few occasions on which the Supreme Court has dealt with the subject have not required a resolution of the issue, but there are inconclusive and inconsistent OBITER DICTA in some of the cases. On the one hand, in *Schilb v. Kuebel* (1971), which upheld a bail reform statute, the Court said that "Bail, of course, is basic to our system of law," and earlier a unanimous Court in *Stack v. Boyle* had stressed the importance of providing for pretrial release lest "the presumption of innocence, secured only after centuries of struggle, would lose its meaning." But in *Carlson v. Landon*, decided in the same term as *Stack*, a 5–4 Court held that alien communists were not entitled to bail pending adjudication of DEPORTATION charges against them. Most of the *Carlson* majority's long opinion concerned the limited rights of ALIENS, the classification of deportation as a noncriminal proceeding, and the validity and exercise of the attorney general's discretionary delegated power to bail aliens; but it also included six sentences implying that even in criminal proceedings the Eighth Amendment does not afford a right to bail. Although frequently cited, considering the noncriminal emphasis in the case and the brevity and superficiality of the Eighth Amendment analysis, the *Carlson* obiter dictum warrants little weight. Probably more significant is SCHALL The Court stressed the noncriminal classification of the proceeding; it noted the limited rights of juveniles compared with adults and the detention's very limited duration; and it observed that there is no historical tradition of a right to juvenile pretrial release and that the detention practice that was upheld has existed throughout the country. Despite all these distinguishing characteristics, the weight given to the importance of preventing pretrial crime and to the possibility of its prediction is suggestive of how the Court might deal with parallel questions in an adult denial-of-bail criminal case.

A number of other controversial issues in pretrial bail law will remain whether or not the Supreme Court infers some form of a right to bail from the Eighth Amendment. The 1984 federal Bail Reform Act and some state constitutional or statutory amendments permit preventive detention of those charged with noncapital offenses if a court finds that pretrial release would pose a danger of future criminal activity. Besides extending the traditional practice which has denied the right to bail only in some capital cases, these enactments also breach long-standing PRECEDENT that only the risk of failure to appear for trial or other limited conduct directly impairing the court's processes, such as threats against witnesses, is relevant to the bail decision. Although the change is in some sense more theoretical than real, direct authorization for judges to explore the uncharted waters of predictions of future dangerousness will in practice undermine the values that gave rise to bail and result in further increases in the proportion of defendants jailed pending trial.

Bail is not constitutionally excessive if the amount does not exceed that normally required for the charged offense. These normal amounts are sufficient to result in very high rates of detention and to mask the existence of de facto preventive detention for those unable to post bond. It was a concern for more equal justice in criminal law administration and a reaction against this discrimination against the poor that gave rise to the bail reform movement of the 1960s and the widespread introduction of other incentives and sanctions as substitute deterrents for money bail. Although this reform, unevenly and incompletely implemented, has had some success, the number of those detained has remained high and is growing. The issue of blatant WEALTH DISCRIMINATION in bail law administration remains to be resolved.

CALEB FOOTE
(1986)

Bibliography

FLEMMING, ROY B. 1982 *Punishment before Trial: An Organizational Perspective of Felony Bail Processes.* New York: Longman's.

FOOTE, CALEB 1985 The Coming Constitutional Crisis in Bail.

*University of Pennsylvania Law Review* 113:959–999, 1125–1185.

FREED, DANIEL J. and WALD, PATRICIA M. 1964 *Bail in the United States, 1964.* Washington, D.C.: U.S. Department of Justice.

TRIBE, LAURENCE H. 1970 An Ounce of Detention. *Virginia Law Review* 56:371–407.

# BAIL
## (Update)

In 1986, when the *Encyclopedia of the American Constitution* was first published, some scholars maintained that the Eighth Amendment's prohibition of "excessive bail" implied a right to bail in all noncapital cases. Others argued that the clause afforded no right to bail in any case. According to this second group, the Eighth Amendment imposed no limitation on Congress's power to deny bail; it governed only the amount of bail when bail was permitted.

Strongly supported by the language of the Supreme Court in *Stack v. Boyle* (1951), many scholars also maintained that the only legitimate purpose of bail under the Eighth Amendment (and of detention when an accused could not secure his or her pretrial release) was to prevent flight or else to protect the integrity of the trial process in other ways (notably, by preventing the intimidation of witnesses). Other scholars contended that a court also could lawfully consider the risk that a defendant would commit crimes during the pretrial period in setting bail and, perhaps, in denying pretrial release altogether. The principal unresolved issues posed by the Eighth Amendment were whether the amendment implied a right to bail and what standards, criteria, or objectives a court could consider in determining whether bail was "excessive."

The Supreme Court addressed these issues and the due process issues posed by pretrial PREVENTIVE DETENTION in UNITED STATES V. SALERNO (1987). *Salerno* upheld the constitutionality of the Federal Bail Reform Act of 1984, which permits detention without bond in some federal cases when neither bail nor other conditions of release "will reasonably assure . . . the safety of any other person and the community."

Holding that the Eighth Amendment does not afford a right to bail in all noncapital cases, the Court quoted the suggestion of *Carlson v. Landon* (1952) that the amendment does not create a right to bail in any case. Finding it unnecessary to resolve this issue, however, the Court indicated that the amendment might create a right to bail in some cases and not others, depending on the strength of the government's reasons for denying bail. The defendants had argued that a denial of bail could be regarded as "infinite" bail, and the Court did not reject this contention. It held, however, that infinite bail was not always excessive. The Court also concluded that dangerousness, as well as the risk of flight, could be considered in judging the propriety of pretrial detention.

The Supreme Court resolved the Fifth Amendment due process issues in *Salerno* through the sort of cost-benefit analysis that has characterized much of its recent constitutional jurisprudence. The Court's opinion noted "the individual's strong interest in liberty" and declared that this interest was both "important" and "fundamental." The opinion concluded, however, that "the government's interest in community safety can . . . outweigh an individual's liberty interest."

The phrase "liberty interest" first appeared in a Supreme Court opinion in 1972. Its author, Justice WILLIAM H. REHNQUIST, later became chief justice and wrote the Salerno opinion. Use of the phrase "liberty interest," which seems to mark liberty as the appropriate subject of a utilitarian trade, has increased greatly in recent years.

Critics of the Supreme Court's cost-benefit analysis suggest that even the most brutal governmental actions may advance "compelling" interests and that some governmental impositions cannot be justified by countervailing public gains. For example, if psychologists developed the capacity to predict future criminality with substantial accuracy, the detention of people who, unlike the defendants in *Salerno*, had not been charged with any crime might be justified through the same analysis that the Supreme Court used to justify the preventive detention in Salerno. The liberty interests of the people detained for failing the psychologists' predictive tests would not differ from the liberty interests of the people detained under current law, and the governmental interest in preventing future crime would also be identical.

An analysis that balances the burdens imposed by a governmental action against the public gain produced by this action seems to omit traditional considerations of individual responsibility and opportunity. This analysis also departs from a tradition-based "fundamental fairness" approach to the due process clause—an approach that might have been more likely to invalidate the detention in *Salerno*. For more than 300 years following the Pennsylvania Frame of Government in 1682, Americans withheld bail only in capital cases and then only when the proof of guilt was "evident and the presumption great." These Americans apparently chose to run greater risks than cost-benefit analysis could have justified.

The Supreme Court recognized that its cost-benefit analysis would not have justified the detention in *Salerno* if this detention had qualified as punishment. However strong the government's interest in imposing criminal punishment, the Constitution precludes it unless the accused has been afforded a trial at which the government

must establish his or her guilt beyond a REASONABLE DOUBT and must comply with other constitutional requirements. Examining Congress's intent, the Court concluded that the objective of the Bail Reform Act was to "prevent danger to the community" and that this objective was "regulatory, not penal."

The Court did suggest that "detention in a particular case might become excessively prolonged, and therefore punitive." It is difficult to envision how Congress's motive could change from regulatory to punitive at some moment in a case of prolonged detention, and the Court offered no hint of when this metamorphosis of LEGISLATIVE INTENT might occur. The Bail Reform Act itself imposes no limit on the length of preventive pretrial detention, and the deadlines of the Federal Speedy Trial Act are flexible. In one recent case, an appellate court declined to find a sixteen-month period of pretrial preventive detention unlawful per se. The Supreme Court's view of retrospectively changing legislative motive may be difficult to understand, but it is likely to save some defendants from detention for a year or more without trial.

Federal courts have made extensive use of the preventive detention provisions of the Bail Reform Act, and both the percentage of defendants detained before trial and the populations of federal pretrial detention facilities have increased substantially. Although many states have enacted preventive detention measures as well, judges and prosecutors appear to have used these state statutes less frequently. One reason may be that the state statutes typically lack a significant provision of the federal act: "The judicial officer may not impose a financial condition that results in the pretrial detention of the person." In state courts, judges and prosecutors may find it easier to set high bail and thereby accomplish preventive detention sub rosa than to comply with the procedural requirements of local preventive detention legislation.

Since the 1960s, bail reform has proceeded from two directions. Judges have released more defendants on recognizance and on nonfinancial conditions, and, especially in the federal courts, judges have detained more defendants without the option of posting bond. Both reforms have made the wealth of defendants less important in determining the probability of their pretrial incarceration, and even the opponents of preventive detention might agree that dangerousness is a less offensive basis for detention than poverty. Both currents of reform move the United States closer to the patterns of pretrial release and detention found in European nations, where bail either is not authorized or has fallen into disuse.

ALBERT W. ALSCHULER
(1992)

(SEE ALSO: *Compelling State Interest; Pennsylvania Colonial Charters; Procedural Due Process of Law, Criminal.*)

Bibliography

ALSCHULER, ALBERT W. 1986 Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process. *Michigan Law Review* 85:510–569.

UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS 1988 *Pretrial Release and Detention: The Bail Reform Act of 1984.* Washington, D.C.: U.S. Department of Justice.

## *BAILEY v. ALABAMA*
219 U.S. 219 (1911)

After the demise of the BLACK CODES some southern states resorted to other devices to insure a steady supply of labor. One Alabama statute effectively converted civil breach of contract into the crime of fraud by making it *prima facie* EVIDENCE of intent to defraud that a worker accept an advance on wages and then neither repay the advance nor perform the work contracted for.

In *Bailey* the Supreme Court held (7–2) that the Alabama law constituted a system of PEONAGE in violation of the THIRTEENTH AMENDMENT's prohibition of involuntary servitude. Justice CHARLES EVANS HUGHES, for the majority, argued that involuntary servitude was a broader concept than SLAVERY and included schemes for enforced labor.

Justice OLIVER WENDELL HOLMES, dissenting, argued that Alabama was acting within its power to define crimes and their punishments.

DENNIS J. MAHONEY
(1986)

## *BAILEY v. DREXEL FURNITURE CO.*
(Child Labor Tax Case)
259 U.S. 20 (1922)

Following the decision invalidating the KEATING-OWEN CHILD LABOR ACT in HAMMER V. DAGENHART (1918), Congress passed a new law in 1919, this time based on its TAXING POWER. The statute levied a ten percent tax on the net profits of mines or factories that employed underage children. Congress had previously used the tax power for social and economic purposes, and the Supreme Court consistently had upheld such enactments, notably in VEAZIE BANK V. FENNO (1869) and MCCRAY V. UNITED STATES (1904).

When the Child Labor Tax Case was decided in 1922, only Justice JOHN H. CLARKE dissented, without opinion, from Chief Justice WILLIAM HOWARD TAFT's opinion for the Court. Taft concluded that the obvious regulatory effect of the law infringed on state JURISDICTION over PRODUCTION and that *Hammer v. Dagenhart* was controlling. Congress, he said, had imposed a tax that was really a penalty for the

purpose of reaching a local subject. Like the Justices in *Hammer*, Taft feared the destruction of federalism. "To give such magic to the word "tax," he said, would remove all constitutional limitations upon Congress and abolish "the sovereignty of the States." He distinguished the Court's earlier rulings upholding federal taxes on state bank notes, oleomargarine, and narcotics by insisting that they had involved regulations or prohibitions that were "reasonably adapted to the collection of the tax." Taft, in fact, advanced the unhistorical proposition that the regulatory purposes of the taxes in those cases were only "incidental" to a primary motive of raising revenue.

The Child Labor Tax Case was favorably cited in UNITED STATES V. BUTLER (1936), but a year later, in SONZINSKY V. UNITED STATES, the Court upheld a federal licensing tax on firearms dealers. Justice HARLAN FISKE STONE's opinion sharply repudiated Taft's, contending that the incidental effect of regulation was irrelevant. Courts, he said, were incompetent to question congressional motives; specifically, they should not measure a tax's regulatory effect and use it to argue that Congress had exercised another power denied by the Constitution. Similar arguments were registered in UNITED STATES V. KAHRIGER (1953) when the Court sustained a federal tax on gambling businesses.

STANLEY I. KUTLER
(1986)

Bibliography

WOOD, STEPHEN 1968 *Constitutional Politics in the Progressive Era: Child Labor and the Law*. Chicago: University of Chicago Press.

## *BAKER v. CARR*
369 U.S. 186 (1962)

Chief Justice EARL WARREN considered *Baker v. Carr* the most important case decided by the Warren Court. Its holding was cryptic: "the right [to equal districts in the Tennessee legislature] is within the reach of judicial protection under the FOURTEENTH AMENDMENT." Many people expected REAPPORTIONMENT under *Baker* to vitalize American democracy. Others feared that it would snare the judiciary in unresolvable questions of political REPRESENTATION, outside the proper bounds of its constitutional authority.

Tennesseans, like others, had moved from countryside to urban and suburban districts, but no redistricting had taken place since 1901. Supporters of reapportionment claimed that the resulting swollen districts made "second-class citizens" of city voters; they blamed "malapportionment" for urban woes and legislative apathy. Finding little legislative sympathy for these claims, they turned to the courts.

But they had several hurdles to clear. The framers of the Fourteenth Amendment had repeatedly denied that it protected the right to vote. Perhaps it protected rights of representation, but the Court had found such rights too cloudy, too sensitive, and too "political" to settle judicially. (See POLITICAL QUESTIONS.)

The central hurdle was the "standards problem" expounded by Justice FELIX FRANKFURTER in COLEGROVE V. GREEN (1946) and in his *Baker* dissent. How could the Court tell lower courts and legislatures the difference between good representation and bad, lacking clear constitutional guidance? The Constitution was a complex blend of competing and countervailing principles, not a mandate for equal districts. "What is actually asked of the Court . . . is to choose among competing bases of representation—ultimately, really, among competing theories of philosophy—in order to establish an appropriate form of government for . . . the states. . . ." Frankfurter accused the Court of sending the lower courts into a "mathematical quagmire."

Writing for the majority, Justice WILLIAM J. BRENNAN argued that the *Colegrove* court had not found apportionment a political question but had declined to hear it using EQUITY discretion. But he did not answer Frankfurter's challenge to lay down workable standards, nor Justice JOHN MARSHALL HARLAN's objection, later reasserted in REYNOLDS V. SIMS (1964), that nothing in the Constitution conveyed a right to equal districts. Brennan merely claimed that "judicial standards under the EQUAL PROTECTION CLAUSE are well developed and familiar," and that "the right asserted is within the reach of judicial protection under the Fourteenth Amendment."

The concurring Justices, WILLIAM O. DOUGLAS and TOM C. CLARK, were not so cautious. Clark felt that "rational" departures from equal districts, such as districts approved by popular referendum, should be permitted. Douglas emphasized that the standards would be flexible (though he would later vote for rigid standards).

These opinions, and *Baker*'s place in history, make sense only in the context of Solicitor General Archibald Cox's AMICUS CURIAE brief supporting intervention. To take on a cause that could, and later did, jeopardize the seats of most of the legislators in the country, and invite formidable political reprisals, the Justices had to move with caution. Cox's brief reassured them that the JOHN F. KENNEDY administration, like its predecessor, favored intervention. The executive support probably swayed the votes of at least two Justices, Clark and POTTER STEWART. Had these voted against intervention, the Court would have divided 4–4, leaving intact the lower court's decision not to hear the case.

Moreover, Cox's brief did address Harlan's and Frankfurter's challenges. As with BROWN V. BOARD OF EDUCATION (1954), he argued, constitutional authority could be demonstrated from social need, as perceived by social scientists, incorporated into a spacious reading of the Fourteenth Amendment. As for standards, there were two possibilities: an absolute, individual right to vote, perhaps grounded on the equal protection clause, and a loose, group right to equal representation, perhaps grounded on the DUE PROCESS CLAUSE. Of the two, Cox seemed to favor the looser one, forbidding "egregious cases" of "gross discrimination." He even showed how such a standard might be drawn on a map of Tennessee. Because he was explicit, Brennan could afford to be cryptic and let the Cox brief draw most of Frankfurter's and Harlan's fire.

Within two years the Court announced in *Reynolds v. Sims* that equal representation for equal numbers was the "fundamental goal" of the Constitution and laid down standards so strict that every state but one, Oregon, was compelled to reapportion. Compliance with *Baker* was widespread and quick. Opposition was strong but late. By 1967 the states had come within a few votes of the two-thirds needed to call a CONSTITUTIONAL CONVENTION to strip courts of redistricting power, but by then reapportionment was largely completed, and the movement died.

Reapportionment added many urban and suburban seats to legislatures, replacing rural ones, but there is little evidence that it produced any of the liberalizing, vitalizing policies its proponents had predicted. What it did bring was a plague of GERRYMANDERING, renewed after each census, because it forced legislators to redistrict without forcing them to be nonpartisan. The Court since *Baker* has been powerless to control gerrymanders. Packing or diluting a group in a district can strengthen or weaken the group, or do both at once. There is no way short of commanding PROPORTIONAL REPRESENTATION to equalize everyone's representation. Nor is there a workable way to equalize representation in the ELECTORAL COLLEGE, the Senate, the national party conventions, party committees, runoff elections, executive appointments, or MULTIMEMBER DISTRICTS. The Court opened these doors when it announced that representation was the fundamental goal of the Constitution, but it closed them when it found that they raised the standards problem too plainly to permit intervention, exactly as Frankfurter had warned.

*Baker* has left us two legacies. The good one is equalizing district size. The bad one is rhetorical indirection, constitutional fabrication, and a penchant for overriding the wishes of people and their representatives, as for example, in *Lucas v. Forty-fourth General Assembly* (1964). Whether the good legacy is worth the bad, and whether it even added on balance to equal representation, can be told only with reference to the full breadth of representation which was too complicated for the Court to touch.

WARD E. Y. ELLIOTT
(1986)

Bibliography

COX, ARCHIBALD 1967 *The Warren Court: Constitutional Decision as an Instrument of Reform.* Cambridge, Mass.: Harvard University Press.

DIXON, ROBERT G., JR. 1968 *Democratic Representation: Reapportionment in Law and Politics.* New York: Oxford University Press.

ELLIOTT, WARD E. Y. 1975 *The Rise of Guardian Democracy: The Supreme Court's Role in Voting Rights Disputes, 1845–1969.* Cambridge, Mass.: Harvard University Press.

NAVASKY, VICTOR 1971 *Kennedy Justice.* New York: Atheneum.

## BALANCED-BUDGET AMENDMENT

Since one was first introduced in 1936, various versions of a balanced-budget amendment to the United States Constitution have been proposed in Congress. Such proposals have been introduced regularly since the 1970s. Moreover, since 1975, such an amendment has been the subject of applications (approximately thirty-two by 1990) by state legislatures for a CONSTITUTIONAL CONVENTION. All such proposals seek to encourage or mandate the adoption of a balanced BUDGET. Some of them have additional goals and would more accurately be denominated "balanced-budget and tax limitation," "deficit limitation," or "federal government limitation" amendments.

The only such proposed amendment to have passed either house is S.J. Res. 58, adopted by the Senate in 1982. It provided that Congress must annually adopt (and may subsequently amend as needed) a prospective statement in which anticipated total outlays (other than principal payments) do not exceed anticipated total receipts (other than borrowing), unless such an anticipated deficit is authorized by three-fifths of the whole number of each house. It charged Congress and the President with assuring that actual outlays do not exceed the anticipated outlays provided in the statement, although they may exceed actual receipts. It limited each year's rate of growth of planned receipts to the previous year's rate of growth in the national income, unless otherwise authorized by a majority of the whole number of each house. It also fixed the deficit as of the date of ratification, subject to enlargement by a vote of three-fifths of the whole number of each house. In wartime these requirements could be suspended by a simple majority.

Enforcement of such an amendment could affect the SEPARATION OF POWERS. It could enhance presidential

power by justifying the IMPOUNDMENT OF FUNDS, for example, or involve the judiciary in overseeing the BUDGET PROCESS, an area heretofore at the very center of majoritarian decision making. Whether current doctrines of STANDING, JUSTICIABILITY, and POLITICAL QUESTION would preclude this judicial supervision is uncertain, and was left uncertain in the congressional debates.

Quoting Justice OLIVER WENDELL HOLMES, JR.'s dissent in LOCHNER V. NEW YORK (1905) to the effect that "a constitution is not intended to embody a particular economic theory. . . . It is made for people of fundamentally differing views," critics argue that the proposed amendment does not belong in the Constitution. That charter can endure the ages by defining structures of power within a regime of ordered liberty, rather than by specifying temporary and highly controversial economic policies, especially amendments, such as this one, with profound distributional effects. Moreover, they fear that such an amendment would weaken constitutional government. If effective, it could create paralyzing supermajority hurdles to daily governance. In contrast, the few other constitutional provisions requiring supermajorities (other than the veto override) do not risk interfering with the ongoing functions of government; even a DECLARATION OF WAR requires only a simple majority. Alternatively, critics argue that if the amendment proved a nullity by being either suspended or ignored, the Constitution's authority as positive law could be undermined. A suspension clause is a rarity in the United States Constitution, in contrast to those of other countries with a lesser tradition of CONSTITUTIONALISM. Even if such an amendment were not formally suspended, Congress might evade the amendment through such devices as off-budget federal agencies and CORPORATIONS and costly regulation of the private and state sectors in lieu of spending programs. For example, states with a balanced-budget requirement have resorted to splitting their budgets into a balanced operating budget and a capital budget financed by borrowing.

In response, supporters argue that current deficits are economically, politically, and morally ruinous, and are destructive of the country's future. Further, they contend that such proposed amendments seek not only to enact a particular economic theory but also to cure a flaw, identified by public choice theory, in the constitutional structure. Because of the nature of "concentrated benefits and dispersed costs," no effective constituency exists to oppose spending decisions. In the absence of a mandatory balanced budget, Congress has ceased to be a deliberative body that resolves and transcends factions' competing demands, because deficits allow representatives to respond to their constituents' multiple spending demands without regard to taxing decisions. This structural defect did not appear before 1960, the proponents explain, because an unwritten constitutional principle favoring peacetime balanced budgets and the reduction of debt had prevailed since 1789. But in the past few decades, Keynesian theory and theories of the WELFARE STATE have undermined this principle; and the institutions that had enforced the principle, POLITICAL PARTIES with strong local ties and the congressional seniority system, have been weakened. Moreover, Supreme Court decisions broadly interpreting Congress's ENUMERATED POWERS have eliminated other constitutional restraints that limited spending. It should be noted that this explanation does not account for the President's major role in enlarging and perpetuating deficits.

ROBERT D. GOLDSTEIN
(1992)

Bibliography

CONGRESSIONAL BUDGET OFFICE 1982 *Balancing the Federal Budget and Limiting Federal Spending: Constitutional and Statutory Approaches.* Washington, D.C.: Government Printing Office.

MOORE, W. S. and PENNER, RUDOLPH G. 1980 *The Constitution and the Budget.* Washington, D.C.: American Enterprise Institute.

WHITE, JOSEPH and WILDAVSKY, AARON 1989 *The Deficit and the Public Interest: The Search for Responsible Budgeting in the 1980's.* Berkeley and Los Angeles: University of California Press.

## BALANCING TEST

Although the intellectual origins of the balancing of interests formula lie in ROSCOE POUND's sociological jurisprudence, the formula was introduced into constitutional law as a means of implementing the Supreme Court's oft-repeated announcement that FIRST AMENDMENT rights are not absolute. In determining when infringement on speech may be justified constitutionally, the Court may balance the interest in FREEDOM OF SPEECH against the interest that the infringing statute seeks to protect. Thus the Court may conclude that the interests in NATIONAL SECURITY protected by the Smith Act outweigh the interests in speech of those who advocate forcible overthrow of the government, or that the free speech interests of pamphleteers outweigh the interest in clean streets protected by an antilittering ordinance forbidding the distribution of handbills.

The 1950s campaign against alleged subversives brought two interlocking problems to the Supreme Court. The dominant free speech DOCTRINES of the Court were PREFERRED FREEDOMS and the CLEAR AND PRESENT DANGER TEST. Because alleged subversives were exercising preferred speech rights and the government was unprepared

to offer evidence that their speech did constitute a present danger of violent overthrow of the government, the Court found it difficult under the existing formulas to uphold government anticommunist action. Because established First Amendment doctrine appeared to be on a collision course with an anticommunist crusade that appeared to enjoy overwhelming popular support, free speech provided the crucial arena for the penultimate crisis of the judicial self-restraint movement. (The ultimate crisis came in BROWN V. BOARD OF EDUCATION, 1954.) Although the logical implication of that movement suggested that the Court ought never declare an act of Congress unconstitutional as a violation of the BILL OF RIGHTS, the Court was not prepared to go so far. The Justices' dilemma was that they were the inheritors of pro-freedom of speech doctrines but wished to uphold infringements upon speech without openly abdicating their constitutional authority.

The way out of this dilemma was the balancing formula. It allowed the Court to vindicate legislative and executive anticommunist measures case by case without ever flatly announcing that the Court had gone out of the business of enforcing the First Amendment. LEARNED HAND's "clear and probable" or "discounting" formula adopted by the Supreme Court in DENNIS V. UNITED STATES (1951) was the vital bridge in moving from a clear and present danger test that impels judicial action to a balancing test that veils judicial withdrawal. For Hand's test permits conversion of the danger test from an exception to freedom of speech invoked when speech creates an immediate danger of violent crime to a general formula for outweighing speech claims whenever the goals espoused in the speech are sufficiently antithetical to those of the majority. Justice FELIX FRANKFURTER's concurrence in *Dennis* and the majority opinion in BARENBLATT V. UNITED STATES (1959) not only made the antispeech potential of the balancing doctrine clear but also exhibited its great potential for absolute judicial deference to coordinate branches. For if constitutional judgments are ultimately a matter of balancing interests, in a democratic society who is the ultimate balancer? Necessarily, it is the Congress in which all the competing interests are represented. Thus the Court deferred to Congress's judgment that the needs of national security outweighed the speech rights of the enemies of that security.

Proponents of the balancing doctrine argue that no one is really willing to give any constitutional right absolute sway and that the act of judging always involves a weighing of competing claims. Certainly when constitutional rights such as free speech and FAIR TRIAL come into conflict, balancing of the two appears inevitable. The opponents of balancing argue for "principled" versus "ad hoc" or case-by-case balancing. If judges are left free to balance the particular interests in each particular case, they are always free to decide any case for or against the rights claimed by the way they state the interests. Opponents of ad hoc balancing insist that whatever balancing must be done should be done in the course of creating constitutional rules that will then be applied even-handedly in all cases. Thus, if fair trial and free speech values conflict, we may want a rule that upholds the constitutionality of banning prosecutors from pretrial release of confessions, but we do not want the kind of ad hoc balancing in which judges are free to find that in some cases such bans are constitutional and in others they are not.

Balancing has remained a principal doctrine in the freedom of speech area and has spread to other constitutional areas such as PRIVACY. Its capacity as a vehicle for judicial discretion is illustrated by BUCKLEY V. VALEO (1976), in which the Court used the balancing doctrine to march through the complex CAMPAIGN FINANCE ACT, striking down some provisions and upholding others in what was effectively a total legislative redrafting, and by the ABORTION cases (see ROE V. WADE, 1973) in which the Court used the balancing doctrine to invest with constitutional authority the "trimester" scheme it invented.

In GIBSON V. FLORIDA LEGISLATIVE INVESTIGATING COMMITTEE (1963) the Court held that government might infringe upon a First Amendment right only when it could show a COMPELLING STATE INTEREST. This formula may be viewed as weighting the balance of interests in favor of constitutional rights, but any government interests can be stated in such a way as to appear compelling. The Court's employment of the balancing test always leaves us uncertain whether any legislative infringement of free speech or other rights, no matter how direct or how open, will be declared unconstitutional, for the Court may always be prepared to find some state interest sufficiently weighty to justify the infringement.

MARTIN SHAPIRO
(1986)

(SEE ALSO: *Absolutism; Judicial Activism and Judicial Restraint.*)

Bibliography

FRANTZ, LAURENT B. 1963 Is the First Amendment Law? *California Law Review* 51:729–754.

HAND, LEARNED 1958 *The Bill of Rights.* Cambridge, Mass.: Harvard University Press.

MENDELSON, WALLACE 1962 On the Meaning of the First Amendment: Absolutes in the Balance. *California Law Review* 50:821–828.

## BALDWIN, ABRAHAM
## (1754–1807)

Abraham Baldwin represented Georgia at the CONSTITUTIONAL CONVENTION OF 1787 and signed the Constitution.

He served on the Committee on Representation, and, although personally opposed to equal representation of states in the SENATE, the Connecticut-born Baldwin played a key role in securing the GREAT COMPROMISE. He later spent eighteen years in Congress.

DENNIS J. MAHONEY
(1986)

## BALDWIN, HENRY
(1780–1844)

Henry Baldwin of Pittsburgh was appointed to the Supreme Court on January 4, 1830, by ANDREW JACKSON. After graduating from Yale College in 1797, he studied law with ALEXANDER J. DALLAS and began his practice in Pittsburgh where he joined the bar in 1801. Law spilled over naturally into politics for Baldwin, and from 1816 to 1822 he served in Congress, where he gained a reputation as an economic nationalist. He also defended Andrew Jackson from charges of misconduct in Spanish Florida and later supported him for President—efforts that won him a seat on the Supreme Court.

Though an unknown judicial quantity, Baldwin was acceptable to the still-dominant JOSEPH STORY-JOHN MARSHALL wing of the Court because of his reputation as a "sound" man and talented lawyer—and because he was not JOHN BANNISTER GIBSON, whom conservatives feared would get the appointment. Baldwin's supporters were soon disappointed, then shocked. Almost immediately the new Justice was out of phase with the Court's nationalism and at odds with several of its members, especially Story, whose scholarly, didactic style Baldwin found offensive and threatening. After serving less than a year on the Court, he wanted off. Worse still, his collapse in 1833 (which caused him to miss that term of the Court) signaled the onset of a mental condition that progressively incapacitated him. Occasionally he rose to the level of his early promise, as for example in *United States v. Arredondo* (1832) where the principle was established that land claims resting on acts of foreign governments (which in the Spanish and Mexican cessions amounted to millions of acres) were presumed valid unless the United States could prove otherwise. Another solid effort was *Holmes v. Jennison* (1840) where he upheld the right of a state to surrender fugitives to a foreign country even though such a power cut into the policymaking authority of the national government in FOREIGN AFFAIRS. His circuit efforts were also well received at first and deservedly so, judging from such opinions as *McGill v. Brown* (1833) where he handled a complicated question of charitable bequests with considerable sophistication.

Baldwin's constitutional philosophy, so far as it can be detected, was set forth in his *General View of the Origin and Nature of the Constitution and Government of the United States*, a rambling, unconvincing treatise published in 1837 (mainly, it would seem, to rescue him from pressing debts). Baldwin presumed to stake out a middle constitutional ground for himself between extreme STATES' RIGHTS constitutional doctrine and the broad nationalism of Marshall and Story which he explicitly condemned as unfounded and usurpatory. He took particular pains to refute the thesis in Story's *Commentaries on the Constitution* (1833) that SOVEREIGNTY devolved on the whole people after 1776. Baldwin's final position on the matter appeared to be little more than a reductionist version of JOHN C. CALHOUN's theories.

The states' rights theory set forth in *General View* was consistent with Baldwin's *Jennison* opinion and his preference for STATE POLICE POWER as stated in the slavery case of GROVES V. SLAUGHTER (1841). On the other hand, in *McCracken v. Hayward* (1844), he did not hesitate to strike down an Illinois stay law that impaired contractual rights. His unpublished opinion in BANK OF AUGUSTA V. EARLE (1839) took the extremely nationalist position that a foreign corporation's right to do business in a state was protected by the PRIVILEGES AND IMMUNITIES clause of Article IV, section 2, of the Constitution.

To say where Baldwin really stood is difficult. He wrote less than forty majority opinions during his fourteen years on the Court. Of those, few were important and fewer still were coherent expositions of constitutional DOCTRINE. He withdrew more and more into paranoiac isolation, carping at his colleagues, criticizing reporter Richard Peters, and pondering his rapidly deteriorating financial situation. He dissented more and more (thirty-some times counting unwritten dissents) and with less and less purpose. That a number of his separate opinions were delivered too late to be included in the reports suggests that his impact in the Court's CONFERENCE was peripheral at best. His effectiveness on the circuit declined, too, if one credits the growing complaints of district judge Joseph Hopkinson who sat with him in Pennsylvania. Baldwin died in 1844, deeply in debt, without friends and with no prospect of being remembered favorably. Illness had taken a heavy toll. His influence on American law was negligible and his presence on the Supreme Court was probably counterproductive.

R. KENT NEWMYER
(1986)

Bibliography

BALDWIN, HENRY 1837 *A General View of the Origin and Nature of the Constitution and Government of the United States. . . .* Philadelphia: John C. Clark.

GATELL, FRANK O. 1969 Henry Baldwin. In Leon Friedman

and Fred L. Israel (eds.), *The Justices of the United States Supreme Court, 1789–1969*, Vol. 1, pages 571–598. New York: Chelsea House.

## BALDWIN, ROGER N.
(1884–1981)

Until the United States entered WORLD WAR I, Roger Nash Baldwin was a social worker and a leading expert on juvenile courts. A pacifist who feared that the war might cause repression of individual rights, Baldwin helped to found the National Civil Liberties Bureau in 1917. The Bureau defended CONSCIENTIOUS OBJECTORS and those prosecuted for allegedly antiwar speeches and publications. Reorganized in 1920 by Baldwin and others as the AMERICAN CIVIL LIBERTIES UNION, it expanded its efforts to include among its many clients leaders of the International Workers of the World and other labor organizations; John T. Scopes, who violated Tennessee's anti-evolution law in 1925 and was prosecuted in the infamous "monkey trial"; the Jehovah's Witnesses; and even those, such as the Ku Klux Klan and the German American Bund, who opposed FREEDOM OF SPEECH for all but themselves. Baldwin was also committed to efforts on behalf of human rights abroad; despite his sympathy for radical causes, his investigation of the Soviet Union led him to oppose communism. In 1940, at his urging, the ACLU adopted a loyalty resolution barring supporters of totalitarian dictatorships from membership, only to find later that the government LOYALTY OATHS, which it fought in court, were based on its own resolution. Baldwin served as director of the ACLU until 1950, as its chairman from 1950 to 1955, and as its international work adviser until his death. After WORLD WAR II, Baldwin was counselor on CIVIL LIBERTIES in the reconstruction of the governments of Japan, Korea, and Germany.

RICHARD B. BERNSTEIN
(1986)

Bibliography

LAMSON, PEGGY 1976 *Roger Baldwin, Founder of the American Civil Liberties Union: A Portrait.* Boston: Houghton Mifflin.

## *BALDWIN v. FISH & GAME COMMISSION*
436 U.S. 371 (1978)

The Supreme Court, 6–3, sustained Montana's exaction of a substantially higher elk-hunting license fee for nonresidents than for residents. Temporarily abandoning the approach of TOOMER V. WITSELL (1948), the Court said that the PRIVILEGES AND IMMUNITIES clause of Article IV of the Constitution protected citizens of other states only as to fundamental rights, a category that did not include the "sport" of killing elk. *Toomer*'s approach returned four weeks later in HICKLIN V. ORBECK (1978), but the Court in Hicklin neither overruled nor distinguished *Baldwin.* (See RESIDENCE REQUIREMENTS.)

KENNETH L. KARST
(1986)

## *BALDWIN v. NEW YORK*
399 U.S. 66 (1970)

When DUNCAN V. LOUISIANA extended the SIXTH AMENDMENT'S TRIAL BY JURY provision to the states in 1968, the Court said that MISDEMEANORS, crimes punishable by imprisonment for less than six months, may be tried without a jury. Petty offenses have always been exempt from the amendment's guarantee of trial by jury in "all criminal prosecutions." Baldwin, having been sentenced to a year in jail for pickpocketing, claimed on APPEAL that New York City had deprived him of his right to a trial by jury. The Court held that the Constitution requires a trial by jury if an offense can be punished by imprisonment for more than six months. Justice BYRON R. WHITE, for a plurality, found decisive the fact that one city alone in the nation denied trial by jury when the possible punishment exceeded six months. Justices HUGO L. BLACK and WILLIAM O. DOUGLAS, concurring separately, would have ruled that the Constitution requires a jury for all accused persons without exception.

LEONARD W. LEVY
(1986)

## *BALLARD, UNITED STATES v.*

See: Postal Power; Religion and Fraud

## *BALLEW v. GEORGIA*
435 U.S. 223 (1978)

In *Ballew v. Georgia*, the Supreme Court unanimously held that a five-person jury in a nonpetty criminal case does not satisfy the right to TRIAL BY JURY under the Sixth Amendment as applied to the states through the FOURTEENTH AMENDMENT. *Ballew* involved a misdemeanor conviction for exhibiting an obscene motion picture.

Although all the Justices agreed upon the result, four separate opinions were written on the five-person jury issue. Justice HARRY A. BLACKMUN joined by Justice JOHN PAUL STEVENS relied heavily on SOCIAL SCIENCE RESEARCH in con-

cluding that there was substantial doubt that a five-person jury functioned effectively, was likely to reach accurate results, or truly represented the community. Justice BYRON R. WHITE concluded that a jury of less than six would fail to represent the sense of the community. Justice LEWIS F. POWELL joined by Chief Justice WARREN E. BURGER and Justice WILLIAM H. REHNQUIST agreed that five-person juries raised "grave questions of fairness" indicating that "a line has to be drawn somewhere if the substance of jury trial is to be preserved." Since an earlier case, WILLIAMS V. FLORIDA (1970), had upheld the constitutionality of six-person juries, the effect of *Ballew* was to draw the constitutional line between five and six.

NORMAN ABRAMS
(1986)

(SEE ALSO: *Jury Size.*)

## BALLOT ACCESS

Throughout most of the nineteenth century, voters were required to bring their own ballots to the polling places. Usually, ballots were preprinted by the POLITICAL PARTIES and contained straight party tickets. When the secret ballot was introduced around the turn of the century, states had to print ballots and decide which parties and candidates should be listed. Until 1968, criteria for ballot access were controlled entirely by the states.

In that year, George Wallace enjoyed significant support in his independent challenge to the major party nominees for the presidency, RICHARD M. NIXON and HUBERT H. HUMPHREY. Wallace met the requirements for ballot listing in every state but Ohio, where he satisfied the 15 percent signature requirement but was unable to do so by the early deadline of February 7. In *Williams v. Rhodes* (1968), the Supreme Court ordered Ohio to list Wallace. Although the state had an interest in seeking to assure that the eventual winner would receive a majority of the votes, it could not pursue that objective by shielding the two established parties from competition. Three years later, in *Jenness v. Fortson* (1971), the Court upheld Georgia ballot access requirements that had prevented most but not all independent candidates and new parties from reaching the ballot.

Some critics have complained that the Court's standard for evaluating ballot access requirements in *Williams*, *Jenness*, and several subsequent decisions has been too vague. In *Williams* the Court said such requirements must be justified by a COMPELLING STATE INTEREST, but in *Anderson v. Celebrezze* (1983) the Court moved toward a more general BALANCING TEST, denying that there was a "litmus-paper test" for identifying invalid regulations. Despite the criticisms of those who favor neat doctrinal formulations, the pattern of results in ballot access cases has been reasonably clear. The Court has struck down requirements that bar truly competitive candidates and parties, while upholding other requirements, even those that work harshly against typical third parties and independent candidates who have no prospect of winning more than a small percentage of votes.

One exception is that the Court has struck down mandatory filing fees for ballot listing even when, as in *Lubin v. Panish* (1974), the fee was low enough that it could not realistically have blocked a seriously competitive candidacy. Another is that the Court has upheld restrictions intended to prevent losing factions in primaries from carrying over their intraparty disputes into general elections. For example, in *Storer v. Brown* (1974), the Court upheld a California statute barring members of a party from running as independent candidates.

The ballot access cases have also been criticized more substantively on the ground that they permit states to adopt overly restrictive requirements. Justice THURGOOD MARSHALL, dissenting in *Munro v. Socialist Workers Party* (1986), criticized the majority for presuming "that minor-party candidates seek only to get elected." Instead, he pointed out, their candidacies serve "to expand and affect political debate." Those who believe that carrying out the function of choosing officers to run the government ought to be the main consideration in designing electoral procedures are likely to take a more favorable view of the ballot access decisions.

DANIEL H. LOWENSTEIN
(2000)

Bibliography

SMITH, BRADLEY A. 1991 Note, Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply. *Harvard Journal on Legislation* 28:167–217.

WINGER, RICHARD 1996 How Ballot Access Laws Affect the U.S. Party System. *American Review of Politics* 16:321–340.

## BALLOT INITIATIVE

See: Direct Democracy; Initiative; Referendum

## *BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES v. BOUKNIGHT*

See: Freedom of Association

## BANCROFT, GEORGE
(1800–1891)

A liberal Democrat from Massachusetts, Bancroft served as JAMES POLK's secretary of the navy and acting secretary of war, as ANDREW JOHNSON's adviser, and as minister to Great Britain and to Germany. He was also the most popular, influential, and respected American historian of the nineteenth century. His twelve-volume epic on American liberty, the *History of the United States from the Discovery of the Continent*, written over half a century, contains 1,700,000 words. The last two volumes, a *History of the Formation of the Constitution of the United States* (1882), covered 1782–1789. The work benefited from Bancroft's notes of his interview with JAMES MADISON in 1836; Madison also opened his private archives to him. Bancroft was an indefatigable researcher. His chronological narrative of the origins, framing, and RATIFICATION OF THE CONSTITUTION was based on manuscript letters as well as public records. He included over 300 pages of letters, many printed for the first time.

Bancroft wrote in a grand style that is today considered florid. His essentially political interpretation remained the standard work of its kind until superseded in 1928 by CHARLES WARREN's *The Making of the Constitution*, although ANDREW C. MCLAUGHLIN's *Confederation and Constitution* (1908) exceeded both in judicious analysis. Bancroft's work is remarkably fair, although Madisonian in approach. He viewed the Constitution as a bundle of compromises between nationalists and states' rightists, North and South, large states and small ones. The epigraph to his work was William Gladstone's judgment that "the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man." CHARLES BEARD made Bancroft one of his prime targets because of Bancroft's belief that the Framers were principled patriots who gave their loyalty to a concept of national interest that transcended purse and status without compromising republican ideals.

LEONARD W. LEVY
(1986)

Bibliography

NYE, RUSSELL 1964 *George Bancroft.* New York: Washington Square Press.

## BANK HOLIDAY OF 1933

See: Emergency Bank Act

## *BANK OF AUGUSTA v. EARLE*
13 Peters 519 (1839)

This case was vitally important to CORPORATIONS because it raised the question whether a corporation chartered in one state could do business in another. Justice JOHN MCKINLEY on circuit duty ruled against corporations, provoking Justice JOSEPH STORY to say that McKinley's opinion frightened "all the corporations of the country out of their proprieties. He has held that a corporation created in one State has no power to contract or even to act in any other State. . . . So, banks, insurance companies, manufacturing companies, etc. have no capacity to take or discount notes in another State, or to underwrite policies, or to buy or sell goods." McKinley's decision seemed a death sentence to all interstate corporate business. On APPEAL, DANIEL WEBSTER, representing corporate interests, argued that corporations were citizens entitled to the same rights, under the COMITY CLAUSE in Article IV, section 2, of the Constitution, as natural persons to do business. With only McKinley dissenting, Chief Justice ROGER B. TANEY for the Court steered a middle way between the extremes of McKinley and Webster. He ruled that a corporation, acting through its agents, could do business in other states if they did not expressly prohibit it from doing so. In the absence of such a state prohibition, the Court would presume, from the principle of comity, that out-of-state corporations were invited to transact business. Thus a state might exclude such corporations or admit them conditionally; but the Court overruled McKinley's decision, and corporations as well as WHIGS, like Webster and Story, rejoiced.

LEONARD W. LEVY
(1986)

(SEE ALSO: *Citizenship; Privileges and Immunities.*)

## BANK OF THE UNITED STATES ACTS
1 Stat. 191 (1791)
3 Stat. 266 (1816)

The first Bank of the United States (1791–1811) was chartered by Congress on a plan submitted by Secretary of the Treasury ALEXANDER HAMILTON as part of his financial system. Modeled on the century-old Bank of England, the national bank harnessed private interest and profit for public purposes. It received an exclusive twenty-year charter. It was capitalized at $10,000,000, of which the government subscribed one-fifth and private investors the

remainder, one-fourth in specie and three-fourths in government stock. Located at Philadelphia and authorized to establish branches, it was to be the financial arm of government (a ready lender, a keeper and tranferrer of funds); through its powers to mount a large paper circulation and advance commercial credit, the bank would also augment the active capital of the country and stimulate enterprise. JAMES MADISON had opposed the bank bill in Congress entirely on constitutional grounds. His arguments, turning on the absence of congressional power and invasion of the reserved rights of the states, were repeated in opinions submitted to President GEORGE WASHINGTON by Attorney General EDMUND RANDOLPH and Secretary of State THOMAS JEFFERSON. They were answered, convincingly in Washington's mind, by Hamilton's argument on the doctrine of IMPLIED POWERS.

The Second Bank of the United States (1816–1836) was an enlarged and revised version of the first. Republican constitutional objections had finally prevailed when Congress refused to recharter the first bank in 1811. But the disorganization of the country's finances during the War of 1812 led the Madison administration to propose a national bank. After several false starts, a plan was agreed upon by Congress in 1816. In 1791, there had been three state-chartered banks; in 1816 there were 260, and Congress acted to recover its abandoned power to regulate the currency. As the constitutional issue receded, controversy shifted to practical and technical questions of banking policy. Inept management, state bank jealousy, and severe financial pressure in 1818–1819 produced demands for revocation of the bank's charter. Aided by the Supreme Court's decision in MCCULLOCH V. MARYLAND (1819), the bank weathered this storm and under the efficient direction of Nicholas Biddle not only prospered but gained widespread public support in the 1820s. Nevertheless, President ANDREW JACKSON attacked the bank on financial, political, and constitutional grounds. Biddle and his political friends decided to make the bank the leading issue in the 1832 presidential election by seeking immediate renewal of the charter not due to expire until 1836. Congress obliged, and Jackson vetoed the recharter bill with a powerful indictment of the bank as a privileged moneyed institution that trampled on the Constitution. (See JACKSON'S VETO OF THE BANK BILL.)Asserting the independence of the three branches of government in the interpretation of the Constitution, he declared, "The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both." After Jackson's reelection, the ties between the government and the bank were quickly severed.

MERRILL D. PETERSON
(1986)

Bibliography

HAMMOND, BRAY 1957 *Banks and Politics in America from the Revolution to the Civil War.* Princeton, N.J.: Princeton University Press.

## BANKRUPTCY ACT
52 Stat. 883 (1938)

The Bankruptcy Act of 1938, known as the Chandler Act, represented Congress's first comprehensive revision of the Bankruptcy Act of 1898. (See BANKRUPTCY POWER.) Under the financial strain caused by the Depression, the nation needed supplementary bankruptcy legislation. In a series of measures from 1933 through 1937, Congress sought to foster rehabilitation and reorganization of financially distressed debtors' nonexempt assets. The measures covered individual workers, railroads, farmers, nonrailroad CORPORATIONS, and municipalities. The Chandler Act both revised the basic bankruptcy provisions of the 1898 act and restructured and refined the Depression-era amendments. It segregated the rehabilitation and reorganization provisions into separate chapters, a structure adhered to in the Bankruptcy Reform Act of 1978. But the 1938 act neither sought nor achieved organic changes in bankruptcy law.

THEODORE EISENBERG
(1986)

Bibliography

WARREN, CHARLES 1935 *Bankruptcy in United States History.* Cambridge, Mass.: Harvard University Press.

## BANKRUPTCY POWER

Article I, section 8, of the Constitution authorizes Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States." As interpreted in the CIRCUIT COURT decision in *In re Klein* (1843), this clause empowers Congress to enact laws covering all aspects of the distribution of a debtor's property and the discharge of his debts. Contrary to some early arguments, Congress's bankruptcy power is not limited to legislating only for the trader class. Commencing in 1800, Congress repeatedly exercised its bankruptcy power during periods of depression or financial unrest, but all early bankruptcy laws were repealed whenever unrest subsided. Since 1898, however, the United States continuously has had a comprehensive bankruptcy law, one completely revised by the BANKRUPTCY REFORM ACT of 1978.

Article I expressly requires bankruptcy legislation to be uniform. As interpreted in *Hanover National Bank v.*

*Moyses* (1902), the uniformity limitation does not prevent incorporation of state law into federal bankruptcy provisions. Bankruptcy law, the Court held in that case, is uniform "when the trustee takes in each state whatever would have been available to the creditor if the bankrupt law had not been passed. The general operation of the law is uniform although it may result in certain particulars differently in different states." And under the *Regional Rail Reorganization Act Cases* (1974) a bankruptcy statute may confine its operations to a single region where all covered bankrupt entities happen to be located. *Railway Executives' Association v. Gibbons* (1982), the only Supreme Court case to invalidate a bankruptcy law for lack of uniformity, struck down the Rock Island Transition and Employee Assistance Act because it covered only one of several railroads then in reorganization.

However many other theoretical limitations restrict Congress's bankruptcy power, only a few have led to invalidation of bankruptcy legislation. As interpreted in reorganization cases, the Fifth Amendment's DUE PROCESS CLAUSE limits Congress's bankruptcy power to alter or interfere with the rights of secured creditors. In LOUISVILLE JOINT STOCK LAND BANK V. RADFORD (1934) the Court found the original FRAZIER-LEMKE ACT unconstitutional because it too drastically interfered with a mortgagee's interest in property. But within months Congress enacted the second Frazier-Lemke Act, with scaled down interference, which the Court upheld in WRIGHT V. VINTON BRANCH OF MOUNTAIN TRUST BANK OF ROANOKE (1937). And in *Continental Illinois National Bank and Trust Co. v. Chicago, Rock Island and Pacific Railway Company* (1935) the Court held that secured creditors could at least temporarily be enjoined from selling their security. *Van Huffel v. Harkelrode* (1931) allows property to be sold free of a mortage holder's encumbrance where his or her rights are transferred to the proceeds of the sale. The *Regional Rail Reorganization Act Cases* found no constitutional flaw in the government's refusal to permit liquidation of an unsuccessful business where the Tucker Act permitted a suit for damages in the COURT OF CLAIMS.

For a brief period, there was doubt about Congress's authority to regulate municipal bankruptcies. In ASHTON V. CAMERON COUNTY WATER IMPROVEMENT DISTRICT (1937) the Supreme Court invalidated, as an interference with state sovereignty, a 1934 municipal bankruptcy law. But in *United States v. Bekins* (1938), in a shift that may be attributable to changes in Court personnel, the Court sustained a similar law. The Bankruptcy Reform Act of 1978 contains an updated municipal bankruptcy law.

Under STURGES V. CROWNINSHIELD (1819), when no national bankruptcy laws are in effect, states may regulate insolvency. Their effectiveness in doing so is limited by the requirement that states not impair the OBLIGATION OF CONTRACTS. When national bankruptcy legislation is in effect, *Stellwagen v. Clum* (1918) and other cases indicate that state laws are abrogated only to the extent that they undermine federal law.

THEODORE EISENBERG
(1986)

Bibliography

WARREN, CHARLES 1935 *Bankruptcy in United States History.* Cambridge, Mass.: Harvard University Press.

## BANKRUPTCY REFORM ACT
92 Stat. 2549 (1978)

The Bankruptcy Reform Act of 1978 was the first comprehensive revision of federal bankruptcy law since 1938 and the first completely new bankruptcy law since 1898. (See BANKRUPTCY POWER.) Although the 1978 act made many substantive changes in bankruptcy law, its most controversial changes concern the organization of the bankruptcy system. The act expanded the bankruptcy court's authority to include JURISDICTION over virtually all matters relating to the bankrupt and the bankrupt's assets. This expansion, combined with Congress's failure to staff the new bankruptcy courts with life-tenured judges, led the Supreme Court in NORTHERN PIPELINE CONSTRUCTION CO. V. MARATHON PIPE LINE CO. (1982) to invalidate portions of the act's jurisdictional scheme. (See JUDICIAL POWER OF THE UNITED STATES.) In an effort to upgrade the bankruptcy courts, the act, in selected pilot districts, creates a system of United States trustees to administer and supervise bankruptcy cases, leaving courts free to perform more traditional adjudicatory functions. One of the statute's most significant changes is to consolidate into a single reorganization proceeding what had been three different methods for reorganizing financially distressed CORPORATIONS.

THEODORE EISENBERG
(1986)

Bibliography

Selected Articles on the Bankruptcy Reform Act of 1978 1979 *St. Mary's Law Journal* 11:247–501.

## *BANTAM BOOKS, INC. v. SULLIVAN*
372 U.S. 58 (1963)

In *Bantam Books v. Sullivan* the Supreme Court struck down a state system of informal censorship, holding that the regulation of OBSCENITY must meet rigorous procedural safeguards to guard against the repression of constitutionally protected FREEDOM OF SPEECH. Rhode Island

had created a commission to educate the public concerning books unsuitable to youths. The commission informed book and magazine distributors that certain publications were "objectionable" for distribution to youths under eighteen years of age and threatened legal sanctions should a distributor fail to "cooperate." Distributors, rather than risk prosecution, had removed books from public circulation, resulting in the suppression of publications the state conceded were not obscene.

KIM MCLANE WARDLAW
(1986)

## BARBOUR, PHILIP P.
(1783–1841)

Philip P. Barbour was appointed to the Supreme Court by ANDREW JACKSON in December 1835 to fill the seat vacated by GABRIEL DUVALL. Born into Virginia's slaveholding plantation elite, Barbour held constitutional values that promoted the interest of that class. His law was largely self-taught, though he attended the College of William and Mary briefly in 1802 before beginning full-time practice in Orange County, Virginia. Beginning in 1812, Barbour served two years in the Virginia Assembly, following which he was elected to Congress where he served until 1825 and then again for two years beginning in 1827. For a brief time he was a Judge of the General Court of Virginia, and in 1830 he was appointed to the federal district court for Eastern Virginia, where he remained until assuming his Supreme Court duties in 1836.

Barbour's views on the Constitution were essentially those of the Richmond Junto of which he was a member. As a STATES' RIGHTS constitutionalist, he was opposed to federally sponsored INTERNAL IMPROVEMENTS, the protective tariff, and the second BANK OF THE UNITED STATES, an institution he viewed as a private CORPORATION whose stock the government should not own. He defended SLAVERY vigorously during the Missouri debates and, at the Virginia Constitutional Convention of 1829–1830, voted consistently with tidewater slaveholders against the democratic forces of the West. Barbour also supported the court-curbing plan of Senator Richard Johnson of Kentucky, prompted by the Court's decision in COHENS V. VIRGINIA (1821), and in 1827 he himself sponsored a measure that would have required a majority of five of seven Justices to hold a law unconstitutional.

Four years on the Court gave Barbour little chance to translate his states' rights philosophy and theory of judicial power into law. He wrote only a handful of opinions, and only in MAYOR OF NEW YORK V. MILN (1837) did he speak for the majority in an important case. There he upheld a New York regulation of immigrants as a STATE POLICE POWER measure, but his exposition of doctrine was inchoate at best and did little to influence future decisions. States' rights thinking also informed his vote in CHARLES RIVER BRIDGE V. WARREN BRIDGE (1837) (where he joined the new Jacksonian majority in refusing to extend by implication the 1819 ruling in DARTMOUTH COLLEGE V. WOODWARD) and in BRISCOE V. BANK OF KENTUCKY, also in 1837 (where the new majority refused to invalidate state bank notes on the ground that they were not BILLS OF CREDIT prohibited by Article I, section 10, of the Constitution).

Although he was a consistent advocate of states' rights, Barbour was not, as JOHN QUINCY ADAMS charged, a "shallow-pated wild-cat" bent on destroying the Union. Indeed, compared to the states' rights views of PETER DANIEL who succeeded him, Barbour's appear moderate and restrained. Even DANIEL WEBSTER conceded that he was "honest and conscientious," and Justice JOSEPH STORY, for all his objection to Barbour's constitutional notions, thought him a "perspicacious" and "vigorous" judge.

R. KENT NEWMYER
(1986)

Bibliography

CYNN, P. P. 1913 Philip Pendleton Barbour. *The John P. Branch Historical Papers* (Randolph Macon College) 4:67–77.

GATELL, FRANK O. 1969 Philip Pendleton Barbour. In Leon Friedman and Fred L. Israel (eds.), *The Justices of the United States Supreme Court, 1789–1969*, Vol. 1, pages 717–734. New York: Chelsea House.

## *BAREFOOT v. ESTELLE*
463 U.S. 880 (1983)

In *Barefoot v. Estelle* the Supreme Court gave its approval to expedited federal collateral review of CAPITAL PUNISHMENT cases. In a 6–3 decision the Court approved the consolidation of hearings on procedural and substantive motions, the separate arguing of which had frustrated imposition of the death penalty even when the claims supporting the appeal were without merit. The opinion by Justice BYRON R. WHITE declared that no constitutional right of the convict was impaired by the one-step appeals process.

DENNIS J. MAHONEY
(1986)

## *BARENBLATT v. UNITED STATES*
360 U.S. 109 (1959)

In a 5–4 decision, Justice JOHN MARSHALL HARLAN writing for the majority, the Supreme Court upheld Barenblatt's

conviction for contempt of Congress based on his refusal to answer questions of the HOUSE COMMITTEE ON UNAMERICAN ACTIVITIES about his membership in the Communist party. He argued that such questions violated his rights of FREEDOM OF SPEECH and association by publically exposing his political beliefs. In an earlier decision, WATKINS V. UNITED STATES (1957), the Court had offered some procedural protections to witnesses before such committees and held out hope that it would offer even greater protections in the future. *Barenblatt* ended that hope.

The Court did follow the *Watkins* approach of denouncing "exposure for the exposure's sake" and requiring that Congress have a legislative purpose for its investigations. But it presumed that Congress did have such a purpose, refusing to look at the actual congressional motives behind the investigation.

*Barenblatt* is the classic case of a FIRST AMENDMENT ad hoc BALANCING TEST. The Court held that the First Amendment protected individuals from compelled disclosure of their political associations. But Justice Harlan went on to say, "Where First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involved a balancing by the Courts of the competing private and public interest at stake in the circumstances shown." Then he balanced Barenblatt's interest in not answering questions about his communist associations against Congress's interest in frustrating the international communist conspiracy to overthrow the United States government. The interests thus defined, the Court had no trouble striking the balance in favor of the government. More than any other decision, *Barenblatt* establishes that the freedom of speech may be restricted by government if, in the Court's view, the government's interest in committing the infringement is sufficiently compelling.

MARTIN SHAPIRO
(1986)

## *BARKER v. WINGO*
407 U.S. 514 (1972)

The SPEEDY TRIAL right protects a defendant from undue delay between the time charges are filed and trial. When a defendant is deprived of that right, the only remedy is dismissal with prejudice of the charges pending against him. In *Barker*, the leading speedy trial decision, the Supreme Court discussed the criteria by which the speedy trial right is to be judged. The Court adopted a BALANCING TEST involving four factors to be weighed in each case where the issue arises. They are: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant, such as pretrial incarceration and inability to prepare a defense. In reaching its decision the Court noted that the speedy trial right is unique inasmuch as it protects societal rights as well as those of the accused. In many instances, delayed trials benefit a defendant because witnesses disappear or memories fade. The balancing takes into consideration the varied interests protected by that right.

WENDY E. LEVY
(1986)

## *BARNES v. GLEN THEATRE*

See: First Amendment; Freedom of Speech; Nude Dancing

## *BARRON v. CITY OF BALTIMORE*
7 Peters 243 (1833)

When JAMES MADISON proposed to the First Congress the amendments that became the BILL OF RIGHTS, he included a provision that no state shall violate FREEDOM OF RELIGION, FREEDOM OF PRESS, or TRIAL BY JURY in criminal cases; the proposal to restrict the states was defeated. The amendments constituting a Bill of Rights were understood to be a bill of restraints upon the United States only. In *Barron*, Chief Justice JOHN MARSHALL for a unanimous Supreme Court ruled in conformance with the clear history of the matter. *Barron* invoked against Baltimore the clause of the Fifth Amendment prohibiting the taking of private property without JUST COMPENSATION. The "fifth amendment," the Court held, "must be understood as restraining the power of the general government, not as applicable to the states."

LEONARD W. LEVY
(1986)

## *BARROWS v. JACKSON*
346 U.S. 249 (1953)

Following the decision in SHELLEY V. KRAEMER (1948), state courts could no longer constitutionally enforce racially RESTRICTIVE COVENANTS by INJUNCTION. The question remained whether the covenants could be enforced indirectly, in actions for damages. In *Barrows*, white neighbors sued for damages against co-covenantors who had sold a home to black buyers in disregard of a racial covenant. The Supreme Court held that the sellers had STANDING to raise the EQUAL PROTECTION claims on behalf of the black buyers, who were not in court, and went on to hold that the FOURTEENTH AMENDMENT barred damages as well as injunctive relief to enforce racial covenants. Chief Justice FRED M. VINSON, who had written the *Shelley*

opinion, dissented, saying the covenant itself, "standing alone," was valid, in the absence of judicial ejectment of black occupants.

KENNETH L. KARST
(1986)

## *BARTKUS v. ILLINOIS*
359 U.S. 121 (1959)

## *ABBATE v. UNITED STATES*
359 U.S. 187 (1959)

A 5–4 Supreme Court held in *Bartkus v. Illinois* that close cooperation between state and federal officials did not violate the DOUBLE JEOPARDY clause when Illinois tried (and convicted) Bartkus for a robbery of which a federal court had acquitted him. Justice FELIX FRANKFURTER's majority opinion de-emphasized the connection between the prosecutions. Despite "substantially identical" INDICTMENTS and although the Federal Bureau of Investigation had given all its EVIDENCE to state authorities, Frankfurter could find no basis for the claim that Illinois was "merely a tool of the federal authorities" or that the Illinois prosecution violated the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT. He rejected the assertion that the Fourteenth Amendment was a "short-hand incorporation" of the BILL OF RIGHTS and also cited the test of PALKO V. CONNECTICUT (1937) with approval.

Justice HUGO L. BLACK, joined by Chief Justice EARL WARREN and Justice WILLIAM O. DOUGLAS, dissented. Black found such prosecutions "so contrary to the spirit of our free country that they violate even the prevailing view of the Fourteenth Amendment." Justice WILLIAM J. BRENNAN, dissenting separately, presented convincing evidence that federal officers solicited, instigated, guided, and prepared the Illinois case, amounting to a second federal prosecution "in the guise of a state prosecution."

Justice Brennan joined the *Bartkus* majority in *Abbate v. United States*, decided the same day. The defendants here were indicted and convicted in both state and federal courts for the same act, the federal prosecution following the state conviction. Brennan, for the majority, relied squarely on UNITED STATES V. LANZA (1922), concluding that "the efficiency of federal law enforcement must suffer if the Double Jeopardy Clause prevents successive state and federal prosecutions." Black, for the same minority, relied on his *Bartkus* dissent and the distinction "that a State and the Nation can [not] be considered two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither can do separately."

DAVID GORDON
(1986)

## BASSETT, RICHARD
(1745–1815)

Richard Bassett represented Delaware at the CONSTITUTIONAL CONVENTION OF 1787 and signed the Constitution. Although there is no record of his speaking at the Convention, he was a leader in securing Delaware's ratification. He went on to become governor and chief justice of Delaware, and a United States senator.

DENNIS J. MAHONEY
(1986)

## BATES, EDWARD
(1793–1869)

A St. Louis attorney and WHIG leader, Edward Bates, a moderate on SLAVERY, opposed the LECOMPTON CONSTITUTION and repeal of the MISSOURI COMPROMISE. In 1860 he sought the Republican presidential nomination, and from 1861 to 1864 he was President ABRAHAM LINCOLN'S ATTORNEY GENERAL and most conservative adviser. In response to EX PARTE MERRYMAN (1861) he defended Lincoln's suspension of HABEAS CORPUS on the weak rationale that the three branches of government were co-equal and that Chief Justice ROGER B. TANEY therefore could not order Lincoln to act. Bates personally disliked the suspension but thought it preferable to martial law. The CONFISCATION ACTS undermined Bates's sense of property rights, and his department rarely supported these acts. Bates strongly supported the EMANCIPATION PROCLAMATION, but he insisted it be limited to areas still under rebel control. He believed that free blacks could be United States citizens because he narrowly construed DRED SCOTT V. SANDFORD (1857) to apply only to Negroes "of *African* descent" suing in Missouri. Bates supplied legal opinions to support the legal tender statutes, but he opposed the admission of West Virginia on constitutional grounds. He also opposed the use of black troops and retaliation for atrocities by Confederates committed on black prisoners of war. Nevertheless, he urged Lincoln to give Negro soldiers equal pay once they were enlisted. Bates consistently urged Lincoln to assert his constitutional role as COMMANDER-IN-CHIEF when Union generalship was poor. Bates had a broad view of his office and exerted a greater control over the United States district attorneys than his predecessors.

PAUL FINKELMAN
(1986)

Bibliography

CAIN, MARVIN E. 1965 *Lincoln's Attorney General: Edward Bates of Missouri.* Columbia: University of Missouri Press.

## *BATES v. STATE BAR OF ARIZONA*
433 U.S. 350 (1977)

In 1976 two Phoenix lawyers ran newspaper advertisements offering "routine" legal services for "very reasonable" prices. A 5–4 Supreme Court declared here that the FIRST AMENDMENT protected this form of COMMERCIAL SPEECH. The majority rejected a number of "countervailing state interests" urged against the FREEDOM OF SPEECH protection, relying on VIRGINIA STATE BOARD OF PHARMACY V. VIRGINIA CITIZENS' CONSUMER COUNCIL (1976). The dissenters strenuously objected to the majority's equating intangible services—which they found impossible to standardize and rarely "routine"—with "prepackaged prescription drugs." The Court rejected, 9–0, a contention that the SHERMAN ANTITRUST ACT barred any restraint on such advertising.

DAVID GORDON
(1986)

## *BATSON v. KENTUCKY*
476 U.S. 79 (1986)

This decision made a major change in the law of JURY DISCRIMINATION. In SWAIN V. ALABAMA (1965) the Supreme Court had held that systematic exclusions of black people from criminal trial juries in a series of cases would be a prima facie showing of RACIAL DISCRIMINATION in violation of the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT. The Court said, however, that a prosecutor's use of PEREMPTORY CHALLENGES to keep all potential black jurors from serving in a particular case would not be such a showing. In *Batson* the Court, 7–2, overruled *Swain* on the latter point and set out standards for finding an equal protection violation based on a prosecutor's use of peremptory challenges in a single case.

In a Kentucky state court James Batson had been convicted of burglary and receipt of stolen goods. After the trial judge had ruled on challenges of potential jurors for cause, the prosecutor had used peremptory challenges—challenges that need not be justified by a showing of potential bias—to keep all four black members of the jury panel from serving on the trial jury. The Kentucky courts denied the defendant's claims that this use of peremptory challenges violated his Sixth Amendment right to TRIAL BY JURY and his right to equal protection of the laws.

In reversing this decision, the Supreme Court's majority spoke through Justice LEWIS F. POWELL. The equal protection clause barred a prosecutor from challenging potential jurors solely on account of their race. *Swain*'s narrow evidentiary standard would allow deliberate racial discrimination to go unremedied. Accordingly, the majority ruled that a defendant establishes a prima facie case of racial discrimination by showing that the prosecutor has used peremptory challenges to keep potential jurors of the defendant's race from serving and that the circumstances raise an inference that the prosecutor did so on account of the defendant's race. If the trial court makes these findings, the burden shifts to the prosecution to offer a race-neutral explanation for the challenges. The judge must then decide whether the defendant has established purposeful discrimination. Plainly, *Batson*'s evidentiary standard leaves much to the trial judge's discretion.

Justice THURGOOD MARSHALL concurred, but said he would hold all peremptory challenges unconstitutional because of their potential for discriminatory use. Justices BYRON R. WHITE and SANDRA DAY O'CONNOR concurred separately, stating that the new evidentiary standard should be applied only prospectively. Chief Justice WARREN E. BURGER dissented, stating that the longstanding practice of peremptory challenges served the state's interest in jury impartiality and arguing that such challenges were typically made for reasons that could not be articulated on nonarbitrary grounds. Justice WILLIAM H. REHNQUIST also dissented, defending the legitimacy of peremptory challenges even when they are based on crude stereotypes.

Peremptory challenges have, indeed, long been based on group stereotypes. If the Supreme Court were to apply the standard to challenges of other groups, the law would be, in practice, much as Justice Marshall said it should be. Even if the new standard is limited to cases of racial discrimination, if trial judges apply it zealously, prosecutors will likely confine their challenges of potential black jurors in cases involving black defendants to challenges for cause.

In *Holland v. Illinois* (1990) the Court rejected, 5–4, a white defendant's claim that the prosecutor's use of peremptory challenges to keep blacks off the trial jury violated the Sixth Amendment right to a jury drawn from a fair cross-section of the community. A majority of the Justices, however, expressed the view that *Batson*'s equal protection principle, which in this case the defendant had not raised, would extend to such a case. That view became law in *Powers v. Ohio* (1991).

KENNETH L. KARST
(1992)

## *BAYARD v. SINGLETON*
1 Martin (N. Car.) 42 (1787)

This was the first reported American state case in which a court held a legislative enactment unconstitutional. This and the TEN POUND ACT CASES are the only authentic ex-

amples of the exercise of JUDICIAL REVIEW carried to its furthest limit before the circuit work of the Justices of the Supreme Court of the United States in the 1790s. During the Revolution, North Carolina had confiscated and sold Tory estates; to protect the new owners, the legislature enacted that in any action to recover confiscated land, the courts must grant a motion to dismiss the suit. Bayard brought such a suit, and Singleton made a motion for dismissal. Instead of granting the motion, the high court of the state delayed decision and recommended a jury trial to settle the issue of ownership. The court seemed to be seeking a way to avoid holding the act unconstitutional and hoped that the legislature might revise it. The legislature summoned the judges before it to determine whether they were guilty of malpractice in office by disregarding a statute. The legislature found no basis for IMPEACHMENT but refused to revise the statute. On a renewed motion to dismiss, the court held the act void, on the ground that "by the constitution every citizen had undoubtedly a right to a decision of his property by TRIAL BY JURY." In defense of judicial review, the court reasoned that no statute could alter or repeal the state constitution, which was FUNDAMENTAL LAW. The court then submitted the case to a jury. The committee of the legislature that had heard the charges against the judges included RICHARD DOBBS SPAIGHT, a vehement antagonist of judicial review, and William R. Davie, co-counsel for Bayard; shortly after, both men represented North Carolina at the CONSTITUTIONAL CONVENTION OF 1787. James Iredell, later one of the first Justices of the Supreme Court of the United States, also represented Bayard. Iredell published an address, "To the Public," in 1786, anticipating the doctrine of *Bayard v. Singleton*, and his correspondence with Spaight on judicial review best reflects the arguments at that time for and against the power of courts to hold enactments unconstitutional. Spaight's position, that such a power was a "usurpation" by the judiciary, accorded with the then prevailing theory and practice of legislative supremacy.

LEONARD W. LEVY
(1986)

## *BEACON THEATRES, INC. v. WESTOVER*
359 U.S. 500 (1964)

Fox West Coast Theatres, Inc., contending that it was being harassed and that its business was being impeded by the threats of a competitor, Beacon Theatres, Inc., to bring an ANTITRUST suit, brought an action for DECLARATORY JUDGMENT in the U.S. District Court. Beacon, in a countersuit, alleged conspiracy in restraint of trade, and asked treble damages under the SHERMAN ANTITRUST ACT.

Judge Westover, exercising his discretion under the Declaratory Judgment Act and the FEDERAL RULES OF CIVIL PROCEDURE, decided to hear first the declaratory judgment suit, which, as an action in EQUITY did not require a jury. Only if that suit were decided in favor of Beacon would the antitrust suit be tried.

The Supreme Court, in an opinion by Justice HUGO L. BLACK, held (5–3) that Westover's decision deprived Beacon of its right to TRIAL BY JURY in a civil case. Because trial by jury is a constitutional right, judicial discretion must be used to preserve it unless there is a showing that irreparable harm would result from the delay. "Only under the most imperative circumstances," Black wrote, ". . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims."

DENNIS J. MAHONEY
(1986)

## BEARD, CHARLES A.
(1874–1948)

Charles Austin Beard, more than any other historian, shaped the way twentieth-century Americans look at the framing of the Constitution. He thus occupied, as he said a historian should, "the position of a statesman dealing with public affairs."

After being graduated at de Pauw and Columbia Universities, Beard continued his studies in Europe. His early writings reflect a theory of strict economic determinism; in *The Rise of American Civilization* (1927) he argued that the CIVIL WAR was less a struggle between SLAVERY and freedom than an epiphenomenon of emerging industrialism. Throughout his career as a teacher at Columbia University and the New School for Social Research and as a writer he maintained that historians cannot discover or describe the past as it actually was, but must instead reinterpret the past in order to shape their own times and the future.

Beard's most influential work was his *Economic Interpretation of the Constitution.* First published in 1913, the book was part of the Progressive movement's assault on such "undemocratic" constitutional obstacles to reform as the CHECKS AND BALANCES, and FEDERALISM. The work was republished, with a new introduction, in 1935, when the forms of CONSTITUTIONALISM again seemed to frustrate attempts at reform legislation. The thesis of the book is that the Constitution was framed by large holders of personal property and capital (especially government securities) in order to further their own economic interests and to frustrate the majority will. The effect of the book at the time of each publication was to undermine the legitimacy of the Constitution in the public mind by ascribing base motives to its authors. Beard's assumptions about the

amounts and types of property owned by the Framers have been thoroughly discredited; yet his thesis about the origin of the Constitution became the standard version taught in universities and public schools. Even his opponents have adopted Beard's analytical framework.

Besides the *Economic Interpretation*, Beard, alone or with his wife, Mary Ritter Beard, was author of some two dozen books on politics and history. He was also president both of the American Historical Association and of the American Political Science Association.

DENNIS J. MAHONEY
(1986)

Bibliography

BROWN, ROBERT E. 1956 *Charles Beard and the Constitution.* Princeton, N.J.: Princeton University Press.

## *BEAUHARNAIS v. ILLINOIS*
343 U.S. 250 (1952)

The Supreme Court upheld, 5–4, an Illinois GROUP LIBEL statute that forbade publications depicting a racial or religious group as depraved or lacking in virtue. Justice FELIX FRANKFURTER first argued that certain categories of speech including LIBEL had traditionally been excluded from FIRST AMENDMENT protection, and he then deferred to the legislative judgment redefining libel to include defamation of groups as well as individuals. By mixing excluded-categories arguments with arguments for judicial deference to legislative judgments for which there is a RATIONAL BASIS, the opinion moves toward a position in which the relative merits of a particular speech are weighed against the social interests protected by the statute, with the ultimate constitutional balance heavily weighted in favor of whatever balance the legislature has struck. Although *Beauharnais* has not been overruled, its continued validity is doubtful after NEW YORK TIMES V. SULLIVAN (1964).

MARTIN SHAPIRO
(1986)

(SEE ALSO: *Freedom of Speech.*)

## BECKER AMENDMENT
(1964)

The public indignation aroused by the Supreme Court's decisions on school prayer and Bible reading (ENGEL V. VITALE, 1962; ABINGTON TOWNSHIP V. SCHEMPP, 1963) provoked the introduction in Congress of over 160 proposals to amend the Constitution. When Chairman Emmanuel Celler, who opposed the amendments, bottled them up in his House Judiciary Committee, the proponents united behind a compromise measure drafted by Representative Frank J. Becker of New York.

The Becker Amendment was worded as a guide to interpretation of existing constitutional provisions rather than as new law. It had three parts. The first two provided that nothing in the Constitution should be deemed to prohibit voluntary prayer or scripture reading in schools or public institutions or the invocation of divine assistance in government documents or ceremonies or on coins or currency. The third part declared: "Nothing in this article shall constitute an ESTABLISHMENT OF RELIGION."

Under pressure of parliamentary maneuvering, Celler conducted hearings in 1964—at which many denominational leaders and constitutional scholars expressed opposition to the Becker Amendment—but his committee never reported any proposal to the House. Amendments similar to Becker's have been introduced in subsequent Congresses, but none has come close to the majority votes needed for submission to the states.

DENNIS J. MAHONEY
(1986)

## BEDFORD, GUNNING, JR.
(1747–1812)

Gunning Bedford, Jr., represented Delaware at the CONSTITUTIONAL CONVENTION OF 1787 and signed the Constitution. A spokesman for small-state positions, he vigorously advocated equal representation of the states in Congress; he also argued for easy removal of the president and against the VETO POWER. He was a delegate to Delaware's ratifying convention.

DENNIS J. MAHONEY
(1986)

## *BEDFORD CUT STONE COMPANY v. JOURNEYMEN STONE CUTTERS ASSOCIATION*
273 U.S. 37 (1927)

The company sought to destroy the union. The union's national membership of 5,000 men then refused to work on buildings made of the stone quarried by the company, which sought an INJUNCTION on the ground that the union's activities restrained INTERSTATE COMMERCE in violation of the ANTITRUST laws. Lower federal courts refused to enjoin the union. The Supreme Court commanded the injunction. The dissenting opinion of Justices LOUIS D. BRANDEIS and OLIVER WENDELL HOLMES revealed the significance of the case. When, Brandeis observed, capitalists combined

to control major industries, the Court ruled that their restraints on commerce were "reasonable" and not violations of the antitrust acts. When, however, a small union, as its only means of self-protection, refused to work on products of an antiunion company, the Court forgot its RULE OF REASON and discovered unreasonable restraint. Brandeis might have added that the Court had made "antitrust" a synonym for "antilabor."

LEONARD W. LEVY
(1986)

## *BELL v. MARYLAND*
378 U.S. 226 (1964)

This case was the last SIT-IN case decided before the PUBLIC ACCOMMODATIONS provisions of the CIVIL RIGHTS ACT OF 1964 took effect. Twelve black students were convicted of criminal trespass for their participation in a sit-in demonstration in Baltimore. The Supreme Court reversed their conviction and remanded to the Maryland courts for clarification of state law. Six Justices, however, addressed the larger constitutional question that had been presented to the Court in case after case in the early 1960s: whether the FOURTEENTH AMENDMENT, in the absence of congressional legislation, provided a right to service in places of public accommodation. These six Justices divided 3–3.

Justices WILLIAM O. DOUGLAS and ARTHUR J. GOLDBERG, concurring in the reversal of the convictions, argued that racial SEGREGATION in public accommodations imposed a caste system that was inconsistent with the abolition of slavery and with the Fourteenth Amendment's establishment of CITIZENSHIP. The refusal to serve blacks, Douglas said, did not reflect any interest in the proprietor's associational RIGHT OF PRIVACY, but rather was aimed at promoting business. Because the restaurant was "property that is serving the public," it had a constitutional obligation not to exclude a portion of the public on racial grounds. Chief Justice EARL WARREN joined Goldberg's opinion, which focused on the rights of citizenship.

Justice HUGO L. BLACK dissented, joined by Justices JOHN MARSHALL HARLAN and BYRON R. WHITE. He indicated strongly his view that Congress, in enforcing the Fourteenth Amendment, could provide a right of access to public accommodations. In the absence of such a law, however, Black was unwilling to find in the Fourteenth Amendment a right to enter on the property of another against the owner's will. (At the ORAL ARGUMENT of the *Bell* case, Justice Black had observed, "But this was *private* property.") The state was entitled to protect the owner's decision by the ordinary processes of law without converting the owner's personal prejudices into state policy, and thus STATE ACTION.

KENNETH L. KARST
(1986)

## *BELL v. WOLFISH*

See: Right of Privacy

## *BELMONT, UNITED STATES v.*
301 U.S. 324 (1937)

*Belmont* arose in the wake of President FRANKLIN D. ROOSEVELT's formal recognition of the Soviet Union in 1933 pursuant to an EXECUTIVE AGREEMENT between the two countries. In conjunction with this act of recognition, Soviet claims to assets located in the United States and nationalized by the Soviet Union in 1918 were assigned to the United States under a collateral agreement known as the "Litvinov Assignment." When the federal government sought to enforce these claims in the state of New York, however, the New York courts dismissed the suit, holding that to allow the federal government to enforce the assignment would contradict New York public policy against confiscation of private property.

The Supreme Court unanimously reversed, holding that the Litvinov Assignment, as part of the process of recognition, not only created international obligations but also superseded any conflicting state law or policy. In so holding, the Court affirmed the President's constitutional authority to speak "as the sole organ" of the national government in formally recognizing another nation and to take all steps necessary to effect such recognition. The Court stated that all acts of recognition unite as one transaction (here, in an "international compact" or executive agreement) which, unlike a formal TREATY, becomes a part of the "supreme Law of the Land" without requiring the ADVICE AND CONSENT of the Senate.

BURNS H. WESTON
(1986)

(SEE ALSO: *Foreign Affairs; Pink, United States v.*)

Bibliography

HENKIN, LOUIS 1972 *Foreign Affairs and the Constitution.* Mineola, N.Y.: Foundation Press.

## *BENDER v. WILLIAMSPORT*
475 U.S. 534 (1986)

High school students in Pennsylvania sought permission to meet together at school for prayer and Bible study dur-

ing extracurricular periods. School authorities refused permission on the basis of the ESTABLISHMENT CLAUSE, despite the fact that the school allowed a wide variety of other student groups to meet on school premises. The students filed suit, claiming violation of their FIRST AMENDMENT right to FREEDOM OF SPEECH.

The district court sided with the students, invoking the doctrine of EQUAL ACCESS enunciated by the Court in WIDMAR V. VINCENT (1981). However, the appeals court reversed, claiming that allowing the students to meet would violate the establishment clause. The Supreme Court granted certiorari to decide the question, which it subsequently declined to do. A bare majority of the Court's Justices side-stepped the constitutional controversy altogether by holding that the party who appealed the district court ruling lacked STANDING.

The four dissenters would have reached the merits of the case and extended the analysis of *Widmar* to secondary schools. According to the dissenters, not only did the establishment clause not forbid religious student groups from meeting on school premises, but schools had an affirmative duty under the First Amendment to allow such groups access to school facilities on the same basis as other groups.

The decision in *Bender* allowed the Court to put off indefinitely the question of whether the Constitution requires equal access in secondary schools. While *Bender* was still in litigation, Congress guaranteed equal access by statute, thus reducing pressure on the Court to resolve the free-speech question.

JOHN G. WEST, JR.
(1992)

(SEE ALSO: *Board of Education of the Westside Community Schools v. Mergens; Religious Fundamentalism.*)

## BENIGN RACIAL CLASSIFICATION

Although race must always be regarded as a SUSPECT CLASSIFICATION, there are circumstances in which official RACIAL DISCRIMINATION may be constitutionally permissible because the purpose is "benign and ameliorative." In *United States v. Montgomery County Board of Education* (1969), for example, the Supreme Court upheld a system of RACIAL QUOTAS for teachers imposed by a federal judge as part of a desegregation program. In REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978) the Court invalidated quotas but indicated that preferential treatment of minority applicants would be acceptable. The question remains whether the government can sponsor AFFIRMATIVE ACTION without denying any person EQUAL PROTECTION OF THE LAWS.

DENNIS J. MAHONEY
(1986)

## BENTON, THOMAS HART
(1782–1858)

A Missouri attorney, senator (1821–1851), and congressman (1853–1855), Thomas Hart Benton was an avid Jacksonian Democrat who led the opposition, on constitutional and economic grounds, to rechartering the second BANK OF THE UNITED STATES. A hard-money man, nicknamed "Old Bullion," Benton supported President ANDREW JACKSON's "specie circular" despite its adverse effects on his cherished goal of westward expansion. Benton opposed NULLIFICATION, and was ever after an enemy of JOHN C. CALHOUN and state sovereignty, allegedly saying in 1850 that Calhoun "died with TREASON in his heart and on his lips." Benton opposed extension of and agitation over SLAVERY, and he personally favored gradual emancipation. Thus, Benton opposed the ANNEXATION OF TEXAS, bellicose agitation over Oregon, war with Mexico (although he ultimately voted for the war), the WILMOT PROVISO, and HENRY CLAY's "Omnibus Bill" because all of these issues would impede western expansion and California statehood by involving them with slavery extension. Benton ultimately voted for some of the compromise measures in 1850, including the extension of slavery into some of the territories, but he opposed the new fugitive slave law. His opposition led to proslavery backlash and his defeat for reelection in 1850. In 1854 Benton published his senatorial memoirs, *Thirty Years View*, and in 1856–1857 *An Abridgement of the Debates of Congress*. While on his death bed, Benton wrote a long tract on DRED SCOTT V. SANDFORD in which he argued for the constitutionality of the MISSOURI COMPROMISE and savaged Chief Justice ROGER B. TANEY's opinion, which Benton believed was legally, historically, and constitutionally invalid, blatantly proslavery, and antiunion.

PAUL FINKELMAN
(1986)

Bibliography

CHAMBERS, WILLIAM W. 1956 *Old Bullion Benton: Senator from the New West.* Boston: Little, Brown.

## *BENTON v. MARYLAND*
395 U.S. 784 (1969)

This decision, one of the last of the WARREN COURT, extended the DOUBLE JEOPARDY provision of the Fifth

Amendment to the states. (See INCORPORATION DOCTRINE.) A Maryland prisoner, having been acquitted on a larceny charge, successfully appealed his burglary conviction, only to be reindicted and convicted on both counts. A 7–2 Supreme Court, speaking through Justice THURGOOD MARSHALL, overruled PALKO V. CONNECTICUT (1937) and, relying on DUNCAN V. LOUISIANA (1968), declared that the Fifth Amendment guarantee "represents a fundamental ideal" which must be applied. Dissenting, Justices JOHN MARSHALL HARLAN and POTTER STEWART reiterated their opposition to incorporation, concluding that the WRIT OF CERTIORARI had been improvidently granted. In OBITER DICTUM they added that retrial here violated even the *Palko* standards.

DAVID GORDON
(1986)

## *BEREA COLLEGE v. KENTUCKY*
211 U.S. 45 (1908)

Berea College, founded half a century earlier by abolitionists, was fined $1,000 under a Kentucky statute forbidding the operation of racially integrated schools. The Supreme Court affirmed the conviction, 7–2, sustaining the law as an exercise of state power to govern CORPORATIONS. Justice JOHN MARSHALL HARLAN, a Kentuckian personally acquainted with the college, dissented, arguing that the law unconstitutionally deprived the school of liberty and property without DUE PROCESS OF LAW. His denunciation of state-enforced SEGREGATION also echoed his dissent in PLESSY V. FERGUSON (1896). The majority addressed neither issue.

KENNETH L. KARST
(1986)

## *BERGER v. NEW YORK*
388 U.S. 41 (1967)

A New York statute authorized electronic surveillance by police under certain circumstances. A conviction for conspiring to bribe a state official based on such surveillance was set aside because the statute did not meet FOURTH AMENDMENT requirements: (1) it did not require the police to describe in detail the place to be searched or the conversation to be seized, or to specify the particular crime being investigated; (2) it did not adequately limit the period of the intrusion; (3) it did not provide for adequate notice of the eavesdropping to the people overheard. These requirements were later incorporated in the OMNIBUS CRIME CONTROL AND SAFE STREETS ACT (1968).

HERMAN SCHWARTZ
(1986)

## *BERMAN v. PARKER*

See: Eminent Domain; Public Use; Taking of Property

## *BETHEL SCHOOL DISTRICT v. FRASER*
478 U.S. 675 (1986)

The Supreme Court had previously held that the FIRST AMENDMENT's protection of FREEDOM OF SPEECH does not stop at school doors. In this case the Court held that a student's freedom of speech is not coextensive with an adult's because school authorities may rightly punish a student for making indecent remarks in a school assembly, which disrupt the educational process. School authorities might constitutionally teach civility and appropriateness of language by disciplining the offensive student. Justice THURGOOD MARSHALL agreed with the majority on the obligation of the school to safeguard its educational mission, but believed that the authorities failed to prove that the speech was offensive. Justice JOHN PAUL STEVENS, also dissenting, claimed that the speech was not offensive. The case is significant as a diminution of free speech by students; they cannot say what can be said constitutionally outside a school.

LEONARD W. LEVY
(1992)

## *BETTS v. BRADY*
316 U.S. 455 (1942)

In *Betts* an INDIGENT defendant was convicted of robbery after his request for appointed counsel was denied. The Court held that the DUE PROCESS clause of the FOURTEENTH AMENDMENT required states to furnish counsel only when special circumstances showed that otherwise the trial would be fundamentally unfair. Here, because the defendant was of "ordinary intelligence" and not "wholly unfamiliar" with CRIMINAL PROCEDURE, the Court found no special circumstances.

Over the next two decades, *Betts* was consistently undermined by expansion of the "special circumstances" exception, resulting in the appointment of counsel in most FELONY cases, until it was finally overruled in GIDEON V. WAINWRIGHT (1963).

BARBARA ALLEN BABCOCK
(1986)

(SEE ALSO: *Right to Counsel.*)

## BEVERIDGE, ALBERT J.
(1862–1927)

Albert Jeremiah Beveridge of Indiana, a lawyer and orator of extraordinary talent and overweening ambition, served two terms in the United States SENATE (1899–1911) as a Republican. He advocated imperialism to open new markets for American industry and favored permanent annexation of the insular TERRITORIES gained in the Spanish American War, without extension of constitutional protections and self-government, for which their non-Anglo-Saxon inhabitants were unfit. An economic nationalist, Beveridge favored repeal of the SHERMAN ANTITRUST ACT, believing that trusts should not be broken up but regulated in the national interest. Defeated for reelection, Beveridge joined THEODORE ROOSEVELT's Progressive Party and was its candidate for governor in 1912. Defeated again, he turned to writing a long-planned biography of Chief Justice JOHN MARSHALL. The four-volume work, completed in 1919, won a Pulitzer Prize for biography. In the book Beveridge presents Marshall as the statesman who molded the Constitution to meet the needs of a vigorous, commercial nation, over the objections of petty agrarians and disunionists like THOMAS JEFFERSON.

DENNIS J. MAHONEY
(1986)

Bibliography

BOWERS, CLAUDE G. 1932 *Beveridge and the Progressive Era.* New York: Literary Guild.

## *BIBB v. NAVAJO FREIGHT LINES, INC.*
359 U.S. 520 (1959)

A unanimous Supreme Court here voided a state highway safety regulation because the state failed to demonstrate sufficient justification to balance the burden it imposed on INTERSTATE COMMERCE. An Illinois statute required trucks using its highways to employ a particular mudguard, outlawed in Arkansas and distinct from those allowed elsewhere. The Court said that cost and safety problems alone were insufficient reason for invalidation, given the "strong presumption of validity" owing to the statute. But, by creating a conflicting standard, the Illinois statute had seriously interfered with and imposed a "massive" burden on interstate commerce.

DAVID GORDON
(1986)

(SEE ALSO: *State Regulation of Commerce.*)

## BIBLE READING

See: Religion in Public Schools

## BICAMERALISM

Bicameralism, the principle of CONSTITUTIONALISM that requires the legislature to be composed of two chambers (or houses), is a feature of the United States Constitution and of the constitution of every state except Nebraska. Bicameralism is supposed to guarantee deliberation in the exercise of the LEGISLATIVE POWER, by requiring that measures be debated in and approved by two different bodies before becoming law. It is also one of those "auxiliary precautions" by which constitutional democracy is protected from the mischiefs latent in popular self-government.

Bicameralism is not distinctively American; there were bicameral legislatures in the ancient republics of Greece and Rome, and there are bicameral legislatures in most countries of the world today. Bicameralism is found in the constitutions of nondemocratic countries (such as the Soviet Union) as well as of democratic countries. And, despite historical association with disparities of social class, both legislative chambers in democratic countries—emphatically including the United States—are typically chosen in popular elections; in countries where one house is chosen other than by election, that house is significantly less powerful than the elective house. Moreover, although it is the practice of most federal nations (such as Australia, Switzerland, and the Federal Republic of Germany) to reflect the constituent SOVEREIGNTY of the states in one house of the legislature, there are bicameral legislatures in countries where FEDERALISM is unknown.

The American colonists came originally from Britain and were familiar with the BRITISH CONSTITUTION. In Parliament, as the Framers knew it, there were two houses with equal power, reflecting two orders of society: the House of Lords comprising the hereditary aristocracy of England (together with representatives of the Scots nobility and the ecclesiastical hierarchy), and the House of Commons representing the freeholders of the counties and the chartered cities. Seats in the House of Commons were apportioned according to the status of the constituency (five seats per county, two per city), not according to population.

The local lawmaking bodies in the colonies were originally unicameral. Bicameralism was introduced in Massachusetts in 1644, in Maryland in 1650, and (in a unique form) in Pennsylvania in 1682; but in each case the "upper house" was identical with the governor's council, and so performed both legislative and executive functions. In the

eighteenth century, all of the colonial legislatures but one were bicameral, with a lower house elected by the freeholders and an upper house generally comprising representatives of the wealthier classes. At the same time the upper houses (although retaining the name "council") became distinctly legislative bodies.

When the newly independent states began constructing constitutions after 1776, all but Pennsylvania and Georgia provided for bicameral legislatures. Typically, the upper house was elected separately from the lower and had higher qualifications for membership, but it was elected from districts apportioned on the same basis and by electorates with the same qualifications. In two states, Maryland and South Carolina, the upper houses were elected indirectly.

The CONTINENTAL CONGRESS, although it conducted a war, negotiated a peace, and directed the collective business of the United States, was never in form a national legislature. Even after its status was regularized by the ARTICLES OF CONFEDERATION, the Congress was a body composed of delegates selected by the state governments and responsible to them. A bicameral Congress was neither desirable nor feasible until Congress became the legislative branch of a national government.

The delegates to the CONSTITUTIONAL CONVENTION OF 1787 agreed at the outset on a bicameral national legislature. In the VIRGINIA PLAN, membership in the first house of Congress would have been apportioned according to the population of the states, and the second house would have been elected by the first. The GREAT COMPROMISE produced the Congress as we know it, with the HOUSE OF REPRESENTATIVES apportioned by population (described by JAMES MADISON in THE FEDERALIST #39 as a "national" feature of the Constitution) and with equal REPRESENTATION of the states in the SENATE (a "federal" feature), so that Congress itself reflects the compound character of American government.

The two principles of apportionment serve to insure that different points of view are brought to bear on deliberations in the two houses. That consideration is also advanced by having different terms for members of the two houses; a shorter term bringing legislators into more frequent contact with public opinion, a longer term permitting legislators to take a more extended view of the public interest. The priority of the House of Representatives with respect to revenue (taxing) measures and the association of the Senate with the executive in the exercise of the TREATY POWER and the APPOINTING POWER also tend to introduce different points of view into legislative deliberations. Until abolished by the SEVENTEENTH AMENDMENT, the election of senators by the state legislatures also contributed to the formation of different viewpoints.

The principal justification for bicameralism is that it increases and improves the deliberation on public measures. But bicameralism is also a device to protect constitutional government against the peculiar evils inherent in democratic government. One must guard against equating democracy, or even majority rule, with the immediate satisfaction of the short-term demands of transient majorities. As *The Federalist* #10 points out, a faction—a group whose aims are at odds with the rights of other citizens or with permanent and aggregate interests of the whole country—may at any given time amount to a majority of the population. Although no mechanical device can guarantee that a majority faction will not prevail, the bicameral structure of Congress operates to make such a result less likely than it might otherwise be.

The Supreme Court cited the importance of bicameralism in the American constitutional system as one reason for striking down the LEGISLATIVE VETO in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983). According to Chief Justice WARREN E. BURGER, that device permitted public policy to be altered by either house of Congress, contravening the belief of the Framers "that legislation should not be enacted unless it has been carefully and fully considered" lest special interests "be favored at the expense of public needs."

Bicameralism is also a principle of American constitutionalism at the state level. At one time representation of the lesser political units, typically the counties, was the rule for state upper houses. In REYNOLDS V. SIMS (1964), however, the Supreme Court held that such schemes of representation resulted in the overvaluation of the votes of rural citizens relative to those of urban and suburban citizens and that they therefore denied the latter the EQUAL PROTECTION OF THE LAWS in violation of the FOURTEENTH AMENDMENT. Some commentators, both scholars and politicians, predicted that imposition of the ONE PERSON, ONE VOTE standard would spell the doom of bicameralism at the state level. However, no state has changed to a unicameral system since the *Reynolds* decision.

Even more than to the innate reluctance of politicians to abolish any public office, this fact is testimony to the independent vitality of bicameralism as a constitutional principle. Even when territoriality is removed as a rationale, the desirability of having a second opinion on proposals before they become law cannot be gainsaid. Hence there is a tendency in the states to find ways of giving their upper houses a distinct perspective. The ordinary differentiation is by the size of the chambers and the length of the terms of office. Some states have tried, with the Supreme Court's approval, to preserve the territorial basis of the upper house by creating MULTIMEMBER DISTRICTS in the more populous territorial units.

The meaning of constitutionalism in a democratic polity is that the short-term interests of the majority will not be

allowed to prevail if they are contrary to the rights of the minority or to the permanent and aggregate interests of the whole. The permanent and aggregate interests are not represented by any person or group of people, but they are protected by a constitutional system that requires prudent deliberation in the conduct of lawmaking. Bicameralism is an important constitutional principle because, and to the extent that, it institutionalizes such deliberation.

DENNIS J. MAHONEY
(1986)

Bibliography

EIDELBERG, PAUL 1968 *The Political Philosophy of the American Constitution.* New York: Free Press.

WHEARE, KENNETH C. 1963 *Legislatures.* New York: Oxford University Press.

## BICKEL, ALEXANDER M.
(1925–1974)

Alexander Bickel was a professor at Yale Law School from 1956 to 1974 and a prolific writer on law and politics. He became the most influential academic critic of the progressive liberal jurisprudence of his time, although he at first made only sympathetic refinements of that doctrine. Having served as a clerk for Justice FELIX FRANKFURTER and edited some unpublished judicial opinions of Justice LOUIS D. BRANDEIS, he, like they, rejected the old CONSTITUTIONALISM of private rights and unchanging FUNDAMENTAL LAW in favor of a living law, evolving with social conditions and with a progressive consciousness. His first important book, *The Least Dangerous Branch* (1962), advanced a variation of Frankfurter's prescription of judicial restraint. Bickel elaborated ways, such as avoiding a constitutional question, by which the SUPREME COURT might accommodate political democracy while enforcing the "principled goals" of a more open, humane, and free society.

In *The Supreme Court and the Idea of Progress* (1970), however, Bickel departed sharply from his role of political tactician for the rule of Supreme Court principle. He attacked the WARREN COURT's principles as themselves impolitic. In Bickel's view, the Court, confident that progress required nationalizing and leveling constitutional limits on the electoral process and an extension of desegregation to racial balancing, had imposed an egalitarianism that was subjective and arbitrary. As a result, Bickel argued, the Court had bred a legalistic authoritarianism and threatened the quality of public schools and distinctive communities.

*The Morality of Consent* (1975) was published posthumously. It examined the turmoil attending the VIETNAM WAR, student revolt, and WATERGATE, extended Bickel's critique, and attempted a reconstruction. Bickel portrayed the entire American order as under siege and ill-defended. He saw universities as well as governments and corporations endangered by two extremes of theory—a committed moralism, which tended to a dictatorship of the self-righteous, and a permissive relativism, which would defend nothing and eroded the moral and social fabric. Bickel recurred to Edmund Burke's critique of the French Declaration of the Rights of Man, and then painstakingly set forth his own morality of consent, a morality to sustain not individual claims but the social process of communicating and governing.

ROBERT K. FAULKNER
(1986)

Bibliography

FAULKNER, ROBERT K. 1978 Bickel's Constitution: The Problem of Moderate Liberalism. *American Political Science Review* 72:925–940.

## BIDDLE, FRANCIS
(1886–1968)

Born to wealth and social position, Francis Biddle of Pennsylvania was graduated from Harvard College and Harvard Law School and became a law clerk to Justice OLIVER WENDELL HOLMES. He entered public service in 1934 as FRANKLIN D. ROOSEVELT's chairman of the National Labor Relations Board. He also served as counsel for the congressional investigation of the Tennessee Valley Authority (1938); as a judge on the United States Court of Appeals for the Third Circuit (1939–1940); as solicitor general (1940–1941); and as attorney general (1941–1945). Biddle stoutly championed CIVIL LIBERTIES and, albeit unsuccessfully, opposed the evacuation of Japanese Americans from the West Coast. He also served on the International Military Tribunal at Nuremberg, which tried the major German war criminals (1945–1946). Thereafter, Biddle retired to a life of writing and leisure. His chief books were *Fear of Freedom* (1951), an assault on McCarthyism; *Justice Holmes, Natural Law, and the Supreme Court* (1961); and *In Brief Authority* (1962), a record of his public service.

HENRY J. ABRAHAM
(1986)

Bibliography

BIDDLE, FRANCIS 1962 *In Brief Authority: From the Years with Roosevelt to the Nürenberg Trial.* Garden City, N.Y.: Doubleday.

## BILL OF ATTAINDER

In American constitutional law, a bill of attainder is any legislative act that inflicts punishment on designated individuals without a judicial trial. The term includes both the original English bill of attainder, which condemned a person to death for treason or felony and confiscated his property, and the bill of pains and penalties, used for lesser offenses and punishments. The first bill of attainder was passed by Parliament in 1459. They were common during the Tudor and Stuart reigns, and Cromwell's and William and Mary's parliaments also resorted to them. During the Revolutionary period, several state legislatures used bills of attainder to condemn Tories and to confiscate their property. THOMAS JEFFERSON in 1778 drafted, and the Virginia legislature passed, a bill of attainder against Josiah Philips, a notorious Tory brigand. The abuse of the procedure in English and American history foreshadowed the possibility of even greater abuse in the future. The bill of attainder, with its disregard of DUE PROCESS OF LAW, could be a potent weapon for the vengeful and covetous.

At the CONSTITUTIONAL CONVENTION OF 1787, ELBRIDGE GERRY, proposed a prohibition against bills of attainder. The measure passed unanimously; it appears in Article I, section 9, as a limitation on Congress, and in Article I, section 10, as a limitation on the states. That the prohibition was meant to extend to all legislative punishments may be seen from a congressional debate in 1794. When Federalist Representative THOMAS FITZSIMONS introduced a resolution to censure the Jeffersonian Democratic Societies and to accuse them of fomenting the WHISKEY REBELLION, JAMES MADISON, denounced it as a bill of attainder.

The Supreme Court first spoke to the question in the TEST OATH CASES (1867). The Court held unconstitutional both a Missouri requirement that practitioners of certain professions swear that they had not aided the Confederate cause and a federal requirement that lawyers take such an oath to practice before federal courts. Since former rebels could not take the oaths, they were effectively deprived of their livelihoods. The Missouri legislature and the Congress had therefore passed bills imposing punishment on the ex-Confederates without judicial trial or conviction of any crime.

No other federal law was held to violate the ban on bills of attainder until UNITED STATES V. LOVETT (1946). In that case the Court held unconstitutional a rider to an appropriations bill which prohibited any payment to three named PUBLIC EMPLOYEES, previously identified as subversives before a congressional committee, unless they were first discharged and reappointed. In *Lovett* the Court expanded on the definition it had given in the *Test Oath Cases*, making clear that all legislative acts were covered, "no matter what their form."

In recent judicial interpretation of the bills-of-attainder clause a law prohibiting Communist party members from holding labor union office was declared unconstitutional (see UNITED STATES V. BROWN); but a law requiring subversive organizations to register with a government agency, and another commandeering the records of a disgraced ex-President were upheld.

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Communist Party v. Subversive Activities Control Board; Nixon v. Administrator of General Services.*)

Bibliography

CHAFEE, ZECHARIAH 1956 *Three Human Rights in the Constitution of 1787.* Lawrence: University of Kansas Press.

## BILL OF CREDIT

A bill of credit is a promissory note issued by a government on its own credit and intended to circulate as money. Under Article I, section 10, of the Constitution the states are prohibited from emitting bills of credit. The prohibition was regarded as essential by the Framers of the Constitution, and it was included without significant debate or dissent by the CONSTITUTIONAL CONVENTION OF 1787.

Bills of credit are, in fact, unsecured paper currency. Both ALEXANDER HAMILTON and JAMES MADISON, referring to the prohibition in THE FEDERALIST (#44 and #80), wrote of a prohibition on "paper money." In the years immediately preceding the adoption of the Constitution, many states had issued unsecured currency in a deliberately inflationary policy intended to benefit borrowers. As long as local politicians had the power to stimulate inflation, there could be no stable economy. The "more perfect union" required that money have essentially the same purchasing power in every state and region.

The MARSHALL COURT, in CRAIG V. MISSOURI (1830), held that a state issue of certificates acceptable for tax payments violated the prohibition on bills of credit, since they were "paper intended to circulate through the community for its ordinary purposes, as money." But the TANEY COURT held that notes issued by a state-chartered bank—of which the state was the sole stockholder—did not violate the prohibition, since they were not issued "on the faith of the state." (See BRISCOE V. BANK OF KENTUCKY.)

DENNIS J. MAHONEY
(1986)

## BILL OF RIGHTS (ENGLISH)
(December 16, 1689)

During the controversy with Great Britain, from 1763 to 1776, American editors frequently reprinted the English

Bill of Rights, and American leaders hailed it as "the second MAGNA CARTA." After the DECLARATION OF INDEPENDENCE, Americans framing their first state constitutions drew upon the Bill of Rights; certain clauses of the national Constitution and our own BILL OF RIGHTS, the first ten amendments, can also be traced to the English statute of 1689. Its formal title was, "An act for declaring the rights and liberties of the subject, and settling the succession of the crown." Like Magna Carta, the PETITION OF RIGHT, and other constitutional documents safeguarding "liberties of the subject," the Bill of Rights imposed limitations on the crown only. Indeed, the document capped the Glorious Revolution of 1688–1689 by which England hamstrung the royal prerogative and made the crown subservient to Parliament, which remained unrestrained by any constitutional document. In effect the Bill of Rights ratified parliamentary supremacy, which is the antithesis of the American concept of a bill of rights as a bill of restraints upon the government generally. Notwithstanding its inflated reputation as a precursor of the American Bill of Rights, the English bill was quite narrow in the range of its protections even against the crown. In fact it established no new principles, except, perhaps, for the provision against standing armies in time of peace without parliamentary approval. Sir William S. Holdsworth, the great historian of English law, declared, "We look in vain for any statement of constitutional principle in the Bill of Rights," a judgment that is too severe.

The Bill of Rights confirmed several old principles of major significance. No TAXATION WITHOUT REPRESENTATION, which became the American formulation, here was limited to the assertion that levying money by royal prerogative "without grant of parliament" was illegal. The FREEDOM OF PETITION, protected by our FIRST AMENDMENT, and indirectly the FREEDOM OF ASSEMBLY go back to time immemorial, as the British say, but were here enshrined as part of the FUNDAMENTAL LAW. Article I, section 6, of the Constitution, protecting freedom of speech for members of Congress, derives from a clause in the Bill of Rights confirming a principle fought for by Parliament for a century and a half. Our Eighth Amendment follows closely the language of another provision of the Bill of Rights, which declares, "That excessive BAIL ought not to be required, no excessive fines imposed, nor CRUEL AND UNUSUAL PUNISHMENTS inflicted." The guarantee against excessive bail made the writ of HABEAS CORPUS effective by plugging the one loophole in the HABEAS CORPUS ACT OF 1679; the crown's judges had defeated that act's purpose by fixing steep bail that prisoners could not afford. The ACT OF TOLERATION OF 1689 preceded the Bill of Rights by a few months and is equally part of the constitutional inheritance of the Glorious Revolution.

The foremost significance of the English Bill of Rights, so called because it began as a declaration and ended as a bill enacted into law, probably lies in the symbolism of the name, conveying far more than the document itself actually protects. As an antecedent of the American Bill of Rights of 1791, the act of 1689 is a frail affair, though it achieved its purpose of cataloguing most of the rights that the Stuarts had breached. As a symbol of fundamental law and the RULE OF LAW it was a mighty precursor of the fuller catalogues of rights developed by the American states and in the Constitution.

LEONARD W. LEVY
(1986)

Bibliography

SCHWOERER, LOIS G. 1981 *The Declaration of Rights, 1689.* Baltimore: Johns Hopkins University Press.

## BILL OF RIGHTS (UNITED STATES)

On September 12, 1787, the only major task of the CONSTITUTIONAL CONVENTION OF 1787 was to adopt, engross, and sign the finished document reported by the Committee on Style. The weary delegates, after a hot summer's work in Philadelphia, were eager to return home. At that point GEORGE MASON remarked that he "wished the plan had been prefaced by a Bill of Rights," because it would quiet public fears. Mason made no stirring speech for CIVIL LIBERTIES; he did not even argue the need for a bill of rights or move the adoption of one, though he offered to second a motion if one were made. ELBRIDGE GERRY moved for a committee to prepare a bill, Mason seconded, and without debate the delegates, voting by states, defeated the motion 10–0. A motion to endorse FREEDOM OF THE PRESS was also defeated, after ROGER SHERMAN declared, "It is unnecessary. The power of Congress does not extend to the Press."

Not a delegate to the convention opposed a bill of rights in principle. The overwhelming majority believed "It is unnecessary." Although they were recommending a strong national government that could regulate individuals directly, Congress could exercise only ENUMERATED POWERS or powers necessary to carry out those enumerated. A bill of rights would restrain national powers, but, as Hamilton asked, "Why declare that things shall not be done which there is no power to do?" Congress had no power to regulate the press or religion.

Civil liberties, supporters of the Constitution believed, faced danger from the possibility of repressive state action, but that was a matter to be guarded against by state bills of rights. Some states had none, and no state had a comprehensive list of guarantees. That fact provided the supporters of ratification with another argument: if a bill

were framed omitting some rights, the omissions might justify their infringement. The great VIRGINIA DECLARATION OF RIGHTS had omitted the FREEDOMS OF SPEECH, assembly, and petition; the right to the writ of HABEAS CORPUS; the right to GRAND JURY proceedings; the RIGHT TO COUNSEL; and freedom from DOUBLE JEOPARDY, BILLS OF ATTAINDER, and EX POST FACTO laws. Twelve states, including Vermont, had framed constitutions, and the only right secured by all was TRIAL BY JURY in criminal cases; although all protected religious liberty, too, five either permitted or provided for ESTABLISHMENTS OF RELIGION. Two passed over a free press guarantee. Four neglected to ban excessive fines, excessive BAIL, compulsory self-incrimination, and general SEARCH WARRANTS. Five ignored protections for the rights of assembly, petition, counsel, and trial by jury in civil cases. Seven omitted a prohibition on ex post facto laws. Nine failed to provide for grand jury proceedings, and nine failed to condemn bills of attainder. Ten said nothing about freedom of speech, while eleven were silent on double jeopardy. Omissions in a national bill of rights raised dangers that would be avoided if the Constitution simply left the rights of Americans uncatalogued. The Framers also tended to be skeptical about the value of "parchment barriers" against "overbearing majorities," as JAMES MADISON said. As realists they understood that the constitutional protection of rights would mean little during times of popular hysteria or war; any framer could cite examples of gross abridgments of civil liberties in states that had bills of rights.

The lack of a bill of rights proved to be the strongest argument of the opponents of ratification. The usually masterful politicians who dominated the Constitutional Convention had made a serious political error. Their arguments against including a bill of rights were neither politic nor convincing. A bill of rights could do no harm, and, as THOMAS JEFFERSON pointed out in letters persuading Madison to switch positions, might do some good. Moreover, the contention that listing some rights might jeopardize others not mentioned was inconsistent and easily answered. The inconsistency derived from the fact that the Constitution as proposed included some rights: no RELIGIOUS TEST for office; jury trials in criminal cases; the writ of habeas corpus; a tight definition of TREASON; and bans on ex post facto laws and bills of attainder. The argument that to include some rights would exclude others boomeranged; every right excluded seemed in jeopardy. Enumerated powers could be abused; the power to tax, opponents argued, might be used against the press or religion. Moreover, the argument that a bill of rights was unnecessary could not possibly apply to the rights of the criminally accused or to personal liberties of a procedural nature. The new national government would act directly on the people and be buttressed by an undefined executive power and a national judiciary to enforce laws made by Congress; and Congress had the authority to define crimes and prescribe penalties for violations of its laws. PATRICK HENRY contended that the proposed Constitution empowered the United States to torture citizens into confessing their violations of congressional enactments.

Mason's point that a bill of rights would quiet the fears of the people was unanswerable. Alienating him and his followers was bad politics and blunderingly handed them a stirring cause around which they could muster opposition to ratification. No rational argument—and the lack of a bill of rights created an extremely emotional issue not amenable to rational argument—could possibly allay the fears generated by demagogues like Henry and principled opponents like Mason.

In Pennsylvania, the second state to ratify, the minority demanded a comprehensive bill of rights. Massachusetts, the sixth state to ratify, was the first to do so with recommended amendments, although only two—jury trial in civil suits and grand jury INDICTMENT—belonged in a bill of rights. But Massachusetts led the way toward recommended amendments, and the last four states to ratify recommended comprehensive bills of rights. Every right that became part of the ten amendments known as the Bill of Rights was included in state recommendations, with the exception of JUST COMPENSATION for property taken.

Some Federalists—above all Madison, whose political position in Virginia deteriorated because of his opposition to a bill of rights—finally realized that statecraft and political expediency dictated a switch in position. In states where ratification was in doubt, especially New York, Virginia, and North Carolina, Federalists pledged themselves to subsequent amendments to protect civil liberties, as soon as the new government went into operation.

In the first Congress, Representative Madison sought to fulfill his pledge. His accomplishment in the face of opposition and apathy entitles him to be remembered as "father of the Bill of Rights" even more than as "father of the Constitution." Many Federalists thought that the house had more important tasks, like the passage of tonnage duties. The opposition party, which had capitalized on the lack of a bill of rights in the Constitution, hoped for either a second convention or amendments that would cripple the substantive powers of the government. They had used the bill of rights issue as a smokescreen for objections to the Constitution's provisions on DIRECT TAXES, the judicial power, and the commerce power; these objections could not be dramatically popularized, and now the Anti-Federalists sought to scuttle Madison's proposals. They began by stalling, then tried to annex amendments aggrandizing state powers, and finally depreciated the importance of the very protections of individual liberty that they had formerly demanded. Madison meant to prove

that the new government was a friend of liberty, and he understood that his amendments, if adopted, would make extremely difficult the passage of genuinely Anti-Federalist proposals. He would not be put off; he was insistent, compelling, unyielding, and, finally, triumphant.

On June 8, 1789, he made his long masterful speech before an apathetic House, introducing amendments culled mainly from state constitutions and state ratification proposals. All power, he argued, is subject to abuse and should be guarded against by constitutional provisions securing "the great rights of mankind." The government had only limited powers, but it might, unless prohibited, use general warrants in the enforcement of its revenue laws. In Great Britain, bills of rights merely erected barriers against the powers of the crown, leaving the powers of Parliament "altogether indefinite," and in Great Britain, the constitution left unguarded the "choicest" rights of the press and of conscience. The great objective he had in mind, Madison declared, was to limit the powers of government, thus preventing legislative as well as executive abuse, and above all preventing abuses of power by "the body of the people, operating by the majority against the minority." Mere "paper barriers" might fail, but they raised a standard that might educate the majority against acts to which they might be inclined. To the argument that a bill or rights was not necessary because the states constitutionally protected freedom, Madison had two responses. One was that some states had no bills of rights, others "very defective ones." The states constituted a greater danger to liberty than the new national government. The other was that the Constitution should, therefore, include an amendment that "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." This, Madison declared, was "the most valuable amendment in the whole list." To the contention that an enumeration of rights would disparage those not in the list, Madison replied that the danger could be guarded against by adopting a proposal of his composition that became the NINTH AMENDMENT. If his amendments were "incorporated" into the constitution, Madison said, using another argument borrowed from Jefferson, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution. . . ."

Supporters of Madison informed him that Anti-Federalists did not really want a bill of rights and that his proposals "confounded the Anties exceedingly. . . ." Madison's proposals went to a select committee, of which he was a member, though its chairman, John Vining of Delaware, thought the House had "more important business." The committee added freedom of speech to the recommended prohibitions on the states, made some stylistic changes, and urged the amendments, which the House adopted. Madison, however, had proposed to "incorporate" the amendments within the text of the Constitution at appropriate points. He did not, that is, recommend their adoption as a separate "bill of rights." Members objected that to incorporate the amendments would give the impression that the Framers of the Constitution had signed a document that included provisions not of their composition. Another argument for lumping the amendments together was that the matter of form was so "trifling" that the House should not squander its time debating the placement of the various amendments. Indeed, Aedanus Burke of South Carolina, an Anti-Federalist, thought the amendments were "not those solid and substantial amendments which the people expect; they are little better than whip-syllabub, frothy and full of wind . . . it will be better to drop the subject." Men of Burke's views in the Senate managed to kill the proposed restrictions on the states, and the Senate sought to cripple the clause against establishments of religion. A conference committee of the two houses, which included Madison, accepted the Senate's joining together several amendments but agreed to Madison's phrasing of the proposal that became the FIRST AMENDMENT. The House accepted the conference report on September 24, 1789, the Senate a day later. Virginia's senators, William Grayson and RICHARD HENRY LEE, both Anti-Federalists, opposed the amendments because they left "the great points of the Judiciary, direct taxation, &c to stand as they are. . . ." Lee informed Patrick Henry that they had erred in their strategy of accepting ratification on the promise of subsequent amendments. Grayson reported to Henry that the amendments adopted by the Senate "are good for nothing. . . ."

Within six months of the time the amendments, or Bill of Rights, were submitted to the states for approval, nine states ratified. Connecticut and Georgia refused to ratify on the ground that the Bill of Rights was unnecessary; they belatedly ratified on the sesquicentennial anniversary of the ratification of the Constitution in 1939. (Massachusetts ratified in 1939, too, although both houses of its legislature in 1790 had adopted most of the amendments, but they had failed to send official notice of ratification.) The admission of Vermont to the union in 1791 made necessary ratification by eleven states. Vermont's ratification of the amendments in November 1791 made Virginia's approval indispensable as the eleventh state. The battle there was stalled in the state senate, where the Anti-Federalists were in control. They first sought to sabotage the Bill of Rights and then, having failed in their chief objective to abolish the power of Congress to enact direct taxes, they irreso-

lutely acquiesced two years later. Virginia finally ratified on December 15, 1791, making the Bill of Rights part of the Constitution.

The history of the framing and ratification of the Bill of Rights is sparse. We know almost nothing about what the state legislatures thought concerning the meanings of the various amendments, and the press was perfunctory in its reports, if not altogether silent. But for Madison's persistence the amendments would have died in Congress. Our precious Bill of Rights was in the main the result of the political necessity for certain reluctant Federalists to make their own a cause that had been originated, in vain, by the Anti-Federalists to vote down the Constitution. The party that had first opposed a Bill of Rights inadvertently wound up with the responsibility for its framing and ratification, while the party that had first professed to want it discovered too late that it was not only embarrassing but politically disastrous for ulterior party purposes.

LEONARD W. LEVY
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Bibliography

BRANT, IRVING 1965 *The Bill of Rights: Its Origin and Meanings.* Indianapolis: Bobbs-Merrill.

DUMBAULD, EDWARD 1957 *The Bill of Rights and What It Means Today.* Norman: University of Oklahoma Press.

RUTLAND, ROBERT A. 1955 *The Birth of the Bill of Rights, 1776–1791.* Chapel Hill: University of North Carolina Press.

SCHWARTZ, BERNARD 1977 *The Great Rights of Mankind: A History of the American Bill of Rights.* New York: Oxford University Press.

## BILL OF RIGHTS IN MODERN APPLICATION

Modern law and theory about the BILL OF RIGHTS reflects the contributions of eighteenth-century Framers, nineteenth-century Reconstructors, and twentieth-century judges. The most central juridical event in the development has been the "incorporation" of the Bill of Rights against state and local governments, a once controversial but now widely accepted judicial DOCTRINE that draws strong support from the text and ORIGINAL INTENT of the FOURTEENTH AMENDMENT.

The standard story about the Bill of Rights focuses on the Founding era in general and JAMES MADISON in particular, but this story ignores all the ways in which the RECONSTRUCTION generation breathed new life into an old bill. A separate Bill of Rights was no part of Madison's carefully conceived original plan at Philadelphia. And many lawmakers in the First Congress were relatively uninterested in the Bill, finding it a "nauseous" distraction. By contrast, Ohio Congressman JOHN A. BINGHAM, the father of the Fourteenth Amendment in the Reconstruction era, placed the Bill of Rights at the center of his thinking about constitutionalism. His speeches in the Thirty-Ninth Congress are far more inspired, and perhaps more inspiring, than Madison's in the First.

The Bill of Rights that emerged in the 1790s was a creature of its time. In the afterglow of a Revolutionary War waged by local governments against an imperial center, the bill of the 1790s affirmed various rights against Congress, but none against the states, as the Supreme Court properly held in BARRON V. CITY OF BALTIMORE (1833). And the rights that the original bill did affirm sounded more in FEDERALISM than in libertarianism. Congress could not establish a national church, but neither could it disestablish state churches. The FIRST AMENDMENT was thus less anti-establishment than it was pro-STATES' RIGHTS; religious policy would be decided locally, not nationally, in the American equivalent of the European Peace at Augsburg and Treaty of Westphalia. The SECOND AMENDMENT celebrated local militias (the heroes of the AMERICAN REVOLUTION), and the THIRD AMENDMENT likewise reflected uneasiness about a central standing army. Much of the rest of the bill reinforced the powers of local juries. (The Fifth Amendment safeguarded GRAND JURIES; the Sixth Amendment, criminal PETIT JURIES; and the SEVENTH AMENDMENT, civil juries. Beyond these specific clauses, many other parts of the original bill also championed the role of juries—who would protect popular publishers like John Peter Zenger in First Amendment cases, would hold abusive government officials liable for UNREASONABLE SEARCHES in FOURTH AMENDMENT cases, and would help assess JUST COMPENSATION in Fifth Amendment cases.) The only amendment endorsed by every state convention demanding a Bill of Rights was the TENTH AMENDMENT, which emphatically affirmed states' rights. Madison wanted more—a bill championing individual rights, and protecting them against states, too—but in 1791, he was struggling against the tide. His proposed amendment requiring states to respect speech, press, conscience, and juries passed the U.S. HOUSE OF REPRESENTATIVES (as the presciently numbered Fourteenth Amendment) but died in a U.S. SENATE that championed states' rights. Only after a CIVIL WAR dramatized the need to limit abusive states would a new Fourteenth Amendment and distinctly modern view of the bill emerge—a bill celebrating individual rights and preventing states from abridging fundamental freedoms.

In retrospect, we can see that the process of incorporation began in the late nineteenth century, when the Court in CHICAGO BURLINGTON & QUINCY RAILWAY V. CHICAGO (1897) applied the principles of the TAKINGS clause to states. The incorporation of First Amendment FREEDOM

OF SPEECH rights began in earnest in 1925 (GITLOW V. NEW YORK), and the religion clauses were first brought to bear against states in 1940 (CANTWELL V. CONNECTICUT, decided under the free exercise clause), and in 1947 (EVERSON V. BOARD OF EDUCATION, decided under the ESTABLISHMENT CLAUSE). Later in the 1940s, the Court incorporated the Fourth Amendment (initially, without the EXCLUSIONARY RULE); and in the early 1960s, with Justice FELIX FRANFURTER's departure from the Court, the logjam broke, and the Court made virtually all the rest of the bill applicable against states and local governments. The vehicle for this transformation was Justice WILLIAM J. BRENNAN, JR.'s brainchild—a theory of "selective incorporation" that in theory steered midway between Justice HUGO BLACK's insistence on total incorporation and critics' condemnation of the very idea of incorporation. In practice, Brennan's and the WARREN COURT's application of this doctrine came very close to the results advocated by Black. Today, only the Second and Seventh Amendments, and the Fifth Amendment's grand jury clause, have not been incorporated.

Mid-twentieth-century critics of the idea of incorporation—like Frankfurter and the second Justice JOHN M. HARLAN—argued that applying the Bill of Rights against state and local governments would ultimately weaken American liberty. If judges were to use the bill against states, the argument went, these judges would be tempted to water the bill down to take account of the considerable diversity of state practice; and then in turn, these judges would hold the federal government to only this watered-down version. But as Black and his fellow incorporationsts anticipated, extension of the Bill of Rights against the states has, in general, dramatically strengthened the bill, not weakened it, in both legal doctrine and popular consciousness. Unused muscles atrophy, while those that are regularly put to use grow strong. Before the Civil War, the Bill of Rights played a surprisingly trivial role. Only once was it used by the Court before 1866 to invalidate federal action, and that one use was DRED SCOTT V. SANDFORD (1857)—which easily accepted the highly implausible claim that the Fifth Amendment DUE PROCESS clause invalidated free-soil territory laws like the NORTHWEST ORDINANCE and the MISSOURI COMPROMISE. In a review of newspapers published in 1841, a recent scholar could find not even one fiftieth anniversary celebration of the Bill of Rights.

In area after area, incorporation enabled judges first to invalidate state and local laws, and then, with this doctrinal base thus built up, judges could begin to keep Congress in check. The First Amendment is illustrative. Before 1925, when the Court began in earnest the process of First Amendment incorporation, free speech had never prevailed against a repressive statute in the U.S. Supreme Court. (And although no case ever reached the Court, no lower federal court in the 1790s ever invalidated the infamous SEDITION ACT of 1798.) Within a few years of incorporation, however, freedom of expression and religion began to win in the High Court in landmark cases involving states, like STROMBERG V. CALIFORNIA and NEAR V. MINNESOTA EX REL. OLSON in 1931 protecting free speech and FREEDOM OF THE PRESS, and *Cantwell v. Connecticut* in 1940 protecting RELIGIOUS LIBERTY. These and other cases began to build up a First Amendment tradition, in and out of court, and that tradition could then be used against even federal officials. Not until 1965 did the Court strike down an act of Congress on First Amendment grounds, and when it did so (in LAMONT V. POSTMASTER GENERAL), it relied squarely on doctrine built up in earlier cases involving states. Consider also the FLAG-DESECRATION cases of *Texas v. Johnson* (1989) and *United States v. Eichman* (1990). In the first case, the Justices defined the basic First Amendment principles to strike down a state statute and then, in the second case, the Court stood its ground on this platform to strike down an act of Congress.

The large body of modern legal doctrine concerning the Bill of Rights has rolled out of courtrooms and into the vocabulary and vision of law students, journalists, activists, and ultimately the citizenry at large. But without incorporation, and the steady flow of cases created by state and local laws, the Supreme Court would have had far fewer opportunities to be part of the ongoing American conversation about liberty. Here, too, we see that the central role of the Bill of Rights today owes at least as much to the Reconstruction as to the Founding.

Perhaps nowhere has the importance of incorporation in shaping American jurisprudence been more evident than in the field of constitutional CRIMINAL PROCEDURE. The overwhelming majority of criminal cases are prosecuted by state governments under state law; only after the incorporation of the Fourth, Fifth, Sixth, and Eighth Amendments did federal courts develop a robust and highly elaborate—if also highly controversial and perhaps mistaken—jurisprudence of constitutional criminal procedure. The centrality of race to modern conceptions of CIVIL RIGHTS and CIVIL LIBERTIES further confirms the significance of Reconstruction. Sometimes the role of the Fourteenth Amendment is explicitly acknowledged—as when the Court in BOLLING V. SHARPE (1954) read the Framers' Fifth Amendment due process clause in light of the Reconstructors' EQUAL PROTECTION clause. Other times, the influence of the Fourteenth Amendment on the jurisprudence of the Bill of Rights has been almost unconscious, as in the landmark 1964 case of NEW YORK TIMES V. SULLIVAN. The facts of this case—involving an all-white local jury from an ex- Confederate state trying to shut down the speech of a Yankee newspaper and a national CIVIL RIGHTS MOVEMENT led by a black preacher—obvi-

ously call to mind images of Reconstruction, but the Court tried to tell a Founding-era story starring Madison and Zenger rather than a Reconstruction tale touting Bingham and Frederick Douglass. But only the Reconstruction can explain why—contra ZENGER'S CASE—local juries are not always to be trusted to protect free expression.

The modern notion of a self-contained federal bill of rights also derives at least as much from Reconstruction as from the Founding. The federal Constitution contains no explicit caption introducing a "Bill of Rights"—unlike many early state constitutions, which feature a self-styled "declaration of rights" preceding an explicit "frame of government." And because the first ten federal amendments ultimately came in as appendices rather than as a preface, still-later amendments had the effect of pushing early amendments to the middle—ten early postscripts before later post-postscripts. It was Bingham's generation that in effect added a closing parenthesis after the first eight (or nine or ten) amendments, distinguishing these amendments from all others. As a result, Americans today can lay claim to a federal "*Bill* of Rights" set apart from everything else, and symbolically first even if textually middling.

Bingham and others also insisted that the early amendments were largely a "Bill of *Rights*"—of persons, not states. Today's conventional wisdom sharply distinguishes between structural issues and rights issues. Here too, this distinction is attributed to the Framers—their Constitution delineated structure; their bill delineated rights. But once again this conventional account misreads the Founding and misses the Reconstruction. Structure and rights tightly intertwined in the original Constitution and in the original Bill of Rights, which themselves tightly intertwined. The basic need to separate rights from structure comes from the Fourteenth Amendment itself—from the need for a suitable filter that enables incorporation to mine and refine rights from the mixed ore in which these rights were initially embedded in the Framers' quarry.

What, in the end, are we to make of the pervasive ways in which our stock stories have exaggerated the Founding and diminished the Reconstruction? Perhaps many of us are guilty of a kind of curiously selective ancestor worship—one that gives too much credit to Madison and not enough to Bingham, that celebrates THOMAS JEFFERSON and PATRICK HENRY but slights Harriet Beecher Stowe and Frederick Douglass. Great as Madison and Jefferson were, they lived and died as slaveholders, and their Bill of Rights was tainted by its quiet complicity with the original sin of SLAVERY. Even as we celebrate the Framers, we must ponder the sobering words of CHARLES PINCKNEY in the 1788 South Carolina ratification debates: "Another reason weighed particularly, with the members of this state, against the insertion of a bill of rights. Such bills generally begin with declaring that all men are by nature free. Now, we should make that declaration with very bad grace, when a large part of our property consists in men who are actually born slaves."

But the Fourteenth Amendment did begin with an affirmation of the freedom—and citizenship—of all. The midwives of this new birth of freedom were women alongside men, blacks alongside whites. As twentieth-century judges have begun to realize, because of these nineteenth-century men and women, our eighteenth-century Bill of Rights has taken on new life and meaning.

AKHIL REED AMAR
(2000)

(SEE ALSO: *Fourteenth Amendment as a New Constitution; Incoporation Doctrine.*)

Bibliography

AMAR, AKHIL REED 1997 *The Constitution and Criminal Procedure: First Principles.* New Haven, Conn.: Yale University Press.

——— 1998 *The Bill of Rights: Creation and Reconstruction.* New Haven, Conn.: Yale University Press.

CURTIS, MICHAEL KENT 1986 *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights.* Durham, N.C.: Duke University Press.

## BINGHAM, JOHN A.
(1815–1900)

An Ohio attorney, John Armor Bingham was a congressman (1855–1863, 1865–1873), Army judge advocate (1864–1865), solicitor of the COURT OF CLAIMS (1864–1865), and ambassador to Japan (1873–1885). After President ABRAHAM LINCOLN's assassination, President ANDREW JOHNSON appointed Bingham as a special judge advocate (prosecutor) to the military commission trying the accused assassination conspirators. Bingham was particularly effective in answering defense objections during the trials and in justifying the constitutionality of trying the civilian defendants in military courts.

From 1865 to 1867 Bingham served on the JOINT COMMITTEE ON RECONSTRUCTION. As a Republican moderate Bingham supported congressional reconstruction but demanded strict adherence to the Constitution and favored early readmission of the ex-Confederate states. He offered numerous amendments to moderate the CIVIL RIGHTS ACT OF 1866, and although these passed he still voted against the bill, because he believed Congress lacked the authority to protect freedmen in this manner. Bingham wanted very much to protect them, and during the debates over the civil rights bill he argued that a new constitutional

amendment was the answer. Bingham believed that the results of the war—including the death of both SLAVERY and state SOVEREIGNTY, as well as the protection of CIVIL LIBERTIES for blacks—could be secured only by an amendment that would nationalize the BILL OF RIGHTS. By working to apply the Fifth and FIRST AMENDMENTS to the states Bingham linked the antislavery arguments of the antebellum period to postbellum conditions.

In 1865 Bingham suggested an amendment that would empower Congress "to secure to all persons in every State of the Union equal protection in their rights, life, liberty, and property." Bingham believed the THIRTEENTH AMENDMENT had not only freed blacks but also made them citizens. As citizens of the United States they were among "the People of the United States" referred to in the PREAMBLE to the Constitution and protected by the Fifth Amendment. However, Bingham was unsure whether the enforcement provision of the Thirteenth Amendment allowed Congress to guarantee and protect CIVIL RIGHTS. Johnson's veto of the 1866 Civil Rights bill only increased Bingham's determination to place such protection beyond the reach of a presidential veto or repeal by a future Congress. Bingham therefore drafted what became section 1 of the FOURTEENTH AMENDMENT, protecting the freedmen by explicitly making them citizens, prohibiting states from abridging their PRIVILEGES AND IMMUNITIES as United States citizens, and guaranteeing all persons DUE PROCESS and EQUAL PROTECTION of the law. In 1871 Bingham reaffirmed his belief that the amendment was designed to protect those privileges and immunities "chiefly defined in the first eight amendments to the Constitution of the United States." Thus, as Bingham saw it, the ABOLITIONIST CONSTITUTIONAL THEORY of the antebellum period became part of the Constitution.

By 1867 Bingham was at least temporarily a Radical Republican. He supported THADDEUS STEVENS's bill for military reconstruction after the ex-Confederate states refused to ratify the Fourteenth Amendment and after numerous outrages had been perpetrated against freedom. Initially opposed to IMPEACHMENT, he was elected to the impeachment committee and was made chairman after threatening to resign unless given that position. Bingham vigorously pursued the prosecution of Johnson, and after it failed he attempted to investigate the seven Republican senators who voted against impeachment.

Bingham had initially opposed linking black suffrage to readmission to the Union, and opposed efforts by Stevens to create such a linkage. He argued that Congress lacked the constitutional authority to do this. But by 1870 he supported the FIFTEENTH AMENDMENT and sought to extend the franchise even further, by prohibiting religious, property, or nationality limitations on the ballot. In 1871, with the three new amendments legitimizing congressional action, Bingham supported the three "force bills," which prohibited states and individuals from violating the newly acquired constitutional rights of the freedmen, gave the federal government supervisory powers over national elections, and made numerous acts federal crimes under the Ku Klux Klan Act. (See FORCE ACTS.) Bingham, the careful constitutionalist and moderate Republican leader, defended these acts because they were a response to the terror being inflicted against blacks, and because they were now constitutional.

PAUL FINKELMAN
(1986)

Bibliography

HYMAN, HAROLD M. and WIECEK, WILLIAM M. 1982 *Equal Justice under Law: Constitutional Development, 1835–1875.* New York: Harper & Row.

SWIFT, DONALD C. 1968 John A. Bingham and Reconstruction: The Dilemma of a Moderate. *Ohio History* 77:76–94.

## BINNEY, HORACE
(1780–1875)

A leading Philadelphia attorney, Horace Binney edited six volumes of the Pennsylvania Supreme Court's decisions, covering the years 1799–1814. In 1862 Binney published two pamphlets entitled *The Privilege of the Writ of Habeas Corpus under the Constitution,* in which he defended President ABRAHAM LINCOLN's suspension of the writ. Binney argued that the President, and not Congress, had the power to suspend HABEAS CORPUS, and that each branch of the government had the right to interpret the Constitution independently. In 1865 Binney answered the many critics of his earlier work with a third pamphlet of the same title.

PAUL FINKELMAN
(1986)

Bibliography

BINNEY, CHARLES CHAUNCEY 1903 *The Life of Horace Binney, with Selections from His Letters.* Philadelphia: Lippincott.

## BIRNEY, JAMES G.
(1792–1857)

A slaveholder, James Gillespie Birney studied law under ALEXANDER DALLAS, was a mildly antislavery politician in Kentucky and Alabama, and was a spokesman for the American Colonization Society. In 1834 he freed his remaining slaves, abandoned colonization, and formed the Kentucky Anti-Slavery Society. Finding Kentucky too dangerous for an abolitionist, Birney moved to Cincinnati, and

in 1836 began publishing an antislavery newspaper, *The Philanthropist*. Unlike WILLIAM LLOYD GARRISON, whom he bitterly opposed, Birney believed that the United States Constitution could be a useful tool for abolitionists. He also argued for abolitionist political activity. In 1840 he was the Liberty party candidate for the presidency, but he drew only 7,069 votes. Four years later he won 62,300 votes, helping set the stage for more successful antislavery parties.

Birney was involved in three legal cases that helped develop his antislavery constitutionalism. In 1836 an antiabolitionist mob in Cincinnati destroyed his press. Birney hired SALMON P. CHASE in a successful suit against the mob leaders for damages to the press. In 1837 Birney sheltered and hired a runaway slave named Matilda, and when she was captured, Chase and Birney defended her on the ground that having voluntarily been brought to Ohio, she therefore was not a fugitive slave; they also made the dubious argument that slaves who escaped from Kentucky into Ohio could not be recaptured, because the NORTHWEST ORDINANCE provided only for the return of slaves who escaped from the "original states." Matilda was returned south, but Chase and Birney were more successful in appealing Birney's conviction for harboring slaves, which the Ohio Supreme Court overturned. (See ABOLITIONIST CONSTITUTIONAL THEORY.)

PAUL FINKELMAN
(1986)

Bibliography

FLADELAND, BETTY L. 1955 *James Gillespie Birney: Slaveholder to Abolitionist.* Ithaca, N.Y.: Cornell University Press.

## BIRTH CONTROL

The American birth control movement began in the early twentieth century as a campaign to achieve a right of REPRODUCTIVE AUTONOMY in the face of hostile legislation in many states. By the time that campaign succeeded in getting the Supreme Court to espouse a constitutional RIGHT OF PRIVACY which allowed married couples to practice contraception, there was not a single state in which an anticontraception law was being enforced against private medical advice or against drugstore sales. GRISWOLD V. CONNECTICUT (1965) and its successor decisions thus did not create the effective right of choice; they recognized and legitimized the right, by subjecting restrictive legislation to strict judicial scrutiny and finding justifications wanting. (See FUNDAMENTAL INTERESTS.)

Contraception is only the most widely practiced method of birth control; others (apart from abstinence) are STERILIZATION and abortion. The Supreme Court, partly on the precedent of *Griswold*, recognized in ROE V. WADE (1973) a woman's constitutional right to have an abortion, qualified by the state's power to forbid abortion during the latter stages of pregnancy. The Court has had no occasion to recognize a person's right to choose to be sterilized, because the states have not sought to restrict that freedom. In any event the birth control movement has now won its most important constitutional battles; both married and single persons are free, both in fact and in constitutional theory, to choose not to beget or bear children.

"Birth control," however, has another potential meaning that is the antithesis of reproductive choice. The state may seek to coerce persons to refrain from procreating, either through compulsory sterilization or by other sanctions aimed at restricting family size. On present constitutional doctrine, the decision to procreate is "fundamental," requiring some COMPELLING STATE INTEREST to justify its limitation. (See SKINNER V. OKLAHOMA.) Although judicial recognition of such an interest is not inconceivable in some future condition of acute overpopulation, no such decision is presently foreseeable.

The constitutional right to choose whether to have a child or be a parent is properly rested today on SUBSTANTIVE DUE PROCESS grounds; "liberty" is precisely the point. Yet the interest in equality has also played a significant role in the development of these rights of choice. Justice BYRON R. WHITE, concurring in *Griswold*, pointed out how enforcement of an anticontraceptives law against birth control clinics worked to deny the disadvantaged from obtaining help in controlling family size. The well-to-do needed no clinics. And once *Griswold* recognized the right of married persons to practice contraception, the Supreme Court saw that EQUAL PROTECTION principles demanded extension of the right to be unmarried. (See EISENSTADT V. BAIRD; CAREY V. POPULATION SERVICES INTERNATIONAL.) Finally, judicial recognition of rights of reproductive choice has followed the progress of the women's movement. The breakdown of the traditional sexual "double standard" and the opening of new opportunities for women outside the "housewife marriage" have gone together, both socially and in constitutional development. No longer is the "erring woman" to be punished with unwanted pregnancy or parenthood. In 1920 Margaret Sanger wrote, "Birth control is woman's problem." Half a century later, the Supreme Court heard that message.

KENNETH L. KARST
(1986)

Bibliography

CHARLES, ALAN F. 1980 Abortion and Family Planning: Law and the Moral Issue. Pages 331–356 in Ruth Roemer and

George McKray (eds.), *Legal Aspects of Health Policy: Issues and Trends.* Westport, Conn.: Greenwood Press.

GREENAWALT, KENT 1971 Criminal Law and Population Control. *Vanderbilt Law Review* 24:465–494.

NOTE 1971 Legal Analysis and Population Control: The Problem of Coercion. *Harvard Law Review* 84:1856–1911.

## BIRTHRIGHT CITIZENSHIP

The FOURTEENTH AMENDMENT provides, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Congress has expanded the range of persons who can claim birthright CITIZENSHIP. For example, children born to American couples abroad receive birthright citizenship under statutory law.

Interpretive controversies have arisen over the Fourteenth Amendment's "jurisdictional proviso," which requires that persons be "subject to the JURISDICTION" of the United States in order to claim constitutional birthright citizenship. It is widely agreed that the proviso was intended to carve out an exception for children born to foreign diplomats or invading armies. The crucial question is whether the proviso has other applications.

Late in the nineteenth century, the Supreme Court held in *Elk v. Wilkins* (1884) that AMERICAN INDIANS born on reservations had not been born subject to the jurisdiction of the United States. *Elk* has never been overruled, but, for practical purposes, it no longer matters; by 1940, Congress had granted birthright citizenship to all Native Americans born in the United States.

In recent decades, the major controversy about the Constitution's citizenship rule has concerned its application to the children of ALIENS who enter the country unlawfully. The Fourteenth Amendment draws no distinctions based on the nationality of a child's parents, and the Court has added none. On the contrary, the Court has asserted that the native-born children of all aliens automatically acquire citizenship by virtue of the Fourteenth Amendment's rule. That assertion appeared in a footnote to PLYLER V. DOE (1982); it was dictum, but it is consistent with the way in which federal IMMIGRATION officials have interpreted the amendment.

During the 1980s, two Yale professors, Rogers Smith and Peter Schuck, maintained that the Fourteenth Amendment's jurisdictional proviso excluded the native-born children of aliens who enter the country illegally. Schuck and Smith reasoned that by their unlawful entry, the aliens refuse to submit to the jurisdiction of American law. Schuck and Smith buttressed this textual argument with a theoretical one. Communities, they said, should be founded on consent; for that reason, foreigners and their children should not be allowed to obtain American citizenship without getting permission from those who already had it.

Schuck and Smith were not hostile to immigration; indeed, they favored increasing the flow of legal immigrants into the United States. During the 1990s, however, anti-immigrant politicians mounted their own assault on the rule granting citizenship to the native-born children of aliens who are unlawfully in the country. Some embraced the interpretive argument advanced by Schuck and Smith; others, including California Governor Pete Wilson, called for a constitutional amendment.

It is hard to deny the appeal of a purely consensual political community, in which every member is present through his or her own free choice, and in which no member is present without the approval of his or her compatriots. It is equally hard, however, to apply this ideal to modern nation states. For example, a child born to immigrant parents and raised in the United States will find her identity and opportunities comprehensively shaped by American political power. American law will govern her education, her encounters with the police, her economic circumstances, her claim to health care, and more. By what right does the United States exercise such pervasive authority over the child? Perhaps the parents consented to having it exercised over them when they entered the country. The child, however, never had any meaningful opportunity to consent.

Consent is an impossibly demanding requirement against which to evaluate citizenship rules. The Fourteenth Amendment's rule incorporates a more realistic norm, one based on reciprocity. Because the United States claims authority to regulate pervasively the lives of the children born within its borders, the United States must permit those children to share in the benefits that flow from that exercise of power. It must admit them to the political community, so that power is exercised for them rather than merely upon them.

Without this principle, the United States might develop a permanent class of laborers, descendants of illegal aliens who would go from cradle to grave in the United States without sharing in its political life. Other Americans might get substantial benefits by exploiting such a workforce. Indeed, some sectors of the American agricultural community have routinely relied on aliens who are subject to deportation; the vulnerability of these workers makes them a ready source of cheap labor.

A permanent workforce of second-class persons would replicate some aspects of slave labor. It is no accident that the Fourteenth Amendment's citizenship rule stands in the way of such a system. The rule was adopted to enfranchise American slaves and their descendants, and, more specifically, to overrule DRED SCOTT V. SANDFORD (1857). In *Scott,* Chief Justice ROGER BROOKE TANEY concluded that

no person descended from slaves could become a citizen of the United States. In dissent, Justices BENJAMIN R. CURTIS and JOHN MCLEAN repudiated Taney's position. McLean simply asserted that any free person who had been born in the United States was an American citizen. Curtis offered a more elaborate argument. He analogized the states to foreign sovereigns, and argued that the power to define citizenship was an essential incident of SOVEREIGNTY. Therefore, Curtis concluded, birthright citizenship depended on state law.

The Fourteenth Amendment rejected not only Taney's theory, but also Curtis's, which had been widely accepted by lawyers before the CIVIL WAR. After the Fourteenth Amendment, states no longer had the power to say who was entitled to membership in their political community. The issue was settled by national law, and state citizenship was reduced to an incident of residence. The states had lost a traditional indicator of sovereign status. This development reflects how deeply the Civil War changed American FEDERALISM.

CHRISTOPHER L. EISGRUBER
(2000)

Bibliography

CARENS, JOSEPH H. 1987 Who Belongs? Theoretical and Legal Questions About Birthright Citizenship in the United States. *University of Toronto Law Journal* 37:413–443.

EISGRUBER, CHRISTOPHER L. 1997 Birthright Citizenship and the Constitution. *New York University Law Review* 72:54–96.

KARST, KENNETH L. 1989 *Belonging to America: Equal Citizenship and the Constitution.* New Haven, Conn: Yale University Press.

KETTNER, JAMES H. 1978 *The Development of American Citizenship 1608–1870.* Chapel Hill: University of North Carolina Press.

NEUMAN, GERALD L. 1996 *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law.* Princeton, N.J.: Princeton University Press.

NOTE 1994 The Birthright Citizenship Amendment: A Threat to Equality. *Harvard Law Review* 107:1026–1043.

SCHUCK, PETER H. and SMITH, ROGERS M. 1985 *Citizenship Without Consent: Illegal Aliens in the American Polity.* New Haven, Conn.: Yale University Press.

## *BISHOP v. WOOD*
426 U.S. 341 (1976)

*Bishop* worked a major change in the modern law of PROCEDURAL DUE PROCESS, enshrining in the law the view Justice WILLIAM H. REHNQUIST had unsuccessfully urged in ARNETT V. KENNEDY (1974): the due process right of a holder of a statutory "entitlement" is defined by positive law, not by the Constitution itself.

Here, a city ordinance that classified a police officer as a "permanent employee" was nonetheless interpreted by the lower federal courts to give an officer employment only "at the will and pleasure of the city." The Supreme Court held, 5–4, that this ordinance created no "property" interest in the officer's employment, and that, absent public disclosure of the reasons for his termination, he had suffered no stigma that impaired a "liberty" interest. The key to the majority's decision presumably lay in this sentence: "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies."

In dissent, Justice WILLIAM J. BRENNAN accurately commented that the Court had resurrected the "right/privilege" distinction, discredited in GOLDBERG V. KELLY (1970),and insisted that there was a federal constitutional dimension to the idea of "property" interests, not limited by state law and offering the protections of due process to legitimate expectations raised by government.

KENNETH L. KARST
(1986)

## BITUMINOUS COAL ACT
50 Stat. 72 (1937)

After CARTER V. CARTER COAL COMPANY (1936), Congress restored regulation of bituminous coal in INTERSTATE COMMERCE. The new act, designed to control the interstate sale and distribution of soft coal and to protect interstate commerce, levied a nineteen and one-half percent tax on all producers but remitted payment to those who accepted the new code. Price-fixing provisions constituted the crux of the act; Congress did not reenact any labor provisions, although it encouraged free COLLECTIVE BARGAINING.

The act established a National Bituminous Coal Commission to supervise an elaborate procedure for setting minimum prices. Unfair competition or sales below established prices violated the code. The act provided extensive PROCEDURAL DUE PROCESS and several means of enforcement, including CEASE-AND-DESIST ORDERS and private suits carrying treble damage awards for injured competitors.

An 8–1 Supreme Court sustained the act in *Sunshine Anthracite Coal Company v. Adkins* (1940). Conceding the tax was "a sanction to enforce the regulatory provisions of the Act," the majority held that Congress might nevertheless "impose penalties in aid of the exercise of any of its ENUMERATED POWERS." The Court thus upheld the act under the COMMERCE CLAUSE, declaring that the method of regulation was for legislative determination.

DAVID GORDON
(1986)

## *BIVENS v. SIX UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS*
403 U.S. 388 (1971)

This is the leading case concerning IMPLIED RIGHTS OF ACTION under the Constitution. Federal agents conducted an unconstitutional search of Webster Bivens's apartment. Bivens brought an action in federal court seeking damages for a FOURTH AMENDMENT violation. Although no federal statute supplied Bivens with a cause of action, the Supreme Court, in an opinion by Justice WILLIAM J. BRENNAN, held that Bivens could maintain that action.

Two central factors led to the decision. First, violations of constitutional rights ought not go unremedied. The traditional remedy, enjoining unconstitutional behavior, plainly was inadequate for Bivens. And the Court was unwilling to leave Bivens to the uncertainties of state tort law, his principal alternative source of action. Second, the implied constitutional cause of action makes federal officials as vulnerable as state officials for constitutional misbehavior. Prior to *Bivens*, state officials were subject to suits under SECTION 1983, TITLE 42, UNITED STATES CODE, for violating individuals' constitutional rights. An action against federal officials had to be inferred in *Bivens* only because section 1983 is inapplicable to federal officials.

Both factors emerged again in later cases. DAVIS V. PASSMAN (1979) recognized an implied constitutional cause of action for claims brought under the Fifth Amendment, and *Carlson v. Green* (1980) extended *Bivens* to other constitutional rights. BUTZ V. ECONOMOU (1978) extended to federal officials the good faith defense that state officials enjoy under section 1983.

*Bivens* raises important questions about the scope of federal JUDICIAL POWER. Chief Justice WARREN E. BURGER and Justices HUGO L. BLACK and HARRY BLACKMUN dissented on the ground that Congress alone may authorize damages against federal officials. The majority, and Justice JOHN MARSHALL HARLAN in a concurring opinion, required no congressional authorization. But they left open the possibility that Congress might have the last word in the area through express legislation.

THEODORE EISENBERG
(1986)

## BLACK, HUGO L.
(1886–1971)

When Hugo LaFayette Black was appointed to the Supreme Court in 1937, the basic tenets of his mature judicial philosophy had already been formed. Born in the Alabama hill country in 1886, Black received his law degree from the University of Alabama in 1906. He practiced law, largely handling personal injury cases, in Birmingham during the next twenty years and served brief terms as police court judge and county prosecutor. In 1926 he was elected to the United States Senate; after reelection in 1932 he became an outspoken advocate of the NEW DEAL and a tenacious investigator. Throughout his career he read extensively in history, philosophy, and literary classics. From THOMAS JEFFERSON he took his view of the FIRST AMENDMENT. Aristotle, his "favorite author," and JOHN LOCKE offered appealing theoretical perspectives on the nature of government and society.

Coming to the bench in the aftermath of President FRANKLIN D. ROOSEVELT'S COURT-PACKING plan, which he vigorously espoused, Black searched for a jurisprudence of certainty, seeking clear, precise standards that would limit judicial discretion, protect individual rights, and give government room to operate. He saw the Constitution as a set of unambiguous commands designed to prevent the recurrence of historic evils. In its text and the intent of its Framers he found the authority for applying some provisions virtually open-ended, and others rather more strictly. All constitutional questions he considered open until he dealt with them; but when he came to a conclusion, he maintained it with single-minded devotion. His opinions never suggested that he entertained any doubts.

Black's Senate years left an indelible impression on his performance as Justice. Each of the popular branches must be left to carry out its duties according to the original constitutional understanding. Congress makes the laws, he noted in YOUNGSTOWN SHEET & TUBE COMPANY V. SAWYER (1952); the President's functions are limited to the recommending and vetoing of bills. Congress, Black believed, had the power to regulate whatever affected commerce. Likewise, unless states discriminated against INTERSTATE COMMERCE, they had the power to regulate in the absence of contrary congressional direction. Nor, under the DUE PROCESS clause of the FOURTEENTH AMENDMENT, might courts consider the appropriateness of legislation. In *Lincoln Federal Labor Union v. Northwestern Iron & Metal Company* (1949), he observed that the Court had rejected "the *Allgeyer-Lochner-Adair-Coppage* constitutional doctrine"; the states had power to legislate "so long as their laws do not run afoul of some specific federal constitutional provision, or of some valid federal law."

Black's adamant refusal to expand judicial power through the due process clause forced him to develop an alternative theory to protect the rights enumerated in the BILL OF RIGHTS. He had to overcome his initial "grave doubts" about the validity of JUDICIAL REVIEW. CHAMBERS V. FLORIDA (1940) was an early milestone. Courts, he stated in that case, "stand against any winds that blow as havens

of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement." Finally, in *Adamson v. California* (1947), he laid down the formulation that guided him for the rest of his career:

> My study of the historical events that culminated in the Fourteenth Amendment . . . persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the States. . . . I fear to see the consequences of the Court's practices of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights. . . . To hold that his Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.

Only by limiting judges' discretion, and demanding that they enforce the textual guarantees, could the protection of these rights be ensured. Black feared that the "shock the conscience" test, which Justice FELIX FRANKFURTER employed for the Court in *Rochin v. California* (1952), with its "accordion-like qualities" and "nebulous" and "evanescent standards," "must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights."

Black applied his INCORPORATION DOCTRINE in scores of cases. From his early days as a public official he hated coerced confessions, and he viewed POLICE INTERROGATIONS without counsel as secret inquisitions in flat violation of the FIFTH AMENDMENT's guarantee of the RIGHT AGAINST SELF-INCRIMINATION. "From the time government begins to move against a man," he said when the Court considered MIRANDA V. ARIZONA (1966), "when they take him into custody, his rights attach." He led the Court in expanding the RIGHT TO COUNSEL from his first term, when he held in JOHNSON V. ZERBST (1938) that in a federal prosecution counsel must be appointed to represent a defendant who cannot afford to hire an attorney. To his supreme satisfaction he wrote the opinion in GIDEON V. WAINWRIGHT (1963), overruling BETTS V. BRADY (1942) and making similar assistance mandatory in state FELONY trials. More of his dissents eventually became law than those of any other Justice.

Given his approach of allowing free play to the spirit of the Constitution while resting his justifications largely on its words, the generalities of the EQUAL PROTECTION clause presented problems of interpretation for Black. In his view, Article I conferred on qualified voters the rights to vote and to have their votes counted in congressional elections. Dissenting in COLEGROVE V. GREEN (1946), he argued that both Article I and the equal protection clause required that congressional district lines be drawn "to give approximately equal weight to each vote cast." Black formally buried *Colegrove* in WESBERRY V. SANDERS (1963). In every REAPPORTIONMENT case, as in every case involving an INDIGENT prosecuted for crime, he supported the equal protection claim. He shared in the widespread agreement that the Fourteenth Amendment had been designed primarily to end RACIAL DISCRIMINATION, and made the first explicit reference to race as a SUSPECT CLASSIFICATION which must be subjected to the "most rigid scrutiny." Ironically, this came in one of the JAPANESE AMERICAN CASES (1943), in which he upheld, over biting dissents, a conviction for violating a military order during WORLD WAR II excluding all persons of Japanese ancestry from the West Coast. But as the Court moved beyond race in applying the equal protection clause, Black refused to follow. Classifications based on wealth or poverty were not "suspect"; and even though the claims in VOTING RIGHTS cases were essential for the democratic process to reach its full potential, he denied them.

During the first twenty-five years of his tenure, Black's opinions had remarkable constancy as he unflaggingly pursued his goal of human advancement within the bounds of constitutional interpretation. But new issues confronted the Court and the country in the 1960s. Black was fighting old age, and Court work, he admitted, was harder. Because of cataract operations he did not read nearly so much as he had. References in his opinions to books and articles became infrequent, and the cases he cited were often his old ones as he repeatedly accused his colleagues of going beyond their province. No longer was he reading the words of the Constitution expansively; his interpretations were restraining and cramped; and his categories of permissible legal action narrowed. Increasingly, he had trouble adjusting to a world that was changing. His opinions took on an essay-like quality, with a new structure and tone, and a note of anger crept into them.

From the beginning Black consistently interpreted the FOURTH AMENDMENT as restrictively as any Justice in the Court's modern history. Refusing to examine the term "unreasonable" in SEARCH AND SEIZURE cases, he generally accepted law enforcement actions. Almost invariably he validated WARRANTLESS SEARCHES including SEARCHES INCIDENT TO ARREST. His Fourth Amendment opinions emphasized the guilt of the accused, often starting with detailed descriptions of the crime; and, oddly, he ignored the amendment's rich history. After calling the EXCLUSIONARY RULE "an extraordinary sanction, judicially imposed," in *United States v. Wallace & Tiernan Company* (1949), he changed his mind: by linking the Fourth and Fifth Amendments in MAPP V. OHIO (1961), he found that "a constitutional basis emerges which not only justifies but actually

requires" the rule. But his enthusiasm waned as the Court enlarged the FOURTH AMENDMENT's scope. In his last search and seizure case, COOLIDGE V. NEW HAMPSHIRE (1971), he converted this limitation on government into a grant of power: "The Fourth Amendment provides a constitutional means by which the Government can act to obtain EVIDENCE to be used in criminal prosecutions. The people are obliged to yield to a proper exercise of authority under that Amendment."

By the time the RIGHT OF PRIVACY matured as an issue, Black had tied himself to the text as a mode of constitutional interpretation. Two heated dissents indicated his narrow conception of the Fourth Amendment. Seemingly oblivious to the dangers of WIRETAPPING, he wrote in BERGER V. NEW YORK (1967): "Had the framers of this amendment desired to prohibit the use in court of evidence secured by an unreasonable search and seizure, they would have used plain appropriate language to say that conversations can be searched and words seized. . . ." Finding no mention of privacy in the Constitution, he dismissed it as a "vague judge-made goal" and denigrated it: "the "right of privacy' . . . , like a chameleon, has a different color for every turning," he wrote in *Berger.* He accurately viewed its elevation to separate constitutional status in GRISWOLD V. CONNECTICUT (1965) as the revival of SUBSTANTIVE DUE PROCESS. "Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention." Black rejected the idea of a living Constitution. His *Adamson* dissent not only had expanded horizons but had set limits.

Black was most famous for his views on the First Amendment. In *Milk Wagon Drivers Union v. Meadowmoor Diaries* (1941), his initial opinion on the subject, he said, "Freedom to speak and write about public questions . . . is the heart of our government. If that be weakened, the result is debilitation; if it be stilled, the result is death." He ceaselessly implored the Court to expand the amendment's protections, and embellished his opinions with moving libertarian rhetoric. But as in other areas during his last half-dozen years or so, Black narrowed his construction and retreated from many of his previous positions.

He subscribed fully to the "preferred position" doctrine of the First Amendment. He used, and reworked, the CLEAR AND PRESENT DANGER test in BRIDGES V. CALIFORNIA (1941), adding words that he repeated often: "the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language . . . will allow." But slowly "clear and present danger," with its inherent balancing of disparate interests, disillusioned Black. The First Amendment "forbids compromise" in matters of conscience, he argued in AMERICAN COMMUNICATIONS ASSOCIATION V. DOUDS (1950). The "basic constitutional precept" is that "penalties should be imposed only for a person's own conduct, not for his beliefs or for the conduct of those with whom he may associate"; those "who commit overt acts in violation of valid laws can and should be punished."

A new word began to appear as his opinions, invariably in dissent, grew more shrill and strident. "I think the First Amendment, with the Fourteenth, 'absolutely' forbids such laws without any 'ifs' or 'buts' or whereases," he wrote when the Court upheld a GROUP LIBEL statute in BEAUHARNAIS V. ILLINOIS (1952). The First Amendment "grants an absolute right to believe in any governmental system, discuss all governmental affairs, and argue for desired changes in the existing order," he proclaimed in *Carlson v. Landon* (1952)—"whether or not such discussion incites to action, legal or illegal," he added in YATES V. UNITED STATES (1957). He refined this speech-conduct distinction in BARENBLATT V. UNITED STATES (1959). Some laws "directly," while others "indirectly," affect speech; when in the latter cases the speech and action were intertwined, Black was willing to use a BALANCING TEST weighing "the effect on speech . . . in relation to the need for control of the conduct."

For many years Black voted to invalidate statutes as direct abridgments of First Amendment rights. He opposed such governmental actions as prescribing LOYALTY OATHS in WIEMAN V. UPDEGRAFF (1952); promulgating lists of "subversive" organizations in JOINT ANTI-FASCIST REFUGEE COMMITTEE V. MCGRATH (1952); demanding organizations' membership lists in GIBSON V. FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE (1963); conducting LEGISLATIVE INVESTIGATIONS of suspected subversives in BARENBLATT V. UNITED STATES or prosecuting for subversive advocacy in DENNIS V. UNITED STATES (1951); and imposing penalties for Communist party membership in APTHEKER V. SECRETARY OF STATE (1965). Under his standard, OBSCENITY and LIBEL laws as well as the state's conditioning admission to the bar on an applicant's beliefs were unconstitutional. In cases of direct abridgment of speech, Black charged in UPHAUS V. WYMAN (1960), any balancing test substituted "elastic concepts" such as "arbitrary" and "unreasonable" for the Constitution's plain language, reducing the document's "absolute commands to mere admonitions." "Liberty, to be secure for any," he wrote in *Braden v. United States* (1961), "must be secure for all—even for the most miserable merchants of hated and unpopular ideas." The framers had ensured that liberty by doing all the balancing that was necessary.

Black was equally outspoken in RELIGIOUS LIBERTY cases, and played a key role in the development of the First Amendment's religious guarantees. He wrote the Court's opinion in EVERSON V. BOARD OF EDUCATION (1947), the first

case declaring that the establishment clause applied to the states. After listing the clause's standards and stating that it was intended to erect, in Jefferson's words, "a wall of separation between Church and State," Black noted that government cannot "contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." But for the state to pay the bus fares of all pupils, including those in parochial schools, served a secular purpose, and did not violate the establishment clause. In MCCOLLUM V. BOARD OF EDUCATION (1948), writing for the Court, he held unconstitutional a RELEASED TIME program in which religious instruction took place in a public school. In the school prayer case of ENGEL V. VITALE (1962), of all his opinions the one that produced the most vocal opposition, Black concluded that a state-sponsored "non-denominational" prayer was "wholly inconsistent" with the establishment clause. The clause prohibited any laws that "establish an official religion whether [they] operate directly to coerce non-observing individuals or not." Religion, he wrote, "is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."

The direct action cases in the mid-1960s tested Black's First Amendment philosophy. He expounded the limitations that TRESPASS and BREACH OF THE PEACE statutes placed on FREEDOM OF SPEECH. Earlier, he had held, in GIBONEY V. EMPIRE STORAGE AND ICE COMPANY (1949), that legislatures could regulate PICKETING, but in *Barenblatt* he noted that they could not abridge "views peacefully expressed in a place where the speaker had a right to be." "Picketing," he now wrote in *Cox v. Louisiana* (1965), "though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment." This was a very different Black from the one who in FEINER V. NEW YORK (1951) labeled the Court's decision sanctioning police action to silence a speaker as "a long step toward totalitarian authority."

New emphases emerged. The ownership of property became pivotal. A property owner, governmental or private, was under no obligation to provide a forum for speech; if owners could not control their property, Black feared, the result would be mob violence. The RULE OF LAW now took precedence over encouraging public discourse and protest. Focusing on maintaining "tranquility and order" in cases like *Gregory v. Chicago* (1969), Black deprecated protesters who "think they have been mistreated or . . . have actually been mistreated," and their supporters, who "do no service" to "their cause, or their country." Gone was much of his former admiration of dissenters, toleration of the unorthodox, and receptivity toward new ideas.

Nonetheless, Black remained uncompromising in protecting FREEDOM OF THE PRESS. In his view the people had the right to read any books or see any movies, regardless of content. In his final case, NEW YORK TIMES V. UNITED STATES (1971), he reexpressed his faith:

> Both the history and language of the First Amendment support the view that the press must be left to publish news, whatever the source, without censorship, INJUNCTIONS, or PRIOR RESTRAINTS.
>
> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. . . . The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.

Three months later he was dead.

Black is one of the handful of great judges in American history, second only to JOHN MARSHALL in his impact on the Constitution. Certain of his premises, and convinced that he and history were at one, he was a tireless, evangelical, constitutional populist. If the Court did not accept his most sweeping doctrines whole, it accepted them piece by piece. Incorporation stands as his monument, but equally enduring is his preeminence in sensitizing a whole generation to the value of the great freedoms contained in the Bill of Rights.

ROGER K. NEWMAN
(1986)

Bibliography

FRANK, JOHN P. 1977 Hugo L. Black: Free Speech and the Declaration of Independence. *University of Illinois Law Forum* 2:577–620.

LANDYNSKI, JACOB W. 1976 In Search of Justice Black's Fourth Amendment. *Fordham Law Review* 45:453–496.

REICH, CHARLES A. 1963 Mr. Justice Black and the Living Constitution. *Harvard Law Review* 76:673–754.

SNOWISS, SYLVIA 1973 The Legacy of Justice Black. *Supreme Court Review* 1973:187–252.

SYMPOSIUM 1967 Mr. Justice Black: Thirty Years in Retrospect. *UCLA Law Review* 14:397–552.

## BLACK, JEREMIAH S.
(1810–1883)

Jeremiah S. Black served on the Pennsylvania Supreme Court (1851–1857), as U.S. Attorney General (1857–1860), U.S. Secretary of State (1860–1861), and U.S. Supreme Court reporter (1861–1862). He advised ANDREW JOHNSON during the early phase of his IMPEACHMENT, and

defended Samuel Tilden's claim to the presidency in the disputed election of 1876. A lifelong Democrat, Black was particularly antagonistic to abolitionists. During the winter of 1860–1861 Black opposed SECESSION and urged President JAMES BUCHANAN to reinforce federal military bases in the South. Buchanan appointed Black to the Supreme Court of the United States, but the SENATE refused to confirm him.

PAUL FINKELMAN
(1986)

Bibliography

BRIGANCE, WILLIAM N. 1934 *Jeremiah Sullivan Black, a Defender of the Constitution and the Ten Commandments.* Philadelphia: University of Pennsylvania Press.

## BLACK CODES

In 1865–1866, the former slave states enacted statutes, collectively known as the "Black Codes," regulating the legal and constitutional status of black people. The Black Codes attempted to accomplish two objectives: (1) to enumerate the legal rights essential to the status of freedom of blacks; and (2) to provide a special criminal code for blacks. The latter objective reflected the two purposes of the antebellum law of slavery: race control and labor discipline.

In the view of white Southerners, emancipation did not of its own force create a civil status or capacity for freedmen. The southern state legislatures accordingly specified the incidents of this free status: the right to buy, sell, own, and bequeath property; the right to make contracts; the right to contract valid marriages, including so-called common-law marriages, and to enjoy a legally recognized parent-child relationship; the right to locomotion and personal liberty; the right to sue and be sued, and to testify in court, but only in cases involving black parties.

But the Codes also reenacted elements of the law of slavery. They provided detailed lists of civil disabilities by recreating the race-control features of the slave codes. They defined racial status; forbade blacks from pursuing certain occupations or professions; prohibited blacks from owning firearms or other weapons; controlled the movement of blacks by systems of passes; required proof of residence; prohibited the congregation of groups of blacks; restricted blacks from residing in certain areas; and specified an etiquette of deference to whites, such as by prohibiting blacks from directing insulting words at whites. The Codes forbade racial intermarriage and provided the death penalty for blacks raping white women, while omitting special provisions for whites raping black women. (See MISCEGENATION.) They excluded blacks from jury duty, public office, and voting. Some Black Codes required racial SEGREGATION in public transportation or created Jim Crow schools. Most Codes authorized whipping and the pillory as punishment for freedmen's offenses.

The Codes salvaged the labor-discipline elements of slave law in master-and-servant statutes, VAGRANCY and pauper provisions, apprenticeship regulations, and elaborate labor contract statutes, especially those pertaining to farm labor. Other provisions permitted magistrates to hire out offenders unable to pay fines. These statutes provided a basis for subsequent efforts, extending well into the twentieth century, to provide a legal and paralegal structure forcing blacks to work, restricting their occupational mobility, and providing harsh systems of forced black labor, sometimes verging on PEONAGE.

The Black Codes profoundly offended the northern ideal of equality before the law. Northerners lost whatever sympathies they might have entertained for the plight of southern whites trying to make the revolutionary transition from a slave society, based on a legal regime of status, to a free, capitalist society based on will and contract. Northerners determined to force the former slave states to create new structures of racial equality. Consequently, the Black Codes were repealed or left unenforced during the congressional phase of Reconstruction. Later Redeemer and Conservative state legislatures reenacted the Jim Crow provisions and labor contract statutes to provide the statutory component of the twilight zone of semifreedom that characterized the legal status of southern blacks through WORLD WAR I.

WILLIAM M. WIECEK
(1986)

Bibliography

WILSON, THEODORE B. 1965 *The Black Codes of the South.* University: University of Alabama Press.

## BLACKMUN, HARRY A.
(1908– )

Nothing in Harry A. Blackmun's background presaged that within three years of his appointment he would write the most controversial Supreme Court opinion of his time—ROE V. WADE (1972)—providing significant constitutional protection to women and their doctors in the area of abortion.

After graduating from public school in St. Paul, Minnesota, where he and WARREN E. BURGER were elementary school classmates, young Blackmun attended Harvard College, having graduated in 1929 *summa cum laude*, and Harvard Law School, being graduated in 1932. He practiced law in St. Paul and then as resident counsel at the

Mayo Clinic in Rochester, Minnesota. In 1959 President DWIGHT D. EISENHOWER appointed him to the Eighth Circuit, where he served for eleven unremarkable years until, in 1970, President RICHARD M. NIXON selected him to fill the vacancy on the Supreme Court created by the resignation of Justice ABE FORTAS.

Blackmun's early years on the Supreme Court did little to disturb his image as a judicial clone of his boyhood friend Warren Burger, at whose wedding he had served as best man. The two voted together so often that the press dubbed them the Minnesota Twins.

Blackmun's voting patterns shifted over the years until by the mid-1980s he was more likely to vote with Justices WILLIAM J. BRENNAN and THURGOOD MARSHALL in defense of a broad vision of constitutional rights than with Burger. When asked whether his views have changed, Blackmun asserts that he has remained constant while the Court has shifted, causing his recent opinions merely to appear more libertarian. If, however, one compares early and late Blackmun opinions, it is difficult to accept Blackmun's protestation that nothing has changed in his legal universe except the backdrop.

One widely held hypothesis seeking to explain Blackmun's apparent shift in views is linked to the stormy public reaction that greeted what is undoubtedly his most significant Supreme Court opinion—*Roe v. Wade*. In *Roe*, drawing on his years at the Mayo Clinic, Blackmun brought a medical perspective to the controversy over the constitutionality of state laws prohibiting abortion. In a now familiar construct, he divided pregnancy into trimesters, holding that the state had no compelling interest in preserving fetal life during the first two trimesters, but that the interest in viable fetal life became compelling in the final trimester. In the years following *Roe*, Blackmun vigorously defended the right of a pregnant woman, in consultation with her doctor, to decide freely whether to undergo an abortion, writing a series of opinions striking down state statutes designed to place obstacles in a woman's path and vigorously dissenting from the Court's willingness to uphold a ban on federal funds to poor women seeking abortions.

Public reaction to Blackmun's abortion decisions was intense. He was subjected to vigorous personal criticism by individuals who believe deeply in a moral imperative of preserving fetal life from the moment of conception. Critics called his opinion in *Roe* a classic example of judicial overreaching and even compared it to Chief Justice ROGER B. TANEY's infamous opi1857nion in DRED SCOTT V. SANDFORD 1857.

Subjected to sustained personal and professional criticism after *Roe*, Blackmun was forced, according to one view, to confront fundamental questions about his role as a Supreme Court Justice. From the crucible of the personal and professional pressures generated by his abortion decisions, many believe that there emerged a Justice with a heightened commitment to the use of judicial power to protect individual freedom.

In fact, the linkage between Blackmun's defense of a woman's right to choose to undergo an abortion and his other major doctrinal innovation—the COMMERCIAL SPEECH doctrine—is a direct one. In *Bigelow v. Virginia* (1975) Blackmun wrote for the Court invalidating a ban on advertisements by abortion clinics and suggesting for the first time that a consumer's right to know might justify First Amendment protection for speech that merely proposed a commercial transaction. One year later, in VIRGINIA STATE BOARD OF PHARMACY V. VIRGINIA CITIZENS CONSUMER COUNCIL (1976) and BATES V. STATE BAR OF ARIZONA (1976), he struck down bans on advertising by pharmacists and lawyers, explicitly granting First Amendment protection for the first time to commercial speech. In his more recent commercial speech opinions, Blackmun's First Amendment analysis has become more trenchant, with his concurrence in CENTRAL HUDSON GAS & ELECTRIC CO. V. PUBLIC SERVICE COMMISSION (1980) ranking as a milestone in Supreme Court First Amendment theory.

Blackmun's third principal contribution to constitutional DOCTRINE—the defense of ALIENS—precedes his abortion decisions. In GRAHAM V. RICHARDSON, one of Blackmun's early majority opinions, he wrote the opinion that outlawed discrimination against resident aliens in granting WELFARE BENEFITS, holding that aliens, as a politically powerless group, were entitled to heightened judicial protection under the EQUAL PROTECTION clause. In later years, his majority opinions invalidated attempts to exclude aliens from all civil service jobs and from state-funded college scholarships; and, although he concurred in the Court's decision upholding the exclusion of aliens from the state police, he vigorously dissented from decisions upholding bans on alien public school teachers and deputy probation officers.

Blackmun's most significant FEDERALISM opinion dramatically illustrates his evolution on the Court. In 1976 he provided the crucial fifth vote for Justice WILLIAM H. REHNQUIST's opinion in NATIONAL LEAGUE OF CITIES V. USERY, invalidating congressional minimum wage protection for municipal employees as a violation of state SOVEREIGNTY. A decade later, however, Blackmun changed his mind and, abandoning the Rehnquist-Burger position, wrote the Court's opinion in GARCIA V. SAN ANTONIO METROPOLITAN TRANSPORTATION AUTHORITY (1985), rejecting their view of state sovereignty and overruling *Usery*.

The hypothesis that Blackmun's apparent drift toward the Brennan-Marshall wing of the Court is linked to the controversy over his abortion decisions is not wholly persuasive. It does not explain Justice Blackmun's pre-*Roe*

decisions protecting aliens and it overlooks the fact that as a little known judge of the Eighth Circuit, Blackmun was among the first federal judges to declare prison conditions violative of the Eighth Amendment. Furthermore, it does not explain why, in the criminal law and CRIMINAL PROCEDURE area, Blackmun's post-*Roe* jurisprudence continues to construe Fourth, Fifth, and Sixth Amendment protections narrowly.

A more fruitful approach to Blackmun's voting patterns is to take seriously his protestation that a consistent judicial philosophy underlies his Supreme Court career. The task is difficult, for Blackmun's judicial philosophy defies easy categorization in terms of fashionable labels. He is "liberal" in cases involving racial minorities and aliens, but "conservative" in the criminal procedure area. His abortion decision in *Roe* has been called the most "activist" in the Court's history, but his *Garcia* federalism opinion counsels "judicial restraint." His commercial speech opinions are rigorously "libertarian," but his tax, antitrust law, and securities law opinions champion vigorous government intervention. Not surprisingly, therefore, attempts to evaluate Blackmun's work using currently fashionable yardsticks often lead to a critical judgment that he is doctrinally inconsistent. In fact, Blackmun's Supreme Court work appears linked by a unifying thread—a reluctance to permit preoccupation with doctrinal considerations to force him into the resolution of an actual case on terms that fail to do intuitive justice to the parties before the Court.

Blackmun's commitment to a jurisprudence of just deserts is reflected in three characteristic motifs that pervade his opinions. First, he is openly mistrustful of rigidly doctrinaire analyses that force him into unfair or unreasonable resolutions of cases. In rejecting the Court's two-tier equal protection analysis in favor of a more "flexible" doctrine, or expressing skepticism about prophylactic EXCLUSIONARY RULES in the criminal process, or searching for a federalism compromise based more on pragmatism than on theory, or rejecting automatic use of the OVERBREADTH DOCTRINE in FIRST AMENDMENT cases, Justice Blackmun refuses to allow doctrine to force him into dispute resolutions that seem intuitively unfair or that give an unjust windfall to one of the parties before the Court.

Second, his opinions are fact-oriented, canvassing both adjudicative and LEGISLATIVE FACTS in an attempt to place the dispute before the Court in a realistic context. In his more recent opinions, he frequently scolds the Court for slighting a case's factual context, often complaining that the Court's desire to announce law has taken it beyond the actual dispute before the Court.

Finally, he insists upon results that accord with his view of the "real" world. His decisions have tended to support efforts to undo the consequences of RACIAL DISCRIMINATION and have demonstrated an increasing empathy for the plight of the powerless, while demonstrating little sympathy for lawbreakers. Such a personal vision of "reality" must ultimately inject a dose of subjectivism into the decision-making process. Yet Justice Blackmun's qualities of mind and heart serve to remind the Court that a doctrinaire, intellectualized jurisprudence needs to be balanced by a jurisprudence grounded in intuitive fairness to the parties, human warmth, and pragmatic realism.

BURT NEUBORNE

(1986)

Bibliography

FUQUA, DAVID 1980 Justice Harry A. Blackmun: The Abortion Decisions. *Arkansas Law Review* 34:276–296.

NOTE 1983 The Changing Social Vision of Justice Blackmun. *Harvard Law Review* 96:717–736.

SCHLESSINGER, STEVEN R. 1980 Justice Harry Blackmun and Empirical Jurisprudence. *American University Law Review* 29:405–437.

SYMPOSIUM 1985 Dedication to Justice Harry A. Blackmun—Biography; Tributes. *Hamline Law Review* 8:1–149.

## BLACKMUN, HARRY A.
(1908– )
(Update 1)

Harry Andrew Blackmun was born in the small town of Nashville, Illinois, on November 12, 1908, but spent most of his childhood in St. Paul, Minnesota. He attended Harvard College on a scholarship, graduating summa cum laude in 1929 with a major in mathematics. Torn between medicine and law, he chose the latter route and attended Harvard Law School, from which he graduated in 1932.

Immediately after graduation Blackmun served as a law clerk to Judge John B. Sanborn of the UNITED STATES COURT OF APPEALS for the Eighth Circuit. He then joined the Minneapolis law firm of Dorsey, Coleman, Barker, Scott, and Barber, where he specialized in tax, civil litigation, and estates. Blackmun left the firm in 1950 to become resident counsel at the Mayo Clinic in Rochester, Minnesota, where he says he enjoyed "the happiest years of my professional experience," with "a foot in both camps, law and medicine."

In 1959 President DWIGHT D. EISENHOWER nominated Blackmun to replace his former employer, Judge Sanborn, on the Eighth Circuit. Blackmun served on that court for eleven years, and then, after the Senate refused to confirm Clement F. Haynsworth, Jr., and G. Harrold Carswell for ABE FORTAS's seat on the Supreme Court, President RICHARD M. NIXON nominated Blackmun, thus accounting for the nickname that Blackmun uses to refer to himself:

"Old No. 3." Blackmun was unanimously confirmed by the Senate and was sworn in as the Supreme Court's ninety-ninth Justice on May 12, 1970.

In appointing Blackmun, Nixon was looking for a judge who shared his philosophy of judicial restraint and would work to reverse the liberal, activist rulings of the WARREN COURT. Nixon's hopes for his new appointee, coupled with Blackmun's long-term friendship with Chief Justice WARREN E. BURGER, who had known Blackmun since childhood and had asked Blackmun to serve as the best man at his wedding, led the media to refer to Burger and Blackmun as the "Minnesota Twins." The two Justices' similar voting patterns during Blackmun's early years on the Court lent credence to the epithet.

Although Blackmun has generally lived up to Nixon's expectations in criminal procedure cases, he increasingly sided with Justice WILLIAM J. BRENNAN, JR., in other controversial cases and is now considered part of the Court's liberal wing. For his part, Blackmun puts little stock in such labels, noting shortly after being nominated to the Supreme Court, "I've been called a liberal and a conservative. Labels are deceiving." He claims that his views have not changed over the years, but that "it's the Court that's changed under me."

Whatever the truth on this issue, Blackmun will likely be best remembered for his controversial and groundbreaking opinion in ROE V. WADE (1973). *Roe* held that the constitutional RIGHT OF PRIVACY protected a woman's right to an ABORTION, thereby in effect invalidating abortion statutes in forty-six states.

Blackmun has continued to advocate the constitutional right to abortion. He wrote the Court's opinions in PLANNED PARENTHOOD OF CENTRAL MISSOURI V. DANFORTH (1976), invalidating requirements of spousal and parental consent, and in *Akron v. Akron Center for Reproductive Health, Inc.* (1983) and *Thornburgh v. American College of Obstetricians and Gynecologists* (1986), striking down various efforts to impose procedural restrictions limiting the availability of abortions.

More recently, however, Blackmun has found himself in dissent on the abortion issue. In *Webster v. Reproductive Health Services* (1989), Chief Justice WILLIAM H. REHNQUIST, joined by Justices BYRON R. WHITE and ANTHONY M. KENNEDY, observed that *Roe*'s "rigid trimester analysis" had proven "unsound in principle and unworkable in practice." Although they did not believe the case required the Court to reconsider the validity of *Roe*'s holding, Justice ANTONIN SCALIA's concurrence indicated that he was ready to overrule *Roe*. Responding in a passionate dissent, Blackmun voiced his "fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided" and concluded that "for today, at least, . . . the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."

Although Blackmun's position on abortion has remained constant, in other areas he has demonstrated an admirable willingness to reconsider his views. His open-mindedness reflects his belief that the law is "not a rigid animal or a rigid profession," but rather a "constant search for truth," as well as his perception that a Supreme Court Justice "grows constitutionally" while on the bench.

One illustration of Blackmun's evolution is his increased tolerance of nontraditional lifestyles. Dissenting in COHEN V. CALIFORNIA (1971), Blackmun argued that the "absurd and immature antic" of wearing a jacket in court bearing the words "Fuck the draft" was not constitutionally protected. He likewise dissented in *Smith v. Goguen* (1974), concluding that the states may constitutionally prosecute those who "harm the physical integrity of the flag by wearing it affixed to the seats of [their] pants." More recently, however, he joined the controversial majority opinions in *Texas v. Johnson* (1989) and *United States v. Eichman* (1990), which held that the FIRST AMENDMENT prohibited prosecution of defendants who had burned the American flag during political protests.

Blackmun's growing tolerance of diversity is also obvious in his dissent in BOWERS V. HARDWICK (1986), which upheld the criminalization of sodomy. His stinging dissent observed that "a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices" and that "depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do."

As he has become more accepting of the unconventional, Blackmun has also become more suspicious of institutions. During his early years on the Court, he tended to defer to institutional prerogatives, believing that a judicial policy of noninterference would leave institutions free to exercise their discretion in the public interest. In his first majority opinion, WYMAN V. JAMES (1971), Blackmun rejected a welfare recipient's FOURTH AMENDMENT challenge to home visits from the welfare department caseworker, whom Blackmun described as "not a sleuth but rather . . . a friend to one in need." He dissented in BIVENS V. SIX UNKNOWN NAMED AGENTS (1971) because he feared that creating a tort remedy for Fourth Amendment violations by federal agents would "open] the door for another avalanche of new federal cases," thereby tending "to stultify proper law enforcement and to make the day's labor for the honest and conscientious officer even more onerous."

More recently, however, Blackmun has become less

trusting of public officials and institutions. In *United States v. Bailey* (1980), for example, his recognition of the "atrocities and inhuman conditions of prison life in America" led him to support a broader duress defense in prison escape cases than the majority was willing to recognize. The picture he painted of prison officials was not a sympathetic one: he described them as indifferent to prisoners' health and safety needs and even as active participants in "the brutalization of inmates."

Given his growing distrust of public officials, Blackmun has increasingly minimized the concerns about the federal courts' caseload expressed in his *Bivens* dissent and instead has opposed limitations on ACCESS TO THE COURTS. He believes that statutes authorizing federal CIVIL RIGHTS suits represent "the commitment of our society to be governed by law and to protect the rights of those without power against oppression at the hands of the powerful." Accordingly, in *Allen v. McCurry* (1980) he dissented from the Court's holding that federal courts must give preclusive effect to prior state court adjudications in civil rights suits; in *Rose v. Lundy* (1982) he opposed the strict exhaustion requirement the majority imposed on HABEAS CORPUS petitioners; and in ATASCADERO STATE HOSPITAL V. SCANLON (1985) he joined Justice Brennan's dissent, which would have prohibited the states from invoking the ELEVENTH AMENDMENT to bar FEDERAL QUESTION suits in federal court.

Another manifestation of Blackmun's increased suspicion of institutions has been his endorsement of more rigorous judicial scrutiny of social and economic legislation under the EQUAL PROTECTION clause. Such legislation is upheld so long as it meets the RATIONAL BASIS test—that is, so long as the legislative means are rationally related to a legitimate governmental purpose. Over the years, the Court has given conflicting signals as to how deferential the rational basis test is. In *United States Railroad Retirement Board v. Fritz* (1980) the Court held that the test was satisfied if a judge could think of some plausible, hypothetical reason for the statutory scheme; whether this hypothetical justification bore any relationship to the legislature's actual purpose was, the Court said, "constitutionally irrelevant." Less than three months later, however, Blackmun's majority opinion in *Schweiker v. Wilson* (1981) observed that the rational basis test is "not a toothless one," and upheld the Medicaid provision at issue there only after finding that the statutory classification represented "Congress' deliberate, considered choice." Similarly, in his separate opinion in *Logan v. Zimmerman Brush Company* (1982), Blackmun found a legislative classification irrational, explaining that the justification for statutory classifications "must be something more than the exercise of a strained imagination."

The limitations imposed by FEDERALISM on the federal government's powers provide a second illustration of Blackmun's willingness to rethink his views. Blackmun represented the decisive fifth vote in NATIONAL LEAGUE OF CITIES V. USERY (1976), where the Court concluded that the TENTH AMENDMENT prohibited Congress from regulating the wages and hours of state employees. His brief concurring opinion interpreted the majority opinion as adopting a balancing approach that sought to accommodate competing federal and state concerns and that would permit federal regulation in areas where the federal interest was "demonstrably greater." Although this interpretation may have represented wishful thinking on Blackmun's part, he did join the majority opinion in full.

After deserting the other Justices from the *National League of Cities* majority in both *Federal Energy Regulatory Commission v. Mississippi* (1982) and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION V. WYOMING (1983), Blackmun ultimately wrote the opinion overruling *National League of Cities* in GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985). Blackmun explained

that the *National League of Cities* approach had proven unworkable because it had been unable to identify a principled way of defining thoseintegral state functions deserving of Tenth Amendment protection. He likewise renounced his own balancing approachbecause it, too, had not provided a coherent standard capable of consistent application by the lower courts.

Though he ultimately rejected a balancing approach in the Tenth Amendment context, one of Blackmun's judicial trademarks has been his tendency to reach decisions by balancing conflicting interests. He believes that "complex constitutional issues cannot be decided by resort to inflexible rules or predetermined categories." Consequently, he pays close attention to the facts of a case and often makes decisions on a case-by-case basis, rather than a sweeping doctrinal one.

Illustrative of Blackmun's balancing approach are his majority opinions in *Bigelow v. Virginia* (1975), VIRGINIA STATE BOARD OF PHARMACY V. VIRGINIA CONSUMERS COUNCIL (1976), and BATES V. STATE BAR OF ARIZONA (1977), which provided the framework for the Court's modern approach to First Amendment cases involving COMMERCIAL SPEECH. Prior to these decisions, the Court considered commercial speech outside the realm of constitutional protection. In each of these three cases, however, Blackmun balanced the First Amendment interests of the advertisers against the public interests served by regulating commercial speech, because, as he explained in *Virginia State Board of Pharmacy*, "the free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system, . . . [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered." Applying this BALANCING TEST in each

case, Blackmun struck down statutes banning advertisements of abortions, prescription drug prices, and legal fees. In each instance, he decided only the narrow issue confronting the Court, expressly declining to consider the extent to which commercial speech might be regulated in other contexts.

Blackmun's commercial speech opinions also illustrate another characteristic of his judicial philosophy—an interest in the real-world impact of the Court's decisions. His opinions often express concern that the Supreme Court operates too frequently from an "ivory tower." In his separate opinion in REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978), for example, Blackmun urged his colleagues to "get down the road toward accepting and being a part of the real world, and not shutting it out and away from us." The balancing approach Blackmun adopted in the commercial speech cases likewise avoided abstract generalizations and focused the Court's attention on the concrete results of each case—in *Virginia State Board of Pharmacy*, for example, on the fact that "those whom the suppression of prescription price information hits the hardest are the poor, the sick, and particularly the aged."

Blackmun has written a series of majority opinions in cases discussing the constitutionality of state efforts to tax interstate and foreign commerce that similarly emphasizes the real-world impact of the state tax at issue in each case. In *Complete Auto Transit, Inc. v. Brady* (1977) his opinion overruled prior Supreme Court precedent that held state taxes on the privilege of doing business within the state per se unconstitutional as applied to INTERSTATE COMMERCE, and instead adopted a four-part test that stressed the practical effect of the state tax. He followed the same approach in *Department of Revenue v. Association of Washington Stevedoring Companies* (1978) and then in *Japan Line, Ltd. v. County of Los Angeles* (1979), where he adapted the *Complete Auto Transit* test to state taxation of foreign commerce.

Blackmun's emphasis on real-world concerns has often been directed more specifically to the effect of the Court's decisions on the powerless, less fortunate members of society. He strives to do justice to the parties in each case, remarking in one interview, "To me, every case involves people. . . . If we forget the humanity of the litigants before us, . . . we're in trouble, no matter how great our supposed legal philosophy can be." This concern is evident in Blackmun's opinions as well. He concurred only in the result in *O'Bannon v. Town Court Nursing Center* (1980) because he found the majority's approach "heartless." His dissent in *Ford Motor Company v. Equal Employment Opportunity Commission* (1982), an employment discrimination case, criticized the majority's reliance on "abstract and technical concerns" that bore "little resemblance to those that actually motivated" the injured employees or anyone "living in the real world."

Aliens are perhaps the disadvantaged group for whom Blackmun has spoken most forcefully and consistently. In a series of majority opinions during the 1970s beginning with GRAHAM V. RICHARDSON (1971), which held that WELFARE BENEFITS could not be conditioned on citizenship or duration of residence in this country, Blackmun urged that alienage be treated as a suspect classification. His more recent statements on behalf of aliens have come in dissent. In *Cabell v. Chavez-Salido* (1982), which upheld a statute that denied aliens employment in any "peace officer" position, Blackmun's dissent focused on the majority's failure to consider the practical impact of its holding. He objected that the Court's abandonment of strict scrutiny was more than an academic matter; in *Cabell*, for example, the majority's permissive standard of review might permit the state to exlude aliens from more than seventy jobs, including toll takers, furniture and bedding inspectors, and volunteer fire wardens.

Blackmun has also focused on the impact of the Court's decisions on the poor. Although one of his early opinions, *United States v. Kras* (1973), upheld a fifty-dollar filing fee in bankruptcy cases in part because paying the fee in installments would result in weekly payments "less than the price of a movie and little more than the cost of a pack or two of cigarettes," Blackmun recently has exhibited more understanding of the plight of the poor. In addition to the concerns articulated in the commercial speech cases, he dissented from the Court's decision in *Beal v. Doe* (1977) to approve a ban on the use of Medicaid funds for nontherapeutic abortions, characterizing the majority's assumption that alternative funding sources for abortions are available to indigent women as "disingenuous and alarming, almost reminiscent of: "Let them eat cake." Again, he contrasted the actual impact of the Court's ruling with its abstract, formalistic approach: "There is another world 'out there,' the existence of which the Court, I suspect, either chooses to ignore or fears to recognize."

Finally, Blackmun has spoken on behalf of racial minorities and the institutionalized. He has consistently voted to uphold AFFIRMATIVE ACTION plans, concluding in his seperate opinion in *Bakke* that " in order to get beyond racism, we must first take account of race." In *Youngberg v. Romeo* (1982) his concurring opinion argued that involuntarily commited retarded persons are entitled to treatment as well as care. "For many mentally retarded people," he reasoned, "the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all their needs is as much liberty as they ever will know." His dissent in *Bailey* criticized the majority's "impeccable exercise in

undisputed general principles and technical legalism" and argued that the scope of the duress defense available in prison escape cases must instead be evaluated in light of the "stark truth" of the "shocking" conditions of prison life.

Although history may best remember Blackmun as the author of *Roe v. Wade*, his contribution to the Court has in fact been much broader. He has thoughtfully balanced conflicting policies, conscientiously and thoroughly digesting the details of each case without reaching out to make decisions based on broad, sweeping generalizations. He has been concerned about the actual impact of the Court's decisions, refusing to permit his place on the Court to allow him to lose compassion for the "little people." He has been receptive to new ideas and exhibited a capacity for growth, in keeping with his recognition that "there is no room in the law for arrogance" and his sense that he, as well as the Supreme Court, has "human limitations and fallibility."

KIT KINPORTS
(1992)

(SEE ALSO: *Flag Desecration; Judicial Activism and Judicial Restraint.*)

Bibliography

KOBYLKA, JOSEPH F. 1985 The Court, Justice Blackmun, and Federalism: A Subtle Movement with Potentially Great Ramifications. *Creighton Law Review* 19:9–49.

NOTE 1983 The Changing Social Vision of Justice Blackmun. *Harvard Law Review* 96:717–736.

SYMPOSIUM 1985 Dedication to Justice Harry A. Blackmun—Biography; Tributes; Articles. *Hamline Law Review* 8:1–149.

——— 1987 Justice Harry A. Blackmun: The Supreme Court and the Limits of Medical Privacy. *American Journal of Law and Medicine* 13:153–525.

WASBY, STEPHEN L. 1988 Justice Harry A. Blackmun in the Burger Court. *Hamline Law Review* 11:183–245.

## BLACKMUN, HARRY A.
(1908–1999)
(Update 2)

Justice Harry A. Blackmun retired from the Supreme Court in June 1994. The opinions he wrote during his last years on the Court continued to reflect the "real world" PRAGMATISM, the deepening sympathy for the powerless, and the strong commitment to pluralism that had marked his previous writings.

As earlier, Blackmun's pragmatism often led him to favor fact-intensive determinations over the application of hard-and-fast rules. Typical was Blackmun's opinion for the Court in MISTRETTA V. UNITED STATES (1989), in which he rejected SEPARATION OF POWERS objections to the federal SENTENCING guidelines, because he concluded that neither the guidelines nor the commission that promulgated them realistically threatened the constitutional scheme of CHECKS AND BALANCES. Similarly, in *International Union, UMWA v. Bagwell* (1994), Blackmun's final constitutional opinion for the Court, he refused to adopt any firm rule regarding when fines for violating civil CONTEMPT OF COURT orders should count as criminal sanctions for purposes of the Sixth Amendment right to TRIAL BY JURY. Instead, he reasoned that the determination of any given case should turn on the degree to which the circumstances implicate the need for the protection. He took an equally functional approach in his opinion for the Court in *Pacific Mutual Life Insurance Company v. Haslip* (1991), rejecting any "mathematical bright line rule" for determining when PUNITIVE DAMAGES violate DUE PROCESS. Blackmun remained particularly opposed to rigid doctrinal analysis when he believed it blocked justice for the weak. He decried, for example, the "sterile formalism" of the Court's decision in DESHANEY V. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES (1989), which found the due process clause of the FOURTEENTH AMENDMENT inapplicable to the failure of county officials to protect a four-year-old boy from his violently abusive father.

In contrast, Blackmun continued to champion strict and often expansive application of rules promoting pluralism and protecting minorities. A prime example was the rule of BATSON V. KENTUCKY (1986), barring prosecutors from exercising PEREMPTORY JURY CHALLENGES based on race. Blackmun wrote for the Court when it extended *Batson* to invalidate race-based peremptory challenges by criminal defendants in *Georgia v. McCollum* (1992), and gender-based peremptory challenges in *J. E. B. v. Alabama* (1994), in both cases stressing the message of hostility and exclusion sent when members of a group historically blocked from full participation in American self-government are systematically ejected from the jury box. Blackmun tended to be similarly uncompromising when applying the FIRST AMENDMENT. His opinion for the Court in FORSYTH COUNTY V. NATIONALIST MOVEMENT (1992) voided an ordinance that capped parade permit fees at $1,000 but let a county administrator set the fee partly based on the group seeking the permit. "A tax based on the content of speech," Blackmun explained, "does not become more constitutional because it is a small fee." To protect RELIGIOUS DIVERSITY he favored strict application of the ESTABLISHMENT CLAUSE and generous accommodation of minority faiths under the free exercise clause. He thus dissented sharply from the Court's determination in EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990) that the free exercise clause

provides no protection against neutral laws that only incidentally prohibit religious practices.

Blackmun remained strongly committed to the right to ABORTION recognized in his opinion for the Court in ROE V. WADE (1973), all the more so as attacks on that ruling escalated both inside and outside the Court. He dissented strenuously in *Ohio v. Akron Center for Reproductive Health* (1990), when the Court upheld a parental notification requirement for abortions performed on minors, and in RUST V. SULLIVAN (1991), when the Court upheld the "gag rules" barring federally funded family-planning services from providing information about abortion. His opinions in these cases focused on the effects the challenged rules would have on women seeking abortions, and highlighted, as had Blackmun's earlier opinions in THORNBURGH V. AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (1986) and WEBSTER V. REPRODUCTIVE HEALTH SERVICES (1989), the degree to which Blackmun had come to view *Roe* as principally about a woman's right to self-determination. When a bare majority of the Court reaffirmed the central holding of *Roe* in PLANNED PARENTHOOD V. CASEY (1992), Blackmun commended the PLURALITY OPINION as "an act of personal courage and constitutional principle," but pointedly warned that his own tenure on the Court was drawing to a close.

Ultimately, however, Blackmun's sharpest and most revealing split with the REHNQUIST COURT came not over abortion but over CAPITAL PUNISHMENT. Blackmun's early opinions on the U.S. Court of Appeals for the Eighth Circuit and on the Supreme Court had made clear that, although he believed the death penalty was constitutional, he was personally opposed to executions and found cases challenging them "excruciating." Over time he grew increasingly uncomfortable with the Supreme Court's handling of capital cases. Finally, in an extraordinary DISSENTING OPINION from the denial of CERTIORARI in *Callins v. Collins* (1994), Blackmun announced his conclusion that the death penalty was unconstitutional. He explained that experience had shown it impossible to administer capital punishment in a manner free from RACIAL DISCRIMINATION and caprice, and yet sensitive to the requirements of individualized fairness. Moreover, he charged, the Court had stopped even trying to address that challenge.

*Callins* was in several respects a fitting capstone to Blackmun's service on the Court. It reflected both his constant attention to the practical operation of the principles announced by the Court and his long-standing concern for the law's treatment of outcasts. It also illustrated his willingness to reconsider his earlier views in light of further experience, a willingness rooted in his open acknowledgement of the difficulty of constitutional adjudication.

Although Justice FELIX FRANKFURTER famously described his version of judicial restraint as "judicial humility," its most vocal supporters, Frankfurter included, have not been judges renowned for their modesty. Blackmun, in *Callins* and throughout his career, exemplified a different, more straightforward kind of judicial humility. He had a keen awareness of the limits of human certainty, and hence of the possibility that he himself might be mistaken. Nevertheless he was steadfast in defending the Constitution as he understood it, particularly when he understood it to protect those most needing protection. The model he provided of humane judging—openly provisional yet resolutely compassionate—is perhaps his greatest legacy.

DAVID A. SKLANSKY
(2000)

Bibliography

COYNE, RANDALL 1995 Marking the Progress of a Humane Justice: Harry Blackmun's Death Penalty Epiphany. *University of Kansas Law Review* 43:367–416.

KARLAN, PAMELA S. 1993 Bringing Compassion Into the Province of Judging: Justice Blackmun and Outsiders. *Dickinson Law Review* 97:527–540.

——— 1994 From Logic to Experience. *Georgetown Law Review* 83:1–4.

KOH, HAROLD HONGJU 1994 The Justice Who Grew. *Journal of Supreme Court History* 1994:5–8.

## BLACKSTONE, WILLIAM
(1723–1780)

The influence of Sir William Blackstone's *Commentaries on the Laws of England*, first published at Oxford between 1765 and 1769, was pervasive in American jurisprudence for much of the nineteenth century, although the work affected constitutional thought more in the realm of philosophy rather than that of specific legal doctrine. The appeal of this four-volume summation of the COMMON LAW, in the beginning of the American federal system, may be explained in part by its highly readable style and its function as a ready reference for many lawyers and jurists whose professional preparation was often indifferent. The practical need for a comprehensive and coherent view of the parent stock more than offset a tentative effort to make the new nation entirely independent of English legal institutions; and after the first American annotations to Blackstone by ST. GEORGE TUCKER in 1804, the importing of successive English editions and the periodic publication of fresh American editions by jurists like THOMAS M. COOLEY of Michigan and scholars like William Draper Lewis of the University of Pennsylvania made the *Commentaries* a standard reference for more than a hundred years.

The almost instant appeal of Blackstone to the English New World colonies—soon to be arguing their entitle-

ments to the "rights of Englishmen" which they finally concluded could be secured only through independence of England itself—lay not only in its comprehensiveness but also in its epitomizing of the creative mercantilist jurisprudence of Blackstone's friend and contemporary, WILLIAM MURRAY (Lord Mansfield), which demonstrated the adaptability of the common law to "modern" economic objectives. The colonial elite, who had devoted the last generation before independence to "Americanization" of the English law, had economic views substantially similar to the scions of the English ruling classes to whom Blackstone delivered his Oxford lectures as Vinerian professor of English law. It was not surprising, therefore, that the *Commentaries*—to be followed in the post-Revolutionary period by the published reports of Mansfield—should appeal to the ruling element in the new nation, which was eager to continue the rules of an ordered economy.

These American leaders, Edmund Burke reminded his listeners in his 1775 "Speech on Conciliation," had a sophisticated legal knowledge, and the proof was in the fact that at that date almost as many copies of the *Commentaries* had been sold in the colonies as in England. JOHN MARSHALL's father was a subscriber to the first Philadelphia printing of 1771–1772, and both the future Chief Justice and his great antagonist, THOMAS JEFFERSON, read assiduously in the volumes. Jefferson wrote that Blackstone's work was "the most elegant and best digested" of any English treatise, "rightfully taking [its] place by the side of the Justinian institutes." While he considered that its continuing popularity in the new nation encouraged a too-slavish reliance on English precedent, he applauded St. George Tucker's plan to bring out an edition with American annotations.

In constitutional thought, the obvious differences in the structure of British and American government stimulated Tucker and succeeding American editors to prepare elaborate essays distinguishing between the frames, although not necessarily the philosophies, of the two constitutional systems. Parliamentary supremacy, which Blackstone endorsed, was in one sense emulated in the organization of the legislative departments as provided in both state and national constitutions. The recent memory of arbitrary and preemptive authority exercised by royal governors led Tucker to make the "popular" branch dominant over the executive. Ironically, Chief Justice Marshall, however congenial he found Blackstone's definition of law in general, was to embody the general principles of the *Commentaries* into a judicial definition of American FEDERALISM which made the judicial an equal branch. Nevertheless, a succession of influential nineteenth-century jurists after Marshall converted the Blackstonian conservatism into the laissez-faire principles that dominated American constitutional law until the 1930s.

The Tucker interpretation of the *Commentaries* led, through his sons, NATHANIEL BEVERLEY TUCKER and HENRY ST. GEORGE TUCKER, to a strict constructionist or "STATES' RIGHTS" school of constitutional thought, which was brought to its zenith in the speeches and writings of Henry's son, John Randolph Tucker. His 1877 Saratoga Springs lecture on state-federal relations as affected by the post-CIVIL WAR amendments to the Federal Constitution culminated in his posthumously published *Commentaries on the Constitution* (1899). This view, merging with Cooley's edition of 1870, kept the conservative jurisprudence of Blackstone in a position of influence until the revolution in American constitutional doctrine in the NEW DEAL crisis of the 1930s.

WILLIAM F. SWINDLER
(1986)

Bibliography

BOORSTIN, DANIEL J. (1941) 1973 *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries.* Cambridge, Mass.: Harvard University Press; reprint, Gloucester, Mass.: Peter Smith.

KATZ, STANLEY M., ed. [William Blackstone] 1979 *Commentaries on the Laws of England: A Facsimile of the First Edition.* Chicago: University of Chicago Press.

KENNEDY, DUNCAN 1979 The Structure of Blackstone's Commentaries. *Buffalo Law Review* 28:205–382.

# BLAINE AMENDMENT
## (1875)

Representative James G. Blaine of Maine, with the support of President ULYSSES S. GRANT, introduced, in December 1875, a proposed constitutional amendment to prohibit state financial support of sectarian schools. The amendment was intended to prevent public support of the Roman Catholic schools which educated a large percentage of the children of European immigrants.

The first clause of the proposed amendment provided that "no State shall make any laws respecting an ESTABLISHMENT OF RELIGION or prohibiting the free exercise thereof." This is an indication that Congress did not believe that the FOURTEENTH AMENDMENT incorporated the religion clauses of the FIRST AMENDMENT. (See INCORPORATION DOCTRINE.)

The second clause would have prohibited the use or control by a religious sect or denomination of any tax money or land devoted to public education. Together with the first clause this prohibition suggests the connection between support of church-related schools and establishment of religion recognized in twentieth-century Supreme Court opinions beginning with EVERSON V. BOARD OF EDUCATION (1947).

The Blaine Amendment was approved by the HOUSE OF REPRESENTATIVES, 180–7; but even a heavily amended version failed to carry two-thirds of the SENATE, and so the proposal died.

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Government Aid to Religious Institutions.*)

## BLAIR, JOHN
(1732–1800)

John Blair was a member of the Virginia House of Burgesses when the AMERICAN REVOLUTION began. In 1776, as a delegate to the state CONSTITUTIONAL CONVENTION, he served on the committee that drafted the VIRGINIA DECLARATION OF RIGHTS and the VIRGINIA CONSTITUTION. In 1777 he was appointed a judge, and in 1780 he became chancellor of Virginia. As a justice of the Court of Appeals he joined in deciding COMMONWEALTH V. CATON (1782). He was a delegate to both the CONSTITUTIONAL CONVENTION OF 1787—at which he never made a speech—and the Virginia ratifying convention. In 1789 President GEORGE WASHINGTON appointed him one of the original Justices of the Supreme Court of the United States. He served on the Supreme Court until 1796, a period during which the Court handed down few important decisions. In the most noteworthy, *Chisholm v. Georgia* (1793), Blair joined in the decision to hear a case brought against a state by a citizen of another state, arguing that to refuse to do so would be to "renounce part of the authority conferred, and, consequently part of the duty imposed by the Constitution."

DENNIS J. MAHONEY
(1986)

Bibliography

ROSSITER, CLINTON 1966 *1787: The Grand Convention.* New York: Macmillan.

## BLASPHEMY

Defaming religion by any words expressing scorn, ridicule, or vilification of God, Jesus Christ, the Holy Ghost, the doctrine of the Trinity, the Old or New Testament, or Christianity, constitutes the offense of blasphemy. In the leading American case, *Commonwealth v. Kneeland* (1838), Chief Justice LEMUEL SHAW of Massachusetts repelled arguments based on FREEDOM OF THE PRESS and on RELIGIOUS LIBERTY when he sustained a state law against blasphemy and upheld the conviction of a pantheist who simply denied belief in God, Christ, and miracles. In all the American decisions, the courts maintained the fiction that the criminality of the words consisted of maliciousness or the intent to insult rather than mere difference of opinion.

The Supreme Court has never decided a blasphemy case. In BURSTYN, INC. V. WILSON (1951) the Court relied on FREEDOM OF SPEECH to void a New York statute authorizing the censorship of "sacrilegious" films. Justice FELIX FRANKFURTER, concurring, observed that blasphemy was a far vaguer term than sacrilege because it meant "criticism of whatever the ruling authority of the moment established as the orthodox religious doctrine." In 1968, when the last prosecution of blasphemy occurred in the United States, an appellate court of Maryland held that the prosecution violated the First Amendment's ban on ESTABLISHMENT OF RELIGION and its protection of freedom of religion. Should a blasphemy case ever reach the Supreme Court, that Court would surely reach a similar result.

LEONARD W. LEVY
(1986)

Bibliography

LEVY, LEONARD W. 1981 *Treason Against God: A History of the Offense of Blasphemy.* New York: Schocken Books.

## BLATCHFORD, SAMUEL
(1820–1893)

Samuel Blatchford had been a federal judge for fifteen years when CHESTER A. ARTHUR appointed him to the Supreme Court in 1882. Like Horace Gray, Arthur's other appointee, Blatchford had initially made his mark on the profession as a reporter. Beginning in 1852, he published a volume of admiralty cases decided in the Southern District of New York, a volume of CIVIL WAR prize cases from the same JURISDICTION, and twenty-four volumes of Second Circuit decisions. He continued to report Second Circuit opinions following his appointment as district judge (1867), circuit judge (1872), and circuit justice. Blatchford's expertise in admiralty, PATENT, and construction of the national banking acts made him the Supreme Court's workhorse; he wrote 435 majority opinions during his eleven-year tenure, almost twenty percent more than his proportional share.

Two personal characteristics shaped Blatchford's modest contributions to American constitutional development. He was singularly uninterested in questions of statecraft, political economy, and philosophy; he was so committed to a collective conception of the judicial function that he dissented less frequently then any Justice since the era of JOHN MARSHALL. These attitudes, coupled with Chief

Justice MORRISON R. WAITE's disinclination to assign him cases involving CONSTITUTIONAL INTERPRETATION, kept Blatchford out of the limelight during his first eight years on the Court. But his compromising tendency prompted MELVILLE W. FULLER, Waite's successor, to regard him as the logical spokesman for narrow, unstable majorities in two controversial FOURTEENTH AMENDMENT cases. Blatchford's lackluster performances in CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY V. MINNESOTA (1890) and *Budd v. New York* (1892) underscored his stolid approach to constitutional law.

At issue in the *Chicago, Milwaukee* case was the validity of an 1887 Minnesota statute establishing a railroad commission authorized to set maximum rate schedules that would be "final and conclusive." Because this scheme left no role for courts in reviewing railroad rates, the briefs focused on two previous statements by Chief Justice Waite. In *Munn v. Illinois* (1877) Waite had explained that "the controlling fact" in rate controversies was "the power to regulate at all." And he had added that "for protection against abuses by legislatures the people must resort to the polls, not the courts." In the *Railroad Commission Cases* (1886), however, Justice STANLEY MATTHEWS had persuaded Waite to acknowledge that "under the pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for PUBLIC USE without JUST COMPENSATION, or without DUE PROCESS OF LAW." Speaking for a 6–3 majority, Blatchford concluded that Waite's majority opinion in the Railroad Commission Cases presupposed at least some role for the courts; it followed that the Minnesota law could not be sustained. At one point Blatchford came very close to equating due process with judicial process, but he cautiously retreated and ultimately said nothing about either the scope of JUDICIAL REVIEW or its rationale, which went beyond Waite's enigmatic OBITER DICTUM. Only the dissent by JOSEPH P. BRADLEY forthrightly summarized what seemed to be the majority's premise. "In effect," he complained, the Court had now held "that the judiciary, and not the legislature, is the final arbiter in the regulation of fares and freights."

*Budd* brought both of the central issues in *Munn* back to the Court for reconsideration. Speaking again for a majority of six, Blatchford reiterated the Court's conclusion that bulk storage and handling of grain was a "business AFFECTED WITH A PUBLIC INTEREST. Consequently rates of charge for these services might be regulated by state governments. But what of *Chicago, Milwaukee*, which Bradley had described as "practically overrul[ing]" *Munn*? The two cases were "quite distinguishable," Blatchford insisted, "for in this instance the rate of charges is fixed directly by the legislature." Blatchford apparently regarded this formulation as an appropriate means of reconciling all previous decisions on the subject. But the distinction between legislative and commission regulation was so artificial that Justice JOHN MARSHALL HARLAN simply ignored it in his characteristically robust opinion for the Court in SMYTH V. AMES (1898). Seymour D. Thompson, editor of the *American Law Review*, was less gracious. "It was no great disparagement of him," Thompson remarked in a critical appraisal of Blatchford's constitutional law opinions, "to say that he was probably a better reporter than Judge."

CHARLES W. MCCURDY
(1986)

Bibliography

PAUL, ARNOLD 1969 Samuel Blatchford. Pages 1401–1414 in Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court, 1789–1969: Their Lives and Major Opinions.* New York: Chelsea House.

## BLOCK GRANTS

See: Federal Grants-in-Aid; Revenue Sharing

## BLOOD SAMPLES

See: Testimonial and Nontestimonial Compulsion

## BLOUNT, WILLIAM
(1749–1800)

William Blount was a delegate to the CONSTITUTIONAL CONVENTION OF 1787 from North Carolina and a signer of the Constitution. Blount did not speak at the Convention and, disliking the result, signed the Constitution only to attest to the fact that it was consented to by all of the states represented.

DENNIS J. MAHONEY
(1986)

## BLUE RIBBON JURY

Under the laws of some states, cases of unusual importance or complexity may be tried to special juries chosen from a venire with qualifications higher than those for the ordinary jury panel. Such juries are commonly called "blue ribbon juries." In *Fay v. New York* (1947) the Supreme Court affirmed (5–4) the constitutionality of using a blue ribbon jury in a criminal prosecution. Whether such juries would meet the contemporary standard of being

drawn from a source fairly representative of the community is uncertain. (See JURY DISCRIMINATION; TAYLOR V. LOUISIANA.) In any event, blue ribbon juries have fallen into disuse.

DENNIS J. MAHONEY
(1986)

## *BLUM v. YARETSKY*
457 U.S. 991 (1982)
## *RENDELL-BAKER v. KOHN*
457 U.S. 830 (1982)

Following the Supreme Court's decision in BURTON V. WILMINGTON PARKING AUTHORITY (1961), commentators and lower courts began to ask whether a significant state subsidy to a private institution might make that institution's conduct into STATE ACTION, subject to the limitations of the Fourteenth Amendment. *Blum* and *Rendell-Baker* ended two decades of speculation; by 7–2 votes, the Court answered "No."

In *Blum* patients in private nursing homes complained that they had been transferred to facilities offering lesser care without notice or hearing, in violation of their rights to PROCEDURAL DUE PROCESS. Through the Medicaid program, the state paid the medical expenses of ninety percent of the patients; the state also subsidized the costs of the homes and extensively regulated their operation through a licensing scheme. The Court rejected each of these connections, one by one, as an argument for finding state action. The Constitution governed private conduct only when the state was "responsible" for that conduct; normally, such responsibility was to be found in state coercion or significant encouragement; these features were missing here.

In *Rendell-Baker* employees of a private school complained that they had been discharged for exercising their rights of FREEDOM OF SPEECH, and fired without adequate procedural protections. The Court reached neither issue, because it concluded that the action of the school did not amount to state action. Although the school depended on public funding, no state policy—no coercion or encouragement—influenced the employees' discharge.

Dissents in the two cases were written by Justices WILLIAM J. BRENNAN and THURGOOD MARSHALL, respectively. They argued that a consideration of all the interconnections between the institutions and the states, including the heavy subsidies, amounted to the kind of "significant state involvement" found in *Burton*. But considering the totality of circumstances in order to find state action is precisely what a majority of the BURGER COURT has been unwilling to do.

KENNETH L. KARST
(1986)

## *BLYEW v. UNITED STATES*
80 U.S. 581 (1872)

The Supreme Court first interpreted the CIVIL RIGHTS ACT OF 1866 in April 1872 in *Blyew v. United States*. That case narrowly construed a jurisdictional provision, in the act's Section 3, that granted JURISDICTION to federal trial courts over criminal and civil "causes" that "affect[ed]" persons who "are denied or cannot enforce" in state court the rights of equality secured by the act's Section 1.

The case arose following the ax murder of a black family in rural Kentucky. Because a state statute precluded the testimony by a black person against a white defendant, it appeared probable that a state court would have excluded the dying declaration of the family's teenage son identifying the perpetrators as John Blyew and George Kennard. The federal attorney for Kentucky, Benjamin Bristow (who would soon argue this case as the first SOLICITOR GENERAL of the United States), obtained a federal INDICTMENT for the state-law crime of murder against Blyew and Kennard and prosecuted them in federal court. To establish jurisdiction under the 1866 act, the indictment asserted that the defendants' victims were denied or could not enforce the same right to testify in state court as white persons enjoy. This was only one among many criminal and civil cases brought in the Kentucky federal court on such a theory.

Convicted and sentenced to death, the defendants appealed. Exercised by this federal interference with its state courts, Kentucky hired (and the Supreme Court permitted) Judge Jeremiah Black to represent Kentucky at ORAL ARGUMENT.

The Court, through Justice WILLIAM STRONG, held that in a criminal trial only the government and the defendant, but not the victim, are persons "affected" within the meaning of the 1866 act. Because neither of these parties had been denied rights under Section 1, the federal court lacked jurisdiction.

With its narrow construction of the "affecting" jurisdiction, the Court avoided the constitutional question of whether Congress can enforce the FOURTEENTH AMENDMENT by granting federal court jurisdiction over state-law causes of action to avoid the risk of a biased state forum. The Court partially resolved this question in *Strauder v. West Virginia* (1880), which upheld the 1866 act's removal jurisdiction. But by then Congress had eliminated the narrowly interpreted "affecting" jurisdiction in its 1874 codification of United States statutes.

By its HOLDING, the Court eliminated the important CIVIL RIGHTS remedial tool of providing a nondiscriminatory federal forum to enforce the COMMON LAW of crimes and torts (including common law duties of nondiscrimination). Since *Blyew*, the model for federal civil rights

criminal enforcement has primarily involved the adoption of a substantive federal criminal statute, with the attendant constitutional and practical difficulties of defining federal rights under both the SLAUGHTERHOUSE CASES (1873) and the CIVIL RIGHTS CASES (1883). Effective civil rights enforcement has been hobbled by this limitation, among others, ever since. Moreover, without the counterexample of the "affecting" jurisdiction, the Court has more plausibly developed doctrines restraining federal court intrusion on discriminatory state enforcement of state law.

The *Blyew* decision permits identifying the Supreme Court's hostility to federal civil rights enactments as early as the end of the first administration of ULYSSES S. GRANT. It also suggests that by the time the Court rendered the *Slaughterhouse* decision, it understood the implications that decision would have for federal civil rights enforcement. This precludes treating the Court's subsequent decisions limiting civil rights legislation as merely expressing a consensus of the political branches reached in the waning days of RECONSTRUCTION.

*Blyew* is also noteworthy because Justice JOSEPH P. BRADLEY, in dissent, first put forward a theory of a group right to the adequate protection of the law and the "badges and incidents" theory of the THIRTEENTH AMENDMENT found in the *Civil Rights Cases*.

The Court's failure to appreciate a class's cognizable interest in the effective protection of the law continues to the present. *Blyew*, for example, anticipated *Linda R. S. v. Richard D.* (1973) a century later, in which the Court held that a crime victim lacked standing to challenge a prosecutorial decision, because it directly affected only the state and defendant.

ROBERT D. GOLDSTEIN
(1992)

Bibliography

GOLDSTEIN, ROBERT D. 1989 *Blyew:* Variations on a Jurisdictional Theme. *Stanford Law Review* 41:469–566.

KAZCOROWSKI, ROBERT 1985 *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866–1876.* New York: Oceana.

## *BOARD OF CURATORS v. HOROWITZ*
435 U.S. 78 (1979)

A state university medical student was dismissed during her final year of study for failure to meet academic standards. The Supreme Court unanimously held that she had not been deprived of her PROCEDURAL DUE PROCESS rights, but divided 5–4 on the reasons for that conclusion. For a majority, Justice WILLIAM H. REHNQUIST commented that the student had not asserted any "property" interest, and strongly hinted that she had not been deprived of a "liberty" interest. Nevertheless, assuming the existence of an interest entitled to due process protections, Rehnquist said that a dismissal for academic rather than disciplinary reasons required no hearing or opportunity to respond. Four concurring Justices disagreed with the remarkable conclusion that due process required a fair procedure for the ten-day suspension of an elementary school pupil in GOSS V. LOPEZ (1975) but not for the academic dismissal of a medical student. Here, however, the four Justices agreed that the student had been given a sufficient hearing.

*Horowitz* illustrates the artificiality of the Court's recent narrowing of the "liberty" or "property" interests to which the guarantee of procedural due process attaches. A student's interest in avoiding academic termination fits awkwardly into those categories, in their recent restrictive definitions. Yet the student plainly deserves protection against termination procedures that are arbitrary. The specter of judges' having to read examination papers is no more than a specter. The concern of procedural due process is not the fairness of a particular student's termination, but the fairness of the procedural system for depriving a person of an important interest.

KENNETH L. KARST
(1986)

## *BOARD OF DIRECTORS OF ROTARY INTERNATIONAL v. ROTARY CLUB*

See: Freedom of Association

## *BOARD OF EDUCATION v. ALLEN*
392 U.S. 236 (1968)

New York authorized the loan of state-purchased textbooks to students in nonpublic schools. Justice BYRON R. WHITE, speaking for the Supreme Court, relied heavily on the "pupil benefit theory" which he purportedly derived from EVERSON V. BOARD OF EDUCATION (1947). If the beneficiaries of the governmental program were principally the children, and not the religious institutions, the program could be sustained.

Justice HUGO L. BLACK, the author of *Everson*, dissented. *Everson*, he recalled, held that transportation of students to church-related schools went "to the very verge" of what was permissible under the establishment clause. Justices WILLIAM O. DOUGLAS and ABE FORTAS also dissented.

*Allen* stimulated efforts to aid church-related schools in many state legislatures. Later opinions of the Court, in-

validating many such aid programs, have limited *Allen's* precedential force to cases involving textbook loans.

RICHARD E. MORGAN
(1986)

(SEE ALSO: *Government Aid to Religious Institutions.*)

## *BOARD OF EDUCATION v. PICO*
457 U.S. 853 (1982)

Six students sued a school board in federal court, claiming that the board had violated their FIRST AMENDMENT rights by removing certain books from the high school and junior high school libraries. The board had responded to lists of "objectionable" and "inappropriate" books circulated at a conference of conservative parents. A fragmented Supreme Court, voting 5–4, remanded the case for trial.

Four Justices concluded that it would be unconstitutional for the school board to remove the books from the libraries for the purpose of suppressing ideas. Four others argued for wide discretion by local officials in selecting school materials, including library books. One Justice would await the outcome of a trial before addressing the constitutional issues. Thus, although the decision attracted national attention, it did little to solve the intractable constitutional puzzle of GOVERNMENT SPEECH.

KENNETH L. KARST
(1986)

## *BOARD OF EDUCATION OF KIRYAS JOEL VILLAGE SCHOOL DISTRICT v. GRUMET*
512 U.S. 687 (1994)

New York State passed a statute creating a public school district that was coterminous with the boundaries of the Village of Kiryas Joel. Kiryas Joel's entire population consisted of adherents of the Satmar Hasidim, a traditional and insular sect of orthodox Judaism. Most Satmar children attended private religious schools. The public school district was established to meet the needs of Satmar children with disabilities that entitled them to publicly funded special education. The Supreme Court held that the creation of the school district under these circumstances violated the FIRST AMENDMENT prohibition on the ESTABLISHMENT OF RELIGION.

Justice DAVID H. SOUTER's opinion (for a majority of the Court on some issues and only a plurality on others) held that New York impermissibly favored religion over nonreligion, and one religious group over others, by drawing district lines explicitly to include members of the Satmar, and only them. New York could not constitutionally establish a separate school district to allow the Satmars to avoid educating their children among those who did not share their cultural practices, especially considering that there was no assurance in New York law that other culturally or religiously identifiable groups would be afforded a similar ACCOMMODATION OF RELIGION in the future. Justice ANTHONY M. KENNEDY concurred in the judgment. For him the constitutional infirmity in New York's creation of the school district was that it impermissibly drew the political boundaries defining the district on the basis of the religion of those who lived within it.

Justice ANTONIN SCALIA, joined by two other Justices, forcefully dissented, arguing that the establishment clause was not implicated by the state's accommodation of the Satmars' cultural insularity. None of the sect's religious practices contributed to the village's desire not to educate Satmar children among nonadherents. The fact that those holding public authority happen to hold certain religious beliefs does not establish that they hold that authority because of those beliefs. To Scalia it was clear that the cultural insularity of the Satmars, and not their religious beliefs, had led to the accommodation. The dissenters also objected to the notion that, in order to justify a current accommodation, the state must somehow give assurances that it will provide similar accommodations in unknown future circumstances. In the wake of this decision, New York passed general laws permitting incorporation of school districts; although the matter is not without doubt, it appears likely that a new school district formed pursuant to the amended law will pass muster with a majority of the Supreme Court.

The situation leading up to the creation of the Kiryas Joel school district was the product of the Court's decision in AGUILAR V. FELTON (1985), which held that it was unconstitutional for the state to fund special education for handicapped children in sectarian schools. The Satmar children with special education needs, who theretofore had attended programs at an annex to their religious school, were thus forced to attend programs with nonadherents, a situation that they and the other students found disruptive. In response, the state created the Kiryas Joel school district. The rule in *Aguilar* proved unenduring, however, as the Court OVERRULED that decision in AGOSTINI V. FELTON (1997). If *Aguilar* had been decided correctly in the first place, the entire saga of Kiryas Joel would have been avoided. For the future, the annex alternative is likely once again available.

WILLIAM K. KELLEY
(2000)

(SEE ALSO: *Government Aid to Religious Institutions.*)

## BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS v. MERGENS
496 U.S. 226 (1990)

In WIDMAR V. VINCENT (1981) the Supreme Court held that a state university had denied a student religious group's FREEDOM OF SPEECH by barring the group from holding a worship meeting on campus. Concluding that the university had created a limited PUBLIC FORUM, the Court rejected the university's argument that allowing the meeting would amount to an unconstitutional ESTABLISHMENT OF RELIGION. In 1984, Congress adopted the Equal Access Act, prohibiting a public high school that receives federal aid from denying religious, philosophical, or political student groups access to its facilities if it allows access by other "noncurriculum related" student groups. The lower federal courts disagreed about the law's constitutionality, and some commentators expected the Supreme Court's resolution of the conflict to illuminate the future path of ESTABLISHMENT CLAUSE jurisprudence. In the event, the light failed.

In *Mergens* the Supreme Court upheld the act, 8–1, against an establishment clause challenge. Justice SANDRA DAY O'CONNOR, writing for herself and three other Justices, found the case closely similar to *Widmar*—as far as the establishment clause question was concerned—and applied the three-part LEMON TEST. First, Congress had a secular purpose of preventing discrimination against religious speech. Second, the primary effect of the law was not to advance religion. Neither Congress nor the school district had endorsed or sponsored any religious group's speech. Furthermore, the act had forbidden school officials to participate in religious groups' meetings and required that any such meetings be held during noninstructional time. Third, the school's requirement of a faculty sponsor did not amount to excessive entanglement of the school with religion.

Justice ANTHONY M. KENNEDY, joined by Justice ANTONIN SCALIA, concurred. Following his opinion in COUNTY OF ALLEGHENY V. AMERICAN CIVIL LIBERTIES UNION (1989), Kennedy rejected the "endorsement" gloss on the LEMON TEST. He would uphold a law against an establishment clause challenge if it did not directly benefit religion to the degree of establishing a state religion, or coerce someone into participating in a religious activity. Here, Congress and the school board had done neither.

Justice THURGOOD MARSHALL, joined by Justice WILLIAM J. BRENNAN, also concurred. For him, the law raised more serious establishment clause problems than had *Widmar;* the school had not simply opened a forum, but had treated its after-school clubs as serving educational functions. He concurred on the assumption that the school would be required to redefine its club program to negate the appearance of sponsorship. Justice JOHN PAUL STEVENS dissented on statutory grounds, arguing that the school's existing club program was "curriculum related," so that the act did not require access for a religious group.

KENNETH L. KARST
(1992)

(SEE ALSO: *Bender v. Williamsport; Equal Access; Religious Fundamentalism.*)

## BOARD OF REGENTS v. ROTH
408 U.S. 564 (1972)

A nontenured state college teacher, hired for a one-year term, was told he would not be rehired for the following year. The Supreme Court held, 5–3, that he had not been deprived of PROCEDURAL DUE PROCESS. Justice POTTER STEWART, for the majority, announced a restrictive view of the nature of the interests protected by the due process guarantee. Henceforth the Court would look for an impact on some "liberty" or "property" interest, rather than examine the importance of the deprivation imposed by the state. Here the teacher had no "property" interest beyond his one-year contract, and his nonrenewal required no hearing.

In a companion case, *Perry v. Sindermann* (1972), the Court found a "property" interest in an unwritten policy that was the equivalent of tenure for a state junior college teacher. Furthermore, the teacher had alleged that his contract had not been renewed because of his exercise of FIRST AMENDMENT freedoms—a "liberty" claim that did not depend on his tenured status.

KENNETH L. KARST
(1986)

## BOARD OF TRUSTEES OF STATE UNIVERSITY OF NEW YORK v. FOX
492 U.S. 469 (1989)

This decision significantly altered the doctrinal formula governing COMMERCIAL SPEECH. In CENTRAL HUDSON GAS AND ELECTRIC CORP. V. PUBLIC SERVICE COMMISSION (1980) the Supreme Court had held that a state's regulation of commercial speech must be "no more extensive than necessary" to achieve the regulation's purposes. In *Fox*, a 6–3 majority explicitly disavowed the idea that a state was limited to the LEAST RESTRICTIVE MEANS in regulating commercial advertising. Justice ANTONIN SCALIA wrote for the Court.

A state-university regulation of on-campus business activity effectively prevented a seller of household goods from holding "Tupperware parties" in the dormitories. Although the company's representatives not only sold goods but also made presentations on home economics, the Court concluded that the speech was commercial. The transactions proposed were lawful, and the advertising was not misleading; thus, the interest-balancing part of the *Central Hudson Gas* formula came into play. Here the university had important interests in preserving a noncommercial atmosphere on campus and tranquillity in the dormitories. Although the regulation did directly advance these interests, other means, less restrictive on speech, would arguably have served just as well. Justice Scalia noted that previous opinions had suggested that regulations of advertising must pass a "least restrictive means" test, but decided that such a formulation was too burdensome on the states. Rather, what is required is "a fit [between means and ends] that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served'" (quoting from *In re R.M.J.*, dealing with lawyer advertising).

Justice HARRY A. BLACKMUN, who had written the Court's early opinions admitting commercial speech into the shelter of the FIRST AMENDMENT, wrote for the three dissenters. He argued that the statute was invalid for OVERBREADTH, and said he need not discuss the least-restrictive-means question.

KENNETH L. KARST
(1992)

## *BOB JONES UNIVERSITY v. UNITED STATES*
461 U.S. 574 (1983)

The Internal Revenue Service adopted a policy in 1969 of denying federal income tax exemption, available by statute to educational and religious institutions, to schools that practiced racial discrimination. Bob Jones University, an institution that had a multiracial student body but restricted interracial socializing, and Goldsboro Christian Schools, which practiced racial SEGREGATION on the basis of religious conviction, sought to have their tax-exempt status reinstated. In an opinion by Chief Justice WARREN E. BURGER, the Supreme Court held, 8–1, that the Internal Revenue Service had the power, even without explicit statutory authorization, to enforce by its regulations a "settled public policy" against racial discrimination in education. None of the Justices accepted the schools' claim that the regulations infringed on the First Amendment's guarantee of religious liberty, but Justice WILLIAM H. REHNQUIST, dissenting, warned of the danger of abrogating the SEPARATION OF POWERS.

DENNIS J. MAHONEY
(1986)

## *BOB-LO EXCURSION COMPANY v. MICHIGAN*
333 U.S. 28 (1948)

Although this decision unsettled interpretations of the COMMERCE CLAUSE, it nevertheless dealt SEGREGATION another blow. A Detroit steamship company violated a state CIVIL RIGHTS statute by refusing to transport a black girl to a local, though Canadian, destination. Justice WILEY RUTLEDGE's majority opinion distinguished MORGAN V. VIRGINIA (1946) and stressed the local nature of transportation in upholding the statute. Justices WILLIAM O. DOUGLAS and HUGO L. BLACK thought the law should be sustained because there could be no conflict with a congressional law; Chief Justice FRED M. VINSON and Justice ROBERT H. JACKSON dissented, arguing that *Morgan* and HALL V. DECUIR (1878) governed.

DAVID GORDON
(1986)

## *BODDIE v. CONNECTICUT*
401 U.S. 371 (1971)

An INDIGENT sought to file for divorce in a state court but was unable to pay the $60 filing fee. The Supreme Court held, 8–1, that the state had unconstitutionally limited the plaintiff's ACCESS TO THE COURTS. For a majority, Justice JOHN MARSHALL HARLAN rested decision on a PROCEDURAL DUE PROCESS theory. The marriage relationship was "basic" in our society, and the state had monopolized the means for legally dissolving the relationship. Justice WILLIAM O. DOUGLAS, concurring, would have rested decision on an EQUAL PROTECTION theory.

Two subsequent 5–4 decisions, *United States v. Kras* (1971) and *Ortwein v. Schwab* (1971), made clear that *Boddie* had not implied a general right of access in all civil cases. *Boddie*'s due process approach, rather than equal protection, has guided the Court's subsequent dealings with WEALTH DISCRIMINATION in the civil litigation process.

KENNETH L. KARST
(1986)

## BODY SEARCH

The term "body search" is limited to strip searches (forcing a suspect to disrobe to enable an officer to observe the naked body), body cavity searches (inserting a finger or instrument into the rectum or vagina), and other penetrations of the body, such as extracting blood. Body searches do not violate the RIGHT AGAINST SELF-INCRIMINATION, because, as held in SCHMERBER V. CALIFORNIA (1966), they do not result in TESTIMONIAL COMPULSION. Nor do they violate DUE PROCESS OF LAW unless conducted in a shocking manner. The FOURTH AMENDMENT is the principal restriction on body searches.

The Supreme Court has, in recent years, balanced competing interests in determining whether a search violates the Fourth Amendment. This approach, which usually results in upholding the search, has been used by courts with devastating effect in situations such as BORDER SEARCHES and prison searches; in the context of both, body searches may occur.

A person who enters the United States may be searched without a SEARCH WARRANT, without PROBABLE CAUSE, and without even reasonable suspicion. This rule applies to a search of a suspect's outer garments and luggage or other containers. If a border search is more intrusive, it may be governed by more stringent standards. The Supreme Court has never reviewed a strip search case that arose at the border. Although lower courts require neither a warrant nor probable cause for such a search, they do require some justification, often expressed as "real suspicion." This standard approximates the "reasonable suspicion" standard that TERRY V. OHIO (1968) used to justify a STOP-AND-FRISK. Although a strip search is far more intrusive than a stop-and-frisk, its occurrence at the border is said to justify the *Terry* standard.

The Supreme Court has never reviewed a body cavity search case that arose at the border. Lower courts do not require a warrant. Nor do they require probable cause, most choosing a "reasonable suspicion" standard. These are dubious positions. Given the lack of EXIGENT CIRCUMSTANCES and the indignity of an exploration of body cavities, it would be appropriate to require both a warrant and probable cause. Even if constitutional at its inception, a body cavity search might be unreasonable and therefore unconstitutional in its execution. Relevant factors include the place in which the examination occurs, the person making the examination, and the manner in which the examination is made.

The Supreme Court held in *Hudson v. Palmer* that, as a result of the needs of prison security and discipline, "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell." This means that a prison cell may be searched without a warrant, probable cause, or even reasonable suspicion. It probably also means that prisoners' outer garments may be searched routinely. *Hudson* does not directly deal with strip searches or body cavity searches.

Five years before *Hudson*, in *Bell v. Wolfish* (1979), a highly debatable 5–4 decision, the Supreme Court relied on the interest in prison security to uphold the strip-searching of inmates of a pretrial detention facility whenever they had a contact visit with an outsider. As part of the search, the prisoner had to expose body cavities to visual inspection. The Court required neither probable cause nor reasonable suspicion. *Bell* does not explicitly authorize routine strip searches, however. Nor does it deal with the digital or instrumental exploration of body cavities.

Lower courts have disagreed about the scope of *Hudson* and *Bell*. Most courts wisely have not interpreted these cases to withdraw all Fourth Amendment protection from prison inmates. Although they do not require a warrant or probable cause, these lower courts authorize strip searches and body cavity searches only on reasonable suspicion or after the occurrence of some event such as a contact visit or the leaving and reentering of the prison. These lower courts also recognize that even if a strip search or body cavity search is justified at its inception, its execution may offend the Fourth Amendment. For example, in *Bonitz v. Fair* (1986) the United States Court of Appeals for the Second Circuit held that body cavity searches of female prisoners were unconstitutional when conducted by nonmedical personnel in an unhygienic manner and in the view of male officers.

Courts apply higher standards when the person searched is a prison employee or visitor.

Body searches occur in settings other than the border and prisons, and the Supreme Court has decided several relevant cases. In *Schmerber*, the Court held that the Fourth Amendment did not require a police officer to obtain a warrant before ordering a doctor to withdraw blood from an apparently drunk driver. The alcoholic content of blood is evanescent and might disappear or change in the time it would take to obtain a warrant. If evidence is not evanescent, however, a warrant might well be required unless the officer is entitled to act routinely, as in fingerprinting all arrestees, for example. Even though it did not require a warrant, *Schmerber* did require a "clear indication" that the driver's blood would disclose intoxication. The Court probably meant to require more than probable cause to justify the subcutaneous intrusion, but in subsequent cases it suggested that "clear indication" means no more than probable cause and may mean less.

In *Winston v. Lee* (1985) the Court prohibited the surgical removal of a bullet from a robbery suspect's body. The removal had been ordered by a state court on probable cause to believe that the bullet, fired from the victim's gun, would identify the suspect as the robber. The Supreme Court balanced the state's need for the evidence against the intrusion of surgery under a general anesthetic. It found that the state already had substantial identification evidence and that the operation posed significant risks. *Winston* is one of the rare cases in which the Court has used the balancing approach to increase, rather than lower, the protections of the Fourth Amendment.

LAWRENCE HERMAN
(1992)

(SEE ALSO: *Prisoners' Rights; Right of Privacy.*)

Bibliography

LAFAVE, WAYNE R. 1987 *Search and Seizure*, 2nd ed. St. Paul, Minn.: West Publishing Co.

WHITEBREAD, CHARLES H. and SLOBOGIN, CHRISTOPHER 1986 *Criminal Procedure*, 2nd ed. Mineola, N.Y.: Foundation Press.

## *BOERNE (CITY OF) v. FLORES*

See: Religious Freedom Restoration Act

## BOLAND AMENDMENT

The Boland Amendment featured in the IRAN-CONTRA AFFAIR and implicated President RONALD REAGAN in a failure to perform his constitutional duty to execute the laws faithfully.

From 1982 through 1986, Congress annually enacted the Boland Amendment as a rider to Defense Department appropriations. The amendment prohibited military assistance to the Contras, the armed opposition to Nicaragua's communist government. The amendment applied to any agency or entity of the United States "involved in intelligence activities." The President signed the amendment annually, although opposing it on policy grounds. Reagan never intimated his belief that its restrictions were unconstitutional or did not apply to him, to any of his executive officers, or to the National Security Council (NSC). When the Iran-Contra Affair became public, the President made inconsistent statements; only then did his administration take the position that the Boland Amendment did not extend to the NSC.

While the amendment was operative, however, the administration, including the director of the NSC, had consistently declared that it complied with the amendment in letter and spirit. In fact, executive officers in the White House had covertly aided the Contras. Furthermore, all involved acknowledged that the amendment prohibited solicitation of funds from other countries. Yet, while the amendment was operative, funds were solicited from Saudi Arabia and Taiwan for military assistance to the Contras, and monies from Iran were used for the same purpose.

The power to appropriate conditionally would be an empty one if the President could command his subordinates to violate an act of Congress that he had signed. Funds raised by the government must, under Article I, section 9, go through the federal Treasury and be in accord with laws passed by Congress. Otherwise, Congress's power over the purse would be debilitated if not meaningless. President Reagan either failed in his constitutional duty to "take care that the laws be faithfully executed" or participated along with high-ranking subordinates in the clandestine violation of law.

LEONARD W. LEVY
(1992)

(SEE ALSO: *Constitutional History, 1980–1989.*)

Bibliography

UNITED STATES: PRESIDENT'S SPECIAL REVIEW BOARD 1987 *Tower Commisson Report.* New York: Bantam-Times Books.

## *BOLLING v. SHARPE*
347 U.S. 497 (1954)

In the four cases now known as BROWN V. BOARD OF EDUCATION (1954), the Supreme Court held that racial SEGREGATION of children in state public schools violated the FOURTEENTH AMENDMENT's guarantee of the EQUAL PROTECTION OF THE LAWS. *Bolling*, a companion case to *Brown*, involved a challenge to school segregation in the DISTRICT OF COLUMBIA. The equal protection clause applies only to the states. However, in previous cases (including the JAPANESE AMERICAN CASES, 1943–1944) the Court had assumed, at least for argument, that the Fifth Amendment's guarantee of DUE PROCESS OF LAW prohibited arbitrary discrimination by the federal government.

The Court in *Bolling* also drew on OBITER DICTA in the Japanese American Cases stating that racial classifications were suspect, requiring exacting judicial scrutiny. Because school segregation was "not reasonably related to any proper governmental objective," the District's practice deprived the segregated black children of liberty without due process. Chief Justice EARL WARREN wrote for a unanimous Court.

The Court concluded its Fifth Amendment discussion

by remarking that because *Brown* had prohibited school segregation by the states, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." Critics have suggested that what was "unthinkable" was the political implication of a contrary decision. But the notions of liberty and equality have long been understood to overlap. The idea of national CITIZENSHIP implies a measure of equal treatment by the national government, and the "liberty" protected by the Fifth Amendment's due process clause implies a measure of equal liberties. Doctrinally as well as politically, a contrary decision in *Bolling* would have been unthinkable.

KENNETH L. KARST
(1986)

## *BOLLMAN, EX PARTE, v. SWARTWOUT*
4 Cranch 75 (1807)

The Supreme Court discharged the prisoners, confederates in AARON BURR's conspiracy, from an INDICTMENT for TREASON. The indictment specified their treason as levying war against the United States. Chief Justice JOHN MARSHALL, for the Court, distinguished treason from a conspiracy to commit it. He sought to prevent the crime of treason from being "extended by construction to doubtful cases." To complete the crime of treason or levying war, Marshall said, a body of men must be "actually assembled for the purpose of effecting by force a treasonable purpose," in which everyone involved, to any degree and however remote from the scene of action, is guilty of treason. But the levying of war does not exist short of the actual assemblage of armed men. Congress had the power to punish crimes short of treason, but the Constitution protected Americans from a charge of treason for a crime short of it.

*Bollman* is also an important precedent in the law of federal JURISDICTION. In OBITER DICTUM, Marshall stated that a federal court's power to issue a WRIT OF HABEAS CORPUS "must be given by written law," denying by inference that the courts have any inherent power to grant habeas corpus relief, apart from congressional authorization. (See EX PARTE MCCARDLE; JUDICIAL SYSTEM.)

LEONARD W. LEVY
(1986)

## BOND, HUGH LENNOX
(1828–1893)

President ULYSSES S. GRANT on July 13, 1870, commissioned Hugh Lennox Bond judge of the newly created Fourth Circuit Court, a position he filled until his death. The Maryland judge was immediately called upon to hold court in an eleven-county section of South Carolina that had been plagued by the Ku Klux Klan's reign of terror. The judge fearlessly restored the rights of freedmen in South Carolina, but he did so in the belief that the states retained responsibility for preserving most CIVIL RIGHTS. Congress, he insisted, could only impede the traditional power of the states over the franchise when there was evidence of direct STATE ACTION resulting in discrimination based on race, color, or previous condition of servitude. Bond rejected the view that the CIVIL WAR amendments incorporated rights deriving from natural law; the protection of such rights, he concluded, remained squarely within state discretion.

He refused to allow the concept of dual CITIZENSHIP to erect an absolute bar to FEDERAL PROTECTION. In *United States v. Petersburg Judges of Elections* (1874), election officials were charged with preventing voting by freedmen without any overt act of RACIAL DISCRIMINATION. Bond acknowledged that under the concept of dual citizenship the states could take away certain rights, such as the franchise. He held, however, that so long as states continued to grant those rights, the federal government could protect freedmen by inferring discriminatory intent from acts depriving them of the rights that had been granted.

Bond insisted on the supremacy of the national government in its proper sphere. In 1876 he ordered the release of the Board of Canvassers of South Carolina who had been imprisoned by the state supreme court for attempting to report election returns favorable to RUTHERFORD B. HAYES. Bond held that Article I, section 2, protected the Canvassers in their capacity as federal officials.

During RECONSTRUCTION Bond courageously extended federal judicial protection to freedmen. Yet even this most vigorous champion in the circuit courts of freedmen's civil rights eschewed the Radical Republicans' CONSTITUTIONAL INTERPRETATION of the Civil War amendments.

KERMIT L. HALL
(1986)

Bibliography

HALL, KERMIT L. 1984 Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871–1872. *Emory Law Journal* 33:921–951.

## BONHAM'S CASE
8 Coke 113b (1610)

Although the issue in *Bonham's Case* concerned the power of the Royal College of Physicians to discipline nonmembers, its importance principally derives from its subse-

quent use as a precedent for JUDICIAL REVIEW and the subordination of LEGISLATION to a higher, constitutional law. Thomas Bonham, holder of a doctorate from Cambridge University, continued to practice in London after being refused permission by the College. Acting under powers conferred by royal charter and parliamentary statutes, the college authorities accordingly fined Bonham and secured his incarceration, thus triggering his suit for false imprisonment before the Court of Common Pleas.

Chief Justice Sir EDWARD COKE ruled in Bonham's favor. Although most of his numerous grounds were technical, Coke also criticized the statutory power of the college to be the original judge in a case to which it had itself been a party and concluded that the COMMON LAW courts could "control" and render void those acts of Parliament that were "against Common Right, and Reason, or repugnant, or impossible to be performed."

Coke, nevertheless, invoked no judicial power to invalidate legislation or measure its constitutionality. He advised only that the statute be construed strictly, not nullified, thus prescribing a rule of statutory construction rather than a doctrine of constitutional superintendence. Coke assumed, moreover, that the defect in the law inhered not in UNCONSTITUTIONALITY but in want of reasonableness and in impossibility of performance. The common law court intervened here as the handmaiden, not the antagonistic overseer, of Parliament, a brother court, and only for the purpose of recapturing a reasonableness that permeated the immutable laws sought by bench and Parliament alike.

Coke's use of evidence was also defective. Coke misquoted, for example, a major precedent, *Tregor's Case* (1334), by infusing into it language that it actually lacked to secure the desired result.

Two antagonistic streams of interpretation devolve from *Bonham's Case.* The Glorious Revolution of 1688 signaled the dominance of Parliament over court as well as crown and, thus, the demise of the spacious judicial interpretation of legislation advocated by Coke. In 1765 WILLIAM BLACKSTONE definitively stated that no power could control unreasonable statutes, for such control subverted all government by setting the judiciary over the legislature. Although Coke's opinion in *Bonham* retained wide currency in the seventeenth century, its erosion began almost immediately and accelerated in the following century. In *The Duchess of Hamilton's Case* (1712), for example, Sir Thomas Powys insisted that judges must "strain hard" to avoid interpretations of statutes that would nullify them.

As the American Revolution approached, however, *Bonham's Case* evolved in the American colonies in the opposite direction as a fixed constitutional barrier against Parliament. Thus, in PAXTON'S CASE (1761) JAMES OTIS urged the Massachusetts Superior Court to impose a disabling interpretation on the British statute of 1662 that had codified WRITS OF ASSISTANCE. Although only private parties, not bench and Parliament, had directly clashed in *Bonham's Case*, Otis advanced it as a firm precedent for judicial evisceration of legislation. Coke questioned only the reasonableness of a statute; Otis and his followers challenged a law's constitutionality.

WILLIAM J. CUDDIHY
(1986)

Bibliography

CORWIN, EDWARD S. 1929 *The "Higher Law" Background of American Constitutional Law.* Ithaca, N.Y.: Cornell University Press.

THORNE, SAMUEL 1938 The Constitution and the Courts: A Reexamination of the Famous Case of Dr. Bonham. Pages 15–24 in Conyers Read (ed.), *The Constitution Reconsidered.* New York: Columbia University Press.

## BONUS BILL

See: Internal Improvements

## *BOOTH v. MARYLAND*
482 U.S. 496 (1987)

Conflicting views on CAPITAL PUNISHMENT emerged in this case dealing with the constitutionality of victim impact statements (VIS). In conformance with state law, the prosecution introduced VIS at the SENTENCING phase of a capital trial. Those statements described the effects of the crime on the victims and their families. Naturally, they were intensely emotional and, according to the majority of the Court, had the effect of prejudicing the sentencing jury. Dividing 5–4, the Court ruled that the VIS provided information irrelevant to a capital-sentencing decision and that the admission of such statements created a constitutionally unacceptable risk that the jury might impose the death penalty arbitrarily or capriciously. Therefore, according to the Court, the VIS conflicted with the Eighth Amendment's CRUEL AND UNUSUAL PUNISHMENT clause. How the murderer could have been exposed to cruel and unusual punishment by the jurors' having listened to statements describing the impact of his crime is mystifying.

Justice BYRON R. WHITE, for the dissenters, believed that VIS are appropriate evidence in capitalsentencing hearings. Punishment can be increased in noncapital cases on the basis of the harm caused and so might be increased in capital cases. VIS reminded the jurors that just as the murderer ought to be regarded as an individual, so too should the victim whose death constituted a unique loss to his

family and the community. Justice ANTONIN SCALIA, for the same dissenters, contended that the Court's opinion wrongly rested on the principle that the death sentence should be inflicted solely on the basis of moral guilt. He thought the harm done was also relevant. Many people believed that criminal trials favored the accused too much if they did not consider the harm inflicted on the victim and the victim's family. The Court's previous opinions required that all mitigating factors must be placed before the capital-sentencing jury; yet the Court here required the suppression of the suffering caused by the defendant. This muted one side of the debate on the appropriateness of capital punishment.

LEONARD W. LEVY
(1992)

## BORDER SEARCH

A search at an international boundary of a person, a vehicle, or goods entering the United States may be carried out without a SEARCH WARRANT and in the absence of PROBABLE CAUSE or even suspicion. In *United States v. Ramsey* (1977) the Supreme Court said that this extraordinary power, which also allows the government to open international mail entering the United States, "is grounded in the recognized right of the sovereign to control . . . who and what may enter the country." The First Congress, in 1789, authorized WARRANTLESS SEARCHES of vessels suspected of carrying goods on which customs duty had been evaded, and similar provisions have been enacted subsequently. As the Court held in ALMEIDA-SANCHEZ V. UNITED STATES (1973), such a search may be conducted not only at the border itself but also at its "functional equivalent," such as "an established station near the border," or "a point marking the confluence of two or more roads that extend from the border," or an airplane arriving on a nonstop flight from abroad.

Under *United States v. Brignoni-Ponce* (1975) an automobile may not be stopped by a roving patrol car miles from the border (in an area that is not its legal equivalent) to determine whether the occupants are illegal aliens unless there is reasonable suspicion. Under *United States v. Martinez-Fuerte* (1976) automobiles may be stopped for this purpose at fixed checkpoints; in these circumstances the opportunity of officers to act arbitrarily is limited.

JACOB W. LANDYNSKI
(1986)

Bibliography

LAFAVE, WAYNE R. 1978 *Search and Seizure: A Treatise on the Fourth Amendment.* Vol. 3:275–327. St. Paul, Minn.: West Publishing Co.

## BORK NOMINATION

On June 26,1987, Justice LEWIS F. POWELL retired from the Supreme Court for reasons of health and age. On July 1, 1987, President RONALD REAGAN nominated Judge Robert H. Bork of the United States Court of Appeals for the District of Columbia Circuit, former Solicitor General of the United States and Professor of Law at the Yale Law School, to replace Justice Powell. The nomination was rejected by the Senate on October 23, 1987 by a vote of forty-two for and fifty-eight against. Although any Senate rejection of a presidential nominee for the Supreme Court is noteworthy, the proceedings surrounding the Bork nomination were uniquely important in providing what turned out to be virtually a public referendum on the deepest questions of constitutional theory. The outcome of this referendum is likely to have long-term effects not only on future nominations, but also on the practice of CONSTITUTIONAL INTERPRETATION.

As a prominent academic, public official, and judge with a firmly established reputation as a political and judicial conservative, Judge Bork had been thought of as a potential nominee for some years. When he was nominated in 1987, opposition crystallized immediately, led by groups such as Common Cause, People for the American Way, Planned Parenthood, and the AMERICAN CIVIL LIBERTIES UNION, the last of whose opposition to the nomination represented a departure from longstanding practice. This opposition, reflected first in the divided and only qualified endorsement of the American Bar Association Standing Committee on the Federal Judiciary, was manifested in newspaper and television advertisements, extensive lobbying efforts, organization of letter-writing campaigns directed primarily at members of the SENATE JUDICIARY COMMITTEE, and in elaborately orchestrated testimony before this Committee (chaired by Senator Joseph Biden of Delaware), testimony featuring a significant number of prominent law school professors.

The public debate and the televised proceedings before the Judiciary Committee focused on five issues, four of which turned out to be much less important than the fifth. First was Judge Bork's role as solicitor general during the administration of President RICHARD M. NIXON and, in particular, his role as the one who as acting attorney general finally implemented the President's order to remove Archibald Cox as SPECIAL PROSECUTOR after both the attorney general (Elliott Richardson) and the deputy attorney general (William Ruckleshaus) had refused. Testimony at the hearings, however, including testimony from Richardson supporting the nomination, established the political and moral plausibility, if not the ultimate correctness, of Bork's action, and quickly removed this issue from center stage.

Second, Judge Bork's writings on ANTITRUST LAW gen-

erated some objections based on the possibility that he would be insufficiently supportive of vigorous enforcement of the antitrust laws. Little came of this, however, in part because of the comparative infrequency of antitrust cases in the Supreme Court and, in larger part, because it became clear that Judge Bork's writings in this area, although controversial, were widely respected and well within the mainstream of academic and professional debate.

Third was Bork's view about FREEDOM OF SPEECH and FREEDOM OF THE PRESS under the FIRST AMENDMENT, in particular the position articulated in a 1971 article, "Neutral Principles and Some First Amendment Problems," in the *Indiana Law Journal.* In this article, Bork argued that only explicitly political speech and not art or literature or anything else not directly relating to political argument was protected by the First Amendment. Although this view represented a substantial departure from both the existing case law and the bulk of academic commentary, Bork's testimony before the Judiciary Committee, conjoined with opinions he had written while on the Court of Appeals, like *Ollman v. Evans* (1984), established that he no longer held this view, at least to such an extent, and the issue turned out to be less important than was first expected.

Fourth, Judge Bork had objected both to the Supreme Court's opinion in SHELLEY V. KRAEMER (1948) striking down judicial enforcement of racially restrictive covenants as unconstitutional state action and to the public-accommodation provisions of the CIVIL RIGHTS ACT OF 1964, calling the latter at the time an act of "unsurpassed ugliness." At the hearings, however, Judge Bork made it clear that he was an unqualified supporter of BROWN V. BOARD OF EDUCATION (1954) and many other Supreme Court decisions outlawing racial SEGREGATION and that he no longer held the views he had set forth in 1963. Moreover, his record on the Court of Appeals and as solicitor general, although hardly aggressive on questions of discrimination on the basis of race and gender, confirmed that Judge Bork no longer held views as hostile to civil rights as might have been inferred solely from some of his earlier writings. This issue never disappeared from the hearings and represented a significant reason for the opposition of numerous civil rights organizations, but in the final analysis, like Bork's views on the First Amendment, it played a somewhat smaller role than had earlier been anticipated.

Fifth and most important were Judge Bork's views about constitutional interpretation and constitutional theory, particularly as they related to questions about the use of ORIGINAL INTENT and about the existence of UNENUMERATED RIGHTS in general and the RIGHT OF PRIVACY in particular. In this context, Judge Bork's views were more consistent over time, as shown in cases like *Dronenburg v. Zech* (1984), representing a view pursuant to which constitutional interpretation was legitimate according to Bork only if restricted to provisions explicitly set forth in the constitutional text, with textual indeterminacies to be resolved by exclusive reference to the original intent of the drafters.

The import of this position was that Judge Bork viewed these Supreme Court decisions finding unenumerated rights in the Constitution as illegitimate judicial usurpation of legislative or majoritarian authority. The discussion of this issue focused largely on the right of privacy, whose recognition Judge Bork viewed as beyond the proper province of the Supreme Court, and on the Supreme Court decisions in ROE V. WADE (1973) on ABORTION and GRISWOLD V. CONNECTICUT (1965) on contraception, both of which were based on principles of enforcement of unenumerated rights or Fourteenth Amendment SUBSTANTIVE DUE PROCESS that Judge Bork found impermissible.

Although Judge Bork's views in this regard were often characterized during the hearings as outside of the academic or professional mainstream, his skepticism about substantive due process, unenumerated rights, and the right to privacy reflected a commonly articulated academic position throughout the 1970s and early 1980s and a position often articulated by academics whose personal political views would have been sympathetic to the enforcement of privacy and abortion rights as a matter of legislative or political policy. In this regard, the charge that Bork's views were widely divergent from the so-called mainstream was simply factually inaccurate.

That Bork's views did not represent some alledged radical right-wing view (see Ronald Dworkin, "The Bork Nomination," *The New York Review of Books*, August 13, 1987), however, does not entail the conclusion that these views could not permissibly be taken into account by the President in nominating him or by the Senate in deciding whether to give their advice and consent to the nomination. From this perspective one of the lessons of the entire process was that a prospective Justice's views about questions of constitutional interpretation and substantive constitutional law became more permissible part of senatorial inquiry than they had previously been. Although the rhetoric at the time inaccurately stressed the "out of the mainstream" character of these views, it does not follow that the senators are obliged to give their ADVICE AND CONSENT to every nominee whose views are within the mainstream. The rejection of the Bork nomination represents a change in practice (in part confirmed in subsequent nominations) toward a process in which senators feel more comfortable about critically inquiring into substansive questons about consitiutional law than they had in the past.

The rejection of the nomination can therefore also be

taken as a virtual public referendum on the right to privacy and perhaps also on the authority of the Supreme Court to enforce unenumerated rights. Although opposition to the abortion decisions was taken to be less "extreme," Bork's opposition to *Griswold* was the focus of the controversy. In their testimony, Bork and his supporters stressed the distinction between the desirability of a right and its existence or historical embodiment in the Constitution, arguing that the desirability of a right, including the right to privacy, was not a sufficient condition for its judicial recognition under a view that recognized majoritarian supremacy and the limited role of JUDICIAL REVIEW. And in opposition, Bork's adversaries before the Judiciary Committee focused on the intrinsic desirability of a right to privacy, on the social obsolescence of the contraception prohibition struck down in *Griswold*, on a Lockean tradition of NATURAL RIGHTS, on the NINTH AMENDMENT, and on a relatively long history of Supreme Court use of substantive due process to encompass unenumerated rights and to invalidate state and federal legislation inconsistent with them.

The final committee vote of five to nine against the nomination (October 6, 1987), as well as the Senate vote consistent with this negative recommendation (both of which included negative votes by Republicans), may well represent a public and legislative endorsement of the authority of the Supreme Court both to interpret the Constitution by use of sources not limited to the original intentions of the Framers and to identify and to enforce rights not explicitly enumerated in the text of the document. Although other factors played a role in the defeat of the nomination, including Bork's views on CIVIL RIGHTS and freedom of speech and a personal style more academic than publicly engaging, the centrality of the privacy-unenumerated rights issue has been confirmed by subsequent nominations. During the proceedings leading to the confirmation of Justice DAVID H. SOUTER, he consistently avoided expressing his views about *Roe v. Wade*, but made clear that he believed both that it was permissible for the Court to identify and enforce unenumerated rights and that the right to privacy was one of them. Insofar as these statements manifest a shift such that it is no longer plausible for a Supreme Court Justice (or nominee) to deny the existence of unenumerated rights or the right to privacy, the rejection of the Bork nomination must be considered not only as the rejection of a particular nominee, but also and more significantly, as the punctuation mark on a longer term constitutional transformation.

FREDRICK SCHAUER
(1992)

(SEE ALSO: *Conservatism.*)

Bibliography

ACKERMAN, BRUCE 1990 Robert Bork's Grand Inquisition. *Yale Law Journal* 99:1419–1439.

BORK, ROBERT H. 1990 *The Tempting of America: The Political Seduction of the Law.* New York: Macmillan.

BRONNER, ETHAN 1989 *Battle for Justice: How the Bork Nomination Shook America.* New York: W. W. Norton.

NAGEL, ROBERT F. 1990 Meeting the Enemy. *University of Chicago Law Review* 57:633–656.

PERTSCHUK, MICHAEL and SCHAETZEL, WENDY 1989 *The People Rising: The Campaign Against the Bork Nomination.* New York: Thunder's Mouth Press.

SANDALOW, TERRANCE 1990 The Supreme Court in Politics. *Michigan Law Review* 88:1300–1325.

SYMPOSIUM 1987 The Bork Nomination. *The Cardozo Law Review* 9:1–530.

## BORROWING POWER

Congress, under Article I, section 8, of the Constitution, may "borrow money on the credit of the United States." This power is ordinarily exercised through the sale of bonds or the issuance of BILLS OF CREDIT. The latter, sometimes called "treasury notes" or "greenbacks," are intended to circulate as currency and thus, in effect, to require the public to lend money to the government. In the GOLD CLAUSE CASES (1935) the Supreme Court held that the government, in borrowing, is bound by the terms of its contracts, but Congress, by invoking SOVEREIGN IMMUNITY, denied its creditors any legal remedy.

DENNIS J. MAHONEY
(1986)

## *BOSTON BEER COMPANY v. MASSACHUSETTS*
97 U.S. 25 (1878)

This case introduced the doctrine of INALIENABLE POLICE POWER, which weakened the CONTRACT CLAUSE's protections of property. The company's charter authorized it to manufacture beer subject to a reserved power of the legislature to alter, amend, or repeal the charter. The state subsequently enacted a prohibition statute. The RESERVED POLICE POWER should have been sufficient ground for the holding by the Court that the prohibition statute did not impair the company's chartered right to do business. However, Justice JOSEPH P. BRADLEY, in an opinion for a unanimous Court, found another and "equally decisive" reason for rejecting the argument that the company had a contract to manufacture and sell beer "forever." The company held its rights subject to the POLICE POWER of the state to promote the public safety and morals. "The Legislature,"

Bradley declared, "cannot, by any contract, devest itself of the power to provide for these objects." Accordingly the enactment of a statute prohibiting the manufacture and sale of intoxicating liquors did not violate the contract clause. Decisions such as this, by which the police power prevailed over chartered rights, produced a doctrinal response: the development of SUBSTANTIVE DUE PROCESS to protect property.

LEONARD W. LEVY
(1986)

## BOUDIN, LOUIS B.
(1874–1952)

Louis Boudianoff Boudin was a prominent New York attorney and the author of books and articles on constitutional law, jurisprudence, and government regulation of the economy. His most significant work was *Government by Judiciary* (2 vols., 1932), a massive, iconoclastic history of the doctrine of JUDICIAL REVIEW. Boudin argued that, beginning in 1803 with JOHN MARSHALL's opinion in MARBURY V. MADISON, the federal judiciary had gradually expanded its powers and authority at the expense of the legislative and executive branches, culminating in a "government by judiciary" hostile to the basic principles of the Constitution established by its Framers and to the tenets of democratic government. While Boudin's admirers praised his erudition and accepted his exposure of the weaknesses of the historical case for judicial review, his critics questioned his tendency to write as an advocate rather than as a historian and charged that his conclusions were not supported by an impartial examination of the historical evidence.

RICHARD B. BERNSTEIN
(1986)

## *BOUNDS v. SMITH*
430 U.S. 817 (1977)

Several state prisoners sued North Carolina prison authorities in federal court, claiming they had been denied legal research facilities in violation of their FOURTEENTH AMENDMENT rights. The Supreme Court, 6–3, upheld this claim in an opinion by Justice THURGOOD MARSHALL.

For the first time the Court explicitly recognized a "fundamental constitutional right of ACCESS TO THE COURTS." This right imposed on prison authorities the affirmative duty to provide either adequate law libraries or the assistance of law-trained persons, so that prisoners might prepare HABEAS CORPUS petitions and other legal papers. The three dissenters each wrote an opinion. Justice WILLIAM H. REHNQUIST complained that the majority had neither defined the content of "meaningful" access nor specified the source of the Fourteenth Amendment right; an EQUAL PROTECTION right, he pointed out, would conflict with ROSS V. MOFFITT (1974).

KENNETH L. KARST
(1986)

## *BOWEN v. KENDRICK*
487 U.S. 589 (1988)

In this case the Court sustained the facial constitutionality of Congress's 1981 Adolescent Family Life Act against a claim that it violated the ESTABLISHMENT CLAUSE of the FIRST AMENDMENT. The statute authorized federal funds for services, publicly or privately administered, that related to adolescent sexuality and pregnancy. A federal district court found that the statute, on its face and as administered, advanced religion by subsidizing and allowing sectarian organizations to preach their message to adolescents; the statute also unduly entangled the government with religion, by requiring official monitoring to ensure that religiously affiliated grantees did not promote their religious missions. The Court, by a 5–4 vote, reversed and remanded the case for a determination whether it was unconstitutionally applied.

Chief Justice WILLIAM H. REHNQUIST, for the majority, observed that the statute neither required grantees to be religiously affiliated nor suggested that religious institutions were specially qualified to provide the services subsidized by the government. Congress merely assumed that religious organizations as well as nonreligious ones could influence adolescent behavior. Congress impartially made the monies available to achieve secular objectives, regardless whether the funds went to sectarian or secular institutions. This was not a case in which the federal subsidies flowed primarily to pervasively sectarian institutions; moreover, the services provided to adolescents, such as pregnancy testing or child care, were not religious in nature. The majority also held that the government monitoring required by the statute did not necessarily entangle it excessively with sectarianism. Conceding, however, that the act could be administered in such a way as to violate the establishment clause, the Court returned the case to the district court for a factual finding on that issue.

The four dissenters, speaking through Justice HARRY A. BLACKMUN, may have been influenced by the fact that the statute banned grants to institutions that advocated ABORTION. Blackmun, as devoid of doubts as was Rehnquist, confidently deplored a decision that breached the LEMON TEST by providing federal monies to religious organizations, thereby enabling them to promote their religious

missions in ways that were pervasively sectarian and, contradictorily, requiring intrusive oversight by the government to prevent that objective. The majority, Blackmun reasoned, distorted the Court's precedents and engaged in doctrinal missteps to reach their conclusion, by treating the case as if it merely subsidized a neutral function such as dispensing food or shelter instead of pedagogical services that impermissibly fostered religious beliefs.

LEONARD W. LEVY
(1992)

## *BOWEN v. OWENS*

See: Sex Discrimination

## *BOWERS v. HARDWICK*
478 U.S. 186 (1986)

Hardwick was charged with engaging in homosexual sodomy in violation of a Georgia statute, but after a preliminary hearing the prosecutor declined to pursue the case. Despite the fact that Hardwick was not going to be prosecuted, he brought suit in federal court to have the Georgia sodomy statute declared unconstitutional. The court of appeals held that the Georgia statute violated Hardwick's FUNDAMENTAL RIGHTS because homosexual activity is protected by the NINTH AMENDMENT and the DUE PROCESS clause of the FOURTEENTH AMENDMENT.

The Supreme Court disagreed, holding 5–4 that the statue did not violate any fundamental rights protected by the Consitution—in particular, that the act did not violate the RIGHT OF PRIVACY announced by the court in previous cases.

Writing for the majority, Justice BYRON R. WHITE contended that previous rulings delineating a constitutional right of privacy could not be used to strike down a law against sodomy. Previous precedents in this field focused on "family, marriage or procreation," said White, and neither Hardwick nor the court of appeals had demonstrated a connection between homosexual activity and these areas. In making his argument from precedent, White explicitly denied that the Court had ever announced a general right of private sexual conduct. Precedent aside, White argued that if the Court itself is to remain constitutionally legitimate, it must be wary of creating new rights that have little or no basis in the text or design of the Constitution. Such rights can be adopted by the Court only if they are so implicit in the concept of ordered liberty or so rooted in the nation's history that they mandate protection; homosexual sodomy meets neither requirement. Given White's framework of analysis, the other arguments marshaled by Harwick also had to fail. The argument that since his conduct took place in the privacy of his home it must be protected fails because one has no right to engage in criminal conduct within one's home. And the argument that the law has no RATIONAL BASIS because it was based solely on the moral views of its supporters fails because "law . . . is constantly based on notions of morality."

Writing for the dissenters, Justice HARRY A. BLACKMUN declared what the majority denied—that a general constitutional right of private sexual conduct (or "intimate association") exists. Blackmun thereby shifted the burden of proof from Hardwick to the government. Because intimate association is generally protected by the Constitution, the government must prove that any regulations in this area are valid. Georgia did not do so; hence, the statute was invalid.

The Court's ruling in *Bowers* engendered a great deal of controversy. Many had wanted the Court to use the case to place discrimination on the basis of SEXUAL ORIENTATION in the same category as racial or gender discrimination. Yet it is understandable why the Court did not do so. Gender and race are not clearly analogous to sexual orientation, for neither is defined by conduct in the way that sexual orientation is. Homosexual sodomy has faced public disapproval for centuries because it is *behavior* that society has judged destructive for a variety of reasons, including its effects on public health, safety, and morality. Whether this judgment is correct or not may be debated, but the Court did not wish to resolve the debate by imposition of its own will in the matter.

JOHN G. WEST, JR.
(1992)

(SEE ALSO: *Freedom of Intimate Association; Sexual Orientation; Sexual Preference and the Constitution.*)

Bibliography

WELLER, CHRISTOPHER W. 1986 *Bowers v. Hardwick:* Balancing the Interests of the Moral Order and Individual Liberty. *Cumberland Law Review* 16:555–592.

## *BOWMAN v. CHICAGO & NORTHWESTERN RAILWAY COMPANY*
125 U.S. 465 (1888)

The Supreme Court, by a vote of 6–3, held that a state statute prohibiting common carriers from importing intoxicating liquors into the state, except under conditions laid down by the state, violated the COMMERCE CLAUSE, because interstate transportation required a single regula-

tory system; the absence of congressional action made no difference.

LEONARD W. LEVY
(1986)

(SEE ALSO: *State Regulation of Commerce.*)

## *BOWSHER v. SYNAR*
478 U.S. 714 (1986)

A 7–2 Supreme Court held that a basic provision of a major act of Congress unconstitutionally violated the principle of SEPARATION OF POWERS because Congress had vested executive authority in an official responsible to Congress. The Balanced Budget and Emergency Deficit Control Act of 1985 (GRAMM-RUDMAN-HOLLINGS) empowered the comptroller general, who is appointed by the President but removable by JOINT RESOLUTION of Congress, to perform executive powers in the enforcement of the statute. In the event of a federal budget deficit, the act requires across-the-board cuts in federal spending. The comptroller general made the final recommendations to the President on how to make the budget cuts.

Five members of the Court, speaking through Chief Justice WARREN E. BURGER, applied a severely formalistic view of separation of powers. They sharply distinguished EXECUTIVE POWER from LEGISLATIVE POWER. The comptroller general was removable only at the initiative of Congress for "transgressions of the legislative will." Congress regarded the official as an officer of the legislative branch, and persons holding the office had so regarded themselves. But the powers exercised by the comptroller general were executive in nature, preparing reports on projected federal revenues and expenditures and specifying the reductions necessary to reach target deficit levels. Because the comptroller general was "Congress's man" and was removable by Congress, the assignment of executive powers to the office gave Congress a direct role in the execution of the laws, contrary to the constitutional structure of the government.

Justice JOHN PAUL STEVENS, joined by Justice THURGOOD MARSHALL, agreed that the Gramm-Rudman-Hollings provision was unconstitutional, but for wholly different reasons. Stevens too described the comptroller general as a legislative officer, but believed that the removal power was irrelevant. Gramm-Rudman-Hollings was defective because by vesting the officer with important legislative powers over the budget, it subverted the legislative procedures provided by the Constitution. Money matters require consideration and voting by both houses of Congress; this body cannot constitutionally delegate so great a legislative power to an agent.

Justice BYRON R. WHITE, dissenting, believed that the threat to separation of powers conjured up by the seven-member majority was "wholly chimerical." He believed that the NECESSARY AND PROPER CLAUSE supported vesting some executive authority in the comptroller general. This officer exercised no powers that deprived the President of authority; the official chosen by Congress to implement its policy was nonpartisan and independent. He or she could not be removed by Congress by joint resolution except with the President's approval.

The concurring Justices and the dissenters understood that the Constitution's separation of powers does not make each branch wholly autonomous; each depends on others and exercises the powers of others to a degree. The Constitution mixes powers as well as separates them. The three branches are separate, but their powers are not. Gramm-Rudman-Hollings reflected the modern administrative state. The majority Justices, who could not even agree among themselves whether the comptroller general exercised executive or legislative powers, lacked the flexibility to understand they did not have to choose between labels. The Court, which quoted MONTESQUIEU and misapplied THE FEDERALIST, ignored #47 and #48, which warned only against "too great a mixture of powers," but approved of a sharing of powers. Currently, money bills originate in the White House and its Bureau of the Budget, despite the provision in Article I, section 7. The First Congress established the President's CABINET and required the secretary of treasury to report to Congress, and all of ALEXANDER HAMILTON's great reports on the economy were made to Congress, not the President. No Court that cared a fig for ORIGINAL INTENT or that understood the realities of policymaking today would have delivered such simplistic textbookish opinions.

LEONARD W. LEVY
(1992)

## BOYCOTT

A boycott is a group refusal to deal. Such concerted action is an effective way for society's less powerful members, such as unorganized workers or racial minorities, to seek fair treatment in employment, public accommodations, and public services. But as the Supreme Court recognized in *Eastern States Retail Lumber Dealers' Association v. United States* (1914): "An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy."

Boycotts by private entrepreneurs were illegal at common law as unreasonable restraints on commercial competition. The Sherman Act of 1890 made it a federal offense to form a "combination . . . in restraint of trade."

The Supreme Court has interpreted that prohibition as covering almost every type of concerted refusal by business people to trade with others. The constitutionality of outlawing commercial boycotts has never seriously been questioned.

Employee boycotts may be either "primary" or "secondary." A primary boycott involves direct action against a principal party to a dispute. A union seeking to organize a company's work force may call for a strike, a concerted refusal to work, by the company's employees. A secondary boycott involves action against a so-called neutral or secondary party that is doing business with the primary party. The union seeking to organize a manufacturing company might appeal to the employees of a retailer to strike the retailer in order to force the retailer to stop handling the manufacturer's products.

Although early American law regarded most strikes as criminal conspiracies, modern statutes like the WAGNER NATIONAL LABOR RELATIONS ACT (NLRA) treat primary strikes in the private sector as "protected" activity, immune from employer reprisals. Even so, the Supreme Court has never held there is a constitutional right to strike. Furthermore, the Court sustained the constitutionality of statutory bans on secondary boycott strikes or related picketing in *Electrical Workers Local 501 v. NLRB* (1951). The use of group pressure to enmesh neutrals in the disputes of others was sufficient to enable government to declare such activity illegal.

Consumer boycotts present the hardest constitutional questions. Here group pressure may not operate directly, as in the case of a strike. Instead, the union or other protest group asks individual customers, typically acting on their own, not to patronize the subject firm. Yet if the appeal is to customers of a retailer not to shop there so long as the retailer stocks a certain manufacturer's goods, a neutral party is the target. The NLRA forbids union PICKETING to induce such a secondary consumer boycott. The Supreme Court held this limited prohibition constitutional in NLRB V. RETAIL CLERKS LOCAL 1001 (1980), although there was no majority rationale. A plurality cited precedent concerning secondary employee boycotts, ignoring the differences between individual and group responses.

On the other hand, when a civil rights organization conducted a damaging boycott against white merchants to compel them to support demands upon elected officials for racial equality, the Supreme Court declared in NAACP V. CLAIBORNE HARDWARE CO. (1982) that a state's right "to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." The Court relied on the FIRST AMENDMENT rights of FREEDOM OF ASSEMBLY AND ASSOCIATION, and FREEDOM OF PETITION. The emphasis on the right to petition government raises the possibility of a different result if the merchants themselves, rather than the public officials, had been the primary target of the boycott. But that would appear incongruous. The Court needs to refine its constitutional analysis of consumer boycotts.

THEODORE J. ST. ANTOINE
(1986)

Bibliography

HARPER, MICHAEL C. 1984 The Consumer's Emerging Right to Boycott: *NAACP v. Claiborne Hardware* and Its Implications for American Labor Law. *Yale Law Journal* 93:409–454.

KENNEDY, RONALD E. 1982 Political Boycotts, the Sherman Act, and the First Amendment: An Accommodation of Competing Interests. *Southern California Law Review* 55:983–1030.

## *BOYD v. UNITED STATES*
116 U.S. 616 (1886)

Justice LOUIS D. BRANDEIS believed that *Boyd* will be remembered "as long as civil liberty lives in the United States." The noble sentiments expressed in JOSEPH P. BRADLEY's opinion for the Court merit that estimate, but like many another historic opinion, this one was not convincingly reasoned. To this day, however, members of the Court return to *Boyd* to grace their opinions with its authority or with an imperishable line from Bradley's.

*Boyd* was the first important SEARCH AND SEIZURE case as well as the first important case on the RIGHT AGAINST SELF-INCRIMINATION. It arose not from a criminal prosecution but from a civil action by the United States for the forfeiture of goods imported in violation of customs revenue laws. In such cases an 1874 act of Congress required the importer to produce in court all pertinent records tending to prove the charges against him or suffer the penalty of being taken "as confessed." The Court held the act unconstitutional as a violation of both the FOURTH and FIFTH AMENDMENTS. The penalty made the production of the records compulsory. That compulsion, said Bradley, raised "a very grave question of constitutional law, involving the personal security and PRIVILEGES AND IMMUNITIES of the citizen. . . ." But did the case involve a search or a seizure, and if so was it "unreasonable," and did it force the importer to be a witness against himself in a criminal case?

Bradley conceded that there was no search and seizure as in the forcible entry into a man's house and examination of his papers. Indeed, there was no search here for evidence of crime. The compulsion was to produce records that the government required importers to keep; no pri-

vate papers were at issue. Moreover, no property was confiscated as in the case of contraband like smuggled goods. The importer, who was not subject to a search, had merely to produce the needed records in court; he kept custody of them. But the Court treated those records as if they were private papers, which could be used as EVIDENCE against him, resulting in the forfeiture of his property, or to establish a criminal charge. Though the proceeding was a civil one, a different section of the same statute did provide criminal penalties for fraud.

Bradley made a remarkable linkage between the right against UNREASONABLE SEARCH and seizure and the right against self-incrimination. The "fourth and fifth amendments," he declared, "almost run into each other." That they were different amendments, protected different interests, had separate histories, and reflected different policies was of no consequence to Bradley. He was on sound ground when he found that the forcible production of private papers to convict a man of crime or to forfeit his property violated the Fifth Amendment and was "contrary to the principles of a free government." He was on slippery ground when he found that such a compulsory disclosure was "the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the fourth amendment." His reasoning was that though the case did not fall within the "literal terms" of either amendment, each should be broadly construed in terms of the other. Unreasonable searches and seizures "are almost always made for the purpose of compelling a man to give evidence against himself," and compulsion of such evidence "throws light on the question as to what is an 'unreasonable search and seizure.'. . ." In support of his reasoning Bradley quoted at length from Lord Camden's opinion (see CHARLES PRATT) in *Entick v. Carrington* (1765). Camden, however, spoke of a fishing expedition under GENERAL WARRANTS issued by an executive officer without authorization by Parliament. There was no warrant in this case, and there was authorization by Congress for a court to compel production of the specific records required by law to be kept for government inspection, concerning FOREIGN COMMERCE which Congress may regulate. In this case, however, Bradley thought meticulous analysis was out of place. He feared that unconstitutional practices got their footing in "slight deviations" from proper procedures, and the best remedy was the rule that constitutional protections "for the security of person and property should be liberally construed." Close construction, he declared, deprived these protections of their efficacy.

Justice SAMUEL F. MILLER, joined by Chief Justice MORRISON R. WAITE, concurred in the judgment that that offensive section of the act of Congress was unconstitutional. Miller found no search and seizure, let alone an unreasonable one. He agreed, however, that Congress had breached the right against self-incrimination, which he thought should be the sole ground of the opinion.

The modern Court no longer assumes that the Fifth Amendment is a source of the Fourth's EXCLUSIONARY RULE or that the Fourth prohibits searches for MERE EVIDENCE. Moreover, the production of private papers may be compelled in certain cases, as when the Internal Revenue Service subpoenas records in the hands of one's lawyer or accountant.

LEONARD W. LEVY
(1986)

Bibliography

GERSTEIN, ROBERT S. 1979 The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court. *UCLA Law Review* 27:343–397.

LANDYNSKI, JACOB W. 1966 *Search and Seizure and the Supreme Court.* Pages 49–61. Baltimore: Johns Hopkins University Press.

## BRADLEY, JOSEPH P.
(1813–1892)

Joseph P. Bradley's appointment to the Supreme Court in 1870 by President ULYSSES S. GRANT was seen as part of Grant's supposed court-packing scheme. But whatever shadow that event cast on Bradley's reputation rapidly disappeared. For more than two decades on the bench, he commanded almost unrivaled respect from colleagues, lawyers, and legal commentators, and over time he consistently has been ranked as one of the most influential jurists in the Court's history.

When Bradley was appointed he already was a prominent railroad lawyer and Republican activist. Indeed, friends had been advocating his appointment to the Court nearly a year before his appointment. Shortly after Grant's inauguration in 1869, the Republicans increased the size of the court from eight to nine. While Grant and Congress haggled over the selection of a new Justice, the Court decided, 4–3, that the legal tender laws were unconstitutional. Justice ROBERT C. GRIER clearly was senile, and after he cast his vote against the laws his colleagues persuaded him to resign. That gave Grant two appointments and, on February 7, 1870, he nominated WILLIAM STRONG and Bradley—and the Court almost simultaneously announced its legal tender decision.

Within a year, Bradley and Strong led a new majority to sustain the constitutionality of greenbacks (unsecured paper currency). In his CONCURRING OPINION, Bradley saw the power to emit BILLS OF CREDIT as the essential issue in the case, and from that he contended that "the incidental power of giving such bills the quality of legal tender fol-

lows almost as matter of course." Bradley also emphasized the government's right to maintain its existence. He insisted it would be a "great wrong" to deny Congress the asserted power, "a power to be seldom exercised, certainly; but one, the possession of which is so essential, and as it seems to me, so undoubted." (See LEGAL TENDER CASES.)

Three months after his appointment, Bradley conducted circuit court hearings in New Orleans where he encountered the SLAUGHTERHOUSE CASES. He held unconstitutional the Louisiana statute authorizing a monopoly for slaughtering operations. Three years later, when the case reached the Supreme Court on appeal, Bradley dissented as the majority sustained the regulation. With Justice STEPHEN J. FIELD, Bradley believed that the creation of the monopoly and the impairment of existing businesses violated the PRIVILEGES AND IMMUNITIES clause of the FOURTEENTH AMENDMENT. Such privileges, Bradley had said earlier in his circuit court opinion, included a citizen's right to "lawful industrial pursuit—not injurious to the community—as he may see fit, without unreasonable regulation or molestation."

The antiregulatory views that Bradley advanced in *Slaughterhouse* did not persist as the major theme of his judicial career, as they did for Justice Field. JUDICIAL REVIEW and judicial superintendence of DUE PROCESS OF LAW could be maintained, he said, in *Davidson v. New Orleans* (1878), "without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure." A year earlier, Bradley had vividly demonstrated his differences with Field when he provided Chief Justice MORRISON R. WAITE with the key historical sources and principles for the public interest doctrine laid down in *Munn v. Illinois* (1877). (See AFFECTATION WITH A PUBLIC INTEREST.)

The Court largely gutted the *Munn* ruling when it held in Wabash, St. Louis, and *Pacific Railway v. Illinois* (1886) that states could not regulate interstate rates, even in the absence of congressional action. Bradley vigorously dissented, protesting that some form of regulation was necessary and that the Court had wrongly repudiated the public interest doctrine of the GRANGER CASES. Ironically, Bradley, the old railroad lawyer, found himself almost totally isolated when he dissented from the Court's finding that the judiciary, not legislatively authorized expert commissions, had the right to decide the reasonableness of railroad rates. That decision, in *Chicago, Milwaukee and St. Paul Railway Co. v. Minnesota*, (1890), marked the triumph of Field's dissenting views in *Munn;* yet Bradley steadfastly insisted that rate regulation "is a legislative prerogative and not a judicial one."

Bradley insisted on responsibility and accountability from the railroads in numerous ways. In *New York Central R.R. v. Lockwood* (1873) he wrote that railroads could not, by contract, exempt themselves from liability for negligence. "The carrier and his customer do not stand on a footing of equality," he said. In *Railroad Company v. Maryland* (1875) he agreed that Maryland could compel a railroad to return one-fifth of its revenue in exchange for a right of way without compromising congressional control over commerce. But Bradley found clear lines of distinction between federally chartered and state chartered railroads. When the Court, in *Railroad Company v. Peniston* (1873), approved Nebraska's tax of a congressionally chartered railroad, Bradley disagreed, arguing that the carrier was a federal GOVERNMENT INSTRUMENTALITY; similarly, he joined Field in dissent in the SINKING FUND CASES (1879), arguing that Congress's requirement that the Union Pacific deposit some of its earnings to repay its debt to the federal government was tantamount to the "repudiation of government obligations."

Bradley generally advocated a broad nationalist view of the COMMERCE CLAUSE. He wrote, for example, the opinion of the Court in *Robbins v. Shelby Taxing District* (1887), one of the most famous of the "drummer" cases of the period, holding that discriminatory state taxation of out-of-state salesmen unduly burdened interstate commerce. He also maintained that states could not tax the gross receipts of steamship companies or telegraph messages sent across state lines. Yet he steadfastly resisted the attempts of business to avoid their fair share of tax burdens, and he ruled that neither goods destined for another state nor goods that arrived at a final destination after crossing state lines were exempt from state taxing. (See STATE TAXATION OF COMMERCE.)

Despite Bradley's broad reading of the Fourteenth Amendment in the *Slaughterhouse Cases*, he voted with the Court majority that failed in various cases to sustain national protection of the rights of blacks. He ruled against the constitutionality of the FORCE ACT of 1870 while on circuit, and the Court sustained his ruling in UNITED STATES V. CRUIKSHANK (1876). He acquiesced in UNITED STATES V. REESE (1876), crippling enforcement of the FIFTEENTH AMENDMENT, and in HALL V. DECUIR (1878) he agreed that a Louisiana law prohibiting racial segregation on railroads burdened interstate commerce. Unlike that of most of his colleagues, Bradley's interpretation of the commerce power was consistent, for he dissented with JOHN M. HARLAN when the Court in 1890 approved a state law requiring segregated railroad cars.

Bradley's most famous statement on racial matters came in the CIVIL RIGHTS CASES (1883). Speaking for all his colleagues save Harlan, Bradley held unconstitutional the CIVIL RIGHTS ACT OF 1875. He limited the scope of the Fourteenth Amendment when he wrote that it forbade only STATE ACTION and not private RACIAL DISCRIMINATION. Bradley eloquently—if unfortunately—captured the national mood when he declared: "When a man has emerged

from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws. . . ." Bradley concurred in BRADWELL V. ILLINOIS (1873), in which the Court held that Illinois had not violated the EQUAL PROTECTION clause of the Fourteenth Amendment when it refused to admit a woman to the bar. He stated that a woman's "natural and proper timidity" left her unprepared for many occupations, and he concluded that "the paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother." Clearly, there were limits to the liberty that Bradley had so passionately advocated in the *Slaughterhouse Cases*.

The variety of significant opinions by Bradley demonstrates his enormous range and influence. In BOYD V. UNITED STATES (1886) he established the modern FOURTH AMENDMENT standard for SEARCH AND SEIZURE questions, advocating a narrow scope for governmental power: "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." In COLLECTOR V. DAY (1871) he dissented when the Court held that state officials were exempt from federal income taxes, and nearly sixty years later the Court adopted his position. He spoke for the Court in CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS V. UNITED STATES (1890), stipulating that forfeited Mormon property be applied to charitable uses, including the building of common schools in Utah. Finally, he helped resolve the Court's difficulties over the exercise of recently enacted JURISDICTION legislation and sustained the right of federal CORPORATIONS to remove their causes from state to federal courts. That opinion made possible a staggering number of new tort and corporate cases in the federal courts.

Bradley played a decisive role in the outcome of the disputed election of 1877 as he supported Rutherford B. Hayes's claims. He was the fifteenth member chosen on the Electoral Commission whose other members included seven Democrats and seven Republicans. Thus, Hayes and the Compromise of 1877 owed much to Bradley's vote.

Bradley, Field, Harlan, and SAMUEL F. MILLER are the dominant figures of late nineteenth-century judicial history. Field's reputation rests on his forceful advocacy of a conservative ideology that the Court embraced but eventually repudiated. Harlan's claims center on his CIVIL RIGHTS views. Miller's notions of judicial restraint continue to have vitality. But Bradley's range of expertise, his high technical competency, and the continuing relevance of his work arguably place him above those distinguished contemporaries. Indeed, a mere handful of Supreme Court Justices have had a comparable impact.

STANLEY I. KUTLER
(1986)

Bibliography

FAIRMAN, CHARLES 1950 What Makes a Great Justice? *Boston University Law Review* 30:49–102.

MAGRATH, C. PETER 1963 *Morrison R. Waite: The Triumph of Character.* New York: Macmillan.

## *BRADWELL v. ILLINOIS*
16 Wallace 130 (1873)

*Bradwell* is the earliest FOURTEENTH AMENDMENT case in which the Supreme Court endorsed sex discrimination. Mrs. Myra Bradwell, the editor of the *Chicago Legal News*, was certified by a board of legal examiners as qualified to be a member of the state bar. An Illinois statute permitted the state supreme court to make rules for admission to the bar. That court denied Mrs. Bradwell's application for admission solely on the ground of sex, although the fact that the applicant was married also counted against her: a married woman at that time was incapable of making binding contracts without her husband's consent, thus disabling her from performing all the duties of an attorney. She argued that the PRIVILEGES AND IMMUNITIES clause of the Fourteenth Amendment protected her CIVIL RIGHT as a citizen of the United States to be admitted to the bar, if she qualified.

Justice SAMUEL F. MILLER, speaking for the Court, declared that the right to be admitted to the practice of law in a state court was not a privilege of national CITIZENSHIP protected by the Fourteenth Amendment. Justice JOSEPH P. BRADLEY, joined by Justices NOAH SWAYNE and STEPHEN J. FIELD, concurred in the JUDGMENT affirming the state court, but offered additional reasons. History, nature, COMMON LAW, and the civil law supported the majority's reading of the privileges and immunities clause, according to Bradley. The "spheres and destinies" of the sexes were widely different, man being woman's protector; her "timidity and delicacy" unfit her for many occupations, including the law. Unlike Myra Bradwell, an unmarried woman might make contracts, but such a woman was an exception to the rule. "The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." Society's rules, Bradley added, ought not be based on exceptions. Chief Justice SALMON P. CHASE dissented alone, without opinion, missing a chance to advocate the cause of SEX EQUALITY, at least in the legal profession.

LEONARD W. LEVY
(1986)

## *BRANCH v. TEXAS*

See: Capital Punishment Cases of 1972

# BRANDEIS, LOUIS D.
(1856–1941)

The appointment of Louis D. Brandeis to the United States Supreme Court was not merely the crowning glory of an extraordinary career as a practicing lawyer and social activist. It was also the inauguration of an equally extraordinary career on the bench. In twenty-three years as a Justice, Brandeis acquired a stature and influence that few—before or since—could match. In part, this achievement reflected the fact that he was already a public figure when he ascended to the Court. But his skills as a jurist provided the principal explanation. He mastered details of procedure, remained diligent in researching the facts and law of the case, and, whatever the subject, devoted untold hours to make his opinions clear and logical. Perhaps the highest compliment came from colleagues who disagreed with his conclusions. "My, how I detest that man's ideas," Associate Justice GEORGE SUTHERLAND once observed. "But he is one of the greatest technical lawyers I have ever known."

Brandeis's opinions and votes on the Court were very much a product of his environment and experience. Born in Louisville, Kentucky, shortly before the CIVIL WAR, he grew up in a family that provided him with love and security. That background probably helped him in establishing skills as a tenacious lawyer in Boston, where he opened his office one year after graduating from Harvard Law School first in his class. Brandeis attained local and then national fame when he used his formidable talents to effect reform at the height of the Progressive movement in the early 1900s. He fought the establishment of a privately owned subway monopoly in Boston, was instrumental in developing a savings bank life insurance system to prevent exploitation of industrial workers by large insurance companies, developed the famed BRANDEIS BRIEF—a detailed compilation of facts and statistics—in defense of Oregon's maximum hour law for women, and even took on the legendary J. P. Morgan when the corporate magnate tried to monopolize New England's rail and steamship lines. Brandeis's renown as "the people's attorney" spread across the country when, in 1910, he led a team of lawyers in challenging Richard A. Ballinger's stewardship of the nation's natural resources as secretary of the interior in the administration of President WILLIAM HOWARD TAFT.

Because of Brandeis's well-known credentials as a lawyer who had single-handedly taken on the "trusts," WOODROW WILSON turned to him for advice in the presidential campaign of 1912. The relationship ripened, and after his election to the White House Wilson repeatedly called upon Brandeis for help in solving many difficult problems. Through these interactions Wilson came to appreciate Brandeis's keen intelligence and dedication to the public welfare. In January 1916 he nominated the Boston attorney to the Supreme Court. Brandeis was confirmed by the United States Senate almost six months later after a grueling and bitter fight.

For Brandeis, law was essentially a mechanism to shape man's social, economic, and political relations. In fulfilling that function, he believed, the law had to account for two basic principles: first, that the individual was the key force in society, and second, that individuals—no matter what their talents and aspirations—had only limited capabilities. As he explained to HAROLD LASKI, "Progress must proceed from the aggregate of the performances of individual men" and society should adjust its institutions "to the wee size of man and thus render possible his growth and development." At the same time, Brandeis did not want people coddled because of inherent limitations. Quite the contrary. People had to stretch themselves to fulfill their individual potentials.

In this context Brandeis abhorred what he often called "the curse of bigness." People, he felt, could not fully develop themselves if they did not have control of their lives. Individual control, however, was virtually impossible in a large institutional setting—whether it be a union, a CORPORATION, the government, or even a town. From this perspective, Brandeis remained convinced that democracy could be maintained only if citizens—and especially the most talented—returned to small communities in the hinterland and learned to manage their own affairs.

This commitment to individual development led Brandeis to assume a leadership position in the Zionist Movement in 1914 and retain it after he went on the Court. In Palestine, Brandeis believed, an individual could control his life in a way that would not be possible in the United States.

This theme—the need for individuals and local communities to control their own affairs—also threads the vast majority of Brandeis's major opinions on the Court. Some of the most controversial of Brandeis's early opinions concerned labor unions. Long before his appointment to the Court he had viewed unions as a necessary element in the nation's economy. Without them large CORPORATIONS would be able to exploit workers and prevent them from acquiring the financial independence needed for individual control. Brandeis made his views known on this matter in HITCHMAN COAL & COKE COMPANY V. MITCHELL (1917). That case concerned the United Mine Workers' efforts to unionize the workers in West Virginia. As a condition of employment the mine owner forced his employees to sign a pledge not to join a union. A majority of the Court held that UMW officials had acted illegally in trying to induce the workers to violate that pledge.

Brandeis dissented. He could not accept the majority's conclusion that a union agreement would deprive the workers and mine owner of their DUE PROCESS rights under

the FOURTEENTH AMENDMENT to FREEDOM OF CONTRACT. "Every agreement curtails the liberty of those who enter into it," Brandeis responded. "The test of legality is not whether an agreement curtails liberty, but whether the parties have agreed upon some thing which the law prohibits. . . ." Brandeis also saw no merit in the majority's concern with the UMW's pressure on workers to join the union. The plaintiff company's lawsuit was premised "upon agreements secured under similar pressure of economic necessity or disadvantage," he observed. "If it is coercion to threaten to strike unless plaintiff consents to a closed union shop, it is coercion also to threaten not to give one employment unless the applicant will consent to a closed non-union shop."

Brandeis adhered to these views in other labor cases that came before the Court. Eventually, the Court came around to Brandeis's belief that unions had a right to engage in peaceful efforts to push for a CLOSED SHOP. Brandeis himself added a finishing touch in an opinion he delivered in *Senn v. Tile Layers Union* (1937), where he upheld a state law restricting the use of INJUNCTIONS against PICKETING.

While concern for the plight of labor was vital to his vision of society, nothing concerned Brandeis more than the right of a state or community to shape its own environment. For this reason he voted to uphold almost every piece of social legislation that came before the Court. Indeed, he wanted to reduce federal JURISDICTION in part because, as he told FELIX FRANKFURTER, "in no case practically should the appellate federal courts have to pass on the construction of state statutes." Therefore, if the state wanted to regulate the practices of employment agencies, expand the disability protection to stevedores who worked the docks, or take other social actions, he would not stand in the way. As he explained for the Court in *O'Gorman & Young v. Hartford Insurance Company* (1931), "the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute." This meant that the Court must abide by the legislature's judgment even if the Court found the law to be of doubtful utility.

Only a few months after *O'Gorman* Brandeis applied this principle in NEW STATE ICE COMPANY V. LIEBMANN (1932). The Oklahoma Legislature had passed a law that prohibited anyone from entering the ice business without first getting a certificate from a state corporation commission showing that there was a public need for the new business. A majority of the Court struck the law down because the ice business was not so AFFECTED WITH A PUBLIC INTEREST to justify a measure that would, in effect, restrict competition.

Brandeis was all for competition. He had long believed that large corporations were dangerous because they often eliminated competition and with it the right of individuals to control their lives, a proposition he examined in detail in *Liggett Company v. Lee* (1933). Whatever misgivings he had about the merits of the Oklahoma law, Brandeis had no trouble accepting the state's right to make its own decisions, especially at a time when the nation was grappling with the problems of the Depression. "It is one of the happy incidents of the federal system," he wrote in dissent, "that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles."

The Tennessee case was an exception to Brandeis's general inclination to protect the states' right to legislate. In fact, he was so devoted to states' rights that he once openly disregarded one of his most-oft stated juridical principles—never decide constitutional matters that can be avoided. Brandeis relied on this principle when he refused to join the Court's opinion in ASHWANDER V. TENNESSEE VALLEY AUTHORITY (1936) upholding the constitutionality of federal legislation establishing the TVA. In a CONCURRING OPINION he argued that they should have dismissed the case without deciding the constitutional issue because the plaintiffs had no STANDING to bring the lawsuit.

Brandeis was willing to ignore the teachings of his TVA opinion, however, when Chief Justice CHARLES EVANS HUGHES asked the aging Justice to write the Court's opinion in ERIE RAILROAD V. TOMPKINS (1938). The Court had voted to overrule SWIFT V. TYSON (1842), a decision that concerned cases arising under DIVERSITY JURISDICTION. Specifically, *Swift* allowed federal courts to ignore the laws of the states in which they were located and instead to apply FEDERAL COMMON LAW. *Swift* thus enabled litigants in certain cases to shop for the best forum in filing a lawsuit, for a federal court under *Swift* could and often did follow substantive law different from that applied by local courts.

Brandeis had long found *Swift* offensive. Not only did it mean that different courts in the same state could come to different conclusions on the same question; of greater importance, *Swift* undermined the ability of the state to control its own affairs. He was no doubt delighted when Hughes gave him the chance to bury *Swift;* and he wanted to make sure there could be no resurrection by a later Court or Congress. He therefore wrote an opinion holding that *Swift* violated the Constitution because it allowed federal courts to assume powers reserved to the states. The constitutional basis for the opinion was startling for two reasons: first, Brandeis could have just as easily overturned *Swift* through a revised construction of the JUDICIARY ACT OF 1789; and second, none of the parties had even raised the constitutional issue, let alone briefed it.

Brandeis would depart from his ready endorsement of state legislation if the law violated FUNDAMENTAL FREEDOMS and individual rights. It was not only a matter of constitutional construction. The BILL OF RIGHTS played a significant role in the individual's, and ultimately the community's, right to control the future. Brandeis knew, for example, that, without FIRST AMENDMENT protections, he never could have achieved much success as "the people's attorney" in battling vested interests. In those earlier times he had sloughed off personal attacks of the bitterest kind to pursue his goals. He knew that, in many instances, he would have been silenced if his right of speech had depended on majority approval. And he expressed great concern when citizens were punished—even during wartime—for saying or writing things someone found objectionable. "The constitutional right of free speech has been declared to be the same in peace and in war," he wrote in dissent in *Schaeffer v. United States* (1920). "In peace, too, men may differ widely as to what loyalty to our country demands; and an intolerant majority, swayed by passion or fear, may be prone in the future, as it has often been in the past, to stamp as disloyal opinions with which it disagrees." This point was later amplified in his concurring opinion in WHITNEY V. CALIFORNIA (1927). The Founding Fathers, Brandeis wrote, recognized "that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones."

Brandeis, then, often brought clear and deepseated convictions to the conference table. He was not one, however, to twist arms and engage in the lobbying that other Justices found so successful. "I could have had my views prevail in cases of public importance if I had been willing to play politics," he once told Frankfurter. "But I made up my mind I wouldn't—I would have had to sin against my light, and I would have hated myself. And I decided that the price was too large for the doubtful gain to the country's welfare."

Brandeis therefore tried to use established procedures to persuade his colleagues. To that end he would often anticipate important cases and distribute his views as a "memorandum" even before the majority opinion was written. In OLMSTEAD V. UNITED STATES (1928), for example, he tried to convince the Court that the federal government should not be allowed to use EVIDENCE in a criminal case that its agents had obtained by WIRETAPPING. The eavesdropping had been done without a judicial warrant and in violation of a state statute. Brandeis circulated a memorandum reflecting views that had not been debated at conference. The government should not be able to profit by its own wrongdoing, he said—especially when, as here, it impinged on the individual's RIGHT TO PRIVACY (a right he had examined as a lawyer in a seminal article in the *Harvard Law Review*). The memorandum could not command a majority, and Brandeis later issued an eloquent dissent that focused on the contention that warrantless wiretaps violated the FOURTH AMENDMENT's protection against UNREASONABLE SEARCHES and seizures.

At other times Brandeis would use the Saturday conferences to urge a view upon his colleagues. On one occasion—involving *Southwestern Bell Telephone Company v. Public Service Commission* (1923)—an entire day was devoted to a seminar conducted by Brandeis to explain why a utility's rate of return should be based on prudent investment and not on the reproduction cost of its facilities. Few, if any, Justices shared Brandeis's grasp of ratemaking principles. Hence, it took more than two decades of experience and debate before the Court—without Brandeis—accepted the validity of his position.

Brandeis took his losses philosophically. He knew that progress in a democracy comes slowly, and he was prepared to accept temporary setbacks along the way. But he rarely faded in his determination to correct the result. If his brethren remained impervious to his reasoning, he was willing to use other resources. He peppered Frankfurter and others with suggestions on articles for the *Harvard Law Review*. He also turned to the numerous congressmen and senators who frequently dined with him. Were they interested in introducing legislation to restrict federal jurisdiction or some other objective? If the answer was affirmative, Brandeis often volunteered the services of Frankfurter (whose expenses in public interest matters were generally assumed by Brandeis).

Few of these extrajudicial activities produced concrete results. Brandeis was apparently pleased, consequently, when Hughes became Chief Justice in 1930. Brandeis felt that the former secretary of state had a better command of the law than did Taft, the preceding Chief Justice, and would be able to use that knowledge to expedite the disposition of the Court's growing caseload. Of greater significance, Hughes and some other new members of the Court had views that closely coincided with Brandeis's. In fact, in 1937, BENJAMIN N. CARDOZO, HARLAN FISKE STONE, and Brandeis—the so-called liberal Justices—began to caucus in Brandeis's apartment on Friday nights to go over the cases for the Saturday conference.

With this kind of working relationship, plus the change in the times, Brandeis was able to join a majority in upholding New Deal legislation (he voted against only three New Deal measures). He also lived to see many of his earlier dissents become HOLDINGS of the Court, particularly in cases concerning labor and the right of states to adopt social legislation. After his death, many other dissents—including his First Amendment views and his contention that warrantless wiretaps were unconstitutional—would also become the law of the land. But Brandeis's

overriding ambition—the desire to establish a legal framework in which individuals and communities could control their affairs—was frustrated by developments that would not yield to even the most incisive judicial opinion. Unions, like corporations and even government, continued to grow like Topsy. Almost everyone, it seemed, became dependent on a large organization. Brandeis, a shrewd realist, surely recognized the inexorable social, economic, and political forces that impeded the realization of his dreams for America. None of that, however, would have deterred him from pursuing his goals. As he once explained to his brother, the "future has many good things in store for those who can wait, . . . have patience and exercise good judgment."

LEWIS J. PAPER
(1986)

Bibliography

BICKEL, ALEXANDER M. 1957 *The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work.* Cambridge, Mass.: Harvard University Press.

FRANKFURTER, FELIX, ed. 1932 *Mr. Justice Brandeis.* New Haven, Conn.: Yale University Press.

FREUND, PAUL 1964 Mr. Justice Brandeis. In Allison Dunham and Philip B. Kurland, eds., *Mr. Justice.* Chicago: University of Chicago Press.

KONEFSKY, SAMUEL J. 1956 *The Legacy of Holmes and Brandeis: A Study in the Influence of Ideas.* New York: Macmillan.

MASON, ALPHEUS T. 1946 *Brandeis: A Free Man's Life.* New York: Viking Press.

PAPER, LEWIS J. 1983 *Brandeis.* Englewood Cliffs, N.J.: Prentice-Hall.

## BRANDEIS AND THE FIRST AMENDMENT

Justice LOUIS D. BRANDEIS served on the Supreme Court from 1916 until 1939 following a legendary career as a practicing attorney. During that lengthy tenure he had several occasions to consider the meaning of the FIRST AMENDMENT guarantee of FREEDOM OF SPEECH, including a number of cases involving critics of the nation's entry into WORLD WAR I. It is, however, a single CONCURRING OPINION he wrote in 1927 that accounts for Brandeis's reputation as arguably our greatest First Amendment judge.

WHITNEY V. CALIFORNIA (1927) grew out of the prosecution of a middle-aged woman for being a member of an organization that advocated changes in government and industrial ownership by means of force or violence. Anita Whitney did not herself advocate or favor the use of force for these purposes, but she attended a convention of a party that voted down her proposed resolution endorsing peaceful methods of change and thereafter remained an active member of the organization. She was prosecuted, convicted, and sent to prison for her association with the group.

She appealed her conviction to the Supreme Court, claiming that the First Amendment protects the political association in which she had engaged. A majority of the Court rejected her contention and affirmed the conviction. Brandeis, joined by Justice OLIVER WENDELL HOLMES, JR., concurred separately. He found a procedural barrier to considering her First Amendment defense and thus he voted to affirm her conviction. Brandeis nevertheless objected strenuously to the majority's rejection of Whitney's claim on the merits. He reiterated the view, previously expressed by Holmes in opinions Brandeis had joined, that under the First Amendment speech can be regulated only when it creates a CLEAR AND PRESENT DANGER of harm. On this occasion, Brandeis even tightened that test, concluding that the only harms that can justify regulation must amount to a "serious injury to the state." It is not, however, his refinement of the clear-and-present danger test that accounts for the extraordinary stature of the *Whitney* opinion. It is Brandeis's exploration of the philosophical foundations of the commitment to free speech that makes the opinion such an important document, and Brandeis such a pivotal figure in the First Amendment tradition.

Brandeis begins his treatment of the subject by ascribing two key tenets to "[t]hose who won our independence." First, they "believed that the final end of the state was to make men free to develop their faculties." Second, they believed that in the conduct of government "the deliberative forces should prevail over the arbitrary." Brandeis perceived an important connection between these two ideas. He says the founders of the American republic "valued liberty both as an end and as a means." To Brandeis, liberty entails much more than being left alone to make self-regarding hedonistic choices or to form arbitrary or self-serving beliefs. Although the American revolutionaries "believed liberty to be the secret of happiness," they also believed "courage to be the secret of liberty." Here Brandeis echoes the great funeral oration of Pericles in Thucydides's *History of the Peloponnesian War,* one of Brandeis's favorite books. Courage is a demanding virtue. Persons who develop their faculties of self-discipline, independence, and strength of character, according to Pericles and Brandeis, not only achieve a meaningful and enduring type of personal happiness but also make the best citizens and contribute the most to the polity. In this way, Brandeis links individual liberty with collective self-government.

That linkage lies at the heart of his high regard for the freedom of speech. He considered the decision to repress unorthodox, threatening speech to be a self-defeating capitulation to fear. "Fear of serious injury cannot alone jus-

tify suppression of free speech and assembly," he states. "Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears." Brandeis worried greatly about the adverse effect on the character of a political community that follows from getting caught up in the cycle of distrust and resentment that the regulation of speech both manifests and fuels. "[F]ear breeds repression," he says, and "repression breeds hate." Such "hate menaces stable government." The more productive response to threatening ideas, Brandeis believed, is to display a form of civic courage: "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies . . . the fitting remedy for evil counsels is good ones."

There can be little doubt that Brandeis's faith in the power of "more speech" was informed by his general attitude toward change. "Those who won our independence by revolution were not cowards," he says. "They did not fear political change. They did not exalt order at the cost of liberty." To him, the choice between repression and toleration represents a fundamental test of character. To fail to trust the power of more speech is to "discourage thought, hope, and imagination." The consequences of such a course, Brandeis believed, are deadly: "the greatest menace to freedom is an inert people."

VINCENT BLASI
(2000)

(SEE ALSO: *Brandeis as Public Interest Lawyer.*)

Bibliography

BLASI, VINCENT 1988 The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in *Whitney v. California. William and Mary Law Review* 29:653–697.

LAHAV, PNINA 1988 Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech. *Journal of Law and Politics* 4:451–482.

STRUM, PHILIPPA 1993 *Brandeis: Beyond Progressivism*, chapter 6. Lawrence: University Press of Kansas.

## BRANDEIS AS PUBLIC INTEREST LAWYER

Had he never been appointed to the U.S. Supreme Court, LOUIS D. BRANDEIS's place in the history of American public law would nonetheless be secure. His reform work as the "people's attorney" inspired two generations of PUBLIC INTEREST LAWYERS and plays a continuing role in debates over the figure and function of the "good lawyer."

Brandeis gave little evidence of his intense interest in using law in the public arena until the 1890s, when he had been in practice in Boston for over a decade. During the 1880s, in partnership with his law school classmate Samuel Warren, Brandeis had developed a steady and lucrative clientele, largely small- to medium-sized manufacturers and entrepreneurs drawn to Brandeis's burgeoning reputation for energy, judgment, and financial acumen. His experience with this clientele—Brandeis, as a Jew and non-native of New England, was largely excluded from REPRESENTATION of Boston's wealthiest and most prestigious financial institutions—helped form Brandeis's hostility to concentrations of economic and political power.

Perhaps the most impressive of Brandeis's many lawyering skills was his remarkable understanding of the business as well as the legal aspects of his clients' enterprises. In one of his best-known letters, to a young lawyer at his firm, he wrote: "Your law may be perfect, your ability to apply it great, and yet you cannot be a successful adviser unless your advice is followed; it will not be followed unless you can satisfy clients, unless you impress them with your superior knowledge, and that you cannot do unless you know their affairs better than they do because you see them from a fullness of knowledge." Partly through his involvement in railroad reorganization matters in the 1890s, he developed an understanding of corporate finance far in advance of that held by most of his lawyer contemporaries.

It was Brandeis's discovery that "business corrupts politics," as well as his restless pursuit of a more publicly meaningful professional life, that led to his first forays into public interest lawyering. He became seriously involved in municipal politics when he opposed the efforts of the Boston Elevated Railway Company to obtain extensive franchise rights and, ultimately, monopoly control over transportation in the notoriously congested Boston area. In the course of fighting the Elevated, Brandeis breathed political life into two reform-minded but genteel citizens' groups, the Public Franchise League and the Associated Board of Trade. These same groups later combined to oppose the proposed capitalization of eight consolidated gas companies who had obtained major concessions from the Massachusetts legislature. With characteristic ingenuity and independence, Brandeis departed from the views of several of his erstwhile reform colleagues and pushed through a compromise plan, according to which the Consolidated Gas Company could increase dividends to shareholders only upon a corresponding reduction in rates charged to consumers.

Brandeis's services as a lawyer–reformer, many of them rendered to clients without fee, eventually spread to the state, regional, and national levels. In his 1905 speech "The Opportunity in the Law" he urged lawyers to take up a position between the CORPORATIONS and the people, beholden to neither. Probably his most ambitious, and easily his most bitterly fought, battle involved the efforts of

the New Haven Railroad, whose interests were controlled by J. P. Morgan, to obtain monopoly leverage over transportation in New England by merging with the Boston & Maine Railroad. In his nine years of jousting with the New Haven, Brandeis scored as many defeats as victories, and some historians now question the economic wisdom of his relentless assault on the merger. But his efforts at understanding and exposing the serpentine financial maneuverings of the New Haven—as he would do with respect to the "Money Trust" in his 1914 muckraking classic, *Other People's Money, and How the Bankers Use It*—justifiably made him a hero to fellow reformers.

Brandeis infused many of his nominally private legal representations with public purpose. His commitment to adjusting the disputes of labor and capital led him to counsel his business clients to avoid taking intransigent positions in their relations with their employees. Among his clients were the Filene brothers, with whom he collaborated in devising innovative plans for employee management and governance in their well-known Boston department store. His reputation for both creativity and fairmindedness led to his selection to mediate and broker the "Protocol of Peace" in the New York garment trades in 1910. Although the Protocol did not survive the continuing warfare between garment workers and employers, it remained a landmark in LABOR mediation that inspired advocates of industrial justice for many years.

Brandeis gave his name to one of the signal developments in constitutional advocacy in the 1908 Supreme Court case of MULLER V. OREGON. He was asked by labor reformers to represent the state of Oregon in defense of its maximum-hours law for women, which had been assaulted as unconstitutional. Before a Court that had emphatically declared its hostility to such protective labor LEGISLATION in LOCHNER V. NEW YORK (1905), Brandeis presented a BRIEF consisting of two pages of legal argument followed by more than one hundred pages of excerpts from SOCIAL SCIENCE studies purporting to demonstrate the evil effects of overwork on women and, hence, on society. This "BRANDEIS BRIEF", despite what now appear to be the gender paternalism of its arguments and the crudities of its social science, confirmed Brandeis's brilliance as a public law advocate. For he attained a victory for his client by giving the Court a means of distinguishing *Lochner,* and in the process helped establish a new form of legal argument informed by social realities. Brandeis's approach in *Muller* became one of the rallying cries of the new SOCIOLOGICAL JURISPRUDENCE that would ripen into the LEGAL REALISM movement of the 1920s.

When Brandeis was nominated for the Supreme Court in 1916, his enemies, some of whom nursed wounds from old legal battles or who opposed the appointment on political grounds, claimed that Brandeis had acted unethically in a number of episodes from his law practice. Most of the accusations proved groundless. They did reveal, however, that Brandeis assumed some risks in his daring use of the lawyer–client relation as a medium for promoting the public good. More than most lawyers, Brandeis was directive rather than reactive in his representations; he took such cases as appealed to his sense of justice and policy, largely avoided the constraining hand of clients, and generally seemed to view himself as "counsel to the situation" (a phrase he made famous). At times, representation of a client became a formality that enabled him to advocate his preferred solution to a pressing question of public policy. This extraordinary autonomy strained the limits of traditional notions of representation and implicitly rejected their emphasis on unblinking loyalty to the client's goals. For this reason Brandeis remains a continuing inspiration for those who see in lawyering the possibilities for the exercise of "moral activism," in legal scholar David Luban's phrase. He also remains an apt symbol for the ambiguities and controversies that attend the role of the "public interest lawyer" in a changing world.

CLYDE SPILLENGER
(2000)

Bibliography

ABRAMS, RICHARD M. 1962 Brandeis and the New Haven–Boston & Maine Merger Revisited. *Business History Review* 36:408–430.

BRANDEIS, LOUIS D. 1914 *Business—A Profession.* Boston: Small, Maynard.

——— 1914 *Other People's Money, and How the Bankers Use It.* New York: F. A. Stokes.

BRANDEIS, LOUIS D. and GOLDMARK, JOSEPHINE 1969 *Women in Industry.* New York: Arno.

FRANK, JOHN P. 1965 The Legal Ethics of Louis D. Brandeis. *Stanford Law Review* 17:683–709.

LEVY, DAVID W. 1969 The Lawyer as Judge: Brandeis' View of the Legal Profession. *Oklahoma Law Review* 22:374–395.

LUBAN, DAVID 1988 *Lawyers and Justice: An Ethical Study.* Princeton, N.J.: Princeton University Press.

MASON, ALPHEUS T. 1946 *Brandeis: A Free Man's Life.* New York: Viking Press.

SIMON, WILLIAM H. 1985 Babbitt v. Brandeis. *Stanford Law Review* 37:565–587.

SPILLENGER, CLYDE 1996 Elusive Advocate: Reconsidering Brandeis as People's Lawyer. *Yale Law Journal* 105:1445–1535.

STRUM, PHILIPPA 1994 The Legacy of Louis Dembitz Brandeis, People's Attorney. *American Jewish History* 81:406–427.

UROFSKY, MELVIN I. 1971 *A Mind of One Piece: Brandeis and American Reform.* New York: Scribner.

## BRANDEIS BRIEF

The opinion of the Supreme Court in MULLER V. OREGON (1908) began with an unusual acknowledgment: the Court

had found useful a brief by LOUIS D. BRANDEIS, supporting Oregon's law regulating women's working hours. The brief had presented the views of doctors and social workers, the conclusions of various public committees that had investigated the conditions of women's labor, and an outline of similar legislation in the United States and overseas. The Court said that although these materials "may not be, technically speaking, authorities," they were "significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation." Its intimations of female dependency aside, this comment marked an important event: the Court's recognition of the utility of briefing and argument addressed to the factual basis for legislation.

Underlying the *Muller* opinion's comment lay a deeper change in the judiciary's conception of its proper role. Since around the time of the Civil War, lawyers and judges had commonly believed that the development of legal (including constitutional) doctrine was a pursuit of truth. In this view, there were answers to be found in authoritative documents such as laws and constitutions. The *Muller* opinion signaled a recognition that judges had a creative, legislative role, that they were properly concerned with the evaluation of the factual basis for legislation. This development, which sometimes bore the name of SOCIOLOGICAL JURISPRUDENCE and which culminated in the LEGAL REALISM of the 1920s and 1930s, represented a major shift in judicial attitudes. Judges came to see themselves as active participants in adapting the law to the needs of society. The technique of the Brandeis brief came to serve not only in cases involving ECONOMIC REGULATION but also in other constitutional contexts far removed. A famous modern example is BROWN V. BOARD OF EDUCATION (1954), in which an AMICUS CURIAE brief detailed the views of social scientists on the educational harm of racial SEGREGATION in schools.

It is possible to present such factual material as EVIDENCE in the trial of a constitutional case, and today it is not unusual for counsel to do so. However, the Brandeis brief has become a common technique in the Supreme Court and other appellate courts. In the *Muller* case, the Brandeis brief aimed at demonstrating that the Oregon legislature reasonably could have believed that certain evils existed and that a limit on women's working hours would mitigate them. Brandeis himself argued no more than that. The assumption was that the law was valid if there was a RATIONAL BASIS for the legislature's assumptions. Evidence on the other side of the factual questions would, in theory, be irrelevant. When the presumption of constitutionality is weaker—that is, when the state must justify its legislation by reference to a COMPELLING STATE INTEREST or some other heightened STANDARD OF REVIEW—the Brandeis brief technique may recommend itself to either side of the argument.

KENNETH L. KARST
(1986)

(SEE ALSO: *Legislative Facts.*)

Bibliography

FREUND, PAUL A. 1951 *On Understanding the Supreme Court.* Chap. 3. Boston: Little, Brown.

## *BRANDENBURG v. OHIO*
395 U.S. 444 (1969)

Libertarian critics of the CLEAR AND PRESENT DANGER test had always contended that it provided insufficient protection for speech because it depended ultimately on judicial guesses about the consequences of speech. Judges inimical to the content of a particular speech could always foresee the worst. Thus, to the extent that the test did protect speech, its crucial element was the imminence requirement, that speech was punishable only when it was so closely brigaded in time with unlawful action as to constitute an attempt to commit, or incitement of, unlawful action. When the Supreme Court converted clear and present danger to clear and probable danger in DENNIS V. UNITED STATES (1951) it actually converted the clear and present danger test into a BALANCING TEST that allowed judges who believed in judicial self-restraint to avoid enforcing the FIRST AMENDMENT by striking every balance in favor of the nonspeech interest that the government sought to protect by suppressing speech. The *Dennis* conversion, however, was even more damaging to the clear and present danger rule than a flat rejection and open replacement by the balancing standard would have been. A flat rejection would have left clear and present danger as a temporarily defeated libertarian rival to a temporarily triumphant antilibertarian balancing standard. The conversion to probable danger not only defeated the danger test but also discredited it among libertarians by removing the imminence requirement that had been its strongest protection for dissident speakers. Accordingly commentators, both libertarian and advocates of judicial self-restraint, were pleased to announce that *Dennis* had buried the clear and present danger test.

Some critics of the danger test had supported LEARNED HAND's approach in MASSES PUBLISHING CO. V. PATTEN (1917), which had focused on the advocacy content of the speech itself, thus avoiding judicial predictions about what the speech plus the surrounding circumstances would bring. *Masses* left two problems, however: the "Marc Antony" speech which on the surface seems innocuous but in the

circumstances really is an incitement, and the speech preaching violence in circumstances in which it is harmless. OLIVER WENDELL HOLMES himself had injected a specific intent standard alongside the danger rule, arguing that government might punish a speaker only if it could prove his specific intent to bring about an unlawful act.

Eighteen years after *Dennis*, carefully avoiding the words of the clear and present danger test itself, the Supreme Court brought together these various strands of thought in *Brandenburg v. Ohio*, a PER CURIAM holding that "the constitutional guarantees of free speech . . . do not permit a state to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." In a footnote the Court interpreted *Dennis* and YATES V. UNITED STATES (1957) as upholding this standard. The decision itself struck down the Ohio Criminal Syndicalism Act which proscribed advocacy of violence as a means of accomplishing social reform. The Court overruled WHITNEY V. CALIFORNIA (1927).

MARTIN SHAPIRO
(1986)

## BRANT, IRVING
(1885–1976)

Irving Newton Brant was a journalist, biographer, and constitutional historian. A strong supporter of President FRANKLIN D. ROOSEVELT, Brant published *Storm over the Constitution* in 1936; a vigorous defense of the constitutionality of the New Deal, it strongly influenced Roosevelt's later attempt to enlarge the membership of the Supreme Court. Brant's concentration in this book on the intent of the Framers of the Constitution led him to begin a biography of JAMES MADISON. Now regarded as definitive, his six-volume biography (1941–1961) had two aims: the rehabilitation of Madison's reputation as constitutional theorist and political leader, and the refutation of the STATES' RIGHTS interpretation of American history (which denied that the Revolutionary generation considered the newly created United States to be one nation). Brant's other works include *The Bill of Rights* (1965), a history championing the absolutist interpretation of the BILL OF RIGHTS espoused by Justices HUGO L. BLACK and WILLIAM O. DOUGLAS, and *Impeachment: Trials and Errors* (1972).

RICHARD B. BERNSTEIN
(1986)

## *BRANTI v. FINKEL*
445 U.S. 507 (1980)

*Branti v. Finkel* tightened the FIRST AMENDMENT restrictions on the use of PATRONAGE in public employment first established in *Elrod v. Burns* (1976). Justice JOHN PAUL STEVEN'S MAJORITY OPINION held that upon taking office a public defender could not constitutionally dismiss two assistants solely because they were affiliated with a different political party. The 6–3 majority held that these dismissals denied the employees' freedoms of belief and association. The employer had failed to show a sufficient connection between party loyalty and effective job performance.

Justice POTTER STEWART dissented, analogizing the public defender's office to private law practice. Justice LEWIS F. POWELL, joined by Justice WILLIAM H. REHNQUIST, also dissented, reiterating his dissenting view in *Elrod* that patronage plays an honorable, traditional role in American politics.

AVIAM SOIFER
(1986)

## *BRANZBURG v. HAYES*
408 U.S. 665 (1972)

*Branzburg v. Hayes* combined several cases in which reporters claimed a FIRST AMENDMENT privilege either not to appear or not to testify before grand juries, although they had witnessed criminal activity or had information relevant to the commission of crimes. The reporters' chief contention was that they should not be required to testify unless a GRAND JURY showed that a reporter possessed information relevant to criminal activity, that similar information could not be obtained from sources outside the press, and that the need for the information was sufficiently compelling to override the First Amendment interest in preserving confidential news sources.

Justice BYRON R. WHITE's opinion for the Court not only rejected these showings but also denied the very existence of a First Amendment testimonial privilege. Despite the asserted lack of any First Amendment privilege, the White opinion allowed that "news gathering" was not "without its First Amendment protections" and suggested that such protections would bar a grand jury from issuing SUBPOENAS to reporters "other than in good faith" or "to disrupt a reporter's relationship with his news sources." White rejected any requirement for a stronger showing of relevance, of alternative sources, or of balancing the need for the information against the First Amendment interest.

Nevertheless, Justice LEWIS F. POWELL, who signed White's 5–4 OPINION OF THE COURT, attached an ambiguous CONCURRING OPINION stating that a claim to privilege "should be judged on its facts by the striking of a proper balance between FREEDOM OF THE PRESS" and the government interest. Most lower courts have read the majority opinion through the eyes of Justice Powell. An opinion

that emphatically denied a First Amendment privilege at various points seems to have created one after all.

STEVEN SHIFFRIN
(1986)

(SEE ALSO: *Reporter's Privilege.*)

## *BRASWELL v. UNITED STATES*
487 U.S. 99 (1988)

Because the Fifth Amendment's RIGHT AGAINST SELF-INCRIMINATION is a personal one that can be exercised only by natural persons, the custodian of a CORPORATION's records may not invoke this right. The contents of corporate records are not privileged either. In this case, however, Braswell, who had been subpoenaed to produce the corporation's records, was its sole shareholder. He claimed that the production of the records, under compulsion, forced him to incriminate himself. Had he been the sole proprietor of a business, the Court would have agreed. But because he had incorporated, he lost the protection of the Fifth Amendment.

Four dissenters strongly maintained that the Court majority, by splitting hairs, had ignored realities. The Court used the fiction that the government did not seek the personal incrimination of Braswell, when it forced him as the head of his solely owned corporation to produce the records. This had the effect of giving the government the evidence needed to convict him. The majority openly conceded that to hold otherwise would hurt the government's efforts to prosecute white collar crime.

LEONARD W. LEVY
(1992)

## *BRAUNFELD v. BROWN*

See: Sunday Closing Laws

## *BRAY v. ALEXANDRIA WOMEN'S HEALTH CLINIC*
506 U.S. 263 (1993)

Abortion rights supporters invoked the anticonspiracy provision of 42 U.S.C. § 1985(3) to attempt to enjoin organized anti-abortion demonstrators from protesting at abortion clinics. The statute had been interpreted in GRIFFIN V. BRECKENRIDGE (1971) to require a "class-based, invidiously discriminatory animus" before covering the action of conspirators. The plaintiffs claimed that the demonstrators had the requisite animus against women. The Supreme Court, in an opinion by Justice ANTONIN SCALIA, and over the full or partial dissents of four Justices, held that the demonstrations were "not directed specifically at women, but are intended to protect the victims of abortion." The animus alleged by the plaintiffs was not established, for want of the requisite focus on women as a class. The Court also found that the plaintiffs failed to allege a right protected against private encroachment, as required by the statute. The RIGHT TO TRAVEL allegedly interfered with was not the target of the demonstrations.

THEODORE EISENBERG
(2000)

(SEE ALSO: *Abortion and the Constitution; Anti-abortion Movement.*)

# BREACH OF THE PEACE

Breach of the peace statutes are today popularly called disorderly conduct statutes. The wording of breach of the peace or disorderly conduct statutes varies significantly from one city or state to another. Generally, such statutes are violated if a person commits acts or makes statements likely to promote violence or disturb "good order" in a public place. Under modern statutes, as under the older COMMON LAW, it is possible to be guilty of committing a breach of the peace solely through the use of words likely to produce violence or disorder.

When a person is prosecuted for breach of the peace for his or her physical actions there is no significant FIRST AMENDMENT issue. Thus, if a person commits a breach of the peace by punching or shoving other persons in public no First Amendment issue arises. However, if a mixture of expression and physical activity forms the basis for the prosecution, the court must ask whether the person is being punished for the physical activity alone. Thus, a person might be convicted of a breach of the peace for using SOUNDTRUCKS OR AMPLIFIERS if the statute punished any use of a sound amplification device, regardless of the message communicated.

When a person is accused of committing a breach of the peace by speaking to others, a court must determine whether the guarantees of FREEDOM OF SPEECH and assembly have been violated. In addition, the court must determine whether the statute is tailored to avoid punishing constitutionally protected speech.

Although the Supreme Court has held that the First Amendment does not prohibit the punishment of FIGHTING WORDS, it has upheld few convictions for breach of the peace based solely upon verbal conduct. A considerable number of breach of the peace and disorderly conduct statutes have been held unconstitutional under the doctrine of VAGUENESS and OVERBREADTH.

A breach of the peace or disorderly conduct statute that

can be constitutionally applied to persons who physically interfere with police officers engaged in police functions cannot constitutionally serve as the basis for punishing the use of insulting or annoying language to a police officer, short of actual interference with the officer's ability to perform police functions.

A person engaged in lawful speech in a public place may sometimes be confronted by a HOSTILE AUDIENCE. In such a situation the police must attempt to protect the individual speaker, or disperse the crowd, before ordering the speaker to cease his or her advocacy of the unpopular message. If it appears that the officers cannot otherwise prevent violence, they may order the speaker or speakers to cease their speech or assembly, and a refusal to comply can constitutionally be punished as disorderly conduct. Breach of the peace statutes may also be applied as consistent with the First Amendment to prohibit conduct that would interfere with the use of government property not traditionally open to speech. Thus, the state might prohibit activities near jails or school buildings if those activities interfere with the government's ability to operate the school or jail.

JOHN E. NOWAK
(1986)

Bibliography

MONAGHAN, HENRY P. 1981 Overbreadth. *The Supreme Court Review* 1981:1–40.

NOWAK, JOHN E.; ROTUND, RONALD D.; and YOUNG, J. NELSON 1983 *Constitutional Law.* Pages 954–958, 973–987. St. Paul, Minn.: West Publishing Co.

## BREARLY, DAVID
(1745–1790)

David Brearly represented New Jersey at the CONSTITUTIONAL CONVENTION OF 1787 and signed the Constitution. He was a spokesman for the small states, favoring equal representation of the states in Congress. He served on the Committee of Eleven on remaining matters, and delivered its reports to the Convention. He was later president of New Jersey's ratifying convention.

DENNIS J. MAHONEY
(1986)

## BRECKINRIDGE, JOHN
(1760–1806)

John Breckinridge studied law under Virginia's GEORGE WYTHE, then moved to Kentucky, serving as state attorney general (1795–1797), state representative (1798–1800), United States senator (1801–1805), and United States attorney general (1805–1806). During the ALIEN AND SEDITION ACT crisis Breckinridge traveled to Virginia, where he convinced THOMAS JEFFERSON, through an intermediary, that the vice-president's resolutions condemning the acts should be introduced in Kentucky, and not North Carolina, Jefferson's initial choice. Breckinridge revised Jefferson's draft by deleting the term NULLIFICATION, thus allowing Kentucky to condemn the acts and declare them unconstitutional without actually defying the federal government. Breckinridge then guided the resolutions through the Kentucky legislature while hiding Jefferson's authorship. In 1802 Breckinridge drafted and shepherded through the Senate an act to repeal the JUDICIARY ACT OF 1801—that eleventh-hour creation of the Federalists under JOHN ADAMS which allowed the outgoing President to appoint additional federal judges. Breckinridge argued that the repeal was constitutional, because if Congress had the power to create inferior courts, then Congress could also abolish them. He also contended against a judicial power to hold unconstitutional acts of Congress or of the President. Breckinridge initially doubted the constitutionality of the LOUISIANA PURCHASE, but in 1803 he introduced the Breckinridge Act which created territorial government for Louisiana. Like the Kentucky Resolutions, this act was secretly written by Jefferson.

PAUL FINKELMAN
(1986)

(SEE ALSO: *Virginia and Kentucky Resolutions.*)

Bibliography

HARRISON, LOWELL H. 1969 *John Breckinridge: Jeffersonian Republican.* Louisville, Ky.: Filson Club.

## *BREEDLOVE v. SUTTLES*
302 U.S. 277 (1937)

Georgia levied an annual POLL TAX of one dollar on every inhabitant between ages twenty-one and sixty except blind persons and women who did not register to vote. Voting registration was conditioned on payment of accrued poll taxes. A white male, denied registration for failure to pay poll taxes, challenged this scheme as a violation of the EQUAL PROTECTION and PRIVILEGES AND IMMUNITIES clauses of the FOURTEENTH AMENDMENT, and of the NINETEENTH AMENDMENT as well. In an opinion by Justice PIERCE BUTLER, a unanimous Supreme Court summarily rejected all these challenges and upheld the law. *Breedlove* was overruled in HARPER V. VIRGINIA BOARD OF ELECTIONS (1966).

KENNETH L. KARST
(1986)

## *BREITHAUPT v. ABRAM*
352 U.S. 432 (1957)

The taking of blood from an unconscious person to prove his intoxication and therefore his guilt for involuntary manslaughter was not conduct that "shocks the conscience" within the meaning of ROCHIN V. CALIFORNIA (1952), nor was it coercing a confession; accordingly the Supreme Court, in a 6–3 opinion by Justice TOM C. CLARK, found no violation of DUE PROCESS OF LAW.

LEONARD W. LEVY
(1986)

## BRENNAN, WILLIAM J., JR.
(1906– )

William Joseph Brennan, Jr., was appointed an Associate Justice of the United States Supreme Court in October 1956. He quickly became, in both an intellectual and statistical sense, the center of gravity of what commentators have come to call the WARREN COURT, dissenting less than any other Justice, and fashioning many of that Court's most important opinions.

He came to the Court with more past judicial experience than any of his colleagues. For seven years he had been a New Jersey state judge, beginning his career at the trial level and rapidly advancing to the New Jersey Supreme Court. He had also been prominent in the movement to reform the antiquated New Jersey court system. He understood and cared about the practical workings of the justice system, and this concern was to prove important in the development of his constitutional perspective.

Brennan was a committed civil libertarian who believed in "providing freedom and equality of rights and opportunities, in a realistic and not merely formal sense, to all the people of this nation." He considered courts to be the particular guardians of constitutional rights. "[T]he soul of a government of laws," he once wrote, "is the judicial function, and that function can only exist if adjudication is understood by our people to be, as it is, the essentially disinterested, rational and deliberate element of our society." For Brennan, the judicial function demanded a continual effort to translate constitutional values into general doctrinal formulations. This emphasis on DOCTRINE distinguished Brennan from his colleague WILLIAM O. DOUGLAS, who was an equally committed civil libertarian.

Brennan viewed courts as the last resort of the politically disfranchised and the politically powerless. Constitutional litigation was for him "a form of political expression"; it was often, he wrote in NAACP V. BUTTON (1963), "the sole practicable avenue open to a minority to petition for redress of grievances." Litigation was thus an alternative, perhaps the only alternative, to social violence. For these reasons he seized every opportunity to enlarge litigants' access to federal courts. Exemplary is his opinion in BAKER V. CARR (1962), which held that the issue of unequal legislative representation was justiciable in federal court, and which Chief Justice EARL WARREN called "the most important case that we decided in my time." In opinion after opinion Brennan worked to open the doors of the federal courthouse, and to make available such federal judicial remedies for violations of the Constitution as HABEAS CORPUS, INJUNCTIONS, DECLARATORY JUDGMENTS, and DAMAGES. In later years Brennan dissented vigorously as many of these opinions were cut back by the BURGER COURT.

Because he believed that "the ultimate protection of individual freedom is found in judicial enforcement" of constitutional rights, Brennan did not flinch from the exercise of JUDICIAL POWER. When the time came, for example, to accelerate the ALL DELIBERATE SPEED with which BROWN V. BOARD OF EDUCATION (1955) had ordered the nation's public schools to be desegregated, Brennan, in GREEN V. NEW KENT COUNTY SCHOOL BOARD (1968), shattered the facsade of southern "freedom-of-choice" plans and wrote that racial discrimination must end "*now*" and "be eliminated root and branch." In KEYES V. SCHOOL DISTRICT #1 OF DENVER (1973) Brennan took the lead in applying the requirement of *Brown* to northern school districts, and in cases like FRONTIERO V. RICHARDSON (1973) and CRAIG V. BOREN (1976) he played a major role in causing gender classifications to be subjected to substantial scrutiny under the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT.

Brennan was a nationalist. He believed in the power of Congress to define and protect CIVIL RIGHTS and to govern the national economy unrestrained by concerns of state SOVEREIGNTY. He disapproved of state regulations that interfered with interstate commerce. He favored the judicial imposition of national, constitutional values onto local decision-making processes. He believed, for example, that federal courts should fully incorporate almost all the guarantees of the BILL OF RIGHTS into the Fourteenth Amendment, and enforce them against the states. He dissented often and forcefully against the "federalist" leanings of the Burger Court. To Brennan the primary purpose of "the federal system's diffusion of governmental power" was to secure "individual freedom."

In his most enduring opinions, Brennan brought a unique and characteristic analysis to bear on the question of constitutional rights. Instead of inquiring into the power of government to regulate rights, he would instead focus on the manner in which the government's regulation actually functioned. The implications of this shift in focus were profound. They are perhaps most visible in the area of FIRST AMENDMENT adjudication.

To appreciate Brennan's contribution to First Amend-

ment jurisprudence, it must be remembered that the Court to which Brennan was appointed was still reverberating from the effects of the constitutional crisis of the 1930s. It was, for example, groping for a means of reconciling judicial protection of First Amendment freedoms with the deep respect for majoritarian decision making that was the legacy of the Court's confrontation with President FRANKLIN D. ROOSEVELT's New Deal. At the time Brennan joined the Court, the Justices were embroiled in a vigorous but ultimately unproductive debate as to whether First Amendment freedoms were "absolutes" or whether they should be "weighed" against competing government interests in regulation. (See ABSOLUTISM; BALANCING TESTS.) Both sides of the debate viewed government interests and individual rights as locked in an indissoluble and paralyzing conflict. Brennan's lasting contribution was to push the Court beyond this debate and to create a form of analysis in which this conflict receded from view. The essence of Brennan's approach was a precise and persistent focus on the processes and procedures through which government sought to regulate First Amendment freedoms.

Justice Brennan first used this approach in his second term on the Court in the modest but seminal case of SPEISER V. RANDALL (1958). The case involved a California law which denied certain tax exemptions to those who refused to execute an oath stating that they did "not advocate the overthrow of the United States or of the State of California by force of violence or other unlawful means." Significantly, Brennan did not approach the case in terms of an "absolute" right to engage in such advocacy. Nor did he inquire into California's "interests" in controlling such speech; he was willing to assume that California could deny tax exemptions to those who had engaged in proscribed speech.

Brennan focused his analysis instead on the procedures used to determine which taxpayers to penalize. He interpreted the California scheme as placing on taxpayers the burden of demonstrating that they had not engaged in unlawful speech. This procedure was unconstitutional, Brennan concluded, because it created too great a danger that lawful speech would be adversely affected. "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens."

By focusing on the manner in which California had regulated speech, rather than on its power to do so, Brennan was led to inquire into the actual, practical effects of the regulatory scheme. He thus shifted the focus of judicial inquiry away from the particular speech of the litigant, and toward the impact of the legislation, as concretely embedded in its procedural setting, on concededly legitimate speech. This change in focus was central to Brennan's First Amendment jurisprudence, and it was the foundation of many of the Warren Court's innovations in this area. It had, for example, obvious relevance for the procedures used by government to regulate unprotected forms of speech like OBSCENITY. Brennan spelled out these implications in a series of influential obscenity decisions that demonstrated the substantive impact of such nominally procedural isses as BURDEN OF PROOF and the nature and timing of judicial HEARINGS.

Brennan's form of inquiry also led to a careful scrutiny of the VAGUENESS of government regulations of speech. Prior to *Speiser* the issue of "vagueness" was primarily conceived in terms of the rather weak NOTICE requirements of the DUE PROCESS clause. But Brennan's analysis offered a strict, new, and specifically First Amendment rationale for the doctrine. As Brennan explained in KEYISHIAN V. BOARD OF REGENTS (1967), a case involving a New York law prohibiting public school teachers from uttering "seditious" words, "[w]hen one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone.'"

Brennan's focus on the practical impact of regulation also led him to the conclusion that the separation of legitimate from illegitimate speech had to be accomplished with "precision" and by legislation incapable of application to legitimate speech. As Brennan wrote in *Button*, First Amendment freedoms are "delicate and vulnerable," and "the threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." In *Button* Brennan coined the term OVERBREADTH to capture this requirement that First Amendment regulations be narrowly tailored, and the term and the requirement have since become doctrinal instruments of major significance.

The framework of analysis developed by Brennan not only dominated the First Amendment jurisprudence of the Warren Court; it remained influential with the Burger Court that succeeded it. Its prominence was in large measure due to its apparent accommodation of government interests in regulation, if only the government could formulate its regulation more narrowly or more precisely. This accommodation, however, was in some respects illusory. The exact degree of constitutionally mandated precision or clarity was never specified, and the psychological assumptions that underlay the approach were not susceptible to empirical verification. As a result the requirements of clarity and precision could without explicit justification be loosened to uphold some government regulations, or

tightened to strike down others. The indirection at the heart of this approach thus left it vulnerable to manipulation.

The approach was at its most compelling, therefore, when it was fused with an underlying substantive vision of the First Amendment. An illustration is the opinion which is Brennan's masterpiece, NEW YORK TIMES COMPANY V. SULLIVAN (1964). At issue in *Sullivan* was the Alabama law of LIBEL, which permitted a public official to recover damages for defamatory statements unless the speaker could prove that the statements were true. With reasoning similar to that in *Speiser* and *Button*, Brennan concluded that Alabama's allocation of the burden of proof was unconstitutional, because it "dampens the vigor and limits the variety of public debate" by inducing "self-censorship."

In *Sullivan*, however, Brennan took the unusual and penetrating step of lifting this analysis from its procedural setting and applying it to the substantive standards required by the First Amendment. Noting that the central purpose of the First Amendment was "the principle that debate on public issues should be uninhibited, robust, and wide-open," Brennan concluded that this purpose would be undermined if those who criticized public officials were subject to "any test of truth." He noted that an "erroneous statement is inevitable in free debate, and [it] must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' The need for "breathing space" led Brennan to conclude that speech about public officials had to be constitutionally protected unless uttered with "actual malice"; that is, uttered "with knowledge that it was false or with reckless disregard of whether it was false or not." The actual malice standard thus incorporated into the substantive law of the First Amendment the insights Brennan had accumulated as a result of his prior focus on the process of regulation. The result, as ALEXANDER MEIKLEJOHN was moved to proclaim, was "an occasion for dancing in the streets."

Although Brennan's focus on process rather than power is most apparent in First Amendment opinions, it also pervades his entire approach to constitutional law. In *Speiser*, for example, California had argued that since a tax exemption was not a right but a privilege bestowed at the pleasure of the state, it could also be withdrawn by the state for any reason. The so-called RIGHT-PRIVILEGE DISTINCTION had a venerable judicial pedigree, and was supported by Supreme Court precedents as recent as *Barsky v. Board of Regents* (1954). Brennan, however, brought a fresh perspective to bear on this argument, for he was concerned not with California's power to withdraw the privilege but with the manner in which it did so. From this perspective the right-privilege distinction was beside the point.

Brennan repeatedly attacked the right-privilege distinction, and many of his most important opinions, contributing to or originating major lines of doctrinal development, were predicated upon its rejection. Examples include SHERBERT V. VERNER (1963), which resuscitated the doctrine of "unconstitutional conditions" as applied to the denial of unemployment compensation; SHAPIRO V. THOMPSON (1969), which created the FUNDAMENTAL RIGHTS strand of equal protection analysis and applied it to durational RESIDENCY REQUIREMENTS for welfare recipients; and GOLDBERG V. KELLY (1970), which for the first time applied the protections of PROCEDURAL DUE PROCESS to the recipients of government entitlements such as WELFARE BENEFITS.

Brennan's focus on process deeply influenced both the Warren and the Burger courts. As the welfare state increased in complexity, Brennan's approach provided the basis for flexible yet far-reaching judicial review of government action. We can recognize the consequences of this approach in the shape of modern constitutional inquiry, with its characteristic scrutiny into whether government has acted through appropriate procedures and in a manner not unduly burdening the exercise of constitutional rights.

It is noteworthy that the results of this scrutiny depend upon an apprehension of the actual impact of government action. In later years Brennan's views on this subject were informed by a compassion and empathy that were not always shared by his colleagues. With the advent of the Burger Court, Brennan increasingly became a dissenter. His dissents, like his majority opinions, tended to be careful and lawyerly, without the eloquence or sting that mark the most memorable examples of the genre. Often, however, both Brennan and the majority were writing within doctrinal frameworks that Brennan himself had helped to create. His success in redefining the major questions of constitutional law is the measure of his achievement.

ROBERT C. POST
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Bibliography

BRENNAN, WILLIAM JOSEPH, JR. 1969 Convocation Address. *Notre Dame Lawyer* 44:1029–1033.

——— 1981 Justice Thurgood Marshall: Advocate for Human Need in American Jurisprudence. *Maryland Law Review* 40: 390–397.

HECK, EDWARD V. 1980 Justice Brennan and the Heyday of Warren Court Liberalism. *Santa Clara Law Review* 20:841–887.

HUTCHINSON, DENNIS J. 1983 Hail to the Chief: Earl Warren and the Supreme Court. *Michigan Law Review* 81:922–930.

KALVEN, HARRY, JR. 1964 The New York Times Case: A Note on "The Central Meaning of the First Amendment." *Supreme Court Review* 1964:191–221.

LEVY, LEONARD W., ed. 1972 *The Supreme Court under Earl Warren.* New York: Quadrangle Books.

## BRENNAN, WILLIAM J., JR.
(1906– )
(Update 1)

After graduating near the top of his Harvard Law School class, William Brennan returned to his hometown, Newark, New Jersey, where he joined a prominent law firm and specialized in labor law. As his practice grew, Brennan, a devoted family man, resented the demands it made on his time and accepted an appointment to the New Jersey Superior Court in order to lessen his work load. Brennan attracted attention as an efficient and fair-minded judge and was elevated to the New Jersey Supreme Court in 1952. President DWIGHT D. EISENHOWER, appointed him to the Supreme Court of the United States in 1956. The appointment was criticized at the time as "political," on the ground that the nomination of a Catholic Democrat on the eve of the 1956 presidential election was intended to win votes for the Republican ticket.

Once on the Court, Brennan firmly established himself as a leader of the "liberal" wing. Often credited with providing critical behind-the-scenes leadership during the WARREN COURT years, Brennan fashioned many of that Court's most important decisions. He continued to play a significant role—although more often as a dissenter, lamenting what he believed to be the evisceration of Warren Court precedents—as the ideological complexion of the Court changed in the 1970s and 1980s.

Brennan was a committed civil libertarian who believed that the Constitution guarantees "freedom and equality of rights and opportunities . . . to all people of this nation." For Brennan, courts were the last resort of the politically disfranchised and the politically powerless, and constitutional litigation was often "the sole practicable avenue open to a minority to petition for redress of grievances." Thus, in Brennan's view, the courts played an indispensable role in the enforcement, interpretation, and implementation of the most cherished guarantees of the United States Constitution. As Brennan observed, the Constitution's "broadly phrased guarantees ensure that [it] need never become an anachronism: The Constitution will endure as a vital charter of human liberty as long as there are those with the courage to defend it, the vision to interpret it, and the fidelity to live by it."

Brennan had an especially influential impact in the areas of EQUAL PROTECTION OF THE LAWS, DUE PROCESS, FREEDOM OF SPEECH, and CRIMINAL PROCEDURE. In his interpretation of the equal protection clause, Brennan evinced little tolerance for INVIDIOUS DISCRIMINATION by the government. When Brennan joined the Court in 1956, the equal protection clause was high on the Court's agenda, for the Court had just handed down its explosive decisions in BROWN V. BOARD OF EDUCATION (1954, 1955). Despite these decisions, and to the Court's mounting frustration, SEGREGATION of southern schools remained largely intact more than a decade after *Brown.* In GREEN V. COUNTY SCHOOL BOARD OF NEW KENT (1968), however, Brennan's opinion for the Court finally dismantled the last serious barriers to DESEGREGATION by invalidating the "freedom of choice" plans that had been used to forestall desegregation in the rural South. Putting aside the ALL DELIBERATE SPEED formula, Brennan emphatically expressed his own and the Court's impatience at the pace of desegregation: "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now.*"

When the Court first considered the lawfulness of school segregation in a city that had never expressly mandated racially segregated education by statute, it was again Brennan, writing for a closely divided Court in KEYES V. SCHOOL DISTRICT NO. 1 OF DENVER (1973), who took a strong stand on the issue: "A finding of intentionally segregative school board action in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious [and] shifts to school authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions."

Although Brennan naturally assumed a leadership role in condemning RACIAL DISCRIMINATION, he sharply distinguished such discrimination from race-conscious AFFIRMATIVE ACTION programs designed to protect racial minorities. Brennan explained the distinction in his separate opinion in REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978): "Against the background of our history, claims that law must be 'color-blind' or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. [We] cannot . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by law and by their fellow citizens." Brennan therefore concluded that the purpose of "remedying the effects of past societal discrimination is . . . sufficiently important to justify the use of race-conscious" affirmative action programs "where there is a sound basis for concluding that minority representation is substantial and chronic and that the handicap of past discrimination is impeding access of minorities to the [field]."

Brennan also played a pivotal role in the evolution of equal protection doctrine in the area of SEX DISCRIMINATION. In FRONTIERO V. RICHARDSON (1973) Brennan, writing a PLURALITY OPINION for four Justices, argued that classifi-

cations based on sex are inherently suspect and, like racial classifications, must be subjected to STRICT SCRUTINY. Taking a strong stand on the issue, Brennan explained that "our Nation has had a long and unfortunate history of sex discrimination" and that history has traditionally been "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." Although Brennan never garnered the crucial fifth vote for this position, he did gain a decisive victory in CRAIG V. BOREN (1976), in which he wrote for the Court that gender-based classifications must be subjected to intermediate scrutiny and that "to withstand constitutional analysis" such classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives."

Brennan also opened the door to the Court's REAPPORTIONMENT revolution. Prior to 1962, the Court had consistently declined to consider claims that state laws prescribing legislative districts that were not approximately equal in population violated the Constitution. As Justice Frankfurter explained in COLEGROVE V. GREEN (1946), such controversies concern "matters that bring courts into immediate and active relations with party contests," and "courts ought not to enter this political thicket." In BAKER V. CARR (1962) Brennan rejected this reasoning and held that a claim that the apportionment of the Tennessee General Assembly violated the appellants' rights under the equal protection clause "by virtue of the debasement of their votes" stated "a justiciable cause of action." Brennan explained that "the question here is the consistency of STATE ACTION with the Federal Constitution," and such claims are not nonjusticiable merely "because they touch matters of state governmental organization." Brennan's opinion for the Court in *Baker* led the way to REYNOLDS V. SIMS (1964), and its progeny, which articulated and enforced the constitutional principle of ONE PERSON, ONE VOTE.

Closely related to the Court's reapportionment decisions was the equal protection doctrine of implied FUNDAMENTAL RIGHTS. Prior to 1969, the Court had hinted on several occasions that the RATIONAL BASIS standard of review might not be applicable to classifications that penalize the exercise of such rights. Building upon these intimations, Brennan held in SHAPIRO V. THOMPSON (1969) that a law that denied WELFARE BENEFITS to residents who had not resided within the JURISDICTION for at least one year immediately prior to their application for assistance penalized the right to interstate travel by denying newcomers "welfare aid upon which may depend the ability of families to subsist." Brennan concluded that because the classification penalized an implied fundamental right it amounted to unconstitutional "invidious discrimination" unless it was "necessary to promote a compelling governmental interest." Brennan's opinion in *Shapiro* crystallized the implied fundamental rights doctrine and thus opened the door to a series of subsequent decisions invalidating classifications that unequally affected VOTING RIGHTS, the right to be listed on the ballot, the RIGHT TO TRAVEL, and the right to use contraceptives.

Although Brennan played a central role in shaping equal protection doctrine in the 1960s, by the 1970s and 1980s he often found himself fighting rearguard actions in an effort to protect his earlier equal protection decisions, particularly in the areas of reapportionment and implied fundamental rights. Occasionally, however, he won a hard-earned victory. In PLYLER V. DOE (1982), for example, Brennan mustered a five-Justice majority to invalidate a Texas statute that denied free public education to children who had not been legally admitted into the United States. Although conceding that education is not a fundamental right, Brennan nonetheless persuaded four of his brethren that intermediate scrutiny was appropriate because the statute imposed "a lifetime hardship on the discrete class of children not accountable for their disabling status."

As these decisions suggest, Brennan was consistently ready and willing to assert judicial authority to enforce the Constitution's guarantee of "the equal protection of the laws." This same activism was evident in Brennan's due process opinions. GOLDBERG V. KELLY (1970) is perhaps the best example. Traditionally, the Court had defined the "liberty" and "property" interests protected by the due process clause by reference to the COMMON LAW. The Court held that if government took someone's property or invaded his bodily integrity, the due process clause required some kind of hearing; but the Court deemed the clause inapplicable if government denied an individual some public benefit to which he had no common law right, such as public employment, a license, or welfare. This doctrine seemed increasingly formalistic with the twentieth-century expansion of governmental benefit programs and governmental participation in the economy, for while more and more individuals grew increasingly dependent upon government, prevailing doctrine gave no constitutional protection against even the most arbitrary withdrawal of governmental benefits.

In *Goldberg*, Brennan dramatically redefined the scope of the interests protected by the due process clause. Brennan explained that "much of the existing wealth in this country takes the form of rights that do not fall within traditional common law concepts of property," and it is "realistic today to regard welfare entitlements as more like property than a 'gratuity.'" This being so, Brennan held, a state could not constitutionally terminate public assistance benefits without affording the recipient the opportunity for an evidential hearing prior to termination. In this opinion, Brennan launched a new era in the extension of due process rights, and in subsequent decisions, the Court,

building upon *Goldberg*, held that the suspension of drivers' licenses, the termination of public employment, the revocation of parole, the termination of food stamps, and similar matters must be undertaken in accordance with the demands of due process.

Despite his extraordinary contributions to the governing principles of American equal protection and due process jurisprudence, Brennan's greatest legacy may be in the area of free expression. When Brennan joined the Court, the country was in the throes of its efforts to suppress communism, and this undoubtedly affected Brennan's views on free expression. Brennan's influence on the Court in this area of the law was felt almost immediately. Two years before Brennan's appointment, the Court, in *Barsky v. Board of Regents* (1954), reaffirmed the RIGHT-PRIVILEGE DISTINCTION in upholding the suspension of a physician's medical license because of events arising out of his communist affiliations. Four years later, in SPEISER V. RANDALL (1958), Brennan's opinion for the Court explicitly rejected the right privilege distinction. *Speiser* involved a California law that established a special property tax exemption for veterans, but denied the exemption to any veteran who advocated the violent overthrow of the government. Brennan rejected the state's argument that the disqualification was lawful because it merely withheld a "privilege": "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' . . . , its denial may not infringe speech."

Brennan's rejection of the rightprivilege distinction in *Speiser* was a critical step in the evolution of FIRST AMENDMENT doctrine. It did not, however, end the case, and Brennan proceeded to articulate a second—and equally important—principle of First Amendment doctrine. Turning to the procedure mandated by the California law, Brennan held that the law violated the First Amendment because it required the applicant to prove that he had not advocated the violent overthrow of government. Brennan explained that "the vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized." Moreover, "the man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct must steer far wider of the unlawful zone than if the State must bear these burdens."

This emphasis on the procedure by which government regulates expression was a hallmark of Brennan's First Amendment jurisprudence. Indeed, Brennan was the principal architect of both the First Amendment VAGUENESS principle and the OVERBREADTH doctrine. Brennan's first full articulation of the vagueness principle came in KEYISHIAN V. BOARD OF REGENTS (1967), which invalidated a New York law prohibiting schoolteachers from uttering "seditious" words. Building upon his opinion in *Speiser*, Brennan grounded the vagueness principle in his observation that "when one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone.'"

Brennan coined the term "overbreadth" in NAACP V. BUTTON (1963), and he first fully explained the rationale of the doctrine in *Gooding v. Wilson* (1972): "The transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' . . . This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression."

Brennan's views on free expression were influenced not only by governmental efforts to suppress communism but by the CIVIL RIGHTS MOVEMENT. In *NAACP v. Button* (1963), for example, Brennan held that a Virginia law prohibiting any organization to retain a lawyer in connection with litigation to which it was not a party was unconstitutional as applied to the activities of the NAACP and the NAACP LEGAL DEFENSE & EDUCATIONAL FUND. Brennan explained that "in the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for [achieving] equality of treatment [for] the members of the Negro Community." In such circumstances, litigation "is a form of political expression," and "groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts." Indeed, for the group the NAACP "assists, litigation may be the most effective form of political association." By bringing litigation within the ambit of First Amendment protection, Brennan's opinion for the Court in *Button* both highlighted the central role of courts as effective instruments of political and social change and empowered organizations like the NAACP to pursue aggressively the vindication of constitutional rights without obstruction from often hostile state governments.

Perhaps Brennan's most important First Amendment opinion, NEW YORK TIMES V. SULLIVAN (1964), also grew out of the civil rights movement. At issue in *Sullivan* was the Alabama law of libel, which permitted a public official to recover damages for defamatory statements unless the accuser could prove that the statements were true. The case

was brought by a Montgomery city commissioner on the basis of several inaccurate statements contained in an advertisement that described the civil rights movement and concluded with an appeal for funds. An Alabama jury found in favor of the commissioner and awarded him damages in the amount of $500,000.

Prior to *Sullivan* it was settled doctrine that libelous utterances were unprotected by the First Amendment and could be regulated without raising "any constitutional problem." With a sensitivity to the history of SEDITIOUS LIBEL and an awareness of the dangers even civil libel actions pose to free and open debate in cases like *Sullivan*, Brennan rejected settled doctrine and held that "libel can claim no talismanic immunity from constitutional limitations." To the contrary, libel "must be measured by standards that satisfy the First Amendment." Moreover, considering the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," Brennan maintained that the "advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for constitutional protection." Balancing the competing interests, Brennan concluded that because "erroneous statement is inevitable in free debate" and "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,' " the First Amendment must be understood to prohibit any public official to recover damages for libel unless "he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

Brennan also played a central role in the evolution of the law of OBSCENITY. In ROTH V. UNITED STATES (1957), the Court's first confrontation with the obscenity issue, Brennan wrote for the Court that obscenity is "utterly without redeeming social importance" and is thus "not within the area of constitutionally protected speech." Characteristically, however, Brennan emphasized that "sex and obscenity are not synonymous" and that it is "vital that the standards for judging obscenity safeguard the protection of . . . material which does not treat sex in a manner appealing to prurient interest." Sixteen years later, after struggling without success satisfactorily to define "obscenity," Brennan came to the conclusion that the very concept is so inherently vague that it is impossible to "bring stability to this area of the law without jeopardizing fundamental First Amendment values." Brennan therefore concluded in his dissenting opinion in *Paris Adult Theatre I v. Slaton* (1973) that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults," the First Amendment prohibits the suppression of "sexually oriented materials on the basis of their allegedly 'obscene' contents." Not surprisingly, this analysis once again revealed the essential touchstones of Brennan's First Amendment jurisprudence—a recognition of the need for precision of regulation and a sensitivity to the practical dynamics of governmental efforts to limit expression. As Brennan cautioned in *Paris Adult Theatre*, "in the absence of some very substantial interest" in suppressing even LOW-VALUE SPEECH, "we can hardly condone the ill effects that seem to flow inevitably from the effort."

As in the equal protection area, and as suggested in *Paris Adult Theatre*, Brennan spent most of his energies in free speech cases in the 1970s and 1980s in dissent. This was especially true in cases involving content-neutral regulations of expression, such as HEFFRON V. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. (1981), and cases involving the regulation of sexually oriented expression, such as FEDERAL COMMUNICATIONS COMMISSION V. PACIFICA FOUNDATION (1978). As in the equal protection area, however, Brennan won a few notable victories. In *Elrod v. Burns* (1976), for example, Brennan wrote a plurality opinion holding the patronage practice of dismissing public employees on a partisan basis violative of the First Amendment; in BOARD OF EDUCATION V. PICO (1982) he wrote a plurality opinion holding unconstitutional the removal of books from a public school library; and in *Texas v. Johnson* (1989) he wrote the opinion of the Court holding that an individual who burned the American flag as a form of political protest had engaged in constitutionally protected conduct that could not be prohibited under a state FLAG DESECRATION statute.

Brennan's opinions in the realm of criminal procedure followed a similar pattern—landmark opinions expanding CIVIL LIBERTIES during the Warren Court, vigorous and often bitter dissents during the BURGER COURT and the REHNQUIST COURT. Brennan's earlier opinions are illustrated by FAY V. NOIA (1963), *Davis v. Mississippi* (1969), and UNITED STATES V. WADE (1967). In *Fay*, Brennan significantly expanded the availability of federal HABEAS CORPUS, holding the writ available not only to persons challenging the jurisdiction of the convicting court but to any individual who was convicted in a proceeding that was "so fundamentally defective as to make imprisonment . . . constitutionally intolerable." In *Davis*, Brennan limited the use of dragnet investigations and invalidated as an unreasonable SEARCH AND SEIZURE the detention of twenty-five black youths for questioning and fingerprinting in connection with a rape investigation where there were no reasonable grounds to believe that any particular individual was the assailant. And in *Wade*, Brennan held that courtroom identifications of an accused must be excluded from evidence where the accused was exhibited to witnesses before trial at a postindictment LINEUP without notice to the accused's counsel. The common theme of these and other Brennan

opinions in the area of criminal procedure was that judges must be especially vigilant to protect those individuals whose rights to fair, decent, and equal treatment in the CRIMINAL JUSTICE SYSTEM might too easily be lost to intolerance, indifference, ignorance, or haste.

Brennan also adopted a consistently firm stand against the constitutionality of CAPITAL PUNISHMENT. In *Furman v. Georgia*, Brennan maintained that the CRUEL AND UNUSUAL PUNISHMENT clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" and that a punishment is cruel and unusual "if it does not comport with human dignity." Noting that the "uniqueness" of capital punishment is evident in its "pain, in its finality, and in its enormity," Brennan concluded that the death penalty "stands condemned as fatally offensive to human dignity" because it is "degrading" to the individual, "arbitrarily" inflicted, "excessive," and unacceptable to "contemporary society." Although he did not persuade a majority to this point of view, he adhered to this position as a matter of unshakable principle throughout his career.

At the time of his appointment to the Supreme Court, much was made of Brennan's Catholicism. It was thought by many, for better or worse, that he would narrowly represent the interests of a Catholic constituency. Brennan did not meet those expectations. To the contrary, guided by his constitutional philosophy rather than his religion, Brennan frequently angered Catholics on such controversial issues as SCHOOL PRAYER, Bible readings, moments of silence, GOVERNMENT AID TO RELIGIOUS INSTITUTIONS (including parochial schools), public displays of the crèche, BIRTH CONTROL, and ABORTION. In this way, as in others, Brennan no doubt surprised many of those who were most responsible for his appointment to the Court.

After serving more than three decades as an Associate Justice, Brennan resigned from the Supreme Court in 1990. He will be remembered as one of the most influential Justices in the history of the Court. Throughout his long and distinguished tenure, Brennan unflinchingly championed the rights of the poor, the unrepresented, and the powerless. There were, of course, those who rejected Brennan's vision of the Constitution and who maintained that he too readily mistook his own preferences for the demands of the Constitution, but there can be no doubt that Brennan expressed his unique and powerful vision of the Constitution as "a vital charter of human liberty" with rare eloquence, intelligence, clarity, and courage.

GEOFFREY R. STONE
(1992)

Bibliography

BERGER, RAOUL 1988 Justice Brennan vs. the Constitution. *Boston College Law Review* 29:787–801.

BLASI, V. 1982 *The Burger Court: The Counter-Revolution That Wasn't.* New Haven, Conn.: Yale University Press.

BRENNAN, WILLIAM J., JR. 1977 State Constitutions and the Protection of Individual Rights. *Harvard Law Review* 90:489–504.

——— 1988 Reason, Passion, and the Progress of the Law. *Cardozo Law Review* 10:23–24.

KALVEN, HARRY, JR. 1988 *A Worthy Tradition: Freedom of Speech in America.* New York: Harper & Row.

LEEDS, J. 1986 A Life on the Court. *New York Times Magazine*, October 5, pp. 24–80.

SCHWARTZ, H. 1987 *The Burger Years: Rights and Wrongs in the Supreme Court, 1969–1986.* New York: Viking.

STONE, GEOFFREY R.; SEIDMAN, LOUIS M.; SUNSTEIN, CASS R.; and TUSHNET, MARK V. 1986 *Constitutional Law.* Boston: Little, Brown.

## BRENNAN, WILLIAM J., JR.
(1906–1997)
(Update 2)

William Joseph Brennan, Jr., was born to Irish immigrant parents in Newark, New Jersey in 1906. He was graduated near the top of his class at Harvard Law School in 1931, without taking the sole constitutional law course offered at that time. After practicing labor law for a hometown firm, Brennan accepted an appointment to the New Jersey Superior Court in 1949 and was elevated three years later to the state Supreme Court. In October 1956, President DWIGHT D. EISENHOWER offered Brennan a recess appointment to the U.S. Supreme Court, partly because the two men shared a concern about the practical workings of the justice system, and partly because Eisenhower thought appointment of a Catholic Democrat would aid his reelection campaign that year. Brennan served as an Associate Justice until July 20, 1990, a period just shy of thirty-four years spanning parts of five different decades. During this period Brennan wrote over 500 MAJORITY OPINIONS articulating the law of the land.

Generally regarded today as among the handful of greatest jurists ever to grace the Court, Brennan had an almost unparalleled impact on our constitutional jurisprudence. His influence is partly attributable to his lengthy service during a period of tremendous political, social, and cultural transformation; as OLIVER WENDELL HOLMES, JR., once said, "A great man represents . . . a strategic point in the campaign of history, and part of his greatness consists in his being there." But it takes a great and focused man to seize the moment and make his mark. Brennan did so in two ways. First, through opinions both voluminous and visionary, he significantly reconstructed the architecture of constitutional DOCTRINE respecting political and CIVIL RIGHTS. Second, he developed and sustained a progressive

methodological approach to interpreting the grand rights-protective phrases of the Constitution, an approach which, although criticized and contested, must be grappled with by subsequent Justices and serious students of the Constitution.

One testament to the doctrinal and social significance of Brennan's jurisprudence is that he often gave differing answers when asked to identify his most important constitutional decision. Perhaps most frequently, he would cite BAKER V. CARR (1962) and its legacy for legislative REAPPORTIONMENT. Previously, the Court had refused to consider claims that unequally populated legislative voting districts violate the Constitution. As Justice FELIX FRANKFURTER had explained in COLEGROVE V. GREEN (1946), such controversies concern "matters that bring courts into immediate and active relations with party contests," and "courts ought not to enter this political thicket." In *Baker*, however, Brennan rejected this reasoning and recognized the JUSTICIABILITY of a claim that the malapportionment of the Tennessee General Assembly violated the rights of voters to EQUAL PROTECTION OF THE LAWS "by virtue of the debasement of their votes." Brennan's opinion for the Court paved the way for REYNOLDS V. SIMS (1964) and its progeny, articulating the now-familiar constitutional principle of ONE PERSON, ONE VOTE, which some claim revolutionized politics in various parts of the country. This principle became a constitutional axiom of democratic governance; spawned further judicial protections against more subtle forms of racial or political vote-dilution; and helped to energize Congress to protect VOTING RIGHTS through federal LEGISLATION.

At other times, Brennan would identify NEW YORK TIMES V. SULLIVAN (1964) as his most significant judicial contribution. At issue in *Sullivan* was Alabama's LIBEL law, which permitted a public official to recover damages for defamatory statements unless the speaker could prove that her pronouncements were true. According to existing case law, libelous statements lacked FIRST AMENDMENT protection and were therefore subject to plenary state regulation. But Brennan rejected this settled doctrine and held that "libel can claim no talismanic immunity from constitutional limitations." For Brennan, the First Amendment reflected a "profound national commitment to the principle that the debate on public issues should be uninhibited, robust, and wide-open," and this commitment was undermined by holding persons who criticize public officials to a rigorous "test of truth." Brennan observed that "erroneous statement is inevitable in free debate, and must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' " Even false speech about public officials, Brennan concluded, should be immune from libel claims for damages unless uttered "with knowledge that it was false or with reckless disregard of whether it was false or not." Application of this so-called "actual malice" standard for libel has since been broadened to protect an array of speakers contributing to a rich public debate on matters of public import.

On still other occasions, Brennan would identify GOLDBERG V. KELLY (1970) as his signature achievement on the Court. Previously, the Court had defined the "liberty" and "property" interests protected by the DUE PROCESS clauses by reference to COMMON LAW principles. If government took someone's PROPERTY or invaded her liberty as defined by the common law, due process required some sort of hearing; but no hearing was required for deprivations of public benefits, such as public employment, a license, or welfare. This doctrine seemed increasingly formalistic with the twentieth-century expansion of government employment and largesse. While more and more people grew increasingly dependent on such forms of "new property," prevailing doctrine did not protect against even the most arbitrary withdrawal of governmental benefits. But *Goldberg* dramatically redefined the scope of the interests protected by the due process clauses. Apparently moved by the tragedy of a family incorrectly cut off from its lifeline, Brennan recognized that "much of the existing wealth in this country takes the form of rights that do not fall within traditional common law concepts of property"; so, it is "realistic today to regard welfare entitlements as more like property than a 'gratuity.' " As a result, *Goldberg* held, a state may not terminate public assistance benefits without affording the recipient an evidentiary hearing prior to termination. Brennan's opinion, which envisioned a humanization of bureaucracy, launched a new era in the extension of due process rights. In subsequent decisions the Court extended *Goldberg* to grant due process protection to the termination of public employment, the termination of food stamps, the revocation of parole, the suspension of drivers' licenses, and many similar governmental actions.

Brennan wrote landmark opinions for the Court on many other important issues as well. With respect to equal protection rights, Brennan was heavily involved in the post–BROWN V. BOARD OF EDUCATION (1954) efforts to enforce integrationist remedies to combat entrenched racial school SEGREGATION. For example, in GREEN V. COUNTY SCHOOL BOARD (1968), Brennan rejected the "freedom of choice" plans used to forestall desegregation in the South; in KEYES V. SCHOOL DISTRICT NO. 1 OF DENVER (1973), he articulated a doctrinal rule more relevant for northern school systems establishing a rebuttable presumption that intentional segregation in part of a system infects the whole; and in COOPER V. AARON (1958), he drafted the PER CURIAM opinion proclaiming JUDICIAL SUPREMACY in CONSTITUTIONAL INTERPRETATION and denouncing Southern po-

litical resistance to the dictates of *Brown.* Brennan laid the foundation for two decades of ardent support for AFFIRMATIVE ACTION programs in his PLURALITY OPINION in REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978), culminating in his short-lived decision in METRO BROADCASTING V. FCC (1990) holding that federal affirmative action programs need not be subjected to the strictest judicial scrutiny. In FRONTIERO V. RICHARDSON (1973) and CRAIG V. BOREN (1976), Brennan led the Court to subject sex-based classifications to a demanding form of "intermediate" judicial scrutiny. With respect to First Amendment rights, Brennan was the architect of the modern OVERBREADTH doctrine in NAACP V. BUTTON (1963) and the modern VAGUENESS doctrine in KEYISHIAN V. BOARD OF REGENTS (1967). At the end of his career he preserved the core meaning of the First Amendment by authoring the controversial 5–4 decisions in *Texas v. Johnson* (1989) and *United States v. Eichman* (1990), which extended constitutional protection to FLAG DESECRATION as an act of political protest. In the realm of criminal justice, Brennan's doctrinal legacy includes not only individually important decisions such as FAY V. NOIA (1963) concerning the scope of the writ of HABEAS CORPUS, but also his successful drive for "selective" INCORPORATION DOCTRINE that made most of the BILL OF RIGHTS applicable to the states, and consequently part of our national political consciousness. Other landmark cases protecting an array of individual's rights include SHERBERT V. VERNER (1963) (RELIGIOUS LIBERTY), KATZENBACH V. MORGAN (1966) (Congress's FOURTEENTH AMENDMENT, SECTION 5 power), SHAPIRO V. THOMPSON (1969) (RIGHT TO TRAVEL), IN RE WINSHIP (1970) (beyond reasonable doubt requirement), BIVENS V. SIX UNKNOWN NAMED AGENTS (1971) (CONSTITUTIONAL REMEDIES), and PENN CENTRAL TRANSPORTATION CO. V. NEW YORK CITY (1978) (REGULATORY TAKINGS). Brennan was also instrumental in drafting the per curiam opinions in BRANDENBURG V. OHIO (1969) (FREEDOM OF SPEECH), and BUCKLEY V. VALEO (1976) (CAMPAIGN FINANCE reform).

These opinions exemplify Brennan's wide-ranging influence over the contemporary constitutional landscape not only for their discrete holdings, but for their articulation of sophisticated doctrinal frameworks that inevitably shaped the presentation and consideration of later cases. Once described as a "virtuoso of doctrine," Brennan carefully crafted tests, rules, and STANDARDS OF REVIEW, and embedded them through repetition to the point where, as Justice DAVID H. SOUTER foretold when he eulogized Brennan, future Justices "in subject after subject of the national law . . . will either accept the inheritance of his thinking, or . . . will have to face him squarely and make good on [their] challenge to him."

Brennan's doctrinal architecture is all the more impressive and formidable because it reflects a coherent and heart-felt substantive vision of the Constitution's grand design: the protection of human dignity. Brennan himself explained that, "As augmented by the Bill of Rights and the Civil War Amendments, this [constitutional] text is a sparkling vision of the supremacy of the human dignity of every individual." This vision explains Brennan's appreciation of *Baker* and its progeny's insistence on fair and participatory governance; he observed that "[r]ecognition of the principle of 'one person, one vote' as a constitutional principle redeems the promise of self-governance by affirming the essential dignity of every citizen in the right to equal participation in the democratic process." Dignity also requires that governments treat individuals with regularity, decency, and respect; these themes emerged throughout Brennan's opinions regarding equality, due process, and criminal justice. Perhaps moved by his own experiences with oppressed laborers and the poor during the Great Depression, Brennan wrote eloquently about the Constitution's proper concern with marginalized individuals for whom the promise of America had yet to be redeemed. And when he finally retired from judicial service, he explained, "It is my hope that the Court during my years of service has built a legacy of interpreting the Constitution and federal laws to make them responsive to the needs of the people whom they were intended to benefit and protect."

One reason for Brennan's remarkable success at translating his substantive visions into constitutional law was his ability to forge case-specific majority coalitions comprised of Justices with differing ideological and methodological views. Brennan was a pragmatic visionary, strategically determining in each case just how far to push his view of the law. He deployed his Irish charm, wit, and winning personality to establish relationships of mutual enjoyment and respect with his associates. But people-skills alone cannot account for his success at forging consensus among colleagues, who themselves were too strong-minded and independent to be cajoled in important cases. Rather, Brennan frequently bridged differences among his colleagues through careful foresight, drafting opinions tactically to accommodate their expected and expressed concerns. As Brennan vividly illustrated to every new set of law clerks by waggling his hand with five fingers extended, he constantly focused on the fact that it takes five agreeing Justices to make PRECEDENT. Thus he was frequently willing to compromise his own views somewhat in order to preserve an opinion of the Court, securing the optimal from within the possible.

This accommodationist strategy was rarely needed during the WARREN COURT era, particularly between 1962 when Justice Felix Frankfurter was replaced by Justice ARTHUR J. GOLDBERG and 1969 when Chief Justice EARL WARREN retired. While the Warren Court's product was

shaped by several minds, Brennan frequently crafted the language and rules that transformed principles into law. During the subsequent BURGER COURT era, Brennan became the leader of a fluctuating group of Justices, never a secure majority, who struggled on an issue-by-issue basis to maintain and sometimes even extend the Warren Court legacy. During this period, and even later on the more conservative REHNQUIST COURT, Brennan's savvy coalition-building efforts led to some surprising liberal victories. These ranged from PLYLER V. DOE (1982), a 5–4 decision invalidating a Texas law denying a free public education to children of illegal immigrants, to *Metro Broadcasting*, Brennan's final majority opinion before retirement, a 5–4 decision upholding a race-conscious affirmative action program designed to enhance speaker diversity in BROADCASTING. Moreover, Brennan also worked hard behind the scenes to influence the opinions of his colleagues in cases of enduring significance. For example, in GRISWOLD V. CONNECTICUT (1965), he convinced Justice WILLIAM O. DOUGLAS to rest the invalidation of a law restricting access to BIRTH CONTROL on more expansive RIGHT OF PRIVACY grounds rather than narrower FREEDOM OF ASSOCIATION grounds. And in *Bakke*, he influenced Justice LEWIS F. POWELL to include in his controlling separate opinion an affirmance of RACE-CONSCIOUSNESS as one nondispositive factor in higher education admissions. Thus Brennan used his considerable powers of persuasion, as well as strategic sensitivity, to control outcomes and shape doctrines even on a divided and oft-divisive Court.

In several areas of the law, Brennan was unable to halt the step-by-step dismantling by the Burger and Rehnquist Courts of his earlier doctrinal structures. For example, in cases such as WAINWRIGHT V. SYKES (1977) and *Teague v. Lane* (1989), the Court severely restricted the availability of the writ of habeas corpus as a means of challenging state criminal procedures. In cases such as MCCLESKEY V. KEMP (1987), the Court began to retreat from its earlier promises of stringent judicial enforcement of racial equality. And in *Gregg v. Georgia* (1976) and its progeny, the Court definitively rejected Brennan's claim that CAPITAL PUNISHMENT necessarily constitutes CRUEL AND UNUSUAL PUNISHMENT. In these realms, when Brennan's efforts to form and maintain coalitions failed, he frequently resorted to rigorous and spirited dissent calculated variously to chide his colleagues, prompt congressional reactions, embolden lower courts, and plant the seeds for a future Court turnabout. Indeed, in the death penalty context he eschewed his general accommodationist stance and, along with Justice THURGOOD MARSHALL, stubbornly adhered to his "view that the death penalty is in all circumstances cruel and unusual punishment," well after the Court had rejected this extreme position. Brennan marginalized himself in this line of cases, and some have suggested that his refusal to wield his consensus-building skills cost him the opportunity to temper the Court's systematic rollback of procedural protections to death-sentenced defendants over the last decade of his tenure.

Brennan's impact on modern constitutional discourse extends beyond the substantive to the methodological. Brennan developed, practiced, and claimed legitimacy for the interpretive principle of a "LIVING CONSTITUTION." This principle entails two commitments. First, constitutional interpretation involves a purposive or functional inquiry: A judge should reflect on the values and ideals underlying the constitutional text; consider how those ideals interact with the practical world; and shape doctrine to best attain those values. Second, given this purposive inquiry, the Constitution's operationalized meaning should change as the needs and demands of society change. As Brennan once explained: "The burden of judicial interpretation is to translate the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century. . . . For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be the measure to the vision of our time." For judges to make up new constitutional principles is illegitimate, he conceded, but for judges to adapt old principles to changing conditions is both appropriate and necessary.

Brennan's methodological approach has generated significant controversy, in part because of the apparent subjectivity in this distinction between making up new principles and adapting old ones. The commonplace charge of JUDICIAL ACTIVISM is misplaced; as evidenced by the Rehnquist Court's recent rulings concerning state SOVEREIGNTY and affirmative action, Justices with very different interpretive commitments frequently trump democratic decisions as well. The more serious charge is that, in the process of discerning the values underlying the Constitution's grand structure and vague rights-protective provisions, Brennan inevitably read his own personal values and ideals into the text. While conceding that constitutional interpretation can never be a mechanical enterprise, Brennan's critics accused him of straying too far from the anchors of textual plain meaning and the ORIGINAL INTENT of the Framers such that he essentially remade the Constitution in his own image. As Justice ANTONIN SCALIA has proclaimed, Brennan's approach would measure the validity of democratic decisions "against each Justice's assessment of what is fair and just." Brennan did not shy from such a charge. He candidly defended the

importance and indeed necessity of operationalizing the Constitution's broad purposes and ideals in a contemporary context, although he recognized that this translation was necessarily a somewhat subjective exercise. He vehemently denied, however, that his jurisprudence merely imposed his personal value judgments into the Constitution; he viewed himself as interpreting through the lens of modern context the judgments already embedded there. Whether this view is accurate and, more generally, whether implementation of a "living Constitution" fulfills or ignores the duty of fidelity to the design of the Framers are the methodological questions that frame the central controversy in constitutional jurisprudence today. Brennan is thus the archetype of a compelling conception of judging in a modern constitutional democracy.

Upon his retirement, Brennan was at ease with the possibility that many of his specific contributions to constitutional law would be supplanted in the future. The commitments he articulated and rules he crafted were, to his mind, the best possible answers to the particular questions of his time. But given changing societal conditions, technologies, and bureaucratic structures, and his belief that society's view of human dignity "will never cease to evolve," he expected that both the questions and answers of tomorrow would leave those of today behind. Thus, while many of his doctrines will surely survive and influence legal dispositions for generations, others will just as surely be overruled or become irrelevant. But upon his death in 1997 he would have been proud enough of his legacy if future Justices would embrace his commitment to the evolving nature of constitutional meaning, and agree with his view that "the progress of the law depends on a dialogue between heart and head."

EVAN H. CAMINKER
(2000)

(SEE ALSO: *Constitutional History, 1945–1961; Constitutional History, 1961–1977; Constitutional History, 1977–1985; Constitutional History, 1980–1989.*)

Bibliography

BLASI, VINCENT 1982 *The Burger Court: The Counter-Revolution That Wasn't.* New Haven, Conn.: Yale University Press.

BRENNAN, WILLIAM J., JR. 1986 The Constitution of the United States: Contemporary Ratification. *South Texas Law Review* 27:433–445.

——— 1988 Reason, Passion, and "The Progress of the Law." *Cardozo Law Review* 10:3–23.

CLARK, HUNTER R. 1995 *Justice Brennan: The Great Conciliator.* New York: Birch Lane Press.

ROSENKRANZ, E. JOSHUA and SCHWARTZ, BERNARD, eds. 1997 *Reason and Passion: Justice Brennan's Enduring Influence.* New York: W. W. Norton & Company.

SCHWARTZ, BERNARD 1994 "Brennan vs. Rehnquist"—Mirror Images in Constitutional Construction. *Oklahoma City University Law Review* 19:213–250.

SYMPOSIUM 1990 A Tribute to Justice William J. Brennan, Jr. *Harvard Law Review* 104:1–39.

——— 1997 In Memoriam: William J. Brennan, Jr. *Harvard Law Review* 111:1–50.

## BREWER, DAVID J.
(1837–1910)

David Josiah Brewer forged conservative socioeconomic beliefs into constitutional DOCTRINE. From the time he assumed his seat on the Supreme Court in December 1889, Brewer unabashedly relied on judicial power to protect private property rights from the supposed incursions of state and federal legislatures. Through more than 200 DISSENTING OPINIONS, most of which came during his last ten years on the bench, Brewer emerged as the conservative counterpart of the liberal "Great Dissenter," JOHN MARSHALL HARLAN.

Like his uncle, Justice STEPHEN J. FIELD, Brewer moved from moderate liberalism as a state judge to strident conservatism on the federal bench. Increasing doubts about the power of the Kansas legislature to regulate the manufacture and sale of alcohol punctuated his twelve-year career on the state supreme court. Brewer refrained from directly challenging a constitutional amendment that destroyed the livelihood of distillers without compensation, although, in *State v. Mugler* (1883), he expressed serious reservations about it. After President CHESTER A. ARTHUR appointed him to the Eighth Circuit in 1884, Brewer adopted a more aggressive position. He held that Kansas distillers deserved JUST COMPENSATION for losses suffered because of PROHIBITION, a position that the Supreme Court subsequently rejected in MUGLER V. KANSAS (1887).

Brewer's CIRCUIT COURT opinions on railroad rate regulation proved more prophetic. He ignored the Supreme Court's HOLDING in *Munn v. Illinois* (1877) that state legislatures could best judge the reasonableness of rates. (See GRANGER CASES.) Instead, Brewer asserted that judges had to inquire broadly into the reasonableness of rates and to overturn LEGISLATION that failed to yield a FAIR RETURN ON FAIR VALUE of investment.

These views persuaded President BENJAMIN HARRISON to appoint Brewer the fifty-first Justice of the Supreme Court. The new Justice immediately lived up to expectations by contributing to the emerging doctrine of SUBSTANTIVE DUE PROCESS OF LAW. Brewer advocated use of the Fifth Amendment and the FOURTEENTH AMENDMENT to shelter corporate property rights from federal and state legislation. Three months after his appointment he joined the majority in the important case of CHICAGO, MILWAUKEE

AND ST. PAUL RAILWAY COMPANY V. MINNESOTA (1890) in striking down a state statute that did not provide for JUDICIAL REVIEW of rates established by an independent commission. More than other members of the Court, Brewer sought to expand the limits of substantive due process. Two years later, when the Court reaffirmed its *Munn* holding in *Budd v. New York* (1893), Brewer complained in dissent that the public interest doctrine granted too much discretion to the legislature. The Court ultimately accepted his position. In REAGAN V. FARMERS' LOAN AND TRUST COMPANY (1894) he spoke for a unanimous Court in holding that a state legislature could not force a railroad to carry persons or freight without a guarantee of sufficient profit. Brewer dramatically expanded the range of issues that the legislature had to consider when determining profitability, and, in so doing, he broadened the grounds for judicial intervention.

Brewer also applied judicial review to congressional acts. He joined the Court's majority in UNITED STATES V. E. C. KNIGHT COMPANY (1895) in narrowing Congress's power under the COMMERCE CLAUSE. He silently joined the same year with Chief Justice MELVILLE W. FULLER in POLLOCK V. FARMERS' LOAN AND TRUST COMPANY . . . decision that obliterated more than one hundred years of PRECEDENT in favor of a federal income tax.

Brewer's important decision in IN RE DEBS (1895) coupled judicial power and property rights with a sweeping assertion of national power. The *Debs* case stemmed from the actions of the militant American Railway Union and its leader, Eugene V. Debs, in the Pullman strike of 1894. Debs had refused to obey an INJUNCTION granted by a lower federal court in Chicago that ordered the strikers to end their BOYCOTT of Pullman cars. President GROVER CLEVELAND dispatched troops to restore the passage of INTERSTATE COMMERCE and of the mails. The lower federal court then found Debs and other union members in contempt of court and imprisoned them. Debs petitioned the Supreme Court for a writ of HABEAS CORPUS on the ground that the lower court had exceeded its EQUITY power in issuing the injunction and that the subsequent EX PARTE contempt proceedings had resulted in conviction of a criminal offense without benefit of the procedural guarantees of the criminal law.

Brewer brushed aside Debs's claims with an opinion that blended morality, national supremacy, and the sanctity of private property. In JOHN MARSHALL-like strokes he concluded that the Constitution granted Congress ample power to oversee interstate commerce and the delivery of the mails. The President had acted properly in dispatching federal troops to quell the strikers, because the Constitution had pledged the power of the national government to preserve the social and economic order. The courts, Brewer concluded, had to protect property rights and this included the use of the CONTEMPT POWER to punish persons who refused to abide by injunctions. He disingenuously admonished Debs to seek social change through the ballot box.

Brewer in the post-*Debs* era retreated into STRICT CONSTRUCTION. This narrowing of his constitutional jurisprudence occurred at a time when most of the other Justices embraced the moderate middle class reformist ethos of the Progressive movement. Brewer, Chief Justice Fuller, and Justice RUFUS PECKHAM emerged as the conservative right wing of the Court.

Brewer disparaged Congress's resort to ENUMERATED POWERS to accomplish purposes not originally contemplated by the Framers. This contrasted sharply with his opinion in *Debs.* He dissented with Chief Justice Fuller in CHAMPION V. AMES (1903) on the ground that an act of Congress regulating interstate sale of lottery tickets threatened to destroy the TENTH AMENDMENT. More than issues of FEDERALISM troubled Brewer; his opinion reflected a socioeconomic agenda aimed at protecting property rights. In *South Carolina v. United States* (1905) he spoke for the Court in holding that the federal government could place an internal revenue tax on persons selling liquor, even though those persons acted merely as agents for the state. Brewer argued that state involvement, free from the federal TAXING POWER, in private business would lead inexorably to public ownership of important segments of the economy.

Brewer championed the concept of FREEDOM OF CONTRACT. He first articulated it for the Court in *Frisbie v. United States* (1895), and he joined with the majority two years later in ALLGEYER V. LOUISIANA when it struck down a Louisiana law affecting out-of-state insurance sales. Although the Court subsequently applied the concept unevenly, Brewer dogmatically clung to it. Between HOLDEN V. HARDY (1898) and *McLean v. Arkansas* (1909), Brewer routinely opposed state and federal laws designed to regulate labor. The single exception was MULLER V. OREGON (1908), and Brewer's opinion for a unanimous Court in that case ironically contributed to the new liberalism of the Progressive era.

LOUIS D. BRANDEIS in *Muller* submitted a massive brief based on extensive documentary evidence about the health and safety of women workers. It openly appealed to judicial discretion, and Brewer took the opportunity to infuse his long-held views of the dependent condition of women into constitutional doctrine. He denied an absolute right of liberty of contract; instead he concluded that under particular circumstances state legislatures might intervene in the workplace. The supposed physical disabilities of women provided the mitigating circumstances that made the Oregon ten-hour law constitutional. He emphatically argued that the Court had not retreated from

substantive due process. Nevertheless, the *Muller* decision and the BRANDEIS BRIEF encouraged constitutional litigation that three decades later shattered Brewer's most cherished conservative values.

The son of a Congregationalist minister and missionary, Brewer never lost touch with his Puritan sense of character and obligation. His jurisprudence forcefully, although naively, proclaimed that material wealth and human progress went hand in hand.

KERMIT L. HALL
(1986)

Bibliography

CRAMER, RALPH E. 1965 Justice Brewer and Substantive Due Process: A Conservative Court Revisited. *Vanderbilt Law Review* 18:61–96.

PAUL, ARNOLD M. 1969 David J. Brewer. Pages 1515–1549 in Leon Friedman and Fred L. Israel, eds., *The Justices of the Supreme Court, 1789–1969.* New York: Chelsea House.

## *BREWER v. WILLIAMS*
430 U.S. 378 (1977)

This highly publicized case produced three concurring and three dissenting opinions and Justice POTTER STEWART's opinion for a 5–4 majority. Williams, who had kidnapped and murdered a child, was being transported by police who had read the MIRANDA RULES to him. But the police played on his religious beliefs. Although they had agreed not to interrogate him and he had declared that he wanted the assistance of counsel and would tell his story on seeing his counsel, a detective convinced him to show where he had buried the body so that the child could have a Christian burial. The Court reversed his conviction, ruling that the use of EVIDENCE relating to or resulting from his incriminating statements violated his RIGHT OF COUNSEL once adversary proceedings against him had begun, and he had not waived his right. (See NIX V. WILLIAMS.)

LEONARD W. LEVY
(1986)

## *BREWSTER v. UNITED STATES*
408 U.S. 501 (1972)

A 6–3 Supreme Court held that the SPEECH OR DEBATE CLAUSE does not protect a United States senator from prosecution for accepting a bribe in return for a vote on pending legislation. The clause, said Chief Justice WARREN E. BURGER, only forbids inquiry into legislative acts or the motives behind those acts. Justices WILLIAM J. BRENNAN and WILLIAM O. DOUGLAS attacked the majority's distinction between money-taking and voting and joined Justice BYRON R. WHITE who contended that the only issue was the proper forum for the trial.

DAVID GORDON
(1986)

## BREYER, STEPHEN G.
(1938– )

Stephen G. Breyer came to the Supreme Court in 1994 with a well-developed judicial philosophy. It was not a completely formed constitutional philosophy, for his career had largely been spent outside the constitutional field.

Born in San Francisco in 1938, Breyer was graduated from Stanford University in 1959 and spent two years as a Marshall scholar at Oxford University. He was graduated from Harvard Law School in 1964, after which he clerked for Justice ARTHUR J. GOLDBERG and spent two years in the ANTITRUST division of the U.S. Department of Justice. From 1967 to 1980 he taught at Harvard Law School, specializing in antitrust and administrative law. Breyer also served as a prosecutor on the WATERGATE special prosecution in 1973 and, in 1974, as special counsel to the U.S. SENATE subcommittee on administrative practice and procedures, chaired by Senator Edward M. Kennedy. As chief counsel to the SENATE JUDICIARY COMMITTEE in 1979 he crafted the LEGISLATION that led to the deregulation of the airline industry.

In 1980 Breyer was appointed to the U.S. Court of Appeals for the First Circuit; he became its chief judge in 1990. Sitting on the federal judicial moon, he necessarily reflected the sun of Supreme Court PRECEDENT. Breyer deferred to ADMINISTRATIVE AGENCY decisions and tended to interpret statutory provisions narrowly. He was one of the original members of the United States Sentencing Commission that in 1987 promulgated controversial federal SENTENCING guidelines. Breyer conceived the idea of a numerical framework that all federal judges would have to apply.

In 1994 President WILLIAM J. CLINTON nominated Breyer to replace the retiring Justice HARRY A. BLACKMUN. The Senate easily confirmed him, and on August 11, 1994, Breyer took his seat as the nation's 108th Supreme Court Justice. He joined a Court that generally supported both FREEDOM OF SPEECH claims and STATES' RIGHTS. It was more skeptical of federal authority than any Court in recent history. At the same time it believed more in neutrality than in equality, particularly in RACIAL DISCRIMINATION and AFFIRMATIVE ACTION cases.

He dissented from the Court's opinion in UNITED STATES V. LÓPEZ (1995), invalidating the Gun-Free School Zone

Act of 1990 on the ground that Congress failed to show that the possession of a gun in school "substantially affects" INTERSTATE COMMERCE. Breyer agreed that Congress must have evidence that "gun- related violence near the classroom poses a serious economic threat" to interstate commerce. "The Constitution requires us to judge the connection between a regulated activity and interstate commerce," but "at one remove." In a lengthy appendix Breyer listed reports and studies from which Congress "could reasonably have found the empirical connection that its law, implicitly or explicitly, asserts."

Breyer has aptly been called "a skeptical friend of government regulation." In his 1993 book, *Breaking the Vicious Cycle*, he charged that the regulatory process wasted both government and private resources and also diverted attention away from true health and environmental concerns. Breyer called for the establishment of a corps of elite civil servants that would have broad discretion to make "common-sense" decisions about regulation. In *Kumho Tire Co. v. Carmichael* (1999), he expanded the trial judge's general "gate-keeping" obligation set forth in *Daubert v. Merrell Dow Pharmaceuticals I* (1993) to apply to testimony "based on 'technical' and 'other specialized' knowledge."

*Denver Area Education Telecommunications Consortium v. FCC* (1996) is Breyer's major FIRST AMENDMENT effort to date. Writing for the Court, he explicitly refused to select a definitive level of scrutiny or category of cases in which to place free speech regulations of indecent material on cable television. He based this refusal on the dynamic nature of telecommunications and BROADCASTING technology. Any decision, Breyer concluded, would likely be based on assumptions that further innovation would quickly render obsolete.

Questions of EXECUTIVE POWER have been prominent during Breyer's tenure. In his concurrence in CLINTON V. JONES (1997), which verges on a qualified dissent, he agreed with the Court that the Constitution does not automatically grant the President immunity from civil suits based on his private conduct. But Breyer noted that once a trial of the President is scheduled, it can only be held when it does not "interfere with the President's discharge of his public duties." The LINE-ITEM VETO law did not violate any SEPARATION OF POWERS issue, Breyer wrote in dissent in *Clinton v. New York* (1998). It was an "experiment" of "representative government" that did not "threaten the liberties of individual citizens."

Breyer's opinions flow easily, frequently stating the issue or the relevant statute or regulation at the outset. In 1982 he stopped using footnotes, returning to an older style that incorporates all sources into the text. His opinions do not evince an overall view of human nature. Suspicious of overarching theories, Breyer decides the case at hand, giving some guidance for the future while declining to reach out to embrace broader principles. He takes a more lenient view than the majority's as to the JUSTICIABILITY requirement. Dissenting in *Raines v. Byrd* (1997), he would have narrowed the inquiry to whether the plaintiffs' status as members of Congress brought an otherwise justiciable controversy outside the scope of Article III.

Breyer has written in several cases involving prisoners. In *Richardson v. McKnight* (1997) he wrote for the Court that prison guards who are employees of a private prison management company are not entitled to qualified immunity from suits by prisoners. Dissenting from the Court's upholding, in *Kansas v. Hendricks* (1997), a law providing for the involuntary commitment of violent sexual predators, Breyer emphasized the law's concern for treatment as the most relevant factor in distinguishing a punitive from a nonpunitive purpose. He urged the Court, in a sole dissent from a denial of certiorari in *Elledge v. Florida* (1998), to hear the appeal of a prisoner who spent more than twenty-three years in prison on death row. The prisoner's claim, "argue[d] forcefully," is "a serious one," given the Eighth Amendment's prohibition against CRUEL AND UNUSUAL PUNISHMENTS, Breyer wrote.

Befitting his background, Breyer has long criticized the "textual" approach to STATUTORY INTERPRETATION championed by Justice ANTONIN SCALIA. Judges, he said in 1984, should interpret a statute "in light of what its purpose must have been," and legislative history must be used to determine this. As he opened his concurring– dissenting opinion in *Schenck v. Pro Choice Network* (1997), "Words take on meaning in context."

"Economics alone," Breyer has written, "cannot prescribe how much a society should spend." Shortly before he went on the Court, he stated his philosophy of judging: "The law is supposed to fit together in a way that makes the human life of people a little bit better."

ROGER K. NEWMAN
(2000)

## BRICKER AMENDMENT
(1952)

Senator John Bricker of Ohio in 1952 introduced a proposed constitutional amendment designed to limit the TREATY POWER and the President's power to make EXECUTIVE AGREEMENTS. The proposal was an outgrowth of widespread isolationist sentiment following the KOREAN WAR, and of fear of the possible consequences of the DOCTRINE of MISSOURI V. HOLLAND (1920) when combined with the United Nations Charter or the so-called Universal Declaration of Human Rights. The amendment, as introduced,

would have declared that "a provision of a treaty or other international agreement which conflicts with this Constitution shall not be of any force or effect," and would have prohibited "self-executing" treaties by requiring separate, independently valid congressional action before a treaty could have force as "internal law."

President DWIGHT D. EISENHOWER opposed the Bricker Amendment, arguing that it would make effective conduct of FOREIGN AFFAIRS impossible and deprive the President "of his historic position as the spokesman for the nation." In February 1954, the Senate defeated the Bricker Amendment, and later it failed by one vote to give the required two-thirds approval to a weaker version written by Senator Walter F. George.

DENNIS J. MAHONEY
(1986)

## *BRIDGES v. CALIFORNIA*
## *TIMES-MIRROR CO. v. CALIFORNIA*
314 U.S. 252 (1941)

In these two companion cases, handed down by the Supreme Court on the same day, a bare majority of five Justices overturned exercises of the CONTEMPT POWER against Harry Bridges, a left-wing union leader, and the *Los Angeles Times*, then a bastion of the state's conservative business establishment, for their out-of-court remarks concerning pending cases. Bridges had been found in contempt for a telegram that predicted a longshoreman's strike in the event of a judicial decree hostile to his union; the *Times* had been punished for an editorial that threatened a judge with political reprisals if he showed leniency toward convicted labor racketeers.

Justice HUGO L. BLACK's majority opinion, joined by Justices WILLIAM O. DOUGLAS, FRANK MURPHY, STANLEY F. REED, and ROBERT H. JACKSON, held that both the telegram and the editorial had been protected by the FIRST AMENDMENT via the DUE PROCESS clause of the FOURTEENTH AMENDMENT against abridgment by the states; neither pronouncement constituted a CLEAR AND PRESENT DANGER to the administration of criminal justice in California courts. Justice FELIX FRANKFURTER, writing for himself and three others, dissented.

Frankfurter's dissent represented the original majority view when the cases were first argued in the spring of 1941. But the defection of Justice Murphy over the summer and the later addition of Justice Jackson produced a new majority for Black by October when the two cases were reargued.

MICHAEL E. PARRISH
(1986)

## BRIEF

Although the term may refer to a number of different kinds of legal documents, in American usage a "brief" ordinarily is a written summary of arguments presented by counsel to a court, and particularly to an appellate court. In the Supreme Court, counsel file briefs only after the Court has granted review of the case. Counsel's first opportunity to acquaint the Court with arguments in the case thus comes in the filing of a petition for a WRIT OF CERTIORARI (or, in the case of an APPEAL, a "jurisdictional statement"), and the papers opposing such a petition. By rule the Court prescribes the length and form of briefs, requires that they be printed (unless a party is permitted to proceed IN FORMA PAUPERIS, as one who cannot afford certain costs), and sets the number of copies to be filed. By the time of ORAL ARGUMENT, the Justices normally have had full opportunity to read and analyze the briefs (including reply briefs) of counsel for the parties and also for any AMICI CURIAE. At or after the argument, the Court may ask counsel to file supplemental briefs on certain issues.

KENNETH L. KARST
(1986)

(SEE ALSO: *Brandeis Brief.*)

Bibliography

STERN, ROBERT L. and GRESSMAN, EUGENE 1978 *Supreme Court Practice*, 5th ed. Chaps. 6–7. Washington, D.C.: Bureau of National Affairs.

## *BRINEGAR v. UNITED STATES*
338 U.S. 160 (1949)

In *Brinegar* the Supreme Court reaffirmed and broadened the rule in CARROLL V. UNITED STATES (1925) authorizing search of an automobile on the road where PROBABLE CAUSE exists to believe it contains contraband. The Court ignored the lack of congressional authorization for the WARRANTLESS SEARCH, a factor present, and emphasized, in *Carroll.*

JACOB W. LANDYNSKI
(1986)

## *BRISCOE v. BANK OF COMMONWEALTH OF KENTUCKY*
11 Peters 257 (1837)

This is one of the cases decided by the Supreme Court during the first term that ROGER B. TANEY was Chief Justice, and the decision panicked conservatives into the belief

that the constitutional restraints which the MARSHALL COURT imposed on the states no longer counted. The case was decided during a depression year when an acute shortage of currency existed. Kentucky authorized a bank, which was state-owned and -operated, to issue notes that circulated as currency. Justice JOSEPH STORY made a powerful argument that the state notes violated the constitutional injunction against state BILLS OF CREDIT, but he spoke in lonely dissent. The Court, by a 6–1 vote, sustained the act authorizing the state bank notes. Justice JOHN MCLEAN, for the majority, assumed that the clause prohibiting bills of credit did not apply to notes not issued on the faith of a state by a CORPORATION chartered by the state. McLean's weak argument was dictated by the practical need for an expansion of the circulating medium. Economics rather than law governed the case.

LEONARD W. LEVY
(1986)

## BRITISH CONSTITUTION

Most eighteenth-century Englishmen believed that they were the freest people in the world. Foreign observers, such as MONTESQUIEU and Voltaire from France or Jean-Louis De Lolme from Geneva, concurred. Great Britain had somehow created and protected a unique heritage—a CONSTITUTION—that combined liberty with stability. This constitution was no single document nor even a collection of basic texts, although MAGNA CARTA, the BILL OF RIGHTS of 1689, and other prominent documents were fundamental to the tradition. It depended as much upon a series of informal understandings within the ruling class as upon the written word. And it worked. It "insures, not only the liberty, but the general satisfaction in all respects, of those who are subject to it," affirmed De Lolme. This "consideration alone affords sufficient ground to conclude without looking farther," he believed, "that it is also much more likely to be preserved from ruin." Not everyone agreed. English radicals insisted by the 1770s that only electoral reform and a reduction of royal patronage could preserve British liberty much longer. A vigorous press, the most open in Europe, subjected ministers to constant and often scathing criticism, which a literate and growing public thoroughly enjoyed. Yet until late in the prerevolutionary crisis of 1763–1775, North Americans shared the general awe for the British constitution and frequently insisted that their provincial governments displayed the same virtues.

Apologists explained Britain's constitutional achievement in both legal and humanistic terms. The role of "mixed government" in preserving liberty appealed to a broad audience. Even lawyers used this theme to organize a bewildering mass of otherwise disparate information drawn from the COMMON LAW, parliamentary statutes, and administrative practice. "And herein indeed consists the true excellence of the English government, that all parts of it form a mutual check upon each other," proclaimed Britain's foremost jurist, Sir WILLIAM BLACKSTONE, in 1765. "In the legislature, the people are a check upon the nobility, and the nobility a check upon the people; . . . while the king is a check upon both, which preserves the executive power from encroachment. And this very executive power is again checked, and kept within due bounds by the two houses. . . ."

To work properly, mixed government (or a "mixed and balanced constitution") had to embody the basic elements of the social order: the crown, consisting not just of the monarch but of the army and navy, the law courts, and all other officeholders with royal appointments; the titled aristocracy with its numerous retainers and clients; and landholding commoners. Each had deep social roots, a fixed place in government, and the power to protect itself from the others. United as king, lords, and commons (or as the one, the few, and the many of classical thought), they became a sovereign power beyond which there was no appeal except to revolution, as American colonists reluctantly admitted by 1775.

Although the king could do no wrong, his ministers could. Every royal act had to be implemented by a minister who could be held legally accountable for what he did. Into the early eighteenth century, this principle generated frequent IMPEACHMENTS, a cumbersome device for attempting to achieve responsible government. By midcentury, impeachment, like the royal veto, had fallen into disuse. Crown patronage had become so extensive that a parliamentary majority hostile to the government almost never occurred in the century after the Hanoverian Succession of 1714. When it did, or even when it merely seemed inevitable, as against Sir Robert Walpole in 1742 and Lord North in 1782, the minister usually resigned, eliminating the need for more drastic measures. When William Pitt the Younger refused to resign in the face of an implacably hostile commons majority in 1783–1784, his pertinacity alarmed many contemporaries. It seemed to portend a major crisis of the constitution until Pitt vindicated himself with a crushing victory in the general election of 1784.

British CONSTITUTIONALISM took for granted a thoroughly aristocratic society. Mixed government theory rested upon the recognition of distinct social orders, linked in countless ways through patron-client relationships. Its boast, that it provided a government of laws and not of men, had real merit, which an independent judiciary assidiously sustained. In like manner the House of Commons really did check the ambitions of the crown.

The quest for responsible ministers still had not reached its nineteenth-century pattern of cabinet government, but it had moved a long way from the seventeenth-century reliance upon impeachment.

The Revolution converted American patriots from warm admirers to critics of British constitutionalism. Some, such as Carter Braxton of Virginia, hoped to change the British model as little as possible. Others, especially THOMAS PAINE, denounced the entire system of mixed government as decadent and corrupt, fit only for repudiation. Most Americans fell between these extremes. They agreed that they needed formal written constitutions. In drafting them, they discovered the necessity for other innovations. Lacking fixed social orders, they simply could not sustain a mixed government. Patron-client relations were also much weaker among the Americans, who had come to regard most crown patronage as inevitably corrupt, a sign of the decay of English liberty. Americans built governments with no organic roots in European social orders. In nearly every state, they separated the government into distinct branches—legislative, executive, and judicial—to keep each behaving legally and correctly. The SEPARATION OF POWERS thus became the American answer to the mixed and balanced constitution. This rejection of government by king, lords and commons led inexorably to a redefinition of SOVEREIGNTY as well. Americans removed sovereignty from government and lodged it with the people instead. To give this distinction substance, they invented the CONSTITUTIONAL CONVENTION and the process of popular ratification. This transformation made true FEDERALISM possible. So long as sovereignty remained an attribute of government, it had to belong to one level or the other—to Parliament or the colonial legislatures. But once it rested with the people, they became free to grant some powers to the states and others to a central government. In 1787–1788, they finally took that step.

JOHN M. MURRIN
(1986)

Bibliography

BLACKSTONE, WILLIAM (1765–1769) 1979 *Commentaries on the Laws of England*, ed. by Stanley N. Katz et al. Chicago: University of Chicago Press.

BREWER, JOHN 1976 *Party Ideology and Popular Politics at the Accession of George III.* Cambridge: At the University Press.

DE LOLME, J. L. 1775 The Constitution of England, or An Account of the English Government; In which it is compared with the Republican Form of Government, and occasionally with the other Monarchies in Europe. London: T. Spilsbury for G. Kearsley.

POCOCK, J. G. A. 1975 *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition.* Princeton, N.J.: Princeton University Press.

ROBERTS, CLAYTON 1966 *The Growth of Responsible Government in Stuart England.* Cambridge: At the University Press.

## BROADCASTING

Broadcasting is the electronic transmission of sounds or images from a single transmitter to all those who have the appropriate receiving equipment. It is thus a powerful medium for communicating ideas, information, opinions, and entertainment. In many countries broadcasting has become an arm of government. In the United States, however, Congress established the Federal Radio Commission in 1927 and then the Federal Communications Commission (FCC) in 1934 to award broadcasting licenses to private parties. Although a number of licenses were also designated for "public broadcasting," most were allocated to qualified applicants who promised to serve the public interest by acting as public trustees of the airwaves.

The asserted basis for government intervention in the United States was, initially, to eliminate the interference created when many different parties broadcast over the same frequency in the same area. Yet this chaos could have been eliminated with a mere registration requirement and the application of property rights concepts, allocating broadcast licenses by deed, as land is allocated. Instead, the potential interference was used to justify a complex and comprehensive regulatory scheme, embodied in the COMMUNICATIONS ACT of 1934.

In 1952, the FCC established a pattern of allocating television licenses to ensure that the maximum number of local communities would be served by their own local broadcast stations, a departure from the more centralized broadcasting systems of most other countries. Although this decision has added additional voices of local news in many communities, most local television stations affiliated with national networks to share the cost of producing programs of higher technical quality. Thus, while broadcast regulation always has been premised on the primacy of these local outlets, much of it has focused on the relationship between local stations and the powerful national broadcasting networks.

Government regulation of broadcasting obviously presents dangers to the FREEDOM OF SPEECH. Notwithstanding a statutory prohibition on censorship in the Communications Act, the existence of the licensing scheme has significantly influenced the content of programs. Holders of valuable licenses are careful not to offend the FCC, lest they jeopardize their chances of a license renewal. Raised eyebrows and stated concerns about aspects of content prevent station management from acting as freely as newspapers or magazines do. (See FAIRNESS DOCTRINE.) Indeed, only in the last quarter-century have broadcasters come to

understand the dominant role that they can play in the distribution of news and information in the United States.

Until recently, the distinct constitutional status of broadcast regulation was premised on the assumption that only a limited number of broadcasting frequencies existed and on the right of the federal government to insure that this scarce commodity was used in the public interest. But recent technological developments have belied this basis for special intervention. Clearly, policy and not physics created the scarcity of frequencies, and now that economic conditions have made alternative media practical, the FCC has begun to open the broadcasting spectrum to new entrants, such as direct broadcast satellites, low-power television, and microwave frequencies.

Nevertheless, in FCC V. PACIFICA FOUNDATION (1978) the Supreme Court suggested that the extraordinary impact of broadcasting on society is itself a possible basis for special rules, at least during hours when children are likely to be listening and watching. This rationale appears to be the only remaining basis for giving broadcasting special constitutional treatment. Technology is rendering obsolete all other distinctions between broadcasting and printed material. For the receiver of ideas at a home console, all manner of data—words and hard copy and soft images—will come through the atmosphere, or over cables, or both. Distinctions based on the mode of delivery of information will have less and less validity. FCC efforts to repeal broadcast regulations, however, have often met with congressional disapproval.

MONROE E. PRICE
(1986)

(SEE ALSO: *Columbia Broadcasting System, Inc. v. Federal Communications Commission.*)

Bibliography

COASE, R. H. 1959 The Federal Communications Commission. *Journal of Law & Economics* 2:1–40.

## BROADCASTING
### (Update 1)

From its inception in the early days of commercial radio, federal regulation of the broadcast industry has rested on three policies that are not always compatible: (1) competition among broadcasters; (2) a fiduciary duty to serve the public interest; and (3) the promotion of local needs and interests. From the FAIRNESS DOCTRINE to the allocation of television licenses, broadcast regulation represented a conscious effort to maximize the public welfare by providing essential information and to encourage national diversity through the celebration of local uniqueness. In the name of the public interest standard of the COMMUNICATIONS ACT of 1934, broadcasters have been characterized as owing fiduciary obligations to their audiences—with the Federal Communications Commission (FCC) and then the courts as appropriate bodies to enforce the trust. The goal of assuring local, public-interest programming, however, is built on theoretical foundations that weaken significantly when it must confront the economic forces and consumer choices that underlie the policy of relying on competition.

The linchpin of broadcast regulation is limited entry by government license, reinforcing an idea of scarcity that has convinced decision makers that broadcasting is so different from the print media that it may be regulated in ways that would be unconstitutional if applied to a newspaper. From *NBC v. United States* (1943) to RED LION BROADCASTING CO. V. FCC (1969), to COLUMBIA BROADCASTING SYSTEM, INC. V. FEDERAL COMMUNICATIONS COMMISSION (1981), the Supreme Court has concluded that the broadcast spectrum is an inherently limited resource. Because this conclusion justifies distinguishing broadcasting from print, the Court must implicitly conclude that newsprint, printing presses, and therefore the print media in general, are not inherently limited. Thus, the Court has noted that more people want broadcast licenses than can have them, without ever pausing to note that the reason for excess demand is that broadcast licenses are highly valuable yet given away free. If the facilities for publishing major newspapers were given away free, there would also be more individuals who wish them than could have them. Essentially the Court has seen broadcasters as competing only against other local broadcasters providing the same service, but print outlets as competing against every other print possibility in the world. After being the last bastion for the belief in broadcast scarcity, the Court signaled in *FCC v. League of Women Voters of California* (1984) that if Congress or the FCC would say that broadcasting was no longer scarce, it, too, would agree.

As notions of scarcity were losing their former intellectual force, the FCC ceased a variety of policies that limited direct competition with broadcasting. Beginning with a deregulatory period in the late 1970s, policies brought broadcasters under increasing competition, not only from UHF stations that had been marginal but, more important, from two other sources: (1) an unshackled cable industry that was able to exceed fifty percent household penetration by the late 1980s; and (2) videocassette recorders, which, being outside the jurisdiction of the FCC, rapidly became standard household items in the 1980s. Because of increased competition, broadcasters could no longer assume they could reap monopoly profits and then assert that they would use some of the excess revenues to air the sort of public-interest programming that appeals far more

to the FCC than to local audiences. These changes in the marketplace brought many of the key assumptions about broadcasting into question. Nowhere was this more apparent than with the fairness doctrine, the talisman of broadcaster as fiduciary.

The fairness doctrine mandates that broadcasters give adequate coverage to significant public issues and ensure that such coverage fairly presents conflicting views on those issues. Held constitutional in *Red Lion*, the fairness doctrine encapsulates a journalistic code of ethics to which most reporters and publishers in all media profess allegiance. Nevertheless, as the Court unanimously held in MIAMI HERALD PUBLISHING COMPANY V. TORNILLO (1974), in all other media the idea of fairness is enforced internally rather than by the legal system. For the nonbroadcast media the FIRST AMENDMENT mandates that the government leave issues of fairness to editors and readers, not to judges.

The fairness doctrine allows legal challenges to broadcasters who present controversial programming. Even if the challenges ultimately fail, the questioning of editorial decisions (where the law mandates that the editor answer) not only imposes time and legal costs but also carries the dim possibility of loss of license. There are no similar costs for avoiding controversy, and everyone agrees that is what some broadcasters do. This is precisely the behavior that the CHILLING EFFECT doctrine would predict. *Red Lion* had denied the existence of a chilling effect because the fairness doctrine fit so perfectly within the premises of broadcast regulation, but in the years following *Red Lion*, accented by President RICHARD M. NIXON's attitudes toward the networks as the most visible example of the hated media establishment, the chill became so obvious that it was a major part of the FCC's decision to repeal the doctrine in 1985.

The FCC's repeal was attacked on two fronts. Congress passed legislation codifying the fairness doctrine, but President RONALD REAGAN's veto, on constitutional grounds, was sustained. Similarly the District of Columbia Circuit Court of Appeals, relying on the alternative that the fairness doctrine no longer served the public interest, affirmed the repeal and the Supreme Court denied CERTIORARI in early 1990. Congressional Democrats, however, remain wedded to the fairness doctrine because they confuse its name with its effects and are pressured by constituency groups that view the potential of acquiring airtime as overriding any adverse effects the doctrine might have. As long as the majority party in Congress holds this position, it is likely that the fairness doctrine will be imposed legislatively and the Supreme Court will be forced to settle the constitutional question.

It is conceivable, although unlikely, that the Supreme Court could cling to scarcity as the explanation for the constitutional distinction between print and broadcasting. More likely, however, the Court would either concede there are no relevant constitutional distinctions or fashion a new one, as it did to sustain the regulation of indecency in FEDERAL COMMUNICATIONS COMMISSION V. PACIFICA FOUNDATION (1978). *Pacifica* concluded that broadcasting could be regulated differently because its unique pervasiveness made it an uninvited intruder in the home and in any event it was uniquely accessible to children. Pervasiveness could be the Court's echo of the more common, if unexplained, conclusion that broadcasting is too powerful a force not to be regulated. Although this explanation is antithetical to the First Amendment because of its similarities to the rationale for regulating the press under the English COMMON LAW, power is nevertheless the most likely surviving rationale for treating broadcasting differently. The rationale might be made more platable by a suggestion that broadcasting had obtained its power because of its privileged monopoly status under federal law, so that continued regulation would be both essential and constitutional.

Whatever may be the answer to the constitutional question of the status of over-the-air broadcasting, the answer's importance, if and when it is given, may be largely historical, given the increasing dominance and penetration of cable with its more numerous viewing options. Once a poor stepchild whose growth was hindered by the FCC to benefit broadcasters, by the 1980s cable had become a major force in communications policy. The Cable Communications Policy Act of 1983, a compromise between the cable industry and the National League of Cities, has set the terms of the current debate by allowing cities to select their own (typically monopolistic) franchisees, but freeing cable from most regulations, especially rate regulation, to which it had formerly been subject. The result has been a predictable escalation in the price for cable service, which too often is accompanied by poor service. This combination has led to increasing calls for reregulation. This development places legislative compromises back at issue and makes it increasingly likely that the Court will have to decide where cable fits into the constitutional scheme of FREEDOM OF THE PRESS.

Franchising is the key issue in cable. Almost every city has preferred to grant an exclusive franchise to the operator of its choice, which thereafter enjoys a monopoly. Initially perceived as in the cities' interest by guaranteeing service (and as a patronage plum), the monopoly franchise is increasingly recognized as having the attributes of monopolies everywhere: a poor product at an excessive price. Yet fears remain that allowing unlimited entry may allow a cable company to skim the cream from the best areas (typically high-density residential areas with customers who can pay), leaving other areas of the city with little or no service.

The answer to exclusive franchises and to subsidiary issues such as rate regulation or requiring a cable system to dedicate a fixed number of no-user-cost access channels over which it has no program control will probably turn on how the Supreme Court chooses to conceptualize cable. In *Los Angeles v. Preferred Communications* (1986), the Court ducked a constitutional decision on exclusive franchising, but three options seem dominant: the broadcast model, the print model, and a hybrid of the two. The last, in keeping with recent jurisprudence that every medium is "a law unto itself," would allow the Court to make up rules that strike a majority as sensible as each case arises. The Court's confidence in its ability to tailor constitutional doctrine to the needs and attributes of a new medium of mass communication harkens back to similar ill-fated hopes for its constitutional treatment of broadcasting.

L. A. POWE, JR.
(1992)

Bibliography

KRATTENMAKER, THOMAS G. 1985 The Fairness Doctrine Today. *Duke Law Journal* 1985:151–176.

POWE, LUCAS A., JR. 1987 *American Broadcasting and the First Amendment*. Berkeley: University of California Press.

SPITZER, MATTHEW 1989 The Constitutionality of Broadcast Licensing. *New York University Law Review* 64:990–1071.

## BROADCASTING
(Update 2)

The contours of modern U.S. broadcast regulation were set in RED LION BROADCASTING CO. V. FCC (1969), in which the Supreme Court upheld the FAIRNESS DOCTRINE, which required licensees to cover controversial issues of public importance and provide a reasonable opportunity for the presentation of opposing points of view. The Court explained that in order to avoid interference on the airwaves, a government agency had to limit the number of broadcast speakers. Because only a lucky few could be licensed to broadcast, the government could require those few to act as trustees or fiduciaries on behalf of the larger excluded community, and obligate them to present views, representative of the community, that otherwise would have no broadcasting outlet. Where it received mutually exclusive applications for a single initial broadcast license, the Federal Communications Commission (FCC) held comparative hearings to ensure that it selected the applicant that would best serve the "public interest."

Congress, the courts, and the FCC have moved away from the *Red Lion* model in important respects. The FCC repealed the fairness doctrine in 1987. It held its last comparative hearing in 1994; since 1998, it has resolved those conflicts by auctions.

Yet it remains plain that broadcasting today is not governed by the same FIRST AMENDMENT rules as print. Congress reemphasized in the Telecommunications Act of 1996 that broadcasters retain an obligation—not shared by speakers in other media—to serve the public interest, convenience, and necessity. The FCC has given that obligation life in its children's programming rules. President WILLIAM J. CLINTON appointed a blue-chip advisory body to explore the public-interest obligations that might be imposed on digital broadcasters—which is to say, all television broadcasters after the year 2006. Congress has required direct satellite broadcasters providing video programming to reserve a portion of their channel capacity for noncommercial educational or information programming. None of this is remotely consistent with the print model for regulation of speech. The Court, however, has shown little interest in reexamining broadcasting's special regulatory status.

Regulatory arrangements for cable television, by contrast, have come under sharp constitutional attack. Lower courts have split over whether franchising authorities may, consistently with the First Amendment, require cable operators to provide public, educational, and governmental access channels, or to satisfy technical requirements such as channel capacity or quality of service. The Court has been bedeviled by its cable television docket. *Denver Area Educational Tele-Communications Consortium v. FCC* (1996), examining provisions relating to the broadcast of indecent programming on cable public-access channels, yielded six opinions and no majority. In TURNER BROADCASTING SYSTEM V. FCC (1994) and *Turner Broadcasting System v. FCC* (1997), which upheld statutory provisions requiring cable television systems to transmit the signals of local broadcast stations—so-called "MUST CARRY" LAWS—the Justices found themselves sharply divided over basic principles.

It may be, though, that both Title III of the Communications Act (applying one regulatory scheme to over-the-air broadcast) and Title VI (applying another to cable television) rely on outmoded categories. The explosive growth of the INTERNET—together with the more general trend toward packet-switched transmission of digitized content—is breaking down old regulatory boundaries. Audio and video programming can be transmitted over the Internet in defiance of traditional regulatory models. In *Reno v. ACLU* (1997), the Court—stating that the Internet gives every person "a voice that resounds farther than it could from any soapbox"—indicated that governmental restrictions on Internet speech should be subject to stringent review. As video, voice, and text increasingly shift to

the Internet, new forms of electronic content delivery will develop outside of the broadcast and cable regulatory regimes. Current distinctions among different transport modes may come to seem increasingly artificial. In such a circumstance, current justifications for different constitutional treatment of those transport modes will seem increasingly artificial as well.

JONATHAN WEINBERG
(2000)

Bibliography

CHEN, JIM 1996 The Last Picture Show. *Minnesota Law Review* 80:1415–1510.

KRATTENMAKER, THOMAS and POWE, LUCAS A. 1994 *Regulating Broadcast Programming.* Cambridge, Mass.: MIT Press.

LEVI, LILI 1996 Not With A Bang But A Whimper: Broadcast License Renewal and the Telecommunications Act of 1996. *Connecticut Law Review* 29:243–287.

ROBINSON, GLEN O. 1998 The Electronic First Amendment: An Essay for the New Age. *Duke Law Journal* 47:899–970.

WEINBERG, JONATHAN 1993 Broadcasting and Speech. *California Law Review* 81:1101–1206.

## BROAD CONSTRUCTION

Broad construction, sometimes called "loose construction," is an approach to CONSTITUTIONAL INTERPRETATION emphasizing a permissive and flexible reading of the Constitution, and especially of the powers of the federal government. Like its opposite, STRICT CONSTRUCTION, the phrase has political, rather than technical or legal, significance.

ALEXANDER HAMILTON advocated broad construction in his 1791 controversy with THOMAS JEFFERSON over the constitutionality of the bill to establish the Bank of the United States. The essence of Hamilton's position, which was accepted by President GEORGE WASHINGTON and endorsed by the Supreme Court in MCCULLOCH V. MARYLAND (1819), was the doctrine of IMPLIED POWERS: that the delegated powers implied the power to enact legislation useful in carrying out those powers. The broad constructionists also argued that the NECESSARY AND PROPER CLAUSE empowered Congress to make any law convenient for the execution of any delegated power. Similarly, broad construction justified enactment of the ALIEN AND SEDITION ACTS and expenditures for INTERNAL IMPROVEMENTS.

In his Report on Manufactures (1792) Hamilton advocated a broad construction of the TAXING AND SPENDING POWER that would authorize Congress to spend federal tax money for any purpose connected with the GENERAL WELFARE, whether or not the subject of the appropriation was within Congress's ordinary LEGISLATIVE POWER. Broad construction of the COMMERCE CLAUSE and of the taxing and spending power now forms the constitutional basis for federal regulation of the lives and activities of citizens. Proponents of broad construction argue that the Constitution must be adapted to changing times and conditions. However, a thoroughgoing broad construction is clearly incompatible with the ideas of LIMITED GOVERNMENT and CONSTITUTIONALISM.

The Constitution both grants power to the government and imposes limitations on the exercise of governmental power. Consistent usage would describe the expansive reading of either, and not just of the former, as broad construction. Indeed, President RICHARD M. NIXON frequently criticized the WARREN COURT for its "broad construction" of constitutional provisions guaranteeing the procedural rights of criminal defendants. The more common usage, however, reserves the term for constitutional interpretation permitting a wider scope for governmental activity.

In the late 1970s and the 1980s, broad construction was largely displaced by a new theory of constitutional jurisprudence called "noninterpretivism." Unlike broad construction, which depends upon a relationship between government action and some particular clause of the Constitution, noninterpretivism justifies government action on the basis of values presumed to underlie the constitutional text and to be superior to the actual words in the document.

DENNIS J. MAHONEY
(1986)

Bibliography

AGRESTO, JOHN 1984 *The Supreme Court and Constitutional Democracy.* Ithaca, N.Y.: Cornell University Press.

## *BROADRICK v. OKLAHOMA*
413 U.S. 601 (1973)

The FIRST AMENDMENT doctrine of OVERBREADTH, developed by the WARREN COURT in the 1960s, came under increasing criticism from within the Supreme Court. In *Broadrick*, that criticism culminated in the invention of a "substantial overbreadth" DOCTRINE.

Oklahoma law restricted the political activities of state civil servants; such employees were forbidden to "take part in the management or affairs of any political party or in any political campaign," except to vote or express opinions privately. Three civil servants sued in a federal district court for a declaration that the law was unconstitutional for VAGUENESS and overbreadth. The district court upheld the law, and on direct review the Supreme Court affirmed, 5–4.

Justice BYRON R. WHITE, for the majority, concluded that the overbreadth doctrine should not be used to invalidate

a statute regulating conduct (as opposed to the expression of particular messages or viewpoints) unless the law's overbreadth is "substantial, . . . judged in relation to the statute's plainly legitimate sweep." Although Oklahoma's law was theoretically capable of constitutionally impermissible application to some activities (the use of political buttons or bumper stickers were arguable examples), it was not substantially overbroad—not likely to be applied to a substantial number of cases of constitutionally protected expression. Thus the law's overbreadth did not threaten a significant CHILLING EFFECT on protected speech, and could be cured through "case-by-case analysis" rather than invalidation on its face. Appellants had conceded that their own conduct (campaigning for a superior state official) could be prohibited under a narrowly drawn statute.

Justice WILLIAM J. BRENNAN, for three dissenters, called the decision "a wholly unjustified retreat" from established principles requiring facial invalidation of laws capable of applications to prohibit constitutionally protected speech. Justice WILLIAM O. DOUGLAS, dissenting, generally attacked the validity of laws restricting public employees' political activity.

On the same day the Court reaffirmed, 6–3, the validity of the HATCH ACT, which similarly restricts federal civil servants, in *Civil Service Commission v. National Association of Letter Carriers* (1973).

KENNETH L. KARST
(1986)

## *BROCKETT v. SPOKANE ARCADES, INC.*
472 U.S. 491 (1985)

The *Brockett* opinion refined the DOCTRINE of OVERBREADTH in FIRST AMENDMENT cases. A Washington statute provided both civil and criminal sanctions against "moral nuisances"—businesses purveying "lewd" matter. Various purveyors of sexually oriented books and films sued in federal district court for a DECLARATORY JUDGMENT that the law was unconstitutional and an INJUNCTION against its enforcement. That court denied relief, but the court of appeals held the law INVALID ON ITS FACE. The defect, the court said, was the law's definition of "lewd" matter, which followed the Supreme Court's formula defining OBSCENITY, but defined the term "prurient" to include material that "incites lasciviousness or lust." That definition was substantially overbroad, the court said, because it included material that aroused only a normal, healthy interest in sex.

A 6–2 Supreme Court reversed, in an opinion by Justice BYRON R. WHITE. The Court agreed that, under MILLER V. CALIFORNIA (1973), a work could not be held obscene if its only appeal were to "normal sexual reactions" and accepted the lower court's interpretation that "lust" would embrace such a work. However, Justice White said, these plaintiffs were not entitled to a facial invalidation of the law. They had alleged that their own films and books were not obscene, but were constitutionally protected. In such a case, there is "no want of a proper party to challenge the statute, no concern that an attack on the statute will be unduly delayed or protected speech discouraged." The proper course would be to declare the statute's partial invalidity—here, to declare that the law would be invalid in application to material appealing to "normal . . . sexual appetites." In contrast, when the state seeks to enforce such a partially invalid statute against a person whose own speech or conduct is constitutionally *unprotected*, the proper course, assuming the law's substantial overbreadth, is to invalidate the law entirely. The result is ironic, but explainable. In the latter case, if the court did not hold the law invalid on its face, there would be a serious risk of a CHILLING EFFECT on the potential protected speech of others who were not in court.

The propriety of partial invalidation depended on the SEVERABILITY of the Washington statute, but that issue was easily resolved: the law contained a severability clause, and surely the legislature would not have abandoned the statute just because it could not be applied to material appealing to normal sexual interests.

Justice SANDRA DAY O'CONNOR joined the OPINION OF THE COURT but argued separately, joined by Chief Justice WARREN E. BURGER and Justice WILLIAM H. REHNQUIST, that the case was appropriate for federal court ABSTENTION, awaiting guidance from the state courts on the statutory meaning of "lust." Justice WILLIAM J. BRENNAN, joined by Justice THURGOOD MARSHALL, dissented, agreeing with the court of appeals.

KENNETH L. KARST
(1986)

## *BRONSON v. KINZIE*
1 Howard 311 (1843)

As a result of the depression of 1837 many states passed debtors' relief legislation to assist property holders who were losing their farms and homes by foreclosure. Illinois, for example, provided that foreclosed property could not be sold at auction unless it brought two-thirds of its appraised value, and that the property sold at foreclosure might be repurchased by the debtor within one year at the purchase price plus ten percent. Such legislation, which operated retroactively on existing contracts, did not directly affect their obligation, the duties of the contracting parties toward each other; it affected their remedies, the

means by which the OBLIGATION OF CONTRACTS can be enforced.

By a vote of 7–1 the Supreme Court held the Illinois statutes unconstitutional on the ground that they violated the CONTRACT CLAUSE. The opinion of Chief Justice ROGER B. TANEY remained the leading one on the subject for ninety years, until distinguished away by HOME BUILDING LOAN ASSOCIATION V. BLAISDELL (1934). Taney conceded that the states have power to change the remedies available to creditors confronted by defaulting debtors, on condition that the changed remedy does not impair the obligation of existing contracts. "But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself." Taney reasoned that the rights of a contracting party could be "seriously impaired by binding the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing." In this case he found that if the state could allow the debtor to repurchase his lost property within a year, it might allow still more time, making difficult a determination of how much time the state might allow. Taney did not say why one year was too long, or why the Court could not fix a rule. He did say that the state requirement fixing two-thirds of the value as the minimum purchasing price "would frequently render any sale altogether impossible." He offered no test by which the state could know whether a change in the remedy adversely affected the obligation of a contract. Justice JOSEPH STORY privately wrote, "There are times when the Court is called upon to support every sound constitutional doctrine in support of the rights of property and of creditors."

LEONARD W. LEVY
(1986)

## BROOM, JACOB
(1752–1810)

Jacob Broom, a member of the CONSTITUTIONAL CONVENTION OF 1787 from Delaware, was a signer of the Constitution. He spoke briefly several times, exhibiting a desire to protect small-state interests and a distrust of a strong executive. When some delegates wanted to dissolve the Convention over the issue of REPRESENTATION, Broom argued against them.

DENNIS J. MAHONEY
(1986)

## BROWN, HENRY BILLINGS
(1836–1913)

Henry Billings Brown served on the Supreme Court from 1890 to 1906. During that period, he wrote more than 450 majority opinions and dissenting or CONCURRING OPINIONS in some fifty other cases, many of which had contemporary and historical significance. Justice Brown's jurisprudence revealed some hesitance, some ambivalence, even contradiction as he struggled to perform the judicial function.

The glorification of private property and free competition reflected one dimension of Brown's thought. He considered the right of private property "the first step in the emergence of the civilized man from the condition of the utter savage," and he joined the majority in LOCHNER V. NEW YORK (1905), striking down a state law that limited the hours of bakery workers to a maximum of sixty per week or ten per day. Yet Brown usually construed the STATE POLICE POWER broadly and sanctioned legislative modification of laissez faire principles. In HOLDEN V. HARDY (1898) Brown upheld Utah's maximum hours act for miners, rejecting arguments that the state had violated the CONTRACT CLAUSE and denied property without DUE PROCESS. He looked realistically at the disparity in bargaining position between employer and employee, recognizing that fear of losing their jobs prompted laborers to perform work detrimental to their health. Concern for public health and inequality of bargaining power justified the state regulation.

POLLOCK V. FARMERS' LOAN & TRUST CO. (1895) also revealed Brown's willingness to permit legislative regulation of private property. When the Court struck down a congressional tax on incomes, Brown eloquently dissented, protesting that the decision ignored a century of "consistent and undeviating" precedent and represented "a surrender of the TAXING POWER to the moneyed class." Although opponents of the tax had raised the specter of socialism to dissuade Congress from raising funds, Brown construed *Pollock* as "the first step toward the submergence of the liberties of the people in a sordid despotism of wealth."

Brown supported the gradual development of federal power as a necessary concomitant to a modern industrial economy. He also wrote many of the Court's ADMIRALTY opinions, broadly interpreting federal JURISDICTION and the scope of federal maritime law. Brown similarly endorsed an expansive federal power under the COMMERCE CLAUSE, joining, for example, Justice OLIVER WENDELL HOLMES' classic statement of the STREAM OF COMMERCE doctrine in SWIFT & CO. V. UNITED STATES (1905).

Brown's CRIMINAL PROCEDURE and CIVIL LIBERTIES opinions reflected the general attitude of late nineteenth-, early twentieth-century America toward criminals, blacks, and women. In BROWN V. WALKER (1896) he held that the Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION was not violated if the state coerced testimony and afforded IMMUNITY from criminal prosecution. Social disgrace and ridicule might result from invoking the Fifth Amendment,

but a "self-confessed criminal" did not deserve protection from his neighbors' negative judgment.

Brown's callousness to CIVIL RIGHTS is manifest in one of the most infamous decisions of the nineteenth century—PLESSY V. FERGUSON (1896). For the Court, Brown upheld a Louisiana statute requiring railroads to provide "equal but separate accommodations" for "white" and "colored" patrons. In a remarkably disingenuous opinion, he reasoned that the statute had "no tendency to destroy the legal equality of the two races" and did "not necessarily imply the inferiority of either race to the other." Brown rejected a Fourteenth Amendment EQUAL PROTECTION challenge, citing as precedent state cases decided prior to passage of the FOURTEENTH AMENDMENT. To Brown the Louisiana law was a reasonable legislative decision consistent with "the established usages, customs and traditions of the people." In other words, Brown conceived civil rights as adequately protected in the legislative process; he did not envision civil rights as enforceable by a minority against the majority. *Plessy* mirrored the late nineteenth-century's belief in physical and social differences between the races. Contemporary scientific and social science thought considered the Negro and Caucasian races as biologically separate and the Caucasian race as superior. In *Plessy,* Brown constitutionalized the prevailing prejudices of his era.

ROBERT JEROME GLENNON
(1986)

Bibliography

GLENNON, ROBERT JEROME 1973 Justice Henry Billings Brown: Values in Tension. *University of Colorado Law Review* 44: 553–604.

## *BROWN v. ALLEN*
344 U.S. 443 (1953)

In *Brown v. Allen* the Supreme Court rejected the claim that North Carolina practiced unconstitutional JURY DISCRIMINATION. Speaking through Justice STANLEY F. REED, the Court held that the state did not deny EQUAL PROTECTION to blacks by randomly selecting jury panels from lists of property taxpayers, even though there was still a significantly smaller proportion of black jurors than black citizens. The Court declined to consider whether selecting for jury duty those with the most property constituted WEALTH DISCRIMINATION. Justices HUGO L. BLACK, FELIX FRANKFURTER, and WILLIAM O. DOUGLAS, dissenting, argued that the tax-list selection technique was not a "complete neutralization of RACIAL DISCRIMINATION."

DENNIS J. MAHONEY
(1986)

## *BROWN v. BOARD OF EDUCATION*
347 U.S. 483 (1954)
349 U.S. 294 (1955)

In the dual perspectives of politics and constitutional development, *Brown v. Board of Education* was the Supreme Court's most important decision of the twentieth century. In four cases consolidated for decision, the Court held that racial SEGREGATION of public school children, commanded or authorized by state law, violated the FOURTEENTH AMENDMENT's guarantee of the EQUAL PROTECTION OF THE LAWS. A companion decision, BOLLING V. SHARPE (1954), held that school segregation in the DISTRICT OF COLUMBIA violated the Fifth Amendment's guarantee of DUE PROCESS OF LAW.

*Brown* illustrates how pivotal historical events, viewed in retrospect, can take on the look of inevitability. To the actors involved, however, the decision was anything but a foregone conclusion. The principal judicial precedent, after all, was PLESSY V. FERGUSON (1896), which had upheld the racial segregation of railroad passengers, partly on the basis of an earlier Massachusetts decision upholding school segregation. More recent Supreme Court decisions had invalidated various forms of segregation in higher education without deciding whether *Plessy* should be overruled. Just a few months before the first *Brown* decision, Robert Leflar and Wylie Davis outlined eleven different courses open to the Supreme Court in the cases before it.

The four cases we now call *Brown* were the culmination of a twenty-year litigation strategy of the NAACP, aimed at the ultimate invalidation of segregation in education. (See SEPARATE BUT EQUAL DOCTRINE.) Part of that strategy had already succeeded; the Supreme Court had ordered the admission of black applicants to state university law schools, and had invalidated a state university's segregation of a black graduate student. The opinions in those cases had emphasized intangible elements of educational quality, particularly the opportunity to associate with persons of other races. (See SWEATT V. PAINTER.) The doctrinal ground was thus prepared for the Court to strike down the segregation of elementary and secondary schools—if the Court was ready to occupy that ground.

The Justices were sensitive to the political repercussions their decision might have. The cases were argued in December 1952, and in the ordinary course would have been decided by the close of the Court's term in the following June or July. Instead of deciding, however, the Court set the five cases for reargument in the following term and proposed a series of questions to be argued, centering on the history of the adoption of the Fourteenth Amendment and on potential remedies if the Court

should rule against segregation. The available evidence suggests that the Court was divided on the principal issue in the cases—the constitutionality of separate but equal public schools—and that Justice FELIX FRANKFURTER played a critical role in persuading his brethren to put the case over so that the incoming administration of President DWIGHT D. EISENHOWER might present its views as AMICUS CURIAE. It is clear that the discussion at the Court's CONFERENCE on the cases had dealt not only with the merits of the black children's claims but also with the possible reaction of the white South to a decision overturning school segregation. Proposing questions for the reargument, Justice Frankfurter touched on the same concern in a memorandum to his colleagues: ". . . for me the ultimate crucial factor in the problem presented by these cases is psychological—the adjustment of men's minds and actions to the unfamiliar and the unpleasant."

When Justice Frankfurter wrote of "the adjustment of men's minds," he had whites in mind. For blacks, Jim Crow was an unpleasant reality that was all too familiar. It is not surprising that the Justices centered their political concerns on the white South; lynchings of blacks would have been a vivid memory for any Justice who had come to maturity before 1930. In any event the Court handled the *Brown* cases from beginning to end with an eye on potential disorder and violence among southern whites.

Chief Justice FRED M. VINSON, who had written the opinions invalidating segregation in higher education, appeared to some of his brethren to oppose extending the reasoning of those opinions to segregation in the public schools. Late in the summer of 1953, five weeks before the scheduled reargument of *Brown*, Vinson died suddenly from a heart attack. With *Brown* in mind, Justice Frankfurter said, in a private remark that has since become glaringly public, "This is the first indication I have ever had that there is a God."

Vinson's replacement was the governor of California, EARL WARREN. At the *Brown* reargument, which was put off until December, he did not say much. In conference, however, Warren made clear his view that the separate but equal doctrine must be abandoned and the cases decided in favor of the black children's equal protection claim. At the same time, he though the Court should avoid "precipitous action that would inflame more than necessary." The conference disclosed an apparent majority for the Chief Justice's position, but in a case of such political magnitude, a unanimous decision was devoutly to be wished. The vote was thus postponed, while the Chief Justice and Justice Frankfurter sought for ways to unite the Court. Near-unanimity seems to have been achieved by agreement on a gradual enforcement of the Court's decision. A vote of 8–1 emerged late in the winter, with Justice ROBERT H. JACKSON preparing to file a separate concurrence. When Jackson suffered a heart attack, the likelihood of his pursuing an independent doctrinal course diminished. The Chief Justice circulated a draft opinion in early May, and at last Justice STANLEY F. REED was persuaded of the importance of avoiding division in the Court. On May 17, 1954, the Court announced its decision. Justice Jackson joined his brethren at the bench, to symbolize the Court's unanimity.

The opinion of the Court, by Chief Justice Warren, was calculatedly limited in scope, unilluminating as to doctrinal implications, and bland in tone. The South was not lectured, and no broad pronouncements were made concerning the fate of Jim Crow. *Plessy* was not even overruled—not then. Instead, the opinion highlighted two points of distinction: the change in the status of black persons in the years since *Plessy*, and the present-day importance of public education for the individual and for American society. Borrowing from the opinion of the lower court in the Kansas case (*Brown* itself), the Chief Justice concluded that school segregation produced feelings of inferiority in black children, and thus interfered with their motivation to learn; as in the graduate education cases, such intangibles were critical in evaluating the equality of the educational opportunity offered to blacks. In *Plessy*, the Court had brushed aside the argument that segregation stamped blacks with a mark of inferiority; the *Brown* opinion, on the contrary, stated that modern psychological knowledge verified the argument, and in a supporting footnote cited a number of social science authorities. (See LEGISLATIVE FACTS.) Segregated education was inherently unequal; the separate but equal doctrine thus had no place in education.

In the ordinary equal protection case, a finding of state-imposed inequality is only part of the inquiry; the Court goes on to examine into justifications offered by the state for treating people unequally. In these cases the southern states had argued that segregation promoted the quality of education, the health of pupils, and the tranquillity of schools. The *Brown* opinion omitted entirely any reference to these asserted justifications. By looking only to the question of inequality, the Court followed the pattern set in earlier cases applying the separate but equal doctrine. However, in its opinion in the companion case from the District of Columbia, the Court added this remark: "Segregation in public education is not reasonably related to any proper governmental objective. . . ." With those conclusory words, the Court announced that further inquiry into justifications for school segregation was foreclosed.

The *Brown* opinion thus presented a near-minimum political target, one that could have been reduced only by the elimination of its social science citations. Everyone understood the importance of educational opportunity. Nothing was intimated about segregation in PUBLIC ACCOM-

MODATIONS or state courthouses, hospitals, or prisons. Most important of all, the Court issued no orders to the defendant school boards, but set the cases for yet another argument at the next term on questions of remedy: should segregation be ended at once, or gradually? Should the Supreme Court itself frame the decrees, or leave that task to the lower courts or a SPECIAL MASTER?

A full year passed before the Court issued its remedial opinion. *Brown II*, as that opinion is sometimes called, not only declined to order an immediate end to segregation but also failed to set deadlines. Instead, the Court told the lower courts to require the school boards to "make a prompt and reasonable start" towart "compliance at the earliest practicable date," taking into account such factors as buildings, transportation systems, personnel, and redrawing of attendance district lines. The lower courts should issue decrees to the end of admitting the plaintiff children to the schools "on a racially nondiscriminatory basis with ALL DELIBERATE SPEED. . . ."

This language looked like—and was—a political compromise; something of the sort had been contemplated from the beginning by Chief Justice Warren. Despite the Court's statement that constitutional principles could not yield to disagreement, the white South was told, in effect, that it might go on denying blacks their constitutional rights for an indefinite time, while it got used to the idea of stopping. Unquestionably, whatever the Court determined in 1954 or 1955, it would take time to build the sense of interracial community in the South and elsewhere. But in *Brown II* the Court sacrificed an important part of its one legitimate claim to political and moral authority: the defense of principle. A southern intransigent might say: after all, if *Brown* really did stand for a national principle, surely the principle would not be parceled out for separate negotiation in thousands of school districts over an indefinite time. The chief responses of the white South to the Court's gradualism were defiance and evasion. (See DESEGREGATION.) In 1956 a "Southern Manifesto," signed by nineteen Senators and 82 members of the House of Representatives, denounced *Brown* as resting on "personal political and social ideas" rather than the Constitution. One Mississippi senator, seeking to capitalize on the country's recent anticommunist fervor, called racial integration "a radical, pro-Communist political movement." President Eisenhower gave the decision no political support, promising only to carry out the law of the land.

Criticism of another sort came from Herbert Wechsler, a Columbia law professor with impressive credentials as a CIVIL RIGHTS advocate. Wechsler argued that the Supreme Court had not offered a principled explanation of the *Brown* decision—had not supported its repeated assertion that segregation harmed black school children. Charles L. Black, Jr., a Texan and a Yale professor who had worked on the NAACP briefs in *Brown*, replied that all Southerners knew that Jim Crow was designed to maintain white supremacy. School segregation, as part of that system, must fall before a constitutional principle forbidding states deliberately to disadvantage a racial group. This defense of the *Brown* decision is irrefutable. But the *Brown* opinion had not tied school segregation to the system of Jim Crow, because Chief Justice Warren's strategy had been to avoid sweeping pronouncements in the interest of obtaining a unanimous Court and minimizing southern defiance and violence.

Within a few years, however, in a series of PER CURIAM orders consisting only of citations to *Brown*, the Court had invalidated state-supported segregation in all its forms. In one case *Plessy* was implicitly overruled. Jim Crow was thus buried without ceremony. Yet the intensity of the southern resistance to *Brown* shows that no one had been deceived into thinking that the decision was limited to education. Not only did the occasion deserve a clear statement of the unconstitutionality of the system of racial segregation; political practicalities also called for such a statement. The Supreme Court's ability to command respect for its decisions depends on its candid enunciation of the principles underlying those decisions.

Both *Brown* opinions, then, were evasions. Even so, *Brown* was a great decision, a personal triumph for a great Chief Justice. For if *Brown* was a culmination, it was also a beginning. The decision was the catalyst for a political movement that permanently altered race relations in America. (See SIT-IN; CIVIL RIGHTS ACT OF 1964; VOTING RIGHTS ACT OF 1965.) The success of the civil rights movement encouraged challenges to other systems of domination and dependency: systems affecting women, ALIENS, illegitimate children, the handicapped, homosexuals. Claims to racial equality forced a reexamination of a wide range of institutional arrangements throughout American society. In constitutionaldoctrinal terms, *Brown* was the critical event in the modern development of the equal protection clause as an effective guarantee of equal CITIZENSHIP, a development that led in turn to the rebirth of SUBSTANTIVE DUE PROCESS as a guarantee of fundamental personal liberties. After *Brown*, the federal judiciary saw itself in a new light, and all Americans could see themselves as members of a national community.

KENNETH L. KARST
(1986)

Bibliography

BELL, DERRICK 1980 *Brown v. Board of Education* and the Interest-Convergence Dilemma. *Harvard Law Review* 93: 518–533.

BLACK, CHARLES L., JR. 1960 The Lawfulness of the Segregation Decisions. *Yale Law Journal* 69:421–430.
KLUGER, RICHARD 1975 *Simple Justice.* New York: Knopf.
LEFLAR, ROBERT A. and DAVIS, WYLIE H. 1954 Segregation in the Public Schools—1953. *Harvard Law Review* 67:377–435.
WECHSLER, HERBERT 1959 Toward Neutral Principles of Constitutional Law. *Harvard Law Review* 73:1–35.
WILKINSON, J. HARVIE, III 1979 *From Brown to Bakke.* New York: Oxford University Press.

## *BROWN v. MARYLAND*
12 Wheat. 419 (1827)

The Court, over the sole dissent of Justice SMITH THOMPSON, held unconstitutional a state act imposing an annual license tax of $50 on all importers of foreign merchandise. Since the state charged only $8 for a retailer's license, the Court could have found that the license tax on wholesalers of imported goods discriminated against FOREIGN COMMERCE, but Chief Justice JOHN MARSHALL, for the Court, expressly declined to give an opinion on the discrimination issue. Marshall rested his opinion partly on a finding that the license tax constituted a state IMPOST or customs duty on imports, contrary to the IMPORT-EXPORT CLAUSE of Article I, section 16, clause 2, of the Constitution. The sale of an import, Marshall reasoned, is inseparably related to bringing it into the country under congressional tariff acts and paying the duty on it.

Marshall had still greater interests to protect. He turned this simple case of a prohibited state impost, or of a state discrimination against foreign commerce, into an opportunity to lay down a rule explaining when federal authority over foreign commerce ceased and the state power to tax its internal commerce began: as long as the importer retained the property in his possession in the "original package" in which he imported it, federal authority remained exclusive; but when the importer broke the package and mixed the merchandise with other property, it became subject to STATE TAXATION. Marshall therefore found that the state act was a violation of the COMMERCE CLAUSE interpreted as vesting an exclusive national power, as well as a violation of the import-export clause, and Marshall added, "we suppose the principles laid down in this case, to apply equally to importations from a sister State."

In the time of Chief Justice ROGER B. TANEY (who represented the state in *Brown*), the Court rejected that supposition and still later ruled that the ORIGINAL PACKAGE DOCTRINE applies only to foreign commerce. Although many imports, like crude oil and natural gas, no longer come in "packages," making the doctrine inapplicable, a state tax on foreign commerce still in transit remains an unconstitutional impost. But little remains today of the original package doctrine. In MICHELIN TIRE CORP. V. WAGES (1976) the Court abandoned the doctrine in cases involving nondiscriminatory *ad valorem* property taxes, ruling that such taxes, even on goods imported from abroad and remaining in their original packages, do not fall within the constitutional prohibition against state taxation of imports.

LEONARD W. LEVY
(1986)

## *BROWN v. MISSISSIPPI*
297 U.S. 278 (1936)

In this landmark decision, the Court for the first time held unconstitutional on DUE PROCESS grounds the use of a coerced confession in a state criminal proceeding. In a unanimous opinion reflecting outrage at the judicial system of Mississippi as well as at its law enforcement officers, Chief Justice CHARLES EVANS HUGHES found difficult to imagine methods "more revolting to the sense of justice" than those used by the state in this case. The record showed that prolonged "physical torture" of black suspects extorted their confessions; they were tried in a rush without adequate defense, were convicted solely on the basis of the confessions which they repudiated, and were quickly sentenced to death. The transcript read "like pages torn from some medieval account. . . ."

Yet the state supreme court, over dissenting opinions, had sustained the convictions on the basis of arguments later used by the state before the Supreme Court: under TWINING V. JERSEY (1908) the Constitution did not protect against compulsory self-incrimination in state courts, and counsel for the prisoners had not made a timely motion for exclusion of the confessions after proving coercion. To these arguments, Hughes replied, first, "Compulsion by torture to extort a confession is a different matter. . . . The rack and torture chamber may not be substituted for the witness stand" except by a denial of due process of law. The state could regulate its own CRIMINAL PROCEDURE only on condition that it observed the fundamental principles of liberty and justice. Second, Hughes regarded counsel's technical error as irrelevant compared to the fact that the wrong committed by the state was so fundamental that it made the whole proceeding a "mere pretense of a trial" and rendered the convictions void.

*Brown* did not revolutionalize state criminal procedure or abolish third-degree methods. But it proved to be the foundation for thirty years of decisions on POLICE INTERROGATION AND CONFESSIONS, finally resulting in an overruling of *Twining* and a constitutional law intended by the FOURTEENTH AMENDMENT.

LEONARD W. LEVY
(1986)

## *BROWN v. SOCIALIST WORKERS '74 CAMPAIGN COMMITTEE*
459 U.S. 87 (1982)

In BUCKLEY V. VALEO (1976) the Supreme Court refused to recognize a blanket FIRST AMENDMENT right of minor political parties to keep their contributors and their disbursements confidential. The Court said, however, that such a right would be recognized in particular cases when parties could show that political privacy was essential to their exercise of First Amendment rights. *Brown* was such a case. The party had shown a "reasonable probability of threats, harassment, or reprisals" in the event of disclosure. The Court thus held, unanimously, that Ohio could not compel the disclosure of contributions to the party, and held, 6–3, that the same logic protected against compulsory disclosure of the party's expenditures, such as wages or reimbursements paid to party members and supporters.

KENNETH L. KARST
(1986)

## *BROWN v. UNITED STATES*
381 U.S. 437 (1965)

This decision revitalized the Constitution's prohibitions on BILLS OF ATTAINDER. The TAFT-HARTLEY ACT had made it a crime for a member of the Communist party to be a labor union officer. Brown, convicted under this law, argued that it violated the FIRST AMENDMENT, the Fifth Amendment's DUE PROCESS clause, and Article I, section 9, which forbids Congress to pass a bill of attainder. A 5–4 Supreme Court agreed with the latter argument. Citing CUMMINGS V. MISSOURI (1867), EX PARTE GARLAND (1867), and UNITED STATES V. LOVETT (1946), Chief Justice EARL WARREN said that the law amounted to legislative punishment of a specifically designated group. Congress might weed dangerous persons out of the labor movement, but it must use rules of general applicability, leaving adjudication to other tribunals. (See also IRREBUTTABLE PRESUMPTIONS.) Justice BYRON R. WHITE, for the dissenters, argued that Congress had shown no punitive purpose, but had intended to prevent future political strikes.

KENNETH L. KARST
(1986)

## *BROWN v. WALKER*
161 U.S. 591 (1896)

After COUNSELMAN V. HITCHCOCK (1892) Congress authorized transactional immunity to compel the testimony of anyone invoking the RIGHT AGAINST SELF-INCRIMINATION in a federal proceeding. Appellant, despite a grant of immunity, refused to testify before a GRAND JURY investigating criminal violations of federal law. He argued that Congress could not supersede a constitutional provision by a mere statute and that the statute did not immunize him from all liabilities that might ensue from incriminating admissions. The Supreme Court, by a 5–4 majority, held that the act provided an immunity commensurate with the scope of the Fifth Amendment right and therefore constitutionally supplanted it.

Justice HENRY B. BROWN, for the Court, declared that if the compulsory disclosures could not possibly expose the witness to criminal jeopardy, the demand of the Fifth Amendment was satisfied. The statute did not have to protect him from every possible detriment that might result from his evidence, as long as it exempted the witness from prosecution for any crime to which he testified under compulsion. If his testimony "operates as a complete pardon for the offense to which it relates,—a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause of question." But he could be compelled to be a witness against himself if a statute of limitations barred prosecution, if his evidence merely brought him into public disgrace, or if he had already received a pardon or absolute immunity and thus stood with respect to such offense "as if it had never been committed."

The dissenters argued that the act was unconstitutional because the amendment protected the witness from compulsory testimony that would expose him to INFAMY even in the absence of a prosecution. They added that the act also exposed the witness to a possible prosecution for perjury, which could not possibly be imputed if he did not have to testify. (See IMMUNITY GRANTS.)

LEONARD W. LEVY
(1986)

## *BROWNING-FERRIS INDUSTRIES, INC. v. KELCO DISPOSAL, INC.*

See: Punitive Damages

## BRYCE, JAMES
(1838–1922)

Educated at Oxford University and called to the bar at Lincoln's Inn, James Bryce was Regius Professor of Civil Law at Oxford from 1870 until 1893. A member of the Liberal party, he served in the House of Commons (1874–1906) and was a member of four cabinets. His writings on American government and politics were influential both

in America and abroad and he was even elected president of the American Political Science Association.

Bryce's most noted work on America was *The American Commonwealth* (1888; last revised, 1910). Rejecting the model of ALEXIS DE TOCQUEVILLE's *Democracy in America*, Bryce set out to describe the American experience without deriving from it any general theories about democracy. A well-educated and widely traveled British politician, Bryce was most impressed by the very constitutional principles Americans frequently take for granted: JUDICIAL REVIEW, and a fixed, written FUNDAMENTAL LAW beyond the amending power of the legislature. He thought the diffusion and limitation of governmental power in America were valuable safeguards against despotism, and that bicameralism and separation of powers provided the opportunity for full discussion of important measures; but he saw two great defects: the possibility that deadlock would prevent prompt action and the difficulty of fixing personal responsibility for policies and actions.

One of Bryce's important contributions as an empirical political scientist was his treatment of the POLITICAL PARTIES. The parties, he observed, constituted "a sort of second and unofficial government" directing the affairs of the legally constituted institutions. The party system counteracted the effects of federalism and separation of powers by linking the interests of legislative and executive officers and by making the results of local elections dependent upon national issues.

Bryce published thirteen other books, including *Studies in History and Jurisprudence* (1901) and *Modern Democracies* (1921), which present American government in comparative perspective, and numerous articles. He was the British ambassador to the United States from 1907 until 1913, and upon his retirement was elevated to the peerage as Viscount Bryce.

DENNIS J. MAHONEY
(1986)

Bibliography

IONS, EDMUND S. 1970 *James Bryce and American Democracy, 1870–1920.* New York: Humanities Press.

## BUCHANAN, JAMES
(1791–1868)

A Pennsylvania attorney, James Buchanan was a congressman (1821–1831), minister to Russia and Britain (1832–1834, 1853–1856), senator (1834–1845), secretary of state (1845–1849), and President (1856–1861). In 1831 Buchanan thwarted a repeal of the Supreme Court's APPELLATE JURISDICTION under section 25 of the JUDICIARY ACT OF 1789. The rest of his prepresidential career reflected his Democratic party regularity and support of STATES' RIGHTS. He attacked Chief Justice ROGER B. TANEY's nationalistic opinion in *Holmes v. Jennison* (1840), denounced the HOLDING in MCCULLOCH V. MARYLAND (1819), and urged a reduction in the number of Supreme Court Justices. In 1844 he declined an appointment to the Court. A close friend of many Southerners, Buchanan hated ABOLITIONISTS, always supported constitutional and congressional protection for slavery, and was the archetypal doughface—the northern man with southern principles. This outlook continued to his presidency and helped undermine it.

Before his inaugural address, Buchanan conversed with Chief Justice Taney while the audience looked on. In his address Buchanan observed that the question of SLAVERY IN THE TERRITORIES was of "little practical importance," in part because it was a "judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit. . . ." Two days later the decision was announced in DRED SCOTT V. SANDFORD (1857), and it appeared to many that Taney improperly had informed Buchanan of what the pending decision would hold. For over a month before the decision Buchanan had communicated with Justice JOHN CATRON of Tennessee and ROBERT C. GRIER of Pennsylvania about the case, successfully urging them to support Taney's position that the MISSOURI COMPROMISE was unconstitutional. Two years later, in his "House Divided Speech," ABRAHAM LINCOLN would accuse Buchanan of conspiring with Taney, President FRANKLIN PIERCE, and Senator STEPHEN A. DOUGLAS to force slavery into the territories. Although there was no conspiracy on this issue, Buchanan promoted slavery in the territories. In 1858 he unsuccessfully attempted to bring Kansas into the Union under the proslavery LECOMPTON CONSTITUTION. His support of slavery and southern Democrats helped split the party in 1860 over Douglas's nomination.

After Lincoln's election Buchanan presided over the disintegration of the Union, failing to act in any meaningful way. In December 1860 he blamed the crisis on the "long-continued and intemperate interference of the Northern people with the question of slavery in the Southern States. . . ." He asserted the Union "was intended to be perpetual," and that SECESSION "is revolution," but he also concluded that neither Congress nor the President had any constitutional authority "to coerce a State into submission which is attempting to withdraw" from the Union. The Union, he declared, rested "on public opinion." Buchanan spent his last few months in office vainly seeking a compromise which the South no longer wanted and whose terms the North found unacceptable. During

these months Buchanan failed to protect military positions in the South, preserve national authority there, or prepare the nation for the impending war. Buchanan bequeathed to Lincoln a Union from which seven states had departed.

PAUL FINKELMAN
(1986)

Bibliography

SMITH, ELBERT B. 1975 *The Presidency of James Buchanan.* Lawrence: University of Kansas Press.

## *BUCHANAN v. WARLEY*
### 245 U.S. 60 (1917)

*Buchanan* was the most important race relations case between PLESSY V. FERGUSON (1896) and SHELLEY V. KRAEMER (1948). A number of southern border cities had adopted residential SEGREGATION ordinances. NAACP attorneys constructed a TEST CASE challenging the constitutionality of Louisville's ordinance, which forbade a "colored" person to move into a house on a block in which a majority of residences were occupied by whites, and vice versa. A black agreed to buy from a white a house on a majority-white block, provided that the buyer had the legal right to occupy the house. The seller sued to compel performance of the contract; the buyer defended on the basis of the ordinance. The Kentucky courts upheld the ordinance. In the Supreme Court, both sides focused the argument on the constitutionality of neighborhood segregation. An unusual number of AMICUS CURIAE briefs attested to the case's importance.

A unanimous Supreme Court reversed, holding the ordinance invalid. Justice WILLIAM R. DAY's opinion discussed at length the rights to racial equality and the "dignity of citizenship" established in the THIRTEENTH and FOURTEENTH AMENDMENTS, as well as the rights to purchase and hold property, established by the CIVIL RIGHTS ACT OF 1866. He lamely distinguished *Plessy* as a case in which no one had been denied the use of his property. Ultimately, however, he rested decision on a theory of SUBSTANTIVE DUE PROCESS: the ordinance unconstitutionally interfered with property rights.

Day's curious opinion may have aimed at persuading two of his brethren. Justice JAMES C. MCREYNOLDS generally attached greater weight to claims of constitutional property rights than to claims to racial equality. And Justice OLIVER WENDELL HOLMES had prepared a draft DISSENTING OPINION that was not delivered, arguing that the white seller lacked STANDING to assert the constitutional right of blacks.

Despite the ground for decision, *Buchanan* was seen by the press as a major CIVIL RIGHTS victory for blacks. And when the Supreme Court faced ZONING in a nonracial context, it upheld an ordinance in VILLAGE OF EUCLID V. AMBLER REALTY CO. (1926). *Buchanan* plainly was more than a property rights decision.

KENNETH L. KARST
(1986)

Bibliography

SCHMIDT, BENNO C., JR. 1982 Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow. *Columbia Law Review* 82:444, 498–523.

## *BUCK v. BELL*
### 274 U.S. 200 (1927)

In *Buck* the Supreme Court upheld, 8–1, a Virginia law authorizing the STERILIZATION of institutionalized mental defectives without their consent. Justice OLIVER WENDELL HOLMES, for the Court, wrote an opinion notable for epigram and insensitivity. Virginia's courts had ordered the sterilization of a "feeble minded" woman, whose mother and child were similarly afflicted, finding that she was "the probable potential parent of socially inadequate offspring," and that sterilization would promote both her welfare and society's. Holmes, the Civil War veteran, remarked that public welfare might "call upon the best citizens for their lives"; these "lesser sacrifices" were justified to prevent future crime and starvation. There was no violation of SUBSTANTIVE DUE PROCESS. Citing JACOBSON V. MASSACHUSETTS (1905), he said, "The principle that sustains compulsory VACCINATION is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough."

Turning to EQUAL PROTECTION, which he called "the usual last resort of constitutional arguments," Holmes saw no violation in the law's reaching only institutionalized mental defectives and not others: "the law does all that is needed when it does all that it can." Justice PIERCE BUTLER noted his dissent.

Although *Buck* continues to be cited, its current authority as precedent is doubtful. (See SKINNER V. OKLAHOMA.)

KENNETH L. KARST
(1986)

Bibliography

CYNKAR, ROBERT J. 1981 Buck v. Bell: "Felt Necessities" v. Fundamental Values? *Columbia Law Review* 81:1418–1461.
GOULD, STEPHEN JAY 1984 Carrie Buck's Daughter. *Natural History* July:14–18.
LOMBARDO, PAUL A. 1985 Three Generations, No Imbeciles:

New Light on *Buck v. Bell*. *New York University Law Review* 60:30–62.

## *BUCKLEY v. VALEO*
### 424 U.S. 1 (1976)

In *Buckley* the Supreme Court dealt with a number of constitutional challenges to the complex provisions of the FEDERAL ELECTIONS CAMPAIGN ACT. The act provided for a Federal Elections Commission, members of which were to be appointed variously by the President and certain congressional leaders. The Court held the congressional appointment unconstitutional; Article 2, section 2, prescribes a process for appointing all officers who carry out executive and quasi-judicial duties: appointment by the President, with confirmation by the Senate. Congress subsequently amended the statute to meet the Court's objections.

Rejecting both FIRST AMENDMENT and EQUAL PROTECTION challenges, the Court upheld, 7–2, the provision of public funds for presidential campaigns in amounts that favored major parties over minor parties.

The Court used a BALANCING TEST in considering First Amendment challenges to the provisions limiting expenditures by candidates and contributions to candidates in congressional elections. For both expenditures and contributions the Court defined the government's interest as preventing corruption and appearance of corruption.

The Court placed the interest of the candidate in FREEDOM OF SPEECH on the other side of the balance in striking down the expenditure provisions. Limiting expenditure limited the amount of speech a candidate might make. The Court rejected the argument that another legitimate purpose of the statute was to equalize the campaign opportunities of rich and poor candidates. The PER CURIAM opinion said that the government might not seek to equalize speech by leveling down the rights of rich speakers. High expenditures by rich candidates created no risk of corruption. Indeed, the opinion demonstrated that such a candidate was not dependent on others' money.

In upholding the contribution limits, the Court characterized the First Amendment interest of contributors not as freedom of speech but freedom of association. It reasoned that the initial contribution of $1,000 allowed by the statute completed the act of association and that further contributions did not significantly enhance the association. Further contributions did, however, increase the risk of corruption.

The statute's requirement that all contributions over $100 be a matter of public record were challenged as violating the right to anonymous political association previously recognized in NAACP V. ALABAMA (1958). The Court upheld the reporting provisions but said that individual applications to contributors to small unpopular parties might be unconstitutional.

MARTIN SHAPIRO
(1986)

Bibliography

POLSBY, DANIEL D. 1976 Buckley v. Valeo: The Special Nature of Political Speech. *Supreme Court Review* 1976:1–44.

# BUDGET

The federal budget is the comprehensive annual program of income and expenditure of the federal government. The budget is not a constitutional requirement, nor does it answer to either the "appopriations made by law" or the "regular statement of account" of Article I, section 9, of the Constitution. Rather the budget is a legislatively created device to regularize the exercise of the TAXING AND SPENDING POWER.

In the nineteenth century there was no overall annual spending program. Appropriations bills were formulated by various congressional committees, which thereby exercised considerable control over the executive departments. A national budget process was first recommended by the Commission on Economy and Efficiency, appointed by President WILLIAM HOWARD TAFT in 1908; and the BUDGET AND ACCOUNTING ACT, which governed the budget process for over half a century, was enacted in 1921.

Because expenditure is an executive function, the President, as chief executive, was given authority to prepare and submit the budget. This represented a major shift of power within the government in favor of the executive branch. President FRANKLIN D. ROOSEVELT further consolidated presidential authority in 1939 by transferring the Bureau of the Budget (created by the 1921 act) from the Treasury Department to the Executive Office of the President. In 1969, President RICHARD M. NIXON restyled the bureau OFFICE OF MANAGEMENT AND BUDGET and increased its control over the operations of executive departments and agencies.

Congress reasserted its role in fiscal policymaking by the CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT (1974). The act created a permanent budget committee in each house of Congress, established the Congressional Budget Office to provide independent evaluation of executive economic planning, and prescribed a timetable for each phase of the budget and appropriations process. Even after passage of this act, however, the budget process is necessarily dominated by the chief executive.

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Balanced-Budget Amendment; Budget Process.*)

Bibliography

BORCHERDING, THOMAS E., ed. 1977 *Budgets and Bureaucrats: The Sources of Government Growth.* Durham, N.C.: Duke University Press.

MARINI, JOHN 1978 The Politics of Budget Control: An Analysis of the Impact of Centralized Administration on the Separation of Powers. Unpublished Ph.D. dissertation, Claremont Graduate School.

## BUDGET AND ACCOUNTING ACT
### 42 Stat. 20 (1921)

Among the aims of the reform movement of the early twentieth century was the creation of neutral processes and agencies to perform public functions, substituting administration for politics in the delivery of government services. One key reform was the introduction of the federal BUDGET. Proposed by President WILLIAM HOWARD TAFT's Commission on Economy and Efficiency, enactment of a federal budget law was delayed by WORLD WAR I. When Congress finally passed a bill in 1920, President WOODROW WILSON, although a longtime advocate of a budget system, vetoed it rather than submit to its limitation of his REMOVAL POWER. A virtually identical bill was passed the following year and signed into law by President Warren Harding, who called it "the greatest reformation in governmental practice since the beginning of the Republic."

Under the act, the President alone was responsible for submitting to Congress each year a statement of the condition of the treasury, the estimated revenues and expenditures of the government for the year, and proposals for meeting revenue needs. The act created the Bureau of the Budget, to receive, compile, and criticize the estimates and requests of the various departments, and the General Accounting Office, to audit the government's fiscal activities.

The Budget and Accounting Act caused a major change in the balance of power within the government, giving the President, rather than Congress, effective control over government spending. The act provided the machinery through which, during the middle third of the twentieth century, the national executive managed the whole economy.

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Budget Process.*)

Bibliography

MARINI, JOHN 1978 The Politics of Budget Control: An Analysis of the Impact of Centralized Administration on the Separation of Powers. Unpublished Ph.D. dissertation, Claremont Graduate School.

## BUDGET PROCESS

Budgeting moved to center stage in American politics in the last quarter of the twentieth century. The budget process, with the TAXING AND SPENDING POWER, has become the focal point of the administrative state. It is the place where political institutions have sought to accommodate the various interests seeking a share of the national wealth. The growth of the public sector, which has accompanied the increase in size of both federal and state budgets, has obscured the distinction between the public and private spheres. At one time, governments controlled expenditures, and budgets provided the means of limiting claims on available resources. Budget conflict was contained because of fundamental agreement concerning the ends of government. With the growth of the bureaucratic state, the consensus in support of LIMITED GOVERNMENT has weakened, as has support for limited—or balanced—budgets. The problem of budget control is exacerbated by a failure of the parties and institutions of government to achieve a new consensus, or political realignment, concerning the purposes of public spending. The Constitution, which separates the powers of government, has provided the conditions for budget strife.

The budget, as a formal plan of government in a fiscal year, is a centralizing device, one that presupposes a conception of the state as an active mechanism pursuing positive purposes in the interest of the people it is created to serve. The modern budget system is the concomitant of the administrative state, which, in principle, is an unlimited government. In America the administrative state traces its origins to the Progressive movement. The national executive budget system was among the political reforms demanded by the Progressives. In their view, the presidential budget, along with party reform, would give activist Presidents the ability to pursue the interests of a national majority. The United States was the last modern industrial nation to adopt an executive budget system. Congress was reluctant to give Presidents the power to formulate budgets, because its members thought such authority would undermine the SEPARATION OF POWERS.

The growth of federal expenditures during WORLD WAR I convinced national leaders—including those in Congress—that the legislative body was incapable of effective management of public resources. Thus, in 1921 an executive budget system was established through the BUDGET AND ACCOUNTING ACT. The President was given the power to formulate a budget and oversee its implementation. At its inception the executive budget was not considered a

means of aggrandizing presidential power but a neutral mechanism to ensure economy and efficiency.

In 1939 President FRANKLIN D. ROOSEVELT reorganized the executive branch and placed the Bureau of the Budget at the center of the newly created Executive Office of the President. Roosevelt had become aware of the planning and management capabilities of the budget office. Furthermore, increased government expenditures during the Great Depression and the economic theories of John Maynard Keynes provided the conditions for using the budget to implement federal fiscal policy. The federal budget became an important tool in the presidential attempt to manage the economy. As long as Presidents and Congress agreed on national priorities, there were few unmanageable conflicts concerning economic policy or budget control.

The centralization of administration in Washington during the 1960s and early 1970s began to erode the consensus forged during the NEW DEAL. The new regulatory bureaucracy created during the Great Society tended to polarize society as well as the political institutions. The divergence between the parties led to heightened conflict between the political branches of government. The Democratic Party, which dominated the legislative branch, was committed to the maintenance of an administrative state. The Republican party, increasingly able to capture the executive branch, sought to limit the size of government. The 1972 reelection of RICHARD M. NIXON produced a crisis in the budget process that led to fundamental reform. In Nixon's view, Congress had become so wedded to the interests of the bureaucratic state that it could no longer control its appetite for increased public expenditures. Nixon sought to limit public spending by impounding expenditures that broke the executive budget. Without control of the budget, the Democratic majority in Congress was unable to challenge the President's authority in formulating economic policy or in establishing national priorities. The 1974 CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT gave Congress the technical capability and institutional means of controlling the amounts of money spent. Congress was at once a dominant force in the formulation of fiscal policy and a major force in setting the priorities of the nation.

Congress succeeded in challenging presidential control of the budget, but the price of success was an institutional inability to reach agreement on expenditures, except at ever higher levels. The reforms in Congress during the 1970s, which accommodated the growth of the administrative state, had weakened congressional leadership and empowered individual members. Power moved from committee chairs to subcommittee chairs. The links between Congress and the permanent bureaucracy undermined presidential attempts to manage the executive branch. The budget process was dominated by those interests in Congress and the bureaucracy that supported the priorities of the administrative state. The growth of the federal government could not be seriously challenged without control of the levers of public spending.

The election of RONALD REAGAN proved to be a serious threat to those committed to the growth of the administrative state. Reagan used the budget process to establish his own priorities, which included a reduction in the size of government. He took advantage of the reconciliation procedure of the Budget Act to force reductions in expenditures, but at the same time reduced tax rates. However, the 1982 recession, coupled with the rapid collapse of inflation, prevented a reduction of expenditures. Instead, the growth of the defense budget and the maintenance of social spending led to an explosion of deficit financing and increased the national debt. Further, the budget process could no longer limit expenditures without fundamental changes in the laws. Nearly half of all federal expenditures now take the form of direct transfer payments to individuals, called ENTITLEMENTS. The political difficulty of raising new revenues, coupled with a mistrust of presidential power, led Congress to attempt to reduce the deficit by procedural devices such as the GRAMM-RUDMAN-HOLLINGS ACT. Congress lacked the will to act, but refused to trust Republican Presidents with the power to cut the few remaining controllable portions of the budget. The result has been stalemate and budget gimmickry.

Until recently, the Constitution of the United States was considered "the instrument and symbol" of politics in America. The Constitution authorized and legitimized the limited charecter of government and symbolized the notion of a HIGHER LAW. The law was seen to be dictated by the nature and reason—not merely legislative majorities—and was the source of legitimate authority. It provided the means by which the various institutions of government and the rights and powers of majorities could be reconciled. It is presupported a structure of government in which the characteristic activity of government—lawmaking by legilative majorites—could culminate in reasonable public law in interest of all. The primary virtue of the legilative branch is the capapcity for such deliberation, or public reasoning. It is by means of such deliberation and reconciliation that the various private intersts could be made compatible with the common good.

But Congress no longer functions primarily as a deliberative body, and the constitutional order has readjusted itself accordingly. The courts are now routinely involved in general policymaking, and Congress is excessively concerned with the details of executive administration. Moreover, Congress is less effective today in reconciling particular interests in light of the general interest. Congress has delegated much of its lawmaking authority to

administrative bodies, and its primary role has become one of administrative oversight. Since the late 1960s, Congress has maintained an administrative apparatus whose task it is to solve—in a technically rational way, using the methods of science and social science—the social and political problems of industrial or postindustrial society.

The federal budget is in the process of replacing the Constitution as the "instrument and symbol" of American politics. Whereas the powers of government were once thought to be limited, now only resources are limited. The budget is the instrument by which the bureaucratic state is fueled; it is the symbol of the centralization of administration that is the dominant political reality of the American regime. The most important political questions are no longer questions of principle or public right but of money and finance. The Constitution was the embodiment of the principles of republican government. The budget has become the symbol of American pluralism at best and redistributionist politics at worst. The Constitution was concerned with institutions, law, and the common good. The budget is the embodiment of the administrative state. It reflects a concern with administrative detail rather than principle, rulemaking rather than lawmaking, and the attempt to placate every private interest, rather than pursuance of a common good.

JOHN MARINI
(1992)

(SEE ALSO: *Balanced-Budget Amendment; Impoundment of Funds; Progressive Constitutional Thought; Progressivism.*)

Bibliography

SCHICK, ALLEN 1980 *Congress and Money.* Washington, D.C.: Urban Institute.

SHUMAN, HOWARD E. 1984 *Politics and the Budget.* Englewood Cliffs, N.J.: Prentice-Hall.

WILDAVSKY, AARON 1988 *The New Politics of the Budgetary Process.* Glenview, Ill.: Scott, Foresman.

## *BUNTING v. OREGON*
243 U.S. 426 (1917)

This decision upheld maximum hour legislation and approved state regulations of overtime wages as a proper exception to the prevailing constitutional standards of FREEDOM OF CONTRACT. A 1913 Oregon law prescribed a ten-hour day for men and women alike, thus expanding the law regulating women's hours which had been upheld in MULLER V. OREGON (1908). In addition, the measure required time and a half wages for overtime up to three hours per day. Justice JOSEPH MCKENNA's opinion for the 5–3 majority (there was no written dissent) assumed the validity of the working hours regulations, thus ignoring LOCHNER V. NEW YORK (1905) as well as Justice DAVID J. BREWER's careful distinction in *Muller* that the status of women required special legislative concern. Lawyers for Bunting had attacked the law for its wage-fixing provisions and had invoked *Lochner* and *Muller* to demonstrate that the Oregon statute had no reasonable relation to the preservation of public health. McKenna, focusing on the overtime provision, denied that it was a regulation of wages. The statute, he contended, was designed as an hours law, and the Court was reluctant to consider it as a "disguise" for illegal purposes. Somewhat ingenuously, McKenna argued that the overtime provision was permissive and that its purpose was to burden and deter employers from using workers for more than ten hours. He admitted that the requirement for overtime might not attain that end, "but its insufficiency cannot change its character from penalty to permission." The Oregon Supreme Court had construed the overtime provision as reflecting a legislative desire to make the ten-hour day standard; beyond that, McKenna and his colleagues were not willing to inquire into legislative motive.

*Bunting* provided frail support in behalf of wage legislation. A few weeks later, the Court split 4–4 on Oregon's minimum wage law (STETTLER V. O'HARA), but in 1923 the Court struck down such legislation in ADKINS V. CHILDREN'S HOSPITAL.

STANLEY I. KUTLER
(1986)

Bibliography

MASON, ALPHEUS T. 1946 *Brandeis: A Free Man's Life.* New York: Viking Press.

## *BURBANK v. LOCKHEED AIR TERMINAL*
411 U.S. 624 (1973)

The Supreme Court, in a 5–4 vote, struck down a city ordinance regulating air traffic as a violation of the SUPREMACY CLAUSE. The ordinance prohibited jets from taking off between 11 p.m. and 7 a.m. and also forbade the airport operator from allowing such flights. The Court, speaking through Justice WILLIAM O. DOUGLAS, applied the PREEMPTION DOCTRINE and found the ordinance in conflict with two federal statutes which provided for the regulation of navigable airspace. Justice WILLIAM H. REHNQUIST, for the dissenters, contended that these statutes did not supersede the STATE POLICE POWER.

DAVID GORDON
(1986)

## *BURCH v. LOUISIANA*
441 U.S. 130 (1979)

In *Burch v. Louisiana*, the Supreme Court held that conviction by a 5–1 vote of a six-person jury in a state prosecution for a nonpetty offense violates the accused's right to TRIAL BY JURY under the SIXTH and FOURTEENTH AMENDMENTS. *Burch* involved a prosecution for exhibiting two obscene motion pictures.

In two earlier cases, APODACA V. OREGON (1972) and JOHNSON V. LOUISIANA (1972), the Court had sustained 10–2 and 9–3 verdicts, and it had also previously ruled in BALLEW V. GEORGIA (1978) that juries of less than six persons were unconstitutional. In *Burch*, the Court concluded that "having already departed from the strictly historical requirements of jury trial, it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved." It relied mainly upon "the same reasons that led us in *Ballew* to decide that use of a five person jury threatened the fairness of the proceeding and the proper role of the jury." *Burch* did not resolve the constitutionality of different majority verdict systems for juries composed of seven through eleven members or majorities of 8–4 or 7–5 on a jury of twelve.

NORMAN ABRAMS
(1986)

(SEE ALSO: *Jury Size; Jury Unanimity.*)

# BURDEN OF PROOF

Although the Constitution does not mention burden of proof, certain principles are widely accepted as having constitutional status. The first and most significant of these is the rule that in a criminal case the government must prove its case "beyond a REASONABLE DOUBT." This is the universal COMMON LAW rule, and was said by the Supreme Court in IN RE WINSHIP (1970) to be an element of DUE PROCESS. This standard is commonly contrasted with proof "by a preponderance of the evidence" or "by clear and convincing evidence." The standard of proof is in practice not easily susceptible to further clarification or elaboration.

To what matters does the burden apply? The *Winship* Court said it extended to "every fact necessary to constitute the crime with which [a defendant] is charged." The government must prove its case beyond a reasonable doubt. But suppose the defendant raises a defense of ALIBI, insanity, duress, or diplomatic immunity? With respect to such defenses the usual rule is that the defendant may be required to produce some evidence supporting his claim; if he does not, that defense will not be considered by the jury. By what standard should the jury be instructed to evaluate such a defense? Should they deny the defense unless they are persuaded by a preponderance of the evidence that the defendant has established it? Or does the "burden of persuasion" on the issue raised by the defendant remain on the government, so that the jury must acquit unless persuaded beyond a reasonable doubt that the defense falls? On this complicated question there is no settled view. The answer should probably vary with the kind of defense: alibi, for example, is not really an affirmative defense but a denial of facts charged. Such a defense as diplomatic immunity, however, might be regarded as one upon which the defendant should bear the burden of proof.

The foregoing structure is complicated by the existence of "presumptions," that is, legislative or judicial statements to the effect that if one fact is proved—say, possession of marijuana—another fact essential to conviction may be "presumed"—say, that the marijuana was illegally imported. The Supreme Court has held such a legislative presumption valid when the proved fact makes the ultimate fact more likely than not.

The burden of proof beyond a reasonable doubt is a critical element of due process. Like the requirements that laws be public and their prohibitions comprehensible and prospective, that trials be public and by jury, and that the defendant have counsel, the burden of proof limits the power of the government to impose arbitrary or oppressive punishments. It reinforces the rights of the defendant not to be a witness against himself nor to take the stand, for it imposes upon the government the task of proving its whole case on its own. A lower standard of proof would pressure defendants to involve themselves in the process of their own condemnation.

In civil cases, the rule is simply stated: the legislature may decide upon the burden of proof as it wishes, usually choosing the "preponderance of the evidence" test. In specialized proceedings, such as motions to suppress evidence for criminal trials, special rules have evolved. (See STANDARDS OF REVIEW.)

JAMES BOYD WHITE
(1986)

Bibliography

MCCORMICK, CHARLES 1954 *Handbook of the Law of Evidence.* Chap. 6. St. Paul, Minn.: West Publishing Co.

## *BURDICK v. TAKUSHI*
504 U.S. 428 (1992)

Write-in voting, whereby the voter unsatisfied with the official candidates listed on the ballot card can write in the

name of any person she would like to be elected, has been a staple of elections since the adoption of the state-printed—or "Australian"—ballot at the end of the nineteenth century. In *Burdick v. Takushi*, however, the Supreme Court, in a 6–3 decision, held that write-in voting was not a constitutionally mandated mechanism for exercising the right to vote, upholding Hawai'i's ban on write-in voting in state and federal elections.

Alan Burdick, a Hawai'i citizen, argued that the ban impermissibly infringed on his FREEDOM OF SPEECH, FREEDOM OF ASSOCIATION, and right to vote under the FIRST AMENDMENT and the FOURTEENTH AMENDMENT. Although recognizing an impairment of Burdick's choice on election day, the Court, per Justice BYRON R. WHITE, explained that all election laws governing BALLOT ACCESS, such as registration and qualification requirements, "invariably impose some burden upon individual voters." Because Hawai'i provided "easy access" to the primary ballot—requiring candidates to obtain only fifteen to twenty-five signatures depending on the office— the ban on write-in voting posed a "very limited" burden on voter choice that was justified by the state's interest in an efficient and orderly ELECTORAL PROCESS.

In his DISSENTING OPINION, Justice ANTHONY M. KENNEDY disagreed with the majority's conclusion that the burden on VOTING RIGHTS was insignificant. The very ballot access rules that the majority found to be liberal, Kennedy concluded were onerous, resulting in unopposed races in over one-third of state House of Representative elections and high numbers of blank, uncast ballots. Citizens who objected to the single candidate listed on the state-printed ballot in a given election had "no way to cast a meaningful vote."

ADAM WINKLER
(2000)

## BUREAUCRACY

The Constitution creates an executive branch that neatly fits into the SEPARATION OF POWERS and CHECKS AND BALANCES system that the Framers devised. But the Constitution does not explicitly provide for the kind of administrative branch, or bureaucracy, that evolved beginning in the late nineteenth century. Congress created both independent commissions, such as the Interstate Commerce Commission (established in 1887), and other executive agencies that regulated a wide range of economic activities, and delegated to those bodies the authority both to make law through rule-making and to adjudicate cases arising under their JURISDICTION.

The Framers of the Constitution understandably did not foresee the development of an executive branch that would be a dominant force in lawmaking and adjudication, functions that they expected to be carried out by Congress and the courts. They conceived of "administration" as the "mere execution" of "executive details," to use ALEXANDER HAMILTON's description in THE FEDERALIST #72. Article II makes the President chief executive by giving him the responsibility to "take care that the laws be faithfully executed." He has the authority to appoint public ministers and other executive branch officials designated by Congress, subject to the ADVICE AND CONSENT of the Senate. He may "require the opinion in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices. . . ." Hamilton concluded in *The Federalist* #72: "The persons, therefore, to whose immediate management the different administrative matters are committed ought to be considered as assistants or deputies of the Chief Magistrate and, on this account, they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence."

Hamilton thought, as did most of the Framers, that the President would be, to use Clinton Rossiter's characterization in *The American Presidency* (1956), chief administrator. From a Hamiltonian perspective—one that later turned up in the presidential supremacy school of thought in public administration, reflected in the Report of the President's Committee on Administrative Management in 1937—the President is constitutionally responsible for the administrative branch.

Whatever may have been the intent of the Framers, the Constitution they designed allows and even requires both congressional and judicial intrusion into executive branch affairs. Two factors help to explain the constitutional ambiguities surrounding executive branch accountability. First, the system of separation of powers and checks and balances purposely gives Congress both the motivation and the authority to share with the President control over the executive branch. Congress jealously guards its position and powers, and its constitutional incentive to check the President encourages legislators to design an executive branch that will, in many respects, be independent of the White House. Other political incentives support those of the Constitution in encouraging Congress to hold the reins of the bureaucracy. Political pluralism has fragmented congressional politics into policy arenas controlled by committees. They form political "iron triangles" with agencies and special interests for their mutual benefit. The resulting executive branch pluralism is a major barrier to presidential control.

Agency performance of quasi-legislative and quasi-judicial functions is the second factor complicating the Hamiltonian prescription for the President to be chief administrator. From the standpoint of constitutional theory,

Congress and the courts are the primary legislative and judicial branches, respectively. Each has a responsibility to oversee administrative activities that fall within their spheres. Congressional, not presidential, intent should guide agency rule-making. Moreover, the constitutional system, as it was soon to be interpreted by the Supreme Court, gave to the judiciary sweeping authority to exercise JUDICIAL REVIEW over Congress and, by implication, over the President and the bureaucracy as well. Chief Justice JOHN MARSHALL stated in MARBURY V. MADISON (1803): "It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule." In concrete CASES AND CONTROVERSIES, where administrative action is appropriately challenged by injured parties, courts interpret and apply both statutory and constitutional law.

The hybrid character of the bureaucracy confuses the picture of its place in the governmental scheme. Constitutional prescriptions apply to the bureaucracy as they do to other branches. The bureaucracy must conform to the norms of separation of powers and checks and balances, PROCEDURAL DUE PROCESS, and democratic participation. The formal provisions of the Constitution and the broader politics of the system have shaped the administrative branch in various ways, limiting and controlling its powers.

Ironically, although the President alone is to be chief executive, Congress actually has more constitutional authority over the bureaucracy than does the White House as the result of its extensive enumerated powers under Article I. These do not mention the executive branch explicitly but by application of the doctrine of IMPLIED POWERS give the legislature the authority to create administrative departments and agencies and determine their course of action. Under the TAXING AND SPENDING POWER, the commerce power, and the WAR POWERS, Congress has authorized the creation of a vast array of agencies to carry out its responsibilities. The Legislative Reorganization Act of 1946 mandated Congress to establish oversight committees to supervise the bureaucracy and see to it that agencies were carrying out legislative intent. More important than legislative oversight, a responsibility most committee chairmen eschew because of its limited vote-getting value, is the appropriations and authorization process carried out by dozens of separate committees on Capitol Hill. Committee chairmen and their staffs indirectly sway administrative policymaking through committee hearings and informal contact with administrators who know that Congress strongly influences agency budgets.

The President's executive powers under Article II mean little unless Congress acquiesces in their exercise and buttresses the President's position in relation to the bureaucracy. It is congressional DELEGATION OF POWER to the President as much as, if not more than, the Constitution that determines to what extent he will be chief administrator. But the bureaucracy is always a pawn in the executive-legislative power struggle. Congressional willingness to strengthen presidential authority over the executive branch depends upon political forces that dictate the balance of power between Capitol Hill and the White House. Presidents have valiantly struggled but only intermittently succeeded in obtaining from Congress the powers they have requested to give them dominance over the bureaucracy.

From the NEW DEAL of FRANKLIN D. ROOSEVELT through the Great Society of LYNDON B. JOHNSON, Congress often agreed to requests for increased powers over the bureaucracy. During Roosevelt's administration, Congress for the first time gave the President authority to reorganize the executive Branch, subject to LEGISLATIVE VETO by a majority vote of either the House or the Senate. Roosevelt issued a historic EXECUTIVE ORDER in 1939 creating the presidential bureaucracy—the Executive Office of the President—to help him carry out his executive responsibilities. Laws granting the President reorganization authority were periodically renewed and acted upon until 1973 when Congress, in reaction to the WATERGATE revelations and concern over the "imperial presidency," allowed the reorganization act to expire. Although Congress renewed the reorganization law during the subsequent administration of President GERALD FORD, presidential authority over the bureaucracy had been impaired by the CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT of 1974 and other laws. Under the Congressional Budget Act the President could no longer permanently impound funds appropriated by Congress, as President RICHARD M. NIXON had done on over forty separate occasions. The law prevented the President from interfering with administrative implementation of legislative programs.

The courts, too, have claimed administrative turf, by exercising judicial review. Most of the statutes of individual agencies as well as the Administrative Procedure Act of 1946 set forth broad standards of procedural due process that administrators must follow when their decisions directly affect private rights, interests, and obligations. The courts not only interpret these statutory requirements but also apply to the administrative realm constitutional criteria for procedural fairness. For example, the Supreme Court held, in *Wong Yang Sung v. McGrath* (1950), that the Fifth Amendment's DUE PROCESS clause requires the Immigration Service to hold a full hearing with an independent judge presiding, before ordering the DEPORTATION of an illegal ALIEN whose life and liberty might be threatened if he were forced to return to his native land.

Involvement of the three original branches of government in the operations of the bureaucracy does not by

itself solve the problem administrative agencies pose to the constitutional theory and practice of the separation of powers. Agencies performing regulatory functions combine in the same hands executive, legislative, and judicial powers. The Administrative Procedure Act of 1946 required a certain degree of separation of functions within agencies by creating an independent class of ADMINISTRATIVE LAW judges who initially decide formal rule-making and adjudicatory cases, which are those that by statute require trial-type hearings. Administrative judges must make their decisions on the record; *ex parte* consultations outside of the agency are forbidden entirely and, within the agency, can be made only in rule-making proceedings. Attempts to impose a judicial model on the administrative process, however, have not solved the constitutional dilemma posed by the fusion of powers within the bureaucracy. Commissions, boards, and agency heads have virtually unlimited discretion to overturn, on the basis of policy considerations, the decisions made by administrative law judges. Courts have supported the imposition of a judicial model on lower-level administrative rule-making and adjudicatory decisions, but have recognized the need for the heads of agencies to have discretion in interpreting legislative intent and flexibility in implementing statutory policy.

Another problem that the bureaucracy poses to the constitutional system is that of democratic control and accountability. An unelected, semi-autonomous administrative branch with the authority to make law arguably threatens to undermine the principles of representative government by removing lawmaking powers from Congress. The solution, in this view, is to restore the delegation of powers doctrine expressed by the Supreme Court in SCHECHTER POULTRY CORPORATION V. UNITED STATES (1935), holding that the primary legislative authority resides in Congress and cannot be delegated to the administrative branch. The *Schechter* rule was never strictly followed, and executive branch lawmaking increased and was even supported by the courts after that decision. However, judges did require that legislative intent be fairly clearly expressed, and they encouraged Congress to tighten agency procedural requirements to guarantee both fairness and compilation of records sufficient to permit effective judicial review.

Administrative discretion in lawmaking and adjudication remains a reality regardless of the intricate network of presidential, congressional, and judicial controls over the bureaucracy. But administrative agencies are not conspiracies to undermine individual liberties and rights, nor to subvert democratic government, a view that conservatives and liberals alike have of the enormous power of the executive branch. Political demands have led to the creation of executive departments and agencies that continue to be responsive to the interests in their political constituencies, a democratic accountability that is narrow but, nevertheless, an important part of the system of administrative responsibility.

The bureaucracy performs vital governmental functions that the three original branches cannot easily carry out. Essential to any modern government is a relatively large and complex administrative branch capable of implementing the wide array of the programs democratic demands produce. American bureaucracy has added an important new dimension to the constitutional system. Because it is so profoundly shaped by the separation of powers, by the process of checks and balances, and by democratic political forces, it does fit, although imperfectly, into the system of constitutional democracy the Framers desired.

PETER WOLL
(1986)

Bibliography

FRIENDLY, HENRY J. 1962 *The Federal Administrative Agencies.* Cambridge, Mass.: Harvard University Press.

LANDIS, JAMES M. 1938 *The Administrative Process.* New Haven, Conn.: Yale University Press.

WOLL, PETER 1977 *American Bureaucracy.* New York: Norton.

## BUREAUCRACY
## (Update)

The Constitution fails to provide for the largest and one of the most important components of American government, the bureaucracy. The Framers understood that the presidency could not function without a group of persons comparable to the English servants of the crown. The Constitution does provide one specific reference to at least the top level of the bureaucracy: "The President . . . may require the Opinion in writing, of the principal officer in each of the executive Departments" (Article II, section 2). The Constitution also specifies how government officers are to be appointed—some by the President with the ADVICE AND CONSENT of the Senate and some by the President alone. It prohibits members of Congress from holding executive office, thus preventing the creation of cabinet government of the European kind. It specifically authorizes Congress to establish an army, navy, and post office. The Framers could also have specified what other departments, such as Treasury and State, should exist. Indeed, they could have provided a complete organization chart of the whole executive branch. But they did not. Instead, they appear to have deliberately left further evolution of the executive branch to Congress and to the President.

The Supreme Court has on occasion played a major role

in shaping the CONSTITUTIONAL THEORY of bureaucracy. From early in the Republic there have been two rival views of the bureaucracy. One, associated with ALEXANDER HAMILTON and later the Progressives, stresses the need for neutrality and expertise. The other emphasizes democratic responsibility. Jacksonian notions of "rotation in office" and "the spoils system" were the expression of this democratic theme. To prevent a gap between the governors and the governed, ordinary citizens were to take their turns in office and then return to private life. The partisans of the party that won one election were to be given government jobs and then turned out in favor of the partisans of whatever party won the next. Such arrangements undercut any vision of an expert bureaucracy reaching "correct" decisions. The Progressive view was eventually embodied in a series of state and federal civil service statutes that gradually incorporated more and more government workers into a system of entry and promotion by technical examinations and GOOD BEHAVIOR tenure.

The Hatch Act of 1939 prohibited federal civil servants from making contributions to, or participating in, election campaigns, in order to protect them from pressure by the President or their politically appointed superiors to actively support the President's party. The Hatch Act was challenged as a violation of the civil servants' FIRST AMENDMENT political participation rights. In *U.S. Civil Service Commission v. National Association of Letter Carriers* (1973) the Supreme Court decisively supported the Progressive theory of bureaucracy by holding that the compelling interest in an expert neutral career civil service outweighed the First Amendment claims at issue.

In a subsequent case, the Court directly confronted one of the last true "rotation in office" systems in the United States. Cook County, Illinois, prosecutors were political appointees. Whenever party control of the elected county executive changed, prosecutors of the winning party replaced those of the losing party. In *Elrod v. Burns* (1979) the prosecutors of the losing party argued that their First Amendment rights were being violated since they were being fired solely because of their political beliefs. Although the Court acknowledged the American tradition of the spoils system, it concentrated on the First Amendment issues and held for the fired prosecutors. Historically, whenever civil service protections were extended to a further category of government positions, those currently holding the positions, even though they owed their appointments to political favor rather than expert qualifications, were "blanketed in"—that is, allowed to keep their jobs. In the Cook County case, the Court in effect blanketed in all the remaining spoils appointees in the United States. The theory of a neutral bureaucracy free of party control has become part of the Constitution, not as a distinct provision but by judicial interpretation ofthe free speech clause.

The simple schema of the first three articles of the Constitution—Article I, Congress; Article II, presidency; and Article III, judiciary—would seem to place the executive department under the President, who is constitutionally endowed with "the executive power of the United States." Particularly since the NEW DEAL, many commentators have stressed the need for presidential control over the ever-growing and increasingly complex federal bureaucracy. In spite of what would appear to be the clear structure of the Constitution, the federal departments are as much, or more, the creatures of Congress as they are the servants of the President. Precisely because Article II does not itemize the executive departments or specify their organization, they have no independent constitutional status. Instead, every executive agency must be crafted by congressional statute, and all of its powers, programs, and expenditures also must be authorized by statute. Congress may further specify by statute the details of agency organization and procedure.

Beginning in the mid-1970s, with the presidency increasingly in the hands of one party and Congress in that of the other, more attention was given to the potential contradictions between the legal basis of the executive departments as congressional creations and the position of the President as chief executive. Agencies live between the duties imposed on them by statute and the executive authority wielded by the President. Recent Presidents have sought to give substantive content to their constitutional authority to "take care that the Laws be faithfully executed" and to assert that whatever discretion the executive agencies wield in the administration of law ultimately belongs to the President. The President's opponents respond by stressing the degree to which the agencies are bound by statutory duties imposed by Congress and the obligation of the President to obey those statutes. Typically these issues arise in the context of broadly worded or incomplete regulatory statutes that must be fleshed out by agency enacted rules. Because they involve ADMINISTRATIVE LAW and statutory interpretation, these issues often escape the attention of constitutional law specialists. The regulatory statute may be conceived as expressing, however vaguely and incompletely, a single, definite government policy that the agency must discover and embody correctly in its rules. Or such a statute may be seen as setting general goals and outer limits and then delegating to the agency an element of lawmaking discretion in fashioning detailed rules. In this view, although some rules are clearly foreclosed by the statute, the agency is free to choose from among a number of alternatives within the boundaries set by the statute. Agency choice

will, and should, vary, depending on the policy views of the President and political appointees to the agencies. The former view tends to isolate the agency from presidential control, and the latter, to maximize such control.

Most immediately the issue is one of the relative policymaking power of the career agency bureaucracy and the politically appointed agency executives. The more we conceive of a single correct rule that most closely corresponds to the dictates of the statute, the greater must be the policy authority of the bureaucracy; it is the administrators who have long experience in dealing with the statute and great expertise in the factual data on which the correctness of a rule must depend. The more the statute is conceived as delegating lawmaking authority to the agency—that is, the discretion to choose from among alternative, equally valid rules—the greater policy authority should be vested in the President and his appointees, for if rule making really is discretionary lawmaking, then it should be done by those held accountable by the electoral process—not by a nonelected technocracy.

When courts reviewing the lawfulness of agency rules choose one of these visions or the other, the judges are deciding the degree to which the agencies belong to Congress or to the President. Depending on the statutory language, the circumstances, and the underlying constitutional theory of the judge, individual decisions go in one direction or the other. The collective impact of these decisions over time will move the federal bureaucracy more toward Article I or toward Article II and thus determine a fundamental aspect of constitutional law, even though those cases do not overtly raise constitutional questions. Such recent Supreme Court decisions as *Chevron U.S.A. v. Natural Resources Defense Council* (1984) and *Motor Vehicle Manufacturers Institute v. State Farm Mutual* (1983) keep both visions alive.

In a series of decisions on more explicitly constitutional SEPARATION OF POWERS issues, some Justices have sometimes sought to draw bright lines between congressional and presidential control over the bureaucracy. The Court's basic position, however, appears to be that it will seek to maintain a balance between the two without creating a firm boundary. This estimate seems confirmed in such cases as IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983), NIXON V. ADMINISTRATOR OF GENERAL SERVICES (1977), BOWSHER V. SYNAR (1986), and *Morrison v. Olson* (1988). One of these cases, *Chadha*, raises the specter of bureaucratic escape from both Congress and the presidency. Congress often passes statutes that vest great lawmaking authority in the agencies. If the bureaucrats in the agencies can use a theory of statutory duty to shield themselves from presidential control, then the agencies may float free of both Article I and Article II and become a "fourth branch" of government unless Congress exercises some continuing control over the agencies after it has made broad delegations of power to them. One congressional attempt to exercise such poststatutory enactment control is the LEGISLATIVE VETO. In some of its delegatory statutes Congress has provided that before an agency promulgates a rule, it must submit the rule for Congress's approval. The Supreme Court ruled the legislative veto unconstitutional in *Chadha*. Congress has a number of other important weapons of administrative oversight, the most important being its appropriation control. It always retains the power to amend the statutes so as to preclude agency action of which it disapproves and ultimately the power to pass new statutes fundamentally altering the programmatic mandates and the organization or even existence of an agency that displeases it. Yet Congress frequently makes broad, vague, or contradictory delegations to the agencies precisely because it cannot muster the political will to specify what it wants. In such circumstances, it also may not muster the will to control the agency's exercise of the lawmaking power delegated to it. Therein lies the appeal to some of enhancing the power over the agencies of another elected official, the President. These grave constitutional questions work themselves out less in major Supreme Court cases than in the detailed language of statutes and the day-to-day practices of such presidential arms as the OFFICE OF MANAGEMENT AND BUDGET.

MARTIN SHAPIRO
(1992)

(SEE ALSO: *Administrative Agencies; Appointing and Removal Power, Presidential; Appointments Clause; Freedom of Speech; Hatch Act; Regulatory Agencies.*)

Bibliography

FISHER, LOUIS 1988 *Constitutional Dialogues.* Princeton, N.J.: Princeton University Press.

SHAPIRO, MARTIN 1988 *Who Guards the Guardians.* Athens, Ga.: University of Georgia Press.

WOLL, PETER 1963 *American Bureaucracy.* New York: Norton.

## *BURFORD v. SUN OIL COMPANY*

See: Abstention Doctrine

## BURGER, WARREN E.
(1907–1995)

Warren Earl Burger was born in St. Paul, Minnesota. He attended the University of Minnesota and, in 1931, re-

ceived a law degree from St. Paul College of Law (today known as the William Mitchell College of Law). After practicing law in St. Paul for several years, he became the assistant attorney general in charge of the Civil Division of the Department of Justice during the administration of DWIGHT D. EISENHOWER. In 1955, Burger was appointed a judge on the United States Court of Appeals for the District of Columbia Circuit. He served in that capacity until 1969, when he became the Chief Justice of the United States, having been nominated for that position by RICHARD M. NIXON.

In the years of his tenure as Chief Justice, the Supreme Court has been marked publicly as having a majority of Justices who hold a generally conservative orientation toward constitutional issues. Burger himself is widely viewed as a primary proponent of this conservative judicial posture and, at least during the early years of the BURGER COURT, he was expected to lead the other conservative Justices in a major, if one-sided, battle to undo as much as could be undone of the pathbreaking work of its predecessor, the quite distinctly liberal WARREN COURT.

To the surprise of many the record of the Burger Court has been extraordinarily complicated, or uneven, when viewed against both of its commonly assumed objectives of overturning Warren Court decisions and of achieving what is often called a "nonactivist" judicial posture toward new claims for constitutional rights. Although it is true that a few Warren Court innovations have been openly discarded (for example, the recognition of a FIRST AMENDMENT right to speak in the context of privately owned SHOPPING CENTERS was overturned) and several other doctrines significantly curtailed (for example, the well-known 1966 ruling in MIRANDA V. ARIZONA has been narrowed as new cases have arisen), it is also true that many Warren Court holdings have been vigorously applied and even extended (for example, the principle of SEPARATION OF CHURCH AND STATE has been forcefully, if still confusingly, applied). What is perhaps most surprising of all, whole new areas of constitutional jurisprudence have been opened up. The foremost example here, of course, is the Court's highly controversial decision in ROE V. WADE (1973), which recognized a woman's constitutional right to have an abortion—subject to a set of conditions that rivaled in their legislation-like refinement the Warren Court's greatly maligned rules for the *Miranda* warnings. Against this history of overrulings, modifications, extensions, and new creations in the tapestry of decisions of its predecessor Courts, it is difficult to characterize the constitutional course steered by the modern Supreme Court under the stewardship of Warren Burger.

The same difficulty arises if one focuses more specifically on the constitutional thought of Burger himself. Burger may properly be regarded as one of the Court's most conservative members. In the field of criminal justice, he has tended to support police and prosecutors. He has joined in a large number of decisions limiting would-be litigants' access to the federal courts. Although he played an important role in the Court's recognition of constitutional rights in areas such as SEX DISCRIMINATION, discrimination against ALIENS, and SCHOOL BUSING, in each of these areas he has resisted extension of the rights initially recognized. Nonetheless, he has been inclined to accept the validity of congressional CIVIL RIGHTS legislation, and to read those laws generously. And he has been a strong supporter of claims of RELIGIOUS LIBERTY. Generally, he has joined the majority as it has pursued this surprisingly labyrinthine constitutional course. The starting point, therefore, for thinking about the constitutional thought of Warren Burger (just as it is for the Court as a whole during his tenure) is the realization that his opinions do not reflect an especially coherent vision of the Constitution and its contemporary significance.

But to say that the decisions and opinions of Burger, taken together, do not add up to a coherent whole does not mean that there are no important themes working their way through them. It is in fact quite possible to locate several distinct threads of thought: for example, a desire to return greater political power to the states in the federal system and to give greater protection to property interests is frequently reflected in Burger's constitutional opinions. But perhaps the most important characteristic of Warren Burger's opinions while Chief Justice is to be found in the area of individual rights and freedoms. It is there that one feels the strongest tension between a commitment to constitutional standards that control and limit the legislative process and a desire to maintain legislative control over the moral and intellectual climate of the community. It is in the resolution of that tension that one is able to determine what is most distinctive about Burger's constitutional jurisprudence.

Burger has frequently displayed a willingness to protect individual freedom at the expense of the interests of the state. His opinion for the Court in *Reed v. Reed* (1971), for example, was the first to subject gender classifications to more rigorous EQUAL PROTECTION scrutiny than had theretofore been the case. But, that said, it is also critical to an understanding of Burger's approach to the BILL OF RIGHTS to see that the depth of his commitment to individual liberties has been limited by a seemingly equal reluctance to extend constitutional protection to individuals or groups whose challenged behavior has gone beyond what may be called the customary norms of good behavior.

Two areas of First Amendment decisions are revealing here. In WISCONSIN V. YODER (1972), for example, Burger wrote an opinion for the Court upholding the right of members of an Amish religious community to refuse, on

religious grounds, to comply with the Wisconsin compulsory school-attendance law. In his opinion Burger repeatedly emphasized the fact that the Amish had adopted a traditional lifestyle, saying at one point how "the Amish communities singularly parallel and reflect many of the virtues of THOMAS JEFFERSON's ideal of the "sturdy yeoman." On the other hand, in every case in which a speaker who used indecent language has sought the protection of the First Amendment, Burger has rejected the claim (though in these cases, usually in dissent) and, in doing so, has stressed the importance of maintaining community norms about proper and improper behavior.

In Burger's opinions, therefore, the protection of a specific liberty is often tied to his assessment of the respectability of the behavior. Sometimes this underlying attitude for a decision has been misinterpreted for other motivations. For example, in COLUMBIA BROADCASTING SYSTEM, INC. V. DEMOCRATIC NATIONAL COMMITTEE (1973), a major decision rejecting the claim that individuals and groups have a constitutional and statutory right to purchase airtime from broadcast stations in order to discuss public issues, Burger emphasized the importance of preserving the "journalistic autonomy" or "editorial discretion" of broadcasters, a theme reported in the press accounts of the case at the time. But this suggestion that the decision rested on a heightened respect for editorial freedom, and a preparedness to live with the consequent risks of bad editorial behavior, was considerably undermined by an additional thought Burger expressed. Freedom for broadcast journalists was to be preferred, he said, because broadcasters were regulated and therefore "accountable," while "[n]o such accountability attaches to the private individual, whose only qualifications for using the broadcast facility may be abundant funds and a point of view."

It is a noteworthy feature of Burger's constitutional work that in the area of FREEDOM OF THE PRESS he has written many of the Court's most prominent decisions upholding claims of the print media for protection against various forms of government regulation. Burger wrote for the Court in MIAMI HERALD PUBLISHING CO. V. TORNILLO (1974), holding that states could not require a newspaper to provide access to political candidates who had been criticized in the newspaper's columns; in NEBRASKA PRESS ASSOCIATION V. STUART (1976), holding that courts could not enjoin the media from publishing in advance of trial purported confessions and other evidence "implicative" of an accused individual; and in RICHMOND NEWSPAPERS, INC. V. VIRGINIA (1980), holding that courts could not follow a course of generally excluding the media from attending and observing criminal trials.

Yet, despite this strong record of extending constitutional protection to the press, the Burger Court, and especially Burger himself, has been strongly criticized by various segments of the press for retreating from earlier precedents and for being generally hostile to press claims. Burger, it is true, has sometimes voted along with a majority to reject press claims, as, for example, in BRANZBURG V. HAYES (1972), when the press urged the Court to recognize a limited constitutional privilege for journalists against being compelled to give testimony to grand juries, or in GERTZ V. ROBERT WELCH, INC. (1974), when the press sought to extend the "actual malice" standard in libel actions to all discussions of public issues, not just to those discussions concerning public officials and PUBLIC FIGURES. But an objective assessment of the holdings of the Burger Court does not seem to warrant the general accusation of its hostility to the press. It is too easy to lose sight of the basic truth that in virtually every case that involved significant issues of press freedom Burger has supported the press, and in many of them has written the majority opinions.

Is it possible to account for this discrepancy between criticism and performance? Here again the best explanation is to be found in Burger's disinclination to extend constitutional protection to activity judged as falling below conventional standards of good behavior. But in the area of freedom of the press this disinclination has manifested itself less in the actual results Burger has reached in particular cases and more in the craftsmanship and the tone of his judicial opinions.

The contrast between the opinions of the Warren Court and of Burger in the freedom of press area is remarkable. With Warren Court opinions the tone struck is almost uniformly that of praise for the role performed by the press in the American democratic political system. They extol the virtues of an open and free press. Although the same theme is to be found in Burger's judicial work, one often encounters rather sharp criticism of the press as well. Burger has actively used the forum of the Supreme Court judicial opinion to ventilate his feelings about the condition of the American press, and not everything he has had to say in that forum has been complimentary. One should consider in this regard one of the major cases in the free press area just mentioned, *Miami Herald Publishing Co. v. Tornillo*. In that case Burger's opinion for the Court begins with a lengthy and detailed description of the argument advanced by the state of Florida in support of its statute, which guaranteed limited access for political candidates to the columns of newspapers. The press has grown monopolized and excessively powerful, the state contended: "Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. . . . Such national news or-

ganizations provide syndicated 'interpretive reporting' as well as syndicated features and commentary, all of which can serve as part of the new school of 'journalism.' " While ultimately rejecting the legal conclusion that the state sought to draw from this assumed social reality, Burger's opinion nevertheless strongly intimates sympathy with the general portrait of the press which the state's argument had painted. Thus, while the press may have had an ally in the constitutional result, it did not in the battle for public opinion generally.

Although Warren Burger retired from the Supreme Court at the end of the 1985–1986 term, what the lasting impact of his constitutional thought will be is of course impossible to tell. For the moment the most appropriate general assessment is that Burger's constitutional work displays a general disunity of character, while suggesting a responsiveness to generally conservative instincts, even when he is on the liberal side.

LEE C. BOLLINGER
(1986)

Bibliography

BLASI, VINCENT, ed. 1983 *The Burger Court.* New Haven, Conn.: Yale University Press.

BOLLINGER, LEE C. 1986 *The Tolerant Society: Freedom of Speech and Extremist Speech in America.* New York: Oxford University Press.

CHOPER, JESSE 1980 *Judicial Review and the National Political Process.* Chicago: University of Chicago Press.

SYMPOSIUM 1980 The Burger Court: Reflections on the First Decade. *Law and Contemporary Problems* 43:1.

## BURGER COURT
(1969–1986)

The roots of the Burger Court lie in the JUDICIAL ACTIVISM of the WARREN COURT. The social vision of the Supreme Court under EARL WARREN was manifested on many fronts—dismantling racial barriers, requiring that legislative apportionment be based upon population, and vastly expanding the range of rights for criminal defendants, among others. At the height of its activity, during the 1960s, the Warren Court became a forum to which many of the great social issues of the time were taken.

Such activism provoked sharp attacks on the Court. Some of the criticism came from the ranks of the academy, other complaints from political quarters. In the 1968 presidential campaign, RICHARD M. NIXON objected in particular to the Court's CRIMINAL PROCEDURE decisions—rulings which, he said, favored the country's "criminal forces" against its "peace forces."

During his first term as President, Nixon put four Justices on the Supreme Court—WARREN E. BURGER, HARRY A. BLACKMUN, LEWIS F. POWELL, JR., and WILLIAM H. REHNQUIST. Rarely has a President been given the opportunity to fill so many vacancies on the Court in so short a time. Moreover, Nixon was explicit about the ideological basis for his appointments; he saw himself as redeeming his campaign pledge "to nominate to the Supreme Court individuals who share my judicial philosophy, which is basically a conservative philosophy."

Thus was born the Burger Court. For a time, pundits, at least those of liberal persuasion, took to calling it "the Nixon Court." Reviewing the 1971 term, *The New Republic* lamented that the "single-mindedness of the Nixon team threatens the image of the Court as an independent institution."

Inevitably, the work of the Burger Court was compared with that of its predecessor, the Warren Court. During the early Burger years, there was evidence that, with Nixon's four appointees on the bench, a new, and more conservative, majority was indeed in the making on the Court.

By the summer of 1976, a conservative Burger Court seemed to have come of age. For example, near the end of the 1975 term the Court closed the doors of federal courts to large numbers of state prisoners by holding that a prisoner who has had a full and fair opportunity to raise a FOURTH AMENDMENT question in the state courts cannot relitigate that question in a federal HABEAS CORPUS proceeding. In other criminal justice decisions, the Court whittled away at the rights of defendants, showing particular disfavor for claims seeking to curb police practices.

Decisions in areas other than criminal justice likewise showed a conservative flavor. For example, in the same term the Court used the TENTH AMENDMENT to place limits on Congress's commerce power, rejected the argument that claims of AGE DISCRIMINATION ought to trigger the higher level of JUDICIAL REVIEW associated with SUSPECT CLASSIFICATIONS (such as race), and refused to hold that CAPITAL PUNISHMENT is inherently unconstitutional.

By the mid-1970s, a student of the Court might have summarized the Burger Court, in contrast with the Warren Court, as being less egalitarian, more sensitive to FEDERALISM, more skeptical about the competence of judges to solve society's problems, more inclined to trust the governmental system, and, in general, more inclined to defer to legislative and political processes. By the end of the 1970s, however, such generalizations might have been thought premature—or, at least, have to be tempered. As the years passed, it became increasingly more difficult to draw clean distinctions between the years of Earl Warren and those of Warren Burger.

Cases involving claims of SEX DISCRIMINATION furnish an example. In 1973 four Justices (WILLIAM J. BRENNAN, WILLIAM O. DOUGLAS, BRYON R. WHITE, and THURGOOD MARSHALL)

who had been on the Court in the Warren era sought to have the Court rule that classifications based on sex, like those based on race, should be viewed as "inherently suspect" and hence subject to STRICT SCRUTINY. The four Nixon appointees (together with Justice POTTER STEWART) joined in resisting such a standard. Yet, overall, the Burger Court's record in sex discrimination cases proved to be one of relative activism, even though the Court applied an intermediate STANDARD OF REVIEW in those cases, rather than one of strict scrutiny. In the 1978 term, for example, there were eight cases that in one way or another involved claims of sex discrimination; in six of the eight cases the Justices voted favorably to the claim, either on the merits or on procedural grounds.

In the early 1980s, with the Burger Court in its second decade, there was evidence that a working majority, conservative in bent, was taking hold. Two more Justices from the Warren era (William O. Douglas and Potter Stewart) had retired. Taking their place were appointees of Republican presidents—JOHN PAUL STEVENS (appointed by President GERALD R. FORD) and SANDRA DAY O'CONNOR (named by President RONALD REAGAN). While Stevens tended to vote with the more liberal Justices, O'Connor appeared to provide a dependable vote for the more conservative bloc on the Court.

In the 1983 term the conservatives appeared to have firm control. The Court recognized a "public safety" exception to the MIRANDA RULES and a "good faith" exception to the EXCLUSIONARY RULE in Fourth Amendment cases. The Justices upheld a New York law providing for the PREVENTIVE DETENTION of juveniles and sustained the Reagan administration's curb on travel to Cuba. As one commentator put it, "Whenever the rights of the individual confronted the authority of government this term, government nearly always won." The AMERICAN CIVIL LIBERTIES UNION's legal director called it "a genuinely appalling term," one in which the Court behaved as a "cheerleader for the government."

No sooner had such dire conclusions been drawn than the Burger Court once again confounded the Court-watchers. The very next term saw the Court return to the mainstream of its jurisprudence of the 1970s. The Court's religion cases are an example. Between 1980 and 1984 the Court appeared to be moving in the direction of allowing government to "accommodate" religion, thus relaxing the barriers the FIRST AMENDMENT erects between church and state. The Court rebuffed challenges to Nebraska's paying a legislative chaplain and Pawtucket, Rhode Island's displaying a Christmas crèche. Yet in the 1984 term the Court resumed a separationist stance, invalidating major programs (both federal and state) found to channel public aid to church schools, invalidating an Alabama statute providing for a "moment of silence or prayer" in public schools, and striking down a Connecticut law making it illegal for an employer to require an employee to work on the employee's chosen Sabbath. The Reagan administration had filed briefs in support of the challenged laws in all four cases, and in each of the four cases a majority of the Justices ruled against the program.

Even so brief a sketch of the Burger Court's evolution conveys something of the dialectical nature of those years on the Court. In reading Burger Court opinions, one is sometimes struck by their conservative thrust, sometimes by a liberal result. Here the Burger Court is activist, there it defers to other branches or bodies. There is continuity with the Warren years, but discontinuity as well. One is struck, above all, by the way in which the Court in the Burger era has become a battleground on which fundamental jurisprudential issues are fought out.

No simple portrait of the Burger Court is possible. Some measure of the Burger years may be had, however, by touching upon certain themes that characterize the Burger Court—the questions which observers of the Court have tended to ask and the issues around which decision making on the Court has tended to revolve.

At the outset of the Burger era, many observers thought that a more conservative tribunal would undo much of the work of the Warren Court. This prophecy has been unfulfilled. The landmarks of the Warren Court remain essentially intact. Among those landmarks are BROWN V. BOARD OF EDUCATION (1954) (school desegregation), REYNOLDS V. SIMS (1964) (legislative REAPPORTIONMENT), and the decisions applying nearly all of the procedural protection of the BILL OF RIGHTS in criminal trials to the states.

In all of these areas, there have been, to be sure, important adjustments to Warren Court doctrine. Sometimes, a majority of the Burger Court's Justices have shown a marked distaste for the ethos underlying those precedents. Thus, while leaving such precedents as MIRANDA V. ARIZONA (1956) and MAPP V. OHIO (1961) standing, the Burger Court has frequently confined those precedents or carved out exceptions. Yet, despite criticisms, on and off the bench, of the INCORPORATION DOCTRINE, there has been no wholesale attempt to turn the clock back to the pre-Warren era.

In school cases, while the Burger Court has rebuffed efforts to provide remedies for de facto SEGREGATION, where de jure segregation is proved the Court has been generous in permitting federal judges to fashion effective remedies (it was an opinion of Chief Justice Burger, in SWANN V. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION (1971) that first explicitly upheld lower courts' use of busing as a remedy in school cases). In legislative apportionment cases, the Burger Court has permitted some deviation from strict conformity to a population basis in drawing state and local government legislative districts,

but the essential requirement remains that REPRESENTATION must be based on population.

A common complaint against the Warren Court was that it was too "activist"—that it was too quick to substitute its judgment for decisions of legislative bodies or other elected officials. In opinions written during the Burger years, it is common to find the rhetoric of judicial restraint, of calls for deference to policy judgments of legislatures and the political process generally.

Some Burger Court decisions reflect a stated preference for leaving difficult social issues to other forums than the courts. In rejecting an attack of Texas's system of financing public schools through heavy reliance on local property taxes, Justice Powell argued against judges' being too ready to interfere with "informed judgments made at the state and local levels."

Overall, however, the record of the Burger Court is one of activism. One of the hallmarks of activism is the enunciation by the Court of new rights. By that standard, no judicial decision could be more activist than the Burger Court's decision in ROE V. WADE (1973). There Justice Blackmun drew upon the vague contours of the FOURTEENTH AMENDMENT'S DUE PROCESS clause to decide that the RIGHT TO PRIVACY (itself a right not spelled out in the Constitution) implies a woman's right to have an ABORTION.

In the modern Supreme Court, the Fourteenth Amendment's due process and EQUAL PROTECTION clauses have been the most conspicuous vehicles for judicial activism. The Warren Court's favorite was the equal protection clause—the so-called new equal protection which, through strict scrutiny and other such tests, produced such decisions as *Reynolds v. Sims*. With the advent of the Burger Court came the renaissance of SUBSTANTIVE DUE PROCESS.

An example of the Burger Court's use of substantive due process is Justice Powell's plurality opinion in MOORE V. EAST CLEVELAND (1977). There the Court effectively extended strict scrutiny to a local ordinance impinging on the "extended family." Powell sought to confine the ambit of substantive due process by offering the "teachings of history" and the "basic values that underlie our society" as guides for judging. It is interesting to recall that, only a few years before *Roe* and *Moore*, even as activist a Justice as Douglas had been uncomfortable with using substantive due process (hence his peculiar "emanations from a penumbra" opinion in GRISWOLD V. CONNECTICUT, 1965). The Burger Court, in opinions such as *Roe* and *Moore*, openly reestablished substantive due process as a means to limit governmental power.

Another index of judicial activism in the Supreme Court is the Court's willingness to declare an act of Congress unconstitutional. Striking down a state or local action in order to enforce the Constitution or federal law is common, but invalidation of congressional actions is rarer. The Warren Court struck down, on average, barely over one federal statute per term; the Burger Court has invalidated provisions of federal law at about twice that rate. More revealing is the significance of the congressional policies overturned in Burger Court decisions. Among them have been campaign finance (BUCKLEY V. VALEO, 1976), the eighteen-year-old vote in state elections (OREGON V. MITCHELL, 1970), special bankruptcy courts (NORTHERN PIPELINE CONSTRUCTION CO. V. MARATHON PIPE LINE CO., 1982), and the LEGELATIVE VETO (IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA, 1983).

Yet another measure of judicial activism is the Court's oversight of the behavior of coordinate branches of the federal government, apart from the substantive results of legislative or executive actions. The Burger Court thrust itself directly into the WATERGATE crisis, during Nixon's presidency. Even as the IMPEACHMENT process was underway in Congress, the Supreme Court, bypassing the Court of Appeals, expedited its hearing of the question whether Nixon must turn over the Watergate tapes. Denying Nixon's claim of EXECUTIVE PRIVILEGE, the Court set in motion the dénoument of the crisis, resulting in Nixon's resignation. The Burger Court has similarly been willing to pass on the ambit of Congress's proper sphere of conduct. For example, the Court's narrow view of what activity is protected by the Constitution's SPEECH OR DEBATE CLAUSE would have surprised WOODROW WILSON, who placed great emphasis on Congress's role in informing the nation.

Closely related to the question of judicial activism is the breadth and scope of the Court's business—the range of issues which the Court chooses to address. Justice FELIX FRANKFURTER used to warn against the Court's plunging into "political thickets" and was distressed when the Warren Court chose to treat legislative apportionment as appropriate for judicial resolution.

Reviewing the record of the Burger Court, one is struck by the new ground it has plowed. Areas that were rarely entered or went untouched altogether in the Warren years have since 1969 become a staple of the Court's docket. In the 1960s Justice ARTHUR J. GOLDBERG sought in vain to have the Justices debate the merits of capital punishment, but the Court would not even grant CERTIORARI. By contrast, not only did the Burger Court, in *Furman v. Georgia* (1972), rule that capital statutes as then administered were unconstitutional, but also death cases have appeared on the Court's calendar with regularity. (See CAPITAL PUNISHMENT CASES OF 1972, 1976.)

Sex discrimination is another area that, because of Burger Court decisions, has become a staple on the Justices' table. In *Hoyt v. Florida* (1961) the Warren Court took a quite relaxed view of claims of sex discrimination in a decision upholding a Florida law making jury service

for women, but not for men, completely voluntary. By the time Warren Burger became Chief Justice, in 1969, the women's movement had become a visible aspect of the American scene, and since that time the Burger Court has fashioned a considerable body of law on women's rights.

The Burger Court has carried forward—or has been carried along with—the "judicialization" or "constitutionalization" of American life. The victories won by blacks in court in the heyday of the CIVIL RIGHTS movement have inspired others to emulate their example. Prisoners, voters victimized by malapportionment, women, juveniles, inmates of mental institutions—virtually any group or individual failing to get results from the legislative or political process or from government bureaucracies has turned to the courts for relief. And federal judges have woven remedies for a variety of ills.

The Burger Court might have been expected to resist the process of constitutionalization. On some fronts, the Justices have slowed the process. SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ (1973) represents a victory for a hands-off approach to SCHOOL FINANCE (although it is undercut somewhat by the Court's subsequent decision in *Plyler v. Doe*, 1982). But such decisions seem to be only pauses in the expansion of areas in which the judiciary is willing to inquire.

The Burger Court may sometimes reach a "liberal" result, sometimes a "conservative" one. In some cases the Justices may lay a restraining hand on the EQUITY powers of federal judges, and in some they may be more permissive. All the while, however, the scope of the Supreme Court's docket expands to include wider terrain. In constitutional litigation, there seems to be a kind of ratchet effect: once judges enter an area, they rarely depart. This pattern characterizes the Burger era as much as it does that of Warren.

Even in areas that seemed well developed in the Warren Court, the Burger Court has added new glosses. It was long thought that COMMERCIAL SPEECH fell outside the protection of the First Amendment; the Burger Court brought it inside. It was Burger Court opinions that enlarged press rights under the First Amendment to include, at least in some circumstances, a right of access to criminal trials. The jurisprudence by which government aid to sectarian schools is tested is almost entirely of Burger Court making. Most of the case law sketching out the contours of personal autonomy in such areas as abortion, BIRTH CONTROL, and other intimate sexual and family relations dates from the Burger era. If idle hands are the devil's workshop, the Burger Court is a temple of virtue.

The contour of rights consists not only of substantive doctrine; it also includes jurisdiction and procedure. Who shall have access to the federal forum, when, and for the resolution of what rights—these have been battlegrounds in the Burger Court. If a case may be made that the Burger Court has achieved a retrenchment in rights, it may be that the case is the strongest as regards the Court's shaping of procedural devices.

Warren Court decisions reflected a mistrust in state courts as forums for the vindication of federal rights. Burger Court decisions, by contrast, are more likely to speak of the COMITY owed to state courts. Thus, in a line of decisions beginning with YOUNGER V. HARRIS (1971), the Burger Court has put significant limitations on the power of federal judges to interfere with proceedings (especially criminal) in state courts. The Court also has sharply curtailed the opportunity for state prisoners to seek federal habeas corpus review of state court decisions.

Technical barriers such as STANDING have been used in a number of cases to prevent plaintiffs' access to federal courts. For example, in *Warth v. Selden* (1976) black residents of Rochester were denied standing to challenge exclusionary ZONING in the city's suburbs. Similarly, in SIMON V. EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION (1976) poor residents of Appalachia were held not to have standing to challenge federal tax advantages granted to private hospitals that refused to serve the INDIGENT.

By no means, however, are Burger Court decisions invariable in restricting access to federal courts or in limiting remedies for the violation of federal law. Some of the Court's interpretations of SECTION 1983, TITLE 42, UNITED STATES CODE (a civil rights statute dating back to 1871) have made that statute a veritable font of litigation. The Warren Court had ruled, in 1961, that Congress, in enacting section 1983, had not intended that municipalities be among the "persons" subject to suit under the statute; in 1978, the Burger Court undertook a "fresh analysis" of the statute and concluded that municipalities are subject to suit thereunder.

Going further, the Court ruled, in 1980, that municipalities sued under section 1983 may not plead as a defense that the governmental official who was involved in the alleged wrong had acted in "good faith"; the majority disregarded the four dissenters' complaint that "ruinous judgments under the statute could imperil local governments." And in another 1980 decision the Court held that plaintiffs could use section 1983 to redress claims based on federal law generally, thus overturning a long-standing assumption that section 1983's reference to federal "laws" was to equal rights legislation. The Burger Court's section 1983 rulings have been a major factor in the "litigation explosion" which in recent years has been the subject of so much legal and popular commentary.

The reach of federal courts' equity powers has been another hotly debated issue in the Burger Court. CLASS ACTIONS seeking to reform practices in schools, prisons, jails, and other public institutions have made INSTITU-

TIONAL LITIGATION a commonplace. Such suits go far beyond the judge's declaring that a right has been violated; they draw the judge into ongoing supervision of state or local institutions (recalling the quip that in the 1960s federal district judge Frank Johnson was the real governor of Alabama). Institutional litigation in federal courts raises serious questions about federalism and often blurs the line between adjudication, legislation, and administration.

Some Burger Court decisions have attempted to curb federal judges' equity power in institutional cases. For example, in RIZZO V. GOODE (1976) Justice Rehnquist, for the majority, reversed a lower court's order to the Philadelphia police department to institute reforms responding to allegations of police brutality; Rehnquist admonished the judge to refrain from interfering in the affairs of local government. Similarly, in prison cases, the Burger Court has emphasized the importance of federal judges' deference to state prison officials' judgment about questions of prison security and administration.

In important respects, however, the Burger Court has done little to place notable limits on federal courts' equity powers. Especially is this true in school DESEGREGATION cases. A wide range of remedies has been approved, including busing, redrawing of attendance zones, and other devices. Although the Court has maintained the distinction between DE FACTO AND DE JURE segregation (thus requiring evidence of purposeful segregation as part of a plaintiff's prima facie case), decisions such as those from Columbus and Dayton (both in 1979) show great deference to findings of lower courts used to support remedial orders against local school districts.

Painting a coherent portrait of the Burger Court is no easy task. An effort to describe the Court in terms of general themes, such as the Justices' attitude to judicial activism, founders on conflicting remarks in the Court's opinions. Likewise, an attempt to generalize about the Burger Court's behavior in any given area encounters difficulties.

Consider, for example, the expectation—understandable in light of President Nixon's explicit concern about the Warren Court's rulings in criminal justice cases—that the Burger Court would be a "law and order" tribunal. In the early years of the Burger Court (until about 1976), the Court, especially in its rulings on police practices, seemed bent on undermining the protections accorded in decisions of the Warren years. The majority showed their attitude to the exclusionary rule by referring to it as a "judicially created remedy," one whose benefits were to be balanced against its costs (such as to the functioning of a GRAND JURY). In the late 1970s, the Court seemed more sympathetic to *Miranda* and to other devices meant to limit police practices. But in the early 1980s, especially in SEARCH AND SEIZURE cases, the Court seemed once again markedly sympathetic to law enforcement.

Or consider the Court's attitudes to federalism. In some decisions, the Burger Court has seemed sympathetic to the interests of states and localities. In limiting state prisoners' access to federal writs of habeas corpus, the Court shows respect for state courts. In rebuffing attacks on inequalities in the financing of a state's public schools, the Court gives breathing room to local judgments about running those schools. In limiting federal court intervention in prison affairs, the Court gives scope for state judgments about how to run a prison.

Yet many Burger Court decisions are decidedly adverse to state and local governments' interests. The Court's section 1983 rulings have exposed municipalities to expensive damage awards. The Burger Court has been more active than the Warren Court in using the dormant COMMERCE CLAUSE to restrict state laws and regulations found to impinge upon national interests. And in the highly controversial decision of GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985) the Court said that, if the states have Tenth Amendment concerns about acts of Congress, they should seek relief from Congress, not from the courts (in so ruling, the Court in *Garcia* overturned NATIONAL LEAGUE OF CITIES V. USERY, 1976, itself a Burger Court decision).

How does one account for such a mixed record, replete with conflicting signals about basic jurisprudential values? The temperament and habits of the Justices of the Burger Court play a part. Pundits often imagine the Justices coming to the Court's conference table with "shopping lists," looking for cases on which to hang doctrinal innovations. For most (although not necessarily all) of the Justices, this picture is not accurate. By and large, the Justices tend to take the cases as they come. This tendency is reinforced by the Court's workload pressures. Far more cases come to the Burger Court than came to the Warren Court. Complaints by the Chief Justice about the burden thus placed on the Court are frequent, and in 1975 it was reported that at least five Justices had gone on record as favoring the concept of a National Court of Appeals to ease the Supreme Court's workload.

The Burger years on the Court have lacked the larger-than-life figures of the Warren era, Justices like HUGO L. BLACK and Felix Frankfurter, around whom issues tended to polarize. Those were judges who framed grand designs, a jurisprudence of judging. Through their fully evolved doctrines, and their arm-twisting, they put pressure on their colleagues to think about cases in doctrinal terms. Since the departure of the great ideologues, the Justices have been under less pressure to fit individual cases into doctrinal tableaux. Ad hoc results become the order of the day.

The Burger Court has been a somewhat less ideological bench than was the Warren Court. Many of the Court's most important decisions have turned upon the vote of the centrists on the bench. It is not unusual to find, especially in 5–4 decisions, that Justice Powell has cast the deciding vote. Powell came to the bench inclined to think in the pragmatic way of the practicing lawyer; as a Justice he soon came to be identified with "balancing" competing interests to arrive at a decision. The Burger Court's pragmatism, its tendency to gravitate to the center, blurs ideological lines and makes its jurisprudence often seem to lack any unifying theme or principle.

A Burger Court decision—more often, a line of decisions—often has something for everyone. In *Roe v. Wade* the Court upheld the right of a woman to make and effectuate a decision to have an abortion. Yet, while invalidating state laws found to burden the abortion decision directly, the Court has permitted state and federal governments to deny funding for even therapeutic abortions while funding other medical procedures. In REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE (1978) a majority of the Justices ruled against RACIAL QUOTAS in a state university's admissions process, but a university, consistent with *Bakke*, may use race as a factor among other factors in the admissions process.

Burger Court decisions show a distaste for categorical values. The Warren Court's fondness for prophylactic rules, such as *Miranda* or the Fourth Amendment exclusionary rule, is not echoed in the Burger Court. The Burger bench may not have jettisoned those rules outright, but most Justices of this era show a preference for fact-oriented adjudication rather than for sweeping formulae.

Burger Court opinions are less likely than those of the Warren Court to ring with moral imperatives. Even when resolving so fundamental a controversy as that over abortion, a Burger Court opinion is apt to resemble a legislative committee report more nearly than a tract in political theory. A comparison of such Warren Court opinions as *Brown v. Board of Education* and *Reynolds v. Sims* and a Burger Court opinion such as *Roe v. Wade* is instructive. Warren Court opinions often read as if their authors intended them to have tutorial value (Justice Goldberg once called the Supreme Court "the nation's schoolmaster"); Burger Court opinions are more likely to read like an exercise in problem solving.

For most of its existence, the Burger Court has been characterized by a lack of cohesive voting blocs. For much of its history, the Burger years have seen a 2–5–2 voting pattern—Burger and Rehnquist in one wing, Brennan and Marshall in the other wing, the remaining five Justices tending to take more central ground. Justice Stewart's replacement by Justice O'Connor (a more conservative Justice) tended to reinforce the Burger-Rehnquist wing, while Justice Stevens gravitated more and more to the Brennan-Marshall camp. Even so, the Burger Court was a long way from the sharp ideological alignments of the Warren years.

The Court's personalities and dynamics aside, the nature of the issues coming before the Burger Court help account for the mixed character of the Court's record. The Warren Court is well remembered for decisions laying down broad principles; *Brown*, *Mapp*, *Miranda*, and *Reynolds* are examples. The task of implementing much of what the Warren Court began fell to the Burger Court. Implementation, by its nature, draws courts into closer judgment calls. It is one thing to lay down the principle that public schools should not be segregated by race, but quite another to pick one's way through the thicket of de facto-de jure distinctions, interdistrict remedies, and shifting demographics. Had the Warren Court survived into the 1970s, it might have found implementation as difficult and splintering as has the Burger Court.

If the Warren Court embodied the heritage of progressivism and the optimistic expectations of post-World War II America, the Burger years parallel a period of doubt and uncertainty about solutions to social problems in the years after the Great Society, the VIETNAM WAR, and Watergate. In a time when the American people might have less confidence in government's capacity in other spheres, the Supreme Court might well intuitively be less bold in imposing its own solutions. At the same time, there appeared, in the Burger years, to be no turning back the clock on the expectations of lawyers and laity alike as to the place of an activist judiciary in public life. Debate over the proper role of the judiciary in a democracy is not insulated from debate over the role of government generally in a society aspiring to ORDERED LIBERTY. Judgments about the record of the Burger Court, therefore, tend to mirror contemporary American ideals and values.

A. E. DICK HOWARD
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Bibliography

BLASI, VINCENT, ed. 1983 *The Burger Court: The Counter-Revolution That Wasn't.* New Haven, Conn.: Yale University Press.

FUNSTON, RICHARD Y. 1977 *Constitutional Counterrevolution?: The Warren Court and the Burger Court: Judicial Policy Making in Modern America.* Cambridge, Mass.: Schenkman.

LEVY, LEONARD W. 1974 *Against the Law: The Nixon Court and Criminal Justice.* New York: Harper & Row.

MASON, ALPHEUS T. 1979 *The Supreme Court from Taft to Burger,* 3rd ed. Baton Rouge: Louisiana State University Press.

WOODWARD, BOB and ARMSTRONG, SCOTT 1979 *The Brethren: Inside the Supreme Court.* New York: Simon & Schuster.
EMERSON, THOMAS I. 1980 First Amendment Doctrine and the Burger Court. *California Law Review* 68:422–481.
HOWARD, A. E. DICK 1972 Mr. Justice Powell and the Emerging Nixon Majority. *Michigan Law Review* 70:445–468.
REHNQUIST, WILLIAM H. 1980 The Notion of a Living Constitution. *Texas Law Review* 54:693–706.
SALTZBERG, STEPHEN A. 1980 Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts. *Georgetown Law Journal* 69:151–209.

## BURGESS, JOHN W.
(1842–1931)

John W. Burgess was professor of political science and constitutional law at Columbia University (1876–1912) where he founded America's first graduate department of political science. Trained in Germany, Burgess sought to develop an American political science based on historical determinism rather than the NATURAL RIGHTS assumptions of the DECLARATION OF INDEPENDENCE. He saw the CIVIL WAR as a necessary step in the process by which FEDERALISM gave way to nationalism. He understood the Constitution as creating the two spheres of government and liberty, and as granting rights to individuals rather than protecting preexisting rights. His most important book was *Political Science and Comparative Constitutional Law* (1890).

DENNIS J. MAHONEY
(1986)

## BURKE-WADSWORTH SELECTIVE TRAINING AND SERVICE ACT

See: Selective Service Acts

## *BURNS BAKING COMPANY v. BRYAN*
264 U.S. 504 (1924)

The Supreme Court, speaking through Justice PIERCE BUTLER, declared unconstitutional a Nebraska statute that prohibited short-weighting as well as overweighting of bread as a violation of DUE PROCESS and an arbitrary interference with private business. Justice LOUIS D. BRANDEIS dissented, joined by OLIVER WENDELL HOLMES, decrying the decision as "an exercise of the powers of a superlegislature," and urging deference to the legislature's basis for state action.

DAVID GORDON
(1986)

## BURR, AARON
(1756–1836)

Aaron Burr of New York served as a Continental Army officer during the Revolutionary War and later practiced law in Albany and New York City. He was elected four times to the legislature and was for two years state attorney general before serving a term in the United States SENATE (1791–1797). He organized the New York Republican party and was the first person to use the Tammany Society for political purposes.

In 1800 Burr was nominated for vice-president on the Republican ticket. Under the ELECTORAL COLLEGE system as it then existed, Burr received the same number of votes as his party's presidential nominee, THOMAS JEFFERSON. The HOUSE OF REPRESENTATIVES took thirty-six ballots to break the tie and elect Jefferson President, and did so only after ALEXANDER HAMILTON interceded with Federalist congressmen.

After his term as vice-president ended in 1805, Burr became involved in a bizarre intrigue, generally supposed to have had as its object the creation of a separate nation southwest of the Appalachian Mountains. His expedition was thwarted, and Burr and several of his confederates were tried for TREASON. President Jefferson personally directed the prosecution and publicly proclaimed the conspirators guilty. In EX PARTE BOLLMAN AND SWARTOUT (1807) the Supreme Court released two of Burr's lieutenants on a writ of HABEAS CORPUS, refusing to extend the constitutional definition of treason to include conspiracy to commit the offense. A few months later Burr himself was tried before JOHN MARSHALL, sitting as circuit judge, and was acquitted on procedural grounds. The acquittal was the occasion of a renewed Jeffersonian assault against Marshall and the independence of the judiciary.

Burr spent the five years following his trial in European exile, and he never returned to public life.

DENNIS J. MAHONEY
(1986)

Bibliography

LOMASK, MILTON 1979 *Aaron Burr: The Years from Princeton to Vice President, 1756–1805.* New York: Farrar, Straus & Giroux.
——— 1982 *Aaron Burr: The Conspiracy and Years of Exile, 1805–1836.* New York: Farrar, Straus & Giroux.

## *BURSON v. FREEMAN*
504 U.S. 191 (1992)

There is no speech more important for a democracy than political speech pertaining to elections. Nevertheless, all

fifty states prohibit political speech in and around polling places on election day. In *Burson v. Freeman*, the Supreme Court, in a 5–3 decision, held that a ban on political speech within 100 feet of the entrance to polling places on election day was not an unconstitutional infringement of the FREEDOM OF SPEECH.

The PLURALITY OPINION of Justice HARRY A. BLACKMUN reasoned that the impairment of core FIRST AMENDMENT rights was justified by the COMPELLING STATE INTEREST in avoiding voter intimidation and election fraud. Despite the OVERBREADTH of the ban—not all prohibited speech would intimidate voters or threaten fraud—the Court was swayed by the fact that every state has long-standing "campaign-free" zones around polling places and by the fear that other measures to preserve electoral integrity might involve unwelcome police presence at the polls.

Justice JOHN PAUL STEVENS, in dissent, agreed that the state's interests were compelling, but argued that smaller campaign-free zones, perhaps no larger than 50 feet, were adequate to insure free access to the polls. Moreover, the ban's application to ordinary campaign-related speech, such as posters and signs, was content-discriminatory and bore no relationship to the prevention of fraud or intimidation.

ADAM WINKLER
(2000)

## *BURSTYN, INC. v. WILSON*
343 U.S. 495 (1952)

The Supreme Court in this case unanimously overruled a 1915 decision that movies are a business "pure and simple," not entitled to constitutional protection as a medium for the communication of ideas. Justice TOM C. CLARK, for the *Burstyn* Court, ruled that expression by means of movies is included within the free speech and free press clauses of the FIRST AMENDMENT and protected against state abridgment by the FOURTEENTH. In this case New York authorized a state censor to refuse a license for the showing of any film deemed "sacrilegious," a standard that permitted unfettered and unprejudiced discretion. (See VAGUENESS DOCTRINE.) The state, Clark declared, had no legitimate interest in protecting any religion from offensive views. Justice FELIX FRANKFURTER, concurring, emphasized the danger to the creative process and to RELIGIOUS LIBERTY from a standard so vague that it could be confused with BLASPHEMY.

LEONARD W. LEVY
(1986)

## BURTON, HAROLD
(1888–1964)

Probably no member of the United States Supreme Court enjoyed greater affection from his colleagues on the bench than Justice Harold Burton, whom FELIX FRANKFURTER once described as having "a kind of a boy scout temperament," and whom others praised for his kindness, reasonableness, and unfailing integrity. "There is no man on the bench now who has less pride of opinion," Frankfurter noted, ". . . or is more ready to change positions, if his mind can be convinced. And no vanity guards admission to his mind." Burton, a former mayor of Cleveland and United States senator from Ohio, enjoyed several other distinctions as well. Named to the Court in 1945, he was the only Republican appointed between 1933 and 1953; he also proved to be the most liberal of HARRY S. TRUMAN's four appointees, which, considering the nature of the competition, did not demand much liberalism.

Although dubbed by the press as one member of Truman's law firm, which also included FRED M. VINSON, TOM C. CLARK, and SHERMAN MINTON, Burton broke ranks with the President on the most crucial test of executive power during his tenure, when he joined Justice HUGO L. BLACK's opinion in YOUNGSTOWN SHEET & TUBE CO. V. SAWYER (1952), which declared Truman's seizure of the nation's steel mills illegal in the absence of congressional legislation.

With the notable exception of JOINT ANTI-FASCIST REFUGEE COMMITTEE V. MCGRATH (1951), however, Burton routinely upheld the Truman administration's efforts to destroy the American Communist party and to purge from the federal government suspected subversives during the high tide of the post-1945 Red Scare. He voted with the majority, for instance, in AMERICAN COMMUNICATIONS ASSOCIATION V. DOUDS (1950), in DENNIS V. UNITED STATES (1951), and in *Bailey v. Richardson* (1951), in which the VINSON COURT sustained the noncommunist oath provisions of the TAFT-HARTLEY ACT, the conviction of eleven top Communist party leaders under the Smith Act, and the federal government's LOYALTY AND SECURITY PROGRAM.

Apart from Minton and STANLEY F. REED, Burton became the most virulent antiradical on the bench during the 1950s. In *Slochower v. Board of Education* (1956) he dissented against Clark's opinion voiding the dismissal of a professor who had invoked his right AGAINST SELF-INCRIMINATION during an investigation into his official conduct. He also dissented in SWEEZY V. NEW HAMPSHIRE (1957), when the Court reversed the conviction of another professor for refusing to answer questions about his classes posed by the state's attorney general. And he, Minton, and Reed were the only dissenters in PENNSYLVANIA V. NELSON

(1956), when the Court invalidated the SEDITION law of that state and, by implication, similar statutes in other states.

Generally, Burton followed an equally conservative standard with respect to criminal justice issues. Here, too, he usually endorsed the claims of government rather than those of the individual. In *Bute v. Illinois* (1948) he wrote for a majority of five that reaffirmed the rule of BETTS V. BRADY (1942), which permitted the states to prosecute noncapital felonies without appointing counsel for indigent defendants. He also tolerated forms of police conduct that offended even Frankfurter's conception of DUE PROCESS. (See RIGHT TO COUNSEL.)

Moments of compassion and insight redeemed Burton's otherwise lackluster record in CIVIL LIBERTIES cases. In *Louisiana ex rel. Francis v. Resweber* (1947), perhaps his most famous opinion, he rebelled against Louisiana's efforts to execute a convicted murderer after the first grisly attempt failed because of low voltage in the electric chair. He also joined Black and Frankfurter in their futile efforts to secure a full hearing before the Supreme Court for Julius and Ethel Rosenberg, who were convicted of espionage at the depths of the cold war with the Soviet Union.

By the conclusion of his judicial career in 1956, moreover, he had emerged as one of the Court's most outspoken foes of racial SEGREGATION, despite an unpromising beginning in MORGAN V. VIRGINIA (1946), where he had been the lone dissenter against Black's opinion invalidating the application of that state's Jim Crow law to interstate buses. Four years before BROWN V. BOARD OF EDUCATION, Burton had been prepared to overrule the SEPARATE BUT EQUAL DOCTRINE in *Henderson v. United States* (1950). Reluctantly, he bowed to the preference of several colleagues for invoking the COMMERCE CLAUSE to topple segregation on southern railroads in that case, but he joined Chief Justice EARL WARREN's opinion eagerly in *Brown*. Suffering from a debilitating illness that later claimed his life, Burton retired from the Court in 1958.

MICHAEL E. PARRISH
(1986)

Bibliography

BERRY, MARY F. 1978 *Stability, Security, and Continuity: Mr. Justice Burton and Decision-Making in the Supreme Court, 1945–1958.* Westport, Conn.: Greenwood Press.

## *BURTON v. WILMINGTON PARKING AUTHORITY*
365 U.S. 715 (1961)

*Burton* exemplifies the interest-balancing approach to the STATE ACTION limitation of the FOURTEENTH AMENDMENT used by the Supreme Court during the Chief Justiceship of EARL WARREN. A private restaurant, leasing space in a publicly owned parking structure, refused to serve Burton because he was black. In a state court action, Burton sought declaratory and injunctive relief, claiming that the restaurant's refusal amounted to state action denying him the EQUAL PROTECTION OF THE LAWS. The state courts denied relief, but the Supreme Court reversed, 7–2, holding the Fourteenth Amendment applicable to the restaurant's conduct.

Public agencies owned the land and the building, had floated bonds, were collecting revenues to pay for the building's construction and maintenance, and received rent payments from the restaurant. The restaurant could expect to draw customers from persons parking in the structure; correspondingly, some might park there because of the restaurant's convenience. Profits earned from the restaurant's RACIAL DISCRIMINATION, the Court said, were indispensable elements in an integral financial plan. All these interrelated mutual benefits taken together amounted to significant involvement of the state in the private racial discrimination. Justice TOM C. CLARK, for the majority, disclaimed any pretensions of establishing a general rule about state aid to private discrimination, or even for the leasing of state property. Under "the peculiar facts or circumstances" here, the state action limitation was satisfied.

Justice POTTER STEWART, concurring, said simply that a state statute permitting a restaurant's proprietor to refuse service to persons offensive to a majority of patrons amounted to official authorization of private discrimination—a theme explored later in REITMAN V. MULKEY (1967). Justice JOHN MARSHALL HARLAN dissented, joined by Justice CHARLES E. WHITTAKER. Harlan complained that the majority had offered no guidance for determining when the state action limitation would be satisfied. Rather than pursue this inquiry, he urged a REMAND to the state courts for further illumination of the "authorization" question raised by Justice Stewart.

KENNETH L. KARST
(1986)

## BUSH, GEORGE H. W.
(1924– )

George Bush served two terms as vice-president during the presidency of RONALD REAGAN, who had been his rival for the Republican presidential nomination in 1980. With Reagan's support, Bush was then elected President in 1988. Bush was thus the first President since 1836 to be elected from the vice-presidency, an office that does not usually provide much prominence or stature to its incum-

bent. Bush was also one of the few Presidents in this century to have reached the White House without having previously won a single statewide election (he was defeated in bids to become U.S. senator from Texas in 1966 and 1970). With the exception of the popular leader DWIGHT D. EISENHOWER, all the others in this category—WILLIAM HOWARD TAFT, HERBERT C. HOOVER, and GERALD R. FORD—proved to be one-term Presidents.

Apart from serving two terms in the U.S. HOUSE OF REPRESENTATIVES (1966–1970), Bush owed his political experience before 1980 to a succession of presidential appointments in the administrations of RICHARD M. NIXON and Gerald Ford. He served successively as U.S. ambassador to the United Nations (1971–1973), chief of the U.S. Liaison Office (that is, de facto ambassador) in the People's Republic of China (1974–1975), and director of the Central Intelligence Agency (1976). His performance in these posts made no enemies but also did little to define his political character or to win him a broad popular following.

In the 1988 presidential campaign, Bush courted the conservative constituencies of Ronald Reagan. He attacked his opponent for his affiliation with the AMERICAN CIVIL LIBERTIES UNION and expressed sympathy with several key conservative complaints against the constitutional rulings of both the WARREN COURT and the BURGER COURT. He thus expressed support for constitutional amendments to prohibit ABORTION and to reauthorize SCHOOL PRAYER. He also supported a constitutional amendment to require a BALANCED BUDGET. As President, he urged a constitutional amendment to overturn the Supreme Court's ruling that FLAG DESECRATION is protected by the FIRST AMENDMENT. None of these amendments was pushed with any sustained energy or intensity by the Bush administration, however, and none found majority support in Congress.

Bush's first choice for the Supreme Court when the retirement of Justice WILLIAM J. BRENNAN opened a vacancy in the summer of 1990 was characteristic of his nonconfrontational style as President. DAVID H. SOUTER, an almost totally unknown New Hampshire state supreme court justice, proved to have taken few public stands on constitutional controversies, and President Bush announced that he, himself, had neither questioned Souter nor learned from others what Souter's views might be on abortion or on other controversial subjects. Bush did, however, emphasize his expectation that Souter would fairly interpret the Constitution instead of "legislating" his own policy preferences. The President was prepared to indicate in general terms that he thought recent Supreme Court Justices had not always properly observed this distinction, but he did not single out any particular decisions for such criticism.

In general, during his first two years in office, President Bush adopted a conciliatory stance toward a Congress dominated by the opposition party. He did assert presidential prerogatives in vetoing congressional measures he thought overly restrictive of the presidency or of the constitutional duties of the executive branch, but he did not make this a major theme either. He conceded before his election that the so-called IRAN-CONTRA AFFAIR in the Reagan administration may have involved significant departures from the law and pledged to observe legal constraints with complete devotion. He did make efforts to consult congressional leaders when he committed U.S. forces to conflict in Panama in 1989 and in the Middle East in 1990, and both efforts generally received broad support in Congress. Like his predecessors, however, President Bush did not acknowledge that he was bound by the 1974 War Powers Resolution; he submitted required reports to Congress, but presented these as voluntary measures of cooperation rather than compliance with binding law.

In the conflict over Iraq's conquest of neighboring Kuwait, President Bush pursued active diplomatic efforts, culminating in a United Nations Security Council Resolution authorizing the use of force to liberate Kuwait. After sending almost half a million American troops to Saudi Arabia, President Bush did finally seek and receive direct congressional authorization for the use of force in this conflict. U.S. air strikes followed within days of this vote in accord with a deadline established in both the U.N. resolution and the congressional resolution. Though the congressional resolution received only a bare majority in the Senate in a largely partisan vote, it was widely accepted as the constitutional equivalent of a DECLARATION OF WAR and essentially put an end to further legal debate about the U.S. military role in the war against Iraq. With the onset of decisive military operations, support for he President in the country rose to record levels.

JEREMY RABKIN
(1992)

Bibliography

BUSH, GEORGE with DOUGLAS WEAD 1988 *Man of Integrity.* Eugene, Ore.: Harvest House.

BUSH, GEORGE 1989 Statement on Signing the Treasury, Postal Service and General Government Act, 1990 (November 3, 1989) in *Public Papers of the Presidents, Administration of George Bush, 1989.* Washington, D.C.: U.S. Government Printing Office.

## BUSH, GEORGE H. W.
(1924– )
(Update)

George Herbert Walker Bush was the forty-first President of the United States. The son of a prominent businessman

and U.S. senator, Bush was born in Milton, Massachusetts on June 12, 1924, but spent almost all of his childhood in Greenwich, Connecticut. Upon his graduation from prep school, Bush entered the Navy in 1942. For the remainder of WORLD WAR II he served as a naval aviator and was awarded the Distinguished Flying Cross. After the end of the war, Bush entered Yale University, where he was graduated Phi Beta Kappa with honors in 1948.

Subsequently, Bush moved to Texas, where he became cofounder and half-owner of an oil drilling company in 1950. In 1967 he sold the oil drilling company and thereafter concentrated on politics and public service. He was a member of the U.S. HOUSE OF REPRESENTATIVES from 1967 to 1971, Ambassador to the UNITED NATIONS from 1971 to 1973, Chairman of the Republican National Committee from 1973 to 1974, Chief Liaison Officer to China from 1975 to 1976, and Director of the Central Intelligence Agency from 1976 to 1977. Bush unsuccessfully sought the Republican nomination for President in 1980. However, RONALD REAGAN, who obtained the nomination, chose Bush as his running mate. Reagan won the election, and Bush served two terms as Vice-President.

In 1988, with Reagan's support, Bush was chosen as the Republican nominee for President. He then defeated Democrat Michael Dukakis in the general election. However, after serving a single term as President, Bush was defeated in his reelection bid by Democrat WILLIAM J. CLINTON in 1992.

The most important potential constitutional crisis of the Bush presidency arose in connection with the American response to Iraq's invasion of Kuwait in 1990. Bush quickly rallied international support for a massive, United States–led military operation designed to expel the Iraqis. The plan included a ground assault on the nation of Iraq. Many questioned whether the armed forces of the United States could be committed to such an operation without a formal DECLARATION OF WAR by Congress. Although no such declaration was forthcoming, Bush was successful in obtaining a resolution from Congress that supported military intervention against Iraq. Ultimately, the quick, spectacular success of Operation Desert Storm, as it was called, muted the legal critics of Bush's actions.

Constitutional arguments were also deeply intertwined with domestic politics during the Bush administration. For example, Bush publicly supported the pro-life position on ABORTION and voiced strong opposition to race-based AFFIRMATIVE ACTION; moreover, his administration also vigorously pressed these views in the federal courts. However, the most significant constitutional legacy of the Bush presidency lay not in its approach to any specific issue, but rather in presidential appointments to the federal courts.

Like Reagan before him, Bush generally sought out conservative appointees at all levels, thereby continuing the erosion of judicial support for liberal constitutionalism. His appointment of CLARENCE THOMAS to the Supreme Court epitomized this trend; after his narrow success in a bitter struggle over confirmation, Thomas has become perhaps the most conservative Justice of the post–WARREN COURT era. By contrast, DAVID H. SOUTER—Bush's other appointee to the Court—has proven to be far more sympathetic to liberal positions. Thus, while Bush's appointees clearly moved the balance of judicial power to the right, he was not entirely successful in his effort to assure the preeminence of conservative legal thought on the Supreme Court.

EARL M. MALTZ
(2000)

Bibliography

MERVIN, DAVID 1996 *George Bush and the Guardian Presidency.* New York: St. Martin's Press.

PARMENT, HERBERT S. 1997 *George Bush: The Life of a Lone Star Yankee.* New York: Scribner.

## BUSHELL'S CASE
### 6 State Trials 999 (1670)

A unanimous decision of the Court of Common Pleas, *Bushell's Case* stands for the proposition that a jury may not be punished for returning a verdict contrary to a court's direction. In medieval England, bribery and intimidation were commonly accepted methods of insuring "correct" verdicts, but the Privy Council and the Star Chamber had eliminated those practices by the sixteenth century. Nevertheless, the Star Chamber often handled as corrupt any acquittal that it felt contradicted the evidence. The popular view increasingly opposed punishment for jurors unless they returned a clearly corrupt verdict, and the House of Commons endorsed that position in 1667. The decision in *Bushell's Case* brought the law into line.

When jurors in a case against William Penn and other Quakers persisted in finding the defendants innocent—despite three days of starvation—Bushell and the other jurors were fined and imprisoned. Bushell obtained a writ of HABEAS CORPUS in the Court of Common Pleas and was subsequently discharged. Chief Justice John Vaughan delivered a powerful opinion distinguishing between the "ministerial" (administrative) and judicial functions of jurors. Violations of the former were finable but a verdict was judicial and therefore not subject to penalty. The Court only judged the law. The jury was obliged to deduce the facts from the evidence, and the court could not penalize them for disagreeing with its deductions and directions. Seventeenth-century jurors were expected and

required to utilize their own knowledge of a case, private knowledge a judge likely did not have. Only by handpicking jurors could the Crown insure favorable verdicts.

DAVID GORDON
(1986)

## BUSING, SCHOOL

See: School Busing

## *BUTCHER'S UNION SLAUGHTERHOUSE v. CRESCENT CITY SLAUGHTERHOUSE*
111 U.S. 746 (1884)

In this case the INALIENABLE POLICE POWER doctrine again defeated a VESTED RIGHTS claim based on the CONTRACT CLAUSE. Louisiana revoked a charter of monopoly privileges, which the Supreme Court had sustained in the first of the SLAUGHTERHOUSE CASES (1873). Although the contract was supposedly irrepealable for a period of twenty-five years, the Court, in an opinion by Justice SAMUEL F. MILLER, maintained that one legislature cannot bind its successors on a matter involving the GENERAL WELFARE, specifically the public health. No legislature can contract away the state's inalienable power to govern slaughterhouses, which affect the public health. Four Justices, concurring separately, argued that the original monopoly was unconstitutional and its charter revocable, because it violated the liberty and property of competing butchers; the four employed SUBSTANTIVE DUE PROCESS in construing the FOURTEENTH AMENDMENT.

LEONARD W. LEVY
(1986)

## BUTLER, BENJAMIN F.
(1818–1893)

A Massachusetts labor lawyer and Democratic politician, Benjamin Franklin Butler became a Union general in 1861. Butler declared that runaway slaves were "contrabands of war," and used them as noncombatants, refusing to return them to their masters. Later he supported the use of Negro soldiers and in 1864 forced the Confederacy to treat black Union prisoners of war according to the rules of war by retaliating against Confederate prisoners. In 1862 Butler directed the occupation of New Orleans, where his strict application of martial law kept a hostile population under control with virtually no violence. In 1865 Butler advocated that black veterans be given confiscated land and the franchise. After entering Congress in 1867, Butler was a manager of President ANDREW JOHNSON'S IMPEACHMENT. Butler approached the trial as if he were prosecuting a horse thief. Butler's lack of dignity in presenting EVIDENCE probably contributed to Johnson's acquittal.

PAUL FINKELMAN
(1986)

Bibliography

HOLZMAN, ROBERT S. 1978 *Stormy Ben Butler.* New York: Octagon Books.

## BUTLER, PIERCE
(1744–1822)

Irish-born Pierce Butler represented South Carolina at the CONSTITUTIONAL CONVENTION OF 1787 and signed the Constitution. It was Butler who first proposed the Convention's secrecy rule. A frequent speaker, he favored a weak central government and championed the interests of slaveholders. He was later a United States senator.

DENNIS J. MAHONEY
(1986)

## BUTLER, PIERCE
(1866–1939)

President WARREN G. HARDING appointed Pierce Butler to the Supreme Court in 1922 in part because Harding wanted to name a conservative Democrat. He also preferred a Roman Catholic. As with other Harding judicial appointments, Chief Justice WILLIAM HOWARD TAFT had an influential role. Before his appointment, Butler had gained some fame as a railroad attorney, particularly for his defense of the carriers in the MINNESOTA RATE CASES (1913) and for his actions as a regent of the University of Minnesota, which led to the dismissal of faculty members who opposed WORLD WAR I or who were socialists.

Progressive senators opposed Butler's confirmation, but marshaled only eight votes against him. The *New York Times* said that Butler's antagonists favored only judges who supported labor unions and opposed CORPORATIONS; the *St. Louis Post-Dispatch* countered that Butler's chief qualities were "bigotry, intolerance, narrowness, and partisanism." Taft predictably praised the appointment as "a most fortunate one." Until his death in 1939, Butler consistently followed the ideological direction friends and foes had anticipated.

Butler maintained his hostility to political dissenters while on the bench. He supported the majority in uphold-

ing a New York criminal anarchy law in GITLOW V. NEW YORK (1925). In UNITED STATES V. SCHWIMMER (1929) he sustained the government's denial of CITIZENSHIP to a sixty-year-old pacifist woman. In 1931 he broke with the majority in STROMBERG V. CALIFORNIA and in NEAR V. MINNESOTA to favor a state conviction of a woman who had displayed a red flag and a state court INJUNCTION against a newspaper editor who had harshly criticized public officials. In the *Near* case, Butler contended that FREEDOM OF THE PRESS should not protect an "insolent publisher who may have purpose and sufficient capacity to contrive and put into effect a scheme or program for oppression, blackmail, or extortion." Six years later Butler joined three others to protest the Court's revival of Justice OLIVER WENDELL HOLMES'S CLEAR AND PRESENT DANGER doctrine in HERNDON V. LOWRY (1937). In one of his final statements, in *Kessler v. Strecker* (1939), he approved the DEPORTATION of an ALIEN who had once joined the Communist party but had never paid dues and long since had left the organization.

A Justice's views rarely are monolithic. In the area of CIVIL RIGHTS, for example, Butler stood alone in opposing state STERILIZATION of mental "defectives" in BUCK V. BELL (1927). Perhaps Butler's Catholicism motivated his vote; in any event, a half century later it was discovered that the sterilized woman had never been an imbecile, as Justice Holmes had callously characterized her. Butler also had strong views on the sanctity of the FOURTH AMENDMENT. In OLMSTEAD V. UNITED STATES (1928) he dissented from Taft's opinion upholding the use of WIRETAPPING for gaining evidence, and in another PROHIBITION case Butler insisted that the Fourth Amendment's prohibition of UNREASONABLE SEARCHES should be construed liberally. "Security against unlawful searches is more likely to be attained by resort to SEARCH WARRANTS than by reliance upon the caution and sagacity of petty officers," he wrote in *United States v. Lefkowitz* (1932).

His concern for the criminally accused, however, was not reflected in POWELL V. ALABAMA (1932), as he dissented with Justice JAMES C. MCREYNOLDS when the Court held that the "Scottsboro Boys" had been denied their RIGHT TO COUNSEL. He consistently opposed black claimants. For example, he dissented when the Court invalidated the Texas all-white primary election in NIXON V. CONDON (1932); he asserted in BREEDLOVE V. SUTTLES (1937) that payment of a POLL TAX as a condition to exercise VOTING RIGHTS did not violate the FOURTEENTH AMENDMENT; and he dissented when the Court first successfully attacked the SEPARATE BUT EQUAL DOCTRINE in MISSOURI EX REL. GAINES V. CANADA (1938). He also sustained state laws that prevented aliens from owning farm land in *Porterfield v. Webb* (1923).

Throughout the 1920s, Butler found the Court receptive to his conservative economic views. He was an aggressive spokesman for the claims of utilities, particularly in rate and valuation cases. He insisted on judicial prerogatives in such cases, relying on DUE PROCESS OF LAW to justify a court's determination of both law and facts. In general, Butler favored valuing utility property at reproduction costs in order to determine rate structures. He led the Court in striking down a state statute forbidding use of unsterilized material in the manufacture of mattresses in *Weaver v. Palmer Bros. Co.* (1924); and, in EUCLID V. AMBLER REALTY COMPANY (1926), he dissented when the Court, led by his fellow conservative, Justice GEORGE H. SUTHERLAND, sustained local zoning laws.

In the tumultuous NEW DEAL years, Butler was one of the conservative "Four Horsemen," along with McReynolds, Sutherland, and WILLIS VAN DEVANTER. He opposed every New Deal measure that came before the Court. Butler rarely spoke in these cases, but before the Court reorganization battle he wrote the majority opinion narrowly invalidating a New York minimum wage law. Echoing LOCHNER V. NEW YORK (1905) and invoking ADKINS V. CHILDREN'S HOSPITAL (1923), Butler declared in MOREHEAD V. NEW YORK EX REL. TIPALDO (1936) that the state act violated the FOURTEENTH AMENDMENT's due process clause. Less than a year later, the *Tipaldo* decision was overturned. Thereafter, Butler and his fellow conservatives found themselves at odds with the new majority. To the end, however, they all resolutely kept the faith.

STANLEY I. KUTLER
(1986)

Bibliography

BROWN, FRANCIS JOSEPH 1945 *The Social and Economic Philosophy of Pierce Butler.* Washington: Catholic University Press.

DANIELSKI, DAVID J. 1964 *A Supreme Court Justice Is Appointed.* New York: Random House.

## *BUTLER, UNITED STATES v.*
297 U.S. 1 (1936)

In this historic and monumentally inept opinion, the Supreme Court ruled that the United States has no power to regulate the agrarian sector of the ECONOMY. The AGRICULTURAL ADJUSTMENT ACT OF 1933 (AAA) sought to increase the purchasing power and living standards of farmers by subsidizing the curtailment of farm PRODUCTION and thus boosting farm prices. Congress raised the money for the subsidies by levying an EXCISE TAX on the primary processors of each crop, in this case a cotton mill, which passed on to the consumer the cost of the tax. AAA was the agricultural equivalent of a protective tariff. By a vote of 6–3 the Court held, in an opinion by Justice OWEN ROBERTS, that the statute unconstitutionally invaded the

powers reserved to the states by the TENTH AMENDMENT. "It is a statutory plan," Roberts declared, "to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end." Roberts reached his DOCTRINE of DUAL FEDERALISM by simplistic MECHANICAL JURISPRUDENCE. He sought to match the statute with the Constitution and, finding that they did not square, seriously limited the TAXING AND SPENDING POWER.

Roberts did not question the power of Congress to levy an excise tax on the processing of agricultural products; he also conceded that "the power of Congress to authorize expenditures of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." He did not even deny that aiding the agrarian sector of the economy benefited the GENERAL WELFARE, in accord with the first clause of Article I, section 8; rather he reasoned that the Court did not need to decide whether an appropriation in aid of agriculture fell within the clause. He simply found that the Constitution did not vest in the government a power to regulate agricultural production. He ruled, too, that the tax was not really a tax, because Congress had not levied it for the benefit of the government; it expropriated money from processors to give to farmers. The tax power cannot, Roberts declared, be used as an instrument to enforce a regulation of matters belonging to the exclusive realm of the states, nor can the tax power be used to coerce a compliance which Congress has no power to command.

Despite Roberts's insistence on calling the crop curtailment program "coercive," it was in fact voluntary; a minority of farmers elected not to restrict production, foregoing subsidies. But Roberts added that even a voluntary plan would be unconstitutional as a "federal regulation of a subject reserved to the states." He added: "It does not help to declare that local conditions throughout the nation have created a situation of national concern; for that is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the states."

Justice HARLAN FISKE STONE, joined by Justices LOUIS D. BRANDEIS and BENJAMIN N. CARDOZO, wrote a scathing, imperishable dissent, one of the most famous in the Court's history. Strongly defending the constitutionality of the AAA on the basis of the power to tax and spend, Stone lambasted Roberts's opinion as hardly rising "to the dignity of an argument" and as a "tortured construction of the Constitution." Stone's opinion confirmed President FRANKLIN D. ROOSEVELT's belief that it was the Court, not the Constitution, that stood in the way of recovery. The AAA decision helped provoke the constitutional crisis of 1937.

LEONARD W. LEVY
(1986)

Bibliography

HART, HENRY M. 1936 Processing Taxes and Protective Tariffs. *Harvard Law Review* 49:610–618.

MURPHY, PAUL L. 1955 The New Deal Agricultural Program and the Constitution. *Agricultural History* 29:160–169.

## *BUTLER v. MICHIGAN*
352 U.S. 380 (1957)

Michigan convicted Butler for selling to an adult an "obscene" book that might corrupt the morals of a minor. The Supreme Court unanimously reversed, in an opinion by Justice FELIX FRANKFURTER, who declared that the statute was not restricted to the evil with which it dealt; it reduced adults "to reading only what is fit for children," thereby curtailing their FIRST AMENDMENT rights as protected by the DUE PROCESS clause of the FOURTEENTH AMENDMENT.

LEONARD W. LEVY
(1986)

## *BUTZ v. ECONOMOU*
438 U.S. 478 (1978)

In an action against the Department of Agriculture and individual department officials for alleged constitutional violations, the Court united two previously separate doctrinal strands governing official liability. *Butz* indicated that immunity from personal liability of federal executive officials in direct actions under the Constitution would be available only under circumstances in which state executive officials would be immune from analogous constitutional actions under SECTION 1983, TITLE 42, UNITED STATES CODE. *Butz* also extended absolute immunity to judicial and prosecutorial officials within an ADMINISTRATIVE AGENCY.

THEODORE EISENBERG
(1986)

(SEE ALSO: *Executive Immunity; Judicial Immunity.*)

## BYRNES, JAMES F.
(1879–1972)

Few members of the United States Supreme Court in this century have led more varied political lives than James F. Byrnes of South Carolina, who served as congressman,

United States senator, and governor of his state, czar of production during WORLD WAR II, and secretary of state. In these other roles, Byrnes left a larger historical legacy than he did on the Court, where he remained for only the October 1941 term.

He wrote sixteen opinions for the Court, never dissented, and did not write a CONCURRING OPINION. As a Justice, he is remembered chiefly for his opinion in EDWARDS V. CALIFORNIA (1942), where he and four others invalidated as a burden on INTERSTATE COMMERCE a California "anti-Okie" law that made it a MISDEMEANOR to bring into the state indigent nonresidents. Initially, Byrnes had been inclined to strike down the law as a violation of the PRIVILEGES AND IMMUNITIES clause of the FOURTEENTH AMENDMENT (a position held by four other Justices), but he finally rejected this approach under pressure from Chief Justice HARLAN FISKE STONE and Justice FELIX FRANKFURTER. Although he also wrote for the Court in *Taylor v. Georgia* (1942), where the Justices voided that state's debt-peonage law, Byrnes did not usually exhibit great sensitivity to the claims of CIVIL LIBERTIES, or to the complaints of convicted felons and working-class people.

MICHAEL E. PARRISH
(1986)

Bibliography

BYRNES, JAMES 1958 *All in One Lifetime.* New York: Harper & Row.

# C

## *CABELL v. CHAVEZ-SALIDO*

See: Alien

## CABINET

Whether or not the President should have a cabinet or council was a leading issue at the CONSTITUTIONAL CONVENTION. Such bodies were prevalent in the colonial governments and in the states that succeeded them. Another key element of the cabinet that also crystallized in the preconstitutional period was the concept of the department. Under the ARTICLES OF CONFEDERATION, Congress established four executive offices in 1781: a secretary of FOREIGN AFFAIRS, a secretary of war, a superintendent of finance, and a secretary of marine.

At the Philadelphia Convention, GOUVERNEUR MORRIS proposed that there be a Council of State, consisting of the Chief Justice of the Supreme Court and the heads of departments or secretaries, of which there should be five, appointed by the President and holding office at his pleasure. The President should be empowered to submit any matter to the council for discussion and to require the written opinion of any one or more of its members. The President would be free to exercise his own judgment, regardless of the counsel he received. Morris's proposal was rejected in the late-hour efforts of the Committee of Eleven to complete the draft of the Constitution. Instead, the Committee made two principal provisions for advice for the President. Its draft specified that "The President, by and with the ADVICE AND CONSENT of the Senate, shall appoint ambassadors, and other public ministers, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein provided for." This provision is attributed to the New York state constitution in which the governor shared the appointment power with the Senate. The draft by the Committee of Eleven also provided that the President "may require the opinion, in writing, of the principal officer of each of the Executive Departments upon any subject relating to the duties of their respective offices."

GEORGE MASON resisted this plan, declaring that omission of a council for the President was an experiment that even the most despotic government would not undertake. Mason proposed an executive council composed of six members, two from the eastern, two from the middle, and two from the southern states. BENJAMIN FRANKLIN seconded the proposal, observing that a council would check a bad President and be a relief to a good one. Gouverneur Morris objected that the President might induce such a council to acquiesce in his wrong measures and thereby provide protection for them. Morris's view prevailed and Mason's plan was defeated. Doubtless a potent factor in the outcome was the expectation that the venerated GEORGE WASHINGTON would become the first President and that a council of some power might impede his functioning. CHARLES PINCKNEY, who once had advocated a council, now argued that it might "thwart" the President.

With the Constitution's prescriptions so sparse, it remained for Washington's presidency to amplify the concept of the cabinet. Congress in 1789 created three departments (State, War, and Treasury) and an attorney general who was not endowed with a department. Washington's appointees—THOMAS JEFFERSON as secretary of state, ALEXANDER HAMILTON as secretary of treasury, Major

General Henry Knox as secretary of war, and EDMUND RANDOLPH as attorney general—reflected Mason's emphasis on geographic representation, for they were drawn from the three principal sections of the country. Washington frequently requested the written opinions of his secretaries on important issues and asked them for suggestions for the annual address to Congress.

In 1793, the diplomatic crisis arising from the war between Britain and France caused the cabinet to take firmer shape as an institution. Washington and his secretaries gathered in a series of meetings, including a notable one of April 19 at which the issuance of the PROCLAMATION OF NEUTRALITY was agreed upon. Jefferson recorded that the meetings occurred "almost every day." Because the crisis persisted throughout 1793, the collegial character of the cabinet became well established. Jefferson, Randolph, and Madison referred to the assembled secretaries as the "cabinet," but Washington did not employ the term. Although "cabinet" was long employed in congressional discussion, it did not appear in statutes until the General Appropriation Act of 1907.

The Constitution's meager provisions left Washington largely free to tailor the cabinet to his own preferences. He selected his secretaries on the basis of their individual talents, without regard to their political or policy predispositions. This procedure proved costly, leading to continuous dispute between Hamilton and Jefferson that required a remaking of the cabinet. Washington then resolved not to recruit appointees strongly opposed to his policies. Presidents have applied this principle in constituting their cabinets ever since.

Washington did not consider himself limited by the Constitution to seeking advice only from his department heads. Congressman JAMES MADISON was a frequent adviser on Anglo-American diplomatic issues, on executive appointments, and on the President's reply to the formal addresses of the two houses of Congress. Chief Justice JOHN JAY provided counsel on diplomatic questions, addresses to Congress, and on the political aspects of a presidential tour of the New England states.

Washington was less successful in seeking counsel from the Senate and the Supreme Court. He visited the Senate to discuss issues arising from an Indian treaty under negotiation, and was rebuffed when legislators made clear that his presence constrained their deliberations. The SUPREME COURT, equally self-protective, declined to render ADVISORY OPINIONS.

Washington set the pattern for future presidencies in reaffirming the constitutional arrangement of a strong, independent, single executive, and in rejecting any division of responsibility between the President and the cabinet. Ever since, the view has prevailed that the Constitution confers upon the President the ultimate executive authority and responsibility, which he does not share with the department heads individually or collectively.

Like the President, the cabinet is subject to such basic principles as SEPARATION OF POWERS and CHECKS AND BALANCES, on which the Constitution was constructed. Consequently, both the cabinet and the President are susceptible to the influence of the other two branches. The paucity of constitutional provision and the circumstances of the cabinet's beginning in Washington's administration, together with its continuous presence in all succeeding administrations, cause the cabinet's institutional status to rest upon custom. Since its founding in 1793, the cabinet, as Richard F. Fenno, Jr., has written, has continued to be "an extra-legal creation, functioning in the interstices of the law, surviving in accordance with tradition, and institutionalized by usage alone." Its influence and, to a large degree, its form rest on the will of the President of the moment.

Not surprisingly, given its acute dependence on the President, the cabinet has varied widely in its functions and its importance. Jefferson recruited a cabinet of supportive fellow partisans, but JOHN QUINCY ADAMS drew into his cabinet representatives of his party's great factions who had contested his rise to the Presidency. JAMES MONROE used his cabinet for the arduous crafting of the MONROE DOCTRINE, but ABRAHAM LINCOLN is one of many Presidents who used his cabinet sparingly. ANDREW JACKSON preferred the counsel of his "kitchen cabinet," an informal, unofficial body of friends who did not hold high position. JOHN TYLER rejected the request of his Whig cabinet that matters be decided by majority vote, with each secretary and the President having but one vote. ANDREW JOHNSON added fuel to the flames of his IMPEACHMENT when he removed Secretary of War EDWIN M. STANTON. Johnson's congressional foes contended that he violated the TENURE OF OFFICE ACT of 1867, which purported to deny the President the right to remove civil officials, including members of his cabinet, without senatorial consent.

The twentieth century, too, has seen wide variation in the demeanors of Presidents toward their cabinets, from WARREN G. HARDING, who considered it his duty to build a cabinet comprised of the "best minds" in the nation, to WOODROW WILSON and JOHN F. KENNEDY, who used their cabinets little and chafed under extended group discussion. DWIGHT D. EISENHOWER endeavored to make the cabinet a central force in his administration through innovations to enhance its operating effectiveness. He created the post of secretary of the cabinet, empowered to arrange an agenda for cabinet meetings and to oversee the preparation of "cabinet papers" by the departments and agencies presenting proposals for cabinet deliberation and presidential decision. The results of cabinet discussions were recorded, responsibilities for implementation were

allotted among the departments and agencies, and a system of follow-up was installed to check on accomplishment.

RICHARD M. NIXON designated four members of his cabinet counselors to the President and empowered them to supervise clusters of activity in several or more departments and agencies. With his popularity dropping and an election looming, JIMMY CARTER reshuffled his administration on an unprecedented scale in 1979 by ejecting discordant cabinet secretaries and replacing them with more supportive appointees. RONALD REAGAN instituted a structure of cabinet councils for broad policy areas with memberships of department secretaries and White House staff, supported by subcabinet working groups.

The cabinet's lack of specific delineation in the Constitution contributes to its weakness in coordinating the far-flung activities of the executive branch and in producing innovative policy on the scale and at the pace the President requires. These shortcomings have caused the cabinet to be overshadowed by more recent institutions of the modern presidency that assist in policy development and coordination. These are largely concentrated in the Executive Office of the President, which includes, among other units, the White House Office, the OFFICE OF MANAGEMENT AND BUDGET, the National Security Council, and the Council of Economic Advisers.

The cabinet's frail constitutional base has made the development of the departments susceptible to forces inimical to the cohesiveness that the concept of a "cabinet" implies. Often departments, such as Labor, Agriculture, and Commerce, were brought into being more by the pressures of their client groups than by the President's preference, and without a clear concept of what a department should be. Frequently alliances are formed between the client groups, the department's bureaus, and congressional committees with jurisdiction over the department. These alliances' combined strength has often exceeded the President's and frustrated his will. Even department heads have sometimes proved more responsive to their alliances than to the President.

Because the doctrines of separation of powers and checks and balances bring the cabinet and its departments within reach of the courts and Congress, those branches too have shaped those executive institutions. The Supreme Court, for example, in *Kendall v. United States* (1838), circumscribed the President's discretionary power over the department head when it upheld a lower court decision ordering the postmaster general to pay a complainant money owed by the United States. The payment was a MINISTERIAL ACT which gave the President "no other control over the officer than to see that he acts honestly, with proper motives." Despite the silence of the Constitution concerning the power of removal, Presidents have long removed department heads for any cause they see fit, and in MYERS V. UNITED STATES (1926) the Court upheld an order of the postmaster general to remove a first-class postmaster despite a statute requiring that the removal be by the advice and consent of the Senate.

The cabinet departments depend on Congress for money, personnel, and other resources necessary to function. In effect, department secretaries look to Congress for the means of survival, sometimes straining their ties with the President. Much of the substance of cabinet rank is provided by Congress: salary, title, membership in bodies such as the National Security Council, place in the line of presidential succession. Members of Congress often assert that department heads, notwithstanding their relation with the President, have responsibilities to the legislators. The powers and functions of the department head are conferred by acts of Congress. Although Congress respects the cabinet secretary's advisory role to the President, he is not solely the President's aide in his extra-cabinet functions, but performs in a shadow area of joint executive-legislative responsibility, and struggles with the resulting dilemmas. It is virtually indispensable that a department secretary attract the confidence of Congress as well as that of the President.

The cabinet's few moorings in the Constitution make its relationships with the POLITICAL PARTIES uncertain and fluctuating. Wilson once conceived of the cabinet as a potential link between the President and his party in Congress. He subsequently abandoned this view and like many other Presidents emphasized loyalty and competence in cabinet selection. JOHN QUINCY ADAMS, Warren G. Harding, HARRY S. TRUMAN, and other Presidents used the cabinet to diminish intraparty factionalism, chiefly by appointing their rivals for the presidential nomination to cabinet posts. Eisenhower allotted several posts to persons with ties to his rival, ROBERT A. TAFT. Parties, however, have considerably less influence on the cabinet than the chief executive or Congress.

LOUIS W. KOENIG
(1986)

Bibliography

FENNO, RICHARD F., JR. 1959 *The President's Cabinet.* Cambridge, Mass.: Harvard University Press.

HINSDALE, MARY 1911 *A History of the President's Cabinet.* Ann Arbor: University of Michigan Press.

HORN, STEPHEN 1960 *The Cabinet and Congress.* New York: Columbia University Press.

## CABLE TELEVISION

See: Broadcasting

## CAHN, EDMOND
(1906–1964)

Edmond Cahn's civil libertarianism emphasized the importance of a written Constitution and the role of the judiciary in upholding the guarantees of the BILL OF RIGHTS. Judicial review is a historically "legitimate" device, he believed, for "converting promises on parchment into living liberties," and the Supreme Court is "the nation's exemplar and disseminator of democratic values." "The firstness of the FIRST AMENDMENT" ensures "the indefinitely continuing right to be exposed to an ideological variety." SEPARATION OF CHURCH AND STATE strengthens both entities and places sovereignty of choice in the populace. The First Amendment, by securing the basis for participation in the democratic process, provides an indispensable moral link between the governed and the governors.

Cahn's fact-skepticism, continually questioning factual assumptions, led him to indict CAPITAL PUNISHMENT, because a mistake-laden legal system should not impose an irreversible penalty. He insisted that the morally neutral social sciences occupy a subordinate place in judicial decisions and that "a judge untethered by a text is a dangerous instrument." He shared much in common with his friend, Justice HUGO L. BLACK, whose off-Court advocacy of First Amendment ABSOLUTISM he did not explicitly adopt. Cahn, a professor of law at New York University, had great confidence in the democratic citizen, freed from false certainties and protected by the mandates of the Bill of Rights, to prevent or repair injustice.

ROGER K. NEWMAN
(1986)

## *CALANDRA, UNITED STATES v.*
414 U.S. 338 (1974)

In *Calandra* the Court refused to apply the EXCLUSIONARY RULE to bar a GRAND JURY from questioning a witness on the basis of unlawfully seized EVIDENCE. The Court pointed out that although grand juries are subject to certain constitutional limitations, they are not bound by the restrictive procedures that govern trials. Since the exclusionary rule is not a constitutional right that redresses an invasion of privacy, but rather a deterrent against future police misconduct, its application should be restricted to situations where it will be most effective as a remedy. Exclusion at the grand jury level would deter only those searches in which evidence is intended solely for grand jury use; if the evidence should be presented at a subsequent trial, it would be excluded.

JACOB W. LANDYNSKI
(1986)

## *CALDER v. BULL*
3 Dallas 386 (1798)

*Calder* is the leading case on the meaning of the constitutional injunction against EX POST FACTO LAWS. Connecticut had passed an act setting aside a court decree refusing to probate a will, and the plaintiff argued that the act constituted an ex post facto law. In the Court's main opinion Justice SAMUEL CHASE ruled that although all ex post facto laws are necessarily "retrospective," retrospective laws adversely affecting the citizen in his private right of property or contracts are not ex post facto laws. The prohibition against the latter extended only to criminal, not civil, cases. An ex post facto law comprehends any retrospective penal legislation, such as making criminal an act that was not criminal when committed, or aggravating the act into a greater crime than at the time it was committed, or applying increased penalties for the act, or altering the rules of EVIDENCE to increase the chances of conviction.

The case is also significant in constitutional history because by closing the door on the ex post facto route in civil cases, it encouraged the opening of another door and thus influenced the course of the DOCTRINE of VESTED RIGHTS. The CONTRACT CLAUSE probably would not have attained its importance in our constitutional history, nor perhaps the DUE PROCESS clause substantively construed, if the Court had extended the ex post facto clause to civil cases. In *Calder,* Chase endorsed the judicial doctrine of vested rights drawn from the HIGHER LAW, as announced by Justice WILLIAM PATERSON in VAN HORNE'S LESSEE V. DORRANCE (1795). Drawing on "the very nature of our free Republican governments" and "the great first principles of the social compact," Chase declared that the legislative power, even if not expressly restrained by a written CONSTITUTION, could not constitutionally violate the right of an antecedent and lawful private contract or the right of private property. To assert otherwise, he maintained, would "be a political heresy," inadmissible to the genius and spirit of our governmental system.

Justice JAMES IREDELL concurred in the judgment as well as the definition of ex post facto laws but maintained that judges should not hold an act void "merely because it is, in their judgment, contrary to the principles of natural justice," which he thought undefinable by fixed standards. (See FUNDAMENTAL LAW; SUBSTANTIVE DUE PROCESS.)

LEONARD W. LEVY
(1986)

## CALHOUN, JOHN C.
(1782–1850)

John C. Calhoun, foremost southern statesman of his time, was a product of the great Scots-Irish migration that took

possession of the southern backcountry before the AMERICAN REVOLUTION. Born near Abbeville, South Carolina, young Calhoun received a smattering of education at a local academy and in his twentieth year went "straight from the backwoods" to Yale College. He excelled by force of intellect and zeal. In 1805, not long after graduating, he attended Litchfield Law School. This New England Federalist education left a permanent impression on Calhoun's mind, though all his political associations were Jeffersonian. Returning to South Carolina, he was admitted to the bar and hung out his shingle in Abbeville. But Calhoun did not take to the law. After making it the steppingstone to the political career he desperately wanted, he gave it up altogether. In 1807 he was elected to the legislature, taking the seat once held by his father. Sometime later he married Floride Bonneau Colhoun, who belonged to the wealthy lowcountry branch of the family, and brought her to the plantation he had acquired above the Savannah River. After two sessions at Columbia, Calhoun won election to the Twelfth Congress. He took his place with the "war hawks" and upon a brilliant maiden speech was hailed as "one of the master-spirits who stamp their name upon the age in which they live."

Calhoun's major biographer has conveniently divided his career into three phases: nationalist, nullifier, sectionalist. During the first, which ended in 1828, Calhoun was successively congressman, secretary of war, and vice-president. As a nationalist, he was the chief congressional architect of the Second Bank of the United States; he supported the tariff of 1816, including its most protective feature, the minimum duty on cheap cotton cloth; and he was a prominent advocate of INTERNAL IMPROVEMENTS. Many Republicans, headed by President JAMES MADISON, believed a constitutional amendment was necessary to sanction federally funded internal improvements. But Calhoun, speaking for his Bonus Bill to create a permanent fund for this purpose, declared that he "was no advocate for refined arguments on the Constitution. The instrument was not intended as a thesis for the logician to exercise his ingenuity on. It ought to be construed with plain, good sense. . . ." He held that the GENERAL WELFARE clause was a distinct power; to those who balked at that, he cited the ENUMERATED POWER to establish post roads. Deeply committed to a system of roads and canals and other improvements to strengthen the Union and secure its defenses, Calhoun, like Hamilton before him, viewed the Constitution as the starting-point for creative statesmanship. Later, when advocating internal improvements as secretary of war, he passed over the constitutional question in silence, thereby avoiding conflict with his chief, JAMES MONROE, who inherited Madison's scruples on the subject.

Calhoun made his first bid for the presidency in 1824 as an unabashed nationalist who professed "to be above all sectional or party feelings and to be devoted to the great interests of the country." He had to settle for the vice-presidency, however; and in that office he seized the first occasion to join the Jacksonian coalition against the National Republican administration of JOHN QUINCY ADAMS. Meanwhile, economic distress revolutionized the politics of South Carolina, driving Calhoun's friends off the nationalist platform and onto the platform of STATES' RIGHTS and STRICT CONSTRUCTION occupied for the past decade by his inveterate enemies. Calhoun was not a leader but a follower—a late one at that—in this movement. By 1827 he, too, had turned against the tariff as the great engine of "consolidation." It was unconstitutional, exploitative of the South, and, with other nationalist measures, it threatened "to make two of one nation." After the "tariff of abominations" the next year, Calhoun, at the request of a committee of the state legislature, secretly penned a lengthy argument against the tariff, showing its unconstitutionality, and expounded the theory of NULLIFICATION as the rightful remedy. (See EXPOSITION AND PROTEST.) The theory was speciously laid in the VIRGINIA AND KENTUCKY RESOLUTIONS. They, of course, were devised to secure the rule of the majority; Calhoun's theory, on the other hand, was intended to protect an aggrieved minority. Moreover, he was precise where those famous resolutions were ambiguous; and, unlike them, he invoked the constitution-making authority of three-fourths of the states. That authority might grant by way of amendment a federal power, such as the protection of manufactures, denied by any one of the states. Calhoun believed that the power of nullification in a single state would act as a healthy restraint on the lawmaking power of Congress; if not, and nullification occurred, the issue would be referred to a convention for decision. Each state being sovereign under this theory, SECESSION was always a last resort; but Calhoun argued that the Union would be strengthened, not weakened or dissolved, under the operation of nullification. Indeed, the Union could be preserved only on the condition of state sovereignty and strict construction—an exact reversal of his earlier nationalist position. The legislature published the *South Carolina Exposition* in December 1828. Although Calhoun's authorship was kept secret for several years, he had become the philosopher-statesman of a movement.

Calhoun hoped for reform from the new administration of ANDREW JACKSON, in which he was, again, the vice-president. But he was quickly disappointed. Personal differences, perhaps more than differences of principle or policy, caused his break with Jackson, completed early in 1831. Laying aside his presidential ambitions—he had hoped to be Jackson's successor—Calhoun issued his Fort Hill Address in July, publicly placing himself at the head

of the nullification party in South Carolina. Named for the plantation near Pendleton that was ever after Calhoun's home, the address elaborated the theory set forth in the *Exposition.* When in the following year South Carolina nullified the tariff, it did so in strict conformity with the theory. Calhoun resigned the vice-presidency and was elected to the Senate to lead the state's cause in Washington. He denounced the President's FORCE BILL as a proposition to make war on a sovereign state. In a notable debate with DANIEL WEBSTER, he expounded the theory of the Union as a terminable compact of sovereign states and within that theory vindicated the constitutionality of nullification. (See UNION, THEORIES OF.) But Calhoun backed away from confrontation. He seized the olive branch of tariff reform HENRY CLAY dangled before him. The crisis was resolved peacefully. The nullifiers declared a victory, of course; and Calhoun vaunted himself on the basis of this illusion.

Henceforth, Calhoun abandoned nullification as a remedy and associated his constitutional theory with varying stratagems of sectional resistance to the alleged corruptions and majority tyranny of the general government. The idea of the "concurrent majority," in which the great geographical sections provided the balancing mechanism of estates or classes in classical republican theory, held a more and more important place in his thought. He came to believe that the government of South Carolina, with the balance of legislative power between lowcountry and upcountry established by "the compromise of 1808," embodied this theory. Slavery, of course, was at the bottom of the sectional interest for which Calhoun sought protection. In 1835 he proposed an ingenious solution to the problem of abolitionist agitation through the United States mail. Direct intervention, as Jackson proposed, was unconstitutional, Calhoun said; but the general government could cooperate in the enforcement of state laws that barred "incendiary publications." He thus invented the doctrine of "federal reenforcement" of state laws; and though his bill was defeated, his object was attained by administrative action. Calhoun led the fight in the Senate against the reception of petitions for the abolition of slavery in the DISTRICT OF COLUMBIA. He denied that there was an indefeasible right of petition. Regarding the attack on slavery in the District as an attack on "the outworks" of slavery in the states, he held that the mere reception of the petitions, even if they were immediately tabled, as would become the practice, amounted to an admission of constitutional authority over slavery everywhere. The fight was, therefore, the southern Thermopylae. In 1838, indulging his penchant for metaphysical solutions, Calhoun introduced in the Senate a series of six resolutions which, in principle, would throw a constitutional barricade around slavery wherever it existed—in the states, in the District, and in the territories (Florida then being the only territory). In an allusion to Texas, one resolution declared that refusal to annex territory lest it expand slavery violated the compact of equal sovereign states. This last resolution was dropped, others were modified, and as finally passed the resolutions advanced Calhoun's position by inches rather than yards.

Calhoun never naïvely believed that abolitionism constituted the chief danger to the South. The chief danger was from consolidation, from spoilsmen, from banks and other privileged interests fattening themselves at the public trough, and from the attendant corruption that undermined republican virtue and constitutional safeguards. The only remedy was to strip the government of its excessive revenues, powers, and patronage, and return to the Constitution as it came from the hand of the Framers. For a time, seeing Jackson as the immediate enemy, Calhoun worked with the Whigs; in 1840 he returned to the Democratic fold. He had become convinced that the Democratic party offered better prospects of security for the South. In addition, he hoped to realize his presidential ambition in succession to his old enemy, MARTIN VAN BUREN, in 1844. This was not to be.

The year 1844 found Calhoun secretary of state, engineering the ANNEXATION OF TEXAS, in the shattered administration of John Tyler. Returning to the Senate the following year, he lent his powerful voice to the Oregon settlement, opposed the Mexican War, then became the foremost champion of slavery in the new territories. He set forth his position in resolutions countering the WILMOT PROVISO in 1847: the territories are common property of the states; the general government, as the agent of the states, cannot discriminate against the citizens or institutions of any one in legislating for the territories; the restriction of slavery would be discriminatory; and finally, the people of the territories have the right to form state governments without condition as to slavery. Before long Calhoun repudiated the MISSOURI COMPROMISE and called for the positive protection of SLAVERY IN THE TERRITORIES. The leader of an increasingly militant South, he nevertheless acted, as in the past, to restrain disunionist forces. Secession was never an acceptable solution in his eyes.

The senator's last major speech—he was too ill to deliver it himself—occurred in March 1850 in response to Henry Clay's compromise plan. Calhoun did not so much oppose the measures of this plan as consider them inadequate. The balanced, confederate government of the Constitution had degenerated into a consolidated democracy before which the minority South was helpless. Only by restoring the sectional balance could the Union be saved,

and he vaguely suggested a constitutional amendment for this purpose. Within the month he was dead. Two posthumous publications were his political testament. The *Disquisition on Government* contained his political theory, including the key idea of the concurrent majority. The *Discourse on the Constitution* specifically applied the theory to the American polity. After recommending various reforms, such as repeal of the 25th section of the JUDICIARY ACT OF 1789, the *Discourse* concluded with a proposal for radical constitutional change: a dual executive, elected by North and South, each chief vested with the VETO POWER. This was a metaphysical solution indeed! Yet it was one that epitomized Calhoun's paradoxical relationship to the Constitution. Although he made a fetish of the Constitution, he could never accept its workings and repeatedly advocated fundamental reforms. Although he proclaimed his love of the Union, his embrace was like the kiss of death. And while exalting liberty, he based his ideal republic on slavery and rejected majority rule as incompatible with constitutional government.

MERRILL D. PETERSON
(1986)

Bibliography

CRALLE, RICHARD K., ed. 1853–1857 *The Works of John C. Calhoun.* 6 Vols. New York: D. Appleton & Co.

MERIWETHER, ROBERT L.; HEMPHILL, W. EDWIN; WILSON, CLYDE N.; and others, eds. 1959–1980 *The Papers of John C. Calhoun.* 8 Vols. to date. Columbia: University of South Carolina Press.

WILTSE, CHARLES M. 1944 *John C. Calhoun: Nationalist, 1782–1828.* Indianapolis: Bobbs-Merrill.

——— 1949 *John C. Calhoun: Nullifier, 1829–1839.* Indianapolis: Bobbs-Merrill.

——— 1951 *John C. Calhoun: Sectionalist, 1840–1850.* Indianapolis: Bobbs-Merrill.

## *CALIFANO v. GOLDFARB*
430 U.S. 199 (1977)

## *CALIFANO v. WEBSTER*
430 U.S. 313 (1977)

These decisions illustrated the delicacy of distinguishing between "benign" gender classifications and unconstitutional ones. *Goldfarb* invalidated, 5–4, a SOCIAL SECURITY ACT provision giving survivor's benefits to any widow but only to a widower who actually had received half his support from his wife. *Webster,* decided three weeks later, unanimously upheld the same law's grant of a higher level of old age benefits to women than to men.

In *Goldfarb* four Justices, led by Justice WILLIAM J. BRENNAN, saw the law as a discrimination against women workers, whose surviving families received less protection. The provision had not been adopted to compensate widows for economic disadvantage but to provide generally for survivors; Congress had simply assumed that wives are usually dependent. Saving the cost of individualized determinations of dependency was also insufficient to justify the discrimination. Four other Justices, led by Justice WILLIAM H. REHNQUIST, saw the law as a discrimination against male survivors; because the discrimination was not invidious, implying male inferiority or burdening a disadvantaged minority, it should be upheld as "benign." Justice JOHN PAUL STEVENS agreed with Justice Rehnquist that the discrimination ran against men; however, it was only "the accidental byproduct of a traditional way of thinking about females." Lacking more substantial justifications, it was invalid. (See Justice Stevens's concurrence in CRAIG V. BOREN).

All the Justices in *Webster* agreed that the gender discrimination was not the product of "archaic and overbroad generalizations" about women's dependency but was designed to compensate for women's economic disadvantages. The *Goldfarb* dissenters, concurring separately in *Webster,* suggested that the fine distinction between the two results would produce uncertainty in the law.

KENNETH L. KARST
(1986)

(SEE ALSO: *Sex Discrimination.*)

## *CALIFANO v. WEBSTER*

See: *Califano v. Goldfarb*

## *CALIFANO v. WESTCOTT*
443 U.S. 76 (1979)

The Supreme Court unanimously found unconstitutional SEX DISCRIMINATION in a federal law providing WELFARE BENEFITS to families whose children were dependent because fathers (but not mothers) were unemployed. The discrimination was based on sexual stereotyping that assumed fathers were breadwinners and mothers homemakers, and was not substantially related to the goal of providing for dependent children. Four Justices would have invalidated the benefits granted by the statute. A majority of five, speaking through Justice HARRY A. BLACKMUN,

instead construed the statute to extend benefits to children of unemployed mothers as well as fathers.

KENNETH L. KARST
(1986)

## *CALIFORNIA v. GREENWOOD*
486 U.S. 35 (1988)

A person's trash if subjected to public scrutiny might reveal intimate matters that could be embarrassing and even expose one to blackmail or criminal prosecution. But anyone throwing away household trash takes the risk of exposure, even if the trash is disposed of in an opaque plastic bag that is sealed. This was the Supreme Court's announcement in this case.

Justice BYRON R. WHITE, for a 6–2 Court, held that the FOURTH AMENDMENT's prohibition against UNREASONABLE SEARCHES and seizures does not apply to those who leave their sealed trash outside their curtilage for collection by the trash collector. In this case, an observant policewoman, suspecting Greenwood of dealing in narcotics, obtained the trash collector's cooperation and found enough incriminating EVIDENCE to establish PROBABLE CAUSE for a search of the residence. This evidence was used to convict him. The question was whether the initial WARRANTLESS SEARCH of the trash violated the Fourth Amendment. The Court ruled that those discarding their trash by placing it on the street for collection abandoned any REASONABLE EXPECTATION OF PRIVACY they might otherwise have. The two dissenters believed that the warrantless investigation of the trash constituted an appalling invasion of privacy.

LEONARD W. LEVY
(1992)

## *CALIFORNIA FEDERAL SAVINGS AND LOAN v. GUERRA*

See: Sex Discrimination

## CALVIN'S CASE
2 Howell's State Trials 559 (1608)

The assumption of the English throne by King James VI of Scotland in 1603 raised the question of what rights accrued in England to Scotsmen born subsequently (the *post-nati*). The English House of Commons wrecked James's plan for a union of the two kingdoms by refusing to permit the NATURALIZATION of Scotsmen dwelling in England and thereby their right to acquire property as native-born Englishmen did. In *Calvin's Case*, however, Lord Chancellor Ellesmere, speaking for the Courts of Chancery and King's Bench, held that the COMMON LAW conferred such naturalization and, thereby, the rights to inherit, sue, and purchase property. In the final stage of the controversy with Parliament that led to the AMERICAN REVOLUTION, Americans relied on *Calvin's case* when claiming that they owed allegiance only to George III personally and were not subject to the authority of Parliament.

WILLIAM J. CUDDIHY
(1986)

## *CAMARA v. MUNICIPAL COURT*
387 U.S. 523 (1967)

In *Camara* the Supreme Court held that the householder may resist warrantless ADMINISTRATIVE SEARCHES of dwellings by inspectors implementing fire, health, housing, and similar municipal codes. However, because the inspection is not a criminal investigation, PROBABLE CAUSE for a warrant may be found without information about the individual dwelling, on the basis of such factors as the date of the last inspection and the condition of the area. Similar protection was accorded to commercial premises in *See v. Seattle* (1967).

JACOB W. LANDYNSKI
(1986)

## CAMDEN, LORD

See: Pratt, Charles

## *CAMINETTI v. UNITED STATES*

See: *Hoke v. United States*

## CAMPAIGN FINANCE

Enlargement of the electorate and development of modern communications have heightened the importance of campaign funds for communicating with voters, a purpose less patently wicked or easily regulated than vote-buying and bribery, which have long been illegal.

Modern attempts to regulate campaign financing, which raise sweeping constitutional issues, have been largely centered on the FEDERAL ELECTION CAMPAIGN ACT of 1971 and its various amendments. Federal law has de-

veloped along six identifiable lines: prohibitions of bribery and corrupt practices; disclosures of campaign contributions and expenditures; limits on the amount of contributions from individuals and groups; prohibitions against contributions from certain sources, such as corporate or union treasuries; limits on total expenditures; and public financing.

Although the regulation of bribery and corrupt practices does not generally raise significant constitutional issues, all of the other elements of the Federal Election Campaign Act and of comparable state laws do. In BUCKLEY V. VALEO (1976), the landmark case on the constitutionality of political finance regulations, the Supreme Court held that expenditures to advocate the election or defeat of candidates are constitutionally protected speech and may not be limited. Subsequent decisions have held that no limit may be imposed on expenditures in REFERENDUM or INITIATIVE campaigns. And in *Common Cause v. Schmitt* (1982) an evenly divided Court sustained a lower court ruling that limits on expenditures by groups or individuals, acting independently, were impermissible, even when the candidate has agreed to limits as a condition for obtaining campaign public subsidies.

Campaign contributions embody a lesser element of constitutionally protected speech, but they are also an exercise of FREEDOM OF ASSEMBLY AND ASSOCIATION guaranteed in the FIRST AMENDMENT. Contributions may be limited to achieve COMPELLING STATE INTERESTS, such as avoidance of "the actuality and appearance of corruption." The Supreme Court has not yet identified any other compelling interest that justifies limits on campaign contributions. Hence, in *Buckley* the Court voided limits on a candidate's contributions to his own campaign and, in *Citizens Against Rent Control v. Berkeley* (1981), invalidated limits on contributions in referendum campaigns, because in neither case did the contributions pose a danger of corrupting candidates.

The rule against expenditures by and contributions from CORPORATIONS, labor unions, and other specified sources has not yet been tested in court, but its justification is largely undermined by FIRST NATIONAL BANK OF BOSTON V. BELLOTTI (1978), which struck down limits on referendum expenditures by corporations because First Amendment speech rights extend to corporations. Presumably the speech and association rights inherent in making contributions attach to corporations, unions, and other associations, and only limits necessary to avoid the actuality or appearance of corruption could be applied.

Public subsidies of campaigns and parties have been adopted by Congress and several states. In *Buckley* the Court held that such expenditures are within the ambit of the spending power of the general welfare clause. The Court also sustained a limit on expenditures for candidates who voluntarily accept public subsidies. No unconstitutional discrimination was found in limiting eligibility for subsidies to parties that had received a specified percentage of the vote in a prior election.

The Court has acknowledged that some persons may be deterred from making contributions and others may be subject to harassment if they exercise their constitutional right to make contributions, but substantial governmental interests warrant disclosure because it assists voters to evaluate candidates, deters corruption, and facilitates enforcement of contribution limits. Minor parties and independent candidates, however, because they have only a modest likelihood of coming to power and because they are often unpopular, need show only "a reasonable probability that compelled disclosure . . . of contributors will subject them to threats, harassment, or reprisals" in order to obtain relief from the disclosure requirements. Minor-party expenditures were also held exempt from disclosure, in BROWN V. SOCIALIST WORKERS '74 CAMPAIGN COMMITTEE (1982), to protect First Amendment political activity.

Equality and liberty, both values rooted in the Constitution, come into conflict in regulation of political finance. Limitations on contributions and expenditures have been justified as efforts to equalize the influence of citizens and groups in the political process. Money and the control of technology, especially communications media, pose special problems of scale; the magnitude of potential inequality between citizens far exceeds that which occurs in traditional or conventional political participation.

In balancing First Amendment liberties and the concern for political equality, the Supreme Court has, in the area of campaign finance, consistently given preference to speech and association rights, with little reference to the inequality this may produce between citizens. The Court has sustained limits on contributions only to avoid corruption, not to achieve equality. Similarly, the Court has permitted public subsidies, which equalize funds available to candidates, and expenditure limits attached to such subsidies, which create an equal ceiling on spending. But equality is not the controlling principle; the Court has made clear that candidate participation in public subsidy- and limitation schemes must be voluntary and that such schemes do not impose ceilings on expenditures by persons acting independently of candidates.

Although equality in the political process has constitutional imprimatur in voting, contemporary constitutional doctrines relating to campaign finance neither acknowledge the validity of equality interests nor provide means for effecting them.

DAVID ADAMANY
(1986)

Bibliography

NICHOLSON, MARLENE 1977 *Buckley v. Valeo*: The Constitutionality of the Federal Election Campaign Act Amendments of 1974. *Wisconsin Law Review* 1977:323–374.

## CAMPAIGN FINANCE
(Update 1)

Criticism of political-funding practices and calls for further reforms increased in the latter half of the 1980s as the cost of campaigns continued to escalate and repeated fundraising scandals were publicized. Turnover of congressional seats reached an all-time low, in part because challengers found it difficult to compete in expensive media campaigns. The growing number of POLITICAL ACTION COMMITTEES contributed most heavily to congressional incumbents, particularly to those in the majority party, and both parties exploited the loopholes found in the federal funding restrictions.

During this period the Supreme Court again considered the constitutionality of existing campaign-finance restrictions, continuing to grapple with the conflict between FIRST AMENDMENT liberties and the concern for political equality, a conflict inherent in attempts to regulate political funding. In the mid-1980s, the Court reiterated and even strengthened principles previously established in BUCKLEY V. VALEO (1976), including the rejection of equalization of political influence as an appropriate rationale for funding restrictions. However, at the end of the 1980s, a majority of the Court for the first time explicitly resolved the conflict by giving preference to equality rather than liberty, possibly signaling that they would view further legislative reforms with greater favor than in the past.

In *Federal Election Commission v. National Conservative Political Action Committee* (1985) the Court invalidated a federal statute that limited independent expenditures by political committees supporting presidential candidates who accepted public subsidies. Writing for the majority, WILLIAM H. REHNQUIST, then an Associate Justice, asserted that "the only legitimate and compelling government interests thus far identified" were preventing the appearance and reality of corruption. Defining the term "corruption" more explicitly than in previous cases, Justice Rehnquist made clear that he was referring to "quid pro quo" arrangements with office holders.

One year later, in *Federal Election Commission v. Massachusetts Citizens for Life* (*MCFL*) (1986), the Court held that the federal requirement that independent expenditures by CORPORATIONS in federal elections be made through voluntary funds given to political committees was unconstitutional as applied to MCFL. However, a change in the premises of a majority of the Justices was evident in Justice WILLIAM J. BRENNAN's opinion both from the narrowness of the HOLDING and from the lengthy explanation, quite unnecessary to the decision, as to why the restriction could be constitutionally applied to most other corporations.

The dicta from *MCFL* became a holding when the Court, in AUSTIN V. MICHIGAN CHAMBER OF COMMERCE (1990), upheld the application of a state statute similar to the one at issue in *MCFL*. According to Justice THURGOOD MARSHALL's majority opinion, the Chamber was not the kind of ideological corporation that was entitled to First Amendment protection under the reasoning of *MCFL* because its assets did not necessarily reflect support for its political expression.

The majority in *Austin* asserted that the compelling interest served by the statute was preventing "a different type of corruption in the political arena: the corrosive and distorting effect of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." In dissent, Justice ANTONIN SCALIA scoffingly referred to the majority's rationale as "the New Corruption" and accused them of adopting the approach of "one man, one minute." Indeed, the distinction between the compelling interest found in *Austin* and the interest in equalization of political influence, which had been rejected in *Buckley* and other cases, is not easy to discern.

By limiting the rationale to situations in which the wealth used for expression "was accumulated with the help of the corporate form," the majority purported to avoid a clash with PRECEDENT. Stressing that the state gives corporations the advantages of perpetual life and freedom from personal liability, the Court concluded that it was appropriate to prevent the use of funds amassed with the help of these benefits from unfairly influencing the electoral process. However, Justice ANTHONY M. KENNEDY pointed out in dissent that the majority's analysis was inconsistent with the reasoning in FIRST NATIONAL BANK OF BOSTON V. BELLOTTI (1978), in which the Court had invalidated bans on corporate expenditures in ballot-measure elections. Indeed, the shift in the majority's approach in *MCFL* and *Austin* is illustrated by the fact that the Court's opinions in these cases strongly resemble the DISSENTING OPINIONS in *Bellotti*. Although *Bellotti* is distinguishable from *MCFL* and *Austin* because the burdens on corporate expression were more severe, the broad principles articulated in *Bellotti* are clearly at odds with the basic premises of *Austin*.

The dichotomy between the majority and the dissents in *Austin* is a classic formulation of the tension between equality and liberty that lies behind all the cases in this area. Because *Austin* and *MCFL* represent a shift toward greater attention to political equality, these decisions

could open up new possibilities for reform as legislatures in the 1990s struggle with the problems caused by the ever spiraling costs of political campaigns.

MARLENE ARNOLD NICHOLSON
(1992)

Bibliography

MUTCH, ROBERT E. 1988 *Campaigns, Congress and Courts: The Making of Federal Campaign Law.* Westport, Conn.: Greenwood Press.

NICHOLSON, MARLENE A. 1987 The Supreme Court's Meandering Path in Campaign Finance Regulation and What It Portends for Future Reform. *Journal of Law and Politics* 3: 509–565.

## CAMPAIGN FINANCE
(Update 2)

"Criticism of political-funding practices and calls for further reforms increased in the latter half of the 1980s as the cost of campaigns continued to escalate and repeated fundraising scandals were publicized." So began the "campaign finance" update for the first supplement to the *Encyclopedia of the American Constitution.* Change "1980s" to "1990s" and the same introduction will serve for this, the second update. Chances are a similar date change will suffice for the third.

The elaborate structure of constitutional doctrine established to govern campaign finance regulation in BUCKLEY V. VALEO and subsequent cases has been based in large part on three dichotomies. First, the Supreme Court distinguishes between limits on campaign expenditures and limits on campaign contributions. The latter are much more likely to be upheld than the former, because the Court regards limits on contributions as more directly targeted at conflict of interest, while limits on expenditures more directly restrict speech.

Second, because the Court sees prevention of corruption as the main legitimate goal of campaign finance regulation, it is more likely to uphold restrictions in campaigns for elective office than in campaigns on ballot measures. Finally, the Court is more likely to uphold restrictions on campaign finance activities of business CORPORATIONS than of individuals and other entities, primarily because the financial resources accumulated by corporations reflect their business success rather than any support for their political views.

Guided by these dichotomies, the Court has laid down rules for what sorts of campaign finance regulation are permissible under the FIRST AMENDMENT, but no one claims there is a consistent pattern to these rules. The Court's logically fragile doctrinal structure has come under increasing pressure in the 1990s from outside critics, from political events, and from within the Court itself. Yet paradoxically, the pressure on the *Buckley* superstructure may assure its survival, as demands for change come from opposite directions.

In Congress, every session features serious debate on campaign finance regulation, but partisan differences, combined perhaps with a reluctance on the part of many members to tamper with a system that has served them well, have prevented any significant amendments to federal campaign law since 1979. On the other hand, new forms of campaign finance regulation have been enacted at the state level, especially but not exclusively in states with the INITIATIVE process. The new forms of regulation are already being challenged in the lower courts. By the early 2000s, the Court will have to decide the validity of restrictions that do not fit neatly within the *Buckley* doctrinal structure, such as contribution limits considerably lower than those upheld in *Buckley,* and inducements for candidates to agree to spending limits consisting not of money or other forms of campaign assistance, but of liberalized contribution limits.

Limits on campaign spending, declared unconstitutional in *Buckley,* have long been the most popular form of campaign regulation. In the 1990s, many reformers who previously supported public financing of campaigns began to demand spending limits, as they gave up on the political feasibility of public funding. Many prominent law professors and a few political scientists have called for overturning *Buckley*'s proscription of spending limits. Other scholars, perhaps fewer in number, argue for the extension of *Buckley,* to render invalid all or most forms of regulation other than disclosure.

Both the uneasiness with *Buckley* and the difficulty of replacing it were apparent in the only major campaign finance decision of the Court in the mid-1990s, *Colorado Republican Federal Campaign Committee v. Federal Election Commission* (1996). Federal law imposes limits on party contributions to candidates, limits considerably higher than those applicable to other contributors. At the same time, it has been generally understood that a party is so intrinsically united with its nominees that it is incapable of making independent expenditures, which under *Buckley* cannot be regulated at all. In *Colorado Republican,* Justice STEPHEN G. BREYER, speaking for a three-member plurality, ruled that if as a factual matter the party acts independently of the candidate, the party has the same right as any other speaker to engage in unlimited independent spending.

Though Breyer's logic may be sound, his result creates a perverse incentive for parties and their candidates to make sure that their campaign efforts are uncoordinated, a result that is hard to justify under any imaginable view

of democratic politics. Perhaps for this reason, the remaining six Justices refused to be bound by the *Buckley* logic. Justice JOHN PAUL STEVENS, writing for two Justices, would have permitted the government the right to ban independent spending by parties. In a more dramatic departure from *Buckley,* Stevens conceded the government "an important interest in leveling the electoral playing field by constraining the costs of federal campaigns."

Justices ANTHONY M. KENNEDY and CLARENCE THOMAS, each speaking for himself and the remaining two Justices, would have departed from *Buckley* in the opposite direction by protecting campaign expenditures by parties from regulation, even if the party's activities were coordinated with the candidate. Since *Buckley,* coordinated expenditures have been treated as contributions and thus subject to limitation. Thomas, speaking only for himself, would have overruled *Buckley* in one respect by declaring all limits on campaign contributions unconstitutional.

On and off the Court, the efforts of campaign finance regulators and deregulators continue to offset each other. However shaky, the *Buckley* regime appears to have plenty of life left in it.

DANIEL H. LOWENSTEIN
(2000)

Bibliography

COMMENTARY ON CAMPAIGN FINANCE REFORM 1998 *Connecticut Law Review* 30:775–910.

LOWENSTEIN, DANIEL HAYS 1995 *Election Law: Cases and Materials.* Durham, N.C.: Carolina Academic Press.

SULLIVAN, KATHLEEN M. 1997 Political Money and Freedom of Speech. *UC Davis Law Review* 30:663–690.

SYMPOSIUM 1992 Comparative Political Expression and the First Amendment. *Capital University Law Review* 21:381–609.

——— 1994 Campaign Finance Reform. *Columbia Law Review* 94:1125–1414.

## CAMPBELL, JOHN A.
(1811–1889)

John Archibald Campbell was the TANEY COURT's most thoughtful advocate of STATES' RIGHTS and, with the exception of JOSEPH STORY, its most penetrating legal scholar. Although never a constitutional doctrinaire like PETER V. DANIEL, Campbell rooted his constitutional jurisprudence in a southern exceptionalism antagonistic to corporate and federal judicial power. Appointed by President FRANKLIN PIERCE in March 1853, Campbell served until April 1861 when he resigned to return to Alabama and eventual support for the Confederacy.

Campbell analyzed constitutional disputes as clashes between sovereign entities. He dissented from successful efforts by the majority to expand federal ADMIRALTY JURISDICTION to river waters above the ebb and flow of the tide. In *Jackson v. Steamboat Magnolia* (1858) he ridiculed these efforts as factually incorrect, historically superficial, and purposefully intended to diminish state SOVEREIGNTY. Campbell only once won acceptance for his narrow view of federal admiralty jurisdiction when he persuaded a bare majority in *Taylor v. Carry* (1858) that, where claims against a vessel rested on conflicting state and federal JURISDICTION, the claimants had to proceed under the former.

Justice Campbell's most important decisions involved CORPORATIONS. The Taney Court recognized corporations as citizens, a status that enabled them to seek relief from unfavorable state legislative and judicial action through federal DIVERSITY JURISDICTION. Campbell in 1853 dissented when the Court reaffirmed this position in *Marshall v. Baltimore and Ohio Railroad.* He charged that the majority perverted the meaning of CITIZENSHIP and crippled state economic regulation.

Campbell also dissented from the majority's view that corporate charters, even when narrowly construed, were contracts in perpetuity. In PIQUA BRANCH BANK V. KNOOP (1854) and DODGE V. WOOLSEY (1856) he insisted, respectively, that state legislatures and CONSTITUTIONAL CONVENTIONS could alter tax-exemption provisions of previously granted charters. The states, Campbell argued, had to retain sovereign power to tax corporations in order to promote the public interest. A political and economic agenda informed Campbell's thinking about corporate CITIZENSHIP and the CONTRACT CLAUSE: federal judicial protection of interstate corporations tilted the balance of national power in favor of northern manufacturing.

Campbell eased the dichotomy between state and federal sovereignty only on questions involving SLAVERY. In DRED SCOTT V. SANDFORD (1857) he concluded that the federal judiciary had a constitutional responsibility to protect slave property. He reiterated the primacy of federal judicial power in cases in the Fifth Circuit involving enforcement of the slave trade and neutrality laws. Like northern federal judges, who enforced the Fugitive Slave Acts, Campbell charged southern federal juries to adhere to a national RULE OF LAW.

During the post-CIVIL WAR era Campbell made his most lasting contribution to constitutional jurisprudence as an attorney for the corporations he once attacked. The Supreme Court in the SLAUGHTERHOUSE CASES (1873) narrowly rejected his arguments in behalf of the rights of corporate citizenship and SUBSTANTIVE DUE PROCESS under the FOURTEENTH AMENDMENT, but two decades later the Justices embraced them.

KERMIT L. HALL
(1986)

Bibliography

SCHMIDHAUSER, JOHN R. 1958 Jeremy Bentham, the Contract Clause, and Justice John Archibald Campbell. *Vanderbilt Law Review* 11:801–820.

## *CANTWELL v. CONNECTICUT*
310 U.S. 296 (1940)

Newton Cantwell and his sons, Jesse and Russell, were arrested in New Haven, Connecticut. As Jehovah's Witnesses and, by definition, ordained ministers, they were engaged in street solicitation. They distributed pamphlets, made statements critical of the Roman Catholic Church, and offered to play for passers-by a phonograph record including an attack on the Roman Catholic religion. The Cantwells were convicted of violating a Connecticut statute that prohibited persons soliciting money for any cause without a certificate issued by the state secretary of the Public Welfare Council. Jesse Cantwell was also convicted of the COMMON LAW offense of inciting a BREACH OF THE PEACE.

Justice OWEN J. ROBERTS delivered the opinion of a unanimous Court: although Connecticut had a legitimate interest in regulating the use of its streets for solicitation, the means the state had chosen infringed upon the RELIGIOUS FREEDOM of solicitors. The secretary appeared to have unlimited discretion to determine the legitimacy of a religious applicant and either issue or withhold the certificate. If issuance had been a "matter of course," the requirement could have been maintained, but so wide an official discretion to restrict activity protected by the free exercise clause was unacceptable. (See PRIOR RESTRAINT.)

The conviction of Jesse Cantwell for inciting breach of the peace was also constitutionally defective. Justice Roberts noted that the open-endedness of the common law concept of breach of the peace offered wide discretion to law enforcement officials. When such a criminal provision was applied to persons engaging in FIRST AMENDMENT-protected speech or exercise of religion there must be a showing of a CLEAR AND PRESENT DANGER of violence or disorder. Although Cantwell's speech was offensive to his listeners, it had not created such a danger.

As a religious freedom precedent, *Cantwell* is important in two ways: first, it made clear that the free exercise clause of the First Amendment applied to the states through the DUE PROCESS clause of the FOURTEENTH AMENDMENT; second, it suggested (in contrast to previous case law, for example, REYNOLDS V. UNITED STATES, 1879) that the free exercise clause protected not only beliefs but also some actions. The protection of belief was absolute, Roberts wrote, but the protection of action was not; it must give way in appropriate cases to legitimate government regulation. The implication was that at least some government regulations of religion-based conduct would be impermissible.

RICHARD E. MORGAN
(1986)

# CAPITAL PUNISHMENT

In 1971, the year before the Supreme Court began its long and tortured experiment in constitutional regulation of the death penalty, Justice JOHN MARSHALL HARLAN issued an ominous warning. In *McGautha v. California* he said that because of the irreducible moral complexity and subjectivity of capital punishment, any effort to impose formal legal rationality on the choice between life and death for a criminal defendant would prove futile: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."

A constitutional interpreter who accepted Justice Harlan's pronouncement could draw one of at least two possible implications from it. She could conclude that in the face of this moral uncertainty, courts cannot interfere in legislative decisions about capital punishment, for judges have no objective principles to correct legislators. On the other hand, she could conclude that capital punishment must be constitutionally forbidden, because this moral uncertainty means that legislators cannot make the death penalty process conform to the minimal constitutional principles of the RULE OF LAW. But a constitutional interpreter might also conclude that Justice Harlan was unnecessarily cynical, and that an enlightened judicial effort might achieve an acceptable moral and instrumental rationality in the administration of the death penalty. The erratic constitutional history of capital punishment both before and after *McGautha* reflects the stubborn difficulty of these questions. That history reveals a complex, often confused experiment in lawmaking. It also illuminates the fundamental, recurring dilemma that Justice Harlan described, and lends sobering support to his pronouncement.

The Fifth Amendment says that no person "shall be deprived of life . . . without DUE PROCESS OF LAW." Thus, a strict textual reader would easily conclude that the Constitution does not forbid capital punishment per se. And indeed in early America, execution was the automatic penalty for anyone convicted of murder or any of several other felonies. Well into the nineteenth century, a jury that believed a defendant to be guilty of murder had no legal

power to save him from death. As the states began to draw distinctions among degrees of murder, a prosecutor had to win a conviction on an aggravated or first-degree murder charge to ensure execution, but, after conviction, the death penalty still lay beyond the legal discretion of the jury.

One potential constitutional restraint on the death penalty lay in the Eighth Amendment prohibition of CRUEL AND UNUSUAL PUNISHMENT. But at least in the Supreme Court's contemporary historical interpretation, *Gregg v. Georgia* (1976), the authors of the cruel and unusual punishment clause did not intend to forbid conventional capital punishment for serious crimes. Rather, the Eighth Amendment, drawing on the English BILL OF RIGHTS of 1689, was intended merely to prohibit any punishments not officially authorized by statute or not lying within the sentencing court's jurisdiction, and any torture or brutal, gratuitously painful methods of execution.

For most of the nineteenth century, American courts placed virtually no constitutional restrictions on capital punishment. Nevertheless, the state legislatures gradually rejected the automatic death penalty scheme. Some legislators may have believed that the automatic death laws were too harsh, and that at least some murderers merited legal mercy. Others, paradoxically, may have felt that the automatic death penalty law actually proved too lenient. A jury that believed a defendant was guilty of first-degree murder, but did not believe he deserved execution, could engage in "JURY NULLIFICATION"—it could act subversively by acquitting the defendant of the murder charge.

In any event, by the early twentieth century most of the states had adopted an entirely new type of death penalty law that gave juries implicit, unreviewable legal discretion in the choice between life and death sentences. The jury was instructed that if it found the defendant guilty of the capital crime, it must then decide between life and death. The jury had no legal guidance in this decision. Moreover, the jury rarely received any general information about the defendant's background, character, or previous criminal record that might be relevant to sentence; it only had the evidence proffered on the guilt issue. Although a few states eliminated capital punishment entirely late in the nineteenth century or early in the twentieth century, the new unguided discretion statute was essentially the model American death penalty law until 1972.

Executions of murderers and rapists were fairly frequent in the United States until the 1960s, though the rate of execution peaked at about 200 per year during the Depression and then dropped during WORLD WAR II. By the 1960s, however, the long-standing practice of death sentencing through unguided jury discretion began to face increasing moral and political opposition. Beyond any fundamental change in moral attitudes toward state killing itself, the opposition sounded essentially three themes. First, early empirical studies by social scientists cast grave doubt on the major instrumental justification for the death penalty—its general deterrent power over murderers. Second, even informal data on the patterns of execution under the unguided discretion laws suggested that the criminal justice system in general, and sentencing juries in particular, acted randomly and capriciously in selecting defendants for capital punishment. The process did not treat like cases alike, and no rational principle emerged to explain why some defendants were executed and others of similar crimes or character were not.

Third, to the extent that any pattern emerged at all, it was the unacceptable pattern of race. Critics of the death penalty offered empirical evidence that the race of the defendant was an important factor in a jury's choice between life and death, and that the race of the victim was potentially a still greater factor. Blacks were sentenced to death more often than whites, and people who committed crimes against whites were executed far more often than those who committed crimes against blacks. The racial pattern was absolutely overwhelming in the instance of rape, where virtually all executed rapists were black men convicted of raping white women, but the pattern was powerfully suggestive for murder as well.

As these themes emerged in academic commentary, legal argument, and even public opinion in the late 1960s, the courts faced increasing pressure to impose some legal restraint on the death penalty. In the most important and most enigmatic decision on capital punishment in American history, *Furman v. Georgia* (1972), a muddled consensus of the Supreme Court ignored Justice Harlan's warning and accepted the challenge, if not the ultimate conclusion, of the arguments against capital punishment. All nine Justices wrote separate opinions in *Furman*, and by a vote of 5–4 the Court reversed the death sentences before them. But the five opinions for reversal achieved at best a vague, thematic consensus about the problems with the death penalty, and no majority position on the solution.

Justices WILLIAM J. BRENNAN and THURGOOD MARSHALL alone were clearly persuaded that the death penalty was categorically unconstitutional in all cases. Responding to the powerful textualist argument that the authors of the Constitution and the Bill of Rights contemplated a legal death penalty, the Justices chose to read the Eighth Amendment's cruel and unusual punishments clause as a flexible instrument that could adjust constitutional law to American society's moral development. Thus, "evolving standards of decency," reflected in public opinion, jury behavior, and legislative attitudes, had come to condemn the death penalty. Moreover, the Eighth Amendment authorized judges to examine the moral and instrumental

justification for capital punishment, and neither retribution nor general deterrence withstood scrutiny. Retribution was an unworthy moral principle, and general deterrence had no empirical support.

But the *Furman* majority hinged on the more cautious and cryptic views of Justices WILLIAM O. DOUGLAS, BYRON R. WHITE, and POTTER STEWART. They avoided the question of whether capital punishment had become an absolutely forbidden penalty, and instead seemed to conclude that, as administered under the unguided discretion laws, capital punishment had achieved impermissibly random or racially discriminatory effects. Thus, the official signal from *Furman* seemed to be that the states could try yet again to develop sound capital punishment laws that would resolve the dilemma between legal guidance and discretion, though the Court certainly suggested no particular formula for doing so. (See CAPITAL PUNISHMENT CASES OF 1972.)

The immediate effect of *Furman* was to suspend all executions for a few years while about three-fourths of the state legislatures prepared their responses. The responses took two statutory forms. Ironically, a few states "solved" the problem of unguided discretion by completely eliminating discretion. Essentially, they returned to the early nineteenth-century model of the automatic death penalty, at least for those convicted of the most serious aggravated murders. Most of the states that restored the death penalty, however, chose a subtler, compromise approach, which might be called the "guided discretion" statute. A rough common denominator of these guided discretion statutes is a separate hearing on the question of penalty after a defendant is convicted of first degree murder. This hearing is a novel cross between the traditional discretionary sentencing hearing conducted by a trial judge in noncapital cases, and a formal, if abbreviated, criminal trial. In most states, the jury decides the penalty, though in a few states the judge either decides the penalty alone or has power to override a jury recommendation on penalty.

The matters at issue in this hearing consist of aggravating and mitigating factors which the two sides may establish. These factors partly overlap with the issues that would be resolved at the guilt trial, but comprehend new information about the defendant's character or background, which would normally be legally irrelevant at the guilt trial. Thus, the prosecution may establish that the defendant committed the murder in an especially heinous or sadistic way; that the victim was a specially protected person such as a police officer; that the murder was for hire or for some other form of pecuniary gain; that the murder was committed in the course of a rape, robbery, or burglary; or that the defendant had a substantial record of earlier violent crimes. Conversely, the defense may introduce evidence that the defendant, though unable to prove legal insanity, was emotionally impaired or under the influence of drugs at the time of the crime; that he was young, or had no serious criminal record; that he had suffered serious abuse or neglect as a child; or that since arrest he had demonstrated remorse and model prison behavior.

The sentencing judge or jury hears these factors and orders execution only if, according to some statutory formula, the aggravating circumstances outweigh the mitigating. Most of the statutes expressly enumerated these factors, and in addition provided for automatic appellate review of the death sentence. Many also required the state appellate court to conduct periodic "proportionality reviews" of death and life sentences in comparable murder cases, to ensure that the new system avoided the problem of caprice denounced in *Furman*.

In 1976 the states returned to the Supreme Court to learn whether they had properly met the obscure challenge of *Furman*. In a cluster of five cases handed down the same day, the Court once again failed to produce a majority opinion. Justices Brennan and Marshall would have struck down both types of statutes. Chief Justice WARREN E. BURGER and Justices HARRY A. BLACKMUN, BYRON R. WHITE, and WILLIAM H. REHNQUIST would have upheld both types of statutes. The swing plurality of Justices Potter Stewart, LEWIS F. POWELL, and JOHN PAUL STEVENS thus decided the constitutional fate of capital punishment, and the outcome, at least, of the 1976 cases was clear: the automatic death penalty statutes fell and the new guided discretion statutes survived.

First, in *Woodson v. North Carolina*, the plurality rejected the new automatic death laws as misguided solutions to the problem of discretion. These statutes were too rigid to capture the quality of individualized mercy required in death sentencing, and only revived the problem of "jury nullification" that had plagued the old automatic sentencing more than a century earlier. Second, in the key opinion in *Gregg v. Georgia* (1976) the plurality upheld the new guided discretion statutes as the proper solution to the complex of problems discerned in *Furman*. To do so, of course, the plurality had to reject the categorical arguments against the death penalty made by Justices Marshall and Brennan in *Furman*, and so it squarely held that the death penalty does not inevitably violate the BILL OF RIGHTS. The plurality opinion accepted retribution as a justifiable basis for execution, in particular because state-enacted revenge on murderers might prevent the more socially disruptive risk of private revenge. The plurality also found the empirical evidence of the general deterrent power of capital punishment to be equivocal, and declared that in the face of equivocal evidence, judges had to defer to popular and legislative judgments. Thus, the simple fact

that three-fourths of the state legislatures had chosen to reenact the death penalty after *Furman* became a primary ground for the general constitutional legitimacy of capital punishment. The plurality relied on the curious principle that the state legislatures, which are supposedly subject to the Eighth Amendment, had become a major source of the evolving moral consensus that could determine the meaning of the Eighth Amendment.

The plurality then examined the Georgia guided discretion statute, as well as the statutes of Florida and Texas, in *Proffitt v. Florida* and *Jurek v. Texas.* It concluded that the substantive and procedural elements of the new concept of the penalty hearing, combined with the promise of strict appellate review, indicated that these statutes, on their face, were constitutionally sufficient to prevent the random and racist effects of the old unguided discretion laws. (See CAPITAL PUNISHMENT CASES OF 1976).

A year later, with the execution of Gary Gilmore in Utah, capital punishment was effectively restored in America. But because of the uncertain meaning of *Gregg*, the rate of execution, compared to the rate of death sentencing, remained very low for several years thereafter. While *Gregg* probably foreclosed any argument that capital punishment was fundamentally unconstitutional, it confirmed that the operation of the death penalty laws remained subject to very strict due process-style constraints. Thus, the death penalty defense bar quickly found numerous legal arguments for challenging particular death sentences or particular elements of the new state statutes. Some of the new legal claims involved state law issues: The new aggravating circumstances that entered the law of homicide after *Furman* had made state substantive criminal law doctrine far more complex than before.

Most of the new claims, however, were constitutional. In one series of cases, the court extended "Eighth Amendment due process" by imposing a sort of revived WARREN COURT criminal procedure jurisprudence on the state death penalty hearing. It gave capital defendants a CONFRONTATION right to rebut aggravating evidence in *Gardner v. Florida* (1977), and a COMPULSORY PROCESS right to present hearsay mitigating evidence in *Green v. Georgia* (1979); it applied the due process "void-for-vagueness" principle to aggravating factors in *Godfrey v. Georgia* (1980) and the RIGHT AGAINST SELF-INCRIMINATION and RIGHT TO COUNSEL to penalty phase investigation in ESTELLE V. SMITH (1981); and it applied the principles of DOUBLE JEOPARDY to penalty phase determination in *Bullington v. Missouri* (1981). As the Court extended "Eighth Amendment due process," the defense bar pushed the lower courts still further to shape the penalty hearing into a formal criminal trial. It claimed, for example, that the Sixth and Eighth Amendments guaranteed the capital defendant a jury trial at the penalty phase, and that the jury had to apply the reasonable doubt standard to any choice of death over life.

At the same time, though it had foreclosed categorical arguments against the death penalty as a punishment for murder, the Court drew another line of decisions effectively limiting the death penalty to the crime of aggravated murder. In COKER V. GEORGIA (1977) the Court held that the death penalty was categorically disproportionate as a punishment for rape of adult women—and, by implication, for any nonhomicidal crime. In so holding, it noted that the great majority of states had repealed the death penalty for rape, and thus continued the method of legislation—counting as a form of constitutional jurisprudence. Yet the Court also engaged in its own moral balancing of the severity of the crime of rape and the severity of the sentence of death, claiming under the Eighth Amendment some independent power to determine when a punishment was so disproportionate as to be "cruel and unusual." The Court further applied this jurisprudence of legislative consensus finding and moral reasoning in ENMUND V. FLORIDA (1982). There, the Court forbade the death penalty as punishment for certain attenuated forms of unintentional felony murder.

After the Court had refined the new constitutional law of the death penalty, the process of appellate litigation in the state supreme courts—and even more so in federal district courts on HABEAS CORPUS petitions—became increasingly complex. It also became increasingly prolonged: the vast majority of defendants sentenced to death under the new laws were likely never to suffer execution, and for those that did, the time between original sentence and execution was often as long as ten years. Meanwhile, the Supreme Court encountered an ever increasing caseload of death penalty cases, in which it was continually asked to fine-tune still further the new constitutional regulation of capital punishment. But the Court's effort at formal legal regulation began to seem self-perpetuating, endlessly creating new grounds for reversible error. The appellate and habeas corpus courts were increasingly overwhelmed with death cases.

The Court recognized that it had exacerbated, not resolved, the inescapable tension between rational legal constraint and subjective jury discretion in the administration of capital punishment, and it began an effort to change course. The result, however, was that it was soon moving confusingly in both directions at once as it faced the fundamental—and perennial—legal issue: the feasibility of strict statutory rules, rather than open-ended discretionary standards, in choosing which defendants should die.

Ironically, perhaps the key decision in explaining the apparent unraveling of the Court's effort at constitutional regulation in the death penalty was a great defense vic-

tory—*Lockett v. Ohio* (1978). There, the Court held that the state must permit the sentencing judge or jury to give independent consideration to any mitigating factors about the defendant's character, crime, or record that the defense could reasonably proffer, even if those factors fell outside the state statute's carefully enumerated list of mitigating factors. The Court took the view that the moral principles of individualized sentencing demanded a degree of jury discretion that no formal statutory list could capture. The echo of Justice Harlan's 1971 warning was obvious. The Court faced the argument that *Lockett* had, ironically, revived all the problems of unguided jury discretion it had denounced in *Furman* and purported to resolve in *Gregg*.

The defense bar quickly lent support to this view, inundating the lower courts with *Lockett* claims that exploited the vast moral relativism of the concept of mitigation. Defendants sought to introduce evidence unrelated to technical criminal responsibility yet vaguely related to their moral deserts, such as evidence of upright, citizenlike conduct in prison while awaiting trial, or of late-found literary promise. The proffered mitigating evidence sometimes was not about the defendant's character at all: a defendant had a loving family that would suffer terribly if he died young; or, however culpable the defendant was, he had an equally culpable accomplice who had managed to gain a plea to a noncapital charge. Other defendants argued that a jury could not make a sound normative judgment about penalty unless it heard detailed evidence about the gruesome physical facts of execution. Still others read *Lockett* as mandating that a jury must receive an explicit instruction that it had full legal power to exercise mercy. It could spare a defendant after consulting its subjective assessment of his moral deserts, regardless of the technical outcome of its measurement of formal aggravating and mitigating factors.

A few years after *Lockett*, facing the complaint that it had revived, at least on the defendant's side, the very unguided discretion that *Furman* purported to prohibit, the Court arrived at a crudely symmetrical solution. In a bizarrely obscure pair of decisions, *Zant v. Stephens* and *Barclay v. Florida* (1983), the Court held that the state, in effect, had its own *Lockett* rights: so long as the sentencing judge or jury established at least one statutorily defined aggravating factor, it could also take account of aggravating factors about the defendant's crime or character that did not appear on the statute's enumerated list. Having taken an important, if ambivalent, step toward regulating capital punishment, the Court, perhaps reflecting simply its own weariness at the overload of death cases before it, had embarked on deregulation. Along with *Zant* and *Barclay*, the Court began, in *California v. Ramos* (1983) and *Pulley v. Harris* (1984), to remove most formal restrictions on such things as prosecution closing argument in the penalty phase and state appellate proportionality review. In *Spaziano v. Florida* (1984) the Court made clear that the apparent trial-like formality of the penalty phase did not create any defense right to jury sentencing. Once again, Justice Harlan echoed ominously.

In any event, partly because the Court has begun to narrow the grounds on which capital defendants can claim legal error, the execution rate has begun a slow but steady increase, with the number of post-*Furman* executions passing fifty in 1985. For the foreseeable future, a tired and conservative Court is not likely to entertain many dramatic procedural or substantive attacks on the death penalty, and so capital punishment has achieved political, if not intellectual stability.

A remarkable irony, though, lies in one remaining possibility for a very broad attack on the death penalty. In the years since *Furman*, social scientists have conducted more sophisticated empirical studies of patterns of death sentencing and have uncovered evidence of random and racially disparate effects similar to the evidence that helped bring down the old unguided discretion laws in *Furman*. Most important, studies using multiple regression analysis have found significant evidence that, holding all other legitimate factors constant, murderers of whites are far more likely to suffer the death sentence than murderers of blacks.

One of the obvious implications of this evidence is that though the new guided discretion statutes reviewed in *Gregg* at first looked like they would meet the demands of *Furman*, they now may have proved failures. If so, there is no reason not to declare capital punishment unconstitutional yet again. It would seem politically unrealistic to think that the court would now accept this implication. But it is nevertheless important to consider how one might reconcile this evidence with the modern constitutional doctrine of capital punishment.

One could finesse the issue by taking the view that no system can be perfect and that the statistical discrepancy is insignificant. Or one could acknowledge that the discrepancy is significant and disturbing, but still ascribe it to the inevitable, often unconscious prejudices of jurors, rather than to any deliberate racist conduct by legislators or prosecutors. If so, one might conclude that the Constitution requires the states to do only what is morally possible, not what is morally perfect. To put the matter in doctrinal terms, one could engage in some mildly revisionist history of *Furman* and *Gregg*. That is, one could say that *Furman* only required the state legislatures to make their best efforts to devise rational, neutral death penalty laws, that *Gregg* had upheld the new guided discretion statutes on their face as proof that the state legislatures had made that effort successfully, and that

constitutional law has no more to say about capital punishment. Whatever the conclusion, capital punishment has given constitutional doctrine making one of its most vexing challenges.

ROBERT WEISBERG
(1986)

(SEE ALSO: *Barefoot v. Estelle.*)

Bibliography

BEDAU, HUGO ADAM (1967) 1982 *The Death Penalty in America.* Oxford: Oxford University Press.

BERNS, WALTER 1979 *For Capital Punishment.* New York: Basic Books.

BOWERS, WILLIAM J., with PIERCE, GLENN L. 1984 *Legal Homicide: Death as Punishment in America, 1864–1982.* Boston: Northeastern University Press.

DEATH PENALTY SYMPOSIUM 1985 *U.C. Davis Law Review* 18: 865–1480.

GRANUCCI, ANTHONY F. 1969 Nor Cruel and Unusual Punishments Inflicted: The Original Meaning. *California Law Review* 57:839–865.

GROSS, SAMUEL R. and MAURO, ROBERT 1985 Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization. *Stanford Law Review* 37:27–153.

LEMPERT, RICHARD 1981 Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment. *Michigan Law Review* 79:1177–1231.

WEISBERG, ROBERT 1983 Deregulating Death. *Supreme Court Review* 1983:304–395.

## CAPITAL PUNISHMENT
### (Update 1)

During the 1980s, a majority of Justices on the Supreme Court struggled without success to disengage the Court from playing an intimate role in the day-to-day administration of capital punishment. As early as 1984, an article on the evolving jurisprudence of capital punishment in the Court could plausibly be titled "Deregulating Death," and the Court continued to reject major challenges to state systems of capital punishment for the rest of the decade. In the wake of *McCleskey v. Kemp*, decided in 1987, scholars could conclude that "nothing appears left of the abolitionist campaign in the courts—nothing but the possibility of small-scale tinkering" (Burt, p. 1741).

Yet conflicts about capital punishment have been a persistent and growing problem for the Court through the 1980s, and there are no indications that the burden will lessen soon. The number of capital cases producing opinions increased during the decade from about five per term in the early 1980s to about ten per term in the late 1980s. Moreover, the level of dispute among the Justices has substantially increased during the course of the decade. In the early 1980s, most challenges to capital punishment were rejected by substantial majorities of the Justices, with a 7–2 vote being the most common outcome during the 1982, 1983, and 1984 terms. Only three of seventeen opinions issued during these three terms were decided by 5–4 margins. Justices WILLIAM J. BRENNAN and THURGOOD MARSHALL were the isolated dissenters in most of these early cases.

By contrast, in the four terms after October 1985, the Court has been sharply and closely divided. Of the twenty-seven cases decided over this span, fourteen produced 5–4 divisions, with Justices JOHN PAUL STEVENS and HARRY A. BLACKMUN usually joining Justices Brennan and Marshall in opposition to the deregulatory thrust of the Court majority. We know of no other body of the Supreme Court doctrine in which the majority of cases divide the Court 5–4.

With the Court divided almost to the point of a mathematical law of maximal disagreement, both JURISPRUDENCE and decorum have suffered. Few would suggest that the Court's decisions of the past decade cumulate into a body of doctrine that is even minimally coherent. And close decisions on questions that are literally matters of life and death do not promote good manners among Justices locked in conflict. It is thus no surprise that Court decorum has been put at some risk by the sustained contentiousness of the death penalty cases.

Close and acrimonious division of the Justices may also undermine the degree to which the Supreme Court's decisions confer legitimacy on the practice of execution in the 1990s. Confidence in the fairness of the system is not bolstered when four of nine Justices publicly proclaim that the race of the victim has a discriminatory influence on whether defendants receive death sentences. The result is that the consistent but slim majority support on the Court may not provide much momentum for public acceptance of the equity of capital punishment, much as the Court's leadership toward abolition was undermined by a slim and divided majority on the Court in *Furman v. Georgia* (1972). A 5–4 majority may lack the institutional credibility to help make executions an accepted part of a modern American governmental system.

One other pattern is of special significance when discussing capital punishment in the Supreme Court during the 1980s: The transition from theory to practice of executions has not yet occurred in most of the United States. Despite the Court's attempts to withdraw from close supervision of death cases, the backlog of death cases has increased substantially, and the lower federal courts continue to play an important role in stopping executions. In-

deed, over half of federal court of appeals decisions in death penalty cases result in overturning the death sentence.

As of January 1990, although thirty-seven states have legislation authorizing capital punishment (and thirty-four of these have prisoners under death sentence), only thirteen states have executed since the reauthorization of the capital punishment in *Gregg v. Georgia*, in 1976. Nine of the thirteen states with a recent execution are located in the South; only one new state resumed executions during the last four years of the 1980s.

The number of executions has also stayed low throughout the 1980s, with a high of twenty-seven in 1987 and an annual average of about twenty for the last five years of the 1980s. But, although the level of executions remained low and eighty percent of these are clustered in four southern states, the number of prisoners under death sentence had increased by the end of 1989 to about 2,400, a more than one-hundred-year supply at the prevailing rates of execution.

Thus, by the end of the 1980s, the withdrawal of the Supreme Court from regulation of the administration of the death penalty had not yet produced a substantial increase in the number of executing states or the number of executions. But the long involvement of the federal courts had helped produce a death row population four times as great as that which cast a shadow on the Court when *Furman v. Georgia* was decided in 1972.

Against this backdrop, an ad hoc committee chaired by retired Justice LEWIS F. POWELL diagnosed the problem that generated these numbers as the delay produced by repetitive and multiple federal APPEALS. The committee suggested the enactment of new statutory procedures for handling death penalty cases in the federal court, which, by and large, would eliminate the filing of successor federal petitions. Under the new procedures, if the state has provided counsel to those sentenced to death through the state appeal and HABEAS CORPUS process, absent extraordinary circumstances, a federal court would lack the power to stay an execution of the condemned person upon the filing of a successor federal petition.

Should such procedures be enacted and actually reduce federal appeal time more than they increase state appeal time, further pressure toward increasing numbers of executions will occur just when large numbers of cases will be exhausting currently available federal reviews.

But even if the Powell committee recommendations were to maintain delay at current levels, but shift more of the total procedural load onto state courts, this result might serve one significant objection that motivated the exercise—it would reduce the extent to which the federal courts could be blamed for delay in execution. A persistent fact of American government is that even among institutions and actors that believe twenty-five executions a year is more appropriate in the United States than 250, there is constant pressure to avoid appearing to be responsible for restricting the scale of executions. The politics of capital punishment at all levels in the United States involves passing the apparent responsibility for preventing executions to other actors or institutions. And the Powell committee's work can be understood in part as a public-relations gesture in this tradition of passing the buck away from the federal court system.

In 1989 and 1990, the Supreme Court, by the familiar 5–4 vote, responded to the considerations that had moved the Powell committee. Now, with few exceptions, a federal habeas corpus petition must be denied when it rests on a claim of a "new right"—one that had not yet been recognized by the Supreme Court when the appeals ended in the state courts. Not only has the Court specifically applied this new bar to death penalty cases, but it has also read the idea of a "new right" broadly enough to bar all but a very few claims.

What would be the impact of true federal court withdrawal from restrictions on execution? The potential number of executions that could result is quite high, two or three times as many as the 199 executions that were to date the twentieth-century high recorded in 1935. How many state governors or state court systems would compensate and to what degree remains to be seen. Practices like executive clemency that used to be a statistically important factor in restricting executions atrophied during the twenty-five years of primary federal court intervention in the capital-punishment process. Whether these processes would reappear under the pressure of large numbers of pending executions in northern industrial states cannot be predicted, nor is it possible to project a likely national number of executions that could represent a new level of equilibrium.

The one certainty is that the U.S. Supreme Court will play a central day-to-day role in any substantial increase in executions. Whatever its doctrinal intentions or public-relations ambitions, the Supreme Court will be for the mass media and the public the court of last resort for every scheduled execution in the United States for the foreseeable future. If executions climb to 100 or 150 per year, the continuing role of the Court as the last stop before the gallows will be that element of the Court's work most sharply etched in the public mind. For an institution narrowly divided on fundamental questions, this case-by-case process could increase both the labor and the acrimony of the Court's involvement with capital punishment. To escape this role would call for more than a shift in procedure or court personnel; it would require a different country.

Under these circumstances, will the hands-off doctrine the Court has so recently constructed continue as executions multiply? In the short run, any major shift in doctrine would be regarded as a surprise. This is a matter more of personnel than of precedent. STARE DECISIS has not often been a reliable guide to Supreme Court pronouncements in capital punishment. Instead, doctrine seems more the servant of policy than its master in this field, and this is equally the case for *Gregg v. Georgia* as for *Furman v. Georgia.* But the current majority is apparently firm and includes the four youngest Justices.

In the long run, if the United States is to join the community of Western nations that has abolished capital punishment, the U.S. Supreme Court is the most likely agency of abolition in the national government. The principal flaws in the system of capital punishment are the same as they have been throughout the twentieth century. The doctrinal foundations for reacting to these matters are easily found in the Court's prior work.

No matter the course of the Court's future pronouncements, capital punishment will remain an area of inevitable judicial activism in one important respect: Whatever the substance of American policy toward executions, the U.S. Supreme Court will continue to be the dominant institutional influence of national government on executions in the United States.

FRANKLIN ZIMRING
MICHAEL LAURENCE
(1992)

(SEE ALSO: *Capital Punishment and Race; Capital Punishment Cases of 1972; Capital Punishment Cases of 1976.*)

Bibliography

AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES 1989 *Committee Report and Proposal.* Washington, D.C.: Judicial Conference of the United States.

BURT, ROBERT A. 1987 Disorder in the Court: The Death Penalty and the Constitution. *Michigan Law Review* 85:1741–1819.

WEISBERG, ROBERT 1983 Deregulating Death. In Philip J. Kurland, Gerhard Gasper, and Dennis J. Hutchinson, eds., *Supreme Court Review,* pp. 305–396. Chicago: University of Chicago Press.

ZIMRING, FRANKLIN E. and HAWKINS, GORDON 1986 *Capital Punishment and the American Agenda.* New York: Cambridge University Press.

## CAPITAL PUNISHMENT
### (Update 2)

The mid-1990s have witnessed an end to what one scholar described in the early 1980s as "a roller coaster system of capital justice, in which large numbers of people are constantly spilling into and out of death row, but virtually no executions take place." Executions averaged forty-five a year from 1992–1997, peaking in 1997 at seventy-one. Although death row continues to grow (at the end of 1997, it exceeded 3,300 inmates), one can anticipate a time in which more people are executed in a year than are added to the capital prison population.

A major reason for this dismal trend is the continued retreat of the Supreme Court from active monitoring of the death penalty. While defendants still chalk up occasional victories, these are mainly in cases affecting relatively small numbers of prisoners. Indeed, death penalty opponents have not generally mounted broad-based claims in the 1990s. With the Court's sanction in the late 1980s of capital punishment for the mentally retarded, PENRY V. LYNAUGH (1989), for perpetrators as young as sixteen, STANFORD V. KENTUCKY (1989), for felony murderers who did not intentionally kill, *Tison v. Arizona* (1987), and for persons sentenced in systems tainted by RACIAL DISCRIMINATION, MCCLESKEY V. KEMP (1987), it appears that few if any systemic challenges remain.

Justice HARRY A. BLACKMUN voiced his disgust with the majority's performance in this area. "From this day forward," he announced in *Callins v. Collins* (1994), "I no longer shall tinker with the machinery of death." He had concluded that the twin goals of modern death penalty jurisprudence under the Eighth Amendment, eliminating arbitrariness and ensuring individualized sentencing, stood in irreconcilable tension: advancing the one jeopardized the other. Worse yet, he noted, the Court was retreating from both of these principles.

Blackmun's criticism was well-founded. The Court continued a trend begun in the mid-1980s, tolerating laws and practices that detracted from the goal of nonarbitrariness. In addition, it showed increased willingness to compromise the aim that it had pursued more faithfully until the 1990s—individualized sentencing. For example, it affirmed a death sentence even though the jurors were not permitted to give the defendant's youth full mitigating effect in *Johnson v. Texas* (1993), and upheld a trial court's sentencing instructions that failed to mention mitigation in *Buchanan v. Angelone* (1998).

Arguably the most important setbacks for capital defendants occurred in the field of HABEAS CORPUS, rather than the Eighth Amendment. Since the 1970s, and increasingly over the following two decades, the Court has been narrowing access to federal court review by death-sentenced prisoners—the most avid consumers of the writ.

Throughout this period, the Court has demanded procedural punctilio of habeas petitioners. Slight missteps by defense counsel, in either state or federal forums, barred

federal review of the merits of the prisoner's contentions unless he was able to demonstrate "cause" for, and "prejudice" from, the procedural default or, in the alternative, actual innocence. At the same time, the Court has declined to recognize innocence as a freestanding constitutional claim under the Eighth or FOURTEENTH AMENDMENTS for inmates seeking to avoid execution by presenting new evidence of innocence. In denying habeas applicants hearings on their claims, the Justices relied heavily on law precluding habeas courts from declarating or applying "new rules" favoring defendants. While most of the decisions in this area purported to interpret the statutes governing habeas, some dealt with issues implicating constitutional principles—for example, the doctrine that the Court cannot review decisions resting on an independent and adequate state law ground.

Congress echoed the Court's anti-habeas sentiment, enacting the ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (AEDPA). Among other things, it drastically limited second or successive habeas petitions, imposed a statute of limitations on habeas filings, and arguably established a deferential STANDARD OF REVIEW of state decisions on questions of law or mixed questions of law and fact.

In addition to issues of STATUTORY INTERPRETATION, these provisions give rise to constitutional questions—such as whether the law amounts to a suspension of the writ, violates DUE PROCESS, or infringes on Article III's requirement of an independent judiciary—that the Court will have to resolve. In 1996, the Justices upheld one of its restrictions against a suspension clause attack. Other cases are percolating in the lower courts and will surely afford the Justices many opportunities to construe the statute's meaning and validity.

What does the future hold for capital punishment and the Court? Aside from habeas, it appears for the moment that the Court will likely continue to "tinker" with minor aspects of the doctrine. The newest Justices, RUTH BADER GINSBURG and STEPHEN G. BREYER, moderate liberals on capital punishment, replaced a liberal—Justice Blackmun—and a conservative—Justice BYRON R. WHITE; therefore, not very much has changed. Changes in the Court's jurisprudence regarding the death penalty will probably have more to do with changes in the Court's personnel than with paradigm shifts in ideology.

VIVIAN BERGER
(2000)

(SEE ALSO: *Cruel and Unusual Punishment; Procedural Due Process of Law, Criminal.*)

Bibliography

BERGER, VIVIAN 1991 Black Box Decisions on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbottom. *Case Western Reserve Law Review* 41: 1067–1092.

——— 1994 *Herrera v. Collins:* The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere. *William and Mary Law Review* 35:943–1023.

GREENBERG, JACK 1982 Capital Punishment as a System. *Yale Law Journal* 91:908–936.

STEIKER, CAROL S. and STEIKER, JORDAN M. 1995 Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment. *Harvard Law Review* 109: 355–438.

SUNDBY, SCOTT 1991 The *Lockett* Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing. *UCLA Law Review* 38:1147–1208.

## CAPITAL PUNISHMENT AND RACE

In MCCLESKEY V. KEMP (1987), the Supreme Court grappled with the difficult issue of race and CAPITAL PUNISHMENT. Confronted with statistical studies that indicated potential RACIAL DISCRIMINATION in the assignment of death sentences in the state of Georgia, the Court considered Eighth Amendment and EQUAL PROTECTION challenges to the application of the Georgia death penalty statute. Whereas no significant disparities existed with respect to the race of defendants, statistical evidence, using sophisticated regression analysis, indicated that blacks were 4.3 times more likely to receive death sentences when they killed whites than when they killed blacks.

McCleskey, a black, had killed a white police officer during an armed robbery. The fact that the race of the victim made it more likely that he would receive the death penalty was, McCleskey argued, a violation of equal protection guarantees and the Eighth Amendment's ban on CRUEL AND UNUSUAL PUNISHMENT. The Court, although expressing some reservations about both the credibility and the relevance of the statistical evidence, nevertheless assumed their validity in order to reach the constitutional questions.

Speaking through Justice LEWIS F. POWELL, the Court's majority of five refused to break new ground in its equal protection jurisprudence. Powell began by noting that it was a settled principle that "a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination'" and that the purposeful discrimination had "a discriminatory effect on him." Therefore, "McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose." Statistical inference, the Court ruled, could at best indicate only that there was a risk that racial discrimination had been a factor in McCleskey's sentencing. The Court has in certain contexts—selection of jury venire and Title VII—accepted statistics as prima facie proof of discrimi-

nation. Moreover, the statistics (particularly in the jury cases) do not have to present a "stark" pattern in order to be accepted as sole evidence of discriminatory intent.

Yet the Court in *McCleskey* distinguished capital sentencing cases as less amenable to statistical proof because of the "uniqueness" of each capital case and the consequent difficulty of aggregating data. Each jury is unique and "the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense." In contrast, the jury-selection and Title VII cases are concerned only with limited ranges of circumstances and are thus more amenable to statistical analysis.

The Court therefore held that for McCleskey's claim of purposeful discrimination to prevail, he "would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because* of an anticipated racially discriminatory effect." But, as the Court laconically notes, this was a claim that was rejected in *Gregg v. Georgia* (1976). Thus, the Court concluded that "absent far stronger proof, . . . a legitimate and unchallenged explanation" for McCleskey's sentence "is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty."

McCleskey also sought to use statistics to support his Eighth Amendment claim that the discretion given to sentencers in the Georgia criminal justice system makes it inevitable that any assignment of the death penalty will be "arbitrary and capricious." The Court has interpreted Eighth Amendment requirements to mean that sentencers must be governed by state laws that contain carefully defined standards that narrow the discretion to impose the death penalty. That is, sentencers must exercise only "guided discretion." But there can be no limits with respect to the sentencer's discretion not to impose the death penalty.

As the Court stated in *Lockett v. Ohio* (1978), "the sentencer" cannot be "precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Discretion that ensures the treatment of all persons as "uniquely individual human beings" is thus an essential ingredient of Eighth Amendment jurisprudence. The Court has ruled that mandatory death sentences are unconstitutional because the "respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

The presence of such discretion, however, makes it impossible for actual decisions to result in racial proportionality. And to stipulate racial proportionality as a requirement either of equal protection or the Eighth Amendment would mean that the sentencer's discretion would have to be limited or extinguished. Proportionality requirements also present the daunting prospect that blacks who are convicted of killing blacks will have to receive the death penalty at an accelerated rate. Of course, proponents of the use of statistics as a measure of equal protection and Eighth Amendment rights do not expect any such result. Rather, their ultimate purpose is to abolish capital punishment under the guise that it is impossible to mete out death sentences in any rational or otherwise nonarbitrary manner. The Court, however, remains unwilling to accept statistical evidence as a sufficient proof of capriciousness and irrationality.

Because the existence of discretion will always produce statistical disparities, the "constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions" cannot be defined in statistical terms. Rather, the constitutional risk must be addressed in terms of the procedural safeguards designed to minimize the influence of racial prejudice in the criminal justice system as a whole. After a thorough review of the Georgia system in *Gregg*, the Court concluded that procedural safeguards against racial discrimination were constitutionally adequate. As the Court rightly said, "where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious."

The Eighth Amendment is not limited to capital sentencing but extends to all criminal penalties. Thus, a racial proportionality requirement for capital sentencing would open the possibility that all sentences could be challenged not only on the grounds of race but on the grounds of any irrelevant factor that showed enough of a statistical disparity to indicate that the sentencing was "irrational" or "capricious." Some cynics have described this as a kind of AFFIRMATIVE ACTION for sentencing decisions. Such a situation not only would prove unworkable but, by limiting the discretion that remains at the heart of the criminal justice system, would also prove to be unjust. The vast majority of convicted murderers, for example, do not receive death sentences, because the discretionary element of the system spares them. The small percentage who do receive death sentences have thorough and exhaustive procedural protections. Under these circumstances, it would be impossible to argue that statistical disparities based on race indicate systemic racism in the CRIMINAL JUSTICE SYSTEM or that the statistical disparities indicate a fundamentally unjust system.

Moreover, some scholars have questioned the validity of the statistics used in the *McCleskey* case. Interracial

murders are more likely to involve aggravating circumstances (e.g., armed robbery, kidnapping, rape, torture, or murder to silence a witness to a crime) than same-race murders, which involve more mitigating factors (e.g., quarrels between friends and relatives). Given the relative rarity of blacks being murdered by whites, the statistics are bound to be skewed, but they do not necessarily prove or even indicate racial discrimination.

Taking into account the different levels of aggravating and mitigating circumstances, one recent study of Georgia sentencing practices concluded that evidence "supports the thesis that blacks who kill whites merit more serious punishment and are not themselves the victims of racial discrimination. By the same token, the same evidence suggests that blacks who kill blacks deserve less punishment and are not being patronized by a criminal justice system because it places less value on a black life."

Given the controversial nature of the statistical evidence proffered in the *McCleskey* case and the doctrine that equal protection and Eighth Amendment rights belong to "uniquely individual human beings" rather than racial groups, the Supreme Court was wise to reject abstract statistical disparities as proof of individual injury.

EDWARD J. ERLER
(1992)

Bibliography

HEILBRUN, ALFRED B., JR.; FOSTER, ALLISON; and GOLDEN, JILL 1989 The Death Sentence in Georgia, 1974–1987. *Criminal Justice and Behavior* 16:139–154.

KENNEDY, RANDALL L. 1988 *McCleskey v. Kemp:* Race, Capital Punishment, and the Supreme Court. *Harvard Law Review* 101:1388–1443.

# CAPITAL PUNISHMENT CASES OF 1972

## *Furman v. Georgia*
## *Jackson v. Georgia*
## *Branch v. Texas*
## 408 U.S. 238 (1972)

The Eighth Amendment clearly and expressly forbids the infliction of CRUEL AND UNUSUAL PUNISHMENTS (a prohibition that since 1947 has applied to the states as well as to the national government), and opponents of CAPITAL PUNISHMENT have long argued that to execute a convicted criminal, whatever his crime, is such a punishment. It was obviously not so regarded by the persons who wrote and ratified the BILL OF RIGHTS. They acknowledged the legitimacy of the death penalty when, in the Fifth Amendment, they provided that no person "shall be held to answer for a capital . . . crime, unless on a PRESENTMENT or INDICTMENT of a GRAND JURY," and when in the same amendment they provided that no one shall, for the same offense, "be twice put in jeopardy of life or limb," and when they forbade not the taking of life as such but the taking of life "without DUE PROCESS OF LAW" (a formulation repeated in the FOURTEENTH AMENDMENT). The question of the original understanding of "cruel and unusual" is put beyond any doubt by the fact that the same First Congress that proposed the Eighth Amendment also provided for the death penalty in the first Crimes Act. In 1958, however, the Supreme Court, in the course of holding deprivation of CITIZENSHIP to be a cruel and unusual punishment, accepted the argument that the meaning of cruel and unusual is relative to time and place; the Eighth Amendment, the Court said in TROP V. DULLES (1958), "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Implicit in this statement is the opinion that society, as it matures, becomes gentler, and as it becomes gentler, it is more disposed to regard the death penalty as cruel and unusual. According to one member of the five-man majority in the 1972 cases, that point had been reached: "capital punishment," wrote Justice THURGOOD MARSHALL, "is morally unacceptable to the people of the United States at this time in their history."

This assessment of the public's opinion could not reasonably provide the basis of the Court's judgment in these cases; contrary to Marshall, the polls showed a majority in favor of the death penalty and, more to the point, there were at that time some 600 persons on death row, which is to say, some 600 persons on whom the American people, acting through their federal and state courts, had imposed death sentences. Marshall's assessment was also belied by the reaction to the Court's decision: Congress and thirty-five states promptly enacted new death penalty statutes, and it is fair to assume that they did so with the consent of their respective popular majorities. The states remained authorized, or at least not forbidden, to do so, because the Court did not declare the death penalty as such to be a cruel and unusual punishment; only two members of the 1972 majority adopted that position. Justice WILLIAM J. BRENNAN said that the death penalty, for whatever crime imposed, "does not comport with human dignity." Marshall, in addition to finding it to be morally unacceptable, said its only possible justification was not that it was an effective deterrent (he accepted Thorsten Sellin's evidence that it was not) but as a form of retribution, a way to pay criminals back, and, he said, the Eighth Amendment forbade "retribution for its own sake." The other majority Justices found the death penalty to be cruel and unusual only insofar as the statutes permitted it to be imposed discriminatorily (WILLIAM O. DOUGLAS), or arbitrarily

and capriciously (POTTER STEWART), or (because it is imposed infrequently) pointlessly or needlessly (BYRON R. WHITE).

That the death penalty has historically been imposed, if not capriciously, then at least in a racially and socially discriminatory fashion seems to be borne out by the statistics. Of the 3,859 persons executed in the United States during the years 1930–1967, when, for a time, executions ceased, 2,066, or fifty-four percent, were black. Georgia alone executed 366 persons, of whom 298 were black. Although American juries have shown increasing reluctance to impose the death penalty (despite the majority sentiment in favor of it in principle), they have been less reluctant to impose it on certain offenders, offenders characterized not by their criminality but by their race or class. "One searches our chronicles in vain for the execution of any members of the affluent strata in this society," said Douglas. "The Leopolds and Loebs are given prison terms, not sentenced to death." The three cases decided in 1972 illustrate his argument. The statutes (two from Georgia, one from Texas) empowered the juries to choose between death and imprisonment for the crimes committed (murder in the one case and rape in the other two), and in each case the jury chose death. As crimes go, however, those committed here were not especially heinous. In the *Furman* case, for example, the offender entered a private home at about 2 a.m. intending to burglarize it. He was carrying a gun. When heard by the head of the household, William Micke, a father of five children, Furman attempted to flee the house. He tripped and his gun discharged, hitting Micke through a closed door and killing him. Furman was quickly apprehended, and in due course tried and convicted. The salient facts would appear to be these: the offender was black and the victim was white, which was also true in the other two cases decided that day.

By holding that the death penalty, as it has been administered in this country, is a cruel and unusual punishment, the Supreme Court challenged the Congress and the state legislatures, if they insisted on punishing by executing, to devise statutes calculated to prevent the arbitrary or discriminatory imposition of the penalty.

WALTER BERNS
(1986)

Bibliography

BERNS, WALTER 1979 *For Capital Punishment: Crime and the Morality of the Death Penalty.* New York: Basic Books.

BLACK, CHARLES L., JR. 1974 *Capital Punishment: The Inevitability of Caprice and Mistake.* New York: Norton.

LEVY, LEONARD 1974 *Against the Law: The Nixon Court and Criminal Justice.* Pages 383–420. New York: Harper & Row.

SELLIN, THORSTEN 1980 *The Penalty of Death.* Beverly Hills, Calif.: Sage Publications.

VAN DEN HAAG, ERNEST 1975 *Punishing Criminals: Concerning a Very Old and Painful Question.* Pages 225–228. New York: Basic Books.

## CAPITAL PUNISHMENT CASES OF 1976

*Gregg v. Georgia*, 428 U.S. 153
*Jurek v. Texas*, 428 U.S. 262
*Proffitt v. Florida*, 428 U.S. 242
*Woodson v. North Carolina*, 428 U.S. 280
*Roberts v. Louisiana*, 428 U.S. 325
*Green v. Oklahoma*, 428 U.S. 907

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Writing for the Supreme Court in *McGautha v. California* (1971), only a year before the CAPITAL PUNISHMENT CASES OF 1972, Justice JOHN MARSHALL HARLAN said, "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can fairly be understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." Yet, in *Furman v. Georgia* (1972), by declaring unconstitutional statutes that permitted arbitrary, capricious, or discriminatory imposition of the death penalty, the Court challenged the Congress and the various state legislatures to write new statutes that did express in advance the characteristics that would allow the sentencing authorities to distinguish between what is properly a capital and what is properly a noncapital case. The statutes involved in the 1976 cases were drafted in the attempt to meet these requirements.

Three states (North Carolina, Louisiana, Oklahoma) attempted to meet them by making death the mandatory sentence in all first-degree murder cases, thereby depriving juries of all discretion, at least in the sentencing process. By the narrowest of margins, the Court found these mandatory sentencing laws unconstitutional. Justices WILLIAM J. BRENNAN and THURGOOD MARSHALL held to their views expressed in the 1972 cases that the death penalty is unconstitutional per se. In the 1976 cases they were joined by Justices POTTER STEWART, LEWIS F. POWELL, and JOHN PAUL STEVENS (new on the Court since the 1972 decisions) who held, in part, that it was cruel and unusual to treat alike all persons convicted of a designated offense. Their view was that no discretion is as cruel as unguided discretion.

The three statutes upheld in 1976 (those from Georgia, Texas, and Florida) permitted jury sentencing discretion but attempted to reduce the likelihood of abuse to a tol-

erable minimum. All three statutes, and especially the one from Georgia, embodied procedures intended to impress on judge and jury the gravity of the judgment they are asked to make in capital cases. For example, all three required the sentencing decision to be separated from the decision as to guilt or innocence. In one way or another, all three implied that a sentence of death must be regarded as an extraordinary punishment not to be imposed in an ordinary case, even an ordinary case of first-degree murder. For example, the Georgia law required (except in a case of treason or aircraft hijacking) a finding beyond a REASONABLE DOUBT of the presence of at least one of the aggravating circumstances specified in the statute (for example, that the murder "was outrageously and wantonly vile, horrible and inhuman"), and required the sentencing authority to specify the circumstance found. In addition, the trial judge was required to instruct the jury to consider "any mitigating circumstances" (an element that was to play an important role in the 1978 capital punishment cases). Finally, Georgia required or permitted an expedited APPEAL to or review by the state supreme court, directing that court to determine whether, for example, "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor," or was "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

These statutes went to great lengths to do what Harlan in *McGautha* had said could not be done but which, in effect, the Court in 1972 had said must be done: to characterize in advance the cases in which death is an appropriate punishment, or in which the sentencing authority (whether judge or jury) is entitled to decide that the death penalty is appropriate. With only Brennan and Marshall dissenting, the Court agreed that all three statutes met the constitutional requirements imposed four years earlier.

From the 1976 decisions emerged the following rules: the death penalty in and of itself is not a cruel and unusual punishment; a death sentence may not be carried out unless the sentencing authority is guided by reasonably clear statutory standards; in imposing the penalty, the sentencing authority must consider the characteristics of the offender and the circumstances of his offense; mandatory death sentences for murder (and presumably for all other offenses) are unconstitutional; the punishment must not be inflicted in a way that causes unnecessary pain; finally, the death penalty may not be imposed except for heinous crimes ("the punishment must not be grossly out of proportion to the severity of the crime").

The Court's decisions were a bitter disappointment not only to the hundreds of persons on death row who now seemingly faced the real prospect of being executed but also to the equally large number of persons who had devoted their time, talent, and in some cases their professional careers to the cause of abolishing the death penalty.

They had been making progress toward that end. In other Western countries, including Britain, Canada, and France, the death penalty had either been abolished by statute or been allowed to pass into desuetude; in the United States almost a decade had passed since the last legal execution. In this context it was easy for the opponents of capital punishment to see the Supreme Court's 1972 decision as a step along the path leading inevitably to complete and final abolition of the death penalty. This hope was dashed, at least temporarily, in 1976.

Not only did the Court for the first time squarely hold that "the punishment of death does not invariably violate the Constitution" but it also gave explicit support to the popular principle that punishment must fit the crime and that, in making this calculation, the community may pay back the worst of its criminals with death. Prior to 1976, the capital punishment debate had focused on the deterrence issue, and a major effort had been made by social scientists to demonstrate the absence of evidence showing the death penalty to be a more effective deterrent than, for example, life imprisonment. This opinion was challenged in 1975 by University of Chicago econometrician Isaac Ehrlich. Employing multiple regression analysis, Ehrlich concluded that each execution might have had the effect of deterring as many as eight murders. His findings were made available to the Court in an AMICUS CURIAE brief filed in a 1975 case by the solicitor general of the United States. In the 1976 opinion announcing the judgment of the Court, Stewart cited the Ehrlich study, acknowledged that it had provoked "a great deal of debate" in the scholarly journals, but nevertheless concluded that, at least for some potential murderers, "the death penalty undoubtedly is a significant deterrent." If this conclusion remains undisturbed, the focus of the capital punishment debate will shift to the issue of human dignity or the propriety of retribution. Thus, Stewart's statement on paying criminals back takes on added significance. With the concurrence of six Justices, he said, "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."

This sanctioning of the retributive principle especially disturbed Marshall, one of the two dissenters. Along with many opponents of the death penalty, he would be willing to allow executions if they could be shown to serve some useful purpose—for example, deterring others from committing capital crimes—but to execute a criminal simply because society demands its pound of flesh is, he said, to deny him his "dignity and worth." Why it would not de-

prive a person of dignity and worth to use him (by executing him) in order to influence the behavior of other persons, Marshall did not say; apparently he would be willing to accept society's calculations but not its moral judgments.

An unwillingness to accept society's moral judgments best characterizes the opposition to capital punishment, a fact reflected in the differences between popular and sophisticated opinion on the subject. Sophisticated opinion holds that the death penalty does not comport with human dignity because, as Brennan (the other dissenter) said, it treats "members of the human race as nonhumans, as objects to be toyed with and discarded." Popular opinion holds that to punish criminals, even to execute them, is to acknowledge their humanity, insofar as it regards them, as it does not regard other creatures, as responsible moral beings. Sophisticated opinion agrees with ABE FORTAS who, after he left the Supreme Court, argued that the "essential value" of our civilization is the "pervasive, unqualified respect for life"; this respect for life forbids the taking of even a murderer's life. Popular opinion holds that what matters is not *that* one lives but *how* one lives, and that society rightly praises its heroes, who sacrifice their lives for their fellow citizens, and rightly condemns the worst of its criminals who prey upon them.

In 1976, seven members of the Supreme Court agreed that society is justified in making this severe moral judgment, but this agreement on the principle may prove to be less significant than the Justices' inability to join in a common opinion of the Court. Embodied in that inability were differences in the extent to which the Justices were committed to the principle, and it could have been predicted that, in future cases, some of them would find reason not to apply it.

WALTER BERNS
(1986)

Bibliography

BERNS, WALTER 1979 *For Capital Punishment: Crime and the Morality of the Death Penalty.* New York: Basic Books.

DAVIS, PEGGY C.; WOLFGANG, MARVIN E.; GIBBS, JACK P.; VAN DEN HAAG, ERNEST; and NAKELL, BARRY 1978 Capital Punishment in the United States: A Symposium. *Criminal Law Bulletin* 14:5–80.

EHRLICH, ISAAC 1975 The Deterrent Effect of Capital Punishment. *American Economic Review* 65:397–417.

ENGLAND, JANE C. 1977 Capital Punishment in the Light of Constitutional Evolution: An Analysis of Distinctions Between *Furman* and *Gregg*. *Notre Dame Lawyer* 52:596–610.

GILLERS, STEPHEN 1980 Deciding Who Dies. *University of Pennsylvania Law Review* 129:1–124.

LEMPERT, RICHARD O. 1981 Desert and Deterrence: An Assessment of the Moral Bases for Capital Punishment. *Michigan Law Review* 79:1177–1231.

## CAPITATION TAXES

A capitation tax, or POLL TAX, is a tax levied on persons. A capitation tax takes a fixed amount for each person subject to it, without regard to income or property. Under Article I, section 9, any federal capitation tax must be apportioned among the states according to population, a restriction originally intended to prevent Congress from taxing states out of existence.

In the twentieth century some states made payment of capitation taxes a qualification for voting, usually in order to reduce the number of black voters. The TWENTY-FOURTH AMENDMENT and HARPER V. VIRGINIA BOARD OF ELECTIONS (1966) ended this practice.

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Direct and Indirect Taxes; Excise Tax.*)

## *CAPITOL SQUARE REVIEW AND ADVISORY BOARD v. PINETTE* 515 U.S. 753 (1995)

In this decision, the Supreme Court invalidated an administrative decision that denied permission to the Ku Klux Klan to erect a large, unattended cross in Capitol Square, a PUBLIC FORUM located in front of the Ohio Statehouse. The administrators had determined that observers might conclude that the state endorsed the religious beliefs embodied in the cross. The Court reasoned that excluding the cross would be consistent with the FREEDOM OF SPEECH guarantee of the FIRST AMENDMENT only if a decision to allow the cross would itself violate the ESTABLISHMENT OF RELIGION clause. The central question was therefore whether the board could constitutionally have permitted the cross to be erected. On this issue, the Court was sharply divided.

In a PLURALITY OPINION, Justice ANTONIN SCALIA, writing for four Justices, argued that the establishment clause is violated in these circumstances only if the government engages in religious expression itself or discriminates in favor of religious expression. Thus, in his view, if the board had "neutrally" permitted all speakers to erect such displays, without regard to their message, its decision to permit a cross as part of that policy would not have violated the establishment clause.

In CONCURRING OPINIONS, Justices SANDRA DAY O'CONNOR, DAVID H. SOUTER, and STEPHEN G. BREYER disagreed with Scalia that the establishment clause could not be violated by "neutral policies that happen to benefit religion." In their view, even neutral policies could violate the establishment clause if the circumstances are such

"that the community would think that the [State] was endorsing religion." As applied to this case, however, these Justices concluded that this problem was not present because "the reasonable observer" would be "able to read and understand an adequate disclaimer."

Justice JOHN PAUL STEVENS dissented on the ground that the establishment clause "prohibits government from allowing [unattended] displays that take a position on a religious issue [in] front of the seat of government," for "viewers reasonably will assume that [government] approves of them." Justice RUTH BADER GINSBURG also dissented.

GEOFFREY R. STONE
(2000)

## CAPTIVE AUDIENCE

The Supreme Court has encountered conflicts between FREEDOM OF SPEECH and PRIVACY. In some cases speech conflicts with a nonspeech interest, such as a claimed right to preserve one's peace and quiet. In other cases speech interests may be discerned on both sides; the listener objects to having to hear an uncongenial message. The notion of "captive audience" refers to both types of case. The right not to be compelled to listen to unwelcome messages may be viewed as a corollary to the right not to be compelled to profess what one does not believe, announced in WEST VIRGINIA BOARD OF EDUCATION V. BARNETTE (1943).

Justice WILLIAM O. DOUGLAS first argued the rights of captive auditors in a dissent in *Public Utilities Commission v. Pollak* (1952). His views reemerged in *Lehman v. Shaker Heights* (1974). There a city-owned transit system devoted transit advertising space solely to commercial and public service messages, refusing space to a political candidate. Four Justices held that placard space in city-owned buses and street cars did not constitute a PUBLIC FORUM because the space was incidental to a commercial transportation venture. Admitting, however, that city ownership implicated STATE ACTION, the four agreed that the transit system's advertising policies must not be "arbitrary, capricious, or invidious." The ban on political advertising was a reasonable means "to minimize chances of abuse, the appearance of favoritism and the risk of imposing upon a captive audience."

Justice Douglas concurred. His main point was that commuters, forced onto public transit as a economic necessity, should not be made a captive audience to placard advertising they cannot "turn off." They have a right to be protected from political messages that they are totally without freedom of choice to receive or reject.

The dissenters argued that, whether or not buses and streetcars were special-purpose publically owned property that could be denied public forum status, the city could not constitutionally discriminate among placard messages on the basis of their content.

A finding that a public forum did exist would likely be decisive for the captive audience issue. Surely there is only the most attenuated "right not to receive" when one enters a public forum whose very definition is that it is open to all senders; those who do not wish to receive a particular visual message are expected to turn away their eyes. *Lehman* and COHEN V. CALIFORNIA (1971) illustrate this tension between the public forum and captive audience concepts.

MARTIN SHAPIRO
(1986)

Bibliography

BLACK, CHARLES 1953 He Cannot Choose but Hear: The Plight of the Captive Auditor. *Columbia Law Review* 53:960–974.

CAHILL, SHEILA M. 1975 The Public Forum: Minimum Access, Equal Access and the First Amendment. *Stanford Law Review* 28:117–148.

## CARDOZO, BENJAMIN N.
(1870–1938)

The towering professional and public reputation that OLIVER WENDELL HOLMES enjoyed when he retired from the Supreme Court in 1932 contributed to President HERBERT HOOVER's selection of Benjamin Nathan Cardozo as his successor despite the fact that there were already two New Yorkers and one Jew on the Supreme Court. Cardozo was one of the very few lawyers in the country whose reputation resembled that of Holmes. A series of famous opinions, his extrajudicial writings, especially *The Nature of the Judicial Process*, his position as chief judge of an able New York Court of Appeals, and his almost saintlike demeanor propelled him into prominence and combined with the usual exigencies of fate and political calculation to put him onto the Supreme Court.

During his five and one-half terms on the Supreme Court from 1932 to 1938, one of Cardozo's major contributions was his demonstration of the utility of COMMON LAW techniques to elaboration of the FOURTEENTH AMENDMENT. Ever since the passage of that amendment, a substantial body of constitutional thought has sought to prevent, or at least to limit, the substantive interpretation of its open-ended provisions. The line stretches from the SLAUGHTERHOUSE CASES (1873) through LEARNED HAND to the current day. The arguments in the 1980s are considerably more complex and theoretical than they were in the nineteenth century and in the 1920s and 1930s. Yet the underlying theme remains essentially the same: the inappropriateness in a democratic society of a nonelected

court giving substantive content to broad constitutional phrases such as DUE PROCESS OF LAW and EQUAL PROTECTION OF THE LAWS because of the lack of appropriate sources of judicial law for such an endeavor. The controversies in Cardozo's day revolved around the use of the due process clauses and the equal protection clause to test both the economic legislation that marked an increasingly regulatory society and the numerous infringements by government of individual rights. Although Cardozo's political and social outlook differed somewhat from those of his predecessors on the Court, Holmes, LOUIS D. BRANDEIS, and HARLAN FISKE STONE, he shared the general substantive constitutional outlook that they had espoused for many years: great deference to legislative judgments in economic matters but a more careful scrutiny to constitutional claims of governmental violation of CIVIL RIGHTS in noneconomic matters.

Thus Cardozo was consistently to be found joining those members of the Court, especially Brandeis and Stone, who voted to uphold ECONOMIC REGULATION against attack on COMMERCE CLAUSE, due process, and equal protection grounds. He wrote some of the more eloquent dissents, *Liggett v. Lee* (1933) (Florida chain store tax), PANAMA REFINING COMPANY V. RYAN (1935) (the "hot oil" provision of the NATIONAL INDUSTRIAL RECOVERY ACT), *Stewart Dry Goods Company v. Lewis* (1935) (graduated taxes on gross sales), and CARTER V. CARTER COAL COMPANY (1936) (The Guffey-Snyder Act), and two of the major Court opinions after the Court reversed itself and adopted the constitutional views of the former dissenters. In STEWARD MACHINE COMPANY V. DAVIS (1937) and HELVERING V. DAVIS (1937) Cardozo's opinions upholding the SOCIAL SECURITY ACT expounded Congress's power under the TAXING AND SPENDING clause of the Constitution and provided the theoretical basis for upholding major legislative policies in a way that complemented the parallel recognition of expansive congressional power under the commerce clause. He also viewed the commerce clause as imposing broad limits on the power of individual states to solve their economic problems at the expense of their neighbors (*Baldwin v. Seelig*, 1935), although he recognized at the same time that state financial needs required some tempering of those views (*Henneford v. Silas Mason Co.*, 1937).

Cardozo's special contribution lay in his discussion of the methodological approach to substantive results. Long before joining the Supreme Court, he had considered the appropriate factors that shape decision making for a judge, and although his primary experience was in the common law, he had considered the issue with respect to constitutional law as well. Many would sharply curtail the judiciary's role in constitutional, in contrast to common law, adjudication because of the legislature's inability to overturn most constitutional decisions, but Cardozo viewed the process of judicial decision making as unitary. In *The Nature of the Judicial Process* he had proposed a fourfold division of the forces that shape the growth of legal principles: logic or analogy (the method of philosophy); history (the historical or evolutionary method); custom (the method of tradition); and justice, morals, and social welfare (the method of sociology).

Those who have attacked the common law approach to Fourteenth Amendment adjudication have perceived the specter of subjectivism in employment of all these methods, but especially in the last. Cardozo saw "justice, morals, and social welfare," which he also labeled as "accepted standards of right conduct," as especially relevant in constitutional adjudication. He struggled to find an acceptable formula for deriving those standards, finally settling on "the principle and practice of the men and women of the community whom the social mind would rank as intelligent and virtuous."

Cardozo never directly met the charge of subjectivism, especially subjectivism in Fourteenth Amendment adjudication, for his message about judging was aimed at a different target: the regressive results produced by too slavish adherence to the so-called objective factors of precedent and logic. But he clearly did not believe that all was "subjective" or that complete reliance on "objective" factors was possible either. One did the best one could to avoid judging on the basis of purely personal values. "History or custom or social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law must come to the rescue of the anxious judge, and tell him where to go."

Cardozo brought these ideas with him to the Supreme Court and applied them to a number of notable issues. From its earliest days and notwithstanding bad experience with SUBSTANTIVE DUE PROCESS of law, epitomized by DRED SCOTT V. SANDFORD (1857) and LOCHNER V. NEW YORK (1905), the Court had become committed, in different guises and formulations, to the notion that various rights, liberties, privileges, or immunities existed that were not spelled out in the Constitution. Although there had been occasional discussion since the end of the nineteenth century of the question whether the Fourteenth Amendment "incorporated" specific provisions of the BILL OF RIGHTS (see INCORPORATION DOCTRINE), most major decisions in the twentieth century had used the due process clause on its own to assess whether a particular "liberty" had been denied. As the attack on the Court's use of the due process clause to strike down economic regulation increased throughout the 1930s, the Court began to refocus the issue of protection of noneconomic rights more in terms of incorporation of particular provisions of the Bill of Rights into the Fourteenth Amendment.

The classic reformulation was rendered by Cardozo in PALKO V. CONNECTICUT (1937). To be incorporated the claimed right must be "fundamental"; or one without which "neither liberty nor justice would exist"; or it must "be implicit in the concept of ORDERED LIBERTY." Without pursuing all the ramifications of the debate over "selective incorporation," as the *Palko* DOCTRINE came to be known, we should note that in the midst of the most severe attack on the Court's interpretation of the Fourteenth Amendment, Cardozo and the whole Court never questioned the notion that the amendment had a substantive content. The approach they chose, the selective incorporation doctrine, required the weighing of factors and building up of precedents in a common law fashion with only the general language of the Fourteenth Amendment as a starting point.

Two Fourteenth Amendment cases suffice to demonstrate specific attempts to apply a "common law" method of judging. In *Snyder v. Massachusetts* (1934) Cardozo wrote an opinion holding that due process was not violated when the defendant was not permitted to be present at a jury view of the scene of an alleged crime. After recognizing that the Fourteenth Amendment protected privileges "fundamental" to a FAIR TRIAL, he considered history, which showed that a view of the scene by a jury was not considered part of the "trial"; current practice in other states, which generally permitted the defendant to be present; and potential prejudice to defendant, which he found to be remote. The balance of these factors led him to conclude that there was nothing fundamental, on the facts of Snyder's case, about the right being asserted.

In GROSJEAN V. AMERICAN PRESS COMPANY (1936), Cardozo wrote an opinion, never published, concerning a Louisiana statute that placed a tax on newspapers that carried advertising and had a circulation over 20,000. The majority had originally agreed to hold the statute unconstitutional on equal protection grounds. After Cardozo wrote an opinion concurring on grounds of violation of FREEDOM OF THE PRESS, Justice GEORGE SUTHERLAND substituted a new opinion for a unanimous Court adopting the free press rationale, although in an ambiguous formulation that suggests unconstitutional motivation as at least one of its rationales. The opinion that Cardozo then withdrew is one of his best, and it discusses his methodology and substantive rationale quite clearly. What is a law "abridging the freedom of the press" may be somewhat more specific than the question whether a law denies liberty without due process of law (or denies a PRIVILEGE OR IMMUNITY of national CITIZENSHIP),but it was not much more of a specific starting point for the Court in the context of the Louisiana statute.

Cardozo's draft opinion considered exhaustively the English use first of licenses and then of taxation to control the press as part of the history that led to adoption of the FIRST AMENDMENT. That history led him to conclude that the tax involved was a modern counterpart of those repressive tactics. But he also recognized the financial needs of government. He thus concluded unambiguously—and innovatively—that while the press was not immune from taxation and while classifications were normally a matter of legislative discretion, freedom of the press could be safeguarded only if the press was not subjected to discriminatory taxation vis-à-vis other occupations and through use of internal classifications. The opinion is a splendid example of the use of history and reason combined with a sympathetic appreciation of the setting in which the press functions and of modern needs to assure its "freedom."

Another interesting substantive view was his analysis, before coming to the Supreme Court, of three due process cases that have become increasingly important to modern constitutional theory: MEYER V. NEBRASKA (1923) and *Bartel v. Iowa* (1923) (state laws forbidding teaching of foreign languages to young children held unconstitutional) and PIERCE V. SOCIETY OF SISTERS (1928) (state requirement that all children attend public school through eighth grade held unconstitutional). In *The Paradoxes of Legal Science* he characterized the unconstitutional legislation and the nature of the "liberty" that was upheld in the following prophetic language. "Restraints such as these are encroachments upon the free development of personality in a society that is organized on the basis of family." This emphasis on "free development of personality" and "family" is a stunning extrapolation of a second level of generalization from the constitutional principle of "liberty"; it places Cardozo a half century ahead of his time, for such a conception of the "liberty" protected by the Fourteenth Amendment did not resurface until GRISWOLD V. CONNECTICUT (1965) and ROE V. WADE (1973); and it is a graphic (and controversial) example of the operation of the "method of sociology" in CONSTITUTIONAL INTERPRETATION.

Cardozo was a judge for twenty-four years and he thought hard about what he did. If he was not wholly successful in making a useful statement that would clarify the basis for the creative leap of judgment that enabled him to value certain arguments more than others and thus to reach a conclusion, no one in the half century that followed has been more successful. More important, he provided assistance in his extrajudicial writings and in the reasoning of his opinions for the position, which continues to have considerable support among constitutional theorists and especially among judges, that asserts the validity of applying techniques of common law adjudication to the elaboration of Fourteenth Amendment doctrine. Finally and perhaps even more controversially, he demonstrated that an able, conscientious judge who believed that substantive Fourteenth Amendment adjudication was differ-

ent from legislating might so comport himself on the bench as to offer hope to his successors a half century later that that position is desirable and capable of achievement.

ANDREW L. KAUFMAN
(1986)

Bibliography

Collected essays on Cardozo in joint 1939 issues of *Columbia Law Review*, 39, #1; *Harvard Law Review*, 52, #3; *Yale Law Journal*, 48, #3; and *Cardozo Law Review*, 1, #1.

KAUFMAN, ANDREW L. 1969 Benjamin Cardozo. In Leon Friedman and Fred L. Israel, eds., *The Justices of the Supreme Court of the United States, 1789–1969*, 3:2287–2307. New York: Chelsea House.

——— 1979 Cardozo's Appointment to the Supreme Court. *Cardozo Law Review* 1:23–53.

## CAREER CRIMINAL SENTENCING LAWS

As a response to concern about violent crime, career criminal sentencing laws—commonly known as "three-strikes" laws—became popular with state legislatures and Congress during the mid-1990s. Like habitual offender statutes that have existed in this country since its inception, three-strikes laws dramatically increase the punishment for various repeat offenders. These statutes may limit parole eligibility and impose extremely long sentences, usually life in prison, even for offenders whose final "strike" is a nonviolent crime.

Three-strikes laws are subject to significant criticisms: (1) they were enacted when violent crime rates were already declining; (2) they rely on a questionable assumption that incarceration reduces crime significantly; and (3) they allocate prison resources poorly because they result in long prison sentences for nonviolent offenders and for aging felons past their peak crime years.

Despite the questionable use of resources, three-strikes laws are almost certainly constitutional. Offenders have raised two significant constitutional challenges to habitual offender statutes: (1) they violate the DOUBLE JEOPARDY clause of the Fifth Amendment; and (2) at least some sentences are grossly disproportionate, in violation of the Eighth Amendment's prohibition against CRUEL AND UNUSUAL PUNISHMENT.

Because the Supreme Court has held that the double jeopardy clause protects against multiple punishments for the same offense, offenders have argued that recidivist sentencing statutes punish defendants for their earlier, previously punished crimes. However, courts have repeatedly reaffirmed the holding of *Moore v. Missouri* (1895), which upheld enhanced punishment under such a statute against a double jeopardy challenge. Among other reasons, courts reject the double jeopardy claim because the enhanced sentence is for a current offense and because the offender is more culpable in light of his continued criminal activity.

Only once has the Court found a term of imprisonment to be a violation of the Eighth Amendment's prohibition against cruel and unusual punishment: in SOLEM V. HELM (1983), wherein the defendant received a term of life imprisonment without benefit of parole although his record involved only nonviolent felonies. In *Harmelin v. Michigan* (1991), a divided Court failed to overrule *Helm*, but limited *Helm*'s application to sentences for minor, nonviolent crimes. Many three-strikes laws avoid the limited protection afforded by *Helm* either by providing a statutory minimum sentence that allows parole eligibility, distinguishing it from the sentence imposed in *Helm*, or by imposing a life sentence only on an offender with a criminal history involving violence, which brings it within *Harmelin*.

MICHAEL VITIELLO
(2000)

Bibliography

DONZIGER, STEVEN R., ed. 1996 *The Real War on Crime: The Report of the National Criminal Justice Commission*. New York: HarperPerennial.

DUBBER, MARKUS D. 1995 Recidivist Statutes as Arational Punishment. *Buffalo Law Review* 43:689–724.

VITIELLO, MICHAEL 1997 Three Strikes: Can We Return to Rationality? *The Journal of Criminal Law and Criminology* 87: 395–481.

## *CAREY v. POPULATION SERVICES INTERNATIONAL*
431 U.S. 678 (1977)

By a 7–2 vote the Supreme Court in *Carey* invalidated three New York laws restricting the advertisement and sale of BIRTH CONTROL devices. Justice WILLIAM J. BRENNAN wrote for a majority concerning two of the laws. First, he read GRISWOLD V. CONNECTICUT (1965) and ROE V. WADE (1973) to require STRICT SCRUTINY of laws touching the "fundamental" decision "whether to bear or beget a child." New York had limited the distribution of contraceptives to licensed pharmacists, and had not offered a sufficiently compelling justification. Second, he read the FIRST AMENDMENT to forbid a law prohibiting the advertising or display of contraceptives. (See COMMERCIAL SPEECH.)

The Court was fragmented in striking down the third law, which forbade distribution of contraceptives to minors under sixteen except under medical prescription.

Justice Brennan, for himself and three other Justices, conceded that children's constitutional rights may not be the equivalent of adults' rights. Yet he found insufficient justification for the law in the state's policy of discouraging sexual activity among young people. He doubted that a limit on access to contraceptives would discourage such activity, and in any case the state could not delegate to doctors the right to decide which minors should be discouraged. Three concurring Justices expressed less enthusiasm for minors' constitutional rights to sexual freedom but found other paths to the conclusion that the New York law as written was invalid.

Chief Justice WARREN E. BURGER dissented without opinion, and Justice WILLIAM H. REHNQUIST filed a short dissent that was unusually caustic, even by his high standard for the genre.

*Carey* was not the last word on the troublesome problem of minors' rights concerning REPRODUCTIVE AUTONOMY; the Court has repeatedly returned to the issue in the ABORTION context. Yet *Carey*'s opinion invalidating the law limiting contraceptives sales to pharmacists was important for its recognition that *Griswold v. Connecticut* stood not merely for a right of marital PRIVACY but also for a broad FREEDOM OF INTIMATE ASSOCIATION.

KENNETH L. KARST
(1986)

## *CAROLENE PRODUCTS COMPANY, UNITED STATES v.*
### Footnote Four
### 304 U.S. 144 (1938)

Footnote four to Justice HARLAN F. STONE's opinion in UNITED STATES V. CAROLENE PRODUCTS CO. (1938) undoubtedly is the best known, most controversial footnote in constitutional law. Stone used it to suggest categories in which a general presumption in favor of the constitutionality of legislation might be inappropriate. The issue of if and when particular constitutional claims warrant special judicial scrutiny has been a core concern in constitutional theory for nearly fifty years since Stone's three-paragraph footnote was appended to an otherwise obscure 1938 opinion.

The *Carolene Products* decision, handed down the same day as ERIE RAILROAD V. TOMPKINS (1938), itself reflected a new perception of the proper role for federal courts. It articulated a position of great judicial deference in reviewing most legislation. In his majority opinion, Stone sought to consolidate developing restraints on judicial intervention in economic matters, symbolized by WEST COAST HOTEL CO. V. PARRISH (1937). But in footnote four Stone also went on to suggest that legislation, if challenged with certain types of constitutional claims, might not merit the same deference most legislation should enjoy.

Stone's opinion upheld a 1923 federal ban on the interstate shipment of filled milk. The Court thus reversed a lower federal court and, indirectly, the Illinois Supreme Court, in holding that Congress had power to label as adulterated a form of skimmed milk in which butterfat was replaced by coconut milk. Today the decision seems unremarkable; at the time, however, not only was the result in *Carolene Products* controversial but the theory of variable judicial scrutiny suggested by its footnote four was new and perhaps daring.

Actually, only three other Justices joined that part of Stone's opinion which contained the famous footnote, though that illustrious trio consisted of Chief Justice CHARLES EVANS HUGHES, Justice LOUIS D. BRANDEIS, and Justice OWEN J. ROBERTS. Justice HUGO L. BLACK refused to agree to the part of Stone's opinion with the footnote because Black wished to go further than Stone in proclaiming deference to legislative judgments. Justice PIERCE BUTLER concurred only in the result; Justice JAMES C. MCREYNOLDS dissented; and Justices BENJAMIN N. CARDOZO and STANLEY F. REED did not take part.

In fact, the renowned footnote does no more than tentatively mention the possibility of active review in certain realms. The footnote is nonetheless considered a paradigm for special judicial scrutiny of laws discriminating against certain rights or groups. The first paragraph, added at the suggestion of Chief Justice Hughes, is the least controversial. The paragraph hints at special judicial concern when rights explicitly mentioned in the text of the Constitution are at issue. This rights-oriented, interpretivist position involves less of a judicial leap than the possibility, suggested in the rest of the footnote, of additional grounds for judicial refusal or reluctance to defer to judgments of other governmental branches.

The footnote's second paragraph speaks of possible special scrutiny of interference with "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." To illustrate the ways in which clogged political channels might be grounds for exacting judicial review, Stone cites decisions invalidating restrictions on the right to vote, the dissemination of information, freedom of political association, and peaceable assembly.

The footnote's third and final paragraph has been the most vigorously debated. It suggests that prejudice directed against DISCRETE AND INSULAR MINORITIES may also call for "more searching judicial inquiry." For this proposition Stone cites two commerce clause decisions, MCCULLOCH V. MARYLAND (1819) and *South Carolina State Highway Dept. v. Barnwell Bros.* (1938), as well as FIRST

AMENDMENT and FOURTEENTH AMENDMENT decisions invalidating discriminatory laws based on religion, national origin, or race. Judicial and scholarly disagreement since 1938 has focused mainly on two questions. First, even if the category "discrete and insular minorities" seems clearly to include blacks, should any other groups be included? Second, does paragraph three essentially overlap with paragraph two, or does it go beyond protecting groups who suffer particular political disadvantage? The question whether discrimination against particular groups or burdens on certain rights should trigger special judicial sensitivity is a basic problem in constitutional law to this day.

Footnote four thus symbolizes the Court's struggle since the late 1930s to confine an earlier, free-wheeling tradition of judicial intervention premised on FREEDOM OF CONTRACT and SUBSTANTIVE DUE PROCESS, on the one hand, while trying, on the other, to create an acceptable basis for active intervention when judges perceive political disadvantages or racial or other invidious discrimination.

Dozens of Supreme Court decisions and thousands of pages of scholarly commentary since *Carolene Products* have explored this problem. In EQUAL PROTECTION analysis, for example, the approach introduced in footnote four helped produce a two-tiered model of judicial review. Within this model, legislation involving social and economic matters would be sustained if any RATIONAL BASIS for the law could be found, or sometimes even conceived of, by a judge. In sharp contrast, STRICT SCRUTINY applied to classifications based on race, national origin, and, sometimes, alienage. Similarly, judicial identification of a limited number of FUNDAMENTAL RIGHTS, such as VOTING RIGHTS, sometimes seemed to trigger a strict scrutiny described accurately by Gerald Gunther as " 'strict' in theory and fatal in fact."

Though this two-tiered approach prevailed in many decisions of the WARREN COURT, inevitably the system became more flexible. "Intermediate scrutiny" is now explicitly used in SEX DISCRIMINATION cases, for example. The Court continues to wrestle with the problem suggested in footnote four cases involving constitutional claims of discrimination against whites, discrimination against illegitimate children, and total exclusion of some from important benefits such as public education. Parallel with footnote four, the argument today centers on the question whether it is an appropriate constitutional response to relegate individuals who claim discrimination at the hands of the majority to their remedies within the political process. Yet, as new groups claim discriminatory treatment in new legal realms, the meaning of "discrete and insular minorities" grows more problematic. Undeniably, however, the categories suggested in footnote four still channel the debate. A good example is John Hart Ely's *Democracy and Distrust* (1980), an influential book that expands upon footnote four's theme of political participation.

Justice LEWIS H. POWELL recently stated that footnote four contains "perhaps the most far-sighted dictum in our modern judicial heritage." Yet Powell also stressed that, in his view, it is important to remember that footnote four was merely OBITER DICTUM and was intended to be no more. Even so, the tentative words of footnote four must be credited with helping to initiate and to define a new era of constitutional development. The questions raised by footnote four remain central to constitutional thought; controversy premised on this famous footnote shows no sign of abating.

AVIAM SOIFER
(1986)

Bibliography

BALL, MILNER S. 1981 Don't Die Don Quixote: A Response and Alternative to Tushnet, Bobbitt, and the Revised Texas Version of Constitutional Law. *Texas Law Review* 59:787–813.

ELY, JOHN HART 1980 *Democracy and Distrust.* Cambridge, Mass.: Harvard University Press.

LUSKY, LOUIS 1982 Footnote Redux: A *Carolene Products* Reminiscence. *Columbia Law Review* 82:1093–1105.

POWELL, LEWIS F., JR. 1982 *Carolene Products* Revisited. *Columbia Law Review* 82:1087–1092.

## CARPENTER, MATTHEW H.
(1824–1881)

A Wisconsin lawyer and senator (1869–1875, 1879–1881), Matthew Hale Carpenter was a vigorous Douglas Democrat who favored compromise to prevent SECESSION. Nevertheless, believing secession treasonous, Carpenter supported the war and became a Republican. During RECONSTRUCTION Carpenter successfully argued *Ex Parte Garland* (1867) which held the FEDERAL TEST ACT of 1865 unconstitutional. (See TEST OATH CASES.) Subsequently General ULYSSES S. GRANT hired Carpenter as counsel for the Army in EX PARTE MCCARDLE (1868). Carpenter's successful defense of the Army and of the right of Congress to limit Supreme Court JURISDICTION led to his election to the SENATE in 1869. There he was generally a strong supporter of Grant's administration, but he only mildly supported CIVIL RIGHTS. In 1872 Carpenter vigorously opposed federal legislation mandating integrated schools and juries because, among other reasons, the statute would violate STATES' RIGHTS. Similarly, as defense counsel he successfully argued for a narrow reading of the FOUR-

TEENTH AMENDMENT in the SLAUGHTERHOUSE CASES (1873). As a former railroad lawyer, however, Carpenter was a leader in protecting business interests. He led the debates supporting the JURISDICTION ACT of 1875, which greatly expanded the JURISDICTION OF FEDERAL COURTS to hear cases in which CORPORATIONS might claim constitutional rights. In 1876 he successfully defended Secretary of War William Belknap in his IMPEACHMENT trial. In 1877 Carpenter unsuccessfully represented Samuel Tilden before the presidential electoral commission. He was defeated for reelection in 1875 because of his connection with Grant administration scandals, but was reelected to the Senate in 1879, serving until his death.

PAUL FINKELMAN
(1986)

Bibliography

THOMPSON, EDWING BRUCE 1954 *Matthew Hale Carpenter: Webster of the West.* Madison: State Historical Society of Wisconsin.

## CARR, ROBERT K.
(1908–1979)

Robert Kenneth Carr was an educator and political scientist; he taught at Dartmouth College (1937–1959) and was president of Oberlin College (1960–1970). In 1947 Carr served as Executive Secretary of the President's Committee on Civil Rights appointed by HARRY S. TRUMAN and played a leading role in framing its report, *To Secure These Rights* (1947); this report's detailed presentation of the legal and social disabilities imposed on America's black population sparked nationwide controversy. Carr's own book on the subject, *Federal Protection of Civil Rights: Quest for a Sword* (1947), set forth the history of federal civil rights laws and their enforcement and demonstrated their inadequacy in theory and practice. In *The House Committee on Un-American Activities, 1946–1950* (1952), Carr argued that the carelessness and irresponsibility displayed by members and staff of the HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES outweighed the benefits of alerting the public to the dangers posed by communism at home and abroad; he concluded that the committee's record argued strongly for its own abolition. Carr also wrote two books on the Supreme Court for general readers, *Democracy and the Supreme Court* (1936) and *The Supreme Court and Judicial Review* (1942), and several other books on education and American government.

RICHARD B. BERSTEIN
(1986)

## CARROLL, DANIEL
(1730–1796)

Daniel Carroll, a wealthy, European-educated Roman Catholic from Maryland, was a signer of both the ARTICLES OF CONFEDERATION and the Constitution. Carroll, who favored a strong national government, spoke often and served on three committees. He was subsequently elected to the first HOUSE OF REPRESENTATIVES.

DENNIS J. MAHONEY
(1986)

## *CARROLL v. PRESIDENT AND COMMISSIONERS OF PRINCESS ANNE*
393 U.S. 175 (1968)

After a meeting of a "white supremacist" group at which "aggressively and militantly racist" speeches were made to a racially mixed crowd, the group announced another rally for the next night. Local officials obtained an EX PARTE order enjoining the group from holding a rally for ten days. The Supreme Court, reviewing this order two years later, held that the case fell within an exception to the doctrine of MOOTNESS: rights should not be defeated by short-term orders "capable of repetition, yet evading review."

A unanimous Court held that the *ex parte* order violated the FIRST AMENDMENT. An INJUNCTION against expressive activity requires NOTICE to the persons restrained and a chance to be heard, absent a showing that it is impossible to give them notice and a hearing.

KENNETH L. KARST
(1986)

## *CARROLL v. UNITED STATES*
267 U.S. 132 (1925)

In *Carroll* the Supreme Court held that an officer can stop and search an automobile without a warrant if there is PROBABLE CAUSE to believe the vehicle contains contraband.

The Court noted that national legislation had routinely authorized WARRANTLESS SEARCHES of vessels suspected of carrying goods on which duty had been evaded. The analogy was shaky; Congress's complete control over international boundaries would justify searching any imports even without probable cause. The Court also approved this warrantless search on a dubious interpretation of the National Prohibition Act. But the Court had independent grounds

beyond history and congressional intent for its decision: the search was justified as an implied exception to the FOURTH AMENDMENT's warrant requirement, because the vehicle might be driven away before a warrant could be obtained. Given these EXIGENT CIRCUMSTANCES, probable cause rather than a warrant satisfied the constitutional test of reasonableness. Indeed, legislative approval was not considered in the later AUTOMOBILE SEARCH cases.

JACOB W. LANDYNSKI
(1986)

## CARTER, JAMES COOLIDGE (1827–1905)

One of the preeminent legal philosophers of his time, James Coolidge Carter frequently appeared before the Supreme Court. Stressing that the FREEDOM OF CONTRACT limited the commerce power, Carter lost two 5–4 decisions in ANTITRUST cases: UNITED STATES V. TRANS-MISSOURI FREIGHT ASSOCIATION (1897) and *United States v. Joint Traffic* (1898). He also defended the constitutionality of the income tax in POLLOCK V. FARMERS' LOAN & TRUST COMPANY (1895). The clearest exposition of his views appears in *Law: Its Origin, Growth and Function* (1905) where he contended that law must harmonize with customary beliefs.

DAVID GORDON
(1986)

## CARTER, JIMMY (1924– )

As the first President elected after the WATERGATE scandal, Jimmy Carter was strongly oriented toward moral duties, Christian ethics, faith, trust, and personal rectitude. The "nobility of ideas" theme evoked in his inaugural address ranged broadly from human rights to the elimination of nuclear weapons. Missing from this pantheon of principles, however, was an understanding of the constitutional system and the mechanics of government needed to translate abstract visions into concrete accomplishments.

Carter considered himself an activist President and wanted to use the power of his office to correct social, economic, and political inequities. Some of his contributions to the legal system were long-lasting, such as the large number of women and persons from minority groups he placed on the federal courts. But comprehensive reforms for welfare, taxation, health, and energy became mired in Congress because of Carter's inability to articulate his beliefs and mobilize public opinion. He and his associates wrongly assumed that institutional resistance from Congress and the executive branch could be overcome simply by appealing to the people through the media.

Carter's congressional relations staff started off poorly and never recovered. By campaigning both against Congress and the bureaucracy, Carter had alienated the very centers of power he needed to govern effectively. He advocated "cabinet government" until the impression of departmental autonomy suggested weak presidential leadership. A major shake-up in July 1979 led to the firing or resignation of five cabinet secretaries, all with a history of friction with certain members of the White House staff. The abrupt nature of these departures cast doubt on Carter's judgment and stability, implying that in any contest between personal loyalty and professional competence, loyalty would prevail.

In foreign policy, the Camp David accord in 1978 marked a high point for Carter when he produced a "framework for peace" between Israeli Prime Minister Menachem Begin and Egyptian President Anwar Sadat. The ratification of the PANAMA CANAL TREATIES also marked a personal triumph, although Carter required last-minute assistance from several senators. His recognition of the People's Republic of China seriously damaged his relations with a number of members of Congress, who were offended by his lack of consultation and the breach of faith with Taiwan. When some of the congressional opponents challenged the termination of the defense treaty with Taiwan, however, the Supreme Court in GOLDWATER V. CARTER (1979) ordered the case dismissed for lack of JUSTICIABILITY. The Iranian revolution and the seizure of the American Embassy in Teheran produced a bitter fourteen months of "America held hostage." This development, including the abortive rescue attempt in 1980, exacerbated Carter's problems of weak leadership and perceived helplessness.

Carter and his associates from Georgia arrived in office with the reputation of amateurs, an image they would never dispel. Carter had campaigned as an outsider, treating that title as a virtue that would set him apart from politicians tainted by the "establishment." He came as a stranger and remained estranged. Having carefully dissociated himself he could not form associations. Throughout his four years he demonstrated little understanding of or interest in legislative strategy, the levers of power, or political leadership.

LOUIS FISHER
(1986)

Bibliography

JOHNSON, HAYNES 1980 *In the Absence of Power: Governing America.* New York: Viking.

## *CARTER v. CARTER COAL CO.*
298 U.S. 238 (1936)

This was the NEW DEAL's strongest case yet to come before the Supreme Court, and it lost. At issue was the constitutionality of the BITUMINOUS COAL ACT, which regulated the trade practices, prices, and labor relations of the nation's single most important source of energy, the bituminous industry in twenty-seven states. No industry was the subject of greater federal concern or of as many federal investigations. After the Court killed the NATIONAL INDUSTRIAL RECOVERY ACT (NIRA) and with it the bituminous code, Congress enacted a "Little NIRA" for bituminous coal. Although the statute contained no provision limiting the amount of bituminous that could be mined, the Court held it unconstitutional as a regulation of PRODUCTION.

The statute had two basic provisions, wholly separable and administered separately by independent administrative agencies. One agency supervised the price and trade-practices section of the statute; the other the labor section, dealing with MAXIMUM HOURS AND MINIMUM WAGES, and COLLECTIVE BARGAINING. In NEBBIA V. NEW YORK (1934) the Court had sustained against a due process attack the principle of price-fixing in the broadest language. The labor sections seemed constitutional, because strikes had crippled INTERSTATE COMMERCE and the national economy on numerous occasions and four times required federal troops to quell disorders. The federal courts had often enjoined the activities of the United Mine Workers as restraining interstate commerce.

The Court voted 6–3 to invalidate the labor provisions and then voted 5–4 to invalidate the entire statute. Justice GEORGE SUTHERLAND for the majority did not decide on the merits of the price-fixing provisions. Had he attacked them, he might have lost Justice OWEN J. ROBERTS, who had written the *Nebbia* opinion. The strategy was to hold the price provisions inseparable from the labor provisions, which were unconstitutional, thereby bringing down the whole act, despite the fact that its two sections were separable.

Sutherland relied mainly on the stunted version of the COMMERCE CLAUSE that had dominated the Court's opinions in UNITED STATES V. E. C. KNIGHT CO. (1895) and more recently in the NIRA and AGRICULTURAL ADJUSTMENT ACT cases: production is local; labor is part of production; therefore the TENTH AMENDMENT reserves all labor matters to the states. That the major coal-producing states, disavowing STATES' RIGHTS, had supported the congressional enactment and emphasized the futility of STATE REGULATION OF COMMERCE meant nothing to the majority. Sutherland rejected the proposition that "the power of the federal government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal." In fact the government had relied on the commerce power, not INHERENT POWERS. But Sutherland stated that "the local character of mining, of manufacturing, and of crop growing is a fact, whatever may be done with the products." All labor matters—he enumerated them—were part of production. That labor disputes might catastrophically affect interstate commerce was undeniable but irrelevant, Sutherland reasoned, because their effect on interstate commerce must always be indirect and thus beyond congressional control. The effect was indirect because production intervened between a strike and interstate commerce. All the evils, he asserted, "are local evils over which the federal government has no legislative control." (See EFFECTS ON COMMERCE.)

Chief Justice CHARLES EVANS HUGHES dissented on the question whether the price-fixing provisions of the statute were separable. Justice BENJAMIN N. CARDOZO, supported by Justices LOUIS D. BRANDEIS and HARLAN F. STONE, dissented on the same ground, adding a full argument as to the constitutionality of the price-fixing section. He contended too that the issue on the labor section was not ripe for decision, because Carter asked for a decree to restrain the statute's operation before it went into operation. Cardozo's broad view of the commerce power confirmed the Roosevelt administration's belief that the majority's anti-labor, anti-New Deal bias, rather than an unconstitutional taint on the statute, explained the decision.

LEONARD W. LEVY
(1986)

Bibliography

STERN, ROBERT L. 1946 The Commerce Clause and the National Economy, 1933–1946. *Harvard Law Review* 49:664–674.

## CARY, JOHN W.
(1817–1895)

As the general counsel of the Chicago, Milwaukee & St. Paul Railway, John W. Cary was involved in some of the most important court cases on ECONOMIC REGULATION in the late 1800s. In briefs submitted in the GRANGER CASES (1877), Cary went beyond the doctrine of VESTED RIGHTS and the guarantee of JUST COMPENSATION relied on by other railroad attorneys such as WILLIAM EVARTS. Cary contended that state fixing of prices (including railroad rates) deprived stockholders not only of their property but also of their *liberty*, that is their freedom to use and control their property. A legislative power to fix prices, he argued, would be "in conflict with the whole structure and theory of our government, hostile to liberty. . . ."

In *Chicago, Milwaukee & St. Paul Railway v. Minnesota* (1890), Cary, along with WILLIAM C. GOUDY, successfully argued that the reasonableness of state-fixed rates was subject to JUDICIAL REVIEW.

DENNIS J. MAHONEY
(1986)

## CASES AND CONTROVERSIES

Article III of the Constitution vests the JUDICIAL POWER OF THE UNITED STATES in one constitutionally mandated Supreme Court and such subordinate federal courts as Congress may choose to establish. Federal judges are appointed for life with salaries that cannot be diminished, but they may exercise their independent and politically unaccountable power only to resolve "cases" and "controversies" of the kinds designated by Article III, the most important of which are cases arising under the Constitution and other federal law. The scope of the federal judicial power thus depends in large measure on the Supreme Court's interpretations of the "case" and "controversy" limitation applicable to the Court itself and to other Article III tribunals.

That limitation not only inhibits Article III courts from arrogating too much power unto themselves; it also prevents Congress from compelling or authorizing decisions by federal courts in nonjudicial proceedings and precludes Supreme Court review of state court decisions in proceedings that are not considered "cases" or "controversies" under Article III. The limitation thus simultaneously confines federal judges and reinforces their ability to resist nonjudicial tasks pressed on them by others.

The linkage between independence and circumscribed power is a continuously important theme in "case" or "controversy" jurisprudence, as is the connection between "case" or "controversy" jurisprudence and the power of JUDICIAL REVIEW of government acts for constitutionality—a power that MARBURY V. MADISON (1803) justified primarily by the need to apply the Constitution as relevant law to decide a "case." During the CONSTITUTIONAL CONVENTION OF 1787, EDMUND RANDOLPH, proposed that the President and members of the federal judiciary be joined in a council of revision to veto legislative excesses. The presidential VETO POWER was adopted instead, partly to keep the judiciary out of the legislative process and partly to insure that the judges would decide cases independently, without bias in favor of legislation they had helped to formulate. Similar concerns led the convention to reject CHARLES PINCKNEY's proposal to have the Supreme Court provide ADVISORY OPINIONS at the request of Congress or the President. Finally, in response to JAMES MADISON's doubts about extending the federal judicial power to expound the Constitution too broadly, the Convention made explicit its understanding that the power extended only to "cases of a Judiciary nature." The Framers understood that the judicial power of constitutional governance would expand if the concept of "case" or "controversy" did.

What constitutes an Article III "case," of a "judiciary nature," is hardly self-evident. No definition was articulated when the language was adopted, but only an apparent intent to circumscribe the federal judicial function, and to insure that it be performed independently of the other branches. In this century, Justice FELIX FRANKFURTER suggested that Article III precluded federal courts from deciding legal questions except in the kinds of proceedings entertained by the English and colonial courts at the time of the Constitution's adoption. But the willingness of English courts to give advisory opinions then—a practice clearly inconsistent with convention history and the Court's steadfast policy since 1793—refutes the suggestion. Moreover, from the outset the SEPARATION OF POWERS aspect of the "case" or "controversy" limitation has differentiated CONSTITUTIONAL COURTS (courts constituted under Article III) from others. Most fundamentally, however, the indeterminate historical contours of "cases" or "controversies" inevitably had to accommodate changes in the forms of litigation authorized by Congress, in the legal and social environment that accompanied the nation's industrial growth and the rise of the regulatory and welfare state, and in the place of the federal judiciary in our national life.

After two centuries of elaboration, the essential characteristics of Article III controversies remain imprecise and subject to change. Yet underlying the various manifestations of "case" or "controversy" doctrine are three core requirements: affected parties standing in an adverse relationship to each other, actual or threatened events that provoke a live legal dispute, and the courts' ability to render final and meaningful judgments. These criteria—concerning, respectively, the litigants, the facts, and judicial efficacy—have both independent and interrelated significance.

As to litigants, only parties injured by a defendant's behavior have constitutional STANDING to sue. COLLUSIVE SUITS are barred because the parties' interests are not adverse.

As to extant factual circumstances, advisory opinions are banned. This limitation not only bars direct requests for legal rulings on hypothetical facts but also requires dismissal of unripe or moot cases, because, respectively, they are not yet live, or they once were but have ceased to be by virtue of subsequent events. The parties' future or past adversariness cannot substitute for actual, current adversariness. Disputes that have not yet begun or have already ended are treated as having no more present need

for decision than purely hypothetical disputes. (See RIPENESS; MOOTNESS).

The desire to preserve federal judicial power as an independent, effective, and binding force of legal obligation is reflected both in the finality rule, which bars decision if the judgment rendered would be subject to revision by another branch of government, and in the rule denying standing unless a judgment would likely redress the plaintiff's injury. These two rules are the clearest instances of judicial self-limitation to insure that when the federal courts do act, their judgments will be potent. To exercise judicial power ineffectively or as merely a preliminary gesture would risk undermining compliance with court decrees generally or lessening official and public acceptance of the binding nature of judicial decisions, especially unpopular constitutional judgments. Here the link between the limitations on judicial power and that power's independence and effectiveness is at its strongest.

Historically, congressional attempts to expand the use of Article III judicial power have caused the greatest difficulty, largely because the federal courts are charged simultaneously with enforcing valid federal law as an arm of the national government and with restraining unconstitutional behavior of the coequal branches of that government. The enforcement role induces judicial receptivity to extensive congressional use of the federal courts, especially in a time of expansion of both the federal government's functions and the use of litigation to resolve public disputes. The courts' checking function, however, cautions judicial resistance to congressional efforts to enlarge the scope of "cases" or "controversies" for fear of losing the strength, independence, or finality needed to resist unconstitutional action by the political branches.

The early emphasis of "case" or "controversy" jurisprudence was on consolidating the judiciary's independence and effective power. The Supreme Court's refusal in 1793 to give President GEORGE WASHINGTON legal advice on the interpretation of treaties with France—the founding precedent for the ban on advisory opinions—rested largely on the desire to preserve the federal judiciary as a check on Congress and the executive when actual disputes arose. Similarly, HAYBURN'S CASE (1792) established that federal courts would not determine which Revolutionary War veterans were entitled to disability pensions so long as the secretary of war had the final say on their entitlement: Congress could employ the federal judicial power only if the decisions of federal courts had binding effect. In the mid-nineteenth century the concern for maintaining judicial efficacy went beyond finality of substantive judgment to finality of remedy. The Supreme Court refused to accept appeals from the Court of Claims, which Congress had established to hear monetary claims against the United States, because the statutory scheme forbade payment until the Court certified its judgments to the treasury secretary for presentation to Congress, which would then have to appropriate funds. The Court concluded that Congress could not invoke Article III judicial power if the judges lacked independent authority to enforce their judgments as well as render them.

Preserving judicial authority remains an important desideratum in the twentieth century, but the growing pervasiveness of federal law as a means of government regulation—often accompanied by litigant and congressional pressure to increase access to the federal courts—inevitably has accentuated the law-declaring enforcement role of the federal judiciary and tended to expand the "case" or "controversy" realm. MUSKRAT V. UNITED STATES (1911) cited the courts' inability to execute a judgment as a reason to reject Congress's authorization of a TEST CASE to secure a ruling on the constitutionality of specific statutes it had passed. Similarly, the Court initially doubted the federal courts' power to give DECLARATORY JUDGMENTS. Yet, by the late 1930s, the Supreme Court had upheld both its own power to review state declaratory judgment actions and the federal DECLARATORY JUDGMENT ACT of 1934. The declaratory judgment remedy authorizes federal courts to decide controversies before legal rights are actually violated. The judge normally enters no coercive order, but confines the remedy to a binding declaration of rights. So long as the controversy is a live one, between adverse parties, and the decision to afford a binding remedy rests wholly with the judiciary, the advisory opinion and finality objections pose no obstacles. A controversy brought to court too early may fail Article III ripeness criteria, but the declaratory remedy itself does not preclude the existence of a "case" or "controversy."

Congress has succeeded in expanding the reach of federal judicial power not only by creating new remedies for the federal courts to administer but also by creating new substantive rights for them to enforce. The Supreme Court maintains as a fundamental "case" or "controversy" requirement that a suing party, to have standing, must have suffered some distinctive "injury in fact." The injury must be particularized, not diffuse; citizen or taxpayer frustration with alleged government illegality is insufficient by itself. In theory, Congress cannot dispense with this requirement and authorize suits by individuals who are not injured. Congress may, however, increase the potential for an injury that will satisfy Article III, simply by legislating protection of new rights, the violation of which amounts to a constitutional "injury in fact." For example, *Trafficante v. Metropolitan Life Insurance Company* (1972) held that a federal CIVIL RIGHTS ban on housing discrimination could be enforced not only by persons refused housing but also by current tenants claiming loss of desired interracial associations; the Court interpreted the

statute to create a legally protected interest in integrated housing. To a point, then, Article III "cases" or "controversies" expand correspondingly with the need to enforce new federal legislation. Yet the scope of congressional power to transform diffuse harm into cognizable Article III injury remains uncertain and apparently stops short of providing everyone a judicially enforceable generalized right to be free of illegal governmental behavior, without regard to more individualized effects.

The historically approved image is that federal judges decide politically significant public law issues only to resolve controversies taking the form of private litigation. Over the years, however, this picture has had to accommodate not only congressional creation of enforceable rights and remedies but also the modern realities of public forms of litigation such as the CLASS ACTION, the participation of organized public interest lawyers, and lawsuits aimed at reforming government structures and practices. (See INSTITUTIONAL LITIGATION.) Public law adjudication, especially constitutional adjudication, is certainly the most important function of the federal courts. The inclination to stretch the boundaries of "cases" or "controversies" to provide desired legal guidance on important social problems, although it has varied among federal judges and courts of different eras, increases in response to congressional authorization and the perception of social need. Offsetting that impulse, however, are two countervailing considerations. First, the judges realize that the more public the issues raised, the more democratically appropriate is a political rather than a judicial resolution. Second, they understand the importance of a litigation context that does not threaten judicial credibility, finality, or independence; that presents a realistic need for decision; and that provides adequate information and legal standards for confident, well-advised decision making. These competing considerations will continue to shape the meaning of "cases" and "controversies," setting the limits of the federal judicial function in ways that preserve the courts' checking and enforcement roles in the face of changes in the forms and objectives of litigation, in the dimensions of federal law, and in the expectations of government officials and members of the public.

JONATHAN D. VARAT
(1986)

Bibliography

BRILMAYER, LEA 1979 The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement. *Harvard Law Review* 93:297–321.

MONAGHAN, HENRY P. 1973 Constitutional Adjudication: The Who and When. *Yale Law Journal* 82:1363–1397.

RADCLIFFE, JAMES E. 1978 *The Case-or-Controversy Provision.* University Park: Pennsylvania State University Press.

TUSHNET, MARK V. 1980 The Sociology of Article III: A Response to Professor Brilmayer. *Harvard Law Review* 93: 1698–1733.

## CATEGORICAL GRANTS-IN-AID

See: Federal Grants-in-Aid

## CATO'S LETTERS

Between 1720 and 1723 John Trenchard and Thomas Gordon, collaborating under the pseudonym of "Cato," published weekly essays in the London newspapers, popularizing the ideas of English libertarians, especially JOHN LOCKE. Gordon collected 138 essays in four volumes which went through six editions between 1733 and 1755 under the title, *Cato's Letters: Essays on Liberty, Civil and Religious.* CLINTON ROSSITER, who rediscovered "Cato," wrote, "no one can spend any time in the newspapers, library inventories, and pamphlets of colonial America without realizing that *Cato's Letters* rather than Locke's *Civil Government* was the most popular, quotable, esteemed source of political ideas in the colonial period." The essays bore titles such as "Of Freedom of Speech . . . inseparable from publick Liberty," "The Right and Capacity of the People to judge of Government," "Liberty proved to be the unalienable Right of all Mankind," "All Government proved to be instituted by Men," "How free Governments are to be framed to last," "Civil Liberty produces all Civil Blessings," and "Of the Restraints which ought to be laid upon publick Rulers." Almost every colonial newspaper from Boston to Savannah anthologized *Cato's Letters,* and the four volumes were imported from England in enormous quantities. The most famous of the letters were those on the FREEDOM OF SPEECH and FREEDOM OF THE PRESS. Cato conceded that freedom posed risks, because people might express themselves irreligiously or seditiously, but restraints on expression resulted in injustice, tyranny, and ignorance. "Cato" would not prosecute criminal libels because prosecution was more dangerous to liberty than the expression of hateful opinions. The sixth edition is available in an American reprint of 1971.

LEONARD W. LEVY
(1986)

Bibliography

JACOBSON, DAVID L. 1965 Introduction to *The English Libertarian Heritage.* Indianapolis: Bobbs-Merrill.

## CATRON, JOHN
(c.1786–1865)

President ANDREW JACKSON appointed John Catron, his fellow Tennessean and political disciple, to the Supreme Court in 1837. A man who reflected Jackson's own views, Catron had been chief justice of Tennessee. While on the state bench, Catron had undoubtedly endeared himself to Jackson by opposing the BANK OF THE UNITED STATES and challenging JOHN MARSHALL'S *Worcester v. Georgia* (1832) opinion on Indian rights. Jackson's appointment of Catron filled one of two new positions created by the Judiciary Act of 1837. JOHN MCKINLEY of Alabama received the other appointment. The two decisively altered the geographic complexion of the Court, because five of the nine justices represented slaveholding circuits.

Catron's constitutional law decisions illustrated the judicial search for a balance between national and state power in the antebellum period. For example, in the LICENSE CASES (1847) Catron emphatically held that the commerce power could be exercised by Congress "at pleasure," but that absent such legislation, states might regulate INTERSTATE COMMERCE within their own boundaries. In the PASSENGER CASES (1849) he voted to strike down state taxes on immigrants because Congress had exercised its authority over foreign commerce.

Catron's opinions on the rights and powers of CORPORATIONS varied widely. He concurred in Chief Justice ROGER B. TANEY'S opinion in BANK OF AUGUSTA V. EARLE (1839), holding that states could exclude foreign corporations, and he also agreed when the Court expanded federal court JURISDICTION over corporate activities in *Louisville Railroad Co. v. Letson* (1844). Except as a party to a diversity suit, however, a corporation, Catron insisted, was not a citizen within the sense of the Constitution. Catron resisted the TANEY COURT'S accommodation with corporate interests in the Ohio bank cases of the 1850s. In PIQUA BRANCH BANK V. KNOOP (1854) he vigorously opposed the use of the CONTRACT CLAUSE to protect state legislative tax exemptions in corporate charters. In a companion case, Catron saw the burgeoning power of corporations as threatening to subvert the state governments that had created them. He believed that the community rights doctrine of CHARLES RIVER BRIDGE V. WARREN BRIDGE COMPANY (1837) had become "illusory and nearly useless, as almost any beneficial privilege, property, or exemption, claimed by corporations" might be construed into a contract to the corporation's advantage. He also protested when the Court, in DODGE V. WOOLSEY (1856), invalidated Ohio's constitutional amendment repealing corporate tax exemptions.

Catron's role in DRED SCOTT V. SANDFORD (1857) was more prominent for his extrajudicial activities than for his opinion. Before the decision, he wrote several letters to President-elect JAMES BUCHANAN, notifying him of the Court's resolution to "decide and settle a controversy which has so long and seriously agitated the country, and which *must* ultimately be decided by the Supreme Court." He also urged Buchanan to pressure his fellow Pennsylvanian, Justice ROBERT GRIER, to join in the effort to decide the constitutional question of congressional control over SLAVERY IN THE TERRITORIES. Catron's political maneuverings have overshadowed his opinion which deviated in some significant respects from Taney's. For example, he did not think that the Court could review the plea in abatement and he thought Taney's discussion of black CITIZENSHIP unnecessary. He also differed from the Chief Justice on the scope of congressional power over the TERRITORIES, acknowledging that it was plenary, save for a few exceptions, such as slavery.

Catron closed his long career with some measure of distinction. Unlike his colleague, Justice JOHN CAMPBELL, who resigned, or Taney, who bitterly opposed the Union's war efforts and President ABRAHAM LINCOLN'S conduct of the war, Catron clung to a Jacksonian faith in the Union. He carried out his circuit duties in Tennessee, Kentucky, and Missouri, often at great personal risk. He lost much of his property in Nashville when he failed to respond to a local demand that he resign. Although he opposed Lincoln's blockade policy when he dissented in the PRIZE CASES (1863), on circuit he upheld the confiscation laws and the government's suspension of the writ of HABEAS CORPUS. "I have to punish Treason, will," Catron wrote. With that expression, and through his judicial decisions, Catron faithfully reflected the spirit of his patron, Andrew Jackson.

STANLEY I. KUTLER
(1986)

Bibliography

GATTELL, FRANK OTTO 1969 John Catron. In Leon Friedman and Fred L. Israel, eds., *The Justices of the Supreme Court*, Vol. 1:737–768. New York: Chelsea House.

SWISHER, CARL B. 1935 *Roger B. Taney.* New York: Macmillan.

## CEASE AND DESIST ORDER

In ADMINISTRATIVE LAW, cease and desist orders require the cessation of specific violations of law or government regulations. The power to issue such orders may be granted to REGULATORY COMMISSIONS by Congress. Cease and desist orders are issued only after FAIR HEARING and are subject to review in the federal courts.

DENNIS J. MAHONEY
(1986)

## CENSORSHIP

See: Prior Restraint and Censorship

## CENSUS

Article I of the Constitution requires a decennial census of the population in order to apportion congressional REPRESENTATION among the states. In the landmark REAPPORTIONMENT cases of the 1960s, the census assumed a central role not only in apportionment but in the process of ELECTORAL DISTRICTING as well. Following the command of JAMES MADISON in FEDERALIST No. 54 that "numbers are the only proper scale of representation," the Supreme Court in REYNOLDS V. SIMS (1964) decreed that "[p]opulation is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." Reliance on the census was indispensable for the Court's willingness to confront the "political thicket" of redistricting and representation.

First, numerical standards from the census provided unassailable empirical data and thereby stemmed charges of the judiciary's making impermissible political decisions. Second, the census provided the denominator for the ONE PERSON, ONE VOTE rule, which emerged as the most successful JUSTICIABLE standard for overseeing politics. Third, the imposition of objective apportionment constraints furthered the efforts to control GERRYMANDERING and helped realize the Court's 1969 command that "each resident citizen has, as far as is possible, an equal voice in the selections [of public officials]."

Since the 1960s, the hope that the census could bring constitutional order to the reapportionment process has faded. Despite its apparent simplicity, the one person, one vote rule engendered considerable litigation and conflicting rules of tolerable deviations for federal and state redistricting. Rather than defeat gerrymanders, the one person, one vote standard spawned a burgeoning industry of computer-aided redistricting that in turn allowed clever partisan manipulations. Even the Court admitted in 1983 that "the rapid advances in computer technology and education during the last two decades make it relatively simple to draw contiguous districts of equal population and at the same time to further whatever secondary goals the State has."

The increased constitutional role occupied by the census also raised the pressure on the decennial enumeration. For all its appearance of objective neutrality, the census involves difficult demographic decisions resulting from a large and mobile population. The census requires "attribution" and "correction" of residence for persons not found during the actual enumeration, for college students, for overseas citizens, for military personnel stationed abroad, for individuals who maintain two homes, and for homeless individuals, among others. In addition, beginning in 1950, the U.S. Bureau of the Census began a post-enumeration survey of the population to check against systematic undercounts. Among the discoveries was that racial and ethnic minorities were significantly more likely to be missed in the enumeration, a problem that persists to this day. Because the resolution for these technical issues has immediate consequences for apportionment, for in-state districting, and for eligibility for federal matching funds, it is not surprising that the census itself is increasingly the subject of litigation.

One source of litigation concerns apportionment decisions between the states. In *Department of Commerce v. Montana* (1992), for example, a state sued over the mechanism for apportioning the fractional remainder when the census numbers were divided by the 435 seats in Congress. *Franklin v. Massachusetts* (1992) challenged the manner in which overseas federal employees were counted, on the ground that an apparently disproportionate number selected states without income taxes as their official residences. In each case, the Supreme Court, using a generous RATIONAL BASIS STANDARD OF REVIEW, granted the federal government wide discretion in implementing the census and in apportioning congressional seats.

Far more contentious has been the persistent undercount of minorities that, critics argue, would be alleviated by using more sophisticated statistical adjustments of the census—as opposed to the elusive attempt to count each and every American. In *Wisconsin v. New York* (1996), however, the Court again applied rational basis review to hold that the decision by the U.S. Secretary of Commerce not to adjust the census statistically to compensate for the minority undercount was within the broad discretion of the executive branch.

More recently, the Court, in *Department of Commerce v. United States House of Representatives* (1999), ruled that the census cannot be statistically adjusted for the purpose of congressional apportionment. The decision was premised exclusively on whether the Census Act, as a matter of STATUTORY INTERPRETATION, itself prevents using sampling in the congressional apportionment context. Because the Court did not reach any constitutional issues, the decision left unresolved whether the Constitution permits statistical sampling in other contexts, such as redistricting and allocation of federal funds to the states, as well as whether a statutory amendment to the Census Act to permit sampling for congressional apportionment would be constitutional.

SAMUEL ISSACHAROFF
(2000)

Bibliography

ISSACHAROFF, SAMUEL and LICHTMAN, ALLAN J. 1993 The Census Undercount and Minority Representation: The Con-

stitutional Obligation of the States to Guarantee Equal Representation. *Review of Litigation* 13:1–29.

## *CENTRAL HUDSON GAS & ELECTRIC CORP. v. PUBLIC SERVICE COMMISSION*
447 U.S. 557 (1980)

*Central Hudson* is the leading decision establishing ground rules for the Supreme Court's modern protection of COMMERCIAL SPEECH under the FIRST AMENDMENT. New York's Public Service Commission (PSC), in the interest of conserving energy, forbade electrical utilities to engage in promotional advertising. The Supreme Court held, 8–1, that this prohibition was unconstitutional.

Justice LEWIS F. POWELL, for the Court, used an analytical approach to commercial speech that combined a TWO-LEVEL THEORY with a BALANCING TEST. First, he wrote, it must be determined whether the speech in question is protected by the First Amendment. The answer to that question is affirmative unless the speech is "misleading" or it is "related to illegal activity" (for example, by proposing an unlawful transaction). Second, if the speech falls within the zone of First Amendment protection, the speech can be regulated only if government satisfies all the elements of a three-part interest-balancing formula: the asserted governmental interest must be "substantial"; the regulation must "directly advance" that interest; and the regulation must not be "more extensive than is necessary to serve that interest."

This intermediate STANDARD OF REVIEW seems loosely patterned after the standard used under the EQUAL PROTECTION clause in cases involving SEX DISCRIMINATION. In those cases, the Court typically accepts that the governmental interest is important; when a statute is invalidated, the Court typically regards gender discrimination as an inappropriate means for achieving the governmental interest. The *Central Hudson* opinion followed this pattern: the promotional advertising was protected speech, and the state's interest in conservation was substantial and directly advanced by the PSC's regulation. However, prohibiting all promotional advertising, including statements that would not increase net energy use, was not the LEAST RESTRICTIVE MEANS for achieving conservation.

Concurring opinions by Justices HARRY A. BLACKMUN and JOHN PAUL STEVENS, both joined by Justice WILLIAM J. BRENNAN, adopted more speech-protective doctrinal positions. Justice WILLIAM H. REHNQUIST, in lone dissent, argued that the PSC's regulation was only an ECONOMIC REGULATION of a state-regulated monopoly, raising no important First Amendment issue.

KENNETH L. KARST
(1986)

## *CENTRAL PACIFIC RAILROAD CO. v. GALLATIN*

See: Sinking Fund Cases

## CERTIFICATION

Certification may refer to a broad range of acts of government officials high and low: a clerk may certify the accuracy of a copy of a document; the Federal Power Commission may issue a certificate that a natural gas pipeline will serve "public convenience and necessity." In federal courts, however, certification has a narrower meaning. A court may certify questions of law to another court for authoritative decision.

The UNITED STATES COURTS OF APPEALS are authorized by Congress to certify "distinct and definite" questions of law for decision by the Supreme Court. The practice has been criticized for influencing the Supreme Court to decide issues in the abstract, without a complete factual record, and for weakening the Court's control over the questions it will decide. Partly for these reasons, this form of certification is rarely used.

More frequently, federal district courts certify doubtful questions of state law for decision by state courts. About half the states expressly authorize their courts to answer such certified questions, and the Supreme Court has applauded the technique. This form of certification is merely a variant form of abstention.

KENNETH L. KARST
(1986)

Bibliography

BATOR, PAUL M.; MISHKIN, PAUL J.; SHAPIRO, DAVID L.; and WECHSLER, HERBERT, eds. 1973 *Hart and Wechsler's The Federal Courts and the Federal System*, 2nd ed. Pages 1582–1586. Mineola, N.Y.: Foundation Press.

## CERTIORARI, WRIT OF

A writ of certiorari is an order from a higher court directing a lower court to transmit the record of a case for review in the higher court. The writ was in use in England and America before the Revolution. Unlike the WRIT OF ERROR, which was used routinely to review final judgments of lower courts, certiorari was a discretionary form of review that might be granted even before the lower court had given judgment.

When Congress established the circuit courts of appeals in 1891, it expressly authorized the Supreme Court to review certain of these courts' decisions, otherwise declared to be "final," by issuing the writ of certiorari, which remained discretionary. In 1925, Congress expanded the

Court's certiorari JURISDICTION and reduced the availability of the writ of error (renamed APPEAL). Certiorari is today the chief mode of the Supreme Court's exercise of APPELLATE JURISDICTION. Proposals to abolish the Court's theoretically obligatory jurisdiction over appeals would leave appellate review entirely to certiorari, and thus to the Court's discretion.

By statute the Court is authorized to grant certiorari in any case that is "in" a federal court of appeals. Thus in an appropriate case the Court can bypass the court of appeals and directly review the action of the district court, as it did in the celebrated case of UNITED STATES V. NIXON (1974).

The Supreme Court's rules have long stated some considerations governing the Court's discretionary grant or denial of certiorari. Three factors are emphasized: (1) conflicts among the highest courts of the states or the federal courts of appeals; (2) the resolution of important unsettled issues of federal law; and (3) the correction of error. These factors do not exhaust but only illustrate the considerations influencing the Court's certiorari policy.

KENNETH L. KARST
(1986)

Bibliography

LINZER, PETER 1979 The Meaning of Certiorari Denials. *Columbia Law Review* 79:1227–1305.

## *CHAE CHAN PING v. UNITED STATES*
(Chinese Exclusion Case)
130 U.S. 581 (1889)

The CHINESE EXCLUSION ACT of 1882 authorized the issuance of certificates to Chinese ALIENS, guaranteeing their right to reenter the United States after leaving. In 1888 Congress amended that act to prohibit reentry by voiding all outstanding certificates, destroying the right of Chinese to land. Justice STEPHEN J. FIELD, for a unanimous Supreme Court, admitted that this act "is in contravention of express stipulations of the Treaty of 1868 (and other agreements) . . . but it is not on that account invalid or to be restricted in its enforcement. The treaties were of no greater legal obligation than the Act of Congress." He asserted that the treaties were equivalent to federal statutes and they might thus be "repealed or modified at the pleasure of Congress." Because "no paramount authority is given to one over the other" the government could constitutionally exclude aliens from the United States as "an incident of SOVEREIGNTY."

DAVID GORDON
(1986)

## CHAFEE, ZECHARIAH, JR.
(1885–1957)

Modern scholarship in the area of free speech is indelibly stamped with the ideas of Zechariah Chafee, Jr., a distinguished professor of law and University Professor at Harvard, and a CIVIL LIBERTIES activist.

Chafee, scion of a comfortable business-oriented New England family, left the family's iron business to enter Harvard Law School, returning there in 1916 to teach. Inheriting ROSCOE POUND's third-year EQUITY course, in which Pound dealt with INJUNCTIONS against libel, Chafee, uncertain as to the meaning of FREEDOM OF SPEECH, read all pre-1916 cases on the subject. He concluded that the few existing decisions reached results unsatisfactory to one seeking precedents for free speech protection. This realization, coupled with stringent new wartime espionage and SEDITION laws, and their often arbitrary enforcement, persuaded him of the importance of developing a modern law of free speech. Starting with articles in the *New Republic* and the *Harvard Law Review*, and a 1920 book, *Freedom of Speech*, Chafee attempted workable delineations between liberty, which he felt must be safeguarded carefully, and the restraints that emergency situations might warrant. Unhappy with the insensitivity of OLIVER WENDELL HOLMES' initial CLEAR AND PRESENT DANGER construct in SCHENCK V. UNITED STATES (1919), Chafee, with the assistance of Judge LEARNED HAND, set out to persuade Holmes that the test for speech should consider not only the individual's interest in freedom but also the social desirability of injecting provocative thought into the marketplace. "Tolerance of adverse opinion is not a matter of generosity, but of political prudence," Chafee argued. Holmes embraced this position in his dissent in ABRAMS V. UNITED STATES (1919), having been newly convinced that the FIRST AMENDMENT established a national policy favoring a search for truth, while balancing social interests and individual interests. Contemporary traditionalists reacted negatively with a move to oust Chafee from Harvard Law School. Such action was thwarted when Harvard President A. Lawrence Lowell rallied to Chafee's defense.

Chafee, as one of the nation's leading civil libertarians in the 1920s became involved with a number of vital issues. He served on commissions to probe owner autocracy and brutality in the mining regions of the East, and he spoke out publicly against excessive use of the labor injunction to curtail legitimate union activities. In 1929 he headed a subcommittee of the Wickersham Commission which looked into police use of the "third degree" and improper trial procedures. He played a prominent role in the American Bar Association's Commission on the BILL OF RIGHTS in the late 1930s, and in the 1940s served on the

Commission on Freedom of the Press, afterward performing similar duties for the United Nations.

Chafee maintained a deep commitment to legal education. He personally regarded as his principal professional accomplishment the Federal Interpleader Act of 1936, a statute creating federal court JURISDICTION when persons in different states make conflicting claims to the same shares of stock or the same bank accounts. His chief influence can be seen, however, in the work of generations of attorneys and judges, nurtured on his free speech and civil liberties view, who have rewritten First Amendment doctrine along Chafee's lines.

PAUL L. MURPHY
(1986)

Bibliography

MURPHY, PAUL L. 1979 *World War I and the Origin of Civil Liberties in the United States.* New York: Norton.

## *CHAMBERS v. FLORIDA*
309 U.S. 227 (1940)

*Chambers* was the first coerced confession case to come before the Court since the landmark decision in BROWN V. MISSISSIPPI (1936). In *Brown*, the physical torture being uncontested, the state had relied mainly on the point that the RIGHT AGAINST SELF-INCRIMINATION did not apply to state proceedings. In *Chambers*, before the state supreme court finally affirmed the convictions it had twice reversed so that juries could determine whether the confessions had been freely and voluntarily made, and the record showed no physical coercion. Moreover, the state contested the JURISDICTION of the Supreme Court to review the judgments, arguing that there was no question of federal law to be denied. However, the Supreme Court, in an eloquent opinion by Justice HUGO L. BLACK, unanimously asserted jurisdiction and reversed the state court.

Black rejected the state's jurisdictional argument, declaring that the Supreme Court could determine for itself whether the confessions had been obtained by means that violated the constitutional guarantee of DUE PROCESS OF LAW. Reviewing the facts Black found that the black prisoners, having been arrested on suspicion without warrant, had been imprisoned in a mob-dominated environment, held incommunicado, and interrogated over five days and through a night until they abandoned their disclaimers of guilt and "confessed." POLICE INTERROGATION had continued until the prosecutor got what he wanted. On the basis of these facts Black wrote a stirring explanation of the relation between due process and free government, concluding that courts in our constitutional system stand "as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice. . . ." Applying the exclusionary rule of *Brown*, the Court held that psychological as well as physical torture violated due process.

LEONARD W. LEVY
(1986)

## *CHAMBERS v. MARONEY*
399 U.S. 42 (1970)

In this important FOURTH AMENDMENT case involving the automobile exception to the SEARCH WARRANT clause, the police had seized a car without a warrant and had searched it later, without a warrant, after having driven it to the police station, where they impounded it. Justice BYRON R. WHITE for the Supreme Court acknowledged that the search could not be justified as having been conducted as a SEARCH INCIDENT TO ARREST; nor could he find EXIGENT CIRCUMSTANCES that justified the WARRANTLESS SEARCH.

White simply fudged the facts. He declared that there was "no difference between on the one hand seizing and holding a car before presenting the PROBABLE CAUSE issue to a magistrate and on the other hand carrying out an immediate search without a warrant." Either course was "reasonable under the Fourth Amendment," but the police had followed neither course in this case. Probable cause for the search had existed at the time of the search, and White declared without explanation that probable cause still existed later when the police made the search at the station, when the felons were in custody. However, the possibility that they might drive off in the car did not exist; that possibility had alone occasioned the automobile exception in the first place. Absent a risk that the culprits might use the vehicle to escape with the fruits of their crime, the constitutional distinction between houses and cars did not matter. White saw no difference in the practical consequences of choosing between an immediate search without a warrant, when probable cause existed, and "the car's immobilization until a warrant is obtained." That logic was irrefutable and irrelevant, because the failure of the police to obtain the warrant gave rise to the case. Only Justice JOHN MARSHALL HARLAN dissented from this line of reasoning.

Until this case mere probable cause for a search, as judged only by a police officer, did not by itself justify a warrantless search; the case is significant, too, because of its implied rule that exigent circumstances need not justify the warrantless search of a car. Following *Chambers*, the Court almost routinely assumed that if a search might have been made at the time of arrest, any warrantless search

conducted later, when the vehicle was impounded, was a valid one.

LEONARD W. LEVY
(1986)

## *CHAMPION v. AMES*
188 U.S. 321 (1903)

As the twentieth century opened, the Supreme Court began to sustain use of the COMMERCE CLAUSE as an instrument to remedy various social and economic ills. (See NATIONAL POLICE POWER.) In 1895 Congress forbade interstate transportation of lottery tickets, seeking to safeguard public morals. Opponents challenged the act on three grounds: the tickets themselves were not SUBJECTS OF COMMERCE, Congress's power to regulate INTERSTATE COMMERCE did not extend to outright prohibition, and such a power would violate the TENTH AMENDMENT's reservation of certain powers to the states.

A 5–4 Court sustained the act, emphasizing Congress's plenary power over commerce. Because the tickets indicated a cash prize might be won, they were items liable to be bought or sold—thus, subjects of commerce and so subject to regulation. Citing the complete prohibition on FOREIGN COMMERCE in the EMBARGO ACT OF 1807, Justice JOHN MARSHALL HARLAN asserted that the power of regulation necessarily included the power of prohibition. Although he rejected the contention that "Congress may arbitrarily exclude from commerce among the states any article . . . it may choose," Harlan justified the ban on transporting lottery tickets on the ground that Congress alone had power to suppress "an evil of such appalling character," thus propounding the NOXIOUS PRODUCTS DOCTRINE. Harlan dismissed the Tenth Amendment objection: that provision was no bar to a power that had been "expressly delegated to Congress."

Chief Justice MELVILLE W. FULLER led Justices DAVID BREWER, Rufus Peckham, and GEORGE SHIRAS in dissent. Fuller noted that the motive underlying the legislation was to suppress gambling, not to regulate commerce. He feared the disruption of distinct spheres of authority and the "creation of a centralized government." He also challenged Harlan's assertion that the commerce power included the right of prohibition. The Court, citing *Champion*, however, would soon uphold the PURE FOOD AND DRUG ACT (in HIPOLITE EGG COMPANY V. UNITED STATES, 1911), the MANN ACT (in HOKE V. UNITED STATES, 1913), and others, relying on its expansive view of the commerce clause.

DAVID GORDON
(1986)

(SEE ALSO: *Darby Lumber Company, United States v.; Hammer v. Dagenhart.*)

## *CHAMPION AND DICKASON v. CASEY*
Cir. Ct., Rhode Island (1792)

Reported widely in newspapers in June 1792, this was the first case in which a federal court held a state act unconstitutional as a violation of the CONTRACT CLAUSE. Rhode Island had passed a stay law, postponing by three years the time for a debtor to pay his creditors.

The Circuit Court for the district, presided over by Chief Justice JOHN JAY, ruled that the stay law impaired the OBLIGATION OF CONTRACTS contrary to Article I, section 10.

LEONARD W. LEVY
(1986)

## *CHANDLER v. FLORIDA*
449 U.S. 560 (1981)

The Supreme Court here distinguished away ESTES V. TEXAS (1965), in which it had held that the televising of a criminal trial violated DUE PROCESS OF LAW because of the inherently prejudicial impact on criminal defendants. In *Chandler* an 8–0 Court ruled that the prejudicial effect must be actually shown by the facts of the particular case; Florida's statute, at issue here, imposed adequate safeguards on the use of electronic media in court, thereby insuring due process of law. Presumably the decision promoted FREEDOM OF THE PRESS and the principle of a PUBLIC TRIAL.

LEONARD W. LEVY
(1986)

(SEE ALSO: *Free Press/Fair Trial.*)

## *CHANDLER v. MILLER*
620 U.S. 305 (1997)

In *Chandler v. Miller*, the Supreme Court, in a MAJORITY OPINION by Justice RUTH BADER GINSBURG, struck down a Georgia statute requiring candidates for certain state offices (including judges, legislators, and executive officials) to certify that they had taken and passed a urinalysis test for illegal drugs within thirty days prior to qualifying for nomination or election. The Court characterized this requirement as an UNREASONABLE SEARCH under the FOURTH AMENDMENT. Following PRECEDENT, the Court indicated

that a reasonable search must normally be based on "individualized suspicion of wrongdoing" unless a "particularized exception" applies. Such an exception can only be justified if, first, the court finds "special needs" for the search "beyond the normal need for law enforcement" or "crime detection"; and, second, if pursuant to a "context specific inquiry" that balances the "competing private and public interests," a court finds that the privacy interests are "minimal" and that substantial enough governmental interests would be "placed in jeopardy by a requirement of individualized suspicion." Unlike the evidence of drug use by railway employees in SKINNER V. RAILWAY LABOR EXECUTIVES' ASSOCIATION (1989) and by students in *Vernonia School District 47J v. Acton* (1995), the record did not contain evidence that the danger of drug use by candidates was "concrete" or "real," or that the public safety was at immediate risk. Unlike the record in NATIONAL TREASURY EMPLOYEES UNION V. VON RAAB (1989), the record in this case did not show that criminal investigation would be inadequate. Nor did it show that DRUG TESTING (the timing of which was in the candidate's control) would effectively deter drug use. Georgia's real interest, the Court concluded, was not "special" but "symbolic," namely, the "image the State seeks to project." Accordingly, the Court found that the risk to public safety was not "substantial" or "important" enough to override the candidate's privacy. The Court explicitly did not reach the Fourth Amendment questions involved in requiring candidates to undergo and disclose the results of a general medical exam or to make a financial disclosure.

The lone dissenter, Chief Justice WILLIAM H. REHNQUIST, showed that the Court could easily have reached the opposite conclusion under the malleable special-needs DOCTRINE, which had been fashioned during his tenure as CHIEF JUSTICE and had moved Fourth Amendment debate away from PROBABLE CAUSE and warrants and toward whether suspicion is necessary at all.

In this case involving a search of judges, the Court appeared at last to be troubled by its ever-decreasing protection of privacy as it cast about for some ground on which to limit the potent special-needs doctrine to only a few exceptional cases (like airport searches) where privacy interests are minimal and there is substantial evidence that public safety is in jeopardy. But in striking down the statute, the Court devised no clear or effective limits on this doctrine and questioned no earlier opinion applying it. Alternatively, given the unique facts of this case, perhaps the Court was troubled not by a concern for privacy but for the potential constraints on public discourse and electoral campaigns that may result if, for purely symbolic purposes, a previously elected legislature can compel, through intrusive investigations, newly contending candidates for office to acquiesce in its policies and thereby obtain their implicit acceptance of policies that should instead be subject to debate.

ROBERT D. GOLDSTEIN
(2000)

(SEE ALSO: *Drug Regulation; Search and Seizure.*)

## CHANDLER ACT

See: Bankruptcy Act

## *CHAPLINSKY v. NEW HAMPSHIRE*
315 U.S. 568 (1941)

In *Chaplinsky,* Justice FRANK MURPHY, writing for a unanimous Supreme Court, introduced into FIRST AMENDMENT jurisprudence the TWO-LEVEL THEORY that "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "FIGHTING WORDS"—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky* itself arose under a "fighting words" statute, which the state court had interpreted to punish "words likely to cause an average addressee to fight." In this narrow context the decision can be seen as an application of the CLEAR AND PRESENT DANGER test. COHEN V. CALIFORNIA (1971), emphasizing this rationale, offered protection to an OBSCENITY that created no danger of violence.

In its broader conception of categories of speech excluded from First Amendment protection, the case served as an important doctrinal source for many later obscenity and libel decisions.

MARTIN SHAPIRO
(1986)

## *CHAPMAN v. CALIFORNIA*

See: Harmless Error

## *CHARLES RIVER BRIDGE v. WARREN BRIDGE COMPANY*
11 Peters 420 (1837)

The Charles River Bridge case reflected the tension within ALEXIS DE TOCQUEVILLE's proposition that the American

people desired a government that would allow them "to acquire the things they covet and which [would] . . . not debar them from the peaceful enjoyment of those possessions which they have already acquired." A metaphor for the legal strains that accompanied technological change, the case spoke more to the emerging questions of railroad development than to the immediate problem of competing bridges over the Charles River.

Following the Revolution, some investors petitioned the Massachusetts legislature for a charter to build a bridge over the Charles River, linking Boston and Charlestown. Commercial interests in both cities supported the proposal, and the state issued the grant in 1785. The charter authorized the proprietors to charge a variety of tolls for passage, pay an annual fee to Harvard College for the loss of its exclusive ferry service across the river, and then, after forty years, return the bridge to the state in "good repair."

Construction of the bridge began immediately, and in 1786, it was open to traffic, benefiting the proprietors, the communities, and the back country. The land route from Medford to Boston, for example, was cut from thirteen to five miles, and trade dramatically increased as the bridge linked the area-wide market. Success invited imitation, and other communities petitioned the legislature for bridge charters. When the state authorized the West Boston Bridge to Cambridge in 1792, the Charles River Bridge proprietors asked for compensation for the revenue losses they anticipated, and the state extended their charter from forty to seventy years. Ironically, that extension provided the basis for future political and legal assaults against the Charles River Bridge. Other bridges followed and no compensation was offered. The state specifically refuted any monopoly claims and the Charles River Bridge proprietors refrained from claiming any.

Increasing prosperity and population raised the collection of tolls to nearly $20,000 annually in 1805; the share values had increased over 300 percent in value. The toll rates having remained constant since 1786, profits multiplied. Swollen profits stimulated community criticism and animated a long-standing hostility toward monopolies. Opportunity was the watchword and special privilege its bane.

Beginning in 1823, Charlestown merchants launched a five-year effort to build a competing "free" bridge over the Charles. They argued that the existing facility was inadequate, overcrowded, and dangerous; but basically, they appealed for public support on the grounds that the tolls on the Charles River Bridge were "burdensome, vexatious, and odious." The proprietors, defending the bridge's utility, offered to expand and improve it. They consistently maintained that the legislature could not grant a new bridge franchise in the vicinity without compensating them for the loss of tolls. But the political climate persuaded legislators to support the new bridge, and in 1828, after rejecting various schemes for compensation, the legislature approved the Warren Bridge charter. The act established the bridge's termini at 915 feet from the existing bridge on the Boston side, and at 260 feet from it on the Charlestown side. The new bridge was given the same toll schedule as the Charles River Bridge, but the state provided that after the builders recovered their investment and five per cent interest, the bridge would revert to the commonwealth. In any event, the term for tolls could not exceed six years. Governor LEVI LINCOLN had previously vetoed similar legislation, but in 1828 he quietly acquiesced.

The new bridge, completed in six months, was an instant success—but at the expense of the Charles River Bridge. During the first six months of the Warren Bridge's operations, receipts for the old bridge rapidly declined. Net income for the Warren Bridge in the early 1830s consistently was twice that for the Charles River Bridge.

Counsel for the old bridge proprietors wasted little time in carrying their arguments to the courts. After DANIEL WEBSTER and LEMUEL SHAW failed to gain an INJUNCTION to prevent construction of the new bridge, they appeared in the state supreme court to argue the merits of the charter in 1829, nearly one year after the bridge's completion. Shaw and Webster contended that the Charles River Bridge proprietors were successors to the Harvard ferry's exclusive franchise. In addition, they argued that the tolls represented the substance of the 1785 charter. Although the charter for the new bridge did not take away the plaintiffs' franchise, the 1828 act effectively destroyed the tolls—the essence and only tangible property of the franchise. The lawyers thus contended that the new bridge charter violated the CONTRACT CLAUSE and the state constitutional prohibition against expropriation of private property without compensation. The Warren Bridge defendants denied the old bridge's monopoly claims and emphasized that the state had not deprived the Charles River Bridge proprietors' continued right to take tolls. They also maintained that the old bridge proprietors had waived exclusivity when they accepted an extension of their franchise in 1792 after the state had chartered the West Boston Bridge.

The state supreme court, dividing equally, dismissed the complaint to facilitate a WRIT OF ERROR to the United States Supreme Court. The Jacksonian Democrats on the state court supported the state and their Whig brethren opposed it. The former rejected monopoly claims and berated the Charles River Bridge proprietors for their failure to secure an explicit monopoly grant. Chief Justice Isaac Parker, acknowledging that the 1785 grant

was not exclusive, agreed that the state could damage existing property interests for the community's benefit without compensation. But he insisted that "immutable principles of justice" demanded compensation when the forms of property were indistinguishable. He conceded that canals and railroads might legitimately destroy the value of a turnpike; but when the state chartered a similar franchise, then operators of the existing property could claim an indemnity.

The United States Supreme Court first heard arguments in the case in March 1831. Although absences and disagreements prevented any decision before JOHN MARSHALL's death in 1835, the Court's records offer good circumstantial evidence that he had supported the new bridge. Following several new appointments and ROGER B. TANEY's confirmation as Chief Justice, the Court heard reargument in January 1837. Webster again appeared for the plaintiffs; defendants engaged Simon Greenleaf of Harvard, a close associate of JOSEPH STORY and JAMES KENT. Both sides essentially continued the arguments advanced in the state court. Finally, in February 1837, after nearly nine years of litigation, the Court decisively ruled in behalf of the state's right to charter the new bridge.

Taney's opinion sought to balance property rights against community needs by strictly construing the old bridge charter. He rejected the proprietors' exclusivity claim, contending that nothing would pass by implication. "The charter . . . is a written instrument which must speak for itself," he wrote, "and be interpreted by its own terms." He confidently asserted that the "rule" of STRICT CONSTRUCTION was well settled and he particularly invoked Marshall's 1830 PROVIDENCE BANK V. BILLINGS opinion, rejecting a bank's claim to implied tax immunity. Like Marshall, Taney concluded that the implications of exclusivity constituted a derogation of community rights. He argued that the community's "interests" would be adversely affected if the state surrendered control of a line of travel for profit. Taney neatly combined old Federalist doctrines of governmental power with the leaven of Jacksonian rhetoric: "The continued existence of a government would be of no great value," he believed, "if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creations; and the functions it was designed to perform, transferred to the hands of privileged CORPORATIONS."

But the touchstone of Taney's opinion was its practical response to the contemporary reality of public policy needs. Taking note of technological changes and improvements, such as the substitution of railroad traffic for that of turnpikes and canals, Taney argued that the law must be a spur, not an impediment, to change. If the Charles River Bridge proprietors could thwart such change, he feared that the courts would be inundated with suits seeking to protect established property forms. Turnpike companies, for example, "awakening from their sleep," would call upon courts to halt improvements which had taken their place. Railroad and canal properties would be jeopardized and venture capital would be discouraged. The Supreme Court, he concluded, would not "sanction principles" that would prevent states from enjoying the advances of science and technology. Taney thus cast the law with the new entrepreneurs and risk-takers as the preferred agents for material progress.

In his dissent Justice Story rejected Taney's reliance upon strict construction and advanced an imposing line of precedents demonstrating that private grants had been construed in favor of the grantees. "It would be a dishonour of the government," Story said, "that it should pocket a fair consideration, and then quibble as to the obscurities and implications of its own contract." But Story's dissent was not merely a defense of VESTED RIGHTS. Like Taney, he, too, was concerned with progress and public policy. But whereas Taney emphasized opportunity, Story maintained that security of title and the full enjoyment of existing property was a necessary inducement for private investment in public improvements. Story insisted that the proprietors were entitled to compensation. He thus discounted the potentially staggering social and economic costs implicit in a universal principle requiring JUST COMPENSATION when new improvement projects diminished the value of existing franchises.

Story's position reflected immediate reality. Several years earlier, the state's behavior in the bridge controversy had discouraged stock sales for the proposed Boston and Worcester Railroad. Lagging investment finally had forced the legislature to grant the railroad a thirty-year guarantee of exclusive privileges on the line of travel.

Given the materialism of the American people, Taney's arguments had the greater appeal and endurance. He allied the law with broadened entrepreneurial opportunities at the expense of past assets. Nothing threatened the economic aspirations of Americans more than the scarcity of capital; nothing, therefore, required greater legal encouragement than venture capital, subject only to the risks of the marketplace. These were the concerns that took a local dispute over a free bridge out of its provincial setting and thrust it into the larger debate about political economy. In a society that placed a premium on "progress" and on the release of creative human energy to propel that progress, the decision was inevitable. And throughout American economic development, the Charles River Bridge case has fostered the process that Joseph Schumpeter called "creative destruction," whereby new forms of property destroy old ones in the name of progress.

STANLEY I. KUTLER
(1986)

Bibliography

KUTLER, STANLEY I. (1971) 1977 *Privilege and Creative Destruction: The Charles River Bridge Case*, rev. ed. New York: Norton.

## CHARTERS, COLONIAL

See: Colonial Charters

## CHASE, SALMON P. (1808–1873)

Born in New Hampshire, Salmon Portland Chase enjoyed an elite education as a private pupil of his uncle, Episcopal Bishop Philander Chase of Ohio, as a Dartmouth student (graduating 1826), and as an apprentice lawyer (1827–1830) to United States Attorney General WILLIAM WIRT. Subsequently, Chase rose quickly as a Cincinnati attorney, beginning also his numerous, seemingly opportunistic, successive changes in political party affiliations. Abandoning Whig, then Democratic ties, Chase became in turn a member of the Liberty party and of the Republican organizations, winning elections to the United States Senate (1848–1855, 1860–1861), and to Ohio's governorship (1856–1860). He was an unsuccessful candidate for the Republican presidential nomination in 1860. ABRAHAM LINCOLN appointed Chase secretary of the treasury (1861–1864), and Chief Justice of the United States (1864–1873). Yet in 1864 Chase tried to thwart Lincoln's second term, in 1868 he maneuvered for the Democratic presidential nomination, and in 1872 he participated in the "Liberal Republican" schism against ULYSSES S. GRANT.

Such oscillations reflected more than Chase's large personal ambitions. Constitutional, legal, and moral concerns gave his public life coherence and purpose. These concerns derived from Chase's early conviction that men and society were easily corrupted, that SLAVERY was America's primary spoiling agent, and that political corruption was a close second. Although Chase, observing Wirt in the *Antelope* litigation (1825), found the doctrine in SOMERSET'S CASE (1772) an acceptable reconciliation of slavery and the Constitution as of that year, later events, especially those attending fugitive slave recaptures, unpunished assaults on abolitionists, and increases in slave areas due especially to the Mexican War and the treaties that closed it off, brought him to accept ABOLITIONIST CONSTITUTIONAL THEORY. Chase concluded that slavery's expansion beyond existing limits would demoralize white labor.

The first steps on this ultimately abolitionist road came from Chase's association with and brave defenses of Ohio antislavery activists, including JAMES BIRNEY, and of fugitive slaves; such defenses won Chase the nickname "attorney general for runaway negroes." A merely opportunistic Cincinnati lawyer would have had easier routes to success than this. Defending runaways and their abettors, Chase abjured HIGHER LAW pleadings popular among abolitionists; he focused instead on technical procedures and on a carefully developed restatement of state-centered FEDERALISM in which he insisted that nonslave jurisdictions also enjoyed STATES' RIGHTS. Slave states were able to export their recapture laws into free states via the federal FUGITIVE SLAVERY statutes. Chase argued that residents of free states also deserved to have the laws of their states concerning the status of citizens enjoy reciprocal effect and respect within slavery jurisdictions. Such a traffic of free state laws and customs across the federal system was impossible (and was to remain so until Appomattox). Chase insisted that residents of free states possessed at least the right to protect their co-residents of any race within those states from being reduced to servitude without DUE PROCESS.

Chase's evolving ideas culminated in a "freedom national" position, a general program for resolving the dilemma that slavery posed to a federal society based on assumptions of legal remedies, CIVIL RIGHTS, and CIVIL LIBERTIES. In his thinking, free labor was more than a marketplace phenomenon. It was a moral imperative, a complex of ethical relationships that the nation, under the Constitution, must nurture. Reformed, corruption-free two-party politics, with even blacks voting, was the way Chase discerned finally to nationalize freedom, a nationalization based upon acceptance of the DECLARATION OF INDEPENDENCE and the BILL OF RIGHTS as minimum definitions of the nation's interest in private rights adversely affected by state wrongs or private inequities.

The CIVIL WAR and the wartime and post-Appomattox RECONSTRUCTION of the southern states were the contexts in which Chase refined his thinking about individuals' rights and the nation's duty to protect them. Lincoln found a place in his cabinet for every one of the major competitors for the Republican presidential nomination in 1860, and Chase became secretary of the treasury. Once the war started, Chase had responsibility to provide an adequate circulating medium for the suddenly ballooning marketplace needs of the government, of the banking and commercial communities of the Union states, and of the millions of urban and rural entrepreneurs who rushed to expand production. Chase helped key congressmen to shape the historic wartime laws on national banking, income taxation, and legal tender (the legitimacy of the last of which Chase himself was to question as Chief Justice, in the LEGAL TENDER CASES).

The most outspoken abolitionist in Lincoln's cabinet, Chase also carved out a role for Treasury officials, who were responsible for administering rebels' confiscated property, in the Army's coastal experiments for abandoned, runaway, or otherwise freed blacks. He applauded the CONFISCATION ACTS, the EMANCIPATION PROCLAMATION, the major elements in Lincoln's MILITARY RECONSTRUCTION, the FREEDMEN'S BUREAU statute, and the THIRTEENTH AMENDMENT. Upon ROGER B. TANEY's death in late 1864, Lincoln, well aware of Chase's antipathy to the decision in DRED SCOTT V. SANDFORD (1857) and his commitment to irreversible emancipation, both of which the President shared, named the Ohioan to be Chief Justice.

After Appomattox, Chase, for his first years as Chief Justice, found that the work of the Court was almost exclusively with white men's rights rather than with the momentous, race-centered public questions that faced the Congress and the new President, ANDREW JOHNSON. On circuit, however, Chase's *In re Turner* opinion sustained broadly, in favor of a black female claimant, the provisions of the 1866 CIVIL RIGHTS ACT for enforcing the Thirteenth Amendment. In his opinion, Chase insisted that federal rights against servitude were defendable in national courts as against both state or private action or inaction, and he emphasized that a state's standard of right could serve as an adequate federal standard so long as the state did not discriminate racially.

Some contemporaries applauded *In re Turner* as an articulation of the new, nationalized federal system of rights that the Thirteenth Amendment appeared to have won. Chase's other circuit opinions did not, therefore, disturb race egalitarians, and generally won favor in professional legal and commercial media. These opinions dealt with numerous litigations concerning private relationships such as marriage licenses, trusts and inheritances, business contracts, and insurance policies made under rebel state dispensation. Chase recognized the validity of these legal arrangements. His decisions helped greatly to stabilize commerce and family relationships in the South.

The course of post-Appomattox Reconstruction as controlled both by President Johnson and by Congress, troubled Chase deeply. He knew, from his work in Lincoln's cabinet, how narrowly the Union had escaped defeat and tended, therefore, to sustain wartime measures. Yet he revered both the CHECKS AND BALANCES of the national government and the state-centered qualities of the federal system reflected in the Constitution. Therefore, in EX PARTE MILLIGAN (1866), Chase, still new on the Court, joined in the unanimous statement that Milligan, who had been tried by a military court, should preferably have been prosecuted in a civilian court for his offenses. But Chase, with three other Justices, dissented from the majority's sweeping condemnation of any federal military authority over civilians in a nonseceded state. The dissenters insisted instead that Congress possessed adequate WAR POWER to authorize military courts.

Chase again dissented from the 5–4 decision in the TEST OATH CASES (1867). Though privately detesting oath tests, Chase held to a public position that legislators, not judges, bore the responsibility to prescribe professional qualifications and licensing standards. By this time Congress had decided on Military Reconstruction. Mississippi officials, appointed earlier by Johnson, asked the Court for an INJUNCTION against the President's enforcing Congress's reconstruction law, and for a ruling that it was unconstitutional. For an unanimous Court, Chase refused to honor the petition (MISSISSIPPI V. JOHNSON, 1867), relying on the POLITICAL QUESTION doctrine. He agreed with his colleagues also in *Georgia v. Stanton* (1867) in refusing to allow the Court to intrude into political questions involving enforcement of the Reconstruction statutes. Mississippians again tried to enlist the Court against Congress. In early 1868 EX PARTE MCCARDLE raised *Milligan*-like issues of military trials of civilians, and of the Court's jurisdiction to hear such matters under the HABEAS CORPUS ACT OF 1867. Congress thereupon diminished the Court's APPELLATE JURISDICTION under that statute. Chase, for the Court, acquiesced in the diminution, though pointing out that all other habeas jurisdiction remained in the Court.

He supported Congress's Military Reconstruction as a statutory base for both state restorations and black suffrage, but he was offended by the Third Reconstruction Act (July 1867), providing that military decisions would control civil judgments in the South. The IMPEACHMENT of Andrew Johnson, with Chase presiding over the Senate trial, seemed to threaten the destruction of tripartite checks and balances. Chase drifted back toward his old Democratic states' rights position, a drift signaled by his advocacy of universal amnesty for ex-rebels and universal suffrage. He had tried, unsuccessfully, to have the FOURTEENTH AMENDMENT provide for both. His enhanced or renewed respect for states' rights was evident in *United States v. DeWitt* (1869), in which the Court declared a federal law forbidding the transit or sale of dangerous naphtha-adulterated kerosene, to be an excessive diminution of STATE POLICE POWERS.

This decision, the first in which the Court denied Congress a capacity to act for regulatory purposes under the COMMERCE CLAUSE, like the decisions on Reconstruction issues, suggests how far the CHASE COURT engaged in JUDICIAL ACTIVISM. Striking in this regard were the Legal Tender Cases. The first of these, *Hepburn v. Griswold* (1870), resulted in a 4–3 decision that the 1862 law authorizing greenbacks as legal tender was invalid as applied

to contracts made before passage of the statute. Chase, for the thin majority, insisted that the statute violated the Fifth Amendment's due process clause, concluding that the spirit of the CONTRACT CLAUSE, though by its terms restraining only the states, applied also to the federal government. The trio of dissenters—all, like Chase, Republican appointees—saw the money and war powers as adequate authority for the statute.

Then, later in 1870, President ULYSSES S. GRANT named two new Justices to the Court: JOSEPH P. BRADLEY and WILLIAM STRONG. The new appointees created, in *Knox v. Lee* (1871), the second Legal Tender Case decision, a majority that overruled *Hepburn.* The new majority now upheld the nation's authority to make paper money legal tender for contracts entered into either before or after enactment of the statute, an authority not pinned necessarily to the war power.

Chase was in the minority in the SLAUGHTERHOUSE CASES (1873) in which the majority found no violation of the Thirteenth or Fourteenth Amendments in a state's assignment of a skilled-trade monopoly to private parties. The doctrine of *Slaughterhouse,* that the privileges of United States citizenship did not protect basic civil rights, signaled a sharp retreat from Chase's own *In Re Turner* position, and was a fateful step by the Court toward what was to become a general retreat from Reconstruction.

*Slaughterhouse,* along with Chase's anti-Grant position in 1872, closed off Chase's long and tumultuous career; he died in 1873. His career was consistent in its anticorruption positions and in its infusions of moral and ethical ideas into constitutional, legal, and political issues. Party-jumping was incidental to Chase's ends of a moral democracy, federally arranged in a perpetual union of perpetual states; he gave this concept effective expression in TEXAS V. WHITE (1869).

To be sure, neither Chase nor "his" Court created novel legal doctrines. But he, and it, helped greatly to reclaim for the Court a significant role in determining the limits of certain vital public policies, both national and state. In the tumults of Reconstruction, while avoiding unwinnable clashes with Congress, Chase bravely insisted that effective governmental power and individual rights could co-exist. He and his fellow Justices advanced novel constitutional doctrines drawn from the prohibitions against ex post facto laws and BILLS OF ATTAINDER, and from the commerce and money powers. In retrospect, such experiments with doctrine take on the quality of interim defenses of judicial authority between prewar reliance on the contract clause, as example, and the post-Chase development of the due process clause of the Fourteenth Amendment.

At the same time, Chase tried to focus the Court's attention on individuals' rights as redefined first by the Thirteenth and then by the Fourteenth Amendment, as against both private and public wrongs. As one who for years had observed at first hand the capacity of nation and states and private persons to wrong individuals, Chase, as Chief Justice, brought a particular sense of urgency to the goal fo protecting individual rights. He failed to convert a majority of his brethren to this task. Instead, America deferred its constitutional commitments. (See CONSTITUTIONAL HISTORY, 1865–1877.)

HAROLD M. HYMAN
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Bibliography

FAIRMAN, CHARLES 1971 *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864–1888.* New York: Macmillan.

HUGHES, DAVID 1965 Salmon P. Chase: Chief Justice. *Vanderbilt Law Review* 18:569–614.

HYMAN, HAROLD M. and WIECEK, WILLIAM M. 1982 *Equal Justice under Law: Constitutional Development 1835–1875.* Chaps. 11–13. New York: Harper & Row.

WALKER, PETER F. 1978 *Moral Choices.* Chaps. 13–14. Baton Rouge: Louisiana State University Press.

## CHASE, SAMUEL
## (1741–1811)

Samuel Chase was one of the most significant and controversial members of America's revolutionary generation. Irascible and difficult, but also extremely capable, he played a central role in Maryland politics during the 1760s and 1770s, signed the DECLARATION OF INDEPENDENCE, and was a member of the Continental Congress from 1775 to 1778. In the latter year ALEXANDER HAMILTON denounced him for using confidential information to speculate in the flour market. During the 1780s Chase pursued various business interests, practiced law, rebuilt his political reputation, and became an important anti-Federalist leader. After the adoption of the Constitution, for reasons that remain unclear, he became an ardent Federalist.

In 1795 he was nominated for a position on the federal bench. President GEORGE WASHINGTON was at first wary of recommending him, but when he had trouble filling a vacancy on the United States Supreme Court, he offered the position to Chase, who accepted in 1796. As one of the better legal minds in the early republic, Chase delivered several of the Court's most important decisions in the pre-Marshall period. In WARE V. HYLTON (1796) he provided one of the strongest statements ever issued on the supremacy of national treaties over state laws. The decision invalidated a Virginia statute of 1777 that placed obstacles in the way of recovery of debts owed by Americans to British

creditors, a law in clear violation of a specific provision of the treaty of peace with Great Britain (1783). In HYLTON V. UNITED STATES (1796) Chase and the Supreme Court for the first time passed upon the constitutionality of an act of Congress, upholding the carriage tax of 1794. Chase concluded that only CAPITATION TAXES were direct taxes subject to the constitutional requirement of apportionment among the states according to population. In CALDER V. BULL (1798), where the Supreme Court held that the prohibition against EX POST FACTO LAWS in the Constitution extended only to criminal, not civil, laws, Chase addressed the issue of constitutionality in natural law terms, presaging those late-nineteenth-century jurists who, in furthering the concept of SUBSTANTIVE DUE PROCESS, were to argue that the Supreme Court could properly hold laws invalid for reasons lying outside the explicit prohibitions of the constitutional text. Riding circuit, he ruled in *United States v. Worrall* (1798) that the federal courts had no jurisdiction over crimes defined by COMMON LAW. This position, which Chase abandoned, was adopted by the Supreme Court in *United States v. Hudson and Goodwin* (1812). (See FEDERAL COMMON LAW OF CRIMES.)

A fierce partisan, Chase refused to recognize the legitimacy of the Jeffersonian opposition in the party struggles of the late 1790s. He used his position on the bench to make speeches for the Federalists and he supported the passage of the ALIEN AND SEDITION ACTS in 1798. Riding circuit, he enforced the law with a vengeance when he presided over the trials of John Fries of Pennsylvania for TREASON and John Callendar of Virginia for SEDITION, sentencing the former to death (Fries was eventually pardoned by President JOHN ADAMS) and the latter to a stiff fine and a prison sentence. When THOMAS JEFFERSON and the Republicans came to power in 1801 and repealed the JUDICIARY ACT OF 1801, Chase vigorously campaigned behind the scenes for the Supreme Court to declare the repeal law unconstitutional, but the other Justices did not go along with him. Chase, however, remained adamant in his opposition to the Jeffersonians, refusing to alter his partisan behavior. "Things," he argued, "must take their natural course, from *bad* to *worse*." In May 1803, in an intemperate charge to a GRAND JURY in Baltimore, he launched yet another attack on the Republican party and its principles.

Shortly thereafter, President Jefferson urged that Chase be removed from office. The House of Representatives voted for his IMPEACHMENT, and he came to trial before the United States Senate. The Constitution authorizes impeachment and conviction of federal government officers for "Treason, Bribery, or other high Crimes and Misdemeanors." Many of the more militant Republicans, unhappy with Federalist control of the judiciary, favored an expansive view of what should constitute an impeachable offense. As one put it: "Removal by impeachment was nothing more than a declaration by Congress to this effect: You held dangerous opinions and if you are suffered to carry them into effect, you will work the destruction of the Union. We want your offices for the purpose of giving them to men who will fill them better." Others, including a number of Republicans, favored a narrow definition: impeachment was permitted only for a clearly indictable offense.

Chase proved to be a formidable opponent. Aided by a prestigious group of Federalist trial lawyers, he put up a strong defense, denying that any of his actions were indictable offenses under either statute or common law. His attorneys raised various complicated and even moot legal questions such as the binding quality of local custom; the reciprocal rights and duties of the judge, jury, and defense counsel; the legality of bad manners in a court room; the rules of submitting EVIDENCE; and the problems involved in proving criminal intent. The prosecution was led by JOHN RANDOLPH, an extreme Republican and highly emotional man who badly botched the legal part of his argument. Chase was acquitted on all counts, even though most senators disliked him and believed his conduct on the bench had been improper. The final result was not so much a vote for Chase as it was against a broad definition of the impeachment clause—a definition that might be used to remove other judges, perhaps even to dismantle the federal judiciary altogether. Even Jefferson appears to have come around to this point of view; he made no attempt to enforce party unity when the Senate voted, and he was not unhappy with the outcome of the trial.

Although Chase served on the Supreme Court for the rest of his life, he no longer played an important role. JOHN MARSHALL had begun his ascendancy, and although Marshall was a staunch nationalist, he was less overtly partisan than Chase and less inclined to provoke confrontations with the Jeffersonians.

RICHARD E. ELLIS
(1986)

Bibliography

ELLIS, RICHARD E. 1981 The Impeachment of Samuel Chase. Pages 57–78 in Michal Belknap, ed., *American Political Trials*. Westport, Conn.: Greenwood Press.

HAW, JAMES et al. 1981 *Stormy Patriot: The Life of Samuel Chase*. Baltimore: Johns Hopkins University Press.

# CHASE COURT
## (1864–1873)

The decade of SALMON P. CHASE's tenure as CHIEF JUSTICE of the United States was one of the more turbulent in the

history of the Supreme Court. Laboring under the cloud of hostility engendered by DRED SCOTT V. SANDFORD (1857), hurt by partisan attacks from without and divisions within, staggering under loads of new business, the Chase Court nevertheless managed to absorb and consolidate sweeping new jurisdictional grants to the federal courts and to render some momentous decisions.

The Chase Court displayed an unusual continuity of personnel, which was offset by political and ideological heterogeneity. Of the nine men Chase joined on his accession (the Court in 1864 was composed of ten members), seven served throughout all or nearly all his brief tenure. But this largely continuous body was divided within itself by party and ideological differences. JOHN CATRON, who died in 1865, JAMES M. WAYNE, who died in 1867, and ROBERT C. GRIER, who suffered a deterioration in his faculties that caused his brethren to force him to resign in 1870, were Democrats. NATHAN CLIFFORD, an appointee of President JAMES BUCHANAN, and STEPHEN J. FIELD were also Democrats, the latter a War Democrat. SAMUEL F. MILLER, DAVID DAVIS, and JOSEPH P. BRADLEY were Republicans. Chase himself was an ex-Democrat who had helped form the Republican party in 1854, but he drifted back to the Democratic party after the war and coveted its presidential nomination. WILLIAM STRONG, Grier's replacement, and NOAH SWAYNE were also Democrats who turned Republican before the war. Like the Chief Justice, Davis never successfully shook off political ambitions; he accepted and then rejected the Labor Reform party's nomination for the presidency in 1872. From 1870, Republicans dominated the Court, which had long been controlled by Democrats.

The work of the Supreme Court changed greatly during Chase's tenure. In 1862 and 1866, Congress realigned the federal circuits, so as to reduce the influence of the southern states, which under the Judiciary Act of 1837 had five of the nine circuits. Under the Judiciary Act of 1866, the southern circuits were reduced to two. By the same statute, Congress reduced the size of the Court from ten to seven members, mainly to enhance the efficiency of its work, not to punish the Court or deprive President ANDREW JOHNSON of appointments to it. In 1869, Congress again raised the size of the Court to nine, where it has remained ever since. More significantly, the business of the Court expanded. By 1871, the number of cases docketed had doubled in comparison to the war years. This increase resulted in some measure from an extraordinary string of statutes enacted between 1863 and 1867 expanding the JURISDICTION OF THE FEDERAL COURTS in such matters as REMOVAL OF CASES from state to federal courts, HABEAS CORPUS, claims against the United States, and BANKRUPTCY.

The Chase Court was not a mere passive, inert repository of augmented jurisdiction: it expanded its powers of JUDICIAL REVIEW to an extent unknown to earlier Courts. During Chase's brief tenure, the Court held eight federal statutes unconstitutional (as compared with only two in its entire prior history), and struck down state statutes in thirty-six cases (as compared with thirty-eight in its prior history). The attitude that produced this JUDICIAL ACTIVISM was expressed in private correspondence by Justice Davis, when he noted with satisfaction that the Court in EX PARTE MILLIGAN (1866) had not "toadied to the prevalent idea, that the legislative department of the government can override everything." This judicial activism not only presaged the Court's involvement in policy during the coming heyday of SUBSTANTIVE DUE PROCESS; it also plunged the Chase Court into some of the most hotly contested matters of its own time, especially those connected with RECONSTRUCTION. The Court also attracted the public eye because of the activities of two of its members: Chase's and Davis's availability as presidential candidates, and Chase's firm, impartial service in presiding over the United States SENATE as a court of IMPEACHMENT in the trial of Andrew Johnson.

The Chase Court is memorable for its decisions in four areas: Reconstruction, federal power (in matters not directly related to Reconstruction), state regulatory and tax power, and the impact of the FOURTEENTH AMENDMENT.

Nearly all the cases in which the Supreme Court disposed of Reconstruction issues were decided during Chase's tenure. The first issue to come up was the role of military commissions. In EX PARTE VALLANDIGHAM, decided in February 1864 (ten months before Chase's nomination), the Court refused to review the proceedings of a military commission, because the commission is not a court. But that did not settle the issue of the constitutional authority of military commissions. The matter came up again, at an inopportune time, in *Ex parte Milligan*, decided in December 1866. Milligan had been arrested, tried, convicted, and sentenced to be hanged by a military commission in Indiana in 1864 for paramilitary activities on behalf of the Confederacy. The Court unanimously ruled that his conviction was illegal because Indiana was not in a theater of war, because the civil courts were functioning and competent to try Milligan for TREASON, and because he was held in violation of the provisions of the HABEAS CORPUS ACT OF 1863. But the Court split, 5–4, over an OBITER DICTUM in Justice Davis's MAJORITY OPINION stating that the Congress could never authorize military commissions in areas outside the theater of operations where the civil courts were functioning. The Chief Justice, writing for the minority, declared that Congress did have the power to authorize commissions, based on the several WAR POWERS clauses of Article I, section 8, but that it had not done so; hence Milligan's trial was unauthorized.

*Milligan* created a furor in Congress and deeply impli-

cated the Court in the politics of Reconstruction. Assuming that military commissions were essential to the conduct of Reconstruction, Democrats taunted Republicans that *Milligan* implied that they were unconstitutional, and hence that proposed Republican measures providing for military trials in the CIVIL RIGHTS ACT OF 1866 and FREEDMEN'S BUREAU Act violated the Constitution. Taken together with subsequent decisions, *Milligan* caused Republicans some anxiety. But, as Justice Davis noted in private correspondence and as Illinois Republican LYMAN TRUMBULL stated on the floor of the Senate, the decision in reality had no application to the constitutional anomaly of Reconstruction in the South.

The Court next seemed to challenge congressional Reconstruction in the TEST OATH CASES, *Ex parte Garland* and *Cummings v. Missouri*, both 1867. The court, by 5–4 decisions, voided federal and state statutes requiring a candidate for public office or one of the professions to swear that he had never participated or assisted in the rebellion. The Court's holding, that they constituted BILLS OF ATTAINDER and EX POST FACTO LAWS, seemingly threatened programs of disfranchisement and oath qualification, another part of proposed Reconstruction measures. Then, in February 1868, the Court announced that it would hear arguments in EX PARTE MCCARDLE, another challenge to military commissions. William McCardle had been convicted by a military commission for publishing inflammatory articles. A federal circuit court denied his petition for a writ of habeas corpus under the HABEAS CORPUS ACT OF 1867, a measure that had broadened the scope of the writ, and he appealed the denial to the Supreme Court. Alarmed, congressional Republicans enacted a narrowly drawn statute known as the McCardle repealer, denying the Supreme Court appellate jurisdiction in habeas petitions brought under the 1867 act. In 1869, the Court accepted the constitutionality of the repealer, because Article III, section 2, made the Court's APPELLATE JURISDICTION subject to "such Exceptions . . . as the Congress shall make." But Chief Justice Chase pointedly reminded the bar that all the rest of the Court's habeas appellate authority was left intact. This broad hint bore fruit in *Ex parte Yerger* (1869), where the Court accepted jurisdiction of a habeas appeal under the JUDICIARY ACT OF 1789. Chief Justice Chase chastised Congress for the McCardle repealer and reaffirmed the scope of the Great Writ.

In the meantime, the Court had turned to other Reconstruction issues. As soon as Congress enacted the MILITARY RECONSTRUCTION ACTS of 1867, southern attorneys sought to enjoin federal officials, including the President and the secretary of war, from enforcing them. In MISSISSIPPI V. JOHNSON (1867), the Court unanimously rejected this petition. Chief Justice Chase drew on a distinction, originally suggested by his predecessor Chief Justice JOHN MARSHALL in MARBURY V. MADISON (1803), between ministerial and discretionary responsibilities of the President, stating that the latter were not subject to the Court's injunctive powers. In *Georgia v. Stanton* (1867), the Court similarly dismissed a petition directed at the secretary of war and General ULYSSES S. GRANT, holding that the petition presented POLITICAL QUESTIONS resolvable only by the political branches of the government. But the words of Justice Nelson's opinion seemed to suggest that if the petition had alleged a threat to private property (rather than the state's property), there might be a basis for providing relief. In May 1867, Mississippi's attorneys moved to amend their petition to specify such a threat. The Court, in a 4–4 order (Justice Grier being absent), rejected the motion. This minor, unnoticed proceeding was probably the truest index to the attitudes of individual Justices on the substantive policy questions of Reconstruction.

The Court's final involvement with Reconstruction came with TEXAS V. WHITE (1869) and *White v. Hart* (1872). In the former case, decided on the same day that the Supreme Court acknowledged the validity of the McCardle repealer, the postwar government of Texas sought to recover some bonds that the Confederate state government had sold to defray military costs. Because a state was a party, this was an action within the ORIGINAL JURISDICTION of the Supreme Court. But one of the defendants challenged the jurisdictional basis of the action, claiming that Texas was not a state in the constitutional sense at the time the action was brought (February 1867). This challenge directly raised important questions about the validity of SECESSION and Reconstruction. Chief Justice Chase, writing for the six-man majority (Grier, Swayne, Miller, dissenting) met the issue head on. He first held that secession had been a nullity. The Union was "indissoluble," "an indestructible Union, composed of indestructible States" in Chase's resonant, memorable phrasing. But, he went on, though the relations of individual Texans to the United States could not be severed, secession had deranged the status of the state within the Union. In language suggestive of the "forfeited-rights" theory of Reconstruction propounded by Ohio congressman Samuel Shellabarger which had provided a conceptual basis for Republican Reconstruction, Chase stated that the rights of the state had been "suspended" by secession and war. Congress was responsible for restoring the proper relationship, in wartime because of its authority under the military and militia clauses of Article I, section 8, and in peacetime under the guarantee of a REPUBLICAN FORM OF GOVERNMENT in Article IV, section 4. This was preponderantly a question to be resolved by Congress rather than the President, and hence the Lincoln and Johnson governments in power before enactment of the Military Reconstruction Acts were "provisional." Congress enjoyed wide latitude in working out

details of Reconstruction policy. The sweeping language of Chase's opinion strongly implied the constitutionality of military Reconstruction. The majority opinion also offered a useful distinction between legitimate acts of the Confederate government of Texas, such as those designed to preserve the peace, and invalid ones in support of the rebellion.

In *White v. Hart* (1872) the Court reaffirmed its general position in *Texas v. White* and emphasized that the relationship of states in the union was a political question for the political branches to resolve. At the same time, the Court disposed of two lingering issues from the war in ways that reaffirmed the doctrine of *Texas v. White*. In *Virginia v. West Virginia* (1870) it accepted the creation of the daughter state, shutting its eyes to the obvious irregularities surrounding the Pierpont government's consent to the separation, and insisting that there had been a "valid agreement between the two States." And in *Miller v. United States* (1871), echoing the PRIZE CASES (1863), a six-man majority upheld the constitutionality of the confiscation provisions of the Second Confiscation Act of 1862 on the basis of the Union's status as a belligerent.

The Chase Court decisions dealing with secession, war, and Reconstruction have stood well the test of time. *Milligan* and the *Test Oath Cases* remain valuable defenses of individual liberty against arbitrary government. The *McCardle* decision was a realistic and valid recognition of an explicit congressional power, while its sequel, *Yerger*, reaffirmed the libertarian implications of *Milligan*. The Court's position in the cases seeking to enjoin executive officials from enforcing Reconstruction was inevitable: it would have been hopeless for the Court to attempt to thwart congressional Reconstruction, or to accede to the Johnson/Democratic demand for immediate readmission of the seceded states. *Texas v. White* and *White v. Hart* drew on a sound prewar precedent, LUTHER V. BORDEN (1849), to validate actions by the dominant political branch in what was clearly a pure political question. Taken together, the Reconstruction cases evince a high order of judicial statesmanship.

The Chase Court made only tentative beginnings in issues of federal and state regulatory power, but those beginnings were significant. The first federal regulatory question to come up involved the currency. In VEAZIE BANK V. FENNO (1869) the Court sustained the constitutionality of sections of the Internal Revenue Acts of 1865 and 1866 that imposed a ten percent tax on state bank notes for the purpose of driving them out of circulation. Chase first held that the tax was not a DIRECT TAX (which would have had to be apportioned among the states) and then upheld Congress's power to issue paper money and create a uniform national currency by eliminating state paper.

The LEGAL TENDER CASES were more controversial. As secretary of the treasury, Chase had reluctantly acquiesced in the issuance of federal paper money. But when the issue came before the Court in the First Legal Tender Case (*Hepburn v. Griswold*, 1870), Chase, speaking for a 4–3 majority, held the Legal Tender Act of 1862 unconstitutional because it made greenbacks legal tender for preexisting debts. The division on the court was partisan: all the majority Justices were Democrats (Chase by this time had reverted to his Democratic antecedents), all the dissenters Republicans. Chase's reasoning was precipitate and unsatisfactory. He asserted that the act violated the OBLIGATION OF CONTRACTS, but the CONTRACT CLAUSE limited only the states. To this Chase responded that the act was contrary to the "spirit of the Constitution." He also broadly implied that the statute violated the Fifth Amendment's guarantee of DUE PROCESS.

An enlarged Court in 1871 reversed *Hepburn*, upholding the constitutionality of the 1862 statute in the Second Legal Tender Cases, with the two new appointees, Bradley and Strong, joining the three dissenters of the first case. Justice Strong for the majority averred that "every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency." The Court's turnabout suggested to contemporaries that President Grant had packed the Court to obtain a reversal of the first decision. Grant was opposed to the decision, and he knew that Bradley and Strong were also opposed; but he did not secure from them any commitments on the subject, and he did not base his appointments solely on the single issue of legal tender.

Other Chase Court decisions involving federal power were not so controversial. In *United States v. Dewitt* (1870) Chase for the Court invalidated an exercise of what would come to be called the NATIONAL POLICE POWER, in this case a provision in a revenue statute prohibiting the mixing of illuminating oil with naphtha (a highly flammable mixture). Chase held that the COMMERCE CLAUSE conferred no federal power over the internal affairs of the states, and that the subject matter was remote from the topic of raising revenue. He simply assumed that there was no inherent national police power. In COLLECTOR V. DAY (1871) Justice Nelson for a divided Court held that federal revenue acts taxing income could not reach the salary of a state judge. Justice Bradley's dissent, maintaining the necessity of federal power to reach sources of income that included some functions of state government, was vindicated in GRAVES V. NEW YORK EX REL. O'KEEFE (1939), which overruled *Day*. In contrast to the foregoing cases, *The Daniel Ball* (1871) upheld the power of Congress to regulate commerce on navigable waterways, even where these were wholly intrastate.

The Chase Court decisions passing on the regulatory and taxing authority of the states caused less controversy.

These cases are significant principally as evidence that the Court continued unabated its prewar responsibility of monitoring the functioning of the federal system, inhibiting incursions by the states on national authority and the national market, while at the same time preserving their scope of regulation and their sources of revenue intact. The first case of this sort, GELPCKE V. DUBUQUE (1864), involved a suit on bonds, issued by a city to encourage railroad building, which the city was trying to repudiate. The state courts had reversed their prior decisions and held that citizens could not be taxed to assist a private enterprise such as a railroad. The Supreme Court, in an opinion by Justice Swayne, reversed the result below, thus upholding the validity of the bonds. Swayne intemperately declared that "We shall never immolate truth, justice, and the law, because a state tribunal has erected the altar and decreed the sacrifice." The decision was welcomed in financial circles, particularly European ones, and presaged a Court attitude sympathetic to investors and hostile to repudiation, especially by a public agency.

The Court displayed less passion in other cases. In *Crandall v. Nevada* (1868), it struck down a state CAPITATION tax on passengers of public conveyances leaving the state as an unconstitutional interference with the right of persons to move about the country. The commerce clause aspects of the case were left to be decided later. Another case involving personal liberty, *Tarble's Case* (1872), vindicated the Court's earlier position in ABLEMAN V. BOOTH (1859) by holding that a state court in a habeas corpus proceeding could not release an individual held in federal custody (here, an allegedly deserting army volunteer).

But most cases testing the scope of state regulatory power dealt with commerce. In PAUL V. VIRGINIA (1869) the Court, through Chase, held that the negotiation of insurance contracts did not constitute commerce within the meaning of the commerce clause, and hence that a state was free to regulate the conduct of insurance companies as it pleased. This doctrine lasted until 1944. But one aspect of Justice Field's concurring opinion in *Paul* had momentous consequences. He asserted that, for purposes of the PRIVILEGES AND IMMUNITIES clause of Article IV, CORPORATIONS could not be considered "citizens," and were thus not entitled to the privileges and immunities of natural PERSONS. This caused attorneys to look to other sources, such as the due process clause (with its term "person") as a source of protection for corporations. During the same term, in WOODRUFF V. PARHAM (1868), the Chase Court upheld a municipal sales tax applied to goods brought into the state in INTERSTATE COMMERCE even though they were still in their original package, thus limiting Marshall's ORIGINAL PACKAGE DOCTRINE announced in BROWN V. MARYLAND (1827) to imports from other nations.

Three 1873 cases demonstrated the Court carefully adjusting the federal balance. In the State Freight Tax Case the Court struck down a state tax on freight carried out of the state. But in the *Case of the State Tax on Railway Gross Receipts* the Court upheld a state tax on a corporation's gross receipts, even when the taxpayer was a carrier and the tax fell on interstate business. And in the *Case of the State Tax on Foreign-Held Bonds* the Court struck down a tax on interest on bonds as applied to the securities of out-of-state bondholders.

The last category of major Chase Court cases dealt with the scope of the Reconstruction Amendments, and the extent to which they would alter the prewar balances of the federal system. One of Chase's circuit court decisions, *In re Turner* (1867), suggested that this potential might be broad. Chase there held a Maryland BLACK CODE's apprenticeship provision unconstitutional on the ground that it imposed a condition of involuntary servitude in violation of the THIRTEENTH AMENDMENT. This decision might have been the prelude to extensive federal involvement in matters that before the war would have been considered exclusively within the STATE POLICE POWER. But this possibility was drastically narrowed in the SLAUGHTERHOUSE CASES (1873), the last major decision of the Chase Court and one of the enduring monuments of American constitutional law. Justice Miller for the majority held that "the one pervading purpose" of the Reconstruction Amendments was the liberation of black people, not an extension of the privileges and rights of whites. Miller construed the privileges and immunities, due process, and EQUAL PROCTECTION clauses of the Fourteenth Amendment in light of this assumption, holding that none of them had deranged the traditional balance of the federal system. The states still remained the source of most substantive privileges and immunities, and the states remained primarily responsible for securing them to individuals. This ruling effectively relegated the definition and protection of freedmen's rights to precisely those governments—Redeemer-dominated southern states—least likely to provide that protection. Because "we do not see in those [Reconstruction] amendments any purpose to destroy the main features of the general system," Miller rejected a substantive interpretation of the new due process clause and restricted the equal protection clause to cases of "discrimination against the negroes as a class."

The future belonged to the *Slaughterhouse* dissenters, Justices Bradley and Field. Bradley articulated the doctrine of substantive due process, arguing that the right to pursue a lawful occupation is a property right which the state may not interfere with arbitrarily or selectively. Field, in a dissent in which Chase joined (Swayne dissented in a separate opinion) relied on the privileges and immunities clause of the Fourteenth Amendment, seeing

in it a guarantee of "the fundamental rights" of free men, which cannot be destroyed by state legislation. His insistence on an "equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life" foreshadowed the doctrine of FREEDOM OF CONTRACT.

Yet Field's and Bradley's insistence on the right to follow a chosen occupation, free of arbitrary discrimination, did not avail Myra Bradwell in her effort to secure admission to the Illinois bar (BRADWELL V. ILLINOIS, 1873). Justice Miller for the majority (Chase being the lone dissenter) refused to overturn a decision of the Illinois Supreme Court denying her admission to the bar solely on the ground of her gender. "The paramount mission and destiny of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator," Bradley wrote in a concurrence. "And the rules of civil society . . . cannot be based upon exceptional cases." The emergent scope of the due process, equal protection, and privileges and immunities clauses were to have a differential application as a result of the *Slaughterhouse* dissents and *Bradwell* ruling, securing the rights of corporations and men in their economic roles, while proving ineffectual to protect others from discrimination based on race and gender. (See RACIAL DISCRIMINATION; SEX EQUALITY.)

During its brief span, the Chase Court made enduring contributions to American constitutional development. It handled the unprecedented issues of Reconstruction with balance and a due recognition of the anomalous nature of issues coming before it. Yet in those decisions, Chase and his colleagues managed to preserve protection for individual rights while at the same time permitting the victorious section, majority, and party to assure a constitutional resolution of the war consonant with its military results. In non-Reconstruction cases, the Chase court continued the traditional function of the Supreme Court in monitoring and adjusting the allocation of powers between nation and states. It was more activist than its predecessors in striking down federal legislation, while it displayed the same nicely balanced concern for state regulatory power and protection of the national market that was a characteristic of the TANEY COURT.

WILLIAM M. WIECEK
(1986)

Bibliography

FAIRMAN, CHARLES 1939 *Mr. Justice Miller and the Supreme Court, 1862–1890.* Cambridge, Mass.: Harvard University Press.

——— 1971 *Reconstruction and Reunion, 1864–88, Part One* (vol. VI of the Oliver Wendell Holmes Devise *History of the Supreme Court of the United States*). New York: Macmillan.

HYMAN, HAROLD M. and WIECEK, WILLIAM M. 1982 *Equal Justice Under Law: Constitutional Development 1835–1875.* New York: Harper & Row.

KUTLER, STANLEY I. 1968 *Judicial Power and Reconstruction Politics.* Chicago: University of Chicago Press.

SILVER, DAVID M. 1957 *Lincoln's Supreme Court.* Urbana: University of Illinois Press.

SWISHER, CARL B. 1930 *Stephen J. Field: Craftsman of the Law.* Washington, D.C.: Brookings Institution.

WARREN, CHARLES 1937 *The Supreme Court in United States History,* rev. ed. Boston: Little, Brown.

## CHATHAM, LORD

See: Pitt, William

## CHECKS AND BALANCES

In its precise meaning, "checks and balances" is not synonymous with SEPARATION OF POWERS; it refers instead to a system of rules and practices designed to maintain the separation of powers. The executive VETO POWER is considered part of this system, along with the power of JUDICIAL REVIEW, the IMPEACHMENT power, and other powers available to any of the branches of government for combating the encroachments of the others.

JAMES MADISON formulated the American theory of checks and balances in response to the ANTI-FEDERALIST charge that the proposed Constitution would contain an overlap of governmental functions, violating the principle of separated powers. Expressing a pessimistic view of human nature, he argued in THE FEDERALIST #10 that the way to avoid majority tyranny lay in creating a large national community of diverse and numerous economic interests, not in statesmanship or in religious and moral constraints. In *The Federalist* #47–49 Madison went on to argue that neither sharply drawn institutional boundaries nor appeals to the electorate could be relied upon to maintain the separation of powers. Both methods presupposed the virtues of official lawfulness and electoral nonpartisanship, virtues whose unreliability was attested by experience. Because such "external checks" were ineffective, said Madison in *The Federalist* #51, maintaining the separation of powers would require "internal checks" that linked the officeholders' personal ambitions to their duties. Officials would defend their constitutional prerogatives if they felt that doing so were a means to furthering their personal ambitions. "[A]mbition checking ambition"—not virtue—was the key to constitutional maintenance. And effective checks required each branch to have a hand in the others' functions. For example, the veto is the President's hand in the legislative function.

Madison knew, however, that this partial blending of

power did not go far enough. Power might still be concentrated if all these branches were united in one interest or animated by the same spirit. Thinkers from Aristotle to MONTESQUIEU had taught that constitutions could be maintained at least partly through a balance of social groups such as estates or economic classes. But theorists with democratic pretensions could not institutionalize such social divisions. The problem for the Framers was to prevent a single interest from predominating in a society that had few official distinctions of status and class. Their answer was to rely on the different institutional psychologies of governmental branches whose personnel would represent the different constituencies and perspectives of a large and diverse society. Thus, Madison argued in *The Federalist* #62–63 that because of differences in age, period of CITIZENSHIP, tenure of office, constituency, and, to a lesser degree, legislative function, members of the House of Representatives and Senate would pursue different policies with different consequences for the long term and varying impact on local, national, and international opinion. ALEXANDER HAMILTON wrote in *The Federalist* #70–71 that presidential types would be likely to seek the acclaim that attends success in difficult tasks, especially tasks requiring leaders to stand against and change public opinion. Such differences in institutional psychology, compounded by the federal features of the electoral system and the pluralism of an essentially democratic, secular, and commercial society, were expected to impede the formation of political parties disciplined enough to overcome the moderating influence of separated institutions.

The American system of checks and balances envisions strong executive and judicial branches. Experience had taught the Framers that popular legislatures were a greater threat to the separation of powers than were executives or courts. Accordingly, *The Federalist* #51 rationalized the bicameralism of Congress and the independence of the executive and judicial branches as means of weakening the naturally strongest branch and strengthening the weaker ones. This positive feature of the system complements its negative function of preventing concentrations of power. The Framers thus sought to achieve separation of governmental institutions without sacrificing the capacity for coordinated leadership when times demanded.

The system of checks and balances has worked well in some respects, but not in all. It has discouraged concentrations of power through centralized and disciplined political parties. Although government is fragmented in normal times, the system does permit central leadership in times of crisis, as the presidencies of THOMAS JEFFERSON, ABRAHAM LINCOLN, and FRANKLIN D. ROOSEVELT attest. It has also helped to create a remarkable degree of judicial independence without producing a judiciary seriously at odds with public opinion on any given issue for too long. The system has not worked so well in the case of Congress, which has undermined its own position by a practice of broad DELEGATION OF POWER to the executive and independent agencies. Many such delegations are necessitated by the problems and complexities that have brought the triumph of the administrative state. But far too many delegations are little more than acts of political buckpassing explained by the perception that the way to reelection does not lie in clear positions on controversial questions, but in constituency services and publicity that is politically safe. After the Great Depression and before the Supreme Court's decision in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983), Congress compounded avoidable offense to the separation of powers when it tried to straddle the question of legislative responsibility, limiting many of its buckpassing delegations of power with various versions of the LEGISLATIVE VETO.

Congress's experience shows that there is a limit to the ability of the system to maintain a constitutional arrangement through reliance on personal ambition. Personal ambition sometimes dictates surrendering institutional prerogatives. The same can be said when Presidents compromise firmness in anticipation of elections and when judges propose "judicial self-restraint" in response to threats like court-packing and withdrawals of JURISDICTION. Despite the Framers' theory of checks and balances, officials must at some point respect constitutional duty as something other than mere means to personal ambition.

SOTIRIOS A. BARBER
(1986)

Bibliography

FISHER, LOUIS 1978 *The Constitution Between Friends: Congress, the President, and the Law.* New York: St. Martin's Press.

SHARP, MALCOLM 1938 The Classical American Doctrine of "the Separation of Powers." In Association of American Law Schools, *Selected Essays on Constitutional Law.* Vol. 4:168–194. Chicago: Foundation Press.

VILE, M. J. C. 1967 *Constitutionalism and the Separation of Powers.* Oxford: Clarendon Press.

## CHEROKEE INDIAN CASES

*Cherokee Nation v. Georgia*
5 Peters 1 (1831)
*Worcester v. Georgia*
6 Peters 515 (1832)

The Cherokee Indian Cases prompted a constitutional crisis marked by successful state defiance of the Supreme Court, the Constitution, and federal treaties. The United

States had made treaties with the Georgia Cherokee, as if they were a sovereign power, and pledged to secure their lands. Later, in 1802, the United States pledged to Georgia that in return for its relinquishment of the Yazoo lands (see FLETCHER V. PECK) the United States would extinguish the Cherokee land claims in Georgia. The Cherokee, however, refused to leave Georgia voluntarily in return for wild lands west of the Mississippi. In 1824 Georgia claimed LEGISLATIVE JURISDICTION over all the Indian lands within its boundaries. The Cherokee, who had a written language and a plantation economy, then adopted a CONSTITUTION and declared their sovereign independence. Georgia, which denied that the United States had authority to bind the state by an Indian treaty, retaliated against the Cherokee by a series of statutes that nullified all Indian laws and land claims and divided Cherokee lands into counties subject to state governance. President ANDREW JACKSON supported the state against the Indians, and Congress, too, recognizing that the Indians could not maintain a separate sovereignty within the state, urged them to settle on federally granted land in the west or, if remaining in Georgia, to submit to state laws.

The Cherokee turned next to the Supreme Court. Claiming to be a foreign state within the meaning of Article III, section 2, of the Constitution, the Indians invoked the Court's ORIGINAL JURISDICTION in a case to which a state was a party and sought an INJUNCTION that would restrain Georgia from enforcing any of its laws within Cherokee territory recognized by federal treaties. By scheduling a hearing the Court exposed itself to Georgia's wrath. Without the support of the political branches of the national government, the Court faced the prospect of being unable to enforce its own decree or defend the supremacy of federal treaties against state violation.

The case of Corn Tassel, which suddenly intervened, exposed the Court's vulnerability. He was a Cherokee whom Georgia tried and convicted for the murder of a fellow tribesman, though he objected that a federal treaty recognized the exclusive right of his own nation to try him. On Tassel's application Chief Justice JOHN MARSHALL issued a WRIT OF ERROR to the state trial court and directed the governor of the state to send its counsel to appear before the Supreme Court. Georgia's governor and legislature contemptuously declared that they would resist execution of the Court's writ with all necessary force, denounced the Court's infringement of state SOVEREIGNTY, and hanged Corn Tassel. Justice JOSEPH STORY spoke of "practical NULLIFICATION." Newspapers and politicians throughout the nation took sides in the dispute between the Court and the state, and Congress in 1831 debated a bill to repeal section 25 of the JUDICIARY ACT OF 1789. Although the House defeated the repeal bill, Whigs despondently predicted that the President would not support the Court if it decided the *Cherokee Nation* case contrary to his view of the matter.

The Court wisely decided, 4–2, to deny jurisdiction on the ground that the Cherokee were not a foreign state in the sense of Article III's use of that term. Although Marshall for the Court declared that the Cherokee were a "distinct political society" capable of self-government and endorsed their right to their lands, he candidly acknowledged that the Court could not restrain the government of Georgia "and its physical force." That, Marshall observed, "savors too much of the exercise of political power" and that was what the bill for an injunction asked of the Court.

A year later, however, the Court switched its strategy. At issue in *Worcester* was the constitutionality of a Georgia statute that prohibited white people from residing in Cherokee territory without a state license. Many missionaries, including Samuel Worcester, defied the act in order to bring a TEST CASE before the Supreme Court, in the hope that the Court would endorse Cherokee sovereignty and void the state's Cherokee legislation. Worcester and another, having been sentenced to four years' hard labor, were the only missionaries to decline a pardon; they applied to the Court for a writ of error, which Marshall issued. Georgia sent the records of the case but again refused to appear before a Court that engaged in a "usurpation" of state sovereignty. The state legislature resolved that a reversal of the state court would be deemed "unconstitutional" and empowered the governor to employ all force to resist the "invasion" of the state's administration of its laws. The case was sensationally debated in the nation's press, and nearly sixty members of Congress left their seats to hear the argument before the Supreme Court.

In an opinion by Marshall, with Justice HENRY BALDWIN dissenting, the Court reaffirmed its jurisdiction under section 25, upheld the exclusive power of the United States in Indian matters, endorsed the authority of the Cherokee Nation within boundaries recognized by federal treaties, declared that the laws of Georgia had no force within these boundaries, and held that the "acts of Georgia are repugnant to the Constitution, laws, and treaties of the United States." The Court also reversed the judgment of the Georgia court and commanded the release of Worcester.

Why did the Court deliberately decide on the broadest possible grounds and challenge Georgia? In a private letter, Justice Story, noting that the state was enraged and violent, expected defiance of the Court's writ and no support from the President. "The Court," he wrote, "has done its duty. Let the nation do theirs. If we have a government let its commands be obeyed; if we have not it is as well to know it. . . ." Georgia did resist and Jackson did nothing. He might have made the famous remark, "John Marshall

has made his decision; now let him enforce it." But Jackson knew Marshall's reputation for political craftiness, knew that a majority of Congress resisted all efforts to curb the Court, and knew that public opinion favored the Court and revered its Chief as the nation's preeminent Unionist. Jackson did nothing because he did not yet have to act. The state must first refuse execution of the Court's writ before the Court could order a federal marshal to free Worcester, and it could not issue an order to the marshal without a record of the state court's refusal to obey the writ. Not until the next term of the Court could it decide whether it had a course of action that would force the President either to execute the law of the land or disobey his oath of office. Marshall believed that public opinion would compel Jackson to execute the law. In the fall of 1832, however, Marshall pessimistically wrote that "our Constitution cannot last. . . . The Union has been prolonged thus far by miracles. I fear they cannot continue."

A miracle did occur, making the Court's cause the President's before the Court's next term; the SOUTH CAROLINA ORDINANCE OF NULLIFICATION intervened, forcing Jackson to censure state nullification of federal law. Georgia supported Jackson against South Carolina, and he convinced Georgia's governor that the way to dissociate Georgia from nullification was to free Worcester. The governor pardoned him. Worcester, having won the Supreme Court's invalidation of the Georgia Cherokee legislation, accepted the pardon. The lawyers for the Cherokee persuaded them to desist from further litigation in order to preserve a Unionist coalition against nullificationists. In 1838, long after the crisis had passed, the Cherokees were forcibly removed from their lands. The Court could not save them. It never could. It had, however, saved its integrity ("The Court has done its duty") by defending the supreme law of the land at considerable risk.

LEONARD W. LEVY
(1986)

Bibliography

BURKE, JOSEPH C. 1969 The Cherokee Cases: A Study of Law, Politics, and Morality. *Stanford Law Review* 21:500–531.

WARREN, CHARLES 1923 *The Supreme Court in United States History*, 3 vols. Vol. 2:189–229. Boston: Little, Brown.

## *CHEROKEE NATION v. GEORGIA*

See: Cherokee Indian Cases

## *CHICAGO v. MORALES*
527 U.S. 41 (1999)

During the 1980s and 1990s, cities experienced a marked increase in organized gang activity, often linked to the street sale of drugs. Cities and states, frustrated by the inability of ordinary criminal prohibitions to eliminate gangs, sought new ways to control the presence of gangs in urban areas.

Chicago, in an effort to crack down on—as described in its brief to the Supreme Court—"obviously brazen, insistent and lawless gang members and hangers-on on the public ways" who "intimidate residents" and "destabilize" neighborhoods, authorized its police to arrest anyone milling about "without any apparent purpose" in the company of a suspected gang member. Under the law, police could order any loiterers to disperse and, if they refused, arrest them, even absent any evidence of criminal wrongdoing.

In a 6–3 decision, the Supreme Court declared Chicago's ordinance unconstitutional because of its VAGUENESS. The majority, in an opinion authored by Justice JOHN PAUL STEVENS, explained that the law failed to give the ordinary citizen "adequate notice of what is forbidden and what is permitted" when using the public streets. Moreover, the majority held that "the freedom to loiter for innocent purposes is part of the 'liberty' " protected by the FOURTEENTH AMENDMENT guarantee of DUE PROCESS OF LAW.

In dissent, Justice ANTONIN SCALIA, Justice CLARENCE THOMAS, and Chief Justice WILLIAM H. REHNQUIST accused the majority of improperly crafting a "constitutional right to loiter," despite a long history of anti-loitering laws in every state.

In fact, the MAJORITY OPINION comports with sixty years of PRECEDENT—dating back to *Lanzetta v. United States* (1939)—invalidating vague and standardless laws that target vagrants, suspected criminals, or their associates by criminalizing innocent activity in public. *Morales* serves notice on cities that they cannot sacrifice CIVIL LIBERTIES in their quest to eradicate street gangs.

ADAM WINKLER
(2000)

(SEE ALSO: *Procedural Due Process of Law, Criminal; Vagrancy Laws.*)

## *CHICAGO, BURLINGTON & QUINCY RAILROAD CO. v. CHICAGO*
166 U.S. 226 (1897)

A 7–1 Supreme Court here sustained a $1 award as JUST COMPENSATION for a TAKING OF PROPERTY, holding that the SEVENTH AMENDMENT precluded it from reexamining facts, decided by a jury, which dictated that amount. Although due process required compensation, a nominal sum did not deprive the railroad of either due process or EQUAL PROTECTION. The Court required a "fair and full equivalent for the thing taken by the public" and stressed the neces-

sity for understanding the spirit of due process. "In determining what is DUE PROCESS OF LAW, regard must be had to substance, not to form."

DAVID GORDON
(1986)

## CHICAGO, BURLINGTON & QUINCY RAILROAD CO. v. IOWA

See: Granger Cases

## CHICAGO, MILWAUKEE & ST. PAUL RAILROAD CO. v. ACKLEY

See: Granger Cases

## CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO. v. MINNESOTA
134 U.S. 418 (1890)

This decision, making the courts arbiters of the reasonableness of railroad rates, presaged the Supreme Court's final acceptance of SUBSTANTIVE DUE PROCESS ten years later. The Minnesota legislature had established a commission to inspect rail rates and alter those it deemed unreasonable. A 6–3 Court struck down the statute as a violation of both substantive and PROCEDURAL DUE PROCESS. Justice SAMUEL BLATCHFORD found that the statute neglected to provide procedural due process: railroads received no notice that the reasonableness of their rate was being considered, and the commission provided no hearing or other chance for the railroads to defend their rates. Moreover, Blatchford said that a rate's reasonableness "is eminently a question for judicial investigation, requiring due process of law for its determination." A company, denied the authority to charge reasonable rates and unable to turn to any judicial mechanism for review (procedural due process) would necessarily be deprived "of the lawful use of its property, and thus, in substance, and effect, of the property itself, without due process of law" (substantive due process). In dissent, Justice JOSEPH P. BRADLEY declared that the majority had effectively overruled MUNN V. ILLINOIS (1877). Bradley's opinion explicitly rejected the assertion that reasonableness was a question for judicial determination; it is, he said, "pre-eminently a legislative one, involving considerations of policy as well as of remuneration." If the legislature could fix rates (as precedent had shown), why could it make no such delegation of power to a commission? Indeed, the Court's next step, in REAGAN V. FARMERS' LOAN & TRUST COMPANY (1894), would be the claim of power to void statutes by which the legislature itself directly set rates, and, in SMYTH V. AMES (1898), the Court would reach the zenith, actually striking down a state act for that reason.

DAVID GORDON
(1986)

# CHIEF JUSTICE, ROLE OF THE

The title "Chief Justice" appears only once in the Constitution. That mention occurs not in Article III, the judicial article, but in connection with the Chief Justice's role as presiding officer of the SENATE during an IMPEACHMENT trial of the President. With such a meager delineation of powers and duties in the Constitution, the importance of the office was hardly obvious during the early days of the Republic. Despite President GEORGE WASHINGTON's great expectations for the post, his first appointee, JOHN JAY, left disillusioned and convinced that neither the Supreme Court nor the chief justiceship would amount to anything. Yet, a little over a century later, President WILLIAM HOWARD TAFT stated that he would prefer the office to his own. During that intervening century, an office of considerable power and prestige had emerged from the constitutional vacuum. Since then, the Chief Justice's role has continued to evolve. Today, the office is the product of both the personalities and the priorities of its incumbents and of the institutional forces which have become stronger as the Supreme Court's role in our government has expanded and matured.

Like the other Justices of the Supreme Court, the Chief Justice of the United States is appointed by the President with the ADVICE AND CONSENT of the Senate. He enjoys, along with all other full members of the federal judiciary, life tenure "during his GOOD BEHAVIOR." With respect to the judicial work of the Court, he has traditionally been referred to as *primus inter pares*—first among equals. He has the same vote as each Associate Justice of the Court. His judicial duties differ only in that he presides over the sessions of the Court and over the Court's private CONFERENCE at which the cases are discussed and eventually decided. When in the majority, he assigns the writing of the OPINION OF THE COURT. Like an Associate Justice, the Chief Justice also performs the duties of a circuit Justice. A circuit Justice must pass upon various applications for temporary relief and BAIL from his circuit and participate, at least in a liaison or advisory capacity, in the judicial administration of that circuit. By tradition, the Chief Justice is circuit Justice for the Fourth and District of Columbia Circuits.

In addition to his judicial duties, the Chief Justice has, by statute, responsibility for the general administration of

the Supreme Court. While the senior officers of the Court are appointed by the entire Court, they perform their daily duties under his general supervision. Other employees of the Court must be approved by the Chief Justice.

The Chief Justice also serves as presiding officer of the JUDICIAL CONFERENCE OF THE UNITED STATES. The Conference, composed of the chief judge and a district judge from each circuit, has the statutory responsibility for making comprehensive surveys of the business of the federal courts and for undertaking a continuous study of the rules of practice and procedure. The Chief Justice, as presiding officer, must appoint the various committees of the Conference which undertake the studies necessary for the achievement of those statutory objectives. He must also submit to the Congress an annual report of the proceedings of the Conference and a report as to its legislative recommendations. Other areas of court administration also occupy the Chief Justice's attention regularly. He has the authority to assign, temporarily, judges of the lower federal courts to courts other than their own and for service on the Panel on Multidistrict Litigation. He is also the permanent Chairman of the Board of the Federal Judicial Center which develops and recommends improvements in the area of judicial administration to the Judicial Conference.

From time to time, Congress has also assigned by statute other duties to the Chief Justice. Some are related to the judiciary; others are not. For instance, he must appoint some of the members of the Commission on Executive, Legislative, and Judicial Salaries; the Advisory Corrections Council; the Federal Records Council; and the National Study Commission on Records and Documents of Federal Officials. He also serves as Chancellor of the Smithsonian Institution and as a member of the Board of Trustees of both the National Gallery of Art and the Joseph H. Hirshhorn Museum and Sculpture Garden.

In addition to these formal duties, the Chief Justice is considered the titular head of the legal profession in the United States. He traditionally addresses the American Bar Association on the state of the judiciary and delivers the opening address at the annual meeting of the American Law Institute. He is regularly invited to other ceremonial and substantive meetings of the bar. Finally, as head of the judicial branch, he regularly participates in national observances and state ceremonies honoring foreign dignitaries.

The foregoing catalog of duties, while describing a burdensome role, does not fully indicate the impact of the Chief Justice on the Supreme Court's work. For instance, with respect to his judicial duties, the Chief Justice, while nominally only "first among equals," may exercise a significant influence on the Court's decision-making process and, consequently, on its final judicial work product. His most obvious opportunity to influence that process is while presiding at the Court's conference. He presents each case initially and is the first to give his views. Thus, he has the opportunity to take the initiative by directing the Court's inquiry to those aspects of the case he believes are crucial. Moreover, although the Justices discuss cases in descending order of seniority, they vote in the opposite order. Therefore, while speaking first, the "Chief," as he is referred to by his colleagues, votes last and commits himself, even preliminarily, only after all of the associates have explained their positions and cast their votes. If he votes with the majority, he may retain the opinion for himself or assign it to a colleague whose views are most compatible with his own. In cases where there is significant indecision among the Justices, it falls to the "Chief" to take the initiative with respect to the Court's further consideration of the case. He may, for instance, suggest that further discussion be deferred until argument of other related cases or he may request that several Justices set forth their views in writing in the hope that such a memorandum might form the basis of a later opinion.

There are also more indirect but highly significant ways by which the "Chief" can influence the decision-making process. As presiding officer during open session, he sets a "tone" which can make ORAL ARGUMENT either a formal, stilted affair or a disciplined but relaxed, productive dialogue between the Court and counsel. Even the Chief Justice's "administrative" duties within the Court can have a subtle influence on the Court's decision-making processes. The efficient administration of the Court's support services as well as the employment of adequate staff personnel can nurture an ambiance conducive to harmonious decision making.

While occupancy of the Court's center chair no doubt gives the incumbent an enhanced capacity to influence jurisprudential developments, there are clear limitations on the exercise of that power. The Court is a collegial institution; disagreement on important issues is a natural phenomenon. In such a context, as Justice WILLIAM H. REHNQUIST put it in a 1976 article: "The power to calm such naturally troubled waters is usually beyond the capacity of any mortal chief justice. He presides over a conference not of eight subordinates, whom he may direct or instruct, but of eight associates who, like him, have tenure during good behavior, and who are as independent as hogs on ice. He may at most persuade or cajole them." Political acumen is often as important as intellectual brilliance. Whatever the Chief's view of his power, he must remember that, in the eyes of the associates, "the Chief Justice is not entitled to a presumption that he knows more law than other members of the Court . . . ," as Justice Rehnquist said in chambers in *Clements v. Logan* (1981). Other institutional concerns further constrain the Chief's ability

to guide the Court's decisions. All Chief Justices have recognized, although to varying degrees, a responsibility to see not only that the Court gets its business done but also that it does so in a manner which maintains the country's confidence. Sometimes, those objectives require that the Chief refrain from taking a strong ideological stance and act as a mediator in the formation of a majority. Similarly, while the assignment power can be a powerful tool, it must be exercised to ensure a majority opinion that advances, not retards, growth in the law. Even the prerogative of presiding over the conference has a price. The Chief Justice must spend significant additional time reviewing all the petitions filed with the Court. As the performance of Chief Justice CHARLES EVANS HUGHES demonstrated, perceiving those areas of ambiguity and conflict that are most troublesome in the administration of justice is essential to leading effectively the discussion of the conference. For the same reason, the Chief must take the time to master the intricacies of the Court's procedure.

The extrajudicial responsibilities of the Chief Justice can also place him at a distinct disadvantage in influencing the Court's jurisprudential direction. The internal decision-making process of the Court is essentially competitive. There is nothing so humble as a draft opinion with four votes and nothing so arrogant as one with six. Such a process does not easily take into account that one participant must regularly divert his attention because of other official responsibilities. Moreover, there is a special intellectual and physical cost in shifting constantly between the abstract world of the appellate judge and the pragmatic one of the administrator. A Chief Justice who takes all his responsibilities seriously must experience the fatiguing tension that inevitably results from such bifurcation of responsibilities. Here, however, there may be compensating considerations. Whatever advantage the Chief may lose in the judicial bargaining because of administrative distractions may well be partially recovered by the prestige gained by his accomplishments beyond the Court. The Court has benefited from a strong Chief Justice's defense against specific political threats such as President FRANKLIN D. ROOSEVELT's Court-packing plan. It has also benefited when the Chief's efforts have resulted in legislation making its own workload more manageable. Chief Justice Taft's support of the JUDICIARY ACT OF 1925, for instance, gave the Court more control over its own docket and, consequently, increased capacity to address, selectively, the most pressing issues. In modern times, the tremors of the litigation explosion that has engulfed the lower courts have been felt on the Supreme Court. The accomplishments of a Chief Justice in alleviating these problems cannot be overlooked by his associates.

Certainly, with respect to nonjudicial matters, a Chief Justice's special responsibility for institutional concerns has commanded respect from the associates. Even such greats as Justice LOUIS D. BRANDEIS regularly consulted the Chief on matters that might have an impact on the reputation of the Court as an institution. This same identification of the Chief Justice with the Supreme Court as an institution has made some Chief Justices the acknowledged spokesperson for both the Supreme Court and the lower federal courts before the other branches of government and, indeed, before the public.

With no specific constitutional mandate to fulfill, early Chief Justices, most especially JOHN MARSHALL, molded the office in which they served just as they molded the courts over which they presided. In those formative periods, the dominance of personal factors was understandable. Today, however, significant institutional forces also shape the office. In addition to the extrajudicial duties imposed by Congress, the Court, now a mature institution of American government, exerts through its traditions a powerful influence over every new incumbent of its bench—including the person in the center chair.

KENNETH F. RIPPLE
(1986)

Bibliography

FRANKFURTER, FELIX 1953 Chief Justices I Have Known. *Virginia Law Review* 39:883–905.

FREUND, PAUL A. 1967 Charles Evans Hughes as Chief Justice. *Harvard Law Review* 81:4–43.

REHNQUIST, WILLIAM H. 1976 Chief Justices I Never Knew. *Hastings Constitutional Law Quarterly* 3:637–655.

SWINDLER, WILLIAM F. 1971 The Chief Justice and Law Reform. *The Supreme Court Review* 1971:241–264.

## CHILD BENEFIT THEORY

Protagonists of aid to religious schools have sought to justify the practice constitutionally through what has become known as the child benefit theory. The establishment clause, they urge, forbids aid to the schools but not to the children who attend them. Recognizing that the schools themselves benefit from the action, they argue that the benefit is secondary to that received by the pupils, and note that the courts have long upheld governmental assistance to children as an aspect of the POLICE POWER.

The recognition is at least implicit in Supreme Court decisions through BOARD OF EDUCATION V. ALLEN (1968). Thus, in *Bradfield v. Roberts* (1899), the Court upheld the validity under the establishment clause of a grant of federal funds to finance the erection of a hospital in the DISTRICT OF COLUMBIA, to be maintained and operated by an order of nuns. The Court reasoned that the hospital corporation was a legal entity separate from its incorporators, and concluded that the aid was for a secular purpose.

Later court decisions ignored this fiction, consistently upholding grants to religious organizations, corporate or noncorporate, to finance hospitals that, though owned and operated by churches, nevertheless were nonsectarian in their admission policies, and generally benefited the patients.

In EVERSON V. BOARD OF EDUCATION (1947) the Court upheld use of tax-raised funds to finance transportation to religious schools, in part because the program had the secular purpose to enable children to avoid the risks of traffic or hitchhiking in going to school. In COCHRAN V. LOUISIANA STATE BOARD OF EDUCATION (1930) and *Board of Education v. Allen* (1968) the Court similarly sustained laws financing the purchase of secular textbooks for use in parochial schools. The beneficiaries of the laws, the Court asserted, were not the schools but the children who attended them.

More recent decisions, however, manifest a weakening of the theory. In *Board of Education v. Nyquist* (1973) the Court refused to uphold a law to finance costs of maintenance and repair in religious schools, notwithstanding a provision that the program's purpose was to insure the health, welfare, and safety of the school children.

Two years later, in *Meek v. Pittenger*, the Court refused to extend *Allen* to encompass the loan of instructional materials to church-related schools, even though the materials benefited nonpublic school children and were provided for public school children. Finally, in WOLMAN V. WALTER (1977) the Court, unwilling to overrule either *Everson* or *Allen*, nevertheless refused to extend them to encompass educational field trip transportation to governmental, industrial, cultural, and scientific centers.

In these later cases, the Court has rejected the argument that if public funds were not used for these support services, many parents economically unable to pay for them would have to transfer their children to the public schools in violation of their own and of their children's religious conscience.

LEO PFEFFER
(1986)

(SEE ALSO: *Establishment of Religion; Separation of Church and State.*)

Bibliography

DRINAN, ROBERT F., S. J. 1963 *Religion, the Courts, and Public Policy.* Chap. 5. New York: McGraw-Hill.

PFEFFER, LEO 1967 *Church, State and Freedom*, rev. ed. Chap. 14. Boston: Beacon Press.

## CHILD LABOR AMENDMENT

Two years after BAILEY V. DREXEL FURNITURE CO. (1922) when for the second time the Supreme Court invalidated a federal child labor law, Congress approved a constitutional amendment empowering it to regulate on the subject. But from 1924 until 1938, the amendment languished in state legislatures, with only twenty-eight of the requisite thirty-six having ratified it by 1938.

Led by the National Association of Manufacturers, critics contended that the proposed amendment endangered traditional state powers and local control of PRODUCTION. The Granges also lobbied in agricultural states in the South and Midwest, arguing that such congressional power would threaten the use of children on family farms. Religious groups maintained that the amendment would lead to federal control of education and increase the costs of educating children. Newspapers overwhelmingly opposed the amendment on the grounds that they would be deprived of delivery boys.

The Court's decision in the WAGNER ACT CASES (1937) renewed interest in congressional legislation. The FAIR LABOR STANDARDS ACT in 1938 outlawed child labor, and in UNITED STATES V. DARBY (1941), the Court sustained the legislation and overturned its own precedents. The new law and the *Darby* decision combined to make the amendment unnecessary.

The lengthy ratification process prompted Congress to impose time limits on many subsequent amendments. The child labor amendment also raised a knotty constitutional problem when one state reversed its position (in a disputed vote) and approved ratification. That action was challenged in COLEMAN V. MILLER (1939), but the Court sidestepped the issue as a POLITICAL QUESTION and left its resolution to Congress.

STANLEY I. KUTLER
(1986)

Bibliography

WOOD, STEPHEN 1968 *Constitutional Politics in the Progressive Era: Child Labor and the Law.* Chicago: University of Chicago Press.

## CHILD LABOR CASE

See: *Hammer v. Dagenhart*

## CHILD LABOR TAX ACT
40 Stat. 1138 (1918)

In HAMMER V. DAGENHART (1918), a 5–4 Supreme Court voided the Child Labor Act of 1916, which had forbidden carriers from transporting the products of child labor in INTERSTATE COMMERCE, as a prohibition, not a regulation, of commerce. This distinction had been thought rejected

as early as CHAMPION V. AMES (1903). Progressive reformers, intent on abolishing child labor, had shifted the basis of their efforts from the COMMERCE CLAUSE to the TAXING POWER, thus invoking a new set of powerful precedents, notably MCCRAY V. UNITED STATES (1904).

In late 1918 Congress passed a Revenue Act to which had been added an amendment known as the Child Labor Tax Act. A ten percent EXCISE TAX was imposed on the net profits from the sale of child labor-produced items. This tax extended to any factory, mine, or mill employing children under fourteen, or to the age of sixteen under certain circumstances. Congressmen from the major cotton textile manufacturing states, southern Democrats, cast nearly all the negative votes.

In BAILEY V. DREXEL FURNITURE CO. (1922) an 8–1 Court invalidated the act, *McCray* and UNITED STATES V. DOREMUS (1919) notwithstanding, as a violation of the powers reserved to the states by the TENTH AMENDMENT.

DAVID GORDON
(1986)

Bibliography

WOOD, STEPHEN B. 1968 *Constitutional Politics in the Progressive Era: Child Labor and the Law.* Chicago: University of Chicago Press.

## CHILD LABOR TAX CASE

See: *Bailey v. Drexel Furniture Co.*

## CHILD PORNOGRAPHY

Every year, thousands of children are compelled to engage in pornographic acts for the production of films and photographs. Child pornography is one of the most insidious forms of child abuse because the victimization does not stop with the physical acts of abuse. In the words of Justice BYRON R. WHITE, "the pornography's continued existence causes the child victims continuing harm by haunting the children in years to come." Because child pornography is child abuse, the Supreme Court has held that it is not protected by the FIRST AMENDMENT. In NEW YORK V. FERBER (1982) the Court ruled that the production and distribution of child pornography can be prosecuted even if the material does not meet the legal test for OBSCENITY because, even if it is not legally obscene, it is still the product of child abuse and, hence, a proper object of state regulation.

In *Osborne v. Ohio* (1990) the Court extended the doctrine of *Ferber* to cover the private possession of child pornography. Ohio prosecuted Osborne for possessing child pornography in violation of a state statute. Osborne contended that the First Amendment prohibited the state from proscribing private possession, but the Supreme Court disagreed by a vote of 6–3. (Osborne's conviction was nevertheless overturned on procedural grounds.) The Court noted that much of the production and sale of child pornography has gone underground and is therefore difficult to prosecute. The only effective way to stop the child abuse by pornographers is by banning possession of the material outright.

Writing for the dissenters, Justice WILLIAM J. BRENNAN argued that the Ohio statute suffered from OVERBREADTH because of its loose definition of what constituted child pornography. Even if the statute had not been overbroad, however, Brennan would have invalidated it. Recalling the words of STANLEY V. GEORGIA (1969), Brennan said that "if the First Amendment means anything, it means that the State has no business telling a man, sitting alone in his own house, what book he may read or what films he may watch."

Brennan's analysis was inapposite to the case at hand, however. No adult has the right to compel a child to appear in a pornographic film or photo; hence, it stretches the imagination to claim that someone else has the right to possess (and derive pleasure from) what the pornographer had no right to produce in the first place. Laws against the possession of child pornography not only help to stop the abuse of children through the production of the pornography; they also protect the child victims' right to privacy after the unlawful photographs or films have been produced.

JOHN G. WEST, JR.
(1992)

Bibliography

ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 1981 *Attorney General's Commission on Pornography, Final Report*, part II, chapter 7. Washington, D.C.: U.S. Government Printing Office.

## CHILDREN AND THE FIRST AMENDMENT

Because many conceptions of the FIRST AMENDMENT's protection of speech and press are premised on a model of human rationality and human choice and because traditional views about children take them to be incapable of having the rationality and exercising the capacity of choice assumed for adults, issues about the free speech rights of children have always been problematic. Indeed, the need to protect children from harmful ideas they may be incapable of evaluating has been explicitly a part of the free speech tradition since JOHN STUART MILL's *On Liberty.*

Treating minors as different for free speech purposes has been a recurring feature of OBSCENITY law. Although the Supreme Court reaffirmed in *Pinkus v. United States* (1978) that it is impermissible to judge the obscenity of material directed primarily to adults on the basis of its possible effect on children, the Court has also held in *Ginsberg v. New York* (1968) that where sexually explicit material is directed at juvenile readers or viewers it is permissible to apply the test for obscenity in light of a juvenile rather than an adult audience. In addition, the Court in NEW YORK V. FERBER (1982) relied on the importance of protecting juvenile performers in allowing CHILD PORNOGRAPHY prosecution for the distribution of material not legally obscene, although it is clear that analogous justifications for restrictions on publications remain impermissible with respect to adult participants. Still, the Court has been sensitive to the likely overuse of children-protecting rationales for restricting speech, and although in FEDERAL COMMUNICATIONS COMMISSION V. PACIFICA FOUNDATION (1978) it relied on a protection of children rationale in upholding restrictions on the times during which sexually explicit or offensive radio programs might be broadcast, in *Sable Communications of California, Inc. v. FCC* (1989) it unanimously struck down a federal law restricting "indecent" telephone communications because of an insufficient showing that a restriction of this magnitude was necessary to protect children. *Sable* thus continued a tradition going back at least to BUTLER V. MICHIGAN (1957), in which Justice FELIX FRANKFURTER made clear that a law reducing the adult population to reading only what was fit for children would be an impermissible encroachment on First Amendment freedoms.

More commonly, the issue has arisen in the context of restrictions on speech in the public schools. Although it is so obvious as never to have generated a Supreme Court case that children as speakers in the PUBLIC FORUM or other open environment have the same free speech rights as adults, the question is more complicated with reference to speech within the confines of the public schools. In upholding a student's right to wear a protest armband even in class, the Supreme Court in TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT (1969) observed that "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" and proceeded to hold content-based restrictions on student speech in the schools invalid unless supported by evidence of actual or potential "disturbance," "disruption," or "disorder."

Both the language in *Tinker* and its "disturbance" standard proved difficult to square, however, with the fact that much of the mission of the schools involves controls on communication, of which the most obvious is the hardly unconstitutional practice of rewarding certain answers and penalizing others. As a result, subsequent cases, themselves frequently criticized as too much of a departure from *Tinker* and too easy an acquiescence to teacher or administrator authority, have tempered the *Tinker* approach. In BETHEL SCHOOL DISTRICT V. FRASER (1986) the Court upheld disciplinary action against a high-school student who had made a sexually suggestive, but plainly not legally obscene, speech in a school assembly, and in HAZELWOOD SCHOOL DISTRICT V. KUHLMEIER (1988), the Court allowed the school to exercise content-based control over a school-sponsored student newspaper produced on school property with school resources, the writing and editing of which was part of a journalism course offered by the school. More significantly, *Hazelwood* explicitly substituted a seemingly more lenient "reasonableness" standard for the *Tinker* "disturbance" standard, although it remains too early to assess the actual import of the new approach. It does seem clear that the recent cases represent a willingness to defer to decisions of school authorities more than has been the case in the past and a consequent willingness to allow school authorities at the primary and secondary level to choose to have an "indoctrination" rather than a "market place of ideas" model as the major purpose of primary and secondary education. Thus, the recent trend will likely result in little judicial review of content-based restrictions on student speech within the primary and secondary schools. But the Court's unwillingness to overrule *Tinker*, combined with decisions like BOARD OF EDUCATION V. PICO (1982), dealing (unclearly) with political censorship of school libraries, indicates that judicial intervention remains appropriate where the content-based restrictions are excessively viewpoint based or where they stem not from the decisions of primary professionals such as teachers and principals, but rather from the selective involvement of more political and less professional elected officials.

FREDERICK SCHAUER
(1992)

Bibliography

GARVEY, JOHN 1979 Children and the First Amendment. *Texas Law Review* 57:321–366.

——— 1981 Freedom and Choice in Constitutional Law. *Harvard Law Review* 94:1756–1794.

YUDOF, MARK G. 1984 Library Book Selection and the Public Schools: The Quest for the Archimedean Point. *Indiana Law Journal* 59:527–564.

## CHILDREN'S RIGHTS

The law of childhood is complex, but as a general legal proposition, a child is someone who has not yet reached

the age of civil majority. Each state has the authority to determine the age of majority for its own residents, and in most states that age is now eighteen. Prior to 1971, the age of majority was typically twenty-one, but after the ratification of the TWENTY-SIXTH AMENDMENT, which gave eighteen-year-olds the right to vote in federal elections, most states lowered the age of majority, as well as the voting age for state elections.

In general, children have less liberty than adults and are less often held accountable for their actions. Parents have legal power to make a wide range of decisions for the child, although they are held responsible by the state for the child's care and support. Children have a special power to avoid contractual obligations but are not normally entitled to their own earnings and cannot manage their own property. Moreover, persons younger than certain statutory limits are not allowed to vote, hold public office, work in various occupations, drive a car, buy liquor, or be sold certain kinds of reading material, quite apart from what either they or their parents may wish.

Although a variety of civic and personal rights accrue at the age of majority, rights to engage in various "adult" activities may occur either before or after the age of eighteen. For example, many states restrict the legal access of nineteen- and twenty-year-olds to alcoholic beverages. On the other hand, most states permit sixteen- and seventeen-year-olds to secure licenses to drive automobiles. State child labor laws typically permit young people who are sixteen or seventeen to work, particularly outside of school hours, although federal law prohibits the employment of children under eighteen in hazardous occupations. A minor who is self-supporting and living away from home may, through emancipation, obtain a broad range of adult rights.

When advocates speak of children's rights, they may have in mind either of two quite contradictory notions. One notion focuses on children's basic needs, and the obligations to satisfy those needs. The other focuses on autonomy and choice.

At times, the word "right" is used to describe the duties of others—typically parents or state officials—to satisfy what are seen as a child's basic needs. Thus, claims are made that a child has or should have a legal right to education, adequate food and shelter, and even love, affection, discipline, and guidance. The federal Constitution has not been interpreted to give a child a substantive right to adequate education or care, although state law sometimes creates such duties. For example, every state provides for free public education, typically through high school, and many state constitutions require as much. Although the Supreme Court decided in SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ (1973) that education is not a "fundamental" right, at least for purposes of requiring strict scrutiny under the EQUAL PROTECTION clause, the Court acknowledged in BROWN V. BOARD OF EDUCATION (1954) that education is "perhaps the most important function of state and local governments." There is no constitutional right to parental love, but opinions such as PIERCE V. SOCIETY OF SISTERS (1925) have suggested that children as well as parents have an interest of constitutional dimension in preserving the parent-child relationship. State child-neglect statutes do impose on parents an obligation to provide adequate custodial care. In all events, a child's "right" to such things as an education or minimally adequate care has little to do with the protection of choice on the part of a particular child. A judge usually does not ask a physically abused child whether she wants to remain with her parents when the responsible authorities believe they cannot protect her from further harm if she remains at home. Compulsory education laws and child labor laws do not give an unhappy eleven-year-old child the legal right to pursue an education by dropping out of school and taking a job.

A second, very different, notion of "children's rights" emphasizes autonomy, choice, and liberty. Claims asserting this sort of right have arisen in a variety of contexts: procedural claims in JUVENILE PROCEEDINGS and in schools (see GOSS V. LOPEZ); choices about abortion or BIRTH CONTROL; access to reading material (see GINSBERG V. NEW YORK); and involvement in political protests (see TINKER V. DES MOINES SCHOOL DISTRICT). Usually the challenge is to some form of state paternalism; but sometimes the minor's claim involves the assertion that he should have the "right" to act independently of his parents. Because the liberty of minors is much more restricted than that of adults, reformers have sometimes asserted that adolescents should have the right to adult status, at least in particular settings. A few have even suggested a children's liberation movement to end the double standard of morals and behavior for adults and children.

The definition of "children's rights" necessarily involves the allocation of power and responsibility among the child, the family, and the state. Taking contemporary constitutional doctrine at face value, three basic principles bear on this allocation. The first principle concerns the children themselves, and the notion that as individuals they have constitutional rights. The Supreme Court declared in IN RE GAULT (1967), the seminal children's rights case, "whatever may be their precise impact, neither the FOURTEENTH AMENDMENT nor the BILL OF RIGHTS is for adults alone."

The second principle concerns parents and the notion that parents have primary authority over the child. Children are part of families, and our traditions emphasize the primacy of the parental role in child-rearing. The rights of children cannot be defined without reference to their parents. The Court has suggested that parental authority

also has a constitutional dimension: the state may not intrude too deeply into the parent-child relationship. Drawing on this principle, the Court held in WISCONSIN V. YODER (1972) that Wisconsin could not compel children to attend public schools when their old-order Amish parents believed that public schooling interfered with their raising of their children as their religion dictates. Nor may a state require all children to attend public school when there are private schools that meet legitimate regulatory standards.

The third principle concerns the state. It suggests that the state, in the exercise of its *parens patriae* power, has a special responsibility to protect children, even from their parents. The state's interest in protecting children has frequently been characterized as "compelling" and has been drawn on to justify a variety of child protective measures that constrain the liberty of parents and children alike. "Parents may be free," declared the Supreme Court in PRINCE V. MASSACHUSETTS (1944), "to become martyrs themselves. But it does not follow that they are free, under free and identical circumstances, to make martyrs of their children before they reach the age of full and legal discretion when they can make that choice for themselves."

Any one of these three principles, if taken very far, cuts deeply into the others. For example, to the extent that children, as individuals, are given autonomy rights, limits are necessarily imposed on parental rights to control their behavior or socialization. Recognition of child autonomy also limits the state's right to constrain a child's conduct in circumstances where adult conduct could not be similarly constrained. Some rights of child autonomy would disable the state from having special protective legislation for children. Broad interpretation of the state's *parens patriae* power to intervene to protect children necessarily will diminish both the parental role in child-rearing and the child's role in decision making. Similarly, an expansive interpretation of parents' rights to control and govern their children necessarily limits the state's ability to protect children, or to ensure child autonomy.

The Supreme Court's decisions concerning children's rights evidence these tensions. For example, the *Tinker* decision, emphasizing child autonomy, declared that children have First Amendment rights to engage in peaceful political protest within the schools. On the other hand, the *Ginsberg* decision, emphasizing state protection of children, determined that the state could criminally punish the sale to minors of sexually explicit materials that an adult would have a constitutional right to receive. (See OBSCENITY.) In its decisions concerning juvenile delinquency proceedings, the Court has extended a broad range of procedural rights to minors, and yet also determined that a juvenile court need not provide an accused young person with TRIAL BY JURY. In PARHAM V. J. R. (1979) the Court held that due process does not require a hearing before the commitment of a minor by a parent to a state mental hospital. Similarly, although the *Pierce* and *Yoder* opinions emphasized the primacy of the parental role in child-rearing, *Prince*, in enforcing a child labor law, emphasized the state's *parens patriae* obligation to protect children.

The Supreme Court's decisions involving the abortion rights of minors suggest that a state may not give parents an absolute "veto" over a pregnant minor's decision to have an abortion (PLANNED PARENTHOOD OF CENTRAL MISSOURI V. DANFORTH, 1976), but may require parental notification, at least for younger pregnant teenagers still living at home (*H. L. v. Matheson*, 1981). And in *Planned Parenthood v. Ashcroft* (1983) the Court upheld a state law requiring either parental or judicial consent to a minor's abortion; under the law the court must approve the abortion if the minor is sufficiently mature to make the abortion decision, or, alternatively, if the abortion is in the minor's best interests.

In sum, the Constitution has not been interpreted to prohibit the state from treating children differently from adults. Because children often lack adult capacity and maturity and need protection, and because of the special relationship of children to their families, giving children the same rights and obligations as adults would often do them a substantial disservice. To assume adult roles, children need to be socialized. The Constitution does not prohibit the use of state or parental coercion in this task of socialization. But, because ours is a society where adults are socialized for autonomous choice, there are necessarily some limits, even for children. In determining the contour of children's constitutional rights, then, the Supreme Court appears to be seeking to recognize the moral autonomy of children as individuals without abandoning children to their rights.

ROBERT H. MNOOKIN
(1986)

Bibliography

HAFEN, BRUCE C. 1976 Children's Liberation and the New Egalitarianism: Some Reservations about Abandoning Youth to Their "Rights." *Brigham Young University Law Review* 1976:605–658.

MNOOKIN, ROBERT H. 1978 *Child, Family and State.* Boston: Little, Brown.

———, ed. 1985 *In the Interest of Children.* New York: W. H. Freeman & Co.

TEITELBAUM, LEE E. 1980 Foreword: The Meaning of Rights of Children. *New Mexico Law Review* 10:235–253.

WALD, MICHAEL S. 1979 Children's Rights: A Framework for Analysis. *University of California, Davis, Law Review* 12: 255–282.

YOUTH LAW CENTER 1982 Legal Rights of Children in the

United States of America. *Columbia Human Rights Law Review* 13:675–743.

## CHILD SUPPORT RECOVERY ACT
106 Stat. 3403 (1992)

The Child Support Recovery Act (CSRA) provides that anyone who willfully fails to pay "past due support" for a child living in another state may be fined or imprisoned. "Past due support" means court-ordered obligations that either have been unpaid for more than a year or exceed $5,000. Congress enacted the CSRA to assist the efforts of states to collect unpaid child support. Congress estimated that the gap between the child support owed and that actually paid was approximately $5 billion annually. It also expressed concern that this deficit contributes to the increase in the cost of federal welfare assistance, much of which goes to single-parent families.

The constitutionality of the act has been questioned since its passage in 1992. Several federal district courts held that the CSRA exceeded the authority of Congress under the COMMERCE CLAUSE, relying heavily on the Supreme Court's decision in UNITED STATES V. LÓPEZ (1995). By mid-1998, however, every federal court of appeals that had reviewed the act had held it constitutional. Although the states have traditionally regulated domestic relationships, the courts have characterized the CSRA either as a regulation of debts owed in INTERSTATE COMMERCE or as regulation of an activity that substantially affects interstate commerce. Moreover, the CSRA only applies to child support obligations owed by a parent for a dependent child residing in a different state. The courts have also rejected arguments based on the TENTH AMENDMENT and NEW YORK V. UNITED STATES (1992) because the act does not direct state officials to do anything. The CSRA does not interfere with state child support determinations; rather, it is an attempt to enforce those state-determined obligations when the obligations take on an interstate character.

JAY S. BYBEE
(2000)

(SEE ALSO: *Federalism.*)

Bibliography

BURDETTE, KATHLEEN A. 1996 Making Parents Pay: Interstate Child Support Enforcement After *United States v. López*. *University of Pennsylvania Law Review* 144:1469–1528.

CALHOUN, JANELLE T. 1995 Interstate Child Support Enforcement System: Juggernaut of Bureaucracy. *Mercer Law Review* 46:921–976.

SIFF, ANDREW M. 1997 *United States v. López* and the Child Support Recovery Act of 1992: Why a Nice Idea Must Be Declared A Casualty of the Struggle to Save Federalism. *Cornell Journal of Law and Public Policy* 6:753–813.

## CHILD WITNESSES

See: *Coy v. Iowa; Maryland v. Craig*

## CHILLING EFFECT

Law is carried forward on a stream of language. Metaphor not only reflects the growth of constitutional law but nourishes it as well. Since the 1960s, when the WARREN COURT widened the domain of the FIRST AMENDMENT, Justices have frequently remarked on laws' "chilling effects" on the FREEDOM OF SPEECH. A statute tainted by VAGUENESS or OVERBREADTH, for example, restricts the freedom of expression not only by directly subjecting people to the laws' sanctions but also by threatening others. Because the very existence of such a law may induce self-censorship when the reach of the law is uncertain, the law may be held INVALID ON ITS FACE. The assumed causal connection between vague legislation and self-censorship was made by the Supreme Court as early as HERNDON V. LOWRY (1937); half a century later, circulating the coinage of Justice FELIX FRANKFURTER, lawyers and judges express similar assumptions in the language of chilling effects.

The assumption plainly makes more sense in some cases than it does in others. For a law's uncertainty actually to chill speech, the would-be speaker must be conscious of the uncertainty. Yet few of us go about our day-to-day business with the statute book in hand. A statute forbidding insulting language may be vague, but its uncertainty is unlikely to have any actual chilling effect on speech in face-to-face street encounters. Yet a court striking that law down—even in application to one whose insults fit the Supreme Court's narrow definition of FIGHTING WORDS—is apt to speak of the law's chilling effects.

For chilling effects that are real rather than assumed, we must look to institutional speakers—publishers, broadcasters, advertisers, political parties, groups promoting causes—who regularly inquire into the letter of the law and its interpretation by the courts. Magazine editors, for example, routinely seek legal counsel about defamation. Here the uncertainty of the law's reach does not lie in any statutory language, for the law of libel and slander is largely the product of COMMON LAW judges. It was a concern for chilling effects, however, that led three concurring Justices in NEW YORK TIMES V. SULLIVAN (1964) to advocate an absolute rule protecting the press against damages for the libel of a public official. The majority's principle in the case, which would allow damages when a newspaper defames an official knowing that its statement

is false, or in reckless disregard of its truth or falsity, may, indeed, chill the press. Even slight doubt about information may make an editor hesitate to publish it, for fear that it may turn out to be false—and that a jury years later will decide it was published recklessly. The concern is not to protect false information, but that doubtful editors will play it safe, suppressing information that is true.

Conversely, when the Justices are persuaded that the law's threat will not have the effect of chilling speech, they are disinclined to use the overbreadth doctrine. A prominent modern example is the treatment of COMMERCIAL SPEECH. Because advertising is profitable, and advertisers seem unlikely to be chilled by laws regulating advertising, such laws are not subject to challenge for overbreadth.

The worry, when a court discusses chilling effects, is that a law's uncertainty will cause potential speakers to censor themselves. Thus, an overly broad law is subject to constitutional challenge even by one whose own speech would be punishable under a law focused narrowly on speech lying outside First Amendment protection. The defendant in court stands as a surrogate for others whose speech would be constitutionally protected—but who have been afraid to speak, and thus have not been prosecuted, and cannot themselves challenge the law. Whether or not this technique amounts to a dilution of the jurisdictional requirements of STANDING or RIPENESS, it allows courts to defend against the chilling effects of unconstitutional statutes that would otherwise elude their scrutiny.

KENNETH L. KARST
(1986)

Bibliography

AMSTERDAM, ANTHONY G. 1960 The Void-for-Vagueness Doctrine in the Supreme Court. *University of Pennsylvania Law Review* 109:67–116.

NOTE 1970 The First Amendment Overbreadth Doctrine. *Harvard Law Review* 83:844–927.

SCHAUER, FREDERICK 1978 Fear, Risk and the First Amendment: Unraveling the "Chilling Effect." *Boston University Law Review* 5:685–732.

## *CHIMEL v. CALIFORNIA*
395 U.S. 752 (1969)

In *Chimel* the Supreme Court considerably narrowed the prevailing scope of SEARCH INCIDENT TO ARREST, by limiting the search to the person of the arrestee and his immediate environs. The Court thus ended a divisive, decades-long debate on the subject.

The principle that officers executing a valid arrest may simultaneously search the arrestee for concealed weapons or EVIDENCE has never been challenged; it is rooted in COMMON LAW, and was recognized by the Court in WEEKS V. UNITED STATES (1914) as an emergency exception to the FOURTH AMENDMENT's warrant requirement. That the search may extend beyond the person to the premises in which the arrest is made was recognized in AGNELLO V. UNITED STATES (1925). The extension, too, has never been challenged; it seems sensible to permit officers to eliminate the possibility of a suspect's seizing a gun or destroying evidence within his reach though not on his person. The permissible scope of a warrantless search of the premises has, however, embroiled the Court in controversy.

Some Justices would have allowed a search of the entire place, arguing that after an arrest, even an extensive search is only a minor additional invasion of privacy. The opposing camp, led by Justice FELIX FRANKFURTER, condemned such wholesale rummaging: to allow a search incident to arrest to extend beyond the need that justified it would swallow up the rule requiring a search warrant save in EXIGENT CIRCUMSTANCES. The latter view finally prevailed in *Chimel*, when the Court ruled that the search must be limited to the arrestee's person and "the area from which he might gain possession of a weapon or destructible evidence." It may not extend into any room other than the one in which the arrest is made, and even "desk drawers or other closed or concealed areas in that room itself" are off-limits to the officers if the suspect cannot gain access to them.

JACOB W. LANDYNSKI
(1986)

## CHINESE EXCLUSION ACT
22 Stat. 58 (1882)

Although Chinese IMMIGRATION to California probably raised both wages and living standards of white laborers, economic, political, and cultural arguments were adduced against the foreigners. Assimilation was said to be impossible: the Chinese were gamblers, opium smokers, and generally inferior. Anti-Chinese feeling became the hub for many political issues, and agitation for legislation increased. Senator John Miller of California contended that failure to enact exclusion would "empty the teeming, seething slave pens of China upon the soil of California." Although most of the nation was indifferent, opposition to exclusion was weak and disorganized; Congress thus passed its first exclusion law in 1882. The act prohibited Chinese laborers from entering the United States for ten years, although resident ALIENS might return after a temporary absence. Nonlaboring Chinese would be admitted only upon presentation of a certificate from the Chinese government attesting their right to come. Other sections provided for deportation of illegal immigrants and prohib-

ited state or federal courts from admitting Chinese to CITIZENSHIP. Further exclusion acts or amendments passed Congress—eleven by 1902. The most important of these were the Scott Act of 1888 prohibiting the return of any departing Chinese and the Geary Act of 1892 which extended the 1882 law. (See CHAE CHAN PING V. UNITED STATES.)

DAVID GORDON
(1986)

## CHINESE EXCLUSION CASE

See: *Chae Chan Ping v. United States*

## CHIPMAN, NATHANIEL
(1752–1843)

Federalist jurist and statesman Nathaniel Chipman was instrumental in securing Vermont's admission to the Union in 1791 as the first state with no history as a separate British colony. An ally and correspondent of ALEXANDER HAMILTON, Chipman was three times chief justice of Vermont and also the first federal judge in the Vermont district. He was professor of law at Middlebury College (1816–1843) and author of *Principles of Government* (1793; revised edition 1833).

DENNIS J. MAHONEY
(1986)

## *CHISHOLM v. GEORGIA*
2 Dallas 419 (1793)

The first constitutional law case decided by the Supreme Court, *Chisholm* provoked opposition so severe that the ELEVENTH AMENDMENT was adopted to supersede its ruling that a state could be sued without its consent by a citizen of another state. Article III of the Constitution extended the JUDICIAL POWER OF THE UNITED STATES to all controversies "between a State and citizens of another State" and provided that the Supreme Court should have ORIGINAL JURISDICTION in all cases in which a state should be a party. During the ratification controversy, anti-Federalists, jealous of state prerogatives and suspicious about the consolidating effects of the proposed union, had warned that Article III would abolish state sovereignty. Ratificationists, including JOHN MARSHALL, JAMES MADISON, and ALEXANDER HAMILTON (e.g., THE FEDERALIST #81) had argued that the clause intended to cover only suits in which a state had given its sovereign consent to being sued or had instituted the suit. Here, however, with Justice JAMES IREDELL alone dissenting, the Justices in SERIATIM OPINIONS held that the states by ratifying the Constitution had agreed to be amenable to the judicial power of the United States and in that respect had abandoned their SOVEREIGNTY.

The case arose when Chisholm, a South Carolinian executor of the estate of a Tory whose lands Georgia had confiscated during the Revolution, sued Georgia for restitution. The state remonstrated against the Court's taking jurisdiction of the case and refused to argue on the merits. The Justices, confronted by a question of sovereignty, discoursed on the nature of the Union, giving the case historical importance. Iredell, stressing the sovereignty of the states respecting reserved powers, believed that no sovereign state could be sued without its consent unless Congress so authorized. Chief Justice JOHN JAY and Justice JAMES WILSON, delivering the most elaborate opinions against Georgia, announced for the first time from the bench the ultra-nationalistic doctrine that the people of the United States, rather than the states or people thereof, had formed the Union and were the ultimate sovereigns. From this view, the suability of the states was compatible with their reserved sovereignty, and the clause in Article III neither excluded suits by outside citizens nor required state consent.

The decision, which seemed to open the treasuries of the states to suits by Tories and other creditors, stirred widespread indignation that crossed sectional and party lines. A special session of the Massachusetts legislature recommended an amendment that would prevent the states from being answerable in the federal courts to suits by individuals. Virginia, taking the same action, condemned the Court for a decision dangerous to the sovereignty of the states. The Georgia Assembly would have defied the decision by a bill providing that any United States officer attempting to enforce it should "suffer death, without benefit of clergy, by being hanged." Though the state senate did not pass the bill, Georgia remained defiant. Congress too opposed the decision and finally agreed on a remedy for it that took the form of the Eleventh Amendment.

LEONARD W. LEVY
(1986)

Bibliography

MATHIS, DOYLE 1967 *Chisholm v. Georgia*: Background and Settlement. *Journal of American History* 54:19–29.

## CHOATE, JOSEPH H.
(1832–1917)

A highly conservative lawyer and leader of the American bar, Joseph Hodges Choate often appeared before the Su-

preme Court in defense of property interests and removed from the concerns of a populace he inimitably referred to as the "Great Unwashed." In MUGLER V. KANSAS (1887), Choate sought in vain to convince the Court to embrace laissez-faire, but he succeeded in wresting, in OBITER DICTUM, future judicial examination of the reasonableness of exercises of STATE POLICE POWER. Choate unequivocally endorsed constitutional rights in private property, a position the Court would soon partly accept. Indeed, his most famous victory came in POLLOCK V. FARMERS' LOAN & TRUST COMPANY (1895), which he argued with WILLIAM GUTHRIE. Labeling the income tax "communistic" and heaping reactionary invective upon his opponent, JAMES COOLIDGE CARTER, Choate constructed a framework for the Court's decision; he attacked the tax as a DIRECT TAX on income from real property, history and judicial precedent to the contrary.

DAVID GORDON
(1986)

Bibliography

HICKS, FREDERICK C. 1931 Joseph Hodges Choate. *Dictionary of American Biography*, Vol. 4. New York: Scribner's.

## CHOICE OF LAW

In the system of American FEDERALISM, some transactions and phenomena are governed by supreme federal law and others by state law. In the latter situations, multistate transactions frequently raise the question which state's law is to be applied. "Choice of law" refers to the process of making this determination. Choice of law may usefully be viewed as an issue of distribution of legislative or lawmaking powers "horizontally" among the states in those areas not governed by overriding federal law.

A basic principle of choice of law theory under the Constitution is that determination of the allocation of lawmaking power among the states in such circumstances is, itself, an issue of state law. Each state has its own law on choice of law, which may differ from the choice of law doctrines of other states and which is applied in actions brought in that state both in state courts and in DIVERSITY JURISDICTION cases in federal courts. Thus the outcome of litigation involving a multistate transaction may in theory be determined by the choice of the forum in which the suit is brought. The basic principle might have been the contrary—that is, that conflicts of state laws within the federal system should be resolved by a comprehensive supreme federal law of choice of law, binding on the states. Such a body of national conflict of laws doctrine might have been derived from the FULL FAITH AND CREDIT clause, the COMMERCE CLAUSE, or the DUE PROCESS clause of the FOURTEENTH AMENDMENT. Alternatively, supreme federal choice of law doctrine might have been developed as FEDERAL COMMON LAW pertaining to the mutual relationships among the states in the federal union. Or Congress, under various ENUMERATED POWERS, might have enacted federal choice of law principles. None of these courses has been followed; the law of choice of law in the federal system has not developed, judicially or legislatively, as supreme federal law. The states remain the primary determiners of the legal aspects of their mutual relationships within the federal union.

A state's law of choice of law, like all state law, is subject to constitutional limitations. Two such provisions have occasionally been applied so as to limit state choice of law principles, but in general these are not significant limitations.

In an occasional early case the Supreme Court held that the application of the forum's own law to a multistate transaction violated due process, even though the forum state did have a legitimate interest in having its law prevail. Under more recent doctrine there would be no due process violation in such circumstances. The modern principle, enunciated in *Allstate Insurance Co. v. Hague* (1981), is that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." The due process clause can also limit a state's choice of law doctrine where there would be unfair surprise to a litigant in the choice of law otherwise proposed to be made.

The Court also has occasionally held that the full faith and credit clause requires a state to apply the law of another state even though the forum state does have a legitimate interest in applying its own law. (Thus in a case of claims for benefits against a fraternal benefit association, the Court held that a national interest in having a single uniform law determine the mutual rights and obligations of members required all states to apply the law of the place where the association was incorporated.) In general, however, the full faith and credit clause does not require that a forum state apply the law of another state unless it would violate due process for the forum to apply its own law.

Other provisions of the Constitution are potentially applicable as limitations on state choice of law doctrine. The commerce clause might be the basis for channeling state choice of law principles regarding multistate commercial transactions. The EQUAL PROTECTION clause and the PRIVILEGES AND IMMUNITIES clause of Article IV might be held to limit distinctions made in state choice of law doctrine based upon the residence or domicile of parties to a trans-

action. These constitutional provisions have not been so developed.

HAROLD W. HOROWITZ
(1986)

Bibliography

SYMPOSIUM 1981 Choice-of-Law. *UC Davis Law Review* 14: 837–917.
——— 1981 Choice of Law Theory after *Allstate Insurance Co. v. Hague. Hofstra Law Review* 10:1–211.

## CHOICE OF LAW AND CONSTITUTIONAL RIGHTS

CHOICE OF LAW (also called conflict of laws or conflicts law) is a body of legal DOCTRINE that seeks to provide a basis for choosing a substantive rule (for example, in tort or contract law) over the conflicting rule of another place. Rules conflict when their applications would produce opposing results in the same case, and when the relation of each place to the controversy makes it plausible for the rule of either place to govern. Conflicts law is usually state COMMON LAW, applied either by state courts or by federal courts in exercise of the latter's DIVERSITY JURISDICTION.

Courts periodically engage in conflicts localism. That is, they choose local state substantive law when the forum state's relation to the controversy is clearly less important than that of the place providing conflicting law. These decisions unfairly damage nonforum litigants, exhibit disrespect to nonforum governments, and undermine principles of order and uniformity in the law. The FULL FAITH AND CREDIT clause, the DUE PROCESS and EQUAL PROTECTION clauses of the FOURTEENTH AMENDMENT, the COMMERCE CLAUSE, and the PRIVILEGES AND IMMUNITIES clause of Article IV could in various ways be read to protect these interests. But the Supreme Court rarely intervenes under the Constitution.

The Court makes serious use of only the first two of the clauses listed above, merging them into a single test. According to *Allstate Ins. Co. v. Hague* (1981), "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."

Applying the *Hague* test in *Phillips Petroleum Co. v. Shutts* (1985), the Court held unconstitutional the attempt of Kansas courts in a nation-wide CLASS ACTION to apply local law to some claims that had no connection with the state. Despite the result, the Court's analysis in *Shutts* reinforced its minimalist view of the Constitution in choice of law. The Court deemed Kansas to have failed the combined full faith and credit and due process test only after concluding that Kansas had no interest in regulating the claims and that application of Kansas law to the claims would disturb the reasonable expectations of the defendant. Not only do state and lower federal courts remain free to apply local substantive law when demonstrating state interest, however modest, in determining the merits of the controversy; they may be free to apply their law even when the state has no such interest, when there is no showing that such would disturb the reasonable expectations of a party.

Commentators have criticized the Court's reluctance to correct conflicts abuse, and they have offered a variety of constitutional theories for more extensive oversight of choice of law. Yet the Court's restraint may be defensible. Constitutional justifications for greater Supreme Court intervention share so fully the mainstream values of choice of law that, should the Court begin to give serious weight to the former, it might be unable to find a logical stopping point short of constitutionalizing the entire subject—an option the Court has disdained.

GENE R. SHREVE
(2000)

Bibliography

LAYCOCK, DOUGLAS 1992 Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law. *Columbia Law Review* 92:249–337.
REESE, WILLIS L. M. 1978 Legislative Jurisdiction. *Columbia Law Review* 78:1587–1608.
SHREVE, GENE R. 1996 Choice of Law and the Forgiving Constitution. *Indiana Law Journal* 71:271–296.
WEINBERG, LOUISE 1982 Choice of Law and Minimal Scrutiny. *University of Chicago Law Review* 49:440–488.

## CHRISTIAN RIGHT

See: Religious Fundamentalism

## *CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS v. UNITED STATES*
136 U.S. 1 (1890)

The Mormon Church was granted a charter of incorporation in February 1851 by the so-called State of Deseret; later an act of the territorial legislature of Utah confirmed the charter. In 1887 Congress, having plenary power over the TERRITORIES, repealed the charter and directed the seizure and disposal of church property.

Justice JOSEPH P. BRADLEY wrote for the Court. He held that the power of Congress over the territories was suffi-

cient to repeal an act of incorporation. He also held that once the Mormon Church became a defunct CORPORATION, Congress had power to reassign its property to legitimate religious and charitable uses, as near as practicable to those intended by the original donors. The claim of RELIGIOUS FREEDOM could not immunize the Mormon Church against the congressional conclusion that, because of its sponsorship of polygamy, it was an undesirable legal entity.

Chief Justice MELVILLE WESTON FULLER dissented, joined by Justice STEPHEN J. FIELD and Justice L. Q. C. LAMAR. Fuller objected to according Congress such sweeping power over property.

RICHARD E. MORGAN
(1986)

## *CHURCH OF THE LUKUMI BABALU AYE, INC. v. CITY OF HIALEAH*
508 U.S. 520 (1993)

The Lukumi religion, of West African origin, migrated to Cuba in the nineteenth century with the slave population, and became known as Santería; in our own time Lukumi has migrated to Florida. Several important rituals require the sacrifice of food animals to *orishas,* the Lukumi pantheon of spiritual beings. This practice led the City of Hialeah to enact several ordinances prohibiting animal sacrifice. The Supreme Court unanimously held that these ordinances violated the free exercise clause of the FIRST AMENDMENT because they had "targeted" religious practices. Justice ANTHONY M. KENNEDY wrote for the Court.

The city argued that the ordinances were valid means to protect public health and prevent cruelty to animals. But, the Court said, the "targeting" of religion was demonstrated by the ordinances' references to "sacrifice" and to "certain religions," and more generally by their overinclusiveness (e.g., forbidding ritual slaughtering even in licensed slaughterhouses) and underinclusiveness (e.g., exempting Kosher slaughtering and leaving unregulated both hunting and slaughtering for food purposes). Kennedy also said "targeting" was evident in statements of city council members indicating a motivation to stamp out the Lukumi religion. Justice ANTONIN SCALIA, joined by Chief Justice WILLIAM H. REHNQUIST, dissociated himself from this view, saying that subjective motive was irrelevant; "targeting" was to be found in the words of the ordinances.

Justices DAVID H. SOUTER and HARRY A. BLACKMUN (joined by Justice SANDRA DAY O'CONNOR), concurring, suggested reconsideration of the holding in EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990) that the free exercise clause has no application to incidental effects on RELIGIOUS LIBERTY caused by laws of general application. If, as *Lukumi* suggests, "targeting" can be proved by showings of overinclusiveness and underinclusiveness, government officials will be well advised to offer legitimate (nontargeted) reasons for the actions that have restricted religious freedom. A judicial inquiry into "targeting" may, as in *Lukumi,* lead to an inquiry into the weight of asserted government interests. Such inquiries have the potential to undermine the "rule" of *Smith,* even if *Smith* escapes overruling.

KENNETH L. KARST
(2000)

Bibliography

KARST, KENNETH L. 1993 Religious Freedom and Equal Citizenship: Reflections on *Lukumi. Tulane Law Review* 69:335–372.

# CIRCUIT COURTS

The JUDICIARY ACT OF 1789 fashioned a decentralized circuit court system. The boundaries of the three circuits coincided with the boundaries of the states they encompassed, a practice that opened them to state and sectional political influences and legal practices. The act assigned two Supreme Court Justices to each circuit to hold court along with a district judge in the state where the circuit court met. (After 1794, a single Justice and a district judge were a quorum.) The circuit-riding provision brought federal authority and national political views to the new and distant states, but also compelled the Justices to imbibe local political sentiments and legal practices.

For a century questions about the administrative efficiency, constitutional roles, and political responsibilities of these courts provoked heated debate. In the JUDICIARY ACT OF 1801, Federalists sought to replace the Justices with an independent six-person circuit court judiciary, but one year later the new Jeffersonian Republican majority in Congress eliminated the circuit judgeships and restored the Justices to circuit duties, although they left the number of circuits at six. (See JUDICIARY ACTS OF 1802.) Subsequent territorial expansion prompted the addition of new circuits and new Justices until both reached nine in the Judiciary Act of 1837. Slave state interests opposed further expansion because they feared the loss of their five-to-four majority on the high court. Congress in 1855 did create a special circuit court and judgeship for the Northern District of California to expedite land litigation.

Significant structural and jurisdictional changes accompanied the CIVIL WAR and RECONSTRUCTION. The Judiciary Act of 1869 established a separate circuit court judiciary and assigned one judge to each of the nine new circuits that stretched from coast to coast. Justices retained circuit-riding duties although the 1869 act and subsequent legislation required less frequent attendance.

Historically, these courts had exercised ORIGINAL and APPELLATE JURISDICTION in cases involving the criminal law of the United States, in other areas where particular statutes granted jurisdiction, and in cases resting on diversity of citizenship. The Judiciary Act of 1869 strengthened the appellate responsibilities of the circuit courts by denying litigants access to the Supreme Court unless the amount in controversy exceeded $5,000. The Jurisdiction and Removal Act of 1875 established a general FEDERAL QUESTION JURISDICTION and made it possible for, among others, interstate CORPORATIONS to seek the friendly forum of the federal as opposed to the state courts. The 1875 measure also transferred some of the original jurisdiction of the circuit courts to the district courts. However, because the circuit courts were given increased appellate responsibilities, along with only modest adjustments in staffing, their dockets became congested. The resulting delay in appeals, combined with similar congestion in the Supreme Court, persuaded Congress in 1891 to establish the Circuit Courts of Appeals which became the nation's principal intermediate federal appellate courts. (See CIRCUIT COURTS OF APPEALS ACT.) Although the old circuit courts became anachronisms, Congress delayed abolishing them until 1911.

Throughout the nineteenth century Supreme Court Justices held ambivalent attitudes toward circuit duty. The Justices complained about the rigors of circuit travel and the loss of time from responsibilities in the nation's capital, but most of them recognized that circuit judging offered a unique constitutional forum free from the immediate scrutiny of their brethren on the Court. "It is only as a Circuit Judge that the Chief Justice or any other Justice of the Supreme Court has, individually, any considerable power," Chief Justice SALMON P. CHASE observed in 1868.

Circuit court judges contributed to the nationalization of American law and the economy. Justice JOSEPH STORY, in the First Circuit, for example, broadly defined the federal ADMIRALTY AND MARITIME JURISDICTION. In perhaps the most important circuit court decision of the nineteenth century, Story held, in *De Lovio v. Boit* (1815), that this jurisdiction extended to all maritime contracts, including insurance policies, and to all torts and injuries committed on the high seas and in ports and harbors within the ebb and flow of the tide. This decision, coupled with Story's opinion eight years later in *Chamberlain v. Chandler* (1823), expanded federal control over admiralty and maritime-related economic activity and added certainty to contracts involving shipping and commerce.

The circuit courts extended national constitutional protection to property, contract, and corporate rights. Justice WILLIAM PATERSON'S 1795 decision on circuit in VAN HORNE'S LESSEE V. DORRANCE was the first significant statement in the federal courts on behalf of VESTED RIGHTS. But in 1830 Justice HENRY BALDWIN anticipated by seven years the PUBLIC USE doctrine later embraced by the Supreme Court. In *Bonaparte v. Camden & A. R. Co.* he held that state legislatures could take private property only for public use, and that creation of a monopoly by a public charter voided its public nature. As new forms of corporate property emerged in the post-Civil War era, the circuit courts offered protection through the CONTRACT CLAUSE. In the early and frequently cited case of *Gray v. Davis* (1871) a circuit court held, and the Supreme Court subsequently affirmed, that a legislative act incorporating a railroad constituted a contract between the state and the company, and a state constitutional provision annulling that charter violated the contract clause.

The circuit courts' most dramatic nationalizing role involved commercial jurisprudence. Through their DIVERSITY JURISDICTION the circuit courts used SWIFT V. TYSON (1842) to build a FEDERAL COMMON LAW of commerce, thus encouraging business flexibility, facilitating investment security, and reducing costs to corporations. After the Civil War these courts eased limitations on the formation and operation of corporations in foreign states (*In Re Spain*, 1891), supported bondholders' rights, allowed forum shopping (*Osgood v. The Chicago, Danville, and Vincennes R. R. Co.*, 1875), and favored employers in fellow-servant liability cases.

Ambivalence, contradiction, and frustration typified circuit court decisions involving civil and political rights. In 1823 Justice BUSHROD WASHINGTON, in CORFIELD V. CORYELL, held that the PRIVILEGES AND IMMUNITIES clause guaranteed equal treatment of out-of-state citizens as to those privileges and immunities that belonged of right to citizens of all free governments, and which had at all times been enjoyed by citizens of the several states. After 1866 some circuit judges attempted to expand this narrow interpretation. Justice JOSEPH P. BRADLEY held, in *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.* (1870), that the FOURTEENTH AMENDMENT protected the privileges and immunities of whites and blacks as national citizens against STATE ACTION. In 1871 the Circuit Court for the Southern District of Alabama, in *United States v. Hall*, decided that under the Fourteenth Amendment Congress had the power to protect by appropriate legislation all rights in the first eight amendments. And in *Ho Ah Kow v. Nunan* (1879) Justice STEPHEN J. FIELD struck down as CRUEL AND UNUSUAL PUNISHMENT, based on the Eighth Amendment and the EQUAL PROTECTION clause of the Fourteenth Amendment, a San Francisco ordinance that required Chinese prisoners to have their hair cut to a length of one inch from their scalps.

These attempts to nationalize civil rights had little immediate impact. The Supreme Court in 1873 rejected

Bradley's reading of the Fourteenth Amendment, and in 1871 the Circuit Court for the District of South Carolina in *United States v. Crosby* concluded that the right of a person to be secure in his or her home was not a right, privilege, or immunity granted by the Constitution. Neither the Supreme Court nor any other circuit court adopted the theory of congressional power to enforce the Fourteenth Amendment set forth in *Hall.* Justice Field's *Nunan* opinion was most frequently cited in dissenting rather than majority opinions.

Political rights under the FIFTEENTH AMENDMENT fared only slightly better. In *United States v. Given* (1873) the Circuit Court for the District of Delaware held that the Fifteenth Amendment did not limit congressional action to cases where states had denied or abridged the right to vote by legislation. In the same year, however, Justice WARD HUNT, in *United States v. Anthony,* concluded that the right or privilege of voting arose under state constitutions and that the states might restrict it to males.

Despite a regional structure and diverse personnel, these circuit courts placed national over state interests, reinforced the supremacy of federal power, promoted national economic development, and enhanced the position of interstate corporations. However, in matters of civil and political rights they not only disagreed about the scope of federal powers but also confronted a Supreme Court wedded to a traditional state-centered foundation for these rights.

KERMIT L. HALL
(1986)

Bibliography

FRANKFURTER, FELIX and LANDIS, JAMES M. 1927 *The Business of the Supreme Court: A Study in the Federal Judicial System.* Pages 3–86. New York: Macmillan.

HALL, KERMIT L. 1975 The Civil War Era as a Crucible for Nationalizing the Lower Federal Courts. *Prologue: The Journal of the National Archives* 7:177–186.

SWISHER, CARL B. 1974 *The Taney Period, 1836–1864.* Volume IV of *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States.* Pages 248–292. New York: Macmillan.

## CIRCUIT COURTS OF APPEALS ACT
26 Stat. 826 (1891)

The first substantial revision of the federal court system since its formation (except for the abortive JUDICIARY ACT OF 1801), this act established a badly needed level of courts just below the Supreme Court: the UNITED STATES COURTS OF APPEALS. Senator WILLIAM EVARTS led the reform movement to relieve pressure on the Supreme Court docket by providing intermediate appellate review for most district and circuit court decisions. By keeping the CIRCUIT COURTS but abolishing their APPELLATE JURISDICTION, Congress maintained two courts with substantially similar JURISDICTION, causing confusion until the circuit courts were abolished in the JUDICIAL CODE of 1911. The act established direct Supreme Court review, bypassing the courts of appeals, in cases of "infamous" crimes (an ill-considered description that actually increased the Court's business and had to be deleted in 1897), and introduced the principle of discretionary Supreme Court review by WRIT OF CERTIORARI.

The basic structure of today's system of appellate review of federal court decisions remains as it was established in the 1891 Act.

DAVID GORDON
(1986)

Bibliography

FRANKFURTER, FELIX and LANDIS, JAMES M. 1927 *The Business of the Supreme Court.* New York: Macmillan.

## CITIES AND THE CONSTITUTION

Cities, unlike STATES, are not mentioned in the Constitution. Many other important collective institutions in our society, such as CORPORATIONS, are not mentioned in the Constitution either. In its effort to determine the constitutional status of cities, the Supreme Court has had to decide whether to treat cities like states or like corporations. In fact, the Court has been required to answer two separate questions concerning the constitutional status of cities. First, do cities, like private corporations, have rights that are protected from governmental power by the Constitution? Second, do cities, like states, exercise governmental power which is limited by the Constitution?

At the time the Constitution was written and adopted, there was no legal distinction between cities and other corporations. Neither WILLIAM BLACKSTONE's *commentaries,* published the decade before the CONSTITUTIONAL CONVENTION OF 1787, nor the first treatise on corporations, published by Stuart Kyd in 1793, categorized corporations in a way that would distinguish the Corporation of the City of New York, for example, from manufacturing and commercial concerns or from universities. Each of these entities was considered a lay corporation, formed by its members and given legal status by a grant of power from the state. The ability of these corporations to pursue the purposes for which their charter was granted was a right that needed protection from governmental power. At the same time, however, all corporations wielded power del-

egated to them by the state and, therefore, posed a danger of abuse that required subjection to popular control.

The Supreme Court's first important attempt to settle the constitutional status of corporations created a distinction between cities and other corporations. In DARTMOUTH COLLEGE V. WOODWARD (1819) Justice JOSEPH STORY articulated a public/private distinction for American corporations, classifying cities with states and distinguishing them from private corporations. "Public corporations," he said, "are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests; but strictly speaking, public corporations are such only as founded by the government for public purposes, where the whole interests belong also to the government."

When considering whether cities should have rights that protect them against state control, the Supreme Court has largely accepted Justice Story's proposition that the cities' whole interest belongs to the government; it has treated cities as if they were the state itself. At least insofar as they are considered "public" entities, cities, unlike private corporations, have virtually no constitutional protection against STATE ACTION. The Supreme Court dramatically summarized the nature of state power over cities in *Hunter v. Pittsburg* (1907):

> Municipal corporations are political subdivisions of the State created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or part with another municipality, repeal the charter and destroy the corporation. . . . In all these respects the State is supreme, and its legislative body, conforming its actions to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

The Court in *Hunter* indicated, however, that there might be a limit to state power over cities, one it articulated in terms of a public/private distinction within the concept of a city. To some extent, cities act like private corporations, and this private aspect of city government, the Court said, could receive the same constitutional protection as other private interests. Even Justice Story had recognized in *Dartmouth College* that cities are not purely public entities but "involve some private interests" as well. But the proposition that cities are entitled to protection from state power under the Constitution in their "proprietary" (as contrasted to their "governmental") capacities has not yielded them much constitutional protection. The Supreme Court has never struck down a state statute on the grounds that it invaded such a private sphere. Indeed, in *Trenton v. New Jersey* (1923) Justice PIERCE BUTLER, noting that such a sphere could not readily be defined, expressed doubt whether there was a private sphere that limited the states' power over their own municipalities.

Whatever limited protection the Court has given cities under the Constitution has involved their public and not their private capacities. In GOMILLION V. LIGHTFOOT (1960) the Court held that the FIFTEENTH AMENDMENT restricted the state's ability to define the boundaries of its cities in a way that infringed on its citizens' VOTING RIGHTS; the Court narrowed the extravagant description of state power over cities in *Hunter* by construing the Court's language in that case to be applicable only to the particular constitutional provisions considered there. But the Court has not subsequently expanded on its distinction between the Fifteenth Amendment and other constitutional provisions, such as the FOURTEENTH AMENDMENT and the CONTRACT CLAUSE, as vehicles for limiting state power over cities. No subsequent case has given cities constitutional protection against state power.

From 1976 to 1985, during the short life of NATIONAL LEAGUE OF CITIES V. USERY (1976), the Supreme Court articulated the most expansive constitutional protection ever given cities, again a protection for their public and not their private activities. By treating them as if they were states the Court limited the power of the federal government to regulate cities; it held that cities, like states, were immunized from federal control under the TENTH AMENDMENT insofar as federal interference "directly impaired their ability to structure integral operations in areas of traditional governmental functions." In GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985), however, *National League of Cities* was overruled. One reason for OVERRULING *National League of Cities*, the Court said, was that there was no practical way to make a public/private distinction between "traditional governmental functions" and other state and city functions. Hence, the Court reasoned, there was no principled basis for choosing some areas of state or city activity over others to be immune from federal control as a constitutional matter.

There is a second question concerning the constitutional status of cities: to what extent are cities like states, and, therefore, subject to those constitutional provisions that affect the power of states? The Supreme Court's answer to this question has been complex.

For some purposes, the Court has treated cities like states. City power is like state power, for example, in that it is equally limited by the DUE PROCESS and EQUAL PROTECTION clauses of the Fourteenth Amendment and by the dormant COMMERCE CLAUSE. On the other hand, the Court has held that cities are not like states for purposes of the ELEVENTH AMENDMENT (dealing with states' immunity from

suits in federal court). In a number of nonconstitutional cases the Supreme Court has also sought to distinguish cities from states. "We are a nation not of city-states but of States," the Court said in *Community Communications Co. v. City of Boulder* (1982), holding cities, like private corporations but unlike states, liable to federal antitrust laws.

Indeed, sometimes the Court has treated cities in a way that distinguishes them from both states and corporations. In MONELL V. DEPARTMENT OF SOCIAL SERVICES (1978) the Supreme Court interpreted SECTION 1983, TITLE 42, UNITED STATES CODE to allow damage suits against cities when they commit constitutional violations. City action is like state action in that cities are subject to constitutional limitations applicable to states. But states, unlike cities, have immunities under the Eleventh Amendment against suits in federal court to enforce these constitutional limitations. Thus, under *Monell,* cities are liable under section 1983 for constitutional violations in situations in which neither the states (because of the Eleventh Amendment) nor private corporations (because their power is not subject to constitutional limitations) would be liable.

Finally, at times cities are considered like states and private corporations simultaneously. Both cities and states can act in the marketplace just as private corporations do. Thus in *White v. Massachusetts Council of Construction Employers* (1983) the Supreme Court held that the commerce clause does not restrict a city's ability to require its contractors to hire city residents as long as it is acting as a market participant and not as a market regulator. The Court thus extended to cities the immunity from commerce clause restrictions that it had previously provided states when they act as market participants. The practical effect of the *White* case, however, is limited. In *United Building & Construction Trades Council v. Camden* (1984) the Court held that the privileges and immunities clause, unlike the commerce clause, limited a city's ability to require its contractors to hire city residents whether or not it acts as a market participant. In *Camden* the Court treated cities like states but distinguished them from corporations; the power of states and cities, unlike that of corporations, is restrained by the privileges and immunities clause of the Constitution.

The cities' historic link with corporations and their assimilation in the nineteenth century to the status of states have given them a divided status under the Constitution. Although the predominant linkage has been between cities and states, there remain occasions when the prior linkage with corporations is emphasized. The Court's ability to conceptualize cities as either states or corporations (indeed, to conceptualize them as both simultaneously or as distinguishable from both) opens up a multitude of possibilities for the Court as it defines the relationship between cities and the Constitution in the future.

GERALD E. FRUG
(1986)

Bibliography

CLARK, GORDON 1985 *Judges and the Cities: Interpreting Local Autonomy.* Chicago: University of Chicago Press.

FRUG, GERALD 1980 The City as a Legal Concept. *Harvard Law Review* 93:1059–1154.

HARTOG, HENDRIK 1983 *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730–1870.* Chapel Hill: University of North Carolina Press.

MICHELMAN, FRANK 1977–1978 Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy *Indiana Law Journal* 53:145–206.

# CITIZENSHIP
## (Historical Development)

The concept of citizenship articulated during the AMERICAN REVOLUTION and adjusted to the special circumstances of an ethnically diverse federal republic in the nineteenth century developed from English theories of allegiance and of the subject's status. Enunciated most authoritatively by Sir EDWARD COKE in CALVIN'S CASE (1608), English law held that natural subject status involved a perpetual, immutable relationship of allegiance and protection between subject and king analogous to the bond between parent and child. All persons born within the king's allegiance gained this status by birth. Conquest or NATURALIZATION by Parliament could extend the status to the foreign-born, but subjects adopted in such a manner were by legal fiction considered bound by the same perpetual allegiance as the native-born. The doctrine "once a subject, always a subject" reflected Coke's emphasis on the natural origins of the subject-king relationship and militated against the emergence of concepts of voluntary membership and EXPATRIATION.

The appearance of new SOCIAL COMPACT ideas modified but did not entirely supersede traditional concepts. By the mid-eighteenth century, Lockean theorists derived subject status from the individual's consent to leave the state of nature and join with others to form a society. To such theorists the individual subject was bound by the majority and owed allegiance to the government established by that majority. Barring the dissolution of society itself or the consent of the majority, expressed through Parliament, individual subjects were still held to a perpetual allegiance.

Colonial conditions eroded these ideas. Colonial naturalization policies especially contributed to a subtle transformation of inherited attitudes. Provincial governments

welcomed foreign-born settlers in order to promote population growth vital to physical security and economic prosperity. Offering political and economic rights in exchange for the ALIEN's contribution to the general welfare of the community, the colonists underscored the contractual, consent-based aspects of membership that had been subordinated in English law to older notions of perpetual allegiance. Imperial administrators, concerned to protect England's monopoly of colonial trade, declared in 1700 that colonial naturalization could confer subject status only within the confines of the admitting colony; although a parliamentary statute of 1740 established administrative procedures whereby a colonial court could vest an alien with a subject status valid throughout the empire, such actions merely reinforced the conclusion that the origins, extent, and effects of subject status were determined not by nature but by political and legal compacts.

When Americans declared independence in 1776 they initially relied on the traditional linkage of allegiance and protection to define citizenship in the new republican states. Congress's resolution of June 24, 1776, declared that all persons then resident in the colonies and deriving protection from the laws were members of and owed allegiance to those colonies. Lockean theory was also useful, for if each colony were considered a separate society merely changing its form of government, then loyalist minorities could still be considered subject to the will of patriot majorities. Yet forced allegiance clashed with the idea that all legitimate government required the free consent of the governed. Wartime TREASON prosecutions contributed to a gradual reformulation of the theory of citizenship that stressed the volitional character of allegiance. Employing a doctrine stated most clearly in the Pennsylvania case of *Respublica v. Chapman* (1781), American courts came to hold that citizenship must originate in an act of individual consent.

Republican citizenship required the consent of the community as well as of the individual, and legislators concerned with establishing naturalization policies concentrated on defining the proper qualifications for membership. This preoccupation obscured the ill-defined nature of the status itself. The Revolution had created a sense of community that transcended state boundaries; the ARTICLES OF CONFEDERATION implied that state citizenship carried with it rights in other states as well (Article IV). Framers of the United States Constitution perpetuated this ambiguity: section 2 of Article IV provided that "The citizens of each State shall be entitled to all PRIVILEGES AND IMMUNITIES of citizens in the several States." Questions concerning the nature and relationship of state and national citizenship would not be resolved until the CIVIL WAR.

The Revolutionary idea that citizenship began with the individual's consent extended logically to the idea of expatriation. Although some states acknowledged this principle, it raised delicate questions of federal relations after 1789. The problem appeared as early as 1795 in *Talbot v. Janson*, when the United States Supreme Court wrestled with the question whether a Virginia expatriation procedure could release a citizen from national as well as state allegiance. Unwilling to resolve that issue, the Court looked to Congress to provide a general policy of expatriation. Although the propriety of such a measure was discussed a number of times during the antebellum period, congressional action foundered on the same issue of federal relations. As long as the question of the primacy of state or United States citizenship remained open, the idea that citizenship rested on individual choice would be more valid for aliens seeking naturalization than for persons whose citizenship derived from birth.

The problematic character of dual state and national citizenship appeared in its most intractable form in disputes over the status of free blacks. Many northern states acknowledged free blacks as birthright citizens, though often at the cost of conceding that important political rights were not necessarily attached to that status. From the 1820s on, slave states increasingly resisted the contention that such citizenship carried constitutional guarantees of "privileges and immunities" in their own jurisdictions. ROGER B. TANEY's opinion in DRED SCOTT V. SANDFORD (1857) that national citizenship was restricted to white state citizens of 1789, persons naturalized by Congress, and their descendants alone marked the final effort, short of SECESSION, to restrict the scope of citizenship.

The FOURTEENTH AMENDMENT finally defined national citizenship as the product of naturalization or birth within the JURISDICTION of the United States, leaving state citizenship dependent upon residency. On July 27, 1868, Congress declared that the right of expatriation was a fundamental principle of American government, thus allowing persons born to citizenship the same right as aliens to choose their ultimate allegiance.

JAMES H. KETTNER
(1986)

Bibliography

KETTNER, JAMES H. 1978 *The Development of American Citizenship, 1608–1870.* Chapel Hill: University of North Carolina Press.

ROCHE, JOHN P. 1949 *The Early Development of United States Citizenship.* Ithaca, N.Y.: Cornell University Press.

# CITIZENSHIP
## (Theory)

Article I, section B, of the Constitution authorizes Congress "to establish a uniform Rule of NATURALIZATION." The

power afforded Congress in this spare textual authorization has long been interpreted as plenary, effectively insulating from constitutional challenge congressional decisions about whom to admit to the national community. The theory of national community expressed through this constitutional interpretation was summarily sketched by the Supreme Court nearly a century ago in *Nishimura Eiku v. United States* (1891): "It is an accepted maxim of international law, that every sovereign nation has the power, inherent in SOVEREIGNTY, and essential to self-preservation, to forbid the entrance of foreigners within its domain, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."

This still regnant theory of sovereignty has become, for most people, entirely natural and unimposed. Its inchoate justification, articulated in abstract terms, does have a natural and necessary air: one can understand nations asserting an absolute right to decide whom to admit or to exclude as advancing the universal right to form communities and the right to keep them distinctive and stable. While nations have grown significantly more interconnected and while the world's creatures are one for some important purposes, the notion of protecting the right to form and maintain special communities within larger communities resonates with our understanding of how America became a nation. Still, even for one who believes in protecting the national community, a moral question remains: what constitutes membership in the political community to be protected?

In a strictly positive sense, the answer is that citizenship in this country has been conferred by birth (either in the United States or abroad to American parents) or by naturalization. Although only "a natural born Citizen" can be President, naturalized citizens are otherwise the formal equals of citizens by birth. Moreover, the Constitution extends many of its protections to "persons" or "people" so that ALIENS are protected in much the same way as citizens even before they are naturalized.

But the United States has been a national community not readily inclined to ask what constitutes membership in the political community—or perhaps more accurately, not genuinely curious about the answer or willing to give it constitutional significance. Congress has long presumed that those who currently share citizenship (citizens and, during most but not all historical periods, documented residents) constitute the community to be protected and maintained.

The judiciary, in turn, has long deferred to whatever Congress decides. This deference, while varying across the range of immigration law disputes, radically diverges from the political relationship between judiciary and legislature that informs most constitutional jurisprudence. Consider a range of congressional "membership" decisions and the corresponding judicial response: Exclusion decisions and procedures are treated as extraconstitutional; congressional power to classify aliens is effectively unconstrained by EQUAL PROTECTION values; DEPORTATION is treated as a civil and not a criminal proceeding, thereby denying certain constitutional protections expressly limited or interpreted to apply only to criminal proceedings; the power to detain remains unlimited by any coherent set of values, and is available effectively to imprison individuals and groups for long periods and under disreputable conditions; immigration judges remain intertwined with government agencies responsible for administering and enforcing immigration law. In so deferring to Congress, the judiciary either denies the constitutional relevance of the always amending character of the national community or indulges absolutely Congress's habitual response to what constitutes membership in the political community.

If together Congress and the courts "freed" us from being genuinely curious about ourselves, they were not without help in constructing this reality. It has been commonplace for many to deny that citizenship does or should play a central role in our political community. No less a figure in recent constitutional jurisprudence than ALEXANDER M. BICKEL insisted that citizenship "was a simple idea for a simple government"; others entirely ignored the question, as if a view on membership in the process of self-determination were not itself constitutive of the national community's very nature. But, of course, citizenship in the United States never has been a simple idea. Naturalization laws, implementing the FOURTEENTH AMENDMENT, were not extended to persons of African descent until 1870; citizens of Mexican descent were deported in 1930 raids; citizens of Japanese descent were interned during WORLD WAR II because of their ancestry; women citizens were not allowed to vote until 1920; Puerto Ricans and people of other conquered territories were afforded only second-class citizenship status. Yet the relationship of these and other events to our conception of United States citizenship has been far more often ignored than attended to, as if the denial of contradictory acts would somehow save the regnant theory of national community.

These efforts notwithstanding, the experience of community is beginning to challenge the prevailing constitutionalized attitude toward membership in the political community. The presence of millions of undocumented workers—sharing neighborhoods, burdens, and laws—has prompted intense and frequently conflicting responses to the general question of citizenship and its role in the political community. In PLYLER V. DOE (1982) the Supreme Court compelled the state of Texas to provide the children of undocumented workers with a free public education. At the same time, attention to the relationship of citizenship to the political community has led the Court

to intensify its scrutiny of laws that deny documented residents access to certain occupations. State laws barring aliens from permanent civil service positions and from the practice of law and civil engineering have been struck down. But where the position is intimately related to the process of democratic self-government (the so-called political function exception), the Court has upheld laws requiring police, public teachers, and probation officers to be citizens.

What this communitarian challenge foreshadows defies facile forecasting; a theory so long dominant as ours toward community membership and sovereignty resists predictable or simple change. Still, in its unwillingness to be silenced, in its refusal to accept uncritically the regnant theory, today's challenge focuses attention on our history, and on the relationship of work to full political life. At least in this sense, there is the hope that we will no longer blithely disregard the values formally expressed in our vision of citizenship. After all, whom we acknowledge as full members of the political community tells us much about who we are and why we remain together as a nation.

GERALD P. LÓPEZ
(1986)

## CITIZENSHIP
### (Update 1)

American citizenship can be obtained in three ways. The most common way, citizenship by birth in the United States (jus soli), is secured by the FOURTEENTH AMENDMENT citizenship clause. Although customary exceptions to this principle exist (e.g., children born on foreign vessels or of diplomatic personnel), this birthright citizenship has been understood (wrongly, I have argued) to extend even to native-born children of ALIENS in the country illegally or on a temporary visa.

A second route to citizenship is through NATURALIZATION. To naturalize, one must be a resident alien who has resided in the United States continuously for five years (a longer period than in Canada and the Scandinavian countries); be of good moral character; and demonstrate an ability to speak, read, and write English and a basic knowledge of United States government and history. These requirements are relaxed for certain individuals, such as spouses of U.S. citizens.

The third route to citizenship is through parentage (jus sanguinis). Statutory law enumerates a number of parentage categories, sometimes augmented by RESIDENCY REQUIREMENTS, that confer eligibility for citizenship on the child. The Supreme Court held in *Rogers v. Bellei* (1971) that in regulating this form of citizenship, Congress is not limited by the citizenship clause of the Fourteenth Amendment. In recent years Congress has liberalized eligibility.

Dual and triple citizenships, which arise as a result of the combination of the American jus soli rule with the jus sanguinis rules of other nations, are tolerated and legally protected. Still, the government discourages multiple citizenship; aliens who wish to naturalize must renounce any prior allegiance, which may or may not effectively terminate their foreign citizenships.

U.S. citizenship, once acquired, is almost impossible to lose without the citizen's expressed consent. The Supreme Court has severely restricted the government's power to denationalize a citizen for disloyalty, divided allegiance, or other reasons. Birthright citizens cannot be deprived of their citizenship unless the govenment proves that they specifically intended to renounce it. Naturalized citizens who procured their citizenship through fraud or misrepresentation are subject to DENATURALIZATION, but to prevail the government must satisfy demanding standards, most recently defined in *Kungys v. United States* (1988). This tiny risk of denaturalization is the only permissible difference between naturalized and other citizens.

As a result of a steady expansion of the equal protection and due process principles, legal resident aliens today enjoy almost all the significant rights and obligations that citizens enjoy, including access to most public benefits. Only five differences are worth noting. Three of them are political: citizens, but not aliens, may vote, serve on juries, and serve in certain high elective ofices and certain high (and not so high) appointive ones. Modern practice (many states in the nineteenth century permitted aliens to vote) and political inertia, more than sound policy, probably account for the durability of these differences. A fourth difference, which congress has considered eliminating, is that citizens can bring their noncitizen family members to the United States more easily than aliens can. Finally, aliens are subject to DEPORTATION, although the actual risk of deportation for a long-term resident alien who does not engage in serious criminal behavior is very low.

This progressive convergence of the citizen and resident-alien statuses suggests some devaluation of American citizenship. As public philosophy, this devaluation carries with it certain dangers for the polity. But it also represents an immense gain for the liberal values of inclusiveness and equal treatment. By maximizing individual opportunity and preventing the formation of a legally disabled underclass, the equality and due process principles have fostered the social mobility and optimism that seem essential to the success of American democracy. Moreover, the constitutional JURISPRUDENCE through which this has been achieved is probably irreversible, re-

flecting fundamental dynamics in domestic law and international relations that enjoy widespread support.

The conception of political membership has grown steadily more fluid, functional, and context-dependent. Before the rise of the modern nation-state, political membership was based upon kinship and ethnic ties. Today, membership is a far more complex, variegated, multipurpose idea. For purposes such as voting, citizenship is the crucial status, whereas mere territorial presence suffices for attributing most constitutional rights. For purposes of participation in an economic common market, membership is constituted by supranational groupings, exemplified by the recently established United States-Canada free-trade zone and the still-evolving European Community.

We live in an increasingly integrated world. Transnational economic relationships are ubiquitous, international travel has become inexpensive, migratory pressures are enormous, environmental problems are often global, scientific and cultural exchanges are highly valued, and political cooperation among nations is more essential than ever before. Even within America's borders, citizenship represents an increasingly hollow ideal. It neither confers a distinctively advantageous status nor demands much of the individuals who possess it.

National citizenship, however, is not anachronistic. It provides a focus of political allegiance and emotional energy on a scale capable of satisfying deep human longings for solidarity, symbolic identification, and community. This is especially important in a liberal polity whose cosmopolitan aspirations for universal principles of human rights must somehow be balanced against the more parochial social commitments to family, ethnicity, locality, region, and nation. Although these political and emotional aspects of citizenship remain significant, American society seems resolved that little else of consequence shall be allowed to turn on citizenship. But within that general understanding and social consensus, the precise role of citizenship and the special rights and obligations that should attach to it are open questions. Here, only one proposition seems certain: Today's conceptions of citizenship may not be adequate to meet tomorrow's needs.

PETER H. SCHUCK
(1992)

Bibliography

BRUBAKER, W. R., ed. 1989 *Immigration and the Politics of Citizenship in Europe and North America.* New York: University Press of America.

SCHUCK, PETER and SMITH, ROGERS 1986 *Citizenship Without Consent: Illegal Aliens in the American Polity.* New Haven, Conn.: Yale University Press.

# CITIZENSHIP
## (Update 2)

The Supreme Court has declared American citizenship "a most precious right," regarded by many as "the highest hope of civilized men." Recognition of the importance of U.S. citizenship led the Court to hold in AFROYIM V. RUSK (1967) that Congress may not deprive a person of U.S. citizenship (other than in the case of wrongful NATURALIZATION) unless the person has a specific intent to relinquish it. American citizens may not be deported, and have the right to enter or return to the United States. Most citizens take these rights for granted, but they mark a significant distinction between the statuses of citizen and ALIEN.

The fundamental norm of U.S. citizenship law is the principle of *jus soli*—that all persons born in the United States are citizens at birth. The language of the FOURTEENTH AMENDMENT—written to overcome Chief Justice ROGER BROOKE TANEY's opinion in DRED SCOTT V. SANDFORD (1857)—affirmed the COMMON LAW rule of *jus soli.* In UNITED STATES V. WONG KIM ARK (1898), decided at the height of constitutionalized American racism, the Court held that the children of Chinese immigrants born in the United States were citizens at birth, despite federal law prohibiting the naturalization of their parents.

Citizenship may also be acquired by descent (*jus sanguinis*) and through naturalization. Since 1790, federal statutes have permitted aliens in the United States to naturalize, and have granted citizenship at birth to persons born to American parents outside the United States. These sources of citizenship are not secured by the Fourteenth Amendment, and traditionally the Court has recognized broad congressional authority to distribute citizenship by statute largely immune from judicial scrutiny. However, in *Miller v. Albright* (1998), the Court was sharply divided over the constitutionality of a federal statute permitting U.S. citizen mothers to pass citizenship to NONMARITAL CHILDREN born outside the United States on easier terms than U.S. citizen fathers. A majority of the Justices indicated that they would invalidate the statute in a properly presented case.

Citizenship is at the same time universalistic and exclusionary. The Constitution forbids Congress from granting TITLES OF NOBILITY; in this republic, the office of citizen defines the class of governors. The concept of citizenship therefore pushes toward universal suffrage. So too, by defining membership in a polity, citizenship suggests a core class of right holders. In a famous formulation, T. H. Marshall noted that "[c]itizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed."

But formal equality on paper has rarely guaranteed equal treatment in life. Throughout American history large classes of citizens have been citizens in name only. Most adult Americans were not eligible to vote at the time of the Constitution's adoption, and discrimination based on race, gender, wealth, and other grounds has created huge political and economic inequalities among nominally "equal" citizens.

So too, laws regulating access to citizenship have included racial exclusions for more of our history than not. The naturalization act of 1790 limited eligible classes to "white persons." Following the CIVIL WAR, the statute was amended to include persons of "African descent"—a formulation that continued to prohibit Asian immigrants from naturalizing. The racial bars on naturalization were not fully removed until 1952. For several decades early in this century, federal law provided that citizen women who married foreigners lost U.S. citizenship for so long as the MARRIAGE lasted.

Despite this history, the constitutional claim of equal citizenship is a powerful one, and distinctions that seem natural in one era become unconstitutional denials of equal citizenship in another. But it is here that the exclusionary aspect of citizenship arises. By drawing a circle and designating those within the circle sovereign and equal, the concept of citizenship perforce treats those outside the circle (aliens) as less than full members. Justice BYRON R. WHITE recognized this implication of citizenship in *Cabell v. Chávez-Salido* (1982): "Self-government . . . begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community."

Does the Constitution necessarily link rights and citizenship? The term "citizen" does not appear in the BILL OF RIGHTS; and it has long been bedrock constitutional law that aliens residing in the United States are protected by the Fourteenth Amendment's guarantee of EQUAL PROTECTION OF THE LAWS, under the rule of YICK WO V. HOPKINS (1886), and enjoy most of the rights secured by other provisions of the Constitution. Furthermore, the Court has applied STRICT SCRUTINY to state regulations based on alienage (with an exception for political rights and offices). At the same time the Court has adopted a virtually toothless STANDARD OF REVIEW for federal statutes that draw distinctions on the basis of alienage. The Court's deference to Congress extends both to explicit regulations of IMMIGRATION and to statutes distinguishing aliens from citizens in the granting of federal benefits. As the Court stated expressly in *Mathews v. Díaz* (1976), "Congress regularly makes rules that would be unacceptable if applied to citizens[;] [and the] fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.' " Perhaps it is not an oxymoron to suggest that constitutional norms supply a "second-class citizenship" for aliens in the United States.

As the nation-state comes under challenge both from below (with claims for autonomy for subnational groups) and from above (with the establishment of supranational legal orders), the concept of citizenship has come under renewed focus. Proposals have been made to make citizenship "mean more"; and landmark changes in U.S. welfare policy in 1996 did just that by disentitling most future immigrants from federally supported welfare programs. Other proposals, of dubious constitutionality, would deny BIRTHRIGHT CITIZENSHIP to children born in the United States to undocumented aliens. Policies that grant significant benefits to citizens denied to aliens apparently have provided a substantial incentive to naturalization. The interesting question for those who seek to pour more content into citizenship is whether naturalizations based on a desire to preserve access to social programs in fact serve that goal.

The increasing frequency of dual nationality poses new questions for the meaning of citizenship. At the beginning of the twentieth century, dual nationality was disfavored. Prevailing INTERNATIONAL LAW norms pursued the goal of ensuring that every person was a member of one and only one nation-state. But migration and state practice have made dual nationality a more common phenomenon, arising usually from birth in one state to parents who are citizens of another state. In a significant shift in state practice, a number of countries are now permitting citizens who naturalize elsewhere to retain their original citizenship. Because the United States continues to admit large numbers of immigrants, it will likely face increasing numbers of dual nationals. The Constitution says nothing explicit about dual nationality. The Fourteenth Amendment's principle of *jus soli* (coupled with the laws of foreign states) is an important cause of dual nationality. Congress's Article I, section 8 power to adopt naturalization laws permits the federal government to either embrace, ignore, or seek to deter dual nationality of persons who attain U.S. citizenship by naturalization.

In the end, we face a constitutional conundrum. As a democracy, the United States needs a *demos* both as a location of SOVEREIGNTY and from which to designate a class of governors. (Although in the nineteenth century a number of states permitted ALIEN SUFFRAGE, those laws had been repealed by the early twentieth century.) But the Constitution does not define rights in terms of citizenship; rights are generally guaranteed as human rights, irrespective of status. Indeed, the Constitution imposes no specific obligations on citizens; and other than JURY SERVICE, there are precious few obligations imposed by law on citizens *qua* citizens. Aliens, then, benefit from a kind of constitutional citizenship, even if the citzenry is

deemed the source of the Constitution and the day-to-day governance of the republic is reserved to citizens.

T. ALEXANDER ALEINIKOFF
(2000)

Bibliography

BRUBAKER, ROGERS 1992 Citizenship as Social Closure. Pages 21–34 in *Citizenship and Nationhood in France and Germany.* Cambridge, Mass.: Harvard University Press.

KARST, KENNETH L. 1977 The Supreme Court, 1976 Term—Foreword: Equal Citizenship under the Fourteenth Amendment. *Harvard Law Review* 91:1–68.

MARSHALL, T. H. 1964 Citizenship and Social Class. Pages 65–122 in *Class, Citizenship, and Social Development: Essays by T. H. Marshall.* Garden City, N.Y.: Doubleday & Company, Inc.

SMITH, ROGERS 1997 *Civic Ideals: Conflicting Visions of Citizenship in U.S. History.* New Haven, Conn.: Yale University Press.

WALZER, MICHAEL 1989 Citizenship. Pages 211–219 in Terence Ball, James Farr, and Russell L. Hanson, eds., *Political Innovation and Conceptual Change.* Cambridge, Mass.: Cambridge University Press.

## *CITY COUNCIL OF LOS ANGELES v. TAXPAYERS FOR VINCENT*
466 U.S. 789 (1984)

A Los Angeles ordinance prohibited the posting of signs on public property. Supporters of a candidate for city council sued to enjoin city officials from continuing to remove their signs from utility poles; they were joined as plaintiffs by the company that made and posted the signs for them. Of the 1,207 signs removed during one week of the campaign, 48 supported the candidate; most were commercial signs. The Supreme Court, 6–3, rejected constitutional attacks on the ordinance on its face and as applied.

The case seemed to call for analysis according to the principles governing rights of access to the PUBLIC FORUM—rights particularly valuable to people of limited means. Instead, Justice JOHN PAUL STEVENS, for the Court, applied the set of rules announced in UNITED STATES V. O'BRIEN (1968), suggesting the possibility that those rules might in the future be applied routinely to FIRST AMENDMENT cases involving regulations that are not aimed at message content. Here the government interest in aesthetic values was substantial; the city had no purpose to suppress a particular message; and the law curtailed no more speech than was necessary to its purpose. In a bow to public forum reasoning, Stevens noted that other means of communication remained open to the plaintiffs.

The dissenters, led by Justice WILLIAM J. BRENNAN, argued that the assertion of aesthetic purposes deserved careful scrutiny to assure even-handed regulation, narrowly tailored to aesthetic objectives that were both comprehensively carried out and precisely defined. The City had made no such showing here, they contended.

Critics of the decision have suggested that it is part of a larger inegalitarian trend in BURGER COURT decisions concerning the FREEDOM OF SPEECH and FREEDOM OF THE PRESS, a trend exemplified by BUCKLEY V. VALEO (1976) and HUDGENS V. NLRB (1976).

KENNETH L. KARST
(1986)

## CITY OF . . .

See: entry under name of city

## CIVIL DISOBEDIENCE

Civil disobedience is a public, nonviolent, political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government. The idea of civil disobedience is deeply rooted in our civilization, with examples evident in the life of Socrates, the early Christian society, the writings of Thomas Aquinas and Henry David Thoreau, and the Indian nationalist movement led by Gandhi.

The many occurrences of civil disobedience throughout American history have had a profound impact on the legal system and society as a whole. The Constitution does not provide immunity for those who practice civil disobedience, but because the United States is a representative democracy with deep respect for constitutional values, the system is uniquely responsive to acts of civil disobedience. Examples of civil disobedience in American history include the Quakers' refusal to pay taxes to support the colonial Massachusetts Church, the labor movement's use of the tactic in the early twentieth century, and citizens' withholding of taxes in protest of military and nuclear expenditures.

The fundamental justification for civil disobedience is that some persons feel bound by philosophy, religion, morality, or some other principle to disobey a law that they feel is unjust. As MARTIN LUTHER KING, JR., wrote in his *Letter from Birmingham Jail*, "I submit that an individual who breaks a law that his conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for law." Civil disobedience is most justifiable when prior lawful attempts to rectify the situation have failed; and when the acts of civil disobedience are done to force the society to

recognize the problem; when performed openly and publicly; and when the actor will accept the punishment. Many proponents urge that civil disobedience be used only in the most extreme cases, arguing that the Constitution provides many opportunities to voice one's grievances without breaking the law.

Opponents of civil disobedience see it as a threat to democratic society and the forerunner of violence and anarchy. The premise of stable democracy, they contend, is that the minority will accept the will of the majority. Opponents argue that the lack of a coherent theory of civil disobedience can result in the abuse of the tactic.

Civil disobedience may be designed to change the Constitution itself. The responsiveness of the Constitution to the voice of dissent and civil disobedience is particularly evident in two movements in our history: the women's suffrage movement and the antislavery movement. These movements brought about great constitutional changes through a variety of political strategies, including civil disobedience.

The women's suffrage movement began in the first part of the nineteenth century. Increasing numbers of women were becoming active in political parties, humanitarian societies, educational societies, labor agitation groups, antislavery associations, and temperance associations. By 1848, the women had organized the National Women's Rights Convention at SENECA FALLS where ELIZABETH CADY STANTON and Lucretia Mott led the women in writing the Declaration of Sentiments. A main tenet of the declaration was that women should be granted the right to vote in order to preserve the government as one that has the consent of the governed. The women used a variety of tactics in their struggle to obtain the franchise, including conventional political tactics, lobbying at the national, state, and local levels, and petitions. An important tactic in the women's fight was the use of civil disobedience, which helped gain support and publicity for their cause. The methods of civil disobedience included voting in elections (which was illegal), refusing to pay taxes, and PICKETING the White House.

A visible act of civil disobedience used by the women's movement was to register and vote in elections. A prominent example occurred in 1872 when SUSAN B. ANTHONY and fourteen other women registered and voted in Rochester, New York. They were accused and charged with a crime "of voting without the lawful right to vote." The women argued that the FOURTEENTH AMENDMENT and FIFTEENTH AMENDMENT gave them the legal right to vote. This legal argument was dismissed by the Supreme Court in MINOR V. HAPPERSETT (1875), when the Court held that women were CITIZENS but were not entitled to vote. Once the Court refused to recognize the argument based on existing amendments, the suffragist organization concentrated their efforts on the fight for passage of a constitutional amendment that would ensure women the right to vote.

Another, more isolated instance of civil disobedience was performed by activist Abby Smith. Abby Smith refused to pay her property taxes until she was given the right to vote at the town meeting. This simple instance of a woman standing up for her rights served to publicize the women's cause to a certain extent.

A final tactic of the WOMAN SUFFRAGE MOVEMENT that amounted to both civil disobedience and lawful dissent was the practice of picketing the White House in order to gain presidential support for the proposed amendment. Although the women had a legal right to picket, the policemen at the time treated them with contempt, as if they were lawbreakers. The women were jailed for exercising constitutional rights, and it was not until later that they were vindicated by the courts.

During the antislavery movement in the mid-1850s, civil disobedience gained considerable acceptance in some parts of the country. Opposition to slavery reached new peaks after the passage of the Fugitive Slave Law of 1850. The act provided for a simplified procedure to return escaped slaves to their masters, with provisions excluding TRIAL BY JURY and writs of HABEAS CORPUS from fugitive slave cases, and providing a financial incentive for federal commissioners to decide cases in favor of southern claimants. Throughout the North, meetings were held where citizens denounced the new law and vowed their disobedience to the act. Many based their views on philosophical, legal, or religious grounds. Those publicly opposing the act included Lewis Hayden, William C. Nell, Theodore Parker, Daniel Foster, and Henry David Thoreau. Some commentators believe that a clear and direct line runs from the antislavery crusaders to the Fourteenth Amendment. The acts of civil disobedience to the Fugitive Slave Act represented the feelings of a substantial portion of the country at the time. This opinion was eventually transformed into the THIRTEENTH, Fourteenth, and Fifteenth Amendments, which abolished slavery, guaranteed the former slaves' citizenship, and protected their right to vote. Civil disobedience remains a potentially significant tool for effecting constitutional change.

The Constitution has been used to justify civil disobedience. Examples in our recent history include the CIVIL RIGHTS MOVEMENT and military resistance. Some of the best-known uses of civil disobedience occurred during the civil rights movements of the 1950s and 1960s. Martin Luther King, Jr., and his followers felt compelled to disobey laws that continued the practice of SEGREGATION; they opposed the laws on moral, ethical, and constitutional grounds. In fact, some of the laws they allegedly disobeyed

were unconstitutional. Although the movement initially attempted to change the system through conventional legal and political channels, it eventually turned to the tactics of civil disobedience in order to bring national attention to its cause. By appealing to the Constitution as justification for their acts of civil disobedience, the civil rights leaders made important contributions to the development of constitutional law in the areas of EQUAL PROTECTION, DUE PROCESS, and FREEDOM OF SPEECH.

The civil rights movement's tactics included SIT-INS, designed to protest the laws and the practice of segregated lunch counters and restaurants. Black students entered restaurants and requested to be served in the white part of the establishment. When they refused to leave upon the owner's request, they were arrested on grounds of criminal TRESPASS.

Quite a few of these cases were heard by the Supreme Court, where the blacks argued that the equal protection clause of the Fourteenth Amendment made these laws unconstitutional. In *Peterson v. City of Greenville* (1963) ten black students had been arrested after they refused to leave a segregated restaurant. The Supreme Court reversed their convictions, holding that the laws requiring segregation violated the equal protection clause of the Fourteenth Amendment. The court reasoned that there was sufficient STATE ACTION because of the existence of the statute, which indicated the state policy in favor of segregation. Many factually similar cases were reversed on the authority of the *Peterson* decision. In addition to using the equal protection clause, the courts sometimes held that the laws as applied to black citizens were VOID FOR VAGUENESS or for lack of NOTICE.

The sit-ins, freedom rides, and continued demonstrations eventually swayed public opinion and contributed to the passage of the CIVIL RIGHTS ACT OF 1964, which prohibited discrimination in many areas of life. Under the act, many acts that had previously amounted to civil disobedience became protected by law.

In addition to the successes achieved in RACIAL DISCRIMINATION law, the civil rights movement and its acts of civil disobedience have contributed to the FIRST AMENDMENT law regarding freedom of speech and FREEDOM OF ASSEMBLY AND ASSOCIATION. For example, in COX V. LOUISIANA (1964) peaceful civil rights demonstrators were convicted of disturbing the peace. The Court struck down the BREACH OF THE PEACE statute for vagueness and OVERBREADTH, thus expanding constitutional rights to free speech and assembly.

Although the civil rights movement involved acts of civil disobedience on a massive scale, resistance to the country's military policy has traditionally involved more solitary acts. Still, the resisters have based many of their arguments on constitutional provisions. These arguments have not always been successful, but the protesters succeeded in calling attention to causes such as opposition to war and military policy.

Those opposed to the country's military policy have used both indirect and direct methods of civil disobedience. Examples of indirect methods include DRAFT CARD BURNING, supplying false information on tax forms, and trespassing on government grounds. Although the protesters gained publicity from these tactics, the disobedient's claims of freedom of speech and RELIGIOUS LIBERTY under the First Amendment usually have not been accepted by the courts. A well-known example of the use of indirect civil disobedience is the Catonsville Nine case in which protesters entered the office of the local Selective Service Board and destroyed government records. Their defense, based on philosophical and moral grounds, was held insufficient by the courts.

Direct forms of civil disobedience to war have included resistance to the draft and refusal to pay taxes. The disobedience surrounding the draft has taken many forms, but many legal challenges have focused on the SELECTIVE SERVICE ACT. In several cases, the men who refused induction argued that the CONSCIENTIOUS OBJECTION provision was unconstitutional as it applied to the individual. They argued that to construe the provision as requiring a belief in a supreme being was a violation of the free exercise clause of the First Amendment. The Court has avoided the constitutional questions in these cases by giving a broad construction to statutory exemptions of the conscientious objectors. Another direct form of civil disobedience used to protest the country's involvement in war has been to withhold the payment of taxes, arguing that to support a war that one does not believe in is in violation of the free exercise clause. The Supreme Court has never decided the constitutional issues in these cases. Although both direct and indirect forms of civil disobedience in resistance to military policy have been equally unsuccessful in presenting legal challenges to laws, they have been successful in publicizing the disobedients' grievances.

The debate concerning the morality or justification for the use of civil disobedience as a method of effecting change in society will never be fully resolved. However, civil disobedience remains a significant and often successful tactic used in many movements in American society. The use of civil disobedience, when incorporated with other conventional political strategies, can lead to profound changes in the Constitution itself or in the interpretation of the document. American society's positive response to certain acts of civil disobedience can be seen in the civil rights movement, the women's suffrage movement, and the antislavery movement. Although not all acts

of civil disobedience yield substantial changes, our democratic system provides the opportunity for civil disobedience to contribute to significant changes in society.

ROBERT F. DRINAN, S.J.
(1986)

Bibliography

FORTAS, ABE 1968 *Concerning Dissent and Civil Disobedience.* New York: World Publishing Co.

GREENBERG, JACK 1968 "The Supreme Court, Civil Rights, and Civil Dissonance." *Yale Law Journal 77:1520–1544.*

KALVEN, HARRY, JR. 1965 *The Negro and the First Amendment.* Columbus: Ohio State University Press.

WEBER, DAVID R., ed. 1978 *Civil Disobedience in America.* Ithaca, N.Y.: Cornell University Press.

## CIVIL FORFEITURE

Forfeiture refers to the government's uncompensated confiscation of PROPERTY that is implicated in crime. The property may be used to commit crime, be its product, or be obtained with its fruits. A home, for example, that is bought with money from a robbery or illegal drug sales is subject to forfeiture. The government may prosecute the culprit criminally and, on his conviction, confiscate his property as part of his punishment, or it may proceed against the property in a civil suit by means of a procedure that is at war with the Constitution.

Unlike EMINENT DOMAIN, forfeiture excludes any compensation for the confiscated property. In the case of civil forfeiture, unfairness and injustice always prevail. "Civil forfeiture," declared the president of the National Association of Criminal Defense Attorneys, "is essentially government thievery." If the civil forfeiture laws of the states and the federal government are a license to steal, the cops are the robbers. Police shake down suspects, confiscate their cash, and make no arrests. At airports, law enforcement officers routinely take cash from travelers who supposedly fit a drug-smuggler profile or otherwise look suspicious. The promise of forfeiture lures officers and prosecutors to seize what they can, because they are able to keep for law enforcement purposes most of what they seize, or they can use the assets for whatever they need—weapons, helicopters, cellular phones, salary increases, bulletproof vests, or new police cars with which to conduct the war against crime.

About 80 percent of all civil forfeiture cases are uncontested, quite likely because most of the suspects are in fact guilty. But many forfeiture victims are innocent. One Floridian, for example, bought a new sailboat for $24,000. Customs officers, who often suspect boat owners of smuggling drugs, seized his sailboat and conducted a seven-hour search, during which time they ripped out its woodwork, smashed its engine, ruptured its fuel tank, and drilled holes in its hull, many below the water line. The officers, who found no drugs, damaged the boat beyond repair, forcing the innocent owner to sell it for scrap. Law enforcement officers seize money, cars, houses, land, and businesses, yet the victims often cannot afford to contest a forfeiture because of the high cost of lawyers. Legal fees can easily run to considerably more than the value of most forfeitures. As one defense attorney declared, "Sue to get your car back? Forget it. If they take your car, it's gone. Unless I get pissed off and take a case for the sweet pleasure of revenge, I'm not going to handle anything less than $75,000 in assets, from which I'd get one-third." A Connecticut family, whose grandson kept controlled substances in his room, lost their home and denounced the government's greed as "Nazi justice." A man who ran an air charter service innocently carried a passenger whose luggage contained drug money. As a result of the search by drug enforcement agents, who caused damage of at least $50,000 for which the Drug Enforcement Agency (DEA) is not liable, the owner of the charter service had to declare BANKRUPTCY, lost his business, and became a truck driver.

Civil forfeitures have a peculiar character—the government sues the supposedly guilty property, not its owners. Thus, in *United States v. One 6.5 mm. Mannlicher-Carcano Military Rifle* (1966), the government sued the rifle that was used to assassinate President JOHN F. KENNEDY. As the Court observed, the law ascribes "to the property a certain personality, a power of complicity and guilt in the wrong." In another case the Court explained, "Traditionally, forfeiture actions have proceeded upon the fiction that the inanimate objects themselves can be guilty of wrongdoing. Simply put, the theory has been that if the object is 'guilty,' it should be held forfeit." The innocence of its owner is irrelevant as a matter of law. The guilt attaches to the thing by which a wrong has been done, and the government profits from the wrong. Forfeitures are an important source of government revenue, and because no person is found guilty in a civil forfeiture case, the forfeiture is held not to constitute punishment—a blatant misconception. A tiny trace of marijuana suffices to justify the forfeiture of a vessel, vehicle, or home.

Civil forfeiture is attractive to the nation's lawmakers because it is much more likely to be successful than a criminal forfeiture proceeding in which the defendant has the benefits of all the rights of the criminally accused guaranteed by the Constitution, plus the presumption that he is innocent until the government proves otherwise beyond a reasonable doubt. In a civil forfeiture case, the government does not have to establish the person's guilt; he is not a party to the case. The obligation of the government is simply to show that a probable causal connection exists

between the property and the commission of a crime. Hearsay, circumstantial evidence, and anything more than a hunch can be used to establish PROBABLE CAUSE. That done, the burden shifts to the owner of the property or to its claimant to establish by a preponderance of evidence that the property is "innocent." Owners or claimants have no way to exercise their constitutional rights. In civil forfeitures, the property that is sued has no rights. Civil forfeiture is swift, cheap, and pretty much a sure thing from the government's standpoint.

The leading American case, decided in 1974, involved the Pearson Yacht Company, which had rented its vessel to someone who left the remains of one marijuana cigarette, which the state discovered on searching the ship. The company had no knowledge that its yacht had been used in violation of state law, yet the Court held against the company and in favor of the forfeiture. The Court, ruling that the innocence of the company mattered not at all, reasoned that the law proceeded not against the owner of the property but against the yacht itself, because the yacht was the guilty party. Intellectual flimflammery characterizes the law of civil forfeiture.

LEONARD W. LEVY
(2000)

(SEE ALSO: *Double Jeopardy.*)

Bibliography

LEVY, LEONARD W. 1996 *A License to Steal: The Forfeiture of Property.* Chapel Hill: University of North Carolina Press.

## CIVIL LIBERTIES

WILLIAM BLACKSTONE described civil liberty as "the great end of all human society and government . . . that state in which each individual has the power to pursue his own happiness according to his own views of his interest, and the dictates of his conscience, unrestrained, except by equal, just, and impartial laws." As a matter of law, civil liberties are usually claims of right that a citizen may assert against the state. In the United States the term "civil liberties" is often used in a narrower sense to refer to RELIGIOUS LIBERTY, personal privacy, and the right to DUE PROCESS OF LAW, or to other limitations on the power of the state to restrict individual freedom of action. In this sense, civil liberties may be distinguished from rights to equality (sometimes called "civil rights"), although the latter have increasingly been recognized as important elements of individual freedom because they permit participation in society without regard to race, religion, sex, or other characteristics unrelated to individual capacity.

The concept of civil liberties is a logical corollary to the ideas of LIMITED GOVERNMENT and RULE OF LAW. When government acts arbitrarily, it infringes civil liberty; the rule of law combats and confines these excesses of power. The concept "government of laws, not of men" reflects this idea as does the vision of justice as fairness.

Although civil liberties are usually associated in practice with democratic forms of government, liberty and democracy are distinct concepts. An authoritarian government structure may recognize certain limits on the capacity of the state to interfere with the autonomy of the individual. Correspondingly, calling a state democratic does not tell us about the extent to which it recognizes civil liberty. Thus, "civil liberties" does not refer to a particular form of political structure but to the relationship between the individual and the state, however the state may be organized. But civil liberties do presuppose order. As Chief Justice CHARLES EVANS HUGHES said in COX V. NEW HAMPSHIRE (1941), "Civil liberties imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."

In the final analysis, civil liberties are based on the integrity and dignity of the individual. This idea was expressed by George C. Marshall, who was chief of staff to the American army in WORLD WAR II and later served as secretary of state: "We believe that human beings have . . . rights that may not be given or taken away. They include the right of every individual to develop his mind and his soul in the ways of his own choice, free of fear and coercion—provided only that he does not interfere with the rights of others."

There are two principal justifications for preferring individual liberties to the interests of the general community—justice and self-interest. At the very least, justice requires norms by which persons in authority treat those within their power fairly and evenly. Self-interest suggests that our own rights are secure only if the rights of others are protected.

Because these two justifications for civil liberties are abstractions to most people, they are often subordinated to more immediate concerns of the state or the majority. In America, even administrations relatively friendly to civil liberty have perpetrated some of the worst violations. The administration of FRANKLIN D. ROOSEVELT interned Japanese Americans during World War II. ABRAHAM LINCOLN suspended the right of HABEAS CORPUS. And as Leonard W. Levy has reminded us, THOMAS JEFFERSON was far more of a libertarian as a private citizen than when he was in power. Nevertheless, civil liberties have been more broadly defined and fully respected in the United States than in other nations.

The roots of American civil liberties can be traced to

ancient times. The city-state of Athens made a lasting contribution to civil liberty. In the sixth century B.C., Solon, the magistrate of Athens, produced a constitution that, while flawed, gave the poor a voice in the election of magistrates and the right to call public officials to account. Solon is also credited with first expressing the idea of the rule of law. But Athens knew no limits on the right of the majority to adopt any law it chose, and there was no concept of individual rights against the state. Greek philosophers introduced the idea of "natural law" and the derivative concept of equality; all Athenians (except slaves) were equal citizens, for all possessed reason and owed a common duty to natural law.

The Romans also contributed to civil liberties, first through a rudimentary SEPARATION OF POWERS of government and later by the further development of natural law. Justinian's *Institutes* recites, "Justice is the fixed and constant purpose that gives every man his due." Nevertheless, the Roman emperors were autocratic in practice; there were no enforceable rights against the state, which practiced censorship, restricted travel, and coerced religion.

In the Middle Ages there was little manifestation of civil liberties. But the idea of a pure natural law was carried forward in Augustine's *City of God*. On the secular side, the contract between feudal lords and their vassals established reciprocal rights and responsibilities whose interpretation was, in some places, decided by a body of the vassal's peers.

Among English antecedents of civil liberties, the starting point is MAGNA CARTA (1215), the first written instrument that exacted from a monarch rules he was bound to obey. Although this document reflected the attempt of barons to secure feudal privileges, basic liberties developed from it—among them the security of private property, the security of the person, the right to judgment by one's peers, the right to seek redress of grievances from the sovereign, and the concept of due process of law. Above all, as Winston Churchill said, Magna Carta "justifies the respect in which men have held it" because it tells us "there is a law above the king."

Another great charter of English liberty was the 1628 PETITION OF RIGHT, a statute that asserted the freedom of the people from unconsented taxation and arbitrary imprisonment. The HABEAS CORPUS ACT OF 1679 was another major document of English liberty. The BILL OF RIGHTS of 1698 which also influenced American constitutional law, declared that parliamentary elections ought to be free and that Parliament's debates ought not to be questioned in any other place, and it condemned perversions of criminal justice by the last Stuart kings, including excessive BAIL and CRUEL AND UNUSUAL PUNISHMENTS.

The experience of the American colonies was important to the development of civil liberties in the United States. The COLONIAL CHARTERS set up local governments that built upon English institutions, and the colonists jealously opposed any infringements upon their rights. The VIRGINIA CHARTER OF 1606 reserved to the inhabitants "all liberties, Franchises and Immunities . . . as if they had been abiding and born, within this our Realm of England."

The MASSACHUSETTS BODY OF LIBERTIES of 1641 expressed in detail a range of fundamental rights later to be adopted in the American BILL OF RIGHTS. Rhode Island was the first colony to recognize religious liberty, largely through the efforts of its founder, ROGER WILLIAMS. The Puritans banished Williams from Massachusetts in 1635 for unorthodoxy, and he settled in Providence. There the plantation agreement of 1640 protected "liberty of Conscience," and this doctrine appeared in the Colony's charter in 1663. The Pennsylvania charter and those of other colonies were also influential in protecting individual rights. ZENGER'S CASE (1735), in which a jury acquitted a New York publisher on a charge of SEDITIOUS LIBEL, was a milestone in securing the freedom of the press.

By the time of the American Revolution, the colonists were familiar with the fundamental concepts of civil liberty that would be included in the Constitution and Bill of Rights. Unlike the contemporary French experience, where the promise of the Declaration of the Rights of Man went largely unfulfilled for want of institutional safeguards, the American Constitution of 1787 embodied a republican government elected by broad suffrage that was reinforced by judicial review and by CHECKS AND BALANCES among the three branches of government.

The original Constitution, a document devoted mainly to structure and the allocation of powers among the branches of the national government, contains some explicit safeguards for civil liberty. It provides that the "privilege" of habeas corpus, which requires a judge to release an imprisoned person unless he is being lawfully detained, may not be "suspended." The EX POST FACTO and BILL OF ATTAINDER clauses require the Congress to act prospectively and by general rule. Article III guarantees a jury trial in all federal criminal cases, defines TREASON narrowly, and imposes evidentiary requirements to assure that this most political of crimes will not be lightly charged.

Apart from the omission of a bill of rights, which was soon rectified, the Constitution's principal deficiency from a civil liberties standpoint was its countenance of slavery. Without mentioning the term, in several clauses it recognized the legality of that pernicious institution. DRED SCOTT V. SANDFORD (1857) cemented the legally inferior status of blacks and contributed to CIVIL WAR by ruling that slaves or the descendants of slaves could not become citizens of the United States. The EMANCIPATION PROCLAMATION (1863) and the THIRTEENTH AMENDMENT (1865) freed the slaves, but the reaction that occurred after the end of RECON-

STRUCTION in 1877 and decisions such as the CIVIL RIGHTS CASES (1883) and PLESSY V. FERGUSON (1896) undercut their purposes. The movement toward civil equality did not gain new momentum until the middle of the twentieth century.

The civil liberties of Americans are embodied primarily in the BILL OF RIGHTS (1791), the first ten amendments to the Constitution. JAMES MADISON proposed the amendments after the debates on RATIFICATION OF THE CONSTITUTION revealed wide public demand for additional protection of individual rights. The FIRST AMENDMENT guarantees the freedoms of speech, press, assembly, petition, and religious exercise, as well as the SEPARATION OF CHURCH AND STATE. The FOURTH AMENDMENT protects the privacy and security of home, person, and belongings and prohibits unreasonable SEARCHES AND SEIZURES. The Fifth, Sixth, and Eighth Amendments extend constitutional protection to the criminal process, including the right to due process of law, TRIAL BY JURY, CONFRONTATION, of hostile witnesses, assistance of legal counsel, the RIGHT AGAINST SELF-INCRIMINATION, and protection against DOUBLE JEOPARDY and cruel and unusual punishment. The TENTH AMENDMENT reserves to the states and to the people powers not delegated to the federal government. Although the Bill of Rights was originally applicable only to the federal government, most of its provisions now have been applied to the states through the due process clause of the FOURTEENTH AMENDMENT. (See INCORPORATION DOCTRINE.) The amendment also provides a generalized guarantee of EQUAL PROTECTION OF THE LAWS as well as a virtually unenforced right to certain PRIVILEGES AND IMMUNITIES. Finally, the FIFTEENTH AMENDMENT and NINETEENTH AMENDMENT guarantee VOTING RIGHTS regardless of race or sex.

A practical understanding of civil liberties in the United States may be aided by illustrations of three main dimensions of the subject: freedom of speech, due process, and equal protection.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The almost universal primacy given free speech as a "civil liberty" rests on several important values: the importance of freedom of speech for self-government in a democracy, its utility in probing for truth, its role in helping to check arbitrary government power, and its capacity to permit personal fulfillment of those who would express and receive ideas and feelings, especially unpopular ones, without fear of reprisal.

Consistent with the First Amendment, even revolutionary speech that is not "directed to inciting or producing imminent lawless action and is likely to incite or produce such action" is immunized from government control. (See INCITEMENT.) Similarly, highly offensive political speech and defamations of public officials and PUBLIC FIGURES that are not intentionally or recklessly false are protected. (See LIBEL AND THE FIRST AMENDMENT.) Because effective advocacy is enhanced by group membership, the First Amendment has also been interpreted to protect freedom of association from interference, absent a compelling state justification. The First Amendment provides particularly strong protection against PRIOR RESTRAINT—INJUNCTIONS or other means of preventing speech from ever being uttered or published.

Freedom of speech is not absolute. In addition to the limits just noted, OBSCENITY, child PORNOGRAPHY, and FIGHTING WORDS likely to provoke physical attacks are unprotected. All forms of speech, furthermore, are subject to reasonable time, place, and manner restrictions. The amendment has been interpreted to afford a lesser degree of protection to speech that is sexually explicit (although not obscene), to COMMERCIAL SPEECH, to SYMBOLIC SPEECH such as nonverbal displays intended to convey messages, and to DEMONSTRATIONS (for example, PICKETING) that combine speech and action.

The concept of fair procedure, embodied in the due process clauses of the Fifth and Fourteenth Amendments, has been viewed as an element of civil liberties at least since Magna Carta, when the king was limited by "the LAW OF THE LAND." In principle, the guarantee of due process prevents government from imposing sanctions against individuals without sufficiently fair judicial or administrative procedures. Justice LOUIS D. BRANDEIS said: "In the development of our liberty insistence upon procedural regularity has been a large factor." Violations of this constitutional guarantee cover a wide range of official misconduct in the criminal process, from lynchings, to coerced confessions, to criminal convictions of uncounseled defendants, to interrogation of suspects without cautionary warnings. Beyond criminal cases, due process principles have been applied to protect juveniles accused of delinquency and individuals whose government jobs or benefits have been terminated. Whatever the context, civil liberty requires that individual interests of liberty and property not be sacrificed without a process that determines facts and liability at hearings that are fairly established and conducted. (See PROCEDURAL DUE PROCESS OF LAW, CRIMINAL; PROCEDURAL DUE PROCESS OF LAW, CIVIL).

The guarantee of equal protection is interpreted to forbid government, and in some cases private entities, to discriminate among persons on arbitrary grounds. The central purpose of the equal protection clause was to admit to civil equality the recently freed black slaves, and leading judicial decisions such as SHELLEY V. KRAEMER (1948) and BROWN V. BOARD OF EDUCATION (1954) and legislative enactments such as the CIVIL RIGHTS ACTS of 1866 and 1964 were particularly addressed to the condition of racial minorities. The constitutional guarantee of equality has been extended to women and to DISCRETE AND INSULAR

MINORITIES—ethnic and religious groups, ALIENS, and children of unwed parents—whom the Supreme Court has deemed unable to protect their interests through the political process. In recent years, the Court has rejected attempts to broaden this category of specially protected groups. It has denied special protection to homosexuals, older persons, and the mentally retarded. The Court has also expressed the antidiscrimination ideal in holding that it is unconstitutional for a legislative districting system to accord votes in some districts significantly greater weight than votes in others.

A vexing equality issue is whether benign classifications of racial minorities or women are consistent with civil liberty on the theory that they prefer groups that historically were, and often still are, discriminated against. Against the background of slavery and legally enforced SEGREGATION, the Supreme Court has upheld AFFIRMATIVE ACTION programs for blacks that prefer them for employment and university admissions on the ground that a wholly "color blind" system would "render illusory the promise" of *Brown v. Board of Education.* It has also upheld some forms of preference for other minorities and for women. There is deep division over these programs. It is often charged that they are themselves an obnoxious use of racial or sexual classifications. Justice HARRY A. BLACKMUN responded to these contentions in REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978) by stating that "[i]n order to get beyond racism, we must first take account of race. . . . We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."

Some liberties in the United States are traceable to a natural law tradition that long antedated the Constitution and are only indirectly reflected in its text. In the American experience, for example, the VIRGINIA DECLARATION OF RIGHTS aserted that "all men are by nature equally free and independent, and have certain inherent rights . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property." This sentiment was reflected in the DECLARATION OF INDEPENDENCE, which spoke of "inalienable rights," and in the Constitution itself, which embodied these principles. In CALDER V. BULL (1798) Justice SAMUEL CHASE expressed his view that NATURAL RIGHTS "form the very nature of our free Republican governments." Over the years the Supreme Court has recognized a number of rights not explicitly grounded in the constitutional text, including, for a season, FREEDOM OF CONTRACT, and, in recent years, the RIGHT TO TRAVEL, and the FREEDOM OF ASSOCIATION. The Court's most celebrated recent decisions of this kind have recognized a series of rights that reflect values of personal privacy and autonomy. These include the rights to marriage and to BIRTH CONTROL, to family relationships and to ABORTION. These liberties are fundamental conditions of the ability of a person to master his or her life. (See FREEDOM OF INTIMATE ASSOCIATION.)

The Supreme Court's decisions enunciating some of these rights have been challenged as unrooted in the original intention of the Framers and therefore subjective and illegitimate. But the Constitution was not frozen in time. Chief Justice JOHN MARSHALL said in MCCULLOCH V. MARYLAND (1819) for a unanimous Court that it is an instrument "intended to endure for ages to come and, consequently, to be adapted to the various crises of human affairs." In the twentieth century, Justice BENJAMIN N. CARDOZO agreed: "The great generalities of the Constitution have a content and a significance that vary from age to age." Further, the NINTH AMENDMENT contemplated that the provisions of the Bill of Rights explicitly safeguarding liberty were not meant to be exhaustive: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Finally, the structure of the Constitution, and the premises of a free society, imply certain liberties, such as the freedom of association and the right to travel.

The uncertainty and even illogic of Supreme Court decisions protecting certain groups and rights—why illegitimate children and not homosexuals, why a right to travel and not a right to housing—should not be viewed as merely the product of politics or prejudice. There are inevitably disagreements and inconsistencies over the proper boundaries of civil liberties and the proper judicial role in their recognition. Filling in the "majestic generalities" of the Constitution has always been a long-range and uncertain task.

An example of the difficulty is CAPITAL PUNISHMENT—the question whether there is a constitutional right not to be executed even for a heinous crime. This liberty is widely accepted throughout the world, but the United States Supreme Court has not recognized it as a constitutional right, instead permitting states to impose sentences of death for murder, subject to due process limitations. Many consider capital punishment inherently a violation of civil liberties because of the randomness in its application, its finality in the face of inevitable trial errors, its disproportionate use against racial minorities, and its dehumanizing effect on both government and the people. The struggle over this and other claims of civil liberty continues in public opinion, legislatures, and the courts.

Another source of American civil liberties is the doctrine of separation of governmental powers, illuminated most notably in the eighteenth century by the *philosophe* MONTESQUIEU. Anticipating John Acton's dictum that absolute power corrupts absolutely, the Supreme Court recognized in LOAN ASSOCIATION V. TOPEKA (1875) that the "theory of our governments, State and National, is op-

posed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers." In the same vein, individual rights are enhanced by the existence of a diverse population. THE FEDERALIST #51 states: "In a free government the security for civil rights [consists] in the multiplicity of interests."

The Supreme Court has enforced the principle of separation of powers. In YOUNGSTOWN SHEET TUBE CO. V. SAWYER (1952) it denied that the President had constitutional power, even in time of national emergency, to seize private companies without legislative authorization. Two Justices rested on the separation of powers doctrine in NEW YORK TIMES CO. V. UNITED STATES (1971) by holding that under all but extraordinary circumstances the President lacks inherent power to enjoin news organizations from publishing classified information. And in UNITED STATES V. NIXON (1974), while ruling that Presidents possess an EXECUTIVE PRIVILEGE to maintain the secrecy of certain communications, the Court rebuffed President RICHARD M. NIXON's attempt to withhold White House tapes from the Watergate special prosecutor. In form, these decisions dealt with questions of allocation of governmental powers; in fact they were civil liberties decisions effectuating a structure designed, in Justice Brandeis's words, "to preclude the exercise of arbitrary power."

Neither the original Constitution nor the Bill of Rights guaranteed the right to vote, a cornerstone of democratic government as well as a civil liberty; slaves, women, and those without property were disfranchised. During the early nineteenth century states gradually rescinded property qualifications; the Fifteenth Amendment (1868) barred voting discrimination by race or color, and the Nineteenth Amendment (1920) outlawed voting discrimination on the ground of sex. Nevertheless, various devices were employed to prevent nonwhites from voting. These were curtailed by the VOTING RIGHTS ACT OF 1965, the TWENTY-FOURTH AMENDMENT's invalidation of POLL TAXES as a qualification for voting, and the Supreme Court's decision in HARPER V. VIRGINIA BOARD OF ELECTIONS (1966). The TWENTY-SIXTH AMENDMENT (1971) extended the franchise to all citizens eighteen years of age and older.

A controversial question is presented by the relationship between the right to property and civil liberties. As the Supreme Court stated in GRIFFIN V. ILLINOIS (1956), "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem." Although some would reject any such link between economics and liberty, others disagree. ALEXANDER HAMILTON stated that "a power over a man's subsistence is a power over his will." More recently, Paul Freund, recognizing that economic independence provides a margin of safety in risk or protest, commented that the effective exercise of liberty may require "a degree of command over material resources."

To a limited extent the Supreme Court has concurred. It has prohibited discrimination against the poor in cases involving voting rights and ACCESS TO THE COURTS. It has also afforded procedural protection against loss of government entitlements, including a government employee's interest in his job and a recipient's interest in welfare benefits. On the other hand, the Court has refused to recognize a generalized constitutional right to economic security. The Court has permitted reduction of welfare benefits below a standard of minimum need, has permitted courtroom filing fees to keep indigents from obtaining judicial discharge of debts, and has refused to recognize a constitutional right to equalized resources for spending on public education. The Court said in DANDRIDGE V. WILLIAMS (1970): "In the area of economics and social welfare, a State does not violate [equal protection] merely because the classifications made by its laws are imperfect." The idea that civil liberties imply a degree of economic security is not yet a principle of constitutional law.

Invasions of liberty are usually committed by government. But individuals may also be victimized by private power. The authority of medieval lords over their vassals was not merely economic. Today large institutions such as corporations, labor unions, and universities may seek to limit the speech or privacy of individuals subject to their authority. For this reason federal and state legislation bars RACIAL DISCRIMINATION and other forms of arbitrary discrimination in the hiring, promotion, and firing of employees, in the sale and rental of private housing, and in admission to academic institutions. The courts likewise have recognized that private power may defeat civil liberties by barring the enforcement of private RESTRICTIVE COVENANTS not to sell real estate to racial minorities and by barring private censorship and interference with freedom of association when those restrictions are supported by STATE ACTION.

Civil liberties can never be entirely secure. Government and large private institutions often seek to achieve their goals without scrupulous concern for constitutional rights. In the eighteenth century Edmund Burke wrote: "Of this I am certain, that in a democracy the majority of citizens is capable of exercising the most cruel oppression upon the minority." More recently, Charles Reich observed that civil liberties are an "unnatural state for man or for society because in a short-range way they are essentially contrary to the self-interest of the majority. They require the majority to restrain itself." The legal rights of minorities and the weak need special protection, particularly under conditions of stress.

The first such condition is economic stringency. Mass unemployment and high inflation exacerbate ethnic rival-

ries and discrimination, and at times are offered to justify the repression of dissent. Minorities pay the heaviest price. The victims include the dependent poor, whose government benefits are often among the first casualties during economic recession.

War also strains the Bill of Rights, for a nation threatened from without is rarely the best guardian of civil liberties within. As noted, President Abraham Lincoln suspended habeas corpus during the Civil War and President Franklin D. Roosevelt approved the internment of Japanese Americans during World War II. In addition, President WOODROW WILSON presided over massive invasions of free speech during WORLD WAR I; MCCARTHYISM, the virulent repression of dissent, was a product of the Cold War of the late 1940s and early 1950s; and President LYNDON B. JOHNSON authorized prosecution of protestors during the VIETNAM WAR. More recently, the deterioration of deatente in the 1980s has led to interference with peaceful demonstrations, widespread surveillance of Americans, politically motivated travel bans and visa denials, and censorship of former government officials.

A third perennial source of trouble for civil liberties in America has been religious zeal. Anti-Catholic and Anti-Semitic nativism paralleled slavery during the nineteenth and twentieth centuries. The Scopes trial (1925), in which a public school teacher was convicted for teaching evolution, was the result of fundamentalist excesses. On the other hand, religious sentiments have often buttressed civil liberties by, for example, supporting the extension of civil rights to racial and other minorities and endorsing the claims of conscientious objectors to conscription in the armed services, even during wartime. But zealous groups threaten to infringe civil liberties when they seek government support to impose their own religious views on nonadherents. This has taken many forms, including attempts to introduce organized prayer in public schools, to outlaw birth control and abortion, and to use public tax revenues to finance religious schools.

If civil liberties exist simply as abstractions, they have no more value than the barren promises entombed in many totalitarian constitutions. To be real, rights must be exercised and respected. The political branches of government—legislators and executive officials—can be instrumental in protecting fundamental rights, and especially in preventing their sacrifice to the supposed needs of the nation as a whole. Yet majoritarian pressures on elected representatives are great during times of crisis, and the stress on liberty is most acute.

The vulnerability of politically accountable officials teaches that freedom is most secure when protected by life-tenured judges insulated from electoral retribution. The doctrine of JUDICIAL REVIEW, which gives the courts final authority to define constitutional rights and to invalidate offending legislation or executive action, is the most important original contribution of the American political system to civil liberty.

Since Chief Justice John Marshall wrote for a unanimous Supreme Court in MARBURY V. MADISON (1803) that the power of judicial review is grounded in the Constitution, tension has existed between this checking authority and the nation's commitment to majority rule. Challenges to the legitimacy of judicial review have been rejected with arguments based on the SUPREMACY CLAUSE in Article VI of the Constitution, on the pragmatic need for national uniformity, and on history. Thus, ROSCOE POUND, the longtime dean of Harvard Law School, concluded that the claim that judicial review is usurpation is refuted by the "clear understanding of American Lawyers before the Revolution, based on the seventeenth-century books in which they had been taught, the unanimous course of decision after independence and down to the adoption of the Constitution, not to speak of the writings of the two prime movers in the convention which drafted the instrument."

Judicial review reinforces the principle that even in a democracy the majority must be subject to limits that assure individual liberty. This principle is the essential premise of the Bill of Rights—the need to counteract the majoritarian pressures against liberty that existed in the eighteenth century and have persisted throughout American history. In the words of the Spanish writer Josea Ortega y Gassett, "[Freedom] is the right which the majority concedes to minorities and hence it is the noblest cry that has ever resounded in this planet." Further, the democratic political process requires civil liberties in order to function—the rights to vote, to speak, and to hear others. Elected legislatures and executive officials cannot be relied on to protect these rights fully and thus to assure the integrity of the democratic process; an insulated judiciary is essential to interpret the Constitution.

The role of the Supreme Court and other courts in exercising judicial review is valid even though their decisions may not reflect the view of the people at a given time. American democracy contemplates limitations on transient consensus and imposes long-term restrictions on the power of legislative majorities to act, subject to a constitutional amendment, because the democracy established by the Constitution is concerned not merely with effectuating the majority's will but with protecting minority rights. Further, as Burt Neuborne has pointed out, federal judges have a democratic imprimatur: "They are generally drawn from the political world; they are appointed by the President and must be confirmed by the Senate." It is for these reasons that James Madison viewed courts as the "natural guardian for the Bill of Rights."

The central role of independent courts in the enforce-

ment of civil liberties has provoked efforts to weaken judicial review. The abolitionists, dissatisfied with federal judges who protected the rights of slaveholders, clamored for jury trials for alleged fugitive slaves; populists have long urged the popular election of judges; and Franklin D. Roosevelt sought to pack the Supreme Court to bend it to popular will. More recently, bills have been introduced in Congress to limit the JURISDICTION OF THE FEDERAL COURTS and to bar some legal remedies that are indispensable to the effectuation of certain constitutional rights. Whatever the perceived short-term advantages of such schemes to one group or another, the long-term effect would be erosion of judicial review and a consequent undermining of civil liberty.

The centrality of courts to the constitutional plan must not obscure the equally important role of legislatures. They can enhance or weaken civil liberty and, absent a declaration of unconstitutionality, their actions are final. During the period of the WARREN COURT, it was widely assumed that the judiciary alone would defend individual rights because legislatures were subject to immediate pressures from the electorate that prevented them from taking a long and sophisticated view of American liberties and protecting minorities and dissenters. But during the 1960s Congress prohibited discrimination in employment, housing, access to PUBLIC ACCOMMODATIONS, and voting; it passed the FREEDOM OF INFORMATION ACT; and it provided legal services for the poor. A few years later it enacted laws aimed at protecting the privacy of personal information. Congress can authorize expenditures, create and dismantle administrative agencies, and enact comprehensive legislation across broad subject areas—powers beyond the institutional capacity of courts.

Legislatures can also impair civil liberties in ways other than restricting judicial review. In recent years battles have raged in Congress over the Legal Services Corporation, the FREEDOM OF INFORMATION ACT, the VOTING RIGHTS ACT, school prayer, tuition tax credits to support private schools, the powers of the Central Intelligence Agency and the Federal Bureau of Investigation, and many other issues. This congressional agenda reflects an intense national debate over the meaning and scope of civil liberties in the 1980s.

Whatever the forum, the security of civil liberty requires trained professionals to press the rights of people. Throughout American history the services of paid counsel have been supplemented by lawyers who volunteer out of ideological commitment or professional obligation. Publicly supported legal services organizations and legislative provision for awarding attorneys' fees to prevailing plaintiffs in CIVIL RIGHTS cases have encouraged the growth of a sophisticated bar that litigates constitutional issues. Vital support for the defense of civil liberties is also provided by private organizations such as the AMERICAN CIVIL LIBERTIES UNION (ACLU) and more specialized groups such as the National Association for the Advancement of Colored People, the National Organization for Women, and public interest law firms ranging across the political spectrum. These bodies engage in litigation, legislative lobbying, and public education in order to advance the rights of their constituencies or constitutional rights generally.

History shows that civil liberties are never secure, but must be defended again and again, in each generation. Examples of frequently repetitive violations of civil liberties involve police misconduct, school book censorship, and interference with free speech and assembly. For instance, the ACLU found it necessary to assert the right of peaceful demonstration when that right was threatened by Mayor Frank Hague's ban of labor organizers in New Jersey in the 1930s, by Sheriff Bull Connor's violence to civil rights demonstrators in Alabama in the 1960s, by the government's efforts to stop antiwar demonstrators in Washington in the 1970s, and by the 1977–1978 effort of the city of Skokie, Illinois, to prevent a march by American Nazis.

The continuing defense of civil liberties is indispensable if often thankless. Strong and determined opponents of human rights have always used the rhetoric of patriotism and practicality to subvert liberty and to dominate the weak, the unorthodox, and the despised. Government efficiency, international influence, domestic order, and economic needs are all important in a complex world, but none is more important than the principles of civil liberties. As embodied in the Constitution and the Bill of Rights, these principles reflect a glorious tradition extending from the ancient world to modern times.

NORMAN DORSEN
(1986)

Bibliography


BRANT, IRVING 1965 *The Bill of Rights.* Indianapolis: Bobbs-Merrill.

CHAFEE, ZECHARIAH, JR. 1941 *Free Speech in the United States.* Cambridge, Mass.: Harvard University Press.

——— 1956 *The Blessings of Liberty.* Philadelphia: Lippincott.

DEWEY, ROBERT E. and GOULD, JAMES A., eds. 1970 *Freedom: Its History, Nature, and Varieties.* London: Macmillan.

DORSEN, NORMAN 1970 The Rights of Americans: What They Are—What They Should Be. New York: Pantheon.

———, ed. 1984 *Our Endangered Rights.* New York: Pantheon.

EMERSON, THOMAS I. 1970 *The System of Freedom of Expression.* New York: Random House.

HAIMAN, FRANKLYN 1981 *Speech and Law in a Free Society.* Chicago: University of Chicago Press.

HAND, LEARNED 1960 *The Spirit of Liberty.* New York: Knopf.

MARSHALL, BURKE, ed. 1982 *The Supreme Court and Human Rights.* Washington, D.C.: Forum Series, Voice of America.
MULLER, HERBERT J. 1963 *Freedom in the Western World from the Dark Ages to the Rise of Democracy.* New York: Harper & Row.
SCHWARTZ, BERNARD 1971 *The Bill of Rights: A Documentary History.* New York: Chelsea House/McGraw-Hill.
TRIBE, LAURENCE H. 1978 *American Constitutional Law.* Mineola, N.Y.: Foundation Press.

## CIVIL LIBERTIES
### (Update 1)

The significant increase in the constitutional protection of CIVIL RIGHTS and civil liberties that has occurred since the late 1950s has brought dramatically renewed focus to the question of the appropriate scope of JUDICIAL POWER. Some argue that the federal judiciary, especially the Supreme Court, should play an active role in helping to shape public values—pushing a sometimes reluctant populace to make more meaningful the broad constitutional guarantees of liberty and equality. Others warn of the antidemocratic nature of JUDICIAL REVIEW. Constitutional decision making often invalidates the policy choices of popularly elected officials in favor of the rulings of life-tenured unelected judges. Schools are desegregated, prisons are ordered restructured, ABORTION regulations are voided, and SCHOOL PRAYERS are prohibited—regardless of how the majority of Americans feel about these decisions.

This countermajoritarian "difficulty" has led to consistent demands for a more passive judiciary. Only if violations of the Constitution are unambiguous, involving significant deprivations of clearly understood civil liberties, the argument goes, should the independent federal judiciary intervene. Otherwise, American democracy should be allowed a loose rein. The choices of the majority, even in most areas that implicate liberty and equality interests, should be considered determinative. And most fundamentally, they should be respected by courts.

How one comes out on this perennial debate, of course, has a major impact upon how one regards the performance of the judiciary in the post-WORLD WAR II era. The VINSON COURT (1946–1953) exercised its authority to invalidate governmental practices relatively rarely. As a result, for example, the criminal prosecution of communists under the Smith Act was upheld and the continued implementation of the SEPARATE BUT EQUAL DOCTRINE by the states went largely undisturbed by the Court.

The WARREN COURT (1954–1969), however, took a much different tack. Following BROWN V. BOARD OF EDUCATION (1954, 1955), the Court launched a virtual constitutional revolution. In fairly rapid succession the Court handed down decisions not only combating RACIAL DISCRIMINATION on a number of fronts but also requiring the REAPPORTIONMENT of legislatures, the application of the bulk of the provisions of the BILL OF RIGHTS against the states through the INCORPORATION DOCTRINE, giving more content to the FIRST AMENDMENT's speech and press guarantees, protecting VOTING RIGHTS, prohibiting orchestrated public school prayer, assuring the poor some measure of ACCESS TO THE COURTS, and bolstering the demands of PROCEDURAL DUE PROCESS. Other institutions of government, both state and federal, were forced to comply with the Justices' aggressive, and often inspiring, vision of the equal dignity of black and white, rich and poor, high and low.

The almost breathless pace of change wrought by the Warren Court led to significant calls for a judicial counterrevolution. President RICHARD M. NIXON named jurists to the Court whom he believed would strictly construe the Constitution. In his view, this meant that the Court would interfere far less frequently with the political branches of government. In many ways, however, the BURGER COURT (1970–1986) failed to fit the bill of STRICT CONSTRUCTION. Some Warren-era doctrines—CRIMINAL PROCEDURE guarantees and legal protections for the poor, for example—were pared back. But the Supreme Court, if anything, became even more accustomed to enforcing its vision of constitutional mandate against other government actors. Important women's rights, including a right to choose to have an abortion, were recognized for the first time. Protections for FREEDOM OF SPEECH were expanded. More surprisingly, perhaps, the Burger Court aggressively patrolled what it considered the appropriate division and SEPARATION OF POWERS among the branches of the federal government. By striking down the LEGISLATIVE VETO procedure in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983), for example, the Court voided, in one stroke, more federal legislative enactments than it had previously in its entire history. The Burger Court may not have been an inspiring Court; it was, however, a powerful one.

The REHNQUIST COURT, of course, has yet to sketch fully its vision of judicial authority. WILLIAM H. REHNQUIST was confirmed as CHIEF JUSTICE in 1986. ANTONIN SCALIA joined the Court in the same year. ANTHONY M. KENNEDY replaced Justice LEWIS F. POWELL in early 1988. Although it is true that a few terms do not a Court make, significant signs are beginning to appear which suggest that the Rehnquist Court may reject much of the activism of its two immediate predecessors. It is possible that the Court will, in the coming decade, intentionally reduce its role in protecting civil liberties through the interpretation of what Justice WILLIAM J. BRENNAN has termed the "majestic generalities" of the Constitution and the Bill of Rights. There is in-

creasing reason to believe that after thirty years of political turmoil over the role of the judiciary in American government, a passive Court may be in the making.

Consider a few prominent examples. In 1986 the Supreme Court dramatically announced a halt to the growth of a favorite Burger Court product, the RIGHT OF PRIVACY. The decision in BOWERS V. HARDWICK (1986) refused to afford constitutional protection to the private, consensual homosexual acts of an adult male. Michael Hardwick had been arrested—though the prosecution was subsequently dropped—for violating Georgia's sodomy statute by having sexual relations with another adult man in his own bedroom. Hardwick claimed that the Georgia law violated the right to privacy. Earlier decisions like GRISWOLD V. CONNECTICUT (1965), which protected the right to use contraceptives, and ROE V. WADE (1973), recognizing the right to terminate a pregnancy, had characterized the right to privacy as "fundamental" and "deeply rooted in this Nation's history and tradition."

The Court in *Bowers* declared that it was not "incline[d] to take a more expansive view of [its] authority to discover new fundamental rights. . . . The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." The majority of the Court claimed that if it were to give credence to claims such as that made by Hardwick, it would be "tak[ing] to itself further authority to govern the country without express constitutional authority." The adjective "further" assumes that the Supreme Court has already moved beyond any supportable role in the constitutional structure. It may also suggest that if *Bowers* is the reversal of a significant trend of decision making in the privacy arena, others will not be far behind.

In the same year, the Supreme Court upheld a municipal ZONING ordinance making it illegal to locate an "adult" theater within a thousand feet of a residential area, single-family dwelling, church, park, or school. The opinion in RENTON (CITY OF) V. PLAYTIME THEATRES, INC. (1986) carried many of the suggestions of the diminished JUDICIAL ROLE that appeared in *Bowers*. As a result, the decision allowed the regulation of constitutionally protected (nonobscene) speech in order to "maintain property values . . . and preserve the . . . quality of the city's neighborhoods."

Perhaps even more telling, though, was the crux of the Court's rationale. The fact that the statute "may" have been motivated, at least in part, by the city's desire to restrict "the exercise of First Amendment rights" was ruled beyond the scope of the Court's review; "[T]his Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." Furthermore, the Court declared that it is beyond the judicial function to "appraise the wisdom of the city's decision. . . . The city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." This language is at least somewhat surprising in a case involving the regulation of speech that is, as even the Court admits, protected by the First Amendment. In an earlier time, one can almost imagine Justice HUGO L. BLACK reminding in dissent that legislatures retain a great deal of leeway for experimentation without violating the Bill of Rights.

In the context of public education, the Supreme Court has taken these declarations of deference to local decision makers considerably farther. In BETHEL SCHOOL DISTRICT V. FRASER (1986) the Court sustained a school's suspension of a student for making a sexually suggestive nominating speech at a voluntary assembly, concluding flatly that the "determination of what manner of speech in . . . school assembly is inappropriate properly rests with the school board." And in HAZELWOOD SCHOOL DISTRICT V. KUHLMEIER (1988), in which the Court upheld the censorship of a high school newspaper, it determined that judicial oversight must be reduced in order to give local school administrators the opportunity to "disassociate" themselves from the messages contained in school-sponsored student publications. Accordingly, principals may constitutionally exercise editorial control over high school newspapers "so long as their actions are reasonably related to legitimate pedagogical concerns."

The Supreme Court's controversial abortion ruling in WEBSTER V. REPRODUCTIVE HEALTH SERVICES (1989) reflects a major change in emphasis as well. Although a majority refused to overrule *Roe v. Wade*, the Court recognized considerably greater authority in state governments to regulate the abortion process. Chief Justice Rehnquist's PLURALITY OPINION characterized the Court's prior abortion decisions as "unsound in principle, and unworkable in practice." *Roe*'s privacy protections are, in his view, "not found in the text of the Constitution or in any place else one would expect to find a constitutional principle." Moreover, they result in the Justices of the Supreme Court acting as the country's "ex officio medical board," accepting or rejecting medical practices and standards throughout the United States. Surely, the Chief Justice wrote, the goal of constitutional adjudication is not "to remove inexorably politically divisive issues from the ambit of the legislative process."

Justice Scalia was even clearer in his declarations that the Supreme Court has no business deciding sensitive policy issues like abortion. He described *Roe* as asserting a "self-awarded sovereignty over a field where [the Court] has little proper business since the cruel questions posed are political . . . not juridical." As a result, he would overrule the 1973 abortion decision outright, returning the

difficult human rights issue to the legislatures for determination.

Other examples—such as the Supreme Court's rulings that minors and mentally retarded defendants can be subjected to CAPITAL PUNISHMENT—could be mentioned. No doubt, though, these few instances constitute far less than a major cross-sampling of the Court's work. In the past several terms the Court has occasionally ventured into new arenas of judicial purview. These areas have primarily involved separation of powers claims rather than classic civil liberties issues. But the Justices have also bolstered the protection afforded to some economic rights and, even more surprising, tentatively entered the difficult thicket of the GERRYMANDER.

Still, the likelihood is strong that a significant trend is afoot. The present Supreme Court seems determined to reduce its role as a policymaker in American government. If new and difficult civil liberties claims are pressed, the judiciary may be less inclined to impose its will on the more democratically accountable branches of government. Even the Court's higher-profile constitutional decisions reflect something of this tendency. In the controversial and widely noted FLAG DESECRATION case, *Texas v. Johnson* (1989), a majority of the Court voted to reverse a state conviction based upon the burning of a flag. Justice Kennedy's influential concurring opinion, however, emphasized that the Court "cannot here ask another branch to share responsibility . . . for we are presented with a clear and simple statute to be judged against a pure command of the Constitution." This desire to defer to other government actors—if possible—may be the hallmark of the judiciary in the years to come. As a matter of democratic theory, that choice may be a wise one. For this constitutional democracy, however, the verdict may be significantly more complex.

GENE R. NICHOL
(1992)

(SEE ALSO: *Desegregation; Freedom of the Press; Prisoners' Rights; Religious Liberty; Separation of Church and State; Sexual Orientation; Sexual Preference and the Constitution.*)

Bibliography

DWORKIN, RONALD 1986 *Law's Empire.* Cambridge, Mass.: Harvard University Press.

FISHER, LOUIS 1988 *Constitutional Dialogues.* Princeton, N.J.: Princeton University Press.

GARVEY, J. and ALEINIKOFF, ALEXANDER 1989 *Modern Constitutional Theory: A Reader.* St. Paul, Minn.: West Publishing Company.

GREENWALT, KENT 1988 *Religious Convictions and Political Choice.* New York: Oxford University Press.

LEVINSON, SANFORD 1988 *Constitutional Faith.* Princeton, N.J.: Princeton University Press.

MACKINNON, CATHERINE 1987 *Feminism Unmodified.* Cambridge, Mass.: Harvard University Press.

NAGEL, ROBERT 1989 *Constitutional Cultures.* Berkeley: University of California Press.

PERRY, MICHAEL 1988 *Morality, Politics and Law.* New York: Oxford University Press.

SYMPOSIUM 1987 The Bork Nomination. *Cardozo Law Review* 9:1–530.

TRIBE, LAURENCE 1988 *American Constitutional Law,* 2nd ed. New York: Foundation Press.

## CIVIL LIBERTIES
(Update 2)

It is generally thought that one of the principal functions of courts in the American political system is to protect civil liberties. Yet "civil liberties" is an ill-defined concept. The prevalent modern conception of the term focuses on rights like FREEDOM OF SPEECH, VOTING RIGHTS, CRIMINAL PROCEDURE safeguards, and sexual autonomy. Yet the Framers of the FOURTEENTH AMENDMENT thought that ECONOMIC LIBERTIES were the most important civil liberties—the FREEDOM OF CONTRACT, to buy and sell PROPERTY, to pursue a lawful occupation, and to protect those FUNDAMENTAL RIGHTS through the judicial process. For most of the period between the adoption of the Fourteenth Amendment in 1868 and the NEW DEAL revolution of the 1930s, it was these economic rights that won the greatest solicitude in the Supreme Court. During the so-called *Lochner* era—named for LOCHNER V. NEW YORK (1905)—the Court invalidated maximum hour laws, minimum wage laws, union protective laws, and other economic LEGISLATION, on the ground of undue interference with liberty of contract.

The modern conception of civil liberties is generally traced to a famous footnote in UNITED STATES V. CAROLENE PRODUCTS CO. (1938), though earlier hints of the shift appear in a handful of cases from the 1920s and 1930s. In the *Carolene Products* footnote, the Court identified a special role for itself in protecting rights constitutive of the democratic process, such as speech and voting, as well as groups habitually disadvantaged in that process, such as racial and religious minorities. Over the next thirty years, the Court refrained from protecting the old civil liberties of contract and property, while gradually expanding its commitment to the new civil liberties of speech, voting, criminal procedure, sexual autonomy, and racial equality. By the end of the 1960s, a revolution in constitutional DOCTRINE and in the Court's perception of its role in the American political system had taken place.

The CIVIL RIGHTS and civil liberties revolutions of the WARREN COURT raise three important questions for CONSTITUTIONAL THEORY. First, how much responsibility do court decisions bear for the fundamental changes that have

taken place in American society and culture since WORLD WAR II—changes like the civil rights and gender revolutions? For example, would it be more accurate to say that BROWN V. BOARD OF EDUCATION (1954) caused or reflected the CIVIL RIGHTS MOVEMENT? Second, is it possible convincingly to distinguish the civil liberties activism of the Warren Court from the now-repudiated economic activism of the *Lochner* era? Third and relatedly, how valid are the claims of modern conservative critics that activist JUDICIAL REVIEW contains an inherently liberal political bias?

As to the causal consequences of legal doctrine, it is noteworthy that the Court often has claimed for itself a vital role in the protection of minority groups from majoritarian oppression. Justice HUGO L. BLACK, in CHAMBERS V. FLORIDA (1940), stated that courts stand "as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement." Similarly, legal scholars frequently assert that *Brown* played a critical role in inspiring the civil rights movement of the 1960s. Critics have suggested, though, that the Justices possess an obvious incentive to inflate their contributions to social change and that American CONSTITUTIONAL HISTORY refutes the romantic image of the Court as savior of oppressed minorities. On this view, the Court sanctioned rather than attacked SLAVERY in the antebellum period, legitimized SEGREGATION for most of the Jim Crow era, validated the Japanese American internment during World War II, failed to protect free speech during either the First or the Second Red Scares, and approved SEX DISCRIMINATION until after the emergence of the modern women's movement.

Even the most celebrated examples of the Court's supposed role as savior of oppressed minorities are less than compelling, on this view. The landmark decision in *Brown* was rendered possible by a broad array of political, social, economic, and ideological forces inaugurated or accelerated by World War II; by the time the Court interceded against school segregation, half the nation already was on its side. Similarly, ROE V. WADE (1973), extending constitutional protection to ABORTION, was decided at the crest of the women's movement and was supported by half the nation from the day it was handed down. Finally, the Court protected gay rights for the first time in ROMER V. EVANS (1996) only after a social and political gay-rights movement had made substantial inroads against traditional attitudes toward divergent SEXUAL ORIENTATIONS.

Whatever the practical consequences of the revolution in civil rights and civil liberties doctrine, the Court's decisions have been intensely controversial. Critics have assailed the Justices for undermining democracy by writing their own value preferences into the Constitution, ignoring traditional constitutional constraints such as text and ORIGINAL INTENT, and assuming for the Court the role of solving societal problems that were going unaddressed by the political branches. Defenders of the Court's expanded civil liberties role generally have replied in one of two ways. Some have argued that certain rights are too fundamental to be left to the political process, and regardless of whether they are textually enshrined in the Constitution, the legitimacy of the entire political system depends on their being validated in court.

Other defenders have advocated a more constrained role for the Court, which validates its protection of rights fundamental to the democratic process, such as speech or voting, while continuing to repudiate *Lochner*-style interventions in behalf of economic rights. This position, known as political process theory, derives from the famous footnote in *Carolene Products* and has received its fullest elaboration in John Hart Ely's landmark book, *Democracy and Distrust* (1980). According to this view, courts act legitimately when protecting rights and groups unlikely to receive a fair hearing in the political process. For example, the self-interest of legislators seeking reelection often biases the political process against affording due recognition to the right of the political opposition to speak freely and have its political strength fairly measured. According to political process theory, judicial intervention in this context is vital to maintaining the integrity of the democratic process. Critics, however, have questioned the capacity of political process theory to provide a principled distinction between the contested value choices implicated in defining a properly functioning political process and those involved, for example, in resolving substantive constitutional disputes over abortion, SCHOOL PRAYERS, and AFFIRMATIVE ACTION. For these critics, the only difference between the Warren Court's protection of democratic values such as speech and voting and the *Lochner*-era Court's protection of economic liberties lies in the competing political agenda of the Justices.

This criticism leads naturally to a third question that has dominated the popular debate over judicial review since the heyday of the Warren Court—does judicial review contain an inherently liberal political bias? Conservative critics largely have succeeded in winning this rhetorical battle; even liberal newspaper journalists generally seem to accept the view that JUDICIAL ACTIVISM is a practice engaged in only by liberal judges. A broader historical perspective tends to refute this view. For much of the Court's history, it was advocates of PROGRESSIVE CONSTITUTIONAL THOUGHT who challenged judicial review for blocking economic redistribution, whether in the form of a mildly progressive income tax, debtor relief laws, minimum wage and maximum hour legislation, or union protective measures.

Perhaps of greater present relevance, the performances

of the BURGER COURT and the REHNQUIST COURT have corroborated the politically double-edged nature of judicial activism. Conservative activism has invalidated race-based affirmative action, minority voting districts, HATE SPEECH regulation, environmental land-use restrictions, and CAMPAIGN FINANCE reform. Liberal activism, on the other hand, has undermined school prayer, abortion regulation, restrictions on indecent speech, and discrimination against African Americans, women, and gays. Thus, judicial review has no intrinsic political bias.

Still, the conservative critics of the Court's expanded civil liberties role may have a point. To observe that judicial review is a politically double-edged sword is not to deny that the practice has any systematic bias, only to suggest that the bias operates along an axis other than partisan politics. Justices of the U.S. Supreme Court (indeed of any state or federal court) are overwhelmingly upper-middle-class or upper-class and extremely well-educated, usually at the nation's most elite universities. Moreover, unlike legislators who generally share a similar cultural background, federal judges enjoy a relative political insulation that significantly reduces any offsetting obligation to respond to the nonelite political preferences of their constituents. Throughout most of American history, this elite cultural bias yielded a constitutional jurisprudence that was somewhat more protective of PROPERTY RIGHTS than was majoritarian politics. Since the constitutional revolution of the 1930s, though, social and cultural issues largely have displaced economic ones from the forefront of the constitutional agenda. And on these issues, a culturally elite bias has roughly correlated with a politically liberal one. That is, on the culture-war issues of school prayer, abortion, PORNOGRAPHY, gay rights, and FLAG DESECRATION, liberal opinion tends to be strongly correlated with years of education and economic class.

This point about the culturally elite bias of judicial review is not inconsistent with the earlier one about the limited capacity and inclination of the Justices to deviate from majoritarian norms. Dominant social mores set the broad boundaries within which judicial review operates; the Court never strays far from them. Thus it is implausible to expect the Court to have invalidated racial segregation before the dramatic transformation in American racial attitudes spawned by World War II; forbidden sex discrimination before the rise of the women's movement; or banned prayer from the public schools before the gradual undermining of the nation's unofficial Protestant establishment. Yet within the parameters established by dominant public opinion, the Justices enjoy some room for maneuver. Plainly the Court's decisions invalidating school prayer or flag-burning prohibitions and protecting the procedural rights of alleged criminals have not commanded majority support. Within the limited playing field that dominant opinion establishes for judicial review, then, the culturally elite values of the Justices may bias outcomes on certain issues in a particular direction.

MICHAEL J. KLARMAN
(2000)

Bibliography

BICKEL, ALEXANDER 1962 *The Least Dangerous Branch.* New Haven, Conn.: Yale University Press.

ELY, JOHN HART 1980 *Democracy and Distrust.* Cambridge, Mass.: Harvard University Press.

FRIEDMAN, BARRY 1993 Dialogue and Judicial Review. *Michigan Law Review* 91:577–682.

KLARMAN, MICHAEL J. 1994 *Brown*, Racial Change, and the Civil Rights Movement. *Virginia Law Review* 80:7–150.

——— 1996 Rethinking the Civil Rights and Civil Liberties Revolutions. *Virginia Law Review* 82:1–66.

MCCLOSKEY, ROBERT 1994 *The American Supreme Court*, 2nd ed. Chicago, Ill.: University of Chicago Press.

ROSENBERG, GERALD N. 1991 *The Hollow Hope: Can Courts Bring About Social Change?* Chicago, Ill.: University of Chicago Press.

## CIVIL LIBERTIES AND THE ANTISLAVERY CONTROVERSY

Two civil liberties issues linked the freedom of communication enjoyed by whites with the cause of the slave: the mails controversy of 1835–1837 and the gag controversy of 1836–1844.

By 1835, southern political leaders, anxiety-ridden by threats to the security of slavery, were in no mood to tolerate a propaganda initiative of the American Anti-Slavery Society, which began weekly mailings of illustrated antislavery periodicals throughout the South. The first mailing was seized and burned by a Charleston, South Carolina, mob, an action condoned by Postmaster General Amos Kendall. President ANDREW JACKSON recommended legislation that would prohibit mailings of antislavery literature to the slave states. Senator JOHN C. CALHOUN denounced this as a threat to the SOVEREIGNTY of the states, while some northern political leaders objected to it on the grounds that it inhibited the FIRST AMENDMENT rights of FREEDOM OF SPEECH and FREEDOM OF THE PRESS of their constituents. In ensuing debates, the POSTAL POWER under Article I, section 8, and the First Amendment became the center of debates on Jackson's counterproposal, which would have mandated interstate cooperation in suppressing abolitionist mailings. Ironically, in 1836, Congress apparently inadvertently enacted legislation making it a misdemeanor to delay delivery of mail. But by 1837, abolitionists abandoned the campaign for more promising antislavery ventures.

The gag controversy proved to be longer-lived. Opponents of SLAVERY had been petitioning Congress ever since 1790 on various subjects relating to slavery, such as the international and interstate slave trade. Such petitions were routinely either tabled or shunted to the oblivion of committees. Southerners in Congress were extremely inhospitable to such petitions, especially when the Anti-Slavery Society discontinued its mails campaign in favor of a stepped-up petition and memorial drive in 1836 focusing on the abolition of slavery in the DISTRICT OF COLUMBIA. To cope with the resulting flood of unwelcome petitions, Calhoun proposed that each house, acting under the rules of proceedings clause of Article I, section 5, refuse to receive petitions concerning slavery, rather than receiving and then tabling them. More moderate congressmen, however, adopted alternate resolutions providing for automatic tabling of such petitions. This only stimulated the antislavery societies to more successful petition drives. In response, each house annually adopted evermore stringent gag rules, the House of Representatives making its a standing rule in 1840.

Congressman JOHN QUINCY ADAMS, the former President who represented a Massachusetts district in the House, carried on an eight-year struggle to subvert the gags; he slyly introduced abolitionist petitions despite the standing rule. Enraged southern congressmen determined to stop his impertinence by offering a motion to censure him in 1842. The move backfired because it gave Adams a splendid forum to defend the First Amendment FREEDOM OF PETITION and to dramatize the threat to whites' CIVIL LIBERTIES posed by the attempted suppression of the antislavery movement. The Adams censure resolution failed. Proslavery congressmen then succeeded in censuring another antislavery Whig, Joshua Giddings of Ohio, for introducing antislavery resolutions in the House in 1842. He resigned his seat, immediately ran for reelection in what amounted to a referendum on his antislavery position, and was overwhelmingly reelected. Recognizing that the gags were not only tattered and ineffectual but now also counterproductive, stimulating the very debate they were meant to choke, Congress let them lapse in 1844.

WILLIAM M. WIECEK
(1986)

Bibliography

WIECEK, WILLIAM M. 1977 *The Sources of Antislavery Constitutionalism in America, 1760–1848.* Ithaca, N.Y.: Cornell University Press.

## CIVIL–MILITARY RELATIONS

The Constitution has a twofold impact on civil-military relations: first, through its specific provisions on this subject: and second, through the overall structure of government and division of powers it prescribes.

Several provisions of the Constitution deal directly with civil-military relations. The second clause of Article I, section 6, prohibits members of Congress from simultaneously holding other federal office. Article I, section 8, gives Congress the power to declare war, to grant LETTERS OF MARQUE AND REPRISAL, to make rules concerning captures, to raise and to support armies, to provide and to maintain a navy, to make rules for the regulation of the armed forces, to provide for calling the militia into federal service, and to provide for organizing, arming, and disciplining the militia. Article I, section 10, limits the military powers of the states. Article II, section 2, makes the President COMMANDER-IN-CHIEF of the armed forces and authorizes the appointment of officers. The SECOND AMENDMENT protects the right of the people to keep and bear arms, in order to constitute a "well-regulated militia." And the THIRD AMENDMENT severely restricts the quartering of troops in private homes.

These provisions constitute only a skeletal framework for the relations between civil government and military forces and between the military and society. Some of them (for example, those dealing with the quartering of troops, the two-year limit on appropriations for the army, the incompatibility of congressional and military office) have become obsolete, meaningless, or unobserved in practice. When written, however, these provisions reflected a broad consensus, expressed in the debates and actions of the CONSTITUTIONAL CONVENTION and the state ratifying conventions. Three key views underlay that consensus. The Framers believed that military power and military usurpation should be feared, that soldiering should be an aspect of CITIZENSHIP, and that control of military power should be divided between state and national governments and between President and Congress.

The "supremacy of the civil over the military," said Justice FRANK MURPHY in DUNCAN V. KAHANAMOKU (1945), "is one of our great heritages." At the time of the framing of the Constitution, everyone agreed on the need to insure civil authority over the military. One of the indictments of George III in the DECLARATION OF INDEPENDENCE was that he had "affected to render the Military independent of and superior to the Civil Power." Several state constitutions, including the Virginia and Massachusetts Bills of Rights, contained declarations that the military should in all cases and at all times be subordinate to and governed by the civil power. CHARLES PINCKNEY vainly proposed inclusion of similar language in the federal Constitution, and the lack of such a provision was the target of much criticism in the state conventions. Objections were also raised because the Constitution had no provision guarding against the dangers of a peacetime standing army.

In practice civil supremacy prevailed for two reasons: the deeply ingrained antimilitary attitudes continuously prevalent in American political culture, and the equally deeply ingrained ideal of the apolitical, nonpartisan, impartial military professional that gained ascendancy in the officer corps after the CIVIL WAR. In the early nineteenth century, the line between professional officer and professional politician was unclear, and individual military officers were often involved in politics. After WORLD WAR II many military officers were appointed to high civil positions in government. Yet at no time, in peace or war, did serious challenges to civilian authority issue from the central military institutions. When, as in the Civil War and the KOREAN WAR, individual military leaders challenged or seemed to challenge the authority of the President, they were removed from command. The Supreme Court, in EX PARTE MILLIGAN (1866), also limited military power by holding that martial law may operate only in situations where actual conflict forces civil courts to close. The Court has also narrowly defined the extent to which American civilians accompanying the armed forces overseas are subject to military justice, as in REID V. COVERT (1957).

In the 1780s there was general agreement that the militia should be the principal source of defense for a free society. Some members of the Constitutional Convention proposed prohibiting a standing army in peacetime or limiting the size of such an army. These proposals were rebutted both in the debates and in THE FEDERALIST by arguments that there was no way to prevent another nation with a standing army from threatening the United States, and that inability to maintain such a force would invite aggression. Everyone agreed, however, that in keeping with the tradition dating from the English BILL OF RIGHTS of 1689, the power to establish military forces rested with Congress. There was widespread belief that appropriations for the army should be limited to one year, and a two-year limit was approved only because it seemed likely that Congress might assemble only once every two years. The Constitution is silent on the means Congress may employ to recruit military manpower. CONSCRIPTION was, however, an accepted eighteenth-century practice, and the Supreme Court has held that the power to "raise and support" armies included, "beyond question," the power "to classify and conscript manpower for military service" in peace or in war.

The early consensus on the central role of the militia did not extend to the question of who should control it. Traditionally, the militias had been state forces, and it was widely accepted that they should remain under state control in time of peace. The national government, however, needed the power to call on the militia to deal with invasions or insurrections. Experience in the Revolution also had demonstrated the need to insure that the militia meet minimum national standards. JAMES MADISON remarked that control over the militia "did not seem in its nature to be divisible between two distinct authorities," but in the end that control was divided: the national government took responsibility for organizing, arming, and disciplining the militia, and the state governments were responsible for the appointment of officers and training. In the debates that led to this shared control, the most repeated and persuasive argument of the nationalists was the need to have a well-organized and disciplined militia under national control so as to reduce reliance on a standing army. Support in the state conventions for what subsequently became the SECOND AMENDMENT was based on similar reasoning.

In the Militia Act of 1792, Congress did not effectively exercise its powers to organize, arm, and discipline the militia. In effect, the states retained sole control over the militia in peacetime. When required, the militia was called into federal service for the limited constitutional purposes of executing the laws, suppressing insurrections, and repelling invasions. Even in wartime, however, the assertion of federal control was controversial because the states guarded their power to appoint officers. In addition, militia units could not be used outside the United States. Thus in the nineteenth century the militia was under state control in peace and under dual control in war. Laws passed between 1903 and 1933 in effect put the militia, now called the National Guard, under dual control in peace and national control in war. Federal support was greatly expanded, federal standards were more effectively imposed, and provision was made to order the National Guard into federal service in war under the army clause of the Constitution, thus precluding any assertion of state power.

In Great Britain the king was the COMMANDER-IN-CHIEF of the army and navy and in some states the governors played similar roles. The Federal Convention gave the President command of the national military forces and of the militia when in federal service. War Presidents, most notably ABRAHAM LINCOLN, FRANKLIN ROOSEVELT, and LYNDON B. JOHNSON, actively directed military operations. The commander-in-chief clause is unique in the Constitution in assigning power in terms of an office rather than a function. It is, consequently, unclear to what extent it gives the President powers extending beyond military command. In *The Federalist*, ALEXANDER HAMILTON wrote that the clause grants "nothing more than the supreme command and direction of the military and naval forces"; yet he also wrote that the clause makes the executive responsible for the "direction of war" and gives him "the power of directing and employing the common strength." The latter definition might justify a President's seizing a steel plant to insure the continuation of war production; the former

clearly would not. Beginning with Lincoln, Presidents have, however, used the clause to justify the exercise of a wide range of war powers.

The ineligibility clause of the Constitution expressly prohibits appointment of congressmen to civil positions created while they are in Congress. The Framers specifically exempted military positions, because, in case of a war, citizens capable of conducting it might be members of Congress. The incompatibility clause, on the other hand, applies to both civil and military offices. Enforced in the nineteenth century, this prohibition against simultaneously holding legislative position and military office has been frequently and systematically violated in the twentieth century by congressmen holding reserve commissions in the military services.

The more fundamental provisions in the Constitution regarding the distribution of power have had an equal effect on shaping civil-military relations, complicating, and at times frustrating, the achievement of civilian control over the military. FEDERALISM required that authority over the militia be divided between state and national governments. This division has enhanced the power of the militia by giving them two masters that might be played off against each other. The division of control over the national forces between Congress and President has worked in comparable fashion. Military officers testifying before congressional committees have some freedom to determine how far they should go in defending the policies of their commander-in-chief and how far they should go in expressing their own views. Military officers working in implicit cooperation with influential members of Congress may be able to undermine policies of the President. In addition, the commander-in-chief clause has at times been interpreted to encourage a direct relationship between the President and the uniformed heads of the armed services, bypassing the civilian secretaries of those departments. The Framers clearly intended to establish firm civilian control over the military, and many specific provisions are designed to secure that goal. Yet, by limiting the power of each branch of the government, the constitutional system effectively limits the power those branches can exercise over the military.

SAMUEL P. HUNTINGTON
(1986)

Bibliography

HUNTINGTON, SAMUEL P. 1957 *The Soldier and the State: The Theory and Politics of Civil-Military Relations.* Cambridge, Mass.: Harvard University Press.

RIKER, WILLIAM H. 1957 *Soldiers of the States: The Role of the National Guard in American Democracy.* Washington, D.C.: Public Affairs Press.

SMITH, LOUIS 1951 *American Democracy and Military Power.* Chicago: University of Chicago Press.

# CIVIL RIGHTS

The core of the concept "civil rights" is freedom from RACIAL DISCRIMINATION. Although the term, not improperly, often refers to freedom from discrimination based on nationality, alienage, gender, age, sexual preference, or physical or mental handicap—or even RELIGIOUS LIBERTY, immunity from official brutality, FREEDOM OF SPEECH, the RIGHT OF PRIVACY, and additional rights found in the Constitution or elsewhere—other terms can characterize these rights. Sometimes they are referred to as CIVIL LIBERTIES or by particular names (for example, gender or handicap discrimination). Although the racial discrimination cases have influenced doctrinal development in many of these other areas, standards governing them often differ at the levels of both judicial scrutiny and appropriate remedies. Racial discrimination deserves separate treatment.

The constitutional law of civil rights begins in the THIRTEENTH, Fourteenth, and FIFTEENTH AMENDMENTS. These "CIVIL WAR amendments" were adopted during RECONSTRUCTION to effect a radical revision of the status of blacks and a sharp change in relations between national and state governments. Until the end of the Civil War, the situation of black people had been dominated by SLAVERY in the South and a regime under which, in the words of the Supreme Court in DRED SCOTT V. SANDFORD (1857), they had no rights that a white man was bound to respect. Their legal rights or disabilities derived from state law, subject to no meaningful control by the national government. The Civil War amendments changed that. The Thirteenth Amendment abolished slavery; the Fourteenth, among other things, prohibited states from denying to any person DUE PROCESS OF LAW or EQUAL PROTECTION OF THE LAWS. (Other provisions of the Fourteenth Amendment had little practical effect). The Fifteenth Amendment protected VOTING RIGHTS against governmentally imposed racial discrimination.

Each amendment empowered Congress to adopt enforcing legislation. Such laws were enacted—most notably the CIVIL RIGHTS ACT OF 1866—but they were not implemented, were interpreted restrictively, or fell into disuse following the COMPROMISE OF 1877 which assured the Presidential election of RUTHERFORD B. HAYES in exchange for his pledge to withdraw Union troops from the South and end Reconstruction. During the same period southern states, effectively free from national control, implemented BLACK CODES, and later Jim Crow laws, which returned black people to a status that was only nominally free. No significant national civil rights law was adopted again until the mid-1960s.

Between Reconstruction and the mid-twentieth century, the judiciary sporadically found significant content in the Civil War amendments; yet racial SEGREGATION and discrimination remained pervasive in the South and widespread elsewhere. During the same period, the Fourteenth Amendment was interpreted expansively to protect burgeoning business enterprise. Between BROWN V. BOARD OF EDUCATION (1954) and the CIVIL RIGHTS ACT OF 1964, the main period of the modern civil rights revolution, the doctrinal potential of the amendments to advance the cause of black people became largely realized. Implementation became the main task, taking the form of comprehensive civil rights statutes, lawsuits brought by the United States and private parties, and administrative enforcement. As a result of this process, some whites have charged that remedies for blacks violate *their* constitutional rights: for example, that AFFIRMATIVE ACTION constitutes "reverse discrimination," or that SCHOOL BUSING for integration injures them. Justice OLIVER WENDELL HOLMES' aphorism, "the life of the law has not been logic: it has been experience," is as least as true of civil rights law as of any other branch of law.

The concept of "equal protection of the laws" underwent its greatest evolution between 1896, when PLESSY V. FERGUSON upheld a state law requiring SEPARATE BUT EQUAL segregation of whites and blacks in intrastate rail travel, and 1954, when *Brown v. Board of Education* held that segregated public EDUCATION denied equal protection. Although *Plessy* dealt only with intrastate transportation and *Brown* only with education, each was quickly generalized to other aspects of life.

The very factors which the Supreme Court invoked to uphold segregation in 1896 were reassessed in *Brown* and used to justify a contrary result. The *Plessy* majority held that the framers of the Civil War amendments did not intend to eliminate segregation in rail travel which the Court characterized as a social, not a political activity. It thereby distinguished STRAUDER V. WEST VIRGINIA (1880), in which the Supreme Court had held that excluding blacks from juries violated the Fourteenth Amendment because it stigmatized them. *Plessy* dismissed the argument that segregating blacks from whites could justify segregating Protestants from Catholics, because that would be unreasonable; racial segregation was reasonable, for state court decisions and statutes had authorized segregation in schools. Finally, the Court addressed what today is called social psychology, writing that although *Plessy* claimed segregation connoted black inferiority, whites would not consider themselves stigmatized if they were segregated by a legislature controlled by blacks. Any harmful psychological effects of segregation were self-inflicted.

*Plessy* became so deeply ingrained in jurisprudence that as late as 1927, in GONG LUM V. RICE, a Court in which Holmes, LOUIS D. BRANDEIS, and HARLAN F. STONE sat unanimously agreed that racial segregation in education "has been many times decided to be within the constitutional power of the state legislature to settle, without the intervention of the federal courts under the Federal Constitution."

Other Supreme Court decisions, however, offered hope that some day the Court might come to a contrary conclusion. In YICK WO V. HOPKINS (1886) the Court invalidated as a denial of equal protection a city ordinance which, under the guise of prohibiting laundries from operating in wooden buildings, where virtually all Chinese laundries were located, excluded Chinese from that business. In BUCHANAN V. WARLEY (1917) it invalidated racial zoning of urban land under the due process clause. Later it struck down state laws prohibiting blacks from participating in primary elections. By 1950, in SWEATT V. PAINTER and MCLAURIN V. OKLAHOMA STATE REGENTS, the Court invalidated segregation in law school and graduate education, without holding segregation unconstitutional per se and without abandoning the separate-but-equal formula. These and other decisions foreshadowed *Brown* and undermined precedents approving segregation.

*Brown* contradicted or distinguished *Plessy* on every score. It read the legislative history of the Civil War Amendments as inconclusive on the question of school segregation, pointing out that although after the Civil War public education had been undeveloped and almost nonexistent for blacks, it had become perhaps the most important function of state government. In effect the amendment was treated as embodying a general evolutionary principle of equality which developed as education became more important. The Court treated early precedents as not controlling school segregation and drew from the 1950 graduate school cases support for a contrary result.

In contrast to *Plessy*'s dismissal of the psychological effects of segregation, *Brown* held that "to segregate them [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The Court cited social science literature in support of this response to *Plessy*. This portion of the opinion provoked much adverse commentary, some condemning the decision as based on social science, not law. But of course, *Plessy* had come to its sociological conclusions without any evidence at all.

In BOLLING V. SHARPE, a companion case to *Brown*, the Court decided that the Fifth Amendment's due process clause prohibited school segregation in the District of Columbia. Any other result, the Court said, would be "unthinkable."

The contending arguments in *Plessy* and *Brown* not only exemplify the possibilities of legal advocacy but also raise the question how "equal protection" could be interpreted so differently at different times. After all, the arguments remained the same, but first one side prevailed, then the other. The reason for the change lies in the development of American history. Indeed, *Brown* suggests as much in describing how much public education had changed between Reconstruction and 1954, how essential education had become for personal development, and how much blacks had achieved. By 1954 black citizens had fought for their country in two major World Wars, the more recent of which was won against Nazi racism; had moved from concentration in the South to a more even distribution throughout the country; and had achieved much socially, politically, economically, and educationally, even though their status remained below that of whites.

The courtroom struggle leading to *Brown* showed that blacks were ready to participate effectively in securing their full liberation. It culminated a planned litigation campaign, building precedent upon precedent, directed by a group of mostly black lawyers headed by THURGOOD MARSHALL, then head of the NAACP LEGAL DEFENSE AND EDUCATIONAL FUND and later a Justice of the United States Supreme Court. This campaign had many ramifications, not the least of which was to become a model for development of public interest law, which grew rapidly in the 1970s.

The nation owed black people a debt which it acknowledged officially in several ways. In the late 1940s and in *Brown* itself the solicitor general of the United States joined counsel for black litigants in calling upon the Supreme Court to declare segregation unconstitutional. That the country was generally prepared to accept this argument was further evidenced in the 1947 Report of President HARRY S. TRUMAN's Committee on Civil Rights. The committee called for the end of racial segregation and discrimination in education, PUBLIC ACCOMMODATIONS, housing, employment, voting, and all other aspects of American life.

Despite the storm of controversy stirred by the 1954 decisions, they are firmly rooted in constitutional law and nowadays there is no longer significant criticism of their results. *Brown* was quickly followed by decisions applying its principles to all other forms of state imposed racial segregation. Courts soon ordered desegregation of parks, beaches, sporting events, hospitals, publically owned or managed accommodations, and other public facilities.

But *Brown* could not affect the rights of blacks against privately imposed discrimination, for the equal protection clause is a directive to the states. The admonition that "no state" shall deny equal protection was not addressed to private employers, property owners, or those who managed privately owned public accommodations. In the CIVIL RIGHTS CASES (1883) the Supreme Court made clear not only that the equal protection clause did not apply to private action but that Congress in enforcing the Fourteenth Amendment might not prohibit private persons from discriminating. As a consequence, national civil rights laws could not apply to private restaurants, hotels, transportation, employment, and housing—places where people spend most of their lives.

In 1960 the SIT-INS, freedom rides, and DEMONSTRATIONS burst upon the national scene, aimed first at racial exclusion from privately owned public accommodations and then at other forms of discrimination. This phase of the civil rights struggle sought to move antidiscrimination precepts beyond the limitation of state power to prohibitions against private discrimination. The cases arising out of these efforts necessarily examined the distinction between what is private and what is STATE ACTION, an issue long debated in political theory and constitutional law. On the one hand, it has been argued that privately asserted rights derive from power conferred and enforced by the state and that at bottom there is no such thing as a "private" right. According to this reasoning, applying the TRESPASS laws to enforce an owner's privately held preference against black patronage of his lunch counter would be prohibited by the Fourteenth Amendment: the owner's property interest is a function of state law; the law of trespass is a state creation; prosecution and its consequences are state conduct. Pursuing such reasoning, lawyers for sit-in demonstrators identified the governmental components of otherwise private action, arguing that the Fourteenth Amendment, therefore, protected blacks who were denied service on racial grounds and later prosecuted for refusing to leave the premises. They had some legal support for this argument. Even before 1954 the Supreme Court had held in MARSH V. ALABAMA (1946) that religious proselytizing on company town property was protected by the FIRST AMENDMENT against prosecution for trespass because the town was a governmental entity, notwithstanding private ownership. Similarly, the equal protection clause had been interpreted to forbid enforcement by state courts or racially RESTRICTIVE COVENANTS against purchase or occupancy of real estate by blacks or other minorities. These cases, and their rationales, followed to the end of their logic, would mean that governmental enforcement of private discrimination violates the equal protection clause.

But the courts were not prepared to follow the reasoning to its logical conclusion. In cases in which blacks were arrested and prosecuted for entering or remaining on privately owned public accommodations where they were not wanted because of race, the Supreme Court first avoided deciding whether there was state action by ruling for the defendants on various other grounds, for example, lack of

evidence or VAGUENESS of the law. In other cases the Court found state action in special circumstances: a private owner segregated because required by law; an ordinance required segregated toilets, which tended to encourage exclusion of blacks; a private restaurant leased premises from a state agency; private security guards who enforced segregation were also deputy sheriffs. But the Court balked at finding state action in prosecution for trespass to enforce a proprietor's personal decision to discriminate. The resistance grew out of a fear that to extend the state action doctrine would make most private decisions subject to government control. Moreover, if one could not call upon the state to enforce private preferences, personal force might be employed.

Other legal theorists would have differentiated between conduct prohibited by the amendment and that which is not by factoring into the decision-making process the concept of privacy. They would find, for example, that impermissible state action existed in racial exclusion from a restaurant but not from a private home. The policy against racial discrimination would prevail in the restaurant case, where there was no countervailing interest of privacy, but in the private home case the privacy interest would outweigh strictures against racial discrimination.

In 1964 the Court held that the Civil Rights Act of that year invalidated convictions of sit-in demonstrators, even those convicted before its passage. The fundamental question of precisely what level of state involvement in private conduct constitutes state action was left undecided.

The uncertain scope of the state action doctrine was underscored by the constitutional basis advanced for congressional power to pass the 1964 Civil Rights Act. Congress relied on the COMMERCE CLAUSE in addition to the Fourteenth Amendment because the commerce clause does not require state action to justify congressional regulation. The initial Supreme Court decisions upholding the 1964 Civil Rights Act, HEART OF ATLANTA MOTEL V. UNITED STATES (1964) and KATZENBACH V. MCCLUNG (1964), relied on the commerce clause, and upheld applications of the law in cases of minimal effect upon commerce.

The impulse to define fully the meaning of state action was further damped by developments in Thirteenth Amendment law. The Thirteenth Amendment has no state action limitation and, therefore, covers private as well as state action. But early efforts to apply it to discrimination as a BADGE OF SERVITUDE were rejected by the Court, which held that the amendment forbade only slavery itself. The Civil Rights Act of 1866 had made illegal private racially discriminatory refusals to contract or engage in real estate transactions. But not until 1968 did the Supreme Court interpret these laws to forbid private discrimination. By the mid-1960s, through the civil rights acts of that period and the new judicial interpretation of Reconstruction legislation, it was no longer necessary to discover state action in ostensibly private conduct in order to prevent discrimination. With the passing of this need, concerted efforts to expand the courts' views of the state action concept came to a halt.

The contrast between the promise of the Constitution and its performance was nowhere better highlighted than in *Brown* itself. The Supreme Court treated constitutional right and remedy in two separate opinions, *Brown I* and *Brown II*, decided in 1955. *Brown I* decided only that racial segregation was unconstitutional, postponing decisions on the means and the pace of school desegregation. *Brown II* proclaimed that school segregation need not end immediately; it had to be accomplished with ALL DELIBERATE SPEED. The Court required a "prompt and reasonable" start, and permitted delay only for the time necessary for administrative changes. Opposition to desegregation, the Court said, would not justify delay. Nevertheless, southern schools actually integrated at an extremely slow pace. Not until 1969, when the Court announced that the time for "deliberate speed" had passed, did school integration proceed rapidly.

While the "deliberate speed" decision contributed to a sense that desegregation was not urgent and procrastination was tolerable, it is difficult to believe that a different formula would have materially affected the pace of integration. Armed physical opposition in Little Rock and elsewhere in the South was aimed at integration at any time, with or without deliberate speed. One hundred members of Congress signed the SOUTHERN MANIFESTO denouncing the Supreme Court, and Congress came within a single vote of severely restricting the Court's JURISDICTION. Congressional legislation implementing *Brown* would not be adopted until after the civil rights movement of the 1960s.

The refusal of school districts to desegregate was not susceptible to remedy because there was almost no one who would bring integration suits. No southern white lawyers would bring school suits until the 1970s; in many a southern state, there was only a handful of black lawyers with minimal resources; civil rights organizations were few, small, and overburdened; the United States Justice Department and the Department of Health, Education, and Welfare had no authority to bring suit. As a consequence, where school boards resisted or claimed to be in compliance with *Brown*, there was hardly any way to compel change. These conditions, not "deliberate speed," kept school segregation in place. Real opportunities for the judiciary to speed the pace of integration had to await political change. That change came in the 1960s, with the pro-civil rights policies of Presidents JOHN F. KENNEDY and LYNDON B. JOHNSON, culminating in the Civil Rights Act of 1964.

Supreme Court opinions stating in OBITER DICTUM that integration must be achieved rapidly began to be issued at the end of the 1960s. In the 1970s courts began to hand down detailed orders requiring the end of segregation "root and branch." Because black and white families were segregated residentially, the only way to integrate schools in many communities was to combine in single attendance zones areas separated by some distance, thus employing SCHOOL BUSING. Numerical standards also were employed to measure whether acceptable levels of integration had been reached. These techniques—particularly busing and RACIAL QUOTAS—have stimulated controversy and political opposition.

The integration of the 1970s in most instances was carried out as quickly as possible when courts ordered it. Although the deliberate speed doctrine had by then been overruled, such rapid desegregation met its literal requirements. In a typical case, the revision of boundaries and regulations and the reassignment of students and teachers took a few months. Conditions in the nation, not "deliberate speed," caused the long delay.

*Brown*, of course, concerned states where segregation had been required or permitted by statute. By the 1970s the Supreme Court faced the issue of northern segregation which was not caused by state statute. It differentiated between "de facto" segregation (resulting from racially segregated housing patterns) and "de jure" segregation (resulting from deliberate official decisions). Some commentators argued that there is no such thing as de facto segregation, for children always are assigned to schools by governmental action. But only where some intent to discriminate was demonstrated did the courts require desegregation. However, where an intent to discriminate has been shown in part of a district, a presumption has been held to arise that single-race schools elsewhere in the district have been the product of such intent. Under this doctrine many northern districts have been desegregated.

Often a city school district is nearly all black and surrounded by white suburban districts. The Court held in MILLIKEN V. BRADLEY (1974) that integration across district lines may not be ordered without proof of an interdistrict violation. A number of lower courts have found such violations and have ordered integration across district lines.

All of these standards were implemented, particularly in the 1970s, by the Departments of Justice and Health, Education, and Welfare (later the Department of Education). The private bar brought a considerable number of cases facilitated by congressional legislation authorizing the award of counsel to prevailing parties in school segregation, to be paid by defendants. But the intimate relation between politics and implementation of constitutional civil rights became apparent once more in the 1980s when a new administration opposed to busing and numerical standards for gauging integration virtually ceased bringing school cases to court, undertook to modify or revoke INJUNCTIONS in already decided cases, and opposed private plaintiffs in others.

Following *Brown* and in response to the demonstrations of the 1960s, the Civil Rights Acts of 1964, 1965, and 1968 were enacted with the goal of implementing the ideals of the Civil War amendments. But results of these laws varied according to their political, social, and legal settings. Public accommodations, for example, integrated easily; housing has been intractable. Affirmative action policies have been devised to assure certain levels of minority participation, but they have stimulated opposition by whites who claim they are being disfavored and illegally so. Controversy has also developed over the question of whether antidiscrimination orders might be entered only upon a showing of official discriminatory intent, or whether such orders are also justified to remedy the racially discriminatory effects of official policies. Affirmative action and discriminatory intent, the twin central legal issues of civil rights in the 1980s, have in common a concern with distributive fairness. Both issues have been contested in political, statutory, and constitutional arenas.

In general, the courts have sustained the constitutionality of affirmative action as a congressional remedy for past discriminations and as an appropriate judicial remedy for past statutory or constitutional violations. In medical school admissions, for example, four Justices of the Supreme Court thought a fixed racial quota favoring minorities violated the Civil Rights Act of 1964, and a fifth Justice found an equal protection violation; a different majority, however, concluded that an admissions policy favoring racial and other diversity, which assured the admission of a substantial but not fixed number of minorities, would be valid as an aspect of a university's First Amendment exercise of academic freedom. The Court, with three dissents, has sustained a congressionally mandated quota assuring ten percent of certain government contracts to minority contractors. And in school integration numerical measures of integration have been commonplace. In employment and voting as well, affirmative action has been incorporated into efforts to undo discrimination and has been upheld by the courts. (See REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE; FULLILOVE V. KLUTZNICK.)

The courts usually have required a showing of discriminatory intent in order to establish an equal protection violation, but intent may be inferred from conduct. In any event, the intent requirement may be dispensed with where Congress has legislated to make discriminatory results adequate to trigger corrective action.

The public accommodations portions of the 1964 Act

prohibited discrimination in specific types of establishments (typified by those providing food or amusement) that affect INTERSTATE COMMERCE. An exception for private clubs reflected uncertainty about the lack of power (perhaps arising out of countervailing constitutional rights of association) and the desirability of controlling discrimination in such places. But the meaning of "private" in this context has not been explicated. Clubs where a substantial amount of business is conducted may not be exempt and an amendment has been proposed to make this clear.

Immediately following passage of the law the Department of Justice and private plaintiffs brought successful suits against recalcitrant enterprises. Most public accommodations complied rapidly. Large national enterprises that segregated in the South integrated because they could not afford the obloquy of resistance, threat of boycott, and consequent loss of business in the North. Many small southern businesses opened to all without problems. Even proprietors who wished to continue discriminating soon bowed to the law's commands. Today one rarely hears of public accommodations discrimination.

Before adoption of the civil rights legislation of the 1960s, the only significant federal regulations of employment discrimination were the Fifth Amendment and Fourteenth Amendment, which prohibited federal and state employment discrimination, and executive order prohibition of discrimination by certain government contractors. The Railway Labor Act and the NATIONAL LABOR RELATIONS ACT were construed to forbid discrimination by covered unions. But all such limitations were difficult to enforce. The Civil Rights Act of 1964 and the 1968 Equal Employment Opportunity (EEO) Act were the first effective prohibitions against discrimination in employment. Private suits (with counsel fees payable to prevailing plaintiffs), suits by the Equal Employment Opportunity Commission against private defendants, and suits by the Justice Department against state and local government are the primary mechanisms of enforcement. As elsewhere in modern civil rights law, the two most important issues with constitutional overtones under this law have been whether a plaintiff must prove that discrimination was intentional and whether courts may award affirmative relief, including racial quotas. As to intent, the EEO statute has been interpreted to forbid hiring and promotion criteria that have an adverse impact on a protected group but bear no adequate relationship to ability to perform the job. Thus, an intelligence test for coal handlers, or a height requirement for prison guards, which screen out blacks or women and do not indicate ability to do the job, violate the statute even absent a showing of intent to discriminate. On the other hand, when the statute is not applicable, a plaintiff can secure relief under the Constitution only by showing intentional discrimination.

Affirmative action in the form of hiring and promotion goals and timetables have been prescribed by courts and all branches of the federal government with enforcement responsibility. Moreover, some private employers have adopted these techniques as a matter of social policy or to head off anticipated charges of discrimination. The legality of such programs has been upheld in the vast majority of cases. Affirmative action has substantially increased minority and female participation in jobs it covers but continues to be attacked by nonprotected groups as unconstitutional, illegal, or unwise. In 1984 the Supreme Court held that the EEO Act prohibits enjoining layoffs of black beneficiaries of a consent decree requiring certain levels of black employment where that would result in discharging whites with greater seniority.

Although the Fifteenth Amendment expressly protects the right to vote against racial discrimination and the Fourteenth Amendment's equal protection clause also has been interpreted to do so, voting discrimination was widespread and blatant well into the 1960s, and to some extent it still persists. Apart from physical violence and intimidation, which lasted until the mid-1960s, a long line of discriminatory devices has been held to be in violation of the Constitution and statutes, only to be succeeded by new ones. Very early, southern states adopted GRANDFATHER CLAUSES, requiring voters to pass literacy tests but exempting those who were entitled to vote in 1866, along with their lineal descendants—which meant whites only. When the courts struck down the grandfather clause, it was succeeded by laws permitting registration only during a very brief period of time without passing a literacy test. Thereafter even those who could pass the test were not permitted to register. Very few blacks could take advantage of this narrow window, but the stratagem was not outlawed until 1939. Most southern states through the 1920s had laws prohibiting blacks from voting in party PRIMARY ELECTIONS. In the South, the Democratic party excluded blacks, and the winner of the Democratic primary always was elected. These laws were held unconstitutional in the 1940s and 1950s on the grounds that the party primary was an integral part of the state's electoral system, despite its nominal autonomy. As the white primary fell, laws and practices were widely adopted requiring registrants to read and understand texts like the Alabama State Constitution or to answer registrars' questions such as "how many bubbles are there in a bar of soap." These tests were held unconstitutional. Racial GERRYMANDERING, a not uncommon practice where blacks in fact voted, also was enjoined as unconstitutional. Other impediments to voting were not motivated solely by racial considerations but affected blacks disproportionately, such as the POLL TAX, later prohibited by constitutional amendment. LITERACY TESTS also lent themselves to discriminatory administration.

The VOTING RIGHTS ACT OF 1965 invalidated any and all

racially discriminatory tests and devices. But, more important, states in which there was a history of voting discrimination (identified by low registration or voter turnout) could not adopt new voting standards unless those standards were certified as nondiscriminatory by the Department of Justice. This prohibition ended the tactic of substituting one discriminatory device for another. Where they were needed, federal officials could be sent to monitor registration and voting or, indeed, to register voters.

Although the 1965 law significantly reduced racial discrimination in the electoral process, abuses persisted in the forms of inconvenient registration procedures, gerrymandering, occasional intimidation, and creation of MULTIMEMBER DISTRICTS. This last device has its roots in post-Reconstruction efforts to dilute black voting strength. The use of single-member districts to elect a city council would result in the election of blacks from those districts where blacks constitute a majority. By declaring the entire city a multimember district, entitled to elect a number of at-large candidates, the majority white population can, if votes are racially polarized, elect an all-white council—a result that has occurred frequently. The Supreme Court required a showing of discriminatory intent if such a voting system were to be held unconstitutional. But the interplay between Court and Congress produced an amendment of the Voting Rights Act in 1982, permitting proof of a violation of the act by a showing of discriminatory effect.

Affirmative action has been an issue in voting as in other areas. The Supreme Court has held that, upon a showing of past voting discrimination, the attorney general may condition approval of legislative redistricting upon a race-conscious drawing of district lines to facilitate election of minority candidates.

Until 1968, the most important federal prohibition of housing discrimination was the equal protection clause, which was held in SHELLEY V. KRAEMER (1948) to prohibit judicial enforcement of restrictive covenants among property owners forbidding occupancy of property by members of racial minorities. The Fifth and Fourteenth Amendments prohibit racial segregation in public housing, but the construction of public housing has virtually ceased.

The Fair Housing Act of 1968 marked the completion of the main statutory efforts to satisfy the prescriptions of President HARRY S. TRUMAN's 1947 Committee on Civil Rights. On the eve of the law's passage, the Supreme Court interpreted the Civil Rights Act of 1866 to forbid refusals to engage in real property transactions on racial grounds. Nonetheless, the 1866 and 1968 acts have been the least effective of the civil rights acts. Their failure owes to deep, persistent opposition to housing integration, to a lack of means of enforcement commensurate with the extent of the problem, and to a shortage in the housing market of houses in the price range which most minority buyers can afford. Because the housing market is atomized, a single court order cannot have widespread effect. (Housing is thus unlike education, where an entire district may be desegregated, or employment, where government agencies and other large employers can be required to take steps affecting thousands of employees.)

An effort to address the relationship between race and economics in housing foundered at the constitutional level when the Court held that large-lot zoning—which precluded construction of inexpensive housing, thereby excluding minorities—was not invalid under the Constitution absent a demonstration of racially discriminatory intent. The 1968 Fair Housing Act authorizes judicial relief when such laws produce discriminatory effects, without demonstration of intent. Nevertheless, economic factors and political opposition have prevented the statutory standard from having a significant practical impact. In several states where state law has invalidated such zoning, the actual change in racial housing patterns has been slight.

Some legislative efforts to desegregate housing have run into constitutional obstacles. A municipality's prohibition of "For Sale" signs to discourage panic selling by whites in integrated neighborhoods has been held to violate the First Amendment. A judge's award of damages for violation of the Fair Housing Act has been held to violate the Sixth Amendment right of TRIAL BY JURY (subsequently, contrary to civil rights lawyers' expectations, jury verdicts often have been favorable to plaintiffs). A large governmentally assisted housing development's racial quota, set up with the aim of preventing "tipping" (whites moving out when the percentage of blacks exceeds a certain point), was still being contested in the mid-1980s.

From constitutional adoption, through interpretation, and judicial and statutory implementation, the law of civil rights has interacted with the world that called it into being. No great departures from settled doctrine are to be anticipated in the near future. But similar assertions might have been made confidently at various points in the history of civil rights, only to be proved wrong in years to come.

JACK GREENBERG
(1986)

(SEE ALSO: *Civil Rights Movement.*)

Bibliography

BLACK, CHARLES L., JR. 1967 Foreword: State Action, Equal Protection, and California's Proposition 14. *Harvard Law Review* 81:69–109.

EASTLAND, TERRY and BENNETT, WILLIAM J. 1979 *Counting by Race.* New York: Basic Books.

GREENBERG, JACK 1968 The Supreme Court, Civil Rights and Civil Dissonance. *Yale Law Journal* 77:1520–1544.

JOINT CENTER FOR POLITICAL STUDIES 1984 *Minority Vote Dilution,* Chandler Davidson, ed. Washington, D.C.: Howard University Press.

KIRP, DAVID L. 1983 *Just Schools: The Idea of Racial Equality in American Education.* Berkeley: University of California Press.

KLUGER, RICHARD 1975 *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality.* New York: Knopf.

KONVITZ, MILTON R. 1961 *Century of Civil Rights.* New York: Columbia University Press.

KUSHNER, JAMES A. 1983 *Fair Housing: Discrimination in Real Estate, Community Development, and Revitalization.* New York: Shepard's/McGraw-Hill.

SCHLEI, BARBARA and GROSSMAN, PAUL 1983 *Employment Discrimination Law,* 2nd ed. Washington, D.C.: Bureau of National Affairs.

U.S. COMMISSION ON CIVIL RIGHTS 1981 *Affirmative Action in the 1980's: Dismantling the Process of Discrimination.* Washington, D.C.: U.S. Commission on Civil Rights.

## CIVIL RIGHTS
### (Update 1)

In contemporary legal discourse, civil rights refer principally to legislative and judicial proscriptions against racial SEGREGATION and RACIAL DISCRIMINATION—although some branches of civil rights law concern SEX DISCRIMINATION and discrimination based on religion, ethnicity, national origin, physical or mental handicap, and SEXUAL ORIENTATION. The primary sources of civil rights are the CIVIL WAR amendments to the Constitution and congressional legislation enacted pursuant to these amendments. In common usage, however, the term civil rights includes antidiscrimination legislation enacted under Congress's other constitutional powers, federal regulations, executive orders, and state laws, as well as judicial decisions interpreting all of these sources.

There have been two major periods of civil rights activity. The first, commonly referred to as RECONSTRUCTION, began at the end of the CIVIL WAR and lasted little more than a decade. The beginning of the second period, sometimes called the Second Reconstruction, is often placed at 1954, with the Supreme Court's decision in BROWN V. BOARD OF EDUCATION (1954).

Although all three branches of the national government have participated in establishing the scope of civil rights, in recent years the Supreme Court has been the focus of continuing interest and often heated debate. The Court has played a highly visible role in determining the applicability of formal civil rights guarantees to social activity, and since *Brown,* the Court has been widely seen as the institution primarily responsible for articulating the morality of racial equality. This perception is ironic, considering the Court's role in eviscerating civil rights legislation during the first RECONSTRUCTION—a history that seems especially vivid in light of some of the Court's recent decisions narrowing the substantive content of civil rights.

Civil rights jurisprudence generally involves two broad issues: defining the right that has allegedly been violated and determining the scope of the remedy once a violation has been found. In theory, the latter follows the former because the Supreme Court often says that the nature of the violation determines the scope of the remedy. However, in practice, the relation between the two is not so neatly defined. First, civil rights remedies do not ineluctably follow the finding of a violation. For example, although the Court in *Brown v. Board of Education* determined that segregation violated the constitutional rights of black school children, the aggrieved children were forced to await *Brown II v. Board of Education* (1955) before the Court issued a remedy. Even this remedy was partial; school boards were not required to eliminate the violation immediately, but "with all deliberate speed." It is also not clear that determining the scope of civil rights remedies actually follows the determination that a violation has occurred. The reverse may occasionally be true: commentators often speculate that the Court's decision to reject a claim of constitutional injury has been influenced by concerns over its ability to administer a manageable and effective remedy. Whatever the exact sequence may be, the narrowed conception of civil rights that evolved during the midstages of the Second Reconstruction has been accompanied by a correspondingly limited scope for remedial policies.

Recent conflicts over civil rights issues reflect the ongoing effort to derive specific resolutions from general principles set forth in the Constitution—an effort that historically has produced shifting and sometimes contradictory interpretations. The THIRTEENTH AMENDMENT, for example, renders SLAVERY and its badges and incidents unconstitutional, whereas the FOURTEENTH AMENDMENT guarantees equal CITIZENSHIP and equality before the law. The late-nineteenth-century Court determined that neither PRIVATE DISCRIMINATION nor state-mandated segregation implicated these civil guarantees. Yet these principles are currently interpreted to permit statutory regulation of private discrimination and to prohibit state-sponsored racial segregation.

Thus, although it seems clear that equality before the law is a basic civil right guaranteed by the Fourteenth Amendment, this ideal has historically offered no clear basis for determining the scope of civil rights because equality is subject to multiple interpretations. In the modern civil rights era, equality has been interpreted to forbid racial discrimination, but even this formula offers no clear basis for determining the scope of civil rights. For exam-

ple, it is not clear whether the proscription against racial discrimination applies only to explicit racial categories or whether it applies more broadly to policies, practices, and customs that appear, on their face, neutral, but exact similar exclusionary effects. It is also not clear whether race-conscious efforts to remedy the effects of racial discrimination are consistent with or a violation of the prohibition. It is also not clear which background circumstances and conditions are relevant and which are not in determining whether an act or policy is discriminatory. Anatole France's oft-quoted saw that "Law in its majestic equality forbids the rich and poor alike from sleeping under bridges" illustrates the transparency of purely formal conceptions of equality that do not acknowledge the importance of social and economic inequality.

Post-1986 developments manifest a ripening of conflict over the question of whether civil rights law contemplates only formal equality or whether it contemplates something more. Judges, scholars, legislators, and laymen have debated whether racial equality requires only the cessation of practices that explicitly discriminate on the basis of race or whether it also demands a full dismantling of practices, policies, and structures that continue to produce racial inequality. The opposing approaches to these questions derive from competing conceptualizations of civil rights: the antidiscrimination approach and the antidomination approach.

The antidiscrimination approach focuses on achieving formal equality through the eradication of racial classifications and purposeful discrimination. It emphasizes individual-centered harms and colorblind remedies. In contrast, the antidomination view tends to look beyond formally manifested or intentional discrimination to the circumstances and conditions of inequality. Ultimately, this wider perspective envisions the creation of legal remedies and social practices that will foster greater RACIAL BALANCE throughout society.

Many, if not most, civil rights decisions are consistent with either approach. However, rough distinctions between the two are apparent in current debates over the extent to which pervasive conditions of racial inequality implicate civil rights and bear on the scope of civil rights remedies. The doctrinal arenas in which this conflict is most apparent have involved discriminatory intent and AFFIRMATIVE ACTION.

Although the scope of the intent doctrine was largely determined in the 1970s, its full impact has become increasingly apparent in subsequent years. Discriminatory intent was first articulated as the *sine qua non* of an EQUAL PROTECTION claim in WASHINGTON V. DAVIS (1976). In this case, plaintiffs challenged the use of a reading and writing test to screen applicants for employment in Washington, D.C., as police officers. Not shown to measure skills necessary for effective performance as a police officer, the test served as an effective barrier to black recruitment. The Court nevertheless determined that an equal-protection claim could be sustained only if the test had been adopted with the intent to discriminate against minority applicants. This intent standard, as further clarified in later cases, could not be satisfied even where the employer adopting the challenged policy or practice did so with full knowledge of its disproportionate impact. In recent years, the discriminatory-intent doctrine has, in effect, provided a presumption of constitutionality to most racially unequal conditions because it is the unusual case in which some discriminatory intent is manifest in a governmental decision. Thus, racial inequalities that have historically burdened nonwhite communities and that continue to exist today in employment, education, housing, and criminal justice generally do not implicate civil rights. Although the Supreme Court has acknowledged that such disparities often result from societal discrimination, unless a particular discriminatory decision can be identified and isolated, such inequalities are not seen to raise any civil rights issues and thus require no remedy.

Many commentators and some members of the Court have criticized the Court's use of the discriminatory-intent test to distinguish inequalities that violate the Constitution from those that do not. They assert that the presence of explicit intent should not exhaust the definition of constitutional injury. Some point out that the model of discrimination contemplated by the intent requirement is simply anachronistic. In the aftermath of *Brown*'s rejection of formal white supremacy, few decision makers currently adopt policies that explicitly discriminate against blacks.

Even on its own terms, the intent standard is inadequate, for racial animus may play a role in decision making, yet be difficult to prove. Indeed, racial motivation may remain hidden even to the actor. Yet another problem is that the intent standard tends to focus inquiry on a single allegedly discriminatory actor when there are often multiple actors, many of whom have acted without animus, but who, in the aggregate, perpetuate the discriminatory effects of past discrimination.

The principle of purposeful discrimination also fails to address inequality that is reproduced by social practices that have now become ingrained in American society. Critics have argued that the intent standard embodies a superficial conceptualization of formal equality in that its critical scope focuses only on the most external aspects of racial discrimination. This framework virtually excludes consideration of racial categories that are effectively created through apparently neutral practices. Sometimes referred to as "procedural discrimination," practices and policies that do not discriminate on their face, but predictably produce racial disparities throughout society are

more common sources of inequity than are formal racial categories. Unvalidated standardized tests, subjective evaluation procedures, nepotism, word-of-mouth hiring practices, and even the high-school diploma requirements can unfairly limit the opportunities of minorities. Whether intentional or unthinking, these practices disadvantage and burden minorities in ways that are closely related to the formal discriminations of the past.

Such criticisms are informed by a view that the moral and political objective of the Fourteenth Amendment is to empower the national government to eliminate the effects of white supremacy. Eliminating intentional discrimination does not fully satisfy this mandate, as purposeful harm is simply one of many means of perpetuating white supremacy.

Despite the effective limits that the intent standard places on the scope of civil rights litigation, defenders marshal several arguments to justify its currency. One is that intentional discrimination prevailed during the period preceding *Brown*, and it is this form of discrimination that is now understood as incompatible with the nation's ideals. Institutionally, the intent standard is justified because intentional racial discrimination is precisely the kind of perversion of democracy that the Court is empowered to correct. Remedying these harms and eliminating these tendencies justify and exhaust the moral and ideological commitment of civil rights. Any other rule, it is argued, would involve judicial overreaching and undue interference with myriad governmental and private practices that sometimes produce racially disproportionate results. Moreover, it would stretch the Court's institutional and symbolic resources to fashion appropriate remedies if a broader standard were used. In sum, there is no ideological, political, or moral justification to move beyond intentional discrimination. Racially disparate results do not themselves speak to civil rights; it is racially unequal treatment that constitutes the crux of the injury. Under this view, the intent standard thus effectively mediates between legitimate and illegitimate conceptions of civil rights.

The intent standard, along with other doctrines in current vogue with the Supreme Court's majority, represents a refusal to extend constitutional protections to preclude institutional and systemic discrimination. Although aggregate views of racial disparities suggest that racial separation and stratification are still common in employment, housing, voting, and the criminal justice system, this view is rendered irrelevant by the Court's current framework that seeks one actor when there are often several and current and demonstrably direct causes when many are historical and cumulative.

Those who support an antidomination view of racial equality note that aggregate views of race paint a picture of society that resembles conditions prevailing during periods in which white supremacy was more openly advocated and racial discrimination more explicitly practiced. They regard these disparities as raising legitimate civil rights issues not only because of their probable connection to the more explicit policies of the not-too-distant past, but also because of the devastating effect on the life chances of minorities and the likelihood that such conditions will reproduce themselves for generations to come.

Earlier decisions suggested that the Court might be receptive to this view. For example, in GRIGGS V. DUKE POWER CO. (1971), the Court ruled that an employment practice that disproportionately harmed minorities constituted EMPLOYMENT DISCRIMINATION under the CIVIL RIGHTS ACT OF 1964, whether or not the practice was adopted with the intent to discriminate. The fact that the practice disparately burdened minorities was enough to require the employer to produce evidence that the practice was a business necessity.

In subsequent years, however, the Court increasingly disfavored such systemic views of discrimination. An ominous indication of the full implications of this trend was suggested by MCCLESKEY V. KEMP (1987) and was reinforced in *Wards Cove Packing Co. v. Antonio* (1989).

In *McCleskey v. Kemp*, Justice LEWIS F. POWELL accepted the validity of a study indicating that African Americans in Georgia who killed whites were significantly more likely to receive the death penalty than were blacks who killed blacks or whites who killed either whites or blacks. Nonetheless, the Court determined that these statistics did not substantiate an equal-protection challenge to the Georgia death penalty. Aggregate statistics could not be used because they could not support an inference that intentional racial discrimination had influenced the disposition of the defendant's particular case. Moreover, other factors, such as the state's interests in imposing the death penalty, in maintaining prosecutorial discretion, and in protecting the integrity of jury deliberations, precluded the defendant from gaining access to information needed to prove that racial discrimination affected the disposition of his case.

Although *McCleskey v. Kemp* might have been reconciled as consistent with the distinction that the Court drew between constitutional claims (in which systemic claims were generally disfavored) and statutory claims (in which the Court had adopted a more flexible approach toward such claims), *Wards Cove* demonstrates that the Court's rejection of systemic claims is not limited to constitutional claims. In *Wards Cove*, the Court significantly narrowed *Griggs* to require, in part, that employees challenging employment practices that create racial disparities must specify and isolate each practice and its effects.

*McCleskey* and *Wards Cove* are two of several cases

that illustrate how the Court in the 1980s has employed various analytical and normative preferences to reject the appeal for systemic relief. Its techniques include viewing causation as isolated rather than interrelated, demanding showings of contemporary rather than historical explanations for racial disparities, and embracing merely formal rather than substantive equality as the objective of civil rights law.

The predominance of the intent standard has significantly affected the development of affirmative action, another area in which the conflict between competing visions of civil rights has been most apparent over the past decade. Affirmative action, while largely referring to race-conscious remedial measures, also encompasses more general efforts to dismantle segregation and to cease the reproduction of racial inequality. GREEN V. COUNTY SCHOOL BOARD OF NEW KENT (1968) best represents this broader conceptualization of affirmative action. In this case, the Supreme Court determined that a "free choice" policy was insufficient to remedy the dual school system created by the defendant school board's previous *de jure* segregation. Equality required not only a cessation of discriminatory practices, but in addition, an affirmative effort to dismantle the racial segregation that had been created through express governmental policy and that would likely be maintained by the practices that were institutionally and societally ingrained.

The current controversy over affirmative action centers on the extent to which this task of dismantling a dual society should be undertaken by governmental and private entities in various contexts. Affirmative efforts have been made to integrate public and private industries, higher education, and professional trades. Affirmative-action plans have been developed as remedies following findings of discrimination; some were included in consent decrees and still others were developed voluntarily, sometimes under the threat of suit, but other times out of genuine commitments to increase the numbers of underrepresented groups in various walks of life.

Critics of affirmative action vigorously assailed the use of race-conscious strategies to benefit minority individuals who had not themselves been shown to be victims of discrimination. Their principal argument is that affirmative action is simply "disease as cure," in that it makes use of race classification to distribute opportunities on the basis of race rather than on individual merits. This is precisely the harm that was imposed on racial minorities and that cannot be justified on nondiscrimination grounds. They argue, moreover, that whites harmed by such efforts are in fact victims of racial discrimination and that the use of race-conscious efforts to correct racial imbalances violates the Fourteenth Amendment.

Affirmative action has been most often justified by supporters as necessary to remedy the effects of past discrimination. Most of the arguments boil down to a view that a full remedy for racial discrimination requires affirmative efforts to restructure racial hierarchy by redistributing educational, economic, and employment opportunities across racial groups. Affirmative action has also been characterized as essential to the nondiscrimination principle. In this view, it is a bottom-line effort to minimize the effects of racial bias that works its way into evaluation systems that have historically favored dominant values and interests. Some argue that affirmative action serves as reparation for past discrimination, whereas others justify affirmative action as essential to creating a future society that is not racially stratified. In the words of one Justice, "to get beyond race, we must first take race into account."

Despite the polarized nature of the ongoing affirmative-action debate, affirmative action is a doctrinal area in which the fluctuating majorities on the Court and its shifting sensibilities since 1986 are best illustrated. Indeed, the Court has only recently reached an apparent consensus on the constitutionality of affirmative action.

The much awaited decision in REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978) produced something of a stalemate: state universities were permitted to use race as one factor in admission decisions; but, absent some evidence of past discrimination on their part, they could not set aside seats for which only minorities could compete. After *Bakke*, the constitutional status of affirmative action remained murky. In subsequent cases, a shifting majority upheld affirmative-action plans adopted by the federal government in construction contracts (in FULLILOVE V. KLUTZNICK, 1980) and in private industry (in UNITED STEELWORKERS OF AMERICA V. WEBER, 1979). However, growing concerns over the rights of whites disadvantaged by these efforts finally came to the fore in FIREFIGHTERS' LOCAL #1784 V. STOTTS (1984), in which the Court precluded federal courts from ordering a city employer subject to an affirmative-action CONSENT DECREE to protect the jobs of less-senior minorities by laying off more-senior whites.

Foes of affirmative action subsequently interpreted *Stotts* to ban all affirmative-action remedies that benefitted persons other than actual victims of discrimination. The U.S. Justice Department, after urging the Court to make such a ruling, used *Stotts* as a basis for challenging affirmative-action programs operated by hundreds of cities and states pursuant to consent decrees. Yet *Stotts* failed to produce a clear consensus regarding the constitutionality of affirmative action. Subsequent Court decisions upholding other affirmative-action plans benefitting "non-victims" indicated that *Stotts* was not read as encompassing a broad rejection of race-conscious remedies.

Despite these decisions, however, there remained on the Court a vocal opposition to such race-conscious measures. That slim majorities upheld these measures suggested that the constitutionality of affirmative action remained highly contested and subject to limitation. In 1989, a majority finally coalesced in CITY OF RICHMOND V. J. A. CROSON CO. (1989) to hold that race-conscious affirmative-action programs were subject to STRICT SCRUTINY. The city of Richmond adopted a thirty percent set-aside program for minority contractors. Although Richmond was fifty percent black, only one sixty-seventh of one percent of all city contracts had gone to minority contractors. The Court held that the city could not undertake an affirmative-action program to correct such gross disparities without some evidence that black contractors had been discriminated against in the past and that this discrimination had caused the disparities. Particularly striking is the Court's refusal to recognize the relevance of Congress's previous findings of industry-wide discrimination, and its willingness to reduce centuries of white supremacy to the same plane as two decades of affirmative action. Such findings could not be "shared," but had to be proven anew in Richmond.

*Croson* demonstrates how the combination of the intent requirement and the application of strict scrutiny to affirmative action combine to create the tragic irony that institutional and systemic perpetuation of racial inequality escapes constitutional scrutiny, while efforts to break these patterns and practices are constitutionally prohibited.

Moreover, *Croson* represents a decisive victory of the more formal antidiscrimination approach over the more contextual antisubordination approach, at least where Congress has not adopted the latter approach. (See METRO BROADCASTING V. FCC.)

Critics argue that traditional protections for nonwhites are being eroded while the civil rights laws are being interpreted vigorously to preclude some of the more effective remedies. This claim is not implausible when one compares, for example, the language in *Croson* (explaining how the Court's deep commitment to eliminate all forms of racial discrimination mandates a rejection of even remedial race classifications) with the Court's willingness in PATTERSON V. MCLEAN CREDIT UNION (1989) to interpret the CIVIL RIGHTS ACT OF 1866 to leave a private employer's racial harassment unremedied under this statute. Although the contrasting protections in each of these cases might be reconciled by focusing on the distinctions between the separate doctrinal categories under which these cases arise, it is hard to ignore the apparent trend in which minorities are receiving less protection against traditional forms of race discrimination while the racially privileged are receiving more.

The Court's recent race jurisprudence also suggests that civil rights litigation no longer occupies the status of "high priority litigation." The Court seems to have rejected the view that civil rights plaintiffs play a special role as private attorneys general seeking to effectuate society's highest interest in eradicating discrimination, root and branch. In technical interpretations, the Court has narrowed the availability of remedies and simultaneously shifted advantages to employers and often to white males. Most troubling are rule 11 cases, in which courts have levied severe penalties against civil rights litigants for bringing suits that were judged to be "frivolous." Although rule 11 of the FEDERAL RULES OF CIVIL PROCEDURE lay dormant until it was raised in 1983, nearly half of all rule 11 sanctions have involved civil rights and public-interest cases. Other research also suggests civil rights cases are also disproportionately likely to be dismissed given the heightened pleading threshold placed on such claims. The overall effect of these "techinical" opinions has been to raise the risk and cost of litigating civil rights claims at precisely the same time that shifts in substantive rules make it unlikely that a plaintiff will prevail. The probable consequence of such decisions is the chilling of the civil rights bar. The long-term consequence may be that law may cease to serve as a meaningful deterrent to discriminatory behavior.

These recent developments have led many to conclude that the Second Reconstruction is largely a dead letter and that the period is now more aptly described as a post-civil rights era. Indeed, the parallels with the Second Reconstruction seem to confirm the cyclical nature of civil rights protection and, more troubling, the cyclical nature of its decline.

KIMBERLÉ CRENSHAW
(1992)

Bibliography

FREEMAN, ALAN 1990 Antidiscrimination Law: The View from 1989. *Tulane Law Review* 64:1407–1441.

LAWRENCE, CHARLES 1987 The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism. *Stanford Law Review* 39:317–387.

ORTIZ, DANIEL 1989 The Myth of Intent in Equal Protection. *Stanford Law Review* 41:1105–1150.

SCHNAPPER, ERIC 1983 Perpetuation of Past Discrimination. *Harvard Law Review* 96:828–864.

STRAUSS, DAVID A. 1986 The Myth of Colorblindness. *Supreme Court Review* 1986:99–134.

TRIBE, LAURENCE H. 1988 *American Constitutional Law*, 2nd ed. New York: Foundation Press.

WILLIAMS, PATRICIA 1989 The Obliging Shell: An Informal Essay on Formal Equal Opportunity. *Michigan Law Review* 87: 2128–2151.

# CIVIL RIGHTS
## (Update 2)

The field of civil rights generally refers to the various areas of American law concerned with a person's right to be free from discrimination based on his or her identity as a member of a particular social group. In the classical liberal political tradition, "civil rights" historically meant the universally held legal rights of all citizens to participate in civil society—for example, to make contracts, pursue occupations, own and convey property—and more recently has included the "political" right to vote in civic elections. The contemporary notion of civil rights as protection for minority groups is linked to the struggle, first by African Americans and then others, to expand the equal enjoyment of (supposedly) universally held rights to disempowered groups in American society. Today, civil rights law, in one form or another, encompasses discrimination based on race, gender, disability, primary language, ethnicity, national origin, family structure, religion, and SEXUAL ORIENTATION.

There are multiple sources of civil rights law. The Constitution contains provisions abolishing SLAVERY (the THIRTEENTH AMENDMENT), prohibiting the denial of VOTING RIGHTS on the basis of race, sex, or failure to pay a POLL TAX (the FIFTEENTH AMENDMENT, the NINETEENTH AMENDMENT, and the TWENTY-FOURTH AMENDMENT), and guaranteeing the EQUAL PROTECTION OF THE LAWS (the FOURTEENTH AMENDMENT and analogous state constitutional provisions). Federal legislative enactments prohibit discrimination on designated bases and in a variety of contexts, including most notably PUBLIC ACCOMMODATIONS, employment, education, lending, and housing. Civil rights law also includes the rules promulgated by federal ADMINISTRATIVE AGENCIES constituted under and charged with enforcement of various federal civil rights statutes. In addition to federal law, an often overlapping complex of state constitutional law and state and local enactments, ordinances, and administrative rules outlaw discrimination on a wide variety of bases and in diverse social contexts.

Federal constitutional law is relevant to civil rights law in several ways. First, and most importantly, the federal Constitution is a substantive source of civil rights protection. The equal protection clause of the Fourteenth Amendment provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The courts have used this open-ended language to craft a general body of civil rights law. While federal and state legislatures may provide greater protection, the constitutional standards set a legal minimum.

The courts early on interpreted equal protection narrowly, to prohibit only the most explicit forms of exclusion of blacks by the government. In PLESSY V. FERGUSON (1896), the Supreme Court upheld a state law requiring SEGREGATION of whites and blacks in rail cars. Articulating what became known as the SEPARATE BUT EQUAL DOCTRINE, the Court interpreted the equal protection clause to permit formal and explicit racial segregation. Under the Court's logic, no denial of equal protection of the laws was manifest in racial segregation so long as equal facilities were provided. Of course, the racial segregation to which African Americans were subjected hardly offered equal facilities. Nevertheless, *Plessy* became the constitutional authority for the legality of the systemic racial segregation that characterized the post-RECONSTRUCTION domination of African Americans in many sectors of American society.

The modern era of civil rights begins with the Court's repudiation of the separate-but-equal doctrine in BROWN V. BOARD OF EDUCATION (1954). According to the *Brown* opinion, segregated schools were inherently unequal. Relying on SOCIAL SCIENCE RESEARCH suggesting that segregation inflicted on black children a stigma of inferiority that impeded their education, the Justices ruled that state-mandated school segregation constituted unequal treatment in violation of the equal protection clause.

*Brown* marked the starting point for a massive increase in litigation challenging various social practices as violating constitutional equal protection guarantees. It also has symbolized, for generations of lawyers, the possibility of employing law for progressive social change. Widely viewed as the American legal system's ratification of the goals of the CIVIL RIGHTS MOVEMENT, *Brown* is associated with the historic dismantling of the formal system of racial segregation that marked not only education, but also public parks, carriers, employment, recreation, and housing in the United States. After decades of expansion and contraction, however, the potential for using constitutional doctrine as a mandate for overcoming continuing inequality has been largely tamed by the narrow interpretations that conservative Court majorities have accorded equal protection doctrine since the mid-1970s.

The potential substantive reach of the equal protection clause is limited at the outset by the Court's continued allegiance to the STATE ACTION doctrine mandating that the equal protection clause applies only to discrimination deemed to be governmental in nature. Therefore, any protection against discrimination by private actors depends on the existence of applicable LEGISLATION. Legislative bodies may, but are not constitutionally compelled to, prohibit various forms of discrimination by private parties. Under the Court's interpretation of the Constitution, however, private discrimination, no matter how pervasive or oppressive, is beyond the purview of the equal protection clause.

The WARREN COURT, which decided *Brown*, often found state action in contexts in which private actors played particularly powerful roles in the lives of individuals. The more conservative BURGER COURT and REHNQUIST COURT have since imposed strict barriers to litigation in the name of the state action doctrine, significantly limiting the potential reach of constitutional antidiscrimination norms. One consequence is that, even in the field of education at issue in *Brown*, continuing racial segregation and new resegregation is beyond constitutional reach because, as the Court ruled in MISSOURI V. JENKINS (1990), racial school segregation that cannot be traced to intentional governmental action must be deemed privately caused.

Another key restriction on the potential reach of the equal protection clause is the judicially imposed requirement that, unless the government has overtly based a decision on race or another constitutionally prescribed ground, the plaintiff must prove that he or she was a victim of "intentional" discrimination to make out a violation of the equal protection clause. Since the fall of the open and official racial apartheid that marked American life, particularly in the South, prior to the late 1960s, decisionmakers have rarely made race an explicit consideration. In WASHINGTON V. DAVIS (1976), the Court held that the disparate racial impact of a standardized written test for choosing police officers did not establish an equal protection violation, for there was no showing that the test had been chosen or its use continued for racially discriminatory purposes. Under this doctrine, a plaintiff must show that a governmental entity intentionally made a decision on the basis of a racial criterion in order to render equal protection norms against RACIAL DISCRIMINATION applicable. The Court chose the "intent" standard to govern constitutional equal protection analysis, even though various civil rights statutes permit "disparate impact" along with intent to make out a violation. Under the disparate impact approach of Title VII of the CIVIL RIGHTS ACT OF 1964, for example, proof of discrimination can be based on the employer's use of a criterion for decisionmaking that results in the disproportionate exclusion of blacks or other protected groups and that cannot be proved necessary to the legitimate needs of the employer. Adoption of the intent standard has meant that constitutional antidiscrimination doctrine is, as a practical matter, virtually useless in litigating against contemporary forms of racial stratification.

The equal protection clause has also been interpreted since *Brown* to apply beyond the context of race and national origin. In CRAIG V. BOREN (1976), the Court held that gender classifications should also be subject to heightened constitutional scrutiny, although a lesser standard known as "intermediate" scrutiny. In a notably vigorous application of this standard, the Court held in UNITED STATES V. VIRGINIA (1996) that the male-only admission policy at the Virginia Military Institute was unconstitutional SEX DISCRIMINATION. In *Clark v. Jeter* (1988), the Court extended the intermediate scrutiny standard to classifications based on the marital status of the subject's parents (or ILLEGITIMACY; see NONMARITAL CHILDREN). The Court has thus far refused to recognize age, wealth, or sexual orientation as SUSPECT CLASSIFICATIONS, meaning that such criteria have no special constitutional significance.

In one of the most controversial civil rights decisions in recent times, the Court in BOWERS V. HARDWICK (1986) exemplified its unwillingness to extend heightened constitutional protections to certain minorities. The Court refused to strike down a state sodomy statute's criminalization of sexual practices between consenting adults on the ground that it violated the constitutional RIGHT OF PRIVACY. The *Bowers* opinion not only refused to extend protection against discrimination to sexual minorities, but seemed to give constitutional legitimacy to the most anachronistic stereotypes and prejudices that underlie the marginalization of sexual minorities in American society. However, in ROMER V. EVANS (1996), the Court struck down a state constitutional amendment prohibiting municipalities from protecting sexual minorities from discrimination, holding that such a REFERENDUM reflected animosity toward a particular group and was unrelated to any legitimate state objective. *Evans* demonstrates that, despite the *Bowers* result, sexual minorities will receive at least some protection from explicit governmental action aimed at them.

In addition to providing substantive civil rights protection, equal protection has also been interpreted to limit legislative action to address historical discrimination. The conservative Court majorities of the last two decades have embraced what might be called a "colorblindness" interpretation of the equal protection clause, so named because it purports to require that the government be blind to race in its decisionmaking processes. According to the colorblindness approach, the equal protection clause protects individuals from personal evaluations based on a proscribed criterion (such as race or gender) rather than vindicates the interests of historically subordinated groups (such as African Americans or women). From this perspective, the equal protection clause protects whites, men, and other historically privileged groups in the same ways that it protects African Americans, women, and other disadvantaged groups.

In the AFFIRMATIVE ACTION cases, the colorblindness approach has meant that governmental attempts to remedy past discrimination through policies giving preference to minorities with respect to various governmental benefits are deemed constitutionally equivalent to race-conscious policies that harm racial minorities. As the Court ruled in RICHMOND (CITY OF) V. J. A. CROSON CO. (1989), STRICT SCRU-

TINY applies to all racial classifications, whether malign or benign. Accordingly, the City of Richmond's affirmative action policy for hiring construction contractors was struck down on the ground that there was insufficient proof that the huge under-representation of racial minorities in the construction contracting business was the result of past racial discrimination— although there had been congressional findings of discrimination nationwide in the construction industry, and Richmond, the capital of the Confederacy, had long enforced racial apartheid in virtually all sectors of public life. ADARAND CONSTRUCTORS, INC. V. PEÑA (1995) extends the same strict scrutiny to analogous affirmative action of the federal government.

In addition to including a significant body of civil rights protections and setting limits on legislative remedial action, the Constitution is relevant to civil rights law because, like any other federal legislative or executive action, civil rights acts of Congress must be authorized by some provision of the Constitution. For example, in the CIVIL RIGHTS CASES (1883), the Court struck down the CIVIL RIGHTS ACT OF 1875, which prohibited racial discrimination in public accommodations. The Court held that the FOURTEENTH AMENDMENT, SECTION 5—granting Congress power to enforce the equal protection clause and other substantive guarantees of the amendment—did not authorize Congress to remedy any discriminatory practice that did not independently constitute a violation of the Fourteenth Amendment. As a substantive matter, the Fourteenth Amendment did not prohibit private discrimination by innkeepers, railroad carriers, and others. Consequently, when Congress came to enact the Civil Rights Act of 1964—prohibiting race and gender discrimination in public accommodations, employment, and education by public and private parties—it relied on the COMMERCE CLAUSE, granting Congress power to regulate INTERSTATE COMMERCE, and the SPENDING POWER, permitting Congress to attach conditions to the receipt of federal funds. The reach of federal civil rights law depends, indirectly, on the future interpretation of these constitutional grants of congressional power and the resolution of FEDERALISM concerns raised by their expansive reach.

Finally, constitutional law is relevant to the field of civil rights in a less formal and a more ideological way. As an abstract matter, the idea of "civil rights" in a democratic society embodies the public meanings of equality and democratic self-determination. The special status of constitutional law in American civic ideology gives special significance to the courts' determination in particular cases the civil rights necessary for justice under democratic principles. The content of "civil rights" is not self-evident, and in fact has been hotly contested throughout American history.

Writers in a new scholarly movement, CRITICAL RACE THEORY, began in the 1990s to challenge many of the core assumptions of the civil rights tradition. According to these writers, judicial interpretations of constitutional requirements for equality constitute and embody a particular way of interpreting the world, a special language for distinguishing the relevant from the irrelevant in the social landscape. The judicial interpretation of the significance and meaning of race, gender, sexual orientation, disability, and other features of a person's identity necessarily is part of the broader struggle over the exercise of social power generally in American society. The structure of antidiscrimination law—with its premise that racial power is manifest in isolated, individual, intentional, and irrational acts—forms a narrative partly of justice and liberation, but partly also of legitimation and apologia. It paints a false picture of a world in which, separate from any race-conscious acts of decisionmakers, things operate according to rational and culturally neutral norms, thereby mistaking the norms of dominant social groups for universal standards of merit.

GARY PELLER
(2000)

Bibliography

BELL, DERRICK A. 1992 *Race, Racism, and American Law*, 3rd ed. Boston: Little, Brown.

BRANCH, TAYLOR 1988 *Parting the Waters: America in the King Years, 1954–63.* New York: Simon & Schuster.

——— 1998 *Pillar of Fire: America in the King Years, 1963–65.* New York: Simon & Schuster.

CRENSHAW, KIMBERLÉ; GOTANDA, NEIL; PELLER, GARY; and THOMAS, KENDALL, eds. 1995 *Critical Race Theory: The Key Writings that Formed the Movement.* New York: The New Press.

DANIELSEN, DAN and ENGLE, KAREN, eds. 1995 *After Identity: A Reader in Law and Culture.* New York: Routledge.

MACKINNON, CATHARINE A. 1989 *Toward a Feminist Theory of the State.* Cambridge, Mass.: Harvard University Press.

MALCOLM X 1990 *Malcolm X Speaks: Selected Speeches and Statements.* New York: Grove Weidenfeld.

SPANN, GIRARDEAU A. 1993 *Race Against the Court: The Supreme Court & Minorities in Contemporary America.* New York: New York University Press.

WILLIAMS, PATRICIA J. 1991 *The Alchemy of Race and Rights: The Diary of a Law Professor.* Cambridge, Mass.: Harvard University Press.

## CIVIL RIGHTS ACT OF 1866 (FRAMING)

14 Stat. 27

Responding to the BLACK CODES, Congress in 1866 passed its first CIVIL RIGHTS bill to enforce the THIRTEENTH AMENDMENT. The bill's definition of national CITIZENSHIP super-

seded the decision in DRED SCOTT V. SANDFORD (1857), which had excluded blacks. A citizen was any person not an Indian or of foreign allegiance born in any state or territory, regardless of color. All citizens were to enjoy full and EQUAL PROTECTION of all laws and procedures for the protection of persons and property, and be subject to like punishments without regard to former slave status. In all jurisdictions citizens were to have equal rights to sue, contract, witness, purchase, lease, sell, inherit, or otherwise convey personal or real property. Anyone who, "under color of any law . . . or custom," prevented any person from enjoying those rights, or who subjected any person to discriminatory criminal punishments because of race or previous involuntary servitude, was subject to MISDEMEANOR prosecutions in federal courts. Congress further authorized the REMOVAL OF CASES from state to federal courts of persons denied civil rights and of federal officer defendants, prosecuted by states, protecting civil rights; that provision connected the civil rights bill to the FREEDMEN'S BUREAU and the HABEAS CORPUS statutes. All federal officials could initiate proceedings under the bill. Federal judges were to appoint special commissioners to enforce judgments under the bill (a use of fugitive slave law processes for opposite purposes). Alternatively, judges could employ the army or state militias, under the President's command, as posses. Last, Congress expanded the Supreme Court's APPELLATE JURISDICTION to include questions of law arising from the statute.

President ANDREW JOHNSON's powerful veto of the Civil Rights Bill, though overridden by Congress, touched both honorable traditions of the states' monopoly of rights and ignoble concepts of race hierarchy. He insisted that the bill would create a centralized military despotism and invoked the recent EX PARTE MILLIGAN (1866) decision. Congress, he argued, was creating black citizens of the same states it was excluding from representation.

Though trenchant, the veto never touched on the question of the remedies available to injured citizens or the nation, when states failed to carry out their duty to treat their own citizens equally. If no statutory remedies existed, then both nation and states were returned to the conditions of 1860. Anxious to make clear the fact of the nation's advance from that pitiable condition, the Congress pushed ahead with a FOURTEENTH AMENDMENT proposal and, in 1867, resorted to military reconstruction as a desperate stop-gap.

But the Fourteenth Amendment, unlike the Thirteenth (which the Civil Rights Act enforced) constrained only STATE ACTION, at least according to Supreme Court judgments commencing with the *Slaughterhouse* case (1873). In May 1870, the Congress "re-enacted" the 1866 Civil Rights law, this time under the Fourteenth and FIFTEENTH AMENDMENTS (though section 16 of the 1870 law still punished discriminatory felonious private acts). In 1874, a revision of the federal statutes appeared, breaking up the text of the 1866 statute into scattered sections.

HAROLD M. HYMAN
(1986)

(SEE ALSO: *Section 1983, Title 42, United States Code.*)

Bibliography

HOWE, M. A. DEWOLFE 1965 Federalism and Civil Rights. [Massachusetts Historical Society] *Proceedings* 77:15–27.

HYMAN, HAROLD M. and WIECEK, WILLIAM M. 1982 *Equal Justice under Law: Constitutional Development 1835–1875.* Chaps. 9–11. New York: Harper & Row.

KACZOROWSKI, ROBERT J. 1971 Nationalization of Civil Rights: Theory and Practice in a Racist Society, 1866–1883. Ph.D. diss., University of Minnesota.

## CIVIL RIGHTS ACT OF 1866
### (Judicial Interpretation)

Judicial interpretation has transformed the Civil Rights Act of 1866 from a simple effort to dismantle the BLACK CODES into one of the most important existing CIVIL RIGHTS laws. In assessing judicial treatment of the act, it is helpful to consider section one of the act separately from section three. Other sections have not led to noteworthy judicial development. Section one of the act, which granted all persons the same rights as white persons to make and enforce contracts, sue, be parties, give EVIDENCE, inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, was reenacted in modified form by the Civil Rights Act of 1870, was divided into two sections by the REVISED STATUTES of 1874, and survives as sections 1981 and 1982 of Title 42, United States Code. Section three of the act, which set forth the procedures for vindicating rights protected by section one, was scattered throughout the United States Code. Portions of it survive as CIVIL RIGHTS REMOVAL statutes and as part of section 1988 of Title 42. Judicial interpretation of the 1866 act is not unrelated to these statutory reshufflings. Cut adrift from their moorings in the entire 1866 act, the act's remnants are amenable to many more interpretations than the original provision.

Cases decided in the years immediately following the 1866 act's passage are particularly important in ascertaining its original meaning. The REVISED STATUTES of 1874 would strip the act's descendants of any close resemblance to the original measure. And once the courts became accustomed to applying the FOURTEENTH AMENDMENT, much of the 1866 act would become superfluous. In addition, ratification of the Fourteenth Amendment eliminated most doubts about the act's constitutionality.

Prior to ratification of the Fourteenth Amendment, most courts were willing to sustain the act under Congress's THIRTEENTH AMENDMENT power to proscribe SLAVERY. But at least Kentucky's highest court in *Bowlin v. Commonwealth* (1867) declared the act unconstitutional. Other courts avoided such a declaration only by interpreting the act not to prohibit some forms of RACIAL DISCRIMINATION that the act's words arguably covered.

In the reported interpretations of the act, for example, courts divided over whether states could continue to outlaw marriages between whites and blacks. State courts in Tennessee (1871), Indiana (1871), and Alabama (1878) found marriage not to be a contract within the meaning of section 1, and therefore rejected attacks on antimiscegenation laws that relied on the 1866 act. State courts in Louisiana (1874) and Alabama (1872) relied at least in part on the 1866 act to find intermarriage legal, but the Alabama case was soon overruled. Not until LOVING V. VIRGINIA (1967) did the Supreme Court hold the Fourteenth Amendment to ban antimiscegenation laws.

State courts also divided over whether the 1866 act abrogated state laws prohibiting blacks from testifying against whites. The Kentucky court found Congress's effort to do so unconstitutional, but an 1869 Arkansas decision found the act to authorize such testimony. In 1869, the California Supreme Court relied on the 1866 act's evidentiary provision to dismiss an INDICTMENT against a mulatto, because Chinese witnesses had testified at his trial and state law prohibited them from testifying against white men. But a year later, despite the 1866 act, the California court sustained the state's evidentiary ban on testimony by Chinese against whites.

After the 1870s, section 1 diminished in importance. The state laws against which it most successfully operated, laws mandating racial discrimination in areas covered by section 1, could also be attacked directly under the Fourteenth Amendment. And with section 1 and the Fourteenth Amendment undermining the most egregious provisions of the Black Codes, there remained only one important area to which section 1 might be applied—private discrimination. When the CIVIL RIGHTS CASES (1883), UNITED STATES V. HARRIS (1883), and UNITED STATES V. CRUIKSHANK (1876) limited Congress's Thirteenth and Fourteenth Amendment power to legislate against private racial discrimination, there was doubt about whether section 1 constitutionally could be applied to private discrimination. One early lower federal court opinion, *United States v. Morris* (1903), suggested the 1866 act's applicability to private discrimination, but Supreme Court statements in *Virginia v. Rives* (1880) and CORRIGAN V. BUCKLEY (1926) suggested that the act did not apply to private conduct. (See STRAUDER V. WEST VIRGINIA, 1880.),

*Hurd v. Hodge* (1948), a companion case to SHELLEY V. KRAEMER (1948), gave section 1 some new life. The court applied section 1 to prohibit courts in the DISTRICT OF COLUMBIA from enforcing a racially RESTRICTIVE COVENANT. The breakthrough came in JONES V. ALFRED H. MAYER CO. (1968), where the Court held both that Congress meant the 1866 act to proscribe private discrimination and that Congress constitutionally could outlaw private discrimination under the Thirteenth Amendment. As the result of *Jones, Johnson v. Railway Express Co.* (1974), and RUNYON V. MCCRARY (1976), the remnants of the 1866 act were transformed from historical relics into federal laws broadly prohibiting private racial discrimination in the sale or lease of all housing, in schools, in employment and in virtually all other contracts. In many respects the 1866 act's newly discovered coverage exceeds that of comprehensive modern civil rights laws. *General Building Constructors Association, Inc. v. Pennsylvania* (1982) limited the 1866 act's reach by holding that liability may not be imposed under the act without proof of intentional discrimination.

Section 3 of the 1866 act traveled a less visible path through the courts. Its primary significance has been to determine when a violation of former section 1 authorizes an original or removal action in federal court. (See REMOVAL OF CASES.) In BLYEW V. UNITED STATES (1872), over the dissents of Justices JOSEPH P. BRADLEY and NOAH SWAYNE, the Court held that Kentucky's testimonial disqualification of black witnesses did not confer ORIGINAL JURISDICTION on a lower federal court to hear a state murder case at which the black witnesses were to testify. In a series of civil rights removal cases, the Court held that what had been section 3 authorized removal to federal court where state laws expressly mandated a racial distinction that prevented blacks from receiving equal justice, as when blacks were excluded from juries. But the Court found removal not to be authorized where the same result was achieved through other than formal state statutory command.

Under section 3's remnants, actions that arise under state law but are removed to federal court are tried in federal court by applying state law. In *Robertson v. Wegmann* (1978), however, the Court misconstrued the shred of the 1866 act commanding this result to require application of state law to cases arising under *federal* law. The same remnant, section 1988, also has been relied on in *Sullivan v. Little Hunting Park, Inc.* (1969) to authorize damages for violations of section 1 rights and in *Tomanio v. Board of Regents* (1980) to require the use of state statutes of limitations in federal civil rights cases.

THEODORE EISENBERG
(1986)

Bibliography

BARDOLPH, RICHARD 1970 *The Civil Rights Record.* Pages 84–87, 94–96, 200–201, 532–533. New York: Thomas Y. Crowell.

CARR, ROBERT K. 1947 *Federal Protection of Civil Rights.* Ithaca, N.Y.: Cornell University Press.

EISENBERG, THEODORE 1981 *Civil Rights Legislation.* Charlottesville, Va.: Michie Co.

## CIVIL RIGHTS ACT OF 1875
### 18 Stat. 335

On his deathbed Senator CHARLES SUMNER (Republican, Mass.) implored a congressional friend, "You must take care of the civil rights bill,—my bill, the civil rights bill, don't let it fail." Since 1870 Sumner had sought to persuade Congress to enact a law guaranteeing to all people, regardless of race or religion, the same accommodations and facilities in public schools, churches and cemeteries incorporated by public authority, places of public amusement, hotels licensed by law, and common carriers. Sumner had contended that racial SEGREGATION was discriminatory, that SEPARATE BUT EQUAL facilities were inherently unequal, and that compulsory equality would combat prejudice as much as compulsory segregation fostered it. Opponents claimed that the FOURTEENTH AMENDMENT protected the privileges of United States CITIZENSHIP only, not those of state citizenship to which the bulk of CIVIL RIGHTS attached. Opponents also claimed that Congress had no constitutional power to protect civil rights from violation by private persons or businesses.

School DESEGREGATION was unpopular among northern Republicans and hated by southern Democrats. After the election of 1874 resulted in a Democratic victory in the House, supporters of Sumner's bill settled for "half a loaf" by consenting to the deletion of the provisions on education, churches, and cemeteries. A black congressman from South Carolina agreed to the compromise because the school clause jeopardized the Republican party in the South and subordinated the educational needs of blacks to their right to be desegregated. Teaching the "three Rs" to the children of former slaves was more important than risking their educational opportunities by demanding their admission to "white" schools.

In February 1875 the lame-duck 43rd Congress, 2nd session, voting along party lines in both houses, passed the modified bill which President ULYSSES S. GRANT signed into law on March 1. The Civil Rights Act of 1875, the last Reconstruction measure and the last civil rights act until 1957, was the most important congressional enactment in the field of PUBLIC ACCOMMODATIONS until the CIVIL RIGHTS ACT OF 1964. The act of 1875 affirmed the equality of all persons in the enjoyment of transportation facilities, in hotels and inns, and in theaters and places of public amusement. Theoretically such businesses, though privately owned and operated, were like public utilities, exercising public functions for the benefit of the public and subject to public regulation. Anyone violating the statute was civilly liable for $500 damages and, on conviction in federal court, subject to a fine of not more than $1,000 or imprisonment for not more than one year. In 1883 the Supreme Court held the statute unconstitutional in the CIVIL RIGHTS CASES.

LEONARD W. LEVY
(1986)

Bibliography

KONVITZ, MILTON R. 1961 *A Century of Civil Rights.* New York: Columbia University Press.

## CIVIL RIGHTS ACT OF 1957
### 71 Stat. 634

Although this law marked the end of an eighty-two-year period of congressional inactivity in the field of CIVIL RIGHTS, it accomplished little. The act created the CIVIL RIGHTS COMMISSION but granted it only investigative and reporting powers. The act also created a separate CIVIL RIGHTS DIVISION within the Department of Justice to be headed by an additional assistant attorney general. More substantively, the act made it unlawful to harass those exercising their VOTING RIGHTS in federal elections and provided for federal initiation of proceedings against completed or potential violations. Offenders receiving more than slight penalties were entitled to TRIAL BY JURY, a watering-down provision inserted by Senate opponents.

The act is as significant for important deletions from the original bill as for what was ultimately enacted. Southern senators managed to eliminate a provision authorizing the ATTORNEY GENERAL to seek injunctive relief against all civil rights violators, a provision opponents feared would enhance the federal presence in school DESEGREGATION disputes and one they characterized as reimposing Reconstruction on the South. The emasculated act was viewed as a victory for southern segregationists. It was not even worth a filibuster.

THEODORE EISENBERG
(1986)

Bibliography

BRAUER, CARL M. 1977 *John F. Kennedy and the Second Reconstruction.* New York: Columbia University Press.

## CIVIL RIGHTS ACT OF 1960
### 74 Stat. 86

The insignificance and ineffectiveness of the CIVIL RIGHTS ACT OF 1957 generated pressure in the next Congress to enact a more effective CIVIL RIGHTS law. And the CIVIL

RIGHTS COMMISSION established by the 1957 act added to the pressure by issuing a report documenting the abridgment of black VOTING RIGHTS in the South.

As enacted, the 1960 act required state election officers to retain for twenty-two months records relating to voter registration and qualifications in elections of federal officials. Where courts found patterns or practices of abridgment of the right to vote on account of race, they were authorized to declare individuals qualified to vote and to appoint federal voting referees to take EVIDENCE and report to the court on the treatment of black voters.

In a provision originally aimed at interference with school DESEGREGATION decrees, the act imposed criminal penalties for obstruction of all court orders. It also created a federal criminal offense of interstate flight to avoid prosecution for destroying buildings or other property.

Like the 1957 act, the 1960 act is noteworthy for its failure to include a proposed provision authorizing the United States to initiate actions on behalf of persons deprived of civil rights.

THEODORE EISENBERG
(1986)

Bibliography

BRAUER, CARL M. 1977 *John F. Kennedy and the Second Reconstruction.* New York: Columbia University Press.

## CIVIL RIGHTS ACT OF 1964
78 Stat. 241

The Civil Rights Act of 1964 signified many changes. For JOHN F. KENNEDY, prompted by southern resistance to DESEGREGATION orders and violent responses to peaceful CIVIL RIGHTS protests, proposing the measure symbolized an aggressive new attitude toward RACIAL DISCRIMINATION. For LYNDON JOHNSON, who supported the act after Kennedy's assassination, it marked a turn away from southern regionalism and toward national leadership on civil rights matters. For Congress, the act ended a century of nonexistent or ineffective civil rights laws and was the first civil rights measure with respect to which the Senate invoked CLOTURE. For blacks, the act was the first major legislative victory since Reconstruction and the most far-reaching civil rights measure in American history.

The act consists of eleven titles. Titles I and VIII reinforce voting rights provisions of the CIVIL RIGHTS ACTS OF 1957 and 1960 and limit the use of LITERACY TESTS to measure voter qualifications. (See also VOTING RIGHTS ACT OF 1970.) Titles III and IV, in provisions deleted from the bills that became the 1957 and 1960 acts, authorize court actions by the ATTORNEY GENERAL to challenge segregated public facilities and schools. Title V amends provisions governing the CIVIL RIGHTS COMMISSION. Title IX authorizes appeal from orders remanding to state courts civil rights cases that have been removed to federal court and authorizes the Attorney General to intervene in EQUAL PROTECTION cases. Title X establishes a Community Relations Service to assist communities in resoving discrimination disputes. Title XI deals with miscellaneous matters. The most important parts of the law are Title II, forbidding discrimination in PUBLIC ACCOMMODATION; Title VI, forbidding discrimination in federally assisted programs; and Title VII, forbidding EMPLOYMENT DISCRIMINATION. In 1972, Congress extended Title VII's coverage to most government employees. It does not cover religious institutions.

Congress shaped the 1964 act with a keen awareness of previously declared constitutional limitations on ANTIDISCRIMINATION LEGISLATION. Title II's ban on discrimination in public accommodations and Title VII's ban on employment discrimination are limited to those entities whose operations affect INTERSTATE COMMERCE. By limiting these provisions to establishments and employers affecting commerce, Congress sought to avoid the CIVIL RIGHTS CASES' (1883) determination that Congress lacks power under the FOURTEENTH AMENDMENT to outlaw discrimination by private citizens, even in such a quasi-public area as that of public accommodations. Unlike its power to enforce the Fourteenth Amendment, Congress's COMMERCE CLAUSE power is not limited to STATE ACTION. In HEART OF ATLANTA MOTEL, INC. V. UNITED STATES, (1964) and KATZENBACH V. MCCLUNG (1964) the Court upheld Title II as a valid exercise of the commerce power and the power to regulate interstate travel. Under the Court's subsequent decision in JONES V. ALFRED H. MAYER CO. (1968), much of Title II and Title VII would be valid as congressional enforcement of the THIRTEENTH AMENDMENT. Title VI's ban on discrimination in federally assisted programs was tied to another constitutional provision, Congress's TAXING AND SPENDING POWER.

Judicial interpretation seems to have avoided another potential constitutional problem attending Title VII. Under a 1972 amendment to Title VII, employers must accommodate an employee's religious practices if the employer is able to do so without undue hardship. In *Trans World Airlines, Inc. v. Hardison* (1977), the Supreme Court held that the statute does not require an employer to bear more than a DE MINIMIS cost to accommodate an employee's religious preferences. If Title VII were interpreted to mandate substantial concessions to religiously based employee work preferences, it might raise serious problems under the FIRST AMENDMENT'S ESTABLISHMENT OF RELIGION clause.

With the 1964 act's constitutional vulnerability minimized shortly after enactment, the way was clear for its development. Title II, banning racial discrimination in

public accommodations, was the act's symbolic heart, providing immediate and highly visible evidence that blacks, as equal citizens, were entitled to equal treatment in the public life of the community. But Title II generated little litigation, for compliance was swift throughout the South once the principle of equal access was established. Equalizing employment opportunity was a goal that would take longer to accomplish. Thus in operation, Title VII has dwarfed all other titles combined, frequently generating a huge backlog of cases in the agency charged with Title VII's administration, the Equal Employment Opportunity Commission (EEOC), and leading to thousands of judicial decisions.

The proof necessary to establish a Title VII violation repeatedly occupies the Supreme Court. Two leading cases, *McDonnell Douglas Corp. v. Green* (1973) and GRIGGS V. DUKE POWER CO. (1971), approve alternative methods of proof in Title VII cases. Under *McDonnell Douglas*, a plaintiff alleging discrimination by an employer must, after exhausting the necessary remedies with the EEOC or a state antidiscrimination agency, show that the plaintiff applied and was rejected for a job for which the plaintiff was qualified, and that the employer continued to try to fill the position. An employer must then justify its actions. Under *Griggs*, in an extension of Title VII not necessarily contemplated by the 1964 Congress, proof that an employment selection criterion has a disproportionate adverse impact on minorities requires the employer to show that the selection standard is required by business necessity. After *Griggs*, statistically based Title VII cases, and threats to bring such cases, became a widespread method for pressuring employers to hire more minority and female workers. Few employers are both able to prove the business necessity of employment tests or other hiring criteria and willing to incur the expense of doing so.

The 1964 act, particularly Title VII, is not without its ironies. First, opponents of the act amended it to include sex discrimination in the hope that such an amendment would weaken the bill's chances for passage. But the bill passed with the additional ban that revolutionized at least the formal status of female workers. And in the case of sex discrimination, Title VII reaches beyond traditional refusals to hire or obvious pay disparities. When the Court held in *General Electric Co. v. Gilbert* (1976) that excluding pregnancy from a health plan does not constitute discrimination on the basis of sex, Congress amended Title VII to overturn the result. *Los Angeles Department of Water and Power v. Manhart* (1978) marks some sort of outer limit on Title VII's protection of female workers. The Court held Title VII to proscribe a requirement that females, who live longer than males and therefore can expect to receive greater total retirement benefits from a pension plan, contribute more to a pension than males contribute. In the case of sex, religion, or national origin discrimination, Title VII provides a defense if these factors constitute a bona fide occupational qualification, a defense sometimes difficult to separate from that of business necessity. The Supreme Court found in *Dothard v. Rawlinson* (1977) that a bona fide occupational qualification justifies requiring male prison guards for at least some classes of male prisoners.

Second, although the BURGER COURT generally has been viewed as conservative in the field of civil rights, Title VII owes much of its practical importance to Chief Justice WARREN E. BURGER's opinion for the Court in *Griggs v. Duke Power Co. Griggs* removed the requirement that discriminatory intent be an element of Title VII cases. This holding, in addition to its significance for Title VII, has been incorporated in other areas, including discrimination in housing under the CIVIL RIGHTS ACT OF 1968. *New York City Transit Authority v. Beazer* (1979), in which the Court refused to invalidate an employment selection standard (exclusion of drug users) with disparate impact on minorities, may signify some retrenchment from the full force of the *Griggs* principle. And in *International Brotherhood of Teamsters v. United States* (1977), the Court refused to extend *Griggs* to invalidate seniority systems that predate Title VII. But the Court never has directly questioned *Griggs*. In UNITED STEELWORKERS OF AMERICA V. WEBER (1979), the Burger Court concluded that Title VII permitted at least some private AFFIRMATIVE ACTION employment programs.

Although Title VII deservedly receives most of the attention paid to the 1964 act, Title VI is also an important antidiscrimination law. In REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE (1978) it provided the setting for the Court's first important pronouncement on affirmative action programs. Many subsequent antidiscrimination laws, such as Title IX of the EDUCATION AMENDMENT OF 1972, the AGE DISCRIMINATION ACT OF 1975, and the REHABILITATION ACT of 1973 are modeled after Title VI. Title VI is the principal antidiscrimination measure for programs receiving federal funds that are not affected by other antidiscrimination measures. In the case of public institutions, however, there is much overlap between Title VI's prohibitions and those contained in the Fourteenth Amendment. The Supreme Court has been ambiguous in describing the relationship between the two. In *Bakke*, a majority of Justices suggested that Title VI and the Constitution are coterminous, but it did not purport to overturn the Court's earlier holding in LAU V. NICHOLS (1974), widely read as extending Title VI to cases of discrimination not banned by the Constitution.

The contributions of the 1964 act to racial equality defy precise measurement, but surely they have been weighty. Beyond the tangible changes the act brought to the public

life of southern communities and to the entire American workplace lie enormous changes in attitudes and everyday personal relations. Those who believe that "you can't legislate morality" would do well to ponder the lessons of the Civil Rights Act of 1964.

THEODORE EISENBERG
(1986)

(SEE ALSO: *Firefighters Local Union No. 1784 v. Stotts.* )

Bibliography

DORSEN, NORMAN; BENDER, PAUL; NEUBORNE, BURT; and LAW, SYLVIA 1979 *Emerson, Haber and Dorsen's Political and Civil Rights in the United States*, 4th ed. Vol. II:581–608, 902–1062, 1172–1220. Boston: Little, Brown.

LARSON, ARTHUR and LARSON, LEX K. 1981 *Employment Discrimination.* New York: Matthew Bender.

SCHLEI, BARBARA L. and GROSSMAN, PAUL 1976 *Employment Discrimination Law.* Washington, D.C.: Bureau of National Affairs.

SULLIVAN, CHARLES A.; ZIMMER, MICHAEL J.; and RICHARDS, RICHARD F. 1980 *Federal Statutory Law of Employment Discrimination.* Indianapolis: Bobbs-Merrill.

## CIVIL RIGHTS ACT OF 1968
82 Stat. 696

This act capped the modern legislative program against RACIAL DISCRIMINATION that included the CIVIL RIGHTS ACT OF 1964 and the VOTING RIGHTS ACT OF 1965. Title VIII of the act, which constitutes the nation's first comprehensive OPEN HOUSING LAW, prohibits discrimination in the sale, rental, financing, and advertising of housing, and in membership in real estate brokerage organizations. Ironically, soon after Title VIII's enactment, the Supreme Court, in JONES V. ALFRED H. MAYER CO. (1968), construed a remnant of the CIVIL RIGHTS ACT OF 1866 to outlaw private racial discrimination in housing. In dissent in *Jones*, Justice JOHN M. HARLAN, joined by Justice BYRON R. WHITE, relied in part on Title VIII's passage to challenge the need for the Court's decision. The 1968 act also contained criminal penalties to protect civil rights activity and comprehensive measures to protect rights of AMERICAN INDIANS. Different portions of the act, including antiriot provisions, represented a backlash against antiwar demonstrations, CIVIL RIGHTS protest, and other forms of domestic unrest.

Like the Civil Rights Act of 1964, the 1968 act survived a southern filibuster in the Senate. Efforts by House opponents to delay consideration of the bill backfired. The delay led to the bill's consideration in the aftermath of Dr. MARTIN LUTHER KING, JR.'s assassination. Given that the bill passed the House by a small margin, the delay may have made all the difference.

THEODORE EISENBERG
(1986)

Bibliography

HARVEY, JAMES C. 1973 *Black Civil Rights During the Johnson Administration.* Jackson, Miss.: University and College Press of Mississippi.

## CIVIL RIGHTS ACT OF 1991
105 Stat. 1071 (1991)

In 1989, the Supreme Court handed down a half-dozen decisions making it more difficult to prevail on claims arising under several pieces of ANTIDISCRIMINATION LEGISLATION. Congress responded by passing the Civil Rights Act of 1990, only to have President GEORGE H. W. BUSH veto it and an override effort fail. Civil rights legislation reintroduced in the spring of 1991 might have suffered a similar fate, but for the bruising confirmation hearing of Supreme Court Justice CLARENCE THOMAS. In the wake of the hearings, which cast the administration in a negative light with regard to CIVIL RIGHTS while simultaneously revealing fractures within the civil rights coalition, both sides sought compromise. The Civil Rights Act of 1991 was quickly passed and signed into law on November 21, 1991.

Broadly speaking, the act sought to achieve two goals: (1) restore civil rights law to its pre-1989 contours; and (2) end inconsistencies in the remedies available under different antidiscrimination statutes. The latter it achieved by providing that, as under 42 U.S.C. § 1981, parties prevailing upon a claim of intentional discrimination under either Title VII or the AMERICANS WITH DISABILITIES ACT could recover compensatory and PUNITIVE DAMAGES, albeit subject to certain caps. As to the former, the act's success was more limited.

The act responded to a number of Court decisions, and as a result, consists of many bits and pieces. Among these, two stand out. First, the act reworked the Court's restrictive reading of section 1981 announced in PATTERSON V. MCCLEAN CREDIT UNION (1989). In *Patterson*, the Court reaffirmed the holding in RUNYON V. MCCRARY (1976) that section 1981 prohibits RACIAL DISCRIMINATION in the making and enforcement of private contracts, but held that it offered no relief from workplace discrimination that occurred after the formation of a contract. In contrast, the 1991 act insists that section 1981 applies to "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Second, the 1991 act responded to *Wards Cove Packing Co. v. Atonio* (1989). In

*Wards Cove*, the Court undermined the disparate impact approach developed in GRIGGS V. DUKE POWER COMPANY (1971) for showing systematic, as opposed to intentional, discrimination. It did so out of concern that a robust disparate impact DOCTRINE would encourage employers to adopt hiring quotas in order to avoid potential liability. The 1991 act went some distance toward undoing the changes wrought by *Wards Cove*, but stopped short of restoring the doctrine to its previous vigor. For example, the act accepted an increased burden imposed by the Court on those bringing claims by adopting the requirement that plaintiffs disaggregate sources of discrimination and establish "causation," while it potentially eased the burden on employers by failing to define what exactly they needed to show in order to establish a "business necessity" justification for otherwise discriminatory practices.

The Civil Rights Act of 1991 slowed the conservative assault on civil rights laws. Nevertheless, by virtue of its various compromises, the act achieved limited success in restoring antidiscrimination law to its pre-1989 state.

IAN F. HANEY LÓPEZ
(2000)

Bibliography

GUERON, NICOLE 1995 Note: An Idea Whose Time Has Come: A Comparative Procedural History of the Civil Rights Acts of 1960, 1964, and 1991, *Yale Law Journal* 104:1201–1234.

LEWIS, HAROLD, JR. 1997 *Civil Rights and Employment Discrimination Law.* St. Paul, Minn.: West.

## CIVIL RIGHTS CASES
### 109 U.S. 3 (1883)

In an opinion by Justice JOSEPH P. BRADLEY, with only Justice JOHN MARSHALL HARLAN dissenting, the Supreme Court ruled that Congress had no constitutional authority under either the THIRTEENTH or the FOURTEENTH AMENDMENT to pass the CIVIL RIGHTS ACT OF 1875. Holding that act unconstitutional proved to be one of the most fateful decisions in American history. It had the effect of reinforcing racist attitudes and practices, while emasculating a heroic effort by Congress and the President to prevent the growth of a Jim Crow society. The Court also emasculated the Fourteenth Amendment's enforcement clause, section five. The tragedy is that the Court made the Constitution legitimize public immorality on the basis of specious reasoning.

The *Civil Rights Cases* comprised five cases decided together, in which the act of 1875 had been enforced against innkeepers, theater owners, and a railroad company. In each of the five, a black citizen was denied the same accommodations, guaranteed by the statute, as white citizens enjoyed. The Court saw only an invasion of local law by the national government, contrary to the powers reserved to the states under the TENTH AMENDMENT. Bradley began his analysis with the Fourteenth Amendment, observing that its first section, after declaring who shall be a citizen, was prohibitory: it restrained only STATE ACTION. "Individual invasion of individual rights is not the subject-matter of the amendment." Its fifth section empowered Congress to enforce the amendment by appropriate legislation. "To enforce what? To enforce the prohibition," Bradley answered. He ignored the fact that the enforcement section applied to the entire amendment, including the CITIZENSHIP clause, which made all persons born or naturalized in the United States and subject to its jurisdiction citizens of the United States and of the states in which they reside. As Harlan pointed out, citizenship necessarily imports "equality of civil rights among citizens of every race in the same state." Congress could guard and enforce rights, including the rights of citizenship, deriving from the Constitution itself. Harlan reminded the Court of its opinion in STRAUDER V. WEST VIRGINIA (1880), where it had said that "a right or immunity created by the constitution or only guarantied by it, even without any express delegation of power, may be protected by congress."

But Bradley took the view that the legislative power conferred upon Congress by the Fourteenth Amendment does not authorize enactments on subjects "which are within the domain of state legislation. . . . It does not authorize congress to create a code of municipal law for regulation of private rights." Congress can merely provide relief against state action that violates the amendment's prohibitions on the states. Thus, only when the states acted adversely to the rights of citizenship could Congress pass remedial legislation. But its legislation could not cover the whole domain of CIVIL RIGHTS or regulate "all private rights between man and man in society." Otherwise, Congress would "supersede" the state legislatures. In effect the Court was saying that the Reconstruction amendments had not revolutionized the federal system. In effect the Court also warned the states not to discriminate racially, lest Congress intervene, as it had in the CIVIL RIGHTS ACT OF 1866, which the Court called "corrective" legislation against state action. In the cases under consideration, however, the discrimination derived from purely private acts unsupported by state authority. "The wrongful act of an individual, unsupported by any such authority, is simply a private wrong" that Congress cannot reach. Congress can, of course, reach and regulate private conduct in the normal course of legislation, penalizing individuals; but, Bradley explained, in every such case Congress possesses under the Constitution a power to act on the subject.

Under the Thirteenth Amendment, however, Congress

can enact any legislation necessary and proper to eradicate SLAVERY and "all badges and incidents of slavery," and its legislation may operate directly on individuals, whether their acts have the sanction of state authority or not. The question, then, was whether the Thirteenth Amendment vested in Congress the authority to require that all persons shall have equal accommodations in inns, public conveyances, and places of public amusement. The Court conceded that the amendment established "universal civil and political freedom throughout the United States" by abolishing slavery, but it denied that distinctions based on race or color abridged that freedom. Where, Bradley asked, does slavery, servitude, or badges of either arise from race discrimination by private parties? "The thirteenth amendment," he declared, "has respect, not to distinctions of race, or class, or color, but to slavery." The act of the owner of an inn, or theater, or transportation facility in refusing accommodation might inflict an ordinary civil injury, recognizable by state law, but not slavery or an incident of it. "It would be running the slavery argument into the ground," Bradley insisted, "to make it apply to every act of discrimination which a person may see fit to make" as to his guests, or those he will take in his coach, or those he will admit to his concert. On the theory that mere discrimination on account of race or color did not impose badges of slavery, the Court held that the Thirteenth Amendment, like the Fourteenth, did not validate the Civil Rights Act of 1875.

The case involved questions of law, history, and public policy. Harlan, dissenting, had the weight of argument as to all three, but Bradley had the weight of numbers. It was an 8–1 decision, and the eight scarcely bothered to answer the dissenter. Ignoring him might have been more discreet than trying to rebut him. He met their contentions head-on, starting with a strenuous objection to their parsimonious interpretation of national powers under the Thirteenth and Fourteenth Amendments, both of which expressly made affirmative grants of power. By contrast, Harlan demonstrated, the Court had generously construed the Constitution to support congressional enactments on behalf of slaveholders. The fugitive slave acts, which operated on private individuals, were based on a clause in the Constitution, Article 4, section 2, paragraph 3, that did not empower Congress to legislate at all. The clause merely provided that a fugitive slave be delivered up upon the claim of his owner, yet the Court sustained the acts of 1793 (PRIGG V. PENNSYLVANIA, 1842) and of 1850 (ABLEMAN V. BOOTH, 1859), implying a national power to enforce a right constitutionally recognized. The Thirteenth Amendment, as the majority admitted, established a constitutional right: civil freedom for citizens throughout the nation. And, as the majority admitted, the abolition of slavery reached the BADGES OF SERVITUDE, so that the freedmen would have the same rights as white men. Similarly, the act of 1875 reached badges of servitude, because it, like the amendments to the Constitution, aimed at erasing the assumption that blacks were racially inferior. For Harlan, RACIAL DISCRIMINATION was a badge of servitude. Bradley had distinguished the act of 1866 from the act of 1875 on the ground that the earlier statute aimed at protecting rights that only the states might deny. Harlan replied that citizens regardless of race were entitled to the same civil rights.

Harlan also demonstrated that the rights allegedly violated by purely private parties were denied by individuals and CORPORATIONS that exercised public functions and wielded power and authority under the state. Relying on a broad concept of state action, he sought to prove that the parties whom the majority regarded as private were, in contemplation of law, public or quasi-public. A railroad corporation, an innkeeper, and a theater-manager had denied accommodations to black citizens. Railroads and streetcars were common carriers, that is, they were public highways, performing state functions; they were public conveyances which, though privately owned, had been established by state authority for a public use and were subject to control by the state for the public benefit. Free citizens of any race were entitled to use such facilities. Similarly, the COMMON LAW defined innkeepers as exercising a quasi-public employment that obligated them to take in all travelers, regardless of race. Theaters were places of public amusement, licensed by the public, of which the "colored race is a part," and theaters were clothed with a public interest, in accord with MUNN V. ILLINOIS (1877). Congress had not promiscuously sought to regulate the entire body of civil rights nor had it entered the domain of the states by generally controlling public conveyances, inns, or places of public amusement. Congress had simply declared that in a nation of universal freedom, private parties exercising public authority could not discriminate on ground of race; in effect the statute reached state instrumentalities whose action was tantamount to state action.

Under the Thirteenth Amendment, Congress could reach badges of servitude; under the Fourteenth, it could reach racial discrimination by state agencies. Contrary to the Court's assertion, Congress had not outlawed racial discrimination imposed by purely private action. It had aimed at such discrimination only in public places chartered or licensed by the state, in violation of the rights of citizenship which the Fourteenth Amendment affirmed. The amendment's fifth section empowered Congress to pass legislation enforcing its affirmative as well as its prohibitory clauses. Courts, in the normal exercise of JUDICIAL REVIEW, could hold unconstitutional state acts that violated the prohibitory clauses. Accordingly, section five was not restricted to merely corrective or remedial national leg-

islation. Congress, not the Court, said Harlan, citing MCCULLOCH V. MARYLAND (1819), might choose the means best adopted to implementing the ends of the two amendments. Harlan insisted that Congress

> may, without transcending the limits of the constitution, do for human liberty and the fundamentals of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the masters of fugitive slaves. If fugitive slave laws, providing modes and prescribing penalties whereby the master could seize and recover his fugitive slave, were legitimate exertions of an implied power to protect and enforce a right recognized by the constitution, why shall the hands of congress be tied, so that—under an express power, by appropriate legislation, to enforce a constitutional provision granting citizenship—it may not, by means of direct legislation, bring the whole power of this nation to bear upon states and their officers, and upon such individuals and corporations exercising public functions, assumed to abridge the supreme law of the land.

Some old abolitionists, deploring a ruling that returned the freedmen to a "reign of contempt, injury, and ignominy," denounced the "new DRED SCOTT decision," but most were resigned to defeat. Racial segregation was common throughout the country. Not surprisingly *The Nation* magazine, which approved of the decision, observed that the public's general unconcern about the decision indicated "how completely the extravagant expectations as well as the fierce passions of the war have died out." The Court served "a useful purpose in thus undoing the work of Congress," said the *New York Times,* and *Harper's Weekly* agreed. Public opinion supported the Court, but justice and judicial craftsmanship were on the side of Harlan, dissenting.

LEONARD W. LEVY
(1986)

Bibliography

KONVITZ, MILTON R. 1961 *A Century of Civil Rights.* New York: Columbia University Press.

WESTIN, ALAN F. 1962 The Case of the Prejudiced Doorkeeper. Pages 128–144 in Garraty, John A., *Quarrels That Have Shaped the Constitution.* New York: Harper & Row.

## CIVIL RIGHTS COMMISSION

THE CIVIL RIGHTS ACT OF 1957 created the Commission on Civil Rights to investigate alleged deprivations of VOTING RIGHTS, to study and collect information concerning denials of EQUAL PROTECTION, and to appraise federal laws and policies with respect to equal protection of the laws. Subsequent legislation restated and expanded the commission's concerns to include denials of rights on the basis of color, race, religion, national origin, sex, age, or handicap. Initially, the commission was to issue a series of reports and expire upon issuance of its final report, but Congress repeatedly has extended the commission's reporting duties and life. The commission lacks power to enforce any antidiscrimination or other CIVIL RIGHTS laws.

By the standards of later civil rights legislation, creation of the commission seems an innocuous event. But at the time even this mild gesture drew substantial southern opposition. The commission's "snoopers," one southern congressman argued, "would cause inestimable chaos, confusion, and unrest among [the South's] people and would greatly increase the tension and agitation between the races there."

Because of the commission's advisory nature, measuring its accomplishments is difficult. In the 1960s, the commission's early reports helped to inform Congress about the need for voting rights legislation. And it clearly has served the function, added to its mandate in 1964, of a national clearinghouse for information about denials of equal protection. But the commission also has played a somewhat larger political role. In most administrations the commission's views are more egalitarian than the President's. The commission thus serves as a gadfly that both makes official sounding pronouncements and commands media attention. Administrations hear the commission even if they do not always listen to it.

THEODORE EISENBERG
(1986)

Bibliography

UNITED STATES COMMISSION ON CIVIL RIGHTS 1961 *Report.* Pages xv–xviii. Washington, D.C.: U.S. Government Printing Office.

## CIVIL RIGHTS DIVISION

Created by Order of the Attorney General No. 3204, February 3, 1939, the Civil Rights Section (originally named the Civil Rights Unit) of the Justice Department became the federal government's principal CIVIL RIGHTS litigation unit. The order creating the Section called for a study of federal law to assess its utility in enforcing civil rights. The study, which stated the legal basis and goals of the Section's early civil rights enforcement efforts, suggested the need for TEST CASES to resolve uncertainties about the scope and constitutionality of the only statutory weapons then available to the Section, the surviving Reconstruction-era civil rights legislation. The Section's test cases include UNITED STATES V. CLASSIC (1941), an important precedent establishing authority to prosecute offenses relating to PRIMARY ELECTIONS, and SCREWS V. UNITED STATES (1945), which allowed the application of the crim-

inal provisions of the CIVIL RIGHTS ACT OF 1866 to misconduct by state police officers.

The Civil Rights Section's growth reflects a general increase in national concern with civil rights matters. As of 1947, the Section is reported never to have had more than eight or ten lawyers and professional workers on its staff. In 1950, the section more than doubled in size. The CIVIL RIGHTS ACT OF 1957 upgraded the Section to the status of Division by providing for an additional assistant attorney general. By 1965, the Division had eighty-six attorneys and ninety-nine clerical workers. By 1978, there were 178 attorneys and 203 support personnel.

The Division's principal activity consists of litigation. It enforces the CIVIL RIGHTS ACT OF 1957, 1960, 1964, and 1968, the VOTING RIGHTS ACT OF 1965, the Equal Credit Opportunity Act, the 1866 act's criminal provisions, laws prohibiting PEONAGE and involuntary servitude, and various other laws. It does so through direct actions or through AMICUS CURIAE appearances in private cases. An administration's civil rights priorities are reflected in the categories of cases emphasized by the Division. In the early 1960s the Division emphasized voting rights cases. From 1965 to 1967, DESEGREGATION of education was its priority issue. By 1967, employment litigation became a priority item. Creation of a Task Force on Sex Discrimination in 1977 reflected a growing concern with sex discrimination.

THEODORE EISENBERG
(1986)

Bibliography

CARR, ROBERT K. 1947 *Federal Protection of Civil Rights: Quest for a Sword.* Ithaca, N.Y.: Cornell University Press.

## CIVIL RIGHTS MOVEMENT

Because the basic rights of CITIZENSHIP were not equally available to all Americans at the nation's inception, civil rights movements involving groups excluded from full political participation have been a continuing feature of U.S. history. Males without property, African Americans, and women are among the groups that have engaged in sustained struggles to establish, protect, or expand their rights as American citizens. These struggles have resulted in fundamental departures from the limited conceptions of citizenship and the role of government that prevailed during the early national era.

The term "civil rights movement" more narrowly refers to the collective efforts of African Americans to advance in American society. These efforts are aspects of a broader, long-term black freedom struggle seeking goals beyond CIVIL RIGHTS, but they have had particularly important impact on dominant conceptions of the rights of American citizens and the role of government in protecting these rights. Although the Supreme Court in the DRED SCOTT decision of 1857 negated the citizenship status of African Americans, the subsequent extensions of egalitarian principles to African Americans resulted in generalized expansions of the scope of constitutionally protected rights. In particular, both the FOURTEENTH AMENDMENT and the FIFTEENTH AMENDMENT to the Constitution, despite retrogressive Court decisions such as PLESSY V. FERGUSON (1896), ultimately served as foundations for major civil rights reforms benefiting black Americans and other groups. During the twentieth century, African Americans have participated in many racial advancement efforts that have enlarged the opportunities and protections available to individuals in other groups. More recently, as a result of sustained protest movements of the period after WORLD WAR II, the term "civil rights" has come to refer not only to governmental policies relating to the equal treatment of individuals but also to policies equalizing the allocation of resources among groups. In short, the modern civil rights movement in the United States has redefined as well as pursued rights.

The National Association for the Advancement of Colored People (NAACP), an interracial group founded in 1909, has been the most enduring institution directing the course of twentieth-century American civil rights movements. Although many organizations later challenged the NAACP's priorities and its reliance on the tactics of litigation and governmental lobbying, the group's large membership and its increasingly effective affiliate, the NAACP LEGAL DEFENSE & EDUCATIONAL FUND, made civil rights reforms into principal black political objectives. Among the outgrowths of NAACP-sponsored legal suits were the Supreme Court's SMITH V. ALLWRIGHT (1944) decision outlawing white primary elections and the BROWN V. BOARD OF EDUCATION (1954, 1955) decision against segregated public schools. These landmark cases helped to reverse earlier Court decisions—such as *Plessy*—that limited the scope of civil rights protections.

In the years after the *Brown* decision, other civil rights organizations departed from the NAACP's reform strategy and placed more emphasis on protest and mass mobilization. Starting with the Montgomery bus boycott of 1955–1956, southern blacks, aided by northern allies, successfully used boycotts, mass meetings, marches, rallies, sit-ins, and other insurgent tactics to speed the pace of civil rights reform. The Southern Christian Leadership Council (SCLC), founded in 1957 and led for many years by MARTIN LUTHER KING, JR., and the Student Nonviolent Coordinating Committee (SNCC), founded in 1960, spearheaded a series of mass struggles against white racial domination in the South. The NAACP also supplied many of the participants and much of the legal support for these

struggles, while the predominantly white Congress of Racial Equality (CORE) contributed activists and expertise in the use of Gandhian nonviolent tactics. Although DESEGREGATION was initially the main focus of southern mass movements, economic and political concerns were evident from their inception.

King and the SCLC played especially important roles in mobilizing mass protest campaigns in the Alabama cities of Birmingham and Selma in 1963 and 1965. SCLC leaders orchestrated clashes between nonviolent demonstrators and often brutal law enforcement personnel. Such highly publicized confrontations made northern whites more aware of southern racial inequities, particularly the pervasive and antiquated Jim Crow system of public SEGREGATION. As the southern struggle's best-known spokesperson, King sought to link black civil rights aspirations with widely accepted, long-established political principles. During 1961 he identified the democratic ideals of the Founding Fathers as an unrealized "noble dream." "On the one hand, we have proudly professed the principles of democracy, and on the other hand, we have sadly practiced the very antithesis of those principles," he told an audience at Lincoln University. Speaking at the 1963 March on Washington, he insisted that the DECLARATION OF INDEPENDENCE and the Constitution were "a promissory note" guaranteeing all Americans "the unalienable rights of life, liberty, and the pursuit of happiness." By exposing the contradictions between American ideals and southern racial realities, the SCLC's southern campaigns strengthened northern white support for civil rights reforms.

Although the SNCC was an outgrowth of the student sit-in movement of 1960, its most significant activities were concentrated in the rural areas of Mississippi and Alabama. In these areas, SNCC staff members worked with indigenous black leaders seeking to overcome economic and political oppression. During the first half of the 1960s, SNCC concentrated its efforts on the achievement of voting rights for southern blacks and federal protection for civil rights workers. SNCC organizers also helped to create new institutions, such as the Mississippi Freedom Democratic party and the Lowndes County (Alabama) Freedom Organization, under local black leadership. By 1966, the "black power" slogan, popularized by SNCC's chair Stokely Carmichael, summarized the group's emerging ideas of a struggle seeking political, economic, and cultural objectives beyond narrowly defined civil rights reforms.

By the late 1960s, organizations such as the NAACP, SCLC, and SNCC faced increasingly strong challenges from "black nationalist" leaders and new militant organizations, such as the Black Panther party. Often influenced by Malcolm X and by Pan-African ideologies, proponents of "black liberation" saw civil rights reforms as insufficient because they did not address the problems of poor blacks. Black nationalists also pointed out that African American citizenship had resulted from the involuntary circumstances of enslavement. In addition, racial-liberation proponents often saw the African American freedom struggle in international terms, as a movement for "human rights" and national "self-determination" rather than for civil rights.

The most significant legislation to result from the mass struggles of the 1960s were the CIVIL RIGHTS ACT OF 1964 and the VOTING RIGHTS ACT OF 1965. (Congress also passed notable civil rights bills in 1968, 1972, and 1990.) Taken together, these laws greatly enhanced the civic status of blacks, women, and other minority groups and placed greater responsibility on the federal government to protect such groups from discriminatory treatment. Although the 1964 and 1965 acts were in some respects simply restatements of protections specified in the constitutional amendments enacted during RECONSTRUCTION, the impact of the new legislation was greater because of the expanded scope of federal regulatory powers and the continued militancy by victims of discrimination.

Since the mid-1960s, national civil rights policies have evinced awareness that antidiscrimination legislation was not sufficient to achieve tangible improvements in the living conditions of many blacks or to bring about equalization of the distribution of resources and services among racial groups in the United States. In 1968 the National Advisory Commission on Civil Disorders (the Kerner Commission) concluded that despite civil right reforms, the nation was "moving toward two societies, one black, one white—separate and unequal." By the time of this report, the liberal coalition that had supported passage of the major civil rights legislation was divided over the role, if any, government should play in eliminating these persistent racial inequities. A "white backlash" against black militancy and claims that black gains had resulted in "reverse discrimination" against whites undermined support for major new civil rights initiatives during the 1970s and 1980s.

Although militant protest activity declined after the 1960s, civil rights movements have remained a significant feature of American political life. The increased black participation in the American political system that resulted from previous struggles lessened black reliance on extralegal tactics, but civil rights issues continued to stimulate protest, particularly when previous gains appeared to be threatened. Furthermore, women, homosexuals, disabled people, and other groups suffering discriminatory treatment have mobilized civil rights movements and created organizations of their own, thereby contributing to the continuing national dialogue regarding the scope of civil rights and the role of government.

During the 1970s and 1980s, debate continued over the appropriateness of employment AFFIRMATIVE ACTION programs and court-ordered compensatory remedies for historically rooted patterns of discrimination. Nevertheless, despite contention regarding these issues and notwithstanding the conservative political climate of the period, most national civil rights policies established during the 1960s have survived. Moreover, civil rights advocates have continued to press, with limited success, toward implementation of policies for group advancement rather than individual rights, tangible gains rather than civil status, and equality of social outcomes rather than equality of opportunity. The modern African American freedom and liberation struggles of the 1960s therefore produced a major but still controversial shift in prevailing norms regarding the nature of civil rights in the United States.

CLAYBORNE CARSON
(1992)

(SEE ALSO: *Race Consciousness; Racial Discrimination; Racial Preference.*)

Bibliography

BRANCH, TAYLOR 1988 *Parting the Waters: America in the King Years, 1954–63.* New York: Simon and Schuster.

CARSON, CLAYBORNE 1981 *In Struggle: SNCC and the Black Awakening of the 1960s.* Cambridge, Mass.: Harvard University Press.

GRAHAM, HUGH DAVIS 1990 *The Civil Rights Record.* New York: Oxford University Press.

KLUGER, RICHARD 1975 *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality.* New York: Knopf.

LAWSON, STEVEN F. 1985 *In Pursuit of Power: Southern Blacks and Electoral Politics.* New York: Columbia University Press.

## CIVIL RIGHTS PRACTICE

Civil rights practice, as discussed herein, refers to litigation brought pursuant to federal CIVIL RIGHTS legislation. Many civil rights statutes exist, some of modern origin and some dating from the RECONSTRUCTION era following the CIVIL WAR. The statutes protect individuals from deprivations of constitutional rights by government and from various kinds of discrimination by private individuals. SECTION 1983, TITLE 42, U.S. CODE, passed in 1871, is the primary vehicle for litigating deprivations of constitutional rights. ANTIDISCRIMINATION LEGISLATION, passed in the 1960s and later, creates protection from private discrimination on certain grounds in particular contexts, such a PUBLIC ACCOMMODATIONS, EMPLOYMENT, and housing. Although the structure and scope of these statutes differ, they are all enforced primarily through private litigation for damages or injunctive relief. The different statutes may also authorize other enforcement mechanisms—criminal prosecutions, civil actions, or administrative enforcement by the government—and these can play an important role in effectuating the purposes of the legislation. But given constraints on government resources, private enforcement is essential.

There are many substantive hurdles to recovery under the various civil rights statutes, some imposed by Congress and many by the Supreme Court in its decisions. Limitations on constitutional rights such as the RIGHT OF PRIVACY or DUE PROCESS OF LAW, stringent proof requirements, and defenses such as absolute and qualified immunity, are but a few examples of the challenging issues a litigant may confront. Because of the complexities in civil rights practice, effective private enforcement usually requires that the plaintiff retain an attorney. In a small number of cases, the plaintiff can join with others in a CLASS ACTION lawsuit, but most likely, the plaintiff as an individual will seek REPRESENTATION.

In 1976, Congress realized that the prevailing American rule, in which each party bears its own attorneys' fees, was a significant impediment to private enforcement of civil rights legislation. In that year, Congress enacted the Attorneys' Fees Awards Act, which permitted "prevailing parties" in civil rights actions to recover their attorneys' fees from the losing parties. In practice, this fee-shifting favors plaintiffs much more than defendants, despite the neutrality of the language. The legislative history of the Attorneys' Fees Awards Act reveals that Congress was aware that civil rights cases often present issues with less monetary value than other types of litigation an attorney might undertake. Congress believed that in the absence of fee-shifting, civil rights plaintiffs with low damages or claims in which predominantly equitable remedies are sought would lack the means to vindicate their rights. The difficulty and the economics of their cases would make them unable to compete with litigants presenting other types of legal work.

Since passage of the Attorneys' Fees Awards Act, the Court has decided numerous cases interpreting the statute. Although a number of the Court's decisions have bolstered recovery of fees, some of the Court's decisions have undercut the incentives the Fees Act gives attorneys to represent civil rights plaintiffs. One example of such a decision is *Evans v. Jeff D.* (1986). There, the Court held that a waiver of fees as part of a settlement is consistent with the purposes of the Fees Act. The decision has affected the strategies of both civil rights plaintiffs' attorneys and defense attorneys. Plaintiffs' attorneys practicing in nonprofit settings are vulnerable to requests for fee waivers, because the rules by which they operate often

prevent them from entering into agreements that give their clients a disincentive to waive their fees. In the private sector, plaintiffs' attorneys have protected themselves by fee agreements that provide for a contingent recovery or payment of an hourly fee in the event of a settlement that includes a waiver. Defendants commonly make lump sum offers, out of which fees will be paid. Often the result is a partial waiver of fees. Because most cases ultimately are settled, the result of *Jeff D.* is that civil rights lawyers who seek to make a living at the practice must take cases with damages high enough to compensate the attorney in the event of settlement. Cases with lower predictable damages—for example, those based on constitutional violations or adverse employment actions against blue-collar or temporary workers, or cases involving equitable relief—are not so likely to be accepted by attorneys.

*City of Burlington v. Dague* (1992) is another case that has sapped the vitality of certain types of civil rights practice. By this decision, the Court withdrew the discretion of judges to award fees in addition to the hourly rate. Unfortunately, some types of civil rights litigation are so expensive that compensation for the hours spent does not begin to pay for the litigation. In the VOTING RIGHTS area, for example, even assessing the viability of a case involves significant SOCIAL SCIENCE RESEARCH. Studies can cost in the tens of thousands of dollars. Plaintiffs cannot afford these costs, and so the attorney must forward them. Without the possibility of extra compensation for the financial risks undertaken by the attorney, there is a significant disincentive to litigate those cases. Some voting rights litigation is handled by nonprofit or private organizations, whose own resources defray costs; also, the U.S. Department of Justice plays a significant role in voting rights litigation because of the department's preclearance responsibilities. However, if a plaintiff does not succeed in placing the case with a nonprofit firm or the Department of Justice for litigation, it is extremely difficult to obtain private counsel. The disincentives to private representation narrow the scope of voting rights issues that are addressed by litigation.

Because civil rights legislation encompasses so many different types of claims, the practice areas differ greatly. Just as some types of civil rights practice have been hard hit by the decisions discussed above, other practices have seemingly been unaffected and are thriving. The Court has not focused on the heterogeneity of civil rights cases as it has decided issues affecting fees and damages. Unless the Court takes account of the varying impacts of its decisions on certain types of practice, the incentives promised by the Fees Act will be greatly diluted.

JULIE DAVIES
(2000)

Bibliography

DAVIES, JULIE 1997 Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory. *Hastings Law Journal* 48:197–270.

LANDSBERG, BRIAN K. 1997 *Enforcing Civil Rights, Race Discrimination and the Department of Justice.* Lawrence: University Press of Kansas.

SCHWAB, STEWART J. and EISENBERG, THEODORE 1987 The Reality of Constitutional Tort Litigation. *Cornell Law Review* 72:641–695.

——— 1988 Explaining Constitutional Tort Litigation: The Influence of the Attorneys Fees Statute and the Government as Defendant. *Cornell Law Review* 73:719–781.

SELMI, MICHAEL 1996 The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law. *Ohio State Law Journal* 57:1–64.

WASBY, STEPHEN L. 1995 *Race Relations Litigation in an Age of Complexity.* Charlottesville, Virginia: University Press of Virginia.

## CIVIL RIGHTS REMOVAL

Since the CIVIL RIGHTS ACT OF 1866, federal CIVIL RIGHTS laws have allowed REMOVAL OF CASES from state to federal courts. The 1866 and 1870 acts provided for removal to federal court of state criminal or civil cases affecting persons who were denied or could not enforce in state court rights guaranteed by the acts. In the REVISED STATUTES of 1874, Congress restated the removal power to encompass violations of "any law providing for . . . equal civil rights." Early removal cases, typified by STRAUDER V. WEST VIRGINIA (1880), allowed removal when state courts denied rights by enforcing state statutes but refused removal when state courts denied rights by following uncodified practices. With the vanishing of the BLACK CODES, removal became an insignificant remedy.

In the 1960s, civil rights protesters often were arrested under state TRESPASS, traffic, and other minor laws and were subjected to unfair state court proceedings. After a pause of eighty years, the Court again considered civil rights removal. In *Georgia v. Rachel* (1966) civil rights SIT-IN demonstrators being prosecuted for trespass in state court sought removal. The Court held removal authorized only for violations of "any law providing for specific civil rights stated in terms of racial equality." But, bending the *Strauder-Rives* line, the Court did not require that a state statute be the basis for the alleged deprivation of federal rights. The Court allowed removal on the grounds that the state prosecution violated the CIVIL RIGHTS ACT OF 1964, which outlaws even attempts to punish persons exercising rights of equal access to PUBLIC ACCOMMODATIONS.

On the same day, however, the Court decided in *City of Greenwood v. Peacock* (1966) that workers engaged in

a voter registration drive could not rely on various voting statutes that prohibit RACIAL DISCRIMINATION to remove their state prosecutions for obstructing the public streets. The mere likelihood of prejudice was not enough to justify removal under the statute. The majority evidently shrank from the prospect of wholesale removal of criminal prosecutions of black defendants from southern state courts to federal courts. *Peacock* effectively precludes widespread modern use of civil rights removal.

THEODORE EISENBERG
(1986)

Bibliography

AMSTERDAM, ANTHONY G. 1965 Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial. *University of Pennsylvania Law Review* 113:793–912.

## CIVIL RIGHTS REPEAL ACT
28 Stat. 36 (1894)

From the middle of the 1860s to 1875, Congress was favorably disposed toward ANTIDISCRIMINATION LEGISLATION and even enacted some such measures over presidential veto. But many of the provisions enacted encountered restrictive interpretations to outright invalidation in the Supreme Court. The Repeal Act of 1894 symbolizes formal reconvergence of congressional and judicial attitudes towards CIVIL RIGHTS statutes.

In 1892 the Democratic party, for the first time after the CIVIL WAR, gained control of both houses of Congress and the presidency. In the Repeal Act of 1894, which repealed portions of the Enforcement Act of 1870 and the FORCE ACT OF 1871, Congress eliminated most civil rights measures that had not already been undermined by the Court. The repealed provisions had provided for federal control of federal elections through the appointment of federal election officials, a control method revived in the CIVIL RIGHTS ACTS of 1960 and 1964 and the VOTING RIGHTS ACT OF 1965.

THEODORE EISENBERG
(1986)

Bibliography

EISENBERG, THEODORE 1981 *Civil Rights Legislation.* p. 741. Charlottesville, Va.: Michie Co.

## CIVIL WAR

The Civil War was the greatest constitutional crisis in the nation's history. It tested the nation-state relationship and the powers of Congress, the President, and the courts. By ultimately destroying SLAVERY, the conflict removed the most destructive element in the constitutional system and produced promises of equality under law throughout the United States. The addition of the THIRTEENTH AMENDMENT, FOURTEENTH AMENDMENT, and FIFTEENTH AMENDMENT dramatically changed the structure of the federal system in important respects. In the short run these amendments ended slavery and gave state and national CITIZENSHIP to over four million black men, women, and children. They also opened the door for black participation in politics. By the mid-twentieth century the amendments would place a great many individual rights under federal protection.

The was also finally settled the long-debated question of SOVEREIGNTY. When a state and the national government clashed over ultimate authority, the national government would prevail. This primacy did not mean, however, that the states were stripped of power or influence. Both state and national governments involved themselves energetically and successfully in war-making and hence increased both their influence and their stature before the people. State and federal taxation increased along with state and federal expenditures for public projects. The war thus produced an ironic dual legacy: freedom for black Americans and a vital federal system in which states would retain significant, though no longer unique, influence over the amount of freedom these freedmen would exercise.

Because Congress was in recess when the conflict began, the President had to cope with the crisis alone. ABRAHAM LINCOLN answered secessionist rhetoric with a powerful argument that sustained national authority by noting the danger of anarchy in SECESSION and by emphasizing the sovereignty of people, not states. "A majority, held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people," Lincoln said. To preserve the constitutional system that embodied this process, Lincoln was willing to lead the Union into war.

Lincoln marshaled northern resources to fight secession. He called for troops, paid $2 million from the treasury, pledged federal credit for $250 million more, and proclaimed a blockade of southern ports. These initiatives raised the constitutional problem of whether the conflict was legitimate at all, for Lincoln had acted without statutory authority and only Congress had power to declare war. In the March 1863 PRIZE CASES, the Supreme Court gave its answer on the disposition of several ships seized by the Union navy after Lincoln's 1861 blockade. The constitutional question was whether the President could blockade the South without a DECLARATION OF WAR by Con-

gress. Emphasizing the distinction between an international war, which Congress had to declare, and a civil war thrust upon the President and demanding immediate response, the Court defined the war as an insurrection, thus recognizing the President's power to subdue the rebellion without recognizing the Confederacy as an independent nation. The Court also justified Lincoln's action on the basis of the Militia Act of 1795, which allowed the President to call up the federal militia to stop insurrections. Presidents JOHN QUINCY ADAMS, JAMES K. POLK, MILLARD FILLMORE, and FRANKLIN PIERCE had established precedents in exercising this power, and the 1827 case of MARTIN V. MOTT had sustained it.

Executive authority over CIVIL LIBERTIES, the rights of civilian justice, FREEDOM OF SPEECH, and FREEDOM OF THE PRESS provoked the most criticism. Fearing prorebel judges and juries in border states, Lincoln in 1861 suspended the privilege of the writ of HABEAS CORPUS in the area between New York and Washington. This action gave the military control over civil liberty. Union soldiers arrested men near Baltimore for recruiting rebels and burning bridges linking Washington to the North. Chief Justice ROGER BROOKE TANEY went to Baltimore especially to challenge Lincoln's suspension of the writ. Congress, not the President, retained constitutional suspension authority, Taney claimed. But over fifty pamphlets quickly surfaced to debate the issue, and authoritative voices supported Lincoln. Lincoln ignored Taney, and habeas corpus remained suspended. In fact, in 1862 suspension of the writ was expanded to cover the entire North.

The Union army arrested about 15,000 people; however, the vast majority were taken as rebel territory was occupied. The number of northern civilians subject to military law owing to the suspension of habeas corpus was limited, perhaps to a few hundred, and press, platform, and pulpit continued to sound with criticism of the "Lincoln dictatorship." On the other hand some newspapers, including the *National Zeitung*, the Philadelphia *Evening Journal*, the Chicago *Times*, and the New York *World*, were temporarily shut down, and the editors of others were arrested, held for short periods of time, and then released—a practice that often restrained their criticism. Furthermore, Lincoln defended the suspension policy with sweeping rhetoric that may have had its own chilling effect on criticism: "The man who stands by and says nothing when the peril of his government is discussed cannot be misunderstood. If not hindered he is sure to help the enemy."

In the most famous civil liberties case of the time, a leading Ohio Democratic congressman, Clement Vallandigham, was arrested in Ohio in 1863 for protesting General Burnside's prohibition of "declaring sympathy for the enemy." Tried and convicted by a military tribunal, Vallandigham was banished to the Confederacy after the Supreme Court denied itself jurisdiction of the case in Ex Parte Vallandigham (1864). Vallandigham and his arrest were popular causes, however, and the Democratic party sought votes with some success as the party of civil liberties throughout the conflict. Still, when northern voters had to choose between Lincoln's suspensions and Vallandigham's defiance, they usually sided with Lincoln and his explanation that preserving the constitutional system as a whole in wartime required limiting speech that threatened the war effort. The Confederate government also suspended the writ of habeas corpus, provoking protest from state-sovereignty radicals, but such protest did little to weaken the Confederacy.

The abiding health of the constitutional system in the North during the war was demonstrated by the ongoing electoral process, within which civil liberty restrictions could be discussed and debated and through which the voters might throw out of office the very government that was restricting civil liberties. In Dixie, too, elections continued for the Confederate Congress, although not for the presidency, which had a six-year term, beginning in 1861. One advantage the North had over the South was an established political system that generated alternatives, focused political discussion, used patronage to keep intraparty rivalries in line, and kept opposition to the administration within reasonable bounds. Confederate political quarrels, lacking party apparatus, became personal and hence more intense.

LEGISLATIVE POWER also expanded during the war, as Congress and executive cooperated to preserve and strengthen national authority. Legislators enacted a series of military drafts that brought national authority directly into the life of every American. Congress endorsed Lincoln's habeas corpus suspension in March 1863, although the tardiness of the Indemnity Act suggests the sensitivity of voters to the issue. Congress established the Joint Committee on the Conduct of the War to investigate generals perceived as not vigorous enough or not in accord with REPUBLICAN PARTY policies. Lincoln used committee pressure to prod generals toward advanced measures. The one major division between executive and legislative branches, over RECONSTRUCTION, began with the antiLincoln diatribe of the Wade-Davis Manifesto, but soon found Lincoln and Congress working out their differences, agreeing on the need to protect freedmen and provide them with economic support through the Freedmen's Bureau Act. Wade and Davis both supported Lincoln for reelection in 1864, and just before his death Lincoln was apparently contemplating a change in his Reconstruction policies that would have moved him closer to Congress. The two branches still debated which southern governments should be restored to the Union—those following Lincoln's plan or Con-

gress's alternative—but both agreed that once war ended Congress would effectively control the Reconstruction process.

There was no disagreement about the wartime economic program. The first federal income tax law, the creation of the first national currency in the Greenback Act of 1862, the development of a national banking system, the taxing out of existence of state-based currency, the huge subsidy to build railroads to the Pacific Ocean, the opening up of millions of acres to homesteading with the HOMESTEAD ACT, the establishment of the Department of Agriculture, and the MORRILL ACT, which helped found and sustain major universities throughout the nation, all received Lincoln's unequivocal approval.

None of this national government activity was accompanied by federal regulation. The first national regulative agency, the Interstate Commerce Commission of 1887, lay twenty-two years into the postwar era. But people now accepted Congress's constitutional authority to shape the economy. Despite the Jeffersonian rhetoric of the Democratic party, it was the old Hamiltonian program and Hamiltonian views of national power, now infusing Whig and Republican political economy, that shaped national government policymaking. State governments, too, became more active. Some states set up public health boards and railroad oversight commissions. In the South, Reconstruction state governments established the region's first public schools. Cities also expanded their activities, having seen what government energy might accomplish.

The death of slavery was the largest constitutional change of the war. The conflict helped to resolve a growing contradiction within the constitutional system itself. On the one hand, the Constitution of 1787 recognized and protected slavery in several of its provisions. FEDERALISM left states free to determine whether they would be free or slave. The Supreme Court had declared the territories open to slavery. Democratic presidents had endorsed proslavery demands. On the other hand, by 1860 slavery had become, in many northern eyes, a major threat to constitutional liberties and the operation of the political/constitutional system.

The prewar era saw proslavery attempts to stifle antislavery voices—in Congress through gag rules, in the free states through anti-abolitionist mobs, and in politics generally through the prohibition of antislavery arguments in the slave states and the territories. All these efforts helped generate sectional parties. In addition, the South used threats of secession to protect slavery, thus hardening northern hostility to the peculiar institution and to what it termed "the Slave Power Conspiracy." People did not have to be racial egalitarians to be enemies of slavery. The threat to individual rights and the political process made slavery a target of northern hostility. The Constitution thus was at war with itself—promising open elections, free debate, the right to petition, the whole process of government by consent, on the one hand, and protecting slavery, on the other. The war ended the conflict.

Freed from obstruction by southern congressmen, the wartime northern Congress not only enacted much nationalizing legislation but also attacked slavery whenever the Constitution put it within congressional reach. Congress ended slavery in the DISTRICT OF COLUMBIA and in the territories. Then, acting on the theory that slaves might be contraband of war, Congress turned on the South and passed laws first confiscating property used directly to attack the Union (First Confiscation Act, August 1861) and then taking all slaves of rebels (Second Confiscation Act, July 1862). But these two laws freed no slaves, for the judicial procedures to prove disloyalty were too cumbersome. The laws did, however, demonstrate growing support for executive action against slavery.

Lincoln had two arenas in which he might act. In civilian areas his emancipation goals were restrained by the Constitution, which let states choose freedom or slavery. He asked border slave states to free their slaves. When that effort failed, he turned his attention to places still in rebellion, places where his constitutional war powers could operate. The EMANCIPATION PROCLAMATION of January 1, 1863, freed slaves wherever the Union advanced after that day, and it permitted freedmen to acquire claims on citizenship by serving as soldiers.

Emancipation ended the national government's protection for slavery, which had existed since 1787. With the adoption of the Thirteenth Amendment in 1865, the national government promised to eradicate, not defend, slavery. The death of slavery ended the reason for secession and for obstructing open debate in Congress and in the polity at large. It also meant that the institution that had most conspicuously challenged the ideal of equal justice under law was gone. As the Civil War ended, a robust constitutional system of active states and a proven nation awaited new challenges to that ideal.

PHILLIP S. PALUDAN
(1992)

(SEE ALSO: *Confederate Constitution; Confiscation Acts; Constitutional History, 1861–1865; Executive Power; Executive Prerogative; Jeffersonianism; War Powers; Whig Party.*)

Bibliography

BELZ, HERMAN 1978 *Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era.* New York: Norton.

——— 1984 *Lincoln and the Constitution: The Dictatorship Question Reconsidered.* Fort Wayne, Ind.: Louis Warren Lincoln Library.

FEHRENBACHER, DON E. 1979 Lincoln and the Constitution. In Cullom Davis, ed., *The Public and Private Lincoln.* Carbondale: University of Southern Illinois Press.

HYMAN, HAROLD 1973 *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution.* New York: Knopf.

———, and WIECEK, WILLIAM 1982 *Equal Justice Under Law: Constitutional Development, 1835–1875.* New York: Harper & Row.

MCKITRICK, ERIC 1967 Party Politics and the Union and Confederate War Efforts. In Walter Dean Burnham and William Chambers, eds., *The American Party System.* New York: Free Press.

NEELY, MARK E., JR. 1991 *The Fate of Liberty: Abraham Lincoln and Civil Liberties,* New York: Oxford.

PALUDAN, PHILLIP S. 1988 *"A People's Contest": The Union and Civil War, 1861–1865.* New York: Harper & Row.

RANDALL, JAMES G. (1926) 1951 *Constitutional Problems Under Lincoln,* rev. ed. Urbana: University of Illinois Press.

## CIVIL WAR AMENDMENTS

See: Fifteenth Amendment; Fourteenth Amendment; Thirteenth Amendment

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*(Continued)*

## CLAIMS COURT

The Claims Court hears actions for money damages against the United States, except for tort claims. The court thus hears claims for contract damages, tax refunds, and JUST COMPENSATION for property taken. With the consent of all parties to an action against the government under the FEDERAL TORT CLAIMS ACT, the court can substitute for a court of appeals and review the decision of a federal district court.

Under the doctrine of SOVEREIGN IMMUNITY, the United States cannot be sued without its consent. At first, persons with claims against the government had to ask Congress for relief under private acts. This practice became burdensome, and in 1855 Congress established the Court of Claims to hear nontort money claims against the United States, and report its recommendations to Congress. Much of the congressional burden remained; thus, in 1863, Congress empowered the court to give judgments against the government. In 1866 the process became fully "judicial" when Congress repealed a provision delaying payment of such a judgment until the Treasury estimated an appropriation.

The Court of Claims retained the nonjudicial function of giving ADVISORY OPINIONS on questions referred to it by the houses of Congress and heads of executive departments. However, its judges from the beginning had life tenure during GOOD BEHAVIOR. In 1933 the question arose whether the Court of Claims was a CONSTITUTIONAL COURT. Congress, responding to the economic depression, reduced the salaries of federal employees, except for judges protected by Article III against salary reductions. In *Williams v. United States* (1933), the Supreme Court, taking the preposterous position that claims against the government fell outside the JUDICIAL POWER OF THE UNITED STATES, held that the Court of Claims was a LEGISLATIVE COURT whose judges' salaries could constitutionally be reduced.

In 1953 Congress declared explicitly that the Court of Claims was established under Article III. In *Glidden v. Zdanok* (1962) the Supreme Court accepted this characterization on the basis of two separate (and incompatible) theories, pieced together to make a majority for the result. Two Justices relied on the 1953 Act; three others would have overruled *Williams* and held that the court had been a constitutional court since 1866 when Congress allowed its judgments to be paid without executive revision, and its business became almost completely "judicial." (The same decision confirmed that the COURT OF CUSTOMS AND PATENT APPEALS was a constitutional court.) The Court of Claims transferred new congressional reference cases to its chief commissioner, and Congress ratified this practice. The court's business became wholly "judicial."

In the FEDERAL COURTS IMPROVEMENT ACT (1982) Congress reorganized a number of specialized federal courts. The Court of Claims disappeared, and its functions were reallocated. The commissioners of that court became judges of a new legislative court, the United States Claims Court. They serve for fifteen-year terms. The Article III judges of the Court of Claims became judges of a new constitutional court, the UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT. That court hears appeals from a number of specialized courts, including the Claims Court.

The availability of a suit for damages in the Claims Court serves to underpin the constitutionality of some governmental action that might otherwise raise serious constitutional problems. Some regulations, for example,

are arguable TAKINGS OF PROPERTY; if the regulated party can recover compensation in the Claims Court, however, the constitutional issue dissolves (*Blanchette v. Connecticut General Insurance Corps.*, 1974).

KENNETH L. KARST
(1986)

Bibliography

SYMPOSIUM 1983 The Federal Courts Improvement Act. *Cleveland State Law Review* 32:1–116.

## CLARK, CHARLES E.
(1889–1963)

Charles Edward Clark, the son of a Connecticut farmer and a graduate of Yale College, achieved distinction as a legal educator and a federal judge. In 1919 he began teaching at Yale Law School, where he had earned his law degree, and became its dean in 1929. Within the year he had modernized the curriculum, stressing interdisciplinary studies. Originally a Republican, Clark became a New Dealer and in 1937 was the only law school dean to testify in favor of President FRANKLIN D. ROOSEVELT's court reorganization plan. In 1939 Roosevelt appointed him to the UNITED STATES COURT OF APPEALS, Second Circuit. As a federal judge for twenty-five years he tended to be a liberal activist even though his opinions on the rights of the criminally accused strongly supported prosecutorial positions. But Clark's opinions favored trade unions, CIVIL RIGHTS, and government regulation of the economy. As a FIRST AMENDMENT absolutist, he eloquently and ardently championed views that Justices HUGO L. BLACK and WILLIAM O. DOUGLAS of the Supreme Court later endorsed.

LEONARD W. LEVY
(1986)

Bibliography

SCHICK, MARVIN 1970 *Learned Hand's Court*. Baltimore: Johns Hopkins University Press.

## CLARK, TOM C.
(1899–1977)

Tom Campbell Clark, Associate Justice of the Supreme Court and ATTORNEY GENERAL of the United States, was born September 23, 1899, in Dallas, Texas. He was educated at the University of Texas at Austin, receiving his B.A. in 1921 and his LL.B. in 1922. Admitted to the Texas Bar in 1922, he joined his family's firm in Dallas.

Clark began his twelve-year career with the Department of Justice in 1937 as a special assistant to the attorney general. He held a number of posts in the department, capped by his 1945 appointment as attorney general by President HARRY S. TRUMAN. With this promotion, Clark became the first person to become attorney general by working himself up from the lower ranks of the department.

Four years later, President Truman appointed Clark Associate Justice of the Supreme Court; he took his oath of office on August 24, 1949. His tenure on the bench spanned eighteen years, and he served on both the VINSON COURT and WARREN COURT. He retired from the Court on June 12, 1967, to avoid the appearance of a conflict of interests when his son, Ramsey Clark, was appointed attorney general by President LYNDON B. JOHNSON. Clark, however, continued to sit as a judge in the various courts of appeal, and to be a vigorous and vocal advocate of judicial reform until his death on June 13, 1977.

On the Supreme Court, Clark built a reputation as a pragmatic jurist. Early on, he voted regularly with Chief Justice FRED M. VINSON and the other Truman appointees. In time, however, he began to assert his independence. In YOUNGSTOWN SHEET AND TUBE COMPANY V. SAWYER (1952), the steel seizure case, Clark voted against Vinson and Truman, concurring in the Court's decision holding unconstitutional Truman's order for governmental seizure of the nation's steel mills.

While Clark was generally viewed as politically conservative, he was relatively nonideological, and his views changed throughout his tenure, especially during the years of the Warren Court (1953–1969). He was a nationalist, a liberal on racial matters, and, in general, a conservative on issues of CRIMINAL PROCEDURE and CIVIL LIBERTIES.

Clark's most significant opinions in the area of FEDERALISM are his landmark opinion on STATE REGULATION OF COMMERCE in DEAN MILK COMPANY V. MADISON (1951), and his dissent in *Williams v. Georgia* (1955), which provided the classic definition of "independent and ADEQUATE STATE GROUNDS" that insulate state court decisions from the Supreme Court. In the racial area, speaking for the Court in BURTON V. WILMINGTON PARKING AUTHORITY (1961), he rejected as unlawful STATE ACTION racial discrimination by private persons who had leased public property. In addition, he wrote for the Court in HEART OF ATLANTA MOTEL, INC., V. UNITED STATES, (1964) where, in a case involving both national power and racial justice, a unanimous Court upheld the PUBLIC ACCOMMODATIONS provisions of the CIVIL RIGHTS ACT OF 1964.

In the areas of criminal procedure and civil liberties Clark was less consistent. Although he may be best known for his controversial opinion in MAPP V. OHIO (1961), declaring that illegally seized evidence must be excluded from a state criminal prosecution, this opinion was atypical. More often, especially in his later years on the bench, he disagreed with the liberalization of criminal procedure wrought by the Warren Court. For instance, he dissented

strongly—indeed almost violently—in MIRANDA V. ARIZONA (1966).

Similarly, Clark's record on civil liberties, though generally conservative, was not completely consistent. Probably Clark was most consistent as to those issues arising out of anticommunist and LOYALTY-SECURITY PROGRAMS. As attorney general, he had been instrumental in setting up some of these programs, and as a Justice he continued to support government efforts to suppress what he regarded as the communist conspiracy. Thus, he dissented in WATKINS V. UNITED STATES (1957) and joined the majority in BARENBLATT V. UNITED STATES (1959). In addition, he was the sole dissenter in *Greene v. McElroy* (1959), a decision which badly damaged the loyalty-security program for employees of private companies.

On the other hand, Clark was generally less sympathetic to efforts by the states to cope with what he regarded as a national problem. Thus, he wrote for a unanimous Court in WIEMAN V. UPDEGRAFF (1952), which held unconstitutional an Oklahoma LOYALTY OATH statute requiring state employees to swear that they were not members of organizations designated by the attorney general as subversive or a "Communist front." Clark emphasized that under the Oklahoma law an individual could be guilty of perjury even though he did not know the character of the organization that he had innocently joined. And he joined the majority in PENNSYLVANIA V. NELSON (1956), which invalidated state SEDITION laws on the ground that Congress had preempted the field.

In other areas of civil liberties, Justice Clark tended more often to vote in favor of asserted constitution rights. Thus, in the area of church-state relations, he wrote the opinion in ABINGTON TOWNSHIP SCHOOL DISTRICT V. SCHEMPP (1963), which held unconstitutional a Pennsylvania statute that required that each school day start with the reading of at least ten verses from the Bible. Similarly, he voted with the majority in a series of cases that drastically narrowed court-martial jurisdiction over civilians, the most significant of which was *Kinsella v. Singleton* (1960).

JOHN KAPLAN
(1986)

Bibliography

KIRKENDALL, RICHARD 1969 Tom C. Clark. In Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court, 1789–1969.* New York: Chelsea House.

## *CLARK DISTILLING CO. v. WESTERN MARYLAND RAILWAY CO.*
242 U.S. 311 (1917)

With Justices OLIVER WENDELL HOLMES and WILLIS VAN DEVANTER dissenting without opinion, the Court upheld the WEBB-KENYON ACT. Chief Justice EDWARD D. WHITE, for the majority, rejected the assertion that the act constituted an unconstitutional legislative DELEGATION OF POWER to the states. No delegation occurred because Congress provided for uniform regulation throughout the states.

DAVID GORDON
(1986)

## CLARKE, JOHN H.
(1857–1945)

With the exception of OLIVER WENDELL HOLMES and LOUIS D. BRANDEIS, John H. Clarke was the most consistently progressive member of the Supreme Court during the final years of EDWARD D. WHITE's chief justiceship and the early tenure of WILLIAM HOWARD TAFT. A prosperous newspaper publisher and attorney who defended many midwestern railroads, Clarke belonged to the moderate wing of the Democratic Party in Ohio which defended the gold standard in 1896 and looked skeptically upon reform programs. WOODROW WILSON appointed Clarke to the federal district court in 1914 and two years later elevated him to the Supreme Court to fill the vacancy left by Wilson's presidential rival, CHARLES EVANS HUGHES.

Intellectually, Clarke could not fill Hughes's shoes, but he surprised many critics by his voting record in cases involving CORPORATIONS and labor. Despite his earlier representation of big business, Clarke became a strong judicial supporter of the antitrust laws. He dissented in the two leading cases of the period, *United States v. United Shoe Machinery Company* (1918) and *United States v. United States Steel Corporation* (1920), when the WHITE COURT spurned the government's efforts to convict these industrial giants for monopolistic behavior.

In 1920, however, Clarke won a majority to his side when the Justices ordered the dissolution of a major railroad monopoly in *United States v. Lehigh Valley Railroad,* and found the Reading Railroad guilty of restraint of trade in the anthracite coal industry. Over a powerful dissent by Holmes, Clarke also wrote for the Court that upheld indictments for open price agreements in the hardwood lumber industry.

Clarke rejected the dominant judicial ideology of FREEDOM OF CONTRACT, which had been used to stifle legislative reforms to benefit labor. He endorsed Oregon's ten-hour law for all industrial workers in BUNTING V. OREGON (1917), approved of the federal ADAMSON ACT which mandated an eight-hour day for railroad workers in WILSON V. NEW (1917), and refused to endorse the INJUNCTION at issue in the YELLOW DOG CONTRACT case of HITCHMAN COAL & COKE CO. V. MITCHELL (1917). He voted as well to sustain the constitutionality of the KEATING-OWEN CHILD LABOR ACT in HAMMER V. DAGENHART (1918), refused to sanction the pros-

ecution of labor unions under the antitrust laws in UNITED MINE WORKERS V. CORONADO COAL CO. (1922), and upheld a union's right to conduct a SECONDARY BOYCOTT in the notorious case of DUPLEX PRINTING CO. V. DEERING (1921).

Despite his progressive record with respect to ECONOMIC REGULATION and the rights of labor, Clarke will probably always be remembered as the Justice who wrote for the majority in the case of ABRAMS V. UNITED STATES (1919), which sustained the conviction of pro-Bolshevik pamphleteers under the wartime ESPIONAGE ACT and SEDITION ACT. Clarke's opinion provoked Holmes's famous and biting dissent. Arguing that "men must be held to have intended and to be accountable for the effects which their acts were likely to produce," Clarke transformed Holmes's CLEAR AND PRESENT DANGER test into something approximating the BAD TENDENCY TEST that came to dominate the Court's FIRST AMENDMENT jurisprudence for several decades.

MICHAEL E. PARRISH
(1986)

Bibliography

WARNER, HOYT L. 1959 *Life of Mr. Justice Clarke.* Cleveland, Ohio: Western Reserve University Press.

## CLASS ACTION

The class action is a procedural device aggregating the claims or defenses of similarly situated individuals so that they may be tried in a single lawsuit. In recent decades the class action has frequently served as the vehicle by which various groups have asserted constitutional claims. For example, all the minority-race school children in various districts have sued (through their parents) to rectify alleged RACIAL DISCRIMINATION on the part of school authorities; or, to illustrate a nonconstitutional claim, the buyers of home freezers have sued as a group claiming that the dealer had made fraudlent misrepresentations. In both examples the members of the class could have sued separately. The class action pulled these potential individual actions into a single lawsuit making litigation feasible for the members of the class (by permitting a single lawyer to try all their claims together). For the party opposing the class the suit has the advantage of providing a single adjudication of all similar claims and the disadvantage, especially marked in suits for money damages, that the entire potential liability to a large group turns on a single suit.

The class action depends on representation, and that concept draws the Constitution into the picture. In the class action most class members are represented by an active litigant whose success or failure binds the class members. Opinions interpreting the DUE PROCESS clauses of the Constitution (in the Fifth and FOURTEENTH ADMENDMENTS ) suggest that normally one may not be bound by the results of litigation to which one is not a party. Yet the class action purports to do just that—to bind the absentee class members to the results of a suit in which they played no active role.

The Supreme Court and the drafters of state and federal class action rules have supplied two solutions to this apparent tension. The Supreme Court's answer came in *Hansberry v. Lee* (1940), in which the justices indicated that class actions could bind absentee class members if the active litigants *adequately represented* the class. If not, the Court reasoned, binding the absentees would deprive them of due process of law.

Adequate representation has two aspects, competence and congruence of interests. All would agree that adequate representation implies some absolute level of competence and diligence on the part of the class representative and attorney. Though few cases have specifically discussed the question, it seems virtually a matter of definition that an adequate representative must pursue the cause with some minimum level of professional skill.

The second aspect of adequate representation presents a more difficult problem, forcing us to decide whether such representation requires the class members to have *agreed* that the action is in their interests, or whether it is possible to define such interests abstractly, without specific consent. Such an abstract definition relies on common intuitions about what would benefit persons in the class's circumstances. In *Hansberry* the Court did not need to decide between these definitions of interest because the attempted class representation failed on either count. Subsequent cases and procedural rules have not clearly resolved the question.

Contemporary procedural rules require that a judge presiding over a class action suit consider initially whether the action is in the class's interest, abstractly considered; that much seems constitutionally required. Beyond that, some rules also require that the absentee members receive individual notice permitting them to exclude themselves from the litigation.

Founded on the constitutional proposition that some form of representation will suffice to bind members of a class, the class suit has come to play an important role in twentieth-century American litigation.

STEPHEN C. YEAZELL
(1986)

(SEE ALSO: *Groups and the Constitution.*)

Bibliography

KALVEN, HARRY, JR. and ROSENFIELD, MAURICE 1941 The Contemporary Function of the Class Suit. *University of Chicago Law Review* 8:684–721.

WRIGHT, CHARLES A. and MILLER, ARTHUR 1972 *Federal Practice and Procedure*, Vols. 7 & 7a. St. Paul, Minn.: West Publishing Co.

YEAZELL, STEPHEN C. 1980 From Group Litigation to Class Action; Part II: Interest, Class and Representation. *UCLA Law Review* 28:1067–1121.

## *CLASSIC, UNITED STATES v.*
313 U.S. 299 (1941)

This became a TEST CASE used by the United States Attorney in Louisiana and the newly created CIVIL RIGHTS DIVISION of the Department of Justice to ascertain the federal government's power to protect VOTING RIGHTS in PRIMARY ELECTIONS. Louisiana election commissioners charged with willfully altering and falsely counting congressional primary election ballots were indicted under what are now sections 241 and 242 of Title 18, United States Code. To analyze the INDICTMENT under section 241, the Supreme Court had to determine whether the right to have one's ballot counted in a state primary election was a right or a privilege secured by the Constitution. Relying in part on Article I, section 2, of the Constitution, the Court held, 4–3, that the right to choose a congressman was "established and guaranteed" by the Constitution and hence secured by it. The Court then reaffirmed earlier holdings that Congress could protect federally secured voting rights against individual as well as STATE ACTION and squarely held that those rights included participation in state primary elections for members of Congress, thus overruling *Newberry v. United States* (1921).

In articulating those rights "secured by the Constitution" within the meaning of section 241, *Classic* forms a link between early interpretations of the phrase, as in EX PARTE YARBROUGH (1884), and later consideration of it, as in UNITED STATES V. GUEST (1966) and GRIFFIN V. BRECKENRIDGE (1971), the latter case decided under the civil counterpart to section 241, section 1985(3) of Title 42, United States Code. *Classic* also constitutes an important link in the chain of precedents specifically pertaining to federal power over elections. Later cases from the 1940s include SMITH V. ALLWRIGHT (1944) and *United States v. Saylor* (1944).

Because the *Classic* indictment also charged a violation of section 242, which requires action "under COLOR OF LAW." the case provides an early modern holding on the question whether action in violation of state law can be action under color of law. With virtually no discussion of the issue, the Court held such action to be under color of law, a holding later used to support similar holdings in *Screws v. United States* (1945) and MONROE V. PAPE (1961). Dissenters in *Screws* and *Monroe* would object to reliance on *Classic* because of its abbreviated consideration of the issue.

THEODORE EISENBERG
(1986)

## CLAY, HENRY
(1777–1852)

Henry Clay, distinguished politician and legislator, was a product of the Jeffersonian Republicanism that took possession of the Trans-Appalachian West, fought a second war against Great Britain, and was nationalized in the process. Born in Hanover County, Virginia, young Clay clerked for Chancellor GEORGE WYTHE and read law in Richmond before emigrating to Kentucky in his twentieth year. Settling in the rising metropolis of Lexington, Clay was promptly admitted to the bar, and by virtue of extraordinary natural talent, aided by the fortune of marriage into a prominent mercantile family, he soon became a leading member of the Bluegrass lawyer-aristocracy.

The chaos of land titles in Kentucky—a legacy of the state's Virginia origins—made it a paradise for lawyers. Clay mastered this abstruse branch of jurisprudence but earned his reputation as a trial lawyer in capital cases, in which he was said never to have lost a client. He rode the circuit of the county courts, acquiring a character for high spirits and camaraderie; he practiced before the court of appeals and also before the United States district court at Frankfort. When he first went to Congress in 1806, Clay was admitted to the bar of the Supreme Court. Occasionally in years to come he argued important constitutional cases before the court. He was chief counsel for the defendant in OSBORN V. BANK OF THE UNITED STATES (1824), for instance, in which the Court struck down a prohibitive state tax on branches of the bank. At about the same time he conducted Kentucky's defense of its Occupying Claimants Law, enacted years earlier in order to settle thousands of disputed land titles. Here Clay was unsuccessful, as the Court, in GREEN V. BIDDLE (1823), found the Kentucky law in violation of the CONTRACT CLAUSE. Justice JOSEPH STORY remarked after hearing Clay in this case that, if he chose, Clay might achieve "great eminence" at the bar. This interesting judgment would never be tested, however, for Clay sought eminence in politics rather than law.

Clay entered politics in 1798 as a Jeffersonian Republican protesting the ALIEN AND SEDITION ACTS and seeking liberal reform of the state constitution. Elected to the legislature in 1803, he became chief spokesman and protector of the Lexington-centered "court party." He was also very popular, rising rapidly to the speakership of the lower house. In 1806 he was sent to the United States Senate to

complete three months of an unexpired term; this experience was repeated, upon the resignation of another incumbent, in 1810. Clay distinguished himself as a bold patriot and orator, as an advocate of federal INTERNAL IMPROVEMENTS and encouragement of domestic manufactures, both of great interest to Kentucky, and as the leading opponent of recharter of the national bank on strict Jeffersonian grounds. He then sought and won election to the Twelfth Congress. Upon its meeting in November 1811, he achieved recognition as chief of the "war hawks" who, though a small minority, took command of the House and elected Clay speaker. Whether or not the war hawks caused, in some significant degree, the War of 1812 is a matter in dispute among historians; but there is no doubt that they brought fresh westerly winds of nationalism into Congress and that Clay, as speaker, mobilized congressional action behind the JAMES MADISON administration's prosecution of the war. Clay transformed this constitutional office, the speakership, from that of an impartial moderator into one of political leadership. Five times he would be reelected speaker, always virtually without opposition; and when he finally retired from the House there was no one to fill his shoes.

After the Peace of Ghent, which he had helped negotiate as an American commissioner, Clay supported President Madison's national Republican platform with its broad constitutional principles. This support required an about-face on the constitutionality of a national bank. Clay candidly chalked up his error to experience, saying that the financial exigencies of the war had shown the necessity of a national bank; he now agreed with Madison on the need for a central institution to secure a stable and uniform currency. Henceforth, certainly, Clay's principal significance with respect to the Constitution lay in the affirmation of congressional powers.

The protective tariff was the core of the maturing national system of political economy that Clay named "the AMERICAN SYSTEM." The country ought not any longer, he argued, look abroad for wealth, but should turn inward to the development of its own resources. Manufactures would rise and flourish behind the tariff wall, consuming the growing surplus of American agriculture; and a balanced, sectionally based but mutually supportive, economy of agriculture, commerce, and manufactures would be the result. Because the system premised a positive role for the national government in economic development, it carried immense implications for the Constitution. When the protective tariff was first attacked on constitutional grounds in 1824, Clay rejected the narrow view that limited the TAXING POWER to raising revenue and continued the liberal interpretation of the COMMERCE CLAUSE that began with Jefferson's embargo. The infrastructure of the "home market" would be provided by a national system of INTERNAL IMPROVEMENTS. Madison, in his surprising veto of the Bonus Bill in 1817, interposed the constitutional objection that neither the funding nor the building of roads and canals was among the enumerated powers. When Madison's successor, JAMES MONROE, persisted in this view, Clay mounted a campaign to overturn it. He appealed to the Jeffersonian precedent of the National (Cumberland) Road; he appealed to the WAR POWERS (transportation as an element of national defense), to the power of Congress to establish post roads, and, above all, to the commerce power. To the old fears of a runaway Constitution Clay opposed his trust in democratic elections and the balance of interests to keep order. Monroe finally conceded the unlimited power of Congress to appropriate money for internal improvements, though not to build or operate them. Clay protested that the concession was of greater scope than the principle he had advocated. But he took satisfaction in the result, most immediately in the General Survey Act of 1824.

Clay's coalition with JOHN QUINCY ADAMS in 1825, in which he secured the New Englander's election to the presidency and accepted appointment as his secretary of state, contributed to a growing sectional and partisan opposition to the American System and the constitutional doctrines that supported it. South Carolina's NULLIFICATION of the protective tariff in 1832 provoked a crisis that Clay, now in the Senate, helped to resolve with his Compromise Tariff Act. Under it protective duties would be gradually lifted until in 1842 they would be levied for revenue only. Without surrendering any constitutional principle, Clay nevertheless seemed to surrender the policy of protectionism. Some politicians said he courted southern votes in his quest for the presidency. As the National Republican candidate against President ANDREW JACKSON in the recent election, he had been badly defeated, winning nothing in the South, and he may have seen in this crisis an opportunity for a useful change of political direction. But Clay insisted he acted, first, to save the Union from the disaster of nullification, which was compounded by Jackson's threatened vengeance, and second, to save what he could of the American System. A high protective tariff could no longer be sustained in any event. The national debt was about to be paid off; the treasury faced an embarrassing surplus unless the revenue was drastically reduced. Clay sought to offset the impact of the surplus on the tariff by diverting the soaring revenue of public land sales to the states. Although Congress passed Clay's Distribution Bill in 1833, Jackson vetoed it.

This veto, with many others, above all JACKSON'S VETO OF THE BANK BILL, fueled Clay's assault on the alleged executive usurpations and monarchical designs of the President. The senator proposed to curtail the powers of the presidency. The abuse of the veto power should be corrected by a constitutional amendment allowing override by a majority of both houses. The despotic potential of the

office, which Jackson was the first to disclose, should be curbed further by an amendment limiting the president to a single term, perhaps of six years. Clay also rejected the 1789 precedent on the REMOVAL POWER, arguing that the power of removal in the President effectively negated the Senate's agency in appointment. Removal, like appointment, should be a joint responsibility. The Whig Party, under Clay's leadership, consistently advocated these measures. None was ever enacted. Clay continued the campaign even after the Whigs came to power in 1841, assailing President John Tyler as he had earlier assailed Jackson.

Although Clay usually supported national authority in the debates of his time, he became increasingly cautious and protective of the Constitution under the threats posed, first, by reckless Jacksonian Democracy, and second, by the combination of abolitionism in the North and aggressive slavocracy in the South. He accepted the "federal consensus" on slavery: it was a matter entirely within the JURISDICTION of the states. Nevertheless, he raised no bar to the use of federal funds to advance gradual emancipation and colonization by the states, indeed advocated it in certain contexts. In the controversy over the right of petition for abolition of slavery in the DISTRICT OF COLUMBIA, he held that a gag was not only indefensible in principle but impolitic in practice, because it would make libertarian martyrs of the abolitionists. Clay opposed the ANNEXATION OF TEXAS, believing that the expansion of slavery it entailed must seriously disrupt the Union. When he seemed to equivocate on the issue in the election of 1844—his third run for the presidency—he lost enough northern votes to ensure his defeat. Returning to the Senate in 1849, he proposed a comprehensive plan for settlement of critical issues between North and South. It eventually became the COMPROMISE OF 1850. Here, as in all of his constructive legislative endeavors, Clay evaded spurious questions of constitutional law and sought resolution on the level of policy in that "spirit of compromise" which, he said, lay at the foundation of the American republic. From his earlier part in effecting the MISSOURI COMPROMISE (1820–1821) and the Compromise of 1833, he had earned the title of The Great Pacificator. The Compromise of 1850 added a third jewel to the crown.

Henry Clay was the most popular American statesman of his generation and one of the most respected. He helped to shape the course of constitutional development during forty years, not as a lawyer, judge, or theorist, but as a practical politician and legislator in national affairs.

MERRILL D. PETERSON
(1986)

Bibliography

COLTON, CALVIN, ed. (1856) 1904 *The Works of Henry Clay.* 10 Vols. New York: G. P. Putnam's.

HOPKINS, JAMES F. and HARGREAVES, MARY W. M., eds. 1959–1981 *The Papers of Henry Clay.* Vols. 1–6. Lexington: University of Kentucky Press.

SEAGER, ROBERT II; WINSLOW, RICHARD E., III; and HAY, MELBA PORTER, eds. 1982–1984 *Papers of Henry Clay.* Vols. 7–8. Lexington: University of Kentucky Press.

VAN DEUSEN, GLYNDON G. 1937 *The Life of Henry Clay.* Boston: Houghton, Mifflin.

# CLAYTON ACT
## 38 Stat. 730 (1914)

Mistakenly hailed by Samuel Gompers as labor's MAGNA CARTA, the Clayton Act represented a new generation's attempt to deal with trusts. Acclaimed for its specificity, the new act in reality contained crucial ambiguities as vague as the SHERMAN ANTITRUST ACT it was intended to supplement. WOODROW WILSON'S ANTITRUST policy included both the FEDERAL TRADE COMMISSION ACT and the Clayton Act; in his view the latter would leave the Sherman Act intact while specifying conduct henceforth prohibited. Framed by Representative Henry Clayton, chairman of the House Judiciary Committee, the antitrust bill pleased no one: labor objected to the absence of an explicit guarantee of immunity for unions, many congressmen found the list of restraints of trade incomplete, and agrarian radicals believed that the bill betrayed Democratic pledges. In the face of this opposition, Wilson abandoned the Clayton bill in Congress. The HOUSE, unhappy over the vagueness of the Sherman Act and wishing to leave businessmen no loopholes, sought as specific a bill as possible. The SENATE objected, but a compromise was reached naming only a few, particularly pernicious, practices which were declared unlawful "where the effect may be to substantially lessen competition or tend to create monopoly"—hardly a model of certainty. Four provisions of the Clayton Act contain this operative phrase. Section 7 prohibited the acquisition of stock by one corporation of another or mergers, but, by neglecting to forbid acquisitions of assets as well as stock, it provided a loophole not plugged until 1950. The act also placed strict limitations on interlocking directorates (section 8), and outlawed price discrimination (section 2) and exclusive dealing and tying contracts (section 3). The Federal Trade Commission would enforce these provisions by procedures paralleling those in the FTC Act. In addition, the act rendered individual officers personally liable for corporate violations, permitted private individuals to secure INJUNCTIONS and to file treble damage suits, and allowed final judgments in government suits to be considered *prima facie* EVIDENCE in private cases.

Of two labor provisions, section 6, which declared that labor was "not a commodity or article of commerce" and that antitrust laws could not be used to forbid legitimate

organizing activities, conceded nothing new. Section 20 prohibited the issuance of injunctions in labor cases unless "necessary to prevent irreparable injury to property." Together with a further clause which declared that peaceful strikes and boycotts were not in violation of federal antitrust laws, this section represented the only victory labor gained in this act.

DAVID GORDON
(1986)

(SEE ALSO: *Labor and the Constitution.*)

Bibliography

NEALE, A. D. and GOYDER, D. G. 1980 *The Antitrust Laws of the United States of America*, 3rd ed. Cambridge: At the University Press.

## CLEAN AIR ACT

See: Environmental Regulation and the Constitution

## CLEAR AND PRESENT DANGER

The clear and present danger rule, announced in SCHENCK V. UNITED STATES (1919), was the earliest FREEDOM OF SPEECH doctrine of the Supreme Court. Affirming Schenck's conviction, Justice OLIVER WENDELL HOLMES concluded that a speaker might be punished only when "the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Holmes was drawing on his own earlier Massachusetts Supreme Judicial Court opinion on the law of attempts. There he had insisted that the state might punish attempted arson only when the preparations had gone so far that no time was left for the prospective arsonist to change his mind, so that the crime would have been committed but for the intervention of the state. In the free speech context, Holmes and Justice LOUIS D. BRANDEIS assimilated this idea to the MARKETPLACE OF IDEAS rationale, arguing that the best corrective of dangerous speech was more speech rather than criminal punishment; government should intervene only when the speech would do an immediate harm before there was time for other speech to come into play.

In the context of *Schenck*, the danger rule made particular sense; the federal statute under which the defendant was prosecuted made the *act* of espionage a crime, not the speech itself. The danger rule in effect required that before speech might be punished under a statute that forbade action, a close nexus between the speech and the action be shown. The concentration of the rule on the intent of the speaker and the circumstances surrounding the speech also seem most relevant in those contexts in which speech is being punished as if it constituted an attempt at a criminal act. Opponents of the danger rule have often insisted that Holmes initially intended it not as a general FIRST AMENDMENT test but only for cases in which a statute proscribing action was applied to a speaker.

In *Schenck*, Holmes wrote for the Court. The most extended statement of the danger rule came some months later in ABRAMS V. UNITED STATES (1919), but by then it was to be found in a Holmes dissent, joined by Brandeis. In GITLOW V. NEW YORK (1925) the Court used the BAD TENDENCY TEST which openly rejected the imminence or immediacy element of the danger rule—again over dissents by Holmes and Brandeis. Brandeis kept the danger rule alive in a concurrence in WHITNEY V. CALIFORNIA (1927) in which he added to the immediacy requirement that the threatened evil be serious. The danger of minor property damage, for example, would not justify suppression of speech.

In the 1930s and 1940s the Court was confronted with a series of cases involving parades and street corner speakers in which the justification offered for suppressing speech was not concern for the ultimate security of the state but the desire to maintain peaceful, quiet, and orderly streets and parks free of disturbance. Behind the proffered justifications usually lurked a desire to muzzle unpopular speakers while leaving other speakers free. In this context the clear and present danger rule was well designed to protect unpopular speakers from discrimination. It required the community to prove that the particular speaker whom it had punished or denied a license did in fact constitute an immediate threat to peace and good order. In such cases as HERNDON V. LOWRY (1937) (subversion), THORNHILL V. ALABAMA (1941) (labor PICKETING), BRIDGES V. CALIFORNIA (1941) (contempt of court), WEST VIRGINIA BOARD OF EDUCATION V. BARNETTE (1943) (compulsory flag salute), and *Taylor v. Mississippi* (1943) (state sedition law), the clear and present danger rule became the majority constitutional test governing a wide range of circumstances, not only for statutes punishing conduct but also those regulating speech itself.

Even while enjoying majority status the rule came under attack from two directions. The "absolutists" led by ALEXANDER MEIKLEJOHN criticized the rule for allowing too broad an exception to First Amendment protections. The rule made the protection of speech dependent on judicial findings whether clear and present danger existed; judges had notoriously broad discretion in making findings of fact, as FEINER V. NEW YORK (1951) and TERMINIELLO V. CHICAGO (1949) illustrated. When applied to radical or subversive speech, the danger test seemed to say that ineffectual speech would be tolerated but that speech

might be stifled just when it showed promise of persuading substantial numbers of listeners. On the other hand, those favoring judicial self-restraint, led by Justice FELIX FRANKFURTER, argued that the rule was too rigid in its protection of speech and ought to be replaced by a BALANCING TEST that weighed the interests in speech against various state interests and did so without rendering the immediacy of the threat to state interests decisive.

Later commentators have also argued that the distinction between speech and conduct on which the danger rule ultimately rests is not viable, pointing to picketing and such SYMBOLIC SPEECH as FLAG DESECRATION which intermingle speech and action. The danger rule also engenders logically unresolvable HOSTILE AUDIENCE problems. If Holmes's formula had demanded a showing of the specific intent of the speaker to bring about violence or of specific INCITEMENT to crime in the content of the speech, it might have afforded greater protection to some speakers. The independent weight the danger formula gives to surrounding circumstances may permit the stifling of speakers because of the real or imagined act or threats of others. Yet focusing exclusively upon intent or upon the presence of the language of incitement may lead to the punishment of speakers whose fervently revolutionary utterances in reality have little or no chance of bringing about any violent action at all.

In DENNIS V. UNITED STATES (1951) the clear and *present* danger test was converted overtly into a clear and *probable* danger test and covertly into a balancing test. As its origin in the law of attempts reminds us, the cutting edge of Holmes's test had been the imminence or immediacy requirement. Speech might be punished only if so closely brigaded in time and space with criminal action that no intervening factor might abort the substantive evil. The probable danger test held that if the anticipated evil were serious enough the imminence requirement might be greatly relaxed. In practice this evisceration of the danger test left the Court free to balance the interests to be protected against the degree of infringement on speech, as the proponents of judicial self-restraint argued the Court had always done anyway under the danger standard.

Since *Dennis* the Court has consistently avoided the precise language of the clear and present danger test and with few exceptions commentators announced its demise. In BRANDENBURG V. OHIO (1969), however, the Court announced that "constitutional guarantees of free speech . . . do not permit a State to forbid . . . advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." The text and footnotes surrounding this pronouncement, its careful avoidance of the literal clear and present danger formula itself, plus the separate opinions of several of the Justices indicate that *Brandenburg* did not seek to revive Holmes's danger rule per se. Such earlier proponents of the rule as HUGO L. BLACK and WILLIAM O. DOUGLAS, feeling that it had been too corrupted by its *Dennis* conversion to retain any power to protect speech, had moved to the position of Meiklejohnian absolutism and its rejection of the danger standard. On the other hand, those Justices wishing to preserve low levels of protection for subversive speech and the high levels of judicial self-restraint toward legislative efforts to curb such speech that had been established in *Dennis* and YATES V. UNITED STATES (1957), shied away from the danger test because they knew that, in its Holmesian formulation, it was antithetical to the results that had been achieved in those cases. Apparently, then, Holmes's formula was avoided in *Brandenburg* because some of the participants in the PER CURIAM opinion thought the danger rule protected speech too little and others thought it protected speech too much.

Yet *Brandenburg* did revive the imminence requirement that was the cutting edge of the danger test, and it did so in the context of subversive speech and of OVERRULING *Whitney v. California*, in which the Brandeis and Holmes clear and present danger "concurrence" was in reality a dissent. Even when the danger test was exiled by the Supreme Court it continued to appear in state and lower federal court decisions and in popular discourse. Although the distinction between speech and action—like all distinctions the law seeks to impose—is neither entirely logical nor entirely uncontradicted by real life experience, clear and present danger reasoning survives because most decision makers do believe that the core of the First Amendment is that people may be punished for what they do, not for what they say. Yet even from this basic rule that speech alone must not be punished, we are compelled to make an exception when speech becomes part of the criminal act itself or a direct incitement to the act. Even the most absolute defenders of free speech would not shy from punishing the speaker who shouts at a mob, "I've got the rope and the dynamite. Let's go down to the jail, blow open the cell and lynch the bastard." However imperfectly, the Holmesian formula captures this insight about where the general rule of free speech ends and the exception of punishment begins. It is for this reason that the danger rule keeps reappearing in one form or another even after its reported demise.

The danger rule is most comforting when the speech at issue is an open, particular attack by an individual on some small segment of government or society, such as a street corner speech denouncing the mayor or urging an end to abortion clinics. In such instances the general government and legal system clearly retain the strength to intervene successfully should the danger of a substantive evil actually become clear and present. The emasculation

of the danger test came in quite a different context, that of covert speech by an organized group constituting a general attack on the political and legal system as a whole. Unlike the situation in particularized attacks, where the reservoir of systemic power to contain the anticipated danger remains intact, should subversive speech actually create a clear and present danger of revolution the system as a whole might not have the capacity to contain the danger. It is one thing to wait until the arsonist has struck the match and quite another to wait until the revolution is ready to attack the police stations. For this reason the Court in *Dennis* reverted to the *Gitlow*-style reasoning that the government need not wait until the revolutionaries had perfected their campaign of conversion, recruitment, and organization. *Dennis* and *Yates* carve out a Communist party exception to the immediacy requirement of the clear and present danger rule. They say that where the speech is that of a subversive organization, the government need not prove a present danger of revolution but only that the organization intends to bring about the revolution as speedily as circumstances permit. Thus the government is permitted to intervene early enough so that its own strength is still intact and that of the revolutionaries still small. When in defense of the danger rule Holmes argued that time had overthrown many fighting faiths, he did so with a supreme confidence that it was the American, democratic, fighting faith that time favored and that subversive movements would eventually peter out in America's liberal climate. It was a failure of that faith in the face of the communist menace that led to the emasculation of the danger rule during the Cold War of the 1950s. With hindsight we can see that Holmes's confidence remained justified, and that communist subversion could not have created even a probable, let alone a present danger. Nonetheless American self-confidence has eroded sufficiently that the Supreme Court remains careful not to reestablish the full force of the danger rule lest it handicap the political and legal system in dealing with those who organize to destroy it.

MARTIN SHAPIRO
(1986)

(SEE ALSO: *Judicial Activism and Judicial Restraint.*)

Bibliography

ANTIEAU, CHESTER JAMES 1950 "Clear and Present Danger"—Its Meaning and Significance. *Notre Dame Lawyer* 1950:3–45.

——— 1950 The Rule of Clear and Present Danger: Scope of Its Applicability. *Michigan Law Review* 48:811–840.

MENDELSON, WALLACE 1952 Clear and Present Danger—From Schenck to Dennis. *Columbia Law Review* 52:313–333.

——— 1953 The Degradation of the Clear and Present Danger Rule. *Journal of Politics* 15:349–355.

——— 1961 Clear and Present Danger—Another Decade. *Texas Law Review* 39:449–456.

STRONG, FRANK 1969 Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—And Beyond. *Supreme Court Review* 1969:427–480.

## *CLEBURNE (CITY OF) v. CLEBURNE LIVING CENTER, INC.*

473 U.S. 432 (1985)

*Cleburne v. Cleburne Living Center, Inc.* (1985) is one of a handful of cases in which the Supreme Court invalidated a law while applying RATIONAL BASIS review, a traditionally deferential standard of judicial scrutiny that usually results in upholding the challenged law. In *Cleburne*, the Justices applied what commentators have called "rational basis with bite" to overturn a city ZONING ordinance that prevented the operation of a group home for the mentally disabled within the city.

Under the rational basis test, challengers must show that the law in question has no legitimate purpose or, assuming a legitimate purpose, that the means adopted by the law bear no reasonable relationship to the achievement of that end. The City of Cleburne argued that its zoning ordinance served the legitimate purpose of preserving property values and protecting the disabled from harassment by nearby school children. According to Justice BYRON R. WHITE, writing for a 6–3 majority, the city's justifications rested on nothing more than "negative attitudes" or "fear" of the mentally disabled. The indulgence of arbitrary prejudice, the Court held, was not a legitimate government purpose.

Some supporters of *Cleburne* hoped that the decision would mark the beginning of heightened judicial scrutiny of laws discriminating against the mentally disabled, much in the way the Court's use of rational basis with bite in SEX DISCRIMINATION cases in the early 1970s previewed the application of more stringent "intermediate scrutiny" to gender classifications. The REHNQUIST COURT dashed such hopes in *Heller v. Doe* (1993), where it returned to the more deferential version of the rational basis test in upholding an involuntary commitment law that discriminated between mentally retarded and mentally ill individuals.

The few other cases in which the Court has applied the rational basis test yet nevertheless invalidated the challenged law include *United States Department of Agriculture v. Moreno* (1973), PLYER V. DOE (1982), *Zobel v. Williams* (1982), *Metropolitan Life Insurance Co. v. Ward* (1985), *Allegheny Pittsburgh Coal Co. v. County Commis-*

*sion* (1989), and ROMER V. EVANS (1996). The growing number of rational basis with bite cases reveals that, despite the Court's insistence that there are but three STANDARDS OF REVIEW under the EQUAL PROTECTION clause—STRICT SCRUTINY, intermediate scrutiny, and rational basis—in practice the Justices apply a spectrum of different standards depending on the context of the particular controversy.

ADAM WINKLER
(2000)

## CLERKS

Each Justice of the Supreme Court employs two or more law clerks. (In recent years, typically each Justice, other than the CHIEF JUSTICE, has employed four clerks.) Most of the clerks are not long-term career employees, but honor law school graduates who have previously served for a year as clerk to a lower federal judge. Typically, the term of service for these noncareer clerks is one year.

The practice of employing recent law school graduates as short-term clerks began with Justice HORACE GRAY. Gray employed a highly ranked Harvard Law School graduate each year at his own expense while serving on the Massachusetts Supreme Judicial Court. He continued to do so when appointed to the United States Supreme Court in 1882. Congress assumed the cost of Justices' law clerks in 1886, but only Gray and his sucessor, OLIVER WENDELL HOLMES, continued the pattern of employing recent law school graduates. The widespread use of the Holmes-Gray practice began in 1919, when Congress authorized each Justice to employ both a "law clerk" and a "stenographic clerk." The use of young law school graduates as judges' law clerks for one- or two-year periods is now the prevailing pattern in most lower federal courts. A clerkship position with a Supreme Court Justice is prestigious, and former clerks have become prominent in the legal profession, government, the judiciary and academe. Three Justices had themselves served as law clerks to Supreme Court Justices (BYRON R. WHITE, WILLIAM H. REHNQUIST, and JOHN PAUL STEVENS).

The employment of noncareer clerks has been defended as exposing the Justices to fresh ideas and the new theories current in their clerks' law schools. Concern that clerks have too large a role in decisions has been expressed, but this is exaggerated, given the clerks' brief tenure and what is known of the Court's decision process. A distinct concern is that with employment of more clerks, they increasingly play an inappropriately large part in the drafting of opinions. That concern is not so easily rebutted, since each Justice has used clerks' services in a distinct fashion, and there is insufficient reliable public information of the roles played by the Court's current clerks. Court opinions, however, have become longer, more elaborate in their arguments, and studded with citations. The opinions of several Justices appear to be written in a uniform law review style, suggesting that staff plays a large part in their drafting.

WILLIAM COHEN
(1986)

Bibliography

OAKLEY, JOHN B. and THOMPSON, ROBERT S. 1980 *Law Clerks and the Judicial Process.* Berkeley: University of California Press.

## CLEVELAND, GROVER
(1837–1908)

The first Democratic President since JAMES BUCHANAN, Grover Cleveland supported civil service reform and tariff reduction. Cleveland devoted much of his two terms (1884–1888, 1892–1896) to eliminating corruption, inefficiency, and the exploitation of government for private benefit. Generally STATES' RIGHTS and probusiness in viewpoint, he insisted that the federal government function within constrained constitutional limits. As the first executive in decades willing to fight Congress, he frequently used the VETO POWER. A 6–3 Supreme Court sustained Cleveland's view of presidential removal power in *McAllister v. United States* (1891). (See APPOINTING AND REMOVAL POWER.)

Cleveland played almost no part in passage of the INTERSTATE COMMERCE ACT. He had no public reaction to the unpopular decision in POLLOCK V. FARMERS' LOAN & TRUST COMPANY (1895), voiding the income tax, for he believed criticism of the Court unseemly.

Cleveland was the second President with an opportunity to enforce the SHERMAN ANTITRUST ACT, but he expressed serious doubts about the act's effectiveness. Cleveland promised action "to the extent that [trusts] can be reached and restrained by Federal power," although he contended that state action provided the proper remedy. What antitrust successes his administration won (such as UNITED STATES V. TRANS-MISSOURI FREIGHT ASSOCIATION, 1897, and *United States v. Addyston Pipe & Steel Corp.*, 1899) belong to his second attorney general, Judson Harmon. Cleveland's last annual message even contains an exculpatory announcement about the "thus far . . . ineffective" act.

Cleveland and his first attorney general, RICHARD OLNEY, helped secure a federal INJUNCTION against the Pullman strike in 1894. Over the Illinois governor's objections, Cleveland sent 2,000 troops to Chicago to protect the

mails and insure the free flow of INTERSTATE COMMERCE, purposes specifically approved by the Court in IN RE DEBS (1895). The troops broke the strike, killing twelve workers; this incident gave rise to the epithet "government by injunction."

Cleveland appointed four men to the Court—L. Q. C. LAMAR, MELVILLE FULLER, EDWARD WHITE, and RUFUS PECKHAM—but he was also the first President to suffer the embarrassment of having two successive appointments rejected by the SENATE.

DAVID GORDON
(1986)

Bibliography

MERRILL, HORACE 1957 *Bourbon Leader: Grover Cleveland.* Boston: Little, Brown.

## *CLEVELAND BOARD OF EDUCATION v. LAFLEUR*
414 U.S. 632 (1974)

The Cleveland school board required a pregnant school teacher to take maternity leave, without pay, for five months before the expected birth of her child. A Virginia county school board imposed a similar four-month leave requirement. The Supreme Court, 7–2, held these rules unconstitutional. Justice POTTER STEWART, for the majority, invoked the IRREBUTTABLE PRESUMPTIONS doctrine. The school boards, by assuming the unfitness of pregnant teachers during the mandatory leave periods, had denied teachers individualized hearings on the question of their fitness, in violation of the guarantee of PROCEDURAL DUE PROCESS. Justice WILLIAM O. DOUGLAS concurred in the result, without opinion. Justice LEWIS F. POWELL rejected the irrebuttable presumptions ground as an EQUAL PROTECTION argument in disguise, but concluded that the boards' rules lacked rationality and denied equal protection. Justice WILLIAM H. REHNQUIST, for the dissenters, aptly characterized the irrebuttable presumptions doctrine as "in the last analysis nothing less than an attack upon the very notion of lawmaking itself."

KENNETH L. KARST
(1986)

## CLIFFORD, NATHAN
(1803–1881)

Nathan Clifford came to the Supreme Court in 1858 after an active political career. He served in the Maine legislature in the 1830s and in the House of Representatives in the early 1840s. He was JAMES K. POLK's attorney general, and during his term he represented (in a private capacity) the rebellious Dorr faction before the Supreme Court in LUTHER V. BORDEN (1849). Clifford's most significant political achievement came in 1848 when Polk dispatched him to persuade Mexico to accept the TREATY OF GUADALUPE HIDALGO as amended by Congress. A decade later, President JAMES BUCHANAN selected him to succeed Justice BENJAMIN R. CURTIS. At a time when the Court was perceived in many quarters as an instrument of southern and Democratic party interests, the choice of a Northerner with southern principles was viewed as blatant partisanship. After a lengthy confirmation battle, the SENATE narrowly approved him.

Clifford, a "doughface" in politics, regarded himself as a Jeffersonian "strict constructionist" in constitutional matters. He resolutely opposed the centralization of governmental power during the 1860s and early 1870s. But in ABLEMAN V. BOOTH (1859) he voted to affirm federal judicial supremacy. During the war, Clifford generally supported the government. He wrote opinions upholding the seizure of slave-trading ships; he joined his colleagues in declining to decide any constitutional questions involving the legal tender laws; and he supported the Court's refusal to consider the martial law issues in EX PARTE VALLANDIGHAM (1864). In the PRIZE CASES (1863), however, Clifford joined the dissenters who questioned the legality of President ABRAHAM LINCOLN's blockade of southern ports.

Following the war, Clifford consistently opposed Republican RECONSTRUCTION policy. He joined the majority opinion in EX PARTE MILLIGAN (1866), which struck down trials by military commissions where the civil courts were functioning; he supported the majority in the TEST OATH CASES (1867); he agreed with the majority's narrow construction of the FOURTEENTH AMENDMENT in the SLAUGHTERHOUSE CASES (1873); and in separate opinions in several VOTING RIGHTS cases, including UNITED STATES V. REESE (1876) and UNITED STATES V. CRUIKSHANK (1876), he went beyond the majority opinions to condemn federal interference with state elections. Finally, he joined the Court's majority that overturned the legal tender laws in *Hepburn v. Griswold* (1870), but when that decision was reversed a year later in *Knox v. Lee* (1871), he dissented in a strict construction of Congress's power to regulate currency. (See LEGAL TENDER CASES.)

In HALL V. DECUIR (1878) Clifford wrote for the Court, nullifying a Louisiana law prohibiting segregation of steamboat passengers. "Governed by the laws of Congress," he wrote, "it is clear that a steamer carrying passengers may have separate cabins and dining saloons for white persons and persons of color, for the plain reason that the laws of Congress contain nothing to prohibit such an arrangement." In short, the absence of federal policy negated state policy—a strange position for an old STATES' RIGHTS Democrat.

Clifford generally supported state regulatory policies.

His concurrence in *Slaughterhouse* signified his unwillingness to embrace a nationalizing interpretation of the Fourteenth Amendment; likewise, it reflected Clifford's traditionalist views of the STATE POLICE POWER. In *Munn v. Illinois* (1877), for example, he joined the majority to sustain Illinois's regulation of grain elevators. (See GRANGER CASES.) Clifford's most articulate statements on state powers came in his dissent in LOAN ASSOCIATION V. TOPEKA (1875). Rejecting the majority's invalidation of a state bonding authorization, Clifford struck at the Court's invocation of natural law doctrine and notions of judicial superintendence. Contending that state legislative power was "practically absolute," subject only to specific state and federal constitutional prohibitions, Clifford protested against JUDICIAL REVIEW that went beyond such limitations in tones reminiscent of older Jeffersonian doctrine: such power, he said, "would be to make the courts sovereign over both the constitution and the people, and convert the government into a judicial despotism."

Clifford dissented ninety-one times during his tenure, an extraordinarily high figure for the time. To some extent, it reflected his isolation and his archaic views. Throughout his judicial career, he consistently was perceived as a partisan Democrat. He served as president of the Electoral Commission to resolve the disputed election of 1876, and most accounts generally credit him with fairness in his conduct of the meetings. Nevertheless, the political purpose of his appointment in 1858 shadowed his work. He did not disappoint his benefactors; yet it was a career best characterized as dull and mediocre.

STANLEY I. KUTLER
(1986)

Bibliography

CLIFFORD, PHILIP Q. 1922 *Nathan Clifford, Democrat.* New York: Putnam's.

FAIRMAN, CHARLES 1939 *Mr. Justice Miller and the Supreme Court, 1862–1890.* Cambridge, Mass.: Harvard University Press.

## CLINTON, WILLIAM JEFFERSON
(1946– )

The forty-second President of the United States, William J. Clinton, was the first popularly elected President to be impeached by the U.S. HOUSE OF REPRESENTATIVES. While he will be best known for the events that precipitated his IMPEACHMENT (the purposeful misrepresentation of his affair with a White House intern), Clinton also played a critical role in redefining the Democratic Party. In particular, rather than seek to transform the nation through government initiatives, Clinton presided over a downsizing of the federal government, especially the reach and prestige of the presidency. By scaling down expectations of what the White House can accomplish and by blurring, if not obliterating, the line separating the personal from the public, Clinton will be long remembered. This legacy permeates the Clinton presidency, including the ways in which Clinton helped shape constitutional values.

Born on August 19, 1946, Clinton was raised in Hope and then Hot Springs, Arkansas. After graduating from high school in 1964, Clinton attended Georgetown University, Oxford University (as a Rhodes Scholar), and, starting in 1970, Yale Law School. Following law school, he returned to Arkansas. After a year teaching at the University of Arkansas, Clinton, in 1974, became the Democratic nominee for Arkansas's Third Congressional District. After losing a close election, Clinton turned his attention to state politics. In 1976, he was elected Attorney General of Arkansas. In 1978, at the age of 32, he was elected governor of Arkansas. Although failing to win reelection in 1980, Clinton was reelected in 1982 and served as governor from 1982 until his 1993 presidential inauguration.

In October 1991, Clinton announced his candidacy for President. During his campaign, Clinton was plagued by charges of marital infidelity and dishonesty. In response to questions about whether he had smoked marijuana, for example, Clinton at first claimed that he did not violate any law and—after admitting that he had smoked marijuana while in England—later argued that he did not inhale. Clinton likewise claimed that he did not act improperly when, after learning that he would not be drafted to serve in the VIETNAM WAR, he reneged on a commitment to join the National Guard. Nevertheless, Clinton persevered, earning his "comeback kid" reputation. Blaming presidential incumbent GEORGE H. W. BUSH for the high unemployment rate and other economic problems, Clinton successfully convinced voters that he would stimulate the economy, recommit the presidency to domestic issues, and reduce the size of government. Clinton's election, moreover, signaled that voters cared most about the ability to govern, not moral leadership.

Thanks to, among other things, a much-improved economy, Clinton secured the 1996 Democratic Party nomination without opposition. In the November 1996 elections, he defeated Republican Robert Dole and Reform Party candidate Ross Perot. In so doing, Clinton became the first Democratic President to be reelected since FRANKLIN D. ROOSEVELT.

Political expediency, not visionary leadership, was the hallmark of the Clinton presidency. Rather than expend political capital on controversial Supreme Court nominees, for example, Clinton embraced easily confirmable pragmatic liberals RUTH BADER GINSBURG and STEPHEN G. BREYER. Likewise, rather than defend the unconventional views of his nominee to the U.S. Department of Justice

CIVIL RIGHTS DIVISION, Lani Gunier, Clinton withdrew the nomination. In the end, although sometimes reminding the nation that he is especially concerned with constitutional matters because he "used to teach constitutional law," Clinton was quite willing to place other agenda items ahead of the advancement of some vision of what the Constitution means. One of these agenda items, the use of the APPOINTING POWER "to give you an administration that looks and feels like America," proved especially important in the nomination of judges and high-ranking officials at the Justice Department.

By downplaying the role of ideology in his constitutional policymaking, the Clinton administration often took a situational approach to constitutional matters. This brand of PRAGMATISM ruled the day on questions of CIVIL RIGHTS and CIVIL LIBERTIES. On gay rights, for example, Clinton promised gay and lesbian leaders that he would "stand with you in the struggle for equality for all Americans." But that promise was only partially fulfilled. While lifting most restrictions on federal civilian employment and supporting LEGISLATION to extend some EMPLOYMENT DISCRIMINATION protections to SEXUAL ORIENTATION discrimination, the Clinton administration neither lifted the ban on gays in the military nor participated in the Supreme Court litigation, ROMER V. EVANS (1996), challenging Colorado's exclusion of sexual orientation discrimination from state and local ANTIDISCRIMINATION LEGISLATION. Clinton, moreover, signed the Defense of Marriage Act, legislation condemning SAME-SEX MARRIAGE. For Clinton, the moral imperative of full equality for gays and lesbians gave way to the political costs of siding too often with gay rights interests.

On AFFIRMATIVE ACTION, political pragmatism likewise dominated administration policymaking. At first, the President sounded a cautionary note, launching a government-wide review of affirmative action by saying that "[w]e shouldn't be defending things that we cannot defend." Concern that Jesse Jackson would run for President in 1996, however, prompted a recalibration of administration policymaking. In an effort to shore up its minority base and neutralize Jackson, the Clinton administration embraced affirmative action. In particular, responding to a 1995 Supreme Court decision, ADARAND CONSTRUCTORS, INC. V. PEÑA, that called into doubt many federal affirmative action programs, Clinton reaffirmed the principle of affirmative action by declaring that the "job of ending discrimination is not done." More significant, by narrowly interpreting the Court's 1995 decision, the Clinton administration kept in place nearly all federal affirmative action programs.

Through his defense of affirmative action and his occasional support of gay rights, Clinton distanced himself from his Republican predecessors, Bush and RONALD REAGAN. Clinton's constitutional politics also varied from his predecessors' on ABORTION rights. Two days after his inauguration, Clinton dismantled the pro-life regulatory initiatives of the Reagan and Bush administrations. Clinton, moreover, vetoed legislation outlawing partial-birth abortions. Unlike his Republican predecessors, however, Clinton neither made hard-hitting bully pulpit speeches on abortion rights nor formulated a pro-choice legislative agenda. Apparently, with the Court's having reaffirmed a woman's right to terminate her pregnancy in PLANNED PARENTHOOD V. CASEY (1992), Clinton saw little political gain in staking out a hard-line position on abortion.

Where the White House did stake out hard-line positions were on legal issues affecting PRESIDENTIAL POWERS, especially WAR POWERS, EXECUTIVE IMMUNITY, and EXECUTIVE PRIVILEGE. On war powers, Clinton invoked military force on a number of occasions without seeking congressional support or approval. He sent cruise missiles into Afghanistan, ordered air strikes in Iraq, Bosnia, and Kosovo, conducted military operations in Somalia, and threatened to invade Haiti. In each case, he pointed to his inherent constitutional power to "command" the military. Indeed, by striking deals with both the North Atlantic Treaty Organization (NATO) and the UNITED NATIONS, Clinton relied more on the sanction of these multinational organizations than on the support of Congress.

On presidential immunity, the Clinton administration unsuccessfully argued before the Court that sitting Presidents were immune from civil lawsuits. In an earlier decision, the Court had concluded that a President was entitled to absolute immunity from civil lawsuits based on his officials duties. In defending a sexual harassment lawsuit filed against the President, CLINTON V. JONES (1997), the administration sought to extend this principle to lawsuits based on unofficial actions before he became President.

On executive privilege, the Clinton administration sought to expand the scope of presidential privileges in the face of both congressional and Office of Independent Counsel investigations of the President. Among other things, the administration claimed that the attorney–client privilege extends to government attorneys working in the White House Counsel's office, that U.S. Secret Service agents could refuse to appear as witnesses in a criminal proceeding concerning presidential activities, and that presidential claims of executive privilege extend to private matters, including communications with White House aides about civil lawsuits filed against the President and criminal investigations. These administration claims were rejected by lower federal courts. In a related case, however, the Supreme Court rejected Office of Independent Counsel efforts to subpoena the notes of meetings between a White House attorney (who had committed suicide) and his private counsel.

This melding of personal and public was also a prominent feature of impeachment proceedings against Clinton. Defenders of the President argued that the proceedings concerned personal sins (inappropriate sexual relations with a White House intern). Critics of the President claimed that the President turned these personal sins into public wrongs—lies and misrepresentations before a federal court judge and a federal GRAND JURY as well as the obstruction of justice. With most members of Congress voting along party lines, a majority of the House voted to impeach Clinton while the U.S. SENATE did not come close to the two-thirds vote necessary to remove him from office. Most senators, however, did condemn the President for his lies, obfuscation, and philandery.

NEAL DEVINS
(2000)

(SEE ALSO: *Articles of Impeachment of William J. Clinton.*)

## *CLINTON v. JONES*
520 U.S. 681 (1997)

*Clinton v. Jones* is one of the Supreme Court's most important decisions on PRESIDENTIAL IMMUNITY. The case involved the issue of whether a sitting President was immune to civil actions based on his conduct before he took office. Whereas the Court had held 5–4 in NIXON V. FITZGERALD (1982) that a President was entitled to absolute immunity from civil lawsuits arising from the discharge of his official duties, a unanimous Court held in *Clinton v. Jones* that a President is not entitled to immunity from lawsuits based on his unofficial actions.

The plaintiff in *Clinton v. Jones*, Paula Corbin Jones, alleged that President WILLIAM J. CLINTON sexually harassed her while he was governor of Arkansas in 1991. Although Clinton denied any wrongdoing, his lawyers argued the lawsuit should be delayed until Clinton left office because burdening a President with litigation would allow judges or legal proceedings to interfere unduly with the performance of his official duties. In an opinion for eight Justices, Justice JOHN PAUL STEVENS explained this kind of burden would never impair the "Executive's ability to perform its constitutionally mandated functions." The Court maintained that denying the President's immunity claim would not produce horrible consequences. It noted that all prior civil suits based on pre-presidential conduct—brought against THEODORE ROOSEVELT, HARRY S. TRUMAN, and JOHN F. KENNEDY—had been quickly dismissed or settled.

The Court explained that two principles supported its conclusion. The first, employed in YOUNGSTOWN SHEET & TUBE CO. V. SAWYER (1952) and MARBURY V. MADISON (1803), was "that when the President takes official action, the Court has the authority to determine whether he has acted within the law." The second principle, applied in UNITED STATES V. NIXON (1973) and *United States v. Burr* (1807), was that "the President is subject to judicial process in appropriate circumstances." Indeed, sitting Presidents, including JAMES MONROE, RICHARD M. NIXON, and even Clinton himself, "have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches" have become commonplace.

The Court remarked that a trial court could accommodate a President's scheduling needs, but refused to recognize a constitutional immunity that required such accommodations. In a separate concurrence, Justice STEPHEN G. BREYER recognized a constitutional principle "that forbids a federal Judge . . . to interfere with the President's discharge of his public duties." Breyer explained this principle would apply once a President had shown "a conflict between judicial proceedings and public duties."

After completing discovery in *Clinton v. Jones*, District Judge Susan Webber Wright dismissed the lawsuit for failing to state a legally cognizable cause of action. Her ruling did not, however, end the President's legal troubles. Before the lawsuit's dismissal, Kenneth Starr, the INDEPENDENT COUNSEL who had been investigating charges of possible misconduct by Clinton regarding a failed land-deal while he was governor of Arkansas, was tipped off that the President and a former White House intern, Monica Lewinsky, might each have lied under oath in *Clinton v. Jones* about the nature of their relationship. Lewinsky had filed an affidavit in the case denying that she had ever had a sexual relationship with the President, while Clinton testified in a deposition on January 17, 1998, that he had never had a sexual relationship with the intern nor ever been alone with her. Subsequent to the dismissal of Jones's lawsuit, the Independent Counsel granted Lewinsky limited immunity to testify about the President's efforts to obstruct the Jones lawyers' and Independent Counsel's lawful attempts to learn about the real nature of her relationship with the President. In an appearance before a federal GRAND JURY on August 18, 1998, Clinton acknowledged an "inappropriate relationship" with Lewinsky but defended the truthfulness of his prior testimony and actions to conceal his relationship with Lewinsky.

Shortly after the President's grand jury appearance, Starr referred to the U.S. HOUSE OF REPRESENTATIVES materials that he claimed indicated that the President had committed eleven possible impeachable offenses in trying to conceal his relationship with Lewinsky from Jones's lawyers and Starr's office. The referral sparked an IMPEACHMENT inquiry against the President. In the midst of the House's proceedings, the President settled Paula Jones's lawsuit then pending on appeal before the U.S. Court of

Appeals for the Eighth Circuit. Nevertheless, the House impeached the President for perjury and obstruction of justice. On February 12, 1999, the U.S. SENATE acquitted the President on both charges.

Within a month of the President's acquittal, Wright cited him for CONTEMPT based on his untruthful testimony in his deposition. In the contempt citation, Wright concluded that "the President's deposition testimony regarding whether he had ever been alone with Ms. Lewinsky was intentionally false, and his statements regarding whether he had ever engaged in sexual relations with Ms. Lewinsky likewise were intentionally false." Consequently, Wright fined the President for the reasonable expenses incurred by the plaintiff's attorneys because of his testimony and by the judge in attending to the deposition. She also referred the matter "to the Arkansas Supreme Court's Committee on Professional Conduct for review and any disciplinary action it deems appropriate."

*Clinton v. Jones* and its fallout have engendered criticism of every institution with which the case has come into contact. For many scholars, the fact that the lawsuit and its fallout paralyzed the national government for over a year flatly contradicts the Supreme Court's assumption in *Clinton v. Jones* that a civil lawsuit based on a President's activities before taking office could proceed without substantially interfering with a President's ability to do his job. Many other scholars, prosecutors, and members of Congress have abandoned support for the Independent Counsel Act; they claim Starr's relentless investigation of the President for nearly six years, including Starr's controversial investigation of matters relating to *Clinton v. Jones* (a case many believe was politically motivated), demonstrates the dangerous and uncontrollable lengths to which a politically unaccountable prosecutor will go to vindicate his charge.

A vocal minority defends *Clinton v. Jones* by placing primary responsibility on the President for the case's fallout. They suggest he could have avoided impeachment and contempt by being more candid in his deposition and grand jury testimony. Moreover, the President's acquittal ironically tracks the logic of the Court's decision in *Clinton v. Jones*. After all, the Court indicated that it would not have allowed the lawsuit against Clinton to proceed had it involved anything that implicated his official duties. Many senators voted against—and much of the public consistently opposed—the President's removal because his misconduct lacked a sufficiently public dimension or nexus to his official duties.

Consequently, the questions remain in what other fora and when a sitting President may be held accountable for unimpeachable misconduct. The suggestion in *Clinton v. Jones* that one such forum is a civil proceeding generates more concerns than it allays, because it plainly allows, as the fallout from the case demonstrates, a plaintiff or judge to interfere, perhaps substantially, with a President's performance of his duties. Indeed, *Clinton v. Jones* exacerbates these concerns further, for it leaves unaddressed whether a President before being impeached may be criminally prosecuted or imprisoned. Regardless of the legitimacy of these concerns, *Clinton v. Jones* clarified that in the future a President's only options in the face of burdensome litigation will not be constitutional immunity but rather a congressional act creating immunity or a sympathetic exercise of a trial judge's scheduling discretion.

MICHAEL J. GERHARDT
(2000)

## CLOSED SHOP

A workplace is a closed shop if, by virtue of a labor contract, only the members of a particular union may be hired. After passage of the TAFT-HARTLEY ACT (1947), the closed shop was replaced by the "union shop" wherein one must join the union after being hired.

DENNIS J. MAHONEY
(1986)

## CLOTURE

Cloture terminates debate in a legislative body. The rules of the SENATE encourage extended debates and, by taking advantage of those rules, sectional or ideological cliques can prevent action on bills they oppose. Only after rules reforms in the early 1960s made cloture easier did Congress pass effective CIVIL RIGHTS ACTS.

DENNIS J. MAHONEY
(1986)

## CLYMER, GEORGE
(1739–1813)

George Clymer, who represented Pennsylvania at the CONSTITUTIONAL CONVENTION OF 1787, was a signer of both the DECLARATION OF INDEPENDENCE and the Constitution. Clymer did not speak often, but he was a member of the committees on state debts and the slave trade.

DENNIS J. MAHONEY
(1986)

## *COCHRAN v. LOUISIANA*
281 U.S. 370 (1930)

Louisiana provided books to all public and private school children. The private school support was challenged on

FOURTEENTH AMENDMENT grounds as a use of public money for private purposes. Chief Justice CHARLES EVANS HUGHES held that the state's purpose was public.

*Cochran* is sometimes cited as an accommodationist precedent, but it was not decided under the establishment clause, which was not considered to apply to the states at that time.

RICHARD E. MORGAN
(1986)

## *CODISPOTI v. PENNSYLVANIA*
418 U.S. 506 (1974)

A 5–4 Court here extended its decision in DUNCAN V. LOUISIANA (1968) to persons receiving serious punishment for criminal contempt. Following their trial, two defendants were cited for contempt and given several consecutive sentences for contempt of court. *Bloom v. Illinois* (1968) served as the basis for Justice BYRON R. WHITE's opinion that the defendants were entitled to a TRIAL BY JURY. Even though no single sentence exceeded six months, the consecutive sentences could not be separated; they all stemmed from one trial conducted as a single proceeding by one judge.

DAVID GORDON
(1986)

## COEFFICIENT CLAUSE

See: Necessary and Proper Clause

## COERCED CONFESSION

See: Police Interrogation and Confessions

## COERCED SPEECH

See: Compelled Speech

## COERCIVE ACTS

See: Constitutional History Before 1776; First Continental Congress, Declarations and Resolves of

## COHEN, MORRIS R.
(1880–1947)

Morris Raphael Cohen came to the United States from Russia in 1892. After receiving his doctorate from Harvard in 1906, Cohen taught philosophy at the City College of New York from 1912 until 1938, when he retired to devote the rest of his life to writing.

A disciple of Justice OLIVER WENDELL HOLMES, Cohen rejected the conventional belief that judges decide cases by mechanical application of independently existing legal rules; he argued that the process of judicial lawmaking should be guided by the scientific method, a thorough understanding of the social consequences of judicial decisions, and a hierarchical set of social values. Believing natural law to be the measure of justice and advocating the philosophical analysis of legal systems, Cohen attacked such proponents of LEGAL REALISM as JEROME FRANK and THURMAN ARNOLD for their refusal to recognize any external standard by which positive law could be criticized. Cohen's legal writings are collected in *Law and the Social Order* (1933) and *Reason and Law* (1950).

RICHARD B. BERNSTEIN
(1986)

Bibliography

HOLLINGER, DAVID A. 1975 *Morris R. Cohen and the Scientific Ideal.* Cambridge, Mass.: M.I.T. Press.

## *COHEN v. CALIFORNIA*
403 U.S. (1971)

Cohen was convicted of disturbing the peace. He wore a jacket bearing the words "Fuck the draft" while walking down a courthouse corridor. In overturning the conviction, a 5–4 Supreme Court held that the FIGHTING WORDS exception to FIRST AMENDMENT protection did not apply where "no individual . . . likely to be present could reasonably have regarded the words . . . as a direct personal insult," and there was no showing that anyone who saw Cohen was in fact violently aroused or that . . . [he] . . . intended such a result." Both majority and dissenters suggested that the failure to show that violence was imminent as the result of the words was fatal to the state's case. The Court thus made clear that words, in the abstract, cannot be read out of the First Amendment; the "fighting words" doctrine depends on the context in which words are uttered.

The state's assertion of other justifications for punishing Cohen were similarly rejected: the jacket's message was not OBSCENITY, because it was not erotic; the privacy interests of offended passers-by were insubstantial in this public place, and anyone offended might look away; there was no CAPTIVE AUDIENCE.

Cohen's chief doctrinal importance lies in its rejection of the notion that speech can constitutionally be prohibited by the state because it is offensive. Because offen-

siveness is an "inherently boundless" category, any such prohibition would suffer from the vice of VAGUENESS. And the First Amendment protects not only the cool expression of ideas but also "otherwise inexpressible emotions."

MARTIN SHAPIRO
(1986)

## *COHEN v. COWLES MEDIA CO.*
501 U.S. 663 (1991)

Late in the 1983 Minnesota gubernatorial campaign, Dan Cohen, an active Republican, offered to provide politically sensitive documents to a *Minneapolis Star and Tribune* reporter. Cohen insisted his name not be mentioned, and the reporter promised confidentiality. Senior editors decided, however, to publish the documents and to cite Cohen as the source.

When the story appeared, Cohen was fired. He sued the newspaper for damages on the basis of the broken promise. A jury returned a verdict in Cohen's favor, but the Minnesota Supreme Court held that such an award would violate the FREEDOM OF THE PRESS. The U.S. Supreme Court reversed the state court. A 5–4 majority, speaking through Justice BYRON R. WHITE, relied on a "line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."

Four Justices dissented, in an opinion by Justice DAVID H. SOUTER, arguing that a state's interest in granting damages for a broken promise is "insufficient to outweigh the interest in unfettered publication of the information revealed in this case." Justice HARRY A. BLACKMUN also wrote a separate DISSENTING OPINION, analogizing the case to HUSTLER MAGAZINE AND LARRY FLYNT V. JERRY FALWELL (1988).

ROBERT M. O'NEIL
(2000)

(SEE ALSO: *Journalistic Practices, Tort Liability, and the Freedom of the Press.*)

## *COHENS v. VIRGINIA*
6 Wheat. 265 (1821)

In the rancorous aftermath of MCCULLOCH V. MARYLAND (1819), several states, led by Virginia and Ohio, denounced and defied the Supreme Court. State officers of Ohio entered the vaults of a branch of the Bank of the United States and forcibly collected over $100,000 in state taxes. (See OSBORN V. BANK OF THE UNITED STATES.) Virginia's legislature resolved that the Constitution be amended to create "a tribunal for the decision of all questions, in which the powers and authorities of the general government and those of the States, where they are in conflict, shall be decided." Widespread and vitriolic attacks on the Court, its doctrine of IMPLIED POWERS, and section 25 of the JUDICIARY ACT OF 1789 showed that MARTIN V. HUNTER'S LESSEE (1816) and *McCulloch* were not enough to settle the matters involved, especially as to the JURISDICTION of the Court over state acts and decisions in conflict with the supreme law of the land as construed by the Court. Accordingly a case appears to have been contrived to create for Chief Justice JOHN MARSHALL an opportunity to reply officially to his critics and to reassert both national supremacy and the supreme appellate powers of his Court.

Two brothers surnamed Cohen sold lottery tickets in Norfolk, Virginia, contrary to a state act prohibiting their sale for a lottery not authorized by Virginia. The Cohens sold tickets for a lottery authorized by an act of Congress to benefit the capital city. In Norfolk the borough court found the defendants guilty and fined them $100. By Virginia law, no appeal could be had to a higher state court. The Cohens, prosperous Baltimore merchants who could easily afford the paltry fine, claimed the protection of the act of Congress and removed the case on WRIT OF ERROR from the local court to the highest court of the land; moreover they employed the greatest lawyer in the nation, William Pinckney, whose usual fee was $2,000 a case, and another distinguished advocate, David B. Ogden, who commanded a fee of $1,000. More was at stake than appeared. "The very title of the case," said the Richmond *Enquirer,* "is enough to stir one's blood"—a reference to the galling fact that the sovereign state of Virginia was being hauled before the Supreme Court of the United States by private individuals in seeming violation of the ELEVENTH AMENDMENT. The state governor was so alarmed that he notified the legislature, and its committee, referring to the states as "sovereign and independent nations," declared that the state judiciaries were as independent of the federal courts as the state legislatures were of Congress, the twenty-fifth section of the 1789 notwithstanding. The legislature, having adopted solemn resolutions of protest and repudiating federal JUDICIAL REVIEW, instructed counsel representing Virginia to argue one point alone: that the Supreme Court had no jurisdiction in the case. Counsel, relying on the Eleventh Amendment to argue that a state cannot be sued without its consent, also contended that not a word in the Constitution "goes to set up the federal judiciary above the state judiciary."

Marshall, for a unanimous Court dominated by Republicans, conceded that the main "subject was fully discussed and exhausted in the case of *Martin v. Hunter,*" but that did not stop him from writing a fifty-five-page treatise which concluded that under section 25 the Court had ju-

risdiction in the case. Marshall said little that was new, but he said it with a majestic eloquence and a forcefulness that surpassed JOSEPH STORY's, and the fact that the Chief Justice was the author of the Court's nationalist exposition, addressed to STATES RIGHTS' advocates throughout the country, added weight and provocation to his utterances. He was sublimely rhapsodic about the Constitution and the Union it created, sarcastic and disparaging in restating Virginia's position. Boldly he piled inference upon inference, overwhelming every particle of disagreement in the course of his triumphs of logic and excursions into the historical record of state infidelity. And he had a sense of the melodramatic that Story lacked, as when Marshall began his opinion by saying that the question of jurisdiction "may be truly said vitally to affect the Union." The defendant in error—Virginia—did not care whether the Constitution and laws of the United States had been violated by the judgment of guilt that the Cohens sought to have reviewed. Admitting such violation, Virginia contended that the United States had no corrective. Virginia, Marshall continued, maintained that the nation possessed no department capable of restraining, peaceably and by authority of law, attempts against the legitimate powers of the nation. "They maintain," he added, "that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every state of the Union." Virginia even maintained that the supreme law of the land "may receive as many constructions as there are states. . . ." Marshall confronted and conquered every objection.

Quickly turning to Article III, Marshall observed that it authorizes Congress to confer federal jurisdiction in two classes of cases, the first depending on the character of the case and the second on the character of the parties. The first class includes "all" cases involving the Constitution and federal laws and treaties, "whoever may be the parties," and the second includes all cases to which states are parties. By ratifying the Constitution the states consented to judicial review in both classes of cases, thereby making possible the preservation of the Union. That Union is supreme in all cases where it is empowered to act, as Article VI, the SUPREMACY CLAUSE, insures by making the Constitution and federal law the supreme law of the land. The Court must decide every case coming within its constitutional jurisdiction to prevent the supreme law of the land from being prostrated "at the feet of every state in the Union" or being vetoed by any member of the Union. Collisions between the United States and the states will doubtless occur, but, said Marshall, "a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it." To prevail, the government of the Union derived from the Constitution the means of self-preservation. The federal courts existed to secure the execution of the laws of the Union. History proved, Marshall declared, that the states and their tribunals could not be trusted with a power to defeat by law the legitimate measures of the Union. Thus the Supreme Court can take APPELLATE JURISDICTION even in a case between a state and one of its own citizens who relied on the Constitution or federal law. Otherwise Article III would be mere surplusage, as would Article VI. For the Court to decline the jurisdiction authorized by Article III and commanded by Congress would be "treason to the Constitution."

Although Marshall's rhetoric certainly addressed itself, grandiosely, to the question of jurisdiction, his critics regarded all that he had declared thus far as OBITER DICTA, for he had not yet faced the Eleventh Amendment, which Virginia thought concluded the case on its behalf. Upon finally reaching the Eleventh Amendment question, Marshall twisted a little history and chopped a little logic. The amendment, he said, was adopted not to preserve state dignity or sovereignty but to prevent creditors from initiating suits against states that would raid their treasuries. The amendment did not, therefore, apply to suits commenced by states and appealed by writ of error to the Supreme Court for the sole purpose of inquiring whether the judgment of a state tribunal violated the Constitution or federal law.

The argument that the state and federal judiciaries were entirely independent of each other considered the Supreme Court as "foreign" to state judiciaries. In a grand peroration, Marshall made his Court the apex of a single judicial system that comprehended the state judiciaries to the extent that they shared a concurrent jurisdiction over cases arising under the supreme law of the land. For most important purposes, Marshall declared, the United States was "a single nation," and for all those purposes, its government is supreme; state constitutions and laws to the contrary are "absolutely void." The states "are members of one great empire—for some purposes sovereign, for some purposes subordinate." The role of the federal judiciary, Marshall concluded, was to void state judgments that might contravene the supreme law; the alternative would be "a hydra in government."

Having sustained the jurisdiction of the Court, Marshall offered a sop to Virginia: whether the congressional lottery act intended to operate outside the DISTRICT OF COLUMBIA, he suggested, depended on the words of that act. The case was then reargued on its merits, and Marshall, again for a unanimous Court, quickly sustained the Cohens' conviction: Congress had not intended to permit the sale of lottery tickets in states where such a sale was illegal.

Virginia "won" its case, just as Madison had in *Marbury*

*v. Madison* (1803), but no one was fooled this time either. The governor of Virginia in a special message to his legislature spoke of the state's "humiliation" in having failed to vindicate its sovereign rights. A legislative committee proposed amendments to the Constitution that would cripple not only the JUDICIAL POWER OF THE UNITED STATES but also (reacting to *McCulloch*) the powers of Congress in passing laws not "absolutely" necessary and proper for carrying out its ENUMERATED POWERS. In the United States Senate, enemies of the Court proposed constitutional amendments that would vest in the Senate appellate jurisdiction in cases where the laws of a state were impugned and in all cases involving the federal Constitution, laws, or treaties. Intermittently for several years senators introduced a variety of amendments to curb the Court or revoke section 25, but those who shared a common cause did not share a common remedy, though GREEN V. BIDDLE (1823) and OSBORN V. BANK OF THE UNITED STATES (1824) inflamed their cause.

In Virginia, where the newspapers published Marshall's long opinion to the accompaniment of scathing denunciations, SPENCER ROANE and JOHN TAYLOR returned to a long battle that had begun with the *Martin* case and expanded in the wake of *McCulloch.* Roane, as "Algernon Sydney," published five articles on the theme that *Cohens* "negatives the idea that the American states have a real existence, or are to be considered, in any sense, as sovereign and independent states." He excoriated federal judicial review, implied powers, and the subordination of the states, by judicial construction, to "one great consolidated government" that destroyed the equilibrium of the Constitution, leaving that compact of the states nonexistent except in name. Taylor's new book, *Tyranny Unmasked* (1822), continued the themes of his *Construction Construed* (1820), where he argued that the "federal is not a national government: it is a league of nations. By this league, a limited power only over persons and property was given to the representatives of the united nations." The "tyranny" unmasked by the second book turned out to be nationalist programs, such as the protective tariff, and nationalist powers, including the power of the Supreme Court over the states.

THOMAS JEFFERSON read Roane and Taylor, egged them on, and congratulated them for their orthodox repudiation of the Court's "heresies." To Justice WILLIAM JOHNSON, who had joined Marshall's opinion, Jefferson wrote that Roane's articles "appeared to me to pulverize every word which had been delivered by Judge Marshall, of the extrajudicial part of his opinion," and to Jefferson "all was extrajudicial"—and he was not wholly wrong—except the second *Cohens* opinion on the merits. Jefferson also wrote that the doctrine that courts are the final arbiters of all constitutional questions was "dangerous" and "would place us under the despotism of an oligarchy." Recommending the works of Roane and Taylor to a friend, Jefferson militantly declared that if Congress did not shield the states from the dangers originating with the Court, "the states must shield themselves, and meet the invader foot to foot." To Senator NATHANIEL MACON of Virginia, Jefferson wrote that the Supreme Court was "the germ of dissolution of our federal government" and "an irresponsible body," working, he said, "like gravity, by day and night, gaining a little today and a little tomorrow, and advancing its noiseless step, like a thief over the fields of jurisdiction, until all shall be usurped from the States, the government of all becoming a consolidated one."

JAMES MADISON deplored some of the Court's tactics, especially its mingling of judgments with "comments and reasoning of a scope beyond them," often at the expense of the states; but Madison told Roane flatly that the judicial power of the United States "over cases arising under the Constitution, must be admitted to be a vital part of the System." He thought Marshall wrong on the Eleventh Amendment and extreme on implied powers, but, he wrote to Roane, on the question "whether the federal or the State decisions ought to prevail, the sounder policy would yield to the claims of the former," or else "the Constitution of the U.S. might become different in every State."

The public reaction to *Cohens* depressed Marshall, because, as he wrote to Story, the opinion of the Court "has been assaulted with a degree of virulence transcending what has appeared on any former occasion." Roane's "Algernon Sydney" letters, Marshall feared, might be believed true by the public, and Roane would be hailed as "the champion of state rights, instead of being what he really is, the champion of dismemberment." Marshall saw "a deep design to convert our government into a mere league of States. . . . The attack upon the Judiciary is in fact an attack upon the Union." The whole attack originated, he believed, with Jefferson, "the grand Lama of the mountains." An effort would be made, predicted Marshall, accurately, "to repeal the 25th section of the Judiciary Act." Doubtless the personal attacks on him proved painful. A bit of anonymous doggerel, which circulated in Virginia after *Cohens*, illuminates public feeling.

> Old Johnny Marshall what's got in ye
> To side with Cohens against Virginny.
> To call in Court his "Old Dominion."
> To insult her with your foul opinion!
> I'll tell you that it will not do
> To call old Spencer in review.
> He knows the law as well as you.
> And once for all, it will not do.
> Alas! Alas! that you should be
> So much against State Sovereignty!

You've thrown the whole state in a terror,
By this infernal "Writ of Error."

The reaction to *Cohens* proves, in part, that the Court's prose was overbroad, but Marshall was reading the Constitution in the only way that would make the federal system operate effectively under one supreme law.

LEONARD W. LEVY
(1986)

Bibliography

BEVERIDGE, ALBERT J. 1916–1919 *The Life of John Marshall*, 4 vols. Vol. IV: 340–375. Boston: Houghton-Mifflin.

HAINS, CHARLES GROVE 1944 *The Role of the Supreme Court in American Government and Politics, 1789–1835.* Pages 427–461. Berkeley: University of California Press.

KONEFSKY, SAMUEL J. 1964 *John Marshall and Alexander Hamilton.* Pages 93–111. New York: Macmillan.

# COKE, EDWARD
## (1552–1634)

Edward Coke (pronounced Cook) was an English lawyer, judge, and parliamentarian who influenced the development of English and American constitutional law by promoting the supremacy of the COMMON LAW in relation to parliamentary powers and the royal prerogative.

After studying at Trinity College, Cambridge, Coke entered the Inner Temple and was called to the Bar in 1578. His career was outstanding from the start. He was elected to Parliament in 1589 and in 1593 he became Speaker of the House of Commons. Appointed attorney-general in 1594, he prosecuted several notable TREASON cases, including that of Sir Walter Raleigh in 1603.

In 1600, Coke began publication of his *Reports.* Eleven volumes had been published by 1615; two additional volumes appeared after his death. These were not collections of appellate opinions; rather, they consisted of case notes made by Coke, legal history, and general criticism. Coke had mastered the precedents, and he brought symmetry to scattered authority. Thereafter, *The Reports*, as they were usually called, were the authoritative common law precedents in England and colonial America.

Coke was appointed Chief Justice of the Court of Common Pleas in 1606, serving until 1613, when he was appointed Chief Justice of the Court of King's Bench. His judicial career was terminated in 1616 when King James I removed him from office. During these years Coke began enunciating ideas concerning the supremacy of the common law, foreshadowing modern concepts of government under law.

Coke's judicial pronouncement most influential on the American doctrine of JUDICIAL REVIEW came in BONHAM'S CASE (1610). The College of Physicians had fined and imprisoned Dr. Bonham for practicing medicine without a license. The court held that because the College would share in the fine, the charter and parliamentary act conferring this authority were contrary to the common law principle that no man can be a judge in his own case. Coke stated: "And it appears in our books, that in many cases, the common law will control acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void. . . ." Coke believed that the common law contained a body of fundamental, although not unchangeable, principles to be ascertained and enunciated by judges through the "artificial reason" of the law. In *Bonham's Case* he seemed to be reasoning that parliamentary acts must be interpreted consistently with those principles. Whatever Coke's precise meaning, however, the statement foreshadowed the American DOCTRINE of judicial review; it was influential in the developing concept of the supremacy of law as interpreted and applied by the judiciary.

Another incident of Coke's judicial career that contributed to the modern idea of government under law came in 1608 during a confrontation with James I. The king had claimed authority to withdraw cases from the courts and decide them himself. In a dramatic Sunday morning meeting convened by the king and attended by all the judges and bishops, Coke maintained that there was no such royal authority. He asserted, quoting Bracton, that the king was not under man "but under God and law," one of the earliest and most quoted expressions of this concept.

Coke returned to Parliament in 1620 and in the final phase of his career made two major contributions to constitutional government and English and American law.

Drawing on the provision in MAGNA CARTA that "no free man shall be taken [or] imprisoned . . . except by the . . . law of the land," he launched the concept of "due process of law." Coke asserted that this provision referred to the established processes of the common law. He expressed this view in the parliamentary debates leading to the PETITION OF RIGHT in 1628, raising Magna Carta to new heights with statements such as "Magna Carta is such a fellow that he will have no sovereign." Coke's arguments presaged the later American concept of a written constitution superior to other law. He also linked Magna Carta with HABEAS CORPUS, although there was little historical support for the connection. He believed that there must be a remedy for imprisonment contrary to common law process and the remedy was to be had through the writ of habeas corpus.

Coke's other major contribution in his last years was the writing of his *Institutes.* This four-part work, published

in 1641, became a basic text in the education of lawyers in England and America. In America, where law books were few, the *Institutes* were the standard work before the publication of WILLIAM BLACKSTONE's *Commentaries* in 1767. As noted by the Supreme Court in one of its several twentieth-century references to Coke (KLOPFER V. NORTH CAROLINA, 1967): "Coke's Institutes were read in the American Colonies by virtually every student of the law. Indeed, THOMAS JEFFERSON wrote that at the time he studied law (1762–1767), *Coke Lyttleton* was the universal elementary book of law students. And to JOHN RUTLEDGE of South Carolina, the Institutes seemed to be almost the foundation of our law." Because few lawyers in England and America had either the inclination or the resources to go behind Coke's *Institutes* and his *Reports*, these works, despite historical inaccuracies revealed by later scholarship, became the authoritative legal source on both sides of the Atlantic.

Coke represents a transition from medieval to modern law. He lived in the dawn of the modern constitutional era, when the British colonization of North America was beginning. As the colonists later sought authority to support their arguments that royal power was limited by law, they found it in Coke. Since the American Revolution, Coke has been regarded as an early authority for the proposition that all government is under law and that it is ultimately for the courts to interpret the law.

DANIEL J. MEADOR
(1986)

Bibliography

BOUDIN, LOUIS B. 1929 Lord Coke and the American Doctrine of Judicial Power. *New York University Law Review* 6:223–246.

BOWEN, CATHERINE D. 1957 *The Lion and the Throne: The Life and Times of Sir Edward Coke.* Boston: Little, Brown.

MULLETT, CHARLES F. 1932 Coke and the American Revolution. *Economica* 12:457–471.

## *COKER v. GEORGIA*
433 U.S. 584 (1977)

Ehrlich Coker, an escaped felon, was convicted of rape with aggravating circumstances and sentenced to die. The Supreme Court, in a 7–2 decision, overturned the sentence. Justice BYRON R. WHITE, in a PLURALITY OPINION, argued that CAPITAL PUNISHMENT is "grossly disproportionate and excessive punishment for the crime of rape," and therefore unconstitutional under the Eighth Amendment, binding on the states through the FOURTEENTH AMENDMENT. Justice LEWIS F. POWELL's concurring opinion was applicable to the facts of this case only, while Justice WILLIAM J. BRENNAN and THURGOOD MARSHALL would have held the death penalty unconstitutional in any case whatsoever. Chief Justice WARREN E. BURGER and Justice WILLIAM H. REHNQUIST dissented, arguing that Coker's sentence was within the reserved power of the State.

DENNIS J. MAHONEY
(1986)

## *COLEGROVE v. GREEN*
328 U.S. 549 (1946)

*Colegrove v. Green* and BAKER V. CARR (which all but overruled *Colegrove* in 1962) bracket the passage of the ONE PERSON, ONE VOTE movement from failure to success. Migration had drastically enlarged urban electoral districts and reduced rural ones in most states, but legislators and voters were slow to reapportion, and reapportionists turned to courts for relief. But courts were wary of tampering with legislators' seats.

The Supreme Court dismissed Colegrove's suit to enjoin Illinois congressional elections in "malapportioned" districts. The Justices gave two reasons: the case wanted EQUITY to make an INJUNCTION appropriate, and it presented a POLITICAL QUESTION reserved for decision of the elected branches both by constitutional mandate and by lack of judicially appropriate standards of judgment. "Courts," said Justice FELIX FRANKFURTER, "ought not to enter this political thicket." Three Justices dissented, arguing that the case did not lack equity, that the question was not political, and that constitutional mandate and standards could be found in Article I, section 2, and the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT—a debatable assertion little argued in either *Colegrove* or *Baker*. Justice WILEY RUTLEDGE, the tiebreaker, thought the question nonpolitical but joined in the vote for dismissal for want of equity.

Though the Court dismissed all REAPPORTIONMENT cases for sixteen years, citing *Colegrove*, Rutledge's discretionary rationale left room for the debate between Justices WILLIAM J. BRENNAN and Frankfurter in *Baker*, and for the intervention that led to the reapportionment revolution. The applicability of the equal protection clause to reapportionment was not seriously debated until REYNOLDS V. SIMS (1964) and OREGON V. MITCHELL (1970). Justices HUGO L. BLACK and JOHN MARSHALL HARLAN debated the applicability of Article I, section 2, in WESBERRY V. SANDERS (1964), which finally overruled *Colegrove*.

WARD E. Y. ELLIOTT
(1986)

Bibliography

AUERBACH, CARL A. 1964 The Reapportionment Cases: One Person, One Vote—One Vote, One Value." *Supreme Court Review* 1964:1–87.

## *COLEMAN v. MILLER*
307 U.S. 433 (1939)

The lieutenant governor of Kansas had broken a tie vote in the Kansas senate to endorse a CHILD LABOR AMENDMENT, which Kansas had previously rejected. The losing senators, opponents of the amendment, challenged the vote because the lieutenant governor was not a part of the state "legislature" within the meaning of Article V and because the previous rejection of the amendment, plus the lapse of thirteen years, had cost the amendment its "vitality."

Over objections from dissenting Justices PIERCE BUTLER and JAMES C. MCREYNOLDS that the lapse of time issue had not been briefed or argued, Chief Justice CHARLES EVANS HUGHES declined to hear the challenge, citing the ratification of the FOURTEENTH AMENDMENT and arguing that efficacy of ratification—both as to lapse of time and as to the prior rejection—was a POLITICAL QUESTION, requiring "appraisal of a great variety of relevant conditions, political, social, and economic," not "within the appropriate range of EVIDENCE receivable in a court." Dominant considerations in political questions, he noted, are the "appropriateness of final action" by the elected branch and the "lack of satisfactory criteria for judicial determination."

Justice HUGO L. BLACK, writing for four concurring Justices, thought that Hughes had not sufficiently emphasized Congress's "exclusive power to control submission of constitutional amendments." An evenly divided Court expressed no opinion as to whether counting the lieutenant governor as part of the legislature was a political question.

WARD E. Y. ELLIOTT
(1986)

Bibliography

SCHARPF, FRITZ W. 1966 Judicial Review and the Political Question: A Functional Analysis. *Yale Law Journal* 75:517–597.

## *COLGATE v. HARVEY*
296 U.S. 404 (1935)

This case is a historical curiosity. Vermont taxed the income from money loaned out of state but exempted from taxation any income from money loaned in the state at not more than five percent interest. The Supreme Court, in an opinion by Justice GEORGE SUTHERLAND, held the act unconstitutional as a violation of the EQUAL PROTECTION and PRIVILEGES AND IMMUNITIES clauses of the FOURTEENTH AMENDMENT. Justices HARLAN F. STONE, LOUIS D. BRANDEIS, and BENJAMIN N. CARDOZO, in dissent, found difficulty in perceiving a privilege of national CITIZENSHIP which the state had violated, especially because the Court had decided forty-four cases since 1868 in which state acts had been attacked as violating the privileges and immunities clause and until this case had held none of them unconstitutional. MADDEN V. KENTUCKY (1940) overruled *Colgate*.

LEONARD W. LEVY
(1986)

# COLLATERAL ATTACK

As a general proposition a litigant gets one chance to present his case to a trial court; if he is dissatisfied with the result, he may APPEAL. What he cannot do, however, is to attack it "collaterally," starting the lawsuit all over again at the bottom, not so much asserting error in the first proceeding as ignoring it or trying to have the second trial court undo its results. This COMMON LAW doctrine forbidding collateral attack exists independently of the Constitution, which makes no direct mention of it. But the Constitution is frequently incomprehensible without some reference to its common law background. In this instance the document at three points implicates the doctrine of collateral attack. One section, the FULL FAITH AND CREDIT clause, seems to forbid collateral attack in civil cases (except where DUE PROCESS may require otherwise); the HABEAS CORPUS clause, by contrast, seems to require it in at least some criminal cases.

What constitutes collateral attack is itself often a difficult question; different JURISDICTIONS attach different significance to their judgments. As a general proposition, though, the full faith and credit clause requires that State A give the JUDGMENTS of State B the same effect State B would; to that extent the clause prohibits collateral attack in the interstate context. (A federal statute imposes the same requirements on federal courts.) The due process clause, however, limits the full faith and credit clause; if the courts of the state rendering the first judgment lacked jurisdiction over the defendant, the full faith and credit clause does not bar collateral attack. Due process requires that a defendant be able collaterally to attack a judgment rendered by a court that lacked authority over him. The due process clause, however, requires a court to permit collateral attack only when the party using it has not pre-

viously litigated the issue of jurisdiction; if he has, that question, like all others, is closed. Moreover, one who engages in litigation without raising the question of jurisdiction is generally treated as if he had done so and lost; the justification for such treatment is that the litigant had an opportunity to do so: due process does not require giving a second chance to one who has actually engaged in a lawsuit. The operation of this proposition leaves open to collateral attack only those judgments entered without any participation by the defendant—default judgments.

Collateral attack is thus available but is rather tightly circumscribed in civil cases; those held in detention on criminal charges have a somewhat wider scope of collateral attack available to them. The habeas clause requires federal courts (and arguably also those of the states) to entertain challenges to detention. Interpreting the federal statutes implementing the clause, federal courts have permitted those in custody to complain of various basic constitutional defects in the trials leading to their conviction; courts in some circumstances have permitted such collateral attack even though the asserted constitutional defect could have been raised in a direct appeal. To that extent present habeas practice, like the due process clause, requires courts to permit collateral attack. Unlike the due process clause, however, the habeas statute has been interpreted to permit litigants in some circumstances to raise again issues already litigated in the criminal trial.

At one level, then, the Constitution appears to issue contradictory commands: recognize judgments as conclusive—except when they are not. At another level the contradiction disappears, for both commands flow from the same impulse: under normal conditions only direct attack by appeal is permissible, but when the basic prerequisites of proper adjudication are absent (the basis of judicial authority or the incidents of a fair criminal trial), the normal rules must give way.

STEPHEN C. YEAZELL
(1986)

Bibliography

AMERICAN LAW INSTITUTE 1971 *Restatement of the Law 2d, Conflicts of Laws.* St. Paul, Minn.: American Law Institute Publishers.

EISENBERG, THEODORE 1981 *Civil Rights Legislation.* Charlottesville, Va.: Michie Co.

NOTE 1957 The Value of the Distinction between Direct and Collateral Attacks on Judgments. *Yale Law Journal* 66:526–544.

## COLLECTIVE BARGAINING

Collective bargaining is the process of negotiation between employers and LABOR unions to establish the wages, hours, and working conditions of employees. Collective bargaining has been regulated by the federal government since passage of the WAGNER (NATIONAL LABOR RELATIONS) ACT (1935) and the TAFT-HARTLEY ACT (1947).

DENNIS J. MAHONEY
(1986)

## *COLLECTOR v. DAY*
11 Wallace 113 (1871)

In MCCULLOCH V. MARYLAND (1819) the Supreme Court had held unconstitutional a state tax on an instrumentality of the national government, and in *Dobbins v. Commissioners* (1842) the Court had forbidden a state to tax the salary of a federal officer. The Court had reasoned that a sovereign government must be immune from the taxes of another government to preserve its independence. Here the Court applied that doctrine reciprocally, holding that the United States had no constitutional power to tax the salary of a state judge. In GRAVES V. NEW YORK EX REL. O'KEEFE (1939) the Court overruled both *Dobbins* and *Collector*, vitiating the DOCTRINE of reciprocal tax immunities.

LEONARD W. LEVY
(1986)

(SEE ALSO: *Intergovernmental Immunity.*)

## *COLLINS v. CITY OF HARKER HEIGHTS*
503 U.S. 115 (1992)

Larry Collins, a city employee, died of asphyxia after entering a manhole to unstop a sewer line. His widow sued under SECTION 1983, TITLE 42, UNITED STATES CODE, alleging that municipalities must train and warn their employees about known workplace hazards. She claimed that the city's inadequate training, warning, and supplying of safety equipment violated the FOURTEENTH AMENDMENT guarantee of DUE PROCESS OF LAW. The Supreme Court, in a unanimous opinion by Justice JOHN PAUL STEVENS, rejected the claim. The Court viewed the claim as being analogous "to a fairly typical state-law tort claim" based on a breach of duty of care. It distinguished cases involving due process claims by those deprived of their liberty, such as prisoners. The holding extended a line of cases, beginning with PAUL V. DAVIS (1976), in which the Court has refused to find constitutional violations for what it regards as merely tortious misbehavior.

THEODORE EISENBERG
(2000)

## COLLUSIVE SUIT

Article III of the Constitution limits the federal courts to the decision of CASES OR CONTROVERSIES. One component of that limitation bars adjudication of the merits of a claim absent a real dispute between parties who have conflicting interests. If nominally opposing parties manufacture a lawsuit to secure a judicial ruling, if one party controls or finances both sides of a case, or if both parties in fact desire the same ruling, the suit will be dismissed as collusive. The issues in a case need not be contested, so long as the parties' ultimate interests in the litigation are opposed. Hence, a default judgment can be entered, or a guilty plea accepted. Nor are all TEST CASES forbidden as collusive—only those where the contestants seek the same outcome. Of course, other JUSTICIABILITY barriers may prevent adjudication.

Like the ban on ADVISORY OPINIONS, the rule banning collusive suits saves judicial resources for disputes that need resolution, helps assure that federal courts act only on the basis of the information needed for sound decision making, and, in constitutional cases, prevents premature judicial intervention in the political process. The rule also may block efforts by supposed adversaries (but actual allies) to procure a ruling detrimental to opponents who are not represented in the collusive action.

JONATHAN D. VARAT
(1986)

## COLONIAL CHARTERS

Perhaps no other American constitutional topic has been subject to such changing and contrary interpretations as has that of colonial charters. For example, GEORGE BANCROFT, who in 1834 had written that the Massachusetts charter of 1629 "established a CORPORATION, like other corporations within the realm," wrote in 1883 that the charter "constituted a body politic by the name of the Governor and Company of the Massachusetts Bay." Bancroft's apparent inconsistency is less contradiction than part of a constitutional controversy. Even during the colonial period constitutional experts disagreed about the legal nature of charters.

A few North American colonies (Plymouth, New Haven) had no charters. Most did, however, and the earliest charters were of two types. The first (Virginia, Massachusetts Bay), modeled on trading company charters granted to merchants, stressed commerce and settlement. The second (Maryland, Maine, Carolina) was based on the palatinate bishopric of Durham County, England. Later, a third type of charter was issued: "royal" charters for colonies in which the governor and other designated officers were appointed by the Crown. Containing more provisions directing government functions, royal charters generally defined a colony's relations with the mother country, not its internal constitution. No matter the type, charters were statements of privileges, not organic acts of government; they conferred immunities from prosecution and did not define structures of governance. Colonial charters, therefore, did not contribute significantly to constitutional law or history except when Americans claimed immunity from parliamentary authority.

American legal theory held that charters were contracts by which the king promised to protect and defend his American subjects in exchange for the subjects' allegiance. A better theory was that charters were evidence of a contract between the English crown and the first settlers of America. By either theory charters were not CONSTITUTIONS but one of the sources of constitutional rights along with the ancient English constitution, the current British constitution, the original contract, the second original contract, COMMON LAW, custom, and, to a minor degree, natural law. The first charter of Virginia stated a principle, repeated in later Virginia charters and in the charters of several other colonies, that the colonists "shall have and enjoy all Liberties, Franchises, and Immunities . . . to all Intents and Purposes as if they had been abiding and born within this our Realm of England. . . ." Americans of the Revolutionary period read such provisions as supporting their constitutional arguments against Britain. The legal theory subscribed to on the imperial side of the controversy held that charters created corporations not unlike municipal and commercial corporations in the mother country. As JOSEPH GALLOWAY declared, the colonies were only "corporations, or subordinate bodies politic, vested with *legislative* powers, to regulate their own internal police, under certain regulations and restrictions, and no more." A more extreme imperial theory held that charters were irrelevant; that the powers and limitations of colonial government came not from charters but from the instructions that British ministers issued to colonial governors. This theory, which American legislatures repudiated, contributed to the coming of the Revolution.

The American theory that charters were inviolable contracts confirming inalienable rights was premised on Old Whig constitutional definitions of LIMITED GOVERNMENT which still enjoyed some support in Britain during the second half of the eighteenth century and found expression in arguments that Parliament lacked constitutional authority to revoke or amend charters. This argument had little support in Britain, where all charters were viewed as revocable. In fact, a majority of colonies had their charters revoked and regranted at various times by the British government. Indeed, no single action so provoked the AMERICAN REVOLUTION as the Massachusetts Government Act

asserting the authority of Parliament to amend colonial charters by unilateral decision.

When the Revolution commenced there were only two proprietary charters (Pennsylvania, Maryland) and two corporate charters (Connecticut, Rhode Island). Remaining colonies had royal charters, except Quebec and Georgia, which were governed by instructions. When Americans began to draft organic acts, they came more and more to think of charters as constitutions. To resist the Massachusetts Government Act, which revoked the charter of 1691, colonial leaders gave consideration to "resuming" the original charter of 1629 granted by Charles I. Connecticut and Rhode Island retained their charters as state constitutions, Connecticut until 1818 and Rhode Island until 1843.

JOHN PHILLIP REID
(1986)

Bibliography

REID, JOHN PHILLIP 1976 In the First Line of Defense: The Colonial Charters, the Stamp Act Debate and the Coming of the American Revolution. *New York University Law Review* 51:177–215.

## *COLORADO v. CONNELLY*
## 479 U.S. 157 (1986)

Narrowly seen, this case deals with true confessions by mentally deranged people, but it resulted in the major holding that the Fifth Amendment's right against compulsory self-incrimination operates only when the coercion is linked to government. A confession that is involuntary in the sense that it is not the product of a rational intellect or free will may, nevertheless, be introduced in EVIDENCE because no government agent misbehaved or was responsible for the involuntary character of the confession. In this case, the murderer confessed in obedience to God's voice. He received his MIRANDA rights, waived them, and insisted on confessing. The court, in a 7–2 decision, found no violation of DUE PROCESS OF LAW and no involuntary self-incrimination. The dissenters believed that the Court was wrong to think that the only involuntary confessions are those obtained by government misconduct. Justice JOHN PAUL STEVENS, concurring with the decision, sensibly acknowledged that the confession in this case was involuntary but not of such a character that it had to be excluded from evidence.

LEONARD W. LEVY
(1992)

(SEE ALSO: *Police Interrogation and Confessions; Right Against Self-Incrimination.*)

## COLOR OF LAW

Some CIVIL RIGHTS statutes proscribe only behavior "under color of" state law, and this requirement has played an important role in the development of FEDERAL PROTECTION OF CIVIL RIGHTS. Ironically, civil rights statutes have been interpreted in a manner that strips the color of law requirement of most of its contemporary significance. Judicial interpretation usually equates the color of law requirement with STATE ACTION. Because in most contexts in which the color of law requirement appears state action also is required, there is no obvious independent role for the color of law requirement.

The phrase "under color of . . . law" appears in the nation's first civil rights act, the CIVIL RIGHTS ACT OF 1866. There it seemed to limit the act's coverage to actions taken pursuant to—under color of—the post-CIVIL WAR southern BLACK CODES. Subsequent revisions of the 1866 act and civil rights statutes modeled after it retained the concept as a way of limiting their coverage. It currently appears in section 242 of the federal criminal code, SECTION 1983, TITLE 42, UNITED STATES CODE, and section 1343(3) of the judicial code, the jurisdictional counterpart to section 1983.

In deciding what constitutes action under color of law, two extreme readings have been rejected. One view, advocated in dissenting opinions by Justices OWEN ROBERTS, FELIX FRANKFURTER, and ROBERT H. JACKSON in SCREWS V. UNITED STATES (1945) and by Justice Frankfurter in MONROE V. PAPE (1961), deems behavior to be under color of state law only when it is authorized by state law. In this view, any action by state officials in violation of state law cannot be under color of law. Where, as in *Screws*, a law officer murders his prisoner, in clear violation of state law, the officer's act would not be regarded as being under color of law and, therefore, would not be subject to civil or criminal penalties under federal statutes containing the requirement. This view of the color of law requirement would limit the significance of modern civil rights statutes, for much official behavior that civil rights litigants allege to violate the Constitution or federal law also violates state law. This view, however, would make the color of law requirement meaningful in the context of the times during which the requirement first appeared. During the post-Civil War era, much of the most disturbing official behavior, particularly behavior aimed at recently freed blacks, was authorized by state law.

The expansive extreme view of color of law arises not in interpreting the phrase itself but in interpreting it in conjunction with a series of nouns that accompany it. Section 1983, for example, refers to action "under color of any statute, ordinance, regulation, custom or usage." In *Adickes v. S. H. Kress & Co.* (1970), Justices WILLIAM J.

BRENNAN and WILLIAM O. DOUGLAS interpreted "color of custom" to include virtually all segregative activity in the South, public or private, because the activity sprang from widespread custom. The majority in *Adickes* interpreted color of custom to include only action that constituted state action. Color of custom thus encompasses private behavior only to the extent that private persons act sufficiently in concert with public officials to render their action state action. This interpretation, combined with rejection in *Screws* and *Monroe* of the view limiting color of law to action authorized by law, leaves the color of law concept with little independent meaning. In general, action is under color of law if and only if the action satisfies the state action requirement.

There are, however, two areas in which it is useful to differentiate between state action and action under color of law. First, some constitutional rights, such as the THIRTEENTH AMENDMENT right not to be enslaved, are protected against both governmental and private infringement. A private person who caused the deprivation of such a right would be liable under statutes containing the "color of law" requirement even though his action was not state action. In these rare cases, action that is under color of law but that is not state action would lead to federal civil rights liability. Second, where a constitutional right, such as the right to DUE PROCESS, can be violated only by the government, private behavior authorized by statute may be action under color of law but, for want of state action, it may not subject the actor to civil rights liability. For example, when, pursuant to state statutes, creditors repossessed property without judicial proceedings, the Court in FLAGG BROS., INC. V. BROOKS (1978) held that the action taken was under color of law but that it was not state action.

In the pre-Civil War era, Congress employed the color of law requirement in a fashion related to its later use in civil rights statutes. States upset with expanding federal power and the behavior of federal officials would go so far as to initiate in state court criminal or civil proceedings against federal officers. Fearful of a biased forum, Congress, in a series of provisions commencing in 1815, provided federal officials with a right to remove these proceedings to federal court. (See REMOVAL OF CASES.) But Congress limited the power of removal to instances when the state proceedings were attributable to action by the officers under color of their office or of federal law. In this sense, as the Court noted in *Tennessee v. Davis* (1880), the color of law requirement clearly meant only action authorized by law, a point emphasized by the dissenters in *Screws*.

Nevertheless, it may be consistent with the purposes of both the removal and civil rights provisions to interpret color of law as limited to action authorized by law only in the case of the removal statute. If one views Congress in each case as desiring to protect only lawful behavior, it makes sense to interpret color of law in the removal statute to require action authorized by law and to interpret color of law in civil rights statutes to encompass official action, whether or not authorized by law. Use of the broad civil rights interpretation of color of law would immunize from state process action by federal officers not authorized by federal law. And in the context of civil rights statutes, adhering to the interpretation given the removal provision would immunize from federal remedies action by state officers not authorized by state law. The different interpretations serve a common function, subjecting a wrongdoer to liability.

THEODORE EISENBERG
(1986)

Bibliography

EISENBERG, THEODORE 1982 Section 1983: Doctrinal Foundations and an Empirical Study. *Cornell Law Review* 67:507–510.

## *COLUMBIA BROADCASTING SYSTEM, INC. v. DEMOCRATIC NATIONAL COMMITTEE*
412 U.S. 94 (1973)

The Supreme Court here considered a FIRST AMENDMENT challenge to a broadcaster's refusal to accept editorial advertisements except during political campaigns. Some Justices maintained that the broadcaster's action did not amount to governmental action, but the Court did not reach the question. Even assuming STATE ACTION, it held that the First Amendment permitted broadcasters to discriminate between commercial and political advertisements. Broadcasters, the Court observed, were obligated by the FAIRNESS DOCTRINE to cover political issues, and their choice to cover such issues outside of commercials protected CAPTIVE AUDIENCES and avoided a threat that the wealthy would dominate broadcast decisions about political issues.

STEVEN SHIFFRIN
(1986)

## *COLUMBIA BROADCASTING SYSTEM, INC. v. FEDERAL COMMUNICATIONS COMMISSION*
453 U.S. 367 (1981)

A 1971 amendment to the COMMUNICATIONS ACT OF 1934 permits the Federal Communications Commission (FCC)

to revoke a broadcaster's license for failure to allow reasonable access to a candidate for federal office. The Supreme Court here interpreted this provision to create a right of access for an individual candidate. Further, reaffirming the much criticized precedent of RED LION BROADCASTING CO. V. FCC (1969), the Court sustained the law, as so interpreted, against a FIRST AMENDMENT challenge. The dissenters argued that the statute created no right of access.

KENNETH L. KARST
(1986)

## *COLUMBUS BOARD OF EDUCATION v. PENICK*
443 U.S. 449 (1979)

## *DAYTON BOARD OF EDUCATION v. BRINKMAN*
433 U.S. 406 (1977); 443 U.S. 526 (1979)

These cases demonstrated the artificiality of the DE FACTO/DE JURE distinction in school DESEGREGATION litigation. Both cases arose in cities in Ohio, where racially segregated schools had not been prescribed by law since 1888. In both, however, blacks charged another form of de jure segregation: intentional acts by school boards aimed at promoting SEGREGATION.

When the *Dayton* case first reached the Supreme Court, a related doctrinal development was still a fresh memory. WASHINGTON V. DAVIS (1976) had held that RACIAL DISCRIMINATION was not to be inferred from the fact that governmental action had a racially disproportionate impact; rather the test was whether such an impact was intended by the legislative body or other officials whose conduct was challenged. (See LEGISLATION.) *Dayton I* in 1977 applied this reasoning to school segregation, emphasizing that a constitutional violation was to be found only in cases of established segregative intent. The Court remanded the case for more specific findings on the question of intent, and said that any remedy must be tailored to the scope of the segregation caused by any specific constitutional violations.

Many observers took *Dayton I* to portend the undermining of KEYES V. SCHOOL DISTRICT NO. 1 (1973). In *Keyes* the Court had held that, once a significant degree of de jure segregation was established, systemwide desegregation remedies (including SCHOOL BUSING) were appropriate unless the school board showed that any remaining racially separate schools were the product of something other than the board's segregative intent. When the case returned to the Supreme Court two years later, these predictions were confounded.

*Dayton II* came to the Court along with the *Columbus* case, and they were decided together. *Columbus*, decided by a 7–2 vote, provided the main opinions. Writing for a majority of five, Justice BYRON R. WHITE applied the *Keyes* presumptions approach so vigorously that the dissenters remarked that the de factode jure distinction had been drained of most of its meaning. None of the Justices disputed the finding that in 1954–1955, when BROWN V. BOARD OF EDUCATION was decided, the Columbus school board had deliberately drawn boundary lines and selected school sites to maintain racial segregation in a number of schools. What divided the Court was the question of inferences to be drawn from these undisputed facts.

Justice White reasoned that this de jure segregation placed the school board under an affirmative duty to dismantle its dual system. Its actions since 1954, however, had aggravated rather than reduced segregation; the foreseeability of those results helped prove the board's segregative intent. A districtwide busing remedy was thus appropriate under *Keyes*. Justice WILLIAM H. REHNQUIST, dissenting, pointed out the tension between this decision and *Dayton I*. Here there was no showing of a causal relationship between pre-1954 acts of intentional segregation and current racial imbalance in the schools. Thus present-day de facto segregation was enough to generate districtwide remedies, so long as some significant pre-1954 acts of deliberate segregation could be shown.

It will be a rare big-city school district in which such acts cannot be found—with a consequent presumption of current de jure segregation. A school board cannot overcome this presumption merely by relying on a neighborhood school policy and showing that the city's residences are racially separated. This analysis obviously blurs the de factode jure distinction.

*Dayton II* made clear that a school board's segregative purpose was secondary to its effectiveness in performing its affirmative duty to terminate a dual system—and that effectiveness was to be measured in the present-day facts of racial separation and integration. Justice White again wrote for the majority, but now there were four dissenters. Justice POTTER STEWART, the Court's one Ohioan, concurred in Columbus but dissented in *Dayton II*, deferring in each case to the district court's determination as to a continuing constitutional violation. In *Dayton II*, the district court had found pre-1954 acts of deliberate segregation, but had found no causal connection between those acts and present racial separation in the schools. That separation, the district judge concluded, resulted not from any segregative purpose on the part of the school board but from residential segregation. Justice Stewart would have accepted that judgment, but the majority, following the *Columbus* line of reasoning, held that the board had not fulfilled its affirmative duty to dismantle the dual sys-

tem that had existed in 1954. Chief Justice WARREN E. BURGER joined Justice Stewart in both cases; Justice Rehnquist dissented in *Dayton II* chiefly on the basis of his *Columbus* dissent.

Justice LEWIS F. POWELL joined Justice Rehnquist's dissents, and also wrote an opinion dissenting in both cases. Justice Powell had argued in *Keyes* for abandoning the de factode jure distinction, and he did not defend that distinction here. Rather he repeated his skepticism that court orders could ever end racial imbalance in large urban school districts and his opposition to massive busing as a desegregation remedy. Justice Powell, a former school board president, argued that, twenty-five years after *Brown*, the federal courts should be limiting rather than expanding their control of public school operations.

KENNETH L. KARST
(1986)

Bibliography

KITCH, EDMUND W. 1979 The Return of Color-Consciousness to the Constitution: Weber, Dayton, and Columbus. *Supreme Court Review* 1979:1–15.

## COMITY, JUDICIAL

Comity is the deference paid by the institutions of one government to the acts of another government—not out of compulsion, but in the interest of cooperation, reciprocity, and the stability that grows out of the satisfaction of mutual expectations. When the courts of one nation give effect to foreign laws and the orders of foreign courts, that deference is called judicial comity. (See ACT OF STATE DOCTRINE.)

The states of the United States are, for many purposes, separate sovereignties. A state court, in deciding a case, starts from the assumption that it will apply its own state law. When it applies the law of another state, normally it does so as a matter of comity. (See CHOICE OF LAW.) Because comity is not so much a rule as an attitude of accommodation, state courts generally feel free to refuse to apply a law that violates their own state's public policy. In *Nevada v. Hall* (1979) California courts upheld a million-dollar verdict against the State of Nevada in an automobile injury case, rejecting Nevada's claim of SOVEREIGN IMMUNITY; the Supreme Court affirmed, saying that the Constitution left to California's courts the degree of comity they should afford to Nevada law.

A state court's enforcement of the valid judgment of a court of another state is not merely a matter of comity but is required by the FULL FAITH AND CREDIT CLAUSE. Similarly, the SUPREMACY CLAUSE binds state courts to enforce valid federal laws and regulations, along with the valid judgments of federal courts.

Notions of comity have recently taken on increased significance in the federal courts themselves. A federal court may, under some circumstances, stay its proceedings because another action between the same parties is pending in a state court. The Supreme Court in *Fair Assessment of Real Estate Association v. McNary* (1981) discovered in the Tax Injunction Act (1937) a general principle of comity forbidding federal courts not only to enjoin the collection of state taxes but also to award DAMAGES in state tax cases. And comity has been a major consideration in the development of the "equitable restraint" doctrine of YOUNGER V. HARRIS (1971), which generally forbids a federal court to grant an INJUNCTION against the continuation of a pending state criminal prosecution.

KENNETH L. KARST
(1986)

(SEE ALSO: *Abstention Doctrine.*)

## COMITY CLAUSE

See: Full Faith and Credit

## COMMAGER, HENRY STEELE (1902–1998)

Henry Steele Commager was one of America's most widely read and influential historians. His two dozen books and scores of articles reflect his keen interest in CONSTITUTIONAL HISTORY as well as an elegant and vivid style. He earned his degrees from the University of Chicago and taught for over sixty years at New York University, Columbia, and Amherst. He also held endowed chairs at Oxford and Cambridge and was a visiting professor at universities on four continents. His first book, *The Growth of the American Republic* (1930) with Samuel E. Morison, has been a standard text for over six decades, and his *Documents in American History*, often updated since its original publication in 1934, dominates its field. *Theodore Parker* (1936) is a riveting study of a transcendentalist reformer. *Majority Rule and Minority Rights* (1943) is a critique of JUDICIAL REVIEW based on Commager's devotion to majoritarianism and respect for dissent. *Civil Liberties Under Attack* (1951) and *Freedom, Loyalty, and Dissent* (1954) blasts MCCARTHYISM and defends constitutional freedoms.

Commager co-edited the *New American Nation* series in over forty volumes and co-authored *The Encyclopedia of American History* (1953). His *Search for a Usable Past*

(1967) is historiographical, and *Freedom and Order* (1966) is an incisive commentary of contemporary America. *The American Mind* (1960) is an interpretation of American thought and culture as influenced by constitutionalism, PRAGMATISM, evolution, and economics. *Empire of Reason* (1977) stresses the ways America fulfilled Enlightenment ideas by institutionalizing them, as in CONSTITUTIONAL CONVENTIONS, FEDERALISM, and BILLS OF RIGHTS. Commager concerned himself with describing the American national character as a product of history, which he regarded as a branch of *belle lettres.* His books reveal the influence of Emersonians as well as pragmatists such as William James, Lester Frank Ward, and John Dewey, whom he depicted as exponents of Americanism. His work also reflects his liberalism and acceptance of government as an agency of popular welfare.

LEONARD W. LEVY
(2000)

## COMMANDER-IN-CHIEF

In every state, the command of the armed forces is the ultimate component of executive power. Article II of the Constitution, adapting British practice, designates the President commander-in-chief both of the nation's armed forces and of the state militia when it is called into national service. Article IV, guaranteeing each state a REPUBLICAN FORM OF GOVERNMENT, somewhat qualifies that authority. It provides that the national force be used to suppress domestic violence only on application of the state legislature or of the governor when the state legislature cannot be convened.

With regard to domestic (and republican) tranquillity, it became apparent soon after 1789 that the deference of Article IV to STATES' RIGHTS did not permit the national government fully to protect the peace of the United States. Although state governments dealt with most episodes of domestic disorder—and still do—some of those episodes had a national dimension. As early as 1792, Congress declared that "it shall be lawful for the President" to use national troops or call forth the militia whenever he deems such action necessary to protect the functioning of the government or the enforcement of its laws. President GEORGE WASHINGTON leading more than 12,000 national guardsmen to suppress the WHISKEY REBELLION of 1793 is the classic symbol of an independent national power to enforce what the President, echoing Jean-Jacques Rousseau, called "the general will." This power has been invoked regularly, most notably during and after the CIVIL WAR, but also in major strikes affecting the national economy (IN RE DEBS, 1895) and in the enforcement of judicial decisions ordering racial DESEGREGATION during the 1950s and 1960s. President WILLIAM HOWARD TAFT used the national force to protect Asian ALIENS threatened by a local mob, relying on his duty as President to carry out the international responsibility of the United States for the safety of aliens.

The formula of the 1792 statute, like that used in later statutes, straddles an unresolved controversy between the President and Congress. Congress insists that its power to pass laws NECESSARY AND PROPER to implement the President's authority as commander-in-chief includes the right to restrict the President's capacity to act. All Presidents, on the other hand, while recognizing the necessity for legislation in many situations, claim that statutes cannot subtract from their constitutional duty and power to preserve the Constitution and enforce the laws. Although the pattern of usage is by no means uniform, Presidents generally conform to statutes that purport to reinforce and structure the President's use of the armed forces in domestic disorders, at least as a matter of courtesy, unless "sudden and unexpected civil disturbances, disasters, or calamities," in the language of Army regulations, leave no alternative. Some Presidents have even paid lip service to the POSSE COMITATUS ACT (1878), a dubious relic of the end of Reconstruction. That act prohibits the use of the Army in suppressing domestic turbulence unless "expressly" authorized. Presidents have evaded this restriction by employing marines for the purpose.

Modern statutes usually retain the ancient requirement of a public proclamation before force is used to restore order, although Presidents sometimes ignore the tradition. The use of force by the President (or by a governor) in dealing with civil disorder does not alone justify suspending the writ of HABEAS CORPUS. According to the DOCTRINE of EX PARTE MILLIGAN (1867) and other cases, the writ cannot be suspended so long as the courts remain capable of carrying out their duties normally.

The use of force as an instrument of diplomacy, or of war and other extended hostilities, does not involve issues of dual SOVEREIGNTY but has presented significant constitutional conflicts both between Congress and the President, and between individuals and the state. (See WAR, FOREIGN AFFAIRS, AND THE CONSTITUTION.) The President's power as commander-in-chief under such circumstances goes far beyond the conduct of military operations. As the Supreme Court declared in *Little v. Barreme* (1804), it is also the President's prerogative to deploy troops and weapons at home and abroad in times of peace and war, and to use them when no valid law forbids him to do so. The purposes for which the President may use the armed forces in carrying on the intercourse of the United States with foreign nations are infinite and unpredictable. They include diplomatic ceremony and demonstrations of power; the employment of force in self-defense in order

to deter, anticipate, or defeat armed attack against the interests of the United States, or any other act in violation of international law that would justify the use of force in time of peace; and the prosecution of hostilities after a congressional DECLARATION OF WAR. In actual hostilities, it is the President's sole responsibility to negotiate truces, armistices, and cease-fires; to direct the negotiation of peace treaties or other international arrangements terminating a condition of war; and to govern foreign territory occupied in the course of hostilities until peace is restored.

These powers are extensive. The use, threat, or hint of force is a frequent element of diplomacy. Military occupations lasted for years during and after the Civil War, the Philippine campaign, a number of Caribbean episodes, WORLD WAR I, and WORLD WAR II. The Cold War has required the apparently permanent deployment abroad of American armed forces on a large scale; novel legal arrangements have developed to organize these activities. Although the broad political and prudential discretion of both the President and Congress is taken fully into account by the courts in reviewing such exercises of the commander-in-chief's authority, constitutional limits have nonetheless emerged.

In recent years Congress has effectively employed its appropriation power to qualify the President's discretion as commander-in-chief in conducting military or intelligence operations that are not "public and notorious" general wars under international law. While such contests between the power of the purse and the power of the sword are largely political, they raise the principle of the SEPARATION OF POWERS applied in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983). The judicial response to these contests can be expected further to clarify a particularly murky part of the boundary between the President and Congress.

EUGENE V. ROSTOW
(1986)

Bibliography

BISHOP, JOSEPH W., JR. 1974 *Justice under Fire.* New York: Charter House.

CORWIN, EDWARD S. (1940) 1957 *The President: Office and Powers 1787–1957.* New York: New York University Press.

WILCOX, FRANCIS 1971 *Congress, the Executive, and Foreign Policy.* New York: Harper & Row.

## COMMENTATORS ON THE CONSTITUTION

The first important analysis of the Constitution appeared during the ratification contests of 1787 and 1788. ALEXANDER HAMILTON and JAMES MADISON, who had participated in the CONSTITUTIONAL CONVENTION, collaborated with JOHN JAY on THE FEDERALIST (1788), a series of essays defending the proposed new plan of government. Appealing to the rationalistic temper of the eighteenth century, they justified the creation of a strong central government on logical and philosophical grounds, and developed a model of CONSTITUTIONALISM that relied upon structural CHECKS AND BALANCES to promote harmony within the system. Ultimate SOVEREIGNTY, they argued, inhered in the American people; the Constitution, as an instrument of the popular will, defined and limited the powers of both the national government and the states. *The Federalist* provided valuable insights into the thinking of the Founding Fathers and established the guidelines for further constitutional commentary down to the CIVIL WAR.

Between 1789 and 1860 two major groups of commentators emerged in response to recurring political crises and sectional tensions. Legally trained publicists from New England and the middle states espoused a national will theory of government to justify the expansion of federal power, while southern lawyers and statesmen formed a state compact school of constitutional interpretation that championed decentralization and state sovereignty. Each group approached constitutional issues in a formal and mechanistic way, and relied upon close textual analysis to support its position.

The nationalists argued that the American people, acting in a collective national capacity, had divided sovereign power between the nation and the states and established the Constitution as the supreme LAW OF THE LAND. Under the resulting federal system, the states retained control of their internal affairs but were subordinate to the general government in all important national concerns, including taxation, INTERSTATE COMMERCE, and FOREIGN AFFAIRS. The Constitution, moreover, created a permanent union, whose basic features could be changed only by resort to a prescribed AMENDING PROCESS. Although several nationalists conceded that the Constitution had originated in a compact of the people of the several states, they insisted that such a compact, once executed, was inviolate, and could not be modified thereafter by the parties. Such was the message of NATHANIEL CHIPMAN's *Sketches of the Principles of Government* (1793) and William Alexander Duer's *Lectures on Constitutional Jurisprudence* (1843).

Other advocates of national supremacy rejected contractual assumptions altogether, and moved toward an organic theory of the Union. Nathan Dane, in *A General Abridgment and Digest of American Law* (1829), contended that the states had never been truly sovereign, because they owed their independence from British rule to the actions of the CONTINENTAL CONGRESS, a national body that represented the American people. The people, not the states, had ratified the Constitution through the ex-

ercise of majority will; therefore, any state efforts to nullify federal law or to withdraw from the Union amounted to illegal and revolutionary acts. JAMES KENT's *Commentaries on American Law* (1826–1830) and Timothy Walker's *Introduction to American Law* (1837) further noted that the Constitution provided for the peaceful resolution of federal-state disputes through the Supreme Court's power of JUDICIAL REVIEW.

In attacking the compact model of constitutionalism, these commentators stressed the noncontractual language of the PREAMBLE and the SUPREMACY CLAUSE. A similar preoccupation with formal textual analysis characterized JOSEPH STORY's *Commentaries on the Constitution of the United States* (1833), the most influential and authoritative statement of the nationalist position. Story, an associate Justice of the Supreme Court, interpreted the Constitution on a line-by-line basis, in light of the nationalistic jurisprudence of JOHN MARSHALL. Like Marshall, he insisted that the powers of the federal government had to be construed broadly, as the Framers had intended. On both theoretical and pragmatic grounds, Story defended the power of the Supreme Court to strike down unconstitutional state laws. Yet he also emphasized the limits of national authority, noting that the states retained control over matters of internal police that affected the daily lives of their citizens. Although Congress alone could regulate interstate commerce, for example, state legislatures might pass health and safety measures that indirectly affected such commerce. By focusing upon questions of terminology and classification, Story sought to demonstrate the stability of the federal system and to place the Constitution above partisan politics.

Nationalist historians described the formation of the Union in similarly legalistic and reverential terms. GEORGE TICKNOR CURTIS's *History of the Origin, Formation, and Adoption of the Constitution of the United States* (1854–1858), the first work to deal exclusively with a constitutional topic, quoted at length from the journals of the Continental Congress and other public records, but largely ignored surrounding political and economic circumstances. For Curtis and other romantic nationalists, the Founding Fathers were disinterested and divinely inspired patriots, who enjoyed the full confidence and support of the American people. Only RICHARD HILDRETH'S *History of the United States of America* (1849–1852) presented a contrary view. Hildreth stressed the importance of conflicting economic groups in the new nation and pointed out that the Constitution had been ratified by conventions representing only a minority of American voters.

Although state compact theorists shared the prevailing belief in a fixed and beneficent Constitution, they deplored what they perceived as the aggrandizing tendencies of the national government. St. George Tucker's "View of the Constitution of the United States," appended to his edition of WILLIAM BLACKSTONE'S *Commentaries* (1803), established the basic premises of the southern constitutional argument. The states and their respective citizens, Tucker contended, had entered into a compact—the Constitution—and had delegated some of their sovereign powers to the resulting federal government for specific and limited purposes. Because the Union remained subordinate to its creators, the states, and depended upon their cooperation for its continued existence, all positive grants of national power had to be construed strictly. If the federal government overstepped its constitutional powers, Tucker suggested that individuals might look to the state or federal courts for redress, while violations of STATES' RIGHTS would be answered by appropriate action from the state legislatures.

Later commentators refined Tucker's ideas and fashioned new remedies for the protection of state rights. The Philadelphia lawyer WILLIAM RAWLE introduced the possibility of peaceable SECESSION through the action of state CONSTITUTIONAL CONVENTIONS in *A View of the Constitution of the United States* (1825). Rawle's reasoning was hypothetical: because the people of each state had agreed to form a permanent union of representative republics, they could withdraw from their compact only by adopting a new state constitution based upon nonrepublican principles. A more realistic assessment of the nature and consequences of secession appeared in HENRY ST. GEORGE TUCKER'S *Lectures on Constitutional Law* (1843). In Tucker's view, secession provided the only mode of resistance available to a state after a controversial federal law had been upheld by the judiciary. Secession was a revolutionary measure, however, because the Constitution had established the courts as the permanent umpires of federal-state relations.

Advocates of NULLIFICATION proposed a more extreme version of the state sovereignty argument, whose origins went back to JOHN TAYLOR of Caroline's *Construction Construed; and Constitutions Vindicated* (1820) and *New Views of the Constitution of the United States* (1823). Unlike the southern moderates, Taylor insisted that sovereignty was indivisible and inhered exclusively in the states. Each "state nation" thus retained the power to construe the terms of the federal compact for itself, and to interpose its authority at any time to protect its citizens against the consolidating tendencies of the federal government. Whenever a federal law violated the Constitution, asserted Abel Parker Upshur in *A Brief Inquiry into the Nature and Character of Our Federal Government* (1840), a state might summon its citizens to a special convention and declare the act null and void within its borders.

As the influence of the slaveholding South continued to decline in national politics, some commentators sought

to preserve the Union by adding still more checks and balances to the constitutional structure. In *A Disquisition on Government* and *A Discourse on the Constitution and Government of the United States* (1851), JOHN C. CALHOUN called for amendments that would establish a dual executive and base REPRESENTATION upon broad interest groups, any one of which might block the enactment of undesirable congressional legislation. ALEXANDER H. STEPHENS' *A Constitutional View of the Late War Between the States* (1868–1870) and JEFFERSON DAVIS's *The Rise and Fall of the Confederate Government* (1881) confirmed the mechanistic cast of southern constitutional thought, as they summed up the case for secession in its final form. With the defeat of the Confederacy, the secessionist option ceased to exist, and later commentators treated the issue as a historical footnote. During the 1950s conservative Southerners tried unsuccessfully to circumvent federal CIVIL RIGHTS policy by reviving the idea of INTERPOSITION in such works as William Old's *The Segregation Issue: Suggestions Regarding the Maintenance of State Autonomy* (1955).

For Civil War Unionists the exercise of sweeping WAR POWERS by the President and Congress provoked vigorous constitutional debate. Conservative publicists, committed to a restrictive view of federal power, insisted that no departure from prewar constitutional norms was permissible, despite the wartime emergency. Former Supreme Court Justice BENJAMIN R. CURTIS charged in *Executive Power* (1862) that President ABRAHAM LINCOLN had acted illegally in authorizing the military to arrest and imprison suspected disloyal civilians in areas removed from a war zone. Joel Parker's *The War Powers of Congress, and of the President* (1863) denounced the EMANCIPATION PROCLAMATION and related CONFISCATION ACTS for impairing property rights and revolutionizing federal-state relations.

A rival group of Lincolnian pragmatists defended the actions of federal authorities by appealing to an organic theory of constitutional development. Evolving national values and practices had shaped the Constitution far more than abstract legal rules, asserted FRANCIS LIEBER in *What Is Our Constitution—League, Pact, or Government?* (1861). The Founding Fathers had not anticipated the problem of secession; therefore, the Lincoln administration might, in conformity with natural law principles, take whatever measures it deemed necessary to preserve the nation. Sidney George Fisher's *The Trial of the Constitution* (1862) discovered new sources of federal power in the doctrine of popular sovereignty and other unwritten democratic dogmas. Charging that adherence to the checks and balances of the formal Constitution had immobilized the government in practice, Fisher urged Congress to create a new constitutional tradition by transforming itself into an American parliament immediately responsive to the popular will. William Whiting, solicitor of the War Department, contended that existent constitutional provisions authorized the federal government to pursue almost any wartime policy it chose. In *The War Powers of the President and the Legislative Powers of Congress in Relation to Rebellion, Treason, and Slavery* (1862), Whiting looked to the GENERAL WELFARE CLAUSE and other statements of broad national purpose to legitimize controversial Union measures.

The leading commentators of the late nineteenth century carried forward an organic view of the Constitution, but linked it to a laissez-faire ideology that sharply restrained the exercise of governmental power at all levels. Influenced by the conservative Darwinism of Herbert Spencer and William Graham Sumner, these economic libertarians feared legislative innovation and called upon the judiciary to preserve the fundamental economic rights of the individual against arbitrary state action. In *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (1868), THOMAS MCINTYRE COOLEY argued that a libertarian tradition stretching back to MAGNA CARTA protected private property from harmful regulation, even in the absence of specific constitutional guarantees. By appealing to these historic liberties, Cooley sought to broaden the scope of the DUE PROCESS clause, transforming it into a substantive restraint upon economic legislation. JOHN FORREST DILLON's *A Treatise on Municipal Corporations* (1872) discovered implied limits to the taxing power. Taxes could only be levied for a PUBLIC PURPOSE, Dillon maintained, and could not benefit one social class at the expense of another. CHRISTOPHER G. TIEDEMAN took an equally restrictive view of state and federal POLICE POWER in *A Treatise on the Limitations of Police Power in the United States* (1886), condemning usury laws and efforts to control wages and prices.

In the area of civil rights, commentators opposed "paternalistic" legislation and insisted that the Civil War had not destroyed the traditional division of power between the nation and the states. Amendments must conform to the general principles underlying the Constitution, asserted John Norton Pomeroy in *An Introduction to the Constitutional Law of the United States* (1868); and these principles included FEDERALISM, as defined by the Founding Fathers. Despite the broad language of the FOURTEENTH AMENDMENT, therefore, Congress lacked power to remedy most civil rights violations, which remained subject to state control. JOHN RANDOLPH TUCKER's *The Constitution of the United States* (1899) warned that federal attacks on customary racial practices in the South would undermine local institutions and create a dangerous centralization of power in the national government. The racist assumptions shared by most libertarians surfaced clearly

in John Ordronaux's *Constitutional Legislation in the United States* (1891). Noting that national progress depended upon "race instincts," Ordronaux suggested that blacks, Orientals, and other non-Aryans were unfit for the full responsibilities of democratic CITIZENSHIP.

Constitutional historians of the late nineteenth century used a Darwinian model of struggle and survival to explain the rise of the American nation. HERMANN VON HOLST, the first scholar to make systematic use of the records of congressional debates, combined antislavery moralism with a laissez-faire attitude toward northern business in his ponderous *Constitutional and Political History of the United States* (1876–1892). Equally moralistic and libertarian was JAMES SCHOULER's *History of the United States under the Constitution* (1880–1913). In the growth of republican institutions and the triumph of Union arms Schouler discerned the unfolding of a divine plan. From a Social Darwinist perspective, William A. Dunning's *The Constitution of the United States in Civil War and Reconstruction, 1860–1867* (1885) and JOHN W. BURGESS' *Reconstruction and the Constitution, 1866–1876* (1902) criticized federal policymakers for enfranchising blacks at the expense of their Anglo-Saxon superiors.

In its mature form libertarian theory created a twilight zone on the borders of the federal system, within which neither the national government not the states could act. While the TENTH AMENDMENT prevented Congress from regulating local economic activities, state legislatures found their police powers circumscribed by the restrictive principles defined by Cooley and his associates. These extraconstitutional restraints also limited the federal government when it sought to exercise its express powers over taxation and commerce. Twentieth-century economic and racial conservatives have continued to defend the libertarian viewpoint and to protest the expansion of federal regulatory power. In *Neither Purse Nor Sword* (1936), James M. Beck and Merle Thorpe condemned early New Deal legislation for violating property rights and invading the reserved powers of the states. Charles J. Bloch's *States' Rights—The Law of the Land* (1958), written in the aftermath of the *Brown* decision, charged that the VINSON COURT and WARREN COURT had subverted the meaning of the Fourteenth Amendment in civil rights cases, and called upon Congress to revitalize the Tenth Amendment, "the cornerstone of the Republic."

As the excesses of a period of industrial growth threatened the welfare of workers and consumers, however, other commentators condemned the laissez-faire model of constitutionalism as archaic and unsuited to the needs of a modern democracy. Impressed by the empiricism of the emerging social sciences, these democratic instrumentalists approached constitutional questions from a pragmatic and reformist perspective. Although they did not deny the existence of fundamental principles, they argued that these principles needed to be adapted to changing environmental conditions. Through intelligent social planning, they maintained, federal and state lawmakers might control an expanding economy in accordance with the popular will.

Mechanistic eighteenth-century concepts, such as SEPARATION OF POWERS, impaired the efficiency of modern government, charged WOODROW WILSON in *Congressional Government* (1885) and *Constitutional Government in the United States* (1908). Constitutional grants of power to the national government established only "general lines of definition," he added, and should be broadly construed by the courts in response to developing societal needs. In a similar vein, WESTEL W. WILLOUGHBY's *The Constitutional Law of the United States* (1910) and FRANK J. GOODNOW's *Social Reform and the Constitution* (1911) criticized judges for obstructing progressive reforms through their continued adherence to laissez-faire idealism.

The advent of the welfare state in the 1930s magnified disagreements between libertarians and instrumentalists, and provoked a major confrontation between President FRANKLIN D. ROOSEVELT and the Supreme Court. EDWARD S. CORWIN, the most influential constitutional commentator of the time, applauded the programs of the early NEW DEAL for establishing a new COOPERATIVE FEDERALISM. In *The Twilight of the Supreme Court* (1934), Corwin urged the Justices to uphold legislative policymaking in economic matters, and pointed to the nationalistic decisions of John Marshall as appropriate precedents. When judicial intransigence persisted, according to Attorney General ROBERT H. JACKSON in *The Struggle for Judicial Supremacy* (1941), the administration adopted a court-packing plan as the only apparent means of restoring the full constitutional powers of the national government. Although the plan failed, a majority of Justices began to redefine congressional power in more liberal terms. Corwin welcomed the Court's belated acceptance of sweeping federal regulation in *Constitutional Revolution, Ltd.* (1941), and correctly predicted that the Justices would thereafter focus their review power on protection of CIVIL LIBERTIES and the rights of minorities.

Instrumentalist historians tended to seek the causes of constitutional change in underlying social and economic developments. CHARLES A. BEARD's pathbreaking study, *An Economic Interpretation of the Constitution of the United States* (1913), encouraged Progressive reformers by demythologizing the work of the Philadelphia Convention. Using previously neglected Treasury and census records, Beard presented the Founding Fathers as a conspiratorial elite who had devised an undemocratic Constitution to protect their property from the attacks of popular legislative majorities. In *American Constitutional Development*

(1943) CARL BRENT SWISHER drew upon other nontraditional sources to explain, and justify, the emergence of the positive state. With comparable erudition WILLIAM W. CROSSKEY's *Politics and the Constitution in the History of the United States* (1953) used linguistic analysis to demonstrate the legitimacy of New Deal regulatory measures. After an exhaustive inquiry into the eighteenth-century meaning of "commerce" and other key words, Crosskey concluded that the Framers had intended to create a unitary, centralized system in which "the American people could, through Congress, deal with any subject they wished, on a simple, straightforward, nation-wide basis."

Although the instrumentalists emphasized the need to adapt the Constitution to changing socioeconomic conditions, they remained committed to the RULE OF LAW and acknowledged the binding force of constitutional norms. This moderate position failed to satisfy a small group of radical empiricists, who argued that written codes were meaningless in themselves and merely served to rationalize the political decisions of legislators and judges. "The language of the Constitution is immaterial since it represents current myths and folklore rather than rules," asserted THURMAN W. ARNOLD in *The Folklore of Capitalism* (1937). "Out of it are spun the contradictory ideals of governmental morality." Howard L. McBain's *The Living Constitution: A Consideration of the Realities and Legends of Our Fundamental Law* (1927) similarly contended that law had no life of its own, but depended for its substance on the unpredictable actions of men. Because the American people believed the fiction of a government of law, they had grown politically apathetic, charged J. ALLEN SMITH in *The Growth and Decadence of Constitutional Government* (1930). Although constitutionalism had been designed to limit arbitrary power, he noted, it protected an irresponsible governing elite from popular scrutiny and control.

The empiricists were more successful in diagnosing ills than in prescribing remedies. Because they stressed the determining influence of ideology and personality upon decision making, they could find no satisfactory way to limit the discretionary power of public officials. The scope of administrative discretion must necessarily broaden as society grows more complex, contended William B. Munro in *The Invisible Government* (1928). He welcomed the trend, which promised to give government agencies greater flexibility in dealing with contemporary problems. Yet unrestrained power might also encourage irresponsible behavior, such as judges so often displayed in reviewing legislative measures. Both LOUIS B. BOUDIN'S *Government by Judiciary* (1932) and Fred Rodell's *Nine Men: A Political History of the Supreme Court of the United States from 1790 to 1955* (1955) reduced jurisprudence to politics, and charged that judges wrote their conservative policy preferences into law under the guise of legal principles. The only remedy they could suggest, however, was the appointment to the bench of liberals who would promote the public welfare in a more enlightened, albeit equally subjective, fashion.

During the past quarter-century commentators, preeminently ALEXANDER M. BICKEL, have continued to debate the nature and scope of JUDICIAL REVIEW, in the context of the Supreme Court's enlarged role as guardian of individual and minority rights. The timely aspects of such recent studies attest to the constructive role that commentators have historically played in the shaping of American constitutional law. Responsive to changing trends in social and political thought, they have often helped to redefine and clarify the terms of constitutional discourse. As Corwin once quipped, "If judges make law, so do commentators."

MAXWELL BLOOMFIELD

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Bibliography

BAUER, ELIZABETH K. 1952 *Commentaries on the Constitution, 1790–1860.* New York: Columbia University Press.

BELZ, HERMAN 1971 The Realist Critique of Constitutionalism in the Era of Reform. *American Journal of Legal History* 15: 288–306.

HYMAN, HAROLD M. 1973 *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution.* New York: Knopf.

KONEFSKY, ALFRED S. 1981 Men of Great and Little Faith: Generations of Constitutional Scholars. *Buffalo Law Review* 30:365–384.

LARSEN, CHARLES E. 1959 Nationalism and States' Rights in Commentaries on the Constitution after the Civil War. *American Journal of Legal History* 3:360–369.

MURPHY, PAUL L. 1963 Time to Reclaim: The Current Challenge of American Constitutional History. *American Historical Review* 69:64–79.

NEWTON, ROBERT E. 1965 Edward S. Corwin and American Constitutional Law. *Journal of Public Law* 14:198–212.

## COMMERCE CLAUSE

The commerce clause is the small part of the Constitution that provides that "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The phrase relating to the Indians was derived from the provision in the 1781 ARTICLES OF CONFEDERATION which gave the federal congress "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians." Despite the elimination of the sweeping second phrase, there never has been any question that the Indian part of the commerce clause (plus the

TREATY and WAR POWERS) gave Congress power over all relations with the Indians, and no more need be said about it.

Nor has there been much question as to the scope of the federal power to regulate foreign commerce. Combined with the tax and WAR POWERS and the provisions prohibiting the states from entering treaties and agreements with foreign powers and from imposing duties on imports and exports, this power clearly gave the federal government complete authority over relations with foreign nations.

The short clause relating to "commerce among the several states," however, has become one of the most significant provisions in the Constitution. It has been in large part responsible for the development of the United States as a single integrated economic unit, with no impediments to the movement of goods or people at state lines.

The draftsmen of the commerce clause could not have envisaged the eventual magnitude of the national commercial structure or the breadth of the CONSTITUTIONAL INTERPRETATION which that structure would produce. Nevertheless the need for a national power over commerce led to the calling of the CONSTITUTIONAL CONVENTION OF 1787, and the seed for the growth of the power was planted in the early years.

In 1786 the Virginia General Assembly, and then a commission representing five states meeting at Annapolis, called for the appointment of commissioners to consider "the trade of the United States" and "how far a uniform system in their commercial regulation may be necessary to their common interest and their permanent harmony." The Congress created under the Articles of Confederation thereupon approved the calling of a convention to meet in Philadelphia in May 1787 for the purpose of revising the Articles and reporting its recommendations to the Congress and the States.

The Convention, after considerable debate, adopted a resolution generally describing the powers to be given the National Legislature, in the form proposed by the Virginia delegation led by GEORGE WASHINGTON, Governor EDMUND RANDOLPH, and JAMES MADISON. It was resolved that "the national legislature ought . . . to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." This and other resolutions were sent to a drafting committee, which reported out the commerce clause and other powers to be conferred on Congress in substantially the form finally adopted.

Although the needs of commerce had been principally responsible for the calling of the Convention, the clause was accepted with hardly any debate. The same was true in the state ratifying conventions. All reflected the view that in general the new Constitution gave the federal government power over matters of national but not of local concern.

The same view was expressed in the first commerce clause case in 1824 (GIBBONS V. OGDEN), written for a unanimous Supreme Court by Chief Justice JOHN MARSHALL, who had been a member of the Virginia ratifying convention. The Court declared that the commerce power did not extend to commerce that is completely internal, and "which does not extend to or affect other states." It "may very properly be restricted to that commerce which concerns more states than one. . . . The genius and character of the whole government seems to be, that its action is to be applied to all the concerns of the nation, and to these internal concerns which affect the States generally."

Of course, neither in 1787 nor in 1824 did those who wrote or ratified or interpreted the Constitution contemplate the tremendous and close-knit economic structure that exists today and the accompanying inability of the states, or of any agency but the nation, to meet the governmental problems that structure presents. Indeed, in the 1820s and into the 1850s many persons regarded even the construction of the principal highways within each state as purely internal matters not subject to federal power, as appeared from President JAMES MONROE's veto on constitutional grounds of an appropriation to construct what is now Interstate 70 from Maryland to the Western states. Although the MARSHALL COURT would not have agreed, some of the more STATES' RIGHTS-minded Supreme Court Justices of the 1840s and 1850s did.

In general, during the century from 1787 to 1887, the only national commercial problems concerned foreign trade and navigation and the removal of state-imposed barriers to interstate trade. Affirmative federal regulation applied almost entirely to matters of navigation on the oceans, lakes, and rivers. An early statute required vessels engaged in coastal traffic to obtain federal licenses. Reasonably enough, none of these were challenged as falling outside the commerce power.

All of the commerce clause cases during the first 100 years, and a great many of them thereafter, were concerned with the negative effect of the clause upon state legislation—even though the clause did not mention the states. The Constitution merely said that Congress should have the power to regulate commerce. Other clauses imposed specific prohibitions upon the states, but the commerce clause did not. On the other hand, it was well known during the early period that the principal evil at which the commerce clause was directed was state restrictions upon the free flow of commerce.

The issue first came before the Supreme Court in *Gibbons v. Ogden* (1824). New York had granted Robert Ful-

ton and ROBERT LIVINGSTON the exclusive right for thirty years to operate vessels propelled by steam in New York waters, thereby excluding steamboats coming from neighboring states. New Jersey, Connecticut, and Ohio had promptly passed retaliatory legislation forbidding the New York monopoly from operating in their waters. The case presented an example (though unforeseeable in 1787) of the type of interstate commercial rivalry which the commerce clause had been designed to prevent.

A unanimous Supreme Court held that Congress's commerce power extended to all commercial intercourse among the states, rejecting arguments that it did not apply to navigation and passenger traffic. The Court, speaking through Marshall, further concluded that Congress had exercised its power in the Coastal Licensing Act, that Gibbons's vessels were operating in compliance with that statute, and that New York's attempt to prohibit them from operating in New York waters was inconsistent with the federal statute and therefore unconstitutional under the SUPREMACY CLAUSE of the Constitution. The Court did not find it necessary to decide whether the power of Congress to regulate interstate commerce was exclusive or whether the states had CONCURRENT POWER in the absence of a conflicting federal law, although Marshall seemed to favor the former view. But Marshall recognized that, although the states had no power to regulate interstate or FOREIGN COMMERCE as such, they could exercise their preexisting powers to enact laws on such subjects as health, quarantine, turnpikes and ferries, and other internal commerce, even though that might overlap the subjects that Congress could reach under the commerce clause. Thus, as a practical matter, the Court recognized that the states had concurrent powers over many aspects of commerce, or of internal matters that might affect external commerce.

After ROGER B. TANEY became Chief Justice in 1835, a number of the Justices, including Taney, took the flat position that only state laws inconsistent with acts of Congress were preempted, and that the commerce clause itself had no preemptive effect. But in none of the cases could a majority of the Court agree on any theory.

This unhappy and unhealthy state of the law was formally resolved in 1852, when, speaking through newly appointed Justice BENJAMIN R. CURTIS, the Court sustained a Pennsylvania law governing the use of pilots in the port of Philadelphia in COOLEY V. BOARD OF WARDENS OF PHILADELPHIA (1852). Six Justices agreed that whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. Where there was no need for regulation on a national scale, only state laws inconsistent with federal would fall.

The Court still cites the *Cooley* principle with approval, although the *Cooley* formula has been largely superseded by an interest-balancing approach to STATE REGULATION OF COMMERCE. (See SELECTIVE EXCLUSIVENESS; STATE POLICE POWER; STATE TAXATION OF COMMERCE.) But in a number of cases during the years following *Cooley*, the Court adopted a more simplistic approach. If the subject of the state regulation was interstate commerce, only Congress could regulate it; if it was not, only the states could. In these cases the Court held—or at least said—that the United States could not tax or regulate manufacturing or PRODUCTION because they were beyond the scope of the federal commerce power, a pronouncement that later caused substantial difficulty but was not explicitly disavowed until *Commonwealth Edison Co. v. Montana* (1981).

During the twenty years after the CIVIL WAR, the Court held that states could not directly tax or regulate interstate commerce, but that they could, for example, fix railroad rates between points in the same state. (See GRANGER CASES.) When, however, Illinois attempted to apply its prohibition against charging more for a shorter rail haul than a longer one to freight between Illinois cities and New York, the Court, applying the *Cooley* formula, held in WABASH, ST. LOUIS & PACIFIC RAILWAY V. ILLINOIS (1886) that the state had no such power. The opinion made it clear that interstate rates, even for the part of a journey within a state, were not subject to state regulation. Such transportation was "of that national character" that can be "only appropriately" regulated by Congress rather than by the individual states.

Because leaving shippers subject to unregulated rail rates was unthinkable at that time, Congress reacted in 1887 by adopting the INTERSTATE COMMERCE ACT, the first affirmative federal regulation of land transportation.

Three years later, in response to a similar public reaction against uncontrolled monopolies, Congress enacted the SHERMAN ANTITRUST ACT, which prohibited combinations that restrained or monopolized interstate and foreign trade or commerce. The Court easily upheld the applicability of the statute to interstate railroads, but, amazingly, by a vote of 8–1, held the act inapplicable to the Sugar Trust which combined all the sugar refiners in the United States. UNITED STATES V. E. C. KNIGHT CO. (1895) held that such a combination concerned only manufacture and production, and not "commerce," as the act (and, presumably, the Constitution) used the word. This ruling left the country remediless against national monopolies of manufacturers. Since interstate manufacturers are of course engaged in interstate trade—selling, buying, and shipping—as well as manufacture, this was a strange decision. It was soon devitalized, though not expressly OVERRULED, in SWIFT & COMPANY V. UNITED STATES (1905), STANDARD OIL COMPANY V. UNITED STATES (1911), and UNITED STATES V.

AMERICAN TOBACCO COMPANY (1911), which similarly involved combinations of manufacturers.

In a number of cases the Court upheld congressional regulation of interstate transportation for noncommercial reasons. Federal statutes forbidding the interstate sale of lottery tickets, the interstate transportation of women for immoral purposes, stolen motor vehicles, diseased cattle which might range across state lines, misbranded food and drugs, and firearms were all held valid, usually without much question. The effect was to establish that the commerce clause applied to things or persons moving across state lines, whether or not they had anything to do with trade or commerce in the usual sense. (See NATIONAL POLICE POWER.) This conclusion was consistent with Marshall's original definition of commerce as intercourse in *Gibbons v. Ogden*.

The Court's narrow approach to the commerce power in the early twentieth century was demonstrated by its invalidation in 1908 of a law creating a WORKER'S COMPENSATION system for all railroad employees, because it included those doing intrastate shop and clerical work, and a law prohibiting railroads from discharging employees because of membership in a labor organization. (See EMPLOYERS' LIABILITY CASES; ADAIR V. UNITED STATES.) In HAMMER V. DAGENHART (1918) the Court even held that Congress could not prohibit the interstate transportation of child-made goods because the prohibition's purpose was to prevent child labor in manufacturing plants within the states.

Decisions other than the monopoly cases during the same period recognized that the congressional commerce power could apply to intrastate transactions that had an effect upon or relation to interstate commerce. Although strikes blocking interstate shipments from manufacturing plants were found to affect interstate commerce only indirectly, the result was different when an intent to restrain interstate commerce was found, or when a SECONDARY BOYCOTT extended to other states. (See LOEWE V. LAWLOR.) Intrastate trains were held subject to federal safety regulations because of the danger to interstate trains on the same tracks. Intrastate freight rates were held subject to federal control when a competitive relationship to interstate rates or a general effect on all rail rates could be shown. (See SHREVEPORT DOCTRINE.) In 1930 the Court sustained the application of the Railway Labor Act to clerks performing intrastate work so as to protect the right to COLLECTIVE BARGAINING and thereby avert strikes disrupting interstate commerce, contrary to the *Adair* decision in 1908.

Perhaps of greatest significance were cases sustaining federal regulation of the stockyards and the Chicago Board of Trade which, even though located in a single city, were found to control interstate prices for agricultural products. (See STAFFORD V. WALLACE.) The Court was not disturbed by the fact that the sales of grain futures which had such an effect were often completely local, since most of them were not followed by any shipments of physical products.

Thus by 1930 there were lines of cases saying that the federal power did not extend to business activity occurring in a single state, and other cases holding the contrary where some kinds of relationship to interstate commerce were shown.

The Great Depression running from 1929 through the 1930s brought the nation its severest economic crisis. Inaction during HERBERT HOOVER's administration proved ineffective and left thirteen million persons unemployed, prices and wages dropping in a self-perpetuating spiral, and banks, railroads, and many other businesses insolvent. The amount of revenue freight carried by railroad, a fair measure of the quantity of interstate commerce, had fallen by fifty-one percent. The public expected FRANKLIN D. ROOSEVELT, who took office in March 1933, to do something about the Depression. Although no one was sure what would work—and no one is yet quite sure what, if anything, did work—the President and Congress tried. Obviously the economy could not be restored by states acting separately. Only measures taken on a national scale could possibly be effective.

To stop the downward spiral in wages and prices, and to increase employment by limiting the number of hours a person could work, MAXIMUM HOURS AND MINIMUM WAGES were prescribed for industry generally, not merely for employees in interstate commerce. Collective bargaining was made mandatory, and protected against employer interference. The object was to increase national employment, national purchasing power, and the demand for and consumption of all products, which would benefit employers, employees, and the flow of commodities in interstate commerce. All this was originally sought to be accomplished by the NATIONAL INDUSTRIAL RECOVERY ACT (NIRA), which authorized every industry to prepare a code of competition designed to accomplish the above purposes; the code would become effective and enforceable when approved by the President.

The same statute and the AGRICULTURAL ADJUSTMENT ACT OF 1933 (AAA) attempted to cope with the overproduction of petroleum and agricultural products, which had forced prices down to absurd levels, such as five cents per barrel of crude oil and thirty-seven cents per bushel of wheat. The petroleum code under the NIRA and programs adopted under the AAA provided for the fixing of production quotas for oil producers and farmers.

The two lines of authorities summarized above supported opposing arguments as to the constitutionality of these measures under the commerce clause. For Congress

to prescribe wages, hours, and production quotas for factories, farms, and oil wells undoubtedly would regulate intrastate activities, which prior opinions had frequently said were regulable only by the states.

On the other hand, the reasoning of opinions sustaining federal regulation of intrastate features of railroading and the intrastate marketing practices of stockyards and grain exchanges also supported the use of the commerce power to regulate intrastate acts that had an effect upon interstate commerce. The same was true of many of the antitrust cases referred to above. None of the relationships previously found insufficient to support federal regulation had involved general economic effects that halved the flow of interstate trade. But Congress had never sought to regulate the main body of manufacturing, mining, and agricultural production.

In the mid-1930s the Supreme Court included four Justices—WILLIS VAN DEVANTER, JAMES MCREYNOLDS, GEORGE SUTHERLAND, and PIERCE BUTLER—who looked askance at any enlargement of the scope of governmental power over business and who steadily voted against extension of the congressional commerce power, and also voted to invalidate both federal and state regulation under the due process clauses. Chief Justice CHARLES EVANS HUGHES and Justice OWEN J. ROBERTS sometimes voted with these four, while Justices LOUIS D. BRANDEIS, HARLAN FISKE STONE, and BENJAMIN N. CARDOZO usually voted to sustain the legislative judgments as to how to deal with economic problems.

In a series of cases in 1935 and 1936, passing upon the validity of the NIRA, the AAA, and the Guffey Snyder (BITUMINOUS COAL CONSERVATION) ACT regulating the bituminous coal industry, Hughes and Roberts joined the conservative four to hold these acts unconstitutional.

The government had hoped and planned to test the constitutionality of the NIRA in a case involving the nationally integrated petroleum industry, PANAMA REFINING CO. V. RYAN (January 1935). But the Court found it unnecessary to decide the commerce issue in the *Panama* case. Instead, that question came before the Court in SCHECHTER POULTRY CORP. V. UNITED STATES (May 1935), in which the defendant had violated the provisions of the Live Poultry Code with respect to wages and hours and marketing practices of seemingly little consequence. The poultry slaughtered and sold by the defendant had come to New York City from other states, but there was nothing in the record to show that this interstate movement was greatly affected by the practices in question.

The only persuasive argument supporting the constitutionality of the Poultry Code was that the depressed state of the entire economy and of interstate commerce in general could be remedied only by increasing national purchasing power, and that prescribing minimum wages and maximum hours for all employees, whether or not in interstate industries, was a reasonable method of accomplishing that purpose. None of the Justices was willing to go that far. Indeed, the opinion of Chief Justice Hughes for the Court and the concurring opinion of Justice Cardozo emphasized as a principal defect in the argument that it would extend federal power to all business, interstate or intrastate. The fact that little would be left to exclusive state control, rather than the magnitude of the effect on interstate commerce from a national perspective, was treated as decisive. On the same day, in RAILROAD RETIREMENT BOARD V. ALTON, an act establishing a retirement program for railroad employees was held, by a vote of 5–4, not to be within the federal commerce power.

In theory, the *Schechter* decision left open the power of Congress to regulate production in major interstate industries such as petroleum or coal. But that opening, if it existed, seemed to be closed by two decisions in 1936. Because of the foreseeable risks from reliance on the commerce power, Congress had utilized the taxing power to "persuade" farmers to limit the production of crops in order to halt the collapse of farm prices. In UNITED STATES V. BUTLER (1936), over Justice Stone's vigorous dissent, six Justices, speaking through Justice Roberts and including Chief Justice Hughes, thought it unnecessary to determine whether this legislative scheme came within the ENUMERATED POWERS of Congress. The majority avoided this inquiry by concluding that the law intruded upon the area of production reserved to the states by the TENTH AMENDMENT, which reserves to the states or the people "the powers not delegated to the United States." The Court invoked the same theory a few months later in CARTER V. CARTER COAL COMPANY (1936) to invalidate the Guffey Act's regulation of wages, hours, and collective bargaining in the coal industry. Although the evidence submitted in a long trial proved indisputably the obvious fact that coal strikes could and did halt substantially all interstate commerce moving by rail, as most commerce then did, five Justices, speaking through Justice Sutherland, found decisive not the magnitude of an effect on interstate commerce but whether the effect was immediate, without an intervening causal factor. Even Chief Justice Hughes concurred to this extent, although not in other parts of the majority opinion. Only Justices Brandeis, Stone, and Cardozo challenged the reasoning of the majority.

The *Butler* and *Carter* cases made it plain—or so it seemed—that the Constitution as construed by the Court completely barred the federal government from endeavoring to resolve the national economic problems which called for control of intrastate transactions at the production or manufacturing stage. As an economic matter, individual states were unable to set standards for their own industries that were in competition with producers in

other states. The result was that in the United States no government could take action deemed necessary to deal with such matters no matter how crippling their effect upon the national economy might be.

In early 1937 the same type of collective bargaining regulation which the *Carter* case had stricken for the coal industry was on its way to the Supreme Court in the first cases under the WAGNER (NATIONAL LABOR RELATIONS) ACT of 1935. That statute by its terms applied to unfair labor practices that burdened or obstructed interstate commerce or tended to lead to a labor dispute that had such an effect. The courts of appeals, following the *Carter* case, had held that the act could not constitutionally reach a steel manufacturing company, a trailer manufacturer, and a small clothing manufacturer.

Three days before the arguments in these cases in the Supreme Court were to commence, President Roosevelt, who had recently been reelected by a tremendous majority, announced a plan to add up to six new Justices to the Supreme Court, one for each Justice over seventy years of age, purportedly for the purpose of providing younger judges who could enable the Court to keep up with its workload. The Court and many others vigorously opposed the plan. Two months later, in the WAGNER ACT CASES (1937), Chief Justice Hughes and Justice Roberts joined Justices Brandeis, Stone, and Cardozo to sustain the applicability of the National Labor Relations Act to the three manufacturers. The evidence as to the effect of their labor disputes upon interstate commerce was obviously much weaker than that presented in the *Carter* case as to the entire bituminous coal industry. Within the next few months, Justices Van Devanter and Sutherland retired, to be succeeded by Senator HUGO L. BLACK and Solicitor General STANLEY F. REED, and the court-packing plan gradually withered away, even though for a long time President Roosevelt refused to abandon it. No one can be certain whether the plan influenced the Chief Justice and Justice Roberts, but many persons thought the facts spoke for themselves.

Chief Justice Hughes's opinion for the Court in *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937) flatly declared that practices in productive industry could have a sufficient effect upon interstate commerce to justify federal regulation under the commerce clause. The test was to be "practical," based on "actual experience." The reasoning of the *Carter* and *Butler* cases was repudiated, although the majority opinion did not say so.

In 1938 a revised AGRICULTURAL ADJUSTMENT ACT and a new FAIR LABOR STANDARDS ACT were enacted. Under the former, the secretary of agriculture, after obtaining the necessary approval of two-thirds of the tobacco growers in a referendum, prescribed marketing quotas determining the maximum quantity of tobacco each grower could sell. Although the practical effect was to limit what would be produced, the object was to stabilize prices by keeping an excessive supply off the market. In *Mulford v. Smith* (1939), the Court, speaking through Justice Roberts, found that because interstate and intrastate sales of tobacco were commingled at the auction warehouses where tobacco was sold, Congress clearly had power to limit the amount marketed by each farmer. HAMMER V. DAGENHART, UNITED STATES V. BUTLER, and the Tenth Amendment were mentioned only in the dissenting opinion of Justice McReynolds and Butler.

The Fair Labor Standards Act of 1938 in substance reenacted the minimum wage and maximum hour provision of the NIRA for employees engaged in interstate commerce or the production of goods for such commerce, and also forbade the shipment in interstate commerce of goods produced under the proscribed labor conditions. The minimum wage then prescribed was twenty-five cents per hour. The prevailing wage in the lumber industry in the South ranged from ten cents to twenty-seven and a half cents per hour, which made it difficult for employers paying more than the lowest amount to compete. A case involving a Georgia sawmill (UNITED STATES V. DARBY LUMBER COMPANY) came to the Supreme Court late in 1940, and was decided in early 1941 after Justice Butler had died and Justice McReynolds had retired. By that time Justices FELIX FRANKFURTER and WILLIAM O. DOUGLAS had replaced Cardozo and Brandeis, and Justice FRANK MURPHY had succeeded Butler.

The Supreme Court, speaking unanimously through Justice Stone, upheld the statute. The Court held that Congress had the power to exclude from interstate commerce goods that were not produced in accordance with prescribed standards, and to prescribe minimum wages and maximum hours for employees producing goods which would move in interstate commerce. Overruling HAMMER V. DAGENHART, the Court declared that the power of Congress to determine what restrictions should be imposed upon interstate commerce did not exclude regulations whose object was to control aspects of industrial production. The Court invoked the interpretation of the NECESSARY AND PROPER CLAUSE in MCCULLOCH V. MARYLAND (1819): the commerce power extended not merely to the regulation of interstate commerce but also "to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." The emphasis was not on direct or indirect effects, a judge-made concept not tied to constitutional language, or even to the substantiality of an effect. The Court found it sufficient that

the establishment of federal minimum labor standards was a reasonable means of suppressing interstate competition based on substandard labor conditions. In KIRSCHBAUM V. WALLING (1942) the Court broadly construed the commerce clause to make the Fair Labor Standards Act apply to service and maintenance employees who were not directly engaged in the production of goods for commerce but in the performance of services ancillary to such production.

A year and a half after *Darby*, in WICKARD V. FILBURN (1942), a unanimous Court, speaking through Justice ROBERT H. JACKSON, upheld marketing quotas under the amended Agricultural Adjustment Act, even though they limited the amount of wheat allowed to be consumed on the farm as well as the amount sold. The object was to reduce the supply of wheat in order to increase the price—and the total supply of wheat, including the twenty percent of the crop consumed on the farm for feed or seed, not only was in at least potential competition with wheat in commerce but had a substantial influence on prices and market conditions for the wheat crop throughout the nation. Reviewing the prior law, and explicitly noting the cases that were being disapproved—*E. C. Knight*, *Employers' Liability*, *Hammer v. Dagenhart*, *Railroad Retirement Board*, *Schechter*, and *Carter*—Justice Jackson's opinion laid to rest the prior controlling effect attributed to nomenclature such as "production" and "indirect," as distinct from the actual economic effect of an activity upon interstate commerce. Even if an "activity be local" and not itself commerce, "it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." The proper point of reference was "what was necessary and proper to the exercise by Congress of the granted power." The Court further declared, as it had in *Darby*, that the magnitude of the contribution of each individual to the EFFECT ON COMMERCE was not the criterion but the total contribution of persons similarly situated, which meant that the insignificant effect of the amount consumed on any particular farm was not decisive.

In 1944 and 1946, in cases holding that Congress could regulate the insurance industry and public utility holding companies (UNITED STATES V. SOUTH-EASTERN UNDERWRITERS ASSOCIATION, 1944; *North American Co. v. Securities and Exchange Commisssion*, 1946), the Court broadly summarized the teachings of its prior cases beginning with the words of Chief Justice Marshall in *Gibbons v. Ogden*:

> Commerce is interstate . . . when it "concerns more States than one." . . . The power granted is the power to legislate concerning transactions which, reaching across State boundaries, affect the people of more states than one;—to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing. This federal power to determine the rules of intercourse across state lines was essential to weld a loose confederacy into a single, indivisible Nation; its continued existence is equally essential to the welfare of that Nation.

Since these decisions there has been no doubt that Congress possesses full power to regulate all aspects of the integrated national economy. The few commerce clause cases of importance since that time concerned the use of the commerce power for noncommercial purposes: to combat racial SEGREGATION, crime, and environmental problems.

In *Katzenbach v. McClung* (1964) the Court sustained the provisions of the CIVIL RIGHTS ACT OF 1964 prohibiting RACIAL DISCRIMINATION by restaurants serving interstate travelers or obtaining a substantial portion of their food from outside the state, both because discrimination had a highly restrictive effect upon interstate travel by Negroes and because it reduced the amount of food moving in interstate commerce (which seems quite doubtful). (See also HEART OF ATLANTA MOTEL V. UNITED STATES.)

PEREZ V. UNITED STATES (1971) upheld the application of the federal loanshark statute to purely intrastate extortion on the ground that Congress had rationally found that organized crime was interstate in character, obtaining a substantial part of its income from loansharking which to a substantial extent was carried on in interstate and foreign commerce or through instrumentalities of such commerce. Unmentioned rationales might have been the difficulty of proving that loansharking in a particular case had an interstate connection and the belief that it was necessary to prohibit all loansharking as an appropriate means of prohibiting those acts that did affect interstate commerce.

In *Hodel v. Virginia Surface Mining and Reclamation Association* (1981) the Court unanimously upheld federal regulation of surface or strip coal mining operations, rejecting the contention that this was merely a regulation of land use not committed to the federal government. There had been legislative findings that surface coal mining causes water pollution and flooding of navigable streams and that it harms productive farm land and hardwood forests in many parts of the country. The Court found, following *Darby*, that this was a means of preventing destructive interstate competition favoring the producers with the lowest mining and reclamation standards, that Congress can regulate the conditions under which goods shipped in interstate commerce are produced when that in itself affects interstate commerce, and that the commerce power permits federal regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one state.

The more recent decisions, which in some respects

went far beyond the classical statements as to the modern scope of the commerce power in *Darby* and *Wickard v. Filburn*, were expected and accepted with little comment or concern. The country now appears to recognize that the national government should have and does have power under the commerce clause to deal with problems that do not limit themselves to individual states—as Chief Justice Marshall had declared in 1824, though doubtless with no idea of how far that principle would eventually be carried.

The enlargement of the commerce power since 1789 is attributable not to the predilections of judges but to such inventions as steamboats, railroads, motor vehicles, airplanes, the telegraph, telephone, radio, and television. When the nation was young, composed mainly of farms and small towns, there was little interstate trade, except by water or near state lines. Now persons and goods can cross the continent in less time than a traveler in 1789 would have taken to reach a town thirty miles away. Business and the economy have adjusted to these changes. Somewhat more slowly than the people and Congress, the Supreme Court has recognized that an integrated national economy is predominantly interstate or related to interstate commerce, and must be subject to governmental control on a national basis.

The expansion of the concept of interstate commerce and of the subjects which Congress can regulate under the commerce power was not accompanied by a contraction of the powers of the states. Only those state laws that discriminate against or unduly burden interstate commerce are forbidden.

ROBERT L. STERN
(1986)

(SEE ALSO: *Dormant Commerce Clause.*)

Bibliography

CORWIN, EDWARD S. 1959 *The Commerce Power versus States Rights.* Princeton, N.J.: Princeton University Press.

FRANKFURTER, FELIX 1937 *The Commerce Clause under Marshall, Taney and Waite.* Chapel Hill: University of North Carolina Press.

GAVIT, BERNARD C. 1932 *Commerce Clause of the United States Constitution.* Bloomington, Ind.: Principia Press.

STERN, ROBERT L. 1934 That Commerce Which Concerns More States Than One. *Harvard Law Review* 47:1335–1366.

——— 1946 The Commerce Clause and the National Economy, 1933–1946. *Harvard Law Review* 59:645–693, 883–947.

——— 1951 The Problems of Yesteryear—Commerce and Due Process. *Vanderbilt Law Review* 4:446–468.

——— 1955 The 1955 Ross Prize Essay: The Scope of the Phrase "Interstate Commerce." *American Bar Association Journal* 41:823–826, 871–874.

——— 1973 The Commerce Clause Revisited—The Federalization of Interstate Crime. *Arizona Law Review* 15:271–285.

## COMMERCE COURT

In 1910 Congress established the Commerce Court, with the JURISDICTION, formerly held by the district courts and courts of appeals, to review decisions of the Interstate Commerce Commission (ICC). Although the ICC acquiesced in the establishment of the new court, acceptance soon turned to opposition. The Commerce Court reversed the ICC's decisions in a number of important cases, and congressional Democrats saw the court as a threat to the program of railroad regulation. Two 1912 bills to abolish the court were vetoed by President WILLIAM HOWARD TAFT. In 1913, a third abolition bill received President WOODROW WILSON's blessing.

The creation of specialized federal courts is often proposed but not often enacted. The short, unhappy life of the Commerce Court is regularly offered as a cautionary tale.

KENNETH L. KARST
(1986)

Bibliography

DIX, GEORGE E. 1964 The Death of the Commerce Court: A Study in Institutional Weakness. *American Journal of Legal History* 8:238–260.

## COMMERCIAL SPEECH

Until 1976 "commercial speech"—a vague category encompassing advertisements, invitations to deal, credit or financial reports, prospectuses, and the like—was subject to broad regulatory authority, with little or no protection from the FIRST AMENDMENT. The early decisions, epitomized by *Valentine v. Chrestensen* (1942), followed the then characteristic judicial approach of defining certain subject-matter categories of expression as wholly outside the scope of First Amendment protection. Under this TWO-LEVEL THEORY, a "definitional" mode of First Amendment adjudication, commercial speech was considered to be, along with OBSCENITY, and LIBEL, outside First Amendment protection.

When facing combinations of unprotected commercial speech and protected political speech in subsequent cases, the Court made First Amendment protection turn on the primary purpose of the advertisement. Thus, in MURDOCK V. PENNSYLVANIA (1943), the Court struck down an ordinance requiring solicitors of orders for goods to get a li-

cense and pay a fee as it applied to Jehovah's Witnesses who sold religious pamphlets while seeking religious converts. On the other hand, in *Bread v. Alexandria* (1951) the Court held that a door-to-door salesman of national magazine subscriptions was subject to a town ordinance barring such sales techniques, because his primary purpose was to sell magazines rather than to disseminate ideas.

The "primary purpose" test unraveled in NEW YORK TIMES V. SULLIVAN (1964), more prominently known for another rejection of the definitional approaches in its holding that defamation is not beyond First Amendment protection. In *Sullivan*, the *New York Times* had printed an allegedly defamatory advertisement soliciting funds for civil rights workers. Although the advertisement's primary purpose was, arguably, to raise money, the Court held that it was protected by the First Amendment because it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."

Recent decisions have gone well beyond *Sullivan* and moved advertising and other commercial speech—political or not—within the protection of the First Amendment. In the leading case, VIRGINIA PHARMACY BOARD V. VIRGINIA CITIZENS CONSUMER COUNCIL (1976), the Court struck down a state ban on prescription drug price advertising. The Court rejected the state's "highly paternalistic approach," preferring a system in which "people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." The Court cautioned, however, that because untruthful speech has never been protected for its own sake government may take effective action against false and misleading advertisements. And it indicated a greater scope for regulating false or misleading commercial speech than is permitted in relation to false political statements, such as defamations of public officials, because advertising is more easily verifiable and is less likely to be "chilled" by regulation because it is a commercial necessity.

*Virginia Pharmacy Board* fixed the principle that advertising may be controlled when it is false, misleading, or takes undue advantage of its audience; but the case left open the issue whether whole categories of commercial speech deemed inherently misleading or difficult to police can be suppressed. This issue divided the Supreme Court with respect to lawyers' advertising, when a narrow majority extended First Amendment protection to price advertising of routine legal services, rejecting the dissenters' claim that the complex and variegated nature of legal services gave lawyers' advertising a high potential for deception and impeded effective regulation of particular deceptions. However, the Court held that "ambulance chasing"—in-person solicitation of accident victims for pecuniary gain—could be barred entirely because of its potential for deception and overbearing.

Where regulation of commercial expression is not directed at potential deception but intended to advance other interests such as aesthetics or conservation, the Supreme Court has followed a relatively permissive approach to state regulatory interests, while becoming hopelessly fragmented about the First Amendment principles that ought to govern. Thus, in *Metromedia, Inc. v. San Diego* (1981) a shifting majority coalition of Justices made clear that commercial billboards could be entirely banned in a city for aesthetic or traffic safety reasons. Recent decisions, following CENTRAL HUDSON GAS V. PUBLIC SERVICE COMMISSION (1980), have fashioned a four-part test to appraise the validity of restrictions on commercial speech. Protection will not be extended to commercial speech that is, on the whole, misleading or that encourages unlawful activity. Even protected commercial speech may be regulated if the state has a substantial interest, if the regulation directly advances that interest, and if the regulation is no broader than necessary to effectuate the state's interest. The elastic properties of this four-part test in actual application have generated considerable disarray within the Supreme Court.

The commercial speech decisions of the BURGER COURT have made clear that freedom of expression principles extend beyond political and religious expression, protecting not only the MARKETPLACE OF IDEAS but expression in the marketplace itself. Second, in affirming relatively broad regulatory power over commercial speech, even though it is deemed to be protected by the First Amendment, the Court has reinforced the notion that the First Amendment extends different levels of protection to different types of speech. The commercial speech decisions thus lend support to Justice ROBERT H. JACKSON'S OBITER DICTUM in KOVACS V. COOPER (1949) that under the First Amendment each type and medium of expression "is a law unto itself."

BENNO C. SCHMIDT, JR.
(1986)

Bibliography

JACKSON, THOMAS H. and JEFFRIES, J. C., JR. 1979 Commercial Speech: Economic Due Process and the First Amendment. *Virginia Law Review* 65:1–41.

WEINBERG, JONATHON 1982 Constitutional Protection of Commercial Speech. *Columbia Law Review* 82:720–750.

## COMMERCIAL SPEECH
(Update 1)

For most of this century commercial speech was regarded as outside the scope of the FIRST AMENDMENT. Indeed, the Supreme Court so held in 1942. But in 1976 the Supreme Court reversed course in the case of VIRGINIA STATE BOARD OF PHARMACY V. VIRGINIA CITIZENS' CONSUMER COUNCIL. There the Court held that Virginia had violated the First Amendment by prohibiting pharmacists from advertising prices of prescription drugs. The Court was unpersuaded that the state's fear that product advertising would lower the "professional" character of the practice of pharmacy outweighed the First Amendment interest in open competition of information and ideas, even about products of commerce.

In 1980 in CENTRAL HUDSON GAS ELECTRIC CORPORATION V. PUBLIC SERVICE COMMISSION, the Court announced a four-part test for deciding when commercial speech is entitled to First Amendment protection. To determine whether commercial speech is protected, the Court held, it must be found that the speech concerns a lawful activity and is not misleading, that "the regulation directly advances the governmental interest asserted," and that the regulation "is not more extensive than is necessary to serve that interest." Applying that standard to the case before it, the Court invalidated a Public Service Commission regulation that prohibited electrical utilities from engaging in promotional advertising. While the Court acknowledged that the commission's purpose was legitimate (namely, to conserve energy), the commission's case failed in the Court's view because there was no showing that this legitimate purpose could not be achieved by regulation less intrusive on First Amendment interests.

In recent years the Supreme Court has seemed to retreat from the *Central Hudson* trend of extending broader First Amendment rights when it comes to protection of commercial speech. In a major decision in 1986 in POSADAS DE PUERTO RICO ASSOCIATES V. TOURISM COMPANY, the Court upheld a Puerto Rican government regulation that forbade casino advertising directed at Puerto Rican residents; advertising aimed at tourists, on the other hand, was permitted. Though casino gambling was legal in Puerto Rico, and though the advertising prohibited was neither misleading nor fraudulent, the Court held that the government's interest in avoiding the debilitating effects of gambling on the internal culture of Puerto Rico was "substantial," that the restriction "directly advanced" that goal, and that the legislature could reasonably conclude that residents would "be induced by widespread advertising to engage in such potentially harmful conduct." The Court refused to require Puerto Rico to use means other than an advertising prohibition to achieve its goal of discouraging gambling by residents. The Court reasoned that, because casino gambling could be prohibited entirely, that power "includes the lesser power to ban advertising of casino gambling."

The *Posadas* case seems a step backward from the direction taken in *Virginia Pharmacy* and *Central Hudson* for two reasons. First, it appears to signal that the Court will not demand that governments demonstrate the inadequacy of nonspeech restrictive measures in controlling supposedly harmful effects of commercial speech. While *Central Hudson* required the state to "demonstrat[e] that its interest in conservation cannot be protected adequately by more limited regulation," *Posadas* was satisfied by the assumption that the legislature "could" conclude, as it "apparently did," that alternative remedies were insufficient. The Court explicitly articulated this limitation in the *Central Hudson* formula in BOARD OF TRUSTEES OF STATE UNIVERSITY OF NEW YORK V. FOX (1989).

Second, the Court's reasoning in *Posadas* that the state's potential power to forbid gambling includes the power to regulate the speech itself even when gambling is not prohibited raises serious questions about the continuing strength of earlier decisions protective of commercial speech. In *Virginia Pharmacy*, for example, although prescription drugs presumably could have been banned by Virginia, that fact did not stop the Court from holding that a ban on advertising for such drugs was unconstitutional.

The most that can be said at the present time about the commercial speech doctrine is that it is not yet on a consistent track, although some level of First Amendment protection for commercial speech is now firmly established.

LEE C. BOLLINGER
(1992)

## COMMERCIAL SPEECH
(Update 2)

Since 1976, the Supreme Court has reviewed FIRST AMENDMENT challenges to regulations affecting "commercial speech" under a standard of intermediate scrutiny. To meet that standard, established in CENTRAL HUDSON GAS AND ELECTRIC CORP. V. PUBLIC SERVICE COMMISSION (1980), a law dictating or restricting the manner, extent, or content of commercial matter must be a law for which a substantial showing can be furnished of actual (rather than merely speculative) need, and of adequate justification in light of the kind and extent of regulation or restriction it enacts.

Protecting consumers from false or misleading information in commercial representations is a typical interest of sufficiently substantial weight to count heavily in this

area, as the opinions of the Court readily admit. Regulations requiring various disclosures such as a product's actual price, ingredients, and full effects (including its effects on the environment, insofar as these, too, may be regarded as important for the consumer to understand) generally tend to be sustained in the courts. The commercial speaker may be constrained to make far more elaborate disclosures in his representations than he might wish to do, or than others not subject to the *Central Hudson* test (for example, candidates for public office) can be compelled to declare. He may likewise be held far more strictly responsible for the accuracy of his affirmative representations in what he presents in his publicity for his product or services, consistent with *Central Hudson*. Subject to meeting the other requirements of the *Central Hudson* test, regulations competently drawn to serve these objectives tend not to be intrusively second-guessed in the courts. It is left quite substantially to the discretion of legislative bodies and to specialized regulatory agencies (such as the Food and Drug Administration and the Federal Trade Commission), moreover, to determine the particular boundary lines—of how much disclosure or in what detail, and of what kind of affirmative claims may or may not be asserted, and on the strength of what measure of empirical support—such as the regulatory agency may require.

In contrast, a restriction severely limiting the time, place, or manner of advertising a particular product or service, not to protect the public from anything identifiably either false or misleading in such commercial material, but rather to protect a competitor's market (whether of the same good or a rival product) is far less likely to be sustained in the courts under the *Central Hudson* test. It may fail at the first step. For insulating certain producers or products from losing market hegemony or market share to competing goods, of whatever importance it may be asserted to have in the minds of legislators, is generally not regarded by the Court as a suitable justification for biasing the manner and extent to which the public receives equally accurate information respecting those respective products, such as each may be.

To be sure, insofar as the legislature may decide to favor certain producers over others (such as dairy farmers producing butter over producers of equally nutritious, lower-cost nondairy substitutes), it may do so with little First Amendment hindrance, virtually as it may choose to do by other means, for example, by imposing a higher tax on the legislatively disfavored product or by providing some kind of price support for the favored product as it may see fit to do. Still, the Court has suggested, it may not by the same gesture attempt to manipulate consumer response by the different technique of biasing what the public may merely learn about each product by denying an equal freedom of (truthful, accurate) commercial communication. Proceeding in this information-biasing way, in the view of the Court, is generally foreclosed by the First Amendment itself. While some critics have wondered over the point, the distinction for the Court is quite clear. The legislature may "fix the fight" between product rivals to a very considerable extent, even by tying one boxer's legs or arms (as imposing a nearly prohibitive tax upon his product may do), but yet may not do so by putting a gag in one fighter's mouth, stopping his breath.

The First Amendment is quintessentially concerned with gags on speech. When gags are used, the burden of justification on government under *Central Hudson* tends at once to rise, even as it sharply does as in the more ordinary instance of political or social advocacy speech. A compelling justification must be provided, and insulating preferred producers of preferred products from having to contend with comparative claims, no less accurate or truthful than their own, is unlikely to suffice.

As an additional consideration pursuant to the *Central Hudson* test, even more conventional regulations (including those discussed earlier respecting what must be disclosed in commercial material in order to make the advertisement permissible), must in each instance have a reasonably close fit to the problem to which they are allegedly addressed. This general requirement of "close fit," in turn, has two matching elements or bookends. On the one side, the law enacted to meet an alleged need must meet it in substantial (not insubstantial) fashion, that is, in a fashion likely to make a real and significant difference rather than very little difference at all. On the other side, the restriction or regulation must not extend further than can be fairly defended in terms of the need it is alleged to be appropriate to meet.

In this latter respect, current commercial speech DOCTRINE has picked up protection from what has been elsewhere described as the First Amendment legislative vice of OVERBREADTH, albeit not yet with all of the consequences that that doctrine has meant in its aplication to laws affecting political, rather than commercial, speech. Specifically, a law on its face prohibiting a greater range of political utterance than the First Amendment will tolerate a legislature to prohibit may risk the fate of being held unconstitutional on its face, solely on that account. It may be impugned even at the behest of one with respect to whom there is no question that his conduct was not merely well within the coverage of the statute, but was conduct itself not protected by the First Amendment. Even so, he is nonetheless able to escape any sanction for his conduct by having the statute declared "void on its face," fatally tainted by its "overbreadth" per se.

Here, however, there is this significant difference. An equivalently "overly broad" restriction on commercial

spech may not be as easily impugned—and probably cannot by a party whose conduct it clearly fits, and as to whom there is no First Amendment problem in its application to him. Rather, insofar as the commercial speech restriction may go too far, it may await a person with better STANDING to be heard on that complaint. So, in this respect, the extent to which commercial speech may claim First Amendment protection remains significantly short of that accorded political or social advocacy speech.

Even so, overall the now-revised *Central Hudson* test has somewhat more First Amendment "bite" than some of its earlier applications by the Court implied. Moreover, this is especially true as it bears on LEGISLATION or regulations that seek to suppress commercial information, rather than to assure its accuracy and completeness, or rather than merely to channel it in various ways. Thus, even as some of the preceding review has already suggested, recent decisions of the Court strongly suggest that where the regulation is one that reflects a desire more to keep the public "underinformed" of certain goods or services than merely to insure it is not deceived or misled, the burden on the state to sustain its commercial speech restrictions may be stepped up to a significant degree. Indeed, suppression of advertisements for products or services a legislature may not wish the public to have brought to their attention ranks hardly better with several members of the current Court than suppression of advertisements for candidates, ballot issues, or for particular books or films a legislature would as readily suppress and keep from public attention, were it free to do so (which it is not). Thus, while legislature authority to channel commercial speech is doubtless greater than its power to direct or channel political speech, yet it is very far from being absolute.

And, in this respect, the Court's suggestion in POSADAS DE PUERTO RICO ASSOCIATES V. TOURISM COMPANY (1986), that a legislature may totally forbid any advertising by any business it would otherwise have the power to forbid to exist or compete at all, is no longer valid. Not only has a majority of the Court now squarely held against that proposition (rather, any restriction must meet the *Central Hudson* test at a minimum), but Chief Justice WILLIAM H. REHNQUIST, who first offered it as an alternative holding in *Posadas*, has also now laid it aside. (See *44 Liquormart, Inc. v. Rhode Island*, 1996; *Greater New Orleans Broadcasting Ass'n v. United States*, 1999.) Commercial speech has thus achieved a strengthened intermediate level of First Amendment protection more robust than before its assimilation began, a mere quarter of a century ago, in *Virginia State Board of Pharmacy v. Virginia Citizens Counsumer Council* (1976).

WILLIAM W. VAN ALSTYNE
(2000)

## *COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY v. NYQUIST*
413 U.S. 752 (1973)
## *SLOAN v. LEMON*
413 U.S. 825 (1973)

These cases, said Justice LEWIS F. POWELL in his opinion for a 6–3 SUPREME COURT, "involve an intertwining of societal and constitutional issues of the greatest importance." After LEMON V. KURTZMAN (1971), New York State sought to aid private sectarian schools and the parents of children in them by various financial plans purporting to maintain the SEPARATION OF CHURCH AND STATE. Avowing concern for the health and safety of the children, the state provided direct financial grants to "qualifying" schools for maintenance costs. But as Justice Powell observed, "virtually all" were Roman Catholic schools, and the grants had the inevitable effect of subsidizing religious education, thus abridging the FIRST AMENDMENT's prohibition against an ESTABLISHMENT OF RELIGION. New York, as well as Pennsylvania, also provided for the reimbursement of tuition paid by parents who sent their children to nonpublic sectarian schools; New York also had an optional tax relief plan. The Court found that the reimbursement plans constituted grants whose effect was the same as grants made directly to the institutions, thereby advancing religion. The tax benefit plan had the same unconstitutional result, because the deduction, like the grant, involved an expense to the state for the purpose of religious education. The Court distinguished outright tax exemptions of church property for reasons given in WALZ V. TAX COMMISSION (1970). By distinguishing *Nyquist* in MUELLER V. ALLEN (1983), the Court sustained the constitutionality of a tax benefit plan that aided the parents of children in nonpublic sectarian schools.

LEONARD W. LEVY
(1986)

## *COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY v. REGAN*
444 U.S. 646 (1980)

A New York statute directed the reimbursement to nonpublic schools of costs incurred by them in complying with certain state-mandated requirements, including the administration of standardized tests. The participation of church-related schools in this program was challenged as an unconstitutional ESTABLISHMENT OF RELIGION, but the Supreme Court rejected the challenge.

Justice BYRON R. WHITE, writing for a narrowly divided Court, noted that a previous New York law authorizing reimbursement for test services performed by nonpublic schools had been found unconstitutional in *Levitt v. Committee* (1973). However, the new statute, unlike its predecessor, provided for state audit of school financial records to insure that public monies were used only for secular purposes.

Justice HARRY BLACKMUN, with whom Justices WILLIAM J. BRENNAN and THURGOOD MARSHALL joined, dissented. Blackmun stressed that New York's program involved direct payments by the state to a school engaged in a religious enterprise. Justice JOHN PAUL STEVENS also filed a brief dissent.

*Committee v. Regan* is another illustration of the blurred nature of the line the Court has attempted to draw between permissible and impermissible state support to church-related schools.

RICHARD E. MORGAN
(1986)

## COMMON LAW
### (Anglo-American)

The common law is a system of principles and rules grounded in universal custom or natural law and developed, articulated, and applied by courts in a process designed for the resolution of individual controversies. In this general sense, the common law is the historic basis of all Anglo-American legal systems. It is also an important element in the origin and plan of the United States Constitution.

Though sometimes characterized as "unwritten" in reference to their ultimate source, the principles and rules of the Anglo-American common law are in fact found in thousands of volumes of written judicial opinions reporting the grounds of decision in countless individual cases adjudicated over the course of centuries. The process that produced this body of law has three important aspects. First, common law principles and rules derive their legitimacy from the adversary process of litigation. They are valid only if they are HOLDINGS, that is, propositions necessary to the resolution of actual controversies. Second, the common law is applied through a characteristic reasoning process that compares the facts of the present case to the facts of earlier cases. The holdings of those earlier cases are PRECEDENTS, which must be followed unless their facts can be distinguished or unless they can be overruled because their grounds are deemed unsound in light of changing social conditions or policy. In the latter situation, or if no existing precedent is applicable, a new rule may be fashioned from the logic of related rules or underlying principle. Third, the common law is a process in the procedural sense. Litigation is governed by rules designed to shape issues of fact and law so that a case may be fairly and efficiently presented to and decided by the jury, the traditional mode of trial.

The principles and rules of the common law grow and change within this threefold process at the initiative of parties to litigation as they bring forward issues falling outside, or challenging, existing precedents. The common law may also be changed by legislative enactment, but in Anglo-American countries legislation is relied on chiefly to supplement or revise or codify the common law in specific situations.

The Anglo-American common law evolved from decisions of the three great English courts of King's Bench, Common Pleas, and Exchequer, which were firmly established by the end of the thirteenth century. These courts, though created under the royal prerogative, became effectively independent by virtue of their ancient origins and the prestige and life tenure of their judges.

By the time of the AMERICAN REVOLUTION, two strands were apparent in the English common law. The private law, which developed in actions between subjects, included complex DOCTRINES of property, contract, and tort appropriate to a sophisticated landed and commercial society. The public law, product of actions in which the king was a litigant, consisted of rules defining and limiting his political and fiscal prerogatives, defining criminal conduct as a reflection of his role as peacekeeper, and establishing a series of procedural rights accorded to the criminally accused. In the largely unwritten English constitution, Parliament as supreme sovereign had power to alter or abolish even the most fundamental common law rules, but by convention basic governmental institutions and individual rights were ordinarily beyond legislative change.

The English common law had by 1776 been received in the American colonies. The full array of English law books was the source of common law principles and rules, and the courts followed the common law process. Though the colonists argued otherwise, the English view was that colonial reception of the common law was a matter of grace, not right. In legal theory, the colonies, as the king's dominions, were directly governed by the prerogative, free of common law constraints. Colonial governmental powers were expressly granted and defined by charter or statute. King and Parliament, when England's interests demanded, would set aside rights guaranteed by the common law. As the DECLARATION OF INDEPENDENCE shows, the Revolution was in part fought to rectify violations of charter grants of legislative and judicial power and invasions of individual rights such as TRIAL BY JURY and freedom from unreasonable SEARCH AND SEIZURE.

In reaction to the prerevolutionary experience, the peo-

ple of the United States asserted SOVEREIGNTY through the federal and state constitutions, under which the executive, legislative, and judiciary were separate branches subject to the written FUNDAMENTAL LAW. The constitutions, however, were adopted against a common law backdrop. The states had expressly received the common law, assuming that their courts would develop it through application of the common law process. The federal Constitution contained no express reception provision, but it did authorize Congress to establish federal courts with JURISDICTION over cases arising under federal law and between citizens of diverse citizenship. Once the federal courts were established, important and difficult questions arose concerning their power to develop a FEDERAL COMMON LAW.

The result of two centuries of learned disputation is that today there is little federal common law. The Supreme Court in ERIE RAILROAD V. TOMPKINS (1938) settled the most enduring controversy by holding that in diversity-of-citizenship cases federal courts must apply the common law as though they were courts of the states where they sit, overruling Justice JOSEPH STORY's famous contrary decision in SWIFT V. TYSON (1842). Earlier the Court had concluded, as DUE PROCESS might have required, that there was no FEDERAL COMMON LAW OF CRIMES, even where federal interests were involved. In civil matters affecting federal interests the Court has held that there is no general federal common law, but the federal courts may articulate common law rules to supplement a comprehensive federal statutory scheme or implement an EXCLUSIVE JURISDICTION. These results are consistent with the basic premise of FEDERALISM that the national government is one of limited powers and other powers are reserved to the states, or to the people.

While the federal Constitution did not adopt the common law as a general rule of decision, many of its specific provisions were of common law origin. In its delineation of the SEPARATION OF POWERS, the Constitution incorporated common law limitations upon the prerogative and Parliament which had been honored in England and disregarded in the colonies. The BILL OF RIGHTS, adopted in part because of doubts about the existence and efficacy of a federal common law, codified specific common law procedural rights accorded the criminally accused. It also incorporated common law protections of more fundamental interests, including that basic guarantee of reason and fairness in governmental action, the right to due process of law.

Most important, the common law process has enabled the federal judiciary to attain its intended position in the constitutional plan. Chief Justice JOHN MARSHALL's opinion in MARBURY V. MADISON (1803), asserting judicial power to review legislation and declare it unconstitutional, was founded on the common law obligation of courts to apply all the relevant law, including the Constitution, in deciding cases. A declaration of unconstitutionality in one case is effective in other similar situations because of the force of precedent. In refining *Marbury*'s principle, the Supreme Court more recently has developed the doctrine of JUSTICIABILITY, designed to establish in constitutional cases the existence of a truly adversary CASE OR CONTROVERSY, to which decision of a constitutional issue is necessary. Together, these rules, by proclaiming that the federal courts are confined to the traditional common law judicial role, provide both legitimacy and effectiveness to court enforcement of the Constitution's limits upon the powers of the other branches and the states.

L. KINVIN WROTH
(1986)

Bibliography

GOEBEL, JULIUS, JR. 1971 *Antecedents and Beginnings to 1801.* Volume 1 of *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States.* New York: Macmillan.

LLEWELLYN, KARL N. 1960 *The Common Law Tradition: Deciding Appeals.* Boston: Little, Brown.

PLUCKNETT, THEODORE F. T. (1929) 1956 *A Concise History of the Common Law.* Boston: Little, Brown.

TRIBE, LAURENCE H. 1978 *American Constitutional Law.* Mineola, N.Y.: Foundation Press.

## COMMON LAW, CONSTITUTIONAL

See: Constitutional Common Law

## COMMON LAW, FEDERAL CIVIL

See: Federal Common Law, Civil

## COMMON LAW, FEDERAL CRIMINAL

See: Federal Common Law of Crimes

## *COMMONWEALTH v. ALGER*

See: State Police Power

## *COMMONWEALTH v. AVES*
18 Pickering (Mass.) 193 (1836)

This became the nation's leading case on sojourner slaves. It posed an unprecedented question: can a slave brought

temporarily into a free state be restrained of liberty and be removed from the state on the master's return? Chief Justice LEMUEL SHAW rejected the contention that COMITY between the states compelled recognition of the laws of the master's domicile. SLAVERY, Shaw replied, was so odious that only positive local law recognized it. (See SOMERSET'S CASE.) In Massachusetts slavery was unconstitutional. Any nonfugitive slave entering Massachusetts became free because no local law warranted restraint and local laws could prevent involuntary removal.

LEONARD W. LEVY
(1986)

## *COMMONWEALTH v. CATON*
4 Call's (Va.) Reports (1782)

Decided by the highest court of Virginia in 1782, this case is a disputed precedent for the legitimacy of JUDICIAL REVIEW. The state constitution of 1776, which did not empower courts to void enactments in conflict with the constitution, authorized the governor to grant pardons except in impeachment cases. A statute on TREASON deprived the governor of his PARDONING POWER and vested it in the general assembly. Caton, having been sentenced to death for treason, claimed a pardon granted by the lower house, though the upper house refused to concur. The court had only to rule that the pardon was not valid.

Call's unreliable report of the case, a reconstruction made in 1827, indicates that the court considered the constitutionality of the statute on treason and that seven of the eight judges were of the opinion that the court had the power to declare an act of the legislature unconstitutional, though the court unanimously held the act constitutional. In fact, only one of the eight judges ruled the act unconstitutional, one held that it had no power to so rule, and another, GEORGE WYTHE, declared that the court had the power but need not exercise it in this case; he decided that the pardon had no force of law because it was not in conformity with the disputed act, which he found constitutional. A majority of the court, including Chief Justice EDMUND PENDLETON and Chancellor JOHN BLAIR, declined to decide the question whether they had the power to declare an act unconstitutional. Writing to JAMES MADISON a week later, Pendleton reported, "The great Constitutional question . . . was determined . . . by 6 Judges against two, that the Treason Act was not at variance with the Constitution but a proper exercise of the Power reserved to the Legislature by the latter. . . ." Both houses subsequently granted the pardon. The legitimacy of the case as a precedent for judicial review is doubtful.

LEONARD W. LEVY
(1986)

## *COMMONWEALTH v. JENNISON*
(Massachusetts, 1783, Unreported)

In 1781 Quock Walker, a Massachusetts slave, left his master, Nathaniel Jennison, to work as a hired laborer for Seth and John Caldwell. Jennison went to the Caldwell farm, seized Walker, beat him severely, and brought him home where he was locked up.

Three legal cases resulted from this event. In *Walker v. Jennison* (1781) Walker sued his former master for assault and battery. A jury ruled Walker was a free man and awarded him fifty pounds in damages. Jennison then successfully sued the Caldwells for twenty-five pounds for enticing away his "slave property." This decision was overturned by a jury in *Caldwell v. Jennison* (1781). Here attorney LEVI LINCOLN paraphrased arguments from SOMERSET V. STEWART (1772) in a stirring speech against slavery. In 1783 Jennison was convicted under a criminal INDICTMENT for assault and battery against Walker (*Commonwealth v. Jennison*). Chief Justice WILLIAM CUSHING charged the jury that the Massachusetts Constitution of 1780 abolished slavery by declaring "All men are born free and equal. . . ." Although some blacks were held as slaves after these cases, the litigation, known collectively as the "Quock Walker Cases," was instrumental in ending the peculiar institution in Massachusetts.

PAUL FINKELMAN
(1986)

Bibliography

FINKELMAN, PAUL 1981 *An Imperfect Union: Slavery, Federalism, and Comity.* Chapel Hill: University of North Carolina Press.

## *COMMONWEALTH v. SACCO AND VANZETTI*
(Massachusetts, 1921)

On August 23, 1927, the Commonwealth of Massachusetts electrocuted two Italian immigrants, Nicola Sacco and Bartolomeo Vanzetti, for the crimes of armed robbery and murder. The executions stirred angry protest in the United States and throughout the world by millions of people who believed that the two men had been denied a fair trial because of their ethnic background and political opinions.

Sacco and Vanzetti, ALIENS and anarchists who had fled to Mexico to avoid the draft during WORLD WAR I, were arrested in 1920 and quickly brought to trial in Dedham, Massachusetts, for the murder of a paymaster and a guard during the robbery of a shoe factory. The trial took place at the end of the postwar Red Scare in a political atmo-

sphere charged with hysteria against foreigners and radicals. Although the ballistics evidence was inconclusive and many witnesses, most of them Italian, placed the two men elsewhere at the time of the robbery, the jury returned guilty verdicts after listening to patriotic harangues from the chief prosecutor, Frederick Katzmann, and the trial judge, Webster Bradley Thayer.

During his cross-examination of the two defendants, Katzmann constantly emphasized their unorthodox political views and their flight to Mexico during the war. Thayer tolerated a broad range of political questions, mocked the two men's anarchism, and urged the members of the jury to act as "true soldiers . . . in the spirit of supreme American loyalty."

A diverse coalition of Bay State aristocrats, law professors such as FELIX FRANKFURTER, Italian radicals, and New York intellectuals attempted to secure a new trial for the condemned men during the next seven years. They marshaled an impressive amount of evidence pointing to Thayer's prejudice, the doubts of key prosecution witnesses, and the possibility that the crime had been committed by a gang of professional outlaws. The Massachusetts Supreme Judicial Court, however, relying on principles of trial court discretion that made it virtually impossible to challenge any of Thayer's rulings, spurned these appeals and refused to disturb either the verdict or the death sentences. A similar conclusion was reached by a special commission appointed by Governor Alvan T. Fuller and headed by Harvard University president A. Lawrence Lowell.

Last-minute efforts to secure a stay of execution from federal judges, including Supreme Court Justices OLIVER WENDELL HOLMES and LOUIS D. BRANDEIS, also proved unavailing. Attorneys for Sacco and Vanzetti argued that because of Thayer's hostility their clients had been denied a FAIR TRIAL guaranteed by the DUE PROCESS clause of the FOURTEENTH AMENDMENT. But with the exception of MOORE V. DEMPSEY (1923), where a state murder trial had been intimidated by a mob, the Supreme Court had shown great reluctance to intervene in local criminal proceedings. "I cannot think that prejudice on the part of a presiding judge however strong would deprive the Court of jurisdiction," wrote Holmes, "and in my opinion nothing short of a want of legal power to decide the case authorizes me to interfere. . . ." Whether Sacco and Vanzetti received a fair trial is questionable; however, Francis Russell has shown how illusory is the old contention that they were wholly innocent.

MICHAEL E. PARRISH
(1986)

Bibliography

JOUGHN, G. LOUIS and MORGAN, EDMUND M. 1948 *The Legacy of Sacco and Vanzetti.* New York: Harcourt, Brace.

RUSSELL, FRANCIS 1962 *Tragedy in Dedham: The Story of the Sacco-Vanzetti Case.* New York: Harper & Row.

## COMMONWEALTH STATUS

Commonwealths are TERRITORIES in free association with the United States, enjoying virtual autonomy in internal affairs but subject to the United States in foreign and defense matters. Citizens of commonwealths are citizens of the United States: they pay federal taxes and may move freely to, from, and within the United States. Public officials are elected by the people of the commonwealths and neither the officials nor their acts require approval by the President or Congress. Constitutional limitations on state legislation are applicable to commonwealth legislation; and APPEAL lies from the highest court of a commonwealth to the Supreme Court of the United States. When Congress established commonwealth status for the Philippines in 1934 it intended an interim state en route to independence, but commonwealth status has become a practically permanent condition for PUERTO RICO and the Northern Marianas.

The basis of the commonwealth relationship is a "covenant" between the American people and the people of the territory. Since Congress's authority to ratify the covenant derives from its plenary power over territories (Article IV, section 3, clause 2), most legal authorities maintain that Congress could repeal the covenant and impose direct rule. But any attempt to do so would constitute a grievous breach of faith and would excite overwhelming domestic and international political opposition.

DENNIS J. MAHONEY
(1986)

## COMMUNICATIONS ACT
### 48 Stat. 1064 (1934)

The Communications Act of 1934, enacted under Congress's COMMERCE POWER, provides the statutory basis for federal regulation of BROADCASTING and electronic communication. The act describes the electromagnetic spectrum as a national resource and permits private parties to use portions of it only as trustees in the public interest. To administer its provisions the act established the seven-member Federal Communications Commission (FCC), authorizing it to make regulations with the force of law and to issue licenses to broadcasters that may be granted, renewed, or revoked in accordance with "public interest, convenience, and necessity." Under the authority of the act the FCC has promulgated the FAIRNESS DOCTRINE, requiring broadcasters to provide equal time for replies to

controversial messages, as well as regulations to prohibit the broadcasting of OBSCENITY.

The act was based on both technological and ideological considerations. The assumption that broadcasting channels are extremely limited has been disproved by improvements in technology; however, the ideological bias in favor of public ownership and regulation has not yet been overcome. Because of the Supreme Court's deference to Congress's findings of LEGISLATIVE FACT regarding the scarcity of broadcasting channels, as embodied in the Communications Act, in the face of the manifest reality that such channels are far more numerous than, for example, presses capable of producing a major metropolitan newspaper or an encyclopedia, the protection afforded broadcasters' FREEDOM OF SPEECH and FREEDOM OF THE PRESS is significantly reduced.

DENNIS J. MAHONEY
(1986)

## COMMUNICATIONS AND COMMUNITY

The essence of community—indeed, its sine qua non—is communications. In terms of constitutionalism, the question arises as to the role of government intervention in the structure of BROADCASTING and other forms of communication to foster or reshape communities. The Federal Communications Commission (FCC) in the United States has, for example, encouraged minority ownership of broadcast channels or, more directly, minority-related programming, as a means (in part) of strengthening certain notions of community. In Europe, the Television Without Frontiers Directive imposed European quotas on national broadcasters to help frame a European information space. In some highly restricted societies that consider control of imagery essential to a notion of community—such as Iran and Iraq—government intervention to affect the pictures and words that swirl into the minds of its citizens is an important art form.

"Community" has informed much of American broadcast policy. It is reflected in the original allocation patterns of radio frequencies. In 1927, and then again in 1934, Congress determined that each local community should have a radio station—that allocations should be designed not to favor a regional or national market, but one that has local roots. This pattern of allocation of licenses based on cities and towns, rather than vast regions, was the chief characteristic of the 1954 Table of Allocations for television frequencies, and it is that pattern that is the imprint of broadcasting in the United States today. In a famous FCC publication, the 1947 Blue Book, the Commission stressed the importance of the broadcaster as a "mouthpiece" for the community, and local management and ownership were big advantages in contested applications for licenses.

One haunting question, always, was whether this emphasis on community was a sham—merely a way for congressional representatives to deliver wealth to individuals within their districts—with the inevitable rise of national impersonal networks and the transfer of licenses to impersonal chains or groups. Artifacts of community included, for example, a requirement that station management go through a formal ascertainment process, asking local leaders what issues were important to the community, with the assumption that this survey would yield coverage in news. But ascertainment was mechanical, and, often, there was no enforcement mechanism to ensure that community needs were met.

A combination of cynicism about the values and practice of localism, recognition of vast changes in ownership, and constitutional doubts about federal requirements (or even pressure) toward localism led in the 1980s to the abandonment of most of the regulatory architecture underlying the allocation of stations to communities. There is no more ascertainment requirement, no more integration of ownership and management, and even no requirement of local news and public affairs. In TURNER BROADCASTING SYSTEM V. FCC (1994), the Supreme Court implied that requiring local coverage (or, in this case, preferring over-the-air channels for mandatory coverage on cable), might not be "content neutral" and, therefore, might mean that legislation would have to surmount the very high STRICT SCRUTINY hurdle to be constitutional.

The Court's growing hostility to AFFIRMATIVE ACTION programs imposed by government also led to the withering away of the minority preference program, with its implications for the use of broadcasting to enhance the place of African Americans, Hispanics, and others within the United States community. In METRO BROADCASTING, INC. V. FCC (1990), the Court narrowly affirmed a minority preference in contested license applications, but the reasoning was wan, and the constitutional support for intervention to assist in community-building of this sort was moving in the wrong direction. *Metro Broadcasting* was undermined in ADARAND CONSTRUCTION, INC. V. PEÑA (1995).

Cable television, too, saw a playing, at the edges, with the use of communications to build community. Tied to the idea that cities had control of the streets and the physical space for wires, cable television became franchised, almost universally, at the local level. As a result, applicants for valuable licenses boasted how adoption of their systems would mean more community-building in the franchise area. Operators guaranteed local studios, channel space for local government and local schools, and public access channels. These became known as PEG (Public Ac-

cess, Educational and Governmental) commitments. Congress, in the 1984 Cable Act, while precluding much local control over program content, continued to permit franchises to contain these PEG requirements. The constitutionality of these requirements has never been fully tested.

These three outcroppings—the architecture of the original allocation of radio and television licenses, an extensive effort to expand minority broadcasting, and the existence of PEG channels—are examples of a fundamental understanding that the nature of community is a function of the organization of communications. But these three outcroppings also indicate the complexity of government ordering of broadcasting and the press to achieve what are deemed to be positive results.

MONROE E. PRICE
(2000)

(SEE ALSO: *Communications and Democracy; First Amendment; Freedom of Speech; Freedom of the Press; "Must Carry" Laws.*)

## COMMUNICATIONS AND DEMOCRACY

The infrastructure of communications is an indicator of the participatory quality of a democratic society. Ideally, the media in a democratic society help create a public sphere in which a critical nongovernmental voice is formed; they perform a checking function against government abuses; and they inform the public, helping to shape a citizenry capable of assuming the duties of making the intelligent decisions necessary for sound choices.

Underlying this idea of the role of communications in reinforcing democracy are a group of assumptions about law and the role of law. In the United States, the role of government is somewhat circumscribed in its capacity to energize or structure media so as to achieve these goals. Government can impose obligations on broadcasters to provide candidates better access to the airwaves or prohibit overcharging for political advertising. Yet, in terms of foreign policy, the United States has sought to shape media in transition societies, such as in the former Soviet Union, on the grounds that a better media structure will lead to a more stable democracy.

Part of this effort involves indicating to parliaments in other societies what elements of law are important to create an enabling environment for a democratic media. These elements almost always include constitutional provisions. A FIRST AMENDMENT model is usually preferred, but many societies opt for a version of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The United States's view is generally that there should not be an elaborate media law; but often in these transition societies a comprehensive press and BROADCASTING law, which includes a statement of positive contributions that should be obtained in terms of information and its relationship to democratic processes, is enacted.

But such an enabling environment also includes defamation and LIBEL laws, preferably with exemptions for a broad range of criticisms of public officials. Omnipresent are licensing provisions for electronic media, but the general pattern—reflected in American practice—is that the press should not be licensed. Many societies provide special rights, privileges, and responsibilities for accredited journalists, while others accord no special status to journalists. These differences, and how they are implemented, can have a substantial impact on the contribution of a media law to an appropriate enabling environment.

More complicated are rules concerning breaches of NATIONAL SECURITY, HATE SPEECH, or spreading propaganda. The United States internal constitutional position is that such laws are generally incompatible with an enabling environment for a media contribution to a democratic society. European models of media regulation often embed such restrictions in the very definition of constitutionally regulable speech. In some societies, including the United States, there is a concern that media too prone to indecent, violent, and pornographic imagery rob the civil space of democratic discussion. This has led to efforts—usually vague, vain, and clumsily enforced—to regulate elements of such speech. In the new technologies, filtering devices are increasingly urged as noninterventionist means to regulate access to speech that the user (or the society) may deem harmful.

The area of speech directly related to the political process remains an area of legislative concern worldwide in terms of adjusting the democratic impact of media organization. In *Arkansas Educational Television Commission v. Forbes* (1998), the Supreme Court concluded that public broadcasters, at least those licensed to state entities, have an obligation, if they hold public debates, to include all candidates, except those who are excluded not because of their viewpoint, but because of poor public performance or other reasonable but narrow bases.

The formal laws themselves are not sufficient to provide an enabling environment for the role of communications in a democratic society. There is also the question of the RULE OF LAW and the institutional infrastructure in which the law exists. The existence of a JUDICIAL SYSTEM or of REGULATORY AGENCIES that have traditions of fairness and independence are essential aspects of a rule of law that protects a free and democratic media sector.

A third strategic area involves the social and political setting in which the modules of law are introduced and the infrastructure is found. How communications function as an aspect of democratic values involves such background elements as the structure of political governance. In some transition societies in the late 1990s, such as Bosnia and Herzegovina, the existence of a monopoly political party controlling the media meant that law alone could not yield democratic values. Forms of media ownership also influence the democratic character of the media. Many societies, including the United States, have foreign investment restrictions on the electronic media to secure indigenous control over the mechanisms of self-governance. Ownership alone does not reveal whether a medium of communication contributes to the growth of democratic values. Patterns of access are also highly relevant to whether the media serve forums for wide-ranging public debates.

MONROE E. PRICE
(2000)

Bibliography

FISS, OWEN M. 1996 *The Irony of Free Speech.* Cambridge, Mass.: Harvard University Press.

SHIFFRIN, STEVEN H. 1990 *The First Amendment, Democracy, and Romance.* Cambridge, Mass.: Harvard University Press.

SUNSTEIN, CASS R. 1993 *Democracy and the Problem of Free Speech.* New York: Free Press.

# COMMUNICATIONS DECENCY ACT
110 Stat. 56 (1996)

The INTERNET has revolutionized the world of communications in an unprecedented fashion. Growing at an exponential rate, the Internet has become a new and unique global marketplace of images, ideas, and information. But the Internet's ease of access and wealth of available material have also raised problems, most notably access to certain kinds of information—particularly words and images of a sexual nature—either by unsuspecting adults or by children. Because of that concern, Congress passed the Communications Decency Act of 1996. That law was part of the much larger Telecommunications Act of 1996, an unusually important legislative enactment designed to encourage the rapid deployment of new telecommunications technologies and to promote competition in the local telephone service market, the multichannel video market, and the market for over-the-air BROADCASTING. In contrast to the rest of the Telecommunications Act, the communications decency provisions were not given careful or extensive consideration by the Congress.

The Communications Decency Act contained two controversial features: the "indecent" communication provision and the "patently offensive" display provision.

The first part of the law prohibited the knowing transmission of "obscene or indecent" messages to any recipient under 18 years of age, by making it a crime when any person "by means of a telecommunications device knowingly . . . makes, creates, or solicits, and . . . initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age. . . ." and regardless of who initiated the communication. The law also made it a crime to permit one's communication facility to be used for such activity.

The other provision of the law prohibited the knowing sending or displaying of "patently offensive" messages in a manner that is available to a person under 18 years of age. This portion of the law focused on the use of any "interactive computer service" (or "chatroom") to display any written or visual communication that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs. . . ." Any person who controlled such facilities was criminally liable as well. The act nowhere defined or explained the meaning of the key terms "indecent" or "patently offensive" display beyond the text just set forth.

Although the act also provided certain defenses against criminal responsibility for individuals or organizations who take "appropriate measures" to restrict access by minors, the nature of those measures was unclear (most would be extremely expensive), and violation of the act carried significant criminal penalties. The act effectively meant that all who published covered information to people under 18 years of age did so at their peril.

Because of the very real CHILLING EFFECT on FREEDOM OF SPEECH on the Internet, the act was challenged on FIRST AMENDMENT grounds the moment it went into effect. In a 1997 ruling, *American Civil Liberties Union v. Reno*, the Supreme Court declared the act to be unconstitutional. The Court concluded that the proper goal of protecting children could not be pursued through means that so broadly stifled the speech of adults on this vital new medium of communication.

JOEL M. GORA
(2000)

Bibliography

LARUE, JANET M. 1996 The Communications Decency Act of 1996: Sensible Not Censorship. *St. John's Journal of Legal Commentary* 11:721–726.

LESSIG, LAWRENCE J. 1996 Reading the Constitution in Cyberspace. *Emory Law Journal* 45:886–910.

## COMMUNIST CONTROL ACT
68 Stat. 775 (1954)

This measure marked the culmination of the United States government's program to prevent subversion from within during the loyalty-security years. Conservative senators, eager to facilitate removal of communists from positions of union leadership, and Senator HUBERT H. HUMPHREY, tired of hearing liberals smeared as "soft on communism," pushed the measure through Congress with large majorities in each chamber. Clearly tied to the 1954 elections, the act outlawed the Communist party as an instrumentality conspiring to overthrow the United States government. The bill as initially drafted made party membership a crime. Responding to criticism of the DWIGHT D. EISENHOWER administration that the membership clause would make the provisions of the 1950 INTERNAL SECURITY ACT unconstitutional, because compulsory registration would violate the RIGHT AGAINST SELF-INCRIMINATION, the bill's sponsors removed its membership clause. However, Congress deprived the Communist party of all "rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof." The act added a new category of groups required to register—"communist-infiltrated" organizations. These, like communist and "front" organizations, although outlawed, were expected to register with the SUBVERSIVE ACTIVITIES CONTROL BOARD.

The measure, virtually inoperative from the beginning, raised grave constitutional questions under the FIRST AMENDMENT, the Fifth Amendment, and the ban against BILLS OF ATTAINDER. The Justice Department ignored it and pushed no general test of its provisions in the court. The act summarized well the official policy toward the Communist party at the time—to keep it legal enough for successful prosecution of its illegalities.

PAUL L. MURPHY
(1986)

Bibliography

AUERBACH, CARL 1956 The Communist Control Act of 1954. *University of Chicago Law Review* 23:173–220.

## COMMUNIST PARTY

See: Subversive Activity

## *COMMUNIST PARTY OF THE UNITED STATES v. SUBVERSIVE ACTIVITIES CONTROL BOARD*
367 U.S. 1 (1961)

The Supreme Court upheld application to the Communist party of provisions of the Subversive Activities Control Act requiring "any organization . . . substantially controlled by the foreign government . . . controlling the world Communist movement" to register with the Board, providing lists of officers and members. The Court postponed considering self-incrimination objections, held that where an individual might escape regulation merely by ceasing to engage in the regulated activity no BILL OF ATTAINDER existed, and deferred to the congressional balance between national security and the FREEDOM OF ASSOCIATION arguing that any inhibition on communists' associational freedom caused by exposure was incidental to regulation of their activities on behalf of foreign governments.

MARTIN SHAPIRO
(1986)

(SEE ALSO: *Subversive Activities Control Board.*)

## COMMUNISTS

See: Extremist Speech

## COMMUNITARIANISM

Communitarianism is a political philosophy that emphasizes the good society's need for strong bonds of community, civic virtue, solidarities of CITIZENSHIP, and public deliberation about moral issues. It generally offers its vision as an alternative to contemporary LIBERALISM, criticizing liberals for overly emphasizing doctrines of individual autonomy at the expense of nurturing the social allegiances that give depth and substance to an individual's identity. Communitarians hark back to the traditional republican political theory which crucially taught that democratic freedom is accomplished not so much by leaving persons alone as by fostering the virtue it takes to govern according to the common good rather than self-interest.

As a matter of CONSTITUTIONAL INTERPRETATION, communitarians object to prevailing legal trends that insist government must be neutral as among the competing views and values of citizens. For instance, in FIRST AMENDMENT cases, the DOCTRINE of content neutrality means that government cannot regulate speech merely because it judges the subject matter of the speech to be unimportant, unworthy, or imminently dangerous. But communitarians

argue that the lofty purposes of the First Amendment are trivialized when the public interest in FREEDOM OF SPEECH about commerce or sex is equated with the public interest in free speech about politics. For communitarians, freedom of speech is basic precisely because open, democratic government is impossible without it. The same heightened public importance is absent when courts analyze COMMERCIAL SPEECH or sexual speech and courts go too far, argue communitarians, when they read the First Amendment as if its purpose were to protect the individual's personal interest in self-expression. To interpret the First Amendment as if the Framers were neutral as between the importance in a democracy of free speech about politics and free speech about the price of commercial products is to trivialize free speech and to misread the Constitution as exalting protection of individual self-expression into a sovereign, absolute value.

Many communitarians also object to interpreting the FOURTEENTH AMENDMENT DUE PROCESS clause as granting implicit constitutional status to a RIGHT OF PRIVACY, as the Supreme Court did in ROE V. WADE (1973) and subsequent cases protecting a woman's right to choose ABORTION. The same purported right of privacy is at stake in cases involving state regulation of SEXUAL ORIENTATION and assisted suicide (or the RIGHT TO DIE). The problem communitarians have with the privacy cases is not necessarily with the results reached but with the legal reasoning that insists constitutional analysis must bracket or put aside any substantive moral discussion of the public good at stake when individuals make private choices. In regard to abortion in particular, communitarians thus would prefer to reframe the issue along lines suggested by Justice RUTH BADER GINSBURG, who has argued that abortion regulations should be analyzed in reference to legal principles prohibiting SEX DISCRIMINATION as a violation of democracy's commitment to equal respect for all persons.

Communitarians also distinguish between two senses of citizenship implicit in the Constitution. One is the liberal view of citizens as individuals who enjoy the protection of legal rights against the state. The other is a stronger, republican vision of citizens who enjoy the legal status of participating in democratic self-governance and the rights and responsibilities of public service. This participatory notion of citizenship stands behind the constitutional status of TRIAL BY JURY of Article III and the Sixth Amendment's stipulation that criminal juries must be chosen from the district within a state where the crime occurred. The battle to amend the Constitution to protect the so-called jury of the "vicinage" or community affected by the crime, communitarians point out, was waged along civic republican lines and shows a continuing commitment among many in the Founding era to preserve opportunities for local communities, through the jury system, to participate in shaping governing principles of law. Likewise, the SECOND AMENDMENT embodies a philosophy of localism insofar as it protects state militias and the right to bear arms in them against the dangers of a single, standing national army. Historically, communitarians have also defended the constitutionality of the military draft (as in the SELECTIVE SERVICE ACTS) by stressing the Framers' commitment to the civic duty and public service obligations of democratic citizens.

When it comes to issues involving the state and religion, communitarians more readily accept the liberal view that RELIGIOUS LIBERTY should be the same everywhere in the United States, protected by federal courts against local, majoritarian preferences. For instance, communitarians' view of open and egalitarian communities premised on participatory opportunities for all leads them to accept the leading Supreme Court cases prohibiting public SCHOOL PRAYERS, which rest on the principle that public schools best educate children to be democratic citizens when they teach children both to respect RELIGIOUS DIVERSITY and to share civic ties despite those religious divisions.

Finally, communitarians balk at the increasing judicialization of politics, a process whereby resolution of core issues about justice and liberty is removed from the power of the people and entrusted to unelected federal judges. The result is dimunition of democracy and the disempowerment of citizens and their representatives. Communitarians concede that individual rights sometimes trump majority power in our constitutional government and that courts therefore need to enforce constitutional guarantees even against the contrary will of political majorities. But communitarians believe that a better balance can be struck between the rights-based liberalism that controls constitutional interpretation currently and the older, civic republican ideals of the Framers, ideals that stressed public duty as well as private rights and that praised participation in self-governing communities, rather than the protection of individual against community, as the key to political liberty.

JEFFREY ABRAMSON
(2000)

Bibliography

ABRAMSON, JEFFREY 1994 *We, the Jury: The Jury System and the Ideal of Democracy.* New York: Basic Books.

ETZIONI, AMITAI, ed. 1995 *New Communitarian Thinking: Persons, Virtues, Institutions, and Communities.* Charlottesville: University Press of Virginia.

———, ed. 1998 *The Essential Communitarian Reader.* Lanham, Md.: Rowman and Littlefeld.

GLENDON, MARY ANN 1991 *Rights Talk: The Impoverishment of Political Discourse.* New York: Free Press.

SANDEL, MICHAEL J. 1996 *Democracy's Discontent: America in*

*Search of a Public Philosophy.* Cambridge, Mass.: Harvard University Press.

SMITH, ROGERS M. 1997 *Civic Ideals: Conflicting Visions of Citizenship in U.S. History.* New Haven, Conn.: Yale University Press.

SUNSTEIN, CASS R. 1999 *One Case at a Time: Judicial Minimalism and the Supreme Court.* Cambridge, Mass.: Harvard University Press.

TAM, HENRY BENEDICT 1998 *Communitarianism: A New Agenda for Politics and Citizenship.* New York: New York University Press.

TUSHNET, MARK V. 1999 *Taking the Constitution Away from the Courts.* Princeton, N.J.: Princeton University Press.

## COMPACT THEORY

See: Social Compact Theory; Theories of the Union

## COMPANION CASE

Cases decided by the Supreme Court on the same day are called companion cases when they involve the same issues or issues that are closely related. Sometimes a single OPINION is used to explain two or more companion cases, and sometimes separate opinions are written. Occasionally a Justice writing for the Court will select the strongest of a group of companion cases for explanation in a full opinion, leaving the weaker cases to be discussed only briefly, with heavy reliance on the conclusions in the full opinion.

KENNETH L. KARST
(1986)

## COMPARABLE WORTH

The term "comparable worth" refers to the claim that workers in predominantly female occupations should be compensated at rates similar to those paid to workers in predominantly male occupations, when the labor involved in both is comparable in value to the employer. The claim assumes (1) that significant sex segregation exists in American employment; (2) that, as a result, women are disadvantaged economically; and (3) that job classifications that are different can nonetheless be compared by analyzing their component skill, effort, responsibility, working conditions, and training requirements.

The first assumption is not controversial. More than half of the jobs that fall under the most commonly used occupational designations are over eighty percent male- or female-dominated. At least part of the second claim is likewise firmly established. On average, women earn only sixty percent of what men do, and the higher the percentage of women in a particular job category, the lower the average wage tends to be.

One of the controversies over comparable worth centers on how much of the male-female wage disparity can be explained by "nondiscriminatory" factors, such as length of time in continuous employment, trade-offs between work and family responsibility, and personal choice. Although these factors may themselves be products of prior SEX DISCRIMINATION, they can nevertheless be distinguished from the employer's own current intentional discrimination, reliance on sex stereotypes, or use of wage-setting devices that do not measure job requirements or performance. Proponents of comparable-worth claims argue that the latter factors produce a significant part of the general wage disparity, so that the disparity is properly challenged as discriminatory under laws guaranteeing equal employment opportunity. Opponents who agree that there is a relationship between employers' undervaluation of certain kinds of work and the fact that such work is predominantly done by women, nonetheless reject comparable-worth claims as a useful strategy for improving the economic condition of women. They prefer strategies that would move large numbers of women into fields in which men are currently overrepresented.

Controversy also surrounds the questions of which jobs are comparable and how to measure comparability. Courts generally accept statistical analysis in claims of EMPLOYMENT DISCRIMINATION, but do not always agree on the validity, appropriateness, or evidentiary weight of particular statistical analyses. Neither do they agree on whether and how comparable-worth claims should fit within the framework of employment discrimination claims created by Title VII of the CIVIL RIGHTS ACT OF 1964, the Equal Pay Act of 1964, or the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT to the Constitution. *County of Washington v. Gunther* (1981), the only Supreme Court opinion to mention comparable worth, expressly declined to address the issue, although it did hold that intentional sex discrimination in wages could be challenged under Title VII, despite differences in male and female job classifications.

Most comparable worth litigation is brought against public employers, who generally employ large numbers of people in a wide variety of job classifications. Although public employers are subject to both Title VII and constitutional prohibitions on discrimination, equal protection claims are generally not raised by plaintiffs seeking comparable-worth decrees. As PERSONNEL ADMINISTRATOR OF MASSACHUSETTS V. FEENEY (1979) illustrates, an employment practice does not violate the Constitution unless its discriminatory impact has been intentionally created. Employers are more likely to set wages on the basis of prevailing market rates for certain job classifications or even

on unconscious stereotypes about the relative worth of female-dominated occupations than on an intentional desire to undercompensate women simply because they are women.

Even in the statutory arena, much uncertainty remains. For example, it is unclear whether the availability of statutory "disparate impact" claims against other types of alleged employment discrimination extends to sex-based wage discrimination. Some courts have asserted that wage-setting practices are too subjective, too multifaceted, or both, to be effectively tested by the disparate impact model of discrimination. Others have simply stated that an employer's reliance on the market in setting wages is not the kind of practice to which the model should apply. The Supreme Court has spoken only obliquely on these issues.

Given uncertainty whether equal pay for work of comparable worth is required by existing federal law, advocates of comparable worth have not confined their efforts to the courtroom. Pay equity, including comparable worth, has to date been more successfully achieved through collective bargaining, state legislation, and local ordinances than through litigation.

CHRISTINE A. LITTLETON
(1992)

(SEE ALSO: *Feminist Theory.*)

Bibliography

BLUMROSEN, RUTH G. 1980 Wage Discrimination, Job Segregation and Women Workers. *Women's Rights Law Reporter* 6:19–57.

DOWD, NANCY E. 1986 The Metamorphosis of Comparable Worth. *Suffolk University Law Review* 20:833–865.

FELDSTEIN, HYDEE R. 1981 Sex-based Wage Discrimination Claims. *Columbia Law Review* 81:1333–1347.

NOTE [LITTLETON, CHRISTINE] 1981 Toward a Redefinition of Sexual Equality. *Harvard Law Review* 95:487–508.

## COMPELLED SPEECH

The FIRST AMENDMENT mandate that "Congress shall make no law . . . abridging the freedom of speech" implies a stricture against compelling or coercing persons to engage in speech they do not wish to make—either because they disagree with the speech or because they wish to remain silent. Substantially the same considerations that drive the prohibition against abridgement of FREEDOM OF SPEECH—whether derived from the notion of the speaker's autonomy or from the listener's entitlement or the societal value of undistorted public discourse—drive the strictures against coercion of speech. The speech protected by the First Amendment may consist of utterances or other forms of expressive conduct by a person or the publication or transmission of expression of others, not all of which are equally protected as speech. Protected speech may also consist of the contribution of funds or furnishing of facilities to be used by the recipients, inter alia, for expressive conduct (i.e., the contribution may be assimilated to speech of the contributor).

Government mandates to utter or publish particular expressions or kinds of expression produce coerced speech, but the coercion's unconstitutionality appears to turn in large part on the content of the expression. High- value speech (such as a LOYALTY OATH or support for an expressive association) may not be coerced, but low-value or low-cost or content-neutral speech (such as disclosure of relevant facts in the sale of goods or securities) may be coerced. Government award, or threat of denial of benefits (like licensing, tax relief, subsidy, employment, or admission to the bar) conditioned on expression by the recipient may also unconstitutionally compel expression, apparently without regard to the magnitude of the benefits. The decisions of the Supreme Court appear to rest on the quality of the compelled expression's expected inhibiting effect on other high-value expression or association, and to vary with the content of the compelled expression.

Another framework for analyzing the problem of compelled speech entails connecting one person's compelled contribution of funds or facilities or opportunities to speak with another person's expression, so as to impute to the former the latter's expression. Justification for the assimilation is not self-evident, and the circumstances under which such contribution is, or should be, equated with speech of the contributor are difficult to state. The problem is most acute if an institution whose essential function is expression claims that it is being coerced to speak because the government directs it to admit unwanted expression or speakers to its own expressive voice (as in the case of the sponsor of a parade), or to give access to its facilities for expression (as the print or electronic media) to persons whose expressions it does not wish to be associated with or to enable. For some expressive organizations, like a parade's sponsor or a political or ideological group, the special value of aggregating funds or voices for the purpose of expression may be sacrificed if the effect of such required admission is to dilute or alter the expression they wish to utter. For others, like the print or broadcast media, the effect of the requirement may be less costly. This may explain why compelling the parade sponsors to include an unwanted participant's speech is held to be unconstitutional, but compelling inclusion in the media sometimes is unconstitutional (as when allowing others' expression may have an inhibiting effect on the medium's expression) and sometimes is constitutionally permitted; particularly in the case of a BROADCASTING me-

dium that originates and exists more as a carrier than a voice, in a framework of expressly government- granted power. The question of compelling such speech in cyberspace remains to be examined.

The special value of purposefully aggregated voice is not sacrificed if the institution's essential function is not expression and the government should require it either to convey expression that it does not wish to convey, as in the case of SHOPPING CENTER owners who are forbidden by state law from excluding leafleters; or public utility CORPORATIONS that send out communications or bills and are required by the state to let other speakers insert related public messages in the unfilled envelope space; or organizations such as the Chamber of Commerce or Rotary Club who want to exclude from membership persons with potentially contrary voices but are forbidden to do so by state CIVIL RIGHTS laws. Those persons or institutions can vent their expression by other means without materially diminishing achievement of their essential nonexpressive functions. As the different outcomes in the shopping mall case, where the state's regulation was upheld, and the envelope case, where it was denied, suggest, the closeness with which the contribution mechanism publicly associates the forced contributor with the making or content of the expression may determine whether the speech is unconstitutionally coerced. The Chamber of Commerce, the Rotary Club, and the parade cases illustrate the difficulty in formulating criteria for separating "essentially" expressive from "essentially" nonexpressive institutions.

A variation of the problem derives from a nonexpressive institution requiring persons to pay dues and then using the dues to fund expression that those persons do not want to express or to be expressed. For the institution's expression to be considered unconstitutionally compelled speech by the contributor, the institutional power to require the contribution must be sufficiently attributable to special government (legislative) empowerment of the institution to acquire membership or funding for its nonexpressive function, as in the case of an integrated bar association that can exclude nonmembers from the practice of law, or a union empowered to enforce a union shop or agency shop agreement that can exclude from employment those who decline to join or contribute. In contrast, the contribution (i.e., speech) does not appear to be viewed by the courts as unconstitutionally compelled if it is required by the "private" power of a voluntary bar association or possibly a local medical society to acquire membership—even though each has the power to deny access to vital earning facilities or privileges to persons who decline to pay dues that will fund the association's speech. The Supreme Court offers few clues as to what separates government-driven private compulsion from "purely" private compulsion in a society in which any institution's coercive power derives from the entire structure of government support embodied in the allocation of rights and duties by law. Moreover, the Court has not explained why, or by what criteria, the group's speech should be imputed to the contributor at the cost of pro tanto abridging the speech of the group and its other members, as when state universities impose extracurricular activities fees, some of which go to student groups supporting policies that some contributors wish not to support. Nor has it squarely addressed the problem of the extent of government power to protect an individual member's freedom from compelled expression by abridging the expression of a "private" nonexpressive institution, like a business corporation, funded by contributions that are not freely given for expression.

In any event, not all institutional expression that can be imputed to a coerced contributor is protected, or equally protected, speech—as the distinctions between the kinds of speech permitted and prohibited by compelled funding in the union shop and integrated bar cases indicate. The point was made, perhaps more sharply, in *Glickman v. Wileman Brothers and Elliott Inc.* (1997), which involved expression by a trade association (generic advertising of the virtues of an industry's product) that was an integral component of a comprehensive government-sponsored economic program for the industry, under which industry members were required to make payment to the association. The Court ruled that the member's contributions to the association's advertising were not to be characterized as compelled speech by the member. But it is not entirely clear whether the opinion deemed the complainant's contribution to be insufficiently tied to the particular expression to impute it to the contributor; or, alternatively, deemed the tie to be close enough to make the expression coerced but deemed the expression not to be protected speech. Similarly, it is unclear from this opinion how a court should measure and balance either the sufficiency of the tie between contribution and expression or the extent to which the particular expression is entitled to be considered protected speech.

A pervasive problem, for which the Court's opinions give no clues, implicates the extent to which the constitutional limits on government coercion of speech are, or should be, less rigorous than the constitutional limits on government prohibition of speech—for example, to what extent, and by what criteria, government prohibition of political expenditures or of solicitation of favorable treatment from officeholders should be more critically scrutinized (and less tolerated) by courts than government compelling disclosure in such matters.

VICTOR BRUDNEY
(2000)

(SEE ALSO: *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston; PruneYard Shopping Center v. Robins.*)

## COMPELLING STATE INTEREST

When the Supreme Court concludes that STRICT SCRUTINY is the appropriate STANDARD OF REVIEW, it often expresses its searching examination of the justification of legislation in a formula: the law is invalid unless it is necessary to achieve a "compelling state interest." The inquiry thus touches not only legislative means but also legislative purposes.

Even the permissive RATIONAL BASIS standard of review demands that legislative ends be legitimate. To say that a governmental purpose must be one of compelling importance is plainly to demand more. How much more, however, is something the Court has been unable to say. What we do know is that, once "strict scrutiny" is invoked, only rarely does a law escape invalidation.

Any judicial examination of the importance of a governmental objective implies that a court is weighing interests, engaging in a kind of cost-benefit analysis as a prelude to deciding on the constitutionality of legislation. Yet one would be mistaken to assume that the inquiry follows such a neat, linear, two-stage progression. Given the close correlation between employing the "strict scrutiny" standard and invalidating laws, the very word "scrutiny" may be misleading. A court that has embarked on a search for compelling state interests very likely knows how it intends to decide.

In many a case a court does find a legislative purpose of compelling importance. That is not the end of the "strict scrutiny" inquiry; there remains the question whether the law is necessary to achieve that end. If, for example, there is another way the legislature might have accomplished its purpose, without imposing so great a burden on the constitutionally protected interest in liberty or equality, the availability of that LEAST RESTRICTIVE MEANS negates the necessity for the legislature's choice. The meaning of "strict scrutiny" is that even a compelling state interest must be pursued by means that give constitutional values their maximum protection.

The phrase "compelling state interest" originated in Justice FELIX FRANKFURTER's concurring opinion in *Sweezy v. New Hampshire* (1957), a case involving the privacy of political association: "For a citizen to be made to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling." The Supreme Court uses some variation on this formula not only in FIRST AMENDMENT cases but also in cases calling for "strict scrutiny" under the EQUAL PROTECTION clause or under the revived forms of SUBSTANTIVE DUE PROCESS. The formula, in short, is much used and little explained. The Court is unable to define "compelling state interest" but knows when it does not see it.

KENNETH L. KARST
(1986)

Bibliography

TRIBE, LAURENCE H. 1978 *American Constitutional Law*. Pages 1000–1002. Mineola, N.Y.: Foundation Press.

## COMPETITIVE FEDERALISM

This is a term often used in analysis of constitutional DOCTRINE or working governmental practice. Competitive federalism is closely related to DUAL FEDERALISM, and in contrast with COOPERATIVE FEDERALISM stresses the conflict between the national government and the states.

HARRY N. SCHEIBER
(1986)

## COMPROMISE OF 1850

The Compromise of 1850 comprised a related series of statutes enacted by Congress in an attempt to settle sectional disputes related to SLAVERY that had flared since 1846, with the outbreak of the Mexican War and the introduction of the WILMOT PROVISO. After California's 1849 demand for admission as a free state and the concurrent appearance of southern disunionist sentiment, what had begun as a contest over the constitutional status of SLAVERY IN THE TERRITORIES absorbed other issues related to the security of slavery in the extant states and expanded into a crisis of the Union.

From proposals submitted by President Zachary Taylor and Senator HENRY CLAY, Senator STEPHEN A. DOUGLAS marshaled measures through Congress that admitted California as a free state; established the Texas-New Mexico boundary and compensated Texas and holders of Texas securities for territory claimed by Texas but awarded to New Mexico; abolished the slave trade in the DISTRICT OF COLUMBIA (but Congress rejected a proposal to abolish slavery itself there); amended the Fugitive Slave Act of 1793 by the drastic new measure known as the Fugitive Slave Act of 1850; and created Utah and New Mexico Territories. (See FUGITIVE SLAVERY.)

Both major parties hailed the Compromise as a final settlement of all problems relating to slavery. Southern disunion sentiment abated, while the Free Soil coalition, which had made a respectable beginning in the 1848 election, began to disintegrate. FRANKLIN PIERCE was elected President in 1852 on a platform extolling the finality of the Compromise and condemning any further agitation of the slavery issue.

But the territorial and fugitive-slave measures only extended and inflamed the slavery controversy. The New Mexico and Utah acts were couched in ambiguous language that left the status of slavery in those two immense territories unsettled, though Congress did decisively reject the Free Soil solution embodied in the Wilmot Pro-

viso of 1846. The acts also contained sections providing for APPEAL of slavery controversies from the TERRITORIAL COURTS directly to the United States Supreme Court, an effort to resolve a politically insoluble problem by nonpolitical means.

The Fugitive Slave Act of 1850 was a harsh and provocative measure that virtually legitimated the kidnapping of free blacks. It thrust the federal presence into northern communities in obtrusive ways by potentially forcing any adult northern male to serve on slave-catching posses, by creating new pseudo-judicial officers encouraged by the fee structure to issue certificates of rendition, and by authorizing use of federal military force to enforce the act. It was therefore widely unpopular in the northern states. Subsequent recaptures, renditions, and rescues provided numerous real-life counterparts to the fictional drama of *Uncle Tom's Cabin.*

The finality supposedly achieved by the Compromise of 1850 was shattered by the controversy over the KANSAS-NEBRASKA ACT of 1854. But as ALEXANDER STEPHENS noted back in 1850, "the present adjustment may be made, but the great question of the permanence of slavery in the Southern states will be far from being settled thereby."

WILLIAM M. WIECEK
(1986)

Bibliography

POTTER, DAVID M. 1976 *The Impending Crisis, 1848–1861.* New York: Harper & Row.

## COMPROMISE OF 1877

Four of the sectional compromises in nineteenth-century America were efforts to settle quarrels by mutual concessions and forestall danger of violence. Three of the four efforts were temporarily successful, and only the fourth, that of 1861, broke down in failure. For the next sixteen years, during the CIVIL WAR and RECONSTRUCTION, differences were resolved by resort to force. The Compromise of 1877 differed from the earlier ones in several ways, one of them being that its main purpose was to foreclose rather than to forestall resort to armed force. Since the Republican party was committed to force when necessary to protect freedmen's rights under the constitutional amendments and CIVIL RIGHTS acts of the Reconstruction period, any repudiation of such commitments had to be negotiated discreetly.

Under President ANDREW JOHNSON and President ULYSSES S. GRANT, the government had been backing away from enforcement of freedmen's rights almost from the start. In part the result of white resistance in the South, this retreat from Reconstruction was also a consequence of the prevalence of white-supremacy sentiment in the North. In the elections of 1874, regarded by some as a referendum on Reconstruction, the Republican House majority of 110 was replaced by a Democratic majority of sixty. And in the ensuing presidential election of 1876 the Democratic candidate, Samuel J. Tilden, won a majority of the popular votes and was conceded 184 of the 185 electoral votes required for election. He also claimed all the nineteen contested votes of South Carolina, Florida, and Louisiana, the only southern states remaining under Republican control. But so did his Republican opponent, Rutherford B. Hayes, who also claimed the election. The impasse was solved by an agreement between the two political parties (not the sections) to create a bipartisan electoral commission of fifteen to count the votes. An unanticipated last minute change of one member of the commission gave the Republicans a majority of one, and by that majority they counted all contested votes for Hayes. That eliminated Tilden, but to seat Hayes required formal action of the House. The Democratic majority, enraged over what they regarded as a "conspiracy" to rob them of their victory, talked wildly of resistance and started a filibuster.

Foreseeing the victory of Hayes, southern Democrats sought to salvage whatever they could out of defeat. Their prime objective was "home rule," which meant not only withdrawal of troops that sustained Republican rule in South Carolina and Louisiana but also a firm Republican commitment to abandon use of force in the future for defending rights of freedmen, carpetbaggers, and scalawags. This amounted to the virtual nullification of the FOURTEENTH and FIFTEENTH AMENDMENTS and the CIVIL RIGHTS ACT. In return southern conservatives promised to help confirm Hayes's election, and many Democrats of the old Whig persuasion promised to cooperate with the new administration, but not to defect to the Republican party unless it abandoned "radicalism."

With control of the army and the submission of enough northern Democrats, Republicans could have seated Hayes anyway. But the southerners exploited Republican fears of resistance and skillfully played what they later admitted was "a bluff game." An old Whig himself, Hayes fell in with the idea of reconstituting his party in the South under conservative white leaders in place of carpetbaggers. He not only pledged "home rule" but promised to appoint a conservative southern Democrat to his cabinet and sweetened his appeal to that constituency by publicly pledging generous support to bills for subsidizing " INTERNAL IMPROVEMENTS of a national character" in the South. Hayes's election was confirmed only two days before he took office.

As in earlier sectional compromises, not all the terms of that of 1877 were fulfilled, but the main ones were.

Hayes appointed a southern Democrat his postmaster general, chief dispenser of patronage, and placed many other white conservatives in southern offices. Bills for federal subsidies to internal improvements met with more success than ever before. The troops sustaining Republican rule in the two states were removed and Democrats immediately took over. In the CIVIL RIGHTS CASES (1883) the Supreme Court erected the STATE ACTION barrier, severely limiting the reach of the Fourteenth Amendment. The Court's opinion was written by Justice JOSEPH P. BRADLEY, who had been a member of the 1877 electoral commission. More important than all this was the pledge against resort to force to protect black rights. That commitment held firm for eighty years, until the military intervention at Little Rock, Arkansas, in 1957. This set a record for durability among sectional compromises.

C. VANN WOODWARD
(1986)

Bibliography

GILLETTE, WILLIAM 1980 *Retreat from Reconstruction, 1869–1879.* Baton Rouge: Louisiana State University Press.

POLAKOFF, KEITH J. 1973 *The Politics of Inertia: The Election of 1876 and the End of Reconstruction.* Baton Rouge: Louisiana State University Press.

WOODWARD, C. VANN 1966 *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction.* Boston: Little, Brown.

## COMPULSORY PROCESS, RIGHT TO

The first state to adopt a constitution following the Declaration of Independence (New Jersey, 1776) guaranteed all criminal defendants the same "privileges of witnesses" as their prosecutors. Fifteen years later, in enumerating the constitutional rights of accused persons, the framers of the federal BILL OF RIGHTS bifurcated what New Jersey called the "privileges of witnesses" into two distinct but related rights: the Sixth Amendment right of the accused "to be confronted with the witnesses against him," and his companion Sixth Amendment right to "compulsory process for obtaining witnesses in his favor." The distinction between witnesses "against" the accused and witnesses "in his favor" turns on which of the parties—the prosecution or the defense—offers the witness's statements in evidence as a formal part of its case. The CONFRONTATION clause establishes the government's obligations regarding the production and examination of witnesses whose statements the prosecution puts into evidence either in its case in chief or in rebuttal. The compulsory process clause establishes the government's obligations regarding the production and examination of witnesses whose statements the defendant seeks to put into evidence in his respective case.

The constitutional questions of compulsory process are twofold: What is "compulsory process?" Who are the "witnesses in his favor" for whom a defendant is entitled to compulsory process? The first is the easier of the two questions to answer. "Compulsory process" is a term of art used to denominate the state's coercive devices for locating, producing, and compelling evidence from witnesses. A common example is the SUBPOENA *ad testificandum*, a judicial order to a person to appear and testify as a witness, or suffer penalty of CONTEMPT for failing to do so. The right of compulsory process, in turn, is the right of a defendant to invoke such coercive devices at the state's disposal to obtain evidence in his defense. The right of compulsory process is therefore no guarantee that defendants will succeed in locating, producing, or compelling witnesses to testify in their favor; it does not entitle defendants to the testimony of witnesses who have died or otherwise become unavailable to testify through no fault of the state. Rather, it assures defendants that the state will make reasonable, good-faith efforts to produce such requested witnesses as are available to testify at trial. It gives a defendant access to the same range of official devices for producing available evidence on his behalf as the prosecution enjoys for producing available evidence on its behalf.

The more significant question for a defendant is: Who are the witnesses for whom a defendant is entitled to compulsory process? What law defines "witnesses in his favor"? Early commentators argued that a defendant might claim compulsory process only with respect to witnesses whose testimony had already been determined to be admissible, according to the governing rules of evidence in the respective jurisdiction. The Supreme Court in its seminal 1967 decision in *Washington v. Texas* rejected that narrow interpretation of "witnesses in his favor." The defendant had been tried in state court for a homicide that he asserted his accomplice alone had committed. The accomplice, who had already been convicted of committing the murder, had appeared at the defendant's trial and offered to testify that he, the accomplice, had acted alone in committing the homicide. The trial court, invoking a state rule of evidence disqualifying accomplices from testifying for one another in criminal cases, refused to allow the accomplice to testify in Washington's favor, and Washington was convicted. The Supreme Court held, first, that the compulsory process clause of the Sixth Amendment, like other clauses of the Sixth Amendment, had become applicable to the states through the DUE PROCESS clause of the FOURTEENTH AMENDMENT. Second, and more significantly, the Court held that the meaning of "witnesses in

[a defendant's] favor" was to be determined not by state or federal evidentiary standards of admissibility but by independent constitutional standards of admissibility. The compulsory process clause, it said, directly defines the "witnesses" the defendant is entitled to call to the witness stand. The state in *Washington* violated the defendant's right of compulsory process by "arbitrarily" preventing him from eliciting evidence from a person "who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."

Having determined that the compulsory process clause operates to render exculpatory evidence independently admissible on a defendant's behalf, the Court found *Washington* to be an easy case; the accomplice's proffered testimony was highly probative of the defendant's innocence, and the state's reasons for excluding it were highly attenuated. The Court has since invoked the authority of *Washington* to prohibit a trial judge from silencing a defense witness by threatening him with prosecution for perjury; to prohibit a state from invoking state HEARSAY RULES to exclude highly probative hearsay evidence in a defendant's favor; and to prohibit a trial judge from instructing a jury that defense witnesses are less worthy of belief than prosecution witnesses. Lower courts have invoked the compulsory process clause to compel the government to disclose the identity of informers; to compel defense witnesses to testify over claims of EVIDENTIARY PRIVILEGES; and to compel the prosecution to grant use IMMUNITY to defense witnesses asserting the RIGHT AGAINST SELF-INCRIMINATION. Although the Supreme Court in *Washington* did not define the outer limits of the compulsory process clause, it subsequently emphasized in *Chambers v. Mississippi* (1973) that "few rights are more fundamental than the right of an accused to present witnesses in his defense."

The companion clause to compulsory process, the confrontation clause, is the more widely known and the more often litigated of the Sixth Amendment witness clauses. The issues of confrontation can be grouped into two questions: What does the right "to be confronted" with witnesses mean? Who are the "witnesses against him" whom a defendant is entitled to confront? The answer to the first question has become relatively clear in recent years. Some commentators, including JOHN HENRY WIGMORE, once argued that the right to be "confronted" with witnesses meant no more than the right of a defendant to be brought face to face with the state's witnesses and to cross-examine them in accord with the ordinary (nonconstitutional) rules of evidence. The Supreme Court in 1974 rejected that position in *Davis v. Alaska.* Davis was convicted in a state court on the basis of testimony for the prosecution by a juvenile delinquent. On cross-examination, the witness refused to answer impeaching questions relating to his current delinquency status, invoking a state-law privilege for the confidentiality of juvenile court records. The Supreme Court held that the right to be confronted with prosecution witnesses creates an independent right in defendants, overriding state rules of evidence to the contrary, to elicit probative evidence from the state's witnesses by cross-examining them for exculpatory evidence they may possess. The Court has yet to decide how far the right to examine prosecution witnesses extends in circumstances other than those presented in *Davis.* The parallel right of compulsory process suggests, however, that the confrontation clause entitles a defendant to elicit by cross-examination from prosecution witnesses the same range of probative evidence that the compulsory process clause entitles him to elicit by direct examination from defense witnesses. Both witness clauses serve the same purpose—to enable an accused to defend himself by examining witnesses for probative evidence in his defense.

The more difficult, and still uncertain, question of confrontation is the meaning of "witnesses against him." A defendant certainly has a right to face and cross-examine whichever witnesses the prosecution actually produces in court. The question is whether the confrontation clause also defines the "witnesses" whom the prosecution must call to the witness stand. Does the confrontation clause specify which witnesses the prosecution must produce in person? Or does it merely entitle a defendant to confront whichever witnesses the prosecution in its discretion chooses to produce? These questions arise most frequently in connection with hearsay, that is, evidence whose probative value rests on the perception, memory, narration, or sincerity of a "hearsay declarant," someone not present in court—and thus not subject to cross-examination. Most jurisdictions address the hearsay problem by treating hearsay as presumptively inadmissible, subject to numerous exceptions for particular kinds of hearsay that are admissible either because of their reliability or for other reasons. The Sixth Amendment potentially comes into play whenever the prosecution invokes such an exception to introduce hearsay evidence against the accused. The confrontation question is whether the hearsay declarant is a "witness against" the defendant, within the meaning of the Sixth Amendment, who must be produced for cross-examination under oath and in the presence of the jury.

The Supreme Court held in *Bruton v. United States* (1968) that a prosecutor must produce in person a declarant whose out-of-court statements are being offered against an accused, not to prove him guilty but to spare the state the administrative burden of conducting separate

trials. The more difficult question is what other declarants are "witnesses" against an accused for constitutional purposes.

Some authorities have argued that hearsay declarants are always witnesses against the accused for Sixth Amendment purposes and, hence, must always be produced in person as a predicate for using their out-of-court statements against an accused, even if they are no longer available to appear or testify in person. Other authorities argue that hearsay declarants are never witnesses against the accused for Sixth Amendment purposes. The Supreme Court appears to have adopted a middle position. *Ohio v. Roberts* (1980) arguably held that although the state has a Sixth Amendment obligation to produce in person available hearsay declarants whom it can reasonably assume the defendant would wish to examine in person at the time their out-of-court statements are introduced into evidence, the state has no Sixth Amendment obligation to produce hearsay declarants who have become unavailable through no fault of the state. The state remains constitutionally free to use the hearsay statements of these declarants, provided that the statements possess sufficient "indicia of reliability" to afford the trier of fact "a satisfactory basis" for evaluating their truth—such as statements that fall within "firmly rooted hearsay exceptions." Significantly, the state's burden of production under the confrontation clause thus parallels its burdens under the compulsory process clause. Both clauses require the state to make reasonable, good-faith efforts to produce in person witnesses the defendant wishes to examine for evidence in his defense. Yet neither clause requires the state to produce witnesses whom a defendant is not reasonably expected to wish to examine for evidence in his defense, or witnesses who have died, disappeared, or otherwise become unavailable through no fault of the state.

Although the confrontation clause does not require the state to produce declarants who are unavailable to testify in person or whom a defendant is not reasonably expected to wish to examine in person, other constitutional provisions do regulate the state's use of their hearsay statements. *Manson v. Brathwaite* (1977) held that the due process clauses of the Fifth and Fourteenth Amendments require the state to ensure that every item of evidence it uses against an accused, presumably including hearsay evidence, possesses sufficient "features of reliability" to be rationally evaluated by the jury for its truth. The compulsory process clause, in turn, requires states to assist the defendant in producing every available witness, including available hearsay declarants, whose presence the defendant requests and who appears to possess probative evidence in his favor. It follows, therefore, that although the state has no obligation under the confrontation clause to produce hearsay declarants who are unavailable to testify in person, it has a residual due process obligation to ensure that their hearsay statements possess sufficient "indicia of reliability" to support a conviction of the accused. Although the state has no obligation under the confrontation clause to produce as prosecution witnesses available declarants whom it does not reasonably believe the defendant would wish to examine in person at the time their out-of-court statements are introduced into evidence, it has a residual obligation under the compulsory process clause to assist him in producing such declarants whenever the defendant indicates that he wishes to call and examine them as witnesses in his defense.

PETER WESTEN
(1986)

Bibliography

WELLBORN III, OLIN GUY 1982 The Definition of Hearsay in the Federal Rules of Evidence. *Texas Law Review* 61:49–93.

WESTEN, PETER 1974 The Compulsory Process Clause. *Michigan Law Review* 73:73–184.

——— 1978 Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases. *Harvard Law Review* 91:567–628.

——— 1979 The Future of Confrontation. *Michigan Law Review* 77:1185–1217.

## COMPUTERS

The rapid advance of computer technology has drastically expanded our ability to store, analyze, and disseminate information. This development has implications for three areas of constitutional doctrine: the RIGHT OF PRIVACY, PROCEDURAL DUE PROCESS OF LAW, and the FREEDOM OF SPEECH and FREEDOM OF THE PRESS.

Because the field is so new, the Supreme Court has not yet had many opportunities to confront these issues. An account of the Court's JURISPRUDENCE so far reveals that it is only slowly beginning to recognize in computer technology a danger different in kind from that presented by information technologies supplanted. Thus, in LAIRD V. TATUM (1972), the earliest of the Court's computer cases, the question presented was whether the Constitution limits the government's right to store publicly available information in computerized form. One of the complaints in *Laird* was that the storage of such information in army-intelligence data banks for undefined subsequent use had a CHILLING EFFECT on the expression of those targeted for observation. In finding that the effect was so speculative that the controversy was not ripe for adjudication, the Court in effect held that government storage of personal

information in a computer does not in itself give rise to a constitutionally based complaint.

WHALEN V. ROE (1977) was the first opinion expressly addressing the right of privacy in a computer context. A New York law required centralized computer storage of the names and addresses of persons prescribed certain drugs. The Court acknowledged "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks." In a CONCURRING OPINION, Justice WILLIAM J. BRENNAN noted that the potential for abuse of computerized information might necessitate "some curb on such technology." Nonetheless, the Court analyzed the law under the same BALANCING TEST used in other cases involving government invasions of privacy, balancing the state's interest in collecting drug-use information against the interest in privacy, and upheld the statute. Although the Court emphasized the stringent security measures taken to prevent unnecessary or unauthorized access to New York's computer files, lower courts have given *Whalen* a narrow reading and placed few constitutional restrictions on government use of computerized data banks. These lower courts have given greater weight to the earlier decision in PAUL V. DAVIS (1976), where the Court had held that alleged LIBEL and public disclosure of arrest records by government officials did not amount to a deprivation of "liberty."

Although the Court seems headed toward a narrow conception of privacy of computerized records as protected by the Constitution, it has embraced a broader view in statutory contexts. In *Department of Justice v. Reporters' Committee for Freedom of the Press* (1989), for example, the Court upheld a privacy interest against a request by CBS News under the FREEDOM OF INFORMATION ACT for disclosure of "rap sheets." Here, the Court noted that "there is a vast difference between public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."

A second important set of privacy questions raised by governmental use of computers is the extent to which computers may be used as an aid or substitute for other decision-making processes. This is a question not merely of the use of stored information but also the use of sophisticated programs that make possible new modes of analysis. One example is computerized matching, now a widespread practice at both the federal and state levels. These powerful programs can, for instance, help determine the eligibility of recipients of governmental benefits by matching lists of the individuals receiving such benefits with other governmental records (such as tax returns, employment files, and automobile licenses), with publicly available information, or with privately supplied information. Although some statutes and regulations limit these computerized matching programs, most courts have failed to perceive the practices as raising constitutional concerns. Some, however, have suggested that computerized matching is the kind of search that should require a SEARCH WARRANT.

The more important issue posed by computerized matching is what action is to be taken on a "hit" (that is, a match between records). What, for example, happens when an individual on a list of recipients of unemployment benefits also turns up on a file of federal employees? This is a question of procedural due process, and once again, the analysis applied so far has not differed from situations in which computers are not used. Similar questions arise in the criminal context, where computerized records may be used to determine whether a person has outstanding arrest warrants or is driving a stolen vehicle.

A closely related question is whether sophisticated computerized analysis techniques may be utilized to develop profiles of certain kinds of individuals that are then used to identify specific people as the focus of governmental law enforcement and investigation. Thus, the government has, in part through computerized analysis of cases, developed certain statistically based profiles of typical drug smugglers. Those who meet the profile are targeted for intense examination, sometimes involving other computerized techniques. In *United States v. Sokolow* (1989) the Court analogized drug-courier profiles to the "hunches" on which police officers typically operate. It then required the same showing of reasonable suspicion required in other instances in which persons are stopped for questioning. Although the Court did not see in the "empirical documentation" of the profile any greater basis for suspecting persons meeting the profile, it also did not find in the profiling technique any cause for heightened constitutional scrutiny.

A final area in which computers figure directly in constitutional analysis is the freedom of speech and freedom of the press. In this area, the question is the extent to which computerized forms of communication are protected by the FIRST AMENDMENT. Is, for example, a computerized bulletin board protected against libel judgments to the same extent as a newspaper under the standard of NEW YORK TIMES V. SULLIVAN (1964)? Can the government subject computers to greater restrictions than other forms of communication? In *Marshfield Family Skateland, Inc. v. Town of Marshfield* (1983), the Supreme Court dismissed a challenge to an ordinance banning video games on the ground it failed to present a substantial federal question, but has not otherwise addressed the issue. Lower court cases have thus far largely involved criminal prosecution, for example, for using computers in gambling. Although these decisions held that the computer

programs were unprotected speech, the computers were so integral to the commission of the crime that these cases are not necessarily indicative of the extent to which courts will find that computers raise unique constitutional questions.

ROCHELLE C. DREYFUS
DAVID W. LEEBRON
(1992)

(SEE ALSO: *Science, Technology, and the Constitution.*)

Bibliography

FREEDMAN, WARREN 1987 *The Right of Privacy in the Computer Age.* New York: Quorum Books.

PRIVACY PROTECTION STUDY COMMISSION 1977 *Personal Privacy in an Information Society.* Washington, D.C.: U.S. Government Printing Office.

SHATTUCK, JOHN 1984 In the Shadow of 1984: National Identification Systems, Computer Matching, and Privacy in the United States. *Hastings Law Journal* 35:991–1005.

U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE 1973 *Records, Computers and the Rights of Citizens* (Report of the Secretary's Advisory Committee on Automated Personal Data Systems). Washington, D.C.: U.S. Government Printing Office.

WESTIN, ALAN F. 1972 *Databanks in a Free Society: Computers, Record-Keeping and Privacy.* New York: Quadrangle Books.

## CONCORD TOWN MEETING RESOLUTIONS
(October 21, 1776)

The people of Concord, Massachusetts, at a town meeting in 1776, were the first to recommend a CONSTITUTIONAL CONVENTION as the only proper body to frame a CONSTITUTION. Earlier that year the provisional legislature of Massachusetts had requested permission from the people of the state to draw up a constitution. The legislature had recommended that the free males of voting age assemble in all the towns to determine that issue and also to decide whether the constitution should be made public for the towns to consider before the legislature ratified it. Nine towns objected to the recommended procedure on the grounds that a legislature was not competent for the purpose. Among the nine, Concord best described the procedure that should be followed.

Concord's resolutions declared that the legislature was not competent for three reasons: a constitution is intended to secure the people in their rights against the government; the body that forms a constitution has the power to alter it; a constitution alterable by the legislature is "no security at all" against the government's encroachment on the rights of the people. Accordingly, Concord resolved, a convention representing the towns should be chosen by all the free male voters. The sole task of the convention should be to frame the constitution. Having completed its task, the convention should publish the proposed constitution "for the Inspection and Remarks" of the people. One week later the town of Attleboro, endorsing the Concord principle of a convention, recommended that the constitution be ratified by the people of the towns rather than by the legislature.

The legislature, ignoring the dissident towns, framed a constitution but submitted it for ratification. The people overwhelmingly rejected it. In 1780 the people ratified a state constitution that was framed by a constitutional convention, the first in the history of the world to be so framed. Concord had designed an institution of government that conformed with the SOCIAL COMPACT theory of forming a FUNDAMENTAL LAW.

LEONARD W. LEVY
(1986)

## CONCURRENT JURISDICTION

The Constitution does not require Congress to create lower federal courts. The Framers assumed that state courts would be competent to hear the cases included in Article III's definition of the JUDICIAL POWER OF THE UNITED STATES. When Congress does choose to confer some of the federal judicial power on lower federal courts, state courts normally retain their JURISDICTION as well. This simultaneous or concurrent jurisdiction of state and federal courts normally exists unless Congress enacts a law stating that the federal power shall be exclusive. Only in unusual circumstances, as when state jurisdiction would gravely disrupt a federal program, has the Supreme Court required an explicit grant of congressional authority for concurrent state jurisdiction to exist. Indeed, in the limited instance of DIVERSITY JURISDICTION, the Framers intended concurrent jurisdiction to be mandatory, so that Congress could not divest state courts of judicial power they possessed before adoption of the Constitution.

Concurrent jurisdiction allows plaintiffs initial choice of a forum more sympathetic to their claims. In many circumstances, however, a defendant may supplant that choice by exercising a right under federal law to remove the case from state to federal court. (See REMOVAL OF CASES.)

State courts need not always agree to exercise their concurrent jurisdiction. If a state court declines to hear a federal claim for nondiscriminatory reasons tied to the sound management of the state judicial system, the Supreme Court will respect that decision.

When concurrent jurisdiction exists, state and federal courts may be asked to adjudicate the same rights or claims between parties at the same time. Ordinarily neither the federal nor the state court is required to stay its proceeding in such situations. However, the federal courts do possess a limited statutory power to enjoin pending state proceedings, and a state or federal court that is the first to obtain custody of property that is the subject of the dispute may enjoin the other.

CAROLE E. GOLDBERG-AMBROSE
(1986)

Bibliography

CURRIE, DAVID 1981 *Federal Jurisdiction in a Nutshell*, 2nd ed. St. Paul, Minn.: West Publishing Co.

## CONCURRENT POWERS

In THE FEDERALIST, JAMES MADISON, wrote that in fashioning the federal relationship "the convention must have been compelled to sacrifice theoretical propriety to the force of extraneous circumstances." These sacrifices which produced a "compound republic, partaking both of the national and federal character" were "rendered indispensable" by what Madison termed "the peculiarity of our political situation." An important feature of the compound republic is the idea of concurrent powers.

Concurrent powers are those exercised independently in the same field of legislation by both federal and state governments, as in the case of the power to tax or to make BANKRUPTCY laws. As ALEXANDER HAMILTON explained in *The Federalist* #32, "the State governments would clearly retain all the rights of SOVEREIGNTY which they before had, and which were not, by that act, *exclusively* delegated to the United States." Hamilton goes on to explain that this "alienation" would exist in three cases only: where there is in express terms an exclusive delegation of authority to the federal government, as in the case of the seat of government; where authority is granted in one place to the federal government and prohibited to the states in another, as in the case of IMPOSTS; and where a power is granted to the federal government "to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*, as in the case of prescribing naturalization rules." This last, Hamilton notes, would not comprehend the exercise of concurrent powers which "might be productive of occasional interferences in the *policy* of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority." The only explicit mention of concurrent power in the Constitution occurred in the ill-fated EIGHTEENTH AMENDMENT which provided that "the Congress and the several States shall have concurrent power to enforce this article."

The story of concurrent power in modern American constitutional history has largely been the story of federal PREEMPTION. The concurrent authority of the states is always subordinate to the superior authority of the federal government and generally can be exercised by the states only where the federal government has not occupied the field, or where Congress has given the states permission to exercise concurrent powers. Thus in MCCULLOCH V. MARYLAND (1819), Maryland's concurrent power of taxation had to give way when the state sought to tax a federal instrumentality, because such a tax was utterly repugnant to federal supremacy.

In the years since *McCulloch* the Supreme Court has devised an intricate system for determining when a federal exercise of power has implicitly or explicitly worked to diminish or extinguish the concurrent powers of the states. The federal government's steady expansion of power over the years has, of course, placed more restrictions on concurrent action by the states as, in more and more areas, the federal government has occupied the whole field of legislation.

The Court's decision in *Pacific and Electric Company v. Energy Resources Commission* (1983) provides a useful summary of the factors that determine whether federal preemption may be said to have taken place: whether Congress is acting within constitutional limits and explicitly states its intention to preempt state authority; whether the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress intended for the state to be excluded from concurrent regulation; whether, even though the regulation of Congress is not pervasive, the operation of concurrent powers on the part of the state would actually conflict with federal law; and whether, in the absence of pervasive legislation, state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. It is not difficult to see that most of the states' concurrent powers today exist at the forbearance of the federal legislature. This result was not entirely anticipated by the Framers of the Constitution; but it was the inevitable consequence of the centripetal forces embodied in the national features of the compound republic.

EDWARD J. ERLER
(1986)

Bibliography

DODD, WALTER F. 1963 Concurrent Powers. In Edwin R. Seligman, ed., *Encyclopedia of the Social Sciences*, Vol. 4:173–174. New York: Macmillan.

STORY, JOSEPH 1833 *Commentaries on the Constitution of the United States*, Vol. 1:407–433. Boston: Hilliard, Gray & Co.

## CONCURRENT RESOLUTION

Concurrent resolutions adopted by the Congress, unlike JOINT RESOLUTIONS, do not require the president's signature and do not ordinarily have the force of law. Concurrent resolutions may be used to express the "sense of Congress" or to regulate the internal affairs of Congress (such as expenditure of funds for congressional housekeeping).

Since 1939, concurrent resolutions have been the normal means of expressing the LEGISLATIVE VETO when by law that limit on PRESIDENTIAL ORDINANCE-MAKING POWER requires action by both houses. Recent examples of this requirement are found in the WAR POWERS ACT (1973) and the CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT (1974).

DENNIS J. MAHONEY
(1986)

## CONCURRING OPINION

When a member of a multi-judge court agrees with the DECISION reached by the majority but disagrees with the reasoning of the OPINION OF THE COURT or wishes to add his own remarks, he will customarily file a concurring opinion. The concurring opinion usually proposes an alternative way of reaching the same result. Once relatively rare, separate concurrences have become, in the late twentieth century, a normal part of the workings of the Supreme Court of the United States.

A concurring opinion may diverge from the majority opinion only slightly or only on technical points, or it may propose an entirely different line of argument. One example of the latter sort is found in ROCHIN V. CALIFORNIA (1952) in which the concurring opinions staked out a much bolder course of constitutional interpretation than the majority was willing to follow. In a constitutional system in which great issues of public policy are decided in controversies between private litigants, the principles of law enunciated in the opinions are usually of far greater importance than the decision with respect to the parties to the case. Sometimes dissenting Justices are closer to the majority on principles than are concurring Justices.

In the most important cases, several Justices may write separate opinions, even though there is substantial agreement on the grounds for deciding the case. DRED SCOTT V. SANDFORD (1857) and the CAPITAL PUNISHMENT CASES (1972) are examples of cases in which every Justice filed a separate concurring or DISSENTING OPINION.

Scholars generally agree that separate concurrences often diminish the authority of the court's decision and reduce the degree of certainty of the law. Some critics have suggested elimination of concurring opinions, especially when they are filed by Justices who also subscribe to the MAJORITY OPINION. But concurring opinions, no less than dissenting opinions, provide alternative courses for future constitutional development.

DENNIS J. MAHONEY
(1986)

## CONDITIONAL SPENDING

The United States Constitution allocates legislative authority between a federal Congress and state governments. Congress may legislate or regulate only pursuant to specific powers expressly delegated in the Constitution; excepting IMPLIED POWERS, all powers not delegated to the national government are retained by the state governments. The power to spend money for the common defense or the GENERAL WELFARE, however, is a power separate from, and in addition to, all of Congress's other ENUMERATED POWERS. Thus, Congress may spend federal funds for any purpose that can be thought to contribute to the general welfare, even though none of Congress's enumerated powers encompasses the subject of the expenditure. Congress may not impose regulatory requirements, however, even though admittedly in the interest of the common defense and general welfare, unless the area regulated is one over which regulatory control is delegated to Congress.

The power to spend carries with it the power to attach certain conditions to the expenditure. Those conditions in effect specify how federal grants will be used. For example, if Congress grants the states funds to build highways, Congress has the concomitant power to specify where the highways should run or how they should be built. This power to impose conditions permits Congress to ensure that its money is actually spent as Congress intends.

The conditional spending problem is presented when Congress seeks to purchase, not the usual goods and services, but compliance with a legislative objective that normally would be pursued by a simple regulation backed by a regulatory penalty such as a fine. When Congress uses its spending power to offer a financial inducement—a reward—for conduct that it could not directly require or regulate under any of its other enumerated powers, the core constitutional conception of specifically delegated powers is threatened. The problem posed by conditional spending is the extent to which federally induced state reliance on federal moneys gives Congress effective regulatory authority over the states beyond the powers delegated to Congress in the Constitution.

The question is of central importance to the basic constitutional scheme of FEDERALISM. Over the course of the last several decades, the federal tax burden on individuals

has increased substantially, making it increasingly difficult as a political matter for state legislatures to raise state taxes. At the same time that the federal tax burden has deterred states from raising their own revenue, national grant programs for general welfare purposes, such as highways, education, and health, have induced states to rely increasingly on national funds to finance state services. Substantial state reliance on the distribution of money raised by national taxation is now a fact of political life in the federal system. This financial dependence of the states on Congress's beneficence invites Congress to extract concessions from the states, to require the states to accept "conditions" in return for the revenues now under Congress's control. If there are no constitutional limitations on the conditions Congress can attach to federal grants, Congress may extract tax revenue from the citizens of the several states, pursuant to the taxing power, and then return that revenue to the states, under the spending power, on the condition that the states impose on themselves or their citizens some regulation that Congress constitutionally could not have imposed under its other enumerated powers.

There are two competing views on the constitutionality of conditions attached by Congress to federal grants. The first view holds that offering a government benefit as a reward for compliance with some congressional objective is in effect identical to regulatory coercion by imposition of a fine to obtain the same end. Under this view, if achievement of an end is beyond Congress's delegated regulatory powers, it also should be constitutionally invalid when pursued through a conditional spending scheme. The second view is that the use of the spending power to offer a reward for compliance with some congressional objective is distinguishable from regulatory coercion in the form of a fine for noncompliance because the latter removes the freedom of choice while the former does not. According to this view, a state or individual confronted with the offer of a conditional grant may refuse the reward and persist in noncompliance, while one confronting a regulatory fine has no freedom of choice. Moreover, a fine takes money but a spending scheme awards it; refusing takes no money. Under this view, then, direct congressional regulation is confined to the enumerated powers, but Congress's purchase of compliance through a scheme of conditional spending is not similarly restrained.

Early spending power cases asserted that there is no conceptual difference between withholding a benefit and imposing a fine to achieve a regulatory end, and applied this principle to protect STATES' RIGHTS. UNITED STATES V. BUTLER (1936) involved a challenge to the AGRICULTURAL ADJUSTMENT ACT OF 1933 (AAA). Under the act, processors of agricultural goods were taxed and the proceeds from the tax were used to pay farmers to allow their land to lie fallow. The purpose of the scheme was to stabilize farm prices by reducing the supply of farm goods in the market. Respondents challenged the scheme as beyond the scope of Congress's delegated powers, primarily the INTERSTATE COMMERCE power, because the act sought to regulate the purely local activity of agricultural production. The United States did not attempt to defend the scheme as a valid commerce regulation, but argued it could be sustained as a valid exercise of Congress's authority to spend "for the general welfare."

The Court disagreed in *Butler*, holding that the scheme was invalid precisely because Congress used its spending power to achieve a regulatory effect on agriculture, otherwise outside the scope of its delegated powers and subject only to state control. The Court expressly endorsed the Hamiltonian view that although Congress had limited powers, the spending power is not limited to the subjects of the enumerated powers; but the Court said the scheme was not a simple exercise of Congress's power to spend. It was "at best . . . a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states." The Court distinguished between a conditional appropriation where the condition specifies how the money is to be spent, which is valid, and a conditional appropriation where the goal of the condition is regulation: "There is an obvious difference between a statute stating the conditioms upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could be enforced. . . . If in lieu of compulsory regulation of subjects within the states' reserved JURISDICTION, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of Section 8 of article I would become the instrument for total subversion of the governmental powers reserved to the individual states."

By modern standards B*utle*r was decided wrongly. *Butler*'s real error, however, was not in holding that spending legislation could not be used to accomplish regulatory ends outside Congress's delegated powers; rather, it was in adopting a narrow interpretation of Congress's power under the COMMERCE CLAUSE that disallowed price-support legislation. Such a result would not hold up today. But in *Butler* the Court's perception that the AAA was regulation, not spending, seems unassailable.

The conceptual foundation of *Butler*—that a reward for compliance is regulation, not spending—has been carried forward and expanded by the modern Court in some CIVIL LIBERTIES cases, FIRST AMENDMENT cases in particular. In those cases, the Court has recognized that offering a governmental benefit on the condition that the individual refrain from engaging in protected activities is the economic and constitutional equivalent of imposing a fine for

the violation of a regulation prohibiting the activity. For example, the Court has held that if government offers a financial reward in return for the recipient's agreement to forgo a practice commanded by her religion, the conditional grant presents the same RELIGIOUS LIBERTY problem that would be presented by a fine for engaging in the religious practice. Either presents the same governmental interference with the individual's constitutionally protected liberty. In either case, the individual may choose to continue the protected activity and suffer the economic loss or forgo the protected activity and avoid the economic loss. In individual liberties cases this proposition is known as the doctrine of UNCONSTITUTIONAL CONDITIONS and is often identified with the Court's decision in SHERBERT V. VERNER (1963).

In its most recent encounter with conditional spending, the Supreme Court appears to have abandoned the conceptual foundation of *Butler* and ignored its currency in the individual liberties area. In *South Dakota v. Dole* (1987) the Court confronted a challenge to the national minimum drinking age (NMDA) amendment to the National Surface Transportation Act. The act authorizes federal grants to the states for the construction of national highways. The NMDA instructed the secretary of transportation to withhold up to ten percent of a state's federal highway funds if that state fails to enact a minimum drinking age of twenty-one within the next year. Thus, by attaching a condition to a grant, Congress sought to impose a uniform national minimum drinking age. In *Dole* the Court assumed for purposes of the case that Congress, after the TWENTY-FIRST AMENDMENT, could not have enacted a regulation requiring each state to adopt such a minimum drinking age for the state. Nor, the Court assumed arguendo, could Congress constitutionally have enacted a simple regulation directly prohibiting the purchase or consumption of alcohol by persons under twenty-one years of age. Thus, the only issue left for the *Dole* Court to resolve was whether the MNDA was constitutional as a condition accompanying a grant of federal funds to the states, even assuming that Congress could not regulate drinking ages directly under any of its delegated legislative powers.

The *Dole* Court observed that "Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages." Thus, the legislation was held to be "within constitutional bounds even if Congress may not regulate drinking ages directly." In essence, the Court held that although Congress lacks regulatory authority to achieve a legislative end directly, Congress may "purchase" state compliance through the use of conditions attached to spending grants. The basis of the Court's holding is that there is a difference between coercing compliance (an exercise of regulatory power) and buying compliance (an exercise of the spending power). The *Dole* holding is in tension with other Supreme Court PRECEDENTS, notably *Butler* and the individual liberties cases, which recognize that conditional spending can be the conceptual and economic equivalent of direct regulation. In effect, the Court in *Dole*, voting 7–2, reverted to the notion that compliance with a condition attached to a benefit is "voluntary" as long as the potential recipient can choose to forgo the benefit in order to avoid compliance with the condition.

The Supreme Court's decision in *Dole* appears to invite the complete abrogation of all limits on delegated federal LEGISLATIVE POWER through the simple device of burdensome taxes accompanied by "financial incentives" to comply with any federal legislative objective that is outside the range of concerns constitutionally delegated to Congress. Chief Justice WILLIAM H. REHNQUIST's opinion in *Dole*, however, suggested some limitations on the breadth of the Court's holding.

First, said the Chief Justice, Congress may "induce" or "tempt" voluntary compliance, but may not "coerce" compliance. The difficulty with the coercioninducement test as a limit on congressional action is that it simply restates the distinction—discredited in some modern individual liberties cases—between achieving an end by regulation and achieving an end by withholding a benefit. The question of "how much benefit" simply is beside the point, for as *Sherbert v. Verner* concluded, any benefit withheld is tantamount to a fine in that amount. One who is subject to the threat of a regulatory fine may choose to violate the regulation and pay the fine because the amount of the fine is modest. But that "freedom" of choice does not eliminate constitutional objections to the substance of the regulation.

The facts of the *Dole* case suggest that Chief Justice Rehnquist was relying upon a distinction Congress would not even credit. Congress's very purpose in enacting the NMDA would have been undercut seriously if not every state had complied; it is clear that Congress had no intention of offering a choice, but threatened to withhold a benefit to obtain regulatory compliance.

Second, in a footnote Rehnquist suggested a constitutional requirement that any condition attached to a federal grant bear some relationship to that grant. In applying this suggestion to the facts of *Dole*, however, the Chief Justice simply noted that the condition related to the national problem of teenage drunk driving. Teenage drunk driving may well be a problem national in scope, but the condition did not in any way specify the characteristics of the highways that the conditioned funds were intended to purchase. Requiring only that the condition relate to a national problem rather than specify characteristics of the particular goods and services to be purchased by the grant seems tantamount to a statement that Congress can reg-

ulate perceived national problems through the spending power. Of course, Congress may with greater legitimacy reach many of the same subjects by the exercise of its wide-ranging commerce powers.

THOMAS R. MCCOY
BARRY FRIEDMAN
(1992)

(SEE ALSO: *Federal Grants-in-Aid; Taxing and Spending Powers.*)

Bibliography

MCCOY, THOMAS R. and FRIEDMAN, BARRY 1988 Conditional Spending: Federalism's Trojan Horse. *Supreme Court Review* 1988:85–127.

MIZERK, DONALD J. 1987 The Coercion Test and Conditional Federal Grants to the States. *Vanderbilt Law Review* 40: 1159–1195.

ROSENTHAL, ALBERT J. 1987 Conditional Federal Spending and the Constitution. *Stanford Law Review* 39:1103–1164.

SULLIVAN, KATHLEEN 1989 Unconstitutional Conditions. *Harvard Law Review* 102:1413–1506.

## CONFEDERATE CONSTITUTION

The Constitution of the Confederate States of America, adopted in 1861, closely followed, and was in a sense a commentary upon, the Constitution of the United States. The most important points of divergence were: provision for the heads of executive departments to sit and speak in the Congress, a single six-year term for the President, a line-item VETO POWER over appropriations, explicit provision for presidential power to remove appointed officials, and the requirement of a two-thirds vote in each house to admit new states.

The Confederate Constitution prohibited laws impairing the right of property in slaves; but it also prohibited the foreign slave trade (except with the United States). Other innovations included a ban on federal expenditures for INTERNAL IMPROVEMENTS and provision for state duties on sea-going vessels, to be used for improvement of harbors and navigable waters. The AMENDING PROCESS provided for a convention of the states to be summoned by Congress upon the demand of state conventions; Congress did not have the power to propose amendments itself.

The provisions of the BILL OF RIGHTS of the United States Constitution were written into the body of the Confederate Constitution, as were those of the ELEVENTH and TWELFTH AMENDMENTS.

DENNIS J. MAHONEY
(1986)

Bibliography

COULTER, E. MERTON 1950 *The Confederate States of America, 1861–1865.* Baton Rouge: Louisiana State University Press.

## CONFERENCE

When the Justices of the Supreme Court refer to themselves in the aggregate as "the Conference"—as distinguished from "the Court"—they are alluding to their deliberative functions in reaching decisions. The Conference considers, discusses, even negotiates; the Court acts.

The name comes from the Justices' practice of meeting to discuss cases and vote on their disposition. Two kinds of questions are considered at these Conferences: whether the Court should review a case, and how to decide a case under review. Just before the beginning of each term, the Conference considers a great many applications for review. (See APPEAL; CERTIORARI, WRIT OF; APPELLATE JURISDICTION; ORIGINAL JURISDICTION.) During the term, in weeks when ORAL ARGUMENTS are scheduled, the Conference generally meets regularly to consider the cases argued within the preceding few days.

The Conference is limited to the nine Justices. Clerks and secretaries do not attend, and if messages are passed into the room, tradition calls for the junior Justice to be doorkeeper. By another tradition, each Justice shakes hands with all the other Justices before the Conference begins. The CHIEF JUSTICE presides.

The Chief Justice calls a case for discussion, and normally speaks first. The other Justices speak in turn, according to their seniority. (Interruptions are not unknown.) The custom has been for Justices to vote in inverse order of seniority, the Chief Justice voting last. Recent reports, however, suggest flexibility in this practice; when the Justices' positions are already obvious, a formal vote may be unnecessary. The vote at the Conference meeting is not final. Once draft opinions and memoranda "to the Conference" have begun to circulate, votes may change, and even the Court's decision may change.

KENNETH L. KARST
(1986)

(SEE ALSO: *Concurring Opinion; Dissenting Opinion; Opinion of the Court.*)

Bibliography

HUGHES, CHARLES EVANS 1928 *The Supreme Court of the United States: Its Foundation, Methods and Achievements: An Interpretation.* New York: Columbia University Press.

WOODWARD, BOB and ARMSTRONG, SCOTT 1979 *The Brethren: Inside the Supreme Court.* New York: Simon & Schuster.

## CONFESSIONS

See: Police Interrogation and Confessions

## *CONFIRMATIO CARTARUM*
1297

Within two centuries after its adoption MAGNA CARTA was reconfirmed forty-four times. The reconfirmation of 1297 is significant because it was the first made after representatives of the commons were admitted to Parliament; because it embodied the inchoate principle that TAXATION WITHOUT REPRESENTATION is unlawful; and because it regarded Magna Carta as FUNDAMENTAL LAW. By one section the king agreed to exact certain taxes only "by the common assent of the realm. . . ." Another section declared that any act by the king's judges or ministers contrary to the great charter "shall be undone, and holden for nought." WILLIAM PENN ordered the charter and its reconfirmation of 1297 reprinted in the colonies for the first time in 1687. JOHN ADAMS, THOMAS JEFFERSON, and other lawyers of the era of the American Revolution were familiar with the principles of the statute of 1297, and in MARBURY V. MADISON (1803) the Supreme Court declared that any act contrary to the fundamental law of the written constitution is void.

LEONARD W. LEVY
(1986)

Bibliography

PERRY, RICHARD L., ed. 1959 *Sources of Our Liberties.* Pages 23–31. New York: American Bar Foundation.

## CONFIRMATION PROCESS

The Constitution vests in the President the power to appoint, with the ADVICE AND CONSENT of the U.S. SENATE, "Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States whose Appointments are not herein otherwise provided for." The Framers, however, were mindful that the lifetime appointment of judges to a coequal branch might demand different procedures and considerations from the appointment of officers serving limited terms in the executive branch and, as a result, throughout a good deal of the CONSTITUTIONAL CONVENTION OF 1787 the method of appointing judges was considered separately from the process of choosing executive officers. Particularly in the case of judicial appointments, achieving agreement among the delegates required a delicate balance to be struck between competing interests at the convention. Smaller states, for example, tended to favor greater senatorial control while representatives from the larger states sought enhanced executive authority through presidential appointment. Complicating the cleavage between small and large was the fundamental issue of where the center of power would be in the new national government; fearful of monarchy, some at the convention sought legislative dominance while others, extolling the virtue of efficiency, called for executive supremacy. Throughout the summer of 1787, the procedures for the appointment of judges and officers of the United States were the subject of spirited debate. The eventual compromise of presidential appointment joined with the advice and consent of the Senate only emerged from the Committee on Postponed Matters in the waning days of the convention. The product of a rather hasty trade-off among sharply held divergent views, the language and history of the APPOINTMENTS CLAUSE leave indefinite the precise nature of the role of the Senate in the appointment and confirmation process. The net result is that, although the phrase "advice and consent" has roots deep in British history, in the American context its interpretation has been shaped by the reality of contemporary politics rather than history or constitutional construction.

ALEXANDER HAMILTON, for example, in THE FEDERALIST, advocated limiting the role of the Senate in the confirmation process to guarding against presidential appointment of "unfit characters." Whatever the constitutional merits of this position, Hamilton's preference quickly proved to be politically unworkable. By the early nineteenth century, the development of a full-fledged party system made the confirmation process, particularly in the case of federal judges, a contentious and often highly partisan affair. During this era senators were selected by state legislatures, and the typical senator was a state party leader sent to the Senate with the task of funneling federal PATRONAGE back to the local party organization. Federal judgeships quickly became part of the patronage package and the successful confirmation of these judges, regardless of individual merit, routinely hinged almost exclusively on the approval of home-state senators. The only indication of Senate deference to presidential prerogative was in the confirmation of cabinet-level appointments. Generally speaking, this was an era of congressional dominance and the Senate had the political autonomy to challenge a wide array of presidential appointments on a variety of partisan and ideological grounds.

During the initial decades of the twentieth century, a series of Progressive-era reforms—including the development of the direct primary, the introduction of nonpartisan local elections, and the passage of the SEVENTEENTH AMENDMENT providing for the direct election of senators—produced weakened party control and organization in the Senate. By the time of the NEW DEAL, the center of influence and power at the national level had shifted from the legislative to the executive branch. The Senate began a period of relative quietude in which widely accepted norms of behavior worked to check the power and independence of individual senators and enhanced the authority and prestige of a few key Senate leaders. At

mid-century, the Senate was a conservative, hierarchical, closed institution in which individual senators were content to concentrate on committee assignments and legislative work. Few senators sought media attention and there was little incentive for the average senator to challenge leadership decisions. In such an environment the confirmation process was a highly predictable, low-key, frequently invisible exercise in which a President, having secured the consent of a few key Senate leaders to any nomination, could be reasonably confident of success. Presidential APPOINTMENT OF SUPREME COURT JUSTICES provided a ready example; from the turn of the century to 1968 the Senate confirmed all but one nominee to the Court.

The modern era of the Senate confirmation process begins in the late 1960s with the protracted hearings in the SENATE JUDICIARY COMMITTEE over the nomination of THURGOOD MARSHALL to the Supreme Court and the full Senate's failure to confirm ABE FORTAS as CHIEF JUSTICE in 1968. It is a process that is frequently nasty, brutish, and not particularly short. It is, in fact, a thoroughly democratic process, resembling at times a modern electoral campaign in which powerful interests employ sophisticated media techniques to mobilize public support or opposition. Senate proceedings, both in committee and on the floor, are often contentious and protracted, with the ultimate outcome being anything but predictable. One explanation for this development is the transformation of the modern Senate from an inner-directed, stable, hierarchical institution to a more fluid body populated by senators who are motivated to seek power and influence through national media exposure, unhampered by constraining norms. Contested, highly visible confirmation proceedings suit the public style of contemporary senators. With Senate leadership exercising few, if any, controls over the behavior of the members, the President is forced to negotiate with one hundred independent contractors in order to find the votes to secure confirmation. In the case of judicial appointments, this task is made even more formidable because the JUDICIAL ACTIVISM of the modern era has been marked by a willingness on the part of the federal courts to expand the range of litigants permitted access to the federal courts and to subject a wide sweep of public and private disputes to judicial intervention. This expansion of JUDICIAL POWER has made the question of who sits on the federal bench a matter of grave concern to diverse and powerful interests and makes a contentious confirmation process even more likely.

In the final analysis, a more contentious confirmation process simply reflects a general trend in modern American politics. Institutional combat through mechanisms such as congressional investigations, INDEPENDENT COUNSELS, criminal prosecutions, and media revelations increasingly have come to supplant elections as the means by which opposing political forces vie for influence, power, and control. Confirmation proceedings provide a ready opportunity for political groups to embarrass opposing interests, to impede policy implementation, and to weaken the executive branch by denying the President an expeditious route to filling important posts. As long as elections in the United States fail to define who will and who will not exercise political control, contentious confirmation proceedings for both executive and judicial appointments are ever more likely to be the rule rather than the exception.

MARK SILVERSTEIN
(2000)

(SEE ALSO: *Bork Nomination; Clarence Thomas.*)

Bibliography

ABRAHAM, HENRY J. 1992 *Justices and Presidents: A Political History of Appointments to the Supreme Court,* 3rd ed. New York: Oxford University Press.

GINSBERG, BENJAMIN and SHEFTER, MARTIN 1998 *Politics by Other Means,* 2nd ed. New York: W. W. Norton & Co.

SILVERSTEIN, MARK 1994 *Judicious Choices: The New Politics of Supreme Court Confirmations.* New York: W. W. Norton & Co.

TWENTIETH CENTURY FUND 1996 *Obstacle Course: The Report of the Twentieth Century Fund Force on the Presidential Appointment Process.* New York: Twentieth Century Fund.

## CONFISCATION ACTS
12 Stat. 319 (1861)
12 Stat. 589 (1862)

Congress enacted the Confiscation Acts "to insure the speedy termination of the present rebellion." Both statutes liberated the slaves of certain rebels and authorized the confiscation of other types of property by judicial procedures based on admiralty and revenue models. Both statutes were compromise measures, influenced by the progressive goal of emancipation of slaves and by a respect for the rights of private property.

The Supreme Court upheld the constitutionality of the acts in the 6–3 decision of *Miller v. United States* (1871), finding congressional authority in the WAR POWERS clauses of Article I. The majority shrugged off Fifth and Sixth Amendment objections on the grounds that the statutes were not ordinary punitive legislation but rather were extraordinary war measures.

The acts were indifferently and arbitrarily enforced, producing a total of less than $130,000 net to the Treasury. Property of Confederates was also virtually confiscated in

proceedings for nonpayment of the wartime direct tax, under the Captured and Abandoned Property Act of 1863, and through President ABRAHAM LINCOLN's contraband emancipation policies.

WILLIAM M. WIECEK
(1986)

Bibliography

RANDALL, JAMES G. 1951 *Constitutional Problems under Lincoln.* Urbana: University of Illinois Press.

## CONFRONTATION, RIGHT OF

The confrontation clause of the Sixth Amendment, which guarantees an accused person the right "to be confronted with the witnesses against him," is one of the two clauses in the BILL OF RIGHTS that explicitly address the right of criminal defendants to elicit evidence in their defense from witnesses at trial. The other clause is its Sixth Amendment companion, the COMPULSORY PROCESS clause, which guarantees the accused the right to "compulsory process for obtaining witnesses in his favor." Together these two clauses provide constitutional foundations for the right of accused persons to defend themselves through the production and examination of witnesses at trial.

PETER WESTEN
(1986)

(SEE ALSO: *Hearsay Rule.*)

## CONFRONTATION, RIGHT OF (Update)

The Supreme Court has explained that the accused's Sixth Amendment right "to be confronted with the witnesses against him" has the primary function of furthering the trial's truth-determining process. But recent cases reveal conflicts over the best way to ascertain truth and competing visions of a trial's shape. Cases involving children especially have posed the question whether a dramatic and adversarial trial, with the accusing witness and accused as protagonist and antagonist, tends to produce the most accurate results. They have also posed the question of the extent to which values other than truth-seeking—such as protecting a witness from the trauma of trial—can supervene the confrontation right.

Taking its cue from Shakespeare's *Richard II*—"Then call them to our presence; face to face and frowning brow to brow, ourselves will hear the accuser and the accused freely speak" (1.1.15–17)—the Court in COY V. IOWA (1988) held that the core of the right, manifest in the Sixth Amendment's text, involves physical face-to-face confrontation between witness and accused. Keeping the dramatis personae together on the trial's stage contributes not only to honest testimony but to maintaining our dramatic sense of what a trial is: "There is something deep in human nature that regards face-to-face confrontation between accused and accuser as "essential to a fair trial." Accordingly, *Coy* held unconstitutional a statute allowing in all such cases a screen to obstruct a sexually abused minor witness's view of the accused.

MARYLAND V. CRAIG (1990) answered affirmatively the question *Coy* reserved: whether a court may employ such a device if it first makes an individualized finding that an important state interest justifies its use in a particular case. But *Craig* did not clarify whether protecting a witness from serious distress or trauma can justify a device that does not also aid truth-seeking by enabling a child, whom distress would otherwise render substantially unavailable, to testify. The device, upheld in *Craig,* altered the nature of the trial by mixing the media of stage and television: in the courtroom, the defendant, judge, and jury watched, via closed-circuit television, real-time pictures of the child testifying in another room in the presence of the prosecutor and defense counsel. In contrast to *Coy,* the *Craig* decision described face-to-face confrontation only as a preference and emphasized that the confrontation clause's interest in reliability can be furthered sufficiently by a witness's testifying under oath and being cross-examined while observed by the trier of fact. In addition, *Kentucky v. Stincer* (1987) determined that the accused may be excluded from a routine witness-competency hearing of a sexually abused minor, because his right to confrontation regarding the witness's substantive testimony remains intact.

Other opinions focus entirely on cross-examination as the core of the confrontation right. While emphasizing that a judge has wide latitude to impose reasonable limits on cross-examination to avoid harassment, prejudice, confusion, trauma, repetition, and the like, recent cases, such as *Delaware v. Van Arsdall* (1986) and *Olden v. Kentucky* (1988), hold that, save for HARMLESS ERROR, a trial judge cannot exclude all inquiry into traditionally relevant subject areas, such as bias and other credibility matters. For example, *Davis v. Alaska* (1974) holds that a court cannot restrict cross-examination about a witness's juvenile court record, despite a statute protecting the record's confidentiality. With respect to the adversarial manner of cross-examination, lower courts do not readily restrict the cross-examination of children to a gentle inquiry using age-appropriate language and concepts, despite claims that traditional cross-examination on counsel's terms is not conducive to a child's truth-telling.

The Court is divided on whether the cross-examination right is exclusively a procedural trial right that guarantees only an opportunity to cross-examine or whether it is also a right that can enhance effective cross-examination by affording PRETRIAL DISCLOSURE, and DISCOVERY. The EYEWITNESS IDENTIFICATION rules established by UNITED STATES V. WADE (1967) exemplify this latter approach. The former is found in *Pennsylvania v. Ritchie* (1987), in which a trial court refused to give defense counsel access to a child welfare office's investigatory file of a sexual abuse case, pursuant to a statute establishing its confidentiality. Because defense counsel had the opportunity to examine the accusing daughter at trial, a plurality found no confrontation clause violation. The Court did require the trial judge to conduct a review of the file in camera to determine whether the accused's due process rights required disclosure. The view that the confrontation clause assures an opportunity to cross-examine but not effective cross-examination led the Court, in *United States v. Owens* (1988) and *Delaware v. Fensterer* (1985), to uphold the admission of a testifying witness's out-of-court statements, even though he had lost all memory concerning the statements other than the fact that he had previously made them.

Finally, the Supreme Court continues to address the admission of HEARSAY and of codefendant statements. *Ohio v. Roberts* (1980), involving the admission of the prior testimony of an unavailable witness, indicated that the confrontation clause imposes a strong preference for in-court statements, which requires the state to make a good-faith effort to produce the declarant in court, and a requirement that the admission of an out-of-court statement be based on indicia of reliability, established either by its coming "within a firmly rooted hearsay exception" or by a showing of "particularized guarantees of trustworthiness." But in *Bourjaily v. United States* (1987) and *United States v. Inadi* (1986), the Court interpreted the two *Roberts* requirements as applying primarily to the admission of prior testimony. *Bourjaily* limited the *Roberts* indicia of reliability requirement by admitting coconspirator statements under an agency theory without regard to their reliability. *Inadi* permitted the prosecutor to introduce out-of-court statements of a coconspirator without making much effort to produce him. It distinguished prior testimony in *Roberts* from these coconspirator statements, in that the latter, precisely because they were made during the conspiracy, may be more probative than a declarant's subsequent postconspiracy in-court statements. This view—that a trial can best achieve truth through the consideration of statements made in a natural setting rather than through the artifice of a dramatic and adversarial replaying at trial—finds support in some lower court decisions admitting children's out-of-court statements made near the time of their abuse or in the context of a trusted relationship. However, by reemphasizing the *Roberts* requirements, the Supreme Court, in *Idaho v. Wright* (1990), rejected the admission, under a residual hearsay exception, of a sexual abuse accusation made by an unavailable three-year-old in response to the allegedly suggestive questions of an examining pediatrician. With little consideration of the growing psychological evidence on the subject, the Court emphasized that to be admissible the out-of-court statement must have been made under circumstances evidencing such trustworthiness that, subsequently at trial, "adversarial testing would add little to its reliability."

With respect to codefendant confessions, in *Cruz v. New York* (1987), *Richardson v. Marsh* (1987), *Lee v. Illinois* (1986), and *Tennessee v. Street* (1985), the Court reaffirmed (if only narrowly) and refined *Bruton v. United States* (1968) by prohibiting the limited admission against a nontestifying codefendant of that portion of his confession that directly implicates the defendant but is not admissible against him.

In noncriminal cases, the DUE PROCESS clause can afford some sort of confrontation right to enhance the truth-determining process. IN RE GAULT (1967) held that a minor who risks loss of liberty in a state juvenile institution enjoys a right of confrontation, including sworn testimony subject to cross-examination. Lower courts have similarly guaranteed such a right in civil commitment proceedings for those suffering from MENTAL ILLNESS, even though these proceedings in practice are not particularly adversarial and rely heavily on out-of-court statements not strictly within traditional hearsay exceptions. The scope of confrontation rights in proceedings involving the custody of children, as in civil child abuse cases, is currently disputed in doctrine and in practice. The Supreme Court recognized the right to confront and cross-examine adverse witnesses in administrative hearings prior to the termination of WELFARE BENEFITS in GOLDBERG V. KELLY (1970) and prior to a prisoner's transfer to a mental hospital in *Vitek v. Jones* (1980). But the Court has permitted decision making without confrontation, based on a written record or on hearing the affected individual's side of the story, in other cases, such as a prison disciplinary proceeding in *Wolff v. McDonnell* (1974) and a PUBLIC EMPLOYEE predischarge review that precedes a fuller post-deprivation hearing in *Cleveland Board of Education v. Loudermill* (1985).

ROBERT D. GOLDSTEIN
(1992)

Bibliography

GRAHAM, MICHAEL H. 1988 The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The

State of the Relationship. *Minnesota Law Review* 72:523–601.

HADDAD, JAMES B. 1990 The Future of Confrontation Clause Developments: What Will Emerge When the Supreme Court Synthesizes the Diverse Lines of Confrontation Decisions. *Journal of Criminal Law and Criminology* 81:77–98.

JONAKAIT, RANDOLPH N. 1988 Restoring the Confrontation Clause to the Sixth Amendment. *UCLA Law Review* 35:557–622.

## CONGRESS AND FOREIGN POLICY

Congress has three principal functions. As a forum for debate, it is a vital instrument for creating and crystallizing public opinion, the source of all legitimate governmental power and policy in a democratic society. Through the investigatory power of its committees, it is the grand inquest of the nation, watching society and government with an eye for new and emerging problems. And it has the sole power of legislation on certain subjects, qualified only by the President's veto. All three aspects of Congress's work are important to its activities in the field of FOREIGN AFFAIRS. This article, however, will concentrate on Congress's role in legislation and its attempt to become a major participant in administration, the only area of its foreign policy agenda currently generating serious constitutional problems.

The Constitution divides the task of making and carrying out foreign policy in accordance with the rule that except where the Constitution provides otherwise, Congress is vested with the legislative part of American foreign policy and the President with the executive portion. Articles I and II mention certain subjects that illustrate the distinction between "legislative" and "executive" functions, and Article I, section 6, paragraph 2, provides that "no person holding any office under the United States shall be member of either House during his continuance in office." In a sentence focused on safeguards against corruption of the governmental process by either Congress or the President, paragraph 2 reveals the clear expectation that the new American constitutional order was not to be a cabinet government, but that Congress and the executive were to be separated institutionally as well as by function. During the period of drafting the Constitution, the presidency was deliberately made unitary rather than plural. And much was said and written about an executive capable of "energy, secrecy, and dispatch," as contrasted with a deliberative legislature not directly involved in the execution of the laws.

Drawing a line between the legislative and executive spheres has been conspicuously difficult in the area of foreign policy, however. One reason why this should be so is that foreign policy includes much more than the passage of statutes and the negotiation of international agreements and their subsequent execution. Much foreign policy is necessarily made in the ordinary course of diplomacy. And from the beginnings under the Constitution of 1787, the President has been recognized as the sole agent of the nation in its dealings with other states. He alone receives ambassadors and, from time to time, declares them unacceptable and sends them away. The power to recognize nations and to withhold recognition was accepted early as entirely presidential. The President is the chief diplomat of the nation; he smiles and frowns, speaks or remains silent, warns, praises, protests, and negotiates.

Even when diplomacy results in treaties that require approval by the Senate before ratification or in EXECUTIVE AGREEMENTS, which the President may or may not submit for a congressional vote, the process of making foreign policy is more heavily influenced by the President than is the passage of most statutes, which make policy in advance of action. The President can shape the circumstances in which issues of foreign policy come before Congress more often and more effectively than he can in dealing with issues of domestic policy. On the other hand, the negotiating process has its own constitutional pitfalls. If the Senate has to consent to the ratification of a major treaty or if Congress must pass enabling legislation in support of a treaty or executive agreement, members of Congress may be surly and uncooperative if they have not somehow participated in the negotiations themselves within or even beyond the limits of Article I, section 6, of the Constitution. Since the failure of the Versailles Treaty in 1919, every President has sought to anticipate the problem through briefings, consultations, or even membership or observer status for senators on negotiating delegations. If, on the other hand, members of Congress are suitably consulted about the instructions given to the negotiators and the ultimate bargain falls short of the goals specified in the instructions, pitfalls of another kind appear. The relation of Congress and the President in the making and ratification of treaties and executive agreements has therefore been a major political and constitutional irritant at least since 1795, when JAY'S TREATY was barely ratified.

ALEXANDER HAMILTON took the view that the executive, legislative, and judicial powers were to be distinguished by their "nature." The EXECUTIVE POWER, he said, is all governmental power that is neither judicial nor legislative in character. From this somewhat circular eighteenth-century axiom, Hamilton, THOMAS JEFFERSON, and JOHN MARSHALL drew a conclusion that has been of critical importance to CONSTITUTIONAL INTERPRETATION ever since. Where a power is executive in character, Hamilton wrote, it is deemed to be presidential unless that conclusion is excluded by the constitutional text. In such cases, presidential supremacy is the rule and congressional authority

the exception, and exceptions are to be strictly construed. The same rule of construction applies when powers are characterized as legislative or judicial. Here, too, the granted power is to be construed broadly, and the exceptions narrowly.

This rule is not without its modern critics. A few recent writers have urged that Congress be considered the supreme institution of government in all realms, and not only in the legislative sphere. They forget that the Constitution of 1787 was composed and adopted by men who found congressional supremacy under the ARTICLES OF CONFEDERATION an unsatisfactory mode of government. The only reason such critics offer for their conclusion is that the United States is "a republic which has become a democracy" and that the imperious rise of modern democracy makes presidential and perhaps even judicial independence an anachronism.

In making and carrying out foreign policy, Congress and the President are forced to work together: neither Congress nor the President can conduct foreign policy alone for long. Sooner or later, a President will need money, new statutes, or both. And, as presently constituted, Congress is incapable of conducting diplomacy or commanding the armed forces, save by sporadic intervention in highly charged episodes. The history of American foreign policy is therefore necessarily the history of a rivalrous and uneasy partnership between Congress and the President, with occasional intervals of harmony and a few of utter frustration, such as WOODROW WILSON's tragic final days.

The normal congressional impulse to nibble at the President's executive authority has gained momentum in recent years from four major sources. The first and perhaps the most important has been the growth in congressional staff, which goes back to the Legislative Reorganization Act of 1946. Before that fateful reform was adopted, Congress and its committees relied largely on the administration of the day for assistance in research and drafting. The Congressional Research Service of the Library of Congress provided some supplemental help, but until the recent past, that service was extremely small. Today, congressional staffs include 35,000 people, and the Congressional Research Service, several hundred more.

The influence of an able young congressional staff on the relations between Congress and the President has been reinforced by a second source of congressional ascendency: the modern habit of electing a Democratic Congress and a Republican President. The habit has been rather popular with the voters, but has decidedly negative features. For example, it encourages partisan irresponsibility on the part of Congress even on major national issues, especially in the field of foreign affairs.

These two tendencies together produce a third: the practice of writing long and elaborate statutes intended to control the President and the courts in detail as they apply statutes and treaties to new situations. As an astute observer recently noted, one of the most influential statutes ever enacted by Congress, the SHERMAN ANTITRUST ACT, consists of six brief paragraphs occupying less than half a page, whereas statutes now tend to be hundreds, if not thousands, of pages long.

Fourth and finally, congressional attacks on the President's prerogatives in the field of foreign affairs draw strength from widespread protest against the foreign policy the United States has pursued since 1945. That protest is based on a nostalgic yearning for the neutrality and comparative isolation of the United States during the century between 1815 and 1914.

These flows of change were suddenly accelerated in the late 1960s and early 1970s by the growing unpopularity of the VIETNAM WAR and the WATERGATE scandal. Protest movements against the war in Vietnam became ominous. In turn, this phenomenon led Congress to move decisively both to stop "Johnson's War" and to alter the traditional constitutional balance between Congress and the President so that such "presidential" wars could never happen again. Thomas M. Franck and Edward Weisbard call this vague and many-sided movement a congressional revolution that has radically redistributed the foreign affairs powers in favor of Congress at the expense of the presidency. Foreign policy, they proclaim, will now be made by "co-determination," without regard to the distinction between legislative and executive functions. The Bastille Day of the congressional revolution, they say, was June 29, 1973, the day when President RICHARD M. NIXON surrendered to a congressional effort to end the American military involvement in Indochina and promised to stop bombing in Cambodia. "With that sullen concession, power over foreign policy shifted: from the imperial President and his discreet and decorous professional relations managers to the undisciplined, rambunctious rabble of the House and Senate."

The power to end wars by armistice and cease-fire agreements had always been regarded as part of the President's authority as COMMANDER-IN-CHIEF. In the case of the Vietnam War, however, the explosion of opinion against the war and the coincidence of the Watergate scandal and the revulsion it produced against President Nixon led to the success of Congress's attempt to end the war independently by using its power over appropriations and forcing a gravely wounded President to acquiesce in its action. This extraordinary conjuncture of political forces also permitted Congress to override President Nixon's veto of the WAR POWERS ACT.

Actually, the revolt of Congress against the Hamiltonian conception of the presidency began long before the ex-

plosion of opinion against the Vietnam War and President Nixon. A key weapon of Congress in that battle was, and remains, the LEGISLATIVE VETO in all its forms. The legislative veto was invented in 1932. It allows Congress to overrule presidential constructions and applications of existing law by CONCURRENT RESOLUTION, that is, to reverse purely executive actions without having to confront the President's VETO POWER. Since that time, the practice had spread throughout the statute books, but particularly in the realm of foreign policy. The Lend-Lease Act of 1941, for example, contained a legislative veto provision, stipulating that Congress could terminate the act by concurrent resolution. President FRANKLIN D. ROOSEVELT thought the provision unconstitutional, but acquiesced in it silently because the act was of transcendent importance, and it was by no means clear that it would have passed without the legislative veto.

During the prolonged struggle between Congress and the President over foreign policy during the 1960s and 1970s, legislation of this kind became a flood. That legislation attempted to control presidential discretion in interpreting and applying statutes and treaties not only by concurrent resolutions passed by both houses but also by veto-free delegations of executive power to one house and even to particular committees of either house.

The Supreme Court held the legislative veto unconstitutional in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983), but Congress has not yet seriously undertaken to comply with the decision by removing from the books more than 200 statutes directly affected by it. Indeed, Congress is still defying the Court by passing or seriously considering bills that would openly violate the rule of the decision.

How far can Congress go in using its power of the purse as a sword in its struggle to seize executive power? In the past, both political usage and Supreme Court opinions made clear that the appropriations power had constitutional limits. Several congressional conditions on the spending of appropriated funds have been ruled or declared to be unconstitutional in cases that include UNITED STATES V. LOVETT (1946), MYERS V. UNITED STATES (1926), *United States v. Klein* (1872), and FLAST V. COHEN (1968). Congress's recent experiments with expanded uses of its appropriations power have stimulated original and provocative law review articles suggesting that the President now has the power to use a line item veto and a limited power to spend in emergencies without prior appropriations and that Congress cannot use its appropriations power to prevent the President from carrying out his constitutional duties. Future constitutional development along some of these lines would be a normal response to perceptions of a congressional thrust for excessive power.

Twelve years after Franck proclaimed the success of what he regarded as Congress's wholesome and cleansing revolution, it is clear that while much has changed, his optimism was premature. Whether the congressional attempt to transform the constitutional relationship between Congress and the President in the field of foreign affairs will prevail in the end remains to be seen. Institutions 200 years old normally reflect the necessities of function. As Franck remarks, if Congress demonstrates that it cannot in fact use its new powers or if its key members are unwilling or unable to devote the necessary time and attention to their new foreign policy responsibilities, "power will run off Capitol Hill."

What is clear, however, is that the historical conflict between Congress and the President about the making and implementation of foreign policy has changed fundamentally. It is no longer the push and pull of a natural tug of war between the legislative and executive branches, operating within the framework of well-understood rules and habits. Congress has been pressing with new determination to take over executive functions in many areas of government, and particularly in foreign affairs. The constitutional balance between Congress and the President has shifted so radically that "the inevitable friction" about which Justice LOUIS D. BRANDEIS wrote in *Myers v. United States* has become war, marked both by episodes of bitter hostility and by a slow presidential retreat that is transforming the President into a prime minister or constitutional monarch, ceremoniously presiding over an increasingly strong Congress. Whether we describe this transformation as a glorious revolution or as a constitutional crisis is immaterial. What is at stake in the battle is far more than constitutional piety or even the effectiveness of government, important as it is. What is at stake is the future of liberty. The accumulation of the legislative and executive powers in the same hands, as Jefferson, JAMES MADISON, and others have said over the years, is "the very definition of tyranny."

The powers of the presidency have not been formally annulled. They are still latent in the bloodstream of the government. But they encounter more and more resistance each time a President tries to use them. As a result, the presidency is being stripped of some of its more important prerogatives.

If the present trends are not reversed by the courts, the President will soon be wrapped like Gulliver in a web of regulatory statutes and hopelessly weakened. Although the President has the sole constitutional authority to conduct foreign relations, congressional leaders sometimes negotiate independently with foreign governments, as they have done recently with Nicaragua, for example. Substantive riders on appropriations bills and other devices to evade the President's veto power are more popular than ever. Congress has already put the President under the

control of a congressional cabinet in the exercise of his responsibilities for intelligence and is actively considering applying that model to the process of making "presidential" decisions about the use of force and foreign policy more generally. If that possibility should materialize, the presidency the nation has known since 1789, the presidency of ABRAHAM LINCOLN and Franklin D. Roosevelt, would be no more.

The Persian Gulf crisis of 1990–1991, however, demonstrated once again the functional necessity for the historic powers of the President. The abject failure of Congress to manage that episode should do much to restore the constitutional balance.

EUGENE V. ROSTOW
(1992)

(SEE ALSO: *Advice and Consent; Congressional War Powers; Foreign Affairs; Senate and Foreign Policy; Treaty Power.*)

Bibliography

CRABB, CECIL V., JR. and HOLT, PAT 1989 *Invitation to Struggle: Congress, the President, and Foreign Policy,* 3rd ed. Washington, D.C.: Congressional Quarterly Press.

FISHER, LOUIS 1985 *Constitutional Conflicts Between Congress and the President.* Princeton, N.J.: Princeton University Press.

_____1988 *Constitutional Dialogues.* Princeton, N.J.: Princeton University Press.

FRANCK, THOMAS M. and WEISBAND, EDWARD 1979 *Foreign Policy by Congress.* New York: Oxford University Press.

ROSTOW, EUGENE V. 1989 *President, Prime Minister, or Constitutional Monarch?* Washington, D.C.: National Defense University Press.

WILSON, WOODROW (1885) 1967 *Congressional Government.* Cleveland, Ohio: Meridan Books.

## CONGRESS AND THE SUPREME COURT

The delegates to the CONSTITUTIONAL CONVENTION OF 1787 confronted two fundamental problems in their quest to correct the political defects of the ARTICLES OF CONFEDERATION. First, they needed to bolster the powers of government at the national level so as to transform the "league of friendship" created by the Articles into a government with all the coercive powers requisite to government. Second, the Framers sought to create energetic but limited powers that would enable the new national government to govern, but in ways safe to the rights of the people. As JAMES MADISON put it in THE FEDERALIST #51, the task was to "enable the government to control the governed, but in the next place oblige it to control itself."

Their successful solution to this political problem was to separate the powers of government. Because the primary source of trouble in a popular form of government would be the legislative branch, the object was to bolster the coordinate executive and judicial branches, to offer "some more adequate defence. . . . for the more feeble, against the more powerful members of the government." The arrangement of checked and balanced institutions would at once avoid "a tyrannical concentration of all the powers of government in the same hands" while rendering the administration of the national government more efficient.

When the Framers examined the existing federal system under the Articles to determine precisely what it was that rendered it "altogether unfit for the administration of the affairs of the Union," the want of an independent judiciary "crown[ed] the defects of the confederation." As ALEXANDER HAMILTON put it in *The Federalist* #22, "Laws are a dead letter without courts to expound and define their true meaning and operation." Thus the improved science of politics offered by the friends of the Constitution prominently included provision for "the institution of courts composed of judges, holding their offices during good behavior."

But to some Anti-Federalist critics of the Federalist-backed Constitution, the judiciary was too independent and too powerful. To the New York ANTI-FEDERALIST "Brutus," the proposed judiciary possessed such independence as to allow the courts to "mould the government into almost any shape they please." The "Federal Farmer" was equally critical: his fellow citizens were "more in danger of sowing the seeds of arbitrary government in this department than in any other." With such unanticipated criticism, the Federalists were forced to defend the judicial power more elaborately than had been done in the early pages of *The Federalist.*

So compelling were the Anti-Federalist arguments that Hamilton saw fit to explain and defend the proposed judicial power in no fewer than six separate essays (#78–83) in *The Federalist.* His task was to show how an independent judiciary was not only *not* a threat to safe popular government but was absolutely essential to it. In making his now famous argument in *The Federalist* #78 that the judiciary would be that branch of the new government "least dangerous to the political rights of the Constitution," Hamilton made the case that the courts were "designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." By exercising neither force nor will but merely judgment, the courts would prove to be the "bulwarks of a limited constitution." Such an institution, Hamilton argued, politi-

cally independent yet constitutionally rooted, was essential to resist the overwhelming power of the majority of the community. Only with such a constitutional defense could the rights of individuals and of minor parties be protected against majority tyranny; only an independent judiciary could allow the powers of the national government to be sufficiently enhanced, while simultaneously checking the unhealthy impulses of majority rule that had characterized politics at the state level under the Articles.

To counter the Anti-Federalist complaint that the courts would be imperiously independent, Hamilton reminded them that the courts would not be simply free-wheeling sources of arbitrary judgments and decrees. The Constitution, in giving Congress the power to regulate the APPELLATE JURISDICTION of the Supreme Court "with such exceptions, and under such regulations, as the Congress shall make," hedged against too expansive a conception of judicial power. "To avoid an arbitrary discretion in the courts," Hamilton noted, "it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." Thus the stage was set for a history of political confrontation between the Congress and the Court.

The tension between Congress and the Court has been a constant part of American politics at least since CHISHOLM V. GEORGIA (1793) led to the ELEVENTH AMENDMENT. Each generation has seen dramatic Supreme Court rulings that have prompted political cries to curb the courts. JOHN MARSHALL's now celebrated opinions in MARBURY V. MADISON (1803) and MCCULLOCH V. MARYLAND (1819), for example, caused him a good bit of political grief when he wrote them; the decision in DRED SCOTT V. SANDFORD (1857) soon came to be viewed as a judicially "self-inflicted wound" that weakened the Court and exacerbated the conflict that descended into civil war; and more recently, protests against the rulings in BROWN V. BOARD OF EDUCATION (1954) and ROE V. WADE (1973) have caused not only political demands for retaliation against the Court but social conflict and even violence as well. But through it all the Court has weathered the hostility with its independence intact.

Only once were the critics successful in persuading Congress to act against the Court, and the Court validated that move. In EX PARTE MCCARDLE (1869) the Court confirmed Congress's power to withdraw a portion of the Court's appellate jurisdiction. Fearing that the Court would use William McCardle's petition for a writ of HABEAS CORPUS under the HABEAS CORPUS ACT OF 1867 as a vehicle for invalidating the Reconstruction Acts *in toto*, the Congress repealed that portion of the act under which McCardle had brought his action—and after the Court had heard arguments in the case. The Court upheld the constitutionality of Congress's action in repealing this particular part of the Court's JURISDICTION. The extent of Congress's power to withdraw the Court's appellate jurisdiction remains a matter of constitutional controversy.

The constitutional relationship between Congress and the Court is one thing; their political relationship is another matter. Although there are often loud cries for reaction against the Court, the critics usually lack sufficient force to achieve political retribution. The reason is most often explained as a matter of political prudence. The courts by their decisions frequently irritate a portion of the community—but usually only a portion. For most decisions will satisfy certain public constituencies that are as vociferous as the critics. Even the most errant exercises of judicial decision making are rarely sufficient to undermine the public respect for the idea of an independent judiciary.

The reason for this is simple enough: an independent judiciary makes good political sense. To make the judiciary too much dependent upon "popularity" as that popularity may be reflected in Congress would be to lower the constitutional barriers to congressional power, barriers generally agreeable to most people most of the time. The arguments of Hamilton in *The Federalist* still carry considerable weight.

Thus in the constitutional design of separating the powers of government through the device of "partial agency"—mingling the powers enough to give each branch some control over the others—is to be found the inevitable gulf between legitimate power and prudent restraint. For Congress to be persuaded to restrict judicial power, the case must first be made that such restrictions are both necessary and proper.

Despite the dangers of legislative power, it was still considered by the Framers to be the cardinal principle of POPULAR SOVEREIGNTY. Basic to this principle is the belief that it is legitimate for the people through the instrumentality of law to adjust, check, or enhance certain institutions of the government. This belief embraces the power of the legislature to exert some control over the structure and administration of the executive and judicial branches.

The qualified power of the legislature to tamper with the judiciary is not so grave a danger to the balance of the Constitution as some see it. For even when a judicial decision runs counter to particular—and perhaps pervasive—political interests, the institutional arrangements of the Constitution are such as to slow down the popular outrage and give the people time for "more cool and sedate reflection." And given the distance between the people and LEGISLATION afforded by such devices as REPRESENTATION (with its multiplicity of interests), BICAMERALISM, and the executive VETO POWER, an immediate legislative backlash to judicial behavior is unlikely. Expe-

rience demonstrates that any backlash at all is likely to be "weak and ineffectual." But if the negative response is not merely transient and is widely and deeply felt, then the Constitution wisely provides well-defined mechanisms for a deliberate political reaction to what the people hold to be intolerable judicial excesses.

But ultimately the history of court-curbing efforts in America, from the failed IMPEACHMENT of Justice SAMUEL CHASE to the Court-packing plan of FRANKLIN D. ROOSEVELT, teaches one basic lesson: the American political system generally operates to the advantage of the judiciary. Presidential court-packing is ineffective as a means of exerting political influence, and impeachment is too difficult to use as an everyday check against unpopular decisions. Not since John Marshall saw fit pseudonymously to defend his opinion in *McCulloch v. Maryland* (1819) in the public press has any Justice or judge felt obliged to respond to public outrage over a decision.

Political responses to perceived excesses of judicial power tend to take one of two forms: either a policy response against a particular decision or an institutional response against the structure and powers of the courts. In either event, the response may be either partisan or principled. Usually a policy response will take the form of a proposed constitutional amendment or statute designed to overrule a decision. An institutional response will generally seek to make jurisdictional exceptions, to create special courts with specific jurisdiction, or to make adjustments regarding the personnel, administration, or procedures of the judicial branch. Whatever the response, court-curbing is difficult. Although a majority of one of the houses of Congress may object to particular cases of "judicial impertinence," as one congressman viewed Justice DAVID DAVIS's controversial opinion in EX PARTE MILLIGAN (1866), a variety of objections will issue in different views of what should be done.

On the whole, there has consistently been a consensus that tampering with judicial independence is a serious matter and that rash reprisals against the Court as an institution may upset the constitutional balance. Underlying the occasional outbursts of angry public sentiment against the court is that "moral force" of the community of which ALEXIS DE TOCQUEVILLE wrote. On the whole, the American people continue to view the judiciary as the "boast of the Constitution."

For any political attempt to adjust or limit the judicial power to be successful it is necessary that it be—and be perceived to be—a principled rather than a merely partisan response. Only then will the issue of JUDICIAL ACTIVISM be met on a ground high enough to transcend the more common—and generally fruitless—debates over judicial liberalism and conservatism. The deepest issue is not whether a particular decision or even a particular court is too liberal for some and too conservative for others; the point is whether the courts are exercising their powers capably and legitimately. Keeping the courts constitutionally legitimate and institutionally capable benefits both the liberal and the conservative elements in American politics.

The system the Framers devised is so structured that the branch the Framers thought "least dangerous" is not so malleable in the hands of Congress as to be powerless. Yet the threat of congressional restriction of the Court remains, a threat that probably helps to keep an otherwise largely unfettered institution within constitutional bounds.

GARY L. MCDOWELL
(1986)

Bibliography

BERGER, RAOUL 1969 *Congress versus the Supreme Court.* Cambridge, Mass.: Harvard University Press.

BRECKENRIDGE, A. C. 1971 *Congress Against the Court.* Lincoln: University of Nebraska Press.

MORGAN, DONALD L. 1967 *Congress and the Constitution.* Cambridge, Mass.: Harvard University Press.

MURPHY, WALTER F. 1962 *Congress and the Courts.* Chicago: University of Chicago Press.

## CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT

88 Stat. 297 (1974)

President RICHARD M. NIXON'S IMPOUNDMENT of billions of dollars appropriated by Congress for purposes which he did not approve amounted to the assertion of virtually uncontrollable power to block any federal program involving monetary expenditures. Nixon used impoundment as a weapon to alter legislative policy rather than to control the total level of government spending.

Congress, in the 1974 act, strengthened its own budgeting process, establishing new budget committees in each house and creating the Congressional Budget Office to give Congress assistance comparable to that given the President by the OFFICE OF MANAGEMENT AND BUDGET. The act required the President to recommend to Congress, in a special message, any proposal to impound funds. Thereafter, either house might veto the impoundment proposal by resolution, thereby forcing release of the funds. If the President refused to comply, the Comptroller General was authorized to seek a court order requiring the President to spend the money. The constitutionality of the LEGISLA-

TIVE VETO was thrown into doubt by the IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983).

PAUL L. MURPHY
(1986)

(SEE ALSO: *Budget Process; Constitutional History, 1961–1977.*)

## CONGRESSIONAL GOVERNMENT

In creating the Constitution, the Framers created a functional SEPARATION OF POWERS, with separate institutions exercising the legislative, executive, and judicial powers. The Constitution also creates a system of CHECKS AND BALANCES, however, with each of the three branches participating in the functions of the others to some degree. In creating this system, the Framers did not specify exactly how much power the various branches were to have relative to one another. As a consequence, the precise balance of power has been left to subsequent historical development.

The late nineteenth century was a period of legislative dominance of the federal government. In 1885, a young WOODROW WILSON described the workings of the constitutional system as "congressional government." The label has stuck as a description of the federal government from roughly 1867 to the turn of the century. This system did not arise by accident. It was a product of the political and constitutional struggles of the CIVIL WAR. The victorious REPUBLICAN PARTY was largely composed of former Whigs, who had originally organized in the 1830s in opposition to the strong presidency of ANDREW JACKSON, or "King Andy." Their preference for congressional leadership, however, was delayed by the exigencies of civil war, which required giving extraordinary powers to the Republican President ABRAHAM LINCOLN. Lincoln's death and disagreements with his successor, ANDREW JOHNSON, led Congress to take legislative control of RECONSTRUCTION. For the first time, Congress overrode a significant presidential veto. Soon, Congress routinely overrode Johnson's vetoes, before eventually attempting to remove him from office through an IMPEACHMENT in 1867 for his resistance to congressional policy.

After the Johnson impeachment (and despite his acquittal), Presidents were on the political defensive and Congress effectively dictated national policy. Executive appointments were a crucial source of political power in the nineteenth century, as well as an important policy decision. In sharp contrast to the modern deference to presidential nominations, the postbellum U.S. SENATE aggressively used its confirmation powers to force Presidents to select officials who were friendly to Congress. At the same time, civil service reforms removed a potential tool for rewarding party loyalists from congressional party leaders, but it also took away a political weapon that earlier Presidents had used to win control of the POLITICAL PARTIES and exert pressure on legislators. The presidential APPOINTING AND REMOVAL POWER was carefully curtailed during this period.

Congress also dominated policymaking. In this period, federal policy was overwhelming made through legislation, which in turn was effectively made by congressional committees. The limitations on presidential appointments prevented the President from developing a system of advisors with whom to develop independent policy recommendations. Even when Presidents urged policies, their proposals carried little weight in what was seen as an exclusively legislative prerogative. The British observer James Bryce found that presidential messages had less effect than "an article in a prominent party newspaper," and their suggestions were "neglected." Congress also restricted presidential discretion in carrying out federal policy. The "EXECUTIVE POWER" was to be narrowly understood, requiring the implementation of the legislative will without any independent policy choice on the part of the President. When the federal government began to take on new regulatory burdens late in the century, Congress chose to create independent commissions or deal directly with executive departments rather than delegate additional powers to the President. A bureaucratic "fourth branch" was seen as preferable to a strengthened presidency.

Congressional government affected the stature as well as the power of the president. Presidential candidates during the period were creatures of the congressionally based political parties. Nominees were not intended to be threatening to existing congressional interests, and as a consequence, the late-nineteenth-century presidency attracted "small men," who came to office with little national reputation and gained no additional stature while in office. Presidents were merely caretakers, and their public appearances were few and largely ceremonial.

Congressional government arose through a combination of the scheme of government created by the separation of powers and the political interpretation of those constitutional powers. Congress had important tools that it was willing to use, such as the power to confirm or reject presidential appointments. And the political actors of the time generally agreed on a theory of government that emphasized the "popular branch" to the exclusion of executive power. Presidents spent the late nineteenth century gradually attempting to regain the influence that they had lost after the war, but congressional government was not overturned until America's emergence as a world power

at the turn of the century and the rise of aggressive Presidents willing to challenge inherited political practices and constitutional understandings.

KEITH E. WHITTINGTON
(2000)

Bibliography

BINKLEY, WILFRED E. 1962 *President and Congress*, 3rd rev. ed. New York: Vintage.

BRYCE, JAMES 1941 *The American Commonwealth*, 3rd rev. ed. New York: Macmillan.

WILSON, WOODROW 1885 *Congressional Government: A Study in American Politics.* Boston, Mass.: Houghton, Mifflin.

## CONGRESSIONAL INVESTIGATIONS

See: Legislative Investigation

## CONGRESSIONAL MEMBERSHIP

Congress under the ARTICLES OF CONFEDERATION was a unicameral body representing thirteen states. But delegates to the CONSTITUTIONAL CONVENTION, influenced by the example of the British Parliament and almost all of the states, agreed rather early to the principle of a two-house legislature. Members of the HOUSE OF REPRESENTATIVES were to be popularly elected, with each state's members proportionate to population. But membership in the SENATE and selection of senators caused intense controversy.

The large states wanted the Senate also to represent population, but the smaller states were adamantly opposed. They forced a compromise under which every state would have two senators, elected by the state legislatures for six-year terms. This solution gave effect to the federal principle, the Senate representing the states and the House providing popular representation. However, legislative election of senators ultimately proved unacceptable. During the nineteenth century the elections were often marked by scandals and deadlocks, and a rising progressive temper in the country led to adoption of the SEVENTEENTH AMENDMENT in 1913 providing for direct popular election of senators.

The size of the House was initially set by Article I at sixty-five, to be revised thereafter on the basis of decennial censuses. As the population grew and more states were admitted to the Union, Congress increased the number of seats until it reached 435 after the 1910 census. Congress then concluded that further enlargement would make the House unwieldy, and by statute in 1929 fixed 435 as the permanent size of the House.

After each census the 435 House seats are apportioned among the states according to a statutory formula. It is then the responsibility of each state legislature to draw the lines for congressional districts. There was initially no legal obligation to assure equality of population among districts. Particularly in the early twentieth century rural-dominated state legislatures refused to revise district lines to provide equitable representation for growing urban areas. Judicial relief failed when the Supreme Court in COLEGROVE V. GREEN (1946) ruled that drawing the boundary lines of congressional districts was a POLITICAL QUESTION for decision by the state legislatures and Congress, not the courts. This HOLDING was implicitly overruled by the Court in BAKER V. CARR (1962), and in WESBERRY V. SANDERS (1964) the Court made equality of population in congressional districts a constitutional requirement.

The drawing of congressional district lines typically generates bitter legislative controversy as the majority party endeavors to protect its dominance by gerrymandering and incumbents of both parties seek to safeguard their own districts. In numerous states since 1964 legislative deadlocks have required the courts to intervene and draw the district lines.

Members of the House have two-year terms. Proposals for extending the term to four years have been made because of the increased costs of campaigning, longer sessions of Congress, and more complex legislative problems. In the Senate, the fact that only one-third of the seats fall vacant every two years gives it the status of a "continuing body," in contrast to the House which must reconstitute itself and elect its officers every two years.

The presiding officer of the House is its Speaker, chosen by the majority party from among its members. The Speaker has a vote and may on rare occasions participate in debate. The Senate's presiding officer is the vice-president; when serving in this capacity his title is President of the Senate. He has no vote except in case of a tie. The Constitution authorizes the Senate to choose a president *pro tempore* to preside in the absence of the vice-president. The president *pro tempore* is typically the senior member of the majority party.

Article I requires that a senator be thirty years of age, nine years a citizen of the United States, and an inhabitant of the state from which elected. A representative need be only twenty-five years of age and a citizen for seven years. By custom a representative should reside in the district from which elected. Members of Congress are disqualified for appointment to executive office, a provision that prevents the development of anything approaching a parlia-

mentary system. To accept an executive post, a member of Congress must resign.

Each house is authorized to "be the judge of the elections, returns and qualifications of its own members" (Article I, section 5). The "qualifications," it has been established by POWELL V. MCCORMACK (1969), are only the age, residence, and CITIZENSHIP requirements stated in the Constitution. However, on several occasions both houses have in effect enforced additional qualifications by refusing to seat duly elected members who met the constitutional qualifications. In 1900 the House refused to seat a Utah polygamist; similar action was taken in 1919 against a Wisconsin socialist who had been convicted under the ESPIONAGE ACT for opposing American participation in WORLD WAR I. The most prominent black member of Congress, Adam Clayton Powell, was denied his seat in 1967. There was a judgment of criminal contempt outstanding against him, and his conduct as a committee chairman had been irregular. The Supreme Court ruled, however, that he possessed the constitutional qualifications and so could not be denied his seat. Members of Congress cannot be impeached, but they are subject to vote of censure by their chamber, and to expulsion by two-thirds vote. The Court indicated that the House might have expelled Powell for his alleged conduct. Vacancies in the Senate can be filled by the state governor, but in the House only by special election.

Members of Congress have immunity from arrest during legislative sessions except for cases of " FELONY, and breach of the peace" (Article I, section 6). They are guaranteed FREEDOM OF SPEECH by the provision that "for any speech or debate in either house, they shall not be questioned in any other place." (See SPEECH OR DEBATE CLAUSE.) The purpose is to prevent intimidation of legislators by the executive or threat of prosecution for libel or slander. They can be held accountable for statements or actions in their legislative capacity only by their own colleagues. This immunity covers not only speeches in Congress but also written reports, resolutions offered, the act of voting, and all other things generally done in a legislative session. However, immunity does not extend to press releases, newsletters, or telephone calls to executive agencies, the Supreme Court held in HUTCHINSON V. PROXMIRE (1979). Also, taking a bribe to influence legislation is not a "legislative act," according to BREWSTER V. UNITED STATES (1972).

C. HERMAN PRITCHETT
(1986)

Bibliography

DAVIDSON, ROGER H. and OLESZEK, WALTER J. 1985 *Congress and Its Members*, 2nd ed. Washington, D.C.: Congressional Quarterly.

## CONGRESSIONAL PRIVILEGES AND IMMUNITIES

The Constitution specifically protects members of Congress against interference with their deliberative function. The special privileges and immunities attendant on CONGRESSIONAL MEMBERSHIP are contained in the first clause of Article I, section 6, of the Constitution. The Framers of the Constitution, familiar with the devices used by the British king against members of Parliament and by royal governors against members of the provincial legislatures, sought to insulate the members of the federal legislature against pressures that might preclude independence of judgment.

The PRIVILEGE FROM ARREST, other than for FELONY, or BREACH OF THE PEACE, has been known in Anglo-American constitutional history since the advent of parliaments; WILLIAM BLACKSTONE cited an ancient Gothic law as evidence of the privilege's immemorial origins. The English Parliament claimed freedom of debate, that is, immunity from prosecution or civil lawsuit resulting from utterances in Parliament, at least from the thirteenth century; that immunity was finally established in the English BILL OF RIGHTS (1689). In America, privilege from arrest during legislative sessions was first granted in Virginia in 1623, and freedom of debate was first recognized in the FUNDAMENTAL ORDERS OF CONNECTICUT (1639).

The ARTICLES OF CONFEDERATION extended both the privilege from arrest and the freedom of debate to members of Congress, in words transcribed almost verbatim from the English Bill of Rights: "Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace." At the CONSTITUTIONAL CONVENTION, these congressional privileges and immunities first appeared in the report of the Committee of Detail; they were agreed to without debate and without dissent. The Committee of Style gave final form to the wording of the clause.

The privilege from arrest, limited as it is to arrest for debt, no longer has any practical application. The immunity from having to answer in court, or in any other place out of Congress, for congressional SPEECH OR DEBATE is now primarily a shield against civil actions by private parties rather than against an executive jealous of his prerogative. That shield has been expanded to protect the whole legislative process, but not, as one senator learned to his chagrin in HUTCHINSON V. PROXMIRE (1979), to every public utterance of a member of Congress concerning a public issue.

DENNNIS J. MAHONEY
(1986)

Bibliography

WORMSER, MICHAEL D., ed. 1982 *Guide to Congress*, 3rd ed. Pages 850–855. Washington, D.C.: Congressional Quarterly.

## CONGRESSIONAL STANDING

Members of Congress occasionally sue in federal court to challenge the constitutionality of executive or legislative action. Although such interbranch litigation is commonplace in some European constitutional systems, the Supreme Court has ruled that members of Congress usually are not the proper people to prosecute these cases. They lack STANDING to sue.

The leading case in this area is *Raines v. Byrd* (1997). Members of Congress challenged the constitutionality of LEGISLATION giving the President a LINE-ITEM VETO. They claimed that the line-item veto injured them by diminishing the legal and practical effect of their votes on appropriations bills. The Court held that the plaintiffs lacked standing to sue because the legislation injured them only in their institutional, rather than personal, capacities. If the legislation had reduced their salaries or forced them from office, they would have had standing. The Court distinguished the line-item veto case from POWELL V. MCCORMACK (1969), where the Court upheld Adam Clayton Powell's standing to sue the U.S. HOUSE OF REPRESENTATIVES for wrongful expulsion. Powell had been singled out for expulsion, which caused him personalized injury. The line-item veto injured all members of Congress indiscriminately, and only in an official sense.

The Court's approach to congressional standing is broadly consistent with its general policies governing the occasions on which federal courts may adjudicate constitutional challenges to legislation or other government action. Through the standing, MOOTNESS, and RIPENESS doctrines, the Court has usually barred plaintiffs from federal court unless they hold concrete personal stakes in the controversy. People who sue because government action threatens their personal liberty or PROPERTY are generally permitted to maintain actions in federal court. People who sue because they are ideologically opposed to the government action in question are usually turned away from federal court. Put another way, the Court grants federal court adjudication to selfishly interested plaintiffs but withholds it from altruistic ones. One of the Court's official explanations for this seeming paradox is that self-interested litigants will bring out the best arguments in favor of their positions. Self-appointed guardians of the public good might lack the litigating initiative so crucial to sharp adversarial presentation.

Another thread running through standing doctrine, especially congressional standing, is the notion that the federal courts must carefully husband their political capital. Members of the public may chafe when they see unelected federal judges undoing the handiwork of the majoritarian branches of government. By restricting constitutional challenges to "proper" plaintiffs, the Court sharply limits the occasions upon which federal courts can exercise JUDICIAL REVIEW. This idea has particular application in the context of congressional standing, where allowing members of Congress to challenge the constitutionality of legislation or executive action would appear to put the courts smack in the middle of the political battlefield. In these situations, the standing doctrine is thought to preserve the judiciary's credibility with the public.

EVAN TSEN LEE
(2000)

Bibliography

MCGOWAN, CARL 1981 Congressmen in Court: The New Plaintiffs. *Georgia Law Review* 15:241–267.

## CONGRESSIONAL VETO

See: Legislative Veto

## CONGRESSIONAL WAR POWERS

The Constitution assigns the power to declare war solely to the Congress, one of the wisest of the many CHECKS AND BALANCES built into the American political system. Throughout American history, however, Presidents have committed acts of war without congressional authorization. The question of where to assign the power to initiate and conduct war was thoroughly debated during the framing of the Constitution. The outcome of that debate was a document that clearly did not give the President unlimited WAR POWERS but in fact separated the power to conduct war from the power to initiate war.

The Constitution grants Congress the power to issue a DECLARATION OF WAR and to "grant letters of Marque and reprisal." There is no question that the ORIGINAL INTENT of the Framers of the Constitution was to vest in the Congress the complete power to decide on war or peace, with the sole exception that the President could respond to sudden attack on the United States without congressional authorization. During the CONSTITUTIONAL CONVENTION OF 1787, the debates centered on an original draft of the war power providing that "the legislature of the United States shall have the power . . . to make war." One member of the convention, CHARLES PINCKNEY, opposed giving this power to Congress, claiming that its proceedings would be too slow; PIERCE BUTLER said that he was "voting for vesting

the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it." Butler's motion received no second, however.

JAMES MADISON and ELBRIDGE GERRY, meanwhile, were not satisfied with the original wording, that the legislature be given the power to make war. They moved to substitute "declare" for "make," "leaving to the Executive the power to repel sudden attacks." The meaning of this motion, which eventually was carried by a vote of seven states to two, was clear. The power to initiate war was left to Congress, with the reservation from Congress to the President to repel a sudden attack on the United States. As THOMAS JEFFERSON explained in 1789, "We have already given . . . one effectual check to the dog of war by transferring the power of letting him loose, from the executive to the legislative body, from those who are to spend to those who are to pay."

Acts of war, acts of reprisal, and acts of self-defense—all have been taken by past Presidents, but seldom without a rationalization of the legal implications of their actions that reflected recognition of the necessity of congressional authorization of all presidential acts of war except self-defense. At a time of national crisis, notably during the CIVIL WAR, the President has acted illegally and depended on Congress to ratify his action after the fact. In the latter half of the twentieth century, however, a major change in the concept of the war power began to be propounded. Beginning with the KOREAN WAR and the VIETNAM WAR, some presidents, congressmen, and publicists claimed for the executive the power to initiate war without the consent of Congress.

Covert war, as we have come to know it, grew out of the United States' experiences in WORLD WAR II . Two factors have combined to encourage covert action and covert war. First, nuclear weapons—forces of utter destruction—have deterred more overt and massive forms of violence. Second, the intensity of the ideological and geopolitical struggle between the United States and the Soviet Union nevertheless assured that violence, albeit covert, would continue. Shortly after World War II, in January 1946, President HARRY S. TRUMAN issued a directive establishing the Central Intelligence Group, the precursor of the Central Intelligence Agency. Previously, no nonmilitary covert operations group had existed in the United States during peacetime. Later intelligence groups would build on this meager institutional foundation, often without questioning either the appropriateness of its methods or the basic assumptions behind its organization.

The Constitution commits the entire power to decide for war or peace to Congress, not the President, with the exception noted above—in the event of sudden attack. No action of covert war is likely to fit within that narrow exception. The COMMANDER-IN-CHIEF clause gives that President no additional power to commit forces of the United Stater to war or acts of war when the nation is at peace. Only Congress is empowered to change this condition.

The Constitution's grant to Congress of the power to grant "letters of Marque and reprisal" covers most of what we think of as covert war. Originally a letter of marque merely authorized crossing into a foreign state to obtain redress for wrongs inflicted by a foreigner, and a letter of reprisal permitted the use of force to secure compensation for an unlawful taking of property or goods within the territorial jurisdiction of the sovereign. When combined, a letter of marque and reprisal permitted a particular person to seize property or even foreign citizens who refused to redress injuries they caused. By the eighteenth century, letters of marque had evolved into means of legitimating acts of war against other sovereign states by private parties. Likewise, reprisals developed into public acts of war against another state or citizens of another state in retaliation for an injury for which the state is held responsible. Under international law a reprisal is legal only if the acts are responsive and proportional to previous hostile acts of another state and the reprisal is first preceded by unsuccessful attempts at a peaceful resolution.

The war clause in its completeness, then, grants to Congress all power to decide on war, including both public and private or covert war, declared or undeclared. The Constitution grants no power to the President to wage private war against states with whom the nation is at peace by hiring modern mercenaries, pirates, or privateers without the express authorization of Congress. Nor does the President or the National Security Council have the authority to privatize the conduct of American foreign policy in the sale of arms or transfer of money. Absent a direct attack on the United States, a decision to go to war is constitutional only when it is publicly arrived at by congressional debate.

EDWIN B. FIRMAGE
(1992)

(SEE ALSO: *Congress and Foreign Policy; Executive Power; Executive Prerogative; Foreign Affairs; Presidential War Powers; Senate and Foreign Policy; War, Foreign Affairs, and the Constitution.*)

Bibliography

LOBEL, JULES 1986 Covert War and Congressional Authority: Hidden War and Forgotten Power. *University of Pennsylvania Law Review* 134:1035–1110.

PRADOS, JOHN 1986 Presidents' Secret Wars: Cia and Pentagon Covert Operations Since World War II. New York: William Morrow.

WORMUTH, FRANCIS D. and FIRMAGE, EDWIN B. 1989 *To Chain the Dog of War: The Power of Congress in History and Law*, 2nd ed. Urbana: University of Illinois Press.

## CONKLING, ROSCOE
(1829–1888)

A New York attorney, congressman (1859–1863, 1865–1867), and senator (1867–1881), Roscoe Conkling in 1861 initiated legislation creating the Joint Committee on the Conduct of the War. In 1865, as a member of the JOINT COMMITTEE ON RECONSTRUCTION, Conkling supported CIVIL RIGHTS for blacks. In 1867 he sponsored military reconstruction legislation. Conkling and other supporters of the bill argued that the South was still in the "grasp of war" and only a military occupation and RECONSTRUCTION would insure protection of the freedmen. After Reconstruction Conkling continued to support civil rights and helped Frederick Douglass become the first black Recorder of Deeds in Washington, D.C. Douglass placed Conkling alongside ULYSSES S. GRANT, CHARLES SUMNER, and BENJAMIN F. BUTLER as a protector of freedmen. In 1880 Conkling led a movement to renominate Grant because of disagreements with President RUTHERFORD B. HAYES over Reconstruction and PATRONAGE. In 1881 Conkling resigned his Senate seat to protest JAMES A. GARFIELD's appointments in New York State. As the undisputed leader of the New York Republican party, Conkling thought he, and not the President, should dispense patronage in the Empire State. Earlier he had opposed Hayes's attempts to remove federal officeholders in New York and had defended CHESTER A. ARTHUR from corruption charges. In 1873 Conkling declined Grant's offer of the Chief Justiceship of the United States; in 1882 the Senate confirmed him for an Associate Justiceship, but he declined to serve.

PAUL FINKELMAN
(1986)

Bibliography

JORDON, DAVID M. 1971 *Roscoe Conkling of New York: Voice in the Senate.* Ithaca, N.Y.: Cornell University Press.

## CONNALLY, THOMAS T.
(1877–1963)

A conservative Texas Democrat and internationalist, Tom Connally, as he officially called himself, served twelve years in the HOUSE OF REPRESENTATIVES and twenty-four in the SENATE. When he retired from politics in 1953, he said he was most proud of his leadership against FRANKLIN D. ROOSEVELT'S COURT-PACKING plan of 1937 and in favor of the creation of the United Nations. Connally's main achievements were in the field of FOREIGN AFFAIRS, from managing the Lend Lease Act to confirmation of the NORTH ATLANTIC TREATY. He was cool toward much of the NEW DEAL, except when it benefited Texas cattle, oil, and cotton interests. The Supreme Court struck down the Connally "Hot Oil" Act in PANAMA REFINING CO. V. RYAN (1935), but he secured a revised measure that constitutionally prohibited the shipment in INTERSTATE COMMERCE of oil produced in excess of government quotas. He opposed every CIVIL RIGHTS measure that came before the SENATE and joined every southern FILIBUSTER, preventing the enactment of antilynching and anti-POLL TAX bills. Connally was one of the last of colorful, powerful, demagogic, and grandiloquent southern politicians who affected a drawl, string-tie, frock coat, and flowing hair.

LEONARD W. LEVY
(1986)

Bibliography

CONNALLY, TOM and STEINBERG, ALFRED 1954 *My Name Is Tom Connally.* New York: Crowell.

## CONNECTICUT COMPROMISE

See: Great Compromise

## CONQUERED PROVINCES THEORY

"Conquered provinces" was one of a half dozen constitutional theories concerning the relationship of the seceded states and the Union. Representative THADDEUS STEVENS (Republican, Pennsylvania), the principal exponent of conquered provinces, argued that SECESSION had been de jure as well as de facto effective, and destroyed the normal constitutional status of the seceded states. Union victory required that they be governed under the principles of international law, which would have authorized essentially unlimited congressional latitude in setting RECONSTRUCTION policy. Congressional legislation for the ex-states had to be based on the premise that "the foundation of their institutions, both political, municipal, and social, must be broken up and relaid." This was to be accomplished through extensive confiscation of Confederates' properties and the abolition of slavery. The state constitutions would have to be rewritten and submitted to Congress, which would then readmit each "province" as a new state.

Other principal theories of Reconstruction were: territorialization, popular among some Republicans since 1861, which would have treated the seceded states as territories; STATE SUICIDE, expounded by CHARLES SUMNER since 1862; state indestructibility, the basis of varying southern and presidential views, and being the central assumption of ABRAHAM LINCOLN's programs; Richard Henry Dana's "Grasp of War" theory of 1865, which would have sanctioned congressional policy under the WAR POWERS; and forfeited rights, a theory propounded by Rep. Samuel

Shellabarger (Republican, Ohio), which ultimately came as close as any to being the constitutional basis of congressional Republican Reconstruction.

Stevens's conquered provinces theory was logically consistent with Republican objectives, and Lincoln's policies concerning the wartime Reconstruction of Louisiana, Arkansas, and Tennessee resembled parts of Stevens's program. But because the idea of conquered provinces was widely considered unconstitutional and draconian, it was never adopted as the basis of Republican policy.

WILLIAM M. WIECEK
(1986)

Bibliography

MCKITRICK, ERIC L. 1960 *Andrew Johnson and Reconstruction.* Chicago: University of Chicago Press.

## CONSCIENTIOUS OBJECTION

A conscientious objector is a person who is opposed in conscience to engaging in socially required behavior. Since the genuine objector will not be easily forced into acts he abhors and since compelling people to violate their own moral scruples is usually undesirable in a liberal society, those who formulate legal rules face the question whether conscientious objectors should be excused from legal requirements imposed on others. The issue is most striking in relation to compulsory military service: should those whose consciences forbid killing be conscripted for combat? Historically, conscientious objection has been considered mainly in that context, and the clash has been understood as between secular obligation and the sense of religious duty felt by members of pacifist sects. The Constitution says nothing directly about conscientious objection, and for most of the country's existence Congress was thought to have a free hand in deciding whether to afford any exemption and how to define the class of persons who would benefit. By now, it is evident that the religion clauses of the FIRST AMENDMENT impose significant constraints on how Congress may draw lines between those who receive an exemption from military service and those who do not. The Supreme Court has never accepted the argument that Congress is constitutionally required to establish an exemption from military service, but it has indicated that the Constitution does entitle some individuals to exemption from certain other sorts of compulsory laws.

The principle that society should excuse conscientious objectors from military service was widely recognized in the colonies and states prior to adoption of the Constitution. JAMES MADISON's original proposal for the BILL OF RIGHTS included a clause that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person," but that clause was dropped, partly because conscription was considered a state function. The 1864 Draft Act and the SELECTIVE SERVICE ACT of 1917 both contained exemptions limited to members of religious denominations whose creeds forbade participation in war. The 1917 act excused objectors only from combatant service, but the War Department permitted some of those also opposed to noncombatant military service to be released for civilian service.

The 1940 Selective Service Act set the basic terms of exemption from the system of compulsory military service that operated during WORLD WAR II, the KOREAN WAR, and the VIETNAM WAR, and during the intervening periods of uneasy peace. A person was eligible "who, by reason of religious training and belief, [was] conscientiously opposed to participation in war in any form." Someone opposed even to noncombatant service could perform alternate civilian service. In response to a court of appeals decision interpreting "religious training and belief" very broadly, Congress in 1948 said that religious belief meant belief "in relation to a Supreme Being involving duties superior to those arising from any human relation. . . ." What Congress had attempted to do was relatively clear. It wanted to excuse only persons opposed to participation in all wars, not those opposed to particular wars, and it wanted to excuse only those whose opposition derived from religious belief in a rather traditional sense. The important Supreme Court cases have dealt with these lines of distinction.

By dint of strained interpretation of the statute, the Court has avoided a clear decision whether Congress could limit the exemption to traditional religious believers. First, in UNITED STATES V. SEEGER (1965), a large majority said that an applicant who spoke of a "religious faith in a purely ethical creed" was entitled to the exemption because his belief occupied a place in his life parallel to that of a belief in God for the more orthodox. Then, in *Welsh v. United States* (1970), four Justices held that someone who laid no claim to being religious at all qualified because his ethical beliefs occupied a place in his life parallel to that of religious beliefs for others. Four other Justices acknowledged that Congress had explicitly meant to exclude such applicants. Justice JOHN MARSHALL HARLAN urged that an attempt to distinguish religious objectors from equally sincere nonreligious ones constituted a forbidden ESTABLISHMENT OF RELIGION; the three other Justices thought that Congress could favor religious objectors in order to promote the free exercise of religion. Because the plurality's view of the statute was so implausible, most observers have supposed that its members probably agreed with Justice Harlan about the ultimate constitutional issue, but this particular tension between

"no establishment" and "free exercise" concepts has not yet been decisively resolved.

In *Gillette v. United States* (1971), a decision covering both religious and nonreligious objectors to the Vietnam War, the Court upheld Congress's determination not to exempt those opposed to participation in particular wars. Against the claim that the distinction between "general" and "selective" objectors was impermissible, the Court responded that the distinction was supported by the public interest in a fairly administered system, given the difficulty officials would have dealing consistently with the variety of objections to particular wars. The Court also rejected the claim that the selective objector's entitlement to free exercise of his religion created a constitutionally grounded right to avoid military service.

In other limited areas, the Court has taken the step of acknowledging a free exercise right to be exempt from a generally imposed obligation. Those religiously opposed to jury duty cannot be compelled to serve, and adherents of traditional religious groups that provide an alternative way of life for members cannot be required to send children to school beyond the eighth grade. (See WISCONSIN V. YODER.) Nor can a person be deprived of unemployment benefits when an unwillingness to work on Saturday is religiously based, though receptivity to jobs including Saturday work is a usual condition of eligibility. (See SHERBERT V. VERNER.) What these cases suggest is that if no powerful secular reason can be advanced for demanding uniform compliance, the Constitution may require that persons with substantial religious objections be excused. To this degree the Constitution itself requires special treatment for conscientious objectors. Beyond that, its recognition of religious liberty and of governmental impartiality toward religions provides a source of values for legislative choice and constrains the classifications legislatures may make.

KENT GREENAWALT
(1986)

Bibliography

FINN, JAMES, ed. 1968 *A Conflict of Loyalties.* New York: Pegasus.

GREENAWALT, KENT 1972 All or Nothing At All. *Supreme Court Review* 1971: 31–94.

SIBLEY, MULFORD QUICKERT and JACOB, PHILIP E. 1952 *Conscription of Conscience: The American State and the Conscientious Objector, 1940–1947.* Ithaca, N.Y.: Cornell University Press.

## CONSCRIPTION

The power of the federal government to conscript may derive either from its power to raise armies or, more debatably, from its broadly interpreted power to regulate commerce. It is restricted by the THIRTEENTH AMENDMENT's prohibition of involuntary servitude or, conceivably, by the Fifth Amendment's guarantee of liberty. The manner in which conscription is conducted must comport with a familiar range of constitutional protections, notably those that guarantee EQUAL PROTECTION and RELIGIOUS LIBERTY.

Though the nation has employed systems of military conscription during the CIVIL WAR, WORLD WAR I, WORLD WAR II, and for all but twelve months between 1945 and 1972, the interplay of these different constitutional considerations has been remarkably underdeveloped. Two hundred years after the Constitution was written, at least two fundamental questions about conscription remain unresolved. What is the power of Congress (or the states) to conscript for civilian purposes? How, if at all, is a conscription system obliged to take account of CONSCIENTIOUS OBJECTION?

The ambiguity surrounding these questions derives in part from the fact that although the constitutionality of military conscription is well settled, the issue has not been settled well. In SELECTIVE DRAFT LAW CASES (1917) the Supreme Court reviewed the World War I military conscription statute and declared that it was "unable to conceive" how the performance of the "supreme and noble duty" of military service in time of war "can be said to be the imposition of involuntary servitude." Therefore, in its view, this contention was "precluded by its mere statement."

This terse comment establishes no conceptual basis for the analysis of later questions. Unfortunately, also, history is not a particularly helpful guide. The intention of the Framers is not clear. At the time of the Constitution, it was accepted that state militias could conscript soldiers, but the central government could not do so. At the same time, the Constitution gave the Congress the power to "raise armies" and it was widely recognized that it could not tenably rely on volunteers. On the basis of this evidence some scholars have argued that to conclude that conscription (as opposed to enlistment) was a power given to Congress is logical, and others have called this conclusion absurd.

Legislative history and judicial PRECEDENT in this first century of the Republic are similarly uninformative. When the Supreme Court decided the *Selective Draft Law Cases* it had only two precedents for a military draft: first, Secretary of War JAMES MONROE's proposal for conscription during the War of 1812, a proposal still under compromise deliberation by Congress when peace arrived; and, second, the Civil War Enrollment Act, the constitutionality of which had been ruled on only by a sharply divided and perplexed Supreme Court of Pennsylvania.

The most significant judicial precedent, *Butler v. Perry* (1916), had been decided only a year before by the Su-

preme Court itself. Here the Court rejected a Thirteenth Amendment challenge to a Florida statute requiring adult men to work one week a year on public roads: "from colonial days to the present time, conscripted labor has been much relied on for the construction and maintenance of public roads," and the Thirteenth Amendment "certainly was not intended to interdict enforcement of those duties which individuals owe to the state."

No subsequent Supreme Court decision limits this sweeping view of the power to conscript. To the contrary, the Court held in *United States v. Macintosh* (1931) that the right of conscientious objection is only statutory and in ROSTKER V. GOLDBERG (1981) that the government can compel an all-male military registration in the face of equal protection contentions founded on a theory of SEX DISCRIMINATION.

Notwithstanding these decisions, it seems likely that a major constitutional issue would arise if the power to conscript were asserted more aggressively. Such an issue might arise if, for example, participation were coerced in a system of civilian national service or if the statutory right of conscientious objection were abolished. In that event, the question thus far begged—what "duties . . . individuals owe to the state"—would have to be, for the first time, seriously addressed.

RICHARD DANZIG
IRA NERKEN
(1986)

Bibliography

ANDERSON, MARTIN and BLOOM, VALERIE 1976 *Conscription: A Select and Annotated Bibliography.* Stanford, Calif.: Hoover Institution Press.

FRIEDMAN, LEON 1969 Conscription and the Constitution: The Original Understanding. *Michigan Law Review* 67:1493–1552.

MALBIN, MICHAEL J. 1972 Conscription, the Constitution, and the Framers: An Historial Analysis. *Fordham Law Review* 40: 805–826.

## CONSCRIPTION ACT

See: Selective Service Acts

## CONSENT DECREE

In a civil suit in EQUITY, such as a suit for an INJUNCTION or a DECLARATORY JUDGMENT, the court's order is called a decree. By negotiation, the plaintiff and the defendant may agree to ask the court to enter a decree that they have drafted. If the court approves, its order is called a consent decree. Federal courts frequently enter consent degrees in actions to enforce regulatory laws in fields such as ANTITRUST, EMPLOYMENT DISCRIMINATION, and ENVIRONMENTAL REGULATION.

KENNETH L. KARST
(1986)

(SEE ALSO: *Plea Bargaining.*)

## CONSENT SEARCH

When an individual consents to a search, he effectively waives his rights under the FOURTH AMENDMENT and makes it unnecessary for the police to obtain a SEARCH WARRANT. In determining the validity of such a consent, the trial court must determine whether the consent was voluntary. The consent of a person illegally held is not considered voluntary. However, an explicit warning about one's constitutional rights, which MIRANDA V. ARIZONA (1966) made mandatory for custodial interrogation, is not a condition for effective consent to a search, under the decision in SCHNECKLOTH V. BUSTAMONTE (1973).

Consent must obviously be obtained from a person entitled to grant it. Not ownership of the premises but the right to occupy and use them to the exclusion of others is the decisive criterion. Thus, the consent of a landlord to search premises let to others is worthless. The consenting party controls the terms of the consent: it may be as broad or as narrow as he wishes to make it, allowing a search of an entire dwelling or merely of one small item.

For a consent by another person to be valid as against a defendant, it must be shown that the consenting party possessed common authority in the place or things searched. Anyone with joint access or control of the premises may consent to a search.

JACOB W. LANDYNSKI
(1986)

Bibliography

LAFAVE, WAYNE R. 1978 *Search and Seizure: A Treatise on the Fourth Amendment.* Vol. 2:610–774. St. Paul, Minn.: West Publishing Co.

## CONSERVATISM

Conservatives would agree with Robert Bork's understanding of the role of the Supreme Court under the Constitution and with its implicit understanding of the Constitution itself. Bork concluded a 1984 lecture at the American Enterprise Institute in Washington with the following words:

> In a constitutional democracy the moral content of the law must be given by the morality of the framer or the legislator, never by the morality of the judge. The sole task of the latter—and it is a task quite large enough for anyone's wisdom, skill, and virtue—is to translate the framer's or the legislator's morality into a rule to govern unforeseen circumstances. That abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist.

Bork's is not, of course, the popular view of the judge's role, a fact made manifest by the reaction to his nomination for a seat on the Supreme Court. Some 1,925 law professors—surely a good proportion of the total—publicly opposed his appointment and took the trouble of communicating their opposition to the SENATE JUDICIARY COMMITTEE. Bork, they said in one way or another, was out of the "mainstream," as surely he was and is. Whereas Bork would appeal to the Framers' morality, mainstream lawyers, arguing that the Framers represented "a world that is dead and gone," tend to prefer their own; some of them go so far so to accuse the Framers of being morally indifferent, a view popularized by Ronald Dworkin, one of Bork's principal opponents. Dworkin sees the Constitution as in need of moral principles and would supply that need. What is required, he says, is a "fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place."

Conservatives would protest that a Constitution that secures the rights of man—the *equal* rights of man—to the end of "securing the blessings of liberty" is not lacking in moral principle. Still, had he chosen to do so, Dworkin could have found in the mill of the founding documents an abundance of the grist he wants to grind. There is, for example, JAMES MADISON's famous statement in THE FEDERALIST #10 to the effect that the first object of government is the protection of different and unequal faculties of acquiring property. Protecting the equal rights of unequally endowed men can only lead to what Madison said it would lead to, and has in fact led to, namely, different degrees and kinds of property. In short, liberty leads to inequality, not of Madisonian rights but of wealth, position, and rank.

Unlike mainstream (or liberal) lawyers, conservatives are willing to live with this dispensation, and not only because they object to the means used by the mainstream lawyers to change it. The history of Title VII of the CIVIL RIGHTS ACT OF 1964 provides an example of those means. That piece of legislation was enacted by Congress to put an end to EMPLOYMENT DISCRIMINATION against blacks and women. But the Supreme Court, over the objections of conservative Justices, including Chief Justice WILLIAM REHNQUIST and Justice ANTONIN SCALIA, has converted it into a statute permitting, and in effect compelling, discrimination favoring blacks and women. Concurring in a case dealing with gender discrimination, a somewhat shamefaced Justice SANDRA DAY O'CONNOR indicated how this was accomplished: "As Justice Scalia illuminates with excruciating clarity, [Title VII] has been interpreted . . . to permit what its language read literally would prohibit." When necessary to further their political agendas, mainstream lawyers, on and off the bench, favor appeals to the "spirit," instead of the written text, of statutes and to what they contend is the "unwritten," instead of the written, Constitution.

No case better illustrates this practice than the 1965 BIRTH CONTROL case GRISWOLD V. CONNECTICUT, and none has given rise to so much criticism from conservatives (and even from a few liberals) as the most prominent of the cases it spawned, ROE V. WADE, the 1973 ABORTION decision. To strike down the Connecticut statute forbidding the use of contraceptives—a statute that for practical reasons could not be enforced and for political reasons could not be repealed—the Court found a right to privacy not in a specific constitutional provision but in "penumbras, formed by emanations" from the FIRST AMENDMENT, THIRD AMENDMENT, FOURTH AMENDMENT, FIFTH AMENDMENT, NINTH AMENDMENT, and ultimately the FOURTEENTH AMENDMENT. To strike down the abortion laws of all fifty states, the Court again invoked this right to privacy, now locating it in the "liberty" protected by the Fourteenth Amendment.

The principal proponent of this kind of constitutional construction, and the chief target of conservative criticism, was Justice WILLIAM J. BRENNAN, and nothing better illustrates his understanding of JUDICIAL POWER than a draft opinion he wrote during the Court's consideration of FRONTIERO V. RICHARDSON (1973), a case decided when the so-called EQUAL RIGHTS AMENDMENT was awaiting ratification by the states. Frontiero was a female air force officer who was denied certain dependents' benefits—benefits that would automatically have been granted with respect to the wife of a male officer—because she failed to prove that her husband was dependent on her for more than one half of his support. The issue on which the Court was divided was whether sex, like race, should be treated as a suspect, and therefore less readily justified, classification. Brennan, we are told, circulated an opinion declaring classification by sex virtually impermissible. "He knew that [this] would have the effect of enacting the equal rights amendment [but he] was accustomed to having the Court out front, leading any civil rights movement" (Bob Woodward and Scott Armstrong, *The Brethren*, p. 254). The authors of this account conclude by quoting Brennan as being of the opinion that there "was no reason to wait several years for the states to ratify the amendment"—no

reason other than the fact, which Brennan knew to be a fact, that the Constitution *as then written* would not support the decision he wanted the Court to render.

Conservatives call this JUDICIAL ACTIVISM, or government by the judiciary. It is not for the judiciary—the least responsible and, conservatives could charge, frequently the most irresponsible branch of government—to make the laws or amend the Constitution (or "bring it up to date"). Those powers belong, in the one case, to the Congress and, in the other, to the people in their sovereign capacity. Judges, they say, quoting *The Federalist* #78, are supposed to be "faithful guardians of the Constitution," not evangels of new modes and orders: "Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually." As conservatives see it, one issue dividing them from mainstream (or liberal) lawyers is that of legitimacy: The legitimacy of judge-made law and, ultimately, the legitimacy of the Constitution itself. If, as James Madison put it, the judges are not guided by the sense of the people who ratified the Constitution, "there can be no security for a consistent and stable, more than for a *faithful* exercise of its powers." The legitimacy of government depends on adherence to the written text, the text the people ratified.

The classic statement of these (conservative) propositions can be found in JOHN MARSHALL's opinion for the Court in MARBURY V. MADISON (1803): The "whole American fabric has been erected" on the principle that government derives from, and is dependent on, the will of the people. "The original and supreme will organizes the government, and assigns to different departments their respective powers."

Statements of this sort abound in the literature of the founding period. "In a government which is emphatically stiled [*sic*] a government of laws, the least possible range ought to be left for the discretion of the judges." "If the constitution is to be expounded, not by its written text, but by the opinions of the rulers for the time being, whose opinions are to prevail, the first or the last? [And if the last] what certainty can there be in those powers [which it assigns and limits]?" Both certainty and legitimacy would be put in jeopardy by rules of constitutional construction that, in effect, permit the judges to do as they will. "Would [the Constitution] not become, instead of a supreme law for ourselves and our posterity, a mere oracle of the powers of the rulers of the day, to which implicit homage is to be paid, and speaking at different times the most opposite commands, and in the most ambiguous voices?"

Connected to this issue of legitimacy is the cause of constitutional government itself. As conservatives see it, inequality of wealth, rank, and position is the price we pay for liberty, and it was to secure the blessings of liberty that the Constitution was ordained and established. In Madison's words in *The Federalist* #10, the Constitution serves to secure liberty by providing "a republican remedy for the diseases most incident to republican government," egalitarian diseases manifested in "a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project." The remedy was to be found in the limits embodied "in the extent and proper structure of the Union"—in a word, in the Constitution. And as Marshall said in *Marbury*, The Constitution is written in order that "those limits not be mistaken or forgotten." THOMAS JEFFERSON made the same point when he said that "the possession of a written constitution [was America's] peculiar security."

What conservatives want to conserve is this *liberal* Constitution, which, as they see it, is endangered by persons styling themselves liberals today. First, there are academic lawyers who treat the Constitution not as *law*—in Marshall's words, "a superior paramount law, unchangeable by ordinary means"—but as a mere "epiphenomenon," which is to say, as merely one of the factors (and, typically, not a controlling factor) entering into judicial decisions. As one of them puts it, rather than carry any precise meaning that judges are bound by oath to recognize and obey, the most important constitutional provisions "do *not* rule out any answer a majority of the Court is likely to want to give." The social, historical, and economic conditions take precedence over the Constitution's written text, and they may dictate any outcome. "There is nothing that is unsayable in the language of the Constitution," writes another.

Second, there is Justice Brennan, who writes that "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."

Third are historians who, in the course of ridiculing the conservatives' appeal for a jurisprudence of ORIGINAL INTENT, insist that "our Constitution is no more important to the longevity and workability of our government than MAGNA CARTA is to the longevity and workability of the British government. Our Constitution is as unwritten as theirs."

Finally, there are journalists who say that "the mere idea of original intent is an absurdity . . . [that] those men in Philadelphia could not have possibly had an "original intent."

As these statements indicate, the conservative effort to preserve that liberal Constitution will gain little support in the liberal community. Unlike the Framers, today's liberals prefer equality to liberty, an equality of status to an

equality of rights, a development foreseen by ALEXIS DE TOCQUEVILLE. Democratic peoples have a natural taste for liberty, he wrote, but their passion for equality is "invincible" and "irresistible," and anyone who tries to stand up against it "will be overthrown and destroyed by it."

In addition, conservatives have to contend with developments in the realm of political thought that, it is said, deprive the Constitution of its philosophical foundations. The Constitution put constraints on the popular will, but, according to Professor Sanford Levinson, those constraints have been deprived of whatever moral authority they might once have had. Constitutional arguments have been rendered meaningless. Indeed, the very idea of CONSTITUTIONALISM is dead: "The death of "constitutionalism' may be the central event of our time," Levinson writes, "just as the death of God was that of the past century (and for much the same reason)." If, as he claims, this view of our situation is "shared by most major law schools," conservatives are engaged in an almost hopeless enterprise. Care of the Constitution was put in the hands of the judges, but the judges are trained in those "major law schools."

Admittedly, and quite apart from the influence of this legal and political thought, governing within the limit imposed by a STRICT CONSTRUCTION of the Constitution has never been an easy matter. FEDERALISM is one of its prominent features, and conservatives, today if not in the past, would preserve it in its integrity. They would do so for political, as well as for constitutional, reasons. Like Tocqueville, they appreciate the political importance of what he called "mores," those "habits of the heart" that characterize a people and, in our case, he argued, made free goverment possible. Conservatives would attribute the Constitution's "longevity and workability" not to its flexibility but, at least in part, to the laws of the states where these mores, or morals and manners, are fostered and protected. Directly or indirectly (by supporting the private institutions whose business it is to provide it), these laws are intended to promote the sort of civic or moral education required of citizens in a democracy. Many of them—such as laws dealing with FLAG DESECRATION, OBSCENITY, indecency, illegitimacy, school prayer, and religious instruction and institutions, the list of which is not endless but is long—have been declared unconstitutional under the Fourteenth Amendment INCORPORATION DOCTRINE. These laws have been declared unconstitutional, conservatives insist, in the absence of any evidence that the framers of the Fourteenth Amendment intended it—originally intended it—to be used for that purpose.

There is, however, an abundance of evidence that the Fourteenth and other post-CIVIL WAR amendments were intended to affect the federal structure of the Constitution in material respects. The same freedom that allowed the states to be concerned about the moral character of their citizens also allowed them to decide who among their residents were to be citizens and, therefore, who among them were to enjoy the CIVIL RIGHTS and the PRIVILEGES AND IMMUNITIES of citizens. Thus, and without any question, those amendments were intended to deprive states of this power; they would do so by providing what Madison in 1787 criticized the original Constitution for its failure to provide, namely, "a constitutional negative on the laws of the States [in order to] secure individuals agst. encroachments on their rights."

The consequence—if only in our own time—has been a tremendous growth of national power at the expense of the states, and especially national judicial power. Conservatives cannot (and, in most cases, do not) complain when this power has been used to put an end to RACIAL DISCRIMINATION; as amended, the Constitution not only authorized this but required it. Given what proved to be almost a century of congressional inaction, they would also agree with the Supreme Court's decision in BROWN V. BOARD OF EDUCATION (1954,1955), the public school desegregation case. Read literally (or construed strictly), the words of the equal protection clause do not lend themselves to the use to which they were put in that case, but—to paraphrase what was said by conservative Chief Justice CHARLES EVANS HUGHES on an earlier occasion—while emergencies may not create power, they do furnish the occasions when it may properly be exercised. On such occasions, the conservative rule of "strict construction" must give way to necessity.

Conservatives concede, as they must, that necessity is the mother of invention; where they differ from mainstream liberals, to cite still another aphorism, is in their refusal to make a virtue of necessity. They cannot say, because it would be foolish to say, that the times must be kept in tune with the Constitution; but because our freedom and prosperity depend upon it, they do say, and say emphatically, that the times, *to the extent possible,* should be kept in tune with the Constitution.

WALTER BERNS
(1992)

(SEE ALSO: *Bork Nomination; Critical Legal Studies; Liberalism; Political Philosophy of the Constitution; Suspect Classification; Unwritten Constitution.*)

Bibliography

BORK, ROBERT H. 1990 *The Tempting of America: The Political Seduction of the Law.* New York: Free Press.

GOLDWIN, ROBERT A. and ART KAUFMAN, eds. 1987 *How Does the Constitution Protect Religious Freedom?* Washington: American Enterprise Institute.

LERNER, RALPH 1987 *The Thinking Revolutionary: Principle*

*and Practice in the New Republic.* Ithaca, N.Y.: Cornell University Press.

McDOWELL, GARY L. 1988 *Curbing the Courts: The Constitution and the Limits of Judicial Power.* Baton Rouge: Louisiana State University Press.

PANGLE, THOMAS L. 1988 *The Spirit of Modern Republicanism: The Moral Vision of the American Founding and the Philosophy of Locke.* Chicago: University of Chicago Press.

RABKIN, JEREMY 1989 *Judicial Compulsions: How Public Law Distorts Public Policy.* New York: Basic Books.

## CONSPIRACY

See: Criminal Conspiracy

## CONSPIRACY LAW

The crime of conspiracy is charged regularly in state and federal courts throughout the United States. This crime consists in an agreement by two or more individuals to commit an additional crime. The conspiracy charge is widely used in a number of different areas, particularly with respect to white-collar crimes and narcotics offenses. The prosecution views the crime of conspiracy as advantageous because it allows, in a single trial, for the prosecution of all conspirators wherever they are located, and it allows the government to prosecute the case in any city in which any act in furtherance of the agreement took place. In addition, statements made by any conspirator are allowed to be used against all other conspirators, and each conspirator can be found criminally responsible for other conspirators' crimes found to be in furtherance of the agreement.

Three major constitutional questions have arisen in conspiracy trials in the United States. The first deals with the DOUBLE JEOPARDY clause of the Fifth Amendment, which provides in part, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Most judges have concluded that the purpose of the double jeopardy clause was to ensure that a person could not be charged more than once for the same offense in the same jurisdiction. Individuals who are prosecuted for the conspiracy offense contend that if they are also charged with the crime that was the subject of the agreement (for example, bank robbery), their double jeopardy rights have been violated. The courts have consistently rejected this claim, however, holding that conspiracy (the agreement to commit bank robbery) and the crime (the actual bank robbery) are separate offenses. Hence, the defendant can receive separate punishment for each without the double jeopardy clause being violated.

Defendants also contend that being charged with conspiracies in two different courts violates their double jeopardy rights. For instance, conspiracy to rob a bank may be a violation of both state and federal law. It is a violation of state law because robbing any institution within the state is a crime. It is a violation of federal law because the bank may be a federally insured institution. Under the principle of "dual sovereignties" the Supreme Court has concluded that separate prosecutions and separate penalties for a federal conspiracy and a state conspiracy do not violate the double jeopardy clause, because such prosecutions are not multiple trials for the same offense by the same jurisdiction.

An additional constitutional issue is raised when defendants are charged with conspiring not to commit a crime but to commit acts that are "injurious to the public health or morals." These cases usually involve situations in which a particular form of behavior, such as charging usurious interest rates, is not itself criminal, but the defendant is charged with *conspiring* to commit that act. The Supreme Court in *Musser v. Utah* (1948) cast considerable doubt on the constitutionality of these prosecutions. The chief argument here is that such conspiracy prosecutions violate the DUE PROCESS clause of both the Fifth Amendment and FOURTEENTH AMENDMENT because the phrase "acts injurious to the public health or morals" is so vague as to give insufficient guidance to citizens. As a consequence of the *Musser* decision, few prosecutions have been based upon this rather open-ended charge; instead, the government typically contends that the defendants have conspired to commit a particular crime and that crime is then set forth in some detail.

The third constitutional issue is perhaps the most famous and controversial, involving free speech implications under the FIRST AMENDMENT. The problem surfaces when the defendants are charged with agreeing to advocate activities challenging the government. In such situations, the question is whether the agreement can be viewed as purely criminal behavior or whether, under the First Amendment, the behavior is protected speech. The most important Supreme Court case in the area is YATES V. UNITED STATES (1956). There the defendants were mid-level officials of the Communist party charged with conspiring to advocate the overthrow of the government of the United States by force and violence. In construing the Smith Act, the Court concluded that the prosecution, to succeed, must show an agreement to engage in unlawful action and a specific intent by each conspirator to engage in that action. If, however, the charge against the defendants were based upon their agreement to advocate the abstract principle of forcible overthrow of the government, that agreement would not violate the statute, even if such advocacy promoted violent activity.

PAUL MARCUS
(1992)

Bibliography

COOK, JOSEPH and MARCUS, PAUL 1991 *Criminal Procedure*, 3rd ed. New York: Matthew Bender.

MARCUS, PAUL 1991 *The Prosecution and Defense of Criminal Conspiracy Cases.* New York: Matthew Bender.

## CONSTITUTION

At the time of the Stamp Act controversy, a British lord told BENJAMIN FRANKLIN that Americans had wrong ideas about the British constitution. British and American ideas did differ radically. The American Revolution repudiated the British understanding of the constitution; in a sense, the triumph in America of a novel concept of "constitution" *was* the "revolution." The British, who were vague about their unwritten constitution, meant by it their system of government, the COMMON LAW, royal proclamations, major legislation such as MAGNA CARTA and the BILL OF RIGHTS, and various usages and customs of government animating the aggregation of laws, institutions, rights, and practices that had evolved over centuries. Statute, however, was the supreme part of the British constitution. After the Glorious Revolution of 1688–1689, Parliament dominated the constitutional system and by ordinary legislation could and did alter it. Sir WILLIAM BLACKSTONE summed up parliamentary supremacy when he declared in his *Commentaries* (1766), "What Parliament doth, no power on earth can undo."

The principle that Parliament had unlimited power was at the crux of the controversy leading to the American Revolution. The American assertion that government is limited undergirded the American concept of a constitution as a FUNDAMENTAL LAW that imposes regularized restraints upon power and reserves rights to the people. The American concept emerged slowly through the course of the colonial period, yet its nub was present almost from the beginning, especially in New England where covenant theology, SOCIAL COMPACT THEORY, and HIGHER LAW theory blended together. THOMAS HOOKER in 1638 preached that the foundation of authority lay in the people who might choose their governors and "set bounds and limitations on their powers." A century later Jared Elliot of Massachusetts preached that a "legal government" exists when the sovereign power "puts itself under restraints and lays itself under limitations. This is what we call a legal, limited, and well constituted government." Some liberal theologians viewed God himself as a constitutional monarch, limited in power because he had limited himself to the terms of his covenant with mankind. Moreover God ruled a constitutional universe based on immutable natural laws that also bound him. Jonathan Mayhew preached in Boston that no one has a right to exercise a wanton SOVEREIGNTY over the property, lives, and consciences of the people—"such a sovereignty as some inconsiderately ascribe to the supreme governor of the world." Mayhew explained that "God himself does not govern in an absolute, arbitrary, and despotic manner. The power of this almighty king is limited by law; not indeed, by acts of Parliament, but by the eternal laws of truth, wisdom, and equity. . . ."

Political theory and law as well as religion taught that government was limited; so did history. But the Americans took their views on such matters from a highly selective and romanticized image of seventeenth-century England, which they perpetuated in America even as England changed. Seventeenth-century England was the England of the great struggle for constitutional liberty by the common law courts and Puritan parliaments against despotic Stuart kings. Seventeenth-century England was the England of EDWARD COKE, JOHN LILBURNE, and JOHN LOCKE. It was an England in which religion, law, and politics converged with theory and experience to produce limited monarchy and, ironically, parliamentary supremacy. To Americans, however, Parliament had bound itself by reaffirming Magna Carta and passing the HABEAS CORPUS ACT, the Bill of Rights, and the TOLERATION ACT, among others. Locke had taught the social contract theory; advocated that taxation without representation or consent is tyranny; written that "government is not free to do as it pleases," and referred to the "bounds" which "the law of God and Nature have set to the legislative power of every commonwealth, in all forms of government."

Such ideas withered but did not die in eighteenth-century England. CATO'S LETTERS popularized Locke on both sides of the Atlantic; Henry St. John (Viscount Bolingbroke) believed that Parliament could not annul the constitution; Charles Viner's *General Abridgment of Law and Equity* endorsed Coke's views in Dr. BONHAM'S CASE (1610); and even as Parliament debated the Declaratory Act (1766), which asserted parliamentary power to legislate for America "in all cases whatsoever," CHARLES PRATT (Lord Camden) declared such a power "absolutely illegal, contrary to the fundamental laws of . . . this constitution. . . ." Richard Price and Granville Sharpe were two of the many English radicals who shared the American view of the British constitution.

TAXATION WITHOUT REPRESENTATION provoked Americans to clarify their views. JAMES OTIS, arguing against the tax on sugar, relied on *Dr. Bonham's Case* and contended that legislative authority did not extend to the "fundamentals of the constitution," which he believed to be fixed. THOMAS HUTCHINSON, a leading supporter of Parliament, summed up the American constitutional reaction to the stamp tax duties by writing, "The prevailing reason at this time is, that the Act of Parliament is against Magna Charta and the NATURAL RIGHTS of Englishmen, and therefore according to Lord Coke, null and void." The TOWNSHEND ACT duties led to American declarations that the supreme leg-

islature in any free state derives its power from the constitution, which limits government. JOHN DICKINSON, in an essay reprinted throughout the colonies, wrote that a free people are not those subject to a reasonable exercise of government power but those "who live under a government so constitutionally checked and controlled, that proper provision is made against its being otherwise exercised." J. J. Zubly of Georgia was another of many who argued that no government, not even Parliament, could make laws against the constitution any more than it could alter the constitution. An anonymous pamphleteer rhapsodized in 1775 about the "glorious constitution worthy to be engraved in capitals of gold, on pillars of marble; to be perpetuated through all time, a barrier, to circumscribe and bound the restless ambition of aspiring monarchs, and the palladium of civil liberty. . . ." TOM PAINE actually argued that Great Britain had no constitution, because Parliament claimed to exercise any power it pleased. To Paine a constitution could not be an act of the government but of "people constituting government. . . . A constitution is a thing antecedent to a government; a government is only the creature of the constitution."

Thus, by "constitution," Americans meant a supreme law creating the government, limiting it, unalterable by it, and above it. When they said that an act of government was unconstitutional, they meant that the government had acted lawlessly because it lacked the authority to perform that act. Accordingly the act was not law; it was null and void, and it could be disobeyed. By contrast when the British spoke of a statute being unconstitutional, they meant only that it was impolitic, unwise, unjust, or inexpedient, but not that it was beyond the power of the government to enact. They did not mean that Parliament was limited in its powers and had exceeded them.

The American view of "constitution" was imperfectly understood even by many leaders of the revolutionary movement as late as 1776. The proof is that when the states framed their first constitutions, the task was left to legislatures, although some received explicit authorization from the voters. THOMAS JEFFERSON worried because Virginia had not differentiated fundamental from ordinary law. Not until Massachusetts framed its constitution of 1780 by devising a CONSTITUTIONAL CONVENTION did the American theory match practice. When the CONSTITUTIONAL CONVENTION OF 1787 met in Philadelphia, the American meaning of a constitution was fixed and consistent.

LEONARD W. LEVY
(1986)

Bibliography

ADAMS, RANDOLPH G. (1922) 1958 *Political Ideas of the American Revolution.* 3rd ed. New York: Barnes & Noble.

BAILYN, BERNARD 1967 *Ideological Origins of the American Revolution.* Cambridge, Mass.: Harvard University Press.

BALDWIN, ALICE M. (1928) 1958 *The New England Clergy and the American Revolution.* New York: Frederick Ungar.

MCLAUGHLIN, ANDREW C. 1932 *The Foundations of American Constitutionalism.* New York: New York University Press.

MULLETT, CHARLES F. 1933 *Fundamental Law and the American Revolution.* New York: Columbia University Press.

## CONSTITUTIONAL ARGUMENT

See: History in Constitutional Argumentation

## CONSTITUTIONAL COMMON LAW

"Constitutional common law" refers to a theory about the lawmaking competence of the federal courts. The theory postulates that much of what passes as constitutional adjudication is best understood as a judicially fashioned COMMON LAW authorized and inspired, but not compelled, by the constitutional text and structure. Unlike the "true" constitutional law exemplified by MARBURY V. MADISON (1803), constitutional common law is ultimately amenable to control and revision by Congress. The theory originated in an effort to explain how the Supreme Court could legitimately insist upon application of the EXCLUSIONARY RULE in state criminal proceedings, once the Court had recast the exclusionary rule as simply a judicially fashioned remedy designed to deter future unlawful police conduct rather than as part and parcel of a criminal defendant's underlying constitutional rights or a necessary remedy for the violation thereof. On this view of the exclusionary rule, why does the state court have a constitutional obligation to do more than provide an "adequate" remedy for the underlying constitutional violation, such as an action for DAMAGES? The source of the Supreme Court's authority to insist that the state courts follow any rule not required by the constitution or authorized by some federal statute is not evident. ERIE RAILROAD V. TOMPKINS (1938) makes plain that the federal courts have no power to create a general FEDERAL COMMON LAW. This limitation exists not simply because of Congress's express statutory command, applicable to civil cases in the federal district courts, but because of the perception that there is no general federal judicial power to displace state law. To the contrary, the courts must point to some authoritative source—a statute, a treaty, a constitutional provision—as explicitly or implicitly authorizing judicial creation of substantive federal law. That federal statutes can constitute such authority has long been clear, and the result has been in many areas judicial creation of a federal common law designed to implement federal statutory policies. There is no a priori reason to suppose that the Constitution itself should differ

from statutes in providing a basis for the generation of an interstitial federal common law. Not surprisingly, therefore, a significant body of federal common law has been developed on the basis of constitutional provisions. For example, the Supreme Court has developed bodies of federal substantive law on the basis of the constitutional (and statutory) grants of jurisdiction to hear cases in ADMIRALTY, as well as cases involving disputes among the states or implicating FOREIGN AFFAIRS. Because the Court's decisions are ultimately reversible by Congress, its decisions holding statutes to be invalid burdens upon INTERSTATE COMMERCE are also best understood as federal common law created by the Court on the authority of the COMMERCE CLAUSE.

In the foregoing examples, constitutional common law has been created to govern situations where state interests are subordinated to interests of special concern to the national government, and thus come within the reach of the plenary national legislative power. They are FEDERALISM cases, in that the federal common law implements and fills out the authority that has been committed to the national government by the constitutional text and structure. Thus, the principle of these cases arguably is limited to the generation of federal constitutional common law in support of national legislative competence. These "federalism" cases do not by themselves establish that the Court may fashion a common law based solely upon constitutional provisions framed as *limitations* on governmental power in order to vindicate CIVIL LIBERTIES, such as those protected by the FIRST AMENDMENT and FOURTH AMENDMENT. Such a judicial rule-making authority—which seeks to create federal rules in areas of primary *state* concern—intersects with federalism concerns in ways that sets these cases apart from the federalism cases. Moreover, at the national level judicial creation of common law implicates SEPARATION OF POWERS considerations. Nonetheless, the Court's constitutionally based common law decisions in areas of plenary national legislative authority at least invite inquiry whether the specific constitutional guarantees of individual liberty might also authorize the creation of a substructure of judicially fashioned rules to carry out the purposes and policies of those guarantees. Several COMMENTATORS have, directly or indirectly, argued for acceptance of judicial power to fashion such a subconstitutional law of civil liberties. They argue that recognition of such a power is the most satisfactory way to rationalize a large and steadily growing body of judicial decision, not only in the criminal procedure area but also with many of the Court's administrative DUE PROCESS cases, while at the same time recognizing a coordinate and controlling authority in Congress. There has, however, been no significant judicial consideration of this theory apart from the decision in *Turpin v. Mailet* (2d Cir., *en banc*, 1978–1979).

Whatever its perceived advantages, a theory that posits a competence in the courts to fashion a constitutionally inspired constitutional common law of civil liberties must deal adequately with a series of objections: that development of such a body of law is inconsistent with the original intent of the Framers; that the line between true constitutional interpretation and constitutional common law is too indeterminate to be useful; and that the existence of such judicial power is inconsistent with the autonomy of the executive department in enforcing law as well as the rightful independence of the states in the federal system. The theory of constitutional common law bears a family resemblance to the views of those commentators who hold that the Court may legitimately engage in "noninterpretive" review—that is, the Court may properly impose values on the political branches not fairly inferrable from the constitutional text or the structure it creates—but who insist that Congress may control those decisions by regulating the JURISDICTION of the Supreme Court. Other differences aside, the constitutional common law view would permit Congress to overrule the noninterpretive decisions directly, bypassing the awkward theoretical and political problems associated with congressional attempts to manipulate jurisdiction for substantive ends.

HENRY P. MONAGHAN
(1986)

Bibliography

MONAGHAN, HENRY P. 1975 The Supreme Court, 1974 Term—Foreword: Constitutional Common Law. *Harvard Law Review* 89:1–45.

SCHROCK, THOMAS S. and WELSH, ROBERT C. 1978 Reconsidering the Constitutional Common Law. *Harvard Law Review* 91:1117–1176.

## CONSTITUTIONAL CONVENTION

Constitutional conventions, like the written constitutions that they produce, are among the American contributions to government. A constitutional convention became the means that a free people used to put into practice the SOCIAL COMPACT THEORY by devising their FUNDAMENTAL LAW. Such a convention is a representative body acting for the sovereign people to whom it is responsible. Its sole commission is to frame a CONSTITUTION; it does not pass laws, perform acts of administration, or govern in any way. It submits its work for popular ratification and adjourns. Such a convention first came into being during the AMERICAN REVOLUTION. The institutionalizing of constitutional principles during wartime was the constructive achievement of the Revolution. The Revolution's enduring heroics are to be found in constitution-making. As JAMES

MADISON exultantly declared, "Nothing has excited more admiration in the world than the manner in which free governments have been established in America; for it was the first instance, from the creation of the world . . . that free inhabitants have been seen deliberating on a form of government and selecting such of their citizens as possessed their confidence, to determine upon and give effect to it."

Within a century of 1776 nearly two hundred state constitutional conventions had been held in the United States. The institution is so familiar that we forget how novel it was even in 1787. At the CONSTITUTIONAL CONVENTION, which framed this nation's constitution, OLIVER ELLSWORTH declared that since the framing of the ARTICLES OF CONFEDERATION (1781), "a new sett [sic] of ideas seemed to have crept in. . . . Conventions of the people, or with power derived expressly from the people, were not then thought of. The Legislatures were considered as competent."

Credit for understanding that legislatures were not competent for that task belongs to JOHN LILBURNE, the English Leveller leader, who probably originated the idea of a constitutional convention. In his *Legall Fundamentall Liberties* (1649), he proposed that specially elected representatives should frame an Agreement of the People, or constitution, "which Agreement ought to be above Law; and therefore [set] bounds, limits, and extent of the people's Legislative Deputies in Parliament." Similarly, Sir Henry Vane, once governor of Massachusetts, proposed, in his *Healing Question* (1656), that a "convention" be chosen by the free consent of the people, "not properly to exercise the legislative power" but only to agree on "fundamentall constitutions" expressing the will of the people "in their highest state of soveraignty. . . ." The idea, which never made headway in England, was reexpressed in a pamphlet by Obadiah Hulme in 1771, recommending that a constitution should "be formed by a convention of delegates of the people, appointed for the express purpose," and that the constitution should never be "altered in any respect by any power besides the power which first framed [it]." Hulme's work was reprinted in Philadelphia in 1776 immediately before the framing of the PENNSYLVANIA CONSTITUTION by a specially elected convention. That convention, however, in accordance with prevailing ideas, simultaneously exercised the powers of government and after promulgating its constitution remained in session as the state legislature. Until 1780 American legislatures wrote constitutions.

The theory underlying a constitutional convention, but not the actual idea of having one, was first proposed in America by the town meeting of Pittsfield, Massachusetts, on May 29, 1776. Massachusetts then had a provisional revolutionary extralegal government. Pittsfield asked, "What Compact has been formed as the foundation of Government in this province?" The collapse of British power over the colonies had thrown the people, "the foundation of power," into "a state of Nature." The first step to restore civil government on a permanent basis was "the formation of a fundamental Constitution as the Basis ground work of Legislation." The existing legislature, Pittsfield contended, although representative, could not make the constitution because, "They being but servants of the people cannot be greater than their Masters, must be responsible to them." A constitution is "above the whole Legislature," so that the "legislature cannot certainly make it. . . ." Pittsfield understood the difference between fundamental and ordinary law, yet inconsistently concluded that the legislature should frame the constitution on condition that it be submitted to the people for ratification.

Pittsfield was merely inconsistent, but the Continental Congress was bewildered. The provisional government of Massachusetts, requesting advice from Congress on how to institute government, said that it would accept a constitution proposed by Congress. That was in May 1775. Many years later, when his memory was not to be trusted, JOHN ADAMS recalled in his autobiography that congressmen went around asking each other, "How can the people institute government?" As late as May 1776, Congress, still lacking an answer, merely recommended that colonies without adequate governments should choose representatives to suppress royal authority and exercise power under popular authority. By then the temporary legislatures of New Hampshire and South Carolina, without popular authorization, had already framed and promulgated constitutions as if enacting statutory law, and continued to operate as legislatures. Adams, however, credited himself with knowing how to "realize [make real] the theories of the wisest writers," who had urged that sovereignty resides in the people and that government is made by contract. "This could be done," he explained, "only by conventions of representatives chosen by the people in the several colonies. . . ." How, congressmen asked him, can we know whether the people will submit to the new constitutions, and he recalled having replied, if there is doubt, "the convention may send out their project of a constitution, to the people in their several towns, counties, or districts, and the people may make the acceptance of it their own act." Congress did not follow his advice, he wrote, because of his "new, strange, and terrible doctrines."

Adams had described a procedure followed only in Massachusetts, and only after the legislature had asked the people of the towns for permission to frame a constitution and submit it for popular ratification. Several towns, led by Concord (see CONCORD TOWN MEETING RESOLUTIONS) protested that the legislature was not a competent body

for the task, because a constitution had been overwhelmingly rejected in 1778. Concord had demanded a constitutional convention. In 1779 the legislature asked the towns to vote on the question whether a state constitution should be framed by a specially elected convention. The towns, voting by universal manhood suffrage, overwhelmingly approved. In late 1779 the delegates to the first constitutional convention in world history met in Cambridge and framed the MASSACHUSETTS CONSTITUTION of 1780, which the voters ratified after an intense public debate. With pride Thomas Dawes declared in an oration, "The people of Massachusetts have reduced to practice the wonderful theory. A numerous people have convened in a state of nature, and, like our ideas of the patriarchs, have authorized a few fathers of the land to draw up for them a glorious covenant." New Hampshire copied the procedure when revising its constitution in 1784, and it rapidly became standard procedure. Within a few years American constitutional theory had progressed from the belief that legislatures were competent to compose and announce constitutions, to the belief that a convention acting for the sovereign people is the only proper instrument for the task and that the sovereign must have the final word. A constitution, then, in American theory, is the supreme fundamental law that creates the legislature, authorizes its powers, and limits the exercise of its powers. The legislature is subordinate to the Constitution and cannot alter it.

LEONARD W. LEVY
(1986)

Bibliography

ADAMS, WILLI PAUL 1980 *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era.* Chapel Hill: University of North Carolina Press.

DODD, WALTER F. 1910 *The Revision and Amendment of State Constitutions.* Baltimore: Johns Hopkins University Press.

JAMESON, JOHN ALEXANDER 1887 *A Treatise on Constitutional Conventions.* 4th ed. Chicago: Callahan & Co.

MCLAUGHLIN, ANDREW C. 1932 *The Foundations of American Constitutionalism.* New York: New York University Press.

WOOD, GORDON S. 1969 *The Creation of the American Republic, 1776–1787.* Chapel Hill: University of North Carolina Press.

## CONSTITUTIONAL CONVENTION, RECORDS OF

The records of the CONSTITUTIONAL CONVENTION OF 1787 are not so full as scholars and jurists would like them to be. A verbatim account of the proceedings does not exist and, absent modern technology, could not have been produced. Stenographers in Philadelphia covered the state ratifying convention, which met in the fall of 1787; but the Federal Convention met in secrecy and, even if the local stenographers had been admitted, the rudimentary state of their craft and assorted personal shortcomings would have made a satisfactory result unlikely.

We must rely for information about the Convention on a journal kept by its secretary, William Jackson, and on notes kept by various delegates. Some of the notes, especially those made by JAMES MADISON, are extensive; others are fragmentary. Taken together, the existing records give us a satisfactory narrative of events at the Convention—although details of the drafting of many key provisions are sparse, leaving the ORIGINAL INTENT of the Framers enigmatic. It is also true that the documentation becomes poorer toward the end of the Convention. The delegates, tired and eager to go home, recorded less than they did earlier, and what they recorded was sketchier. This is unfortunate, because the last weeks of the Convention saw many important compromises and changes about which, in the absence of adequate records, we know far too little.

The story of how Madison created his notes is familiar: "I chose a seat in front of the presiding member, with the other members, on my right and left hand. In this favorable position for hearing all that passed I noted in terms legible and in abbreviations and marks intelligible to myself what was read from the Chair or spoken by the members; and losing not a moment unnecessarily between the adjournment and reassembling of the Convention I was enabled to write out my daily notes during the session or within a few finishing days after its close." Conscientiously completed at considerable physical cost—Madison later confessed that the task "almost killed" him—these notes are the principal source of information about the convention. That Madison kept his notes in his possession until his death caused one suspicious scholar, WILLIAM W. CROSSKEY, to charge that during his life he had tampered with them—"forged" them, in fact—to make them consistent with political actions he had taken after 1787, an accusation since proven to be without foundation. The one considerable problem with Madison's notes is that they contain only a small proportion of each day's debates. They should not be used with the assumption that they are comprehensive.

The source next in importance to Madison's notes is the Convention records kept by New York delegate ROBERT YATES. They were published in 1821 under the title *Secret Proceedings and Debates of the Convention Assembled at Philadelphia in the Year 1787* by an anonymous editor, who turned out to be Citizen Edmond Genêt, the incendiary ambassador of revolutionary France to the United States in 1793. When Madison first saw the published version of Yates's notes, he warned against their "extreme in-

correctness"—and with good reason, for it has been discovered that Genêt was guilty of the sin Crosskey laid at Madison's door: tampering with the manuscript version of Yates's notes, deleting some parts and changing others. The *Secret Proceedings* must therefore be used with extreme caution.

Several other delegates left notes, records, and scraps of paper that shed varying amounts of light on what occurred at Philadelphia, among which the notes of RUFUS KING and JOHN DICKINSON are the fullest. ALEXANDER HAMILTON, JAMES MCHENRY, WILLIAM PIERCE, PIERCE BUTLER, WILLIAM PATERSON, CHARLES PINCKNEY, and JAMES WILSON left more fragmentary materials. OLIVER ELLSWORTH and LUTHER MARTIN said a good deal about the workings of the Convention in polemics generated by the campaign for the RATIFICATION OF THE CONSTITUTION during 1787–1788. Their accounts should be consulted, but their partisanship obviously dictates that their statements be used with caution.

The remaining source of information about the Convention is the official journal published in 1819 at the direction of Congress and edited by then Secretary of State JOHN QUINCY ADAMS. Although Adams complained that the manuscript record left by Convention Secretary William Jackson was "very loosely and imperfectly kept," he was able to make perfect sense of it, with the result that the journal that issued from his editorship is a reliable, if barebones, narrative of the daily business of the Convention.

Scholars are aware that several delegates kept manuscript notes of Convention proccedings that have not been found. It is possible that in the future our understanding of Convention proceedings will be enriched, if not fundamentally changed, by the discovery of yet another set of Convention notes.

JAMES HUTSON
(1992)

Bibliography

FARRAND, MAX, ed. 1987 *The Records of the Federal Convention of 1787*, rev. ed., 4 vols. New Haven, Conn.: Yale University Press.

HUTSON, JAMES H. 1986 The Creation of the Constitution: The Integrity of the Documentary Record. *Texas Law Review* 65: 1–39.

## CONSTITUTIONAL CONVENTION OF 1787

Over the last two centuries, the work of the Constitutional Convention and the motives of the Founding Fathers have been analyzed under a number of different ideological auspices. To one generation of historians, the hand of God was moving in the assembly; under a later dispensation, the dialectic replaced the Deity: "relationships of production" moved into the niche previously reserved for Love of Country. Thus, in counterpoint to the Zeitgeist, the Framers have undergone miraculous metamorphoses: at one time acclaimed as liberals and bold social engineers, today they appear in the guise of sound Burkean conservatives.

The "Fathers" have thus been admitted to our best circles; the revolutionary generation that confiscated all Tory property in reach and populated New Brunswick with outlaws has been converted into devotees of "consensus" and "prescriptive rights." Indeed, there is one fundamental truth about the Founding Fathers that every generation of Zeitgeisters has done its best to obscure: they were first and foremost superb democratic politicians. They were political men—not metaphysicians, disembodied conservatives, or agents of history—and, as recent research into the nature of American politics in the 1780s confirms, they were required to work within a democratic framework. The Philadelphia Convention was not a council of Platonic guardians working within a manipulative, predemocratic framework; it was a nationalist reform caucus which had to operate with great delicacy and skill in a political cosmos full of enemies to achieve the one definitive goal—popular approbation.

Perhaps the time has come, to borrow WALTON HAMILTON's fine phrase, to promote the Framers from immortality to mortality, to give them credit for their magnificent demonstration of the art of democratic politics: they made history and they did it within the limits of consensus. What they did was hammer out a pragmatic compromise that would both bolster the "national interest" and be acceptable to the people. What inspiration they got came from collective experience as politicians in a democratic society. As JOHN DICKINSON put it to his fellow delegates on August 13, "Experience must be our guide. Reason may mislead us."

When the Constitutionalists went forth to subvert the ARTICLES OF CONFEDERATION, they employed the mechanisms of political legitimacy. Although the roadblocks confronting them were formidable, they were also endowed with certain political talents. From 1786 to 1790 the Constitutionalists used those talents against bumbling, erratic behavior by the opponents of reform. Effectively, the Constitutionalists had to induce the states, by democratic techniques, to cripple themselves. To be specific, if New York should refuse to join the new Union, the project was doomed; yet before New York was safely in, the reluctant state legislature had to take the following steps: agree to send delegates to the Convention and maintain them there; set up the special ratifying convention; and accept that convention's decision that New York should ratify the

Constitution. The same legal hurdles existed in every state.

The group that undertook this struggle was an interesting amalgam of a few dedicated nationalists and self-interested spokesmen of various parochial bailiwicks. Georgians, for example, wanted a strong central authority to provide military protection against the Creek Confederacy; Jerseymen and Connecticuters wanted to escape from economic bondage to New York; Virginians sought a system recognizing that great state's "rightful" place in the councils of the Republic. These states' dominant political figures therefore cooperated in the call for the Convention. In other states, the cause of national reform was taken up by the "outs" who added the "national interest" to their weapons systems; in Pennsylvania, for instance, JAMES WILSON's group fighting to revise the state Constitution of 1776 came out four-square behind the Constitutionalists.

To say this is not to suggest that the Constitution was founded on base motives but to recognize that in politics there are no immaculate conceptions. It is not surprising that a number of diversified private interests promoted the nationalist public interest. However motivated, these men did demonstrate a willingness to compromise in behalf of an ideal that took shape before their eyes and under their ministrations.

What distinguished the leaders of the Constitutionalist caucus from their enemies was a "continental" approach to political, economic, and military issues. Their institutional base of operations was the Continental Congress (thirty-nine of the fifty-five designated delegates to the Convention had served in Congress), hardly a locale that inspired respect for the state governments. One can surmise that membership in the Congress had helped establish a continental frame of reference, particularly with respect to external affairs. The average state legislator was probably about as concerned with foreign policy then as he is today, but congressmen were constantly forced to take the broad view of American prestige, and to listen to the reports of Secretary JOHN JAY and their envoys in Europe. A "continental" ideology thus developed, demanding invigoration of our domestic institutions to assure our rightful place in the international arena. Indeed, an argument with the force of GEORGE WASHINGTON as its incarnation urged that our very survival in the Hobbesian jungle of world politics depended upon a reordering and strengthening of our national SOVEREIGNTY.

MERRILL JENSEN seems quite sound in his view that to most Americans, engaged as they were in self-sustaining agriculture, the "Critical Period" was not particularly critical. The great achievement of the Constitutionalists was their ultimate success in convincing the elected representatives of a majority of the white male population that change was imperative. A small group of political leaders with a continental vision and essentially a consciousness of the United States' international impotence, was the core of the movement. To their standard rallied other leaders' parallel ambitions. Their great assets were active support from George Washington, whose prestige was enormous; the energy and talent of their leadership; a communications "network" far superior to the opposition's; the preemptive skill which made "their" issue The Issue and kept the locally oriented opposition on the defensive; and the new and compelling credo of American nationalism.

Despite great institutional handicaps, the Constitutionalists in the mid-1780s got the jump on the local oppositions with the demand for a Convention. Their opponents were caught in an old political trap: they were not being asked to approve any specific reform but only to endorse a meeting to discuss and recommend needed reforms. If they took a hard line, they were put in the position of denying the need for any changes. Moreover, because the states would have the final say on any proposals that might emerge from the Convention, the Constitutionalists could go to the people with a persuasive argument for "fair play."

Perhaps because of their poor intelligence system, perhaps because of overconfidence generated by the failure of all previous efforts to alter the Articles, the opposition awoke too late. Not only did the Constitutionalists manage to get every state but Rhode Island to appoint delegates to Philadelphia but they also dominated the delegations. The fact that the delegates to Philadelphia were appointed by state governments, not elected by the people, has been advanced as evidence of the "undemocratic" character of the gathering, but this argument is specious. The existing central government under the Articles was considered a creature of the states—not as a consequence of elitism or fear of the mob but as a logical extension of STATES' RIGHTS doctrine. The national government was not supposed to end-run the state legislatures and make direct contact with the people.

With delegations named, the focus shifted to Philadelphia. While waiting for a quorum to assemble, JAMES MADISON drafted the so-called VIRGINIA PLAN. This was a political masterstroke: once business got underway, this plan provided the framework of discussion. Instead of arguing interminably over the agenda, the delegates took the Virginia Plan as their point of departure, including its major premise: a new start on a Constitution rather than piecemeal amendment. This proposal was not necessarily revolutionary—a new Constitution might have been formulated as "amendments" to the Articles of Confederation—but the provision that amendments take effect after

approval by nine states was thoroughly subversive. The Articles required unanimous state approval for any amendment.

Standard treatments of the Convention divide the delegates into "nationalists" and "states' righters" with various shadings, but these latter-day characterizations obfuscate more than they clarify. The Convention was remarkably homogeneous in ideology. ROBERT YATES and JOHN LANSING, Clinton's two chaperones for ALEXANDER HAMILTON, left in disgust on July 10. LUTHER MARTIN left in a huff on September 4; others went home for personal reasons. But the hard core of delegates accepted a grinding regimen throughout a Philadelphia summer precisely because they shared the Constitutionalist goal.

Basic differences of opinion emerged, of course, but these were not ideological; they were structural. If the so-called states' rights group had not accepted the fundamental purposes of the Convention, they could simply have pulled out and aborted the whole enterprise. Instead of bolting, they returned day after day to argue and to compromise. An index of this basic homogeneity was the initial agreement on secrecy: these professional politicians wanted to retain the freedom of maneuver that would be possible only if they were not forced to take public stands during preliminary negotiations. There was no legal means of binding the tongues of the delegates: at any stage a delegate with basic objections to the emerging project could have denounced the convention. Yet the delegates generally observed the injunction; Madison did not even inform THOMAS JEFFERSON in Paris of the course of the deliberations. Secrecy is uncharacteristic of any assembly marked by ideological polarization. During the Convention the *New York Daily Advertiser* called the secrecy "a happy omen, as it demonstrates that the spirit of party on any great and essential point cannot have arisen to any height."

Some key Framers must have been disappointed. Commentators on the Constitution who have read THE FEDERALIST but not Madison's record of the actual debates (secret until after his death in 1836), have credited the Fathers with a sublime invention called "Federalism." Yet the Constitution's final balance between the states and the nation must have dissatisfied Madison, whose Virginia Plan envisioned a unitary national government effectively freed from and dominant over the states. Hamilton's unitary views are too well known to need elucidation.

Under the Virginia Plan the general government was freed from state control in a truly radical fashion, and the scope of its authority was breathtaking. The national legislature was to be empowered to disallow the acts of state legislatures, and the central government would be vested, in addition to the powers of the nation under the Articles of Confederation, with plenary authority "wherever . . . the separate States are incompetent or in which the harmony of the United States may be interrupted by the exercise of individual legislation." Finally, the national Congress was to be given the power to use military force on recalcitrant states.

The Convention was not scandalized by this militant program for a strong autonomous central government. Some delegates were startled, some leery of so comprehensive a reform, but nobody set off any fireworks and nobody walked out. Moreover, within two weeks the general principles of the Virginia Plan had received substantial endorsement. The temper of the gathering can be deduced from its unanimous approval, on May 31, of a resolution giving Congress authority to disallow state legislation "contravening in its opinion the Articles of Union."

Perhaps the Virginia Plan was the delegates' ideological Utopia, but as discussions became more specific many of them had second thoughts. They were practical politicians in a democratic society, and they would have to take home an acceptable package and defend it—and their own political futures—against predictable attack. June 14 saw the breaking point between dream and reality. Apparently realizing that under the Virginia Plan, Massachusetts, Virginia, and Pennsylvania could virtually dominate the national government, the delegates from the small states demanded time for a consideration of alternatives. John Dickinson reproached Madison: "You see the consequences of pushing things too far. Some of the members from the small States wish for two branches in the General Legislature and are friends to a good National Government; but we would sooner submit to a foreign power than . . . be deprived of an equality of suffrage in both branches of the Legislature, and thereby be thrown under the domination of the large States."

Now the process of accommodation was put into action smoothly—and wisely, given the character and strength of the doubters. Madison had the votes, but mechanical majoritarianism could easily have destroyed the objectives of the majority: the Constitutionalists sought a qualitative as well as a quantitative consensus, a political imperative to attain ratification.

According to the standard script, the "states' rights" group now united behind the NEW JERSEY PLAN, which has been characteristically portrayed as no more than a minor modification of the Articles of Confederation. The New Jersey Plan did put the states back into the institutional picture, but to do so was a recognition of political reality rather than an affirmation of states' rights.

Paterson, the leading spokesman for the project, said as much: "I came here not to speak my own sentiments, but the sentiments of those who sent me. Our object is

not such a Government as may be best in itself, but such a one as our Constituents have authorized us to prepare, and as they will approve." This is Madison's version; in Yates's transcription, a crucial sentence follows: "I believe that a little practical virtue is to be preferred to the finest theoretical principles, which cannot be carried into effect."

The advocates of the New Jersey Plan concentrated their fire on what they held to be the political liabilities of the Virginia Plan—which were matters of institutional structure—rather than on the proposed scope of national authority. Indeed, the SUPREMACY CLAUSE of the Constitution first saw the light of day in Paterson's Sixth Resolution; for Paterson, under either the Virginia or the New Jersey system the general government would "act on individuals and not on states." From the states' rights viewpoint, this was heresy.

Paterson thus reopened the agenda of the Convention, but within a distinctly nationalist framework. Paterson favored a strong central government but opposed putting the big states in the saddle. As evidence for this there is an intriguing proposal among Paterson's preliminary drafts of the New Jersey Plan:

> Whereas it is necessary in Order to form the People of the U.S. of America in to a Nation, that the States should be consolidated, . . . it is therefore resolved, that all the Lands contained within the Limits of each state individually, and of the U.S. generally be considered as constituting one Body or Mass, and be divided into thirteen or more integral parts.
>
> Resolved, That such Divisions or integral Parts shall be styled Districts.

He may have gotten the idea from his New Jersey colleague Judge DAVID BREARLEY, who on June 9 had commented that the only remedy to the dilemma over representation was "that a map of the U.S. be spread out, that all the existing boundaries be erased, and that a new partition of the whole be made into 13 equal parts." According to Yates, Brearley added at this point, "then a government on the present [Virginia Plan] system will be just."

Thus, the delegates from the small states announced that they were unprepared to be offered up as sacrificial victims to a "national interest" that reflected Virginia's parochial ambition. Caustic CHARLES PINCKNEY was not far off when he remarked sardonically that "the whole conflict comes to this: Give New Jersey an equal vote, and she will dismiss her scruples, and concur in the National system." What he rather unfairly did not add was that the Jersey delegates were not free agents who could adhere to their private convictions; they had to stake their reputations and political careers on the reforms approved by the Convention—in New Jersey, not Virginia.

Paterson spoke on Saturday, and the weekend must have seen a good deal of consultation, argument, and caucusing. One delegate prepared a full-length address: on Monday Alexander Hamilton, previously mute, rose and delivered a six-hour oration. It was a remarkably apolitical speech; the gist of his position was that both the Virginia and New Jersey Plans were inadequately centralist, and he detailed a reform program reminiscent of the Protectorate under the Cromwellian *Instrument of Government* of 1653. He wanted, to take a striking phrase from a letter to George Washington, a "strong well mounted government."

From all accounts this was a compelling speech, but it had little practical effect; the Convention adjourned, admired Hamilton's rhetoric, and returned to business. Hamilton, never a patient man, stayed another ten days and then left in disgust for New York. Although he returned to Philadelphia sporadically and attended the last two weeks of the Convention, Hamilton played no part in the laborious task of hammering out the Constitution. His day came later when he led the New York Constitutionalists into the savage imbroglio over ratification—an arena in which his unmatched talent for political infighting surely won the day.

On June 19 James Madison led off with a long, carefully reasoned speech analyzing the New Jersey Plan; although intellectually vigorous in his criticisms, Madison was quite conciliatory in mood: "The great difficulty lies in the affair of REPRESENTATION; and if this could be adjusted, all others would be surmountable." When he finished, a vote was taken on whether to continue with the Virginia Plan as the nucleus for a new constitution: seven states voted yes; New York, New Jersey, and Delaware voted No; and Maryland was divided.

Paterson, it seems, lost decisively; yet in a fundamental sense he and his allies had achieved their purpose: from that day onward, it could never be forgotten that the state governments loomed ominously in the background. Moreover, nobody bolted the convention. Paterson and his colleagues set to work to modify the Virginia Plan, particularly with respect to representation in the national legislature. They won an immediate rhetorical bonus; when OLIVER ELLSWORTH of Connecticut moved that the word "national" be expunged from the Third Virginia Resolution ("Resolved that a *national* Government ought to be established consisting of a *supreme* Legislative, Executive and Judiciary"), Randolph agreed and the motion passed unanimously. The process of compromise had begun.

For two weeks the delegates circled around the problem of legislative representation. The Connecticut delegation appears to have evolved a possible compromise early in the debates, but the Virginians, particularly Madi-

son, fought obdurately against providing for equal representation of states in the second chamber. There was enough acrimony for BENJAMIN FRANKLIN to propose institution of a daily prayer, but on July 2, the ice began to break when the majority against equality of representation was converted into a dead tie. The Convention was ripe for a solution and the South Carolinians proposed a committee. Madison and James Wilson wanted none of it, but with only Pennsylvania dissenting, a working party was established to cope with the problem of representation.

The members of this committee, one from each state, were elected by the delegates. Although the Virginia Plan had held majority support up to that date, neither Madison nor Randolph was selected. This was not to be a "fighting" committee; the members could be described as "second-level political entrepreneurs."

There is a common rumor that the Framers divided their time between philosophical discussions of government and reading the classics in political theory. In fact, concerns were highly practical; they spent little time canvassing abstractions. A number of them had some acquaintance with the history of political theory, and it was a poor rhetorician indeed who could not cite JOHN LOCKE, Montesquieu, or James Harrington in support of a desired goal. Yet up to this point no one had expounded a defense of states' rights or the SEPARATION OF POWERS on anything resembling a theoretical basis. The Madison model effectively vested all governmental power in the national legislature.

Because the critical fight was over representation of the states, once the GREAT COMPROMISE was adopted on July 17 the Convention was over the hump. Madison, James Wilson, and GOUVERNEUR MORRIS fought the compromise all the way in a last-ditch effort to get a unitary state with parliamentary supremacy. But their allies deserted them and after their defeat they demonstrated a willingness to swallow their objections and get on with the business. Moreover, once the compromise had carried (by five states to four, with one state divided), its advocates threw themselves into the job of strengthening the general government's substantive powers. Madison demonstrated his devotion to the art of politics when he later prepared essays for *The Federalist* in contradiction to the basic convictions he expressed in the Convention.

Two ticklish issues illustrate the later process of accommodation. The first was the institutional position of the executive. Madison argued for a chief magistrate chosen by the national legislature, and on May 29 this proposal had been adopted with a provision for a seven-year nonrenewable term. In late July this was reopened; groups now opposed election by the legislature. One felt that the states should have a hand in the process; another small but influential circle urged direct election by the people. There were a number of proposals: election by the people, by state governors, by electors chosen by state legislatures, by the national legislature. There was some resemblance to three-dimensional chess in the dispute because of the presence of two other variables: length of tenure and eligibility for reelection. Finally the thorny problem was consigned to a committee for resolution.

The Brearley Committee on Postponed Matters was a superb aggregation of talent and its compromise on the Executive was a masterpiece of creativity. Everybody present knew that under any system devised, George Washington would be the first President; thus they were dealing in the future tense. To a body of working politicians the merits of the Brearley proposal were obvious: everyone could argue to his constituents that he had really won the day. First, the state legislatures had the right to determine the mode of selection of the electors; second, the small states were guaranteed a minimum of three votes in the ELECTORAL COLLEGE while the big states got acceptance of the principle of proportional power; third, if the state legislatures agreed (as six did in the first presidential election), the people could be involved directly in the choice of electors; and finally, if no candidate received a majority in the College, the decision passed to the House of Representatives with each state having one vote.

This compromise was almost too good to be true, and the Framers snapped it up with little debate or controversy. Thus the Electoral College was neither an exercise in applied Platonism nor an experiment in indirect government based on elitist distrust of the masses. It was merely an improvisation which was subsequently, in *The Federalist* #68, endowed with high theoretical content.

The second issue on which some substantial bargaining took place was SLAVERY. The morality of slavery was, by design, not an issue; but in its other concrete aspects, slavery influenced the arguments over taxation, commerce, and representation. The THREE-FIFTHS RULE—that three-fifths of the slaves would be counted both for representation and for purposes of DIRECT TAXATION—had allayed some northern fears about southern overrepresentation, but doubts remained. Southerners, on the other hand, were afraid that congressional control over commerce would lead to the exclusion of slaves or to their prohibitive taxation as imports. Moreover, the Southerners were disturbed over "navigation acts" (tariffs), or special legislation providing, for example, that exports be carried only in American ships. They depended upon exports, and so urged inclusion of a proviso that navigation and commercial laws require a two-thirds vote in Congress.

These problems came to a head in late August and, as usual, were handed to a committee in the hope that, in Gouverneur Morris's words, "these things may form a bargain among the Northern and Southern states." The Com-

mittee reported its measures of reconciliation on August 25, and on August 29 the package was wrapped up and delivered. What occurred can best be described in George Mason's dour version. Mason anticipated JOHN C. CALHOUN in his conviction that permitting navigation acts to pass by majority vote would put the South in economic bondage to the North. Mainly on this ground, he refused to sign the Constitution. Mason said:

> The Constitution as agreed to till a fortnight before the Convention rose was such a one as he would have set his hand and heart to. . . . Until that time the 3 New England States were constantly with us in all questions . . . so that it was these three States with the 5 Southern ones against Pennsylvania, Jersey and Delaware. With respect to the importation of slaves, [decision making] was left to Congress. This disturbed the two Southernmost States who knew that Congress would immediately suppress the importation of slaves. Those two States therefore struck up a bargain with the three New England States. If they would join to admit slaves for some years, the two Southernmost States would join in changing the clause which required the 2/3 of the Legislature in any vote [on navigation acts]. It was done.

On the floor of the Convention there was a love-feast. When Charles Pinckney of South Carolina attempted to overturn the committee's decision, by insisting that the South needed protection from the imperialism of the northern states, General CHARLES COTEWORTH PINCKNEY arose to spread oil on the waters:

> It was in the true interest of the S[outhern] States to have no regulation of commerce; but considering the loss brought on the commerce of the Eastern States by the Revolution, their liberal conduct towards the views of South Carolina [on the regulation of the slave trade] and the interests the weak South. States had in being united with the strong Eastern states, he thought it proper that no fetters should be imposed on the power of making commercial regulations; and that his constituents, though prejudiced against Eastern States, would be reconciled to this liberality. He had himself prejudices against the Eastern States before he came here, but would acknowledge that he had found them as liberal and candid as any men whatever.

Drawing on their vast collective political experience, employing every weapon in the politician's arsenal, looking constantly over their shoulders at their constituents, the delegates put together a Constitution. It was a makeshift affair; some sticky issues they ducked entirely; others they mastered with that ancient instrument of political sagacity, studied ambiguity, and some they just overlooked. In this last category probably fell the matter of the power of the federal courts to determine the constitutionality of acts of Congress. When the judicial article was formulated, deliberations were still at the stage where the legislature was endowed with broad authority which by its own terms was scarcely amenable to JUDICIAL REVIEW. In essence, courts could hardly determine when "the separate States are incompetent or . . . the harmony of the United States may be interrupted"; the national legislature, as critics pointed out, was free to define its own jurisdiction. Later the definition of legislative authority was changed into the form we know, a series of stipulated powers, but the delegates never seriously reexamined the jurisdiction of the judiciary under this new limited formulation. All arguments on the intention of the Framers in this matter are thus deductive and *a posteriori.*

The Framers were busy and distinguished men, anxious to get back to their families, their positions, and their constituents, not members of the French Academy devoting a lifetime to a dictionary. They were trying to do an important job, and do it in such a fashion that their handiwork would be acceptable to diverse constituencies. No one was rhapsodic about the final document, but it was a beginning, a move in the right direction, and one they had reason to believe the people would endorse. In addition, because they had modified the impossible amendment provisions of the Articles of Confederation to one demanding approval by only three-quarters of the states, they seemed confident that gaps in the fabric which experience would reveal could be rewoven without undue difficulty.

So, with a neat phrase introduced by Benjamin Franklin that made their decision sound unanimous and an inspired benediction by the Old Doctor urging doubters to question their own infallibility, the delegates accepted the Constitution. Curiously, Edmund Randolph, who had played so vital a role throughout, refused to sign as did his fellow Virginian George Mason and ELBRIDGE GERRY of Massachusetts. Presumably, Randolph wanted to check the temper of the Virginia populace before he risked his reputation, and perhaps his job, in a fight with PATRICK HENRY. Events lend some justification to this speculation: after much temporizing and use of the conditional tense, Randolph endorsed ratification in Virginia and ended up getting the best of both worlds.

Madison, despite his reservations about the Constitution, was the campaign manager for ratification. His first task was to get the Congress in New York to light its own funeral pyre by approving the "amendments" to the Articles and sending them on to the state legislatures. Above all, momentum had to be maintained. The anti-Constitutionalists, now thoroughly alarmed and no novices in politics, realized that their best tactic was attrition rather than direct opposition. Thus they settled on a position expressing qualified approval but calling for a second Convention to remedy various defects (the one with the most dema-

gogic appeal was the lack of a BILL OF RIGHTS). Madison knew that to accede to this demand would be equivalent to losing the battle, nor would he agree to conditional approval (despite wavering even by Hamilton). This was an all-or-nothing proposition: national salvation or national impotence, with no intermediate position possible. Unable to get congressional approval, he settled for second best: a unanimous resolution of Congress transmitting the Constitution to the states for whatever action they saw fit to take. The opponents then moved from New York and the Congress, where they had attempted to attach amendments and conditions, to the states for the final battle.

At first, the campaign for RATIFICATION went beautifully: within eight months after the delegates set their names to the document, eight states had ratified. Theoretically, a ratification by one more state convention would set the new government in motion, but in fact until Virginia and New York acceded to the new Union, the latter was a fiction. New Hampshire was the next to ratify; "Rogues' Island" was involved in its characteristic political convulsions; North Carolina's convention did not meet until July and then postponed a final decision. Finally in New York and Virginia, the Constitutionalists outmaneuvered their opponents, forced them into impossible political positions, and won both states narrowly.

Victory for the Constitution meant simultaneous victory for the Constitutionalists; the anti-Constitutionalists either capitulated or vanished into limbo—soon Patrick Henry would be offered a seat on the Supreme Court and Luther Martin would be known as the Federalist "bulldog." And, irony of ironies, Alexander Hamilton and James Madison would shortly accumulate a reputation as the formulators of what is often alleged to be our political theory, the concept of "federalism." Arguments would soon appear over what the Framers "really meant"; although these disputes have assumed the proportions of a big scholarly business in the last century, they began almost before the ink on the Constitution was dry. One of the best early ones featured Hamilton versus Madison on the scope of presidential power.

The Constitution, then, was not an apotheosis of "constitutionalism," a triumph of architectonic genius; it was a patchwork sewn together under the pressure of time and events by a group of extremely talented democratic politicians. They refused to attempt the establishment of a strong, centralized sovereign on the principle of legislative supremacy for the excellent reason that the people would not accept it. They risked their political fortunes by opposing the established doctrines of state sovereignty because they were convinced that the existing system was leading to national impotence and, probably, to foreign domination. For two years, they worked to get a convention established. For over three months, in what must have seemed to the faithful participants an endless process of give-and-take, they reasoned, cajoled, threatened, and bargained amongst themselves. The results were a Constitution which the voters, by democratic processes, did accept, and a new and far better national government.

JOHN P. ROCHE
(1986)

Bibliography

BROWN, ROBERT E. 1956 *Charles Beard and the Constitution.* Princeton, N.J.: Princeton University Press.

DINKIN, ROBERT J. 1977 *Voting in Provincial America.* Westport, Conn.: Greenwood Press.

ELKINS, STANLEY and MCKITRICK, ERIC 1961 The Founding Fathers: Young Men of the Revolution. *Political Science Quarterly* 76:181–203.

FARRAND, MAX, ed. 1937 *Records of the Federal Convention of 1787.* New Haven, Conn.: Yale University Press.

KENYON, CECILIA M. 1955 Men of Little Faith: The Anti-Federalists on the Nature of Representative Government. *William and Mary Quarterly,* 3rd series, 12: McDonald, Forrest T. 1958 *We the People.* Chicago: University of Chicago Press.

ROCHE, JOHN P. 1961 The Founding Fathers: A Reform Caucus in Action. *American Political Science Review* 55:799–816.

ROSSITER, CLINTON 1966 *1787: The Grand Convention.* New York: Macmillan.

WARREN, CHARLES (1928) 1937 *The Making of the Constitution.* Boston: Little, Brown.

# CONSTITUTIONAL COURT

Article III vests the federal judicial power in the Supreme Court and in any lower courts that Congress may create. The judiciary so constituted was intended by the Framers to be an independent branch of the government. The judges of courts established under Article III were thus guaranteed life tenure "during GOOD BEHAVIOR" and protected against the reduction of their salaries while they held office. The federal courts so constituted are called "constitutional courts." They are to be distinguished from LEGISLATIVE COURTS, whose judges do not have comparable constitutional guarantees of independence.

Constitutional courts, sometimes called "Article III courts," are limited in the business they can be assigned. They may be given JURISDICTION only over CASES AND CONTROVERSIES falling within the JUDICIAL POWER OF THE UNITED STATES. For example, Congress could not constitutionally confer jurisdiction on a constitutional court to give ADVISORY OPINIONS, or to decide a case that fell outside Article III's list of cases and controversies included within the judicial power. That list divides into two categories of cases: those in which jurisdiction depends on the issues at stake (for example, FEDERAL QUESTION JURISDICTION) and

those in which jurisdiction depends on the parties to the case (for example, DIVERSITY JURISDICTION.)

Congress can, of course, create bodies other than constitutional courts and assign them the function of deciding cases—even cases falling within the judicial power, within limits that remain unclear even after NORTHERN PIPELINE CONSTRUCTION CO. V. MARATHON PIPE LINE CO. (1982). Such a legislative court is not confined by Article III's specification of the limits of the federal judicial power, any more than an administrative agency would be so confined. However, a legislative court's decisions on matters outside the limits of Article III cannot constitutionally be reviewed by the Supreme Court or any other constitutional court.

KENNETH L. KARST
(1986)

Bibliography

WRIGHT, CHARLES ALAN 1983 *The Law of Federal Courts*, 4th ed. Pages 39–52. St. Paul, Minn.: West Publishing Co.

## CONSTITUTIONAL DUALISM

The phrases "dualist Constitution" and "dualist democracy" were coined by Yale Law School Professor Bruce Ackerman. "Dualism" lies at the heart of his influential *We, The People*, a three-volume reinterpretation of the history and meaning of American Constitutional democracy, and probably the single most important and controversial work in constitutional theory of the 1990s. "Dualism," on Ackerman's account, is the United States' distinctive contribution to democratic theory and practice. It refers to a "two-track" scheme of lawmaking and rests on a two-tiered conception of ordinary citizens' involvement in national politics.

The notion of "private citizenship" aims to combine private freedom and public liberty in a fashion that is normatively attractive and historically faithful. Thus, "private citizenship" strikes a realistic—and, Ackerman claims, distinctly American—balance between full-time devotion to the common good and relentless pursuit of self-interest. It describes a world in which citizens are free, for the most part and most of the time, to pursue their own interests, sacrificing private lives to a modest extent by voting and keeping abreast of important events. On rare occasions, however, issues arise that demand more active involvement. In such moments, Americans must assume the full mantle of a self-governing citizenry. By rising to these "constitutional moments," however, they succeed in governing themselves without losing themselves—in the fashion of more single-minded theories of participatory democracy or civic republicanism—to government.

Ackerman's "two-track" theory of lawmaking runs along the same dual lines. Our constitutional tradition contemplates two types of politics: normal politics and "higher lawmaking" or "constitutional politics." Normal politics is the business of politicians, as private citizens pursue their largely private lives. Then the rare occasion for constitutional politics emerges. Crises and conflicts put on the national agenda fundamental choices about national identity and the role of government. Spurred by prophetic political leaders, the people awake from their civic slumber, mobilize, and participate in extended popular deliberation, debate, and decisionmaking. Framed by the intricate clash of competing leaders, POLTICAL PARTIES, and institutions, including rival branches of the national government, this process of constitutional questions: who belongs to the national political community, what are the rights of CITIZENSHIP, and what are the powers and duties of government.

The higher lawmaking process produced the Constitution and the major changes in it—the RECONSTRUCTION amendments and the "amendment analogues" embodied in the great NEW DEAL cases, UNITED STATES V. DERBY LUMBER COMPANY (1941) and WICKARD V. FILBURN (1942). Thus, on Ackerman's account, there have been but three "constitutional moments"—the Founding, Reconstruction, and the New Deal—each ushering in a new constitutional regime. What legitimated change in each instance was not observance of the formal rules of the constitutional AMENDING PROCESS; in each case, those rules were flaunted. Rather, it was the participation of an engaged citizenry, for this ensured that the constitutional changes wrought by these moments represented the considered wishes of the people.

From this, Ackerman derives a dualist theory of JUDICIAL REVIEW. When the people return to their private pursuits, and normal politics resumes, the constitutional courts have a mandate to protect the result of the people's higher lawmaking from future ordinary politicians and normal politics—that is, a "preservationist function." Striking down the products of normal politics when these trench on the fruits of higher lawmaking cannot fairly be called countermajoritarian or anti-democratic.

In some key respects, there is nothing new about dualism. ALEXANDER HAMILTON, in FEDERALIST No. 78, famously justified judicial review in preservationist terms. The Constitution was an act of the sovereign people; the constitutional court voiding LEGISLATION as incompatible with the Constitution would be enforcing the people's will over and against errant representatives. What is new, then, is Ackerman's candid account of how major constitutional changes on the part of "We, the People" flouted the prescribed rules for amendment, combined with his claim to redeem the lawfulness of these great changes by dint of his discovery of an elaborate and evolving pattern of higher lawmaking norms, a common law of higher law-

making, that has governed constitutional transformations outside Article V.

Critics have cast doubt on whether Ackerman's common law of higher lawmaking is a serviceable tool for courts to determine the bona fides of alleged non-Article V amendments and on what kind of guidance, if any, courts, lawmakers, or citizens, finding themselves in the thick of constitutional politics, can derive from Ackerman's ex post rules of recognition. However, many critics left unpersuaded by Ackerman's effort to derive a formal grammar of higher lawmaking have acknowledged that Ackerman has brought into brilliantly detailed focus a genuine tradition of constitutional politics. He has shown how the parties to New Deal and Reconstruction controversies clashed as much over constitutional process as substance. Politicians and reform movements not only addressed the electorate on constitutive questions of national identity and popular government in ways 1990s Americans have almost forgotten; they also fought over the rules of engagement and the processes of change and resistance to change in self-conscious and sophisticated constitutional terms. To this extent, Ackerman succeeds in vindicating the constitutional creativity of ordinary citizens continuing into the twentieth century.

Having reminded us that American politics sometimes has proceeded upon a "higher" and more citizenry-engaging track than the "ordinary," however, Ackerman has been met by another brand of critics who suggest that U.S. history has been punctuated by many more moments of constitutive change than three. The elections and presidencies of THOMAS JEFFERSON and ANDREW JACKSON, the defeat of POPULISM and emergence of Jim Crow in the 1890s, the rise of U.S. imperialism at the turn of the twentieth century, the PROGRESSIVE era, and the CIVIL RIGHTS MOVEMENT of the mid-twentieth century all have been put forward as candidates. Ackerman's own most recent writings note that movements for fundamental reform—attended by popular mobilization around constitutive issues of national identity, POPULAR SOVEREIGNTY, and the powers and duties of government—brought forth new parties, pivotal elections, major institutional changes, and doctrinal innovations in each generation of the nineteenth century. Thus, Ackerman himself now seems to agree that even if his original three moments involved more sweeping changes, the differences between them and these others are not so great as to warrant the simple division of American historical time into three long periods of "normal politics" and three bursts of "constitutional politics." Not all these other (perhaps partial) constitutional moments fit tidily into the Whiggish, progressive arc of Ackerman's scheme; some were moments of reactionary, not liberal, reforms. Not all of them followed Ackerman's legitimating rules; some were more or less democratic but others involved a great measure of force and fraud. Taken together, these criticisms do not undo the dualist scheme so much as complicate and enrich it, suggesting a more complex narrative of constitutional development—more constantly changing, more tenaciously remaining the same, more constrained by the institutional inheritances of conflicts whose resolutions merit little legitimacy even by Ackerman's forgiving lights, and arrayed into many overlapping periods of ordinary and constitutional politics and lawmaking.

By bringing politics and popular political action into focus in the realm of constitutional theory, Ackerman's dualism has forever changed the legal academy's reigning narrative of constitutional development. Whether it will affect how courts interpret the Constitution remains an open question.

WILLIAM E. FORBATH
(2000)

(SEE ALSO: *Amendment Process (Outside Aritcle V); Constitutional Theory.*)

Bibliography

ACKERMAN, BRUCE A. 1991 *We the People: Foundations.* Cambridge, Mass:. Harvard University Press.

——— 1998 *We the People: Transformations.* Cambridge, Mass:. Harvard University Press.

## CONSTITUTIONAL FICTIONS

The leading modern American discussion of legal fictions remains Lon Fuller's articles first published in 1930–1931. Fuller argued that legal fictions promote function, form, and sometimes fairness. It has become increasingly clear, however, that legal fictions no longer serve merely as an "awkward patch" on the fabric of law, as Fuller put it. Fuller considered legal fictions a necessary evil for systematic thinking about law. He viewed legal fictions as akin to working assumptions in physics: they provide a kind of scaffolding, but are not intended to give essential support nor to deceive. After their useful function ends, legal fictions should and could be readily removed.

Fuller defined a legal fiction as "either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility." In today's postrealist world, however, there is a widespread sense that legal fictions are not some small awkward patch, but rather virtually all of law's seamless cloth. This transforms the problem of defining and explaining legal fictions. The very pervasiveness of legal fictions helps to camouflage them. We may generally ignore a phenomenon that permeates our LEGAL CULTURE.

Fuller's taxonomy of legal fictions illuminated Henry Maine's earlier assertion that legal fictions "satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present." To Maine, legal fictions were "invaluable expedients for overcoming the rigidity of law," but they were also "the greatest of obstacles to symmetrical classification." Fuller advanced beyond Maine's complacent legal anthropology, but he still somewhat desperately sought symmetry. Today we tend to regard all law as a gyrating classification system full of overlaps, gaps, and incommensurate variations. In Grant Gilmore's words, "The process by which a society accommodates to change without abandoning its fundamental structure is what we mean by law."

Precisely because legal fictions are not static, they may grow to influence or even control how we think or refuse to think about basic matters. The fiction that a corporation is a person warranting certain constitutional protections, for example, obviously has spread like kudzu since the Supreme Court first propounded this notion in dicta in *Santa Clara County v. Southern Pacific Railroad* (1886). We employ legal fictions to preserve a notion of continuity with the past, yet legal fictions help short-circuit attempts to comprehend the complexity behind the assumptions a legal fiction conveys. Like sunlight, legal fictions affect the directions of growth.

There is a basic irony in our commitment to perserving the RULE OF LAW alongside our reverence for pragmatic immediate solutions to pluralistic problems. Nevertheless, few Americans have ever gone as far in condemning legal fictions as did Jeremy Bentham. Bentham claimed that "n English law, fiction is a syphilis, which runs in every vein, and carries into every part of the system the principle of rotteness." If fictions are to justice "[e]xactly as swindling is to trade," as Bentham put it, Americans tend to exalt trade so much that we tolerate and even celebrate the trader, the flimflam man, and the innovative judge.

In constitutional law, legal fictions are at least as pervasive as in what is still nostalgically called private law. Obviously, a great judge in a constitutional case has to do more than look up the answer in the constitutional text. But what it is we want a good or great postrealist judge to do remains intensely controversial.

The paradoxical way in which Americans revere but fail to heed closely constitutional law suggests that it may be impossible to separate basic constitutional fictions from constitutional governance. Yet political history in the United States has been dominated by an ongoing, multifaceted debate about proper interpretation of the Constitution. Controversies about specific instances of JUDICIAL REVIEW and proposals for constitutional change ebb and flow, but debate about what is true to the Constitution never disappears.

Americans generally display remarkable respect for an old ambiguous text despite—perhaps because of—widespread uncertainty about what it contains. Yet the Constitution and its most important amendments surely were not ratified by a majority of Americans. Moreover, whoever "we the people" may have excluded or included, it is clear that the American people have not actually endorsed the centuries of judicial gloss on the Constitution that provides much basic constitutional law. Nevertheless, sacerdotalizing of the Constitution amounts to a civic religion. General acquiescence in the interpretations of the text by unelected judges thus provides a central constitutional fiction that ironically also has proved to be a notably sturdy foundation. It is important to distinguish this crucial, general trapeze act involving the assumption of societal consent from the more specific uses of fictions in constitutional law.

As early as the 1830s ALEXIS DE TOCQUEVILLE declared: "The government of the Union rests almost entirely on legal fictions. The union is an ideal nation which exists, so to say, only in men's minds and whose extent and limits can only be discerned by understanding." Tocqueville made his point about the central role of legal fictions in American governance, ironically, just as constitutional debate about the abolition of SLAVERY began to spiral toward the CIVIL WAR. That example of the terrible cost of fundamental disagreements about the meaning of the Constitution helps explain why most Americans most of the time are willing to accept the central constitutional fiction that judicial interpretations of the Constitution somehow can settle even the most controversial questions.

An important initial question is whether the American model of judicial review, promulgated most famously by Chief Justice JOHN MARSHALL in MARBURY V. MADISON (1803), may not itself be a fiction of elemental proportions. Marshall insisted that to deserve the "high appellation" of "a government of laws and not of men," the American system required the power of federal judges to declare legislative acts unconstitutional, but this was hardly necessary to decide the case before the Court and lacked explicit support in the constitutional text. Additional fictions that have played particularly important roles in our constitutional history range from markedly inconsistent judicial declarations enforcing FEDERALISM to decisions granting FOURTEENTH AMENDMENT protection to CORPORATIONS. Among the most important recent examples are decisions applying most but not all of the BILL OF RIGHTS to the states, on the theory that their protections were incorporated through the DUE PROCESS clause of the Fourteenth Amendment, and decisions making EQUAL PROTECTION doctrine

applicable to the federal government through a theory of "reverse incorporation" premised on the Fifth Amendment.

Less obvious but equally important constitutional fictions limit or ignore the constitutional text. For example, the SLAUGHTERHOUSE CASES (1873) rendered the privileges or immunities clause of the Fourteenth Amendment essentially redundant. Also, there has been long-standing reluctance to give the NINTH AMENDMENT any content at all. Constitutional fictions thus may restrain as well as enlarge judicial authority.

Particularly flagrant constitutional fictions have produced a smattering of serious scholarly and political criticism, but most Americans apparently continue to revere the Supreme Court and to accept its interpretations even when not pleased by the results in specific cases. For example, there were withering attacks on the Court's aggressive use of what many saw as fictional limitations on progressive legislation in the 1920s and 1930s, but the failure of President FRANKLIN D. ROOSEVELT'S COURT-PACKING PLAN suggested that Americans, even when outraged at specific results and dubious about their bases, nevertheless were more willing to accept judicially created fictions than to tinker with the institution of judicial review.

As James Russell Lowell stated in 1888, "After our Constitution got fairly into working order it really seemed as if we had invented a machine that would go of itself, and this begot a faith in our luck which even the civil war itself but momentarily disturbed." But Lowell sardonically continued, "I admire the splendid complacency of my countrymen, and find something exhilarating and inspiring in it. . . . And this confidence in our luck with the absorption in material interests, generated by unparalleled opportunity, has in some respects made us neglectful of our political duties."

It might be thought that legal fictions ought to play a diminished role in constitutional law, in contrast to their prevalence in COMMON LAW. For instance, constitutional law does not lack a text, whereas the common law, in Frederick Pollock's words, "professes . . . to develop and apply principles that have never been committed to any authentic form of words." Despite the best efforts of interpretivists, originalists, and self-proclaimed strict constructionists, however, constitutional law as we know it—and as it has been from the start—demonstrates clearly that even our written "authentic form of words" requires additional criteria for everyday construction and interpretation. In fact, we seem to grow ever more doubtful about what sources we should consult, to say nothing of what might be thought authoritative.

We lack any rule of recognition to distinguish constitutional truth from constitutional fiction. Moreover, our constitutional history clearly reveals that some sections of the authentic text have been relegated to limbo through nonoriginalist hierarchical principles, whereas other sections have acquired so many levels of added meaning that it is now hard to discern any original shape beneath the layers of barnacles added over the years.

The constitutional text is manipulable, but that need not mean it is infinitely manipulable. Federal judges have declared themselves less bound by STARE DECISIS in the constitutional realm than they are in other domains, but they tend to remain concerned with the past and with their won places in history. Yet these same judges use legal fictions to purge the past of its blemishes and discontinuities.

There seems to be a kind of ideological frontier thesis in constitutional law. Justices who start anew and never actually look back are applauded. Because they usually can find PRECEDENTS readily and tend not to consider contexts, these judges reinforce a tendency to turn our backs on past unpleasantness. Fundamental assumptions in constitutional doctrine posit an America full of openings: we may all escape the sins of the past; we all enjoy a fair and equal start in the race of life.

Equality among citizens, for example, is virtually always assumed, whether actual or not. This formal ideal of equality generally provides a complete defense against those who seek remedies for past discrimination unless they can demonstrate that the defendants actually violated the plaintiffs' equality; thus, the victim must place the defendant at the scene of past crimes. This fiction was essential a century ago in the CIVIL RIGHTS CASES (1883) and PLESSY V. FERGUSON (1896); a similar fiction was crucial when the Court vigorously enforced its version of FREEDOM OF CONTRACT before the NEW DEAL; and its formal fictional counterpart seems prevalent in RACIAL DISCRIMINATION cases today.

In constitutional law we are devoted to the artificial doctrinal categories and analytic tests that judges create. This remains so even if we are subliminally aware, as Justice OLIVER WENDELL HOLMES noted, that a particular doctrine may be "little more than a fiction intended to beautify what is disagreeable to the sufferers." Judicial reliance on binary tests to foster pseudocertainty is not new, of course, as anyone who recalls the twilight zone of DUAL FEDERALISM must acknowledge. In constitutional cases today, however, judges seem to rely even more frequently on multipart formulas to convey that "delusive exactness" Holmes decried—and sometimes practiced.

Legal fictions are quite different from literary fictions. As ROBERT COVER pointed out, potential violence lurks beneath the fictions created by judges, whereas the nexus between real force and even the most powerful literary fiction is attenuated. Additionally, the author of literary

fiction enjoys more freedom than the creator of legal fiction. The poet, even the novelist, usually tries to operate on multiple levels and even dreams of reaching a broad and varied audience. Writers of literary fiction also tend to acknowledge and even to use the possibility of complicity between the teller of the tale and the recipient of it, so that shared understanding is a core concern. By contrast, legal fiction employs a specialized shorthand; many creators and users of legal fiction intend their work product to be confined to, or even ignored by, only a narrow audience of professionals.

Americans find it easy to read prepossessions into the Constitution. We resemble religious sects who are able to find diverse creeds in the same Bible. A century ago, CHRISTOPHER G. TIEDEMAN, a leading conservative treatise writer, admiringly noted that "when public opinion . . . requires the written words to be ignored the court justly obeys the will of the popular mandate, at the same time keeping up a show of obedience to the written word by a skillful use of legal fictions." Today heated political and social controversies often revolve around whether the Constitution resolves, or is even relevant to, the debate over ABORTION or AFFIRMATIVE ACTION, for example. Many people will consider whatever answers the Supreme Court hands down to be constitutional fictions at best. Yet, as the historian CHARLES BEARD put it in 1930, "Humanity and ideas, as well as things, are facts." Constitutional fictions tend to grow into fundamental facts of life in a culture that reveres law.

AVIAM SOIFER
(1992)

(SEE ALSO: *Constitution as Civil Religion; Constitutional Interpretation; Incorporation Doctrine; Legal Realism.*)

Bibliography

FULLER, LON 1967 *Legal Fictions.* Palo Alto, Calif.: Stanford.
KAMMEN, MICHAEL 1986 *A Machine That Would Go of Itself.* New York: Knopf.
SOIFER, AVIAM 1986 Reviewing Legal Fictions. *Georgia Law Review* 20:871.

## CONSTITUTIONAL HISTORY BEFORE 1776

The opening words of the United States Constitution, "We the People," startled some of the old revolutionaries of 1776. PATRICK HENRY, after expressing the highest veneration for the men who wrote the words, demanded "What right had they to say, *We the People. . . .* Who authorized them to speak the language of *We, the People,* instead of *We, the States?*" It was a good question and, as Henry knew, not really answerable. No one had authorized the members of the CONSTITUTIONAL CONVENTION to speak for the people of the United States. They had been chosen by the legislatures of thirteen sovereign states and were authorized only to act for the governments of those states in redefining the relationships among them. Instead, they had dared not only to act for "the people of the United States" but also to proclaim what they did as "the supreme law of the land," supreme apparently over the actions of the existing state governments and supreme also over the government that the Constitution itself would create for the United States. Because those governments similarly professed to speak and act for the people, how could the Constitution claim supremacy over them and claim it successfully from that day to this, however contested in politics, litigation, and civil war? The answer lies less in logic than in the centuries of political experience before 1787 in which Englishmen and Americans worked out a political faith that gave to "the people" a presumptive capacity to constitute governments.

The idea that government originates in a donation by the people is at least as old as classical Greece. Government requires some sort of justification, and a donation of power by the governed or by those about to be governed was an obvious way of providing it. But such a donation has seldom if ever been recorded as historical fact, because it is virtually impossible for any substantial collection of people to act as a body, either in conveying powers of government or in prescribing the mode of their exercise. The donation has to be assumed, presumed, supposed, imagined—and yet be plausible enough to be acceptable to the supposed donors.

In the Anglo-American world two institutions have lent credibility to the presumption. The first to emerge was the presence in government of representatives chosen by a substantial portion of the people. With the powers of government thus shared, it became plausible to think of the representatives and the government as acting for the people and deriving powers from them. But as these popular representatives assumed a dominant position in the government, it was all too easy for them to escape from the control of those who chose them and to claim unlimited power in the name of the almighty people. A second device was necessary to differentiate the inherent sovereign powers of the people from the limited powers assigned to their deputed agents or representatives. The device was found in written CONSTITUTIONS embodying the people's supposed donation of power in specific provisions to limit and define the government.

Such written constitutions were a comparatively late development; the United States Constitution was one of the first. They came into existence not simply out of the need to specify the terms of the putative donation of

power by the people but also out of earlier attempts by representatives or spokesmen of the people to set limits to governments claiming almighty authority from a different source. Although the idea of a popular donation was an ancient way of justifying government, it was not the only way. Indeed, since the fall of Rome God had been the favored source of authority: earthly rulers, whether in church or state, claimed His commission, though the act in which He granted it remained as shadowy as any donation by the people. Up to the seventeenth century, the persons who spoke for the people spoke as subjects, but they spoke as subjects of God as well as of God's lieutenants. While showing a proper reverence for divinely ordained authority, they expected those commissioned by God to rule in a godlike manner, that is, to abide by the natural laws (discernible in God's government of the world) that were supposed to guide human conduct and give force to the specific "positive" laws of nations derived from them. Even without claiming powers of government, those who spoke for the people might thus set limits to the powers of government through "fundamental" laws that were thought to express the will of God more reliably than rulers who claimed His commission. The link is obvious between such FUNDAMENTAL LAWS and written constitutions that expressed the people's will more reliably than their elected representatives could. The one grew out of the other.

Written constitutions were a deliberate invention, designed to overcome the deficiencies of representative government, but representative government itself was the unintended outcome of efforts by kings to secure and extend their own power. The story begins with the creation of the English House of Commons in the thirteenth century, when the English government centered in a hereditary king who claimed God-given authority but had slender means for asserting it. The king, always in need of funds, summoned two representatives from each county and from selected boroughs (incorporated towns) to come to his court for the purpose of consenting to taxes. He required the counties and boroughs in choosing representatives, by some unspecified electoral process, to give them full powers of attorney, so that no one could later object to what they agreed to. Although only a small part of the adult population shared in the choice of representatives, the House of Commons came to be regarded as having power of attorney for the whole body of the king's subjects; every man, woman, and child in the country was held to be legally present within its walls.

The assembly of representatives, thus created and identified with the whole people, gradually acquired an institutional existence, along with the House of Lords, as one branch of the king's Parliament. As representatives, the members remained subjects of the king, empowered by other subjects to act for them. But from the beginning they were somewhat more than subjects: in addition to granting the property of other subjects in taxes, they could petition the king for laws that would direct the actions of government. From petitioning for laws they moved to making them: by the sixteenth century English laws were enacted "by authority" of Parliament. Theoretically that authority still came from God through the king, and Parliament continued to be an instrument by which English monarchs consolidated and extended their government, never more so than in the sixteenth century. But in sharing their authority with Parliament the kings shared it, by implication, with the people. By the time the first American colonies were founded in the early seventeenth century, the king's instrument had become a potential rival to his authority, and the people had become a potential alternative to God as the immediate source of authority.

The potential became actual in the 1640s when Parliament, discontented with Charles I's ecclesiastical, military, and fiscal policies, made war on the king and itself assumed all powers of government. The Parliamentarians justified their actions as agents of the people; and at this point the presumption of a popular origin of government made its appearance in England in full force. The idea, which had been overshadowed for so long by royal claims to a divine commission, had been growing for a century. The Protestant Reformation had produced a contest between Roman Catholics and Protestants for control of the various national governments of Europe. In that contest each side had placed on the people of a country the responsibility for its government's compliance with the will of God. The people, it was now asserted, were entrusted by God with creating proper governments and with setting limits on them to insure protection of true religion. When the limits were breached, the people must revoke the powers of rulers who had betrayed their trust. For Roman Catholics, Protestant rulers fitted the definition, and vice versa.

When Englishmen, mostly Protestant, challenged their king, who leaned toward Catholicism, these ideas were ready at hand for their justification, and the House of Commons had long been recognized as the representative of the people. The House, the members now claimed, to all intents and purposes *was* the people, and the powers of the people were supreme. Both the king and the House of Lords, lacking these powers, were superfluous. In 1649 the Commons killed the king, abolished the House of Lords, and made England a republic.

By assuming such sweeping powers the members of the House of Commons invited anyone who felt aggrieved by their conduct of government not only to question their claim to represent the people but also to draw a distinction between the powers of the people themselves and of the

persons they might choose, by whatever means, to represent them.

The first critics of the Commons to draw such a distinction were, not surprisingly, the adherents of the king, who challenged the Commons in the public press as well as on the field of battle. The House of Commons, the royalists pointed out, had been elected by only a small fraction of the people, and even that fraction had empowered it only to consent to positive laws and taxes, not to alter the government. Parliament, the royalists insisted, must not be confused with the people themselves. Even if it were granted that the people might create a government and set limits on it in fundamental laws, the House of Commons was only one part of the government thus created and could not itself change the government by eliminating the king or the Lords.

More radical critics, especially the misnamed Levellers, called not only for a reform of Parliament to make it more truly representative but also for a written "Agreement of the People" in which the people, acting apart from Parliament, would reorganize the government, reserving certain powers to themselves and setting limits to Parliament just as Parliament had formerly set limits to the king. Although the Levellers were unsuccessful, other political leaders also recognized the need to elevate supposed acts of the people, in creating a government and establishing its fundamental laws, above acts of the government itself. They also recognized that even a government derived from popular choice needed a SEPARATION OF POWERS among legislative, executive, and judicial branches, not merely for convenience of administration but in order to prevent government from escaping popular control.

Although the English in these years generated the ideas that have guided modern republican government, they were unable to bring their own government into full conformity with those ideas. By the 1650s they found that they had replaced a monarch, whose powers were limited, first with a House of Commons that claimed unlimited powers and refused to hold new elections, and then with a protector, Oliver Cromwell, whose powers knew only the limits of his ability to command a conquering army. In 1660 most Englishmen were happy to see the old balance restored with the return of a hereditary king and an old-style but potent Parliament to keep him in line. In 1688 that Parliament again removed a king who seemed to be getting out of control. This time, instead of trying to eliminate monarchy, they replaced one king with another who promised to be more tractable than his predecessor. William III at the outset of his reign accepted a parliamentary declaration of rights, spelling out the fundamental laws that limited his authority.

JOHN LOCKE, in the classic defense of this "Glorious Revolution," refined the distinction made earlier by the Levellers between the people and their representatives. Locke posited a SOCIAL COMPACT in which a collection of hitherto unconnected individuals in a "state of nature" came together to form a society. Only after doing so did they enter into a second compact in which they created a government and submitted to it. This second compact or constitution could be broken—the government could be altered or replaced—without destroying the first compact and throwing the people back into a state of nature. Society, in other words, came before government; and the people, once bound into a society by a social compact, could act without government and apart from government in order to constitute or change a government.

Locke could point to no historical occurrence that quite fitted his pattern. Even the Glorious Revolution was not, strictly speaking, an example of popular constituent action; rather, one branch of an existing government had replaced another branch. And the Declaration of Rights, although binding on the king, was no more than an act of Parliament that another Parliament might repeal. Moreover, the authority of the king remained substantial, and he was capable of extending his influence over Parliament by appointing members to lucrative government offices.

Locke's description of the origin of government nevertheless furnished a theoretical basis for viewing the entire British government as the creation of the people it governed. That view was expressed most vociferously in the eighteenth century by the so-called commonwealthmen, who repeated the call for reforms to make Parliament more representative of the whole people and to reduce the king's influence on its members. But it was not only commonwealthmen who accepted Locke's formulation. By the middle of the eighteenth century the doctrine of the divine right of kings was virtually dead in England, replaced by the sovereignty of the people, who were now accepted as the immediate source of all authority whether in king, lords, or commons.

In England's American colonies the idea that government originates in the people had been familiar from the outset, nourished not only by developments in England but also by the special conditions inherent in colonization. Those conditions were politically and constitutionally complex. The colonies were founded by private individuals or corporations under charters granted by the king, in which Parliament had no part. In the typical colony the king initially conveyed powers of government to the founders, who generally remained in England and directed the enterprise through agents. As time went on, the king took the powers of government in most colonies to himself, acting through appointed governors. But whether the immediate source of governmental authority in a colony rested in the king or in royally authorized corporations or individual proprietors, it proved impossible to govern col-

onists at 3,000 miles' distance without current information about changing local conditions. That kind of information could best be obtained through a representative assembly of the settlers, empowered to levy taxes and make laws. As a result, in each of England's colonies, within a short time of the founding, the actual settlers gained a share in the choice of their governors comparable to that which Englishmen at home enjoyed through their Parliament.

England's first permanent colony in America, Virginia, was the first to exhibit the phenomenon. The Virginia Company of London, which founded the colony in 1607 and was authorized to govern it in 1609, did so for ten years without participation of the actual settlers. The results were disastrous, and in 1618 the company instructed its agents to call a representative assembly. The assembly met in 1619, the first in the present area of the United States. When the king dissolved the Virginia Company and resumed governmental authority over the colony in 1624, he declined to continue the assembly, but the governors he appointed found it necessary to do so on their own initiative until 1639, when the king recognized the need and made the Virginia House of Burgesses an official part of the government.

In most other colonies representatives were authorized from the beginning or came into existence spontaneously when colonists found themselves beyond the reach of existing governments. The Pilgrims who landed at Plymouth in 1620 provided for their own government by the MAYFLOWER COMPACT, with a representative assembly at its center. The initial governments of Rhode Island and Connecticut began in much the same way. In these Puritan colonies religious principle worked together with pragmatic necessity to emphasize the popular basis of government. Puritans believed that government, though ordained by God, must originate in a compact (or covenant) between rulers and people, in which rulers promised to abide by and enforce God's laws, while the people in return promised obedience. Even in Massachusetts, where from the beginning the government rested officially on a charter from the king, Governor John Winthrop took pains to explain that he regarded emigration to Massachusetts as a tacit consent to such a covenant on the part of everyone who came. The emigrants themselves seem to have agreed; and because the king's charter did not spell out the laws of God that must limit a proper government, the representative assembly of the colony in 1641 adopted the MASSACHUSETTS BODY OF LIBERTIES, which did so.

The model for the colonial representative assemblies was the House of Commons of England; but from the beginning the colonial assemblies were more representative than the House of Commons, in that a much larger proportion of the people shared in choosing them. In England REPRESENTATION was apportioned in a bizarre fashion among the towns and boroughs, with nearly empty villages sending members while many populous towns sent none. In the colonies, although the extension of representation did not everywhere keep up with the spread of population westward, the imbalance never approached that in England, where virtually no adjustments to shifts of population were made after the sixteenth century and none at all between 1675 and the nineteenth century. And while in England a variety of property qualifications and local regulations excluded the great majority of adult males from voting, in the colonies, because of the abundance of land and its widespread ownership, similar restrictions excluded only a minority of adult males.

In addition to its broader popular base, representation in the colonies retained more of its original popular function than did the English counterpart. Representatives in both England and the colonies were initially identified more with a particular group of subjects than with their rulers. As representatives assumed a larger and larger role in government, they necessarily came to consider themselves as acting more in an authoritative capacity over the whole people and less as the designated defenders of their immediate constituents. This conception grew more rapidly in England, as the power of the king declined and that of Parliament increased, than it did in the colonies, where representatives continued to champion the interests of their constituents against unpopular directives from England. The divergence in the American conception of representation was to play a key role both in the colonies' quarrel with England and in the problems faced by the independent Americans in creating their own governments.

By 1763, when France surrendered its North American possessions, Great Britain stood at the head of the world's greatest empire. But the place of the American colonists in that empire remained constitutionally uncertain. Officially their governments still derived authority not from popular donation but directly or indirectly from the king. In two colonies, Rhode Island and Connecticut, the king had conveyed power to the free male inhabitants to choose their own governor, governor's council, and legislative assembly. In two more the king had conveyed governmental power to a single family, the Penns in Pennsylvania and the Calverts in Maryland, who exercised their authority by appointing the governor and his council. In the rest of the colonies the king appointed the governor and (except in Massachusetts) his council, which in all colonies except Pennsylvania doubled as the upper house of the legislature. Thus in every colony except Rhode Island, Connecticut, and Massachusetts, a representative assembly made laws and levied taxes, but neither the governor nor the members of the upper house of the legislature owed their positions even indirectly to popular choice.

It might have been argued that the king himself owed his authority to some sort of popular consent, however tacitly expressed, but it would have been hard to say whether the people who gave that consent included those living in the colonies. It would have been harder still to say what relationship the colonists had to the king's Parliament. In England the king's subordination to Parliament had become increasingly clear. It was Parliament that recognized the restoration of Charles II in 1660; it was Parliament that, in effect, deposed James II in 1688; it was Parliament that placed George I on the throne in 1714 and established the succession of the House of Hanover. Insofar as England's kings ruled Great Britain after 1714 they ruled through Parliament. But they continued to rule the colonies through royal governors and councils, and Parliament still had no hand officially in the choice of royal governors and councils or in the formulation of instructions to them.

Because each colony had its own little parliament, its representative assembly, the people of each colony could have considered themselves as a separate kingdom and a separate people, separate not only from the people who chose the representative assemblies of the other colonies but separate also from the people of Great Britain who chose the British Parliament. If any colonist thought that way—and probably few did before the 1760s or 1770s—he would have had to consider a complicating fact: the British Parliament did on occasion legislate for the colonies and the colonies submitted to that legislation, most notably to the Navigation Acts of 1660 and 1663, which limited the trade of the colonies for the benefit of English merchants. Did this submission mean that the people of the colonies, who elected no representatives to Parliament, were subordinate to, as well as separate from, the people of Great Britain?

In one sense the answer had to be yes: if the king was subordinate to Parliament and the colonists were subordinate to the king, that would seem to make the colonists subordinate to Parliament and thus to the people who elected Parliament. But since Parliament had so seldom legislated for the colonies, it could be argued that the colonists' subordination to it was restricted to those areas where it had in fact legislated for them, that is, in matters that concerned their trade. In other areas, they would be subordinate to Parliament only through the king, and the subordination of the colonial representative assemblies to the king was by no means unlimited. Through the taxing power the colonial assemblies had achieved, over the years, a leverage in the operation of their respective governments comparable to that which had raised Parliament above the king in Great Britain. To be sure, they had not arrived at so clear a position of superiority over their royal governors as Parliament enjoyed over the king. For example, while Queen Anne was the last monarch to veto an act of Parliament, royal governors regularly vetoed acts of colonial assemblies; and even an act accepted by the king's governor could still be vetoed by the king himself. The assemblies nevertheless enjoyed considerable power; by refusing to authorize taxation or to appropriate funds, they could thwart royal directives that they considered injurious to the interests or rights of their constituents. And in some ways they enjoyed a greater independence of royal influence than did Parliament. Because there were few sinecures or places of profit in colonial governments within the appointment of the king or his governors, it was difficult for a governor to build a following in an assembly through patronage.

Despite its constitutional and political ambiguities the British imperial system worked. It continued to work until the power of Parliament collided with the power of the colonial assemblies, thus requiring a resolution of the uncertainties in their relationship. The collision occurred when Parliament, facing a doubled national debt after the Seven Years War, passed the Revenue Act of 1764 (usually called the Sugar Act), levying duties on colonial imports, and the Stamp Act of 1765, levying direct taxes on legal documents and other items used in the colonies. In these acts, probably without intending to, Parliament threatened to destroy the bargaining power through which the colonial assemblies had balanced the authority of the king and his governors. If Parliament could tax the colonists directly, it might free the king's governors from dependence on the assemblies for funds and ultimately render the assemblies powerless.

In pamphlets and newspaper articles the colonists denounced the new measures. The assemblies, both separately and in a STAMP ACT CONGRESS, to which nine colonies sent delegates, spelled out in resolutions and petitions what they considered to be fundamental constitutional rights that Parliament had violated. In doing so the assemblies were obliged to define their constitutional relationship to Parliament with a precision never before required.

Parliament, it must be remembered, had been regarded for centuries as the bulwark of English liberties. It was the representative body of the English people, and through it the English had tamed their king as no other Europeans had. To question its supremacy might well seem to be a reactionary retreat toward absolute monarchy by divine right. The colonists were therefore hesitant to deny all subordination to Parliament. Yet, if they were to enjoy the same rights that other British subjects enjoyed in Great Britain, they must reserve to their own assemblies at the very least the power to tax. They acknowledged, therefore, the authority of Parliament to legislate for the whole empire as it had hitherto done in regulating colonial trade, but they drew a distinction between the power to legislate and the power to tax.

The colonists associated legislation with the sovereign

power of a state, and they wanted to consider themselves as remaining in some still undefined way under the sovereign power of the British government. But taxation had from the time of England's first Parliaments been a function of representatives, authorized by those who sent them to give a part of their property to the king in taxes. Taxation, the colonial assemblies affirmed, was not a part of the governing 1869 or legislative power, but an action taken in behalf of the king's subjects. This distinction could be seen, they pointed out, in the form given to Parliamentary acts of taxation: such acts originated in the House of Commons and were phrased as the gift of the commons to the king.

Now the difference between American and British conceptions of representation began to appear. The colonists did not think of the English House of Commons as representing them, for no county or town or borough in the colonies sent members. The British government had never suggested that they might, and the colonists themselves rejected the possibility as impracticable. Given their conception of the representative's subservient relation to his constituents, it would have been impossible, they felt, to maintain adequate control over representatives at 3,000 miles' distance. Thus the colonists had not authorized and could not authorize any representative in Parliament to give their property in taxes. When Parliament taxed them, therefore, it deprived them of a fundamental right of Englishmen, sacred since before the colonies were founded. For a Parliament in which the colonists were not represented to tax them was equivalent to the king's taxing Englishmen in England without the consent of the House of Commons. The colonists called in vain on English courts to nullify this violation of fundamental law.

In answering the colonial objections, British spokesmen did not claim that the colonists could be taxed without the consent of their representatives. Thomas Whately, speaking for the ministry that sponsored the taxes, went even further than the colonists by denying that any legislation affecting British subjects anywhere could be passed without consent of their representatives. But he went on to affirm what to the colonists was an absurdity, that the colonists were represented in the House of Commons. Although they did not choose members, they were *virtually* represented by every member chosen in Britain, each of whom was entrusted with the interests not merely of the few persons who chose him but of all British subjects. The colonists were represented in the same way as Englishmen in towns that sent no members, in the same way also as English women and children.

However plausible this reasoning may have been to Englishmen, to the colonists it was sheer sophistry. They made plain in resolutions of their assemblies, as for example in Pennsylvania, "That the only legal Representatives of the Inhabitants of this Province are the Persons they annually elect to serve as Members of Assembly." Pamphlets and newspapers were even more scathing in rejecting the pretensions of Parliament to represent Americans. In Massachusetts JAMES OTIS asked, "Will any man's calling himself my agent, representative, or trustee make him so in fact?" On that basis the House of Commons could equally pretend "that they were the true and proper representatives of all the common people upon the globe." (See TAXATION WITHOUT REPRESENTATION.)

In reaction to the objections of the colonists and of the English merchants who traded with them, Parliament in 1766 repealed the Stamp Act and revised the Sugar Act. But at the same time it passed a Declaratory Act, affirming its right to legislate for the colonies "in all cases whatsoever." The framers of the act deliberately omitted specific mention of the power to tax, but in the following year Parliament again exercised that presumed power in the TOWNSHEND ACTS, levying more customs duties on colonial imports. The colonists again mounted protests, but they were still reluctant to deny all Parliamentary authority over them and clung to their distinction between legislation and taxation, which the great William Pitt himself had supported (unsuccessfully) in Parliamentary debate. Parliament, they said, could regulate their trade, even by imposing customs duties, but must not use the pretext of trade regulation for the purpose of raising revenue.

Once again the colonial protests, backed by boycotts, secured repeal of most of the offending taxes, but once again Parliament reaffirmed the principle of its unlimited power, not in a declaration, but by retaining a token tax on tea. The colonists, relieved of any serious burden, were left to ponder the implications of their position. In one sense Parliament was treating them as part of a single people, over all of whom, whether in England or elsewhere, Parliament reigned supreme. In rejecting the notion that they were, or even could be, represented in Parliament, the colonists implied that they were a separate people or peoples.

A reluctance to face this implication had prompted their continued recognition of some sort of authority in Parliament. If Parliament in the past had secured the rights of Englishmen, was it not dangerous (as Whately had indeed said it was) to rely instead on the powers of their own little assemblies? If they were a separate people, or peoples, not subject to Parliament, would they not be foregoing the rights of Englishmen, the very rights they were so vigorously claiming? Could they expect their own assemblies to be as effective defenders of those rights as the mighty British Parliament?

As the quarrel over taxation progressed, with the Boston Tea Party of 1773 and Parliament's punitive Coercive Act of 1774 against Massachusetts, more and more Americans overcame the doubts raised by such questions. The Coercive Acts regulated trade with a vengeance by inter-

dicting Boston's trade, and the acts also altered the government of Massachusetts as defined by its royal charter (ending the provincial election of the governor's council), thereby showing once and for all that guarantees given by the king could not stand before the supremacy claimed by Parliament. In the treatment of Massachusetts the other colonies read what was in store for them, and the various colonial assemblies sent delegates to the FIRST CONTINENTAL CONGRESS in 1774 in order to concert their response.

As in the earlier Stamp Act Congress, the delegates had to determine what they considered to be the limits of Parliament's authority. This time, abandoning their distinction between legislation and taxation (which Parliament had never recognized), they denied that Parliament had or had ever had constitutional authority over them. As a last conciliatory gesture, they expressed a willingness voluntarily to submit to bona fide regulations of trade, but made clear that Parliament had no constitutional right to make such regulations. Following the lead given in tracts by JOHN ADAMS, JAMES WILSON, and THOMAS JEFFERSON, they elevated their separate representative assemblies to a constitutional position within their respective jurisdictions equal to that of Parliament in Great Britain. The only remaining link connecting them with the mother country was their allegiance to the same king, who must be seen as the king of Virginia, Massachusetts, and so on, as well as of England, Scotland, Wales, and Ireland. (Ireland, it was noted, also had its separate Parliament.) Over his peoples beyond the seas the king exercised his powers through separate but equal governments, each with its own governor, council, and representative assembly.

The king did not, of course, rule by divine right. In the colonies as in England he derived his authority from the people themselves, that is, from the separate consent or constituent act of each of the peoples of his empire. John Adams of Massachusetts, perceiving the need to identify such an act, pointed to the Glorious Revolution of 1688 as an event in which each of the king's peoples participated separately. "It ought to be remembered," he said, "that there was a revolution here, as well as in England, and that we as well as the people of England, made an original, express contract with King William." That contract, as Adams and other colonists now saw it, limited royal power in the same way it was limited in England and guaranteed in each colony the exclusive legislative and taxing authority of the representative assembly.

Although the First Continental Congress gave a terminal clarity to the colonists' views of their constitutional position in the empire, it looked forward uncertainly toward a new relationship among the colonies themselves. The membership of the Congress reflected the uncertainty. Some of the members had been chosen by regularly constituted assemblies; others had been sent by extralegal conventions or committees; and a few were self-appointed. What authority, if any, the members had was not clear. Given the view of representation that had guided colonial reaction to Parliamentary taxation, no one was ready to claim for Congress the powers denied to Parliament. Though delegates from every colony except Georgia were present, they had not been chosen by direct popular elections and therefore were not, by their own definition, representatives. At best, as one of them put it, they were "representatives of representatives."

Yet they had not come together simply for discussion. Boston was under military occupation and Massachusetts was under military government. Regular royal government throughout the colonies was fast approaching dissolution. It was time for action, and the Congress took action. Without pausing to determine by what authority, it adopted an ASSOCIATION forbidding not only exports to and imports from Great Britain but also the consumption of British goods. And it called for the creation of committees in every county, city, and town to enforce these restrictions.

In the misnamed Association (membership in which was scarcely voluntary) the Congress took the first steps toward creating a national government separate from that of the (not yet independent) states. If the members believed, as presumably they did, that the authority of government derives from the people, they implied, perhaps without quite realizing what they were doing, that there existed a single American people, distinct not only from the people of Great Britain but also from the peoples of the several colonies and capable of conveying a political authority distinct from that either of Great Britain or of the several colonies.

The implication would not become explicit until the Constitution of 1787, but the Second Continental Congress, which assembled in May 1775, looked even more like the government of a single people than had the First. Fighting had already broken out in April between British troops and Massachusetts militiamen, and Congress at once took charge of the war and began the enlistment of a Continental Army. It sent envoys to France to seek foreign assistance. It opened American commerce to foreign nations. It advised the peoples of the several colonies to suppress all royal authority within their borders. And finally, after more than a year of warfare, it declared the independence of the United States.

Despite the boldness of these actions, the DECLARATION OF INDEPENDENCE itself betrayed the ambiguities that Americans felt about their own identity. It unequivocally put an end to royal authority (parliamentary authority had already been rejected) and consequently to all remaining connection with the people of Great Britain. But it was not quite clear whether the independence thus affirmed was of one people, or of several, or of both one and several.

While the preamble spoke of "one people" separating from another, the final affirmation was in the plural, declaring that "these United Colonies are, and of Right ought to be Free and Independent States." Yet in stating what constituted free and independent statehood, the Declaration specified only "power to levy war, conclude peace, contract alliances, establish commerce." These were all things, with the possible exception of the last, that had been done or would be done by the Congress.

But if the Congress sometimes acted like the government of a single free and independent state, the members still did not recognize the implication that they represented a single free and independent people. They did not consider their Declaration of Independence complete until it had been ratified by each of the separate states whose freedom and independence it declared. And when they tried to define their own authority, they found it difficult to reach agreement. ARTICLES OF CONFEDERATION, first drafted in 1776, were not ratified by the several states until 1781. The Articles entrusted Congress with the powers it was already exercising but declined to derive those powers from a single American people. The old local committees of the Association of 1774, tied directly to Congress, were now a thing of the past, and the enactments of Congress became mere recommendations, to be carried out by the various states as they saw fit.

Even before the Declaration of Independence, in response to the recommendation of the Congress, the states had begun to create governments resting solely on the purported will of the people within their existing borders. In every state a provisional government appeared, usually in the form of a provincial congress resembling the old colonial representative assembly. In most of the states, beginning with Virginia in June 1776, these provincial congresses drew up and adopted, without further reference to the people, constitutions defining the structure of their governments and stating limitations on governmental powers in bills of rights. In every case the constitution was thought or proclaimed to be in some way an act of the people who were to be governed under it, and therefore different from and superior to acts of representatives in a legislative assembly. But often the provincial congress that drafted a state constitution continued to act as the legislative body provided in it. Although a constitution might affirm its own superiority to ordinary legislation, the fact that it was created by legislative act rendered doubtful its immunity to alteration by the body that created it.

A similar doubt surrounded the principle, also enunciated in most of the constitutions, that (as in Virginia) "The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other." The several provincial congresses that drafted the constitutions inherited the aggressiveness of the colonial assemblies against executive and, to a lesser degree, judicial powers, which had hitherto rested in an overseas authority beyond their reach. In spite of the assertion of the separation of powers, and in spite of the fact that executives and judges would now derive authority solely from the people they governed, the state constitutions generally gave the lion's share of power in government to the representative assemblies.

The result was to bring out the shortcomings of the view of representation that had directed the colonists in their resistance to British taxation. For a decade the colonists had insisted that a representative must act only for the particular group of persons who chose him. They occasionally recognized but minimized his responsibility, as part of the governing body, to act for the whole people who were to be governed by the laws he helped to pass. Now the representative assemblies were suddenly presented with virtually the entire powers of government, which they shared only with a weak executive and judiciary and with a Continental Congress whose powers remained uncertain, despite Articles of Confederation that gave it large responsibilities without the means to perform them. Undeterred by any larger view of their functions, too many of the state assemblymen made a virtue of partiality to their particular constituents and ignored the long-range needs not only of their own state but of the United States.

The solution lay ahead in 1787. By 1776 the inherited ingredients of the settlement then adopted were in place. A rudimentary distinction between the constituent actions of a putative people and the actions of their government had been recognized, though not effectively implemented, in the state governments. All government officers were now selected directly or indirectly by popular choice, with their powers limited, at least nominally, by a reservation to the people of powers not specifically conveyed. And a national center of authority, not quite a government but nevertheless acting like a government, was in operation in the Continental Congress.

What was needed—and with every passing year after 1776 the need became more apparent—was a way to relieve popular government from the grip of short-sighted representative assemblies. Two political inventions filled the need. The first was the constitutional convention, an assembly without legislative powers, entrusted solely with the drafting of a constitution for submission to popular ratification, a constitution that could plausibly be seen as the embodiment of the popular will superior to the ordinary acts of representative assemblies. Massachusetts provided this invention in 1779, in the convention that drafted the state's first constitution. (See MASSACHUSETTS CONSTITUTION. )

The first invention made way for the second, which was

supplied by JAMES MADISON and his colleagues at Philadelphia in 1787. They invented the American people. It was, to be sure, an invention waiting to be made. It had been prefigured in the assumptions behind the Continental Association and the Declaration of Independence. But it reached fulfillment only in the making of the Constitution. By means of a national constitutional convention the men at Philadelphia built a national government that presumed and thus helped to create an American people, distinct from and superior to the peoples of the states.

The idea of popular SOVEREIGNTY was, as we have seen, an old one, but only occasionally had it dictated the formation of popular governments, governments in which all the officers owed their positions directly or indirectly to popular election. Though the idea surfaced powerfully in the England of the 1640s and 1650s, it eventuated there in a restored monarchy, and it won only partial recognition in England's Revolution of 1688. In the AMERICAN REVOLUTION it had seemingly found full expression in thirteen separate state governments, but by 1787 the actions of those governments threatened once again to discredit the whole idea. The signal achievement of the constitutional convention was expressed in the opening words of the document it produced: "We the People of the United States." The United States Constitution rescued popular sovereignty by extending it. It inaugurated both a new government and a new people.

EDMUND S. MORGAN
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Bibliography

ADAMS, WILLI PAUL 1980 *The First American Constitutions.* Chapel Hill: University of North Carolina Press.

BAILYN, BERNARD 1967 *The Ideological Origins of the American Revolution.* Cambridge, Mass.: Harvard University Press.

——— 1968 *The Origins of American Politics.* New York: Knopf.

FIGGIS, JOHN NEVILLE 1914 *The Divine Right of Kings.* Cambridge: At the University Press.

GREENE, JACK P. 1963 *The Quest for Power.* Chapel Hill: University of North Carolina Press.

KANTOROWICZ, ERNST H. 1957 *The King's Two Bodies.* Princeton: N.J.: Princeton University Press.

LABAREE, LEONARD W. 1930 *Royal Government in America.* New Haven, Conn.: Yale University Press.

MCILWAIN, CHARLES H. 1923 *The American Revolution.* New York: Macmillan.

MORGAN, EDMUND S. and MORGAN, HELEN M. 1953 *The Stamp Act Crisis.* Chapel Hill: University of North Carolina Press.

POCOCK, JOHN G. A. 1957 *The Ancient Constitution and the Feudal Law.* Cambridge: At the University Press.

RUSSELL, CONRAD 1979 *Parliaments and English Politics 1621–1629.* Oxford: Clarendon Press.

SCHUYLER, ROBERT L. 1929 *Parliament and the British Empire.* New York: Columbia University Press.

SKINNER, QUENTIN 1978 *The Foundations of Modern Political Thought.* Cambridge: At the University Press.

TUCKER, ROBERT W. and HENRICKSON, DAVID C. 1982 *The Fall of the First British Empire.* Baltimore: Johns Hopkins University Press.

## CONSTITUTIONAL HISTORY, 1776–1789

On July 4, 1776, King George III wrote in his diary, "Nothing of importance this day." When the news of the DECLARATION OF INDEPENDENCE reached him, he still could not know how wrong he had been. The political philosophy of SOCIAL COMPACT, NATURAL RIGHTS, and LIMITED GOVERNMENT that generated the Declaration of Independence also spurred the most important, creative, and dynamic constitutional achievements in history; the Declaration itself was merely the beginning. Within a mere thirteen years Americans invented or first institutionalized a bill of rights against all branches of government, the written CONSTITUTION, the JUDICIAL REVIEW, and a solution to the colonial problem (admitting TERRITORIES to the Union as states fully equal to the original thirteen). RELIGIOUS LIBERTY, the SEPARATION OF CHURCH AND STATE, political parties, SEPARATION OF POWERS, an acceptance of the principle of equality, and the conscious creation of a new nation were also among American institutional "firsts," although not all these initially appeared between 1776 and 1789. In that brief span of time, Americans created what are today the oldest major republic, political democracy, state constitution, and national constitution. These unparalleled American achievements derived not from originality in speculative theory but from the constructive application of old ideas, which Americans took so seriously that they constitutionally based their institutions of government on them.

From thirteen separate colonies the Second Continental Congress "brought forth a new nation," as ABRAHAM LINCOLN said. In May 1776, Congress urged all the colonies to suppress royal authority and adopt permanent governments. On that advice and in the midst of a war the colonies began to frame the world's first written constitutions. When Congress triggered the drafting of those constitutions, Virginia instructed its delegates to Congress to propose that Congress should declare "the United Colonies free and independent states." Neither Virginia nor Congress advocated state sovereignty. Congress's advice implied the erection of state governments with sovereign powers over domestic matters or "internal police."

On June 7, 1776, Congressman RICHARD HENRY LEE of Virginia introduced the resolution as instructed, and Congress appointed two committees, one to frame the docu-

ment that became the Declaration of Independence and the other to frame a plan of confederation—a constitution for a continental government. When Lincoln declared, "The Union is older than the States, and in fact created them as States," he meant that the Union (Congress) antedated the states. The Declaration of Independence, which stated that the colonies had become states, asserted the authority of the "United States of America, in General Congress, Assembled."

The "spirit of '76" tended to be strongly nationalistic. The members of Congress represented the states, of course, and acted on their instructions, but they acted for the new nation, and the form of government they thought proper in 1776 was a centralized one. As a matter of fact BENJAMIN FRANKLIN had proposed such a government on July 21, 1775, when he presented to Congress " ARTICLES OF CONFEDERATION and perpetual Union." Franklin urged a congressional government with an executive committee that would manage "general continental Business and Interests," conduct diplomacy, and administer finances. His plan empowered Congress to determine war and peace, exchange ambassadors, make foreign alliances, settle all disputes between the colonies, plant new colonies, and, in a sweeping omnibus clause, make laws for "the General Welfare" concerning matters on which individual colonies "cannot be competent," such as "our general Commerce," "general Currency," the establishment of a post office, and governance of "our Common Forces." Costs were to be paid from a common treasury supplied by each colony in proportion to its male inhabitants, but each colony would raise its share by taxing its inhabitants. Franklin provided for an easy amendment process: Congress recommended amendments that would become part of the Articles when approved by a majority of colonial assemblies. Franklin's plan of union seemed much too radical in July 1775, when independence was a year away and reconciliation with Britain on American terms was the object of the war. Congress simply tabled the Franklin plan.

As the war continued into 1776, nationalist sentiment strengthened. THOMAS PAINE's *Common Sense* called for American independence and "a Continental form of Government." Nationalism and centralism were twin causes. JOHN LANGDON of New Hampshire favored independence and "an American Constitution" that provided for appeals from every colony to a national congress "in everything of moment relative to governmental matters." Proposals for a centralized union became common by the spring of 1776, and these proposals, as the following representative samples suggest, tended to show democratic impulses. Nationalism and mitigated democracy, not nationalism and conservatism, were related. A New York newspaper urged the popular election of a national congress with a "superintending power" over the individual colonies as to "all commercial and Continental affairs," leaving to each colony control over its "internal policy." A populistic plan in a Connecticut newspaper recommended that the congress be empowered to govern "all matters of general concernment" and "every other thing proper and necessary" for the benefit of the whole, allowing the individual colonies only that which fell "within the territorial jurisdiction of a particular assembly." The "Spartacus" essays, which newspapers in New York, Philadelphia, and Portsmouth printed, left the state "cantons" their own legislatures but united all in a national congress with powers similar to those enumerated by Franklin, including a paramount power to "interfere" with a colony's "provincial affairs" whenever required by "the good of the continent." "Essex" reminded his readers that "the strength and happiness of America must be Continental, not Provincial, and that whatever appears to be for the good of the whole, must be submitted to by every Part." He advocated dividing the colonies into many smaller equal parts that would have equal representation in a powerful national congress chosen directly by the people, including taxpaying widows. Carter Braxton, a conservative Virginian, favored aristocratic controls over a congress that could not "interfere with the internal police or domestic concerns of any Colony. . . ."

Given the prevalence of such views in the first half of 1776, a representative committee of the Continental Congress probably mirrored public opinion when it framed a nationalist plan for confederation. On July 12, one month after the appointment of a thirteen-member committee (one from each state) to write a draft, JOHN DICKINSON of Pennsylvania, the committee chairman, presented to Congress a plan that borrowed heavily from Franklin's. The Committee of the Whole of Congress debated the Dickinson draft and adopted it on August 20 with few changes. Only one was significant. Dickinson had proposed that Congress be empowered to fix the western boundaries of states claiming territory to the Pacific coast and to form new states in the west. The Committee of the Whole, bending to the wishes of eight states with extensive western claims, omitted that provision from its revision of the Dickinson draft. That omission became a stumbling block.

On August 20 the Committee of the Whole reported the revised plan of union to Congress. The plan was similar to Franklin's, except that Congress had no power over "general commerce." But Congress, acting for the United States, was clearly paramount to the individual states. They were not even referred to as "states." Collectively they were "the United States of America"; otherwise they were styled "colonies" or "colony," terms not compatible with sovereignty, to which no reference was made. Indeed, the draft merely reserved to each colony "sole and exclusive Regulation and Government of its internal police, in

all matters that shall not interfere with the Articles of this Confederation." That crucial provision, Article III, making even "internal police" subordinate to congressional powers, highlighted the nationalist character of the proposed confederation.

The array of congressional powers included exclusive authority over war and peace, land and naval forces, treaties and alliances, prize cases, crimes on the high seas and navigable rivers, all disputes between states, coining money, borrowing on national credit, Indian affairs, post offices, weights and measures, and "the Defence and Welfare" of the United States. Congress also had power to appoint a Council of State and civil officers "necessary for managing the general Affairs of the United States." The Council of State, consisting of one member from each of the thirteen, was empowered to administer the United States government and execute its measures. Notwithstanding this embryonic executive branch, the government of the United States was congressional in character, consisting of a single house whose members were to be elected annually by the legislatures of the colonies. Each colony cast one vote, making each politically equal in Congress. On all important matters, the approval of nine colonies was required to pass legislation. Amendments to the Articles needed the unanimous approval of the legislatures of the various colonies, a provision that later proved to be crippling.

The Articles reported by the Committee of the Whole provoked dissension. States without western land claims opposed the omission of the provision in the Dickinson draft that gave Congress control over western lands. Large states opposed the principle of one vote for each state, preferring instead proportionate representation with each delegate voting. Sharp differences also emerged concerning the rule by which each state was to pay its quota to defray common expenses. Finally some congressmen feared the centralizing nature of the new government. Edward Rutledge of South Carolina did not like "the Idea of destroying all Provincial Distinctions and making every thing of the most minute kind bend to what they call the good of the whole. . . ." Rutledge resolved "to vest the Congress with no more Power than what is absolutely necessary." JAMES WILSON of Pennsylvania could declare that Congress represented "all the individuals of the states" rather than the states, but ROGER SHERMAN of Connecticut answered, "We are representatives of states, not individuals." That attitude would undo the nationalist "spirit of '76."

Because of disagreements and the urgency of prosecuting the war, Congress was unable to settle on a plan of union in 1776. By the spring of 1777 the nationalist momentum was spent. By then most of the states had adopted constitutions and had legitimate governments. Previously, provisional governments of local "congresses," "conventions," and committees had controlled the states and looked to the Continental Congress for leadership and approval. But the creation of legitimate state governments reinvigorated old provincial loyalties. Local politicians, whose careers were provincially oriented, feared a strong central government as a rival institution. Loyalists no longer participated in politics, local or national, depleting support for central control. By late April of 1777, when state sovereignty triumphed, only seventeen of the forty-eight congressmen who had been members of the Committee of the Whole that adopted the Dickinson draft remained in Congress. Most of the new congressmen opposed centralized government.

James Wilson, who was a congressman in 1776 and 1777, recalled what happened when he addressed the Constitutional Convention on June 8, 1787:

> Among the first sentiments expressed in the first Congs. one was that Virga. is no more. That Massts. is no more, that Pa. is no more c. We are now one nation of brethren. We must bury all local interests and distinctions. This language continued for some time. The tables at length began to turn. No sooner were the State Govts. formed than their jealousy & ambition began to display themselves. Each endeavored to cut a slice from the common loaf, to add to its own morsel, till at length the confederation became frittered down to the impotent condition in which it now stands. Review the progress of the articles of Confederation thro' Congress & compare the first and last draught of it [Farrand, ed., *Records*, I, 166–67].

The turning point occurred in late April 1777 when Thomas Burke of North Carolina turned his formidable localist opinions against the report of the Committee of the Whole. Its Article III, in his words, "expressed only a reservation [to the states] of the power of regulating the internal police, and consequently resigned every other power [to Congress]." Congress, he declared, sought even to interfere with the states' internal police and make its own powers "unlimited." Burke accordingly moved the following substitute for Article III, which became Article II of the Articles as finally adopted: "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States in Congress assembled." Burke's motion carried by the votes of eleven states, vitiating the powers of the national government recommended by the Committee of the Whole.

In the autumn of 1777 a Congress dominated by state-sovereignty advocates completed the plan of confederation. Those who favored proportionate representation in Congress with every member entitled to vote lost badly to those who favored voting by states with each state having one vote. Thereafter the populous wealthy states had no

stake in supporting a strong national government that could be controlled by the votes of lesser states. The power of Congress to negotiate commercial treaties effectively died when Congress agreed that under the Articles no treaty should violate the power of the states to impose tariff duties or prohibit imports and exports. The power of Congress to settle all disputes between states became merely a power to make recommendations. The permanent executive branch became a temporary committee with no powers except as delegated by the votes of nine states, the number required to adopt any major measure. Congress also agreed that it should not have power to fix the western boundaries of states claiming lands to the Pacific.

After the nationalist spurt of 1776 proved insufficient to produce the Articles, the states made the Confederation feckless. Even as colonies the states had been particularistic, jealous, and uncooperative. Centrifugal forces originating in diversity—of economics, geography, religion, class structure, and race—produced sectional, provincial, and local loyalties that could not be overcome during a war against the centralized powers claimed by Parliament. The controversy with Britain had produced passions and principles that made the Franklin and Dickinson drafts unviable. Not even these nationalist drafts empowered Congress to tax, although the principle of no TAXATION WITHOUT REPRESENTATION had become irrelevant as to Congress. Similarly, Congress as late as 1774 had "cheerfully" acknowledged Parliament's legitimate "regulation of our external commerce," but in 1776 Congress denied that Parliament had any authority over America, and by 1777 Americans were unwilling to grant their own central legislature powers they preferred their provincial assemblies to wield. Above all, most states refused to repose their trust in any central authority that a few large states might dominate, absent a constitutionally based principle of state equality.

Unanimous consent for amendments to the Articles proved to be too high a price to pay for acknowledging the "sovereignty" of each state, although that acknowledgment made Maryland capable of winning for the United States the creation of a national domain held in common for the benefit of all. Maryland also won the promise that new states would be admitted to the union on a principle of state equality. That prevented the development of a colonial problem from Atlantic to Pacific, and the NORTHWEST ORDINANCE OF 1787 was the Confederation's finest and most enduring achievement.

The Constitution of 1787 was unthinkable in 1776, impossible in 1781 or at any time before it was framed. The Articles were an indispensable transitional stage in the development of the Constitution. Not even the Constitution would have been ratified if its Framers had submitted it for approval to the state legislatures that kept Congress paralyzed in the 1780s. Congress, representing the United States, authorized the creation of the states and ended up, as it had begun, as their creature. It possessed expressly delegated powers with no means of enforcing them. That Congress lacked commerce and tax powers was a serious deficiency, but not nearly so crippling as its lack of sanctions and the failure of the states to abide by the Articles. Congress simply could not make anyone, except soldiers, do anything. It acted on the states, not on people. Only a national government that could execute its laws independently of the states could have survived.

The states flouted their constitutional obligations. The Articles obliged the states to "abide by the determinations of the United States, in Congress assembled," but there was no way to force the states to comply. The states were not sovereign, except as to their internal police and tax powers; rather, they behaved unconstitutionally. No foreign nation recognized the states as sovereign, because Congress possessed the external attributes of sovereignty especially as to FOREIGN AFFAIRS and WAR POWERS.

One of the extraordinary achievements of the Articles was the creation of a rudimentary federal system. It failed because its central government did not operate directly on individuals within its sphere of authority. The Confederation had no independent executive and judicial branches, because the need for them scarcely existed when Congress addressed its acts mainly to the states. The framers of the Articles distributed the powers of government with remarkable acumen, committing to Congress about all that belonged to a central government except, of course, taxation and commercial regulation, the two powers that Americans of the Revolutionary War believed to be part of state sovereignty. Even ALEXANDER HAMILTON, who in 1780 advocated that Congress should have "complete sovereignty," excepted "raising money by internal taxes."

Congress could requisition money from the states, but they did not pay their quotas. In 1781 Congress requisitioned $8,000,000 for the next year, but the states paid less than half a million. While the Articles lasted, the cumulative amount paid by all the states hardly exceeded what was required to pay the interest on the public debt for just one year.

Nationalists vainly sought to make the Articles more effective by both interpretation and amendment. Madison devised a theory of IMPLIED POWERS by which he squeezed out of the Articles congressional authority to use force if necessary against states that failed to fulfill their obligations. Congress refused to attempt coercion just as it refused to recommend an amendment authorizing its use. Congress did, however, charter a bank to control currency, but the opposition to the exercise of a power not expressly delegated remained so intense that the bank had to be

rechartered by a state. Congress vainly sought unanimous state consent for various amendments that would empower it to raise money from customs duties and to regulate commerce, foreign and domestic. In 1781 every state but Rhode Island approved an amendment empowering Congress to impose a five percent duty on all foreign imports; never again did an amendment to the Articles come so close to adoption. Only four states ratified an amendment authorizing a congressional embargo against the vessels of any nation with whom the United States had no treaty of commerce. Congress simply had no power to negotiate commercial treaties with nations such as Britain that discriminated against American shipping. Nor had Congress the power to prevent states from violating treaties with foreign nations. In 1786 JOHN JAY, Congress's secretary of foreign affairs, declared that not a day had passed since ratification of the 1783 treaty of peace without its violation by at least one state. Some states also discriminated against the trade of others. Madison likened New Jersey, caught between the ports of Philadelphia and New York, "to a cask tapped at both ends." More important, Congress failed even to recommend needed amendments. As early as 1784 Congress was so divided it defeated an amendment that would enable it to regulate commerce, foreign and domestic, and to levy duties on imports and exports. Often Congress could not function for lack of a quorum. The requisite number of states was present for only three days between October 1785 and April 1786. In 1786 Congress was unable to agree on any amendments for submission to the states.

The political condition of the United States during the 1780s stagnated partly because of the constitutional impotence of Congress and the unconstitutional conduct of the states. The controversy with Britain had taught that liberty and localism were congruent. The 1780s taught that excessive localism was incompatible with nationhood. The Confederation was a necessary point of midpassage. It bequeathed to the United States the fundamentals of a federal system, a national domain, and a solution to the colonial problem. Moreover the Articles contained several provisions that were antecedents of their counterparts in the Constitution of 1787: a free speech clause for congressmen and LEGISLATIVE IMMUNITY, a PRIVILEGES AND IMMUNITIES clause, a clause on the extradition of FUGITIVES FROM JUSTICE, a FULL FAITH AND CREDIT clause, and a clause validating United States debts. The Confederation also started an effective government bureaucracy when the Congress in 1781 created secretaries for foreign affairs, war, marine, and finance—precursors of an executive branch. When the new departments of that branch began to function in 1789, a corps of experienced administrators, trained under the Articles, staffed them. The courts established by Congress to decide prize and admiralty cases as well as boundary disputes foreshadowed a national judiciary. Except for enactment of the great Northwest Ordinance, however, the Congress of the Confederation was moribund by 1787. It had successfully prosecuted the war, made foreign alliances, established the national credit, framed the first constitution of the United States, negotiated a favorable treaty of peace, and created a national domain. Congress's accomplishments were monumental, especially during wartime, yet in the end it failed.

By contrast, state government flourished. Excepting Rhode Island and Connecticut, all the states adopted written constitutions during the war, eight in 1776. Madison exultantly wrote, "Nothing has excited more admiration in the world than the manner in which free governments have been established in America, for it was the first instance, from the creation of the world that free inhabitants have been seen deliberating on a form of government, and selection of such of their citizens as possessed their confidence to determine upon and give effect to it."

The VIRGINIA CONSTITUTION OF 1776, the first permanent state constitution, began with a Declaration of Rights adopted three weeks before the Declaration of Independence. No previous bill of rights had restrained all branches of government. Virginia's reflected the widespread belief that Americans had been thrown back into a state of nature from which they emerged by framing a social compact for their governance, reserving to themselves certain inherent or natural rights, including life, liberty, the enjoyment of property, and the pursuit of happiness. Virginia's declaration explicitly declared that as all power derived from the people, for whose benefit government existed, the people could reform or abolish government when it failed them. On the basis of this philosophy Virginia framed a constitution providing for a bicameral legislature, a governor, and a judicial system. The legislature elected a governor, who held office for one year, had no veto power, and was encumbered by an executive council. The legislature chose many important officials, including judges.

Some states followed the more democratic model of the PENNSYLVANIA CONSTITUTION OF 1776, others the ultraconservative one of Maryland, but all state constitutions prior to the MASSACHUSETTS CONSTITUTION OF 1780 were framed by legislatures, which in some states called themselves "conventions" or assemblies. Massachusetts deserves credit for having originated a new institution of government, a specially elected constitutional convention whose sole function was to frame the constitution and submit it for popular ratification. That procedure became the standard. Massachusetts's constitution, which is still operative, became the model American state constitution. The democratic procedure for making it fit the emerging theory that the sovereign people should be the source of the con-

stitution and authorize its framing by a constitutional convention, rather than the legislature to which the constitution is paramount. Massachusetts was also the first state to give more than lip service to the principle of separation of powers. Everywhere else, excepting perhaps New York, unbalanced government and legislative supremacy prevailed. Massachusetts established the precedent for a strong, popularly elected executive with a veto power; elsewhere the governor tended to be a ceremonial head who depended for his existence on the legislature.

The first state constitutions and related legislation introduced significant reforms. Most states expanded VOTING RIGHTS by reducing property qualifications, and a few, including Vermont (an independent state from 1777 to 1791), experimented with universal manhood suffrage. Many state constitutions provided for fairer apportionment of REPRESENTATION in the legislature. Every southern state either abolished its ESTABLISHMENT OF RELIGION or took major steps to achieve separation of church and state. Northern states either abolished SLAVERY or provided for its gradual ending. Criminal codes were made more humane. The confiscation of Loyalist estates and of crown lands, and the opening of a national domain westward to the Mississippi, led to a democratization of landholding, as did the abolition of feudal relics such as the law of primogeniture and entail. The pace of democratic change varied from state to state, and in some states it was nearly imperceptible, but the Revolution without doubt occasioned constitutional and political developments that had long been dammed up under the colonial system.

The theory that a constitution is supreme law encouraged the development of judicial review. Written constitutions with bills of rights and the emerging principle of separation of powers contributed to the same end. Before the Revolution appellate judges tended to be dependents of the executive branch; the Revolution promoted judicial independence. Most state constitutions provided for judicial tenure during good behavior rather than for a fixed term or the pleasure of the appointing power. Inevitably when Americans believed that a legislature had exceeded its authority they argued that it had acted unconstitutionally, and they turned to courts to enforce the supreme law as law. The dominant view, however, was that a court holding a statute unconstitutional insulted the sovereignty of the legislature, as the reactions to HOLMES V. WALTON (1780) and TREVETT V. WEEDEN (1786) showed. COMMONWEALTH V. CATON (1782) was probably the first case in which a state judge declared that a court had power to hold a statute unconstitutional, though the court in that case sustained the act before it. In RUTGERS V. WADDINGTON (1784) Alexander Hamilton as counsel argued that a state act violating a treaty was unconstitutional, but the court declared that the judicial power advocated by counsel was "subversive of all government." Counsel in *Trevett* also contended that the court should void a state act. Arguments of counsel do not create precedents but can reveal the emergence of a new idea. Any American would have agreed that an act against a constitution was void; although few would have agreed that courts have the final power to decide matters of constitutionality, that idea was spreading. The TEN POUND ACT CASES (1786) were the first in which an American court held a state enactment void, and that New Hampshire precedent was succeeded by a similar decision in the North Carolina case of BAYARD V. SINGLETON (1787). The principle of MARBURY V. MADISON (1803) thus originated at a state level before the framing of the federal Constitution.

The Constitution originated in the drive for a strong national government that preceded the framing of the Articles of Confederation. The "critical period" of 1781–1787 intensified that drive, but it began well before the defects of the Articles expanded the ranks of the nationalists. The weaknesses of the United States in international affairs, its inability to enforce the peace treaty, its financial crisis, its helplessness during SHAYS' REBELLION, and its general incapacity to govern resulted in many proposals—in Congress, in the press, and even in some states—for national powers to negotiate commercial treaties, regulate the nation's commerce, and check state policies that adversely affected creditor interests and impeded economic growth. Five states met at the Annapolis Convention in 1786, ostensibly to discuss a "uniform system" of regulating commerce, but those who masterminded the meeting had a much larger agenda in mind—as Madison put it, a "plenipotentiary Convention for amending the Confederation."

Hamilton had called for a "convention of all the states" as early as 1780, before the Articles were ratified, to form a government worthy of the nation. Even men who defended state sovereignty conceded the necessity of a convention by 1787. William Grayson admitted that "the present Confederation is utterly inefficient and that if it remains much longer in its present State of imbecility we shall be one of the most contemptible Nations on the face of the earth. . . ." LUTHER MARTIN admitted that Congress was "weak, contemptibly weak," and Richard Henry Lee believed that no government "short of force, will answer." "Do you not think," he asked GEORGE MASON, "that it ought to be declared . . . that any State act of legislation that shall contravene, or oppose, the authorized acts of Congress, or interfere with the expressed rights of that body, shall be *ipso facto* void, and of no force whatsoever?" Many leaders, like THOMAS JEFFERSON, advocated executive and judicial branches for the national government with "an appeal from state judicatures to a federal court in all cases where the act of Confederation controlled the question. . . ."

RUFUS KING, who also promoted a "vigorous Executive," thought that the needed power of Congress to regulate all commerce "can never be well exercised without a Federal Judicial." A consensus was developing.

The Annapolis Convention exploited and nurtured that consensus when it recommended to all the states and to Congress that a constitutional convention to "meet at Philadelphia on the second Monday in May next (1787), to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union. . . ." Several states, including powerful Virginia and Pennsylvania, chose delegates for the Philadelphia convention, forcing Congress to save face on February 21, 1787, by adopting a motion in accord with the Annapolis recommendation, although Congress declared that the "sole and express purpose" of the convention was "revising the articles of confederation."

The CONSTITUTIONAL CONVENTION OF 1787, which formally organized itself on May 25, lasted almost four months, yet reached its most crucial decision almost at the outset. The first order of business was the nationalistic VIRGINIA PLAN (May 29), and the first vote of the Convention, acting as a Committee of the Whole, was the adoption of a resolution "that a *national* Government ought to be established consisting of a *supreme* legislative, Executive and Judiciary" (May 30). Thus the Convention immediately agreed on abandoning, rather than amending, the Articles; on writing a new Constitution; on creating a national government that would be supreme; and on having it consist of three branches.

The radical character of this early decision may be best understood by comparing it with the Articles. The Articles failed mainly because there was no way to force the states to fulfill their obligations or to obey the exercise of such powers as Congress did possess. "The great and radical vice in the construction of the existing Confederation," said Alexander Hamilton, "is the principle of legislation for states or governments, in their corporate capacities, and as contradistinguished from the individuals of which they consist." The Convention remedied that vital defect in the Articles, as George Mason pointed out (May 30), by agreeing on a government that "could directly operate on individuals." Thus the framers solved the critical problem of sanctions by establishing a national government that was independent of the states.

On the next day, May 31, the Committee of the Whole made other crucial decisions with little or no debate. One, reflecting the nationalist bias of the Convention, was the decision to establish a bicameral system whose larger house was to be elected directly by the people rather than by the state legislatures. Mason, no less, explained, "Under the existing confederacy, Congress represent the States not the people of the States; their acts operate on the States, not on the individuals. The case will be changed in the new plan of Government. The people will be represented; they ought therefore to choose the Representatives." Another decision of May 31 was to vest in the Congress the sweeping and undefined power, recommended by the Virginia Plan, "to legislate in all cases to which the separate States are incompetent; or in which the harmony of the U.S. may be interrupted by the exercise of individual [state] legislation; to negative all laws passed by the several States contravening in the opinion of the National Legislature the articles of Union, or any treaties subsisting under the authority of the Union." Not a state voted "nay" to this exceptionally nationalistic proposition. Nor did any state oppose the decision of the next day to create a national executive with similarly broad, undefined powers.

After deliberating for two weeks, the Committee of the Whole presented the Convention with its recommendations, essentially the adoption of the Virginia Plan. Not surprisingly, several of the delegates had second thoughts about the hasty decisions that had been made. ELBRIDGE GERRY reiterated "that it was necessary to consider what the people would approve." Scrapping the Articles contrary to instructions and failing to provide for state equality in the system of representation provoked a reconsideration along lines described by WILLIAM PATERSON of New Jersey as "federal" in contradistinction to "national." Yet injured state pride was a greater cause of dissension than were the powers proposed for the national government. Some delegates were alarmed, not because of an excessive centralization of powers in the national government but because of the excessive advantages given to the largest states at the expense of the others. Three states—Virginia, Massachusetts, and Pennsylvania—had forty-five percent of the white population in the country. Under the proposed scheme of proportionate representation, the small states feared that the large ones would dominate the others by controlling the national government.

On June 15, therefore, Paterson submitted for the Convention's consideration a substitute plan. It was a small states plan rather than a STATES' RIGHTS one, for it too had a strong nationalist orientation. Contemplating a revision, rather than a scrapping, of the Articles, it retained the unicameral Congress with its equality of state representation, thus appeasing the small states. But the plan vested in Congress one of the two critical powers previously lacking: "to pass Acts for the regulation of trade and commerce," foreign and interstate. The other, the power of taxation, appeared only in a stunted form; Congress was to be authorized to levy duties on imports and to pass

stamp tax acts. Except for its failure to grant full tax powers, the PATERSON PLAN proposed the same powers for the national legislature as the finished Constitution. The Plan also contained the germ of the national SUPREMACY CLAUSE of the Constitution, Article Six, by providing that acts of Congress and United States treaties "shall be the supreme law of the respective States . . . and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding." The clause also provided for a federal judiciary with extensive jurisdiction and for an executive who could muster the military of the states to compel state obedience to the supreme law. Compulsion of states was unrealistic and unnecessary. Paterson himself declared that the creation of a distinct executive and judiciary meant that the government of the Union could "be exerted on individuals."

Despite its nationalist features, the Paterson Plan retained a unicameral legislature, in which the states remained equal, and the requisition system of rising a revenue, which had failed. "You see the consequence of pushing things too far," said John Dickinson of Delaware to Madison. "Some of the members from the small States wish for two branches in the General Legislature and are friends to a good National Government; but we would sooner submit to a foreign power than submit to be deprived of an equality of suffrage in both branches of the Legislature, and thereby be thrown under the domination of the large states." Only a very few dissidents were irreconcilably opposed to "a good National Government." Most of the dissidents were men like Dickinson and Paterson, "friends to a good National Government" if it preserved a wider scope for small state authority and influence.

When Paterson submitted his plan on June 15, the Convention agreed that to give it "a fair deliberation" it should be referred to the Committee of the Whole and that "in order to place the two plans in due comparison, the other should be recommitted." After debating the two plans, the Committee of the Whole voted in favor of reaffirming the original recommendations based on the Virginia Plan "as preferable to those of Mr. Paterson." Only three weeks after their deliberations, had begun the Framers decisively agreed, for the second time, on a strong, independent national government that would operate directly on individuals without the involvement of states.

But the objections of the small states had not yet been satisfied. On the next day, Connecticut, which had voted against the Paterson Plan, proposed the famous GREAT COMPROMISE: proportionate representation in one house, "provided each State had an equal voice in the other." On that latter point the Convention nearly broke up, so intense was the conflict and deep the division. The irreconcilables in this instance were the leaders of the large-state nationalist faction, otherwise the most constructive and influential members of the Convention: Madison and James Wilson. After several weeks of debate and deadlock, the Convention on July 16 narrowly voted for the compromise. With ten states present, five supported the compromise, four opposed (including Virginia and Pennsylvania), and Massachusetts was divided. The compromise saved small-state prestige and saved the Convention from failure.

Thereafter consensus on fundamentals was restored, with Connecticut, New Jersey, and Delaware becoming fervent supporters of Madison and Wilson. A week later, for example, there was a motion that each state should be represented by two senators who would "vote per capita," that is, as individuals. Luther Martin of Maryland protested that per capita voting conflicted with the very idea of "the States being represented," yet the motion carried, with no further debate, 9–1.

On many matters of structure, mechanics, and detail there were angry disagreements, but agreement prevailed on the essentials. The office of the presidency is a good illustration. That there should be a powerful chief executive provoked no great debate, but the Convention almost broke up, for the second time, on the method of electing him. Some matters of detail occasioned practically no disagreement and revealed the nationalist consensus. Mason, of all people, made the motion that one qualification of congressmen should be "citizenship of the United States," and no one disagreed. Under the Articles of Confederation, there was only state citizenship; that there should be a concept of national citizenship seemed natural to men framing a constitution for a nation. Even more a revelation of the nationalist consensus was the fact that three of the most crucial provisions of the Constitution—the taxing power, the NECESSARY AND PROPER CLAUSE, and the supremacy clause—were casually and unanimously accepted without debate.

Until midway during its sessions, the Convention did not take the trouble to define with care the distribution of power between the national government and the states, although the very nature of the "federal" system depended on that distribution. Consensus on fundamentals once again provides the explanation. There would be no difficulty in making that distribution; and, the framers had taken out insurance, because at the very outset, they had endorsed the provision of the Virginia Plan vesting broad, undefined powers in a national legislature that would act on individuals. Some byplay of July 17 is illuminating. ROGER SHERMAN of Connecticut thought that the line drawn between the powers of Congress and those left to the states was so vague that national legislation might "interfere . . . in any matters of internal police which respect the Government of such States only, and wherein the gen-

eral welfare of the United States is not concerned." His motion to protect the "internal police" of the states brought no debaters to his side and was summarily defeated; only Maryland supported Connecticut. Immediately after, another small-state delegate, GUNNING BEDFORD of Delaware, shocked even EDMUND RANDOLPH of Virginia, who had presented the Virginia Plan, by a motion to extend the powers of Congress by vesting authority "to legislate in all cases for the general interest of the Union." Randolph observed, "This is a formidable idea indeed. It involves the power of violating all the laws and constitution of the States, of intermeddling with their police." Yet the motion passed.

On July 26 the Convention adjourned until August 6 to allow a Committee on Detail to frame a "constitution conformable to the Resolutions passed by the Convention." Generously construing its charge, the committee acted as a miniature convention and introduced a number of significant changes. One was the explicit enumeration of the powers of Congress to replace the vague, omnibus provisions adopted previously by the Convention. Although enumerated, these powers were liberally expressed and formidable in their array. The committee made specific the spirit and intent of the Convention. Significantly the first enumerated power was that of taxation and the second that of regulating commerce among the states and with foreign nations: the two principal powers that had been withheld from Congress by the Articles. When the Convention voted on the provision that Congress "shall have the power to lay and collect taxes, duties, imposts and excises," the states were unanimous and only one delegate, Elbridge Gerry, was opposed. When the Convention next turned to the commerce power, there was no discussion and even Gerry voted affirmatively.

Notwithstanding its enumeration of the legislative powers, all of which the Convention accepted, the Committee on Detail added an omnibus clause that has served as an ever expanding source of national authority: "And to make all laws that shall be necessary and proper for carrying into execution the foregoing powers." The Convention agreed to that clause without a single dissenting vote by any state or delegate. The history of the great supremacy clause, Article Six, shows a similar consensus. Without debate the Convention adopted the supremacy clause, and not a single state or delegate voted nay. Finally, Article One, section 10, imposing restrictions on the economic powers of the states with respect to paper money, ex post facto laws, bills of credit, and contracts also reflected a consensus in the Convention. In sum, consensus, rather than compromise, was the most significant feature of the Convention, outweighing in importance the various compromises that occupied most of the time of the delegates.

But why was there such a consensus? The obvious answer (apart from the fact that opponents either stayed away or walked out) is the best: experience had proved that the nationalist constitutional position was right. If the United States was to survive and flourish, a strong national government had to be established. The Framers of the Constitution were accountable to public opinion; the Convention was a representative body. That its members were prosperous, well-educated political leaders made them no less representative than Congress. The state legislatures, which elected the members of the Convention, were the most unlikely instruments for thwarting the popular will. The Framers, far from being able to do as they pleased, were not free to promulgate the Constitution. Although they adroitly arranged for its ratification by nine state ratifying conventions rather than by all state legislatures, they could not present a plan that the people of the states would not tolerate. They could not control the membership of those state ratifying conventions. They could not even be sure that the existing Congress would submit the Constitution to the states for ratification, let alone for ratification by state conventions that had to be specially elected. If the Framers got too far astray from public opinion, their work would have been wasted. The consensus in the Convention coincided with an emerging consensus in the country that recaptured the nationalist spirit of '76. That the Union had to be strengthened was an almost universal American belief.

For its time the Constitution was a remarkably democratic document framed by democratic methods. Some historians have contended that the Convention's scrapping of the Articles and the ratification process were revolutionary acts which if performed by a Napoleon would be pronounced a coup d'état. But the procedure of the Articles for constitutional amendment was not democratic, because it allowed Rhode Island, with one-sixtieth of the nation's population, to exercise a veto power. The Convention sent its Constitution to the lawfully existing government, the Congress of the Confederation, for submission to the states, and Congress, which could have censured the Convention for exceeding its authority, freely complied—and thereby exceeded its own authority under the Articles! A coup d'état ordinarily lacks the deliberation and consent that marked the making of the Constitution and is characterized by a military element that was wholly lacking in 1787. A Convention elected by the state legislatures and consisting of many of the foremost leaders of their time deliberated for almost four months. Its members included many opponents of the finished scheme. The nation knew the Convention was considering changes in the government. The proposed Constitution was made public, and voters in every state were asked to choose delegates to vote for or against it after open debate. The use of state ratifying conventions fit the theory that a

new fundamental law was being adopted and, therefore, conventions were proper for the task.

The Constitution guaranteed to each state a republican or representative form of government and fixed no property or religious qualifications on the right to vote or hold office, at a time when such qualifications were common in the states. By leaving voting qualifications to the states the Constitution implicitly accepted such qualifications but imposed none. The Convention, like the Albany Congress of 1754, the Stamp Act Congress, the Continental Congresses, and the Congresses of the Confederation, had been chosen by state (or colonial) legislatures, but the Constitution created a Congress whose lower house was popularly elected. When only three states directly elected their chief executive officer, the Constitution provided for the indirect election of the President by an ELECTORAL COLLEGE that originated in the people and is still operative. The Constitution's system of separation of powers and elaborate CHECKS AND BALANCES was not intended to refine out popular influence on government but to protect liberty; the Framers divided, distributed, and limited powers to prevent one branch, faction, interest, or section from becoming too powerful. Checks and balances were not undemocratic, and the Federalists were hard pressed not to apologize for checks and balances but to convince the Anti-Federalists, who wanted far more checks and balances, that the Constitution had enough. Although the Framers were not democrats in a modern sense, their opponents were even less democratic. Those opponents sought to capitalize on the lack of a BILL OF RIGHTS, and RATIFICATION OF THE CONSTITUTION became possible only because leading Federalists committed themselves to amendments as soon as the new government went into operation. At that time, however, Anti-Federalists opposed a Bill of Rights because it would allay popular fears of the new government, ending the chance for state sovereignty amendments.

Although the Framers self-consciously refrained from referring to slavery in the Constitution, it recognized slavery, the most undemocratic of all institutions. That recognition was a grudging but necessary price of Union. The THREE-FIFTHS CLAUSE of Article I provided for counting three-fifths of the total number of slaves as part of the population of a state in the apportionment of REPRESENTATION and DIRECT TAXATION. Article IV, section 2, provided for rendition of fugitive slaves to the slaveholder upon his claim. On the other hand, Article I, section 9, permitted Congress to abolish the slave trade in twenty years. Most delegates, including many from slaveholding states, would have preferred a Constitution untainted by slavery; but Southern votes for ratification required recognition of slavery. By choosing a Union with slavery, the Convention deferred the day of reckoning.

The Constitution is basically a political document. Modern scholarship has completely discredited the once popular view, associated with CHARLES BEARD, that the Constitution was undemocratically made to advance the economic interests of personalty groups, chiefly creditors. The largest public creditor at the Convention was Elbridge Gerry, who refused to sign the Constitution and opposed its ratification, and the largest private creditor was George Mason who did likewise. Indeed, seven men who either quit the Convention in disgust or refused to sign the Constitution held public securities that were worth over twice the holdings of the thirty-nine men who signed the Constitution. The most influential Framers, among them Madison, Wilson, Paterson, Dickinson, and Gouverneur Morris, owned no securities. Others, like Washington, who acted out of patriotism, not profit, held trifling amounts. Eighteen members of the Convention were either debtors or held property that depreciated after the new government became operative. On crucial issues at the Convention, as in the state ratifying conventions, the dividing line between groups for and against the Constitution was not economic, not between realty and personalty, or debtors and creditors, or town and frontier. The restrictions of Article I, section 10, on the economic powers of the states were calculated to protect creditor interests and promote business stability, but those restrictions were not undemocratic; if impairing the obligations of contracts or emitting bills of credit and paper money were democratic hallmarks, the Constitution left Congress free to be democratic. The interest groups for and against the Constitution were substantially similar. Economic interests did influence the voting on ratification, but no simple explanation that ignores differences between states and even within states will suffice, and many noneconomic influences were also at work. In the end the Constitution was framed and ratified because most voters came to share the vision held by Franklin in 1775 and Dickinson in 1776; those two, although antagonists in Pennsylvania politics, understood for quite different reasons that a strong central government was indispensable for nationhood.

LEONARD W. LEVY
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Bibliography

ADAMS, WILLI PAUL 1980 *The First American Constitutions.* Chapel Hill: University of North Carolina Press.

BEARD, CHARLES 1935 *An Economic Interpretation of the Constitution of the United States.* New York: Macmillan.

BROWN, REOBERT E. 1956 *Charles Beard and the Constitution: A Critical Analysis of "An Economic Interpretation of the Constitution."* Princeton, N.J.: Princeton University Press.

BURNETT, EDMUND C. 1941 *The Continental Congress.* New York: Macmillan.

CROSSKEY, WILLIAM W. and JEFFREY, WILLIAM, JR. 1980 *Politics and the Constitution in the History of the United States.* Volume III: "The Political Background of the Federal Convention." Chicago: University of Chicago Press.

FERRAND, MAX, ed. 1937 (1966) *The Records of the Federal Convention of 1787.* New Haven: Yale University Press.

JENSEN, MERRILL 1940 *The Articles of Confederation.* Madison: University of Wisconsin Press.

KENYON, CECILIA, ed. 1966 *The Antifederalists.* Indianapolis: Bobbs-Merrill.

MCDONALD, FORREST 1958 *We the People: The Economic Origins of the Constitution.* Chicago: University of Chicago Press.

MCLAUGHLIN, ANDREW C. 1905 *The Confederation and the Constitution, 1783–1789.* New York: Harper & Brothers.

MURPHY, WILLIAM P. 1967 *The Triumph of Nationalism: State Sovereignty, the Founding Fathers, and the Triumph of the Constitution.* Chicago: Quadrangle Books.

RACOVE, JACK N. 1979 *The Beginnings of National Politics: An Interpretation of the Continental Congress.* New York: Knopf.

WARREN, CHARLES 1928 *The Making of the Constitution.* Boston: Little, Brown.

## CONSTITUTIONAL HISTORY, 1789–1801

GEORGE WASHINGTON was inaugurated the first President of the United States on April 30, 1789, in New York City. The First Congress, having been elected in February, was already at work. Most of the members were supporters of the Constitution. Fifty-four of them had sat either in the CONSTITUTIONAL CONVENTION or in one of the state ratifying conventions; only seven were Anti-Federalists. A new government had been established. But in 1789 it was only a blueprint. The first business of the President and Congress was to breathe life into the Constitution. For a document of some 5,000 words, the Constitution was remarkably explicit and complete. Yet it left a great deal to the discretion and decision of the men entrusted with its care. They, too, were "founding fathers," for they transformed words engrossed on parchment into living institutions and defined the terms of debate on the Constitution.

JAMES MADISON was the Federalist leader in the House of Representatives, where most of the formative legislation of the new government originated. Among the first statutes were those establishing the three executive departments: state, treasury, and war. Madison wrote into his bill for the department of state a provision authorizing the President to remove the department head, thereby precipitating the first congressional debate over interpretation of the Constitution. The document was clear on the President's power to appoint, with the advice and consent of the Senate, but silent on his power to remove executive officers. Removal being the reverse of appointment, some congressmen argued that it should follow the same course. But Madison contended, successfully, that the President's responsibility to see that the laws were faithfully executed necessarily included the removal power. The action of the House set an enduring precedent. Thus it was that in the first year of the new government an UNWRITTEN CONSTITUTION, unknown to the Framers, grew up alongside the written constitution. (See APPOINTING AND REMOVAL POWER.)

Article II, it was sometimes said, had been framed with General Washington in mind; and so great was the confidence in him that Congress showed little jealousy of the chief executive. The act creating the treasury department, however, made its head responsible to Congress as well as to the President. This was recognition that "the power of the purse" was fundamentally a legislative power, and therefore the secretary of the treasury must answer to Congress in financial matters.

The JUDICIARY ACT OF 1789, which gave life to Article III, originated in the Senate. The act provided for an elaborate system of federal courts, created the office of ATTORNEY GENERAL, and in Section 25 authorized the Supreme Court to review on APPEAL decisions of state courts concerning questions of federal law involving the United States Constitution and the laws and treaties made under it. None of this had been settled in the Constitution itself, though Federalists said that Article III together with the SUPREMACY CLAUSE of Article VI implicitly sanctioned Section 25.

The Federalists, with Madison in the lead, kept the promise made during the ratification campaign to add a BILL OF RIGHTS to the Constitution. Even before North Carolina and Rhode Island entered the new union, Congress approved twelve amendments and sent them to the states. Ten were ratified and on December 15, 1791, became part of the Constitution. In the founding of the nation the Bill of Rights was important less because it secured fundamental rights and liberties against the national government, which was without DELEGATED POWER in this sphere, than because it strengthened public confidence in the government without impairing its powers as many Anti-Federalists had wished.

The principal executive offices were filled by THOMAS JEFFERSON at state, ALEXANDER HAMILTON in the treasury, Henry Knox in the war department, and EDMUND RANDOLPH as the part-time attorney general. The unity of the executive was one of the claims made for it in THE FEDERALIST. Washington worked closely with his subordinates, and depended on them for initiative and advice, but there was never any doubt that the executive power belonged

exclusively to him. The Constitution made no provision for a "cabinet," nor was one contemplated at first. The President seemed to think, on the basis of the ADVICE AND CONSENT clause, that the Senate was meant to function as an advisory council. In August he appeared personally in the Senate to ask its advice on a proposed treaty with an Indian tribe. But the process proved awkward and cumbersome. It was not repeated. The President, instead, conducted his business with the Senate in writing, and met his need for collective consultation and advice, particularly in FOREIGN AFFAIRS, through the development of the cabinet. By 1793 it was an established institution. There were suggestions in the First Congress of a movement toward a generalized ministerial responsibility on the model of the treasury act; but this did not materialize. On the whole, the first presidency decisively enforced the theory of SEPARATION OF POWERS, associated with congressional government, rather than the ministerial responsibility characteristic of parliamentary government. In 1791 the President exercised the VETO POWER for the first time. The veto was potentially a means for controlling legislation, but Washington did not use it in that fashion (he vetoed only one other measure in eight years), and in the first forty years of the government Presidents used the veto sparingly.

The most important political and constitutional issues of Washington's first administration arose out of Hamilton's financial program. Exploiting his special relationship with Congress—conceiving of himself, indeed, as a kind of prime minister—Hamilton submitted a series of reports to Congress recommending measures to put the country's fiscal house in order, strengthen the government by appealing to the cupidity of the moneyed class, and stimulate the commercial and manufacturing sectors of the economy. His plan to fund the national debt at face value raised questions of equity between debtor and creditor interests but did not present a constitutional issue. The expectation of funding on the part of creditor groups had, of course, been a vital source of Federalist support for the Constitution. But Hamilton's plan also called for the assumption of the state debts. This proposal surprised many and aroused intense opposition in Congress, especially among Southerners sensitive to Anti-Federalist fears of undue concentration of power in the national government. Madison opposed Hamilton's plan, though on other grounds, and in doing so disclosed a division in the Federalist ranks on the direction of the new government. He was joined by his Virginia friend, Jefferson, who had just taken up his duties as secretary of state in the spring of 1790. Both were disposed to be conciliatory on this issue, however, and entered into a sectional bargain with Hamilton that would fix the permanent seat of government on the Potomac in exchange for the necessary southern votes to secure passage of the assumption bill. Still, the compromise failed to quiet Anti-Federalist fears. In December the Virginia legislature adopted a series of resolutions condemning the assumption of state debts as inimical to federal and republican institutions and pointedly questioning the constitutionality of the measure. Hamilton responded angrily. "This," he said, "is the first symptom of a spirit which must either be killed, or will kill the Constitution."

The constitutional question was brought to the fore a few months later on the bill to charter the BANK OF THE UNITED STATES. A national bank, as conceived and proposed by Hamilton, would function as the financial arm of the government and multiply the active capital of the country by mounting a large paper circulation. Because three-fourths of the initial bank capital would come in the form of public securities—securities issued to fund the debt—the institution was obviously an integral part of the funding system and would directly benefit the same creditor class. Madison vigorously opposed the bill in the House, less on grounds of policy than on grounds of unconstitutionality. The power to incorporate a bank was not among the powers delegated to Congress, nor could it be considered NECESSARY AND PROPER to execute those powers. But Congress adopted the bill and sent it to the President. Uncertain whether to sign or return it, Washington first sought the attorney general's opinion, which was adverse, and then requested Jefferson's. The secretary of state agreed with Madison and offered an even more emphatically STRICT CONSTRUCTION of the Constitution. The government was one of strictly delegated powers, as declared in the TENTH AMENDMENT still in the course of ratification. "To take a single step beyond the boundaries thus specifically drawn around the powers of Congress," Jefferson warned, "is to take possession of a boundless field of power, no longer susceptible to definition." To these objections Hamilton replied in a powerful opinion founded on the doctrine of IMPLIED POWERS, "Every power vested in a government is in its nature *sovereign*, and included, by *force* of the *term*, a right to employ all *means* requisite and fairly applicable to the attainment of the *ends* of such power, and which are not precluded by restrictions and exceptions specified in the Constitution ..." (italics in original). The utility of a national bank in the execution of powers to tax, borrow money, and regulate commerce could not be denied. It was decisive in Hamilton's judgment. Washington concurred, and signed the Bank Bill into law.

In his Report on Manufactures, presented to the Second Congress, Hamilton extended his nationalist program by way of the GENERAL WELFARE CLAUSE. Believing that extensive domestic manufactures were necessary to the wealth and welfare of the nation, Hamilton proposed a comprehensive system of aid and encouragement—tar-

iffs, bounties, inspections, export controls, drawbacks—which he justified under the power to provide for the general welfare. No legislation resulted from the report, but it produced consternation in opposition ranks. "If not only the *means*, but the *objects* [of the government] are unlimited," Madison wrote, "The parchment had better be thrown into the fire at once" (italics in original). Virginia's two senators introduced constitutional amendments to limit the application of the clause to the ENUMERATED POWERS and deny the power of Congress to charter corporations.

Although the widening debate took its shape from the constitutional question, it involved much more. It involved the conflict of economic interests: debtors and creditors, landed property and fluid capital, the mass of people engaged in agriculture, and the enterprising class of merchants, bankers, and manufacturers. The fact that the former tended to be concentrated in the South, the latter in the Northeast, particularly in the coastal cities, gave the conflict a sectional character as well. The debate also involved competing strategies of economic development in the new nation, as well as contrasting ideas of the nature of freedom, the Union, and republican government. To an extent, certainly, the conflict was epitomized in the clash between the leading cabinet secretaries, Jefferson and Hamilton, who increasingly appeared as the protagonists of opposing doctrines and parties in the public eye. One despised, the other idolized governance. One located the strength of the republic in the diffuse energies of a free society, the other in the consolidation of the government's power. One believed that private interest corrupted public good, the other conscripted private interest for public benefit. One viewed the Constitution as a superintending rule of political action, the other, as a point of departure for heroic statesmanship. In the balance between authority and liberty, Hamilton was an apologist for the former, Jefferson for the latter. Hamilton feared most of the ignorance and turbulence of the people, while Jefferson preached "trust the people" and feared rulers independent of them.

The division on foreign policy deepened the division on domestic policy. Jefferson, Madison, and those who began to call themselves Republicans opposed British power and influence and openly championed the French Revolution. Hamilton and the Federalists, on the other hand, relied upon British trade, credit, and power to nurture American development; they feared the contagion of French ideas. The controversy over foreign policy assumed a constitutional dimension after Britain and France went to war in 1793. President Washington issued a proclamation pledging "a conduct friendly and impartial" toward the belligerents and warning citizens against hostile acts. Jefferson opposed this PROCLAMATION OF NEUTRALITY, as it came to be known, principally because it tended to defeat his foreign policy objectives to oppose Britain and support France. As an ally, France had a right to expect friendship from the United States; Britain, on the other hand, might have been made to pay a price for American neutrality, as in recognition of "free ships make free goods" and related guarantees of neutral rights. Viewing a declaration of neutrality as the negative side of a DECLARATION OF WAR, Jefferson also held that the proclamation invaded the authority of Congress. The popular reception of the new French minister to the United States, Edmond Genêt, fueled criticism of the proclamation. Genêt himself took advantage of this sentiment by arming privateers in American ports and issuing military commissions to American citizens. Hamilton, under the pseudonym "Pacificus," wrote a series of newspaper articles in defense of the presidential proclamation. Broadly construing Article II, Hamilton maintained that all executive power is vested in the President unless specifically qualified or withheld. The power to declare war belonged to Congress, of course, but did not preclude unilateral actions by the President bearing on the exercise of that power. To Republicans such a power looked suspiciously like the British royal prerogative in foreign affairs. Taking up his pen in reply, Madison, as "Helvidius," argued that all matters touching on the WAR POWER are necessarily legislative; the executive, therefore, cannot initiate a course of action that, in effect, confronts Congress with a *fait accompli*. Whatever the abstract merits of Madison's argument, it gave too little weight to realities in the conduct of foreign affairs, which inevitably favored the executive.

In the absence of statute, executive officers decided difficult questions of neutrality as they arose. Thus it was that the cabinet became a permanent institution. Jefferson and Hamilton were usually at odds, causing many split decisions. On July 18, 1793, the officers submitted to the Supreme Court a list of twenty-nine questions about international law. The Justices declined to rule, however, thereby setting a precedent against ADVISORY OPINIONS. The cabinet hammered out its own ADMINISTRATIVE LAW of neutrality, which prevailed until Congress convened and enacted the Neutrality Act of 1794.

Long before that the firebrand French minister had been recalled and Jefferson had retired from the government, ensuring Hamilton the same ascendancy in foreign affairs he had earlier enjoyed in domestic affairs. The upshot was JAY'S TREATY, negotiated in London in November 1794 and ratified by the Senate six months later. The treaty preserved peace with Britain but, in Republican opinion, at the cost of submission to British maritime power and risk of war with France. Like every great issue of Washington's presidency, the treaty caused significant constitutional debate. Because some provisions required

appropriations to carry them into effect, the treaty came under the scrutiny of the House of Representatives. In this connection a Republican majority demanded that the President lay before the House a copy of the instructions given to JOHN JAY and other pertinent documents. The President emphatically rejected the call, holding that the House had no constitutional power with respect to treaties. The House, after reiterating its position and carefully differentiating the appropriation power from the TREATY POWER, which it disclaimed, proceeded to vote the money requested by the President.

The protracted battle over Jay's Treaty set the stage for the presidential election of 1796. Washington's decision to retire after two terms lifted the last restraint on partisanship, and two infant POLITICAL PARTIES, each with its own standard bearer, JOHN ADAMS for the Federalists, Jefferson for the Republicans, contested the election. The Constitution had been intended to work without parties. Parties, the Framers reasoned, fed the natural turbulence of the populace and served the ambitions of demagogues; they caused implacable rivalries in legislative councils, usurping the place of reason and moderation; they introduced whole networks of partisan allegiance at cross-purposes with the national welfare. Washington had attempted to govern independently of parties, but in an increasingly polarized political environment even he became a partisan. When the Republicans sought to channel popular enthusiasm for the French cause into "democratic societies," Washington publicly condemned the societies as illicit political engines, thereby betraying intolerance of political opposition from outside the constitutional channels of authority. WASHINGTON'S FAREWELL ADDRESS pointedly warned the people against the "baneful" effects of parties. The Republicans, however, were rapidly discovering in party organization outside the government the appropriate means for wresting power from the Federalists who, in their eyes, were the real bane of the country.

Adams was elected President by a slender ELECTORAL COLLEGE majority. Crisis with France, mounting since the British treaty, set the course of the administration. Angrily denouncing French decrees against American commerce, Adams sent a special commission to negotiate in Paris under threat of war. Intriguing agents of the French foreign ministry demanded money as the price of negotiations. The Americans indignantly refused. This affair—the XYZ Affair—then exploded in the United States, and the Federalists converted foreign crisis into domestic crisis. Under cover of whipped-up war hysteria, they assailed the patriotism of the Republicans, portraying them as Jacobin disorganizers in the country's bowels whose ultimate treachery only awaited the signal of an invading French army. Although the President refrained from asking for a declaration of war, he inflamed the war spirit. Congress abrogated the French treaties, expanded the army, established the Navy Department, and authorized an undeclared naval war against France. The Republicans fought this policy to no avail. Two years later the Supreme Court, in a prize case, *Bas v. Tingey* (1800), upheld the power of the government to make war without declaring it.

The war hysteria found domestic expression in the ALIEN AND SEDITION ACTS. The Republicans attacked the laws restrictive of ALIENS on grounds of policy and the Alien Act, in particular, for violating the Constitution by authorizing the President summarily to deport aliens deemed dangerous to the nation. The Sedition Act, the Republicans argued, was without congressional authority and directly violated the FIRST AMENDMENT. Despite the smokescreen of war, TREASON, and subversion, Republicans believed that the law aimed at suppressing their presses and crippling their party. Political freedom, as well as FREEDOM OF SPEECH and FREEDOM OF THE PRESS, was at stake. When the federal courts, manned by partisan Federalist judges, cooperated in enforcing the Sedition Act, closing off the judicial channel of redress, Jefferson and Madison turned to two Republican state legislatures to arouse opposition. The VIRGINIA AND KENTUCKY RESOLUTIONS interposed the authority of these states to declare the Alien and Sedition Acts unconstitutional and urged other states to join in forcing their repeal. The resolutions were especially significant as landmark statements of the THEORY OF THE UNION as a compact of sovereign states and of the right of a state, whether by INTERPOSITION or NULLIFICATION, to judge the constitutionality of acts of Congress. Northern state legislatures, in response, rejected the theory together with the appeal. Although the resolutions contributed to rising popular opposition against the administration, they did not force repeal of the hated laws. Whatever their later significance for the issue of STATES' RIGHTS and Union—the constitutional issue over which the Civil War would be fought—the resolutions originated in a struggle for political survival and addressed the fundamental issue of freedom and self-government descending from the American Revolution.

The foreign crisis passed in 1800. Adams seized the olive branch extended by France, broke with the Hamiltonian faction in his administration, and dispatched another commission to negotiate peace. The result was the Convention of 1800, which restored normal relations and formally terminated the Franco American alliance of 1778. From the standpoint of the "war system," Adams's decision to make peace drove a sword into the Federalist party. In the ensuing presidential election, Hamilton and his friends conspired to defeat Adams.

The election of 1800 was bitterly contested by two organized political parties. The Republicans achieved unprecedented unity behind their ticket of Jefferson and

AARON BURR. By party organization and electioneering tactics they turned the election of the President into a test of public opinion. This, of course, made a mockery of the Constitution, under which a body of electors separated from the people was to choose the President and vice-president. Electoral tickets became party tickets, and every presidential elector became an agent of the popular majority that elected him.

Jefferson won a decisive victory over Adams. Although the Federalists swept New England, took two of the small middle states (New Jersey and Delaware), and picked up scattered votes in three others, the Republicans won everything else, south, west, and north. The electoral vote, 73–65, failed to reflect the wide Republican margin at the polls. But the victory was jeopardized by political developments that played havoc with the electoral system. Under the Constitution each elector cast two votes for different candidates; the one with the most votes became President, while the runner-up became vice-president. The rise of political parties made the system an anachronism, for electors chosen on a party ticket would cast both votes for the party candidates, thereby producing a tie between them. So it happened in 1800: Jefferson and Burr received an equal number of electoral votes. The choice was thus thrown into the House of Representatives. There the lame-duck Federalist majority plotted to annul the popular verdict either by creating an interregnum or by dealing Burr into the presidency. Finally, on the thirty-sixth ballot, the stalemate was broken and Jefferson was elected.

The new Republican majority moved rapidly to amend the Constitution to prevent a similar occurrence in the future. The TWELFTH AMENDMENT (1804) provided for separate ballots for President and vice-president. The elaborate machinery devised by the Framers for the election of the President was thus radically revised in response to changing political realities. Not only was this an effective use of the AMENDING PROCESS, but it seemed to suggest frequent change by amendment in the future. However, the next amendment of the Constitution came only after the passage of sixty-one years and the convulsions of civil war.

MERRILL D. PETERSON
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Bibliography

BUEL, RICHARD, JR. 1972 *Securing the Revolution: Ideology and American Politics, 1789–1815.* Ithaca, N.Y.: Cornell University Press.

MALONE, DUMAS 1962 *Jefferson and the Ordeal of Liberty.* Boston: Little, Brown.

MILLER, JOHN C. 1960 *The Federalist Era: 1789–1801.* New York: Harper & Row.

STOURZH, GERALD 1970 *Alexander Hamilton and the Idea of Republican Government.* Stanford, Calif.: Stanford University Press.

WHITE, LEONARD D. 1948 *The Federalist: A Study in Administrative History, 1789–1801.* New York: Free Press.

## CONSTITUTIONAL HISTORY, 1801–1829

THOMAS JEFFERSON entered the presidency in 1801 with a rhetoric of return to constitutional first principles. Inaugurated in the new permanent capital on the Potomac, he offered a brilliant summation of these principles together with a lofty appeal for restoration of harmony and affection. "We are all republicans: we are all federalists," he declared. He hoped to achieve "a perfect consolidation" of political sentiments by emphasizing principles that ran deeper than party names or doctrines. He spoke of preserving "the whole constitutional vigor" of the general government yet called for "a wise and frugal government, which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned." Jefferson never doubted that "constitutional vigor" and individual liberty were perfectly compatible, indeed that the strength of republican government rested upon the freedom of the society. He named "absolute acquiescence in the decisions of the majority the vital principle of republics, from which there is no appeal but to force." This principle demanded freedom of opinion and debate, including the right of a minority to turn itself into a new majority, as the Republican party had done. "If there be any among us," Jefferson said, alluding to the delusions of 1798, "who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error may be tolerated where reason is left free to combat it." He thus announced a commitment to ongoing change through the democratic process. Because of that commitment the Constitution became an instrument of democracy, change became possible without violence or destruction, and government went forward on the continuing consent of the governed.

The "revolution of 1800," as Jefferson later called it, introduced no fundamental changes in the structure or machinery of the general government but made that government a more effective instrument of popular leadership. Jefferson himself possessed great popular authority. Combining this with the constitutional authority of the office, he overcame Whiggish monarchical fears and gave the presidency a secure place in the republican system. Jefferson dominated his administration more surely and

completely than even GEORGE WASHINGTON had done. The cabinet, which was composed of moderate Republicans, enjoyed unprecedented harmony, stability, and unity. It was the main agency of policy and decision making.

Jefferson also dominated Congress. For the first time, in 1801, the Republicans controlled both houses of Congress. The Federalists were a shrinking minority, though by no means powerless. In republican theory Congress should control the executive. Jefferson honored the theory in official discourse. Thus he declined to appear before Congress in person and sent his annual "State of the Union" message to be read by a clerk, setting a precedent that remained unbroken for 112 years. Practically, however, Jefferson recognized that the government demanded executive leadership if any majority, Federalist or Republican, was to carry out its program. How could he overcome the constraints of republican theory and the constitutional SEPARATION OF POWERS? The solution was found partly through the personal influence Jefferson commanded and partly through a network of party leadership outside constitutional channels. As the unchallenged head of the Republican party, Jefferson acted with an authority he did not possess, indeed utterly disclaimed, in his official capacity. Leaders of both houses of Congress were the President's political lieutenants. Despite the weak structural organization of the Republican party in Congress—the only formal machinery was the presidential nominating caucus which came into being every four years—the party was a pervasive functional reality. The President was chief legislator as well as chief magistrate. Nearly all the congressional legislation during eight years originated with the President and his cabinet. Lacking staff support, Congress depended on executive initiatives and usually followed them. Federalists complained of the "backstairs" influence of the President; eventually some Republicans, led by JOHN RANDOLPH, rebelled. But the system of presidential leadership worked with unerring precision during Jefferson's first term. It faltered during his second term when the Republicans, with virtually no opposition to contend with, began to quarrel among themselves; and it would not work at all under Jefferson's successor, JAMES MADISON, who lacked Jefferson's popular prestige and personal magnetism.

In matters of public policy, the Jefferson administration sought reform within the limits of moderation and conciliation. More doctrinaire Republicans, still infected with Anti-Federalism, were not satisfied with a mere change of leadership and demanded restrictive constitutional amendments to place the true principles of government beyond reversal or contradiction. While rejecting this course, Jefferson was never entirely happy with the consequences of his temporizing policies. Republican reform was bottomed on fiscal policy. The Hamiltonian system of public debt, internal taxes, and a national bank was considered an evil of the first magnitude. Secretary of the Treasury ALBERT GALLATIN developed a plan to extinguish the debt, which had increased under the Federalists, by large annual appropriations, yet, amazingly, reduce taxes at the same time. All internal taxes would be repealed and government would depend solely on revenue from the customs houses. The plan required deep retrenchment, especially in the army and navy departments. Of course, it was premised on peace. Congress embarked on it; and although the debt was dramatically reduced during the next seven years, the plan was initially upset by the exigencies of the Tripolitan War, then derailed by the Anglo-American crisis that led to the War of 1812. Jefferson agonized over ALEXANDER HAMILTON's fiscal system. "When the government was first established," he wrote in 1802, "it was possible to have kept it going on true principles, but the contracted, English, half-lettered ideas of Hamilton destroyed that hope in a bud. We can pay off his debt in 15 years, but we can never get rid of his financial system. It mortifies me to be strengthening principles which I deem radically vicious, but the vice is entailed on us by the first error. . . . What is practicable must often control pure theory." A case in point was the Bank of the United States. Jefferson thought it an institution of "the most deadly hostility" to the Constitution and republican government. Yet he tolerated the Bank, in part because its charter ran to 1811 (when Republicans would refuse to renew it) and also because Gallatin found the bank highly useful to the government's operations.

Jefferson's "war on the judiciary" featured three main battles and several skirmishes, ending in no very clear outcome. The first battle was fought over the JUDICIARY ACT OF 1801. Republicans were enraged by this blatantly partisan measure passed in the waning hours of JOHN ADAMS's administration. It created a new tier of courts and judgeships, extended the power of the federal judiciary at the expense of state courts, and reduced the number of Supreme Court Justices beginning with the next vacancy, thereby denying the Republicans an early opportunity to reshape the Court. Jefferson promptly targeted the act for repeal. The Federalists had retreated to the judiciary as a stronghold, he said, from which "all the works of Republicanism are to be beaten down and erased." The Sedition Act had demonstrated the prostration of the judiciary to partisan purposes. After taking office Jefferson acted to pardon victims of the act, which he considered null and void, and to drop pending prosecutions. He often spoke of making judges more responsible to the people, perhaps by periodic review of their tenure; and although he recognized the power of JUDICIAL REVIEW, he did not think it binding on the executive or the legislature. According to his theory of "tripartite balance" each of the coordinate

branches of government is supreme in its sphere and may decide questions of constitutionality for itself. The same theory was advanced by Republicans in Congress, as against the Federalist claim of exclusive power of the Supreme Court to declare legislation unconstitutional. Congress did not settle this issue; but after heated debate it repealed the offensive act and, with minor exceptions, returned the judiciary to its previous footing.

The second battle involved the case of MARBURY V. MADISON (1803). Although the Supreme Court's decision would later be seen as the cornerstone of judicial review, the case was understood at the time primarily as a political duel between the President and the Court, one in which Chief Justice JOHN MARSHALL took a gratuitous stab at the executive but then deliberately backed away from a confrontation he knew the Court could not win.

The third battle featured the IMPEACHMENT of federal judges. In 1803 Congress impeached, tried, and convicted Judge JOHN PICKERING of the district court in New Hampshire. The case was a hard one because Pickering's bizarre conduct on the bench stemmed from intoxication and possible insanity; but in the absence of any constitutional authorization for the removal of an incompetent judge, the Republicans took the course of impeachment and convicted him of "high crimes and misdemeanors." The subsequent impeachment of Supreme Court Justice SAMUEL J. CHASE was clearly a political act. A high-toned Federalist, Chase had earned Republican enmity as the convicting judge in several SEDITION trials and by harangues to grand juries assailing democracy and all its works. Nevertheless, his trial in the Senate ended in a verdict of acquittal in 1805. Jefferson and the Republican leaders turned away from impeachment in disgust. Although it may have produced salutary restraint in the federal judiciary, and enhanced the President's role as a popular leader, neither impeachment nor any other Jeffersonian action disturbed the foundations of judicial power.

During his second term, Jefferson used the TREASON trial of AARON BURR to renew the attack on the judiciary but without success. The former vice-president was charged with treason for leading a military expedition to separate the western states from the Union. Determined to convict him, Jefferson again faced an old enemy, John Marshall, who presided in the trial at Richmond. At Burr's request, Marshall subpoenaed Jefferson to appear in court with papers bearing on the case. Jefferson refused, citing his responsibility as chief executive. "The Constitution enjoins his constant agency in the concerns of six millions of people. Is the law paramount to this, which calls on him on behalf of a single one?" he asked. The court backed off. Nothing required Jefferson's presence. He offered to testify by deposition, but this was not requested. When the trial ended in Burr's acquittal, Jefferson denounced its whole conduct as political. He laid the proceedings before Congress and urged that body to furnish some remedy for judicial arrogance and error. Several Republican state legislatures instructed their delegations to seek amendment making judges removable on the address of both houses of Congress. Both President and Congress were preoccupied with FOREIGN AFFAIRS in the fall of 1807, however, and nothing came of this effort.

The first foreign crisis of the Jefferson administration culminated in the LOUISIANA PURCHASE. It was an ironic triumph for a President, an administration, and a party that made a boast of constitutional purity. For the Constitution made no provision either to acquire foreign territory or, as the purchase treaty mandated, to incorporate that territory and its inhabitants into the Union. Jefferson, therefore, proposed to sanction the acquisition retroactively by amendment of the Constitution. Actually, such an authorization was the lesser part of the amendment he drafted; the larger part undertook to control the future of the Trans-Mississippi West by prohibiting settlement above the thirty-third parallel. But neither part interested congressional Republicans, and Jefferson, though he said failure of the amendment made the Constitution "a blank paper by construction," acquiesced. A revolution in the Union perforce became a revolution in the Constitution as well. The expansion of the treaty-making power was only the beginning of the revolution. A series of acts for the government of the new territory vested extraordinary power in the President; and the President proposed, with the sanction of a constitutional amendment, a national system of INTERNAL IMPROVEMENTS to unite this far-flung "empire of liberty."

The foreign crisis of Jefferson's second administration continued under Madison and finally terminated in the War of 1812. With the formation of the Third Coalition against Napoleonic France in 1805, all Europe was engulfed in war. The United States became the last neutral nation of consequence—to the profit of its carrying trade. Unfortunately, each side, the British and the French, demanded the trade on its own terms, and submission to one side's demands entailed conflict with the other. Britain, the dominant sea power, was the greater problem. British ships attacked American carriers under interpretations of rules of blockade, contraband, and neutral commerce that were rejected by the United States. Britain claimed the right of impressment of seamen aboard American ships on the ground that they were actually British subjects who had deserted from His Majesty's Navy and shipped aboard American vessels with government connivance. There was some truth in this claim, but thousands of American citizens were, in fact, impressed by Britain. And every seizure was a stinging reminder of past colonial servitude. Diplomatic efforts to settle these issues proved abortive. Re-

lations rapidly deteriorated after the *Chesapeake-Leopard* Affair in June 1807. The attack of HMS *Leopard* on an American naval vessel after its captain refused to permit boarding and search for deserters inflamed the entire country against Britain. Jefferson might have taken the country to war. Instead, in December, he proposed, and Congress swiftly passed, the EMBARGO ACT. Essentially a self-blockade of American commerce, the act was in some part a preparation for war and in some part an experiment to test the theory of "peaceable coercion." The idea that the United States might enforce reason and justice on European belligerents by withholding its commerce was a first principle of Jeffersonian statecraft. Under the trial now begun, that idea failed. While the policy had comparatively little effect abroad, it produced serious economic, political, and perhaps even constitutional damage at home.

The embargo raised a host of constitutional issues, all hotly debated by Federalists and Republicans, though the parties seemed to have changed places. First, and broadest, was the issue of the commerce power. Republicans said the power to regulate commerce included the power to prohibit it. Federalists, who were closely allied with eastern merchants and shipmasters, limited regulation to encouragement and protection. Yet it was a Federalist, John Davis, the United States District Judge for Massachusetts, who upheld the constitutionality of the embargo on a broad view of the commerce power backed up by the "inherent SOVEREIGNTY" of the United States. Second, wholesale violation of the embargo in the Lake Champlain region led the President to proclaim an insurrection and authorize military force to suppress it under the same law George Washington had earlier used to put down the WHISKEY REBELLION over Republican opposition. Third, enforcement of the embargo required ever tighter measures of control. The fourth in the series of five embargo acts empowered customs collectors to search without a SEARCH WARRANT and to detain vessels merely on suspicion of intent to violate the law. The FOURTH AMENDMENT, a part of the Bill of Rights, was thus jeopardized. Fourth, before Congress adjourned in April 1808 it authorized the President to suspend the embargo against either or both belligerents—an unprecedented DELEGATION OF POWER. Federalists, of course, denounced the embargo in terms that recalled the VIRGINIA AND KENTUCKY RESOLUTIONS.

A storm of protest in New England led Congress, at the end of Jefferson's presidency, to repeal the embargo. The Non-Intercourse Act, which replaced it, reopened trade with all the world except Britain and France. That course, too, failed; and for the next three years under the new president, Madison, the country drifted toward war. In the end, war was declared because both diplomacy and "peaceable coercion" had failed to resolve the conflict over neutral rights. But that conflict was a symbol of much more: the honor and independence of the nation, the freedom of its commerce, the integrity of American nationality, the survival of republican government. The war was thus morally justified as the second war for American independence. The nation was ill-prepared for war, however, and its conduct produced one disaster after another. One section of the Union, New England, vigorously opposed the war from the start.

This opposition gave rise to the principal constitutional controversy of the time. The governors of the New England states challenged congressional power to provide for organizing and calling forth the militia. The chief justice of Massachusetts's highest court advised the governor that the right to decide when the militia should be called belonged to him, not to Congress or the President; and later, in 1814, when the militia was activated it was in the state rather than the national service. Years later, in *Luther v. Mott* (1827), the Supreme Court fully sustained national authority over the militia. Interference with the prosecution of the war was accompanied by a steady stream of denunciation. Madison called this a "seditious opposition," but unlike his Federalist predecessors he made no move to restrain or suppress it. Ultra-Federalists had been hinting at disunion since the Louisiana Purchase threatened New England's power in the Union; some of them had plotted to establish a Northern Confederacy in 1804. Now, a decade later, Federalist delegates from all the New England states met secretly in the HARTFORD CONVENTION, not to plot disunion, for moderate forces were in control, but to organize resistance against "Mr. Madison's War." Resolutions adopted by the convention recommended a series of constitutional admendments, including elimination of the THREE-FIFTHS CLAUSE for the apportionment of representation and direct taxes, limitation of presidential tenure to one term, a two-thirds vote in Congress to admit new states and to declare war, and the disqualification of naturalized citizens from federal office.

The commissioners of the Hartford Convention arrived in Washington with their resolutions in the midst of jubilation over the Battle of New Orleans. They were ridiculed, of course; and from this nadir the Federalist party never recovered. News of the Peace of Ghent quickly followed. While it resolved none of the issues over which the war had begun, the treaty placed American independence on impregnable foundations and confirmed the strength of republican government. The American people erased the shame from a war so meager in victories, so marked by defeat, division, and disgrace, and put upon it the face of glory. In December 1815 Madison laid before Congress a nationalistic program that featured measures, such as a national bank, formerly associated with the defeated party. Yet the program was not a case of "out-Federalizing Fed-

eralism." The Republican nationalism that matured with the Peace of Ghent had nothing to do with Federalist nationalism, with its vitiating Anglophobia, its narrow class and sectional views, and its distrust of popular government. The American political experiment had vindicated itself, exorcising earlier fears for its survival and making possible the incorporation of principles of national improvement and consolidation into the Republican party.

A new era dawned in American politics in 1815. For a quarter-century the nation had directed its industry and commerce toward a Europe ravaged by war and revolution; now that era had ended, and with it the opportunity of rearing American prosperity on the misfortunes of the Old World. For almost as long, government had been carried on by party spirit; now one of the two parties, the Federalist, around which the rivalry of men, issues, and principles had turned, ceased to be a factor in national affairs, and it was by no means clear what political force would replace the force of party. A country that had hugged the Atlantic seaboard and sought its prosperity in foreign trade was about to explode in the Trans-Appalachian West. During the next six years five new western states would enter the Union. A wider Union and the rise of the West as a self-conscious section raised difficult problems of economic development, constitutional principle, and political power. Since its Revolutionary birth the nation had enjoyed astonishing continuity of leadership. Thomas Jefferson, author of the Declaration of Independence, was a gray eminence at Monticello; James Madison, Father of the Constitution, was the President who had finally, irrevocably, secured that independence in a second war against Great Britain. But a new generation of political leaders had burst on the scene during the war, and the fate of the nation now lay in their hands.

Nearly all Republicans united on the program of national improvement and consolidation that Madison laid before the Fourteenth Congress in December. This "Madisonian Platform" proceeded from an enlarged view of the general government's responsibility for the nation's welfare. A national bank had previously been recommended to Congress as an agency for financing the war. Now, facing the chaos of runaway state banking, Madison recommended it as a permanent institution to secure the constitutional object of a stable and uniform national currency. Madison, of course, had opposed the original Bank of the United States as unconstitutional, and Republicans in Congress had defeated its recharter in 1811. But conditions and needs had changed, and Madison, with most of these same Republicans, considered that experience had settled the question of constitutionality in favor of a national bank. The Madisonian platform called for continuing in peacetime high tariff duties on imports in order to protect the infant industries that had grown up behind the sheltering wall of war and embargo. The President called for a comprehensive system of internal improvements—roads and canals to bind the nation together, secure its defenses, and facilitate internal commerce. Any deficiency of constitutional power should be overcome by amendment. In a final appeal to the liberality of American patriotism, Madison proposed the establishment of a national university, in Washington, which would be "a central resort of youth and genius from every part of their country, diffusing on their return examples of those national feelings, those liberal sentiments, and those congenial manners which contribute cement to our union and strength to [its] great political fabric."

Congress responded with legislation to charter a national bank, establish a system of tariff protection, and create a permanent fund for financing a vast network of roads, canals, and other improvements. The last measure, dubbed the Bonus Bill because the fund was founded on the bonus to be paid for the bank charter, was vetoed by Madison on constitutional grounds in the last act of his presidency. In this surprising retreat to the doctrine of strict construction, Madison delivered the first shock to the postwar nationalism he had himself championed. His successor, JAMES MONROE, took the same position on internal improvements, holding that a constitutional amendment was necessary to authorize them. Republican leaders in Congress disagreed. They found sufficient constitutional warrant to build as well as to fund internal improvements in the commerce, post road, and general welfare clauses, and they declined to seek an amendment lest by the failure to obtain it the Constitution be weakened. In the end, however, Monroe conceded the unlimited power of Congress to appropriate money for internal improvements, while continuing to deny the power to construct and operate them. This concession provided a constitutional justification for the General Survey Act of 1824. Although the same argument supported important projects in the ensuing administration, no national system of internal improvements was ever realized. In the absence of constructive national action, the several states embarked upon ambitious projects of their own (New York's Erie Canal, for instance, begun in 1817); and soon the government even relinquished its one great enterprise, the National Road, to the states.

The period of Monroe's presidency was signalized as "The Era of Good Feelings." This reflected the dissolution of old party ties and feelings. The Republican party had become the grand party of the nation. In 1820 Monroe ran unopposed for reelection and only one erratic electoral vote was cast against him. But his success had little to do with party or popularity, nor did it translate into effective

power and leadership. Power and leadership had shifted to Congress, particularly to the House of Representatives where HENRY CLAY had converted the office of speaker from that of an impartial moderator to one of policymaking leadership. To an extent, certainly, executive power receded because foreign affairs had taken a distant second place to domestic affairs on the nation's agenda. Interestingly, Monroe is best remembered not for any initiative or achievement in domestic affairs but for a masterly stroke of foreign policy, the Monroe Doctrine. But Clay even challenged the President in foreign policy; and congressional ascendancy owed much to the boldness and address of young leaders like Clay who sought to command the popular feeling and power of the country. Partly for this reason the postwar Republicans consensus was soon shattered and "good feelings" vanished on the winds of change. Great issues, such as the Missouri Compromise, split the nationalizing Republican party along its sectional seams. The Panic of 1819, which led to the first major depression in the country's history, released powerful currents that shriveled the bright hopes of 1815.

Although the Panic of 1819 broke banks, bankrupted merchants, idled workers, and emptied factories everywhere, it was centered in American agriculture, especially in the freshly burgeoning lands of the South and West. Many purchasers of these lands had availed themselves of the credit allowed by the Harrison Land Act of 1800. Also important to frontier farmers and planters, of course, was bank credit. State banks had generally met this need, but now they were aided and abetted by the new Bank of the United States, which established most of its branches in the South and West. Agricultural prices collapsed worldwide in 1818. A severe contraction of bank credit followed. The Bank of the United States barely survived, and did so only at the expense of bankrupting many thousands of farmers, merchants, and local bankers. Several western states enacted legislation in the interest of debtors. The controversy over the constitutionality of debtor relief laws rocked Kentucky for a decade. All along the frontier, in wheat lands and in cotton lands, people tended to blame their troubles on the Bank. There were calls for repeal of its charter, and state legislatures acted to restrain "The Monster." Ohio levied a prohibitive tax on resident branches; when it was not paid the state auditor seized $100,000 of the Bank's funds, thereby giving birth to the case of OSBORN V. THE BANK OF THE UNITED STATES (1824). Wherever the depression caused hostility to the Bank, it weakened the spring of support for economic nationalism generally. To nationalist leaders, on the other hand, the depression offered further confirmation of the colonial character of the American economy and pointed up the imperative need for higher protective tariffs and other government assistance to bring about a flourishing "home market" for the products of American industry. This AMERICAN SYSTEM, as Clay named it, had its fulfillment in the Tariff of 1824.

While the Panic was at its height, in March 1819, the Supreme Court handed down its unanimous decision in MCCULLOCH V. MARYLAND, upholding the constitutionality of the Bank and its freedom to operate without state interference. Chief Justice John Marshall drew upon the Hamiltonian doctrine of IMPLIED POWERS not only for the congressional authority to charter a bank but also for a sweeping vindication of national supremacy. In the same momentous term, which established the high-water mark of judicial nationalism, the court invoked the CONTRACT CLAUSE to strike down laws of two states. In DARTMOUTH COLLEGE V. WOODWARD it extended the protection of that clause to corporate charters; and in STURGES V. CROWNINSHIELD it struck down a New York law for the relief of debtors whose contracts antedated the law. Quite aside from their implications for national versus state authority, all these decisions placed the court unreservedly on the side of propertied interests against popular majorities in state legislatures.

The Bank case, in particular, provoked attack on the Supreme Court and more broadly on the growth of national power. In Virginia opposition to the Supreme Court, which Jefferson called a "subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric," sparked revival of the STATES' RIGHTS doctrines of the Virginia and Kentucky Resolutions and offered powerful reinforcement of the state's challenge to the court's appellate jurisdiction. The challenge had ridden on an old case involving the confiscation of Loyalist lands during the American Revolution. Taking the case on appeal from the Virginia Court of Appeals, the Supreme Court had overturned the state's confiscation law and found for the right of the English heir. To this Judge SPENCER ROANE, head of the Virginia court, responded by denying the Supreme Court's appellate jurisdiction, declaring section 25 of the Judiciary Act of 1789 unconstitutional, and refusing to execute the Supreme Court's decree. The court again took up the case, MARTIN V. HUNTER'S LESSEE (1816), and through Justice JOSEPH STORY reasserted the constitutionality of the appellate jurisdiction over state courts together with the judicial supremacy that went with it. But for the Bank case the controversy would have been quickly forgotten. As Marshall observed, however, that case "roused the Sleeping Giant of Virginia." Under the pseudonym "Hampden," in the columns of the Richmond *Enquirer*, Roane advanced a DUAL FEDERALISM philosophy of the Constitution. Under it there could be no ultimate appeal from the state courts to

the Supreme Court. Marshall replied at length as "Friend of the Constitution" in the Alexandria *Gazette*. The veteran Old Republican JOHN TAYLOR of Caroline expounded the Virginia doctrines *ad nauseum* in *Construction Construed and Constitutions Vindicated* (1820). The doctrines still had a long course to run, but the controversy over appellate jurisdiction drew to a close in COHENS V. VIRGINIA (1821). In this arranged case Virginia became the defendant when the Cohens appealed their conviction in state court to the Supreme Court under Section 25. The Virginia assembly adopted resolutions backing the state cause. Surprisingly, perhaps because the case resulted in a nominal victory for the state, Marshall's broad assertion of national judicial supremacy provoked no official reaction in Virginia, and opposition collapsed in 1822.

The Missouri Compromise was enacted in the midst of these events and communicated its own passions to them. The proposal to restrict slavery in Missouri as a condition of statehood raised difficult questions about the constitutional authority of Congress, the nature of the Union, the future of the West, the morality of slavery, and the sectional balance of power. Congress had previously restricted SLAVERY IN THE TERRITORIES. That power was not seriously in dispute. But the Missouri constitution would provide for slavery, and it was by no means clear that Congress could overrule it, especially as slavery had always been considered an institution under local jurisdiction. The compromise resolved the issue by allowing Missouri to enter the Union as a slave state. A new problem arose, however, when the proffered Missouri constitution contained a provision for excluding "free negroes and mulattoes" from the state. Opponents of the compromise charged that this violated the PRIVILEGES AND IMMUNITIES clause of the United States Constitution, because Negroes who were citizens of northern states would be denied citizenship in Missouri. Laboriously, a new compromise had to be constructed to save the original one. Under it Missouri would be admitted to the Union only after the legislature agreed, despite the constitutional provision, never to pass a law that might abridge the privileges and immunities of citizens. Missouri acquiesced and gained admission to the Union in August 1821. Not for many years would the harmony of the Union again be disturbed by slavery. The Missouri Compromise, therefore, contributed mightily to peace and union. Yet to Thomas Jefferson, contemplating the exclusion of slavery above the 36' 30" parallel, the compromise was "like a fire-ball in the night," sounding "the knell of the Union." "It is hushed, indeed, for the moment. But this is a reprieve only, not the final sentence. A geographical line, once conceived and held up to the angry passions of men, will never be obliterated; and every new irritation will mark it deeper and deeper."

The Republican consensus vanished during Monroe's second term. The Missouri question had raised fears of sectional parties and politics that were not dispelled by the compromise. The growth of the West, with a maturing sectional consciousness of its own, and the scramble of economic interests for the bounty and favor of the general government put the National Republican system under heavy strain. While nationalists continued to believe that the Union would survive and prosper only through measures of consolidation, growing numbers of Republicans, inspired by the Virginia "Old Republicans," believed consolidation must tear the Union apart. They called for return to Jeffersonian austerity and states' rights.

In this unstable political environment, the contest for the presidential succession was especially disturbing. Monroe's chief cabinet officers, JOHN QUINCY ADAMS, William H. Crawford, and JOHN C. CALHOUN, were in the race from the start, and they were soon joined by Henry Clay and ANDREW JACKSON. In the absence of a single dominant leader or a clear line of succession, such as the Virginia dynasty had afforded, the Republican party split into personal followings and factions. The congressional caucus of the party, which had been the mechanism for nominating candidates for President and vice-president, could no longer be relied upon. The caucus itself had become an issue. In an increasingly democratic electorate it was assailed as a closed, elitist institution. Politicians grew wary of the caucus but saw no obvious substitute for it. "We are putting to the proof the most delicate part of our system, the election of the Executive," DANIEL WEBSTER remarked. What was most distressing about the present contest, among men nourished on traditional Whig fears of executive power, was that it made the presidency the center of gravity in the government. Great issues of public policy were submitted to the artifice and caprice of presidential politics; and senators and representatives, if elected on the basis of presidential preferences, must necessarily compromise their independence. This threatened subordination of the legislative to the executive power was an inversion of the proper constitutional order.

Given the multiplicity of candidates, each with his own following, and none able to command a majority of votes, the election of the President inevitably wound up in the House of Representatives. There Clay, the speaker, having been eliminated, threw his support to Adams, who was chosen over Jackson, the popular vote leader. Adams's subsequent appointment of Clay as secretary of state, the cabinet post which had furnished the President for the third successive time, brought cries of "corrupt bargain" from the Jacksonians, and from this canard the Adams administration never recovered. Boldly, in his first message to Congress, Adams proposed to rally the country behind a great program of national improvement, one which took conventional internal improvements—rivers and harbors,

roads and canals—only as a starting point. "Liberty is power," Adams declared. A nation of liberty should be a nation of power, provided, of course, power is used beneficently. The Constitution presents no obstacle. Indeed, to refrain from exercising legitimate powers for good ends would be treachery to the people. "While foreign nations less blessed with that freedom which is power . . . are advancing with gigantic strides in the career of public improvement," Adams said, "were we to slumber in indolence or to fold up our arms and proclaim to the world that we are palsied by the will of our constituents, would it not be to cast away the bounties of Providence and doom ourselves to perpetual inferiority?"

In response to the message, all the old artillery of states' rights and STRICT CONSTRUCTION was hauled out and turned on the administration. Liberty is power? What dangerous nonsense. Liberty is the jealous restraint of power. Individuals, not governments, are the best judges of their own interests; and the national interest consists only in the aggregate of individual interests. These ideas had been employed in the attack on the American System. Now they entered deeply into the ideology of the emerging Jacksonian coalition. A new recruit to the coalition was Vice-President Calhoun, who began to shed the liberality and nationalism that had characterized his political career. In part, certainly, he was influenced by the rising states' rights frenzy in South Carolina. This movement was orchestrated by Calhoun's enemies in the Crawford faction. In 1825 they drove through the legislature resolutions declaring the protective tariff and federal internal improvements unconstitutional. This "Revolution of 1825," as it came to be known, showed how far out of step Calhoun was with the opinion of his state, and he hurried to catch up.

In Congress the anticonsolidation movement provided most of the rhetoric and some of the substance of opposition on every issue with the administration but was especially evident in debates on the judiciary and the tariff. Report of a bill in the House to reorganize the federal judiciary, mainly by the addition of three circuits—and three new judges—in the West, furnished a forum for advocates of reforming the judiciary. There was still no consensus on the role and authority of the Supreme Court. The Court had been a powerful ally of consolidation. Between 1816 and 1825 it had ruled in favor of national power seventeen times and of states' rights only six times, when they were at issue; and by 1825 it had invalidated in whole or in part the statutes of ten states. Various measures, most of them involving constitutional amendment, had been offered to curb judicial power: the withdrawal of opinions, or removal of Justices, on the address of both houses of Congress; the requirement of seriatim opinions; the use of the Senate as a tribunal of last resort on federal questions; and the repeal of section 25 of the Judiciary Act. All were aired in the 1826 debate. Nothing of substance emerged; the reorganization bill itself, after passing the House, failed in the Senate. Yet the debate, which was the "last hurrah" of reform, may have contributed to the increasing moderation of the Marshall Court after 1825.

The tariff had been a constitutional issue since the great debate on the American System in 1824. The power to tax, Virginia congressman PHILIP P. BARBOUR had then argued, was not a power to promote one industry over another, nor did any such power exist in the Constitution. Controversy was reignited three years later by demands for additional protection, particularly on behalf of the rising wool and woolens industry of the Northeast. Jacksonian politicians, who came into control of the new Congress, could not ignore the demand. Under the leadership of MARTIN VAN BUREN of New York they framed a tariff bill that was a political strategem rather than a serious piece of economic legislation. Moreover, they persuaded their southern friends to go along with the bill on the spurious plea that it would finally fail because of provisions designed to trigger overwhelming New England opposition, thereby enabling the Jacksonians to claim credit in the North for protectionist efforts without inflicting further injury on the South. But in the Senate, where it was named the Tariff of Abominations, the bill was amended to become less objectionable to New England, and its grat spokesman, Webster, heretofore a free-trader, dramatically declared his support. THE TARIFF ACT OF 1828 became law. The South felt betrayed. In South Carolina, which had grasped the flagging torch of states' rights from Virginia, there were demands to "calculate the value of the Union." The legislature, in December, enacted a series of resolutions declaring the tariff oppressive and unconstitutional. It also published the South Carolina Exposition and Protest, which Calhoun had authored secretly at the invitation of a legislative committee. The Exposition repeated, with some elaboration, the litany of antitariff arguments South Carolina radicals had been urging for several years and it offered the first authoritative statement of "the Carolina doctrine" of nullification.

A motley coalition—western agrarians, southern planters, northern democrats—swept Andrew Jackson into the presidency in 1828. His inaugural address gave no clear sign of the direction his administration would take; but the dominant pressure of the men, ideas, and interests gathered around the President was toward dissolution of the National Republican platform and toward the rebirth of party government on specious Jeffersonian principles.

MERRILL D. PETERSON
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Bibliography

ADAMS, HENRY 1891–1893 *History of the United States during the Administrations of Jefferson and Madison.* 9 Vols. New York: Scribner's.

BEVERIDGE, ALBERT J. 1919 *The Life of John Marshall*, vol. IV. Boston: Houghton Mifflin.

CUNNINGHAM, NOBLE E., JR. 1978 *The Process of Government under Jefferson.* Princeton, N.J.: Princeton University Press.

DANGERFIELD, GEORGE 1952 *The Era of Good Feeling.* New York: Harcourt, Brace.

GOODRICH, CARTER, ed. 1967 *The Government and the Economy: 1783–1861.* Indianapolis: Bobbs-Merrill.

JOHNSTONE, ROBERT M., JR. 1978 *Jefferson and the Presidency: Leadership in the Young Republic.* Ithaca, N.Y.: Cornell University Press.

KETCHAM, RALPH 1984 *Presidents above Party: The First American Presidency, 1789–1829.* Chapel Hill: University of North Carolina Press.

SOFAER, ABRAHAM D. 1976 *War, Foreign Affairs and Constitutional Power: The Origins.* Cambridge, Mass.: Ballinger.

TURNER, FREDERICK JACKSON 1906 *Rise of the New West, 1819–1829.* New York: Macmillan.

WHITE, LEONARD D. 1951 *The Jeffersonians: A Study in Administrative History, 1801–1829.* New York: Macmillan.

## CONSTITUTIONAL HISTORY, 1829–1848

Constitutional change in the Jacksonian era began with the Virginia CONSTITUTIONAL CONVENTION of 1829–1830, and climaxed in the election controversies of 1848. Between these dates, the American people tried to renovate their constitutional order, especially with respect to the great issues of FEDERALISM, democratization, and slavery.

Virginia's venerable Constitution of 1776, like other early constitutions, had come to enshrine the related evils of malapportionment and disfranchisement. THOMAS JEFFERSON denounced these and other defects in the document from the founding of the commonwealth to his death. His criticism produced the convention of 1829, where the badly underrepresented Western delegates demanded reform, including white manhood suffrage and a REAPPORTIONMENT that would fairly represent the growing population of their region. The convention was a showcase of Virginia's political leadership, including as delegates JAMES MADISON (who had also been a delegate at the 1776 convention), JOHN MARSHALL, JAMES MONROE, JOHN RANDOLPH, as well as emergent conservative leaders like JOHN TYLER, Benjamin Watkins Leigh, and Abel Parker Upshur. The conservatives from the tidewater region, representing the interests of slaveholders, held the reformers at bay, conceding only a limited modification of the old freehold suffrage to include householders and leaseholders, far less than the taxpayer-militia qualification representing a compromise conceded by the western delegates. Reapportionment similarly fell short of western demands, as the convention adopted a complex system of regional representation. The conservative triumph on these two issues was assured partly because many delegates heeded Leigh's warning that reform would produce "the annihilation of all state rights." Implicit in this response were fears for the security of slavery. Those fears were bloodily confirmed by Nat Turner's 1831 slave insurrection in Southampton County, and reawakened the next year as the Virginia General Assembly debated and ultimately voted down a proposal for the gradual abolition of slavery.

Slavery, only hinted at in the 1828 Virginia debates, soon surfaced as a constitutional topic throughout the South. In *State v. Mann* (1829) Chief Judge Thomas Ruffin of the North Carolina Supreme Court held that the absolute subjection characteristic of slavery was "essential to the value of slaves as property, to the security of the master, and [to] the public tranquility." The South Carolina Court of Appeals later held that "a slave can invoke neither MAGNA CHARTA nor COMMON LAW. . . . In the very nature of things, he is subject to despotism." The political counterpart of this new proslavery jurisprudence was the "positive good" thesis, first advanced by South Carolina Governor George McDuffie in 1835 and amplified thereafter by JOHN C. CALHOUN in the United States Senate.

Southern judicial and political leaders found themselves compelled to erect defenses for the internal security of slavery after 1830 in part because a new cadre of abolitionists appeared in the northern states, led at first by William Lloyd Garrison. Repudiating both gradualism and projects for the colonization of free blacks in Liberia, this new generation of antislavery workers demanded the immediate and uncompensated abolition of slavery. They tried their hand at constitutional challenges to slavery. Although they conceded that the federal government had no power to interfere with slavery in the states, they found many areas for legitimate federal action, such as exclusion of slavery from the territories, abolition of slavery in the DISTRICT OF COLUMBIA, abolition of the interstate slave trade, and refusal to admit new slave states. At the state level, they sought, unsuccessfully, to have slavery declared unconstitutional in New Jersey, persuaded the Massachusetts and New York legislatures to enact PERSONAL LIBERTY LAWS, and provided invaluable support for fugitive slave rescues. In 1832, when they got their first taste of constitutional litigation in the Connecticut prosecution of Prudence Crandall, they attempted to define and secure the rights of free blacks under the PRIVILEGES AND IMMUNITIES CLAUSE of Article IV, section 2, of the Constitution.

By 1830 it was obvious that the South Carolinians were counting the costs of the Union, and weighing their alternatives. The fundamental concepts of state SOVEREIGNTY

and the right of SECESSION were commonplace at the time. Thus in the Webster-Hayne debates of 1830, South Carolina Senator Robert Y. Hayne was closer to orthodoxy than DANIEL WEBSTER when he supported a cluster of theories derived or extrapolated from the VIRGINIA AND KENTUCKY RESOLUTIONS of 1798–1799: he condemned the consolidationist tendencies of the federal government, asserted state sovereignty, insisted on a STRICT CONSTRUCTION of the Constitution, reiterated the compact theory of the Union (by which the Constitution and the national Union were the creation of a compact of sovereign states), and defended the legitimacy of INTERPOSITION and NULLIFICATION. Webster's famous rhetorical reply is better known but less analytical than other rebuttals by Edward Livingston, JOHN QUINCY ADAMS, and JOSEPH STORY between 1830 and 1833. These maintained that sovereignty had effectively been transferred to the national government by the Constitution, that the Union created thereby was perpetual, and that secession was extralegal. In his *Commentaries on the Constitution* (1833), Story flatly denied that the Constitution was a compact among sovereign states. James Madison joined his venerable voice to theirs, condemning all theories of nullification as perversions of the doctrines he and Thomas Jefferson had propounded in 1798 and 1799. All maintained that because the Union was perpetual, it was therefore indissoluble. But John Quincy Adams had the ominous last word when he wrote in 1831 that "it is the odious nature of [this] question that it can be settled only at the cannon's mouth." South Carolina's attempted nullification of the TARIFF ACT of 1828 and its 1832 revision forced a resolution of these conflicts that came close to the mode Adams had predicted.

Though ostensibly aimed at the tariff, and the larger but more nebulous problem of the "consolidation" of the federal government's powers, the nullification controversy at its heart concerned the security and perpetuity of slavery. The tariff controversy nonetheless provided a convenient vehicle for the Carolinians to reconfirm their traditional THEORIES OF THE UNION and state sovereignty. In November 1832 a specially elected convention adopted the SOUTH CAROLINA ORDINANCE OF NULLIFICATION, which prohibited collection of the tariff and appeals to the United States Supreme Court. President ANDREW JACKSON responded with his "Proclamation to the People of South Carolina," drafted by Secretary of State Livingston, which refuted nullification theories, asserted federal supremacy, insisted on obedience to federal laws, warned that "Disunion by armed force is treason," and, surprisingly in view of his Bank Veto Message five months earlier, maintained that the Supreme Court was the proper and final arbiter of disputes under the United States Constitution and laws. The FORCE ACT of 1833 gave teeth to the proclamation, while a compromise tariff assuaged Carolina's nominal grievance. The Carolinians suspended, then rescinded the ordinance of nullification, which had been universally condemned by other states. But the state convention consoled itself with the empty gesture of a second ordinance nullifying the Force Act. On this equivocal note, the nullification crisis dissolved. Both sides in reality suffered a long-term defeat. Nationalists led by Jackson had failed to quash ideas of state sovereignty and secession; Calhoun and the nullifiers had failed to forge a united front of slave states and had promoted the federal "consolidation" they feared and condemned.

The second party system, emergent at the time of the nullification crisis, produced its own constitutional controversies. HENRY CLAY had announced the basis of what he called the AMERICAN SYSTEM in 1824: a protective tariff, federal aid to INTERNAL IMPROVEMENTS, and support for the second Bank of the United States. In a decade this became the program of the Whig Party. Jacksonian Democrats denounced all three elements as being of dubious constitutionality. In 1830 President Andrew Jackson vetoed the MAYSVILLE ROAD BILL partly because he doubted that federal aid for internal improvements, at least those lying wholly within a state, was constitutional. Two years later, in his veto of the recharter bill for the second Bank of the United States, he similarly expressed reservations about the constitutional power of Congress to charter a bank. He brushed aside the binding force of Chief Justice John Marshall's decision on the subject in MCCULLOCH V. MARYLAND (1819) by asserting that "the authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities. . . ." In 1833 Jackson ordered his subordinates to remove all federal deposits from the bank, and to redistribute them in selected state-chartered banks.

The democratization of American politics was advanced by the Whigs' development of mass electioneering techniques in the 1840 presidential campaign. Whig success was short-lived, however, because of President William Henry Harrison's death in 1841. JOHN TYLER, a conservative Virginia Democrat, succeeded to the office, and in doing so established the important precedent that he was not merely the "acting President" but President in fact. One of the few positive accomplishments of the Whigs' brief accession to power was the enactment of the nation's second Bankruptcy Act in 1841. Its repeal in 1843 returned the matter of insolvency legislation to the states, where it was to remain until 1898. Direction of the nation's economy was to remain chiefly the responsibility of the states until the Civil War. (See BANKRUPTCY POWER.)

In the 1830s the states encouraged and subsidized economic development in numerous ways. Their role was almost entirely promotional; during the Jacksonian era, they essayed only the most diffident beginnings of ECONOMIC

REGULATION. The state legislatures granted charters and franchises for banking, insurance, railroad, and manufacturing CORPORATIONS. Encouraged by the remarkable but unduplicated success of New York's Erie Canal in the 1820s, other states provided direct financial support for construction of turnpikes, canals, and railroads.

State jurists likewise supported economic development, sometimes by creating whole new domains of law (torts, nonmarine insurance), and sometimes by reworking traditional legal doctrines to provide instrumentalist approaches supportive of entrepreneurs. In 1831 Chancellor Reuben Walworth of New York upheld the power of the legislature to grant EMINENT DOMAIN powers to railroads, and Chief Justice LEMUEL SHAW of the Massachusetts Supreme Judicial Court afterward approved the extension of that power to manufacturing corporations as well. Chief Judge JOHN BANNISTER GIBSON of the Pennsylvania Supreme Court helped refashion the law of contracts in favor of the doctrine of *caveat emptor*, an impersonal and seller-oriented approach presumably suited to a national market. The new orientation of the law of contracts and sales emphasized the autonomy of the individual and private will, dismissing earlier insistence on equitable dealing and community standards of fairness.

But the public law of the states in the 1830s was not exclusively concerned with succoring nascent industrial capitalism. In fact, the common law itself, as well as its judicial exemplars, came under reformist attack. In the Jacksonian period, the movement toward an elective judiciary decisively gained ground, as Mississippi led the way in 1832 by making its entire bench elective. Other states followed suit, so that by the twentieth century only the federal judiciary remained wholly appointive and life-tenured. An even stronger assault on judge-made law emerged from the movement to codify all laws. Even legal conservatives like Joseph Story conceded that some restatement of law in certain areas (EVIDENCE, criminal law, and commercial law) might be both feasible and useful. More thoroughgoing codifiers, such as Edward Livingston and Robert Rantoul, condemned the common law as antidemocratic, mysterious, and prolix.

Meanwhile, the controversy over slavery intensified. From 1835 to 1840, mobs in all sections of the country harassed abolitionists and free blacks. The beleaguered abolitionists, for their part, mounted a propaganda campaign against slaveholding by weekly mailings of abolitionist literature throughout the South. Democrats and southern political leaders reacted violently, with Postmaster General Amos Kendall condoning destruction of mail in Charleston. President Jackson recommended congressional prohibition of abolitionist mailing in the southern states, but Senator John C. Calhoun objected, partly because such federal legislation would invade rights reserved to the states. The controversy dissipated when abolitionists redirected their energies to a petition campaign, garnering signatures throughout the north on petitions to Congress demanding various antislavery measures, such as abolition in the District of Columbia, interdiction of the interstate slave trade, and refusal to annex the slaveholding republic of Texas or to admit new slave states.

Abolitionists were active in legal-constitutional efforts against slavery at the state level, too. In Massachusetts, they scored a striking victory against the ingress of sojourners' slaves in COMMONWEALTH V. AVES (1836), when Chief Justice Shaw expounded an American version of the doctrine of SOMERSET'S CASE (King's Bench, 1772). Shaw held that a sojourning slave could not be held in slavery against her will in Massachusetts because no state law supported slavery and because the "all men are free and equal" provision of the 1780 Massachusetts Declaration of Rights was "precisely adapted to the abolition of negro slavery." Abolitionists enjoyed less success the next year in Ohio and Pennsylvania, however. Chief Judge Gibson held in 1837 that, under the Pennsylvania constitution, blacks were not "freemen" and hence could not vote. A state constitutional convention meeting that year took no action to reverse this holding. In Ohio, the abolitionist lawyers SALMON P. CHASE and JAMES G. BIRNEY developed an impressive range of legal and constitutional arguments in *Matilda's Case* (1837) to demonstrate that the 1793 federal Fugitive Slave Act was unconstitutional under the FOURTH AMENDMENT, the Fifth Amendment's DUE PROCESS clause, and the NORTHWEST ORDINANCE 's guarantees of TRIAL BY JURY and HABEAS CORPUS. These arguments failed then, but they furnished an impressive stock of ideas to expanding ABOLITIONIST CONSTITUTIONAL THEORY.

At the national level, defenders of slavery launched a counterattack against this assault. The United States House of Representatives in 1836 adopted the first of the congressional "gag resolutions," declaring that all petitions coming into the House as a result of the antislavery petition campaign would be automatically tabled, without being referred or read. In subsequent years, the Senate adopted a similar rule, and the House made it a standing rule. But the gags proved insufficient bars to the determined evasions of a handful of antislavery congressmen, led by John Quincy Adams, who repeatedly introduced antislavery petitions. (See CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY.)

Observing such assaults on slavery with alarm, Calhoun introduced into the Senate in 1837 a series of resolutions that in effect restated the nature of the Union and slavery's relation to it. These resolutions condemned antislavery agitation as "subversive"; declared that the federal government was the "common agent" of the states, bound to protect all their institutions, including slavery; that slavery

was an "essential element" in the organization of the Union; that any congressional interference with slavery in the District of Columbia or the territories would be an "attack on the institutions" of the slave states; and that Congress could not discriminate against the interests of the slave states in the territories. Congress declined to adopt the last two, but its endorsement of the others threatened to give the slave states a constitutional predominance in the Union.

Abolitionists responded with innovative constitutional thinking of their own. In 1839 the hitherto unified movement began to split apart. The antislavery mainstream became involved in political action, forming the Liberty Party. They conceded exclusive state power over slavery in the states where it existed, but called for congressional action elsewhere, as, for example, by refusing to admit new slave states and by repealing the Fugitive Slave Act. Two splinter groups of the movement challenged this moderate position. Followers of William Lloyd Garrison, embracing the theological doctrine of perfectionism, by 1842 came to denounce the Constitution as a proslavery compact, and called for disunion. Radical abolitionists, led by the New York lawyer Alvan Stewart, discarded previous assumptions about slavery's legitimacy and contended that slavery was everywhere unconstitutional as a violation of various constitutional provisions, including the Fifth Amendment's due process clause (considered both in procedural and substantive senses), Article IV's guarantee of a REPUBLICAN FORM OF GOVERNMENT, and the same article's privileges and immunities clause.

Abolitionists harked back to the DECLARATION OF INDEPENDENCE and to the tenets of republican ideology of the Revolutionary era. So did contemporary suffrage reformers in Rhode Island, who faced the same problems of malapportionment and disenfranchisement as had Virginia two decades earlier. After concluding that the existing conservative regime would never concede reform, they called an extralegal constitutional convention to modernize the state's constitution, which until then had been the 1662 Charter. This "People's Constitution" was ratified by universal male suffrage. Its supporters then elected a new government for the state, with Thomas W. Dorr as governor. The existing regime refused to cede power, so for several months in 1842, Rhode Island had two governments, each claiming a different source of constitutional legitimacy: the Dorrites, a do-it-yourself, implicitly revolutionary popular sovereignty; and the extant regime, legality backed by force. With behind-the-scenes support of President Tyler, the regular government suppressed its opponents, then inaugurated the substance of what the reformers had demanded. The failure of the Dorr Rebellion demonstrated that the guarantees of self government and equality in the Declaration of Independence would not be taken literally or programmatically in the Jacksonian era.

Constitutional change came to other states less turbulently in the 1840s. In neighboring Massachusetts, Chief Justice Shaw placed the Supreme Judicial Court in the forefront of legal and constitutional innovation in a series of decisions from 1842 to 1850 that created new doctrines and revolutionized old ones. In *Commonwealth v. Hunt* (1842) Shaw legitimated labor union organization in the United States. The Philadelphia and New York *Cordwainers Cases* (1806, 1810), reaffirmed by New York decisions in the mid-1830s, had held labor organization and strikes to be CRIMINAL CONSPIRACIES at common law and illegal under state statutes prohibiting injury to commerce. But in *Hunt*, Shaw held that neither the objectives of the workers nor their means—unions and strikes—were inherently unlawful. Because it removed the taint of per se illegality from unions, the *Hunt* decision has been extravagantly called the "Magna Carta of organized labor."

Another Shaw decision of the same year, *Farwell v. Boston and Worcester Railroad*, proved as damaging to the cause of industrial workers as *Hunt* had been beneficial. In exempting an employer from liability for the injury to one of its employees caused by the negligence of another employee, Shaw enunciated the fellow-servant rule that stood as a bar to recovery in such situations.

Because Massachusetts was in the vanguard of industrialization, Shaw had an opportunity to influence the law of railroads and common carriers more than any other contemporary jurist, leading one scholar to conclude that he "practically established the railroad law for the country." In cases involving eminent domain and taxation, Shaw held railroads to be "a public work, established by public authority" whose property is held "in trust for the public." Shaw thereby hoped to secure legislative benefits granted railroads, while at the same time leaving open the possibility of some degree of public control through legislation. Yet he was solicitous to exempt railroads from forms of liability that would have drained investment capital.

The temperance movement proved to be as prolific a source of judicial lawmaking as innovations in transportation technology. Throughout the antebellum period, state appellate courts had kept alive the HIGHER LAW tradition enunciated by Justice SAMUEL CHASE in his opinion in CALDER V. BULL (1798). State judges, especially those of Federalist and Whig antecedents, readily struck down various state laws for the inconsistency with "the great principles of eternal justice" or "the character and genius of our government." In his *Commentaries on the Constitution* (3rd ed., 1858), Joseph Story summed up "the strong current of judicial opinion" that "the fundamental maxims of a free government seem to require, that the

rights of personal liberty and private property should be held sacred." The Delaware Supreme Court used such nebulous concepts derived from the nature of republican government to void a local-option PROHIBITION statute in 1847. Higher law constitutional doctrine became all the more important after the United States Supreme Court's 5–4 decision in the LICENSE CASES (1847), upholding Massachusetts, Rhode Island, and New Hampshire statutes taxing and regulating liquor imported from outside the state. This trend culminated in the celebrated case of WYNEHAMER V. PEOPLE (1856), where the New York Court of Appeals struck down a state prohibition statute under the state constitution's LAW OF THE LAND and due process clauses.

Chief Justice Shaw was the author of a doctrine that provided a powerful offset to such higher law tendencies: the POLICE POWER. In COMMONWEALTH V. ALGER (1951) he stated that all property is held "under the implied liability that . . . use of it may be so regulated, that it shall not be injurious . . . to the rights of the community." He accorded the legislature sweeping power to subject property to "reasonable limitations." After the Civil War, the police power doctrine constituted the basis for an alternative to the dogmas of SUBSTANTIVE DUE PROCESS and FREEDOM OF CONTRACT.

Courts were by no means the sole font of constitutional innovation in the 1840s. State legislatures and constitutional conventions also modified the constitutional order. Reflecting the movement of the age from status to contract, as noted by Sir Henry Maine, the state legislatures in the 1840s extended some measure of control to married women over their own property through the married women's property acts. State courts sometimes reacted with hostility to these measures, seeing them either as a deprivation of the husband's property rights protected by higher law or as deranging gender and marital relationships.

Four New England states experimented with embryonic railroad regulatory commissions (Rhode Island, 1839; New Hampshire, 1844; Connecticut, 1850; Massachusetts, various ad hoc special commissions), but none of these proved successful or permanent. New York in the 1840s had to confront the legal consequences of the emergent nativist controversy. Roman Catholics sought public funding for parochial schools and objected to use of the King James Bible for devotional sessions in public schools. Nativists, for their part, demanded that the predominantly Catholic immigrants of the period be disfranchised.

The most significant state constitutional event of the decade was the drafting and ratification of the New York Constitution of 1846. This document was a compendium of constitutional trends of the era and profoundly influenced subsequent constitutions, especially those of Michigan and Wisconsin. It capped the decade's long movement toward general incorporation acts by restricting the granting of special corporate charters, and, for good measure, made all legislation respecting corporations, both general and special, subject to repeal or amendment at any time. It put to rest the controversies of the rent wars of the previous decade by abolishing all feudal real property tenures and perpetual leases, converting all long-term leaseholds into freeholds. It made the entire New York bench elective, and required appointment of a three-member commission to draw up a reformed procedural code.

Despite the sweep of innovation in the 1846 New York Constitution and its daughters in the west, the needs of certain groups in American society remained unmet. Chief among these were women. Feminists convened in Seneca Falls, New York, in 1848 and issued a manifesto on women's rights modeled on the Declaration of Independence, demanding VOTING RIGHTS, the recognition by law of full legal capacity, revision of male-biased divorce laws, access to the professions and to educational opportunity, and abolition of all discriminatory legislation.

Blacks in the northern states were no better off. After 1842, their situation, especially in areas near the slave states, became more precarious because of Justice Story's opinion in PRIGG V. PENNSYLVANIA (1842), upholding the constitutionality of the Fugitive Slave Act of 1793 and striking down inconsistent state legislation. After *Prigg*, most state personal liberty laws, such as those assuring jury trial to alleged fugitives or extending the writ of habeas corpus to them, were suspect. Abolitionists seized on a Story dictum in *Prigg*, stating that the states did not have to assist in fugitive recaptures under the federal act. They induced several state legislatures to enact statutes prohibiting state facilities from being used for temporary detention of alleged fugitives.

The slavery question briefly returned to Congress in 1842, in the form of the "*Creole* Resolutions" offered by Representative Joshua Giddings (Whig, Ohio). Slaves aboard the *Creole*, an American-flag vessel, mutinied on the high seas and made their way to the Bahamas, where most of them were freed by British authorities. Secretary of State Daniel Webster protested and demanded compensation for the liberated slaves. Giddings, despite the gag rule, introduced resolutions setting forth the *Somerset*-based position that the slaves had merely resumed their natural status, freedom, and could not be reenslaved. The federal government lacked authority to protect or reimpose their slave status, which was derived solely from Virginia law and hence confined to this JURISDICTION. The House defeated the resolutions and censured Giddings. But he was reelected by a landslide, in effect forcing and

winning a REFERENDUM on his antislavery positions. This, together with the earlier and ignominious failure of an effort to censure Representative John Quincy Adams for flouting the gag, led to the demise of the gag rules in both houses in 1844.

Such inconclusive sparring between slavery and abolition might have gone on indefinitely had it not been for the Mexican War. But proslavery ambitions to expand into the southwestern empire fundamentally altered the character of the American Union, destabilizing extant constitutional settlements and requiring new constitutional arrangements to replace the now obsolete MISSOURI COMPROMISE.

ANNEXATION OF TEXAS had been controversial ever since Texan independence in 1836. When the issue reestablished itself on the national agenda in 1844, opponents of annexation, including Daniel Webster, Joseph Story, and John Quincy Adams, argued that annexation was not constitutionally permissible under the territories clause of Article IV, section 3, because previous annexations had been of dependent territories of sovereign nations, whereas Texas was itself an independent nation. Proponents dismissed this as an insignificant technicality, under the broad reading of the FOREIGN AFFAIRS power by Chief Justice Marshall in AMERICAN INSURANCE CO. V. CANTER (1828). Political opposition blocked ratification of an annexation treaty until President Tyler hit on the expedient of annexation by JOINT RESOLUTION of both houses, which required only a majority vote in each, rather than the two-thirds required for treaties in the Senate. Texas was thereby annexed in 1845.

Annexation hastened the deterioration of relations with Mexico, but Tyler was cautious and circumspect in his deployment of American forces in the areas disputed between Mexico and the United States. But the new President, JAMES K. POLK, ordered American ground forces into the area. After Mexican forces captured American soldiers, and the United States declared war, the question of the extent of the President's power to order American troops into combat areas reappeared regularly in congressional debates over military appropriations. In 1847, Whig Representative ABRAHAM LINCOLN offered the SPOT RESOLUTIONS, demanding to know the spot on American soil where, according to Polk, Mexican troops had attacked Americans. This led to House passage of a resolution early in 1848 declaring that the Mexican War had been "unconstitutionally begun by the President." Military victories and the TREATY OF GUADALUPE HIDALGO (1848) obviated this partisan measure, without providing any resolution to the question originally debated by James Madison and ALEXANDER HAMILTON in the Helvidius-Pacificus exchange of 1793 over whether there is an inherent executive prerogative that would embrace the power to commit troops to belligerent situations without explicit authorization by Congress. (See WAR, FOREIGN AFFAIRS, AND THE CONSTITUTION.)

In 1846, northern public opinion coalesced with remarkable unity behind the WILMOT PROVISO, which would have prohibited the extension of slavery into any territories to be acquired as a result of the Mexican War. Alarmed by the extent and fervor of grassroots support for such exclusion in the free states, administration Democrats and southern political leaders offered three alternatives to it, plus an expedient designed to depoliticize the whole question. The earliest proposal was to extend the old Missouri Compromise line of 36 30 all the way to the Pacific coast with slavery excluded north of the line and permitted south of it. After a short-lived flurry of interest in 1847, this suggestion withered. The northern Democratic alternative to the Wilmot Proviso was widely known as POPULAR SOVEREIGNTY or, pejoratively, "squatter sovereignty." First proposed by Vice-President George M. Dallas and then associated with Michigan Senator Lewis Cass, popular sovereignty called on Congress to refrain from taking any action concerning SLAVERY IN THE TERRITORIES, leaving it to the settlers of the territories to determine the future of slavery there. The idea's principal appeal derived from its superficial and simplistic democratic appearance. But its vitality was due to an ambiguity that could not be indefinitely postponed, namely, *when* were the settlers to make that determination? By the southern interpretation, that decision could not be made until the eve of statehood, by which time, presumably, slaveholders could avail themselves of the opportunity of settling there with their slaves and thus give the territory a proslavery impetus it would never lose. (All prior American territorial settlements had either guaranteed property rights in extant slaves, such as the LOUISIANA PURCHASE TREATY, or, like the Northwest Ordinance, had left existing pockets of slavery undisturbed as a practical matter despite their theoretical prohibition of slavery.) The northern assumption concerning popular sovereignty was that the territorial settlers could make their choice concerning slavery at any time in the territorial period, a position unacceptable to the South, which correctly believed that such an interpretation would exclude slavery.

The third alternative was embodied in resolutions offered by Calhoun in 1847. He proposed that the territories were the common property of all the states, and that Congress therefore could not prohibit citizens of any state from taking their property (including slaves) with them when they migrated into a territory. He also asserted that Congress could not refuse to admit a new state because it permitted slavery. After Calhoun's death in 1850, others

advocated that Congress would have to protect the rights of slaveholders in all territories.

This selection of alternatives naturally influenced the presidential election of 1848. Democrats nominated Cass, thus providing some oblique endorsement of popular sovereignty, with its yet unresolved ambiguity. Whigs nominated the apolitical General ZACHARY TAYLOR and refused to endorse any party position at all on the various alternatives. Disgrunted elements of both parties in the northern states joined hands with the moderate, political-action abolitionists of the Liberty party to form the Free Soil party, which adopted the Wilmot Proviso as its basic plank, supplemented by the old Liberty party program of "divorce" of the federal government from support of slavery. Free Soil was an implicitly racist program, calling for the exclusion of all blacks from the territories to keep them open to white settlement, but that made it no less abominable to southern political leaders. The Whig victory in 1848 on its nonplatform merely postponed the resolution of what was rapidly becoming an urgent constitutional confrontation.

The American Union was in a far different condition in 1848 from what it had been at the onset of the Jacksonian era. The nation had increased in geographical extent by half. Such an immense increase necessitated a new or wholly revised constitutional order that could accommodate, if possible, the conflicting sectional expectations for the future of the western empire. All major constitutional events that had occurred at the national level since 1831 had made John Quincy Adams's prediction of that year all the more pertinent: the questions came ever closer to being settled at the cannon's mouth.

WILLIAM M. WIECEK
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Bibliography


BLOOMFIELD, MAXWELL 1976 *American Lawyers in a Changing Society, 1776–1876.* Cambridge, Mass.: Harvard University Press.

DUMOND, DWIGHT L. 1961 *Antislavery: The Crusade for Freedom in America.* Ann Arbor: University of Michigan Press.

FRIEDMAN, LAWRENCE M. 1973 *A History of American Law.* New York: Simon & Schuster.

HAAR, CHARLES M., ed. 1965 *The Golden Age of American Law.* New York: Braziller.

HORWITZ, MORTON J. 1977 *The Transformation of American Law, 1780–1860.* Cambridge, Mass.: Harvard University Press.

HURST, JAMES WILLARD 1956 *Law and the Conditions of Freedom in the Nineteenth-Century United States.* Madison: University of Wisconsin Press.

HYMAN, HAROLD M. and WIECEK, WILLIAM M. 1982 *Equal Justice under Law: Constitutional Development, 1835–1875.* New York: Harper & Row.

LEVY, LEONARD W. 1957 *The Law of the Commonwealth and Chief Justice Shaw: The Evolution of American Law, 1830–1860.* Cambridge, Mass.: Harvard University Press.

WIECEK, WILLIAM M. 1977 *The Sources of Antislavery Constitutionalism in America, 1760–1848.* Ithaca, N.Y.: Cornell University Press.

ZAINALDIN, JAMIL 1983 *Law in Antebellum Society: Legal Change and Economic Expansion.* New York: Knopf.


## CONSTITUTIONAL HISTORY, 1848–1861

In American constitutional history, the years 1848 to 1861 ordinarily appear as a prelude to revolution, a time of intense controversy without significant change. Yet in at least two respects this impression is mistaken. First, constitutional change, though minimal in the national government, was widespread and vigorous among the states during the antebellum period. Second, if the structure of party politics is included (as it should be) in one's purview of the American constitutional system, then the 1850s, like the 1860s, were a decade of revolution.

Powerful social forces exerted pressure upon the constitutional order at mid-century. Mass immigration reached its first crest, with more than two million persons arriving in the years 1849–1854. This great influx caused much concern about the effects of ethnic diversity upon the quality of national life and upon the American experiment in self-government. At the same time, the progress of industrialization and business enterprise was rapidly changing the economic face of the agricultural nation for which the Constitution had been written. The railroads alone, as they tripled their mileage in the 1850s and thus accelerated their transformation of domestic commerce, confronted government with a host of new issues and problems, ranging from the regulation of capital formation to the determination of corporate liability in tort law. Still another major force at work was the continuing westward expansion of American SOVEREIGNTY and American people. The United States in 1848 was a transcontinental nation that had acquired forty percent of all its territory in the preceding three years. Occupation and assimilation of this new Western empire, extending from the mouth of the Rio Grande to the waters of Puget Sound, would absorb much national energy throughout the rest of the century. The process in itself placed no heavy strains upon the constitutional system. For the most part, it required only the further use of already tested forms and practices, such as territorial organization. But in the antebellum period, westward expansion became irredeemably entangled with still another formidable social force—the increasingly ominous sectional conflict over slavery.

The federal government, while extending its rule to the

Pacific Ocean in the antebellum period, underwent little structural change. The Constitution had not been amended since 1803. Far fewer amendments than usual were proposed from 1848 to 1860, and none of them passed either house of Congress. (Prominent among those introduced were proposals for the popular election of senators and postmasters.) During the secession winter of 1860–1861, however, Congress received nearly two hundred proposed amendments. Most of them were aimed at dampening the crisis by offering concessions or guarantees to the South on such subjects as SLAVERY IN THE TERRITORIES and the DISTRICT OF COLUMBIA, the domestic slave trade, FUGITIVE SLAVES, and the right to travel with slaves in free states. Only one of these efforts proved successful to the point of passing both houses, but RATIFICATION in the states had scarcely begun before it was interrupted and canceled by the outbreak of hostilities. This abortive "Thirteenth Amendment" would have forbidden any amendment authorizing Congress to interfere with slavery as it existed in the states, thereby presumably fixing a double lock on the constitutional security of the institution. (See CORWIN AMENDMENT.)

Besides formal amendment, constitutional change may be produced by other means, such as legislative enactment and judicial decision. Congress altered the structure of the executive branch in 1849, for instance, by establishing a Department of the Interior. To it were transferred a number of agencies previously housed in other departments, notably those administering PATENTS, public lands, military pensions, and Indian affairs. Congress in 1849 also created the new office of "assistant secretary" for the Treasury Department, adding a similar position to the Department of State four years later. The federal bureaucracy as a whole grew appreciably in the antebellum period, but largely because of the necessary expansion of the postal system. Of the 26,000 civilian employees in 1851 and 37,000 in 1861, eighty percent were in the postal service. Only six percent performed their duties in the capital. On the eve of the CIVIL WAR, the whole Washington bureaucracy numbered about 2,200. The Department of State got along throughout the 1850s with a staff of thirty persons or fewer. The presidency remained a very simple affair with practically no official staff. Not until 1857 did Congress provide funds even for a private secretary and a messenger.

The federal government accepted few new responsibilities during the antebellum period. Enlargement of its role was inhibited by the economic principle of laissez-faire, by the constitutional principles of STRICT CONSTRUCTION and FEDERALISM, and by the inertial influence of custom. Most of the governmental activity affecting the lives of ordinary citizens was carried on by the states and their subdivisions. Any effort to extend national authority usually met resistance from Southerners worried about the danger of outside interference with slavery. Congressional reluctance to expand federal power is well illustrated in the history of the first successful telegraph line, run between Washington and Baltimore in the mid-1840s. Built with federal money and put in commercial operation as a branch of the postal system, it was very soon turned over to private ownership. When Congress did occasionally become venturesome, presidential disapproval might intervene. JAMES K. POLK and Franklin Pierce, citing constitutional reasons, vetoed several INTERNAL IMPROVEMENTS bills. JAMES BUCHANAN expressed similar scruples in vetoing homestead legislation and land grants for the support of colleges. Sometimes a new social problem or need did evoke federal intervention, such as laws providing for safety inspection of steamboats and for minimum health standards on ocean-going passenger ships. Perhaps most significant was the expanded use of federal subsidies, in the form of land grants or mail contracts, to support railroad construction, steamship lines, and overland stagecoach service to the Pacific.

Although the three branches of the federal government remained fairly stable in their relationships to one another during the antebellum period, there was some shift of power from the presidency to Congress. The change is commonly viewed as a decline in presidential leadership, but it must be attributed to other factors as well, including the intensity of the sectional conflict. Congress could quarrel violently over slavery, then arrange some kind of truce, and thus perform admirably its function as a deliberative assembly. The President, on the other hand, could take no vigorous action, make no substantial proposal in respect of slavery without infuriating one side or the other.

For various reasons, none of the Presidents between ANDREW JACKSON and ABRAHAM LINCOLN served more than a single term, and only one, MARTIN VAN BUREN, was even renominated. Polk's energetic foreign policy and successful prosecution of the war with Mexico strengthened the presidency for a time, but by 1848 sectional strains and party dissension had put his administration in disarray. Zachary Taylor and Millard Fillmore were committed as Whigs to the principle of limited executive power. They did not exercise the VETO POWER, for instance, and were the last Presidents in history to refrain from doing so. Taylor, to be sure, proved unexpectedly stubborn on the slavery issue and seemed headed for a collision with Congress until his sudden death in the summer of 1850 cleared the way for compromise. During the great sectional crisis of 1846–1850, the Senate reached its peak of oratorical splendor and national influence. JOHN C. CALHOUN, HENRY CLAY, and DANIEL WEBSTER were the most famous men in America, and the outstanding political figure of the decade that followed was not a President but a senator—STEPHEN A. DOUGLAS. Most of the leading cabinet members of the

1840s and 1850s (Webster, Calhoun, Buchanan, Robert J. Walker, John M. Clayton, JEFFERSON DAVIS, Lewis Cass) were recruited directly from the Senate. Lincoln, after his election in 1860, filled the three top cabinet positions with Republican senators. The appearance of presidential weakness in the 1850s was therefore partly a reflection of senatorial prestige.

If Pierce and Buchanan were among the most ineffectual of American Presidents, as they are commonly portrayed, it was not for lack of trying to be otherwise. Both men regarded themselves as Jacksonian executives. Together they exercised the veto as often as Jackson in his two terms (though Pierce's negatives were usually overridden). Both took stern attitudes toward groups whom they labeled rebellious—namely, the free-state forces in Kansas and the Mormons in Utah. Both conducted a vigorously expansionist foreign policy, having in mind especially the acquisition of Cuba. Both made energetic use of patronage to coerce votes from Congress on critical measures—the KANSAS-NEBRASKA ACT in 1854 and the admission of Kansas with a proslavery constitution in 1858. (See LECOMPTON CONSTITUTION.) Their fatal mistake was in misjudging the moral and political strength of the antislavery crusade. Seeking to discredit and dissipate the movement rather than accommodate it, they pursued policies that disastrously aggravated the sectional conflict and thereby brought the Presidency into disrepute. Then, in the final crisis of 1860–1861, Buchanan's constitutional scruples and his reluctance to use presidential power without specific congressional authorization lent substance to the *fainéant* image that history has fixed upon him. Again, as in 1850, the fate of the country seemed to rest primarily with the Senate, and when compromise failed in that body, little hope remained for peaceable preservation of the Union.

Meanwhile, the Supreme Court had tried its hand at resolving the slavery question and in the process had reasserted its power to review congressional legislation. The famous decision in DRED SCOTT V. SANDFORD (1857) invalidated a law that had been repealed three years earlier—the 3630 restriction of the MISSOURI COMPROMISE. Consequently, it did not put the Court into confrontation with Congress. Like the policies of Pierce and Buchanan, however, the decision outraged antislavery opinion and aggravated the sectional conflict. Thus the Court, like the presidency, entered the Civil War with lowered prestige.

At the level of state rather than national government, antebellum Americans acted very much in accord with the Jeffersonian credo that every generation should write its own fundamental law. The period 1830 to 1860 has been called "the high water mark for the making of constitutions among the states." During those three decades, ten new states framed their first constitutions, and eighteen of the other twenty-four revised their constitutions by means of conventions. In addition, many states added amendments from time to time through legislative action. The voters of Massachusetts, for instance, rejected a new constitution drafted by a convention in 1853, but they approved of six amendments in 1855, three in 1857, one in 1859, and two in 1860.

State constitutions became longer in the antebellum period, not only describing in greater detail the structure and functions of government but also incorporating many specific instructions and prohibitions intended to set public policy and control the substance of governmental action. The machinery for constitutional change remained heterogeneous, generally cumbersome, and, in some states, poorly defined. There was a clear trend, however, toward popular participation at every stage. Typically, voters decided whether a convention should be called, elected its members, and passed judgment on its handiwork. Legislative amendment, which bypassed the convention process and often had to be approved by two successive legislatures, was always submitted to the voters for ratification.

Democratization of the state constitutional systems, begun earlier in the century, proceeded unremittingly during the antebellum period. Two major categories of change were further extension of the franchise and further lengthening of the list of elective offices. With but a few exceptions, the old religious and property-holding qualifications for suffrage disappeared, although some states continued to require that voters be taxpayers. Under nativist influence, Connecticut in 1855 and Massachusetts in 1857 sought to curtail immigrant participation in politics by installing an English literacy test. But a stronger contrary tendency, exemplified in the constitutions of Wisconsin (1848), Michigan (1850), Indiana (1851), and Kansas (1859), was to expand the immigrant vote by enfranchising foreigners as soon as they had declared their intention to become citizens. Women were everywhere excluded from the polls, except in a few local elections, and blacks could vote only in a half-dozen northeastern states, but white male suffrage had become almost universal. The shift from appointive to elective offices was most dramatic in the case of the judiciary. Until 1846, only a few states had elective judgeships of any kind, and only in Mississippi were all judges elected. In that year both New York and Iowa followed the Mississippi example, and then the rush began. By 1861, twenty-four of the thirty-four states had written the election of judges into their constitutions, though in five of them the change did not extend to their supreme courts.

The antebellum state constitutions, like those written earlier, were primarily constructive. They established or redesigned systems of government and endowed them

with appropriate powers. But in many there was also a conspicuous strain of negativism, reflecting disillusionment with state government and a determination to curb extravagance, corruption, and favoritism. Notably, the framers often placed new restrictions on legislative authority, particularly with reference to public finance, banks, and corporations. These subjects were political issues, of course, but then every CONSTITUTIONAL CONVENTION became to some extent a party battle. As a rule, Democrats were more hostile than their opponents to corporate enterprise and government promotion of it. Attitudes varied according to local circumstances, however, and much depended upon which party in the state had the upper hand at the time. The states of the Old Northwest, where prodigal internal improvement policies in the 1830s had proved disastrous, were especially emphatic in their restraint of legislative power. Their new constitutions approved in the years 1848–1851 forbade state investment in private enterprise and put strict limits on public indebtedness. They also restricted banking in various ways, such as ordering double liability for stockholders, prohibiting the suspension of specie payments, and requiring that any general banking act must be submitted to a popular REFERENDUM.

State constitutional change occurred in many ways and resulted from the work of many hands, including those of voters, convention delegates, legislators, governors, and judges. Appellate courts particularly often shaped or reshaped the fundamental law in the course of performing their routine duties, although JUDICIAL REVIEW of state legislation by state courts was a fairly rare occurrence until after the Civil War. Despite all the constitutional activity, innovation was by no means the dominant mode in the antebellum period. States borrowed much from one another, and old forms were sometimes retained well beyond the limits of their appropriateness. Vermont in 1860 still had its quaint Council of Revision, elected every seven years to examine the condition of the constitution and propose amendments. North Carolina had not yet given its governor a veto power, and in South Carolina, the legislature continued to choose the state's presidential electors. Yet the new problems of the age did encourage some experimentation. For example, certain states had begun to develop the quasi-judicial regulatory commission as an extra branch of government, and framers of the Kansas constitution in 1859 introduced the item veto, a device that most states would eventually adopt.

Although federal and state constitutional development proceeded in more or less separate grooves, the fundamental constitutional problem of the age was the relation between the nation and its constituent parts. The problem had been present and intermittently urgent since the birth of the republic, but after 1846 it became associated much more than ever before with the interrelated issues of slavery and expansion and with the dynamics of party politics.

In the federal system established by the Constitution, the national government and the state governments were each supreme within their respective spheres. This principle of DUAL FEDERALISM, even though it accorded rather well with the actual structure and distribution of governmental power in antebellum America, was by no means universally accepted as a true design of the Republic. Nationalists like Webster and Lincoln asserted the primacy of the nation, the sovereignty of its people, and the perpetuity of the Union. Sectionalists like Calhoun and Davis lodged sovereignty with the states, insisted upon strict construction of federal authority, and viewed the Union as a compact that could be abrogated. Logical consistency was not a characteristic of the intersectional debate, however. Both proslavery and antislavery forces invoked federal power and appealed to states' rights whenever either strategy suited their purposes. With regard to the recovery of fugitive slaves, for instance, Southerners demanded expansion and vigorous use of national authority, while the resistance to that authority of some northern state officials amounted to a revival of nullification. (See UNION, THEORIES OF THE.)

Most Americans agreed that slavery was a state institution, but from that premise they drew conflicting inferences. In the radical antislavery view of SALMON P. CHASE, the institution had no standing beyond the bounds of slave-state JURISDICTION, and the federal government had no constitutional power to establish it, protect it, or even acknowledge its legal existence. In short, slavery was local and freedom national. (See ABOLITIONIST CONSTITUTIONAL THEORY. ) According to Calhoun, however, the federal government, as the mere agent of the states, was constitutionally obligated to give slavery as much protection as it gave any other kind of property recognized by state law. Only the sovereign power of a state could restrict or abolish the institution. In short, slavery was national and antislavery the local exception.

The practice of the United States government over the years ran closer to Calhoun's theory than to Chase's. All three branches recognized property rights in slaves and extended aid of some kind to their masters. Congress went beyond the requirements of the Constitution in making the recovery of fugitive slaves a federal business, and under congressional rule the national capital became a slave state in miniature, complete with a slave code, whipping posts, and a thriving slave trade. The image of the nation consistently presented in diplomatic relations was that of a slaveholding republic. With a persistence amounting to dedication, the Department of State sought compensation for owners of slaves escaping to foreign soil, and repeatedly it tried to secure Canadian cooperation in the return

of fugitives. In the *Dred Scott* decision, Chief Justice ROGER B. TANEY laid down the one-sided rule that the federal government had no power over slavery except "the power coupled with the duty of guarding and protecting the owner in his rights."

To be sure, national authority was also used for antislavery purposes. In outlawing the foreign slave trade, Congress plainly acted within the letter and intent of the Constitution. In prohibiting slavery throughout much of the Western territory, however, the lawmakers probably drew as much sanction from the example of the NORTHWEST ORDINANCE as from the somewhat ambiguous passage in Article IV, section 3, that seemed to be relevant—namely, "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." By 1840, such prohibition had been enacted in six territorial organic acts, as well as in the Missouri Compromise. Furthermore, Chief Justice JOHN MARSHALL in AMERICAN INSURANCE COMPANY V. CANTER (1828) had given the territory clause a broad construction. In legislating for the TERRITORIES, he declared, "Congress exercises the combined powers of the general and of a State government." Since the authority of a state government to establish or abolish slavery was generally acknowledged, Marshall's words seemed to confirm Congress in possession of the same authority within the territories.

The constitutionality of legislation excluding slavery from federal territory did not become a major issue in American public life until after introduction of the WILMOT PROVISO in 1846. Although the question had arisen at times during the Missouri controversy of 1819–1820, the famous 36°30' restriction had been approved without extensive discussion and with the support of a majority of southern congressmen. The subject had arisen again during the 1830s, but only as a secondary and academic consideration in the debate over abolitionist attacks upon slavery in the District of Columbia. As a practical matter, the Missouri Compromise had presumably disposed of the problem by reviving and extending a policy of having two different policies, one on each side of a dividing line. North of that line (first the Ohio River and then 36°30'), slavery was prohibited; south of the line, slavery was permitted if desired by the white inhabitants.

In the summer of 1846, with Texas annexed and admitted to statehood, with title to Oregon secured by treaty, and with the war against Mexico under way, the United States found itself engaged in territorial expansion on a grand scale. Texas entered the Union as a slaveholding state, and Oregon was generally understood to be free soil, but what about New Mexico and California, if they should be acquired by conquest? To many Americans, including President Polk, the obvious answer seemed to be extending the Missouri Compromise line to the Pacific Ocean. But the issue arose at a time when sectional antagonism had been inflamed by a decade of quarreling over abolitionist petitions, the GAG RULE, and the Texas question. Furthermore, whereas the 36°30' line had meant partial abolition in a region previously open to slavery, extension of the line through New Mexico and California would have meant a partial rescinding of the abolition already achieved there by Mexican law. So David Wilmot's proposal to forbid slavery in any territory that might be acquired from Mexico won the overwhelming approval of northern congressmen when it was introduced in the House of Representatives on August 8, 1846. Southerners were even more united and emphatic in their opposition; for the Proviso would have completed the exclusion of slaveholders from all the newly acquired land in the Far West. Such injustice, they warned, could not fail to end in disunion.

The Proviso principle of "no more slave territory" quickly became the premier issue in American politics and remained so for almost fifteen years. Virtually the raison d'être of the Free Soil and Republican parties, the principle was rejected by Congress in 1850 and again in 1854, deprived of its legitimacy by the Supreme Court in 1857, and supported by less than forty percent of the electorate in the presidential contest of 1860. Yet forty percent proved sufficient to put a Republican in the White House and thereby precipitate SECESSION. During those years of intermittent sectional crisis from 1846 to 1861, the Southerners and northern conservatives who controlled government policy sought desperately and sometimes discordantly for a workable alternative to the Proviso. One thing that complicated their task was the growing tendency of all elements in the controversy to constitutionalize their arguments.

Southerners especially felt the need for constitutional sanction, partly because of their vulnerability as a minority section but also in order to offset the moral advantage of the antislavery forces. It was not enough to denounce the Proviso as unfair; they must also prove it to be unconstitutional despite the string of contrary precedents running back to the venerated Northwest Ordinance. One way of doing so was to invoke the Fifth Amendment, arguing that any congressional ban on slavery in the territories amounted to deprivation of property without DUE PROCESS OF LAW. But this argument, though used from time to time and incorporated rather vaguely in Taney's *Dred Scott* opinion, did not become a significant part of anti-Proviso strategy. For one thing, the Fifth Amendment had another cutting edge, antislavery in its effect. Free Soilers and Republicans could and did maintain that slavery was illegal in federal territory because it amounted to deprivation of *liberty* without due process of law.

More in keeping with the strict constructionism generally favored by Southerners was the principle of "nonintervention," that is, congressional nonaction with respect to slavery in the territories. Actually, nonintervention had been government policy in part of the West ever since 1790, always with the effect of establishing slavery. But in earlier years the policy had been given little theoretical underpinning. Then, after the introduction of the Wilmot Proviso, there were strenuous efforts to convert nonintervention into a constitutional imperative. The emerging argument ignored Marshall's opinion in *American Insurance Company v. Canter* and held that the territory clause of the Constitution referred only to disposal of public land. In providing government for a territory, Congress could do nothing more than what was absolutely necessary to prepare the territory for statehood. That did not include either the prohibition or the establishment of slavery. Thus nonintervention became a doctrine of federal incapacity. It left open, however, the question of what authority prevailed in the absence of congressional power. One answer, associated with Calhoun, was that property rights in slavery were silently legitimized in every territory by the direct force of the Constitution. Another answer, associated with Lewis Cass and Douglas, was that nonintervention meant leaving the question of slavery to be decided by the local territorial population. The latter theory, given the name POPULAR SOVEREIGNTY, had the advantage of seeming to be in tune with the spirit of Jacksonian democracy.

Thus, by 1848, when American acquisition of New Mexico and California was confirmed in the TREATY OF GUADALUPE HIDALGO, four distinct solutions to the problem of slavery in the territories had emerged. At one political extreme was the free soil doctrine requiring enactment of the Wilmot Proviso. At the other extreme was the Calhoun property rights doctrine legitimizing slavery in all federal territory by direct force of the Constitution. Between them were two formulas of compromise: extension of the 3630 line and the principle of popular sovereignty. Presumably the choice rested with Congress, but the constitutionalizing of the argument opened up another possibility—that of leaving the status of slavery in the territories to judicial determination. Legislation facilitating referral of the question to the Supreme Court was proposed in 1848 and incorporated in the historic set of compromise measures enacted two years later. The COMPROMISE OF 1850 admitted California as a free state, but for the rest of the Mexican Cession it adopted the principle of nonintervention. The effect was to reject the 3630 and Proviso solutions while leaving the field still open to popular sovereignty, the property rights doctrine, and judicial disposition.

Although neither of the major parties took a formal stand on the territorial question in the elections of 1848 and 1852, it was the Democrats who became closely associated with the principle of nonintervention. Cass, their presidential nominee in 1848, declared that Congress lacked the power to prohibit slavery in the territories and that the territorial inhabitants should be left free to regulate their internal concerns in their own way. This seemed to endorse popular sovereignty as the appropriate corollary to nonintervention, but for about a decade the Democratic party managed to invest both terms with enough ambiguity to accommodate both its northern and southern wings. More specifically, Southerners found that they could assimilate popular sovereignty to their own purposes by viewing it as the right of a territorial population to accept or reject slavery *at the time of admission to statehood.* That would presumably leave the Calhoun doctrine operative during the territorial period. At the same time, northern Democrats like Douglas went on believing that popular sovereignty meant the right of a territorial legislature to make all decisions regarding slavery, within the limits of the Constitution. The Whigs failed to achieve any such convenient doctrinal ambiguity, and that failure may have contributed to the disintegration of their party.

In 1854, a heavily Democratic Congress organized the territories of Kansas and Nebraska, repealing the antislavery restriction of the Missouri Compromise and substituting the principle of nonintervention. "The true intent and meaning of this act," the measure declared, "[is] not to legislate slavery into any Territory or State, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States." This passage, since it could be interpreted to mean either the northern or the southern brand of popular sovereignty, preserved the ambiguity so necessary for Democratic unity. But of course the Kansas-Nebraska Act, by removing a famous barrier to slavery, provoked a storm of anger throughout the free states and set off a political revolution.

The crisis of the late 1850s was in one respect a confrontation between the emerging Republican party and the increasingly united South—that is, between the Wilmot Proviso and the principles of Calhoun. Yet it was also a struggle within the Democratic party over the meaning of nonintervention and popular sovereignty. The *Dred Scott* decision in March 1857 cleared the air and intensified the crisis. In ruling that Congress had no power to prohibit slavery in the territories, the Supreme Court officially constitutionalized the principle of nonintervention and virtually rendered illegal the main purpose of the Republican party. But Chief Justice Taney went further and disqualified the northern Democratic version of popular

sovereignty. If Congress had no such power over slavery, he declared, then neither did a territorial legislature. Douglas responded with his FREEPORT DOCTRINE, insisting that a territorial government, by unfriendly legislation, could effectively exclude slavery, no matter what the Court might decide to the contrary. Southern Democrats, in turn, demanded federal protection of slavery in the territories, and on that issue the party split at its national convention in 1860.

By 1860 it had become apparent that slavery was not taking root in Kansas or in any other western territory. Yet when secession began after Lincoln's election, the efforts at reconciliation concentrated on the familiar territorial problem. The centerpiece of the abortive Crittenden compromise was an amendment reviving and extending the 3630 line, so recently outlawed by the Supreme Court. This continued fascination with an essentially empty issue was not so foolish as it now may seem; for the territorial question had obviously taken on enormous symbolic meaning. Because of the almost universal agreement that slavery in the states was untouchable by the federal government, the territories had come to be the limited battleground of a fierce and fundamental struggle. Thus the sectional conflict of the 1850s, whatever its origins and whatever its substance, was decisively shaped by constitutional considerations.

DON E. FEHRENBACHER
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Bibliography

BESTOR, ARTHUR 1961 State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine, 1846–1860. *Illinois State Historical Society Journal* 54:117–80.

DEALEY, JAMES QUAYLE 1915 *Growth of American State Constitutions.* Boston: Ginn & Co.

FEHRENBACHER, DON E. 1978 *The Dred Scott Case: Its Significance in American Law and Politics.* New York: Oxford University Press.

PARKINSON, GEORGE PHILLIP, JR. 1972 "Antebellum State Constitution-Making: Retention, Circumvention, Revision." Ph.D. dissertation, University of Wisconsin.

POTTER, DAVID M. 1976 *The Impending Crisis, 1848–1861.* Completed and edited by Don E. Fehrenbacher. New York: Harper & Row.

WHITE, LEONARD D. 1954 *The Jacksonians: A Study in Administrative History, 1829–1861.* New York: Macmillan.

## CONSTITUTIONAL HISTORY, 1861–1865

If expediency and ideology ordinarily conflict with the constitutionalist desire for procedural regularity and limitations on government, in time of war they pose a fundamental challenge to CONSTITUTIONALISM and the RULE OF LAW. The first fact to be observed about the constitutional history of the CIVIL WAR, therefore, is that the federal Constitution, as in the prewar period, served as both a symbol and a source of governmental legitimacy and as a normative standard for the conduct of politics. Because the rule of the Constitution continued without interruption, it is easy to overlook the pressures that the war generated to institute a regime based exclusively on necessity and the public safety. To be sure, considerations of public safety entered into wartime constitutionalism, and there were those who believed passionately that the Union government in the years 1861 to 1865 did indeed cast aside the Constitution and resort to arbitrary rule. Yet, considered from either a comparative or a strictly American perspective, this judgment is untenable. The record abundantly demonstrates the persistence of constitutional controversy in Congress, in the executive branch, in the courts, and in the forum of public opinion—evidence that the nation's organic law was taken seriously in time of war, even if it was not applied in the same manner as in time of peace. Indeed, a constitutionalizing impulse may be said to have manifested itself in the business of warfare itself. General Order No. 100 for the government of Union armies in the field, promulgated by President ABRAHAM LINCOLN in 1863, was an attempt to limit the destructiveness of modern war that had resulted from developments in weaponry and from the emergence of other aspects of total war.

The most important constitutional question resolved by the events of the war concerned the nature of the Union. (See THEORIES OF THE UNION.) The Framers of the Constitution had created a mixed regime that in some respects resembled a confederation of autonomous states and in others a centralized unitary government. Its distinguishing feature—the chief characteristic of American FEDERALISM—was the division of SOVEREIGNTY between the federal government and the state governments. In constitutional law several decisions of the Supreme Court under Chief Justice JOHN MARSHALL had confirmed this dual-sovereignty system; yet periodically it was questioned by political groups who insisted that the Union was simply a league of sovereign states, and that the federal government possessed no sovereignty whatsoever except as the agent of the states. From 1846 to 1860 defenders of slavery asserted this state-sovereignty theory of the Union; although they never secured a congressional majority for the theory, they did force northern Democrats to adopt positions that virtually abandoned any claim to federal sovereignty in matters concerning slavery. The SECESSION policy of President JAMES BUCHANAN, which regarded secession as illegal but nonetheless tolerated the existence of the newly forming Confederate States of America, signified the constitutional and political bankruptcy of Dem-

ocratic DUAL FEDERALISM and the practical repudiation of federal sovereignty.

The constitutional results of the Civil War must be measured against the effective triumph of proslavery state sovereignty which permitted the disintegration of the Union in 1860–1861. Northern victory in the war established federal sovereignty in political fact and in public policy, and by the same token repudiated the state-sovereignty theory of the Union. From the standpoint of constitutional law, this result vindicated the divided-sovereignty concept of federalism asserted in the early national period. From the standpoint of federal-state relations in the field of public policy, the war produced a significant centralizing trend, evident principally in military recruitment and organization, internal security, the regulation of personal liberty and CIVIL RIGHTS, and the determination of national economic policy.

The changes in federalism produced by the war have usually been described—sometimes in almost apocalyptic terms—as the destruction of STATES' RIGHTS and the old federal Union and their replacement by a centralized sovereign nation. In fact, however, the changes in federal-state relations that occurred between 1861 and 1865 did not seriously erode or alter the decentralized constitutional system and political culture of the United States. The centralizing of policy was based on military need rather than the appeal of a new unitary constitutional model, and it was of limited scope and duration. In no comprehensive way did the federal government become supreme over the states, nor were states' rights obliterated either in law or in policy. The theoretical structure of American federalism, as explicated by John Marshall, persisted; the actual distribution of power between the states and the federal government, the result of policy struggles on questions raised by the war, was different.

Perhaps the best way to describe the change in federalism that occurred during the Civil War is to say that after a long period of disinclination to use the constitutional powers assigned to it, the federal government began to act like an authentic sovereign state. Foremost among its achievements was the raising of armies and the providing and maintaining of a navy for the defense of the nation.

At the start of the war the decision to resist secession was made by the federal government, but the task of raising a military force fell largely upon the states. The regular United States Army, at approximately 16,000 men, was inadequate for the government's military needs, and federal authorities were as yet unprepared to call for United States volunteers. To meet the emergency it was necessary to rely on the militia, a form of military organization that, while subject to national service, was chiefly a state institution. Accordingly President Lincoln on April 15, 1861, acting under the Militia Act of 1795, issued a call to the state governors to provide 75,000 militia for three months of national service. By August 1861, in pursuance of additional presidential requests, the War Department had enrolled almost 500,000 men for three years' duty. Yet, although carried out under federal authority, the actual recruiting of troops and to a considerable extent their preparation for combat were done by the state governors, acting as a kind of war ministry for the nation.

This arrangement did not last long. Within a year declining popular enthusiasm and the utility of centralized administrative management severely impeded state recruiting efforts and led to greater federal control. Eventually national CONSCRIPTION was adopted. Congress took a half-way step toward this policy in the Militia Act of July 1862, authorizing the President, in calling the militia into national service, to make all necessary rules and regulations for doing so where state laws were defective or inadequate. Under this statute a draft was planned by the War Department, to be enforced by provost marshals nominated by state governors and appointed by the department. Political resistance in the states prevented implementation of this plan. At length, in the Enrollment Act of March 1863, Congress instituted an exclusively national system of conscription. Directed at male citizens ages twenty to forty-five and foreigners who declared their intention to become citizens, the draft law omitted all reference to the state militia. Conscription was to be enforced by federal provost marshals under a Provost Marshal General, operating under an administrative structure organized according to congressional districts. The Civil War draft, which permitted substitutes and money commutation, aroused widespread and often violent opposition and was directly responsible for inducting only six percent of the total Union military force. Nevertheless, it proved to be a decisive constitutional precedent on which the federal government relied in meeting its manpower needs in the wars of the twentieth century. (See SELECTIVE SERVICE ACTS.)

Closely related to the raising of armies was the task of maintaining internal security on the home front against the treasonable and disloyal acts of persons interfering with the war effort. In this sphere too the Union government exercised previously unused powers, asserting an unwonted sovereignty in local affairs that challenged the states' exclusive power to regulate civil and political liberty.

The law against TREASON, the elements of which had been defined in the Constitution, was the most formidable instrument for protecting national security outside the theater of war. Yet in its various manifestations—the Treason Act of 1790 requiring the death penalty and the Seditious Conspiracies Act of 1861 and the treason provisions of the CONFISCATION ACT of 1862 imposing less se-

vere penalties—it was inapplicable in the South as long as federal courts could not operate there. It was also unsuited to the task of containing the less than treasonable activities of Confederate sympathizers and opponents of the war in the North. Loyalty oaths were a second internal security measure. The third, and by far the most important, component of Union internal security policy was military detention of persons suspected of disloyal activities, suspension of the writ of HABEAS CORPUS, and the imposition of martial law.

In April 1861 and on several occasions thereafter, President Lincoln authorized military commanders in specific areas to arrest and deny the writ of habeas corpus to persons engaging in or suspected of disloyal practices, such as interfering with troop movements or discouraging enlistments. In September 1862 the President issued a general proclamation that such persons were liable to trial by military commission or court-martial. Initially the State Department supervised civilian arrests made by secret service agents, federal marshals, and military officers. In February 1862 the War Department assumed responsibility for this practice and created a commission to examine the causes of arrests and provide for the release of persons deemed to be political prisoners. Congress further shaped internal security policy in the HABEAS CORPUS ACT of March 1863, requiring the secretaries of war and state to provide lists of prisoners to federal courts for GRAND JURY consideration. If no indictment for violation of federal law should be forthcoming, a prisoner was to be released upon taking an oath of allegiance.

The Union government arrested approximately 18,000 civilians, almost all of whom were released after brief detention for precautionary rather than punitive purposes. The policy was extremely controversial, however, for what Unionists might consider a precaution to prevent interference with the war effort could easily be regarded by others as punishment for political dissent. Evaluation of internal security policy depended upon conflicting interpretations of CIVIL LIBERTIES guarantees under the Constitution, and differing perceptions of what critics and opponents of the government were in reality doing. As with conscription, however, there was no denying that internal security measures had a significant impact on federal-state relations.

In carrying out this policy the federal government for the first time intervened significantly in local regulation of civil and political liberty. Not only did the federal government make arbitrary or irregular arrests but it also temporarily suspended the publication of many newspapers. Not surprisingly, considering the traditional exclusivity of state power over civil liberty and the partisan context in which the internal security question was debated, the states resisted this extension of federal authority. In several states persons adversely affected by internal security measures, or by enforcement of federal laws and orders concerning conscription, trade restrictions, internal revenue, or emancipation, initiated litigation charging federal officers with violations of state law, such as false arrest, unlawful seizure, kidnaping, assault, and battery. Under prewar federalism no general recourse was available to national officials involved as defendants in state litigation of this sort. Congress remedied this defect, however, in the Habeas Corpus Act of 1863.

The 1863 act provided that orders issued by the President or under his authority should be a defense in all courts against any civil or criminal prosecution for any search, seizure, arrest, or imprisonment undertaken in pursuance of such an order. The law further authorized the removal of litigation against national officers from state to federal courts, and it imposed a two-year limit on the initiation of such litigation. On only two previous occasions, in 1815 and 1833 in response to state interference with customs collection, had Congress given protection for federal officers acting under authority of a specific statute by permitting removal of litigation from state to federal courts. The Habeas Corpus Act of 1863, by contrast, protected actions taken under any federal law or EXECUTIVE ORDER. Critics argued that the law gave immunity rather than indemnity, denied citizens judicial remedies for wrongs done by the government, and usurped state power. The logic of even a circumscribed national sovereignty demanded some means of protection against state JURISDICTION, however, and during reconstruction Congress extended the removal remedy and the federal judiciary upheld its constitutionality. The wartime action marked an important extension of federal jurisdiction that made the national government, at least in time of national security crisis, more able to compete with the states in the regulation of civil liberty.

The most novel and in the long run probably the most important exercise of federal sovereignty during the Civil War led directly to the abolition of slavery and the protection of personal liberty and civil rights by the national government. No constitutional rule was more firmly established than that which prohibited federal interference with slavery in the states that recognized it. The outbreak of hostilities did not abrogate this rule, but it did create the possibility that, under the war power, the federal government might emancipate slaves for military purposes. After prohibiting slavery where it could under its peacetime constitutional authority (in the DISTRICT OF COLUMBIA and in the TERRITORIES), Congress struck at slavery in the Confederacy itself. In the Confiscation Act of 1862, it declared "forever free" slaves belonging to persons in rebellion, those who were captured, or who came within Union army lines. Executive interference with slavery

went considerably farther. After trying unsuccessfully in 1862 to persuade loyal slaveholding states to accept a federally sponsored plan for gradual, compensated emancipation to be carried out by the states themselves, Lincoln undertook military emancipation. In the EMANCIPATION PROCLAMATION of January 1, 1863, he declared the freedom of all slaves in states still in rebellion and pledged executive-branch protection of freedmen's personal liberty.

Federal power over personal liberty was further made manifest in the work of local police regulation undertaken by Union armies as they advanced into southern territory. All persons in occupied areas were affected by the rule of federal military commanders, and none more so than freed or escaped slaves. From the first incursions of national force in May 1861, War and Treasury Department officials protected blacks' personal liberty, provided for their most pressing welfare needs in refugee camps, and assisted their assimilation into free society by organizing their labor on abandoned plantations and by recruiting them into the army. In March 1865 Congress placed emancipation-related federal police regulation on a more secure footing by creating the Bureau of Refugees, Freedmen, and Abandoned Lands. Authorized to control all subjects relating to refugees and freedmen for a period of one year after the end of the war, the FREEDMEN'S BUREAU throughout 1865 established courts to protect freedmen's personal liberty and civil rights, in the process superseding the states in their most traditional and jealously guarded governmental function.

Federal emancipation measures, based on the war power, did not accomplish the permanent abolition of slavery as it was recognized in state laws and constitutions. To accomplish this momentous change, and the invasion of state power that it signified, amendment of the Constitution was necessary. Accordingly, Congress in January 1865 approved for submission to the states a constitutional amendment prohibiting slavery or involuntary servitude, except as a punishment for crime, in the United States or any place subject to its jurisdiction. Section 2 of the amendment gave Congress authority to enforce the prohibition by appropriate legislation.

Controversy surrounded this terse, seemingly straightforward, yet rather delphic pronouncement, which became part of the Constitution in December 1865. Though it appeared to be a legitimate exercise of the amending power under Article V, Democrats argued that the THIRTEENTH AMENDMENT was a wrongful use of that power because it invaded state jurisdiction over local affairs, undermining the sovereign power to fix the status of all persons within a state's borders and thus destroying the unspoken premise on which the Constitution and the government had been erected in 1787. The Republican framers of the amendment for their part were uncertain about the scope and effect of the guarantee of personal liberty that they would write into the nation's organic law. At the least, the amendment prohibited chattel slavery, or property in people; many of its supporters believed it also secured the full range of civil rights appurtenant to personal liberty that distinguished a free republican society. No determination of this question was required in order to send the amendment to the states, however, and when a year later the precise scope of the guarantees provided and congressional enforcement power became issues in reconstruction, more detailed and specific measures, such as the CIVIL RIGHTS ACT OF 1866 and the FOURTEENTH AMENDMENT, were deemed necessary. Constitutionally speaking, the Thirteenth Amendment played a minor role in reconstruction.

The federal government further exercised sovereignty characteristic of a nation-state in the sphere of economic policy. This development raised few questions of constitutional propriety; the instruments for accomplishing it lay ready to hand in the ALEXANDER HAMILTON-John Marshall doctrines of BROAD CONSTRUCTION and IMPLIED POWERS. These doctrines had fallen into desuetude in the Jacksonian era, when mercantilist-minded state governments effectively determined economic policy. The exodus of Southerners from the national government in 1861 altered the political balance, however, and Republicans in control of the wartime Congress seized the opportunity to adopt centralizing economic legislation. They raised the tariff for protective purposes, authorized construction of a transcontinental railway, facilitated settlement on the public domain (HOMESTEAD ACT), provided federal aid to higher education (MORRILL ACT), established a uniform currency, asserted federal control over the nation's banking institutions, and taxed the American people in innovative ways (income tax, DIRECT TAX). These measures laid the foundation for increasing federal ECONOMIC REGULATION in the late nineteenth and early twentieth centuries. Yet they did not make the determination of economic policy an exclusively national function. In this field, as in civil rights, the federal government's acquisition of a distinct and substantial share of sovereignty diminished, but by no means obliterated, state power.

As the federal government gained power relative to the states during the war, so within the SEPARATION OF POWERS structure of the national government the executive expanded its authority relative to the other branches. Lincoln was the instrument of this constitutional change. Unlike his predecessor Buchanan, Lincoln was willing to acknowledge the necessity of an inflexible defense of the Union during the secession crisis, and after the bombardment of Fort Sumter he acted swiftly and unhesitatingly to commit the nation to arms.

To raise a fighting force Lincoln called the state militia into national service, ordered—without authority from Congress—a 40,000-man increase in the regular army and navy, requested 42,000 volunteers, and proclaimed a blockade of ports in the seceded states. He also instituted the main elements of the internal security program previously described, closed the postal service to treasonable correspondence, directed that $2,000,000 be paid out of the federal treasury, and pledged the credit of the United States for $250,000,000. Lincoln did all this without congressional authority, but not without regard for Congress. Ordering the militia into national service, he called Congress into session to meet in mid-summer. Directing the enlargement of the army and navy, he said he would submit these actions to Congress. He did so, and Congress voted approval of the President's military orders, "as if they had been done under the previous express authority and direction of the Congress." Thereafter Lincoln was ever mindful of the lawmaking branch, and in some respects deferential to it. Yet in war-related matters he continued to take unilateral actions. Thus he proclaimed martial law, suspended habeas corpus, suppressed newspaper publication, issued orders for the conduct of armies in the field, ordered slave emancipation, and directed the political reorganization of occupied southern states.

How could these extraordinary actions be rationalized under the nation's organic law? The question aroused bitter controversy at the time, giving rise to charges of dictatorship which continued to find echo in scholarly debate. No more penetrating analysis of the problem has ever been offered than that presented by Lincoln himself.

In his message to Congress of July 4, 1861, Lincoln said his actions were required by "public necessity" and "popular demand." Referring to suspension of the writ of habeas corpus, he stated that if he violated "some single law," his doing so was justified on the ground that it would save the government." "[A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?" he asked. On another occasion Lincoln posed the question whether it was possible to lose the nation and yet preserve the Constitution. "By general law life and limb must be protected," he reasoned, "yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb." This appears to mean that the Constitution might be set aside, as a limb is amputated, to save the life of the nation. The inference can be drawn that emergency action, while expedient, is unconstitutional.

What is required to understand the lawfulness of the emergency measures in question, however, is not legalistic analysis of the constitutional text but rather consideration of the fundamental relationship between the nation and the Constitution. Lincoln's principal argument was that the steps taken to defend the government were constitutional because the Constitution implicitly sanctioned its own preservation. The Constitution in this view was not a mere appendage of the living nation or a derivative expression or reflection of national life, as a legal code might be considered to be. Coeval and in an ultimate political sense coterminous with it, the Constitution *was* the nation. This conception is present in Lincoln's statement of April 1864 that "measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation." "Is there," he asked in his message of July 1861, "in all republics, this inherent and fatal weakness? Must a government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?" Not that Lincoln conceded to his critics at the level of positivistic, text-based constitutional argument. Concerning habeas corpus suspension, for example, he tenaciously insisted that as the Constitution did not specify who might exercise this power, he was justified in doing so when Congress was not in session. Congress, in fact, subsequently ratified Lincoln's suspension of habeas corpus. Although his argument conformed to the requirements of American constitutional politics, his principal justification of emergency actions was that they were necessary to preserve the substance of political liberty, which was the end both of the Constitution and the Union.

It is sometimes said that Lincoln established in American public law the principle of constitutional dictatorship. Yet at no time did Lincoln exercise unlimited power. The notion of constitutional dictatorship also obscures the fact that although Lincoln applied military power on a far wider scale than previous Presidents, in doing so he merely accelerated a tendency toward expansion of the executive's defensive war-making capability. In 1827 the Supreme Court, in MARTIN V. MOTT, had upheld the President's power under the Militia Act of 1795 to call out the militia (and by extension the army and navy) in the event of actual or imminent invasion. President JAMES K. POLK had used this defensive war-making power to commit the nation to war against Mexico, and Presidents Millard Fillmore and Franklin Pierce had employed military force in circumstances that could have led to wars with foreign states. In his exercise of executive power Lincoln merely widened a trail blazed by his predecessors.

Yet in minor matters unrelated to the war, emancipation, and reconstruction, Lincoln was a passive President. Although as party leader he made effective use of his patronage powers, he did little to influence congressional legislation aside from formal suggestions in annual messages. Moreover he exercised the veto sparingly, gave broad latitude to his department heads, and made little use of the cabinet for policymaking purposes. Lincoln's

respect for legislative independence complemented and encouraged another important nineteenth-century constitutional trend—the strengthening of congressional power.

To an extent that is difficult to appreciate in the late twentieth century, nineteenth-century government was preeminently legislative in nature. Lawmakers shaped public policy, resolved constitutional controversies through debate and legislation, controlled the TAXING AND SPENDING process, and exercised significant influence over administration. The years between the presidencies of THOMAS JEFFERSON and ANDREW JACKSON had been a period of legislative assertiveness, and although the struggle over slavery had brought Congress to near-paralysis, still the political foundation existed for wartime exertions of power that anticipated the era of congressional government during and after reconstruction.

Although Congress approved Lincoln's emergency measures in 1861, its action by no means signified general deference to executive power. On the contrary, reciting constitutional provisions that gave Congress power to declare war and regulate the military establishment, members made vigorous claim to exercise the WAR POWER. Accordingly, they raised men and supplies for the war, attempted through the Joint Committee on the Conduct of the War to influence military strategy, modified internal security policy, and enacted laws authorizing confiscation, emancipation, and reconstruction. The need for party unity notwithstanding, the Republican majority in Congress insisted on civilian control over the military, monitored executive department administration, and, in an unusual maneuver in December 1862, even tried to force a change in the cabinet. Tighter internal organization and operational procedures made Congress more powerful as well as more efficient during the war. The speaker of the House, for example, assumed greater control over committee memberships and the flow of legislative business; the party caucus became a more frequent determinant of legislative behavior; and standing committees and their chairmen enjoyed enhanced prestige and influence, gradually superseding select committees as the key agencies for accomplishing legislative tasks. Exercising power conferred by statute in 1857 to punish recalcitrant or uncooperative witnesses, Congress used its investigative authority to extend its governmental grasp.

In the 1930s and 1940s, Civil War historiography regarded conflict between a radical-dominated Congress and the soberly conservative Lincoln administration as the central political struggle of the war. Recent research has shown, however, that disagreement between the Democratic and Republican parties was more significant in shaping the course of political and constitutional events than was the radical versus moderate tension within the Republican party. Conflict occurred between the executive and legislative branches, as much as a result of institutional rivalry inherent in the structure of separated powers as of programmatic differences. Congressional-presidential relations were not notably more strained than they have been in other American wars. Although Lincoln demonstrated the potentially vast power inherent in the presidency, his wartime actions did not measurably extend the executive office beyond the sphere of crisis government. He evinced no tendency toward the so-called stewardship conception of the presidency advanced by THEODORE ROOSEVELT in the early twentieth century. The power of Congress waxed, its wartime achievements in policymaking and internal organization providing a solid basis for a subsequent era of congressional government.

A significant portion of American constitutional history from 1861 to 1865 occurred south of the Potomac, where were manifested many of the same problems and tendencies that appeared in the wartime experience of the United States government. The CONFEDERATE CONSTITUTION, modeled closely on that of the United States, revealed the most bitterly contested issues that had led to the war. It recognized and protected the right of slave property; proclaimed state sovereignty as the basis of the Confederacy; omitted the GENERAL WELFARE clause and the TAXING AND SPENDING POWER contained in the United States Constitution; stated that all federal power was expressly delegated; and prohibited a protective tariff and INTERNAL IMPROVEMENTS appropriations. Yet the right of secession was not recognized, evidence that the Confederacy was intended to be a permanent government.

Confederate constitutional history was marked by war-induced centralization and conflicts between federal and state authority. The Confederate government conscripted soldiers; suspended the writ of habeas corpus and declared martial law; confiscated enemy property and seized for temporary use the property of its own citizens; taxed heavily and imposed tight controls on commerce and industry; and owned and operated munitions, mining, and clothing factories. These actions and policies aroused strong opposition as expressed in the rhetoric of states' rights and through the institutions of state government. Some governors refused to place their troops under the Confederacy's authority and challenged conscription and internal security measures. Many state judges granted writs of habeas corpus that interfered with military recruitment. Lack of effective leverage over the states seriously hampered the Confederate war effort.

The most significant difference between Union and Confederate constitutionalism centered on POLITICAL PARTIES. Driven by the desire to create national unity, Southerners eschewed political party organization as unnecessary and harmful. When political differences arose, they had to find resolution in the conflict-inducing meth-

ods of the system of states' rights. In the North, by contrast, political parties continued to compete, with beneficial results. Political disagreements between the government and its Democratic critics were kept within manageable bounds by the concept of a loyal opposition, while among members of the governing party differences were directed into policy alternatives. Moreover, party organization encouraged federal-state cooperation in the implementation of controversial measures like conscription, thus helping to minimize the centrifugal effects of federal organization. Indeed, the persistence of organized party competition, even in the critical year of 1864 when military success was uncertain and the Democratic party campaigned on a platform demanding a cessation of hostilities, was perhaps the most revealing fact in Civil War constitutional history. It showed that despite important changes in federal-state relations and reliance on techniques of emergency government, the American commitment to constitutionalism was firm, even amidst events that tested it most severely.

HERMAN BELZ
(1986)

Bibliography

BELZ, HERMAN 1978 *Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era.* New York: Norton.

CURRY, LEONARD P. 1968 *Blueprint for Modern America: Nonmilitary Legislation of the First Civil War Congress.* Nashville, Tenn.: Vanderbilt University Press.

FEHRENBACHER, DON E. 1979 Lincoln and the Constitution. In Cullom Davis, ed., *The Public and Private Lincoln: Contemporary Perspectives.* Carbondale: University of Southern Illinois Press.

HYMAN, HAROLD M. 1973 *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution.* New York: Knopf.

MCKITRICK, ERIC 1967 Party Politics and the Union and Confederate War Efforts. In Walter Dean Burnham and William N. Chambers, eds., *The American Party System: Stages of Political Development.* New York: Free Press.

MCLAUGHLIN, ANDREW C. 1936 Lincoln, the Constitution, and Democracy. *International Journal of Ethics* 47:1–24.

RANDALL, JAMES G. (1926) 1951 *Constitutional Problems under Lincoln,* rev. ed. Urbana: University of Illinois Press.

WEIGLEY, RUSSELL F. 1967 *A History of the United States Army.* New York: Macmillan.

## CONSTITUTIONAL HISTORY, 1865–1877

The great political and constitutional issue of the period 1865–1877 was the RECONSTRUCTION of the Union after the CIVIL WAR. Reconstruction presented several closely related issues. There were issues involving the nature of the federal system. One of these arose even before the war ended: what was the constitutional relationship to the Union of the states that had attempted to secede? Another arose after the southern states were restored to normal relations: what powers did the national government retain to protect the rights of its citizens? There was the problem of defining the constitutional status of black Americans—a problem that finally forced Americans to define American CITIZENSHIP and the rights incident to it. Also, because the President and Congress disagreed on these issues, Reconstruction brought about a crisis in legislative-executive relations that culminated in the only impeachment of an American President. Finally, the Reconstruction controversy had a powerful effect upon Americans' conception of the proper role of government, laying the groundwork for the development of laissez-faire constitutionalism.

These issues would be adjusted in the context of the established party system. During the war, the Republican party worked diligently and fairly successfully to broaden its support. Renaming their organization the Union party, Republican leaders accepted as colleagues men who had been influential Democrats until the outbreak of war. In 1864 the party nominated Tennessee's Democratic former governor and senator, ANDREW JOHNSON, to the vice-presidency. Despite this, the Union party, which would revive the name Republican after the war, was the heir to the governmental activism of the old Federalist and Whig parties. Likewise Republicans inherited nationalist theories of the federal system. (See UNION, THEORIES OF THE.), The war confirmed and extended their distrust of STATES' RIGHTS doctrines; yet many Republicans would resist going too far in the direction of "consolidation" of the Union at the expense of traditional areas of state jurisdiction. On the other hand, the majority of Democrats had remained loyal to their party and its heritage of states' rights and small government. Naturally, the Reconstruction issue, which involved both questions, found the two parties ranged against one another.

Northerners faced a paradox when they considered the status of the Confederate states at war's end. They had denied that a state could leave the Union, but few wanted the same governments that had attempted secession to return as if nothing had happened. Only so-called Peace Democrats argued that the Union should be restored through negotiations between the Confederate state governments and the national government. Somehow, Republicans and War Democrats insisted, the national government must have power to secure some changes in the South and in the federal system before final restoration. As the war progressed, and especially in 1865 and 1866, when they were forced to grapple with the problem, Republicans propounded a variety of constitutional justi-

fications for such power. Unlike Democrats, who insisted that state government had existed before the Union and independent of it, Republicans insisted that states could exist only in the Union and by virtue of their connection with it. Thus, by trying to secede, the southern states had committed STATE SUICIDE, in the graphic language of Senator CHARLES SUMNER; or, as other Republicans put it, they had "forfeited their rights." Given this view, there were several ways to justify national power over Southerners. Many Republicans argued that if Southerners now lacked state governments, Congress must restore them under the clause of the Constitution requiring the national government to guarantee a REPUBLICAN FORM OF GOVERNMENT to each state. Moreover, in the 1849 case of LUTHER V. BORDEN the Supreme Court, citing this clause, had seemed to concede to the "political branches" of the government the power to recognize whether a state government was legitimate in case of doubt. The Court had held that the admission of state representatives to Congress was conclusive. With state governments defunct, Republicans argued, the Court's holding meant that the political branches of the national government would have final say about what government would be recognized as restored to the Union and when that recognition would take place. Implicit in this power was the authority to determine what sort of government would be acceptable.

But when some Republicans insisted that the GUARANTEE CLAUSE entitled the national government to require changes it believed necessary for states to be considered republican, most of their colleagues rebelled. Such an interpretation would give the national government power to modify "unrepublican" political and civil laws in states that had never left the Union.

Other Republicans found a safer source of power over states that had forfeited their rights: the national government had recovered control over the territory and citizens of the South through exercise of its WAR POWERS, which had overridded the peacetime provision of the Constitution that guaranteed citizens' and states' rights. The government could continue to hold Southerners in this "grasp of war" until they agreed to meet the government's conditions for the restoration of peace. On this theory, national power would be temporary, providing no precedent for intruding in states that had not been in rebellion.

Finally, other Republicans—those who wanted the most radical changes in southern society—argued that, having broken away from national authority de facto, the southern states were conquered provinces no different from any other newly acquired territory. Thus Southerners were subject to the direct control of the national government, which ought to provide ordinary territorial governments through which they could govern themselves under the revisory power of Congress. In this way the national government would retain authority to legislate directly for the South until new states were created there—establishing a public school system, for example, or confiscating the great landed estates and distributing them among the people as small farms. But this theory also seemed too radical for most Northerners, and most Republicans endorsed the more limited "grasp-of-war" doctrine.

Congress was adjourned in April and May 1865, as Lincoln was assassinated and the war ended. Lincoln's successor, the former Democrat Johnson, accepted the key elements of the WADE-DAVIS BILL developed during the war, but he followed Lincoln's policy of carrying it out under presidential authority, rather than calling Congress back into session to enact Reconstruction legislation. Johnson called for white, male voters in each southern state to elect a state constitutional convention as soon as fifty percent of them had taken a loyalty oath that would entitle them to AMNESTY. Thus blacks would have to depend on governments elected by whites for protection of life and property. The conventions were required to pronounce their states' SECESSION ordinances null and void, repudiate debts incurred by their Confederate state governments, and abolish slavery. Finally, the southern states would have to ratify the proposed THIRTEENTH AMENDMENT, which abolished slavery throughout the land. Then the conventions could organize elections to ratify the new constitutions, elect state officials, and elect congressmen. By December 1865, as Congress reconvened, this process had been completed in most of the southern states and would soon be completed in the remainder.

At first Johnson was vague about his constitutional theory of Reconstruction, but as congressional opposition developed his supporters articulated a position that left little power to Congress. Secession had merely "suspended" the operation of legal governments in the South, they insisted. As COMMANDER-IN-CHIEF of the armed forces, the President had the duty under the government's war powers to reanimate state governments. War powers were inherently presidential, Johnson insisted. He had exercised them in such a way as to preserve the traditional federal system. Congress could do no more than exercise its constitutional power to "judge of the elections, returns and qualifications of its own members" by deciding whether individual congressmen-elect were disqualified by their roles in the war; it could not deny REPRESENTATION to whole states. Gaining the support of northern Democrats for this states'-rights-oriented policy, Johnson set the stage for a bitter struggle over the relative powers of the branches of the national government.

A majority of congressmen might have acquiesced in the President's position had they been confident that loyalists would control the southern state governments or that the rights of the newly freed slaves would be re-

spected there. However, it soon became apparent that the states were controlled by former rebels and that the rights of the freedmen would be severely circumscribed. Compounding the problem, the ex-Confederate-dominated South would increase its congressional representation now that slavery was abolished; the constitutional provision counting only three-fifths of the slave population would no longer apply. All this persuaded congressional Republicans to refuse immediate admission of southern state representatives to Congress and to seek a compromise with the President.

There were two thrusts to the congressional policy: protection of freedmen's rights and a new system of apportionment of representation in Congress. Most congressional leaders believed that the Thirteenth Amendment automatically conferred citizenship upon the freedmen when it abolished slavery. Moreover, the amendment's second section authorized Congress to pass legislation appropriate to enforce abolition. Republicans acted upon this understanding by passing a new FREEDMEN'S BUREAU bill, augmenting one passed during the war, and proposing the bill that became the CIVIL RIGHTS ACT OF 1866. The first, a temporary measure justified under the war powers, authorized an Army bureau to supervise the transition from slave to free labor, protecting the rights and interests of the freedmen in the process. The second was designed to secure permanent protection for the freedmen in their basic rights. Few Republicans thought that Americans would accept so drastic a change in the federal system as to give Congress instead of the states the job of protecting people in their ordinary rights. Therefore they adopted the idea of leaving that job to the states but requiring them to treat all groups equally. At the same time, Republicans intended to require equality only in the protection of *basic* rights of citizenship. This goal forced them to define just what those rights were. So the Civil Rights Act declared all persons born in the United States, except Indians who did not pay taxes, to be citizens of the United States; it granted all citizens, regardless of race, the same basic rights as white citizens. What were these basic rights of citizenship? "To make and enforce contracts; to sue, be parties, and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property; and to full and equal benefit of all laws and proceedings for the security of persons and property" and to "be subject to like punishment, pains, and penalties." To secure these rights without centralizing power of ordinary legislation in Washington, the bill permitted citizens to remove legal cases from state to federal court jurisdiction in any state that did not end discrimination. (See CIVIL RIGHTS REMOVAL.) The idea was to force states to abolish RACIAL DISCRIMINATION in their own laws in order to preserve their jurisdictions. As its author explained, the act would "have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race."

At the same time Republicans prepared a fourteenth amendment to define citizenship and its rights; to change the way seats in Congress were apportioned, so as to reflect the number of voters rather than gross population; to disqualify leading Confederates from holding political office; and to guarantee payment of the United States debt while repudiating the Confederate debt. Congress was to have power to enforce this amendment, too, by "appropriate" legislation.

Republicans expected Johnson to endorse these measures, which after all did not attempt to replace the governments he had instituted in the South, and they expected Southerners to signify their acceptance of these "terms of peace" by ratifying the new amendment. However, Johnson insisted that the Republican program would revolutionize the federal system. He vetoed the legislation and urged Southerners to reject the proposed amendment. At the same time he attacked the Republicans bitterly. Republicans responded by passing the Civil Rights Act over Johnson's veto, enacting the new Freedman's Bureau Act, and sending the FOURTEENTH AMENDMENT to the states for RATIFICATION. To the voters, they stressed the moderation of their proposals, and Johnson's supporters were badly beaten in the congressional elections of 1866. Nonetheless, Southerners followed Johnson's advice and refused to ratify the amendment.

This refusal angered and frightened Republican congressmen. If the conflict drifted into stalemate, northern voters might tire of it and blame the Republicans for not completing restoration. Outraged at southern recalcitrance and Johnson's "betrayal," the Republicans passed new Reconstruction laws over his veto early in 1867. Designating Johnson's southern governments as temporary only, the Republicans instructed Southerners to begin the process anew. This time many leading Confederates would be disfranchised while the freedmen were permitted to vote. New state conventions would have to be elected to write new constitutions banning racial discrimination in civil and political rights. The voters would have to ratify these constitutions, and then newly elected state officials would have to ratify the Fourteenth Amendment. In 1869 the Republican Congress proposed to the states the FIFTEENTH AMENDMENT, banning racial discrimination in voting; southern states that had not yet finished the process of being readmitted would be required to ratify this amendment, too. In some ways the new program was a relief to Republicans. They expected that once southern blacks could vote, their state governments would have to provide them with the protection of the laws, thus rendering unnecessary the exercise of national power and preserving the old balance of the federal system.

Until the southern states complied with the new Reconstruction laws, they were to be under the control of the Army, subject to martial law and, if necessary, military courts. Southerners insisted that this whole program was unconstitutional, and they tried to persuade the Supreme Court to declare it so. In 1867 and 1868 representatives of Johnson's state governments asked the Supreme Court to enjoin Johnson and his secretary of war, respectively, from enforcing the MILITARY RECONSTRUCTION ACTS. They hoped for success, because the majority of the Justices were suspected of opposing the Republican program. In earlier cases, including EX PARTE MILLIGAN (1866), a narrow majority had held that military courts could not operate upon civilians where civil courts were functioning, and in the TEST OATH CASES the Court had ruled unconstitutional laws requiring persons to swear oaths of past loyalty in order to follow certain professions. However, even Johnson would not sustain an effort to secure Court intervention in so plainly a political issue, and the Court dismissed both suits. (See MISSISSIPPI V. JOHNSON.)

Southerners tried again in EX PARTE MCCARDLE (1869), where a Southerner convicted of murder in a military court asked for a write of HABEAS CORPUS, citing the Supreme Court's Milligan decision. At least some Reconstruction laws might be jeopardized if the Court endorsed this argument, and Republicans responded by repealing the law under which McCardle had brought his suit. The Court grudgingly acquiesced in the repeal but virtually invited a new application for the writ under another law.

These developments produced ambivalent feelings about the courts among Republicans. Before the war the judiciary had tended to sustain laws protecting slavery and discrimination against black Americans. During the war Chief Justice ROGER B. TANEY had seemed to obstruct the military effort, and the Court's course since the war had hardly been reassuring. Fearing judicial interference, several leading Republicans proposed narrowing the Court's jurisdiction and requiring a two-thirds majority of Justices to rule a congressional law unconstitutional, or denying that power altogether. On the other hand, the judiciary was the only national institution besides the military capable of enforcing the new laws protecting the rights of American citizens. Not only did Congress refrain from passing the court-limitation bills but it also expanded judicial authority by making the national judiciary the forum in which citizens and even businesses were to secure justice if their rights were denied in the states. Indeed, even as Republicans worried whether the Court would impair Reconstruction, in their roles as circuit court judges the Justices were upholding the power of the national government to protect rights under the Thirteenth and Fourteenth Amendments. Altogether, the Reconstruction era witnessed a great expansion of the jurisdiction and activity of the federal courts.

While the southern attack on the Reconstruction laws failed in the Supreme Court, Johnson was able to use against the laws the fact that they employed the military in their enforcement. As COMMANDER-IN-CHIEF of the armed forces, Johnson sought to limit the authority of military commanders and to give command of occupying forces to officers sympathetic to his position. When Secretary of War EDWIN M. STANTON resisted these efforts, Johnson suspended him from office and appointed the popular General ULYSSES S. GRANT in his place. By late 1867 Johnson's obstruction was so successful that Reconstruction was grinding to a halt, with white Southerners ready to prevent ratification of their new, egalitarian constitutions.

Many Republicans denied that the President had the constitutional right to obstruct legislation in this way, and they urged the House of Representatives to impeach him. However, most Republicans were frightened of taking so radical a step, and many insisted that IMPEACHMENT lay only for indictable crimes. Despite his obstructionism, Johnson had not clearly broken any law, and they would not support impeachment until he did. Therefore in December 1867 the first impeachment resolution failed.

However, in February 1868 Johnson did finally seem to break a law. As noted, Johnson had earlier suspended Secretary of War Stanton. He had done this while the Senate was adjourned, conforming to the TENURE OF OFFICE ACT, passed in 1867, which made all removals of government officers temporary until the Senate confirmed a successor, or, in certain circumstances, voted to accept the President's reasons for removal. In Stanton's case, the Senate in 1867 refused to concur in the removal, and Stanton returned to office. Now Johnson defied the Senate and the law, ordering Stanton's permanent removal. The House impeached him immediately, and from March through May the Senate established rules of procedure, heard arguments and testimony, and deliberated.

Although many questions were raised during Johnson's trial in the Senate, the decision finally turned for most senators on whether they believed Stanton was in reality covered by the Tenure of Office Act. Despite Johnson's initial compliance with the act, his lawyers persuaded just enough Republican senators that the act did not cover Stanton, and Johnson was acquitted. But the price for acquittal was Johnson's promise to end his obstruction of the Reconstruction laws. With that interference ended, most southern states adopted new state constitutions, and in nearly all those states Republicans took control of the governments.

The new southern constitutions and Republican governments were among the most progressive in the nation.

Elected mainly by black voters, southern Republican leaders thought they could secure enough white support to guarantee continued victory by using government power to promote prosperity and provide services. Thus they emulated northern Republican policies, using state taxes and credit to subsidize railroads and canals, to develop natural resources, and to control flooding along the Mississippi River. They created the first centralized state public school systems and opened state hospitals and asylums. At the same time southern Republicans were committed to improving the conditions of former slaves, both on principle and to keep the support of their largest constituency. They passed laws to provide them with the same state services that whites received, put blacks in important positions, banned discrimination in many businesses, shaped labor laws to protect workers' interests, and appointed local judges who would be sympathetic to blacks in disputes with whites.

All these activities required the states to spend and borrow far more money than they had before the war. Because it was primarily whites who owned enough property to pay taxes, the Republican policies redistributed wealth, something not acceptable to nineteenth-century Americans. Bitterly, white Southerners charged that "ignorant," "brutal" voters were being duped by venal politicians with promises of "class legislation." Southern whites denied that such governments were really democratic. Unable to defeat Republicans at the polls in most states, they turned to violence and fraud. From 1868 through 1872, midnight riders, known by such names as the Ku Klux Klan, terrorized local Republican leaders. After 1872 the violence became more organized and more closely linked to anti-Republican political organizations.

A few southern Republican governors were at first able to suppress the violence. But by 1870 they were appealing to the national government for help, thus causing serious problems for national Republican leaders. Republicans had hoped that enfranchising the freedmen would protect them without a massive expansion of national power. Moreover, everyone believed that legislation must be based on the Fourteenth and Fifteenth Amendments, ignoring the earlier view that the Thirteenth Amendment gave power to protect citizens' basic rights. But the language of the two later amendments only protected rights against STATE ACTION, and Republicans had a difficult time justifying laws protecting blacks and white Republicans from attacks by private individuals. Nonetheless, in 1871 Republicans passed such laws and also authorized President Grant to take drastic action to crush violence, including suspension of the writ of habeas corpus. They insisted that the Fourteenth Amendment required states to protect their residents; failure to do so would amount to state denial of EQUAL PROTECTION.

At first this response seemed successful, and violence abated. However, it soon flared anew. In many southern states Republicans claimed that Democratic violence and intimidation should nullify apparent Democratic majorities in elections, and they refused to count Democratic votes from areas where violence was most intense. In return Democrats organized armed militia to press their claims. In state after state Republicans had to appeal for national troops to protect them against such opponents. Where it was difficult to afford protection, the Democratic militias—often called "White Leagues"—drove Republican officials from office.

It became ever more difficult for national Republicans to respond. More and more Northerners feared that continued national intervention in the South was undermining the federal system. At the same time the Supreme Court manifested its concern to preserve a balance between state and national authority. In *Texas v. White* (1869) the Justices emphasized the importance of states in the Union, and in *Collector v. Day* (1871) they seemed to endorse the doctrine of DUAL FEDERALISM, by denying the national government's power to tax the incomes of officers of the "sovereign" states. In the SLAUGHTERHOUSE CASES (1873) the Court, in an implicitly dual federalist opinion, ruled that national and state citizenships were distinct. The Fourteenth Amendment protected only a limited number of rights inherent in national citizenship; those rights usually identified as basic remained the sole province of the states. This decision severely curtailed national power to protect black Southerners and southern Republicans from violence. In UNITED STATES V. CRUIKSHANK (1876) the Court held invalid indictments against white conspirators who had massacred blacks, in part on the grounds that the Fourteenth Amendment was aimed only at state action and could not justify prosecution of private individuals.

At the same time a growing number of Northerners were coming to share Southerners' concern about "class legislation." To these Northerners, calls for a protective tariff, for artificial inflation of the currency, for repudiation of state-guaranteed railroad bonds, for regulation of railroad rates, and for government imposition of an eight-hour work day all indicated a growing clamor for "class legislation" in the North. City political organizations, which taxed urban property holders to provide services to the less wealthy, seemed to be engaging in the same kind of "plunder" that southern whites alleged against their Republican governments. Many Northerners began to argue that the state and national constitutions required judges to overturn class legislation. They had some initial successes. The Supreme Court ruled part of the Legal Tender Act unconstitutional, only to overrule itself a year later (see LEGAL TENDER CASES), and state courts ruled that business and railroad promotion laws exceeded legislative power. However, the courts generally declined the invi-

tation to write the doctrine of "laissez faire" into the Constitution. The majority in the *Slaughterhouse Cases* rejected the argument, and the Court sustained broad state regulatory power over businesses AFFECTED WITH A PUBLIC INTEREST—railroads, grain warehouses, and others that were left undefined. (See GRANGER CASES.)

Nonetheless, the conviction was growing that the sort of wealth-redistributing policies followed by southern Republicans was fundamentally wrong and so was fear that such ideas might spread north. More and more Northerners agreed with southern whites that southern proponents of such policies were "carpetbaggers" and "scalawags." By 1875 President Grant was refusing to help his beleaguered political allies; all but three southern states had returned to Democratic control, often through force and intimidation; and white Southerners were planning similarly violent campaigns to "redeem" the last three in 1876. Their effort to do so led to one of the greatest political and constitutional crises in American history.

In the presidential election of 1876 the violence and fraud endemic in the South threatened to engulf the nation. In the three remaining Republican states in the South—South Carolina, Louisiana, and Florida—Democrats engaged in campaigns of violence and intimidation. Republican officials threw out votes from districts they claimed Democrats had carried by force. Democrats once again charged fraud and armed to confront Republicans; southern Republicans once again appealed to the national government for protection. However, this time the outcome of the presidential election itself turned upon who had carried these three states. Without them, Democrat Samuel J. Tilden was one electoral vote short of victory. Republican RUTHERFORD B. HAYES needed the electoral votes of all three to win.

As the time drew near to count the electoral vote and declare a winner, two sets of electoral votes were sent to Congress from each of the contested states—the Republican votes certified by appropriate state agencies, and Democratic competitors. The Constitution requires electoral votes to be counted by the president of the Senate (normally the vice-president of the United States) in the presence of both houses of Congress. Republicans insisted that, absent a specific congressional resolution governing the subject, the Republican president pro tempore of the Senate would have the power to decide which set of votes were the correct ones to count (the vice-president having died in office). Controlling the Senate, Republicans prepared to block any contrary resolution that might come from the Democratic House. Democrats, on the other hand, insisted that if the two houses of Congress could not agree upon which set of votes was legitimate, neither could be counted. Then no candidate would have a majority, and according to the Constitution the House would name the winner.

With no clear precedent, and with the Supreme Court not yet accepted as the usual arbiter of such constitutional disputes, it seemed that the conflict might be resolved by force. Republican President Grant controlled the Army; if he recognized a President counted in by the Republicans, a competitor named by the House would have a hard time pressing his claim. To counter this Republican program, Democrats threatened forcible resistance.

As Americans demanded a peaceful end to the crisis, the two sides were forced to compromise. Congress passed a resolution turning all disputed electoral votes over to an Electoral Commission of ten congressmen and five Supreme Court Justices for decision. The commission decision would stand in each case unless *both* houses voted to disagree to it—an early example of a LEGISLATIVE VETO.

To the Democrats' dismay, the three Republican Supreme Court Justices joined the five Republican congressmen on the commission to decide every disputed vote in favor of the Republican candidate. In each case the majority accepted the votes certified by the agency authorized by state law. Republicans insisted the commission had no power "to go behind" these returns.

Furious, Democrats charged that this was a partisan decision. Many of them urged Democratic congressmen to prevent the completion of the count by filibustering, saying that the House could name the President if the count were not completed by the constitutional deadline of March 3. But most Democrats felt that Americans would not support such a radical course after Democrats had agreed to the compromise. To strengthen these moderates, Hayes promised not to help southern Republicans against rival claimants for state offices. As a result Hayes was declared President just within the deadline. When he honored his commitment to the Democrats, the last southern Republican governments collapsed, even though the Republicans had claimed state victories based on the same election returns that elected Hayes. (See COMPROMISE OF 1877. )

The collapse of Reconstruction was related directly to the development of constitutional commitments that would dominate the last quarter of the nineteenth century. It marked a renewal of a state-centered federalism that would characterize succeeding years. Furthermore, it was a direct result of the growing fear of "class legislation" that would lead to the acceptance of "laissez-faire constitutionalism" in the 1890s.

MICHAEL LES BENEDICT
(1986)

Bibliography

BENEDICT, MICHAEL LES 1975 *A Compromise of Principle: Congressional Republicans and Reconstruction, 1863–1869.* New York: W. W. Norton.

FAIRMAN, CHARLES 1971 *Reconstruction and Reunion, 1864–*

*88—Part One*, Volume 6 of *The History of the Supreme Court of the United States.* New York: Macmillan.

GILLETTE, WILLIAM 1979 *Retreat from Reconstruction, 1869–1879.* Baton Rouge: Louisiana State University Press.

HYMAN, HAROLD M. 1973 *A More Perfect Union: The Impact of the Civil War and Reconstruction upon the Constitution.* New York: Knopf.

MCKITRICK, ERIC L. 1960 *Andrew Johnson and Reconstruction.* Chicago: University of Chicago Press.

STAMPP, KENNETH M. 1965 *The Era of Reconstruction, 1865–1877.* New York: Knopf.

## CONSTITUTIONAL HISTORY, 1877–1901

American public life during the CIVIL WAR–RECONSTRUCTION years was dominated by clashes over constitutional issues of the most basic sort: race and CITIZENSHIP; FEDERALISM, STATES' RIGHTS, and the Union; the power of the President, Congress, and the courts; and the bounds of military and civil authority. This was a time when the interpretation of the Constitution held center stage in American public life. The resolution of fundamental issues was sought in Congress and the courts, in party politics and elections, ultimately through force of arms. Merely to list the milestones of the period—the great debate over SLAVERY IN THE TERRITORIES; *Dred Scott v. Sandford* (1857); SECESSION and CIVIL WAR; the Thirteenth, Fourteenth, and FIFTEENTH AMENDMENTS; the CIVIL RIGHTS, Reconstruction, and Enforcement Acts; and the IMPEACHMENT OF ANDREW JOHNSON—is to make the point that during the years from 1850 to 1877 the Constitution provided the context in which Americans expressed, and fought over, their most fundamental social beliefs.

How different was the period that followed! The structure of government—the relationship of the states and territories to the Union; the powers of Congress, the courts, and the President; the role of the POLITICAL PARTIES—often was a matter of political but rarely of constitutional concern. Nor were the major economic and social issues of the time confronted primarily in constitutional terms. It is revealing that no amendment to the Constitution was adopted between 1870 and 1913.

This does not mean, though, that constitutional issues had no place in American public policy between 1877 and 1900. Rather, what happened was that a sea change was taking place in American life, and the issues generated by this change took time to assume a full-fledged constitutional guise. Just as the basic constitutional issues of states' rights and slavery did not fully emerge until the 1850s, so too the constitutional issues generated by the rise of an urban-industrial society did not come into their own until after 1900, in many respects not until the 1930s.

Where should we look, in the late nineteenth century, for the seeds of the great twentieth-century effort to adapt the Constitution to the realities of an urban-industrial society? The primary structural concern of the time was over the role of the judiciary, and here was a foreshadowing of the conflict between the administrative state and the representative state that would assume such great importance after 1900. Second, economic issues—in particular, those involving the regulation of large enterprises—were a fruitful area of contention in the late nineteenth century. And finally, questions of citizenship and race—partly a legacy of the Civil War-Reconstruction years but also a product of the social strains generated by an industrializing society—continued to engage the attention of the public and of policymakers.

Frank Goodnow in his *Comparative Administrative Law* (1893) observed that while constitutional issues set the terms of debate over the character of American government before the Civil War, administrative issues took center stage afterward. Certainly it seemed that, as much as anything could, the war had settled the question of the relationship of the states to the Union. Nor did the desuetude of the post-Reconstruction Presidency, the dominance of Congress, or the still-nascent administrative state generate much in the way of constitutional debate.

Late nineteenth-century Presidents were caught up in party politics and patronage and did relatively little to formulate and conduct public policy. But America's evolution into a powerful industrial nation began to leave its mark. RUTHERFORD B. HAYES and GROVER CLEVELAND used federal troops to restore order during the railroad strikes of 1877 and 1894. The federal bureaucracy, though small, was growing; and something like a professional civil service took form, in part under the aegis of the Civil Service Commission established by the PENDLETON ACT of 1883. Tariff and fiscal policy came to be more closely identified with presidential leadership. But in constitutional terms the chief executive at the end of the century was little changed from what he had been in 1877.

Congress, however, became a considerably more powerful and effective branch of government during this period. WOODROW WILSON in 1885 called "Congressional Government" the "predominant and controlling force, the centre and source of all motive and of all regulative power." This enhanced authority came from the fact that state and local party leaders served as senators and representatives; from congressional control over budgetary and fiscal policy; and from the increasing regularity and stability of congressional leadership and procedure.

Perhaps the most striking change in the balance of governmental powers during the late nineteenth century was the rise of JUDICIAL ACTIVISM. The Supreme Court found only two federal laws unconstitutional between 1790 and

1864, but it voided federal acts in seven cases between 1868 and 1877 and in eleven cases between 1878 and 1899. The Court voided state acts in thirty-eight cases before 1865, in thirty-five cases between 1865 and 1873, and in ninety-one cases between 1874 and 1899. A debate as old as the Constitution heated up once again in the 1890s: what were the proper limits of JUDICIAL REVIEW?

The belief was then widespread—and has been gospel since—that the late nineteenth-century courts declared open season on laws threatening corporate interests. The *American Law Review* observed in 1894 that "it has come to be the fashion . . . for courts to overturn acts of the State legislatures upon mere economical theories and upon mere casuistical grounds." Federal and state courts found in the DUE PROCESS and EQUAL PROTECTION clauses of the Fourteenth Amendment and in the doctrine of FREEDOM OF CONTRACT grounds for voiding laws that regulated working conditions or taxed CORPORATIONS. This judicial conservatism culminated in an unholy trinity of Supreme Court decisions in the mid-1890s: IN RE DEBS (1895), which sustained a federal INJUNCTION against striking railroad workers; UNITED STATES V. E. C. KNIGHT COMPANY (1895), which severely limited the scope of the SHERMAN ANTITRUST ACT; and POLLOCK V. FARMERS' LOAN AND TRUST (1895), which struck down the 1894 federal income tax law. Arnold Paul has called these decisions "related aspects of a massive judicial entry into the socioeconomic scene, . . . a conservative oriented revolution."

But the extent of the courts' antilabor and antiregulatory decision making has been exaggerated; and its purpose has been distorted. A review in 1897 of 1,639 state labor laws enacted during the previous twenty years found that 114 of them—only seven percent—were held unconstitutional. The STATE POLICE POWER to regulate working conditions was widely accepted legal doctrine: in ninety-three percent of 243 Fourteenth Amendment challenges before 1901 the Supreme Court upheld the state laws. By the late 1890s the influential New York and Massachusetts courts looked favorably on laws affecting the conditions of labor, as did the Supreme Court in HOLDEN V. HARDY (1898).

Nor did judicial policy rest only on a tender concern for the rights of property. The desire to foster a national economy was evident in many federal court decisions. And many Justices shared the widespread public sense that American society was being wrenched beyond recognition by industrialism and its consequences. Justice STEPHEN J. FIELD and jurist THOMAS M. COOLEY were as ill at ease with large corporate power as they were with legislative activism. The influential judge and treatise writer JOHN F. DILLON, who called all attempts "to pillage and destroy" private property "as baneful as they are illegal," insisted "with equal earnestness upon the proposition that such property is under many important duties toward the State and society, which the owners generally fail to appreciate."

By far the most important applications of the Constitution to issues of public policy during the late nineteenth century involved large corporate enterprise, that increasingly conspicuous and troubling presence on the American scene. Railroads led the way both in the scale of their corporate organization and in the consequent public, regulatory, and judicial response.

The roads were great beneficiaries of private and state loans before the Civil War. In the years after 1865, they received substantial federal and state land grants, and loans and subsidies from counties and townships. There were 35,000 miles of track in 1865; 93,000 in 1880. But by the mid-1870s railroads were staggering beneath the weight of their expansion. Fierce competition in the East and Midwest forced down rates and earnings. The overcapitalized lines, with high fixed costs, suffered also from the price deflation of the time. Bankruptcies and reorganizations, rate discrimination, and price-fixing pools were among the consequences. All had the effect of feeding popular anti-railroad sentiment.

That great Civil War venture in mixed enterprise, the Union Pacific Railroad, was a prolific breeder of controversy. Political and constitutional difficulties sprang up around the federal government's role in the capitalization and direction of the road. Congressmen bitterly assailed the Union Pacific's inability (or disinclination) to meet its financial obligations to the government. But not until the SINKING FUND CASES (1879) did the Supreme Court sustain the right of Congress to require this and other transcontinental lines to repay their debts. The Credit Mobilier scandal of 1872, in which stock in the construction company that built the Union Pacific was distributed to a number of influential politicians, epitomized the difficulty of fitting a semipublic enterprise into the American system of government. The Pacific Railroad Commission finally concluded: "The sovereign should not be mated with the subject."

Railroad land grants were no less a source of contention. The House unanimously resolved in 1870 that "the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued." Once again, the very principle of such aid came under attack: "These grants . . . have been made on the theory that government is an organized benevolence, and not merely a compact for the negative function of repelling a public enemy or repressing disorders."

The consequences of state and local railroad aid also were distressing, and were equally productive of doubts as to whether such aid was part of the proper role of government. The Supreme Court heard more than 350 bonding cases between 1870 and 1896. While the courts felt

constrained to enforce most of those obligations, they made clear their displeasure with government subsidization. John F. Dillon condemned subsidies as "a coercive contribution in favor of private railway corporations" which violated "the general spirit of the Constitution as to the sacredness of private property." Thomas M. Cooley objected to railroad subsidies on similar grounds, arguing that "a large portion of the most urgent needs of society are relegated exclusively to the law of demand and supply." In LOAN ASSOCIATION V. TOPEKA (1875) the Supreme Court used this argument to block direct government subsidization of private enterprise.

During the years from 1880 to 1900, public, political, and (inevitably) judicial attention shifted from subsidization to regulation of the economy. The prevailing economic thought of the time, the weakness of government supervision, and the power of private interests worked against an effective system of ECONOMIC REGULATION. But inevitably the strains and conflicts attending the rise of an industrial economy produced demands on the state to intervene.

Journalist E. L. Godkin observed in 1873: "The locomotive is coming in contact with the framework of our institution. In this country of simple government, the most powerful centralizing force which civilization has yet produced must, within the next score years, assume its relation to that political machinery which is to control and regulate it." Nor surprisingly the railroads, the biggest of America's national enterprises, were the first to come under federal regulation.

During the 1870s, state railroad policy had moved from subsidy to containment. The 1870 Illinois constitution required the legislature to "pass laws establishing maximum rates of charges for the transportation of passengers and freight." That body in 1871 set maximum freight and grain elevator rates, forbade price discrimination, and created a railroad commission with supervisory and enforcement powers. Similar laws were adopted in Minnesota, Wisconsin, and Iowa. Because Grange members often were prominent advocates of rate regulation, these acts came to be known as the Granger laws.

The Supreme Court in *Munn v. Illinois* (1877), the first of the GRANGER CASES, upheld the regulatory power of the legislatures and opened up yet another path to regulation by resurrecting the old COMMON LAW doctrine that when private property was AFFECTED WITH A PUBLIC INTEREST it was subject to public accountability and control. But at the same time the Court conceded that "under some circumstances" legislation might be held to violate the Fourteenth Amendment: a portent of the conservative jurisprudence of later years.

Whatever constitutional authority might adhere to state regulation, its effectiveness was severely limited by compliant state railroad commissions, the political and legal influence of the roads, and above all the national character of the enterprise. From the mid-1880s on, federal courts increasingly struck down state railroad tax and rate laws that in their view interfered with the flow of INTERSTATE COMMERCE. The implicit policy decision was that ratemaking should be in the hands of the railroads—and be subject to the review of federal courts, not state courts and legislatures. One observer thought that "long tables of railway statistics, with the accompanying analyses, look strangely out of place in a volume of United States Reports": testimony to the fact that the courts of necessity were taking on a quasi-administrative role.

The scale and complexity of the interests affected by the railroads, the competitive problems of the lines themselves, the limited effectiveness of state regulation, and the growing intervention of the federal courts all fed a movement for national railroad regulation culminating in the INTERSTATE COMMERCE ACT of 1887. That act defined and laid down penalties for rate discrimination, and created an Interstate Commerce Commission (ICC) with the power to investigate and prosecute violators. Its primary purpose was negative: to block pooling and other cartel practices, not to secure a stable railroad rate structure. What the ICC gained thereby in constitutionality it lost in administrative effectiveness. Its early performance showed how difficult it was—given the power of private interests, popular distrust of government, and constitutional limits on the exercise of public power—to establish a bureaucratic mode of regulation. Instead, the ICC adopted what was in fact the only functioning American mode of economic supervision, that of the judiciary. Cooley, the judge and treatise writer who became the ICC's first chairman, announced: "The Commissioners realize that they are a new court, . . . and that they are to lay the foundations of a new body of American law."

During the first ten years of its existence the ICC handed down rulings on more than 800 rate controversies. But the Commission's impact was limited by the size, complexity, and competitiveness of the railroad business and by its lack of supervisory power. Demands rose in the 1890s for government ownership and operation of the lines, or at least for more rigorous supervision by a national Department of Transportation. But, as Cooley observed, these proposals were beyond the range of the late nineteenth-century American polity: "The perpetuity of free institutions in this country requires that the political machine called the United States Government be kept from being overloaded beyond its strength. The more cumbrous it is the greater is the power of intrigue and corruption under it."

The regulation of large enterprise in general posed the same problems, and produced the same response, as did

that of the railroads. Mid-nineteenth-century general incorporation acts, and the competition among states to attract corporation charters, guaranteed that the terms of incorporation would remain easy, the regulation of company affairs loose and permissive. In theory the internal affairs of corporations were the business of the states; in practice, the states exercised little control.

But as in the case of the railroads, the growth of business corporations into national enterprises created a demand for federal regulation. Once again, judicial interpretation fostered the growth of a national economy. State and federal courts strengthened the legal status of foreign (out-of-state) corporations, in effect reversing the severe constraints imposed on them by PAUL V. VIRGINIA (1869). In *Barron v. Burnside* (1887) the Supreme Court for the first time held that state regulation of foreign corporations could be of doubtful constitutionality. By the turn of the century the "liberal theory" of foreign corporations was the prevailing one.

Even more dramatic was the courts' use of the Fourteenth Amendment to protect corporate rights and privileges. During the 1870s, said Howard Jay Graham, "the rule that corporations were *not* to be regarded as constitutional " PERSONS' theoretically was the LAW OF THE LAND." But this rule was more theory than fact, and during the late nineteenth century the judiciary explicitly brought corporations under the protection afforded to persons by the due process and equal protection clauses of the Amendment.

The rise of large enterprise in the late nineteenth century took forms that roused public concern and ultimately evoked a legislative and judicial response. The urge to override the limitations of state chartering led to the invention of the corporate trust and then the holding company. Although only about ten trusts were created during the 1880s, the word in the generic sense of a "huge, irrepressible, indeterminate" corporation came to be the object of great public concern. By 1890 several states had ANTITRUST laws, and six state supreme courts had held that trust agreements were against public policy or were illegal as monopolies or conspiracies in RESTRAINT OF TRADE. And public pressure grew for a federal antitrust law, as it had for railroad regulation.

The SHERMAN ANTITRUST ACT of 1890, passed overwhelmingly by Congress, relied on the legislature's power under the COMMERCE CLAUSE to outlaw "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." The breadth of the law's formulation, and its dependence on the courts rather than on an administrative agency to define its provisions, testified to the still underdeveloped state of federal regulation. But in other ways the statute was sophisticated. By relying on the old common law concept of the illegality of conspiracies in restraint of trade, the drafters minimized the risk of having the law declared unconstitutional. And the Sherman Act was widely understood to be aimed at great combinations, not to fix an unrealistic standard of small-unit competition on the economy.

Even so, enforcement was full of difficulty. The Department of Justice in the 1890s lacked the manpower, the money, and the inclination to prosecute vigorously. The courts, too, severely limited the utility of the act. They held that a firm could come to dominate a sector of the economy without doing anything illegal, and they developed distinctions between reasonable and unreasonable restraint of trade, between legitimate business practices and "illegal commercial piracy." And in its Sugar Trust decision of 1895 (*United States v. E. C. Knight Company*) the Supreme Court dealt the law a heavy blow, holding that the Sherman Act applied only to "commerce" and not to manufacturing, and that the activities of the American Sugar Refining Company lay outside the act's coverage even though that firm controlled over ninety percent of the nation's sugar refining capacity.

The *American Law Review* called this decision "the most deplorable one that has been rendered in favor of incorporated power and greed . . . since the Dartmouth College case." In fact, the Court did take a narrow and mechanical view of interstate commerce. On that premise, its decision reflected a long-held distinction between state regulation of manufacturing and federal responsibility for interstate commerce. When private parties brought suit against trade and price cartels (particularly by those prime instances of enterprises in interstate commerce, the railroads), the Supreme Court was not reluctant to find that they violated the Sherman Act.

By the turn of the century it was apparent that the problem of corporate regulation was "rapidly assuming phases which seem beyond the scope of courts of justice." The rise of corporate capitalism, and the question of what to do about it, called as much for political-administrative a will and wisdom as for legal-constitutional power and propriety.

The primary legal and, ultimately, constitutional justification for late nineteenth-century state regulation was the police power: the obligation of the states to protect the health, morals, safety, and welfare of their citizens. Many thought that the potential of that power was great indeed. The president of the American Bar Association estimated in 1897 that more than ninety percent of state legislation rested on the police power. CHRISTOPHER TIEDEMAN's *Limitations of the Police Power in the United States* (1886) was an elaborate attempt to find constitutional grounds for containing what he took to be a widely applied principle of government intervention. OLIVER WENDELL

HOLMES caustically said of the police power: "We suppose the phrase was invented to cover certain acts of the legislature which are seen to be unconstitutional, but which are believed to be necessary."

The police power had its greatest appeal when public health and morals appeared to be at stake. A case in point was regulation of the liquor business. The Supreme Court upheld the right of the states to forbid the manufacture and sale of alcohol, and refused to accept the due process clause of the Fourteenth Amendment as a defense against state liquor legislation. (See INALIENABLE POLICE POWER.) Still more dramatic was judicial acceptance of extensive regulation—indeed, the near-crippling—of the oleomargarine industry. By 1886, twenty-two states either heavily taxed that product or required unattractive packaging or labeling. An 1886 federal law—"protection run mad," said an outraged critic—required that the product be called "oleo" (rather than "butterine" or other enticing names), and subjected it to a high license and manufacturing tax. The Supreme Court in *Powell v. Pennsylvania* (1888) upheld a similar Pennsylvania statute on the basis of the state's police power to protect public health.

The insufficiency of the state police power as a basis of state economic regulation became more and more apparent as the century neared its end. Corporate interests effectively espoused a laissez-faire, SUBSTANTIVE DUE PROCESS constitutionalism. More fundamentally, courts recognized the growing imbalance between state supervision and an economy that was becoming national in scope.

By 1899 the Supreme Court had held twenty-nine state laws unconstitutional because they conflicted with the commerce clause of the Constitution. In LEISY V. HARDIN (1890) the Court voided an Iowa law blocking the entry of liquor into the state, holding that the movement of an original package was protected by the national commerce power, so long as Congress had not authorized the state regulation. Responding to this invitation, Congress quickly passed the Wilson Act, which made liquor subject to state law regardless of where it was packaged. The Court validated the law on the grounds that "the common interest did not require entire freedom in the traffic in ardent spirits." But without similar congressional authorization, it continued to apply the original package doctrine against state laws restricting the entry of oleomargarine and cigarettes. And in CHAMPION V. AMES (1903) the Court upheld a statute forbidding the interstate transportation of lottery tickets, thus opening the prospect of NATIONAL POLICE POWER.

The constraints that limited the application of government authority to economic problems were at least as evident in the realm of social policy. During the period of the Civil War and Reconstruction, citizenship and race had been issues of prime importance not only in constitutional law but in politics and legislation as well. In the twentieth century these and other social concerns—education, crime, poverty, social mores, CIVIL LIBERTIES—would draw comparable attention from the public, Congress, and the courts. But such was not the case during the years between 1871 and 1900. With American society in transit from its small-unit agrarian past to its large-unit urban, industrial future, the political or constitutional standing of individual or social rights was largely ignored.

These years saw relatively little redefinition—in either constitutional law or legislative action—of the status of women, Orientals, blacks, or AMERICAN INDIANS. Legal barriers to female equality occasionally fell, but by legislation, not constitutional adjudication. Opposition to women's suffrage remained strong. Between 1870 and 1910 suffrage advocates conducted 480 campaigns in thirty-three states to get the issue on the ballot. Seventeen state REFERENDA (all but three west of the Mississippi) were held; only two were successful, in Colorado in 1893 and in Idaho in 1896.

The position of Orientals and blacks in society worsened. Organized labor agitated for the exclusion of Chinese immigrants, and anti-Chinese riots in the West testified to the intensity of public feeling. An 1882 federal law banned Chinese immigration for ten years. Supplementary acts in 1884 and 1888 tightened the exclusion law and imposed restrictions on Chinese already in the country. The Supreme Court in 1887 refused to apply the Civil Rights and Enforcement Acts of the Reconstruction period to Chinese, and in 1889 the Court upheld the restriction of Chinese immigration.

In 1892 Congress overwhelmingly renewed Chinese exclusion for another decade; it also required the registration of every resident Chinese laborer, with affidavits by one or more whites that the registrant had entered the country legally. The Supreme Court upheld this law in 1893. These policies had palpable consequences. About 100,000 lawful Chinese immigrants were in the United States in 1880; there were about 85,000 in 1900. In 1902 Chinese immigration was suspended indefinitely.

An even more pervasive white public opinion supported—or at least remained unconcerned about—discrimination against blacks. Late nineteenth-century northern courts generally upheld state laws that forbade discrimination in theaters, restaurants, and other public places, as a proper exercise of the police power. (The degree to which those laws were enforced is another matter.) But on similar grounds the courts accepted the growing number of SEGREGATION statutes. State laws separating the races in public transportation and accommodation, forbidding racial intermarriage, limiting access to the vote, and segregating schools met with no judicial obstacle.

In this sense the Supreme Court's acceptance of a

Louisiana railroad segregation law in PLESSY V. FERGUSON (1896) represented the approval of an already widely established public policy, not the promulgation of new constitutional doctrine. When in 1903 the Court refused to agree that the Fifteenth Amendment might be used against Alabama officials who kept blacks from voting, Holmes suggested that relief "from a great political wrong" must come from "the legislative and political department of the government of the United States." At the same time the Court's invention of the STATE ACTION limitation on congressional power encouraged Congress to refrain from remedying private RACIAL DISCRIMINATION. (See CIVIL RIGHTS CASES.)

On the face of things, Indian public policy in the late nineteenth century had a different goal: it sought not to foster but to reduce separatism. Indian Commissioner Thomas J. Morgan declared in 1891: "The end at which we aim is that the American Indians shall become as speedily as possible Indian Americans; that the savage shall become a citizen." But majority sentiment still regarded even nontribal Indians as inferior, and the Supreme Court went along. In *Elk v. Wilkins* (1884)—coterminous with the CIVIL RIGHTS CASES that invalidated the CIVIL RIGHTS ACT OF 1875—the Court held that Indians were not citizens within the understanding of the Fourteenth Amendment.

At the end of the century the acquisition of noncontiguous territory with substantial populations (Hawaii, the Philippines, Puerto Rico) raised old problems of statehood and citizenship in new forms. The Supreme Court in the INSULAR CASES (1901) limited the degree to which the Constitution applied to these peoples, much as the Court had been inclined to do with regard to Orientals, blacks, and Indians.

In most of the areas of social policy—education, crime, FIRST AMENDMENT freedoms—that in the twentieth century became important battlegrounds of public policy and constitutional law, there was little or no late nineteenth-century constitutional controversy. Only two such issues—prohibition and religion—raised substantial questions of constitutionality. New Hampshire Senator Henry W. Blair first proposed a national prohibition amendment to the Constitution in 1876, and a proposal to this effect was before Congress continuously until its adoption in 1918. State and local restrictions on the distribution and sale of liquor increased, and in general the courts sustained them against Fourteenth Amendment attacks, as proper applications of the police power.

The place of RELIGION IN THE PUBLIC SCHOOLS led to much political and legal conflict. State courts frequently dealt with the thorny issue of school Bible reading. Most states allowed this practice without exegesis, and the courts approved so long as attendance or participation was voluntary. The Iowa Supreme Court upheld a law that forbade the exclusion of Bible reading from the schools. But the Wisconsin court denied the constitutionality of such reading: "The connection of church and state corrupts religion, and makes the state despotic."

Protestant-Roman Catholic hostility underlay much of the conflict over school Bible reading, as it did the issue of state aid to parochial schools. Maine Republican James G. Blaine sought a constitutional amendment forbidding aid in the 1870s (see BLAINE AMENDMENT), and by 1900 twenty-three states had banned public grants to parochial schools. But the interrelationship of religion and education did not come before the Supreme Court until well into the twentieth century.

FELIX FRANKFURTER once told of a distinguished professor of property law who was called on to teach a course in constitutional law. Dutifully he did so. But he soon abandoned the effort, on the ground that the subject was "not law at all but politics." At no time in American history did this pronouncement seem more justified than in the period from 1877 to 1901. Except for the regulation of large enterprise, Americans debated the problems of a developing industrial society more in political than in constitutional terms. After 1900 the fit—or lack of fit—between those problems and the American constitutional system would be faced more directly.

MORTON KELLER
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Bibliography

BETH, LOREN P. 1971 *The Development of the American Constitution 1877–1917.* New York: Harper & Row.

GRAHAM, HOWARD J. 1968 Everyman's Constitution: Historical Essays on the Fourteenth Amendment, The "Conspiracy Theory," and American Constitutionalism. Chaps. 10–13. Madison, Wisc.: State Historical Society.

KELLER, MORTON 1977 *Affairs of State: Public Life in Late Nineteenth Century America.* Cambridge, Mass.: Harvard University Press.

PAUL, ARNOLD M. 1960 *Conservative Crisis and the Rule of Law.* Ithaca, N.Y.: Cornell University Press.

SKOWRONEK, STEPHEN 1982 *Building a New American State: The Expansion of National Administrative Capacities 1877–1920.* Cambridge: At the University Press.

## CONSTITUTIONAL HISTORY, 1901–1921

American public life profoundly changed during the early twentieth century. The policy agenda during the Progressive era stands in dramatic contrast, both quantitatively and qualitatively, to its nineteenth-century predecessors. A substantial body of state and national legislation sought

to subject large corporations and public utilities to far greater regulation than had been the case before. A comparable surge of enactments dealt with social issues ranging from the hours and working conditions of women and children to housing, the quality of food and drugs, the conservation of land, and the control of drinking and prostitution.

More than at any time since the CIVIL WAR and RECONSTRUCTION, Americans paid substantial attention to the structure of their government. The pace of lawmaking that dealt with politics and government quickened, stimulated by the dual motives (not always complementary) of expanding popular democracy and of bringing greater honesty and efficiency to the workings of the American state. A burst of innovation led to the creation of direct PRIMARY ELECTIONS, the INITIATIVE and REFERENDUM, and new registration and voting laws, as well as to the direct election of senators and to women's suffrage. A flood of discussion and a lesser flow of administrative, judicial, and legislative action sought to increase the effectiveness of the executive branch and the BUREAUCRACY, to improve the workings of Congress and the functioning of the courts, and to modernize the relationship between federal and state authorities and the governance of the nation's cities.

American involvement in WORLD WAR I was the capstone to the Progressive era. Federal involvement in the American economy and society reached new heights; and in both technique and spirit wartime governance drew heavily on the immediate prewar experience.

THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, and WOODROW WILSON were far more activist than their predecessors both in leadership styles and in domestic and foreign policy. But perhaps the most dramatic result of the quickened pace of government and the new policy agenda was the adoption between 1913 and 1920 of four constitutional amendments, providing for a federal income tax, the direct election of senators, PROHIBITION, and women's suffrage. Only at the beginning of the Republic and during the Reconstruction era had constitutional revision occurred on so large a scale.

Insofar as there was a common denominator to the public policy of the Progressive era, it lay in the belief that the time had come to deal with some of the more chaotic and unjust aspects of a mature industrial society; to bring public policy (and the nation's political and governing institutions) into closer accord with new social and economic realities. This impulse cannot be simply explained away by the once fashionable label of "reform," or the now fashionable label of "social control." A quest for social justice coexisted in complex ways with a search for order. Some Progressives wanted society (and the polity) to be more efficient: more honest and economical, less wasteful and corrupt. Others sought policies that would make society safer: more secure from the threats of big business and corrupt political machines, or from the vagaries of competition and the business cycle, or from radicals, immigrants, or blacks. Still others wanted society to be fairer: more humane and less inequitable.

This was not solely an American development. H. G. Wells observed in 1906 that "the essential question for America, as for Europe, is the rescue of her land, her public service, and the whole of her great economic process from the anarchic and irresponsible control of private owners . . . and the organization of her social life upon the broad, clear, humane conceptions of modern science."

Could it be said that a substantially changed constitutional order was one consequence of American Progressivism? Did the complex structure of ECONOMIC REGULATION embodied in the Interstate Commerce Commission, enforcement of the SHERMAN ACT, the Federal Trade Commission, railroad regulation, and a host of other economic measures fundamentally alter the relationship of the state to the economy? Did the interventionism embodied in the growing body of social legislation, accumulating restrictions on IMMIGRATION, the CIVIL LIBERTIES onslaught of the war years, and the passage of national prohibition fundamentally alter the relationship of government to American society and the individual rights of its citizens? Did the sequence of interventionist foreign policy actions, delimited at one end by the acquisition of overseas colonies after the Spanish American War of 1898, and at the other by American intervention in World War I, fundamentally alter the place of FOREIGN AFFAIRS in the American political order?

In sum, did the early twentieth-century outburst of legislation, executive leadership, new agencies, and new government functions lead to what has been called "a qualitatively different kind of state"? Did a corporate-bureaucratic system of government supplant the nineteenth-century American "state of courts and parties"? JOHN W. BURGESS held in 1923 that the past generation had seen the transformation of American constitutional law from a stress on the protection of individual liberty to the imposition of "autocratic" governmental power over property, persons, and thought.

The distinctive American style of government that took form during the first century of the nation's history rested on the balance and SEPARATION OF POWERS among the executive, legislative, and judicial branches; on a FEDERALISM that rendered (through the POLICE POWER) to the states the things that were social; and on a conception of individual rights that, for all its abuses and distortions (the sacrifice of southern blacks to the not-so-tender mercies of southern whites; the use of the DUE PROCESS clause of the FOURTEENTH AMENDMENT to spare CORPORATIONS the indignity of state regulation and taxation), arguably gave

nineteenth-century Americans more individual freedom from the interposition of the state than any other people in the world. To what degree was that constitutional order changed between 1901 and 1921?

Of course there can be no definitive answer: the glass of change inevitably will remain partially filled for some, partially empty for others. But an obscure chapter in the constitutional history of the United States may come into clearer focus if we abandon the traditional historiographical emphasis on Progressive "reform" in favor of an examination of the major instrumentalities of government: Congress, the presidency, the bureaucracy, and the mechanisms governing federal-state relations.

Congress was the branch of government that underwent the most overt and formal alteration during the early twentieth century. Two major changes, the popular election of senators through the passage of the SEVENTEENTH AMENDMENT, and the reduction of the powers of the speaker of the House of Representatives, came about in these years. These changes were products of the widespread view that Congress, like the parties, was under the control of corrupt, machine-bound politicos and sinister business interests.

Six times between 1893 and 1911 the House approved a direct election amendment. Finally, spurred by an arrangement whereby progressive Republicans agreed to drop the cause of black voting in the South in return for southern Democratic support, the Senate accepted the change. The Southerners assured that control of the time, place, and manner of holding senatorial elections would remain the province of each state.

A 1911 law sought also to assure that congressional districts would be compact, contiguous, and of roughly equal populations. But enforcement was so difficult, and the courts were so loath to intervene, that it had little effect. And although the direct election of senators gradually reversed the tendency (at least until recent times) for the Senate to become a "millionaires's club," it cannot be said that that body's role in the governmental process was substantially different in the 1920s from what it had been before 1900.

The controversy over the House speaker's authority was more intense. Joseph G. Cannon, the speaker from 1901 to 1911, appointed and was himself one of the five-member Committee on Rules, thus controlling assignments to the key committees of the House, which he populated with like-thinking conservatives. His power to expedite the work of an unwieldy legislature had been a late-nineteenth-century reform, designed to keep a boss-ridden legislature from working its will. Now it appeared to a majority of congressmen as an obstacle to the more programmatic demands of Progressive government. In 1910–1911 a coalition of Democrats and insurgent Republicans deprived Cannon of his power to serve on and appoint the Rules Committee, to choose standing committees, and to recognize members on the floor.

The seniority system came into general use as a more equitable means of choosing committee chairmen—a "reform" of the sort that Finley Peter Dunne's Mr. Dooley presumably had in mind when he commented on the Progressive predilection for structural change: "I wisht I was a German, and believed in machinery." But by the 1920s the House was as much under the control of the majority party leadership as it had ever been. During most of the decade, the Republican speaker, rules committee chairman, and floor leader ran the GOP Steering Committee and, hence, Congress. Surely Cannon would have nodded approval of floor leader John G. Tilson's estimate of his role in the 69th Congress (1929): "It will probably be said with truth that the most important work I have done during the session has been in the direction of preventing the passage of bad or unnecessary laws."

Much of the constitutional controversy of the early twentieth century focused on the character of the presidency—and of the Presidents. The Spanish American War and the governance of territories afterward gave WILLIAM MCKINLEY' s administration some of the attributes of the modern presidency, and led to concern over "The Growing Power of the President." But it was the chief executives of the Progressive years who gave a dramatically new shape to the office.

Theodore Roosevelt's executive vigor, his flamboyant efforts to turn the presidency into a "bully pulpit," his concern with issues such as the relations between capital and labor, the trusts, and conservation, and his assertiveness in foreign policy gave his presidency a cast of radicalism. Critics often spoke of him—more so than of any president since ABRAHAM LINCOLN—as having stretched the Constitution to its limits and beyond. Roosevelt himself thought that the power of the presidency enabled him "to do anything that the needs of the nation demanded. . . . Under this interpretation of executive power, I did and caused to be done many things not previously done. . . . I did not usurp power, but I did greatly broaden the use of executive power." But Roosevelt's innate conservatism, the traditionalist goals that informed most of his actions, and his political skill meant that few of his initiatives ran into constitutional difficulties. The most serious congressional objections on constitutional grounds came in the debate over the HEPBURN ACT expanding the power of the Interstate Commerce Commission (ICC); and Roosevelt adroitly compromised by leaving untouched the courts' power to review the ICC's decisions.

A contemporary said that the difference between Roosevelt and his successor, William Howard Taft, was that when a desirable course of action was proposed to Roo-

sevelt he asked if the law forbade it; if not, then it should be done. Taft, on the other hand, tended to ask if the law allowed it; if not, then Congress must be asked. Taft brought a judicial temperament and experience (and almost no elective experience) to his office. He was thus a more self-conscious advocate of a limited presidency, and celebrator of the supremacy of law and of constitutional limitations, than any of his Republican predecessors.

Yet these views did not prevent his administration from adopting a more vigorous antitrust policy than that of Roosevelt. And Taft advocated innovations such as the establishment of a COMMERCE COURT to review ICC decisions and the institution of a federal BUDGET drawn up by the executive branch. The realities of early-twentieth-century American public life weighed more heavily than the niceties of constitutional theory.

Woodrow Wilson as a scholar of American government had long been critical of the traditional relationship between President and Congress. He often praised the British system of ministerial responsibility; his ideal President resembled the British Prime Minister. But as chief executive Wilson more closely followed Roosevelt's conception of the presidency as a bully pulpit (though perhaps with less bullying and more pulpit-pounding). And even more than Roosevelt he took the lead in formulating and seeing to the passage of legislation, a course symbolized by his breaking a tradition that dated from the time of THOMAS JEFFERSON by personally proposing legislation in a message to Congress.

The scope and coherence of Wilson's legislation was far greater than that of his predecessors. But it is worth noting that of the numerous major bills passed in his administration, including the Federal Reserve Act, the FEDERAL TRADE COMMISSION ACT, the CLAYTON ANTITRUST ACT, the WEBB-KENYON ACT, the ESPIONAGE ACT, and the SEDITION ACT, only the KEATING-OWEN CHILD LABOR ACT was struck down by the Supreme Court.

With the entry of the United States into World War I, Wilson assumed presidential leadership of a sort that had not been seen since the time of Lincoln and the Civil War. The mobilization of American agriculture, industry, military manpower, and public opinion led to federal intervention into private activity on a massive scale. The creation of agencies such as the War Industries Board, the Food, Fuel, and Railroad Administrations, the War Finance Corporation, the National War Labor Board, and the Committee on Public Information, and statutes such as the SELECTIVE SERVICE ACT, the ESPIONAGE ACT, the Webb-Pomerene Act (which allowed exporters to organize cartels), and the Overman Act (which greatly expanded the President's power over federal bureaus and agencies) amounted to an unprecedented increase of federal power and its concentration under the President.

Did these circumstances in fact add up to a basic change in the constitutional character of the presidency? Certainly the administrations of WARREN G. HARDING and CALVIN COOLIDGE did not suggest so: they would have been comfortable with the most ardent (and least efficacious) practitioners of the limited presidency of the nineteenth century. Nor did HERBERT HOOVER, whose ambitions resembled those of his Progressive predecessors, exercise effective executive leadership on a bold new scale. And when FRANKLIN D. ROOSEVELT came into office in the trough of the Depression in 1933, he found it necessary to rest his call for a "temporary departure from [the] normal balance" of "executive and legislative authority" on the need for a "broad executive power to wage a war against the emergency as great as the power that would be given me if we were in fact invaded by a foreign foe."

For all the pressures of early-twentieth-century social, economic, and cultural change, the executive branch's constitutional position altered little if at all. After 1921, as before 1900, the powers of the presidency depended not upon alterations in Article II of the Constitution, or upon what the Supreme Court made of that article, but on the political skills of the incumbent and on the course of events: war and peace, prosperity and depression, the growth and alteration of government itself.

The argument that the character of American government underwent major change during the early twentieth century rests on the rise of an administrative state. Certainly one distinguishing characteristic of this period was the proliferation of administrative courts, boards, and commissions, with an attendant expansion of the powers, rules, and regulations of the public administration sector of the American state.

The ideal of expert administrators functioning through (or above) restraints such as party politics, federalism, or the balance of powers had a strong appeal to the Progressive generation. Abbot Lawrence Lowell warned: "If democracy is to be conducted with the efficiency needed in a complex modern society it must overcome its prejudice against permanent expert officials as undemocratic."

The courts had performed a number of essentially administrative and regulatory duties during the nineteenth century. Now, as economic and social problems became more complex and technical, so grew routinized and prescribed administrative processes, in which rule replaced discretion in public law. State laws and constitutions became ever more detailed and codelike; state regulatory agencies multiplied and gained substantially in independence. Federal laws increasingly left to administrative officers the "power to make supplementary law through rules and regulations."

The American involvement in World War I led to an exponential growth of administrative agencies and their power. The War Industries Board and its allied commissions had control over the American economy of a sort

only dreamed of in Theodore Roosevelt's New Nationalism. Under the wartime ESPIONAGE ACT, the Post Office Department, the Department of Justice, and the Committee on Public Information wielded powers of suppression and persuasion over American thought and opinion that had no analogue in the nation's past.

Just where administrative law and its accompanying instrumentalities stood in the constitutional system was a matter of continuing concern. Woodrow Wilson observed in his pioneering 1887 essay "The Study of Administration" that "the field of administration is a field of business. It is removed from the hurry and strife of politics; it at most points stands apart even from the debatable ground of constitutional study." But administration was political in its relationship to law, to policy, and to interest group pressures; and it had an intimate relationship to—indeed, was very much a part of—the constitutional system of American government. In many ways the history of American public administration between 1900 and 1921 was a painful instruction in those home truths.

Administrative law of a sort had been part of the American constitutional system since the nineteenth century. Pensions, customs, internal revenue, land grants, and patents were administered by governmental agencies subject to little or no JUDICIAL REVIEW. There was continuing resistance to the idea that public administration had a distinct place in the constitutional order. Bruce Wyman, in one of the earliest systematic discussions of administrative law, set the subject in the context of Anglo-American COMMON LAW rather than constitutional law, holding that the central issue was whether public administration was subject to the same rules of law as governed the relations of citizens with one another.

Adolph Berle took another tack, arguing that administrative law was in fact the application of the will of the state by all three branches, for modern conditions made the traditional differentiation of functions impossible. Administrative law's constitutionality, he implied, rested on the proposition that all of the branches of government were essentially instruments for the expression of the popular will. Thus administrative law was "not a supplement to constitutional law. It is a redivision of the various bodies of law which previously had been grouped under the head of constitutional law."

The courts created evasive categories—"quasi-legislative," "quasi-judicial"—which enabled them to accept administrative powers without addressing the question of whether or not these threatened the separation of powers. By 1914 it appeared that "the exercise of certain discretionary power by administrative officers formally considered legislative is now held unobjectionable."

The growth of the federal bureaucracy, its increasing adherence to its own norms and standards, the fact that it was more and more under the civil service rather than political patronage—all of this has been taken to herald the arrival on the American scene of an autonomous administrative state. But the continuing subservience of government and public policy to the dictates of party politics, the competing governmental units of Congress and the courts, and underlying it all the persisting individualism, hostility to the state, and diversity of American life and thought, meant that the administrative expansion of the early twentieth century did not go on unchecked.

During the war, and immediately after, a number of intellectuals put forward schemes of postwar domestic economic and social reconstruction; they thought that the wartime infrastructure of governmental control and direction might be turned to more basic postwar problems. It soon became apparent, however, that both ideology and politics were working in another direction. Wilson himself told Congress in December 1918: "Our people . . . do not want to be coached and led. . . . [f]rom no quarter have I seen any general scheme of "reconstruction' which . . . we could force our spirited businessmen and self conscious laborers to accept with due pliancy and obedience."

Similar forces worked to constrain the outward reach of postwar foreign policy embodied in the League of Nations. Both courts and legislatures after the mid-1920s began to turn from the radical-bashing of the Espionage Acts and the 1919–1920 Red Scare to begin the erection of the broad definition of FIRST AMENDMENT freedoms that would come to prevail in the modern American definition of civil liberties. A 1918 survey of American ADMINISTRATIVE LAW (probably by the young HAROLD LASKI, surely no enemy of the active state) warned that "with the great increase of state activity . . . there never was a time "when the value of the BILL OF RIGHTS" will have been so manifest."

As in so many other areas of American government, surface changes did not necessarily alter underlying continuities. Congressmen and party leaders may no longer have had the patronage power that once had been theirs. Yet Congress as an institution, and congressmen as party politicians, remained intensely sensitive to the political implications of administrative appointments, activities, and, perhaps most of all, budgets.

Attempts by the Presidents of the time to extend the control of the executive branch over the bureaucracy frequently ran afoul of congressional opposition. By 1921 it was an arguable point—as, indeed, it always had been—whether the bureaucracy was more subject to the direction of the President or to the will of Congress. One thing was certain: the autonomy of the bureaucracy—from Congress, from the parties, from politics—was not markedly greater than it had been a generation before.

True, administrative law as a field of theoretical concern and practical application would continue to develop. The New Deal did not spring fully armed from the brow

of Franklin Roosevelt, but was built on a solid foundation of national and state precedents. From an international (and a later American) perspective, the New Deal's experiments did not seem especially bold and revolutionary. But the scale and passion of the charges of a broached constitutionalism raised by the New Deal's opponents in the 1930s suggests just how limited was the pre-1933 acceptance of an American administrative state.

One more aspect of the evolution (or non-evolution) of the American Constitution during the early twentieth century demands attention. That is the hoary principle of federalism: the distribution of functions between the state and federal governments.

In theory the Civil War and the postwar amendments had settled the nagging early-nineteenth-century question as to the degree to which the states were independent governmental entities. Relatively little attention was paid to the question of federalism during the late nineteenth century, in large part because the issues that most engaged the national government—tariff and currency policy, foreign relations, Indian affairs—were of marginal concern to the states. But as the full force of industrialism and urbanism began to change public policy in the early twentieth century, the relative roles of the federal and state governments once again became a matter of constitutional importance. The police power over health, safety, morals, and (from the late nineteenth century on) welfare, was the major legal basis for state social and economic legislation. For the most part the court accepted this; as ZECHARIAH CHAFEE, JR. observed in 1920, "The health, comfort, and general welfare of the citizens are in charge of the state governments, not of the United States."

But of the 194 Supreme Court decisions that invalidated state laws between 1899 and 1921, 102 were explained on the ground that the laws violated the distribution of powers embodied in the principle of federalism. By the 1920s and the early 1930s there was much talk of a judicial DUAL FEDERALISM that had created a "twilight zone" in which neither state nor federal power applied. And the attempt of the New Deal to create a new level of national intervention in the realms of economic regulation and social welfare led to one of the great constitutional controversies in American history. Once again, it would appear that the policy changes of the 1900–1921 period were not accompanied by a significant alteration of the constitutional order.

MORTON KELLER
(1986)

Bibliography

BERLE, A. A., JR. 1916–1917 The Expansion of American Administrative Law. *Harvard Law Review* 30:430–448.

BETH, LOREN 1971 *The Development of the American Constitution 1877–1917.* New York: Harper & Row.

BLUM, JOHN M. 1954 *The Republican Roosevelt.* Cambridge, Mass.: Harvard University Press.

BERGESS, JOHN W. 1923 *Recent Changes in American Constitutional Theory.* New York: Columbia University Press.

HASBROUCH, PAUL D. 1927 *Party Government in the House of Representatives.* New York.

LOWELL, A. LAWRENCE 1913 Expert Administrators in Popular Government. *American Political Science Review* 7:45–62.

NOTE 1915 Delegation of Legislative Power to Administrative Officials. *Harvard Law Review* 28:95–97.

——— 1918 The Growth of Administrative Law in America. *Harvard Law Review* 31:644–646.

SKOWRONEK, STEPHEN 1982 *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920.* Cambridge: At the University Press.

WYMAN, BRUCE 1903 *The Principles of Administrative Law Governing the Relations of Public Officers.* St. Paul, Minn.: Keefe-Davidson Co.

## CONSTITUTIONAL HISTORY, 1921–1933

If reverence for the federal Constitution had diminished in the Progressive era, it was revitalized in the 1920s, as the Constitution again became a symbol of national unity and patriotism. Organizations such as the American Bar Association and the National Security League launched national campaigns of patriotism, circulating leaflets and pamphlets by the hundreds of thousands, encouraging Constitution worship, promoting an annual Constitution Day, and working for state laws to require Constitution instruction in the public schools. Forty-three states passed laws mandating the study of the the Constitution; often such laws required loyalty oaths for teachers. Such laws were intended to affirm one hundred percent Americanism from every public school instructor.

The Constitution which was so apotheosized, however, was one geared primarily to the service of property interests. This meant, on the one hand, the protection of business from government regulation and from assault by radical and liberal critics; and, on the other, active intervention of courts and the executive branch to see that constitutional ways were found to insure that the free use of one's property be protected by positive government policies, both formal and informal. Thus, while constitutional changes did occur during the decade and new emphases were developed, these modulations were contained within the dominant ideological construct of free enterprise and individual property rights—rights, it was argued, that had been secured for all time by the sacred document and its amendments.

The most influential constitutionalist of the 1920s was

Chief Justice WILLIAM HOWARD TAFT. Taft set the tone for national political leadership. He was fully committed to the protection of a social order explained and justified by the tenets of JOHN LOCKE, Adam Smith, the Manchester Economists, WILLIAM BLACKSTONE, THOMAS COOLEY, and Herbert Spencer. Espousing a social ethic that stressed selfreliance, individual initiative and responsibility, and the survival of the fittest, Taft emphasized the virtually uninhibited privilege of private property and rationalized the growth of corporate collectivism in terms of individual liberty and private enterprise. For Taft it was time to move away from Progressive expansivism and restore the country to its traditional constitutional bases through a legal system that rested primarily upon judicial defense of a static Constitution and an immutable natural law.

In specific constitutional terms, these goals required restrictive, although selectively restrictive, interpretations of the federal government's taxing and commerce power; an emphasis upon the TENTH AMENDMENT as an instrument for precluding federal intrusion into the reserved powers of the states; and a limitation on the states themselves, through an interpretation of the FOURTEENTH AMENDMENT that emphasized SUBSTANTIVE DUE PROCESS and FREEDOM OF CONTRACT. These constitutional constructs would protect property against restrictive state laws but leave the states free through their police power to legislate against private activities that might threaten that property.

Operating from these assumptions, the Supreme Court majority in this period was activist in its hostility to legislative enactments that threatened or constrained the rights or privileges of the "haves" of society. Thus, between 1921 and 1933, that body ruled unconstitutional fourteen acts of Congress, 148 state laws placing governmental restraints on one or another form of business activity, and twelve city ordinances. Conversely, its majority had no trouble sustaining federal measures that aided business and sanctioning numerous state laws and city ordinances that abridged the CIVIL LIBERTIES of labor, radicals, too outspoken pacifists, and other critics of the capitalist system. In 1925, Taft took the further step of lobbying through Congress a new JUDICIARY ACT, granting the Supreme Court almost unlimited discretion to decide for itself what cases it would hear. (See CERTIORARI, WRIT OF. ) Henceforth the Court could choose to take no more cases than it could handle expediently and could restrict adjudication to matters of more general interest. The result was an upgrading of the importance of the cases that the body did agree to hear and a commensurate enhancement of the Court's own prestige and power. Such a looming judicial presence dampened the enthusiasm of activist legislators, state and national, for pushing social reform legislation and made progressive members of REGULATORY COMMISSIONS cautious about exercising their frequently limited authority. Hence bodies such as the Interstate Commerce Commission and the Federal Trade Commission remained largely passive during the period, except when their business-oriented majorities sought to act solicitiously toward those being regulated.

The three presidential administrations of the period, while sharing a common constitutional philosophy, differed in concrete legislative and policy accomplishments. WARREN G. HARDING had begun his presidency with an ambitious legislative docket. His proposals included a National BUDGET AND ACCOUNTING ACT (previously vetoed by WOODROW WILSON), a new farm credit law, the creation of a system of national highways, the enactment of a Maternity Bill, the immediate development and effective regulation of aviation and radio, the passing of an antilynching law, and the creation of a Department of Public Welfare. A surprised Congress was confused over priorities and wound up passing little legislation. The PACKERS AND STOCKYARDS ACT of 1921 made it unlawful for packers to manipulate prices, create monopolies, and award favors to any person or locality. The regulation of stockyards provided for nondiscriminatory services, reasonable rates, open schedules, and fair charges. The measure, which was constitutionally based on a broad interpretation of the COMMERCE CLAUSE, gave the secretary of agriculture authority to entertain complaints, hold hearings, and issue CEASE AND DESIST ORDERS. The bill was a significant part of the agrarian legislation of the early 1920s, and its validation by the Supreme Court in STAFFORD V. WALLACE (1922) provided a constitutional basis for later New Deal legislation. The 1921 Congress also passed the Fess-Kenyon Act, appropriating money for disabled veteran rehabilitation, and the SHEPPARD-TOWNER MATERNITY ACT, subsidizing state infant and maternity welfare activities. Aside from the bill setting up a Budget Bureau in the Treasury Department with a director appointed by the President, little else was forthcoming. By the end of 1921 the *New York Times* observed: "It is evident, and it is clearly admitted in Washington, that the public is not counting any longer upon sound and constructive legislation from Congress." Indeed, Congress supported only occasional further legislation through the decade. One effect of such congressional inaction, along with the increasingly desultory Harding leadership and the even more quiescent CALVIN COOLIDGE presidency, was to direct the attention of reformers to the AMENDING PROCESS.

The immediate post-WORLD WAR I years had seen the ratification of the EIGHTEENTH AMENDMENT (prohibition) and the NINETEENTH AMENDMENT (woman suffrage). In the 1920s certain fallout from both occurred. Prohibition was unpopular from the start. In fact, noncompliance became such a problem that by the late 1920s President HERBERT HOOVER appointed a special commission, headed by for-

mer Attorney General GEORGE WICKERSHAM to "investigate problems of the enforcement of prohibition under the 18th Amendment." As the report of the commission stated, "the public was irritated at a constitutional "don't' in a matter where the people saw no moral question." More specifically, the commission pointed to enforcement problems, emphasizing the lack of an American tradition of concerned action between independent government instrumentalities. This, it felt, was now being painfully demonstrated by the Eighteenth Amendment's policy of state enforcement of federal laws, with responsibility too often falling between the two stools and enforcement occurring not at all. Not surprisingly, during the twelve years that the Eighteenth Amendment was in force, more than 130 amendments affecting the Eighteenth in some manner were introduced. Most of these amendments provided for outright repeal; others weakened the amendment in varying degrees. When FRANKLIN D. ROOSEVELT opposed prohibition in 1932, he attracted wide support. The TWENTY-FIRST AMENDMENT repealing the Eighteenth was ratified in December 1933, although prohibition's legal residue took some years to settle. (This measure came only nine months after passage of the relatively uncontroversial TWENTIETH AMENDMENT, eliminating the "lame duck" session of Congress and changing the time for the inauguration of presidents from March to January).

The momentum that carried woman suffrage to a successful amendment continued to some degree into the early 1920s. Some feminist leaders continued to push for improved working conditions for women, for minimum wage laws, and for laws bettering the legal status of women in marriage and DIVORCE. In 1922, Congress passed the Cable Act, providing that a married woman would thereafter retain and determine her own citizenship and make her own application for naturalization after lawful admission for permanent residence, which the Act reduced to three years. Supporters of the political emancipation of women, especially the National Women's Party, got the EQUAL RIGHTS AMENDMENT (ERA) introduced in Congress in 1923 and worked for its adoption by lobbying and exerting political pressure in the early years of the decade. At that time the ERA was opposed by most of the large women's organizations, by trade unions, and by the Women's Bureau primarily because it was seen as a threat to labor-protective legislation. Opponents contended that the ERA would deprive most working women and the poor of hard-won economic gains and would mainly benefit middle and upper class women. Thus the measure floundered at the time, not to be revived until toward the end of WORLD WAR II. The same period saw all native-born American Indians granted full citizenship through the Curtis Act of 1924. The measure, however, did not automatically entitle them to vote, and some states still disfranchised Indians as "persons under guardianship." In 1925 Congress passed the Federal Corrupt Practices Act, extending federal regulation of political corruption to the choice of presidential electors.

A CHILD LABOR AMENDMENT fared only slightly better. With the Supreme Court striking down federal child labor laws as unconstitutional under both the commerce and the taxing powers, advocates of children's rights turned to the amending process and Congress adopted a proposed Child Labor Amendment in June 1924. Opposed by manufacturers' associations and certain religious groups, the measure, by 1930, had secured ratification in only five states. More than three-fourths had rejected it, with the greatest hostility coming from the south and from agricultural regions, where child labor was seen as essential to family economic stability. The measure was eventually superseded by the FAIR LABOR STANDARDS ACT of 1938. By that time the evils of child exploitation were no longer felt to be beyond the constitutional reach of federal legislative power.

Other amendments were proposed: providing minimum wages for women; establishing uniform national marriage and divorce laws; giving the president an item veto in appropriation bills; abolishing congressional immunity for speeches and debates in either house; providing representation for the DISTRICT OF COLUMBIA; changing the amending process itself; providing for the election of judges; providing for the independence of the Philippine Islands; prohibiting sectarian legislation; defining the right of states to regulate employment of ALIENS; requiring teachers to take an oath of allegiance; preventing governmental competition with private enterprise; conferring upon the House of Representatives coordinate power for the ratification of treaties; limiting the wealth of individual citizens; providing for legislation by INITIATIVE; extending the civil service merit system; regulating industry; and prohibiting loans to any except allies. Varying support for all reflected, to a greater or lesser degree, public discontent with aspects of the political-constitutional system of the time. A segment of this discontent crystallized in the La Follette Progressive Party's 1924 platform, which even proposed the RECALL of judges, much to the alarm and ire of Chief Justice Taft. Such straws in the wind did not, however, portend a successful assault upon property-oriented constitutional interpretation. That assault would await the depths of the Depression.

The middle to later years of the decade saw continued congressional hostility to government interference in economic and personal activities, but no reluctance to use power when the result supported President Coolidge's aphorism that "the business of America is business." Antilynching legislation failed during the decade; northern conservatives joined white southerners in deploring it as

an assault upon STATES' RIGHTS and individual freedom. In 1927, Congress enacted the McNary-Haugen Farm Bill, an elaborate measure calling for federal support for agricultural prices. The measure countered the prevailing temper of constitutional conservatism, for it extended national regulatory authority over agricultural PRODUCTION and thus not only invaded a sphere of authority traditionally reserved to the states but also interfered extensively with private property rights. President Coolidge vetoed the measure, denouncing it as "economically and constitutionally unsound." When Congress persisted, he vetoed a second McNary-Haugen Bill the following year on the same grounds.

Somewhat similar antistatist sentiments emerged when, in 1925, newly appointed Attorney General HARLAN FISKE STONE took the Bureau of Investigation out of politics and terminated its pursuit of radicals. "There is always the possibility," Stone stated in taking the action, "that a secret police may become a menace to free government and free institutions because it carries with it the possibility of abuses of power which are not always quickly apprehended or understood. The Bureau . . . is not concerned with political or other opinions of individuals. It is concerned with their conduct, and then only with such conduct as is forbidden by the laws of the United States." Store's action was popular with all but some patriotic and right-wing groups for whom radical, or even unorthodox, ideas were a threat which the government did have a responsibility actively to check.

On the other hand, Congress met little opposition when it enacted a broad, restrictive IMMIGRATION ACT in 1924 imposing stringent quotas on entry to the United States, heavily biased against southern and eastern European and Asiatic peoples. Such action was consonant with the strong tendency of the courts in the period to define the rights of aliens narrowly, with an eye to keeping such people in their proper place, particularly as easily exploitable members of the work force.

To the extent that an alternative constitutional tradition existed or was developed in the 1920s, its impact was not fully felt until Depression days. There were undertones of protest, however, coming from disparate sources. Justice LOUIS D. BRANDEIS, in his dissent in *Gilbert v. Minnesota* (1920), a decision sustaining a sedition conviction for criticism of the government's wartime policies, had stated: "I cannot believe that liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property." Others quickly picked up on the contradiction in this double standard, particularly when the same "liberty" was not then deemed applicable to FREEDOM OF THE PRESS, and FREEDOM OF ASSEMBLY. The AMERICAN CIVIL LIBERTIES UNION (ACLU), a product of the war, itself an opponent of strong government intervention in people's personal lives, worked through the decade to strengthen the power of labor and working people. The ACLU operated on the assumption that BILL OF RIGHTS freedoms flowed from economic power and that artificial impediments to the achievement of that power had to be removed. The National Association for the Advancement of Colored People was active in the decade in behalf of the constitutional rights of minorities, although its successes in producing constitutional change were decidedly limited. Similarly, organized labor saw itself as a beleaguered "minority" throughout the decade, attributing its position partly to conservation constitutionalism. Samuel Gompers stated shortly before his death: "The Courts have abolished the Constitution as far as the rights and interest of the working people are concerned."

The impact of such criticism ultimately was not so great as that from popularly elected constitutional liberals and an influential segment of the legal community. Senators William E. Borah and GEORGE NORRIS openly opposed the appointment of CHARLES EVANS HUGHES to the Chief Justiceship, arguing that there was a need for judges who would stop treating the Fourteenth Amendment only as a protection of property and recognize it as a guarantee of individual liberty. Although this opposition failed, partly because of Hughes's constitutional record and the public image of him as more progressive than reactionary, the Senate did block the subsequent nomination of John J. Parker, a prominent North Carolina Republican, to the Supreme Court in 1930; opponents particularly emphasized his racist and antilabor record. Both actions constituted unignorable Depression calls for constitutional liberalization, echoed increasingly by liberal lawyers, particularly in the law schools, many of which has been influenced by the LEGAL REALISM movement of the times. Such criticism combined with growing disillusionment with the business establishment and cynicism about a Supreme Court that could be aggressively activist in the protection of property rights and a paragon of self-restraint when it came to protecting human rights. Pressure for altered uses of government power mounted fairly early in Depression days.

Herbert Hoover was undoubtedly the most competent of the 1920s Presidents. A successful mining engineer and government bureaucrat, he had served effectively as wartime food administrator under Woodrow Wilson and as secretary of commerce in the Harding and Coolidge administrations. Hoover was eager to overhaul the executive branch of the government and reorganize it in ways that would achieve greater efficiency and greater economies in government. Saddled quickly with the worst depression in American history, Hoover was pressed to launch a large-scale national attack on the depression through federal governmental action. Such action had to fit his constitu-

tional views, which were decidedly Taftian. For Hoover, "unless the enterprise system operated free from popular controls, constitutional freedoms would die." "Under the Constitution it was impossible to attempt the solution of certain modern social problems by legislation." "Constitutional change must be brought about only by the straightforward methods provided by the Constitution itself." Such a commitment to laissez faire economics and constitutional conservatism precluded sweeping federal actions and permitted only such remedial legislation as the AGRICULTURAL MARKETING ACT of 1929, designed to assist in the more effective marketing of agricultural commodities. Congress created the Reconstruction Finance Corporation in 1932 to rescue commercial, industrial, and financial institutions through direct government loans. Both measures so limited the scope of permissible federal activity that neither proved adequate to the challenge of providing successful depression relief.

A more specific example of Hoover's constitutionalism involved congressional enactment of the Muscle Shoals Bill of 1931. In 1918 President Wilson had authorized, as a war-time measure, the construction of government plants at Muscle Shoals on the Tennessee River for the manufacture of nitrates and of dams to generate electric power. After the war the disposition of these plants and dams produced bitter national controversy. Conservatives insisted that they be turned over to private enterprise. Congress twice enacted measures providing for government ownership and operation for the production and distribution of power and the manufacture of fertilizers. In vetoing the second of these bills (Coolidge had vetoed the first in 1928), Hoover reiterated his belief that government ownership and operation was an approach to socialism designed to break down the initiative and enterprise of the American people. He argued that such a measure was an unconstitutional federal entrance into the field of powers reserved to the states and as such deprived the people of local communities of their liberty.

A growing number of congressmen and senators, however, were convinced that such constitutional negativism was no longer useful. In 1932, Congress passed and sent to a reluctant President the NORRIS-LAGUARDIA ACT, probably the most important measure of the period. Ever since the 1890s, labor had protested against business's turn to the courts for INJUNCTIONS to prohibit its legitimate activities. Congress's only response was a Railway Labor Act, in 1926, giving railway labor the right to bargain collectively through its own representatives. By the late 1920s, a national campaign against the labor INJUNCTION was launched with liberal congressional leaders joined by groups as disparate as the ACLU, the Federal Council of Churches, and the American Federation of Labor, all protesting the unfairness and unconstitutionality of enjoining labor's legitimate use of speech, press, and assembly. The Great Depression intensified this discontent. The Norris-LaGuardia Act made YELLOW DOG CONTRACTS unenforceable in federal courts; forbade the issuance of injunctions against a number of hitherto outlawed union practices; and guaranteed jury trials in criminal prosecutions based on violations of injunctions. The act thus removed the machinery for a variety of informal antilabor devices.

Hoover's response was to seek assurance from his attorney general, William Mitchell, that the more rigorous terms of the measure could be successfully bypassed. Having gained such assurance, he signed the bill, leaving Senator Norris to remark, bitterly, that the President dared not veto but did everything he could to weaken its effect. Yet the measure was generally popular, as was its symbolism, which presaged a more active role for the federal government in the achievement of social justice.

Such response was not lost on Franklin D. Roosevelt. During the presidential campaign of 1932, he called for a new, more liberal view of the Constitution and a BROAD CONSTRUCTION of congressional legislative power as a way of solving the nation's difficult problems. His overwhelming election victory seemed to assure that the minority liberal constitutional arguments of the 1920s would become majority ones when the NEW DEAL program was enacted.

PAUL L. MURPHY
(1986)

Bibliography

HICKS, JOHN D. 1960 *Republican Ascendancy, 1921–1933.* New York: Harper & Row.

LEUCHTENBURG, WILLIAM E. 1958 *The Perils of Prosperity, 1914–1932.* Chicago: University of Chicago Press.

MURPHY, PAUL L. 1972 *The Constitution in Crisis Times, 1918–1969.* New York: Harper & Row.

——— 1972 *The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to F.D.R.* Westport, Conn.: Greenwood Press.

## CONSTITUTIONAL HISTORY, 1933–1945

With the exception of the CIVIL WAR–RECONSTRUCTION era and the turbulent decade of the 1960s, no period in our history generated more profound changes in the constitutional system than the years of the Great Depression and WORLD WAR II. Although the tenure of a Chief Justice of the United States often marks the boundary of a particular constitutional epoch, in this period it was a single President, FRANKLIN D. ROOSEVELT, whose personality and policies dominated the nation's political landscape, first as the

leader of a domestic "war" against economic chaos, and, finally, as the architect of victory over the Axis powers. "Most of us in the Army have a hard time remembering any President but Franklin D. Roosevelt," remarked one soldier at the time of Roosevelt's death in April 1945. "He was the COMMANDER-IN-CHIEF, not only of the armed forces, but of our generation."

Roosevelt, described by Justice OLIVER WENDELL HOLMES as having a "second-rate intellect, but a first-rate temperament," was a charming, politically astute country squire from Hyde Park, New York. Crippled by polio at thirty-nine, elected President a decade later, he presided over five momentous revolutions in American life. The first, arising from his confrontation with the Supreme Court, has been aptly termed the "constitutional revolution" of 1937. The Court abandoned its long campaign, dating from the 1880s, to shape the content of the nation's economic policy by means of the judicial veto. The second revolution elevated the presidency, already revitalized by THEODORE ROOSEVELT and WOODROW WILSON in the Progressive era, to the pinnacle of leadership within the American political system. FDR did not invent the "imperial presidency," but his mastery of the radio, his legislative skills, and his twelve-year tenure went far toward institutionalizing it, despite several notable setbacks at the hands of Congress and the Court.

The third revolution, symbolized by the expansion of FEDERAL GRANT-IN-AID programs, the SOCIAL SECURITY ACT of 1935, and the efforts by the Department of Justice to protect CIVIL RIGHTS under the old Reconstruction-era statutes, significantly transformed American FEDERALISM by making the national government the chief custodian of economic security and social justice for all citizens. The fourth, marked by the revitalization of old independent REGULATORY COMMISSIONS such as the Interstate Commerce Commission, saw the final denouement of laissez-faire capitalism and the birth of state capitalism, managed by a bureaucratic elite drawn from the legal profession, the academic world, and private business. And the fifth revolution, characterized by the unionization of mass-production industries, the growing influence of urban-labor representatives in the Congress, and Roosevelt's successful effort to attract support from ethnic minorities, brought a major realignment in voting blocs and party strength that lasted three decades.

The triumph of Roosevelt and the Democratic party in the 1932 elections represented both the outcome of short-term political forces and the culmination of voting realignments that began much earlier. The inability of the HERBERT HOOVER administration to stop the slide into economic depression after the stock market crash of 1929 represented the most obvious and immediate source of Roosevelt's appeal. More significantly, his victory ended an era of Republican domination in national politics that began with WILLIAM MCKINLEY in 1896, and it ushered in a Democratic reign that lasted well into the 1980s. From McKinley to Hoover, the Republicans controlled the White House, except for Wilson's two terms (1913–1921), a Democratic interlude that rested mostly upon divisions in Republican ranks.

The Republicans also controlled both houses of Congress for twenty-eight of the thirty-six years between McKinley and Franklin Roosevelt, elected a majority of the nation's governors and state legislators outside the South, and even enjoyed great popularity in big cities among trade unionists, middle class professionals, and many ethnic-religious minorities. On a platform of high tariffs, sound money, low taxes, and rising prosperity, the GOP built a formidable national coalition.

The Republican coalition developed signs of collapse during the Warren G. Harding-Calvin Coolidge-Herbert Hoover years as economic distress increased among farmers and industrial workers despite the vaunted prosperity of the Republican New Era. In 1924, running as an independent on the Progressive party ticket, the aging Senator Robert LaFollette garnered a healthy share of votes from both urban workers and staple-crop farmers, who protested with their ballots against the economic conservatism of Coolidge and his Democratic rival, John W. Davis, a prosperous Wall Street lawyer. Hoover easily defeated New York governor Alfred E. Smith in 1928, but Smith—Irish, Roman Catholic, opposed to prohibition, and urban to the core—detached millions of ethnic, working class voters from the Republican party. Three years of economic distress which also alienated farmers, businessmen, and the once-affluent middle classes, completed the realignment process and assured Roosevelt victory in 1932.

From 1932 until his death, Roosevelt forged his own national coalition. Anchored in the lily-white South and the big cities where the Democratic party had been powerful since the days of ANDREW JACKSON and MARTIN VAN BUREN, Roosevelt welded together a collection of social, ethnic, regional, and religious minorities into a new political majority. In peace and war, the NEW DEAL gave power, status, and recognition to those who had been outsiders in American society before the Great Depression—Irishmen, Jews, Slavs, white Southerners, and blacks.

Within this broad, diverse "Roosevelt coalition," the power and influence of organized labor and the urban wing of the Democratic party grew impressively, especially after the elections of 1934 and 1936 and the passage of the WAGNER (NATIONAL LABOR RELATIONS) ACT in 1935. Roosevelt's nomination in 1932 had been made possible by the support of key southern leaders. The success of the New Deal after 1934 and Roosevelt's electoral victories in 1940

and 1944, however, rested upon the political acumen and money provided by big labor through the political action committees of the Congress of Industrial Organizations. Roosevelt built well. His coalition ran both houses of Congress in every year but eight during the next half century. It elected HARRY S. TRUMAN in 1948, JOHN F. KENNEDY in 1960, LYNDON B. JOHNSON in 1964, and JIMMY CARTER in 1976.

Neither of the two amendments to the Constitution ratified during this period owed their inspiration directly to Roosevelt or the New Deal, although the TWENTIETH AMENDMENT, eliminating the lame-duck session of Congress, had been pushed by leading progressives for over a decade, and the TWENTY-FIRST AMENDMENT, repealing national PROHIBITION of liquor, had been endorsed by the Democratic party in its 1932 platform. Both amendments were proposed in 1932, the first time since 1789 that a single Congress had sent to the states for RATIFICATION more than one amendment. Congress also specified an unusual ratification procedure for the Twenty-First Amendment, requiring the states to convene special ratifying conventions instead of submitting the measure to their legislatures. Proponents of prohibition repeal feared that the legislatures, most of them malapportioned in favor of rural constituencies, would not be sympathetic to ratification.

Supporters of the Twentieth Amendment, led by the venerable progressive senator from Nebraska, GEORGE NORRIS, argued that the existing short session of Congress which met from December until March was a barrier to effective majoritarian democracy. By an accident of history, Congresses elected in November of even-numbered years did not meet in regular session until December of the odd-numbered year. Norris's amendment, first passed by the Senate in 1923, proposed to correct this situation by moving forward to January 3 from December the date on which sessions of Congress began and shifting back to January 3 and 20 from March 4 the date on which the terms of office began for members of Congress, and the President and Vice-President, respectively. A newly elected Congress, reflecting the fresh mandate of the people, would meet two months after an election rather than thirteen months later.

The Senate passed the Norris plan five times after 1923, but it failed to advance in the Republican-dominated House of Representatives, where the Speaker, Nicholas Longworth, opposed it. Longworth wished to keep the lame-duck session as a check upon the turbulent masses and he also objected to a provision in the Norris amendment that allowed Congress to determine the date of its own adjournment each year. Such flexibility, he believed, would only encourage more lawmaking by Congress, a prospect that he and other conservatives viewed with great distaste. The 1930 elections returned Democratic majorities to both houses of Congress, who quickly passed the Twentieth Amendment and sent it on to the states where it was ratified three years later.

American temperance organizations struggled for more than a century to achieve their goal with the adoption of the EIGHTEENTH AMENDMENT in 1919. It took the "wet" forces little more than a decade to bring the brewery, the distillery, and the saloon back to American life through ratification of the Twenty-First Amendment nine months after Roosevelt took office. Like the resurgence of the Democratic party, the repeal of national prohibition reflected a fundamental shift in political forces. The Congress that passed the Eighteenth Amendment during WORLD WAR I was overwhelmingly rural, with House seats apportioned on the basis of the 1910 census, the last to record a majority for the countryside rather than the cities. The 72nd Congress, on the other hand, reflected the reapportionment of the House in 1929, where twenty-one states (mostly from the rural South and West) lost representation and eleven states (mostly in Eastern metropolitan areas) increased their share of seats.

In addition to providing urban-ethnic voters with a measure of symbolic revenge for the inconvenience of a "dry" decade, the repeal of prohibition had wide appeal in a nation reeling from economic depression and plagued by criminal violence. Sponsors argued that repeal would boost employment, raise tax revenues, and permit law enforcement personnel to concentrate upon the apprehension of major criminals such as John Dillinger. With equal vehemence, defenders of the "dry" faith claimed that repeal had been hatched by millionaires and rich corporations, eager to shift their tax burdens onto poor consumers of alcohol, and that Satan would conquer America. Thirty-six states, more concerned for the nation's fiscal problems than for the wiles of Satan, ratified the repeal amendment by December 1933.

The legislative program of the New Deal had a more direct impact upon the fate of the old CHILD LABOR AMENDMENT, which had passed Congress in 1924 but had failed to secure ratification by three-fourths of the states. As late as 1937, only twenty-eight state legislatures had ratified the proposal which would have authorized Congress to regulate or prohibit the labor of persons under eighteen years of age. Fifteen states, mostly in the South and border regions, had rejected it; five had failed to act. The amendment became moot, however, when Congress in 1938 passed the FAIR LABOR STANDARDS ACT, which contained a similar restriction, and when the Supreme Court upheld its constitutionality in UNITED STATES V. DARBY LUMBER COMPANY (1941).

As usual, formal constitutional revision on the state level during these years was more extensive and diverse

than for the federal government, although only three states (New York, Missouri, and Georgia) entirely rewrote their constitutions. At one extreme were states such as Tennessee and Illinois, where constitutional innovation remained minimal. The fundamental law of Tennessee had not been amended since 1870, while the Illinois Constitution of 1890 had been revised only twice since that date. On the other hand, voters in Louisiana were asked to adopt twenty-eight constitutional amendments in 1938, nineteen in 1940, ten in 1942, and nineteen in 1944, creating an organic law that filled nearly 300 pages with 200,000 words. California ran a distant second. By the end of World War II, its constitution of 1879 had been amended 250 times and totaled close to 50,000 words.

Unlike the United States Constitution with its broad, sweeping language, most state charters in this period included detailed declarations of public policies; the amendment process often served as a surrogate for statutory changes. In 1944, for instance, 100 proposed amendments were put before the voters in thirty different states. In California, Arizona, Oregon, and Washington the electorates defeated amendments to enact old-age pension schemes. Arkansas and Florida adopted right-to-work amendments that banned union shops, while California spurned a similar amendment. In the same year voters in other states were asked to pass upon amendments dealing with the location of airports, POLL TAXES, dog racing, and preferential civil service hiring for veterans.

Because of the era's economic crisis, which combined high unemployment, business failures, and falling tax revenues, all of the states confronted similar constitutional crises, because their organic laws usually limited state indebtedness. Escalating relief burdens placed a severe strain upon the states' fiscal resources, especially before the New Deal picked up a larger share of these costs after 1935. Legislatures and governors often found paths around these obstacles through constitutional experimentation: amendment, REFERENDUM, and judicial interpretation.

The age of Roosevelt, marked by class conflict and intense political controversy over both the economy and FOREIGN AFFAIRS, spawned many durable myths about the presidency, the growth of federal authority, and the relationship between government and the private sector. Roosevelt's critics, who hated the New Deal and distrusted his diplomacy, accused him of erecting a Presidential dictatorship. The New Deal and the mobilization of the war economy, it has been argued, also transformed the federal union as well as business-government relationships by subjecting local government and business corporations to the despotism of Washington bureaucrats. There is some truth in these generalizations but also considerable exaggeration.

Few political leaders in our history could match Roosevelt's oratorical gifts, his skill at dispensing patronage, and his deft manipulation of subordinates, the press, Congress, and opponents. But Roosevelt also experienced a number of profound setbacks between 1933 and 1939 that limited presidential power even during the unparalleled economic crisis of the Great Depression. It was World War II that shifted the balance decisively in his favor, but even during those turbulent years he usually functioned within boundaries set by Congress and public opinion.

Under the New Deal, the years of presidential preeminence in the shaping of domestic policy were remarkably fertile but brief. During the so-called Hundred Days, from Roosevelt's inauguration to early June 1933, Congress rubber-stamped dozens of White House proposals, including new banking laws, the first federal securities statute, a complete overhaul of the nation's monetary system, legislation creating the Tennessee Valley Authority, as well as laws setting up the controversial National Recovery Administration and the New Deal's basic farm program. Acting under the dubious authority of the World War I Trading with the Enemy Act, Roosevelt banned gold exports and all foreign exchange transactions until Congress approved of the administration's monetary plans that nullified gold clauses in private and public contracts and devalued the dollar by almost twenty-five percent. Equating the Depression with war, Roosevelt asked for and received from Congress the resources appropriate for a military commander battling a foreign invader.

The 1934 elections gave the President even larger majorities in Congress. This mandate encouraged a second burst of New Deal reforms in 1935. Again responding to presidential initiatives, Congress adopted a series of path-breaking laws, including the Social Security Act, the Wagner National Labor Relations Act, a $4.8 billion relief and public works measure, and a significant revision of the federal tax code that closed many loopholes and levied new surcharges on the very rich. Despite the judicial mutilation of key administration measures in 1935–1936, executive power probably stood at its peacetime zenith after Roosevelt's crushing reelection victory in 1936.

Even during these years of strong presidential leadership, Roosevelt's claims to authority did not go unchallenged. The federal courts remained a bastion of conservative Republicanism. Federal judges had issued hundreds of INJUNCTIONS against New Deal programs by early 1935, when the Supreme Court began to invalidate many of the laws of the Hundred Days, including the NATIONAL INDUSTRIAL RECOVERY ACT (NIRA) and the AGRICULTURAL ADJUSTMENT ACT. The most serious rebuff to the President came in the *Schechter* case, where the Justices invalidated the NIRA on the ground of improper DELEGATION OF POWER to the executive, and HUMPHREY'S EXEC-

UTOR V. UNITED STATES (1935), where they curbed the President's power to remove members of independent regulatory commissions.

These judicial affronts to presidential authority became a war during FDR's second term, beginning with his ill-devised scheme to "pack" the Supreme Court with additional Justices. His proposed "Judicial Reform Act of 1937" inspired criticism both from conservatives and from many of the President's liberal friends in the Congress as well. This bitter legislative struggle divided the New Deal coalition, squandered much of the political capital that Roosevelt had accumulated during the previous four years, and gave rise to cries of "dictatorship," "tyranny," and "fascism." When the dust settled, the Court-packing plan had been defeated by Chief Justice CHARLES EVANS HUGHES and opponents in the Congress, but the Supreme Court never again seriously challenged the New Deal.

The economic recession of 1937–1938 and Roosevelt's attempt to restructure the executive branch dealt new blows to presidential leadership and prestige. Having taken credit for the economic upturn in 1935–1936, the President had to absorb the blame for the "Roosevelt recession," which had been triggered in part by his own desire to cut federal expenditures and balance the budget. Congress also scuttled his plans to reorganize the executive branch which rested upon the recommendations of a blue-ribbon committee on administrative management. The original bill called for an enlargement of the White House staff, creation of the Executive Office of the President to include the Bureau of the Budget, and a consolidation of existing bureaus, agencies, and commissions into twelve superdepartments under the President's control. The independent regulatory commissions such as the Federal Trade Commission, the Interstate Commerce Commission, and the Securities Exchange Commission would have been regrouped under the authority of these executive departments.

Congressional opponents denounced the plan as another presidential power grab. Working in tandem with rebellious bureaucrats who hoped to protect their own fiefdoms from the White House, they easily defeated the most controversial features of the plan. Roosevelt got his Bureau of the Budget and a larger staff, but little more. His political fortunes hit rock bottom in the 1938 elections, when several conservative Democratic senators won reelection despite Roosevelt's effort to purge them during bitter primary campaigns. Confronted by an emerging conservative congressional coalition of southern Democrats and midwestern Republicans, Roosevelt had lost the initiative on domestic policy by the time German troops marched into Austria and Czechoslovakia.

The growth of presidential power, checked at the end of the 1930s, received new impetus after 1938 from the coming of World War II. Although the Supreme Court had reaffirmed in the broadest possible terms the President's constitutional authority over foreign policy in UNITED STATES V. CURTISS-WRIGHT EXPORT CORPORATION (1936), the actual limits of that authority remained to be tested. Sometimes alone and sometimes with congressional support, between 1939 and 1945 Roosevelt enlarged presidential power to an extent unknown even during World War I and the early New Deal.

Facing substantial isolationist sentiment both in Congress and among the public, Roosevelt initially attempted to counter Germany and Japan by means of EXECUTIVE AGREEMENTS and EXECUTIVE ORDERS that rested exclusively upon his claims to inherent presidential authority to conduct foreign relations and command the armed forces. He applied economic sanctions against Japan, terminating a 1911 commercial treaty, banning sales of scrap iron and steel, and freezing all Japanese financial assets in the United States. He ordered naval patrols of the western Atlantic—virtually assuring hostilities with German U-boats—and he ordered the military occupation of Iceland, with attendant naval convoys to protect ships supplying the occupation troops. In brief, Roosevelt waged an economic war in Asia and shooting war in the Atlantic without the consent of Congress.

The most extraordinary assertion of presidential power before Pearl Harbor was the destroyer-bases executive agreement in September 1940, by which Roosevelt transferred fifty over-age American destroyers to the British government in return for leases on seven naval bases in the Caribbean. This transaction, through which the President gave away a substantial portion of the United States Navy, rested upon a generous interpretation of an old nineteenth-century statute which permitted the President to dispose of worn-out ships. Most observers have believed that this action subverted the intention of Congress and violated a 1917 law specifically prohibiting the President in any foreign war "to send out of the jurisdiction of the United States any vessel built, armed, or equipped as a vessel of war." Attorney General ROBERT H. JACKSON, who advised Roosevelt on the legality of the transfer, dismissed this statute on the grounds that it applied only to ships built with the specific intention of giving them to a nation at war.

After the Japanese attack on Pearl Harbor Congress rapidly augmented presidential control over both military policy and the domestic economy. By means of the renewal of Lend-Lease, the Second WAR POWERS ACT, the EMERGENCY PRICE CONTROL ACT, the War Labor Dispute Act, and other laws, Congress gave the President the discretion, among other things, to allocate $50 billion of war supplies to America's allies, to reorganize all executive departments and agencies at will, to fix rents and prices

throughout the land, and to seize industrial plants closed by strikes. In 1935, invalidating the NIRA, the Supreme Court had scolded Congress for vesting unbridled authority in the President to regulate the economy. Ten years later, as World War II drew to a close, executive discretion over the nation's economic structure far transcended that of the NIRA years.

A substantial enlargement of presidential discretion was essential for effective prosecution of World War II, but the growth of executive power carried with it threats to CIVIL LIBERTIES and unfathomable dangers to the survival of the human race. The Congress that permitted the President to restructure the executive branch also approved of the administration's plans to remove Japanese Americans from the West Coast. (See JAPANESE AMERICAN CASES. ) The Congress that permitted the President to ration sugar and gasoline also gave the Commander-in-Chief a blank check for research, development, and potential use of nuclear weapons. This was truly, in Justice BENJAMIN N. CARDOZO's memorable phrase, "delegation run riot."

The expansion of federal responsibility for economic management and social services paralleled the growth of presidential power between 1933 and 1945. In a series of cases beginning with the WAGNER ACT CASES (1937) and ending with WICKARD V. FILBURN (1942), the Supreme Court laid to rest the antiquated notions of DUAL FEDERALISM, which had postulated the existence of rigid constitutional boundaries separating appropriate federal activities from those reserved exclusively to the states. In the wake of these decisions and those upholding the Social Security Act, there seemed to be no constitutional limitation upon the authority of Congress to regulate INTERSTATE COMMERCE and to tax and spend on behalf of the GENERAL WELFARE, even where these federal efforts intruded deeply into areas of social and economic life traditionally left to local government. Practice often preceded formal doctrinal legitimation. In 1934, for instance, the Bureau of Biological Survey in the Department of Commerce eradicated over seven million disease-carrying rodents in three states with a $8.7 million grant from the Civil Works Administration. Although this project produced no constitutional objection, a more sweeping federal intrusion into the domain of local health authorities is hard to imagine.

The most far-reaching instrument of expanding federal policymaking became the myriad programs of FEDERAL GRANTS-IN-AID which provided federal money for specific activities to be administered by state officials under federal guidelines. As early as 1862, the MORRILL ACT had conveyed federal lands to the states on condition that they be used for the construction and support of colleges and universities. In the Weeks Act of 1911, Congress had extended this principle to include cash grants to the states for fighting forest fires in the watersheds of navigable streams. Similar grant-in-aid programs flourished during the Wilson administration for vocational education, highways, and agricultural extension work, but budget-conscious Republican administrations had put a cap on new programs during the 1920s.

In their efforts to fight the depression, both the Hoover and Roosevelt administrations increasingly used the grant-in-aid technique. The Emergency Relief and Construction Act of 1932, approved reluctantly by Hoover, offered over $600 million in federal loans to the states for work-relief projects. The Roosevelt administration substituted grants for loans in the relief programs of the New Deal. By 1940, in addition to these vast relief activities and the continuation of old programs from the Progressive era, the New Deal had undertaken grant-in-aid programs for employment services and unemployment compensation, old age assistance, child welfare services, and maternity care. Social Security, the largest New Deal grant-in-aid program, assisted the blind, the disabled, and the unemployed through combined federal-state efforts.

The growth of federal grant-in-aid programs during the New Deal years rested upon the realization that many social and economic problems required national attention and that only the federal government commanded the fiscal resources to deal with them. Between 1932 and the end of World War II, the federal government's share of total taxes collected rose from twenty-four percent to nearly seventy-four percent. At the same time, grant-in-aid programs avoided the growth of an even larger federal bureaucracy and left many important administrative decisions in the hands of state and local officials.

In addition to grant-in-aid programs, state and local elites played a major role in the implementation of other New Deal efforts as well, a pattern of political decision making that refuted simplistic ideas about rampant centralization of power in federal bureaucrats. The heart of the New Deal's farm program, the domestic allotment system, vested important decisions in county committees composed of farmers and extension-service personnel chosen by local authorities. Under the Taylor Grazing Act, local livestock ranchers determined the extent of grazing rights on the vast public lands in the western states. And the most coercive federal program in this period, the SELECTIVE SERVICE ACT of 1940, left life-and-death decisions about the drafting of millions of American citizens in the hands of local draft boards appointed by state governors. Without the active participation of state and local officials, the wartime rationing programs for gasoline, sugar, coffee, and butter would have broken down for lack of enforcement.

When New Deal reformers ignored the interests and sensibilities of local elites, they provoked instant political

protest and retaliation. Roosevelt quickly dismantled the innovative Civil Works Administration in 1934 because it drew intense criticism from governors, county supervisors, and mayors who objected to the complete nationalization of its extensive work-relief efforts. The subsequent Works Projects Administration program gave a larger share of decision making to local officials, who systematically used the machinery to punish political enemies and to discriminate against racial minorities, especially in the South. When idealistic young lawyers in the Agricultural Adjustment Administration attempted to protect sharecroppers and tenants from wholesale eviction under the farm program, they stirred up a revolt by commercial farmers, who forced their removal from the agency. Much of the opposition from southern Democrats to the New Deal after 1935 grew out of their anger at the Department of Justice for attempting to protect blacks from local violence under the old Reconstruction-era civil rights laws. The New Deal nourished a new brand of COOPERATIVE FEDERALISM in many areas of American life, but it was not a federalism without conflict and tensions, especially when national reformers challenged entrenched local customs and power relationships.

While encouraging the growth of big labor and ministering to the needs of the elderly and the poor, the New Deal also provided substantial benefits to American capitalists. Business opposition to Roosevelt was intense, but it was narrowly based in labor-intensive corporations in textiles, automobiles, and steel which had the most to lose from collective bargaining. The New Deal found many business allies among firms in the growing service industries of banking, insurance, and stock brokerage where government regulations promised to reduce cutthroat competition and to weed out marginal operators. Because of its aggressive policies to expand American exports and investment opportunities abroad, the New Deal also drew support from high-technology firms and from the large oil companies who were eager to penetrate the British monopoly in the Middle East.

Sophisticated businessmen discovered that they could live comfortably in a world of government regulation. The "socialistic" Tennessee Valley Authority lowered the profits of a few utility companies, but cheap electric power for the rural South translated into larger consumer markets for the manufacturers of generators, refrigerators, and other appliances. In addition to restoring public confidence in the stock exchanges and the securities industry, the Securities and Exchange Commission promoted self-regulation among over-the-counter dealers. Motor trucking firms received a helping hand from the Interstate Commerce Commission in reducing rate wars, and the major airlines looked to the Civil Aeronautics Board to protect them from the competitive rigors of the marketplace. When "Dr. Win-the-War" replaced "Dr. New Deal" after 1942, businessmen began to play key roles as well in the wartime agencies that regulated production, manpower, and the allocation of raw materials. The New Deal thus laid the foundations of both the welfare state and the permanent warfare state.

MICHAEL E. PARRISH
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Bibliography

CAREY, JANE PERRY 1865 *The Rise of a New Federalism: Federal-State Cooperation in the United States.* New York: Russell & Russell.

HAWLEY, ELLIS P. 1965 *The New Deal and the Problem of Monopoly.* Princeton, N.J.: Princeton University Press.

LEUCHTENBURG, WILLIAM E. 1963 *Franklin D. Roosevelt and the New Deal.* New York: Harper & Row.

PATTERSON, JAMES T. 1969 *The New Deal and the States: Federalism in Transition.* Princeton, N.J.: Princeton University Press.

POLENBERG, RICHARD 1972 *War and Society: The United States 1941–1945.* Philadelphia: Lippincott.

SCHLESINGER, ARTHUR M., JR. 1957, 1959, 1960 *The Age of Roosevelt,* 3 vols. Boston: Houghton Mifflin.

## CONSTITUTIONAL HISTORY, 1945–1961

Reconversion to a peacetime society required reestablishing balance among the branches of the government and a careful reassessment of the role of each. The same process occasioned a reexamination of the relations between government and private power. These immediate problems of reconstruction were joined by the emergence of a "cold war" with the Communist bloc of nations. Americans defined that struggle as one against totalitarian rule—the antithesis of constitutional democracy.

The wartime period had seen massive government regulation of the economy and the personal lives of citizens. Congress had authorized governmental reorganization in 1941, reenacting a WORLD WAR I measure giving the President almost unlimited power to reorganize federal agencies directing the nation's resources in wartime. (See WAR POWERS ACT.) At the end of WORLD WAR II, Congress created a bipartisan Commission on Organization of the Executive Branch of the government headed by ex-President HERBERT HOOVER. It recommended reforms designed to reduce administrative disorder and bureaucracy. Congress in 1947 proposed the TWENTY-SECOND AMENDMENT (ratified in 1951) limiting presidential service to two terms.

Although many congressional conservatives hoped to roll back various New Deal programs, few were prepared to return the nation's economy to the unregulated control of private business leaders. Depression lessons had been painful. The FULL EMPLOYMENT ACT of 1946 declared that it was the government's task to take all steps necessary to maximize employment, production, and purchasing power. And while certain conservative congressmen were disturbed by the economic management this measure obviously necessitated, few opposed its goal of securing national economic stability. The Housing and Rent Act of 1947, continuing the wartime Price Control Act, raised an important question: does the WAR POWER continue after the shooting has ceased? The Supreme Court, in WOODS V. MILLER (1948), answered affirmatively as to legislation responding to wartime dislocations.

The issue of restraints on organized labor dissolved presidential-congressional harmony. President HARRY S. TRUMAN in 1946 vetoed the TAFT-HARTLEY ACT, an amendment to the 1935 WAGNER ACT, the nation's principal labor law. Taft-Hartley sought to eliminate an alleged prolabor bias by arming management with new rights and imposing limitations on long-established trade union practices. Truman called the act "completely contrary to the national policy of economic freedom," and "a threat to the successful working of our democratic society." But Congress passed it over his veto, and thirty states also enacted antilabor statutes, including RIGHT-TO-WORK LAWS and antipicketing measures. The LANDRUM-GRIFFIN ACT of 1959 sought to combat growing charges of union scandal, extortion, and deprivation of members' rights by imposing more direct federal authority over internal union procedures.

Executive-legislative cooperation resulted in passage of the Cellar-Kefauver Act of 1950, authorizing more rigid enforcement of the antitrust laws against corporate mergers. Two years later, following a Supreme Court ruling striking at "fair trade" laws, Congress passed the McGuire Act exempting state-approved fair trading from the federal antitrust laws. Seen as a consumer protection law, the measure was politically acceptable at the time.

In the FOREIGN AFFAIRS area, Congress and the President clashed. Truman had inherited a presidency whose prerogatives in foreign policy had been greatly expanded. Committed to the realization of Roosevelt's postwar programs, Truman backed American participation in the new United Nations. Such action entailed expanding presidential prerogatives at the expense of congressional power. American participation meant applying military sanctions against an aggressor state at the discretion of the United States delegate to the Security Council, who was under the control of the President. By the United Nations Participation Act of 1945 Congress recognized that the President could not commit the United States to participation in United Nations military sanctions without congressional consent, but it acknowledged implicitly that Congress's warmaking power was conditioned by the necessity of international security action. Similarly, when the United States joined the NORTH ATLANTIC TREATY Organization in 1950, it pledged automatic intervention if any member suffered armed attack. The question was raised whether such a commitment upset the traditional balance between the executive and legislative branches in questions of war and peace.

With the invasion of South Korea by Communist forces, presidential discretion rather than congressional action provided a dramatic answer. Truman, on June 25, 1950, without asking for a formal DECLARATION OF WAR or consulting Congress, ordered United States POLICE ACTION in the area. This order brought charges from Senator ROBERT A. TAFT that Truman had "usurped power and violated the Constitution and the laws of the United States." In the "great debate" that followed, Truman's actions and presidential war power generally were condoned, but not without a strong attempt, led by Senator John Bricker, to curb the treaty-making power of the President by constitutional amendment. One form of the unsuccessful BRICKER AMENDMENT would have declared: "A provision of a treaty or other international agreement which conflicts with this Constitution shall not be of any force or effect."

The Supreme Court ultimately eased the minds of Bricker's supporters. The circumstances were constitutionally significant. As new treaties of alliance grew in the late 1940s and early 1950s, American military and civilian personnel spanned the globe. Questions grew regarding the legal status of American citizens living abroad. Did the Constitution follow the flag? In REID V. COVERT (1957) the Court held that an EXECUTIVE AGREEMENT was subject to the limits of the Constitution, and thus could not confer on Congress power to authorize trial by COURT-MARTIAL of a civilian dependent of a serviceman stationed overseas. "We must not," wrote Justice HUGO L. BLACK, "break faith with this nation's tradition of keeping military power subservient to civilian authority."

Earlier, Congress had enacted a NATIONAL SECURITY ACT, creating the National Security Council and reorganizing the means by which war powers were exercised. The measure constricted the President's foreign policy prerogatives by requiring him to consult Congress before taking certain actions. In practice, however, it did not constrain willful Presidents. The ATOMIC ENERGY ACT of 1946 sought to insure civilian control over atomic energy production and precluded dissemination of technical information to other nations. By the 1950s, however, President Eisen-

hower sought and obtained an amendment, as the basis for an international cooperation program, to develop peaceful applications of nuclear energy. Nuclear power was apparently to become an important bargaining chip in the international arena.

One incident growing out of the KOREAN WAR revealed public feelings regarding the swelling authority of the executive and the proper nature of constitutional government. During the war, the President felt that constitutional history was on his side, given earlier validated presidential interventions in national emergency crises. He authorized his secretary of commerce to seize and operate struck steel mills, thereby insuring production of vital defense materials. His executive order was not based on statutory authority, but only on the ground that a threatened strike of the nation's steelworkers created a national emergency. When the steel companies sought an INJUNCTION against the government, federal spokesmen argued that the seizure was based upon Article II of the Constitution, and "whatever inherent, implied, or residual powers may flow therefrom." The President's actions drew sharp criticism, especially his refusal to use the Taft-Hartley Act provisions hated by his labor constituency. Before the Supreme Court, government counsel stressed expanded presidential prerogative during national emergencies, but the Supreme Court drew a line between public regulation and governmental operation of private business. In one of its most celebrated postwar constitutional decisions, the Court, speaking through Justice Black, rejected claims for presidential EMERGENCY POWERS and INHERENT POWERS in domestic affairs. Truman promptly announced compliance with the ruling, and the public reacted favorably to JUDICIAL ACTIVISM in curtailing excessive federal power. (See STEEL SEIZURE CONTROVERSY; YOUNGSTOWN SHEET & TUBE V. SAWYER.)

Constitutional development in the Truman years had been heavily influenced by considerations of national security at home and abroad, some serious, some specious, and all heavily political. Republican and conservative southern Democratic opponents of the New Deal had begun in 1938 to "red-bait" the Roosevelt administration by associating its personnel with un-Americanism or by representing the government's extension of powers as socialistic or communistic. Wartime investigations of federal employees and postwar revelations of inadequate security procedures intensified conservative demands for a housecleaning of the executive branch. Capitalizing on this issue during the 1946 congressional elections, the Republicans secured control of both houses of Congress, insuring that the subsequent Congress would investigate the loyalty of federal employees. During this period, the HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES (HCUA) was given permanent committee status, and between 1947 and 1948 Congress instituted thirty-five committee investigations of federal personnel and policies.

Lacking Roosevelt's political capital, and alarmed by leaks of classified information, Truman moved quickly to take control of the loyalty issue. In November 1946 he appointed a special presidential commission to investigate the problem, and in 1947 he formally instituted, by EXECUTIVE ORDER 983 . . . permanent federal employee LOYALTY-SECURITY PROGRAM. To disarm congressional opposition further, Truman appointed conservatives to the loyalty program's major administrative positions. Under this program, negative information from any source was the potential basis for a security dismissal or the denial of government service. An ATTORNEY GENERAL'S LIST of subversive organizations was drawn up, with membership a basis for dismissal. The only guideline the order provided was that a designated organization must be "totalitarian, Fascist, Communist, or subversive," or one adopting a policy "approving the commission of acts of force or violence to deny to others their constitutional rights."

Civil libertarians attacked the program on constitutional grounds, charging that it presumed employees to be subversive and subject to dismissal unless they could prove themselves innocent. Critics of the program also charged that it lacked procedural protections, a charge raised chronically against HCUA. However, the administration moved with regard for justice and fair play during its loyalty probes, and by early 1951 the Civil Service Commission had cleared more than three million federal employees; the Federal Bureau of Investigation had made 14,000 investigations of doubtful cases; over 2,000 employees had resigned, although in very few cases because of the investigation; and 212 persons had been dismissed because of reasonable doubts of their loyalty. In 1948 the executive branch also sought to demonstrate concern for national security by obtaining indictments of the eleven national leaders of the Communist party under the Smith Act. A long and bombastic trial followed, ending in convictions for conspiracy to advocate overthrow of the government by force and violence. (See DENNIS V. UNITED STATES.)

Conservative critics claimed that the Truman administration's loyalty efforts were window dressing to divert attention from more serious problems. The sensational Alger Hiss-Whittaker Chambers hearings and the resultant conviction of Hiss, a former New Deal official, for perjury in connection with disclosures of secret security information, catalyzed Congress into launching its own loyalty program. The MUNDT-NIXON BILL, seeking to force communists out into the open by requiring them to register with the Justice Department, was caught in 1948 election year politics and failed passage; but by 1950, following the reelection of Truman, the INTERNAL SECURITY

ACT, a similar measure, was passed resoundingly over the President's veto. The act went beyond the Truman loyalty program for government employees. It attempted to extend loyalty probes into nongovernmental areas of American life and generally assumed a need to shift the authority for security matters to congressional leadership. Civil libertarians challenged the measure as violative particularly of FIRST AMENDMENT guarantees. But in the Korean War period, with burgeoning security apprehensions fed aggressively by Senator JOSEPH R. MCCARTHY of Wisconsin, the possibility of launching a successful test case of even the act's most extreme provisions promised little success. Instead, Senator Patrick A. McCarran of Nevada, one of the measure's principal champions, persuaded Congress in 1952 to pass, over another Truman veto, a revised immigration law. The act contained provisions to prevent the admission of possible subversives, and it authorized DEPORTATION of immigrants with communist affiliations even after they had become citizens.

The expanded activities of congressional committees in LEGISLATIVE INVESTIGATIONS of loyalty and security raised important constitutional questions about committee prerogatives and behavior. While practice varied, some of the more flamboyant committees, such as HCUA, Senator McCarthy's Committee on Governmental Operations, or McCarran's Senate Internal Security Committee with large, aggressive, and ruthless staffs, pried into federal activities and even investigated subversion in the movie and entertainment industries, various private organizations, the academic community, and the churches. Committee actions alarmed civil libertarians, because of growing disregard for the type of procedural guarantees and safeguards of individual liberty normally afforded any citizen in a court of law. The committees browbeat witnesses, denied a RIGHT TO COUNSEL, and afforded no opportunity to examine charges, which were often irresponsible and from dubious sources. Opportunity to cross-examine witnesses was denied. Individuals' past affiliations and activities were used as evidence of guilt, and they were expected to prove themselves innocent to an obviously biased congressional "jury." As a result many witnesses invoked the Fifth Amendment, refusing to testify on the grounds that any statement made might tend to incriminate them. This led to charges that such citizens were "Fifth Amendment Communists." Congress in 1954 passed a FEDERAL IMMUNITY ACT to force testimony in return for promises of immunity from prosecution. (See IMMUNITY GRANT.) Generally the courts, including the Supreme Court, were cautious about thwarting government measures, deciding cases on the narrowest of grounds and proscribing only the most overt abuses.

Postwar demands for greater constitutional protections for minorities within American society expanded CIVIL RIGHTS. Many Americans believed that the United States should extend first class CITIZENSHIP to all. The struggle with the Communist world for the minds of Third World people added urgency. Early in 1946, President Truman established a Committee on Civil Rights affirming that "the preservation of civil rights, guaranteed by the Constitution, is essential to domestic tranquillity, national security, the general welfare, and the continued existence of our free institutions." In 1947 the committee proposed extension of an approach initiated by Attorney General FRANK MURPHY in the late 1930s, stressing that the federal government should be a shield in protecting citizens against those who would endanger their rights, and a sword to cut away state laws violating those rights. The report called for strengthening the CIVIL RIGHTS DIVISION of the Justice Department, using the Federal Bureau of Investigation in cases involving violations of civil rights, enacting antilynching and anti-POLL TAX laws, and establishing a permanent Fair Employment Practices Commission. However, with Southerners dominating many key congressional committees, prospects were dim for any program extending full civil rights to black Americans.

Truman determined to make the effort. In early 1948 he sent Congress a message calling for prompt implementation of the commission's report. A southern revolt in the Congress culminated in the secession of members from the Democratic Party. These "Dixiecrats" ran their own presidential candidate, J. Strom Thurmond, on a STATES' RIGHTS platform calling for "segregation of the races" and denouncing national action in behalf of civil rights as a "totalitarian concept, which threatens the integrity of the states and the basic rights of their citizens." Although Truman won the election, in the civil rights area he had available only executive remedies. These he utilized, strengthening the Civil Rights Division and encouraging the Justice Department to assist private parties in civil rights cases. He also ordered that segregation be ended in federal employment and that the armed services be fully integrated. (See EXECUTIVE ORDERS 9980 AND 9981.) These developments encouraged civil rights activists to look to the courts for constitutional action in behalf of minority rights. Truman's Supreme Court appointees, however, were consistently conservative and espoused a narrow view of the judicial power. Only a few cautious rulings proscribed some forms of RACIAL DISCRIMINATION. (See SHELLEY V. KRAEMER; SWEATT V. PAINTER.)

Although DWIGHT D. EISENHOWER shared many of Truman's views regarding the President's vital and dominant leadership role in foreign policy, he conceived the domestic presidency in a different light. No social crusader, Eisenhower also had no desire to undo major programs of the New and Fair Deals. Rather he saw the presidency as a mediating agency, harmonizing the functioning of the

team, and ratifying decisions and policies carefully prepared by responsible subordinates or by congressional leadership. Thus during Eisenhower's eight years in office Congress reasserted considerable domestic initiative, and when the President acted he usually complemented congressional desires.

During the 1952 campaign, Republicans made much of the "Communists in government" issue. Eisenhower realized that loyalty-security actions had to be taken to satisfy a nervous public. In 1953, he established a new executive loyalty program that expanded the criteria of the earlier Truman program. Discharge from federal service was now based on a simple finding that the individual's employment "may not be clearly consistent with the interests of national security." Several thousand "security risks" were dismissed. HCUA, cheering from the sidelines, then attempted to subpoena former President Truman to explain his security inadequacies. Truman responded with a polite letter giving the committee a lecture on SEPARATION OF POWERS and the independence of the executive.

Critics of the program focused on the absence of PROCEDURAL DUE PROCESS, the prevalence of GUILT BY ASSOCIATION, and the use of "faceless informers" as sources of damaging accusations. As long as Senator McCarthy was riding high such allegations remained just that. Tired of being smeared as "soft on Communists," frustrated liberal Democrats pushed through Congress a COMMUNIST CONTROL ACT in 1954, outlawing the party and initially seeking to make party membership a crime. The act proved virtually unenforceable. With the Senate censure and eventual demise of Senator McCarthy and the growing lack of enthusiasm of the Eisenhower administration for fueling the loyalty hysteria, security issues drifted into the background. By the late 1950s respectable bodies such as the New York City Bar Association and the League of Women Voters called for more precise standards for the federal government's loyalty-security program. With the Supreme Court also questioning aspects of that program's constitutional insensitivity, the President in early 1960 established a new industrial security program with vastly improved procedural safeguards. It included FAIR HEARINGS, the right of CONFRONTATION, and the right to examine all charges under ordinary circumstances. The same spirit came to prevail in the operation of other security programs.

The Eisenhower administration showed concern for state prerogatives and the need for balancing them against the rights of the individual. The federal government's growth in size and power since the late 1930s had been paralleled in state governments. During this period the states collected more money, spent more, employed more people, and engaged in more activities than ever before. When the expenditure and employment were assisted by FEDERAL GRANTS-IN-AID, lack of state compliance with federal standards meant potential loss of federal revenues. But states acted enthusiastically on their own in areas ranging from education and social services to a struggle with the federal government over control of natural resources. In 1947 the Supreme Court ruled that the United States had dominion over the soil under the marginal sea adjoining California. That state had maintained it was entitled, by virtue of the "equal footing" clause in the act admitting it to the Union, to the rights enjoyed by the original states and that those states owned such offshore areas. The Court concluded that such ownership had not been established at the time of the Constitution, and the interests of SOVEREIGNTY favored national dominion. But following the victorious Eisenhower campaign of 1952, in which the Republicans had courted the West and the South with promises of offshore riches, Congress passed the Submerged Lands Act of 1953, vesting in the states the ownership of lands beneath the marginal sea adjacent to the respective states. The Supreme Court subsequently denied leave to file complaints challenging the statute's constitutionality.

At another level, states and municipalities became so concerned in the 1950s with employees' loyalty that they enacted restrictive security measures. These included prohibiting the employment of Communist party members, LOYALTY OATHS as a condition of employment for teachers, service personnel, and candidates for public office, and measures authorizing state prosecution for SEDITION against the United States. State bar associations in turn moved to exclude from admission candidates who were allegedly former Communist party members or who refused to answer questions regarding former suspect affiliations. When the Supreme Court struck at such state sedition laws (PENNSYLVANIA V. NELSON, 1956) and bar restraints (SCHWARE V. NEW MEXICO BOARD OF BAR EXAMINERS, 1958; KONIGSBERG V. CALIFORNIA STATE BAR, 1957) its actions were denounced by the Conference of Chief Justices of the States as "the high-water mark . . . in denying to a state the power to keep order in its own house." Bills were introduced in Congress to deny the Court APPELLATE JURISDICTION in cases of this kind.

In this atmosphere, national leaders were hesitant to push for early implementation of the Supreme Court's DESEGREGATION mandate, and preferred to interpret the command "with ALL DELIBERATE SPEED" by emphasizing deliberation. A pattern of "massive resistance" emerged in the southern states, constituting a crazy quilt of INTERPOSITION proclamations, pupil-assignment or placement laws, freedom-of-choice laws, TUITION GRANT plans, and

state statutes prescribing discipline of teachers for violation of state policies on the school segregation question. Meanwhile, federal authorities sat on their hands until after the 1956 election. Then they took cautious steps to bring the federal government more directly into the civil rights area. Eisenhower's attorney general proposed a federal statute to authorize an investigation of rights violations, particularly VOTING RIGHTS. The CIVIL RIGHT ACT OF 1957 passed after Southerners had so amended it as to make it virtually toothless. When Eisenhower signed the act into law early in September, he could have used a much stronger bill. One week earlier Governor Orville Faubus of Arkansas, an acknowledged segregationist, had ordered state troops into Little Rock to prevent implementation of a federal court order approving the admission of a handful of black students into that city's Central High School. Confronted with military defiance of federal authority, Eisenhower had no choice but to respond. He reluctantly dispatched several companies of the United States Army to Little Rock, under a provision of the United States Code, which authorized the suppression of insurrection and unlawful combinations that hindered the execution of either state or federal law. (See POSSE COMITATUS ACT.) He also nationalized and thus neutralized the Arkansas National Guard. Black children attended school for a year under military protection and Arkansas's massive resistance was held at bay by bayonets.

After the Little Rock case was decided by the Supreme Court in COOPER V. AARON (1958), which sustained the school desegregation order, Congress also acted. The CIVIL RIGHTS ACT OF 1960 made it a federal crime for a person to obstruct or interfere with a federal court order, or to attempt to do so by threats of force. Other provisions expanded federal remedies for enforcing voting rights. The measure, for which the Republicans claimed credit in their 1960 platform, put Congress and the executive branch on record as committed to push ahead with rights enforcement.

For minority groups without the political constituency of blacks, little positive action was forthcoming. Women's rights in this period was a subliminal theme at best. Women's work in World War II had gone a long way toward shattering the stereotype of the helpless, weaker sex in need of protective legislation. Some leaders in Congress moved toward proposal of the EQUAL RIGHTS AMENDMENT as a vote of thanks to women for their magnificent wartime performance. Both parties endorsed the measure at war's end, and Harry Truman spoke publicly in its support. But Eleanor Roosevelt, with the support of organized labor, insisted that protective legislation was more valuable for working women than the establishment of an abstract principle of legal rights. Despite two attempts in the Senate to pass a bill proposing the amendment in the late 1940s, and a third in 1953 with a rider specifying that no protective legislation was to be affected, the measure was not seriously revived in this period.

The rights of American Indians suffered even more. In 1953, the Eisenhower administration set out on a policy of "termination," supporting a program designed to reduce the federal government's involvement in Indian affairs and to "free" Indians from federal supervision. Specifically, termination sought to end the existing supportive federal-tribal relationship and transfer almost all responsibilities and powers from the federal government to the states. The effects on "terminated" tribes was disastrous; many tribal members were soon on public assistance rolls. Indians detested the law embodying this policy, seeing it as an instrument for tribal extinction. They expended their energies to defeat it, and finally achieved victory in 1968. The Indian Civil Rights Act of that year encouraged Indian self-determination with continuing government assistance and services.

The judicial branch in the period from 1945 to 1961 changed from a cautious and accommodating agency, under Chief Justice FRED M. VINSON, to an active, aggressive, and controversial storm-center under Chief Justice EARL WARREN. Just as WILLIAM HOWARD TAFT had made the Supreme Court the principal instrument for the determination of constitutionality in the 1920s, Earl Warren, who assumed the chief justiceship 1953, came to play a similar role in the late 1950s. Often backlash resulted, but in Warren's case, from conservatives and not liberals. Statistically, the WARREN COURT's record was not so activist as that of the 1920s. Four acts of Congress, eighty-five state acts, and sixteen ordinances were ruled unconstitutional from 1945 through 1960, with the Justices overruling twenty-two prior decisions. But the activist image was strong because the Court entered explosive areas of sensitive public policy.

The Court's unanimous decision in BROWN V. BOARD OF EDUCATION (1954) had shocked southern states-righters into defensive and retaliatory actions. The Court's consistent pushing ahead in the civil rights area sustained and intensified this antipathy. But Warren, supported by a liberal majority, was not prepared to stop. In the loyalty-security area, the Court limited the more sweeping provisions of the Smith Act, the Internal Security Act of 1950, and state loyalty measures. The rights of individuals and their protection from the abuses of government seemed to come first to the Justices' minds. The Court struck at departures from fair procedure by congressional committees. In *Jencks v. United States* (1957) it ruled that a defendant in a criminal case should have access to prior recorded statements of witnesses against him. Congress

promptly sought to limit that ruling by the passage of the JENCKS ACT. By the late 1950s, the Justices began the process of critically examining state anti-OBSCENITY and censorship laws. In Congress there was talk of the need to curtail the Court's authority through legislation limiting its appellate jurisdiction. National action by right-wing groups quickly emerged to bolster such a movement, contributing to a broad public dialogue on the Court's proper function.

Defenders and critics of the Warren Court's liberal activism debated the proper role of the Constitution in the American polity. Champions of liberal judicial activism defended the legitimacy of judicial activity to shape constitutional law in accordance with democratic values. Supporters of judicial restraint advocated deference to popularly elected legislatures with courts confined to a narrowly circumscribed role. To conservative constitutionalists, the rule of law meant more than the imposition by a liberal Court of its own ethical imperatives, with little concern for orthodox doctrinal consistency.

There were no winners in this debate. But it proved apropos to the developments of the 1950s and to the institutional interrelationships of those years.

PAUL L. MURPHY
(1986)

Bibliography

MURPHY, PAUL L. 1969 *The Constitution in Crisis Times, 1918–1969.* New York: Harper & Row.

MURPHY, WALTER F. 1962 *Congress and the Court.* Chicago: University of Chicago Press.

PRITCHETT, C. HERMAN 1954 *Civil Liberties and the Vinson Court.* Chicago: University of Chicago Press.

## CONSTITUTIONAL HISTORY, 1961–1977

An examination of nonjudicial constitutional development from the administration of President JOHN F. KENNEDY to that of President GERALD R. FORD reveals at the outset an unusual amount of constitutional change through the process of constitutional amendment. Indeed, counting the adoption of the BILL OF RIGHTS in 1791 as only one episode of constitutional change via the AMENDMENT PROCESS, the period from 1961 to 1977 was characterized by an exceptionally high level of constitutional amending activity, with four amendments adopted during the period. In contrast, again counting the adoption of the Bill of Rights as one amendment episode, there were thirteen constitutional amendments adopted between 1789 and 1961.

Three of the constitutional amendments adopted during the 1961–1977 period were clear reflections of the expansion of egalitarianism that found expression in other fields in the policies of REAPPORTIONMENT, and the enlargement of the protection of CIVIL RIGHTS. The TWENTY-THIRD AMENDMENT, adopted on March 19, 1961, extended the right to vote in presidential elections to the residents of the DISTRICT OF COLUMBIA although restricting the District to the number of electoral votes allotted to the least populous state. The TWENTY-FOURTH AMENDMENT, ratified on January 23, 1964, outlawed the imposition of POLL TAXES in presidential and congressional elections and therefore removed a form of WEALTH DISCRIMINATION in federal elections. The addition of this amendment to the Constitution was subsequently rendered superfluous by the Supreme Court's holding in HARPER V. VIRGINIA BOARD OF ELECTIONS (1966) that poll taxes were a form of INVIDIOUS DISCRIMINATION prohibited by the Constitution. Further extension of VOTING RIGHTS occurred with the adoption of the TWENTY-SIXTH AMENDMENT on June 30, 1971, which extended the right to vote in both federal and state elections to eighteen-year-old citizens. The Twenty-Sixth Amendment was necessitated by the Supreme Court's holding in OREGON V. MITCHELL (1974) that Congress lacked the constitutional power to legislate the eighteen-year-old vote in state and local elections.

In contrast with the Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments, the Twenty-Fifth Amendment, relating to PRESIDENTIAL SUCCESSION and disability and adopted in 1967, was the result of years of debate with regard to the problems that might arise if an incumbent president were temporarily or permanently disabled. Serious consideration of such an amendment to the Constitution was prompted by the illnesses afflicting President DWIGHT D. EISENHOWER during his term of office, and additional impetus for constitutional change in this area was created by the assassination of President Kennedy in 1963.

Under the provisions of the Twenty-Fifth Amendment, the President may declare his own disability to perform the duties of the office by informing the president pro tempore of the SENATE and the speaker of the HOUSE OF REPRESENTATIVES in writing of his own disability. Alternatively, the President's disability may be declared in writing to the same congressional officers by the vice-president and a majority of the Cabinet. In either instance, the vice-president assumes the duties of the presidency as acting President. A period of presidential disability may be ended either by the President's informing the congressional officers in writing of the termination of his disability, or if there is disagreement between the President and the vice-president and a majority of the Cabinet on the issue of the President's disability, the Congress may resolve the dispute. A two-thirds majority of both houses of Congress, however, is required to declare the President disabled; otherwise, the President resumes the duties of his office.

Although the disability provisions of the Twenty-Fifth Amendment have not been applied, Section 2 of the amendment had an important impact on the succession to the presidency during the administration of President RICHARD M. NIXON. Section 2 provides that whenever a vacancy in the office of vice-president occurs, the President shall appoint a new vice-president with the approval of a majority of both houses of Congress. These provisions of the Twenty-Fifth Amendment came into play when Vice-President Spiro T. Agnew resigned his office in 1973 under the threat of prosecution for income tax evasion. Pursuant to Section 2, President Nixon appointed Congressman Gerald R. Ford of Michigan as Agnew's successor, and the Congress confirmed Ford as vice-president. Subsequently, President Nixon resigned his office on August 9, 1974, when his IMPEACHMENT for his involvement in the WATERGATE affair and other abuses of office seemed imminent, and Vice-President Ford succeeded Nixon in the office of President. Under the provisions of the Twenty-Fifth Amendment, Ford thus became the first appointed vice-president as well as the first unelected vice-president to assume the office of the presidency.

The Watergate affair that led to President Nixon's resignation involved not only charges of bugging the Democratic National Committee headquarters, and the obstruction by the executive of the subsequent investigation of that incident, but also more generalized abuses of power by the executive. In addition to the issue of the scope of EXECUTIVE PRIVILEGE, which was ultimately resolved by the Supreme Court adversely to the President's claims in UNITED STATES V. NIXON (1974), the Watergate affair raised major constitutional issues concerning the nature of the impeachment process, as the impeachment of a President was seriously considered by the Congress for the first time since the impeachment of President ANDREW JOHNSON in 1868. Because the Constitution provides that governmental officers including the President may be removed from office on impeachment for TREASON, bribery, or other high crimes and MISDEMEANORS, the consideration of the impeachment of President Nixon by the Congress involved the determination of what constituted an impeachable offense, an issue that had also been at the heart of the debate over the Johnson impeachment.

In the deliberations of the Judiciary Committee of the House of Representatives regarding ARTICLES OF IMPEACHMENT against President Nixon, the President's supporters argued that the President could be impeached only within the meaning of the Constitution for an indictable criminal offense. The President's opponents, on the other hand, contended that articles of impeachment could embrace political offenses, such as the abuse of power by the President, which were not indictable under the criminal law. The latter position ultimately prevailed among a majority of the Judiciary Committee when the committee adopted three articles of impeachment against President Nixon that contained charges that were essentially political, abuse of power offenses which were not indictable.

Article one of the articles of impeachment charged the President with obstruction of justice and with violating his oath of office requiring him to see to it that the laws were faithfully executed, but the second and third articles charged him with violating the constitutional rights of citizens, impairing the administration of justice, misusing executive agencies, and ignoring the SUBPOENAS of the Judiciary Committee through which it had sought EVIDENCE related to its impeachment inquiry. Although these charges included some indictable offenses, in adopting the articles the majority of the committee obviously construed the words "high crimes and misdemeanors" to include offenses that did not involve indictable crimes. In reaching this conclusion, the committee majority took a position that conformed with the view of the nature of the impeachment process that the House of Representatives had adopted in the Johnson impeachment proceedings in 1868.

Whether this broad view of the nature of impeachable offenses would have been sustained by a majority of the House of Representatives or the required two-thirds majority in the Senate remained an unanswered question because of President Nixon's resignation in August 1974. The Supreme Court rejected the President's claim of executive privilege and ordered the disclosure of the White House tape recordings relevant to the trial of those indicted in the Watergate affair. On the tapes thus released there appeared conversations clearly indicating President Nixon's participation in a conspiracy to obstruct justice, an indictable offense. In light of almost certain impeachment by the House of Representatives and likely conviction in the Senate, President Nixon resigned. With the impeachment process thus aborted, the answer to what properly could be considered an impeachable offense was left unresolved, as it had been in the proceedings against President Johnson over a hundred years earlier.

The Watergate affair and the abuses of presidential power associated with it, along with the involvement of the United States in the Vietnam War, had a profound impact upon the principal nonjudicial constitutional issue during the 1961–1977 period—the issue of the proper relation between the powers of the executive branch of the government and the powers of the Congress. Beginning at least as early as the administrations of FRANKLIN D. ROOSEVELT in the 1930s and 1940s, the presidency had increasingly become the dominant political institution at the national level, and Roosevelt's successors refined and added to the assertions of PRESIDENTIAL POWER that had characterized his administrations. By the late 1960s and

early 1970s, therefore, the "Imperial Presidency" had become the focus of considerable attention and constitutional controversy, and a reassertion of congressional power against the aggrandizement of presidential power had clearly begun.

This reassertion of congressional power was to a great extent a reaction to the expansion of the powers of the presidency to new extremes during the administration of President Nixon. Although previous presidents had asserted the power to impound and to refuse to expend funds appropriated by Congress in limited areas, President Nixon asserted a much broadened IMPOUNDMENT power as a presidential prerogative. Instead of the relatively isolated instances of presidential refusals to spend congressionally appropriated monies that had occurred previously, during the 1970s the Nixon administration impounded billions of dollars in congressional appropriations and effectively asserted a presidential power to enforce only those congressionally authorized programs that received the president's approval.

The involvement of the United States in the war in VIETNAM and Southeast Asia contributed to further controversy regarding the scope of presidential power to commit the armed forces to foreign military conflicts in the absence of a DECLARATION OF WAR by the Congress. The involvement of the United States in Vietnam had begun under President Kennedy with the dispatch of military advisers to the South Vietnamese armed forces, but under Presidents LYNDON B. JOHNSON and Nixon the American military presence in Southeast Asia grew to hundreds of thousands of troops. The failure of the American military efforts in Southeast Asia and the high cost of those efforts in lives and resources bolstered the arguments of critics that the power of the President to commit the United States to foreign military conflicts must be reined in.

Because of the impoundment policy of the Nixon administration and the presidential war in Southeast Asia, a reassertion of congressional power occurred in the field of domestic as well as FOREIGN AFFAIRS. The congressional response to the impoundment controversy was the enactment of the CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974. This legislation provided that if the President resolved to eliminate the expenditure of funds appropriated by Congress, he was required to inform both houses of Congress of: the amounts involved; the agencies and programs affected; and the fiscal, budgetary, and economic effects of, and the reasons for, the proposed impoundment of funds. Both houses of Congress, the act provided, must approve the impoundment within forty-five days. If the President proposed instead to defer the spending of congressionally authorized appropriations, the act provided that he must similarly inform Congress of his intention to defer expenditures, and within forty-five days either house of Congress could require the expenditure of the funds by passing a resolution disapproving the President's proposed action. If the President refused to abide by congressional disapproval of impoundments, the act further authorized the Comptroller General to initiate legal action in the federal courts to force compliance with the will of the Congress.

In addition to addressing the problem of presidential impoundments, the Congressional Budget and Impoundment Control Act was directed at strengthening the powers of Congress over the budgetary process. To replace the practice of enacting appropriations without regard to the total amount that should be appropriated in a given fiscal year, the act provided that the Congress should agree upon a BUDGET resolution at the outset of the appropriations process, setting the total amount of money to be appropriated during the fiscal year. The amount so specified would then govern the actions of Congress in considering individual appropriations bills.

Finally, the act created a new agency, the Congressional Budget Office, and authorized that agency to advise Congress regarding revenue estimates, the likely amount of deficits or revenue surpluses and other economic data important to the budgetary process. Congress thus created a congressional agency, beyond the control of the executive, which would be an independent source of economic and budgetary information in competition with the executive branch's Treasury Department and Office of Management and Budget.

This reassertion of congressional power over domestic policy was matched in the field of foreign policy by the WAR POWERS RESOLUTION of November 7, 1973, passed over the veto of President Nixon. In the War Powers Resolution, Congress sought to deal with the problem of presidential wars such as the military involvement of the United States in Southeast Asia. Congress therefore not only imposed restrictions upon the power of the President to commit the country's armed forces in foreign conflicts but also sought to define the war-making powers of both the President and the Congress.

With regard to the war-making power of the President, the War Powers Resolution declared that the President could introduce United States armed forces into hostilities, or into a situation in which imminent involvement in hostilities was clearly indicated by the circumstances, only pursuant to a declaration of war, or under specific statutory authorization, or in response to a national emergency created by an attack upon the United States, its territories or possessions, or its armed forces. The language of the resolution thus clearly repudiated the argument, frequently asserted in the past, that the President was constitutionally authorized to take whatever action deemed necessary to protect the national interest. The impact of

the resolution as an authoritative congressional interpretation of the President's constitutional war-making power was diluted, however, by the decision of Congress to include the interpretation of the President's war-making power in the "Purpose and Policy" section of the act, with the result that it did not purport to have legally binding effect.

The parts of the War Powers Resolution that did purport to be legally binding required the President to consult with Congress in every possible instance before committing the armed forces in hostilities or hostile situations. If the armed forces are introduced by the President into hostilities or hostile situations in the absence of a declared war, the resolution provided, the President must report the situation in writing to the presiding officers of the Congress within forty-eight hours and continue to report every six months thereafter. The resolution further required that in the absence of a declared war, the introduction of the armed forces must be terminated within sixty days, or ninety days if the military situation makes their safe withdrawal impossible within sixty days. Finally, in the absence of a declared war or congressional authorization, the President must withdraw the armed forces from hostilities occurring outside the territory of the United States if Congress directs him to do so by CONCURRENT RESOLUTION, which is not subject to the President's veto power.

Although the War Powers Resolution was plainly an attempt by Congress to reassert its authority over presidential war-making and over the conduct of foreign affairs generally, its impact upon presidential power did not appear to have been so great as its supporters hoped or it critics feared at the time of its passage. During the administration of President Ford, American armed forces were introduced into hostile situations during the evacuation of Vietnam as well as during the recapture of the American merchantman *Mayaguez* and its crew from Cambodia. President Ford nevertheless did not feel bound in these actions by the terms of the War Powers Resolution but rather made plain his conviction that he was acting under his constitutional powers as COMMANDER-IN-CHIEF and as chief executive. The War Powers Resolution was thus subjected to early challenge as an authoritative construction of the President's war-making power. Given the ability of Presidents to marshal public support for their actions in foreign affairs, particularly in times of crisis, it was clear that the act could not be considered the last word regarding the relative power of Congress and the President in the field of foreign policy and war-making.

Just as the War Powers Resolution and the Congressional Budget and Impoundment Control Act symbolized the reassertion of congressional power in relation to the executive, both also embodied the device which Congress increasingly used in reasserting power over executive policymaking—the LEGISLATIVE VETO. The legislative veto first emerged as a congressional device for controlling the executive during the 1930s when Congress reserved the right to veto presidential proposals to reorganize the executive branch, but by the 1970s the legislative veto in various forms had proliferated and had been embodied in almost two hundred statutes enacted by Congress. The increased use of the legislative veto reflected Congress's dissatisfaction with its relationship with the executive and a desire to reassert policymaking power that had been eroded during the previous decades of heightened executive power.

Congress employed the legislative veto to disapprove proposed presidential actions, to disapprove rules and regulations proposed by the executive branch or administrative agencies, and to order the termination of presidential actions. The device took several forms, with some statutes requiring a resolution of approval or disapproval by only one house of Congress, others requiring both houses to act through a concurrent resolution, and still others conferring upon congressional committees the power to exercise the legislative veto.

Despite its increased use by Congress, the legislative veto was frequently opposed by the executive branch since its introduction in the 1930s on the grounds that the practice violates the Constitution. The executive and other critics of the legislative veto argued that the practice violated the principle of SEPARATION OF POWERS, ignored the principle of bicameralism in the exercise of legislative power, and allowed Congress to avoid the President's veto power which is normally applicable to legislation passed by Congress.

The constitutional principle of separation of powers, critics of the legislative veto noted, permits Congress to shape national policy by passing statutes, but, properly construed, does not permit Congress to interfere in the enforcement or administration of policy—a power properly belonging to the executive branch. The legislative veto, it was argued, thus violated a fundamental constitutional principle, especially insofar as it was used to allow Congress to veto rules and regulations proposed by executive or administrative agencies under DELEGATIONS OF POWER from the Congress.

Opponents also argued that the Constitution contemplates that Congress's policy-making role ordinarily requires the passage of statutes by both houses of Congress with the presentation of the statutes to the President for his approval or disapproval. By allowing the approval or disapproval of national policy through single house resolutions, JOINT RESOLUTIONS, or decisions of congressional committees, it was argued, the legislative veto ignored the

bicameral legislative process contemplated by the Constitution and in addition permitted congressional policymaking through mechanisms not subject to the President's veto power, as the Constitution also contemplated.

Congress, on the other hand, clearly viewed the legislative veto as a useful weapon in exercising oversight over the executive and the bureaucracy, both of which were recipients of massive delegations of legislative power since the 1930s. Striking at another source of the imperial presidency, Congress thus embodied the legislative veto in the National Emergencies Act of 1976, which terminated national emergencies declared by the President in 1933, 1950, 1970, and 1971, and required the President to inform the Congress of the existence of national emergencies and the powers the executive intends to use in managing the emergency. Such emergencies, the act provided, could be terminated at any time by Congress via a concurrent resolution. (See EMERGENCY POWERS.)

Despite the long-standing controversy regarding the constitutional legitimacy of the legislative veto, the Supreme Court did not pass upon the validity of the device until 1983. In IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983), however, the Court declared the legislative veto invalid on the ground that it violated the constitutional principles requiring legislative enactments to be passed by both houses of Congress and to be subject to the veto powers of the President.

Just as the period from the administration of President Kennedy to that of President Ford witnessed significant readjustments of presidential-congressional relations, dramatic changes also occurred during the period in the nature of the political party system and the electoral process. Perhaps the most significant development was the decline in the power and influence of the major political parties. The decline in the percentage of the public who identified with the Republican and Democratic parties that began in the 1950s continued during the 1960s and 1970s. In 1952 twenty-two percent of the voters indicated a strong identification with the Democratic party, while thirteen percent indicated such an identification with the Republican party. By 1976, these percentages had declined to fifteen and nine percent, respectively, while the number of voters identifying themselves as independents had risen significantly.

This decline in voter identification with the two major political parties was accompanied by a decline in the importance of the national conventions of the two parties in the selection of presidential candidates. In 1960, only sixteen states selected their delegations to the national party conventions through presidential primaries, but by 1976 thirty states used the primary system for the selection of national party convention delegates, with the result that almost three-quarters of the Democratic national convention delegates and well over sixty percent of the Republican delegates were selected through the presidential primary process. Nominations of presidential candidates were consequently no longer the products of negotiations among party leaders at the national conventions; rather the national conventions merely ratified the selection of a presidential candidate as determined in the presidential primaries. And this decline in the significance of the national conventions was furthered, in the Democratic party, by the adoption of rules during the 1970s diminishing the power of party leaders and requiring proportional representation of women, minority groups, and other constituent groups within the party.

The decline of power of the political parties was furthered by the adoption of federal CAMPAIGN FINANCING laws in 1971, 1974, and 1976 which limited the amounts that could be contributed to election campaigns by individuals and groups and provided for federal financing of presidential elections. The result was a further diminution of the importance of traditional party organizations to presidential candidates, who increasingly relied upon personal campaign organizations both to win nomination and to conduct their national election campaigns. In a governmental system based upon the separation of powers, the decline of the party system, which traditionally had served to bridge the gap between the executive and legislative branches, could only have profound effects upon the capacity of Presidents to lead as well as upon the formation of national policy.

The period between 1961 and 1977 witnessed an acceleration of a long-term trend toward the centralization of power in the national government, although by the end of the period a significant reaction to this trend had become apparent. Two primary factors contributed to this centralizing trend: increased subsidization by the national government of programs at the state and local levels, and the assumption of responsibility by the national government over vast areas that had traditionally been left to state and local governments.

When John F. Kennedy was elected in 1960, for example, FEDERAL GRANTS-IN-AID to state and local governments stood at just over seven billion dollars and accounted for approximately fifteen percent of the total expenditures of state and local governments. By 1976, these federal grants-in-aid had mushroomed to almost sixty billion dollars and constituted almost twenty-five percent of total state and local expenditures.

Not only did state and local governments become increasingly dependent financially upon federal largess during this period but the character of federal grant-in-aid programs was also significantly altered. Before the 1960s, federal aid was primarily directed at subsidizing programs identified by state and local governments, but during the

1960s the identification of program needs increasingly shifted to the national government, with federal funds allocated according to national priorities. In addition, many federal grants, especially during President Johnson's War on Poverty program, were distributed at the local community level, by-passing state governors and officials who had traditionally had a voice in the administration of federal grants. As a result of the ensuing outcry from state and local officials, during the late 1960s and 1970s the federal government resorted to the device of block grants to state and local governments, grants involving fewer nationally imposed restrictions on their use and thus allowing the exercise of greater discretionary power by state and local officials. In 1972, Congress also adopted the State and Local Fiscal Assistance Act, which embraced the principle of federal revenue sharing with state and local governments. Despite the greater flexibility allowed state and local decision makers under REVENUE SHARING and block grants, the financial dependence of state and local governments on the national government in 1976 was eight times what it had been in 1960.

During the same period, the federal government's power was significantly expanded through congressional passage of a host of new statutes that expanded the regulatory role of the federal government in numerous new fields. Civil rights, the environment, occupational safety, consumer protection, and many other fields for the first time were subjected to extensive federal regulation. Since almost all of the new regulatory statutes involved extensive delegation of legislative power by Congress to the bureaucracy, the new expansion of federal regulatory authority involved a massive increase in administrative rules and regulations, as the bureaucracy exercised the legislative powers that had been delegated to it.

This increased intrusion of the federal government into the lives and affairs of the public ultimately produced a backlash of hostility toward the federal bureaucracy. John F. Kennedy had campaigned for the presidency in 1960 with the promise to get the country moving again, a promise suggesting an activist role for the national government. Because of the backlash against the expansion of the regulatory role of the federal government, however, presidential candidates in 1976 found that attacks on the federal bureaucracy and the national government as a whole hit a responsive chord with the public and proved to be popular campaign rhetoric.

This unpopularity of the bureaucracy, however, was only one symptom of the American public's shaken confidence in its major political institutions that had become manifest by the mid-1970s. Between 1961 and 1976, one President had been assassinated, one had resigned in disgrace, the long and costly war in Vietnam had concluded in disaster, and the Watergate affair had revealed the betrayal of the public trust at the highest levels of the government as well as abuses of power with sinister implications for the liberties of the American people. Such traumatic events not only undermined public confidence in political institutions but also profoundly affected the course of constitutional development. The office of the presidency, which since the 1930s had evolved into the dominant political institution at the national level, was consequently diminished considerably by 1976 in both power and prestige. Although a resurgence of congressional power had occurred in the 1970s, there was little evidence that Congress was institutionally capable of assuming the role of national leadership previously performed by the presidency, and effective national leadership had been made even more difficult by the decline of the political party system.

The most basic problem confronting the American polity by 1976 was nevertheless the problem of the loss of public confidence in governmental institutions. And the restoration of that confidence was the most profoundly difficult and fundamentally important task American public leadership faced as this period of constitutional development came to a close.

RICHARD C. CORTNER
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Bibliography

ALEXANDER, HERBERT 1976 *Financing Politics: Money, Elections and Political Reform.* Washington, D.C.: Congressional Quarterly.

DRY, MURRAY 1981 The Congressional Veto and the Constitutional Separation of Powers. In Bessette, Joseph M. and Tulis, Jeffry, *The Presidency in the Constitutional Order.* Baton Rouge: Louisiana State University Press.

JACOB, HERBERT and VINES, KENNETH N., eds. 1976 *Politics in the American States: A Comparative Analysis,* 3rd ed. Boston: Little, Brown.

KEECH, WILLIAM R. and MATTHEWS, DONALD R. 1977 *The Party's Choice.* Washington, D.C.: Brookings Institution.

KURLAND, PHILIP B. 1977 *Watergate and the Constitution.* Chicago: University of Chicago Press.

SCHLESINGER, ARTHUR M., JR. 1973 *The Imperial Presidency.* Boston: Houghton Mifflin.

SCIGLIANO, ROBERT 1981 The War Powers Resolution and the War Powers. In Bessette, Joseph M. and Tulis, Jeffry, *The Presidency in the Constitutional Order.* Baton Rouge: Louisiana State University Press.

SUNDQUIST, LEONARD D. 1981 *The Decline and Resurgence of Congress.* Washington, D.C.: Brookings Institution.

## CONSTITUTIONAL HISTORY, 1977–1985

As America moved from commemorating the bicentennial of the DECLARATION OF INDEPENDENCE to commemorating

the bicentennial of the Constitution, the political order was in apparent disarray. Constitutional history is, primarily, an account of changes in the distribution of power and authority within a regime. At least since 1933, political power in the American regime had shifted toward the federal government, and, within the federal government, toward the executive branch. Commentators referred to an "imperial presidency"; and yet no one since DWIGHT D. EISENHOWER had held the presidential office for two full terms. JOHN F. KENNEDY had been assassinated; LYNDON B. JOHNSON had abandoned the quest for reelection; RICHARD M. NIXON had been forced to resign; GERALD R. FORD, the appointed vice-president who succeeded Nixon, lost his bid for election in his own right. JIMMY CARTER, who defeated Ford, was to prove unable to carry the burden of the presidency, and so to be crushed in his bid for reelection by the landslide that elected RONALD REAGAN.

The national consensus about what the government should be and should do, at bottom a consensus about the meaning of the Constitution, was breaking down. No longer did national majorities automatically form behind the notions of positive government, of redistribution of wealth and incomes, or of solving anything identified as a "national problem" by creating a new administrative agency within the federal BUREAUCRACY. There were indications that a new consensus was forming, but it was not yet fully formed. Less clearly than in the past—say, in 1800, 1832, 1860, or 1932—was the new consensus readily identified with the program of a particular POLITICAL PARTY, although the revitalization of the Republican party gave it the better claim to such identification.

Constitutional history can be understood either broadly or narrowly. In the broad sense, the constitution is the arrangement of offices and the distribution of powers in a country, it is how the country governs itself. In a narrow sense, the Constitution is a document in which the framework for self-government is spelled out. The process of constitutional change in the United States most often involves redistribution of power without constitutional amendment.

Formal amendment of the Constitution is a rare event. Only thirty-two amendments have ever been proposed by Congress, and two of those were pending as 1977 began; by 1985 both had died for want of RATIFICATION. The EQUAL RIGHTS AMENDMENT (ERA), ostensibly a guarantee that women and men would be treated equally under the law, but potentially a blank check for expansion of federal and judicial power, had been proposed in 1972. The DISTRICT OF COLUMBIA REPRESENTATION AMENDMENT, which would have made the national capital the equivalent of a STATE for most purposes, had been proposed in 1978. Even as those proposals failed to obtain the necessary votes in state legislatures, there was popular demand for more amendments: to mandate a balanced federal BUDGET; to proscribe SCHOOL BUSING as a remedy for de facto school segregation; to permit prayer in public schools; and to overturn the Supreme Court's proclamation of a constitutional right to abortion.

Amendments to accomplish each of these objectives were introduced in Congress, and the ERA was reintroduced, but none was proposed to the states. Indeed, only one amendment received a two-thirds vote in either house of Congress: the balanced budget amendment passed the Senate, but died when the House of Representatives failed to act on it. In the case of the balanced budget amendment, there were petitions from thirty-three states (one less than constitutionally required) calling for a convention to frame the proposal. Although there was much speculation among politicians, academicians, and pundits about how such a convention might work and whether it could be restricted in its scope, the failure of a thirty-fourth state to act made the speculation at least temporarily moot.

For three decades, constitutional innovation had been centered on the judicial branch. Between 1977 and 1985, however, constitutional development centered on the contest between Congress and the executive branch for predominance. The most important constitutional decision of the Supreme Court during the period, IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983), passed on a phase of that contest.

The only uniquely American constitutional doctrine is that of the SEPARATION OF POWERS attended by CHECKS AND BALANCES. The embodiment of that doctrine in the Constitution set up a constant rivalry for preeminence between the political branches and an intense jealousy of powers and prerogatives. Beginning in the FRANKLIN D. ROOSEVELT era, the President—or the institutionalized presidency—seemed to acquire ever more power within the political system, and appeared to have acquired a permanent position of dominance. But the VIETNAM WAR and the WATERGATE crisis led to a resurgence of Congress, represented especially in the War Powers Resolution of 1973 and the CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT of 1974.

The seizure of the American embassy in Iran by Islamic revolutionary guards in 1979 set the stage for reassessment of the constitutional status of the WAR POWERS. President Carter in April 1980 ordered the armed forces to attempt a rescue of the American citizens held hostage in Tehran. The secrecy necessarily surrounding such an attempt precluded the "consultations" mandated by the War Powers Resolution. When, through the coincidence of bad planning and bad weather, the operation proved a costly failure, congressional critics were quick to denounce Carter for his defiance of the law—some going so far as

to call for his IMPEACHMENT. The hostages subsequently were released as the result of an EXECUTIVE AGREEMENT by which Carter canceled the claims of some Americans against the revolutionary government of Iran and caused other claims to be submitted to an international tribunal rather than to American courts. This settlement of the hostage crisis appeared to some observers to exceed the scope of presidential power, but it was upheld by the Supreme Court in DAMES & MOORE V. REGAN (1981).

The War Powers Resolution continued to bedevil presidential conduct of FOREIGN AFFAIRS during the Reagan administration; but the real character of that controversial resolution was revealed by the contrast between two incidents involving American military forces. In 1981 President Reagan, at the request of all of the governments of the region, and in conjunction with two foreign allies, detailed a battalion of marines to Beirut, Lebanon, as part of an international peacekeeping force. The operation was not of the sort explicitly covered by the War Powers Resolution, and Reagan, although he communicated with members of Congress, did not take steps to comply with the consultation or reporting requirements of the resolution. Congress, however, unilaterally acted to approve the President's course of action rather than precipitate a confrontation over either the applicability of the resolution or its constitutionality. Several months after a suicide bomber killed more than 200 marines, the President withdrew the rest of the marines from Lebanon, conceding a major foreign policy failure; but Congress, because it had acted affirmatively to approve the operation, was in no position to condemn the President for that failure.

Subsequently, in 1984, the President authorized a military operation to rescue American citizens trapped in the small Carribean nation of Grenada and to liberate that country from a Cuban-sponsored communist dictatorship. Such an operation was precisely within the terms of the War Powers Resolution, but it was planned and executed in secrecy and, again, the President complied with neither the consultation nor the reporting requirements of the resolution. However, because the operation was perceived as a success, most members of Congress refrained from complaining about the breach of the War Powers Resolution.

As the War Powers Resolution represented the resurgence of Congress in the foreign policy arena, the Congressional Budget Act was designed to reassert congressional control over government spending priorities. The federal budgetary process had been introduced in the 1920s to replace the chaotic amalgam of uncoordinated appropriations by which Congress had theretofore allocated federal revenues. But the executive budget, while coordinating expenditures and subjecting them to a common annual plan, remained detached from the appropriations process; hence disputes arose between the branches, especially when the aggregate of appropriations exceeded the executive's estimate of revenues. The deferral and cancellation of appropriated expenditures—called IMPOUNDMENT—became especially controversial when President Nixon was accused of using them for political, rather than economic, reasons.

The 1974 act purported to solve the problem by making budget planning a congressional function and by linking budgeting and appropriations in a single process. But, because the internal structure of Congress is not conducive to unified decision making and because the executive branch has not conceded that the detailed planning of expenditures is properly a legislative activity, the revised budget process has not been successful. The national government commonly operates for most of the year on the basis of resolutions authorizing continued spending at some percentage increase over the previous year's spending plus numerous special appropriations.

Between 1977 and 1985, as, to a lesser degree, between WORLD WAR II and 1977, one of the great tests of constitutional government in America was the fiscal crisis resulting from persistent excesses of governmental expenditures over governmental revenues. Under constant political pressure to maintain or increase expenditure levels, but facing the unpopularity of increases in taxation (combined with the economic difficulty that increased tax rates may, by diminishing the tax base, actually result in lower revenues), Congress has resorted to borrowing to finance chronic deficits. At the end of 1985, Congress enacted, and President Reagan signed, a law providing for automatic reductions of appropriations when projected deficits reached specified levels. However, the ink was hardly dry before that measure (the GRAMM-RUDMAN-HOLLINGS ACT) was challenged as unconstitutional, even by some members of Congress and some representatives of the administration.

State legislatures, commonly required by their state constitutions to balance their own annual budgets, have petitioned Congress for a convention to propose a balanced budget amendment to the federal constitution. How even a constitutional mandate could be enforced to make Congress do what it seems unable to do, that is, to make difficult choices about public affairs, remains unclear. Meanwhile, the Congressional Budget Act exists to frustrate any attempt of the executive branch to supply the decision making.

Yet another device by which Congress attempted to reassert itself in the contest for dominance under a constitution that separates powers was the LEGISLATIVE VETO. Long before 1977, the DELEGATION OF POWER to the executive branch and to various INDEPENDENT REGULATORY AGENCIES was so great that the published volumes of fed-

eral regulations exceeded in number by many times the volumes of federal statutes. In statutes delegating legislative power to administrative bodies, Congress began to include provisions allowing Congress, or one house of Congress, to deprive agency actions of effect by simple resolution. In June 1983 the Supreme Court, in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA, held that the legislative veto, in some or all of its forms, was unconstitutional. The effect of the *Chadha* decision on legislative veto provisions that differed significantly from that in the Immigration and Nationality Act remained unclear for some time after the decision, and Congress continued to enact new legislative veto provisions after the decision. The real winner in that struggle for power, however, was not the President, but the bureaucracy.

Congress also asserted itself in more traditional ways, especially by exploiting the constitutional requirement that certain presidential actions have the Senate's ADVICE AND CONSENT. One category of such action is treaty making. President Carter suffered embarrassment over the PANAMA CANAL TREATIES and defeat on the second Strategic Arms Limitation Treaty. The Panama Canal debate was the first extended debate on a major treaty since that on the Treaty of Versailles in 1919. The treaty was signed in September 1977 but the Senate did not consent to its ratification until the spring of 1978. The vote was 68–32 (only one affirmative vote more than required) and the Senate attached a "reservation" to the treaty, asserting that the United States could intervene militarily if the canal should ever be closed; the reservation nearly caused Panama to rescind its ratification of the treaty. President Carter signed the strategic arms treaty in July 1979 at a summit meeting with President Leonid Brezhnev of the Soviet Union. Although trumpeted as a major foreign policy achievement, the treaty was delayed in Senate hearings and finally shelved in 1980 after the Soviet Union invaded Afghanistan.

President Carter vigorously asserted the presidential treaty power when, after recognizing the People's Republic of China in Beijing as the lawful government of all of China he unilaterally abrogated the long-standing mutual defense treaty between the United States and the Republic of China on Taiwan. An affronted Congress immediately provided for a United States Institute to represent American interests in the Republic of China while delaying for over a year Carter's request that trade preferences be granted to the mainland regime. Congress was unable to salvage the mutual defense treaty, however; and the Supreme Court held in GOLDWATER V. CARTER (1979) that members of Congress lacked STANDING to challenge the President's action in court.

The other category of action requiring Senate approval is appointments. The Senate, although nominally controlled by the President's own party, frequently used confirmation hearings and votes to express disapproval of certain Reagan administration policies, especially the administration's reluctance to impose and enforce AFFIRMATIVE ACTION requirements. The Senate delayed for over a year appointment of Edwin Meese to be ATTORNEY GENERAL, and rejected outright the promotion of William Bradford Reynolds to be associate attorney general. Although Reagan's nomination of SANDRA DAY O'CONNOR to the Supreme Court (the only nomination to the Court between 1977 and 1985) was approved rapidly and without serious controversy, several other judicial appointments were delayed or rejected.

Another signal characteristic of American constitutionalism is FEDERALISM. From the mid-1930s on, the balance of power between the national government and the states has been shifting steadily in favor of the national government. President Reagan came to office pledging a reversal of that trend. However, his proposal for a "new federalism," in which governmental functions assumed by the national government would be relinquished to the states, was coolly received not only by Congress but also by state politicians, who feared that their responsibilities would increase even as their revenues continued to decrease. Somewhat more successful was Reagan's proposal to replace the myriad of categorical FEDERAL GRANTS IN-AID, by which the national government partially funded certain mandated programs and set the standards by which the programs were to be run, with block grants.

Congress, however, has increasingly imposed conditions and restrictions on the use of block grant funds; so even the limited victory may prove hollow. Although conservatives like President Reagan frequently express a principled aversion to the use of conditional grants of money as a means to coerce the states into acceding to federal goals and programs, they have not been so averse in practice. Examples of new uses of the TAXING AND SPENDING POWER to accomplish legislative goals not strictly within Congress's ENUMERATED POWERS include: a requirement that hospitals receiving federal funds perform certain lifesaving measures on behalf of handicapped newborn children; a requirement that states, as a condition of receiving highway building funds, enact certain provisions to counter drunken driving; and a requirement that schools, as a condition of receiving federal aid, permit religious groups to meet in their facilities on the same basis as do other extracurricular organizations.

Whether the election of 1980 wrought an enduring change in the constitution of American government remains an open question. Although President Reagan decisively defeated former Vice-President Walter F. Mondale in 1984, the House of Representatives remained under the control of Carter's and Mondale's party. And the

Senate, even with a Republican majority, did not prove to be so committed as the President to reduction of the role of the federal government in American society. Nevertheless, Reagan had considerable success in achieving the deregulation of some kinds of businesses and in returning to private enterprise some activities that had come under the ownership and management of the federal government. On the other hand, the heralded "new federalism" did not cause a resurgence in the relative importance of the state governments, and federal control continued to be maintained through the use of conditions attached to grants-in-aid. At the bicentennial of the Constitution, it is still too early to say whether Reagan effected, as he said he would, "another American revolution."

DENNIS J. MAHONEY
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Bibliography

CARTER, JIMMY 1984 *Keeping the Faith.* New York: Bantam.

FISHER, LOUIS 1984 *Congressional Conflicts between Congress and the President.* Princeton, N.J.: Princeton University Press.

GINSBERG, BENJAMIN 1987 *Reconstituting American Politics.* New York: Oxford University Press.

HOWITT, ARNOLD M. 1984 *Managing Federalism.* Washington: Congressional Quarterly.

SCHRAMM, PETER W. and MAHONEY, DENNIS J., eds. 1986 *The 1984 Election and the Future of American Politics.* Durham, N.C.: Carolina Academic Press.

## CONSTITUTIONAL HISTORY, 1980–1989

The major constitutional development of the 1980s was the confirmation of divided government as a legitimate alternative to presidential party government as a model for constitutional administration. In the elections of 1980 and 1984 the people chose a Republican President while returning a Democratic majority to the HOUSE OF REPRESENTATIVES. In 1986 the Democratic party regained control of the Senate, which it retained in 1988 as the REPUBLICAN PARTY again won the presidency. This type of split-ticket voting was a relatively new phenomenon in modern American politics. From 1889 to 1953, no President on his inauguration faced a Congress one house of which was controlled by the opposition party. The contemporary period of divided government began in 1969 when the Republican RICHARD M. NIXON was elected President and the Democrats controlled Congress. After the resignation of Nixon in 1974, the Democrats briefly revived presidential party government with the election of JIMMY CARTER in 1976. Their inability to govern effectively despite having power over both political branches prepared the way for the Republican capture of the White House in 1980.

Throughout the 1980s, assessments of divided government tended to be uncertain because such government contradicted what had come to be accepted since the NEW DEAL as the constitutional norm, namely, presidential government under a dominant party after a critical or realigning election. In fact, there were indications in Nixon's two election victories of a disintegration of the New Deal liberal coalition and an expectation of a political realignment that would enable the presidential party system to continue. The problem with this analysis was that while twentieth-century presidential government was historically liberal, many students of politics believed it was also inherently or in its nature liberal. Many observers were therefore reluctant to conclude that divided government could represent the deliberate choice of the electorate or that it could be a satisfactory approach to running the Constitution, despite the fact that it brought the constitutional principle of the SEPARATION OF POWERS more directly to bear on the conduct of government.

Part of the difficulty observers had in recognizing the legitimacy of divided government was attributable to the political popularity of RONALD REAGAN. Despite having twice been elected governor of California, Reagan was an improbable candidate for President. This improbability owed less to his being a former Hollywood actor than to his advocacy of NATURAL RIGHTS individualism, LIMITED GOVERNMENT, and middle class social values that had come to be identified in the dominant political culture as the essence of right-wing reactionism. Labeled an "ideological" candidate by the national media, he ran on a platform that proposed to reverse the tide of centralized BUREAUCRACY, restore equal opportunity for individuals, stimulate economic growth through deregulation and market incentives, and rebuild national defense. Reagan's assertion of these policies made the election of 1980 the most significant since 1932. In effect, it was a REFERENDUM on the regulatory WELFARE STATE, broadly conceived in the light of the liberal reforms of the 1960s and 1970s. When President Reagan won reelection in 1984, and Vice-President GEORGE BUSH won election as President in 1988, in a significant sense the era of welfare state liberalism was over, a fact difficult to deny. Divided government was the constitutional expression of this political change.

In one sense, the source or cause of divided government was the Constitution. The FUNDAMENTAL LAW organizes government into three coordinate branches and, in the words of THE FEDERALIST #51, guards against a concentration of the several powers in the same department by "giving to those who administer each department the necessary constitutional means and personal motives to resist the encroachments of the others." Moreover, the Consti-

tution permits voters to make a free political choice, including that of ticket splitting (which some critics of divided government have proposed to restrict by a constitutional amendment). Furthermore, the Constitution does not establish POLITICAL PARTIES in the structure of government, but allows them to exist as voluntary associations regulated by state and federal law. A contributing factor to divided government was the decline of partisan loyalty in the electorate, caused in part by antiparty reform measures, such as CAMPAIGN FINANCE laws. With the decline of party, political choice was based in part on the political values, principles, and governmental duties and functions associated with the executive and legislative branches or their leading officials. The separation of powers, one of the basic concepts of limited government, was thus the organizing principle of divided government.

A second apparent cause of divided government was uncertainty or ambivalence in the electorate about the basic direction of public policy. In electing Republican chief executives, the people approved of policies aimed at economic expansion, control of inflation, tax reform, limitations on government spending, and strengthened national defense. In voting Democratic control of Congress, the people expressed a desire to maintain the social welfare and regulatory programs that constituted the achievement of modern liberalism. These included ENTITLEMENT programs and legally conferred benefits for individuals and groups in every social class. Although politically contradictory, these policy alternatives might be seen as reflecting complementary dimensions of the public philosophy underlying American CONSTITUTIONALISM: individualism, based on natural rights principles that limit government power, and the public interest, based on community consensus that requires government regulation.

Nevertheless, in a relative historical sense, by contrast with the period of presidential party government which it succeeded, the public philosophy of divided government represented a partial attempt to restore an older conception of limited government. This was the idea that federal power was limited to specific ends or objects in accordance with the federal principle of divided SOVEREIGNTY. Reagan administration proposals for a new FEDERALISM that would return certain policy matters to the states expressed this outlook. Underlying these proposals was the more basic idea of restoring a sense of discipline and limitation in the conduct of government, seen in attempts to limit government spending, reduce the federal deficit, and revive the concept of a balanced BUDGET.

The political expression of this conservative idea was a state-based movement for a CONSTITUTIONAL CONVENTION to limit federal spending and achieve a balanced budget. By the mid-1980s this movement had begun to produce political effects in Washington. The Republican-controlled Senate and executive branch supported a BALANCED-BUDGET CONSTITUTIONAL AMENDMENT. The Democratic party switched from supporting deficit spending to arguing for deficit reduction as a reaction against Reagan administration defense spending in a year (1985) when the deficit reached $200 billion. With the executive and legislature each blaming the other for the deficits, the situation was ripe for a bipartisan solution. The result was the Balanced Budget and Emergency Deficit Control Act of 1985.

Known as the GRAMM-RUDMAN-HOLLINGS ACT, the law required the federal budget deficit to be reduced by stages until it was eliminated in 1991. It contained a triggering mechanism by which automatic across-the-board spending cuts were mandated if deficits exceeded specified levels at certain target dates. Finding it difficult to meet the reduction requirements, Congress put some spending items "off budget" so that they would not be counted in the reckoning of the deficit problem. In 1987 it revised the law to postpone the balanced budget date to 1993. Although the Washington political establishment generally disliked the law, it had the effect of reducing the deficit and slowing the rate of increase in government spending. Despite sharp differences over spending priorities, limitation of spending had become a bipartisan objective or requirement, replacing the presumption of indefinite government expansion based on taxing and spending that marked the 1960s and 1970s. In this sense, divided government signaled the kind of change in the policy agenda associated with a political realignment.

Although compromise could be said to be the logic of government under the separation of powers, as seen in the disposition of such major issues as the budget deficit, tax reform, and control of immigration, ideological conflict was the predominant political effect of divided government. The struggle between the executive and legislature for control of the administrative state, a continuing theme in twentieth-century CONSTITUTIONAL HISTORY, was exacerbated by the ideological polarization of the 1980s.

Powerful governing instruments were available for carrying on the struggle for policymaking and administrative control. Having forced President Nixon to resign through application of the IMPEACHMENT power, Congress curbed EXECUTIVE POWER by passing laws respecting presidential actions in regard to WAR POWERS, intelligence activities, and budgetary matters. In 1978, Congress took the major step of creating the office of special prosecutor outside the executive branch to investigate wrongdoing in high-level executive offices. By vigorous use of the LEGISLATIVE VETO and the appropriations and oversight powers, Congress in the 1980s challenged the president not only in domestic policy but also in FOREIGN AFFAIRS.

Although the executive was weaker than in the era of

presidential party government, this branch also experienced a restoration of authority under divided government. Despite legislative measures aimed at limiting the executive, the principal elements of presidential power from the pre-WATERGATE period remained intact. The White House staff of 600 and the Executive Office of the President staff of 5,000 employees were powerful institutions that functioned as a policymaking structure parallel to the regular executive departments. Perhaps the main element in the power of the chief executive was the fact that political responsibility for government continued to fall primarily upon the president. On the whole, despite severe second-term problems in the IRAN-CONTRA AFFAIR, President Reagan was reasonably successful in meeting that responsibility. Possessing aptitude suitable for a plebiscitary type of presidency, he used the media effectively to communicate directly with the electorate and shape public opinion in support of administration policies.

Although President Reagan's political appeal rested in part on his opposition to big government, he responded to the constitutional imperative of the modern administrative state by expanding executive authority to achieve the policy ends of his administration. In 1981 he issued Executive Order 12291, giving the OFFICE OF MANAGEMENT AND BUDGET (OMB) authority to require executive agencies to submit cost-benefit analyses. Focused on budgetary impact, the order was intended as a check on the regulatory process, aimed at eliminating waste and inefficiency. In 1985, President Reagan issued a more far-reaching directive, Executive Order 12498, intended to coordinate and establish White House control over bureaucratic policymaking. This order required executive agencies to submit proposed regulations to OMB for substantive approval to ensure that they were consistent with overall White House policy.

The Reagan EXECUTIVE ORDERS resisted an inherent tendency in Congress toward micromanagement of the executive branch, a tendency encouraged by the politics of divided government. Reaction to the directives revealed the ambiguous constitutional status of ADMINISTRATIVE AGENCIES subject to the control of both the President and Congress. Functionally the executive departments and independent REGULATORY AGENCIES are in the executive branch, for they are concerned with enforcing and administering laws. The President can order administrative officers to carry out policies within their statutory discretion, and if they fail to follow his direction, he should be able to remove them, on the theory that the Constitution intends law enforcement to be managed by the chief executive. Adminstrative departments and agencies owe their existence, however, to Congress. By its lawmaking power, it creates the units of the administrative state, defining the purpose and powers of each department or agency and the terms and conditions of holding office. From this point of view, the executive departments and regulatory agencies are accountable to Congress and may exercise rulemaking discretion only within their statutory mandates.

Claiming discretionary rulemaking authority exercised by previous administrations, Reagan officials frequently acted to withdraw, revoke, or alter agency rules. When they did so, they were sometimes charged, by congressional committees and by private INTEREST GROUPS that opposed the changes, with violating their statutory authority. In the period of divided government, rulemaking under the delegation of LEGISLATIVE POWER to the executive, usually considered a basic feature of the modern administrative state, was thus subject to attack as lawless executive conduct.

Despite serious deregulatory efforts, the structure of the regulatory welfare state changed very little in the 1980s. Few agencies were eliminated, and given the balance of political forces and congressional defense of the status quo, it was difficult to effect major policy changes. On the government-expansion side, the Veterans Administration was elevated to cabinet rank. The main difference between this period and the 1970s was that the regulatory state functioned in a more accommodating and less antagonistic spirit in relation to regulated groups and associations. Corporations opposed the wholesale dismantling of regulatory structures that the "Reagan revolution" at first seemed to threaten, because it would reopen costly political and legal battles. What corporations wanted was greater flexibility in government—business relations and greater reliance on economic analysis in regulatory policy. After initially strong deregulatory efforts met stiff resistance in the subgovernments of the administrative constitution, the Reagan administration moderated its regulatory policy accordingly.

In seeking to preserve the regulatory welfare state, the Democratic congressional establishment evinced tendencies toward legislative supremacy inherent in the doctrine of the separation of powers and the theory of POPULAR SOVEREIGNTY. As in the past, the appropriations power, regarded as the quintessential legislative power, was the most effective instrument for asserting the congressional will.

The CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT of 1974 made Congress an equal participant in budget planning. The act created the Congressional Budget Office to compete with the OMB, and it solved the problem of presidential IMPOUNDMENT OF FUNDS by placing tight restrictions on presidential nonspending (called deferrals and rescissions). At the same time, the act succeeded in one of its implicit purposes, to facilitate congressional spending, which increased significantly in the 1970s and 1980s. Under divided government, the cooperation envi-

sioned in the budget act between the executive and legislature was elusive, and by 1985 it was widely believed that the BUDGET PROCESS was not working satisfactorily, for reasons that implicated both branches. The Gramm-Rudman-Hollings Act did not improve the process.

Failing to reach agreement on the series of executive department appropriations bills required by the law, Congress from 1986 to 1988 enacted each year a single measure, the omnibus continuing resolution, to fund the entire federal government. The continuing resolution previously had been a technical expedient used to keep an agency in operation when action on an appropriations bill was not complete by the end of the congressional session. It now was transformed into a comprehensive budget act. Concealed within the continuing resolutions were many substantive policy decisions, unknown to anyone but their subcommittee sponsors, that were enacted into law without public scrutiny and debate. The continuing resolution for 1988, for example, appropriated $605 billion, was 1,057 pages long, and was accompanied by a 1,194-page conference report. President Reagan, with only one day to consider the bill, was virtually forced to sign it if he did not want to shut down the government for lack of funds. In effect, Congress deprived the President of his VETO POWER.

Another constitutional innovation of Congress was the creation of commissions outside the government to decide public policy matters. For example, Congress established the National Economic Commission; the Commission on Executive, Legislative, and Judicial Salaries; and the Commission on Sentencing Guidelines to deal with politically controversial subjects. These were but a few of 596 federal commissions created in 1988 by Congress, 117 of which were determined by the General Accounting Office to be concerned with substantive policy questions. A contemporary manifestation of the progressive belief that government could be purified by separating politics from administration, government by commission added a new wrinkle by proposing to separate politics from legislation. It was an acknowledgment that the legislative process itself, where interests are properly expressed, was so immobilized by faction and ideology that Congress was prepared to abdicate its constitutional responsibility for lawmaking.

If the policy environment was not conducive to legislation, Congress could influence administrative policymaking through the legislative veto. In the era of presidential party government the legislative veto was used mainly to effect executive reorganization plans and strengthen presidential policymaking. In the aftermath of Watergate, Congress used the veto extensively to supervise regulatory policymaking, including it in more than 200 statutes. The Supreme Court declared the legislative veto unconstitutional in the case of IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA. Nevertheless, Congress continued to employ devices that were the functional equivalent of the legislative veto. For example, it required agencies to get the approval of appropriations committees before taking an action and used committee reports and notification requirement to supervise bureaucratic policymaking.

The most significant congressional constitutional innovation in the period of divided government was the creation of a major executive office, the INDEPENDENT COUNSEL, outside the executive branch. The independent counsel is a SPECIAL PROSECUTOR whose duty is to investigate allegations of criminality by high-level officials in the executive branch. After the Watergate affair, bills were introduced into Congress to provide for the prosecution of executive branch wrongdoing by an officer not subject to the political influence or legal control of the President. The premise on which these proposals rested was that an inherent conflict of interest prevented the President and the Justice Department from conducting an unbiased investigation of malfeasance in the executive branch. Publicly the proponents of the special prosecutor defended it as an "auxiliary precaution" under the theory of separation of powers and CHECKS AND BALANCES for controlling the government, especially the executive power. The Carter administration supported this legislation, and the office of special prosecutor—renamed independent counsel in 1983—was included in the Ethics in Government Act of 1978.

The independent counsel act assumes that the executive branch is peculiarly prone to illegal activity and conflict of interest. Its provisions apply to the President, vice-president, cabinet officers, senior White House staff, and sundry directors of agencies constituting a class of about seventy officials. The law provides that upon receiving information about a possible criminal violation by a covered official, the ATTORNEY GENERAL shall conduct an inquiry to decide whether an investigation by an independent counsel is needed. Restrictions on the attorney general make further investigation almost necessary for dealing with allegations of wrongdoing. The judiciary committee of either house is also authorized to request the appointment of a special prosecutor. At the request of the attorney general, a panel of judges from the District of Columbia Circuit Court (called the Special Division) appoints an independent counsel, whose jurisdiction is defined by the Special Division and who can be removed by the attorney general only for cause.

Although the act purports to separate the independent counsel from the legislative branch, the effect of the law is to create a major executive office outside the executive branch. It provides a means by which Congress can do

things that for political reasons it might not wish to do through the use of constitutional powers otherwise available to it, such as impeachment. Investigation and INDICTMENT through the independent counsel process can be seen as a substitute for impeachment. Despite the appointment of the counsel by the attorney general and the appearance of administrative independence, the independent counsel is in effect an agent of Congress, for congressional committee investigations are the primary source of information on which the appointment process is based. Furthermore, when an executive official is targeted for investigation, the independent counsel is under political pressure to find a violation. The counsel searches for a crime to pin on the executive official, rather than looking for the person to fit the crime, as traditional law enforcement does.

In *Morrison v. Olson* (1988) the Supreme Court upheld the constitutionality of the independent counsel act. In earlier decisions, such as *Chadha*, NORTHERN PIPELINE CO. V. MARATHON PIPE LINE CO. (1981), and BOWSHER V. SYNAR (1986), the Court had struck down acts of Congress as violations of the separation of powers. Its acceptance of the independent counsel was therefore a major victory for Congress. The independent counsel's functions appeared to be a "purely executive power" that under the Court's previous separation of powers decisions required placing the officer under the full removal power of the President. The Court dropped this line of analysis, however, concluding simply that the removal provisions of the act and other limits on the President's ability to control the discretion of the independent counsel did not interfere with the President's exercise of his constitutional duty to execute the laws. *Morrison v. Olson* in effect invited Congress to create additional special prosecutors to enforce laws that are judged to be too important to leave to the discretionary litigation policy of politically appointed officers in the executive branch.

Although the office of independent counsel was created ostensibly to assure impartial investigation of executive branch improprieties, it encouraged lawmakers to pursue policy disagreements with the executive branch in a partisan manner, to the point of criminalizing them. The Iran-Contra affair illustrated this tendency. It also epitomized the conflicts of divided government carried into the sphere of foreign policy. In this pivotal event, the President relied on executive discretion in foreign affairs, congressional committees investigated executive officials in the accusatorial manner established in the McCarthy era, and independent counsel obtained indictments leading to criminal trials that obviated impeachment proceedings.

The Iran-Contra affair initially involved the secret sale of arms to Iran, with which the United States had been in a state of undeclared war since 1979. The sale was a foreign policy maneuver intended to secure the release of American hostages held by Arab terrorists. This covert action arguably violated the requirement of the NATIONAL SECURITY ACT that the President, in conducting such an operation, make a factual "finding" and notify Congress. The Reagan administration used the profits from the Iranian arms sale to aid the Contras in Nicaragua seeking to overthrow the left-wing Sandinista government. The foreign policy question here was whether the United States should support the rebels. Congress cast the dispute in legal terms, which was made easier by a series of riders it had attached to defense appropriations acts from 1982 to 1986. These riders, known as the BOLAND AMENDMENTS, prohibited any funds from being spent by any agency of the United States involved in "intelligence activities," for the purpose of supporting the military overthrow of the Nicaraguan government.

Fundamental constitutional issues concerning the powers of President and Congress in foreign policy were hung on the peg of narrow statutory questions concerning the meaning of the Boland amendments. Yet as products of legislative compromise and executive-legislative accommodation in the (unacknowledged) spirit of divided government, the riders were deliberately vague and ambiguous. A key question was whether the National Security Council (NSC) was an "intelligence activity" in the sense intended by the legislation. The riders did not expressly identify it as such, although they did so identify other agencies. A further question, assuming that NSC was covered, was whether its activities conformed to the permissible scope of intelligence activities assisting the Contras that the Boland amendments approved. Neither the Iran-Contra hearings nor subsequent judicial trials of NSC officials satisfactorily resolved these questions.

If basic constitutional questions could not be reached, answers to narrow legal questions were also elusive because of the basic ambiguity in congressional foreign policy. Sometimes Congress voted for military and humanitarian aid to the Contras; at other times it barred using military equipment to overthrow the Nicaraguan government. Congress desired to challenge the President's control of foreign policy, but was afraid of critical public reaction if it did so too clearly or extremely. Therefore, it resorted to imprecise statutory language that did not unequivocally block the executive branch from carrying out its pro-Contra policy. For his part, President Reagan did not veto the Boland amendments, either because he viewed them as a compromise that permitted the administration to pursue its policy or because he feared impeachment.

The latter was a reasonable fear, for when information about the Iranian arms sale was revealed in 1986 a Watergate-type impeachment mood gripped many law-

makers and critics of the executive branch. The office of independent counsel, however, in conjunction with the traditional legislative power of investigation, was available as a less politically risky alternative. In November 1986, President Reagan promptly agreed to a congressional request to seek the appointment of an independent counsel to investigate the Iran-Contra affair. NSC officers Lt. Col. Oliver North, Admiral John Poindexter, and Robert McFarlane were the most prominent targets of the investigation, which resulted in at least six criminal convictions.

The trial of Oliver North illustrated the process by which constitutional controversy over the conduct of foreign policy was reduced to minor criminal convictions. North was a principal figure in the administration's policy who was called to testify in 1987 before the House and Senate select committees investigating the Iran-Contra matter. He was given a grant of criminal-use IMMUNITY, which meant that his testimony—televised to the nation in dramatically staged hearings—could not be used against him in any criminal prosecution that might result from the independent counsel's investigation. North's testimony was subsequently used against him, however, in a supposedly nonevidentiary way that arguably violated North's Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION as interpreted by the Supreme Court in KASTIGAR V. UNITED STATES (1972). North was indicted on a dozen counts. He was not charged with violating the Boland amendments, and he was acquitted on the most serious charges, such as defrauding the government by diverting funds to the Contras. North was convicted on three charges: accepting an illegal gratuity, falsifying and destroying government documents, and obstructing Congress.

The precise purpose of Congress in the Iran-Contra affair was a matter of some dispute. In policy terms, the Democratic leadership opposed aiding the rebels, yet it pursued this policy ambiguously and inconsistently. More clear was the constitutional purpose of Congress—to assert the power of the legislative branch in foreign affairs. Historical practice and constitutional law recognized a broad sphere of executive power and discretion in this area. Congress therefore required cogent arguments against the administration's policy to overcome the presumption that tended to favor executive authority in the making of foreign policy, especially in the twentieth century. To bring foreign policy in a detailed operational sense under the RULE OF LAW, as the Boland amendments purported to do, asserted a congressional claim of authority to rival that of the President. Criminalizing the foreign policy disagreement through the use of independent counsel prosecutions was a suitable means of discrediting executive authority. An administration that conducted foreign policy by illegal or lawless means could not be considered constitutionally legitimate. This was the point that criminal convictions in the Iran-Contra affair were intended to make.

Criminal conviction was an effective policymaking tool because it could be justified by the traditional republican goal of imposing the rule of law on executive power, which is always the potential source of tyranny, according to the antiexecutive strain in American political thought. Although the Iran-Contra defendants were not tried for violating the Boland amendments, members of Congress did not hesitate to make accusations and to conclude that officials of the executive branch broke the laws enacted by Congress to prevent the United States from getting involved in a war in Latin America. Senators and representatives could make these accusations, confident that under the separation of powers doctrine their possession of the lawmaking power makes them superior to the executive branch and establishes a presumption that the will of Congress is tantamount to the rule of law.

Even if the Boland amendments are considered constitutional, it is questionable whether the lawmaking power can be effectively employed in making foreign policy. The reason is that in foreign affairs U.S. officials are required to deal with the representatives of other countries, who are not subject to the authority and rules of action that constitute U.S. law. The rule of law as propounded by legislative enactments under the separation of powers is further questionable because the purpose of foreign policy is to protect the public safety and national security. Prudence, wisdom, and discretion in the exercise of power are required to achieve this end, rather than the general and prospective rules of action that characterize the rule of law. The statesmanship on which the successful conduct of foreign policy depends has usually been thought more likely to result from the actions of the chief executive, who can be held politically accountable, than from the deliberations of hundreds of lawmakers in Congress.

In the 1980s, tendencies toward legislative assertiveness clashed with an executive authority that had significantly recovered from the power deflation and loss of respect suffered during the eras of the VIETNAM WAR and Watergate. President Reagan was in many respects a nonpolitical chief executive, uninterested in the details of partisan maneuvering and administrative management, who in spite of himself refurbished the presidential office. That he successfully served two terms and employed military force in foreign affairs without interference from Congress under the War Powers Resolution was evidence of executive branch revitalization.

Divided government contradicted the theory of presidential party government. Yet it was not, as some observers argued, a historical and procedural accident. On the

contrary, divided government resulted from a reconsideration of the public philosophy of interest-group liberalism and the constitutional theory of the regulatory welfare state. It was a partial repudiation of the twentieth-century tendency toward governmental activism and centralized sovereignty. Divided government was a confirmation of the relevance and utility of the separation of powers principle, one of the basic concepts of limited government.

HERMAN BELZ
(1992)

(SEE ALSO: *Bork Nomination; Civil Liberties; Civil Rights; Congress and Foreign Policy; Congressional War Powers; Conservatism; Constitutional Reform; Criminal Justice System; Economy; Establishment Clause; First Amendment; Freedom of Speech; Freedom of the Press; Line-Item Veto; Procedural Due Process of Law, Civil; Procedural Due Process of Law, Criminal; Racketeer Influenced and Corrupt Organizations Act; Religious Fundamentalism; Religious Liberty.*)

Bibliography


CARTER, STEPHEN L. 1988 The Independent Counsel Mess. *Harvard Law Review* 102:105–141.

EASTLAND, TERRY 1989 *Ethics, Politics, and the Independent Counsel: Executive Power, Executive Vice, 1789–1989.* Washington, D.C.: National Legal Center for Public Interest.

HARRIS, RICHARD A. and MILKIS, SIDNEY M., eds. 1989 *Remaking American Politics.* Boulder, Colo.: Westview Press.

HELCO, HUGH 1986 General Welfare and Two American Political Traditions. *Political Science Quarterly* 101:179–196.

JONES, GORDON S. and MARINI, JOHN A., eds. 1988 *The Imperial Congress: Congress in the Separation of Powers.* New York: Pharos Books.

LOWI, THEODORE J. 1985 *The Personal President: Power Invested, Promise Unfulfilled.* Ithaca, N.Y.: Cornell University Press.

MANSFIELD, HARVEY C., JR. 1985 Pride Versus Interest in American Conservatism Today. *Government and Opposition* 20: 194–205.

SHAPIRO, MARTIN 1985 The Constitution and the Bureaucracy. *This Constitution* 9:11–16.

SUNDQUIST, JAMES L. 1989 Needed: A Political Theory for the New Era of Coalition Government in the United States. *Political Science Quarterly* 103:613–636.

WILDAVSKY, AARON 1980 *How to Limit Government Spending.* Berkeley: University of California Press.


# CONSTITUTIONAL HISTORY, 1989–1999

During the years from 1989 to 1999, the Supreme Court fashioned a number of novel DOCTRINES for AFFIRMATIVE ACTION, FEDERALISM, RELIGIOUS LIBERTY, the RIGHT OF PRIVACY, and PRESIDENTIAL POWERS. Pressured by public criticism and challenges from Congress, the Court modified and in some cases OVERRULED earlier holdings. Nominations by Presidents GEORGE H. W. BUSH and WILLIAM J. CLINTON helped push the Court toward the center.

Policies for affirmative action bounced around because none of the branches provided consistent principles. Although language in some of the CIVIL RIGHTS ACTS of Congress appeared to announce a race-neutral policy, other statutes endorsed preferential treatment. In FULLILOVE V. KLUTZNICK (1980), the Court upheld a congressional statute that set aside a certain percentage of public works funds for "minority business enterprises." When the states and cities tried to adopt similar set-asides, the Court in RICHMOND (CITY OF) V. J. A. CROSON CO. (1989) struck them down. A year later, in METRO BROADCASTING, INC. V. FCC (1990), the Court again upheld affirmative action at the congressional level, this time a program that offered advantages to minorities in deciding licenses and ownership of radio and television BROADCAST stations.

The Court revisited these holdings in ADARAND CONSTRUCTORS, INC. V. PEÑA (1995), which required federal race-based policies to satisfy the same standard—STRICT SCRUTINY—applied to state and local programs. Such programs must serve a COMPELLING STATE INTEREST and be narrowly tailored to address identifiable past RACIAL DISCRIMINATION. Federal courts, Congress, and federal ADMINISTRATIVE AGENCIES must now reassess affirmative action programs in light of this heightened standard.

Following *Adarand*, Clinton summarized his administration's review of federal affirmative action programs. Acknowledging some problems, he concluded: "We should reaffirm the principle of affirmative action and fix the practices. We should have a simple slogan: Mend it, but don't end it." He directed agencies to eliminate affirmative action programs if they (1) create a quota, (2) create preferences for unqualified individuals, (3) create reverse discrimination, or (4) continue even after its equal opportunity purposes have been achieved. A moratorium was placed on some set-aside programs.

Affirmative action programs came under attack in a number of states, including California, Texas, and Michigan. Californians voted in support of a ballot INITIATIVE to end bilingual education—allowing immigrant students to receive one year of English immersion before moving into regular classes unless their parents obtain a waiver—and another initiative outlawing affirmative action in public hiring, contracting, and education.

The Court continues to struggle with federalism. Its attempt in NATIONAL LEAGUE OF CITIES V. USERY (1976) to distinguish between national and state powers proved so confusing and incapable of application that the Court rejected its handiwork nine years later, in GARCÍA V. SAN

ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985). At that point, it appeared that the protection of federalism would depend largely on the political process operating within Congress.

However, several decisions in the 1990s seemed to revive state power. In GREGORY V. ASHCROFT (1991), the Court held that Missouri's constitution, which provided a mandatory retirement age of 70 for most state judges, did not violate the AGE DISCRIMINATION ACT (ADEA). Although the Court referred to the TENTH AMENDMENT and the GUARANTEE CLAUSE, the decision rested largely on STATUTORY INTERPRETATION, leaving the door open for Congress to rewrite the ADEA if it wanted to cover state judges.

A year later, the Court again cited the Tenth Amendment when it invalidated part of a 1985 congressional statute designed to force states to find disposal sites for low-level radioactive WASTE. The 6–3 decision in NEW YORK V. UNITED STATES (1992) ruled that the statutory provision, forcing states to take possession of the waste if they failed to discover other solutions, was an invalid effort by Congress to commandeer the states' legislative processes and thus inconsistent with the Tenth Amendment. The Court explained that states are not "mere political subdivisions" of the United States, nor are state governments regional offices or administrative agencies of the federal government. In terms of public policy, the decision had modest impact. Rather than try to draft new LEGISLATION to satisfy the Court, Congress decided to rely on the existing compacts that states had created to dispose of the waste.

On a similar ground, the Court in *Printz v. United States* (1997) struck down, by a 5–4 vote, a key portion of a 1993 GUN CONTROL law. That statute required state and local law enforcement officers to conduct background checks on prospective handgun purchasers. The Court said that Congress may not "command" state officers to administer a federal regulatory program. The decision is not expected to have a substantial effect on governmental policy. Most states already require background checks.

Great fanfare was given to UNITED STATES V. LÓPEZ (1995), the Court's decision striking down a congressional statute that banned guns within 1,000 feet of schools. Some commentators regarded the ruling as highly significant, but it may have been a case where Congress simply failed to present adequate findings to show an INTERSTATE COMMERCE link with guns on school playgrounds. Within two weeks of the decision, Clinton submitted legislation to Congress to amend the earlier statute by requiring the federal government to prove that the firearm has "moved in or the possession of such firearm otherwise affects interstate or foreign commerce." Congress enacted the legislation in 1996, finding that crime at the local level "is exacerbated by the interstate movement of drugs, guns, and criminal gangs," that the occurrence of violent crime in school zones has resulted in a decline in the quality of education, and that it has the power under the interstate COMMERCE CLAUSE to enact the legislation.

Also in 1995, federalism was at issue in the TERM LIMITS case decided by the Court, *U.S. Term Limits, Inc. v. Thornton.* A number of states had adopted constitutional amendments or other measures to place term limits on legislators not only in state legislatures but in Congress as well. Arkansas, for example, amended its constitution to limit members of Congress to three terms in the U.S. HOUSE OF REPRESENTATIVES and to two terms in the U.S. SENATE. The Court held that the Arkansas constitution violated the U.S. Constitution by adding to the qualifications established for members of Congress. The fifth vote in this 5–4 decision was supplied by Justice ANTHONY M. KENNEDY, who invoked principles of federalism by charging that Arkansas had invaded "the sphere of federal sovereignty."

Federalism became entwined with religious freedom in a case that arose in Oregon. Two members of the Native American Church had been fired by a private organization because they ingested peyote, a hallucinogenic drug. They took the drug as part of a religious sacrament. Their application for unemployment compensation was denied by Oregon under a state law that disqualifies employees who are fired for work-related "misconduct." Remaining drug-free was a condition of their employment.

Divided 6 to 3, the Court in EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990) held that the free exercise clause permits a state to prohibit sacramental peyote use and to deny unemployment benefits to persons fired for such use. State law may prohibit the possession and use of a drug even if it incidentally prohibits a religious practice. The Court distinguished this case from other unemployment-benefit cases by noting that the religious conduct in those cases was not prohibited by law. Oregon law made it a criminal offense to possess or use peyote.

Oregon remained free to make an exemption for the use of peyote by members of the Native American Church. Twenty-three states had statutory or judicially crafted exemptions for the religious use of peyote. One year after *Smith,* the Oregon legislature enacted a bill that protects the sacramental use of peyote by the Native American Church.

A number of religious groups urged Congress to pass legislation that would grant greater religious freedom than that recognized by the Court. The purpose was to reinstate the previous standard (compelling state interest) for testing federal, state, and local laws burdening religion. Proponents of the bill believed that the Court's ruling threatened a number of religious practices, including the

use of ceremonial wine, the practice of kosher slaughter, and the Hmong (Laotian) religious objection to autopsy.

In 1993, Congress enacted the RELIGIOUS FREEDOM RESTORATION ACT (RFRA), which provided that government may substantially burden a person's religious exercise only if it demonstrates a compelling interest and uses the least restrictive means of furthering that interest. The statute therefore restored the compelling interest test that the Court had adopted in 1963 and 1972. In 1994, Congress passed legislation to legalize the use of peyote by Native Americans for ceremonial purposes.

In *Boerne v. Flores* (1997), the Court ruled that Congress, in passing the RFRA, had exceeded the scope of its enforcement power under the FOURTEENTH AMENDMENT, SECTION 5. Parts of the Court's decision were superficial, unpersuasive, and internally inconsistent, inviting continued challenges and legislative activity. Although the Court strongly hinted that it has the last and final word in deciding the meaning of the Constitution, in fact it left the door wide open for future congressional action. In 1998, new legislation (called "Son of RFRA") was introduced to rely more on congressional SPENDING POWER and commerce power. Also in 1998, the U.S. Court of Appeals for the Eighth Circuit held that RFRA was constitutional as applied to the federal government.

In 1999, the Court handed down a series of rulings that once again protected the independence of the states. In *Alden v. Maine; Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, U.S.;* and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,* the Court declared that Congress cannot subject states to suits in their own courts for violating federal rights unless they first give their consent. The Court also invalidated efforts by Congress to abrogate state immunity from suit for violations of intellectual property rights.

Privacy issues led to a number of important Court rulings. ROE V. WADE (1973), establishing a woman's right to ABORTION, was under steady attack from both conservatives and liberals as a prime example of judicial overreaching. As medical knowledge advanced, the Court's attempt to rely on the viability of a fetus was undermined by technology. Appointments to the Court by Presidents RONALD REAGAN and Bush further helped to erode *Roe.* In WEBSTER V. REPRODUCTIVE HEALTH SERVICES (1989), the Court retreated somewhat from *Roe* and continued that process three years later, in PLANNED PARENTHOOD V. CASEY (1992), jettisoning *Roe*'s trimester framework while affirming the "core meaning" of *Roe* by preserving the right to abortion.

The Court's bitter experience with *Roe* may have convinced it to announce in two 1997 rulings that there was no RIGHT TO DIE with the assistance of a physician. Under heavy criticism from the public, the Court had learned that it had to carve out a more modest role for itself while recognizing a larger function for elected branches and the states.

On May 6, 1994, Paula Corbin Jones filed suit in federal court against President Clinton and Danny Ferguson, an Arkansas state trooper, for actions that occurred in 1991 at a hotel in Little Rock, Arkansas. She alleged that Clinton, as governor of Arkansas, violated her constitutional rights to EQUAL PROTECTION and DUE PROCESS by sexually harassing and assaulting her. Clinton, claiming immunity from civil suit, filed a motion to dismiss the complaint without prejudice to its refiling after his presidency.

The Constitution does not provide an express immunity for the President. Nevertheless, federal courts have developed a doctrine of IMMUNITY OF OFFICIALS for official acts. Paula Jones was raising a different issue: Is the President entitled to immunity from civil liability for unofficial acts committed in his personal capacity? A district court ruled that the President did not have absolute immunity from civil causes of action that arise prior to assuming office. However, the judge held that the trial could be delayed until after Clinton left the presidency, but allowed the discovery and deposition process to go forward, including deposing the President.

The Eighth Circuit upheld the decision that Clinton was not entitled to immunity from civil liability for his unofficial acts, but reversed the district court by holding that the trial could proceed while he was in office. A unanimous Supreme Court, in CLINTON V. JONES (1997), affirmed the appellate court. If properly managed by the trial court, "it appears to us highly unlikely to occupy any substantial amount of petitioner's [Clinton's] time."

Clinton was deposed and the case was dismissed in 1998. After Paula Jones appealed to the Eighth Circuit, Clinton agreed to settle the case by offering her $850,000. However, his responses to questions about his relationship with former White House aide Monica Lewinsky led to new charges that he had committed perjury, suborned the perjury of witnesses, and obstructed justice. INDEPENDENT COUNSEL Kenneth Starr investigated these charges and concluded, in a report to the House of Representatives, that Clinton may have committed impeachable offenses. The House impeached Clinton on two articles (perjury and obstruction of justice), but the Senate voted 45 to 55 on the first article and 50 to 50 on the second, both votes being well short of the two-thirds required for removal from office.

Starr's investigation led to several constitutional claims by the White House. Presidential aides insisted that they could not be compelled to testify at a GRAND JURY. First Lady Hillary Clinton believed that her discussions with a

government attorney were privileged. The U.S. Secret Service argued that the agents responsible for protecting the President should not be forced to testify about matters of Clinton's conduct. On all those matters Starr won at every level, including appeals by the administration to the Supreme Court.

As part of the "Contract With America," Republicans supported an item veto—often referred to as a LINE-ITEM VETO—for the President. Enacted in 1996, the Line Item Veto Act supplemented the rescission authority given to the President by the Impoundment Control Act of 1974. Instead of requiring the President to obtain the support of both Houses of Congress within a specified number of days, as set forth in the 1974 legislation, the Line Item Veto Act put the burden on Congress—during a thirty-day review period—to disapprove presidential rescission proposals. Any bill or joint resolution of disapproval would be subject to a presidential veto, ultimately requiring a two-thirds majority in each chamber for an override.

The Line Item Veto Act provided for expedited JUDICIAL REVIEW to test the constitutionality of the statute. Senator Robert C. Byrd and several colleagues filed suit to challenge this transfer of authority to the President. The Court in *Raines v. Byrd* (1997) held that the legislators did not have sufficient personal stake in the dispute, and did not allege a sufficiently concrete injury, to establish STANDING to bring the case. The next year, however, the Court in *Clinton v. New York* (1998) held that the private parties challenging the statute had standing and that the statute was unconstitutional because it violated the procedure that requires that all bills be presented to the President for his signature or veto. Writing for the majority, Justice JOHN PAUL STEVENS argued that there was no constitutional authorization for the President to amend or repeal a statute.

LOUIS FISHER
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Bibliography

BAKER, LYNN A. 1995 Conditional Federal Spending After *López. Columbia Law Review* 95:1911–1989.

DEVINS, NEAL 1996 *Shaping Constitutional Values: Elected Government, the Supreme Court, and the Abortion Debate.* Baltimore, Md.: Johns Hopkins University Press.

FISHER, LOUIS 1999 *American Constitutional Law*, 3rd ed. Durham, N.C.: Carolina Academic Press.

GARROW, DAVID J. 1994 *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade.* New York: Macmillan.

LESSIG, LAWRENCE 1995 Translating Federalism: *United States v. López. Supreme Court Review* 1995:125–215.

MCCONNELL, MICHAEL W. 1997 Institutions and Interpretation: A Critique of *City of Boerne v. Flores. Harvard Law Review* 111:153–195.

STRAUSS, DAVID A. 1993 Abortion, Toleration, and Moral Certainty. *Supreme Court Review* 1993:1–28.

# CONSTITUTIONAL INTERPRETATION

"Constitutional interpretation" comprehends the methods or strategies available to people attempting to resolve disputes about the meaning or application of the Constitution. The possible sources for interpretation include the text of the Constitution, its "original history," including the general social and political context in which it was adopted as well as the events immediately surrounding its adoption, the governmental structures created and recognized by the Constitution, the "ongoing history" of interpretations of the Constitution, and the social, political, and moral values of the interpreter's society or some subgroup of the society. The term "originalist" refers to interpretation concerned with the first three of these sources.

The extraordinary current interest in constitutional interpretation is partly the result of controversy over the SUPREME COURT's expansive readings of the FOURTEENTH AMENDMENT; it also parallels developments in literary theory and more generally the humanities. Received notions about the intrinsic meaning of words or texts, access to an author's intentions, and the very notion of "validity" in interpretation have been forcefully attacked and vehemently defended by philosophers, literary theorists, social scientists, and historians of knowledge. Legal writers have imported scholarship from these disciplines into their own, and some humanists have become interested in legal interpretation.

Issues of interpretive methodology have always been politically charged—certainly so in constitutional law. JOHN MARSHALL's foundational decisions asserting the power of the central government were met by claims that he had willfully misconstrued the document. In our own time, modernist interpretive theories tend to be invoked by proponents of JUDICIAL ACTIVISM, and more conventional views by its opponents. The controversy within the humanities and the social sciences is itself deeply political, for the modernist assertion that truth or validity is socially constructed and hence contingent is often perceived as destabilizing or delegitimating.

The Constitution is a political document; it serves political ends; its interpretations are political acts. Any theory of constitutional interpretation therefore presupposes a normative theory of the Constitution itself—a theory, for example, about the constraints that the words and intentions of the adopters should impose on those who apply or interpret the Constitution. As Ronald Dworkin ob-

served, "Some parts of any constitutional theory must be independent of the intentions or beliefs or indeed the acts of the people the theory designates as Framers. Some part must stand on its own political or moral theory; otherwise the theory would be wholly circular."

The eclectic practices of interpreters and the continuing debate over the appropriate methods or strategies of constitutional interpretation suggest that we have no unitary, received theory of the Constitution. The American tradition of constitutional interpretation accords considerable authority to the language of the Constitution, its adopters' purposes, and the implications of the structures created and recognized by the Constitution. But our tradition also accords authority to precedents and the judicial exegesis of social values and practices, even when these diverge from plausible readings of the text and original understandings.

Any theory of constitutional interpretation must start from the fact that we have a written Constitution. Why is the written Constitution treated as binding? Because, as Chief Justice Marshall asserted in MARBURY V. MADISON (1803), it is law—the supreme law of the land—and because since 1789 public institutions and the citizenry have treated it as an authoritative legal document. It is no exaggeration to say that the written Constitution lies at the core of the American "civil religion."

Doubtless, the most frequently invoked canon of textual interpretation is the "plain meaning rule." Marshall wrote in STURGES V. CROWNINSHIELD (1819):

> [A]lthough the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. . . . [I]f, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous that all mankind would, without hesitation, unite in rejecting the application.

Marshall did not equate "plain" meaning with "literal" meaning, but rather (as Justice OLIVER WENDELL HOLMES later put it) the meaning that it would have for "a normal speaker of English" under the circumstances in which it was used. The distinction is nicely illustrated by Chief Justice Marshall's opinion in MCCULLOCH V. MARYLAND (1819), decided the same year as *Sturges*. Maryland had argued that the NECESSARY AND PROPER clause of Article I authorized Congress only to enact legislation "indispensable" to executing the ENUMERATED POWERS. Marshall responded with the observation that the word "necessary," as used "in the common affairs of the world, or in approved authors, . . . frequently imports no more than that one thing is convenient, or useful, or essential to another." He continued:

> Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. . . . This word, then, like others, is used in various senses; and in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

To read a provision without regard to its context and likely purposes will yield either unresolvable indeterminacies or plain nonsense. An interpreter could not, for example, decide whether the FIRST AMENDMENT'S " FREEDOM OF SPEECH" encompassed singing, flag-waving, and criminal solicitation; or whether the "writings" protected by the COPYRIGHT clause included photographs, sculptures, performances, television broadcasts, and computer programs. She would not know whether the provision in Article II that "No person except a natural born Citizen . . . shall be eligible to the Office of President" disqualified persons born abroad or those born by Caesarian section. We can identify interpretations as compelling, plausible, or beyond the pale only because we think we understand the concerns that underlie the provisions.

One's understanding of a provision, including the concerns that underlie it, depends partly on the ideological or political presuppositions one brings to the interpretive enterprise. Marshall could so readily label Maryland's construction of the word "necessary" as excessive because of his antecedent conception of a "constitution" as essentially different from a legal code—as a document "intended to endure for ages to come"—and because of his beliefs about the structure of FEDERALISM implicit in the United States Constitution. A judge starting from different premises might have found Maryland's construction more plausible.

A meaning thus is "plain" when it follows from the interpreter's presuppositions and when these presuppositions are shared within the society or at least within the relevant "community of interpretation"—for example, the legal profession. Kenneth Abraham has remarked, "The plain is plain because it is constantly recurring in similar contexts and there is general agreement about the meaning of language that may be applied to it. In short, meaning is a function of agreement. . . ."

When a provision is interpreted roughly contemporaneously with its adoption, an interpreter unconsciously

places it in the social and linguistic context of her society. Over the course of several centuries, however, even a relatively stable nation will undergo changes—in social and economic relations, in technology, and ultimately in values—to an extent that a later interpreter cannot readily assume that she has direct access to the contexts in which a constitutional provision was adopted. This poses both a normative and a methodological question for the modern interpreter: should she attempt to read provisions in their original social and linguistic contexts, or in a modern context, or in some way that mediates between the two? And, to the extent that the original contexts are relevant, how can she ascertain them?

Original history includes "legislative history"—the debates and proceedings in the conventions and legislatures that proposed and adopted constitutional provisions—and the broader social, economic, and political contexts surrounding their adoption. Although it is widely acknowledged that original history should play a role in constitutional interpretation, there is little agreement over the aims and methods of historical inquiry. The controversy centers on the level of generality on which an interpreter should try to apprehend the adopters' intentions. On the highest or broadest level, an interpreter poses the questions: "What was the general problem to which this provision was responsive and how did the provision respond to it?" On the most specific level, she inquires: "How would the adopters have resolved the particular issue that we are now considering?"

The first or "general" question elicits answers such as: "The purpose of the COMMERCE CLAUSE was to permit Congress to regulate commerce that affects more than one state, or to regulate where the states are separately incompetent to regulate." Or: "The purpose of the EQUAL PROTECTION clause was to prohibit invidious discrimination." These characterizations do not purport to describe the scope of a provision precisely. On the contrary, they are avowedly vague or open-ended: the claim is not that the equal protection clause forbids every conceivable invidious discrimination (it may or may not) but that it is generally concerned with preventing invidious discriminations.

The general question is an indispensable component of any textual interpretation. The interpreter seeks a "purpose" that she can plausibly attribute to everyone who voted for the provision, and which, indeed, must have been understood as their purpose even by those who opposed its adoption. The question is often couched in objective-sounding terms: it seeks the "purpose of the provision" rather than the "intent of the framers." And its answer is typically sought in the text read in the social and linguistic context in which it was adopted. As Marshall wrote in *McCulloch,* "the spirit of an instrument . . . is to be collected chiefly from its words." If the status of the written Constitution as "law" demands textual interpretation, it also entails this general inquiry, without which textual interpretation cannot proceed.

The second inquiry, which can be called "intentionalist," seeks very specific answers, such as: "Did the adopters of the Fourteenth Amendment intend to prohibit school SEGREGATION?" or "Did they intend to prohibit 'reverse' discrimination?" One rationale for this focus was asserted by Justice GEORGE H. SUTHERLAND, dissenting in HOME BUILDING & LOAN ASSOCIATION V. BLAISDELL (1934): "[T]he whole aim of construction, as applied to a provision of the Constitution, is . . . to ascertain and give effect to the intent of its framers and the people who adopted it." Another rationale is that recourse to the adopters' intentions constrains the interpreter's discretion and hence the imposition of her own values. Some methodological problems are presented by any interpretive strategy that seeks to specify the adopters' intentions.

The procedures by which the *text* of a proposed constitutional provision is adopted are usually straightforward and clear: a text becomes a law if it is adopted by the constitutionally prescribed procedures and receives the requisite number of votes. For example, an amendment proposed in Congress becomes a part of the Constitution when it is approved by two-thirds of the members of each House and ratified by the legislatures in three-fourths of the states, or by conventions in three-fourths of the states, as Congress may prescribe.

How does an *intention* acquire the status of law? Some interpreters assume, without discussion, that by ratifying the framers' language, the thousands of people whose votes are necessary to adopt a constitutional provision either manifest their intent to adopt, or are somehow bound by, the intentions of certain of the drafters or framers—even if those intentions are not evident from the text itself. This view is not supported by anything in the Constitution, however, or by eighteenth- or nineteenth-century legal theory or practice.

If one analogizes the adoption of "an intention" concerning the text of the Constitution to the adoption of a text, an intention would become binding only when it was held by the number and combination of adopters prescribed by Article V. This poses no particular difficulty for an interpreter who wishes to understand the general aims or purposes of a provision. Statements by framers, proponents, and opponents, together with the social and political background against which the provision was adopted, often indicate a shared understanding. But these sources cannot usually answer specific questions about the adopters' intentions. The intentionalist interpreter thus often engages in a degree of speculation that undermines the very rationale for the enterprise.

The adopters of a provision may intend that it prohibit or permit some activity, or that it *not* prohibit or permit the activity; or they may have no intentions at all regarding the matter. An intentionalist interpreter must often infer the adopters' intentions from opaque sources, and must try to describe their intentions with respect to situations that they probably never thought about.

The effort to determine the adopters' intentions is further complicated by the problem of identifying the intended specificity of a provision. This problem is nicely illustrated by an example of Ronald Dworkin's. Consider the possible intentions of those who adopted the CRUEL AND UNUSUAL PUNISHMENT clause of the Eighth Amendment. They might have intended the language to serve only as a shorthand for the Stuart tortures which were their exemplary applications of the clause. Somewhat more broadly, they might have intended the clause to be understood to incorporate the principle of *ejusdem generis*—to include their exemplary applications and other punishments that they found, or would have found, equally repugnant.

More broadly yet, they might have intended to delegate to future decision makers the authority to apply the clause in light of the general principles underlying it. To use Dworkin's terms, they might have intended future interpreters to develop their own "conceptions" of cruel and unusual punishment within the framework of the adopters' general "concept" of the clause. If so, then the fact that they viewed a certain punishment as tolerable does not imply that they intended the clause "not to prohibit" such punishments. Like parents who instill values in their children both by articulating and applying a moral principle, the adopters may have accepted the eventuality that the principle would be applied in ways that diverged from their own particular views.

Whether or not such a motivation seems likely with respect to applications of the clause in the adopters' contemporary society, it may be more plausible with respect to applications by future interpreters, whose understandings of the clause would be affected by changing knowledge, values, and forms of society. On the other hand, the adopters may have thought of themselves as more virtuous or less corruptible than unknown future generations, and for that reason may have intended this and other clauses to be construed narrowly.

How can an interpreter determine the breadth of construction intended by the adopters of any particular provision? Primarily, if not exclusively, from the language of the provision itself. Justice FELIX FRANKFURTER wrote in *National Mutual Insurance Company v. Tidewater Transfer Company* (1949):

> The precision which characterizes [the jurisdictional provisions] . . . of Article III is in striking contrast to the imprecision of so many other provisions of the Constitution dealing with other very vital aspects of government. This was not due to chance or ineptitude on the part of the Framers. The differences in subject-matter account for the drastic difference in treatment. Great concepts like "Commerce among the several states," "due process of law," "liberty," "property," were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this nation knew too well that only a stagnant society remains unchanged. But when the Constitution in turn gives strict definition of power or specific limitations upon it we cannot extend the definition or remove the translation. Precisely because "it is a *constitution* we are expounding," *M'Culloch v. Maryland*, we ought not to take liberties with it.

Charles Curtis put the point more generally: "Words in legal documents are simply delegations to others of authority to give them meaning by applying them to particular things or occasions. . . . And the more imprecise the words are, the greater is the delegation, simply because then they can be applied or not to more particulars. This is the only important feature of words in legal draftsmanship or interpretation."

This observation seems correct. Yet it is worth noting that the relative precision of a word or clause itself depends both on context and on interpretive conventions, and is often uncertain and contestable. For example, in UNITED STATES V. LOVETT (1946) Justice Frankfurter characterized the BILL OF ATTAINDER clause as among the Constitution's very "specific provisions." Yet he construed that clause to apply to punishments besides death, ignoring the technical eighteenth-century distinction between a bill of attainder, which imposed the death penalty, and a bill of "pains and penalties," which imposed lesser penalties.

The effort to characterize clauses as relatively open or closed confronts a different sort of historical problem as well. The history of interpretation of written constitutions was not extensive in 1787. Marshall's assertion that it is the nature of a constitution "that only its great outlines should be marked" (*McCulloch*) drew more on theory than on practice. But Marshall and his successors practiced this theory. Whatever assumptions the adopters of the original Constitution might have made about the scope of their delegations of authority, the RECONSTRUCTION amendments were adopted in the context of decades of "latitudinarian" constitutional interpretation. What bearing should this context have on the interpretation of provisions adopted since the original Constitution?

The intentionalist interpreter's initial task is to situate the provision and documents bearing on it in their original linguistic and social contexts. She can draw on the accumulated knowledge of American social, political, and in-

tellectual history. Ultimately, however, constitutional interpretation is subject to the same limitations that attend all historical inquiry. Quentin Skinner has described the most pervasive of these:

> [I]t will never in fact be possible simply to study what any given classic writer has *sai*. . . . without bringing to bear some of one's own expectations about what he must have been saying. . . . [T]hese models and preconceptions in terms of which we unavoidably organize and adjust our perceptions and thoughts will themselves tend to act as determinants of what we think or perceive. We must classify in order to understand, and we can only classify the unfamiliar in terms of the familiar. The perpetual danger, in our attempts to enlarge our historical understanding, is thus that our expectations about what someone must be saying or doing will themselves determine that we understand the agent to be doing something which he would not—or even could not—himself have accepted as an account of what he *was* doing.

Trying to understand how the adopters intended a provision to apply in their own time and place is, in essence, doing history. But the intentionalist interpreter must take the further step of translating the adopters' intentions into the present. She must decide how the commerce power applies to modes of transportation, communication, and economic relations not imagined—perhaps not imaginable—by the adopters; how the cruel and unusual punishment clause applies to the death penalty in a society that likely apprehends death differently from a society in which death was both more commonplace and more firmly integrated into a religious cosmology. The Court invoked difficulties of this sort when it concluded that the history surrounding the adoption of the Fourteenth Amendment was "inconclusive" with respect to the constitutionality of school DESEGREGATION almost a century later. Noting the vastly different roles of public education in the mid-nineteenth and mid-twentieth centuries, Chief Justice EARL WARREN wrote in BROWN V. BOARD OF EDUCATION (1954): "[W]e cannot turn back the clock to 1868 when the Amendment was adopted. . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." In sum, even the historian who attempts to meet and understand the adopters on their own ground is engaging in a creative enterprise. To project the adopters into a world they could not have envisioned borders on fantasy.

In an important lecture given in 1968, entitled "Structure and Relationship in Constitutional Law," Professor Charles L. Black, Jr., described a mode of constitutional interpretation based on "inference from the structure and relationships created by the constitution in all its parts or in some principal part." Professor Black observed that in *McCulloch v. Maryland*, "Marshall does not place principal reliance on the [necessary and proper] clause as a ground of decision. . . . [Before] he reaches it he has already decided, on the basis of far more general implications, that Congress possesses the power, not expressly named, of establishing a bank and chartering corporations: . . . [h]e addresses himself to the necessary and proper clause only in response to counsel's arguing its *restrictive* force." Indeed, the second part of *McCulloch*, which held that the Constitution prohibited Maryland from levying a tax on the national bank, rested exclusively on inferences from the structure of the federal system and not at all on the text of the Constitution. Similarly, *Crandall v. Nevada* (1868) was not premised on the PRIVILEGES AND IMMUNITIES clause of either Article IV or the Fourteenth Amendment. Rather, the Court inferred a right of personal mobility among the states from the structure of the federal system: "[The citizen] has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it . . . and this right is in its nature independent of the will of any State over whose soil he must pass to exercise it."

Citing examples like these, Professor Black argued that interpreters too often have engaged in "Humpty-Dumpty textual manipulation" rather than relying "on the sort of political inference which not only underlies the textual manipulation but is, in a well constructed opinion, usually invoked to support the interpretation of the cryptic text."

Institutional relationships are abstractions from the text and the purposes of provisions—themselves read on a high level of abstraction. The implications of the structures of government are usually vague, often even ambiguous. Thus, while structural inference is an important method of interpretation, it shares the limitations intrinsic to other interpretive strategies. It seldom yields unequivocal answers to the specific questions that arise in the course of constitutional debates.

For the most part, the Supreme Court—the institution that most systematically and authoritatively interprets and articulates the meaning of the Constitution—has construed the language, original history, and structure of the Constitution on a high level of abstraction. It has treated most provisions in the spirit suggested by Chief Justice Marshall in *McCulloch v. Maryland*. This view of the Constitution is partly a political choice, based on the desire to accommodate a venerated and difficult-to-amend historical monument with changing circumstances, attitudes, and needs. But it is no less a consequence of the nature of language and history, which necessarily leave much of the meaning of the Constitution to be determined by its subsequent applications.

Constitutional disputes typically arise against the background of earlier decisions on similar subjects. A complete theory of constitutional interpretation therefore must deal with the role of precedent. Interpreting a judicial precedent is different from interpreting the constitutional provision itself. A precedent consists of a JUDGMENT based on a particular set of facts together with the court's various explanations for the judgment. The precedent must be read, not only in terms of its own social context, but against the background of the precedents it invokes or ignores. Lon Fuller wrote:

> In the common law it is not too much to say that the judges are always ready to look behind the words of a precedent to what the previous court was trying to say, or to what it would have said if it could have foreseen the nature of the cases that were later to arise, or if its perception of the relevant factors in the case before it had been more acute. There is, then, a real sense in which the written words of the reported decisions are merely the gateway to something lying behind them that may be called, without any excess of poetic license, "unwritten law."

The American doctrine of STARE DECISIS accords presumptive but not indefeasible authority to precedent. Courts sometimes have overruled earlier decisions to return to what is said to be the original understanding of a provision. They have also overruled precedents that seem inconsistent with contemporary norms. For example, in HARPER V. VIRGINIA STATE BOARD OF ELECTIONS (1966), the Supreme Court overruled a twenty-year-old precedent to invalidate, under the equal protection clause, a state law conditioning the right to vote in state election on payment of an annual POLL TAX of $1.50. After surveying intervening decisions protecting political participation and other interests, Justice WILLIAM O. DOUGLAS concluded: "In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection clause *do* change."

The process of constitutional adjudication thus has a dynamic of its own. It creates an independent force which, as a DOCTRINE evolves, may compete with the text and original history as well as with older precedents. Whether or not, as Justice JOHN MARSHALL HARLAN argued in dissent, *Harper* was inconsistent with the original understanding of the Fourteenth Amendment, the decision would have been inconceivable without the intervening expansion of doctrine beyond applications contemplated by the adopters of the Fourteenth Amendment.

Disagreements about the propriety of this evolutionary process are rooted in differing theories of constitutional law. To a strict intentionalist like Raoul Berger, the process appears to be simply the accretion of errors, which should be corrected to the extent possible. Others hold that the process properly accommodates the Constitution to changing needs and values. As Justice Holmes wrote in MISSOURI V. HOLLAND (1920):

> [W]hen we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our entire experience and not merely in that of what was said a hundred years ago. . . . We must consider what this country has become in deciding what the Amendment has reserved.

Chief Justice CHARLES EVANS HUGHES's opinion in *Home Building & Loan* stands as the Court's most explicit assertion of the independent force of precedents and of the changing values they reflect. The Court upheld a law, enacted during the Depression, which postponed a mortgagor's right to foreclose against a defaulting mortgagee. In dissent, Justice Sutherland argued that the CONTRACT CLAUSE, which had been adopted in response to state debtor-relief legislation enacted during the depression following the Revolutionary War, was intended to prohibit precisely this sort of law. Given his intentionalist premise this disposed of the case. Hughes did not dispute Sutherland's account of the original history. Rather, he reviewed the precedents interpreting the contract clause to conclude:

> It is manifest . . . that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people, and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. . . . [T]he question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

The views articulated by Holmes, Hughes, and Douglas reflect the Court's actual practice in adjudication under the BILL OF RIGHTS, the Fourteenth Amendment, and other provisions deemed relatively open-textured. The process

bears more resemblance to COMMON LAW adjudication than to textual exegesis.

In an influential essay, Thomas Grey observed that the American constitutional tradition included practices of nonoriginalist adjudication purportedly based on principles of natural rights or FUNDAMENTAL LAW, or on widely shared and deeply held values not readily inferred from the text of the written Constitution. Several of the Supreme Court's contemporary decisions involving procreation and the family have invoked this tradition, and have given rise to a heated controversy over the legitimacy of adjudication based on "fundamental values."

Originalist and nonoriginalist adjudication are not nearly so distinct as many of the disputants assume. Constitutional provisions differ enormously in their closed- or open-texturedness. Indeed, a provision's texture is not merely a feature of its language or its original history, but of the particular situation in which it is applied. One's approach to a text is determined by tradition and by social outlooks that can change over time. Depending on one's political philosophy, one may bemoan this inevitability, or embrace it. For better or for worse, however, Terrance Sandalow described an important feature of our constitutional tradition when he remarked that "[t]he Constitution has . . . not only been read in light of contemporary circumstances and values; it has been read *so that* the circumstances and values of the present generation might be given expression in constitutional law."

Most disputes about constitutional interpretation and fundamental values concern interpretation in particular institutional contexts. Today's disputes center on the judicial power to review and strike down the acts of legislatures and agencies and are motivated by what ALEXANDER M. BICKEL dubbed the "counter-majoritarian difficulty" of JUDICIAL REVIEW. Urgings of "judicial restraint" or of a more expansive approach to constitutional adjudication tend to reflect differing opinions of the role of the judiciary in a democratic polity and, more crudely, differing views about the substantive outcomes that these strategies yield. The question, say, whether Congress, the Supreme Court, or the states themselves should take primary responsibility for elaborating the equal protection clause is essentially political and cannot be resolved by abstract principles of interpretation. But this observation also cautions against taking interpretive positions based on particular institutional concerns and generalizing them beyond the situations that motivated them.

Constitutional interpretation is as much a process of creation as one of discovery. If this view is commonplace among postrealist academics, it is not often articulated by judges and it probably conflicts with the view of many citizens that constitutional interpretation should reflect the will of the adopters of the Constitution rather than its interpreters.

So-called STRICT CONSTRUCTION is an unsatisfactory response to these concerns. First, the most frequently litigated provisions do not lend themselves to "strict" or unambiguous or literal interpretation. (What are the strict meanings of the privileges or immunities, due process, and equal protection clauses?) Second, attempts to confine provisions to their very narrowest meanings typically produce results so ludicrous that even self-styled strict constructionists unconsciously abandon them in favor of less literal readings of texts and broader conceptualizations of the adopters' intentions. (No interpreter would hold that the First Amendment does not protect posters or songs because they are not "speech," or that the commerce clause does not apply to telecommunications because the adopters could not have foreseen this mode of commerce.) An interpreter must inevitably choose among different levels of abstraction in reading a provision—a choice that cannot itself be guided by any rules. Third, the two modes of strict interpretation—literalism and strict intentionalism—far from being synergistic strategies of interpretation, are often antagonistic. (Although the adopters of the First Amendment surely did not intend to protect obscene speech, the language they adopted does not exclude it.) A strict originalist theory of interpretation must opt either for literalism or for intentionalism, or must have some extraconstitutional principle for mediating between the two.

To reject these strategies is not to shed constraints. The text and history surrounding the adoption of a provision originate a line of doctrine, set its course, and continue to impose limitations. Some interpretations are more plausible than others; some are beyond the pale. And the criteria of plausibility are not merely subjective. Rather, they are intersubjective, constituted by others who are engaged in the same enterprise. Beyond the problem of subjectivity, however, the demographic characteristics of the legal interpretive community gives rise to an equally serious concern: the judiciary and the bar more generally have tended to be white, male, Anglo-Saxon, and well-to-do, and one might well wonder whether their interpretations do not embody parochial views or class interests. The concerns cannot be met by the choice of interpretive strategies, however, but only by addressing the composition and structure of the institutions whose interpretations have the force of law.

PAUL BREST
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(SEE ALSO: *Interpretivism; Noninterpretivism.*)

Bibliography

ABRAHAM, KENNETH 1981 Three Fallacies of Interpretation: A Comment on Precedent and Judicial Decision. *Arizona Law Review* 23:771–783.

BERGER, RAOUL 1977 *Government by Judiciary: The Transfor-*

*mation of the Fourteenth Amendment.* Cambridge, Mass.: Harvard University Press.

BLACK, CHARLES L., JR. 1969 *Structure and Relationship in Constitutional Law.* Baton Rouge: Louisiana State University Press.

CURTIS, CHARLES 1950 A Better Theory of Legal Interpretation. *Vanderbilt Law Review* 3:407–437.

DWORKIN, RONALD 1981 The Forum of Principle. *New York Law Review* 56:469–518.

ELY, JOHN HART 1980 *Democracy and Distrust.* Cambridge, Mass.: Harvard University Press.

FULLER, LON 1968 *Anatomy of Law.* New York: Praeger.

GREY, THOMAS 1975 Do We Have an Unwritten Constitution? *Stanford Law Review* 27:703–718.

HOLMES, OLIVER W. 1899 The Theory of Interpretation. *Harvard Law Review* 12:417.

MONAGHAN, HENRY 1981 Our Perfect Constitution. *New York University Law Review* 56:353–376.

SANDALOW, TERRANCE 1981 Constitutional Interpretation. *Michigan Law Review* 79:1033–1072.

SKINNER, QUENTIN 1969 Meaning and Understanding in the History of Ideas. *History & Theory* 8:3–53.

SYMPOSIUM 1985 Constitutional Interpretation. *University of Southern California Law Review* 58:551–725.

SYMPOSIUM ON LAW AND LITERATURE 1982 *Texas Law Review* 60:373–586.

TEN BROEK, JACOBUS 1938–1939 Admissibility and Use by the Supreme Court of Extrinsic Aids in Constitutional Construction. *California Law Review* 26:287–308, 437–454, 664–681; 27:157–181, 399–421.

## CONSTITUTIONALISM

Constitutionalism is a term not altogether congenial to American lawyers. It seems to share the characteristics of other "isms": it is neither clearly prescriptive nor clearly descriptive; its contours are difficult to discern; its historical roots are diverse and uncertain. Legal realist WALTON H. HAMILTON, who wrote on the subject for the *Encyclopedia of the Social Sciences,* began his article in an ironic vein: "Constitutionalism is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order."

Historians, on the other hand, employ the concept with some confidence in its meaning. American historians tend to use it as a shorthand reference to the constitutional thought of the founding period. European historians have a somewhat harder time. Given a largely UNWRITTEN CONSTITUTION and the SOVEREIGNTY of Parliament, what does it mean to refer to British constitutionalism? What is the significance of Dicey's distinction between the "conventions of the constitution" and the "law of the constitution"? How meaningful is the distinction? As Dicey noted: "Whatever may be the advantages of a so-called unwritten constitution, its existence imposes special difficulties on teachers bound to expound its provisions." French authors view constitutionalism as an important element of the French Revolution, but run into difficulties as they contemplate the fact that, since the constitution of 1791, France has had fifteen of them—and by no means all democratic. German historians tend to restrict the use of the term *Konstitutionalismus* to the Central European constitutional monarchies of the nineteenth century, though German-language equivalents for constitutionalism (*Verfassungsstaat, Verfassungsbegriff*) are frequently encountered in the literature. The German constitutionalist trauma is, of course, the ease with which the Weimar constitution, in its time viewed as one of the most progressive in the world, could be brought to collapse at the hands of determined enemies who then managed to organize arbitrariness in the form of law.

Constitutionalism has both descriptive and prescriptive connotations. Used descriptively, it refers chiefly to the historical struggle for constitutional recognition of the people's right to "consent" and certain other rights, freedoms, and privileges. This struggle extends roughly from the seventeenth century to the present day. Its beginnings coincide with the "enlightenment" of the seventeenth and eighteenth centuries. Used prescriptively, especially in the United States, its meaning incorporates those features of government seen as the essential elements of the American Constitution. Thus F. A. Hayek called constitutionalism the American contribution to the RULE OF LAW.

Constitutionalism obviously presupposes the concept of a CONSTITUTION. A Swiss authority of some influence in the American revolution, EMERICH DE VATTEL, in his famous 1758 treatise, *The Law of Nations or the Principles of Natural Law,* provided a definition: "The FUNDAMENTAL LAW which determines the manner in which the public authority is to be exercised is what forms the *constitution of the State.* In it can be seen the organization by means of which the Nation acts as a political body; how and by whom the people are to be governed; and what are the rights and duties of those who govern. This constitution is nothing else at bottom than the establishment of the system, according to which a Nation proposed to work in common to obtain the advantages for which a political society is formed."

This rather neutral definition has to be read against the background of Vattel's theory of natural law. Vattel recognized the right of the majority to reform its government and, most important, excluded fundamental laws from the reach of legislators, "unless they are expressly empowered by the nation to change them." Moreover, Vattel believed that the ends of civil society were "to procure for its citizens the necessities, the comforts, and the pleasures of life, and in general their happiness; to secure to each the peaceful enjoyment of his property and a sure means of obtaining justice; and finally to defend the whole body against all external violence."

Later in the eighteenth century strong prescriptive elements became part of the very definition of a constitution. Two examples are equally famous. On October 21, 1776, the town of Concord, Massachusetts, resolved "that a Constitution in its Proper Idea intends a System of Principles Established to Secure the Subject in the Possession and enjoyment of their Rights and Privileges, against any Encroachment of the Governing Part." (See CONCORD RESOLUTION.) Article 16 of the French Declaration of the Rights of Man of 1789 put it even more bluntly: "A society in which the guarantee of rights is not assured nor the SEPARATION OF POWERS provided for, has no constitution."

Although it would be impractical to make such substantive features a necessary part of one's definition of a written or unwritten constitution, a proper understanding of constitutionalism as a historical phenomenon depends on them. Constitutionalism does not refer simply to having a constitution but to having a particular kind of constitution, however difficult it may be to specify its content. This assertion holds true even in the case of the interplay of old forces (monarchies and estates) with new forces (the middle class in particular) which characterized the emergence of constitutional monarchies in Central Europe during the nineteenth century. Seen from a constitutionalist perspective, many of the German constitutional monarchies were influenced by concepts that had much in common with constitutionalist thought. The most important of these concepts was the *Rechtsstaat:* a state based on "reason" and a strict regulation of government by law.

The concepts of a constitution and of fundamental laws have not had a constant meaning over time. Since the eighteenth century (though not before), it has become customary to translate Aristotle's word *politeia* as "constitution": "A constitution is the arrangement of the offices in a *polis*, but especially of the highest office." This definition precedes Aristotle's differentiation among six forms of government—those for the common good (monarchy, aristocracy, and "polity") and their perversions, which serve individual interests (tyranny, oligarchy, and democracy). Aristotle thus introduced substantive, not merely formal, criteria into his teachings about constitutional arrangements.

Cicero is usually credited with first giving the Latin term *constitutio* something like its modern meaning. About a mixed form of government, he said in *De Re Publica:* "This constitution has a great measure of equability without which men can hardly remain free for any length of time." Indeed, Roman law was characterized by constitutional notions. The constitution of the Roman republic, putting other substantive arrangements aside, was marked by the power of the plebs to pass on laws which bound the entire Roman people. While this republican prerogative of the plebs was later replaced by Senate lawmaking and eventually by the emperor's legislative monopoly, its status is perhaps best illustrated by Augustus's repeated refusal, on "constitutional" grounds, to accept extraordinary powers to renew law and morals. Though this Augustan reticence may have been a triumph of form over substance, "triumphs" of this kind have frequently illustrated how constitutional notions have become deeply entrenched.

In subsequent Roman usage the term *constitutio* came to identify imperial legislation that preempted all other law. The understanding of *constitutio* as signifying important legislation was retained during the Middle Ages in the Holy Roman Empire, in the church, and throughout Europe. A well-known English example is the Constitution of Clarendon issued by Henry II in 1164.

In England, the modern use of constitution as referring to the nature, government, and fundamental laws of a state dates from the early seventeenth century. In the House of Commons, in 1610, James Whitelock argued that the imposition of taxes by James I was "against the natural frame and constitution of the policy of this kingdom, which is ius publicum regni, and so subverteth the fundamental law of the realm and induceth a new form of State and government."

In Europe, perception that some laws were more fundamental than others were well established before the eighteenth century. MAGNA CARTA (1215), the PETITION OF RIGHT (1628), and the HABEAS CORPUS ACT (1679) are the best known English illustrations of this point. In addition, by their coronation oaths English kings obliged themselves "to hold and keep the laws and righteous customs which the community of [the] realm shall have chosen." Even if the law could not reach the king, the king was viewed as under the law (and, of course, under God). The bounds of the king's discretion were defined by the ancient laws and customs of England or, put differently, the COMMON LAW. By the seventeenth century, EDWARD COKE was even prepared to claim that acts of Parliament were subject to review under the common law (and natural law).

Though the status of French kings was considerably more mysterious and legal constraints on them were far fewer than in England, they too were viewed as subject to fundamental laws. The French Protestant political theorists of the sixteenth century expressed far-reaching views on the matter. François Hotman subtitled the XXVth chapter of the third edition of his *Francogallia* (1586): "The king of France does not have unlimited domain in his kingdom but is circumscribed by settled and specific law."

Beginning in the seventeenth century, the struggle over the limits of power, the ends of government, and the limits of obedience was frequently expressed in terms of social contract theory. Johannes Althusius, Hugo Grotius, JOHN

LOCKE, and Jean-Jacques Rousseau all influenced the civil struggles of their age. Although the differences among these writers are profound, all of them stipulate a SOCIAL COMPACT as the foundation for the constitutional arrangements of the state. While such a contract is not necessarily based on an assumption of popular sovereignty, a social contract without the assumed or actual consent of "the people" or their representatives is unthinkable. Once this notion spread widely, it was difficult to maintain the divine right of kings, and it became almost irresistible to relocate sovereignty in the people—Thomas Hobbes notwithstanding.

One must not confuse the concept of a social contract with that of a constitution. For the "contractarians," constitutions follow from the social contract; they are not identical with it. Although the social contract is mostly a logical stipulation, at times the contract seems real enough, embodying or justifying specific constitutional arrangements. The Glorious Revolution in England, the American Revolution, the French Revolution—all appealed to the social contract.

The Glorious Revolution, like the English Civil War before it, was seen in contractarian terms. The Convention Parliament of 1689 resolved that James II "having endeavored to subvert the constitution of the kingdom by breaking the original contract between king and people . . . has abdicated the government and the throne is hereby vacant." The Declaration of Rights of 1689 was part of Parliament's contract with William and Mary and, later that year, was incorporated into the act of Parliament known as the BILL OF RIGHTS. After reciting Parliament's grievances against the absolutist tendencies of James II, the Bill of Rights prohibited the suspension of the laws by regal authority; provided for the election and privileges of Parliament (including a prohibition of prerogative taxation); and dealt with the right to petition, excessive bail, and the jury system.

Although this catalogue of constitutional concerns is modest by contemporary standards, the Bill of Rights, in conjunction with other British traditions and the "mixed government" confirmed by the Glorious Revolution, led MONTESQUIEU to celebrate England as the one nation in the world "that has for the direct end of its constitution political liberty." Montesquieu concluded his chapter on "The Constitution of England" in *The Spirit of the Laws* with the wry comment that it was not his task to examine whether the English actually enjoyed this liberty. "Sufficient it is for my purpose to observe, that it is established by their laws; and I inquire no further." When Montesquieu's book was published in 1748, some questions about constitutional liberty in England might indeed have been examined. For instance, the right to vote was extremely restricted and even that small electorate was not consulted when, by the Septennial Act of 1716, Parliament extended its own duration by another four years. For the American colonists who fought more against the British Parliament than against their monarch, this example of the "sovereignty of Parliament" marked the limit of British constitutionalism. As JAMES MADISON wrote in THE FEDERALIST #53, citing the Septennial Act: "Where no constitution paramount to the government, either existed or could be obtained, no constitutional security similar to that established in the United States, was to be attempted."

American constitutionalism during the colonial and revolutionary periods included the notions of a constitution as superior to legislation and the notion of a written constitution. As concerns the "writing" of constitutions, Gerald Stourzh has remarked, for the period after 1776, that Americans clearly differentiated "between the functions of constitution-*making* (with an additional differentiation between drafting and ratifying functions), of *amending* constitutions, and of *legislating* within the framework of the constitution."

One formal element in the American colonies was bound to have a profound impact on American constitutionalism, especially its choice of written constitutions as the means for anchoring the organization of their governments and the protection of their rights and privileges. COLONIAL CHARTERS, fundamental orders, and other written documents were used in the establishment of the colonies. These contracts between rulers and ruled provided for the government of the colonies, secured property rights, and even extended the guaranteed liberties and privileges of the English constitution. The 1629 CHARTER OF MASSACHUSETTS BAY is an important early example.

Pennsylvania, however, provides the most vivid illustration of the essential features and conundrums of American constitutionalism. In England, in 1682, a "frame of government of the province of Pensilvania" was agreed to by the Governor, WILLIAM PENN, and "divers freemen" of the province. It was a revision of an earlier plan drawn up by Penn which he had called "Fundamental Constitutions of Pennsylvania." The frame of government was replaced by a new frame as early as 1683. Its place was taken in 1701 by the Pennsylvania Charter of Privileges, granted by Penn during his second visit to the province and formally approved by the General Assembly. (See PENNSYLVANIA COLONIAL CHARTERS.) Though the focus here is on the Charter of Privileges, William Penn's preface to the Frame of Government deserves quotation: "*Any government is free to the people under it* (whatever be the frame) *where the laws rule, and the people are a party to those laws,* and more than this is tyranny, oligarchy, or confusion." Having invoked the notions of government of laws and popular consent, Penn went on, however, to warn against excessive optimism about the RULE OF LAW: "Governments, like

clocks, go from the motion men give them; and as governments are made and moved by men, so by them they are ruined too." It is difficult to imagine a better reflection on the challenges faced by the American constitution makers of the eighteenth century.

The Pennsylvania Charter of Privileges of 1701 was a remarkable constitutional document. First of all, the charter itself was adopted in a constitutional manner, according to the provisions for amending the Frame of Government. Second, it began, not with the organization of government, but with an issue of fundamental rights: it guaranteed the freedom of conscience and made all Christians eligible for public office. Third, the charter provided for a unicameral representative assembly to be elected annually by the freemen with the right to initiate LEGISLATION and with all parliamentary powers and privileges "according to the Rights of the free-born Subjects of *England*, and as is usual in any of the King's Plantations in *America*." Fourth, far ahead of its time, it gave to all "criminals" "the same Privileges of Witness and Council as their Prosecutors." Fifth, it guaranteed the "ordinary Course of Justice" in all disputes concerning property. Sixth, the proprietor committed himself and his heirs not to breach the liberties of the charter; anything done to the contrary should "be held of no Force or Effect." Seventh, the liberties, privileges, and benefits granted by the charter were to be enjoyed, "any Law made and passed by this General Assembly, to the Contrary hereof, notwithstanding." Eighth, the charter could be amended only by a vote of "*Six* Parts of *Seven*" of the Assembly and the consent of the governor. Ninth, the guarantee of liberty of conscience was placed even beyond the power of constitutional amendment "because the Happiness of Mankind depends so much upon the Enjoying of Liberty of their Consciences."

This colonial charter, granted by a feudal landowner, embodies the most significant elements of American constitutionalism as it emerged in the course of the century—the concept of consent and the concept of a written constitution sharply differentiated from ordinary legislation and with provisions for its amendment and a bill of rights, however rudimentary. Indeed, by placing the liberty of conscience beyond the amending power it posed the ultimate conundrum of constitutionalism—the possibility of unconstitutional constitutional amendments.

The concept of consent had direct consequences for questioning the powers of Parliament over America and for the American understanding of REPRESENTATION. In terms of constitutionalism, the most important part of the long list of grievances against George III with which the DECLARATION OF INDEPENDENCE began (following the model of the Declaration of Rights of 1689) was the passage which stated that the king had "combined with others to subject us to a JURISDICTION foreign to our constitutions, and unacknowledged by our laws; giving his assent to their acts of pretended legislation." The nation began with an assertion of the right to consent.

In the decades of constitution-making following independence the main organizational task of American constitutionalism was to spell out in detail the implications of popular sovereignty for the structure of government. What, for instance, should follow from the famous formulation in the VIRGINIA DECLARATION OF RIGHTS, of June 12, 1776, "that all power is vested in, and consequently derived from, the people; the magistrates are their trustees and servants, and at all times amenable to them"? Four subjects were of overriding importance: the franchise; the separation of powers; the amending process; and the protection of individual rights.

Political status in the colonies had mostly depended on property ownership, and the Revolution had not done away with these requirements. The federal CONSTITUTIONAL CONVENTION OF 1787 could not agree on who should have the right to vote. Sovereignty of the people did not mean all the people. But who should have the right to vote was discussed frequently and with great seriousness. The voters of the Massachusetts town of Northampton, for instance, concluded in 1780 that restricting the franchise for the Massachusetts house to freeholders and other men of property was inconsistent with the concepts and principles of native equality and freedom, the social compact, personal equality, and no TAXATION WITHOUT REPRESENTATION. Their objections pertained only to elections to the house; indeed, they were based on the notion that in a bicameral legislature one chamber should represent property, the other persons. A few more decades had to elapse before property and taxpaying qualifications disappeared. The franchise was expanded in all Western societies in the course of the nineteenth century. The earliest and most inclusive expansion, however, came in the United States—although even here the vote was withheld from women, AMERICAN INDIANS, slaves, and, as a rule, free blacks.

The colonists widely believed that their governments were "mixed" in accord with the British model. A London compendium from 1755 said of the colonial governments: "By the governor, representing the King, the colonies are monarchical; by a Council they are aristocratical; by a house of representatives, or delegates from the people, they are democratical." While this was more an "ideal type" than an accurate description of the constitutional facts, the post-Revolution problem for those who had grown up within the tradition of mixed or balanced government was how to institute it under radically changed conditions. The question was not really whether to have balanced government, though some advocates of "simple" government existed.

The separation of powers doctrine, as put forward most influentially by Montesquieu, sought to limit power by separating factions and, to some extent, associating them with the executive and legislative functions of government. To Montesquieu the separation of powers was a necessary if not a sufficient condition of liberty. By 1776 the American constitutional problem had become not the separation of "powers" but the distribution of power flowing from a single source—the people.

Though the Americans continued to view the separation of powers as necessary to liberty and therefore indispensable to constitutionalism, they faced a formidable challenge in attempting to implement the concept. The towns of Essex County, Massachusetts, wrote "the Essex Result," a veritable dissertation on the subject in voicing their objections to the proposed Massachusetts constitution of 1778, which they considered insufficiently mindful of the separation of powers. They propounded the principle "that the legislative, judicial, and executive powers are to be lodged in different hands, that each branch is to be independent, and further, to be so balanced, and be able to exert such checks upon the others, as will preserve it from dependence on, or an union with them."

Practical problems were inevitable. The different powers of government do not imply clearly differentiated functions; they will necessarily be closely intertwined—especially if one adds the notion, urged in the Essex Result, of CHECKS AND BALANCES. In the major state constitutions enacted in 1776 and immediately after, the legislative branch usually dominated, but the constitutions distinguished conceptually between legislative, executive, and judicial functions. They made members of one branch ineligible to serve in the others, and they gave some measure of autonomy to the judiciary. However, with respect to such crucial features as the structure and election of the executive and the power of appointments, they differed radically one from the other.

As successful revolutionaries, the Americans faced a difficult political task. They needed to justify the power of the people to change their government and at the same time to assure the stability of the new order based on popular sovereignty. If, as a practical matter, consent meant consent by a majority, was that majority not also at liberty to change the states' new constitutions? If not, why not? Vattel had struggled valiantly to develop a satisfactory framework for thinking about constitutional change, though without much success. His argument in *The Law of Nations* that the legislative power could not amend the constitution is hardly a model of tight reasoning. Concluding his essay, Vattel observed: "However, in discussing changes in a constitution, we are here speaking only of the right; the expediency of such changes belongs to the field of politics. We content ourselves with the general remark that it is a delicate operation and one full of danger to make great changes in the State; and since frequent changes are hurtful in themselves, a Nation ought to be very circumspect in this matter and never be inclined to make innovations, except for the most urgent reasons or from necessity."

In America, THOMAS JEFFERSON was the foremost theorist of constitutional change. He believed that each generation has "a right to choose for itself the form of government it believes most promotive of its happiness. . . ." The same man who provided us with this theory of constitutional change wanted to be remembered in his epitaph for the VIRGINIA STATUTE OF RELIGIOUS LIBERTY (1786), which ended with a proviso that sought to secure the statute forever: we "do declare, that the rights hereby asserted are of the NATURAL RIGHTS of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right."

In a way, the matter was simple. Jefferson and many of his fellow citizens were for change, stability, and inalienable rights all at the same time. These disparate aims were somewhat reconciled in practice by having the constitutions provide for their own amendment and for bills of rights. This course had important practical implications: it legitimized the concept of constitutional change and thus dramatically reduced the need for revolutions; and it advised the majority that it had no power to regulate at will the structure of government or basic rights of individuals. Enlightened America was anything but unanimous on the status of specific rights. Not every state constitution had a bill of rights; those that did almost always included the liberty of conscience, FREEDOM OF PRESS, trial by jury, and protection of property. Some of the rights, as Penn and Jefferson suggested, were considered so fundamental that their amendment would conflict with the very nature of constitutional government.

The CONSTITUTIONAL CONVENTION OF 1787 and the main features of the federal constitution, after a decade of state constitutions, further defined American constitutionalism. The Constitution precariously provided for a mode of RATIFICATION hardly in accord with the ARTICLES OF CONFEDERATION. Among the ironies of history is the fact that the Constitutional Convention's preference for the convention method of ratification (rather than ratification by all state legislatures as required by the Articles) resulted in attaching to the Constitution, in 1791, a BILL OF RIGHTS, which the Framers of Philadelphia had considered unnecessary.

The most important aspect of the Constitution was its implementation of the goal "to form a more perfect Union." Carl J. Friedrich characterized the claim that FEDERALISM is an American invention a defensible overstatement. The Constitution's effort to delineate clearly the

powers of the federal government as against those of the states is remarkable indeed. Its main accomplishment was not to get bogged down by the metaphysics of sovereignty and to enable the federal government to legislate and tax in a manner binding the people directly, without using the states as intermediaries. This structure of "dual sovereignty" assured the viability of the federal government and, at least well into the twentieth century, the viability of the states. It underwent one substantial modification. When the "perpetual" nature of the Union was challenged over the issue of SLAVERY, constitutional amendments were enacted at the end of the Civil War for the primary purpose of securing equal rights to recently emancipated black citizens. These amendments eventually legitimized a great expansion of federal influence on the law of the states in the interest of greater equality for blacks and other minorities.

The constitutional organization of the federal government is delineated by the organization of the constitutional text. The PREAMBLE speaks of the people of the United States as ordaining and establishing the Constitution. The first (and presumably most important) article deals with the election and LEGISLATIVE POWERS OF CONGRESS. Article II vests the executive power in a President. Article III concerns the JUDICIAL POWER and its jurisdiction. Although this organization seems to provide us with a rather pure example of the separation of powers, the Constitution combines elements of separate and independent powers (such as an independent judiciary or a President not dependent on Congress for his term of office) with a thorough mixing of powers, best summarized by the concept of checks and balances.

Superficially, the legislative and executive branches seem to be assigned separate functions: lawmaking and law executing. The judicial branch, through dispute-settling, performs one part of the executive function under special conditions and special procedures. In reality, however, both the executive and the judiciary engage in lawmaking through interpretation and rule-making. The executive intrudes into the legislative function by exercising the VETO POWER. Congress, on the other hand, performs executive functions through legislative oversight, appropriations decisions, and confirming appointments. One might better forgo the Framers' own characterization of the system as one of separation of powers. American constitutionalism indulged itself in heaping checks upon checks so that the love of power of officials occupying the various branches of government could be harnessed.

On one of the most important of these checks and the most distinctly American contribution to constitutionalist doctrine, the Constitution of 1787 was silent. Nowhere does the constitutional text grant the power of JUDICIAL REVIEW of legislation. On the basis of the debates in the Constitutional Convention one can make a strong case that some of the most influential Framers thought that judicial review was implied, but this is not the same as saying that the Constitution implies it. How then did the American judiciary end up as the guardian of the Constitution?

There had been instances of courts exercising the power of judicial review as well as public debate of the issue in the new states. The case for judicial review was based on a peculiarly American amalgam of various strands of constitutionalism. First, there was the notion of a constitution as fundamental law. If Lord Coke could claim the common law as a basis for reviewing acts of Parliament, how much more plausible the claim that judges were bound to obey a fundamental charter viewed as supreme law. Second, if the constitutions derived their authority from the sovereignty of the people, and if legislators and other government officials were simply the people's trustees and servants, it was no great leap to reason that judges had to obey the will of the whole people as expressed in the constitution. Third, the special procedures for constitutional amendment typically denied the legislatures the power to amend by ordinary legislation, which suggested that attempts of that kind should go unenforced. Fourth, those constitutions containing bills of rights reenforced the notion of a constitution as superior law with the aim of protecting the rights of individuals against tyrannical majorities. Fifth, in the case of the federal constitution there was the added need to assure its status as supreme law throughout the Union. The arguments for and practice of judicial review of state legislation served to consolidate the understanding of the American Constitution as the supreme law of the land to which all government actors were subject.

Chief Justice JOHN MARSHALL in MARBURY V. MADISON (1803) to the contrary notwithstanding, the issue of judicial review was an intricate one. No simple constitutionalist syllogism could be constructed that invariably led one to conclude that judges had the power of judicial review. The amalgam, however, proved powerful under the conditions prevailing in the United States. When the Supreme Court went ahead and in effect appointed itself and the other judges guardians of the Constitution (in the case of the Supreme Court, eventually to become the preeminent guardian), the people, by and large, acquiesced.

The American institution of judicial review has influenced developments abroad. Various forms of constitutional review exist in Austria, Germany, India, Italy, Japan, and, now, even France—to name the most important. While their historical roots are many and their institutional characteristics diverse, the American model was highly visible when they came into being. One of the most instructive contemporary instances is that of the Court of Justice of the European Community. Starting with the

need of assuring the uniformity of Community law throughout the member nations, the Court of Justice has transformed the treaties underlying the European Community (especially the Treaty of Rome) into the constitution of the community. These are radical developments. The constitutionalization of the Treaty of Rome has led to the introduction of judicial review, or what one might more appropriately call Community review, even into countries that have not previously recognized the power of their courts to pass on the constitutionality of legislation.

As constitutionalism does not refer to having a constitution but to structural and substantive limitations on government, it would be a gargantuan task to determine its incidence in a world full of written constitutions, of which many do not mean what they say, while others do not accomplish what they mean. The need to distinguish between form and substance would necessitate impossibly vast empirical assessments. The distinction between form and substance would also make desirable a detailed examination of the legal situation in countries, such as Great Britain, that meet most substantive requirements of constitutionalism without a written constitution, an entrenched bill of rights, or the power of judicial review.

Constitutionalism matured in the context of the liberal democracies with their emphasis on civil and political rights and their attempts clearly to define the public and the private sphere. The rights guaranteed, with the exception of certain rights to participate in the exercise of governmental power, were rights of the citizen against infringement by government of his own sphere, or "defensive" rights (German constitutional law has coined the term *Abwehrrechte* for this category). The eighteenth- and nineteenth-century constitutions do not contain social rights aimed at guaranteeing citizens a fair measure of well-being. A notable aspect of the Weimar constitution was its effort to formulate rights that would guarantee everyone a worthwhile existence. As the concept of CITIZENSHIP expanded from the formal equality of sharing legal capacities to the substantive equality of sharing goods, the contemporary welfare state became clearly committed to some undefined (and probably undefinable) minimum of such substantive equality. The predominant means for accomplishing such goals has been legislation rather than constitutionalization. Certain legislation of this kind has been viewed by some as in actual conflict with the constitutionalist scheme. This alleged conflict has, in turn, led to substantial efforts in the United States and other countries to reinterpret the liberal constitutions as not only permitting but demanding government intervention on behalf of the underprivileged.

In conjunction with these difficulties, but by no means restricted to them, American constitutional scholarship engages in periodic debates about methods of CONSTITUTIONAL INTERPRETATION. Much of the discussion reinvents the interpretive wheels of earlier generations. Its main focus is the degree of fidelity which may be owed the words of the Constitution and the intentions of its Framers. Some contemporary writing argues that the Constitution can incorporate contemporary value preferences of a highly subjective kind. The tension is between the need to expound an essentially unaltered eighteenth-century Constitution in a manner consistent with "the progress of the human mind," on the one hand, and the danger of dissolving the Constitution in the process. The dispute is further complicated by endless varieties of highly refined theories concerning the proper scope of judicial review.

Over its two hundred years the American Constitution has been assigned the role of a national ideology. It has performed this role for a people that has grown from a few million to almost 250 million citizens of very diverse background. While the historical disinclination to amend the Constitution by means other than judicial review may help account for its durability, it has also subjected the Constitution to considerable strain. As the secular equivalent of the Bible, as Walton Hamilton observed, "it became the great storehouse of verbal conflict, and rival truths were derived by the same inexorable logic from the same infallible source." More often than not, Americans invoke constitutional principles in order to understand and resolve conflicts. This fact attests to the extraordinary vitality of American constitutionalism. It may also endanger its viability. Too frequent crossings of the line between "constitution as ideology" and "ideology as constitution" will blur the line. The American concept of the legitimacy of government is closely tied to the Constitution. Its limitless manipulation may endanger the very legitimacy that has been the great accomplishment of American constitutionalism.

GERHARD CASPER
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Bibliography

ADAMS, WILLI PAUL 1980 *The First American Constitutions.* Chapel Hill: University of North Carolina Press.

BAILYN, BERNARD 1967 *The Ideological Origins of the American Revolution.* Cambridge, Mass.: Belknap Press.

COOKE, JACOB E., ed. 1961 *The Federalist.* Middletown, Conn.: Wesleyan University Press.

DICEY, A. V. (1885) 1959 *Introduction to the Study of the Law of the Constitution.* London: Macmillan.

FRANKLIN, JULIAN H., ed. 1969 *Constitutionalism and Resistance in the Sixteenth Century.* Indianapolis: Bobbs-Merrill.

FRIEDRICH, CARL J. 1941 *Constitutional Government and Democracy.* Boston: Little, Brown.

——— 1967 *The Impact of American Constitutionalism Abroad.* Boston: Boston University Press.

HAMILTON, WALTON H. 1931 Constitutionalism. Pages 255–258 in Edwin R. A. Seligman et al. (eds.), *Encyclopedia of the Social Sciences.* New York: Macmillan.

MAITLAND, F. W. 1926 *The Constitutional History of England.* Cambridge: At the University Press.

MCILWAIN, CHARLES HOWARD (1940) 1947 *Constitutionalism: Ancient and Modern.* Ithaca, N.Y.: Cornell University Press.

PENNOCK, J. RONALD and CHAPMAN, JOHN W., eds. 1979 *Constitutionalism.* New York: New York University Press.

PERRY, RICHARD L., ed. 1972 *Sources of Our Liberties.* New York: New York University Press.

STOURZH, GERALD 1977 The American Revolution, Modern Constitutionalism, and the Protection of Human Rights. Pages 162–176 in Kenneth Thompson et al. (eds.), *Truth and Tragedy: A Tribute to Hans J. Morgenthau.* Washington, D.C.: New Republic Book Co.

WOOD, GORDON S. 1969 *The Creation of the American Republic 1776–1787.* New York: Norton.

WORMUTH, FRANCIS D. 1949 *The Origins of Modern Constitutionalism.* New York: Harper.

## CONSTITUTIONALISM AND THE AMERICAN FOUNDING

Between 1776 and 1789 the American people constituted themselves a nation by creating republican governments in the thirteen former English colonies and then, in the CONSTITUTIONAL CONVENTION OF 1787, by transforming the Union of confederated states into a genuine law-giving government. The novelty of this achievement was epitomized in the seal of the new nation, which, by incorporating the phrase "Novus Ordo Seclorum," announced "a new order of the ages." Yet in founding political societies Americans pursued a goal that had occupied Western man since antiquity: the establishment of government power capable of maintaining the stability and order necessary to realize the purposes of community, yet so defined and structured as to prevent tyranny. This age-old quest for the forms, procedures, and institutional arrangements most suitable for limiting power and implementing a community's conception of political right and justice, we know as CONSTITUTIONALISM.

Constitutionalism takes as its purpose resolution of the conflict that characterizes political life and makes government necessary, through procedures and institutions that seek to limit government and create spheres of individual and community freedom. Based on the paradoxical idea that the power to make law and to rule can be at once sovereign and effective, yet also defined, reasonable, and responsible, constitutionalism contains an inherent tension that sets it against utopianism and anarchism, which deny the reality of power, and against absolutism and totalitarianism, which tolerate no limitations on power. Nevertheless, although constitutionalists can in retrospect be seen as sharing common assumptions, differences among them have sometimes led to irreconcilable conflict. One such division occurred in the eighteenth century when the American people separated from the English and adopted a new type of constitutional theory and practice for the conduct of their political life.

Perhaps the most obvious feature of American constitutionalism was its apparent dependence upon legally binding written instruments prescribing the organization of government and fixing primary principles and rules to guide its operation. Texts had of course long been used in law, government, and politics, and the English constitution comprised written elements. Americans' resort to documentary, positive law techniques of government was so much more systematic and complete than any previous undertaking, however, as to amount to constitutional innovation. Following the American example, peoples everywhere in the modern world have adopted the practice of forming governments by writing constitutions. But Americans in the founding era did more than invent a new approach to the old problem of limited government. Their constitution-making was informed with a new purpose—the liberal purpose of protecting the NATURAL RIGHTS of individuals. American charters of FUNDAMENTAL LAW were not simply ordinances of government; they were also constitutions of liberty. The meaning of liberty, especially the relation between the individual and the community that was central to any practical definition of it, was a deeply controversial issue that divided Americans in state and national constitution-making. The adoption of the federal Constitution in 1787, however, marked a decisive shift toward protection of individuals in the pursuit of their interests, and away from enforcement of community consensus aimed at making citizens virtuous and moral as the central purpose of constitutional government in America.

American constitutionalism is thus concerned with organizational and procedural matters, on the one hand, and with substantive questions of political purpose, on the other. Most constitutional politics in the United States deals with the former concern, as groups and individuals assert or deny the existence of proper governmental power or challenge methods used to employ it. Nevertheless, constitutionalism is ultimately normative and purposive. Every state may be said to have a constitution, in the sense of an institutional structure and established procedures for conducting political affairs. But not every state is a constitutional state. In the Western political tradition constitutional government exists where certain forms and procedures limit the exercise of power. American constitutionalism goes farther by pursuing not only the negative goal of preventing tyranny but also the positive end of promoting individual liberty, both in the passive sense of

protection against government power and in the active sense of participation in the decisions of the political community. Viewed in this light, American constitutionalism raises basic questions of political purpose that connect it with the mainstream of Western political philosophy.

In the history of constitutionalism the great problem has not been to create power but to define and limit it. The Western constitutional tradition has employed two methods toward this end. The first is the theory and practice of arranging the internal structure of government so that power is distributed and balanced. A second method of constitutionalism has been to subject government to legal limitations, or the RULE OF LAW.

English constitutionalism in the period of American colonization comprised both strands of the constitutional tradition. The common law courts in the early seventeenth century insisted on the superiority of law to the royal prerogative. Sir EDWARD COKE gave famous expression to the idea of a higher law controlling government in asserting that "sovereign power' is no parliamentary word. . . . MAGNA CARTA is such a fellow, that he will have no sovereign." Coke also said that "when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void." Parliament itself, however, subsequently claimed supremacy in lawmaking, and vindication of its authority in the Glorious Revolution of 1688 effectively precluded development of the rule of law into a politically relevant form of HIGHER LAW constitutionalism. An internally balanced institutional structure, expressed in the revised and revitalized theory of mixed government in the eighteenth century, became the principal model of constitutional government in England.

Essentially descriptive in its connotation, the English constitution was the structure of institutions, laws, conventions, and practices through which political issues were brought to resolution and carried out in acts of government. Yet the constitution was also prescriptive or normative, or at least it was supposed to be. More specifically, as Montesquieu, WILLIAM BLACKSTONE, and other eighteenth-century writers affirmed, the end of the English constitution was civil and political liberty. From the standpoint of modern constitutionalism the legislative supremacy that contemporaries regarded as the foundation of English liberty was incompatible with effective restraints on governments. Nevertheless, Parliament was believed to be under a moral obligation to protect the rights and liberties of Englishmen, and the sanctions of natural law were still seen as effective restraints. Moreover, political accountability to public opinion through elections operated as a limitation on government. Englishmen thus continued to see their constitution as fixed and fundamental, notwithstanding legislative SOVEREIGNTY.

American constitutionalism began in the seventeenth century when English settlers founded political societies and institutions of government in North America. Two things stand out in this early constitutional experience. First, the formation of government was to a considerable extent based on written instruments. In corporate and proprietary colonies the founding documents were COLONIAL CHARTERS granted by the crown conferring enumerated powers on a particular person or group within a designated geographical area for specific purposes. Under these charters the colonists adopted further agreements, organic acts, ordinances, combinations, and frames of government giving more precise form to political institutions. In religiously motivated colonies government was more clearly the result of mutual pledging and association under civil-religious covenants. American colonists thus used constitutionlike instruments to create political community, define fundamental values and interests, specify basic rights, and organize governmental institutions.

The second outstanding fact in early American constitutional history was substantial community control over local affairs. To be sure, the colonies employed the forms and practices of English government and generally emulated the metropolitan political culture. Their institutions at the provincial and local level were patterned after English models, and the theory of mixed government and the balanced constitution was accepted as valid. Yet discordant tendencies pointed to a distinctive course of constitutional development. The fact that in most colonies the power of the governor depended on royal authority while the power of the assembly rested on a popular base, as well as frequent conflict of interest between them, made separation and division of power a political reality discrepant with the theory of mixed government. Furthermore, popularly elected assemblies responsive to growing constituencies and enjoying de facto local sovereignty under written charters introduced a republican element into American politics.

As English subjects, Americans believed they lived under a free and fixed English constitution. Long before the Revolution they expressed this view in the course of conflicts with imperial officials. Numerous writers asserted that the constitution was a SOCIAL COMPACT between the people and their rulers; that the legislature could not alter the fundamental laws from which government derived its form, powers, and very existence; that government must exercise power within limits prescribed by a compact with the people. Moreover, the compact chosen to organize and direct government, as a colonial sermon of 1768 put it, must coincide with "the moral fitness of things, by which alone the natural rights of mankind can be secured." Disputing the descriptive English constitution that included parliamentary sovereignty, Americans were coming to

think of a constitution as normative rules limiting the exercise of power for the purpose of protecting the people's liberty, property, and happiness.

In declaring their independence from England, Americans in a sense reenacted the founding experience of the seventeenth century. They took what their history and political circumstances determined to be the logical step of writing constitutions to organize their political communities. Before issuing the DECLARATION OF INDEPENDENCE, Congress recommended that the colonies adopt governments that "in the opinion of representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general." Although some argued that the people acting in convention should form the government, political exigencies and Whig political theory conferred legitimacy on legislatures which, in all but two instances, were responsible for writing or adopting the first state constitutions.

The most distinctive feature of the state constitutions, their documentary character, followed the decision to form new governments as a matter of course. Given the long tradition of founding documents in America, it seemed obvious that the purposes of political community and limitations on government could be better achieved by writing a constitution than by relying on an unstipulated, imprecise constitution like England's, which did not limit government and was not really a constitution after all. Although consisting in part of written documents, the English constitution was too subjective, ultimately existing in men's minds and premised on the idea that "thinking makes it so." Americans insisted that the principles and rules essential to organizing power and preserving liberty be separated from the government and objectively fixed in positive form. Old in the tendency it reflected, though new in its comprehensive application, American constitutionalism rested on the idea that "saying it makes it so," or at least the hope that putting something in writing so it can be authoritatively consulted makes it easier to achieve specified ends.

The state constitutions stood in a direct line of descent from colonial documents that created political communities and established institutions of government. One type of founding document (compact or covenant) signified mutual promise and consent by which individuals formed a political community and identified basic values, rights, and interests. A second type of document (ordinance or frame) specified governmental institutions. Half the state constitutions written between 1776 and 1789 were described as compacts and contained bills of rights that defined basic community values. In the other constitutions the design of government received principal attention. All the constitutions reflected tendencies of previous political development; none created institutions on a completely clean slate. This fact appeared more clearly in documents that were mainly concerned with establishing a framework of government. In these more modern documents, which anticipated the course of American constitutional development, community consensus yielded in importance to protection of individual rights as the main purpose of constitution-making.

Republicanism was the political philosophy of the AMERICAN REVOLUTION. Although lacking in precise meaning, the concept is most accurately defined as government resting on the consent of the people and directed by the public will expressed through representative institutions. In the perspective of Western political thought republican philosophy was formulated in the seventeenth century to defend liberty against absolutism. The state constitutions were republican insofar as they limited government by prescribing public decision-making procedures that prevented government officials from aggrandizing power for private benefit rather than for the public good. The constitutions were liberal also in confirming and extending the right of political participation that according to republican philosophy constituted true liberty for individuals. In many respects, however, state constitutionalism in the revolutionary era was a doctrine of community power and control that restricted individual rights in a way that would now be seen as illiberal.

Under the state constitutions the most important power in modern government—the power to make law and to compel obedience—was lodged in the legislature. Unimpeded by internal governmental checks under the extreme version of the SEPARATION OF POWERS that prevailed in the first phase of state making, and sustained by presumptive identity with POPULAR SOVEREIGNTY as the source of political authority after the rejection of monarchy, legislatures acted forcefully to promote public virtue and the common good. Requirements of public virtue frequently took the form of restrictions on individual liberty through sumptuary laws and statutes regulating the transfer and use of property. Bills of rights that were part of state constitutions had little effect on curbing legislative power because they were treated as hortatory rather than legally binding. In the name of popular sovereignty and patriotism, state legislatures fashioned a constitutionalism of unity and power in government.

The concentrated power of republican virtue acting through institutions of community control was a useful and perhaps necessary expedient in the wartime emergency. In the doctrines of state sovereignty and the POLICE POWER revolutionary republicanism entered into the American constitutional tradition, and has offered a compelling model of constitutional government throughout our history to reformers and radicals on both the left and the right. However, the actions of the state legislatures too

plainly contradicted the constitutional meaning of the Revolution to become accepted as the principal or exclusive expression of American constitutionalism. That meaning was nowhere better stated than by the MASSACHUSETTS CIRCULAR LETTER of 1768, which declared: ". . . in all free States the Constitution is fixed; as the supreme Legislative derives its Power & Authority from the Constitution, it cannot overleap the Bounds of it, without destroying its own foundation." Yet this was precisely what was happening in the American republics.

The state constitutions may have been fundamental law in the sense of ordaining a framework of government, but they were not fundamental in the sense of controlling legislative power. In all but two states the constitution was written by the legislature and could be altered or abolished by that body. More than language of urging and admonition, contained in many of the constitutions, was needed to transform them into effective restraints on the actual exercise of power. Nor was the technique of internal institutional balance effectively employed to limit the state legislatures.

Attempts to restrict state legislative power in the 1780s broadened and reformed American constitutionalism. Writing and amending of constitutions by popularly elected conventions clarified the distinction between legislative law and fundamental law. Massachusetts in 1780 and New Hampshire in 1784 wrote their constitutions in conventions and required them to be ratified by the people in special elections. In theory this was the most effective way to make the constitution an antecedent higher law secure against legislative alteration. Further restriction of legislative power resulted from changes in the internal structure of government. Executive officers were given greater powers as CHECKS AND BALANCES—that is, a partial and limited sharing or mixing of functional powers among the departments—were introduced in some states as modification of the separation of powers. BICAMERALISM, a carry-over from colonial government, was recognized as a means of making legislative action more deliberate. And courts began to play a more prominent political role by treating constitutions as higher law in relation to legislative enactments.

So strong was the tradition of community self-government under legislative sovereignty, however, that it could not easily be dislodged as the main reliance of constitutionalism. Certainly little could be done to alter it by isolated efforts in the several states. Effective reform, if that was what was needed, could only come from an interstate collaboration working through the state system created by the colonies when they declared their independence. Heretofore peripheral to republican political development, the Union of the states in the Confederation became the focus of constitutional change.

The CONTINENTAL CONGRESS had been formed by the colonies in 1774 as a coordinating and advisory body to protect American interests and eventually to pursue the cause of national independence. Exigencies of war and common concerns among the states had given Congress political power, which it had exercised through informal rules and practices that were codified in the ARTICLES OF CONFEDERATION. Considered from a constitutional perspective as a limiting grant of power, the Articles were inadequate because, although they gave Congress ostensible power to do many things, they did not confer the lawmaking authority that is essential to government. Congress could at best make resolutions and recommendations, which in practice amounted to requests that the states could ignore. The Articles were unconstitutionlike in consequence of having been written by Congress and ratified by the states, rather than based in any direct way on popular authority. They were also unconstitutionlike with respect to institutional structure. Whether considered analogous to a legislative or executive body, Congress was the sole governmentlike organ, and only an evolving departmental system saved it from complete incompetence.

As an alliance or league of friendship, the Articles were a successful founding instrument. Yet in the form given it in the Articles, the confederation was incapable of addressing in a constructive manner the defects in American government revealed in the actions of the states. The confederation provided a field of political action, however, on which the reform of republican constitutionalism could take place. The practical impossibility of amending the Articles so as to strengthen Congress having been demonstrated, and the insecurity of liberty and property in the states apparently increasing, proponents of constitutional reform made a desperate move—the calling of a convention of the states at Philadelphia in May 1787—into an enduring achievement of statesmanship and constitutional invention.

Perhaps most significant, the Framers gave institutional expression to the idea that a constitution, in order to function as a limiting grant of power, must be higher as well as fundamental law. In addition to originating or organizing power, it must be maintained separate from and paramount to government. In a formal sense the Constitution as a founding document was superficially similar to the state constitutions. A preamble explained the reasons for the document, proclaimed the existence of a people and political community, defined specific purposes, and ordained a framework of government. In reality, however, the Framers departed from the model of the state constitutions. It was unnecessary to return to the fundamentals of the social compact and the purposes of republican government, as state constitution writers to varying degrees

were inclined to do. The authors of the Constitution observed that they were not addressing the natural rights of man not yet gathered in society but natural rights modified by society and interwoven with the rights of the states. They knew that the nation whose existence they were recognizing was loosely related in its constituent parts and united by few principles and interests. It was far from the kind of cohesive, integrated community that the states by contrast seemed to be, and most unlike the nation-states of Europe. Hence the Framers briefly addressed in the PREAMBLE those few basic unifying purposes and values—liberty, justice, domestic peace, military defense, the general welfare—and gave virtually the entire document to stipulating the institutions and procedures of government. As fundamental law the Constitution thus was less a social compact for a coherent, like-minded community and more a contractlike specification of the powers, duties, rights, and responsibilities among the diverse polities and peoples that constituted the American Union.

Far more effectively than writers of earlier founding instruments, the Framers made the Constitution a paramount, controlling law. In a practical sense this was merely a question of law enforcement. Creating a real government to operate directly on individuals throughout a vast jurisdiction raised a new and potentially difficult compliance issue, but this received little attention at the Convention. It was the old compliance problem of the states that stood in the way of making the Constitution binding and effective. At first the delegates considered a congressional veto on state legislation to deal with this issue, but this was rejected as impracticable and was replaced by the SUPREMACY CLAUSE. This clause expressed the paramountcy of the federal Constitution over the states, and by inference, over national legislative law as well. Not explicitly stated, but implied in the judicial article, was the idea that the superior force of the Constitution depended on its application and interpretation by the courts.

The higher law character of the Constitution was further affirmed and institutionalized in the method of its drafting and in provisions for its ratification and amendment. Although delegates to the Philadelphia Convention were appointed by the state legislatures rather than elected by the people, the Constitution was a more genuine expression of the will of the people than were the Articles of Confederation, which were written by Congress. The Framers' apprehension about unlimited popular rule does not gainsay their commitment to the republican idea that government derives its just powers from the consent of the governed. Consistent with this commitment, institutions of direct popular consent that were still exceptional at the state level were incorporated into the national constitution. Ratification would be decided by conventions in the states, presumably popularly elected. Amendment of the Constitution could occur through popular approval, in state legislatures or special conventions, of proposals recommended by Congress or by a convention to be called by Congress on the application of two-thirds of the state legislatures. The superiority of the Constitution to legislative law was enhanced by this provision for amendment, as an utterly fixed and inflexible political law would become irrelevant to the task of governing an expanding society. If the Constitution required change, however, the people would have to amend it. Thus were popular sovereignty and the higher law tradition incorporated into American constitutionalism.

To make the Constitution paramount law in operational fact, however, it was not enough to assert its supremacy and assume that the people's innate law-abidingness would give it effect. This was to rely on "paper barriers," concerning the efficacy of which there was much skepticism among the Framers. It was necessary also to structure the organs of government so that power would be internally checked and limited. Although the Framers' objective was to create coercive authority where none existed, they rejected concentrated sovereign power as a constitutional principle. Delegated, divided, reciprocally limiting power formed the motif of their institutional design.

Unlike the state constitutions, which organized the inherent plenary power of the community, the Constitution delegated specific powers to the general government. The contrast was most significant in the plan of the legislative department, to which the state constitutions assigned the LEGISLATIVE POWER and which the federal constitutions defined by the ENUMERATED POWERS. Stable and energetic government seeming to require a strong executive and independent judiciary, the Constitution made grants of power of a more general nature to these branches, which under the separation of powers were counterweights to the lawmaking department. The separation principle by itself, however, as the state experience showed, was not a sufficient limitation on legislative power. Accordingly, checks and balances, by which each branch was given a partial and limited agency in the others' power (for example, executive participation in legislation through the VETO POWER or legislative judging in the IMPEACHMENT process) built further restraints into the Constitution.

The structure of the Union, of course, presented the most urgent question of institutional arrangements affecting the constitutional reality of a supreme political law. A division of power was already evident in the plan of the Articles of Confederation; what was needed was to transform the Union's political authority into a genuine power to impose lawful requirements on its constituent parts. This was achieved by reconstituting the Confederation as a compound republic, based on both the people and the states. Once this was accomplished, the pertinent fact for

the paramountcy of the Constitution was the division of sovereignty. By giving the central government power over objects of general concern and allowing the states to retain almost all of their authority over local matters, the Framers divided sovereignty, thereby effectively eliminating it from the constitutional order. Arguments were certain to arise about the nature and extent of the powers of the several governments in the American state system, but the effect of such controversy would be to focus attention on the Constitution as the authoritative source of answers to questions about the rights of constituent members.

The Constitution was both fundamental and higher law because it expressed the will of the people, the ultimate source of authority in America. But it would truly limit power only if it was superior to the people themselves as a political entity, as well as to the legislative law. At the time some theorists of popular sovereignty argued that the people could alter their government at will, exercising the right of peaceful revolution and disregarding legalities of form and procedure, even as the Framers did in drafting and securing RATIFICATION OF THE CONSTITUTION against the express requirements of the Articles of Confederation. However we view their action, the authors of the Constitution rejected the notion of unlimited popular sovereignty. They provided restraints on the people in the form of a limited number of offices, long terms of office, indirect elections, large electoral districts, and separated and balanced departments of government. Although these provisions have often been viewed as antidemocratic and in conflict with republican theory, they are more accurately seen as modifying the popular form of government adopted during the Revolution. The Framers' intent, as JAMES MADISON wrote in THE FEDERALIST #10, was to supply "a republican remedy for the diseases most incident to republican government." And it should not be forgotten that despite careful distribution and balancing of authority, Congress remained potentially the most powerful branch of the government, most responsive to the people and possessed of the lawmaking power.

Making the Constitution effective as a permanent higher law involved matters of form, procedure, and institutional structure. Yet as procedural issues carry substantive implications, and means sometimes become ends in themselves, it is also necessary to ask what a constitution is for. To prevent tyranny, the constitutionalist goal, is to create a space in which differences among people become manifest, in which politics can appear and questions of purpose arise. If running a constitution always reflects political concerns, making a constitution is all the more a form of political action that derives from or partakes of political philosophy.

Americans were emphatic in declaring liberty to be the purpose of their constitutions. Moreover, if the purpose of politics is to protect men's natural rights, then American constitutions were liberal in purpose. Yet the concept of liberty, universally embraced as a political good, can be defined in different ways. And while recognition of natural rights gave modern politics a new purpose, it is equally true that virtue and moral excellence did not disappear from political discourse. These considerations give rise to two conceptions of political freedom in the constitutionalism of the founding period. The first is the liberty of self-governing political communities that were thought to have an obligation to make men virtuous and on which individuals depended for their happiness and well-being. The second rests on the primacy of natural rights and generally asserts individual liberty over community consensus as the purpose of government.

Although these conceptions of liberty stand in theoretical opposition to each other, they coexisted in the revolutionary era. After protesting imperial policies in the language of English constitutional rights, Americans justified national independence by appealing to universal natural rights. Wartime exigencies required decisive political action, however, which was based on the right of local communities to control individuals for the sake of the common good. States interfered with the liberty and property of individuals by controlling markets, restricting personal consumption, awarding monopoly privileges, and limiting imports and exports. They also regulated the speech and press freedoms of persons suspected of disloyalty to the patriot cause. In many ways revolutionary republicanism subordinated the rights of individual citizens to those of the community, defining true liberty as the pursuit of public happiness through political action.

Reacting against state encroachments on liberty and property, the constitution makers of 1787 emphasized protection of individual rights rather than promotion of virtue and community consensus as the purpose of government. Rather than an unattainable ideal of public virtue in ordinary citizens, they appealed to enlightened self-interest as the social reality on which the Constitution would rest. The Framers recognized factional conflict as a limiting condition for creating a constitution, yet also as an opportunity for broadening and redefining republican government. Alongside the communitarian ideal, which remained strong in many states, they created a new constitutional model in the complex and powerful government of the extended republic, based partly on the people yet so structured and limited that individual liberty, property, and pursuit of personal interests would be substantially protected against local legislative interference. This is not to say that mere private enrichment at the expense of the community good or general welfare was the end of the Constitution. The concepts of virtue and the public interest remained integral to political thought and dis-

course. But virtue assumed a new meaning as the prudent and rational pursuit of private commercial activity. Instead of telling people how to live in accordance with a particular conception of political right or religious truth, the Framers would promote ends believed beneficial to all of society—peace, economic growth, and intellectual advancement—by accommodating social competition and upholding citizens' natural rights against invasion by the organized power of the community, whether local, state, or national.

The Founding Fathers often appear antidemocratic because they created a strong central government, removed from direct popular and local community control, which they expected to be managed by an aristocratic elite. Notwithstanding its foundation in popular sovereignty and protection of individual liberty and rights, the Constitution contradicted rule by local communities guided by republican civic virtue as the real meaning of the Revolution. Although the Revolution stood for government by consent, there is no sound reason for regarding revolutionary state making as the single true expression of the republican principle. Essential parts of that principle were that government should operate through laws to which all were subordinate, both citizens and government officials, and that legislative law should be controlled by the higher law of the constitution. This was the meaning of the rule of law in the United States, and its more complete realization in the Constitution of 1787 signified climax and fulfillment of the Revolution.

The Framers' purpose must also be considered in relation to the threat of national disintegration, either from internal discord or foreign encroachment. The weakness of Congress in discharging its responsibilities was surely an impediment to protecting American interests, and an embarrassment to patriotic men. Yet the problem in 1787 was not the threat of total rupture of the Union attended by actual warfare among the states; the problem was the character of American politics and government, or the nature and tendency of republican government. Republicanism was the defining idea of the nation, and without it America would no longer have existed. The country was growing in the 1780s as population expanded, economic development occurred, and westward settlement continued. Yet the state system of 1776 was incapable of adequately accommodating and guiding this development. The states were too strong for the good of republican principles, the Union not strong enough. By restructuring the state system, by reconstituting the Union on the basis of a republican constitution that crystallized tendencies in congressional-state relations in the 1780s, the Framers sought to reform American government to the end of securing the republican ideals of the Revolution.

A constitution must recognize and conform to a people's principal characteristics and nature. Considered from this point of view the achievement of the Founding Fathers is undeniable. They created a complex government of delegated and dispersed, yet articulated and balanced, powers based on the principle of consent. Confirmation of that principle was in turn required by the Constitution in the cooperation and concurrence among the branches of government that were necessary for the conduct of public business. Made for an open, acquisitive, individualistic, competitive, and pluralistic society, the Constitution ordered the diverse constituent elements of American politics. More than merely a neutral procedural instrument for registering the play of social forces, it was a statement of ends and means for maintaining the principles that defined Americans as a national people. The Framers made a liberal constitution for a liberal society.

The Constitution was not only formally ratified but also quickly accorded full political legitimacy. The state constitutions, although not merely pretextual or façade documents, were not invoked and applied in the actual conduct of government as the United States Constitution was. And the new federal instrument was more than accepted: it rapidly became an object of veneration. The Constitution took a deep and abiding hold on the American political mind because it reflected a sober regard for the propensities of ordinary human nature and the realities of republican society; created powerful institutions capable of attracting men of talent, ambition, and enlarged civic outlook; and introduced changes in the conduct of public affairs that most people saw as improvements and that caused them to form an interest in the government it created.

The Constitution stipulated institutions, rules, and procedures embodying and symbolizing the principles of republican liberty, national unity, and balance and limitation of power. It was a fixed, objective document that could be consulted and applied, not a formless assemblage of principles, statutes, and decisions carried about in men's minds and dependent on social internalization for its effect. Yet the Constitution's principles and provisions were general and ambiguous enough to allow varying interpretations. Liberty, union, and reciprocally limiting power meant different things to different people, as did the rules and institutional arrangements expressing and embodying them. At a superficial level this circumstance produced conflict, but at a deeper level the effect was unifying. For groups and individuals were encouraged to pursue political goals within the framework of rules and requirements established by the Constitution. Thus the document became permanent and binding. Only the most extreme groups (radical abolitionists and slaveholders in the nineteenth century, totalitarian parties in the twentieth) have repudiated the Constitution as a framework for political action.

The Constitution possessed force and effect because it was useful and relevant to political life. Responsive to the social environment, it had instrumental value. At the same time, repeated reference to the document as the source and symbol of legitimate authority confirmed its intrinsic value, apart from the practical results of specific controversies. People believed, in other words, that it was important to follow the Constitution for its own sake or for the common good, rather than for a particular political reason. The intrinsic value of the Constitution lay not only in the wisdom and reasonableness of its principles in relation to the nature of American society but also in the form those principles were given in a written instrument. The effect of the Constitution as binding political law has much to do with its textual character.

The Framers addressed this issue in discussing "parchment barriers." The state constitutions were evidence that written stipulations were no guarantee of performance, especially when it came to limiting legislative power. Madison in particular said that it was not enough to erect parchment barriers in the form of constitutional provisions stating that the legislative department must confine itself to lawmaking. It was further necessary to arrange the interior structure of government so the constituent parts would limit each other. Personal motives of ambition and interest, Madison reasoned, when linked with constitutional offices would lead men to resist encroachments from other departments. These were the "auxiliary precautions" (supplementing accountability to the people) that would oblige government to control itself. Madison was saying that pluralistic differences in opinion and interest are necessary to make the prescriptions of the text function effectively.

Nevertheless, American constitutionalism insists that the text of the fundamental law be given its due. Madison's auxiliary precautions are in fact rules written into the document. Although the written text may not be sufficient, it is necessary to achieve the purposes of constitutionalism, or so it has seemed most of the time to most Americans. In the Constitutional Convention RUFUS KING said that he was aware that an express guarantee of STATES' RIGHTS, which he favored, would be regarded as "a mere paper security." But "if fundamental articles of compact are not sufficient defence against physical power," King declared, "neither will there be any safety against it if there be no compact."

Reference to the constitutional text has been a fixed feature of American politics. Its significance and effect have been variously estimated. A long tradition of criticism holds that the document has failed to limit government, especially the federal government in relation to the states. Others argue that constant invoking of the Constitution has trivialized politics by translating policy debate into legalistic squabbles that discourage dealing with issues on their merits. Reformers seeking a more programmatic politics have lamented that the Constitution by fragmenting power prevents responsible party government. And still others contend that the Constitution has worked precisely as intended: to eliminate genuine political action and make citizens passive subjects interested in private economic pursuits rather than public happiness and civic virtue.

These criticisms misunderstand the nature of constitutional politics and hence the binding and configurative effect of the Constitution. If politics is concerned with the end or purpose of political community, the proper role of government, the relationship between the individual and society, then it is difficult to see how the Constitution can be said to have brought an end to politics or prevented political action. As an expression of modern liberalism, however, the Constitution did signify a change in the nature of politics. To elevate natural rights into constitutionally protected CIVIL RIGHTS, as the Framers did, was to discourage an older politics based on the pursuit of glory, honor, conquest, and political or religious truth, as well as a newer ideological politics born of modern revolution. The Framers' constitutionalism was a way of organizing political life that paradoxically placed certain principles, rules, and procedures beyond politics, according them the status of fundamental and paramount law. Premised on the idea that citizens could pursue private interests while preserving community, it was intended to limit the scope and intensity of politics, preventing a total absorption of society that would impose tyranny in the name of ruler, party, people, or community.

Starting in the 1790s and continuing with remarkable continuity to the present day, public policy advocates have charted courses of action with reference to the Constitution. Using constitutional language firmly embedded in political rhetoric, such as DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAW, separation of powers, and so forth, they invoke its principles and values to justify their goals, argue over the meaning of its requirements, and align themselves with its manifest tenor as explicated in constitutional law and legislation. Political leaders do this not because they are unwaveringly committed to a specific constitutional principle; in different circumstances they might advocate a different principle. The decisive fact is the high public status accorded the Constitution: policymakers and political actors know that the people take the Constitution seriously, regard it as supreme law, believe that it is powerful because it embodies sound principles of government and society's basic values, and, indeed, venerate it. Aware of this popular prejudice in favor of the Constitution, and seeking the approval of public opinion, political groups and individuals are constrained to act in

conformity with its provisions. Thus the Constitution as binding political law shapes the form and content of policies and events.

The constraining effect of the Constitution might nevertheless be questioned, for it will appear obvious that while some requirements are unequivocally clear (for example, the minimum age of the President), many provisions are ambiguous and imprecise in meaning. Confronted with this fact, many scholars have concluded that there is no single, true meaning of the Constitution, but rather that there are several possible readings of it, none of which possesses exclusive legitimacy. Some contend there is no real Constitution against which arguments about it can be evaluated, only different assertions as to what the Constitution is at any given time, or as to what we want it to be. Expressed in the oft-cited statement that the Constitution is what the Supreme Court says it is, this view, carried to its logical conclusion, would mean that the American Constitution is a developing, evolving, growing thing that is changed by the actions of judges, lawmakers, and executive officers. In that case the Constitution ceases to be a fixed, prescriptive, paramount law.

Politically and historically realistic as this analysis appears, it has never been accepted as legitimate in constitutional theory or in the conduct of constitutional politics. From the standpoint of the people and their representatives, the Constitution, in both its procedural requirements and its essential principles, has a true, fixed, ascertainable meaning. This popular understanding has existed from the beginning of constitutional politics in the debate over ratification, and it will probably continue until the popular belief, that the Constitution as a document says what it means and means what it says, is eroded or superseded by a more sophisticated view of the character of texts and political language. There is still a strong tendency in public opinion to think that written constitutions, in THOMAS JEFFERSON's words, "furnish a text to which those who are watchful may again rally and recall the people: they fix too for the people principles for their political creed."

The importance of the constitutional text in American government has been raised anew in recent years in the controversy over original intent jurisprudence. Many legal scholars have expressed doubt about the wisdom and legitimacy of consulting the original intent of the Constitution or of its authors in settling constitutional disputes. The words of the text, it is argued, apart from anything that its authors may have written or said about its meaning, must be considered as expressing the original intent. And the text must be read and understood according to the accepted meaning of words in the interpreter's own time, place, and historical situation. Some dispose of original intent more directly by asserting that constitutional interpretation need not be bound by the constitutional text, but may be based on fundamental social values and conceptions of justice and moral progress that judges are specially qualified to understand and apply. Either way, the Constitution is assured of its status as a "living document" adaptable to changing social conditions.

Although there may be sound reasons for disconnecting constitutional politics from original intent, from a historical standpoint it seems clear that neither the Framers nor the people over 200 years have taken so narrow a view of the meaning and relevance of original intent. The purpose of making a fixed, objective constitution was to decide the most important basic questions about politics and government once and for all—or until the people changed their mind and amended the document. The idea was to bind future generations in fundamental ways. This purpose would be defeated if those who later ran the Constitution were free to substitute their own definitions of its key terms. Yet the fact remains that constitutional principles and rules have been reinterpreted and redefined, in apparent contradiction of the Framers' intent, in decisions and statutes that have been accepted as politically legitimate. The Supreme Court has, in a sense, acted as a continuing constitutional convention.

Although the Founding Fathers intended the Constitution to be permanent and binding, the language of the document cannot realistically or reasonably, in a categorical sense, be frozen in its eighteenth-century meaning. It is the Constitution's essential purposes and its fundamental principles and procedures that were not intended to change. The question to be asked is whether fundamental principles and values—the values of individual liberty, national union, distributed and balanced power, the consent of the people—can be defined in an authoritative text and thereby realized in public law and policy to the satisfaction of the political community. American political history generally provides an affirmative answer to this question. But it is important to remember that an overriding imperative in American politics, law, and government has been to reconcile public policy with constitutional principles and rules as embodied in the text, and in accordance with the Framers' intentions. Moreover, original intent has not been viewed in a narrowly positivistic manner. The text was thought to have a definite and lasting meaning; and speeches, writings, and letters of the authors of the Constitution have always been thought pertinent to the task of elucidating its meaning. Whatever the practical effect of dismissal of the text and repudiation of original intent would be, such a step would alter the historic character of American constitutionalism.

Diverse in ethnic, religious, cultural, and social char-

acteristics, Americans were united in 1776 by the political principles set forth in the Declaration of Independence. Inchoate though it was, the new nation was defined by these principles—liberty, equality, government by consent, the pursuit of happiness as an individual right—which in various ways were written into the state constitutions. By establishing a republican government for the nation, the Framers of the Constitution confirmed these principles, completing the Revolution and making it permanent. Since then American politics has derived from and been shaped by the Constitution, and has periodically been renewed by popular movements resulting in electoral realignments that have included a return to the first principles of the Founding as an essential element.

Understanding this attachment to the constitutional text has often been difficult for scholars and intellectuals, who tend to disparage it as "constitution worship." Perhaps reverence for the Constitution expresses not so much a naive literalism, however, as an awareness of the act of foundation as a source of authority. Considered in this perspective the constitutional text stands for the Founding, and the principles written into the document symbolically represent values evident in the actions of the Framers. The Founding required rational discussion, deliberation, compromise, and choice; consent, concurrence, and mutual pledging. These procedural values are embodied in constitutional provisions that require government under a fixed institutional structure and by deliberative processes that depend on compromise and concurrence, in accordance with substantive principles of natural rights, consent, and limited and balanced power.

HERMAN BELZ
(1986)

Bibliography


CORWIN, EDWARD S. 1955 *The "Higher Law" Background of American Constitutional Law.* Ithaca, N.Y.: Cornell University Press.

FRIEDRICH, CARL J. 1968 *Constitutional Government and Democracy.* Cambridge, Mass.: Harvard University Press.

GOUGH, J. W. 1955 *Fundamental Law in English Constitutional History.* Oxford: Oxford University Press.

LIENESCH, MICHAEL 1980 The Constitutional Tradition: History, Political Action, and Progress in American Political Thought. *Journal of Politics* 42:2–30.

LUTZ, DONALD 1980 From Covenant to Constitution in American Political History. *Publius* 10:101–133.

MCILWAIN, CHARLES H. (1940) 1947 *Constitutionalism: Ancient and Modern.* Ithaca, N.Y.: Cornell University Press.

VILE, M. J. C. 1967 *Constitutionalism and the Separation of Powers.* New York: Oxford University Press.

WRIGHT, BENJAMIN F. 1958 *Consensus and Continuity: 1776–1787.* New York: Norton.


# CONSTITUTIONAL REASON OF STATE

Reason of state is one of the illimitable silences of the Constitution. Derived directly from Niccolò Machiavelli and JOHN LOCKE (who called it the "prerogative"), it is "the doctrine that whatever is required to insure the survival of the state must be done by the individuals responsible for it, no matter how repugnant such an act may be to them in their private capacity as decent and moral men." Not labeled "reason of state" by the Supreme Court, the doctrine often travels under the banner of NATIONAL SECURITY or the "interests of society."

National survival is the ultimate value protected by the doctrine. But more is covered; it is used whenever an important interest of the state is jeopardized, as perceived by those who wield effective control over the state's apparatus (government). Wartime use is the most obvious, stated classically by ABRAHAM LINCOLN in 1861: "Is there in all republics this inherent and fatal weakness? Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?" Other instances in which reason of state has been the validating principle include the treatment of American Indians, wars of conquest (such as the Mexican War), economic depressions, and the control of dissident groups. Justification for both the Korean and Vietnam "wars" rests on the doctrine. (See KOREAN WAR; VIETNAM WAR.)

The basic constitutional problem is to distinguish between the circumstances fit for republican (that is, democratic) rule and those suited for personal rule. With rare exceptions—the principal ones are the *Steel Seizure Case* (YOUNGSTOWN SHEET AND TUBE V. SAWYER, 1952) and UNITED STATES V. UNITED STATES DISTRICT COURT (1972)—the Supreme Court has deferred to the political branches of government. The President normally is the moving force, with Congress usually acquiescing in executive actions designed to meet perceived emergencies. The PRIZE CASES (1863) were the leading early judicial statement approving the doctrine. (See also JAPANESE AMERICAN CASES.)

To the extent that the doctrine of reason of state finds acceptance, the theory of LIMITED GOVERNMENT recedes. Government in the United States has always been relative to circumstances, precisely as strong as conditions necessitated. The Constitution, accordingly, has been updated by successive generations of Americans, often at least tacitly employing reason of state principles.

No criteria exist by which to determine whether reason of state has been validly invoked. The Supreme Court has thus far failed to define such synonymous terms as "na-

tional security" and "society." By employing a BALANCING TEST, the Justices rule for society—for the state—whenever the vital interests of the state are considered to be in danger. In so doing, the Court never divulges how it determines what the interests of society are or the weights to be given to them. Reason of state, therefore, often amounts to government by fiat, but with the legitimizing imprimatur of the Supreme Court.

The BILL OF RIGHTS was an effort to limit the application of reason of state. However, Supreme Court interpretations have converted many of those seemingly absolute commands into mere hortatory admonitions to act reasonably in the circumstances. For example, the FIRST AMENDMENT's presciption that "no law" should abridge freedom of speech or press has been interpreted into relative standards. Reason of state thus has been resurrected by the Supreme Court after the constitutional Framers tried to hem it in.

Every nation employs a variation of reason of state, whether or not it has a written constitution. France, for example, expressly provides for EMERGENCY POWERS in Article 16 of the constitution of the Fifth Republic. The United States has accomplished the same result without an express constitutional provision or even a stated constitutional principle.

If, as many assert, the United States has entered a period of great danger, one in which its constitutional institutions will be sorely tested, reason of state will doubtless often be invoked—probably tacitly—as emergencies and crises arise. The doctrine can and will be employed to justify presidential use of violence without congressional authorization, as Presidents have almost routinely done in the past. It is the ultimate basis for expansion of presidential powers in many directions.

The Constitution was written at a propitious time in history, a time when a coalescence of factors—geography, natural resources, freedom from external pressures, a small population, capital and cheap labor from Europe—provided a favorable milieu for the FUNDAMENTAL LAW and its structure of government to flourish. Today, Americans face polar opposites—a shrinking planet, dwindling resources, total immersion in FOREIGN AFFAIRS, a burgeoning population, a slowing of productivity and of economic growth. Crisis government, accordingly, is becoming the norm. More and more, government will call upon emergency powers—upon reason of state—in efforts to cope. The large meaning is that a new fundamental law is emerging, one that can be called the "Constitution of Control." It exists as another layer on the palimpsest that is the Constitution of 1787.

ARTHUR S. MILLER
(1986)

Bibliography

FRIEDRICH, CARL J. 1957 Constitutional Reason of State. Providence, R.I.: Brown University.

MILLER, ARTHUR SELWYN 1981 *Democratic Dictatorship: The Emergent Constitution of Control.* Westport, Conn.: Greenwood Press.

ROSSITER, CLINTON 1948 *Constitutional Dictatorship: Crisis Government in the Modern Democracies.* Princeton, N.J.: Princeton University Press.

## CONSTITUTIONAL REFORM

Although any change in the Constitution can be labeled a reform, the broad term "constitutional reform" is usually reserved for proposed amendments that would alter in some fundamental way the structure of the government established by the nation's charter—that is, the organization of the legislative, executive, and judicial branches, the distribution of power among them, and their interrelationships.

Rarely have structural amendments to the Constitution been adopted. Of the twenty-six amendments ratified since 1787, only two have affected the form or character of the institutions as they were designed by the Framers. The SEVENTEENTH AMENDMENT, ratified in 1913, required United States senators to be chosen by popular election rather than by state legislatures. The TWENTY-SECOND AMENDMENT, approved in 1951, limits presidential tenure to two full terms. The other twenty-four amendments either have added substantive provisions (guaranteeing FREEDOM OF SPEECH and RELIGIOUS LIBERTY, abolishing SLAVERY, providing for WOMAN SUFFRAGE, and so on) or, while dealing with the governmental structure, have corrected flaws or made minor adaptations in the constitutional design without altering the nature or relationships of the institutions that compose the government.

The stability of the American constitutional structure contrasts sharply with the impermanence of governmental systems in many other countries, some of which have written, discarded, and rewritten entire constitutions during the period that the United States constitutional structure has remained virtually unchanged. The American experience undoubtedly reflects a general satisfaction with the governmental system, particularly with that system's original and distinctive feature—its SEPARATION OF POWERS and CHECKS AND BALANCES. It may also reflect the fact that the Constitution embodies probably the most difficult AMENDING PROCESS of any constitution in the world. In the normal process, an amendment must be approved by two-thirds of each house of Congress and then be ratified by the legislatures (or constitutional conventions) of three-fourths of the states. The requirement for such extraor-

dinary majorities confers an effective VETO POWER on any sizable political bloc; an amendment must be favored by Republicans and Democrats alike, by both conservatives and liberals, by advocates of a strong presidency as well as defenders of Congress. Yet structural amendments redistribute power and hence create winners and losers among the political blocs. The potential losers can usually muster enough support, either in the Congress or in the state legislatures, to block action. (As an alternative to initiation by the Congress, amendments may be proposed by a CONSTITUTIONAL CONVENTION organized at the request of two-thirds of the state legislatures; but no such convention has ever been called. RATIFICATION by three-fourths of the states would still be required.)

During the 1980s, the objective of constitutional reform attracted authoritative and well-organized support, expressed through two organizations made up of persons with long experience in high office. One, which included former officials of every administration from DWIGHT D. EISENHOWER to RONALD REAGAN, was created in 1982 to advocate a single six-year term for the President—a proposal with a history of support going back to ANDREW JACKSON. Ineligibility for reelection, the group argued, would enable the President to rise above politics and put the national interest ahead of personal reelection concerns. But the proposal encountered the objections, among others, that if the President is ineligible for reelection, he becomes a "lame duck" and hence loses authority, and that six years would be too long for a President who turned out to be ineffective. The proposal failed to win widespread support, and the movement faded.

The second organization, established in 1981, was the Committee on the Constitutional System, consisting of former members of Congress, former high executive officials, academics, and other political observers. Identifying the principal structural problem as one of conflict and deadlock between the executive and legislative branches, the committee undertook a broad consideration of remedies. Rejecting the six-year term for the President, the group recommended instead that the term of members of the HOUSE OF REPRESENTATIVES be extended from two years to four (a proposal advanced in 1966 by President LYNDON B. JOHNSON) and the term of senators from six years to eight. All House members and half the senators would be chosen in each presidential election, thus eliminating the present midterm congressional contests. Proponents contend that a four-year time horizon for the whole government would enable it to make difficult decisions that it does not now make because the next election is always imminent; opponents respond that the midterm election is a necessary check to enable the voters to register approval or disapproval of their government.

The committee also endorsed an amendment to permit members of Congress to serve in the presidential CABINET and other executive branch positions (a variation of proposals that won considerable support in earlier decades to give cabinet members nonvoting seats in the Congress and to require cabinet members, or even the President, to appear before Congress to answer questions). And it proposed to ease the process for approving treaties, by reducing the present requirement for a two-thirds vote of the SENATE to either 60 percent of the Senate or a constitutional majority of both houses.

Finally, the committee recommended consideration of two more radical reforms. One would reduce the likelihood of divided government (that is, one party controlling the executive branch and the opposing party ruling one or both houses of Congress), which the committee identified as conducive to deadlock and inaction, by requiring voters to choose between party slates for President, vice-president, Senate, and House. The second would provide a means for reconstituting a government that had proved incapable of governing—because of deadlock between the branches, presidential incapacity, corruption, or any other reason—by means of a special election in which the presidency, vice-presidency, and congressional seats would be at stake. Such a procedure would correspond to those by which legislatures in parliamentary democracies are dissolved and new elections held. These proposals, too, attracted little popular support, and constitutional reform remained a subject only for academic debate.

JAMES L. SUNDQUIST
(1992)

Bibliography

ROBINSON, DONALD L. 1989 *A Government for the Third American Century.* Boulder, Colo.: Westview Press.

SUNDQUIST, JAMES L. 1986 *Constitutional Reform and Effective Government.* Washington, D.C.: Brookings Institution.

# CONSTITUTIONAL REMEDIES

Constitutional remedies take different forms, including defenses to criminal prosecutions, postconviction HABEAS CORPUS actions, civil actions for DAMAGES, and declaratory and injunctive relief. Remedies for violations of constitutional rights, at first indistinguishable from more general legal remedies, became the focus of special congressional concern after the CIVIL WAR and are now a highly developed set of modern rules shaped by both Congress and the Supreme Court.

Until well into the twentieth century, misbehavior by state or federal officials was more likely to be viewed as

tortious or otherwise merely unlawful rather than as unconstitutional. As in MARBURY V. MADISON (1803) and DRED SCOTT V. SANDFORD (1857), federal courts would refuse to enforce unconstitutional legislation, but the question of additional remedies for constitutional violations rarely arose. CRIMINAL PROCEDURE had not yet been federalized, and there were few constitutional rights that could give rise to distinctive remedies. Thus, early remedies against official misbehavior, such as the effort to vest jurisdiction in the Supreme Court to issue writs of MANDAMUS, invalidated in *Marbury,* were not thought of as distinct constitutional remedies. Even today, the liability for damages of the United States (but not United States officials) is governed largely by the FEDERAL TORT CLAIMS ACT, which does not by its terms distinguish between constitutional violations and other tortious conduct. It authorizes an action against the United States only if the challenged behavior also happens to violate state law. The conflating of constitutional violations and other legal wrongs limited and obscured constitutional remedies.

The Civil War led to the creation of new constitutional rights, and RECONSTRUCTION era CIVIL RIGHTS statutes demonstrated a new congressional belief in the need to give such rights special protection. Section 4 of the CIVIL RIGHTS ACT OF 1866, "with a view to affording reasonable protection to all persons in their constitutional rights of equality before the law," increased the number of federal judicial officers authorized to enforce the statutory protections of the act. The HABEAS CORPUS ACT OF 1867 established federal habeas corpus relief as a remedy in all cases "where any person may be restrained of his or her liberty in violation of the constitution," a provision that survives with little substantive change today. The Enforcement Act (the Civil Rights Act of 1870) imposed criminal penalties for the violation of constitutionally protected voting rights and for conspiracies to violate constitutional rights. The Ku Klux Klan Act (the Civil Rights Act of 1871)—part of which is now SECTION 1983, TITLE 42, U.S. CODE—created a civil action for every person deprived, under color of state law, of constitutional rights. Similar criminal prohibitions, largely ineffective, against violating constitutional rights continue in force in Sections 241 and 242, Title 18, U.S. Code.

These Reconstruction statutes, combined with increasing substantive constitutional protections, led to important judicially generated growth of constitutional remedies in both the criminal and civil areas. In the 1920s the Supreme Court began to treat the DUE PROCESS clause of the FOURTEENTH AMENDMENT as a limitation on state criminal procedure. The resulting constitutionalization of criminal procedure led to expanded direct review by the Supreme Court of the constitutionality of state court convictions and to greater use of federal habeas corpus to vindicate constitutional rights. The EXCLUSIONARY RULE for FOURTH AMENDMENT violations has been a particularly controversial remedy in the criminal sphere.

In the civil arena, the term "constitutional remedies" usually refers to damages actions and injunctive relief, each of which has had a distinct historical development. Injunctive relief for constitutional violations developed first. EX PARTE YOUNG (1908) established the availability, despite the ELEVENTH AMENDMENT and the doctrine of SOVEREIGN IMMUNITY, of injunctive relief against unconstitutional behavior by state officers. The remedial power to enjoin unconstitutional behavior figured prominently in the fight against SEGREGATION statutes.

As the use of the INJUNCTION to protect constitutional rights grew, different forms of injunctive relief emerged. Injunctions protecting constitutional rights may be subdivided into simple injunctions and structural, or institutional, injunctions. The simple injunction, ordering, for example, that the unconstitutional statute not be enforced, has remained relatively uncontroversial. The proper scope of broader injunctive relief has been debated since the 1960s, when federal courts found that recalcitrant state officials and legislatures did not comply with court orders to desegregate school systems and to improve conditions in prisons or mental institutions. Remedial orders in such INSTITUTIONAL LITIGATION involved courts in the details of running institutions. DESEGREGATION orders not promptly obeyed led to hard choices about obedience to the RULE OF LAW in the face of resistance to one particular remedy, court-ordered SCHOOL BUSING. Some observers raised questions about the legitimacy of judicial intervention in the operations of other public institutions and the capacity of courts as institutional managers. In a few cases, courts faced with years of noncompliance ordered local governments to finance constitutionally prescribed remedies, even going so far as to order increases in local taxes. In MISSOURI V. JENKINS (1990) the Court held that a federal district court may direct a local government to levy taxes to comply with desegregation requirements.

Damages were awarded against public officials in a few early twentieth-century decisions in cases brought under section 1983, and damages are one traditional remedy under the Fifth Amendment's TAKING OF PROPERTY clause. However, the modern right to recover damages against officials for constitutional violations is mainly traceable to MONROE V. PAPE (1961) and BIVENS V. SIX UNKNOWN NAMED AGENTS (1971). In *Monroe* the Court held that section 1983 authorized a damages action against police officers who violated the Fourth Amendment in an illegal arrest and search. Actions based on section 1983 have since grown to encompass most constitutional harms, and litigation under the section constitutes one of the largest segments of federal court civil dockets. The remedies available under

section 1983 include compensatory damages, punitive damages (against individuals, but not governments), injunctive relief, and the award of attorneys' fees. The Eleventh Amendment severely limits monetary remedies for constitutional violations, but the Supreme Court made clear that a state may be required to pay the cost of prospective compliance with the Constitution, such as the cost of desegregating a school system.

Section 1983 authorizes actions only against state officials. In *Bivens* the Court allowed a damages action against federal officials for violating the Fourth Amendment. After *Bivens* the Court recognized IMPLIED CONSTITUTIONAL RIGHTS OF ACTION under the FIRST AMENDMENT, Fifth Amendment, and Eighth Amendment. In the 1980s, however, the Court began to rein in the *Bivens* remedy. In *Chappell v. Wallace* (1983) and *United States v. Stanley* (1987) the Court refused to recognize *Bivens* actions for enlisted military personnel who alleged that they had been injured by unconstitutional actions of their superiors and who had no cause of action against the United States. In *Bush v. Lucas* (1983) the Court refused to create a *Bivens* remedy for a violation of a civil service employee's First Amendment rights, because the violation arose "out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States." And in *Schweiker v. Chilicky* (1988) the Court held that the denial of SOCIAL SECURITY benefits in violation of due process did not give rise to a *Bivens* action against the wrongdoing officials.

Congress greatly influences constitutional remedies by expanding, contracting, and shaping them. The Fourteenth Amendment and other constitutional provisions authorize Congress to enact legislation, both remedial and substantive, to enforce constitutional rights. The Reconstruction statutes were enacted largely under this authority. Section 1983 and federal habeas corpus, both federal statutory remedies, are the two most frequently used constitutional remedies, aside from defenses to criminal prosecutions.

The limits of congressional power over constitutional remedies have not been fully tested. Congress has left in place the two most-used statutory protections and regularly rejects proposals to restrict federal court jurisdiction to hear particular classes of cases or to issue specific remedies. Congress did limit section 1983 by requiring, in the Civil Rights of Institutionalized Persons Act, that certain prisoners first exhaust state administrative remedies before bringing section 1983 actions. And, in refusing to extend *Bivens* actions, the Supreme Court, in *Bush v. Lucas* and *Schweiker v. Chilicky*, emphasized that comprehensive alternative congressional remedial schemes were already in place for protecting the constitutional rights asserted. Congress's refusal to enact jurisdictional limitations, together with the implausibility of repealing section 1983 or federal habeas corpus, suggests a deep national commitment to the ideal of remedying constitutional wrongs.

The modern growth of constitutional remedies may have modified that commitment in one important way. The increased availability of injunctive and damages relief taught that fully remedying each constitutional wrong comes at a cost, either in challenging the authority of governing officials or in increasing confrontations between the judicial and political branches of government or between federal courts and state officials. A full panoply of remedies to fix each constitutional wrong may have increased the Supreme Court's reluctance to acknowledge new constitutional rights. In PAUL V. DAVIS (1976), *Parratt v. Taylor* (1981), and subsequent cases involving both the due process clause and section 1983, the Court may have curtailed substantive constitutional protections in order to avoid triggering extensive remedial relief.

THEODORE EISENBERG
(1992)

Bibliography

EISENBERG, THEODORE 1982 Section 1983: Doctrinal Foundations and an Empirical Study. *Cornell Law Review* 67:482–556.

——— 1991 *Civil Rights Legislation*, 3rd ed. Charlottesville, Va.: Michie.

NAHMOD, SHELDON H. 1986 *Civil Rights and Civil Liberties Litigation*, 2nd ed. Colorado Springs, Colo.: Shepard's.

SCHWAB, STEWART J. and EISENBERG, THEODORE 1988 Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant. *Cornell Law Review* 73:719–784.

## CONSTITUTIONAL REMEDIES (Update)

The 1990s began with MISSOURI V. JENKINS's (1990) 5–4 affirmation of federal JUDICIAL POWER to remedy constitutional violations. The case sustained federal court power to promote local tax increases to fund DESEGREGATION orders. Proposed constitutional amendments and LEGISLATION abrogating the decision failed to gain adequate support. And in *Crawford-El v. Britton* (1998), the Supreme Court, in a 5–4 decision, refused to require CIVIL RIGHTS plaintiffs to adduce clear and convincing evidence of improper motive, a heightened level of proof, to avoid dismissal of constitutional claims that depend on the defendant's motive.

Most developments in the 1990s, however, curtailed vindication of constitutional rights, especially for prison-

ers. The Federal Courts Improvement Act of 1996 amended SECTION 1983, TITLE 42, UNITED STATES CODE to limit actions alleging constitutional violations by state judges. It prohibits injunctive relief against judicial officers unless a DECLARATORY JUDGMENT has been violated or declaratory relief is unavailable. It thus limits the Court's allowance in *Pulliam v. Allen* (1984) of injunctive relief against judges. The same Act also limits attorney fee awards against judges to cases in which the judge's actions are "clearly in excess" of the judge's JURISDICTION, a standard that precludes fee awards in most cases.

The ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 capped years of efforts by conservatives to curtail federal HABEAS CORPUS. It limits the ability of prisoners to file repeat habeas petitions; imposes firmer deadlines for the filing of habeas petitions; and limits prison institutional reform litigation. The Prison Litigation Reform Act of 1996 echoes the same themes and further curtails the rights of prisoners to assert constitutional violations. It limits the circumstances under which courts may enter injunctions against unconstitutional prison conditions, including overcrowding and inadequate medical care. It also addresses the alleged problem of frivolous prisoner litigation by curtailing the authority of impoverished prisoners to file lawsuits without paying filing fees.

Ironically, data from the federal courts suggest that the aggressive statutory antiprisoner program was based in part on myth. No long-term increase in prisoner litigiousness is perceptible from the mid-1970s to the 1990s. Increases in prisoner filings can be explained by increases in the prison population, not by more filings per prisoner.

Court decisions also restricted the opportunities of prisoners to assert constitutional violations. *Wilson v. Seiter* (1991) held that prisoners claiming that prison conditions violate the Eighth Amendment's ban on CRUEL OR UNUSUAL PUNISHMENT must establish that prison officials had a culpable state of mind. But in *Farmer v. Brennan* (1994), the Court acknowledged that the Eighth Amendment requires prison officials to maintain minimally humane prison conditions. In *Heck v. Humphrey* (1994), the Court restricted the power of prisoners to challenge the constitutionality of their convictions under section 1983. A state prisoner has no cause of action under section 1983 unless the conviction is first invalidated by the grant of a writ of habeas corpus.

Actions against prosecutors are one area in which federal decisions did not curtail constitutional remedies. *Burns v. Reed* (1991), *Buckley v. Fitzsimmons* (1993), and *Kalina v. Fletcher* (1997) all tend to limit the absolute immunity of prisoners to acts directly related to the prosecution of cases, and to deny immunity for investigative or other prosecutorial activities.

THEODORE EISENBERG
(2000)

(SEE ALSO: *Immunity of Public Officials; Prisoners' Rights.*)

Bibliography

EISENBERG, THEODORE 1996 *Civil Rights Legislation*, 4th ed. Charlottesville, Virginia: Michie.

TUSHNET, MARK and YACKLE, LARRY 1997 Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act. *Duke Law Journal* 47:1–86.

## CONSTITUTIONAL THEORY

The term "constitutional theory" refers to two aspects of constitutional law. First, it refers to general theories of the Constitution, which deal with the overall structure of the government, the relations among the branches, and the relation between the national and state governments. Second, it refers to theories of JUDICIAL REVIEW, which provide justifications for the occasions on which the courts, ruling on constitutional issues, will and will not displace the judgments of elected officials.

General theories of the Constitution consider the structure of the government as defined in the Constitution and, more important, as the institutions of the government have developed historically. The primary subjects of this sort of constitutional theory are the SEPARATION OF POWERS of the three branches of the national government, and FEDERALISM, or the division of authority between the national government and state governments. Constitutional theories of this sort attempt to explain how the institutional arrangements of the United States government promote the public interest by allowing the adoption of socially beneficial legislation that does not threaten FUNDAMENTAL RIGHTS.

Theories of the separation of powers fall into two basic groups. In one, the primary concern is the separateness of the branches of the national government. Within this version of constitutional theory, problems arise when one branch begins to assume duties historically performed by another branch. The LEGISLATIVE VETO, invalidated in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983), offers an example. In the other version, the emphasis is on CHECKS AND BALANCES, and so the legislative veto is treated as a useful innovation to deal with problems of legislative control of executive actions in a government much larger than it was when created in 1789.

In general, checks and balances theories are more receptive to institutional innovations than separation of powers theories. Innovations tend to be seen as democratically chosen devices by which the executive and legislative branches respond to the demands for expansive substantive action generated by the political process; the public asks that the government expand its activity in the provi-

sion of social welfare or in international affairs, and the government responds first by acting to satisfy those demands and then, finding that either Congress or the President has grown too powerful, by developing new institutions like the legislative veto to check the branch that seems more threatening.

Yet, if checks and balances theories allow for institutional innovation and therefore for the adoption of policies that the public believes to be in its interest, they are less sensitive than separation of powers theories to the threats to fundamental freedoms that institutional innovations pose. If the original design of the Constitution carefully balanced the branches, as separation of powers theories suggest, then it is unlikely that current majorities will improve on that design.

Similar tensions pervade theories of federalism. At the outset, federalism appeared to be an important protection of democracy and social experimentation: state and local government, being closer to the people, could more readily be controlled by them than the more remote government in the national capital; and the variety of problems faced on the local level might elicit various responses, some of which would prove valuable enough to be adopted elsewhere while those that failed would do so only on a small scale. As the nation expanded, however, economic conditions appeared to require more coordinated responses than local governments could provide. As a result, federalism lost some of its value, to the point where on most issues the national government is free to act as national majorities wish, no matter how much some local governments and local majorities might object. The impairment of local democracy is apparent, yet alternative theories of federalism rely on notions of a sharp division of authority between state and nation that tend to seem quite artificial under modern circumstances.

These examples show how changes in both the scope of the national economy and the reach of the national government pose questions for general theories of the Constitution. Most dramatically, neither POLITICAL PARTIES nor ADMINISTRATIVE AGENCIES were contemplated by the designers of the Constitution, and yet any overall theory of the operation of the national government—a constitutional theory of the first sort—must somehow accommodate the importance of parties and BUREAUCRACIES.

General constitutional theory also deals with the role of the courts, though on a relatively high level of abstraction. Such theories agree that the courts exist to protect fundamental rights, but disagree primarily on the sources of those rights. One approach finds fundamental rights rooted in transcendental conceptions of rights, of the sort identified in classical theories of natural law. This approach often meets with skepticism about the existence of natural law. Another approach finds the fundamental rights enumerated in the text of the Constitution, but has difficulty dealing with what have been called the "open-ended" provisions of the Constitution, such as the NINTH AMENDMENT and the PRIVILEGES AND IMMUNITIES clauses, which appear to refer to UNENUMERATED RIGHTS.

When general theories of the Constitution deal with the role of judicial review, they sometimes adopt varieties of the other basic type of constitutional theory, the concern of which is the justification of judicial review. Constitutional theories of this type must divide the universe of constitutional claims into those that the courts should uphold and those that they should reject. A powerful argument against a court's decision to exercise its power to invalidate legislation is that such a decision necessarily overturns the outcome of processes of majority rule that are themselves an important value in the American constitutional system. It should be noted, however, that the strength of the "countermajoritarian difficulty," as ALEXANDER M. BICKEL called it, can vary, depending on which government actor actually promulgated the rule in question—a city council, a state government, an administrative agency, Congress, or the President? Majoritarianism alone cannot answer the questions about judicial review. The constitutional system, though it values majority rule, does not take majority rule to be the sole value, as the Constitution's inclusion of limitations on the power of government demonstrates. If there is to be any judicial review, which seems required by the structure of the Constitution, on some occasions courts will displace the decisions of the majoritarian legislatures.

Most constitutional theories of the second type agree, however, that the courts should not simply substitute their determination of what is wise public policy for the legislature's. Not only do courts often lack the competence that legislatures have in developing information about social problems and possible methods of responding to those problems, but, more to the point, the countermajoritarian implications of such freewheeling exercises of the power of judicial review are, for most, unacceptable in the American constitutional system. Theories of this type therefore set themselves two tasks: they must specify when and why courts can invalidate legislation, and when and why they cannot.

Modern constitutional theories of this type fall into several basic groups, though many variants have been offered:

1. ORIGINALISM insists that the courts should invalidate legislation only when the legislation is inconsistent with provisions of the Constitution as those provisions were intended to be applied by their authors. This theory might significantly limit the power of courts if, as most of its proponents believe, the Framers of the Constitution did not intend to place substantial limits on government's powers. The theory is vulnerable on a number of grounds. For some provisions, the evidence is at least mixed, sometimes suggesting that the Framers did indeed intend to limit government power a great deal. Originalist theories,

because they seem to be primarily concerned about imposing limits on judicial discretion, have difficulty dealing with the kinds of ambiguities about intentions that historical inquiry almost invariably generates. The framers of the FOURTEENTH AMENDMENT, for example, were a coalition of Radical Republicans, who desired substantial changes in the overall operation of government with respect to individual rights, and more conservative Republicans, who wanted to preserve a substantial amount of state autonomy in that area. Whose intentions are to control in interpreting the amendment? In addition, technological change presents society with innovations that could not have been within the contemplation of the Framers, and social change sometimes means not only that contemporary values are different from those of the Framers of the Constitution but also that the meaning of practices with which they were familiar has changed so much that it is unclear why contemporary society ought to respond to those practices as the authors intended. WIRETAPPING, a practice that clearly has something to do with the values protected by the FOURTH AMENDMENT but which is significantly different from the practices the Framers actually contemplated, is an example of the first problem. The second problem is illustrated by the changed role of public schools between 1868, when the Framers of the Fourteenth Amendment foresaw little impact on SEGREGATION of public schools, and 1954, when the Supreme Court held that segregated public education is unconstitutional.

2. Natural law theories rely on substantive moral principles determined by philosophical reflection on the proper scope of government in relation to individual liberty, to specify the choices that are within the range of legislative discretion and those that violate individual rights. Contemporary versions of these theories are offered by conservative libertarians, who stress the importance of private property as a domain of liberty, and by liberal supporters of the WELFARE STATE, who stress the importance of nondiscrimination and the provision of the basic necessities of life for people to be able to lead morally acceptable lives. Natural law theories often face general skepticism about the existence of the kinds of rights on which they rely, and a more specific skepticism about the ability of judges as compared to legislators to identify whatever rights there might in fact be.

3. Precedent-oriented constitutional theories rely on past decisions by the courts to guide contemporary decisions. PRECEDENTS are taken to identify with sufficient clarity the kinds of choices that are to be left to legislatures. Using the ordinary techniques of legal reasoning, the courts can use precedents to determine constitutional questions that they have not faced before. Proponents of these theories argue that the techniques of legal reasoning are sufficiently constraining that courts will not be able to do whatever their policy inclinations would suggest, but are also sufficiently loose that courts will be able to respond appropriately to innovations and social change. Precedent-oriented theories face a number of problems. Many critics find it difficult to give normative value to the decisions of prior courts simply because those decisions happen to have been made; for them, just because the courts at one time "got off the track" is no reason to continue on an erroneous course. Other critics are skeptical about these theories' claims regarding the degree to which precedent actually constrains judges. Influenced by the American legal realists, they argue that the accepted techniques of legal reasoning are so flexible that judges can choose policies they prefer and disguise those choices as dictated by, or at least consistent with, prior decisions.

4. Process-oriented theories attempt to minimize the countermajoritarian difficulty by pressing judicial review into the service of majority rule. They do so by identifying obstacles that make the government less than truly majoritarian. For theories of this sort, the democratic process is bound to malfunction when some people are excluded from the franchise, so that majoritarian legislatures can freely disregard their views. Similar problems arise when rights of expression are limited, so that supporters of certain positions are punished for advocating their adoption; majoritarian legislatures would not learn what these people actually prefer, and the outcome of the political process would therefore be distorted. Process-oriented theories have also dealt with questions of discrimination, which they typically treat as arising from situations in which, though there is no formal disfranchisement, prejudice leads legislators systematically to undervalue the true wishes of their constituencies taken as a whole, that is, including the victims of prejudice.

Critics of process-oriented theories point to limitations that the Constitution places on government that, though perhaps explicable in terms of preserving a majoritarian process, somehow seem devalued when treated solely in process terms; the THIRTEENTH AMENDMENT ban on SLAVERY is a notable example, as is the body of constitutional privacy law that the Supreme Court has developed. Other critics suggest that process-oriented theories, while purporting to serve majoritarian goals, actually subvert them, because the theories are loose enough to allow judges to identify so many obstacles in the processes of majority rule that they can use process-oriented theories to serve their own political goals. A libertarian process theory, for example, might rely on the economic theory of public choice to argue that the courts should be much more active in invalidating social and economic legislation because the beneficiaries of such laws tend to be concentrated INTEREST GROUPS that can readily organize and lobby for their interests, while the costs of the laws are borne by consum-

ers and taxpayers who, because no individual has much at stake, are systematically underorganized in the political process. A social welfare process theory, in contrast, would argue that poor people are at a systematic disadvantage in the political process because they have insufficient income, compared to wealthier people, to devote to political activity; such a theory would suggest that the courts should invalidate restrictions on the provision of public assistance, and should uphold—and perhaps even require—limitations on contributions to political campaigns.

5. The final group of theories of judicial review focuses less on the limits that courts should face in deciding individual cases and more on the practical political limits the courts actually do face in exercising the power of judicial review. These theories stress that the courts are part of the general political process and can be constrained by the actions of the other branches. Some of these theories emphasize the formal limitations on judicial power built into the Constitution, such as Congress's ability to restrict the jurisdiction of the courts, its power to impeach judges, and the public's power to amend the Constitution. These formal limitations have rarely been invoked successfully where Congress or the public has simply disagreed with the results the judges have reached. Another mechanism built into the Constitution, the power to replace judges who resign or die in office with judges sympathetic to the political program of current political majorities, has been more effective in the long run. Replacement of judges in the ordinary way has often shifted the general tenor of the courts, though no one can guarantee that this mechanism will succeed in overturning any particular decision, such as the Supreme Court's ABORTION decision in 1973.

Other versions of this type of theory note that the courts have only infrequently succeeded in imposing their agenda on the public without having some substantial support in the political branches. In short, these theorists argue that the courts cannot get away with very much; the countermajoritarian difficulty, though real, has been exaggerated. Further, in this view, the courts have a limited amount of "political capital": they can invest their capital in decisions designed to enhance their reputation, either by invalidating unpopular laws that somehow have survived in the political process or by upholding popular laws, and thereby generate returns that they can use to preserve their public support when they invalidate genuinely popular statutes. These types of constitutional theory seem to pay attention to the realities of the operation of politics, but they are often too informal in their understanding of politics to be fully persuasive, and in any event, they fail to capture the important normative dimensions of most discussions of constitutional law.

MARK TUSHNET
(1992)

(SEE ALSO: *Conservatism; Constitutional Interpretation; Critical Legal Studies; Deconstructionism; Interpretivism; Jurisprudence and Constitutional Law; Law and Economics Theory; Legal Fictions; Liberal Constitutional Construction; Liberalism; Noninterpretivism; Political Philosophy of the Constitution.*)

Bibliography

BICKEL, ALEXANDER 1962 *The Least Dangerous Branch: The Supreme Court at the Bar of Politics.* Indianapolis, Ind.: Bobbs-Merrill.

ELY, JOHN HART 1980 *Democracy and Distrust.* Cambridge, Mass.: Harvard University Press.

TUSHNET, MARK 1988 *Red, White, and Blue: A Critical Analysis of Constitutional Law.* Cambridge, Mass.: Harvard University Press.

## CONSTITUTIONAL THEORY
### (Update)

Richard Posner, a leading academic-judge of the era, chose "Against Constitutional Theory" as the title of his 1997 James Madison Lecture on Constitutional Law at the New York University School of Law. Defining "constitutional theory" as "the effort to develop a generally accepted theory to guide the interpretation of the Constitution," he contrasts it with "inquiries of a social scientific character into the nature, provenance, and consequences of constitutionalism" and "commentary on specific cases and doctrines." He notes that "[c]onstitutional theorists are normativists; their theories are meant to influence the way judges decide difficult constitutional cases." What, then, is Posner's objection to constitutional theory? It is "that constitutional theory has no power to command agreement from people not already predisposed to accept the theorist's policy prescriptions." Although "constitutional theory" may often be "rhetorically powerful," it nonetheless "lacks the agreement-coercing power of the best natural and social science." At bottom, it is just not very helpful to the person grappling to make decisions as a judge or other official sworn to uphold the Constitution.

An immediate question is how "constitutional theory" as defined by Posner differs from "CONSTITUTIONAL INTERPRETATION", which is surely relevant to, and indeed constitutes, constitutional performance. In the initial *Encyclopedia of the American Constitution*, Paul Brest, writing on "constitutional interpretation," sketched a taxonomy of the legal arguments that have guided judges in giving content to the Constitution. Similarly, Philip Bobbitt in two books, *Constitutional Fate* and *Constitutional Interpretation*, has extensively elaborated what he terms the "modalities" of constitutional argument—text, history, structure, doctrine, prudence, and appeals to our consti-

tutional "ethos." These modalities constitute the parts of speech, as it were, of the particular grammar of "constitutional law-talk," a proposition that Posner could scarcely deny.

One difference between the basically taxonomic approaches of Brest and Bobbitt and "theory," as described by Posner, may be the overtly normative thrust of the latter. To be sure, both Brest and Bobbitt are normativists to the extent that they would presumably declare "out of bounds," and thus illegitimate, modes of argument that defy standard notions of legal grammar, such as emphasizing the norms of revealed religion or, indeed, offering as a reason for a particular decision the probability that it would enhance the judge's prospects for relection, in many states, or promotion within the federal judiciary. Such moves would be as inappropriate as saying "I are going" or "Threw the ball Jack to I." Just as the latter would reveal the speaker as inept in English grammar, offering the ostensible "arguments" described above would illustrate the same degree of failure to grasp the structure of legal grammar. That being said, an important part of the Brest-Bobbitt project, and of other writers influenced by them, is to suggest that there does not exist a single royal road to "correct" constitutional interpretation, anymore than there is only one way correctly to convey a given idea. To that extent, the "modalities" are not agreement-forcing.

Instead, constitutional adjudicators may well find themselves tugged in different directions by the various modalities, with text leading in one direction, attention to history leading in another, and decided case law in yet a third. This means, among other things, that such modal analysts are unlikely to fall victim to Posner's jibe that constitutional theorists "cannot resist telling their readers which cases they think were decided consistently with or contrary to their theory," since they do not assign to one given approach a dominance that will necessarily resolve conflicts. It may be possible, of course, to condemn some particular ineptness in applying one of the modalities, such as purportedly history-based decisions that simply ignore relevant historial materials (see, e.g., DRED SCOTT V. SANDFORD (1857)) or a doctrinally oriented opinion that offers unusually tendentious readings of the cases relied on (see, e.g., EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990)). This, however, is very different from saying, as does Robert Bork, that ORIGINAL INTENT provides the only legitimate basis for constitutional judgment; or, as does John Hart Ely, in his enormously influential *Democracy and Distrust* (1980), that courts, though usually required to defer to decisions made by politically accountable branches of government, can nonetheless interpret the FOURTEENTH AMENDMENT as authorizing them to engage in "representation-reinforcement" of otherwise vulnerable minorities who are victimized by prejudice but not, say, to protect the right of women (who constitute a majority of the population) to reproductive autonomy.

Law professors adopting a taxonomic approach are primarily concerned that their students are introduced to the array of argumentative possibilities and can use all of them effectively, as any given case might require. A professorial "theorist" as described by Posner would, on the other hand, be far more likely to spend time praising some decisions and condemning others by reference to their fit with the professor's favorite approach.

One must acknowledge that legal academics have always been in the habit of grading judicial handiwork. Most of the pre-judicial writings of FELIX FRANKFURTER, whether in the law reviews or in *The New Republic*, attempted to separate acceptable judicial wheat from the all too common chaff emanating from the "Old Court." No one referred to this as "constitutional theory," however. "Constitutional theory," as a self-conscious development within the legal academy, is almost certainly the consequence of the reinvigoration, following the apparent triumph in 1937 of Frankfurter and his devotees and the judicial retreats linked with that episode, of a significantly "activist" judiciary linked with BROWN V. BOARD OF EDUCATION (1954) and then many other cases identified with the WARREN COURT. *Brown* is central, though, because there Frankfurter joined Warren's opinion, and he and his devotees had to explain its propriety.

It is no coincidence, then, that the first major book clearly identified as a work in "constitutional theory," in Posner's sense, is ALEXANDER M. BICKEL *The Least Dangerous Branch* (1962). Bickel, a graduate of the Harvard Law School who clerked for Frankfurter (and who, as clerk, wrote a famous memorandum to Frankfurter, subsequently published in the *Harvard Law Review*, justifying the invalidation of school segregation), identified what he termed the "countermajoritarian difficulty"; that is, the purported anomaly of the politically nonaccountable Court invalidating legislation passed by majoritarian political institutions, and attempted to set out the (relatively uncommon) circumstances under which the Court would indeed be entitled to intervene. Many things might be said about Bickel's argument, including the fact that he did not talk about any of the other notable "countermajoritarian difficulties" in our political system, ranging from BICAMERALISM; the staggeringly antimajoritarian basis of political REPRESENTATION in the U.S. SENATE (reflected, to at least some extent, in the ELECTORAL COLLEGE); the presidential VETO POWER; and such accepted practices (far more pervasive, indeed, in our own time than even in the 1950s) as the use of the FILIBUSTER in the Senate to prevent a legislative majority from working its will. In any event, Bickel was willing to defend *Brown* (though not, later in the de-

cade, such decisions as BAKER V. CARR (1962), where Frankfurter had dissented), and the combatants in the great theory wars— devoted to defending or attacking one or another normative view of the judiciary's role as presumptive "ultimate interpreter" of the Constitution (itself a highly tendentious term of the Court's creation)—were off and running.

Although important sallies continue to be delivered in these wars, the most important contemporary work in what might well be described as neotheory of the Constitution involves moving away from normative, methodologically driven inquiries of the type described above to broader, more historically grounded inquiries into the actual operation of the American constitutional order. Exemplary in this regard is Stephen M. Griffin's *American Constitutionalism: From Theory to Practice* (1996). Like Posner, Griffin rejects the obsessive emphasis on judicial review and concomitant attempts to construct a single master method that would at once resolve the "countermajoritarian difficulty." Instead he asks to what extent is it truly plausible to view the Constitution, especially as interpreted by courts, as playing a significant role in channeling the great socioeconomic changes over the 200 years since its adoption. Griffin answers: Not much. As a descriptive practice, constitutional interpretation has changed to accommodate felt necessities of the times, as, indeed, OLIVER WENDELL HOLMES, JR., suggested so memorably in *The Common Law* (1881). To the extent that the Constitution can be assigned a significant role, the reason lies in basic structural features of the American order, including bicameralism, equal state membership in the Senate, or the dates established for inauguration of Presidents or the convening of Congress, provisions that have almost never been the subject of litigation, and so have lacked interest to legal academics for whom the agenda is set by the litigation practices of the Court. This interest in the implications of basic constitutional design has generated another important branch of contemporary constitutional neotheory, much influenced by so-called social choice or "positive political theory" within political science. These theorists assume that politics is carried on by rational individuals, where "rationality" is defined as the maximization of individual goals and sensitivity to the incentives generated by given institutional designs.

Perhaps the most crucial clause of the Constitution for Griffin and other practitioners of "neotheory" is Article V, which sets out an exceedingly difficult process of formal constitutional change. (Indeed, in Levinson (1995), political scientist Donald Lutz compared the U.S. Constitution to the constitutions of every state and of more than thirty other countries and determined that the U.S. Constitution has the highest "index of difficulty" in regard to formal amendment.) The consequence is that many of the most significant changes over the past 200 years have taken place outside of Article V. That is, there may be far more constitutional "amendments"—in the sense of changes in constitutional practice that cannot plausibly be derived from the original text or the formal amendments added to it—than the twenty-six (or twenty-seven, depending on one's acceptance of the purported TWENTY-SEVENTH AMENDMENT, proposed in 1789 and declared ratified only in 1992) set out as textual additions to the original 1787 Constitution. More to the point, to limit one's definition of "amendment" only to these textual additions is to adopt a basically atheoretical approach to the problem, explaining away, by stipulative definition, what is in fact the great mystery of American constitutionalism, which is how, adopting Chief Justice JOHN MARSHALL's language in MCCULLOCH V. MARYLAND (1819), the system has actually "adapted to the various *crises* of human affairs." These other "amendments" are unwritten, at least in the text of the Constitution itself (as against presidential statements, statutes, judicial opinions, and the like), but no analyst of American constitutionalism could possibly make sense of what has happened since 1789 without taking them into account.

Both Yale's Bruce Ackerman and Harvard's Laurence Tribe, among the most eminent of contemporary writers on the Constitution, agree, for example, that the TREATY clause of the 1787 Constitution is best read as covering such acts as the NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) or the General Agreement on Trades and Tariffs (GATT). Yet these extraordinarily important developments in international trade were "ratified" not by two- thirds of the Senate, as required by the clause, but, rather, by a majority of each house of Congress. For Tribe, this is enough to render unconstitutional both NAFTA and GATT. Ackerman, however, though agreeing with Tribe as to the meaning of the 1787 Constitution, and agreeing as well that no formal Article V amendment has changed the treaty clause, argues that a non-Article V amendment was affected by the response of the United States to the exigencies of WORLD WAR II and the de-facto ratification of these new procedures by the American electorate. Indeed, Ackerman makes similar, even more important, arguments in regard to the so-called RECONSTRUCTION amendments following the CIVIL WAR and then the NEW DEAL. He denies, for example, that the Fourteenth Amendment can be legitimately viewed as a simple Article V change of the Constitution. And, agreeing with conservatives that the New Deal violated the original Constitution and that, of course, no formal amendment changed Congress's powers to shape the national economy, Ackerman nonetheless argues that the New Deal represented what he calls a "constitutional moment" that legitimately transformed the operative Constitution. Tribe denounces such ideas a "free-form" theory unbefitting a disciplined legal analyst.

However unconventional Ackerman's approach may be, it responds to the fundamental reality identified by Griffin and others, the brute fact that the meanings ascribed to the Constitution have radically changed over time though there have been so few formal amendments. Those who resist "free-form" theory often either end up simply ignoring the most significant single episode in post-1787 CONSTITUTIONAL HISTORY, the process by which the Fourteenth Amendment became part of the Constitution, or, as with the New Deal, are forced to argue that the Old Court unaccountably failed to understand the Constitution and that the New Deal court simply "restored" the Constitution to its original meaning (or, at least, the meaning given it by Marshall in GIBBONS V. OGDEN (1824)). Or, as with GATT and NAFTA, Tribe, the author of the most significant treatise in constitutional law in the twentieth century, is forced to take a position that, in context, not only is reminscent of a disgruntled JOHN W. DAVIS railing against the New Deal, but also is one that would almost certainly be rejected by any Court to which it was presented, not least because of the political earthquake that would follow a declaration that, indeed, one-third plus one of a grotesquely malapportioned Senate is constitutionally entitled to reject such fundamental aspects of the modern globalized economy. This does not, of course, mean that Tribe is "wrong"; his arguments are well within the rules of acceptable legal grammar, just as were the arguments against the New Deal or, for that matter, the propriety of *Brown*. Nonetheless, there is an unbridgeable chasm between Tribean constitutional theory, at least in this instance, and the actual practices of American political institutions, including courts that offer often strained "interpretations" designed in effect to ratify the de-facto amendatory changes.

One should note that Ackerman's account of historical change, though significantly descriptive, also has a significant normative dimension. He wants to offer an account by which we can recognize "authorized" non-Article V amendments—that is, the results of "constitutional moments" and the particular kind of mobilized polity linked to such moments—and, concomitantly, reject other changes as illegitimate because they do not represent an authoritative, albeit unconventional, declaration by the sovereign "We the People." Whether "constitutional theory," even in its "neo" variety, can escape normativism is an important question. (Whether it should, even assuming it can, is, of course, another question.)

Another important aspect of Ackerman's work, reflected as well in Griffin's call for a new approach to constitutional analysis and a different conception of constitutional theory, is the emphasis on the crucial role of nonjudicial actors within the political system. The innovative actions of Presidents and legislatures, and of state governments, create new political realities to which courts must respond (even if the response, as in important areas of FOREIGN AFFAIRS, is to declare that these are POLITICAL QUESTIONS left to the discretion of political decisionmakers). Moreover, at least one strand of argument among contemporary constitutional theorists concerns the claims made by the Court for its own supremacy as a constitutional interpreter. Constitutional "protestants," who emphasize the legitimacy of multiple interpreters of the Constitution, contend with "catholics" who view the Court as indeed its "ultimate interpreter." Yet other theorists have begun emphasizing (and sometimes questioning) the difference between the interpretive freedom accorded the Supreme Court and the extraordinarily diminished freedom allowed the judges who serve in what the Constitution terms "inferior" courts, who are often expected to be almost literally unthinking satraps of their institutional superiors. If Supreme Court Justices swear loyalty to the Constitution, it appears that they expect their hierarchical inferiors to swear loyalty to themselves. Indeed, Posner, the Chief Judge of the Seventh Circuit Court of Appeals, wrote a famous article in *The New Republic* entitled "What am I, a Potted Plant?," taking issue with this notion.

The post-*Brown* fixation with "constitutional theory as the search for a definitive method of constitutional interpretation by judges on the Supreme Court" allowed its practitioners to avoid coming to terms with the actualities of the American polity, beginning with the fact that judges on the Court are only one, and not at all the most important, set of actors with responsibilities to think seriously about their constitutional duties. Even more to the point, knowledge of these actualities requires immersion in such disciplines as history, both American and comparative, and a number of the social sciences. Whether American legal academics are willing so to immerse themselves remains an open question.

SANFORD LEVINSON
(2000)

(SEE ALSO: *Amendment Process (Outside of Article V); Constitutional Dualism; Nonjudicial Interpretation of the Constitution; Originalism.*)

Bibliography

ACKERMAN, BRUCE 1991 *We the People: Foundations.* Cambridge, Mass.: Harvard University Press.

——— 1998 *We the People: Transformations.* Cambridge, Mass.: Harvard University Press.

ACKERMAN, BRUCE and GOLOVE, DAVID 1995 Is NAFTA Constitutional? *Harvard Law Review* 108:799–929.

BOBBITT, PHILIP 1982 *Constitutional Fate.* New York: Oxford University Press.

——— 1991 *Constitutional Interpretation.* Cambridge, Mass.: Basil Blackwell.

ESKRIDGE, WILLIAM and LEVINSON, SANFORD 1998 *Constitutional Stupidities, Constitutional Tragedies.* New York: New York University Press.

FRIEDMAN, BARRY 1998 The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy. *New York University Law Review* 73:333–433.

GRIFFIN, STEPHEN M. 1996 *American Constitutionalism: From Theory to Practice.* Princeton, N.J.: Princeton University Press.

LEVINSON, SANFORD, ed. 1995 *Responding to Imperfection: The Theory and Practice of Constitutional Amendment.* Princeton, N.J.: Princeton University Press.

POSNER, RICHARD 1998 Against Constitutional Theory. *New York University Law Review* 73:1–22.

SYMPOSIUM 1997 Fidelity in Constitutional Theory. *Fordham Law Review* 65:1247–1818.

TRIBE, LAURENCE H. 1995 Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation. *Harvard Law Review* 108:1221–1303.

## CONSTITUTION AND CIVIC IDEALS

The renowned constitutional scholar ALEXANDER M. BICKEL believed that "the concept of citizenship plays only the most minimal role in the American constitutional scheme." The Constitution "bestowed rights on people and persons, not . . . some legal construct called citizen"—a state of affairs Bickel thought "idyllic."

Indeed, the unamended Constitution mentioned citizenship remarkably infrequently. Three times it made citizenship "of the United States" required for the elective federal offices (Article I, sections 1–2; Article II, section 1). It mentioned citizenship of a "State" four times in describing the JURISDICTION of the federal courts (Article III, section 2), and once in protecting citizens' PRIVILEGES AND IMMUNITIES by a principle of interstate equality (Article IV, section 2). Article I, section 8, also gave Congress the power to establish "an uniform Rule of naturalization." That was all. The Constitution did not define United States or state citizenship, explain their relationship, or specify their "Privileges and Immunities." Strikingly, it did not demand citizenship of voters, Supreme Court Justices, or even traitors (Article III, section 3).

Yet, despite its silences on citizenship, the Constitution embodied not one but several civic ideals, all of which presented a conception of the nature and meaning of membership in the Union that its Framers aimed to perfect. With deference to Bickel, the Constitution's reticence about these ideals traces only partly to an exaltation of universal personal rights over all particular political identities. In important ways the different civic ideals visible in the Constitution were in sharp tension with each other. The Constitution's silences also reflected the Framers' decisions not to confront, much less resolve, those difficulties. Subsequently, these initially postponed conflicts over rival civic ideals have shaped the nation's evolution profoundly. Over time, Americans have modified their original civic conceptions, and in the twentieth century many have supported a new ideal of American civic identity.

In framing the Constitution, American leaders drew on the classical republican tradition espoused by James Harrington and analyzed by Baron de MONTESQUIEU and from colonial and revolutionary struggles men like LUTHER MARTIN derived their beliefs that legitimate governments must be popularly controlled and that popular governance must be conducted preeminently in small republics. Hence, they favored FEDERALISM, opposed lodging any extensive power in the national government, and continued to believe in the primacy of state citizenship over national citizenship. From the Enlightenment LIBERALISM of JOHN LOCKE and, in most American readings, WILLIAM BLACKSTONE, others such as JAMES WILSON and JAMES MADISON derived their esteem for sacred personal rights, including rights of property and conscience (expressed in the CONTRACT CLAUSE limits on the states and the Article IV ban on RELIGIOUS TESTS for national office). Such men tended to favor national power and the primacy of Americans' more extended membership in their nation.

But beyond their liberalism and REPUBLICANISM, American leaders from GOUVERNEUR MORRIS to CHARLES PINCKNEY also expected that to be a full member of the American community, one would share in a special ethnocultural heritage clustered around Protestant Christianity, the white race, European or (preferably) American birth, and male predominance in most spheres. This version of "Americanism" led them to require all Presidents after the revolutionary generation to be "natural born" citizens (Article II, section 1); to countenance black chattel SLAVERY implicitly but recurrently (e.g., Article I, sections 2 and 9; Article IV, section 2; Article V); to distinguish tribal Indians from both Americans and foreigners twice (Article I, sections 2 and 8); and to accept tacitly the subordinate status of women. Such an Americanism was often bound up with Protestant visions of the new Union as a "redeemer nation," providentially selected to serve divine purposes. Christianity also pervaded the other early American civic conceptions, intertwining with republican espousals of public virtue as well as liberal precepts of human dignity that transcended temporal politics and nationalities.

None of these civic conceptions could gain exclusive sway in the Constitution; none could be wholly ignored. In some respects, the Framers invented a novel kind of national liberal republic that was a significant contribution to the development of modern regimes. But some fun-

damental conflicts were compromised or evaded precisely by leaving citizenship and the touchy relation between state and national political membership undefined: by avoiding, explicitly accepting, or opposing the illiberal institution of black chattel slavery; by not specifying civic privileges and immunities; and by refusing to establish a national religion while permitting state establishments to continue. Even the relationship of state authority to Congress's new power to naturalize citizens was left for later resolution.

Almost immediately, state-oriented republican anxieties about the Constitution's expansions of national power compelled Congress to propose the BILL OF RIGHTS, explicitly reserving powers to the states and protecting local institutions like MILITIA and juries, although several amendments, the FIRST AMENDMENT especially, also specified liberal protections of basic personal freedoms. Clashes between Jeffersonianism and Jacksonian STATES' RIGHTS republicanism and the FEDERALISTS' and Whigs' nationalist economic liberalism continued through the antebellum years, accompanied by growing conflicts pitting liberal and Christian advocates of expanded rights for blacks and other ethnic and religious minorities against Americanist defenses of Protestant white male supremacy. Finally, of course, issues of the primacy of state versus national citizenship and the status of blacks fueled the Union's great crisis in the 1860s. The CIVIL WAR amendments appeared to decide those disputes in favor of liberal nationalistic civic conceptions, but in the late nineteenth century both traditional republican views of federalism and Americanist views of racial and gender hierarchies were in many respects successfully reasserted.

Most Progressive Era reformers remained narrow Protestant Americanists, but Progressive intellectuals on the left, including John Dewey, Randolph Bourne, and Horace Kallen, began formulating a broader conception of American civic identity. They drew on republicanism's calls for democratic participation, liberalism's emphasis on equal human dignity, and Americanism's stress on the importance of constitutive social identities. But, relying on pragmatist philosophic foundations, these thinkers reformulated those conceptions into one that may be termed "democratic cultural pluralism." It represented American nationality as a democratically organized confederation of disparate ethnic, religious, and cultural groups, all entitled to equal respect in public institutions and policies; these groups would serve as the primary loci of most persons' social identities. Democratic pluralists saw national membership essentially as a means to advance the welfare of all such groups on a fair, neutral basis. The democratic cultural pluralist conception of American civic identity increasingly came to prevail in judicial constitutional doctrines and in American citizenship statutes after the NEW DEAL and especially during the Great Society years. The federal government repudiated racial SEGREGATION, ended ethnically exclusionary IMMIGRATION and naturalization policies, reduced legal discriminations against women, and promoted broader opportunities via bilingual and AFFIRMATIVE ACTION programs. In the 1970s and 1980s, criticisms of these measures mounted, with many contending that they promoted fragmentation and group selfishness instead of national unity. Thus, the great questions about American civic ideals that the Constitution did not answer still remain far from settled.

ROGERS M. SMITH
(1992)

(SEE ALSO: *Gender Rights; Jacksonianism; Jeffersonianism; Political Philosophy of the Constitution; Pragmatism; Progressive Constitutional Thought; Progressivism; Sex Discrimination; Whig Party.*)

Bibliography

KARST, KENNETH L. 1989 *Belonging to America: Equal Citizenship and the Constitution.* New Haven, Conn.: Yale University Press.

KETTNER, JAMES H. 1978 *The Development of American Citizenship, 1608–1870.* Chapel Hill: University of North Carolina Press.

## CONSTITUTION AS ASPIRATION

What is the point of constitutional law? What fundamental purpose does it serve? And in what sense is the Constitution law? There are at least two possible types of response to these foundational questions; one quite familiar and one less so. The cluster of familiar responses might be called the "Constitution of constraints." On this view, the purpose of the Constitution is to constrain congressional and executive lawmaking at both the state and federal level. The Constitution imposes constraints, or boundaries, on what lawmakers might otherwise be inclined to do. The Constitution is a source of law, because the point of the enterprise, thus understood, is to impose limits, enforced judicially, on what popularly elected representatives or executives might enact, on behalf of the majority they purportedly represent. And limits, interpreted and enforced judicially, is precisely what we mean by "law."

It is this view of the Constitution that has inspired the outpouring of scholarship and judicial opinions concerned with the countermajoritarian difficulty, and it is this view of the Constitution that has defined the boundaries of most contemporary constitutional argument, at least as it pertains to the BILL OF RIGHTS. For while most constitutional theorists agree that the point of constitutional law

is to impose legal constraints on lawmakers from what they might otherwise be inclined to do, they disagree fundamentally over the content of those constraints, and over what the legislative or executive evil is toward which the Constitution is aimed. Thus, liberal constitutionalists view the Constitution's core purpose as the protection of individual rights and liberties against LEGISLATION that serves the interests of majorities but runs roughshod over core individualistic values. Conservative constitutionalists view the Constitution's core purpose as the protection of institutions and traditions that might be endangered by a popular legislature's reckless leveling or egalitarian instincts, and proceduralists or process theorists view the Constitution's core purpose as the protection of the openness and fairness of the political process itself. Although these differences are profound, their common grounding is equally significant: they all concur in their understanding of the Constitution as a "Constitution of constraints," and more particularly of legal constraints to be enforced by the judiciary on behalf of interests, traditions, values, or rights that might otherwise be trammeled by an unconstrained majoritarian process.

As familiar and widely shared as this understanding might be, one can discern in our CONSTITUTIONAL HISTORY and even in our current debates an alternative conception of what the point of constitutionalism might be, and what sense we might make of its self-declared status as "law." On this alternative view, the point of the Constitution is to declare a set of moral and political aspirations for democratic self-governance, rather than a set of judicially enforced legal constraints upon it. These constitutional aspirations, one might argue, are intended to open up and then to guide, rather than constrain, political debate and legislative decisionmaking. They constitute a set of ideals for a DELIBERATIVE DEMOCRACY which the legislative and executive branches ought to aim for. They constitute law, but not in the adjudicative and judge- focused sense meant by the LEGAL REALISTS; rather, they constitute law in the sense often embraced by eighteenth-century natural lawyers: aspirations or ideals meant to guide the hand of the lawmaker. These ideals, or constitutional aspirations, are then realized not only or even primarily through judicial decisions that invalidate legislation, but rather through legislative or executive decisions that further them.

What those aspirations might be, of course, is open to question and a matter of controversy. But because constitutional aspirations, unlike constitutional constraints, are reflected in legislative or executive enactment rather than exclusively in judicial decisions, their content need not reflect the limiting practical and jurisprudential conventions of adjudicative enterprises. The meaning we ascribe to constitutional aspirations, or the content we find in them, or the interpretations on whose behalf we argue, need not, for example, be subject to the limiting practical need to be reasonably subjected to judicial enforceability. Nor need the content ascribed to constitutional aspirations be subject to the jurisprudential or moral imperatives that constrain courts in all adjudicative lawmaking: that the decisions which give them meaning reflect the peculiarly judicial legal goals of horizontal equity, legal justice, and respect for past practice and PRECEDENT. Rather, our constitutional aspirations, and thus the interpretations we suggest for those constitutional phrases that might express them, should serve the quite different practical and moral conventions of legislative enterprises: Constitutional aspirations, understood as ideals governing lawmakers in a deliberative democracy, should, for example, encourage open and informed political democracy among all sectors of society, guide the legislature toward an appreciation and concern for the common good, direct it against favoritism, factionalism, or self-interest, forbid the creation or tolerance of castes, and point law toward the well-being of all.

If we attend to the aspirational content of our Constitution, different potential meanings of some of its key phrases emerge. For example, the FIRST AMENDMENT might be understood, aspirationally, as aimed at the invigoration of political debate and the protection of dissent, rather than as a constraint on all forms of legislation that in any way inhibits private expression. If so, then legislation that inhibits some private expression toward the end of opening up political debate—such as regulations limiting the amount of money spent in political campaigns—might be understood as fulfilling a constitutional aspiration rather than violating a constitutional constraint. The guarantee that no state shall deny an individual's liberty without DUE PROCESS OF LAW, found in the Fifth Amendment and the FOURTEENTH AMENDMENT, might also be understood as expressive of a constitutional aspiration: that each individual enjoy some measure of positive liberty—some measure of true self- governance—which no state may challenge and which Congress must aggressively protect, rather than a constraint on progressive legislation that interferes with private rights of contract or PROPERTY. In this perspective, a federal guarantee of minimal welfare or income sustenance might be understood as essential to this constitutional aspiration. The repeal of such a minimum might be viewed as violative of the aspiration.

To take a more extended example, the Fourteenth Amendment declares that no citizen shall be denied "EQUAL PROTECTION OF THE LAW," but it is silent on what that protection means. Over the last fifty years, the Supreme Court has produced a working and workable account: the equal protection clause, the Court now reasons, requires Congress to legislate in a way that is rational: legislative classifications must rationally track differences

in the world that are relevant to some legitimate legislative end. Racial classifications, according to this standard understanding, are presumptively irrational: they do not reflect any legitimate and meaningful difference between citizens. Legislation that categorizes on the basis of race, therefore, violates the equal protection clause of the Fourteenth Amendment. More generally, any legislation, or any STATE ACTION, which fails this test of rationality is vulnerable to judicial invalidation. Thus, the constitutional guarantee of equal protection imposes a constraint of rationality on legislating majorities, who may otherwise legislate in whatever way and toward whatever end they see fit. Race, and to a lesser extent gender, are presumptively irrational bases for legislative categorization.

This interpretation of both the scope and the meaning of the equal protection clause follows directly—indeed inexorably—from the more basic understanding of the Constitution as one of constraints. First, scope: The equal protection clause, on this view, imposes a constraint of rationality on Congress, on state legislatures, and more broadly on state action. Where the legislating branch fails the test, the legislation is invalidated. Second, on content: The ideal of rationality imposed on Congress and on state legislatures by the Fourteenth Amendment echoes the ideal of horizontal equity or legal justice required of courts in all areas of lawmaking that "likes must be treated alike." The "equal protection" that emerges from the Fourteenth Amendment, when viewed as a part of the constitution as constraint, is an echo of the jurisprudential ideal of lawmaking required of courts. Likes must be treated alike, and claims of difference, and hence different treatment, carefully defended.

Viewed in this light, the paradigm moment of constitutional lawmaking under the Fourteenth Amendment is clearly BROWN V. BOARD OF EDUCATION (1954). The state legislature had legislated on the basis of race, thus failing the test of rationality. Racial differences between citizens, in this case school children, are not rationally relevant to any legitimate state interest. The Court properly invalidated the law. The Constitution thus acted as a constraint on errant legislation, and on the irrational legislature that produced it.

If, however, we view the Fourteenth Amendment's equal protection clause as expressive of a constitutional aspiration, quite different potential meanings emerge. Viewed as a moral and political guide to legislation, the clause might be read as urging upon the state and federal legislatures the task of providing equal protection, through proactive legislation, to groups that are, for whatever societal reason, in need of it. The constitutional mandate, then, is not a directive to courts to invalidate legislation based on impermissibly irrational categorical assumptions. Rather, the constitutional mandate is a directive to state legislatures to enact whatever law is necessary to equally protect citizens against whatever subordinating inequalities has rendered them in need of it—including, for example, the ravages of unchecked private violence, racism, or, arguably, societal neglect—and a grant of power to the federal Congress to take corrective action should the state legislatures fail. The role of the Court in this aspirational enterprise of equality is minimal, while the role of the state and federal legislatures is primary. The Fourteenth Amendment expresses an aspiration, and directs states and Congress to attempt to achieve it.

Both the scope and content of the equal protection clause, on this interpretation, are consistent with the fundamental commitments of the aspirational Constitution. First, on scope: The aim of the clause is to ensure that states and Congress respond to inequalities brought on by social privation or violence coupled with legislative or state neglect. The trigger for constitutionally inspired congressional action, in other words, is not a state's irrational legislation, but rather, private or societal inequality coupled with state inaction. Second, on content: The equal protection clause, on this view, requires of the states and Congress that they act so as to ensure that all people enjoy the equal protection of law. This echoes and instantiates quite general legislative aspirations: to legislate in a way that protects and furthers and enhances the general well-being of all, rather than in a way that furthers the particular interests of some.

Beyond the meaning of particular clauses, however, if we attend to our constitutional aspirations, rather than only heed constitutional constraints, a quite different history of that field of law and politics comes into focus. The history of the equal protection clause understood as a part of our "constitution of constraints" is a history of judicial decisions, reacting to and sometimes invalidating irrational legislative enactments. By contrast, the history of our constitutional aspiration to equal protection is a history of political struggles over the content of equality, periods of public quietude and unrest and eventual legislative enactments, sometimes followed and sometimes not by judicial response. It is a history of our politics, which are sometimes responsive to and sometimes inattentive to and even overtly hostile to constitutional guidance. The paradigm, ideal, climactic moments of this history are not *Brown*, or ROE V. WADE (1973), or ROMER V. EVANS (1996). Rather, the paradigm moments are the passage of the RECONSTRUCTION amendments themselves; the passage of the nineteenth- and twentieth- century CIVIL RIGHTS ACTS; the turn-of-the-century struggles over the constitutionality of progressive taxation and the LABOR MOVEMENT; the campaigns for WOMAN SUFFRAGE; and, in more recent times, the passage of the AMERICANS WITH DIS-

ABILITIES ACT; the VIOLENCE AGAINST WOMEN ACT; and, possibly, the passage, sometime in the next few decades, of a federal law forbidding private-sector discrimination on the basis of SEXUAL ORIENTATION. At each of these moments, Congress acted constitutionally, but in at least two senses, not just one. At each such moment, it acted in compliance with a constraint of rationality. More consequentially for our politics, at each such moment it acted in accordance with a constitutional aspiration: an aspiration to protect all citizens, and equally, against the damage done by societal privation and state neglect, to correct this damage with federal law, and thus to assure equal protection of the law. And at each such moment, Congress acted in harmony with a higher or natural legal obligation to legislate on behalf of the general good, the general will, or the general well-being—to legislate, in short, in the interest of all of the governed.

ROBIN WEST
(2000)

Bibliography

ACKERMAN, BRUCE 1991 *We the People: Foundations.* Cambridge, Mass.: Harvard University Press.

——— 1998 *We the People: Transformations.* Cambridge, Mass.: Harvard University Press.

AMAR, AKHIL 1990 40 Acres and a Mule: A Republican Theory of Minimal Entitlements. *Harvard Journal of Law and Public Policy* 13:37–43.

FISS, OWEN 1976 Groups and the Equal Protection Clause. *Philosophy and Public Affairs* 5:107–177.

HEYMAN, STEVEN 1991 The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment. *Duke Law Journal* 41:507–571.

MICHELMAN, FRANK 1969 Foreword: On Protecting the Poor Through the Fourteenth Amendment. *Harvard Law Review* 83:7–59.

SUNSTEIN, CASS R. 1993 *Democracy and the Problem of Free Speech.* New York: Free Press.

——— 1993 *The Partial Constitution.* Cambridge, Mass.: Harvard University Press.

TRIBE, LAURENCE H. 1985 *Constitutional Choices.* Cambridge, Mass.: Harvard University Press.

TEN BROEK, JACOBUS 1965 *Equal Under Law.* New York: Collier Books.

WEST, ROBIN 1994 *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment.* Durham, N.C.: Duke University Press.

WOOD, GORDON S. 1992 *The Radicalism of the American Revolution.* New York: Knopf.

## CONSTITUTION AS CIVIL RELIGION

That there exist similarities between religious devotion and esteem for the Constitution of the United States is scarcely a new notion. JAMES MADISON wrote in 1792 that our fundamental charter should be the object of "more than common reverence for authority," treated indeed as "political scriptures" protected against "every attempt to add to or diminish them." Conversely, but in the same terms, Madison's great friend and colleague THOMAS JEFFERSON complained in 1816 about the propensity of Americans to "look at constitutions with sanctimonious reverence and deem them like the ark of covenant, too sacred to be touched." By 1885 the young scholar WOODROW WILSON could write in his classic *Congressional Government* of the "almost blind worship" directed at the Constitution's principles.

Perhaps the most important scholarly formulation of the role played by the Constitution within what later scholars would come to call the American civil religion was Max Lerner's 1937 article "Constitution and Court as Symbols." Influenced by Justice OLIVER WENDELL HOLMES, JR.'s famous assertion that "we live by symbols" and by the contemporary political-anthropological analysis of THURMAN ARNOLD, Lerner emphasized the "totem[ic]" aspect of the Constitution "as an instrument for controlling unknown forces in a hostile universe." It was no coincidence with Lerner that an American culture so influenced by Protestant Christianity would fix on the Constitution: "The very habits of mind begotten by an authoritarian Bible and a religion of submission to a higher power have been carried over to an authoritarian Constitution and a philosophy of submission to a higher law." The United States, whatever the prohibition of the FIRST AMENDMENT on an ESTABLISHMENT OF RELIGION, "ends by getting a state church after all, although in a secular form."

The very title of Lerner's article points to the dual aspect of this purported state church: there is not only an authoritative text but also an equally authoritative institution that can give privileged interpretations of that text. That institution, of course, is the Supreme Court. No less a skeptic than HENRY ADAMS confessed that "he still clung to the Supreme Court, much as a churchman clings to his bishops, because they are his only symbol of unity; his last rage of Right." Even the more scholarly Alpheus Mason suggested that the marble palace of the Supreme Court constituted our "Holy of Holies."

It is, then, easy enough to show that religious language and metaphors come readily to analysts of the Constitution. And it is also easy enough to agree with contemporary scholars like Robert Bellah that all societies, very much including our own, amass a variety of myths, symbols, narratives, and rituals that can be brought together under the rubric of "civil religion." But one may still wonder about such concepts, especially when applied quite specifically to suggest that an understanding of American CONSTITUTIONALISM is enhanced by placing it within the analogical

context of religion. What, then, is genuinely learned by reference to Constitution "worship" or comparing the Supreme Court to the Vatican?

For almost all the persons mentioned and many others besides, the lesson has to do with the central role of the Constitution, as declared by the Court, in providing the basis of national unity. A striving for sources of unity is especially important in what Justice THURGOOD MARSHALL aptly described in *Gillette v. United States* (1971) as "a Nation of enormous heterogeneity in respect of political views, moral codes, and religious persuasions." The Constitution overcomes such heterogeneity by offering the individual membership in what one nineteenth-century analyst termed a "covenanting community." From this perspective, it is the Constitution that provides the political basis of the "unum" that overcomes the "pluribus" of American civil society.

One way of achieving this ostensible unity is by explicitly asking (or demanding) that the citizenry pledge commitment to it. The Constitution itself, in Article VI, even as it prohibits religious tests for public office, formally requires all public officials to take an oath recognizing the supremacy of the Constitution over alternate sources of political authority. Such oaths are scarcely meaningless. Thus, Justice WILLIAM J. BRENNAN, when asked if he had "ever had difficulty dealing with [his] own religious beliefs in terms of cases," responded by pointing to the oath he had taken upon appointment to the Court in 1956 as having "settled in my mind that I had an obligation under the Constitution which could not be influenced by any of my religious principles. . . . To the extent that [any duty of a Roman Catholic] conflicts with what I think the Constitution means or requires, then my religious beliefs have to give way."

Not only public officials must take oaths of allegiance to the Constitution: nationalized citizens since 1790 have been required to take an oath of allegiance not simply to the United States but to the Constitution. The United States has been rent by recurrent controversy over the propriety of loyalty oaths as a means both of achieving unity and of identifying those who, by their unwillingness to subscribe to such oaths, are insufficiently integrated into the civil faith.

Although analyzing the Constitution in terms of American civil religion is suggested here, the emphasis on the Constitution as the basis of unity has limits. No doubt there is some validity to this notion, but its adherents often overlook the extent to which shared belief in the abstract idea of the Constitution may often generate significant political conflict, including civil war. Just as the history of traditional religion is replete with actual, often extremely bitter, conflict even among persons purporting to share a common faith, so does the history of constitutional faith present a far more complex picture than the conventional focus on unity would suggest. The notion of the Constitution as the focus of attention in an American civil religion may have more ominous implications than are suggested by an analysis that sees only unity as the outcome of such attention.

Indeed, there are direct analogies between the cleavages observed within traditional religious communities and those seen within the American constitutional community. Two questions common to law and religion seem especially important. First, what constitutes the body of materials that counts as authoritative teachings for the community organized as a faith community? Within traditional religion, this question can take the form of debates about "canonical" texts, for example. But a recurrent struggle, seen vividly, in the history of Western Christianity, concerns the propriety of viewing as authoritative only the materials within a closed body of canonical texts. Counter to such a textual, or scriptural, understanding would be one emphasizing as well the authority of traditions derived from sources other than these canonical texts. From an early time the Catholic church invoked the propriety of its own teachings as a supplement to the teachings of the Bible. That propriety, of course, was specifically challenged by those Protestant reformers who took "Only the Scriptures" as their cry and rejected all nonscriptural teachings as totally without authority.

The second question common to law and religion centers on the need for an institutional structure that can authoritatively resolve disputes. Against the claims of the particular institutional authority of the Vatican, Protestants asserted a "priesthood of all believers" that could come to its own conclusions about the meaning of scripture. The more radical Protestant sects were often accused, not unfairly, of being anarchic in their implications. These are obviously oversimplified "ideal typical" evocations of Catholicism and Protestantism (which have their analogues within Judaism and Islam as well). Nonetheless, how might they help to illuminate the role played by the Constitution within the overall structure of American political culture?

What constitutes the Constitution? Is it composed only of the particular words of the canonical text associated with the outcome of the CONSTITUTIONAL CONVENTION OF 1787, as amended thereafter, or does it also include "unwritten" materials that are equally authoritative? Second, does there exist a particular institution whose interpretations of the Constitution (however defined) are treated as authoritative? Both of these questions allow divergent responses, each of them with their Protestant and Catholic analogues.

As to the first dimension, it is almost certainly true that

an important strain of American constitutionalism is Protestant inasmuch as it emphasizes, like Chief Justice JOHN MARSHALL in MARBURY V. MADISON (1803), a "reverence" for written constitutions, with the linked suggestion that the Constitution consists *only* of what is written down. Perhaps the most important twentieth-century judicial explicator of this strain was Justice HUGO L. BLACK, who began his book *A Constitutional Faith* (1968) by stating, "It is of paramount importance to me that our country has a written constitution." More recent adherents include former Attorney General Edwin Meese and ROBERT H. BORK, whose defeat for a seat on the Supreme Court can be explained in part by his antagonism to the legitimacy of any notion of an UNWRITTEN CONSTITUTION on which judges could draw equally with the written one.

The competing view, emphasizing a more Catholic, unwritten dimension to the Constitution, goes back at least as far as *Marbury.* Indeed, Justice SAMUEL CHASE made free reference to "certain vital principles in our free Republican government" that would "overrule an apparent and flagrant abuse of legislative power" even if not explicitly expressed. Many other Justices, including Chief Justice Marshall himself in FLETCHER V. PECK (1810), have expressed similar sentiments.

The most important modern Justice in this tradition is almost certainly JOHN MARSHALL HARLAN, who joined in an epic debate with Justice Black in the 1965 decision GRISWOLD V. CONNECTICUT, in which the Court invalidated a Connecticut birth control law on the grounds that it violated the RIGHT OF PRIVACY. Justice Black dissented. He could "find in the Constitution no language which either specifically or implicitly grants to all individuals a constitutional "right to privacy." Though he "like[d] my privacy as well as the next person," he refused to find it protected against state interference. For Black, evocation of an unwritten aspect of the Constitution threatened a return to the discredited jurisprudence of LOCHNER V. NEW YORK (1905) and its endorsement of a nontextual FREEDOM OF CONTRACT. Harlan, however, joined in striking down the Connecticut law and endorsed the necessity when interpreting DUE PROCESS OF LAW to look at "what history teaches are the traditions from [this country] developed as well as the traditions from which it broke. That tradition is a living thing." A central fault line of debate within the Supreme Court can thus be understood as pitting "Protestants," who emphasize a solely textual Constitution, against "Catholics," who look to unwritten tradition as well.

The second dimension of the Protestant-Catholic distinction—that concerning institutional authority—does not so much explain debate within the Supreme Court as it does the fundamental debate about the primacy of the Court as an expositor of the meaning of the Constitution. The Court has several times in the modern era, most notably in the 1958 Little Rock school case COOPER V. AARON, interpreted *Marbury* to stand for the proposition that it is the "ultimate interpreter" of the Constitution. Justice Black, however Protestant his theory of the Constitution, was thoroughly Catholic in his embrace of the ultimate authority of the Supreme Court as constitutional interpreter.

Not surprisingly, it has usually been nonjudges who have proclaimed the merits of a more Protestant understanding of judicial authority. A classic account was given by President ANDREW JACKSON in his 1832 message (written by ROGER BROOKE TANEY) vetoing on constitutional grounds the renewal of the charter of the BANK OF THE UNITED STATES. He dismissed Marshall's opinion in MCCULLOCH V. MARYLAND (1819), which upheld the constitutionality of the bank, stating that the "authority" of the Supreme Court opinions was restricted only to "such influence as the force of their reasoning may deserve." ABRAHAM LINCOLN, when running against STEPHEN A. DOUGLAS for the Senate in 1858, took a similar stance in regard to the infamous DRED SCOTT V. SANDFORD decision of the previous year. More recently, former Attorney General Meese provoked significant controversy when he criticized JUDICIAL SUPREMACY and called for recognizing the primacy of the Constitution as against the decisions of the Supreme Court. Meese was castigated by many who not only defended the role of the Court as "ultimate interpreter" but also pronounced Meese's views as having dangerously anarchic tendencies.

To the extent that one accepts a reading of traditional religion as providing a base for disruption and fragmentation as well as unity, one should be prepared to accept the suggestion that the Constitution-oriented civil religion will have similar aspects and tendencies. In particular, the debates about the sources underlying legitimate decision making and about institutional authority to give privileged interpretations are likely to last at least as long as the schism between the Roman Catholic church and Protestant sects, however much the proponents of any given view would like to bring the debate to an end through surrender by the other side.

Finally, one should note that some critics have condemned the notion of civil religion not so much on empirical grounds—they often concede the existence of the phenomenon analyzed by Bellah, Lerner, and others—but rather on normative grounds. Embrace of the tenets of constitutional faith has been described by some of these critics as the equivalent of idolatry. They argue instead that constitutional faith, however important, must always be judged by the distinctly different claims of more traditional faith communities.

SANFORD LEVINSON
(1992)

(SEE ALSO: *Constitution and Civic Ideals; Political Philosophy of the Constitution.*)

Bibliography

BELLAH, ROBERT 1970 Civil Religion in America. Pages 168–189 in Bellah, ed., *Beyond Belief.* New York: Harper & Row.

GREY, THOMAS C. 1984 The Constitution as Scripture. *Stanford Law Review* 37:1–25.

KAMMER, MICHAEL 1986 *A Machine That Would Go of Itself: The Constitution in American Culture.* New York: Knopf.

LERNER, MAX 1937 Constitution and Court as Symbol. *Yale Law Journal* 42:1290–1319.

LEVINSON, SANFORD 1988 *Constitutional Faith.* Princeton, N.J.: Princeton University Press.

## CONSTITUTION AS LITERATURE

Although presumably no one would say that the Constitution offers its readers an experience that cannot be distinguished from reading a poem or a novel, there is nonetheless a sense in which it is a kind of highly imaginative literature in its own right (indeed its nature as law requires that this be so), the reading of which may be informed by our experience of other literary forms. But to say this may be controversial, and the first step toward understanding how such a claim can be made may be to ask what it is we think characterizes imaginative literature in the first place.

It is common in our culture to marginalize "high literature," even while admiring it, and this mainly by thinking of it as offering nothing more than a refined pleasure, merely aesthetic in kind, and by assuming that it can therefore have nothing to do with practical affairs, with money or power. Those who think of themselves as literary people sometimes reciprocate with a marginalization of their own, speaking as if the merely practical offered nothing of interest to one who is devoted to what Wallace Stevens once called "the finer things of life." But this mutual marginalization impoverishes both sides, and the rest of us too, for it rests on a false dichotomy, between the aesthetic and the practical, which is like—and related to—those between fact and fiction, form and content, science and art.

For there is an important sense in which all literature is constitutive, great literature greatly so, of the resources of culture, which are simultaneously employed and remade in the creation of the text, and of what might be called the textual community as well. (By this I mean the relations that each text establishes between its author and its reader, and between those two and the others that it talks about.)

Beginning with the second point, we can say that every text, whether self-consciously literary or not, establishes what Aristotle called an ethos (or character) for its speaker and its reader and for those it speaks about as well; in addition, it establishes, or tries to establish, a relation among these various actors. In this sense every text is socially and ethically constitutive, a species of ethical and political action, and can be understood and judged as such. In fact, we make judgments of this sort all the time—although perhaps crudely so—for example whenever we find a politician's speech patronizing or a commercial advertisement manipulative or when we welcome frank correction at the hand of a friend.

The first point, that the text reconstitutes its culture, is perhaps more familiar, for we have long seen works of art as remaking the culture out of which they are made. This observation establishes a significant connection between the Constitution (and other legal texts) on the one hand and literary texts on the other; for in both, the material of the past is reworked in the present, and part of the art of each of these kinds of literature is the transformation, or reconstitution, of its resources.

To say this is to leave open, of course, the question how, and by what standards, such judgments of art and ethics are to be made. To pursue this question would be the work of a volume at least; let it suffice here to say these are judgments that expression of all sorts permits and that expression of a self-conscious kind—in the law and in fiction, as well as poetry and history—invites. Perhaps we can say in addition that through the reading of texts that address this question in interesting and important ways we may hope to develop our own capacities of analysis and judgment. For present purposes, the point is simply to suggest that once literature is seen as socially and culturally constitutive, the connection with the Constitution, and with the judicial literature elaborating it, may seem less strange than it otherwise might.

This line of thought began by rethinking what we mean by literature. We might wish to start from the other side, by thinking again about our ways of imagining law. In our culture the law is all too often seen simply as a set of rules or directives issuing from a sovereign to be obeyed or disobeyed by those subject to it. This is the understanding—crudely positivistic—that for many years dominated much of our theoretical thinking and much of our teaching as well; it still holds sway deeper in our minds than we may like to admit. In fact, as the history of the Constitution itself demonstrates with exemplary clarity, the meaning of legal directives is not self-evident or self-established, but requires the participation of readers who offer a variety of interpretations, often in competition with each other. In this sense the readers, as well as the writers, of our central legal texts are makers of the law, and any view of the law and the Constitution should reflect this fact.

Law is perhaps best thought of, then, not as a structure

of rules, but as a set of activities and practices through which people engage both with their language (and with the rest of their cultural inheritance) and with each other. One of its aims, deeply literary in character, is to give meaning to experience in language; this is the backward-looking role of law. When it looks forward, as it does above all in the Constitution (but also in contracts, statutes, loan agreements, and trust indentures), it seeks to establish through language a set of relations among various actors, each of whom is given by the legal text certain tasks, obligations, or opportunities that otherwise would not exist, but none of which can be perfectly defined in language. By its nature, then, the legal text gives rise to a set of rhetorical and literary activities through which alone it can work.

The point of such a line of thought is not to assert there is no difference between a judicial opinion, or a constitutional amendment, and a lyric poem—that would be silly—but that, by looking to the deeper structures of the activities in which we engage, we may see them as sharing certain concerns and do this in ways that improve our capacity to understand, to judge, and to perform them. We may perhaps free literature from the veil drawn over it by the claim that it is merely aesthetic and, at the same time, free law from its veil, made of the claims that it is purely practical, only about power, or simply a branch of one of the policy sciences.

The Constitution is constitutive in the two ways in which every text is: it recasts the material of its tradition into new forms, for good or ill; and it establishes a set of relations among the actors it addresses and defines. The first point is historical and quite familiar and usually takes the form of observing that the U.S. Constitution is not a wholly radical innovation, but built upon certain models—British and colonial—out of which it grew. To this fact indeed it owes much of its durability and, perhaps as well, much of its capacity to make what really was new (that is, dual sovereignty) both intelligible and real. The second point is really a suggested way of reading the Constitution: not as a document allocating something called "power" but as a rhetorical creation defining new places and occasions for talk, creating new speakers, and establishing conditions of guidance and restraint. All of these activities are imperfectly determinate and therefore call for the literary and rhetorical practices of reading and writing, intepretation and argument, that lie at the center of the law. Before the Constitution was adopted, none of its official actors existed; there was no President, no Senate, no Supreme Court. One of the effects of the text, as ratified, was to bring these actors into existence. But that is not the end of it; every act of these new actors depends for its validity upon a claim, implied or expressed, about the meaning of the Constitution itself, and every such claim is in principle open to argument. This is not to say that the Constitution is incoherent, but that as a work of language it has much uncertainty built into it. In fact, it has the only kind of coherence that is open for human institutions to have.

This brings us to the most obvious, and best rehearsed, connection between literature and the law, especially constitutional law, namely, both of these fields work by the reading of texts, or by what it is now the fashion to call "interpretation." That word, however, is not without its dangers, for it may be taken to imply that an interpreter of a text reproduces in her own prose, in her "interpretation," a statement of what the original text means that is in some sense complete and exhaustive, which can indeed serve as an adequate substitute for it. But in neither literature nor the law can this be done; any "interpretation" is of necessity partial, in the sense that it is both incomplete and motivated by a set of understandings and desires that belong to the present reader (formed though these are in part from the materials of the past). The "interpretation" of an earlier text does not so much restate its meaning as elaborate possibilities of meaning that it has left open; the new text is the product of a new time, as well as the old.

Not solely the product of the present and of its partialities, both law and literature are grounded on the premise that the past speaks to us in texts that illumine and constrain though always incompletely so. Accordingly, there are similar interpretive vices in both fields; for example, the attempt to collapse the text, with all its difficulties and uncertainties, into some simplified statement of its "plain meaning," all too often in denial of the uncertainties that both kinds of texts necessarily have and with them the responsibilities for judgment that they generate. Or we may seek simplicity in another direction, defining the meaning of the text by reference to something outside it (for example, the biography of the writer or the "original intention" of the framer or legislator), usually without recognizing that what we think of ourselves as simply referring to is also, in part at least, our own creation—a text which itself requires interpretation. The result of both of these methods is the hidden arrogation of power to the so-called interpreters, who pretend to yield to an external authority, but actually exercise the power in question themselves. Or the vice may be of an opposite kind: to see so much complexity and indeterminacy in a text as to make its responsible reading hopeless and to say, therefore, that nothing can be clear but our own desires (if those) and that no respect needs to be paid (because none can) to the putatively authoritative texts of others. At its extreme, the tendency of this method is to destroy both law and culture.

In both kinds of work the process of reading requires

a toleration of ambiguity and uncertainty: a recognition of complexity, an acknowledgment that our own habits of mind condition both what we see in a text and what we feel about it, and a relinquishment of the hope of universal and absolute clarity. Yet it requires a recognition as well that the past can speak to the present, that culture can be transmitted and transformed, that it is possible, and worth doing, to look beyond ourselves to that which we have inherited from others. Here, in this uncertain struggle to discover and state meaning, to establish a connection with the texts of another, is the life of law and literature alike.

One feature of legal interpretation that is distinctive, or distinctively clear, and of special relevance to the Constitution is its idealizing character. The reading of legal texts inherently involves us in the expression of our ideals, and this in two ways. First, whenever we interpret the Constitution, or any other legal text, we necessarily imagine for it an author, with a certain imagined character and set of values, situated in a certain set of circumstances, and actuated by a certain set of motives or aims. For whatever our theory may pretend, the text cannot be read simply as an abstract order or as the decontextualized statement of an idea; it must be read as the work of a mind speaking to minds. Thus, in our every act of interpretation we define—indeed, we create—a mind behind the text. This is necessarily the expression of an ideal; although, of course, our sense of the past helps to shape it, and to call it an ideal is not to say that it is one that all people share. But we idealize the speakers of the law, or it is not law.

Second, the literature of the law is inherently idealizing in the way in which lawyers idealize their official audiences. We speak to a judge not as to the small-minded angry person we actually think him to be, but as his own version of the wisest and best judge in the world, as we imagine it. And the judge too speaks not to a world of greedy, selfish, and lazy people, as he may see us, but to an ideal audience, the best version of the public he can imagine. In both cases our acts of imagining are acts of idealization for which we are responsible; it is in this way the nature of law to make the ideal real.

JAMES BOYD WHITE
(1992)

(SEE ALSO: *Constitutional Interpretation*)

Bibliography

LEUBSDORF, JOHN 1987 Deconstructing the Constitution. *Stanford Law Review* 40:181–201.

VINING, JOSEPH 1986 *The Authoritative and The Authoritarian.* Chicago: University of Chicago Press.

WHITE, JAMES BOYD 1984 *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community.* Chapter 9. Chicago: University of Chicago Press.

# CONTEMPT POWER, JUDICIAL

The Constitution nowhere mentions contempt of court. The courts' powers in this area flow instead from a COMMON LAW tradition of debated antiquity and legitimacy. Contempt power has, however, become entangled with the Constitution in two respects: first, courts have had to explain how they came to exercise a power that in some respects seems antithetical to constitutional values; second, the Constitution has been held to limit some aspects of the courts' exercise of contempt power.

Contempt is the disobedience of a court's order or interference with its processes. Most judicial decrees are not orders to do or refrain from doing some act. Contempt would not arise, for example, from the simple failure to pay a money judgment. Some judgments, however, directly order a party to perform or refrain from performing some act. A court might order a party to transfer land, to integrate a school system, to cease polluting a stream, to answer questions put by the other side, or to refrain from obstructive behavior in the courtroom.

Having disobeyed such an order, one might be charged with a crime (since many jurisdictions make such acts criminal) or with contempt. Either charge might result in a fine or jail sentence, but the accompanying process might differ. For some categories of contempt the contemnor may suffer punishment without many of the rights normally attaching to criminal trials: to be represented by counsel, to prepare for trial, to present testimony, to cross-examine witnesses, or to have a TRIAL BY JURY. The list is extreme and would not apply to all of the often confusing categories of contempt developed by the courts, but it illustrates the potentially drastic nature of the power.

Courts employ such "criminal" contempt sanctions to redress judicial dignity, but individual litigants may also use contempt sanctions to gain the benefit of court orders. A party seeking to compel obedience to an INJUNCTION entered at his request may ask a court for a "civil" contempt sanction. Such a sanction typically orders the contemnor to jail or to the payment of a progressively mounting fine until he "purges" himself of the contempt by obeying the injunction in question. Though an accused civil contemnor enjoys the rights of counsel, testimony, and cross-examination, his hearing has none of the protections accorded criminal defendants, for the courts have held that this is a "civil" rather than a "criminal" proceeding in spite of the risk of imprisonment. Nor is the duration of the imprisonment or the size of the fine subject to any limitation save the discretion of the judge and the contemnor's continuing ability to perform the act required of him.

Justifying the use of apparently criminal penalties without protections constitutionally accorded criminal defendants, the courts have relied on claims of history, necessity,

and categorization. The claim of history has rested on the propositions that at the time the Constitution was framed courts had long exercised contempt powers and that the Framers did not intend to alter them. Those claims have been challenged but are still made. The claim of necessity still urges the need for orderly adjudicatory proceedings and enforceable orders. The argument rests on the hypothesis that, were the usual restrictions of the BILL OF RIGHTS to apply to contempt proceedings, the courts would be unable to function. The argument from categorization involves simply the assertion that because neither civil nor criminal contempts involve "crimes," the portions of the Bill of Rights applicable to crimes do not apply. In the case of imprisonment for civil contempt this argument is bolstered by the circumstance that the contemnor has the power at any time to obtain his release by complying with the order—a power not enjoyed by a convicted criminal.

Though the courts' exercise of contempt power has thus been remarkable for the absence of constitutional constraints, some limits do exist. First, state and federal legislatures have statutorily required greater protections that the Constitution mandates. Second, the Supreme Court has imposed some constitutional limits: in criminal contempts the judge must find the defendant guilty beyond a reasonable doubt; in "indirect" contempts (those not committed before a judge or involving judicial officers) the contemnor is, in addition, accorded the rights of counsel, testimony, and cross-examination. Even in cases of direct contempt the contemnor may have a trial by jury if the judge proposes to inflict a serious penalty. Yet even in enunciating these protections, the Court has steadfastly insisted that the judge has a wide power to impose sentence on the spot for contemptuous behavior in the courtroom.

Judicial use of contempt power involves a collision between two *desiderata:* that of having tribunals able to conduct their proceedings and enforce their orders; and that of having persons whose freedom stands in jeopardy enjoy the protections of the Bill of Rights. Thus far the courts have concluded that in many situations the first goal necessitates subordinating the second.

STEPHEN C. YEAZELL
(1986)

Bibliography

GOLDFARB, RONALD L. 1963 *The Contempt Power.* New York: Columbia University Press.

## CONTEMPT POWER, JUDICIAL
(Update)

Contempt is an ancient process for punishing disrespect for, disruption of, or disobedience of a lawful order of the government. For centuries in England and the United States the process was essentially unregulated. Individual judges and legislative houses defined and punished contempt as they saw fit.

Arguably, little has changed. Federal contempt statutes are notoriously vague and do not limit the power to punish. Although contempt of Congress proceedings are not unheard of, most modern contempt proceedings (including contempt of Congress) involve the judiciary. Contempt is invoked to deal with conduct ranging from misbehavior in court, to refusals to supply information, to failures to make support payments, to disobedience of orders regulating protests at ABORTION clinics, and much else.

Contempt is nowhere mentioned in the Constitution, but repeated instances of serious abuse have led the Supreme Court to impose both substantive and procedural limits on the contempt power, relying on various provisions of the Constitution.

For example, judges long used contempt to punish those who criticized their decisions. The Court has in the last fifty years repeatedly held that such punishments abridge the FIRST AMENDMENT guarantee of FREEDOM OF SPEECH.

Another battle involved the right of accused contemnors to TRIAL BY JURY. Historically, there was no such right; however, the contempt power was frequently employed to deny jury trials for alleged conduct that constituted both crimes and violations of court orders. The Court, recognizing the judge's inherent conflict of interest in a proceeding to vindicate the dignity and authority of the court, OVERRULED centuries of PRECEDENT and held that the Sixth Amendment required a jury trial for serious contempt punishments.

Much in the law of contempt turns on the murky distinction between "civil" and "criminal" contempt. The distinction does not depend on whether the allegedly contumacious conduct constitutes a crime, but rather on the purpose of the contempt proceeding. If it is to punish a past act of contempt, the proceeding is said to be "criminal," and most of the constitutional protections afforded criminal defendants apply. If the purpose is to coerce compliance with an existing order—for example, by a cumulative fine or jail sentence until the contemnor obeys—or to compensate a party injured by the contumacious conduct, the proceeding is said to be "civil," and is governed by the more general standard of DUE PROCESS OF LAW. The civil/criminal distinction is difficult to apply, especially where on-going acts allegedly violate a judicial order, and thus all three purposes may be served by the same proceeding. This has led to much confusion over the procedural protections available to those accused of contempt.

Another distinction contributing to procedural confusion is between "direct" and "indirect" contempts. A "di-

rect" contempt is an act of disrespect or disobedience personally observed by the judge. On the theory that no fact-finding process is necessary, "direct" contempts may be punished "summarily," that is, without a formal trial. "Indirect" contempts involve conduct outside the presence of the judge, requiring some form of trial to determine what occurred. Despite efforts by judges to expand the category of "direct" contempts, the Court has limited the summary contempt power as a matter of due process to acts committed in the judge's presence requiring immediate response to protect the court's ability to function.

The law of contempt thus presents many difficult issues. In addition to the procedurally confusing distinctions, there is still neither a generally accepted definition of contumacious behavior nor a framework for assessing the appropriate severity of sanctions. And there is the recurring problem posed by those who prove impervious to coercive contempt sanctions, some of whom endure years of incarceration rather than comply. The Court may tell us in the future how the Constitution applies to these and other questions.

EARL C. DUDLEY, JR.
(2000)

(SEE ALSO: *Clinton v. Jones.*)

Bibliography

BRAUTIGAM, RICHARD C. 1972 Constitutional Challenges to the Contempt Power. *Georgetown Law Journal* 60:1513–1536.

DOBBS, DAN B. 1971 Contempt of Court: A Survey. *Cornell Law Review* 56:183–284.

DUDLEY, EARL C., JR. 1993 Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts. *Virginia Law Review* 79:1025–1098.

FOX, SIR JOHN C. 1927 *The History of Contempt of Court.* Oxford, England: Clarendon Press.

GOLDFARB, RONALD 1963 *The Contempt Power.* New York: Columbia University Press.

KUHNS, RICHARD B. 1978 The Summary Contempt Power: A Critique and New Perspective. *Yale Law Journal* 88:39–123.

OSWALD, JAMES F. 1892 *Contempt of Court, Committal, and Attachment and Arrest Upon Civil Process in the Supreme Court of Judicature.* London, England: W. Clowes.

RAVESON, LOUIS S. 1990 A New Perspective on the Judicial Contempt Power: Recommendations for Reform. *Hastings Constitutional Law Quarterly* 18:1–65.

## CONTEMPT POWER, LEGISLATIVE

See: Legislative Contempt Power

## CONTINENTAL CONGRESS

On September 5, 1774, delegates from the colonies convened in Philadelphia in a "Continental" Congress, so called to differentiate it from local or provincial congresses. The FIRST CONTINENTAL CONGRESS adopted a Declaration and Resolves to protest British measures and promote American rights; it also adopted the ASSOCIATION. The Congress dissolved on October 24, 1774, having decided that the colonies should meet again if necessary on May 10, 1775. By that time, the colonies and Great Britain were at war. The Second Continental Congress adopted a Declaration of the Causes and Necessity of Taking Up Arms on July 6, 1775, and the DECLARATION OF INDEPENDENCE a year later. The Congress appointed GEORGE WASHINGTON as commander-in-chief of its armies, directed the war, managed FOREIGN AFFAIRS, and adopted a plan of union designated as the ARTICLES OF CONFEDERATION. After the thirteenth state ratified the Articles in 1781, the official governing body of the United States became known as "the Congress of the Confederation," but it was a continuation of the Continental Congress and was not reconstituted until 1789, when a Congress elected under the Constitution of the United States took office.

LEONARD W. LEVY
(1986)

Bibliography

BERNETT, EDMUND C. 1941 *The Continental Congress.* New York: Macmillan.

## CONTRACEPTION

See: Birth Control; *Griswold v. Connecticut*; Reproductive Autonomy

## CONTRACT CLAUSE

In a flashing aperçu Sir Henry Maine observed that "the movement of progressive societies has hitherto been a movement from Status to Contract." In feudal systems a person acquired a fixed, social status by birth, one's legal rights and duties being determined thereby for life. The decline of feudalism was a fading away of the status system in favor of personal rights and duties based largely on contractual relationships. Obligations imposed by ancestry gave way to obligations voluntarily undertaken. Generally thereafter a person's place in society depended upon success or failure in covenants with respect, for example, to wages, raw materials, farm and industrial goods, or artistic talent. In such a setting it is crucial that agreements be dependable—not merely to promote the individual's se-

curity and mobility but for the good of a society that relies for its sustenance upon a vast network of voluntary, contractual relationships. Thus Article I, section 10, of the Constitution, reflecting in part unfortunate experience under the ARTICLES OF CONFEDERATION, forbids *inter alia* state laws "impairing the OBLIGATION OF CONTRACTS." In THE FEDERALIST #44, JAMES MADISON, observed that such laws "are contrary to the first principles of the SOCIAL COMPACT and to every principle of sound legislation." In his view "the sober people of America" were "weary of fluctuating" legislative policy, and wanted reform that would "inspire a general prudence and industry, and give a regular course to the business of society."

Indeed the sanctity of contracts was deemed so vital to personal security that in fifty-five years following the Supreme Court's first contract clause decision (FLETCHER V. PECK, 1810), twenty-two states put such provisions in their own constitutions. With one exception each of them was included in the state's bill of rights. Prior to 1810 four states had already done this. All of them protected contracts generally (per *Fletcher*), not merely private contracts as in the NORTHWEST ORDIANCE. Plainly in JOHN MARSHALL's day and long thereafter his Court's broad view of the contract clause was widely accepted—along with FREEDOM OF RELIGION, and FAIR TRIALS—as one of those restrictions on government "which serve to protect the most valuable rights of the citizen."

Obviously those who thus equated property rights and civil liberty were—like the Founding Fathers and the MARSHALL COURT—disciples of JOHN LOCKE. He had taught that property and liberty go hand in hand; that neither thrives without the other; that to protect them both as indispensable to life itself is the reason for government. Generations later, in a radically changed economic setting, some Americans came to believe that property hampers liberty. Inevitably then (having forgotten Locke) they would misunderstand both the founders and our early judges—Lockians all. Thus the Progressive movement convinced itself and its heirs that the Marshall Court had erred in holding the contract clause applicable to state, that is, public, covenants and that in so holding the judges had revealed a pro-property bias. Both of these views—derived largely from *Fletcher* and *Dartmouth College v. Woodward* (1819)—seem erroneous. The first rests on the strange idea that unambiguous language of the Constitution means not what it plainly says, but rather something else, because of the supposed intent of its authors. (Of course authors' intent may be a proper key to the meaning of ambiguous terminology, but that is a very different matter.)

Had the CONSTITUTIONAL CONVENTION OF 1787 wanted the clause to cover only private agreements, that is, those between individuals, it need only have said so. The Continental Congress had done just that in the Northwest Ordinance: "... no law ought ever to be made, or to have force in the said territory, that shall in any manner whatever, interfere with or affect private contracts. . . ." Six weeks later, RUFUS KING moved to include its private contract approach in the Constitution. Following a brief discussion of possible ramifications of such a provision, it was dropped. A few days later, at the suggestion of the Committee of Style, the Constitutional Convention adopted the contract clause, which refers comprehensively to "contracts" without qualification. Nothing in our record of the proceedings explains the change of mind or the change of terminology. But this is certain: not a word there or in *The Federalist* even hints that the founders were concerned only with private covenants—that they thought a state should be free to violate its own agreements. ALEXANDER HAMILTON would later observe: "It is . . . impossible to reconcile the idea of a [state] promise which obliges, with a power to make a law which can vary the effect of it." Hamilton, of course, had been a member of the Constitutional Convention.

Long before John Marshall became a judge, Justice JAMES WILSON, in CHISHOLM V. GEORGIA (1793), had asked rhetorically: "What good purpose could this constitutional provision secure if a state might pass a law impairing the obligation of its own contracts, and be amendable, for such a violation of right, to no controlling judiciary power?" This from one who had been perhaps the second most important leader of the Constitutional Convention. Justice WILLIAM PATERSON, too, had been influential at the Convention. Years before *Fletcher* in a similar case, VAN HORNE'S LESSEE V. DORRANCE (1795), he had held that a state could not impair its own contractual obligations. So did the highest court of Massachusetts in *Derby v. Blake* (1799) and in *Wales v. Stetson* (1806). *Fletcher* was not without significant judicial precedent.

The argument that the contract clause does not mean what it says rests essentially on the proposition that the crucial contract problem in late eighteenth-century America was erosion of private contract obligations by debtors' relief legislation. No doubt this was a vexing and well-known difficulty. Yet surely it is no *ipso facto* basis for excluding related problems plainly covered by explicit constitutional language. State negligence with respect to state obligations was after all a matter of experience. Even if it were known that the Framers intended the written words to embrace only private contracts, judges could not properly adopt that view. For those who ratified can hardly be said to have ratified something other than the words of the document. To hold otherwise is to undermine the basic premise of a written constitution. As the Marshall Court put it in orthodox manner in *Dartmouth:* "This case being within the words of the Contract Clause, must be

within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception. . . ." No such basis for an exception having been discovered, the Supreme Court ever since has found the contract clause applicable as written to contracts generally, whether public or private.

A related problem in *Fletcher* concerned the scope of the term "contract." The Georgia legislature had sold and granted to speculators millions of acres of public land. A subsequent legislature had repealed the grant on the ground that it had been obtained by bribery. Meanwhile part of the land had been conveyed to innocent third-party purchasers. The issue in *Fletcher* was whether the initial grant entailed obligations protected against impairment by the contract clause. The Court responded affirmatively. Of course, in modern usage a grant is not a contract, but that does not solve the problem. For it is quite clear that in the late eighteenth century the term "contract" had far broader connotations than it does today. As Dean ROSCOE POUND has explained:

> Contract was then used, and was used as late as Parsons on Contracts in 1853 to mean [what] might be called "legal transaction." . . . Not merely contract as we now understand it, but trust, will, conveyance, and grant of a franchise are included. . . . The writers on natural law considered that there was a natural legal duty not to derogate from one's grant. . . . This is the explanation of *Fletcher*, . . . and no doubt is what the [contract clause] meant to those who wrote it into the Constitution. ["The Charles River Bridge Case," *Massachusetts Law Quarterly* 27:19–20.]

In sum, in the context of the times a grant included an executory, contractual obligation of the grantor not to violate the terms of his grant.

On this and the public contract aspect of Marshall's opinions one finds no criticism or disagreement in a random selection of twelve legal treatises published before 1870, including THOMAS M. COOLEY's famous *Constitutional Limitations* (1868). Twelve years later, however, Cooley's *General Principles of Constitutional Law* (1880) took a somewhat critical stand. The change apparently reflected attacks upon the Marshall Court by C. M. Hill, R. Hutchinson, and J. M. Shirley writing separately in the *American Law Review* and the *Southern Law Review* from 1874 to 1879. In due course the Progressives would pick up these charges that the Marshall Court had erred, and they would add that "the great Chief Justice" was in fact "a stalwart . . . reactionary," a servant of property interests. It seems no coincidence that the Hill-Hutchinson-Shirley attacks germinated in an era (1865–1873) when nearly sixty percent of laws challenged under the contract clause were held invalid—an all-time high. Many such cases of course "favored" business interests and thus tended to offend Progressives. The result was that John Marshall became for them a villain.

*Fletcher*, of course, upheld the property claims of innocent, third-party purchasers. The alternative would have been to sustain the property claims of the innocent people of Georgia. Either way the judges would be deciding in favor of some, and against other, property interests. Either way innocent people would suffer. One fails to see how *Fletcher* can be said to reveal a property bias. Was there, however, bias of another sort in deciding for the ultimate buyers rather than for the initial owners? Far from exceptional, the choice was informed by a long settled (and still prevailing) rule of Anglo-American EQUITY jurisprudence. Although a fraudulent purchaser takes a good title *at law*, it is subject to cancellation by a chancery decree. Thus in a clash between a cheating buyer and his innocent victim the latter prevails. But *Fletcher* involved a clash between the innocent victim and an equally innocent, subsequent purchaser for value. With the equities thus in balance and the social interest in security of transactions on the side of the purchaser in possession, the chancellor does not intervene (the victim's recourse being an action for damages against the fraudulent party). In short, Marshall and his Court read the contract clause in the light of a long familiar rule of equity.

In the *Dartmouth* case, a group of philanthropists had received a public charter to create a college in New Hampshire. Later the state tried to take over and govern the school contrary to the charter provisions. Marshall's Court, following *Fletcher*, held that the charter was a contract which the state was not free to violate. Viewed narrowly the case was won by the college trustees, but they had no beneficial interest in the college property. They won on behalf of the donor-philanthropists (presumably deceased) and generations of future students.

The Progressive response is that the *Dartmouth* decision was a crafty gambit purposefully designed for an ulterior purpose: protection of corporation charters from legislative interference. That it was highly successful is demonstrated, we are told, by the enormous growth of corporate enterprise thereafter. This is make-believe. Justice JOSEPH STORY in *Dartmouth* pointed out that no state need grant irrevocable or nonamendable charters—that the power to amend or revoke may be reserved. Damage resulting from failure to do so can hardly be held a fault of the judges. In fact reservation of power to alter corporate charters became widespread after *Dartmouth* and was not unknown before. (See RESERVED POLICE POWER.)

*Fletcher* and *Dartmouth* are not pro-property, but rather pro-transaction, cases. They mean that when judges

find no clearly overriding public interest such as they found in GIBBONS V. OGDEN (1824) they will not disturb the contractual arrangements, that is, the *transactions*, by which women and men conduct their affairs—be they philanthropists (*Dartmouth*) or land speculators and farmers (*Fletcher*). As Marshall put it, "the intercourse between man and man would be very seriously obstructed, if this principle be overturned." Incidentally, by killing New York's restrictive steamboat law *Gibbons* too promoted transactional freedom.

An inclination toward unfettered private activity was deep in the temper of the times. Americans were on the make. They had escaped the old-world fetters: king, feudal aristocracy, and established church. They were the "new men." A vast geographical frontier invited initiative and ingenuity. The standard of living was low, but natural resources were plentiful. These conditions put a high premium on private, developmental effort. Such was the setting in which contract clauses found their way into bills of rights along with other basic protections then deemed indispensable to personal freedom and social well-being.

If the Marshall Court found that the Constitution forbade reneging on state obligations, it also recognized that public agreements raised special problems justifying a special rule of strict construction. In PROVIDENCE BANK V. BILLINGS (1830) Rhode Island had chartered the Providence Bank "in the usual form" with no reference of stipulation concerning taxation. Later, when the state enacted a bank tax, Providence Bank argued that a power (taxation) which might be used to destroy its charter was foreclosed by implication. The Court demurred: "as the whole community is interested in retaining [the power to tax] undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose to abandon it does not appear." Obviously the mere grant of a corporate charter for an ordinary banking operation could not rationally be held to imply an immunity from routine, nondiscriminatory taxation.

Marshall's Jacksonian successors under Chief Justice ROGER B. TANEY followed the established path with two modifications: a temporary enlargement of the rule of strict construction, and a decision that a state may not by covenant fetter its power of EMINENT DOMAIN. The former occurred in CHARLES RIVER BRIDGE CO. V. WARREN BRIDGE CO. (1837). Massachusetts had authorized private investors to build, operate, and maintain a public drawbridge in exchange for toll rights for a period of forty (later extended to seventy) years. Before that period expired the state authorized a competing, in effect toll-free, bridge only yards away from the original facility. Was the state free thus to jeopardize the revenue of the first bridge, or did the forty-year provision implicitly preclude such interference? It must have been clear at the outset to all concerned that investors would not provide, maintain, and operate for forty years a public facility, if the state were free at any time to disrupt their only source of compensation. Surely in these circumstances the Marshall rule of strict construction was satisfied; the state's "deliberate purpose" to permit unimpeded toll collection for the period in question seems obvious.

The Taney Court did not repudiate—indeed it purported to follow—the *Providence Bank* rule of strict construction. In fact, it simply ignored the "deliberate purpose" aspect of that rule, and substituted an incompatible principle derived from English precedents: "nothing passes by implication in public grants." (Thus did Harvard College lose part of its endowment.) Justices Story and SMITH THOMPSON dissented on implied agreement grounds. Justice JOHN MCLEAN agreed with them on the merits, but thought the Court lacked JURISDICTION. In substance *Charles River* was a 4–3 decision—although five of the Justices had been appointed by President ANDREW JACKSON, the other two by his Jeffersonian predecessors.

The majority position—exalting form over substance—would have permitted construction of an adjacent, toll-free bridge immediately after construction of the first one. Yet surely no court would so decide. If this be true, the Taney rule against implied agreements must be untenable. The Court seems rarely to have used it, having returned long ago to the Marshall approach. See, for example, NORTHWESTERN FERTILIZING CO. V. HYDE PARK (1878): "Nothing is to be taken as conceded but what is given in unmistakable terms, *or by an implication equally clear*" (emphasis added). The major upshot of the Taney Court's stricter rule of construction was that those who covenanted with a state took care to secure elaborately explicit commitments.

*Charles River Bridge* exudes liberalism, stressing as it does the social interest in progress. Property rights, the Court proclaimed, must not impede developing technology. Old turnpike charters, for example, should be construed "strictly" lest they block new railroads. But no such clash of old and new was at issue before the Court. The real problem was that after some forty years the Massachusetts legislature had come to believe the tolls were no longer justified—the bridge having long since paid for itself. A severely split Court decided not the real, but a hypothetical, case—demonstrating once again that the framing of the issue largely determines the outcome of a controversy.

The other innovation of the Taney era came in *West River Bridge Co. v. Dix* (1848). Vermont had granted exclusive bridge rights. This did not prevent it from confiscating the grantees' bridge during the life of the grant—

subject of course to JUST COMPENSATION. The Court's rationale was that all contracts are subject to HIGHER LAW conditions. "Such a condition is the right of eminent domain." The indispensable power of taxation, however, is not such a "condition" and thus may be limited by state covenants, as the Court held in PIQUA BRANCH OF THE STATE BANK V. KNOOP (1854). Surely the distinction rests not on "higher law"—whatever that meant to the Court in the *Piqua* opinion—but upon the just compensation requirement in the one situation but not in the other, and the fact that there are many taxpayers and many ways to secure public revenue, but only one recourse when a specific piece of private property stands in the way of the public welfare.

The WAITE COURT followed a similar approach in generously defining the so-called STATE POLICE POWER. Thus a charter to operate a lottery does not bar enforcement of a later antilottery law. "All agree that the legislature can not bargain away the police power," the Court declared in STONE V. MISSISSIPPI (1880). Of course neither the state in question, nor any other, has ever undertaken to "bargain away" its POLICE POWER. The DOCTRINE as enunciated in *Stone* is at best a truism providing no standard for judgment. Had it been used in *Dartmouth*, the school would have lost its case and its independence. In fact, as Gerald Gunther has remarked, the *Stone* police power rule has been used mainly in cases "involving prohibitions of matters widely regarded as "evil": for example, lotteries and intoxicating beverages, in an era when "Court invalidations of state laws impairing corporate charter privileges reached its highest frequency." (See INALIENABLE POLICE POWER.)

The epidemic of railroad fever that began in the Midwest in the 1850s was a prolific source of contract clause litigation. Many towns, cities, counties, and states issued railroad-aid bonds at an overall face value exceeding half a billion dollars. The purpose was to induce railroad companies to build lines convenient to the various bond issuers. Some of the desired construction never materialized. Many, perhaps all, of the railroad companies were overcapitalized. Stock watering was common. Some public and company officials were less than honest. These developments produced widespread resentment which some communities may have used for selfish purposes. In any case, what Henry Adams called the "mortgaged generation" (1865–1895) tried in one form or another to evade or repudiate much of its bond obligation. These circumstances are reflected in the path-breaking case of GELPCKE V. DUBUQUE (1864). After several decisions upholding the authority of cities to issue railroad-aid bonds, the Iowa Supreme Court, reinterpreting state law, reversed itself. On review the nation's highest Court upheld the claims of the adversely affected bondholders. In doing so it intimated that the state court's shift of position, retroactively altering the position of investors, was incompatible with contract clause principles. Popularly elected state judges apparently were more responsive to public sentiment than were appointed members of the federal Supreme Court. Ten years later *Pine Grove Township v. Talcott* (1874) brought the most extreme application of *Gelpcke* doctrine: to situations in which the state judiciary held bond issues invalid without overruling any prior decisions. The Supreme Court's rationale was that similar bond issues had been upheld in many other states before issuance of the bonds in question.

The contract clause intimations in *Gelpcke* and *Pine Grove* became an explicit basis of decision in *Douglass v. Pike* (1880). Much later the Court said that state court decisions did not produce contract obligations, and that neither *Gelpcke* nor its numerous offspring had in fact held otherwise. (*Tidal Oil Co. v. Flanagan*, 1924.)

Along with these bond cases another numerically important group involved the old problem of tax exemption. Without foregetting Marshall's *Providence Bank* rule of strict construction, the Court blocked a series of state efforts to annul pledges of corporate tax immunity.

After 1890 the contract clause as applied to state covenants gradually declined in favor or a more comprehensive, new device called SUBSTANTIVE (economic) DUE PROCESS—a gross perversion of the FOURTEENTH AMENDMENT. Years later, after the demise of that perversion, two cases suggested a possible renaissance of the contract clause. In UNITED STATES TRUST CO. V. NEW JERSEY (1977), the Court expounded a new principle of "particular" (more careful) scrutiny for cases involving public covenants "because the State's self-interest is at stake." New Jersey had issued transportation-system bonds pledging it would not substantially divert to other transportation needs the reserves and revenues securing them. Later it repealed this pledge. State courts upheld the repeal as a police power measure designed to promote additional transportation facilities. The Supreme Court reversed. No longer willing to defer to state determination of such issues, it ruled that judges must decide whether the contract impairment is "reasonable and necessary to serve an important public purpose." In this case it found that the state's needs could be served by less drastic means. In a bitter dissent Justices WILLIAM J. BRENNAN, BYRON R. WHITE, and THURGOOD MARSHALL insisted that for a century the "central principle" had been this: "unusual deference to [state and local] law-making authority." They could not accept a departure "from the virtually unbroken line of our cases" holding that "lawful" exercises of the police power are "paramount to private rights held under contract." The question remains, however, whether a particular exercise of power is lawful.

We turn now from public to private contract problems. No doubt the contract clause was inspired largely by debtor's relief laws, for example, measures authorizing postponed repayment of debts, installment payments, or payment in goods (often at a discount). In the Supreme Court's first encounter with this private contract problem it struck down a New York law discharging debts upon surrender of the debtor's property however inadequate to meet his obligations. Chief Justice Marshall's opinion for a unanimous Court in STURGES V. CROWNINSHIELD (1819) is noteworthy for two points: the "mere existence" of the national BANKRUPTCY POWER does not preclude state insolvency legislation; and, while a state may not impair contract obligations, it may alter the legal sanctions (remedies, such as imprisonment for debt) for enforcement of such obligations. Eight years later OGDEN V. SAUNDERS (1827) construed *Sturges* to prohibit only retrospective application of insolvency measures. Prospective application was deemed a different matter. The Court's rationale was that a debtor relief act in existence at the time of a contract became part of the contract; later enforcement thus would not constitute an impairment. On this basis, however, a retroactive insolvency law could also be upheld. After all, a state's power to adopt future insolvency measures may equally be deemed part of every contract. In his only recorded constitutional dissent "the great Chief Justice" along with Justices GABRIEL DUVALL and Story objected: the 4–3 majority had reduced a safeguard for contract rights to no more than a prohibition on "retrospectivity." Later, we shall see, even this restriction faded away.

Marshall's dissenting view in *Ogden* finds support in two separate votes in the Constitutional Convention. The contract clause of the Northwest Ordinance applied only to "private contracts . . . previously formed." In "copying" it, the Founders (as we have seen) dropped the limiting word "private." *They also dropped the limiting term "previously formed."* Later, on September 15, the Convention reaffirmed this position by rejecting George Mason's motion to insert the word "previous" after the words "obligation of" in the contract clause. Thus on two occasions the convention *rejected* the limitation that *Ogden v. Saunders* read into the Constitution.

The *Sturges* distinction between impairment of obligations and alteration of remedies threatened in later years to undermine the contract clause. Thus BRONSON V. KINZIE (1843), a leading Taney Court decision, taught that the allowable scope of remedial changes depends on their "reasonableness," provided "no substantial right" is impaired. As Justice BENJAMIN N. CARDOZO wrote with characteristic restraint in *Worthen Co. v. Kavanaugh* (1935), the dividing line "is at times obscure." The leading modern case, HOME BUILDING AND LOAN ASSOCIATION V. BLAISDELL (1934), upheld a Minnesota "mortgage moratorium" law that extended the time of payment of mortgage loans, thus saving many homeowners, farmers, and businesses from foreclosure. The Court used the remedy and police power gambits to escape the *Sturges-Ogden* rule against retroactivity. The significance of the case is this: it is the culmination early in the Great Depression of a long, step-by-step process that replaced the absolute approach of the Constitution with a judicial balancing or "reasonableness" approach in private contract cases. Yet all agree these are the cases that above all else produced the unqualified language of the contract clause. Such absolutism does not mean that the founders were hard-hearted, preferring creditors to debtors. It means merely that, giving debtor-relief authority to Congress via the bankruptcy power, they opted for uniform, national treatment of the ubiquitous debtorcreditor tension.

Notwithstanding *Blaisdell* the "old Court" thereafter struck down several insolvency measures. One of them was LOUISVILLE JOINT STOCK LAND BANK V. RADFORD (1935). In effect it read the contract clause into the Fifth Amendment to invalidate a federal mortgage moratorium law (a matter of reverse INCORPORATION). Then with the advent of the Roosevelt Court in 1937 (until *United States Trust* in 1977) the contract clause all but vanished as a safeguard for contractual obligations—public or private. The only exceptions are *Indiana ex rel. Anderson v. Brand* (1938), protecting teacher tenure claims, and *Wood v. Lovett* (1941), protecting a tax-sale purchaser against repeal of a law that cured possible defects in his title. *Wood* is particularly interesting because it rests on the *Fletcher* principle that a state land grant entails an implied contractual obligation not to repudiate the grant in question. Then came ALLIED STRUCTURAL STEEL CO. V. SPANNAUS (1978). There an employer had adopted an employee pension agreement. The state tried to alter it by enlarging the employer's obligations retroactively. Finding the alternation too "severe" to be upheld, the Court observed: "If the Contract Clause is to retain any meaning at all . . . it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." As in *United States Trust*, Justices Brennan, White, and Marshall dissented bitterly. Stressing again their view of minimal (or no) protection of economic interests vis-à-vis the police power, they added this: the contract clause at most prevents diminution, not enlargement, of contractual obligations.

All of these cases from *Fletcher* to *Spannaus* entail a common theme: the precept of reasonable expectations. To what extent, if any, is government free to disturb those formal pledges on which men and women acting in good faith have planned their lives? A healthy legal system accommodates changing social needs. When ours was a rich

and vigorous, yet underdeveloped, nation with a low overall standard of living, our law encouraged capital formation, transactional freedom, and respect for contract obligations. The "design"—not always and everywhere fully perceived—was to encourage production in the interest of a more comfortable life for everyone. Given the propensity of successful institutions to press beyond the limits of their logic, such encouragement may take grotesque forms, for example, the judicial abuses called DUAL FEDERALISM and substantive due process. If eventually a "backward" nation becomes highly developed, emphasis seemingly shifts from economic rights to "personal rights," from production to welfare, as in the United States beginning in the 1930s. If such a shift results in overreaction, threatening the source of the "golden eggs," emphasis may focus again on production along with protection for property and contractual rights, as in *New Jersey Trust* and *Spannaus.*

WALLACE MENDELSON
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Bibliography

HALE, ROBERT L. 1944 The Supreme Court and the Contract Clause. *Harvard Law Review* 57:512–557, 621–674, 852–892.

HURST, WILLARD 1956 *Law and the Conditions of Freedom.* Madison: University of Wisconsin Press.

SCHWARTZ, BERNARD 1980 Old Wine in Old Bottles? The Renaissance of the Contract Clause. *Supreme Court Review* 1979:95–121.

WRIGHT, BENJAMIN F. 1938 *The Contract Clause of the Constitution.* Cambridge, Mass.: Harvard University Press.

## CONTRACT THEORY

See: Social Compact Theory

## CONTROLLED-SUBSTANCE ABUSE

Throughout the quarter-century from 1965 to 1990 the federal government waged a frustrating "war" against the growing problem of trafficking in, and abuse of, marijuana, heroin, cocaine, and other drugs. The government's war on drugs raises a number of issues of constitutional dimension: To what extent does the EQUAL PROTECTION clause permit differences in the regulation of various controlled substances? How specific must regulations be to conform to the requirements of the DUE PROCESS clause? To what extent is the use of controlled substances protected by a constitutional RIGHT OF PRIVACY or by RELIGIOUS LIBERTY? Does the FOURTH AMENDMENT prohibition of unreasonable SEARCH AND SEIZURE contain an exception for seizure of illicit drugs? Does the prohibition of CRUEL AND UNUSUAL PUNISHMENT impose any limitations on the sanctions imposed on drug offenders?

The FOURTEENTH AMENDMENT guarantee of equal protection of the laws has been interpreted to require a RATIONAL BASIS for governmental classifications. A classification is "underinclusive" if it does not include all who are similarly situated and "overinclusive" if it includes those who do not rationally belong with the other members of a prohibited class. The earliest efforts to regulate the abuse of controlled substances raised substantial issues under the equal protection clause, because they failed to include many drugs and tended to apply the same punitive sanctions to all drugs, despite substantial differences in their dangerousness. In 1937, for example, the Marijuana Tax Act classified marijuana with narcotic drugs, imposing the same harsh penalties for possession of marijuana as for heroin or cocaine. For more than thirty years, the drug policy of the United States recognized no distinctions among drugs. The same strategy was used to control all drugs, and that strategy was simply to keep escalating the penalties. Only one exception was recognized, and that was alcohol. Alcohol was treated as though it were not a drug at all. Drug treatment programs racked it up as a success if they converted a drug addict into an alcoholic. Separate federal bureaucracies were created to deal with alcohol abuse and drug abuse so that no one would get the idea that America's ten million alcoholics were addicted to a drug.

In 1970 the federal Controlled Substances Act codified a comprehensive scheme for the classification of drugs on five different schedules, depending on their potential for abuse, risk of addiction, and legitimate medical use. Penalties for trafficking vary substantially, depending on the schedule on which a drug is placed. Since 1970, continuous legal challenges have been mounted against the classification of marijuana on Schedule I, along with heroin, LSD, and other drugs having no recognized medical use. Other drugs, such as PCP, have been moved from a lower schedule to a higher one as awareness of the potential for their abuse has increased.

The guarantee of due process of law contained in both the Fifth and Fourteenth Amendments has been interpreted to require adequate notice of a criminal prohibition, to ensure both that potential violators can comply with the law and that law enforcement officers are not given broad authority to discriminate in the enforcement of the laws. Laws not meeting this standard are struck down as unconstitutionally vague.

In two spheres drug laws have raised substantial problems of VAGUENESS. The first problem lies in the description of the prohibited drug itself. The development of "designer drugs" in clandestine laboratories has enabled

new drugs to appear in the illicit market faster than laws can be amended to prohibit them. Congress responded in 1986 by prohibiting controlled-substances "analogues," which are defined as substances whose chemical structure is "substantially similar" to previously controlled substances. Legal challenges asserting that this language is unconstitutionally vague are currently pending.

Second, attempts to regulate the marketing of drug paraphernalia have run into vagueness challenges, because drug "paraphernalia" include common household objects, such as spoons and scales. In 1982 the Supreme Court upheld an ordinance regulating the sale of items "designed or marketed for use with illegal cannabis or drugs." The Court concluded that any problem of vagueness was cured by a requirement of proof of actual intent that the items be used for illegal purposes.

The constitutional guarantee of privacy has been interposed against many governmental efforts to regulate drug use, but the most significant battleground has been urine testing of employees to detect drug use. In 1989 the Supreme Court gave the green light to programs requiring DRUG TESTING of railway employees involved in train accidents and U.S. Customs Service employees applying for positions involving interdiction of drugs. The Court declared that the expectations of privacy are diminished for employees who participate in industries that are pervasively regulated or who are employed in drug enforcement efforts.

Whether drug use can ever be constitutionally protected as part of a religious exercise came before the Court in a 1990 case presenting a constitutional challenge to the discharge of Oregon employees who participated in a Native American Church ceremony that included the chewing of peyote buttons. In EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES V. SMITH, the Court declared that a general criminal prohibition of the use of peyote could be enforced even when peyote was used as part of a legitimate, bona fide religious ceremony. The dissenting Justices argued that preference was being shown to some religions over others, noting that the alcohol used for sacramental wine in Catholic services was exempted from the PROHIBITION laws enacted in the 1920s.

The prohibition of UNREASONABLE SEARCHES and seizures in the Fourth Amendment has frequently been viewed as an obstacle by police charged with the enforcement of drug laws. The EXCLUSIONARY RULE, which requires the suppression of illegally seized evidence, may result in the dismissal of drug trafficking charges if the illicit drugs were seized without a valid SEARCH WARRANT. A study of New York City police revealed that immediately after the exclusionary rule was first announced in 1961, arrest reports in half of all cases related that the defendant "dropped the drugs on the ground upon seeing the police officer." Any inquiry into the grounds for a search was thus avoided. During the prior year only fourteen percent of the reports claimed the defendant dropped the drugs. Obviously, the new rule did not cause an outbreak of "dropsy" in New York; it caused an outbreak of police perjury. Police were willing to lie to avoid application of the exclusionary rule to their searches.

Congress has frequently responded to the complaints of narcotics officers that the exclusionary rules make their jobs too tough. As part of President RICHARD M. NIXON's war on drugs, Congress enacted a NO-KNOCK ENTRY provision for drug cases in 1970, providing that search warrants for drugs could dispense with the normal requirement that police knock and announce themselves before entering the premises to be searched. Police argued that the exemption was necessary for drug cases because drugs are quickly destroyed if violators are warned of the police presence. What was forgotten was that police occasionally make mistakes. A series of "wrong-door" raids led to shootouts that left four innocent people dead, including one police officer. In 1974, Congress repealed the no-knock provision, restoring the requirement of a knock on the door even in drug cases.

During the 1980s the argument that search and seizure requirements should be relaxed in drug cases gained a receptive ear in the Supreme Court. In case after case, the Court carved out exceptions to the requirements of PROBABLE CAUSE and search warrants, citing the need for more pervasive police surveillance to prevent the smuggling of illicit drugs.

A common legislative response to the frustration of escalating drug use is simply to escalate the penalties for illegal possession or trafficking of drugs. Does the cruel and unusual punishment clause of the Eighth Amendment impose any limitation? In 1962 the Supreme Court struck down a California law that made it a criminal offense "to be addicted to the use of narcotics." The Court characterized addiction as an illness over which the victim had no control, and concluded it would be "cruel and unusual punishment" to imprison someone for simply being sick. Subsequent cases, however, have held that addiction offers no defense to someone arrested for such activities as possession of drugs or being intoxicated in public. The imposition of life prison sentences has been challenged as disproportionate to the seriousness of drug offenses, but the Supreme Court currently gives states a wide berth in setting the level of punishment for drug offenses.

In the early 1970s, New York's Governor Nelson Rockefeller successfully sponsored a law imposing mandatory life imprisonment for drug pushers. The law was hailed as the ultimate solution, one that would make drug selling such a serious offense that no one would want to take the risk. The total failure of that policy quickly became an

embarrassment. Motorists began complaining that they could not drive down some streets in Harlem in broad daylight without being accosted at every corner by drug hustlers. The hustlers, of course, were addicts on the lowest rung of the distribution ladder. The threat of a mandatory prison sentence had little impact on them.

Today legislators are stymied. Although they have imposed a mandatory sentence of ten years to life and a fine of $100,000 for engaging in a drug enterprise, these penalties have no perceptible impact on the number of drug enterprises flourishing in America. A serious suggestion has been made that CAPITAL PUNISHMENT is the answer.

A potent weapon against drug traffickers has been found in the enactment of forfeiture laws. Under the Comprehensive Forfeiture Act of 1984, federal authorities can seize any property derived from the proceeds of a drug transaction or any property used to facilitate a drug offense. Houses, businesses, automobiles, airplanes, and boats have been forfeited to the government. In 1990 the Supreme Court ruled that money paid to criminal defense lawyers for representation in drug prosecutions could also be seized, without violating the Sixth Amendment RIGHT TO COUNSEL. Courts have split on the question of whether the Eighth Amendment prohibition of cruel and unusual punishment requires that a forefeiture be proportionate to the seriousness of the offense. In one case, forfeiture of a house worth $100,000 was upheld even though the property was used to grow less than $1,000 worth of marijuana plants.

As the war on drugs escalates, the tension between law enforcement techniques and traditional constitutional liberties will increase. In applying a BALANCING TEST, courts can be expected to give greater and greater weight to the need to suppress drug trafficking. One may hope that the casualties in the war on drugs will not include the Constitution itself.

GERALD F. UELMEN
(1992)

(SEE ALSO: *Crack Cocaine and Equal Protection; Drug Regulation.*)

Bibliography

KAPLAN, JOHN 1970 *Marijuana: The New Prohibition.* New York: Simon and Schuster.

NATIONAL COMMISSION ON MARIJUANA AND DRUG ABUSE 1973 *Drug Use in America: Problem in Perspective*, Second Report (March).

TREBACH, ARNOLD 1982 *The Heroin Solution.* New Haven, Conn.: Yale University Press.

UELMEN, GERALD F. and HADDOX, VICTOR G. 1990 *Drug Abuse and the Law.* New York: Clark Boardman.

WISOTSKY, STEVEN 1986 *Breaking the Impasse in the War on Drugs.* Westport, Conn.: Greenwood Press.

# COOLEY, THOMAS M.
(1824–1898)

Thomas McIntyre Cooley was a distinguished law teacher, state judge, first chairman of the Interstate Commerce Commission, and author of the influential 1868 *Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union.* Born in western New York to a family with a Jeffersonian "bias," Cooley absorbed an anticorporate equal-rights ideology, fearful of "class legislation" that aided the few at the expense of many.

In 1843 Cooley went west to Michigan and combined activities in law, journalism, politics, and poetry. He helped organize the Free Soil Party in the state and in 1856 became a Republican. Narrowing his concerns to the law, he rapidly attained professional recognition. Appointed Compiler of the state's laws in 1857 and Reporter to the Supreme Court in 1858, he was selected in 1859 as a professor at the newly opened University of Michigan Law Department. In 1864 he was elected to the Michigan Supreme Court.

Cooley tempered his preoccupation with the law with historical and political values and naturally turned to constitutional questions. To Francis Thorpe's 1889 query on books for a constitutional law library he replied that "constitutional law is so inseparably connected with constitutional history and that is so vital a part of general history that I should not know where to draw the line."

Historical, COMMON LAW, and Jacksonian sensibilities were the presuppositions of Cooley's 1868 treatise, although his aim was merely to write "a convenient guidebook of elementary constitutional principles." The book was that; it had gone through six editions by 1890 and had a broader circulation, a greater sale, and more frequent citations than any other law book published in the second half of the nineteenth century.

The treatise was useful because no one prior to Cooley had systematically analyzed the cases and principles dealing with constitutional limitations on state legislative power. Chapters on constitutional protection to personal liberty, to liberty of speech, and to RELIGIOUS LIBERTY were supplemented with chapters on municipal government, EMINENT DOMAIN, taxation, and the POLICE POWER. Chapter Eleven, "Of the Protection to Property by the Law of the Land" attracted the most attention, for here Cooley discussed DUE PROCESS OF LAW and gave it a significant substantive definition. Cooley said that legislative restraints on property should be tested by "those principles of civil liberty and constitutional defense which have become established in our system of law, and not by any rules that pertain to forms of procedure only." His test of due pro-

cess was historical: the "established principles" and "settled usuages" of the common law protected property rights.

Cooley's definition of due process was used in the briefs of corporation lawyers who also distorted his comprehensive definition of the liberty protected by the FOURTEENTH AMENDMENT as embracing "all our liberties—personal, civil, and political" to a FREEDOM OF CONTRACT doctrine. Twentieth-century commentators have often accepted these briefs, misinterpreting Cooley as a zealous advocate of the judicial protection of property rights. To Cooley, however, due process did not necessarily mean judicial process nor did individual property rights mean corporate property rights. His views on judicial self-restraint were summarized in his treatise comment that judges "cannot run a race of opinions upon points of right, reason, or expediency with the law-making power." And Cooley repeated Justice LEMUEL SHAW's views on a strong police power.

When Cooley was writing his treatise he was lecturing students on "the struggle between corporations and the rights of the people," condemning the decision in DARTMOUTH COLLEGE V. WOODWARD (1819), issuing opinions criticizing special privileges for corporations, and using the principle of equal rights and the maxims of "no taxation except for a PUBLIC PURPOSE" and of "due process of law" to declare tax aid to railroad corporations unconstitutional.

Cooley anxiously observed the growth of corporate capitalism in post-CIVIL WAR America. Deploring the national sentiment "to become immediately rich and great," he worried over the conflict of labor and capital and felt "that *class legislation* has been making the rich richer and the poor poorer," adding that "property is never so much in danger of becoming master as when capital unjustly manipulates the legislation of the country." These remarks in an 1879 lecture at Johns Hopkins University have been overlooked, as has a similar warning in an 1884 article on "Labor and Capital Before the Law" that when constitutional protection to property especially benefits those who have possessions, "the Constitution itself may come to be regarded by considerable classes as an instrument whose office it is to protect the rich in the advantages they have secured over the poor, and one that should be hated for that reason."

In court decisions Cooley evidenced older Jeffersonian values, upholding free public education, the FREEDOM OF THE PRESS, the rights of local self-government, and the necessity for judicial self-restraint. But the changing America of the late nineteenth century diminished earlier Jeffersonian hopes. In a melancholic mood in 1883 he admitted that "the political philosophy of Burke never grows stale and is for all times and all people."

By the 1880s Cooley had a national reputation, earned by judicial duties and constant lecturing, editing, and writing, including editions of SIR WILLIAM BLACKSTONE and JOSEPH STORY and treatises on torts and taxation. Aspirations for a United States Supreme Court appointment were dashed in 1881 when railroad interests, Cooley thought, successfully lobbied for STANLEY MATTHEWS. But Cooley had given up on Republicans, and in 1886 wondered whether the Party "possesses any good reason for existence." He admired GROVER CLEVELAND and accepted his offer of the chairmanship of the Interstate Commerce Commission. Regulating the American railway system was a task beyond Cooley's declining powers, and the effort led to a breakdown that left him a semi-invalid after 1890.

An 1889 comment to the South Dakota Constitutional Convention reveals that Cooley had modified older beliefs in constitutional limitations to legislative power: "Even in the millennium people will be studying ways whereby—by means of corporate power—they can circumvent their neighbors. Don't do that to any such extent as to prevent the legislative power hereafter from meeting all the evils that may be within the reach of proper legislation."

ALAN R. JONES
(1986)

Bibliography

JONES, ALAN R. 1986 *The Constitutional Conservatism of Thomas McIntyre Cooley: A Study in the History of Ideas.* New York: Garland Publishing.

TWISS, BENJAMIN 1942 *Lawyers and the Constitution: How Laissez-Faire Came to the Constitution.* Princeton, N.J.: Princeton University Press.

## *COOLEY v. BOARD OF WARDENS OF PORT OF PHILADELPHIA*
12 Howard 299 (1851)

The chaos in judicial interpretation that characterized the TANEY COURT'S COMMERCE CLAUSE cases was ended in *Cooley*, the most important decision on the subject between GIBBONS V. OGDEN (1824) and UNITED STATES V. E. C. KNIGHT CO. (1895). The Taney Court finally found a doctrinal formula that allowed a majority to coalesce around a single line of reasoning for the first time since the days of the MARSHALL COURT. That formula was the DOCTRINE of SELECTIVE EXCLUSIVENESS, announced for the majority by Justice BENJAMIN R. CURTIS. The doctrine was a compromise, combining aspects of the doctrines of CONCURRENT POWERS over commerce and EXCLUSIVE POWERS, but three Justices of the eight who participated rejected the compromise. Justices JOHN MCLEAN and JAMES M. WAYNE, whom Curtis privately called "high-toned Federalists," persisted

in their nationalist view, expressed in dissent, that congressional powers over INTERSTATE and FOREIGN COMMERCE were always exclusive, while PETER V. DANIEL, an intransigent states-rightist, concurred in the majority's result on the ground that congressional power over commerce was never exclusive.

At issue in *Cooley* was the constitutionality of a Pennsylvania statute requiring ships of a certain size entering or leaving the port of Philadelphia to employ local pilots in local waters. Cooley, claiming that the state act unconstitutionally regulated foreign commerce, refused to pay the pilotage fee. The fact that the first Congress had provided that the states could enact pilotage laws did not alter Cooley's claim. Curtis for the Court acknowledged that if the grant of commerce powers to Congress had divested the states of a power to legislate, the act of Congress could not confer that power on the states. The problem was whether the power of Congress in this case was exclusive.

Commerce, Curtis declared, embraces a vast field of many different subjects. Some subjects imperatively demand a single uniform rule for the whole nation, while others, like pilotage, demand diverse local rules to cope with varying local situations. The power of Congress was therefore selectively exclusive. If the subject required a single uniform rule, the states could not regulate that subject even in the absence of congressional legislation. In such a case congressional powers would be exclusive. Such was the nationalist half of the doctrine. The other half, by which the Court sustained the state act, maintained that the states did possess concurrent powers over commerce if the subject required diversity of regulation. Thus Congress's power was exclusive or concurrent depending on the nature of the subject to be regulated. "It is the opinion of a majority of the court," Curtis declared, "that the mere grant to Congress of the power to regulate commerce, did not deprive the States of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention . . . to leave its regulation to the several States."

The Court's doctrine of selective exclusiveness gave it a point of departure for analyzing commerce clause issues. The doctrine, however, had to be interpreted. It did not even suggest how the Court could determine which subjects required national legislation, thus excluding state action, and which required diverse local regulations. The doctrine could be manipulated by Justices who employed nationalist doctrine to invalidate state enactments.

LEONARD W. LEVY
(1986)

Bibliography

SWISHER, CARL BRENT 1974 *History of the Supreme Court.* Vol. 5:404–407. New York: Macmillan.

## COOLEY RULE

See: *Cooley v. Board of Wardens of Port of Philadelphia*; Selective Exclusiveness

## COOLIDGE, CALVIN
(1872–1933)

John Calvin Coolidge, the thirtieth President of the United States, succeeded WARREN G. HARDING upon Harding's death in August 1923 and served until 1929. The heart of his legislative program was a series of tax reductions for individual taxpayers in all brackets, economy in government, and a balanced BUDGET.

The chief legislative controversy of the 1920s concerned the McNary-Haugen bills, which Coolidge vetoed in 1927 and 1928. These bills, proposed in response to a prolonged agricultural recession, would have authorized the federal government to buy and sell farm products in an effort to raise their prices. Coolidge opposed the bills as unworkable and as an unconstitutional expansion of the commerce power. The Congress, he argued, was limited to those powers granted to it or implied as incidental to the express powers. In language anticipating the opposition to the NEW DEAL, Coolidge cautioned against the dangers of bureaucracy. He also observed that the people of the United States could reallocate the constitutional powers of the federal government and the states by means of the AMENDING PROCESS. Coolidge supported national legislation to regulate child labor, but he believed that a constitutional amendment would be required first to grant such power to the federal government.

Coolidge's only appointment to the Supreme Court was of his Amherst College classmate, Attorney General HARLAN FISKE STONE.

THOMAS B. SILVER
(1986)

Bibliography

SILVER, THOMAS B. 1983 *Coolidge and the Historians.* Durham, N.C.: Carolina Academic Press.

## *COOLIDGE, UNITED STATES v.*

See: Federal Common Law of Crimes

## *COOLIDGE v. NEW HAMPSHIRE*
403 U.S. 443 (1971)

In *Coolidge v. New Hampshire*, police officers, acting pursuant to a SEARCH WARRANT issued by the state attorney

general, seized and later searched an automobile parked in the driveway of a murder suspect's home. The Supreme Court ruled the warrant invalid because a prosecutor could not be regarded as a neutral and detached magistrate. The automobile seizure was too far removed in time and space from the suspect's arrest to be considered incident to that arrest, was not grounded in any EXIGENT CIRCUMSTANCES to qualify for an AUTOMOBILE SEARCH or PLAIN VIEW exception nor was the discovery of the automobile inadvertent. Later decisions have confined *Coolidge* to its facts, emphasizing the automobile's location on a private driveway and the fact that the automobile was not contraband, stolen, or itself dangerous.

STEVEN SHIFFRIN
(1986)

## COOPER, THOMAS
(1759–1839)

Dr. Thomas Cooper, an English radical who settled in the United States in 1794, was an intellectual jack-of-all-trades, master of most, and the author of treatises on philosophy, law, religion, government, political economy, and various sciences. When he was a Jeffersonian editor, he was convicted of violating the SEDITION ACT OF 1798. His *Political Essays* and the report of his trial advocated a radically broad theory of FREEDOM OF THE PRESS. Later a Pennsylvania judge, he was removed from office and soured on liberalism, although his friend THOMAS JEFFERSON called him the "greatest man in America, in the powers of mind and in acquired information." When Cooper was president of what later became the University of South Carolina, he revised the state statutes and wrote *On the Constitution* (1826), which spoke for SLAVERY, state SOVEREIGNTY, and NULLIFICATION.

LEONARD W. LEVY
(1986)

## *COOPER v. AARON*
358 U.S. 1 (1958)

For several years after its decision in BROWN V. BOARD OF EDUCATION (1954–1955), the Supreme Court gave little guidance or support to the lower courts charged with supervising the DESEGREGATION of the public schools. In this case, however, the Court was confronted with direct defiance of *Brown* by a state's highest officials, and it met that challenge head-on.

Even before the *Brown* remedial opinion in 1955, the school board of Little Rock, Arkansas, had approved a plan for gradual desegregation of the local schools, and the federal district court had upheld the plan. Just before the opening of the fall 1957 term, the state governor, Orval Faubus, ordered the state's National Guard to keep black children out of Little Rock's Central High School. The attorney general of the United States obtained an injunction against the governor's action, and the children entered the school. A hostile crowd gathered, and the children were removed by the police. President DWIGHT D. EISENHOWER was thus prodded into his first significant act supporting desegregation; he sent Army troops to Central High to protect the children, and eight black students attended the school for the full academic year.

In February 1958, the school board asked the district court, in *Cooper v. Aaron*, for a delay of two and one-half years in the implementation of its plan, and in June the court agreed, commenting on the "chaos, bedlam and turmoil" at Central High. In August the federal court of appeals reversed, calling for implementation of the plan on schedule. The Supreme Court, in an unusual move, accelerated the hearing to September 11, and the next day it issued a brief order affirming the decision of the court of appeals. Later the Court published its full opinion, signed by all nine Justices to emphasize their continued unamimous support of *Brown*.

The opinion dealt quickly with the uncomplicated merits of the case, saying that law and order were not to be achieved at the expense of the constitutional rights of black children. The Court then added a response to the assertion by the Arkansas governor and legislature that the state was not required to abide by *Brown*, because *Brown* itself was an unconstitutional assumption of judicial power.

The response scored two easy points first: the Constitution, under the SUPREMACY CLAUSE, is "the supreme Law of the Land," and MARBURY V. MADISON (1803) had held that it was the province of the judiciary to "say what the law is." The Court's next step, however, was not self-evident: *Marbury* meant that the federal courts are supreme in expounding the Constitution; thus *Brown* was the supreme law of the land, binding state officers. This view, which carried the assertion of judicial power further than *Marbury* had taken it, has been repeated by the Court several times since the *Cooper* decision.

*Cooper*'s importance, however, was not so much doctrinal as political. It reaffirmed principle at a crucial time. The televised pictures of black children being escorted into school through a crowd of hostile whites galvanized northern opinion. The 1960 election brought to office a president committed to a strong civil rights program—although it took his death to enact that program into law.

KENNETH L. KARST
(1986)

(SEE ALSO: *Civil Rights Act of 1964.*)

## COOPERATIVE FEDERALISM

The theory of cooperative federalism postulates that the relationship between the national government and the states is one in which: governmental functions typically are undertaken jointly by federal and state (including local) agencies, rather than exclusively by one or the other; a sharing of power characterizes an integrated system instead of an exclusive SOVEREIGNTY at either level of government; and power tends not to concentrate at either level, or in any one agency, because the fragmented and shared nature of responsibilities gives citizens and interest groups "access" to many centers of influence.

Cooperative federalism is a modern phenomenon. Its main features—sharing of policy responsibilities and financial resources, interdependence of administration, overlapping of functions—are associated mainly with the FEDERAL GRANT-IN-AID programs. Collaboration, grants-in-aid from the national government to the states, bypassing of the states through establishment of grant programs aiding local or special-district governments directly, and development of auditing procedures and conditional grant requirements all have characterized cooperative federalism in the period after 1933.

Numerous analysts who celebrate these developments as signifying that old-style FEDERALISM is "dead," displaced by "intergovernmental relations," argue that the tension, pretensions at autonomy, and the notion of separateness of responsibilities that characterized governance in the pre-New Deal periods of constitutional development no longer form part of the reality of the federal system. Some scholars argue that relative power distribution is no longer a relevant issue. Forgotten is the elementary notion that "sharing" does not necessarily mean equality. Characteristically, in the modern grant-in-aid programs, the national government has not only raised and distributed the revenues, it has also designed the programs and established the goals, quite apart from overseeing administration.

Fascination with the alleged "non-centralization of power," which is seen to result from cooperative federalism, also can obscure the evidence of the vast additions of discretionary power in the national executive branch since 1933. Presidents from both parties have contributed to the growth of the "Imperial Presidency," and the process of centralization of power that has gone forward in this century has been profoundly influenced by this development.

The decision in MASSACHUSETTS V. MELLON (1923) established the juridical foundation of modern grant-in-aid constitutional theory. The Court there dismissed the complaint of Massachusetts that state prerogatives were improperly invaded by conditional grant programs (in that instance, the maternity-aid program of national grants). The interpretation of the TENTH AMENDMENT as "but a truism," in UNITED STATES V. DARBY (1941), further advanced the constitutional basis for cooperative federalism in action. Subsequently the Court upheld the principle of making grants conditional, even in *Oklahoma v. United States Civil Service Commission* (1947), when the federal legislation required adherence to HATCH ACT restraints on political activity by state officials. A contrary note was sounded by the Court in NATIONAL LEAGUE OF CITIES V. USERY (1976), in which the Court asserted that "Congress may not exercise power in a fashion that impairs the states' integrity of their ability to function effectively in a federal system." Yet this assertion was made as the Court invalidated only a regulatory measure affecting hours and wages of local government employees, not a grant-in-aid or collaborative program. In GARCIA V. SAN ANTONIO TRANSIT AUTHORITY (1985) the Court overruled *Usery*, the majority declaring that case-by-case development since 1976 had failed to produce any principled basis for identifying "fundamental' elements of state sovereignty." The Court specifically cited the history of federal grants-in-aid as evidence that cooperative federalism and the political process gave adequate protection to the interests of the states.

HARRY N. SCHEIBER
(1986)

Bibliography

CORWIN, EDWARD 1941 *Constitutional Revolution, Ltd.* Claremont, Calif.: Claremont Colleges.

## *COPPAGE v. KANSAS*
236 U.S. 1 (1915)

In *Adair v. United States* (1908), the Supreme Court had held that the section of the ERDMAN ACT that outlawed YELLOW DOG CONTRACTS was outside Congress's power to regulate INTERSTATE COMMERCE. Now, facing a question "not distinguishable in principle," a 6–3 Court struck down a Kansas statute banning yellow dog contracts. Justice MAHLON PITNEY for the majority, finding no reason to depart from *Adair*, reaffirmed the doctrine of FREEDOM OF CONTRACT. That "fundamental and vital" freedom fused rights of liberty and property so that any "arbitrary interference with that freedom of contract would impair those rights." Only a "legitimate" exercise of STATE POLICE POWER could limit it, and the majority could see no relation between the avowed purpose of the statute and the state's responsibility to protect the safety, morals, and health of its citizens. Indeed, "an interference with the normal exercise of personal liberty and property rights is the primary object of the statute." Concluding that it deprived employers and employees of the right to contract freely on their own terms, the majority voided the statute as a violation of SUB-

STANTIVE DUE PROCESS guaranteed by the FOURTEENTH AMENDMENT.

In a brief dissent, Justice OLIVER WENDELL HOLMES reiterated the position he had stated in LOCHNER V. NEW YORK (1905). He saw nothing in the Constitution forbidding the Kansas statute, and he declined to substitute the courts' judgment for the legislature's on this policy question. In a lengthier dissent joined by Justice CHARLES EVANS HUGHES, Justice WILLIAM R. DAY, who had voted with the majority in *Adair*, asserted that Kansas had enacted the statute to promote the general welfare, thereby validly limiting the freedom of contract.

DAVID GORDON
(1986)

## COPYRIGHT

The Framers of the Constitution delegated to the national government authority to enact copyright laws. The copyright power, together with the PATENT power, is found in Article I, section 8, clause 8, which empowers Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Because there is no record of any debate on this clause at the CONSTITUTIONAL CONVENTION OF 1787, and mention of it in THE FEDERALIST is perfunctory, the meaning of the clause must be found in case law.

The phrase "to promote the progress of science" states what the Supreme Court, in *Mazer v. Stein* (1954), described as "the economic philosophy behind the clause," which is "the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors. . . ." Most courts, however, would deny that the introductory phrase permits the denial of copyright to any particular work on the ground that it does not contribute to such "progress." In fact, a United States Court of Appeals held in 1979 that obscene content does not invalidate copyright.

The words "by securing" came into contention in *Wheaton v. Peters* (1834), the first important copyright case decided by the Supreme Court, and a case involving two of the Court's own reporters. The plaintiff there argued that the federal copyright statute merely added additional remedies to a right that already existed at COMMON LAW. To bolster this position, he argued that the word "secure" meant to protect, insure, save, and ascertain, not to create. The Court rejected this contention, holding that the federal statute had created a new right, but that the author had not complied with the act's conditions.

Because the clause contains the words, "for limited times," a federal copyright statute that purported to grant copyright protection in perpetuity would clearly be unconstitutional. So too would a term that is nominally "limited" but is in fact the equivalent of perpetual protection (for example, a one thousand year term). The term currently provided for newly created works, the life of the author plus fifty years, conforms with the "limited times" requirement.

Only "authors" may be granted copyright in the first instance, although, once granted, copyright is transferable by an author to others. The term "authors" in the Constitution gives rise to the "originality" requirement in the law of copyright, which excludes from copyright protection material copied from others. An author is no less an author because others have anticipated his work, as long as he did not copy from such others. This Judge Frank contrasted with an "inventor" under the patent power, who must by definition produce something "novel," that is, not anticipated in the prior art. By reason of the phrase "exclusive right," it is clear that Congress has the power to grant to authors the "exclusive right" to exploit their works. But Congress is under no compulsion to exercise its full powers under the Constitution. If it may withhold copyright protection altogether from a given category of works, it may also grant something less than exclusive rights. The phrase "to their respective writings" means that only "writings" may be the subject of copyright. But the concept of a "writing" for copyright purposes has been liberally construed. The Court has held that photographic portraits and sound recordings constitute a "writing." Indeed, in *Goldstein v. California* (1973), the Court defined "writings" as "any physical rendering of the fruits of creative intellectual or aesthetic labor." A work that has not been physically fixed is ineligible for copyright protection.

In *Goldstein* the Court held that the copyright power is not exclusive, so that, subject to the SUPREMACY CLAUSE, the states retain concurrent power to enact copyright laws. Until adoption of the current Copyright Act in 1978 this reserved state power was significant, because most unpublished works were protected by so-called common law (or state law) copyright. However, under the current Copyright Act this area of state law has been largely preempted, so that most works, published or unpublished, are protected, if at all, under the federal act.

In recent years the courts have begun to question whether, and to what extent, the copyright laws are subject to the FREEDOM OF SPEECH and FREEDOM OF THE PRESS guarantees of the FIRST AMENDMENT. If the First Amendment were literally applied it would invalidate the Copyright Act, since the act clearly abridges the freedom of speech and press of those who would engage in copyright infringement by copying from others. Nothing in the First Amendment limits the freedom protected thereunder to speech that is original with the speaker. Nor does the fact

that the Constitution also grants to Congress the power to enact copyright laws render the First Amendment inapplicable. The First Amendment and the remainder of the BILL OF RIGHTS limit only those powers that have otherwise been confided to the federal government. If it did not modify such powers, it would have no meaning at all. The conflict between these two socially useful, yet antithetical, interests is, of course, capable of resolution. The Ninth Circuit held in *Krofft v. McDonald's Corp.* (1977), and the Supreme Court implicitly agreed in *Zacchini v. Scripps-Howard Broadcasting Co.* (1977), that "ideas" lie in the domain of the First Amendment, so that copyright may not be claimed therein, but that the form of "expression" of ideas may be the subject of copyright, notwithstanding the First Amendment.

MELVILLE B. NIMMER
(1986)

(SEE ALSO: *Intellectual Property Law and the First Amendment.*)

Bibliography

NIMMER, MELVILLE B. 1978 *Copyright.* 4 Vols. Albany, N.Y.: Matthew Bender & Co.

## COPYRIGHT AND THE FIRST AMENDMENT

See: Intellectual Property Law and the First Amendment

## *CORFIELD v. CORYELL*

4 Wash. C.C. 371 (1823)
6 Fed. Case 546 (No. 3,230)

The importance of Justice BUSHROD WASHINGTON's circuit opinion derives from the fact that it contains the only exposition of Article IV, section 2, prior to the adoption of the FOURTEENTH AMENDMENT, that also uses the phrase PRIVILEGES AND IMMUNITIES. The clause in Article IV declares: "The Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several states." *Corfield* arose because the plaintiff's vessel had been condemned under a state law forbidding nonresidents to take shell fish from state waters; in his TRESPASS action, the plaintiff relied upon the privileges and immunities clause. Washington declared, however, that the clause protected only the "fundamental" rights of CITIZENSHIP, such as the protection of government, the enjoyment of life, liberty, and property, the right to move about freely, the right to claim the benefit of the writ of HABEAS CORPUS, the right to sue, and the right to vote if qualified. This category did not include the right to exploit the state's oyster beds.

LEONARD W. LEVY
(1986)

(SEE ALSO: *Slaughterhouse Cases.*)

## *CORNELIUS v. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.*

473 U.S. 788 (1985)

This decision demonstrated how cumbersome the Supreme Court's analysis of PUBLIC FORUM issues has become since its decision in PERRY EDUCATION ASSOCIATION V. PERRY LOCAL EDUCATORS' ASSOCIATION (1983).

A 1983 EXECUTIVE ORDER limited the Combined Federal Campaign (CFC), a charity drive among federal employees, to charities that provide direct health and welfare services, and expressly excluded legal defense and advocacy groups. Seven such groups sued in federal district court, challenging their exclusion as a violation of the FIRST AMENDMENT. That court agreed, and issued an INJUNCTION forbidding exclusion of the groups from CFC. The court of appeals affirmed, but the Supreme Court reversed, 4–3, in an opinion by Justice SANDRA DAY O'CONNOR.

The Court held that the government had not designated either the federal workplace or CFC in particular as a public forum, in the sense of the *Perry* opinion. Rather, each of these was a "nonpublic forum"—a government operation in which communications could be limited to those promoting the operation's mission. CFC's purpose was to provide a means for government employees to lessen the government's burden in meeting human health and welfare needs, by making their own contributions to those ends. It was not necessary, in excluding the plaintiffs from CFC, to show that their solicitations would be incompatible with the goals of CFC; the relevant standard was the reasonableness of the exclusion. The President could reasonably conclude that money raised for direct provision of food or shelter was more beneficial than money raised for litigation or advocacy on behalf of the needy. Furthermore, the government could properly avoid the appearance of political favoritism by excluding all such groups. Those organizations had alternative means for raising funds from government employees, including direct mail advertising and in-person solicitation outside the workplace.

The Court, recognizing that other groups not in the business of direct provision of health and welfare services had been allowed to participate in CFC, remanded the case for determination whether the government had ex-

cluded the plaintiff groups for the purpose of suppressing their particular viewpoints.

Justice HARRY A. BLACKMUN, joined by Justice WILLIAM J. BRENNAN, dissented, arguing that any governmental exclusion of a class of speakers from any forum must be justified by a showing that the would-be speakers' intended use of the forum was incompatible with the relevant governmental operation. Here no such incompatibility had been shown, he said. Justice JOHN PAUL STEVENS, also dissenting, expressed skepticism about the value of a DOCTRINE founded on a series of categories of forum. In this case, he said, the government's own arguments supported "the inference of bias" against the excluded groups.

KENNETH L. KARST
(1986)

## *CORONADO COAL COMPANY v. UNITED MINE WORKERS*

See: *United Mine Workers v. Coronado Coal Company*

## CORPORATE CITIZENSHIP

In American constitutional law, business CORPORATIONS are not endowed with rights of CITIZENSHIP. Corporations can neither vote nor claim protections afforded by the PRIVILEGES AND IMMUNITIES clauses of Article IV, section 2, and the FOURTEENTH AMENDMENT. However, the Supreme Court has consistently refused to say that citizenship is a precondition for the exercise of numerous other rights granted to "the people" or to "persons" in the BILL OF RIGHTS or the Fourteenth Amendment. Political rights normally thought to be essential attributes of citizenship in a democratic political community—rights of speech, association, assembly, press, and DUE PROCESS—extend to noncitizens and citizens alike. With the important exceptions of the rights to vote and to hold office, the constitutional status of citizenship does not bar a noncitizen from exercising political rights, or from otherwise participating in political activities. The fact that citizenship does not stand as a barrier to the enjoyment of many basic political rights has also afforded the Court the opportunity to extend rights of political participation to corporations. Indeed, in FIRST NATIONAL BANK OF BOSTON V. BELLOTTI (1978), the Court conferred FIRST AMENDMENT rights of speech upon business corporations. With this jurisprudential innovation, an ideological construct known as the "corporate citizen" acquired new meaning.

In early nineteenth-century American law, incorporation was a privilege that could be granted only by a special legislative act (a corporate charter) wherein the terms of incorporation (e.g., purpose of the business, limitations on debt and capitalization) were stipulated. Anglo-American law endowed the legal entity of the corporation with a life of its own; as a fictitious individual distinct from the corporeal membership, the corporate entity could exist in perpetuity. Historically, the attribution of constitutional rights to the entity has contributed to the expansion of corporate autonomy. This has protected business corporations against dictation by the state while it has allowed for regulation of corporate power in the public interest. The metamorphosis of the corporate entity from a highly regulated creature of government to a constitutionally protected "individual" began in the early nineteenth century when American jurists vested the entity with rights and legal capacities that afforded protection against hostile state LEGISLATION. Legal reasoning also provided ideological support for the corporation in what can be termed the doctrine of "corporate individualism." Originally a defense of the corporation's constitutional rights of PROPERTY, as well as an imposition of responsibility and liability, corporate individualism gradually merged with the entrepreneurial ethos of competitive industrial capitalism to justify an expanding corporate autonomy.

The legal DOCTRINE of corporate individualism first acquired ideological significance outside the law in political argument that personified the corporation as an individual within the competitive marketplace. Beginning in the late 1830s, this mystification promoted the liberalization of state incorporation laws by undermining the widely held perception of the corporation as an instrument of special privilege and monopoly. By 1870, most states had passed statutes making incorporation a right available to all capitalists rather than a privilege granted only to a few. Moreover, the corporate individual achieved an enhanced legal status when the corporate entity became a "person" within the meaning of the Fourteenth Amendment in *Santa Clara County v. Southern Pacific Railroad* in 1886, an event that would facilitate the ascendancy of corporate power in industry and finance. By 1900, the business corporation had realized a significant measure of autonomy consistent with the protection afforded by property rights embodied in the Fourteenth Amendment's SUBSTANTIVE DUE PROCESS doctrine of FREEDOM OF CONTRACT.

In the last quarter of the nineteenth century, corporate leaders resorted to various means of regulating prices or combining capital in an effort to supplant competitive with cooperative methods of business. Widespread public opposition in the 1880s to the combination movement inspired Congress to pass the SHERMAN ANTITRUST ACT in 1890 to regulate monopolistic practices and unreasonable restraints of trade. However, in the absence of significant ANTITRUST enforcement in the mid-to-late 1890s, the combination movement gained momentum. Between 1898

and 1904, the first great merger wave of corporate capitalism transformed the very structure of the American economy. Far-reaching changes in the law of corporations greatly aided this development. Following New Jersey's lead in 1896, numerous state legislatures eliminated a host of traditional regulatory controls over their corporate creations and legalized mergers. During this same period, American jurists began to formulate the modern legal conception of the corporate entity as "real" or "natural." The "real entity theory"—by which corporations were understood as the natural and inevitable result of individuals seeking to operate efficently in the marketplace—further absorbed the personified corporate individual as it gradually supplanted the venerable "artificial entity theory" that viewed the corporation as a creature of government. This personified entity, therefore, both reflected and justified an accelerating progression toward corporate autonomy.

To many Americans during the Progressive era (1890–1916), *laissez-faire* ideology and its legal corollary, the doctrine of liberty of contract, seemed out of phase with economic and social realities. Having evolved from a legal protection of VESTED RIGHTS and the exclusive franchise into an ideological justification of the competitive marketplace, corporate individualism would undergo yet another ideological transfiguration in the era of the large corporation. Contrary to the precepts of *laissez-faire* liberalism, legal reasoning in the law of antitrust recognized not only that corporate power posed dangers to individual liberty and equality of opportunity, but that it also produced social and technological benefits when regulated in the public interest. In adopting the "RULE OF REASON in STANDARD OIL COMPANY V. UNITED STATES (1911), Justice EDWARD D. WHITE explained that freedom to contract is the rule, but restraints of trade in practicing this freedom must be reasonable, as judged in light of the standard of fair competition. Supreme Court decisions thereafter articulated a business ethic of fairness that imposed on the corporate individual a legal and moral obligation to obey the law. In this way, the idea of corporate social responsibility in antitrust law provided an enduring rationale that would influence the evolving concept of corporate citizenship in constitutional law.

During the twentieth century, Supreme Court decisions enhanced the legal standing of the corporate citizen as the business corporation acquired constitutional rights under the First, FOURTH, Fifth, Sixth, and SEVENTH AMENDMENTS. The debate over the political rights of the corporation was first joined on the Supreme Court in *Bellotti* in 1978. In AUSTIN V. MICHIGAN CHAMBER OF COMMERCE (1990), the *Bellotti* dissenters found themselves in the majority. *Austin* reformulates the issue of corporate political power debated in the Progressive era. It advances beyond the view that the threat posed by corporate power to democracy is rooted in corporate bribery and corruption of elected officials and asserts instead that the greater danger to electoral politics is the potential for large corporations to use their "immense aggregated wealth" to "distort" the political process. *Austin* invokes an ethic of fairness to define the rights of the corporate citizen with regard to candidate elections and thereby establishes a new standard of corporate social responsibility for the political MARKETPLACE OF IDEAS that is very similar, in principle, to that established by the rule of reason for the economic marketplace. However, in regulating corporate speech, the Supreme Court has conferred legitimacy on the corporate citizen which, as a member of the political community, can exercise its First and Fourteenth Amendment rights of political speech, press, petition, and association with minimal restrictions. With respect to the corporation's expanding constitutional freedoms, it is significant to note that Justice LEWIS F. POWELL, writing for a plurality in *Pacific Gas and Electric Company v. California Public Utilities Commission* (1986), did not distinguish negative First Amendment rights of corporations from those of real persons. In holding that a public utility cannot be compelled either to associate with disagreeable speech or to respond to others' views, Powell reasoned in effect that a business corporation possesses a mind or conscience. Thus corporate individualism and its ideological offspring, the corporate citizen, continue to justify and facilitate the widening scope of corporate power over economic, social, and political realms.

SCOTT R. BOWMAN
(2000)

(SEE ALSO: *Corporate Power, Free Speech, and Democracy; Dartmouth College v. Woodward; Progressive Constitutional Thought.*)

Bibliography

ARNOLD, THURMAN W. 1937 *The Folklore of Capitalism.* New Haven, Conn.: Yale University Press.

BOWMAN, SCOTT R. 1996 *The Modern Corporation and American Political Thought: Law, Power, and Ideology.* University Park: Pennsylvania State University Press.

BRUER, PATRICK J. 1992 Citizenship. Pages 145–147 in Kermit L. Hall, ed., *The Oxford Companion to the Supreme Court of the United States.* New York: Oxford University Press.

DODD, EDWIN MERRICK 1954 *American Business Corporations Until 1860.* Cambridge, Mass.: Harvard University Press.

HANDLIN, OSCAR and HANDLIN, MARY F. 1945 Origins of the American Business Corporation. *Journal of Economic History* 5:1–23.

HARTZ, LOUIS 1948 *Economic Policy and Democratic Thought: Pennsylvania, 1776–1860.* Chicago: Quadrangle Books.

HORWITZ, MORTON J. 1985 *Santa Clara* Revisited: The Devel-

opment of Corporate Theory. *West Virginia Law Review* 88: 173–224.

HURST, JAMES WILLARD 1956 *Law and the Conditions of Freedom in the Nineteenth-Century United States.* Madison: University of Wisconsin Press.

MAYER, CARL J. 1990 Personalizing the Impersonal: Corporations and the Bill of Rights. *Hastings Law Journal* 41:577–667.

SKLAR, MARTIN J. 1988 *The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, The Law, and Politics.* Cambridge, Eng.: Cambridge University Press.

# CORPORATE FEDERALISM
## (Historical Development)

Perhaps the most conspicuous aspect of the American federal system of government, aside from the continuing robustness of state government itself, is that CORPORATIONS in America are chartered overwhelmingly by the states and almost never by the national government. Despite the modern displacement and augmentation of state power by federal power in realms as diverse as criminal law and the regulation of morals, the power of states to create the corporations and other entities that conduct America's business affairs has steadfastly resisted federal encroachment. The United States is essentially alone among the commercialized industrial powers of the world in not allocating that power to the central governmental authority.

This allocation of power has long been controversial. Overwhelmingly, until the last quarter of the twentieth century, this allocation of governmental power has been regarded with hostility by those concerned with the parochialism of American state governments, with suspicion by historians explicating American political and institutional development, and with concern by economists committed to a planned economy. In these perspectives, the state power to charter corporations and control the existence of other business entities looked to be a "race to the bottom" in which states seeking the revenue provided by corporate chartering fees were the witting and unwitting pawns of businesses and those who controlled them. The states became pawns because corporations may freely do business in all states even though chartered by only one, and because they are also free to change their state of incorporation at will. Thus, businesses both covertly and overtly evaded or overcame regulations framed in the interest of shareholders and the larger public by pitting one state against another. Recently, however, scholars in economics and scholars in law influenced by them have posited a radical new interpretation of the allocation of the power to charter businesses. Congruent with the competitive principles of neoclassical economics, these scholars have reinterpreted the regime of state chartering as beneficial, not detrimental, both economically and politically. These scholars view the allocation of the power to charter businesses and its evolution not so much as evidence of the corruption of local politics, but as wealth- producing competition. This competitive process, these scholars suggest, is not necessarily corrupt but rather one that requires state governments to be attentive to the actual needs of successful businesses in a fluid and dynamic economy, balancing the necessary shareholder protection from incompetent and self-interested managers with managerial desire to obtain capital (from shareholders) cheaply, thus helping to maximize a business's production of wealth.

Proponents of each theory have propounded an admixture of history, economics, and political theory to make their claims. The story of FEDERALISM and the corporation thus has two components, one of which concerns the legal and economic nature of business entities and the other of which concerns the nature of the legal regime, constitutional, statutory, and COMMON LAW, relevant to the existence and status of those entities.

When the Constitution was adopted business was still largely a local phenomenon. Save for a handful of trading companies, few businesses reached beyond their local environment. The costs of communication and transportation, the uncertainties of the politics and the cultures of foreign environments, and the difficulties of controlling an organization over expanses of both time and space, made cosmopolitan enterprise expensive and problematic when possible, and more often impossible. Consequently, of necessity and habit, business enterprises were regarded as local.

At the time of the adoption of the Constitution, moreover, the corporation was not principally a business utility. Rather, it was a vehicle for the creation of entities more generally, such as municipal corporations and charitable corporations, as well as business corporations. Contemporary corporate law reflected that understanding. Each corporate entity, whether business or not, was a product of the energies of the local citizenry and the sanction of the sovereign body legislating the entity into existence. These creations came to be seen as products of the agreement of a sovereign body and a group of individuals who agreed to create a legal entity for certain purposes. Only occasionally were those purposes economic. Because business enterprise was local and severely limited in scale and scope, most businesses existed without being chartered by the sovereign.

In a federal constitutional system of DUAL SOVEREIGNTY, however, which sovereign had the power to create business entities quickly became controversial as the physical, temporal, and spatial boundaries for economic activity began very gradually to melt away. Entrepreneurial choice, however, was also legally limited.

States not only chartered corporations but also regulated them, usually through the charter itself. Entrepreneurs who sought the advantages of the corporate form, such as monopoly rights and limited liability (although there is today an important debate about whether these advantages, especially limited liability, were as prevalent or as advantageous as historians have long assumed), submitted to certain regulations as a condition of incorporation. Because state legislatures granted the charters—creation of subordinate legal entities being the prerogative of the sovereign, and SOVEREIGNTY residing ultimately in the legislature—corporations were legislative creations. Their creation thus occasioned, especially in times of antibusiness sentiment, stringent limits on corporate behavior and even outright denials of charters.

State legislative sovereignty was not, however, absolute. The courts, especially the Supreme Court, spent much effort, especially in the early nineteenth century, to create the preconditions for cosmopolitan, even national, businesses and to limit parochial control of those businesses by the states. In its early decisions it noted that corporations were creatures of common law as well as charter, thus claiming for itself a role in defining corporate existence. It laid this claim in DARTMOUTH COLLEGE V. WOODWARD (1816) by defining corporations as contracts between the sovereign and the individual corporators, and then using the CONTRACTS CLAUSE to prohibit states from changing the terms of such contracts after the charter was granted. It legimated congressional charters by validating the charter of the Bank of the United States in MCCULLOCH V. MARYLAND (1819) though Congress did not take advantage of this power often. The Court used its own power to create the presumption that a corporation might operate across state lines unless excluded from doing so, and then limited the terms on which a state might exclude. In these, and many other ways, the Court helped to create the legal regime that allowed corporations to reincorporate at will, and thus to take advantage of the economic and political conditions that made both the "race to the bottom" and the "climb to the top" plausible interpretations of the history of corporate federalism.

GREGORY A. MARK
(2000)

Bibliography

BUTLER, HENRY A. 1985 Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges. *Journal of Legal Studies* 14:129–166.

MARK, GREGORY A. 1998 The Court and the Corporation: Jurisprudence, Localism, and Federalism. *Supreme Court Review* 1997:403–437.

# CORPORATE POWER, FREE SPEECH, AND DEMOCRACY

Although CORPORATIONS do not enjoy all constitutional rights enjoyed by individuals—for example, neither the RIGHT AGAINST SELF-INCRIMINATION under the Fifth Amendment nor the right against interstate discrimination under the PRIVILEGES AND IMMUNITIES clause of Article IV has been extended to corporate entities—they have been held to enjoy the right of FREEDOM OF SPEECH under the FIRST AMENDMENT. Numerous First Amendment claims have been litigated on behalf of media corporations invoking the FREEDOM OF THE PRESS as well as free speech. But the free speech clause has also been extended to nonmedia corporations. In FIRST NATIONAL BANK OF BOSTON V. BELLOTTI (1978), the Supreme Court invalidated a state law prohibiting any corporation from making contributions or expenditures for the purpose of influencing the vote on any state ballot INITIATIVE or REFERENDUM question other than one directly affecting its business. And in *Pacific Gas & Electric (PG&E) v. Public Utilities Commission* (1986), the Court invalidated a requirement that a utility corporation carry unwanted literature in its billing envelope. Each of these cases was decided over a vigorous DISSENTING OPINION objecting that speech rights should be limited to natural PERSONS, and that speech restrictions were a permissible condition upon government's grant of the considerable privileges of the corporate form.

Critics of corporate free-speech rights argue that corporations, which lack souls or personalities, cannot have any right comparable to that of individuals in self-expression. As Justice WILLIAM H. REHNQUIST wrote in dissent in *PG&E*, to ascribe "to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality." But the majority of the Court, in extending free-speech protection to corporations, has reasoned that the First Amendment protects values beyond speaker autonomy—specifically, the values of ensuring the free flow of information to the public and preventing the government from entrenching itself in power by distorting debate or suppressing dissident views. These systemic values, the Court has concluded, counsel against allowing government to regulate speech even when the speaker is a corporation.

A further reason for the Court's approach may well be the serious line-drawing problems that would attend any attempt to exclude corporations from free-speech protection. A tobacco manufacturer is a corporation, but so is a book publisher, a BROADCASTING company, a daily newspaper, and a nonprofit advocacy group. Excluding all corporations from the First Amendment would untenably

exclude the speech of nonprofit advocacy organizations. But excluding only for-profit corporations would eliminate most newspapers, publishers, and broadcasters—an outcome incompatible with freedom of the press. Any attempt to exempt the institutional media would raise intractable problems of deciding who counts as a member. And although corporations do enjoy certain state-conferred advantages such as limited liability and tax benefits, government confers similar advantages on a range of other collective entities, from LABOR unions to POLITICAL PARTIES, that surely would not be disqualified from First Amendment protection on that account.

Still, critics object that corporate enjoyment of free-speech rights may itself distort or dampen debate and diversity in public discourse, so that corporate speech regulation will enhance rather than inhibit the freedom of speech. Such objections rest in part on the disproportionate market power of corporations, and the fear that freedom for corporate speakers will produce public debate dominated by those that are economically powerful. As Justice BYRON R. WHITE objected in dissent in *Bellotti*, corporations have acquired "vast amounts of money which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process." A related but separate objection is that corporations will be able to use wealth aggregated for economic purposes to express political views without regard to whether they reflect the actual opinions of owners, customers, or employees.

The Court has acknowledged the second but not the first of these objections. It has maintained that regulations aimed at the content of speech may not be justified by the goal of equalizing relative speaking power—whether by inhibiting the speech of wealthy corporations or wealthy individuals. But in a narrowly divided 1990 decision, AUSTIN V. MICHIGAN CHAMBER OF COMMERCE, the Court held that for-profit corporations may be required to segregate their expenditures on behalf of political candidates from their corporate treasuries in order to deal with "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." Similar segregation requirements, the Court had previously held in *Federal Election Commission v. Massachusetts Citizens for Life* (1986), may not constitutionally be imposed on nonprofit advocacy organizations, which present no similar danger of distortion. Thus, *Austin* stands as a shallow bow to the critics against a general backdrop of constitutional protection for corporate speech.

While the First Amendment has been held to bar most direct regulation of corporate speech through content-based laws, it also has been held to permit a wide range of content-neutral structural regulation of speech markets. For example, in TURNER BROADCASTING SYSTEM V. FEDERAL COMMUNICATIONS COMMISSION (1994, 1997), the Court held that Congress may require cable operators to carry broadcast programs they would otherwise drop in order to ensure competition in the video programming market and diversity in the broadcast choices available to households lacking cable television. Nor does current First Amendment law bar enforcement of general ANTITRUST LAW against media conglomerates found to have excessive market power. All that is required is that the goal of such structural regulation be economic rather than ideological, and that the regulation not be needlessly broad.

KATHLEEN M. SULLIVAN
(2000)

(SEE ALSO: *Corporate Citizenship; Electoral Process and the First Amendment.*)

Bibliography

BAKER, EDWIN C. 1995 Turner Broadcasting: Content-Based Regulation of Persons and Presses. *Supreme Court Review* 1994:57–128.

BEZANSON, RANDALL P. 1995 Institutional Speech. *Iowa Law Review* 80:735–824.

FISS, OWEN M. 1996 *Liberalism Divided: Freedom of Speech and the Many Uses of State Power.* Boulder, Colo.: Westview Press.

VARIOUS AUTHORS 1997 Speech and Power: Is First Amendment Absolutism Obsolete? *The Nation* 265:3:11–19.

## CORPORATIONS AND THE CONSTITUTION

The United States is the organizational or the corporate society par excellence. Seen sociologically, numerous societal entities of a corporate nature exist. From the perspective of constitutional law, only the business corporation has the status of being a PERSON. Those enterprises are social organizations midway between the state and the individual, owing their existence to the latter's need for organization and the former's reluctance to supply it. They are part of the greatest silence of the Constitution—the nature and operation of the economy. Except for a few nebulous provisions in Article I, plus the OBLIGATION OF CONTRACTS clause and the property provisions of the Fifth Amendment, all is left to inference. Neither business corporations nor unions nor any other private organization (for example, universities, farmers' legions, veterans' leagues, and the like) are mentioned.

As a consequence, corporate organizations fit uneasily

into constitutional theory. As collectivities, they are the principal units of today's political pluralism. The giant corporations dominate the economy, both domestically and internationally. It was not always so. As late as 1800, only about 300 business corporations existed. Industrialization, coupled with massive governmental aid (pursuant to ALEXANDER HAMILTON's principles), so burgeoned corporate growth that during the 1850s more were formed than ever before. After the CIVIL WAR, the "trusts"—the forerunners of today's corporate giants—flowered.

The large corporations do not fit into democratic theory. Centers of economic and thus of political power, some are so mighty as to challenge the SOVEREIGNTY of the state. Constitutional decisions of the Supreme Court have formed a major part of the legal basis for that dominating position. DARTMOUTH COLLEGE V. WOODWARD (1819) set the tone. Chief Justice JOHN MARSHALL read the CONTRACT CLAUSE to nullify New Hampshire's attempt to alter Dartmouth's charter, originally granted by the English crown. In well-known language, Marshall called the corporation "an artificial being, invisible, intangible, and existing only in contemplation of law." He thus made it clear that corporations, although collectivities, were private entities, and by labeling them "artificial beings" he paved the way for the Court in 1886 to declare that corporations are PERSONS protected by the FOURTEENTH AMENDMENT. (Also in 1819, Marshall ruled that Congress had IMPLIED POWER to form corporations when "NECESSARY AND PROPER" to carry out its expressly granted powers. The decision, MCCULLOCH V. MARYLAND, is also noteworthy for its theory of BROAD CONSTRUCTION of the Constitution.)

As constitutional persons, corporations were able to invoke the DUE PROCESS clauses to fend off adverse regulations. By inventing the concept of SUBSTANTIVE (or economic) DUE PROCESS, the Supreme Court helped to defang the Granger, Populist, and nascent LABOR MOVEMENTS. FREEDOM OF CONTRACT was read into the Constitution; laissez-faire economics became constitutional DOCTRINE. By that one development the Court catapulted JUDICIAL REVIEW into a powerful instrument of governance.

LOCHNER V. NEW YORK (1905) is the best known economic due process decision. Over a famous dissent by Justice OLIVER WENDELL HOLMES, the Court invalidated a statute regulating the hours of workers in bakeries, because both the company's and the workers' freedoms to contract were improperly invaded. So many similar decisions were rendered that by 1924 John R. Commons called the Court "the first authoritative faculty of political economy in the world's history."

That practice was altered by the Great Depression: in 1937 the Court grudgingly conceded that economic policy was a province of federal legislation. The turning point came in WEST COAST HOTEL CORP. V. PARRISH (1937) and the WAGNER ACT CASES (*National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 1937). The latter decision in practical effect "constitutionalized" political pluralism. FERGUSON V. SKRUPA (1963) illustrates the modern, and doubtless permanent, attitude of the Court toward ECONOMIC REGULATION.

Noneconomic regulation is a different matter. In FIRST NATIONAL BANK OF BOSTON V. BELLOTTI (1978) the Court invalidated a Massachusetts statute prohibiting corporations from spending money to influence elections. Corporate managers now have an unabridgeable right not only to spend their personal funds to further their political views but to use the money of others (in legal theory, corporations are owned by the stockholders). Although fictional persons, corporations by judicial legislation are attaining many of the rights of natural persons.

Neither political theorists nor economists have produced a satisfactory theory of conscious economic cooperation and its effect on the constitutional order. The Supreme Court refuses to recognize the corporation for what it is—a private government that, save in label, differs little from public government. Americans are governed as much—perhaps more—by corporations as they are by the official organs of government. Corporations, moreover, have such an influence upon the governmental structure that a version of corporatism is in process of creation.

Corporations were originally considered to be arms of the state—divisions of society established to get some of the public's business done. Today, paradoxically, they are both associations of individuals and constitutional persons. As such, they challenge orthodox constitutional theory. Their governmental character could be acknowledged by the Supreme Court; but the Justices have usually refused to do so. However, SMITH V. ALLWRIGHT (1944) did apply constitutional norms to a corporate body (albeit not a chartered corporation)—the Democratic party; and in MARSH V. ALABAMA (1946) a business corporation operating a "company town" was subjected to the limits of the FIRST AMENDMENT.

The giant corporations have assets that overshadow those of most of the states (and, indeed, most nation-states). They have created a national economic system that makes a decentralized political order impractical. Traditional concepts of FEDERALISM have consequently had to give way to notions of nationalism. In recent decades, many corporations have become transnational and they are creating an international economic order. They thus challenge the political order of the nation-state much as their predecessors altered the original federal system.

Corporate bodies, whether business or otherwise, have become so socially significant that in one perspective they have replaced the individual (the natural person) as the basic unit of society. The modern corporation has created

societies with structural foundations different from those of the past. Constitutional theory must therefore adapt itself to the corporation on three levels: federalism (in many respects corporations are in effect the most important units of local government); nationalism (where the transnational corporation challenges the sovereignty of the nation-state); and individualism (the natural person must become adapted to living in a hierarchic, bureaucratic society). To date, little scholarly activity has addressed any of these levels.

ARTHUR S. MILLER
(1986)

(SEE ALSO: *Corporate Citizenship; Corporate Federalism; Corporate Power, Free Speech, and Democracy; Multinational Corporations, Global Markets, and the Constitution.*)

Bibliography

COLEMAN, JAMES S. 1974 *Power and the Structure of Society.* New York: W. W. Norton.

COMMONS, JOHN R. 1924 *Legal Foundations of Capitalism.* Madison: University of Wisconsin Press.

MILLER, ARTHUR SELWYN 1976 *The Modern Corporate State: Private Governments and the Constitution.* Westport, Conn.: Greenwood Press.

## *CORRIGAN v. BUCKLEY*
271 U.S. 323 (1926)

Reviewing a RESTRICTIVE COVENANT case from the DISTRICT OF COLUMBIA, the Supreme Court unanimously held that it presented no substantial constitutional question. The Court dismissed Fifth and FOURTEENTH AMENDMENT claims because they referred to government and state, not individual, actions. (Surprisingly, the Court failed to mention that the Fourteenth did not apply in the District.) Although these amendments provide for equal rights, they did not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property. The Court therefore dismissed the case for want of JURISDICTION.

DAVID GORDON
(1986)

(SEE ALSO: *Shelley v. Kraemer; State Action.*)

## CORWIN, EDWARD S.
(1878–1963)

Edward S. Corwin, McCormick Professor of Jurisprudence at Princeton University, succeeded the nineteenth-century titans James Kent, Joseph Story, and THOMAS M. COOLEY. Corwin's understanding of constitutional and political thought distinguished him from these lawyers and judges, who exemplified Edmund Burke's maxim that the study of law sharpens the mind by narrowing it. Matchless learning in government and history made him an eminent COMMENTATOR ON THE CONSTITUTION.

Corwin's *Liberty against Government* (1948) was a major defense of liberty as the fundamental American principle. *The Twilight of the Supreme Court* (1934) upheld the NEW DEAL with an idea of national power that left presidential and congressional power without statable limits. Corwin later more persuasively and moderately pondered the New Deal's extension of governmental power in relationship to the Founders' intention. In UNITED STATES V. DARBY (1941) Chief Justice HARLAN FISKE STONE had cited Chief Justice JOHN MARSHALL's definition of congressional power over INTERSTATE COMMERCE in GIBBONS V. OGDEN (1824) and Marshall's interpretation of NECESSARY AND PROPER in MCCULLOCH V. MARYLAND (1819). Corwin persuasively denied that Marshall would have consented to be "thus conscripted in the service of the New Deal": "Liberty, the spacious liberty of an expanding nation, not social equality, was the lodestar of his political philosophy." Corwin's bow to the "great Chief Justice" Marshall showed that Corwin, too, championed liberty.

Public law, said Corwin, is the "law that governs government itself"; political theory is the branch that explains the moral source of the law's authority. Corwin identified his topics and accomplishments in public law as the origins and development of the idea of liberty against government, "the most important theme of American constitutional legal history"; JUDICIAL REVIEW in historical perspective; DUAL FEDERALISM; and the Presidency.

*The Constitution and What It Means Today* (1920, 1958), his best known work, combined scholarship and simplicity. Popular education for Corwin kept the Constitution from becoming a "craft mystery," whether one of bench and bar or of behaviorism. Corwin's most important work was *The President: Office and Powers* (1957), which concluded that the autonomous and self-directing idea of the Presidency had triumphed. Decades before the WATERGATE crimes he prophetically challenged the excesses of presidential power with the idea of liberty against government. The most important condition of the people's moderation in liberty was religious instruction. Corwin's *Constitution of Powers in a Secular State* (1951) opposed Supreme Court decisions against religious instruction in the public schools, arguing that the American people understand democracy as a system of ethical principles "grounded in religion." Hence, religion in effect should habituate Americans to virtue; virtue should guide the use of liberty.

Corwin's preeminence arose in part from his emphasis

on fundamentals, restoration of natural law, explanations of doctrine, grasp of the perennial themes of American politics and history, and understanding of the enduring principles that prop the Constitution. In teaching future scholars, Corwin had, according to Alpheus T. Mason, the gift "of reaching within each person, of discovering something firm and worthwhile, of encouraging him to stand on it." As Corwin himself put it, "a noble emulation is the true source of excellence."

RICHARD LOSS
(1986)

Bibliography

LOSS, RICHARD 1977 Edward S. Corwin: The Constitution of the Dominant Presidency. *Presidential Studies Quarterly* 7: 53–65.

———, ed. 1981 Corwin on the Constitution, Volume I, The Foundations of American Constitutional and Political Thought, the Powers of Congress, and the President's Power of Removal. Ithaca, N.Y.: Cornell University Press.

STEVENS, RICHARD G. 1980 The Constitution and What It Meant to Corwin. *Political Science Reviewer* 10:1–53.

## CORWIN AMENDMENT
(1861)

On 2 March 1861, in a futile attempt to prevent the secession of the slaveholding states, Congress proposed, and sent to the states for ratification, a constitutional amendment designed to protect SLAVERY in the states where it existed. The amendment, written by Representative Thomas Corwin of Ohio, would have prohibited any future constitutional amendment authorizing Congress to abolish or interfere with the "domestic institutions" of any state. Although the amendment went on specifically to include the institution of "persons held to service or labor," it is not clear what other domestic institutions, if any, might have been protected.

The Corwin Amendment was proposed after President-elect ABRAHAM LINCOLN rejected the CRITTENDEN compromise proposals, which would have permitted slavery in some federal territories. Its intended effect was that, although slavery would survive in the existing slave states, there would never be any new slave states admitted to the union, and slaveholders would be an ever diminishing minority. In any case, the Corwin Amendment was largely a symbolic gesture of conciliation, as six southern states had already seceded by the time it was proposed. The legislatures of only two states (Ohio and Maryland) voted to ratify the Corwin Amendment.

DENNIS J. MAHONEY
(1986)

Bibliography

HYMAN, HAROLD M. 1967 The Narrow Escape from the Compromise of 1860: Secession and the Constitution. Pages 149–166 in Harold M. Hyman and Leonard W. Levy, eds., *Freedom and Reform.* New York: Harper & Row.

## COUNSEL, RIGHT TO BE REPRESENTED BY

See: Right to Counsel

## *COUNSELMAN v. HITCHCOCK*
142 U.S. 547 (1892)

The first Supreme Court decision on immunity statutes, *Counselman* remained the leading case until it was distinguished away in KASTIGAR V. UNITED STATES (1972). Appellant refused to testify before a federal GRAND JURY on the ground that he might incriminate himself, though he had been granted USE IMMUNITY under an 1887 act of Congress guaranteeing that his evidence would not be used against him criminally, except in a prosecution for perjury. *Counselman* thus raised the question whether a grant of use immunity could supplant the Fifth Amendment right of a person not to be a witness against himself in a criminal case. The government contended that an investigation before a grand jury was not a criminal case, which could arise only after an INDICTMENT should be returned, but that in any instance, Counselman had received immunity in return for his testimony.

Justice SAMUEL BLATCHFORD for a unanimous Court declared that it is "impossible" that the clause of the Fifth Amendment could mean only what it says, for it is not limited to situations in which one is compelled to be a witness against himself in a "criminal case." The object of the clause is to insure that no person should be compelled as a witness "in any investigation" to testify to anything that might tend to show he had committed a crime. "The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard," and therefore it applied to grand jury proceedings that might result in a prosecution. Clearly, said Blatchford, a statute cannot abridge a constitutional privilege nor replace one, "unless it is so broad as to have the same extent in scope and effect." The statute did not even do what it purported to do; it did not bar use of the compelled testimony, for its fruits could be used against the witness by searching out any leads, originating with his testimony, to other evidence that could convict him. No statute leaving the witness subject to prosecution after answering incriminating questions can have the effect of supplanting the constitutional

provision. The 1887 act of Congress was unconstitutional because it was not a "full substitute" for that provision.

Thus the Court introduced the extraordinary doctrine that a statute could be a substitute for a provision of the Constitution, after having said that a statute could not "replace" such a provision. But the statute, to be constitutional, must serve "co-extensively" with the right it replaces. The Court laid down the standard for TRANSACTIONAL IMMUNITY: to be valid the statute "must afford absolute immunity against future prosecution for the offense to which the question relates."

LEONARD W. LEVY
(1986)

(SEE ALSO: *Right Against Self-Incrimination.*)

## *COUNTY OF ALLEGHENY v. AMERICAN CIVIL LIBERTIES UNION*
492 U.S. 573 (1989)

Each year the County of Allegheny set up a variety of exhibits to commemorate the holiday season. Inside the county courthouse, a crèche was displayed on the grand staircase. Outside the courthouse stood a Christmas tree and a menorah, the latter a symbol of Hanukkah. The outside display was accompanied by a sign describing it as part of the city's salute to liberty. A splintered Supreme Court ruled that the crèche violated the ESTABLISHMENT CLAUSE, but the menorah did not.

Justice HARRY A. BLACKMUN delivered the opinion of the Court with respect to the crèche. He argued that the crèche violated the second prong of the LEMON TEST because it expressed a patently religious message, as indicated by an accompanying banner with the words "Gloria in Excelsis Deo!" ("Glory to God in the Highest!"). However, Blackmun argued that the menorah did not endorse religion because in context it was devoid of religious significance. The menorah and Christmas tree together merely symbolized the different facets of the "same winter-holiday season, which has attained a secular status in our society."

Justice SANDRA DAY O'CONNOR rejected Blackmun's reasoning with respect to the menorah, although she concurred in the Court's judgment. Unlike Blackmun, O'Connor readily acknowledged the religious meaning of the menorah, but argued that its display was permissible because in context it "conveyed a message of pluralism and freedom of belief" rather than endorsement. Justices WILLIAM J. BRENNAN, JOHN PAUL STEVENS, and THURGOOD MARSHALL disagreed. They contended that both the Christmas tree and the menorah were religious symbols and that their display effected a dual endorsement of Christianity and Judaism.

Four Justices on the Court—WILLIAM H. REHNQUIST, ANTONIN SCALIA, BYRON R. WHITE, and ANTHONY M. KENNEDY—took issue with the Court's ruling on the crèche. Writing for this group, Justice Kennedy argued that the guiding principle in establishment-clause cases should be government neutrality toward religion—but neutrality properly understood. Given the pervasive influence of the "modern administrative state," said Kennedy, complete government nonrecognition of religion would send "a clear message of disapproval." Hence, some government recognition of religion may actually further the goal of neutrality. As applied to this case, for the government to recognize only the secular aspects of a holiday with both secular and religious components would signal not neutrality but "callous indifference" toward the religious beliefs of a great many celebrants. Such hostility is not required by the Constitution according to Kennedy. As long as holiday displays do not directly or indirectly coerce people in the area of religion and the displays do not tend toward the establishment of a state religion, they should be constitutional. Under this standard, the crèche, the Christmas tree, and the menorah were all permissible.

JOHN G. WEST, JR.
(1992)

(SEE ALSO: *Establishment of Religion; Lynch v. Donnelly; Religious Liberty; Separation of Church and State.*)

## COURT MARTIAL

See: Military Justice

## COURT OF CLAIMS

See: Claims Court

## COURT OF CUSTOMS AND PATENT APPEALS

The Court of Customs Appeals was established by Congress in 1909 to hear appeals from the Board of General Appraisers, a body that itself heard appeals from decisions by customs collectors. (In 1926 the Board became the United States Customs Court, and in 1980 that court was converted into the United States COURT OF INTERNATIONAL TRADE.) In 1929 Congress renamed the court and expanded its jurisdiction. The new Court of Customs and Patent Appeals (CCPA) heard, in addition, appeals from the Patent Office in both patent and trademark cases.

In 1958 Congress declared the CCPA to be a CONSTITUTIONAL COURT, created under Article III. In *Glidden Co. v. Zdanok* (1962) the Supreme Court held, 5–2, that the CCPA was, indeed, an Article III court, despite its statutory authorization to do some nonjudicial business. There was no opinion of the Court, and the theories supporting the decision were in conflict. Justice JOHN MARSHALL HARLAN, for three Justices, concluded that the CCPA had been an Article III court since 1930, when Congress had granted its members life tenure during good behavior. Justice TOM C. CLARK, for the other two majority Justices, said that the 1958 declaration of Congress had converted the CCPA into a constitutional court. Justice WILLIAM O. DOUGLAS, joined by Justice HUGO L. BLACK, dissented, arguing that the court remained a LEGISLATIVE COURT despite the congressional declaration. Thus, while a majority rejected each theory argued in support of the decision, the result was acceptance of the CCPA's Article III status.

In the FEDERAL COURTS IMPROVEMENT ACT (1982) Congress abolished the CCPA, transferring its JURISDICTION to a newly established UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

KENNETH L. KARST
(1986)

## COURT OF INTERNATIONAL TRADE

In 1926 Congress converted the Board of General Appraisers, which had been hearing APPEALS from decisions of customs collectors, into the United States Customs Court. In 1956, Congress declared that the court was established under Article III. Because the court's business is strictly "judicial" and its members are appointed for life during good behavior, it is probably a CONSTITUTIONAL COURT on the same reasoning that was applied to the COURT OF CUSTOMS AND PATENT APPEALS (CCPA).

In 1980 Congress changed the Customs Court's name to the United States Court of International Trade and extended its JURISDICTION to include additional noncustoms matters relating to international trade. Its decisions, formerly reviewed by the CCPA, today are reviewed by the UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

KENNETH L. KARST
(1986)

## COURT OF MILITARY APPEALS

In the Uniform Code of Military Justice, enacted in the aftermath of WORLD WAR II, Congress established the Court of Military Appeals (COMA). A civilian body, whose three judges serve for fifteen-year terms, COMA reviews questions of law arising in certain serious court-martial cases. COMA, which heard its first case in 1951, has never been part of the federal judiciary. The whole military justice system, COMA included, is part of the governance of the armed forces. Since 1983, however, many of COMA's decisions have been reviewable by the Supreme Court on petition for CERTIORARI. Whether or not such a review has taken place, a person in custody as a result of a court-martial decision can apply for HABEAS CORPUS in a federal district court. (See MILITARY JUSTICE.)

Like many another judicial or military institution, COMA has sought to expand its jurisdiction. It has developed a notion of its own "inherent powers," which it has used to nudge the military justice system toward increasing resemblance to the civilian system of criminal justice, notably by tightening the requirements of procedural fairness. Although some military officers have strongly criticized COMA's "constitutionalizing" innovations, most proposals for statutory restoration of the old order have died in congressional committees.

KENNETH L. KARST
(1986)

Bibliography

WILLIS, JOHN T. 1972 The Constitution, the United States Court of Military Appeals and the Future. *Military Law Review* 57:27–97.

——— 1972 The United States Court of Military Appeals: Its Origin, Operation and Future. *Military Law Review* 55:39–93.

## COURT-PACKING PLANS

"Court packing" is an ambiguous phrase. It arises more frequently as an epithet in political disputation than as an analytical term in scholarly discourse. "Packing" connotes a deliberate effort by an executive, especially a President, to appoint one or more (usually more) judges to assure that decisions will accord with the ideological predisposition of that executive. *Webster's New International Dictionary* defines "pack" as "to . . . make up unfairly or fraudulently, to secure a certain result." Yet not everyone agrees on what is unfair, and it is not at all extraordinary for Presidents to take pains to ascertain that a prospective nominee is likely to behave in ways that will not be out of harmony with the ends of their administrations.

Furthermore, the word "packing" has been employed with respect to two different situations—when a President is filling vacancies that have arisen in the natural course of events, and when a President seeks legislation to increase the membership of courts to create additional

opportunities for appointments that may shape the outcome of pending and future litigation.

Although political antagonists have taken advantage of the elasticity of the word to raise the charge of Court packing through much of our history, scholars have largely concentrated their attention on three particular episodes. The first of these events took place on the night of March 3, 1801, when in his final hours in office, President JOHN ADAMS sat up very late signing commissions of sixteen appointees to circuit judgeships and forty-two justices of the peace for the District of Columbia, including one William Marbury. All these offices had been created in the last three weeks of his term by an obliging Federalist Congress, and Adams, outraged by the victory of the Democratic Republicans in 1800 and fearful of its consequences for the nation, busied himself filling the posts with faithful partisans to serve as a restraint on his successor, THOMAS JEFFERSON. This melodrama of the "midnight judges" would subsequently lead to the landmark case of MARBURY V. MADISON (1803).

Historians long thought they had detected another instance of Court packing during RECONSTRUCTION. In 1870, at a time when the membership of the Court had been reduced, the Supreme Court, in *Hepburn v. Griswold*, struck down the Legal Tender Act of 1862 as applied to debts incurred before its enactment. The 4–3 vote strictly followed party lines. A year later, in *Knox v. Lee* and *Parker v. Davis*, the decision was reversed when the three dissenters in the earlier ruling were joined by two new appointees, both Republicans, of President ULYSSES S. GRANT. Their appointments followed the action of Congress restoring the Court to nine Justices. This sequence gave credibility to the allegation that the Court had been packed in order to save the Republican administration's monetary policy. In fact, however, scholars now agree that neither the augmentation of the size of the bench nor these appointments resulted from partisan or ideological motivations.

By far the most important Court-packing plan in American history emerged out of a conflict between the Supreme Court and the administration of FRANKLIN D. ROOSEVELT in the Great Depression. In 1935 and 1936, the Court again and again struck down NEW DEAL laws, including those creating the two foundation stones of Roosevelt's recovery program, the NATIONAL INDUSTRIAL RECOVERY ACT and the AGRICULTURAL ADJUSTMENT ACT OF 1935 (AAA). Most of these rulings came on split decisions, with OWEN J. ROBERTS joining the conservative "Four Horsemen"—PIERCE BUTLER, JAMES C. MCREYNOLDS, GEORGE SUTHERLAND, and WILLIS VAN DEVANTER—to form a five-man majority, sometimes augmented by the Chief Justice, CHARLES EVANS HUGHES.

The Roosevelt administration responded by exploring a number of possibilities for curbing the powers of the Supreme Court. As early as May 1935, Attorney General HOMER S.CUMMINGS directed one of his aides to look into how the Court's authority to pass on constitutional questions could be limited. Rumors had circulated from the beginning of the New Deal era that Court packing might someday be attempted, and at a cabinet meeting at the end of 1935, the President mentioned packing the Court as the first of a series of options. A cabinet official noted in his diary, however, that Roosevelt characterized it as "a distasteful idea." Still, Roosevelt more than once alluded to the episode in Great Britain earlier in the century when the threat of creating several hundred new peers had compelled the House of Lords to approve reform legislation.

Initially, critics of the judiciary assumed that redress could be achieved only by amending the Constitution, but the behavior of the Court in 1936 turned the thinking of the administration in new directions. When Justice HARLAN F. STONE, in a biting dissent in BUTLER V. UNITED STATES (1936), accused the majority in the 6–3 ruling invalidating the AAA processing tax of a "tortured construction of the Constitution," he fostered the idea that Congress need not alter the Constitution because properly interpreted it could accommodate most of the New Deal. Instead, Congress should concern itself with the composition of the Court.

The replacement of even one Justice could shift 5–4 decisions toward approval of FDR's policies without any modification of the Constitution. Yet, although this Court was the oldest ever, not a single vacancy developed in all of Roosevelt's first term. Increasingly, the administration looked for a solution that would eschew the tortuous process of constitutional amendment and instead, by the much simpler procedure of an act of Congress, overcome obstruction by elderly judges.

Shortly after winning reelection in November 1936, Roosevelt told Cummings that the time to act had come. Not only had the Court struck down fundamental New Deal laws in his first term, but in addition, it was expected to invalidate innovative legislation such as the National Labor Relations Act and the SOCIAL SECURITY ACT when it ruled on these statutes early in his second term. Moreover, although he had won an overwhelming endorsement from the people in a contest in which he had carried all but two of the states, he was constrained from taking advantage of this mandate because if he tried to put through measures such as a wages and hours law the Court was likely to wipe out those laws too. He saw little prospect that the Court might change its attitude; in the very last decision of the term, MOREHEAD V. NEW YORK EX REL. TIPALDO (1936), it had shocked the nation by striking down a New York State minimum wage law for women, thereby indicating that it did not merely oppose concentrated power in Washington, but was in the President's words, creating a "no-man's land' where no Government—State or Federal—can

function." Under these circumstances, FDR was determined not to be like President JAMES BUCHANAN, who sat passively while his world collapsed about him.

During the month of December, Cummings put together the specific proposal that Roosevelt embraced. Cummings was influenced by the political scientist EDWARD S. CORWIN, who suggested linking an age limit of seventy years for Justices to the appointment of additional members of the bench, but he did not find the precise formula until he came upon a 1913 memorandum by James C. McReynolds, then attorney general, recommending that when a judge of the lower federal courts did not retire at seventy the President be required to appoint an additional judge. Cummings seized McReynolds's idea and applied it to the Supreme Court as well. He also worked out a rationale for the scheme by incorporating it in a package of proposals for relieving congestion in the federal judicial system. Roosevelt, for his part, savored the irony that the original notion had come from McReynolds, now the most hostile Justice on the Court.

Through all these months, the President had given little indication of what he was considering. After the adverse decision in SCHECHTER POULTRY CORPORATION V. UNITED STATES, he had said, "We have been relegated to the horse-and-buggy definition of interstate commerce," but so loud were objections to this remark that he made almost no public utterance about the Court for the next year and a half and did not raise the issue in the 1936 campaign. No cabinet officer save Cummings knew of the surprise he was about to spring, and he confided nothing to his congressional leaders until the very end.

On February 5, 1937, Roosevelt stunned the nation by sending to Congress a plan to reorganize the federal judiciary. He prefaced the proposal by claiming that aged and infirm judges and insufficient personnel had created overcrowded federal court dockets and by asserting that "a constant and systematic addition of younger blood will vitalize the courts." To achieve this goal, he recommended that when a federal judge who had served at least ten years waited more than six months after his seventieth birthday to resign or retire, a President might add a new judge to the bench. He could appoint as many as six new Justices to the Supreme Court and forty-four new judges to the lower federal tribunals.

The President's message elicited boisterous opposition. From the very first day, opponents characterized his scheme as "court packing" and accused Roosevelt of tampering with the judiciary. Within weeks, they had forced him to back away from his crowded dockets-old age rationale by demonstrating that the Supreme Court was abreast of his work. Especially effective was a letter from Chief Justice Hughes read by Senator BURTON K. WHEELER at the opening of hearings before the SENATE JUDICIARY COMMITTEE. An increase in the size of the Court, Hughes objected, would not promote efficiency, but would mean that "there would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide."

Despite fervent and well-organized protests, commentators concluded that the legislation was likely to be approved because Roosevelt had such huge Democratic majorities in both houses of Congress. After the 1936 elections, the Republicans were reduced to only sixteen members in the Senate. In the House, the Democrats had a 4–1 advantage. Although there were some conspicuous defectors, such as Wheeler, it seemed unlikely that enough Democrats would break with a President who had just won such an emphatic popular verdict of approval to deny him the legislation he sought.

A series of unanticipated decisions by the Court, however, drastically altered this situation. On March 29, the Court, in a 5–4 ruling in WEST COAST HOTEL CO. V. PARRISH (1937), validated a minimum wage act of the state of Washington essentially the same as the New York law it had struck down the previous year. Two weeks later, in a cluster of 5–4 decisions, it upheld the constitutionality of the WAGNER (NATIONAL LABOR RELATIONS) ACT. In May, by 5–4 and 7–2, it validated the Social Security Act. The critical development in these votes was the switch of Justice Roberts, who for the first time since the spring of 1935, broke away from the Four Horsemen to uphold social legislation. Roberts's turnabout gave Roosevelt a 5–4 advantage, which swelled to a prospective 6–3 when, also in May, one of the Four Horsemen, Willis Van Devanter, announced that he was retiring. On that same day, the Senate Judiciary Committee voted, 10–8, to recommend against passage of the bill, and administration polls of the Senate found that as a consequence of these developments Roosevelt no longer had the votes. "A switch in time," it was said, "saved nine."

Roosevelt, however, persisted in trying to put through a modified Court-packing measure, and he almost succeeded. In June, he advanced a compromise raising the suggested retirement age from seventy to seventy-five years and permitting him only one appointment per calendar year. Although watered down, this new version preserved the principle of the original bill and would give him two new Justices by January 1, 1938 (one for the calendar year 1937 and one for 1938), as well as a third Justice for the Van Devanter vacancy. In July, when Court-packing legislation finally reached the Senate floor, the opposition found that Roosevelt had a majority for this new proposal if it could be brought to the floor. The President's advantage, however, rested on the influence of the domineering Senate Majority Leader, Joseph T. Robinson, but when shortly after the debate began, Robinson died, Roosevelt's

expectation went down with him. On July 22, the Senate voted to inter the bill in committee.

Roosevelt had suffered a severe defeat, but he insisted that, although he had lost the battle, he had won the war. To the Van Devanter vacancy, he soon named HUGO L. BLACK, an ardent New Dealer and supporter of Court packing, and within two and a half years of his defeat, he was able to appoint a majority of the nine Justices. This "Roosevelt Court," as it was called, never again struck down a New Deal law. Indeed, it took so expansive a view of the commerce power and the spending power and so circumscribed the due process clause that scholars speak of the "Constitutional Revolution of 1937." Not once since then has the Court stuck down any significant law—federal or state—regulating business. The struggle over Court packing, however, cost Roosevelt dearly, for it solidified a bipartisan conservative coalition arrayed against further New Deal reforms.

Although no President since Roosevelt has advocated a Court packing statute, the charge of packing has been raised against three of his successors. When, in his final year in office, LYNDON B. JOHNSON sought to elevate Associate Justice ABE FORTAS to the Chief Justiceship, conservative Republicans charged him with a "midnight judge" kind of maneuver to deny his probable successor, RICHARD M. NIXON, the opportunity to make the selection, and after revelations about Fortas's comportment, the endeavor failed. So frank was Nixon in turn about stating his desire to reverse the doctrines of the WARREN COURT that he was accused of trying to pack the Supreme Court with conservative jurists when he made nominations such as those of Clement Haynsworth and G. Harrold Carswell. Both of these nominations were rejected, but Nixon won confirmation of four other choices, including WARREN E. BURGER as Chief Justice, although they were sometimes to disappoint him by their subsequent behavior. An even louder outcry arose over RONALD REAGAN's selections. His attempt to place Robert Bork on the Supreme Court was turned aside, but he secured approval of four other nominees, all regarded as sharing his conservative outlook. He had even greater success in the lower federal courts. His efforts were decried as, in the title of one book, *Packing the Courts: The Conservative Campaign to Rewrite the Constitution*, but neither Reagan nor Nixon had acted markedly differently from such twentieth-century predecessors as WILLIAM HOWARD TAFT, WARREN G. HARDING, and Franklin D. Roosevelt, although none of the others may have exhibited such sedulous ideological zeal.

WILLIAM E. LEUCHTENBURG
(1992)

Bibliography

ALSOP, JOSEPH and CATLEDGE, TURNER 1938 *The 168 Days.* Garden City, N.Y.: Doubleday, Doran.

LEUCHTENBURG, WILLIAM E. 1966 The Origins of Franklin D. Roosevelt's "Court Packing" Plan. In Philip B. Kurland, ed. *The Supreme Court Review: 1966.* Pages 347–400. Chicago: University of Chicago Press.

——— 1969 Franklin D. Roosevelt's Supreme Court "Packing" Plan. In Harold M. Hollingsworth and William F. Holmes, eds., *Essays on the New Deal.* Pages 69–115. Austin: University of Texas.

## COURTS AND SOCIAL CHANGE, I

Since the mid-twentieth century, courts in the United States have been involved in many of the most important, difficult, and emotional issues of modern politics. From racial and gender equality to ABORTION to reform of CRIMINAL PROCEDURE, court decisions have ordered change on a broad scale on behalf of relatively powerless groups that have suffered from both past and present discrimination. Further, such litigation has often occurred, and appears to have been most successful, when the other branches of government have failed to act. Indeed, for many, part of what makes American democracy exceptional is that it includes the world's most powerful court system, protecting minorities and defending liberty, in the face of opposition from the democratically elected branches. But have courts contributed to social change?

Supreme Court decisions are not self-implementing. As ALEXANDER HAMILTON pointed out long ago, courts are particularly dependent on the actions of others. Hamilton argued in THE FEDERALIST #78, that the judiciary "has no influence over either the sword or the purse . . . and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." Without the support of government, or of citizens, court decisions ordering social change are unlikely to affect or change people's lives in important ways.

Those seeking social change through litigation often must rely on the Constitution, and the set of beliefs that surround it. The problem they face is that the Constitution is not unbounded; certain rights are enshrined in it and others are not. For example, there are no constitutional rights to decent housing, adequate levels of welfare or health care, or clean air, while there are constitutional rights to minimal governmental interference in the use of one's PROPERTY. Lacking a strong constitutional foundation for their litigation, reformers often must push the courts to read the Constitution in an expansive or "liberal" way. This presents an additional obstacle to change due to judicial awareness of the need for predictability in the law and the politically exposed nature of judges whose decisions go beyond the positions of electorally accountable officials. Thus, the nature of rights in the U.S. legal system,

embedded in the Constitution, and the institutional reticence of judges, may constrain the courts in producing social change by preventing them from hearing or responding positively to many claims.

The result of these factors—lack of constitutional rights, lack of power of implementation, lack of JUDICIAL INDEPENDENCE—is that courts are constrained from producing social change. Courts decisions can sometimes contribute to change, but only when there is broad political support for it. Consider, for example, one of the most famous Supreme Court decisions ordering social change on behalf of a relatively powerless group within society, BROWN V. BOARD OF EDUCATION (1954).

Given the praise accorded to the 1954 *Brown* decision and its holding that race-based SEGREGATION of public schools was unconstitutional, examining its actual effects produces quite a surprise. The surprise is that a decade after *Brown* little had changed for most African American students living in the eleven states of the old Confederacy that had required race-based school segregation by law. For example, in the 1963–1964 school year, barely one in one hundred (1.2 percent) of these African American children was in a nonsegregated school. That means that for nearly ninety-nine of every one-hundred African American children in the South a decade after *Brown*, the finding of a constitutional right changed nothing.

Change came to school systems in the South in the wake of congressional and executive branch action. Title VI of the CIVIL RIGHTS ACT OF 1964 required the cut-off of federal funds to programs receiving federal monies where RACIAL DISCRIMINATION was practiced and the 1965 Elementary & Secondary Education Act provided a great deal of federal money to generally poor Southern school districts. This combination of federal funding and Title VI gave the executive branch a tool to induce DESEGREGATION when it chose to do so. When the U.S. Department of Health, Education, and Welfare began to threaten fund cut-offs to school districts that refused to desegregate, dramatic change occurred. By the 1972–1973 school year, over 91 percent of African American school children in the eleven Southern states were in integrated schools, up from 1.2 percent in the 1963–1964 school year.

*Brown* shows that U.S. courts by themselves can almost never be effective producers of social change. At best, they can second the social reform acts of the other branches of government. Problems that are unsolvable in the political context can rarely be solved by courts. Turning to courts to produce social change substitutes the myth of America for its reality. It credits courts and judicial decisions with a power they do not have.

GERALD N. ROSENBERG
(2000)

Bibliography

DAHL, ROBERT A. 1957 Decision-Making in a Democracy: The Role of the Supreme Court as a National Policy-Maker. *Journal of Public Law* 6:279–295.

HAMILTON, ALEXANDER; MADISON, JAMES; and JAY, JOHN 1961 (1788) *The Federalist.* Clinton Rossiter, ed. New York: New American Library.

GALANTER, MARC 1974 Why the 'Haves' Come Out Ahead: Speculations on the Limits of Social Change. *Law & Society Review* 9:95–160.

HOROWITZ, DONALD L. 1977 *The Courts and Social Policy.* Washington, D.C.: Brookings Institution.

MCCLOSKEY, ROBERT G. 1994 *The American Supreme Court,* 2nd ed. Chicago: University of Chicago Press.

ROSENBERG, GERALD N. 1991 *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press.

SCHEINGOLD, STUART A. 1974 *The Politics of Rights.* New Haven, Conn.: Yale University Press.

## COURTS AND SOCIAL CHANGE, II

The apparent accomplishments of the WARREN COURT led liberals to believe that the Supreme Court could contribute substantially to social change. They saw BROWN V. BOARD OF EDUCATION (1954) as the precursor of the CIVIL RIGHTS movement of the 1960s, and the Court's CRIMINAL PROCEDURE decisions such as MIRANDA V. ARIZONA (1966) as the driving force behind substantial changes in police practices. Even after the retirement of Chief Justice EARL WARREN, ROE V. WADE (1973) suggested that the Court's decisions might lead to major changes in important social practices. The Court's decisions in the 1970s striking down statutes as SEX DISCRIMINATION similarly supported the view that the Court could be an important force for social change.

Overall, however, the BURGER COURT and the REHNQUIST COURT suggested to liberals that their enthusiasm for the courts might have been misplaced. The Burger Court initially invalidated CAPITAL PUNISHMENT, but then endorsed state efforts to reestablish it. The Court rejected an early challenge to state laws making homosexual sodomy illegal in BOWERS V. HARDWICK (1986). It also eroded important Warren Court PRECEDENTS, relieving school districts of further obligations to undo the effects of racial SEGREGATION, and refused to extend the Warren Court's criminal procedure holdings. By the 1990s, some liberal constitutional scholars thought, society's protection of the rights the Warren Court singled out was not significantly different from the situation that had existed in the early years of Warren's tenure.

These events led to a more subtle understanding of the Court's relation to social change. A long-standing view, going back to at least the early 1900s, is that the Court "fol-

lows the election returns": Court decisions simply ratify changes that have already taken place. A defender of this view would contend, for example, that major changes in the social role of women preceded the Court's gender discrimination decisions of the 1970s. The courts' withdrawal from the field of school desegregation occurred after changes in the political climate made SCHOOL BUSING and other desegregation remedies increasingly unpopular.

Political scientist Gerald Rosenberg mounted an important attack on the view that the courts could play a large part in inducing major social changes. Rosenberg pointed out that no significant amount of desegregation occurred in the deep South until the mid-1960s, a decade after *Brown*, and took place only when Congress enacted civil rights statutes that threatened recalcitrant districts with the loss of federal financial assistance. Then, observing that the Court's ABORTION decisions succeeded in making abortions more easily available, Rosenberg argued that the courts' ability to contribute to social change varied depending on the kind of change involved. The segregation cases showed that the courts could do little when success depended on the cooperation of other political actors. Abortion was different, in Rosenberg's view, because the Court's decisions created a market that could be satisfied by private parties without government support.

Rosenberg's critics believed that he failed adequately to take account of indirect effects of court decisions. They argued that *Brown* had important effects, which Rosenberg minimized, on the spirits of civil rights activists, encouraging them to continue their activities because they knew that the Court agreed with their vision of the Constitution.

This criticism suggests that the courts can affect social change along two dimensions. Rosenberg focused on immediate effects on actual practices, while his critics focused on longer-range effects accomplished by changing the understandings people have of what the Constitution requires. The critics' position is that courts change the way people think about the Constitution, and those changed views then lead people to support new policies. Contrary to this position are public opinion surveys showing that the courts have relatively small effects on public understandings, because the public either does not know of what the courts have done, or misinterprets the messages the courts have attempted to send.

In response, scholars who believe the courts do have important effects have directed attention away from immediate effects on social practices and on beliefs about the Constitution. They argue that the courts have produced a general American "rights-consciousness." For some, this makes Americans willing to sue to vindicate what they believe are their rights far more frequently than is appropriate, generating an "adversary culture" that makes it more difficult to resolve conflicts both large and small. For others, rights-consciousness endorses a highly individualist way of thinking about social problems, which makes it more difficult for Americans to develop group-oriented theories and strategies that might be more effective in vindicating the very rights at issue.

MARK TUSHNET
(2000)

Bibliography

GARROW, DAVID 1994 Hopelessly Hollow History: Revisionist Devaluing of *Brown v. Board of Education*. *Virginia Law Review* 80:151–160.

GLENDON, MARY ANN 1991 *Rights Talk: The Impoverishment of Political Discourse*. New York: Free Press.

ROSENBERG, GERALD 1991 *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press.

TUSHNET, MARK 1984 An Essay on Rights. *Texas Law Review* 62:1363–1403.

## COURTS OF APPEALS

See: United States Courts of Appeals

## COVER, ROBERT M.
(1943–1986)

Born in Boston in 1943, Robert M. Cover earned his B.A. from Princeton University in 1965. In 1963 Cover had left Princeton to work for the Student Nonviolent Coordinating Committee (SNCC) in Georgia, where he was jailed and beaten. Although he became a superb scholar and an inspirational teacher and friend, Cover remained an engaged activist. He believed that "legal meaning is a challenging enrichment of social life, a potential restraint on arbitrary power and violence." He never separated himself or his work from that pursuit.

Cover received his LL.B. from Columbia Law School in 1968, at which time he immediately joined the Columbia faculty. He moved to Yale Law School in 1972 and was named the Chancellor Kent Professor of Law and Legal History in 1982.

Cover won the Ames Prize for *Justice Accused: Antislavery and the Judicial Process* (1975). This book probed the moral dilemma confronting northern judges opposed to slavery on moral grounds who nonetheless believed that the law of antebellum America required them to order fugitive slaves returned to their masters. In addition, Cover coauthored books on procedure and wrote numerous articles about how narrative, myth, and history "invite

new worlds" by illuminating the tension between law and the normative worlds we construct.

Cover's pathbreaking work stressed that judicial language is unlike literary language because it involves actual violence, pain, and death. He explored new facets of jurisdiction, law and religion, civil rights, and civil liberties. If a dominant theme emerged in the radically interdisciplinary work of this "anarchist who love[d] law," it was exploration of how law might be a bridge toward the creation of new narratives and better actualities. To Cover, law should involve a conscious quest for a juster justice.

Cover died of a heart attack in 1986.

AVIAM SOIFER
(1992)

Bibliography

MEMORIAL ISSUE 1987 *Yale Law Journal* 96:1699–1984.

## *COX v. LOUISIANA*
379 U.S. 536 (1965)
379 U.S. 559 (1965)

Some black students were jailed in a courthouse for PICKETING segregated lunch counters. About 2,000 other black students marched there and, in accordance with police instructions, lined a sidewalk 101 feet away. Whites gathered. Cox made a speech that elicited some grumbling from whites; the police ordered the demonstration broken up; the students were dispersed.

Justice ARTHUR GOLDBERG writing for the Supreme Court reversed Cox's BREACH OF THE PEACE conviction, finding that Cox's actions threatened no violence and that the police could have handled any threat from the whites. The Court also held the breach of peace statute unconstitutionally vague and overbroad as construed by the state supreme court to define breach as "to arouse from a state of repose . . . to disquiet."

In striking down Cox's conviction for obstruction of public passages because the statute's actual administration had vested discretion in city officials to forbid some parades and allow others, the Court emphasized that violation of nondiscriminatory traffic laws would not be protected by the FIRST AMENDMENT. The court reversed Cox's conviction for picketing near a courthouse because the police, by directing the demonstrators to a particular sidewalk, had led them to believe that it was not near the courthouse within the terms of the statute so that a subsequent conviction created a "sort of entrapment," in violation of DUE PROCESS. Nevertheless, in dictum it invoked the old doctrine that picketing was subject to reasonable regulation as "speech plus" and supported the authority of a state legislature to forbid picketing near a courthouse because of its danger to the administration of justice.

Although *Cox* is often cited as a case establishing the concept of a PUBLIC FORUM, the Court went out of its way to say "We have no occasion . . . to consider the constitutionality of the . . . non-discriminatory application of a statute forbidding all access to streets and other public facilities for parades and meetings."

MARTIN SHAPIRO
(1986)

## *COX v. NEW HAMPSHIRE*
312 U.S. 569 (1941)

In this seminal decision, Chief Justice CHARLES EVANS HUGHES, writing for a unanimous Supreme Court, synthesized a series of cases involving speeches, parades, and meetings in parks and on streets. He held that there was a "right of assembly . . . and . . . discussion of public questions immemorially associated with resort to public places," but that such a right was limited by the authority of local government to make reasonable regulations governing "the time, place and manner" of such speech, if the regulations did not involve "unfair discrimination" among speakers. The Court upheld a state law requiring parade licenses issued by local governments on the grounds that, as construed by the state supreme court, it authorized only such reasonable and nondiscriminatory regulations. *Cox* is one of the building blocks in the creation of the doctrine of the PUBLIC FORUM.

This case took on renewed importance in the context of the CIVIL RIGHTS demonstrations of the 1960s. The crucial problem under the *Cox* test is often whether a law purporting to be a neutral regulation of traffic and noise control is actually a façade behind which local authorities seek to deny a public forum to speakers whose speech they dislike.

MARTIN SHAPIRO
(1986)

## *COX BROADCASTING CORP. v. COHN*
420 U.S. 469 (1975)

In *Cox Broadcasting Corp. v. Cohn* the Supreme Court held that broadcasting the name of a rape victim, derived from public court documents open to public inspection, could not constitutionally be made the basis for civil liability. The Court left open the questions whether liability could be imposed for a similar broadcast if the name had been obtained in an improper fashion, or if the name had

not been directly derived from the public record, or if the name had not appeared in a public record open to public inspection, or if the public record were inaccurate.

STEVEN SHIFFRIN
(1986)

## *COY v. IOWA*
487 U.S. 1012 (1988)

Coy was convicted of sexually assaulting two thirteen-year-old girls. During his trial, the girls gave testimony in front of a screen that blocked Coy from their sight. Coy claimed that use of the screen violated his right to CONFRONTATION guaranteed by the Fifth Amendment. The Supreme Court agreed, holding that face-to-face examination of witnesses testifying at trial is a fundamental guarantee of the confrontation clause.

Writing for the majority, Justice ANTONIN SCALIA argued that open accusations seem integral to the very idea of fairness; moreover, face-to-face confrontation serves the end of truth because it is more difficult for witnesses to lie (or lie convincingly) when they must do so to the face of the person their testimony will harm. Scalia argued that the Court's previously carved out exceptions to the confrontation clause were inapposite because they dealt with out-of-court statements and not testimony given during trial. Whether there may be exceptions to the confrontation clause even at trial, Scalia was unwilling to say. All he would acknowledge is that if such exceptions exist they must be "necessary to further an important public policy."

Justice SANDRA DAY O'CONNOR, in one of her characteristically narrow concurrences, claimed that nothing in the ruling should be construed as forbidding state efforts to protect child witnesses, and she listed several types of state action that she thought would not raise a "substantial Confrontation Clause problem." O'Connor also seized on the majority's concession that exceptions to the confrontation clause may exist when "necessary to further an important public policy." The key word, O'Connor pointed out, was "necessary," and this would likely be the focus of future litigation. It was; and in 1990, the Court took up the issue again in MARYLAND V. CRAIG.

JOHN G. WEST, JR.
(1992)

## *COYLE v. SMITH*
221 U.S. 559 (1911)

This decision construed the guarantee of a REPUBLICAN FORM OF GOVERNMENT in a case involving a state's admission to the Union. The enabling act admitting Oklahoma specified the location of the state capital, a condition which the Oklahoma legislature soon violated. The Supreme Court struck down the limitation as outside the limits of Congress's power over admission.

DAVID GORDON
(1986)

# CRACK COCAINE AND EQUAL PROTECTION

During the 1980s, the federal government and many states adopted particularly harsh sentences for possessing or trafficking in crack cocaine. This SENTENCING has become controversial because it is borne largely by African American defendants, and because penalties at both the federal and state level are much lower for possession or sale of powder cocaine, the form of cocaine with which defendants of other races tend to get caught. In federal court, for example, crack defendants since 1986 have received by statute the same sentences imposed upon defendants convicted of trafficking in one hundred times as much powder cocaine.

Crack and powder cocaine are different forms of the same drug. Indeed, crack cocaine is made from powder cocaine, and the conversion process is simple and inexpensive, so it tends to occur toward the end of the distribution chain. Unlike powder cocaine, though, crack cocaine can be smoked, which makes its psychotropic effects more intense and shorter lasting, and also makes it far more addictive. Crack also is easier than powder cocaine to handle in small quantities, and hence easier to sell to the poor.

Federal constitutional challenges to heightened sentences for crack cocaine trafficking have failed without exception. Because crack laws do not explicitly distinguish between defendants on the basis of race or any other SUSPECT CLASSIFICATION, courts have subjected the laws to "minimal scrutiny" under the EQUAL PROTECTION clause. Such scrutiny asks merely whether the lines the law draws have a RATIONAL BASIS. The crack laws have passed this test easily, because cocaine is demonstrably more dangerous when it comes in the form of crack. As a consequence, the federal courts of appeals have unanimously rejected equal protection challenges to the crack sentences. In contrast, the Minnesota Supreme Court struck down an enhanced state penalty for trafficking in crack cocaine, but only after concluding that the equal protection guarantee in Minnesota's state constitution was more demanding than its federal analogue.

Some commentators have applauded the federal decisions and criticized the Minnesota court, reasoning that because crack cocaine does particular damage in poor,

black communities, heightened penalties for crack trafficking hurt black drug dealers but help blacks as a whole. But others have been less sanguine. Federal judges have repeatedly attacked the crack laws as draconian, and some scholars have suggested that conventional equal protection analysis takes no account of the most troubling features of the crack penalties: the extent of the difference between the treatment of crack and powder cocaine, the special need for fairness in meting out criminal sanctions, and the grounds for suspecting that the crack sentences might be less severe were they not imposed almost entirely upon black defendants. Thus, the resounding failure of constitutional challenges to the federal crack sentences may speak less to the merits of the sentences than to the inadequacies of equal protection DOCTRINE.

DAVID A. SKLANSKY
(2000)

(SEE ALSO: *Drug Regulation; Race and Criminal Justice.*)

Bibliography

KENNEDY, RANDALL 1997 *Race, Crime, and the Law.* New York: Random House.

SKLANSKY, DAVID A. 1995 Cocaine, Race, and Equal Protection. *Stanford Law Review* 47:1283–1322.

## *CRAIG v. BOREN*
429 U.S. 190 (1976)

It is ironic that the leading modern decision setting the STANDARD OF REVIEW for claims of SEX DISCRIMINATION involved discrimination against men, concerning an interest of supreme triviality. Oklahoma allowed women to buy 3.2 percent beer upon reaching the age of eighteen; men, however, had to be twenty-one. A young male would-be buyer and a female beer seller challenged the law's validity. The young man became twenty-one before the Supreme Court's decision; his challenge was thus rejected for MOOTNESS. The Court held that the seller had STANDING to raise the young man's constitutional claims, and further held, 8–1, that the law denied EQUAL PROTECTION OF THE LAWS. Justice WILLIAM H. REHNQUIST dissented.

Speaking through Justice WILLIAM J. BRENNAN, the Court held that classifications based on gender were invalid unless they served "important governmental objectives" and were "substantially related to achievement of those objectives." This intermediate standard was a compromise between the two views of the majority in FRONTIERO V. RICHARDSON (1973) as to the level of judicial scrutiny of both legislative objectives and legislative means. Under the RATIONAL BASIS standard of review, the objective need be only legitimate, and the means (in equal protection language, the classification) only rationally related to its achievement. At the opposite end of the continuum of standards of review, STRICT SCRUTINY demands a legislative objective that is a COMPELLING STATE INTEREST, and means that are necessary to achieving that objective. The *Craig* standard appears to have been deliberately designed to fall between these two levels of judicial scrutiny of legislation.

In the years since *Craig*, the Supreme Court has often invalidated classifications based on sex but typically has not challenged the importance of legislative objectives. Instead, the Court generally holds that a sex classification is not "substantially related" to a legislative goal. In *Craig* itself, the Court admitted that traffic safety, the state's objective, was important, but said maleness was an inappropriate "proxy for drinking and driving."

Justice JOHN PAUL STEVENS, concurring, doubted the utility of multitiered levels of judicial scrutiny in equal protection cases, and commented that men, as a class, have not suffered "pervasive discrimination." The classification was objectionable, however, because it was "based on the accident of birth," and perpetuated "a stereotyped attitude" of young men and women. Because the state's traffic safety justification failed, the law was invalid.

KENNETH L. KARST
(1986)

## *CRAIG v. MISSOURI*
4 Peters 410 (1830)

*Craig* defined BILLS OF CREDIT, which no state may issue without violating Article I, section 10, of the Constitution. By a 4–3 vote the Supreme Court ruled that bills of credit mean any paper medium intended to circulate as money on the authority of a state, even if not designated as legal tender in payment of debts. Missouri, lacking currency, authorized state loan offices to issue loan certificates, on collateral, to private citizens, in amounts ranging from fifty cents to ten dollars; the certificates could be used for payment of taxes and official salaries. Chief Justice JOHN MARSHALL's opinion invalidating the state act, though constitutionally correct, ignored economic realities: many states desperately needed a circulating medium. Senator THOMAS H. BENTON, for Missouri, defending its certificate law before the Court, thunderingly defended state sovereignty. The disastrous consequences of *Craig* provoked denunciations of the court and yet another movement in Congress to repeal section 25 of the JUDICIARY ACT OF 1789, the grant of APPELLATE JURISDICTION under which the Court had reversed state court judgments and held state acts unconstitutional. The repeal movement failed, but a solid South ominously opposed the Court.

LEONARD W. LEVY
(1986)

(SEE ALSO: *Briscoe v. Bank of Commonwealth of Kentucky.*)

## *CRAMER v. UNITED STATES*
325 U.S. 1 (1945)

On the night of June 12, 1942, several specially trained saboteurs were put ashore from a German submarine near Amagansett, New York, with orders to disperse throughout the United States and to sabotage the American war effort. Anthony Cramer, a naturalized American citizen of German background, befriended two of the saboteurs, met with them, and was suspected of assisting them in their mission. However, the only overt acts to which two witnesses could testify were two meetings between Cramer and one of the saboteurs, who was an old friend of Cramer's. The prosecution was unable to produce the testimony of two witnesses concerning what took place at the meetings or to establish that Cramer gave information, encouragement, shelter, or supplies to the saboteurs. Cramer was tried for and convicted of TREASON, and he appealed his conviction to the Supreme Court.

The *Cramer* case marked the first time that the Supreme Court passed on the meaning of the treason clause of Article III, section 2, of the Constitution. Justice ROBERT H. JACKSON, for a 5–4 Court, held that the overt acts testified to by two witnesses must be sufficient, in their setting, to sustain a finding that actual aid and comfort was given to an enemy of the United States. Although there was other EVIDENCE of Cramer's Nazi sympathies and of his assistance to the saboteur, the overt acts—the meetings—were not in themselves treasonable, and the conviction could not stand.

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Haupt v. United States; Quirin, Ex Parte.*)

Bibliography

BELKNAP, MICHAL R. 1980 The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case. *Military Law Review* 89:59–95.

## CRANCH, WILLIAM
(1779–1855)

President JOHN ADAMS in March 1801 commissioned his nephew, William Cranch, assistant judge of the newly created Circuit Court for the DISTRICT OF COLUMBIA. President THOMAS JEFFERSON in 1806 surprised Cranch, a loyal Federalist, by elevating him to chief judge, a post he filled until his death, half a century later.

Cranch simultaneously undertook the unofficial position of reporter of the decisions of the Supreme Court of the United States. His nine volumes of reports, for which he derived compensation at public sale, covered the period from the August Term, 1801, to the February Term, 1815. The role of the law reporter in Cranch's time commanded professional respect and even glamour. These reports, which added luster to the judge's reputation, received favorable comment, even from Jeffersonian opponents.

Cranch's first major constitutional opinion, *United States v. Bollman et al.* (1807), stressed the independence and power of the federal judiciary, themes that pervaded his other major opinions. President Jefferson in early 1807 had sought a bench warrant for the arrest of Erik Bollman and Samuel Swartwout on charges of TREASON in the Burr Conspiracy. Cranch dissented from the decision by the court's other two judges to issue the warrant. He took exception to the English doctrine of constructive treason. He also rejected the proposition that an executive communication from the President, without either an oath or affirmation, established sufficient probability of treasonous activity.

Three decades later Cranch spoke for a unanimous court in upholding the power of the judiciary to intervene in executive affairs. *United States ex rel. Stokes v. Kendall* (1837) stemmed from an alleged debt due Stokes and others for services they claimed to have rendered to the Post Office. When Postmaster General Amos Kendall refused to pay, despite congressional direction to do so, Stokes sought a WRIT OF MANDAMUS. Although no circuit court had ever issued such a writ against the executive branch, Cranch held that his court could do so. He found that the judicial power could properly issue a writ to command performance of a purely ministerial function by the head of an executive department.

Cranch remained a thoroughgoing Federalist long after that party ceased to exist. His opinions powerfully affirmed the role of the federal judiciary. His most important legacy was the establishment of the Circuit Court and its successors in the District of Columbia as the major forums in which to adjudicate causes involving executive departments and agencies.

KERMIT L. HALL
(1986)

Bibliography

CARNEL, WILLIAM F. 1901 Life and Times of William Cranch, Judge of the District Circuit Court, 1801–1855. *Records of the Columbia Historical Society* 5:294–310.

## *CRAWFORD v. BOARD OF EDUCATION*
458 U.S. 527 (1982)

## *WASHINGTON v. SEATTLE SCHOOL DISTRICT NO. 1*
458 U.S. 457 (1982)

By statewide votes, both Washington and California sought to limit the use of SCHOOL BUSING for purposes of DESEGREGATION. A 1978 Washington INITIATIVE effectively prohibited school boards from assigning children to public schools outside their residential neighborhoods for purposes of racial integration. A 1979 amendment to the California Constitution prohibited state courts from ordering school busing unless busing would be available in a federal court as a remedy for a violation of the FOURTEENTH AMENDMENT. The Supreme Court sustained the California measure, 8–1, but held the Washington measure invalid, 5–4.

In the *Seattle* case, Justice HARRY A. BLACKMUN wrote for the majority. Following the precedent of HUNTER V. ERICKSON (1969), he concluded that the Washington law placed a special burden on racial minorities, using an issue's racial nature to define the local decision-making structure. For the dissenters, Justice LEWIS F. POWELL argued that the Washington law had not altered the political process at all, but had merely adopted a neighborhood school policy—something a local school board itself remained free to do, within the limits of the Fourteenth Amendment.

Justice Powell wrote for the Court in the *Crawford* case. The California courts had previously read the state constitution to forbid DE FACTO as well as DE JURE school SEGREGATION. There was, however, no "ratchet" principle in the Fourteenth Amendment; the state could constitutionally adopt federal EQUAL PROTECTION standards. The amendment, Powell said, was not adopted with a racially discriminatory purpose; it chiefly reflected a choice for the neighborhood school policy. Justice THURGOOD MARSHALL, dissenting, considered the two cases indistinguishable. Indeed, the opinions of Justice Powell in the two cases bear marked similarities; yet, if *Hunter* be taken as the critical precedent, the distinction is supportable. A line is none the worse for being thin.

KENNETH L. KARST
(1986)

# CREATIONISM

Creationism is the belief that plants and animals were originally created by a supernatural being substantially as they now exist. Proponents of creationism today are primarily evangelical Christians who adopt a literal reading of the book of Genesis in the Bible. Several hundred creationists also hold advanced science degrees and claim that the best scientific evidence supports creationism; these creationists advocate what they call "scientific creationism."

Scientific creationism is far afield from prevailing scientific orthodoxy, and although most of its proponents are evangelicals, many evangelicals do not subscribe to it. Scientific creationism teaches that the earth is several thousand years old, rather than several billion, and that much of the fossil record was created in a worldwide deluge, rather than by the gradual accumulations of the ages. It harkens back to catastrophism of the type dominant in the scientific community before the theories of Charles Lyell and Charles Darwin gained acceptance. Scientific creationists claim that the fossil record supports the idea that when life first appeared it was already complicated and multifaceted; at the very least, they argue, the fossil record shows no support for the gradual progression of life forms taught by classical Darwinian theory. Much of the evidence cited by creation scientists comes from evolutionists, who continue to have marked disagreements with one another about the mechanism by which evolution occurs.

Creationism originally became a constitutional issue because creationists tried to keep evolution from being taught in the public schools, a policy the Supreme Court struck down as violative of the ESTABLISHMENT CLAUSE in EPPERSON V. ARKANSAS (1968). Creationism remains a constitutional issue, however, because creationists now seek to have scientific creationism taught in public schools. In fact, they have sought state laws that require the teaching of creationism side-by-side with evolution.

Opponents of these laws maintain that teaching creationism is tantamount to teaching religion and hence abridges the establishment clause; as evidence for their position, they point to the religious underpinnings of creationism and claim that few if any scientists hold creationist beliefs. Creationists respond that how they derived their theory is irrelevant; the sole question is whether or not it can be validated by scientific research. As for the dearth of scientists who are creationists, creation scientists point to their own doctorates in science from secular universities. Nevertheless, creationists readily admit that few scientists have adopted creationism, but claim that this is the result of prejudice on the part of evolutionists, marshaling evidence that graduate students and professors believing in creationism have been systematically discriminated against because of these beliefs. Creationists argue that laws requiring the teaching of scientific creationism alongside evolution are required to break the stranglehold of such prejudice.

In response to creationist concerns, Louisiana enacted

a law requiring the balanced treatment of the theories of "evolution science" and "creation science" in the public schools. The act defined the respective theories as "the scientific evidences for [creation or evolution] and inferences from those scientific evidences." The act did not mandate that either theory be taught in the schools; but it did demand that if one was taught the other must be taught. The act also required that neither evolution nor creation science be taught "as proven scientific fact."

The Supreme Court held 7–2 that the act failed the first part of the LEMON TEST because it did not have a valid secular purpose; hence, the statute was unconstitutional on its face under the establishment clause.

Writing for the majority, Justice WILLIAM J. BRENNAN rejected the act's explicitly stated secular purpose of "protecting ACADEMIC FREEDOM" because the statute did not in any way enhance the freedom of teachers to teach science. Brennan also rejected the contention that Louisiana wanted to ensure "fairness" by requiring that all the evidence regarding origins be taught, noting that the law unequally provided for the development of curriculum guides for creation science, but not evolution.

The core of Brennan's argument, however, was his determination that creation science embodies "religious doctrine" and that the "preeminent purpose of the Louisiana legislature was . . . to advance the religious viewpoint that a supernatural being created humankind." Brennan sought to show from the legislative record that legislators in fact supported the act because evolution contradicted their own religious beliefs. Hence, the motivations of the legislators, rather than the clear language of the act, was the decisive factor in invalidating the law.

Justice ANTONIN SCALIA, joined by Chief Justice WILLIAM H. REHNQUIST, filed a lengthy dissent attacking many of the central premises of the majority's opinion. Scalia maintained that the majority was able to dismiss the act's stated secular purpose only by misconstruing it. According to Scalia, the "academic freedom" the act sought to guarantee related not to the teachers, but to the students, whom the legislature wanted to be able to study various views of the origin and development of life. Furthermore, the act on its face treated evolution and creation science equally, and the few differences that did exist could be readily explained. For example, the state provided for the development of study guides for creation science, but not evolution because "of the unavailability of works on creation science suitable for classroom use . . . and the existence of ample materials on evolution."

Scalia saved his most cutting remarks for the majority's inquiry into the subjective motives of Louisiana's legislators. Scalia showed through copious citations that the majority had distorted legislators' intentions. But in Scalia's view, even had the majority correctly read the motives in this case, motives alone should not have invalidated the law. The act should have been struck down only if its objective language clearly violated the Constitution or if the primary effect of the law in practice was to advance religion impermissibly (a question not before the Court).

*Edwards v. Aguillard* raises questions both difficult and deep; it is not really analogous to cases dealing with school prayer or Bible reading because these practices are devotional exercises clearly designed to inculcate religious truth. In this case, however, the state officially disclaimed any intention to present creationism as "true." So even if creationism is inherently religious—as the Court determined—it is not necessarily the case that teaching about it promotes religion in violation of the establishment clause. As Justice LEWIS F. POWELL pointed out in his concurring opinion, the Court has often maintained that public schools have the right to teach objectively about religion. So to strike down the Louisiana law, the Court not only had to find creationism religious, but it had to maintain that the purpose of the law was to teach creationism as true. As a factual matter, however, this was by far the weakest link in the Court's logic.

Why then did the Court rule as it did? One can only speculate; but it would not be inappropriate to point out the obvious: creationism conjures up images of the Scopes trial and intolerant fundamentalists who are none too bright. In the battle between science and superstition, creationism has been accounted superstition, and one can readily understand why the Court would be reluctant to uphold a law that might appear to sanction creationism. Unfortunately, there are problems with excluding beliefs like creationism from the classroom entirely.

Evolution remains so controversial primarily because it is part of a much larger debate over the nature and meaning of life. The study of how life began almost inevitably raises questions of why: Why did life begin? Why are humans rational? Why is there order in the universe? Men and women have debated these questions for thousands of years, considering them to be some of the most important inquiries human beings can undertake. Yet these are the very sorts of questions that modern science cannot answer. All modern science can legitimately offer are tentative explanations about the physical process by which life developed after it first appeared; of its own accord, it can tell us nothing of the purpose or meaning of the development of life. Nor, in all probability, will it ever unravel the mystery of how life first arose from nonlife. The result is that if one relegates the discussion of the origin and development of life to science textbooks that discussion will be, at best, incredibly impoverished because modern science cannot legitimately provide answers to questions of meaning and purpose. At worst, the discussion will be disingenuous because attempts will be made to answer the

questions of meaning in the guise of science. One does not need to know much of recent history to realize that science has been used quite often to justify a variety of philosophically laden schemes, from social darwinism to eugenics. The encroachment of science into the domains of philosophy and theology may be more subtle in the public schoolroom, but it occurs nevertheless. It can be seen in the 1959 biology text that declared that "nothing supernatural happened" when life first arose or in more recent texts that emphasize "chance" and "randomness" as the sole determinants of how life developed. Such statements advance philosophical and theological claims just as surely as creationism; yet these claims are allowed because they are made in the name of science. In such a situation, one can readily understand why some creationists have tried to distance their theory from its religious underpinnings; they know this is the only way their ideas will get a fair hearing.

It might be better if public schools—and the Court—recognized more forthrightly that both philosophy and theology have a place in the discussion of origins and that their inclusion in school curricula need not be equated with their advancement by the state. One can teach about various theories, after all, without advocating any of them.

JOHN G. WEST, JR.
(1992)

(SEE ALSO: *Religious Fundamentalism; Separation of Church and State.*)

Bibliography

BERGMAN, JERRY 1984 *The Criterion: Religious Discrimination in America.* Richfield, Minn.: Onesimus.

BIRD, WENDELL R. 1978 Freedom of Religion and Science Instruction in Public Schools. *Yale Law Journal* 87:515–570.

CURTIS, V. KAY 1988 Religion: Church and State Relations: Balanced Treatment of Theories of Origins—*Edwards v. Aguillard. Oklahoma Law Review* 41:740–758.

## CRIMINAL CONSPIRACY

The modern crime of conspiracy punishes the act of agreement with another to do something unlawful, and the vagueness and breadth of its scope are the legacies of seventeenth-century English judges who invented its COMMON LAW progenitor. Constitutional DOCTRINE has not shaped the boundaries of this crime; it is, indeed, the other way around. Most paradoxically, the crime has served both as a tool for the suppression of FIRST AMENDMENT freedoms and as a weapon for the defense of rights to racial equality. Like all political issues, the definition of "unlawful" conspiracies fluctuates with the moral hemlines of history.

In the eighteenth century, the English crime came to encompass the agreement to do any "immoral" acts, even noncriminal ones. This became an element of American conspiracy law as well, and one of its early critics was Chief Justice LEMUEL SHAW of the Massachusetts Supreme Judicial Court. In *Commonwealth v. Hunt* (1842) Shaw put an end to conspiracy prosecutions of laborers who organized to seek such noncriminal goals as higher wages or a CLOSED SHOP. Criminal goals, of course, remained punishable, and trade union conspiracy prosecutions died out in the 1890s only because they were replaced by judicial resort to the labor INJUNCTION. Statutes prohibiting noncriminal conspiracies remained on the books, but their demise was hastened by state court decisions holding them void for VAGUENESS or violative of the EX POST FACTO clause.

Federal conspiracy prosecutions commenced in 1867 with the enactment of a Federal Criminal Code provision prohibiting conspiracies to defraud the United States. The rise of organized crime during Prohibition provided the impetus for the expansion of federal conspiracy offenses; the RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT of 1970 is an exemplar of their sweeping scope. In 1925, Judge LEARNED HAND labeled conspiracy "the darling in the prosecutor's nursery," because of the progovernment features that mark conspiracy trials. HEARSAY statements of co-conspirators are admissible in evidence, and conspiratorial membership may be inferred solely from conduct showing a desire to further the conspiracy's goals. In *Pinkerton v. United States* (1946) the Court held conspirators liable for every crime committed by co-conspirators, including those of participants whose existence was unknown but foreseeable. The DOUBLE JEOPARDY clause does not bar separate, consecutive sentences for these offenses and the conspiracy itself. VENUE will lie anywhere an act is committed in furtherance of the conspiracy, often effectively nullifying the SIXTH AMENDMENT right to be tried where a crime is committed. Conspirators may be tried en masse, and fringe participants thus become tainted with the culpability of the ringleaders.

It is small wonder that in *Krulewitch v. United States* (1949) Justice ROBERT H. JACKSON declared that the "elastic, sprawling and pervasive" nature of the crime of conspiracy poses a "serious threat to fairness" in the administration of justice. Yet while many commentators call for limitations on the crime, DUE PROCESS arguments meet with recurrent failure in the courts. This amoeboid offense remains entrenched in state and federal law and in legislative proposals for criminal code reform.

Conspiracy was a potent weapon for the prosecution of political dissidents during WORLD WAR I, and these cases brought the Supreme Court to its first important encounter with the First Amendment's guarantees of FREEDOM OF

SPEECH and FREEDOM OF THE PRESS. The ESPIONAGE ACT of 1917 prohibited conspiracies to obstruct the draft or cause insubordination in the armed services, and in SCHENCK V. UNITED STATES (1919) and FROHWERK V. UNITED STATES (1919) a unanimous Court affirmed the conspiracy convictions of dissidents who had circulated antidraft publications. In *Schenck*, Justice OLIVER WENDELL HOLMES declared that only a CLEAR AND PRESENT DANGER of a conspiracy's success would justify conviction, but this formula was not an important limitation in these cases, where the danger was assumed. Justices Holmes and LOUIS D. BRANDEIS later argued for greater speech protections, but their pleas went unheeded for a generation. Conspiracy convictions of eleven national Communist party leaders were affirmed in DENNIS V. UNITED STATES (1951), even though the danger posed by their conspiracy to advocate the overthrow of the government was evidenced only by the party's structure and tenets. The doctrinal thaw came in 1957, with Justice JOHN MARSHALL HARLAN's opinion in YATES V. UNITED STATES portending the formula of BRANDENBURG V. OHIO (1969). *Brandenburg* allows prosecution for speech crimes—including conspiracy to advocate—only when advocacy of imminent, illegal action is likely to incite such action.

*Brandenburg*'s weakness as a limit on conspiracy prosecutions is that it only guarantees defendants the benefit of appellate court scrutiny of jury verdicts. It provides no more than an indirect caution for legislative reliance on conspiracy statutes or prosecutorial decisions to seek indictments. Protection of speech interests rests ultimately in the court of public opinion, and the VIETNAM WAR era dissidents found an uncertain haven there. The "Chicago Seven" protesters at the 1968 Democratic National Convention were acquitted of conspiring to travel interstate with intent to incite a riot, but they were convicted of other INCITEMENT offenses. Benjamin Spock and William Sloane Coffin were convicted of conspiring to counsel draft evasion, based on their support of a DRAFT CARD BURNING rally in Boston. After appellate court reversals in *United States v. Dellinger* (1972) and *United States v. Spock* (1969), reprosecution was halted only because the government decided to give up trying. The CHILLING EFFECT of such prosecutions is irremediable, and judicial vindication of speech rights often becomes a matter of better late than never.

The concept of conspiracy can serve CIVIL LIBERTIES as aptly as it defeats them. After the CIVIL WAR, Congress prohibited conspiracies "to injure, oppress, threaten or intimidate" any citizen's free exercise of constitutional rights, and also provided a civil action for DAMAGES against conspirators. Narrow judicial construction of these rights defeated their enforcement in the era of UNITED STATES V. HARRIS (1883) and the CIVIL RIGHTS CASES (1883). But Justice WILLIAM O. DOUGLAS's opinion in SCREWS V. UNITED STATES (1945) revived prosecutions of state officials, while UNITED STATES V. GUEST (1966) brought similar vindication against private individuals, and GRIFFIN V. BRECKENRIDGE (1971) opened the damage remedy door. Debate continues over the scope of rights protected by these remedies. But conspiracy's contribution toward curbing civil rights violators remains as notable as its role in rounding up racketeers.

CATHERINE HANCOCK
(1986)

Bibliography

FILVAROFF, DAVID B. 1972 Conspiracy and the First Amendment. *University of Pennsylvania Law Review* 121:189–253.
JOHNSON, PHILLIP E. 1973 The Unnecessary Crime of Conspiracy. *California Law Review* 61:1137–1188.

## CRIMINAL JUSTICE ACT
78 Stat. 552 (1964)

By the Criminal Justice Act Congress provided that counsel must be furnished at public expense for INDIGENT defendants in federal criminal cases. The act requires each district court to formulate a plan for furnishing counsel, subject to supervision by the circuit judicial council and the Judicial Conference of the United States. The act provides that counsel shall be furnished from the defendant's first appearance before a court or magistrate through the APPEAL process, and authorizes reimbursement for such expenses as investigations and expert testimony.

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Right to Counsel.*)

## CRIMINAL JUSTICE AND DUE PROCESS

The application to the CRIMINAL JUSTICE SYSTEM of the DUE PROCESS clauses of the Fifth Amendment and the FOURTEENTH AMENDMENT raises three principal issues. First, which of the provisions of the BILL OF RIGHTS relating to police practices and criminal trials are "incorporated" by the Fourteenth Amendment's due process clause so as to apply against the states as well as the federal government? Second, what doctrinal framework should be used to evaluate claims about PROCEDURAL DUE PROCESS in the criminal as opposed to civil context? Third, what doctrinal framework should be used to evaluate claims about substantive

limits on police practices, or what has come to be known as SUBSTANTIVE DUE PROCESS?

The INCORPORATION question is a consequence of the Supreme Court's decision in the post–WORLD WAR II era to pursue a doctrinal strategy of "selective incorporation" by which it considered each individual provision of the Bill of Rights and determined whether that provision was so fundamental so as to apply against the states pursuant to the due process clause of the Fourteenth Amendment. Although the Court explicitly rejected Justice HUGO L. BLACK's theory of "total incorporation" (by which every provision of the Bill of Rights would be incorporated against the states), it accomplished much the same result through "selective incorporation," given that almost every provision of the Bill of Rights has been individually incorporated.

As for criminal justice, almost every provision of the Bill of Rights relating to police practices and the conduct of criminal trials has been incorporated against the states. The FOURTH AMENDMENT limit on unreasonable SEARCHES AND SEIZURES and its EXCLUSIONARY RULE have been incorporated, as have the Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION and its MIRANDA RULES. In addition, the Fifth Amendment's DOUBLE JEOPARDY clause, the Eighth Amendment's CRUEL AND UNUSUAL PUNISHMENT clause, and almost every provision of the Sixth Amendment relating to criminal trials have all been incorporated.

Nonetheless, two important exceptions to this trend toward expansive incorporation are worth noting in the criminal justice context. First, the Fifth Amendment's GRAND JURY clause has never been incorporated. Although that clause has been interpreted to require that all federal FELONY cases be based on an INDICTMENT by a grand jury, the Court explicitly rejected such a requirement for state criminal proceedings in the nineteenth-century case HURTADO V. CALIFORNIA (1884), and it has never revisited the issue. Thus, states are constitutionally free to structure their charging mechanisms in other ways. A substantial number of states use grand juries for some cases, but some jurisdictions give prosecutors greater power to charge by information than would be constitutionally permissible in federal courts, and some jurisdictions use alternative (and perhaps more rigorous) methods to "check" prosecutorial charging decisions. Among those alternatives are judicially conducted preliminary hearings or judicial inquests, also known as "one-man grand juries." Second, although the Court incorporated the Sixth Amendment right to TRIAL BY JURY in nonpetty criminal cases in DUNCAN V. LOUISIANA (1968), it failed to incorporate that aspect of the jury right that requires JURY UNANIMITY in federal criminal trials. This peculiar result arose from the fragmentation of the Court in the 1970s. Four Justices (led by Justice BYRON R. WHITE) believed that the Sixth Amendment required neither federal nor state criminal juries to be unanimous; four other Justices (led by Justice WILLIAM O. DOUGLAS) believed that the Sixth Amendment required both federal and state criminal juries to be unanimous. Justice LEWIS F. POWELL, JR., provided the fifth, "swing" vote on the matter, declaring that the Sixth Amendment required jury unanimity in federal, but not in state, cases. Thus, both in grand jury practice and in the degree of unanimity required of criminal juries, states remain significantly freer than the federal government to pursue their own policies without running afoul of the Fourteenth Amendment's due process clause.

The second set of issues raised by the intersection of the due process clause and the criminal justice system—the requisites of procedural due process—have become murkier in recent years. On occasion in the last few decades, the Court has seemed to assume that the doctrinal framework for analyzing claims of inadequate procedures should be the same in the civil and criminal contexts. Thus, for example, in deciding whether indigent criminal defendants should be entitled to state-funded psychiatric assessments in CAPITAL PUNISHMENT trials, the Court applied the same BALANCING TEST that the Court had applied to claims regarding procedural due process in civil contexts. However, in a more recent case, *Medina v. California* (1992), the Court explicitly rejected this approach and held that the standard should be one more deferential to state interests: courts should uphold a challenged state procedure "unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." The Court reasoned that in light of the explicit provisions of the Bill of Rights relating to criminal procedure, expansive readings of the due process clause would give inadequate deference to considered legislative judgments. After *Medina*, it remains to be seen both how deferential the Court's standard will turn out to be, and how the Court will choose whether a particular procedural challenge should be considered under a specific provision of the Bill of Rights or under the more general due process clause.

The third principal issue—substantive due process—has likewise been addressed recently by the Court, and in a similar fashion that has both narrowed the scope of possible challenges and raised questions about the future. The Court has held, from the early part of this century, that the due process clause not only ensures fair procedures, as its text most obviously suggests; it also is the source of certain substantive limits on governmental power. In the criminal justice context, the Court has held that the due process clause renders unconstitutional some police practices and some treatment of pretrial detainees. The Court has assumed that the "deliberate indifference" of governmental actors to certain kinds of harms—for

example, inattention to prisoners' medical needs—is enough to violate the due process clause. But in *County of Sacramento v. Lewis* (1998), a case involving a high-speed POLICE PURSUIT that resulted in death, the Court held that the "deliberate indifference" standard was too accommodating to plaintiffs in cases that involve on-the-spot police decisionmaking. In such a context, a court should decline to find a violation of due process unless the actions of the police were so egregious as to "shock the conscience." It remains to be seen which other contexts within the criminal justice system will be held to require the more deferential "shocks the conscience" standard. The narrowing of opportunities for substantive due process challenges within the criminal justice system reflects the growth of a more general skepticism on the Supreme Court for "substantive" regulation under the due process clause.

CAROL S. STEIKER
(2000)

## CRIMINAL JUSTICE AND RACE

See: Race and Criminal Justice

## CRIMINAL JUSTICE AND TECHNOLOGY

In 1928 Justice LOUIS D. BRANDEIS warned that "discovery and invention have made it possible for the government, by means far more effective than the rack, to obtain disclosure in court of what is whispered in the closet." And, he went on to ask, "can it be that the Constitution affords no protection against such invasion of individual security?" In OLMSTEAD V. UNITED STATES (1928) the Supreme Court responded yes to Brandeis's question: the Constitution "affords no protection."

Today the Court continues to give virtually the same answer. Thus, in *United States v. Knotts* (1983), Justice WILLIAM H. REHNQUIST wrote that "nothing in the FOURTH AMENDMENT prohibit[s] the police from augmenting the sensory facilities bestowed upon them at birth with such enhancement as science and technology afforded them in this case." That case involved a mobile tracking device, but the same attitude is reflected in many other cases and contexts. The Court has virtually abdicated any role in shaping a response to the threats to liberty and individual rights posed by the new technology, leaving the problem to the occasional efforts of the Congress and to the state legislatures and courts.

The *Olmstead* WIRETAPPING controversy set the pattern. There the Court construed the Fourth Amendment to deny any constitutional protection against devices that do not involve a physical trespass and the seizure of tangible documents. Nine years later, in NARDONE V. UNITED STATES (1937), the Court construed a federal statute codifying federal radio and telecommunications law to prohibit wiretapping, much to everyone's surprise. The limitations of this approach were reflected in the virtual failure of the statute to reduce wiretapping significantly and in the Court's understandable refusal in *Goldman v. United States* (1942) to apply the statute to the next significant technological development, a detectaphone placed against a wall that could overhear conversations in another room without physically trespassing.

Now, a half century later, Brandeis's warning is more timely than ever, for we have developed technologies that make these early devices seem primitive. These new technologies include tiny, almost invisible video and audio surveillance devices that can function at short or long distances and by night as well as day, such as a "miniawac," which can spot a car or a person from 30,000 feet in the air; electronic bracelets and anklets that signal a probation or parole officer if his or her charge goes more than a short distance from home; and chemical dust that can be used with ultraviolet detectors for tracking. Computer matching of records in different places can also provide vast amounts of information about a person. Many other techniques involving new biological and medical technology are also being developed.

The Court's resistance to imposing constitutional controls on the use of technological advances in the CRIMINAL JUSTICE SYSTEM stems in part from the law enforcement and constitutional contexts in which these issues arise. Almost always the question before the Court has been whether a convicted criminal is to go free because the enforcement authorities have used some technological device without meeting constitutional requirements. Only for a brief period in its history (1961–1967) has the Court not been reluctant to tolerate such an outcome.

The constitutional provision at issue in these cases is usually the Fourth Amendment, which imposes restrictions only on SEARCH AND SEIZURE. The Court's analytic approach has been to dichotomize surveillances into "searches" and "nonsearches," with the latter denied any Fourth Amendment protection at all; other constitutional provisions, such as the Fifth Amendment's ban on compelled self-incrimination, have been construed as inapplicable to the use of most technological devices. SCHMERBER V. CALIFORNIA (1966) illustrates that point.

This dichotomous approach, together with the Court's general reluctance to recognize the special impact of modern technology on individual liberty, was illustrated just a few years after it overruled *Olmstead* in KATZ V. UNITED STATES (1967). A sharply divided Court in UNITED STATES V.

WHITE (1971) refused to recognize a constitutionally protected right not to have one's conversation with another person secretly transmitted electronically by the latter to police listening some distance away. "Inescapably, one contemplating illegal activity must realize and risk that his companions may be reporting to the police," wrote Justice BYRON R. WHITE, and to him there was no significant difference "between probable informers on the one hand and probable informers with transmitters on the other." But as the dissenting Justice JOHN MARSHALL HARLAN wrote, "third-party bugging . . . undermine[s] that confidence and sense of security that is characteristic of . . . a free society. It goes beyond the . . . ordinary type of "informer situation." The "assumption of risk" analysis used by the Court is circular, insisted Justice Harlan, for "the risks we assume are in large part reflections of laws that translate into rules [our] customs and values. . . . The critical question, therefore, is whether . . . we *should* impose on our citizens [such] risks . . . without at least the protection of a warrant." Moreover, the Fourth Amendment is designed to protect all of us, not just people "contemplating illegal activities," and the Court's approach precluded constitutional protections when a confidential conversation turns out to be wholly innocent.

The *White* unconcern for differences in degree that become differences in kind has been reflected in virtually every constitutional case involving modern technology that the Court has faced. For example, seeking anonymity in a crowd and moving to out-of-the-way places are ways to preserve some privacy in a surveillance-pervaded crowded society. In *United States v. Knotts* the Court ruled that an electronic device, a "beeper," surreptitiously attached to a container that emitted electronic signals, enabling the police to trace the container wherever it went, did not call for constitutional protection; the Court reasoned that "visual surveillance from public places along [the] route" of the person with the container would have provided the same information. Only if the beeper enters a house with the container and continues to operate is there a privacy encroachment requiring a SEARCH WARRANT. The same reasoning can obviously apply to beepers secretly attached to people.

The Court has been equally indifferent to the threats to privacy and liberty posed by modern expansions of visual surveillance. Walls and distance—which we ordinarily use to protect privacy—are not very effective safeguards in today's world. Video surveillance can now be conducted from great distances and often with the capability of listening as well. So far, the Court has tended to ignore distance as a factor. In a series of three decisions in the late 1980s the Court consistently upheld surveillance from above enclosed areas, even when the surveillance was made possible only by the use of highly sophisticated equipment. In *Dow Chemical Co. v. United States* (1986), Dow had a 2,000-acre chemical factory, around which it maintained elaborate security that barred ground-level views; it also investigated any low-level flights. Any further protection against intrusion, such as a roof over the entire facility, would have been prohibitively expensive. An Environmental Protection Agency airplane took approximately seventy-five pictures of the plant from altitudes as high as 12,000 feet. The camera's precision was so great that the pictures could be enlarged over 240 times without significant loss of detail or resolution; it was possible to see pipes and wires as small as one-half inch in diameter. Finding the plant similar to an OPEN FIELD, a 5–4 majority of the Court denied constitutional protection against the surveillance.

In *Dow*, the Court suggested that more protection might be available to a private residence than to a large industrial complex. But in *California v. Ciraolo* (1986) the same 5–4 majority decided the same way when police flew a private plane 1,000 feet above Ciraolo's yard, which he tried to protect with a six-foot outer fence and a ten-foot inner fence; the police saw a marijuana plant in the yard on a small plot, which they photographed. Despite Ciraolo's precautions, Chief Justice WARREN E. BURGER concluded that even though Ciraolo had a REASONABLE EXPECTATION OF PRIVACY in his backyard, it was "unreasonable for [him] to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet," because the observation occurred in public "navigable air space" and the members of the public could look down as they flew overhead. As Justice LEWIS F. POWELL observed in dissent, however, the likelihood of such an observation by a private person on a public or private plane is "virtually nonexistent."

The Court confirmed its indifference to the privacy of areas under surveillance a few years later in *Florida v. Riley* (1989), when it concluded that observations from a helicopter hovering 400 feet above a partially covered greenhouse in the defendant's backyard did not implicate the Fourth Amendment. The Court stressed that the helicopter was not violating the law, "did not interfere with respondent's normal use of the greenhouse," observed no "intimate details," and caused "no undue noise, no wind, dust or threat of injury." The Court did not explain why any of these should be determinative in deciding whether the greenhouse was entitled to be free from unrestricted surveillance.

An especially serious threat to individual liberty arises from the computer revolution. Seeking medical care, participating in public welfare programs, engaging in regulated activities, or even acting as consumers requires us to provide third parties vast amounts of personal information

that previously we could have kept confidential. Data that were once either nonexistent or kept in a shoebox or file cabinet are now on someone else's computer disks. Moreover, those records that did exist were stored in public or private files usually scattered in a great many places, making it difficult to develop a full dossier on anyone. That difficulty is now a thing of the past. Computer matching pulls together masses of information in different files, information that can dog one throughout one's existence. As sociologist Gary Marx points out, "this can create a class of permanently stigmatized persons," making it impossible for people to overcome past mistakes and failures and to start a new life. Rehabilitation may be rendered impossible.

The Supreme Court has not dealt directly with computer matching, but has effectively denied constitutional protection to the privacy of a key element in that process: the records themselves. In *United States v. Miller* (1976) the Court refused to require police to meet Fourth Amendment requirements when they subpoenaed a bank's microfilm records of a suspect's checks, bank statements, deposit slips, and other bank transaction records. The Court found no "legitimate expectation of privacy in these records and documents because all contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. . . . The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government." The result is that the enormous mass of information that we must "voluntarily convey" in order to live in a modern world is now without constitutional protection. This includes not only bank and medical records but even the telephone numbers we call, which are not conveyed to any one at all but simply recorded for billing purposes by usually inanimate equipment. In *Smith v. Maryland* (1979) the Court refused to require constitutional prerequisites for installation of a pen register that recorded the numbers of outgoing telephone calls. Justice HARRY A. BLACKMUN wrote that "the switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber." Wayne LaFave noted the "ominous proposition that modern technology cannot add to one's justified expectation of privacy, but can only detract from it."

Finally, the Court has extracted a principle from one of the oldest forms of "technology" that would render newer technology one of the greatest threats to privacy and other individual rights. In concluding in *United States v. Place* (1983) that use of a dog's sense of smell to detect drugs in a suitcase did not raise Fourth Amendment concerns, the Court said, "A 'canine sniff' by a well-trained narcotics detection dog . . . does not expose non-contraband items that otherwise would remain hidden from public view . . . [and is] limited both in the manner in which the information is obtained and in the content of the information revealed." This approach would seem to be counter to the proposition that an intrusion cannot be validated by what it turns up. Moreover, if accuracy and unobtrusiveness are criteria, then what lies in store if, as Justice Brandeis feared, we do indeed develop ways that can unobtrusively detect the presence of incriminating materials by foolproof methods?

And why should techniques be limited to searching out tangible items; what of incriminating expressions or even thought revealed by new medical or chemical technology? At this point the Court might balk, but so far its CONSTITUTIONAL THEORY would impose few if any controls.

HERMAN SCHWARTZ
(1992)

Bibliography

FISHMAN, CLIFFORD S. 1985 Electronic Tracking Devices and the Fourth Amendment: *Knots, Karo* the Questions Still Unanswered. *Catholic University Law Review* 34:277–395.

LAFAVE, WAYNE 1987 *Search and Seizure.* St. Paul, Minn.: West Publishing Co.

MARX, GARY T. 1988 *Undercover Police Surveillance in America.* Berkeley: University of California Press.

OFFICE OF TECHNOLOGY ASSESSMENT 1985 *Federal Government Information Technology: Electronic Surveillance and Civil Liberties.* Washington, D.C.: U.S. Government Printing Office.

## CRIMINAL JUSTICE SYSTEM

The BILL OF RIGHTS has sometimes been likened to a national code of CRIMINAL PROCEDURE. However, the Constitution regulates many important aspects of criminal justice that are not "procedural" in any sense; at the same time, it fails to regulate many other important aspects, both procedural and nonprocedural. Moreover, features of the criminal justice system that are subject to extensive constitutional limitations are not, in practice, so strictly regulated as is commonly believed. It is therefore appropriate to reflect on which important aspects of criminal justice are and are not governed by the Constitution, what factors explain these patterns, and what the future role of the Constitution should be in defining fundamental norms of criminal justice.

To evaluate the role of constitutional norms in criminal matters, it is necessary to analyze the entire criminal justice system. Each political entity in the United States (local, state, or federal) has such a system; it consists not only of the rules of EVIDENCE and procedure applicable in criminal matters, but also the major institutions of criminal

justice (for example, the police, lawyers, judges, court and correctional officials), as well as the provisions of the criminal law (crimes, defenses, and penalties). This system can be envisioned as a process that begins with the definition of the criminal law and the institutions of justice; proceeds "chronologically" through increasingly selective stages of investigation, charging, adjudication, appellate review, and punishment; and ends with the continuing careers of convicted offenders, who all too often, begin the process all over again. Each of these stages of the process raises fundamental issues of justice and of individual-state relations that might be, but often are not, regulated by constitutional norms. At the same time, the enforcement of any such norm is limited by that norm's systemic context; specific rules are dependent on other rules, many of which are not subject to federal constitutional regulation. Thus, changes in specific constitutional norms are often canceled by compensating changes in other rules or practices in the same or different parts of the system.

The following is a list of the major issues at each stage of the above chronological flow model that are and are not subject to significant constitutional regulation:

1. The definition of crimes and penalties is largely unregulated by the Constitution, except for certain limitations imposed by the EX POST FACTO, BILL OF ATTAINDER, and EQUAL PROTECTION clauses, the FIRST AMENDMENT and Eighth Amendment, the RIGHT OF PRIVACY, and the VAGUENESS and fair notice doctrines. Almost all issues relating to the definition of defenses (e.g., self defense, intoxication, and insanity) are unregulated.

2. Except for the appointment and tenure of federal judges, the requirements of judicial neutrality in the issuance of warrants and at trial, and certain First Amendment limitations on the hiring and firing of public employees, the institutions of criminal justice are not regulated at all by the federal Constitution; many are also not closely governed by STATE CONSTITUTIONS. Important unregulated issues include selection and internal supervision of police, prosecutors, and correctional officials; selection and tenure of state judges; and training of police, prosecutors, judges, and defense attorneys.

3. The investigation of criminal charges is covered by highly detailed constitutional limitations as to SEARCH AND SEIZURE, POLICE INTERROGATION AND CONFESSIONS, the RIGHT TO COUNSEL, and BAIL. Important unregulated issues include police decisions to investigate or not investigate, to use informants and undercover police officers, and to charge some offenders and offenses, but not others; magistrate shopping; nighttime arrests and searches; searches when no one but police are present; use of arrest and pretrial detention in minor cases; prompt appearance in court; appellate review of pretrial detention; and nonbail release conditions.

4. Prosecutorial decisions to select offenders and charges, to later drop charges, and to engage in PLEA BARGAINING as to charges and the sentence, or both, have an enormous impact on case outcomes. However, except for very limited equal-protection and "vindictive prosecution" standards, these critical decisions are not regulated by the Constitution.

5. Other pretrial procedures covered by the Constitution include the GRAND JURY (in federal cases only), certain aspects of DISCOVERY, motions to exclude evidence, and SPEEDY TRIAL. However, the powers of the prosecution and the defense to obtain statements from potential witnesses (other than the defendant) before a trial are not regulated by the Constitution.

6. Extensive FAIR TRIAL rights are provided by the Constitution; examples are TRIAL BY JURY, right to counsel, CONFRONTATION with state witnesses, BURDEN OF PROOF, RIGHT AGAINST SELF-INCRIMINATION, and DOUBLE JEOPARDY. Important unregulated issues include the admissibility of the defendant's prior convictions or other misconduct, separation of guilt and sentencing evidence and findings, the necessity of written findings of guilt, multiple trials for the same offense in different states or in both state and federal systems, and most issues involving joinder of offenses and offenders in a single trial.

7. Many of the fair trial standards also apply to SENTENCING proceedings, but they apply more flexibly. The Constitution does not require formal findings or reasons for a particular sentence, nor does it limit guilty plea concessions. Except for the imposition of CAPITAL PUNISHMENT, sentencing decisions need not be structured by guidelines. The Eighth Amendment sets some limits on disproportionately severe prison terms and fines, and sentences are also limited by certain First Amendment, equal protection, and right of privacy rules, but most sentences are not constitutionally regulated either as to their form or severity.

8. The FREEDOM OF THE PRESS and fair trial principles govern media publicity and access to trials and certain pretrial proceedings.

9. Although HABEAS CORPUS rights are guaranteed, it is not clear whether the Constitution guarantees defendants any right to direct appeal in state cases. If an appellate system is provided, it must meet minimal equal protection and DUE PROCESS requirements, but the number of appellate levels, composition of courts, and nature of appealable issues are not regulated.

10. Victims have no rights under the Constitution—to be heard or to appeal, to be protected, or to receive compensation.

11. Compensation of citizens for unconstitutional search, arrest, pretrial detention, or imprisonment is available under federal CIVIL RIGHTS statutes, but is subject to

important limitations (for example, judicial immunity and police officer's defense of reasonable belief that arrest or search was lawful).

12. The Constitution guarantees very few PRISONERS' RIGHTS. Most fair trial rights do not apply to decisions such as prison discipline, transfers, parole, and revocation of probation.

To understand why the Constitution regulates criminal matters so selectively, it is necessary to consider not only the implications of FEDERALISM, but also the textual sources and historical development of federal constitutional norms. The constitutional texts applicable to criminal cases are mostly found in the Bill of Rights (1791) and the FOURTEENTH AMENDMENT (1868). Of these, only the latter applies directly to the states, and it did not provide much concrete guidance until the 1960s, when the WARREN COURT, with use of the INCORPORATION DOCTRINE, began to hold that certain Bill of Rights guarantees were implicit in the Fourteenth Amendment's due process clause. Because there were very few federal criminal cases until the twentieth century, there was little early case law interpreting Bill of Rights guarantees. Indeed, before the adoption of the EXCLUSIONARY RULE in federal cases in 1914, there was virtually no case law, because there was no criminal court remedy encouraging defendants to litigate constitutional claims.

The Supreme Court's application of the exclusionary rule to state criminal cases in 1961, along with its expansion of the availability of habeas corpus and right to counsel in 1963, set the stage for a veritable explosion of constitutional case law during the final years of the Warren Court. Nevertheless, this expansion was constrained by the texts of the Bill of Rights. These texts were written in response to specific perceived abuses of the late eighteenth century. Moreover, they were written at a time when crime tended to be local and relatively disorganized, and before the development of organized police forces and the emergence of the public prosecutor's monopoly over the bringing of cases to trial. Considering these dramatic changes in the nature of crime and criminal justice, the Bill of Rights remains remarkably relevant today, but it fails to address many fundamental issues of modern criminal justice. In the absence of specific provisions, the courts have had to create new rights either by broad analogy to specific rights, or by applying the more open-ended provisions of the due-process clauses of the Fifth and Fourteenth Amendments. However, both approaches weaken the legitimacy of such newly recognized rights and make them vulnerable to attack.

This inherent vulnerability of the Warren Court's jurisprudence, combined with the appointment of more conservative Justices by Presidents RICHARD M. NIXON and RONALD REAGAN, substantially slowed the expansion of criminal-process safeguards during the 1970s; indeed, the Supreme Court began to cut back on the scope of substantive rights and the availability of exclusionary and habeas corpus remedies. Notions of federalism also provided justification for this conservative shift; many believed that the Warren Court had gone too far in imposing strict federal standards on state criminal justice systems faced with rapidly rising crime rates and inadequate resources. Also, the relatively late development of these standards in federal cases and their very recent application to state cases lent some support to the view that they were not truly fundamental, at least in state cases.

But the Supreme Court did not simply relax the standards in state cases. Because the majority of Justices still accepted the premise of the selective incorporation doctrine—that a uniform definition of each right should apply in state and federal criminal cases—the conservative decisions of the 1970s and 1980s resulted in the lowering of constitutional standards in federal cases as well. Congress responded with a few statutory safeguards, and the Supreme Court's own FEDERAL RULES OF CRIMINAL PROCEDURE continued to provide certain standards more restrictive than the Constitution requires. At the same time, many state courts responded by relying more and more on STATE CONSTITUTIONAL LAW to provide greater protections. In addition, state statutes, rules of procedure, and evidence codes continued to provide important safeguards in areas where constitutional law had retreated or had never been applied.

The degree of the Supreme Court's conservative shift since 1970 should not be overstated. Indeed, a closer analysis of the jurisprudence of the Warren Court reveals that it too had doubts about the wisdom of expanding and strictly enforcing constitutional standards in state and federal criminal cases. Six themes that cut across the spectrum of specific rights illustrate this ambivalence. Although these themes became much clearer in the 1970s and 1980s, they were already evident in the Warren Court era.

First, even the Warren Court recognized that some procedural rights are less important than others. The most important rights were those directly related to the integrity of the adversary system, particularly the right to counsel. Such rights, when violated, were more likely to receive retroactive application and to lead to automatic reversal of a conviction. At the other end of the spectrum, receiving the least protection, were FOURTH AMENDMENT rights. In theory, such rights involve fundamental issues of individual freedom from governmental oppression. In practice, however, they tend only to be asserted by defendants who, in light of illegally seized physical evidence, appear to be clearly guilty of criminal conduct. Thus, the Warren Court recognized several important limitations on these

rights and related exclusionary remedies; for example, these rights received little if any retroactive application. Post-Warren Court decisions reflect this "hierarchy of rights" theme even more strongly.

Second, even the adversary-system rights given highest priority by the Warren Court were not applied with equal strictness at all stages of the criminal process. Except for police interrogations covered by MIRANDA V. ARIZONA (1966), the right to counsel was not applied before the filing of formal charges. Similarly, the Court did not show much interest in extending fair trial standards to critical decisions made by correctional authorities, such as disciplinary isolation and revocation of parole. Indeed, the Supreme Court (along with most lower courts) adopted a "hands off" approach toward the entire correctional process. Decisions after 1970 did recognize some rights for prisoners and extended counsel rights to some preindictment proceedings. It remains true, however, that constitutional fair trial guarantees apply primarily *at* trial; the criminal justice system is not, on the whole, really an "adversary" system.

Third, even some trial rights were not deemed applicable to all criminal cases: the Warren Court held that there is no right to a jury trial for "petty offenses" (maximum sentence not exceeding six months' imprisonment). The petty-offense limitation was later applied in different form to the right to counsel at trial. The rationale for this limitation, also widely followed in nonconstitutional procedural rules, is that more severe penalties require more exacting procedures of adjudication. During the pretrial investigative stage, however, the opposite rule applies: more serious offenses give the citizen fewer rights and the police greater power, for example, to make warrantless entries to arrest.

Fourth, the Warren Court's failure to condemn certain problematic features of American criminal justice implied that fundamental concepts, such as due process and equal protection, may mean different things in criminal cases than they do in other contexts. This view was later explicitly adopted by the Court in *Gerstein v. Pugh* (1975), holding that the Fourth Amendment defines (sometimes less strictly) "the "process that due' for seizures of person or property in criminal cases." The Warren Court never questioned the traditional use of money bail to condition pretrial release, even though such use often constitutes blatant WEALTH DISCRIMINATION. The Court held that the right to vote could not be lost by inability to pay a POLL TAX,, yet it allowed the right of physical liberty before conviction to be lost by inability to post bail. Similarly, the Warren Court never seriously questioned the dominant form of adjudication of criminal cases, that is, plea bargaining, which would seem to be either an UNCONSTITUTIONAL CONDITION on the exercise of rights or a case of coerced waiver of rights. It scarcely seems imaginable that the Warren Court would have tolerated in any other context an institutionalized practice whose main purpose is to discourage the exercise of constitutional rights.

Fifth, the Warren Court recognized that police and courts have a practical need for easily administered "bright-line" rules that disregard the specific circumstances of each case. Although most of the Warren Court's bright lines tended to be overly broad with respect to individual rights, some tilted more in the other direction, for example, the automatic right to conduct a limited SEARCH INCIDENT TO ARREST. Later Supreme Court decisions have struck the opposite balance: most, but not all, bright-line rules favor the police.

Finally, the Warren Court undercut many of its liberal, prodefendant rights by recognizing significant limitations on the scope of exclusionary remedies. Thus, defendants lack STANDING to object to even the most outrageous violations of another person's rights; they cannot object to the use of illegally seized evidence to contradict their own testimony on the witness stand; remote products ("fruits") of illegality remain admissible in the prosecution's case, and there is no criminal court remedy for an illegal arrest that does not produce any such evidentiary fruits; and the admission of clearly excludable evidence generally does not require reversal if the reviewing court concludes, in light of the untainted evidence, that admission was HARMLESS ERROR. These exceptions were greatly expanded (and became more numerous) in later Supreme Court decisions; meanwhile, field studies of the exclusionary rule confirmed what perhaps was true even under the Warren Court: exclusion of evidence is rare, occurring in less than one percent of cases, many of which still result in conviction.

Why are fundamental constitutional rights so weakly enforced, even by liberal judges? In addition to the important reasons of history and federalism, noted earlier, there are a number of factors peculiar to the criminal process. First, enforcement of rights usually costs money, and the criminal justice system is inherently underfunded: crime often increases much faster than prisons can be built; legislatures enact moralistic and "get tough" laws, but not the tax increases necessary to pay for their enforcement; and criminal laws are rarely repealed or reduced in severity because there are no votes for the elected official who is, or even appears to be, "soft" on crime or immorality. Second, in part as a result of the first problem, almost all cases are resolved by a guilty plea rather than by trial; defendants who plead guilty waive not only their trial rights, but frequently also their rights to contest the introduction of illegally obtained evidence.

Third, the remedies for constitutional violations create problems of their own. The exclusionary rule often requires courts to throw out reliable evidence; retrial after appellate reversal of conviction may be impossible because of lost evidence, witnesses, and testimony. Fourth, the actors purportedly regulated by constitutional norms retain substantial unregulated discretion—not only because of the need to limit caseloads to stay within resource limits, but also because the correctness of the actors' decisions often turns on case-specific factual determinations, such as voluntariness of consent or waiver, which does not permit close regulation by legal norms. In any case, such norms govern relatively few issues; officials deal with cases and defendants under many rules and at many stages of system processing, and each stage provides opportunities to undercut or evade the occasionally strict rule.

Finally, it must be admitted that Americans are deeply ambivalent about some of their most fundamental ideals of justice. Such ideals often make it more difficult to arrest and convict criminals; particularly in times of rapidly increasing crime rates, most citizens prefer to protect themselves and their property rather than criminals. Even where constitutional norms are designed to protect the innocent, they are necessarily most likely to be asserted by a guilty defendant. As noted earlier, this is almost always true in the Fourth Amendment area, but it is generally true throughout the system. The presumption of innocence itself is somewhat counterintuitive: most arrested persons and certainly most defendants brought to trial are guilty, or ought to be; if they were not, our criminal justice system would be grossly defective. Similarly, the right against compelled self-incrimination is contrary to the general duty to testify and the view that wrongdoers have a duty to admit their mistakes; the right to a vigorous defense is contrary to the view that wrongdoers should not be assisted in their efforts to conceal the truth and avoid punishment; and limits on deceptive police practices are contrary to the view that sometimes it is necessary to fight fire with fire. In light of these value conflicts, citizens—and sometimes even lawyers and judges—may lose sight of the importance of our most fundamental criminal-procedure safeguards.

What, then, can we conclude about the proper role of the Constitution in criminal matters? Despite the problems described, Americans certainly must not stop trying to improve the quality of criminal justice. Moreover, constitutional norms play a central role in these efforts—defining, as the Supreme Court said of the CRUEL AND UNUSUAL PUNISHMENT clause, "the evolving standards of decency which mark the progress of a maturing society." At the same time, constitutional norm setting has its limits. Only the most fundamental and lasting norms can be expressed in the constitutional text. Moreover, the case law articulating such norms must not get too far ahead of our ability and willingness to enforce these rules; otherwise, idealism and hope turn to hypocrisy and cynicism.

The Constitution is only one source of norms in criminal cases; other major sources are state constitutions, statutes, codes of criminal procedure and evidence, model law and procedural codes, administrative regulations, and the COMMON LAW,. Increasingly, Americans have begun to look to statements of international human rights; although the INFLUENCE OF THE AMERICAN CONSTITUTION ABROAD once made the United States a leader in this field, international norms have now progressed to the point where they sometimes set standards more strict than, or in areas not covered by, the American Constitution.

RICHARD S. FRASE
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Bibliography

AMERICAN BAR ASSOCIATION 1980 *ABA Standards for Criminal Justice*, 4 vols., 2nd ed. Boston: Little, Brown.

AMERICAN LAW INSTITUTE 1975 *A Model Code of Prearraignment Procedure*. Philadelphia: American Law Institute.

FRASE, RICHARD S. 1986 Criminal Procedure in a Conservative Age: A Time to Rediscover the Critical Nonconstitutional Issues. *Journal of Legal Education* 36:79–82.

FRIENDLY, HENRY J. 1965 The Bill of Rights as a Code of Criminal Procedure. *California Law Review* 53:929–956.

KAMISAR, YALE; LAFAVE, WAYNE; and ISRAEL, JEROLD H. 1990 *Modern Criminal Procedure: Cases, Comments, Questions*, 7th ed. St. Paul, Minn.: West Publishing Co.

LAFAVE, WAYNE R. and SCOTT, AUSTIN W., JR. 1986 *Criminal Law*, 2nd ed. St. Paul, Minn.: West Publishing Co.

ZIMRING, FRANKLIN E. and FRASE, RICHARD S. 1980 *The Criminal Justice System: Materials on the Administration and Reform of the Criminal Law*. Boston: Little, Brown.

## CRIMINAL LAW

See: Federal Criminal Law

## CRIMINAL PROCEDURE

"It was a great day for the human race," Charles E. Merriam wrote in *Systematic Politics* (1945), "when the idea dawned that every man is a human being, an end in himself, with a claim for the development of his own personality, and that human beings had a dignity and a worth, respect for which is the firm basis of human association." This idea is the predicate for that branch of American constitutional law which is concerned with criminal procedure, for this body of law is deliberately weighted in

favor of persons accused of crime. This pronounced tilt of the law is based on the assumption that it is vitally necessary to protect the dignity inherent in all human beings, regardless of their station in society.

The commitment of the Constitution to protect in some emphatic way the rights of criminal defendants is reflected in the fact that such protection is a principal theme of the federal BILL OF RIGHTS. Similar protections appear in the bills of rights that form parts of all state CONSTITUTIONS. Even before the ratification of the Bill of Rights in 1791, however, the Constitution in its original form did not ignore the subject altogether. Thus, the privilege of the writ of HABEAS CORPUS was guaranteed, and both BILLS OF ATTAINDER (legislative convictions for crime) and EX POST FACTO laws (laws making criminal acts that were innocent when done) were forbidden (Article I, sections 9 and 10). TRIAL BY JURY "for all crimes" was also guaranteed (Article III, section 2), and the offense of TREASON was defined with meticulous care to prevent abuse of a charge often made on flimsy grounds in moments of great political excitement (Article III, section 3).

The Bill of Rights filled in many more details by spelling out a long list of guarantees designed to protect criminal defendants: freedom from "unreasonable SEARCHES AND SEIZURES" (FOURTH AMENDMENT), INDICTMENT, by GRAND JURY, freedom from DOUBLE JEOPARDY, the RIGHT AGAINST SELF-INCRIMINATION, the right to DUE PROCESS OF LAW (Fifth Amendment), the right to a speedy and PUBLIC TRIAL by an impartial local jury, the right to notice of charges, the right to confront adverse witnesses (*i.e.*, cross-examination), the right to have the assistance of counsel (SIXTH AMENDMENT), and freedom from excessive BAIL and from the infliction of CRUEL AND UNUSUAL PUNISHMENT (Eighth Amendment). In addition, section 1 of the FOURTEENTH AMENDMENT, with its provision that no state shall "deprive any person of life, liberty, or property, without due process of law," eventually opened the door to considerable supervision of criminal justice in the states by the federal courts.

This commitment to the safeguarding of the rights of defendants in criminal cases was deeply rooted in the COMMON LAW system which the earliest settlers brought with them from England. In ancient Anglo-Saxon and Norman times, questions of guilt or innocence were determined by such ritualistic devices as trial by battle or ordeal, or by compurgation (oath-taking), which were largely appeals to God to work a miracle establishing the defendant's innocence. Actually, private vengeance, taking the form of private war or blood feuds, was the principal check on criminal conduct. But by the time the first colonies were established in America, the basic procedures characteristic of modern jurisprudence had taken form. The essence of modern adjudication is the discovery of innocence or guilt through the presentation of proofs and reasoned argument.

Furthermore, it is important that under common law a person accused of crime carries with him the presumption of innocence, which means that the defendant is not obliged to prove his innocence, but rather that the BURDEN OF PROOF is on the prosecution to prove guilt. In addition, jurors must be instructed by the presiding judge that they may convict only if they find that guilt has been established "beyond a REASONABLE DOUBT," which is the greatest quantum of proof known to the law. In most civil litigation a preponderance of evidence suffices to support a verdict. Thus, in a landmark English case, *Woolmington v. D.P.P.* (1935), the House of Lords ruled clearly wrong an instruction of the trial judge to the effect that since the accused had shot his wife, the law presumed him to be guilty of murder unless he could satisfy the jury that death was due to an accident. "No matter what the charge or where the trial," Lord Sankey declared, "the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

The common law rules relating to the presumption of innocence and the burden of proof are part of the law prevailing in every American state. For example, following the completion of a modern, revised criminal code in Wisconsin, the legislature adopted a statute that declared: "No provision of the criminal code shall be construed as changing the existing law with respect to presumption of innocence or burden of proof." These principles are also firmly rooted in federal jurisprudence. As Justice FELIX FRANKFURTER, dissenting in *Leland v. Oregon* (1952), wrote, "From the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the minds of jurors. It is the duty of the Government to establish his guilt beyond a reasonable doubt." Similarly, the Supreme Court has ruled that the standard of proof beyond a reasonable doubt in criminal cases is a due process requirement binding upon the state courts. It is, Justice WILLIAM J. BRENNAN asserted in IN RE WINSHIP (1970), "a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence. . . ." According to the Supreme Court, the states are required to prove beyond a reasonable doubt all elements of the crime with which the defendant was charged, and the jury must be so instructed. An instruction is improper if it has the effect of reducing substantially the prosecution's burden of proof or of requiring the defendant to establish his innocence beyond a reasonable doubt.

The solicitude of American constitutional law for the rights of the accused is so great that the American system has been described as a defendant's law, in contrast with inquisitorial systems of other countries which give the prosecution many advantages not available in the United States. American public law on this important subject rests upon the recognition of several important considerations that are not the product of abstract theorizing or mere sentimentalism but rather the result of historical experience over centuries of time. For one thing, it is an unquestionably legitimate, indeed essential, function of government to apprehend, try, and punish convicted criminals. But it is also the duty of those public officials who operate the criminal justice system to avoid violating the law themselves in their zeal to combat crime. Of course, our society has a serious crime problem which government cannot and should not ignore, but it has long been recognized that at some point the price of law enforcement may be exorbitant. As Justice Frankfurter observed in *Feldman v. United States Oil Refining Co.* (1944), "The effective enforcement of a well designed penal code is of course indispensable for social security," but he went on to say: "The Bill of Rights was added to the original constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed."

Surely, one of the indispensable objectives of a free society is to avoid the disorganizing consequences of lawlessness by public officials. Thus Justice OLIVER WENDELL HOLMES observed in his celebrated dissenting opinion in the Supreme Court's first WIRETAPPING case, OLMSTEAD V. UNITED STATES (1928), that "we must consider two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected and to that end that all available evidence should be used. It is also desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part I think is a less evil that some criminals should escape than that the Government should play an ignoble part." In a separate dissenting opinion in the same case, Justice LOUIS D. BRANDEIS warned that government forcefully teaches by example, that crime is contagious, and that "if the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." To permit the government to commit crimes, he asserted, in order to convict criminals, "would bring terrible retribution."

Without question, if unrestrained by law, the police could apprehend and prosecutors could secure the conviction of far more lawbreakers than they now manage to catch and convict. For example, if the police had a free hand to break into any dwelling or other building and to rummage around as they please, looking for stolen goods or other contraband, such as controlled substances, unquestionably they would solve more crimes and put more thieves, burglars, drug peddlers, and other criminal characters in jail. But the price would be prohibitively high, since it would entail the destruction of a cherished aspect of privacy. Similarly, if the police were completely free to torture suspects, more confessions would be secured, and the conviction rate would rise significantly, but again, other values must be weighed in the balance. These values include avoiding the risk of convicting innocent people who cannot endure the pain and avoiding the danger of encouraging unprofessional, brutal police conduct which employs uncivilized methods shocking to the conscience. Obviously, choices must be made between the desire to catch and punish lawbreakers and our concern for maintaining the legal amenities of a civilized society. The search for a tolerable balance between these competing objectives is what much of our constitutional law is all about. As Justice WILLIAM O. DOUGLAS remarked, in *An Almanac of Liberty* (1954), "a degree of inefficiency is a price we necessarily pay for a civilized, decent society. The free state offers what a police state denies—the privacy of the home, the dignity and peace of mind of the individual." Aside from the fact that one hundred percent law enforcement would make the building of additional jails the highest priority of the country, it simply cannot be achieved without devoting resources far beyond what we can afford, considering all the other important functions for which government is responsible, and without resorting to methods that are almost universally deplored in civilized countries.

The various rights secured for the accused by our constitutional law are not technicalities; due process of law is at the center of our concept of justice. The overall purpose of our legal system is not so much to secure convictions as to render justice. Our rules of constitutional law are not only designed to protect people who are in trouble with the law but also to assure us that those who are engaged in the often exciting business of law enforcement will observe those time-tested rules which in large measure constitute the essence of fair procedure. "Let it not be overlooked," Justice ROBERT H. JACKSON, dissenting in SHAUGHNESSY V. UNITED STATES (1953), wrote, "that due process of law is not for the sole benefit of the accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice. . . ."

There are additional compelling reasons that explain and support our legal system's concern for protecting the rights of persons accused of crime. For one thing, a crim-

inal case is essentially a contest between an individual and a government, that is to say, between parties of vastly unequal strength. This disparity in the strength of the parties is especially visible in the modern age of powerful governments. The teaching of experience the world over is that inequality tends to beget injustice, and where the parties are so unequal, a determined effort must be made to redress the imbalance of power. Thus, the accused is entitled to seek a reversal of a conviction in an appellate court, but the prosecution may not get an acquittal reversed, for the double jeopardy principle forbids it. In this respect, the scales of justice are tipped in favor of the weaker party.

In addition, our concern for the defendant's rights rests upon an understanding that for most people it is a very serious matter indeed to be accused by the government of having committed a crime. The possible consequences range from loss of employment to disruption of family life, injury to reputation, and, ultimately, loss of personal liberty. It follows that one accused of crime is likely to be in such deep trouble that he or she must have every opportunity to combat the charges, as fully, as quickly, and as decisively, as possible. Many rights—bail, a public and SPEEDY TRIAL, CONFRONTATION, of accusers, and assistance of counsel—facilitate an early and effective defense, or at the very least, make one possible.

Furthermore, one of the major purposes of assuring a full measure of due process of law is to promote the sense of community by giving all of us the feeling that even guilty persons have been treated fairly. As Justice Douglas observed in *Brady v. Maryland* (1963), "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of criminal justice suffers when any accused is treated unfairly." As Justice Brennan said in FURMAN V. GEORGIA (1972), "Even the vilest criminal remains a human being possessed of common human dignity."

In a larger sense, our body of procedural law in the criminal field seeks to combat abuse of the POLICE POWER of the state. Police brutality is the hallmark of totalitarian and dictatorial systems of government. The twentieth century has been well schooled in the fearful menace of the midnight knock on the door, the ransacking of private dwellings by the police without legal warrant, the use of torture to break the will, and the ultimate indignity of incarceration in brutal concentration camps. For these compelling reasons our constitutional law was deliberately formulated to prevent the unrestrained exercise of police power.

Indeed, if one looks closely at the elements of the constitutional right to a FAIR TRIAL it becomes clear that for every rule there is a persuasive reason. The basic rights of the accused are responses to our concrete historical experience. Why, for example, does American constitutional law assure defendants representation by counsel? The answer was explained with convincing clarity by Justice GEORGE SUTHERLAND in POWELL V. ALABAMA (1932):

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

In GIDEON V. WAINWRIGHT (1963), the case that extended the RIGHT TO COUNSEL in state courts to all persons charged with felonies, Justice HUGO L. BLACK argued that it was an obvious truth that a person too poor to hire a lawyer cannot be assured a fair trial. He pointed out that government spends vast sums of money to engage the services of lawyers to prosecute, and that few defendants who can afford them fail to hire the best lawyers they can find to present their defenses, from which it follows that "lawyers in criminal courts are necessities, not luxuries."

To cite another example, in all American jurisdictions, state and federal, double jeopardy—which means essentially putting a person on trial twice for the same offense—is forbidden. Once a defendant has been tried and acquitted, he may not be put on trial a second time, even though the prosecution has found fresh relevant evidence not previously available to it or has discovered that serious legal errors were made at the trial. As explained by Justice Black in *Green v. United States* (1957): "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

There are equally persuasive reasons for the guarantee of trial by jury. Justice BYRON R. WHITE noted, in the landmark case of DUNCAN V. LOUISIANA (1968), that the right of trial by jury is "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." The jury, one of the distinctive features of Anglo-American jurisprudence, is the result of several centuries of concrete experience; it has changed

in the past, in many different ways, and it is still a dynamic institution. The authors of the Constitution were thoroughly familiar with the jury system and made careful provision for it in the original document, before the Bill of Rights filled in additional details. Thus, our criminal law procedure has always reflected a reluctance to entrust prosecutors and judges with unchecked powers over life and liberty.

Similarly, there are compelling reasons why American constitutional law protects the individual against UNREASONABLE SEARCHES AND SEIZURES, the main reason being the desire to protect the RIGHT OF PRIVACY. This "right to be left alone," as Justice Brandeis asserted in his notable dissenting opinion in *Olmstead*, is "the most comprehensive of rights and the right most valued by civilized man." Fresh from his Nuremberg experience, Justice Robert Jackson wrote, in a spirited dissent in BRINEGAR V. UNITED STATES (1949), that the Fourth Amendment rights "are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivation of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." Justice Jackson also pointed out that because police officers are themselves the chief invaders of this right, the responsibility for protection against unreasonable searches and seizures has fallen on the courts.

An ancient teaching of English and American law is that to compel a person to convict himself or herself of a crime by being coerced into giving unwilling testimony is inadmissible. Our criminal jurisprudence makes the assumption that everyone is innocent until proved guilty beyond a reasonable doubt on the basis of competent evidence; the prosecution has the duty to prove guilt. Because the accused is not required to establish his innocence, it follows that he cannot be required to supply testimony that would lead to a conviction. The Fifth Amendment's guarantee against compulsory self-incrimination is thus neither an alien nor a novel doctrine but rather, as Justice Douglas wrote in *An Almanac of Liberty*, "one of the great landmarks in man's struggle to be free of tyranny, to be decent and civilized. It is our way of escape from the use of torture. It is part of our respect for the dignity of man."

The rights of the accused in American criminal procedure are not static but respond to changing social values and moral concepts. This dynamism is reflected in the judicial interpretation of the Eighth Amendment's prohibition of cruel and unusual punishment. Thus Chief Justice EARL WARREN wrote in TROP V. DULLES (1958): "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Similarly, in FURMAN V. GEORGIA, the Supreme Court for the first time held that the death penalty is unconstitutional under certain circumstances, Justice THURGOOD MARSHALL observing that "a penalty that was permissible at one time in our Nation's history is not necessarily permissible today." The court similarly made new law when it ruled in *Estelle v. Gamble* (1976) that deliberate indifference of a jailer to the medical needs of prisoners constituted an "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment. Similarly, the right to be free from unreasonable searches or seizures had to be given a progressively broadened scope as we moved into the age of electronic gadgetry. Given the dynamic character of American life, flexibility of interpretation was inevitable if a living Constitution was to retain its vitality, and the broad and generous character of constitutional language contributed to that flexibility.

Many policy questions relating to criminal procedure must be understood in the context of the federal character of the American system of government. Certain important powers are delegated by the Constitution to the national government, and except as the states are limited by that Constitution—which is the supreme law of the land—the TENTH AMENDMENT confirms that the states retain power over all other matters. One of the most important residual powers of the states is the power to define and punish crimes. Although Congress was not expressly empowered to enact a general code of criminal statutes, it was assumed from the beginning that the national government could enforce its laws by imposing criminal sanctions. The doctrine of IMPLIED POWERS provided the necessary doctrinal underpinning. For example, the delegated power to tax includes by implication the power to punish persons who commit tax frauds. The federal criminal code has expanded steadily since 1789 and is today a lengthy document. Even so, most criminal laws are state laws, and a very large majority of persons in jail are incarcerated in state institutions. That the criminal law in all its facets is mainly state law is a well-understood fact of American life. In a special message to Congress in 1968, President LYNDON B. JOHNSON pointed out that crime "is essentially a local matter. Police operations—if they are to be effective and responsible—must likewise remain basically local. This is the fundamental premise of our constitutional structure and of our heritage of liberty." It follows, said the President, that "the Federal Government must never assume the role of the Nation's policeman."

Decisions of state courts are not reviewable by the Supreme Court if they involve only issues of state law, as to which the highest state court speaks the last word. For example, a 1967 case involved an appeal from the Texas courts regarding the state's habitual-criminal statute. Under this statute, the trial jury is fully informed of previous criminal convictions and the state is not obliged to have a

two-stage trial, one devoted to the pending charge and a second to a consideration of the previous convictions. On appeal, the Supreme Court ruled in *Spencer v. Texas* that as a matter of national constitutional law the state is not required to provide a two-stage trial. Declining to interfere, the Court held that this matter is controlled by state procedural law; the Court is not "a rule-making organ for the promulgation of state rules of procedure."

There are, in fact, two avenues available to seek federal judicial review of the decisions of state courts in criminal cases. First of all, if a convicted defendant has taken whatever appeals are available to him under state law in the state courts and if he has sought review of a substantial federal (as distinguished from state law) question, then the Supreme Court has JURISDICTION to review the judgment on direct review if it chooses to do so. Second, one who is in custody following conviction in a state court and has exhausted his available postconviction state remedies may, in a proper case, assert his federal legal claim by applying to a federal district court for a writ of habeas corpus. Accordingly, whether through direct review by the Supreme Court or through habeas corpus proceedings, federal courts often correct state courts where federal rights have been denied. But federal courts do not sit merely to correct errors alleged to have occurred in state courts. As the Supreme Court said in *Herb v. Pitcairn* (1945), "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."

The key question, then, is: what is a federal right? A short answer is: any right arising under the Constitution of the United States, statutes of Congress, or treaties. But the provisions of the Constitution relating to basic rights are stated in vague and general language that does not in terms apply to the states. Indeed the Court held in a landmark case, BARRON V. BALTIMORE (1833), that the Bill of Rights did not apply to the states. This holding was based on the proposition that the Bill of Rights was intended only to supply additional protection from violations by the new, untested national government, and that wherever the states were limited by the constitution, the language to this effect was always explicit. Prior to the Civil War, federal court review of state criminal convictions under the Bill of Rights was not possible.

A major change in our whole system of government began in 1868 with the adoption of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Not until 1923, however, did the Supreme Court undertake to employ this clause as a limit on state criminal procedure. In the leading case of MOORE V. DEMPSEY, the Court held that a conviction in a trial dominated by a mob was a violation of due process and could be remedied by a federal court through issuance of a writ of habeas corpus. In such a proceeding the federal court must make an independent evaluation of the facts, even though the state's highest appellate court has upheld the correctness of the conviction. The Supreme Court, too, on direct review, began to reverse state convictions as violations of due process. In 1932 the Court ruled that the Sixth Amendment right to representation by counsel, at least in capital cases, is an indispensable element of a fair trial which is guaranteed by the Fourteenth Amendment's due process clause. Later decisions extended the constitutional right to counsel in state courts to include any offense punishable by imprisonment for any period of time. Other decisions, most of which were made after World War II by the WARREN COURT, applied to the states, as due process requirements, most of the other provisions of the Bill of Rights which are designed to protect persons accused of crime. For example, in MAPP V. OHIO (1961) the Court extended to the states the EXCLUSIONARY RULE, long applicable in federal prosecutions by reason of the Fourth Amendment. Henceforth state courts, too, would be required to exclude from criminal trials all evidence secured as a result of unreasonable searches and seizures. Similarly, a state violates due process if it subjects a person to compulsory self-incrimination (MALLOY V. HOGAN, 1964), if it denies trial by jury at least where nonpetty offenses are involved (DUNCAN V. LOUISIANA, 1968), or if it subjects a defendant to the hazards of double jeopardy (BENTON V. MARYLAND, 1969). In fact, by 1970 all of the criminal procedure provisions of the Bill of Rights were made applicable to the states by way of Fourteenth Amendment due process, except the Fifth Amendment guarantee of indictment by grand jury and the Eighth Amendment prohibition of excessive bail. The bail guarantee very likely will be incorporated into the Fourteenth Amendment when the issue comes to the Supreme Court in the proper form. All the other rights of the accused guaranteed by the Bill of Rights are now regarded as elements of Fourteenth Amendment due process, enforceable against the states through federal judicial process. In the words of the Court, they are "fundamental principles of liberty and justice," or are "basic in our system of jurisprudence," or are " FUNDAMENTAL RIGHTS essential to a fair trial," or are "the very essence of a scheme of ordered liberty." (See INCORPORATION DOCTRINE.)

Not only does Fourteenth Amendment due process now incorporate most of the Bill of Rights, it also has an independent force wholly outside of the Bill of Rights. For example, in the famous case of *Mooney v. Holohan* (1935), the Court ruled that a state has denied the accused due process of law if the prosecution has deceived the court and jury by presenting testimony known to be perjured. Similarly, in *Jackson v. Virginia* (1979), the Court ruled that a state court conviction can pass the test of Four-

teenth Amendment due process only if a rational trier of fact could find that each essential element of the crime had been established "beyond a reasonable doubt."

The expansion of the list of federally enforceable constitutional rights available to defendants in state courts has come a long way in enlarging both the review powers of the Supreme Court and the habeas corpus jurisdiction of the federal district courts. The federal courts are establishing more and more standards in the area of criminal justice which the states are obliged to observe.

In operating the CRIMINAL JUSTICE SYSTEM, government must make some hard choices, since basic objectives undergirding that system often conflict. On the one hand, there is the due process model, preferred by the courts, which stresses our concern for maintaining the legal amenities of a civilized community. This process, adversarial and judicial in character, seeks to protect the dignity and autonomy of the individual. On the other hand, there is the crime control model, preferred by most law enforcement officials, which emphasizes the need to apprehend, try, and punish lawbreakers. The principal procedural objective is the quick, efficient, and reliable handling of persons accused of crime. The method is essentially administrative and managerial in character, operating, especially in respect to MISDEMEANORS, on assembly-line principles. Accordingly, many law enforcement officials are critical of what they see as the Supreme Court's tenderness on the subject of defendants' rights, arguing that change has been too rapid and too far-reaching. Impatience has even been expressed by a few Justices of the Court itself. An experienced California trial judge, Macklin Fleming, has gone so far as to accuse the Court of pursuing the unattainable objective of "perfect justice." It is difficult, perhaps impossible, to locate the exactly right balance between the due process model and the crime control model. But in seeking to achieve a tolerable balance the Supreme Court has moved with considerable caution, deciding one case at a time, and always within the mainstream of American culture and its dominant legal traditions.

DAVID FELLMAN
(1986)

Bibliography

CASPER, JONATHON D. 1972 *American Criminal Justice: The Defendant's Perspective.* Englewood Cliffs, N.J.: Prentice-Hall.

CORTNER, RICHARD C. 1980 *The Supreme Court and the Second Bill of Rights.* Madison: University of Wisconsin Press.

FELLMAN, DAVID 1976 *The Defendant's Rights Today.* Madison: University of Wisconsin Press.

FLEMING, MACKLIN 1974 *The Price of Perfect Justice.* New York: Basic Books.

FRIENDLY, HENRY J. 1967 The Bill of Rights as a Code of Criminal Procedure, in *Benchmarks.* Chicago: University of Chicago Press.

GOLDSTEIN, ABRAHAM S. 1960 The State and the Accused: Balance of Advantage in Criminal Procedure. *Yale Law Journal* 69:1149–1199.

PACKER, HERBERT L. 1964 Two Models of the Criminal Process. *University of Pennsylvania Law Review* 113:1–68.

## CRIMINAL SYNDICALISM LAWS

Criminal syndicalism statutes were but one of several kinds of statutes punishing manifestations of unpopular thought and expression for their probable bad tendency enacted during and just after WORLD WAR I by many midwestern and western states. The laws were a response to the economic unrest of the postwar period, specifically to the doctrines and activities of the Industrial Workers of the World (IWW), and to the antiradical hysteria prompted by the Russian Revolution of 1917. Twenty-two states and territories enacted—and eight other states considered but rejected—criminal syndicalism statutes between 1917 and 1920. Attempts to enact a federal criminal syndicalism law in 1919 and 1920 came to nothing, but the Smith Act of 1940 was patterned after the earlier model.

The Idaho statute, the first of its kind and a model for those adopted by other states, defined criminal syndicalism as "the doctrine which advocates crime, sabotage, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political reform." Offenses punished as FELONIES under such statutes included oral or written advocacy of criminal syndicalism; justifying commission of or attempts to commit criminal syndicalism; printing or displaying written or printed matter advocating or advising criminal syndicalism; organizing or being or becoming a member of any organization organized or assembled to teach or advocate criminal syndicalism, or even presence at such an assembly. Though most citizens and state legislators believed that these statutes were directed solely against the use or advocacy of force and violence, in practice they jeopardized FREEDOM OF SPEECH, because they were used to punish those who expressed or even held opinions offensive to the majority of the community.

Criminal syndicalism statutes almost uniformly survived constitutional challenges in the state courts. In WHITNEY V. CALIFORNIA (1927) the United States Supreme Court upheld the California Criminal Syndicalism Act; Justice LOUIS D. BRANDEIS's eloquent opinion, concurring only in the result, set forth the most sophisticated formulation of the theoretical foundations and practical applications of the CLEAR AND PRESENT DANGER test previously formulated in other FIRST AMENDMENT cases. In *Fiske v. Kansas* (1927), the first decision overturning a conviction under a criminal syndicalism statute, the Supreme Court merely invali-

dated the statute's application, holding that the state had not shown that the defendant had advocated any but lawful methods to achieve the goals of the IWW. In DE JONGE V. OREGON (1937) a unanimous Court struck down the application of the Oregon Criminal Syndicalism Act to defendants who had merely attended a peaceful meeting of the Communist party; the Oregon legislature later repealed the statute. The labor troubles of the 1930s prompted efforts to strengthen existing criminal syndicalism laws, but these came to nothing, and several states followed Oregon's example in repealing their criminal syndicalism statutes. State criminal syndicalism statutes fell into disuse after the 1930s; in BRANDENBERG V. OHIO (1969) the Supreme Court declared the Ohio Criminal Syndicalism Act unconstitutional on its face, overruling *Whitney*, adopting the principles of Justice Brandeis's concurring opinion, and making successful prosecutions under criminal syndicalism statutes virtually impossible.

RICHARD B. BERNSTEIN
(1986)

Bibliography

CHAFEE, ZECHARIAH, JR. 1941 *Free Speech in the United States.* Cambridge, Mass.: Harvard University Press.

DOWELL, ELDRIDGE FOSTER 1939 *A History of Criminal Syndicalism Legislation in the United States.* Baltimore: Johns Hopkins University Studies in Historical and Political Science, Series 57, No. 1.

## CRITICAL LEGAL STUDIES

"Critical legal studies" refers to a development in American jurisprudence in the late 1970s and 1980s. Its originators were self-consciously affiliated with leftist political movements. Their understanding of the law, including constitutional law, was influenced by the experience of the movements for CIVIL RIGHTS and against the VIETNAM WAR, in which, as they saw it, appeals to legality—in the form of saying that RACIAL DISCRIMINATION was unconstitutional and that the war was being conducted illegally—played an important but complex role. Their intellectual position was shaped in large measure by an understanding of American LEGAL REALISM that took realism's implications to be more radical than many of its first proponents may have believed. The radical reading of legal realism was supported, in critical legal studies, by an understanding of what were perceived as the intellectual difficulties of the liberal tradition, which produced the tensions that the realists attempted unsuccessfully to resolve.

The most direct legacy of legal realism to critical legal studies was the idea of indeterminacy. Critical legal studies understood the realist message to be that law, again including constitutional law, was shot through with "contradictions," in the sense that, at least in any socially significant case, legal arguments that were professionally defensible were available for a rather wide range of outcomes and rules, some of which might differ radically from others. According to critical legal studies, this indeterminacy resulted from the fact that the liberal tradition attempted to, but could not, suppress what Duncan Kennedy, an early proponent of critical legal studies, called "the fundamental contradiction" of social life—that people are both fearful of, and dependent upon, other people. In the critical legal studies analysis, the central themes of the liberal tradition, expressing suspicion of government efforts to promote "the good" in societies where there were fundamental differences over what constitutes the good, drew primarily on the fear of other people. Yet, according to critical legal studies, because social life necessarily places people in relations of dependence on each other, law cannot, and does not, simply express the fear of others. Rather, law attempts to express both aspects of the fundamental contradiction, which is what generates the possibility of acceptable legal arguments leading to radically different results.

To deal with the point that the indeterminacy thesis is in tension with the fact that lawyers can predict with some assurance how judges will resolve many contentious legal issues, even if the issues could in some sense be regarded as open to decision either way, critical legal studies relies on claims about law as ideology. In one version, influenced by Marxist social thought, indeterminacy is resolved in fact by the political predispositions of the judges, and predictability occurs because the judges, and lawyers too, are drawn from a relatively narrow range of social classes, whose interests they promote. The conspiratorial overtones of this account are reduced in another version of the argument that law is a form of ideology. This version, influenced by the work of Michel Foucault, argues that indeterminacy is resolved because on a higher level of abstraction some general ideology about reason and the state is embedded in modern culture, so that many of the more radical possibilities are ruled out of contention from the start.

Critical legal studies is a form of general jurisprudence, and the indeterminacy thesis was developed primarily in connection with private law. The critical legal studies analysis of constitutional law has two important strands. The first, drawing on the private law studies, is a critique of the distinction between public and private that pervades law and appears in constitutional law in the form of the STATE ACTION doctrine. According to that doctrine, the Constitution regulates only actions by government, leaving private parties free to shape their relations and to control their property without regard to constitutional norms.

One key element in the legal realist analysis of private law, however, was that the private law of property and contract could fairly be characterized as a form of delegating public authority to private individuals, subject always to public control through, for example, doctrines restricting the enforcement of contracts on the ground that they violate public policy. Given that analysis of private law, the state action doctrine appears incoherent, and for critical legal studies SHELLEY V. KRAEMER (1948), holding unconstitutional judicial enforcement of racially restrictive property covenants, is not an anomaly, as it is in many mainstream accounts of constitutional law, but is instead a necessary implication of the analysis of the publicprivate distinction.

The second important strand in the critical legal studies analysis of constitutional law has been the "critique of rights." The critique of rights applies the indeterminacy thesis to the individual rights provisions of the Constitution. Vacillation by the Supreme Court over the importance of intent versus effect in antidiscrimination law, for example, is taken to reflect not just the political shift from the WARREN COURT to the BURGER COURT and now the REHNQUIST COURT but also the indeterminacy of the idea of nondiscrimination itself. The critique of rights accepts the proposition that there is general agreement on the importance of certain FUNDAMENTAL RIGHTS, so long as the claims are either that there are such rights (without specifying what they are) or that the rights are acknowledged and enforced in abstract terms. But, the critique of rights contends that, as is always the case when socially significant claims are made, when it comes to enforcing these abstract rights in particular contexts, neither the Constitution nor the Court's precedents even weakly determine what the Court does. Rather, what matters are the current political predispositions of the members of the Supreme Court, a fact that is reflected in the general understanding that we can talk about "conservatives" and "liberals" on the Court.

The critique of rights is augmented and given a political twist by an analysis of the Supreme Court as one of the branches of a unitary government. In this analysis, influenced by mainstream political science, the Court is treated as a political body whose central role, symbolized by the political processes by which Justices are appointed, is to act on behalf of those interests who control the political system over the medium to long run. With this political understanding as a background, the critique of rights argues that, as a general matter with some exceptions, the Supreme Court will interpret—and historically has interpreted—the individual rights provisions of the Constitution primarily to protect the interests of established groups, particularly the owners of large aggregations of property. LOCHNER V. NEW YORK (1905), for an earlier period, and the Court's recent CAMPAIGN FINANCE decisions, for the modern period, exemplify the Court's commitment to an interpretation of the Constitution in the service of established power groups.

Apart from general challenges to the indeterminacy thesis across the board, the main criticism of the critique of rights has been offered by minority scholars and liberal defenders of the legacy of the Warren Court. For them, the Warren Court's decisions show that, at least on occasion, the Supreme Court's articulation of individual rights can both advance the interests of minority groups and express a vision of a way of organizing society in which existing holders of power might be displaced.

Most proponents of the critique of rights accept both of these points. As to the first, though, they make several points. First, if we examine the entire history of the Supreme Court, the Warren era appears almost as an aberration. Second, many of the Warren Court's decisions might be understood in political terms as advancing the political agenda of the NEW DEAL political coalition, which may have retained control of the courts after it shattered in the political branches. BROWN V. BOARD OF EDUCATION (1954, 1955), a key example used against the critique of rights, would be seen as the Court's enforcement of a national view against SEGREGATION—which was, among other things, embarrassing the United States during the period of Cold War ideological competition with the Soviet Union—against the wishes of a recalcitrant region. If the Warren Court was the judicial expression of the New Deal coalition, it is not surprising, according to the critique of rights, that when the New Deal coalition lost power in the political branches, the Supreme Court eventually abandoned the Warren Court's ideology.

The critique of rights also argues, in response to both of the minority challenges, that the appeal to rights may indeed be a way of expressing opposition to the existing social order, but that those appeals may also be politically damaging. The appeal to rights can be politically damaging because it may divert resources into litigation and a focus on the courts. According to this view, successful legal appeals to rights may sometimes be more harmful than unsuccessful ones. Having secured one victory in the courts, a minority movement may rest on its laurels, relying on the courts to continue to protect its interests and overlooking the fact that permanent victories occur, given the role of the courts in the political system, only if the winners in the courts eventually secure the backing of the political branches. In addition, once a movement achieves a major victory in the courts, such as ROE V. WADE (1973) was for the women's movement, it may make the reasonable short-term judgment that it should devote resources to further judicial action—for example, relying on the courts to strike down laws aimed at undermining or whittling away at *Roe*. This would allow its opponents to adopt the strategy (which may be more successful in the long

run) of influencing state and local legislatures, Congress, and the President.

In this view, however, the appeal to rights can also be an expression of opposition to the established order, precisely because the indeterminacy of law rests on the fundamental contradiction of social life. That contradiction means that any system of law contains competing views of the good social order. Thus, adherents of utopian visions of an alternative social order can argue that their preferred social order would realize values already acknowledged in the law but imperfectly implemented in the present order. In addition, the general public respect for fundamental human rights—at least when they are stated in the abstract—gives the advocate of some novel right or of the extension of an acknowledged right an initial rhetorical advantage in public discussions of those claims.

According to the critique of rights, then, the utility of appeals to rights will depend on a careful analysis of the particular circumstances and settings in which the appeals are made. If a social movement can rely on the language of rights without diverting its resources into litigation, for example, many of the disadvantages of the appeals to rights disappear. Yet, although the idea of making appeals to rights without relying on the courts is sensible, in the political culture of the United States, people who invoke rights but do not seek to have the courts implement them are likely to be seen as using a form of language that their behavior belies. Similarly, political circumstances sometimes are favorable for the use of the utopian appeals to rights in litigation as a method of securing legal victories or as a method of mobilizing a constituency. Such favorable circumstances appear to have been present for the civil rights movement during the Warren era. Proponents of the critique of rights would caution, however, that careful analysis of the particulars is necessary in order to make a judgment about whether the advantages of an appeal to rights outweigh the disadvantages.

With the apparent dissolution of much of the Warren Court legacy on the Supreme Court in the late 1980s, the critical legal studies perspective on constitutional law may gain some added force, for the Warren era may become understood as the kind of aberration that critical legal studies has always contended it was. On the other hand, to the extent that critical legal studies is a self-consciously leftist political movement, leftists and liberals may find recourse to the language of rights even more essential in a conservative era.

MARK TUSHNET
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Bibliography

KELMAN, MARK 1987 *A Guide to Critical Legal Studies.* Cambridge, Mass.: Harvard University Press.

TUSHNET, MARK 1988 *Red, White, and Blue: A Critical Analysis of Constitutional Law.* Cambridge, Mass.: Harvard University Press.

UNGER, ROBERTO 1986 *The Critical Legal Studies Movement* Cambridge, Mass.: Harvard University Press.

## CRITICAL RACE THEORY

Critical race theory embraces a movement of leftist scholars, most of them scholars of color situated in law schools, whose work challenges the ways in which race and racial power are constructed and represented in American legal culture and more generally in American society. Although critical race theory scholars differ in object, argument, accent, and emphasis, their work is unified by two common interests. The first is to understand how a regime of white supremacy and its subordination of people of color have been maintained in America, and, in particular, to examine the relationship between that social structure and professed ideals such as "the RULE OF LAW" and "EQUAL PROTECTION". The second is a desire not merely to understand the vexed bond between law and racial power but to change it. Critical race theory scholars share an ethical commitment to human liberation—even as they reject conventional notions of what such a conception means, and often disagree among themselves over the specific directions of change.

Critical race theory expresses deep dissatisfaction with traditional mainstream CIVIL RIGHTS discourse, which has been shaped in terms that exclude radical or fundamental challenges to status quo institutional practices in American society by treating the exercise of racial power as rare and aberrational rather than as systemic and ingrained. In this view, liberal race reform, by reinforcing the basic myths of American meritocracy, has served to legitimize the very social practices—in employment offices and admission departments—that were originally targeted for reform. Critical race theory scholars have drawn important insights from the CRITICAL LEGAL STUDIES movement's critique of the role of law in constituting and rationalizing an unjust social order. In particular they agree with critical legal studies scholars in rejecting a traditional view that distinguishes law from politics, holding that politics is open-ended, subjective, discretionary, and ideological, whereas law is determinate, objective, bounded, and neutral. Critical race theory scholars embrace the critical legal studies critique of this view, but they part company with one strand of critical legal studies scholarship that deploys a certain postmodern critique of racial identity to challenge the coherence of any intellectual project centered on race. Critical race theory scholars have framed this particular critique as an attack against color-consciousness that differs from the recent conservative devotion to "col-

orblindness" only in its rhetorical politics. For critical race theory scholars, even though race is socially constructed—the idea of biological race is "false"—race is nonetheless real in the sense that there is a material dimension and weight to the experience of being "raced" in American society, a materiality that in significant ways has been produced and sustained by law.

Critical race theory scholarship thus offers a theoretical vocabulary for the practice of progressive racial politics in contemporary America, even as it seeks to expose the irreducibly political character of the REHNQUIST COURT majority's hostility toward policies that would take race into account in redressing historical and contemporary patterns of RACIAL DISCRIMINATION. One arena for deployment of critical race theory is the debate over AFFIRMATIVE ACTION, in which civil rights liberals have seemed unwilling to see the hidden racial dimensions of the meritocratic mythology that their conservative opponents have so deftly used to control the terms of current debate. Critical race theory understands that, claims to the contrary notwithstanding, distributions of power and resources that were racially determined before the advent of affirmative action will continue to produce predictable patterns of racial disempowerment if affirmative action be abandoned. The conceptions of merit employed by opponents of affirmative action function not as a rational basis for distributing resources and opportunity, but rather as a repository of hidden, race-specific preferences for those who have the power to determine the meaning and consequences of "merit." Critical race theory scholars have shown that the putatively neutral baseline from which affirmative action is said to represent a deviation is in fact a mechanism for perpetuating the distribution of rights, privileges, and opportunity established under a regime of uncontested white supremacy. A return to that so-called neutral baseline would mean a return to an unjust system of racial power.

Critical race theory can also bring a useful perspective to the debate over the proliferation of economic, political, and social relations across national borders which has come to be known as globalization. In this perspective, generalized references to "north" and "south" or to "rich" and "poor" nations figure as metaphorical substitutes for serious and sustained attention to the racial and ethnic character of the massive distributive transformations that globalization has set in motion. An indifference to questions of racial ideology and power is seen in liberal and leftist efforts to emphasize questions of class structure in explaining the political significance of global economic processes within the United States. These explanations leave out the current dynamics of racial power, ignoring the racial composition of the communities that have been chosen to bear the sharp edge of economic dislocation. Yet, even a cursory review of current national discourses about issues such as public education, IMMIGRATION, and WELFARE reform demonstrates the degree to which questions of race and racial ideology stand at the very center of today's debates. These developments defy explanations in terms of liberal accounts of poverty and social inequality, or leftist formulations about the historical class relations between labor and capital. An inquiry informed by critical race theory would examine the way a certain brand of racial politics has been mobilized to buffer the massive upward distribution of resources and opportunity in the United States, and would explore the way racial ideologies have been used to justify relatively open border policies toward our northern neighbors, even as we close off our borders to those from the south.

Finally, critical race theory scholars seek to contribute to the discussion within communities of color over the future direction of antiracist politics. Powerful voices of racialism have been raised, particularly within the African American community, in which contemporary racial crisis is frequently represented as a reflection of unmediated white power. What racialists too often fail to note is that the same narrow politics of racial solidarity helped to rally African Americans behind the nomination of CLARENCE THOMAS to the Supreme Court. Justice Thomas has been an active participant in the evisceration of the post– civil rights political coalition. Similarly, the black racialist account proffers a vision of racism that portrays racial power primarily through its impact on African American males. By rendering the particular experiences of black females invisible, this form of racialist politics effectively denies the struggle against racialized gender oppression a place on the antiracist agenda.

Questioning regnant visions of racial meaning and racial power, critical race theorists seek to fashion a set of tools for thinking about race that will avoid the traps of racial thinking. Political interventions that overlook the multiple ways in which people of color are situated and resituated as communities, subcommunities, and individuals will do little to promote effective countermobilization against today's newly empowered right. Critical race theory scholars have sought to prevent this waste of political effort by illuminating the ways in which issues of racial ideology and power continue to matter in American life.

KIMBERLÉ CRENSHAW
NEIL GOTANDA
GARY PELLER
KENDALL THOMAS
(2000)

Bibliography

CRENSHAW, KIMBERLÉ; GOTANDA, NEIL; PELLER, GARY; and THOMAS, KENDALL, eds. 1995 *Critical Race Theory: The Key Writings That Formed the Movement.* New York: New Press.

DELGADO, RICHARD, ed. 1995 *Critical Race Theory: The Cutting Edge.* Philadelphia: Temple Uiversity Press.

## CRITTENDEN, JOHN J.
(1787–1863)

A Kentucky lawyer, John Jordan Crittenden was a United States attorney general (1841, 1850–1853) and senator (1817–1819, 1835–1841, 1842–1848, 1855–1861). In late 1828 President JOHN QUINCY ADAMS nominated him to the Supreme Court, but the Senate's Democratic majority killed the appointment. A border state Whig, Crittenden always supported compromise on slavery. Thus, as President Millard Fillmore's attorney general, Crittenden vigorously enforced the 1850 fugitive slave law. But he also opposed ANNEXATION OF TEXAS, the Mexican War, the KANSAS-NEBRASKA ACT, and Kansas statehood, because these issues raised the politically disruptive question of SLAVERY IN THE TERRITORIES. In December 1860 Crittenden proposed four resolutions and six constitutional amendments to settle the SECESSION crisis. The resolutions condemned the northern PERSONAL LIBERTY LAWS and reasserted the constitutionality of the fugitive slave laws. The amendments—one of which declared the others "unrepealable"—would have compensated masters for unrecovered fugitive slaves and given permanent protection to slavery where it already existed and in all existing territories or those "hereafter acquired" which were south of the MISSOURI COMPROMISE line. Crittenden's only concession to northern sentiments was to propose the permanent prohibition of slavery north of the Missouri Compromise line; however, many Northerners read "hereafter acquired" as an invitation for proslavery filibustering in Latin America. Furthermore, Republicans opposed any western extension of slavery. Southern extremists, on the other hand, wanted secession, and not compromise. Thus, only the amendment permanently protecting slavery in the existing states was approved by Congress. From 1861 to 1863 Crittenden worked to prevent Kentucky's secession and limit the war to preserving the Union. Thus, he opposed the EMANCIPATION PROCLAMATION, the CONFISCATION ACTS, the use of black troops, West Virginia statehood, and other administration policies.

PAUL FINKELMAN
(1986)

Bibliography

KIRWAN, ALBERT D. 1962 *John J. Crittenden: The Struggle for the Union.* Lexington: University of Kentucky Press.

## CROLY, HERBERT
(1869–1930)

New York journalist and social critic Herbert David Croly was the leading intellectual of the Progressive movement. Croly's *The Promise of American Life* (1909) became the programmatic handbook of the reformers: in it he advocated strengthening the federal government as the special protector of working people and the creation of a "WELFARE STATE." His inspiration was the nationalism of ALEXANDER HAMILTON rather than the individualism of THOMAS JEFFERSON. Croly believed that the process of government should be separated from politics and placed in the hands of experts. Croly advised President WOODROW WILSON, but his greatest influence on public affairs was as editor of *The New Republic.*

DENNIS J. MAHONEY
(1986)

## CROSS-EXAMINATION, RIGHT OF

See: Confrontation, Right of

## CROSSKEY, WILLIAM W.
(1894–1968)

William Winslow Crosskey's reputation as a constitutional historian rests upon his *Politics and the Constitution in the History of the United States* (1953, 1960), a learned, controversial reinterpretation of the framing of the Constitution. Crosskey, a professor of law at the University of Chicago, argued that the Framers of the Constitution sought to create a unitary system of government with virtually unlimited legislative powers, that Congress would have supreme authority within the constitutional system, and that the power of JUDICIAL REVIEW was intended merely as a means for the judiciary to defend itself against encroachments by the other branches of government. Crosskey began with two premises: first, that the words of the Constitution should be understood according to the meanings they had in common usage in 1787; and, second, that the source relied upon by most historians to determine the intent of the Framers, JAMES MADISON'S *Notes of the Debates in the Federal Convention of 1787,* had been deliberately distorted by Madison to support the "limited-powers" interpretation of the Constitution favored by Jeffersonian Republicans. Crosskey's third volume, completed posthumously by William W. Jeffrey, Jr., and published in 1980, asserted that nationalist sentiments and ideas pervaded the political climate in the United States

from the Revolution to the opening of the CONSTITUTIONAL CONVENTION OF 1787.

RICHARD B. BERNSTEIN
(1986)

## CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment provides that "excessive BAIL shall not be required . . . nor cruel and unusual punishment inflicted." Similar provisions now exist in virtually all state constitutions. Even if they did not, the federal constitutional prohibition has been held in *Robinson v. California* (1962) to be binding on the states through the FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE.

A legal prohibition against cruel and unusual punishment appears to have originated in the English BILL OF RIGHTS in 1688. Its purpose then was to curtail the shockingly barbarous punishments that were so common during that period.

How the prohibition was to be applied to American society, with its different values and legal system, remained unclear a century after the enactment of the American BILL OF RIGHTS. In the late nineteenth and early twentieth centuries, the Supreme Court did occasionally interpret the cruel and unusual punishment language, mostly as it related to the means for executing CAPITAL PUNISHMENT. However, not until the 1970s did the Supreme Court begin to give extensive consideration to the scope and meaning of the prohibition apart from capital punishment. The Court did not decide until 1977, for example, whether the cruel and unusual punishment clause applied to persons who had not been convicted of crime. INGRAHAM V. WRIGHT (1977) raised the question whether the corporal punishment of school children constituted cruel and unusual punishment. The Court held that it did not, stating that the Eighth Amendment provision is applicable only to persons convicted and incarcerated for crimes. In the Court's view, the prohibition was not necessary to protect children in public institutions, as other protections were available. Since *Ingraham*, the Supreme Court has also held that the Eighth Amendment is inapplicable to persons detained for treatment or detention and not punishment, such as persons committed to mental institutions (*Youngblood v. Romero*, 1982) or detained awaiting trial (*Bell v. Wolfish*, 1979). Any protection against improper punishments in such situations derives from due process of law and not the Eighth Amendment prohibition against cruel and unusual punishment.

Since the late 1970s, in a number of cases involving noncapital sentences and the treatment of prison inmates, the Court has generally given a narrow interpretation of the cruel and unusual punishment clause.

Prior to Supreme Court review of the issue, several federal and state courts had held that a sentence could be invalid on cruel and unusual punishment grounds if its length was disproportionate to the offense. Courts used several measures to determine whether a particular sentence violated the Eight Amendment: the nature of the crime, and particularly whether violence was involved; comparison of the individual sentence or statutory sentencing scheme with sentences or schemes for similar crimes in other jurisdictions; and comparison of the individual sentence or statutory sentencing scheme for the particular crime with those for other similar or more serious crimes in the same jurisdiction. Thus a federal court of appeals struck down a life sentence imposed on an offender under a Texas statute authorizing a life sentence for a person convicted of felonies on three separate occasions. In this case, the three felonies included: fraudulently using a credit card to obtain $80.00 worth of services; passing a forged check for $28.36; and obtaining $120.75 by false pretenses. The three convictions occurred over a nine-year period. In RUMMEL V. ESTELLE the Supreme Court reversed; the 5–4 majority refused to apply the comparative measures used by lower courts. Instead, it gave great weight to legislative judgments on criminal sentences and to the deterrence of habitual offenders. The fact that Rummel was eligible for early release on parole apparently eased the majority's decision. After *Rummel*, it was uncertain what circumstances might justify judicial intervention on cruel and unusual punishment grounds in cases not involving habitual offender statutes. In *Hutto v. Davis* (1982), in a PER CURIAM opinion, the Court, over three dissents, held that a forty-year sentence for possession of nine ounces of marijuana did not constitute cruel and unusual punishment. The Court reiterated the *Rummel* majority's view that federal courts should be "reluctan[t] to review legislatively mandated terms of imprisonment" and that "successful challenges to the proportionality of particular sentences" should be "exceedingly rare."

In 1983, in SOLEM V. HELM, however, the Supreme Court invalidated a life sentence without possibility of parole for a person convicted under a recidivist statute. The immediate charge involved passing a check for one hundred dollars written on a nonexistent account; all his prior felony convictions were for nonviolent crimes against property. The Court, in a 5–4 decision, applied a proportionality test in applying the cruel and unusual punishment clause. Even after this decision, it appears that the burden of attacking a sentence of a term of years on disproportionality grounds, at least in the federal courts,

will be difficult to carry. Some state supreme courts have been more willing to use state constitutional counterparts to the Eighth Amendment to strike down terms that seem excessive relative to the crime committed.

In earlier cases, the Supreme Court did reverse some sentences involving issues other than their length. In TROP V. DULLES (1958), for example, the Court concluded that depriving a person of nationality for conviction by court-martial of wartime desertion constituted cruel and unusual punishment. Also, in WEEMS V. UNITED STATES (1909), the Court held that the crime of being an accessory to the falsification of a public document could not justify a twelve-to-twenty-year sentence at hard labor with chains and a permanent deprivation of civil rights.

The Supreme Court has also applied the Eighth Amendment to reverse the punishment of a person simply because of his status or condition. In *Robinson v. California* (1962) the Court held that punishing a person for being a drug addict constitutes cruel and unusual punishment. The Court refused, however, to apply this same reasoning six years later when it was asked to invalidate an alcoholic's conviction of public drunkenness in *Powell v. Texas* (1968).

In summary, the Supreme Court has rarely relied on the federal prohibition against cruel and unusual punishment to overturn a criminal sentence. The Court has also applied the prohibition sparingly to challenges by prisoners to prison conditions, even though courts have frequently found these conditions to be shocking.

Without question, most prisons throughout the country are archaic, overcrowded, filthy, and understaffed, and provide few worthwhile vocational or recreational activities for prisoners. Because the prison population is growing dramatically at a time when resources to maintain it are shrinking proportionately, prison conditions are deteriorating. In several cases in the late 1970s and early 1980s, the Supreme Court attempted to articulate standards for applying the prohibition against cruel and unusual punishment to challenges against prison conditions. In *Rhodes v. Chapman* (1981) the Court summarized these standards as follows: "Today the Eighth Amendment prohibits punishments which, although not physically barbarous, involve the unnecessary and wanton infliction of pain, or are grossly disproportionate to the severity of the crime. Among unnecessary and wanton infliction of pain are those that are totally without penological justification." The Court has not yet applied these standards to the intentional physical abuse of prisoners. It has, however, cited with approval a court of appeals decision, *Jackson v. Bishop* (1968), which proscribed the whipping of prisoners.

*Holt v. Finney* (1978) confronted the Supreme Court with its first Eighth Amendment challenge to prison conditions. The lower courts had declared that the general conditions of the Arkansas state prison system constituted cruel and unusual punishment. Among the conditions challenged were: administration of much of the prisons' activities by inmate trustees; dangerous barracks; overcrowded and filthy conditions in isolation or punishment cells and the poor diet of prisoners in these cells; and lack of any rehabilitation programs. The lower courts entered sweeping orders requiring major improvements in the prisons. Among these improvements were restrictions on the numbers of prisoners placed in isolation cells, a requirement that bunks be placed in these cells, a discontinuation of the "grue" diet, and a limit of thirty days in an isolation cell. The state appealed the thirty-day limitation. In a cautious opinion, the Supreme Court upheld the lower court's conclusion. Although it held that confinement in punitive isolation is not a per se violation of the Eighth Amendment, the Court stated that such confinement may become a violation depending on the conditions of isolation. If violations do occur, the Court said, remedies may include a limit on the time to be spent in isolation; the thirty-day restriction of the lower court seemed supportable in this case.

The Supreme Court reached a different result in a constitutional challenge to overcrowding in an Ohio prison. In *Rhodes v. Chapman* (1981) the issue was "double-bunking" prisoners in cells originally designed for single inmates. The courts below had found this practice to violate the Eighth Amendment because prisoners were serving long sentences; the prison was thirty-eight percent over capacity; decency required more living space; prisoners spent much of their time in their cells; and double-bunking was a regular practice, not a temporary condition.

The Supreme Court reversed, holding that there was no evidence that double-bunking in this case "inflicted unnecessary or wanton pain or [was] grossly disproportionate to the severity of crimes warranting punishment." The Court found that double-bunking did not lead to "deprivation of essential food, medical care, or sanitation" or to increased violence among inmates. In the Court's view, the Constitution "does not mandate comfortable prisons," and judges should be reluctant to intervene in prison condition cases unless the conditions were "deplorable" or "sordid": "In discharging [their] oversight responsibility, however, [federal] courts cannot assume that State legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the penal function in the criminal justice system."

In another opinion, *Estelle v. Gamble* (1976), the Supreme Court established some minimum requirements for the provision of health care in prisons. Stating that the government must provide medical care to those whom it

punishes by incarceration, the Court held that "deliberate indifference to the serious medical needs of prisoners constitutes unnecessary and wanton infliction of pain proscribed by the Eighth Amendment." The Court placed several limits on successful claims, however. For example, an inadvertent failure to provide adequate medical care would not constitute "unnecessary and wanton infliction of pain." Nor would an accident, simple negligence, or a disagreement as to treatment options.

Thus, although the Supreme Court had indicated that the Eighth Amendment does protect prisoners from deplorable conditions, for the most part the Court has not shared the view of many lower courts or of prison experts as to what conditions are deplorable.

The Supreme Court has yet to consider a number of other important questions, such as the factors that must be weighed in assessing challenges to the conditions of a prison as a whole; the constitutional limits on behavior modification programs, including drug usage programs; and the minimum requirements for providing a secure environment for prisoners. Precedent suggests that the Supreme Court will be as cautious in addressing these and other related prison condition issues as it has been in confronting other asserted impositions of cruel and unusual punishment.

SHELDON KRANTZ
(1986)

(SEE ALSO: *Institutional Litigation.*)

Bibliography

GRANNUCCI, ANTHON F. 1969 Nor Cruel and Unusual Punishment Inflicted. *California Law Review* 57:839–865.

JOINT COMMITTEE ON THE LEGAL STATUS OF PRISONERS 1977 American Bar Association Standards Relating to the Legal Status of Prisoners. *American Criminal Law Review* 14:377–629.

KRANTZ, SHELDON 1983 *Corrections and Prisoners' Rights in a Nutshell*, 2nd ed. St. Paul, Minn.: West Publishing Co.

SHERMAN, MICHAEL and HAWKINS, GORDON 1981 *Imprisonment in America: Choosing the Future.* Chicago: University of Chicago Press.

UNIFORM LAW COMMISSION 1978 *Model Sentencing and Convictions Act.* New York: National Conference of Commissioners on Uniform State Laws.

UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL 1957 *Minimum Rules for the Treatment of Prisoners.* New York: United Nations Publications.

## CRUEL AND UNUSUAL PUNISHMENT
### (Update 1)

The Eighth Amendment's cruel and unusual punishment clause, derived from COMMON LAW and held to restrain the states as well as the federal government, applies to noncapital as well as capital criminal punishments. The concept of cruel and unusual punishments, while undoubtedly meant to address extremely harsh or painful methods and kinds of PUNISHMENT, also incorporates ideas of excessiveness, proportionality, and appropriateness. It is therefore relative, and whether a particular punishment is cruel and unusual depends on prevailing societal standards, objectively determined, regarding punishments. The Supreme Court has held that the clause outlaws not only punishments that are barbarous, involving torture or the intentional and unjustifiable infliction of unnecessary pain, but also forbids confinements whose length or conditions are disproportionate to the severity of crimes, serious deprivations of prisoners' basic human needs, loss of CITIZENSHIP as a punishment, and punishments for status.

In WEEMS V. UNITED STATES (1910) the Court held the Philippine punishment of *cadena temporal* unconstitutional as applied. The imposed punishment for the crime of making a false entry in a public record—not shown to have injured anyone—was fifteen years' imprisonment at hard and painful labor with chains, loss of CIVIL LIBERTIES, and governmental surveillance for life. The Court, in *Estelle v. Gamble* (1976), also held that deliberate indifference to a prisoner's serious medical needs constitutes cruel and unusual punishment. In *Hutto v. Finney* (1978) it upheld a lower court's conclusion that routine conditions in the Arkansas prison system were so inhumane as to be cruel and unusual. Earlier, the Court had determined in TROP V. DULLES (1968) that imposing loss of citizenship on a native-born citizen for desertion in wartime was cruel and unusual because it destroyed the person's political existence and made him stateless. In implicit recognition that states may define as crimes only acts, conduct, or behavior, the Court, in *Robinson v. California* (1962), held criminal imprisonment for the status of being a drug addict, unaccompanied by any acts, cruel and unusual.

The question to what degree the Eighth Amendment's cruel and unusual punishment clause may limit the power of a state to define the length of a prison sentence has been troublesome. The issue arises most often in challenges to recidivist statutes mandating life sentences on persons having three or more consecutive felony convictions or to sentencing statutes requiring extremely long sentences for those convicted of small drug offenses. Originally, in a number of cases raising disproportionate-length challenges to such statutes, the Court took the view that legislatures had extremely wide latitude in setting felony sentence lengths and that it would rarely, if ever, find such statutes unconstitutional. Thus, in RUMMEL V. ESTELLE (1980) the Court upheld a life sentence imposed on a person who was separately convicted and imprisoned for three nonviolent felonies, involving illegally acquiring

money in the amounts of $80, $28.36, and $120.75. The only mitigation in the sentence was a possibility of parole after twelve years. In *Hutto v. Davis* (1982) the defendant received a sentence of forty years in prison and a fine of $20,000 for possession and distribution of nine ounces of marijuana, and the Court upheld this statute as well, although the average sentence for similar offenders was approximately three years.

Although these two cases suggested that the Court, in practice, did not accept any constitutional standard of length proportionality in felony cases, in a subsequent case a different Court majority strongly endorsed and articulated just such a standard. In SOLEM V. HELM (1983) the Court struck down, as uconstitutionally disproportionate in length, a sentence of life imprisonment without possibility of parole for a defendant convicted for a seventh felony, which involved uttering a "no-account" check for $100. The Court held that although no sentence is per se unconstitutional, the cruel and unusual punishment clause requires that criminal sentences must be proportionate to the crime for which the defendant has been convicted. The judgment whether a sentence is proportionate turns on an analysis guided by consideration of the gravity of the offense and harshness of the penalty; sentences imposed on other criminals in the same JURISDICTION; and sentences imposed on commission of the same crime in other jurisdictions. *Solem*, however, overturned no prior case law, and the current Court is strongly disposed to accept legislative judgments. The only reasonable conclusion to draw is that the principle of length proportionality is weak and, except in rare cases, unlikely to stand as a check on disparate and extremely long sentences.

GARY GOODPASTER
(1992)

(SEE ALSO: *Prisoners' Rights.*)

Bibliography

GRANUCCI, ANTHONY F. 1969 "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning. *California Law Review* 57:839–865.

## CRUEL AND UNUSUAL PUNISHMENT
### (Update 2)

Three major trends in state and federal SENTENCING have dominated the punishment arena during the last two decades: first, the reduction of judicial discretion and the correlative enactment of fixed sentencing guidelines in non-CAPITAL PUNISHMENT cases; second, the adoption of severe prison terms for habitual offenders and for designated crimes, also known as "three strikes, you're out" (or CAREER CRIMINAL SENTENCING LAWS) and "mandatory minimum" statutes; and third, the implementation of new capital murder statutes after the Supreme Court's decision in *Gregg v. Georgia* (1976), as well as the more recent adoption of the death penalty by the federal government and by several states. These developments have presented a number of challenges to Eighth Amendment jurisprudence and have given rise to three important controversies: first, what proportionality test applies to noncapital sentences; second, whether the twin constitutional goals of consistency and individualized sentencing in capital cases can be reconciled; and third, whether the risk that RACIAL DISCRIMINATION may infect the imposition of the death penalty violates the Eighth Amendment.

The Court has been deeply divided over the proportionality test to apply in noncapital cases. In *Harmelin v. Michigan* (1991), a case involving a mandatory sentence of life imprisonment without the possibility of parole for the possession of 672 grams of cocaine, the Court severely narrowed the proportionality test that it had articulated in SOLEM V. HELM (1983). Justice ANTONIN SCALIA, joined by Chief Justice WILLIAM H. REHNQUIST, invited the Court to eliminate all proportionality review in noncapital cases. Scalia and Rehnquist interpreted the Eighth Amendment to prohibit only certain modes of punishment (like drawing and quartering) and unusual penalties not prescribed by law. In the controlling, CONCURRING OPINION of Justice ANTHONY M. KENNEDY, joined by Justices SANDRA DAY O'CONNOR and DAVID H. SOUTER, Kennedy preserved a narrow proportionality principle that "forbids only extreme sentences that are 'grossly disproportionate' to the crime," but nevertheless concluded that the sentence at issue was not grossly disproportionate. Kennedy relegated the analysis of the other two prongs of the earlier three-prong *Solem* proportionality test, namely intrajurisdictional and interjurisdictional comparative analyses, to cases where gross disproportionality is found.

In the capital context, the Court has articulated an intricate set of constitutional rules in an attempt to fulfill the mandate of *Furman v. Georgia* (1972) and *Gregg* to eliminate arbitrariness and ensure fairness in capital sentencing. The Court's opinions have pursued the twin Eighth Amendment objectives of consistency and individualized sentencing. In pursuit of consistency, the Court has narrowed the definition of permissible aggravating circumstances and required that the discretion of sentencing juries be channeled. In pursuit of individualized sentencing, the Court has required the admission of any mitigating evidence and the jury's consideration of that evidence. The increasing tension in recent years between these twin constitutional commands has led several members of the Court to conclude that they are simply incompatible. For-

mer Justice HARRY A. BLACKMUN, dissenting from the denial of CERTIORARI in *Callins v. Collins* (1994), concluded that the Eighth Amendment's competing constitutional commands could not be reconciled and that the death penalty, as presently administered, violates the Eighth Amendment. Justices Scalia and CLARENCE THOMAS have joined Blackmun in acknowledging the incompatibility of the goals of consistency and individualized sentencing, but have instead decided to discard the principle of individualized sentencing.

Racial discrimination has continued to plague capital sentencing schemes in a number of states. The Baldus study found that, in Georgia during the 1970s, the likelihood of being sentenced to death for killing white victims was 4.3 times greater than the likelihood of being sentenced to death for killing black victims, holding constant 39 other nonracial explanatory variables. The study raised the possibility that considerations of race were injecting arbitrariness in the imposition of the death penalty. The Court assumed the validity of the Baldus study in MCCLESKEY V. KEMP (1986), but nevertheless concluded that the risk that racial bias infected the Georgia capital sentencing system was not significant under the Eighth Amendment.

BERNARD E. HARCOURT
(2000)

Bibliography

KENNEDY, RANDALL 1988 *McCleskey v. Kemp:* Race, Capital Punishment, and the Supreme Court. *Harvard Law Review* 101:1388–1443.

STEIKER, CAROL and STEIKER, JORDAN 1995 Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment. *Harvard Law Review* 109: 355–438.

SUNDBY, SCOTT E. 1991 The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing. *UCLA Law Review* 38:1147–1208.

## *CRUIKSHANK, UNITED STATES v.*
92 U.S. 542 (1876)

*Cruikshank* paralyzed the federal government's attempt to protect black citizens by punishing violators of their CIVIL RIGHTS and, in effect, shaped the Constitution to the advantage of the Ku Klux Klan. The case arose out of a federal prosecution of nightriders responsible for the Colfax Massacre of 1873 in Grant Parish, Louisiana. Several hundred armed whites besieged a courthouse where hundreds of blacks were holding a public assembly; the attackers burned down the building and murdered about 100 people. The United States tried Cruikshank and others involved in the massacre and convicted three for violating section six of the FORCE ACT OF 1870. That act, which survives as section 241 of Title 18 of the United States Code, is a general conspiracy statute making it a federal crime, then punishable by a $5,000 fine and up to ten years in prison, for two or more persons to conspire to injure or intimidate any citizen with the intent of hindering his free exercise of any right or privilege guaranteed him by the Constitution or laws of the United States.

In a unanimous opinion by Chief Justice MORRISON R. WAITE, the Court ignored the statute and focused on the INDICTMENT to ascertain whether the rights Cruikshank and others interfered with were granted or secured by the United States. Reasserting the theory of dual CITIZENSHIP advanced in the SLAUGHTERHOUSE CASES (1873), Waite concluded that the United States cannot grant or secure rights not under its JURISDICTION. Examining in turn each right named in the indictment as having been deprived, Waite found that they were all "left under the protection of the States." None was a federal right. The right to peaceably assemble predated the Constitution and remained "subject to state jurisdiction." The United States could neither infringe it nor protect it, for it was not an attribute of United States citizenship. So too the right to bear arms. The right to be secure in one's person, life, and liberty was protected by the FOURTEENTH AMENDMENT against state deprivation, but for protection of that right, sovereignty "rests alone with the States." The amendment, said Waite, "adds nothing to the rights of one citizen as against another." Thus the violence here conducted by private persons could not be reached by Congress, which was limited to assuring that the states do not violate the amendment's prohibitions. As for the right to vote, the FIFTEENTH AMENDMENT merely protected against discrimination based on race. The Constitution did not confer the right to vote on anyone; that right was not, Waite said, an attribute of national citizenship.

By such reasoning the Court held that the indictment did not show that the conspirators had hindered or prevented the enjoyment of any right granted or secured by the Constitution. Accordingly, no conviction based on the indictment could be sustained, and the Court ordered the defendants discharged. The conspiracy statute remained impotent until revived in recent times by the Department of Justice, but the Court did not sustain a conviction under the statute until 1966 (*United States v. Price*; *United States v. Guest*), when the Court vitiated *Cruikshank.*

LEONARD W. LEVY
(1986)

Bibliography

MAGRATH, C. PETER 1963 *Morrison R. Waite.* Pages 120–134. New York: Macmillan.

## CRUZ v. BETO

See: Religious Liberty

## CRUZAN v. DIRECTOR, MISSOURI DEPARTMENT OF HEALTH

See: Right to Die

## CULTS AND THE CONSTITUTION

The term "cult," currently used to designate a particular unpopular and feared new religious group often claiming a personal relationship between its leader and the Divinity, is not found explicitly in the original Constitution, the FIRST AMENDMENT's free exercise or establishment clause, or the FOURTEENTH AMENDMENT'S EQUAL PROTECTION clause. Among the most prominent of these groups in recent times have been the Unification Church, the Worldwide Church of God, Inc., the Church of Scientology, and the International Society for Krishna Consciousness.

Cults, which have experienced varying degrees of discrimination and persecution by law enforcement officials, have consistently claimed that the Constitution does not sanction legal distinctions between them on the one hand and long-established and respected faiths on the other. They note, too, that historically most of the now well-established and fully respected faiths, including Baptists, Roman Catholics, Jews, Mormons, Christian Scientists, and Jehovah's Witnesses, have been subjected to governmental discrimination before achieving acceptability and equal treatment.

The claim to equal treatment was upheld in LARSON V. VALENTE (1982) where the Supreme Court held unconstitutional a Minnesota statute, enforced against the Unification Church, that imposed special registration and reporting requirements upon religious groups that received more than half of their income from nonmembers, a provision the Court found to have been aimed at unpopular cults. This provision, the Court said, constituted precisely the sort of official denominational preference and discrimination forbidden by the establishment clause in the absence of a compelling interest not otherwise amenable to protection. Moreover, the statute also violated the clause by authorizing excessive governmental entanglement with and politicizing of religion.

Compelling registration is only one comparatively mild sanction imposed by government upon religious cults. Although that term had not yet become popular in 1944, when *United States v. Ballard* was decided by the Supreme Court, that decision ruled unconstitutional a mail fraud conviction of "I Am" members who obtained donations by representing that their leader was divinely appointed with supernatural powers to heal the incurably ill. To allow a jury to determine the truth or falsity of religious doctrines, the Court said, would render vulnerable representations concerning the miracles of the New Testament, the divinity of Christ, life after death, and the power of prayer. The First Amendment permits only a determination whether the defendants themselves actually believed that what they recounted was true, not whether it was actually true.

Other devices applied against cults include denial of tax exemption, dissolution of the corporate structure and seizure of assets (as in CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS V. UNITED STATES, 1890), and prosecution for disturbance of the peace (as in CANTWELL V. CONNECTICUT, 1940, involving Jehovah's Witnesses).

Whatever may have been the Court's response in earlier times, today it accords cults the same constitutional protection accorded to long-standing and commonly accepted faiths.

LEO PFEFFER
(1986)

Bibliography

New York University Review of Law and Social Change 1979–1980 Volume 9, #1: *Proceedings of Conference on Alternative Religions, Government Control and the First Amendment.*

## CUMBERLAND ROAD BILL

See: Internal Improvements

## CUMMINGS, HOMER S. (1870–1956)

A prominent Connecticut Democrat, Homer S. Cummings served as attorney general under President FRANKLIN D. ROOSEVELT from 1933 to 1939, defending much of the NEW DEAL legislation in the Supreme Court. He broke with recent practice when he personally argued the GOLD CLAUSE CASES (1935), and the Court reiterated much of his argument in its opinions. Cummings strongly supported Roosevelt's COURT-PACKING plan as "clearly constitutional" and privately suggested a constitutional amendment requiring justices to retire at seventy. With Carl McFarland, he wrote *Federal Justice* (1937), a history of the Department of Justice based on previously neglected manuscript materials. Cummings instituted reform of federal criminal

and administrative procedures, helping secure adoption of the FEDERAL RULES OF CIVIL PROCEDURE in 1938.

DAVID GORDON
(1986)

## *CUMMINGS v. MISSOURI*

See: Test Oath Cases

## CURFEW LAWS

See: Juvenile Curfew Laws

## CURTILAGE

See: Open Fields Doctrine

## CURTIS, BENJAMIN R.
(1809–1874)

Benjamin Robbins Curtis of Massachusetts generally rates high marks for his six-year tenure on the Supreme Court. His bold dissent in DRED SCOTT V. SANDFORD (1857), followed by his dramatic resignation, largely accounts for his reputation. Yet Curtis's contributions to the development of constitutional law transcend that one case.

Curtis's prominence in the *Dred Scott* case is ironic, considering the fact that he received his appointment in 1851 because he was a northern Whig, acceptable to southern slave interests. By that time, he already was a leading figure in Boston legal circles. He had been selected in 1846 to succeed Justice JOSEPH STORY as an overseer (trustee) of Harvard College, and he was highly regarded for his promotion of procedure and litigation reforms. In 1851 he represented the Boston school board against the desegregationists in ROBERTS V. CITY OF BOSTON. But most important, Curtis had also endorsed Senator DANIEL WEBSTER's efforts in the COMPROMISE OF 1850, had advocated strict enforcement of the new Fugitive Slave Act, and had fought abolitionists and free-soilers, even opposing CHARLES SUMNER's successful Senate campaign in 1851. Shortly afterward, President MILLARD FILLMORE, following Webster's recommendation, nominated Curtis to succeed Justice LEVI WOODBURY. The only criticism came from the abolitionist press. Southern politicians, however, were satisfied and the Democratic Senate quickly confirmed the appointment.

Curtis's first major opinion, in COOLEY V. BOARD OF WARDENS (1851), reflected both his legal skills and his willingness to follow the middle ground of his patron, Daniel Webster. The case involved the limiting effects of the COMMERCE CLAUSE on state regulation, a subject that had divided the TANEY COURT since 1837. Southerners feared congressional regulation of interstate traffic in slaves, and consequently sought to interpret the commerce power narrowly. In *Cooley* Curtis acknowledged broad congressional authority over foreign and INTERSTATE COMMERCE, but the case challenged the validity not of congressional action but of local pilotage regulations for the port of Philadelphia. Curtis devised a compromise between the EXCLUSIVE POWER and CONCURRENT POWER views. His doctrine of SELECTIVE EXCLUSIVENESS recognized exclusive congressional power over subjects demanding uniform national regulation, but invited state regulation, in cases where Congress had not acted, of subjects admitting of diverse local regulation.

Curtis again demonstrated a shrewd practicality coupled with an ability to make law responsive to new conditions when he upheld federal regulations of steamboat operations. In *Steamboat New World v. King* (1854) Curtis applied the emerging law of negligence to the rapidly expanding technology of steamboating. In addition, he confirmed that federal admiralty jurisdiction applied to all inland, navigable waters. A year before the *Dred Scott* controversy over the content of the Fifth Amendment's DUE PROCESS clause, Curtis had discussed the subject in MURRAY'S LESSEE V. HOBOKEN LAND AND IMPROVEMENT COMPANY (1856) and had followed a traditional procedural interpretation of the clause.

The understanding of Curtis's role in *Dred Scott* has shifted with historiographical tides. When it was fashionable to view the CIVIL WAR as a "reconcilable conflict," Curtis was seen as a *provocateur;* but when the *Dred Scott* decision is seen as Chief Justice ROGER TANEY's attempt to make the nation safe for slavery, Curtis's opinion emerges as a calm, reasoned historical and legal brief properly explicating national authority to regulate SLAVERY IN THE TERRITORIES. Curtis's opinion differed from Taney's conclusions in nearly every respect. He demonstrated historically that blacks could be American citizens, and hence could sue in the federal courts. Equally important, he offered constitutional language and long-standing historical precedent to justify congressional regulation of slavery in the territories. Curtis's comments on the need for judicial restraint were pointed: "To engraft on any instrument a substantive exception not found in it must be admitted to be a matter attended with great difficulty. . . . To allow this to be done with the Constitution, upon reasons purely political, renders its judicial interpretation impossible because judicial tribunals . . . cannot decide upon political considerations."

Curtis resigned a few months after the *Dred Scott* decision. He was dissatisfied with his circuit duties and his

inadequate salary, and the *Dred Scott* imbroglio convinced him that he and his colleagues could no longer work together effectively and harmoniously.

During the Civil War, Curtis emerged as an outspoken critic of Lincoln's unprecedented exercise of PRESIDENTIAL POWERS. In good Whig fashion, he leveled constitutional attacks on Lincoln for suspending the writ of HABEAS CORPUS and for issuing the EMANCIPATION PROCLAMATION. Yet, following the war, he endorsed the sentiments of the National Union Convention in 1866 and advocated exclusive presidential control of reconstruction. Two years later, he joined WILLIAM M. EVARTS and others to represent President ANDREW JOHNSON in his IMPEACHMENT trial. Curtis's defense of the President argued that Johnson was not an "acting President," as some claimed, and that the TENURE OF OFFICE ACT unduly interfered with the President's constitutional prerogative to remove executive officers—an argument the Supreme Court came to accept half a century later. Finally, he offered a ringing affirmation of the FIRST AMENDMENT to defend Johnson against the charge that he had "improperly" spoken of Congress.

In his last years, Curtis had a lucrative law practice and argued more than fifty cases before the Supreme Court. Most noteworthy were his briefs in behalf of federal regulation of the insurance industry in PAUL V. VIRGINIA (1869) and his defense of the legal tender laws in *Hepburn v. Griswold* (1870).

Curtis's all too brief career on the Supreme Court must exclude him from a short list of truly great jurists. But he displayed uncommon skills, especially a talent for closely reasoned and logical arguments. His defense and understanding of the Constitution, on and off the bench, mark contributions that have been affirmed by the passage of time.

STANLEY I. KUTLER
(1986)

Bibliography

CURTIS, GEORGE TICKNOR and CURTIS, BENJAMIN R., eds. 1879 *Life and Writings of Benjamin Robbins Curtis.* Boston: Little, Brown.

FEHRENBACHER, DON E. 1978 *The Dred Scott Case: Its Significance in American Law and Politics.* New York: Oxford University Press.

LEACH, RICHARD H. 1952 Benjamin Robbins Curtis: Judicial Misfit. *New England Quarterly* 25:507–523.

## CURTIS, GEORGE T.
(1812–1894)

A leading Boston attorney, George Ticknor Curtis ordered the rendition to SLAVERY of Thomas Sims in 1852 while serving as a Fugitive Slave Law Commissioner. (See SIMS' CASE.) In 1856 he represented Dred Scott before the United States Supreme Court in DRED SCOTT V. SANDFORD. Curtis wrote numerous legal treatises, three political biographies, and a two-volume *History of the Origin, Formation, and Adoption of the Constitution* (1854–1858)—revised as *Constitutional History of the United States* (1889–1896). This work presents a classic Federalist-Whig interpretation of American political and constitutional history. It was begun at the suggestion of DANIEL WEBSTER and reflects the senator's approach to the Constitution and the Union.

PAUL FINKELMAN
(1986)

Bibliography

FISH, CARL RUSSELL 1930 George T. Curtis. *Dictionary of American Biography,* Vol. 4, pp. 613–614.

## *CURTISS-WRIGHT EXPORT CORPORATION, UNITED STATES v.*
299 U.S. 304 (1936)

Nearly two years after Paraguay and Bolivia went to war in 1932, Congress authorized President FRANKLIN D. ROOSEVELT to embargo American arms shipments to the belligerents if he found that the action might contribute to reestablishing peace. Indicted in January 1936 for conspiring to violate the embargo resolution and Roosevelt's implementing proclamation, Curtiss-Wright Export Corporation demurred on grounds of unconstitutional DELEGATION OF POWER. Recent rulings against NEW DEAL legislation in PANAMA REFINING CO. V. RYAN (1935) and SCHECHTER POULTRY CORP. V. UNITED STATES (1935) lent weight to the company's position, and the district court sustained the demurrer. On appeal, however, the Supreme Court approved the embargo resolution and proclamation with a ringing endorsement of independent presidential authority in the area of FOREIGN AFFAIRS.

For a 7–1 majority, Justice GEORGE SUTHERLAND defended the embargo measures by distinguishing between powers of internal and external SOVEREIGNTY, a distinction the government had not employed in arguing *Curtiss-Wright.* For him, the federal government's domestic authority derived from states having delegated power via the Constitution. External sovereignty had passed, however, from the British Crown to the United Colonies and then to the United States in their collective capacities, with the states severally never possessing it nor delegating it. "Rulers come and go; governments end and forms of government change; but sovereignty survives." In the realm of

foreign relations, the authority of the federal government therefore equaled that of any sovereign nation, and the usual constitutional divisions between the President and Congress were largely irrelevant, as was the normal prohibition on delegation of legislative power. Keenly aware of the need for energy and dispatch in the delicate business of conducting foreign relations, the Framers had endorsed this arrangement, Sutherland claimed, and early statesmen put it into practice. Although dissenting, Justice JAMES C. MCREYNOLDS filed no opinion.

Later characterized as dictum-laden, Sutherland's argument made sense within the constitutional climate of the 1930s and in view of his own commitments. The government, for example, had claimed that the 1934 embargo resolution and proclamation met the straited *Panama-Schechter* requirement that delegatory legislation specify the findings of fact the President must make before taking the anticipated action. Such an approach ignored the plausible objection that findings involving diplomatic and military imponderables were no firmer than those already disallowed as "opinion" in *Schechter.* An alternative was simply to rely on judicial precedent and legislative practice regarding delegation in areas cognate to foreign relations. Sutherland did examine earlier embargo, tariff, and kindred measures in which Congress had given latitude to the President, but he did so primarily as a means of showing that his view of external sovereignty had been accepted from the beginning. Neither judicial nor legislative iterations carried the same weight as the original intent and first principles he valued so highly. Perhaps most important, Sutherland himself had broached the external-internal distinction the previous May, in CARTER V. CARTER COAL COMPANY (1936), and had earlier explicated his full theory of sovereignty in his book *Constitutional Power and World Affairs* (1919).

The real weakness of Sutherland's opinion was its faulty history. Scant evidence exists that the Framers held the extraconstitutional understanding of the foreign relations power he attributed to them. Sutherland also misconstrued many of the earlier episodes and commentaries that, he argued, were informed by his theories of sovereignty and plenary executive authority. *Curtiss-Wright* nevertheless had timing on its side. It soon provided a base for upholding EXECUTIVE AGREEMENTS as domestic law in UNITED STATES V. BELMONT (1937) and UNITED STATES V. PINK (1942). More broadly, Sutherland's opinion appealed to proponents of an expanded presidential role as the United States acquired global responsibilities, engaged in nuclear diplomacy, fought undeclared wars, and debated the requirements of internal security.

CHARLES A. LOFGREN
(1986)

Bibliography

LEVITAN, DAVID M. 1946 The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory. *Yale Law Journal* 55:467–497.

LOFGREN, CHARLES A. 1973 *United States v. Curtiss-Wright Export Corporation:* An Historical Reassessment. *Yale Law Journal* 83:1–32.

## CUSHING, WILLIAM
(1732–1810)

William Cushing served on the United States Supreme Court, in an undistinguished manner, for nearly twenty-one years. Born into a politically well-connected, upper middle class Massachusetts family, he graduated from Harvard College, and then studied law; he was admitted to the bar in 1755. He practiced law in Maine, where he represented the interests of large landholders against squatters and debtors. In 1771 he succeeded his father as a judge of the Massachusetts Superior Court. Because many of his family had loyalist leanings and he owed his position to a royal appointment, Cushing expressed his political views cautiously during the 1770s, when colonial resistance to British policies turned into revolution. Although he chose the patriot side in 1776, some ardent radicals doubted his enthusiasm for independence. Nonetheless he was appointed to the newly created superior court and became chief justice for the state in 1777 when JOHN ADAMS resigned the post. He also served as a member of the convention that wrote the MASSACHUSETTS CONSTITUTION of 1780.

While chief justice, Cushing played an important role in bringing about the end of slavery in Massachusetts, beginning with COMMONWEALTH V. JENNISON (1783). In his charge to the jury, Cushing interpreted the clause of the state constitution that declared that "all men are born free and equal" as abolishing slavery in the state. Unsympathetic to the debtors in western Massachusetts who prevented the collection of taxes and closed the courts during SHAYS' REBELLION, Cushing opposed their activities while riding circuit and presided over the TREASON trial of the leaders; some of his sentences included the death penalty. He advocated RATIFICATION OF THE CONSTITUTION in 1788 and served as vice-president of the state ratifying convention.

GEORGE WASHINGTON appointed Cushing the first associate Justice of the United States Supreme Court in 1789. Despite his extensive judicial experience he did not play a very active role on the Court. Although he participated in many of the most important cases of the 1790s—CHISHOLM V. GEORGIA (1973), *Ware v. Hylton* (1796), HYLTON V.

UNITED STATES, (1796), and CALDER V. BULL (1798)—his opinions tended to be brief, and dealt with narrow legal and procedural questions. Ceremonious in his deportment, Cushing was the last member of the Court to wear a wig. His affability and courtesy enabled him to enforce the Sedition Act with minimal rancor. After 1800, illness, age, and the difficulties of riding circuit caused him considerable hardship. He could no longer adequately perform his duties, and he probably would have retired early if a federal pension had been available. He died, while still a member of the Supreme Court, in 1810.

RICHARD E. ELLIS
(1986)

Bibliography

JOHNSON, HERBERT ALAN 1969 William Cushing. Pages 57–70 in Leon Friedman and Fred L. Israel, eds., *Justices of the Supreme Court, 1789–1969*, Vol. I. New York: Chelsea House.

## CUSHMAN, ROBERT E.
(1889–1969)

Robert Eugene Cushman taught constitutional law for many years at Cornell University. His landmark anthology, *Leading Constitutional Decisions* (1925; 16th ed. by Robert F. Cushman, 1982), quickly established itself as a standard casebook for constitutional law and history courses. Cushman founded and edited the Cornell Studies on Civil Liberty; the contributors to this series of monographs included Robert K. Carr, Milton R. Convitz, Walter Gellhorn, James Morton Smith, and Cushman himself. Cushman described his monograph, *Civil Liberties in the United States* (1956), as "a guide to current problems and experience." A synoptic description of the state of the law and an attempt to chart its future development, it was well-received, although some critics questioned its formalistic approach and its skeletal coverage of various issues. Cushman's major scholarly work, *The Independent Regulatory Commissions* (1941), a byproduct of his service with the President's Committee on Administrative Management (1937); prophetically proposed the separation in independent regulatory commissions of the prosecutorial and adjudicative functions. For many years he wrote the *American Political Science Review*'s annual survey of the work of the Supreme Court. From 1958 until his death, Cushman was editor-in-chief of the *Documentary History of the Ratification of the Constitution;* he was succeeded by MERRILL JENSEN.

RICHARD B. BERNSTEIN
(1986)

## CUSTODIAL INTERROGATION

See: Police Interrogation and Confessions

# D

## *DAIRY QUEEN, INC. v. WOOD*
369 U.S. 469 (1962)

The owners of the "Dairy Queen" trademark sued a licensee alleging breach of contract and trademark infringement and asking for injunctive relief and an "accounting." Since this was a case in EQUITY, U.S. District Judge Wood denied the defendant's motion for a jury trial.

A unanimous Supreme Court, speaking through Justice HUGO L. BLACK, held that Wood's decision deprived Dairy Queen of its SEVENTH AMENDMENT rights: although the complaint asked for an "accounting," it was really a suit for damages or debt. As Black wrote, "the constitutional right of TRIAL BY JURY cannot be made dependent upon the choice of words used in the pleadings."

DENNIS J. MAHONEY
(1986)

## DALLAS, ALEXANDER J.
(1759–1817)

Admitted to the bar in 1785, Alexander James Dallas practiced law in Philadelphia. He supplemented his income by reporting the opinions of the courts that sat in that city, including the Supreme Court of the United States (1790–1800). From 1801 to 1814 he was United States attorney for eastern Pennsylvania.

As secretary of the treasury under President JAMES MADISON (1814–1816), Dallas secured enactment of the highest federal taxes to that date, restored confidence in the currency, and dictated terms of the second BANK OF THE UNITED STATES ACT (1816). In 1815 he was also acting secretary of war.

DENNIS J. MAHONEY
(1986)

## DAMAGES

From the earliest days of COMMON LAW, courts have ordered the payment of money ("damages") to compensate for legal wrongs. Two related but separable lines of cases shape the availability of damages for violations of constitutional rights. One line of cases involves inyterpretation of SECTION 1983, TITLE 42, UNITED STATES CODE, and its express provision for "an action at law" to redress deprivations of constitutional rights by state officials. Since the revival of section 1983 in MONROE V. PAPE (1961), it has been understood that damages are available to compensate for sonstitutional violations by state officials. CAREY V. PIPHUS (1978) reaffirmed this understanding, but held that substantial damages could not be recovered for PROCEDURAL DUE PROCESS violations without proof of injury. *Smith v. Wade* (1983) clarified the standards governing awards of PUNITIVE DAMAGES under section 1983.

In actions against federal officials, which are not governed by section 1983, the Court, in BIVENS V. SIX UNKNOWN NAMED AGANTS OF THE FEDERAL BUREAU OF NARCOTICS (1971), inferred a damages action based on the FOURTH AMENDMENT. Later cases, such as DAVIS V. PASSMAN (1979), extended the implied constitutional damages action to other constitutional provisions. The *Bivens* line of cases may be viewed as an extension of EX PARTE YOUNG (1908)

and other decisions that allowed actions for injunctive relief to be based directly on the Constitution.

THEODORE EISENBERG
(1986)

Bibliography

NEWMAN, JON O. 1978 Suing the Lawbreakers: Proposals to Strngthen the Section 1983 Damages Remedy for Law Enforcers' Misconduct. *Yale Law Journal* 87:447–467.

## DAMAGES CLAIMS
### (Update to Damages)

At least since MARBURY V. MADISON was decided in 1803, it has been understood that the United States Constitution is law, enforceable by courts and superior in status to LEGISLATION. In some surprising particulars, however, exactly what that means is far from clear. Since the early 1970s a good deal of both judicial and academic attention has been focused on the propriety of recognizing what are called constitutional damages claims. Compensatory and punitive actions based directly on the Constitution raise significant questions concerning the role of the judiciary in the American system of govenment. The Supreme Court's response to the tensions presented by the creation of constitutional damages actions has been a complex and confusing one.

The Constitution has traditionally been enforced through a variety of remedial mechanisms. *Marbury's* embrace of JUDICIAL REVIEW itself adopts a constitutional enforcement measure—a "negative" judicial authority to ignore statutes that conflict with the terms of the Constitution. Since OSBORN V. BANK OF THE UNITED STATES was decided in 1824, INJUNCTIONS have been used to prevent government officials from engaging in future constitutional violations. In this century, the judiciary's equitable enforcement powers have been stretched to include certain nontraditional remedies, such as the exclusion of relevant evidence in criminal trials and the busing of school children in DESEGREGATION cases.

On one level, lawsuits seeking monetary compensation for the violation of constitutional rights are commonplace. SECTION 1983, TITLE 42, U.S. CODE, creates an action at law for constitutional injuries sustained at the hands of persons acting "under color" of state or local authority. Public employees terminated unconstitutionally by state agencies, the victims of unlawful arrests, persons subjected to discrimination prohibited by the FOURTEENTH AMENDMENT, and myriad other plaintiffs have successfully recovered money damages from state and local officials in constitutional causes of action based on section 1983.

There is, however, no counterpart to section 1983 for federal officials. If, for example, an FBI agent or a treasury officer exceeds the strictures of the FOURTH AMENDMENT, any damage claim instigated by the victim must be rooted directly in the Constitution. The general federal-question jurisdictional statute (28 U.S.C. 1331) empowers the UNITED STATES DISTRICT COURTS to entertain cases arising under the Constitution. But no statutory directive explicitly creates a cause of action for money damages. And the power of federal judges to infer such claims from the sparse language of the constitutional charter has proven a matter of considerable complexity.

In BIVENS V. SIX UNKNOWN NAMED AGENTS, decided in 1971, the Supreme Court held for the first time that federal officials can be sued for damages under the Fourth Amendment. Bivens, allegedly without PROBABLE CAUSE, had been "manacled . . . in front of his wife and children" while federal officials threatened to "arrest the entire family." The Court concluded that the "injuries consequent" to an illegal search provide the basis for an "independent claim both necessary and sufficient to make out . . . [a] cause of action." The *Bivens* case thus seemed to open the door to the recognition of a full complement of constitutional damage claims.

To a significant degree, however, *Bivens*'s promise has remained unfulfilled. The decision determined that the Fourth Amendment is directly enforceable against federal officials through damage decrees. It was silent, however, about other provisions of the BILL OF RIGHTS. In the decade following the ruling, the Supreme Court held that the implied antidiscrimination component of the Fifth Amendment (DAVIS V. PASSMAN (1979)) and the CRUEL AND UNUSUAL PUNISHMENTS prohibition of the Eighth Amendment (*Carlson v. Green*, 1980) would sustain damages actions. But in *Stanley v. Lucas* (1987), the Justices determined that a former serviceman could not assert a constitutional damage claim against the ARMED FORCES for being involuntarily subjected to LSD testing—in apparent violation of the DUE PROCESS clause of the Fifth Amendment. And other decisions have disapproved free speech (*Bush v. Lucas*, 1983) and PROCEDURAL DUE PROCESS (*Schweiker v. Chilicky*, 1988) claims lodged against federal officials.

The set of principles that guide the Supreme Court's constitutional damages claims cases is, in several aspects, surprising. According to *Carlson v. Green*, victims of individualized constitutional violations by federal officials are said to "have a right to recover damages . . . in federal court despite the absence of any statute conferring such a right." The action may be defeated, however, in two instances. First, relief will be denied if the government official demonstrates the existence of "special factors counselling hesitation in the absence of affirmative action by Congress." Second, the constitutional claim will fail if Congress, by providing an alternative remedy or by clear

legislative directive, has indicated that JUDICIAL POWER should not be exercised. "Special factors" have been found to exist in the military and civil service contexts, and more recently, intricate statutory schemes like the SOCIAL SECURITY system have been deemed adequate substitutes for constitutional review.

It is unusual, of course, for exercises in CONSTITUTIONAL INTERPRETATION—like *Bivens* itself—to be effectively overturned or displaced by congressional enactment. *Marbury v. Madison* would seem to argue otherwise. Nor is it commonplace for the Court openly to admit that constitutional violations will be remedied unless "special factors" counsel against enforcement. Chief Justice JOHN MARSHALL argued in COHENS V. VIRGINIA (1821), for example, that "we have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."

Damages actions are typically either created by statute or, if fashioned through the COMMON LAW process, subject to legislative revision or rejection. *Bivens*-type cases occupy a hazy middle ground between traditional constitutional interpretations and common law adjudication. It is perhaps not surprising, therefore, that the decisions are riddled with compromise as well.

GENE R. NICHOL
(1992)

Bibliography

DELLINGER, WALTER E. 1972 Of Rights and Remedies: The Constitution as a Sword. *Harvard Law Review* 85:1532–1564.

HILL, ALFRED 1969 Constitutional Remedies. *Columbia Law Review* 69:1009–1161.

MERRILL, THOMAS W. 1985 The Common Law Powers of Federal Courts. *University of Chicago Law Review* 52:1–72.

MONAGHAN, HENRY P. 1975 Foreword: Constitutional Common Law. *Harvard Law Review* 89:1–45.

NICHOL, GENE R. 1989 *Bivens*, *Chilicky* and Constitutional Damages Claims. *Virginia Law Review* 75:1117–1154.

## *DAMES & MOORE v. REGAN*
### 453 U.S. 654 (1981)

The United States hostage crisis was settled by the 1981 Algerian Agreement under which, *inter alia*, the United States undertook to terminate certain litigation by American claimants against Iran and its agencies. Under the agreement, the claims involved were required to be submitted to binding international arbitration. By EXECUTIVE ORDER, President JIMMY CARTER suspended various claims pending in American courts. Certain American claimants challenged this action as exceeding presidential authority. The Supreme Court upheld the President's authority to conclude and implement this part of the agreement on the basis of his constitutional FOREIGN AFFAIRS powers. It relied on congressional acceptance of broad presidential power during crises in foreign affairs, and on Congress's historic acquiescence in the practice of settling American claims by EXECUTIVE AGREEMENT. The Court also held that if the agreement caused a TAKING OF PROPERTY within the scope of the Fifth Amendment, American nationals had a remedy for compensation in the CLAIMS COURT OF THE UNITED STATES.

The decision effectively permitted the President to remove a category of cases from federal court JURISDICTION (although the Court characterized its action as only approving a change in the "applicable substantive law"). And it opened the way to subsequent "takings" litigation over a broad area of foreign economic policy. In both respects the Court went beyond previous decisions involving presidential executive agreement authority, and treated the presidential executive agreement as fully equivalent to a Senate-approved treaty. Accordingly, it seems to be the most sweeping judicial recognition to date of presidential foreign relations power.

PHILLIP R. TRIMBLE
(1986)

Bibliography

MARKS, LEE R. and GRABOW, JOHN C. 1982 The President's Foreign Economic Powers after Dames & Moore v. Regan: Legislation by Acquiescence. *Cornell Law Review* 68:68–103.

TRIMBLE, PHILLIP R. 1984 Foreign Policy Frustrated—Dames & Moore, Claims Court Jurisdiction and a New Raid on the Treasury. *Columbia Law Review* 84:317–385.

## *DANDRIDGE v. WILLIAMS*
### 397 U.S. 471 (1970)

*Dandridge* stifled the infant DOCTRINE, born in cases such as GRIFFIN V. ILLINOIS (1956) and DOUGLAS V. CALIFORNIA (1963), that governmental WEALTH DISCRIMINATION, like RACIAL DISCRIMINATION, demanded strict judicial scrutiny of its justifications. Maryland provided welfare aid to dependent children on the basis of need, partly determined by the number of children in a family. However, payment to any one family was limited to $250 per month, irrespective of the family's size. A 6–3 Supreme Court, speaking through Justice POTTER STEWART, characterized the case as one involving "social and economic" regulation, and applied the RATIONAL BASIS standard of review. Here there were legitimate state interests in encouraging employment and avoiding distinctions between welfare recipients and the working poor. Although some welfare beneficiaries were unemployable, the maximum-grant rule was generally reasonable.

Justice THURGOOD MARSHALL, dissenting, rejected the idea of two separate STANDARDS OF REVIEW, rational basis and STRICT SCRUTINY. He argued for a "sliding scale" of judicial supervision that would demand progressively more state justification as the classification in question bore more heavily on the powerless and in proportion to the importance of the interest at stake. Here, where indigent children were being deprived of basic subsistence as defined by the state's own standards of need, the permissive rational basis standard was inappropriate. Marshall also argued that the maximum-grant rule was invalid even under that permissive standard, given the state's aim of aiding children and the unemployability of a large proportion of welfare recipients.

After *Dandridge*, it became futile to argue to the Supreme Court either that welfare subsistence was a FUNDAMENTAL INTEREST or that wealth discrimination implied a SUSPECT CLASSIFICATION. Since 1970 the Court has regularly shied away from decisions that would place the judiciary in the position of allocating state resources.

KENNETH L. KARST
(1986)

## DANE, NATHAN
(1752–1835)

A loyal graduate of Harvard College, Nathan Dane of Beverly, Massachusetts, became a lawyer, politician, and scholar. In 1787, while representing his state in Congress, he single-handedly composed the NORTHWEST ORDINANCE. Its provision outlawing slavery derived from Thomas Jefferson's LAND ORDINANCE OF 1785, but Dane deserves credit for writing the various other provisions that amounted to the first national BILL OF RIGHTS. It included, too, a precursor of the CONTRACT CLAUSE.

After serving in various state offices, Dane was forced by deafness to retire to his law practice and to legal scholarship as the century ended. Although he attended the HARTFORD CONVENTION, he spent most of his energies on a compendium of American law, published in eight volumes between 1820 and 1829 and known as "Dane's Abridgment." The work earned him the name of "the American Blackstone" and the money that he gave to develop Harvard Law School. Dane Hall was the first building and Dane himself chose the first Dane Professor, Justice JOSEPH STORY.

LEONARD W. LEVY
(1986)

Bibliography

JOHNSON, ANDREW W. 1986 *The Life and Constitutional Thought of Nathan Dane.* New York: Garland Publishing.

## DANIEL, PETER V.
(1784–1860)

Peter Vivian Daniel, a Virginian born in 1784, served as an Associate Justice of the Supreme Court of the United States from 1841 until his death in 1860. His opinions were notable for the extremist positions he adopted on constitutional issues, including the powers of the federal and state governments, the status of CORPORATIONS, and SLAVERY.

Daniel, a Republican and later a Jacksonian Democrat, served in the Virginia General Assembly, as privy councillor, and as lieutenant governor. President ANDREW JACKSON appointed him to the U. S. District Court in 1836 and President MARTIN VAN BUREN to the Supreme Court in 1841. There the bulk of his work involved cases concerning land titles, procedure, and EQUITY. However, he did participate in most of the major constitutional decisions of the TANEY COURT. But in all instances save one, he spoke either in a concurring or in a dissenting opinion.

Viewing the federal Constitution as a compact among sovereign states, Daniel opposed the extension of federal regulatory authority in COMMERCE CLAUSE cases and extolled the states' POLICE POWER (LICENSE CASES, 1847; PASSENGER CASES, 1849). He concurred in COOLEY V. BOARD OF WARDENS (1851) because he denied that the subject matter of that case (pilotage regulation) was within the federal commerce power at all. In the first *Pennsylvania v. Wheeling Bridge* case (1851), Daniel condemned the use of the commerce power to restrict commerce on navigable rivers. Daniel's hostility to federal ADMIRALTY JURISDICTION sprang from the same source and was buttressed by his insistence on preservation of JURY TRIAL. He dissented in PROPELLER GENESEE CHIEF V. FITZHUGH (1851), one of the few times in which he disagreed with Chief Justice ROGER B. TANEY, opposing the extension of federal admiralty jurisdiction to nontidal waters. In his *Searight v. Stokes* dissent (1845), Daniel insisted that the federal government lacked any power at all to finance INTERNAL IMPROVEMENTS, going far beyond the constitutional doctrine of Jackson's MAYSVILLE ROAD BILL veto (1830).

Daniel was an inveterate foe of banks and corporations, seeking unsuccessfully to deny them access to federal courts as the "Citizens" requisite to Article III jurisdiction (*Rundle v. Delaware and Raritan Canal Co.*, 1852, dissent). In his dissent in *Planters Bank v. Sharp* (1848), he sought to limit the CONTRACT CLAUSE's scope as a restraint on state regulatory power over corporations. In the only significant constitutional case where he spoke for the Court, WEST RIVER BRIDGE V. DIX (1848), Daniel upheld the state's use of EMINENT DOMAIN and police power to condemn corporate property.

In his later years, Daniel came to despise the institutions and values of the free states. His concurrence in DRED SCOTT V. SANDFORD (1857) was remarkable for its intemperate condemnation of the MISSOURI COMPROMISE and for his insistence that no free blacks could be citizens.

Daniel himself best evaluated his contribution to the work of the Court in his *Genesee Chief* dissent: "My opinions may be deemed to be contracted and antiquated, unsuited to the day in which we live, but they are founded upon deliberate convictions as to the nature and objects of LIMITED GOVERNMENT."

WILLIAM M. WIECEK
(1986)

Bibliography

FRANK, JOHN P. 1964 *Justice Daniel Dissenting: Peter V. Daniel.* Cambridge, Mass.: Harvard University Press.

## *DARBY LUMBER COMPANY, UNITED STATES v.*
312 U.S. 100 (1941)

This decision held the FAIR LABOR STANDARDS ACT of 1938 to be a valid exercise of federal power under the COMMERCE CLAUSE. That was no surprise after the 1937 decisions upholding the WAGNER (NATIONAL LABOR RELATIONS) ACT and after the retirement of the four Justices who had voted consistently for a narrow interpretation of the commerce clause. The opinion of Justice HARLAN FISKE STONE was nevertheless of great significance. For instead of speaking in terms of such nonconstitutional concepts as "direct" and "indirect," it returned to basic constitutional principles as to the scope of the power of Congress.

The commerce clause itself precluded states with high labor standards from protecting their wage levels by forbidding the entry of goods produced elsewhere at lower wages. This meant that in the absence of federal legislative action, states with the lowest labor standards could drive the standards down throughout the country. In 1916 Congress first sought to meet this problem by barring the interstate transportation of goods produced by children. Although that statute was clearly a regulation of INTERSTATE COMMERCE the Supreme Court held it unconstitutional by a vote of 5–4 in HAMMER V. DAGENHART (1918) because the purpose of the act was to control what occurred during the course of intrastate PRODUCTION. Five years later, in ADKINS V. CHILDREN'S HOSPITAL (1923), the Court ruled, 6–3, that the DUE PROCESS clause forbade the fixing of minimum wages by either federal or state governments.

The downward spiral of prices and wages during the Great Depression of the 1930s forced employers seeking to survive to reduce wages to incredibly low levels. Congress sought to deal with this problem by requiring the codes of fair competition under the NATIONAL INDUSTRIAL RECOVERY ACT to prescribe MAXIMUM HOURS AND MINIMUM WAGES. SCHECHTER POULTRY CORP. V. UNITED STATES (1935), holding the NRA unconstitutional, brought this program to a halt, and CARTER V. CARTER COAL COMPANY (1936), holding that Congress lacked power to regulate labor conditions and relations in the coal industry, seemed to create an insurmountable impediment. Unpredictably, this lasted for only a year, when *Carter* was in substance overruled in the WAGNER ACT CASES (1937) and *Adkins* was overruled in WEST COAST HOTEL CO. V. PARRISH (1937). The result was passage of the Fair Labor Standards Act in June 1938.

That statute prescribed a minimum wage of twenty-five cents per hour for employees engaged in interstate commerce or in producing goods for such commerce. Payment of fifty percent more for overtime was required for all hours over forty-four per week (to be reduced to forty after two years). The act penalized violation of those standards or interstate shipment of goods produced in violation of them.

The lumber industry was typically afflicted with depressed wage rates; wages ranged from ten to twenty-seven and one-half cents per hour. The annual average wage for all lumber industry employees in Georgia in 1937 was $389. Fred Darby was paying his employees twelve and one-half to seventeen cents per hour; he devised a scheme to continue doing so after the Fair Labor Standards Act became effective, and he was indicted.

Although the other federal lower courts had seen the light after the Labor Board cases and sustained the new statute, the Georgia district judge deemed himself bound to follow HAMMER V. DAGENHART and CARTER until the Supreme Court explicitly overruled them. Accordingly, he dismissed the INDICTMENT as an invalid regulation of manufacture, not interstate commerce, and the government appealed directly to the Supreme Court.

In upholding the statute Justice Stone spoke for a unanimous Court—undoubtedly because Justice JAMES C. MCREYNOLDS had retired three days before. The Court first held that the prohibition against the interstate shipment of goods produced under substandard labor conditions was "indubitably a regulation of [interstate] commerce." And this was none the less so because the motive or purpose may have been to control the "wages and hours of persons engaged in manufacture." The commerce power of Congress, as defined in GIBBONS V. OGDEN (1824), "may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon which the courts are given no control." The contrary decision in

HAMMER V. DAGENHART "by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice [OLIVER WENDELL] HOLMES" was accordingly overruled.

In determining the validity of the regulation of wages and hours for manufacturers, the Court adopted the approach approved in MCCULLOCH V. MARYLAND (1819), the initial pronouncement on the scope of the ENUMERATED POWERS. The test was whether a regulation of intrastate activities was an "appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." The directness or indirectness of the effect on such commerce was not mentioned, although the substantiality of the effect was. (See EFFECTS ON COMMERCE). The Court noted that legislation under other powers had often been sustained "when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power. . . ." The policy of excluding from interstate commerce goods produced under substandard labor conditions could reasonably be effectuated by prohibiting such conditions for manufacturers producing for interstate distribution. That would suppress a method of interstate competition Congress deemed unfair.

The opinion flatly rejected the contention that the TENTH AMENDMENT restricted the enumerated powers. That amendment, which provides that "the powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people," did not deprive the federal government of "authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." "The amendment states but a truism that all is retained which has not been surrendered."

*Darby* was followed a year later by WICKARD V. FILBURN in which the Court alluded to the NECESSARY AND PROPER clause, which MCCULLOCH V. MARYLAND had emphasized, as the source of the power of Congress to regulate intrastate transactions. It also identified the cases which *Darby* had disapproved by implication, among others *Hammer*, *Schechter*, and *Carter*. *Darby* and *Wickard* together have provided the foundation for commerce clause interpretation thereafter. They firmly establish that the national economic system is subject to the control of the only entity that can possibly control it, the federal government.

ROBERT L. STERN
(1986)

Bibliography

DODD, E. MERRICK 1946 The Supreme Court and Fair Labor Standards, 1941–1945. *Harvard Law Review* 59:321–375.

STERN, ROBERT L. 1946 The Commerce Clause and the National Economy, 1933–1946. *Harvard Law Review* 59:645–693, 883–947.

## DARNEL'S CASE

See: Petition of Right

## *DARTMOUTH COLLEGE v. WOODWARD*

4 Wheaton 518 (1819)

The most famous and influential CONTRACT CLAUSE case in our history, *Dartmouth College* was a boon to higher education and to corporate capitalism. The case established the DOCTRINE, never overruled, that a CORPORATION charter or the grant by a state of corporate rights to private interests comes within the protection of the contract clause. Although the case involved a small college in New Hampshire rather than a manufacturing concern, a bank, or a transportation company, the Court seized an opportunity to broaden the contract clause by making all private corporations its beneficiaries. DANIEL WEBSTER, counsel for the college, said that the judgment was a "defense of VESTED RIGHTS against Courts and Sovereignties," and his co-counsel, Joseph Hopkinson, asserted that it would "secure corporations . . . from legislative despotism. . . ." Corporations were still a recent innovation; JAMES KENT, in his *Commentaries on American Law* (1826), remarked that their rapid multiplication and the avidity with which they were sought by charter from the states arose as a result of the power that large, consolidated capital gave them over business of every sort. The Court's decision in the *Dartmouth College* case, Kent said, more than any other act proceeding from the authority of the United States, threw "an impregnable barrier around all rights and franchises derived from the grant of government; and [gave] solidity and inviolability to the literary, charitable, religious, and commercial institutions of our country." Actually, FLETCHER V. PECK (1810) had made the crucial and original extension of the contract clause, construing it to cover public and executed contracts as well as private executory ones. The *Dartmouth College* doctrine was a logical implication.

The college case was a strange vehicle for the doctrine that emerged from it. Dartmouth, having been chartered in 1769 in the name of the crown to christianize and educate Indians, had become a Christian college for whites and a stronghold of the Congregationalist Church, which had benefited most from the laws establishing the Protestant religion in New Hampshire. The college had become embroiled in state politics on the side of the

Federalists, who supported the establishment. When in 1815 the trustees removed the president of the college, they loosed a controversy that drew to the ousted president a coalition of Jeffersonians and religious denominations demanding separation of church and state. The reformers having swept the state elections in 1816, the legislature sought to democratize the college by a series of statutes that converted it into a state university under public control, rather than a private college as provided by the original charter. The state supreme court sustained the state acts, reasoning that the institution had been established with public aid for public purposes of an educational and religious nature. The state court held that the contract clause did not limit the state's power over its own public corporations.

On APPEAL, the Supreme Court held that Dartmouth was a private eleemosynary corporation whose VESTED RIGHTS could not be divested without infringing a continuing obligation to respect inviolably the trustees' control of property given to the corporation for the advancement of its objectives. The Court held unconstitutional the state acts subjecting Dartmouth to state control and ordered Woodward, the treasurer of the institution who had sided with the state, to return to the trustees the records, corporate seal, and other corporate property which he held.

At every step of his opinion Chief Justice JOHN MARSHALL misstated the facts about the history of the original charter in order to prove that it established a purely private corporation. That, perhaps, was a matter primarily of interest to the college, which, contrary to Marshall, had received its charter not from George III but from the governor of the colony; moreover, the private donations, which Marshall said had been given to Dartmouth on condition of receiving the charter, had been given unconditionally to an entirely different institution, Moor's Charity School for Indians, and had been transferred to Dartmouth over the donors' objections. Also, the funds of the college, contrary to Marshall, did not consist "entirely of private donations," because the endowment of the college at the time of the issuance of the chapter derived mainly from grants of public lands. Even if the grant of the charter were a contract, as Marshall said it "plainly" was, Parliament could have repealed it at will. The Chief Justice conceded the fact but added that a repeal would have been morally perfidious. If, however, the charter were subject to revocation at the will of the sovereign authority, or the grantor, the "contract" did not bind that party and created no obligation that could be impaired.

Marshall conceded that at the time of Independence, the state suceeded to the power of Parliament and might have repealed or altered the charter at any time before the adoption of the Constitution. The provision in Article I, section 10, preventing states from impairing the obligation of a contract, altered the situation. That clause, Marshall conceded, was not specifically intended to protect charters of incorporation: "It is," he said boldly, "more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution," but the clause admitted no exceptions as far as private rights were concerned. "It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted." In the absence of proof that the language of the Constitution would have been altered had charters of incorporation been considered, the case came within its injunction against state acts impairing the OBLIGATION OF CONTRACTS.

Although Marshall can be doubted when he said, "It can require no argument to prove that the circumstances of this case constitute a contract," his general doctrine, that any state charter for a private corporation is a constitutionally protected contract, was not far-fetched. The Court must construe the text, not the minds of its framers, and, as he said, "There is no exception in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it." If a state granted a charter of incorporation to private interests, the charter has "every ingredient of a complete and legitimate contract," should it be made on a valuable consideration for the security and disposition of the property conveyed to the corporation for management by its trustees in perpetuity. Unless, as Justice JOSEPH STORY stressed in his concurring opinion, the government should reserve, in the grant of the charter, a power to alter, modify, or repeal, the rights vested cannot be divested, except by the consent of the incorporators, assuming they have not defaulted. Whether, however, a modification of the charter, as in this case, impairs an obligation, if the charter be executed and by its terms should not specify a term of years for the corporation's existence, is another question. In *Fletcher v. Peck*, however, the Court had brought executed as well as public contracts within the meaning of the contract clause. Marshall construed contract rights sweepingly, state powers narrowly.

Max Lerner's comment on the case, referring to Webster's peroration, is provocative. "Every schoolboy," he wrote, "knows Webster's eloquent plea and how Marshall, whom the Yazoo land scandals had left cold, found his own eyes suffused with tears, as Webster, overcome by the emotion of his words, wept. But few schoolboys know that the case had ultimately less to do with colleges than with business corporations; that sanctity of contract was invoked to give them immunity against legislative control, and that business enterprise in America never had more useful mercenaries than the tears Daniel Webster and John Marshall are reputed to have shed so devotedly that

March day in Washington. . . ." In fact, the reserved power to alter or repeal, of which Story spoke, limited corporate immunity from legislative control. Moreover, the protection given by the Court to corporate charters came into play after the legislatures, not the Court, issued these charters, often recklessly and corruptly, without consideration of the public good; Marshall's opinion should have put the legislatures and the public on guard. Finally, the case had a great deal to do with higher education as well as business. *Dartmouth College* is the MAGNA CARTA of private colleges and universities, and, by putting them beyond state control, provided a powerful stimulus, not only to business corporations but also to the chartering of state institutions of higher learning. Unable to make private institutions public ones, the states established state universities.

LEONARD W. LEVY
(1986)

Bibliography

BEVERIDGE, ALBERT J. 1916–1919 *The Life of John Marshall*, 4 vols. Vol. IV:220–281. Boston: Little, Brown.

HAINES, CHARLES GROVE 1944 *The Role of the Supreme Court in American Government and Politics, 1789–1835.* Pages 378–419. Berkeley: University of California Press.

SHIRLEY, JOHN M. (1879) 1971 *The Dartmouth College Causes and the Supreme Court.* New York: Da Capo Press.

STITES, FRANCIS N. 1972 *Private Interest and Public Gain: The Dartmouth College Case, 1819.* Amherst: University of Massachusetts Press.

## DAVIS, DAVID
(1815–1883)

David Davis's Supreme Court appointment in 1862 stemmed from his longtime legal and political association with ABRAHAM LINCOLN. Throughout the CIVIL WAR, Davis loyally supported the administration in the PRIZE CASES (1863) and EX PARTE VALLANDIGHAM (1864), but he opposed the President regarding emancipation and military trials of civilians. At one point, Davis urged Lincoln to withdraw the EMANCIPATION PROCLAMATION, believing that it would only increase southern resistance and border-state hostility toward the Union. The military trial issue, however, aroused Davis's unrelenting enmity and criticism. Appropriately, Davis delivered the Court's unanimous opinion in EX PARTE MILLIGAN in 1866, holding that civilian trials by presidentially created military commissions were unconstitutional. Davis, joined by the four Democrats on the bench, added that Congress could not authorize such commissions, provoking sharp dissent from Chief Justice SALMON P. CHASE and the other three Republicans.

Democrats and Southerners claimed that the subsequent Republican military reconstruction program was unconstitutional on the basis of *Milligan.* But Davis's opinion really offered little comfort on this point. While he found that the "laws and usages of war" could not apply where civil courts were open, he qualified this conclusion by specifying those "states which have upheld the authority of the government." In his private correspondence, Davis showed that he was disturbed by contemporary interpretations. He noted that there was "not a word said in the opinion about reconstruction, the power is conceded in insurrectionary states."

Disenchanted with the Republicans, and equally wary of the Democrats, Davis castigated the partisan wrangling that characterized the RECONSTRUCTION period. He opposed suffrage for blacks, stating that "the thrusting on them [of] political rights is to their injury." He advocated the preservation of traditional state powers, and he expressed alarm "at the tendency to consolidated Govt manifested by the Republican party." Yet he believed that the military reconstruction program would have been avoided if the Democrats and the South had accepted the FOURTEENTH AMENDMENT. Davis displayed little inclination to have the judiciary thwart the Republican program, however. He was with the majority in TEXAS V. WHITE (1869). He also resisted the attempts of some colleagues to force a decision in EX PARTE MCCARDLE (1868) before Congress repealed the appropriate JURISDICTION legislation, thinking "it was unjudicial to run a race with Congress." Finally, he opposed a motion to challenge the Reconstruction Act on property rights grounds in *Mississippi v. Stanton* (1868).

Davis's sense of restraint characterized his votes in most of the other issues involving the Civil War and Reconstruction. Despite the libertarian concerns he had expressed in *Milligan,* he joined the dissenters who favored upholding both federal and state TEST OATHS. He also joined the dissenters who favored sustaining LEGAL TENDERS in *Hepburn v. Griswold* (1870) and then joined the new majority a year later when the decision was reversed. His political conservatism, combined with his notions of JUDICIAL RESTRAINT, best explains his adherence to the majority view in the SLAUGHTERHOUSE CASES (1873).

Davis's literal reading of the compact clause (Article I, section 10), however, led him to dissent in *Virginia v. West Virginia* (1871) when he denied the legality of West Virginia's annexation of two western Virginia counties during the Civil War. And in *Miller v. United States* (1871), a key case testing the CONFISCATION ACT of 1862, he supported the act's constitutionality but found reversible error. In a number of circuit rulings involving confiscation, his insistence on procedural fairness largely masked his distaste for the law.

In the Court's consideration of emerging economic

questions in the 1870s, Davis again adopted rather traditional views on federalism and state prerogatives. He dissented, for example, in PHILADELPHIA & READING RAILROAD V. PENNSYLVANIA (the *State Freight Tax Case*, 1873), arguing that a state tax imposed on freight tonnage was simply a business tax and not an interference with INTERSTATE COMMERCE. In a long series of municipal bond cases in the 1860s and 1870s, Davis usually supported Justice SAMUEL F. MILLER's vigorous battle against the Court's attempts to provide bondholders protection from state taxation or repudiation. In his most notable statement on the issue, Davis dissented when the Court held that the interest of nonresident bondholders could not be taxed. In *State Tax on Foreign-Held Bonds* (1873), Davis relied on traditional state statutes requiring taxation of "all mortgages [and] money owned by solvent debtors." Such taxation, he said, did not impair any contractual obligations between creditors and those who issued bonds. A quarter-century later, Davis's views were adopted by a new majority.

Despite his prominence and reputation, Davis produced few noteworthy constitutional opinions beyond his contribution in *Milligan*. In truth, he was misplaced as a Supreme Court Justice. He preferred the involvement of political life or trial court work. Davis eagerly sought the presidency and he courted anti-Grant elements within the Republican party in 1872. He finally resigned in 1877 when the Illinois legislature elected him to the Senate. He eventually was elected President *pro tem*, prompting Chief Justice MORRISON R. WAITE, who deplored Davis's political ambitions, to remark that the position was "as near to the Presidency as he can get."

Davis himself offered the most candid and fitting estimate of his judicial career. "[A]s I never did like hard study, the work is not always agreeable," he wrote to his brother-in-law in 1870. "I believe I write the shortest opinions of any one on the bench, & if I had to elaborate opinions & write legal essays as some Judges do, I would quit the concern. I like to hold trial court, but this work on an appellate bench is too much like hard labor."

STANLEY I. KUTLER
(1986)

(SEE ALSO: *Constitutional History, 1861–1865; Constitutional History, 1865–1877.*)

## DAVIS, JEFFERSON
(1808–1889)

A Mississippi planter, Jefferson Davis graduated from West Point, served with distinction in the Mexican War, and was a congressman (1845–1846), senator (1847–1851, 1857–1861) and secretary of war (1853–1857). In 1861 he reluctantly resigned from the Senate when Mississippi left the Union. Davis served as Confederate President (1861–1865) and at the end of the CIVIL WAR was indicted for TREASON and jailed but never tried because prosecutors were unsure they could legally convict him. Stripped of his CITIZENSHIP, Davis never returned to politics, but he did write a tedious and defensive two-volume history of SECESSION and his presidency, *The Rise and Fall of the Confederate Government* (1881).

Davis came to national political prominence with his opposition to the COMPROMISE OF 1850. He was one of ten senators who voted against California statehood. Davis supported only the 1850 Fugitive Slave Act, which he thought should be passed and enforced "as a right not to be estimated . . . by the value of the property, but for the principles involved." Unlike JOHN C. CALHOUN, with whom he usually agreed, Davis opposed a constitutional amendment to secure southern rights in all the TERRITORIES. Davis supported extending the MISSOURI COMPROMISE line to California.

After Calhoun's death Davis was the Senate's foremost supporter of southern rights and STATES' RIGHTS. He asserted that secession was constitutional because: the Constitution did not prohibit it nor provide power to coerce a state to remain in the Union; the national government was created by "the states," not "the people," and therefore the states could exist separately from the national government; and the Union "was in the nature of a partnership between individuals without limitation of time" and could be dissolved by the unilateral action of any of the parties.

Davis was ambivalent, however, on whether the theoretical right of secession should be implemented. He opposed secession at the NASHVILLE CONVENTION (1850), arguing that southern rights could be protected within the Union. In 1851 he unsuccessfully sought the Mississippi governorship on a "states' rights" ticket, but later in the decade he opposed states' rights parties because he thought southern interests could best be protected by alliances with sympathetic northern Democrats. In 1860 he attempted to mediate a compromise that would have taken John Bell, JOHN C. BRECKINRIDGE, and STEPHEN A. DOUGLAS out of the presidential contest, in favor of a single Democratic candidate. In 1858 he said publicly that if a Republican were elected "I should deem it your duty to provide for your safety outside the Union." In 1859 he said that the John Brown raid meant that loyalty to the Constitution required secession. Even so, after ABRAHAM LINCOLN's election Davis urged compromise, and served on the Committee of Thirty-Three. Only when this committee failed did he support secession.

Davis was ambivalent in other ways. He believed that blacks were inferior to whites, that congressional prohibition of the African slave trade was unconstitutional, and

that the federal government should not interfere with slavery. Yet his plantation was a model, surpassed only by his brother's for treating blacks with compassion and for giving them a great deal of self-government. He opposed reopening the slave trade on moral grounds and in 1865 advocated emancipation to save the Confederacy. He saw secession as a conservative measure to protect the Constitution from tyranny by Lincoln and the national government. But as Confederate president, Davis implemented CONSCRIPTION, suspension of HABEAS CORPUS, and impressment of supplies. A lifelong states' rights man, Davis was vilified by politicians and governors as he sought, unsuccessfully, to create a Confederate national policy.

PAUL FINKELMAN
(1986)

Bibliography

DODD, WILLIAM E. 1907 *Jefferson Davis.* Philadelphia: George Jacobs.

MCCARDELL, JOHN 1979 *The Idea of a Southern Nation.* New York: Norton.

## DAVIS, JOHN W.
(1873–1955)

One of the nation's most celebrated lawyers, John William Davis served as SOLICITOR GENERAL under WOODROW WILSON, winning WILSON V. NEW (1917) and the SELECTIVE DRAFT LAW CASES (1918). In 1924 he was the Democratic candidate for President. He remained prominent at the Supreme Court bar, successfully challenging NEW DEAL legislation, and in 1952 Davis attacked HARRY S. TRUMAN's seizure of the steel mills as a "usurpation" of power "without parallel in American history." (See YOUNGSTOWN SHEET AND TUBE COMPANY V. SAWYER.) He won that case but would lose his last one: *Briggs v. Elliott* (1954). Arguing this companion case to BROWN V. BOARD OF EDUCATION (1954), Davis dismissed arguments about SEGREGATION's psychological harm and urged the continued validity of the SEPARATE BUT EQUAL rule.

DAVID GORDON
(1986)

## *DAVIS v. ALASKA*

See: Compulsory Process, Right to

## *DAVIS v. BEASON*
130 U.S. 333 (1890)

*Davis* involved an Idaho territorial statute directed at POLYGAMY. The law required voters to foreswear membership in any organization that "teaches, advocates, counsels or encourages" its members to undertake polygamous relationships. Davis was convicted of swearing falsely.

Justice STEPHEN J. FIELD, speaking for the Supreme Court, saw the case as identical to REYNOLDS V. UNITED STATES (1879). The free exercise clause of the FIRST AMENDMENT protected religious beliefs not acts that prejudiced the health, safety, or good order of society as defined by the legislature operating under its POLICE POWER. Field concluded that if something is a crime, then to teach, advise, or counsel it cannot be protected by evoking religious tenets.

The decision became one of the principal underpinnings of what later came to be called the "secular regulation" approach to the free exercise clause whereby no religious exemptions are required from otherwise valid secular regulations.

RICHARD E. MORGAN
(1986)

## *DAVIS v. PASSMAN*
442 U.S. 228 (1979)

Congressman Otto Passman fired Davis, a female member of his staff, because "it was essential that the [job] be [held by] a man." Such SEX DISCRIMINATION normally violates Title VII of the CIVIL RIGHTS ACT OF 1964 but Congress had exempted itself from that act's coverage. Davis therefore brought suit directly under the Constitution, alleging that sex discrimination by members of Congress violates the EQUAL PROTECTION guarantees contained in the Fifth Amendment. The Supreme Court, in an opinion by Justice WILLIAM J. BRENNAN and over four dissents, found that Davis had stated a cause of action. The Court extended its holding in BIVENS V. SIX UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS (1971) to allow direct private damage actions under the Fifth Amendment. The majority did not discuss the SPEECH OR DEBATE CLAUSES' effect, if any, on the action.

THEODORE EISENBERG
(1986)

## *DAVIS v. SCHNELL*

See: Literacy Test

## DAY, WILLIAM R.
(1849–1923)

William Rufus Day was named to the Supreme Court by THEODORE ROOSEVELT in 1903, after WILLIAM HOWARD TAFT

had declined the nomination to remain at his post in the Philippines. Coincidentally, Day had replaced Taft on the Sixth Circuit Court of Appeals in 1899 when President WILLIAM MCKINLEY dispatched Taft to the Pacific outpost.

Day's tenure spanned the Progressive era. He generally favored the movement's interventionist thrust, particularly state regulatory actions. Day's decisions relating to federal power, however, were more ambivalent, as reflected by his famous opinion in HAMMER V. DAGENHART (1918), which invalidated a congressional attempt to regulate child labor premised on the COMMERCE CLAUSE. Unlike many STATES' RIGHTS advocates, he consistently supported state police regulations.

Justice Day faithfully followed the precedent of UNITED STATES V. E. C. KNIGHT COMPANY (1895), holding that Congress's INTERSTATE COMMERCE power did not extend to PRODUCTION. For example, in *Delaware, Lackawanna and Western Railroad Company v. Yurkonis* (1915) he declined to extend coverage of the federal EMPLOYERS LIABILITY ACT to coal miners even though the coal they produced eventually was used in interstate commerce. Three years later, in the child labor case, Day elaborated his conception of FEDERALISM with an expansive discussion of the TENTH AMENDMENT and its limitations on national power. He found that a congressional law prohibiting the interstate transportation of goods made by child labor unconstitutionally regulated production.

Generally, however, Day supported federal regulation of business. In *Atchison, Topeka and Santa Fe Railway Company v. Robinson* (1914), he wrote an opinion sustaining amendments to the HEPBURN ACT that greatly expanded federal JURISDICTION in railroad regulation, and in *Harriman v. Interstate Commerce Commission* (1908) he vigorously dissented from an opinion by Justice OLIVER WENDELL HOLMES that weakened the commission's SUBPOENA powers. Day also consistently sided with the government in antitrust suits. Soon after his appointment, he provided the decisive vote for the government in NORTHERN SECURITIES COMPANY V. UNITED STATES (1904). Although he acquiesced in the Court's RULE OF REASON doctrine in STANDARD OIL COMPANY V. UNITED STATES and UNITED STATES V. AMERICAN TOBACCO COMPANY(1911), Day expressed reservations toward the doctrine in a number of opinions that strongly supported the SHERMAN ACT. Finally, in *United States v. United States Steel Corporation* (1920), he led the dissenters who hotly disputed the Court's approval of the corporation's control of most of the steel industry. Consistently acting as a principled foe of monopoly, Day advocated governmental intervention to destroy concentrated power and insure competition.

Despite Day's views in the child labor case, he supported the concept of a NATIONAL POLICE POWER based on the commerce clause. In *Pittsburgh Melting Company v. Totten* (1918) he sustained the Meat Inspection Act of 1906, and in HOKE V. UNITED STATES (1913) he offered a classic defense of the police power to uphold the MANN ACT. Congress's control over commerce, he said, was "complete in itself," and Congress might adopt "not only means necessary but convenient to its exercise, and the means may have the quality of police considerations."

Similarly, Day upheld widespread uses of state police powers. He joined Justice JOHN MARSHALL HARLAN's dissent in LOCHNER V. NEW YORK (1905), and he supported the Court's approval of compulsory VACCINATION in JACOBSON V. MASSACHUSETTS (1905). Day consistently rejected the rigid FREEDOM OF CONTRACT dogma of *Lochner.* In *McLean v. Arkansas* (1909) he wrote to sustain state mining safety regulations and deferred to legislative prerogative: "The [state] legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments." Although the judiciary might have different views of social policy, Day insisted judges had no warrant to interfere. When the Court invalidated a state law prohibiting YELLOW DOG CONTRACTS in COPPAGE V. KANSAS (1915), Day protested against a literalist view of liberty of contract and, ignoring the *Lochner* precedent, he argued that "liberty of contract may be circumscribed in the interest of the State and the welfare of its people."

Day served on the Court until 1922. His opinions, though not memorable, were relatively free from rigid dogma. He contributed significantly to the Court's general approval of the expanded scope of governmental authority, federal and state. In the latter part of his career, that support extended to the prosecution of dissenters and radicals as he consistently sided with the government in the "Red Scare" cases. His 1918 child labor opinion unfortunately has served to obscure his more enduring contributions to constitutional law, such as his support for national regulatory power and an expanded state police power authority.

STANLEY I. KUTLER
(1986)

Bibliography

MCLEAN, JOSEPH E. 1946 *William Rufus Day: Supreme Court Justice from Ohio.* Baltimore: Johns Hopkins University Press.

## DAYTON, JONATHAN
(1760–1824)

Jonathan Dayton, the youngest signer of the Constitution, represented New Jersey at the CONSTITUTIONAL CONVENTION OF 1787. He spoke several times at the Convention in support of small-state positions. He was afterward

speaker of the HOUSE OF REPRESENTATIVES and a senator. In 1807 he was arrested for conspiring with AARON BURR but was not tried.

DENNIS J. MAHONEY
(1986)

## *DAYTON BOARD OF EDUCATION v. BRINKMAN*

See: *Columbus Board of Education v. Penick*

## *DAYTON-GOOSE CREEK RAILWAY COMPANY v. UNITED STATES*
263 U.S. 456 (1924)

A unanimous Supreme Court here sustained the constitutionality of the recapture provision of the ESCH-CUMMINGS TRANSPORTATION ACT of 1920. The Dayton-Goose Creek Railway earned a return exceeding six percent of its property value, prompting the Interstate Commerce Commission to ask what arrangements it had made to contribute to the fund for which the act had provided. The railroad then sought an INJUNCTION against enforcement of the act, alleging the provision's unconstitutionality. Sixteen railroads, including some of the most powerful of the day, filed AMICUS CURIAE briefs.

Chief Justice WILLIAM HOWARD TAFT asserted that Congress's power over INTERSTATE COMMERCE was not limited to prescribing reasonable rates and voiding unjust ones. Its regulatory power was "intended . . . to foster, protect, and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety." Because private railroads offered a public service, Congress might regulate them in order to assure performance of that function. After considering the necessity and justification for the recapture provisions, Taft concluded that the railroad's obligation to serve the public limits it to only "fair or reasonable profit." Reducing a carrier's income to what the Court deemed a FAIR RETURN did not constitute a TAKING OF PROPERTY without compensation because the act made the carrier only a trustee of any "excess." The government was entitled to appropriate that amount for "public uses because the appropriation takes away nothing which equitably belongs either to the shipper or to the carrier."

DAVID GORDON
(1986)

## *DEAN MILK COMPANY v. CITY OF MADISON*
340 U.S. 349 (1951)

A Madison, Wisconsin, city ordinance that prohibited the sale of milk pasteurized at a plant more than five miles outside city limits provided the basis for clarification of the limits on STATE REGULATION OF COMMERCE. A 6–3 Supreme Court invalidated the law as an "undue burden on INTERSTATE COMMERCE" because it effectively barred the sale of milk from firms in neighboring Illinois. Justice TOM C. CLARK also found a discrimination against outside producers which could not be sustained as an exercise of the state's POLICE POWER when "reasonable nondiscriminatory alternatives" were available, as here.

DAVID GORDON
(1986)

# DEATH PENALTY

See: Capital Punishment; Capital Punishment and Race; Capital Punishment Cases of 1972; Capital Punishment Cases of 1976

## *DEBS, IN RE*
158 U.S. 564 (1895)

Eugene V. Debs, head of the American Railway Union, petitioned for a writ of HABEAS CORPUS on the ground that he had been imprisoned illegally, for contempt of court, because of his defiance of an INJUNCTION issued by a United States CIRCUIT COURT. That draconian injunction, which became a model for subsequent injunctions in American LABOR disputes, sought to end the strike by Debs's union against railroads hauling Pullman sleeping cars. The Pullman Company and the managers association of twenty-four railroad CORPORATIONS, according to a later federal investigation, sought to crush the strike and the union rather than accept any peaceable solution. The managers jubilantly described the injunction as a "gatling gun on paper." It prohibited the strikers from attempting to obstruct the movement of mail or INTERSTATE COMMERCE by the struck railroads. It also forbade the use of "persuasion" aimed at preventing workers from doing their jobs.

Justice DAVID J. BREWER, speaking for a unanimous Supreme Court, delivered a breathtakingly broad opinion based not on any statutory authority for the injunction, but on general principles of national supremacy. "The strong arm of the national government," he declared, "may be put forth to brush away all obstructions to the freedom of INTERSTATE COMMERCE or the transportation of the mails.

If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws." Similarly, Brewer added, the United States might invoke the power of its courts to remove obstructions by injunctions. Brewer's opinion transcended the particular injunction in this case; he failed to examine its terms, though it outlawed persuasion as well as force and assumed that the refusal to work for a railroad is an obstruction of commerce and the mails.

National supremacy, which the Court rendered nearly impotent to cope with obstructions to commerce caused by giant corporations, triumphed against the militant union. The union never recuperated from its defeat in this case and soon disintegrated. *Debs* taught that injunctions could be effective union-smashing devices. They became common afterward. The case also foreshadowed the use of the SHERMAN ANTITRUST ACT against unions. The circuit court had issued the injunction mainly on the ground that the strike was a combination in restraint of interstate commerce. The Supreme Court said that it did not dissent from that conclusion but preferred to rest its judgment on "broader ground."

LEONARD W. LEVY
(1986)

Bibliography

LINDSEY, ALMONT 1942 *The Pullman Strike.* Chicago: University of Chicago Press.

## *DEBS v. UNITED STATES*
249 U.S. 211 (1919)

During his long and controversial career as a LABOR leader and radical, Eugene V. Debs twice ran afoul of the federal government, which looked upon his activities as a threat to the nation's economic and political orthodoxy. In 1894 he was sentenced to six months' imprisonment for contempt of court as part of the GROVER CLEVELAND administration's efforts to crush the Pullman boycott in Chicago. In IN RE DEBS (1895) the United States Supreme Court affirmed this conviction and upheld the sweeping labor INJUNCTION which Debs and other leaders of the American Railway Union were alleged to have violated. Two decades later, as the leader of the American Socialist Party and one of the most visible critics of the WOODROW WILSON administration's decision to enter WORLD WAR I, Debs again found himself in federal court, this time charged with violating the ESPIONAGE ACT of 1917.

Debs was tried and convicted on the basis of a speech he delivered at a socialist, antiwar rally in Canton, Ohio, for inciting insubordination, disloyalty, and mutiny in the armed forces and for obstructing military recruitment. In his oration, Debs praised other imprisoned leaders of the party who had been convicted for aiding and abetting resistance to the draft. In the course of his speech Debs also accused the government of using false testimony to convict another antiwar activist and he labeled the war as a plot by "the predatory capitalist in the United States" against the working class, "who furnish the corpses, having never yet had a voice in declaring war and . . . never yet had a voice in declaring peace." He told the audience that "you need to know that you are fit for something better than slavery and cannon fodder," and he ended by noting: "Don't worry about the charge of TREASON to your masters; but be concerned about the treason that involves yourselves." Debs was sentenced to ten years in prison.

When the *Debs* case reached the Supreme Court, a postwar "red scare" had descended on the nation. CRIMINAL CONSPIRACY trials of leaders of the Industrial Workers of the World were still underway. The Department of Justice had embarked on a large-scale program that would culminate in the PALMER RAIDS and the deportation of hundreds of ALIEN radicals.

Without even a reference to the CLEAR AND PRESENT DANGER test enunciated a week earlier, a unanimous Supreme Court affirmed Debs's conviction in an opinion written by Justice OLIVER WENDELL HOLMES. Although Holmes conceded that "the main theme" of Debs's speech had concerned socialism, its growth, and its eventual triumph, he argued that "if a part of the manifest intent of the more general utterance was to encourage those present to obstruct recruiting . . . the immunity of the general theme may not be enough to protect the speech." As Harry Kalven has remarked, "It is somewhat as though George McGovern had been sent to prison for his criticism of the [VIETNAM] war." Holmes saw the case as a routine criminal appeal; in a letter to Sir Frederick Pollock, Holmes referred to the *Debs* case, saying, "there was a lot of jaw about free speech."

Debs remained in federal prison long after the armistice. Although a convicted felon, he received the Socialist Party nomination for President in 1920 and nearly a million votes. President Wilson, in failing health and embittered by the war and its critics, refused to pardon Debs before leaving the White House in 1921. His successor, the Republican conservative WARREN G. HARDING, displayed greater compassion by granting the socialist leader a pardon.

MICHAEL E. PARRISH
(1986)

Bibliography

FREUND, ERNST 1919 The Debs Case and Freedom of Speech. *The New Republic,* May 3, 1919, p. 13. Reprinted in *University of Chicago Law Review* 40:239–42 (1973).

## DECISION

A decision is the final determination by a competent tribunal of matters of law and fact submitted to it in a CASE OR CONTROVERSY. The decision is ordinarily in writing and comprises the JUDGMENT or decree in the case. The decision is not itself law, but only evidence of the law; and the value of a case as precedent derives less from the decision than from the reasoning behind the decision. The term "decision" is one of popular usage and not a technical legal term.

The Supreme Court reaches its decisions in CONFERENCE following the ORAL ARGUMENT of a case. A vote is taken after each Justice has had a chance to state his or her views. The decision is announced by means of a memorandum order or as part of a formal opinion.

In casual usage, the decision is often confounded with the OPINION OF THE COURT, a usage sanctioned by certain law dictionaries and a number of court opinions. In precise usage, however, the decision is the conclusion reached by the court, while the opinion is a statement of the reasoning by which the decision was reached. In the simplest terms, the decision answers the question: who won the case.

DENNIS J. MAHONEY
(1986)

## DECLARATION AND RESOLVES OF FIRST CONTINENTAL CONGRESS

See: First Continental Congress, Declarations and Resolves of

## DECLARATION OF INDEPENDENCE
1 Stat. 1 (July 4, 1776)

America's most fundamental constitutional document was adopted by the United States in Congress on July 4, 1776. The Declaration of Independence may carry little weight in the courts; it may, for all its being placed at the head of the *Statutes at Large* and described in the United States Code as part of the "organic law," have no legally binding force. Yet it is the Declaration that constitutes the American nation. John Hancock, president of the Continental Congress, transmitting the Declaration to the several states, described it as "the Ground & Foundation of a future Government." JAMES MADISON, the Father of the Constitution, called it "the fundamental Act of Union of these States."

The Declaration of Independence is the definitive statement for the American policy of the ends of government, of the necessary conditions for the legitimate exercise of political power, and of the SOVEREIGNTY of the people who establish the government and, when circumstances warrant, may alter or abolish it. No mere tract in support of a bygone event, the Declaration was and remains the basic statement of the meaning of the United States as a political entity.

The historical event, the Revolution, provided the occasion for making that statement. RICHARD HENRY LEE, on instructions from the Virginia convention, introduced three resolutions on June 7, 1776: to declare the colonies independent, to establish a confederation, and to seek foreign alliances. Each of the resolutions was referred to a select committee, one of which was charged with preparing "a declaration to the effect of the first resolution." Lee's motion was adopted on July 2, the Declaration two days later.

Although the Congress had appointed for the task a distinguished committee, including JOHN ADAMS of Massachusetts, BENJAMIN FRANKLIN of Pennsylvania, ROGER SHERMAN of Connecticut, and ROBERT LIVINGSTON of New York, THOMAS JEFFERSON of Virginia actually penned the Declaration. So well did Jefferson express the sentiments of the Congress that his committee colleagues made only a few changes in his draft.

Jefferson, by his own account, turned to neither book nor pamphlet for ideas. Nor did he seek to expound a novel political theory. His aim was to set forth the common sense of the American people on the subject of political legitimacy. To be sure, there are ideas, and even phrases, that recall JOHN LOCKE: the Declaration follows Locke in stressing the NATURAL RIGHTS of man as the foundation of the political order. But the concept of man's natural autonomy, modifiable only by his consent to the rule of others in a SOCIAL COMPACT, was long acknowledged in the American colonies; it inhered in congregational church polity, and it was transmitted through such theoretical and legal writers as EMERICH DE VATTEL, Jean-Jacques Burlamaqui, and Samuel Pufendorf, as well as by the authors of CATO'S LETTERS and other popular works.

The Declaration of Independence has a structure that emphasizes its content. It begins with a preamble, by which the document is addressed not to the king of Great Britain or to the English public, but to the world at large, to the "opinion of mankind." Moreover, the purpose of the document is said explicitly to be to "declare the causes" that impelled the Americans to declare their independence from Britain.

There had been other revolutions in British history, but this one was different. From the barons at Runnymede to the Whigs who drove James II from the throne, British insurgents had appealed to the historic rights of English-

men. The declarations they extracted—from MAGNA CARTA to the BILL OF RIGHTS—were the assurances of their kings that the ancient laws obtaining in their island would be respected. The preamble of the Declaration of Independence makes clear that this is not the case with the American Revolution. The case of Britain's rule in America was to be held up to a universal standard and exposed as tyrannical before a "candid world." Against the selfsame standard all government everywhere could be measured. Everyone who reads the Declaration with his eyes open must be struck by this fact: the Declaration justifies the independence of the American nation by appeal not to an English or an Anglo-American standard, but to the universal standard of human rights.

There follows next a statement of the ends of government and of the conditions under which obedience to government is proper. "All men are created equal . . . endowed by their Creator with certain unalienable rights . . . among [which] are life, liberty, and the pursuit of happiness." Equality is the condition of men prior to government—logically prior, not chronologically. But that equality is not equality of condition, or even equality of opportunity; certainly it is not equality of intelligence, strength, or skill. The equality that men possess by nature is equality of *right*. There is, among human beings, none with a right to rule the others; God may claim to rule human beings by right, human beings may rule the brutes by right, but no human being has a claim to rule another by right.

The rights with which men are endowed are said to be "unalienable." That is, human rights may be neither usurped nor surrendered, neither taken away nor given up. The Declaration rejects the false doctrine of Thomas Hobbes (more gently echoed by WILLIAM BLACKSTONE) that men on entering society and submitting to government yield their natural rights and retain only "civil" rights, dispensed and revoked at the pleasure of the sovereign.

"To secure these rights, governments are instituted among men." The purpose of government is to protect the natural rights which men possess, but which, in the absence of government, they are not secure enough to enjoy. Government in society is not optional, it is a necessary condition for the enjoyment of natural rights. But the institution of government does not create an independent motive or will in society. All just powers of government derive "from the consent of the governed."

The Declaration asserts that the people retain the right of revolution, the right to substitute new constitutions for old. But it also asserts that the exercise of that right is properly governed by prudence—a prudence that the Americans had shown in the face of great provocation.

The next section of the Declaration is a bill of indictment against George III on the charge of attempted tyranny. The specifications are divided almost evenly between procedural and substantive offenses. The fact that the king—by his representatives in America—assembled the provincial legislatures at places far from their capitals or required persons accused of certain crimes to be transported to England for trial, evinced a tyrannical design by disregard of procedural safeguards. But even when the established procedures were followed, as in giving or withholding assent to legislation, the result could be tyrannical; for example, the suppression of trade, the discouragement of population growth, and the keeping of standing armies in peacetime were acts according to the forms of due process that unjustly deprived the Americans of their liberty. Still other acts, such as making the royal assent conditional on surrender of the right of representation and withholding assent from bills to create provincial courts, were tyrannical in both form and substance.

The most critical charge, the thirteenth, was that the king had conspired with others—the British Parliament—to subject the Americans to a JURISDICTION foreign to their constitution. The Americans had come to see that a compact existed between the British king and each of his American provinces by which the king exercised executive power in each even as he did in the home island, and that the common executive was the sole governmental connection between America and Britain. The imperial constitution, as the Americans had come to understand it, no more permitted the British legislature to regulate the internal affairs of Massachusetts or Virginia than it did the provincial legislatures to regulate the internal affairs of England or Scotland. But the British legislature could not breach the compact between the king and the provinces because Parliament was not a party to that compact. The king, however, by conniving at that usurpation, did breach the compact.

The final five accusations deal with the fact that Britain and America were at war. One charge that Jefferson included, but Congress struck out, accused the king of waging "cruel war against human nature itself" by tolerating the introduction of SLAVERY into the colonies and sanctioning the slave trade. Only two states, Georgia and South Carolina, objected to the passage, but the others acquiesced to preserve unanimity. In any case, the condemnation of slavery was implicit in the opening paragraphs of the Declaration.

The conclusion of the document asserts that the Americans had tried peaceably to resolve their differences with the mother country while remaining within the empire, and in a final paragraph contains the actual declaration that the erstwhile colonies were now independent states.

Whether the colonies became independent collectively or individually was a matter of debate for at least a hundred years. At the CONSTITUTIONAL CONVENTION OF 1787,

JAMES WILSON, and ALEXANDER HAMILTON advanced the former position, while LUTHER MARTIN maintained the latter position. At least until the Civil War, different THEORIES OF THE UNION arose based on differing interpretations of the act of declaring independence.

Considered as a tract for the times, as a manifesto for the Revolutionary cause, the Declaration marks an important step in American constitutional development. The resistance to British misrule in America had, at least since the French and Indian Wars, been based on an appeal to the British constitution. The Americans had charged that the imposition of taxes by a body in which they were not represented and the extension to them of domestic LEGISLATION by a Parliament to whose authority they had not consented violated the ancient traditions of British government. The constitution, that is, the arrangement of offices and powers within the government and the privileges of the subjects, had been overridden or altered by the British Parliament. Although the differences between the American provinces and the mother country were great, they were differences about, and capable of resolution within, the British constitutional framework. The liberties that the colonists had claimed were based on prescription.

When independence was declared, the British constitution became irrelevant. The liberties claimed in the Declaration are grounded in natural law; they are justified by reason, not by historical use. The American Revolution was, therefore, the first and most revolutionary of modern revolutions. Not the quantity of carnage but the quality of ideas distinguishes the true revolution. In the Declaration was recognized a HIGHER LAW to which every human law—constitution or statute—is answerable. The British constitution, as it then existed, was tried by the standards of that higher law and found guilty of tyranny. As the British constitution, so every constitution, including the American Constitution, may be tried; and on conviction the sentence is that the bonds of allegiance are dissolved.

Much of American constitutional history has revolved around the attempt to reconcile the nation's political practice with the teachings of the Declaration. The gravest problem in our constitutional history was SLAVERY. Although the Congress struck out Jefferson's condemnation of slavery as "cruel war against human nature," the founders clearly understood that slavery was incompatible with the principles of liberty and equality that they espoused.

Chief Justice ROGER B. TANEY, in DRED SCOTT V. SANDFORD (1857), tried to read the black man out of the Declaration. But this was a distortion of the history and the plain meaning of the document. Even JOHN C. CALHOUN had not stooped to this, choosing rather to denounce the Declaration than to pervert its meaning. The antithesis between the Declaration and the existence of chattel slavery was recognized by the slave power in Congress when, during the gag rule controversy, any petition referring to the Declaration of Independence was automatically treated as a petition against slavery and laid on the table.

The intimate connection between the Declaration of Independence (and therefore of antislavery) and the Constitution became the theme of the political career of ABRAHAM LINCOLN. When the slavery question divided the nation, Lincoln, with the voice of an Old Testament prophet, called for rededication to the principles of the Declaration. During Lincoln's presidency, the Civil War, begun as a challenge to the Union, was won as a struggle to vindicate the Declaration of Independence. It was fought to prove that a nation "dedicated to the proposition that all men are created equal" could endure.

The putative antagonism between America's two basic documents, invented by the slave power in the nineteenth century, was revived as a political theme during the Progressive movement. Authors like J. ALLEN SMITH and CHARLES A. BEARD contended that the Constitution's system of FEDERALISM, SEPARATION OF POWERS, CHECKS AND BALANCES, and bicameralism frustrated the unfettered will of the people allegedly set free by the Declaration. Smith and Beard posited a virtually bloodless coup d'état by wealthy conservatives—a "Thermidorian reaction" to the success of the democratic revolution. Thus constitutional forms were attacked as illegitimate, notwithstanding that they were intended to preserve the Declaration's regime of LIMITED GOVERNMENT.

The Beard-Smith thesis remained popular as long as the Constitution seemed to be a barrier to social reform and redistribution of wealth and income by the government. The later twentieth century, however, witnessed another change in the attitude of intellectuals toward the two documents. President FRANKLIN D. ROOSEVELT appointed a sufficient number of Supreme Court Justices to insure that the Court would ratify his policies as constitutional. Later, the WARREN COURT devised a host of new "constitutional" rights and remedies for criminal defendants, ethnic minorities, and political dissenters. The Constitution was transformed into a "living" document, that is, one almost infinitely malleable in the hands of enlightened judges. History, understood as progress, rather than nature thereafter dictated the ends of government. The Declaration of Independence, with its references to "the laws of nature and of nature's God," although revered as a symbol of American nationality, ceased to be regarded as the source of authoritative guidance for American politics.

The Constitution of the United States is sometimes pronounced, by scholars or politicians, to be neutral with respect to political principles. But the Constitution was not framed in a vacuum. It was devised as the Constitution of

the nation founded by the Declaration of Independence. The Declaration prescribes the ends and limits of government, and proclaims the illegitimacy of any government that fails to serve those ends or observe those limits. The Constitution is thus ruled by the Declaration. The Constitution provides for the government of the regime created by the Declaration: the regime of equality and liberty.

DENNIS J. MAHONEY
(1986)

Bibliography

BECKER, CARL L. 1922 *The Declaration of Independence.* Cambridge, Mass.: Harvard University Press.

DIAMOND, MARTIN 1975 The Declaration and the Constitution: Liberty, Democracy and the Founders. *The Public Interest* 42:39–55.

HAWKE, DAVID 1964 *A Transaction of Free Men: The Birth and Course of the Declaration of Independence.* New York: Scribner's.

JAFFA, HARRY V. 1959 The Universal Meaning of the Declaration of Independence. Chap. 14 of *The Crisis of the House Divided.* New York: Doubleday.

WHITE, MORTON 1978 *The Philosophy of the American Revolution.* New York: Oxford University Press.

## DECLARATION OF WAR

The Constitution gives Congress the power "to declare War . . ." (Article I, section 8, clause 11). There is no explicit provision for any other exercise by the United States of its sovereign power to make war, although the President is made "COMMANDER IN CHIEF of the Army and Navy of the United States . . ." (Article II, section 2). But the draftsmen were certainly familiar with the concept of undeclared war, usually with limited purposes and theaters of operation, such as the French and Indian War of 1754–1756 and the opening campaign of the Seven Years War between England and France, in which GEORGE WASHINGTON had fought as a lieutenant colonel. Indeed, ALEXANDER HAMILTON observed that "the ceremony of a formal denunciation [i.e., declaration] of war has of late fallen into disuse" (THE FEDERALIST #25). Whether the Framers intended to give Congress the paramount power to wage war against other sovereigns is a question that has ever since been debated but not formally resolved. The problem had not, of course, arisen under the ARTICLES OF CONFEDERATION, when all federal (or confederate) power was vested in the Continental Congress. The records of the CONSTITUTIONAL CONVENTION furnish no clear answer. The draft submitted by the Committee on Detail on August 6, 1787, gave Congress the power "to make war." When it was considered eleven days later, on motion by ELBRIDGE GERRY and JAMES MADISON, "make" was changed to "declare." The brief debate gives no indication of any effect the change was intended to have on the allocation of war-making power between President and Congress. For what it is worth, some years later Hamilton expressed the view that making war was essentially an executive function, while Madison thought the power belonged primarily to Congress.

Whatever the Framers may have intended, the practice has clearly been in accord with the Hamiltonian view. The United States has fought only five declared wars (the War of 1812, the Mexican War, the Spanish War, WORLD WAR I, and WORLD WAR II), but the President has committed the armed forces to combat on more than 150 other occasions, from JOHN ADAMS'S undeclared naval war with France in 1798–1799 to the KOREAN WAR and the VIETNAM WAR. (See also POLICE ACTION; STATE OF WAR.) The CIVIL WAR was, of course, undeclared, since a declaration would have constituted a recognition of Confederate SOVEREIGNTY, but it was treated as war for the purposes of international law. (See PRIZE CASES, 1863.) As a practical matter, whether a formal declaration of war adds much to the power of the President is doubtful, so long as Congress furnishes the necessary men and money. Thus, during the Vietnam War the lower federal courts held that Congress, by supplying troops and arms, made the President's actions constitutional; and the Supreme Court let their decisions stand. (See MASSACHUSETTS V. LAIRD.)

Congress has occasionally attempted to assert its primacy in war, but without much success. In 1896, when a group of congressmen proposed to declare war on Spain, GROVER CLEVELAND scotched the project by informing them that as Commander in Chief he had no intention of using the Army and Navy for any such purpose. The WAR POWERS RESOLUTION of 1973, enacted over President RICHARD M. NIXON'S veto, provides in substance that before the President can commit the armed forces to actual or potential combat he must first "consult" with Congress and must withdraw the forces within ninety days unless Congress declares war or provides "specific authorization" for their continued employment.

Scholars disagree on the constitutionality of the War Powers Resolution. In any case, it seems unlikely to have much practical effect, as President GERALD R. FORD demonstrated in 1975 when he immediately, and with a minimum of "consultation," used the armed forces to rescue an American vessel, the *Mayaguez,* and its crew, who had been seized by the communist regime in Cambodia. History suggests that it will be politically very difficult for Congress to deny support when the troops are actually fighting. If there is any historical difference between wars declared by Congress and other wars, it seems to be that

the former have usually been larger in scale and have had as their goal not some more or less limited objective, such as rescuing American citizens or defending an ally from attack, but the total defeat of the enemy.

JOSEPH W. BISHOP, JR.
(1986)

Bibliography

CRUDEN, JOHN C. 1975 The War-Making Process. *Military Law Review* 69:35–143.

LOFGREN, CHARLES A. 1972 War-Making Power under the Constitution: The Original Understanding. *Yale Law Journal* 81:672–702.

ROSTOW, EUGENE V. 1972 Great Cases Make Bad Laws: The War Powers Act. *Texas Law Review* 50:833–900.

## DECLARATORY JUDGMENT

Until the beginning of the twentieth century, most American courts would entertain lawsuits only when plaintiffs sought redress for harm already suffered or imminently threatened. Except in certain real property actions, the plaintiff was not deemed harmed simply because uncertainty about his or her legal rights made potentially beneficial conduct too risky to undertake. For example, if a manufacturer were uncertain about whether a new product would infringe another's patent, or a would-be demonstrator were uncertain whether the planned demonstration was protected under the FIRST AMENDMENT, the only choices were to refrain from acting or to proceed and wait to be sued or prosecuted.

The declaratory judgment is a judicial remedy that allows the uncertain individual instead to file suit, asking a court to determine the legal rights in question. It reflects the view, long accepted in land title law, that paralysis due to uncertainty is real harm that courts should alleviate.

Over the first decades of the twentieth century, the states and the federal government adopted this remedy by statute. Declaratory judgments came into use not only to eliminate uncertainty but also to provide a similar but less coercive remedy to individuals eligible for injunctive relief.

Under Article III, the life-tenured federal judiciary may not give ADVISORY OPINIONS but may hear only real disputes between adverse, concretely interested parties. Because declaratory judgments are typically sought in advance of liability-causing conduct, there were early doubts that declaratory judgment actions would satisfy this requirement, known as RIPENESS. To allay this concern, the drafters of the federal declaratory judgment statute limited the remedy to "case[s] of actual controversy within [the courts'] JURISDICTION."

The Supreme Court held in *Perez v. Ledesma* (1971) that, for reasons of comity, a person being prosecuted in a state court for violation of a state criminal law may not seek a declaratory judgment in a federal court that the law is unconstitutional. Prior to a state prosecution, however, an individual may obtain a federal declaration of constitutional rights. That individual may have to flirt so dangerously with actual prosecution in order to satisfy the ripeness requirement, however, that the declaratory judgment may not be able to perform its salutary function of encouraging constitutionally protected conduct.

The plaintiff in a declaratory judgment action is frequently the person who would be a defendant in a more traditional lawsuit, and the elements of a complaint for declaratory relief often differ from those of a more traditional complaint. In applying legal doctrines that antedated the declaratory remedy to this new form of litigation, courts sometimes require that the suit be transposed to what it would have been had the declaratory remedy not existed. Thus, in determining whether the right to TRIAL BY JURY exists in a suit for a declaratory judgment, the courts must ascertain whether the claim could have been filed as an action at COMMON LAW had the declaratory judgment not been invented. Similarly, in determining whether a suit arises under federal law within the meaning of the FEDERAL QUESTION statute, the courts must ascertain whether the federal element would have appeared in the plaintiff's *prima facie* case had the suit been brought for a conventional remedy. Unfortunately, there is not always only one conventional alternative to a given declaratory judgment action, and this cumbersome transposition process has been difficult to administer.

CAROLE E. GOLDBERG-AMBROSE
(1986)

Bibliography

NOTE 1949 Developments in the Law: Declaratory Judgments, 1941–1949. *Harvard Law Review* 62:787–885.

## DECONSTRUCTION

The topic of deconstruction and the Constitution arises chiefly because of work done since 1978 by the left-oriented scholars of the Conference on CRITICAL LEGAL STUDIES, who have applied modern continental critical theory, including literary theory, to Anglo-American law. The issues involved also descend from the rise of PRAGMATISM in American philosophy in the late nineteenth century and its influence on American JURISPRUDENCE via the skepticism of OLIVER WENDELL HOLMES, JR., and the later adherents of LEGAL REALISM. This dual ancestry is not coincidental. Deconstruction was popularized by the

French critical philosopher Jacques Derrida, especially in his 1974 book *Of Grammatology*. Though most influenced by Friedrich Nietzsche, Derrida also drew on a forebear of American pragmatism, Charles Peirce.

Like many pragmatists, deconstructionists take a radical stance toward the epistemological doubts that have occupied modern philosophy since Descartes. In their view, although the various ways in which human minds represent their experiences to themselves (from organic sensations to oral languages, to conventional writing) may bear some complex relationship to an external physical reality, they never provide a direct, unmediated grasp of it. The visual sensation of seeing the color "red," the sounds of the English adjective "red," and the written word "red" may somehow signify to us something that is really out there, but we cannot claim that our physical sensation or our oral or written terms are full or necessary representations of it. The something might cause different physical sensations in different individuals or sensory apparatuses, and certainly it can be signified by different sounds or written marks. All this is uncontroversial in most modern epistemologies.

What deconstructionists distinctively stress is that our sense of the meaning of our particular representations, our regard of those representations as signs for external somethings, is heavily dependent on the relationship of the representations or signs to some existing system of representations or signs. Obviously, the meaning readers of written English assign to the written marks "red" requires familiarity with the system of signs that is written English. The meaning speakers of English assign to the spoken sounds of "red" requires knowledge of English as a system of sound signs. Even the visual sensation we call "red" has its meaning for us only by reference to other sensations and to a system of terms that classifies and labels those sensations for us, a system that partly constitutes our knowledge of colors. The sensation, too, is for us a sign that gains much of its sense from a system of signs.

Deconstructionists therefore see all human experience as heavily defined and constructed by vast webs of signs that get their meaning more clearly from their relationship to other signs than from reality. We still presume that some such reality exists, that human minds have formed systems of signs to give reality a measure of order and meaning, and that reality can somehow prompt sensations in us that may persuade us to revise the signs we use to depict it. But deconstructionists stress that our choice of particular signs to represent reality is always in some measure arbitrary, influenced more by the preexisting set of signs available to us than any self-evident demands of external reality. Hence, we cannot have much confidence that any set of signs is an accurate representation of reality. All such systems are but partial interpretations, discernibly built out of other partial interpretations that at best show aspects of the world, and those through a glass darkly.

Yet we persist in taking our interpretations, our systems of signs, to be something more. We present them to ourselves (or they present themselves to us) as reliable windows or maps revealing an external reality of matter andor reason that can be rendered present to our minds and senses. Like Nietzsche and the pragmatists, deconstructionists urge us to abandon this old dualistic "metaphysics of presence," in which we try to pierce through our mental limitations to grasp fully an external truth beyond. Instead, we should admit that our world of experience is *always* composed largely of questionable interpretations, partial perspectives, and contingent systems of signs. We should therefore turn inquiry away from the "reality" for which signs allegedly stand, toward a greater understanding of the components, possibilities, and limitations of systems of signs. The world will then be seen as sets of signs or texts, melding philosophy and other modes of inquiry into literary theory.

Deconstruction is one means toward a better understanding of these texts. One deconstructs something—a novel, a treatise, a law, a political institution—by viewing it as a system of signs and unraveling it to reveal its reliance on preexisting systems of signs to make it meaningful; its consequent vulnerability to multiple meanings, depending on which of the systems of signs it incorporates, is stressed, along with its embodiment of those systems' biases and of the contradictions within them and among them, and thus its inevitable incompleteness and incoherencies. To be sure, one may also find insights that seem worth preserving. But ultimately one can always show any text to be another partial, ambiguous system of signs constructed out of other such systems.

Unlike the early scientific resolutive-compositive method of inquiry, moreover, the point of deconstruction is not to give us a fuller understanding of how the object of analysis functions while otherwise leaving it intact after we mentally reconstruct it. Deconstruction always invalidates much of what a text initially appeared to do or say, altering our sense of it. We may then strive to construct new accounts of the text's themes that are more comprehensive because they encompass what we have learned; but those accounts will ultimately remain partial interpretations.

The appeal of all this for critical scholars in Anglo-American law should be clear. National legal systems can plausibly be viewed as systems of signs for which people make strong claims. They are said to have considerable internal coherence and to be largely accurate representations of external social and political worlds and of appropriate moral principles. Those claims seem integral to

a legal system's very legitimacy. But, via deconstruction, one can often show that many legal terms derive from preexisting discourses identified with particular ruling groups and that they express those groups' interests more clearly than they express any objective moral principles. Legal language can also be shown to be subject to multiple inconsistent interpretations, depending on which elements are stressed. Thus, the law may seem indeterminate or incoherent, gaining definition only from those who wield enough power to make their interpretations stick.

Critical legal scholars have deconstructed the doctrines of judicial and ADMINISTRATIVE LAW in numerous areas of American law, such as contracts, property, and criminal law, in just these ways. At times, however, they have moved too quickly to two types of conclusions that represent shallow readings of the implications of deconstruction. Some align deconstruction with Marxism, attempting to show that legal doctrines at bottom express capitalist class interests rooted in material relations of production. Such readings have some force, but in deconstructionist terms they do not go far enough unless they concede that the various Marxisms are but further systems of signs and that Marxist claims to have grasped the truth of external material reality are highly vulnerable to deconstructionist debunking. Other critical legal scholars write as if the American legal system is peculiarly guilty of insuperable internal contradictions and ambiguities, implying that a system ordered on different principles would overcome these problems. But again deconstruction suggests that although there are more or less encompassing interpretations, all systems of signs will always be vulnerable to demonstrations of their inadequacy.

These points can be exemplified by showing how we might begin deconstructing the Constitution. Its PREAMBLE says that "We the People of the United States" are ordaining and establishing the document. Those words seem to assume a traditional understanding of flesh-and-blood persons consciously using words as authoritative signs, accurately representing themselves and their thoughts and giving new order to their lives.

But deconstructing interpreters can challenge that picture in all the ways just suggested. "We the People" is, after all, plainly a kind of metaphor: no reader really thinks all the people of the United States directly established the Constitution. Interpreters can easily show, moreover, that the text's terms, derived largely from the discourse of American elites, treat many as virtually invisible nonpeople (e.g., indentured servants, women, African Americans, Native Americans, all of whom the document relegates to lesser categories, explicitly or implicitly). Thus, deconstruction might first suggest that the Constitution is a misleading, biased creation of elites alone, as leftist critics assert.

Next, one can deconstruct the Constitution to display internal dissonances. For instance, in contrast to the Preamble, the last article of the original Constitution (Article VII) indicates that the Constitution must be ratified by nine state conventions. Here the Constitution seems established more by a supermajority of the states, or of these state conventions, than by "We the People." Wrestling with whether the text finally describes itself as a product of the national populace or the states has long led analysts to conclude that it is opaque or inconsistent, incapable of constituting a government without added meaning supplied by its interpreters. If so, it is less a constitution than it purports to be.

Deconstruction of "We the People" can be taken still deeper yet. We might question how much of its meaning derives from reference to *any* flesh-and-blood inhabitants of the United States, then or now, be they a national populace, ruling elites, or state citizens. For some readers, the opening words actually summon up thoughts of Founding Fathers who are plainly not all "the People," but a few, and whose identities are provided much more by enduring national myths than any perceptions of the Founders' physical reality. Insofar as readers do think of "the People," moreover, they are likely to imagine the type of entity portrayed in certain traditions of political writing and novels—a heroic demos of anti-aristocratic republicans, unified by a general will and acting as a collective moral agent capable of political transformations. That may be a stirring image, but it is one expressing knowledge of certain systems of signs, not of the particular persons living in the United States in 1787–1789.

The power of those political traditions in shaping our reading of the Constitution suggests in turn that these systems of signs are actually providing much of the Constitution's meaning that the text purports to derive from "the People." If so, the most fundamental political claim of the Constitution, the claim that it is the creation of responsible human agents who are guiding their own collective destiny, may appear to be a myth. The Constitution now seems much more a set of signs drawn from other systems of signs that constituted the consciousness of "We the People" than a law created by "We the People." In short, deconstruction of "We the People" can lead us to think of political agency in a different way, a subjectless way that is sharply opposed to what the text initially seemed to suggest.

There is something to be learned from each of these three deconstructionist readings of the Constitution, culminating in this challenge to meaningful human agency itself. Yet we should also recall that the partiality of every existing interpretation does not by itself show that they are all simply false. The existence of contradictions in a text or a body of laws does not alone prove that its essential

themes are indefensible. And the dependence of our minds on the many systems of signs that order our worlds of experience does not prove that we cannot play a significant role in coming to understand those worlds somewhat better and in reordering them beneficially.

Like the "cynical acid" concerning the determinacy of legal rules and factual judgments that the legal realists earlier provided, deconstruction simply renders certain particular claims of these sorts less credible. It does not prevent us, after encompassing the insights it provides us, from going on to construct systems of ideas and institutions that seem more satisfactory than their predecessors, albeit still imperfect. Nor does it tell us much about how such constructive efforts should proceed. Thus, deconstruction itself represents but a partial contribution to understanding the Constitution and judging what it can and should mean, how and whether it can and should work, today and in the future.

ROGERS M. SMITH
(1992)

(SEE ALSO: *Political Philosophy of the Constitution.*)

Bibliography

DERRIDA, JACQUES 1974 *Of Grammatology*, trans. Gayatri Spivak. Baltimore: Johns Hopkins University Press.

KELMAN, MARK 1987 *A Guide to Critical Legal Studies.* Cambridge, Mass.: Harvard University Press.

NIETZSCHE, FRIEDRICH 1966 *Beyond Good and Evil: Prelude to a Philosophy of the Future*, ed. Walter Kaufmann. New York: Random House.

## DE FACTO/DE JURE

De facto and de jure are old COMMON LAW terms meaning, respectively, "in fact" and "in law." In older usage, de facto carried at least a hint of reference to illegitimacy or illegality. Thus, a usurper might be called a de facto king, or a corporation whose formation was irregular might be called a de facto corporation. As these examples suggest, the connotation often was that for some legal purposes the person or institution would be treated *as if* there were no irregularity. De jure, on the other hand, carried a suggestion of lawfulness or rightfulness.

In modern constitutional law, these terms have come to be used almost exclusively in the context of racial SEGREGATION, and particularly segregation in the public schools. In this context the connotations concerning lawfulness are reversed. De jure segregation refers to the separation of pupils by race resulting from deliberate action by state officials, such as the legislature or the school board. De facto segregation refers to the racial separation of pupils by other causes, and particularly through the adoption of the "neighborhood school" policy in a community characterized by residential separation of the races. The Supreme Court has held that only de jure segregation violates the Constitution. (See COLUMBUS BOARD OF EDUCATION V. PENICK; DAYTON BOARD OF EDUCATION V. BRINKMAN.)

There is some artificiality in this distinction. When a school board's members are aware of racial patterns in residential neighborhoods, and they draw school attendance district lines in ways that do not minimize the racial separation of pupils, it would not do violence to the language to call the results of their action de jure segregation. Yet the courts tend not to "find" the "fact" of de jure segregation in this circumstance.

On the other hand, deliberately segregative actions of the school board in the rather distant past may be held to constitute de jure segregation, so that the school board remains under a continuing obligation to dismantle a "dual" (segregated) system by taking affirmative remedial action, such as the busing of children. The *Columbus* and *Dayton* cases that are cited above exemplify this line of reasoning.

KENNETH L. KARST
(1986)

(SEE ALSO: *Keyes v. School District No. 1; School Busing; Swann v. Charlotte-Mechlenburg Board of Education.*)

Bibliography

SEDLER, ROBERT ALAN 1979–1980 The Constitution and School Desegregation: An Inquiry into the Nature of the Substantive Right. *Kentucky Law Journal* 68:879–969.

## DEFAMATION

See: Libel and the First Amendment

## *DEFUNIS v. ODEGAARD*
### 416 U.S. 312 (1974)

DeFunis challenged the constitutionality of the University of Washington law school's use of racial preferences in admitting students. The case was expected to be a decisive test for AFFIRMATIVE ACTION programs in higher education. Instead, by a 5–4 vote, the Supreme Court held that the case was moot, because the law school would graduate DeFunis at the end of the current term, however the case might be decided. Cynics, remembering how the Court had recently dealt with the argument of MOOTNESS in ROE V. WADE (1973), suggested that the majority had been readier to reach the merits of the ABORTION issue in *Roe* than it was to face the problem presented by *DeFunis.*

Justice WILLIAM O. DOUGLAS, who thought the case was not moot, wrote an opinion on the merits. He concluded that the law school had denied DeFunis, a nonminority applicant, the EQUAL PROTECTION OF THE LAWS by awarding a preference solely on the basis of race. Justice Douglas commented that minority applicants should be evaluated specially to avoid cultural bias in admissions, but he did not explain how a school could evaluate minority applicants separately without devising a scale to measure them against other applicants. Such a scale would necessarily involve setting goals for minority representation. *DeFunis* was Justice Douglas's last chance to speak to these issues, which returned to the Court in REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978), after his retirement.

KENNETH L. KARST
(1986)

## *DE JONGE v. OREGON*
299 U.S. 353 (1937)

The Oregon Criminal Syndicalism Law was declared unconstitutional as applied to a person who conducted a meeting of the Communist party at which "neither CRIMINAL SYNDICALISM nor any unlawful conduct was taught or advocated." The Supreme Court held that peaceful speech at a peaceful, open meeting could not be punished constitutionally simply because of party sponsorship even if it were assumed that the party advocated violent overthrow of government. "Peaceable assembly for lawful discussion," declared Chief Justice CHARLES EVANS HUGHES for an 8–0 Court, "cannot be made a crime."

This is one of the early cases "incorporating" the FREEDOM OF SPEECH and FREEDOM OF ASSEMBLY provisions of the FIRST AMENDMENT into the DUE PROCESS clause of the Fourteenth Amendment, thus making them binding on the states. Unlike many other speech cases of the 1920s and 1930s, *De Jonge* rests firmly on freedom of speech rather than on collateral due process grounds such as VAGUENESS. It also foreshadows later, not altogether successful, attempts by the Court to distinguish between those Communist party members and activities devoted to constitutionally protected advocacy and those implicated in incitement to revolutionary violence.

MARTIN SHAPIRO
(1986)

## DELEGATION OF POWER

Early in American constitutional history the Supreme Court announced a rule that Congress could not delegate its power to the President or others. Yet the practical demands of an increasingly complex governmental environment have forced Congress to delegate, often quite broadly. The Court has rationalized all but a few delegations without abandoning the rule of nondelegation. This has been accomplished through successively more permissive formulations of the rule. Though the rule is in a state of desuetude, some revival is possible in the aftermath of the Court's invalidation of a LEGISLATIVE VETO in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983).

A few commentators call the rule against delegations a judge-made doctrine lacking genuine constitutional status. This suggests the untenable proposition that genuine rules of constitutional law must be explicit in the constitutional document. Building on a COMMON LAW maxim against redelegation of delegated authority and on JOHN LOCKE's observation that only the sovereign people can determine the legitimate location of legislative authority, most commentators have found nondelegation implicit in the SEPARATION OF POWERS and in concepts of representative government and DUE PROCESS OF LAW. The status of the rule thus secured, debate has concentrated on exactly what it prohibits.

As if the rule prohibited all delegations, nineteenth-century judges tried to reconcile it with the practical needs of government by denying that delegations in fact were delegations in law. In *The Brig Aurora* (1813) the Supreme Court held that Congress had not breached the rule by empowering the President to make factual finding on which the application of a previously declared congressional policy—an embargo—was contingent. In *Wayman v. Southard* (1825) the Court permitted a delegation to federal judges for "filling up the details" of part of the Federal Process Act of 1792. Though the rules announced in these cases were modest when stated in the abstract, the delegations themselves were the objects of acrimonious political conflict. By the early 1900s, power to declare facts and fill up details had become the foundation for the delegation of such discretionary authority to the President and administrative agencies as power to decide which grades of tea to exclude from import, to make rules regulating grazing on lands in national forests, and even to vary tariffs on imported goods.

In J. W. HAMPTON & COMPANY V. UNITED STATES (1928) the Court formulated a more realistic delegation doctrine when it acknowledged that transfers of discretionary authority were essential to the effectiveness of Congress's will in modern conditions. The new rule was that congressional delegation is permissible if governed by adequate "legislative standards," a term that now includes statutory specifications of facts to be declared, preambulatory statements of legislative purpose, and even judicial imputations of legislative purpose inferred from legislative and administrative history.

The Court has rarely taken the standards requirement

seriously. Illustrative of a pattern that prevails to the present, *Federal Radio Commission v. Nelson Brothers* (1933) found adequate guidance for issuing radio station licenses in what Congress called the "public convenience, interest, and necessity." This pattern was interrupted when the Court unexpectedly used the delegation doctrine against the NATIONAL INDUSTRIAL RECOVERY ACT (1933) in PANAMA REFINING COMPANY V. RYAN (1935) and SCHECHTER POULTRY CORPORATION V. UNITED STATES (1935). But the spirit of these decisions was not to survive, and by the middle of World War II the Court had returned to using the delegation doctrine more for rationalizing than for limiting transfers of congressional power.

As if delegations were not broad enough, the Court in *United States v. Mazurie* (1975) suggested an even more permissive approach. UNITED STATES V. CURTISS-WRIGHT EXPORT CORPORATION (1936) had seemed to hold that because the President had independent powers in the field of FOREIGN AFFAIRS, the standards requirement for congressional delegations to the President could be relaxed in that area. At a time when *Panama* and *Schechter* had recently limited the scope of delegated power, *Curtiss-Wright* was a reasonable move toward flexibility in foreign affairs. But *Curtiss-Wright* featured an unorthodox theory of extraconstitutional or inherent governmental power, and the need for a special approach to foreign affairs delegations disappeared as the Court returned to its old permissiveness toward delegations generally. During the VIETNAM WAR, however, the nondelegation doctrine was raised in opposition to American policy, and, although the Court successfully avoided the issue, government lawyers invoked *CurtissWright* before congressional committees. One of these lawyers was WILLIAM H. REHNQUIST, who later led the Court to its first reaffirmation of *Curtiss-Wright*'s delegation doctrine in *Mazurie*, a relatively noncontroversial case involving a delegation to the tribal council of an American Indian tribe over liquor sales on a reservation. The tribe's council, said Justice Rehnquist, had "independent authority over tribal life," just as the President had over foreign affairs, and *Curtiss-Wright* was cited for a new rule that the standards requirement is "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." In light of what "less stringent" can mean today, *Mazurie* has a potential for rationalizing virtual abdications of congressional responsibility, not only to the President but to the states, whose legal claims to "independent authority" are stronger than that of Indian tribal councils.

Since the 1930s and with accelerated frequency after the Vietnam War, Congress used the legislative veto to recapture power lost through broad delegations. To the extent—perhaps modest—that regulatory and political conditions permit, Congress may choose to delegate more narrowly now that the legislative veto is unavailable. And if the Court really has renewed its commitment to the separation of powers, it may honor the standards requirement with something more than mere lip service.

SOTIRIOS A. BARBER
(1986)

Bibliography

BARBER, SOTIRIOS A. 1975 *The Constitution and the Delegation of Congressional Power.* Chicago: University of Chicago Press.

DAVIS, KENNETH C. 1958 *Administrative Law Treatise.* St. Paul, Minn.: West Publishing Co.

## DELEGATION OF POWER
(Update)

The delegation doctrine concerns Congress's power to give or delegate the rulemaking authority it has to the executive or judicial branches. In most of the cases involving the doctrine, litigants have challenged congressional delegation of rulemaking authority to ADMINISTRATIVE AGENCIES.

By the early 1980s the Supreme Court seemed to have a well-established position on the scope of Congress's power to delegate its rulemaking power. The Court held, as a matter of formal doctrine, that Congress could not delegate its power "to legislate," for such a delegation would violate the Constitution's command that "all legislative Powers . . . shall be vested in a Congress." But the Court also held that Congress could seek "assistance" from the other branches in exercising its LEGISLATIVE POWER and therefore could give the other branches authority to enact rules to "fill in" the details of congressional policy. Yet, although the formal doctrine purported to set some judicially enforceable limits on congressional delegations, the Court's application of the doctrine imposed virtually no limits on Congress's power to delegate rulemaking authority.

The Court's decisions held that to be constitutional a delegation must contain a congressionally adopted policy or set of "intelligible principles" to guide and confine the other branch in its rulemaking activity. The Court stated that such intelligible principles were necessary to ensure that the other branch merely implemented or filled in the details of policy that Congress had adopted. It also held that the standards were necessary to give the courts a means of measuring whether the other branch had complied with the scope of Congress's delegation and thus to measure whether the other branch had acted in conformity with the "will of Congress."

This delegation doctrine was virtually without force. With two exceptions in the 1930s, the Court found that all

of Congress's delegations contained sufficient intelligible principles. Many of the approved principles—such as "consistent with public convenience, interest and necessity" and "just and reasonable"—were so broad and vague that they gave the other branch seemingly unconfined discretion in exercising its rulemaking authority.

The Court's lenient, accommodating approach in applying the "intelligible principles test" led many commentators to charge that the Court paid mere lip service to the test and, as a result, failed to enforce a meaningful judicial limitation on Congress's delegations. Indeed, the Court's approach seemed to reflect a judicial judgment that congressional delegation of rulemaking authority is inevitable and desirable and that the difficulties of creating more restrictive constitutional rules or principles were greater than the benefits of doing so.

Then, in 1983, the Supreme Court did invalidate a congressional delegation of its decision-making power, and some thought that the Court might be signaling a stricter approach to delegation challenges. In IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983) the Court held that the one-house LEGISLATIVE VETO was unconstitutional. For over fifty years, some legislation delegating congressional authority to the executive branch had provided that specified executive action could be annulled by one house of Congress. In *Chadha*, for example, Congress delegated power to the ATTORNEY GENERAL to allow ALIENS to remain in the country, even though their visas had expired. The legislation delegating this power provided that either house of Congress could, nonetheless, overturn the attorney general's determination in a particular case by adopting a resolution. The attorney general allowed Chadha to stay after his visa expired, but the HOUSE OF REPRESENTATIVES passed a resolution ordering him to leave. Accepting that Congress has the power to set the terms for aliens to remain in the country, the Court ruled that setting or revising those terms was a legislative act and that Congress could exercise its legislative power only through legislation, which requires action by both houses and presentation to the President. Congress could not vest its legislative power in one of its own houses.

The *Chadha* majority did not consider the one-house veto as a delegation issue. But as Justice BYRON R. WHITE pointed out in dissent, *Chadha* in effect imposed a significantly more stringent limitation on Congress's power to delegate its authority than the Court had imposed in the preceding fifty years. Some thought that the Court's more stringent approach would be limited to congressional delegations to parts of Congress. Others speculated that *Chadha* might signal the Court's willingness to scrutinize all the delegations more closely, as some members of the Court, most notably Chief Justice WILLIAM H. REHNQUIST, have sometimes urged.

The Court has recently indicated that speculation about the broader implications of *Chadha* probably is not warranted. In two significant cases during the 1988 term, the Court reaffirmed its use of the intelligible principles test and emphasized its long tradition of upholding delegations in light of the need for flexibility in formulating and enforcing federal policy. In MISTRETTA V. UNITED STATES (1989), the Court upheld Congress's delegation of power to the Sentencing Commission to promulgate a new system of determinate sentences for federal crimes. And in *Skinner v. Mid-America Pipeline* (1989), the Court sustained Congress's delegation of power to the secretary of transportation to establish and collect pipeline-safety user fees. The pipeline case seems particularly significant because in an earlier decision the Court had seemed to suggest that it might employ greater scrutiny in testing the constitutionality of Congress's delegation of its power to tax. *Skinner* belies that suggestion.

The Court's approach in delegation cases can be contrasted with its approach in cases charging that Congress has appropriated the powers of another branch. In those cases, the Court is far less deferential. For example, in BOWSHER V. SYNAR (1986) the Court held that Congress acted beyond its authority in attempting to give "executive" power to the comptroller general, who is responsible to Congress, not the executive branch. The difference in judicial scrutiny may reflect a conclusion that JUDICIAL POWER need not be exercised to prevent one branch from giving away some of its powers but should be exercised to prevent one branch from usurping the powers of another. A branch can protect against relinquishing its own power simply by refusing to delegate; it must rely on the courts to prevent another branch from invading its domain.

Moreover, although the Court rarely invalidates congressional delegation of its rulemaking authority on constitutional grounds, the Court does require that such delegations be clearly made. Such a requirement protects against congressionally unauthorized rulemaking by the other branches. For example, in *National Cable Television Association v. United States* (1974), the Court held that the Federal Communications Commission overstepped its delegated authority in seeking to cover its administrative costs through user fees, noting that such fees could be viewed as taxes and that congressional delegations of its revenue-raising power should be "narrowly construed." As the *Skinner* case shows, Congress can delegate the power to collect revenue when it chooses to do so, but the Court will require a clear statement that such delegation is intended, lest the other branches intrude without permission into the congressional domain.

SCOTT H. BICE
(1992)

Bibliography

ARANSON, PETER H. et al. 1982 A Theory of Legislative Delegation. *Cornell Law Review* 68:1–67.

SYMPOSIUM 1987 The Uneasy Constitutional Status of the Administrative Agencies: Part 1, Delegation of Powers to Administrative Agencies. *American University Law Review* 36: 295–442.

## DELIBERATE SPEED

See: All Deliberate Speed

## DELIBERATIVE DEMOCRACY

Deliberative democracy aspires to combine two fundamental values in the design of political institutions— political equality and deliberation. The idea is to combine the equal consideration of everyone's views (political equality) with conditions that facilitate those views' being formed on the basis of good information, good faith discussion, and a balanced account of competing arguments (deliberation). Some theorists have held that the American Constitution has, from the beginning, been an attempt to create the social conditions where deliberative democracy might be possible, at least among representatives who speak for, or act for, the people.

JAMES MADISON, most notably, was committed to the "republican principle" (which entailed political equality) as well as to a scheme of government that would "refine the popular appointments by successive filtrations," as he said at the CONSTITUTIONAL CONVENTION OF 1787. The aspiration for deliberative democracy was famously expressed by Madison in FEDERALIST No. 10, where he said representatives "refine and enlarge the public views by passing them through a chosen body of citizens." ALEXANDER HAMILTON added, in *Federalist* No. 71, "The republican principle demands that the deliberate sense of the community should govern . . . but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests." It is representatives who must "withstand the temporary delusion" to "give time and opportunity for more cool and sedate reflection." The *Federalist* distinguishes deliberative public opinion, filtered through representatives considering the public interest on the basis of cool and sedate reflection, from the more direct expressions of the public will that can be twisted by vicious arts of campaigning and persuasion. Directly consulting the people can be dangerous because the people may be motivated by passions or interests to form factions adverse to the rights of others or to the general interest. Such factions are not motivated by deliberative public opinion, the Federalists believed. Indeed deliberation might well have prevented the evils of more DIRECT DEMOCRACY as experienced by the ancient Athenians. Madison speculates in *Federalist* No. 63 that a representative and deliberative body like the U.S. SENATE might have protected the Athenians from "decreeing to the same citizens the hemlock on one day and statues on the next." It was, after all, the Athenians who killed Socrates.

The Federalist position was that deliberative democracy could be practiced only in small representative bodies that preserved some independence from the public. No matter what the character of the participants, too large a body would make deliberative democracy impossible. "Had every Athenian citizen been a Socrates, every Athenian Assembly would still have been a mob," Madison asserts in *Federalist* No. 55. Madison also resisted attempts to include a "right of instruction" in the BILL OF RIGHTS, a right that would have stripped legislators of decisionmaking autonomy. Similarly, the Federalists opposed annual or even very frequent ELECTIONS in order to give legislators flexibility to deliberate in the public interest.

The ANTI-FEDERALISTS opposed the "filter" theory of REPRESENTATION because they thought that only the more educated and privileged would get to do the representing or filtering for everyone else. In such elite bodies, ordinary citizens such as simple farmers would not be included. The Anti-Federalists advocated a very different theory of representation, one modeled on a different metaphor, the "mirror." As Melancton Smith argued, in opposing the Constitution at the New York ratification convention, representatives "should be a true picture of the people, possess a knowledge of their circumstances and their wants, sympathize in all their distresses, and be disposed to seek their true interests." Anti-Federalists sought frequent elections, TERM LIMITS, and any measures that would increase the closeness of resemblance between representatives and those they represented. In Rhode Island, the Anti-Federalists even held a REFERENDUM on the Constitution. Tiny Rhode Island was the only state to submit the Constitution to direct vote of the people. The Federalists, thinking such a method inappropriate and sensing probable defeat, boycotted the referendum and the Constitution was voted down. The Federalists argued that the only way to consult "the people in their assembled collective capacity" would be to gather representatives who "could reason, confer and convince each other." Only through a small representative body, such as the state conventions prescribed for approving the Constitution, could a deliberative decision be taken. The Anti-Federalist strategy of consulting the public without a requirement of organized deliberation (although the Anti-Federalists did conduct their referendum through votes of town meetings) represented the first salvo in a long war of competing conceptions of democracy. In the long run, the Federalist emphasis on deliberation and discussion may well have lost out to a form of democracy, embodied in referendums and INITIATIVES, and in other forms of direct consultation

that achieve political equality—regardless of whether or not it is also accompanied by deliberation.

In the more than two centuries since the founding of the Republic, many changes, both formal and informal, in the American political system have served to promote political equality through more direct public consultation, but at the cost of deliberation. Consider what has happened to the ELECTORAL COLLEGE, the election of senators, the presidential selection system, the development and transformation of the national POLITICAL PARTY conventions, the rise of referenda (particularly in the Western states), and the development of public opinion polling. People vote directly and their votes are counted equally. Many aspects of Madisonian "filtration" have disappeared in a system that has taken on increasing elements of what might be called "plebescitary" democracy (embodied in referenda, primaries, and the influence of polls).

The Electoral College was originally intended to be a deliberative body, meeting state by state, that would choose the most qualified person. Now if members of the Electoral College exercise independent judgment, they are condemned as "faithless electors" and may be subject to challenge in the courts. Senators are elected directly since the SEVENTEENTH AMENDMENT (which came into effect in 1913). Primaries and referenda bring to the people decisions that were previously made by political elites—party leaders in the case of nominations and legislators in the case of laws. Public opinion polls bring substantive issues directly to the public (in representative samples) without any opportunity for "filtering" or deliberation.

Yet this movement to more direct consultation has come at a cost—a loss in the institutional structures that provide incentives for deliberation. Much SOCIAL SCIENCE RESEARCH has established that ordinary citizens suffer from "rational ignorance" (to use Anthony Downs's famous phrase). Each individual voter or citizen can see that his or her individual vote or opinion will not make much difference to policy outcomes, and so there is little reason to make the effort to become more informed. The result is a consistently low level of knowledge in the American electorate about politics and policy. Hence, the pursuit of political equality through increasingly direct methods of public consultation has produced a loss in political information, informed choice, and deliberation.

Some theorists have held that the Framers of the Constitution foresaw this problem from the beginning and, in the words of Yale Law School Professor Bruce Ackerman, developed a "dualist theory" of democracy. Most of the time the public is inattentive and uninformed, just as social science has established. Ackerman calls the resulting condition "normal politics." However, every once in a while, the Republic is seized by an issue or a crisis and there are sustained periods of "mobilized deliberation," which Ackerman calls "constitutional moments." Thus far, there have been at least three: the founding of the Republic, RECONSTRUCTION, and the NEW DEAL. In each case, deliberative democracy is practiced for a period long enough for fundamental principles to be seriously debated and established. The result is the possibility of informal constitutional change—informal because it takes place outside the confines of the formal amendment process specified in Article V.

The "constitutional moment" combines political equality and deliberation—for a "moment" or brief period of time. There are other efforts to realize both principles, at least for informal processes of public consultation that might advise policymakers and improve the public dialogue. "Deliberative Opinion Polling" selects random samples of the public and brings them together for several days of deliberation. The result is an explicit attempt to combine the two forms of representation at odds in the founding of the Republic: the filter and the mirror, the process of deliberation, and a small microcosm that is a picture of the whole. Through scientific random sampling a more representative group can be created than anything envisioned by the Anti-Federalists. And through sustained deliberation, the public's views can, in a sense, be refined and enlarged. All of this is to say that the quest to realize "deliberative democracy" continues in policymaking, the study of public opinion, and CONSTITUTIONAL INTERPRETATION.

JAMES S. FISHKIN
(2000)

(SEE ALSO: *Amending Process; Amendment Process (Outside Article V); Constitutional Dualism.*)

Bibliography

ACKERMAN, BRUCE A. 1991 *We the People: Foundations.* Cambridge, Mass.: Harvard University Press.

——— 1998 *We the People: Transformations.* Cambridge, Mass.: Harvard University Press.

BESSETTE, JOSEPH M. 1994 *The Mild Voice of Reason: Deliberative Democracy and the American National Government.* Chicago: University of Chicago Press.

DOWNS, ANTHONY 1956 *An Economic Theory of Democracy.* New York: Harper and Row.

FISHKIN, JAMES S. 1991 *Democracy and Deliberation: New Directions for Democratic Reform.* New Haven, Conn.: Yale University Press.

——— 1995 *The Voice of the People: Public Opinion and Democracy.* New Haven, Conn.: Yale University Press.

KRAMNICK, ISAAC 1988 The "Great National Discussion": The Discourse of Politics in 1787. *William and Mary Quarterly* 45:3–31.

MADISON, JAMES; HAMILTON, ALEXANDER; and JAY, JOHN 1987 *The Federalist Papers* (originally published 1788). New York: Penguin Books.

RAKOVE, JACK N. 1996 *Original Meanings: Politics and Ideas in the Making of the Constitution.* New York: Random House.
STORING, HERBERT J. 1981 *What the Anti-Federalists Were For.* Chicago: University of Chicago Press.
SUNSTEIN, CASS R. 1993 *Democracy and the Problem of Free Speech.* New York: Free Press.
——— 1993 *The Partial Constitution.* Cambridge, Mass.: Harvard University Press.

## *DELIMA v. BIDWELL*

See: Insular Cases

## DEMEANOR EVIDENCE

See: Confrontation, Right of

## DE MINIMIS NON CURAT LEX

(Latin: "The law does not concern itself with trifles.") It is a maxim of the COMMON LAW that the courts will not intervene in disputes where the substance of the controversy is insignificant. For example, a court will not hear a case that turns on an amount less than a dollar or a time period shorter than a day.

DAVID GORDON
(1986)

(SEE ALSO: *Cases and Controversies.*)

## DEMOCRACY

See: Communications and Democracy; Corporate Power, Free Speech, and Democracy; Deliberative Democracy; Democratic Theory and Constitutional Law; Direct Democracy

## DEMOCRATIC THEORY AND CONSTITUTIONAL LAW

Much of American CONSTITUTIONAL THEORY and law is concerned with the existence and significance of conflict between democracy and constitutionalism as implemented in this country. Democracy is often thought to be in conflict both with constitutionalism as a general matter and with the institutional implementation that Americans have largely come to identify with constitutionalism, JUDICIAL REVIEW.

Whether there is any inconsistency depends first on the nature of constitutionalism and the particular features of the constitution in question. At the very least a constitution is a set of rules that describe a structure of government, a way of making official decisions. The U.S. Constitution, like many others, is entrenched, which is to say that the ordinary legislative processes for which it provides are not empowered to change the Constitution itself. Congress, for example, may not provide in LEGISLATION that there shall be three senators from every state. Again like many others, the U.S. Constitution goes beyond prescribing a structure and places substantive limits on the power of the government it creates. The theory of constitutionalism is especially concerned with entrenchment and the hierarchical system of legal rules that produces it.

A constitution can conflict with democratic principles if it sets out a nondemocratic structure of government or if it sets out a democratic structure but limits the power of the government so created. The standard argument that the U.S. Constitution is undemocratic rests on a relatively simple concept of democracy, assuming that it consists of simple majority rule, either directly or through a representative legislature. By this test the constitutional structure itself is undemocratic because the U.S. SENATE and the ELECTORAL COLLEGE give disproportionate weight to the influence of voters in small states. Moreover, the ordinary government, itself only somewhat majoritarian, is subject to limits that can be overridden only through the even less-majoritarian AMENDING PROCESS of Article V. Amendment requires a SUPERMAJORITY of three- fourths of the states, so that even a small minority of the population can block constitutional change.

To the extent that the Constitution still protects state autonomy from national legislation it might be said to be undemocratic in one more way, because reserved state powers can block the decision of a national majority. Yet, clashes between local and national majorities present a problem concerning the definition of the relevant political community.

Whether there is really a conflict between the Constitution and democracy, however, depends on the content of democratic theory. Much of American constitutional commentary concerns the presence or absence of that conflict, and hence turns on the proper understanding of democracy. In particular, those who argue that constitutionalism and the U.S. Constitution do not actually conflict with democracy commonly appeal to a more sophisticated notion of democracy than the absolute rule of a majoritarian assembly. Three strategies of reconciling constitutionalism and democracy are especially important. Of those, two maintain that entrenchment and substantive limitations can provide prodemocratic corrections for the failings of ordinary representative government, while the third rejects an essentially procedural understanding of democracy.

According to the first such argument, representative as-

semblies are prone to make decisions that reflect the short-term but not the long-term views of their constituents. Seemingly undemocratic structures like BICAMERALISM and substantive limitations like the CONTRACT CLAUSE can respond to those tendencies. On this account such limitations are a form of collective self-binding, the standard example of which is Odysseus's strategy of having himself bound to the mast while he listened to the Sirens' song. Fearful of what they and their representatives may do in perilous economic times, for example, the people in a sober moment of constitution-making may adopt a provision like the contracts clause banning state impairment of contractual obligations, thus limiting the legislature's flexibility in times of crisis.

Whether such arrangements perform as designed is a question for political science. Whether they are consistent with democracy is a question for normative democratic theory. Three questions seem particularly important. First is the basic issue of establishing the power of decision when the people are divided. May a majority, or a supermajority, properly bind a minority? To the extent that democracy entails such binding, as in most conceptions it does, it is in an important sense collectivist, allowing the choices of individuals to be overridden by those of groups. Second are issues associated specifically with self-binding where the model is an action by one individual, for example, someone who puts the alarm clock on the other side of the room before going to bed. Whether such self-management techniques are actually desirable requires a surprisingly intricate investigation. It must be explained, for example, why the choices made by an individual at one time are more authentic than those made at another. Finally, because constitutions generally endure beyond the lives of those who make them, the claim that constitutional self-binding is consistent with democracy requires a theory in which the decisions of one group of citizens count as self-binding with respect to their successors.

Much has been said about the last question, the problem of the "dead hand." It becomes serious when there is a real question whether a self-binding limitation introduced into the constitution in the past would enjoy contemporary democratic support. If not, whether the constitution is consistent with democracy depends on the temporal dimension of democracy. According to some approaches, collective political entities are continuous for purposes of establishing political obligation, with the result that people alive today may legitimately be bound by the choices of their predecessors. The question of intertemporal political obligation was debated with particular vigor around the time of the U.S. Constitution's framing.

The second approach to reconciling constitutionalism and democracy rests on the claim that representative assemblies and other policymakers are apt to reflect the views of their constituents too little, not too much. Where the interests of agents and principals are different, the principals will want to take steps to check the power of their agents. A classic example involves political dissent. Incumbents in office have strong incentives to suppress dissent, for example by limiting the ability of outsiders to report on official misconduct. A strong law of SEDITIOUS LIBEL is one familiar way of accomplishing that end.

If the people are to rule, however, they must have information about the conduct of their agents and in particular must have information about official misconduct. They thus have interests very different from those of incumbents in office. One way of dealing with this divergence of interests is to take basic questions concerning the operation of the political process out of the hands of the ordinary legislature by resolving those questions in a constitution. Protections for FREEDOM OF SPEECH and FREEDOM OF THE PRESS are central examples.

As regulation of the political process moves beyond basic protection for political dissent it raises questions that must be referred to democratic theory. For example, many people believe that political influence will depend on personal wealth when the most effective means of access to public debate are controlled by private hands. Such disparities of influence are thought by some to be inconsistent with democracy. That conclusion has important implications for the rules governing political debate and hence for the constitutional entrenchment of such rules.

Finally, it is possible to reconcile familiar features of the U.S. Constitution with democracy by taking a nonprocedural view of democracy, one that breaks democracy's usual association with majority, or indeed popular, rule. One might think, for example, that the commitment to POPULAR SOVEREIGNTY really rests on a commitment to equality in certain substantive respects, so that what is more substantively egalitarian is more democratic. Whether a constitution is democratic, according to this theory, depends on that constitution's consonance with the deeper theory on which democracy itself rests.

This step is especially attractive if one is seeking to justify the substantive limitations in the U.S. Constitution that are now widely thought predominantly to protect political minorities. For example, constitutional antidiscrimination norms often provide such protection. Reconciling such norms with majoritarian democracy has posed a major problem for constitutional theory. If an important component of democracy is truly substantive, however, and if its substance is egalitarian, that problem of theory becomes much easier to solve. Nonprocedural conceptions of democracy, however, are quite controversial.

As the preceding discussion suggests, the potential inconsistency between democracy and an entrenched constitution is not tied to the particular enforcement mech-

anisms that any constitution may employ. Judicial review is not a necessary condition for that conflict. Nor is it a sufficient condition. A judiciary that somehow was confined to enforcing clear rules in a constitution that was itself democratic would raise no problems with respect to democracy. That would be true no matter how the judges were chosen and no matter how they could be removed.

Judicial review is potentially undemocratic to the extent that it puts the power of choice in the hands of judges. The supposed clash between democracy and judicial review is so prominent in American constitutional debate because it is so common for the judiciary to apply textually unclear constitutional provisions, or to apply principles that the judges have found to be implicit in the Constitution, in ways that appear closely to track the views of the judges as to desirable outcomes. When that happens constitutional adjudication resembles substantive policymaking whereby the judiciary displaces the decisions made by nonjudicial governmental actors. Because of their indirect selection and life tenure, American federal judges are frequently regarded as less accountable to the people than are elected officers.

As a result, judicial review as practiced in America encounters what ALEXANDER M. BICKEL called the countermajoritarian difficulty. Whether that difficulty is real depends first of all on the extent to which the courts make substantive choices. When they do, the question whether their decisions are likely to be less democratic than those of other governmental decisionmakers is once again one for political science and democratic theory. Leading attempts to solve the countermajoritarian difficulty generally rely on arguments that reconcile the Constitution itself with democracy. Thus Bickel argued that because of the institutional characteristics of the judiciary, substantive judicial choice will in certain important areas reflect the long-term views of the people better than will the output of the more directly electoral process. In a similar vein, John Hart Ely has sought to justify large parts of contemporary constitutional doctrine on the grounds that it enhances democracy by mitigating the agency problems associated with representative legislatures. Implicit in a position like Ely's is a claim concerning the institutional tendencies of courts: that they will in general produce the kinds of doctrines that reinforce, rather than hinder, democracy.

There are commentators who reject all such attempts to reconcile American constitutional practice with democracy and conclude that the conflict is irresolvable. Those who take that position often then say, so much the worse for constitutionalism, or so much the worse for democracy.

JOHN C. HARRISON
(2000)

Bibliography

AMAR, AKHIL R. 1991 The Bill of Rights As a Constitution. *Yale Law Journal* 100:1131–1210.

BICKEL, ALEXANDER M. 1962 *The Least Dangerous Branch.* Indianapolis, Ind.: Bobbs-Merrill.

DWORKIN, RONALD 1996 *Freedom's Law.* Cambridge, Mass.: Harvard University Press.

ELSTER, JON and SLAGSTAD, RUNE, eds. 1988 *Constitutionalism and Democracy.* New York: Cambridge University Press.

GOLDWIN, ROBERT A. and SCHAMBRA, WILLIAM A., eds. 1980 *How Democratic is the Constitution?* Washington, D.C.: American Enterprise Institute for Public Policy Research.

HART ELY, JOHN 1980 *Democracy and Distrust.* Cambridge, Mass.: Harvard University Press.

# DEMONSTRATION

The FIRST AMENDMENT guarantees the right of persons to congregate peaceably in large numbers in appropriate public spaces in order to communicate ideas or grievances. In *Edwards v. South Carolina* (1963) the Court described an assemblage of 187 protesters on the grounds of a state capitol as "an exercise of . . . basic constitutional rights in their most pristine and classic form." Mass demonstrations cannot be prohibited simply on account of their size or their need to occupy public land.

Constitutional litigation over demonstrations tends to focus on three issues. First is the question of what public spaces must be made available to demonstrators. By virtue of the number of persons involved, mass demonstrations can be disruptive of other activities even when the demonstrators remain peaceable and orderly. When must those other activities give way to the First Amendment claims of persons who wish to engage in a mass demonstration?

The Supreme Court has never given a definitive and comprehensive answer to that question, and probably never could. The Court has indicated, however, that demonstrations in PUBLIC FORUMS such as streets, sidewalks, and parks cannot be subjected to a blanket prohibition. On the other hand, the Court has upheld regulations that entirely prohibited demonstrations in a jailyard and in areas of a military base otherwise open to the public.

Second, the issue has arisen whether a demonstration can be prohibited or postponed on the ground that audience hostility to the demonstrators threatens to produce a BREACH OF THE PEACE. The Court has inveighed against any such "heckler's veto" in OBITER DICTUM, and has reversed disorderly conduct convictions of speakers who continued their orderly protests in the face of potentially threatening crowds. In language quoted many times in the United States Reports, the Court stated in TERMINIELLO V. CHICAGO (1949):

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Despite strong dicta and case outcomes favorable to speakers, it cannot be said with assurance that a hostile audience can in no circumstances provide a basis for disallowing a demonstration. The Court has yet to decide a case in which the regulatory authority was confined by a narrowly drawn statute and the police could not contain the HOSTILE AUDIENCE by the exercise of due diligence. There is also the unresolved question of whether demonstrators who wish to proceed in the face of a hostile audience have a First Amendment right to do so on repeated occasions, or whether at some point the mounting costs of police protection for the demonstrators might justify a prohibition on the continuation of their expressive activity.

A third set of issues that arise frequently in disputes over demonstrations concerns the doctrine of prior restraint. Demonstrators who wish to assemble in large numbers can be required to obtain permits in advance, despite the general presumption in First Amendment law against licensing. Officials who administer permit systems for marches and rallies are required to rule upon permit requests expeditiously, and to validate denials in court on a strict timetable. Thus, administrative delay is not permitted to serve as an indirect means of prohibiting mass demonstrations. If a permit request is under administrative or judicial consideration by the time a demonstration is scheduled to take place, the demonstrators may be permitted to proceed without a permit and defend against a prosecution on the ground that they exhausted all channels of prior approval and were entitled under the First Amendment to have their permit request granted. However, demonstrators who do not both apply for a permit and pursue all channels of appeal may be prosecuted for holding a march or rally without a permit, despite the fact that had they applied for a permit they would have been entitled under the Constitution to have it issued.

A fourth issue concerning demonstrations that has not generated a great deal of litigation to date but could do so in the future is whether persons who engage in mass demonstrations can be made to pay the costs of municipal services that attend the event. The Court has indicated in dictum that reasonable costs for such services as clean-up, police protection, and the provision of toilets can be assessed against the demonstrators. However, such assessments can be quite large for major events and can be used as a means of discouraging demonstrations. This issue of cost assessment was important in the litigations during the 1970s over the proposed march of American Nazis in the predominantly Jewish community of Skokie, Illinois, and could emerge as a focus of controversy in other cases.

VINCENT BLASI
(1986)

Bibliography

BAKER, C. EDWIN 1983 Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations. *Northwestern University Law Review* 78:937–1024.

BOLLINGER, LEE C. 1982 The Skokie Legacy: Reflections on an "Easy Case" and Free Speech Theory. *Michigan Law Review* 80:617–633.

## DENATURALIZATION

American CITIZENSHIP can be lost in two ways: denaturalization and EXPATRIATION. Denaturalization is the official cancellation, for cause, of a certificate of naturalization. It can be employed only against a person who has secured his citizenship by NATURALIZATION. Once denaturalized, a person is again an ALIEN in the eyes of the law; unlike the expatriate, he is considered never to have been a citizen. As an alien, the denaturalized former citizen is vulnerable to DEPORTATION and, in the case of a denaturalized criminal, to extradition.

Denaturalization, like naturalization, is governed by statute—currently, the Immigration and Nationality Act of 1952. Congress derives the implied power to denaturalize from its express power set forth in Article I, section 8, to "establish a uniform Rule of Naturalization." Congress has provided for denaturalization when a person's citizenship has been "illegally procured" or "procured by concealment of a material fact or by willful misrepresentation."

Denaturalization has been employed against naturalized citizens because of their membership in communist, Nazi, or other organizations espousing doctrines deemed antithetical to American allegiance. In such cases, the ground for denaturalization is that citizenship has been illegally procured because the applicant failed to comply with the statutory condition that he be attached to the principles of the American Constitution for the five years immediately preceding his naturalization. Also under the act, membership in such an organization within five years of naturalization is "prima facie evidence" of a lack of attachment prior to naturalization.

Denaturalization has also been employed against crim-

inals and racketeers (thereby rendering them subject to deportation), on the ground that they obtained their American citizenship by lying about their criminal past. In such a case, even though the courts have held that denaturalization proceedings are suits in EQUITY and are governed by the FEDERAL RULES OF CIVIL PROCEDURE, the government must prove that the naturalized citizen lied about his criminal past, and thus, in effect, must prove the crime. The Supreme Court has stated, however, that the government need not meet the usual standard of proof for criminal guilt, as the defendant is subject not to penal sanctions but only to denaturalization.

Recently denaturalization suits have also been brought against Nazi war criminals. The central issue in these cases has been falsification or concealment of objective facts about the person's past. Although the courts have been unanimous that the alleged misrepresentations must be material, they have disagreed over whether a misrepresentation is sufficiently material if the truth, which by itself would not have been sufficient to bar the granting of citizenship, would nevertheless have provided leads for uncovering facts of the person's past that would have precluded his naturalization.

Litigants sometimes challenge the constitutionality of denaturalization, arguing either that it reduces naturalized citizens to second class status (in that they can be stripped of citizenship on grounds and by procedures that cannot be applied to native-born citizens), or that Congress's power to naturalize does not carry with it the implied power to denaturalize. To date such arguments have proven unsuccessful.

RALPH A. ROSSUM
(1986)

Bibliography

GORDON, CHARLES and ROSENFIELD, HARRY N. 1984 *Immigration Law and Procedure*, Vol. 3, chap. 20. New York: Matthew Bender.

ROCHE, JOHN P. 1952 Statutory Denaturalization. *University of Pittsburgh Law Review* 13:276–327.

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

Eugene Dennis and other high officials of the Communist party had been convicted of violating the ALIEN REGISTRATION ACT of 1940 (the Smith Act) by conspiring to advocate overthrow of the government by force and violence. LEARNED HAND, writing the Court of Appeals opinion upholding the constitutionality of the act and of the conviction, was caught in a dilemma. He was bound by the Supreme Court's CLEAR AND PRESENT DANGER rule, and the government had presented no evidence that Dennis's activities had created a present danger of communist revolution in the United States. Hand, however, believed that courts had limited authority to enforce the FIRST AMENDMENT. His solution was to restate the danger test as: "whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." Because Dennis's conspiracy to advocate was linked to a grave evil, communist revolution, he could be punished despite the remote danger of communist revolution. Hand's restatement allowed a court to pay lip service to the danger rule while upholding nearly any government infringement on speech. If the ultimate threat posed by the speech is great enough, the speaker may be punished even though there is little or no immediate threat.

The Supreme Court upheld Dennis's conviction with only Justices HUGO L. BLACK and WILLIAM O. DOUGLAS dissenting. Chief Justice FRED M. VINSON'S PLURALITY OPINION adopted Hand's restatement of the danger rule. At least where an organized subversive group was involved, speakers might be punished so long as they intended to bring about overthrow "as speedily as circumstances would permit."

Justice FELIX FRANKFURTER's concurrence openly substituted a BALANCING TEST for the danger rule, arguing that the constitutionality of speech limitations ultimately depended on whether the government had a weighty enough interest. Congress, he said, surely was entitled to conclude that the interest in national security outweighed the speech interests of those advocating violent overthrow.

Decided at the height of the Cold War campaign against communists, *Dennis* allied the Court with anticommunist sentiment. No statute would seem more flatly violative on its face of the First Amendment than one that made "advocacy" a crime. Indeed, in YATES V. UNITED STATES (1957) the Court later sought to distinguish between active urging or incitement to revolution, which was constitutionally punishable "advocacy," and abstract teaching of Marxist doctrine, which was constitutionally protected speech.

Defenders of the clear and present danger rule criticize *Dennis* for abandoning that rule's essential feature, the immediacy requirement. Such commentators see the Court as correcting its *Dennis* error in BRANDENBURG V. OHIO (1969) in which the Court returned to something like "clear and present danger" and placed heavy emphasis on the immediacy requirement. Justices Black and Douglas subsequently treated *Dennis* as a case applying the clear and present danger rule and thus as an illustration of the failure of the rule to provide sufficient protection for speech and of the need to replace it with the more "absolute" free speech protections urged by ALEXANDER MEIKLEJOHN. Proponents of balancing applaud Hand's

"discounting" formula as one of the roots of the balancing doctrine, although only the most ardent proponents of judicial self-restraint support Frankfurter's conclusion that Congress, not the Court, should do the final balancing.

It is possible to read *Dennis*, *Yates*, and *Brandenburg* together as supporting the following theory. The clear and present danger rule, including a strong immediacy requirement, applies to street-corner speakers; so long as their speech does not trigger immediate serious harms, others will have the opportunity to respond to it in the marketplace of ideas, and the government will be able to prepare protective measures against violence that may follow. However, where organized, subversive groups engage in covert speech aimed at secret preparations that will suddenly burst forth in revolution, the "as speedily as circumstances will permit" test is substituted for the immediacy requirement. Covert speech cannot easily be rebutted in the marketplace of ideas; by the time underground groups pose a threat of immediate revolution, they may be so strong that a democratic government cannot stop them or can do so only at the cost of many lives.

Whether or not the Communist party of Eugene Dennis constituted such a covert, underground group impervious to the speech of others and posing a real threat of eventual revolution, a theory such as this is probably the reason the Smith Act was never declared unconstitutional and *Dennis* was never overruled although both have been drastically narrowed by subsequent judicial interpretation.

MARTIN SHAPIRO
(1986)

Bibliography

CORWIN, EDWARD S. 1951 Bowing Out Clear and Present Danger. *Notre Dame Lawyer* 27:325–359.

MENDELSON, WALLACE 1952 Clear and Present Danger—From Schenk to Dennis. *Columbia Law Review* 52:313–333.

## *DEPARTMENT OF AGRICULTURE v. MORENO*

See: *Department of Agriculture v. Murry*

## *DEPARTMENT OF AGRICULTURE v. MURRY*
413 U.S. 508 (1973)
## *DEPARTMENT OF AGRICULTURE v. MORENO*
413 U.S. 528 (1973)

Piqued by the activities of protesting students and members of "hippie communes" during the VIETNAM years of agony, Congress in 1971 amended the Food Stamp Act to deny eligibility for food subsidies to two classes of applicants: "unrelated" persons living together and persons claimed by others in the previous year as tax dependents. On the same day the Supreme Court struck down both these amendments. *Moreno*, 7–2, invalidated the "unrelated" limitation on "Fifth Amendment EQUAL PROTECTION" grounds; the amendment was irrelevant to the act's goals of nourishing the needy and aiding agriculture, and harming "hippies" for their unpopularity was not a legitimate legislative purpose. The law thus lacked a RATIONAL BASIS. *Murry*, 5–4, held the "tax dependency" limitation an unconstitutional IRREBUTTABLE PRESUMPTION. A claimant might be needy during the current year although dependent on another during a previous year; yet the law denied any opportunity to qualify for aid by demonstrating need.

KENNETH L. KARST
(1986)

# DEPORTATION

Deportation is the removal of an ALIEN out of the country. Congress has plenary power to deport aliens, even of long residence; its power rests upon the same grounds and is as unqualified as its power to exclude aliens from entering the country. Aliens permitted to enter and reside in the United States remain subject to the power of Congress to order them deported. Congress may direct that all aliens leave the country, or that some leave and others stay, distinguishing between the two by such tests as it thinks appropriate. While aliens cannot be deported without DUE PROCESS OF LAW, guaranteed to them by the Fifth Amendment, they are entitled only to PROCEDURAL DUE PROCESS: NOTICE and a HEARING at which they may seek to show that they do not come within the classification of aliens whose deportation Congress has directed. (A resident of the United States who claims to be a citizen cannot be deported without a judicial trial.)

Initially, deportation was conceived of only as a method for expelling aliens who had entered the country illegally. Soon, however, Congress employed it to remove aliens who had entered legally but had violated conditions attached to continued residence. Thus, for example, the Immigration Act of 1917 provided for the deportation of aliens convicted of crimes involving moral turpitude. Other statutory grounds for deportation, now codified in the Immigration and Nationality Act of 1952, include violation of alien registration requirements, drug trafficking, addiction to narcotics, becoming a public charge within five years after entry, or membership in the Communist party or other subversive organizations.

By its express terms, the Immigration and Nationality

Act applies retroactively to any alien belonging to any class enumerated in the statute, notwithstanding that the alien entered the United States prior to the date of the statute or that the facts alleged to justify deportation occurred prior to that date. Because deportation is not considered a punishment, the prohibition of the EX POST FACTO clause of the Constitution does not apply, and retroactive application of provisions specifying grounds for deportation was upheld in *Lehmann v. Carson* (1957).

In *Harisiades v. Shaughnessy* (1952) Justice WILLIAM O. DOUGLAS declared in his dissent that "an alien, who is assimilated in our society, is treated as a citizen so far as his property and his liberty are concerned. . . . If those rights, great as they are, have constitutional protection, I think the more important one—the right to remain here—has a like dignity." To date, this view has not been able to overcome the two basic propositions announced in the Court's seminal deportation case, *Fong Yue Ting v. United States* (1893), that Congress has the INHERENT POWER to order deportation and that deportation is not a criminal punishment.

RALPH A. ROSSUM
(1986)

Bibliography

GORDON, CHARLES and ROSENFIELD, HARRY N. 1984 *Immigration Law and Procedure*, Vol. 1, chaps. 4–5; Vol. 2, chaps. 6–8. New York: Matthew Bender.

NOTE 1962 Deportation and Exclusion. *Yale Law Journal* 71: 760–792.

## DESEGREGATION

Freed finally of slavery's shackles, blacks in America began the long quest for racial equality. Desegregation, a generic term used to describe elimination of the SEGREGATION and RACIAL DISCRIMINATION that nonwhites confronted at life's every turn, has been the equivalent of their Holy Grail.

While blacks have attacked barriers based on color across a spectrum that includes VOTING, employment, housing, the administration of justice, access to public facilities, and even sex and marriage, the elimination of discrimination in the public schools has been and remains the most important goal for black Americans in their continuing struggle against racism in this country.

At an early time in the nation's history, blacks hoped an already hostile society might at least share their fear, as a black minister phrased it, "for our rising offspring to see them in ignorance in a land of gospel light." That petition presented in 1787 to the Massachusetts legislature sought a separate school for Boston's black children whose parents had withdrawn them from the harassment and ridicule heaped on them by white teachers and students in some of the new nation's first public schools.

The legislature denied the petition, which reflected fears shared by succeeding generations of black parents who all during the nineteenth century filed dozens of law suits with state courts seeking relief from the racial discrimination they found in the public schools. Depending on the times and the character of the discrimination they faced, black parents have sought equal educational opportunity for their children through the advocacy of either racially separate or integrated schools.

With few exceptions, the courts were no more sympathetic to these petitions than were the school boards whose policies sometimes excluded black children from the public schools entirely and always subjected them to conditions that left little doubt as to which students were deemed members of the superior race. In ROBERTS V. CITY OF BOSTON (1850) a state court rejected a school desegregation petition almost two decades before the adoption of the FOURTEENTH AMENDMENT; three decades after its ratification, the United States Supreme Court concluded in PLESSY V. FERGUSON (1896) that the Fourteenth Amendment did not prohibit state-sanctioned segregation, citing the *Roberts* decision as support for the reasonableness of what it called SEPARATE BUT EQUAL facilities. *Plessy* provided the Constitution's blessing for laws throughout the South that required racial segregation not only in public schools, but in every possible public facility, including cemeteries and houses of prostitution.

The law and much of society enforced the "separate" phase of the *Plessy* standard to the letter, but the promise of "equal" facilities received only the grudging attention of a public whose racial attitudes ranged from apathy to outright hostility. Deep-South states spent far less for the schooling of black children than for whites. Despite a major effort to equalize segregated schools as a means of forestalling the steadily increasing number of CIVIL RIGHTS challenges in the 1950s, the South as a whole expended an average of $165 for every white child, and only $115 for each black in 1954, the year in which segregated schools were ruled unconstitutional.

More than a half century after its *Plessy* decision, the Supreme Court in BROWN V. BOARD OF EDUCATION (1954) reviewed the "separate but equal" DOCTRINE in the light of education's importance for children in a modern society, and concluded that the Fourteenth Amendment's EQUAL PROTECTION clause was violated by segregated schools "even though the physical facilities and other "tangible" factors may be equal. . . ."

Chief Justice EARL WARREN's ringing rhetoric in the *Brown* opinion condemned racially segregated schooling as "inherently unequal." He found that the separation by the state of children in grade and high schools solely on

the basis of race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

This decision was the result of long years of planning and litigation by the NAACP, and the committed work of lawyers including THURGOOD MARSHALL and Robert L. Carter, social scientists like Kenneth Clark, and hundreds of courageous black parents and their children. The decision, most blacks were convinced, required the elimination of segregated school facilities. Black parents knew that state-mandated black schools were a racial insult, and most hoped that if their children attended schools with whites, they would more likely gain access to the same educational resources as white children.

But the determination of civil rights groups representing an ever-increasing number of black parents seeking to join in school desegregation suits was met by the equally determined and, at least initially, far more powerful resistance of southern whites who strongly opposed sending their children to school with blacks and greatly resented the federal coercion involved in school desegregation orders which they equated with the occupation of the region by Union forces following the CIVIL WAR.

Arguably, opposition by southern working class whites could be predicated on the basis that, by invalidating segregation laws, *Brown* betrayed postReconstruction promises of white superior status made to them by policymakers in return for political support given during periods when populist movements sought to challenge the monopoly of economic power held by the upper class.

Although the Supreme Court refused to turn the clock back to 1868 to determine whether the framers of the Fourteenth Amendment had intended to condone segregated schools, an examination of postReconstruction history shows that policies of segregation reflected a series of political compromises through which working class whites settled their demands for social reform and greater political power. C. Vann Woodward and other historians have shown that segregated schools and facilities were established by legislatures at the insistence of the white working classes who saw color barriers as official confirmation that the society's policymakers would maintain even the poorest whites in a permanent status superior to that designated for blacks.

While not willing to acknowledge that its school desegregation decision would deprive whites of long-held rights of superior status based on race, the Court in *Brown v. Board of Education II* (1955), signaled that it was aware of the major social upheaval its ruling would require. Rejecting the black petitioners' requests for immediate relief, the Court chose a procedure that would permit the individual resolution of administrative and academic problems. It mandated only a "prompt and reasonable start toward full compliance," and returned the cases to the district courts with the admonition that orders and decrees be entered to admit plaintiffs to public schools on a racially nondiscriminatory basis "with ALL DELIBERATE SPEED. . . ."

But the Court's conciliatory efforts did not avoid and may have encouraged a period of massive resistance by southern elected officials, a rise in the Ku Klux Klan and other white supremacist groups, and a general upswing in economic intimidation and threats of physical violence against blacks deemed responsible for or participants in the civil rights movement. The Court met open resistance in Little Rock, Arkansas, and elsewhere with firm resolve, as in COOPER V. AARON (1958), but for several years condoned pupil placement laws and other procedural devices clearly designed to frustrate any meaningful compliance with the *Brown* mandate.

Federal courts were far less cautious in applying the *Brown* decision as the controlling precedent in cases challenging racial segregation in other public facilities. Thus, in the first half-dozen years following *Brown*, civil rights groups succeeded in desegregating state-operated places of recreation, government buildings, and transportation facilities.

Finally, in 1964, during the height of the SIT-IN protest movement that was bringing an end to "Jim Crow" policies in many hitherto segregated privately owned facilities not covered by the Fourteenth Amendment, the Court indicated that the time for mere deliberate speed had run out, in GRIFFIN V. SCHOOL BOARD OF PRINCE EDWARD COUNTY (1964). But the success of a decade of white resistance to school desegregation was reflected in the statistics. In the eleven states of the old Confederacy, a mere 1.17 percent of black students were attending school with white students by the 1963–1964 school year. The dirgelike progress of school desegregation finally gained momentum through a series of far-reaching lower court orders combined with the federal government's enforcement of Title VI of the CIVIL RIGHTS ACT OF 1964. This provision required the cut-off of federal financial assistance to entities that followed racially discriminatory policies. The federal government's enforcement of Title VI was seldom vigorous, but even the threat of losing the federal monies made available under a host of new antipoverty and educational assistance programs in the late 1960s persuaded hundreds of southern school districts that some form of compliance was in their best interests.

In 1968, the Supreme Court in GREEN V. NEW KENT COUNTY SCHOOL BOARD virtually eliminated the offer by a school board of "freedom of choice" to all children as a sufficient compliance with desegregation requirements. The decision was hailed by civil rights lawyers who believed that the *Brown* mandate could not be implemented

unless public schools were rendered nonidentifiable by race. This goal, articulated in the *Green* case by Justice WILLIAM J. BRENNAN as requiring school boards to formulate plans that promise "realistically to convert promptly to a system without a "white' school and a "Negro' school, but just schools," was furthered when the Court applied the *Green* standard to a large, urban school district in North Carolina in SWANN V. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION (1971). A few years later, the Court held a large northern school district subject to a similar standard in KEYES V. SCHOOL DISTRICT NO. 1 OF DENVER, COLORADO, (1973). (See SCHOOL BUSING.)

But while the percentage of children attending desegregated schools increased impressively, opposition to school desegregation remained. Resistance focused on plans like those approved in both *Swann* and *Keyes* requiring the transportation of children in order to achieve a measure of desegregation in each school roughly equivalent to the percentages of white and nonwhite children in the district as a whole. Opponents had gained national political strength, and their support likely played an important role in the election of RICHARD M. NIXON as President in 1968. The Nixon administration adopted policies that had the effect of slowing the federal government's participation in the school desegregation campaign, but the Supreme Court rejected Administration-sponsored delay requests in ALEXANDER V. HOLMES COUNTY BOARD OF EDUCATION (1969) and *Carter v. West Feliciana Parish School Board* (1970), although not without cracks in the solid front of unanimous opinions the Court had handed down in school desegregation cases since *Brown I.*

By 1974, in MILLIKEN V. BRADLEY, an APPEAL from lower court orders requiring the consolidation with the seventy percent black Detroit school system of fifty-three predominantly white suburban school districts, those cracks had grown into a chasm between divergent viewpoints on the appropriateness of school desegregation remedies. The insistence of civil rights lawyers that courts had unlimited discretion to impose racial-balance oriented plans to remedy proven segregation resulted in a significant change in the standards for proving school district liability for violating the Constitution.

In a 5–4 decision, the Court in *Milliken* held that federal courts could not impose multidistrict remedies to cure a single district's segregation absent findings that the other included school districts had failed to operate unitary school systems within their districts, or were responsible for the segregation in the other districts. Proof of this character could be found in few districts without histories of official, statemandated segregation, and thus plans to desegregate large, urban school districts through metropolitanwide plans were rendered inoperable.

By the late 1970s, roughly half of all nonwhite children in the nation resided in the country's twenty to thirty largest school districts. Minority children averaged sixty percent of the school population in these districts and close to seventy percent in the ten largest districts. Politically if not physically, desegregation in these districts on the *Green-Swann* model became increasingly difficult.

Lower courts, impressed by detailed prescriptions of racial wrongdoing by urban school boards, continued at the urging of civil rights lawyers to grant relief requiring reassignments and busing to change the racial makeup of schools. But the Supreme Court, now quite divided, set increasingly difficult liability standards in cases from Dayton and Columbus, Ohio; Omaha, Nebraska; Austin, Texas; Milwaukee, Wisconsin; and Indianapolis, Indiana. Plans requiring wholesale reassignment of children in these districts were finally approved, mainly because the proof of past discrimination was so clear. There was little judicial enthusiasm for continued reliance on a remedial process about which there was so much controversy as to its effectiveness even among civil rights proponents.

By this time, a great many black communities were questioning the continued validity of the "neither black schools nor white schools" desegregation approach that had stood as an article of faith since the early post-*Brown* years. Disenchantment was prompted by the hundreds of black schools closed and the scores of black teachers and principals dismissed in the course of the school desegregation process. In addition, black parents were discovering that the sacrifice involved in busing children across town to mainly white schools did not always eliminate racial discrimination. More litigation had to be prosecuted to challenge resegregation tactics as varied as the use of standardized tests to track black students into virtually all-black classrooms, to the exclusion of blacks from extracurricular programs. In most desegregated school systems, black students were far more likely to be suspended and expelled for disciplinary violations than white students. Black parents able to enroll their children in desegregated schools all too often found themselves protesting policies of in-school discrimination quite similar to those that had led their late eighteenth-century predecessors to petition for separate schools.

The NAACP and the few other groups who sponsored most school desegregation litigation remained firm in their belief that identifiably black schools would always be inferior and must be eliminated. But local black groups in several cities including Atlanta, St. Louis, Detroit, Dallas, Boston, and Portland, Oregon, decided that mainly black schools in black neighborhoods might provide effective schooling for their children if black parents could be involved more closely in faculty hiring, curriculum selection, and other policymaking aspects of these schools.

In 1975, a court of appeals approved in *Calhoun v.*

*Cook*, over the vigorous objection of the national NAACP office, a settlement of a twenty-year-old Atlanta school case providing full faculty and employee desegregation but only limited pupil desegregation in exchange for a school board promise to hire a number of blacks in top administrative positions, including a black superintendent of schools.

A few years later, in *Milliken v. Bradley II* (1977), the Supreme Court approved without dissent a Detroit desegregation plan that gave priority to a range of "educational components" while limiting pupil desegregation in the district that was by now more than eighty percent black to a provision that no school be less than thirty percent black. The Court though was unable to decide and left standing a lower court ruling that an almost all-black subdistrict created by the Dallas school desegregation plan met school desegregation standards. The record showed both that housing patterns and geographical conditions would have made desegregation difficult and that much of the black community in the subdistrict supported its retention.

Public resistance to school desegregation continued into the 1980s even though the likelihood of new court orders was lessened by the Supreme Court's application of higher standards of proof even in litigation where metropolitan relief was not sought. For example, California voters approved an amendment to their state constitution barring state courts from ordering racial balance remedies in cases where, absent a finding that the school board was guilty of a specific intent to discriminate, the Fourteenth Amendment would not require racial balance relief. The Supreme Court upheld this provision in *Crawford v. Los Angeles Unified School District* (1982).

Civil rights organizations mobilized to meet such challenges, but local black groups increasingly opted for programs that promised to provide equal educational opportunity in neighborhood schools. At the same time, many black parents either moved to suburban areas or sent their children out of their neighborhoods to enable them to attend predominantly white schools.

The quest for effective schooling in the 1980s mirrors those made by black parents in the 1780s and during all the periods between. They and their children have recognized that neither separate schools nor integrated schools will automatically eliminate racist policies intended to provide priority to white children for scarce educational resources. School desegregation programs mandated by the *Brown* decision, and earnestly sought in hundreds of court cases, have served to slow but have not otherwise much discouraged those policies.

Beyond the real gains made by blacks during the *Brown* years, there remain millions of black and other minority children whose schooling remains both segregated and inferior. For them, there is ample basis for parental fears as they watch their rising offspring grow "in ignorance in a land of gospel light."

DERRICK A. BELL
(1986)

Bibliography

BELL, DERRICK A. (1973) 1980 *Race, Racism and American Law.* Boston: Little, Brown.

KALODNER, HOWARD I. and FISHMAN, JAMES J., eds. 1978 *Limits of Justice: The Courts' Role in School Desegregation.* Cambridge, Mass.: Ballinger.

KLUGER, RICHARD 1976 *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality.* New York: Knopf.

WOODWARD, C. VANN (1955) 1974 *The Strange Career of Jim Crow.* New York: Oxford University Press.

## *DESHANEY v. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES*
488 U.S. 189 (1989)

When Joshua DeShaney was one year old, his parents were divorced; the court awarded custody of Joshua to his father, who moved to Wisconsin and remarried. When Joshua was three, his father's second wife complained to the county department of social services (DSS) that the father was abusing the child, hitting him and leaving marks on him. DSS officials interviewed the father, who denied the charges; DSS did not pursue the matter. A year later Joshua was admitted to a hospital with multiple bruises and abrasions; the examining doctor notified DSS; DSS immediately obtained a court order taking custody over Joshua, but the DSS investigating team decided there was insufficient evidence of child abuse to retain Joshua in the court's custody. The father promised DSS that he would enroll Joshua in a preschool program and undertake counseling for himself. A month later the hospital emergency room notified DSS that Joshua had been treated again for suspicious injuries; the caseworker concluded there was no basis for action. Over the next six months the caseworker visited the home, repeatedly saw injuries on Joshua's head, and noted that he had not been enrolled in the preschool program. She recorded all this in her files and did nothing more. About a month later, the emergency room notified DSS that Joshua had been admitted with injuries they believed caused by child abuse. On the caseworker's next two home visits, she was told Joshua was too ill to see her. DSS took no action. Four months later, the father beat four-year-old Joshua, who lapsed into a coma; Joshua suffered severe brain damage, but lived. He is expected to spend the rest of his life in an institution for the profoundly retarded.

The father was tried and convicted of child abuse, but the case that reached the Supreme Court was a civil action, brought by Joshua's mother against DSS and some DSS employees, seeking damages on the ground that DSS had deprived Joshua of SUBSTANTIVE DUE PROCESS OF LAW in violation of the FOURTEENTH AMENDMENT. The lower courts denied relief and the Supreme Court affirmed, 6–3. For the majority, Chief Justice WILLIAM H. REHNQUIST concluded that the due process clause imposed no affirmative duty on the state or its officers to protect a citizen's life or liberty against private persons' invasions. Furthermore, no such constitutional duty arose merely because DSS had known of Joshua's situation and indicated its intention to protect him. The case differed from those in which the Court had recognized a state duty to assure minimal safety and medical treatment for prisoners and institutionalized mental patients, for here the state had done nothing to restrain Joshua or otherwise prevent him from protecting himself or receiving protection from other persons. The harm, in other words, "was inflicted not by the State of Wisconsin, but by Joshua's father."

For the dissenters, Justice WILLIAM J. BRENNAN castigated the majority for so limited a view of the prison- and mental-hospital cases. Here the state had set up DSS to protect children in precisely Joshua's situation, thus encouraging citizens generally to rely on DSS to prevent child abuse. One had to ignore this context to conclude, as the majority did, that the state had simply failed to act. Justice HARRY A. BLACKMUN, in a separate dissent, objected to the majority's formalistic distinction between STATE ACTION and state inaction; the state had assumed responsibility for protecting Joshua from the very abuse that deprived him of much of what it means to have a life.

In a great many ways the Supreme Court has imposed affirmative duties on the states to compensate for inequalities or other harms not directly of the states' making. (See ACCESS TO THE COURTS; RIGHT TO COUNSEL; MENTAL RETARDATION AND THE CONSTITUTION; PROCEDURAL DUE PROCESS OF LAW, CIVIL.) Its decisions in these areas recognize, if only partially, the artificiality of insisting that constitutional guarantees be rigidly confined to action that is formally governmental, ignoring the interlacing of public and private action that characterizes much behavior in America's complex society. As *DeShaney* sadly illustrates, a mechanical application of the judge-made state-action limitation on the Fourteenth Amendment can permit the systematic evasion of public responsibility.

KENNETH L. KARST
(1992)

Bibliography

TRIBE, LAURENCE H. 1989 The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics. *Harvard Law Review* 103:1–39.

## DEVELOPMENTALLY DISABLED ASSISTANCE AND BILL OF RIGHTS ACT

89 Stat. 486 (1975)

This statute established a grant program under which participating states receive federal financial assistance to aid them in creating programs for the developmentally disabled, a term that refers mainly to the mentally retarded. To qualify for federal funds states must take AFFIRMATIVE ACTION to hire qualified handicapped individuals, submit a plan to evaluate the services provided under the act, have a habitation plan for each person receiving services under a program funded under the act, and have in effect a system to protect and advocate the rights of persons with developmental disabilities. The act's "bill of rights" for the developmentally disabled includes the rights to appropriate treatment in a setting least restrictive of the patient's liberty, to a well-balanced diet, to sufficient medical and dental services, to be free of restraint as punishment, to be free of excessive use of chemical restraints, to be visited by relatives, and to a safe environment. In PENNHURST STATE SCHOOL AND HOSPITAL V. HALDERMAN (1981) the Supreme Court, in an opinion by Justice WILLIAM H. REHNQUIST and over three dissents, held that the "bill of rights" portion of the act does not confer on the developmentally disabled any substantive rights to appropriate treatment in the least restrictive setting. The act "does no more than express a congressional preference for certain kinds of treatment."

THEODORE EISENBERG
(1986)

(SEE ALSO: *Disabilities, Rights of Persons With.*)

Bibliography

EISENBERG, THEODORE 1981 *Civil Rights Legislation.* Pages 886–887. Charlottesville, Va.: Michie Co.

## DEVOLUTION AND FEDERALISM IN HISTORICAL PERSPECTIVE

The word "devolution" became a staple in political discourse with the capture by the REPUBLICAN PARTY of decisive majorities in both houses of Congress in the 1994 election. Under the banner of a "Contract with America," and directed by Speaker Newt Gingrich, who outspokenly demanded absolute acceptance of party leadership, the new majority in the U.S. HOUSE OF REPRESENTATIVES undertook to implement a broadly based neoconservative agenda. One main instrument for achievement of that agenda's specific goals was a carefully crafted shift in pol-

icymaking authority and administrative responsibility, away from the national government and into the hands of the states.

Many of the key portions of the 1994 conservative agenda were a restatement of main themes in the policies pursued by the White House and the Republican Party during the administrations of RONALD REAGAN and GEORGE H.W. BUSH. One of these themes was embodied in an attack on the powers of federal regulatory agencies in general, with emphasis particularly on the Environmental Protection Agency, the National Labor Relations Board, and the Occupational Safety and Health Administration. Also prominent were demands for reduction of federal capital gains taxes and for tempering the progressivity of federal taxation. Conservatives also condemned what they termed an unwarranted "activism" by so-called liberal judges in the federal courts—a reflection of the conservatives' dissatisfaction (dating from the time of the WARREN COURT DESEGREGATION and criminal justice decisions) with the Supreme Court's interpretations of minority rights, with judicial broadening of the criteria for STANDING to litigate environmental and consumer causes, and with the emerging concept of the entitlement rights of welfare clients and others against bureaucratic decisions. Withal, as Herman Belz indicated in his "CONSTITUTIONAL HISTORY, 1980–1989" entry in this encyclopedia, the 1980s witnessed the consolidation of a conservative program of deregulation and reestablishment of "market values"; pursuit of a social agenda; and the paradoxical attack on taxes and the bugaboo of "big government" that went forward with a steady burgeoning of federal deficits in the annual budgets of the Reagan years. And, as Belz emphasized, polarization of political differences and the dynamics of conflict were heightened by the persistence of divided government, with one party controlling one or both houses of Congress while the other held the presidency—a situation that would continue to pertain throughout most of the presidency of WILLIAM J. CLINTON as well.

Other elements of the 1994 "Contract with America" platform, however, reflected a significant extension of the earlier programs and a distinct hardening of ideological lines. These developments involved opposition to ABORTION rights; AFFIRMATIVE ACTION in the schools and the workplace; and federal welfare and health programs, especially those designed to reach the poorest (and hence politically the most vulnerable) elements of the nation's citizenry. (The only plank in the 1994 platform that was not pursued zealously was CAMPAIGN FINANCE reform, which proved to be of less interest as a concrete legislative goal to the newly elected senators and representatives than it had been as a campaign pledge.)

A notable feature of the 1994 agenda was the extent to which conservatives pursued their goals through a shifting of policymaking responsibility and administrative authority out of the federal government's control and into that of the states. So insistent and so broad in scope was this effort that some analysts applied the term "devolution revolution" to what was being attempted, especially with regard to the attack on the inherited policies and institutions of the post-1935 welfare state and its social security, health care, and welfare programs. An increasing number of state legislatures and governorships won by the Republicans enhanced the attractiveness of such devolution ideas as they were advanced by the congressional leadership. And, indeed, the 1994 Republican Governors' Conference welcomed the election as "a historic moment of opportunity—an occasion when the political climate makes possible fundamental change in the federal–state relationship."

Whatever the differences between 1980s conservatism and the heightened ideological character of the new Republican strategies that crystallized in 1994, a vital element of continuity was the extent to which the conservative appeal was articulated in explicitly constitutional terms, and not merely in the language of policy or the imperatives of specific versions of morality. Devolution, in this sense, appeared as a constitutional imperative, a return to "ORIGINAL INTENT" and "correct" principles. The champions of devolution thus appealed to a version of the Framers' principles in 1787, downplaying the intent or historical development of the post–CIVIL WAR "nationalizing" amendments (the THIRTEENTH, FOURTEENTH, and FIFTEENTH), to argue for a federal constitutional order in which state sovereignty was central to governmental legitimacy. Also mobilized was a new emphasis on the need to rebuild safeguards of state autonomy that conservatives regarded as assured by the TENTH AMENDMENT, which they interpreted anew in terms akin to the Supreme Court's view in the 1850s and again in the 1920s and early 1930s, at the height of conservative STATES' RIGHTS jurisprudence.

Reinforcing this political campaign to devolve powers and programs was the movement of the conservative bloc on the REHNQUIST COURT to revitalize Tenth Amendment restraints on the reach of congressional regulatory powers, to reassert ELEVENTH AMENDMENT–based barriers to suits against the state governments, and to retrench in the important realm of federal procedure with regard to welfare clients' rights and standing for litigants in public interest suits. Now the 1980s strategy of appointing federal judges at all levels who would be likely to advance the conservative agenda was reinforced by a strategy of withholding consent for Clinton judicial appointments seen as "too liberal." By the end of the 1990s, the results of this strategy were evident in, for example, the decisions in *Seminole Tribe of Florida v. Florida* (1996) and UNITED STATES V. LÓPEZ (1995) that dramatically revealed the cramped and

hostile view of modern federal government powers that was held generally by a five- Justice majority on the Court. Then, in June 1999, the Court handed down three decisions (*Alden v. Maine* and related cases) that heavy-handedly reversed long-held DOCTRINES so that the states and their agencies (including state research universities) would be immunized from damages in PATENT and trademark suits, and so that millions of state employees would be denied the right to sue in state courts for damages for violation of national labor-law entitlements and (presumably ) other federally guaranteed rights.

Viewed in a longer historical perspective, the political and constitutional confrontations of the 1990s over devolution policy and law are new variants of a persistent dynamic—the debate over "sorting out" which realms of law and policy should be governed from Washington, and which from the states and local governments. The issue had been joined in the earliest years of the Republic, when the Federalists and the emerging Jeffersonian parties had debated in constitutional terms such questions as the powers appropriate to a national bank (questions that ultimately reached the Supreme Court in formal constitutional terms in the 1819 case of MCCULLOCH V. MARYLAND). Throughout the pre–Civil War years, too, every aspect of the anti-SLAVERY debate had been embedded in a constitutional framework of doctrine regarding FEDERALISM. The new and explicitly nationalized constitutional order that emerged after the Civil War fundamentally changed the framework of those debates, but the terms of argument had remarkable continuities. Thus, even after the foundations of a federal administrative law in the 1880s, and significant expansion of centralized power in banking, ANTITRUST, and LABOR relations, much of the Progressive era's politics was dominated by the question of how much power the national government ought to excercise and to what extent states' rights—a cause always kept at the forefront, partly because Southern segregationists were determined to retain state control of race relations—should be respected. Similarly, the constitutional issues of the interwar years, climaxing in the responses to the Great Depression in the NEW DEAL period, were constantly framed in terms of the legitimate reach and limitations of state versus federal power.

Those who would recite the mantra of states' rights and "state sovereignty" in recent times have had to carry the burden of its historic association with racism and Jim Crow. Still, a determination to take seriously the constitutional requirements of federalism has never been the exclusive preoccupation of extremists. A federal "creed" commonly has been given respect, or at least lip service, by politicians and lawyers across the political spectrum. Progressive intellectuals and judges, too, have recognized the imperatives of federalism as a consideration in policy. Thus FELIX FRANKFURTER, writing in 1922 of the Court's invalidation of a federal anti-child labor law, said "We must pay a price for federalism," even when that price must be "the [constitutional] impotence of the federal government to correct glaring evils unheeded by some of the states." Even the New Deal administration fashioned some of its major departures in policy, such as the Social Security system, in the style of "cooperative federalism" that gave the states a major policy role and extensive fiscal support through grants-in-aid, rather than going full-bore toward nationalization of policy and administration. And during the administration of LYNDON B. JOHNSON—the high point of post-war expansion of the national government's role in social legislation, regulation, and welfare programs—the President's principal advisers contended that by adopting a cooperative state–federal approach for many of his initiatives Johnson was honoring "our whole national history as a federal system." Similarly, few in the Democratic Party's leadership in the post-Johnson years have taken an ideological position against devolution in areas of law they have seen as susceptible of assignment to the states or as requiring for efficiency's sake a shift of authority away from the center. It has been intended and anticipated consequences, not the issue of devolution in raw ideological or constitutional form, that have divided the liberal and centrist elements in both major POLITICAL PARTIES on questions of major policy change. Despite the conservative opposition to Clinton's posture on major policy questions—concededly not a posture of wholesale antigovernmentalism—he too has been willing to make important concessions to the states, as for example in accepting the compromise of a sweeping WELFARE RIGHTS reform bill in 1996 that diminished federal authority and transferred vital discretionary powers to the states.

At the end of the twentieth century, it would appear likely that one reform successfully supported by conservatives and more generally by state officials has been set in place for a long time. This is the policy against "unfunded mandates," by which Congress had extended rights as entitlements to individuals and groups without providing state and local governments with funding that would permit them to fulfill those mandates. This change is a two-faceted victory for its proponents. On the one hand, it constrains the national government with respect to instituting new programs; on the other, it is linked with the larger, and legally distinct, policy of devolution insofar as it effectively curbs the power of federal courts to play a major role in defining benefits and entitlements in terms of constitutional rights, or to extend the terms of specific LEGISLATION through STATUTORY INTERPRETATION. Moreover, many of the same political leaders who call for devolution and for enhancement of state authority have led a successful campaign since the late 1970s to curtail, often

radically, the fiscal competence of the states by dint of extreme constraints on their taxing powers.

Still, the ongoing controversy over federalism and devolution can take unexpected turns in the hands of judges. Thus, the REHNQUIST COURT, in a decision that startled nearly all commentators but was welcomed on its substantive terms by opponents of the new welfare cutbacks, in SAENZ V. ROE (1999) eviscerated one of the strongest devolutionist features of the 1996 welfare law. The Court held invalid Congress's devolution to state governments of the power to establish a two-tier system of benefits that would disadvantage newly arrived residents by limiting them to the level of benefits that the states of their previous residency allowed. In respect to devolution, then, not only evolving Tenth Amendment law and the enhanced political power of neoconservatives, but also as a countervailing force in the courts, the PRIVILEGES AND IMMUNITIES clause of the Fourteenth Amendment might well operate in a complex judicial role in the continuing evolution of state–federal relations.

The latest moves by the Justices seem to confirm the wisdom of the late Carl Friederich when he contended that as a working system, American federalism cannot be understood unless it is analyzed in dynamic terms—as a process, and not only a concept to be interpreted in formalistic doctrinal terms.

HARRY N. SCHEIBER
(2000)

Bibliography

MASHAW, JERRY L. and CALSYN, DYLAN S. 1996 Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain. *Yale Law & Policy Review/Yale Journal on Regulation* 14:297–323.

MELNICK, R. SHEP 1994 *Between the Lines: Interpreting Welfare Rights.* Washington, D.C.: Brookings Institution.

SCHEIBER, HARRY N. 1996 Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective. *Yale Law & Policy Review/Yale Journal on Regulation* 14:227–296.

## DIAL-A-PORN

With the development of new telephone technologies, the transmission of sexually explicit messages over the phone lines has become a multimillion dollar business. Telephone pornography raises special difficulties because many children call telephone sex lines unbeknown to parents. Some companies engaged in telephone pornography actually solicit business from minors, distributing advertisements for their services on school playgrounds. In one highly publicized case in California, a twelve-year-old boy who had been exposed to a pornographic phone message sexually assaulted a four-year-old girl.

In response to concerns about the effects of telephone pornography on children, Congress in 1983 banned all "obscene or indecent" commercial phone messages transmitted to persons under the age of eighteen. Pursuant to provisions of the law, the Federal Communications Commission (FCC) developed procedures by which telephone pornography companies could restrict their services to adults, including message scrambling, mandatory payment by credit card, and special access codes for users. Use of these procedures provided a defense against prosecution under the law. In 1988, however, an appellate court held the FCC regulations unconstitutional; and a few months later, Congress decided that its previous law was not sufficient to remedy the problem and subsequently banned "obscene or indecent" telephone messages directed to all persons, regardless of age.

In *Sable Communications of California, Inc. v. FCC* (1989), the Supreme Court upheld Congress's ban on "obscene" phone messages by a vote of 6–3, but it unanimously struck down the prohibition against "indecent" messages. Writing for the majority, Justice BYRON R. WHITE noted that the Court had already decided that OBSCENITY is not protected by the FIRST AMENDMENT; hence the ban on obscene phone messages was clearly constitutional under the Court's previous decisions. The indecency restriction was a different matter. Applying the COMPELLING STATE INTEREST test the Court regularly uses in free speech cases, White argued that the government undoubtedly has a compelling interest in eliminating indecent messages directed at children. However, the wholesale ban on indecent phone messages was not narrowly tailored to further that interest. According to White, nothing indicated that the regulations promulgated under the previous law would not have protected children sufficiently. White hinted, but did not decide, that those previous regulations were constitutional.

Concurring, Justice ANTONIN SCALIA pointed out that while the Court forbade the government from prohibiting all indecent phone messages, it did not hold that public utilities have an obligation to carry such messages. In other words, regardless of the provisions of federal law, a utility could make a business decision not to carry sexually explicit message services.

Justice WILLIAM J. BRENNAN agreed with the Court's invalidation of the ban on indecent phone messages, but he objected to its approval of the obscenity provisions, noting: "I have long been convinced that the exaction of criminal penalties for the distribution of obscene materials to consenting adults is constitutionally intolerable."

JOHN G. WEST, JR.
(1992)

## *DIAMOND v. CHAKRABARTY*

See: Patent

## DICEY, ARTHUR V.

See: Rule of Law

## DICKINSON, JOHN
(1732–1808)

The conservative patriot leader John Dickinson, scion of a wealthy Quaker family, was called to the bar at the Middle Temple in London in 1757 and soon after returning to America became one of the most prosperous lawyers in Philadelphia. He served in the colonial legislatures of both Delaware and Pennsylvania, and in 1765 he rose to continental prominence with his pamphlets opposing the Sugar Act and the Stamp Act.

A delegate to the STAMP ACT CONGRESS (1765), Dickinson was the author of that body's Declaration of Rights and Grievances, ostensibly a loyal, even humble, petition to the king. Dickinson's resolutions condemned as unconstitutional the levying of internal taxes upon the colonists by the British Parliament and denounced as subversive of liberty the trial of offenses against tax laws by admiralty courts without juries. Dickinson himself later referred to the Declaration of Rights and Grievances as the first American BILL OF RIGHTS.

After the passage of the TOWNSHEND ACTS in 1767 Dickinson established himself as the preeminent American interpreter of the constitutional relationship between the colonies and Britain. His "Letters from a Farmer in Pennsylvania" (1767–1768), published in all but four American newspapers, advanced an understanding of the British constitution that made Parliament supreme in imperial matters but proscribed all TAXATION WITHOUT REPRESENTATION. Moreover, he abandoned the distinction between external and internal taxes in favor of a distinction based on purpose: if a duty was laid for the purpose of raising revenue, rather than regulating commerce, then it was taxation and fell under the constitutional proscription. The Farmer's Letters counseled petition for repeal of, rather than resistance to, unconstitutional legislation.

By the time he wrote his long essay on "The Constitutional Power of Great Britain" in 1774, Dickinson had come to think of the British Empire as federal—comparable to the Swiss Confederation or the United Netherlands. The British king was king of the American colonies, but "a parliamentary power of internal legislation over these colonies appears . . . equally contradictory to humanity and to the Constitution, and illegal."

In 1774 Dickinson represented Pennsylvania in the First Continental Congress. The petition to the king and the address to the inhabitants of Canada, adopted pursuant to the DECLARATION AND RESOLVES, were products of Dickinson's pen. In 1775, at the Second Continental Congress, he worked with THOMAS JEFFERSON drafting the Declaration of the Causes and Necessity of Taking Up Arms. But Dickinson was still committed to the idea of a resolution of the crisis within the constitutional system of the British Empire. He opposed immediate separation from Britain and refused to sign the DECLARATION OF INDEPENDENCE.

On June 12, 1776, the Congress, anticipating independence, appointed a committee to draft a plan of union. Dickinson was the dominant member of that committee and the principal author of the draft ARTICLES OF CONFEDERATION reported to Congress on July 12. Dickinson's draft called for no mere alliance or league of sovereign states but for a permanent union with a national government. The "United States assembled" was to be heir to those powers of regulation and general legislation legitimately exercised before independence by the British Parliament, while each "colony" retained "sole and exclusive Regulation and Government of its internal police, in all matters that shall not interfere with the Articles of this Confederation." True to the "Farmer's" principles, Dickinson inserted a provision that "the United States assembled shall never impose or levy any Taxes or Duties, except in managing the Post-Office." Dickinson's draft Articles were regarded by many in Congress, especially Southerners, as too centralizing, and even some who favored Dickinson's position despaired of securing ratification. Only after considerably weakening the government to be established by the Articles did Congress finally propose them to the states.

When his stand on independence cost Dickinson his seat in Congress and his colonelcy in the militia, he enlisted in the army as a private soldier. But in November 1776 he was elected to Congress by Delaware, and he was later made a brigadier general in the Delaware militia. In 1779 he signed the Articles of Confederation to signify Delaware's ratification.

Dickinson served as president of Delaware in 1781–1782 and as president of Pennsylvania in 1782–1785. In both states he was recognized as a leader of the conservative party. Although a slaveholder, he favored abolition of SLAVERY, and he opposed its extension into the Northwest Territory.

In 1785 he retired to his estate in Delaware, but he was recalled to public service in 1786 and elected a delegate from Delaware to the ANNAPOLIS CONVENTION. Dickinson was chosen president of the convention, which discussed commercial problems under the Confedera-

tion and which issued the first call for a federal constitutional convention.

Notwithstanding his poor health, Dickinson accepted appointment to represent Delaware at the CONSTITUTIONAL CONVENTION OF 1787. Although he was an active and conscientious delegate, his contribution to the work of the convention was not among the most important. A nationalist of long standing, he represented a small state and often had to balance competing interests. He was the first to propose a bicameral congress with equal REPRESENTATION of the states in one house and representation apportioned by population or financial contribution in the other—a proposal that later became the basis of the GREAT COMPROMISE. He favored abolition of the slave trade but acquiesced in the compromise that imposed a twenty-year moratorium on congressional power to accomplish it. He wanted Congress to be the dominant branch of government, with full authority to remove Presidents and judges; and he wanted to limit executive power and to create a council to share the President's appointing power. Forced by illness to leave the convention early, Dickinson authorized a colleague to sign his name to the finished Constitution.

Dickinson wrote a series of nine newspaper essays (signed "Fabius") in support of RATIFICATION OF THE CONSTITUTION; they were influential, especially in Pennsylvania. He declined appointment as a United States senator from Delaware and never held public office under the new Constitution.

DENNIS J. MAHONEY
(1986)

Bibliography

FORD, PAUL LEICESTER, ed. 1970 *Political Writings of John Dickinson.* New York: DaCapo.

JACOBSON, D. L. 1965 *John Dickinson and the Revolution in Pennsylvania.* Berkeley: University of California Press.

STILLE, CHARLES J. 1891 *Life and Times of John Dickinson.* Philadelphia: Historical Society of Philadelphia.

## DICTA

See: Obiter Dictum

## DIES, MARTIN
(1900–1972)

Martin Dies, an anti-NEW DEAL Democrat from Texas, served in the HOUSE OF REPRESENTATIVES from 1931 to 1945 and from 1953 to 1961. In 1938 he became chairman of the special Committee to Investigate Un-American Activities, forerunner of the HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES. Dies and his committee attained national prominence through sensational exposés of supposed Fascist, Nazi, and communist activity in government, labor unions, and industry. His published lists of government employees who were "Communists or Communist dupes," the publicity he gave to unsubstantiated accusations, and his disregard of normal CIVIL LIBERTIES foreshadowed the activities of Senator Joseph McCarthy.

DENNIS J. MAHONEY
(1986)

## DIFFERENCE AND CONSTITUTIONAL EQUALITY

Central to our liberal tradition is the conviction that we share a universal human nature, from which follows our common entitlement, or right, to be treated with respect and dignity. Central to our commitment to the RULE OF LAW, and to our constitutional scheme of governance, is the conviction that we are all entitled to legal equality, or equal treatment under the law. And yet our individual identity is clearly formed, in part, by traits that we share with some but not others. Women and men have different biological roles and capacities in reproduction, for example, and African Americans and whites have profoundly different political and cultural histories. Furthermore, all LEGISLATION, from the simplest criminal statute to the highest constitutional norm, virtually by definition, categorizes citizens, treating some quite differently from others. Thus, we claim and aspire to a universality belied by our differentiating traits, and we are committed to legal equality in the face of the brute inequalities that law itself creates. How, then, to justify law, and the differences it creates and mirrors among us?

In the mid- and late-twentieth century, the Supreme Court, under the sweeping language of the FOURTEENTH AMENDMENT guarantee of EQUAL PROTECTION OF THE LAWS, developed a rich body of law and principle in response to these central paradoxes. Basically, the Court now reads the mandate of "equal protection of the laws" as imposing upon state and federal legislation a requirement of rationality. If the lines drawn by a law between different groups of people reflect a real difference between them, then the law is rational and upheld; if not, it constitutes a failure of equal protection and might be struck. A law imposing a minimum age on drivers, for example, is not a denial of equal protection because the line it draws is basically rational: the legally created difference between sixteen and seventeen year-olds does reflect, albeit only crudely, a real relation between the driving abilities and maturity of older and younger teenagers. Some legislative categories, however, are based on inherently SUSPECT CLASSIFICATIONS,

some so suspect as to create a virtually insurmountable presumption against their constitutionality. Racial categories are of this sort. Racially segregatory laws simply do not reflect any real difference between citizens. They are presumptively irrational, and consequently unconstitutional.

This deceptively simple formula—equality requires rationality—has the virtue of underscoring the coherence of our basic liberal and legalistic ideals. The prohibition on irrational legal categories and the insistence that racial categories are presumptively irrational not only restate our commitment to universality while permitting the categorization of citizens necessary to sensible legislation, but also remind us of the deeply divisive consequences of the historically disastrous belief, held by most whites through most of this country's history, in black difference and inferiority. The "folding" of the liberal commitment to universalism, the legalistic ideal of equal treatment, and the clear understanding that legislation premised on a belief in black difference and inferiority violates the equal protection clause of the Fourteenth Amendment protects us against the danger of repeating the most horrific chapter of our history. In spite of its strengths, however, and its breathtakingly elegant restatement of liberal ideals, this deceptively simple understanding of the meaning of equal protection has produced tremendous dissension and division within the Supreme Court, and has triggered the production of a vast and exceedingly complex body of DOCTRINE. The core problems with the Court's formulaic solution—that equality requires rationality, that rationality requires that legislative distinctions track real differences, and that racial differences are simply not real, but rather a product of bigoted perception—are threefold.

First, not all racial differences are a problem of or created by bigoted perception, and not all legislation that tracks or targets those differences is necessarily malign. That the belief in black inferiority necessarily rests on a belief in black difference certainly does not imply that all claims of racial difference rest on a racist and false commitment to black inferiority or white superiority. Rather, some differences are real and in need of redress: differences in average income levels, educational achievement, and infant mortality rates between otherwise comparable black and white communities are examples. Noting these differences, and legislating in a way meant to redress them, may be good or bad policy, but it is clearly not the same thing, and not the same evil, as legislatively segregating the races because of the presumed inferiority of African Americans. Nevertheless, and in spite of the clear difference between "benign" discrimination, or AFFIRMATIVE ACTION (meant to eradicate the patterns of subordination from which perceptible differences stem) and "malign" discrimination (meant to create, tolerate, or perpetuate that very subordination), the Court's commitment to the ideal of a "colorblind" constitution, which would neither see nor tolerate legislated racial difference, has cast the constitutionality of affirmative legislation designed to ameliorate the consequences of our racist past into considerable doubt.

The second problem with the Court's understanding of equality and difference is simply that even if it be true that claims of racial difference are so often coupled with beliefs in racial inferiority that it is morally sensible to view with suspicion all legislation that racially delineates, it is not at all clear that a recognition of other deep or inherent differences between groups of people—between men and women, or ALIENS and citizens, or mentally competent and incompetent adults—is similarly badly motivated, or that legislation that presumes or respects those differences courts social disaster. Sometimes, of course, such delineations are indeed badly motivated, and in a way that does echo our racial histories. The turn of the century "paternalistic" laws prohibiting women's participation in professional life, or denying women VOTING RIGHTS, or excusing them from JURY SERVICE, for example, did seem to be premised in part on a claim of women's intrinsic differences, and that claim was in turn wedded to a belief in female inferiority and vulnerability. But some "paternalistic" laws are not so clearly harmful, or so unambiguously motivated. Laws granting widows but not widowers a presumption of dependency in determining various benefits, for example, might be based on a wrongful and harmful "stereotype" of female dependency, or it might be an attempt, akin to an affirmative action program, to protect women who have spent their adult lives in nonremunerative domestic realms, against the harmful effects of a market economy that fails to recognize or compensate household and domestic labor. Laws that permit or require employers to protect female workers' job security against the risk of a pregnancy-related disability, even when they do not similarly protect all disabled workers, might be based on the paternalistic and pernicious notion that because women but not men have babies they must be protected against the harsh reality of the workaday world, or it might be based on a commendable attempt to equalize the abilities of men and women to combine parenthood and work.

The third problem with the Court's equation of equality with rationality, and of rationality with a tracking of difference, is that it is blind to the harms law can effect by ignoring, rather than fetishizing, differences. Just as a flat tax will disproportionately hurt the poor and help the rich, so a flat rule requiring, for example, that all firefighters or police officers have a minimum height or weight, will disproportionately exclude women from the ranks, and, to whatever extent height and weight fail to correlate with job performance, they effect this exclusion for no good

reason. Similarly, a language proficiency requirement, evenhandedly applied, will disproportionately exclude those for whom English is a second language, and test score requirements will disproportionately exclude those who do not test well. If laws permitting or requiring either private or public employers to use such criteria are constitutionally permissible even where their relevance to the performance legitimately expected of employees is weak or nonexistent, then these laws will themselves be complicit in the perpetuation of societal subordination of already disadvantaged groups. And, their complicity lies in their failure to take real differences into account, not in their counterfactual and demeaning insistence on difference in the face of a deeper, more real, or truer universality.

These problems have prompted constitutional commentators to suggest alternative approaches to the problems of equality and difference. One approach, originating in some forms of radical FEMINIST THEORY and CRITICAL RACE THEORY, suggests that societal differentiations between groups such as women and men and blacks and whites are themselves invariably a function of, or caused by, political subordination, and that it is precisely that political subordination that is forbidden by our constitutional commitment to equality. It is subordination that creates the perception of difference, and it is subordination that is, basically, unconstitutional. Hence, all perceived "differences" are windows to subordination, which the law should be required to address. This is sometimes called the "antisubordination" approach: the law should concern itself with the eradication of the subordination that causes differentiation, rather than with a rational mirroring of difference. Where a law aggravates or furthers, rather than ameliorates or addresses, such subordination, it should be invalidated as unconstitutional and violative of our commitment to equality, and it should be struck down regardless of whether it echoes or challenges perceived differences.

A second approach, sometimes called an "acceptance" approach and which stems from some forms of difference feminism or cultural feminism, reads in the equal protection clause a mandate that states take whatever steps are necessary, not to track differences nor to eradicate them, but rather to render the differences harmless or inconsequential. This approach has enormous appeal, particularly for its common-sense acknowledgment that some differences are properly cherished rather than viewed with suspicion, and should only cause concern to the degree they may cause unnecessary suffering. That women generally undergo pregnancy, childbirth, and lactation in order to reproduce, while men simply ejaculate, for example, is surely one such difference: it is a difference that is impossible to deny, and one that many men and women take great pleasure in. But it is also one that, presently, does have harmful consequences for women. Those consequences, however, are not necessarily consequences of the difference, or put differently, the difference itself need not have harmful consequences. Laws, such as those requiring employers to protect the job security of pregnant workers, can be used to prevent harm. Similarly, that women presently earn less than men at least in part because women engage in more childcare, is a difference that also has enormous consequences, many of them harmful to women. Those harms as well could be at least in part ameliorated through legal intervention: laws could, for example, require that the paycheck of a wage earner married to a spouse working in the home be issued jointly to both spouses, or even be divided equally between them, with the stay-at-home spouse receiving a full half. On this approach, it would be the failure to take action to render difference harmless—rather than the recognition of difference itself—that constituted the constitutional violation.

Both of these alternative approaches, however, arguably founder on the slippery slope to socialism. Surely the differences that are most subordinating are the differences caused by our unequal distribution of wealth in this society, and surely those wealth differences are the precise differences that most cry out to be rendered "harmless." Under either an antisubordination or an acceptance approach to difference and equality, the wealth difference would raise a constitutional problem, it would be something to be eradicated or something to be "made harmless." These two alternative approaches would suggest that at least vast differences in wealth should be viewed as constitutionally suspect. This result seems counterintuitive, and counterexperiential, particularly given the undeniable historical role of the Constitution in the protection of private PROPERTY against public redistribution.

What should we make of this conclusion? If we hold fast to our commitment to private property, and to our view of the Constitution as its guardian, then that commitment and that view should indeed weigh against either of these alternative conceptions of equality and difference. Perhaps, though, the difficulty lies not so much with these alternative conceptions of equality, as with our assurance that vast wealth differences are constitutionally unobjectionable, and even constitutionally protected. Such assurance might not be warranted. Minimally, the emergence of these alternative conceptions of constitutional equality might prompt us to reexamine our conviction that our constitutional ideals of equality, equal protection, and liberty all buttress, rather than undermine our conviction that unchecked differences of wealth produced by an unchecked market are constitutionally protected against redistribution. Rather than discard con-

ceptions of constitutional equality on the grounds that they throw the constitutionality of unchecked capital into question, perhaps we should reexamine, openly and without precommitment, whether or not it is truly the case that our constitutional commitment to an ideal of equality can co-exist with our tolerance of massive wealth differences, and the extraordinary inequalities to which it leads. Perhaps our tolerance of great wealth disparities and our espousal of ideals of equality can co-exist. But perhaps they cannot. If not, then this simultaneous constitutional tolerance of the institutions of wealth and capital, and constitutional celebration of equality, is surely a contradiction as central, and as momentous, and as disabling, as our country's contradictory embrace, in the first century of its existence, of the peculiar institution of SLAVERY, and our simultaneous espousal of the moral and constitutional ideal of liberty.

ROBIN WEST
(2000)

Bibliography


BECKER, MARY 1987 Prince Charming: Abstract Equality. *Supreme Court Review* 1987:201–247.

FISS, OWEN 1976 Groups and the Equal Protection Clause. *Philosophy and Public Affairs* 5:107–177.

GILLIGAN, CAROL 1982 *In a Different Voice: Psychological Theory and Women's Development.* Cambridge, Mass.: Harvard University Press.

LAWRENCE, CHARLES and MATSUDA, MARI 1996 *We Will Not Go Back: Making the Case for Affirmative Action.* Boston, Mass.: Houghton-Mifflin.

LITTLETON, CHRISTINE 1987 Reconstructing Sexual Equality. *California Law Review* 75:1279–1337.

MACKINNON, CATHERINE 1987 *Feminism Unmodified: Discourses on Life and Law.* Cambridge, Mass.: Harvard University Press.

——— 1991 Reflections on Sex Equality Under Law. *Yale Law Journal* 100:1281–1328.

MINOW, MARTHA 1990 *Making All the Difference: Inclusion, Exclusion and American Law.* Ithaca, N.Y.: Cornell University Press.

WEST, ROBIN 1997 *Caring for Justice.* New York: New York University Press.


## *DIFRANCESCO, UNITED STATES v.*
449 U.S. 117 (1980)

In this case on the DOUBLE JEOPARDY clause of the Fifth Amendment a 5–4 Supreme Court sustained the constitutionality of the ORGANIZED CRIME CONTROL ACT OF 1970, which in special instances granted to the United States the right to APPEAL a criminal sentence. Justice HARRY A. BLACKMUN for the majority, rejecting the dissenters' contention that review of a sentence is comparable to the review of a verdict of acquittal, held that a government appeal that succeeded in increasing a sentence did not constitute double jeopardy.

LEONARD W. LEVY
(1986)

## DILLON, JOHN F.
(1831–1914)

Elected a member of the Iowa Supreme Court at thirty-one, John Forrest Dillon was a leading advocate of the PUBLIC PURPOSE doctrine. In 1869 President ULYSSES S. GRANT appointed Dillon to the Eighth Circuit Court, but after ten years' service Dillon resigned to accept a professorship at Columbia University Law School. Within three years he left that post to enter private practice, and he soon represented major business interests including Jay Gould and the Union Pacific Railroad.

Although Dillon was not an original thinker, his writings and speeches helped establish his tremendous reputation. He served as president of the American Bar Association in 1892 and delivered the prestigious Storrs Lectures at Yale University shortly thereafter. These were published in 1895 as *The Laws and Jurisprudence in England and America*, and in them Dillon claimed that the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT "in the most impressive and solemn form places life, liberty, contracts, and property . . . among the fundamental and indestructible rights of all the people of the United States." He endorsed SUBSTANTIVE DUE PROCESS and rhapsodized on the distinction of America's written CONSTITUTIONS: their limitations on government. Restraints such as SEPARATION OF POWERS and CHECKS AND BALANCES were just two of the many means available to prevent "despotism of the many,—of the majority." Dillon also wrote an influential treatise on *Municipal Corporations* (1872).

As a judge, Dillon narrowly construed the public purpose DOCTRINE. He believed that a municipal corporation had the authority to tax to support a public purpose, but incidental public benefits did not justify such taxation. Moreover, he believed that the judiciary could inquire into the legislative purpose and that private enterprises (with the sole exception of railroads) did not qualify under the doctrine. He thus wrote laissez-faire ideas into the law as limitations on legislative power (*Loan Association v. Topeka*, *Commercial National Bank of Cleveland v. Iola*, both 1873). Dillon appeared frequently before the Supreme Court where, in UNITED STATES V. TRANS-MISSOURI FREIGHT ASSOCIATION (1897) he urged the Court to adopt the RULE OF REASON whereby the SHERMAN ANTITRUST ACT would be read to prohibit only unreasonable restraints of trade, a

position finally adopted in STANDARD OIL COMPANY V. UNITED STATES (1911).

DAVID GORDON
(1986)

Bibliography

JACOBS, CLYDE E. (1954)1973 *Law Writers and the Courts.* New York: Da Capo Press.

## *DIONISIO, UNITED STATES v.*
410 U.S. 1 (1973)

A gambling suspect refused a federal court's order to provide a voice sample to a GRAND JURY, and was adjudged in civil contempt and committed to custody. The Supreme Court affirmed. The Court rejected, 7–2, a claim that the order violated the suspect's RIGHT AGAINST SELF-INCRIMINATION, saying that the voice sample was to be used only for identification, not for the content of the statements. A 6–3 majority also rejected a claim that the order violated the FOURTH AMENDMENT. Because there was no "seizure" here, there was no need to demonstrate the reasonableness of the grand jury's request.

DAVID GORDON
(1986)

## DIRECT AND INDIRECT TAXES

The Constitution imposes two major limitations on the federal power to tax. Direct taxes can be levied only if allocated among the states according to population. All other taxes (indirect taxes) must be uniform among the United States.

The requirement of apportioning direct taxes apparently was included because the southern states feared that they would bear excessive burdens on land and slaves—a fear demonstrated by the fact that (until the FOURTEENTH AMENDMENT) only three-fifths of slaves were counted in the population. Nobody in the Convention appeared to be very clear, however, on just what was a direct tax that had to be allocated.

The issue first came to the Supreme Court in HYLTON V. UNITED STATES (1796). A duty laid on carriages was challenged as being a direct tax. The Court pointed out the difficulties with direct taxes, particularly the fact that while the total amount allocated to each state related to the population of that state, the individual taxpayers (in this case the owners of carriages) would pay quite different amounts depending not only on population but also on the relative numbers of the taxable subjects within the state. The Court expressed doubt that any taxes other than a capitation tax or a tax on the value of land could be called direct taxes. Over the next century the issue seldom arose, for Congress levied very few taxes beyond customs duties until the CIVIL WAR. However, the Court did hold that a tax of ten percent on state-issued currency (VEAZIE BANK V. FENNO, 1869), a tax on the succession to a decedent's property (*Scholey v. Rew*, 1875), and income taxes (*Springer v. United States*, (1881) were all indirect, not direct taxes.

The income tax involved in *Springer* had remained in effect only until 1872. By the 1890s, however, many groups called for a reduction in federal dependence on tariffs for revenue and for an income tax on wealthier persons. In 1894 a statute was passed imposing a tax on all incomes over $4,000. Facing a challenge to this tax, the Supreme Court reversed its earlier stand and in POLLOCK V. FARMERS' LOANTRUST CO. (1895) held the tax a direct tax and so invalid because not apportioned. The Court's new position was that taxes on the rents or income of real estate and taxes on personal property or the income from personal property were direct taxes and must be apportioned, though taxes on income from other sources would not be direct taxes.

A few years later there was another attempt to enact an income tax law. More conservative members of Congress countered by presenting a proposal to amend the Constitution to provide that income taxes need not be apportioned. Perhaps to their surprise, the SIXTEENTH AMENDMENT was proposed by Congress in 1909 and secured ratification by three-fourths of the states in 1913. The result, of course, was to open the door to the major federal revenue producer.

During the twentieth century there have been occasional attempts to litigate various taxes as being direct—but never with success. Congress does not impose capitation taxes nor property taxes—and all other kinds of taxes apparently are indirect.

The requirement that indirect taxes be uniform has given little difficulty. In upholding a federal tax on legacies in *Knowlton v. Moore* (1900), the Court said that what is required is geographical uniformity. A tax is uniform when it operates with the same force and effect in every place where the subject of it is found. It does not matter that the subject may exist in some states and not in others so long as the tax is the same. Thus, the Court in *Fernandez v. Wiener* (1945) upheld a federal statute imposing death taxes on community property—even though such property existed in only the few states that had adopted the community property system. In *United States v. Ptasynski* (1983) the Court cast some doubt on the geographical limitation by upholding a provision exempting Alaskan oil

from a crude oil windfall profit tax. (See TAXING AND SPENDING POWER.)

EDWARD L. BARRETT, JR.
(1986)

Bibliography

PAUL, RANDOLPH E. 1954 *Taxation in the United States.* Pages 46–58. Boston: Little, Brown.

## DIRECT DEMOCRACY

Those who framed the Constitution opted for a system of representative government rather than direct democracy. The true distinction between the "pure democracies of Greece" and the American government, explained JAMES MADISON in THE FEDERALIST #63, lay "in the total exclusion of the people in their collective capacity from any share in the latter." It was this distinction that the Federalists believed might permit American government to succeed where other democracies had failed. Placing the exclusive power of ordinary lawmaking in governors distinct from the governed, said Madison, would refine and enlarge public views "by passing them through the medium of a chosen body of citizens" whose wisdom, patriotism, and love of justice would make them unlikely to sacrifice the interest of the country "to temporal or partial considerations." Representative bodies afforded greater opportunities for deliberation and debate. Popular masses were perceived as too quick to form preferences, frequently failing to consider adequately the interests of others, and overly susceptible to contagious passions.

Part of the Framers' distrust of popular rule was the threat it posed to creditor rights and individual property interests. And the well-heeled delegates had plenty to fear from the masses of have-nots. Indeed, some historians contend that the central problem that prompted the convening of the delegates at Philadelphia was not the weaknesses of the ARTICLES OF CONFEDERATION but concern over an excess of POPULISM in the states. In any case, Madison and his fellow Federalists labored mightily—and successfully—to block an attempt to include in the FIRST AMENDMENT a right of the people to "instruct their representatives."

In the early part of the twentieth century the Progressives successfully introduced two forms of direct democracy at the state level—the INITIATIVE and the REFERENDUM. These innovative reforms, now a part of the lawmaking process in more than half the states, were a response to the widely perceived corruption and control of legislators by wealthy interest groups. The Progressives sought to curb legislatures by placing corrective power in the citizenry. The initiative allows the voters to propose and enact legislation by simple majority vote. Initiatives are thus designed to rectify corruption that impedes legislation by circumventing the legislative framework. Conversely, referenda are directed against corruption that produces legislation by adding an additional layer to the lawmaking process. The referendum allows the voters to reject laws previously enacted by the legislature. Thus, the two Progressive reforms simultaneously make it both less difficult and more difficult to enact laws.

Not long after many of the western states began to use the initiative device, its constitutionality came under attack. In *Pacific States Telephone & Telegraph Co. v. Oregon* (1912), the Supreme Court was asked to rule whether a state's use of a voter initiative to enact a tax measure was consistent with the REPUBLICAN FORM OF GOVERNMENT guaranteed to the states by Article IV, section 4, of the Constitution. The taxpayer argued that the representative nature of republican government precluded the people from taking legislative functions into their own hands. The Court never reached the merits of this claim, holding instead that whether a state government is "republican" was a POLITICAL QUESTION that courts were not competent to answer. The Court, treating the challenge as an attack on the legitimacy of the Oregon government, relied on LUTHER V. BORDEN (1849) for the proposition that such a matter was properly to be resolved by the political branches of the national government (Congress and the President).

The JUSTICIABILITY bar to the resolution of the constitutional challenge to citizen lawmaking remains securely in place. But although the Supreme Court has never passed on the constitutionality of direct democracy devices in general, the Court has condemned its use in particular applications. In HUNTER V. ERICKSON (1969) the Supreme Court struck down a voter initiative altering a city charter to require that any OPEN HOUSING LAWS passed by the city council be approved by voter referendum before taking effect. The Court's majority held that by making open housing laws more difficult to enact, the charter amendment erected special barriers to legislation favoring ethnic and religious minorities and therefore violated the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT.

Similar concerns led the Court to invalidate an anti-SCHOOL BUSING initiative passed by the voters of the state of Washington. In *Washington v. Seattle School District No. 1* (1982), a 5–4 majority thwarted the voter reversal of an attempt by Seattle school authorities to achieve racial balance through involuntary busing. The majority's route to its conclusion that the initiative offended the equal protection clause cannot easily be mapped. At times, Justice HARRY A. BLACKMUN, the opinion's author, appears to find

impermissible racial motivation. He notes that "there is little doubt that the initiative was effectively drawn for racial purposes," a fact of which he believed the Washington electorate was "surely aware." Elsewhere in the opinion, he seems to rest the decision on the customized alteration of the normal decision-making process for issues of unique interest to minority groups. In such instances, Blackmun suggests, inquiry into motivation is not necessary. This latter reading is reinforced by the 8–1 decision in CRAWFORD V. BOARD OF EDUCATION (1982), handed down the same day.

Over Justice THURGOOD MARSHALL's lone dissenting observation that the case was indistinguishable from *Seattle*, the Court in *Crawford* sustained an amendment to the California Constitution (approved overwhelmingly by both houses of the California legislature and ratified by the voters) stripping state courts of the power to order busing, except in cases of Fourteenth Amendment violations. It is not uncommon for commentators to express amazement that the two cases were decided by the same Court, much less on the same day. The Court's conclusion in *Crawford* that the California amendment was not adopted with a racially discriminatory purpose is difficult to square with its opposite assessment on a similar record in *Seattle*.

What differentiates *Seattle* from *Crawford*, however, is the role of direct democracy. The sponsors of the Washington initiative sought to circumvent the representative process that produced Seattle's pupil reassignment plan. The school board had historically made considerable efforts to alleviate the isolation of the district's sizable minority population. Local attempts to recall the board members responsible for some of these efforts had failed. The initiative process afforded an opportunity for the populace to reverse the minority's gains. In marked contrast to the Washington process, the California amendment in *Crawford* was a joint effort of the legislature and the voters. Here was not a case of the people bypassing a representative body. The Madisonian nightmare, so stark in *Seattle*, was largely absent from the California reaction against a zealous judiciary. None of this is explicit in the two opinions. Indeed, neither opinion makes any serious effort to distinguish its companion case. The Justices were understandably hesitant to announce explicitly a distinction grounded on a distrust of electoral majorities. But it is hard to reconcile the two results on any other ground.

Nowhere is the tension between the Madisonian fears of popular masses and the American democratic ideal more in evidence than in an interchange between Justice HUGO L. BLACK and Thurgood Marshall, then solicitor general, that occurred during the oral argument in REITMAN V. MULKEY (1967). By an overwhelming majority, California voters had adopted an initiative measure amending the state constitution to repeal existing open housing laws and forbid the enactment of new ones. During ORAL ARGUMENT, Marshall stressed that this authorization of RACIAL DISCRIMINATION in the private housing market had been the result of voters bypassing the representative process. "Wouldn't you have exactly the same argument," he was asked, if the provision challenged "had been enacted by the California legislature?" "It's the same argument," Marshall replied, "I just have more force with this." "No," interjected Justice Black, "it seems to me you have less. Because here, it's moving in the direction of letting the people of the States . . . establish their policy, which is as near to a democracy as you can get."

Hugo Black was undoubtedly right in observing that direct voter legislation is quite a bit closer to "democracy" than legislative products. What his vision obscures, however, is the intentional nature of the gap between true democracy and the republican form of government carved out by those who drafted the Constitution. Representative government was designed to capture the virtues of POPULAR SOVEREIGNTY without being tainted by its vices. Accountability to the electorate was to be the touchstone of legitimacy. But the Framers opted for the virtues of agency, favoring a removed deliberation over the impassioned decision making of participatory democracy.

Two-thirds of those questioned in a 1987 nationwide Gallup survey said that citizens ought to be able to vote directly on some state and local laws, and a poll conducted in 1977 found more than half in favor of a constitutional amendment for a national initiative. In the late 1970s, the Senate held extensive hearings on just such a proposed amendment. Despite the sponsorship of more than fifty members of Congress and supportive testimony by a wide range of both conservatives and liberals, the proposal died in committee. Americans are not, it seems, quite ready to abandon their commitment to the Framers' preferences.

JULIAN N. EULE
(1992)

Bibliography

BELL, DERRICK 1978 The Referendum: Democracy's Barrier to Racial Equality. *Washington Law Review* 54:1–29.

CRONIN, THOMAS E. 1989 *Direct Democracy*. Cambridge, Mass.: Harvard University Press.

EULE, JULIAN N. 1990 Judicial Review of Direct Democracy. *Yale Law Journal* 99:1503–1590.

## DIRECT DEMOCRACY
(Update)

The 1990s witnessed no abatement in the trend for American voters to employ the direct ballot increasingly in their

politics, and vital constitutional questions have continued to surface in the federal courts centering on the legitimacy of various INITIATIVE and REFERENDUM measures. Indeed, the term "government by initiative" has become a commonplace in political commentary. Most of the initiatives and referenda in the states have been designed to achieve legislative reforms. However, many of the most controversial, both as to their policy effects and as to their constitutionality, have been framed not as ordinary LEGISLATION but rather as amendments to the state constitutions. Especially notable in recent years have been direct-ballot measures that may be termed "rights-reducing," that is to say, intended to reduce the rights that may be claimed under state law by individuals and groups. The constitutionality of the plebiscitary process itself, in its several variants, has also been the subject of attention in these debates and in several cases before the Supreme Court.

The Court has sought on the one hand to define the standards by which the constitutionality of specific procedures for the direct ballot can be tested, and, on the other, it has applied EQUAL PROTECTION analysis and other criteria to decide on the constitutional validity of the legislative results of plebiscites in the states. As noted by the late JULIAN N. EULE and other notable commentators, the Court's record has been marked by significant ambiguities, lacunae, and apparent inconsistencies. The impression of inconsistencies in the jurisprudence of direct-ballot constitutionality has left open the door to widely varying results in the lower courts. This uncertainty is evident, for example, in the litigative history of Proposition 209, a California constitutional amendment passed by the state's voters in 1996 with the result of ending state AFFIRMATIVE ACTION programs that employed gender or race classifications. The federal district court issued an INJUNCTION against enforcement, on the ground that in order to reverse this measure, the minorities and women affected adversely could not use ordinary political and legislative process but instead carried the special burdens of action exclusively through constitutional amendment—a more costly and difficult procedure. In this respect, the district court applied the standard regarding "special barriers" to obtaining redress through regular political processes, as formulated in HUNTER V. ERICKSON (1969) and later opinions. The district court also cited several Supreme Court decisions requiring STRICT SCRUTINY of measures that could disadvantage racial minorities, and contended that in light of predictable adverse effects on minorities and women the Proposition 209 amendment was invalid as a violation of equal protection. Shortly afterward, however, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit overturned the district court's decision, declaring that because women and minorities actually comprised in total a majority of the citizenry of California, no equal protection issue or procedural flaw stood in the way of its validation. Tellingly, however, the Ninth Circuit judges also complained that they found themselves "caught in the cross-fire of seemingly irreconcilable Supreme Court precedent." In the last analysis, they declared, it was properly "the general rule of our constitutional democracy" that the judgment of federal courts should not be exercised to "trump self-government." The Supreme Court declined to hear arguments in an appeal of the Ninth Circuit decision.

The Ninth Circuit decision reflected a strong strain of historic deference to state direct-ballot measures that had been articulated in the Supreme Court by, for example, Justice HUGO L. BLACK, who believed that, absent a COMPELLING STATE INTEREST or clear indication of discriminatory animus and effects, plebiscitary measures should be regarded as admirable examples of "devotion to democracy, not to bias, discrimination, or prejudice." An example of where such deference can lead, especially in a taxation case, was the decision of the Supreme Court in *Nordlinger v. Hahn* (1992). The Court upheld the constitutionality of a 1978 California ballot measure, Proposition 13, which set up a two-tier tax system that gave vast advantages to existing PROPERTY owners over those who would acquire property after the amendment went into effect; the majority upheld the measure even though explicitly declaring that it was manifestly unjust in its operation.

The same Justices who let stand the Proposition 209 decision when appealed from the Ninth Circuit had decided differently in an earlier direct-ballot case, ROMER V. EVANS (1996), which also concerned minority rights and special barriers in political process. Over protests by the dissenters that the Court was involving itself in "cultural debate[s]" that ought not concern the judiciary, the majority ruled unconstitutional a Colorado state constitutional amendment, adopted by initiative, that would have invalidated all local ordinances barring discrimination based on SEXUAL ORIENTATION. Declaring that this amendment violated the equal protection clause of the FOURTEENTH AMENDMENT "[by making] a class of persons a stranger to its laws," Justice ANTHONY M. KENNEDY wrote for the majority that homosexuals would thereby be denied the "safeguards that others enjoy" and would be rendered "unequal to everyone else." The Court also referred to the extra political barrier placed on homosexual citizens to obtain redress: They would need to resort to state-level constitutional amendment as the only procedure available if the amendment were to be applied.

A different strain in the Court's jurisprudence on the direct ballot has been intertwined with FIRST AMENDMENT DOCTRINE, and to some degree also with FEDERALISM considerations, as the Court has assessed state measures de-

signed to address alleged flaws of direct democracy in actual practice. Criticisms have been directed especially at the influence of money, the use of professional signature gatherers and data banks, manipulation of public opinion through distortive ballot language and printed arguments in voter pamphlets, and the like. These ills are often compounded by low rates of participation by eligible voters in elections that institute fundamental changes of policy and law. Because of these features of actual practice, the critics contend, the initiative and referendum have become the very embodiment of special-interest and single-issue politics that undermine the deliberative virtues (and the checks and balance) of ordinary legislative procedure. There is, in this view, an "excess of democracy."

But how far can the states legitimately regulate the direct-ballot process, and still have their legislation survive challenges under the "exacting scrutiny" standard that pertains in First Amendment matters? This issue came before the Court in *Buckley v. American Constitutional Law Foundation* (1998), commonly referred to as *"Buckley II"* to differentiate it from the landmark case BUCKLEY V. VALEO (1976) in which First Amendment protection of speech was invoked to strike down strict federal restrictions on political campaign contributions. In *Buckley II*, the Court struck down a set of regulations affecting the solicitation of signatures in the petition phase of the direct ballot process in Colorado. The state had required solicitors to wear badges with personal name identification and had prohibited signature gathering by nonresidents and residents who were not registered to vote. No compelling state interest was shown, the majority ruled, because other means were available to control corruption or fraud. But the Justices also reaffirmed a concept of the initiative process—especially the petition phase when measures are qualified for the ballot—as involving "core political speech" protected by the First Amendment. In dissent, however, Chief Justice WILLIAM H. REHNQUIST, consistently with the view of state prerogatives that he has expressed in many federalism opinions, declared flatly that "[s]tate ballot initiatives are a matter of state concern"; he found no merit in the majority's application of First Amendment constraints.

The continuing importance of the direct ballot has been manifested in hundreds of measures in recent years, among them votes to restrict the rights of immigrants; reduce state protection of defendants' rights in CRIMINAL PROCEDURE; enhance "victims' rights"; articulate environmental rights; establish a RIGHT OF PRIVACY; introduce new economic regulations or, alternatively, immunize private property from some of regulation's economic effects; limit the TAXING OR SPENDING POWERS; and reform the structure and powers of state government. In sum, the plebiscitary movement maintains its momentum at the century's close. And it is safe to anticipate a continuing debate over the constitutional dimensions of the great historic question regarding the place of populistic lawmaking process in a republican polity. The core dilemma was expressed by JAMES MADISON when he argued in FEDERALIST No. 49, that "a constitutional road to the decision of the people" must be kept open, as it was the people on which a republic's legitimacy must rest; but that because plebiscitary process carried "the danger of disturbing the public tranquillity by interesting too strongly the public passions," only rarely, and on great issues of public life, should the citizenry want to resort to direct votes. This cautionary view will undoubtedly continue to operate in counterpoint with arguments that the direct ballot is the "most democratic of procedures" (as it was termed in the dissent in *Romer*), requiring special deference from the judiciary. And it will continue to be an urgent question whether the JUDICIAL POWER should be deployed more vigorously so as to assure that fundamental constitutional values are not overwhelmed by the "public passions" that Madison and his colleagues feared so greatly at the nation's founding.

HARRY N. SCHEIBER
(2000)

Bibliography

EULE, JULIAN N. 1990 Judicial Review of Direct Democracy. *Yale Law Journal* 99:1503.

MICHELMAN, FRANK I. 1998 "Protecting the People from Themselves," or How Direct Can Democracy Be? *UCLA Law Review* 45:1717–1734.

SCHACTER, JANE S. 1995 The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy. *Yale Law Journal* 105:107–176.

SCHEIBER, HARRY N. 1997 The Direct Ballot and State Constitutionalism. *Rutgers Law Journal* 28:787–823.

TARR, G. ALAN, ed. 1996 *Constitutional Politics in the States: Contemporary Controversies and Historical Patterns*. Westport, Conn.: Greenwood Press.

## DIRECT ELECTIONS

Whenever there has been dissatisfaction with the performance of appointing officials, whether party, legislative, or electoral college, there has been a demand for direct elections. The Progressive era (1890–1920) marked a heyday for such demands, producing direct election of senators (SEVENTEENTH AMENDMENT), direct nomination of state party candidates (through PRIMARY ELECTIONS), and, in many cities and states, direct legislation through INITIATIVE and REFERENDUM, and direct RECALL of candidates. After most close presidential elections, there has also been talk of direct election of the President in place of the ELECTORAL COLLEGE.

Direct election of the President and direct party primaries have been criticized on policy (but not constitutional) grounds for weakening the two-party system. Initiative and referendum, besides being criticized as "plebiscitary," have been challenged as violative of the GUARANTEE CLAUSE, but such challenges have uniformly been found nonjusticiable. The leading case is *Pacific States Telephone Company v. Oregon* (1912).

WARD E. Y. ELLIOTT
(1986)

Bibliography

BONFIELD, ARTHUR E. 1962 The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude. *Minnesota Law Review* 46:513–572.

## DIRKSEN, EVERETT M. (1896–1969)

Everett McKinley Dirksen represented Illinois as a United States congressman (1933–1949) and senator (1951–1969). Despite a previous record as an isolationist in FOREIGN AFFAIRS and a reactionary in domestic affairs, he contributed to the legislative successes of the Democratic Presidents when he was the Republican leader of the SENATE in the 1960s. Dirksen was an eccentric—flamboyant in style, florid in oratory, and organ-voiced; he was also a superb parliamentary tactician and a politician who was exceptionally inconsistent in his policies. On matters of constitutional interest, he supported MCCARTHYISM and opposed the censure of Senator Joseph R. McCarthy, and savagely criticized the Supreme Court for opinions he disliked, especially on REAPPORTIONMENT, SEPARATION OF CHURCH AND STATE, and the rights of the criminally accused. Dirksen favored bills to curb the Court's APPELLATE JURISDICTION, proposed a constitutional amendment to allow prayers in public schools, and led a movement that failed by the vote of one state to convene a constitutional convention. Yet the CIVIL RIGHTS ACT OF 1964 and the VOTING RIGHTS ACTS OF 1965 would not have been passed without his support.

LEONARD W. LEVY
(1986)

Bibliography

SCHAPSMEIER, EDWARD L. 1985 *Dirksen of Illinois: Senatorial Statesman.* Urbana: University of Illinois Press.

## DISABILITIES, RIGHTS OF PERSONS WITH

When Justice OLIVER WENDELL HOLMES, JR., declared in BUCK V. BELL (1927) that the state's POLICE POWER authorized involuntary sterilization of individuals thought to be mentally impaired, he asserted, "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles is enough." His statement embodied three assumptions about people with disabilities that have since provoked repeated and partially successful constitutional challenges. The first assumption was that people with disabilities do not enjoy the same basic rights as anyone else, such as the rights to procreate or to be free from involuntary medical treatment. The second assumption was that people with disabilities have no special rights should their conditions leave them vulnerable to legal, social, or physical jeopardy. The third assumption was that society's interests always outweigh the interests of people who have or who are perceived to have disabilities.

Inspired by the CIVIL RIGHTS MOVEMENTS for blacks and for women, in the 1950s and 1960s, advocates for people with disabilities drew on changing medical knowledge about mental and physical disabilities. During the same years, increased federal funds for research and services reached those with mental disabilities and helped to support a movement for their rights. Advocates attacked the segregation produced by institutional settings. They also challenged the deprivation of VOTING RIGHTS; rights to have sexual relations; rights to marry; rights to have children; rights of access to jobs, housing, and transportation; and rights to treatment and services. The disability rights movement attained periodic success in constitutional adjudication in the lower federal courts, which in turn supported federal legislation backed by congressional findings of constitutional rights and also provided the backdrop for landmark Supreme Court DUE PROCESS, and EQUAL PROTECTION decisions.

Initial lawsuits maintained that people with disabilities retained the same rights held by others. On this theory, confinement of persons on grounds of MENTAL ILLNESS or MENTAL RETARDATION should not deprive them of other liberties, and the confinement itself should be justified by provision of services or treatment. The court of appeals so reasoned in *Donaldson v. O'Connor* (1974) and then built on this judgment with *Wyatt v. Aderholt* (1974), which declared on PROCEDURAL DUE PROCESS grounds a right to treatment for persons civilly committed to state mental institutions. It was this right to treatment that Congress incorporated in the DEVELOPMENTALLY DISABLED ASSISTANCE AND BILL OF RIGHTS ACT (1975).

Although the Supreme Court refrained from endorsing the right to treatment at that time, it reinforced the disability rights movement by unanimously announcing in O'CONNOR V. DONALDSON (1975) that "a State cannot con-

stitutionally confine without more [justification] a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." The Court also reasoned that mere public intolerance could not justify the deprivation of physical liberty.

Elaborating the FOURTEENTH AMENDMENT due process theory of liberty, advocates argued that the right to treatment included a right to be treated in the least restrictive setting possible, which meant the setting least confined and removed from the rest of the community. A series of lawsuits challenging the conditions and absence of treatment at a large institution in Pennsylvania produced the disappointing decision in PENNHURST STATE SCHOOL V. HALDERMAN (1981) that the Developmental Disability Act did not confer any substantive right to appropriate treatment in the least restrictive environment. This Supreme Court conclusion occurred after years of litigation had already propelled the states to move people from institutions to community-based facilities.

Then the Supreme Court took the occasion of one more lawsuit arising from the same Pennsylvania institution to announce a constitutional right to treatment for people with disabilities confined in state institutions. In *Youngberg v. Romeo* (1982) the Court declared that the due-process clause of the Fourteenth Amendment assures (1) safe conditions of confinement; (2) freedom from bodily restraints; and (3) training or "habilitation," meaning a duty to provide at least "such training as an appropriate professional would consider reasonable to ensure the individual's safety and to facilitate his ability to function free from bodily restraints."

The emerging right to treatment also spawned arguments for a right to refuse treatment. Lower federal courts in cases such as *Rennie v. Klein* (1978) recognized a constitutional privacy right of involuntary mental patients to refuse medication. In WASHINGTON V. HARPER (1990) the Supreme Court announced that forced administration of antipsychotic drugs violates a constitutional liberty interest, but that due process can be satisfied by administrative processes less formal than a court hearing. During the same term, the Court acknowledged in *Cruzan v. Missouri Department of Health* (1990) that a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from its prior decisions. In *Cruzan*, the first Supreme Court decision addressing the RIGHT TO DIE, the Court acknowledged that incompetent as well as competent persons have a constitutionally protected liberty interest in consenting to or refusing treatment. Yet this interest did not forbid a state from requiring clear and convincing evidence that the patient herself would want to terminate life-sustaining treatment. Having spoken on this issue, the Court, like many state courts, may start to hear right-to-die and treatment cases affecting severely disabled adults, infants, and children.

Implicit in the due process liberty cases is the theme of equal protection, which has also inspired an independent line of opinions articulating rights of persons with disabilities. Adcocates achieved early constitiutional success by linking claims about disablilities to arguments against racial SEGREGATION. Thus in *Hobson v. Hansen* (1967), affirmed in *Smuck v. Hobson* (1969), the district court ruled public-school ability-tracking unconstitutional in light of its racially segregative impact. In *Larry P. v. Riles* (1979) the district court found unconstittutional I.Q. tests for placing students in classes for the "educable mentally retarded" because of a foreseeable racial impact.

Charges of RACIAL DISCRIMINATION trigger STRICT SCRUTINY under the equal-protection clause. Yet the Supreme Court has resisted claims that strict scrutiny should also apply to charges of discrimination on the basis of disability. In CLEBURNE V. CLEBURNE LIVING CENTER, INC. (1985) the Court expressly rejected the assertion that persons with disabilities are members of a suspect or semisuspect classification.

Nonetheless, the Court in *Cleburne* did give unusually sharp teeth to its low-level rational-relationship scrutiny. It found that a city requirement of a special-use permit for a proposed group home for persons with mental retardation violated the equal-protection clause. Locating group homes in residential neighborhoods would be essential to the goal of moving disabled people out of remote institutions and into the mainstream community. The city of Cleburne had created a special ZONING permit requirement for the operation of a group home for mentally retarded persons. The majority of the Court found no RATIONAL BASIS for believing that the proposed group home would pose a special threat to the city's interests and rejected fear and negative attitudes by community members as inadequate bases for treating mentally retarded individuals differently from others. Justice THURGOOD MARSHALL, joined by Justices WILLIAM J. BRENNAN and HARRY A. BLACKMUN, maintained that the Court's majority had in effect applied heightened scrutiny and should explicitly accord such scrutiny given the history and continuing legacy of segregation of and discrimination against people with mental retardation.

A combination of equal protection and due process arguments produced the landmark decisions in *Mills v. Board of Education* (1973) and *Pennsylvania Ass'n for Retarded Children v. Pennsylvania* (1971), which decreed that children with disabilities have constitutional rights to equal educational opportunity, and exclusion from public schooling violates these rights. Congress expressly relied on the constitutional dimensions of these district court decisions in promulgating the EDUCATION FOR ALL HANDI-

CAPPED CHILDREN ACT of 1975. Sometimes known as the "special education" statute, this act provides federal moneys to assist states in extending free appropriate public education to children with disabilities.

Drawing from procedural due-process doctrines, the act calls for individualized evaluations of each child's educational and health needs and an administrative process providing opportunities for parents to participate and raise objections to proposed placements. The act also echoes the right to treatment, but locates it within the context of compulsory schooling. The act introduces the desegregation concept of mainstreaming children with disabilities in regular classrooms to the extent possible. For students who still require instruction in separate classrooms or separate facilities, the act calls for selecting the placement that is the least restrictive—the one most approximating the mainsteam classroom. Finally, the statute calls for related medical services to ensure that students with special physical needs are not excluded from instruction due to medical needs.

Disability rights advocates have struggled to combine arguments for extending to people with disabilities the same liberty interests enjoyed by others with the use of arguments for special claims for treatment and even rights to refuse treatment that might not arise for others. The REHABILITATION ACT of 1973 included section 504, a nondiscrimination provision modeled after the CIVIL RIGHTS statutes drafted to guard against both racial discrimination and SEX DISCRIMINATION. A central idea developed in this context is that people entitled to protection against discrimination include those who are perceived to be disabled, whether or not they actually are disabled. On this basis, people who have had a disease or an illness or people who may be perceived to have an illness or a deformity have been extended statutory protections, as in *School Board of Nassau County v. Arline* (1987).

Antidiscrimination principles also animate the Fair Housing Act Amendments of 1988 that protect persons with disability and the AMERICANS WITH DISABILITY ACT (1990), heralded by many as the most important and extensive legislation ever adopted on behalf of persons with disability. Yet enduring questions about the meaning of equality and the degree of requisite accommodation will arise both as statutory questions and as constitutional questions concerning the scope of JUDICIAL POWER to order expenditures to accommodate previously excluded groups. Ending the exclusion of physically handicapped persons requires architectural renovation, new communication technologies, and other potentially costly changes. Ending the exclusion of persons with mental disabilities may require the creation of new kinds of institutions, like group homes, which involve money and trained personnel as well as changed community attitudes. Devising programs for persons with AIDS or at risk of AIDS would also involve large expenditures.

Federal courts implementing statutory and constitutional rights for persons with disabilities may confront claims of ELEVENTH AMENDMENT immunity asserted by states against court-ordered expenditures. In analogous cases involving court-ordered remedies for school segregation and prison conditions, courts have ruled that inadequate resources can never be an adequate justification for a state to deprive persons of their constitutional rights.

Much has changed since Justice Holmes's 1927 opinion in *Buck v. Bell;* the law recognizes many of the same rights for persons with disabilities as for others. Courts and legislatures have articulated special rights to help disabled persons overcome legal, social, and physical jeopardy. Will the Constitution direct an answer to the question when societal interests outweigh the interests of persons with disabilities? Perhaps the future constitutional challenge is to locate within societal interests the interests of persons with disabilities so the very terms of the questions will change.

MARTHA MINOW
(1992)

Bibliography

BURGDORF, ROBERT L. and BURGDORF, MARCIA PEARCE 1977 The Wicked Witch Is Almost Dead: *Buck v. Bell* and the Sterilization of Handicapped Persons. *Temple Law Quarterly* 50: 955–1034.

MINOW, MARTHA 1990 *Making All the Difference: Inclusion, Exclusion, and American Law.* Ithaca, N.Y.: Cornell University Press.

NOTE 1973 Right to Treatment. *Harvard Law Review* 86: 1282–1306.

STUDENT AUTHORS 1974 Developments in the Law: Civil Commitment of the Mentally Ill. *Harvard Law Review* 87:1190–1406.

TRIBE, LAURENCE 1988 *American Constitutional Law,* 2nd ed. Mineola, N.Y.: Foundation Press.

## DISABILITY DISCRIMINATION

The rights of people with disabilities have not received much protection under the Constitution. Statutes such as the Individuals with Disabilities Education Act, section 504 of the REHABILITATION ACT of 1973, and the AMERICANS WITH DISABILITIES ACT of 1990 have created most of the rights that exist in this area.

The most disappointing decision by the Supreme Court involving people with disabilities was the Court's 1927 decision in BUCK V. BELL. At the age of sixteen, Carrie Buck became pregnant and had her baby taken away from her. She was most likely raped in the foster home at which she

was working as a caretaker. Because her mother had been found to be "feeble-minded," it was easy for her foster parents to claim that Carrie, too, was "feeble-minded" and have her housed in the "State Colony for Epileptics and Feeble Minded" where the superintendent, empowered by state law to perform a surgical procedure upon her for the purpose of rendering her sterile, began proceedings to do so. She was eighteen at the time of the intended procedure.

In upholding the power of the state to sterilize her, Justice OLIVER WENDELL HOLMES, JR., delivered the OPINION OF THE COURT in which he recited the now- famous passage: "Three generations of imbeciles are enough." "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." Scholars, in fact, have disputed whether Carrie or her daughter were "feeble-minded." Her mother appears to have been an unfortunate victim of poor family circumstances—her husband died at a young age leaving her with three children to raise and no means of support. In *Buck*, the various courts accepted the unchallenged assertion that Carrie was illegitimate whereas public records indicate that her parents were married at the time of her birth. Her school records also reveal that she had performed well in school before being sent to live in a foster home. In her impoverished world, however, it was easy to have the facts distorted with little or no legal challenge.

The Court's decision in *Buck* is often blamed for spurring on other states to enact compulsory sterilization statutes. And as recently as 1973, the Court mentioned the Court's holding in *Buck* without disapproval in ROE V. WADE.

The legal status of people with disabilities improved somewhat with the Court's 1985 decision in CLEBURNE V. CLEBURNE LIVING CENTER, INC. (1985). In that case, a Texas city denied a special use permit for the operation of a group home for the mentally retarded, acting pursuant to a municipal ZONING ordinance requiring permits for such homes. Under city law, a special use permit was required for "hospitals for the insane or feeble-minded." The city council had determined that the proposed group home should be classified as a "hospital for the feebleminded" and voted 3–1 to deny a special use permit. Cleburne Living Center challenged that decision under the FOURTEENTH AMENDMENT.

The Cleburne Living Center urged the Supreme Court to follow the lower court and apply "heightened scrutiny" to their claim, analogous to the intermediate scrutiny used in cases of SEX DISCRIMINATION. The Court rejected this invitation, concluding that such a standard would not give state and local government sufficient latitude to respond to the genuine differences between mentally retarded persons and others. Instead, the Court applied "RATIONAL BASIS; scrutiny under which a state "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." Usually, classifications are found to be constitutional under this lower STANDARD OF REVIEW. In *Cleburne*, however, the Court concluded that the city's action could not pass constitutional muster. "The short of it is that requiring the permit in this case appears to rest on an irrational prejudice against the mentally retarded, including those who would occupy the [group home]." It therefore affirmed the holding of the appellate court that the ordinance was unconstitutional.

The *Cleburne* decision was hailed as a victory for the disability rights community, and a possible first step toward recognition of heightened scrutiny. That possibility, however, has not been realized. The appellate courts have steadfastly interpreted *Cleburne* as holding that mere rational basis scrutiny applies to disability-based distinctions. Thus, individuals with disabilities have generally found that statutory rather than constitutional challenges are a more successful avenue for their complaints.

RUTH COLKER
(2000)

Bibliography

SMITH, J. DAVID and NELSON, K. RAY 1989 *The Sterilization of Carrie Buck: Was She Feebleminded or Society's Pawn?* Far Hills, N.J.: New Horizon Press.

## *DISANTO v. PENNSYLVANIA*
273 U.S. 34 (1927)

Protection of the public health and welfare temporarily lost ground to the COMMERCE CLAUSE in this case. A Pennsylvania statute required the licensing of persons selling steamship tickets to or from foreign countries. The Court declared the law a "direct" interference with FOREIGN COMMERCE, over the dissents of Justices Harlan Fiske Stone, Oliver Wendell Holmes, and LOUIS D. BRANDEIS. Stone found the directindirect test of EFFECTS ON COMMERCE "too mechanical, too uncertain . . . and too remote . . . to be of value." He proposed a more pragmatic test: "the actual effect on the flow of commerce," a view which prevailed in 1941 when this decision was overruled by *California v. Thompson.*

DAVID GORDON
(1986)

(SEE ALSO: *Parker v. Brown.*)

## DISCOVERY

Discovery is a procedure by which one party obtains information from the adverse party in his case. This disclosure of information in criminal proceedings includes statements, documents, test results, reports, and other similar items. Although there is a very broad power to discover items in the exclusive possession of an adverse party in civil proceedings, the Supreme Court stated in *Weatherford v. Bursey* (1977) that "there is no general constitutional right to discovery in a criminal case."

In civil cases, the predominant means for discovery are depositions and interrogatories. In criminal cases, no jurisdiction expressly permits the defense to discover prosecutorial information through interrogatories. Most juruisdictions allow depositions in criminal cases only for the purpose of preserving testimony. Most jusdictions also have statutes or court rules similar to FEDERAL RULE OF CRIMINAL PROCEDURE 16 governing defense discovery which require the prosecution to disclose items such as: (1) written or recorded statements (including GRAND JURY testimony) of the defendant and, in some states, of any co-defendant; (2) the substance of any oral statment of the defendant (and, in some states of a co-defendant) that the prosecution intends to use at trial; (3) the defendant's prior criminal record; (4) relevant documents and other tangible objects; and (5) results and reports of physical or mental examinations and of scientific tests or experiments.

The prosecutorial duty to disclose exculpatory information is based on the view that the primary task of the prosecutor is to see justice done and DUE PROCESS upheld through the fair treatment of accused persons. If this duty is breached, the defendant is entitled to a new trial.

The leading modern case on this duty is *Brady v. Maryland* (1963). In separate trials, the petitioner and a companion were convicted of murder and sentenced to death. At his trial, the petitioner admitted participating in the crime but claimed that his companion had done the actual killing. Prior to trial the petitioner's attorney requested the prosecution to allow him to examine all the companion's statements to the police. One such statement, in which the companion admitted the actual killing, was withheld by the prosecution and did not come to the petitioner's attention until after his conviction was affirmed on APPEAL. The Supreme Court held that "the suppression by the prosecution of EVIDENCE favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

In order to determine whether particular information should have been disclosed, courts consider whether the defendant made a specific request for the information at issue or a more general request for exculpatory information. They also consider to what extent the information was material to the outcome of the trial. When a specific request is made, withholding information is seldom excusable. Even when a general request is made or the defense fails to request exculpatory information, withholding clearly material information, such as the fact that particular testimony is perjured, is not permissible. In determining materiality, the test is whether the withheld information creates a reasonable doubt in the mind of the trial judge as to the defendant's guilt.

There is no clear rule as to when exculpatory information must be disclosed, but it would seem that some circumstances would require pretrial disclosure in order to permit the defense adequate time to prepare its case.

Generally, the prosecutor decides what evidence should be disclosed, although the trial court may occasionally decide *in camera* whether a particular piece of evidence is favorable to the defendant and should therefore be disclosed to him.

Finally the Supreme Court indicated in *United States v. Agurs* (1976) and *Smith v. Phillips* (1982) that the focus should be whether the prosecutor's failure to disclose rendered the trial fundamentally unfair, not the extent of prosecutorial culpability.

CHARLES H. WHITEBREAD
(1986)

Bibliography

SALTZBURG, STEPHEN 1980 *American Criminal Procedure.* St. Paul, Minn.: West Publishing Co.

WHITEBREAD, CHARLES H. 1980 *Criminal Procedure.* Mineola, N.Y.: Foundation Press.

## DISCRETE AND INSULAR MINORITIES

The idea of the "discrete and insular minority" originated in the now famous footnote four of the opinion in UNITED STATES V. CAROLENE PRODUCTS COMPANY (1938). Justice HARLAN F. STONE, writing for only a plurality of the Court, queried—without answering the question—"whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." In the wake of the Court's about-face in 1937, Justice Stone was serving notice that the Court might not accord the same deference to statutes directed at "discrete and insular minorities" that it would to statutes directed at ECONOMIC REGULATION.

The Court made little use of the concept until the early 1970s, when it began to delineate the class characteristics

of such groups. Included were groups that had been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Although race, nationality, and alienage seem to have been firmly established as class characteristics of the "discrete and insular minority," the Court has refused to extend such class status to illegitimates, the poor, or conscientious objectors.

REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE (1978) presented the question of the "discrete and insular minority" in a new light. The question in *Bakke* was whether the same "solicitude" should be applied to test a governmental action designed to benefit rather than injure a "discrete and insular" minority. The university, citing *Carolene Products*, argued that STRICT SCRUTINY was reserved exclusively for "discrete and insular minorities." Four Justices agreed that a white male needed no special protection from the political process that authorized the actions of the university. Justice LEWIS F. POWELL rejected this argument: "the "rights created by the . . . FOURTEENTH AMENDMENT are, by its terms, guaranteed to the individual. The rights established are personal rights. . . .' The guarantee of EQUAL PROTECTION cannot mean one thing when applied to one individual and something else when applied to a person of another color."

In FULLILOVE V. KLUTZNICK (1980) the Court, for the first time since the JAPANESE AMERICAN CASES (1943–1944), upheld a racial classification that was expressed on the face of a law. *Fullilove* involved a challenge to an act of Congress authorizing federal funds for local public works projects and setting aside ten percent of those funds for employment of businesses owned by Negroes, Hispanics, Orientals, AMERICAN INDIANS, and Aleuts. Chief Justice WARREN E. BURGER, writing for a plurality, called for judicial deference to Congress's power under section 5 of the Fourteenth Amendment, as equivalent to "the broad powers expressed in the NECESSARY AND PROPER CLAUSE. . . ." The irony was that the idea of the "discrete and insular minority" in its inception was designed to curtail such deference when racial classifications were involved.

BENIGN RACIAL CLASSIFICATIONS, it is sometimes said, are justified because they do not involve the stigma of INVIDIOUS DISCRIMINATION. The recipients of the benefits that accrue from the "benign" classification are not branded as members of an "inferior race" as they would be if the classification were an invidious one. This theory erects "stigma" as the standard for equal protection rights. Absent any such stigma the implication is that the Constitution is not offended, even if individuals must bear burdens created by a classification that otherwise would be disallowed by the equal protection clause. As Burger stated in *Fullilove*, "a sharing of the burden' by innocent parties is not impermissible." To use the idea of stigma as a racial class concept is, in effect, to translate equal protection rights into class rights.

But the intrusion of class into the Constitution is a dangerous proposition, one that is at odds with the principles of the constitutional regime—principles ultimately derived from the proposition that "all men are created equal." Class considerations explicitly deny this equality because they necessarily abstract from the individual and ascribe to him class characteristics that are different—and necessarily unequal—from those of individuals outside the class. A liberal jurisprudence must disallow all class considerations. When there is a conflict between two different "discrete and insular minorities," which should be accorded preference? No principle can answer this question. And the question is not merely theoretical. The Court has already faced this dilemma in cases such as UNITED JEWISH ORGANIZATIONS V. CAREY (1977) and *Castenada v. Partida* (1977), and in a pluralistic society it is inevitable that many more such cases will arise. Equal protection can be the foundation of a genuine liberal jurisprudence only if it applies to individuals. As Justice JOHN MARSHALL HARLAN remarked in his powerful dissent in PLESSY V. FERGUSON (1896), the case that established the SEPARATE-BUT-EQUAL DOCTRINE, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of CIVIL RIGHTS, all citizens are equal before the law." This is undoubtedly still the essential principle of liberal government.

JAMES MADISON argued, in THE FEDERALIST #10, that in a large, diverse republic with a multiplicity of interests it was unlikely that there would ever be permanent majorities and permanent minorities; thus there would be little probability that "a majority of the whole will have a common motive to invade the rights of other citizens." On this assumption, the majorities that do form will be composed of coalitions of minorities that come together for limited self-interested purposes. The majority will thus never have a sense of its own interest as a majority.

By and large, the solution of the Founders has worked remarkably well. There have been no permanent majorities, and certainly none based exclusively on race. Understanding American politics in terms of monolithic majorities and "discrete and insular minorities"—as the Supreme Court appears to do—precludes the creation of a common interest that transcends racial class considerations. By transforming the Fourteenth Amendment into an instrument of class politics, the Court risks either making a majority faction more likely by heightening the majority's awareness of its class status as a majority, or

transforming the liberal constitutional regime into one no longer based on majority rule.

EDWARD J. ERLER
(1986)

Bibliography

ELY, JOHN H. 1980 *Democracy and Distrust: A Theory of Judicial Review*. Pages 75–77 and 135–179. Cambrige, Mass.: Harvard University Press.

ERLER, EDWARD J. 1982 Equal Protection and Personal Rights: The Regime of the "Discrete and Insular Minority." *Georgia Law Review* 16:407–444.

KARST, KENNETH L. and HOROWITZ, HAROLD W. 1974 Affirmative Action and Equal Protection. *Virginia Law Review* 60:955–974.

## DISCRIMINATION

See: Age Discrimination; Antidiscrimination Legislation; Disability Discrimination; Race and Sex in Antidiscrimination Law; Racial Discrimination; Sex Discrimination

## DISMISSED TIME

See: Released Time

## DISORDERLY CONDUCT

See: Breach of the Peace

## DISSENTING OPINION

In cases in which the judges of a multijudge court are divided as to the DECISION, it is customary for those in the minority to file a dissenting OPINION. This practice is followed in the Supreme Court of the United States. In recent years, dissenting opinions have been filed in as many as seventy percent of all cases decided by the Court. In a typical TERM over 150 separate dissenting opinions are filed by Justices who find themselves on the losing side.

The author of a dissenting opinion tries to explain why the Court should have decided the case differently. Often a dissenting Justice will attempt to provide the public with an interpretation of the MAJORITY OPINION in order to narrow its scope or to restrict its impact. A strong dissenting opinion may go far to weaken the decision and may point the way for future litigation.

The opinion of the Court is written by a Justice on the prevailing side designated by the Chief Justice (or the senior Justice in the majority), and must reflect a consensus of the majority. Dissenters have a freer hand: they can make their point more sharply because they do not need to accommodate colleagues who might balk at aspects of their argument. Before the decision of a case is announced, the draft opinions circulate among the Justices. A well-argued dissent can induce the author of the majority opinion to modify its content, either to retain majority support, as in EVERSON V. BOARD OF EDUCATION (1947), or to respond in kind to a particularly harsh attack, as in DRED SCOTT V. SANDFORD (1857). In an extraordinary case, the dissent may attract enough support actually to become the majority opinion.

Dissents are most common during change in the ideological composition of the Court. For a time the dissents portend an imminent revolution in the tendency of judicial thought and point to the future course of decisions. Once the revolution is perfected there follows a time when the dissents resist the new orientation and recall the old orthodoxy. Two of the Court's great dissenters were Justices JOHN MARSHALL HARLAN (1833–1911) and OLIVER WENDELL HOLMES, each of whom stood against the majority of his day and took positions that much later were adopted by the Court.

CHARLES EVANS HUGHES once wrote that "a dissent in the court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day. . . ." Contemporaneously, HARLAN F. STONE wrote that "dissents seldom aid in the right development of the law. They often do harm."

DENNIS J. MAHONEY
(1986)

## DISTRICT OF COLUMBIA

"If any of their officers, or creatures, should attempt to oppress the people, or should actually perpetrate the blackest deed, he has nothing to do but get into the ten miles square. Why was this dangerous power given?" The "dangerous power" to which GEORGE MASON objected so vehemently at the Virginia ratifying convention was that vested in Congress by the seventeenth clause of Article I, section 8, "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may . . . become the seat of the government of the United States." That the power to legislate for the capital district should be controversial was a surprise to JAMES MADISON, who had proposed it in the CONSTITUTIONAL CONVENTION OF 1787. He defended the provision as the means by which the federal government might "be

guarded from the influence of particular states, or from insults."

The district was established on the banks of the Potomac River between Maryland and Virginia, at a site chosen by GEORGE WASHINGTON, and Congress assumed JURISDICTION over it on February 27, 1801. The location of the capital was agreed to by northern Federalists in exchange for southern acquiescence in federal assumption of state revolutionary war debts. But that location, south of Mason's and Dixon's line, resulted in the greatest national disgrace before the Civil War, namely, that the federal capital was a bastion of slavery and the home of a flourishing slave market. Not until the COMPROMISE OF 1850 was even abomination of slave trading extinguished.

Originally, the District of Columbia comprised one hundred square miles of land ceded by Virginia and Maryland, and three municipal corporations, Washington, Georgetown, and Alexandria. Alexandria was retroceded to Virginia in 1846, at the request of its inhabitants, and the district has since comprised less than seventy square miles. Since 1871, there has been a single municipal corporation coextensive with the district. The 1980 population of over 600,000 was larger than the populations of each of four states.

During most of its history the district's lawmaking was done directly by Congress. There was a brief period of home rule, under a government like those of the TERRITORIES, from 1871 to 1874, during which the district plunged deeply into debt. From 1878 until 1974 the district was governed by three commissioners appointed by the President. Home rule was restored by passage of the DISTRICT OF COLUMBIA GOVERNMENT REORGANIZATION AND SELF-GOVERNING ACT in 1973 and adoption of a city charter in 1974. Since that time the district has been governed by an elected mayor and council, although Congress must approve the budget and retains a veto over other legislation.

The legal status of residents of the District of Columbia is anomalous. The Framers of the Constitution apparently did not foresee a large permanent population in the district distinct from the population of the surrounding states. Even the CITIZENSHIP of district residents, who were not citizens of any state, was uncertain until adoption of the FOURTEENTH AMENDMENT (1868). At least from *Hepburn v. Ellzey* (1805) until the Supreme Court sustained an amendment to the JUDICIAL CODE in *National Mutual Insurance Company v. Tidewater Transfer Company* (1949), citizens of the district could not sue or be sued in federal court under DIVERSITY JURISDICTION. Moreover, district residents were unable to vote for presidential electors until passage of the TWENTY-THIRD AMENDMENT (1961), and they remain unrepresented in Congress to this day (except, since 1970, by a nonvoting delegate). In 1978, Congress proposed the DISTRICT OF COLUMBIA REPRESENTATION AMENDMENT, which would have given the district a status equivalent to statehood, but the amendment failed of RATIFICATION by the state legislatures.

The district has often been the site of experiments in "model legislation," such as the DISTRICT OF COLUMBIA MINIMUM WAGE ACT (1918) and the District of Columbia Crime Control Act (1970). The district is also the focus of demonstrations, small and great, against government policies, ranging from Coxey's army (1894) and the bonus marchers (1932) to Resurrection City (1968) and the marches against the VIETNAM WAR. The right to carry demands for redress of grievances directly to the seat of government is a unique expression of FREEDOM OF PETITION.

Creation of a capital district outside the jurisdiction of any of the constituent states has been copied by other federal unions, including Australia, Brazil, India, and Mexico. The idea that no one member of the federation should control the conditions under which the central government works has thus become a part of the modern theory of FEDERALISM. The all-too-real practical difficulty is that the conditions come to be controlled instead by those who make up the permanent infrastructure of the government and whose perceived interest is in the perpetual growth of that government. In the United States itself, the District of Columbia remains an anomaly, a city dependent almost entirely upon the public payroll serving as the capital of a republic dedicated to the principle of free private enterprise.

DENNIS J. MAHONEY
(1986)

## DISTRICT OF COLUMBIA
### (Update)

After nearly two hundred years since assuming exclusive JURISDICTION over the District of Columbia, Congress continues to tinker with the governmental structure of the district and to disfranchise its citizens.

The 1990s witnessed the effective end of a twenty-year experiment with home rule in the district. A series of fiscal and management crises, coupled with remarkably high crime rates, led Congress to pass LEGISLATION creating a "control board" to oversee the district's governance. Its five members appointed by the President, the control board assumed most of the powers of the elected mayor and city council.

The institution of the control board further diluted the limited opportunities for self-government enjoyed by the district's citizens. Although the TWENTY-THIRD AMENDMENT granted the district a voice in the ELECTORAL COLLEGE, district citizens do not have full REPRESENTATION in Congress.

(They have a delegate in the U.S. HOUSE OF REPRESENTATIVES who can vote in committee, but not on the final passage of legislation.) With the end of home rule, the over 500,000 citizens of the district have no formal say in legislation governing their communities.

The disfranchisement of district citizens contravenes the famous rallying principle of the AMERICAN REVOLUTION, "No taxation without representation." Yet, despite scholars' sound constitutional arguments for extending VOTING RIGHTS to district citizens based on the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT, neither the courts nor the political branches show any inclination to establish a truly REPUBLICAN FORM OF GOVERNMENT in the district.

ADAM WINKLER
(2000)

## DISTRICT OF COLUMBIA MINIMUM WAGE LAW
40 Stat. 960 (1918)

Congress, in its capacity as legislature for the DISTRICT OF COLUMBIA, enacted this minimum wage law for women and minors "to maintain them in good health and to protect their morals." Seeking to ground the act on the POLICE POWER, Congress established a Minimum Wage Board with power to compel testimony and other EVIDENCE. The act authorized the board to investigate wage conditions of women and minors in the District of Columbia and to fix their minimum wages on the basis of adequacy "to supply the necessary cost of living." The act required the board to provide PROCEDURAL DUE PROCESS; it also provided for APPEALS to courts of the District and made violations punishable as MISDEMEANORS. The Supreme Court declared the act unconstitutional in *Adkins v. Children's Hospital* (1923) as a violation of SUBSTANTIVE DUE PROCESS OF LAW, but when the Court overruled *Adkins* in WEST COAST HOTEL CO. V. PARRISH (1937), Attorney General HOMER CUMMINGS declared that the law was in effect without any need for congressional reenactment.

DAVID GORDON
(1986)

(SEE ALSO: *Unconstitutionality.*)

## DISTRICT OF COLUMBIA REPRESENTATION AMENDMENT
92 Stat. 3795 (1978)

Twenty-three times since 1800, congressional representation for the DISTRICT OF COLUMBIA had been sought, mainly on the grounds that taxation of District residents without REPRESENTATION in Congress was undemocratic. The modern District's predominantly black population is larger than that of each of ten states. In 1978 Congress proposed a constitutional amendment that would treat the district as a state is treated for purposes of congressional and ELECTORAL COLLEGE representation and for participation in presidential elections and RATIFICATION OF CONSTITUTIONAL AMENDMENTS. It would have repealed the TWENTY-THIRD AMENDMENT, which had allowed district residents to vote for President and vice-president, while limiting district representation in the electoral college to that of the least populous state. As with other recent amendments, Congress fixed a seven-year time limit for ratification and provided that it would implement the amendment by legislation at a later date.

Although both houses of Congress passed the proposed amendment enthusiastically, it had slight chance of ratification because it would have added two senators and one representative to Congress, all almost certain to be both black and Democrats. In 1985, the period for ratification expired.

PAUL L. MURPHY
(1986)

Bibliography

BEST, JUDITH 1983 *National Representation of the District of Columbia.* Frederick, Md.: University Publications of America.

## DISTRICT OF COLUMBIA SELF-GOVERNING AND GOVERNMENT REORGANIZATION ACT
87 Stat. 774 (1973)

Limited home rule in the DISTRICT OF COLUMBIA had been a long-time desire of its inhabitants. Since 1874, the President had chosen the city's administrators and Congress had acted as the city's governing council. Washingtonians elected only their school board and a nonvoting delegate to the House of Representatives.

This 1973 act granted the District a council, a mayor, and increased self-government. It provided a charter for local government, subject to approval by a majority of the registered voters. Although Congress sought to avoid day-to-day responsibility for District affairs, it retained ultimate legislative authority as provided in Article I, section 8, including the power to legislate generally for the District and to veto local laws. The city government exercised the functions of several quasi-federal agencies: the Redevelopment Land Agency, the National Capital Housing Authority, and the District of Columbia Manpower Administration. The Act reorganized the National Capital

Planning Commission, giving the mayor responsibility for District planning, excepting federal and international projects. Further, it required the President, in appointing judges to the District of Columbia Court of Appeals and the Superior Court, to choose from candidates submitted to him by a newly created District of Columbia Judicial Nomination Commission.

The act, while still denying the District congressional REPRESENTATION, satisfied a number of city residents' demands for local control over city affairs.

PAUL L. MURPHY
(1986)

## DIVERSITY JURISDICTION

Under Article III of the Constitution, the JUDICIAL POWER OF THE UNITED STATES extends to "Controversies between Citizens of different States . . . and between . . . the Citizens [of a State] . . . and foreign . . . Citizens or Subjects." This power is called diversity jurisdiction because its basis is the difference in CITIZENSHIP of the parties.

The accepted justification for diversity jurisdiction has been the need to protect out-of-state citizens against discrimination in state courts. However, the extent of such discrimination as of the time the Constitution was written is uncertain, and there is evidence that financial and commercial interests supported diversity jurisdiction in the hope of finding shelter from state laws and judicial systems favorable to debtors.

In fact, the diversity jurisdiction authorized in Article III is not confined to situations in which out-of-state citizens require protection. For example, a plaintiff may file a diversity action in her home state's federal court if she can obtain personal JURISDICTION over the defendant there. Also, it is constitutionally permissible for Congress to confer diversity jurisdiction even when citizens of the same state are on both sides of the litigation, so long as some out-of-state citizens are also parties. Congress has conferred jurisdiction in just such cases in the federal interpleader statute.

Congress has the power to determine how much of the constitutionally authorized diversity jurisdiction the lower federal courts may exercise. It has enacted a general statute that allows the federal courts to hear some but not all types of diversity cases either originally or on REMOVAL. Examples of excluded cases are those in which less than a required amount is in controversy, those in which there is incomplete diversity (that is, at least one plaintiff is from the same state as at least one defendant), and those which the defendant seeks to remove from his or her home state's court.

In 1946 Congress first provided expressly for diversity jurisdiction over suits involving citizens of the DISTRICT OF COLUMBIA and TERRITORIES. In *National Mutual Insurance Co. v. Tidewater Co.* (1949), the Supreme Court upheld the law because two Justices were willing to declare that the District of Columbia was a "state" within the meaning of the diversity clause of Article III, and three Justices concluded that Congress could confer the jurisdiction even if it were not within the Article III judicial power.

The citizenship of parties for purposes of applying the general diversity statute is not always obvious. Some problems have been solved by statute. For example, problems arising from the Court's 1844 decision that a CORPORATION is a citizen of its state of incorporation were resolved by a congressional declaration that a corporation is a citizen of both the state of its incorporation and of the state where its principal place of business is located. Others have been handled by judicial interpretation, which has held, for example, that an individual is a citizen of the state in which he or she is domiciled at the time suit is filed. Difficult interpretive problems remain, however.

Under the Rules of Decision Act, as interpreted in ERIE RAILROAD V. TOMPKINS (1938), a federal court hearing a diversity case must apply the substantive law of the state in which it is located. It must also employ that state's CHOICE OF LAW rules and any of the state's procedural rules that have a predictable effect on the outcome of the case and do not conflict with the FEDERAL RULES OF CIVIL PROCEDURE or some overriding federal policy. In cases in which state law is unclear or has not yet been decided, the federal court must strive to resolve the case as the state's highest court would, drawing direction from trends and policies manifest in state judicial opinions at all levels. The state courts are not bound by the federal court's decisions interpreting state law.

It is doubtful that Congress could constitutionally enact a law giving to the federal courts or assuming for itself the power to develop substantive law for diversity cases. Although the *Erie* opinion avoided this constitutional issue, fundamental notions of state sovereignty and the limited role of the federal government dictated the decision's interpretation of the Rules of Decision Act. Notwithstanding these limitations, Congress may enact and has enacted rules of procedure regulating diversity cases, even though the rules also affect substantive rights. And because of the federal interest in the orderly and fair treatment of individuals engaged in multistate transactions, Congress likely could also constitutionally enact a body of federal choice of law rules applicable to diversity actions.

Declining concern over the need to protect out-of-state citizens against discrimination in state courts, coupled with rising distress over the heavy caseload of the federal courts, has spawned proposals to eliminate the federal courts' general diversity jurisdiction. While some continue

to praise diversity jurisdiction for the continued acquaintance it offers federal judges with the common law process and the access it offers litigants (albeit selectively) to the often superior federal procedural system, those who support congressional repeal of diversity jurisdiction seem to be approaching success. Eventually it may come to be used only in complex, multistate cases, such as CLASS ACTIONS and interpleaders, in which the federal courts' power to issue process nationwide offers substantial advantages over state jurisdiction.

CAROLE E. GOLDBERG-AMBROSE
(1986)

Bibliography

ELY, JOHN HART 1974 The Irrepressible Myth of *Erie*. *Harvard Law Review* 87:693–740.

SHAPIRO, DAVID 1977 Federal Diversity Jurisdiction: A Survey and a Proposal. *Harvard Law Review* 91:317–355.

## DIVORCE AND THE CONSTITUTION

The constitutional power of the states to prescribe conditions for marriage and divorce went largely unchallenged until the mid-twentieth century. Once Americans became highly mobile, however, new constitutional questions emerged. Divorce might be difficult under some states' laws, and well-nigh impossible under others', but in some places the courthouse doors were open. Could two North Carolinians go to Nevada, stay there for six weeks of "residence," obtain EX PARTE divorces from their respective North Carolina spouses, marry each other, and return to live in North Carolina without being guilty of bigamous cohabitation? In two cases entitled *Williams v. North Carolina* (1942, 1945), the Supreme Court answered that question conditionally. The Nevada divorces were valid, and must be given FULL FAITH AND CREDIT by North Carolina, if the travelers really were domiciled in Nevada when they received their divorces. However, domicile was a jurisdictional requirement for the Nevada courts; North Carolina might constitutionally retry the issue of the previous Nevada domicile, and, if its courts found that domicile lacking, might punish its straying residents.

The *Williams* "solution" soon crumbled. The Court held in 1948 that if both husband and wife entered appearances in the Nevada proceeding, then neither of them could later challenge the Nevada divorce by way of COLLATERAL ATTACK. Nor could a third party attack such a JUDGMENT. Perhaps the "true" domiciliary state might prosecute for bigamy in a case just like *Williams*, but few states had North Carolina's zeal for such prosecutions.

Since mid-century American law in this area has undergone two distinct but related revolutions. First, almost all the states now permit the dissolution of marriage on at least one "no fault" ground. Second, in a variety of contexts the Supreme Court has recognized not only a constitutional right to marry but a broad FREEDOM OF INTIMATE ASSOCIATION. It is doubtful that a state's interest in preserving a marriage against the will of one spouse would be given the same weight today that the Court gave it in the 1940s. In SOSNA V. IOWA (1975) the majority did remark that domicile was still a jurisdictional requirement for divorce, but the Court might take a different view if a latter-day prosecutor were to bring bigamy charges in circumstances closely resembling the *Williams* facts. (See MARRIAGE AND THE CONSTITUTION.)

*Sosna* itself upheld Iowa's one-year durational RESIDENCE REQUIREMENT as a condition on access to the state's divorce court, rejecting the argument that this limitation denied the constitutional RIGHT TO TRAVEL with the comment that the state had not denied divorce but only delayed it. Lawyers, including Justices, are experts in rationalizing; each day's delay in getting a divorce is surely a denial of one day's single status and of the right to remarry. The *Sosna* rationalization was aimed at distinguishing the Court's earlier decision in BODDIE V. CONNECTICUT (1971). *Boddie* held, on PROCEDURAL DUE PROCESS grounds, that INDIGENTS could not constitutionally be denied ACCESS TO THE COURTS in divorce cases for inability to pay filing fees. The Court there remarked on the "basic importance" of marriage, and took note that the state had a monopoly over its dissolution—and thus the availability of lawful remarriage.

The Court has not recognized a "right to divorce" analogous to the "right to marry" confirmed in LOVING V. VIRGINIA (1967) and ZABLOCKI V. REDHAIL (1978). However, we are not far from the recognition that the Constitution demands important justification for any significant interference with a spouse's freedom to terminate a marriage. Although the virtual disappearance of highly restrictive divorce laws makes less urgent the recognition of this constitutional liberty, that same change in state law surely alters the climate in which the Justices would evaluate the state's interests urged in opposition to the claim of associational freedom.

The collateral issue of child custody can also raise constitutional issues. Of necessity, a domestic relations court must have wide discretion in awarding custody. Yet because the parent-child relation is itself an intimate association of "fundamental" importance, it is vital that the custody decision not be made arbitrarily. The presumption of custody for the mother over a child of "tender years," for example, raises grave issues concerning SEX DISCRIMINATION. Racial and religious grounds for custody

obviously raise constitutional danger signals, as PALMORE V. SIDOTI (1984) shows. And for a court to deny custody to a parent simply because he or she is living with another adult outside marriage, or is involved in a homosexual relationship, would also raise serious problems of associational freedom. Of course, at some level of maturity well below the age of adulthood, the child's preference—his or her own associational freedom—takes on constitutional weight that may dominate the custody decision. The Supreme Court has only begun its exploration of these painful subjects. Surely an early priority for the Court will be the reexamination of its old assumptions about the interests that justify a state's imposing its own preferred family patterns on the individuals who must live in them.

KENNETH L. KARST
(1986)

Bibliography

GARFIELD, HELEN 1980 The Transitory Divorce Action: Jurisdiction in the No-Fault Era. *Texas Law Review* 58:501–547.

KARST, KENNETH L. 1980 The Freedom of Intimate Association. *Yale Law Journal* 89:624–692.

NOTE 1980 Developments in the Law: The Constitution and the Family. *Harvard Law Review* 93:1156, 1308–1350.

## DNA TESTING AND GENETIC PRIVACY

Constitutional RIGHT OF PRIVACY issues in the context of genetic testing may arise as federal, state, and local governments engage in the collection of DNA samples for DNA identification testing. These tests produce patterns of DNA banding that are highly specific to each individual. Such DNA banding patterns are useful for determining disputed paternity and for matching suspects to forensic samples in either criminal or military settings, among others. To facilitate such genetic identification, both law enforcement agencies and the military have begun assembling databases of DNA patterns. Additionally, many states have enacted laws requiring compulsory DNA sampling of convicted criminals. In analyzing the privacy implications of such testing, it is important to bear in mind that the patterns themselves contain essentially no information related to genetic disease or other expressed physical or behavioral genetic traits, only a highly individualized pattern of DNA fragments.

The federal Constitution contains no explicit right of privacy, but privacy is implicated in the constitutional restrictions on SEARCH AND SEIZURE under the FOURTH AMENDMENT, and the RIGHT AGAINST SELF-INCRIMINATION under the Fifth Amendment. In SCHMERBER V. CALIFORNIA (1966), the Supreme Court held that warrantless removal of a blood sample from a suspect for purposes of blood alcohol testing constitutes a search under the Fourth Amendment. However, the Court held that because blood drawing is a safe, routine, and minimally invasive medical procedure, such a search did not intrude on the suspect's privacy, and was permissible with PROBABLE CAUSE. The Court also held that the taking of such evidence did not implicate the Fifth Amendment right against self-incrimination, as this right extends only to compelled oral testimony.

From this PRECEDENT, courts have more recently held that taking forensic DNA samples is not a form of compelled "self-incrimination," and is a permissible government search. Indeed, some forms of DNA identification tests can be done with a hair root or other bodily samples obtained by even less invasive procedures than drawing blood. Additionally, where compulsory testing of convicted criminals is concerned, the required showing of probable cause is much lower because convicts, having forfeited many of their CIVIL RIGHTS, have diminished privacy interests.

An additional important source of constitutional privacy arises from the line of reproductive rights cases including ROE V. WADE (1973). These cases establish a constitutional right against governmental intrusion into aspects of reproductive privacy. Despite the conceptual relationship between genetics and procreation, reproductive privacy does not appear to be implicated by DNA identification tests. The Supreme Court has stressed that these cases deal only with direct governmental intrusion into "protected decisionmaking" related to procreation, childbearing, and related familial choices. DNA identification testing does not impede or directly burden an individual's ability to beget, bear, or rear a child.

An additional aspect of constitutional privacy arises from a right of informational privacy found by the Supreme Court in WHALEN V. ROE (1977). This constitutional right restricts the ability of the government to compile personal information about individuals. However, the courts have held this right to be sharply limited. Government collection of such information is usually permissible when the government can show a legitimate reason for doing so, and takes some steps to restrict access to the information. Because DNA identification patterns contain little personal information, and governmental need for such information is compelling, collection of such patterns is probably permissible under *Whalen*, particularly since Congress has enacted some statutory protections against unauthorized disclosure or use of information in law enforcement DNA collection.

DAN L. BURK
(2000)

## DOCTRINE

In constitutional law as in other pursuits of revelation, initiates commonly refer to "doctrines": bodies of rules or principles either authoritatively declared or systematically advocated. Some such doctrines have been simple; the ORIGINAL PACKAGE DOCTRINE is an example. Others, such as the INCORPORATION DOCTRINE, may become shorthand references to larger and more complex creations of the legal mind. More inclusively, one may speak of a doctrine as the body of principles ruling any branch of law, including constitutional law: the doctrine governing PRIOR RESTRAINTS on speech, for example, or the doctrine governing discrimination based on ILLEGITIMACY. In any such use, "doctrine" refers to a body of judicial interpretations of a particular branch of law.

Even more generally, one may speak of constitutional "doctrine" in the abstract, referring to the whole body of rules and principles resulting from the judicial process of CONSTITUTIONAL INTERPRETATION. Our constitutional law, apart from a few rules explicitly stated in the text of the Constitution (such as the requirement that a senator be thirty years old), consists almost entirely of doctrine made by judges in the tradition of the Anglo-American COMMON LAW. Doctrine thus develops as precedents are made by decisions in particular cases. One branch of constitutional doctrine, in fact, is designed in part to assure that the federal courts' lawmaking is informed by the need to apply doctrine to concrete facts. (See CASES AND CONTROVERSIES.) There is therefore a human quality in nearly every constitutional case; a court's opinion normally begins with a recitation of actual facts touching the lives of named individuals. One danger in an era of CLASS ACTIONS and INSTITUTIONAL LITIGATION is that those techniques carry some risk of squeezing the human flavor out of a case, with attendant costs to the process of keeping doctrine attuned to life. Yet implied in the idea of doctrine is the elaboration of principles transcending the concerns of particular individuals, to provide guidance—or comfort—to people in the aggregate.

Doctrinal formulas may outlive their usefulness, as the "original package doctrine" has. When they do, they fall into disuse or are explicitly abandoned. One of the paradoxes of law is that it strives to provide the security of enduring rules and principles yet is compelled to adjust to the demands of an evolving human society. Constitutional doctrine is rarely tidy and nearly always susceptible to manipulation; it is full of ambiguity and vagueness; "absolute" rules either give way to interest-balancing or serve as interest-balancing's disguises. Doctrine was ever history's handmaiden.

Yet constitutional doctrine has had generating force of its own. It is hard to imagine what this country would have been like but for the nation-building doctrinal contributions of the MARSHALL COURT. And the doctrinal development begun by BROWN V. BOARD OF EDUCATION (1954) has been a major influence in our twentieth-century social and political life. If constitutional doctrine sometimes seems no more than a chapter in a given era's political story, it is sometimes a chapter that advances the plot.

KENNETH L. KARST
(1986)

Bibliography

BICKEL, ALEXANDER M. 1962 *The Least Dangerous Branch: The Supreme Court at the Bar of Politics.* Indianapolis: Bobbs-Merrill.

## *DODGE v. WOOLSEY*
18 Howard 331 (1856)

The PIQUA BRANCH BANK V. KNOOP (1854) decision striking down the tax on banks enraged the people of Ohio. They exercised SOVEREIGNTY by amending their state CONSTITUTION to empower and require their legislature to tax all banks, regardless of any tax-immunity or tax-preference clauses in their charters. Woolsey, a stockholder of a bank, sued the bank, as well as the tax collector, in a state court to enjoin the collection of a tax authorized by the state legislature under the new amendment to the state constitution. The Supreme Court, by a vote of 6–3, for the first time sustained its JURISDICTION in a STOCKHOLDER'S SUIT and ruled that the state could no more impair the OBLIGATION OF A CONTRACT, contrary to the CONTRACT CLAUSE, by its constitution than by a statute. Justice JOHN A. CAMPBELL, one of the dissenters, angrily asserted that his brethren had established the DOCTRINE that the final power over public revenues was to be found not in the people "but in the numerical majority of the judges of this court. . . ." Besides his heat, he raised a profound question: "Should it be that a state of this Union had become the victim of vicious legislation, its property alienated, its powers of taxation renounced in favor of chartered associations, and the resources of the body politic cut off, what remedy has the people against the misgovernment?" Chief Justice ROGER B. TANEY answered for the majority by saying that the people govern themselves, wisely or not, and are bound to their contracts by the Constitution. By 1862 the Court handed down five more decisions involving the taxation of Ohio banks. The state finally capitulated, and the Court irrevocably committed itself to the doctrine that a grant of tax privileges could not be repealed for the life of the contract.

LEONARD W. LEVY
(1986)

## DOE, CHARLES
(1830–1896)

Charles Cogswell Doe, associate justice of the New Hampshire Supreme Court from 1859 to 1874, and chief justice from 1876 to 1896, is remembered as one of the country's greatest COMMON LAW judges. He is less renowned for his contributions to constitutional law. One reason may have been his bold originality. During his years on the bench, constitutional law was less tolerant of the unorthodox and less receptive to eccentric genius than was the common law. And Doe was original if not eccentric. The perspective from which he viewed the state constitution is an example. The drafters of the document had adopted words indicating they were writing a SOCIAL COMPACT and Doe insisted it had to be interpreted as a social compact. Under the other types of constitutions—those that were organic laws, not compacts—the government, Doe maintained, possesses INHERENT POWERS limited by certain enumerated provisions (for example, the federal BILL OF RIGHTS). When the liberty of a citizen is pitted against the authority of the state, the citizen must find specific wording to restrain government. A constitution that is a compact, by contrast, has no place for inherent power. As a result, Doe held in *Wooster v. Plymouth* (1882), CIVIL RIGHTS are not immunities but "privileges which society has engaged to provide in lieu of the natural liberties so given up by individuals" under the "contract." The proposition that the compact made government an agent, and individual rights absolute except when specifically surrendered, permitted Doe to relieve the citizen of the burden of establishing constitutional limits on state authority. The state had to demonstrate that the power it claimed had, by compact, been delegated to it.

The chief constitutional DOCTRINE resulting from the social compact doctrine was equality. "The bill of rights," Doe ruled in *State v. U.S. & Canada Express Co.* (1880), "is a bill of their equal, private rights, reserved by the grantors of public power." Equality, he added, is "practically the source and sum of all rights, and the substance of the constitution." Doe sought to make equality the most fundamental civil right protecting nineteenth-century Americans.

The national development in constitutional law most troublesome to Judge Doe was the United States Supreme Court's decision in the SINKING FUND CASES (1879). Fearing that the ruling endangered private property rights, he wrote several opinions hoping to diminish those cases' influence. In *Corbin's Case* (1891) Doe even invented the concept of "constitutional estoppel" to bar the state government from taking an action that in a corporate charter it had expressly reserved the right to take. Doe's particular genius even led him to criticize FLETCHER V. PECK (1810) and DARTMOUTH COLLEGE V. WOODWARD (1819), two decisions most contemporaries thought protected property rights. Doe believed they weakened property rights and increased arbitrary legislative power. Better had they been decided on the SEPARATION OF POWERS principle than on the CONTRACT CLAUSE.

In Doe's hands, the separation of powers principle became a means of enlarging his court's JURISDICTION. His distrust of legislative power resulted in support of laissez-faire principles, but his belief that courts should impose common law tests of reasonableness on business supported a measure of regulation. The supremacy of constitutional limitations was his foremost principle.

JOHN PHILLIP REID
(1986)

Bibliography

REID, JOHN PHILLIP 1967 *Chief Justice: The Judicial World of Charles Doe.* Cambridge, Mass.: Harvard University Press.

## *DOE v. BOLTON*

See: *Roe v. Wade*

## *DOLAN v. CITY OF TIGARD*
512 U.S. 374 (1994)

Governments often require landowners to satisfy conditions before issuing building permits. Under the Supreme Court's opinion in *Nollan v. California Coastal Commission* (1987), landowners can challenge such conditions as violating the Fifth Amendment's TAKINGS clause when they lack an "essential nexus" to the harms of development.

Dolan sought permission from the City of Tigard, Oregon to expand her retail hardware business, which was partially situated on a floodplain. The Planning Commission conditioned its approval on Dolan's agreeing to dedicate both her land within the floodplain to improve the city's flood control system and an additional 15-foot strip for a pedestrian/bicycle pathway. The Court held, 5–4, that these conditions constituted a taking of property.

The MAJORITY OPINION, authored by Chief Justice WILLIAM H. REHNQUIST, found that the "essential nexus" test of *Nollan* was met. But this was not enough. An exaction should also bear a "rough proportionality" to the corresponding harm. "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." Finding no such "individualized

determination" in the case, the Court found an unconstitutional takings instead.

In dissent, Justice JOHN PAUL STEVENS criticized the Court for resurrecting heightened JUDICIAL REVIEW of regulations similar to *Lochner*-era SUBSTANTIVE DUE PROCESS jurisprudence. He argued that the uncertainty of assessing environmental harms should justify deference to legislative processes where the government can demonstrate rationality and impartiality of its conditions. Justice DAVID H. SOUTER wrote a separate dissent, in which he argued that proportionality ought to be considered part of the "essential nexus" test of *Nollan*.

EDWARD J. MCCAFFERY
(2000)

## *DOMBROWSKI v. PFISTER*
380 U.S. 479 (1965)

*Dombrowski* marks the high point of the Supreme Court's willingness to authorize federal district court interference with pending state criminal proceedings. When decided, *Dombrowski* seemed to suggest that such interference was warranted when the state statutes forming the basis of the prosecution were alleged to violate the First Amendment overbreadth doctrine. The CHILLING EFFECT—a term first used in *Dombrowski*—on First Amendment rights of prosecutions under such statutes derived from the fact of the prosecution, thereby rendering successful defense of the prosecution an inadequate remedy for the chilling effect. *Dombrowski* was "reinterpreted" in YOUNGER V. HARRIS (1971) and has since been of little precedential or practical importance.

THEODORE EISENBERG
(1986)

# DOMESTIC COMMERCE

See: Intrastate Commerce

# DOMESTIC VIOLENCE CLAUSE

Article IV, section 4 of the U.S. Constitution provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

The last phrase in this section, known as the domestic violence clause, was added to the Constitution in response to SHAYS' REBELLION in Massachusetts in 1786–1787 in which disgruntled Massachusetts farmers shut down the state courts and threatened the legislature. Congress, acting under the ARTICLES OF CONFEDERATION and concerned that rebellion might affect other states, attempted to raise federal troops from neighboring states, but was ignored. When the CONSTITUTIONAL CONVENTION began, three months after Shays' Rebellion was resolved, the drafters included among the Constitution's purposes the need "to insure domestic tranquility" and added the domestic violence clause.

The domestic violence clause commits the power to protect the states to the "United States" rather than to any particular branch. In 1792 Congress assigned to the President the duty to respond on behalf of the United States, a statutory power the President retains today. Presidents have used their authority sparingly. The first President to use this authority was apparently RUTHERFORD B. HAYES who, in 1877, was asked by the governor of West Virginia (because the state legislature was not in session) to send federal troops to help suppress a railroad LABOR riot. On several occasions Presidents have declined to respond to requests for assistance because the state had not demonstrated the insufficiency of its own resources or because an official, and not the state legislature, had made the request.

The domestic violence clause has long had a secondary meaning. It was frequently cited during two critical periods—the drafting of the Constitution in 1787 and the FOURTEENTH AMENDMENT enforcement debates— as evidence that the states, not the federal government, had the primary responsibility for criminal law enforcement. Some of the Framers, who were concerned that the new federal government would usurp traditional state power over crime, pointed out that the Constitution expressly granted to the United States the power to punish only three crimes: treason, counterfeiting, and piracy on the high seas. They then argued that the domestic violence clause reserved to the states the power to define and punish domestic crime.

These arguments were renewed during the debates over early CIVIL RIGHTS legislation enforcing the Fourteenth Amendment. Those who favored an expansive view of the Fourteenth Amendment made a two-step argument: (1) The clause obligated the federal government to intervene when a state was overwhelmed by domestic disturbances and requested assistance, and (2) crimes committed within a state constituted evidence of the state's inability to deal with domestic disturbances and, accordingly, the guarantee of EQUAL PROTECTION OF THE LAWS justified federal intervention whether or not the state requested it. Those who favored a more limited view of the Fourteenth Amendment argued that the domestic violence clause was itself a limitation on the powers of Con-

gress and that the federal government could not invade the inherent power of states to punish crime, at least not without a proper request from the state.

The arguments over the relationship between the domestic violence clause and the power of Congress to punish crime have never been addressed by the courts. In LUTHER V. BORDEN (1849), the Supreme Court held that the determination of when a state government has properly requested federal assistance under the domestic violence clause belongs to the political branches exclusively. Since that time the courts have declined invitation to construe the duty of the United States under the clause. Accordingly, the constitutional role of the domestic violence clause remains somewhat obscure.

JAY S. BYBEE
(2000)

Bibliography

BYBEE, JAY S. 1997 Insuring Domestic Tranquility, *Lopez*, Federalization of Crime and the Forgotten Role of the Domestic Violence Clause. *George Washington Law Review* 66:1–83.

COMMENT 1966 Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy. *Duke Law Journal* 1966:415–462.

FERGUSON, CLARENCE C. 1959 The Inherent Justiciability of the Constitutional Guaranty Against Domestic Violence. *Rutgers Law Review* 13:407–425.

RICH, BENNETT M. 1941 *The Presidents and Civil Disorder.* Washington, D.C.: The Brookings Institution.

WIECEK, WILLIAM M. 1972 *The Guarantee Clause of the U.S. Constitution.* Ithaca, N.Y.: Cornell University Press.

## *DOREMUS, UNITED STATES v.*
249 U.S. 86 (1919)

Congress moved to suppress illegal drug trafficking in the HARRISON ACT of 1919 by compelling persons dealing in narcotics to register with the federal government. The act further imposed a $1 annual license tax, an exercise of the NATIONAL POLICE POWER. Justice WILLIAM R. DAY, for a 5–4 Supreme Court, sustained the entire act even though the provision at issue was the one requiring the use of federal forms for recording transactions. "The act may not be declared unconstitutional," Day said, "because its effect may be to accomplish another purpose as well as the raising of revenue." He found the tax section closely related to the rest of the act. By ignoring LEGISLATIVE INTENT—and his own recent opinion in HAMMER V. DAGENHART (1918) where such intent had been dispositive—he chose to follow the line of precedents beginning with CHAMPION V. AMES (1903). A single-sentence dissent found that the act overstepped Congress's delegated powers and invaded the states' RESERVED POLICE POWER.

DAVID GORDON
(1986)

(SEE ALSO: *Drug Regulation; Taxing and Spending Powers.*)

## *DOREMUS v. BOARD OF EDUCATION*
342 U.S. (1952)

A New Jersey statute provided for the reading, without comment, of five verses of the Old Testament at the opening of each public school day. This was challenged as an ESTABLISHMENT OF RELIGION by a taxpayer of the town of Hawthorne who had had a child in its school system.

Justice ROBERT H. JACKSON, writing for the Supreme Court, rejected the STANDING of the plaintiff to raise the constitutional question. His child had been graduated from school, so that his claim as a parent suffered from MOOTNESS. Furthermore, because there was no showing that public money was spent on the practice, the plaintiff's taxpayer status gave him no stake in the litigation.

Justice WILLIAM O. DOUGLAS, with whom Justices STANLEY F. REED and HAROLD BURTON agreed, dissented. A taxpayer, Douglas argued, had a general interest in how the schools of the community were managed. The effect of this disposition was to defer for a decade decision on the constitutional merits of religious exercises in public schools.

RICHARD E. MORGAN
(1986)

# DORMANT COMMERCE CLAUSE

The Constitution does not explicitly restrict STATE REGULATION OF COMMERCE. While the COMMERCE CLAUSE of Article I authorizes congressional displacement of state commercial regulation, the constitutional text is silent regarding the residuum of power left to the states where Congress has not acted. It has long been accepted, however, that the mere grant of authority to Congress—even if unexercised—implies some restrictions on the states. A panoply of terms is applied to this constitutional implication. Among the most popular are the "negative commerce clause" or the "dormant commerce clause."

Surprisingly there was little discussion at the CONSTITUTIONAL CONVENTION OF 1787 on the subject of free trade. Consequently, the Supreme Court felt obligated to justify the implied limitation on the state by reference to the events that precipitated the call for a convention rather than to what transpired at the gathering. The ARTICLES OF

CONFEDERATION era was marked by commercial warfare between the states. The resulting barriers to national trade, which threatened the vitality and peace of the Union, are often viewed as a primary catalyst for the Convention of 1787.

Judging from the constitutional language alone, one might conclude that the Framers left protection of national trade to congressional supervision rather than judicial enforcement. This expectation, however, does not appear to have been the vision of the principal Framer. JAMES MADISON anticipated that competing economic interests would neutralize each other in Congress and prevent the enactment of national regulation of interstate trade. The commerce clause, explained Madison in a letter written a half-century after the Constitution's drafting, would act "as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government." Under Madison's impasse theory, Congress would be unable to act because of political impediments, and the state would be powerless to act because of limited authority.

Madison's theory did not address the question of who was to bring the states back in line when they transcended their authority. Logic pointed to the courts. If Congress were paralyzed in the face of potent and conflicting local interests, only the courts could protect the national interest in free trade. Few expressed this sentiment better than OLIVER WENDELL HOLMES, JR. Too often, observed Holmes, state action is taken "that embodies what the Commerce Clause is meant to end." The Union "would be imperiled," he warned, if the Court lacked power to void such laws. The Court's active role in scrutinizing state commercial regulation suggests that most of Holmes's successors have shared his concern.

The Court's dormant commerce clause jurisprudence has two distinctive branches. Under the "discrimination" branch, the Court invalidates state legislation discriminating against INTERSTATE COMMERCE. Under the "undue burdens" branch, the Court will strike down even neutral state regulations if the burden imposed on the interstate commerce is clearly excessive in relation to the local benefits.

The discrimination branch has been relatively noncontroversial. Even those who question the propriety of judicial balancing of trade burdens and local benefits generally concede the need for discrimination review. The dormant commerce clause, however, seems an odd vehicle for attacking interstate discrimination. The antidiscrimination provision of Article IV's PRIVILEGE AND IMMUNITIES clause seems far more appropriate.

In its original form, as contained in the Articles of Confederation, the privileges and immunities clause specifically addressed the problem of commercial isolationism, providing that the inhabitants of each state "shall be entitled to all privileges and immunities of free citizens in the several states; and . . . shall have free ingress and regress to and from any other States, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof." Little evidence exists on why the clause was pared down when carried over to the Constitution. CHARLES PINCKNEY, generally believed to have drafted the shorter version, assured the convention that no change in substance was intended. The term "privileges and immunities" probably was seen as sufficiently comprehensive to obviate the need for explicit references to ingress, regress, trade, and commerce.

If the positive command of the privileges and immunities clause were given the broad scope that was likely intended, resort to the commerce clause's negative inferences would be unnecessary for resolution of the discrimination cases. That the Court has not followed this route is attributable largely to PAUL V. VIRGINIA (1869). *Paul* held that CORPORATIONS were not "citizens" within the privileges and immunities clause. Notwithstanding subsequent construction of the DUE PROCESS and EQUAL PROTECTION clauses to encompass corporations as "persons" and the recognition of corporate CITIZENSHIP for purposes of Article III's diversity provisions, the holding in *Paul* remains a bar to corporate invocation of the antidiscrimination shield of Article IV.

Although some Justices and commentators believe that the Court may be proceeding under the wrong constitutional provision, almost no one questions the validity of the judicial role in voiding state discrimination against interstate commerce. However, the Court's continued willingness to strike down evenhanded state regulation because of "undue" burdens on the nation's free trade is a matter of substantial controversy. The present scope of congressional power dwarfs whatever James Madison may have anticipated. Moreover, the judicial expansion of the national commercial power is punctuated by the frequency with which Congress exercises its authority. Madison's image of a Congress deadlocked by competing geographic economic interests is seldom visible. Naturally, differences of perspective within Congress sometimes prevent consensus. But Congress has mechanisms to circumvent such stalemates. When impasses occur, Congress can shift decision-making responsibility onto the shoulders of REGULATORY AGENCIES by broad and often standardless delegations of power.

The rationale for the Court's zealous oversight of state commercial regulation has thus been substantially undermined. This led Justice ANTONIN SCALIA, in a CONCURRING OPINION in *CTS Corp. v. Dynamics Corp.* (1985) and a

dissent in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue* (1987), to observe that absent rank discrimination—which he suggested is better dealt with under the privileges and immunities clause—the role of invalidating state legislation that unduly burdens free trade properly belongs with Congress. This view parallels another FEDERALISM development.

In GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985), the Supreme Court abdicated any role in preserving the balance of power between the states and the federal government, deciding that the struggle over the scope of Congress's commercial power was best suited for the political arena. The states that petitioned for judicial assistance were told to fight their battle in Congress. This, said the Court, is how the Framers wished the scales of power to be balanced. Yet when a state regulates commerce in a congressional vacuum, the Court is there to ensure that the national economic interest will be adequately protected. The scales are not, after all, allowed to tip according to the political wind. The Court is keeping its thumb on the congressional side.

JULIAN N. EULE
(1992)

(SEE ALSO: *Dormant Powers.*)

Bibliography

EULE, JULIAN N. 1982 Laying the Dormant Commerce Clause to Rest. *Yale Law Journal* 99:425–485.

REGAN, DONALD H. 1986 The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause. *Michigan Law Review* 84:1091–1287.

## DORMANT COMMERCE CLAUSE (Update)

The "dormant commerce clause" limits state power to obstruct economic nationalism. At the core of this principle is the idea that states may not overtly discriminate against INTERSTATE COMMERCE. For example, when New Jersey blocked importation of solid WASTE from other states, the Supreme Court found a constitutional violation in PHILADELPHIA V. NEW JERSEY (1978). In cases like *West Lynn Creamery, Inc. v. Healy* (1994), the Court has continued to insist that protective tariffs and similar trade barriers offend this antidiscrimination principle.

Courts sometimes invoke the dormant commerce clause to strike down state laws that are not discriminatory on their face. In a leading case, *Hunt v. Washington State Apple Advertising Commission* (1977), the Supreme Court invalidated a North Carolina law that barred the display on apple crates of any grading symbol other than the federal Department of Agriculture grade. The Court reasoned that this law, although superficially neutral, unjustifiably burdened growers from the state of Washington, who had developed their own distinctive grading system. Courts often evaluate evenhanded regulatory laws under the BALANCING TEST set forth in *Pike v. Bruce Church, Inc.* (1970), which provides that such laws "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."

State taxing measures have provided a common source of dormant commerce clause litigation. In *Complete Auto Transit, Inc. v. Brady* (1977), the Court summarized its many holdings in the tax field with a test that focuses on the presence of (1) nondiscrimination; (2) fair apportionment; (3) a reasonable nexus between the taxed activity and the taxing state; and (4) an appropriate relation between the burden imposed by the tax and the services afforded to the taxpayer by the state. In cases like *Oklahoma Tax Commission v. Jefferson Lines, Inc.* (1995), the Court has continued to apply this four-step methodology.

In some situations the dormant commerce clause does not operate even when state laws are facially discriminatory. A quarantine exception permits states to block the importation of articles, such as germ-infested rags, whose very movement creates risks of contagion. The dormant commerce clause also does not apply when a state acts as a market participant rather than a market regulator; for example, courts have upheld "buy local" laws under which a state insists on making its own purchases solely from in-state suppliers. Discriminatory state laws may escape invalidation if there is no less-restrictive alternative for achieving an important state interest; thus the Court, in *Maine v. Taylor* (1986), upheld a state's outright ban on the importation of baitfish where there was no other way to safeguard native fish populations from certain diseases. In *Camps Newfound/Owatonna, Inc. v. Town of Harrison* (1997), the Court suggested that the dormant commerce clause would not invalidate monetary subsidies limited to in-state businesses even if they had the same effect as unlawfully discriminatory tax benefits. Finally, even if a state law otherwise would violate the dormant commerce clause, Congress can validate the law by way of ordinary LEGISLATION enacted pursuant to its commerce power, without the need for a constitutional amendment.

Particularly because the dormant commerce clause lacks a clear textual foundation, it is sometimes decried as illegitimate. But such luminaries as JAMES MADISON endorsed the principle, and many analysts argue that it reflects the central aims of the Framers. In the end,

proponents of the principle have won out, for the Court has recognized and applied some form of the dormant commerce clause for more than 140 years.

DAN T. COENEN
(2000)

Bibliography

BITTKER, BORIS I. 1999 *Bittker on the Regulation of Interstate and Foreign Commerce*. Gaithersburg, Maryland: Aspen Law & Business.

COENEN, DAN T. 1989 Untangling the Market Participant Exemption to the Dormant Commerce Clause. *Michigan Law Review* 89:395–488.

——— 1998 Business Subsidies and the Dormant Commerce Clause. *Yale Law Journal* 107:965–1053

COLLINS, RICHARD P. 1988 Economic Union as a Constitutional Value. *New York University Law Review* 63:43–129.

EULE, JULIAN N. 1982 Laying the Dormant Commerce Clause to Rest. *Yale Law Journal* 99:425–485.

HELLERSTEIN, JEROME R. and HELLERSTEIN, WALTER 1993 *State Taxation*, 2nd ed. Boston, Mass.: Warren Gorham Lamont.

REGAN, DONALD H. 1985 The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause. *Michigan Law Review* 84:1091–1287.

## DORMANT POWERS

A constitutional power is called dormant if it is granted by the constitution but is not currently being exercised. For a variety of reasons Congress may not see fit to exercise power which it has been granted by the Constitution. These dormant powers may be "awakened" whenever Congress chooses to exercise them.

The federal system of the United States presumes that the states possess the governmental powers not taken away from them by the Constitution. In vesting powers in the federal government, the Constitution grants the national government EXCLUSIVE POWER over some matters of national scope, but CONCURRENT POWERS with the states over other matters. When a power granted to the federal government lies dormant, its effect depends on whether it is an exclusive or concurrent power. When the Supreme Court concludes that the subject matter requires uniform national regulation, then the states are not free to exercise the power even though Congress has not legislated in the area. By its silence Congress is presumed to have decreed that the subject shall remain free of regulation. If, on the other hand, the subject of the power admits of locally diverse regulation, as in COOLEY V. BOARD OF WARDENS (1851), states may legislate until Congress intervenes.

When Congress awakens a dormant power by legislating, its act will preempt inconsistent state laws by force of the SUPREMACY CLAUSE of Article VI. However, the courts do not always hold that Congress has preempted state law simply because it has granted power to a federal administrative agency to regulate an area. If the agency has not exercised the power given to it, then the states may yet be free to regulate the subject just as if the power were still dormant.

GLEN E. THUROW
(1986)

Bibliography

PRITCHETT, C. HERMAN 1977 *The American Constitution*, 3d ed. Pages 150–216. New York: McGraw-Hill.

## *DORR v. UNITED STATES*

See: Insular Cases

## DOUBLE JEOPARDY

Double jeopardy is the most ancient procedural guarantee provided by the American BILL OF RIGHTS. Rooted in Greek, Roman, and canon law, the right not to be put twice in jeopardy may be regarded as essential to a right to TRIAL BY JURY, and is well established in the law of other nations.

The Fifth Amendment of the Constitution includes the simple phrase: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Yet this phrase, which has been copied in most American state constitutions, conceals a number of complex policy issues, many of which are still unsettled in American law in spite of numerous judicial interpretations since its birth in 1791.

In the course of time American courts abandoned any insistence that the jeopardy required involve a risk of life or limb, even though that had been an important consideration under the harsh criminal law of eighteenth-century England. Thus, the policy underlying the double jeopardy protection does not depend upon the hazard of severe physical punishment or death.

The English COMMON LAW recognizes the pleas of *autrefois acquit* (former acquittal) and *autrefois convict* (former conviction) to preclude retrial of an accused person, but American law has taken a more expansive view of the right. In America a prior accusation without a verdict could result in a successful plea of double jeopardy. The American version of the right is more generous to accused persons in many other respects, making double jeopardy an important potential source of protection.

In *Green v. United States* (1957) Justice HUGO L. BLACK provided a persuasive explanation of the American con-

cept of double jeopardy. He suggested that the guarantee against double jeopardy is aimed primarily at three potential abuses of governmental power: "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby (1) subjecting him to embarrassment, expense and ordeal and (2) compelling him to live in a continuing state of anxiety and insecurity, as well as (3) enhancing the possibility that even though innocent he may be found guilty."

Double jeopardy policy embodies a conflict between a defendant's interest in "being able once and for all, to conclude his confrontation with society," as the Court said in *United States v. Jorn* (1970), and the public interest in a full and accurate prosecution. To preclude retrial of an accused person on some technical defect in the presentation of the prosecution's case is not in the public interest. Conversely, individuals must be protected against repeated risks of criminal punishment so that they may conclude their confrontation with society in a just manner and resume their normal lives as free citizens.

Surprisingly, it was not until 1969 that the Supreme Court extended the Fifth Amendment's double jeopardy prohibition to state criminal prosecutions. In BENTON V. MARYLAND (1969) the Court finally held "that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage." Since then the Court has been deeply involved in reviewing double jeopardy questions, refining and reconsidering many of its earlier interpretations of the clause. Now the Supreme Court is the chief source of policymaking in double jeopardy matters, although some state legislatures have begun to reexamine the DOCTRINE in the process of revising state criminal codes to eliminate overlapping criminal offenses.

Double jeopardy law involves at least four distinct policy questions. The first concerns the time when jeopardy begins or "attaches." Clearly, pretrial proceedings are not covered by double jeopardy, but at some point after a trial opens jeopardy is said to "attach." The second double jeopardy question is the legal significance to be accorded political boundaries such as statefederal, statemunicipal, nationalinternational. Third is the problem arising from the numerous definitions of crime which sometimes carve up criminal deeds into small parcels of criminalized behavior. These multiple offense categories could give rise to multiple prosecutions unless bounded by the double jeopardy protection. Finally, there is the issue raised by a criminal appeal (by the defendant or the state) with its potential of a new trial reviving the same risks to the liberty of the defendant.

All these issues are embraced within the American doctrine of double jeopardy and none has been definitively resolved. American double jeopardy law has become one of the most complex areas of JUDICIAL POLICYMAKING. English law on the subject lacks the complexity of American law because it is confined largely to the issue of the effect of a prior final judgment. American law is distinctive in its subtle interplay among the interests of the accused person, the prosecution, and the society at large. However, American double jeopardy law is confused by the judicial failure to separate the strands of double jeopardy and to pursue the essential purposes served by double jeopardy. Indeed, close reading of Supreme Court decisions reveals some conflict among the Justices concerning the goals of double jeopardy policy.

In *Crist v. Betz* (1978) the issue of attachment of double jeopardy was called "the lynchpin for all double jeopardy jurisprudence," but it still is not clearly settled. The federal rule is that jeopardy attaches at the time when the jury is sworn, and this federal rule now extends to state proceedings as well. The rule takes effect when the first witness is sworn in a case tried before a judge. After this point, in the absence of exceptional circumstances, the defendant's jeopardy begins, and it cannot be begun again merely because the prosecution wishes to retry a stronger case at a later time.

However, it is possible for the prosecution to retry a case that has been aborted short of FINAL JUDGMENT if it can bear the heavy burden of showing "manifest necessity" for repetitious proceedings. Courts have wrestled vainly in an effort to define the nature of the "manifest necessity" that justifies reprosecution. Recently the Supreme Court has developed a balancing test to weigh the interests of the prosecution and the defendant. Now, if a mistrial is based upon an error by the state that could be manipulated to strengthen the prosecution's case, a defendant is entitled to immunity from reprosecution if he chooses to oppose the mistrial, but not if he requests it. But the Supreme Court has wavered in its mistrial decisions, even overruling itself at times.

Attachment doctrines apply to JUVENILE PROCEEDINGS as well as to adult criminal trials, so that jeopardy attaches to an adjudicatory finding in juvenile court, preventing a subsequent trial in the criminal court for the same conduct. However, a closed master's hearing for a juvenile has been treated as a pretrial event, not an attachment of jeopardy.

The clearest interpretation of double jeopardy policy appears in the area of separate prosecutions for the same offense by federal and state governments. According to BARTKUS V. ILLINOIS (1959), double jeopardy is inapplicable when a defendant is charged with having violated the laws of two or more different "sovereigns." Yet, after a barrage of criticism of the Supreme Court ruling, the attorney gen-

eral adopted a policy of avoiding federal reprosecution of a matter already tried by a state where the state prosecution rested upon the same act or acts. This discretionary policy remains an administrative restraint upon federal prosecution. In 1970 the Supreme Court held in *Waller v. Florida* that a state and its municipalities were not "separate sovereigns" in this sense; successive prosecutions thus were barred by the double jeopardy clause.

The most complex and least settled area of double jeopardy involves the meaning of "same offense" in the Fifth Amendment clause. The basic federal rule does not prohibit imposition of two or more punishments for the same activity. Instead, the Supreme Court has largely left it to the Congress and the state legislatures to carve up a single act or series of acts into an appropriate set of criminal offenses. The possibility of fragmentation of a single act into a number of criminal offenses with separate trials for each generally is not an occasion for judges to invoke the double jeopardy protection, although the Supreme Court has made some limited attempts to do so.

The double jeopardy clause is not a barrier to an APPEAL by the prosecution in a criminal case. The government may appeal decisions in a criminal case only if authorized by statute. Since the ORGANIZED CRIME CONTROL ACT OF 1970, which grants the right to appeal a sentence imposed upon a "dangerous special offender," reviews of sentences are available to the federal government. The Supreme Court has held in *United States v. DiFrancesco* (1980) that the increase of a sentence on review under this statute does not constitute multiple punishment in violation of the double jeopardy clause. Whenever a defendant appeals from his own conviction he is usually said to have "waived" his right to plead double jeopardy.

Taken together, double jeopardy doctrines appear still to be somewhat unsettled in the United States. The general contours of double jeopardy have been described since 1969 in increasing detail. Yet inconsistencies and uncertainties continue. This most ancient of American rights is subject to judicial balancing. Increasingly, the balance has been more favorable to the prosecution, contracting the generous scope of double jeopardy evident in earlier years. Since the Supreme Court has been deeply divided on double jeopardy issues we may expect continued developments of policy with changes in judicial personnel. States may have more stringent views of double jeopardy policy under their own double jeopardy provisions. Therefore some states may set higher standards than the Supreme Court for the protection of defendants.

JAY A. SIGLER
(1986)

Bibliography

FRIEDLAND, MARTIN 1969 *Double Jeopardy.* Oxford: Clarendon Press.

SIGLER, JAY A. 1969 *Double Jeopardy: The Development of a Legal and Social Policy.* Ithaca, N.Y.: Cornell University Press.

WESTIN, PETER and DRUBEL, RICHARD 1979 Toward a General Theory of Double Jeopardy. *Supreme Court Review* 1978:81–169.

## DOUBLE JEOPARDY
(Update 1)

Over the past few years, the Supreme Court has decided a substantial number of cases involving double jeopardy issues. For the most part, these decisions continued a trend noted in the *Encyclopedia* of giving additional flexibility to the doctrine, although several notable exceptions expanded the protection provided by the clause. The most significant developments concerned two topics: multiple crimes arising from the same conduct and sentencing. The most disturbing development occurred under the dual-sovereignty doctrine.

In the area of multiple offenses, the Supreme Court continues to adhere to the position that the legilslative branch has virtually unlimited power to define as seperate crimes and to punish cumulatively individual steps within a criminal trasaction and the completed transaction as well. The well-worn test set out in *Blockburger v. United States* (1932) determined whether the offenses are seperate by asking if each "requires proof of a fact which the other does not," This has been constructed as a rule of statutory construction, which is not controlling within a single prosecution if the LEGISLATIVE INTENT is clear and that multiple punishments are intended.

However, where individual crimes arising from the same events are adjudicated separately, a sharply divided Court expanded the protection of the double jeopardy clause beyond the confines of the *Blockberger* test. In *Grady v. Corbin* (1990), the Court concluded that a prosecution for vehicular manslaughter was barred where the defendant had been convicted previously of driving while intoxicated based on the same automobile accident. The Court reasoned that successive prosecutions present dangers that require protection under the double jeopardy doctrine even in circumstances where the two crimes do not constitute the "same offense" under the *Blockberger* test. It formulated a new and certainly more complicated test: The guarantee against double jeopardy is violated by subsequent criminal prosecution when the government establishes an essential element of that crime by proving conduct that constituted an offense for which the defendant has been previously prosecuted.

The decision in *Grady v. Corbin* unsettled the law with regard to the important concept of what constitutes the

"same offense." Its immediate practical effect will be to encourage, if not require, the government to prosecute in a single case all charges arising from the same transaction because some of those that share a common element will be barred by the double jeopardy clause if they are prosecuted later. How this decision will be reconciled with the body of related doctrine—and even whether it will stand the test of time given the Court's history of dramatically changing course on double jeopardy issues—remains to be seen. Indeed, the conflicting nature of the Court's double jeopardy jurisprudence was apparent from cases decided during the same term. In *Dowling v. United States* (1990), the Supreme Court determined that EVIDENCE of criminal conduct was not barred by the collateral estoppel concept of double jeopardy, even though the defendant had been found not guilty in an earlier trial of that criminal conduct. *Dowling* and *Grady v. Corbin* can be reconciled because the crimes in *Dowling* were not part of the same transaction, but the two cases demonstrate that there is no broad consensus within the Court on basic principles, particularly the application of this "same transaction" concept.

In the area of SENTENCING, the Court decided a number of significant cases. Although the clause does not apply to civil penalties, the Court concluded that in a very rare case a penalty traditionally considered remedial can be so overwhelmingly disproportionate to the damage caused that it must be considered punishment with a purpose of deterrence or retribution. In this circumstance, presented by a series of penalties in *United States v. Halper* (1989), the double jeopardy clause bars imposition of civil penalties subsequent to criminal conviction and punishment.

The Court has determined that the double jeopardy clause does not in general prohibit the government, pursuant to statutory authorization, from appealing a sentence or prohibit a court from increasing that sentence after review. In contrast, the double jeopardy clause does impose some limits on resentencing in CAPITAL PUNISHMENT litigation. In *Bullington v. Missouri* (1981), the Court concluded that the clause prohibits imposing a death sentence on resentencing where a jury initially imposed a life sentence. The trial-type proceedings involved in such a determination render a decision not to impose a death penalty the equivalent of an acquittal at trial. The double jeopardy clause does not, however, bar the trial judge, under statutory authorization, from overriding a jury recommendation of life imprisonment and imposing a death sentence.

The Court concluded that the double jeopardy doctrine permits either resentencing or judicial modification of a sentence in two other areas. First, it held in *Morris v. Mathews* (1986) that where the defendant is convicted of both a jeopardy-barred greater offense and a lesser offense that is not so barred the error may be corrected without resentencing by simply substituting the lesser-included conviction, unless the defendant can demonstrate a reasonable probability that he or she would not have been convicted of the lesser offense absent the joint trial with the jeopardy-barred offense. Second, the decision in *Jones v. Thomas* (1989) held that as long as the resentencing remains within legislatively intended limits an appellate court could modify an initially invalid consecutive sentence by vacating the shorter sentence and crediting the defendant for the time served even after the defendant had fully satisfied the shorter sentence. In reaching this conclusion, the Court dismissed longstanding PRECEDENT apparently prohibiting resentencing after the defendant had satisfied one of two alternative sentences.

In a disturbing, although not doctrinally surprising, opinion, the Court extended to prosecutions by separate states its very broad HOLDING that double jeopardy is inapplicable where the same conduct is prosecuted by state and federal governments. Reasoning that this dual-sovereignty doctrine rests on the critical determination that two entities draw authority to punish from separate sources of power, the Court concluded in HEATH V. ALABAMA (1985) that the doctrine operates between states as it does between state and federal governments.

On first examination, applying the doctrine to two states appears to present no major issues. However, an examination of the facts of the case and the underlying policies presents a different picture. *Heath* involved a kidnapping that began in Alabama and ended in a murder across the nearby state line in Georgia. Pursuant to a plea bargain in Georgia, the defendant avoided the death penalty in exchange for a life sentence. He was then prosecuted in Alabama for the same murder and sentenced to death. The Supreme Court's decision resulted in affirming that death sentence.

At a practical level, the operation of the dual-sovereignty doctrine permitted two states to enjoy all the advantages of multiple prosecutions that the double jeopardy clause was intended to prevent. Admittedly, however, these advantages can accrue to the prosecution whenever the dual-sovereignty doctrine is applied. The major difference in this case is that the two sovereigns were protecting the same policy interest—punishing the taking of human life. When the state and federal government are involved, there has historically been not only a separate source of political power, but also a separate interest protected.

*Heath* demonstrates that the Supreme Court is steadfast in its commitment to a monolithic and absolute dual-sovereignty doctrine in the context of double jeopardy. Given the expansion of federal JURISDICTION to almost

every area of state criminal law, this position is understandable, if not defensible. Currently, the different policy interest protected by the federal prosecution is often imaginary, and the decision in *Heath* makes recognition of this fact unnecessary.

ROBERT P. MOSTELLER
(1992)

Bibliography

LAFAVE, WAYNE R. and ISRAEL, JEROLD H. 1985 *Criminal Procedure.* St. Paul, Minn.: West Publishing Co.

THOMAS, GEORGE C. 1988 An Elegant Theory of Double Jeopardy. *University of Illinois Law Review* 1988:827–885.

## DOUBLE JEOPARDY
(Update 2)

In the 1990s, the Supreme Court decided a number of cases dramatically revising the prevailing interpretation of the Fifth Amendment's double jeopardy clause. These decisions have generally continued the Court's trend of leaving more leeway for state and federal legislatures, as well as prosecutors, to decide how many prosecutions and civil proceedings they will bring to punish a defendant for an act or course of conduct.

On the subject of what constitutes the "same offense" for double jeopardy purposes, a sharply divided Court, only three terms after deciding *Grady v. Corbin* (1990) on a 5–4 vote, overruled that decision by a similarly split vote in *United States v. Dixon* (1993) and returned to the older *Blockburger* definition of "same offense." Instead of defining "offenses" by determining whether two prosecutions are based on the same conduct (as in *Grady*), courts will now ask only whether each of the two statutes defining the offenses charged contains an element the other does not. Under this test, the Court allowed a defendant to be prosecuted for an assault even though he had already been punished, in a CONTEMPT proceeding, for violating a protective order by committing the same assault, as long as the statutes defining the two offenses each required proof of a different additional fact.

Defining when the double jeopardy clause prohibits successive proceedings for the same offense also caused the Court considerable trouble and second thoughts. A person who is convicted of an offense may be subjected to more than one kind of punishment for that offense—both a fine and a prison sentence, for example. But the double jeopardy clause prohibits the government from taking two bites of the apple by bringing multiple proceedings seeking different "punishments" for the same offense, even if one of those proceedings is labeled "civil." *United States v. Halper* (1989) ruled that the government could not criminally prosecute a person who had already been punished in a "civil" proceeding by a fine so disproportionate to the harm done that it could not be considered "solely remedial." Applying a similar test, a bitterly divided Court in *Montana Department of Revenue v. Kurth Ranch* (1994) found that a Montana tax for possession and storage of dangerous drugs was "punishment," and that the state was therefore not allowed to impose that fine in a civil proceeding and also bring a separate criminal prosecution (although both penalties could have been leveled in the same proceeding). But applying this same subjective test and distinguishing *Halper* rather tortuously, the Court two years later concluded that CIVIL FORFEITURE is not "punishment" for double jeopardy purposes, partly because of its historical pedigree. Because of this conclusion, the defendant in *United States v. Ursery* (1996) was allowed to be criminally prosecuted for a marijuana offense even though, in an earlier proceeding, the government had forfeited his home and PROPERTY due to the presence of the same marijuana; and another defendant, in *United States v. $405,089.23* (1996), faced a forfeiture proceeding after a separate criminal prosecution even though the government could have sought forfeiture as a penalty originally. Finally, in *Hudson v. United States* (1998), the Court, split 5–4, disavowed *Halper's* mode of analysis. Even though a "civil" fine is intended in part as a deterrent, it may still be considered a remedial measure that therefore does not constitute "punishment" within the meaning of the double jeopardy clause, especially if it can be shown that the legislature intended the measure to be a civil penalty. Like the newly restricted definition of "same offense," which frees legislatures from judicial supervision of their decisions about how many offenses may be based on the same conduct, this new, narrowed test allows the government freedom to decide how many proceedings to bring, even when based on the "same offense."

The same split on the Court over the issue of how much leeway legislatures should be allowed reappeared in the area of SENTENCING. The Court had previously held that double jeopardy protections do not generally attach at sentencing. Applying this maxim expansively, the Court in *Witte v. United States* (1995) ruled that a defendant may be prosecuted for an offense on the basis of conduct that has already been used as "relevant conduct" at a sentencing proceeding in an earlier prosecution, leading to a substantial increase in that sentence. Taking the theory that sentencing is not governed by the same rules as trial one step further, the Court in *United States v. Watts* (1996) held that a defendant's sentence may even be enhanced by an allegation on which the jury at his trial had actually acquitted him (because the standard of proof at sentencing is lower).

In the past, the Court had applied double jeopardy

principles to capital sentencing in *Bullington v. Missouri* (1981), holding that the prosecution may not seek the death penalty in a retrial of a defendant who had been given a life sentence on the same charge and then successfully appealed the conviction. But in *Schiro v. Farley* (1994), the Court allowed a state to proceed to the penalty phase of a capital proceeding even though the jury had implicitly acquitted the defendant of facts the state would be required to prove at the penalty phase in order to sustain a capital sentence. The Court also distinguished *Bullington* in the noncapital case of *Monge v. California* (1998), a case brought under a state "three strikes" law where the state had not proven all the facts required by the statute to show that the defendant should have his sentence doubled because he had an eligible earlier conviction. After the enhanced sentence was reversed on appeal for insufficient evidence about the previous conviction, the state was allowed to try again, and to submit proof of the required factors. The Court, split 5–4 once again, held that this relitigation was permissible because it only concerned a sentencing factor in a noncapital case.

One of the few areas of double jeopardy law that has caused no dissension on the Court has been one of the most controversial in other arenas. Although the Court has never overruled or even questioned the dual sovereignty DOCTRINE, the successive state and federal prosecutions of the Los Angeles police officers who were videotaped beating Rodney King provoked a new flurry of academic and public debate about whether the Court's interpretation of the double jeopardy clause is more formalistic than fair. Scholarly opposition to the doctrine, from academics writing from a wide range of perspectives (from civil libertarians to adherents of ORIGINALISM), continued to be overwhelming. The officers' conviction in federal court, following their acquittal in state court, convinced many observers of the truth of one of the double jeopardy clause's central tenets—prosecutorial practice makes perfect.

SUSAN N. HERMAN
(2000)

Bibliography

AMAR, AKHIL REED and MARCUS, JONATHAN 1995 Double Jeopardy Law After Rodney King. *Columbia Law Review* 95:1–59.

HERMAN, SUSAN N. 1995 Reconstructing the Bill of Rights: A Reply to Amar and Marcus's Triple Play on Double Jeopardy. *Columbia Law Review* 95:1090–1111.

SYMPOSIUM 1994 The Rodney King Trials: Civil Rights Prosecutions and Double Jeopardy. *UCLA Law Review* 41:509–720.

THOMAS, GEORGE C., III 1998 *Double Jeopardy: The History, the Law*. New York: New York University Press.

# DOUGLAS, STEPHEN A.
## (1813–1861)

An Illinois lawyer and judge, Stephen Arnold Douglas served in the HOUSE OF REPRESENTATIVES (1843–1847) and the SENATE (1847–1861), where he chaired the powerful committee on the TERRITORIES from 1847 until 1859. Throughout his career Douglas was a strong Democratic partisan who advocated western expansion, railroad development, and compromise on slavery. A major political figure throughout the 1850s, Douglas closed his career with his losing presidential campaign in 1860. When the CIVIL WAR began Douglas rallied to the cause of the Union despite his hostility toward Lincoln and his familial and residual political ties to the South.

Throughout his career Douglas attempted to finesse the issue of SLAVERY IN THE TERRITORIES while supporting territorial acquisition and western settlement. Douglas hoped such a policy would lead to a presidential nomination from a united Democratic party. Practical politics dovetailed with Douglas's personal beliefs that blacks were inferior to whites, that slavery was a legitimate institution deserving of constitutional and political protection, and that ABOLITIONISTS were troublemakers or worse.

The key to Douglas's program was POPULAR SOVEREIGNTY, which would allow settlers to decide the slavery issue for themselves, and thus not require Congress, and the national Democratic party, to take a position on slavery in any particular territory. Ultimately, Douglas's position proved costly. Proslavery Democrats eventually demanded federal protection for slavery in the territories and opposed any Democrat who would not support them. On the other hand, Northerners, in Illinois and elsewhere, came to oppose the spread of slavery into the western territories. By 1858 Douglas discovered he could not satisfy the voters at home and remain a viable presidential candidate in the South.

As early as 1844–1845 Douglas had advocated that settlers in the West be allowed to decide for themselves the status of slavery. In Congress he urged the organization of the Oregon Territory without slavery because settlers there did not want slavery. In the House and Senate Douglas enthusiastically supported all American claims in Oregon and the Mexican War, and he opposed the WILMOT PROVISO. As chairman of the Committee on the Territories, Douglas secured the organization of the Oregon and Minnesota territories without slavery. In August 1850, Douglas resurrected the compromise measures of HENRY CLAY'S "Omnibus Bill" and adroitly guided them through the Senate, one bill at a time, as the COMPROMISE OF 1850. The Compromise included the infamous Fugitive Slave Law of

1850, the admission of California without slavery, and organization of the rest of the Mexican Cession with slavery. The compromise satisfied few, but it halted a SECESSION movement then building in the South and probably delayed the Civil War by ten years.

In 1854 Douglas supported the KANSAS-NEBRASKA ACT in the expectation that it would stimulate western expansion and set the stage for a transcontinental railroad, which he hoped would begin in Chicago. The act repealed the MISSOURI COMPROMISE, refused "to legislate slavery into any Territory of State, nor to exclude it therefrom," and left the settlers "perfectly free to form and regulate their domestic institutions in their own way." Northern resentment of this sellout to slavery resulted in Democratic electoral defeats and formation of the Republican party, while popular sovereignty in the territories quickly degenerated into "bleeding Kansas." Douglas lost political support throughout the North, but he explained to hostile constituents that popular sovereignty would lead to a free Kansas. In 1858, however, Kansas petitioned for statehood under the proslavery LECOMPTON CONSTITUTION. Douglas opposed the Lecompton Constitution because it was ratified by fraud, did not represent the majority in Kansas, and thus was not a fair expression of popular sovereignty. For this opposition Douglas was virtually read out of his party. Later that year, in debate with ABRAHAM LINCOLN during the Senate race, Douglas defended the Supreme Court's decision in DRED SCOTT V. SANDFORD (1857) and the Kansas-Nebraska Act by asserting in the FREEPORT DOCTRINE that territorial governments could prevent slavery by denying it police protection or supportive legislation. Despite opposition from the Buchanan wing of his own party, as well as Lincoln, Douglas was reelected to the Senate. In 1859 his party, dominated by Southerners, stripped him of his Territorial Committee chairmanship because of his apostasy on the Lecompton Constitution and his Freeport Doctrine. Openly a presidential candidate since 1852, Douglas led a divided party in 1860. He ran second in popular votes and a distant fourth in electoral votes. Douglas opposed SECESSION and before his death in 1861 urged Lincoln to call out enough troops to defend the Union.

PAUL FINKELMAN
(1986)

Bibliography

JAFFA, HARRY V. 1959 *Crisis of the House Divided: An Interpretation of the Lincoln-Douglas Debates.* Garden City, N.Y.: Doubleday.

JOHANNSEN, ROBERT W. 1973 *Stephen A. Douglas.* New York: Oxford University Press.

# DOUGLAS, WILLIAM O.
(1898–1980)

William Orville Douglas was appointed to the Supreme Court by President FRANKLIN D. ROOSEVELT on April 15, 1939, the youngest appointee since JOSEPH STORY, 128 years earlier. Illness forced his retirement on November 12, 1975, but he had surpassed by nearly two years the record for longevity of service previously held by STEPHEN J. FIELD.

As a child, Douglas contracted polio and overcame the residual weakness in his legs through long solitary hikes. When his father died before Douglas's sixth birthday, his mother was left nearly penniless with three children. Douglas knew grinding poverty and from his childhood, through all of his education, he worked to support himself and his family. Three views that colored his outlook on life emerged from this period and strongly influenced his legal views. Above all an individualist, he believed that, if given enough room by society, one could achieve full potential through self-reliance and hard work. At the same time, he formed a deep sympathetic bond with the outcasts and disadvantaged of society, particularly the poor, racial minorities, and political radicals. Finally, he harbored a lingering resentment of "the establishment," a view that later matured into a distrust of concentrations of power, whether of the private sector, the police, or government generally. A number of Douglas's legal positions trace their origin to these three linked premises, from his populist view of the antitrust laws to his repeated insistence that the function of the BILL OF RIGHTS was to take government off the backs of the people.

Douglas's career prior to his appointment to the Court also explains the hallmarks of his judicial style. (Over the years, even admirers of the Justice's substantive conclusions criticized his opinions for insufficiently explaining the origins of novel legal DOCTRINES, for carelessness in setting out the limits and definitions of the principles announced, and for unnecessary inconsistency in arguments made from one case to another.) Douglas was always a superior student, with an intellect in the genius range, yet from high school through law school, as he explained in his autobiography, "I had been trotting while I learned." His work obligations and his other activities left little time for reflection. Douglas was a quick study.

Douglas described both his initial appointment as a law teacher and his appointment to the Supreme Court as furnishing new leisure for intellectual contemplation. Intellectual habits, however, are not so easily set aside. Douglas was never contemplative. His habit was to analyze swiftly mountains of data, get to the heart of a controversy, and

decide. He was impatient with extended discussion as an aid to decision, with long indecision prior to decision, and with excessive concern for peripheral issues. He remained a loner who spent little time trying to proselytize other members of the Court to his own views. In the Court's conferences and in his separate opinions, he was content to state his positions without adapting them to gain greater acceptance from either his brethren or the scholarly community.

Douglas's impatience with traditional legal style in opinions is also easily explained. As a law professor at Columbia and Yale, Douglas was at the center of the realist movement in jurisprudence. (See LEGAL REALISM.) The realists shared the view that traditional judicial opinions obscured rather than explained the reasons for decision. Douglas's own approach to his fields of business organization, securities regulation, and bankruptcy was to study the political, economic, and social institutions with which the law dealt and to shape the law to cope with contemporary problems presented by those institutions. And so it was with his approach to constitutional law. Douglas viewed much of the elaborate argument in standard Court opinions as so much "Harvard fly paper." Indeed, he delighted in sharp criticism of his opinion-writing style, which he viewed as the carping of the conservative legal establishment. He remained a pragmatist who did not try to develop a general theory of constitutional adjudication. Often he was content to let Justices with whom he agreed develop the overarching theories. He was indifferent to scholarly debates about the abstract limits of JUDICIAL ACTIVISM, and he did not have a consistent theory explaining his own pattern of judicial restraint and active judicial intervention.

The substance of Douglas's constitutional jurisprudence can best be explained by contrast with the views of the two other major figures among Roosevelt's appointees to the Court—FELIX FRANKFURTER and HUGO L. BLACK. Between 1937 and 1939, when these three joined the Court, the chief constitutional controversies were still perceived as those of the previous decade—the Court's "economic due process" theory had restrained state ECONOMIC REGULATION, and its "dual federalism" theory had limited federal power to regulate the national economy. The mainstream of constitutional law thought was still preoccupied by the mistakes of the "old Court" in writing its own notions of laissez-faire economics into constitutional limits on state and federal power. All of Roosevelt's appointees shared the opinion that these decisions of the old Court had been erroneous. The major battles surrounding economic due process, and the legitimate scope of federal economic regulatory authority, however, were over before Roosevelt appointed a single Justice to the Court. (See WAGNER ACT CASES; WEST COAST HOTEL V. PARRISH.)

The early 1940s brought new problems, with personal liberty claims asserted under the FIRST AMENDMENT, and attacks on criminal convictions for procedural irregularities of constitutional dimension. For Frankfurter, the lessons of the Court's previous excesses in second-guessing state and federal economic regulation applied here. It was inappropriate for judges to block decisions of political majorities simply because judges held deep personal views that those decisions were wrong. Issues of personal liberty involved a balance between legitimate interests of government and claims of constitutionally protected liberty. Judges must defer to reasonable governmental accommodations of these competing interests. Moreover, in the case of challenged state laws, interests of FEDERALISM imposed additional constraints.

For a brief initial period, Black and Douglas accepted the Frankfurter position. In *Minersville School District v. Gobitis* (1940), the first of the FLAG SALUTE CASES, Justice Frankfurter wrote for the Court, sustaining a law compelling salute to the flag against a challenge by children of Jehovah's Witnesses, whose religious beliefs forbade their participation. (Only Justice HARLAN FISKE STONE dissented.)

The break with Frankfurter came soon. Black and Douglas shared similar concerns about the rights of minorities and about fair procedures in state and federal criminal trials. In 1942, dissenting in *Jones v. Opelika*, a case sustaining a state license tax applied to the sale of religious literature, they announced that they had recanted their position in *Gobitis*. *Jones* was overruled a year later in MURDOCK V. PENNSYLVANIA (1943), with Douglas writing for the Court. The same year, *West Virginia State Board of Education v. Barnette* overruled *Gobitis*, with Black and Douglas joining Justice ROBERT H. JACKSON's opinion.

Even though Black and Douglas often wrote jointly in constitutional cases involving claims of constitutionally protected liberty, it was Black who was the theoretician. Black gradually evolved the views that protection of liberty required the Court to give liberal—and even literal—construction to the Bill of Rights, and that the Bill of Rights restricted not only the national government but also state governments, because, historically, it had been "incorporated" into section one of the FOURTEENTH AMENDMENT. (See INCORPORATION DOCTRINE.) Douglas and Black often clashed with Frankfurter on both issues throughout the 1940s and 1950s.

In *Adamson v. California* (1947) the Court decided, 5–4, that the RIGHT AGAINST SELF-INCRIMINATION of the Fifth Amendment was inapplicable to the states. Justice Frankfurter, concurring, defended the Court's position that the historic and practical meaning of due process was not contained in the specific provisions of the Bill of Rights, but

he also insisted that working out the limits of DUE PROCESS OF LAW required more than personal judgments according to a judge's idiosyncratic sense of justice. Black, joined by Douglas, wrote a lengthy dissent arguing that the Fourteenth Amendment incorporated the "specific" standards of the Bill of Rights.

As time passed, Black, again joined by Douglas, further insisted that the guarantees of the Bill of Rights were specific indeed. Characteristic was their position concerning the First Amendment—that it literally forbade all government restrictions upon the content of "speech," leaving to the government power only to regulate "conduct" (for example, YATES V. UNITED STATES, 1957, separate opinion). Justice Frankfurter predictably insisted that free speech claims involved a balance between competing interests and required deference to legislative choices (BEAUHARNAIS V. ILLINOIS, 1952). During the 1950s, the Frankfurter position usually prevailed. Black and Douglas were often in lonely dissent as the Court sustained a series of state and federal antisubversion measures. With the appointment of Chief Justice EARL WARREN and Justice WILLIAM J. BRENNAN in the mid-1950s, the dissenting group grew to four.

After Frankfurter's retirement in 1962, the substance, if not the rhetoric, of many of the Black and Douglas dissenting opinions prevailed. Although the Court rejected total "incorporation" of the Bill of Rights, a process of "selective incorporation" of "fundamental" provisions applied nearly all of its provisions to state governments (for example, GRIFFIN V. CALIFORNIA, 1965, overruling *Adamson v. California*). The provisions of the Bill of Rights governing procedure in criminal trials were expansively construed in cases such as MIRANDA V. ARIZONA (1966). And while no other Justice accepted the Black-Douglas theory that the First Amendment literally protected all speech, the Court's cases of the 1960s rejected the Frankfurter position that the First Amendment tolerated all reasonable governmental restriction on speech. (See NEW YORK TIMES V. SULLIVAN; BRANDENBURG V. OHIO.)

The 1960s, however, brought new constitutional problems and a noticeable split between Justices Black and Douglas. There was a negative side to Black's theory pinning activist protection of liberty to the literal meaning of the Bill of Rights. For Black, the Bill of Rights defined not only the minimum guarantees of constitutionally protected liberty but also the maximum. As with Frankfurter's approach, the restrictive branch of Black's theory could be traced to the judicial excesses of the past. The "old Court" had used a natural law approach to write into the Constitution laissez-faire economic policies not fairly reflected in the document's history or text. For Black it was equally wrong for judges to import subjective notions of personal liberty into the Constitution. If judges balanced competing interests in interpreting the Constitution, there was danger beyond the certainty that judges would "balance away" constitutional restrictions with which they were unsympathetic. Judges might also use an open-ended balancing process to create rights according to their subjective predilections.

In *Adamson v. California*, two other dissenting Justices—FRANK MURPHY AND WILEY B. RUTLEDGE—had agreed with Black and Douglas that the Fourteenth Amendment incorporated the Bill of Rights as restrictions on state government. They had disagreed, however, with the contention that the Bill of Rights was the outer limit of constitutionally protected liberty. In their view, the Fourteenth Amendment's conception of due process required "fundamental standards of procedure . . . despite the absence of a specific provision of the Bill of Rights." Black and Douglas, on the other hand, had condemned the "natural law-due process formula" which allowed courts "to roam at large in the broad expanse of policy and morals and to trespass, all too freely, on the legislative domain. . . ."

In the late 1940s and the 1950s Douglas continued to support Black's literalist position. Occasional votes can be identified during this period, however, to suggest that his agreement with Black was only skin deep. In *Francis v. Resweber* (1947), decided only months before *Adamson*, the Court permitted a state to electrocute a man after a first attempt at his execution had failed. The vote was again 5–4. This time Black concurred in the result, without opinion. Douglas, along with Murphy and Rutledge, joined Justice HAROLD BURTON's dissent. The same year, another 5–4 vote, in *Kotch v. Board of River Pilot Commissioners* (1947), sustained a Louisiana law that limited the occupation of river pilots to friends and relatives of incumbents. Black wrote for the Court, but Douglas and Murphy joined Rutledge's dissent.

In the late 1960s, more cases arose testing the negative side of Black's constitutional literalism and the break with Black had become apparent. (Interestingly, Douglas never openly conceded that he had recanted his agreement with Black in the *Adamson* case. Only in the posthumously published second volume of his autobiography does he admit that the Murphy and Rutledge position was one with which he "in the years to come, was inclined to agree.") The pattern of voting disagreements with Black in the 1960s was no longer episodic but dramatic. Their differences can be seen on a wide range of issues, all centering on Black's consistent rejection of what he called the "natural law" approach to constitutional adjudication and Douglas's growing willingness to go beyond the literal text of the document.

Douglas wrote the Court's opinion in HARPER V. VIRGINIA STATE BOARD OF ELECTIONS (1966), striking down poll taxes

in state elections under the EQUAL PROTECTION clause. Black dissented. Douglas also wrote for the Court in LEVY V. LOUISIANA (1968), striking down a state law discriminating against children born out of wedlock. Again, he relied on an expansive interpretation of the equal protection clause. Justice Black was in dissent and, three years later (*Labine v. Vincent*, 1971), wrote an opinion for the Court that seemed at the time to overrule *Levy*. Here, Black emphasized the absence of any "specific constitutional guarantee." Douglas, of course, was in dissent. Douglas endorsed open-ended theories extending the Fourteenth Amendment's restrictions on STATE ACTION to actions by private business. Black disagreed, insisting that in the absence of federal legislation, the Fourteenth Amendment was inapplicable to private conduct. (See BELL V. MARYLAND.) With reference to limitations on the time, place, or manner of speech activities on public property, Douglas was prepared to balance the need for available avenues of dissent against competing state interests, if the balance favored freedom of expression. Black disagreed. In ADDERLEY V. FLORIDA (1966), a 5–4 decision sustaining a sheriff's order that protesters leave a jail driveway, Black wrote for the Court and Douglas for the dissent. Finally, Douglas was prepared to interpret the Constitution to require government to follow fair criminal, civil, and administrative procedures even where those requirements could not be tied to specific guarantees of the Bill of Rights. Black, of course, disagreed. (See IN RE WINSHIP; GOLDBERG V. KELLY.)

The most dramatic clash between the two former judicial allies occurred in GRISWOLD V. CONNECTICUT (1965). Douglas wrote for the Court, striking down a state law forbidding the use of contraceptive devices. In that case, Black's dissent was predictable, since no provision of the Bill of Rights dealt with the issue. Douglas made a valiant attempt in his opinion to maintain the façade of his agreement with Black eighteen years earlier in *Adamson*. The opinion explained that the right of marital privacy was within "penumbras, formed by emanations" of specific guarantees of the Bill of Rights. (See PENUMBRA THEORY.) The façade was thin, particularly as Douglas relied on the NINTH AMENDMENT for the proposition that constitutionally protected liberty was not limited to the specific guarantees of the Bill of Rights. Just how far removed from even the "penumbras" of the Bill of Rights was Douglas's own conception of the constitutional guarantee of privacy became apparent years later in his concurrence in the abortion cases (*Doe v. Bolton* and ROE V. WADE, 1973; see also RIGHT OF PRIVACY.) Here, he explained that the term "liberty" in the Fourteenth Amendment, as he read it, was broader than the Court's conception of a right to freedom of choice in the areas of marriage, divorce, procreation, contraception, and the education and upbringing of children. It included "the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf." These, too, were rights that he insisted could not be abridged by government absent a COMPELLING STATE INTEREST.

Douglas had come to believe that the excesses of the old Court in the economic due process cases had not been that the judges read personal values into the fabric of the Constitution. The problem was, rather, that the Court's laissez-faire economic values were the wrong values. For Douglas, the "right" values had been clear all along. They required protecting the individual's right to self-fulfillment, protecting the politically powerless from unsympathetic legislative majorities, insulating the individual from excess concentrations of governmental and private power, and insisting that government procedures be fundamentally fair.

These values best explain Douglas's decisions, up until the end. In his own written instructions for his funeral service, conducted in Washington, D.C., in January 1980, Douglas requested that Woody Guthrie's song "This Land is Your Land" be sung. He patiently explained that some had falsely assumed the song to be a hymn to socialism. Quite to the contrary, he said, the song was in praise of the freedom to wander from place to place which had received constitutional protection in his opinion for the Court in *Papachristou v. City of Jacksonville* (1972).

The *Papachristou* decision was a fitting epitaph. Douglas had written for a unanimous Court striking down a local VAGRANCY ordinance under the due process clause of the Fourteenth Amendment. The technical basis for the decision was that the ordinance was unconstitutionally vague. Insofar as activities that were "normally innocent" were made crimes, an unfettered discretion was placed in the hands of the police. But, quoting Walt Whitman, Henry David Thoreau, and Vachel Lindsay, he went on to argue that wandering and strolling were more than merely "innocent" activities. They were "historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence." The *Papachristou* opinion, in its results, its style, and the values it enshrined, was vintage Douglas.

WILLIAM COHEN
(1986)

Bibliography

COUNTRYMAN, VERN 1977 *The Douglas Opinions*. New York: Random House.

DOUGLAS, WILLIAM O. 1974 *Go East, Young Man: The Early Years.* New York: Random House.

——— 1980 *The Court Years: 1939–1975.* New York: Random House.

KARST, KENNETH L. 1969 Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula." *UCLA Law Review* 16:716–750.

POWE, L. A., JR. 1974 Evolution to Absolutism: Justice Douglas and the First Amendment. *Columbia Law Review* 74:371–411.

SIMON, JAMES F. 1980 *Independent Journey: The Life of William O. Douglas.* New York: Harper & Row.

## *DOUGLAS v. CALIFORNIA*
372 U.S. 353 (1963)

*Douglas*, decided the same day as GIDEON V. WAINWRIGHT (1963), established an EQUAL PROTECTION right for INDIGENTS to be supplied counsel by the state, free of charge, to represent them in direct APPEALS from their criminal convictions. Justice WILLIAM O. DOUGLAS, for a 6–3 majority, followed the lead of GRIFFIN V. ILLINOIS (1956): DUE PROCESS might not require the state to offer appellate review of convictions, but once appeals were granted as of right, they must be made *effectively* available for all. The state's procedure, which provided appellate counsel only when the appeals court found such an appointment appropriate, denied "that equality demanded by the FOURTEENTH AMENDMENT."

Justice JOHN MARSHALL HARLAN, dissenting, elaborated on his *Griffin* dissent. The Fourteenth Amendment had enacted no "philosophy of leveling"; the state had no affirmative duty to relieve the poor from the handicaps of poverty. Due process was satisfied by the reasonableness of the state's procedure for appointing counsel.

*Douglas* appeared to be a major precedent pointing toward strict judicial scrutiny of WEALTH DISCRIMINATION. However, the BURGER COURT ended such speculations, even in the field of criminal justice. (See ROSS V. MOFFITT; STRICT SCRUTINY.)

KENNETH L. KARST
(1986)

## *DOWDELL v. UNITED STATES*

See: Insular Cases

## DOWLING, NOEL T.
(1885–1969)

Constitutional problems of FEDERALISM were the chief interest of Noel Thomas Dowling, Columbia University's principal teacher of constitutional law for three decades (1926–1956). Joining the Columbia faculty in 1922, Dowling, a gentle Alabamian, moved into constitutional law when the more corrosive THOMAS REED POWELL departed for Harvard. The main sources of Dowling's influence were his casebook, his articles, and his consulting activities.

Dowling's widely used book, *Cases on Constitutional Law*, was first published in 1937, at the height of the New Deal crisis. Its major theme reflected his lifelong concern: "the regulatory power of government, national and state." His teaching stressed the lawyer's role in constitutional litigation. His emphasis on statutes and LEGISLATIVE FACTS reflected his long participation in the work of Columbia's Legislative Drafting Research Fund.

Dowling advised on the drafting of a number of federal and state statutes. PRUDENTIAL INSURANCE CO. V. BENJAMIN (1946), upholding the MCCARRAN ACT of 1945 granting congressional permission for continued state regulation of insurance, was a special vindication for Dowling's emphasis on the broad scope of the congressional "consent" power. Similarly, Chief Justice HARLAN F. STONE's "balancing" opinion in SOUTHERN PACIFIC CO. V. ARIZONA (1945) vindicated Dowling's advocacy of a significant judicial role in curbing state intrusions on free trade in the absence of congressional action.

GERALD GUNTHER
(1986)

Bibliography

SYNPOSIUM 1958 A Tribute to Noel Thomas Dowling. *Columbia Law Review* 58:589–613.

## *DOWNES v. BIDWELL*

See: Insular Cases

## DRAFT CARD BURNING

The burning of Selective Service registration certificates—or "draft cards"—was a brief and dramatic episode that punctuated the early opposition to the VIETNAM WAR. Many draft registrants, often before television cameras, publicly burned their cards to demonstrate their refusal to participate in the draft. These events attracted wide attention and often served as a rallying point for war protesters.

Congress responded in 1965 by amending the Universal Military Training and Service Act to make it a FELONY when any person "knowingly destroys [or] knowingly mutilates" his registration certificate. This law was challenged by David O'Brien with the aid of the AMERICAN CIVIL LIB-

ERTIES UNION. O'Brien had burned his registration certificate before a sizable Boston crowd, including several FBI agents. He was indicted, tried, convicted, and sentenced to prison in the Massachusetts District Court, but the United States Court of Appeals held that the 1965 law unconstitutionally abridged FREEDOM OF SPEECH because it interfered with O'Brien's "symbolic" protest against the war.

In *United States v. O'Brien* (1968), the Supreme Court in an opinion by Chief Justice EARL WARREN reversed the Court of Appeals and upheld the challenged law and O'Brien's conviction. The Court first ruled that the Government has a "substantial interest in assuring the continued availability" of draft cards—for example, so that the individual can prove he has registered and so communication between registrants and local boards can be facilitated, particularly in an emergency. Second, in a more far-reaching holding, the Court rejected O'Brien's claim that the 1965 amendment was unconstitutional because Congress sought to suppress freedom of speech. The Court did not determine whether that in fact was Congress's purpose. Instead it ruled that such a purpose would not invalidate the law in light of the principle that courts may not "restrain the exercise of lawful [congressional] power on the assumption that a wrongful purpose or motive has caused the power to be exercised." (See MCCRAY V. UNITED STATES.)

Only Justice WILLIAM O. DOUGLAS dissented from the Court's decision, in an opinion that dwelt less on draft card burning than on the power of Congress to initiate a peacetime draft. The *O'Brien* case led to a sharp curtailment of draft card burning and opponents of the Vietnam War turned to other forms of protest.

NORMAN DORSEN
(1986)

Bibliography

ALFANGE, DEAN, JR. 1968 Free Speech and Symbolic Conduct: The Draft Card Burning Case. *Supreme Court Review* 1968: 1–52.

## *DRAPER v. UNITED STATES*
358 U.S. 307 (1959)

In *Draper* the Supreme Court held that information provided by a previously reliable informer, even though hearsay and not within the personal knowledge of the police, is sufficient to establish PROBABLE CAUSE for an arrest, at least when there is substantial corroboration for the information.

JACOB W. LANDYNSKI
(1986)

## DR. BONHAM'S CASE

See: Bonham's Case

## *DRED SCOTT v. SANDFORD*
19 Howard 393 (1857)

Closely associated with the coming of the CIVIL WAR, DRED SCOTT V. SANDFORD remains one of the most famous decisions of the United States Supreme Court. It is certainly the prime historical example of judicial power exercised in the interest of racial subordination, and, as such, it stands in sharp contrast with BROWN V. BOARD OF EDUCATION (1954), handed down almost a century later.

Scott was a Missouri slave owned by an army medical officer named John Emerson, who took him to live at military posts in Illinois and in federal territory north of 3630 where SLAVERY had been prohibited by the MISSOURI COMPROMISE. In 1846, Scott brought suit against Emerson's widow in St. Louis, claiming that he had been emancipated by his residence on free soil. Missouri precedent was on his side, and after two trials he won his freedom. In 1852, however, the state supreme court reversed that judgment. By a 2–1 vote and in bitterly sectional language, it declared that the state would no longer enforce the antislavery law of other jurisdictions against Missouri's own citizens. Scott's residence elsewhere, it held, did not change his status as a slave in Missouri.

Normally, the next step should have been an APPEAL to the United States Supreme Court, but a recent decision in the somewhat similar case of STRADER V. GRAHAM (1851) may have persuaded Scott's legal advisers that the Court would refuse to accept JURISDICTION. They decided instead to initiate a brand new suit for freedom in the federal CIRCUIT COURT for Missouri against Mrs. Emerson's brother, John F. A. Sanford of New York, who had been acting as her agent in the Scott litigation and may even have become the slave's owner. Sanford's New York CITIZENSHIP provided the foundation for DIVERSITY JURISDICTION. So began the case of *Dred Scott v. Sandford* (with Sanford's name misspelled in the official record).

Up to this point, the principal issue in Scott's suit had been how residence on free soil affected the legal status of a slave. It was a familiar issue that dated back to the noted British case of *Somerset v. Stewart* (1772) and had been dealt with in a number of state court decisions. (See SOMERSET'S CASE.) During the early decades of American independence, a tacit sectional accommodation had prevailed. Southerners accompanied by slaves were generally able to travel and sojourn in free states without interference. At the same time, southern courts joined in upholding the rule that a slave domiciled in a free state became

forever free. Beginning in the 1830s, however, this arrangement broke down under antislavery pressure. State after state in the North withdrew the privilege of maintaining slaves while sojourning, and there was growing judicial acceptance of the view that any slave other than a fugitive became free the moment he set foot on free soil. (See COMMONWEALTH V. AVES.) To Southerners the change meant not only inconvenience but also insult, and by the 1850s they were retaliating in various ways.

*Dred Scott v. Sandford* raised an additional issue. In order to maintain a suit in federal court, Scott had to aver that he was a citizen of Missouri. Sanford's counsel challenged this assertion with a plea in abatement arguing that Negroes were not citizens and that the Court therefore lacked jurisdiction. The trial judge ruled that any person residing in a state and legally capable of owning property was qualified to bring suit under the diverse-citizenship clauses of the Constitution and the JUDICIARY ACT. On the merits of the case, however, he instructed the jury in favor of the defendant. Like the Missouri Supreme Court in *Scott v. Emerson*, he declared that Scott's status, after returning to Missouri, depended entirely upon the law of that state, without regard to his residence in Illinois and free federal territory. The jury accordingly brought in a verdict for Sanford.

The case then proceeded on WRIT OF ERROR to the United States Supreme Court, whose membership at the time consisted of five southern Democrats, two northern Democrats, one northern Whig, and one Republican. Argument before the Court in February 1856 introduced another new issue. For the first time, Sanford's lawyers maintained that Scott had not become free in federal territory because the law forbidding slavery there was unconstitutional. This, of course, was the issue that had inflamed national politics for the past decade and would continue to do so in the final years of the sectional crisis. With a presidential contest about to begin, the Justices prudently ordered the case to be reargued at the next session. On March 6, 1857, two days after the inauguration of James Buchanan, Chief Justice ROGER B. TANEY finally read the decision of the Court.

Although Taney spoke officially for the Court, every other member had something to say, and only one concurred with him in every particular. The effect of the decision was therefore unclear, except that Dred Scott had certainly lost. Seven Justices concluded that at law he remained a slave. Taney, in reasoning his way to that judgment, also ruled that free blacks were not citizens and that Congress had no power to prohibit SLAVERY IN THE TERRITORIES. But were these declarations authoritative parts of the decision?

According to some contemporary critics and later historians, Taney did not speak for a majority of the Court in excluding Negroes from citizenship. Their conclusion rests upon the assumption that only those Justices expressly agreeing with him can be counted on his side. Yet, since Taney's opinion was the authorized opinion of the Court, it seems more reasonable to regard only those Justices expressly disagreeing with him as constituting the opposition. By this measure, the opinion never encountered dissent from more than two Justices at any major point. Furthermore, five Justices in their opinions spoke of the citizenship question as having been decided by the Court. In other words, the authoritativeness of that part of Taney's opinion was attested to by a majority of the Court itself.

More familiar is the charge that Taney indulged in OBITER DICTUM when he ruled against the constitutionality of the Missouri Compromise restriction after having decided that Scott was not a citizen and so had no right to bring suit in a federal court. "Obiter dictum" was the principal battle cry of the Republicans in their attacks on the decision. By dismissing Taney's ruling against territorial power as illegitimate, they were able to salvage the main plank of their party platform without assuming the role of open rebels against judicial authority. What the argument ignored was Taney's not unreasonable contention that throughout his opinion he was canvassing the question of jurisdiction. Having concluded that Scott could not be a citizen because he was a *Negro*, the Chief Justice elected to fortify the conclusion by demonstrating also that Scott could not be a citizen because he was a *slave*. Such reinforcement was especially appropriate because some of the Justices were convinced that the Court could not properly review the citizenship question.

It therefore appears that none of Taney's major rulings can be pushed aside as unauthoritative. In any case, the long-standing argument over what the Court "really decided" has been largely beside the point; for Taney's opinion was accepted as the opinion of the Court by its critics as well as its defenders. As a matter of historical reality, the *Dred Scott* decision is what he declared it to be.

Taney devoted about forty-four percent of his opinion to the question of Negro citizenship, thirty-eight percent to the territorial question, sixteen percent to various technical issues, and only two percent to the original question of whether residence on free soil had the legal effect of emancipating a slave. Throughout the entire document, he made not a single concession to antislavery feeling but instead committed the JUDICIAL POWER OF THE UNITED STATES totally to the defense of slavery. Behind his mask of judicial propriety, the Chief Justice had become privately a fierce southern sectionalist, seething with anger at "Northern insult and Northern aggression." His flat legal prose does not entirely conceal the intensity of emotion that animated his *Dred Scott* opinion.

The citizenship issue concerned the status of free Negroes only; for everyone agreed that slaves were not citizens. Yet Taney persistently lumped free Negroes and slaves together as one degraded class of beings who "had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority." Thus all blacks, in his view, stood on the same ground. Emancipation made no difference. Negroes could not have been regarded as citizens by the Framers of the Constitution, he declared, because at the time they "had no rights which the white man was bound to respect." These notorious words were not mere historical commentary as defenders of the Chief Justice have often insisted. Taney also held that the constitutional status of Negroes had not changed at all since 1787, which meant that in 1857 they still had no federal rights that white men were bound to respect. His reasoning excluded blacks not only from citizenship but also from every protection given to *persons* by the Constitution.

Much more forceful in its political impact was Taney's ruling against the constitutionality of the antislavery provision in the Missouri Compromise. He began by dismissing as irrelevant the one clause of the Constitution in which the word "territory" appears, preferring instead to derive the territorial power of Congress by implication from the power to admit new states. No less remarkable is the fact that he never said precisely why the antislavery provision was unconstitutional. Historians have inferred from one brief passage that he based his holding on the DUE PROCESS clause of the Fifth Amendment. Yet there is no explicit statement to that effect, and in the end he did not declare that congressional prohibition of slavery in the territories *violated* any part of the Constitution; he said only that it was "not warranted" by the Constitution, a phrasing that suggests reliance on the principle of strict construction.

Not satisfied with ruling in effect that the Republican party was organized for an illegal purpose, the Chief Justice also struck a hard blow at northern Democrats and the doctrine of POPULAR SOVEREIGNTY. If Congress could not prohibit slavery in a territory, he said, neither could it authorize a territorial legislature to do so. This statement, being on a subject that did not arise in the case, was *dictum*. It exemplified Taney's determination to cover all ground in providing judicial protection for slavery. The dissenting Justices, JOHN MCLEAN and BENJAMIN R. CURTIS, rejected Taney's blanket exclusion of Negroes from citizenship. Having thus affirmed Scott's capacity to bring suit in a federal court, they proceeded to the merits of the case while denying the right of the Court majority to do so. Both men upheld the constitutionality of the Missouri Compromise restriction by interpreting the territory clause, in Republican style, as an express and plenary delegation of power to Congress. They went on to maintain that antislavery law, state or federal, dissolved the legal relationship between any master and slave coming within its purview, thereby working irrevocable emancipation.

Antislavery critics made good use of the dissenting opinions in launching an angry, abusive attack upon the Court majority and its judgment. The influence of the decision on the sectional conflict is difficult to assess. No doubt it contributed significantly to the general accumulation of sectional animosity that made some kind of national crisis increasingly unavoidable. It also aggravated the split in the Democratic party by eliciting STEPHEN A. DOUGLAS'S FREEPORT DOCTRINE and inspiring southern demands for a territorial slave code. At the same time, there is reason to doubt that the decision enhanced Republican recruiting or had a critical effect on the election of ABRAHAM LINCOLN.

For the two principals in the case, the verdict of the Court made little difference. John Sanford died in an insane asylum two months after the reading of the decision. Dred Scott was soon manumitted, but he lived only sixteen months as a free man before succumbing to tuberculosis. The constitutional effect of the decision likewise proved to be slight, especially after the outbreak of the Civil War. The wartime Union government treated *Dred Scott v. Sandford* as though it had never been rendered. In June 1862, Congress abolished slavery in all the federal territories. Later the same year, Lincoln's ATTORNEY GENERAL issued an official opinion holding that free men of color born in the United States were citizens of the United States. The THIRTEENTH AMENDMENT (1865) and the FOURTEENTH AMENDMENT (1868) completed the work of overthrowing Taney's decision.

The *Dred Scott* case damaged Taney's reputation but did not seriously weaken the Supreme Court as an institution. Aside from its immediate political effects, the case is significant as the first instance in which a major federal law was ruled unconstitutional. It is accordingly a landmark in the growth of JUDICIAL REVIEW and an early assertion of the policymaking authority that the Court would come to exercise more and more.

DON E. FEHRENBACHER
(1986)

Bibliography

EHRLICH, WALTER 1979 *They Have No Rights: Dred Scott's Struggle for Freedom.* Westport, Conn.: Greenwood Press.

FEHRENBACHER, DON E. 1978 *The Dred Scott Case: Its Significance in American Law and Politics.* New York: Oxford University Press.

SWISHER, CARL B. 1974 *The Taney Period, 1836–1864*, Volume V of the Oliver Wendell Holmes Devise *History of the Supreme Court of the United States.* New York: Macmillan.

## DRUG ABUSE

See: Controlled-Substance Abuse; Drug Regulation

## DRUG REGULATION

Congress's power to regulate the manufacture, distribution, and use of narcotic drugs, formerly limited by a considerable body of constitutional DOCTRINE based on the TENTH AMENDMENT, today is regarded as plenary, limited only by the guarantees of the BILL OF RIGHTS.

The Constitution nowhere expressly grants to Congress power to regulate narcotics. Congress's efforts to regulate the area have thus relied on its powers to tax and regulate foreign and interstate commerce, and on its implied power to make laws enforcing treaty obligations. In the early part of this century, though, the Supreme Court viewed these powers as being constrained by the Tenth Amendment, which, the Court repeatedly held, reserved the POLICE POWER exclusively to the states; federal laws attempting to usurp the police power were void.

Thus, for example, tax statutes were void unless they indicated on their face a revenue purpose rather than an intent to exercise reserved police power. As the Court stated in *United States v. Jin Fuey Moy* (1916), a tax statute would be upheld where it was clearly designed to raise revenue, even though it had "a moral end as well as revenue in view," provided that moral ends were reached "within the limits of a revenue measure." In practice, purported taxes would seldom be voided, but ambiguities in statutory language would be resolved by reference to the purported revenue purpose.

The requirement of a revenue purpose has become less important over time. Congress quickly became adept at structuring tax measures to pass the facial scrutiny of the courts. At the same time, the Court's review of purpose became more cursory. Indeed, at least one lower court expressed the view that a tax purpose is no longer required. In any case, the expansion of the COMMERCE CLAUSE power has made the use of the TAXING POWER unnecessary, and the Comprehensive Drug Abuse Prevention and Control Act of 1970 repealed most prior federal statutes based on the taxing power.

The development of the commerce power largely paralleled that of the taxing power. The Court for many years distinguished sharply between the commerce power granted to the federal government and the police power reserved to the states. The Court's decision in CHAMPION V. AMES (1903), though, established that Congress had the power to ban goods dangerous in themselves from interstate and FOREIGN COMMERCE. Under this power, Congress was free to ban trade in narcotics with foreign countries and between states, but had no power to regulate the intrastate manufacture or sale of narcotics. Thus, prosecution of narcotics violators under federal law required a case-by-case showing that the drugs in question were involved in foreign or interstate commerce, although Congress could create a statutory presumption that drugs of a type normally imported from foreign countries had been so imported.

Now that the courts have sweepingly interpreted the commerce clause, Congress may impose sanctions without showing in each prosecution that the narcotics transaction affected interstate commerce. Challenges to recent federal narcotics regulations have been routinely brushed aside by the courts.

Congress has also occasionally regulated drugs through the TREATY POWER. Thus, a law requiring narcotics addicts to register with customs upon leaving the United States was valid as a measure to carry out the nation's obligations under the Hague Convention of 1912, a treaty ratified by the Senate. With the rise of the commerce power, however, Congress has had little need for the treaty power in regulating narcotics.

Congress's power to regulate narcotics is, of course, limited by the Bill of Rights. In general, these limits are the same in narcotics cases as in other criminal cases; for example, Congress may not authorize unreasonable SEARCHES AND SEIZURES or CRUEL AND UNUSUAL PUNISHMENT of narcotics violators. Nonetheless, the BURGER COURT's contraction of the reach of the Fourth Amendment has led some commentators to speak ironically of a "narcotics exception" to that guarantee.

One issue unique to the narcotics laws, however, has arisen from the FIRST AMENDMENT's guarantee of RELIGIOUS LIBERTY. Several religious groups in the United States use drugs in their observance. The question thus arises whether the federal and state governments may constitutionally forbid the possession and use of drugs for religious purposes. The Supreme Court has held that only a COMPELLING STATE INTEREST can justify substantial infringement of the right to free exercise of religion. This compelling interest must, under the holding in SHERBERT V. VERNER (1963), be "some substantial threat to public safety, peace or order."

Two state courts have found that this standard bars legislative prohibition of the use of peyote by members of the Native American Church in their religious ceremonies. California, indeed, has found that the same ban applies to any person who uses peyote in connection with a bona fide religious practice, even if the person is not a member of any recognized religious group. In a 1964 case involving a "self-styled peyote preacher" the California Supreme Court granted a new trial to determine whether the defendant's professed religious belief was bona fide. Most

courts, however, have rejected this view. As of 1983, courts in at least five states have held that the interest of defendants in free exercise of religion is outweighed by the compelling governmental interest in controlling the distribution and use of dangerous drugs.

Whether or not Congress is constitutionally compelled to do so, it has occasionally granted exemptions for the sacramental use of otherwise controlled substances. Just as sacramental wine was exempted from the provisions of the National Prohibition Act (1919), the Controlled Substances Act of 1970 exempted from its prohibitions the sacramental use of peyote. Although the Drug Enforcement Agency has consistently interpreted this exemption as being available only to members of the Native American Church, at least one lower court has held that Congress intended to exempt all bona fide religious groups using peyote for sacramental purposes and regarding the drug as a deity.

Other than this single exemption for peyote, however, the federal narcotics laws have not authorized sacramental use of otherwise forbidden drugs. Nor have the courts yet recognized any religious claims other than those made for peyote. The Supreme Court has not yet spoken on the matter, and constitutional claims for religious exemptions to the narcotics laws cannot be regarded as wholly frivolous. Still, neither the Supreme Court nor the lower courts seem currently to view these claims with favor.

JOHN KAPLAN
(1986)

Bibliography

BONNIE, RICHARD J. 1980 *Marijuana Use and Criminal Sanctions.* Charlottesville, Va. Michie Co.

KAPLAN, JOHN 1970 *Marijuana: The New Prohibition.* New York: World Publishing Co.

——— 1983 *The Hardest Drug: Heroin and Public Policy.* Chicago: University of Chicago Press.

MOORE, MARK H. and GERSTEIN, DEAN R., eds. 1981 *Alcohol and Public Policy: Beyond the Shadow of Prohibition.* Washington, D.C.: National Academy Press.

NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE 1973 *Drug Use in America: Problem in Perspective.* Washington, D.C.: Government Printing Office.

## DRUG REGULATION
(Update 1)

The breadth of congressional power under the COMMERCE CLAUSE to regulate the manufacture, distribution, and possession of psychoactive drugs remains unquestioned. In recent years, however, strong measures taken by the federal and state governments to prevent and punish drug offenses have raised constitutional objections grounded in the BILL OF RIGHTS. The most controversial of these measures has been the use of chemical testing to detect the presence of illicit drugs in a person's urine or other body fluids.

Beginning in the mid-1980s, many public and private employers began to require urine testing as a condition of employment. The FOURTH AMENDMENT ban against UNREASONABLE SEARCHES is implicated when a governmental agency requires its employees or applicants for employment to submit to urine testing or when the government requires private employers (such as railroads) to test their employees. The collection and subsequent analysis of a person's urine is clearly a "search" for Fourth Amendment purposes, so the constitutional controversy has focused on when such testing is "reasonable" in light of the government's objectives and the employees' interests in personal privacy. It is generally agreed that urine testing is "reasonable," even in the absence of a SEARCH WARRANT, if it is based on PROBABLE CAUSE, or "individualized suspicion," that a particular employee has used illicit drugs. The controversial question is whether, and under what circumstances, employees can be required to submit to urine testing as part of a random or universal screening program.

In 1989 the Supreme Court upheld two screening programs, rejecting the argument that urine testing is per se unreasonable in the absence of individualized suspicion. However, in upholding testing programs for U.S. Customs agents and for railroad employees, the Court closely scrutinized the governmental objectives and the testing protocols. For example, in NATIONAL TREASURY EMPLOYEES UNION V. VON RAAB (1989), the Court held that the Customs Service's interests in the integrity and safety of its work force and in the protection of sensitive information justified the urine testing of all employees applying for or holding positions involving interdiction of illicit drugs or requiring the carrying of firearms. Taking its cue from *Von Raab*, the District of Columbia Court of Appeals subsequently held in *Harmon v. Thornburgh* (1989) that these same interests did not justify the random testing of attorneys in the Justice Department's antitrust division.

Measures taken to suppress drug use have also been challenged under the Eighth Amendment's prohibition against CRUEL AND UNUSUAL PUNISHMENT. Trafficking in illicit drugs is typically punishable by lengthy periods of imprisonment, and under many statutes, severe sentences are mandatory. However, in *Hutto v. Davis* (1982), the Supreme Court rejected a proportionality challenge to two consecutive twenty-year sentences for possessing and distributing nine ounces of marijuana, and the Sixth Circuit Court in *Young v. Miller* (1989) refused to set aside a mandatory nonparolable life sentence imposed by Michigan on a female first offender who had been convicted of pos-

sessing at least 650 grams of heroin. Acknowledging that the sentence "borders on overkill," that Michigan permits parolable life sentences for armed robbery or second-degree murder, and that only one other state authorized a sentence of such severity for drug offenses, the Sixth Circuit Court nonetheless found no constitutional impediment to "Michigan's efforts to punish major drug traffickers to the fullest extent of the law, even those who are first offenders."

In 1990 the Supreme Court resolved a question discussed at length in the main volumes of the *Encyclopedia*—whether bona fide sacramental use of peyote is protected by the FIRST AMENDMENT guarantee of RELIGIOUS LIBERTY. In EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990) the Court held that Oregon's criminal prohibition against possession of peyote could constitutionally be applied to sacramental use of the drug and that a state employee could therefore be fired and denied unemployment compensation for having used peyote at a religious ceremony of the Native American Church. The Court's opinion is less noteworthy for the result it reached than for its reformulation of the governing constitutional rule. As noted in the *Encyclopedia*, under the BALANCING TEST articulated in SHERBERT V. VERNER (1963), the issue is whether the state's interest in suppressing use of illicit drugs is sufficiently compelling to override the individual's interest in religious liberty. However, in the peyote case, the Court held that the government is not required to exempt religiously motivated actors from generally applicable and otherwise valid criminal prohibitions.

RICHARD J. BONNIE
(1992)

Bibliography

ROTHSTEIN, MARK 1987 Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law. *Chicago-Kent Law Review* 63:683–743.

## DRUG REGULATION
(Update 2)

Congress and the states have broad authority to regulate the sale, possession, and manufacture of narcotic drugs. The states regulate under their inherent POLICE POWER to act for the health, safety, and welfare of the public. Congress's power arises from its constitutional grants of power to tax and to regulate FOREIGN COMMERCE and INTERSTATE COMMERCE. To date, the expansive powers of Congress have been unaffected by a recent Supreme Court decision resurrecting a FEDERALISM-based limitation on the reach of the COMMERCE CLAUSE. In UNITED STATES V. LÓPEZ (1995), the Court held that a federal statute prohibiting gun possession near schools exceeded the authority of Congress. Such activity, the Court said, was not economic in nature and, even if engaged in on a large scale, did not substantially affect interstate commerce. This ruling produced a flurry of challenges to federal statues, including major drug regulation statutes such as the Comprehensive Drug Abuse Prevention and Control Act of 1970. Although none of these cases has yet reached the Court, lower courts have uniformly accepted Congress's detailed findings that intrastate manufacture, distribution, and possession of controlled substances, as a class of activities, have a substantial and direct effect on interstate drug trafficking and that effective control of interstate trafficking requires regulation of both intrastate and interstate activities. Congress may regulate all such activities and may impose sanctions without showing in each prosecution that a particular narcotics transaction affected interstate commerce.

Despite the broad scope of their powers, federal and state governments must still comply with the individual liberty protections of the BILL OF RIGHTS. Over the past decade strong, even harsh, antidrug laws have provoked numerous constitutional challenges. But successful challenges have been few. Courts have, for example, rejected claims that lengthy, mandatory sentences for drug offenses constitutes CRUEL AND UNUSUAL PUNISHMENT. Courts have also given federal and state governments a relatively free hand to employ two of their most controversial antidrug strategies: suspicionless DRUG TESTING and forfeitures of PROPERTY connected to drug activity.

When the government conducts drug testing of employees, students, or persons under government supervision or when it requires private industry such as railroads or airlines to conduct such testing, the chief constitutional check is the FOURTH AMENDMENT prohibition on UNREASONABLE SEARCH and seizures. Courts agree that the collection and analysis of a person's blood, urine, or hair intrudes on recognized expectations of privacy and amounts to a search. The essential question is whether such testing is reasonable.

If the government conducts a SEARCH OR SEIZURE as part of a criminal investigation, reasonableness requires PROBABLE CAUSE or reasonable suspicion that the individual has engaged in wrongdoing. But drug testing programs subject persons such as police officers, airline pilots, or job applicants to testing solely because they are within the targeted group. To evaluate these suspicionless drug testing programs, the Court has developed the "special needs" DOCTRINE. The Court permits abandonment of individualized suspicion if a search or seizure is prompted by a purpose, or special need, other than criminal law enforcement. To determine whether such suspicionless schemes

are reasonable, the Court asks whether, on balance, the need to search outweighs the intrusion the search entails. This free-form, case-by-case BALANCING TEST has resulted in Court approval of most drug testing programs.

First, the courts almost always characterize the intrusion of drug testing as "minimal." In the absence of strip searches or other similarly intrusive methods, they view the taking of blood or the collection of urine or hair as a common occurrence, usually no more intrusive than a physical exam in a doctor's office or the loss of privacy associated with using a public restroom. And, usually, testing data are disclosed only to a limited number of persons and reveal only illicit drug use and not other information, such as pregnancy or diabetes.

Second, the government's need to conduct drug tests is routinely found to outweigh the minimal intrusion that they involve. The Court has upheld mass, suspicionless drug testing of high school athletes to respond to the "crisis" of drug use and insubordination in the schools. It has permitted suspicionless testing of U.S. Customs Service employees to deter drug use among agents whose job was drug interdiction, or who carried guns, or handled classified information. But the government's justification for drug testing can sometimes be too flimsy. In CHANDLER V. MILLER (1997), the Court struck down a Georgia law that required all candidates for public office to undergo drug testing. Georgia failed to show there was any drug use problem among candidates or any danger to public safety. It also failed to show why ordinary public scrutiny of such officials was inadequate to deter or detect drug use. After *Chandler*, government drug testing remains relatively easy to justify, but some actual drug use problem or concern for public safety must be demonstrated.

One of the government's most popular (and most profitable) antidrug devices is CIVIL FORFEITURE of assets. Typical civil forfeiture laws permit the government, on a bare bones showing of probable cause, to seize any property thought to be proceeds of a crime or suspected of being used or intended for use in criminal activity. The prime targets for forfeiture are assets connected to drug trafficking and possession. The government has seized cars, boats, planes, farms, houses, cash, and even livestock connected to drug manufacture and possession.

In civil forfeitures, the property is thought to be the guilty or offending party and seizure is permitted whether or not the owner is charged with or convicted of a crime. The government does not have to honor rights associated with criminal proceedings, such as proof beyond a REASONABLE DOUBT or TRIAL BY JURY. Indeed, the owner must prove the property's innocence or lose it entirely. Civil forfeitures are subject to some constitutional boundaries. PROCEDURAL DUE PROCESS requires that property owners have prior NOTICE and a hearing before the government seizes land or other immovable property. Seizure of property only incidentally or haphazardly associated with criminal activity can be equivalent to a fine and limited by the excessive fines clause. However, although individual Justices have acknowledged the harshness of the civil forfeiture remedy, the Court has taken refuge in the long historical acceptance of civil forfeitures and has rejected any fundamental assault on its scope. Thus it declined to view forfeiture as a punishment subject to the DOUBLE JEOPARDY clause. It also rejected the idea that DUE PROCESS prevents the seizure of property from innocent owners; that is, owners who were unaware that others used their property, such as a car, to engage in drug trafficking.

MARY M. CHEH
(2000)

Bibliography

CHEH, MARY M. 1994 Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles On the Constitution. *New York Law School Law Review* 39: 1–48.

LAFAVE, WAYNE 1996 *Search and Seizure: A Treatise on the Fourth Amendment* (with 1998 Supplement). St. Paul, Minn.: West Publishing Co.

LEADING CASE 1997 Suspicionless Drug Testing. *Harvard Law Review* 111:289–299.

NOTE 1997 Drug Testing and the Fourth Amendment: What Happened to Individualized Suspicion? *Drake Law Review* 46:149–172.

## DRUG TESTING

Increasingly through the 1980s, federal and state governments required testing of a person's blood, urine, breath, and hair to try to determine recent drug or alcohol use. President Ronald Reagan's Executive Order No. 12564 hastened this trend by ordering federal executive agencies to develop and implement such programs for their employees. Other tested groups have included military personnel, defendants subject to pretrial release, probationers, PRISONERS and parolees, state employees (especially those involved in law enforcement and transportation), high school and college athletes and other students, women seeking obstetrical care and their neonates, and parents in child abuse and neglect cases.

When required or encouraged by the government, drug-testing programs raise fundamental issues for FOURTH AMENDMENT jurisprudence. Judicial legitimation of such programs may over time lead to substantial alteration of the predominant paradigms of privacy. Such programs present very different issues from the blood test in SCHMERBER V. CALIFORNIA (1966), which the Supreme Court permitted on the grounds that medical personnel

administered it based on PROBABLE CAUSE of intoxication and that EXIGENT CIRCUMSTANCES excused the lack of a SEARCH WARRANT.

In its 1988 term the Supreme Court upheld in large part two federal testing programs. In SKINNER V. RAILWAY LABOR EXECUTIVES' ASS'N. (1989), the Court upheld regulations of the Federal Railroad Administration that required railroads to test the urine and blood of employees in major train accidents. NATIONAL TREASURY EMPLOYEES UNION V. VON RAAB (1989) upheld urine testing of Customs Service employees as a condition of promotion to positions that involve direct drug interdiction or the carrying of guns. The Court remanded for further consideration the issue of employee testing for promotion to positions allowing access to "sensitive" information.

All Justices agreed that a compelled production and subsequent chemical analysis of urine, blood, and breath are invasions of a person's REASONABLE EXPECTATION OF PRIVACY and therefore a search and possibly a seizure. For the first time outside of a prison context, the Court's majority concluded that a search of a person's body may be analyzed as an ADMINISTRATIVE SEARCH and thus may be upheld without individualized suspicion. Applying a test derived from a 1985 school search case, NEW JERSEY V. T.L.O., and developed in the 1986 term in cases involving searches of a junkyard, a probationer's home, and an employee's desk, the Court concluded that a government's "special needs," apart from those of normal law enforcement, can justify dispensing with the presumption that compliance with the warrant clause determines the reasonableness of the search. Such justification occurs at least when a warrant or probable clause requirement (or some lesser standard of individualized suspicion) would interfere with the state's satisfying its special needs.

Finding that such requirements were not practical because they would frustrate the government's achievement of its goals, the Court concluded that the drug-testing programs were reasonable in view of the importance of the state's interest, as weighed against individual privacy interests. It treated the latter as limited because of the reduced privacy expectation of employees, especially those in such highly regulated and scrutinized jobs as railroaders and Customs Service officers. The Court also noted the programs' efforts to employ accurate tests and to obtain employee medical data that could improve test interpretation, recognizing that the accuracy of a test affects a search's reasonableness (as well as the due process validity of any decision, such as dismissal, predicated on the test). To the extent the testing procedure is not particularly reliable, as can easily be the case, the government's interest is reduced.

Although these decisions approve widespread testing without individualized suspicion, they involve only testing that is triggered by a special event such as an accident or an application for promotion. Some lower court decisions have more deferentially reviewed the facts of challenged programs and upheld testing that lacked some of the restrictions crafted into the Customs Service program. Such programs involve more sustained and less predictable invasions of privacy and increase the discretionary power of superiors over subordinates that Fourth Amendment jurisprudence can limit. For example, courts have upheld repeated random or systematic drug tests of employees, such as flight controllers, police officers, and prison guards, without a triggering event. With respect to large classes of employees among whom the interest in deterring drug use is less substantial, lower courts have also approved testing based on an individualized suspicion that is less than probable cause.

As the Court gives more scope to administrative search doctrine, officials may rely increasingly on such searches rather than on a police officer's discretionary decision to search based on an individual suspicion of crime. Any such development will increasingly pose the question of the appropriate standard of JUDICIAL REVIEW in assessing the reasonableness not of an individual officer's acts but of a general legislative or executive program. The evidence justifying the program and the rules limiting discretion will be relevant to such an assessment. While in *Von Raab* the government plausibly hypothesized risks that might arise from a Customs officer's drug use, no evidence of drug abuse within the Customs Service was available. In accepting such hypothetical justifications, the Court's scrutiny was far from searching. This deference is consistent with the Court's explicit refusal to consider the availability of less intrusive means in determining reasonableness. Yet, in remanding some of the regulations for further consideration, the Court showed that its scrutiny was not of the lowest order.

The Court could confine the reach of these two cases largely to governmental employment by attributing them to the special scrutiny to which public employees may be subjected in hiring, retention, and promotion and thus treat these cases as variants of an UNCONSTITUTIONAL CONDITIONS problem. Yet, the numbers of persons covered by such testing and the intensity of these searches raise the question whether these decisions may signal a basic paradigm shift in Fourth Amendment law away from the presumption that reasonableness is defined by the warrant clause. The BURGER COURT and the REHNQUIST COURT have for years been edging in this direction rhetorically and in a series of ad hoc judgments; whether in retrospect *Von Raab* will be a watershed case cannot yet be determined.

The "special needs" rule risks a doctrinal unraveling of the warrant clause presumption in two ways. If the range and number of administrative searches increase, distin-

guishing administrative searches with a civil enforcement rationale from criminal enforcement searches will become ever more difficult. Second, a burgeoning of administrative searches will have the doctrinally unjustified and politically unattractive result of affording the criminal suspect more privacy protection than the populace at large.

These decisions are also noteworthy for the extent to which they permit intrusions on the body as a routine matter. They legitimate the role that intruding on bodily privacy can play in disciplining the civilian adult population. No appreciation is found in the Court's opinions that the body is the home of the self. The only noticeable concern is with the shame of scrutinized urination, a matter that testing programs sometimes address by providing only for aural supervision.

Also of note is their impact on the Fourth Amendment values of particularity and informational privacy. Depending on the kind of chemical analyses permitted, drug tests can provide a recent history—whether accurate or not, extending back many weeks—of legal and illegal drug use, which may have occurred solely in the home's privacy. They can also provide information about bodily and psychosomatic conditions such as pregnancy, HIV antibodies, diabetes, epilepsy, and depression.

In other, often more public situations that do not involve the employment relationship, the need to identify and seize a person may present a preliminary practical impediment to drug testing. In MICHIGAN DEPARTMENT OF STATE POLICE V. SITZ (1990), the Supreme Court upheld the constitutionality of temporary seizures at sobriety checkpoints. Officers briefly stopped all cars, examined the driver for signs of intoxication, and presumably observed what was in plain view. Upon finding signs of intoxication, the officer would direct the driver to a side location to examine his license and registration and to test sobriety. The state police established these checkpoints for short periods of time without prior notice to the public and without providing reasons for their location and timing.

The court reviewed these seizures by appling a reasonableness BALANCING TEST derived from *Brown v. Texas* (1979), but without first making a finding of "special needs" as in *Von Raab*. Presumably, the distinction between these two tests is that the Court treats brief seizures of persons in cars upon the highway, even for the routine law enforcement purposes, as less intrusive than searches. Subjecting the program's justification to a more lenient scrutiny than was used in *Von Raab*, the Court easily concluded that the state's interest in a program that outweighs the individual's liberty interests in avoiding brief detention. As in *Von Raab*, the Court refused to base its reasonableness judgement on the availability of other effective means of achieving state objectives that less seriously burden Fourth Amendment values. Accordingly, it refused to consider substantial evidence that checkpoints are far less effective in identifying and apprehending drunk drivers than are seizures based on articulable suspicion. It is too early to tell whether and how the power to seize without individualized suspicion will be combined with a *Von Raab* drug search.

ROBERT D. GOLDSTEIN
(1992)

(SEE ALSO: *Search and Seizure.*)

Bibliography

LAFAVE, WAYNE 1987 *Search and Seizure: A Treatise on the Fourth Amendment.* St. Paul, Minn.: West Publishing Co.

SCHULHOFER, STEPHEN 1989 On the Fourth Amendment Right of the Law-Abiding Public. *Supreme Court Review* 1989:87–163.

ZEESE, KEVIN 1989 *Drug Testing: Legal Manual.* New York: Clark Boardman.

## DRUG TESTING
### (Update)

Government drug testing of employees, students, and others such as persons on probation, is now a widespread and entrenched phenomenon. The chief constitutional limit on such testing is the FOURTH AMENDMENT prohibition on UNREASONABLE SEARCH and seizures. Because courts agree that the collection and analysis of a person's blood, urine, or hair is a search, the key question is whether such testing is reasonable.

When the government conducts a SEARCH OR SEIZURE as part of a criminal investigation, reasonableness requires PROBABLE CAUSE or reasonable suspicion that the individual has engaged in wrongdoing. But the requirement of individualized suspicion would doom modern drug testing programs because they are blanket, suspicionless searches of mostly innocent people. In a series of cases the Supreme Court excused the need for individualized suspicion when a search was conducted for a "special need" other than ordinary law enforcement. But it was unclear whether a special need was a standard for judging testing programs or simply an invitation to balance the "minimal" intrusion of drug testing against the important social problem the government was addressing.

In *Vernonia School District 47J v. Acton* (1995) the Court upheld random urinalysis of public school student athletes, saying that students in school had a reduced expectation of privacy; that being monitored while providing

a urine specimen was no more intrusive than using a public restroom; and that testing was needed to combat a proven drug use problem in the schools. In dissent, Justice SANDRA DAY O'CONNOR insisted that suspicionless testing was contrary to bedrock Fourth Amendment requirements and could only be justified if the government had a specific and substantial need to test and proved that a suspicion-based approach was unworkable.

The Court moved toward O'Connor's position in CHANDLER V. MILLER (1997). Although the Court did not reverse any prior rulings, it said that suspicionless testing, even if only minimally intrusive, is permissible only if the government shows actual evidence of a drug use problem or real hazards flowing from possible drug use. The government must also explain why ordinary suspicion-based law enforcement methods are inadequate and show that its testing program actually responds to the problem it identified. In *Chandler*, the Court struck down a Georgia law that required all candidates for public office to undergo drug testing. Georgia failed to show there was any drug use problem among candidates or any danger to public safety. It also failed to show why ordinary public scrutiny of such officials was inadequate to deter or detect drug use.

MARY M. CHEH
(2000)

(SEE ALSO: *Drug Regulation.*)

Bibliography

RECENT DEVELOPMENT 1998 Reining in the National Drug Testing Epidemic: *Chandler v. Miller. Harvard Civil Rights–Civil Liberties Law Review* 33:253–272.

ZEESE, KEVIN 1996 *Drug Testing: Legal Manual.* Deerfield, Ill.: Clark Boardman Callaghan.

## DUAL FEDERALISM

EDWARD S. CORWIN devised the term "dual federalism" to describe a constitutional theory enunciated by the Supreme Court and by many COMMENTATORS ON THE CONSTITUTION at various times (and to various purposes) in the nation's history—a theory concerning the proper relationships between the national government and the states. This theory, Corwin wrote, embodied four postulates of constitutional interpretation: "1. The national government is one of ENUMERATED POWERS only; 2. Also, the purposes which it may constitutionally promote are few; 3. Within their respective spheres the two centers of government are 'sovereign' and hence 'equal'; 4. The relation of the two centers with each other is one of tension rather than collaboration."

This theory gives enormous importance to the TENTH AMENDMENT, with its declaration that powers not delegated to the national government and not prohibited to the states by the Constitution "are reserved to the States respectively, or the people." (The ARTICLES OF CONFEDERATION had reserved to the states powers that were not "expressly delegated" to Congress.) Confronted with the competing concept of national authority in the Constitution's SUPREMACY CLAUSE, proponents of dual federalism have insisted that the Tenth Amendment holds a superior position. The TANEY COURT, especially in the LICENSE CASES, often portrayed the states' reserved powers as a constitutional limitation on the legitimate authority of Congress. In the post-CIVIL WAR period, the Court built another constitutional monument to dual federalism theory in its doctrine of INTERGOVERNMENTAL IMMUNITIES. In the hands of a conservative, property-minded judiciary in the late nineteenth century, dual federalism became a potent instrument for invalidation of federal regulatory measures. In HAMMER V. DAGENHART (1918) the Court's majority took an extreme view of the Tenth Amendment, declaring that it forbade even a federal regulation of interstate commerce when the regulation's purpose was to invade the province of the states' reserved powers.

A series of decisions in the late 1930s, however, put to rest the formal constitutional theory of dual federalism. The Court's revised interpretations of the COMMERCE POWER, the CONTRACT CLAUSE, and the TAXING AND SPENDING POWER all rejected Tenth Amendment limitations on national authority. Meanwhile, the Court also validated the administrative innovations of COOPERATIVE FEDERALISM, in the form of extensive programs of FEDERAL GRANTS-IN-AID to the states.

The only serious reappearance of dual federalism theory in post-NEW DEAL constitutional law has been in NATIONAL LEAGUE OF CITIES V. USERY (1976), in which a concept of inviolable powers and functions of the "states as states" became a limitation on congressional regulatory power, in this instance the power to establish wages and hours for municipal workers.

HARRY N. SCHEIBER
(1986)

Bibliography

CORWIN, EDWARD S. 1950 The Passing of Dual Federalism. *Virginia Law Review* 36:1–24.

MASON, ALPHEUS THOMAS 1968 Federalism: Historic Questions and Contemporary Meanings. The Role of the Court. In Valerie, Earl, ed., *Federalism: Infinite Variety in Theory and Practice.* Itasca, Ill.: F. E. Peacock Publishers.

SCHEIBER, HARRY N. 1978 American Federalism and the Diffusion of Power. *University of Toledo Law Review* 9:619–680.

## DUANE, JAMES
(1733–1797)

James Duane, a wealthy New York lawyer and conservative political leader of the Revolutionary period, served in the Continental Congress (1774–1784) and helped write and secure ratification of the ARTICLES OF CONFEDERATION. As mayor of New York City (1784–1789) he presided over the Mayor's Court case of RUTGERS V. WADDINGTON (1784), a disputed precedent for JUDICIAL REVIEW. Not named, because of his nationalist views, as a delegate to the CONSTITUTIONAL CONVENTION OF 1787, he attended the New York convention and worked for RATIFICATION OF THE CONSTITUTION. He was later the first UNITED STATES DISTRICT COURT judge in New York (1789–1794).

DENNIS J. MAHONEY
(1986)

## DUE PROCESS OF LAW

A 1354 act of Parliament reconfirming MAGNA CARTA paraphrased its chapter 29 as follows: "That no man . . . shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in Answer by due Process of Law." This was the first reference to due process in English legal history. Chapter 29 of the 1225 issue of Magna Carta originally concluded with the phrase "by the LAW OF THE LAND." Very probably the 1354 reconfirmation did not equate "the law of the land" with "due process of law"; the two were not synonymous. Due process in the 1354 enactment, and until the seventeenth century, meant an appropriate COMMON LAW writ.

In the Five Knights Case (see PETITION OF RIGHT), JOHN SELDEN, the great parliamentarian, said in defense of the accused that "No freeman shall be imprisoned without due process of law," meaning that the "law of the land" was an equivalent for "either INDICTMENT or PRESENTMENT." Sir EDWARD COKE, in his commentary on Magna Carta, also equated due process with the law of the land, meaning regularized courses of proceeding in common law prosecutions for crime. Coke's primary claim was that the law of the land was the common law, one of several rival systems of law then prevalent in England. When abolishing the courts of High Commission and Star Chamber, Parliament in 1641 quoted the due process phraseology of the act of 1354 and added that trials by "ordinary Courts of Justice and by the ordinary course of law" protected property right against arbitrary proceedings. JOHN LILBURNE and his Levellers agreed, but they also asserted that due process signified a cluster of procedural protections of the criminally accused, including TRIAL BY JURY, the RIGHT TO COUNSEL, and the RIGHT AGAINST SELF-INCRIMINATION. By the mid-seventeenth century due process and the law of the land referred to PROCEDURAL DUE PROCESS in both civil and criminal cases. The "law of the land" usage, however, was the dominant one, and "due process" continued to be used in the very limited sense of a writ appropriate to a legal proceeding. A century later WILLIAM BLACKSTONE discussed various processes—original, mesne, and final—without discoursing on due process of law per se. After referring to indictment in capital cases and the principle that "no man can be put to death without being brought to answer by due process of law," Blackstone referred to the different writs that summoned an accused to trial in MISDEMEANOR and FELONY cases.

In the American colonies the usage was similar. In deference to Magna Carta, the "law of the land" formulation was by far the most common, although a variety of paraphrases existed. The MASSACHUSETTS BODY OF LIBERTIES (1641) guaranteed that one's life, liberty, and property could not be deprived except by "some expresse law of the Country warranting the same, established by a generall Court and sufficiently published"—that is, by known, standing law. West New Jersey protected the same substantive rights by a clause guaranteeing "due trial and judgment passed by twelve good and lawful men." New York in 1683 sought a charter that incorporated the famous chapter of Magna Carta with a clause requiring "by due course of law." Probably the first American reference to "due process of law" was in a Massachusetts act of 1692 endorsing chapter 29 of Magna Carta.

During the controversy with Great Britain leading to the American Revolution, Americans frequently spoke of trial by jury, FUNDAMENTAL LAW, the law of the land, no TAXATION WITHOUT REPRESENTATION, and a gamut of CIVIL LIBERTIES, but rarely referred to due process of law. Their references to the "law of the land" had no fixed or single meaning. They meant by it a variety of safeguards against injustice and abuses of CRIMINAL PROCEDURE; they equated it with NOTICE, hearing, indictment, trial by jury, and, more generally, with regular forms of common law procedure and even the fundamental law itself or constitutional limitations on government. The "law of the land" was an omnibus phrase whose content ranged from specific writs to the concept of CONSTITUTIONALISM, and the phrase connoted protection of substantive rights—life, liberty, and property—as well as various precedural rights. Later, due process inherited all the content and connotations of law of the land.

All the first state constitutions used the "law of the land" phraseology, as did the NORTHWEST ORDINANCE OF 1787. No state constitution included a due process clause until New York's of 1821, although Mississippi's constitution of 1817 referred to "due course of law." Before the

Civil War, only five state constitutions referred to "due process of law." All others had the older "law of the land" equivalent.

The first American constitution to include a due process clause was the Constitution of the United States in its Fifth Amendment, ratified in 1791. The clause reflected JAMES MADISON's preference. For reasons unknown, he recommended that no person should be "deprived of life, liberty, or property without due process of law." The four states which had ratified the Constitution with recommendations for a comprehensive BILL OF RIGHTS urged versions of chapter 29 of Magna Carta, although only one, New York, referred to "due process of law" rather than "law of the land." The due process clause of the Fifth Amendment was ratified without any discussions that illumine its meaning. Although every clause of the Constitution is supposed to have its own independent meaning, rendering no clause tautological, the due process clause was an exception. It pacified public apprehensions, bowed toward Magna Carta, and reinforced specific rights such as trial by jury.

When the Supreme Court construed the due process clause of the Fifth Amendment for the first time in MURRAY V. HOBOKEN LAND COMPANY (1856), it declared that although due process limited all branches of the government, it had only the procedural connotations that derived from the settled usages and modes of proceeding which characterized old English law suited to American conditions. Chief Justice ROGER B. TANEY's opinion in DRED SCOTT V. SANDFORD (1857) passingly employed SUBSTANTIVE DUE PROCESS OF LAW, which had cropped up in some state decisions and in ABOLITIONIST CONSTITUTIONAL THEORY as well as proslavery theory. The FOURTEENTH AMENDMENT's due process clause, taken verbatim from the Fifth's, proved to be the turning point in the national acceptance of "due process of law" as the common usage rather than the "law of the land" usage. In the last third of the nineteenth century, state constitutions finally substituted "due process" for "law of the land," and judicial decisions, state and federal, as well as legal treatises, expounded "due process of law," making it the most important and influential term in American constitutional law.

LEONARD W. LEVY
(1986)

Bibliography

HOWARD, A. E. DICK 1968 *The Road from Runnymede: Magna Carta and Constitutionalism in America.* Charlottesville: University Press of Virginia.

JUROW, KEITH 1975 Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law. *American Journal of Legal History* 19:265–279.

MOTT, RODNEY 1926 *Due Process of Law.* Indianapolis: Bobbs-Merrill.

## DUE PROCESS OF LAW, PROCEDURAL

See: Procedural Due Process of Law, Civil; Procedural Due Process of Law, Criminal

## DUE PROCESS OF LAW, SUBSTANTIVE

See: Substantive Due Process

## DULANY, DANIEL
(1722–1797)

Daniel Dulany was a member of the Delaware governor's council (1757–1774) and one of the most prominent lawyers in America. In 1765 he published a pamphlet opposing the Stamp Act and arguing that "there is a clear distinction between an Act imposing a Tax for the single Purpose of raising a Revenue, and those Acts which have been made for Regulation of Trade." He denounced the doctrine of virtual representation as a "cobweb, spread to catch the unwary, and intangle the weak."

Dulany was a delegate to the STAMP ACT CONGRESS but later opposed the AMERICAN REVOLUTION.

DENNIS J. MAHONEY
(1986)

## *DUN & BRADSTREET, INC. v. GREENMOSS BUILDERS, INC.*
472 U.S. 749 (1985)

The PLURALITY OPINION in this case may portend significant changes in the constitutional DOCTRINE governing LIBEL AND THE FIRST AMENDMENT. Dun & Bradstreet, a credit reporting business, falsely and negligently reported to five subscribers that Greenmoss had filed a petition in bankruptcy, and also negligently misrepresented Greenmoss's assets and liabilities. In an action for defamation, Greenmoss recovered substantial compensatory and punitive damages. Vermont's highest court held that the principle of GERTZ V. ROBERT WELCH, INC. (1974) did not apply in actions against defendants who were not part of the press or broadcast media. A fragmented Supreme Court avoided this question but affirmed, 5–4.

Justice LEWIS F. POWELL, for a three-Justice plurality, concluded that *Gertz*—which had held, among other

things, that punitive damages could not be awarded against a magazine without proof of knowing or reckless disregard of the falsity of the statement—was applicable only to "expression on a matter of public concern." Justice Powell spoke only generally about the content of the "matter of public concern" standard, but hinted that "media" speech might qualify automatically for protection under *Gertz*. Dun & Bradstreet's report, however, involved "matters of purely private concern." Although such speech is "not wholly unprotected" by the FIRST AMENDMENT, he concluded, it can be the basis of a punitive damages award even absent a showing of reckless disregard of the truth. Chief Justice WARREN E. BURGER and Justice BYRON R. WHITE, in separate CONCURRING OPINIONS, expressed willingness to abandon *Gertz* altogether, but meanwhile agreed with this radical surgery on *Gertz*.

In a footnote pregnant with meaning, Justice Powell remarked that some kinds of constitutionally protected speech are entitled only to "reduced protection"—COMMERCIAL SPEECH, for example. But he did not place Dun & Bradstreet's report in the latter category, and thus raised speculation that the majority may be prepared to adopt a "sliding scale" for the FREEDOM OF SPEECH, with varying (and, as yet, unspecified) degrees of constitutional protection for each kind of speech, depending on the Justices' determinations about the value of the speech and the context in which it is uttered.

Justice WILLIAM J. BRENNAN, for the four dissenters, agreed that credit reports were not central to First Amendment values, but argued nonetheless that the *Gertz* requirements should apply to this case: credit and bankruptcy information was "of public concern." Justice Brennan noted with satisfaction that six Justices (the dissenters and authors of the concurring opinions) had rejected a distinction between the First Amendment rights of "media defendants" and of others sued for defamation.

KENNETH L. KARST
(1986)

## *DUNCAN v. KAHANAMOKU*
327 U.S. 304 (1946)

Interpreting the scope of MARTIAL LAW established in Hawaii after the bombing of Pearl Harbor, Justice HUGO L. BLACK, for the Supreme Court, concluded that the Hawaiian Organic Act of 1900 extended constitutional guarantees to that TERRITORY. The creation of military courts empowered to try civilians violated the SIXTH AMENDMENT right to a FAIR TRIAL, thus contravening the intent of Congress. Chief Justice HARLAN FISKE STONE and Justice FRANK MURPHY wrote separate CONCURRING OPINIONS. Stone would have given greater scope to martial law but found the claim of EMERGENCY POWER unjustified here. Murphy joined the Court's opinion but preferred to rest on constitutional grounds, citing EX PARTE MILLIGAN (1866). Justices HAROLD BURTON and FELIX FRANKFURTER, in dissent, argued that the military situation and the conduct of the war, as an executive function, justified the emergency steps taken here.

DAVID GORDON
(1986)

## *DUNCAN v. LOUISIANA*
391 U.S. 145 (1968)

A 7–2 Supreme Court here overruled several earlier decisions and held that the FOURTEENTH AMENDMENT incorporated the Sixth Amendment right to TRIAL BY JURY. Louisiana tried Duncan for battery, a MISDEMEANOR charge punishable by up to two years' imprisonment. The court denied his request for a jury trial and sentenced him, upon conviction, to sixty days and a $150 fine. On appeal to the Supreme Court, the Justices abandoned the approach used in PALKO V. CONNECTICUT (1937) and *Adamson v. California* (1947), where the Court had examined the circumstances to determine whether they preserved the implicit DUE PROCESS requirement of "fundamental fairness." In his opinion in *Duncan*, Justice BYRON R. WHITE asked instead whether trial by jury was "fundamental to the American scheme of justice" and concluded that history supported an affirmative response. Conceding a court's duty to distinguish between petty and serious offenses to determine which cases warranted this protection, White declined to do so as a general rule. He declared that an offense punishable by more than two years' imprisonment was sufficiently serious to apply the Sixth Amendment guarantee. Penalties involving less than six months' time were not accorded that right. As usual, Justices HUGO L. BLACK and WILLIAM O. DOUGLAS, concurring separately, advocated the total INCORPORATION DOCTRINE. Justices JOHN MARSHALL HARLAN and POTTER STEWART, dissenting, asserted that "the Court's approach and its reading of history are altogether topsy-turvy." Later decisions in WILLIAMS V. FLORIDA (1970) and *Apodaca v. Oregon* (1972) have limited the extent of the right incorporated.

DAVID GORDON
(1986)

## *DUNN v. BLUMSTEIN*
405 U.S. 330 (1972)

Tennessee restricted voting to persons with one year of residence in the state and three months in the county. The

Supreme Court, 6–1, speaking through Justice THURGOOD MARSHALL, held this limitation a denial of the EQUAL PROTECTION OF THE LAWS. The durational RESIDENCE REQUIREMENTS had to pass the test of STRICT SCRUTINY, both because they penalized exercise of the RIGHT TO TRAVEL interstate and because they restricted the FUNDAMENTAL INTEREST in voting. The state's asserted justifications for the requirements were not necessary for achieving COMPELLING STATE INTERESTS. Fraud could be prevented by the LESS RESTRICTIVE MEANS of requiring registration thirty days before an election. The objective of an informed electorate bore only a tenuous relation to length of residence. Chief Justice WARREN E. BURGER dissented. The recently appointed Justices LEWIS F. POWELL and WILLIAM H. REHNQUIST did not participate.

The following year, the Court approved fifty-day residency requirements in *Marston v. Lewis* (1973) and *Burns v. Fortson* (1973).

KENNETH L. KARST
(1986)

## *DUPLEX PRINTING PRESS COMPANY v. DEERING*
254 U.S. 443 (1921)

In a case that brought the apparently prolabor provisions of the CLAYTON ACT before the Supreme Court, a 6–3 majority held that the act had placed no substantial bar to issuing INJUNCTIONS against labor unions. Section 6 of the act allowed unions to "lawfully [carry] out . . . legitimate objects," and section 20 denied the issuance of injunctions in a labor dispute unless essential to protect property. Duplex sought an injunction against a SECONDARY BOYCOTT which had been brought to force unionization of their open shop, claiming injury to and destruction of INTERSTATE COMMERCE. The Court declared that the boycott, even though peaceful, was not a "lawful method" of achieving the union's ends and thus violated the antitrust laws. According to the Court, section 6 only approved methods not expressly forbidden. Moreover, the majority redefined section 20: "labor dispute" was not meant generically but applied only "to parties standing in proximate relation to a controversy," an unwarranted gloss. They thus confined the section to a mere reflection of precedent, undoing congressional action.

Justice LOUIS D. BRANDEIS, joined by Justices OLIVER WENDELL HOLMES and JOHN H. CLARKE, dissented. Brandeis argued that the defendants shared a "common interest" with the employees, and the majority's denial of the existence of a dispute, within the act's meaning, simply ignored reality. Section 20, said the dissenters, attempted to render both sides equal. Although the Court refused to acknowledge that the Clayton Act had legalized any new methods for labor's use, a similar decision in BEDFORD CUT STONE V. JOURNEYMEN STONECUTTERS (1927) prompted enactment of the NORRIS-LAGUARDIA ACT in 1932, reversing the doctrinal direction.

DAVID GORDON
(1986)

(SEE ALSO: *Labor and the Antitrust Laws.*)

## DU PONCEAU, PETER S.
(1760–1844)

Peter S. Du Ponceau arrived in America from France as Baron von Steuben's interpreter. Following service in the Revolution, he became a citizen of Pennsylvania where he was admitted to the bar in 1785. He defended the radical state CONSTITUTION of 1776 and was an ANTI-FEDERALIST, but as time passed he became a Jeffersonian Republican. He declined THOMAS JEFFERSON's offer of the chief justiceship of Louisiana. Du Ponceau was a founder and provost of the Law Academy of Pennsylvania. Among his books were *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States* (1824), in which he advocated a FEDERAL COMMON LAW, and *A Brief View of the Constitution of the United States* (1834), in which he sought a middle course between a consolidated government and STATES' RIGHTS. In general he taught moderate nationalism and the supremacy of the union.

LEONARD W. LEVY
(1986)

Bibliography

BAUER, ELIZABETH K. 1952 *Commentaries on the Constitution.* Pages 65–78. New York: Columbia University Press.

## DUVALL, GABRIEL
(1752–1844)

Although he served as a Justice of the United States Supreme Court for nearly a quarter of a century, Gabriel Duvall had a relatively small impact on the development of American constitutional law. Born into a prominent Maryland Huguenot family, he studied law and was admitted to the bar in 1788. He supported the movement for independence during the 1770s, and held a number of minor posts under the revolutionary government. Following the adoption of the Maryland Constitution of 1777 he served as clerk of the State House of Delegates. In 1782 he was elected to the Maryland State Council and in 1787 to the House of Delegates as a representative from An-

napolis. He was selected to be a delegate to the CONSTITUTIONAL CONVENTION, but, for reasons that are unclear, he declined to serve. He supported THOMAS JEFFERSON during the political battles of the 1790s, and was elected as a Democratic-Republican to Congress in 1794. He resigned the position less than two years later to become a judge of the Maryland Supreme Court. He helped to organize Maryland successfully for the Republicans in 1800 and often advised Jefferson and JAMES MADISON on appointments there. In December 1802 Jefferson appointed him to be the first comptroller of the United States Treasury.

In 1811 President Madison appointed Duvall to the United States Supreme Court. On the most important and controversial cases of the period—*Martin v. Hunter's Lessee* (1816), *Gibbons v. Ogden* (1824), and BROWN V. MARYLAND (1827)—Duvall followed the lead of JOSEPH STORY and JOHN MARSHALL, and he even supported the Chief Justice when he dissented in *Ogden v. Saunders* (1827). *Dartmouth College v. Woodward* was the only major case in which he failed to support Marshall, but since he dissented without opinion, it is not possible to determine his reasons. It is clear that Duvall knew and understood the law, and he did write straightforward and creditable opinions for the Court in several minor commercial law and maritime cases: *Archibald Freeland v. Heron, Lenox and Company* (1812); *United States v. January and Patterson* (1813), *Prince v. Bartlett* (1814); and *The Frances and Eliza v. Coates* (1823).

Although no abolitionist, Duvall had definite antislavery leanings. Dissenting from a Supreme Court ruling in *Mina Queen and Child v. Hepburn* (1812), in which HEARSAY evidence had been excluded "from a trial in which two black persons attempted to establish their freedom," he argued, with some force, "It appears to me that the reason for admitting hearsay evidence upon a question of freedom is much stronger than in cases of pedigree or in controversies relative to the boundaries of land. It will be universally admitted that the right to freedom is more important than the right of property." In another case, *LeGrand v. Darnall* (1829), speaking on behalf of the Court, Duvall ruled that a slaveholder's deeding of property to his ten-year-old son by a slave woman implied an intention to free the boy, despite a Maryland law that denied manumission to any slave under forty-five years of age.

As he grew older, Duvall's increasing infirmities and deafness caused numerous problems and considerable embarrassment for the Court. For almost a decade his resignation was expected, but he did not step down until January 1835, when he received assurances that ANDREW JACKSON planned to appoint fellow Marylander ROGER B. TANEY to the bench. Duvall died nine years later at the age of ninety-two.

RICHARD E. ELLIS
(1986)

Bibliography

DILLARD, IRVING 1969 Gabriel Duvall. Pages 419–429 in Leon Friedman and Fred L. Israel, eds., *Justices of the Supreme Court 1789–1969.* New York: Chelsea House.

# E

## *EAKIN v. RAUB*
12 Sargeant & Rawle 330 (Pa. 1825)

In this otherwise insignificant Pennsylvania case, JOHN BANNISTER GIBSON offered the classic rationale for JUDICIAL RESTRAINT. His opinion is an explicit refutation of JOHN MARSHALL's arguments for JUDICIAL REVIEW in MARBURY V. MADISON (1803), a position which Gibson confessed he had once accepted, but more as "a matter of faith than of reason."

Gibson's major premise was that the judiciary had no right or power to void legislation without express constitutional warrant. Like Marshall, Gibson agreed that under a written CONSTITUTION, no branch of government could claim more than its granted powers. But as the legislature was supreme within the limits of its grant, Gibson argued, the judiciary could not annul those powers without "direct authority" from the constitution, "either in terms or by irresistible implication." While the judiciary might interpret legislation, it had no power to "scan the authority of the lawgiver." The legislature was superior, Gibson concluded, because "the power to will and to command is essentially superior to the power to act and obey."

Legislative indiscretions and abuses severely tested Gibson's fidelity to his principles. In *Norris v. Clymer* (1845) Gibson acknowledged that he had altered his views on judicial review because the Pennsylvania constitutional convention of 1837, by its silence, apparently sanctioned the power, and also "from experience of the necessity of the case." While Gibson undoubtedly moderated his views for some circumstances, he remained generally faithful to the notion of legislative superiority and the wisdom of judicial restraint. The "experience of the necessity of the case" involved legislative private acts that granted equity. The legislature had given substantially complete EQUITY jurisdiction to the courts in 1836, yet continued to act on its own, inevitably provoking clashes with the judiciary. In *Greenough v. Greenough* (1849) Gibson strongly defended an exclusive sphere for judicial power: "[T]he judicial power . . . is . . . so distributed . . . that the legislature cannot exercise any part of it." The next year, in *De Chastellux v. Fairchild*, he struck down an act ordering a new trial in an action of TRESPASS." The power to order new trials is judicial," he said; "but the power of the legislature is not judicial."

In the *Eakin* opinion Gibson emphasized judicial independence, and he acknowledged legislative sovereignty, but only "within the limit of its powers." Further, he anticipated cases such as *De Chastellux* when he said that a legislative act directing a reversal of a court judgment would be "a usurpation of judicial power." Finally, he declared that when the judiciary was the prescribed organ to execute the constitution, such as in the conduct of trials, the judges were bound to follow the constitution, a legislative act notwithstanding.

Throughout the remainder of his long career, Gibson adhered to the spirit of *Eakin.* He insisted that the legislature's apprehension of public sentiment, not the fear of judicial interposition, offered the most effective barrier to unconstitutional action. With language similar to later opinions by MORRISON R. WAITE and OLIVER WENDELL HOLMES, Gibson declared that the responsibility for overcoming abusive acts rested not with the courts, but with the people, who were "wise, virtuous, and competent to manage their own affairs."

STANLEY I. KUTLER
(1986)

## *E. C. KNIGHT COMPANY, UNITED STATES v.*

See: *Knight Company, E. C., United States v.*

## ECONOMIC ANALYSIS AND THE CONSTITUTION

To what extent do "economic" ideas and concepts better enable us to understand the American Constitution?

One persisting characterization of the Constitution is that it succeeded both in arresting a decline in the American economy occurring under (and because of) the ARTICLES OF CONFEDERATION and in initiating an epoch of great prosperity. In reality, the shape of the economy during the 1780s was not particularly unsatisfactory. Indeed, in 1786 BENJAMIN FRANKLIN was willing to declare that "America was never in higher prosperity." But deflation injured creditors such as farmers, thereby provoking SHAYS' REBELLION in Massachusetts as well as inducing the enactment by the states of debtors' relief legislation.

The 1789 Constitution authorized the federal government to tax and to regulate commerce and centralized in the national government the power to print money. The long-range economic implications of these particular grants of power have been profound; their short-range consequences, however, may well have been modest. The federal power to tax was lightly exercised for many decades, and the federal power to print money was of limited importance in an era when "monetary policy" had not yet been recognized as a major instrument of national economic policy. The burst of prosperity in the decades following adoption of the Constitution owed largely to a surge in foreign trade, promoted by America's neutrality during the Napoleonic Wars—a neutrality that had been facilitated, to be sure, by the Constitution's recognition of centralized authority over foreign policy.

The first comprehensive "Economic Interpretation of the Constitution" to attract great attention was that of CHARLES A. BEARD in his celebrated 1913 study. Rejecting the popular view of the Constitution as the noble product of patriotic impulses, Beard assessed the Constitution as an "economic document" designed to advance certain economic interests to the detriment of others. In particular, he believed that "personalty" interests—"money, public security, manufacturers, and trade and shipping"—prevailed at the expense of "landed" interests of farmers and others, as well as at the expense of the unpropertied general public. Beard further asserted that the entire constitutional process had been initiated by a small group of men "immediately interested through their personal possessions in the outcome of their labors." In the preface to his 1935 edition, however, Beard denied that he had meant to suggest that the Framers were merely seeking to enrich themselves personally; rather, Beard explained, the Framers' own economic holdings merely made them receptive to the claims of more general economic groups.

The empirical ambitions that Beard displayed in his research remain commendable. But his particular empirical conclusions have been disputed by more recent scholarship. For example, those attending the CONSTITUTIONAL CONVENTION owned more in realty than they owned in securities; and it is not clearly true that creditors as a class supported the Constitution's RATIFICATION. Those portions of the Constitution that Beard singled out as establishing its economic preferences were the Constitution's general system of CHECKS AND BALANCES, which supposedly served to inhibit the unpropertied majorities; Congress's powers over taxation, war, commerce, and public lands; and the prohibitions on state coinage of money and on state impairment of contractual obligations. The DUE PROCESS clause of the FIFTH AMENDMENT Beard barely mentioned—even though the due process clause of the FOURTEENTH AMENDMENT had served as the basis for the Supreme Court's notorious decision in LOCHNER V. NEW YORK (1905) just eight years previously. Much of Beard's analysis of the Constitution now seems badly forced. In particular, his treatment of checks and balances is extraordinarily reductionistic in its failure to acknowledge that they were designed to serve any purpose other than the protection of certain property interests. In all, Beard's economic interpretation—though a major event in constitutional historiography—no longer commands adherents.

Economists have long been concerned with the objective of economic efficiency, and modern economists have developed an elaborate analysis in support of this objective. Might it be that the goal of efficiency has constitutional status? Insofar as original intent is relevant, information is needed on the economic views of the Framers. One philosophy common in eighteenth-century America was classical republicanism, which, in commending community, equality, and public virtue, was capable of disparaging commercial activity. The Framers, however, were also exposed to the newer tradition of Lockean liberalism, which strongly endorsed individualism and commercial activity. Propitiously, Adam Smith's *The Wealth of Nations* was published in 1776, the year of the DECLARATION OF INDEPENDENCE. Consistent with Smith's free market approach, ALEXANDER HAMILTON in THE FEDERALIST #11 espoused the idea of an open national economy: "The veins of commerce in every part will be replenished and will acquire additional motion and vigor from a free circulation of the commodities of every part." Hamilton began that paper with the observation that "the prosperity of commerce" is "a primary object of [enlightened states-

men's] political cares"—an observation that evidently contemplated mercantilist, rather than laissez-faire, policies. In *The Federalist* #10, JAMES MADISON made clear that he was hardly an economic egalitarian. "The first object of government" is to protect "the diversity of faculties of man, from which the rights of property originate." Elsewhere, however, *The Federalist* set forth theories that were imbued with republicanism; and in a 1792 essay Madison recommended policies that would "raise extreme indigence towards a state of comfort." In all, the free market interests of the Framers should neither be ignored nor exaggerated.

From the early nineteenth century on, free-market norms have exerted their most continuing influence upon constitutional doctrine through the negative underside of the COMMERCE CLAUSE. According to Justice ROBERT JACKSON in *H. P. Hood & Sons v. DuMond* (1949), "Our system . . . is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the nation, that no home embargoes will withhold his exports, and that no foreign state will by custom duties or regulation exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." The Supreme Court has frequently endeavored to protect out-of-state sellers, out-of-state buyers, and multistate transportation concerns from discriminatory or excessive burdens imposed by self-interested state governments. In SOUTHERN PACIFIC COMPANY V. ARIZONA (1945), for example, the Court invalidated an Arizona statute limiting the lengths of trains operating in Arizona: the Court found that the statute's burdens on INTERSTATE COMMERCE were substantial, its safety benefits probably trivial. At times, however, the Court has been reluctant to intervene even when the prospect of Justice Jackson's "exploitation" has seemed keen. If a state enjoys a monopoly on an important natural resource, then the state, by imposing a substantial tax on the extraction of that resource, can "export" its tax burden, enriching its local treasury at the expense of consumers throughout the nation. Yet in *Commonwealth Edison Company v. Montana* (1981) a divided Supreme Court declined to hold that Montana's thirty percent severance tax on coal violated the commerce clause. The Court majority did not clearly disagree with the proposition that an "exported" state tax violates commerce clause ideals if it is not "fairly related to the services provided by the state." But the majority seemed to regard it as beyond the judicial function to assess the incidence of such a tax and to compute the value of those state-provided "services." (See STATE REGULATION OF COMMERCE.)

Though the commerce clause imposes some limits on the states, its primary and explicit purpose is to confer powers on the federal Congress. In GIBBONS V. OGDEN (1824) the Court, in expansively interpreting what counts as interstate commerce, upheld a congressional enactment that implicitly abrogated a New York rule creating a steamboat monopoly between certain New York and New Jersey ports. Because this monopoly plainly offended free-market norms, the federal statute in *Gibbons* vindicated what Justice Jackson in *Hood* regarded as the "vision of the Founders." But what would the result have been in *Gibbons* had it been Congress, rather than the state, that had insisted on a monopoly? In exercising its commerce clause powers in the twentieth century, Congress has frequently chosen to restrict rather than enhance the competitive process. What is noteworthy is that the Supreme Court has found this in no way problematic. Justice Jackson's opinion in WICKARD V. FILBURN (1942) was shrewd in its perception of how intra-farm (and hence intrastate) events could have an aggregate impact on interstate economic arrangements. But the opinion was strikingly uninterested in the extent to which the federal statute it was approving brought about the cartelization of the otherwise highly competitive agricultural economy, thereby curtailing production and elevating consumer prices. Perhaps the point is that the "vision of the Founders," as understood by the Court, is not a competitive economy as such, but merely an economy free of anti-competitive restrictions imposed by the states. Besides accounting for the assumed irrelevance of free-market norms to congressional action under the commerce clause, this attribution of purpose can also explain the fact that the negative underside of the commerce clause has never been thought directly applicable to private monopolies that might severely restrict competition. Consider, however, Paul Freund's view that the spirit—though not the letter—of the commerce clause anticipates a "free national market," and that the commerce clause therefore needs to be supplemented by a strong federal antitrust program.

In the first third of the Twentieth Century, the Court did engage in a rather broad-ranging implementation of free-market values. The Court proceeded primarily in the name of the due process clauses of the Fourteenth and Fifth Amendments, clauses which enabled it to review all state and federal legislation, without regard to interstate impacts. During these years, the quite sophisticated approach of an Adam Smith was frequently replaced by the insensitive dogmatism of the Social Darwinist movement, thereby provoking Justice OLIVER WENDELL HOLMES's *Lochner* quip that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Since 1937, by contrast, the Court has consistently declined to invalidate "economic" legislation on substantive due process grounds and has stubbornly refused to subject that legislation to even minimal review. In WILLIAMSON V. LEE OPTI-

CAL CO. (1955), for example, the Court unanimously and unhesitatingly upheld an Oklahoma statute requiring consumers to employ a licensed doctor merely in order to fit old eyeglass lenses into new frames.

Judicial tolerance of inefficient economic enactments is probably for the best. Economic analysis is an acquired taste; courts should not insist that legislators be educated in basic economic concepts, let alone that they keep abreast of the current literature on externalities and public goods. Moreover, most economists would acknowledge that a legislature might properly choose to sacrifice economic efficiency in order to achieve some desired distribution of wealth among societal groups. Also, even if certain private conduct is economically acceptable, a legislature could properly conclude that the conduct is interpersonally unfair in the particular way it enables A to cause harm to B.

Nevertheless, the argument favoring somewhat greater judicial scrutiny of inefficient legislation is not altogether without merit. In *Lynch v. Household Finance Corp.* (1972), a PROCEDURAL DUE PROCESS case, the Court—drawing on John Locke, John Adams, and WILLIAM BLACKSTONE—recognized an important connection between property and liberty. In addition, recent "commercial speech" cases such as VIRGINIA STATE BOARD OF PHARMACY V. VIRGINIA CITIZENS CONSUMER COUNCIL, INC. (1976) have attached considerable constitutional significance to marketplace norms. Moreover, aggressive JUDICIAL REVIEW is often defended on the ground of its ability to correct predictable breakdowns in the legislative process. *Southern Pacific* itself relied, for commerce clause purposes, on the Court's idea that out-of-state railroads are likely to be unrepresented in the state's legislative processes. For due process purposes, "consumers" as such are anything but a DISCRETE AND INSULAR MINORITY. But—as an economic analysis of the legislative process lucidly suggests—the very diffusion of consumers throughout society signifies that consumers may fare poorly in the legislature when challenged by producer groups, which are far better able to mobilize themselves in seeking protective legislation.

In any event, given the Supreme Court's position that neither the commerce clause (as a grant of power) nor the due process clause (as a restriction of power) includes any significant free-market content, it appears likely that Congress, if it chooses, could enact socialism (the ultimate rejection of market values) as this country's form of economic organization. It seems hard to deny that Congress could offer a RATIONAL BASIS on behalf of a socialist program that would satisfy the trivial demands of the commerce and due process clauses. To be sure, the takings clause would require that the nationalization of industry achieve a PUBLIC USE. But recent interpretations of the public use doctrine make it doubtful that the doctrine places any limits on Congress's choice of economic philosophy.

It is true that the takings clause would require Congress to afford JUST COMPENSATION to the shareholders of any companies nationalized. As a general matter, the just compensation requirement serves to rule out at least certain legislative efforts to redistribute wealth, whether by socialism or by more modest measures. It should not be forgotten that the progressive federal income tax—a central feature of federal policy during the last forty years—required for its legality a constitutional amendment. Still, the Supreme Court's invalidation of a pre-amendment federal income tax in POLLOCK V. FARMERS' LOAN & TRUST COMPANY (1895) rested on a dubious interpretation of the DIRECT TAXES clause. Consider, moreover, a general tax on wealth or property, the proceeds of which are dedicated to financing welfare programs: it seems entirely clear that such a tax would not constitute a prohibited "taking." It appears, then, that wealth redistribution is constitutionally quite acceptable so long as it is both candid and even-handed.

When a "taking" does occur, the "just compensation" that the takings clause requires has long been defined in terms of "fair market value." This "fair market value" gloss introduces, almost by hypothesis, certain capitalist values into constitutional doctrine. Yet that gloss can also be critiqued precisely from a free-market perspective. Assume a neighborhood of homes which, if individually available for sale, would each yield a price of $100,000. At any one time, however, only a limited number of houses are in fact offered for sale. To state that a homeowner is not interested in selling for $100,000 is to acknowledge that he presently values his ownership of the house at some figure in excess of $100,000. That excess is what economists call "consumer surplus." "Fair market value" provides less than full compensation in that it deprives the homeowner of this consumer surplus. From an ethical perspective, compensation that is less than full is arguably less than "just." Moreover, economic analysis can make clear that a "fair market value" standard for compensation has the practical effects of subsidizing government in its land acquisitions (by negating consumer surplus) and distorting government EMINENT DOMAIN choices (by encouraging government to ignore variations in consumer surplus among property owners).

Yet an economic analysis also verifies that the problem of measuring full compensation resists easy solution. Rendering consumer surplus compensable would not be satisfactory: consumer surplus would be notably difficult to quantify on an individual basis, and compensability would invite owners to dissemble in representing their surpluses' magnitude. Reminded of the difficulties involved in establishing the proper price for an eminent-domain forced

sale, an economist might question the very practice of forced sales: he might suggest that the government be deprived of the eminent domain power altogether, thereby remitting the government to the opportunities afforded by the ordinary real estate market for purposes of acquiring land. Yet it is precisely the economist who can explain why this solution, too, would not always be satisfactory. Without the government's power of eminent domain, the owner of the final parcel within a tract of land that the government has otherwise succeeded in acquiring would be in a position—knowing of the government's situation—to extract an excessive monopoly price from the government-buyer. Because governments engage in tract acquisition more frequently than private parties do (only governments build superhighways, for example), it may make sense to limit the eminent domain power to governmental bodies. Obversely, the fact that the eminent domain power *is* generally limited to governments helps explain why private parties often are not in a good position to initiate large-tract projects.

As suggested above, an economic analysis is at least able to deepen understanding of the implications of constitutional doctrine. Correspondingly, such an analysis can correct what would otherwise be misunderstandings. In SHAPIRO V. THOMPSON (1969), for example, the Supreme Court considered the states' argument that WELFARE BENEFITS can be properly be denied to indigents who move into a state in order to collect higher benefits. Such an argument, the Court suggested, rested on the implicit premise that such welfare applicants are not "deserving"—a premise that the Court then rejected as unsound. But from the economist's useful perspective, the problem is not the grantee's desert but rather the grantor's incentives. States, anticipating an influx of indigents if welfare benefits are increased, may be dissuaded from raising those benefits, a dissuasion that might ill serve whatever the public's preference may be for compassionate welfare programs. Given an economic point of view, *Shapiro* unwittingly reduces the feasibility of state-administered welfare programs, thereby strengthening the argument in favor of the nationalization of welfare.

At the minimum, economic analysis can assist in identifying the costs or inefficiences of any proposed constitutional ruling. It is, of course, for the courts then to determine what weight to accord these costs in interpreting constitutional doctrine. The economist would be disturbed, however, by any disparagement of these costs that seems naive or inadequately considered. In *Shapiro*, for example, there is language stating that administrative inefficiencies, no matter what their magnitude, are automatically "uncompelling" for purposes of STRICT SCRUTINY review. But it is far from clear that the Court really adheres to such a position. In recent procedural due process opinions such as MATHEWS V. ELDRIDGE (1976), the Court has taken the efficiency criterion significantly into account.

In a number of important ways, then, an economic analysis can be clearly beneficial in the process of constitutional analysis. Nevertheless, economics will probably never achieve, in constitutional studies, the influence that it has secured in certain other fields of law. There are too many constitutional doctrines that endorse ideas or values that are largely beyond the economist's jurisdiction. To employ an extreme example, the economist's recognition of people's "taste for discrimination" is of little help in understanding the Constitution's moral assessment that racial discriminations are inherently invidious.

GARY T. SCHWARTZ
(1986)

Bibliography


BEARD, CHARLES A. (1913) 1935 *An Economic Interpretation of the Constitution.* New York: Macmillan.

ELLIOT, B. W. (1941) 1979 *Dynamics of Ascent.* New York: Knopf.

EPSTEIN, DAVID F. 1984 *The Political Theory of the Federalist.* Chicago: University of Chicago Press.

EPSTEIN, RICHARD A. 1985 *Takings.* Cambridge, Mass.: Harvard University Press.

FREUND, PAUL A. 1961 *The Supreme Court of the United States.* Cleveland, Ohio: World Publishing Co.

GOLDWIN, ROBERT A. and SCHAMBRA, WILLIAM A., eds. 1982 *How Capitalist Is the American Constitution?* Washington, D.C.: American Enterprise Institute.

LEE, SUSAN P. and PASSELL, PETER 1979 *A New Economic View of American History.* New York: Norton.

MCDONALD, FORREST 1979 *We the People: The Economic Origins of the Constitution.* New York: Samuel Insull.

POSNER, RICHARD A. 1977 *Economic Analysis of Law.* Boston: Little, Brown.

WOOD, GORDON S. 1969 *The Creation of the American Republic, 1776–1787.* Chapel Hill: University of North Carolina Press.

WRIGHT, ESMOND 1978 *Fabric of Freedom 1763–1800.* New York: Hill & Wang.


## ECONOMIC DUE PROCESS

"Economic due process" is the name given to the doctrine that the Supreme Court used to strike down a variety of economic regulations in the first third of the twentieth century. The core of the doctrine is the conception that the central interest protected by the DUE PROCESS clauses is "liberty of contract." Given that assumption, the Court could not justify ECONOMIC REGULATION as a means to redress inequality of bargaining power between contracting parties, such as workers and employers. Moreover, eco-

nomic legislation that purported to be based on other objectives—such as protecting public health, morals, or safety—was examined by the Court to ensure that the challenged legislation reasonably advanced those objectives.

The doctrine reached its full form in LOCHNER V. NEW YORK (1905), where a bare majority of the Court struck down a state law limiting bakery workers' maximum hours to sixty per week. Because the Constitution protected liberty of contract, economic regulation for its own sake was invalid, and thus, a state legislature could not regulate the hours of bakery workers to protect them from exploitation. A "labor law, pure and simple" would be unconstitutional. The hours of workers could be regulated only to protect the interests within the POLICE POWER—health, safety, welfare, or morality. Even if the legislature passed the law with the stated purpose of protecting workers' health, the Court would still ask whether the law was necessary for that purpose. This inquiry was designed to ensure that the law was not in fact a pretext for forbidden economic regulation.

There were two distinct criticisms of the *Lochner* decision. One was that the Court did not give sufficient weight to the judgment of the New York legislature that excessive hours of work jeopardized the health of bakery workers. Three of the four dissenting Justices in *Lochner* conceded that New York could not limit bakers' hours to prevent their economic exploitation. They would, however, have accepted New York's judgment that the measure was necessary to protect health. A more fundamental objection was that the Constitution permitted economic regulation for economic motives. A prophetic solo dissent by Justice OLIVER WENDELL HOLMES, JR., disagreed with the Court's major premise that the Constitution protected liberty of contract. He said, "A Constitution is not intended to embody a particular economic theory. . . . It is made for people of fundamentally differing views."

In the three decades that followed, the Court upheld most challenged economic regulations on the ground that they protected public health, safety, or morals. Indeed, in BUNTING V. OREGON (1971) it upheld a law fixing maximum hours for factory workers. However, the Court struck down a significant number of laws that it considered to be interferences with a free market. In ADAIR V. UNITED STATES (1908) and COPPAGE V. KANSAS (1915), the Court invalidated laws that outlawed labor contracts forbidding employees to join labor unions. The Court overturned a minimum wage law in ADKINS V. CHILDREN'S HOSPITAL (1923) and a law that fixed prices in TYSON BROTHER V. BANTON (1927). And in NEW STATE ICE COMPANY V. LIEBMANN (1932), the Court invalidated a law that limited business entry for businesses that were not public utilities.

The Court abandoned its free-market approach to the due process clause in NEBBIA V. NEW YORK (1934), where it sustained a Depression-era law fixing minimum prices for milk. A bare majority of the Court concluded that a "state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." Two years later, in MOREHEAD V. NEW YORK EX REL. TIPALDO (1936), the Court unexpectedly invalidated a law setting minimum wages for women workers. That decision was, however, overruled the following year in WEST COAST HOTEL CO. V. PARRISH (1937). Since 1937, no decision of the Supreme Court has held an economic regulatory measure invalid under the due process clause.

The decision in *Nebbia* abandoned the idea that business regulation for economic motives was forbidden. During the *Lochner* era, the Court had decided whether laws were reasonably necessary to promote police-power objectives only because it sought to ensure that the police power was not a subterfuge for economic regulation. Once the Court decided that economic regulation need not be justified by the police power, it might have been concluded that economic regulations are valid whether or not they are reasonable, and occasionally, the Supreme Court has said this. In FERGUSON V. SKRUPA (1963), Justice HUGO L. BLACK, writing for the Court, said that in rejecting *Lochner* the Court had abandoned the doctrine "that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely."

Conventional due process doctrine seems to say, however, that economic regulatory legislation might be invalid if sufficiently unreasonable. In *Nebbia* the Court stated that laws violated due process if they did not have "a reasonable relation to a proper legislative purpose" or if they were "arbitrary." In UNITED STATES V. CAROLENE PRODUCTS CO. (1938), the Court upheld the Filled Milk Act of 1923, which prohibited the shipment of skimmed milk compounded with vegetable oil in interstate commerce. A lower federal court decided that the law lacked RATIONAL BASIS because filled milk was not deleterious to health. The opinion of Justice HARLAN F. STONE said that in the application of the rational basis test, "the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of legislators."

Although the Court, in the *Carolene Products* case, concluded that the Filled Milk Act did rest on a permissible congressional finding that filled milk was injurious to health, its OBITER DICTA suggested that the law could be challenged if the facts presented to the lower court proved that the law's lack of wisdom was not debatable: "Where

the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts . . . such facts may properly be made the subject of judicial inquiry, . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."

In one sense, there is no difference between the dictum in *Ferguson v. Skrupa*—that the due process clause does not permit an inquiry into legislative reasonableness—and the dictum of *Carolene Products* that suggests the possibility of a trial to show that a law lacks a rational basis. For more than fifty years, Supreme Court decisions, without exception, have upheld all economic regulations challenged under the due process clause.

In another sense, however, the *Carolene Products* approach has produced a different outcome than would have occurred if the Court had adhered consistently to the *Ferguson* dictum. Lower courts frequently conduct trials to determine whether laws challenged as a violation of due process are reasonable. Occasionally, lower federal courts decide that state or federal laws lack a rational basis. Although the Supreme Court has uniformly reversed those decisions when appealed, the laws may be effectively invalidated when there is no appeal. For example, in *Milnot Co. v. Richardson* a lower federal court decided that the Filled Milk Act—the same law sustained in *Carolene Products*—was unconstitutional because it lacked a rational basis. The federal government, not sympathetic to the objectives of the statute, did not appeal.

A few academic commentators have argued that the Court's withdrawal from judgment in the economic due process area has gone too far. Some have argued that the Court should use the rational basis formula to invalidate laws that have no real purpose except to favor one economic interest at the expense of a competing interest or the public. Indeed, some state courts use the due process clause, or some other provision, in state constitutions in exactly this manner. The Supreme Court, however, has neither acknowledged nor followed that advice. In WILLIAMSON V. LEE OPTICAL COMPANY (1955), for example, the Court sustained a state law forbidding a dispensing optician to duplicate eyeglasses without a prescription from an optometrist or ophthalmologist. Opticians argued, with some merit, that the law was unnecessary to protect public health and that the legislature's real purpose was to give optometrists and ophthalmologists a monopoly on the sale of eyeglasses. The Court answered that the law might encourage people to have their eyes examined more often, although a more candid answer might have been that it did not matter whether the law was unabashed economic favoritism.

All the Justices appointed in the last fifty years have agreed that the *Lochner* line of decisions represented an abuse of JUDICIAL POWER. The consensus about economic due process is the starting point of current debate about constitutional law. The point of Justice Holmes's *Lochner* dissent was that it was irresponsible for Justices to read their own subjective economic preferences into the due process clause. Is it equally an abuse of power to read the due process clause to overturn state legislation that restricts noneconomic liberties? Justice WILLIAM O. DOUGLAS, writing for the Court when it struck down a state ban on BIRTH CONTROL devices in GRISWOLD V. CONNECTICUT (1965), insisted that there was a difference between judging the propriety of laws that "touch economic problems, business affairs or social conditions" and those that involve such personal liberties as "an intimate relation of husband and wife." Justice HARRY A. BLACKMUN, writing for the Court in ROE V. WADE (1973), which struck down laws restricting ABORTION, acknowledged and quoted Holmes's admonition in his *Lochner* dissent that the Constitution "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and even familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." The opinion went on, however, to conclude that the due process clause protects "personal rights that can be deemed "fundamental."

*Lochner* is a discredited and overruled decision, but its ghost continues to haunt contemporary constitutional law debate.

WILLIAM COHEN
(1992)

(SEE ALSO: *Labor Movement; State Police Power.*)

Bibliography

COX, ARCHIBALD 1987 *The Court and the Constitution.* Boston: Houghton Mifflin.

HETHERINGTON, JOHN A. C. 1958 State Economic Regulation and Substantive Due Process of Law. *Northwestern University Law Review* 53:13–32.

LINDE, HANS A. 1970 Without "Due Process": Unconstitutional Law in Oregon. *Oregon Law Review* 49:125–187.

MCCLOSKY, ROBERT G. 1962 Economic Due Process and the Supreme Court: An Exhumation and Reburial. *Supreme Court Review* 1962: 34–62.

WONNELL, CHRISTOPHER T. 1983 Economic Due Process and the Preservation of Competition. *Hastings Constitutional Law Quarterly* 11:91–134.

## ECONOMIC EQUAL PROTECTION

During the heyday of the doctrine of ECONOMIC DUE PROCESS, the EQUAL PROTECTION clause took a backseat to the

DUE PROCESS clause. In BUCK V. BELL (1927), Justice OLIVER WENDELL HOLMES, JR., called an argument that a law was invalid because its application was confined to an unreasonably small number of people "the usual last resort of constitutional arguments." Still, the "last resort" succeeded, and laws were invalidated under the equal protection clause when burdensome business regulations unreasonably (in the Court's view) exempted some businesses from the burden. In *Smith v. Cahoon* (1931), for example, the Supreme Court invalidated a law requiring compulsory insurance for trucks because it exempted those carrying agricultural products. The next-to-last decision of this kind was *Hartford Steam Boiler Inspection & Insurance Co. v. Harrison* (1937). The Court held that a law forbidding stock insurance companies from acting through salaried agents violated equal protection because the restriction did not apply to mutual insurance companies.

Since 1937, the Court has invalidated an economic regulatory law on the basis of similar reasoning only once: *Morey v. Doud* (1957) struck down an Illinois law regulating the sale of money orders because American Express money orders were exempted by name. In NEW ORLEANS V. DUKES (1976) the Court characterized *Morey* as "the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds" and overruled it.

Since 1976, two cases have applied the equal protection clause to "wholly economic regulations," but each case was unique. In METROPOLITAN LIFE INSURANCE COMPANY V. WARD (1985), a bare majority of the Court invalidated a tax on insurance companies because local companies were exempted. This discriminatory tax statute would have been invalid under the COMMERCE CLAUSE, except that Congress had authorized states to impose taxes that burdened out-of-state insurance companies. The Court concluded that discrimination against out-of-state business was nonetheless prohibited by the equal protection clause. *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County* (1989) invalidated a tax assessor's practice of valuing recently sold property at its sale price for property tax purposes, while valuing property that had not changed hands at a level far below its present market value. In a footnote, the Court commented that its decision was only applicable to an "aberrational" administrative practice that was illegal under state law. The Court did not decide whether the assessor could justify an identical but legally authorized practice on the ground that it was unfair to tax "unrealized paper gains in the value of property."

In a much-cited CONCURRING OPINION in an earlier case, Justice ROBERT H. JACKSON argued that there was a substantial difference between economic due process, which the Court had appropriately rejected, and economic equal protection. In RAILWAY EXPRESS AGENCY V. NEW YORK (1949), the Court upheld a law that prohibited advertising signs on vehicles, but exempted a sign advertising the business of the vehicle owner. The Court lamely concluded that the distinction between signs advertising the vehicle owner's own business and those advertising some other business was reasonable, because New York could reasonably conclude that the latter signs were more distracting. Concurring, Justice Jackson concluded that signs of both classes were equally distracting, but argued that a better reason to uphold the distinction was that New York could decide that it was fair to exempt those who advertised their own businesses. In a much-quoted OBITER DICTUM he argued that a requirement of equality should be given more than lip service in cases of ECONOMIC REGULATION: "There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principle of law which officials would impose upon a minority must be imposed generally. . . . Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

Justice Jackson's dictum has had only a minor influence on Supreme Court decisions. Government lawyers rarely respond to equal protection challenges with the bald reply that the difference in treatment between groups is simply the outcome of INTEREST GROUP politics. Most often, there is an attempt to justify a particular group's exemption from a burden with the argument that exemption promotes a praiseworthy public purpose. The Court has uniformly credited those arguments, no matter how farfetched, in economic regulation cases. In WILLIAMSON V. LEE OPTICAL COMPANY (1955), for example, the Court sustained a law prohibiting opticians from duplicating eyeglasses without a prescription from an ophthalmologist or optometrist. The Court said that a legislature might conclude that although the optician had the ability to duplicate the lenses without a prescription, the prohibition would encourage people to have their eyes examined more often. It is easy enough to show that the public health justification in *Williamson* was an afterthought to uphold a law that the legislature passed to protect the business of two groups of eye-care professionals from competition of a third.

Much contemporary legislation is, in fact, based on interest-group politics. But because the Court has rejected the free-market constitutional command of economic due process, it is doubtful that the Court would accept the argument of a few legal commentators that it should seriously ask whether the outcomes of interest-group pressures further the public good. Questions about whether it is fair to promote the interests of one economic group at the expense of another will likely be left to the political processes for the foreseeable future.

One prominent argument in this area begins by con-

ceding the point that laws can be justified as the outcomes of interest-group politics. So long as government lawyers seek to uphold a law's exemptions and classifications on good-government grounds, however, courts should limit themselves to those arguments and insist that there be a "real and substantial" relationship to those good-government grounds. Critics of this approach argue, among other things, that its adoption would only promote more elaborate legislative "boilerplate," to supply stronger less-than-candid good-government justifications to explain the outcomes of interest-group politics.

Be that as it may, in cases involving economic regulation, economic equal protection has met the same fate as economic due process.

WILLIAM COHEN
(1992)

(SEE ALSO: *Economic Freedom; Economy.*)

Bibliography

GUNTHER, GERALD 1972 Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection. *Harvard Law Review* 86:1–48.

LINDE, HANS A. 1975 Due Process of Lawmaking. *Nebraska Law Review* 55:197–255.

SUSTEIN, CASS R. 1985 Interest Groups in American Public Law. *Stanford Law Review* 38:29–87.

## ECONOMIC LIBERTIES AND THE CONSTITUTION

Contrary to its existing practice, the United States Supreme Court was once a strong guarantor of economic liberties. This was the period (1897–1937) of "economic due process." The Fifth Amendment and FOURTEENTH AMENDMENT provide that neither the federal nor state governments shall deprive any person "of life, liberty, or PROPERTY, without DUE PROCESS OF LAW." The Court interpreted these prohibitions to mean that government could not, except in specified or extraordinary circumstances, prevent individuals or corporations from freely engaging in the production and distribution of goods and services.

However, since 1936 the Supreme Court has abandoned this interpretation; economic regulations now are subject to a very low level of review pursuant to which they are upheld whenever rationally related to the achievement of legitimate state purposes. Supporters of the more recent policy conclude that as a result, the Court has wisely steered a neutral role in the nation's economic affairs. Another interpretation of this policy, however, is that it has denied many people a fundamental liberty in a society dedicated to liberty—the opportunity to engage in economic activity. Our Constitution, it is argued, was not intended to be neutral in the conflict between liberty and authority, especially in the economic area.

There is little question that the Framers of the Constitution sought to limit greatly the commercial powers of the states. The tariffs and other economic barriers erected by the states against each other were a major source of discontent with the existing confederation. The regulatory abuses of the state legislatures are not so well detailed, but probably were no less responsible for such sentiments. According to ALEXANDER HAMILTON, writing in 1801, "creditors had been ruined or in a very extensive degree, much injured, confidence in pecuniary transactions had been destroyed, and the springs of industry have been proportionately relaxed" because of the failure of the states to safeguard commercial freedoms.

The deterioration of the economy that followed the revolutionary period led the states to what CHARLES EVANS HUGHES once described as "an ignoble array of legislative schemes for the defeat of creditors and invasion of contractual relations." Among other things, the states passed stay laws extending the due dates of notes and installment laws allowing debtors to pay their obligations in installments after they had fallen due. (See Debtors' Relief Legislation.)

JOHN MARSHALL, later Chief Justice, said in Virginia's ratification convention that economy and industry were essential to happiness, but the ARTICLES OF CONFEDERATION took away "the incitement to industry by rendering property insecure and unprotected." The Constitution, on the contrary, would "promote and encourage industry." JAMES MADISON stated that the passage of laws infringing contractual obligations "contributed more to that uneasiness which produced the convention . . . than those which accrued . . . from the inadequacy of the Confederation to its immediate objectives." During the CONSTITUTIONAL CONVENTION OF 1787 Madison said that an important object of the Union was "the necessity of providing more effectively for the security of private rights, and the steady dispensation of justice. . . . Was it to be supposed that Republican liberty could long exist under the abuses of it, practiced in [some of the] states?" ALBERT J. BEVERIDGE, Marshall's biographer, understandably concluded that the "determination of commercial and financial interests to get some plan adopted under which business could be transacted, was the most effective force that brought about [the Philadelphia convention]."

Several provisions of the Constitution appear to have been intended to curtail the economic regulatory authority of government. These are the prohibitions on the passage of EX POST FACTO laws which affect both the state and federal governments, and the ban on state laws impairing the OBLIGATION OF CONTRACTS. At the time the Constitution

was framed and ratified, the term "ex post facto law" was applied to both penal and civil retroactive laws. In the criminal law, it was accepted that an ex post facto law was one that rendered an act punishable that was not punishable when it was committed. The term also described civil laws that operated retroactively to the detriment of a private owner of an iterest acquired or existing under prior law. Justice JOSEPH STORY of the MARSHALL COURT asserted that "every statute, which takes away or impairs VESTED RIGHTS acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to the transactions or considerations already passed, must be deemed retrospective."

Newspapers and judges of that period considered that stay and installment laws operated ex post facto. Members of Congress used the term in the broad sense. Some leading constitutional scholars held similar views on the meaning of the clauses. Although accounts of the CONSTITUTIONAL CONVENTION do not disclose precisely how the Framers defined the term, they are consistent with the view that ex post facto included retroactive civil laws. Nevertheless, a 1798 Supreme Court decision, CALDER V. BULL, interpreted the ex post facto clauses as applying solely to penal laws, thereby removing them as an important restraint on the regulatory powers of the federal and state legislatures.

In Chief Justice Marshall's opinion, the CONTRACT CLAUSE was intended to safeguard FREEDOM OF CONTRACT—which made it, under this view, a severe curb on state economic regulation. According to the Chief Justice, if a law limited the written understanding of the parties, it impaired their contractual obligation whether it was enacted before or after execution of the agreement.

However, the Supreme Court, in a 4–3 decision in OGDEN V. SAUNDERS (1827), ruled that the clause did not cover contracts executed subsequent to the adoption of a law: that is, it applied only to retroactive and not to prospective laws. The case involved a New York bankruptcy law, adopted prior to the execution of the promissory obligation in issue. In his only dissent on a constitutional issue in his thirty-four years as Chief Justice, Marshall vigorously contended that the New York law, although passed before the execution of the note, changed the understanding of the parties, and therefore impaired the obligation of their contract. The majority decision in the case followed a quarter of a century of failure to obtain a national bankruptcy law. Marshall's interpretation would have greatly limited the operation of state bankruptcy laws, and the majority rejected this outcome.

The BILL OF RIGHTS also evidences constitutional concern for material rights. The TAKINGS clause of the Fifth Amendment states that private property shall not be taken for PUBLIC USE without JUST COMPENSATION. The Fifth Amendment also states that no person shall be deprived of life, liberty, or property without due process of law. The SECOND AMENDMENT prohibits the confiscation of arms. The THIRD AMENDMENT restricts the quartering of troops. The FOURTH AMENDMENT prohibits unreasonable SEARCHES AND SEIZURES, and the Eighth Amendment prohibits excessive BAIL and fines.

Those who doubt that the Constitution protects the material rights from infringement by the states should consider section 1 of the Fourteenth Amendment, the second sentence of which reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." The framers of this amendment, the Congress of 1866, were concerned about protecting property and economic liberties as well as other personal rights.

While opinion is divergent as to the full meaning of the quoted language, commentators generally agree that it was primarily intended to make constitutional the CIVIL RIGHTS ACT OF 1866, placing it beyond the power of any subsequent Congress to repeal. The chief purpose of this act was to provide federal protection for the freed blacks in the exercise of certain described liberties.

The 1866 law was not confined to the protection of blacks. It was also intended to secure equality of rights for most other citizens. Thus Senator Lyman Trumbull, who wrote the original bill, viewed it as affecting state legislation generally, quoting in his introductory statement from a note to WILLIAM BLACKSTONE's commentaries: "In this definition of civil liberty it ought to be understood, or rather expressed, that the restraints introduced by the law should be equal to all, or as much as the nature of things will admit." The statute emphasized material, and not political or intellectual, considerations. It protected against discriminatory treatment the rights of most native-born citizens "to make and enforce contracts . . . and to inherit, purchase, lease, sell, hold and convey real and personal property."

The debates on section 1 of the Fourteenth Amendment further spell out Congress's commitment to preserving the material rights. Frequently quoted in the debates was Justice BUSHROD WASHINGTON's definition in CORFIELD V. CORYELL (1823), stating that privileges and immunities included "the right to acquire and possess property of every kind." For the thirty-ninth Congress, Sir William Blackstone and Chancellor JAMES KENT were highly authoritative on the powers and purposes of government. Both strongly emphasized the importance of economic and property rights in a free society.

There should be little doubt that the values of foremost

importance to the Framers of many provisions of the Constitution encompassed the protection of economic and property rights.

BERNARD H. SIEGAN
(1986)

Bibliography

CORWIN, EDWARD S. 1948 *Liberty Against Government.* Baton Rouge: Louisiana State University Press.

MCCLOSKEY, ROBERT G. 1962 Economic Due Process and the Supreme Court. *Supreme Court Review* 1962:34–62.

SIEGAN, BERNARD H. 1981 *Economic Liberties and the Constitution.* Chicago: University of Chicago Press.

——— 1984 The Economic Constitution in Historical Perspective. In Richard M. McKenzie, ed., *Constitutional Economics.* Pages 39–53. Lexington, Mass.: D.C. Heath.

## ECONOMIC OPPORTUNITY ACT
78 Stat. 580 (1964)

Moving rapidly to consolidate his control over the administration he inherited from JOHN F. KENNEDY, President LYNDON B. JOHNSON in January 1964 declared "war on poverty" and announced his aim of building a "Great Society." The Economic Opportunity Act of 1964 was the centerpiece of the Johnson program.

Building on a BROAD CONSTRUCTION of the TAXING AND SPENDING POWER, the architects of the act erected a new conception of the role of the federal government. The government was to eliminate the "culture of poverty" that kept some people in economic distress. The act established several new agencies, the most important of which was the Office of Economic Opportunity (later the Community Services Administration) within the Executive Office of the President. It also created a plethora of new programs: Job Corps, Neighborhood Youth Corps, Head Start, etcetera.

From the beginning the war on poverty faced problems, and no poor person ever benefited from it as much as the bureaucrats who ran it. Funds were targeted on the basis less of economic need than of political patronage. And simultaneous expenditure for the war on poverty and the war in Vietnam depleted the treasury and fueled runaway inflation.

DENNIS J. MAHONEY
(1986)

## ECONOMIC REGULATION

In the field of economic policy, the composite constitutional powers of American governments—federal, state, and local—are extremely broad. Granted that governments may not implement economic policies that would violate the guarantees of the BILL OF RIGHTS or a few other constitutional limitations, within these spacious constraints there is little that governments may not do. But what they must or should do is more complex. As to macroeconomic policy, whose main instruments are monetary and fiscal, powers amount virtually to duties, for government could not function without taxing and borrowing, nor could the economy run at all smoothly if government declined to issue any money or take any steps to control its value. (See BORROWING POWER; MONETARY POWER; TAXING AND SPENDING POWER.) Just how these essential functions should be carried out is a matter of art and of debate, but few contend that the functions need not be carried out at all. However, as to microeconomic policies—those identified by usage as the substance of "economic regulation"—constitutional powers have not been regarded as inescapable duties. Although governments may intervene directly to regulate prices, wages, quality of products, and various other aspects of markets, they need not do so. Wages, for instance, have been regulated at some times but not others, in some occupations but not all, and so as to set minima but not maxima. In short, economic regulation is constitutionally optional.

Nonetheless, American governments have always practiced economic regulation, albeit in varying forms and degrees. Moreover, they have always been considered to possess broad authority to regulate, even if during a relatively short interval at the beginning of this century the federal courts invalidated a few particular forms of economic regulation without, however, casting doubt on the legitimacy of most other forms. This historically continuous practice of economic regulation shows that American governments were never dogmatically addicted to laissez-faire, notwithstanding a broad though sometimes faltering preference for private enterprise, and that the Constitution, as intended, written, and interpreted, is not a manifesto in favor of laissez-faire.

Before the CIVIL WAR, the constitutional authority of the states to carry on any and every form of economic regulation was seldom questioned. And this acceptance was not for want of regulations to question. On the contrary, state and local governments set the prices to be charged by wagoners, wood sawyers, chimneysweeps, pawnbrokers, hackney carriages, ferries, wharfs, bridges, and bakers; required licensing of auctioneers, retailers, restaurants, taverns, vendors of lottery tickets, and slaughterhouses; and inspected the quality of timber, shingles, onions, butter, nails, tobacco, salted meat and fish, and bread. This very incomplete list attests to an intention to exercise detailed control over the operation of markets, especially (though not only) those that have since been characterized as providing "public services" and those thought to be morally

dubious because of association with usury, betting, intoxication, or excessive jubilation.

In the few instances before the Civil War when such regulations came before its eyes, the Supreme Court roundly affirmed their constitutional propriety, always provided (for so the issues arose) that the state's legislation did not collide with the federal commerce power. So in GIBBONS V. OGDEN (1824) JOHN MARSHALL referred to "the acknowledged power of a state to regulate . . . its domestic trade" and to adopt "inspection laws, quarantine laws, health laws . . . , and those which respect turnpike roads, ferries, etc." In the LICENSE CASES (1847), ROGER B. TANEY defined the STATE POLICE POWER as "nothing more or less than the powers of . . . every sovereignty . . . to govern men and things," including commerce within its domain, powers absolute except as restrained by the Constitution. Again, in COOLEY V. BOARD OF WARDENS (1851) the Court upheld the constitutionality of a state law requiring ships in the port of Philadelphia to employ local pilots, and further regulating the qualifications of pilots and their fees. Only one notable judgment of the time, by the highest court of New York, seems on casual reading to cast doubt on a state's regulatory power. In WYNEHAMER V. PEOPLE (1856) that court invalidated a law prohibiting the sale, and even the possession, of hard liquor on the ground that the statute acted retroactively and thus fell afoul of the DUE PROCESS clause in the state's constitution. The Justices agreed that a PROHIBITION law framed to operate prospectively would lie entirely within the legislature's power, and the only Justice who expressed reservations about outright prohibition went on to say: "It is . . . certain that the legislature can regulate trade in property of all kinds." Long and widespread practice throughout the country confirmed that state legislatures can indeed regulate the terms and conditions not only of trade but also of PRODUCTION, as well as entry into various occupations—though courts repeatedly insisted that the states' police powers, broad though they were, must be limited by profound constitutional antipathy to arbitrary action, such as that instanced by Justice SAMUEL CHASE in CALDER V. BULL (1798): "a law that takes property from A. and gives it to B."

Nor was this broad scope of the police power curtailed by decisions following shortly after the ratification of the FOURTEENTH AMENDMENT in 1868. In the SLAUGHTERHOUSE CASES (1873) the majority of the Supreme Court upheld a Louisiana law that closed down all slaughtering inside New Orleans, confined it to a designated area outside the city, and gave a single private company the right to operate a slaughterhouse there, despite the complaint by butchers that the statute, by depriving them of part of their usual trade, violated the PRIVILEGES AND IMMUNITIES and due process clauses of the Fourteenth Amendment. The Court concluded that the police power undoubtedly authorized regulation of slaughtering, and that the prohibitions imposed on the states by the amendment should not be interpreted as a limitation on reasonable exercises of the police power.

A broadly similar view prevailed in *Munn v. Illinois* (1877), which concerned the validity of a statute fixing the maximum charge to be levied by grain elevators in Chicago. Against the defendants' plea that the ceiling thus set on their earnings effectively deprived them of property without due process, Chief Justice MORRISON R. WAITE marshaled the long history of adjudication prior to 1868: "It was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law." The word "necessarily" signaled a departure from the majority's blunt assertion in *Slaughterhouse* that due process should not box in the police power. Instead, the Court adopted in *Munn* the pared-down principle that states could, without offending against due process, regulate the prices of some kinds of business, "those AFFECTED WITH A PUBLIC INTEREST" or, as later usage had it, public service businesses. The tempting inference, that ordinary, "private" businesses are immune to economic regulation, though lent plausibility by some hints in the text, is not confirmed by any forthright judicial statement. (See GRANGER CASES.)

The "affectation with a public interest" DOCTRINE, though frequently invoked by courts in support of state regulation of railroads and public utilities, did not always carry the day. The first notable deviation, not only from *Munn* but from the longer previous tradition, took place in ALLGEYER V. LOUISIANA (1897). In question was Allgeyer's right to buy marine insurance from a New York company despite a Louisiana statute prohibiting out of state insurance companies from doing business there without a license. While conceding the state's power to regulate or even to exclude insurance companies domiciled in other states, the Court concentrated on every American citizen's privilege to pursue an "ordinary calling or trade" and, in the course of it, to make such contracts as might be useful and proper. By interfering with a person's exercise of that privilege, the Court unanimously held, Louisiana had abridged the Fourteenth Amendment's guarantee of liberty and property. To believe, however, as the decision's admirers and detractors alike have believed, that the Court thus read a sweeping FREEDOM OF CONTRACT into the Fourteenth Amendment, so as to equate all economic regulation with denial of due process, is to ignore a vital passage in the opinion, where RUFUS PECKHAM declared that the police power of a state "cannot extend to prohibiting a citizen from making contracts . . . outside the limits and JURISDICTION of the State, and which are also to be performed outside of such jurisdiction." Cavalier disre-

gard of that essential qualification has made the *Allgeyer* opinion seem what it was not. If further evidence were needed, it was supplied by the Court's decision one year later in HOLDEN V. HARDY (1898), where the majority of seven upheld an act of Utah regulating the hours of labor in mines and smelters, without any suggestion that mines and smelters are businesses affected with a public interest, and notwithstanding considerable interference with freedom of contract.

Supposedly initiated by *Allgeyer,* the triumph of "economic due process" or SUBSTANTIVE DUE PROCESS—a triumph never fully consummated—was supposedly completed by LOCHNER V. NEW YORK (1905). Inasmuch as the Supreme Court there struck down a statute that limited the work of bakers to sixty hours a week, the decision could be so represented. But a close reading of the opinions, including the dissents, leads to the sounder conclusion that the statute was invalidated because, while purporting to be a measure for the public health, it adopted means that (in the majority's view) had no reasonable relation to that end, or alternatively because it was really an effort to interfere in the bargaining between master and employee, an effort lying outside the proper scope of the police power as constrained by the due process clause.

That the *Lochner* decision did not undermine economic regulation was demonstrated three years later in MULLER V. OREGON (1908), when the Supreme Court (with only one new member) upheld a restriction on hours of work of women as a reasonable means of achieving the proper end of public health, and was demonstrated again in BUNTING V. OREGON (1917), where the statute applied to men as well as women and to overtime wage rates as well as to hours. In ADKINS V. CHILDREN'S HOSPITAL (1923), however, the Court once again sailed closer to the *Lochner* tack, when it disallowed a minimum wage law. Nevertheless, despite the *Lochner-Adkins* line and reliance on decisions before, during, and after the brief era of laissez-faire activism, many states continued to pass and enforce laws regulating the conditions of labor as well as other economic relations, especially after the onset of the Great Depression.

The older line of interpretation, temporarily obscured but not reversed, was restored to predominance by the Supreme Court's decision in NEBBIA V. NEW YORK (1934). Here, while apparently relying on *Munn v. Illinois* (1877), the Court effectively reversed it by holding "that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices." Indeed, the Court went on to say that it had upheld an extensive variety of economic regulations, a statement the accuracy of which it vindicated by citing some hundred PRECEDENTS that it had laid down during the three or four decades earlier. A further step toward closing the *Lochner* episode was taken in WEST COAST HOTEL V. PARRISH (1937); and the final (at least until the present) bit of punctuation was supplied in UNITED STATES V. CAROLENE PRODUCTS COMPANY (1938) when the Court committed itself not to invalidate regulatory legislation unless the law's irrationality offended against due process or it otherwise contravened specific constitutional guarantees such as those in the Bill of Rights.

Meanwhile, economic regulation by the federal government had been undergoing a roughly parallel development. Substantively it was less extensive, because until about the Civil War economic activity within the several states far outweighed that which crossed the boundaries of any state, because the federal government spent less and did less than state and local governments, and not at all because the federal government was more attached than were state and local governments to laissez-faire. Ample evidence to the contrary is afforded by the protective tariffs so vigorously advocated by ALEXANDER HAMILTON and HENRY CLAY and so widely supported, by the subsidies granted to transportation facilities in the name of INTERNAL IMPROVEMENTS, and by close regulation of ships and sailors involved in interstate and foreign navigation. If nevertheless the federal government did little to implement the COMMERCE CLAUSE during its first century, Congress's latent constitutional power was recognized and approved. When Marshall wrote in GIBBONS V. OGDEN (1824) that the commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution," he prefigured later judicial pronouncements that the commerce power is effectively the NATIONAL POLICE POWER.

As might have been expected, the coexistence of two tiers of police power occasioned increasing collisions when, after the Civil War, the federal government expanded the exercise of its own power. Such collisions might have been resolved by simple-minded recourse to the SUPREMACY CLAUSE, but that solution would not have appealed strongly to judges who remembered that the professed objective of the Civil War had been, on the one side, to protect the autonomy of the states and, on the other side, to preserve a Union (rather than replace it by a unitary state). Recollections of the crisis reinforced the traditional effort to delineate clear boundaries between the domains of the states and that of the federal government.

A striking specimen of this issue arose from the increasing efforts of state governments after the Civil War to regulate railroad rates, and in particular to prohibit what many shippers regarded as iniquitous discrimination. In this instance a railroad had charged a shipper a certain amount for sending goods from one place in Illinois to

New York City while charging another shipper less for sending the same sort of goods from another place in Illinois to New York City, though the latter distance was greater than the former. This habitual practice, known as LONG-HAUL-SHORT-HAUL DISCRIMINATION, violated an Illinois statute. In WABASH, ST. LOUIS, PACIFIC RAILWAY V. ILLINOIS (1886) the Supreme Court decided that, although the Illinois courts had confined application of the statute to transportation within the state, the statute was nevertheless invalid as applied to contracts for continous transportation through several states, so "interfering with and seriously embarrassing" interstate commerce. The counterargument, that state statutes of this sort might be permitted to stand until the federal government might occupy the field, became moot when in the following year Congress passed the INTERSTATE COMMERCE ACT, which among other things established the first federal REGULATORY AGENCY, the Interstate Commerce Commission. For twenty-seven years thereafter, until announcement of the SHREVEPORT DOCTRINE, a relatively comfortable equilibrium recognized the exclusive power of states to regulate purely intrastate transportation and of the federal government to regulate purely interstate transportation, though controversy occasionally erupted as to whether some particular regulation by one tier of government materially spilled over into the other's domain.

Concerning enterprises other than transportation, it was harder to draw a neat line between what is a fixture within a state and what though within a state is visiting it as a bird of passage or, according to a habitual metaphor, "flowing" through it. This difficulty was manifested in UNITED STATES V. E. C. KNIGHT CO. (1894), the Supreme Court's first ruling on the SHERMAN ANTITRUST ACT. It arose from a suit asking that the courts invalidate contracts by which the "Sugar Trust" had purchased four independent refineries, so achieving an almost complete monopoly of refining. Considering that the government had attacked the contracts rather than the trust itself, that the contracts concerned factories necessarily installed within a state, and that no proof had been offered to connect the contracts with a scheme to restrain interstate commerce, the Court held that the contracts were not reached by the Sherman Act; as so construed, the act was valid. In dissent, Justice JOHN MARSHALL HARLAN objected that the nub of the case was not the sugar trust's acquisition of the four refineries but its monopolization of interstate commerce. One may suppose that, contrary to Chief Justice MELVILLE W. FULLER's pronouncement that "commerce succeeds to manufacture," Harlan would have preferred to say that manufacture, when ancillary to interstate commerce, falls within federal legislative power.

Similar partitioning of state and federal domains persisted in most such decisions down to 1936, accompanied by judicial reminders that if the reach of the commerce power were excessively widened, the states would be rendered economically otiose. So in HAMMER V. DAGENHART (1918) the Supreme Court, while agreeing that the working hours of children in mines and factories should be regulated (and in fact was regulated by every state), invalidated a federal child labor law on the ground that it would disturb the desirably "harmonious" balance between the police power and the commerce power. Similarly, when ruling in *Schechter Poultry Corporation v. United States* (1935) that poultry slaughterers in New York City could not be reached by federal regulation, Chief Justice CHARLES EVANS HUGHES wrote: "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and all the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government."

That traditional view was substantially revised by *National Labor Relations Board v. Jones & Laughlin Steel Corporation* (1937), decided while President Franklin D. Roosevelt's Court reorganization plan was being vigorously debated. Technically the turn hinged on the Court's finding that the defendant company, besides owning steel mills and mines, owned and operated interstate railroads and water carriers and sales offices throughout the country; as the company was "a completely integrated enterprise," one in which manufacture and commerce might be said to have been completely unified, its relations with labor unions in its steelworks and mines as well as in its railroads and water carriers were properly subject to federal regulation. On a narrow view, the Court continued to adhere to the principle that state and federal regulation must coexist—as the Court took trouble to emphasize in UNITED STATES V. DARBY LUMBER COMPANY (1941)—and merely found federal power applicable to "national" firms; on a broader view the Court had considerably shifted the dividing line. The virtual obliteration of the line was confirmed by WICKARD V. FILBURN (1942), where the Court upheld federal regulation of wheat farming, by reinterpreting production as well as consumption on the farm, previously understood to be inherently local, as ingredients of an "economic market" which, being national and indeed international, was properly subject to federal regulation.

Rash though it may be to suppose that one can identify historical patterns, it might nevertheless be ventured that economic regulation by the states was never impeded by laissez-faire nor, except briefly and partially, by the doctrine of substantive due process, and that economic regulation by the federal government has expanded, generally though unsteadily, as a proportion of the whole. This sum-

mary, assuming it to be accurate, does not of course endorse the logical rigor of CONSTITUTIONAL INTERPRETATION that underlay those tendencies, nor does it prejudge their political desirability. Those who see private enterprise as self-serving and chaotic conclude that extensive economic regulation is a condition of social welfare; whereas minimalists maintain that economic regulation is desirable only in the event of market failure, that is, only in relation to enterprises that give rise to oppressive externalities or to industries that are natural monopolies. The Constitution provides ample scope for the former view but imposes no restrictions corresponding to the latter view. Despite some indications of "deregulation" in legislation and adjudication since 1960, it would be foolhardy to predict whether economic regulation will diminish or increase during the future.

WILLIAM LETWIN
(1986)

Bibliography

HALE, ROBERT L. 1952 *Freedom Through Law: Public Control of Private Governing Power.* New York: Columbia University Press.

HAMMOND, BRAY 1957 *Banks and Politics in America from the Revolution to the Civil War.* Princeton, N.J.: Princeton University Press.

HANDLIN, OSCAR 1947 *Commonwealth: A Study of the Role of Government in the American Economy.* New York: Oxford University Press.

KOONTZ, HAROLD and GABLE, RICHARD W. 1956 *Public Control of Economic Enterprise.* New York: McGraw-Hill.

LETWIN, WILLIAM 1965 *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act.* Chicago: University of Chicago Press.

LIEBHOFSKY, H. H. 1971 *American Government and Business.* New York: Wiley.

MORRIS, RICHARD B. 1946 *Government and Labor in Early America.* New York: Columbia University Press.

WILSON, JAMES Q., ed. 1980 *The Politics of Regulation.* New York: Basic Books.

## ECONOMIC REGULATION
(Update)

The term "economic regulation" has no clearly defined meaning. In its narrowest sense, it is probably limited to government control of prices, outputs, and market entry. At one time, such regulation was widespread, covering major industries such as transportation, energy, telecommunications, and agriculture. Beginning in the mid-1970s, however, such traditional forms of government regulation have been in retreat, and "deregulation" has been the watchword. Since the 1930s, constitutional law has been thought to place little restriction on these traditional forms of economic regulation. Even less constitutional guidance has been found relating to deregulation.

In the meantime, business activities have been subjected to new federal forms of regulation governing EMPLOYMENT DISCRIMINATION, worker safety, pollution, and other "social" issues. We might more broadly define economic regulation, then, as government regulation of activities relating to market transactions, actual or potential. Given this very broad subject matter, it is obvious that in specific cases economic regulations might happen to implicate all manner of constitutional DOCTRINES. Thus, in some sense, the constitutional topic of "economic regulation" is indeed a broad one.

Yet, the fact that some constitutional rule may happen to apply to an economic activity as well as to noneconomic activities is of no particular interest. Rather, the interesting question is the distinctive constitutional status of economic regulation. In other words, we need to ask when the government's power is either increased or decreased by virtue of the fact that the regulated activity is connected with the marketplace.

Although this distinction does not play a central role in current doctrine, the Supreme Court does sometimes give distinctive treatment to regulation of economic activities. A familiar example is the COMMERCIAL SPEECH doctrine, which provides a lower protection for speech that is integrally related to market transactions. Two recent cases from other areas of constitutional law also provide illustrations that the marketplace nexus retains significance in constitutional analysis.

The first example is UNITED STATES V. LÓPEZ (1995). *López* involved a federal statute that criminalized possession of firearms in school zones. The Court held, for the first time since the NEW DEAL, that a federal regulation of private activity exceeded congressional power under the COMMERCE CLAUSE. What is most notable for present purposes, however, is the Court's care to distinguish the case from PRECEDENTS involving economic regulation. For instance, the Court observed that even WICKARD V. FILBURN (1942) (which the Court called "perhaps the most far reaching example of commerce clause authority over intrastate activity"), "involved economic activity in a way that the possession of a gun in a school zone does not." In contrast, the statute before the Court had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." Nor was it "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." Hence, the firearms statute could not be sustained "under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed

in the aggregate, substantially affects interstate commerce."

Justice ANTHONY M. KENNEDY's CONCURRING OPINION (joined by Justice SANDRA DAY O'CONNOR), also stressed the distinction between congressional power over economic and noneconomic activity. He felt bound by precedent to recognize "congressional power to regulate transactions of a commercial nature." Hence, he argued, the Court was foreclosed "from reverting to an understanding of commerce that would serve only an eighteenth-century economy"; precedent also precluded "returning to the time when congressional activity was limited by a judicial determination that those matters had an insufficient connection to an interstate system." In short, he said, "Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy."

Although governmental authority to restrict economic activity is broad, it is not unlimited. That is the teaching of LUCAS V. SOUTH CAROLINA COASTAL COUNCIL (1992). *Lucas* involved a state regulation that, as construed by the lower courts, completely eliminated the economic value of certain beachfront land. With narrow exceptions, the Court held, a regulation must be considered a TAKING OF PROPERTY if it "denies all economically beneficial or productive use of land." Note that it is only economically beneficial uses that are protected; that is, only the ways in which the land or its product might enter into some market transaction. The Court found "the notion . . . that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture." But *Lucas,* assuming it would continue to receive the support of a majority today, is a narrow holding, applying only to direct regulations of land (as opposed to personal PROPERTY) that destroy 100 percent of its economic value. The holdings in other recent takings cases are also quite narrow. Land is protected from economic regulation, but apparently only in extreme cases.

In short, the commercial sphere continues to be subject to nearly plenary regulation. (Contrast the much broader protection given to the "noneconomic" spheres of politics, media, religion, and family.) FEDERALISM plays little role in restraining national LEGISLATION of commercial activities, and the right to enter into such activities receives special protection only in the case of extreme restrictions on land use. Thus, despite its critics, the post– New Deal distinction between personal and economic rights seems largely intact.

DANIEL A. FARBER
(2000)

(SEE ALSO: *Economic Due Process; Economic Liberties; Interstate Commerce; Property Rights; State Regulation of Commerce.*)

Bibliography

FARBER, DANIEL A.; ESKDRIGE, WILLIAM N., JR.; and FRICKEY, PHILIP P. 1998 *Constitutional Law: Themes for the Constitution's Third Century,* 2nd ed. St. Paul, Minn.: West Group.

LAZARUS, RICHARD 1997 Counting Votes and Discounting Holdings in the Supreme Court's Taking Cases. *William and Mary Law Review* 38:1099.

LESSIG, LAWRENCE 1995 Translating Federalism: *United States v. López. Supreme Court Review* 1995:125–215.

## ECONOMICS OF AFFIRMATIVE ACTION

The Supreme Court has mandated that government AFFIRMATIVE ACTION plans must serve some COMPELLING STATE INTEREST and must be narrowly tailored to further this interest. Economics doesn't have much to say about whether, say, remedying RACIAL DISCRIMINATION is a compelling interest, but the tools of economics can shed light on what types of affirmative action programs satisfy the narrow tailoring requirement (or LEAST RESTRICTIVE MEANS TEST). Economic analysis suggests that the most narrowly tailored affirmative action program (1) will be racially explicit (rather than the Court's current preference for "race neutral means to increase minority participation"); (2) will use a sliding scale of credits in which the size of the racial preferences declines with minority participation; and (3) may at times create "quasi-quotas" that effectively ensure a participation floor for minorities.

The idea that a remedy needs to be tailored to further the government's legitimate interest is captured in part by the unexceptional idea that remedial classifications should not be too overinclusive or underinclusive. The Court, for example, in RICHMOND (CITY OF) V. J.A. CROSON CO. (1989) was particularly concerned about the problem of overinclusion; that is, giving affirmative action preferences to people (such as Aleuts) who were not injured by past discrimination in a particular jurisdiction. However, the same opinion also expressed a strong preference for the "the use of race-neutral means to increase minority business participation." This preference for "race-neutral means"—such as general subsidies for small entrepreneurs—necessarily conflicts with the Court's aversion to overly inclusive programs. If preferring the minuscule number of Aleuts in Richmond is "grossly overinclusive," then extending preferences to a much larger class of whites—as would race-neutral subsidies—*a fortiori* would fail the narrow tailoring requirement. Narrowly tailoring the beneficiary class for remedial subsidies so that it will

not be overinclusive necessitates explicit racial classifications.

Clearly, the Court has something more in mind by narrow tailoring than a mere insistence on not too much over- or underinclusion. Indeed, the Court's decisions suggest that narrow tailoring may also require that racial preferences not unduly burden nonminorities. Government decisionmakers are constitutionally required to remedy discrimination using the least restrictive alternative. Here, too, economic analysis can be of help—especially in evaluating the relative costs (burdens to minorities) and benefits (remedying racial discrimination) of different affirmative action programs. Narrow tailoring implies a sensitivity to the contours and scope of racial preferences and economic analysis is especially attuned to analyzing effects on the margin.

Simple economics suggests that the Court's antipathy for quotas is overstated. Quotas may be more narrowly tailored to achieve the government's remedial interest than many other types of racial preferences. While quotas are imperfectly tailored because they mandate an inflexible level of minority participation, bidding credits (and other preferences) may be poorly tailored because they induce too much uncertainty and volatility in minority participation.

The question of whether affirmative action racial preferences should be implemented with quotas or credits is similar to the more general question of whether laws should take the form of quantity or price regulation. Economists such as Martin Weitzman and Robert Cooter have suggested circumstances where either type of regulation might be the most efficient. Applied to the question of affirmative action, these models suggest that more narrowly tailored programs will exhibit a "sliding scale" of racial preferences in which the size of the preference will vary inversely with the degree of successful minority participation in the program. Under a narrowly tailored program, the farther minority participation falls below what it would be in the absence of discrimination, the larger the racial preference government might legitimately confer.

Sliding-scale preferences may come close to setting aside a minimum quota of contracts for minority bidders, but such quasi-quotas (for fractions of the legitimate remedial goal) are consistent with narrow tailoring when dramatic shortfalls in minority participation would undermine the government's remedial effort. For example, in an industry where the government has a legitimate interest in increasing minority participation to 30 percent (the fair estimate of what it would have been absent discrimination), the government might find that allowing minority participation to fall below 5 percent would affect the long-term viability of all minority business. Under such circumstances, the government might be justified under the narrow tailoring principle in granting substantial bidding credits for 5 percent of government contracts, effectively guaranteeing that at least 5 percent will go to minorities.

Quasi-quotas can be defended as narrowly tailored remedies because they cause decisionmakers to internalize the true social costs of dramatic shortfalls in minority participation. The problem with simple (invariant) bidding credits is that the participation of minorities may fluctuate in ways that are inconsistent with narrow tailoring of the preferences to the government's underlying remedial interest. Quasi-quotas for a fraction of the overall remedial goal dampen this potential damaging fluctuation. And because the quasi-quota would only set aside a fraction of the government's legitimate remedial goal, it would impose a smaller burden on the interests of nonbeneficiaries. Finally, granting minority enterprises guarantees of minimum participation can increase the quality of minority participants—so as to reduce the long-term disparity between minority and nonminority recipients.

Economics also suggests that sometimes government can remedy private discrimination without unduly burdening nonminorities. Government racial preferences in procurement, for example, can counteract private underutilization in the same market without unduly burdening nonminority firms who are by hypothesis overutilized in the overall market because of their race.

IAN AYRES
(2000)

Bibliography

AYRES, IAN 1996 Narrow Tailoring. *UCLA Law Review* 43: 1781–1838.

AYRES, IAN and VARS, FREDERICK E. 1998 When Does Private Discrimination Justify Public Affirmative Action? *Columbia Law Review* 1998:1577–1641.

COOTER, ROBERT 1984 Prices and Sanctions. *Columbia Law Review* 84:1523–1560.

## ECONOMIC STABILIZATION ACT
### 84 Stat. 799 (1970)

This measure authorized the most comprehensive peacetime ECONOMIC REGULATION in American history. The act extended a temporary sweeping DELEGATION OF POWER which authorized the President "to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970." It authorized federal courts to issue INJUNCTIONS to enforce the presidential orders and

mandated a $5,000 penalty for violation. A Democratic Congress passed the act at a time of persistent inflation; Republicans charged it was an election-year ploy attacking President RICHARD M. NIXON for failure to curtail rising unemployment, high interest rates, and a balance of payments deficit.

Nixon signed the measure but indicated he would have preferred to veto it and had no intention of using its authority. He opposed committing vast regulatory power to presidential discretion; if Congress favored controls, he said, it should "face up to its responsibilities and make such controls mandatory." One year later, amid growing disapproval of his economic policies, Nixon used the act to impose a ninety-day freeze on wages, prices, and rents. The President twice requested and received congressional extension as "in the public interest." The act was allowed to expire in 1974.

PAUL L. MURPHY
(1986)

Bibliography

SILK, LEONARD 1973 *Nixonomics.* New York: Praeger.

## ECONOMY

The United States Constitution is much more than the formal document ratified in 1789. It is the preeminent symbol of the American preference for continuity over radical change, a collection of myths that provides a common faith, and a complicated dialogue between written and unwritten rules of law. As such it reflects and embodies many of the conflicting values at the core of American culture. The law itself, as an extended commentary on the Constitution, has perpetuated many of those conflicts by seeking to balance essentially irreconcilable objectives. It has always attempted, with mixed success, to reconcile elitism and democracy, individual opportunity and community, enterprise and equity, growth and stability, competition and cooperation, and freedom and responsibility. Moreover, it has both liberated and encouraged economic growth even as it has tried to make economic institutions responsible and accountable.

The Constitution's Framers could not anticipate the dramatic changes that occurred in the United States during the first half of the nineteenth century. After all, they drafted the document to serve an economy in which most farmers practiced subsistence agriculture and in which factories were rare, transportation limited, banking and credit primitive, and business transactions simple and direct. Nevertheless, the Constitution provided a congenial legal environment during the first phase of industrialization. The rapid expansion of the nation in size and population was an inherently decentralizing force, as the Supreme Court recognized when it began to interpret the COMMERCE CLAUSE and the CONTRACT CLAUSE. The Court might have defined constitutional power over the economy in several ways. For example, in explaining the meaning of the commerce clause, it might have prohibited the states from enacting any statutes regarding interstate trade. It might also have ruled that state laws could coexist with federal laws in the absence of direct conflict between the two or that the states could legislate only until Congress decided to address the same subject. But in an age when the fear of centralized power was all-pervasive, particularly in the South, the Court's decisions were inevitably compromises. Although the Court prohibited states from taxing the federal government, blocked them from limiting or excusing debts, denied their right to violate corporate charters, banned them from directly interfering with INTERSTATE COMMERCE, confirmed the sanctity of contracts between individuals in two or more states, and granted CORPORATIONS perpetual existence—all important prerequisites to the establishment of national markets—it left the states plenty of responsibilities. They could charter, license, and regulate businesses, and they could regulate working conditions. And because the Constitution provided for a government of ENUMERATED POWERS, leaving a broad economic arena to the states under the TENTH AMENDMENT, the relationship between federal and state law hinged on the assumption that state statutes were constitutional unless prohibited by the Constitution or preempted by Congress.

In short, even JOHN MARSHALL's most nationalistic decisions reinforced the idea of separate realms of power with separate responsibilities. The Supreme Court's commentary on economic powers did not end with its early decisions regarding the commerce and the contract clauses. Following the depression of 1837, the Court formally recognized a general federal commercial law and a national credit system protected by "impartial" federal courts. That business law provided national rules for the marketplace, but did not entirely displace state rules. Hence, corporations could "forum shop" for the laws, state or federal, best suited to their needs. Then, at the end of the century, the I. M. Singer Company and the Big Four meat-packing firms persuaded the Court to strike down state licensing and tax laws designed to exclude the products of out-of-state corporations. By doing so, the Court may have played an even more important part in creating a continental market than did the railroads.

During the nineteenth century the Constitution was defined as much by the inaction of Congress as by the actions of the Supreme Court. Preoccupied as it was with a host of thorny sectional issues, Congress refused to intervene in new questions concerning the relative powers

of the states and the federal government. For example, although the Constitution granted the power to coin money to the national government, Congress did not authorize the issuance of national bank notes until the CIVIL WAR. In the meantime, state-chartered commercial banks issued debt instruments that doubled as the nation's currency. Equally significant, Congress used the central government's power to issue corporate charters, which Marshall had read into the Constitution in 1819, only to create national banks and to encourage a few land-grant railroads. Congress might have used the commerce power to license bridges and highways—a logical extension of the power over interstate trade—but transportation decisions were left almost entirely to the states and to private enterprise. Moreover, although the Constitution permitted Congress to enact uniform BANKRUPTCY laws, Congress used that power seldom and reluctantly, leaving the states to pass extensive debtor legislation.

By failing to limit the states' powers in most economic spheres, the Constitution indirectly encouraged legal experimentation and innovation. So did the structure of government mandated by the Constitution. The tendency of FEDERALISM to disperse power to the local level reinforced the dependence of Americans on quasi-governmental associations, such as commercial federations, civic organizations, and booster clubs—organizations that often served as better forums for collective action than did formal institutions of government. Given the decentralized nature of the pre-Civil War political system and the lack of major ideological differences between the POLITICAL PARTIES, the controversies over tariffs, banks, and internal improvements reflected localism and particularism more than STATES' RIGHTS. Not only did federalism institutionalize the nation's centrifugal, localistic impulses; it also reinforced the American tendency to view economic conflicts in constitutional and legal terms, and it reduced tension among competing economic groups by providing a variety of jurisdictions in which to fight for their objectives.

By barring certain acts, the Constitution encouraged the states to expand powers indisputably their own, especially their POLICE POWERS over private property. For example, had the EMINENT DOMAIN power not been granted to private companies, the construction of bridges, turnpikes, canals, and railroads—and industrial development in general—would have been impeded. Individual property owners could be recalcitrant. Railroads needed to acquire broad ribbons of land; without the state's power of condemnation, the property had to be purchased at great expense on the open market. In 1807 the Schuylkill and Susquehanna Navigation Company failed to complete its canal because of the high prices it had to pay for land and water rights.

But under the new eminent domain statutes, which spread throughout the nation after the 1830s, indirect damages were not subject to compensation, and benefits to property not taken—such as any appreciation in property values—could be deducted from required compensation. Those were important subsidies to public works. The courts also limited the liability of transportation companies for injuries to workers, and the legislatures enacted new laws relaxing penalties for usury and debt.

The transformation of law was linked to the emergence of the business corporation, which tapped a vast pool of small investors, permitted them to transfer and withdraw their funds quickly, spread the risk of investment, and limited their liability. But the railroads grew so fast and became so powerful that by the 1870s and 1880s the promotion of capital investment had given way to demands for regulation in many parts of the nation.

Regulation has served many purposes, including the disclosure of illicit activities, the restraint of monopolies and oligopolies, fact gathering, the protection of industries from harmful competition, publicizing the problems of various businesses, and coordinating business activities. It has also served more ritualistic, almost mythic, purposes consistent with the dictates of CONSTITUTIONALISM. For example, it has maintained the illusion of accountability, the notion that the economy works in rational ways subject to public control. It has also perpetuated the idea that there is a "public interest," not just a multitude of special interests competing for preference in an open market. And it has formally acknowledged free competition, one of the most cherished American values. The classical model of free competition was valued not only because it promoted economic efficiency or even provided maximum individual opportunity but also because it built character and mollified some of the antisocial elements in unrestrained individualism.

The promotion of businesses by the state—such as providing exclusive charters, tax exemptions, land, or capital—had always implied a right to regulate those businesses. That right had been freely admitted, at least by businesses that served the public, such as canals and railroads. But by the end of the nineteenth century, corporations tried to free themselves from restrictions—except when restrictions served their interests. State and federal courts aided them in many ways, such as by limiting the state police powers, exalting freedom of the courts, and devising SUBSTANTIVE DUE PROCESS to limit the power of Congress and the state legislatures. Because many congressional leaders shared the assumptions of the Supreme Court's conservative majority, Congress failed to provide the basic ground rules needed for effective antitrust actions. It did not, and probably could not, define what size business should be. Those who supported anti-

trust actions were not well armed with evidence concerning the potential impact of that policy on income distribution, on the concentration of wealth, on the efficiency of production, and on a host of related matters.

The American respect for private property and the RULE OF LAW, as well as the inability of Congress and the legislatures to decide how big was too big and what constituted "unfair" business practices, made regulation all the more difficult. The SHERMAN ANTITRUST ACT (1890) failed more for this reason than because of opposition from the courts or the power of special interests. Not surprisingly, the regulatory commission became the favored alternative not just to antitrust prosecutions but also to using taxation, federal incorporation, or NATIONAL POLICE POWER to discipline the economy. The Interstate Commerce Commission, created in 1887, set the legalistic precedent of case-by-case regulation, and that approach blended well with the faith of many Progressive politicians in panels of experts working through a process relatively immune from political influence. Many reformers favored regulatory commissions because they considered the political process clumsy and easily corrupted. They also assumed that men of good will could compromise or reconcile their differences if they could find reliable facts and that fact-finding was a job for experts.

At the federal level, the regulatory commission was a child of the Progressive Era, but the number of commissions proliferated during the 1930s with the establishment of the Civil Aeronautics Board, the Tennessee Valley Authority, the Bonneville Power Authority, the Securities and Exchange Commission (SEC), and the multitude of National Recovery Administration code boards. The SEC brought credibility and order to the securities industry largely because the agency's first chairman, James M. Landis, recognized the value of close relations with the stock industry. For example, the SEC provided "advance opinions" in response to specific regulatory questions, a dramatic departure from the formal adjudicatory procedures followed by both the ICC and the Federal Trade Commission (FTC). Yet, despite the number and influence of the NEW DEAL commissions, they did little to change the shape of industrial America. Instead, they showed the limits of commission-style regulation. The reform movement of the 1930s included many competing visions: a cartelized industrial order regulated by business leaders through trade associations; a sink-or-swim free market economy; a corporate state in which government provided both centralized planning and a forum where different interest groups could resolve their differences; and the older Progressive ideal of government as a referee, intervening only to insure that participants followed the rules. The regulatory commission had become a cheap alternative to structural reform.

After WORLD WAR II, regulatory commissions faced increasing criticism. Some critics charged that the commissions were elitist and undemocratic: by combining executive, legislative, and judicial functions in appointive bodies, the agencies constituted a "fourth branch of government" that was clandestine, remote, and capricious. Other critics insisted that over time regulatory boards became narcissistic and bureaucratized as the reform impulse suffocated under crushing caseloads and the staggering range of trivial detail encountered in day-to-day deliberations. Others complained that commissions were not independent enough, that they were too subject to political interference, such as being staffed by political hacks and cronies unsympathetic to regulation. Still another criticism was that commissions were easily "captured" by those they regulated, either through direct means or through the subtle process by which the regulator gradually came to speak the same language and to hold the same economic philosophy as the regulated. Finally, many politicians and academics charged that commissions were grossly inefficient, a judgment hard to dispute when cases brought before the Civil Aeronautics Board and the FTC often took years to settle.

Two things happened in the postwar period. First, the old constitutional goal of balancing public and private, individual acquisitiveness and the common welfare, and stability and growth seemed anachronistic—perhaps even faintly absurd—to many Americans who had come of age in the RONALD REAGAN era. And second, to most Americans the size of a business became far less important than its sense of social responsibility. During the 1960s and 1970s, Americans discovered the dangers of DDT, phosphates in laundry detergents, propellants in aerosol cans, lead-based paints, nuclear power, radioactive wastes, chemical dumps, oil spills, saccharin, Pintos, Corvairs, Volkswagens, and dozens of other staples of modern industrial society. Economic regulation gave way to social and environmental regulation as the Environmental Protection Agency (1970), the Occupational Safety and Health Review Commission (1970), the Consumer Product Safety Commission (1972), the Mining Enforcement and Safety Administration (1973), the Office of Strip Mining Regulation and Enforcement (1977), and a host of other agencies demonstrated their popularity. In 1981 the EPA alone had more employees than the ICC, FTC, SEC, and Federal Power Commission, even though the youngest of those four had been around for nearly fifty years and the oldest for almost a hundred. Moreover, while "con sumers" had little affect on New Deal regulatory policies, the Sierra Club, the National Audubon Society, Common Cause, and many other citizen groups gave the public far greater influence over the new regulation.

Over time, the law has been far more successful in its

quest to encourage economic growth than in its representation of interests outside the marketplace. The Framers faced many difficult problems, none more vexing than how to elevate basic principles of law above the push and pull of day-to-day politics without rendering those principles blind to new economic needs. Of necessity, the Constitution transcended time and place. To ensure that the law would be responsive yet responsible, two choices were made: vast economic power was granted to state and local governments to decide their economic futures, and the courts and stand-in regulatory commissions were left to resolve most conflicts. Promotion and regulation were clearly complementary, and they often pulled in the same direction, but the balance inherent in the nineteenth-century law was impossible to maintain.

DONALD J. PISANI
(1992)

(SEE ALSO: *Environmental Regulation and the Constitution; Federal Trade Commission Act; Interstate Commerce Act; Preemption; Progressive Constitutional Thought; Progressivism; Property Rights; Regulatory Agencies; Securities Law.*)

Bibliography

FRIEDMAN, LAWRENCE M. 1985 *A History of American Law.* New York: Simon and Schuster.

——— and SCHEIBER, HARRY N., eds. 1988 *American Law and the Constitutional Order: Historical Perspectives.* Cambridge, Mass.: Harvard University Press.

HALL, KERMIT L. 1989 *The Magic Mirror: Law in American History.* New York: Oxford University Press.

PISANI, DONALD J. 1987 Promotion and Regulation: Constitutionalism and the American Economy. *Journal of American History* 74:740–768.

## *EDELMAN v. JORDAN*
415 U.S. 651 (1974)

This decision defines states' ELEVENTH AMENDMENT immunity from suit in federal court. Plaintiffs, alleging that Illinois welfare officials were unconstitutionally administering a welfare program financed by state and federal funds, sought the payments wrongfully withheld. The Supreme Court, in an opinion by Justice WILLIAM H. REHNQUIST, held the Eleventh Amendment to bar the request for retroactive relief but suggested that, as in EX PARTE YOUNG (1908), the Eleventh Amendment would not bar relief requiring the state to pay the costs of future constitutional compliance. In MILLIKEN V. BRADLEY (1977), the Court reconfirmed *Edelman* by requiring a state to pay the costs of future constitutional compliance.

*Edelman* also developed the principles regulating Congress's power to modify the states' Eleventh Amendment immunity. First, limiting earlier holdings such as *Parden v. Terminal Railway* (1964), *Edelman* held that mere participation by a state in a federal welfare program does not constitute a waiver of the state's Eleventh Amendment protection. It thus confirmed the narrow approach to waiver signaled by *Employees v. Department of Public Health and Welfare* (1973). Second, despite Congress's power to abrogate states' Eleventh Amendment immunity, *Edelman* stated that actions brought under SECTION 1983, TITLE 42, UNITED STATES CODE, are limited by the Eleventh Amendment. At the time, the state's protection from section 1983 actions seemed to stem from the Court's holding in MONROE V. PAPE (1961) that Congress had not meant to render cities liable under section 1983. With the overruling of that portion of *Monroe* in MONELL V. DEPARTMENT OF SOCIAL SERVICES (1978), the question whether section 1983 abrogated the states' Eleventh Amendment immunities reemerged. In QUERN V. JORDAN (1979), a sequel to *Edelman*, the Court held that section 1983 was not meant to abrogate the states' Eleventh Amendment protection.

THEODORE EISENBERG
(1986)

## EDUCATION AMENDMENTS OF 1972 (TITLE IX)
86 Stat. 373

Title VI of the CIVIL RIGHTS ACT OF 1964 prohibits discrimination on the ground of race, color, or national origin in programs receiving federal financial assistance. Title IX of the Education Amendments of 1972 extends Title VI's ban to discrimination on the basis of sex in federally assisted education programs. Title IX excludes from its coverage fraternities, sororities, Girl Scouts, Boy Scouts, and similar organizations, and scholarships awarded to beauty contest winners; the act does not require sexually integrated living facilities. Title IX instructs federal departments to implement its provisions through rules or regulations and authorizes termination of funding in cases of noncompliance.

Title IX has played a major role in increasing female athletic opportunities at educational institutions, and *North Haven Board of Education v. Bell* (1982) held that Title IX could reach sexually discriminatory employment practices. In *Cannon v. University of Chicago* (1979) the Supreme Court held that Title IX may be enforced through private civil actions. (See SEX DISCRIMINATION.)

THEODORE EISENBERG
(1986)

Bibliography

DORSEN, NORMAN et al. 1979 *Emerson, Haber and Dorsen's Political and Civil Rights in the United States,* 4th ed. Vol. II: 771–774, 883–893. Boston: Little, Brown.

# EDUCATION AND THE CONSTITUTION

Basic to any discussion of the role of courts in educational decision making is the primacy of education in American ideology. Americans believe that education is central to the realization of a truly democratic and egalitarian society. It is through education that the skills necessary to exercise the responsibilities of citizenship and to benefit from the opportunities of a free economy will be imparted, no matter how recently arrived or previously disadvantaged the individual. Thus courts are concerned with protecting access to education. Moreover, since decision making by those charged with the administration of public education is seen as one of the most significant areas of law in terms of its effects on the lives of individuals and groups in our society, courts are inevitably drawn into reviewing the legitimacy of those decisions.

Education is primarily a state function in large part delegated to local school districts; the federal government has no direct constitutional responsibility for education. Nevertheless, Congress has enacted laws providing FEDERAL GRANTS-IN-AID to state and local educational agencies, as well as laws protecting the CIVIL RIGHTS of various categories of students. The constitutional authority for these statutes and their implementing regulations comes from Article I, section 8, clause 1, of the Constitution—the TAXING AND SPENDING POWER—which has been interpreted to permit Congress to attach conditions to the receipt of federal funds. Constitutional authority for congressional civil rights mandates governing educational institutions may also lie in section 5 of the FOURTEENTH AMENDMENT.

In the absence of federal legislation, are there constitutional constraints on the extent to which school authorities can control education and regulate the lives of students and teachers? Conversely, do students and teachers have the same constitutional rights as all citizens in our society, or are these rights limited within the school environment? The courts have acknowledged the importance of education to our democratic society and the importance of schools in preserving and transmitting the values—social, moral, or political—on which our society rests. The challenge is to inculcate those values without stifling the exercise of the freedom of expression, the freedom of religion, and other constitutional rights.

Until the middle of the twentieth century, education was almost the sole prerogative of school administrators and local boards of education. There were few legal constraints on school authorities and even fewer legal entitlements for teachers and students. Today various competing groups and individuals seek to control educational decision making—school boards, school administrators, teachers, parents, students, community leaders, minority groups, and federal and state agencies. Their struggles for control have often ended up in the courts. Since BROWN V. BOARD OF EDUCATION (1954), the Supreme Court has decided cases involving nearly every major area of educational policy.

Whether states may constitutionally compel all children to be educated in state-run schools was resolved by the Supreme Court in PIERCE V. SOCIETY OF SISTERS (1925), which held that while the state may compel all children to obtain schooling, parents have a constitutional right to choose between public and private schools. Nearly fifty years after *Pierce*, however, the Court held that there are certain constitutional interests of parents and children that may outweigh the state's interest in compelling children to attend school. The Court, in WISCONSIN V. YODER (1972), emphasized that parental direction of the religious upbringing of their children is an important interest to be protected. Although education is important to our democratic society, the interest of the state in compelling two more years of education beyond the eighth grade was outweighed by the burden on the RELIGIOUS LIBERTY of Amish parents. Only the dissent discussed the possibility that the child's interest might differ from that of the parent. In this perspective, *Yoder* seems not so much a case about the rights of children as a contest between parents and state over the power to inculcate values.

The state has a much greater role to play in selecting the curriculum and regulating what is taught in its own schools than it does in private schools. Education necessarily involves the process of selection; it also requires some degree of order to carry out the educational mission. However, as the Supreme Court noted in TINKER V. DES MOINES INDEPENDENT SCHOOL DISTRICT (1969), students (and teachers) do not "shed their constitutional rights . . . at the schoolhouse gate." Nevertheless, these rights may be circumscribed because of the "special characteristics of the school environment." The constitutional claims made on the courts with regard to schooling have been directed principally toward the protection of individual freedom and the attainment of equality. In the first instance, the countervailing factors are the stability and order of the educational enterprise; in the second instance, they center on differing conceptions of equality and the extent to which the educational enterprise is constitutionally obligated to respond to the equity-based claims of various groups absent a showing of intentional discrimination.

There has been much litigation regarding constitutional limitations on the inculcation of religious, political, and moral values in the public schools. The principal cases resolving the question of the proper place of RELIGION IN THE PUBLIC SCHOOLS were decided in the early 1960s. In

ENGEL V. VITALE (1962) the Supreme Court held that a nondenominational prayer written by the New York Board of Regents for use in the public schools violated the FIRST AMENDMENT's prohibition of an ESTABLISHMENT OF RELIGION. A year later, in ABINGTON SCHOOL DISTRICT V. SCHEMPP (1963), the Court struck down the practice of reading verses from the Bible and the recitation of the Lord's Prayer in public schools, holding that the state's obligation to be neutral with regard to religion forbids it to conduct a religious service even with the consent of the majority of those affected. Justice TOM C. CLARK was careful, however, to distinguish between the study of religion or of the Bible "when presented objectively as part of a secular program of education" and religious exercises. In *Stone v. Graham* (1980), the Court held unconstitutional a Kentucky law that required that the Ten Commandments be posted on the walls of public school classrooms. The Court indicated, however, that the case would be different if the Ten Commandments were integrated into the school's curriculum, where the Bible could be studied as history, ethics, or comparative religion.

Although the extent to which religious socialization can be undertaken by school authorities has been sharply limited by the courts, the constitutional limits on political and moral socialization are less clear. *West Virginia State Board of Education v. Barnette* acknowledged the right of school authorities to attempt to foster patriotism in the schools, but held that the Constitution protects the right of nonparticipation in a patriotic ritual that, in effect, coerces an expression of belief. So too, the First Amendment appears to prevent the editing out of particular ideas with a view to prescribing orthodoxy in politics, religion, or other matters of opinion, but the removal of books and curricular materials from the school library may be permitted when it is done for educational reasons. In so holding, the PLURALITY OPINION in BOARD OF EDUCATION V. PICO (1982) recognized a limited right of students to receive information, at least in the context of removal of books from a school library, that was protected by the First Amendment.

The reverse side of the coin involves the extent to which parents have a constitutional right to exempt their children from being socialized by public schools to values to which they object. Absent a clear establishment clause claim, it is unlikely that parents can demand, on moral or philosophical grounds, that certain books or courses be excluded from the public school curriculum approved by school authorities. And absent a clear free exercise claim, it is also unlikely that parents can exempt their children from courses to which they may object, particularly as *Pierce* protects the option of sending their children to private schools if they disagree with the values being taught in the public school.

To what extent does the Constitution protect the right of free expression of students and teachers in the school environment? Complete freedom of expression is inconsistent with the schooling enterprise, which requires order and control. In *Tinker v. Des Moines Independent Community School District* (1969) the Court said that although an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," school officials could limit expression if they showed that "the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."

With regard to First Amendment protection for student organizations, the Supreme Court, in *Healy v. James* (1972), held that "associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." Nevertheless, because the denial of recognition of a student organization is a form of prior restraint, school authorities have a heavy burden of proving the likelihood of disruption. Although the college in the *Healy* case had denied Students for a Democratic Society access to campus facilities, various other student organizations were permitted such access. Thus, *Healy* might be read as concerned with equal treatment—that is, if a college generally permits student organizations access to its facilities, although it could exclude all such organizations, it may not exclude an organization based on the political or social views it espouses. (See also WIDMAR V. VINCENT, 1981.)

May a teacher's right of expression be restricted in light of the special demands of the school environment? This question arises in a variety of contexts. Is the right of the teacher as citizen to free expression circumscribed by being an employee of the school system? Does the teacher as a professional have the right to determine course content, the selection of books, and the ideas and values to be presented in the classroom? Another question, not yet clearly resolved, is whether there is an independent right of ACADEMIC FREEDOM protected by the Constitution or whether that freedom is merely a corollary of the students' RIGHT TO KNOW.

The Supreme Court has never decided a case that squarely dealt with academic freedom in the classroom. Although KEYISHIAN V. BOARD OF REGENTS (1967) noted that academic freedom is "a special concern of the First Amendment" and that "the classroom is peculiarly the " MARKETPLACE OF IDEAS'," the case involved neither the classroom nor the teacher's right to choose the curriculum or to teach in any particular way. Justice HUGO L. BLACK, in his concurring opinion in EPPERSON V. ARKANSAS (1968), expressed a narrow view of the "academic freedom" protected by the First Amendment: "I am . . . not ready to

hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed. . . . I question whether . . . "academic freedom' permits a teacher to breach his contractual agreement to teach only the subjects designated by the school authorities that hired him."

Although lower court decisions vary significantly as to whether "academic freedom" in the classroom is constitutionally protected, OBITER DICTUM in the PLURALITY OPINION in *Pico* suggested that school authorities have unfettered discretion to inculcate community values through the curriculum. If this view prevails, the teacher would appear to have no unilateral right to dictate the lessons (especially value lessons) to which the student will be exposed. If the classroom is the vehicle for imparting values, it cannot also be an open "marketplace of ideas."

Other issues of "academic freedom" actually involve the extent to which the freedom of expression of teachers as citizens, outside the classroom, must be balanced against the interest of the state as employer. For example, the Supreme Court held in *Pickering v. Board of Education* (1968) that, "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." However, if the teacher's statements had been shown to have impeded his or her performance in the classroom or otherwise interfered with the regular operation of the schools, the speech might not be protected. And it is not clear whether protection would extend to teachers who voice their criticisms in the classroom.

The extent to which the Constitution constrains school authorities in the manner in which institutional rules and regulations are applied to students and teachers has been extensively litigated. Must certain procedures be followed before a student can be searched for EVIDENCE of the commission of a crime or a violation of a school rule, or before disciplinary action can be taken for failure to comply with institutional rules and norms?

A search made of private property is ordinarily held to be "unreasonable" under the FOURTH AMENDMENT if made without a valid SEARCH WARRANT. Even when the circumstances are such that courts have permitted warrantless searches, however (such as when necessary to prevent concealment or destruction of evidence), such searches usually require a showing of a PROBABLE CAUSE. However, the Supreme Court, in balancing school authorities' "substantial" interest in maintaining discipline against students' legitimate expectations of privacy, has fashioned a less protective standard. In NEW JERSEY V. T.L.O. (1985) the Court held that a search by school authorities is constitutional when there are reasonable grounds for suspecting that the search will turn up evidence, and when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." Moreover, there is no warrant requirement for school searches.

Important constitutional values are incorporated in our notions of procedural fairness. GOSS V. LOPEZ (1975) held that state-created entitlements to a public education are protected by the due process clause of the Fourteenth Amendment; thus, the right to attend school may not be withdrawn on the ground of misconduct, absent fair procedures for determining whether the misconduct has occurred. However, having decided that some process is due, the procedural requirements in the school environment are minimal. In the case of a ten-day suspension of a student for disciplinary reasons, *Goss* required only that the student be given notice of the charges and an opportunity to explain his or her version of the story. Immediate removal from school may be justified in some cases even before the hearing. The hearing itself may simply be a brief meeting between the student and the administrator minutes after the alleged transgression. More stringent safeguards, however, may be required for deprivations of education significantly longer than the ten-day period involved in *Goss.* Just two years after *Goss*, the Court held, in INGRAHAM V. WRIGHT (1977), that although the administration of corporal punishment for violating school rules implicated a constitutionally protected liberty interest, "the traditional COMMON LAW remedies were fully adequate to afford due process." Thus, no advance procedural safeguards were constitutionally required. Because, according to the Supreme Court in BOARD OF CURATORS V. HOROWITZ (1978), academic grades and evaluations typically involve more subjective and evaluative judgments than do disciplinary decisions, the determination of "what process is due" turns on whether the disputed action is deemed to be academic or disciplinary in nature.

Yet another constitutional constraint on the public schools is embodied in the Fourteenth Amendment's EQUAL PROTECTION clause. The assertion of an entitlement to a minimum educational opportunity, to equal access to the schooling process, or to a specified educational outcome seeks to impose an affirmative obligation upon public schools. The most fully matured and litigated definition of equal educational opportunity is the right of minority students to be free of RACIAL DISCRIMINATION. The principal issues have concerned the requirements for finding that the Constitution has been violated, and the scope of the remedy once a constitutional violation has been established. The courts have held that intentional actions of school authorities constitute de jure SEGREGATION and, in some cases, that intent to segregate can be inferred from

actions that have the foreseeable effect of fostering segregation. The courts have also held that the lapse of time between past acts and present segregation does not alone eliminate the presumption of causation and intent. Courts have also coped with the question whether RACIAL QUOTAS or AFFIRMATIVE ACTION to assist minorities who have been handicapped by past discrimination are unconstitutional, what are permissible remedial techniques (such as zoning, pairing of schools, or SCHOOL BUSING), when a systemwide remedy is permissible and what proof is required before a systemwide remedy can be ordered, and whether a court may require that school district boundaries be reorganized in order to devise an effective remedy.

Some students seeking equal educational opportunity are asserting a right to be free of dicrimination on the basis of gender. However, most of the case law has developed under Title IX of the EDUCATION AMENDMENTS OF 1972 and its implementing regulations, and few of these cases have been decided on constitutional grounds.

In CRAIG V. BOREN (1976) the Supreme Court indicated that gender would not be treated as a SUSPECT CLASSIFICATION as is race, but as a category requiring an intermediate level of judicial scrutiny. Thus, a gender classification must serve important governmental objectives and must be substantially related to the achievement of those objectives before it can be upheld. MISSISSIPPI UNIVERSITY FOR WOMEN V. HOGAN (1982), involving the exclusion of males from MUW's School of Nursing, held that the state had failed to meet this standard. The state had argued that its single-sex admissions policy was designed to compensate for discrimination against women, but was unable to show that women had suffered discrimination in the field of nursing. For the majority, not only was the policy excluding males from the School of Nursing not compensatory, it tended "to perpetuate the stereotyped view of nursing as an exclusively women's job." The state also failed to show that the gender-based classification was substantially related to its purported compensatory objective. SEPARATE BUT EQUAL educational offerings, if truly equal, and policies that are truly compensatory may still be constitutionally permitted in the case of gender.

Equal educational opportunity has sometimes been defined in terms of financial resources. The school finance reform movement of the early 1970s concerned inequalities in educational resources among school districts within a state. The issue in those cases was whether such inequalities were constitutionally impermissible. In SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ (1973) the Supreme Court held that because Texas's school finance system neither employed a SUSPECT CLASSIFICATION nor touched on a fundamental interest, the financing scheme must be assessed in terms of the RATIONAL BASIS standard of review. The Supreme Court's opinion distinguished differences among school districts from a state "financing system that occasioned an absolute denial of educational opportunities to any of its children." Those statements raise two related questions: First, under what circumstances, if any, is exclusion of a class of children from public schools constitutionally justifiable? Second, if absolute deprivation of an education is unconstitutional, can this principle be extended to certain children who, although attending public schools, are "functionally excluded?" PLYLER V. DOE (1982) raised the first question and LAU V. NICHOLS (1974) the second.

In *Plyler v. Doe* the Court held invalid a state statute that permitted school districts to bar illegal alien children from public schooling. *Lau v. Nichols* involved non-English-speaking children who, even though they had the same access as other children to teachers and books, were "functionally excluded" because they could not understand what went on in the classroom where only English was spoken. The Court struck down this "functional exclusion" of students on statutory grounds.

Although students with limited English proficiency and handicapped students, like minorities or women generally, have sought equal treatment with respect to educational offerings, in some circumstances they have sought to impose affirmative duties on government to remove barriers to their opportunity to obtain an equal education—barriers that were not of the government's making. If they do not receive special treatment, the argument goes, they do not have an opportunity equal to that of others to take advantage of the education the government offers to all. The Supreme Court has not yet held that this latter approach to equal educational opportunity, focusing on an affirmative duty to provide special, additional services for certain groups, is constitutionally dictated; the only cases to come before the Court have been decided on statutory grounds.

CLEBURNE V. CLEBURNE LIVING CENTER, INC. (1985) suggested in OBITER DICTUM that the handicapped are entitled only to application of the rational relationship standard to their equal protection claims. However, now that *Plyler v. Doe* has recognized the importance of education, perhaps the handicapped will receive some special solicitude for their claims to education. On the other hand, *Plyler v. Doe* involved the total exclusion of undocumented alien children from public schooling. Even in *Rodriguez*, the Court suggested that the total deprivation of education might be constitutionally impermissible. Thus, arguably, the total exclusion—or perhaps even the functional exclusion—of handicapped children from education would be unconstitutional, but there would be no constitutional violation in a state's failure to provide the special treatment and additional educational resources needed to bring them to the same starting line as other children.

Since Americans view education as of utmost importance to the maintenance of both their political and their economic systems, as well as to the well-being of the individual and his or her family, schooling is compulsory. The school is, on the one hand, the agency of government closest to the day-to-day lives of people and, on the other hand, the most inherently coercive. Thus courts have been concerned with the appropriate balance between individual liberties and societal interests as well as equal access to an education.

BETSY LEVIN
(1986)

Bibliography

GOLDSTEIN, STEPHEN R. 1976 The Asserted Constitutional Right of Public School Teachers to Determine What They Teach. *University of Pennsylvania Law Review* 124:1293–1357.

HIRSCHOFF, JON 1977 Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction? *Southern California Law Review* 50:871–959.

LEVIN, BETSY 1977 Current Trends in School Finance Reform Litigation. *Duke Law Journal* 1977:1099–1137.

VAN ALSTYNE, WILLIAM W. 1970 The Constitutional Rights of Teachers and Professors. *Duke Law Journal* 1970:841–879.

YUDOF, MARK G.; KIRP, DAVID L.; VAN GEEL, TYLL; and LEVIN, BETSY 1982 *Educational Policy and the Law*. Berkeley, Calif.: McCutchan.

## EDUCATION AND THE CONSTITUTION
(Update)

Although the first compulsory attendance law was enacted in Massachusetts in 1852, public and private education were almost exclusively governed by state constitutional provisions and statutes until the 1920s. In three landmark constitutional decisions from 1923 to 1927—MEYER V. NEBRASKA (1923), PIERCE V. SOCIETY OF SISTERS (1925), and *Farrington v. Tokushige* (1927)—the Supreme Court affirmed the authority of the states to compel attendance at public or private schools. In so doing, however, it declared that the states may neither abolish private education nor regulate it so severely that private schools are effectively turned into public schools.

The "Pierce compromise," which recognized the role of the state in compelling school attendance, but preserved private alternatives, was premised on the economic rights of private schools, the recognition that there are constitutional limits on the states' legitimate authority to inculcate particular values and attitudes in children, and on natural law theories of the rights of parents to direct the upbringing of their children. Put somewhat differently, parents may choose to supplement the basic education provided by the state by relying on private schools, but governments have no constitutional obligation to pay for private education. Parents may choose a private school that reflects their religious, educational, and other values, but the state has the authority to regulate those schools reasonably to accomplish its legitimate socialization and citizenship objectives.

*Meyer* and its progeny have never been overruled by the Supreme Court, despite their reliance on now repudiated notions of SUBSTANTIVE DUE PROCESS in the economic sphere, and they provide the foundation for all subsequent constitutional decisions in the education field. Only one narrow constitutional exception to compulsory attendance has been fashioned, in WISCONSIN V. YODER (1972), and this exception was for Amish students claiming that modern public high schools undermined their religious faith and practices. Furthermore, state courts, under federal and state constitutional provisions, have restrained state authorities from too closely constraining the operation of private religious schools.

Some modern commentators, however, believe that the "Pierce compromise" would rest more comfortably on FIRST AMENDMENT grounds. The idea is that a state monopoly over elementary and secondary education would imperil democratic values as government agencies sought to establish an ideological conformity that would jeopardize the rights of adult citizens to formulate and express their own points of view, particularly with respect to matters of public policy. The underlying assumption is that indoctrination by the state may be as dangerous to freedom of expression as direct government censorship of what speakers may say.

The theme of *Meyer* and *Pierce* was carried forward in *West Virginia Board of Education v. Barnette*, decided by the Court in 1943. A majority of the Justices held that West Virginia could not constitutionally require its students to salute the American flag in violation of their personal beliefs. Justice ROBERT H. JACKSON did not challenge the notion that public schools may seek to inculcate patriotic values, but he held that the compelled expression of belief was an unconstitutional means of achieving that end. Although the case involved Jehovah's Witnesses, the decision rested on the students' freedom of expression, not their right of free exercise of religion. AMBACH V. NORWICK (1979) reinforces the view that the key factual element in *Barnette* was the coerced declaration of belief. In *Ambach*, the Court held that a state may prefer American citizens to resident aliens in selecting teachers on the theory that citizens are more knowledgeable and effective in communicating American cultural and political values.

Two decades after *Barnette*, the Court, acting under the

ESTABLISHMENT CLAUSE of the First Amendment, declared in ENGEL V. VITALE (1962) and ABINGTON TOWNSHIP SCHOOL DISTRICT V. SCHEMPP (1963) that the states and school districts may not require or sponsor SCHOOL PRAYER. The Court, evidencing some skepticism as to whether such prayers ever might be genuinely voluntary, completely abolished sponsored prayer in public schools, even for students wishing to engage in such prayer. In effect, the Court treated the ban on establishing religion as a substantive limit on governmental expression in public schools. In reaching this result, the Court was at pains to distinguish between ritual indoctrination of religion and the study of religion as an academic subject.

But in the years after WORLD WAR II, the major concern of the federal courts was less the need to cabin state indoctrination than it was to vindicate the rights of African Americans and other groups to an equal educational opportunity. The landmark decision, of course, was BROWN V. BOARD OF EDUCATION OF TOPEKA, a 1954 decision in which a unanimous Supreme Court declared that segregation of students by race in public schools violated the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT. *Brown* was elaborated on in a series of decisions—including GREEN V. COUNTY SCHOOL BOARD OF NEW KENT (1969), SWANN V. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION (1971), KEYES V. SCHOOL DISTRICT NO. 1 OF DENVER (1973), MILLIKEN V. BRADLEY (1974), and *Board of Education of Oklahoma City Public Schools v. Dowell* (1991)—seeking to define unlawful SEGREGATION, to establish the legal framework for remedying past RACIAL DISCRIMINATION (including the constitutionality of continuing to rely on neighborhood assignment of pupils), to pass on the appropriateness of interdistrict remedies, and to define when a "unitary" or nondiscriminatory school system had been established. Much of the debate centered on what affirmative steps a school district must take, including the busing of children to more remote schools to achieve a racial balance, once a constitutional violation has been proven.

In the 1960s and early 1970s, a number of groups sought to be included under the umbrella of *Brown*, urging that they had been victims of discrimination in the public schools. For example, handicapped students argued that they could not constitutionally be excluded from public schooling, students from poor families urged that the District of Columbia allocated less money to schools in the poorer neighborhoods, and Asian American students, in LAU V. NICHOLS (1974), alleged that the absence of special instruction in English for students with limited proficiency in English functionally excluded them from a public education in violation of the equal protection clause. These lawsuits met with varying degrees of success.

The era of equal educational opportunity in constitutional litigation largely came to an end in 1973 with the Supreme Court's ruling in SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ (1973). Texas relied extensively on local property taxes to support public education, and students from poor districts, with low property values, alleged that the resultant distribution of funds discriminated against them in violation of the equal protection clause. In this context, the Court held that education is not a fundamental interest under the Fourteenth Amendment. Unless a particular group was the object of a SUSPECT CLASSIFICATION (that is, historically disadvantaged groups such as African Americans), the Court would not apply a rigorous standard of review to relative denials of educational opportunity, but would uphold educational policies that "bear some rational relationship to legitimate state purposes." The Court concluded that the state's interest in local control of education constituted such a legitimate purpose and that local financing was a rational means of achieving it. After *Rodriquez*, and with few exceptions outside the realms of race and alienage (e.g., PLYLER V. DOE, 1982), equal educational opportunity claims were litigated under federal statutes enacted to protect particular classes of students (for example, the handicapped, students with limited English proficiency, and women) and under state constitutional provisions.

The modern era in constitutional litigation in the education field is dominated by the struggle for the hearts and minds of coming generations of citizens. The public schools have become the battlegrounds for essentially ideological wars. Under a variety of constitutional provisions, most notably the speech and religion clauses of the First Amendment, the Supreme Court has been asked to intervene to resolve disputes over Darwinism and creationism, fundamentalist Christianity and secularism, CONSERVATIVISM and LIBERALISM, and feminism and advocacy of traditional roles for women. In addressing these divisive and controversial issues, the Court has tended to focus on the motivation of school authorities. If they make curricular and other choices in good faith and if they seek to advance educational objectives, then the decision is virtually insulated from JUDICIAL REVIEW. If, in contrast, they act to suppress a political ideology or to indoctrinate religious values in children, then their actions may violate the First Amendment.

By way of example, under WALLACE V. JAFFREE (1985), moments of silence are permissible only if their purpose, in context, is not to advance religion. Similarly, according to *Edwards v. Aguillard* (1987), a state may not require that theories of the origin of Homo sapiens contrary to Darwinism be taught if the decision is motivated by religious concerns. And federal appellate courts have held in *Smith v. Board of School Commissioners* (1987) and *Mozert v. Hawkins County Board of Education* (1987) that an

emphasis on secular values in textbooks and courses is permissible so long as the impetus is not hostility toward religion.

The socialization perspective also yields insights into constitutional decisions involving students and teachers. In TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT (1969) the Supreme Court held that students may engage in expressive activity in public schools (wearing black armbands to protest the VIETNAM WAR) as long as their speech does not threaten a substantial disruption of or material interference with the schools' educational activities. In other words, students may not thwart the schools' ability to communicate, but subject to that caveat, they may express their personal points of view—even if they are inconsistent with those taken by school authorities, thereby reducing the schools' ability to indoctrinate students.

Under BETHEL SCHOOL DISTRICT V. FRASER (1986), *Tinker* is inapplicable to vulgar student expression because limits on such expression are appropriate to schools' educational mission. Furthermore, according to the Court's decision in HAZELWOOD SCHOOL DISTRICT V. KUHLMEIER (1988), *Tinker* protects only the personal speech of students. When they participate in curricular activities—for example, as staff members for a school newspaper organized as part of a journalism course—they must conform to reasonable school policies on the content of the publication. Finally, 0a majority of the Justices have stated in BOARD OF EDUCATION V. PICO (1982) that library books may be removed from a school library if the books are pedagogically unsuitable or vulgar; they may not be removed because the school board wishes to suppress an ideology with which it disagrees.

A similar analysis may be applied to the academic freedom of elementary and secondary school teachers. If a school district insists on educational grounds that teachers assign particular books, then their academic freedom in the classroom has not been violated, according to a Tenth Circuit decision in *Carey v. Board of Education* (598 F.2nd 535, 1979). If, however, there is a systematic effort to suppress a type of book in order to exclude particular ideas or ideologies, then the school authorities have invaded the academic freedom of the teachers. Thus, for example, it is one thing to exclude books on Russian history because no courses on Russian history are offered or resources are limited; it is quite another thing to do so because the books discuss Marxist ideas.

The current constitutional standard seeks to distinguish between indoctrination and education. It is questionable whether such a distinction can be applied by federal courts in a principled and predictable manner. Schools stress many values: students are told that racial discrimination, drug abuse, and murder are wrong; they are told that democratic participation, civility, and honesty are right. Thus, the source of the distinction between indoctrination and education may lie more in the nature of the values being promulgated than in the process of communication.

MARK G. YUDOF
(1992)

Bibliography

VAN GEEL, TYLL 1987 *The Court and American Education Law.* Buffalo, N.Y.: Prometheus Books.

YUDOF, MARK G. 1983 *When Government Speaks.* Berkeley: University of California Press.

——— 1984 The Quest for the Archimedean Point. *Indiana Law Journal* 59:527–564.

YUDOF, MARK G. et al. 1991 *Educational Policy and the Law,* 3rd ed. St. Paul, Minn.: West Publishing Co.

## EDUCATION OF HANDICAPPED CHILDREN ACTS

84 Stat. 175, 88 Stat. 579,
89 Stat. 773, 91 Stat. 230

Title VI of the Elementary and Secondary Education Amendments of 1970, the Education for All Handicapped Children Act of 1975 (EAHCA), and the Education of the Handicapped Amendments of 1974 and 1977 provide funds and a variety of federal programs to assist states in educating and training handicapped individuals. In states receiving federal educational assistance for handicapped children, the acts require a state policy assuring all handicapped children the right to a free appropriate public education, assuring private school education at no cost to parents if children are placed in private schools as the means of fulfilling state responsibilities under the acts, offering an individual educational plan for every handicapped child, and providing education with nonhandicapped children to the "maximum extent appropriate." The acts require substantial procedural safeguards to assure receipt of a free appropriate public education. EAHCA provides a private right of action, after exhaustion of administrative remedies, to compel compliance.

*Board of Education v. Rowley* (1982), the Supreme Court's first interpretation of EAHCA, held that the statutorily mandated "free appropriate public education" need not provide each child an opportunity to achieve her full potential. The statute mandates only an "adequate" education, one reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

THEODORE EISENBERG
(1986)

(SEE ALSO: *Disabilities, Rights of Persons With.*)

Bibliography

BURGDORF, ROBERT L., JR. 1980 *The Legal Rights of Handicapped Persons.* Pages 213–245. Baltimore: Paul H. Brookes.

## *EDWARDS v. AGUILLARD*

See: Creationism

## *EDWARDS v. ARIZONA*
451 U.S. 477 (1981)
## *OREGON v. BRADSHAW*
462 U.S. 1039 (1983)

In *Edwards*, involving application of the MIRANDA RULES, the Court held that when an accused has invoked his right to have counsel present during interrogation, he has not waived that right simply by responding to further POLICE INTERROGATION unless he himself initiated additional communication. In *Bradshaw* the defendant, who had been advised of his rights and had asked for an attorney, later initiated a conversation with an officer who reminded him that he had no obligation to speak to the police. The prisoner said he understood, continued talking, and confessed. A plurality of the Court decided that the conviction in *Bradshaw* involved no breach of the rule of *Edwards*, which was meant to prevent badgering by the police.

LEONARD W. LEVY
(1986)

## *EDWARDS v. CALIFORNIA*
314 U.S. 160 (1941)

The years of the Great Depression were especially harsh for residents of the Dust Bowl. Many migrated to the West, and particularly California, in conditions of poverty graphically detailed in John Steinbeck's novel, *The Grapes of Wrath* (1939). California's hospitality to this "huge influx of migrants" was reflected in its "Okie law," making it a MISDEMEANOR knowingly to assist an indigent person in entering the state. Edwards, a Californian, went to Texas and drove his indigent brother-in-law back to California. For his troubles, he was given a six-month suspended jail sentence for violating the Okie law.

The Supreme Court unanimously reversed the conviction. Justice JAMES F. BYRNES, for the Court, concluded that the law violated the COMMERCE CLAUSE. The state's concerns with health and the integrity of its welfare funds were insufficient to justify so severe a burden on INTERSTATE COMMERCE. Justice WILLIAM O. DOUGLAS, concurring, would have rested decision on the PRIVILEGES AND IMMUNITIES clause of the FOURTEENTH AMENDMENT. Interstate travel was a privilege of national CITIZENSHIP, and to deny that privilege to indigents would create an inferior class of citizens. Justices HUGO L. BLACK and FRANK MURPHY joined this opinion.

Justice ROBERT H. JACKSON, concurring, agreed with Justice Douglas but also remarked that indigence was "a neutral fact—constitutionally an irrelevance, like race, creed, or color."

KENNETH L. KARST
(1986)

(SEE ALSO: *Equal Protection of the Laws; Wealth Discrimination.*)

# EFFECTS ON COMMERCE

"At the beginning Chief Justice [JOHN] MARSHALL described the federal commerce power with a breadth never yet exceeded." So said Justice ROBERT H. JACKSON for a unanimous Supreme Court in WICKARD V. FILBURN (1946), in the course of an opinion recognizing the broad sweep of Congress's modern power to regulate the national economy under the COMMERCE CLAUSE. Marshall's opinion in GIBBONS V. OGDEN (1824) read that clause's reference to commerce "among the several States" to mean "that commerce which concerns more States than one."

For the Constitution's first century, however, Congress did little to regulate INTERSTATE COMMERCE. The first major national regulatory laws were the INTERSTATE COMMERCE ACT of 1887, regulating railroads, and the SHERMAN ANTITRUST ACT of 1890. It fell to another Supreme Court to define the scope of congressional power, and at first the Court's definition was narrow. In UNITED STATES V. E. C. KNIGHT CO. (1895) the Court interpreted the Sherman Act, which prohibited monopolizing "any part of the trade or commerce among the several States," to exclude from its coverage a monopoly of sugar refining. Manufacturing was not commerce, said the Court; that "commerce might be indirectly affected" by a manufacturing combination producing ninety-eight percent of the nation's refined sugar was insufficient to bring the combination under the act's terms.

"Direct" effects on commerce, however, were found in a series of Sherman Act cases culminating in SWIFT & CO. V. UNITED STATES (1905). (See also STAFFORD V. WALLACE.) Yet the Court persisted in its assertion that manufacturing was not commerce, even to the extent of holding in HAMMER V. DAGENHART (1918) that a congressional regulation of the interstate transportation of goods made by child labor was invalid because its purpose was to regulate manufacturing.

Meanwhile, the Court was developing quite another view of congressional power to regulate railroads. In *Houston, East and West Texas Railway Co. v. United States*, the "Shreveport case" (1914), the Court upheld an Interstate Commerce Commission order requiring a railroad to equalize certain interstate and intrastate rates. Such railroads were "common instrumentalities" of interstate and local commerce; the ICC was regulating only the relation between local and interstate rates. Taken seriously, the SHREVEPORT DOCTRINE implies congressional power to regulate intrastate activity because of its effect on interstate commerce.

After two decades of resisting the implications of the Shreveport case, the Court returned to its logic in *National Labor Relations Board v. Jones & Laughlin Steel Corporation* (1937), the most important judicial victory for FRANKLIN ROOSEVELT'S NEW DEAL. There the Court upheld the WAGNER ACT's regulation of collective bargaining in application to a large steel manufacturer that obtained its raw materials in interstate commerce, manufactured steel in Pennsylvania, and shipped finished products to many other states. The opinion was written by Chief Justice CHARLES EVANS HUGHES, who had written the Shreveport case's opinion. A strike by manufacturing employees, said Hughes, would "directly" obstruct interstate commerce. "It is the effect upon commerce, not the source of the injury, which is the criterion."

In every succeeding case, the Supreme Court has applied this "effects on commerce" rationale to sustain congressional power. WICKARD V. FILBURN was the culminating case of ECONOMIC REGULATION, upholding congressional control of a small farmer's on-the-farm consumption of wheat, on the theory that Congress had a RATIONAL BASIS for believing that the aggregate of all such farmers' consumption would have "a substantial economic effect" on commerce. More recently the Court has employed similar reasoning to sustain congressional regulations aimed at distinctly noneconomic purposes. (See PEREZ V. UNITED STATES, extortion through "loan sharking"; HEART OF ATLANTA MOTEL V. UNITED STATES, racial segregation). Today, the "effects on commerce" rationale effectively allows Congress to be the judge of its own commerce clause powers.

KENNETH L. KARST
(1986)

Bibliography

STERN, ROBERT L. 1946 The Commerce Clause and the National Economy, 1933–1946. *Harvard Law Review* 59:645–693, 883–947.

## *EICHMAN, UNITED STATES v.*

See: Flag Desecration

## EIGHTEENTH AMENDMENT

The Eighteenth Amendment was framed and adopted to give a peacetime constitutional basis to the national PROHIBITION of alcoholic beverages, originally imposed as a war measure. Congress proposed the amendment in December 1917, and ratification was completed thirteen months later. Congress adopted the National Prohibition Act (VOLSTEAD ACT) to provide a mechanism for enforcement and penalties for violation of the prohibition.

The prohibition amendment provided the occasion for several controversies about the character and extent of the amending power. In Ohio, for example, the voters, by REFERENDUM, attempted to rescind their legislature's ratification of the amendment; but the Supreme Court held that procedure unconstitutional in *Hawke v. Smith* (1920). The Court, in the *National Prohibition Cases* (1920), rejected a number of arguments that the amendment was itself unconstitutional because of purported inherent limitations on the AMENDING POWER, including the contention that ordinary legislation cannot be made part of the Constitution and the assertion that the Constitution cannot be amended so as to diminish the residual SOVEREIGNTY of the states. In the same case the Court held that the requirement of a two-thirds vote in each house to propose amendments was met by the vote of two-thirds of the members present and voting and that amendments automatically become part of the Constitution when ratified by three-fourths of the states, whether or not promulgated by Congress or the secretary of state. In *United States v. Sprague* (1931) the Court rejected the argument that the amendment should have been ratified by state conventions rather than by state legislatures, holding that the mode of RATIFICATION OF CONSTITUTIONAL AMENDMENTS was a matter of congressional discretion.

Prohibition, a product of the reforming impulse that characterized PROGRESSIVE CONSTITUTIONAL THOUGHT, proved very difficult to enforce; and the widespread disregard of federal law scarcely tended toward that moral improvement that the authors intended. In 1933, the Eighteenth Amendment became the only constitutional amendment ever to be wholly rescinded when it was repealed by passage of the TWENTY-FIRST AMENDMENT.

DENNIS J. MAHONEY
(1986)

## EIGHTH AMENDMENT

See: Bail; Capital Punishment; Cruel and Unusual Punishment; Punitive Damages

## EISENHOWER, DWIGHT D.
(1890–1969)

The nation has often rewarded its military heroes by electing them to the presidency. General of the Army Dwight David Eisenhower, who had commanded the Allied forces in Europe during WORLD WAR II, was President from 1953 to 1961. A 1915 graduate of West Point, Eisenhower held no public office—except his military command—before being elected President.

Eisenhower was a "moderate" Republican: conservative on economic matters but often liberal on social issues. Although he privately expressed to Chief Justice EARL WARREN his disapproval of BROWN V. BOARD OF EDUCATION (1954), he proposed, and successfully pressed for passage of, the CIVIL RIGHTS ACTS OF 1957 and 1960, the first such acts since Reconstruction. They expanded VOTING RIGHTS and created the CIVIL RIGHTS COMMISSION. In 1957, when the governor of Arkansas resisted a federal court's SCHOOL DESEGREGATION order (see COOPER V. AARON), the Eisenhower administration obtained an INJUNCTION forbidding the use of the National Guard to prevent INTEGRATION. When anti-integration rioting broke out in Little Rock, and the local authorities proved unable or unwilling to suppress it, Eisenhower ordered regular federal troops to the city.

Perhaps because of his military background Eisenhower was more cautious than some Presidents in exercising his power as COMMANDER-IN-CHIEF. He brought the KOREAN WAR to an end and, thereafter, no American troops were actively engaged in combat during his administration. When Chinese communists bombarded the Nationalist-held islands of Quemoy and Matsu, Eisenhower sought, and obtained, a JOINT RESOLUTION of Congress authorizing American military action, if necessary. In 1958, again authorized by congressional resolution, he ordered Marines to Lebanon to maintain order, but they did no actual fighting.

In foreign affairs, Eisenhower's was an activist administration. During the Eisenhower presidency the mutual defense treaty with Nationalist China and the Southeast Asia (SEATO) Treaty were signed, each committing the United States to the defense of distant—and not necessarily democratic—countries. Under the SEATO pact Eisenhower in 1954 began the American policy of assistance to South Vietnam that continued through the VIETNAM WAR (1965–1973). Eisenhower supported the United Nations campaign of "anticolonialism," opposing America's European allies in Suez and Africa.

Domestically, Eisenhower was criticized for not speaking out forcefully against Senator Joseph R. McCarthy of Wisconsin, whose inquiries into communist influence in government threatened CIVIL LIBERTIES and often involved GUILT BY ASSOCIATION. Eisenhower promulgated EXECUTIVE ORDER 10450, which revamped the existing LOYALTY-SECURITY PROGRAM for federal employees.

During his two terms in the White House Eisenhower suffered three serious illnesses and was, for a time, virtually incapacitated. During those periods, Vice-President RICHARD M. NIXON presided over the cabinet and the National Security Council while routine matters were handled by a powerful White House staff. Eisenhower's illnesses raised questions about PRESIDENTIAL SUCCESSION in case of disability that were not resolved until passage of the TWENTY-FIFTH AMENDMENT.

Eisenhower made four APPOINTMENTS OF SUPREME COURT JUSTICES: Chief Justice EARL WARREN (1953) and Associate Justices JOHN MARSHALL HARLAN (1955), WILLIAM J. BRENNAN (1956), and CHARLES E. WHITTAKER (1957). Ironically, the moderate conservative Eisenhower made his most lasting mark on American constitutional history by appointing Justices who turned the Court toward liberal activism.

DENNIS J. MAHONEY
(1986)

Bibliography

GREENSTEIN, FRED I. 1982 *The Hidden Hand Presidency: Eisenhower as Leader.* New York: Basic Books.

## *EISENSTADT v. BAIRD*
405 U.S. 438 (1972)

At a BIRTH CONTROL lecture, Baird gave contraceptive foam to a woman presumed to be unmarried. Convicted in a Massachusetts court for distributing a contraceptive device, Baird sought federal HABEAS CORPUS. On appeal the Supreme Court, 6–1, held the conviction unconstitutional. Four Justices, concluding that GRISWOLD V. CONNECTICUT (1965) would bar prosecution for distribution of contraceptives to married persons, held that the EQUAL PROTECTION clause forbade the state to outlaw their distribution to the unmarried. Two Justices relied on *Griswold* alone, saying the record had not shown the recipient to be unmarried. Chief Justice WARREN BURGER dissented.

KENNETH L. KARST
(1986)

(SEE ALSO: *Freedom of Intimate Association; Right of Privacy.*)

## *EISNER v. MACOMBER*
252 U.S. 189 (1920)

A 5–4 Supreme Court declared that stock dividends did not constitute income subject to taxation under the SIX-

TEENTH AMENDMENT. Justice MAHLON PITNEY agreed that dividends were a "mere readjustment of the evidence of a capital interest already owned." Justices OLIVER WENDELL HOLMES, WILLIAM R. DAY, and JOHN H. CLARKE joined the DISSENTING OPINION of LOUIS D. BRANDEIS, who argued that the dividends represented profit (and thus income) and that the power conferred by the amendment ought to be measured by "the substance of the transaction, not its form." The Court subsequently narrowed the DOCTRINE of *Eisner* through a series of exquisite distinctions.

DAVID GORDON
(1986)

## ELASTIC CLAUSE

See: Necessary and Proper Clause

## ELECTED JUDICIARY

Federal judges are appointed by the President, with the advice and consent of the Senate. Appointment is for life. Although there was substantial disagreement among the delegates to the CONSTITUTIONAL CONVENTION OF 1787 about how to select judges, ALEXANDER HAMILTON's proposal for lifetime presidential appointments ultimately prevailed and has remained intact for two centuries.

This system was not without its critics, however. Chief among them was THOMAS JEFFERSON, who argued that the independence of the judiciary should be subject to the people's will. While President, Jefferson urged that federal judges should be removed from office upon the recommendation of Congress to the President. In his old age, Jefferson expressed regret that the Constitution did not provide for the removal of judges on a simple majority vote of the legislature, the branch most responsive to the public will. Many historians have attributed Jefferson's antipathy toward the judiciary to his personal animosity toward his distant cousin, Chief Justice JOHN MARSHALL.

Initially, the states also established appointive systems for the selection of judges. Five states entrusted the appointive power to the governor, and eight vested the appointive power in one or both houses of the legislature. To this day, the legislature selects most judges in Connecticut, South Carolina, and Virginia, and state supreme court justices are elected by the legislature in Rhode Island.

Gradually, however, states began adopting systems by which judges were popularly elected. Public perception that property owners controlled the judiciary led to reform, initially at the lower trial court levels. In 1832, Mississippi became the first state in which all judges were popularly elected. An electoral system was adopted in New York at the New York Constitutional Convention of 1846. By the time the CIVIL WAR began, twenty-four of the thirty-four states had established elected judiciaries. Newly admitted states all adopted popular election for most judges.

Disenchantment with the popular election of judges grew during the latter half of the nineteenth century. Judicial candidates were invariably selected by political machines, which typically controlled them after their election. Judicial corruption and incompetence became commonplace. In 1906, in his classic address on the "Causes of Popular Dissatisfaction with the Administration of Justice," ROSCOE POUND claimed that "putting courts into politics, and compelling judges to become politicians in many JURISDICTIONS . . . has almost destroyed the traditional respect for the bench." By the turn of the century, several states converted their judicial elections into nonpartisan races. Today, nonpartisan elections are used to select most or all judges in seventeen states. Only thirteen states still utilize partisan elections to select most or all judges.

A return to the appointive system, utilizing a commission to make nominations, was endorsed by the American Bar Association in 1937. Three years later, Missouri became the first state to adopt this scheme, since known as the Missouri Plan. Thirty-one states now use some variation of the plan for selection of at least some of their judges. In many of these states, the appointment is not for life, however. The judge serves a limited term and must face the voters in a retention election. Normally, retention elections are uncontested. In 1986, however, a well-financed campaign against the retention of three justices of the state supreme court in California succeeded in removing them from the court.

The rising cost of election campaigns for judicial offices has led to increasing concerns about the propriety of campaign fund-raising by judges. In many states, million-dollar campaigns for state supreme court seats represent the largest share of judicial campaign expenditures and large corporations are major contributors to the campaigns. In 1986, for example, five justices of the Texas Supreme Court received $387,700 in campaign contributions from Texaco and Pennzoil while a lawsuit between them was pending before the court.

Unfortunately, the debate between proponents of judicial independence and those who exalt judicial accountability frequently masks a hidden agenda. Thus, in one era, those with a liberal agenda decry the entrenched power of a conservative judiciary; in another era, liberal judges are defended with fervent loyalty to the concept of judicial independence.

At a time when political campaigns have been reduced to raising large campaign chests to finance blizzards of

fifteen-second television commercials, however, the wisdom of subjecting judges to election contests must be seriously questioned. In political campaigns the complex issues being decided by judges tend to be oversimplified. Frequently, an emotional issue such as CAPITAL PUNISHMENT or ABORTION becomes the campaign's focal point. The risk becomes substantial that judicial outcomes will become simple reflections of the prevailing political winds. The death penalty offers a startling example. The three justices removed from the California Supreme Court in 1986 were subjected to a bitter campaign that characterized voting for their removal as "three votes for the death penalty." After they were replaced, the affirmance rate in review of death penalty judgments jumped from 7.8 percent to 71.8 percent, with very few precedents being overtly overruled. Nationally, there is a close correlation between the method of selection of justices of a state supreme court and that court's affirmance rate in death penalty appeals. For the period 1977–1987, death penalty affirmance rates varied among state supreme courts according to manner of judicial selection as follows:

| | |
|---|---|
| Executive appointment: | 26.3% |
| Uncontested retention elections: | 55.3% |
| Nonpartisan contested elections: | 62.9% |
| Partisan contested elections: | 62.5% |
| Legislative appointments: | 63.7% |

The dependence of judges upon traditional sources of campaign funds also raises serious questions about their ability to remain impartial when their campaign supporters appear as litigants or lawyers in cases before them. The Code of Judicial Conduct, adopted by the American Bar Association in 1972, does not require a judge to disqualify himself or herself if a campaign contributor is a party to a case.

Often when lawyers have a choice of filing a case in state or federal court, they opt for federal court because they have greater confidence the case will be decided by an impartial tribunal, unaffected by the vagaries of local politics. Even the most conscientious state judges have expressed discomfort with the prospect of campaigning for reelection and with that prospect's subliminal impact upon their decision-making process. As California Supreme Court Justice Otto Kaus put it, "It's hard to ignore a crocodile in your bathtub."

Although many of those appointed to the state and federal benches are politicians before they get there, the goal should be to permit them to cease political activity once they put on their robes. At the federal level, that goal has been largely achieved. At the state level, however, it does not appear that an elected judiciary can be insulated from the corrupting influence of campaign fund-raising. A 1971 report of the American Bar Association concluded, "There is no harm in turning a politician into a judge. He may become a good judge. The curse of the elective system is that it turns every elected judge into a politician."

GERALD F. UELMEN
(1992)

Bibliography

BERKSON, LARRY et al. 1981 *Judicial Selection in the United States: A Compendium of Provisions.* Chicago: American Judicature Society.

DUBOIS, PHILLIP L. 1980 *From Ballot to Bench: Judicial Elections and the Quest for Accountability.* Austin: University of Texas Press.

## ELECTION FINANCE

See: Campaign Finance

## ELECTIONS, REGULATION OF

Defining "democracy," Henry B. Mayo has argued that the "one institutional embodiment . . . universally regarded as indispensable in modern democracies is that of choosing the policy-makers [representatives] at elections held at more or less regular intervals." In addition to their central democratic function of providing a mechanism for popular choice of officials, parties, and policies, elections have also been credited with two other important democratic functions: offering a forum for public participation and education in politics; and legitimizing the state's coercive authority and peacefully resolving social conflicts, because the public will generally accept officials and policies selected through fair, participative processes.

The Constitution, by its terms, mandates elections only for members of the House of Representatives and of the Senate. Article I, section 2, provides that members of the House shall be elected by the people of the respective states, and the SEVENTEENTH AMENDMENT provides similarly for senators. Persons meeting the qualifications necessary to vote for members of the larger house of the legislature in each state are constitutionally eligible to vote for representatives and senators. The Supreme Court, in WESBERRY V. SANDERS (1964), held also that "as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." Subsequently, the Court has reaffirmed, in *Kirkpatrick v. Preisler* (1969), that in drawing congressional district boundaries states must "make a good-faith effort to achieve precise mathematical equality."

Characterizing its previous decisions, the Supreme Court, in *Rivera-Rodriguez v. Popular Democratic Party* (1982), said that it has "rejected claims that the Consti-

tution compels a fixed method of choosing state or local officers or representatives." The guarantee clause of Article IV, section 4, has been construed to raise only POLITICAL QUESTIONS within the exclusive jurisdiction of Congress and does not, therefore, make state methods for selecting officials subject to constitutional adjudication in the federal courts. Nonetheless, every state employs popular elections to select presidential electors and its governor and legislature. Other state executive, administrative, and judicial officials, and all manner of local officials are also elected. In all, about 540,000 federal, state, and local offices are filled by election. In addition, the prevailing method of selecting political party nominees and of choosing final contenders in nonpartisan elections is the primary election.

Thirty-seven states provide for popular review of policymaking by the use of referenda, and twenty-one states allow popular instigation of policy through initiative elections. Referendum elections are also widely used in local governments throughout the nation, especially to review tax levies and charter revisions; and initiative elections are available in some local jurisdictions.

Although the Constitution prescribes elections only for Congress, virtually all elections have gradually been constitutionalized and therefore in some degree nationalized. The FIFTEENTH AMENDMENT prohibits the states from impairing the franchise on the basis of race, color, or previous condition of servitude. The NINETEENTH AMENDMENT forbids discrimination in electoral qualification based on sex; and the TWENTY-FOURTH AMENDMENT prevents the states from imposing "any poll tax or other tax" as a condition of voting for a candidate for federal office. The TWENTY-SIXTH AMENDMENT effectively grants the right to vote to all eligible citizens at eighteen years of age.

In the modern era, the right to vote has been declared a "fundamental right" under the FOURTEENTH AMENDMENT, in REYNOLDS V. SIMS (1964), because it is "preservative of other basic civil and political rights." The Supreme Court has therefore declared, in KRAMER V. UNION FREE SCHOOL DISTRICT (1969) and HARPER V. VIRGINIA BOARD OF ELECTIONS (1966), that every classification defining the right to vote in elections must be subject to strict judicial scrutiny and can be sustained only by independent judicial examination which finds "important," "compelling," or "overriding" state interests justifying restrictions on voting rights.

Mayo has argued that elections effectively promote democracy only if two conditions obtain. First, there must be "political equality in which [each] person should have one vote . . . and each vote should count equally." Second, citizens must have the "freedom to oppose," consisting of "formal rules . . . of effective choice—secret ballot, freedom to run for office, and freedom to speak, assemble, and organize for political purposes." It is these conditions for effective elections that the Supreme Court has generally promoted by declaring the vote a fundamental right and by rejecting poll taxes, residence requirements of extended duration, race and sex qualifications, limits on campaign spending, wide deviations from the ONE PERSON, ONE VOTE principle, and impediments to candidacy that significantly narrow voters' choices.

DAVID ADAMANY
(1986)

(SEE ALSO: *Brown v. Socialist Workers '74 Campaign Committee.*)

Bibliography

MAYO, HENRY B. 1960 *An Introduction to Democratic Theory.* New York: Oxford University Press.

NOTE 1975 Developments in the Law—Elections. *Harvard Law Review* 88:1111–1339.

## ELECTORAL COLLEGE

The Electoral College was hurriedly improvised by the Framers to placate all factions, provide a mechanism for electing GEORGE WASHINGTON, and leave hard questions for the states to resolve after Washington's retirement. Yet it turned out, unexpectedly, to be the forming and sustaining mold of the American party system.

At conception, the College was partly democratic and responsive to the large states, partly aristocratic and answerable to small states. It was apportioned mostly by population, with a delegate for each congressman and senator, and a state could select its delegates in any way it pleased. The Framers seem to have expected that, after Washington, the delegates—acting deliberatively or as agents of state legislatures—would normally fail to muster a majority for one candidate, and that most elections would be settled in the House of Representatives, with one vote per state.

This happened only in 1824, when the House chose JOHN QUINCY ADAMS over ANDREW JACKSON, the frontrunner in popular and electoral votes. In 1800 the House also elected THOMAS JEFFERSON, who tied with his running mate AARON BURR in the Electoral College. This deadlock led to the adoption of the TWELFTH AMENDMENT, which separated the votes for President and vice-president and gave the College its essential modern written constitutional constraints.

In the same decades, the College acquired two powerful unwritten constraints: party control and unit vote. Party control originated in congressional nominating caucuses in 1796 and shifted to state and national nominating conventions during the 1830s. It ended the notion of unbound, deliberative delegates seeking "continental"

leadership. POLITICAL PARTIES, not delegates, did the deliberation.

The unit vote, chosen by all but one state by 1836, delivered each state's delegation as a unit to the winner of its popular vote. Unit voting already prevailed in the House and in most state elections, but the Electoral College gave it its widest leverage. It is kind to winners, hard on second parties, and almost prohibitive of third parties. It forces competition for shiftable votes, and it rewards inclusive, center-seeking, accommodational parties (and groups) while discouraging narrow, ideological, exclusive ones. Many scholars believe that the American two-party system has its roots in the unit vote and its taproot in the Electoral College.

The College has prompted two complaints, both largely, but not wholly, theoretical. It might elect as President an "unrepresentative" candidate who had won a minority of the popular vote or had been chosen deliberatively by "unfaithful" delegates, or who was chosen by a House manipulated by splinter groups. Or it might favor some voters against others: urban against rural, liberal against conservative, North against South, or large state against small. Yet we have had only two clear minority Presidents (RUTHERFORD B. HAYES and BENJAMIN HARRISON), one House-chosen President (John Quincy Adams), no Presidents chosen by the rare, unfaithful delegate, and no constitutional crisis over any of these contretemps.

The College was once thought to favor "pivotal" large-state over small-state voters, and hence urban, liberal over rural, conservative interests, but political change and closer analysis have qualified this impression. Liberals who defended the College in the 1950s fought unsuccessfully to abolish it, in favor of direct election, in the 1960s and 1970s.

Any of the major reform proposals—direct election, proportional representation by state, and election by congressional district—arguably would change outcomes of close elections. JOHN F. KENNEDY would have lost the 1960 election, with the same votes cast, under the proportional or district systems. But surely the same vote would not have been cast, for any alternative system would have changed voting and campaign strategies. The district system might have given more weight to rural voters, the direct or proportional systems to third parties. Changes in the party system in either case could have been profound.

These complexities may explain why Congress, which considers proposing an amendment to abolish the Electoral College after most close elections, has never actually done so. The Supreme Court has been likewise acquiescent, upholding state delegate allocations against all challenges and refusing, in *Delaware v. New York* (1966), to hear Delaware's complaint that New York voters had 2.3 times better odds of affecting the outcome of a presidential election.

WARD E. Y. ELLIOTT
(1986)

Bibliography

CEASER, JAMES W. 1979 *Presidential Selection: Theory and Development.* Princeton, N.J.: Princeton University Press.

ELLIOTT, WARD E. Y. 1975 *The Rise of Guardian Democracy: The Supreme Court's Role in Voting Rights Disputes, 1845–1969.* Cambridge, Mass.: Harvard University Press.

PIERCE, NEAL R. 1968 *The People's President: The Electoral College in American History and the Direct-Vote Alternative.* New York: Simon & Schuster.

## ELECTORAL DISTRICTING, I

The number of members to be elected to a given legislative body and the voting rule by which that body will be chosen are commonly laid down in statute. The United States, like most democratic nations of the world, elects representatives from geographically defined election districts. At issue are the election method, the criteria for drawing district lines (or GERRYMANDERING), specifying who will actually do the redistricting, and the nature of legal and/or administrative review of redistricting choices.

In the United States most elections are conducted under the rule that the candidate receiving the greatest number of votes will be chosen. Congressional elections now take place in single-member districts, but this practice has not always been uniform. Prior to 1842, the smaller states commonly elected members to Congress in at-large elections with entire states as the electorate. At both the state and local level, at-large and multimember district elections in areas of high minority concentration have come under increasing challenge as dilutive of minority voting rights as a result of litigation brought under the VOTING RIGHTS ACT OF 1965 (as Amended in 1982) or directly under the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT to the Constitution. Both the proportion of states using multimember districts for state legislative elections and the proportion of cities using at-large elections have declined over the past several decades.

In the overwhelming majority of states the legislative body itself is responsible for drawing new plans (usually after the decennial CENSUS). In most states the governor has VETO POWER over state and congressional plans. In some states, legislative or congressional districting is entrusted to nonpartisan or bipartisan commissions.

Many criteria have been proposed to guide districting in the United States and multiple and potentially conflicting "reasonable" goals can be advocated for redistricting decisionmaking. The exercise of state redistricting au-

thority is subject to JUDICIAL REVIEW under federal standards involving Article I, section 2; the equal protection clause of the Fourteenth Amendment; the FIFTEENTH AMENDMENT; and the Voting Rights Act of 1965 (as amended); as well as by state courts acting exclusively in terms of state law issues. Until 1993, redistricting case law appeared to be a largely settled area, with no real changes from the 1980s to the 1990s apparent in terms of "ONE PERSON, ONE VOTE" or vote dilution standards. That situation changed dramatically when the Supreme Court decided SHAW V. RENO (1993) and its progeny and brought turmoil into the area of race-related districting.

It is convenient to divide proposed districting criteria into three categories: (1) formal (e.g., one person, one vote; compactness; contiguity), (2) racial, and (3) political. In the racial and political categories, we can usefully further distinguish between criteria that focus on intent and those that focus on the outcomes (or anticipated outcomes) of the redistricting process. It is also useful to differentiate different criteria for districting according to their legal derivations and legal force. In this analysis, "primary" criteria are mandated by the Constitution. "Secondary" criteria are those that derive explicitly from state constitutional provisions or from federal statutes. "Tertiary" criteria are those that, in a particular instance, derive their force from being implicitly embedded in state or local statute. "Supplementary" criteria, finally, are those that have no legal sanction in constitution or statute, whatever may be their moral force or the normative arguments in their favor.

Primary criteria must be satisfied by any redistricting plan. Lower-order criteria cannot, of course, override the primary criteria of the federal Constitution. It is important, however, to recognize that the status of any particular criterion as secondary, tertiary, or supplemental will vary with the particular legal context (e.g., from state to state, locality to locality). Moreover, the binding force of any particular criterion will vary with the nature of the constitutional or statutory language concerning its use. Some criteria may be lexicographically ordered. Some may be specified to apply only to the extent that they do not come into conflict with other criteria of higher or coordinate status.

The most important of the primary districting criteria is the one person, one vote standard derived from the Fourteenth Amendment (for state and local legislative bodies) and from Article I (for the U.S. HOUSE OF REPRESENTATIVES). The Court has taken a two-pronged approach to operationalizing the one person, one vote standard. For state and local bodies, plans where the maximum deviation from strict population equality is less than 10 percent are generally considered to be prima facie valid and some plans with even higher deviations have been approved. In contrast, for the U.S. House, one person, one vote has been interpreted to require that deviations be reduced to the greatest extent feasible, and this has led the Court to reject congressional plans with even minuscule population deviations.

Almost all academic commentators on the one person, one vote cases have expressed the view that a zero-deviation-tolerance standard for congressional districting makes no sense, given measurement errors in the underlying census data and the reality that the decennial U.S. census provides only a snapshot of a constantly changing population. Moreover, an undue insistence on numerical equality substantially interferes with the implementation of other districting criteria.

The next most important primary districting criterion is the equal protection standard for the REPRESENTATION of various types of minority groupings. This standard has been instantiated in different ways for different types of groups.

For POLITICAL PARTY supporters, the test laid down in *Davis v. Bandemer* (1986) seems to invalidate only virtual exclusion of a group from the political process and/or electoral success. However, there is considerable dispute as to how to interpret the *Bandemer* test. What can be said is that only one of the post-*Bandemer* challenges to plans as being unconstitutional partisan gerrymanders has proved successful, and the facts of that successful challenge are so unusual that it is hard to extrapolate from that case to others. Thus, for all intents and purposes, *Bandemer* appears not to be influential.

For racial groups (and certain other ethnic groups designated for special protection by the Voting Rights Act), at minimum, the equal protection standard requires that there be no "retrogression" in racial representation other than what would occur on the basis of demographic shifts in underlying populations.

In 1993, in *Shaw*, with further clarifications in subsequent cases such as MILLER V. JOHNSON (1995), the Court laid down a new constitutional test: plans may not use race as their predominant or exclusive criterion. We will need to wait until the post-2000 districting cases to see how the *Shaw* test is to be reconciled with the nonretrogression test and with the most important of the secondary redistricting criteria—the need to avoid "minimizing or canceling out the vote" of the racial and ethnic groups protected under the Voting Rights Act.

In states covered in whole or in part by section 5 of the Voting Rights Act, the Voting Rights Section of the Civil Rights Division of the U.S. Department of Justice (DOJ) must verify that proposed plans "do not have the purpose and will not have the effect of denying or abridging the right to vote." If DOJ is not convinced, it can deny preclearance, which voids the plan unless the DOJ decision

be reversed by the U.S. District Court for the District of Columbia—something that in the 1980s and 1990s almost never happened. In any districting situation, litigation can also be brought to challenge a plan as a "dilution" under the standards laid down in the 1982 amendments to section 2 of the Voting Rights Act as interpreted in *Thornburg v. Gingles* (1986).

Other secondary criteria may be embedded in state constitutions, such as language about contiguity and/or compactness of districts. Tertiary criteria may be found in a bill enacting a districting plan and stating the criteria that the proposed plan is supposed to have followed, such as respecting political subunit boundaries to the extent feasible or nonfragmentation of "communities of interest." Even when such criteria are not explicitly mentioned they may serve as a test for whether a plan is one in which race was not the sole or preponderant criterion. Other criteria, such as minimizing change from previous district lines, although not in any way mandated, have been held to be permissible by courts.

BERNARD GROFMAN
(2000)

(SEE ALSO: *Voting Rights.*)

Bibliography

DAVIDSON, CHANDLER and GROFMAN, BERNARD 1994 *The Quiet Revolution in the South: The Impact of the Voting Right Act, 1965–1990.* Princeton, N.J.: Princeton University Press.

GROFMAN, BERNARD 1983 "Criteria for Districting: A Social Science Perspective." *UCLA Law Review* 33:77–184.

GROFMAN, BERNARD, ed. 1990 *Political Gerrymandering and the Courts.* New York: Agathon Press.

GROFMAN, BERNARD; HANDLEY, LISA; and NIEMI, RICHARD 1992 *Minority Representation and the Quest for Voting Equality.* New York and London: Cambridge University Press.

## ELECTORAL DISTRICTING, II

The constitutional guidelines governing federal electoral districting require that federal representatives be apportioned among the states "according to their respective Numbers," that representatives not exceed one for every thirty thousand persons, that every state have at least one representative, and that federal district boundaries not cross state lines.

Originally, the Constitution made few demands on states in the conduct of their electoral districting practices and for good reason. As JAMES MADISON and ALEXANDER HAMILTON highlighted in THE FEDERALIST Nos. 52 and 59, electoral practices and procedures were highly political in nature, subject to a variety of considerations in every state, and would not lend themselves to a uniform rule of resolution. It made little sense to provide more than the minimum required in the constitutional text, because additional restrictions were impractical and arguably unnecessary. Hamilton added that had the Constitution introduced an authority in the federal government to regulate state elections, this would have been immediately denounced as an unwarranted transposition of power and a premeditated attempt to destroy state governments.

In the early 1960s, the Supreme Court ignored Hamilton's and Madison's admonitions—and perhaps the Constitution itself—imposing new and unparalleled restrictions on state and federal districting. The circumstances—disproportionate legislative districts that frequently imposed a rural stranglehold on state and congressional elections—may have justified judicial intervention. In BAKER V. CARR (1962), the Court ruled that REAPPORTIONMENT issues were no longer POLITICAL QUESTIONS best left to the political departments of government to resolve but could be reviewed by the judiciary for potential constitutional violations. One year later the Court established the ONE PERSON, ONE VOTE rule, and two years later the Court mandated equipopulous districts for congressional elections and for both houses of state legislatures.

The one person, one vote decisions raised a host of problems for electoral districting. First, how precise was the numerical equality required by the equipopulous districts requirement? In 1983 the ineluctable logic of one person, one vote was used by the Court to strike down a New Jersey congressional districting scheme in which the difference between the largest and smallest districts was less than 0.7 percent. Justice BYRON R. WHITE, dissenting, proclaimed that it suspended credulity to believe that such a trifling deviation from absolute population equality somehow detracted from "fair and effective" REPRESENTATION, the touchstone in reapportionment and redistricting cases. Yet the New Jersey ruling was consistent with the assumption throughout the reapportionment cases: that equal representation meant equally populated districts. Once this identification had been made, such exacting demands on population equality were the natural, if perhaps austere, consummation of the earlier reapportionment case law.

The one person, one vote rule formalized the reapportionment process, employing a standard that was easy to quantify but that failed to account for other factors that might create voting inequalities: the influence of POLITICAL PARTIES, money, and INTEREST GROUPS, in addition to GERRYMANDERING, multimember districts, and bloc voting. If voters had a right to effective representation, as the Court had declared in the reapportionment cases, was the Court not obliged to account for these electoral inequalities as well? This second problem evades resolution because it is impossible to distribute political power in such a way as

not to advantage or disadvantage one group while attempting to accommodate another.

In the context of racial and ethnic minorities, the courts and federal government have attempted to provide effective representation by generally mandating that jurisdictions dismantle multimember or at-large districts and create some majority-minority single-member districts. Again, the intractable nature of the politics of representation arises here, for it is by no means clear that minorities are more effectively represented when packed into districts in which minority-preferred candidates may be elected than when they are spread out through a number of districts in which their influence may be broader, even if their preferred candidates are not elected.

In the 1990s, the constitutional requirement of equipopulous districts, the sophisticated districting technology available, and the demand by the U.S. Department of Justice that states covered by the VOTING RIGHTS ACT OF 1965 create majority-minority districts in proportion to the minority populations in the jurisdictions covered, combined to create bizarrely shaped racially gerrymandered districts in a number of states. These districts were successfully challenged on EQUAL PROTECTION grounds in SHAW V. RENO (1993) AND ITS PROGENY, where the Court held that districts in which race was the predominant factor motivating the creation of their boundaries were unconstitutional.

Ironically, the equal protection clause from which the right to effective representation derived, a right incorporated into the Voting Rights Act, has now been used successfully to attack the very race-conscious districting that was intended to promote effective representation. The difficult question that courts and the other branches of government will have to resolve in the future is how to reconcile the now reasserted individual rights protected by the equal protection clause with the group or interest-based rights underlying effective representation.

ANTHONY A. PEACOCK

(2000)

Bibliography

CORTNER, RICHARD C. 1970 *The Apportionment Cases.* Knoxville:University of Tennessee Press.

ELLIOTT, WARD E. Y. 1974 *The Rise of Guardian Democracy: The Supreme Court's Role in Voting Rights Disputes, 1845–1969.* Cambridge, Mass.: Harvard University Press.

GROFMAN, BERNARD N. and DAVIDSON, CHANDLER, eds. 1992 *Controversies in Minority Voting: The Voting Rights Act in Perspective.* Washington, D.C.: The Brooking Institution.

PEACOCK, ANTHONY A., ed. 1997 *Affirmative Action and Representation:* Shaw v. Reno *and the Future of Voting Rights.* Durham, N.C.: Carolina Academic Press.

RUSH, MARK E. 1993 *Does Redistricting Make a Difference? Partisan Representation and Electoral Behavior.* Baltimore, Maryland: Johns Hopkins University Press.

SCHER, RICHARD K.; MILLS, JON L.; and HOTALING, JOHN J. 1996 *Voting Rights and Democracy: The Law and Politics of Districting.* Chicago: Nelson-Hall Publishers.

SWAIN, CAROL M. 1993 *Black Faces, Black Interests: The Representation of African Americans in Congress.* Cambridge, Mass.: Harvard University Press.

THERNSTROM, ABIGAIL M. 1987 *Whose Votes Count? Affirmative Action and Minority Voting Rights.* Cambridge, Mass.: Harvard University Press.

## ELECTORAL DISTRICTING, FAIRNESS, AND JUDICIAL REVIEW

Democratic governance requires that governors be accountable to the voters. As political thinkers from Condorcet to Kenneth Arrow have noted, however, the will of the voters can only be determined through institutional channels that imperfectly reflect the electorate's preferences. Those institutional channels are controlled by incumbent officials who, unfortunately, have every incentive to resist change that may threaten their sinecure. The Constitution responds to this problem only partially by requiring a population-based apportionment of the Congress every ten years, but saying little else about the mechanisms for selecting governors.

Even the limited apportionment constraint is not self-executing. For example, the 1920 CENSUS revealed that, for the first time, a majority of the population was found in urban areas and was concentrated in the manufacturing centers of the North and Midwest. The incumbent Congress simply refused to reapportion itself out of office and the constitutional command of REAPPORTIONMENT was disregarded for an entire decade. The same pattern was repeated in most states, despite comparable state constitutional commands for apportioning legislative seats. By the time of the reapportionment cases of the 1960s, disparities in the population base of state legislative districts exceeded 40 to 1.

In COLEGROVE V. GREEN (1946), Justice FELIX FRANKFURTER, writing for a plurality of the Supreme Court, forbade any judicial intervention lest the courts be dragged into the "political thicket" of apportionment. Despite the Court's invocation of institutional limitations, no other actor could address the maldistribution of political opportunity. The election of federal and state legislatures was contaminated by malapportionment and officials so elected saw no gain in disrupting a beneficial status quo. State courts proved as unresponsive as the Supreme Court, leaving underrepresented voters no channel through which to wrest back political power.

The stalemate ended abruptly with the landmark cases

of BAKER V. CARR (1962) and REYNOLDS V. SIMS (1964) which, in turn, rejected the POLITICAL QUESTION doctrine and announced the ONE PERSON, ONE VOTE rule of apportionment. Together with their companion cases of the early 1960s, *Baker* and *Reynolds* quickly undid the most visible and egregious affront to fair distribution of political opportunity. The sweep of these cases cannot be underestimated: the reapportionment cases were arguably the most far-reaching pronouncement of JUDICIAL REVIEW since the first enunciation of that power in MARBURY V. MADISON (1803). Within only a few years, the system of REPRESENTATION in virtually every state in the country had been radically overhauled under an exercise of judicial power that was as popularly accepted as it was effective.

While malapportionment was the visible target, the reapportionment cases introduced a more substantive concern with what *Reynolds* termed "the achieving of fair and effective representation for all citizens." The early reapportionment cases reveal a fundamental concern that control over the redistricting process could distort the outcomes of a legitimate electoral process. In the first blush of its reapportionment revolution, the Court entertained the idea that numerical equality could guarantee fundamental political fairness. Over the next two decades, that illusion fell victim to computer-driven GERRYMANDERING through which partisan aims could be achieved consistent with the equipopulation principle. The legacy of *Baker* and *Reynolds* was a readily JUSTICIABLE one person, one vote principle that served as a mild constraint on partisan distortions of the political process. The promise to deliver a broader conception of "political fairness" was largely unrealized.

The limits of that legacy were apparent in *Karcher v. Daggett* (1983), a clear partisan gerrymander of New Jersey that was, at bottom, faithful to the equipopulation principle. The Court refused to undertake a more searching inquiry into political fairness, and instead struck down the plan under an absolutist requirement of numerical exactness among districts—even though the population deviations involved were less than the margin of error of the underlying census numbers.

In *Davis v. Bandemer* (1986), the Court finally unmoored the issue of political fairness from numerical malapportionment by creating an independent constitutional cause of action for partisan gerrymandering. However, the Court's evidentiary standard of proving "consistent degradation" of political opportunity has proven impossible to meet in light of the limited number of elections available within the decennial redistricting cycle. Unlike *Baker*, whose Delphic musings were quickly followed by the easily applied one person, one vote standard of *Reynolds*, *Bandemer* has yielded no progeny capable of operationalizing its efforts to constrain excesses of partisan manipulation of the political process. The unenforceability of *Bandemer* stands in marked contrast to the more aggressive enforcement of the prohibition on racial gerrymandering under equally uncertain constitutional standards, as evidenced by SHAW V. RENO (1993) and its progeny.

The Court's elusive search for appropriate judicial review of political fairness hesitates between the need to police abuses in the political order and uncertainty over how to avoid unseemly judicial immersion in pure politics. So far, the Court has resisted the appeal of Justice JOHN PAUL STEVENS to a uniform albeit complex test for self-serving dealing that focuses on procedural irregularities and outward appearances of improper consideration. Perhaps inspired by the ready application of the equipopulation principle, the Court appears stuck awaiting the next appearance of an easily applied justiciable standard.

SAMUEL ISSACHAROFF

(2000)

Bibliography

ISSACHAROFF, SAMUEL 1993 Judging Politics: The Elusive Quest for Judicial Review of Political Fairness. *Texas Law Review* 71:1643–1703.

ISSACHAROFF, SAMUEL; KARLAN, PAMELA S.; and PILDES, RICHARD H. 1998 *The Law of Democracy.* New York: Foundation Press.

KARLAN, PAMELA S. 1996 Cousins' Kin: Justice Stevens and Voting Rights. *Rutgers Law Journal* 27:521–541.

KLARMAN, MICHAEL J. 1997 Majoritarian Judicial Review: The Entrenchment Problem. *Georgetown Law Review* 85:491–553.

## ELECTORAL PROCESS AND THE FIRST AMENDMENT

Prior to 1890, political activity in the United States was generally unregulated. By 1990, however, government regulation of the electoral process extended to CAMPAIGN FINANCE, BALLOT ACCESS, candidate speech, and regulation of POLITICAL PARTY affairs. This regulation is motivated by a variety of perceived problems, including negative campaigning and the influence of large campaign donors, and by the need for orderly elections.

Although the extent to which the FIRST AMENDMENT covers COMMERCIAL SPEECH or PORNOGRAPHY has long been a topic of debate, there has been virtually unanimous agreement that political speech and association is at the core of the First Amendment, and so entitled to the highest level of protection. Regulation of the electoral process, almost by definition, implicates this speech and association.

First Amendment problems are obvious when the state seeks to prohibit candidates who express certain views from running for office, as in *Communist Party v. Whitcomb* (1974), striking down a requirement that candidates

take a LOYALTY OATH, or when LEGISLATION directly limits political speech, as in *Mills v. Alabama* (1966), striking down a ban on election-day newspaper editorials. For similar reasons, proposals to ban negative campaign ads have been constitutional nonstarters.

However, electoral regulation can also raise less obvious First Amendment concerns. For example, the FREEDOM OF ASSOCIATION means little if the state refuses to grant a party a place on the ballot. Such regulation can be necessary to provide for orderly elections, but there is evidence, such as *Williams v. Rhodes* (1968), that these laws have also been used to reduce political competition and to prevent unpopular views from gaining a public hearing.

Rights of association can also be infringed by regulation of political parties' internal affairs. Parties are intimately woven into the electoral law of many states, yet remain voluntary, private associations, not state agencies. The Supreme Court has found it difficult to balance these roles, but in the 1980s and 1990s issued several decisions striking down, on freedom of association grounds, state efforts to regulate party affairs.

The clash between free speech and the regulatory impulse is most troublesome in the field of campaign finance. Large contributions to candidates raise concerns of both political equality and corruption. But, as the Court recognized in BUCKLEY V. VALEO (1976), limits on political contributions and spending have the effect of limiting political speech, and so can be justified only by the most COMPELLING STATE INTEREST.

Ultimately, efforts to curtail the influence of private spending on political campaigns may be futile. By the 1990s many politically active groups were bypassing candidates' campaigns completely, choosing instead to run advertisements that discussed candidates' positions on issues, often in harsh or glowing terms, but which stopped short of specifically endorsing or opposing a candidate. Because these "issue ads" can influence election results, numerous proposals have been made to restrict them. But the Court struck down such limits in *Buckley*, noting that the discussion of issues is perhaps the most vital part of the First Amendment, and that the distinction between discussion of candidates and discussion of issues often dissolves in practice. Candidates both campaign on, and are identified with, issues.

By 1997, some had become so frustrated with the constitutional restraints on campaign finance regulation that the U.S. SENATE considered a constitutional amendment to allow greater restrictions on issues ads and private campaign donations. But such restrictions would have the odd result, in many situations, of leaving overtly political speech with less protection than commercial speech, NUDE DANCING, or FLAG DESECRATION. Absent such an amendment, the Court has shown little inclination to move in that direction.

BRADLEY A. SMITH
(2000)

Bibliography

LOWENSTEIN, DANIEL H. 1993 Associational Rights of Major Political Parties: A Skeptical Inquiry. *Texas Law Review* 71: 1741–1792.

POLSBY, DANIEL D. 1976 *Buckley v. Valeo:* The Special Nature of Political Speech. *Supreme Court Review* 1976:1–47.

SMITH, BRADLEY A. 1991 Judicial Protection of Ballot Access Rights. *Harvard Journal of Legislation* 28:167–217.

——— 1997 Money Talks: Speech, Corruption, Equality, and Campaign Finance. *Georgetown Law Journal* 86:45–99.

SUNSTEIN, CASS R. 1992 Free Speech Now. Pages 255–316 in Cass R. Sunstein and Richard A. Epstein, eds., *The Bill of Rights in the Modern State*. Chicago: University of Chicago Press.

## ELECTRONIC EAVESDROPPING

A Constitution written in the eighteenth century does not easily accommodate events and developments two centuries later. This has been especially true of the FOURTH AMENDMENT guarantee against unreasonable SEARCHES AND SEIZURES. Originally designed to deal with British soldiers breaking into buildings to search for smuggled goods under overly broad GENERAL WARRANTS, in this century it has had to deal with electronic eavesdropping. In 1928 Justice LOUIS D. BRANDEIS, dissenting in OLMSTEAD V. UNITED STATES, observed that " WRITS OF ASSISTANCE and GENERAL WARRANTS are but puny instruments of tyranny and oppression when compared with wiretapping." Today, there are surveillance devices far more penetrating and efficient than wiretapping, such as tiny microphones that catch the softest utterance hundreds of feet away; pen registers that record telephone numbers; "beepers" that trace movements over miles and for days; and electronic intensifiers that permit photography in almost complete darkness. Continuing advances in miniaturization and surveillance technology will produce even more intrusive and undetectable devices.

At first, the Supreme Court refused to apply any of the BILL OF RIGHTS to these technologies. The FIRST AMENDMENT ramifications were emphasized by Justice Brandeis in his *Olmstead* dissent when he pointed out the link between freedom of expression and invasions of personal security, a link established as early as the WILKES CASES (1763–1770), the first great English cases establishing the right of personal security against governmental intrusion. The *Olmstead* majority did not even mention the First

Amendment, however, and that silence continues—the First Amendment has played an insignificant role in constitutional analyses of electronic surveillance, although in UNITED STATES V. UNITED STATES DISTRICT COURT (1972) the Supreme Court did address First Amendment considerations relevant to domestic NATIONAL SECURITY intelligence surveillance. In *Olmstead* the Fifth Amendment was explicitly ruled inapplicable, and electronic surveillance was held not to be a form of compelled self-incrimination. That ruling has been reaffirmed in cases such as HOFFA V. UNITED STATES (1966).

It is the Fourth Amendment that has become the primary constitutional instrument for control of electronic surveillance, and even that development was delayed some forty years. In 1928, the Supreme Court ruled in *Olmstead*, over dissents by Justices Brandeis and OLIVER WENDELL HOLMES, that the Fourth Amendment was limited to physical intrusions on property (TRESPASSES) that "seized" material objects, not intangible conversations. *Olmstead* was gradually eroded in the 1950s and 1960s, particularly with respect to conversations. The trespass aspect of *Olmstead* remained applicable, however, until 1967, when KATZ V. UNITED STATES extended Fourth Amendment protection to conversations and other things that people reasonably expect to keep private.

During the forty years between *Olmstead* and *Katz*, electronic surveillance was not left completely uncontrolled, however. Although the trespass requirement produced the ruling in *Goldman v. United States* (1942) that a room microphone placed against the outside of a wall did not violate the Fourth Amendment, telephone wiretapping itself was held to be prohibited by section 605 of the COMMUNICATIONS ACT of 1934, and this prohibition was applied to both federal and state law enforcement officers in NARDONE V. UNITED STATES (1937) and *Benanti v. United States* (1955). New York State also established statutory procedures for regulating electronic surveillance.

Empirical studies of wiretapping prior to 1968 showed that the controls established by these laws were ineffective. The Justice Department construed section 605 so narrowly that it was rarely invoked; judicial supervision of state wiretapping was virtually nonexistent. In addition, two forms of wiretapping and bugging remained completely uncontrolled: national security wiretapping, done pursuant to presidential directives; and surveillance with the consent of one of the parties to the conversation.

As to national security surveillances, the FEDERAL BUREAU OF INVESTIGATION (FBI) installed over 7,000 wiretaps and room microphones during 1940–1960, and one treasury agent additionally admitted to having installed over 10,000 wiretaps and microphones between 1934 and 1948; other federal agencies also did electronic eavesdropping. Although all of these intrusions were purportedly for national security purposes, many were revealed to be for crime control or political purposes, the most notorious of which was the massive electronic surveillance of MARTIN LUTHER KING, JR., between 1963 and 1968 ordered by FBI Director J. EDGAR HOOVER.

Consent surveillance, either on a telephone extension or with informers equipped with secret radio transmitters or recorders, is probably the most widely practiced type of electronic surveillance, although so much of electronic surveillance remains secret that one cannot be certain. The Supreme Court had consistently held, before and after the *Katz* decision, that under both the Constitution and the Communications Act, consent surveillance is free from virtually all constitutional or statutory controls. Leading cases on this point include ON LEE V. UNITED STATES (1952) and UNITED STATES V. WHITE (1971). The only federal restriction prior to 1968 was a very limited rule of the Federal Communications Commission barring secret recordings.

Ever since the 1937 *Nardone* decision, the Justice Department had sought authority for electronic surveillance. This effort gained impetus from Attorney General ROBERT F. KENNEDY's campaign against organized crime in 1961–1963 and the revelation that FBI Director Hoover had illegally installed hundreds of taps and bugs on alleged organized crime figures under the "national security" authority, many of which stayed in place for many years; the disclosure of these surveillances placed scores of convictions in jeopardy. With the Court's decisions in BERGER V. NEW YORK (1967) and *Katz*, the stage was set for congressional action. In these two decisions the Court discarded the "trespass" requirement imposed by *Olmstead*, ruled that electronic surveillance was subject to Fourth Amendment requirements, and set out relatively detailed requirements for a valid statute, including: (1) a specification and detailed description of the place to be searched, the conversations to be overheard, and the crime under investigation; (2) a limit on the period of intrusion; and (3) adequate NOTICE of the eavesdropping to the people overheard.

Six months after *Katz*, Congress passed the OMNIBUS CRIME CONTROL AND SAFE STREETS ACT (1968), Title III of which legitimated electronic surveillance for law enforcement purposes. The statute provides that electronic surveillance of conversations is prohibited, upon pain of a substantial jail sentence and fine, except for: (1) law enforcement surveillance under a court order; (2) certain telephone company monitoring to ensure adequate service or to protect company property; (3) surveillance of a conversation where one participant consents to the surveillance; and (4) national security surveillance insofar as

it is within the President's inherent constitutional powers, whatever those may be. Law enforcement surveillance must meet certain procedural requirements, which include: (1) an application by a high ranking prosecutor; (2) surveillance for one of the crimes specified in Title III; (3) PROBABLE CAUSE to believe that a crime has occurred, that the target of the surveillance is involved, and that EVIDENCE of that crime will be obtained by the surveillance; (4) a statement indicating that other investigative procedures are ineffective; and (5) an effort to minimize the interception.

A judge must pass on the application and may issue the order and any extensions if the application meets the statutory requirements. Shortly after the surveillance ends, notice must be given of the surveillance to some or all of the persons affected, as the judge decides, unless he agrees to postpone the notice. Illegally obtained evidence may not be used in any official proceedings, and a suit for damages may be brought for illegal surveillance, though a very strong good faith defense is allowed. In addition, the manufacture, distribution, possession, and advertising of devices for electronic surveillance for private use are prohibited.

The legislation is written in terms of federal officials but it also authorizes state surveillance if a state passes a law modeled on the federal statute, though the state may (as have some states, like Connecticut) impose more stringent requirements. More than half the states plus the DISTRICT OF COLUMBIA have passed such statutes, though many rarely use the authority. State surveillance is concentrated in New York, New Jersey, and Florida, mostly for narcotics and gambling offenses.

Title III raised many constitutional issues but almost all have been resolved in its favor. For example, a common contention is that electronic eavesdropping is inherently uncontrollable and necessarily intrudes on vast numbers of innocent people who use phones or rooms under surveillance, thus violating the particularization requirements of the Fourth Amendment. In order to meet this objection, and to avoid turning the surveillance authorization into a general warrant, Title III requires that interceptions be minimized. The Supreme Court, however, made this requirement very easy to meet by its decision in *Scott v. United States* (1978). The lower courts do not impose sanctions for the failure to minimize interception, partly because minimization is often very difficult to achieve or supervise. One federal judge in a major drug case excused the interception of seventy-three calls between a suspect's babysitter and her friends and classmates with the comment that although these conversations were indeed "teenage trivia . . . the eavesdropper, unless possessed of the prescience of a clairvoyant, could hardly predict when they might become relevant, or when they might be interrupted by an adult with more pressing problems." There are also many cases where police do not minimize interceptions even though they could. For example, some police listen to every conversation, including privileged conversations between lawyers and their clients, but record only those they think appropriate. In one case, it was accidentally revealed that police had recorded all conversations but had prepared a minimized set for use in court. Where room microphones are used, minimizing the interceptions is virtually impossible, especially if the microphones are placed in areas to which the public has access.

The *Berger* case also seemed to require that the interception be limited to specific and quite short time periods. Title III, however, permits thirty-day authorizations on a twenty-four-hour per day basis, with an unlimited number of extensions, and many interceptions remain in continuous operation for many months. The Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications for 1981, issued by the Administrative Office of the United States Court, indicates that almost half the 106 federal interceptions reported for 1981 lasted thirty or more days.

One of the most significant ways of enforcing Fourth Amendment requirements is by imposing sanctions for their violation. Imposing these sanctions, of course, requires an awareness by the victim that a search has taken place, and of how it was conducted. With a conventional search, such conditions are easy to meet, but electronic surveillance is surreptitious and may never be discovered. The Supreme Court has therefore insisted that notice of the interception be given to the persons named in the application as targets of the surveillance. The statute, however, permits indefinite postponement of this notice, and this provision, too, has been upheld.

Critics have charged that judicial supervision has been minimal and ineffective, particularly on the state level. At hearings before the National Commission for the Review of Federal and State Laws Relating to Electronic Surveillance, many witnesses lamented the inability or unwillingness of state judges to supervise the process closely.

Passage of the statute, while effectively ending the constitutional debate, has not ended the dispute over the value of electronic eavesdropping. Critics have charged that the device is used almost exclusively for minor crimes involving gambling and drugs; is quite useless for major crimes and especially those involving organized crime, the avowed target of the statute; is very expensive; is largely unsupervised by the judiciary; and has invaded the privacy of millions. For support, they rely on the staff studies of the National Commission. Proponents reply that the technique has produced some very useful results, that many of the problems are those attending any new technique,

and that more sophisticated use will produce better results. The opposing views were set out in detail in the Report of the National Commission; over a vigorous minority dissent the majority of the commission supported the use of electronic surveillance under the statute, with some modification.

Two types of surveillance remain uncontrolled by Title III: consent intrusions and national security surveillance. Title III totally exempts interceptions by government officials if an official is a party to the conversation of if there is consent by one of the parties; a private interception that is consented to is also exempt, unless the interception is for the purpose of committing a tortious, criminal, or "other injurious act," the meaning of which is not clear. Several states, however, have imposed more stringent requirements on consent surveillance than the federal statute, such as a warrant, either by statute (California, Georgia) or under their own state constitutions (Alaska, Montana). The Supreme Court, however, continues to rule in cases like *United States v. White* (1971) that consent surveillance does not implicate the Fourth Amendment.

National security surveillance continues to pose difficult constitutional questions. Presidents since FRANKLIN D. ROOSEVELT have claimed inherent executive power to use electronic surveillance to obtain intelligence for national security purposes, and have authorized such intrusions on their own, without prior judicial approval. Most courts have upheld such a power, where national security surveillance involving foreign powers and agents is concerned. But where American citizens or groups are targeted for domestic security purposes, the Supreme Court, in *United States v. United States District Court*, ruled unanimously that the President has no INHERENT POWER to use warrantless electronic surveillance. The Court did suggest that Congress could authorize procedures for domestic intelligence gathering that are less stringent than those of Title III for law enforcement, but so far Congress has not done so.

Intelligence gathering for foreign security purposes is now governed by statute. The 1976 Report of the Senate Select Committee to Study Governmental Operations with Respect to the Intelligence Agencies disclosed massive abuses of executive power to tap telephones and bug rooms for national security purposes, often with the approval of the incumbent President. These abuses included taps on the telephones of National Security Agency advisers authorized by President RICHARD M. NIXON in 1969; on the Los Angeles Chamber of Commerce in 1941; on congressmen in the early 1960s in connection with the "sugar lobby"; and FBI taps and bugs on Martin Luther King, Jr., to find "communist" influence. From 1940 to 1975, the FBI alone installed some 10,000 taps and bugs; the National Security Agency, the Central Intelligence Agency, local police, and many other governmental agencies have also engaged in national security surveillance.

These disclosures resulted in the passage in 1978 of the Foreign Intelligence Surveillance Act, which requires approval from a court for national security surveillances of foreign powers or agents. The President is denied extrastatutory inherent or other power to use electronic surveillance for foreign intelligence within the United States—though not outside—and no Americans may be eavesdropped upon unless their activities have some element of criminality about them. The court operates secretly, and there have been very few published rulings and very little public information about it. The constitutionality of this act and its procedures—which are much less demanding than those under Title III for law enforcement purposes—has been sustained.

The courts have also tried to grapple with other forms of electronic surveillance. In *Smith v. Maryland* (1979) pen registers, which record the telephone numbers called, were held outside Title III and not in conflict with the Fourth Amendment; the Supreme Court concluded that the user has no reasonable expectation of privacy in the numbers called. Electronic signaling devices ("beepers") attached to cars to enable their movements to be traced have also been held to be without Fourth Amendment protection because cars are generally traced while on public streets and highways (*United States v. Knotts, 1983*); if the device is attached to a container or other item that is taken into a private area, however, a warrant and probable cause are required (*United States v. Karo*, 1984).

In 1928, after describing the dangers that the emerging modern technology presented to individual liberty, Justice Brandeis asked, "Can it be that the Constitution affords no protection against such invasions of individual security?" Almost a half century later, it is clear that such protection is available—if the nation wants it.

HERMAN SCHWARTZ
(1986)

(SEE ALSO: *Criminal Justice and Technology.*)

Bibliography

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1968–1982 *Reports on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications.* Washington, D.C.: Administrative Office.

AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE 1974 *Standards Relating to the Administration of Criminal Justice; Electronic Surveillance.* Pages 33–52. New York: Institute of Judicial Administration.

CARR, JAMES G. 1977 (with 1983 supp.) *The Law of Electronic Surveillance.* New York: Clark Boardman.

NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAW RELATING TO ELECTRONIC SURVEILLANCE 1976 *Report* and *Staff Studies.* Washington, D.C.: Government Printing Office.

SCHWARTZ, HERMAN 1968 The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order." *Michigan Law Review* 67:455–510.

——— 1977 *Taps, Bugs, and Fooling the People.* New York: Field Foundation.

UNITED STATES CONGRESS, SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES 1976 *III Final Report.* 94th Congress, 2d session.

## ELEMENTARY AND SECONDARY EDUCATION ACT

79 Stat. 27 (1965)

This first general school aid bill in American history broke an impasse that had long stymied legislation to provide federal moneys to elementary and secondary schools. Previous efforts toward such action had foundered on the question whether EDUCATION was a state, not federal, function; whether segregated school systems should receive federal aid; and whether aid to private as well as public schools would violate the FIRST AMENDMENT's establishment clause. The segregation issue had been settled by the CIVIL RIGHTS ACT OF 1964. The 1964 elections had filled Congress with federal aid advocates untroubled by STATES' RIGHTS issues. The church-state controversy over federal assistance to parochial schools continued but was generally resolved here for the first time.

As passed, the measure, which appealed to the CHILD BENEFIT THEORY, authorized specialized aid to districts with children from low-income families. Private schools would share in aid to some specialized services such as shared-time projects and educational television. The act gave school districts wide discretion in using the federal funds; it required, however, that the funds be used to meet the special needs of educationally deprived children and that private schools be included in any benefit sharing. The act also authorized for five years grants to states for purchase of textbooks and library material, and for funding supplementary community educational services that schools could not provide. It expanded the 1954 Cooperative Research Act, authorizing a five-year program of grants for new research and training in teacher methods, and it provided for grants to strengthen state departments of education.

Despite overwhelming congressional support for the act, critics continued to express constitutional doubts. The use of public funds for books in parochial schools and special educational centers could not be justified, it was argued, because funds would be channeled directly to religious schools. The AMERICAN CIVIL LIBERTIES UNION contended that providing instructional materials and supplementary services to church schools was an unconstitutional subversion of the principle of SEPARATION OF CHURCH AND STATE. In FLAST V. COHEN (1968) the measure was challenged on First Amendment grounds, but the Court did not rule on the constitutional issues in the case.

PAUL L. MURPHY
(1986)

## ELEVENTH AMENDMENT

The Eleventh Amendment of the Constitution provides that "the JUDICIAL POWER OF THE UNITED STATES shall not be construed to extend to any suit in law or EQUITY, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of a foreign State." Congress submitted this amendment, on votes of twenty-three to two in the Senate and eighty-one to nine in the House of Representatives, for ratification in March 1794. By February 1795, the legislatures of three-fourths of the states had ratified, but, because of delays in certification of this action, adoption of the amendment was not proclaimed until 1798.

According to traditional theory the purpose of the amendment was to correct an erroneous interpretation of the Constitution by the Supreme Court. Impetus for the amendment undoubtedly was the unpopular decision in CHISHOLM V. GEORGIA (1793)—one of seven early suits instituted against a state by citizens of other states or by ALIENS. In *Chisholm* the Court, voting 4–1, held that the judicial power of the United States and the JURISDICTION of the Court reached such suits under the provision in Article III extending the federal judicial power to "Controversies between a State and Citizens of another State . . . and between a State . . . and foreign States, Citizens or Subjects."

Although the language of Article III is broad enough to support the *Chisholm* holding, proponents of the theory that the amendment was adopted to correct an error in constitutional interpretation have argued that (1) the doctrine of SOVEREIGN IMMUNITY, exempting the sovereign from unconsented suits, was part of the COMMON LAW heritage at the time the Constitution was adopted, and hence implicitly qualified some delegations of judicial power in Article III; and (2) an understanding to that effect emerged during the ratification debates.

Existence of an implicit common law qualification upon the various delegations of federal judicial power is doubtful, however. While the supposition that the immunity doctrine was already incorporated into American law ap-

pears sound, at least some state immunity surely was surrendered under the Constitution. The purpose behind the various delegations of judicial power to the United States was to create a judiciary competent to decide all cases "involving the National peace and harmony." Surrender—rather than retention—of state immunity is consonant with that objective. Nor is the argument that the ratification debates evidenced an understanding that the states would be immune from suit persuasive. While ALEXANDER HAMILTON, JAMES MADISON, and JOHN MARSHALL offered assurances to that effect in reply to Anti-Federalist objections, these objections were not quieted; and other leading Federalists, including EDMUND RANDOLPH and JAMES WILSON—members of the Committee of Detail where most provisions of Article III were drafted—took the contrary view.

While some proponents of the Eleventh Amendment probably understood it to be corrective, the broad support enlisted for its adoption can be better explained in terms of diverse perceptions and objectives. These ranged from the desire of STATES' RIGHTS advocates to repudiate the extravagant nationalism manifested by Federalist justices in their *Chisholm* opinions, to Federalist perceptions that the amendment effected only a relatively insignificant restriction upon part of the DIVERSITY JURISDICTION of the federal judiciary. Experience was accumulating that suit against a state in the Supreme Court was cumbersome and unnecessary for the maintenance of federal supremacy. Moreover, assumption of a major portion of state indebtedness and rapid liquidation of the remainder had allayed a Federalist concern that partially accounted for the original grant of federal judicial power.

Judicial construction of the amendment has been shaped by the view that as a corrective measure, it restored common law sovereign immunity as an implicit qualification upon some grants of judicial power in Article III. As interpreted, the amendment bars any suit against a state, including those raising federal questions, instituted by private plaintiffs, regardless of CITIZENSHIP (*Hans v. Louisiana*, 1890), as well as by foreign states (*Monaco v. Mississippi*, 1934) in federal court. In general, only where another state or the United States is plaintiff, is a state subject to unconsented suit in federal court (*Virginia v. West Virginia*, 1907; *United States v. Mississippi*, 1965). The amendment does not affect Article III rights of a state to institute suits in federal courts, nor does it preclude appeals by private plaintiffs in actions commenced by a state. (See COHENS V. VIRGINIA.)

Although the amendment literally limits the federal judicial power—which, by general rule, may not be modified by consent of the parties—as shorthand for the doctrine of sovereign immunity, it has always been interpreted to permit exercises of Article III powers upon a state's waiver of immunity from suit in federal court. Such waivers ordinarily must be explicit (EDELMAN V. JORDAN, 1974); however, implied and imputed waivers, although exceptional, are not unknown (*Parden v. Terminal Railway*, 1964).

The amendment imposes an absolute bar against unconsented suits commenced in federal court by private plaintiffs against state governments and their agencies. To this generalization, there is a single but increasingly important exception. Congress, pursuant to its enforcement powers under the FOURTEENTH AMENDMENT, may create federal causes of action against the states and thereby deprive them of immunity (FITZPATRICK V. BITZER, 1976). Whether such authority can be inferred from other powers delegated to the national government has not been settled.

The exemption from suit enjoyed by the states under the amendment does not extend to their political subdivisions nor, in general, to governmental corporations (*Lincoln County v. Luning*, 1890). Of paramount importance in restricting the impact of the amendment is the availability of relief in suits instituted against state officers for acts performed or threatened under color of unconstitutional state legislation. The issues whether and to what extent the amendment bars suits against state officers for official acts have occasioned more litigation under the amendment than any others, and the course traversed by the Court from OSBORN V. BANK OF THE UNITED STATES (1824) through *In re Ayers* (1887) to EX PARTE YOUNG (1908) was tortuous. In some early cases the amendment was held applicable only to suits in which a state was a defendant of record, but this rule was never firmly established. Later cases turned on whether a suit against a state officer was substantially a suit against the state itself. In *Ayers* the Court held that a suit against a state officer is a suit against the state unless the officer's act, if stripped of its official character, constitutes a private wrong; but this rigorous test was abandoned in *Ex parte Young*, a landmark case which, despite its unpopularity at the time, fixed the law for the future. While adhering to the general rule that a suit against a state officer is barred by the amendment if it is substantially against the state itself, the Court adopted the fiction that mere institution of state judicial proceedings by a state officer pursuant to an allegedly unconstitutional statute is a wrong for which federal equitable relief is available. The theoretical difficulties posed by this formulation are grave and many, but in facilitating direct access to the federal courts to test the validity of state legislation, *Young* is of transcendent importance in maintaining federal supremacy and the RULE OF LAW. Adopted as the instrument of judicial protection of the rights of property and enterprise, the *Young* principle today does the same essential service in the protection of personal

rights and liberties. Even so, not every act of a state may be reached through suit against its officers. Where such suits are adjudged to be against the state itself—actions affecting the public treasury for past wrongs and those seeking to dispossess the state of property—the Eleventh Amendment remains a bar (*Edelman v. Jordan*, 1974).

CLYDE E. JACOBS
(1986)

(SEE ALSO: *Atascadero State Hospital v. Scanlon; Pennhurst State School & Hospital v. Halderman.*)

Bibliography

JACOBS, CLYDE E. 1972 *The Eleventh Amendment and Sovereign Immunity.* Westport, Conn.: Greenwood Press.

NOWAK, JOHN E. 1975 The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments. *Columbia Law Review* 75:1413–1469.

## ELEVENTH AMENDMENT
### (Update 1)

The Eleventh Amendment is at the center of an important debate about state accountability under federal law. Part of the debate is historical: What was the amendment originally intended to do? Part of the debate concerns modern doctrine: What should the amendment mean today?

Everyone agrees that the Eleventh Amendment was adopted to overturn the result reached by the Supreme Court in CHISHOLM V. GEORGIA (1793). In *Chisholm*, the Court heard a case brought by a citizen of South Carolina against the state of Georgia on a contract. The suit involved no question of federal law. It was brought under a provision of Article III conferring jurisdiction over "Controversies between a State and Citizens of another State." Despite Georgia's claim of SOVEREIGN IMMUNITY from suit, the Court held that Georgia could be compelled to appear.

The amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state." The historical debate concerns not whether but how the amendment was intended to overrule *Chisholm.* There are two ways to understand what the adopters of the amendment intended.

The first is to read the amendment as *forbidding* suits brought against states by out-of-state citizens or by foreign citizens or subjects. Under this reading, federal courts cannot take jurisdiction over such suits, even if a federal question is involved. The second is to read the amendment as *repealing* a jurisdiction that had previously been authorized. Under this reading, suits cannot be brought against states by out-of-state citizens or by foreign citizens or subjects merely because of the character of the parties. But if there is any other basis for jurisdiction, such as the existence of a federal question, suits are permitted. Under either reading of the amendment, ADMIRALTY AND MARITIME JURISDICTION is not affected, for the amendment refers only to suits "in law or equity."

The Supreme Court was not forcEd to choose between the two readings of the amendment until after the CIVIL WAR. Eventually, the Court chose to read the amendment as *forbidding* jurisdiction whenever an out-of-stater or a foreigner sued a state, as a way of protecting southern states from suit under the federal CONTRACT CLAUSE after they defaulted on state-issued revenue bonds. The Court then filled in the "missing" term of the amendment by holding in *Hans v. Louisiana* (1890) that the underlying principle of the amendment required that suits by in-staters be forbidden as well. In this century, the Court has further expanded the prohibition of the amendment by reading it to prohibit suits by foreign countries (*Principality of Monaco v. Mississippi*, 1934) and in admiralty (*Ex parte New York, No. 1*, 1921).

In recent years, a number of legal scholars have argued that reading the amendment as only *repealing* the party-based jurisdiction of Article III is historically more accurate. Four Justices of the Supreme Court, led by Justice WILLIAM J. BRENNAN, have shared this view and have argued that modern doctrine should be brought into line with this understanding. In *Pennsylvania v. Union Gas Co.* (1989), however, a majority of the Court refused to incorporate this historical view into modern doctrine.

Although the Court reads the Eleventh Amendment to forbid federal court jurisdiction even when federal law provides the basis for private parties' suits against the states, the prohibition may be avoided or overcome in a number of ways. First, a state may waive its sovereign immunity by a voluntary appearance. As *Edelman v. Jordan* (1974) illustrates, however, a state may raise a sovereign immunity defense for the first time on appeal after having made a voluntary appearance at trial and having lost on the merits of the dispute. Second, the Supreme Court held in *Cohens v. Virginia* (1821) that the Eleventh Amendment does not apply to appeals to the Supreme Court from the state courts. Third, a state's subdivisions are not protected by the amendment. Under the principle enunciated in *Lincoln County v. Luning* (1890) a municipality, county, or school board may be sued in federal court under federal law without regard to the Eleventh Amendment.

Fourth, suit may be brought against a state officer for prospective relief. The foundation case is *Ex parte Young*

(1908), in which the Court permitted an INJUNCTION prohibiting a state officer from acting unconstitutionally. The principle was expanded to permit injunctions ordering affirmative actions by state officials in *Edelman v. Jordan* (1974). But the same decision held that a federal court is forbidden to award monetary relief that will necessarily come out of the state treasury.

Finally, Congress may abrogate the states' sovereign immunity by statutes explicitly so providing. Under an abrogating statute, a state may be sued directly for the retroactive monetary relief otherwise unavailable under *Edelman*. The first case to allow congressional abrogation was *Fitzpatrick v. Bitzer* (1976), which sustained a statute enacted under the FOURTEENTH AMENDMENT. The Court suggested in *City of Rome v. United States* (1980) that statutes passed under the FIFTEENTH AMENDMENT could also abrogate state sovereign immunity. Most recently, the Court sustained an abrogating statute passed under the COMMERCE CLAUSE in *Pennsylvania v. Union Gas* (1989). The combined reach of the Fourteenth Amendment and the commerce clause is such that Congress has considerable freedom to abrogate state sovereign immunity so long as it employs language making its intention clear.

After the Court's decision in *Union Gas*, the debate among the Justices over the original meaning of the amendment may have lost most of its practical significance. Under current doctrine there appears to be no significant constraint on the power of Congress to authorize suit against the states, beyond the limitations inherent in the ENUMERATED POWERS under which Congress has acted. This position is not greatly different from that which would be achieved if the Eleventh Amendment were read as merely repealing party-based jurisdiction, leaving intact FEDERAL QUESTION JURISDICTION for private suits brought under valid federal law. The most important difference is that the present doctrine requires Congress to speak clearly in lifting the states' Eleventh Amendment immunity from suit in federal court.

WILLIAM A. FLETCHER
(1992)

Bibliography

FLETCHER, WILLIAM A. 1983 A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction. *Stanford Law Review* 35:1033–1131.

GIBBONS, JOHN J. 1983 The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation. *Columbia Law Review* 83:1889–2005.

ORTH, JOHN V. 1987 *The Judicial Power of the United States: The Eleventh Amendment in American History.* New York: Oxford University Press.

# ELEVENTH AMENDMENT
## (Update 2)

The Eleventh Amendment was the first change in the Constitution in response to a Supreme Court decision. In 1793, CHISHOLM V. GEORGIA upheld the Court's ORIGINAL JURISDICTION over an action on a contract by a citizen of South Carolina against the state of Georgia. The Eleventh Amendment, adopted in 1798, responded to that decision. It provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

There is substantial disagreement over what this amendment means. The current view of the Court is that *Chisholm* created a "shock of surprise," because it had never been thought that a state could be sued by private persons, and that the amendment was intended to protect states from such suits. This view reads the amendment, though in terms a limitation on federal JURISDICTION, as embodying a doctrine of state SOVEREIGN IMMUNITY. To understand why this reading is controversial, more history is in order.

Pre–CIVIL WAR decisions raised alternative and at times narrow interpretations of the amendment, for example, suggesting a "party of record" rule to avoid a bar when a state as such was not named as defendant, or hinting that the amendment did not apply when jurisdiction was based, not on who the parties were, but on the "arising under federal law" grant of power. By 1890, however, *Hans v. Louisiana* laid the basis for the current view, holding that a federal court could not hear a suit by a Louisiana bondholder against his state on a federal claim of unconstitutional impairment of contract. Even though the Eleventh Amendment by terms prohibited only a limited class of plaintiffs from suing, *Hans* reasoned that the amendment would never have been passed had it been understood to permit claims by in-staters, and that it should be read to provide immunity to a state from a suit by any private person. Later decisions expanded this immunity to include, for example, suits brought by foreign states or suits in ADMIRALTY.

As the activities of modern governments grew and came to overlap, state and local governments increasingly became subject to the substantive reach of federal statutes. Under *Lincoln Co. v. Luning* (1890), local governments are not regarded as "the state" for purposes of the Eleventh Amendment and accordingly can be sued in federal court. In *Parden v. Terminal Railway of Alabama* (1964), the Court, in a 5–4 decision, permitted a federal statutory

claim against a state in federal court, arguing that states "surrendered a portion of their sovereignty" in agreeing to Congress's ENUMERATED POWERS and that by participating in the regulated activity (running a railroad) states waived their immunity. Soon the Court modulated its approach, insisting on more explicit "clear statements" to find congressional intent to authorize federal court suits against states or to find state waiver of immunity.

In a significant advance for state accountability under law, *Fitzpatrick v. Bitzer* (1974) upheld Congress's power, when acting to enforce the FOURTEENTH AMENDMENT, to subject states to suit in federal courts. New scholarship began to reexamine the amendment's text and history, arguing that the amendment did not restrain Congress from specifically authorizing suits, based on federal laws, against states. Many concluded that the amendment did not embody a broad principle of state immunity from federal court suit, but rather was a carefully limited repeal of a party-based head of jurisdiction over states, that left intact both FEDERAL QUESTION and admiralty heads of power. This "diversity repeal" view made sense of the limited text of the amendment, of the support for its enactment from both FEDERALISTS and ANTI-FEDERALISTS, and of the Court's subsequent appellate practice in federal question cases coming from the state courts.

In 1989, *Union Gas v. Pennsylvania*, by a 5–4 vote, upheld Congress's power to authorize suits against states under Article I. The PLURALITY OPINION extended the reasoning of *Fitzpatrick* to the COMMERCE CLAUSE, holding that if Congress spoke clearly enough, it could abrogate states' immunity when acting under the commerce clause, a plenary power that also limits state powers. In some tension with other DOCTRINES, the plurality treated the amendment as a limit on the Court's power to construe jurisdictional provisions to abrogate sovereign immunity, but not as a limit on Congress's power to abrogate state sovereign immunity pursuant to its plenary powers. The plurality's rationale would permit congressional abrogation of immunity, if in clear terms, under other Article I provisions. But its reign was short. *Union Gas* was OVERRULED by *Seminole Tribe v. Florida* (1996).

Endorsing *Hans*, *Seminole Tribe*, 5–4, concluded that Congress lacks power under Article I to abrogate states' constitutional immunity from suit. This immunity, merely exemplified by the amendment, protects state treasuries from federal judgments and state sovereignty from the "indignity" of being sued by individuals for any kind of relief. Thus, "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area," Congress cannot authorize "suits by private parties against unconsenting states," and a law extending federal jurisdiction to disagreements between tribes and states over gambling on AMERICAN INDIAN reservations was thus unconstitutional. *Seminole Tribe* distinguished, and thus apparently preserved, Congress's power to abrogate immunity from suit under the Fourteenth Amendment, added to the Constitution after the Eleventh Amendment and designed as an explicit limit on state power.

Under *Seminole Tribe*, it is thus important to determine whether a particular federal statute that subjects states to suits in federal court has been properly enacted under Congress's powers under the FOURTEENTH AMENDMENT, SECTION 5, or instead has been validly enacted only under an Article I power, for example, over INTERSTATE COMMERCE. For it is only under the Fourteenth Amendment (or possibly other post–Civil War amendments) that Congress may have power to create causes of action enforceable against states, as such, without their consent. Since *Seminole Tribe*, lower court decisions have considered whether Congress validly abrogated state immunity in enacting laws concerning, for example, BANKRUPTCY, COPYRIGHT PATENT, minimum wage, AGE DISCRIMINATION, and DISABILITY DISCRIMINATION under the Fourteenth Amendment. In two 1999 decisions, the Court gave a narrow reading to Congress's power under section 5 of the Fourteenth Amendment, holding unconstitutional two different federal remedial statutes authorizing suits against states. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* (1999), the Court held that, although patents were a form of property protected by the Fourteenth Amendment from state "deprivations" without DUE PROCESS OF LAW, Congress's abrogation of states' immunity from suit for patent infringement was unconstitutional because of the possibility that state remedies would sufficiently compensate the patentholder and thereby provide due process. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* (1999), the Court held that injuries to a business from unfair competition in violation of the federal Lanham Act were not deprivations of "property interests" for due process purposes and thus Congress had no basis under the Fourteenth Amendment for abrogating states' immunity to such claims. As of this writing, the Court has granted CERTIORARI in a case challenging the constitutionality of the Age Discrimination in Employment Act's abrogation of state immunity.

Eleventh Amendment doctrine does permit mechanisms for affirmative enforcement of federal law other than suits against states in federal courts. The most important of these are EX PARTE YOUNG (1908) actions against state officers for prospective injunctive relief against violations of federal (though not state) law. But while state officers may be sued for damages in their individual capacities, suits against state officers for such "retroactive" relief as accrued monetary liabilities payable from the state treasury are prohibited, as are some suits against

state officers involving state interests in property. *Seminole Tribe* preserves the rule that prospective relief against state officers to prevent continuing violations of federal law is generally permitted, though the Court there refused to permit such an action on the somewhat implausible ground that it was impliedly precluded by the federal statute's authorization (held unconstitutional) of suit against the state directly. Whether the *Ex parte Young* doctrine will be substantially narrowed remains to be seen.

Other mechanisms for enforcing federal law against states include suits by the federal government, consented-to suits in state or federal courts, and suits by other states. The Eleventh Amendment does not bar the United States from suing a state. Some federal statutes, for example, the Fair Labor Standards Act, include provisions authorizing suit by the United States with recoveries ultimately payable over to individual beneficiaries. (The constitutionality of "qui tam" actions against states—that is, actions brought by private parties in the name of the United States to recover damages for fraud against the federal government, a portion of which recovery goes to the private party—is before the Court as of this writing.) States are not immune from suits by sister states, so long as the plaintiff state is not suing merely as parens patriae for a small number of private interests. Although the amendment does not apply to a suit against one state in the courts of another under *Nevada v. Hall* (1979), *Alden v. Maine* (1999) holds that states can constitutionally refuse to consent to suits against themselves in their own courts under federal law, thereby substantially limiting the practical availability of relief in state courts.

Finally, unlike other constitutional limits on federal JUDICIAL POWER that cannot be disregarded on the parties' consent, a state can waive its constitutional immunity, consenting to jurisdiction in either federal or state court. However, in *College Savings Bank* the Court overruled *Parden* and held that Congress may not require states to consent to suit as a condition of being permitted to engage in activity subject to regulation under the commerce clause. Such a constructive waiver theory, the Court said, was indistinguishable from abrogation, and the "voluntariness of the waiver [is] destroyed when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity." The Court, however, preserved Congress's authority to insist on a consent-to-suit clause in approving bi-state compacts, or as a condition for receiving federal funds.

The recent expansion of states' immunity from federal jurisdiction is in tension with RULE OF LAW ideas spreading elsewhere in the world. While this entry describes the current state of the law, the closely split decisions of the decade beginning in 1989 may foreshadow further uncertainties on the amenability of states to federal court process for enforcement of federal law, particularly considering *Seminole Tribe*'s interaction with other developments in FEDERALISM. For now, the Eleventh Amendment bars Congress from subjecting states to suits in federal court for violations of federal laws enacted under Article I of the Constitution, and limits the relief that may be sought against state officers, and a comparable doctrine of constitutional sovereign immunity protects states from suit on federal claims in their own courts.

*Postscript.* In *Kimel v. Florida Board of Regents* (2000), the Court held that Congress's attempted abrogation of states' Eleventh Amendment immunity for claims under the Age Discrimination in Employment Act (ADEA) was not constitutional. Application of the ADEA to the states had been upheld as an exercise of commerce clause power in EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) V. WYOMING (1983), but *Seminole Tribe* held that Congress lacks power to abrogate sovereign immunity from suit under that clause. The basic question in *Kimel* was whether the ADEA was a valid exercise of Congress's power under the Fourteenth Amendment, section 5, so as to authorize Congress to abrogate the states' immunity from suit. The Court, finding that the ADEA was clearly intended to abrogate the states' immunity, nonetheless held that Congress lacked power to act under the Fourteenth Amendment. The Court reasoned that age is not a "suspect" basis for classification, and that states accordingly had latitude to make rational age classifications; yet the ADEA generally prohibits state employers from relying on "age as a proxy for other qualities." Because rational age classifications by states are permissible under the Constitution, the Court held that the act could not be justified as "proportional" to violations of section 1 that Congress has power to remedy. And because the ADEA could not be upheld as an exercise of Fourteenth Amendment power, it could not constitutionally abrogate the states' immunity from suit.

VICKI C. JACKSON
(2000)

Bibliography

AMAR, AKHIL REED 1987 Of Sovereignty and Federalism. *Yale Law Journal* 96:1425–1520.

FLETCHER, WILLIAM A. 1983 A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than A Prohibition Against Jurisdiction. *Stanford Law Review* 35:1033–1131.

GIBBONS, JOHN 1983 The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation. *Columbia Law Review* 83:1889–2129.

JACKSON, VICKI C. 1988 The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity. *Yale Law Journal* 88:1–126.

——— 1997 Seminole Tribe, the Eleventh Amendment and

the Potential Evisceration of Ex Parte Young. *New York University Law Review* 72:495–546.

MARSHALL, WILLIAM P. 1989 The Diversity Theory of the Eleventh Amendment: A Critical Evaluation. *Harvard Law Review* 102:1372–1396.

MELTZER, DANIEL J. 1996 The Seminole Decision and State Sovereign Immunity. *Supreme Court Review* 1996:1–65.

ORTH, JOHN V. 1987 *The Judicial Power of the United States: The Eleventh Amendment in American History.* New York: Oxford University Press.

VAZQUEZ, CARLOS 1997 What Is Eleventh Amendment Immunity? *Yale Law Journal* 106:1683–1806.

## *ELFBRANDT v. RUSSELL*
384 U.S. 11 (1966)

By a 5–4 vote, the WARREN COURT struck down a section of Arizona's Communist Control Act of 1961, which subjected state employees to perjury prosecutions if they subscribed to a state LOYALTY OATH while members of the Communist party, later joined the party, or joined "any other organization" having for "one of its purposes" the overthrow of the government. For the majority, Justice WILLIAM O. DOUGLAS argued that even knowing membership in the Communist party could not expose one to criminal punishment without proof of specific intent to further the organization's illegal goals of violent revolution. Such a law "infringes unnecessarily on protected freedoms. It rests on the doctrine of " GUILT BY ASSOCIATION' which has no place here. . . ."

The dissenters were led by Justice BYRON R. WHITE. "If a government may remove from office . . . and . . . criminally punish . . . its employees who engage in certain political activities," White wrote, "it is unsound to hold that it may not, on pain of criminal penalties, prevent its employees from affiliating with the Communist Party or other organizations prepared to employ violent means to overthrow constitutional government."

MICHAEL E. PARRISH
(1986)

## *ELKINS v. UNITED STATES*
364 U.S. 206 (1960)

In Elkins the Supreme Court overthrew the SILVER PLATTER DOCTRINE, an exception to the EXCLUSIONARY RULE allowing use in federal prosecutions of evidence seized by state officers in illegal searches. Two changes had undermined the authority of the doctrine since it was formulated in WEEKS V. UNITED STATES (1914). First, the extension of the constitutional prohibition of unreasonable searches to the states in WOLF V. COLORADO (1949) meant that the doctrine now permitted federal courts to admit evidence unconstitutionally seized. Second, the doctrine vitiated the policies of about half the states, which had in the meantime independently adopted an exclusionary rule.

The *Elkins* opinion, in addition, contains the most thorough and convincing analysis in favor of the exclusionary rule to be found in any opinion of the Court; it thus laid the groundwork for imposition of the rule on the states the following year in MAPP V. OHIO (1961).

JACOB W. LANDYNSKI
(1986)

## ELKINS ACT
32 Stat. 847 (1903)

The decisions in INTERSTATE COMMERCE COMMISSION V. CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY (1897) and its companion case, *ICC v. Alabama Midland Railway Company*, had stripped the Interstate Commerce Commission of much of its regulatory power. As a result, many of the evils the INTERSTATE COMMERCE ACT had been designed to remedy had revived. One of the most pernicious abuses was the practice of rebating. Federal legislation forbidding the practice would not only save the railroads money but also protect them against demands imposed by the trusts. Sponsored by the railroads, the Elkins Act made any deviation from the published rate schedule (whether a rebate or a general rate reduction) a criminal offense. Although Congress repealed the imprisonment penalty, it quadrupled the fine and directly subjected the corporations to the penalty; no longer could the principal escape punishment for its agents' acts. Anyone who sought or received a rebate (or other rate concession) was equally liable to criminal penalties. Despite the act's significance, further legislation would prove necessary. Charges were now enforced, but the ICC was still powerless to replace discriminatory rates. Congress would expand ICC powers and extend regulatory control over the rails in the HEPBURN and MANN-ELKINS ACTS.

DAVID GORDON
(1986)

Bibliography

SHARFMAN, ISAIAH L. 1931–1937 *The Interstate Commerce Commission.* Vol. 1. New York: Commonwealth Fund.

## ELLSWORTH, OLIVER
(1745–1807)

Oliver Ellsworth played a key role in the creation of the United States Constitution in 1787 and the establishment

of a national judiciary during the Constitution's first decade.

Born into a well-established Connecticut family, he entered Yale in 1762, but left after two years to attend the College of New Jersey (Princeton) where he was graduated with a B.A. in 1766. Ellsworth returned to Connecticut and studied theology for about a year, but abandoned it for the law and was admitted to the bar in 1771. One of the ablest lawyers of his day, he built up an extremely lucrative practice. He also entered politics and was elected to the state's General Assembly in 1773. A warm supporter of the patriot cause against Great Britain, he helped supervise the state's military expenditures during the war for independence, was appointed state attorney for Hartford in 1777, a member of the Governor's Council in 1780, and a judge of the Connecticut Supreme Court in 1785. He also served as one of the state's representatives to the Continental Congress for six terms (1777–1783). While in Congress he became a member of the Committee of Appeals which heard appeals from state admiralty courts, and in this capacity he ruled on the important case of Gideon Olmstead and the British sloop *Active* which eventually culminated in UNITED STATES V. PETERS (1809).

In 1787 Connecticut selected him to be one of its three delegates to the federal CONSTITUTIONAL CONVENTION in Philadelphia. He played an active role at the convention and won respect for his orderly mind and his effectiveness as a debater. Ellsworth favored the movement to establish a strong and active federal government with the power to act directly on individuals and to levy taxes, as a substitute for the weak central government created by the ARTICLES OF CONFEDERATION. But he also thought that the VIRGINIA PLAN went too far in a nationalist direction. "The only chance of supporting a general government lies in grafting it on those of the original states," he argued. In particular, he opposed the idea of apportioning representation in both houses of Congress according to population, to the clear advantage of larger states. To resolve the differences between the large and the small states he helped forge the successful GREAT COMPROMISE which apportioned representation in the lower house according to population and in the Senate by a rule of equality, with each state having two senators. Ellsworth also played an active role on the Committee on Detail which produced the basic draft of the United States Constitution.

Following adoption of the Constitution, Connecticut elected Ellsworth to the United States Senate. He recognized that the Constitution as written and ratified was only a basic outline; an actual government had to be created and its powers implemented. He supported ALEXANDER HAMILTON's financial program and was opposed to attempts to ally the United States too closely with France, but his most important contribution was the drafting of the JUDICIARY ACT OF 1789. This law was in many ways an extension of the Constitution itself, for it fleshed out the terse third article of that document which dealt with the nature and powers of the federal judiciary. The Judiciary Act of 1789 specified that the Supreme Court should consist of six Justices, that each state should have a district court, and that there should be three circuit courts consisting of two Supreme Court Justices sitting with a district judge. Under this law the fedral courts were given exclusive JURISDICTION in a number of important areas and CONCURRENT JURISDICTION with the state courts in other matters. The act also provided that decisions of the state courts involving the Constitution or laws or treaties of the United States could be appealed to the Supreme Court.

In 1796 President GEORGE WASHINGTON appointed Ellsworth Chief Justice of the United States. He held the post for three years but had little impact. The cases he heard were not very significant, illness limited his participation in the duties of the Court, and a diplomatic mission took him out of the country. Perhaps his most important decision came in *Wiscart v. Dauchy* (1796) in which he examined the relationship of the Supreme Court to the district and circuit courts, established a series of important rules dealing with WRITS OF ERROR, and extended COMMON LAW procedures in APPEALS to EQUITY and ADMIRALTY jurisdiction as well. His opinions tended to be brief, to the point, and nationalist in orientation. In *United States v. La Vengeance* (1796) he expanded the admiralty jurisdiction of the federal courts to inland navigable rivers, the Great Lakes, and other water routes away from the high seas; and while riding circuit in *United States v. Isaac Williams* (1799) he upheld the English common law DOCTRINE that citizens of a country did not have a right to expatriate themselves without their native country's consent.

As Chief Justice, Ellsworth encouraged the practice of the Supreme Court's handing down PER CURIAM opinions, with a single decision representing the will of the entire court, as opposed to having separate SERIATIM opinions by the individual Justices. JOHN MARSHALL, who succeeded Ellsworth as Chief Justice, considered the continuation and further development of this practice all-important in maintaining respect for the authority of the Court when it handed down controversial decisions.

In 1799 Ellsworth, over the protest of some of his closest associates, agreed to a request from President JOHN ADAMS to be part of a special diplomatic mission to resolve the undeclared naval war with France. The mission was a success, but Ellsworth became ill while abroad, resigned the chief justiceship in October 1800, and stayed in England to recuperate. By the time he returned to America

the Jeffersonians had triumphed and he retired from public life.

RICHARD E. ELLIS
(1986)

Bibliography

BROWN, WILLIAM GARROTT 1905 *The Life of Oliver Ellsworth.* New York: Macmillan.

GOEBEL, JULIUS, JR. 1971 *History of the Supreme Court of the United States, Vol. 1: Antecedents and Beginnings to 1801.* New York: Macmillan.

## ELLSWORTH COURT

See: Supreme Court, 1789–1801

## EMANCIPATION PROCLAMATION
12 Stat. 68 (1863)

ABRAHAM LINCOLN, employing the Constitution's WAR POWERS, announced the Emancipation Proclamation on September 22, 1862. It had its roots in ABOLITIONIST CONSTITUTIONAL THEORY. Although Lincoln's swift rise in the Republican party was due in part to his outspoken opposition to the extension of SLAVERY, on the outset of the war he was bound by the Constitution (Article IV, section 2) and federal laws on FUGITIVE SLAVES that required federal officials to return runaways, even to disloyal owners. Politically ambitious Union general George B. McClellan, a conservative would-be Democratic presidential candidate, sternly enforced the 1850 law; generals BENJAMIN F. BUTLER and John Charles Frémont, by contrast, refused to return runaways in their commands and armed some against rebel guerrillas. Lincoln countermanded the latter's orders to dim the issue of arming Negroes and to keep policy in civilians' hands.

Negroes continued to flee to Union lines no matter what orders civilians or generals issued. Awareness grew in the Union army and among bluecoats' families and other correspondents that almost the only trustworthy southerners were blacks. Gradually, sentiment increased that to return runaways was indecent and illogical, for slaves were the South's labor force. In Congress, with few exceptions, Democrats remained uneducable on the runaway issue and damned as unconstitutional any mass emancipation whether by EXECUTIVE ORDER or statute and whether or not involving colonization of freedmen abroad or compensation to loyal owners. Republicans, from Lincoln down, altered their opinions on race matters. Some northern states softened racist BLACK CODE clauses in constitutions and civil and criminal laws; some made laws color-blind. Congress, in addition to the CONFISCATION ACTS and with Lincoln's assent, enacted laws in March, April, and June 1862, respectively, that prohibited military returns of disloyal owners' runaways without requiring a judicial verdict of disloyalty, ended slavery in the DISTRICT OF COLUMBIA with compensation to owners, and forbade slavery in the federal TERRITORIES, thus challenging part of DRED SCOTT V. SANDFORD (1857). In effect, Republicans, retaining their basic view of the Constitution as an adaptable instrument, were adopting aspirations that abolitionist constitutionalists had long advanced.

Fearing conservative gains in the 1862 congressional and state elections, congressional Republicans then marked time. Lincoln did not have this option. He determined to reverse two centuries of race history *if* continued Confederate intransigence forced further changes and *if* the Union won the war.

Therefore, following the Antietam "victory," Lincoln proclaimed that unless slaveowners in still-unoccupied states of the Confederacy (he excluded unseceded slaveholding states) publicly renounced the rebellion by January 1, 1863, their slaves "shall be then, thenceforward, and forever free." All Union military personnel must positively assist, not merely not impede, runaways from slavery. With respect to unseceded slaveholding states, Lincoln encouraged "immediate or gradual" emancipation by state initiative, with compensation to loyal owners and colonization of freedmen abroad.

The Proclamation was not an immediate success. It diminished opinion abroad favoring recognition of the Confederacy. Few southern whites abjured the rebellion before the deadline. Lincoln, on New Year's Day 1863, announced the Proclamation to be in effect. But he had enlarged his horizons, adding an announcement that he would recruit blacks for the Union's armies. Relatively few blacks lived in northern states. Lincoln's new policy, if successful—which meant if Union voters persevered, if enough slaves kept coming into Union lines, and if Union forces occupied enough Confederate areas—could drain the South of its basic labor force and augment the Union's military power.

The policy eventually succeeded. Almost 200,000 black bluecoats, overwhelmingly southern in origin, helped to crush the rebellion. *Dred Scott* was made irrelevant. Though black Union soldiers and sailors suffered inequities in rank, pay, and dignity compared to whites, their military record made it impossible for the nation to consider them again as submen in law, though racists advocated the retrograde view. Compared to their prewar status even in the free states, blacks' legal and constitutional conditions improved as a result of the Proclamation. It initiated also an irreversible revolution in race relationships leading to the WADE-DAVIS BILL, the THIRTEENTH AMENDMENT, and the CIVIL RIGHTS ACT OF 1866. But the

eventual consequence of the Emancipation Proclamation was Appomattox; thereby, alternatives forbidden by *Dred Scott*, by the 1861 Crittenden Compromise, and by the aborted Thirteenth Amendment of 1861, became options. This society could be slaveless, biracial, and more decently equal in the constitutions, laws, and customs of the nation and the states.

HAROLD M. HYMAN
(1986)

(SEE ALSO: *Civil War.*)

Bibliography

BELZ, HERMAN 1978 *Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era.* New York: Norton.

HYMAN, HAROLD M. and WIECEK, WILLIAM M. 1982 *Equal Justice under Law: Constitutional Development 1835–1875.* Pages 252–255. New York: Harper & Row.

OATES, STEPHEN B. 1977 *With Malice Toward None: The Life of Abraham Lincoln.* New York: Harper & Row.

VOEGELI, V. JACQUES 1967 *Free But Not Equal: The Midwest and the Negro During the Civil War.* Chicago: University of Chicago Press.

## EMBARGO ACTS
(1807–1809)

For fifteen months the United States under President THOMAS JEFFERSON pursued a policy of economic coercion against foreign powers as an alternative to war. In retaliation for attacks on American commerce during the Napoleonic wars, a compliant Congress gave Jefferson everything he requested, including five embargo acts which sought to compel England and France to respect American maritime rights in return for a restoration of American trade. The first three acts, which interdicted that trade, could be constitutionally defended by a doctrine of IMPLIED POWERS that Jefferson once thought inimical to American liberty. In *United States v. The William* (1808) a federal district court invoked a BROAD CONSTRUCTION of the COMMERCE CLAUSE, reinforced by the NECESSARY AND PROPER CLAUSE, to justify a ruling that the power to regulate commerce included the power to prohibit it. Justice WILLIAM JOHNSON of the Supreme Court, a Jefferson appointee, rebuked the President in a circuit case, *Gilchrist v. Collector* (1808), for having exceeded his statutory authority in enforcing the embargo acts, and another Jefferson appointee, Justice BROCKHOLST LIVINGSTON, in *United States v. Hoxie* (1808), scathed the President for insinuating the doctrine of constructive treason into a prosecution for violation of the acts. The draconian fourth embargo act carried the administration to the precipice of unlimited enforcement powers and mocked Republican principles by its concentration of authority in the President, its employment of the navy for enforcement, and its disregard of the FOURTH AMENDMENT's protection against UNREASONABLE SEARCHES and seizures. Unconstitutional military enforcement characterized the fifth embargo act, which rivaled any legislation in American history for its suppressiveness. The embargo acts, having failed their purpose, lapsed when Jefferson left office.

LEONARD W. LEVY
(1986)

## EMERGENCY BANK ACT
48 Stat. 1 (1933)

When FRANKLIN D. ROOSEVELT took office on March 4, 1933, banks had closed in thirty-eight states. The next day Roosevelt declared a national bank holiday, suspended all gold transactions, and called a special session of Congress for March 9. On that day Congress rushed through, and that same evening Roosevelt signed, a bill submitted by the White House aimed at ending the panic that had begun earlier that year. The bill ratified Roosevelt's actions, which he had based on the questionable authority of the 1917 Trading With the Enemy Act. The act gained constitutional significance by thus expanding executive authority. Congress also gave the President discretionary authority over national and Federal Reserve banks. The act provided for calling in all gold and gold certificates in circulation and assessed criminal penalties for hoarding. The government could appoint conservators for the assets of insolvent banks, and the Treasury could license the reopening of sound ones and reorganize the remainder. The act further authorized the emergency issuance of paper notes up to a limit of one hundred percent of the value of government bonds in its member banks.

DAVID GORDON
(1986)

## EMERGENCY COURT OF APPEALS

In the Emergency Price Control Act of 1942, Congress established a comprehensive system of administrative control over prices, as a means of checking the inflation that accompanied this country's entry into WORLD WAR II. The Act created a temporary Emergency Court of Appeals, staffed by federal judges from the district courts and courts of appeals, with exclusive JURISDICTION to determine the validity of price control regulations. Regulated persons thus could not challenge the administrative regulations' constitutionality or statutory authorization in the ordinary

state or federal courts—either in injunctive proceedings or by way of defense to criminal prosecutions for their violation. The only course open was to obey the regulations and challenge their validity in the newly created court.

In a series of decisions, the most important of which was YAKUS V. UNITED STATES (1944), the Supreme Court upheld the validity of this scheme (*Lockerty v. Phillips*, 1943; *Bowles v. Willingham*, 1944; see also JUDICIAL SYSTEM).

A Temporary Emergency Court of Appeals, established in 1971, is similarly staffed by judges from other federal courts. It hears appeals from the district courts in cases arising under various congressional statutes regulating allocation and pricing of certain commodities.

KENNETH L. KARST
(1986)

Bibliography

BATOR, PAUL M.; MISHKIN, PAUL J.; SHAPIRO, DAVID L.; and WECHSLER, HERBERT, eds. 1973 *Hart and Wechsler's The Federal Courts and the Federal System*, 2nd ed. Pages 317–322. Mineola, N.Y.: Foundation Press.

## EMERGENCY POWERS

As justifications for taking emergency action without first receiving legislative authority, chief executives from different countries have relied on "reason of state" (*raison d'état*) and "prerogative." JOHN LOCKE, in the *Second Treatise on Civil Government* (1690), defined prerogative as the power to act "according to discretion for the common good, without the prescription of the law and sometimes even against it. . . ." More concise is the maxim *salus populi suprema lex:* the safety of the people is the supreme law.

The United States Constitution contains few provisions for emergency power. Congress has the power to meet emergencies by passing LEGISLATION. Under Article I, section 8, Congress may declare war and call forth the militia to suppress insurrections and to repel invasions. Article II authorizes the President to convene Congress "on extraordinary Occasions" for the purpose of enacting emergency legislation.

An exception to this statutory process is implied in the debates at the CONSTITUTIONAL CONVENTION. The Framers recognized that the President might have to begin military operations for defensive purposes before Congress could act. When one of the delegates proposed that Congress be empowered to "make war," it was objected that legislative proceedings might at times be too slow for the safety of the country. "Declare" was substituted for "make," giving Congress the power to declare war but allowing the President discretionary authority "to repel sudden attacks."

For twentieth-century America, the concept of "defensive war" has expanded to include military actions far beyond the nation's borders. The long drawn-out war in Southeast Asia led to the WAR POWERS RESOLUTION of 1973, an effort to reconcile the war-making power of the President with the war-declaring power of Congress. The statute attempts to insure the "collective judgment" of both branches by requiring the President to consult with Congress "in every possible instance," to report to Congress within forty-eight hours after introducing forces into hostilities, and to withdraw those forces unless he receives congressional support within sixty or ninety days. Congress may at any time during this period pass a CONCURRENT RESOLUTION (which is not subject to veto) directing the President to remove forces engaged in hostilities. The consultation and reporting provisions have had mixed results. The LEGISLATIVE VETO mechanism in the War Powers Resolution was declared invalid in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983).

Article I, section 9, permits the suspension of the writ of HABEAS CORPUS "in Cases of Rebellion or Invasion [when] the public Safety may require it." It has never been determined conclusively whether this power resides solely in Congress or is shared with the President. History supports the latter interpretation. In April 1861, while Congress was in recess, President ABRAHAM LINCOLN issued proclamations ordering a number of emergency actions, including the suspension of the writ of habeas corpus. Congress supported his initiatives, as did a sharply divided Supreme Court in the PRIZE CASES (1863).

Although Chief Justice ROGER B. TANEY had earlier placed the power of suspension exclusively with Congress, in *Ex parte Merryman* (1861), Lincoln ignored the court order and continued to exercise emergency powers. His attorney general, EDWARD BATES, argued that the President shared with Congress the power to suspend the writ of habeas corpus. In such cases as EX PARTE MILLIGAN (1866) and DUNCAN V. KAHANAMOKU (1946), the Supreme Court has held illegal the establishment of military tribunals to try civilians in areas where the civil courts are open. In these decisions, however, the Court took care to assert judicial control at the close of, rather than during, hostilities.

The President's emergency power has also grown because of authority delegated to him by Congress. These authorities would sometimes come to life whenever the President issued a proclamation declaring the nation to be in a state of emergency. A report issued by a Senate special committee in 1973 disclosed that four proclamations (issued by FRANKLIN D. ROOSEVELT in 1933, HARRY S. TRUMAN in 1950, and RICHARD M. NIXON in 1970 and 1971) brought

to life 470 provisions of federal law. Each statute conferred upon the President some facet of control over the lives and property of American citizens.

The NATIONAL EMERGENCIES ACT of 1976 restricted the use of presidential emergency powers. The statute terminated emergency authorities two years from the date of the bill's enactment (September 14, 1976). For future national emergencies the President must publish a declaration in the *Federal Register.* Congress could terminate the national emergency by passing a concurrent resolution. After the *Chadha* decision, Congress substituted a joint resolution for the concurrent resolution. To prevent "emergencies" from lingering for decades without congressional attention or action, the 1976 statute contained an action-forcing mechanism. No later than six months after the President declares a national emergency, and at least every six months thereafter while the emergency continues, each House of Congress must meet to consider a vote to terminate the emergency.

The 1976 statute exempted certain provisions of law, including section 5(b) of the Trading With the Enemy Act, first enacted in 1917. This section had become a source of presidential authority in peacetime as well as wartime. President Roosevelt, for example, used section 5(b) in 1933 to declare a national emergency. Legislation in 1977 attempted to strengthen congressional control, allowing Congress to terminate an emergency by passing a concurrent resolution (a joint resolution would now be required). It was under the 1977 legislation that President Jimmy Carter seized Iranian assets in 1979, an action upheld by the Supreme Court two years later in DAMES & MOORE V. REGAN (1981).

LOUIS FISHER
(1986)

Bibliography

ROSSITER, CLINTON 1963 *Constitutional Dictatorship: Crisis Government in the Modern Democracies.* New York: Harcourt, Brace & world.

U.S. CONGRESS 1976 *The National Emergencies Act* (*Public Law 94–412*). *Source Book: Legislative History, Texts, and Other Documents.* Senate Committee on Government Operations and Senate Special Committee on National Emergencies and Delegated Emergency Powers. 94th Congress, 2d session.

## EMERGENCY PRICE CONTROL ACT
56 Stat. 23 (1942)

The most important independent administrative agency set up during WORLD WAR II was the Office of Price Administration (OPA). The agency began studying plans for rationing and price fixing in April 1941 without benefit of statutory authority. The Emergency Price Control Act of 1942 gave the OPA official status, with broad powers for price regulation and a price administrator to make the act effective. The administrator was given broad discretion to supervise and fix prices and rent ceilings, combat profiteering and speculation, expedite defense purchases without excessive waste, and place limits on wages and other income from PRODUCTION. From 1942 to 1945, the OPA approached complete regulation of prices and rents. To prevent sellers and landlords from seeking INJUNCTIONS in state or federal courts against enforcement of particular price orders, the statute directed all determinations of the legality of price orders, including their constitutionality, to an EMERGENCY COURT OF APPEALS, established in Washington, D.C.

Unlike most wartime agencies, the OPA was challenged in the courts. The Supreme Court was supportive, upholding in YAKUS V. UNITED STATES (1944) those portions of the EPCA delegating to the OPA power to fix prices; in *Bowles v. Willingham* (1944) the Court upheld an OPA rent-fixing directive. *Yakus* also upheld the channeling of issues of legality to the Emergency Court of Appeals, which had the effect of requiring other courts to enforce price orders irrespective of the question of their lawfulness. In *Steuart and Bros. v. Bowles* (1944), the system of "indirect sanctions," whereby the OPA imposed its controls on the economy without formal resort to the judicial process, was sustained; the Court refused to interfere with the principal coercive device whereby various executive agencies gave practical force to their directives.

PAUL L. MURPHY
(1986)

Bibliography

UNITED STATES OFFICE OF TEMPORARY CONTROLS 1947 *The Beginnings of OPA.* Washington, D.C.: Office of Temporary Controls.

## EMINENT DOMAIN

In his argument as counsel in WEST RIVER BRIDGE COMPANY V. DIX (1848), the first case in which the Supreme Court ruled directly on the constitutionality of the states' power of eminent domain, DANIEL WEBSTER thundered against the whole concept of state discretion in "takings." Only in the past few years, he contended, had this power of eminent domain been recognized in American law. Claims for its legitimacy, moreover, were "adopted from writers on other and arbitrary [civil law] governments," he declared; and eminent domain could easily become an instrument for

establishment by the states of "unlimited despotisms over the private citizens." Webster tried, in effect, to get the court to impose Fifth Amendment standards on the states.

Webster was engaged in a failing cause. Besides, his history was inaccurate and his predictions of disaster were simplistic. He was certainly right, however, in seeing the eminent domain power as a formidable threat to VESTED RIGHTS, corporate or individual. He understood that eminent domain condemnations might become a proxy for regulation under the POLICE POWER, undermining the CONTRACT CLAUSE as a bulwark of PROPERTY RIGHTS. He was right in raising the alarm when he did; when *West River Bridge* was argued there had been a vast increase in activity by government and private CORPORATIONS in exercise of eminent domain. The transportation revolution in America was in an expansionary phase; extensive new railroad construction reinforced the effects on PROPERTY law already felt from canal, turnpike, and bridge enterprises. All these ventures required use of the "taking" power in order to accomplish their purposes.

Contrary to Webster's version of legal history, government's power to expropriate privately owned property for a variety of public purposes had long been an element of Anglo-American law. The power of eminent domain was the power to compel transfers to government or government's assignees. In its constitutional version, even in the 1840s, it was understood as a power that could be exercised legitimately only for a PUBLIC USE or PUBLIC PURPOSE, and that required the payment of JUST COMPENSATION. In English decisions and statutes going back several centuries, in American colonial law, and in the state law of the early republic, this power of taking by governmental authority had been exercised for such purposes as road-building, fortifications, drainage (including the great Fens projects of England in the seventeenth century), navigational improvement on rivers, and construction of bridges and canals. In colonial Massachusetts, statute had extended a variant of the power into the manufacturing sector by authorizing builders of mills to dam up streams, flooding neighboring lands; these "milldam laws" provided for assessment of damages and payment of compensation in cash.

The Fifth Amendment—which the Supreme Court would rule in BARRON V. BALTIMORE (1833) was not applicable to the states—expressed the views and used language already embodied in several of the state constitutions adopted during the Revolutionary era. Thus the amendment's requirement that property could be taken "for public use" and on payment of "just compensation" had been foreshadowed by such documents as the 1780 Massachusetts Declaration of Rights, which declared that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive reasonable compensation therefor."

Although several early state constitutions lacked such language, uniformly the state courts, in reviewing takings cases, ruled that general principles of justice, the writings of the natural-law jurists, or the constitutional values reflected in the Fifth Amendment justified imposition by judges of both a "public use" and a "just compensation" limitation upon their legislatures' uses of the eminent domain power. It was a singular feature of legal development in the states, however, that despite the widespread formal adoption of such limitations, in fact only slight constraints were placed on the legislatures. In practice, compensation paid to persons suffering from takings was far below market value (and, because of offsetting benefits commonly calculated against damages, often they were paid nothing in cash); hence, eminent domain became an instrument for the subsidization, through cost reduction, of both governmental enterprises and favored private undertakings. "Public convenience" became, in most states, a legitimate reading of the "public use" requirement; and in practice, the legislatures enjoyed wide discretion in deciding what types of enterprise might be vested with the power to expropriate private property. Ironically, the very bridge and railroad corporations that Webster represented so often were among the greatest beneficiaries of eminent domain devolution in that era.

The Court in *West River Bridge* wholly rejected Webster's contentions, ruling that state eminent domain powers were "paramount to all private rights vested under the government." It left the state courts to decide for themselves whether compensation payments were just in particular cases, or whether DUE PROCESS requirements of state constitutions had been met.

So stood constitutional doctrine until the adoption of the FOURTEENTH AMENDMENT. Under its due process clause, the door was opened to challenges in federal courts of state eminent domain actions. Increasingly, too, in the late nineteenth century, the Supreme Court was called upon to rule upon the constitutionality of regulatory measures that activist state legislatures were enacting. The issue tended to take the form of defining a "taking," with the constitutional requirement it connoted, as opposed to bona fide use of the police power, which did not require compensation. The Court ruled in a succession of cases that the Fourteenth Amendment embodied the requirements of "public use" and "just compensation." It took a broad view, however, of what types of enterprise the states might aid with devolutions of the eminent domain power; in a series of cases on irrigation districts, drainage companies, individual enterprises and corporation activities in

other areas such as logging and mining, and the more traditional areas of state activity, the Court upheld legislative discretion under a permissive "public use" standard.

In MUGLER V. KANSAS (1887), the Court attempted to distinguish between a taking, which required compensation, and uses of the police power, which it defined as laws abating nuisances or limiting uses of property that were harmful to "health, morals, or safety of the community," not compensable. But drawing the police powereminent domain line proved difficult; indeed, it perplexes the Court to the present day. In *Pennsylvania Coal Company v. Mahon* (1922), Justice OLIVER WENDELL HOLMES argued that the police power and eminent domain power are on a single continuum; differences are a matter of degree, not qualitative. The Court has continued to struggle with the issue, and in modern land-use ZONING cases from EUCLID V. AMBLER REALTY (1926) to *Agins v. Tiburon* (1980) it has sought a firmer ground to replace the distinction Holmes found so appropriate.

The Court has upheld congressional discretion in deciding what purposes of federal eminent domain met the Fifth Amendment's "public use" requirement. In *United States v. Gettysburg Electric Railway Company* (1896), the Court declared acceptable any use "which is legitimate and lies within the scope of the Constitution." In *United States ex rel. Tennessee Valley Authority v. Welch* (1946) the Court carried the doctrine to an extreme, concluding that a congressional decision to authorize expropriation of property "is entitled to deference until it is shown to involve an impossibility." A few years later, *Berman v. Parker* (1954) upheld federal eminent domain takings to conduct an urban redevelopment project in the District of Columbia. Here the end was the public welfare, a "broad and inclusive" concept, the Court declared, that certainly embraced slum clearance and an urban development designed to be "beautiful as well as sanitary." Given the validity of this purpose, it was legitimate to invoke eminent domain, which was only a means. Congress must decide as to the need for the project and its design.

In its quest to develop standards to distinguish takings from legitimate exercise of the police power, the Court has probed to the heart of property concepts. What rights are "vested," how "reasonable expectations" should be defined, what obligations inhere in the ownership of private property—all are questions that come to the surface repeatedly in continuing litigation. Nearly 150 years ago, Chief Justice LEMUEL SHAW of Massachusetts admonished, in *Boston Water Power Company v. Railroad* (1839), that the eminent domain power "must be large and liberal, so as to meet the public exigencies, and it must be so limited and constrained, as to secure effectually the rights of the citizen; and it must depend, in some instances, upon the nature of the exigencies as they arise, and the circumstances of individual cases." Shaw's view may have lacked prescriptive potential, but it has proved remarkably accurate in predicting the direction that the law would take—and the perplexities that would beset the best efforts of lawmakers and judges to produce definitive formulae.

HARRY N. SCHEIBER
(1986)

(SEE ALSO: *Hawaii Housing Authority v. Midkiff.*)

Bibliography

DUNHAM, ALLISON 1962 *Griggs v. Allegheny County* in Perspective: Thirty Years of Supreme Court Expropriation Law. *Supreme Court Review* 1962:63–106.

GRANT, J. A. C. 1931 The "Higher Law" Background of the Law of Eminent Domain. *Wisconsin Law Review* 6:67–85.

HURST, JAMES WILLARD 1964 *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836–1915.* Cambridge, Mass.: Harvard University Press.

SCHEIBER, HARRY N. 1971 The Road to *Munn:* Eminent Domain and the Concept of Public Purpose in the State Courts. *Perspectives in American History* 5:327–402.

STOEBUCK, WILLIAM B. 1972 A General Theory of Eminent Domain. *Washington Law Review* 47:553–608.

——— 1980 Police Power, Takings, and Due Process. *Washington and Lee Law Review* 37:1057–1099.

## EMINENT DOMAIN
## (Update)

One of the most challenging and enduring puzzles in American constitutional law is how one distinguishes a compensable TAKING OF PROPERTY from a legitimate and noncompensable exercise of the POLICE POWER. To suggest the Supreme Court's approach to the question, Harry N. Scheiber, author of the *Encyclopedia*'s principal article on eminent domain, looked back and away from the Court to Chief Justice LEMUEL SHAW of Massachusetts. Shaw had observed in 1839 that much depends "upon the nature of the exigencies as they arise, and the circumstances of individual cases." As of 1985, Scheiber concluded, Shaw's view "lacked prescriptive potential, but it has proved remarkably accurate in predicting the direction that the law would take—and the perplexities that would beset the best efforts of lawmakers and judges to produce definitive formulae."

Even in 1985, however, there were at least some "definitive formulae" by which to identify regulatory takings. First, it had long been thought that government regulatory action resulting in physical invasion of private PROPERTY

should always be regarded as a taking, no matter how trivial the intrusion, and this per se rule was firmly endorsed by the Court in LORETTO V. TELEPROMPTER, INC. (1982), at least if the government invasion was "permanent." A second per se rule—that government regulation of nuisance-like activity was never to be regarded as a taking, no matter how substantial the burden of the regulation—was also clear enough.

Neither of these per se rules could be of much importance in the modern regulatory state, for modern regulation seldom results in physical invasions and commonly reaches beyond the mere control of nuisances. Yet, in this broad and important middle ground, the Court in 1985 was self-consciously drawing the line between takings and the police power in just the ad hoc fashion that Shaw had long ago foreseen. The two per se rules aside, the Court's approach was one of balancing a number of considerations, including the mix and breadth of benefits and burdens worked by a regulation, its economic impact, and the extent of its interference with concrete investment-backed expectations. The ad hoc approach played into the two per se rules as well, because temporary physical invasions were to be examined in terms of balancing and because the characterization of something as a nuisance is itself a matter of more or less.

Have matters changed since 1985? The answer depends in large part on three cases decided by the Court in 1987: *Nollan v. California Coastal Commission*, *Keystone Bituminous Coal Association v. DeBenedictis*, and *First English Evangelical Lutheran Church v. County of Los Angeles*. Unfortunately, the meaning of these cases is hardly clear. Some analysts see in them an unwelcome move away from ad hoc balancing. In their view, the Court has now confirmed the two per se rules mentioned above and added more, such that the law of regulatory takings is being resolved into a series of categorical "either-ors." Either a regulation (controlling other than nuisances) is categorically a taking because it results in a permanent physical invasion, specifically undermines a distinct investment-backed expectation, or totally eliminates the property's economic value, or it is categorically not a taking at all. But other commentators see in the 1987 decisions yet more evidence that the Court remains unable to develop what Scheiber called "definitive formulae."

The foregoing disagreement aside, there are other puzzles in the takings cases of 1987. *Nollan* found a taking where the regulatory authority had conditioned a development permit on the property owners' dedication of a lateral easement of public passage across their land. This decision suggests that some regulatory programs will be subjected to heightened judicial scrutiny in the course of determining takings questions, but it is far from clear how broadly this suggestion should be read. *Keystone Bituminous*, in the course of upholding Pennsylvania's Subsidence Act against a takings claim, seems to overrule the opinion of Justice OLIVER WENDELL HOLMES, JR., in *Pennsylvania Coal Company v. Mahon* (1922), the centerpiece of regulatory takings law; yet the Court never says as much. And Justice JOHN PAUL STEVENS, in his dissent in *First English Evangelical Lutheran Church*, poses a nice problem for the Court's endorsement in that case of INVERSE CONDEMNATION as a remedy for regulatory takings.

*First English* finally announced what had been anticipated ever since the dissenting opinion of Justice WILLIAM J. BRENNAN in *San Diego Gas and Electric Company v. City of San Diego* (1981). *First English* holds that in the event of regulatory takings, property owners are entitled to the JUST COMPENSATION required by the Fifth Amendment, including interim DAMAGES for the period the offending regulation remains in effect. "Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." But amendment or withdrawal no longer permits the government to escape liability, as it did before. Once the taking has occurred, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."

Of all that the Court has decided about takings since 1985, only the remedy of inverse condemnation appears to be clear, yet even it is cloudy. The cloud looms because of the Court's admonition that it is not dealing "with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, and the like which are not before us." Here a temporary loss of use might not be a taking at all. But how, Justice Stevens wonders, is one to draw the line between such "everyday regulatory inconveniences" and compensable temporary takings? In any event, if a regulation can affect a significant percentage of some property's *value* without being held a taking—and this is clearly the law—then why should a regulation not be allowed to affect as well a significant percentage of the property's useful *life*?

The law of takings seems little clearer today than it did in 1985, inverse condemnation *in principle* aside.

JAMES E. KRIER
(1992)

(SEE ALSO: *Environmental Regulation and the Constitution; Property Rights; Regulatory Agencies.*)

Bibliography

SYMPOSIUM 1988 The Jurisprudence of Takings. *Columbia Law Review* 88:1581–1794.

# EMPLOYEE SPEECH RIGHTS
## (Private)

Employees in the private sector enjoy FIRST AMENDMENT rights like any other citizens. But those constitutional rights run only against the government—against STATE ACTION—and not against the private employer, who poses the chief threat to employees' FREEDOM OF SPEECH at and about the workplace. So the speech of private sector employees implicates the First Amendment only in those rare instances when the government acts to suppress that speech.

The paucity of First Amendment issues in the private sector workplace has contributed to an impoverished conception of the significance of employee speech and of the workplace as a forum for expression. The workplace is often seen as simply a component of the market, a domain of purely instrumental relations. Yet workplace issues, and related issues of class and wealth, are central to individuals' lives and to public debate. The workplace is where people discuss these issues, as well as other social and political issues, current events, popular culture, and personal concerns. It is thus an important arena for deliberation among citizens and for the formation of personal ties that transcend family, neighborhood, and racial and ethnic boundaries. But there is little recognition of the unique importance of workplace speech in those relatively rare cases in which private sector employee speech is threatened by state action.

Until recently, government suppression of private employee speech was largely confined to the arena of LABOR law—the law governing unions and collective bargaining. First Amendment challenges to restrictions on labor speech have a mixed record. Although peaceful labor picketing is a recognized form of protected expression, the Supreme Court has upheld numerous laws that prohibit picketing based on its purpose or effect. The Court has treated the constitutional implications of these prohibitions rather casually, failing to explain, for example, why labor picketing is less protected than CIVIL RIGHTS picketing. On the other hand, the Court has cited First Amendment concerns as the basis for narrowly construing a National Labor Relations Act provision to avoid banning consumer handbilling.

The law of discriminatory WORKPLACE HARASSMENT has recently called attention to the constitutional speech rights of private sector employees. Title VII of the CIVIL RIGHTS ACT OF 1964 prohibits employers from discriminating against employees, and from subjecting them to a "hostile work environment," on the basis of sex, race, ethnicity, and religion. Other laws, state and federal, extend the hostile environment theory to harassment on the basis of age, disability, and veteran status. Employers can be held liable for a hostile environment based partly or entirely on the speech of subordinate employees. As a result, harassment DOCTRINE induces employers to prohibit employee speech that could contribute to harassment liability, whether or not it constitutes harassment. Because Title VII operates indirectly, by inducing private actors to censor speech, the constitutional issue is obscured and seldom litigated. But it is serious nonetheless. Citing fear of liability, some employers have sought to purge the workplace of comments, jokes, or cartoons that might offend some employee on the basis of race, sex, religion, ethnicity, or other protected status.

Employers who read harassment law as a reason to ban any "suggestive" or conceivably offensive speech may be overreacting to the law; but in the absence of clear limitations on the sort of expression that may count toward liability, the reaction is foreseeable. The vague contours of hostile environment law are thus responsible for a serious constriction of the freedom of working people to communicate at work. Some pruning is in order.

The Court suggested a drastic solution in R.A.V. V. CITY OF ST. PAUL (1992). While condemning most attempts to suppress racist and sexist speech, the majority suggested in dicta that Title VII may be defensible: It is "directed not against speech but against conduct"—that is, EMPLOYMENT DISCRIMINATION—and it only "incidentally" restricts "a particular content-based subcategory of a proscribable class of speech," such as "sexually derogatory 'fighting words.' " This defense of harassment law is strikingly narrow: Hostile environment law would be drastically pruned if only FIGHTING WORDS, OBSCENITY, and other traditionally unprotected speech could be actionable. This standard takes too little account of the peculiar vulnerability of the workplace audience. It would render discrimination law powerless to prevent hostile coworkers from using obnoxious and bigoted speech to make the workplace intolerable for minority and female coworkers.

The solution to this dilemma may lie in a workplace-specific standard focusing on the time, place, and manner of alleged harassing speech. For example, speech that is personally directed at an unwilling listener, or that is not reasonably avoidable by unwilling listeners, exploits the workplace setting and the economic constraints on employees, and deserves lesser constitutional protection. Employers and employees alike need a definitive resolution of the problem of verbal workplace harassment, a resolution that recognizes both the free speech interests of employees and the special vulnerability of the workplace audience.

CYNTHIA L. ESTLUND
(2000)

Bibliography

BECKER, MARY 1996 How Free Is Speech at Work? *UC Davis Law Review* 29:815–873.

ESTLUND, CYNTHIA L. 1997 Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment. *Texas Law Review* 75:687–777.

GREENAWALT, KENT 1995 *Fighting Words: Individuals, Communities, and Liberties of Speech.* Princeton, N.J.: Princeton University Press.

VOLOKH, EUGENE 1992 Freedom of Speech and Workplace Harassment. *UCLA Law Review* 39:1791–1872.

## EMPLOYEE SPEECH RIGHTS
(Public)

The FREEDOM OF SPEECH rights of PUBLIC EMPLOYEES have evolved from simplicity to complexity. Late nineteenth and early twentieth century judges thought public officials could require citizens to surrender their constitutional rights in order to obtain or continue receiving government benefits or government jobs. "The petitioner may have a constitutional right to talk politics," Justice OLIVER WENDELL HOLMES, JR., famously declared in *McAuliffe v. Mayor of New Bedford* (1892), "but he has no constitutional right to be a policeman." *McAuliffe* and other cases allowed public employees to be fired for criticizing their departments, because "[t]he servant . . . takes the employment on the terms which are offered him."

This rule did not survive the coming of the welfare state, where most Americans depended on some government benefit and many held government jobs. The Supreme Court during the second half of the century sensibly rejected both *McAuliffe* and the hard distinction between constitutional rights and mere state privileges that had enabled public officials to trade state benefits for constitutional liberty. Public employees first gained a measure of freedom when in WIEMAN V. UPDEGRAFF (1952) the Justices unanimously agreed that persons who belonged to "innocent" political organizations could not be banned from state jobs. Sixteen years later, the Justices extended this ruling and laid down vague guidelines for determining when public employees could speak without fear of losing their jobs. Justice THURGOOD MARSHALL in *Pickering v. Board of Education of Will County, Illinois* (1968) declared that the official constitutional standard required "a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

The general rules governing the free-speech rights of public employees seem fairly libertarian at first glance. Judicial opinions celebrate the contribution such public employees as Nathaniel Hawthorne and Herman Melville have made to public discourse, and constitutional protection has been extended, in *Board of Commissioners v. Wabaunsee County v. Umbehr* (1996), to private contractors who do business with the state. The BURGER COURT struck a blow at traditional PATRONAGE practices, ruling in *Elrod v. Burns* (1976) and *Branti v. Fishel* (1980) that public employees could not be hired or fired simply on the basis of their political affiliations, unless "party affiliation is an appropriate requirement for the effective performance of the public office involved." Although the Justices have sustained measures forbidding political campaigning by public employees, the Court in UNITED STATES V. NATIONAL TREASURY EMPLOYEES UNION (1995) declared unconstitutional as applied to civil servants below the level of GS-16 a 1989 statute barring all federal employees from accepting any compensation for outside speeches or articles.

When actually applied on a case-by-case basis, however, the *Pickering* guidelines have strongly favored public employers. The Justices in *Connick v. Myers* (1983) narrowly defined matters of public concern when ruling that an assistant district attorney could be fired for complaining about working conditions in her department. Several years later, in WATERS V. CHURCHILL (1994), the Justices held that public employees could be constitutionally fired on the basis of what their supervisors erroneously thought they said, even though their actual statements may have been constitutionally protected. The opinion of Justice SANDRA DAY O'CONNOR in that case emphasized that courts should generally defer to government claims concerning what restrictions on speech were necessary to the efficient operation of public services.

*Waters* and other recent cases may indicate that public employees have free-speech rights only when a government attorney foolishly asserts that the Constitution does not give that employee any rights. Whenever public employers give more particularized reasons as to why a particular speech warrants termination, the FIRST AMENDMENT as construed by the REHNQUIST COURT is not likely to be very protective of the free-speech rights of public employees. In the latter half of the 1990s, the Justices may begin their opinions by highlighting the value of speech by public employees; however, maintaining the efficiency of the public workplace as defined by public employers remains the more important value.

MARK A. GRABER
(2000)

## EMPLOYERS' LIABILITY ACTS
34 Stat. 232 (1906)
35 Stat. 65 (1908)

In the first Employers' Liability Act of June 1906, Congress extended nationwide protection to railroad workers

against the arsenal of COMMON LAW defenses which employers had so effectively used to defeat personal injury suits. This act rendered every common carrier engaged in INTERSTATE COMMERCE liable to its employees for all damages resulting from negligence. Congress thus discarded the "fellow-servant" rule which had exculpated employers in accidents caused by another workman's negligence. Moreover, contributory negligence would not bar recovery and the law directed juries, not judges, to determine questions of negligence and assess damages proportionally. The act also prohibited the use of insurance or other benefits as a defense against damage suits. When a 5–4 Supreme Court declared this act unconstitutional because it extended to railroad employees not engaged in interstate commerce, Congress passed a second version of the act in April 1908. Although substantially the same, the new act covered only employees actually working in interstate commerce. Congress also added several sections further protecting employees and extended the period of limitation on actions from one to two years. As it had implied in its first decision, the Court unanimously sustained the act in the second set of EMPLOYERS' LIABILITY CASES (1912).

DAVID GORDON
(1986)

## EMPLOYERS' LIABILITY CASES
207 U.S. 463 (1908)
223 U.S. 1 (1912)

The first EMPLOYERS' LIABILITY ACT, passed in 1906, made a common carrier liable for the on-the-job injury or death of any employee and eliminated the "fellow-servant" rule by which an employer had been relieved of liability for an injury to one worker caused by another's negligence. In the first *Employers' Liability Cases*, a 5–4 Supreme Court held that Congress had exceeded its INTERSTATE COMMERCE power.

Justice EDWARD D. WHITE's opinion for the Court (only Justice WILLIAM R. DAY concurred completely in his opinion) addressed two objections to the act: that Congress had no power to regulate the subject, and that the act regulated things outside the scope of the commerce power. He dismissed the first objection. The COMMERCE CLAUSE set no limits on subjects regulated. Indeed, the Court decided only the extent of Congress's power, not the wisdom of its action. "We fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant . . . [as a subject of] interstate commerce." The argument that the act had unconstitutionally regulated INTERSTATE COMMERCE proved more troublesome. Because the act imposed liability on employers "without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of injury, of necessity [it] includes subjects wholly outside the power of Congress to regulate commerce." White refused to accept the contention that the Court ought to interpret the act as applying solely to interstate commerce even though it did not explicitly say so.

Chief Justice MELVILLE W. FULLER and Justice DAVID J. BREWER concurred in Justice RUFUS PECKHAM's opinion endorsing White's result but retreating from White's statement about Congress's power over master-servant relations. In a lengthy dissent, Justice WILLIAM MOODY argued that the Court was obliged to read the statute so as to preserve its constitutionality. "We think that the act, reasonably and properly interpreted, applies . . . only to cases of interstate commerce . . . and not to domestic commerce."

After Congress enacted another version of the law accommodating the majority's objections, a unanimous Court upheld its constitutionality. Justice WILLIS VAN DEVANTER's opinion broadly asserted the reach of Congress's power over the subject. He disposed of the objection that the act, by discarding COMMON LAW doctrines, had exceeded Congress's power: "A person has no property, no vested interest, in any rule of common law." The act also promoted safety and advanced commerce, and Van Devanter dismissed the contention that it violated the DUE PROCESS CLAUSE's guarantee of FREEDOM OF CONTRACT.

DAVID GORDON
(1986)

## EMPLOYMENT DISCRIMINATION

Employment discrimination on grounds of race, sex, nationality, or religion may be challenged under two acts of Congress. One of the statutes, now codified as Title 42 of the United States Code, section 1981, is a survivor of the CIVIL RIGHTS ACT OF 1866, enacted for the protection of former slaves. As originally enacted, the statute was not seen as an employment discrimination statute. It conferred upon blacks the right to make and enforce contracts, to sue and to enjoy on a par with whites the protection of laws. The act was passed pursuant to Congress's authority under section 2 of the THIRTEENTH AMENDMENT, and Congress proposed the FOURTEENTH AMENDMENT in order to assure the act's validity. After the Reconstruction era, however, it and other Reconstruction-era civil rights legislation fell into disuse until the 1960s. Not until *Johnson v. Railway Express Agency, Inc.* (1975) did the United States Supreme Court confirm the application of section 1981 to RACIAL DISCRIMINATION in private-sector employment. This statute's use in employment discrimination cases has become secondary to reliance on Title VII of the CIVIL RIGHTS ACT OF 1964, which was enacted by Congress as part of a comprehensive statute prohibiting discrimination on grounds of race, sex, religion,

or national origin in employment, PUBLIC ACCOMMODATIONS, and federally funded programs.

Enactment of the 1964 Act followed a long period of civil rights DEMONSTRATIONS against the kinds of discrimination the act prohibited. For twenty years preceding the enactment of Title VII, more than 200 fair employment practice bills had been proposed in the Congress, but none had passed. Allegations of a Title VII violation often are accompanied by additional allegations of a section 1981 violation.

Another survivor of Reconstruction-era legislation now codified as 42 United States Code 1985(c), was originally designed to protect blacks from Ku Klux Klan violence. The Supreme Court, in *Great American Federal Savings and Loan Association v. Novotny* (1979), rejected the view that section 1985(c) provides an independent remedy for the adjudication of rights protected by Title VII.

The constitutionality of Title VII of the 1964 act was never seriously questioned. The power of Congress to enact Title VII, either under the COMMERCE CLAUSE or to enforce the FOURTEENTH AMENDMENT, seems to have been assumed. In 1972 Congress extended the coverage of Title VII to include employment discrimination by state and local governments. Subsequently, it was argued that backpay awards and attorneys' fees levied by a federal court against a state under the amended Title VII violated the jurisdictional limitations of the ELEVENTH AMENDMENT. However, in FITZPATRICK V. BITZER (1976) the Supreme Court rejected that argument, holding that the 1972 amendment was a valid exercise of Congress's enforcement power under section 5 of the FOURTEENTH AMENDMENT.

REGINALD ALLEYNE
(1986)

Bibliography

COMMENT 1980 Developments in the Law—Section 1981. *Harvard Civil Rights-Civil Liberties Law Review* 15:29–277.

DEAN, JOHN P. 1978 Title VII and Public Employers: Did Congress Exceed Its Powers? *Columbia Law Review* 78:372–408.

HILL, HERBERT 1977 The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law. *Industrial Relations Law Journal* 2:1–96.

## *EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON v. SMITH*
484 U.S. 872 (1990)

Two drug and alcohol abuse counselors were fired from their jobs after ingesting the hallucinogenic drug peyote during a religious ceremony of the Native American Church. They were subsequently denied unemployment compensation by the state of Oregon because the state determined they had been discharged for work-related "misconduct." The workers filed suit, alleging that the denial of compensation violated the free exercise clause of the FIRST AMENDMENT. The Supreme Court disagreed by a vote of 6–3.

If the Court had handled *Smith* as it had handled most of its previous cases in the field of RELIGIOUS LIBERTY, it would have first asked whether Oregon had a COMPELLING STATE INTEREST to deny unemployment compensation to the fired workers. If Oregon could demonstrate such an interest, and the denial of compensation was narrowly tailored to further that end, the denial would have been upheld. But the Court did not treat *Smith* as it had previous cases. Instead, it used *Smith* to abolish the compelling-interest standard for challenges brought under the free exercise clause.

Writing for five members of the Court, Justice ANTONIN SCALIA made the astonishing claim that the Court had never really applied the compelling-interest standard to free exercise claims. According to Scalia, the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." Of course, the Court had held precisely that in several cases, most notably CANTWELL V. CONNECTICUT (1943) and WISCONSIN V. YODER (1972). But Scalia noted that these cases implicated other constitutional rights besides free exercise, and he suggested that those other rights were the decisive factor in the Court's decisions to hold unconstitutional particular applications of certain general laws. In *Cantwell*, the invalidated licensing law impinged on the FREEDOM OF SPEECH; in *Yoder*, the compulsory education law infringed on the "right of parents . . . to direct the education of their children." Scalia concluded from this that only when the free-exercise clause is joined with other constitutional protections may it invalidate particular applications of general laws. As a practical matter, this means that the free exercise clause alone means very little. Generally applicable laws that do not implicate other constitutional rights are constitutional, no matter how difficult they make it for certain persons to practice their religion; indeed, it is conceivable that a generally applicable law could destroy certain religious groups entirely and yet survive a free exercise challenge under Scalia's approach. Only laws that expressly seek to regulate religious beliefs or to proscribe certain actions only when they are engaged in for religious reasons violate the free exercise clause according to the Court's new standard.

Concurring in the judgment, but disavowing the Court's reasoning, Justice SANDRA DAY O'CONNOR attacked

the majority opinion as "incompatible with our Nation's fundamental commitment to individual religious liberty." Carefully recalling prior precedents, O'Connor showed that the compelling-interest test had been applied much more consistently by the Court in free exercise cases than Scalia had suggested. O'Connor further defended the test as an appropriate method by which to enforce "the First Amendment's command that religious liberty is an independent liberty. . . ." Applied to the case at hand, O'Connor believed that the free exercise claim could not prevail, however, because exempting the two workers from drug laws would significantly impair the government's "overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance."

Justices THURGOOD MARSHALL, WILLIAM J. BRENNAN, and HARRY A. BLACKMUN joined most of Justice O'Connor's concurring opinion, but they disagreed with her ultimate conclusion, arguing that enforcement of drug laws against the religious ingestion of peyote was in no way necessary to fulfill the state's legitimate interest in circumscribing drug use. The state had argued that an exemption of the claimants in *Smith* would invite a flood of other claims for exemption to drug laws based on religious beliefs; but Blackmun pointed out that many states already have statutory exemptions for religious peyote use and have suffered no such difficulty.

The debate on the Court that erupted in *Smith* over what standard to apply to free exercise claims was dramatic; and yet it was not entirely unexpected, having been foreshadowed in several previous cases, including GOLDMAN V. WEINBERGER (1986) and O'LONE V. ESTATE OF SHABAZZ (1987). It also had been preceded for some years by a vigorous debate among scholars such as Walter Berns and Michael McConnell. Berns had long characterized the Court's decision in *Yoder* as contrary to American republicanism. His view clearly triumphed in *Smith.* Whether or not the Court's new approach is any better than its old one, however, is open to question.

One can certainly understand why the Court might want to restrict challenges under the free exercise clause. When only the members of a particular religious group may use an illegal drug or ignore compulsory education laws, the free exercise clause appears to undermine the equality before the law established by the rest of the Constitution. Scalia's approach seeks to avoid this contradiction by defining free exercise in terms of other constitutional rights, such as freedom of speech, FREEDOM OF ASSOCIATION, and EQUAL PROTECTION. Scalia has a keen theoretical mind, and one can readily see the analytical power of his approach. Under his scheme, religious liberty will be protected by general rights applicable to all, rather than by specific exemptions granted only to those who hold peculiar religious beliefs. The principle of equality before the law will be maintained. That this approach may indeed afford protection to religious liberty is demonstrated by the recent development of the doctrine of EQUAL ACCESS, which is premised on free-speech and free-association protections rather than the free-exercise clause.

Yet one can legitimately wonder—as Justice O'Connor did in *Smith*—whether Scalia's approach will actually protect the free exercise of religion to its fullest extent. One suspects that it could only do so if the Court were willing to give an expansive reading to other constitutional rights in order to make up for its restricted interpretation of free exercise. Indeed, Scalia himself had to resort to an UNENUMERATED RIGHT of parental control over a child's education to explain the Court's previous ruling in *Wisconsin v. Yoder* within his framework. But the REHNQUIST COURT appears to be in no mood to give a broad reading to any rights just now, which makes its evisceration of the free exercise clause all the more troubling.

Government today wields a wide array of regulatory powers that the Court no longer even presumes to question; the "compelling state interest" test may be the only practical way to insulate religious groups from the destructive effects of such regulatory powers. The Court's failure to appreciate this fact raises troubling questions about its commitment to religious freedom for all.

JOHN G. WEST, JR.
(1992)

Bibliography

BERNS, WALTER 1976 *The First Amendment and the Future of American Democracy,* Chapter 2. New York: Basic Books.

MCCONNELL, MICHAEL W. 1990 The Origins and Historical Understanding of Free Exercise of Religion. *Harvard Law Review* 103:1409–1517.

## EN BANC

(French: "As a bench.") The term often applies to appellate courts, and in particular to the UNITED STATES COURTS OF APPEALS. Commonly only a three-member panel of a federal court of appeals hears a case. When the full membership is sitting—whether by its own choice or at a litigant's request—the case is heard before them *en banc.* In the federal courts of appeals, the decision of a panel is reconsidered *en banc* if a majority of the full court's members agree on such a hearing.

DAVID GORDON
(1986)

## *ENDO, EX PARTE*

See: Japanese American Cases

## ENFORCEMENT ACTS

See: Force Acts

## *ENGEL v. VITALE*
370 U.S. 421 (1962)

The Board of Regents of the State of New York authorized a short prayer for recitation in schools. The Regents were seeking to defuse the emotional issue of religious exercises in the classroom. The matter was taken out of the hands of school boards and teachers, and the blandest sort of invocation of the Deity was provided: "Almighty God, we acknowledge our dependence upon Thee, and beg Thy blessings upon us, our teachers, and our country." School districts in New York did not have to use the prayer, and if they did, no child was required to repeat it. But if there were any prayer in a New York classroom it would have to be this one. The Board of Education of New Hyde Park, New York, chose to use the Regents' Prayer and directed its principals to cause it to be said aloud at the beginning of each school day in every classroom.

Use of the prayer was challenged as an ESTABLISHMENT OF RELIGION. Justice HUGO L. BLACK, writing for the Court, concluded that neither the nondenominational nature of the prayer nor the fact that it was voluntary could save it from unconstitutionality under the establishment clause. By providing the prayer, New York officially approved theistic religion. With his usual generous quotations from JAMES MADISON and THOMAS JEFFERSON, Black found such state support impermissible.

Justice WILLIAM O. DOUGLAS concurred separately. He had more trouble than Black concluding that the prayer established religion "in the strictly historic meaning of these words." What Douglas feared was the divisiveness engendered in a community when government sponsored a religious exercise.

Only Justice POTTER STEWART dissented, concluding that "the Court has misapplied a great constitutional principle." Stewart could not see how a purely voluntary prayer could be held to constitute state adoption of an official religion. For Stewart, an official religion was the only meaning of "establishment of religion." He noted that invocations of the Deity in public ceremonies of all sorts had been a feature of our national life from its outset. Without quite saying so, Stewart asked his brethren how the Regents' Prayer could be anathematized on establishment clause grounds without scraping "In God We Trust" off the pennies.

*Engel v. Vitale* was the first of a series of cases in which the Court used the establishment clause to extirpate from the public schools the least-commondenominator religious invocations which had been a traditional part of public ceremonies—especially school ceremonies—in America.

The decision proved extremely controversial. It has been widely circumvented and there have been repeated attempts to amend the Constitution to undo the effect of *Engel.*

RICHARD E. MORGAN
(1986)

Bibliography

BERNS, WALTER 1976 *The First Amendment and the Future of American Democracy.* Pages 33–76. New York: Basic Books.
MUIR, WILLIAM K., JR. 1967 *Prayer in the Public Schools.* Chicago: University of Chicago Press.

## ENGLISH BILL OF RIGHTS

See: Bill of Rights (English)

## ENGLISH CONSTITUTION

See: British Constitution

## "ENGLISH ONLY" LAWS

See: "Official English" Laws

## *ENMUND v. FLORIDA*
458 U.S. 782 (1982)

Before this decision, nine states permitted infliction of the death penalty on one who participated in a FELONY resulting in a murder, even if committed by confederates. Earl Enmund drove the getaway car in a robbery at which codefendants killed the victims when he was not present and had not premeditated murder. A 5–4 Court held that the CRUEL AND UNUSUAL PUNISHMENT clause of the EIGHTH AMENDMENT, which the FOURTEENTH AMENDMENT extended to the states, prevented imposition of the death penalty. Capital punishment was disproportionate to the crime when Enmund had not himself killed, attempted to kill, intended to kill, or even intended the use of lethal force.

LEONARD W. LEVY
(1986)

## ENTANGLEMENT TEST

See: Government Aid to Religious Institutions

## ENTITLEMENT

Both the Fifth Amendment and the FOURTEENTH AMENDMENT protect "life, liberty or property" against deprivation "without due process of law." At least according to the constitutional text, when citizens seek to challenge a government's action as a violation of the due process clause, they must adduce some interest in "life, liberty or property" of which they have been deprived.

In the field of PROCEDURAL DUE PROCESS OF LAW, the Supreme Court traditionally read the phrase "life, liberty or property" as an undifferentiated whole, giving individuals the right to appropriate NOTICE and hearing whenever the government subjected them to "grievous loss." This broad interpretation, however, was often limited by the RIGHT-PRIVILEGE DISTINCTION, according to which benefits that the government was not legally obligated to grant could be denied or terminated without constitutional constraint. Thus, a "grievous loss" occasioned by a denial of "largess" would not trigger constitutional requirements of fair procedure under the due process clause.

In the years following WORLD WAR II, as the involvement of government in social welfare programs and the domestic economy continued to increase, it became clear that government allocation of largess constituted a powerful mechanism for government oppression if left unconstrained. In GOLDBERG V. KELLY (1970), in the course of an opinion imposing constitutionally mandated procedural requirements on the termination of WELFARE BENEFITS, the Court announced in obiter dictum the elimination of the largess or privilege exception to the demands of due process. The claim that "public assistance benefits are a privilege and not a right" was unavailing, according to Justice WILLIAM J. BRENNAN, because "welfare benefits are a matter of statutory entitlement for persons qualified to receive them," functioning more like "property" than "gratuity." The loss of benefits imposed a "grievous loss" and thus called forth the demands of due process.

Two years later, in BOARD OF REGENTS V. ROTH (1972) and *Perry v. Sinderman* (1972), the Court moved the concept of "entitlement" from the margins of due process doctrine to its core. In passing on the claims of untenured professors employed by state colleges to hearings before being dismissed from their posts, the majority opinions of Justice POTTER STEWART took the position that it was not the "weight" of interests affected by public action that invoked the protection of due process but their "nature." Rather than evaluating the "grievousness" of injuries inflicted by discharge, the Court required the instructors to demonstrate that their discharge amounted to a deprivation of technically defined "liberty" or "property."

The liberty protected by due process was delineated in *Roth* as a matter of federal constitutional law. The Court referred to historically rooted concepts of liberty: beyond freedom from bodily restraint and assault, it included the "privileges long recognized as essential to the orderly pursuit of happiness by free men." Property interests, on the other hand, were said to find their source outside the Constitution in "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Beyond the areas protected as liberty, therefore, an entitlement grounded in "some independent source such as state law" was a necessary condition for a claim to procedural due process protection. Because under state law Roth's employment was terminable at will, he had no property entitlement upon which to base his demands for due process. The Court left it open for Perry to show some "binding understanding" not embodied in the written terms of his contract that could support a "legitimate claim of entitlement."

In subsequent cases, the Court clarified the proposition that legislative alteration of the terms of the entitlement does not trigger a requirement of notice and hearing, but only administrative action predicated upon alleged failures to meet the terms of the entitlement. Decisions involving prison release and good-time credit programs, like *Wolff v. McDonnell* (1974) and *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex* (1979) have extended the entitlement concept to conditions of liberty conferred by state laws or regulations. A hearing before deprivation of credit toward release or other prison perquisites granted to a duly sentenced prisoner is required only when the law granting the liberty is sufficient to vest an entitlement.

The reliance on positive law entitlements outside of the Constitution to define the applicability of constitutional protection forces the Supreme Court to spend considerable effort defining what constitutes a sufficiently clear and binding entitlement to invoke the protection of procedural due process. In *Roth* the Court differentiated between an unprotected "unilateral expectation" and a "legitimate claim of entitlement" that could support a property interest. Subsequent opinions have looked primarily to statutes, regulations, and contractual provisions to draw the line of demarcation, but have not required great specificity of entitlement to generate protection. Positive law that leaves official decision makers entirely unconstrained in dispensing benefits or employment has been held to create no protected interests; when criteria in positive law provide substantive limitations on official discretion binding on the decision-makers, even standards

as vague as "good cause" or "probable ability to fulfill the obligations of a law abiding life" have enabled citizens to claim the protection of due process.

A great deal has been held to turn on the particular official choice of language, as well as state court glosses on it. The difference between benefits that "shall be granted if" and that "shall not be granted unless" particular criteria are met can lead to outcomes that vary considerably among cases that seem otherwise quite similar. Under current doctrine, policymakers who seek to control the decisions of street-level bureaucrats with written criteria for actions must pay the price of providing due process to the citizens whom those decisions affect. Given the rule-governed nature of most modern bureaucracies, this doctrine means hearings are widely available. It also means, however, that policymakers who seek to escape federal due process constraints have an incentive to leave their subordinates entirely without formal guidance.

The reliance on positive law in defining entitlements has led to a doctrinal conundrum. It is not uncommon for the very statute or regulation that defines the property or liberty entitlement to provide procedures to terminate that interest. In these cases, it has been argued that the entitlement protected is simply the entitlement to retain the benefit until it has been terminated in accordance with statutory procedures. If those procedures have been followed, the argument goes, termination deprives the citizen of no property and federal due process can require nothing more.

Whatever its logical appeal, this argument, originally articulated by Justice WILLIAM H. REHNQUIST in his PLURALITY OPINION in ARNETT V. KENNEDY (1974), is an invitation for government to eliminate the constraints of due process in the administration of statutorily created interests by attaching nugatory procedural protections to their statutory definition of interests. The Court, in *Cleveland Board of Education v. Loudermill* (1985), acknowledged this danger in forcefully rejecting the Rehnquist argument. Justice BYRON R. WHITE wrote for eight members of the Court that once the positive law of a state lays the groundwork for an entitlement, the constitutionally mandated procedures for terminating that interest were unaffected by the procedures that a state might attach. Although state law determines whether an individual is entitled to the protections of due process by defining their entitlements, the Constitution defines what due process requires. "The categories of substance and procedure are distinct," the Court held. "Were the rule otherwise, the due process clause would be reduced to a mere tautology."

SETH F. KREIMER
(1992)

Bibliography

MONAGHAN, HENRY P. 1977 Of Liberty and Property. *Cornell Law Review* 62:401–444.

SMOLLA, RODNEY 1982 The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much. *Stanford Law Review* 35:69–120.

TRIBE, LAURENCE H. 1987 *American Constitutional Law*, 2nd. ed. pp. 663–714. Westbury, N.Y.: Foundation Press.

## ENTRAPMENT DEFENSE

The entrapment defense is not constitutionally safeguarded and raises no constitutional issue unless a guilty defendant claims that law enforcement conduct violates the fundamental fairness mandated by DUE PROCESS OF LAW; if such a constitutional defense were to be recognized by the Supreme Court the effect would, like an EXCLUSIONARY RULE, be aimed at deterring unlawful police conduct.

Entrapment is a means of securing evidence to convict by luring a person into the commission of a crime of which he is suspected. Ordinarily the duty of an officer of the law is to deter crime and apprehend those who commit it, not to incite or instigate it. Certain offenses of a clandestine or consensual character, however, are difficult to expose and punish except by some degree of covert government participation. Official deceit is not necessarily illegal or unconstitutional. Undercover police work is particularly effective in uncovering crimes that involve gambling, drugs, prostitution, and official corruption. Nevertheless the government should not fight crime with crime.

When an undercover officer has gained the confidence of a radical organization and encouraged its members to engage in terrorist activities and provided them with the weapons and explosives to do so, he has become an *agent provocateur* who has conceived and procured the commission of a crime that would not have occurred but for him. If an officer posing as an imposter approaches a law-abiding person with no criminal record and induces him to smuggle contraband, the officer has passed the law's tolerance and the smuggler's guilty conduct may be legally excusable. When entrapment goes too far, it creates a legal defense which, like insanity or killing to save one's own life, merits a verdict of not guilty. The question in any case is whether the evidence shows that entrapment is a sufficient defense by a person who has in fact committed the crime charged against him. The mere fact that a government agent provides a favorable opportunity to one willing and ready to break the law is not entrapment for the purpose of making good a defense; if, however, the defendant had no previous intent to commit the offense and did so only because the police induced him, the verdict should be an acquittal.

Entrapment comes before the Supreme Court as a nonconstitutional defense in cases involving federal crimes. The Justices have always divided into two wings: one fo-

cuses on the criminal intent or predisposition of the defendant to commit the crime; the other focuses on the conduct of law enforcement officers. The view that has always prevailed, from the first case, *Sorrells v. United States* (1932), to *Hampton v. United States* (1976), is that it is no entrapment for the police merely to instigate the crime; they must also instigate its commission by luring an innocent person with no previous disposition to commit it. The criminal design, as Chief Justice CHARLES EVANS HUGHES said in 1932, must originate with the authorities who implant the predisposition in the mind of an otherwise innocent person and incite him to commit it so that they may prosecute. Thus, in *United States v. Russell* (1973), the Court sustained the conviction of the manufacturer of an illegal drug, who claimed that the government had violated due process when an undercover agent supplied him with an essential chemical ingredient. But the ingredient was harmless, its possession was not illegal, and, above all, the defendant was already engaged in the criminal enterprise. In *Hampton*, however, a government informant supplied an illegal drug and arranged its sale by the defendant to undercover agents. Although the government deliberately set him up, the Court stressed that his previous propensity to commit the crime negated his entrapment defense. He was, in a phrase of Chief Justice EARL WARREN, "an unwary criminal" rather than an "unwary innocent."

Justice WILLIAM H. REHNQUIST wrote the entrapment opinions of the BURGER COURT, from which Justices POTTER STEWART, WILLIAM J. BRENNAN, and THURGOOD MARSHALL dissented. The dissenters insisted that the majority's focus on the criminal's predisposition is "subjective," and they preferred an "objective" test: whether, despite predisposition, police conduct instigated the offense. The objectivity of that view, however, can be deceptive, and it ignores criminal intent. Doubtless, though, the trend of decision has made the entrapment defense nearly useless if a jury does not accept it. If the "outrageousness" of police conduct should pass the threshold of judicial tolerance in some future case, the Court may find a due process basis for the entrapment defense.

LEONARD W. LEVY
(1986)

Bibliography

DUNHAM, DAN S. 1977 Hampton v. United States: Last Rites for the "Objective" Theory of Entrapment? *Columbia Human Rights Law Review* 9:223–262.

O'CONNER, PETER J. 1978 Entrapment versus Due Process: A Solution to the Problem of the Criminal Conviction Obtained by Law Enforcement Misconduct. *Fordham Urban Law Journal* 7:32–53.

ROSSUM, RALPH A. 1978 The Entrapment Defense and the Teaching of Political Responsibility. *American Journal of Criminal Law* 6:287–306.

## ENUMERATED POWERS

Instead of establishing a national government with a general power to do whatever it might deem in the public interest, the Constitution lists the authorized powers of Congress. The chief source of these "enumerated powers" is Article I, section 8, which authorizes Congress to regulate commerce among the several states, tax and spend, raise and support military forces, and so on. This enumeration has been supplemented by other grants, including authority to enforce the CIVIL WAR amendments.

The enumeration of powers has both a negative and a positive implication. Enumerating or specifying powers implies that some of government's ordinary concerns are beyond the constitutional competence of the national government. This implication is made explicit by the TENTH AMENDMENT. Nevertheless, the founding generation wanted to solve such specific problems as commercial hostility among the states and an unpaid war debt. When THE FEDERALIST defended the proposed national powers it cited the desiderata that might be achieved through their successful exercise. The enumeration of powers thus implies affirmative responsibilities as well as limited concerns. These competing implications are associated with competing approaches to constitutional interpretation and different conceptions of the normative character of the Constitution as a whole. As a reminder of a line between national and state powers, the enumeration of powers suggests THOMAS JEFFERSON's view of the Constitution as a contract between sovereign states to be construed with an eye to preserving state prerogatives. As a reminder of affirmative responsibilities the enumeration suggests JOHN MARSHALL's view of the Constitution as a charter of government to be construed in ways that permit achievement of the social objectives it envisions. History has not favored the Jeffersonian view.

ALEXANDER HAMILTON, in *The Federalist* #84, cited the enumeration of powers as one reason for opposing a BILL OF RIGHTS. Not only were bills of rights unnecessary in countries whose governments possessed only those powers that their people had expressly granted, specifying rights could undermine the enumeration of powers by suggesting "to men disposed to usurp" that the Constitution authorized all that the bill of rights did not prohibit. The result Hamilton ostensibly feared was achieved through constitutional doctrines that accompanied the nation's progress toward the economically integrated industrial society Hamilton favored. These doctrines included Hamilton's own theories of the SUPREMACY CLAUSE and the NECESSARY AND PROPER CLAUSE, theories that influenced

John Marshall's doctrine of IMPLIED POWERS in MCCULLOCH V. MARYLAND (1819).

Marshall's original theory of implied powers was consistent with the idea of enumerated powers because it removed STATES' RIGHTS burdens on national power while insisting that national concerns were limited. In the twentieth century, however, the Supreme Court changed the meaning of implied powers and gave nationalist readings to the general welfare clause and other powers. The aggregate and practical effect of these interpretations was to empower the national government to deal with anything that Congress may perceive as a national problem. This development has all but eliminated the restrictive implication of the enumeration of powers, leaving the Bill of Rights and the Constitution's institutional norms as the principal limitations on national power.

SOTIRIOS A. BARBER
(1986)

(SEE ALSO: *General Welfare Clause; Tenth Amendment.*)

Bibliography

ALFANGE, DEAN, JR. 1969 Congressional Power and Constitutional Limitations. *Journal of Public Law* 18:103–134.

BARBER, SOTIRIOS A. 1984 *On What the Constitution Means.* Chap. 4. Baltimore: Johns Hopkins University Press.

## ENVIRONMENTAL QUALITY IMPROVEMENT ACT

See: Environmental Regulation and the Constitution

## ENVIRONMENTAL REGULATION AND THE CONSTITUTION

Indirectly, at least, the Constitution provides the federal government with power to regulate on behalf of environmental quality, but it also sets limits on the power. It sets limits, likewise, on the regulatory power of the states. What it does not do, at present, is grant the "constitutional right to a clean environment" so avidly sought in the heyday of environmental concern, the decade of the 1970s. Thus, the one unique aspect of the general topic considered here has no doctrinal standing; the remaining aspects are matters of doctrine, but they are not unique to environmental regulation. It is quite sufficient, then, merely to illustrate the wide range of constitutional issues that arise in the context of environmental regulation, and to suggest the nature of the debate on the question of a constitutional right to an environment of good quality.

Environmental lawmaking at the national level of government—whether by Congress, the executive, or indeed the federal courts—became important only in the 1970s, but the beginnings reach back well into the nineteenth century, if not farther. This history, especially the strong federal presence of recent years, makes apparent the significant constitutional authority of the central government in regard to the environment. Granting that it is a government of LIMITED POWERS, and mindful of occasional suggestions "that these powers fall short of encompassing the breadth of concerns potentially subject to environmental regulation," one can still conclude, with Philip Soper, "that no conceivable measure reasonably intended to protect the environment is beyond the reach" of federal authority.

The most important source of federal power to regulate in the environmental field is found in the COMMERCE CLAUSE. The clause, especially as it pertains to congressional authority to regulate activities *affecting* commerce, has been so expansively applied by the federal courts as to justify federal control of virtually any problem of environmental pollution. Some pollution sources, such as automobiles and ships, move in INTERSTATE COMMERCE; other sources manufacture products that do so; pollution affects such mainstays of interstate commerce as agricultural commodities, livestock, and many raw materials; pollutants themselves can be seen as products, or at least by-products, moving "in commerce" across state lines. An imaginative federal district court relied upon this last theory to sustain the Clean Air Act in *United States v. Bishop Processing Company* (D.Md. 1968).

These views lend support not only to the federal air pollution control program but also to programs concerning noise, pesticides, solid waste, toxic substances, and water pollution. Regarding the last especially, Congress can draw on its unquestioned authority over navigable waters, and on the willingness of the federal courts to regard as navigable any waters of a depth sufficient, as someone once said, to float a Supreme Court opinion.

The federal government can draw on other sources of power, at least on a selective basis, to support programs of environmental regulation. The property clause of Article IV, section 3, for example, gives Congress the power to "make all needful Rules and Regulations respecting" the property of the United States. In *Kleppe v. New Mexico* (1976) the clause was relied upon to sustain the Wild Free-Roaming Horses and Burros Act of 1971 as a "needful regulation" "respecting" public lands, against New Mexico's claim that the federal government lacked authority to control the animals unless they were moving in interstate commerce or damaging public lands. It seems clear that under the property clause Congress may regulate the use of its own lands, and perhaps adjacent lands as well, to protect environmental conditions and promote ecological balance on government property.

Other powers relevant to environmental regulation include the TAXING POWER, which presumably would authorize effluent and emission fees to control pollution; perhaps the ADMIRALTY power, as a basis for controlling pollution from ships; and the power to approve INTERSTATE COMPACTS, as an indirect means by which to impose federal environmental standards on compacting states, as the Court suggested in *West Virginia ex rel. Dyer v. Sims* (1951), involving a compact among eight states to control pollution in the Ohio River system. And the Supreme Court may draw on its ORIGINAL JURISDICTION to shape a FEDERAL COMMON LAW of pollution in suits between states or between a state and the citizens of another state.

The TREATY POWER provides yet another basis for federal environmental quality and conservation measures. The leading case here is MISSOURI V. HOLLAND (1920), sustaining the Migratory Bird Act of 1918. Congress enacted the legislation in question in order to give effect to a treaty between the United States and Great Britain. Missouri, claiming "title" to birds within its borders, sought to prevent a federal game warden from enforcing the Act. The Court, through Justice OLIVER WENDELL HOLMES, rejected the state's contention. Treaties, under the SUPREMACY CLAUSE, are the "supreme Law of the Land"; so too are acts of Congress " NECESSARY AND PROPER for carrying into Execution" the treaty power vested in the president and the Senate. *Missouri v. Holland* is of particular interest because the Court upheld the Migratory Bird Act notwithstanding the fact that a similar act, not based on a treaty, had earlier been invalidated as beyond the scope of congressional power. As Soper remarks, the case "accordingly seems to stand for the proposition that Congress may do by statute and treaty what it has no power to do by statute alone."

The specific basis for the state's claim in *Missouri v. Holland* was the TENTH AMENDMENT, which reserves to the states powers not delegated to the United States by the Constitution. The provision introduces the subject of constitutional limitations (as opposed to powers) that may apply to programs of environmental regulation, and illustrates a limitation applicable only to the federal government, and not to the states.

The Tenth Amendment figured prominently in a series of cases involving the federal Clean Air Act and decided by several courts of appeals in the 1970s. A central question in the cases was whether the amendment foreclosed the federal Environmental Protection Agency from promulgating regulations compelling various implementation and enforcement measures by the states, under threat of fines and imprisonment for recalcitrant state and local officials. The courts of appeals divided on the question, at least one of them intimating a constitutional violation, one explicitly finding no violation, and one interpreting the Clean Air Act in such a way as to sidestep the issue. The Supreme Court granted certiorari and heard argument in several of the cases, but it ultimately declined to reach the merits because counsel for the United States conceded that the regulations in question would have to be rewritten to eliminate requirements that states adopt implementation and enforcement measures. The Court's later decisions in HODEL V. VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION (1981) and *Federal Energy Regulatory Commission v. Mississippi* (1982) show that Congress can constitutionally place great pressures on the states to regulate, so long as it uses indirect means for doing so.

Another constitutional limitation operating upon state but not federal environmental protection programs arises from the supremacy clause. The limitation may come into play in two common respects. One of these involves PREEMPTION and is illustrated by BURBANK V. LOCKHEED AIR TERMINAL, INC. (1973), where the Court concluded that federal legislation, including the Noise Control Act of 1972, reflected a congressional intention to "occupy the field" of aircraft noise regulation; hence, Burbank's noise ordinance was held invalid under the supremacy clause. The second application of the clause is illustrated in *Hancock v. Train* (1976) and *Environmental Protection Agency v. State Water Resources Control Board* (1976), in which the Court held that the supremacy clause sheltered federal facilities from permit requirements imposed by state governments pursuant to the Clean Air Act and the Federal Water Pollution Control Act, respectively, absent a clear congressional indication to the contrary.

The remaining constitutional limitations on environmental regulation apply more or less equally to state and federal government alike. We can put aside the general question of state *authority* to regulate on behalf of the environment. States, unlike the federal government, are not creatures of limited powers. It has long been acknowledged that the STATE POLICE POWER justifies the widest range of health and safety measures insofar as the federal Constitution is concerned, absent some conflict with supreme federal law. This generalization stood fairly firm even during the most active period of SUBSTANTIVE DUE PROCESS review by the federal judiciary. And it bears mention, regarding health and safety measures, as the Court said in *Northwestern Laundry v. Des Moines* (1916), that "the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections. Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property or subject the occupant to large expense in complying with the terms of the law or ordinance."

The BILL OF RIGHTS may bear on state and federal environmental regulation just as it may bear on regulation

generally. Recent cases illustrate the point. Thus the FIRST AMENDMENT came into play in *Metromedia, Inc. v. San Diego* (1981), where a local ordinance controlling billboards and the like for the sake of safety and aesthetics was invalidated insofar as it pertained to noncommercial advertising. In *Air Pollution Variance Board of Colorado v. Western Alfalfa Corporation* (1974), the issue was whether the FOURTH AMENDMENT prohibition of unreasonable searches and seizures was violated when a health inspector entered the grounds of a pollution source to make an opacity check of smoke coming from a chimney. The Court held the entry lawful under a line of cases sustaining "open field" searches. In *United States v. Ward* (1980), the Court held that civil penalties imposed for violating certain provisions of the Federal Water Pollution Control Act pertaining to oil spills were not "quasi-criminal" so as to implicate the Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION (or, presumably, the Sixth Amendment's procedural restrictions applicable to criminal prosecutions). Similarly, *Atlas Roofing Co. v. Occupational Safety and Health Review Commission* (1976) held that administrative civil penalty provisions of the Occupational Safety and Health Act did not contravene the SEVENTH AMENDMENT right to TRIAL BY JURY.

In principle, the takings clause of the Fifth Amendment might be thought to contain the most significant restriction on state and federal environmental regulation. The clause, which applies to the states through the FOURTEENTH AMENDMENT, provides: "nor shall private property be taken for PUBLIC USE, without JUST COMPENSATION." It is clearly recognized that a government regulation can work a taking, but it is seldom held that it actually does. Most environmental regulations challenged on taking grounds are alleged to reach too far, to reduce value too much, and thus to transgress the bounds drawn by Justice Holmes in one of his most famous—and least informative—generalizations, uttered in *Pennsylvania Coal Co. v. Mahon* (1922): "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The statement suggests that if a regulation reduces property value by a great deal, a taking will be found. In practice, however, the courts tend to look not at value lost but value left. If the regulation leaves significant value intact, then usually it will be upheld. The central case in point is PENN CENTRAL TRANSPORTATION COMPANY V. NEW YORK CITY (1978), upholding New York's historic landmark preservation law as applied to Grand Central Terminal, notwithstanding very large losses to the terminal's owners. In any event, the takings clause has little bite in the context of conventional environmental regulation because control of nuisance-like activities has long escaped takings challenges even if the value of the regulated property is reduced to zero. Because virtually any environmental regulation can be characterized as a nuisance control measure, virtually none is likely to be regarded as a taking.

The state and federal governments, then, may regulate rather freely on behalf of environmental quality, but are they constitutionally obliged to do so? Nothing in the federal Constitution says as much. There are arguments that diligent and imaginative searching would find the right between the lines of text, chiefly in the "penumbra" of the Bill of Rights, or as a fundamental personal right protected by the NINTH AMENDMENT, or as a right "implicit in the concept of ORDERED LIBERTY" and guaranteed by the DUE PROCESS clause. The Supreme Court and all but a few federal district courts have been unmoved by these arguments. Courts generally have displayed an unwillingness to make the difficult business of environmental policy a matter of constitutional principle, a point reflected in state court decisions holding that state constitutional amendments setting out environmental rights are not self-executing but require, rather, legislative implementation. The courts, quite obviously, feel ill-equipped to play a role thought better suited to legislatures. It is not that the environment is somehow less important than other recognized constitutional values, but rather that it is less amenable to adjudication.

Richard B. Stewart summarizes the arguments in this regard: a constitutional right to environmental quality would give courts ultimate responsibilities for making resource allocation decisions beyond their analytic capabilities; for trading off allocative efficiency and distributional equity without any principled means by which to do so; and for engineering and implementing dynamic policies through the clumsy and apolitical means of litigation. Stewart adds:

> A familiar justification for constitutional protection of given interests is that they are held by a "discete and insular" minority or are otherwise chronically undervalued because of basic structural defects in the political process. This rationale has been utilized by advocates of a constitutional right to environmental quality, buttressing it by claims that environmental degradation violates "fundamental" interests in health and human survival and implicates the fate of future generations that are unrepresented in the political process. But the spate of environmental legislation enacted by federal and state governments over the past ten years flatly contradicts the general claim that the political process suffers from structural defects that necessitate a constitutional right to environmental quality [*Development*, 1977: 714–715].

Whether future generations will agree is an open question.

JAMES E. KRIER
(1986)

Bibliography

SOPER, PHILIP 1974 The Constitutional Framework of Environmental Law. Pages 20–125 in E. Dolgin and T. Guilbert, eds., *Federal Environmental Law.* St. Paul, Minn.: West Publishing Co.

STEWART, RICHARD B. 1977 The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act. *Iowa Law Review* 62:713–769.

——— 1977 Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy. *Yale Law Journal* 86:1196–1272.

## ENVIRONMENTAL REGULATION AND THE CONSTITUTION (Update 1)

In recent years, three issues have dominated the constitutional side of environmental law. The first issue involves the ability of administrative agencies to obtain access to private property and business records for purposes of inspection. These FOURTH AMENDMENT problems are not, however, distinctive to the environmental area, but are typical of those involving ADMINISTRATIVE SEARCH in general.

The second issue involves FEDERALISM. Since the doctrine of NATIONAL LEAGUE OF CITIES V. USERY (1976) met its demise in GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985), Congress has faced no constitutional obstacles to environmental regulation. Where state regulation is concerned, however, COMMERCE CLAUSE and PREEMPTION problems remain recurring sources of litigation. State environmental regulations often burden interstate businesses and may sometimes be a pretext for protectionism. Although some state regulatory measures have fallen afoul of the dormant commerce clause, courts on the whole have been sympathetic to environmental measures and willing to give them the benefit of the doubt in commerce clause cases. The results in preemption cases are much less predictable. As the federal regulatory presence has grown, the difficulties of coordinating local regulations with federal rules have become more widespread. As a result, state regulations are not infrequently held to be preempted by federal law.

The third major constitutional issue involves government regulation of private lands. Under some circumstances, a regulation that "goes too far" can be an unconstitutional TAKING OF PROPERTY. Efforts at enviromental preservation can severely restrict the use of property, therby raising taking problems.

One of the best-known cases is a Wisconsin Supreme Court decision, *Just v. Marinette County* (1972). *Just* involved a Wisconsin statute that allowed only limited uses of wetlands, such as harvesting of wild crops, forestry, hunting, and fishing. Other uses required a special permit. Essentially, this law required special permission before any commercial or residential use could be made of the property. The Wisconsin Supreme Court upheld the statute, despite the severe restriction on land use, because of the strong public interest in preserving wetlands. Other state courts have split on the constitutionality of similar statutes.

The Supreme Court has considered several environmental takings cases. In *Keystone Bituminous Coal Association v. DeBenedictus* (1987) the Court upheld a Pennsylvania statute that required underground coal miners to provide support for surface structures. A similar Pennsylvania statute had been held unconstitutional in a wellknown opinion by Justice OLIVER WENDELL HOLMES, JR.,, but the current statute was found to be unobjectionable because it required only a small fraction of the total coal deposits to be left in the ground. On the other hand, in *Nollan v. California Coastal Commission* (1987) the Court took a much different approach. *Nollan* involved a couple who wanted to build a larger beach house. As a condition for receiving a permit, the California Coastal Commission required them to allow the public to walk along the beach. Justice ANTONIN SCALIA found a taking because there was an insufficient nexus between the state's goal of preserving the public's right to view the ocean and the requirement that the public be allowed to walk along the beach.

As these two decisions indicate, the outcomes in taking cases are often unpredictable. This uncertainty is a particular problem for environmental regulators and land-use planners, for a mistake can result in an award of damages as well as an injunction against the taking.

With these exceptions, constitutional issues have not loomed large in federal environmental law. By and large, like most regulations of economic activities, environmental statutes have received only minimal judicial scrutiny. As a result, the major issues in environmental law have involved statutory interpretation rather than constitutional disputes.

DANIEL A. FARBER
(1992)

Bibliography

MICHELMAN, FRANK 1988 Takings, 1987. *Columbia Law Review* 88:1600–1629.

ROSE, CAROL 1984 *Mahon* Reconsidered: Why the Takings Issue Is Still a Muddle. *Southern California Law Review* 57: 561–599.

# ENVIRONMENTAL REGULATION AND THE CONSTITUTION
## (Update 2)

While disputes over STATUTORY INTERPRETATION and other subconstitutional issues continue to dominate environmental law, in recent years the field of environmental law has been significantly influenced by the Supreme Court's constitutional jurisprudence on FEDERALISM, the TAKINGS clause of the Fifth Amendment, and Article III STANDING. Taken together, these constitutional developments may signal a period of retrenchment and decentralization in environmental regulation. The Court's renewed concern for state SOVEREIGNTY and PROPERTY RIGHTS, and its resistance to liberal standing principles for "private attorneys general" are noticeable departures from past trends. At a minimum, it is clear that constitutional issues now loom larger than ever in environmental law.

In a series of split decisions, the REHNQUIST COURT has tightened the constraints on Congress's authority to direct state institutions or impose upon state resources. In NEW YORK V. UNITED STATES (1992), the Court invalidated the "take title" provision of the Low-Level Radioactive Waste Act Amendments of 1985 as violative of the TENTH AMENDMENT prohibition on "commandeering" state legislatures. The offending section specified that a state or regional compact that fails to provide for the disposal of all internally generated WASTE by a particular date must, upon the request of the waste's generator or owner, take title to, and possession of, the waste. In *New York*, the Court clarified the relationship between the COMMERCE CLAUSE and the Tenth Amendment, holding that even where Congress exercises its legitimate commerce clause authority, the method it chooses must not run afoul of the Tenth Amendment. Relying on *New York*, the Court in *Printz v. United States* (1997) held unconstitutional provisions that imposed on state law enforcement officers a duty to investigate the eligibility of would-be gun purchasers. The Court held that the Tenth Amendment forbids the commandeering of state executive officers just as it does the conscription of state legislatures in the service of federal regulatory objectives.

In UNITED STATES V. LÓPEZ (1995), the Court invalidated as insufficiently related to INTERSTATE COMMERCE a federal statute criminalizing handgun possession near schools. For the first time in over fifty years, the Court explicitly limited Congress's commerce clause authority, raising potential questions about the extent of federal environmental power. In still another important case for state sovereignty, *Seminole Tribe v. Florida* (1996), the Court held that Congress cannot abrogate states' ELEVENTH AMENDMENT immunity from suit in federal court pursuant to its Article I powers.

After *Seminole*, claims for damages against states or state agencies for liability pursuant to federal environmental statutes were to be adjudicated in state courts unless a state waived its immunity from suit in federal court. However, in the 1998–1999 term, the Supreme Court further curbed federal authority over states in three controversial 5–4 rulings. Most significantly for environmental law, the Court held in *Alden v. Maine* (1999) that Congress lacks the power under Article I to subject non-consenting states to private suits for damages in state courts for violations of federal law. Still available post-*Alden* are private suits in both state and federal court seeking injunctive relief against state officers for ongoing violations of law under the EX PARTE YOUNG (1908) exception to SOVEREIGN IMMUNITY. The effect of *Alden* on environmental law remains an open question. Injunctive relief rather than penalties tends to be the most important feature of private actions against states for violations of federal environmental law, making the continued availability of injunctive relief in such private actions important. *Alden* may significantly impair private cost–recovery suits against states for remediation of hazardous waste sites under the federal superfund law, however. Of course, the federal government itself may still seek damages in both state and federal courts for state violations of federal law.

The revival of a states' rights vision of federalism and the imposition of constraints on federal power has significant implications for environmental law. Most federal environmental statutes passed since 1970 extend Congress's reach into historically local matters and rely heavily on the states for implementation and administration, an approach to regulation known as "cooperative federalism." These statutes contain a range of measures designed to induce state cooperation—measures that invite closer constitutional scrutiny in the wake of the Court's federalism jurisprudence. Following *López*, several federal courts have entertained commerce clause challenges to major environmental statutes such as the Endangered Species Act, the Clean Water Act, and the Comprehensive Environmental Response, Compensation and Recovery Act. To date, however, these challenges have been mostly unsuccessful. Following *New York*, federal courts have struck down a number of statutory provisions for conscripting state governments to administer federal programs in violation of the Tenth Amendment.

Still, although federal courts have repudiated the most obvious examples of federal commandeering, nonetheless they seem prepared to tolerate the liberal use of Congress's TAXING AND SPENDING POWER in "inducing" state cooperation. For example, in *Virginia v. Browner* (1996), the

U.S. Court of Appeals for the Fourth Circuit rejected a challenge to the Clean Air Act's sanction provisions, which allow the Environmental Protection Agency (EPA) to withhold federal highway funds and impose other measures on noncomplying states. The Court upheld the provisions as "inducements," as opposed to "outright coercion." The question remains whether imposing conditions on a state's receipt of federal funds can ever rise to the level of coercion. While the revival of federalism symbolically undermines the strong federal role in environmental regulation, perhaps the federalism cases portend less a judicial brake on federal environmental regulation than a warning to the federal government to be careful in crafting state inducements.

Over the last decade, the Court has also ventured further into land use regulation. Building upon its holding in *Nollan v. California Coastal Commission* (1987), the Court in DOLAN V. TIGARD (1994) invalidated an exaction requiring a landowner to provide a public greenway in exchange for a permit to build a parking lot adjacent to her plumbing and electrical supply store. The Court held that in addition to a "sufficient nexus" between the regulated use and the proposed exaction, there must be a "rough proportionality" between the two. The exaction in *Dolan* failed to meet the latter criterion, thus violating the takings clause of the FOURTEENTH AMENDMENT. Taken together, *Nollan* and *Dolan* threaten to chill local land use regulation.

In LUCAS V. SOUTH CAROLINA COASTAL COUNCIL (1992), the Court invalidated South Carolina's Beachfront Management Act as an unconstitutional taking of private property, as applied to a particular landowner. The impugned legislation forbade development of beachfront property on the barrier island beach where Lucas had, prior to the act's passage, purchased an empty lot. The trial court had held that the act's prohibition on development reduced the value of Lucas's land to nothing, a finding left undisturbed on appeal. The Court held that state regulatory statutes that reduce land value to nothing are unconstitutional takings unless the proposed restrictions are part of the landowner's title to begin with, consonant with background COMMON LAW nuisance or property principles. Of particular interest is the Court's decision in *Eastern Enterprises v. Apfel* (1998), in which a plurality opined that severe, disproportionate, and extremely retroactive liability in the form of economic regulation may amount to an unconstitutional taking. The trend in takings law may constrict the ability of federal and state governments to impose environmentally protective regulation on private property without paying substantial costs.

The Rehnquist Court has also retreated from the liberal standing principles that helped to open the administrative process to citizen participation over the last several decades. In LUJAN V. DEFENDERS OF WILDLIFE (1992), the Court denied standing to a national environmental organization suing under the citizen suit provision of the Endangered Species Act. The plaintiffs challenged the exemption of overseas projects from a rule requiring that federal agencies consult with the U.S. Department of the Interior to minimize the effect of their projects on endangered species. The plaintiffs alleged that their own personal and professional interests in endangered species would be harmed by federally funded development projects. In denying standing, the Court held that the plaintiffs' injuries were not sufficiently "imminent" to establish the Article III standing requirement of injury in fact, nor, according to a plurality, would those injuries be redressable by a favorable court decision. While in many cases the more stringent "imminence" requirement will merely require plaintiffs to be more precise in alleging injury, the redressability requirement, which forces plaintiffs to demonstrate that a favorable decision would in fact alleviate the harm, is less easily rectified and may result in the dismissal of some cases if adopted by a majority of the Court in the future. The Court acknowledged in *Lujan* that its holding made standing "substantially more difficult" to achieve when the plaintiff is not herself the object of government action. At this writing, the Court has granted CERTIORARI on a case—*Friends of the Earth, Inc. v. Laidlaw Environmental Services*—that will clarify the stringency of the redressability requirement.

In coming years, the DUE PROCESS clause may be a fertile source of constitutional jurisprudence relevant to environmental law. Due process issues to watch include the imposition of caps on PUNITIVE DAMAGE awards in toxic contamination suits; the definition of knowledge and fault requirements for environmental crimes; environmental justice challenges to federal and state environmental laws that disproportionately burden minorities with environmental risk; and the retrospective imposition of strict liability on defendants in toxic tort suits.

JODY FREEMAN
(2000)

## *EPPERSON v. ARKANSAS*
393 U.S. 97 (1968)

Arkansas prohibited the teaching in its public schools "that mankind ascended or descended from a lower order of animals." In dealing with a challenge to the law based on establishment clause and FREEDOM OF SPEECH grounds, Justice ABE FORTAS, speaking for the Supreme Court, concluded that the Arkansas law violated the establishment clause. "There can be no doubt," he said, "that Arkansas

sought to prevent its teachers from discussing the theory of evolution because it is contrary to the beliefs of some that the book of Genesis must be the exclusive source of the doctrine of the origin of man."

Justice HUGO L. BLACK and Justice POTTER STEWART concurred in brief opinions resting on VAGUENESS grounds. The Black opinion raised important GOVERNMENT SPEECH issues that are still unresolved.

RICHARD E. MORGAN
(1986)

(SEE ALSO: *Creationism.*)

## EQUAL ACCESS

For over two decades litigation involving religion and the public schools focused on state-sponsored religious exercises. This pattern changed during the 1980s, as student-led religious groups sought access to school facilities on the same basis as other student groups. These groups claimed that once a public school opened its premises to extracurricular student groups, it created a limited PUBLIC FORUM and could not discriminate against some groups on the basis of the content of their speech; hence, the school was obliged to grant "equal access" to religious student groups that wanted to use school facilities. Equal access found a legal footing in WIDMAR V. VINCENT (1981), where the Supreme Court held that a public university could not close its facilities to religious student groups once it had opened them for use by other groups because to do so would violate the religious students' FREEDOM OF SPEECH guaranteed by the FIRST AMENDMENT.

Despite *Widmar*, most secondary schools continued to reject requests by religious students to meet on school premises, as did most federal courts; indeed, until 1989 every federal appellate court to rule on the issue held that it would violate the ESTABLISHMENT CLAUSE for secondary schools to allow religious student groups to meet on the same basis as other student groups. The basic rationale for these lower-court holdings came from a federal appellate opinion by Judge Irving Kaufman in *Brandon v. Guilderland* (1980). In *Brandon*, a group of high school students sought permission to meet before school in an empty classroom to pray and read the Bible. The school district denied the request. Judge Kaufman argued that the district could not accede to the students' petition because to do so would impermissibly advance religion and excessively entangle church and state in violation of the second and third prongs of the LEMON TEST.

Kaufman's main argument was psychological: "To an impressionable student even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular creed. This symbolic inference is too dangerous to permit." Critics of the decision disagreed. Chief Justice WARREN BURGER, dissenting in BENDER V. WILLIAMSPORT (1986), argued that one must objectively distinguish between state advancement of religion and individual advocacy of religion; whereas the former activity is prohibited by the First Amendment, the latter is "affirmatively protected." The fact that "some hypothetical students" might mistake individual religious expression for state religion was irrelevant according to Burger, who added: "No one would contend that the State would be authorized to dismantle a church erected by private persons on private property because overwhelming evidence showed that other members of the community thought the church was owned and operated by the state."

When the Supreme Court declined to resolve the constitutionality of equal access, Congress intervened by passing the Equal Access Act in 1984. The act applies to all public secondary schools receiving federal money that also maintain a "limited open forum," which exists whenever a school allows "one or more noncurriculum related student groups to meet on school premises during noninstructional time." The act forbids schools with a limited open forum from discriminating against student groups because of the content of their speech.

In BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS V. MERGENS (1990) the Supreme Court held that the act does not violate the establishment clause as applied to religious student groups, but declined to rule whether the equal-access rights guaranteed by statute are also required by the First Amendment. The Court will likely have another opportunity to deal with this First Amendment issue. As equal-access theory is based primarily on the freedom of speech, it lends itself to a broader range of activities than just the student meetings protected by the Equal Access Act. More recent cases have focused, for example, on the right of students to distribute religious publications to classmates on school premises. These cases have yet to reach the Supreme Court.

JOHN G. WEST, JR.
(1992)

(SEE ALSO: *Religion in Public Schools; Religious Fundamentalism; Religious Liberty; Separation of Church and State.*)

Bibliography

WEST, JOHN G., JR. 1991 The Changing Battle over Religion in the Public Schools. *Wake Forest Law Review* 26:361–401.

WHITEHEAD, JOHN W. 1989 Avoiding Religious Apartheid: Affording Equal Treatment for Student-Initiated Religious Expression in Public Schools. *Pepperdine Law Review* 16:229–258.

## *EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) v. WYOMING*
460 U.S. 226 (1983)

The EEOC sought to enforce the AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) against the state of Wyoming in a case involving the involuntary retirement of a fifty-five-year-old game warden. The Supreme Court, 5–4, upheld the ADEA as so applied. Justice WILLIAM J. BRENNAN, for the Court, found congressional power in the COMMERCE CLAUSE, and rejected the state's claim, based on NATIONAL LEAGUE OF CITIES V. USERY (1976), that it was immune to this form of congressional regulation. The majority was composed of the four dissenters in *Usery* plus Justice HARRY A. BLACKMUN.

Wyoming, Brennan said, failed the third part of the formula of *Hodel v. Virginia Surface Mining and Reclamation Association* (1981): the ADEA did not "directly impair" Wyoming's ability to "structure integral operations in areas of traditional governmental functions." Wyoming could use other means to test the fitness of game wardens—or, as the ADEA allowed, justify the necessity of the age limit. The ADEA would affect state finances and state policies only marginally. Chief Justice WARREN E. BURGER, for the four dissenters, employed the same *Hodel* formula and concluded that the ADEA was unconstitutional as applied to a state.

This decision helped set the stage for *Usery's* overruling in GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1984).

KENNETH L. KARST
(1986)

(SEE ALSO: *Intergovernmental Immunity.*)

# EQUALITY

See: Difference and Constitutional Equality; Equal Protection of the Laws

# EQUAL PROTECTION OF THE LAWS

The ancient political ideal of equality did not find explicit recognition in the text of the Constitution until the FOURTEENTH AMENDMENT was ratified in 1868. Yet equality was an American ideal from the earliest colonial times. There was irony in the expression of the ideal in the DECLARATION OF INDEPENDENCE; the newly independent states generally limited voting to white male property owners, and THOMAS JEFFERSON, the Declaration's author, was the troubled owner of slaves. Even so, one feature of white American society that set it apart from Europe was an egalitarian climate for social relations. The Constitution's ban on TITLES OF NOBILITY symbolized the nation's determination to leave behind the old world's privileges of monarchy and aristocracy.

Jefferson, who believed in an aristocracy of "virtue and talents," understood that equality of opportunity was consistent with wide disparities among individuals' wealth and power. The equality he envisioned was, above all, equality before the law. The principle of universal laws, equally applicable to all citizens, itself provided a foundation for a market economy whose competitive struggles would lead to further inequalities. An equality that was formal, or legal, thus would undermine the "equality of condition" that attracted some of Jefferson's contemporaries. Yet formal equality was something that mattered greatly in the nation's first decades, and it matters greatly today. When Europeans remark, as they still do, on America's relatively high degree of equality, they are referring not to equality of wealth or political power but to equality of social status. With pardonable literary exaggeration, Simone de Beauvoir said it this way: "the rich American has no grandeur; the poor man no servility; human relations in daily life are on a footing of equality. . . ."

The Fourteenth Amendment's wording emphasizes legal equality. A state is forbidden to "deny to any person within its jurisdiction the equal protection of the laws." On its face this language seems to demand no more than even-handed enforcement of laws as they are written. Such a reading, however, would drain all life from the guarantee of equal protection. On this view even a law barring blue-eyed persons from state employment would pass constitutional muster if the state applied it equally, without discrimination, to all applicants, refusing jobs only to those who were blue-eyed. No one has ever seriously argued for so restricted a scope for the equal protection clause. The Supreme Court casually dismissed the idea with a passing comment in YICK WO V. HOPKINS (1886): "the equal protection of the laws is a pledge of the protection of equal laws."

At the other extreme of silliness, the *Yick Wo* statement might be taken literally, interpreting the equal protection clause to forbid the enforcement of any law that imposed any inequality. As Joseph Tussman and JACOBUS TEN BROEK showed nearly forty years ago, so sweeping a reading would convert the clause into a constitutional prohibition on legislation itself. All laws draw lines of classification, applying their rules only to some people (or some transactions or phenomena) and not to others. Furthermore, the very existence of law—that is, of governmental regulation of human behavior—implies inequality, for some

individuals must evaluate the behavior of others and enforce the state's norms by imposing sanctions on the recalcitrant. In Ralf Dahrendorf's biting formulation, "all men are equal *before* the law but they are no longer equal *after* it." Given the diverse characteristics of humans, the achievement of equality as to one aspect of life necessarily implies inequalities as to other aspects. And if it were possible to construct a society characterized by total, uncompromising equality, no one would want to live in that society.

Then what kinds of inequality are prohibited by the equal protection clause? The abstraction, equality, cannot resolve cases; the question always remains, equality as to what? To give meaning to the equal protection clause requires identification of the substantive values that are its central concern. The inquiry begins in the history leading to the adoption of the Fourteenth Amendment, but it does not end there. To understand the substantive content of the equal protection clause, we must consider not only what it meant to its framers, but also what it has come to mean to succeeding generations of judges and other citizens.

Just what role the framers had in mind for the equal protection clause remains unclear; the amendment's sketchy "legislative history" has been given widely divergent interpretations. All the interpreters agree, however, that the framers' immediate objective was to provide an unshakable constitutional foundation for the CIVIL RIGHTS ACT OF 1866. That act had been passed over the veto of President ANDREW JOHNSON, who had asserted that it exceeded the powers of Congress.

The 1866 act had declared the CITIZENSHIP of all persons born in the United States and subject to its JURISDICTION. This declaration, later echoed in the text of the Fourteenth Amendment, had been designed to "overrule" the assertion by Chief Justice ROGER B. TANEY in his opinion for the Supreme Court in DRED SCOTT V. SANDFORD (1857) that black persons were incapable of being citizens. Taney had said that blacks—not just slaves but any blacks—were incapable of citizenship, because blacks had not been members of "the People of the United States" identified in the Constitution's PREAMBLE as the body who adopted that document. Blacks has been excluded from membership in the national community, according to Taney, because they were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority. . . ." Discriminatory state legislation in force when the Constitution was adopted, Taney said, negated the conclusion that the states "regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; . . . and upon whom they had impressed such deep and enduring marks of inferiority and degradation. . . ."

This dubious reading of history is beside the point; *Dred Scott*'s relevance to our inquiry is that Taney's assumptions about racial inferiority and restricted citizenship were just what the drafters of the 1866 act sought to destroy. There was to be no "dominant race" and no "subordinate and inferior class of beings," but only citizens. Indeed the act's conferral of various CIVIL RIGHTS was aimed at abolishing a new system of serfdom designed to replace SLAVERY in the southern states. That system rested on the BLACK CODES, laws methodically imposing legal disabilities on blacks for the purpose of maintaining them in a state of dependency and inferiority.

The 1866 act, after its declaration of citizenship, provided that "such citizens, of every race and color [including former slaves], shall have the same right [to contract and sue in court and deal with property, etc.] as is enjoyed by white citizens. . . ." The "civil rights" thus guaranteed were seen as the equal rights of citizens. When President Johnson vetoed the bill, he similarly linked the ideas of citizenship and equality, and argued that the THIRTEENTH AMENDMENT was an insufficient basis for congressional power. Congress overrode Johnson's veto, but from the time of the veto forward, a major purpose of the promoters of the Fourteenth Amendment, then under consideration in Congress, was to secure the constitutional foundations of the 1866 act.

The amendment, like the act, begins with a declaration of citizenship. In the same first section, the amendment goes on to forbid a state to "abridge the PRIVILEGES OR IMMUNITIES of citizens of the United States," to "deprive any person of life, liberty, or property, without DUE PROCESS OF LAW," or to deny a person "the equal protection of the laws." No serious effort was made during the debates on the amendment to identify separate functions for the three clauses that followed the declaration of citizenship. The section as a whole was taken to guarantee the equal enjoyment of the rights of citizens.

Beyond those specific goals, nothing in the consensus of the Fourteenth Amendment's framers would have caused anyone to anticipate what the Supreme Court made of the amendment in the latter half of the twentieth century. Yet the Fourteenth Amendment was not written in the language of specific rights, such as the right to contract or buy or sell property, but was deliberately cast in the most general terms. The broad language of the amendment strongly suggests that its framers were proposing to write into the Constitution not a "laundry list" of specific civil rights but a principle of equal citizenship.

To be a citizen is to enjoy the dignity of membership in the society, to be respected as a person who "belongs."

The principle of equal citizenship presumptively forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a nonparticipant. As Taney recognized in his *Dred Scott* opinion, the stigma of caste is inconsistent with equal citizenship, which demands respect for each individual's humanity. Further, a citizen is a participant in society, a member of a moral community who must be taken into account when community decisions are made. Citizenship also implies obligations to one's fellow citizens. The values of participation and responsibility contribute to the primary citizenship value of respect, but they are also independently significant as aspects of citizenship.

For the first eight decades of the Fourteenth Amendment's existence, its interpretation by the Supreme Court was largely a betrayal of the constitutional ideal of equal citizenship. First by inventing the STATE ACTION limitation on the Fourteenth Amendment in the CIVIL RIGHTS CASES (1883), and then by giving racial SEGREGATION the stamp of constitutional validity in the SEPARATE BUT EQUAL decision of PLESSY V. FERGUSON (1896), the Supreme Court delivered virtually the entire subject of race relations back into the hands of the white South. The equal citizenship principle was left to be articulated in dissenting opinions. Notable among those dissents were the opinions of Justice JOSEPH P. BRADLEY in the SLAUGHTERHOUSE CASES (1873) and of Justice JOHN MARSHALL HARLAN in the *Civil Rights Cases* and *Plessy v. Ferguson.* The latter dissent included a passage that is now famous: "In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." For half a century, those words expressed not a reality but a hope.

Outside the field of RACIAL DISCRIMINATION, the equal protection clause had little force even during the period when the due process clause of the Fourteenth Amendment was in active use as a defense against various forms of ECONOMIC REGULATION. By the 1920s, Justice OLIVER WENDELL HOLMES could say in BUCK V. BELL (1927), with accuracy if not with compassion, that the equal protection clause was the "usual last resort of constitutional arguments."

Even during the years when Holmes's "last resort" epithet summarized equal protection jurisprudence, the NAACP was pinning its hopes for racial justice on the federal judiciary, and was winning some victories. The Supreme Court had struck down LITERACY TESTS for voting that contained GRANDFATHER CLAUSES exempting most white voters, in GUINN V. UNITED STATES (1915) and *Lane v. Wilson* (1939); the Court had begun the process of holding "white primaries" unconstitutional; and it had invalidated racial zoning in BUCHANAN V. WARLEY (1917). And after the nation had emerged from the Great Depression and World War II, the judicial climate was distinctly more hospitable to equal protection claims.

The Depression had brought to dominance a new political majority, committed to active governmental intervention in economic affairs for the purpose of achieving full employment and major improvements in wages and the conditions of labor. The judiciary's main contribution to those egalitarian goals was to free the legislative process from the close judicial supervision of economic regulation that had attended the flowering of SUBSTANTIVE DUE PROCESS doctrines in the recent past. The war not only ended the Depression; it was a watershed in race relations. The migration of blacks from the rural South to northern and western cities, which had slowed during the Depression, dramatically accelerated, as wartime industry offered jobs that black workers had previously filled only rarely. Urban blacks were soon seen as a potent national political force. By the end of the war, the Army had begun the process of racial integration. Wartime ideology, with its scorn for Nazi racism, had lasting effects on the public mind. Even as the Supreme Court was upholding severe—and racist—wartime restrictions in the JAPANESE AMERICAN CASES (1943–1944), it reflected a new national state of mind in its celebrated OBITER DICTUM in KOREMATSU V. UNITED STATES (1944): "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny."

In the immediate postwar years the Supreme Court held unconstitutional the judicial enforcement of RESTRICTIVE COVENANTS in SHELLEY V. KRAEMER (1948), and it even ruled that the equal protection clause forbade some forms of segregation in state universities. (See SWEATT V. PAINTER, 1950.) The expected return to economic depression did not materialize. Instead, the country entered a period of unprecedented economic expansion. Good times are the most propitious for egalitarian public policies; it is relatively easy for "haves" to share with "have-nots" when they see their own conditions as steadily improving. The time was ripe, in the 1950s, for important successes in the movement for racial equality.

On the national scene, however, the political branches of government remained disinclined to act. One-party politics in the South had given disproportionate influence in the Congress to Southerners whose seniority gave them chairs of major committees. With President DWIGHT D. EISENHOWER reluctant to intervene, the prospects for effective civil rights legislation seemed dim. Thus was the stage furnished when Eisenhower appointed EARL WARREN to the Chief Justiceship in 1953.

In Warren's first term the Court decided BROWN V.

BOARD OF EDUCATION (1954)—still the leading authoritative affirmation that the Constitution forbids a system of caste—and in so doing began what PHILIP KURLAND has called an "egalitarian revolution" in constitutional law. *Brown* was a major event in modern American history. Race relations in America would never again be what they were on the eve of the decision. The political movement for racial equality took on new vitality, and other egalitarian movements drew encouragement from that example. The constitutional law of equal protection gained powerful momentum, and the doctrinal effects went well beyond the subject of racial equality. If *Brown* itself represented JUDICIAL ACTIVISM, it was no more than a shadow of what was to come. The equal protection clause became the cutting edge of the WARREN COURT's active intervention into realms that previously had been left to legislative choice.

Two doctrinal techniques served these egalitarian ends. First, the Court heightened the STANDARD OF REVIEW used to test the constitutionality of certain laws, insisting on STRICT SCRUTINY by the courts of legislation that employed a SUSPECT CLASSIFICATION or discriminated against the exercise of a FUNDAMENTAL INTEREST. Second, the Court relaxed the "state action" limitation on the Fourteenth Amendment, bringing new forms of private conduct under the amendment's reach. Although the BURGER COURT later revitalized the "state action" limitation and slowed the advance of equal protection into new doctrinal territory, it made its own contributions to the development of the principle of equal citizenship.

Once the Court had firmly fastened the "suspect classification" label to racial discrimination, other forms of discrimination were attacked in the same terms. Some Justices have refused to find any legislative classification other than race to be constitutionally disfavored, but most of them have been receptive to arguments that at least some nonracial discriminations deserve heightened scrutiny. Thus, while only discrimination against ALIENS has been assimilated to the "suspect classifications" category—and even that assimilation is a sometime thing—the Court has announced clearly that judicial scrutiny should be heightened in some significant degree for SEX DISCRIMINATION or legislative classifications based on ILLEGITIMACY. Not only in these opinions but also in opinions refusing to apply similar reasoning to other forms of discrimination, the Court has developed a consensus on two sets of factors that are relevant in determining a classification's degree of "suspectness" or disfavor, and thus the level of justification which courts should demand for it.

The first set of factors emphasizes the equal citizenship value of respect; these factors reflect the judiciary's solicitude for the victims of stigma. A classification on the basis of a trait that is immutable and highly visible—such as race or sex—promotes stereotyping, the automatic assignment of an individual to a general category, often implying inferiority. The second set of factors, emphasizing the equal citizenship value of participation, focuses on the historic disadvantages (especially political disadvantages) of DISCRETE AND INSULAR MINORITIES. Both the phrase and the idea antedate Warren Court activism; they come from Justice HARLAN FISKE STONE's opinion for the Court in UNITED STATES V. CAROLENE PRODUCTS CO. (1938). Legislation that burdens a group likely to be neglected by the legislature is a natural candidate for special judicial scrutiny.

The equal citizenship themes of respect, participation, and responsibility also informed the Warren Court's decisions demanding close examination of the justifications for legislative discrimination against the exercise of "fundamental interests." Those decisions, in theory, might have been rested on grounds of substantive due process rather than equal protection. In fact, the Burger Court, which refused to recognize any new "fundamental" interests in equal protection doctrine, employed similar reasoning under the heading of due process, with corresponding attention to the values of equal citizenship. (See ABORTION AND THE CONSTITUTION; FAMILY AND THE CONSTITUTION; RIGHT OF PRIVACY.) The equal protection cases, however, identify only three clusters of interests as "fundamental": VOTING RIGHTS and related interests in equal access to the electoral process; certain rights of ACCESS TO THE COURTS (which have come to be explained more recently on due process grounds); and rights concerning marriage, procreation, and family relations. (See FREEDOM OF INTIMATE ASSOCIATION.)

Voting, of course, is one of the core responsibilities of citizenship. Perhaps more important, it is the citizen's preeminent symbol of participation as a valued member of the community. Access to the courts, like voting, is instrumentally valuable as a way to protect other interests. But—also like voting—the chance to be heard is an important citizenship symbol. To be listened to, to be treated as a person and not an object of administration, is to be afforded the dignity owed to a citizen. Finally, the marriage and family cases similarly implicate the citizenship values of respect, responsibility, and participation. Marriage and parenthood do not merely define one's legal obligations; they define one's status and social role and self-concept. For the state to deny a person the right and responsibility of choice about such matters is to take away the presumptive right to be treated as a person, one of equal worth among citizens. None of these "fundamental" interests is entirely immune from state interference; what the principle of equal citizenship requires is that government offer weighty justification before denying their equal enjoyment.

In retrospect the whole apparatus of differential stan-

dards of review can be seen as judicial interest-balancing, thinly disguised: the more important the interest in equality, the more justification was required for its invasion by the government. Perhaps the Warren Court's majority chose to clothe its decisions in a "judicial"-sounding system of categories because the Justices were sensitive to the charge that they were writing their own policy preferences into the equal protection clause, and not just "interpreting" it. As a consequence, the Court extended the reach of equal protection without ever explicitly articulating the substantive content of the equal protection clause.

The Warren Court, in its final years, was well on the way to effective abandonment of the "state action" limitation on the Fourteenth Amendment, finding "significant state involvement" in all manner of private racial discriminations that denied their victims full participation in the public life of the community. Once Congress passed the CIVIL RIGHTS ACT OF 1964, however, it became unnecessary for the Court to complete its dismantling job; now there was a federal statutory right of access to PUBLIC ACCOMMODATIONS such as hotels, restaurants, and theaters. When the Court in JONES V. ALFRED H. MAYER CO. (1968) discovered the Thirteenth Amendment as a source of congressional power to forbid most other private racial discrimination, the chief practical motivation for doing away with the "state action" doctrine was removed. In later years, a different majority of Justices has gone far to restore the "state action" limitation to its former status but at the same time it has both reaffirmed the power of Congress to stamp out private racial discrimination and promoted that purpose with an expansive interpretation of existing civil rights acts.

The right to participate in the community's public life—even those portions of public life that are owned and managed by private persons—is an essential ingredient of effective citizenship, part of what it means to be a respected member of society. The "state action" limitation, when the Supreme Court invented it, insulated the "private" choices of the owners of public accommodations and other commercial businesses not only from the direct reach of the Fourteenth Amendment's guarantee of equal protection but also from congressional vindication of the rights of equal citizenship. Although "state action" remains an impediment to the application of the equal protection clause to some private conduct, Congress can protect, and has protected, the most important claims to participation by all citizens in society's public life.

To say that the principle of equal citizenship is the substantive core of the equal protection clause, and that the Supreme Court's recent equal protection jurisprudence has centered on the values of equal citizenship, is not to decide particular cases. Equal citizenship is not a decisional machine but a principle that informs judgment by reference to certain substantive values. Like other constitutional principles, it is inescapably open-ended. The Warren Court's expansion of the content of equal protection doctrine was regularly greeted with the criticism that the Court had not specified exactly how far its egalitarian principles would reach. The critics did no more than echo what Jeremy Bentham had said more than a century earlier: the abstraction, equality, is insatiable; where would it all end?

This "stopping-place" problem is implicit in any constitutional guarantee of equality. Most obviously, it lies at the center of the question of affirmative governmental obligations to reduce inequality. In a few decisions over the past three decades the Supreme Court has imposed on government the duty to compensate for the inability of INDIGENTS to pay various costs or fees required for effective access to the courts. The Burger Court's consciousness of the stopping-place problem produced two types of response. Some claims of access, although accepted, were explained as resting on rights to procedural fairness, and thus on due process rather than equal protection grounds. (See BODDIE V. CONNECTICUT.) Other access claims were rejected, halting further extension of the demands of equal protection. (See ROSS V. MOFFITT.) Yet the Court has not been willing to put an end to the notion that some inequalities, although not caused directly by the state, are constitutionally intolerable, requiring governmental action to relieve their victims from some of their consequences.

Similarly, consciousness of the stopping-place problem has influenced the Court's definition of what constitutes a legislative discrimination based on race, or gender, or, presumably, any other disfavored classification. After flirting in some school segregation cases with a view that would equate de facto with de jure segregation, the Court declared in the employment discrimination case of WASHINGTON V. DAVIS (1976) that it was not enough, in making a claim of racial discrimination, to show that legislation had a racially discriminatory impact. To succeed, such a claim must be based on a showing of official discriminatory purpose. (See LEGISLATION.) The "impact" principle, said the Court, "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." In other words, where would it all end?

What is needed, in dealing with the stopping-place problem as with any other aspect of equal protection interest-balancing, is the guidance that can be found in the Fourteenth Amendment's substantive values. Some inequalities will invade the core values of equal citizenship, and others will touch them hardly at all. The level of justification required for governmental action—or failure to

act—will vary according to the magnitude of that invasion. Some economic inequalities may be so severe as to impose a stigma of caste, but most do not. Part of our tradition of responsible citizenship, after all, is to provide for oneself and one's family. The principle of equal citizenship is not a charter for economic leveling but a presumptive guarantee against those inequalities that dehumanize or seriously impair one's ability to participate as a member of society. To say that such determinations turn on questions of degree is merely to acknowledge that no constitutional principle is a substitute for judicial judgment.

Since the late 1960s a number of governmental and private bodies have voluntarily taken steps to compensate for inequalities that are the legacy of past societal discrimination, and generally to integrate various institutions by race and by gender. These AFFIRMATIVE ACTION programs, sometimes in the form of racial or gender-based quotas for employment or housing or admission to higher education, do not merely equalize. Every equality begets another inequality. Even absent a quota, when a person's race becomes a relevant qualification for a job, all other relevant factors are diminished in weight. To put the matter more concretely, an individual can lose the competition for the job on the basis of his or her race. If affirmative action is constitutionally justified—and the Supreme Court has largely validated it—the reasons lie not in any lack of sympathy for such arguments, but in the weight of countervailing considerations supporting the programs. The Justices' various opinions upholding affirmative action have mainly sounded the theme of remedying past discrimination, but other arguments emphasize the urgency of integrating American institutions in the present generation.

The debate over affirmative action has touched a more general issue: the appropriate role of groups in equal protection analysis. In one view, group membership is simply irrelevant. The text of the equal protection clause provides its guarantees to "any person," and much of our constitutional tradition is individualistic. Yet, inescapably, a claim to equality is a claim made on behalf of a group. If every law draws some line of classification, then it is also true that every individual is potentially classifiable according to an enormous variety of characteristics. Legislative classification implies a selection of certain attributes as the relevant ones—the "merits" that justify conferring a benefit (or "demerits" that justify a burden). Once such a classification is written into law, any individual is classified either with the group of persons who possess the "merits" (or "demerits") or with the group of those who do not. To complain against a classification scheme is not merely to say "I am wronged," but to say "We—the whole group of individuals disadvantaged—are wronged." Indeed, any claim based on a rule of law is intelligible only as a demand to be treated the same as other members of a group, that is, all others who share the relevant "individual" attributes specified by the rule.

The origins of the Fourteenth Amendment strongly suggest that a group, defined by race just as the *Dred Scott* opinion had defined it, was intended to be the amendment's chief beneficiary. If today the equal protection clause prohibits other forms of inequality, there is nothing incongruous about viewing that development in one perspective as the recognition of the claims of groups of people: women, aliens, illegitimate children, homosexuals, the handicapped. When equal citizenship is denied, the denial typically takes a form that affects not merely isolated individuals but classes of people.

The equal protection clause limits only the states; nothing in the constitutional text expressly imposes an analogous limit on the federal government. Yet since BOLLING V. SHARPE (1954) the Supreme Court has consistently interpreted the Fifth Amendment's due process clause to guarantee equal protection against federal denial. This interpretation has roots in the original Constitution's assumption that the new national government would have a direct relationship with individuals. The idea of national citizenship was current long before the Civil Rights Act of 1866. And that citizenship, as Justice Bradley argued in his dissent in the *Slaughterhouse Cases*, implies some measure of equality before the law. *Bolling*, a companion case to *Brown v. Board of Education*, presented a challenge to school segregation in the District of Columbia. *Brown* held the segregation of state schools unconstitutional, and Chief Justice Warren said it would be "unthinkable" if a similar principle were not applied to the national government. After the Fourteenth Amendment's reaffirmation of national citizenship, such a result would, indeed, have been unthinkable.

The Warren Court's expansion of constitutional guarantees of equality necessarily implied an expansion of the powers of the national government. The Civil War amendments were reinterpreted to give Congress sweeping powers to reach virtually all racial discriminations, public and private. The Fourteenth Amendment's equal protection clause became the basis for intensified intervention by the federal courts into areas previously governed by local law and custom, as a new body of uniform national law replaced local autonomy. As the "state action" limitation was relaxed, the Constitution brought the commands of law to areas previously regulated by private institutional decision. In ALEXANDER BICKEL's phrase, the Warren Court's main themes were "egalitarian, legalitarian, and centralizing."

The desegregation of places of public accommodations in the South is an instructive example. The Supreme Court first held unconstitutional all forms of state-sponsored seg-

regation, including segregation of public beaches, parks, golf courses, and restaurants. Then, cautiously, it began to apply the same reasoning to some privately owned public accommodations, finding "state action" in the most tenuous connections between public policy and the private decision to segregate. Finally, in HEART OF ATLANTA MOTEL CO. V. UNITED STATES (1964) the Court moved swiftly to validate the Civil Rights Act of 1964, which forbade segregation in most public accommodations that mattered. In all these actions the Court promoted the extension of a body of uniform national law to replace the local laws and customs that had long governed southern communities, with an earlier Supreme Court's blessing.

These changes in the law governing racial discrimination in public accommodations were, in one perspective, a repetition of a course of events that had been common in the Western world since the seventeenth century. An older system, basing a person's legal rights on his or her status in a hierarchical structure, came to be replaced by a newer law that applied impersonally to everyone. The abolition of slavery, the 1866 Civil Rights Act, the Civil War amendments—all had been earlier episodes in this same historical line. And the law that liberated individuals from domination based on race, like the law that previously had broken feudal hierarchies and the power of the guilds, was the law of the centralized state. If one were asked to compress three centuries of Western political history into three words, the words might be: "egalitarian, legalitarian, and centralizing."

Justice ROBERT H. JACKSON, concurring in EDWARDS V. CALIFORNIA (1941), remarked that the Fourteenth Amendment's privileges and immunities clause was aimed at making United States citizenship "the dominant and paramount allegiance among us." Whatever the historical warrant for that assertion, it reflects today's social fact. We think of ourselves primarily as citizens of the nation, and only secondarily as citizens of the several states. The Constitution itself has become our pre-eminent symbol of national community, and the judiciary's modern contributions to our sense of community have centered on the principle of equal citizenship.

It is hard to overstate the importance of the ideal of equality as a legitimizing force in American history. For the SOCIAL COMPACT theorists of the eighteenth century whose thinking was well-known to the Framers of the original Constitution, some measure of equality before the law was implicit in the idea of citizenship. DANIEL WEBSTER, speaking of "the LAW OF THE LAND," agreed: "The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." By Webster's time, support for the principle of equality of opportunity could be found even among the most comfortable Americans, who saw in that principle a way to justify their advantages. More generally, the egalitarian spirit that has promoted a national consciousness has also lent legitimacy to government. There has been just enough truth in the belief that "anyone can grow up to be President" to provide a critical measure of the diffuse loyalty that is an essential ingredient of nationhood.

Never in our history has it been true that *anyone* might aspire to the presidency. Slavery and racial discrimination are only the most obvious and uglier counterexamples; not until our own time have women's aspirations to such high position become realistic. Yet the guarantee of equal protection of the laws, even during the long decades when lawyers deemed it a constitutional trifle, stood as a statement of an important American ideal. Much of the growth in our constitutional law has resulted when the downtrodden have called the rest of us to account, asking whether we intend to live up to the principles we profess. Vindication of the constitutional promise of equal citizenship did not take its rightful place on our judicial agenda for an unconscionably long time, and it remains far from complete. What is most remarkable, however, is the nourishment that the promise—the promise alone—has provided for a national community.

KANNETH L. KARST
(1986)

Bibliography


BELL, DERRICK A., JR. 1980 *Race, Racism, and American Law*, 2nd ed. Boston: Little, Brown.

BICKEL, ALEXANDER M. 1970 *The Supreme Court and the Idea of Progress.* New York: Harper & Row.

BLACK, CHARLES L., JR. 1969 *Structure and Relationship in Constitutional Law.* Pages 51–66. Baton Rouge: Louisiana State University Press.

ELY, JOHN HART 1980 *Democracy and Distrust: A Theory of Judicial Review.* Cambridge, Mass.: Harvard University Press.

FISS, OWEN M. 1976 Groups and the Equal Protection Clause. *Philosophy and Public Affairs* 5:107–177.

KARST, KENNETH L. 1977 The Supreme Court, 1976 Term—Foreword: Equal Citizenship under the Fourteenth Amendment. *Harvard Law Review* 91:1–68.

KINOY, ARTHUR 1967 The Constitutional Right of Negro Freedom. *Rutgers Law Review* 21:387–441.

MICHELMAN, FRANK I. 1969 The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment. *Harvard Law Review* 83:7–59.

POLE, J. R. 1978 *The Pursuit of Equality in American History.* Berkeley: University of California Press.

RAE, DOUGLAS 1981 *Equalities.* Cambridge, Mass.: Harvard University Press.

TOCQUEVILLE, ALEXIS DE 1945 *Democracy in America*, P. Bradley, ed., 2 vols. New York: Vintage Books.

TUSSMAN, JOSEPH and TEN BROEK, JACOBUS 1949 The Equal Protection of the Laws. *California Law Review* 37:341–381.

WESTEN, PETER 1982 The Empty Idea of Equality. *Harvard Law Review* 95:537–596.

# EQUAL PROTECTION OF THE LAWS
## (Update 1)

Two questions have dominated the Supreme Court's equal protection opinions since 1985. The first, largely a matter of rhetoric, is the question of the appropriate STANDARD OF REVIEW. The second and more important question is the relevance of racial groups in determining the existence of discrimination and in providing legislative or judicial remedies for the harms of discrimination.

The uninitiated reader of the Court's opinions surely would think the process of decision in an equal protection case begins with a selection of the appropriate standard of judicial review from among three well-worn formulas: (1) STRICT SCRUTINY, which requires the government to offer compelling justification for an inequality it has imposed, and so generally results in the invalidation of governmental action; (2) RATIONAL BASIS, in which the Court pays strong deference to the government's assertions of justification and generally upholds the governmental action; or (3) the "intermediate," "heightened" scrutiny that falls between these two polar extremes, requiring "important" justification. Then, the same reader might imagine, the Court measures the government's asserted justifications against the proper standard of review, and on that basis reaches judgment.

More skeptical readers know that the order of the decisional process is often quite the reverse, with a judgment on the merits of the case preceding—even dictating—the selection of a standard of review as an opinion's rhetorical structure. The skeptics know, too, how misleading it is to speak of "the" standard of review, given the Court's occasional willingness to require significant justification in the name of "rational basis" review. Justice THURGOOD MARSHALL has long (and accurately) insisted that the Court's decisions add up to a sliding scale in which the standard of review varies according to the importance of the interests at stake. Justice JOHN PAUL STEVENS made a similar point when he said, "There is only one equal protection clause." In equal protection cases, as in other cases, the Court decides by weighing interests.

The Court's post-1985 equal protection decisions are illustrative. A 6–3 majority of the Justices used the traditional, highly deferential, "rational basis" standard to uphold two acts of Congress governing eligibility for welfare benefits and food stamps in *Lyng v. Castillo* (1986) and *Lyng v. Automobile, Aerospace and Agricultural Implement Workers* (1988). Similarly, in *Kadrmas v. Dickinson Public Schools* (1988), the Court upheld, 5–4, a state law authorizing some school districts to impose on unwilling parents user fees for school-bus transportation. The majority specifically rejected the argument of two dissenting Justices that PLYLER V. DOE (1982) demanded heightened judicial scrutiny for wealth classifications governing access to public education. *Plyler*'s opinion had been written in the language of "rational basis" review, but no one among the Justices or the Court's commentators had been deceived into believing that the Court was being deferential to the legislature's judgment. In fact, the Court in *Kadrmas* explicitly called *Plyler* a case of heightened scrutiny. The post-1985 decisions may be less than satisfying, but they are conventional applications of existing doctrine.

The dissenters' invocation of *Plyler v. Doe* reminds one, however, that Justices can make "rational basis" into the equivalent of heightened scrutiny when they are so inclined. Two recent cases evoked such responses. ATTORNEY GENERAL OF NEW YORK V. SOTO-LOPEZ (1986) was a challenge to a state law that gave veterans of the armed forces a preference in civil-service hiring, but only if the veterans were New York residents when they entered the forces. A four-Justice plurality concluded that the law failed to pass the heightened scrutiny demanded by the RIGHT TO TRAVEL. Two other Justices rejected both the "right to travel" argument and the conclusion that heightened scrutiny was appropriate; nonetheless, they concluded that the law lacked a rational basis and so violated the equal protection clause. Plainly, this is not a classical "rational basis" decision, any more than was *Plyler v. Doe*.

In CLEBURNE V. CLEBURNE LIVING CENTER (1985) the Justices were unanimous in holding unconstitutional a Texas town's refusal to grant a ZONING variance to allow the operation of a group home for mentally retarded persons. The court of appeals had concluded that an official classification based on MENTAL RETARDATION required justification at the level of "intermediate" scrutiny, but a majority of the Supreme Court disagreed. Vigorously arguing that the proper standard was "rational basis," the majority proceeded to a meticulous examination of the justifications offered by the town, rejecting each one as insufficient. As Justice Marshall, concurring, pointed out, *Cleburne* has taken its place alongside *Plyler* as a leading modern example of the sliding scale of standards of review in action.

In at least two kinds of cases, the "rational basis" standard, initially given "bite" in the fashion of *Plyler* and *Cleburne*, has been transformed into candid recognition of a more rigorous judicial scrutiny of governmental justifications. The law of SEX DISCRIMINATION moved from the "rational basis" explanation of *Reed v. Reed* (1971) to the

explicit "intermediate" scrutiny of CRAIG V. BOREN (1976). A similar rhetorical change is visible in the law governing classifications based on the legal status of ILLEGITIMACY. First came the "rational basis" language of LEVY V. LOUISIANA (1968); eventually, the open adoption of "intermediate" scrutiny in *Clark v. Jeter* (1988). These progressions exemplify the normative power of the factual: the practice of heightened scrutiny eventually leads to its formal recognition as doctrine. It is not extravagant to expect a similar treatment of the claims of the mentally retarded in some future opinion. In the end, the standard of JUDICIAL REVIEW seems not so much to govern decisions as to provide a rhetorical framework on which lawyers and judges can fasten the substantive considerations that are the heart of argument and decision: the harms of governmental actions to constitutionally protected interests and the government's justifications for those actions.

In contrast, arguments about the relevance of group harms and the validity of group remedies are of major importance in deciding cases—and, indeed, in deciding whether the nation will seriously address the continuing harms of RACIAL DISCRIMINATION. Certainly racial discrimination happens to people one by one, but it happens because they are members of a racial group. The harms of group subordination have multiple causes; actions are harmful because of their contexts. Yet our current constitutional law pays little attention to context and, instead, centers on a principle demanding no more of government than formal racial neutrality. To establish a claim of racial discrimination that violates the equal protection clause, normally one must show that identifiable officers of the government have purposefully acted on a racial ground to produce the harm in question—a proposition typically hard to prove.

A rare case in which the requisite purpose was found was *Hunter v. Underwood* (1985). The Supreme Court concluded that a clause in Alabama's 1901 state constitution disenfranchising persons convicted of crimes of "moral turpitude" had been adopted for the purpose of preventing black citizens from voting and continued in the present to have racially disparate effects. Accordingly, the Court held that it was unconstitutional for the state to deny the vote on the basis of a conviction for the MISDEMEANOR of passing a worthless check. The Court based its conclusion about the law's continuing racially disparate effects on statistics showing that blacks in two Alabama counties had been disenfranchised under the law at a rate at least 1.7 times the rate for whites.

Two years later, however, in rejecting an equal protection attack on the constitutionality of the death penalty, a majority of the Justices refused to give similar weight to a statistical demonstration of racial discrimination. A study of some 2,000 Georgia murder cases in the 1970s showed dramatic racial disparities in the likelihood that CAPITAL PUNISHMENT would be imposed. In MCCLESKEY V. KEMP (1987) the Court decided, 5–4, that those statistics were irrelevant; to prevail on a claim of racial discrimination, a defendant must show some specific acts of purposeful discrimination by the prosecutor, jury, or judge in his or her own case. Surely the majority Justices understood that a contrary decision would have threatened wholesale reversals of death sentences—a course they were unwilling to take.

Both the *Hunter* and *McCleskey* cases raised questions concerning the relevance of group subordination in equal protection analysis. *McCleskey* illustrates the present majority's devotion to the principle of formal racial neutrality and its reluctance to accept a showing of disparity among racial groups as proof of the discrimination that violates the equal protection clause. In interpreting a number of federal CIVIL RIGHTS statutes, however, the Court has accepted this sort of statistical proof of discrimination.

The issue of the constitutionality of AFFIRMATIVE ACTION brings together the rhetorical question of the standard of judicial review and the more substantive question of group remedies. Although, since 1985, the Supreme Court has remained fragmented on both these aspects of affirmative action, the practical effects of the decisions show a remarkable stability.

Given the acceptability of statistical proof of violation of a number of major antidiscrimination laws, many an affirmative-action program amounts to the substitution of one group remedy for another. Accordingly, there is broad agreement among the Justices on the validity of affirmative-action programs that are seen to be genuinely remedial. Yet the dominant principle for the Court's current majority is one of formal racial neutrality, and there is some awkwardness in squaring affirmative action with this principle. In two recent affirmative-action cases—WYGANT V. JACKSON BOARD OF EDUCATION (1986), on public hiring, and RICHMOND (CITY OF) V. J. A. CROSON CO. (1989), on public contracting—the key opinions were written by Justices LEWIS F. POWELL and SANDRA DAY O'CONNOR. On the surface, these opinions minimize group concerns, but together they make clear how a public institution can constitutionally adopt an affirmative action program. The approved method, explained as a form of remedy for past discrimination, makes judicious use of statistics showing racial disparities. In short, Justices Powell and O'Connor have found a way to use the language of individual justice in the cause of ending group subordination.

The prevailing opinions in *Wygant* and *Croson* emphasize the "strict scrutiny" standard of review, employing this standard both in evaluating the justifications for affirma-

tive action as a remedy for past discrimination and in requiring "narrow tailoring" of a racially based remedy. In METRO BROADCASTING, INC. V. FCC (1990), however, a different 5–4 majority announced that the less demanding "intermediate" scrutiny was appropriate in evaluating an affirmative-action program approved by Congress. In an opinion by Justice WILLIAM J. BRENNAN, the majority upheld a congressionally approved program of the Federal Communications Commission (FCC) for a limited number of racial preferences in the distribution of broadcast licenses. Here the majority said that Congress was not limited to providing remedies for past discrimination; rather, the affirmative-action program was aimed at achieving a greater diversity in broadcast programming. The four dissenters, in opinions by Justice O'Connor and Justice ANTHONY M. KENNEDY, insisted on "strict scrutiny" for congressional affirmative action as well as for state or local governmental programs and argued that the nonremedial purpose of broadcasting diversity was not a sufficiently compelling governmental purpose to pass the test.

Even after the retirement of Justice Brennan, there remains a majority of Justices who agree that Congress has the power, in enforcing the FOURTEENTH AMENDMENT, to remedy societal discrimination, both private and governmental, through affirmative-action programs. Presumably, in future cases, that result will be described, as it was in *Croson*, as consistent with "strict scrutiny." Indeed, in *Metro Broadcasting* itself one might have imagined an opinion upholding the FCC's diversity program as broadly "remedial." In the affirmative-action context, as elsewhere in equal protection doctrine, discussions of the standard of review serve purposes that are mainly rhetorical.

KENNETH L. KARST
(1992)

(SEE ALSO: *Capital Punishment and Race; Discrete and Insular Minorities; Race and Criminal Justice; Race-Consciousness; Racial Preference.*)

Bibliography

BELL, DERRICK A. 1987 *And We Are Not Saved: The Elusive Quest for Racial Justice.* New York: Basic Books.

KARST, KENNETH L. 1989 *Belonging to America: Equal Citizenship and the Constitution.* New Haven, Conn.: Yale University Press.

KENNEDY, RANDALL L. 1988 McCleskey v. Kamp: Race, Capital Punishment, and the Supreme Court. *Harvard Law Review* 101:1388–1433.

LAWRENCE, CHARLES R., III 1987 The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism. *Stanford Law Review* 39:317–388.

MINOW, MARTHA 1987 The Supreme Court, 1986 Term—Foreword: Justice Engendered. *Harvard Law Review* 101: 10–95.

# EQUAL PROTECTION OF THE LAWS
## (Update 2)

The equality value of the equal protection clause is implicated most strongly when the government discriminates against groups. Discrimination on the basis of identifiable group membership, such as race, gender, alienage, birth out of wedlock, or SEXUAL ORIENTATION means that all members of the disfavored group are disadvantaged by governmental action because of their group membership. The constitutional permissibility of discrimination on the basis of group membership depends on whether the government can provide an adequate justification for the specific act of discrimination. The matter of adequate justification is influenced in part by the degree of scrutiny called for under the articulated STANDARD OF REVIEW applicable to discrimination against the particular group. But it is also influenced by the Supreme Court's value judgments about the premises underlying the discrimination.

The paradigmatic form of discrimination on the basis of identifiable group membership in American society has been RACIAL DISCRIMINATION. The Court has long held that all racial discrimination is suspect and so is subject to the STRICT SCRUTINY standard of review. The specific act of racial discrimination must be shown to be "precisely tailored to advance a compelling governmental interest." Applying this exacting standard of review, the Court has held unconstitutional virtually all governmental action discriminating against African Americans and other racial or ethnic minorities in the last half of the twentieth century. However, the Court has also held that the equal protection clause prohibits only intentional racial discrimination. Facially neutral laws that have the demonstrable effect of disadvantaging racial minorities as a group are not subject to constitutional challenge absent evidence of an invidious purpose to discriminate on a racial basis.

The most controverted constitutional issue of racial equality today is the permissibility of race-based AFFIRMATIVE ACTION designed to overcome the inequality that exists between African Americans (and other racial- ethnic minorities) and whites, inequality that has resulted from a long history of official and unofficial racial discrimination. On the one hand, the preference for racial minorities as a group embodied in affirmative action programs causes individual whites to suffer discrimination because of their race, and so is inconsistent with the principle of formal racial neutrality. On the other hand, this racial preference advances the objective of substantive racial equality. The tension between the principle of formal racial neutrality and the objective of substantive racial equality is reflected in the difficult and often divided Court decisions as to

the constitutional permissibility of race-based affirmative action.

The one point on which the Court is agreed is that racial preference is constitutionally permissible when it is precisely tailored to overcome the present consequences of identified past discrimination for which the governmental entity employing racial preference is itself responsible. Since 1990, however, the Court has limited the use of race-based affirmative action for this purpose, emphasizing that there must be a substantial basis in evidence for finding the existence of identified past discrimination. In ADARAND CONSTRUCTORS, INC. V. PEÑA (1995), the Court held that racial preference programs adopted by Congress are subject to the same "strict scrutiny" standard of review as racial preference programs adopted by state and local governments, effectively overruling METRO BROADCASTING, INC. V. FCC (1990).

The Court, in SHAW V. RENO (1993) AND ITS PROGENY, has also held that when a state seeks to remedy the dilution of minority political power caused by past discrimination in voting, it is not justified in using race as the predominant factor in ELECTORAL DISTRICTING. The state may not draw electoral districts in an irregular form in disregard of "traditional districting criteria" in order to create a legislative district in which racial minority voters are in the majority. There is also a question as to whether the Court will continue to follow its earlier decision in REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978), where it held that a public university may use race-conscious admissions criteria in order to achieve a racially diverse student body.

The clear trend in equal protection jurisprudence today is toward a requirement of formal racial neutrality. For the most part, governmental efforts to overcome substantive racial inequality will have to be accomplished by racially neutral means, which are likely to be less effective than race-based affirmative action. This result, interacting with the conclusion that the equal protection clause prohibits only intentional racial discrimination, seriously limits governmental efforts to achieve substantive racial equality in American society.

In times past, classifications on the basis of gender were pervasive in American law, and were based on stereotyped assumptions about men and women and their respective societal roles. These gender-based classifications reinforced male domination and female subordination, but in many of their specific applications they disadvantaged men as well as women. The Court held in CRAIG V. BOREN (1976) that SEX DISCRIMINATION is subject to "intermediate" scrutiny, and that in order to be upheld, it must be "substantially related to advancing an important governmental interest."

In applying this standard of review, the Court has insisted on an "exceedingly persuasive justification" for any gender-based classification. The Court has found such a justification to exist only where the particular gender-based classification had the purpose and effect of remedying the present consequences of past societal discrimination suffered by women as a group or was related to biological and physical differences between men and women and their different roles in the reproductive process. Because gender-based classifications are constitutionally disfavored, they have generally been eliminated in federal and state laws and replaced with gender-neutral criteria, such as "surviving spouse," "dependent spouse," "custodial parent," and the like. In UNITED STATES V. VIRGINIA (1996), one of the very few cases involving gender-based classifications to come before the Court in recent years, the Court held that Virginia could not constitutionally exclude women from the citizen-soldier training afforded by the Virginia Military Institute, a state-supported military college.

The Court's interpretation of the equal protection clause necessarily influences the political decisions of Congress and the state legislatures with respect to discrimination on the basis of identifiable group membership. Although the Court, applying strict scrutiny, has held that the equal protection clause precludes the states from discriminating against resident ALIENS with respect to entitlement to governmental benefits, such as WELFARE, it has also held that Congress's plenary power over IMMIGRATION and NATURALIZATION requires extreme judicial deference to Congress's treatment of resident aliens. When Congress discriminates against resident aliens, for example, by denying them WELFARE BENEFITS, the deferential RATIONAL BASIS standard of review applies, and such discriminations are routinely held to be constitutionally permissible. This broad constitutional power has played a role in the political process in recent years. In the Welfare Reform Act of 1996, Congress denied many welfare benefits to resident aliens.

The Court's approach to discrimination against NONMARITAL CHILDREN highlights how the matter of adequate justification is influenced by the Court's value judgments about the premises underlying the discrimination. Saying that it is "illogical and unjust" to penalize out-of-wedlock children for the circumstances of their birth, the Court, applying an articulated "important and substantial relationship" standard of review, has held unconstitutional all of the traditional forms of discrimination against children born out of wedlock, such as denying welfare benefits to a family that includes nonmarital children.

The Court held that discrimination against gay and lesbian persons solely on the basis of their sexual orientation was "arbitrary and irrational" and so was unconstitutional even under the lower scrutiny of the rational basis standard of review. In ROMER V. EVANS (1996), the Court, applying this standard of review, held violative of equal

protection a Colorado state constitutional provision that excluded discrimination on the basis of sexual orientation from the protection of state and local antidiscrimination laws. Writing for the Court, Justice ANTHONY M. KENNEDY, said that the law "imposed a disadvantage born of animosity toward the class of persons affected," and that, "[a] law declaring that in general it shall be more difficult for one group of citizens than for others to seek aid from the government itself is a denial of equal protection of the laws in the most literal sense." Justice ANTONIN SCALIA, in dissent, accused the majority of taking sides in a "culture war," and said that Colorado was entitled to enact a law expressing the view that homosexuality was "morally wrong and socially harmful."

The Court's opinion in *Romer* reflects a strong commitment to the value of equality and makes clear that the constitutional guarantee of equal protection forbids government to discriminate against gay and lesbian persons solely because of their status as members of a disfavored group. Any laws that disadvantage persons because of their sexual orientation thus must be justified on grounds that are independent of majority hostility. In this connection, Congress has excluded openly homosexual persons from serving in the Armed Forces. The government has generally succeeded in persuading lower courts that this exclusion is rationally related to legitimate military concerns. The constitutionality of this exclusion has not yet been decided by the Court.

ROBERT A. SEDLER
(2000)

(SEE ALSO: *Adoption, Race, and the Constitution; Antidiscrimination Legislation; Asian Americans and the Constitution; Race, Reproduction, and Constitutional Law; Sexual Orientation and the Armed Forces.*)

Bibliography

ALEINIKOFF, ALEXANDER T. 1991 A Case for Race-Consciousness. *Columbia Law Review* 91:1060–1125.

BRADLEY, CRAIG M. 1994 The Right Not to Endorse Gay Rights: A Reply to Sunstein. *Indiana Law Journal* 70:29–38.

CARTER, STEPHEN L. 1991 *Reflections of an Affirmative Action Baby.* New York: Basic Books.

CULP, JEROME M., JR. 1994 Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims. *New York University Law Review* 69: 162– 196.

FARBER, DANIEL A. and SHERRY, SUZANNA 1996 The Pariah Principle. *Constitutional Commentary* 13:257–284.

FLAGG, BARBARA J. 1994 Enduring Principles: On Race, Process and Constitutional Law. *California Law Review* 82:935–980.

FOSTER, SHEILA 1993 Difference and Equality: A Critical Assessment of the Concept of "Diversity." *Wisconsin Law Review* 1993:105–161.

FRANKE, KATHERINE M. 1995 The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender. *University of Pennsylvania Law Review* 144:1–99.

GINSBURG, RUTH BADER 1992 Speaking in a Judicial Voice. *New York University Law Review* 67:1185–1209.

GRAGLIA, LINO A. 1996 "Affirmative Action," Past, Present, and Future. *Ohio Northern Law Journal* 23:1207–1225.

MACKINNON, CATHERINE A. 1991 Reflections on Sex Equality Under Law. *Yale Law Journal* 100:1281–1328.

SUNSTEIN, CASS R. 1994 Homosexuality and the Constitution. *Indiana Law Journal* 70:1–28.

SYMPOSIUM 1993 Sexual Orientation and the Law. *Virginia Law Review* 79:1419–1902.

——— 1995 Voting Rights After *Shaw v. Reno*. *Rutgers Law Review* 26:517–773.

## EQUAL RIGHTS AMENDMENT

In March 1972, Congress proposed an Equal Rights Amendment (ERA) to the United States Constitution. The amendment provided:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
> Section 3. The Amendment shall take effect two years after the date of ratification.

In May 1982, the extended deadline for ratification expired without the necessary approval from three-fourths of the states; fifteen had never ratified and five had voted to rescind their ratification. Challenges to the legality of those rescissions and to Congress's extension of the ratification deadline became moot.

Proponents subsequently reintroduced the amendment in Congress, thus continuing a campaign that began a half-century earlier. Some version of an equal rights amendment had surfaced in every congressional term between 1923 and 1972. In the view of most proponents, the text adopted in 1972 was designed to prohibit gender classifications except those concerning personal privacy, physical characteristics, or past discrimination. The rationale was that a constitutional prohibition would avoid piecemeal remedies for various forms of discrimination. Such a mandate would also subject sex-based classifications to a more rigorous standard of review than that prevailing under FOURTEENTH AMENDMENT doctrine, which allows discrimination substantially related to an important state purpose.

Although conceived as a measure to unite women, the amendment has often divided them. Throughout its his-

tory, the ERA campaign has triggered fundamental controversies about the meaning of equality and the means to attain it in a society marked by significant disparities in sexual roles. Much debate has centered not on legal entitlements but on cultural aspirations. Dispute has focused on the amendment's effect concerning laws purportedly advantaging women, such as protective labor legislation, marital support requirements, and military service exemptions. Particularly during the earlier part of the century, opponents contended that equality in formal mandates could never secure equality in fact. So long as female wage earners and homemakers were more economically vulnerable than men, a demand for equal rights appeared out of touch with social realities. By contrast, ERA proponents contended that protective legislation had often "protected" women from opportunities for higher paid vocations, and had legitimated stereotypes on which invidious discrimination rested. Supporters also noted that by the time Congress proposed the amendment in 1972, much sex-based regulation had been either invalidated or extended to men, and that which remained could be cast in sex-neutral terms.

So too, much of the discrimination that the amendment was originally designed to redress was, by the 1970s, illegal under various judicial, executive, and legislative mandates. Accordingly, the ERA ratification campaign frequently focused on symbolic rather than legal implications. To proponents, a constitutional mandate would serve as an important affirmation of women's equal status and as a catalyst for change in social practices beyond the scope of legal regulation. For opponents, however, the amendment's symbolic subtext represented an assault less on gender discrimination than on gender differences, and an invitation for further encroachments on states' rights.

In the ratification struggle of the 1970s, ERA supporters lacked the leverage to make their interests felt. But if the equal rights campaign helps inspire and empower women to expand their political influence, then the struggle itself may prove more important than its constitutional consequences.

DEBORAH L. RHODE
(1986)

(SEE ALSO: *Feminist Theory.*)

Bibliography

BOLES, JANET 1979 *The Politics of the Equal Rights Amendment.* New York: Longmans.

BROWN, BARBARA A.; EMERSON, THOMAS I.; FALK, GAIL; and FREEDMAN, ANN E. 1971 The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women. *Yale Law Journal* 80:872–985.

RHODE, DEBORAH L. 1983 Equal Rights in Retrospect. *Journal of Law and Inequality* 1:1–72.

# EQUITABLE RESTRAINT

See: Abstention Doctrine

# EQUITY

First named (in Article III) among the subjects to which the judicial power "shall extend" are "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority." The word "equity" has here a technical meaning well comprehended by American lawyers of the eighteenth century, and today still generally familiar to lawyers in all legal systems derived from that of England. The explanation is necessarily historical.

In a development more than well begun in the Middle Ages, and pretty much completed by Stuart times, England developed a unique double system of courts at the national level—the courts of "law," or COMMON LAW courts, and the "court of equity"—or, as it was often called, the "court of chancery."

The common law courts administered a system of law that was radically deficient, first as to remedies available, and, second, as to the breadth of considerations that could be taken into account in the formation of decisions. These courts could in most cases award only damages in money, in many cases a step inadequate to the doing of full justice. The common law courts were also excessively formalistic. If, for example, an error occurred in the transcription of a written contract, the common law courts had no conceptual apparatus for dealing with the mistake. Similarly, they had little capacity for taking into account the problems created by fraud. And the "trust," an institution of great importance, was utterly unknown to the "common law."

During the Middle Ages, suitors who could not get full justice out of the common law courts began to appeal to the Lord Chancellor, a high royal official, for supplementary or corrective help. By Tudor times, this practice had become firmly institutionalized, so that the Lord Chancellor became in some sense a judicial officer, hearing and dealing with such pleas. Little by little, the "chancery" came to be a court. This court had at its disposal a remedy enormously more versatile and efficient than the award of damages—the remedy of the order, or command, that the defendant do or refrain from doing something. The chancery court, in contrast to the courts of common law, knew nothing of the jury; the Chancellor decided all issues of fact and law.

This "court of chancery" opened its eyes, moreover, to many things the common law courts were institutionally

disabled from seeing. While a suitor in the common law courts might, for example, get a JUDGMENT in his favor on a written contract procured by fraud on his part, the chancery court might order him to give up the fraudulently procured instrument, or to refrain from suing on it, or even to refrain from collecting on a "law" judgment he had already procured by using it.

Because this chancery court so often intervened in the name of a higher justice or of "conscience," it came to be thought of as (and called) a "court of equity." By the time of the drafting of the Constitution, the doctrines and practices of this kind of "equity" had become well systematized. And most of the new states had borrowed from English practice the two-part system of "law" courts and "chancery" courts, with the doctrines and remedial apparatus of equity available in the latter. It is against this background that the constitutional phrase, "cases in law and equity," is to be understood. "Cases in law" were such cases as would be heard by the common law courts; "cases in equity" were such as would be heard by the Court of Chancery, in England or in a state mirroring the English division.

At the very beginning, the new national government rejected (in the JUDICIARY ACT OF 1789) the idea of totally separate courts of "law" and of "equity." The lower federal courts combined "legal" and "equitable" JURISDICTION in the same judges. But the ancient division was in some sense continued. Down to 1938, the federal district court had the two separate sides of "law" and "equity," respectively—in addition to such special jurisdictions as admiralty and bankruptcy. Even today, after the formal merger of "law" and "equity" cases under the single name of "civil action," lawyers still refer, for example, to the INJUNCTION (an order to do or not to do something) as "equitable relief."

"Equity" cases, in the language of Article III, are of great importance. The injunction is enormously more flexible and powerful than the remedies—mostly the award of damages—available to the court in a "case at law." Dramatic examples abound. It would have been impossible even to begin thinking about the lower federal courts' desegregating the schools if those courts had not had jurisdiction over "cases in equity" seeking orders to state officials. On this jurisdictional grant, indeed, rests the whole elaborate development of efficacious relief against official action thought to be unconstitutional—ranging from injunctions against the enforcement of unconstitutional laws (as in PIERCE V. SOCIETY OF SISTERS, 1925, enjoining state enforcement of a law requiring all pupils to go to public schools) to the running of state prisons by an Alabama district judge. (See INSTITUTIONAL LITIGATION.) The modern history of practical constitutional safeguards is a history of the use of the "equitable" remedy of injunction, together with the remedy of the DECLARATORY JUDGMENT—a remedy that would probably have been judged outside the "judicial power" were it not for its close analogy to "cases in equity."

Another characteristic of "cases in equity," overpoweringly important in the use of the national judicial power to protect constitutional rights against action of the states, is that the "court of equity" does not use the jury. This, as far as we can tell, is a gift of history; there appears to be no intrinsic reason why a local jury should not find "the facts" in, say, school desegregation cases. Experience shows that local juries will not often convict, for example, in prosecutions for CIVIL RIGHTS crimes, where the jury is constitutionally required. The whole course of development of national protection of human rights against local oppression might have been quite different if it were not for the fact that the "court of equity," the Lord Chancellor's court, sat without a jury—so that the federal judge, wielding the vital weapons in the "equity" remedial armory, does the same.

CHARLES L. BLACK, JR.
(1986)

Bibliography

FISS, OWEN M. 1972 *Injunctions.* Mineola, N.Y.: Foundation Press.

MCCLINTOCK, HENRY LACY 1948 *Handbook of the Principles of Equity.* St. Paul, Minn.: West Publishing Co.

## ERDMAN ACT
30 Stat. 424 (1898)

The report of a commission appointed by President GROVER CLEVELAND to investigate the Pullman strike of 1894 (see IN RE DEBS) prompted this act, one of the earliest federal acts providing for the arbitration of railway labor disputes. The act applied to all railroads and their employees engaged in INTERSTATE COMMERCE and provided mediation of any labor dispute "seriously interrupting or threatening to interrupt" interstate commerce. If mediation failed to resolve the dispute, the parties could turn to an arbitration board whose award would be binding and enforceable through EQUITY proceedings. Neither strikes nor lockouts were permitted during arbitration or ninety days after an award. Section 10 made it a MISDEMEANOR for any employer to require, as a condition of employment, any discriminatory agreements, particularly with regard to union membership. Clearly aimed at outlawing YELLOW DOG CONTRACTS, section 10 fell in *Adair v. United States* (1906) as a violation of FREEDOM OF CONTRACT. The act otherwise operated quite successfully, and Congress fortified its mediation provisions in 1913. A bitter nationwide

strike in which both sides refused to invoke mediation, however, forced replacement of the act three years later with the ADAMSON EIGHT-HOUR ACT.

DAVID GORDON
(1986)

Bibliography

TAYLOR, BENJAMIN J. and WITNEY, FRED 1971 *Labor Relations Law*, 2nd ed. Englewood Cliffs, N.J.: Prentice-Hall.

## *ERIE RAILROAD CO. v. TOMPKINS*
304 U.S. 64 (1938)

The Supreme Court in *Erie* posed the question whether the "oft-challenged doctrine of SWIFT V. TYSON (1842) shall now be disapproved," and answered that it should. The Court rejected its earlier construction of the Rules of Decision Act, originally section 34 of the JUDICIARY ACT OF 1789, and held that the "laws of the several states"—which, except as otherwise required by federal law, are to be "regarded as rules of decision" in civil actions in the federal courts "in cases where they apply"—included all of the decisional or COMMON LAW of the states.

*Erie*, like *Swift*, involved an exercise of the DIVERSITY JURISDICTION of the federal courts. In *Erie*, plaintiff Tompkins brought a federal court suit against the railroad for personal injuries, and the court of appeals upheld a substantial jury verdict in the face of the railroad's claim that it had not violated the limited duty owned to plaintiff under the decisional law of the state where the injury occurred. That court concluded that, in the absence of a state statute, the question of the scope of the railroad's duty was one not of "local" but of "general" law, and under the general law the railroad had a duty of care that the jury could properly find to have been broken.

The Supreme Court, in an opinion by Justice LOUIS D. BRANDEIS, reversed and remanded for application of state law with respect to the scope of the railroad's duty. The Court concluded that (1) the refusal in *Swift* to read the mandate of the Rules of Decision Act as embracing all of the decisional law of the states was based on an incorrect construction of the purpose of that act; (2) the construction in *Swift* had prevented uniformity in the administration of state law and had permitted "grave discrimination by noncitizens [of a state] against citizens"; and (3) the doctrine of *Swift* represented "an unconstitutional assumption of powers by the Courts of the United States." Justices PIERCE BUTLER and JAMES C. MCREYNOLDS dissented; Justice STANLEY F. REED concurred in part, believing it unnecessary to reach the constitutional issue addressed by the Court.

Although the parties in *Erie* had not briefed the question whether *Swift* should be overruled, there had been intimations of the Court's intentions in earlier majority and dissenting opinions. And while the *Erie* result itself still finds general acceptance, the years since the decision have seen much debate about its rationale, scope, and application.

DAVID L. SHAPIRO
(1986)

(SEE ALSO: *Federal Common Law*, *Civil.*)

## ERNST, MORRIS
(1888–1976)

With his colleague ARTHUR GARFIELD HAYS, Morris Ernst served as general counsel to the AMERICAN CIVIL LIBERTIES UNION from 1929 to 1954. Together with Hays and ROGER BALDWIN, Ernst fought to protect individual rights against government action. Although he excoriated both the Ku Klux Klan and the Communist party, he defended members of both organizations. He was a staunch opponent of government censorship and defended James Joyce's novel against OBSCENITY charges in the Ulysses trial (1934). Ernst participated in a number of well-known cases, including COMMONWEALTH OF MASSACHUSETTS V. SACCO AND VANZETTI (1921), HAGUE V. CIO (1939), and the *Associated Press v. NLRB* (1937), one of the WAGNER ACT CASES. He wrote several popular books championing civil liberties.

DAVID GORDON
(1986)

## ERROR, WRIT OF

A writ of error is an order of an appellate court, directing a lower court to transmit the record of a case that it has decided, for review by the appellate court. The JUDICIARY ACT OF 1789 established the writ of error as the means of invoking the APPELLATE JURISDICTION of both the CIRCUIT COURTS and the Supreme Court. For a century, the writ of error was, in practice, virtually the exclusive method of invoking review by the Supreme Court. In the cases specified by law for issuance of the writ, review by the Supreme Court was obligatory. In 1891 Congress reorganized the federal judiciary, establishing the circuit courts of appeals. (See CIRCUIT COURTS OF APPEALS ACT.) In some cases, these courts' decisions were final, unless the courts certified questions for review by the Supreme Court, or the Supreme Court in its discretion granted WRITS OF CERTIORARI to review their decisions. In 1925, in the course of reducing the Supreme Court's obligatory JURISDICTION and expanding the Court's discretionary control of its docket,

Congress changed the name of the writ of error; since that time the Supreme Court's theoretically obligatory appellate jurisdiction has been invoked by APPEAL.

KENNETH L. KARST
(1986)

Bibliography

ROBERTSON, REYNOLDS and KIRKHAM, FRANCIS R. 1951 *Jurisdiction of the Supreme Court of the United States*, ed. Richard F. Wolfson and Philip B. Kurland. Pages 191–196, 756, 806–807. Albany, N.Y.: Matthew Bender.

## ERVIN, SAMUEL J.
(1896–1985)

A conservative Democrat who graduated from Harvard Law School in 1922, Samuel J. Ervin described himself as an "ol' country lawyer" from North Carolina, his native state. In 1954 he left that state's supreme court to enter the United States SENATE. During his two decades as a senator, he supported business against labor and opposed CIVIL RIGHTS legislation, equal rights for women, voting by eighteen-year-olds, and federal encroachments on STATES' RIGHTS. He also became a strict separationist on church–state issues, and he opposed intrusive searches, computer invasions of privacy, preventive detention, and any other measures he deemed subversive of the Constitution. By 1973 he was respected as the Senate's expert on the Constitution. Central casting destined him to be chairman that year of the Senate's Select Committee on Presidential Campaign Activities—the WATERGATE committee. As chairman, he was a relentless but fair interrogator who expressed outrage when witnesses equivocated or lied. The televised hearings made him a national celebrity as the watchdog of the Constitution who preached the constitutional responsibilities of those entrusted with public office. Ervin projected a grandfatherly image of a judicious moralist, the very model of integrity when models were in short supply. The public adored "Senator Sam," and he adored the Constitution.

LEONARD W. LEVY
(1986)

Bibliography

ERVIN, SAMUEL J., JR. 1980 *The Whole Truth: The Watergate Conspiracy*. New York: Random House.

## *ERZNOZNIK v. CITY OF JACKSONVILLE*
422 U.S. 205 (1975)

An ordinance prohibited drive-in movie theaters from showing films containing nudity on screens visible from public streets or places. Conceding that the films were constitutionally protected speech, the city asserted an authority to protect its citizens, particularly minors, against unwilling exposure to offensive materials. The Supreme Court declared the ordinance unconstitutional, holding that people on public streets, unlike people in their homes or people on buses who are a captive audience, have only a limited interest in privacy which does not justify the city's discrimination among movies based solely on content.

KIM MCLANE WARDLAW
(1986)

(SEE ALSO: *Obscenity*.)

## ESCH-CUMMINGS TRANSPORTATION ACT
41 Stat. 456 (1920)

Congress favored the return of the railroads to private ownership and operation after government control during WORLD WAR I. This act accomplished that objective and altered Congress's regulatory approach. It did not seek to prevent abuses so much as to strengthen the industry and foster the public interest. The act granted the Interstate Commerce Commission extensive new powers including the authority to set minimum rates, oversee fiscal operation of the roads, regulate acquisitions and consolidations, and supervise services. One provision prescribed a rate-making rule to assure "a FAIR RETURN upon the aggregate value of the railroad property," allowing the ICC to determine what constituted such a return. A recapture clause, inserted to protect weaker lines, required that roads earning a return over six percent divide that profit between a reserve fund for their own stability and a general fund (administered by the ICC) to compensate those railroads earning under four and one-half percent. The Supreme Court sustained this clause in DAYTON-GOOSE CREEK RAILWAY V. UNITED STATES (1924). The act also established labor boards with JURISDICTION over a variety of disputes.

DAVID GORDON
(1986)

Bibliography

SHARFMAN, ISAIAH L. 1931–1937 *The Interstate Commerce Commission*. Vol. 1. New York: Commonwealth Fund.

## *ESCOBEDO v. ILLINOIS*
378 U.S. 478 (1964)

Daniel Escobedo was arrested and taken to the police station for questioning. Over the course of several hours, his

repeated requests to see his lawyer were refused and his lawyer sought unsuccessfully to consult with him. The Supreme Court held that Escobedo's subsequent confession was obtained in violation of his Sixth Amendment RIGHT TO COUNSEL. For the first time, the Court spoke of "an absolute constitutional right to remain silent," which the presence of a lawyer would facilitate. *Escobedo* is important also because it presaged MIRANDA V. ARIZONA (1966) in discussing the possibility that warnings about the right to counsel might serve to cure the infirmity of in-custody interrogation.

Although *Escobedo* retains historical significance, the arguments in POLICE INTERROGATION AND CONFESSION cases have largely shifted from the Sixth to the Fifth Amendment with an emphasis on whether warnings were given, and given correctly, and whether the right to remain silent was waived.

The case has lost authority as precedent in another respect. It seemed to establish a practical flexible standard for the time when Sixth Amendment rights would come into play: when "the investigation is no longer a general inquiry into an unresolved crime but has begun to focus on a particular suspect." This approach was specifically abandoned in *Kirby v. Illinois* (1972), when the court limited *Escobedo* to its facts and ruled that the right to counsel does not attach until adversary judicial proceedings have been initiated.

BARBARA ALLEN BABCOCK
(1986)

## ESPIONAGE ACT
### 40 Stat. 451 (1917)

When on April 2, 1917, President WOODROW WILSON asked Congress to recognize a STATE OF WAR, he included in his indictment of Germany the activities of German agents in the United States. Such activity, he said, should be treated with "a firm hand of stern repression." Nine weeks later, a much discussed and much amended Espionage Act was signed into law.

The initial measure, an amalgamation of seventeen bills prepared in the attorney general's office, was intended to "outlaw spies and subversive activities by foreign agents." Critics, particularly in the American press, quickly complained that the measure was far too restrictive and imposed a type of PRIOR RESTRAINT AND CENSORSHIP potentially destructive to basic American liberties. Thus, despite Wilson's contention that the administration must have authority to censor the press since this was "absolutely necessary to the public safety," the most overt censorship provisions were removed. The belief of a majority of national lawmakers that now the bill could not be used to suppress critical opinion overlooked the fact that two of the twelve titles of the act as passed still bore directly on freedom of expression. One provided punishment for (1) making or conveying false reports for the benefit of the enemy; (2) seeking to cause disobedience in the armed forces; and (3) willfully obstructing the recruiting or enlistment service. Another section closed the mails to any item violating any of the act's provisions.

The constitutional basis of these two provisions rested on a broad interpretation of the federal WAR POWERS and upon the argument that a denial of use of the mails did not constitute censorship, since the federal courts had ruled that the mails constituted an optional federal service. Thus, it was argued, refusal to extend the facility did not deprive anyone of a constitutional right. Further, the measure's supporters argued that FREEDOM OF SPEECH was not absolute and could not protect a person who deliberately sought to obstruct the national war effort.

The difficulty of applying the law, however, was clear from the outset, since the statute sought to punish questionable intent, a difficult factor to measure. With punishment set at a $10,000 fine, imprisonment for up to twenty years, or both, and with its interpretation largely in the hands of patriotic enforcers, many suffered under the measure and its subsequent amendments. The Justice Department prosecuted more than 2,000 cases. At least 1,050 citizens were convicted under its terms, including Industrial Workers of the World leaders, Socialists (especially Eugene V. Debs), and a number of suspect hyphenates, particularly German Americans, whose verbal criticism of aspects of the war were often brutally repressed. The Supreme Court upheld the constitutionality of the act's prohibitions on causing disobedience in the armed forces and obstructing enlistment in a series of postwar decisions: SCHENCK V. UNITED STATES (1919), *Frohwerk v. United States* (1919), DEBS V. UNITED STATES (1919).

Under the mails provisions, the postmaster general exercised virtually dictatorial authority over the effective circulation of the American press, a power which he used capriciously and subjectively for punitive reasons. In an effort to preserve FIRST AMENDMENT values through the process of statutory construction, Judge LEARNED HAND construed the mails provision narrowly to exclude its application to ordinary criticism of government policies, including war policy. Hand's decision, however, was reversed by the court of appeals. (See MASSES PUBLISHING CO. V. PATTEN.)

The measure remained on the books through the 1920s and 1930s and was reenacted in March 1940, Congress increasing its penalties for peacetime violation. The Supreme Court narrowed its application in *Hartzel v. United States* (1944) by interpreting its provisions through a literal application of Holmes's clear and present danger test.

The government again turned to it in 1971, seeking unsuccessfully to prevent the publication by the *New York Times* of the "Pentagon papers," which the government called harmful to the security of the United States. (See NEW YORK TIMES CO. V. UNITED STATES.)

PAUL L. MURPHY
(1986)

(SEE ALSO: *World War I.*)

Bibliography

CHAFEE, ZECHARIAH 1941 *Free Speech in the United States.* Cambridge, Mass.: Harvard University Press.

MURPHY, PAUL 1979 *World War I and the Origin of Civil Liberties in the United States.* New York: Norton.

## ESTABLISHMENT CLAUSE

Three themes dominate recent Supreme Court decision making under the First Amendment's ESTABLISHMENT OF RELIGION clause. First, the Court has continued to follow the doctrinal framework of EVERSON V. BOARD OF EDUCATION (1947) and LEMON V. KURTZMAN (1971), but with increasing emphasis on the "endorsement or disapproval" inquiry advocated by Justice SANDRA DAY O'CONNOR. Second, the Court has steered a selective course in applying this framework, upholding certain governmental practices but invalidating others. Third, and potentially most significant, the Justices stand at the brink of a radical change in doctrine. Although a majority of the Court continues to follow *Everson* and *Lemon*, there is growing support for an alternative interpretation that would dramatically weaken the principle of SEPARATION OF CHURCH AND STATE.

In *Everson*, the Supreme Court adopted a broad interpretation of the establishment clause, one that forbids governmental favoritism for religion over irreligion as well as for one religion over another. Since 1971, this broad interpretation has been implemented through the three-part LEMON TEST. Under *Lemon*, a statute (or other governmental action) can be upheld only if it satisfies three requirements: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibitsreligion...; finally, the statute must not foster "an excessive governmental entanglement with religion."

Despite persistent criticism, the Court continues to embrace the *Everson* interpretation and the *Lemon* test. The Court has reformulated the first two parts of *Lemon*, however, by emphasizing the "endorsement or disapproval" inquiry that Justice O'Connor initially proposed in her concurring opinion in LYNCH V. DONNELLY (1984). In WALLACE V. JAFFREE (1985) and *Edwards v. Aguillard* (1987), the Court adopted O'Connor's formulation of the "purpose" inquiry: "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion." In COUNTY OF ALLEGHENY V. ACLU (1989) the Justices likewise relied on O'Connor's formulation to modify *Lemon*'s "primary effect" requirement. Thus, the Court held that regardless of purpose, governmental action has a constitutionally impermissible effect if it *appears* to endorse or disapprove religion. "The Establishment Clause, at the very least," wrote the Court, "prohibits government from appearing to take a position on questions of religious belief."

Justice O'Connor's approach does not eliminate difficult questions of application. As suggested by *Corporation of Presiding Bishop v. Amos* (1987), for example, there is no "endorsement" when government merely "accommodates" religion by removing burdens that government itself has created. More generally, the line between partisan "endorsement" and neutral "acknowledgment" may be exceedingly difficult to draw.

With or without the O'Connor reformulation, the *Lemon* test provides no more than a framework for analysis. Its application requires an exercise of judgment, an exercise of judgment that depends on the context of specific cases and on the individual philosophies of the Justices. In its recent cases, the Court's applications of *Lemon* have suggested a relaxation of establishment clause restraints on GOVERNMENT AID TO RELIGIOUS INSTITUTIONS and activities. At the same time, the Court has applied the clause forcefully to prohibit government from advancing religion through the public school curriculum, and it has adopted a fact-specific approach for cases involving religious symbols.

If government singles out religion for special economic benefits, the Supreme Court continues to find an establishment clause violation. Thus, in TEXAS MONTHLY, INC. V. BULLOCK (1989) the Court invalidated a Texas sales tax exemption that was limited to religious periodicals. For governmental programs that include secular as well as religious beneficiaries, however, the Court's decisions in WITTERS V. WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND (1986) and BOWEN V. KENDRICK (1988) suggest a relaxation of the Court's prior doctrine. In *Witters*, the question was whether the establishment clause required the state of Washington to deny vocational rehabilitation funds to an individual attending a Christian college in preparation for a religious career. The Washington State Supreme Court had held that the denial was mandated by *Lemon*'s second prong, but the United States Supreme Court unanimously disagreed. Although the opinion of the Court was narrowly drawn, separate concurring opinions, joined by a majority of the Justices, gave a broad reading to MUELLER V. ALLEN (1983), one that apparently

would support the constitutionality of any neutrally drawn educational assistance program, even if most of the individual beneficiaries used the funds for religious training.

In *Bowen* the Court rejected a facial challenge to a federal statute designed to combat teenage sexual relations and pregnancy. In addressing these religiously sensitive topics, the statute not only permitted but expressly encouraged the involvement of religious organizations. Nonetheless, the Court refused to invalidate the statute either in its entirety or with respect to religiously affiliated grantees. Although the Court remanded for a determination of whether particular grants might render the statute unconstitutional as applied, it refused to presume that religiously affiliated grantees would use their grants "in a way that would have the primary effect of advancing religion."

The Court's permissive treatment of governmental funding programs has not been duplicated in the public school context. In *Edwards v. Aguillard* the Court considered a challenge to Louisiana's Balanced Treatment Act, which provided that evolution could not be taught in the public schools unless accompanied by the teaching of CREATIONISM. With only two Justices dissenting, the Court concluded that the act violated the first prong of *Lemon* and therefore was unconstitutional. Citing mandatory attendance policies and the impressionability of young students, the Court noted that it was "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." Unpersuaded by the legislature's articulation of a secular purpose, the Court concluded that the act was designed "to alter the science curriculum to reflect endorsement of a religious view that is antagonistic to the theory of evolution." The Court found that this "preeminent religious purpose" was at least the "primary purpose" of the act and that the act therefore "endorses religion in violation of the First Amendment."

The Supreme Court's treatment of governmental displays of religious symbols shows neither the permissiveness of the funding cases nor the "particular vigilance" the Court has exercised in policing the public school curriculum. Instead, the Court has adopted a fact-specific approach that requires case-by-case determinations of whether particular religious displays have the purpose or effect of endorsing religion. In *County of Allegheny v. ACLU* the Court considered challenges to two separate holiday displays in downtown Pittsburgh, one of a crèche, the other of a menorah. A sharply divided Court found that the crèche violated the establishment clause but that the menorah did not. The Court emphasized that the crèche stood essentially alone in the Allegheny County Courthouse and included a banner that read "Gloria in Excelsis Deo." By contrast, the menorah was placed beside a large Christmas tree and was accompanied by a sign proclaiming the City of Pittsburgh's "salute to liberty." Focusing on the second prong of *Lemon*, as modified by Justice O'Connor, the Court concluded that the crèche sent an impermissible message of religious endorsement, whereas the menorah, in context, sent a permissible message of cultural diversity and freedom of belief.

The Court's recent applications of its establishment clause doctrine are significant and controversial in their own right. A far more important development, however, may be just around the corner. For years, critics have attacked *Everson* and *Lemon* for their alleged hostility to religion. To date, the Court has resisted these attacks, affirming the basic wisdom of its doctrinal framework and continuing to enforce a meaningful separation of church and state. The Court is changing, however, and it may be within one vote of a dramatic shift in doctrine. Speaking for four Justices in *County of Allegheny*, Justice ANTHONY M. KENNEDY wrote that "substantial revision of our Establishment Clause doctrine may be in order." Suggesting the direction such revision might take, he argued that governmental "support" for religion should be permitted unless it involves coercion, "proselytizing" for a particular religion, or "direct benefits" so substantial as to in fact establish or tend to establish a state religion. It seems clear that the four Justices joining this opinion would support a fundamental retreat from the Court's existing doctrine.

Justice Kennedy's suggested course would seriously threaten the political-moral principles and policies that are furthered by the Court's prevailing approach. Governmental "support" for religion causes harm to the religious and irreligious individuals who are not within the government's favor. This harm creates feelings of resentment and alienation, which in turn cause injury to the political community itself. At the same time, the purported support for religion is often illusory; it may demean religion and work to its long-term detriment. The Supreme Court's establishment clause doctrine works to ensure a proper respect for the religious and irreligious beliefs of individuals, supports the maintenance of a religiously inclusive political community, and does no disservice to the important role of religion in our society. Whatever its weaknesses, this doctrine should not be abandoned.

DANIEL O. CONKLE
(1992)

Bibliography

CONKLE, DANIEL O. 1988 Toward a General Theory of the Establishment Clause. *Northwestern University Law Review* 82: 1113–1194.

NOTE 1987 Developments in the Law: Religion and the State. *Harvard Law Review* 100:1606–1781.

SMITH, STEVEN D. 1987 Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test. *Michigan Law Review* 86:266–332.

## ESTABLISHMENT CLAUSE (Update)

At the close of the twentieth century, the Supreme Court's jurisprudence of the establishment clause appears to be in radical transition. Between WORLD WAR II and the 1980s, the Court adhered to a largely separationist understanding of the establishment clause, under which public institutions and programs—and especially public schools—were understood to be exclusively secular, and religious institutions were barred from participation in many government-funded programs. That understanding was reflected in the controversial three-part test of LEMON V. KURTZMAN (1971), which required that government action have a secular purpose; have a primary effect that neither advances nor inhibits religion; and refrain from excessive entanglement between religion and government.

Each of these parts of the LEMON TEST received criticism, mostly on the ground that they had the effect of requiring discrimination against, or hostility toward, religion. As the years wore on, the *Lemon* test became encrusted with multiple conflicting interpretations, rendering it largely indeterminate.

Beginning with WIDMAR V. VINCENT (1981), the Supreme Court began a shift toward an interpretation based on the idea of neutrality: that the FIRST AMENDMENT prohibition on the ESTABLISHMENT OF RELIGION permits the government to allow religious institutions and religiously motivated individuals to share in the benefits of public life without discrimination. *Widmar* involved a public university that allowed student groups to use empty facilities for meetings. In order to preserve a strict SEPARATION OF CHURCH AND STATE, the university refused to permit the use of facilities for religious activities. That meant that a student group could meet on campus to discuss sex, drugs, rock and roll, politics, or Shakespeare, but could not meet to pray or study the Bible. Reversing the appellate court, the Supreme Court held that the establishment clause is not offended by the neutral provision of facilities to religious and secular student groups on an evenhanded basis, and that the FREEDOM OF SPEECH guarantee forbids the exclusion of any group on the basis of the content of its speech.

The *Widmar* paradigm of "equal access" soon began to spread to other constitutional issues. First, the Court approved tax credits that could be used for expenses at public or private schools. Then, Congress extended the principle of "equal access" to high school student groups. In 1986, the principle was extended by a unanimous Supreme Court to an issue of funding, which had previously been the area of the most rigid strict separationism. In that case, WITTERS V. WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND (1986), the Court held that aid that is "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institutions benefited" does not generally violate the establishment clause.

In subsequent cases, the Court held that a government-provided sign language interpreter could be used by a student at a Roman Catholic high school; that religious symbols may be displayed in a public square; and that a public university may (indeed must) fund a student publication with a religious viewpoint. In all of these cases, the dispositive consideration was that the aid was provided on a neutral basis, without favoring or disfavoring religion.

It is a sign of the shift in DOCTRINE that every one of these decisions required reversing the lower court. It takes a certain period of time before a new legal principle works its way into the ordinary law of the lower courts. In this context, the process has been prolonged by the Court's reluctance to OVERRULE its earlier decisions. In particular, the Court has declined to overrule *Lemon* even though it has not relied on that case to strike down a government policy in almost fifteen years. As a result, inconsistent decisions have piled up, and lower courts are uncertain about the state of the law.

Indeed, the Supreme Court has not been prepared to adopt the neutrality approach unreservedly. In ROSENBERGER V. RECTOR & VISITORS OF THE UNIVERSITY OF VIRGINIA (1995), where the Court approved the funding of a religious student magazine on a neutral basis, the MAJORITY OPINION, authored by Justice ANTHONY M. KENNEDY, cabined the holding with three distinctions that are difficult to square with any coherent theory of the First Amendment: that the aid came in the form of a payment of the printer's bill rather than a subsidy to the group; that the student group was not organized as a "religious organization"; and that student mandatory activity fees are not the same as taxes. One suspects that the purpose of these distinctions is to allow the Court to retreat from the neutrality principle in the future, if it wishes, without overruling this decision.

In other important areas of establishment clause jurisprudence, doctrine is also in flux. Since the mid-1980s, the Court has generally approved the idea that legislatures and executive officials may accommodate the exercise of religion, even when not compelled to do so under the free exercise clause, subject to certain limitations. However, in practice, the Court has been reluctant to approve of AC-

COMMODATION OF RELIGION in many cases. The standard for legitimacy of religious accommodations therefore remains unsettled.

The closest to a "test" for legitimate accommodations is found in the PLURALITY OPINION written by Justice WILLIAM J. BRENNAN, JR., in TEXAS MONTHLY, INC. V. BULLOCK (1989). The plurality stated that the government may single out religious organizations for a special accommodation when it is designed to relieve a substantial government-imposed burden on the exercise of religion, or where the accommodation does not impose a substantial burden on third parties. (It is unclear whether both of these criteria need to be satisfied, or just either one.) As a result of the vagueness of these standards, as well as the lack of a majority opinion, this area remains very much in doubt.

In BOARD OF EDUCATION OF KIRYAS JOEL VILLAGE SCHOOL DISTRICT V. GRUMET (1994), the Court implied that it is generally unconstitutional for the government to accommodate a particular religious group, where there is no satisfactory legal guarantee that similarly situated religious groups would receive comparable accommodations. As a practical matter, that makes it difficult for legislatures to make accommodations except in broad terms, and makes it difficult for executive officers to do so at all. It is not clear whether that principle was intended to be so sweeping.

MICHAEL W. MCCONNELL
(2000)

(SEE ALSO: *Government Aid to Religious Institutions; Religion in Public Schools; Religious Liberty.*)

Bibliography

LUPU, IRA C. 1993 The Lingering Death of Separationism. *Geroge Washington Law Review* 62:230–279.

MCCONNELL, MICHAEL 1992 Religious Freedom at a Crossroads. *University of Chicago Law Review* 59:115–194.

MONSMA, STEPHEN V. and SOPER, J. CHRISTOPHER, eds. 1998 *Equal Treatment of Religion in a Pluralistic Society.* Grand Rapids, Mich.: W. B. Eerdmans.

SYMPOSIUM 1992 Religion in Public Life: Access, Accommodation, and Accountability. *George Washington Law Review* 60:599–856.

## ESTABLISHMENT OF RELIGION

The FIRST AMENDMENT begins with the clause, "Congress shall make no law respecting an establishment of religion. . . ." There are two basic interpretations of what the framers meant by this clause. In EVERSON V. BOARD OF EDUCATION (1947), the first decision on the clause, the Supreme Court unanimously adopted the broad interpretation, although the Justices then and thereafter disagreed on its application. (See SEPARATION OF CHURCH AND STATE.) Justice HUGO L. BLACK declared that the clause means not only that government cannot set up a church but also that government cannot aid all religions impartially or levy a tax for the support of any religious activities, institutions, or practices. "In the words of [THOMAS] JEFFERSON," Black said, "the clause against establishment of religion by laws was intended to erect "a wall of separation between Church and State."

EDWARD S. CORWIN, a distinguished constitutional scholar who espoused the narrow view of the clause, asserted that the Court's interpretation was "untrue historically." What the clause does, he wrote, "and all that it does, is to forbid Congress to give any religious faith, sect, or denomination preferred status. . . . The historical record shows beyond peradventure that the core idea of "an establishment of religion' comprises the idea of preference; and that any act of public authority favorable to religion in general cannot, without manifest falsification of history, be brought under the ban of that phase" (Corwin, "Supreme Court as National School Board," pp. 10, 20). Justice POTTER STEWART, dissenting in ENGEL V. VITALE (1962), endorsed the narrow view when he noted that a nondenominational school prayer did not confront the Court with "the establishment of a state church" or an "official religion."

The debate in the First Congress, which proposed the First Amendment, provides support for neither the broad nor the narrow interpretation. The history of the drafting of the clause, however, is revealing. Congress carefully considered and rejected various phrasings that embraced the narrow interpretation. At bottom the amendment was an expression of the intention of the Framers of the Constitution to prevent Congress from acting in the field of religion. The "great object" of the BILL OF RIGHTS, JAMES MADISON, had said, when introducing his draft of amendments to the House, was to "limit and qualify the powers of Government" for the purpose of making certain that none of the powers granted could be exercised in forbidden fields, including religion. The history of the drafting of the establishment clause does not provide a clear understanding of what was meant by the phrase "an establishment of religion." But the narrow interpretation, which permits government aid to religion in general or on a nonpreferential basis, leads to the impossible conclusion that the First Amendment *added* to Congress's powers. The amendment meant to restrict Congress to the powers that it possessed, and since it had no power to legislate on matters concerning religion, and therefore could not support religion on any basis, Congress would have had no

such power even in the absence of the First Amendment. To suppose that an express prohibition on power vests or creates power is capriciously unreasonable. The Bill of Rights, as Madison said, was not framed "to imply powers not meant to be included in the enumeration."

Congress did not define "an establishment of religion" because its members knew from common experience what they meant. At the time of the framing of the amendment, six states maintained or authorized establishments of religion. That amendment denied to Congress the power to do what those states were doing, and since *Everson* the states come under the same ban. An establishment meant to the framers of the amendment what it meant in those states. Thus, reference to the American experience with establishments at the time of the framing of the Bill of Rights is essential to any understanding of what the clause in question meant.

The narrow interpretation is based on European precedents but the European form of an establishment was not the American form, except in the Southern colonies before the AMERICAN REVOLUTION, and the European meaning of establishment was not the American meaning. The revolution triggered a pent-up movement for separation of church and state in the nine states that had establishments. Of these nine, North Carolina (1776), New York (1777), and Virginia (1786) separated church and state. Each of the remaining six states made concessions to anti-establishment sentiment by broadening their old establishments. After the Revolution, none maintained a single or exclusive establishment. In all six an establishment of religion was not restricted to a state church or a system of public support of one denomination; in all an establishment meant public support of all denominations and sects on a nonpreferential basis.

Three of these six states were in New England. The MASSACHUSETTS CONSTITUTION (1780) authorized its towns and parishes to levy taxes for the support of Protestant churches, provided that each taxpayer's money go to the support "of his own religious sect or denomination" and added that "no subordination of any one sect or denomination to the other shall ever be established by law." An establishment in Massachusetts meant government support of religion. Congregationalists, for a few decades, benefited the most, because they were the most numerous and resorted to various tricks to fleece non-Congregationalists out of their share of religious taxes. But the fact remains that Massachusetts had a multiple, not a single, establishment under which Baptist, Episcopalian, Methodist, and Unitarian churches were publicly supported until the establishment ended in 1833. In 1784 Connecticut and New Hampshire modeled their multiple establishments after that of Massachusetts, ending them in 1818 and 1819, respectively.

In the South, where the Episcopal Church was the sole established church before the revolution, three states either maintained or permitted establishments of religion, and in each the multiple form was the only legal one. Maryland (1776) permitted its legislature to tax for the support of "the Christian religion," with the proviso that every person had the right to designate the church of his choice, making every Christian church an established church on a nonpreferential basis. The legislature sought to pass an enabling act in 1785, but the nonpreferential system was denounced as an establishment and defeated. The situation in Georgia was the same as in Maryland, and a revised constitution (1789), which was in effect when the First Amendment was adopted, continued the multiple establishment system, allowing each person to support only his own church. South Carolina restricted its multiple nonpreferential establishment to Protestant churches. The last Southern establishment died in 1810. Virginia sought to emulate the Maryland system, but a general assessment bill benefiting all Christian churches failed, thanks to the opposition of most non-Episcopal denominations and to MADISON'S MEMORIAL AND REMONSTRANCE; the VIRGINIA STATUTE OF RELIGIOUS FREEDOM (1786) then separated church and state.

In none of the six states maintaining or allowing establishments at the time of the framing of the First Amendment was any church but a Christian one established. The multiple establishments of that time comprehended the churches of every denomination and sect with a sufficient number of adherents to form a church. Where Protestantism was established it was synonymous with religion; there were either no Jews or no Roman Catholics or too few of them to make a difference. Where Christianity was established, as in Maryland, which had a significant Roman Catholic minority, Jews were scarcely known. To contend that exclusive establishments of one religion existed in each of the six states ignores the novel American experiment with multiple establishments on an impartial basis. Europe knew only single-church establishments. An establishment of religion in the United States at the time of the First Amendment included nonpreferential government recognition, aid, or sponsorship of religion. The framers of the amendment looked to their own experience, not Europe's.

LEONARD W. LEVY
(1986)

(SEE ALSO: *Creationism; Larkin v. Grendel's Den, Incorporated; Lynch v. Donnelly; Marsh v. Chambers; Mueller v. Allen; Thornton v. Caldor, Inc.; Valley Forge Christian College v. Americans United for Separation of Church and State; Wallace v. Jaffree; Widmar v. Vincent.*)

Bibliography

ANTIEAU, CHESTER JAMES et al. 1964 *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses.* Milwaukee, Wisc.: Bruce Publishing Co.

COBB, SANFORD H. 1902 *The Rise of Religious Liberty in America.* New York: Macmillan.

CORWIN, EDWARD S. 1949 The Supreme Court as National School Board. *Law and Contemporary Problems* 14:3–22.

LEVY, LEONARD W. 1986 *The Establishment Clause: Religion and the First Amendment.* New York: Macmillan.

## *ESTELLE v. SMITH*
451 U.S. 454 (1981)

A unanimous Supreme Court held that the protection of the MIRANDA RULES applied to every phase of an in-custody prosecution, and that a psychiatrist's testimony introduced at the penalty phase of a capital trial violated the RIGHT AGAINST SELF-INCRIMINATION. At the pretrial interview on which the testimony was based, the defendant had not received the appropriate warnings about his right to silence.

LEONARD W. LEVY
(1986)

## *ESTES v. TEXAS*
381 U.S. 532 (1965)

The trial of Billy Sol Estes for swindling involved a FREE PRESS/FAIR TRIAL confrontation in which the Supreme Court held that televising trials was inherently prejudicial to a FAIR TRIAL. Circuslike live television and radio broadcasts of Estes's pretrial hearings involved such extensive disruption of the courtroom that many changes were ordered for coverage of the trial. Although live broadcasts of the actual trial were forbidden, excerpts from the proceedings were broadcast regularly.

The Court split 5–4 on the constitutionality of televising the proceedings. Justices HUGO L. BLACK, WILLIAM J. BRENNAN, POTTER STEWART, and BYRON R. WHITE called the practice unwise and dangerous, but not constitutionally objectionable. Chief Justice EARL WARREN and Justices ARTHUR J. GOLDBERG and WILLIAM O. DOUGLAS joined an opinion by Justice TOM C. CLARK seeking to ban television completely from the courts—subject to future developments (see CHANDLER V. FLORIDA)—as a violation of the right to a fair trial. Both the jury and the witnesses, Clark declared, would be under great pressure and be more self-conscious, aware of a large public audience; prospective witnesses might be influenced by the proceedings. The judge would have additional responsibilities (and temptations), and the defendant would be subject to "a form of mental—if not physical—harassment." Clark said, "A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nationwide arena." Justice JOHN MARSHALL HARLAN approved the ban here, but indicated he would do so only in cases of "great notoriety."

DAVID GORDON
(1986)

## *EUCLID v. AMBLER REALTY COMPANY*
272 U.S. 365 (1926)

This case established the constitutionality of ZONING laws to regulate land use. In *Euclid* a Cleveland suburb sought to preserve an area of single-family dwellings by excluding even two-family dwellings and apartment houses, as well as commercial properties and public buildings. Against claims drawn from supposed deprivations of liberty and property without DUE PROCESS OF LAW and a supposed denial of the EQUAL PROTECTION OF THE LAWS, a 6–3 Supreme Court, speaking through Justice GEORGE SUTHERLAND, sustained the comprehensive zoning ordinance. It was, the Court ruled, a legitimate STATE POLICE POWER measure intended to maintain the residential area and thus protect the community's health, peace, and safety. As a result of this leading decision on comprehensive zoning laws, no argument drawn from the FOURTEENTH AMENDMENT or from the takings clause is likely to survive judicial scrutiny in the absence of an ordinance that is demonstrably unrelated to the improvement of a community.

LEONARD W. LEVY
(1986)

## EULE, JULIAN N.
(1949–1997)

Julian N. Eule was an exceptionally successful classroom teacher in the law schools at Temple University (1977–1984) and the University of California, Los Angeles (1984–1997). His enthusiasm and ebullience stimulated and challenged his colleagues and students and enlivened his constitutional law scholarship. Those writings centered on three concerns vital to representative government: keeping the channels open for the people's communications, keeping government actors accountable to the people, and seeking institutional strategies to protect against the subordination of groups. Eule's scholarship was not just an academic exercise; it was a quest for usable principles to make American democracy work. In striving for that high

purpose he insisted on testing his arguments against the facts of American political life. Even during his last illness, he gave energy and hope to everyone around him. His gallantry in the face of adversity is a lesson for democracy's advocates throughout the legal profession.

KENNETH L. KARST
(2000)

Bibliography

SIDEBAR 1997 Julian Eule, 1949–1997. *UCLA Law* 20:2–7.
SYMPOSIUM 1998 Voices of the People: Essays on Constitutional Democracy in Memory of Professor Julian N. Eule. *UCLA Law Review* 45:1523–1776.

## EUTHANASIA

Euthanasia, or mercy killing, has long engaged the attention of philosophers and others concerned with the morality of offering the incurably ill the dignity of a choice whether to end their lives. Only recently, however, has euthanasia become a subject of constitutional debate. Active assistance to suicide remains a crime throughout the country, and the sort of euthanasia actively practiced on the defective newborn and on some very old persons who are ill beyond hope is also murder. Neither of these forms of euthanasia raises any serious constitutional issue. It is "passive euthanasia"—the withholding of aids to the preservation of life—that has been discussed in constitutional terms. Unfortunately, "the RIGHT TO DIE," perhaps because it is so effective a slogan, has beclouded discussion of genuine issues of personal choice.

The Supreme Court has not yet confronted these matters. Undoubtedly, however, there is some constitutional right to refuse medical treatment. Compulsory VACCINATION has been upheld against the claim that it deprived its reluctant beneficiary of liberty without DUE PROCESS OF LAW. A strong governmental interest in protecting public health justified that invasion of an unwilling person's body, however, and no such interest is present in the ordinary case of a person who refuses medical treatment. Even absent any claim to RELIGIOUS LIBERTY, the idea of a right to refuse treatment follows easily from the Supreme Court's modern recognition of constitutional rights to personal autonomy, offered in the name of "privacy." The Court's decisions affirming the right of a woman to have an abortion are cases in point.

In the context of euthanasia, however, the constitutional right to refuse treatment fits awkwardly into the typical dilemma a patient's doctors and relatives face. Even if a person has previously directed her doctors not to use artificial means to prolong life, she will ordinarily be unconscious for a time before dying and thus incapable of forming any present intention to refuse aid. Usually, of course, the problem of passive euthanasia arises in connection with patients in a persistent vegetative state who have given no directions whatever to their doctors. To invoke the concept of a constitutional right to die in such a case, as New Jersey's supreme court did in *Matter of Quinlan* (1976), is to beg the critical question whether someone in such a state can have any rights at all. The decision of the *Quinlan* court authorizing the termination of artificial life supports seems justified, but surely its justification appropriately responds to interests of the patient's relatives, not the patient's constitutional RIGHT OF PRIVACY.

KENNETH L. KARST
(1986)

Bibliography

SYMPOSIUM 1977 In Re Quinlan. *Rutgers Law Review* 30:243–328.

## EVANGELICALS AND THE CONSTITUTION

See: Religious Fundamentalism

## *EVANS v. ABNEY*
396 U.S. 435 (1970)

The 1911 will of U.S. Senator Augustus O. Bacon gave land to the city of Macon, Georgia, in trust for use as a park for white persons only. The city's operation of the park on these terms could not survive the Supreme Court's decisions invalidating state-sponsored SEGREGATION, and the city was replaced by private trustees. When the Supreme Court held, in *Evans v. Newton* (1966), that the park must still be open to all races, Bacon's residuary heirs claimed the land, arguing that the trust had failed. The Georgia courts agreed, and the Supreme Court held, 5–2, that this judicial enforcement of Bacon's racially discriminatory disposition of property did not constitute STATE ACTION in violation of the FOURTEENTH AMENDMENT. Justice HUGO L. BLACK, for the majority, distinguished SHELLEY V. KRAEMER (1948), saying that *Abney* involved no RACIAL DISCRIMINATION: the terminated park was unavailable for blacks and whites alike. Justices WILLIAM O. DOUGLAS and WILLIAM J. BRENNAN dissented.

*Abney's* importance lay in showing that *Shelley* did not stand for a broad principle forbidding judicial enforcement of any and all private racial discrimination. It also began the BURGER COURT's revitalization of the state action

limitation as a barrier to enforcement of the Fourteenth Amendment.

KENNETH L. KARST
(1986)

## EVARTS, WILLIAM MAXWELL
(1818–1901)

William Maxwell Evarts, called "the Prince of the American Bar," was probably the most famous, successful, and influential lawyer of his time. He defended ANDREW JOHNSON in the President's IMPEACHMENT trial, and he served as attorney general, secretary of state, and United States senator (Republican, New York). Twice Evarts almost became CHIEF JUSTICE of the United States. His lasting impact on American constitutional law derived from his pathbreaking arguments as counsel and his authorship of the CIRCUIT COURTS OF APPEALS ACT (1891). In the GRANGER CASES (1877) he argued that rate regulation interfered with the management and beneficial use of private property, reducing profits and thereby taking private property without JUST COMPENSATION or DUE PROCESS OF LAW. He lost that case, but his argument was destined for eventual acceptance. IN RE JACOBS (1885) was his greatest constitutional triumph. His argument, which the New York Court of Appeals adopted, advanced SUBSTANTIVE DUE PROCESS OF LAW and the doctrine of FREEDOM OF CONTRACT. Evarts was a stalwart champion of VESTED RIGHTS and an opponent of government regulation. The Circuit Courts of Appeals Act (Evarts Act) created the modern three-tier structure of the federal courts and the discretionary WRIT OF CERTIORARI by which the Supreme Court manages its APPELLATE JURISDICTION.

LEONARD W. LEVY
(1986)

Bibliography

TWISS, BENJAMIN 1942 *Lawyers and the Constitution.* Pages 93–109. Princeton, N.J.: Princeton University Press.

## EVARTS ACT

See: Circuit Courts of Appeals Act

## *EVERSON v. BOARD OF EDUCATION*
330 U.S. 1 (1947)

A New Jersey statute authorized local school boards to reimburse parents for the cost of public transportation of students to both public and private schools. Such reimbursement for the cost of transportation to church-related schools was challenged as an unconstitutional ESTABLISHMENT OF RELIGION.

Justice HUGO L. BLACK delivered the opinion of a 5–4 Supreme Court. He began with a consideration of the background of the establishment clause, which relied heavily on the writings of JAMES MADISON and THOMAS JEFFERSON, but he had little to say about the actual legislative history of the FIRST AMENDMENT's language in the First Congress. Black concluded that the establishment clause "means at least this":

> Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach and practice religion. . . . In the words of Jefferson, the clause against the establishment of religion by law was intended to erect "a wall of separation between church and State."

But after this sweeping separationist pronouncement, Justice Black pirouetted neatly and upheld the New Jersey program on the grounds that the state aid in that case was a public safety measure designed to protect students and could in no way be construed as aid to church-related schools.

Four dissenters were convinced that Justice Black had missed the point. Justice ROBERT H. JACKSON likened Black's MAJORITY OPINION to Byron's Julia who, "whispering I will ne'er consent, consented." What could be more helpful to a school, Jackson asked, than depositing the students at its door? Justice WILEY B. RUTLEDGE, with whom Justices Jackson, FELIX FRANKFURTER, and HAROLD BURTON joined, also filed a lengthy dissent. Justice Rutledge also made lavish use of the writings of Madison and Jefferson, and argued that the New Jersey program could not be justified as a public safety expenditure.

*Everson* stands at the entrance to the maze of law and litigation concerning participation by church-related schools in public programs. It was the first major utterance by the Supreme Court on the meaning of the establishment clause. Those favoring strict separation between religious institutions and government were pleased by Black's rhetoric and dismayed by his conclusion; those favoring a policy of flexibility or accommodation in church-state relations reacted the opposite way. That *Everson* satisfied no one and enraged many was portentous.

RICHARD E. MORGAN
(1986)

Bibliography

JOHNSON, RICHARD M. 1967 *The Dynamics of Compliance.* Evanston, Ill.: Northwestern University Press.

MORGAN, RICHARD E. 1972 *The Supreme Court and Religion.* Pages 76–122. New York: Free Press.

# EVIDENCE

Excepting cases that may be decided by applying legal rules to undisputed facts, the determination of disputed factual propositions must be central to adjudicating the rights and liabilities of litigants. As an initial matter, a society might adopt an "inquisitorial" system, under which a public official investigates and decides the facts. In the Anglo-American legal tradition, however, we structure the litigation process so that every dispute has at least two parties, each charged with the primary responsibility for proving its factual propositions and therefore discovering and presenting the evidence to support its version of the facts before an impartial arbiter.

In criminal cases, this adversary system is reinforced by rules that place the BURDEN OF PROOF on the prosecution, presuming that the defendant is innocent, and that grant the defendant a RIGHT AGAINST SELF-INCRIMINATION—thus shielding him from being forced to be a witness against himself, and depriving the prosecution of an obvious source of evidence. The structuring of criminal litigation as a contest between the state as prosecutor and the defendant—with the judge as arbiter—has two major consequences. First, this procedure gives greater weight to the autonomy of the individual litigant. Second, placing responsibility on each party to advance its own cause will, in general, result in the production of more evidence for the finder of fact than would be produced by disinterested—and perhaps bored and overworked—public officials. Though our prototypical case is the criminal case, we use similar procedures and rules in civil cases.

In both civil and criminal cases, TRIAL BY JURY means that a group of laymen decides issues of disputed fact. A great many of the intricacies of our laws of evidence result from two specific worries about the jury. The first is that the jury may systematically overvalue or undervalue some kinds of evidence, such as HEARSAY. The second is that the ad hoc nature of the jury, which is empaneled to decide a particular case, will produce a verdict at odds with the values of a legal system handling many cases over a long period of time. Often a rule of evidence will keep out testimony not so much because a jury might overweigh it but simply because other policies of the law are entitled to equal weight along with the proper resolution of factual issues. In this category fall the exclusion of reliable evidence because it has been unconstitutionally seized; because it has been obtained in violation of the MIRANDA RULES; because it is a coerced confession (which, though typically unreliable, may in a particular case be thoroughly corroborated); or because its exclusion is necessary to enforce a privilege, such as that protecting confidential communications between the attorney and the client.

Nor is the exclusion of evidence confined to cases where we choose this means of vindicating the rights of the individual. Though it is by no means clear that the rule is of constitutional dimension, every Anglo-American JURISDICTION in civil and (until the passage of California's "Victims' Bill of Rights" initiative) in criminal cases kept from the jury certain evidence of the prior character of the accused—not so much because the jury might overvalue it as out of fear that the jury might succumb to the temptation to be lawless and decide that the defendant was either so bad a person that he should be punished regardless of his fault in the particular case at issue. That kind of jury behavior might appeal to common sense, but it would be at odds with our principles requiring a particular act as a precondition of guilt and requiring fair NOTICE of the charge made against a defendant.

Despite the huge body of statutory and COMMON LAW evidence law, the Constitution nowhere states flatly a rule as to admissibility of evidence and refers to evidence in only one place—the requirement of two witnesses to the same overt act before a conviction of TREASON may be returned. Moreover, apart from the rules as to SEARCH AND SEIZURE and selfincrimination, the rules of evidence have largely escaped the Supreme Court's constitutional supervision. In criminal cases, however, two lines of cases have partially constitutionalized the law of evidence. The first involves the defendant's right to exclude inculpatory hearsay evidence that otherwise would be admitted under one or another of the exceptions to the general rule excluding hearsay; the second involves the defendant's rights to introduce exculpatory evidence notwithstanding common or statutory law purporting to exclude such evidence. Both these lines grow out of the Sixth Amendment. The first grows out of the CONFRONTATION clause, which guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The second line also stems in part from the Sixth Amendment right of the accused to " COMPULSORY PROCESS for obtaining witnesses in his favor," and in part from the DUE PROCESS clause.

Historically, courts read the confrontation clause as guaranteeing only the right of the accused to be present at his trial and to cross-examine any witnesses testifying there. In the 1960s, however, the Supreme Court began to view the clause as forbidding use in a criminal trial of certain inculpatory hearsay declarations. Thus, the Court held in POINTER V. TEXAS (1965) that the clause rendered inadmissible at a criminal trial a transcript of inculpatory testimony elicited during a preliminary hearing at which the defendant was not represented by counsel from a pros-

ecution witness who was no longer available to testify. Likewise, a codefendant's out-of-court confession that also implicated the accused was held inadmissible in *Bruton v. United States* (1968) when the codefendant invoked his right against self-incrimination and refused to take the stand at the trial. Similarly, in *Barber v. Page* (1968) the Court held that preliminary hearing testimony of an absent witness was inadmissible when the prosecutor had failed to make a good-faith effort to obtain the presence of the witness at the trial. These rulings by the Court threw the validity of inculpatory hearsay evidence into doubt. The Court seemed to be drifting toward a rule that would in effect preclude the use of all such hearsay.

*California v. Green* (1970) arrested this drift. In *Green*, a prosecution witness testified adversely to the defendant during a preliminary hearing at which the defendant's attorney subjected him to a rigorous cross-examination. At the later trial, however, the witness claimed to have suffered a memory lapse and refused to repeat his testimony. The prosecutor then read into evidence portions of the preliminary hearing testimony. The Court held that, under these circumstances, admission of the hearsay did not violate the confrontation clause. The Court stated that its previous confrontation clause decisions had all rested on the inability of the defendant effectively to cross-examine witnesses, and that where, as here, defendant had once had a full and fair opportunity to cross-examine, there was no constitutional impediment to the hearsay.

*Green* made it clear that when the declarant was unavailable at the trial, his declaration would be admissible if he had been subject to meaningful cross-examination by defendant's counsel at the time he made the declaration. The meaning of "unavailability" and the nature of "meaningful cross-examination" were left open to interpretation, but clearly where these criteria were met, the evidence was admissible. By the same token, *Green* left little doubt that when the declarant was available at the trial for meaningful cross-examination, evidence of his out-of-court declaration would be admissible even if he had not been subject to cross-examination at the time he made the statement.

Since *Green*, the Court's decisions have withdrawn even further from the constitutionalization of hearsay law. The Court made apparent in *Ohio v. Roberts* (1980) that hearsay evidence of a declarant's out-of-court statements will be admissible, even when the defendant has never had an opportunity to cross-examine the declarant, provided that the declarant is truly unavailable and that the statements bear adequate "indicia of reliability." "Reliability can be inferred without more in a case where the evidence fails within a firmly footed hearsay exception," that is, an exception "rest[ing] upon such solid foundations" that "virtually any evidence within them" will in fact be reliable. Thus, dying declarations are admissible, as are properly administered business and public records. Hearsay evidence is admissible even under less "firmly rooted" exceptions when there is a particularized showing of its trustworthiness under the circumstances. Thus, under some circumstances, at least, declarations against penal interest and party admissions by coconspirators (such as a spontaneous admission by a coconspirator to his prison cellmate) are admissible.

The Court's decisions since *Green* thus have confined the pre-*Green* decisions narrowly to their facts. Apparently, the Court is unlikely to find that evidence admitted under an established hearsay exception offends the confrontation clause, unless, as in *Barber v. Page*, a prosecutor falsely alleges for purposes of the exception that a declarant is unavailable, or, as in *Bruton v. United States*, the hearsay consists of a codefendant's confession which ostensibly is read into evidence against him alone but in fact contains statements inculpating other defendants in the same trial, and the codefendant refuses to take the stand. Moreover, even when a defendant alleges a *Barber* or *Bruton* violation, the Court is unlikely to find that the facts of the case at hand justify reversal. Twice since *Green* the Court has refused to sustain arguments that a prosecutor had failed to make a good-faith effort to find absent declarants, and repeatedly the Court has found even clear and admitted violations of the *Bruton* rule to result in merely HARMLESS ERROR not justifying reversal.

It would seem, then, that the Court has substantially withdrawn from the field of writing hearsay law. While it has not explicitly reverted to the traditional view of the confrontation clause in this area, the manner in which it has analyzed hearsay exceptions in recent cases leaves little doubt of its reluctance significantly to reduce the prosecutor's ability to introduce evidence falling within ancient, recognized exceptions.

The rules of evidence traditionally have been held to bind defendants as well as the state. The first significant developments in the line of cases recognizing defendants' rights to introduce exculpatory evidence despite rules of evidence excluding it grew out of the compulsory process clause. In *Washington v. Texas* (1967) the Court overturned a Texas statute that rendered accomplices incompetent to testify for each other. The Court held that the compulsory process clause forbade the state "arbitrarily [to] den[y defendants] the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed and whose testimony would have been relevant and material to the defense."

In *Chambers v. Mississippi* (1973) the Court faced a case in which it might have used compulsory process reasoning but used the due process clause instead. In *Cham-*

*bers* the defendant was charged with murder for shooting a police officer during a crowd incident. Another man, McDonald, who had been in the crowd, had confessed to the shooting, and substantial evidence pointed to the truth of this confession, but McDonald had repudiated the confession and had not been charged in the case. The trial judge allowed Chambers to present two witnesses who claimed actually to have seen McDonald fire the shots, but the judge barred the testimony of witnesses who had not seen the incident but to whom McDonald had made damaging admissions, ruling that this testimony did not fall within any applicable state hearsay exception. In addition, the judge permitted Chambers to call McDonald to the stand and to read his prior confession into evidence, but when McDonald repudiated the confession on the stand and offered an alibi, the judge refused to allow Chambers to examine McDonald as an "adverse witness," ruling that because McDonald had not actually alleged the defendant's guilt, his testimony was not "adverse" within the meaning of Mississippi's exception to the rule that a party may not impeach his own witness.

The Supreme Court reversed, holding that the trial judge's exclusion of this exculpatory evidence had violated the due process clause of the FOURTEENTH AMENDMENT. The trial judge's refusal to allow Chambers to examine McDonald, who was a "witness against him" even if not an "adverse" witness under Mississippi law, constituted prejudicial error. In addition, the Court held that the trial judge's refusal to allow the exculpatory hearsay testimony of the three witnesses to whom McDonald had confessed violated Chambers's right "to present witnesses in his own defense." Although the language used by the Court in discussing these issues is reminiscent of the confrontation and compulsory process clauses of the Sixth Amendment, the Court did not explicitly rest its decision on these clauses. Rather, the Court announced only that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations," and that "under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial."

The Court has applied *Chambers* in only one other case. In *Green v. Georgia* (1979) the defendant was convicted of rape and murder, and a second trial was then held to decide whether CAPITAL PUNISHMENT would be imposed. At this trial, the defendant sought to introduce a witness who had previously testified for the prosecution at the trial of Moore, the defendant's coconspirator. The witness intended to testify, as he had testified at Moore's trial, that Moore had admitted to him that Moore alone had fired the shots that killed the victim, and that the defendant had not been present when the shots were fired. The trial judge, however, ruled this testimony inadmissible as hearsay. At Moore's trial the witness's repetition of Moore's declaration had fallen within the admission exception to the hearsay rule, but its repetition at Green's trial did not fall within the exception. In a brief opinion, the Supreme Court reversed. It noted that the excluded evidence was highly relevant to a critical issue in the trial and that substantial reasons existed to assume its reliability: it was a statement against Moore's penal interest made spontaneously by him to a close friend and for which there was ample corroborating evidence. Most important, the prosecution had considered the evidence reliable enough to use against Moore at his trial. Under these circumstances, the Court ruled, "the hearsay rule may not be applied mechanistically to defeat the ends of justice."

The future of this line of cases is not easy to foresee. The cases may stand for no more than the proposition that the Court will reverse a conviction when it is convinced that a gross injustice has been done. But they seem to stand for more. They seem to suggest that the Court has begun to read into the Constitution the ethical rule that the state's proper goal is not merely to get a conviction but to get a conviction only if justice demands it. Thus, the cases suggest, the prosecutor may not object to evidence that the defense seeks to introduce on any ground other than that it is wasteful of time, or likely to distract the jury's attention from the real issues of the case. This consideration, always important ethically, rises to constitutional significance when failure to abide by it leads to the exclusion of strongly credible exculpatory evidence that is highly relevant to critical issues in the trial.

JOHN KAPLAN
(1986)

Bibliography

MAGUIRE, JOHN M. 1947 *Evidence, Common Sense, and Common Law.* Mineola, N.Y.: Foundation Press.

MCCORMICK, CHARLES T. 1954 *Handbook of the Law of Evidence.* St. Paul, Minn.: West Publishing Co.

MORGAN, EDMUND M. 1961 *Basic Problems of Evidence.* Philadelphia: American Bar Association.

THAYER, JAMES BRADLEY 1898 *Preliminary Treatise on Evidence at Common Law.* Boston: Little, Brown.

WIGMORE, JOHN HENRY 1961 *Evidence in Trials at Common Law,* rev. by John T. Naughton. Boston: Little, Brown.

## EVIDENTIARY PRIVILEGE

To say that a person possesses an evidentiary privilege means that he or she cannot be compelled, as a witness, to disclose certain ("privileged") information. The possessor of the privilege (the privilege "holder") may also be entitled to prevent others who share the privileged information from disclosing it. The holder may waive the privi-

lege by failing to assert it in timely fashion, by explicitly consenting to the disclosure of privileged information, or by engaging in conduct interpreted as consent (for example, voluntarily testifying to a portion of the privileged matter). In state courts, the contours of evidentiary privileges are determined by state law. In federal courts, they are determined by federal law, though at times the federal approach has been to defer to state rules of privilege, as specified, for example, in Federal Rule of Evidence 501.

Unlike most of the evidentiary rules of exclusion (such as those excluding HEARSAY or irrelevant evidence), the testimonial privileges do not exclude EVIDENCE because it is unreliable, prejudicial, or lacking in fact-finding utility. Rather, they exclude it *despite* its potential value; the privileges promote goals other than rational fact-finding. To be aware of these goals is to understand why traditional evidentiary privileges can readily take on constitutional dimensions. The interests served by the privileges are commonly phrased in terms that are uncompromisingly utilitarian. For example, privileges concerned with the protection of confidential communications—such as those between husband and wife, attorney and client, doctor and patient, priest and penitant, parent and child (a developing privilege)—are commonly justified on such reasoning: first, that the free flow of communication is indispensable to these important relationships; second, that confidentiality is essential to their free flow. An alternative perspective would support the claims of confidentiality not for such narrowly instrumental reasons but because confidentiality serves the participants' interest in privacy, whether or not the possibility of compulsory disclosure would hinder free communication.

Similar justifications, both instrumental and noninstrumental, could be generated in support of another kind of privilege, protecting interests other than confidentiality. An example is the phase of the husband-wife privilege permitting one spouse to refuse to testify against another, whether or not the testimony may concern intraspousal communications.

Although these privileges were not in their original conception constitutionally based, today they are often seen as implicating constitutional values. The justifications for many of the privileges could be reformulated in terms of constitutional principles. The attorney-client privilege, invoked by a criminal defendant, could draw support from the RIGHT TO COUNSEL, the RIGHT AGAINST SELF-INCRIMINATION, and the DUE PROCESS clauses of the Constitution. Indeed, if the attorney-client privilege were not a common law privilege, some version of it probably would have to be invented to satisfy constitutional requirements. FIRST AMENDMENT arguments could likewise be mustered in support of the priest-penitent privilege and the REPORTER'S PRIVILEGE (which in some states protects against compelled disclosure of a newsperson's sources of information). And, efforts to pierce the confidentiality of certain communications—such as those between husband and wife, priest and penitent, or psychiatrist and patient—could be challenged as infringements of a constitutionally protected RIGHT OF PRIVACY.

On the other hand, just as evidentiary privileges sometimes draw support from constitutional principles, sometimes their enforcement may prove incompatible with other constitutional requirements. Thus to deny a criminal defendant the use of testimony important to his or her defense, out of respect for a privilege invoked by a witness, might run afoul of the defendant's right of CONFRONTATION, to COMPULSORY PROCESS, or to due process of law; the conflicting constitutional claims of the defendant and the witness would then have to be resolved.

LEON LETWIN
(1986)

Bibliography

CLEARY, E. 1984 *McCormick on Evidence*, 3rd ed. Pages 170–187. St. Paul, Minn.: West Publishing Co.

NOTE 1985 Developments in the Law—Privileged Communications. *Harvard Law Review* 98:1450–1666.

## *EVITTS v. LUCEY*
### 469 U.S. 387 (1985)

Interpreting DOUGLAS V. CALIFORNIA (1963), the Supreme Court held, 7–2, in an opinion by Justice WILLIAM J. BRENNAN, that the DUE PROCESS clause of the FOURTEENTH AMENDMENT requires the effective assistance of counsel during a defendant's first appeal, as of right, from a criminal conviction. (The Court had previously held that the RIGHT TO COUNSEL at the trial level comprehended effective assistance.) The procedural posture of this case made it unnecessary to spell out standards for judging the effectiveness of counsel on appeal; the Court thus left those standards for another day. Justice WILLIAM H. REHNQUIST and Chief Justice WARREN E. BURGER dissented, arguing that the trial and appellate levels presented different degrees of need for counsel's assistance, and predicting that the decision would allow convicted defendants to "tie up the courts" with petitions for HABEAS CORPUS based on claims of ineffectiveness of appellate counsel.

KENNETH L. KARST
(1986)

## EXCESSIVE FINES

See: Punitive Damages

## EXCISE TAX

In its original meaning an excise was a tax on goods manufactured or produced within the taxing country, as opposed to a duty or IMPOST on imports. Undoubtedly, this was the sense in which it was used in the constitutional grant of power to Congress to collect "taxes, duties, imposts and excises." In modern times an excise tax is any tax imposed on the manufacture or sale of a commodity, engaging in an occupation, or enjoying any other privilege. It is distinguished from a direct tax, such as a POLL TAX or an *ad valorem* property tax.

EDWARD L. BARRETT, JR.
(1986)

(SEE ALSO: *Direct and Indirect Taxes; State Taxation of Commerce.*)

## EXCLUSIONARY RULE

When the police obtain evidence by violating the BILL OF RIGHTS, the victim of their misconduct may lack any effective legal remedy. Yet some enforcement mechanism is necessary if several important constitutional guarantees are to be a reality and not merely expressions of hope. The Supreme Court responded to this concern by developing a series of rules that have come to be known in the aggregate as the exclusionary rule. In typical application, the rule is that evidence obtained in violation of a person's constitutional rights cannot be used against that person in his or her trial for a criminal offense. The rule is most frequently applied to exclude evidence produced by SEARCHES OR SEIZURES made in violation of the FOURTH AMENDMENT. However, a coerced confession obtained in violation of the defendant's Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION, or a statement taken from the defendant in violation of his Sixth Amendment's guarantee of the RIGHT TO COUNSEL, would also be inadmissible at his trial.

The term "exclusionary rule" is of modern origin, but even at COMMON LAW a coerced confession was excluded or inadmissible as evidence, because its involuntariness cast serious doubt on its reliability. No one today seriously argues that this long-standing rule of evidence should be abandoned. Other aspects of the exclusionary rule, however, have been the source of major controversy among members of the judiciary, professional commentators, law enforcement officials, and the public.

The controversy did not become intense until the era of the WARREN COURT. But as far back as WEEKS V. UNITED STATES (1914) the Supreme Court had unanimously held that evidence seized in violation of the Fourth Amendment was inadmissible in a *federal* criminal prosecution. However, even after the Court had held in WOLF V. COLORADO (1949) that the Fourth Amendment's guarantee against unreasonable searches and seizures was applicable to the states, the Court had continued until 1961 to resist the argument that the exclusionary rule should also be extended to *state* prosecutions. In that year, in MAPP V. OHIO, the Warren Court held that the Fourteenth Amendment did, indeed, impose on the states the exclusionary rule derived from the Fourth Amendment. Subsequent decisions broadened the Sixth Amendment guarantee of the right to counsel to govern the procedures for police interrogation and for the use of LINEUPS; each of these developments was accompanied by an extension of the exclusionary rule to state-court proceedings. Since the "FRUIT OF THE POISONOUS TREE" DOCTRINE requires the exclusion not only of evidence immediately obtained by these various forms of constitutional violation but also of other evidence derived from the initial violations, the exclusionary rule in its modern form results in the suppression of many items of evidence of unquestioned reliability and the acquittal of many persons who are guilty.

The primary purpose of the exclusionary rule, as the Supreme Court said in *Elkins v. United States* (1960), "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Yet this deterrent function is only part of the exclusionary rule's justification. A court that allows the government to profit from unconstitutional police action sullies the judicial process itself, by becoming an accomplice in an unlawful course of conduct. When the Court first applied the rule in *Mapp* to state-court prosecutions, it said:

> There are those who say, as did Justice (then Judge) [BENJAMIN N.] CARDOZO, that under our constitutional exclusionary doctrine "the criminal is to go free because the constable has blundered." . . . In some cases this will undoubtedly be the result. But, . . . "there is another consideration—the imperative of judicial integrity." . . . The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice LOUIS D. BRANDEIS, dissenting, said: . . . "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for law."

The evidence seized in an illegal search—a knife, a packet of heroin, counterfeit plates—is as trustworthy and material as if the search had been lawful. The rule's critics argue that to protect the privacy of the search victim by letting a guilty person escape responsibility for his crime

is illogical. It would make more sense, they say, to use the evidence (as do the courts in Great Britain, for example) and provide civil or criminal remedies against the errant police officers. If the rule's purpose is to deter police lawlessness, the critics argue, the rule misses the point: prosecutors, not police officers, feel the immediate effects of the rule. If the rule is designed to maintain respect for the courts, they ask how the public can be expected to respect a system that frees criminals by suppressing trustworthy evidence of their guilt.

How many criminals do go free when the constable blunders? Inadequate studies provide no clear-cut answer, except that opponents of the exclusionary rule grossly exaggerate the number of felons it sets loose, and they tend to dramatize the worst cases. In California, whose supreme court has created the most stringent exclusionary rule in the nation, a study by the National Institute of Justice showed that .78 percent of all accused felons are not prosecuted because of search and seizure problems, and of those released, nearly three-fourths were involved in drug-related cases. The effect of the exclusionary rule is slight in cases involving violent crimes. When the charge is murder, rape, assault, or robbery, prosecutors decide not to proceed in one out of every 2,500 cases. Studies of felony court records in other states reach similar conclusions. Only 0.4 percent of all cases that federal prosecutors decide not to prosecute are rejected because of search problems. At the trial level, motions to suppress illegally seized evidence are rarely granted in cases of violent crime. If the exclusionary rule were abolished, the conviction rate in all felony cases would increase by less than half of one percent. Translated into absolute figures, however, thousands of accused felons are released nationally as a result of the exclusionary rule, most of them in drug and weapons possession cases. Street crime does not flourish, though, because of the exclusionary rule, even though it does protect criminals, as do all constitutional rights. They also protect society and help keep us free.

The rule's effectiveness in deterring illegal searches is hotly debated. The critics point out that some ninety percent of criminal prosecutions do not go to trial but are disposed of by pleas of "guilty." (The figure varies from state to state, and according to the nature of the crime.) Without a trial, there is no evidence for the rule to exclude. In the huge number of cases in which the police make arrests but the persons arrested are not prosecuted, the exclusionary rule has, of course, no immediate application. The rule's proponents reply that the decision whether to prosecute or accept a defendant's "guilty" pleas on a lesser offense may itself be influenced by the prosecutor's estimate of the potential operation of the exclusionary rule if the case should go to trial. (In jurisdictions where separate procedures are established to rule on motions to suppress evidence, the rule normally will have operated in advance of the trial.)

Undeniably, however, the exclusionary rule has no application at all to the cases that cry out most for a remedy: cases of police misconduct against innocent persons, who are never even brought to the prosecutors' attention, and cases of illegal searches and seizures made for purposes other than collecting evidence to support prosecutions. In TERRY V. OHIO (1968) Chief Justice EARL WARREN admitted: "Regardless how effective the rule may be where obtaining conviction is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal." The police may deliberately engage in illegal searches and seizures for a number of reasons: to control crimes such as gambling or prostitution; to confiscate weapons or contraband or stolen property; or to maintain high visibility either to deter crime or to satisfy a public clamoring for aggressive police action. In none of these cases will the exclusionary rule inhibit police violations of the Bill of Rights.

The rule does not in fact significantly impede the police, despite contentions from the rule's opponents that it handcuffs the police. A 1984 report prepared for the National Center for State Courts concluded that a properly administered search warrant process can protect constitutional rights without hampering effective law enforcement. Nevertheless, police try when possible to conduct search and seizure under some exception to the warrant requirement. The overwhelming number of searches and seizures are warrantless. In 1980, for example, only about 1,000 warrants were issued in Los Angeles in about 300,000 cases. Police usually try to make CONSENT SEARCHES or searches under what they claim to be EXIGENT CIRCUMSTANCES, or they conduct a search to confiscate contraband or harass criminals, without attempting a prosecution. In the few cases in which they seek warrants, they get them almost as if magistrates rubber-stamp their applications, and almost all warrants survive in court despite motions to suppress. Motions to suppress are made in about five percent of all cases but are successful in only less than one percent of all cases. Still more important is the fact that only slightly over half of one percent of all cases result in acquittals because of the exclusion of evidence.

Even when the rule does operate to exclude evidence in a criminal trial, it has no direct, personal effect on the police officer whose misconduct caused the rule to be invoked. The rule does not require discipline to be imposed by the officer's superiors, nor does either civil or criminal responsibility follow as a matter of course. Police officers are prosecuted only extremely rarely for their official mis-

deeds. Suits for damages by victims are inhibited not only by the defense of "good faith" and PROBABLE CAUSE but also by the realization that most officers are neither wealthy nor insured against liability for their official acts. Unsurprisingly, most victims conclude that a lawsuit is not worth its trouble and expense. In the typical case of an illegal search, neither the judge who excludes the fruits of the search from evidence nor the prosecutor whose case is thereby undermined will explain to the officer the error of his ways. The intended educational effect of judicial decisions is also diminished by the time-lag between the police action and its final evaluation by the courts. Even if an officer should hear that a court has excluded the evidence he found in an illegal search some months ago, he will probably have forgotten the details of the event. Incentives and sanctions that might influence the officer's future behavior are not within the exclusionary rule's contemplation. On the other hand, advocates of the rule emphasize that it is meant to have an institutional or systemic effect on law enforcement agencies generally, not necessarily on particular officers.

The officer is apt to respond not to judicial decisions (which he may regard as unrealistic if they impede his work) but to departmental policies and the approval of his colleagues and superiors. One whose main job is the apprehension of criminals and the deterrence of crime will have a low tolerance for what he sees as procedural niceties. He may even shade the truth in making out a report on a search or when testifying in court. It is not unheard of for the police to arrange to make a valid arrest at a place where they can conduct a warrantless SEARCH INCIDENT TO THE ARREST, and thus evade the requirement of a SEARCH WARRANT based on probable cause to believe that evidence of crime is in that place. To the extent that the courts have used the exclusionary rule to educate the police, then, the main things learned seem to have been the techniques for evading the rule.

Summarizing the criticisms of the exclusionary rule, Dallin H. Oaks has said:

> The harshest criticism of the rule is that it is ineffective. It is the sole means of enforcing the essential guarantees of freedom from unreasonable arrests and searches and seizures by law enforcement officers, and it is a failure in that vital task.
>
> The use of the exclusionary rule imposes excessive costs on the criminal justice system. It provides no recompense for the innocent and it frees the guilty. It creates the occasion and incentive for large-scale lying by law enforcement officers. It diverts the focus on the criminal prosecution from the guilt or innocence of the defendant to a trial of the police. Only a system with limitless patience with irrationality could tolerate the fact that where there has been one wrong, the defendant's, he will be punished, but where there have been two wrongs, the defendant's and the officer's, both will go free. This would not be an excessive cost for an effective remedy against police misconduct, but it is a prohibitive price to pay for an illusory one.

Despite the severity of criticisms, the exclusionary rule's chief critics have not proposed its total abolition. However, the Supreme Court has limited the rule's application in significant ways. Thus, for the most part, only the victim of an illegal search has standing to claim the benefits of the exclusionary rule; if A's house is searched in violation of the Fourth Amendment, and evidence is found incriminating B, the evidence can be used in B's trial. (State courts are free to extend the exclusionary rule to such cases; some state courts have done so, concluding that the point of the rule is not to protect people against being convicted but to deter the police.) Similarly, in UNITED STATES V. CALANDRA (1974) the Court held that illegally obtained evidence is admissible in grand jury proceedings, and it ruled in HARRIS V. NEW YORK (1971) that it can be used for the purpose of impeaching the testimony of the accused at his trial. Some uses of illegally obtained evidence have been tolerated as HARMLESS ERROR. More important, the GOOD FAITH EXCEPTION to the exclusionary rule allows the use of evidence obtained with a search warrant if the police reasonably believed the warrant to be valid, even though it later proves to be illegal. The rule has also been held inapplicable to collateral proceedings for postconviction relief such as HABEAS CORPUS. The Court's opinions in these cases have repeated the familiar criticisms of the exclusionary rule; their logic would seem to suggest abandonment of the rule altogether.

Yet the exclusionary rule remains, largely because no one has yet suggested an effective alternative means for enforcing the Bill of Rights against police misconduct. A federal statute dating from Reconstruction authorizes the award of damages against state or local officials (including police officers) who violate individuals' constitutional rights. In 1971, the Supreme Court found that the Fourth Amendment itself implicitly authorized similar damages awards against federal officers who violated the Amendment. The future effectiveness of such remedies will depend in part on the Supreme Court itself, as it spells out the victim's BURDEN OF PROOF in these cases and the measure of damages. Partly, however, the civil-damages alternative depends for its effectiveness on legislation to provide for real compensation to victims when the police officers are judgment-proof, and for real punishment of officers for constitutional violations when the payment of damages is unrealistic.

Meanwhile, the Supreme Court has only the exclusionary rule, which everyone agrees is an imperfect deterrent

to police misbehavior. The rule survives, then, for want of better alternatives. But it also stands as a symbol that government itself is not above the law.

LEONARD W. LEVY
(1986)

(SEE ALSO: *Electronic Eavesdropping; New York v. Quarles; Police Interrogation and Confessions; Warrantless Searches; Wiretapping.*)

Bibliography

LAFAVE, WAYNE R. 1978 *Search and Seizure: A Treatise on the Fourth Amendment*, 3 vols. St. Paul: West Publishing Co.

OAKS, DALLIN H. 1970 Studying the Exclusionary Rule. *University of Chicago Law Review* 37:665–757.

SCHROEDER, WILLIAM 1981 Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule. *Georgetown Law Review* 68:1361–1426.

STEWART, POTTER 1983 The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases. *Columbia Law Review* 83:1365–1404.

## EXCLUSIVE POWERS

The Constitution divides governmental power in two ways: between the states and the federal government, and among the three branches of the federal government. Some powers are vested exclusively in one authority, and may not be exercised by any other authority.

The exclusive powers of the federal government include not only all power over FOREIGN AFFAIRS but also certain domestic powers that affect the whole country. Not all of the powers granted to the federal government by the Constitution are exclusive in character; some may be exercised concurrently and independently by both state and federal governments, or may be exercised by the states until Congress acts.

The Constitution makes clear the exclusive character of some powers by explicitly prohibiting the states from exercising them (such as the treaty power). In some other cases, the courts have held the grant to be exclusive when the subject of the power is national in character or requires one uniform system or plan. In some cases the states, with the express permission of Congress, may exercise an exclusive power of the national government.

The states also possess exclusive powers. Because the Constitution establishes a government of limited powers, any domestic governmental power not granted to the federal government by the Constitution and not prohibited by it to the states remains an exclusive power of the state government.

Within the federal government a power may be possessed exclusively by one of the three branches of government. The separation of powers implies that each branch of government has its exclusive sphere of power, which it can independently exercise and from which the other branches are excluded. In theory the legislative power, executive power, and judicial power each belong exclusively to one branch of government. This exclusive power is compatible with the influence of other branches over some part of its exercise. Only Congress may legislate, but legislation may be affected by the President's veto power and the power of the courts to declare statutes unconstitutional. Powers not explicitly granted to one branch have been found by the courts to belong exclusively to Congress, the President, or the courts when they are in their nature exclusively legislative, executive, or judicial.

Although the complexities of modern government require much sharing of power among governmental authorities, the constitutional principles of federalism and the separation of powers require also the maintenance of the proper exclusive spheres of power.

GLEN E. THUROW
(1986)

Bibliography

PRITCHETT, C. HERMAN 1977 *The American Constitution*, 3d ed. Pages 150–216. New York: McGraw-Hill.

## EXECUTIVE AGREEMENTS

Executive agreements—that is, international agreements concluded between heads of state or their representatives, commonly without the necessity of parliamentary approval—are nowhere explicitly authorized in the Constitution. The Constitution is silent about international agreement-making except as it vests in the President, in cooperation with the Senate, the power to make and enter into treaties. Nevertheless the principle has long been established that the capacity of the United States to negotiate and enter into international agreements is not exhausted by the TREATY POWER. This principle has been repeatedly recognized in the actual conduct of United States FOREIGN AFFAIRS since the early days of the Republic. Since the mid-nineteenth century, but especially since WORLD WAR II, the use of executive agreements in United States practice has exceeded the use of treaties by an increasingly wide margin.

The expression "executive agreement," which is not widely used outside the United States but which has its equivalents abroad, is understood by the Department of State to refer, in general, to any international agreement brought into force relative to the United States without the ADVICE AND CONSENT of the Senate that is constitution-

ally required for treaties. In particular, it is understood to refer to three kinds of agreements: those made pursuant to, or in accordance with, an existing treaty; those made subject to congressional approval or implementation ("congressional-executive agreements"); and those made under, and in accordance with, the President's constitutional powers ("sole executive agreements"). None of these executive agreements is subject to the formal treaty-making process specified in Article II, section 2, clause 2, of the Constitution.

A treaty-based executive agreement, provided that it is within the intent, scope, and subject matter of the parent treaty, has the same validity and effect as the treaty itself and is subject to the same constitutional limitations. Deriving from one of the elements of "the supreme law of the land," it takes precedence over all inconsistent state laws and follows the customary rule favoring the instrument later in time in case of inconsistency with a federal statute. A conspicuous example of a treaty-based executive agreement is the traditional *compromis* defining the terms of submission to adjudication or arbitration under a basic convention. Another is found in the hundreds of STATUS OF FORCES AGREEMENTS and other agreements required to carry out the NORTH ATLANTIC TREATY, the linchpin of United States policy in Europe since WORLD WAR II.

A congressional-executive agreement is based on either a prior or a subsequent act of Congress authorizing the making of the agreement or providing general authority for the executive action needed internationally to implement the legislation in question. The scope or subject matter of the agreement is the same whether the congressional act comes before or after the negotiation of the agreement; the act of Congress often takes the form of an authorization to enter into or effectuate an agreement already negotiated. In principle, however, the agreement must reside within the joint powers of Congress and the President in order to have constitutional validity. An agreement outside the legal competence of Congress or the President, authorities generally agree, would be unconstitutional. On the other hand, as the American Law Institute has commented, "the source of authority to make a congressional-executive agreement may be broader even than the sum of the respective powers of Congress and the President," and "in international matters the President and Congress together have all the powers of the United States inherent in its SOVEREIGNTY and nationhood and can therefore make any international agreement on any subject." In any event, partly out of a concern to CHECK AND BALANCE the President in the conduct of foreign affairs, the vast majority of executive agreements entered into by the United States—for example, the Lend-Lease Agreements of World War II and the Trade Expansion Acts of 1934 and 1962—are of this type. Like its treaty-based counterpart, deriving from one of the elements of "the supreme law of the land," the congressional-executive agreement supersedes all inconsistent state law and follows the customary rule favoring the instrument later in time in case of inconsistency with a federal statute.

Sole executive agreements are international agreements entered into by the President without reference to treaty or statutory authority, that is, exclusively on the basis of the President's constitutional powers as chief executive and COMMANDER-IN-CHIEF, responsible for United States foreign relations and military affairs. Department of State records indicate that only a small percentage of executive agreements are of this type and that the great majority have dealt with essentially routine diplomatic and military matters. Accordingly, with relatively minor exception (such as agreements settling pecuniary and personal injury claims of citizens against foreign governments), they have had little direct impact on private interests and therefore have given rise to little domestic litigation. However, in part out of fear that the President might undertake by international agreement what would be unconstitutional by statute, as in fact occurred in MISSOURI V. HOLLAND (1920), such agreements have not been free of controversy. Two issues in particular continue to stand out.

First there is the question, not yet conclusively settled, of whether Congress may legislate to prohibit or otherwise limit sole executive agreements. Although comprehensive limitations on such agreements, including the proposed BRICKER AMENDMENT of 1953–1954, have so far failed to be adopted, Congress has nonetheless occasionally restricted presidential authority in ways that appear to preclude some executive agreements. For example, the War Powers Resolution of 1973, requiring congressional authorization to introduce combat troops into hostile situations, arguably restrains the President from making agreements that would commit United States armed forces to undeclared foreign wars. Similarly, the Arms Control and Disarmament Act of 1961 forbids the limitation or reduction of armaments "except pursuant to the treaty making power . . . or unless authorized by further legislation of the Congress of the United States." The validity of such restrictions upon presidential authority has been challenged by Presidents and has yet to be determined by the Supreme Court.

Second, while it is widely accepted that the President, under the "executive power" clause, has the authority to conclude sole executive agreements that are not inconsistent with legislation in areas where Congress has primary responsibility, there is a question as to whether the President alone may make an agreement inconsistent with an act of Congress or, alternatively, whether a sole executive agreement may supersede earlier inconsistent congressional legislation. The prevailing view, rooted in the belief

that it would be unconscionable for an act of a single person—the President—to repeal an act of Congress, is that sole executive agreements are inoperative as law in the United States to the extent that they conflict with a prior act of Congress in an area of congressional competence. This is the position taken by a federal appeals court in *United States v. Guy W. Capps, Inc.* (4th Circuit, 1953) and by the American Law Institute. The Supreme Court has not yet rendered a definitive decision in these respects, however.

The foregoing two issues aside, there is broad agreement about the scope and effect of sole executive agreements as a matter of constitutional law. Like the other two kinds of executive agreements, they are subject to the same limitations applicable to treaties, they are not limited by the TENTH AMENDMENT, and they supersede all inconsistent state law.

In sum, all three categories of executive agreements bespeak a historic trend toward strong executive leadership in foreign affairs. Only three final points need be added. First, the judgment to resort to these agreements in lieu of the treaty alternative is essentially a political one, affected more by surrounding circumstances than by abstract theories of law. Second, once in force, executive agreements are presumptively binding upon the United States and the other parties to them under international law, to the same extent and in the same way as treaties. Third, the international obligations assumed under such agreements survive all subsequent limitations or restrictions in domestic law.

BURNS H. WESTON
(1986)

Bibliography

AMERICAN LAW INSTITUTE 1965 *Restatement of the Law, Second: Foreign Relations Law of the United States.* Pages 361–448. St. Paul, Minn.: American Law Institute.

——— 1980 *Restatement of the Law: Foreign Relations Law of the United States (Revised), Tentative Draft No. 1.* Pages 71–144. Philadelphia: American Law Institute.

BERGER, RAOUL 1972 The Presidential Monopoly of Foreign Relations. *Michigan Law Review* 71:1–58.

BORCHARD, EDWIN 1944 Shall the Executive Agreement Replace the Treaty? *Yale Law Journal* 53:664–683.

HENKIN, LOUIS 1972 *Foreign Affairs and the Constitution.* Pages 173–188. Mineola, N.Y.: Foundation Press.

MCDOUGAL, MYRES and LANS, ASHER 1945 Treaties and Congressional-Executive Agreements: Interchangeable Instruments of National Policy. *Yale Law Journal* 54:181–351, 534–615.

## EXECUTIVE AGREEMENTS
(Update)

Article II of the Constitution empowers the President to make treaties with the ADVICE AND CONSENT of two-thirds of the U.S. SENATE. An "executive agreement" is an agreement with a foreign government signed by a member of the executive branch without the advice and consent of the Senate. When the executive acts unilaterally the agreement is known as a "sole executive agreement"; when the executive acts with the approval of a simple majority of both houses of Congress the agreement is known as a "congressional–executive agreement." The President has discretion to decide whether to sign an international agreement in the form of an Article II treaty, a sole executive agreement, or a congressional–executive agreement. In deciding which form of agreement is appropriate, the President will consider the relative importance of the agreement, the likelihood of obtaining a SUPERMAJORITY of the Senate or a simple majority of both houses, and the domestic legal effect of the agreement.

The Constitution does not expressly authorize executive agreements. Article I prohibits states from entering into "an Agreement or Compact with another State, or with a foreign Power," without congressional authorization. Some commentators have suggested that this reference indicates that the Framers understood that there were forms of international agreements other than Article II treaties. There is strong evidence that the Framers were referring to international agreements that do not bind the nation in the future. The term "Agreement or Compact" probably derived from the eighteenth-century treatise *The Law of Nations* by EMERICH DE VATTEL. In this treatise, Vattel defined an agreement or compact as a contemporaneous exchange that imposes no future obligation. For example, a state might use a compact to settle disputed borders with another state or foreign government. By contrast, Vattel defined a treaty as binding the state in perpetuity. One could infer that the Framers intended that an Article II treaty would bind future administrations, unlike other forms of agreements, including executive agreements.

No executive agreements were concluded until 1817, when President JAMES MONROE signed the Rush–Bagot Agreement with Britain to limit military forces along the Great Lakes. Monroe subsequently doubted the constitutionality of this executive agreement and sought the Senate's advice and consent. By 1900, only 124 executive agreements had been concluded over 111 years, and none of them operated to bind the United States prospectively. Presidents understood that an executive agreement, unlike an Article II treaty, could not bind a President's successors. For example, President THEODORE ROOSEVELT concluded an executive agreement to assume responsibility for Santo Domingo's customs house, but subsequently he decided that, because the agreement might operate prospectively, he needed the Senate's advice and consent.

By the 1930s Presidents increasingly relied on execu-

tive agreements. President FRANKLIN D. ROOSEVELT signed more than 600 agreements in his four terms in office. Still, Roosevelt respected the traditional distinction between treaties and executive agreements. Then–Attorney General ROBERT H. JACKSON advised Roosevelt that when "negotiations involve commitments as to the future," they "are customarily submitted for the ratification by a two-thirds vote of the Senate before the future legislative power of the country is committed."

President HARRY S. TRUMAN used executive agreements for the first time in lieu of treaties to bind the nation prospectively when he signed the Bretton Woods Agreements in 1945 establishing the International Monetary Fund and the World Bank, and a protocol in 1947 binding the United States to the General Agreement on Tariffs and Trade (GATT). Congress approved the Bretton Woods Agreements as congressional–executive agreements, but neither the Senate nor Congress ever approved the 1947 GATT.

Since 1947, Presidents have employed Article II treaties and executive agreements interchangeably. The vast majority of all international agreements has been in the form of executive agreements. These include important trade agreements such as the NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA), the Canadian Free Trade Agreement, and the World Trade Organization (WTO).

One critical issue is whether an executive agreement should have the same effect on domestic law as an Article II treaty. Article VI of the Constitution provides that treaties "shall be the Supreme Law of the Land." The Supreme Court has interpreted that provision to mean that a treaty supersedes any contrary state law or state constitutional provision and any prior inconsistent federal law. Some commentators have argued that an executive agreement can have the same effect as an Article II treaty in displacing state and federal law. In *United States v. Belmont* (1937) and *United States v. Pink* (1942), the Court enforced a sole executive agreement settling outstanding claims by U.S. nationals against the Soviet Union as a condition to reestablishing diplomatic relations. In DAMES & MOORE V. REGAN (1981), the Court upheld a claims settlement agreement negotiated unilaterally by President JIMMY CARTER with Iran for the release of U.S. hostages. The agreement effectively nullified a default judgment obtained by Dames & Moore for a breach of contract by Iran. Other scholars dispute the implication that a President could legislate federal law without any congressional authorization simply by making an agreement with a foreign leader. The domestic legal status of executive agreements remains contestable.

JOEL R. PAUL
(2000)

(SEE ALSO: *Treaty Power.*)

Bibliography

ACKERMAN, BRUCE and GOLOVE, DAVID 1995 Is NAFTA Constitutional? *Harvard Law Review* 108:799–928.

BORCHARD, EDWIN 1944 Shall the Executive Agreement Replace the Treaty? *Yale Law Journal* 53:616–683.

JACKSON, JOHN H. 1967 The General Agreement on Tariffs and Trade in United States Domestic Law. *Michigan Law Review* 66:249–313.

MCDOUGAL, MYERS and LANS, ASHER 1945 Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I. *Yale Law Journal* 54:181–351.

MCLURE, WALLACE 1941 *International Executive Agreements.* New York: Columbia University Press.

PAUL, JOEL R. 1998 The Geopolitical Constitution: Executive Expediency and Executive Agreements. *California Law Review* 86:671–773.

TRIBE, LAURENCE H. 1995 Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation. *Harvard Law Review* 108:1221–1303.

## EXECUTIVE DEFIANCE OF "UNCONSTITUTIONAL" LAWS

Presidents in recent years have asserted that they may refuse to comply with any provision of law that they believe is unconstitutional. This weapon is far more versatile and more potent than the VETO POWER, for it may be applied surgically to selected portions of a law and cannot be overridden by Congress. Defenders of this claimed executive authority urge that since each branch takes an oath to support the Constitution, each therefore has an equal right to interpret that document for itself. Just as JUDICIAL REVIEW permits judges to reject unconstitutional laws, "presidential review" gives the President the same option. Yet even accepting the "departmentalist" view that each branch enjoys autonomy in construing the Constitution, it does not follow that the President may refuse to execute an allegedly unconstitutional law. Despite its appeal in terms of symmetry and logic, "presidential review" is contrary to the ORIGINAL INTENT. Unlike judicial review, which was frequently endorsed at the Federal Convention and in the state ratification debates, the Founders rejected the notion that the executive may refuse to execute laws that it deems to be unconstitutional.

The President's failure to honor a statute because of its alleged unconstitutionality is equivalent to the "suspending power" that English kings employed for 400 years before it was abolished by the BILL OF RIGHTS (ENGLISH) of 1689. Through this royal prerogative, the Crown was able to nullify all or portions of a law—sometimes on the ground that it was unconstitutional.

The Founders were careful not to confer this prerogative on the American President. Article II thus enjoins

the President to "take Care that the Laws be faithfully executed." In marked contrast to the duty placed on judges by the SUPREMACY CLAUSE, the President's obligation extends to all laws, not just those "made in pursuance" of the Constitution. The Framers also insisted on giving the President only a qualified rather than an absolute veto, even though the primary purpose of the veto was to shield the executive against unconstitutional laws. By rejecting an absolute veto, the Convention necessarily anticipated that laws might be enacted over a President's constitutional objection. Should this occur it would be up to the judiciary—not the executive—to check the statute's enforcement. Had the Founders envisioned that Presidents could refuse to execute "unconstitutional" laws, the veto would have been superfluous in the very setting for which it was principally designed. Finally, if there had been any hint that the President would have authority to suspend allegedly unconstitutional laws, the ANTIFEDERALISTS would have been quick to object, for one of their chief objections to the Constitution was that the President would be "as much a King as the King of Great-Britain." Yet nowhere in the Antifederalist literature is there any mention of a presidential suspending power.

Throughout most of our history, the executive has honored this original understanding by implementing even those statutes to which the President has constitutional objections. The first known instance of presidential defiance of an "unconstitutional" law occurred in 1860, almost three-quarters of a century after the Constitution was ratified. Between 1789 and 1973 there were only ten occasions when a President refused to comply with an allegedly unconstitutional law. Since the mid-1970s, however, such defiance has become more common. Rather than using the veto against laws it believes to be unconstitutional, the White House now often issues a "signing statement" charging that parts of a bill the President has just signed into law are invalid. Though the executive does not always follow through on these objections, refusals to comply with allegedly unconstitutional laws are no longer a rarity. From 1974 through 1980, there were as many instances of presidential defiance as had occurred during the previous 185 years. The Supreme Court has not yet been presented with a case challenging this growing presidential practice. If the Court respects the intent of the Founders it will declare the practice to be unconstitutional.

CHRISTOPHER N. MAY
(2000)

(SEE ALSO: *Impoundment of Funds; Judicial Supremacy; Line-Item Veto; Nonjudicial Interpretation of the Constitution.*)

Bibliography

CALABRESI, STEVEN G. and PRAKASH, SAIKRISHNA B. 1994 The President's Power to Execute the Laws. *Yale Law Journal* 104: 541–665.

EASTERBROOK, FRANK H. 1989–1990 Presidential Review. *Case Western Reserve Law Review* 40:905–929.

MAY, CHRISTOPHER N. 1998 *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative.* Westport, Conn.: Greenwood Press.

PAULSEN, MICHAEL S. 1994 The Most Dangerous Branch: Executive Power to Say What the Law Is. *Georgetown Law Journal* 83:217–345.

RECENT LEGAL OPINIONS CONCERNING PRESIDENTIAL POWERS 1994 *Arkansas Law Review* 48:311–346.

SCIGLIANO, ROBERT 1989 The President's "Prerogative Power." Pages 236–256 in Thomas E. Cronin, ed., *Inventing the American Presidency.* Lawrence: University Press of Kansas.

## EXECUTIVE IMMUNITY

In tracing the development of executive immunity in the United States, one should separate immunity for constitutional violations from immunity for nonconstitutional violations and immunity of federal officials from immunity of state officials. State officials' immunity for nonconstitutional violations is a matter left to each state's laws. At least since enactment in 1871 of SECTION 1983, TITLE 42, UNITED STATES CODE, state officials have been liable for some federal constitutional violations. Until well into the twentieth century, however, their immunity in constitutional cases had not been fully explored because there were relatively few federal constitutional restrictions on state officials' behavior. By the middle of the twentieth century, federal officials, who are not covered by section 1983, seemed immune from actions for both constitutional and nonconstitutional misbehavior. Within a few decades, however, with the exception of the President, no executive official, state or federal, was fully immune from damage actions for constitutional violations.

In the Massachusetts case of *Miller v. Horton* (1891) Justice OLIVER WENDELL HOLMES, writing for the majority, narrowly restricted state officials' state-law immunity from suit. Even reasonable, good-faith behavior might trigger liability if found to violate the Constitution or some other legal limit. But in *Spaulding v. Vilas* (1896) and other cases, the Supreme Court was more protective of federal executives. And in subsequent years, many states provided their executives with more generous protection from suits in state courts, particularly when their acts were viewed as discretionary rather than ministerial.

*Gregoire v. Biddle* (1949) highlighted the movement away from *Miller v. Horton.* In an influential opinion by Judge LEARNED HAND for the United States Court of Appeals, *Gregoire* suggested that a federal executive officer's malice would not render him liable for an otherwise lawful act. *Gregoire* was read as conferring broad immunity upon federal officials. *Barr v. Matteo* (1959) accentuated this trend when, in a case generating no majority opinion, the

Supreme Court seemed to hold federal officials absolutely immune from defamation suits.

After *Barr*, the Supreme Court paused in its treatment of federal executive immunity to explore the liability, under section 1983, of state officers charged with constitutional violations. In a series of cases, including PIERSON V. RAY (1967), SCHEUER V. RHODES (1974), and WOOD V. STRICKLAND (1975), the Court held that unconstitutional acts by state executive officials would not trigger liability under section 1983 if the officials acted under a reasonable, good-faith belief that their behavior was constitutional. But they enjoyed no absolute immunity. *Scheuer v. Rhodes*, in which a governor was found not to have absolute immunity, dispelled illusions some had entertained about special status for high officials.

This experience with state officials undoubtedly influenced the Court's subsequent treatment of federal officials. In BUTZ V. ECONOMOU (1978), over four dissents, the Supreme Court held that the good-faith defense, and not the rule of *Barr*, applied to damage actions against federal officials for constitutional violations. Prior statements about absolute immunity, and the importance of the ministerialdiscretionary dichotomy, in effect were limited to cases involving common law torts. *Harlow v. Fitzgerald* (1982) reaffirmed and modified the limited immunity of high federal executive officials and NIXON V. FITZGERALD (1982) found the federal chief executive, the President, to enjoy the absolute immunity that *Scheuer* had denied to state chief executives.

THEODORE EISENBERG
(1986)

Bibliography

JAFFE, LOUIS L. 1963 Suits against Governments and Officers: Damage Actions. *Harvard Law Review* 77:209–239.

SCHUCK, PETER H. 1981 Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages. *Supreme Court Review* 1980:281–368.

## EXECUTIVE ORDER

Executive orders, a class of presidential documents, primarily regulate actions of government officials and agencies. Although most executive orders are issued under specific statutory authorization, some, including President HARRY S. TRUMAN'S STEEL SEIZURE order and executive orders affecting CIVIL RIGHTS, are issued on the President's own authority under Article II. Executive orders were not numbered until 1907 and were not required to be published until 1935.

Executive orders have taken on particular importance in times of war and in the field of civil rights. President FRANKLIN D. ROOSEVELT's executive orders played a key role in the WORLD WAR II Japanese relocation program, sustained in the JAPANESE AMERICAN CASES (1943–1944). Most executive orders concerning civil rights relate to employment by government contractors. Executive Order 8802 (1941), generated by a wartime need for labor, established a Committee on Fair Employment Practices to carry out a policy of nondiscrimination in defense industries. EXECUTIVE ORDERS 9980 AND 9981 (1948) declared a national policy of nondiscrimination in federal employment and sought to foster equality of treatment in the armed services. Executive Order 11603 (1962) attempted to promote nondiscrimination in federally assisted housing. On the more mundane level, executive orders also have been a vehicle through which Presidents promulgate the never-ending plans for reorganizing the executive branch of government.

With the enactment of ANTIDISCRIMINATION LEGISLATION in the 1960s and the expansion of constitutional prohibitions on government discrimination, executive orders prohibiting discrimination became less important. They continue, however, to provide internal authority regulating the federal government's employment and contracting policies. And in requiring employers to take AFFIRMATIVE ACTION to hire minorities and women, EXECUTIVE ORDER 11246 (1965) goes further than fair employment statutes. It has been a significant factor in pressuring government contractors to hire minority and female workers.

THEODORE EISENBERG
(1986)

(SEE ALSO: *Presidential Ordinance-Making Power.*)

Bibliography

MORGAN, RUTH P. 1970 *The President and Civil Rights: Policy-Making by Executive Order.* New York: St. Martin's Press.

## EXECUTIVE ORDER 9066 AND PUBLIC LAW 503 (1942)

On February 19, 1942, citing the necessity for "every possible protection against espionage and against sabotage," President FRANKLIN D. ROOSEVELT issued an EXECUTIVE ORDER authorizing various military commanders to designate any area in the United States from which "any or all persons may be excluded" at their discretion. Although based on a 1918 WAR POWERS act, the order resulted from vigorous anti-Japanese sentiment on the West Coast. Despite its broad wording, the order was enforced almost exclusively against persons of Japanese ancestry. The order conveyed a remarkably broad DELEGATION OF POWER but failed

to distinguish between American citizens and ALIENS or even between loyal and disloyal citizens. To provide for enforcement, the War Department drafted a bill making it a federal crime for a civilian to disobey a military relocation order. The bill passed Congress without dissent and Roosevelt signed it into law on March 21. Few spoke out against the use of these two measures to deprive some 110,000 people (an entire community was relocated in ten "camps") of their CIVIL RIGHTS. The Supreme Court sustained the evacuation and relocation in three JAPANESE AMERICAN CASES (1943–1944), despite a vigorous dissent by Justice FRANK MURPHY objecting to the "legalization of racism."

DAVID GORDON
(1986)

## EXECUTIVE ORDER 10340
(1952)

On April 8, 1952, on the eve of a nationwide strike of steelworkers, President HARRY S. TRUMAN issued Executive Order 10340, directing the secretary of commerce to take possession of and operate the plants and facilities of eighty-seven major steel companies. The order anticipated that the plants would continue to be run by company managers, preserving the rights and obligations of the companies until corporation officials and union leaders settled their dispute. As justification for averting a work stoppage, the order referred to Truman's proclamation of December 16, 1950, declaring the existence of a national emergency and the dispatch of American fighting men to Korea. The order called steel "indispensable" for producing weapons and war materials, for carrying out the programs of the Atomic Energy Commission, and for maintaining the health and vitality of the American economy.

Although Truman based the order on authority under "the Constitution and laws of the United States, and as President of the United States and COMMANDER-IN-CHIEF of the armed forces of the United States," the Justice Department later argued in court that Truman had acted solely on inherent executive power without any statutory support. On June 2, 1952, the Supreme Court declared the Executive Order invalid.

LOUIS FISHER
(1986)

(SEE ALSO: *Steel Seizure Controversy; Youngstown Sheet and Tube Co. v. Sawyer.*)

Bibliography

MARCUS, MAEVA 1977 *Truman and the Steel Seizure Case: The Limits of Presidential Power.* New York: Columbia University Press.

## EXECUTIVE ORDER 11246
(1965)

Executive Order 11246 required government contractors to take AFFIRMATIVE ACTION to ensure nondiscriminatory employment practices. Employers complying with the order may encounter employees or potential employees who claim that affirmative action violates Title VII of the CIVIL RIGHTS ACT OF 1964 or the Constitution. UNITED STEELWORKERS OF AMERICA V. WEBER (1979), which sustained some affirmative action by private employers, does not foreclose all such claims. Efforts to undermine the order by amending the 1964 act have failed. Part I of the order, which banned discrimination and required affirmative action by the federal government, was superseded by Executive Order 11478 (1969) and by the 1972 extension of the 1964 act to government employees.

THEODORE EISENBERG
(1986)

## EXECUTIVE ORDERS 9835 AND 10450
(1947, 1953)

As a result of domestic political and security pressures after 1945, Presidents HARRY S. TRUMAN and DWIGHT D. EISENHOWER instituted sweeping loyalty investigations of federal workers. Truman's Executive Order 9835, affecting over two million employees, established loyalty review boards in executive departments to evaluate information provided by Federal Bureau of Investigation or Civil Service Commission investigations and informants. The basic standards for dismissal required "reasonable grounds for belief in disloyalty," which included evidence of affiliation with groups on the ATTORNEY GENERAL'S LIST of subversive organizations. Critics who alleged widespread subversion nevertheless demanded more stringent measures, and Truman's Executive Order 10241 (April 28, 1951) altered the criterion to one of "reasonable doubt" of loyalty. The change effectively shifted the burden of proof to the accused or suspected employee. Eisenhower, however, later complained that the Truman program reflected "a complacency . . . toward security risks," such as homosexuals and alcoholics, and in April 1953, he issued Executive Order 10450 that made security, not loyalty, the primary concern.

The loyalty probes produced new bureaucracies, with agendas of their own and standards and practices that varied widely in different departments. Between 1947 and 1956, approximately 2,700 employees were dismissed and another 12,000 resigned because of the inquiries. After 1953, the security program provided for immediate suspension without pay, and many employees undoubtedly

resigned to avoid the stigma of combating the charges, however flimsy. Then, too, the program's shroud of secrecy, including the use of unknown informants, made challenges difficult.

The Supreme Court responded cautiously to the program. In *Bailey v. Richardson* (1951) an evenly divided bench sustained Bailey's dismissal even though she had been denied an opportunity to confront her accusers. The same day, in JOINT ANTI-FASCIST REFUGEE COMMITTEE V. MCGRATH, the Court questioned the procedures for compiling the attorney general's list of subversive organizations, yet did not prevent its continued use. Some individuals successfully challenged their dismissals, but courts carefully avoided broader constitutional issues. In *Peters v. Hobby* (1955) the Supreme Court overturned a medical professor's dismissal because his position was nonsensitive, yet the Justices ignored Peters's challenge against secret informers. Similar reasoning was employed in *Cole v. Young* (1956) to reverse the discharge of an employee who had challenged the use of the attorney general's list as a violation of rights of association. The real turning point came in *Service v. Dulles* (1957) when the Court reversed the dismissal of one of the "China Hands" who had been purged from the State Department. Finally, in *Greene v. McElroy* (1959), Chief Justice EARL WARREN condemned the use of "faceless informers," unknown to the accused. Without determining constitutional issues, the Court held that the government's evidence must be disclosed to the individual to give him an opportunity to refute it.

Although the Court's decisions undoubtedly demonstrated that abusive, illegal governmental actions could be brought to account, such challenges required extraordinary individual persistence and courage as well as financial and emotional cost. For all the government's efforts, the results were dubious. Judith Coplon, convicted of passing Justice Department documents to a Soviet agent, had escaped the program's net. And in 1954, the Civil Service Commission acknowledged that no communist or fellow traveler had been uncovered in its probes.

STANLEY I. KUTLER
(1986)

Bibliography

HARPER, ALAN D. 1969 *The Politics of Loyalty.* Greenwich, Conn.: Greenwood Press.

## EXECUTIVE ORDERS 9980 AND 9981 (1948)

When issued by President HARRY S. TRUMAN, Executive Orders 9980 and 9981 were among the most far-reaching federal antidiscrimination measures adopted since Reconstruction. Executive Order 9980 authorized the establishment of review boards within federal executive departments and agencies to which employees claiming racially discriminatory treatment could appeal. It also established a Fair Employment Board to coordinate and supervise executive antidiscrimination policy and to hear appeals from agency and department review boards.

Executive Order 9981 declared it "to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin." To this end, the order established the President's Committee on Equality of Treatment and Opportunity in the Armed Services to study and resolve the problem of SEGREGATION in the armed forces. Issued under pressure from black leaders, and in the midst of a reelection campaign, the order and the committee's recommendations were crucial first steps to desegregating the armed services.

THEODORE EISENBERG
(1986)

Bibliography

BERMAN, WILLIAM C. 1970 *The Politics of Civil Rights in the Truman Administration.* Pages 116–120. Columbus: Ohio State University Press.

## EXECUTIVE POWER

Article II of the Constitution vests "the executive power" of the United States in the President, whereas Article I vests in Congress those legislative powers "herein granted," and Article III says that the JURISDICTION of the federal courts extends only to the subjects enumerated in the article. The common reader would normally construe these provisions to confer the entire executive power on the President, while granting Congress and the courts only parts of the legislative and judicial authority of the United States. As so often happens, however, the common reader has had a difficult time. From the first term of President GEORGE WASHINGTON, there has been a considerable debate over the scope of the President's executive power.

One party, labeled "Super-Whigs" by EDWARD S. CORWIN, views all the powers of the national government with grudging suspicion as necessary but distasteful restraints on the powers of the states or the people. For members of this party, the first principle of constitutional exegesis is that the Constitution provides limited and ENUMERATED POWERS that should be narrowly construed. They read the first sentence of Article II as a "mere designation" of the President's office and would confine the President's au-

thority strictly to those examples of the executive power mentioned in the constitutional text: the VETO POWER, the power to receive ambassadors, the duty to execute faithfully the laws, and the others.

The other participant in the debate, the party of those who interpret law in the manner of JOHN MARSHALL, read the vesting clause of Article II as a grant to the President of a broad and independent range of authority to be defined historically and by the necessities of circumstance, and not limited to the powers and duties mentioned in the text. For this party, "the executive power" includes not only IMPLIED POWERS, but also the prerogative and emergency powers of the British Crown unless limited or denied to the President by the Constitution.

The issue has long since been settled by usage and by decisions of the Supreme Court in cases such as EX PARTE MILLIGAN, *In re Neagle* (1890), and IN RE DEBS (1895), but it continues to enjoy a half-life in the literature of the Constitution.

In his perceptive study, *The Creation of the Presidency, 1775–1789*, C. C. Thach, Jr. concludes that Article II admits "an interpretation of executive power which would give to the President a field of action much wider than that outlined by the enumerated powers." Thach has no doubt that this consequence of the text was contemplated and intended because the dominant force governing the CONSTITUTIONAL CONVENTION OF 1787 was not the theories of MONTESQUIEU and WILLIAM BLACKSTONE, popular as they were, but the experience of the state and the national governments between 1776 and 1787. To the majority of the founding fathers, led by JAMES WILSON, JOHN JAY, JAMES MADISON, and GOUVERNEUR MORRIS, the lesson of this experience was the danger of unbridled legislative power and the necessity for a strong and accountable national executive "to counterbalance legislative predominance. Neither theorist nor foreign model was needed to demonstrate that fact. The state legislatures' excesses and the incompetency of Congress as an administrative body produced the presidency." This is why Article I, section 6, forbids any member of Congress from holding an executive office during his or her term and why the Convention rejected several proposals that would have diluted the unity of the presidency or subordinated the office to a congressional committee.

Thach's judgment has been vindicated by the ebb and flow of history, despite the survival of a minority view favoring congressional supremacy. Upheavals of public opinion like those of the later stages of the VIETNAM WAR and the WATERGATE scandal caused the pendulum to swing more violently than usual in the direction of congressional power, but—thus far, at any rate—James Wilson's conception of the presidency has recovered from the vehemence of periodic congressional attacks and prevails in public opinion, governmental practice, and constitutional law.

The reasons for this pattern are simple, but fundamental: they correspond to functional necessity. Congress cannot conduct the day-to-day business of a vast government, the central task of the executive power. The size, history, and habits of Congress make it an admirable legislative body, but for these reasons also make it impossible for Congress, even through committees and committee staff, to constitute the operational arm of a government capable of "energy, secrecy, and dispatch."

It is equally apparent that no American President can preempt the legislative power and rule by decree, at least not for long. It is not always easy to discover at what point in the process of government a statute is constitutionally necessary. But as a matter of principle, there is a boundary between the legislative and executive functions, no matter how difficult it sometimes is to draw. As a matter not only of legal obligation, but of institutional resistance, every President is forced sooner or later to respect the limits of the tripartite system of government, sanctioned as it is by the conviction that "there can be no liberty" in a society where the executive and legislative functions are combined and where the judiciary is not separated from both the other branches.

Congress had to consider the indispensable elasticity of these concepts when it met for the first time in 1789. In considering a statute to establish the first three departments of the government, Congress faced the question as to whether it was constitutionally required to give the President the power to remove heads of the departments or whether the President had that power under Article II, with or without a statute. The Constitution made it clear that only the President could nominate these officers, but could not appoint them without the ADVICE AND CONSENT of the SENATE. Congress could provide other procedures for "inferior" officers or officers to be appointed by the courts. Were the new cabinet ministers to serve at the President's pleasure or was IMPEACHMENT required to remove them? Could the President remove them only with the advice and consent of the Senate? Could the Senate or Congress as a whole remove them on its own motion, whatever the President thought?

Madison led the extended debate on the bill in the HOUSE OF REPRESENTATIVES, and in the end, Congress decided to say nothing on the subject, but to leave the outcome to practice and to the courts. Madison contended that the officers should be deemed to serve at the President's pleasure. The principal reason he offered for discovering an "implied" power of removal in Article II was that the President could not be expected faithfully to exe-

cute the laws if he were not given a free hand to dismiss his chief subordinates; neither the Senate nor Congress as a whole should have a binding vote in the conduct of the administrative business of the government, save through legislation. It followed, Madison concluded, that the President alone was responsible and accountable for the removal of officials.

Madison's position on the constitutional basis of the President's removal power was tested in a famous episode. During the passionate battles between President ANDREW JOHNSON and Congress over policy in the military occupation of the South, Congress passed the TENURE OF OFFICE ACT, providing that certain heads of departments could serve until their successors were qualified. The provision was designed by Congress to prevent Johnson from dismissing Secretary of War EDWIN M. STANTON, who was in charge of the military occupation of the South. Stanton was removed by Johnson, however, and the House of Representatives proceeded to impeach the President, largely for violating the statute. The President, of course, was acquitted by the Senate. Some sixty years later, the Supreme Court declared the Tenure of Office Act unconstitutional in MYERS V. UNITED STATES (1926).

To confirm that the authority of a President to remove a member of his CABINET is an integral part of "the" executive power was hardly the end of the story. The *Myers* case did not concern the removal of a cabinet member, but of a postmaster. At the present stage in the evolution of the law on the subject, it can be said that the President's "absolute" power to remove federal officials is clear only for those of senior political responsibility whose appointments have been confirmed by the Senate. In contrast, military officers and foreign-service officers receive their commissions from the President after a senatorial vote of consent, but can only be discharged after compliance with statutory procedures for assuring them justice. For officials below the political level, Congress can qualify or abolish the President's removal power by passing civil-service legislation or by other means and direct the appointment of members of boards, commissions, and independent agencies for fixed terms. However, the Supreme Court has held in RUTAN V. REPUBLICAN PARTY OF ILLINOIS (1990) that the FIRST AMENDMENT prevents state governors from discriminating among lower-level state officials on political grounds with regard to promotions, dismissals, and other aspects of employment. This line of cases surely applies also to the national government.

The same pattern of adjustment and accommodation between President and Congress is manifest in other lines of decisions that distinguish between the executive and the legislative functions—those on pardons, for example. This *Encyclopedia* considers the relations of Congress and the President in the field of FOREIGN AFFAIRS in a number of articles, so this phase of the problem will not be addressed here. This article will, however, recall the ways in which the President and Congress share powers with respect to the important subject of appropriations.

It is often said that Congress has exclusive authority over the national purse because of the provisions in Article I, section 9, that "no money shall be drawn from the Treasury but in Consequence of appropriations made by law," and in Article I, section 7, that all money bills must originate in the House of Representatives. From the beginning, however, questions have arisen about the import of these words. The questions were raised with new intensity by the controversy over President RONALD REAGAN's handling of the IRAN-CONTRA AFFAIR.

Does the word "law" in the phrase "appropriations made by law" mean only statutory law, or does it include the President's actions pursuant to his prerogative and EMERGENCY POWERS under the Constitution as well? President Washington spent unappropriated funds to put down the WHISKEY REBELLION, and ABRAHAM LINCOLN spent two million dollars in unappropriated funds for war material during the early months of the CIVIL WAR, while Congress was not in session. President WOODROW WILSON and a number of other Presidents have taken comparable actions.

Article I, section 9, prohibits the spending of unappropriated funds. Does it therefore by implication allow the President not to spend funds, even when they have been appropriated? When the Armistice in Europe was signed in 1945, could President HARRY S. TRUMAN cancel military procurement contracts? The practice of presidential IMPOUNDMENT OF FUNDS already appropriated goes back at least to President THOMAS JEFFERSON. On rare occasion, Presidents have relied on their inherent constitutional powers both to spend funds without benefit of statutory authority and not to make expenditures that had been authorized by statute.

Such acts have been treated as presenting a special constitutional problem fraught with overtones of tyranny. In situations of this kind, it has been normal practice for Presidents to report such expenditures or decisions not to spend to Congress, often with a request that Congress join its authority to that of the President by approving the action already taken. While some conclude that President Lincoln acted unconstitutionally in spending two million dollars of unappropriated funds in 1861 for the purpose of resisting the Confederacy, this author is of the opinion that Lincoln was legally correct in characterizing his action as constitutional.

The existence of an emergency does not suspend the Constitution; it merely changes the state of facts to which the law must be applied. As a matter of international law and constitutional law alike, the government of the United

States possesses all the powers it requires to function in the society of nations. Like every other constitution, the Constitution of the United States contemplates the possibility of emergencies and makes provision for dealing with them. When Presidents invoke their emergency powers, they are acting under the Constitution, not beyond its limits, regardless of whether they are right or wrong in judging the scope of their powers. There is no other way for them to act. The general constitutional norms of reasonableness apply to the field of emergency actions as they do to other exercises of executive (and legislative) authority. In scrutinizing actions taken by the executive in the name of emergency, however, Congress, the courts, and the people may conclude that what the President did was justifiable as going no further than was reasonably necessary to carry out the President's constitutional responsibility under the circumstances.

Even if Lincoln could have assembled Congress in emergency session in the spring of 1861, his political judgment that such a session would have been impolitic, to say the least, was an important part of this constitutional responsibility. In defending Washington's unorthodox method of financing the suppression of the Whiskey Rebellion, ALEXANDER HAMILTON spoke of a presidential prerogative to make temporary "advances" against future congressional appropriations. This is a possible approach to the constitutional problem; it is analytically more precise, however, to treat such presidential actions as exercises of an autonomous presidential power. Congress may approve after the event, as frequently happens when Presidents use the national force on their own authority. The PRIZE CASES (1863). But the President's action meets the standard of Article I, section 9, whether Congress approves or not.

Involving the claim of emergency, however, by no means justifies every decision the President (or Congress) takes to resolve it, as shown in *Ex Parte Milligan* (1866). In the context of the Constitution as a whole and considering the possibilities of abuse, the President's power to spend unappropriated funds should be confined to the minimum necessary for the purpose.

During the administration of RICHARD M. NIXON, a major controversy between Congress and the presidency developed about the existence and the extent of the President's power not to spend appropriated funds. The controversy resulted in the CONGRESSIONAL BUDGET AND IMPOUNDMENT ACT of 1974. This statute distinguishes between appropriations that authorize expenditures and those that mandate them. In the first category, the Act acknowledges a power in the President to sequester appropriated funds for a limited period, giving Congress time to reconsider its prior decision. Where an appropriation is mandatory, however, the President is required to carry it out.

These problems in determining the respective role of the legislature and the executive in spending public funds, important as they are, do not address the principal constitutional issues raised by the growing tendency of Congress to use riders on appropriation bills, LEGISLATIVE VETOES, standing congressional oversight committees, and other legislative methods as devices for taking executive powers unto itself. The pracitce of "tacking foreign matter to money bills" was familiar to the Constitutional Convention and has been familiar ever since, both in money bills and more generally. No constitutional way to protect the President's veto by requiring Congress to enforce a rule of "germaneness"—that is, a rule that would confine each act to one subject—has yet been developed. Two approaches to the problem are currently being discussed: the LINE ITEM VETO and a more vigorous judicial development of the Supreme Court's analysis and conclusions in cases like *Springer v. Government of the Philippine Islands* (1928), IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983), BOWSHER V. SYNAR (1986), and *Commodity Future Trading Commission v. Schor* (1986), all of which recognize the importance of enforcing the constitutional distinction between legislative and executive power, whatever form the encroachment may take. There has been some support for the novel argument that a constitutional basis for the item veto already exists and should be declared by the Supreme Court rather than by constitutional amendment. Whether or not so radical a step is taken, however, it is to be expected that the Court will pursue the initiative it took in *Chadha* and *Bowsher.*

EUGENE V. ROSTOW
(1992)

(SEE ALSO: *Congress and Foreign Policy; Congressional War Powers; Executive Prerogative; Pardoning Power; Senate and Foreign Policy.*)

Bibliography

CORWIN, EDWIN S. 1940 and 1957 *The President: Office and Powers.* New York: New York University Press.

FISHER, LOUIS 1975 *Presidential Spending Power.* Princeton, N.J.: Princeton University Press.

THACH, CHARLES C., JR. 1922 *The Creation of the Presidency, 1775–1789.* Baltimore Md.: The Johns Hopkins Press

## EXECUTIVE PREROGATIVE

Executive prerogative refers to the President's constitutionally based authority to declare policy, take action, and make law without congressional support or in the face of inconsistent congressional LEGISLATION. This authority may be seen as a corollary of the SEPARATION OF POWERS under which the President has exclusive EXECUTIVE POWER

that Congress may not invade because Congress's authority is limited to LEGISLATIVE POWERS. Executive prerogative may also refer to certain EMERGENCY POWERS under which the President may act contrary to the Constitution, such as spending funds without an appropriation or contrary to an act of Congress that would properly be classified as a legislative act. In the view of some eighteenth-century political theorists, the President could act extraconstitutionally or illegally if circumstances required, but he would have to seek subsequent ratification of the act. More recently, the President has justified such action on the basis of an inherent or implied authority conferred by the Constitution.

Executive prerogative mostly relates to FOREIGN AFFAIRS but may also include domestic acts, such as actions during war or national emergency, dismissal of CABINET officers appointed with Senate participation, and assertion of EXECUTIVE PRIVILEGE to protect communications of executive branch officials from congressional or judicial inquiry.

The Constitution does not expressly delegate a "foreign affairs" power to the President or to any single branch of the government. Indeed, the Constitution delegates most specific foreign relations powers to the Congress. These powers include the powers to declare war, to regulate FOREIGN COMMERCE, and to define and punish offenses against the law of nations, piracy, and FELONIES committed on the high seas, as well as the powers to authorize an army, navy, and MILITIA and to make rules for the regulation of land and naval forces. Congress therefore has concurrent authority and substantial practical influence over all aspects of foreign affairs. Notwithstanding this authority, the President dominates foreign affairs. Yet the Constitution delegates relatively few foreign relations powers to the President, and several of these powers are shared with the Senate or Congress. The President has the power to make treaties and appoint ambassadors, but only with the participation of the Senate. His power as COMMANDER-IN-CHIEF is subject to limitation by the congressional war, legislative, and appropriations powers. The President has the power to receive ambassadors, the duty (and implicitly the power) to take care that laws (including treaties and customary international law) be faithfully executed, and a general executive power. But executive prerogative rests more on historical practice and functional necessity than on constitutional text.

Much of the President's dominance of foreign affairs is based on extralegal factors, such as access to the media and political party status. Most presidential foreign affairs authority derives from congressional support. For example, Congress has delegated to the President plenary authority over foreign commerce. It has also authorized and funded a standing armed force, a vast intelligence bureaucracy, and dozens of agencies with thousands of officials participating in all facets of international organization and activities. Having created the bureaucracies, Congress has generally been content to let the executive run them. Executive prerogative has historically sanctioned the President's right to recognize foreign states and governments, establish diplomatic relations, initiate negotiations, determine the content of communications with foreign governments, conduct intelligence operations, conclude presidential EXECUTIVE AGREEMENTS, and initiate military action.

Executive prerogative has been controversial since the first administration of GEORGE WASHINGTON. After Washington declared neutrality in 1793 in the war between France and Great Britain, ALEXANDER HAMILTON and JAMES MADISON debated his authority under the pseudonyms Pacificus and Helvidius. The structure of the debate, and even the arguments advanced, have been used repeatedly in foreign policy clashes between the President and Congress, most recently in the IRAN-CONTRA AFFAIR. The Washington declaration amounted to a decision not to declare war and implicitly interpreted a treaty with France not to require U.S. entry into the war.

Madison rejected Washington's authority to issue the declaration because in his view neutrality pertained to declaration of war, a congressional power, and to the application of a treaty, a power shared with the Senate. Madison viewed constitutional powers as strictly separated so that any activity within the scope of a legislative power was precluded to the President. He also advocated a narrow construction of the executive power and other presidential authorities specified in the constitutional text. In Madison's view, the President could only execute laws and policies established by Congress.

Hamilton took a broad view of the executive power, arguing that its scope was limited only by explicit exceptions such as Senate participation in treaty making and congressional power to declare war. Thus, the President could preserve peace until Congress declared war. As the "organ of intercourse" between the United States and foreign nations, the President could make, interpret, suspend, and terminate treaties; recognize foreign governments; and execute the laws of nations (including the law of neutrality). In Hamilton's view, the President shared power with the legislature in war and treaty making.

Washington established other important precedents supporting presidential foreign affairs power. He authorized military actions against AMERICAN INDIANS without congressional authorization and dispatched an envoy without Senate approval. He also asserted executive privilege against both the Senate and Congress to protect treaty-negotiating instructions, and he effectively eliminated the Senate's "advice" function in treaty making. Other early Presidents also established major precedents justifying

presidential foreign affairs power. JOHN ADAMS initiated presidential executive agreements. THOMAS JEFFERSON committed funds to purchase military supplies without an appropriation and dispatched the navy to protect U.S. vessels against pirates off Africa.

Since then, presidential authority has fluctuated with the strength of particular Presidents and the exigencies of the moment, depending on what the President has claimed and what the Congress has tolerated. The courts generally have declined to adjudicate these controversies. On the few occasions when the Supreme Court has addressed questions of presidential power, it has almost always sided with the President.

In a much-quoted passage, Justice GEORGE SUTHERLAND, in UNITED STATES V. CURTISS-WRIGHT EXPORT CORP. (1936), referred to "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." Sutherland explained that "[t]he President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it." Sutherland offered a functional explanation: "if, in the maintenance of our international relations, embarrassment . . . is to be avoided and success for our aims achieved, congressional legislation . . . must often accord to the President a degree of discretion and freedom. . . . [H]e, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries. . . . He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. . . ."

In *Chicago and Southern Air Lines v. Waterman S. S. Corp.* (1948) Justice ROBERT H. JACKSON, after noting the importance of secret intelligence in executive decision making, added: "[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political department of the government. . . . They are delicate, complex and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

In YOUNGSTOWN SHEET TUBE CO. V. SAWYER (1952), however, the Court denied an executive emergency power to seize steel mills during the KOREAN WAR. The determinative factor was that Congress had earlier declined to give the President such authority. Jackson's concurring opinion, which is now the standard framework for analysis, held that the President's authority is maximum when exercised pursuant to express or implied congressional authorization, but is "at its lowest ebb" when exercised contrary to the express or implied will of Congress. Jackson recognized a "zone of twilight" where there is neither a grant nor a denial of presidential authority. The branches then have concurrent authority, and "Congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable if not invite, measure on independent presidential responsibility." In DAMES & MOORE V. REGAN (1981) the Court upheld a presidential executive agreement eliminating causes of action in federal courts for claims against foreign governments, contrary to a statute conferring jurisdiction over such cases, on the basis of congressional acquiescence to earlier executive agreements dealing with such claims. Presidents have also negotiated export restraint measures covering steel and automobiles at odds with the antitrust laws, and Congress has acquiesced.

In the absence of much judicial guidance, presidential foreign affairs power has been shaped by political compromises between Congress and the President. Almost all exercises of presidential power, including politically controversial ones, have the sanction of congressional acquiescence.

Executive prerogative builds on the negotiation function. Everyone agrees that the President has exclusive authority to recognize foreign states and governments, establish diplomatic relations, and control official communications with foreign governments. The President declares foreign policy, although important declarations like the MONROE DOCTRINE or support for the African National Congress typically require congressional action to be effective. Executive branch officials, with congressional acquiescence, have also construed executive prerogative to include the right to preserve confidentiality of diplomatic communications and related executive deliberations.

The President may negotiate an international agreement on any subject matter. He decides whether to conclude it on the basis of Article II or the constitutionally equivalent procedure of authorization by Congress. He may conclude some international agreements without any congressional participation. These agreements have sometimes been controversial, but the Supreme Court has approved. In UNITED STATES V. BELMONT (1937) and UNITED STATES V. PINK (1942), the Court upheld an executive agreement that superseded state law. In *Dames & Moore v. Regan* (1981) the Court upheld an executive agreement inconsistent with a federal statute. After the VIETNAM WAR and WATERGATE, the President fended off congressional attempts to regulate executive agreements. The President

may also interpret, suspend, and terminate Article II treaties without Senate participation.

The most controversial aspect of executive prerogative concerns the presidential war power. This authority rests in part on the commander-in-chief clause and in part on congressional authorization of military forces and acquiescence in their use. Since WORLD WAR II, the President has frequently initiated military activities without a congressional DECLARATION OF WAR. Examples include military actions in Korea, the Dominican Republic, Lebanon, Grenada, the Persian Gulf, and Panama. During the Vietnam War, Congress challenged the President, passing the War Powers Resolution over the President's veto. Subsequent presidents disregarded its major limitation, sending troops to the Middle East, Asia, Africa, and Latin America. Some members of Congress complained, but Congress acquiesced to presidential military action, at least for limited purposes. Executive branch officials have also claimed constitutionally based authority to initiate covert intelligence operations.

Only rarely has a President acted contrary to congressional prohibition. In some contexts, however, functional theory and historical practice constitutionally justify such action, whether as an emergency power or, under contemporary theory, as a synergistic product of the textual powers of the President. One cannot anticipate the contexts in which such action may be required, and it is therefore difficult to define rules in principled terms. The prospect for congressional acquiescence seems crucial. The President does not have a general power to override acts of Congress for foreign-policy purposes. Nevertheless, the foreign relations power may justify action inconsistent with acts of Congress when foreign policy urgency requires and Congress seems likely to acquiesce. Presidential exercise of power is subject to congressional review to weigh the genuineness of the urgency and wisdom of the action. If Congress disagrees, it can repudiate the President formally. Congressional action in response to assertions of presidential prerogative should in turn prevail and constitutional lawmaking continue.

PHILLIP R. TRIMBLE
(1992)

(SEE ALSO: *Congress and Foreign Policy; Congressional War Powers; Presidential War Powers; Senate and Foreign Policy; War, Foreign Affairs, and the Constitution; War Powers.*)

Bibliography

BALDWIN, GORDON 1976 The Foreign Affairs Advice Privilege. *Wisconsin Law Review* 1976:16–46.

CORWIN, EDWARD 1917 *The President's Control of Foreign Relations.* Princeton, N.J.: Princeton University Press.

FISHER, LOUIS 1985 *Constitutional Conflicts Between Congress and the President.* Princeton, N.J.: Princeton University Press.

GLENNON, MICHAEL J. 1990 *Constitutional Diplomacy.* Princeton, N.J.: Princeton University Press.

HENKIN, LOUIS 1972 *Foreign Affairs and the Constitution.* Mineola, N.Y.: Foundation Press.

KOH, HAROLD HONJU 1990 *The National Security Constitution.* New Haven, Conn.: Yale University Press.

LOBEL, JULES 1989 Emergency Power and the Decline of Liberalism. *Yale Law Journal* 98:1385–1433.

NOTE 1968 Congress, the President, and the Power to Commit Forces to Combat. *Harvard Law Review* 81:1771–1805.

——— 1984 The Extent of Independent Presidential Authority to Conduct Foreign Intelligence Activities. *Georgetown Law Journal* 72:1855–1883.

WRIGHT, QUINCY 1922 *The Control of American Foreign Relations.* New York: Macmillan.

## EXECUTIVE PRIVILEGE

Executive privilege refers to a right of the chief executive to refuse to produce documents within his control in response to a demand from either the legislative or judicial departments of the national government. There would seem to be no question that the chief magistrate need not respond to such demands from departments of state governments. Raoul Berger has asserted that "executive privilege is a myth," a creature of the Presidents who have asserted this claim to immunity without foundation in the Constitution. Although the Constitution does provide for legislative privilege, there are no words in the Constitution on which to base any such executive privilege. Nevertheless, the Supreme Court, in UNITED STATES V. NIXON (1974), wrote executive privilege into the Constitution on the grounds that it inheres in the notion of SEPARATION OF POWERS that is immanent in our basic document:

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to these values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

The privilege as created by the Court in *Nixon* is not, however, an absolute one. Interests of the other branches of government may override the presidential interest in

the privilege. And in *Nixon* the executive privilege was held subordinate to the claim of a GRAND JURY for EVIDENCE "that is demonstrably relevant in a criminal trial." Thus, the weight of the privilege to withhold information differs according to its function. It is at its lowest force when it "is based only on the generalized interest in confidentiality." It is at its strongest when the claim is based on the ground of "military or diplomatic secrets."

The Supreme Court's constitutional DOCTRINE of executive privilege is still in its nascency. The Court, in *Nixon*, particularly eschewed passing on "the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, [or] with that between the confidentiality interest and congressional demands for information, [or] with the President's interest in preserving state secrets." In the absence of constitutional language, the constitutional meaning of executive privilege depends totally on judicial creation, for "it is the province and duty of this Court "to say what the law is."

Prior to the *Nixon* decision, the question of executive privilege, especially as it related to demands of Congress on the executive branch, was resolved in the political rather than the judicial arena. It was a contest of wills, with each side exerting its own powers and its own claims on public opinion, which was frequently dispositive of the issue. The strongest power of the Congress lies in its control over the purse and its threat to cut off funding from programs as to which Congress makes inquiry and as to which the executive branch declines to produce the documents sought. The greatest force on the side of the executive branch lies in its capacity to delay acquiescence, since most executive privilege questions become moot or stale through the passage of time.

The problem has a long history in this country, going back to the time that President GEORGE WASHINGTON declined to deliver to the House of Representatives documents relating to JAY'S TREATY, on the grounds that it was none of the business of the House to participate in the treaty process and that all relevant information had, indeed, been delivered to the Senate, whose job it was to advise and consent on the content of treaties. When in the *Burr* case JOHN MARSHALL subpoenaed communications in the hands of President THOMAS JEFFERSON, Jefferson decided which he would and which he would not provide. In *Burr* the judiciary proved helpless against the adamancy of the President to withhold documents, although the Court might have tried to invoke the CONTEMPT POWER.

Since the investigatory or oversight power of Congress is itself an implied rather than a granted power, its claim to access to presidential papers generally rests on as weak a reed as does the President's claim to immunity from producing the information. Both are implicit rather than express constitutional rights. But the case differs where Congress, particularly the House, is investigating the question of misbehavior of executive branch officials. The Congress is particularly charged by the IMPEACHMENT provisions of the Constitution with the duty of "throwing the rascals out." And surely they must have access to relevant information to determine whether an executive official, be it the President himself, has committed "high crimes and misdemeanors" for which he might be impeached and convicted. But the problem of executive privilege has not arisen in the impeachment context. Rather the impeachment power is used to justify a general congressional power of investigation.

It is with regard to Congress's legislative duty to secure knowledge on which to base its laws or to assure itself that the President is, indeed, engaged in the faithful execution of the laws which Congress has enacted that "executive privilege" problems tend to arise. History provides us with no doctrinal answer to the correct meaning of executive privilege here. Most are agreed that the privilege can be claimed only by the President himself or by a government official at the command of the President. It is not to be invoked even by the vice-president or the secretary of state except through the President. There is little other consensus. Impeachable offenses aside, the privilege is strong where, as the Court noted, it is concerned with military or state secrets. Beyond this, history shows only that the balance between the two constitutional claims, Congress's to be able to perform its duties and the President's to perform his own, has been resolved on an ad hoc basis, with the President having the greater ability to manipulate public opinion, and Congress being able to invoke only the time-consuming processes of contempt and fiscal restraints.

Now that the Supreme Court seems to have made the question of executive privilege a judicial rather than a political one, some further elucidation may be forthcoming. But, except in times of crisis such as the Watergate affair, the mills of the courts, like the mills of the gods, grind so very slowly that they may prove inadequate to provide greater definition to the amorphous concept of executive privilege. This is especially the case since the Court recognized the privilege as a conditional one and not an absolute one, requiring balancing by a judicial arbiter without any special competence to perform the task. It may be predicted, however, that where the conflict is between the judicial and executive branches, as it was in the *Nixon* case, the judicial branch is more likely to prevail, at least in a criminal case or one in which the government itself is seeking the information. But, as between Congress and the President, the Court is likely to be found where it is usually found, aligned with the executive branch.

Executive privilege could cover immunities other than the right to reject a demand for information from another

branch. In the Nixon period, the question arose, speculatively, whether a President of the United States could be arrested, indicted, and tried for crime while still in office. That a successful impeachment would leave the person charged with no immunity to arrest, INDICTMENT, and trial is made clear by the words of the Constitution itself. On the other hand, it says nothing about executive immunity while in office. Without judicial precedent or judgment, there appeared to be agreement that the President of the United States and only the President must be immune from interruption of his duties while he holds office, subject only to the necessity for responding to impeachment charges. There is no moment when the President is not on duty, even while on vacation. This immunity, whether termed executive privilege or not, derives from the implications of the Constitution much more readily than his right to refuse to produce documents, which need not interrupt his presidential obligations.

One must assume, too, that the President, like everyone in the nation, can claim the RIGHT AGAINST SELF-INCRIMINATION both in Congress and in the courts. The practical effects on the electorate of such a claim make it highly unlikely that it will ever be invoked. And again, the privilege not to incriminate himself is not the executive privilege as that term is generally used.

The contours of executive privilege remain hard to define, and certainty is not likely to come soon, if ever.

PHILIP B. KURLAND
(1986)

Bibliography

BERGER, RAOUL 1974 *Executive Privilege: A Constitutional Myth.* Cambridge, Mass.: Harvard University Press.

KURLAND, PHILIP B. 1978 *Watergate and the Constitution.* Chicago: University of Chicago Press.

UNITED STATES SENATE, JUDICIARY COMMITTEE, SUBCOMMITTEE ON SEPARATION OF POWERS 1971 *Executive Privilege: The Withholding of Information by the Executive.* 92nd Congress, 1st session. Washington, D.C.: Government Printing Office.

———, SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE AND SEPARATION OF POWERS, AND COMMITTEE ON GOVERNMENT OPERATIONS, SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS 1973 *Freedom of Information: Executive Privilege; Secrecy in Government.* 3 Vols. 93rd Congress, 1st session. Washington, D.C.: Government Printing Office.

## EXECUTIVE PRIVILEGE
(Update)

The term "executive privilege" has been applied to explain and define a variety of immunities claimed by the President to resist inquiries or impositions by other branches of government.

In the broadest sense, the term covers claims by the President that he is not subject to any type of judicial process while serving in his office. However, whether or not the President can be indicted and tried for a criminal offense while in office (an issue that has yet to be resolved), the Supreme Court held in CLINTON V. JONES (1997) that he can be required to appear and answer as a defendant and to testify in a civil case for acts committed before he became President. A President can also be ordered to respond to a subpoena for tapes (and documentary materials) in a criminal case, as the Court held in UNITED STATES V. NIXON (1974). Presumably he could also be obliged to give testimony in such cases, so long as one of the narrower testimonial privileges described below does not specifically apply. When President WILLIAM J. CLINTON was asked to give testimony before the Monica Lewinsky GRAND JURY convened by INDEPENDENT COUNSEL Kenneth Starr, he chose to appear voluntarily rather than test the extent of his testimonial immunity.

On the other hand, in NIXON V. FITZGERALD (1982), the Court held that Presidents cannot be sued for damages for acts taken while in office.

In the narrowest sense, executive privilege covers only specific testimonial privileges under which the President may refuse to produce documents or permit testimony by members of the executive department to either Congress or the courts on matters relating to the operation of that branch.

With respect to resisting inquiries by Congress, Presidents going back to GEORGE WASHINGTON have refused to disclose materials relating to the interior workings of the presidential office. Presidents JOHN ADAMS, THOMAS JEFFERSON, and ANDREW JACKSON similarly asserted the privilege in the nineteenth century and every President since FRANKLIN D. ROOSEVELT did so in our time.

When privilege is asserted before Congress, the only weapon available to the legislative branch is to vote a CONTEMPT citation and seek to obtain penalties or a compliance order before the courts. Generally, a compromise is then worked out between the two branches. In the rare instances that an assertion of executive privilege before Congress was presented to the courts, generally the executive department's claim has been upheld or the case has been held to lack JUSTICIABILITY.

Executive privilege has also been asserted by the President or executive department members in judicial proceedings, generally in criminal cases. Commentators and the courts have noted that the term has been applied in at least five separate situations. Included in this category are the "state secrets" privilege covering NATIONAL SECU-

RITY matters, and the privilege to withhold the names of informers or information relating to pending criminal investigations.

Another recognized privilege is the "presidential communications" privilege established by the Court in *United States v. Nixon.* Under that DOCTRINE, communications to and from the President before and after a presidential decision has been made are ordinarily immune from process, based on SEPARATION OF POWERS concerns. Breach of that privilege is possible only after a compelling showing of need by the person seeking the information.

The most frequently invoked form of executive privilege is the "deliberative process" privilege. Under that doctrine, the President, on behalf of any executive branch officer, may refuse to disclose recommendations and deliberations comprising part of the process by which governmental decisions and policies are formulated. To invoke this privilege, the President must show that the material sought to be discovered related to communications made before a governmental decision was made (it was "predecisional") and that it related to the method chosen or advice given to arrive at the decision.

Even if such a showing is made, the privilege can be overcome by a showing of need, less than that required to breach the "presidential communications" privilege. Among the considerations that must be balanced by the courts are the importance of the evidence, the availability of alternate sources of information, the significance of the litigation and the extent of government misconduct sought to be examined.

New assertions of executive privilege were made during the Monica Lewinsky investigation involving President Clinton. But the courts rejected any claim of privilege by U.S. Secret Service agents or by government lawyers asserting an attorney–client privilege not to respond to questions involving possible criminal activity within their knowledge.

LEON FRIEDMAN
(2000)

Bibliography

BERGER, RAOUL 1974 *Executive Privilege: A Constitutional Myth.* Cambridge, Mass.: Harvard University Press.

ROZELL, MARK J. 1994 *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability.* Baltimore, Md.: Johns Hopkins University Press.

## EXHAUSTION OF REMEDIES

Exhaustion-of-remedies questions arise in at least two areas of constitutional adjudication. Since *Ex parte Royall* (1886), state prisoners have been required to exhaust available, effective state court remedies before seeking federal HABEAS CORPUS relief from allegedly unconstitutional state convictions. Congress codified this result more than half a century later. The exhaustion requirement, which is not constitutionally mandated, is said to reflect the Court's sensitivity to relations between federal and state courts; a federal court is prevented from reviewing a state conviction until state courts have had a chance to correct constitutional errors.

In another class of cases seeking to vindicate constitutional rights, the Supreme Court does not require exhaustion of state judicial remedies. In MONROE V. PAPE (1961) and a series of later cases, the Court has stated that there is no requirement of exhaustion of state judicial remedies before bringing an action against state officials under SECTION 1983, TITLE 42, UNITED STATES CODE. *Patsy v. Board of Regents* (1982) held that litigants bringing section 1983 cases also need not exhaust state administrative remedies and thereby resolved a long-standing conflict among the courts of appeal. In the Civil Rights of Institutionalized Persons Act (1980),Congress imposed an exhaustion-of-administrative-remedies requirement upon certain prisoners bringing actions under section 1983.,

The exhaustion requirement in habeas corpus cases, and its absence in section 1983 cases, generates difficulty in deciding whether to require exhaustion in constitutional actions brought by prisoners, many of which may be brought either as habeas actions or as section 1983 cases. In *Preiser v. Rodriguez* (1973) the Court held that exhaustion was required in a case close to "the core of habeas corpus," that is, one attacking the validity of a prisoner's conviction or otherwise challenging the fact or duration of confinement. When the prisoner challenges the conditions of confinement, the Court said, the nonexhaustion rule applicable to section 1983 cases governs. Perhaps inspired in part by the long-standing exhaustion requirement in habeas corpus cases, much modern CIVIL RIGHTS legislation reflects sensitivity to state prerogatives by requiring complainants initially to present claims to state authorities. Title VII of the CIVIL RIGHTS ACT OF 1964 requires resort to state antidiscrimination agencies before the Equal Employment Opportunity Commission may act on a complaint. Title VIII of the CIVIL RIGHTS ACT OF 1968 requires federal administrators to allow state and local housing agencies the first chance at a housing discrimination complaint. But post-Civil War ANTIDISCRIMINATION LEGISLATION, such as the CIVIL RIGHTS ACT OF1866 and 1870, reflected no such sensitivity. And the practice is not uniform in modern statutes. The VOTING RIGHTS ACT OF 1965 expressly rejects any requirement of exhaustion of administrative or other remedies before initiation of actions in

federal court. Other civil rights statutes simply do not address the issue.

THEODORE EISENBERG
(1986)

Bibliography

COMMENT 1974 Exhaustion of State Administrative Remedies in Section 1983 Cases. *University of Chicago Law Review* 41: 537–556.

NAHMOD, SHELDON H. 1979 *Civil Rights & Civil Liberties Litigation.* Pages 143–148. Colorado Springs, Colo.: Shepard's.

## EXIGENT CIRCUMSTANCES SEARCH

Although the Supreme Court has denounced WARRANTLESS SEARCHES as *"per se* unreasonable under the FOURTH AMENDMENT," it has recognized "a few specifically established and well-delineated exceptions" to this rule based on exigent circumstances. A SEARCH WARRANT, which in ordinary circumstances provides constitutional reasonableness for a search, may be dispensed with if the delay involved in obtaining the warrant might defeat the purpose of the search. In fact, far more searches are made without warrants than with them. The warrantless search is "exceptional" only in the sense that exceptional (that is, exigent) circumstances are needed to justify it.

Five types of warrantless searches have thus far received the Court's sanction. In WEEKS V. UNITED STATES (1914) the Court upheld SEARCH INCIDENT TO ARREST of a person—and, in later cases, of the area under the arrestee's control—in order to disarm him and prevent the destruction of EVIDENCE. The search of an automobile on the road is constitutional when there is PROBABLE CAUSE to believe the automobile is transporting contraband. As the Court said in CARROLL V. UNITED STATES (1925), to delay the AUTOMOBILE SEARCH is to risk the escape of driver and vehicle. "Hot pursuit" of a suspected felon into a building was held reasonable in WARDEN V. HAYDEN (1967). Delaying to obtain a warrant might endanger the lives of the pursuing officers and others. Such a search may continue until the suspect is apprehended and his weapons are seized. In SCHMERBER V. CALIFORNIA (1966) the Court permitted the compulsory taking of blood from an individual to determine whether he was intoxicated while driving when there was probable cause to believe that he was. The exigency in such cases is furnished by the fact that the level of alcohol in the blood diminishes after its intake ceases. In TERRY V. OHIO (1968) the Court upheld the practice of stopping a suspect and frisking his outer clothing to discover concealed weapons, even when probable cause for an arrest is lacking, provided that circumstances entitle an officer to believe that a criminal venture is about to be launched and that his safety or that of others is endangered.

The concept of exigent circumstances is an open one. Indeed, in *Mincey v. Arizona* (1978) the Court indicated that officers may enter and search without a warrant upon reasonable belief that there is a "need to protect or preserve life or avoid serious injury. . . ."

JACOB W. LANDYNSKI
(1986)

Bibliography

LANDYNSKI, JACOB W. 1971 The Supreme Court's Search for Fourth Amendment Standards: The Warrantless Search. *Connecticut Bar Journal* 45:2–39.

## *EX PARTE*

(Latin: "From the part [of]. . . .") A legal proceeding is said to be *ex parte* if it occurs on the application or for the benefit of one party without NOTICE to or contest by an adverse party. In the reports such a case is entitled *"Ex parte. . ."* followed by the name of the party at whose instance the case is heard. A proceeding of which an adverse party has notice, but at which he declines to appear, is not considered *ex parte.* Writs, INJUNCTIONS, etcetera, are said to be *ex parte* when they are issued without prior notice to an affected party.

DENNIS J. MAHONEY
(1986)

## *EX PARTE . . .*

See under name of party

## EXPATRIATION

Expatriation was defined by the Supreme Court in *Perkins v. Elg* (1939) as "the voluntary renunciation or abandonment of nationality and allegiance." It refers to the loss of CITIZENSHIP as a result of voluntary action taken by a citizen, either native-born or naturalized. By expatriation, a citizen becomes an ALIEN; he divests himself of the obligations of citizenship and loses the rights connected with those obligations. In general, he can regain citizenship only by the process of NATURALIZATION.

At COMMON LAW, a person owed perpetual allegiance to the country of his birth and could not expatriate himself without the consent of that country. Initially, there was an inclination in the United States to follow this rule. In 1868, however, Congress explicitly broke with that tradition and

declared by statute that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness." Congress did so in order to establish that persons naturalized in the United States did not continue to owe allegiance to foreign governments. Congress seemed to rely on the simple mechanism of formal renunciation to determine whether a citizen actually wished to expatriate himself. Because the statute made expatriation dependent upon the voluntary action of the individual, it raised no constitutional questions about Congress's power over expatriation.

Determination of volition, however, has never been limited to formal renunciation, and through a series of nationality statutes, culminating in the Immigration and Nationality Act of 1952, Congress has identified various actions that indicate a citizen's desire voluntarily to expatriate himself. These actions include obtaining naturalization in a foreign state, taking an oath of allegiance to a foreign state, serving in a foreign army, voting in a foreign election, desertion from the armed forces, TREASON against the United States, assuming public office under the government of a foreign state for which only nationals of that state are eligible, formal renunciation of citizenship either in the United States or abroad, and leaving or remaining outside the United States during either a war or a national emergency for the purpose of evading military service.

Congress's power to declare that such actions constitute voluntary renunciation, even when the individual who so acts claims not to have intended to renounce his citizenship, was rarely challenged by the courts until the 1960s. Nationality laws were shielded from judicial scrutiny because the courts believed it was beyond their competence to examine matters so intimately related to foreign affairs. However, in the landmark decision of AFROYIM V. RUSK (1967), the Supreme Court restored citizenship to a naturalized citizen who was considered by the government to have expatriated himself by voting in an Israeli parliamentary election. The Court held that although Congress can provide a mechanism by which an individual can voluntarily expatriate himself, volition is a judicially ascertainable quality and the government bears the BURDEN OF PROOF that the citizen's renunciation was truly voluntary. Put simply, *Afroyim* made the statutory presumption of volition rebuttable rather than conclusive.

While the BURGER COURT seemed to retreat from these principles in *Rogers v. Bellei* (1971), in *Vance v. Terrazas* (1980) it reaffirmed *Afroyim* and held that the government must prove specific intent to surrender citizenship and not simply the voluntary commission of an expatriating act. At the same time, the Court upheld the rebuttable presumption that an act of expatriation is performed with the specific intention of relinquishing citizenship and held that Congress is free to prescribe as the evidentiary standard for proving this intention the "preponderance-of-the-evidence" standard of proof.

RALPH A. ROSSUM
(1986)

Bibliography

GORDON, CHARLES and ROSENFIELD, HARRY N. 1984 *Immigration Law and Procedure*, Vol. 3, chap. 20. New York: Matthew Bender.

SCHWARTZ, DAVID F. 1975 American Citizenship after *Afroyim* and *Bellei:* Continuing Controversy. *Hastings Constitutional Law Quarterly* 2:1003–1028.

## EXPOSITION AND PROTEST
(1828–1829)

JOHN C. CALHOUN drafted the *Exposition* in 1828. The next year, the legislature of South Carolina published the *Exposition* in amended form along with its own resolution of protest against the TARIFF ACT OF 1828. Like most of the great controversial documents in American politics it took the form of a discourse on the meaning of the Constitution. It argued the case for STRICT CONSTRUCTION of the powers of the federal government and spelled out the doctrine of NULLIFICATION.

Rejecting the argument that a protective tariff was justified by custom and precedent, the *Exposition* declared: "Ours is not a government of precedent. . . . The only safe rule is the Constitution itself." But even the Constitution was not a safe rule if its interpretation were left to Congress and the Supreme Court, which were its creatures. The only authoritative interpreter was the constituent body itself, the people of the states in convention.

According to the *Exposition*, if a convention in any state declared a federal law unconstitutional, the law was null and void in that state until the Constitution was amended to authorize the disputed act. Should an amendment pass the state would have no recourse but SECESSION.

DENNIS J. MAHONEY
(1986)

Bibliography

FREEHLING, WILLIAM W. 1965 *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1865.* New York: Harper & Row.

## EX POST FACTO

IN THE FEDERALIST #84 ALEXANDER HAMILTON argued that "the creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment

for things which, when they were done, were breaches of no law" has been "in all ages" one of "the favorite and most formidable instruments of tyranny." Indeed, ex post facto legislation has generally been regarded as a violation of the fundamental DUE PROCESS requirement that there must be fair warning of the conduct which gives rise to criminal penalties. The Framers of the Constitution believed so strongly that ex post facto laws were contrary to the principles of republican government that they proscribed their use in two different provisions of the Constitution: Article I, section 9, as a specific exception to the powers of the United States Congress, and Article I, section 10, as a specific prohibition on the powers of state legislatures.

Justice SAMUEL CHASE in CALDER V. BULL (1798) provided what has since come to be regarded as the authoritative delineation of the kinds of LEGISLATION that fall within the Constitution's prohibition against ex post facto enactments:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and received less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender.*

Although there is some question about the Framers' intent, the Supreme Court has consistently followed Chase's lead in restricting the ex post facto rule to criminal laws. Thus the Court has held that the deportation of ALIENS, the loss of a passport, and the denial of certain benefits do not fall within the ex post facto exception because they are not punishments in a criminal sense even though they may be "burdensome and severe." In the TEST OATH CASES (1867), however, the Court held that oaths that disqualified people from holding certain offices or practicing certain professions constituted ex post facto laws.

The essential ingredient of an ex post facto law is its retrospective character; but not all retrospective laws are ex post facto in the technical meaning of the term. An ex post facto law not only is retrospective but also injures those to whom it is directed by imposing or increasing criminal penalties. For example, *Weaver v. Graham* (1981) invalidated retroactive application to a prisoner of a law reducing "good time" credits against a sentence. Retrospective laws that ameliorate penalties, however, are not ex post facto.

The rights affected by retrospective legislation must be substantial. As the Court held in *Beazell v. Ohio* (1925), statutory changes in trial procedures or rules of EVIDENCE "which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited." Thus, the ex post facto prohibition secures "substantial personal rights against arbitrary and oppressive legislation without limiting legislative control of remedies and procedures that do not affect matters of substance." Of its own weight, the ex post facto prohibition applies only to legislative acts, and not to changes in the law effected by judicial decisions. But where an unforeseeable statutory construction by a court is applied retrospectively in a manner that is tantamount to ex post facto legislation, that construction is barred by the due process clause. Although the particular application of the ex post facto clause has generated much controversy and debate, and involves, on occasion, the most intricate and detailed considerations, there seems to be almost universal agreement that the Constitution's prohibition against ex post facto legislation remains one of the mainstays of constitutional government.

EDWARD J. ERLER
(1986)

Bibliography

FIELD, OLIVER P. 1922 Ex Post Facto in the Constitution. *Michigan Law Review* 20:315–331.

NOTE 1975 Ex Post Facto Limitations on Legislative Power. *Michigan Law Review* 73:1491–1516.

## EXTRADITION

See: Fugitive from Justice

## EXTRATERRITORIALITY

Around the turn of the century, the Supreme Court placed strict territorial limits on the application of United States constitutional and statutory law. In the case of *In re Ross* (1891) the Court held that a citizen could be tried by an American consular court, without INDICTMENT by GRAND JURY and without TRIAL BY JURY, for crimes aboard an American ship in Japan. The Court flatly declared that "[t]he Constitution can have no operation in another country." And in *American Banana Co. v. United Fruit Co.* (1909) Justice OLIVER WENDELL HOLMES asserted that "[a]ll legislation is prima facie territorial." Although he acknowledged that exceptions could be found in the case of laws applying on the high seas or in "uncivilized" countries, Holmes said "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." No doubt these sweeping statements, even then, were not literally followed. In any event, today DOCTRINES

limiting the extraterritorial application of both the Constitution and statutory law have been abandoned.

In REID V. COVERT (1956) the Court effectively overruled *Ross* and held that Congress could not deprive a citizen of the right to a jury trial in a court-martial abroad where CAPITAL PUNISHMENT was potentially involved. Justice HUGO L. BLACK said: "When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." This decision signaled the end of territorial limitations on the Constitution.

In *United States v. Toscanino* (2d Cir. 1974) a lower court applied the FOURTH and Fifth AMENDMENTS where American officials instigated enforcement activity by foreign officials that included torture and violated United States treaty obligations. Although other courts have declined to apply CONSTITUTIONAL REMEDIES in the circumstances of particular cases before them, they agree that the Bill of Rights may apply where the United States government instigates conduct that "shocks the conscience." The JUST COMPENSATION clause of the Fifth Amendment has also been held applicable to TAKINGS OF PROPERTY abroad in several lower court cases. As a general rule, therefore, the Constitution now unquestionably applies to acts of government abroad.

At the same time the special circumstances that are invariably present in these cases influence the scope of constitutional protection afforded. Although the court only occasionally confronts these questions, it seems clear that protection against government action abroad is more difficult to obtain than in similar cases without a foreign element. This is especially true when foreign policy or national security interests are at issue, as was the case in UNITED STATES V. CURTISS-WRIGHT EXPORT CORP. (1936). Indeed, in HAIG V. AGEE (1981) the Supreme Court questioned whether the FIRST AMENDMENT would apply at all to government suppression of speech abroad, where the speech threatened American intelligence activity.

Perhaps the most accurate description of the modern approach to extraterritorial application of constitutional law was made by Justice JOHN MARSHALL HARLAN in *Reid v. Covert.* He took exception to the broad suggestion that "every provision of the Constitution must be deemed automatically applicable to American citizens in every part of the world." He believed that "the question is *which* guarantees of the Constitution *should* apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it." The Harlan view seems more likely to prevail in a world of increased American involvement and interdependence than the absolutist approach of Justice Black.

A related issue of historical interest was whether the Constitution applied to TERRITORIES acquired by the United States. Constitutional guarantees limiting legislative and executive power were applicable only when Congress, expressly or by clear implication, "incorporated" the acquired territory into the United States. In unincorporated territories only undefined "fundamental" liberties were guaranteed.

Finally, the courts have repeatedly applied federal statutes to conduct abroad, assuming other jurisdictional prerequisites were met. Occasionally limitations on the application of a particular statute have been imposed, but those limitations have normally been based on the presumed intent of Congress or on international comity, not the Constitution.

PHILLIP R. TRIMBLE
(1986)

Bibliography

COUDERT, FREDERICK R. 1926 The Evolution of the Doctrine of Territorial Incorporation. *Columbia Law Review* 26:823–850; *Iowa State Bar Association Report* 1926:180–228.

HENKIN, LOUIS 1972 *Foreign Affairs and the Constitution.* Pages 266–269. Mineola, N.Y.: Foundation Press.

KAPLAN, STEVEN M. 1977 The Applicability of the Exclusionary Rule in Federal Court to Evidence Seized and Confessions Obtained in Foreign Countries. *Columbia Journal of Transnational Law* 16:495–520.

NOTE 1985 Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction. *Harvard Law Review* 98:1310–1330.

## EXTRATERRITORIALITY
(Update)

At the start of the twentieth century, both federal LEGISLATION and the U.S. Constitution were presumed to apply only within the territory of the United States. In the case of *In re Ross* (1891), the Supreme Court stated that "[t]he Constitution can have no operation in another country." And in *American Banana Company v. United Fruit Company* (1909), the Court refused to apply the SHERMAN ANTITRUST ACT extraterritorially, declaring that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." At the end of the twentieth century, however, federal statutes are frequently applied to both U.S. and foreign nationals outside the United States, although the protections of the BILL OF RIGHTS are not always afforded to foreign nationals abroad.

It is clear that Congress has constitutional authority to legislate extraterritorially, even if doing so violates INTERNATIONAL LAW (which it generally does not). The territorial

reach of a statute is therefore a question of congressional intent. The Supreme Court sometimes assumes that Congress does not intend to regulate conduct outside the United States, applying the so-called presumption against extraterritoriality. For example, in *Equal Employment Opportunity Commission v. Arabian American Oil Company* (1991), the Court held that Title VII did not prohibit EMPLOYMENT DISCRIMINATION by an American company against an American citizen abroad. Because the presumption's principal modern justification is the notion that Congress is primarily concerned with domestic conditions, it should not be applied when foreign conduct affects domestic conditions. And in *Hartford Fire Insurance v. California* (1993), the Court ignored the presumption and held that the Sherman Antitrust Act applied to anticompetitive conduct by foreign companies that caused substantial, intended effects in the United States, OVERRULING the specific holding of *American Banana*.

It is also clear that the Bill of Rights applies extraterritorially, but whether it applies to foreign nationals or only to U.S. nationals abroad depends on the theory one adopts. Under an "organic" theory, the Bill of Rights constrains the government wherever it acts. In REID V. COVERT (1957), a case involving a U.S. citizen overseas, Justice HUGO L. BLACK observed, "the United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." Under a "compact" theory, by contrast, the Constitution is viewed as a compact between the American people and their government that does not limit the government's treatment of foreign nationals.

In *United States v. Verdugo-Urquídez* (1990), the Court adopted a compact theory for the FOURTH AMENDMENT prohibition against unreasonable SEARCHES AND SEIZURES. The Court held that the Fourth Amendment did not apply to U.S. Drug Enforcement Administration agents searching the residences of a Mexican national in Mexico. *Verdugo-Urquídez* reasoned that because the text of the Fourth Amendment referred to the right of "the people" to be free from UNREASONABLE SEARCHES and seizures, it applied only to U.S. citizens and to others who had established substantial, voluntary connections with the United States. Such reasoning implies, however, that other provisions of the Bill of Rights, like the FIRST AMENDMENT guarantee of FREEDOM OF SPEECH, the DUE PROCESS clause, and even the TAKINGS clause, which are not limited to "the people," may apply extraterritorially to U.S. and foreign nationals alike.

The due process clause may have particular relevance for the extraterritorial application of federal statutes. One interesting question is whether the extraterritorial application of U.S. law requires "significant contacts" such that its application is "neither arbitrary nor fundamentally unfair," as *Allstate Insurance v. Hague* (1981) required in the domestic, conflict-of-laws context. Another is whether Congress may constitutionally impose liability for conduct that is compelled by foreign law. The Court noted in *Societé Internationale v. Rogers* (1958) that dismissing the complaint of a party who could not comply with DISCOVERY orders because of Swiss bank secrecy laws would raise "serious constitutional questions" under the due process clause.

WILLIAM S. DODGE
(2000)

Bibliography

BORN, GARY B. 1992 A Reappraisal of the Extraterritorial Reach of U.S. Law. *Law and Policy in International Business* 24:1–100.

BRILMAYER, LEA and NORCHI, CHARLES 1992 Federal Extraterritoriality and Fifth Amendment Due Process. *Harvard Law Review* 105:1217–1263.

DODGE, WILLIAM S. 1998 Understanding the Presumption Against Extraterritoriality. *Berkeley Journal of International Law* 16:85–125.

KRAMER, LARRY 1991 Vestiges of Beale: Extraterritorial Application of American Law. *Supreme Court Review* 1991:179–224.

NEUMAN, GERALD L. 1991 Whose Constitution? *Yale Law Journal* 100:909–991.

## EXTREMIST SPEECH

Extremist speech is generously protected under the FIRST AMENDMENT to the Constitution as interpreted by the Supreme Court in this century. What speech should be classified as "extremist" is, of course, a difficult matter, one that will vary from culture to culture. In some countries advocating FREEDOM OF SPEECH may itself be "extremist." But in the United States the label of extremist speech is reserved for speech that advocates violent overthrow of the government, the commission of serious crimes (such as assassination), racism, and anti-Semitism or discrimination against other minorities or groups. And, in this country, it has been decided that this speech will receive constitutional protection.

Probably the most widely known contemporary instance of the protection of extremist speech arose in the late 1970s when a small group of neo-Nazis from Chicago announced their intention of conducting a march in the Chicago suburb of Skokie, home to some 40,000 Jews and several thousand survivors of WORLD WAR II German concentration camps. The city resisted, enacting a number of ordinances prohibiting, among other things, speech known as group libel, that is, speech that would "portray criminality, depravity or lack of virtue in, or incite vio-

lence, hatred, abuse or hostility toward a person or a group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation." The AMERICAN CIVIL LIBERTIES UNION, on behalf of the neo-Nazi group, challenged the city's interference with the proposed march as unconstitutional under the First Amendment. The Courts sustained the challenge. Both the Illinois Supreme Court and the U.S. Court of Appeals for the Seventh Circuit, in two separate cases, held that under modern Supreme Court precedents it was beyond doubt that even this most offensive speech was constitutionally protected, absent a showing that the speech was about to turn into illegal conduct.

In fact, cases involving extremist speech constitute the backbone of the First Amendment jurisprudence. This is true, in part, because the very first cases involving free speech issues to come before the Supreme Court (which did not occur until 1919) involved extremist speech. The Supreme Court, therefore, began the process of developing modern First Amendment jurisprudence in contexts where the issue at hand was to define the outer boundaries of the principle of free speech. Many cases followed over the next seventy years, of which the Skokie case was one.

As a result of these cases, much judicial and academic ink has been spent on deciding what should be the test for establishing the limits of the First Amendment. Various formulations have been devised. It has been said that First Amendment protection ends when there is a CLEAR AND PRESENT DANGER to the society (the test OLIVER WENDELL HOLMES initially proposed in 1919); when speech explicitly advocates illegal action (the test proposed by Judge LEARNED HAND in 1918); when speech will in the due course of events threaten the overthrow of government (which was approximately the test the Court followed during the nadir of First Amendment protection in the era of MCCARTHYISM); or when speech threatens imminent serious illegal behavior and is directly intended to incite such action (the prevailing test today).

Cases involving extremist speech have been so important to the development of First Amendment jurisprudence because they have raised independent, or separate, theoretical issues about the role and meaning of the modern idea of freedom of speech. Two major issues should be noted.

First, drawing the boundaries of freedom of speech involves more than just knowing what the basic purposes of the First Amendment are. Because we live in an imperfect world, rules of law, including constitutional law, must prepare for tears and snags of a practical world. Language is rarely precise enough to foreclose mistaken applications of the rules we devise. Institutions must be relied upon to apply the rules, and the quality of institutional decisions will be dependent on the quality of the people who compose them. Thus, the extremist speech cases have posed a second issue: To what extent must *unworthy* speech be protected in order to insure that truly *worthy* speech—speech that advances the purposes of the First Amendment—will in fact be preserved? The difficulties of drawing that line, to achieve in a practical world the right level of free speech, are immense. One must consider to what extent legislative institutions will themselves be sensitive to freedom of speech, the degree to which citizens will be deterred from speaking by the perceived possibility of hostile government action, and the courage of judges to stand up to improper legislative attempts to interfere with valuable speech. Therefore, drawing the outer line at which constitutional protection stops generates its own important and fascinating issues, beyond the issue of deciding what purposes or values underlie the First Amendment. As a general proposition it may be said that modern First Amendment protection uses extremist speech to give "breathing space" to the right of freedom of speech.

But there is an even more important reason why extremist speech cases have commanded such attention over the past seventy years. It may well be the case that extremist speech protection furthers a *distinctive* First Amendment value, separate from its function of affording ample leeway to valuable speech. The classic rationales for free speech see the relationship between free speech and the discovery of truth and a democratic system of government. These have been forcefully articulated in cases involving extremist speech. But there is another potential First Amendment meaning, or value, at stake in these cases involving speech deeply threatening to basic values of American society. Extremist speech is often bad, as socially harmful as other bad acts that are regularly subject to social regulation. That means that free speech may be a special context in which the society chooses to let bad acts go unregulated as a symbolic act of self-recognition of the difficulties of dealing appropriately with bad acts—as, for example, by being too intolerant in the ordinary political process or by reacting with excessive harshness when bad acts are punished. This rationale of free speech focuses on the relationship between that principle and the general virtue of tolerance. It may well be, in other words, that the centrality of the extremist speech cases in the First Amendment jurisprudence arises out of the fact that they have added a new and significant, and distinctively American, role to the idea of freedom of speech.

LEE C. BOLLINGER
(1992)

Bibliography

BAKER, C. EDWIN 1989 *Human Liberty and Freedom of Speech.* New York: Oxford University Press.

BOLLINGER, LEE C. 1986 *The Tolerant Society: Freedom of*

*Speech and Extremist Speech in America.* New York: Oxford University Press.

## EYEWITNESS IDENTIFICATION

Eyewitness identification can be powerful EVIDENCE in a criminal prosecution. Yet an identification can easily be wrong, whether made soon after the crime or in court. Because identifications can have a potentially devastating impact and are of questionable reliability, courts are especially concerned with them. Triers of fact typically assume that an eyewitness to a crime can accurately discern and remember the physical characteristics of the perpetrator. However, extensive research proves that powers of observation and recall are quite deficient.

The legal system cannot fully rectify problems with identification; it cannot affect a witness's perceptual and recall capabilities. However, the law can try to control any conscious or unconscious attempt by the police or prosecution to supply what perception and memory cannot.

Although the courts have never directly supervised the use of identification techniques, the Supreme Court has tried to minimize mistaken identification by requiring that procedures most likely to produce inaccurate results comport with certain constitutional requirements. Both the Sixth Amendment RIGHT TO COUNSEL and the DUE PROCESS clauses of the Fifth Amendment and FOURTEENTH AMENDMENT provide defendants with substantive bases for questioning identifications.

In UNITED STATES V. WADE (1967) the defendant participated in a postindictment LINEUP conducted without notice and in the absence of his counsel. The Supreme Court held that the Sixth Amendment required invalidation of the defendant's subsequent conviction because a postindictment lineup was a "critical stage," when substantial prejudice to defendant's rights could result and counsel could help to avoid the prejudice.

However, the Supreme Court held in KIRBY V. ILLINOIS (1972) that the right to counsel does not extend to pretrial identification procedures employed before adversarial judicial proceedings are initiated. In *Kirby* the defendant was arrested and later identified in a police station confrontation at which the defendant was not advised of his right to counsel and his attorney was not present. The Court clarified the "initiation of adversarial proceedings" in *Moore v. Illinois* (1977), where the defendant was identified by a victim during a preliminary hearing where his counsel was not present. In *Moore* the Court held that adversarial proceedings had begun at the preliminary hearing, rather than only after the indictment.

In UNITED STATES V. ASH (1973) a witness observed a photographic array prior to trial, and defendant's counsel was not present. The Court held that there is no right to counsel at such displays and that right to counsel is limited to "trial-like confrontations." In a photographic display, the defendant is not present and does not confront the prosecutor or the adversarial system.

The Supreme Court held in *Stovall v. Denno* (1967) that the guarantee of due process of law protects an accused from identification procedures that are "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny a defendant due process of law. In *Stovall* the Court held that a one-to-one emergency confrontation between the accused and an injured witness in a hospital room did not violate due process because it was not unnecessarily suggestive and was not substantially likely to lead to misidentification.

The due process questions of suggestibility returned to the Court in the following years. In *Simmons v. United States* (1968) the felons who had robbed a bank were still at large. The police showed six snapshots to witnesses, who identified the defendants from the photos. Guidelines of the International Association of Chiefs of Police require a photographic array to include eight photographs. However, in this case, the Court found that the compelling need for identification of the robbers justified the suggestive procedure as long as there was little danger of misidentification and rejected the defendants' due process claim. Then in *Neil v. Biggers* (1972) the Court emphasized reliability over suggestibility in analyzing a due process claim. In *Neil* the Court accepted the reliability of a station-house show-up at which the defendant was identified in an accidental encounter at a water fountain seven months after the crime. The Court denied the defendant's due process claim.

In *Manson v. Brathwaite* (1977) the Court reaffirmed that the reliability of an identification is the "linchpin" of due process analysis. In *Manson* an undercover police officer purchased heroin from a seller while standing near him in a well-lit hallway for two or three minutes. A few minutes later the undercover officer described the seller to another officer, who gave the undercover officer a picture of the defendant. Two days later, the undercover officer identified the picture as a photograph of the person from whom he had bought heroin. The *Manson* Court held that a single photographic display of an accused did not create a substantial likelihood of irreparable misidentification, for it was done by a trained police officer. To prevail on a due process claim, then, a defendant must prove both unnecessary suggestiveness and substantial likelihood of misidentification.

The remedy for violation of either the Sixth Amendment right to counsel or the due process standards is exclusion of the pretrial evidence and of any in-court identification derived from the tainted pretrial identifica-

tion. To limit the application of this severe remedy, the Supreme Court has developed the "independent source" test, by which an in-court identification is admissible if it derives from a source independent of the tainted identification. A source is independent if there has been prior opportunity to observe the criminal act, an easy identification, and no past misidentification. However, in *Moore* the Court held that criminal prosecution may begin as early as the initial appearance, at least for the purpose of determining the right to counsel.

At a suppression hearing, usually held prior to trial, the court determines admissibility of pretrial identification evidence. Generally, the prosecution bears the burden of establishing the presence of counsel or intelligent waiver by the accused or of showing that an in-court identification derives from a source independent of tainted pretrial identification. The burden of proving a violation of due process, however, is on the defendant. In some jurisdictions, if the defendant can show that an identification process was unnecessarily suggestive, then the burden shifts to the government to show the justification of exigent circumstances.

Admissibility and credibility are separate questions. Identification evidence found admissible, usually by the judge, is not necessarily credible. The jury decides whether it believes that the witness has made an accurate identification.

Properly conducted lineups are least likely to result in misidentification. A court has the authority to order an accused to participate in a lineup. A court may, in its discretion, order a lineup at the request of the defendant, but the defendant has no constitutional right to a lineup either before trial or in the courtroom during trial. A court may also allow the defendant to sit in the audience. Sound litigation tactics require counsel for the defendant to observe the lineup procedure for reliability but not participate or use the lineup for DISCOVERY.

CHARLES H. WHITEBREAD
(1992)

(SEE ALSO: *Procedural Due Process of Law, Criminal.*)

Bibliography

BUCKOUT, ROBERT 1980 Nearly 2,000 Witnesses Can Be Wrong. *Bulletin of the Psychonomic Society* 16:307–310.

WHITEBREAD, CHARLES H. 1986 *Criminal Procedure*. Mineola, N.Y.: Foundation Press.

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## FAIR COMMENT

See: Libel and the First Amendment

## FAIR HEARING

In numerous contexts the Constitution requires the state to afford its citizens DUE PROCESS, which frequently includes an adversarial voicing of opposed contentions. "Fair hearing" in this broadest sense could thus include both the specific constitutional guarantees that attach to criminal trials and the more general requirement that civil litigation meet minimal standards of fairness. Among lawyers, however, the term more narrowly refers to the procedure that must be afforded to persons involved not in judicial trials but in some less formal dispute with the state. Speaking to that issue, the Supreme Court has asked when the Constitution requires any process and what that process should be. For some time the Court focused on the first question, assuming that if any process was due, it would resemble a formal trial; later decisions emphasized the flexibility of appropriate process.

For due process requirements to attach to any proceedings, they must, by involving governmental action that threatens life, liberty, or property, fall within the requirements of the Fifth and FOURTEENTH AMENDMENTS. Following in the wake of the welfare state, the Court has expanded its definition of property to include entitlements to various government benefits (for example, welfare and disability payments, tenured positions in state employment). Many threatened deprivations of such benefits consequently require due process, and the question becomes what that process must be. The Court has never answered that question in categorical terms, insisting that each situation calls for a rather individualized judgment. It has, however, suggested some minimal criteria and a set of factors to be considered in striking the balance from case to case. In deciding what process is due, one must consider "first, the private interest . . . affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail" (MATHEWS V. ELDRIDGE, 1976). These factors represent an attempt to arrive at conclusions about two aspects of process: timing and elaborateness.

At a minimum, due process requires notice that tells the person threatened with deprivation the reason for the action and how he can challenge its factual and legal bases. Usually notice and such an opportunity must precede the deprivation, but even this proposition is not invariable; thus in a case of a threat to public health or other emergency situation, a seizure could occur first and notice and hearing afterward.

More difficult than the question of the timing of the required process is its nature. Because the Court has been unable to articulate guidelines applicable to all situations, it defines appropriate processes on a case-by-case basis. Consequently one can fully understand the requirements of due process only by sampling a large number of cases. It is, however, possible to suggest some rough guidelines and some distinctions. The first might be the line between situations requiring formal adjudicatory hearings, as for

the termination of WELFARE BENEFITS in GOLDBERG V. KELLY (1970), and those that do not: the more serious the deprivation, the more likely the Court is to require a trial-type hearing. Even when such a hearing is not required, one can further differentiate situations according to the formality of the process required: the state must provide a written statement of reasons for ending disability benefits and give the recipient a chance to respond (*Mathews v. Eldridge*), but a school official need engage only in a brief oral conversation before suspending a student, as in GOSS V. LOPEZ (1975). Indeed, the Court has approved procedures that are not even adversarial in the normal sense, for example, an expulsion proceeding in which a medical student has an opportunity to demonstrate her medical skills to several local doctors over several days. (See BOARD OF CURATORS V. HOROWITZ.)

The consequence of such flexibility is that a constitutionally "fair hearing" need not entail a hearing at all, and even if it does that hearing may occupy various points along a continuum of adjudicatory formality. Such flexibility results from the Court's attempts, once it has concluded that due process attaches, to tailor the process to the situation at hand, taking some account of the stakes for the adversaries and of the goals of process. Some commentators have criticized the Court for the narrowness of its focus, arguing that the goals of process include the dignity of the participants as well as the accuracy of the result; the Court has seemed unpersuaded of this point.

The constitutional focus on fair hearings in administrative law has drawn attention to a number of areas presenting similar profiles—to which, however, due process does not apply, either because the institutions involved are private or because life, liberty, or property is not threatened. Nevertheless, under the influence of the constitutional cases many institutions (such as private schools or trade associations) have adopted processes that resemble those that might be required if due process did apply. Some of these procedures have resulted from legislation or regulation and an occasional judicial decision using COMMON LAW; others have come voluntarily. In either case the consequence has been a softening of the lines between the practices of public and private institutions; there is thus a sense in which one can speak of a fair hearing as a practice (though not a constitutional requirement) of many areas of institutional life.

If fairness does not always require a hearing, it is nevertheless true that the constitutional ideal described by the term has permeated many areas of life where neither fairness nor a hearing is constitutionally required. The result, in a society of large institutions and sometimes uncertain responsibility for decisions, has been a requirement taking many forms but having at its basis the idea that persons about to be adversely affected have the right to know why and to respond.

STEPHEN C. YEAZELL
(1986)

Bibliography

FRIENDLY, HENRY 1975 Some Kind of Hearing. *University of Pennsylvania Law Review* 123:1267–1317.

MASHAW, JERRY L. 1976 The Supreme Court's Due Process Calculus for Administrative Adjudication in *Mathews v. Eldridge:* Three Factors in Search of a Theory of Value. *University of Chicago Law Review* 44:28–59.

VERKUIL, PAUL 1975 The Ombudsman and the Limits of the Adversary System. *Columbia Law Review* 75:845–861.

## FAIR HOUSING LAWS

See: Open Housing Laws

## FAIR LABOR STANDARDS ACT
52 Stat. 1060 (1938)

The Fair Labor Standards Act (FLSA), usually called the federal wage and hour law, was adopted in 1938. For all covered employees the act required the payment of a minimum wage (initially 25 cents an hour) and time and one-half for all hours worked over forty a week. Child labor was forbidden under certain circumstances. The act prohibited the shipment in INTERSTATE COMMERCE of goods produced under substandard conditions. There were numerous and complicated exemptions.

The constitutionality of the act under the COMMERCE CLAUSE was sustained by the Supreme Court in UNITED STATES V. DARBY LUMBER CO. (1940). Since then the act has been amended many times, principally to increase periodically the minimum wage, which reached $3.35 an hour in 1981, to expand coverage, and to provide more effective enforcement.

The act originally covered employees engaged in commerce or in the PRODUCTION of goods for commerce. Production was defined to include activities necessary to the actual production.

Coverage based on engagement in commerce includes employees engaged in the actual movement of commerce, such as transportation, shipping, and communications. It also includes employees whose work involves the distribution or receipt of goods across state lines. The Supreme Court upheld application of the act to employees who did construction or repair work on interstate instrumentalities and even to employees who prepared plans and specifications for the construction or repair of interstate instrumentalities.

Under the extended production definition, many fringe activities were found necessary to production. Thus, the Court upheld application to employees of an office building occupied by a corporation which at other locations produced goods for commerce and to employees of an independent contractor washing windows in industrial plants that produced goods for commerce.

These decisions, although they involved statutory construction, demonstrated the enormous scope of the commerce power even under coverage formulas less extensive than that used to describe the constitutional maximum, "affecting" commerce. The breadth of the Court's holdings led Congress in 1949 to amend the statute to confine the extended production definition to activities "closely related" and "directly essential" to production.

The reduced coverage effectuated by this change was largely nullified, however, by a 1961 amendment providing for "enterprise" coverage. Before 1961 coverage was determined for each employee; thus, some employees of an employer could be covered while others were not. "Enterprise" coverage extended to all an employer's employees, if at least two employees were covered individually and the enterprise did a requisite annual dollar volume of business. The constitutionality of "enterprise" coverage was upheld by the Court in *Maryland v. Wirtz* (1967).

Other aspects of the act have also received expansive interpretation. Thus, the term "employee" has been defined in accordance with "economic reality" rather than COMMON LAW rules, and applied to persons who in other contexts would be independent contractors. These cases illustrate the peculiar American phenomenon of defining "employee" differently under various statutes, so that an employee may be covered under one statute and not under another.

What constitutes compensable work time has presented a special problem under the FLSA. In *Armour & Co. v. Wantoch* (1944), involving firefighters, the Court held that inactive waiting time was compensable work time. Time spent in travel between the mine entrance and the underground cutting face was held compensable in *Tennessee Coal, Inc. & Railroad v. Muscoda Local* (1944). Finally, in *Anderson v. Mt. Clemens Pottery Co.* (1946), the Court required payment for time spent by employees walking between the factory gate and their work place. Many lawsuits were promptly filed claiming billions of dollars in back wages. Congress responsed by enacting the Portal-to-Portal Act of 1947, which distinguished between an employee's compensable principal activity and noncompensable preliminary and after-working activities. Employers were thus absolved in most cases from liability under the *Mt. Clemens Pottery* decision. The Court held, however, that time spent changing clothes, when necessitated by the nature of the work, is a principal activity and thus compensable.

The FLSA applies on a work week basis. Overtime is required for hours in excess of forty a week. The required time and one-half premium is applied to the employee's "regular rate of pay" which is determined by dividing the total weekly compensation (including straight wages plus all fringe benefits) by the number of hours worked. Because employee pay plans are of great variety, determination of the regular rate of pay frequently is a difficult problem.

Among the principal exemptions from the FLSA are executive, administrative, and professional employees (which terms have special definitions), employees of small retail or service establishments, and some employees engaged in agriculture. Special provision is made for learners, apprentices, students, and the handicapped.

The act is enforced by individual employee suits for back wages, or suits by the secretary of labor seeking an INJUNCTION as well as back wages. Individual suits are preempted by suits by the secretary. Liquidated DAMAGES are authorized. TRIAL BY JURY is available in employee suits, but generally is denied in combined injunction-back-wage suits by the secretary. The FLSA is unique in labor legislation in providing criminal prosecution for willful violators. Such actions are handled by the Justice Department, but have not been a major aspect of the statute's enforcement.

Originally the FLSA applied only to private employment. In 1966 it was extended to employees of state hospitals and schools; this extension was sustained in *Maryland v. Wirtz* (1967). In 1974 Congress extended the FLSA to almost all state and local government employees. In NATIONAL LEAGUE OF CITIES V. USERY (1976) the Court held that the TENTH AMENDMENT protected state sovereign functions against commerce power regulation and overruled *Maryland v. Wirtz*. *Usery* in turn was overruled by GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985). Congress responded the same year with legislation authorizing states and cities to reimburse employees for overtime with compensatory time off in lieu of cash payment.

In 1938 the principal purpose of the FLSA was to combat the Depression by increasing the purchasing power in the hands of the lowest-paid workers. Thus, it has been called the original antipoverty law. Fifty years later, the wisdom of the act and its effect on the economy are still debated, but the FLSA survives as a permanent and major piece of American labor legislation.

WILLIAM P. MURPHY
(1986)

Bibliography

PLAYER, MACK 1975 Enterprise Coverage under the Fair Labor Standards Act: An Assessment of the First Generation. *Vanderbilt Law Review* 28:283–347.

WILLIS, ROBERT N. 1972 The Evolution of the Fair Labor Standards Act. *University of Miami Law Review* 26:607–634.

## FAIRNESS DOCTRINE

Born out of a progression of decisions by the Federal Communications Commission (FCC) and then codified by Congress in 1959, the fairness DOCTRINE requires a BROADCASTING license holder "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." Although the doctrine was upheld against a FIRST AMENDMENT challenge in RED LION BROADCASTING COMPANY V. FCC (1969), it has been perceived increasingly as an intrusive exception to the First Amendment, with diminishing justification.

The doctrine, applicable to radio and television licensees and to some cable operators, requires a licensee that presents a controversial issue to provide a reasonable amount of time for contrasting viewpoints. A less frequently litigated aspect of the doctrine requires affirmative coverage of issues important to the public. Finally, the doctrine assures persons who are disparaged on the airwaves a limited right to respond.

The doctrine reflects a distinction in the way Congress and the courts have conceived of newspapers, on the one hand, and broadcasters on the other. Thus, in MIAMI HERALD V. TORNILLO (1974) the Supreme Court held unconstitutional on First Amendment grounds a Florida statute that required a newspaper to grant a right of reply to persons attacked in its columns. The Court did not distinguish *Red Lion* but ignored it.

Recently a campaign to narrow, if not eliminate, the fairness doctrine has gained momentum. When the fairness doctrine was in full sway, its justification was a supposed scarcity of the channels available for transmission of broadcast signals. Those who wished to communicate by the printed word were not curtailed by government action or the rationing of resources. On the other hand, the number of channels for radio and television transmission was demonstrably limited. Cable television and other new technologies have undermined the "scarcity" justification for regulation by providing abundant new channels.

Some have argued that the spectrum of broadcasting channels is a public resource, and thus that the federal government can insist that a private user of that resource give voice to many speakers. In another perspective, emphasis on the right of the licensee to be an unencumbered editor is misplaced. Expressing this view, in *Red Lion*, the Court said that "it is the right of the viewers and listeners, not the right of broadcasters, which is paramount." (See LISTENERS' RIGHTS.)

Recent commentary has proposed quite a different solution to the "fairness" issue: setting aside segments of broadcast time, or even whole channels, for public access. Owners of broadcasting stations would have no editorial control over these "soapboxes of the air." Broadcasters generally consider the fairness doctrine a badge of second-class citizenship in the ranks of the press. The FCC, in the early 1980s, confined the fairness doctrine's scope and considered its repeal. As an interim measure the FCC announced that asserted violations would not be adjudicated individually, but would be considered when a broadcaster sought renewal of a license. Still, despite these limits, the doctrine continues to influence the culture of television. Producers of national and local television news programs take great care to present at least two sides of important controversial issues.

MONROE E. PRICE
(1986)

Bibliography

BOLLINGER, LEE 1976 Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media. *University of Michigan Law Review* 75:1–42.

## FAIRNESS DOCTRINE
### (Historical Development and Update)

From its establishment in 1934 the Federal Communications Commission (FCC) discouraged broadcast station owners from airing biased presentations of controversial issues. In 1939 the National Association of Broadcasters (NAB) echoed the FCC's fair treatment approach. Responding at least in part to Father Charles Coughlin's controversial anti-Semitic broadcasts, NAB adopted a voluntary code that discouraged stations from editorializing and encouraged balanced treatment of controversial issues. In 1940 the FCC applied these principles in its *Mayflower* decision, which banned on-air editorializing by station owners involved in BROADCASTING. Although the FCC's no-editorializing policy was never challenged in the courts, scholars have long criticized it as a clear violation of broadcasters' FIRST AMENDMENT rights.

In 1946 the FCC promulgated "The Blue Book," in which it suggested that broadcasters had an affirmative duty to cover subjects of a controversial nature. At this point NAB lobbied the FCC to overturn its *Mayflower* decision and to recognize a broadcasters' right to editorialize. In 1949 the FCC agreed to permit editorializing,

but continued its commitment to fair treatment of controversial issues in its "Report on Editorializing," which included what came to be known as the "fairness doctrine." The doctrine required broadcasters to cover controversial issues of public importance and provide a reasonable opportunity for the presentation of opposing viewpoints on these issues. Broadcasters preferred blanket permission to editorialize and complained about the fairness doctrine on FREEDOM OF SPEECH grounds. However, the FCC enforced fairness doctrine violations only at license renewal time and even then was extremely reluctant to deny renewal on that basis. The lack of official enforcement of the doctrine left it constitutionally unchallenged until the 1960s.

In the 1960s the FCC increased its enforcement of the fairness doctrine, and it developed further the principle that fairness required broadcasters to offer response time to persons personally attacked by commentators. When the FCC ordered a station to provide response time for such an attack, the station brought a First Amendment challenge in RED LION BROADCASTING CO., INC. V. FCC (1969). The Supreme Court upheld the fairness doctrine as justified by the governmental interest in allocating and regulating the broadcast spectrum as a scarce resource. The constitutional significance of *Red Lion* is the lower degree of scrutiny given to laws burdening the First Amendment rights of broadcasters.

Since *Red Lion*, however, judges, scholars, and policymakers have expressed increasingly shrill opposition to the scarcity rationale for government regulation of broadcasting, with commentators arguing either that the rationale was never sound or that technological change has rendered it no longer sound. Heeding these calls, a deregulatory FCC abolished the fairness doctrine in 1987. It found that the doctrine was inconsistent with the FCC's mission to regulate broadcasting in the public interest, and that the doctrine had a CHILLING EFFECT on speech in violation of the First Amendment. The U.S. Court of Appeals for the District of Columbia Circuit reviewed this decision in *Syracuse Peace Council v. FCC* (1989), but it did not reach the First Amendment question, holding that the FCC had acted within its discretion when abolishing the doctrine, which was not required by statute.

The Supreme Court declined to review *Syracuse Peace Council*, and the Court has avoided revisiting *Red Lion*. Nonetheless, the Court has expressed skepticism about the continuing vitality of the scarcity rationale as applied to broadcasting. In addition, the Court has chosen not to extend *Red Lion* to new media. In TURNER BROADCASTING SYSTEM, INC. V. FCC (1994), the Court applied heightened scrutiny to regulations of the cable industry, and in *Reno v. ACLU* (1997), the Court declined to apply *Red Lion* to regulation of the INTERNET. Scholars seeking to justify new media regulation have frequently turned from the scarcity rationale to other regulatory rationales, such as intrusiveness in the home and the need to protect children from violence.

In the late 1980s Congress tried twice to enact the fairness doctrine into law, but opposition from Presidents RONALD REAGAN and GEORGE H. W. BUSH on First Amendment grounds thwarted these efforts. A Republican Congress is unlikely to seek reenactment of the fairness doctrine, but a Democratic Congress with a Democratic President could conceivably revive it. The doctrine's demise appears to have encouraged the development of talk radio, which some scholars interpret as evidence that the doctrine did in fact chill speech.

Today the fairness doctrine is but a legacy that lives on in the Supreme Court's *Red Lion* PRECEDENT, which itself reflects an earlier era of First Amendment jurisprudence rather than current scholarly thinking on the subject.

AMY L. TORO
(2000)

Bibliography

BARRON, JEROME A. 1989 What Does the Fairness Doctrine Controversy Really Mean? *Hastings Communications/Entertainment Law Journal* 12:205–44.

HAZLETT, THOMAS W. and SOSA, DAVID W. 1997 Was the Fairness Doctrine a "Chilling Effect"?: Evidence from the Postderegulation Radio Market. *Journal of Legal Studies* 26:279–301.

KRATTENMAKER, THOMAS G. and POWE, L. A., JR. 1985 The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream. *Duke Law Journal* 1985:151–176.

ROWAN, FRED 1984 *Broadcast Fairness, Doctrine, Practice and Prospects.* New York: Longman.

SIMMONS, STEVEN J. 1978 *The Fairness Doctrine and the Media.* Berkeley: University of California Press.

## FAIR RETURN ON FAIR VALUE

The DOCTRINE of a fair return on a fair value, which the Supreme Court propounded in SMYTH V. AMES (1898), provided that any government regulation of rate schedules charged by railroads or utilities must allow a reasonable profit or fair rate of return based on a fair valuation of the property. The principal considerations were the original cost of the property, and the cost of reproducing it at the time of the rate regulation. Having entered the business of supervising the details of ratemaking, the Court remained in that business until 1944.

The Court first provided the basis for the doctrine by equating rate regulation with EMINENT DOMAIN: just compensation must accompany a TAKING OF PROPERTY, and to the Court a rate regulation was comparable to a taking. In

CHICAGO, MILWAUKEE, AND ST. PAUL RAILWAY COMPANY V. MINNESOTA (1890) the Court declared that the failure to allow a company to charge reasonable rates for the use of its property constituted an unconstitutional taking of property or a violation of SUBSTANTIVE DUE PROCESS OF LAW comparable to a taking. In REAGAN V. FARMERS' LOAN AND TRUST COMPANY (1894) the Court voided rates because they were fixed so low that they virtually took property without compensation. (See GRANGER CASES.) In *Smyth v. Ames* the Court, in a unanimous opinion by Justice JOHN M. HARLAN, proclaimed that a company was entitled to receive a reasonable profit based on the rates it could charge and that a reasonable rate must be determined by the fair value of the property. To ascertain that value, Harlan declared that among the matters to be considered "and given such weight as may be just and right in each case" are the following: "the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses. . . ."

Prior to WORLD WAR I, the Court usually relied on original costs in determining whether a particular rate schedule yielded a fair return. The Court switched to reproduction costs after the war, when prices and costs rose, thereby challenging more rates. *Smyth*'s vague and flexible standards allowed the Court to act as it wished, without restraints. In UNITED RAILWAYS & ELECTRIC COMPANY V. WEST (1930), for example, the Court voided rates allowing a profit of 6.26 percent on the ground that anything less than 7.5 percent was "confiscatory."

Fair value governed fair return standards against the opposition of Justices LOUIS D. BRANDEIS and OLIVER WENDELL HOLMES, who attacked the doctrine as legally and economically unsound. In 1939, Justices FELIX FRANKFURTER and HUGO L. BLACK called for the rejection of the doctrine, and in 1942 the Court indicated that the determination of property value, although useful, was not indispensable. Finally, in FEDERAL POWER COMMISSION V. HOPE NATURAL GAS (1944), the Court rejected the fair value doctrine. Thereafter the Court permitted government ratemaking bodies to fix rates without judicial interference, on condition that the ratemaking process respected PROCEDURAL DUE PROCESS.

LEONARD W. LEVY
(1986)

Bibliography

HALE, ROBERT L. 1952 *Freedom through Law.* New York: Columbia University Press.

# FAIR TRIAL

The requirement of a fair trial in criminal proceedings has its constitutional source in the due process clause of the Fifth and FOURTEENTH AMENDMENTS, which declares that no person shall be deprived of "life, liberty, or property, without DUE PROCESS OF LAW." Other provisions of the BILL OF RIGHTS deal explicitly with particular aspects of a criminal trial. Historically, the coverage of those provisions has tended to expand, narrowing the application of the more general provision. The "incorporation" of provisions of the Fifth and SIXTH AMENDMENTS into the due process clause of the Fourteenth Amendment is especially noteworthy in this respect, having had the effect of eliminating the need for fair-trial analysis of issues in state cases covered by those provisions. While important elements of a fair trial are thus treated individually, the requirements can be summarized generally as a hearing before a competent, impartial tribunal, at which the prosecutor does not present the government's case inaccurately or unfairly and the defendant has an opportunity to present his case fully and effectively.

Ordinarily, any judge of a court having JURISDICTION is presumed to be competent to hear a criminal case. However, a judge is presumed not to be impartial if he has a substantial personal interest in a verdict against the defendant. The requirement of a fair trial prohibits a judge from sitting in that circumstance. In *Tumey v. Ohio* (1927) the Supreme Court held invalid a local practice assigning the mayor of a village as judge in criminal cases, because the compensation for his judicial services and other income for the village accrued only if the defendant were convicted and a fine imposed. In *In re Murchison* (1955) the Court overturned convictions for criminal contempt following a trial before the same judge who was the defendants' accuser and the principal witness against them.

The Sixth Amendment gives a criminal defendant the right to be tried by an "impartial jury." That provision, which applies to federal and state trials, entitles the defendant to a jury selected from a representative cross-section of the community, without inclusions or exclusions because of sex, nationality, race, or other impermissible classifications. (See JURY DISCRIMINATION.) The jury finally chosen need not have any particular composition or be representative of the community as a whole.

The defendant must have a reasonable opportunity to uncover bias or prejudice of an individual juror. This is afforded by VOIR DIRE, the examination of prospective jurors. The trial judge or the prosecutor and defense counsel question the members of the jury panel to reveal any basis for disqualification in the particular case. The trial judge has broad discretion to direct the conduct and scope of the examination, provided it is adequate to ensure the ju-

rors' impartiality. Counsel for either side may challenge a juror "for cause" if there is a basis for disqualification and then exercise a limited number of "peremptory" challenges without explanation. In an effort to secure an impartial jury, the prosecutor may, under the DOCTRINE of SWAIN V. ALABAMA (1965), exercise peremptory challenges on the basis of group factors such as race or nationality.

However fair the formal means for ensuring an impartial tribunal, a trial conducted in an atmosphere of mob violence or insistent public pressure for conviction does not meet the constitutional standard. (See MOORE V. DEMPSEY.)

The Sixth Amendment gives a criminal defendant the RIGHT TO BE INFORMED OF THE ACCUSATION. This right, which is essential to a fair trial, requires that the statement of the offense charged identify the criminal conduct and the circumstances of the alleged crime precisely enough for the defendant to prepare his defense.

Although the constitutional guarantee of a fair trial does not ordinarily entitle the defendant to PRETRIAL DISCLOSURE of the EVIDENCE against him, all jurisdictions allow limited pretrial DISCOVERY of evidence and some allow rather full discovery subject only to special exceptions. Whenever evidence against the accused is disclosed, the defendant is entitled to enough time to prepare to meet it; if evidence is not disclosed before trial, the defendant may be entitled to a continuance. Furthermore, as the Court held in *Wardius v. Oregon* (1973), the defendant cannot be obliged to disclose evidence before trial unless the prosecution has a reciprocal obligation; fundamental fairness requires that discovery be "a two-way street."

Most of the evidentiary requirements of a fair trial are now subsumed under the CONFRONTATION and COMPULSORY PROCESS clauses of the Sixth Amendment, which, as incorporated into the Fourteenth, are applied to state criminal trials. A defendant has the rights "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." As part of his right to hear and challenge the evidence against him, the defendant has a right to be present at the trial. (He may lose this right by absenting himself voluntarily or interfering with the orderly conduct of the trial.) Like other constitutional rights, the right to be present cannot be unnecessarily burdened; accordingly, since *Estelle v. Williams* (1976) a defendant cannot be required to appear at trial in prison clothing. Where jurors have obtained information from a person who did not appear as a witness, some courts have treated the event as a violation of the right to confront witnesses.

The confrontation clause also limits the use of out-of-court statements of persons who are not present in court. With few exceptions, an available witness must testify in person, so that he can be cross-examined by the defense. If a witness is not available, his out-of-court statement can be used as evidence only if there are indications of reliability sufficient to satisfy the purpose of confrontation at trial. (See HEARSAY RULES.)

The right to compulsory process assures the defendant that he will be able to present evidence favorable to his case. On occasion, the Supreme Court has held that the application of a state procedural requirement or the trial judge's conduct of the trial denied the defendant an opportunity to present critical evidence and has reversed the conviction, relying on the compulsory process clause or directly on the due process clause.

The Sixth Amendment gives a defendant the right "to have the assistance of counsel for his defense," which requires that counsel be appointed for an INDIGENT defendant in any case in which a sentence of imprisonment is imposed. Before this provision was made applicable to the states by incorporation into the Fourteenth Amendment, an indigent state defendant had a right to appointed counsel only if counsel were necessary to a fair trial. The appointment of counsel was required for defendants who were unable to defend themselves effectively because of their ignorance, or illiteracy, or youth, or because the circumstances of the case made professional skills essential; capital cases were invariably deemed to require the appointment of counsel. Since the decisions in GIDEON V. WAINWRIGHT (1963) and ARGERSINGER V. HAMLIN (1972), the RIGHT TO COUNSEL applies alike in federal and state cases. It is possible although unlikely that in a minor case in which the Sixth Amendment's provision was inapplicable, the defense would be so difficult and complex that counsel would be required for a fair trial.

The requirements of a fair trial embodied in the due process clause continue to govern the conduct of the prosecution, which is not the subject of another, particular provision of the Bill of Rights. Although the prosecution is responsible for the presentation of the case against the defendant, its concern must be, as the Court said in BERGER V. NEW YORK (1967), "not that it shall win a case, but that justice shall be done. . . . It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The prosecutor's obligation of fairness requires him to avoid conduct calculated or likely to mislead the jury. The knowing use of false evidence, including testimony of a witness, is ground for reversal of a conviction. If the prosecutor knows that a witness has testified falsely about a material fact, he must take steps to correct the falsehood. The obligation not to use false evidence extends to the government as a whole; even if the prosecutor at trial is unaware that evidence is false, a blameworthy failure of the police or others in the prosecutor's office or elsewhere

in the government to avoid or remedy the falsehood is a denial of a fair trial.

The prosecutor has a parallel obligation to disclose evidence favorable to the defendant if, as the Court said in *United States v. Agurs* (1976), the "evidence is obviously of such substantial value that elementary fairness requires it." The constitutional obligation of fairness does not require the prosecution to disclose all evidence that might possibly be helpful to the defense. The test following a conviction is whether the undisclosed evidence "creates a REASONABLE DOUBT that did not otherwise exist." The duty to disclose evidence in response to a specific request by the defense is greater; if the evidence is material at all the prosecutor must either honor the request or inform the court of his refusal.

Aside from his obligation to present the evidence fully, the prosecutor must avoid arguments or conduct before the jury that might mislead it or prejudice it against the defendant. In his opening and closing arguments as well as his questioning of witnesses, the prosecutor is expected not to depart from the evidence or to lead the jury away from a dispassionate judgment based on the evidence. Isolated improper remarks of a prosecutor usually are not deemed to have denied a fair trial, especially if they do not appear to have been a deliberate violation and the trial judge has taken corrective action such as instructing the jury to disregard the remarks. In order to determine whether the standard of fair trial has been met, the prosecutor's conduct is examined in the context of the whole trial.

In a number of situations, the demands of a fair trial are opposed by conflicting demands based on the FIRST AMENDMENT's protection of FREEDOM OF THE PRESS. Pretrial publicity of a case may make it more difficult or impossible to impanel an impartial jury. A fair trial does not require that jurors have been entirely ignorant of the facts of a case but only that, having in mind the news coverage and atmosphere of the community, they be able to decide according to the evidence. The Supreme Court has occasionally reversed a conviction because members of the jury were presumed to have, or acknowledged that they had, strong preconceptions of the defendant's guilt because of extensive coverage of the case in local news media.

A similar problem has sometimes arisen during trial. In *Sheppard v. Maxwell* (1966) the Supreme Court concluded that prejudicial pretrial publicity in the news media as well as the "carnival atmosphere" created by the media in and around the courtroom during trial had denied the defendant a fair trial. In ESTES V. TEXAS (1965) the Court concluded that television coverage of portions of a sensational trial that had also been the subject of massive pretrial publicity was impermissible. There is, however, no absolute constitutional prohibition against radio, television, or photographic coverage of a trial, which may, as the Court held in CHANDLER V. FLORIDA (1981), be allowed if it is conducted in a manner consistent with a fair trial.

The Supreme Court held, in RICHMOND NEWSPAPERS, INC. V. VIRGINIA (1980), that the First Amendment protects the right of the public to attend criminal trials. (In contrast, the right to a PUBLIC TRIAL in the Sixth Amendment is a right of the defendant alone.) Therefore, all other measures for ensuring a fair trial, such as sequestration of witnesses or jurors, must be considered before the public can be excluded, whether or not the defendant asks for exclusion. The Court has indicated strongly that a trial court should exercise its authority in whatever manner will afford a fair trial without closing it to the public.

Unlike some of the more particular provisions of the Bill of Rights that have to do with criminal process, the requirement of a fair trial retains the flexibility of a general standard and is not susceptible to precise definition by a set of rules. While important aspects of a fair trial are covered by other constitutional provisions, some remain within the ambit of the general standard. Jurisprudentially, the principal difference is that, unlike some particular constitutional rules, the general standard does not invalidate a conviction for a single instance of prejudicial error or unfairness. Rather it is set in the context of the whole trial, and a conviction will be reversed only if the trial as a whole was unfair. The standard of a fair trial also serves as a reminder of the government's relationship with an individual even when it seeks to convict him of a crime and as the repository of changing or enlarged conceptions of what fairness in the criminal process requires.

LLOYD L. WEINREB
(1986)

Bibliography

AMERICAN BAR ASSOCIATION 1968 *Standards Relating to Fair Trial and Free Press.* New York: Institute of Judicial Administration.

FELLMAN, DAVID 1976 *The Defendant's Rights Today.* Madison: University of Wisconsin Press.

KAMISAR, YALE; LAFAVE, WAYNE R.; and ISRAEL, JEROLD H. (1965) 1986 *Modern Criminal Procedure.* St. Paul, Minn.: West Publishing Co.

LEVY, LEONARD W. 1974 *Against the Law.* New York: Harper & Row.

WEINREB, LLOYD L. (1969) 1987 *Criminal Process.* Mineola, N.Y.: Foundation Press.

## FAMILY AND THE CONSTITUTION

Family relations have an uncertain, even ambivalent constitutional status in Supreme Court decisions. If the Con-

stitution protects the family against external interference, it also permits the establishment of public moral standards to regulate social relations among adults and to protect children from apparently harmful parental conduct.

This ambivalence appeared early. In MEYER V. NEBRASKA (1923) the Supreme Court opined that FOURTEENTH AMENDMENT "liberty" included the right "to marry, establish a home and bring up children." The Court did not explain, however, why this right stopped short at monogamy. In REYNOLDS V. UNITED STATES (1878) it had upheld Congress's power to forbid POLYGAMY in the TERRITORIES notwithstanding the religiously grounded objections of Mormon settlers. Nor did the Court subsequently explain how the right "to bring up children" was consistent with the compulsory STERILIZATION of a woman considered retarded by state authorities upheld in BUCK V. BELL (1927). One discernible principle did unify these early cases: the Constitution protects only family relations that judges consider "normal" and "wholesome." This principle might occasionally lead judges to substitute their views of normality for legislative impositions (as in *Meyer* where the state had forbidden schoolroom teaching of children in any language but English); it hardly serves, however, as a MAGNA CARTA for the protection from state interference of family sanctity and autonomy.

The prospect that constitutional doctrine might be elevated to serve this broader protective purpose emerged in the 1960s, as cases involving family relations began to appear in unprecedented numbers on the Supreme Court's docket. But in fact the decided cases exemplify the same conflicting strains as before. The first of the modern cases was GRISWOLD V. CONNECTICUT (1965), striking down a state law that prohibited anyone including married couples from using contraceptives. The Court spoke of marriage as "intimate to the degree of being sacred" and found a constitutionally protected " RIGHT OF PRIVACY surrounding the marriage relationship." In subsequent cases, however, the Court has been reluctant to extend this familial privacy right beyond the conventionally conceived marriage bond. Although EISENSTADT V. BAIRD (1972) recognized the right of unmarried persons to practice contraception, in *Doe v. Commonwealth's Attorney* (1976) the Court summarily affirmed a lower court's rejection of a constitutional attack on a state law criminally proscribing homosexual relations even among consenting adults in private. Similarly in *Belle Terre v. Boraas* (1974) the Court upheld a municipal ZONING restriction excluding communal families unless they were "related by blood, adoption or marriage"; and yet in MOORE V. CITY OF EAST CLEVELAND (1977) the Court struck down zoning restrictions that limited residence to nuclear families and excluded multigenerational families with blood ties. The theme that runs through these two zoning cases and through *Griswold* and *Doe* is that the Constitution protects "families" when they reflect conventional social definitions of decency and morality.

The Court does not unquestioningly defer to legislative conceptions of appropriately conventional family relations. The Court has struck down familial regulations reflecting RACIAL DISCRIMINATION as in LOVING V. VIRGINIA (1967), or SEX DISCRIMINATION regarding alimony entitlements as in *Orr v. Orr* (1979), or required consent for adoptive placement as in *Caban v. Mahammed* (1979). But even in these cases the Justices appear guided more by their own conceptions of appropriate social conventions for family relations than by any principle of protection of individuals against state interference with their autonomous choices in family matters.

The constitutional status of parent-child relations is the result of similar conflicting impulses. In the adult relations cases, the underlying conflict is essentially between principles of individual autonomy and of community, between the individual's FREEDOM OF INTIMATE ASSOCIATION and the right of a group to define and enforce common standards of conduct on every group member. For state regulation of parent-child relations, these same conflicting principles are at stake, but the conflict extends even into these principles' very definition.

Thus the state can plausibly claim that it must restrict parental conduct to protect and enhance the child's developing capacity for individual autonomy. The claim is implicit in compulsory education laws, in laws permitting state intervention to override parental directives in disputes between parent and child (particularly adolescent children), and in laws proscribing child abuse or neglect. Parents, however, can plausibly claim that a child's capacity to develop as an autonomous individual is impaired by state impositions on parental conduct beyond the most minimal standards to protect the child's physical integrity. Thus even if constitutional DOCTRINE should give priority to individual autonomy over communitarian claims in adult relations, this priority does not resolve disputes regarding state regulation of parental conduct when both the state and the parents can plausibly claim to speak for the child's developing capacity for individual autonomy.

These disputes have occurred in three different contexts: claims by state authorities that parents' conduct was harmful to children; claims by parents that their children were harmed by state conduct, particularly in public schools; and claims by children, particularly older children, that state authorities should take their sides in disputes with their parents. In none of these contexts do the decided cases yield consistent constitutional principles.

The unresolved tension between competing principles was particularly evident in two Supreme Court decisions in successive terms that considered the application of con-

stitutional norms to state abuse and neglect statutes. In *Santosky v. Kramer* (1982) the Court held that states must meet a higher burden of proof than the ordinary civil standard before the parent-child relationship could be terminated on grounds of harmful parental conduct; but in *Lassiter v. Department of Social Services* (1981) the Court had held that the parental relationship was not of sufficient constitutional weight to require the appointment of counsel to give indigent parents effective assistance against state actions for termination.

A similar if less blatant inconsistency is evident in the Court's rulings regarding the rights of parents to constrain state impositions on their children in public schools. Thus in INGRAHAM V. WRIGHT (1977) the Court ruled that school officials were free to inflict corporal punishment on students notwithstanding parental objections that the punishment was physically and psychologically harmful to their children; but in WISCONSIN V. YODER (1972) the Court had ruled that school officials could not require Amish children to attend secondary schools in the face of their parents' objections that this imposition was harmful to the children and inconsistent with the parents' views on proper child-rearing practices.

In the Amish case, the Court emphasized the religious basis for the parents' claims, a factor that might serve to distinguish the parents' claim in the corporal punishment case. But parental claims to preclude state interference in their decisions regarding children were not similarly honored, notwithstanding the religious grounding of such claims, in PLANNED PARENTHOOD V. DANFORTH (1976) where the parents objected to their unmarried pregnant daughters' wish to obtain an abortion. The minors' abortion and the Amish case might be distinguished on the ground that the pregnant minors openly disagreed with their parents while the Amish students apparently concurred with theirs. But this view of the abortion case—that the Constitution not only permits but requires state intervention to protect the autonomous wishes of older children from being overridden by their parents—cannot readily be squared with the Court's subsequent ruling in PARHAM V. J. R. (1979) essentially upholding parents' authority to confine their adolescent children in psychiatric institutions, notwithstanding the children's objections and claims for independent judicial protection.

These decisions raise at least the suspicion that the same guiding principle is at work in these parent-child-state cases as appeared in the cases regarding state regulation of adult familial relations—the principle that the Justices are not prepared to find constitutional protection for family status as such but only for those families whose conduct meets the Justices' particular approval. This principle could explain the Court's deference to Amish parents who generally succeed in imposing rigid behavioral controls on their children, as the Court repeatedly stressed in *Yoder,* or its deference to parents' wishes to confine their socially disruptive children in psychiatric institutions. A judicial preference for such behavior controls might also explain the Court's refusal to defer to parents' objections to school corporal punishment or to parents' resistance to abortions when they had failed effectively to constrain their unmarried daughters' indulgence in sexual relations.

The Court has not been unanimous in these cases, and no Justice has explicitly defended this particular child-rearing principle as a constitutional norm. Yet the logical plausibility of this harmonizing principle does suggest that current constitutional doctrine gives no special status to family relations as such, either between parents and child or among adults. The occasional rhetorical flourishes in Supreme Court opinions about the "constitutional sanctity" of the family does not yet reflect any consistent constitutional principle.

ROBERT A. BURT
(1986)

Bibliography

BURT, ROBERT A. 1979 The Constitution of the Family. *The Supreme Court Review* 1979:329–395.

GOLDSTEIN, J. et al. 1973 *Beyond the Best Interests of the Child.* New York: Free Press.

——— 1979 *Before the Best Interests of the Child.* New York: Free Press.

KARST, KENNETH L. 1980 The Freedom of Intimate Association. *Yale Law Journal* 89:624–692.

## *FARETTA v. CALIFORNIA*
422 U.S. 806 (1975)

In *Faretta* the Supreme Court reversed the conviction of a defendant forced to accept the services of a public defender in a FELONY case, holding that the Sixth Amendment guarantees the right to self-representation when a defendant "knowingly and intelligently" requests it.

This is a major decision about the WAIVER OF CONSTITUTIONAL RIGHTS because the argument of the state and the dissent was that society has an interest in a FAIR TRIAL, independent of the defendant's desires. Recognition of such an interest would necessarily mean that the trial judge must have discretion to reject even a knowing and intelligent waiver of the RIGHT TO COUNSEL.

Standby counsel may be appointed over the defendant's objection to aid him should he request help at the trial, or to intervene if the termination of self-representation becomes necessary.

BARBARA ALLEN BABCOCK
(1986)

## FARRAND, MAX
(1869–1945)

Anyone who cares seriously to study the work of the CONSTITUTIONAL CONVENTION OF 1787 owes a debt to Max Farrand. Farrand, professor of history at Stanford (1901–1908) and Yale (1908–1925) Universities and later director of research at the Huntington Library, compiled and edited all the known *Records of the Federal Convention* (1911, revised 1937). That work was more influential than his narrative history books, which were intended for undergraduate or popular audiences.

DENNIS J. MAHONEY
(1986)

## *FAY v. NOIA*
372 U.S. 391 (1963)

The Great Writ of HABEAS CORPUS allows state prisoners to seek federal court review of constitutional errors made at their trials, but the JUDICIAL CODE requires EXHAUSTION OF REMEDIES in state court, in order to preserve comity between state and federal courts. Charles Noia's 1942 murder conviction was based solely on a coerced confession procured in violation of his FOURTEENTH AMENDMENT rights to DUE PROCESS. He chose not to file a state APPEAL, however, because he feared that a new trial might end in a death sentence. Years later, he sought review of his due process claim in state courts, but they held that his original failure to appeal was a procedural default that barred further review. In *Fay*, a 6–3 Supreme Court held that his failure was not a "deliberate bypass" of state procedures and thus no bar to habeas corpus relief.

Justice WILLIAM J. BRENNAN, speaking for the majority, posited a "manifest federal policy" that liberty rights should not be denied without the fullest opportunity for federal JUDICIAL REVIEW. The concept of comity could not justify denying habeas corpus relief for failure to exhaust a remedy no longer available. As for the state's interests in insuring finality of criminal judgments, or exacting compliance with its procedures through default rules, these could not outweigh the "ideal of fair procedure" and the historic habeas corpus policy favoring the free exercise of federal judicial power to enforce this ideal. Finally, the state's rejection of Noia's claim could not be treated as an ADEQUATE STATE GROUND, for this jurisdictional deference would unduly burden the vindication of federal rights. Only when a defendant deliberately evaded state adjudication would FEDERALISM concerns justify the denial of habeas corpus review.

As dissenting Justice JOHN MARSHALL HARLAN noted, *Fay* marked a dramatic expansion of federal power to supervise state criminal justice. The concepts of exhaustion and adequate state grounds were modified to make room for a generous view that excused defendants from uncalculated WAIVER OF CONSTITUTIONAL RIGHTS in state proceedings. The "deliberately bypassing" defendant was a rare one, and *Fay*'s scope freed most defendants from forfeiting their rights through procedural defaults of every kind. Simultaneously, the WARREN COURT's application of the Fourth, Fifth, and Sixth Amendments to the states codified a Bill of Rights for criminal defendants. *Fay* insured a broad federal path of enforcement for these new guarantees, in an era when the state path of review was not always open or receptive to constitutional claims.

The BURGER COURT era brought a less hospitable federal climate for criminal defendants and, not surprisingly, also brought a corresponding change in the habeas corpus barometer, emerging clearly in WAINRIGHT V. SYKES (1977). *Fay*'s deliberate bypass rule did not endure as an exclusive measure of federalism interests, because a new "manifest" federal policy came to elevate the state's interest in finality above the ideal of fair procedure. With this new federalism, the whole point of habeas corpus review was transformed from the protection of constitutional rights to the protection of those with a claim to innocence.

CATHERINE HANCOCK
(1986)

Bibliography

COVER, ROBERT M. and ALEINIKOFF, T. ALEXANDER 1977 Dialectical Federalism: Habeas Corpus and the Court. *Yale Law Journal* 86:1035–1102.

## FBI

See: Federal Bureau of Investigation

## FEDERAL . . . ACT

See also under word following "Federal"

## FEDERAL BUREAU OF INVESTIGATION

The Federal Bureau of Investigation (FBI) is a division of the Department of Justice supervised by the attorney general. Although a CABINET officer since the 1790s, the ATTORNEY GENERAL did not oversee federal law enforcement and did not even head a federal department until congressional legislation of 1870 created the Department of Justice. The attorney general's responsibilities originally involved arguing major cases before the Supreme Court

and advising the President on constitutional questions. The combination of the RECONSTRUCTION experience with the enactment of legislation regulating INTERSTATE COMMERCE in 1887 and preventing corporate mergers in 1890, however, led attorneys general to recognize the need for experienced investigators to secure evidence to prosecute violators of the ANTITRUST and interstate commerce laws. Accordingly, in July 1908 Attorney General Charles Bonaparte, by EXECUTIVE ORDER, created a special investigation division within the Department of Justice, the Bureau of Investigation, formally renamed the Federal Bureau of Investigation in 1935.

Thereafter, the FBI's investigative reponsibilities increased as new laws expanded the definition of interstate commerce crime (the MANN ACT of 1910 and the Dyer Act of 1919) and law enforcement responsibilities (laws criminalizing kidnapping and bank robbing) and barred specified political activities that threatened the nation's internal security (the ESPIONAGE ACT of 1917 and the Smith Act of 1940). Yet this expansion raised no unique constitutional question both because it was legislatively mandated and because the Supreme Court upheld the constitutionality of the Espionage and Smith Acts, which impinged on speech and association.

The FBI's activities have raised constitutional issues because of the Bureau's monitoring of "subversive" activities, particularly since 1936. In striking contrast even to the abusive PALMER RAIDS of 1920, which had been based on the 1918 Immigration Act's alien deportation provisions, after 1936 the FBI did not seek evidence to effect prosecution; and its "intelligence" investigations were authorized solely under secret executive directives (President FRANKLIN D. ROOSEVELT's oral directive of August 1936) or public executive orders (President HARRY S. TRUMAN's March 1947 order establishing the Federal Employee Loyalty Program). In acquiring intelligence about dissident activities, the FBI's purposes became either to service White House interests and those of the increasingly powerful FBI director or, in the case of federal loyalty-security programs, to anticipate espionage by identifying "potentially disloyal" federal employees. In time, the FBI's dissemination activities extended beyond the executive branch—at first, during the 1940s, informally and then after the 1950s formally, to governors and to carefully selected reporters, columnists, prominent national leaders, and members of Congress. Rather than prosecuting individuals for violating federal laws, the FBI instead brought about the dismissal of "subversive" employees by disseminating information on state employees to state governors under a code-named Responsibilities Program and by exposing publicly other "subversives," often through covert assistance to the HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES, Senator Joseph McCarthy, and the Senate Internal Security Subcommittee. Adopting a more aggressive tack after 1956, FBI officials instituted two other formal programs, COINTELPRO and Mass Media, both having as their purpose the discrediting of targeted organizations and their adherents.

These programs were not subject to JUDICIAL REVIEW both because they had no law enforcement purpose and because they were conducted secretly. Furthermore, these covert efforts to "harass, disrupt and discredit" targeted organizations or to disseminate derogatory information about political activists to favored journalists, members of Congress, Presidents, governors, and prominent citizens were based on a commitment to contain political change.

The FBI's activities raised other constitutional questions in view of some of the Bureau's investigative techniques. Despite the legislative ban against WIRETAPPING of the COMMUNICATIONS ACT of 1934 and the FOURTH AMENDMENT prohibition of UNREASONABLE SEARCHES and seizures, from 1940 forward the FBI installed wiretaps and bugs and conducted break-ins when investigating "subversive" activities and at times during sensitive criminal investigations. These techniques were authorized under secret directives issued either by Presidents (Franklin Roosevelt's May 1940 authorization of wiretapping), the attorney general (Herbert Brownell's May 1954 authorization of bugging), or solely by the FBI director (J. EDGAR HOOVER's 1942 authorization of break-ins). Theoretically, information so obtained could not be used for prosecution. However, two individuals inadvertently uncovered the FBI's ELECTRONIC EAVESDROPPING at a time when they were the subjects of criminal inquiries. Intercepted messages included attorney-client conversations, and in both cases, the disclosures led the courts to overturn the defendants' convictions.

Contrary to the rationale that gained currency during the 1960s of inherent presidential powers, when FBI officials first employed these electronic surveillance techniques in the 1940s they privately conceded their illegality and accordingly sought to preclude public discovery of potentially controversial practices. For example, when outlining how requests for his approval to conduct break-ins were to be submitted, FBI Director Hoover characterized this technique as "clearly illegal." Because break-ins offered the opportunity to acquire otherwise unobtainable information about "subversive" activities (membership and subscription lists, financial records, correspondence and memoranda), Hoover was willing to risk use of this technique. To avert discovery, however, the FBI director devised a special records procedure, "Do Not File," to ensure the undiscoverable destruction of such records and further to allow FBI officials to affirm, in response to congressional SUBPOENAS or court-ordered DIS-

COVERY motions, that a search of the FBI's "central records system" uncovered no evidence of illegal conduct. This FBI practice raised additional constitutional question insofar as, beginning in the late 1950s, break-ins were employed during some criminal investigations.

ATHAN THEOHARIS
(1992)

(SEE ALSO: *McCarthyism.*)

Bibliography

THEOHARIS, ATHAN and COX, JOHN STUART 1988 *The Boss.* Philadelphia: Temple University Press.

UNGAR, SANFORD 1975 *FBI.* Boston: Atlantic/Little, Brown.

## FEDERAL COMMON LAW, CIVIL

In the English legal tradition to which this country is heir, judge-made COMMON LAW—law developed by courts in the absence of applicable LEGISLATION—has played a critical role in the determination of rights, duties, and remedies. But because our federal government is one of limited, delegated powers, the questions whether and under what circumstances the federal courts are empowered to formulate federal common law have been the subject of much debate. Although it is now settled that the federal courts do have such authority in civil matters, the debate continues over the sources of that authority and the proper scope of its exercise.

The Supreme Court's decision in ERIE RAILROAD CO. V. TOMPKINS (1938) marks a watershed in the evolution of this problem. Prior to that decision, the federal courts did not strive to develop a federal, or national, common law binding on the states and indeed on occasion denied that it existed (*Wheaton v. Peters*, 1834; *Smith v. Alabama*, 1888). Yet the Supreme Court, in SWIFT V. TYSON (1842), upheld the authority of the federal courts, in cases within the DIVERSITY JURISDICTION, to determine certain controversies on the basis of "general principles and doctrines" of jurisprudence and without regard to the common law decisions of the state courts. Thus, during the reign of *Swift v. Tyson*, the federal courts exercised considerable common law authority over a variety of disputes, ultimately extending well beyond the interstate commercial controversy involved in *Swift* itself and involving matters apparently not subject to federal legislative power. The decisions rendered in these cases, however, did not purport to bind the state courts, and the result was often the parallel existence of two different rules of law applicable to the same controversy, with the governing rule dependent on the forum in which the controversy was adjudicated.

Historians disagree on the justification—statutory and constitutional—of the *Swift* decision. In one view, the decision was not rooted in contemporary understanding of the nature of the common law but instead represented the use of judicial power to aid in the redistribution of wealth to promote commercial and industrial growth. A contrasting position is that the decision was fully consistent with the perception of the time that the common law of commercial transactions was not the command of the sovereign but rather was both the embodiment of prevailing customs and a process of applying them to the case at hand.

There is general agreement, however, that the Court expanded *Swift* well beyond its originally intended scope and that its OVERRULING, in *Erie*, reflected a very different perception of the proper role of the federal courts. The Court in *Erie*, speaking through Justice LOUIS D. BRANDEIS, concluded that there was no "general" federal common law—that the Rules of Decision Act, originally section 34 of the JUDICIARY ACT OF 1789, required adherence to state decisional or common law in controversies such as *Erie* itself, a case that fell within federal JURISDICTION solely on the basis of the parties' diversity of citizenship.

But the *Erie* decision helped bring to the surface the existence of what has been called a "specialized" federal common law, operating in those areas where the application of federal law seems warranted even though no federal constitutional or legislative provision points the way to a governing rule. Indeed, on the very day that *Erie* was decided, the Court in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.* (1938), again speaking through Justice Brandeis, said that "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."

What is the source of the authority to formulate federal common law—law that, unlike decisions rendered pursuant to *Swift*, binds state and federal courts alike? To some extent, the source may be traced to specific constitutional provisions, such as the grant of ADMIRALTY AND MARITIME JURISDICTION in Article III, or the prohibition of unreasonable SEARCHES AND SEIZURES in the FOURTH AMENDMENT. (See BIVENS V. SIX UNKNOWN NAMED AGENTS, declaring the existence of a damage remedy for a Fourth Amendment violation.) But the line between CONSTITUTIONAL INTERPRETATION, on the one hand, and the exercise of common law authority, on the other, is indistinct, and there is often disagreement among both judges and commentators about the function the courts are performing. The significance of this disagreement is more than semantic, for the ability of the legislative branch to modify or reject a Supreme Court ruling is plainly more circumscribed if the ruling is seen to be required by the Consti-

tution than if the ruling is a common law one authorized but not compelled by the FUNDAMENTAL LAW.

In other instances, the source of judicial authority may be found in a particular federal statute. Infrequently, the congressional command is explicit, as in the mandate in Rule 501 of the Federal Rules of Evidence that in certain cases questions of evidentiary privilege "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." More often, the legislative direction is, at best, implicit and the judicial role may be viewed as that of implementing federal legislative policy by filling the gaps left by the legislation itself. Once again, the line between statutory construction and the exercise of common law authority is not easily drawn.

In a significant number of cases, the exercise of authority to formulate federal common law is difficult to trace to a specific provision in the Constitution or in a statute. In such cases, the authority may be attributed more broadly to the nature of the judicial process, to the structure of our federal constitutional system, and to the relationships created by it. The authority, in other words, may be rooted in necessity. As Justice ROBERT H. JACKSON put it, concurring in *D'Oench Duhme Co. v. F.D.I.C.* (1942): "Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes and is apparent from the terms of the Constitution itself."

Some examples of the exercise of this authority may help to clarify its scope. Perhaps most important is the category of those interstate or international disputes that, in the words of the Supreme Court, "implicate conflicting rights of States or our foreign relations" (*Texas Industries, Inc. v. Radcliff Materials, Inc.*, 1981). Such disputes do not always fall within the specific jurisdictional grants of Article III applicable to certain interstate or international controversies. In any event, the existence of a conflict between the interests of two states may make it inappropriate for the law of either to govern of its own force. And controversies affecting our relations as sovereign with foreign nations may require a single federal response rather than a cacophony of responses rooted in varying state laws. (See ACT OF STATE DOCTRINE.)

Another leading instance of the exercise of common law authority embraces controversies involving the rights, obligations, or proprietary interests of the United States. In such controversies, especially those arising in the administration of nationwide programs, formulation of federal common law may be warranted by the need for uniform treatment of the activities of the federal government or, more modestly, for some degree of federal supervision of the application of state law to those activities.

The amorphous origins and uncertain scope of the federal common law power underscore the need to recognize certain limitations that are anchored in the concerns of FEDERALISM and of SEPARATION OF POWERS. The first of these concerns focuses on the interests of the states in preserving a measure of autonomy on matters properly within their sphere—interests reflected in the TENTH AMENDMENT. Because federal law is often interstitial in character—written against a background of state laws governing basic human affairs—the concern for federalism supports a presumption that state law ought not to be displaced in the absence of a clear legislative direction, a sharp conflict between the state law and federal program, or the existence of a uniquely federal interest requiring protection. To some extent, this presumption is supported by and reflected in the provision of the Rules of Decision Act that state laws shall constitute the rules of decision except where otherwise required by the Constitution or by federal treaty or statute. But the last phrase of that act—limiting its command to "cases where they (the rules of decision) apply"—gives the provision a circularity that affords little guidance to the resolution of particular problems of potential conflict between federal and state authority.

Even when the exercise of federal authority is warranted, a careful balancing of state and federal interests may lead to the adoption of state laws rather than to the imposition of a uniform federal rule, so long as the state laws in question are compatible with federal interests. Such results were reached, for example, in *De Sylva v. Ballentine* (1955), involving a definition of "children" under the Federal Copyright Act, and *United States v. Kimbell Foods, Inc.* (1979), dealing with the priority of federal government liens arising from federal lending programs.

The second concern—that of separation of powers—springs from the belief that the primary responsibility for lawmaking should rest with the democratically elected representatives in the legislative branch. At a time when the common law function was seen in terms primarily of the application of established customs and usages, the concern for the proper separation and allocation of federal powers had less force than it does today, when there is more emphasis on the creative potential of the common law. Moreover, the separation of powers question is not unrelated to the regard for state interests, since the bicameral federal legislature is structured in such a way as to protect the states against action that might be taken by a legislature apportioned solely on the basis of population.

Concern that the courts not usurp a function that is properly legislative has led to an emphasis on LEGISLATIVE INTENT in many instances in which the federal courts have been asked to articulate new rights or develop new remedies not specifically provided for by statute. Moreover, the Supreme Court has stressed the ability of Congress to

displace federal common law with statutory regulations, even in some instances in which the source of authority is the Constitution itself.

The problems inherent in the exercise of common law power have been highlighted in the Supreme Court's struggle with the question of implied remedies for federal constitutional or statutory violations. Since *Bivens v. Six Unknown Named Agents* (1971), the Court has generally been willing to allow a person harmed by unconstitutional action to sue for damages, despite the lack of any constitutional or statutory provision for suit. But persons harmed by violations of federal statutes have frequently been held unable to obtain relief in the absence of an express statutory remedy or strong evidence of legislative intent to permit such a remedy.

In both types of cases the Supreme Court has perhaps too readily yielded its authority to exercise a principled discretion in determining whether traditional common law remedies should be available to implement federal policy. The tendency toward formalistic insistence on a remedy for every wrong in cases involving constitutional violations, and toward ritualistic invocation of legislative intent in order to deny a remedy in cases of statutory infractions, suggests a relinquishment of the judicial responsibility that lies at the heart of our common law heritage.

DAVID L. SHAPIRO
(1986)

Bibliography


BATOR, PAUL; MISHKIN, PAUL J.; SHAPIRO, DAVID L.; and WECHSLER, HERBERT (1953) 1973 and 1981 Supp. *Hart and Wechsler's The Federal Courts and the Federal System.* Pages 691–832. Mineola, N.Y.: Foundation Press.

BRIDWELL, RANDALL and WHITTEN, RALPH U. 1977 *The Constitution and the Common Law.* Lexington, Mass.: Lexington Books.

FIELD, MARTHA A. 1986 Sources of Law: The Scope of Federal Common Law. *Harvard Law Review* 99:883–984.

FRIENDLY, HENRY J. 1964 In Praise of Erie—And of the New Federal Common Law. *New York University Law Review* 39: 383–422.

FREYER, TONY ALLAN 1979 *Forums of Order: The Federal Courts and Business in American History.* Greenwich, Conn.: Jai Press, Inc.

HILL, ALFRED 1967 The Law-Making Power of the Federal Courts: Constitutional Preemption. *Columbia Law Review* 67:1024–1081.

HORWITZ, MORTON J. 1977 *The Transformation of American Law, 1780–1860.* Pages 211–252. Cambridge, Mass.: Harvard University Press.

REDISH, MARTIN H. 1980 *Federal Jurisdiction: Tensions in the Allocation of Judicial Power.* Pages 79–107. Indianapolis: Bobbs-Merrill.


# FEDERAL COMMON LAW OF CRIMES

One of the leading Jeffersonian jurists, ST. GEORGE TUCKER, noted with alarm that Chief Justice OLIVER ELLSWORTH and Justice BUSHROD WASHINGTON had laid down the general rule that the COMMON LAW was the unwritten law of the United States government. The question whether the Constitution adopted the common law, Tucker wrote,

> is of very great importance, not only as it regards the limits of the JURISDICTION of the *federal courts;* but also, as it relates to the extent of the powers vested in the *federal government.* For, if it be true that the common law of England has been adopted by the United States in their national, or federal capacity, the jurisdiction of the *federal courts* must be co-extensive with it; or, in other words, *unlimited:* so also, must be the jurisdiction, and authority of the *other branches* of the federal government [Tucker, *Blackstone's Commentaries,* 1803, I, 380].

Tucker's answer to the question was that the JUDICIAL POWER OF THE UNITED STATES under Article III was limited to the subjects of congressional legislative power and that common law did not give jurisdiction in any case where jurisdiction was not expressly given by the Constitution. Tucker's view eventually prevailed, but it was probably not the view of the Constitution's Framers.

Article III extends the judicial power of the United States to all cases in law and EQUITY arising under the Constitution, treaties, and "Laws of the United States." The latter phrase could include common law crimes. At the CONSTITUTIONAL CONVENTION OF 1787, the Committee of Detail reported a draft declaring that the Supreme Court's jurisdiction extended to "all Cases arising under the Laws passed by the Legislature of the United States." The Convention without dissenting vote adopted a motion striking out the words "passed by the Legislature." That deletion suggests that "the Laws of the United States" comprehended the common law of crimes, as well as other nonstatutory law.

The legislative history of the JUDICIARY ACT OF 1789 suggests a similar conclusion. A draft of that statute relating to the jurisdiction of both the federal district and federal circuit courts (sections nine and eleven as enacted) gave these courts "cognizance of all crimes and offenses that shall be cognizable under the authority of the United States and *defined by the laws of the same.*" The italicized phrase, deleted from the act's final text, might have restricted criminal jurisdiction to statutory crimes. Whether a federal court was to apply a federal common law of crimes or apply the common law of the state in which a crime was committed is not clear.

What is clear is that the first generation of federal

judges assumed jurisdiction in cases of nonstatutory crimes. Justice JAMES WILSON, an influential Framer of the Constitution, at his state's ratifying convention had endorsed federal prosecutions at common law for criminal libels against the United States. In 1793 he instructed a federal GRAND JURY on the virtues of the common law, which included, he said, the law of nations. The grand jury indicted Gideon Henfield for breaching American neutrality by assisting a French privateer in the capture of a British ship; the INDICTMENT referred to "violation of the laws of nations, against the laws and constitution of the United States and against the peace and dignity of the United States." ALEXANDER HAMILTON prepared the indictment, which Attorney General EDMUND RANDOLPH (another Framer) helped prosecute. Justice Wilson, joined by Justice JAMES IREDELL and Judge RICHARD PETERS, constituted the federal CIRCUIT COURT that tried Henfield's nonstatutory offense. Henfield, having been at sea when President GEORGE WASHINGTON proclaimed American neutrality, pleaded ignorance. Secretary of State THOMAS JEFFERSON, who had urged Henfield's prosecution and endorsed Wilson's opinion as to the indictability of the offense, explained that the jury acquitted because the crime was not knowingly committed. JOHN MARSHALL, in his *Life of Washington*, described the prosecution as having been based on an offense "indictable at common law, for disturbing the peace of the United States."

Subsequent common law prosecutions were not so fuzzy. In 1793 a federal grand jury indicted Joseph Ravara, a consul from Genoa, for attempting to extort money from a British diplomat. Justice Wilson, joined by Peters, ruled that the circuit court had jurisdiction, although Congress had passed no law against extortion. Justice Iredell argued that the defendant's diplomatic status brought him within the exclusive ORIGINAL JURISDICTION of the Supreme Court. Ravara was tried in 1794 by a circuit court consisting of Jay and Peters, who instructed the jury that the offense was indictable at common law, part of the LAW OF THE LAND. The jury convicted. In 1795 a federal court in New York, at the instigation of Attorney General Randolph, indicted Greenleaf, the editor of the *New-York Journal*, for criminal libel, a common law crime. The case was dropped, but in 1797 the editor was again indicted for the same crime and convicted by a court presided over by Chief Justice Oliver Ellsworth, an influential Framer and chief author of the Judiciary Act of 1789. In Massachusetts in 1797 Ellsworth ruled that the federal circuit court possessed jurisdiction over crimes against the common law, which the laws of the United States included, and therefore might try persons indicted for counterfeiting notes of the Bank of the United States (not then a statutory offense).

In the same year a federal grand jury followed Justice Iredell's charge and indicted a congressman, Samuel J. Cabell, for the common law crime of SEDITIOUS LIBEL, but the prosecution was aborted for political reasons. In 1798, before Congress passed the Sedition Act, prosecutions for seditious libel were begun against Benjamin Bache, who soon died, and John Burke, who fled the country before Justice WILLIAM PATERSON could try him. In 1799 Ellsworth and Iredell, in separate cases, told federal grand juries that the federal courts had common law jurisdiction over seditious libel and, in Ellsworth's words, over "acts manifestly subversive of the national government." He added that an indictable offense need be defined only by common law, not statute.

The sole dissenting voice in this line of decision was that of Justice SAMUEL CHASE in *Worrall's Case* (1798), where the common law indictment was for attempted bribery of a federal official. Judge Peters disagreed with Chase's argument that no federal common law of crimes existed, and the jury convicted. Chase, however, changed his opinion in *United States v. Sylvester* (1799), when he presided over a common law prosecution for counterfeiting. Thus, Chief Justices Jay and Ellsworth and Justices Wilson, Paterson, Iredell, and Chase endorsed federal court jurisdiction over common law crimes. The Jeffersonians, by then, vehemently opposed such views, arguing that only the state courts could try common law crimes. When Jefferson was President, however, Judge Pierpont Edwards, whom he had appointed to the federal district court in Connecticut, sought and received common law indictments against several persons for seditious libel against the President and the government. Jefferson knew of the common law prosecutions by the federal court and did not criticize them or take any actions to halt them, until he learned that one of the defendants could prove the truth of his accusation that the President had once engaged in a sexual indiscretion. The prosecutions were dropped except for those against Hudson and Goodwin, editors of Hartford's *Connecticut Courant*, who challenged the jurisdiction of the federal court.

By this time the administration had a stake in a ruling against federal jurisdiction over common law crimes. After much government stalling until a majority of Jeffersonian appointees controlled the Supreme Court, UNITED STATES V. HUDSON AND GOODWIN was finally decided in 1812. Without hearing ORAL ARGUMENTS and against all the precedents, a bare majority of the Court, in a brief opinion by Justice WILLIAM JOHNSON, ruled that the question whether the federal courts "can exercise a common law jurisdiction in criminal cases" has been "settled in public opinion," which opposed such jurisdiction. Moreover, the Constitution had not expressly delegated to the federal courts authority over common law crimes. "The legislative authority of the Union must first make an act a crime, affix

a punishment to it, and declare the Court that shall have jurisdiction of the offense."

Justice JOSEPH STORY, who had not made known his dissent at the time, did so in a circuit opinion in 1813 and forced a reconsideration of the rule of *Hudson and Goodwin*. In *United States v. Coolidge* (1816), decided without argument, Johnson, noting that the Court was still divided (Marshall and Washington probably supported Story), refused to review the 1812 decision in the absence of "solemn argument." Thus the great question was resolved without reasoned consideration, to the enormous detriment of the power of the United States courts to define criminal acts.

Although "judge-made" or nonstatutory federal crimes disappeared after the *Coolidge* decision, federal courts continued to exercise common law powers to enforce law and order within their own precincts (see CONTEMPT POWER) and continued to employ a variety of common law techniques, forms, and writs in the enforcement of congressionally defined crimes. The FEDERAL RULES OF CRIMINAL PROCEDURE reflect that fact, as does *Marshall v. United States* (1959). By its "supervisory powers" over lower federal courts and, through them, over federal law enforcement officers, the Supreme Court can still be said, loosely, to exercise an interstitial common law authority with respect to federal crimes.

LEONARD W. LEVY
(1986)

Bibliography

CROSSKEY, WILLIAM W. 1953 *Politics and the Constitution in the History of the United States*, 2 vols. Chaps. 20–24. Chicago: University of Chicago Press.

GOEBEL, JULIUS, JR. 1971 *Antecedents and Beginnings to 1801*. Volume 1 of Freund, Paul, ed., *The Oliver Wendell Holmes Devise History of the Supreme Court*. New York: Macmillan.

PRESSER, STEPHEN B. 1978 "A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence." *Northwestern Law Review* 73:26–111.

TUCKER, ST. GEORGE 1803 Blackstone's Commentaries, with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia, 5 vols. Philadelphia: Young & Small.

WARREN, CHARLES 1923 "New Light on the History of the Federal Judiciary Act of 1789." *Harvard Law Review* 37:49–132.

WHARTON, FRANCIS, ed. 1849 (1970) *State Trials of the United States During the Administrations of Washington and Adams*. New York: Burt Franklin.

## FEDERAL COMMUNICATIONS COMMISSION

See: Broadcasting; Communications Act; Regulatory Agencies

## *FEDERAL COMMUNICATIONS COMMISSION v. LEAGUE OF WOMEN VOTERS*

See: Government Speech

## *FEDERAL COMMUNICATIONS COMMISSION v. PACIFICA FOUNDATION*

438 U.S. 726 (1978)

In *FCC v. Pacifica Foundation* the Court held that limited civil sanctions could constitutionally be invoked against a radio broadcast containing many vulgar words. The Court stressed that its holding was limited to the particular context, that is, to civil sanctions applied to indecent speech in an afternoon radio broadcast when, the Court assumed, children were in the audience. The opinion did not address criminal sanctions for televised or closed circuit broadcasts or late evening presentations, nor did it illuminate the concept of indecent speech except to suggest that occasional expletives and Elizabethan comedies may be decent enough even in the early afternoon.

STEVEN SHIFFRIN
(1986)

## FEDERAL COURTS IMPROVEMENT ACT

96 Stat. 25 (1982)

This act reorganized several specialized federal courts. It merged the former COURT OF CLAIMS and COURT OF CUSTOMS AND PATENT APPEALS into a new UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, transferring to the new court the former courts' JURISDICTION, and staffing it with the judges of the superseded courts. The Federal Circuit is a CONSTITUTIONAL COURT, staffed by twelve judges with life terms.

The act also created a new CLAIMS COURT to handle the trial functions formerly performed by commissioners (later called trial judges) of the old Court of Claims. The Claims Court is a LEGISLATIVE COURT; its sixteen judges serve for fifteen-year terms. Appeals go to the Federal Circuit.

KENNETH L. KARST
(1986)

Bibliography

SYMPOSIUM 1983–1984 The Federal Courts Improvement Act. *Cleveland State Law Review* 32:1–116.

## FEDERAL CRIMINAL LAW

In the past two decades, Congress has enacted many new types of criminal statutes, such as the RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO) and the continuing criminal enterprise and money-laundering offenses. New approaches to criminal penalties and sentencing have also been adopted, including criminal forfeiture, high mandatory sentences, and the sentencing guidelines. Although the government has been prosecuting these new crimes and penalties, often in combination, for many years, with few exceptions their constitutionality has not been tested in the Supreme Court.

The Constitution as applied to the substantive federal criminal law is largely dormant. The Supreme Court infrequently agrees to review cases raising issues of interpretation of federal criminal statutes. Even rarer is the case in which the Court agrees to consider the constitutionality of a substantive criminal statute. And cases in which the Court holds either substantive criminal legislation or prosecutorial action to be unconstitutional are rarer still. This is not for want of a large number of federal criminal cases in which such issues are raised, nor for a lack of applicable constitutional provisions or doctrines against which federal criminal statues and prosecutions can be tested—for example, DOUBLE JEOPARDY, VAGUENESS, and CRUEL AND UNUSUAL PUNISHMENT.

There have been a few recent exceptions to the prevailing pattern. In *Grady v. Corbin*, a 1990 decision arising out of a state drunk driving-criminal homicide prosecution, the Supreme Court adopted a revised double-jeopardy test that, among its most important effects, may have an impact on federal RICO and continuing criminal enterprise prosecutions.

Before *Grady*, the principal test for determining whether the Constitution was violated by successive prosecutions under two different criminal statutes for the same criminal act or transaction was the doctrine described in *Blockburger v. United States* (1932): that the double-jeopardy prohibition is not violated if each of the statutes involved in the two prosecutions requires proof of a fact that the other statute does not.

The effect of *Blockburger* has been generally to permit separate prosecutions growing out of the same conduct (even if the essence of the charges are similar) as long as they were based on different federal criminal statutes. In the federal criminal context, the *Blockburger* standard is easily met; there is little coherence or consistency in the way federal crimes are drafted, and the nature of most of these statutory offenses is such that they have elements quite different from all others.

In *Grady*, the Court ruled that the *Blockburger* test should still be applied in the first instance. If this standard is satisfied by a comparison of the elements of the two offenses, it is to be followed by a further inquiry under which the subsequent prosecution is barred if "the government, to establish an essential element of an offense charged in that prosecution, . . . prove[s] conduct that constitutes an offense for which the defendant has already been prosecuted."

Rather than focusing, as does *Blockburger*, on the statutory elements alone, this latter test requires a comparison of what the prosecutor attempts to prove at both of the trials. Justice WILLIAM J. BRENNAN, writing for the majority in *Grady*, took pains, however, to note that "[t]his is not . . . [a] same evidence test. The critical inquiry is what conduct the . . . [government] will prove, not the evidence . . . [it] will use to prove that conduct."

Depending on its subsequent interpretation, application of the *Grady* test could impose an important restriction on the government's ability to prosecute RICO and continuing criminal-enterprise cases. The RICO offense is committed when a person conducts the affairs of an enterprise (a continuing conspiratorial group or legal entity, such as a corporation or a governmental agency) through a pattern of racketeering activity that involves the commission of two or more related predicate offenses.

Before *Grady*, the government could, and often did, prosecute RICO cases relying on predicate offenses for which the accused had previously been tried and convicted (and even offenses of which the accused had been acquitted). *Grady*'s abandonment of *Blockburger* as the exclusive test of double jeopardy in successive-prosecution cases can be argued to bar the use as predicate offenses in RICO (and, for similar reasons, in continuing criminal enterprise cases) of crimes for which the accused has previously been tried. If the *Grady* test is applied as Justice ANTONIN SCALIA, in dissent, suggested it would be—that is, "where the charges arise from a single criminal act, occurrence, episode, or transaction, they must be tried in a single proceeding"—the decision will have the effect of barring separate trials of a RICO charge and the predicate offenses on which the RICO count is based.

An early post-*Grady* decision, *United States v. Esposito* (1990), handed down by a federal court of appeals, has taken a contrary view, however, holding that *Grady* does not bar a prosecution of the predicate crimes where there has been a prior acquittal on the related RICO charge. *Esposito* relied mainly on the earlier Supreme Court decision in *Garrett v. United States* (1985), a case only briefly cited in *Grady*.

*Garrett* involved the double-jeopardy implications of a continuing criminal-enterprise prosecution where the facts underlying a prior conviction of marijuana importation were used to prove one of the three predicate of-

fenses on which the continuing criminal-enterprise charge was based. The Supreme Court ruled that the double-jeopardy prohibition was not violated where the prior conviction was only one incident of conduct that occurred on two single days during the five-year course of conduct that was the basis for the continuing criminal-enterprise charge.

Although *Garrett* seems to be a relevant precedent in deciding on the effect of *Grady* on RICO and continuing criminal-enterprise prosecutions, the question remains whether, after *Grady*, *Garrett* is still good law and, if so, whether in a RICO or continuing criminal-enterprise prosecution, the government in proving conduct underlying a prior conviction as a predicate offense is trying to "establish *an essential element* of . . . [the] offense charged in that prosecution" (emphasis added).

*Grady* does not affect another application of the same *Blockburger* test—its use as the constitutional standard for determining whether separate punishments can be imposed for offenses tried together. Accordingly, even after *Grady*, there is no constitutional bar to the practice of prosecuting, along with a RICO count, separate predicate offenses (even those based in essentially the same harmful conduct) whose statutory elements differ from each other and those in the RICO statute and, following conviction on all of the charges, imposing separate punishments for each of the several crimes.

*Grady* is a modern rarity, a constitutional decision that may impose a substantive restriction on the enforcement of the federal criminal law, but there is a chance that it will not remain very long on the books. It was a 5–4 decision, with Justice Scalia, joined by Justices SANDRA DAY O'CONNOR, ANTHONY M. KENNEDY, and Chief Justice WILLIAM H. REHNQUIST dissenting. Given the close division in the case, the subsequent retirement of the author of the majority opinion, Justice Brennan, and the fact that the Court's articulation of double-jeopardy doctrine seems to be continually evolving, the case is a possible candidate for early overruling.

Apart from *Grady*, no other recent significant constitutional decision has served to restrict the use of the many innovative federal crime statutes and punishments enacted during the past two decades. The closest that the Court has come recently to such a decision is Justice Scalia's concurring opinion in *H.J., Inc. v. Northwestern Bell Telephone Co.* (1989) (joined by the same three Justices who joined him in dissent in *Grady*), in which he raised doubts about whether a key element of the RICO statute—the "pattern" requirement in the "pattern of racketeering activity" phrase—meets the constitutional proscription against vagueness in criminal statutes.

The *H.J.* decision itself involved a civil action under the provision of the RICO statute that authorizes a private treble-damage suit to be brought by a person injured by a criminal RICO violation. Justice Scalia noted that because RICO has criminal applications "as well," it "must, even in its civil applications, possess the degree of certainty required for criminal laws." A corollary follows from this proposition. A decision in a civil RICO suit that the "pattern of racketeering" phrase used in defining the criminal violation is constitutionally infirm would apply equally in the criminal context. Thus, a constitutional decision that might in its immediate impact serve to insulate business people from treble-damage actions could also serve to protect organized-crime figures from federal criminal prosecution. Of course, it remains to be seen whether the concurring opinion in *H.J.* will gain another adherent and ripen into a constitutional restriction on the breadth of the RICO statute.

An innovative aspect of the RICO and drug statutes, the punishment of criminal forfeiture, was recently considered in *Caplin and Drysdale, Chartered v. United States* (1989), where the Court held that neither the Fifth nor the Sixth Amendment exempts from forfeiture assets that a criminal defendant proposes to use to pay defense counsel. In a related case, *United States v. Monsanto* (1989), the Court upheld the constitutionality of a pretrial order freezing such assets in a defendant's possession.

A more central constitutional challenge to criminal forefeiture, litigated in some of the courts of appeals, but yet to be considered by the Supreme Court, is the question as to whether, given the nature and circumstances of the offense, a forefeiture might be grossly disproportionate under the Eighth Amendment's cruel and unusual punishment clause.

Under the RICO statute, the prosecutor may seek forfeiture of the convicted person's entire interest in an enterprise the affairs of which were carried on in violation of the statute; the statutory forfeiture provision contains no limitation. Moreover, once the accused is convicted, forfeiture is mandatory; the judge has no discretion to reduce the amount. Thus, a person who owns all or most of a corporation and violates the federal criminal law, for example, by accepting or paying some kickbacks may, as a result of a RICO conviction, forfeit his or her entire interest in the corporation to the government.

In *United States v. Busher* (1987), taking to heart the Supreme Court's ruling in SOLEM V. HELM (1983) (the Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed"), the Ninth Circuit Court of Appeals ruled that the Eighth Amendment limits extreme criminal forfeitures under RICO (and under the drug laws) to insure that the punishment imposed is not "disproportionate to the crime committed." Some of the other circuits have ruled similarly.

None of these decisions has been reviewed by the Supreme Court. However, the Court has agreed to consider an appeal on an Eighth Amendment ground in a drug case that might shed some light on the forfeiture punishment issue. In *Harmelin v. Michigan*, the Court will decide whether a mandatory term of life imprisonment without parole imposed on a person with no prior criminal record, who has been convicted of possession of slightly more than a pound of cocaine, violates the eighth amendment proscription against cruel and unusual punishment. The case will be considered in the 1990–1991 term.

There has been one recent important constitutional decision affecting a key element in the federal criminal enforcement system, MISTRETTA V. UNITED STATES (1989), where the Court sustained the United States Sentencing Commission against a constitutional challenge claiming that the legislation setting up the Commission delegated excessive legislative power to the Commission and violated separation of powers doctrine.

In 1984, with a view to eliminating excessive disparity in federal sentences, the Congress enacted the Sentencing Reform Act setting up the Sentencing Commission as an independent body in the Judicial Branch, with authority to establish binding Sentencing Guidelines that, based upon detailed factors relating to the offense and the offender, provide for a range of determinate sentences for all federal offenses.

In *Mistretta*, the Court ruled that the Sentencing Reform Act sets forth "more than . . . [the] 'intelligible principle' or minimal standards" that are required under traditional nondelegation doctrine prohibiting excessive delegations of legislative authority: "Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate."

While recognizing that the Sentencing Commission "unquestionably is a peculiar institution within the framework of our Government," the Court rejected the argument that the structure of the Commission violated separation of powers doctrine insofar as it required Article III judges, who sit on the Commission with other nonjudicial appointees selected by the President, to exercise legislative authority; and also required those judges to share their judicial rulemaking authority with nonjudges; and threatened judicial independence insofar as the President is given authority to remove the judges from the Commission.

*Mistretta* is a significant decision since it sustains against constitutional attack the basic structural change relating to federal sentencing that Congress had effected by enacting the Sentencing Reform Act. Although there are further constitutional issues that may be raised in cases applying the guidelines—for example, whether the guidelines violate due process insofar as they restrict judicial discretion to weigh individual factors in sentencing—the message of *Mistretta* is that the Sentencing Commission and its guidelines are here to stay.

Although *Mistretta* is significant, it is also *sui generis*. It is a unique decision relating to a new institutional structure and does not detract at all from the observation made earlier that the Constitution is largely dormant as applied to the substantive federal criminal law.

Of course, given the current makeup of the Court, public attitudes toward crime, and the historical reluctance of the Court to adjudge substantive federal criminal legislation unconstitutional, even were the Court to agree to review the constitutionality of these new measures, it would be unlikely that any of them would be found invalid. Still, even if declarations of unconstitutionality are unlikely, it would be helpful to the bench and bar if the Court were to review these issues with greater frequency.

The import of the Court's general reluctance to review many issues of statutory interpretation and the constitutionality of substantive federal criminal laws and related issues (while inexplicably continuing frequently to delve deeply into the minutiae of Fourth Amendment search and seizure issues) goes far beyond the direct effect of the Court's failure to consider the relevant issues; it influences the lower federal courts, which see many more federal criminal cases than the high court, and it may also be having an impact on the Congress.

Not surprisingly, federal district courts and courts of appeals generally do not give extended consideration to claims challenging the constitutionality of the new federal criminal statutes such as RICO. Correspondingly and perhaps more importantly, they also appear generally not even to be influenced very much by constitutional values in their interpretation of federal criminal statutes. This may not be unexpected in a climate created by a high court that itself is paying little attention to such issues. Yet in a system of judicial review, one expects constitutional values to be applied not only as a basis for determining the validity of criminal statutes, but as an element influencing, in appropriate cases and to a limited extent, issues of statutory interpretation.

In recent years, Congress has legislated an explosion in federal criminal statutes. At the same time, the legislature seems to be paying less and less attention to statutory details and has even become careless in the drafting process. In 1984, 1986, and 1988, Congress enacted comprehensive legislative packages encompassing a large number of federal criminal subjects; in the 1988 legislation, for example, a significant number of the provisions were directed to correcting drafting errors in the earlier legislation. Although it is not possible to demonstrate any

direct linkage between the Supreme Court's inattention to the federal criminal law and the increase in legislative action in this area and the corresponding increase in drafting sloppiness, one might expect the Congress to be affected in its actions if the Court were to enter this arena more frequently.

Were the Court more actively to review and perhaps occasionally invalidate federal legislative or executive action in the criminal sphere affecting substantive interests, the effect might go far beyond the specific issues being decided. It might influence federal judges' approach to issues of interpretation of federal criminal statutes and also affect the kinds of cases prosecutors bring and the kind of positions they take in cases being brought. Most important, it could influence the Congress and have a significant impact on the form and content of future federal criminal legislation.

NORMAN ABRAMS
(1992)

Bibliography

ABRAMS, NORMAN 1986 *Federal Criminal Law and Its Enforcement.* St. Paul, Minn.: West Publishing Co.

——— 1989 The New Ancillary Offenses. *Criminal Law Forum* 1:1–39.

KURLAND, ADAM H. 1989 The Guarantee Clause as a Basis for Federal Prosecution of State and Local Officers. *Southern California Law Review* 62:367–491.

LYNCH, GERARD E. 1987 Rico: The Crime of Being a Criminal, Parts I & II, Parts II & III. *Columbia Law Review* 87:661–764, 920–984.

## FEDERAL CRIMINAL LAW
(Update)

If a constitutional snapshot is taken of the current status of the federal criminal law, the picture that emerges is somewhat changed from a decade ago. It continues to be the case that the Supreme Court does not with great frequency label as unconstitutional federal prosecutorial action, judicial penalties, or federal criminal statutes under the DOCTRINES of DOUBLE JEOPARDY, CRUEL AND UNUSUAL PUNISHMENT, excessive fines, or void for VAGUENESS, but there have been some new developments.

Although the Court is reviewing fewer criminal cases overall, the Justices are addressing more federal criminal cases, particularly those involving key issues of STATUTORY INTERPRETATION or questions arising under the SENTENCING guidelines and criminal forfeiture. This activity has marginally increased the number of cases in which the Court has addressed constitutional issues in a federal criminal context.

In 1993, in *United States v. Dixon*, the Court OVERRULED its earlier decision in *Grady v. Corbin* (1990) that had established a new test for double jeopardy in a successive prosecution context. Grady had applied a "same conduct" test as a supplement to the *Blockburger* test which provides that in successive prosecution cases, if each of the statutes involved in the two prosecutions contains an element that the other does not, double jeopardy does not bar the second prosecution. In *Dixon*, a majority of the Court ruled that *Grady* had been wrongly decided and reinstated the *Blockburger* test as the exclusive means of adjudging whether the double jeopardy standard has been violated in a successive prosecution context.

The Court also applied the double jeopardy clause in cases involving both civil sanctions and criminal prosecution. As in the *Grady* and *Dixon* cases, the Court overruled a decision that had won the Court's approval only a handful of years earlier.

In *Hudson v. United States* (1997), which involved administrative sanctions imposed against bankers followed by their indictment for the same conduct, a majority of the Court "largely disavowed" the approach developed in 1989 in *United States v. Halper.* The Court adopted a two-pronged test for determining whether double jeopardy barred the second prosecution. Were the administrative sanctions imposed intended by Congress to be civil? If so, were they nevertheless punitive in nature or effect despite the congressional intent? Only the "clearest proof" would suffice to overturn the legislative intent. In both *Dixon* and *Hudson*, the Court returned to an approach that is easier to apply; one that focuses mainly on the statutory setting rather than the particular circumstances of the case; one that makes it more difficult for a defendant to sustain a claim of double jeopardy.

Because forfeiture is now part of a number of federal criminal statutes, it should not surprise that during this period, the Court also addressed constitutional issues regarding the use of this sanction. First, in *Alexander v. United States* (1993), the Court held that criminal forfeiture is "no different, for Eighth Amendment purposes, from a criminal fine," and in the same year in *Austin v. United States*, relying in part on *Halper*, the Court ruled that CIVIL FORFEITURE is limited by the excessive fines clause of the Eighth Amendment if at least part of its purpose was punishment.

Subsequently in *United States v. Usery* (1996), the Court ruled that, for purposes of the double jeopardy clause, civil IN REM forfeitures under the drug laws and money laundering statutes were not punitive and not to be treated as criminal. The approach used in *Austin* was thus restricted to the excessive fines clause.

Then in 1998, in *United States v. Bajakajian*, the Court applied the excessive fines clause to strike down the crim-

inal IN PERSONAM forfeiture of $357,144 that the defendant had been transporting out of the country without reporting it as required by federal law. The majority concluded that the forfeiture of the "property involved in the [failure to report] offense" constitutes punishment and is thus a fine within the meaning of the excessive fines clause. The majority proceeded to use the same standard applied under the cruel and unusual punishments clause—gross disproportionality—as the test of constitutionality under the fines clause.

While the double jeopardy and excessive fines clauses have been applied by the Court in recent federal criminal cases, the void for vagueness doctrinal area continues to be quiescent. One case is worth mentioning because it involved what the Sixth Circuit Court of Appeals described as the "most ambiguous of federal criminal statutes." In *United States v. Lanier* (1997), the Court unanimously rejected a vagueness challenge to Title 18, section 242, which makes it a federal crime for a person acting willfully and under COLOR OF LAW to deprive another of rights protected by the Constitution. A local judge who allegedly sexually assaulted several women in his chambers had been charged with a violation of section 242.

The Supreme Court stated that the "touchstone" of vagueness doctrine is "whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." The Court remanded the case to the Court of Appeals to determine whether, in light of preexisting law, the unlawfulness of the judge's behavior under the Constitution was apparent. The decision appears to leave open the possibility of a wide-ranging use of section 242 to address conduct not covered by other federal criminal statutes, and it suggests that the Court is not likely to restrict on vagueness grounds other broad criminal statutes found in the Federal Criminal Code.

In its recent constitutional decisions affecting the federal criminal law, the Supreme Court has shown a willingness to strike down prosecutorial action and judicial penalties, but it has not invalidated criminal statutes on substantive grounds. That the Court has been closely divided in many of its recent constitutional rulings, and that dissenting Justices (not always the same group) have not been reluctant to overrule recent PRECEDENTS when they later obtain a majority, does not bode well in the near term for the stability, certainty, and predictability of federal criminal law.

NORMAN ABRAMS
(2000)

Bibliography

AMAR, AKHIL R. 1997 Double Jeopardy Law Made Simple. *Yale Law Journal* 106:1807–1848.

JEFFRIES, JOHN C., JR. 1985 Legality, Vagueness and the Construction of Penal Statutes. *Virginia Law Review* 71:189–244.

KING, NANCY J. 1996 Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties. *University of Pennsylvania Law Review* 144:101–196.

THOMAS, GEORGE C., III 1995 A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem. *California Law Review* 83:1027–1070.

# FEDERAL ELECTION CAMPAIGN ACTS

## Presidential Election Campaign Fund Act
## 85 Stat. 497 (1971)
## Federal Election Campaign Act
## 86 Stat. 3 (1971)
## Federal Election Campaign Act
## 88 Stat. 1263 (1974)

The success of constitutional democracy depends upon the integrity and autonomy of the electoral process. But whether that integrity is threatened more seriously by wealthy individuals and organizations than by regulations that prevent individuals and organizations from using their resources to promote candidates and policies is a matter for debate. During the 1970s several attempts at campaign finance "reform" were enacted, resulting in an almost complete switch from private to public financing at least of the presidential general election campaigns.

Two reform statutes were enacted in 1971: the Federal Election Campaign Act (FECA) and the Presidential Election Campaign Fund Act. The former required any committee receiving or spending more than $1,000 in a campaign for federal office to register with the federal government and publish reports of contributions and expenditures. It also prohibited contributions under names other than that of the actual donor and limited total expenditures on campaign advertising. The second statute created a fund of public money to replace private contributions in financing presidential election campaigns. By means of a "check-off" device, taxpayers would nominally designate one dollar of their annual federal income tax payment for the election campaign fund. Acceptance of these public funds precluded a party or campaign committee from accepting any private contributions.

The FECA of 1974 was an extremely comprehensive effort to regulate the "time, place, and manner" of electing federal officials. Among the provisions of the 1974 act were: maximum spending limits for presidential nominating and general election campaigns; federal matching funds for qualifying candidates in major party nominating campaigns; complete federal funding of major party candidates in the general election campaign; limits on con-

tributions of individuals, organizations, and political action committees to campaigns for Congress and for the presidential nominations; limits on campaign spending per state in presidential nomination campaigns; and rigorous accounting and reporting requirements for campaign finance committees. In addition, the 1974 act created a six-member Federal Elections Commission to enforce the other provisions of the act; the commission was to comprise members appointed by the President, the speaker of the House of Representatives, and the president pro tempore of the Senate.

The Supreme Court heard major constitutional challenges to the 1974 act even as the first campaign was being conducted under it. In BUCKLEY V. VALEO (1976) the Court held unconstitutional the method of appointment of the commission (because the Constitution grants to the President alone the power to appoint federal officers) and all the spending limitations imposed other than as a condition for receiving federal matching funds. The rationale for the latter holding was that the commitment of funds in support of a candidate or cause was a form of expression protected under the FIRST AMENDMENT.

The tendency toward public financing of electoral campaigns, with accompanying regulation, works to the advantage of incumbents and to the disadvantage of challengers, who usually need to spend more than their opponents to overcome the advantages of incumbency. The scheme for financing and regulating the presidential election campaigns serves to insulate the two major parties from challenges by third parties or independent candidates. While claiming to protect the people from the "fat cats," federal politicians have taken steps to protect themselves from the people.

DENNIS J. MAHONEY
(1986)

Bibliography

ALEXANDER, HERBERT E. 1980 *Financing Politics: Money, Elections and Political Reform.* Washington, D.C.: Congressional Quarterly.

## *FEDERAL ENERGY AGENCY v. ALGONQUIN SNG, INC.*
426 U.S. 548 (1976)

A unanimous Supreme Court, through Justice WILLIAM J. BRENNAN, upheld the constitutionality of oil import licensing fees imposed under the Trade Expansion Act (1962) and the Trade Act (1974). Under those statutes the President was authorized to "adjust" imports of commodities if the importation was in such quantities or under such conditions as to threaten national security. This was not an improper DELEGATION OF POWER, as the laws established preconditions for and limits upon its exercise. Furthermore, the court ruled, license fees were as acceptable a means of adjusting levels of importation as quotas.

DENNIS J. MAHONEY
(1986)

## FEDERAL FARM BANKRUPTCY ACT

See: Frazier-Lemke Acts

## FEDERAL GRANTS-IN-AID

Federal grants-in-aid are subventions to state or local governments, private institutions, or individuals in support of a wide variety of undertakings. Early in the nineteenth century, governmental transfers of land were used to support road construction and agricultural education. Cash grants to states for diverse functions, such as vocational EDUCATION, forest fire prevention, and maternal health, came of age in the decades preceding the NEW DEAL. The public welfare programs established in 1935 greatly expanded the federal role in state finances. But it is the proliferation of categorical grants since 1960 that has rendered them the principal instrument of federal influence over social services and urban affairs. This recent extraordinary growth reflects an unplanned series of fragmented national responses to state fiscal inadequacy in the face of increased demand for collective goods.

Most of the current 500 or so national grant programs are intergovernmental, and federal monies under them constitute about one-quarter of the annual expenditures of both state and local governments. Notwithstanding federalism-inspired movements toward less directive federal grants, known as REVENUE SHARING and block grants, most aid programs remain categorical, with narrowly defined undertakings and detailed conditions imposed on the receiving agencies.

Grants are made pursuant to Congress's broad discretion to spend for the GENERAL WELFARE and common defense. Like other national powers, grant-making authority rests on permissive and expansive constitutional principles established during the post-New Deal era of judicial reaction and retreat, typified by such cases as STEWARD MACHINE CO. V. DAVIS (1937) and *Oklahoma v. Civil Service Commission* (1947). The recurrent use of grant conditions to impose national solutions on traditionally local issues suggests that the political safeguard of FEDERALISM constraining Congress in the use of national regulatory power is less operative in the exercise of grant-making authority. (See TAXING AND SPENDING POWER.)

For many years intergovernmental relationships in grant programs were understood to be administrative, cooperative, professional, and donative. Consequently, federal judges declined to intervene in grievances founded on grant programs. This aloofness markedly changed with the advent of antipoverty litigation in the late 1960s, when courts acknowledged that private beneficiaries of public WELFARE BENEFITS were entitled to relief against state and local laws and practices inconsistent with federal grant conditions. Litigation over grants soon became a staple of federal court dockets, with suits by federal grantor agencies and local government grantees as well as by private parties. The judicial decisions, while providing a novel and potent injunctive remedy, broadly construed and uniformly validated federal goals and conditions. Federal courts thus placed their stamp of approval on Congress's expansive use of federal grants.

Grants differ from regulation in that they entail expenditures, not direct commands and sanctions, as the inducement for conforming activity. Because of this difference, courts maintain that state and local governmental participation in grant-in-aid programs is voluntary, not coerced. They consequently reject attacks on grant conditions, on the ground that onerous or intrusive requirements can be avoided by the "simple expedient" of not yielding and of refusing the grant. This choice of the state or city is largely fictional in light of citizen-industry mobility and the competition among states for resources. But courts cannot intelligibly resolve the question of whether federal grants have overborne the "free will" of government units.

On several recent occasions Congress has further reduced the difference between grants and regulation through the creation of new grant-in-aid directives without additional federal funding. Instead of monetary inducements, Congress has chosen to condition continuation of eligibility under well-established, and usually large, aid programs on conformity with its new requirements. This tying arrangement has the look of regulation, but its validity seems beyond question so long as there is a plausible relationship between the new program or condition and the national purposes of the older one.

For example, states may be required to supplement or to provide welfare payments in order to remain eligible for large Medicaid health care grants; the justification is that income maintenance and health-care support once were within a single grant program, and, more fundamentally, that subsistence payments significantly affect the health of the impoverished. Similarly Congress has tied the availability of federally insured mortgages to state participation in a flood control program; has tied the entire portmanteau of federal health dollars to state adoption of an elaborate apparatus for health systems planning and cost control; and has tied highway grants to state regulation of billboards, state enforcement of a federal speed limit, and state adoption of a national minimum age for drinking. There may be constitutional limits on tying new conditions to older grant programs, but the limits remain unenforced and unexplored.

The basic constitutional constraint on grant conditions is that they must be relevant to the purpose of a grant program. Here, as elsewhere, Congress has an exceedingly large discretion to determine relationships between means and goals. Fair treatment of private beneficiaries and efficiency are the two primary categories of relatedness, and they obviously can carry a good deal of baggage. In addition, Congress of late has established a web of elaborate "cross-cutting" conditions applicable to all or most grant-in-aid programs concerning, for example, the handicapped, environmental impacts, labor and procurement standards, citizen participation, merit hiring, and CIVIL RIGHTS. Administrative enforcement of grant conditions played a major role in the DESEGREGATION of southern schools. To be sure, many of these restrictions would fall within congressional powers under the COMMERCE CLAUSE and the FOURTEENTH AMENDMENT, but there is significance in Congress's casting them as grant-in-aid conditions. The judicial assumption that states have the option not to accept the grants apparently makes it easier for Congress to impose new and controversial obligations on the states.

The TENTH AMENDMENT limit established in NATIONAL LEAGUE OF CITIES V. USERY (1976) has not been applied to grants founded on the spending power, no doubt because such a ruling would eviscerate the current system of federal grants. Numerous federal grant conditions directly affect the structure and operation of state and local governments. Grant programs not only pervasively alter the spending priorities of governmental units, but, through the imposition of conditions, also allocate power between state and local governments (and occasionally between governors and legislatures), dictate hiring practices and employment benefits, and, by barring partisan political activity, limit the occasions on which officials administering departments having grants may be elected.

There is, finally, the Supreme Court's assimilation of grant programs to regulatory ones in its holding that state laws inconsistent with the terms of federal grants are invalid under the SUPREMACY CLAUSE. Although not fully explicated, this theory has been used repeatedly to warrant injunctive relief against grantee noncomplicance with national conditions. Traditionally, federal administrative enforcement of grant conditions had been exceptionally lax, perhaps designedly so. Third-party suits for injunctive relief have altered this convention, while enlarging the role of federal courts in monitoring and enforcing grant pro-

grams. As a consequence, there is now more law and less discretion defining and governing the relationships under national grants.

LEE A. ALBERT
(1986)

Bibliography

LAPIERRE, D. BRUCE 1983 The Political Safeguards of Federalism Redux. *Washington University Law Quarterly* 60:779–1056.

MAXWELL, J. and ARONSON, J. R. (1965) 1977 *Financing State and Local Government.* Washington, D.C.: Brookings Institution.

## FEDERAL IMMUNITY ACT
68 Stat. 745 (1954)

The growing tendency in the early 1950s of witnesses before congressional committees to refuse to testify by relying on the Fifth Amendment's RIGHT AGAINST SELF-INCRIMINATION led Congress in 1954 to amend previous statutes and provide revised immunity arrangements. The purpose of the measure was to bypass the Fifth Amendment by giving Congress the power to grant a reluctant witness immunity from prosecution and compel the individual to testify. Either house of Congress by majority vote or a congressional committee by a two-thirds vote could grant immunity from prosecution to a witness in a national security investigation, provided an order was first obtained from a United States District Court judge. The statute required the attorney general to be given advance notification and an opportunity to offer objections. The law also permitted UNITED STATES DISTRICT COURTS to grant immunity to witnesses before courts or GRAND JURIES. Witnesses thus immunized faced the choice of testifying or going to jail. The Fifth Amendment could not be raised as a barrier to compulsory testimony.

In ULLMAN V. UNITED STATES (1956) the Supreme Court sustained its constitutionality.

PAUL L. MURPHY
(1986)

(SEE ALSO: *Immunity Grant.*)

## FEDERALISM

Federalism is a political system in which different levels of government agree to share power in governing the same territory. Constitutional federalism in the United States refers both to the constitutional provisions for the national and the state governments to exist and to perform particular functions in the federal system of governance, and to the sets of relationships—among states, and between states and the federal government—for which the Constitution provides a framework. JUDICIAL REVIEW of federalism refers to the limits on federal and state action that courts will enforce on behalf of the federal structure of the Constitution.

*Constitutional Federalism.* Constitutional federalism in the United States emerged out of practical experiences under the ARTICLES OF CONFEDERATION and political exigencies. Experience showed that greater centralization was essential, but the political leadership of the states would not have been prepared to give up their states' self-governing powers to a separate and entirely national government. This pragmatic reality is reflected in the assumption, in many parts of the Constitution, that the states will continue as separate governments, each having a legislature, an executive authority, and courts. The provisions for selecting members of Congress presuppose that state legislatures exist; the provisions for calling forth the militia presuppose an executive authority in each state; and the SUPREMACY CLAUSE presupposes a state judiciary. Even the FOURTEENTH AMENDMENT, which substantially changed the balance of powers between the national and the state governments, contemplates the continued existence of the states as self-governing entities. Section 2 of the Fourteenth Amendment, which penalizes states for VOTING RIGHTS discrimination in elections of members of the state legislature or for state executive or judicial officers, contemplates not only the states' existence but also the continued operation of the three branches of state government.

U.S. federalism has been the subject of theoretical debate from its beginnings. FEDERALIST No. 39 described the provisions of the Constitution as partly national and partly confederated. *Federalist* No. 59 offered a political theory of the value of federalism: it would serve as a "double security" for the preservation of liberty, with each level of government presumably having motives to check abuses by the other. In *United States Term Limits v. Thornton* (1995), the influential concurrence of Justice ANTHONY M. KENNEDY linked U.S. federalism to coexisting CITIZENSHIPS (state and federal) and political accountability, emphasizing that both state and national government representatives are selected by the people and that each level of government is accountable to the people.

Among the values claimed for federalism as a constraint on national power are (1) its liberty-preserving, tyranny-preventing possibilities, (2) the potential for decentralized government to maximize the satisfaction of individual preferences by allowing citizens to choose among diverse regimes by moving from one to another, (3) the opportunities for more active political participation at lower levels of government whose units are smaller, (4) the possibilities

for developing cross-cutting allegiances among different groups in society, given that state boundaries for the most part do not correspond to such deeply divisive characteristics as race, religion, or language, and (5) the greater prospects offered by decentralization for useful innovation in government design and policy. But whether constitutional constraints on national power actually serve these goals remains contested. National power in the last half-century has been an important force for liberty and equality as against tyrannical policies of state-sponsored racial SEGREGATION, though in recent years some state or local jurisdictions have moved ahead of federal policies in advancing CIVIL RIGHTS for gays and lesbians. Vigorous federal action, especially in economic or environmental spheres, can sometimes avoid "races to the bottom" that would constrain rather than enhance state choices, though whether states would race to the bottom, or to the top, in some important areas of regulation remains in contest. If the only significant politics is at the national level, participation in state or local politics may be less meaningful. Cross-cutting allegiances may be temporary products of contingent demographic distributions rather than a value of federalism itself. And, some would say, experimentation can be achieved through nationally directed but decentralized programs.

Debate over the "value" of federalism in the United States continues. Edward Rubin and Malcolm Feeley, for example, argue that federalism, as a constraint on national power, is a "national neurosis," grounded in history but serving no current constitutional value, and thus should never be the basis for invalidating or interpreting a federal statute. At another pole, scholars such as Steven Calabresi argue that judicial enforcement of federalism-based limits on national power is as important as judicial enforcement of individual rights–based limits. Still others, such as Larry Kramer, explore the federal structure's empirical effects on national politics and governance.

A related controversy has developed over the basis, and scope, of judicial enforcement of federalism-based limits on state regulation under the DORMANT COMMERCE CLAUSE doctrine. Values of diversity and efficiency have been invoked in favor of more relaxed review of state programs; public choice analysis, on the other hand, has been invoked to support judicial enforcement of "bargains" among the states that will be economically advantageous in the long run to all if cheating can be avoided. There is disagreement both about the source of the limits (e.g., whether from the grant of power to Congress over INTERSTATE COMMERCE or from the PRIVILEGES AND IMMUNITIES of citizenship clause in Article IV) and over the value of some of the more recent manifestations of federalism-based invalidations of state regulatory action (especially those in the area of ENVIRONMENTAL REGULATION). Justices ANTONIN SCALIA and CLARENCE THOMAS have sought, from ORIGINALIST or TEXTUALIST perspectives, to unravel the COMMERCE CLAUSE as a source of judicially imposed restraints on the states, while upholding judicially enforced bans on state discrimination against out-of-staters or interstate commerce under the privileges and immunities clause, or the import–export clause.

*Judicial Review of National Action.* The debate over the values of federalism is only loosely linked to debate over the role of judicial review. While those who see no value in the maintenance of federal structures may be opposed to judicial enforcement of purported federalism-based limits on national or state power, those who see value in federalism are nonetheless of very different minds on the proper role of judicial review. Building on Herbert Wechsler's work, some argue that federalism values are adequately protected by the structural role of the states in the national political process, or even that federalism challenges to national action should be regarded as lacking JUSTICIABILITY. Others, including Barry Friedman and Vicki Jackson, argue that the historical embeddedness of federalism, RULE OF LAW concerns, or the constitutionally prescribed functions of the states, contemplate some judicially enforceable federalism-based limits on national power. And still others, including Roderick Hills, Jr., argue for judicial enforcement of federalism-based limits to promote accountability and efficiency in national decision-making.

Despite proclamations of the death of federalism in the 1970s, the 1990s have seen a renewed willingness by the Supreme Court to invalidate federal laws based on federalism concerns. Two somewhat distinct lines of cases can be identified, one dealing with federal regulations that apply to the states as such, and the other dealing with federal regulation of the activity of private entities.

*(i) Federal Regulation of State Governments.* In *Maryland v. Wirtz* (1966), the Court held that the commerce clause authorized federal regulation of the employment practices of state governments, and upheld an extension of the federal minimum wage law to a limited group of state and local government public employees. But in NATIONAL LEAGUE OF CITIES V. USERY (1974), the Court found merit in TENTH AMENDMENT objections to Congress's further extension of the federal minimum wage law to municipal transit workers. Under *National League of Cities*, the Tenth Amendment barred federal action if it regulated states as such, affecting attributes of state sovereignty in areas of traditional government function, without compelling federal need. Seeking to apply this standard, the lower courts reached conflicting decisions on a range of questions and for several years the Court declined to invalidate other extensions of federal law to the states. Then, in GARCÍA V. SAN ANTONIO METROPOLITAN

TRANSIT AUTHORITY (1985), the Court, by a 5–4 vote, OVERRULED *National League of Cities.* It concluded that the effort to identify traditional government functions protected by the Tenth Amendment was inconsistent with federalism's dynamic potential, and that the national political process would generally be sufficient to protect the interests of the states. *García* was widely read as an abandonment by the Court of federalism-based judicial review of national action.

Instead, in the 1990s, the Court began to abandon the premise of *García.* In GREGORY V. ASHCROFT (1991), a STATUTORY INTERPRETATION decision holding the federal AGE DISCRIMINATION law inapplicable to state judges, the Court wrote at length about the values of federalism and the need for a constrained national government. In NEW YORK V. UNITED STATES (1992), the Court held unconstitutional a federal statute that required a state by a certain date either to designate a site for disposal of radioactive WASTE or to assume liabilities of private generators and holders of radioactive waste in the state, a choice that the Court found to be an effort to coerce or "commandeer" the state legislature. According to the OPINION OF THE COURT by Justice SANDRA DAY O'CONNOR, the 1787 Constitution abandoned federal power to regulate the states as such, substituting for it federal power to regulate private persons. Moreover, the Court suggested, to permit Congress to require states to legislate would confuse the lines of political accountability. *García*'s basic rationale was ignored, and its holding distinguished and narrowed. The statute upheld in *García*, the Court said, was one generally applicable to private as well as state entities. In *Printz v. United States* (1997), the Court extended the anticommandeering rule of *New York* to invalidate a federal law requiring local law enforcement authorities to perform background checks on gun purchasers. Distinguishing this case from the well-settled obligation of state courts to entertain federal claims, the Court held that the federal government cannot require state executive or legislative bodies to enforce or administer federal law. As of this writing, the Court has granted CERTIORARI in a case challenging Congress's power to require states to limit their own disclosures of drivers' records and raising the question whether Congress, under Article I, can enact laws that regulate but do not "commandeer" the states.

*City of Boerne v. Flores* (1997) suggests that the Court's reinvigoration of federalism as a limit on national action will also apply to Congress's power under the Fourteenth Amendment. *Flores* held that Congress exceeded its powers under the FOURTEENTH AMENDMENT, SECTION 5 in enacting the RELIGIOUS FREEDOM RESTORATION ACT (RFRA), which prohibited state and local governments from applying generally applicable laws in ways that substantially burdened religious practice, unless the laws met the "compelling interest" test of STRICT SCRUTINY. First, the Court held that Congress lacked power to treat conduct that, under the Court's caselaw, did not violate the free exercise clause as if it did violate that clause. Moreover, the Court held, although Congress does have some power to impose prophylactic measures prohibiting conduct that does not itself violate section 1 of the Fourteenth Amendment in order to prevent other conduct that does, such a remedial or preventive use of the section 1 power must be proportional and congruent to actual violations. It concluded that the sweep of RFRA was broader than any record of such violations would warrant and thus found RFRA unconstitutional, while also suggesting that Congress had violated SEPARATION OF POWERS principles in acting on a theory different from the theory previously approved by the Court in enforcing rights under the Fourteenth Amendment. (*Flores* carried to its logical extreme might suggest that, had Congress sought to outlaw racial segregation by the states after PLESSY V. FERGUSON (1896) was decided but before *Plessy* was in substance overruled by BROWN V. BOARD OF EDUCATION (1954), Congress's action could have been challenged as violating the separation of powers.) Two 1999 decisions by the Court expanded on *Flores*, holding unconstitutional, as not supported by the due process clause of the Fourteenth Amendment, Congress's abrogation of ELEVENTH AMENDMENT immunity on claims for PATENT infringement and Lanham Act violations.

*(ii) Federal Regulation of Private Activity.* In the years following the NEW DEAL, the Court upheld federal power under the commerce clause to regulate a wide range of private activities, in areas ranging from civil rights to crimes such as loansharking. The Court's reasoning appeared to allow little room either for consideration of the interests of states or the effect of federal LEGISLATION on the balance of powers between national and state governments. Nor did the Court engage in rigorous judicial scrutiny of congressional motives or reasons for acting. But in UNITED STATES V. LÓPEZ (1995), for the first time since the New Deal, the Court struck down a federal law regulating private behavior as beyond Congress's ENUMERATED POWERS. The statute prohibited possession of a firearm within 1,000 feet of a school, but included no explicit findings supporting a connection to interstate commerce or otherwise linking the prohibited action to an enumerated source of federal power. Invoking the notion of dual sovereignty, in which the states needed to have a sphere of regulation that the federal government was not involved in, the Court held that the connection to interstate commerce was too obscure, the rationales for upholding the law too sweeping, and the subject matter too closely connected to areas traditionally regulated by the states to pass constitutional muster.

*(iii) Related Cases.* In addition to these lines of cases

involving substantive powers of Congress, the Court has also restricted Congress's power to give federal courts JURISDICTION over certain cases against states. Overruling a prior decision, the Court in *Seminole Tribe v. Florida* (1996) held that under the ELEVENTH AMENDMENT, Congress lacked power to subject states to unconsented-to suits in federal courts to enforce legislation enacted pursuant to Article I of the Constitution, and in several later cases restricted the availability of judicial remedies, in federal and state courts, against states for violations of substantively applicable federal law.

*Unanswered Questions.* These developments leave many questions unanswered. Recent federalism decisions, including *Printz* and *Seminole Tribe*, require the courts to determine the source of power for various congressional enactments because, under current doctrine, Congress has more power to impose substantive obligations and judicial remedies on state governments when Congress acts pursuant to the Fourteenth Amendment than pursuant to the commerce clause. Thus, whether Congress can subject states to private remedies under, for example, the federal minimum wage law, will depend on whether such a statute is a valid exercise of Congress's power to enforce the Fourteenth Amendment. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* (1999), the Court recognized a patent as PROPERTY protected by the DUE PROCESS clause of the Fourteenth Amendment, but nonetheless held the patent law's abrogation of the states' SOVEREIGN IMMUNITY from suit to be unconstitutional under *Flores* because state remedies might provide all relief to which patentholders were constitutionally entitled for infringements, and thus abrogation of immunity was not proportional to constitutional injuries Congress could properly seek to remedy or forestall. *Flores* and its progeny thus clearly demonstrate that the Court cannot be expected simply to defer to whatever Congress does in claimed exercises of its Fourteenth Amendment powers.

Likewise subject to challenge under *Flores* are a range of federal laws prohibiting state and local governments from engaging in conduct that would not, of itself, violate the Fourteenth Amendment EQUAL PROTECTION clause as interpreted by the Court. In WASHINGTON V. DAVIS (1976), the Court held that only intentional discrimination violates the Fourteenth Amendment. Yet federal statutes (such as Title VII) that apply to state and local governments prohibit "disparate impact" actions, or prohibit discrimination based on categories (age, disability) that the Court has held are not SUSPECT CLASSIFICATIONS for purposes of equal protection analysis. Whether this and other statutes will meet *Flores*'s "proportionality" test for congressional power under the Fourteenth Amendment, section 5, remains for future decisions.

The Court's 1999 Eleventh Amendment and state sovereign immunity decisions did not question Congress's substantive authority to extend patent laws, or minimum wage laws, to the states. While the reasoning behind the anticommandeering rule of *New York* and *Printz* might be thought to raise questions about Congress's power under Article I to regulate the states pursuant to laws such as the FAIR LABOR STANDARDS ACT, *New York* distinguished *García* as involving a generally applicable statute. On this basis, the Fair Labor Standards Act, other federal laws that apply to employment decisions by public and private employers (including antidiscrimination laws), or laws like the patent and COPYRIGHT laws, would remain constitutional as applied to the states (even if the available judicial remedies were more limited). *New York*'s distinction between laws directed at state governments because of their governmental capacities and more generally applicable laws that incidentally apply to states may be justified by the added constraints on imprudent national legislation that enactment of generally applicable legislation entails. *Printz*, moreover, noted the distinction as being of potential relevance. Unless the Court were prepared to completely overrule *García*, Congress's substantive authority to extend otherwise valid, generally applicable laws to state and local governments seems likely to survive at least in part.

In light of the revival of federalism as a judicially enforced limit on national power, exercises of federal TAXING AND SPENDING POWERS may well be subject to renewed challenge, in efforts to extend the more state- protective approaches of the commerce clause to these other important powers. PREEMPTION challenges may also reflect the Court's renewed sensitivity to protecting state governments from perceived federal overreaching.

Finally, international developments may apply new pressures on the Court's federalism doctrines. MISSOURI V. HOLLAND (1920) treats the federal TREATY POWER as unlimited by federalism-based constraints on Congress's enumerated powers that may operate in the domestic sphere. Yet as the United States increasingly becomes a party to international treaties and EXECUTIVE AGREEMENTS, this doctrine is likely to be retested. Increased development of INTERNATIONAL LAW and its extension to relations between sovereign states and their own citizens is likely to be reflected in theories and cases presented to federal courts. While some scholars argue that federal courts lack power to apply international norms as part of federal COMMON LAW (in part because of the adverse effects on state authority), others would embrace the internationalization of federal law. And where international obligations are assumed by the United States through means other than the procedure for U.S. SENATE ratification of treaties by a two-thirds vote, federalism challenges might be particularly pressing.

More vigorous enforcement of federalism-based limits on national power seems likely to continue under the current Supreme Court, which has expressed its concerns not

only in adjudicated cases but in other policy statements including the *Long Range Plan for the Federal Courts* and in Chief Justice WILLIAM H. REHNQUIST's Annual State of the Judiciary Addresses. A more difficult question is the relationship between this significant change in the law of judicial review of federalism issues, and the practice and structure of constitutional federalism. Some formal DEVOLUTION of power to the states was a feature of legislation enacted in the 104th Congress, including WELFARE reform and the Unfunded Mandates Act. What role the change in judicial decisions will play in supporting or encouraging this process is unclear.

What does seem clear is that the Court will continue to treat federalism as an important and judicially enforceable constitutional principle that will on occasion constrain national power. Given the degree to which federal assumptions remain part of the constitutional structure, it is consistent with U.S. rule of law traditions for the Court to do so. What also seems clear from history is that judicial efforts substantially to limit Congress's reasoned exercise of its enumerated powers are likely to be politically destabilizing, ineffective, or both. History suggests that the fundamental organization of the United States through the states does afford mechanisms for the concerns of people in different states to make themselves felt in the national political process, and thus supports a deferential stance for judicial review of national action that is not alleged to infringe on individual rights nor to interfere with the states' ability to maintain their own legislative, executive, and judicial branches.

*Postscript.* In *Reno v. Condon* (2000), the Court, refusing to extend the anticommandeering doctrine, upheld the constitutionality of the federal Driver's Privacy Protection Act (DPPA). With some exceptions, the DPPA prohibits motor vehicle bureaus from releasing driver's license information without taking steps to assure the individual's consent to such disclosures. The Court rejected South Carolina's argument that this statute unconstitutionally commandeered state officials to enforce or administer a federal scheme. State compliance with federal law as required by this act, the Court said, differed from states being compelled to enforce federal law by regulating third parties. The Court also concluded that the law was "generally applicable" in that it regulated all "entities that participate as suppliers to the market for motor vehicle information"—both states and private resellers of that information.

VICKI C. JACKSON
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Bibliography


BAKER, LYNN 1995 Conditional Federal Spending After *López*. *Columbia Law Review* 95:1911–1989.

BEDNAR, JENNA and ESKRIDGE, WILLIAM N., JR. 1995 Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism. *Southern California Law Review* 68: 1447–1491.

BRADLEY, CURTIS A. and GOLDSMITH, JACK L. 1997 Customary International Law as Federal Common Law: A Critique of the Modern Position. *Harvard Law Review* 110:815–876.

BRIFFAULT, RICHARD 1994 "What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism. *Vanderbilt Law Review* 47:1303–1353.

CALABRESI, STEVEN G. 1995 "A Government of Limited and Enumerated Powers": In Defense of *United States v. López*. *Michigan Law Review* 94:752–831.

CAMINKER, EVAN 1995 State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law? *Columbia Law Review* 95:1001–1089.

FRIEDMAN, BARRY 1997 Valuing Federalism. *Minnesota Law Review* 82:317–412.

GARDBAUM, STEPHEN 1996 Rethinking Constitutional Federalism. *Texas Law Review* 74:795–838.

HILLS, RODERICK M., JR. 1998 The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't. *Michigan Law Review* 96:813–944.

JACKSON, VICKI C. 1998 Federalism and the Uses and Limits of Law: *Printz* and Principle? *Harvard Law Review* 111: 2180–2259.

KADEN, LEWIS B. 1979 Politics, Money and State Sovereignty: The Judicial Role. *Columbia Law Review* 79:847–897.

KRAMER, LARRY 1994 Understanding Federalism. *Vanderbilt Law Review* 47:1485–1561.

LAPIERRE, D. BRUCE 1985 Political Accountability in the National Political Process: The Alternative to Judicial Review of Federalism Issues. *Northwestern University Law Review* 80: 577–665.

LAWSON, GARY and GRANGER, PATRICIA B. 1993 The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause. *Duke Law Journal* 43:267–336.

MERRITT, DEBORAH JONES 1988 The Guarantee Clause and State Autonomy: Federalism for a Third Century. *Columbia Law Review* 88:1–78.

PRAKASH, SAIKRISHNA BANGALORE 1993 Field Office Federalism. *Virginia Law Review* 79:1957–2037.

REGAN, DONALD H. 1995 How to Think About the Federal Commerce Power and Incidentally Rewrite *United States v. López*. *Michigan Law Review* 94:554–614.

REVESZ, RICHARD 1992 Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation. *New York University Law Review* 67:1210–1254.

RUBIN, EDWARD L. and FEELEY, MALCOLM 1994 Federalism: Some Notes on a National Neurosis. *UCLA Law Review* 41: 903–952.

SHAPIRO, DAVID L. 1995 *Federalism: A Dialogue*. Evanston, Ill.: Northwestern University Press.

TUSHNET, MARK 1996 Federalism and Liberalism. *Cardozo Journal of International and Comparative Law* 4:329–344.

WECHSLER, HERBERT 1954 The Political Safeguards of Federalism: The Role of the States in the Composition and Se-

lection of the National Government. *Columbia Law Review* 54:543–560.

## FEDERALISM, CONTEMPORARY PRACTICE OF

The Supreme Court does not enforce constitutional FEDERALISM. Rather, it enforces sufferance federalism, that is, federalism as determined by Congress, a weak form of federalism in which state laws govern particular subjects only so far as Congress decides and in which Congresss controls such subjects as it sees fit. The Court also does not now recognize any significant distinction between taxing a state and taxing a private business; the former may be subjected to national taxes imposed by Congress in any circumstance applicable to the latter. And the Court interprets the SPENDING POWER not as a limited power enabling the government to defray the expenses of its own operations and programs but as a power available to Congress to use to eliminate diversity among state laws according to its own choice. At the same time, the Supreme Court also deems Congress to possess power to restrict the means by which state or LOCAL GOVERNMENTS might attempt to raise their own revenue for their own programs, without depending on appropriations from Congress. This renders each state dependent on such funds as Congress may see fit to budget, with such strings attached as Congress decides as a way to force changes in laws otherwise not subject to its control. In brief, in the aggregate of its federalism decisions the Court acts overall as an agency of the national government on federalism questions. "Judicially constrained dual federalism" does not accurately describe federalism in the United States. Rather, "sufferance federalism"—federalism to such extent as the national government decides to be appropriate—is the system virtually de jure in the United States.

Several examples of mere sufferance federalism have been provided in four recent decisions of the Supreme Court. Instructive on the point is *South Dakota v. Dole* (1987), which sustained an act of Congress that disapproved state statutes permitting any person over eighteen years of age to purchase beer. Congress desired that the minimum state drinking age should be raised to twenty-one. The means selected by Congress were efficient to this end. It reduced federally appropriated matching highway funds to any state in which the lawful minimum drinking age was lower than Congress desired the state legislature to enact and reduced these funds by such a fraction as Congress could be confident would be sufficiently harsh that no state could hold out against the penalty thus imposed.

The Court, over two dissents, rejected the view that the spending power is a power merely to meet the government's own operating BUDGET as a national government (the view JAMES MADISON had held). It also rejected the view that Congress's power was at most a power to set the conditions of a general or a specific program it would be willing to help fund (e.g., the construction of such highways as would be built to congressional specifications of design, quality, and materials). Rather in *Dole* the Court accepted the additional view that the spending power is available to Congress to use as an oblique power for the "indirect achievement of objects which Congress is not empowered to achieve directly." It is a power, in short, to require states to adopt the same substantive law on a given subject as their neighbors have, insofar as Congress sees fit, or be penalized under federal programs of assistance at such level of disadvantage Congress is confident will be sufficient to bring about the change it desires in their laws. As illustrated by the *Dole* case, the Court thus acts as an *active* department in federalism matters, that is, an enforcing department of the national government, validating Congress's preferences not merely in respect to its own laws but in respect to the content of state law as well. The three other major federalism decisions by the Court in the most recent five years (1985–1990) are of the same general hue.

In *South Carolina v. Baker* (1988), for example, the Court sustained an act of Congress eliminating the federal tax deductibility of interest income received on bearer bonds issued by state or local governments, bonds commonly used as a means of financing state or local operations. In sustaining this act, the Court overruled its own unanimous holding in POLLOCK V. FARMERS' LOAN TRUST (1895). Then, going beyond the facts of the case and the immediate legal question, Justice WILLIAM J. BRENNAN volunteered that Congress might also forbid states from attempting to raise revenue by issuing such bonds *at all*. In Justice Brennan's view, if Congress felt that such bonds would be a hindrance to its own collection of national taxes, it might outlaw their use by the states. To the objection that this would leave the states effectively subject to Congress ("sufferance federalism"), Justice Brennan was unfazed: "[S]tates must find their protection from congressional regulation through the national political process, not through judicially defined spheres of [respective national and state powers]."

In a related federalism development involving the ELEVENTH AMENDMENT and state immunity from suits brought by private parties in federal court, a majority of the Court overruled still another unanimous and equally long-standing contrary decision. It held that Congress could subject states to money DAMAGE CLAIMS in federal courts without their consent or waiver of SOVEREIGN IMMUNITY despite the Eleventh Amendment, which as ap-

plied by the Court a full century earlier in *Hans v. Louisiana* (1890), was deemed by the Court to preclude such FEDERAL JURISDICTION. In this third new case, *Pennsylvania v. Union Gas Co.* (1989) the Court thus reinterpreted the Constitution to favor congressional power once again.

The fourth case in the Court's recent quartet is of the same character. In GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985), the Court overruled its own decision that was then less than a decade old, holding that Congress may directly command the terms of state employment to the same extent it had presumed to regulate wages and hours in private employment. The case overruled was NATIONAL LEAGUE OF CITIES V. USERY (1976).

In large measure, however, these developments are not thematically new, despite the fact that three of the four constituitonal federalism cases involved such complete inconsistencies with the Supreme Court's own prior decisions as to require its previous interpretations of the Constitution to be set aside. Rather, the passing terms of the Supreme Court have but hardened what has been, overall, a one-way twentieth-century trend. Writing in 1950 in the *Virginia Law Review*, the distinguished constitutional historian EDWARD S. CORWIN summarized the developments in "The Passing of Dual Federalism." His conclusions were accurate even for the time:

> [T]he Federal System has shifted base in the direction of a consolidated national power. . . . [The] entire system of constitutional interpretation touching the Federal System is today in ruins. Today neither the State Police Power nor the concept of Federal Equilibrium is any "ingredient of national legislative power," whether as respects subject-matter to be governed, or the choice of objectives or of means for its exercise. [Today] "Cooperative Federalism" spells further aggrandizement of national power. . . . Resting as it does primarily on the superior fiscal resources of the National Government, Cooperative Federalism has been, to date, a short expression for a constantly increasing concentration of power at Washington in the instigation and supervision of local policies.

To be sure, even as implied in Corwin's article a half-century ago, the system of dual federalism was not originally expected to be administered by the Supreme Court in this one-sided fashion. Rather, in theory, it spoke to the Constitution's original differential apportionment of legislative powers (between the national and state governments) and a certain equilibrium in different spheres of respective national and constrained state powers that was meant to be held in place under the superintendence of the Supreme Court. The powers constitutionally apportioned were separated between limited—albeit important—powers under congressional control and the larger number left to the separate determination by legislature within each state. Subjects not believed to require a common regime of uniform national regulation—and thus not identified in Article I or elsewhere as subject to congressional disposition—were reserved from the national government to such differential treatment as the domestic law of each state might reflect. Madison characterized this basic arrangement in THE FEDERALIST #45: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."

The Supreme Court, while fully expected to grant full enforcement to acts of Congress within its ENUMERATED POWERS ("few and defined"), was equally expected to withhold enforcement from any not within them. Indeed, it was the latter obligation of the courts that was particularly emphasized in the course of the RATIFICATION debates. In Pennsylvania, JAMES WILSON put the point reassuringly in the following terms: "If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void." In *The Federalist* #78, ALEXANDER HAMILTON specifically adverted to the federalism-checking function of the courts: "If it be said that the legislative body [Congress] are themselves the constitutional judges of their own powers, . . . it may be answered that this cannot be the natural presumption, where it is not to be collected from any particular provision in the constitution. . . . It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." In the Virginia convention, JOHN MARSHALL took the same view: "If they [Congress] were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. *They would declare it void.*"

Moreover, according to Marshall, a law that might nominally come within the limits of some enumerated power vested in Congress should—and would—be held void by the courts if it were discoverable that it was but a means to effectuate a control over a matter not entrusted to Congress, a matter reserved to the internal disposition of each state. On the very point of policing the equilibrium of federalism against abuse by congressional indirection in the exertion of its powers (as in *South Dakota v. Dole*), Marshall insisted in MCCULLOCH V. MARYLAND on the obligation of the judges to disallow the attempt: "[S]hould congress, under pretext of executing its powers, pass laws for the accomplishment of objects not trusted to the [national]

government it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land." This is the same position Justice FELIX FRANKFURTER repeated concretely, dissenting in *United States v. Kahriger* (1953): "[W]hen oblique use is made of the taxing power as to matters which substantively are not within the powers delegated to Congress [in this instance, whether gambling within a state ought or ought not be suppressed—a commonplace criminal law subject of state and local law and nowhere entrusted to Congress to decide], the Court cannot shut its eyes to what is obviously, because designedly, an attempt to control conduct which the Constitution left to the responsibility of the States, merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure."

The constitutional checks felt to be desirable in respect to state laws not subject to congressional pleasure were in turn expressly (albeit quite narrowly) provided for principally in the special provisions of Article I, section 10 (forbidding state EX POST FACTO LAWS or impairing the OBLIGATION OF CONTRACT). Later, to be sure, between 1865 and 1870, these limitations were significantly enlarged in the Civil War amendments—in respect to which Congress is given strong powers of enforcement. However, subject to these limitations and such others as might be variously reflected internally in each state in keeping with its own constitution as interpreted by the states' own courts (rather than as the federal courts might want), it was the varietals of state law—not national law—that were meant to occupy the fields not given to Congress to command.

The main check against persistent immoderation of state law (for example, criminal law, family law, TORTS, local business regulation, trusts and estates) lay not in any possible PREEMPTION by Congress—it being understood that there was no such general power of preemption provided or vested in Congress by the Constitution. Instead, the main check that might keep the character of state laws from reaching extremes not forbidden by the constitution itself inhered in the porousness of state boundaries and the freedom of state citizens to move away from a state to a different state, taking their skills and personal property with them. Any persistent tendency toward immoderation in state legislation was thus constrained to the extent it was deemed constitutionally desirable to have it constrained—not by a supererogatory general authority in Congress, but by the consciousness of each state that it could not prevent its citizens from considering the comparative advantage of a different state or veto the free movement of persons and of personal property within the United States.

In contrast, modern federalism, or sufferance federalism, eliminates this alternative check on state laws, as it tends also to eliminate differences among the states themselves. Insofar as processes of democratic centralism (Congress) can impose uniform preemptive national legislation regardless of subject matter (as the Constitution is now construed by the Supreme Court to permit—largely via the COMMERCE CLAUSE), such difference as any particular state law might provide as a contrast with that of some other state can be made of no consequence even within that state. Whatever the state law may permit to those within that state, it remains true that even all those moving to or residing in that state must reckon with the separate and enforceable prohibition Congress has already enacted and made applicable to them as a matter of federal law, a law fully enforceable via the federal courts. They must therefore conform to that law, rather than merely to the law of the state, regardless of where they reside. And insofar as Congress has been persuaded to regulate them in keeping with how others (though not including the state of their residence) may want them to be regulated by federal law, it will make no difference where they attempt to go. However, even more obtains under sufferance federalism than this. Because powers vested in Congress are interpreted to permit it to effectively determine the very content of state laws (as they are now so interpreted in general), then to the extent that INTEREST GROUPS and states with influence in Congress find themselves embarrassed or vexed by some distinction the internal laws of some few other states provide by way of contrast with themselves, they may act through Congress to compel the legislatures in every state to revise those states' own laws to conform to the preference already adopted in their states. Either way, then, such differences as may tend to exhibit themselves in certain laws of different states even today remain subject to congressional sufferance and elimination, if, as, and when Congress so decides.

It is the interpretive stance of the Supreme Court (e.g., on the scope of the power to "regulate commerce among the several states," equating it with a power to regulate or prohibit whatever may affect commerce, whether or not it is commerce that Congress cares about in the particular case) and not the literal abrogation of JUDICIAL REVIEW on the federalism question that is solely responsible for the change to sufferance federalism in the United States. The Court continues to be nominally willing to review substantive federalism, but it invariably sustains such preemptions of directions or commands that Congress presumes to enact as long as Congress goes through certain formal motions in the course of enacting its bills; however, it is not a refusal to hear or to entertain the case as such. This distinction might appear to be merely scholastic insofar as

the practical results would appear to be the same as though the Court had abrogated judicial review of federalism cases. But it is more than scholastic precisely because the Court's current position does not leave the merits of the federalism objection unaddressed; rather, it denies the merits of those objections—that is, it decides the cases in which they arise. Accordingly, an amendment currently being pressed in thirty-three state legislatures (approved by fifteen legislatures, by one house in six others, and pending in twelve more) that, if proposed and ratified, would require the Court to address and decide the merits of federalism objections in cases otherwise appropriately raising such questions, would change nothing at all. Proposals of this sort proceed on a misunderstanding of judicial behavior on the Supreme Court. Sufferance federalism in the United States is not the result of the nonreviewability of federalism cases arising under the Constitution; rather, it is the result of the Supreme Court's own disposition to find that it is merely this form of federalism the Constitution of the United States provides.

WILLIAM W. VAN ALSTYNE
(1992)

Bibliography

CORWIN, EDWARD 1950 The Passing of Dual Federalism. *University of Virginia Law Review* 36:1–23.

EPSTEIN, RICHARD 1989 The Proper Scope of the Commerce Clause. In Ellen Frankel Paul, ed., *Liberty, Property, and Government*. Albany: State University of New York Press.

PATTERSON, JAMES 1969 *The New Deal and the States: Federalism in Transition*. Princeton, N.J.: Princeton University Press.

STERN, ROBERT 1973 The Commerce Clause Revisited—The Federalization of Intrastate Crime. *Arizona Law Review* 15: 271–285.

VAN ALSTYNE, WILLIAM 1985 The Second Death of Federalism. *Michigan Law Review* 83:1709–1733.

——— 1987 Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea. *Duke Law Journal* 87:769–799.

——— 1989 Dual Sovereignty, Federalism and National Criminal Law: Modernist Constitutional Doctrine and the Nonrole of the Supreme Court. *American Criminal Law Review* 26:1740–1759.

## FEDERALISM, HISTORY OF

Reflecting on the achievements of the CONSTITUTIONAL CONVENTION, JAMES MADISON, wrote in 1831 that the Framers had lacked even "technical terms or phrases" to describe accurately the governmental system they designed. Prior to 1787, the term "federal" had been used to signify confederation, a system in which SOVEREIGNTY remained with the constituent states that ceded certain elements of authority to a central government—and in which the central authority's legislature merely could propose measures to the states for approval. By contrast, in what was known as "consolidated" government, typical of the modern European nation-state, the central authority was the repository of sovereignty and the power of the locally based units of government depended entirely upon it. The Founders departed from all the historical precedents in both these modes, Madison declared, to produce a system that was "a novelty and a compound." It is this system that we know as American federalism, with its combination of features associated with both the consolidated (or unitary) nation-state and the old-style confederational form of government.

Nearly two centuries of colonial history in North America had afforded only rare examples of cooperation and coordination that presaged even in a remote way the system devised in 1787. In 1643, Plymouth, Massachusetts, Connecticut, and New Haven formed a league called the United Colonies of New England. Commissioners appointed by the four governments dealt with boundary questions, missions to the Indians, and even coordination of military operations in the Indian war of 1675–1676; but the organization soon faded into obscurity. The only serious effort at united action after that time and involving surrender of any colonial powers was the abortive Albany Plan of Union of 1754. Designed by BENJAMIN FRANKLIN and THOMAS HUTCHINSON, the plan would have created a council of the colonies and an executive appointed by the Crown. In addition to being empowered to declare war, conclude treaties with the Indian nations, and regulate territories outside the existing colonial boundaries, the council would have been given authority to impose taxes. But the plan foundered, with not a single colonial assembly giving assent to the proposal.

Certain qualities of the British colonial system itself had foreshadowed American federalism. Although formal authority remained squarely in the hands of the British government, still the colonies were given significant latitude in governing their own affairs. The sudden centralization of power after 1763, when the British decided to tighten the reins and impose new taxes and administrative reforms, precipitated the Revolutionary crisis. Even the exigencies of newly declared independence and armed conflict with Britain had not induced the American states, however, to surrender claims to sovereignty in the interest of national unity. Indeed, the ARTICLES OF CONFEDERATION specifically provided that each state would retain "its sovereignty, freedom, and independence, and every power, JURISDICTION and right, which is not by this confederation expressly delegated to the United States, in Congress as-

sembled." Article III, moreover, described the government only as "a firm league of friendship." The notorious weaknesses of government under the Articles, leading to demands for basic reform by 1786–1787, derived from precisely this perpetuation of the states' prerogatives.

What the Convention sought to create in 1787 was a system in which some measure of sovereignty would be retained for the states; but the national government would be given powers ample enough to govern effectively, operate directly upon the citizens, and establish the nation as a credible presence in international affairs. The continued existence of the states as separate legal entities was an essential component of the original understanding embodied in the Constitution. Structural features that assured the states of great influence included the system of REPRESENTATION in Congress (including equal representation for each state in the Senate), the AMENDING PROCESS, and the voting by state in the House of Representatives in presidential elections not resolved in the ELECTORAL COLLEGE.

Equally important was the concept of enumerated powers. The jurisdiction of the proposed national government, wrote Madison in THE FEDERALIST #39, extended "to certain enumerated objects only, and [left] to the several states a residuary and inviolable sovereignty over all other objects." The "general principle" underlying enumeration of the central government's powers, as JAMES WILSON later wrote, was "that whatever object was confined in its nature and operation to a particular State ought to be subject to the separate government of the States; but whatever in its nature and operation extended beyond a particular State, ought to be comprehended within the federal jurisdiction." On this principle was designed Article I, section 8, with its enumeration of the specific powers of Congress, including control over foreign and INTERSTATE COMMERCE, coinage, and the military and naval forces; the power to establish roads and post offices, inferior federal courts, and an organized militia; and authority as well to declare war and conclude treaties, to create a federal district as the seat of government, and to govern TERRITORIES and regulate property of the United States. Specific limitations were also embraced in the original document of 1787: the prohibition against import and export taxes, grants of TITLES OF NOBILITY, BILLS OF ATTAINDER, suspension of HABEAS CORPUS except during rebellions or invasions, or congressional interference with the slave trade for a period of twenty years. Demarcating the boundaries of the states' authority were provisions in Article I, section 10, that prohibited the states from enactment of EX POST FACTO LAWS, bills of attainder, or laws impairing the OBLIGATION OF CONTRACT. The Constitution also forbade the states from entering into treaties or imposing duties or tonnage fees without permission of Congress.

The seeds of controversy over the proper reach of the bounds of national power were to be found, however, in the GENERAL WELFARE CLAUSE and in the NECESSARY AND PROPER CLAUSE. Article VI, moreover, included the SUPREMACY CLAUSE, holding that all laws and treaties made under the Constitution "shall be the supreme Law of the Land." Opponents of the Constitution cited all these provisions as evidence that the Constitution could easily justify a dangerous centralization of power, overwhelming the states and rendering their alleged residual sovereignty a nugatory matter. A new tyranny, according to this view, could easily be the result of consolidated, unitary government.

Anticipating exactly such objections, the Framers built into the federal design a guarantee of a REPUBLICAN FORM OF GOVERNMENT to each state. The PRIVILEGES AND IMMUNITIES, and extradition provisions further buttressed state authority. The most important consequence of concern about the centralization of power and potential tyranny, however, was the movement for a BILL OF RIGHTS. The first nine amendments, together with the original provisions of the Constitution prohibiting the states from enacting bills of attainder or abrogating contracts, represented an effort to establish national ideals of justice—defining boundaries beyond which government must respect the rights of individual citizens. The Bill of Rights served to reinforce federalism itself as a bulwark of defense for liberty against concentrated governmental power.

What values were intended to be served by this new system of federalism, a system described by a New York judge in 1819 as a "complex and peculiar structure" that permitted the states and the national government to move "in different spheres but occupying the same territorial space, operating upon and for the benefit of the same people"? The first value, designed to protect liberty and to give republican principles full play, was maintenance of government "close to the people." The champions of the Constitution contended that by giving a continuing—and vital—role to the states, popular oversight of governmental operations would be effective and there would be a high degree of participation in public affairs. These same contentions have been heard ever since in the arguments for a federal division of powers in American government.

A second value given a high place in the rationale for federalism was diversity itself. Regional differences in cultural values and local preferences on matters of law and policy would be permitted and find expression when important powers of government remained with the states. Providing in this manner for diversity meant, as Justice LOUIS D. BRANDEIS argued in NEW STATE ICE COMPANY V. LIEBMANN (1932), that "a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."

Efficiency was another value intended to be promoted by federalism. Loading all the functions of government upon authority at the center is not only potentially dangerous to liberty; it is also potentially the cause of congestion, complexity, and ineffectiveness. Even unitary, consolidated governments find it necessary to devolve certain functions on subnational or local authority. As Madison wrote in *The Federalist* #14, even if the states were to be abolished, "the general government would be compelled, by the principle of self-preservation, to reinstate them in their proper jurisdiction." What distinguishes a system founded on the principles of federalism from a consolidated system, however, is that federalism recognizes the legitimacy of exclusive state claims to some meaningful autonomy in important areas of law and policy. Power to control at least some of the things that really matter, in the regulation of society's affairs, must be left to the states.

A notable distinguishing feature of American federalism, consistent with the effective pursuit of these values, is the provision for constitutional amendment. What seemed a rational division of authority in the largely agrarian-commercial nation of 1787 will not be rational (or even minimally workable) two hundred years later in an integrated industrial nation with over fifty times the population of 1787. Most of the major changes in the American federal system, both in formal doctrine and in actual governmental practice, have occurred in response to that problem. By a remarkable insight of the Framers, expressed through the amendment process explicitly and the judicial processes by implication, they provided mechanisms for successful adaptation to changing circumstances and national values.

The principles of a federal system require that major changes in the boundaries of authority between the states and the national government should be accomplished by the prescribed amendment process. Such fundamental change should not occur through a process of ordinary legislation or mere administrative innovations in policy. The actual operation of the American system has sometimes conformed to this ideal: fundamental change in the structure of powers within the system were initiated, for example, by the CIVIL WAR and RECONSTRUCTION amendments. Yet at other times basic changes in federal-state relationships were effected without resort to the amendment process. Even the THIRTEENTH, FOURTEENTH, and FIFTEENTH AMENDMENTS, for example, ratified decisions already made on the bloody battlefields of the Civil War. The doctrine of IMPLIED POWERS was a judicial invention in MCCULLOCH V. MARYLAND (1819). The dramatic swing in antebellum interpretation of the COMMERCE CLAUSE—first the MARSHALL COURT's nationalistic interpretation; then, the TANEY COURT's assertion of DUAL FEDERALISM and concurrent powers—came about by judicial innovations in doctrine. Vast changes in law and policy, not least the abandonment of economic due process and the emergence of new presidential EMERGENCY and WAR POWERS, have occurred since 1933 without benefit of constitutional amendments.

Provisions for accommodating new states in the course of national expansion is another important feature of the federal scheme. The thirteen original states took the chance, in effect, that they would be confronted by new sectional alignments and powerful interests hostile in some measure to their own. It was a certainty that each new state taken into the Union would significantly dilute the power of the original states in the Senate, and, as population grew in newer areas, would dilute even more their power in the House of Representatives and in the Electoral College. This provision for the admission of new states underlined the values fundamental to the original understanding: government close to the people, diversity, and efficiency.

A legacy of the Founders not easily separated from their creation of a federal system is the "federal creed" that has been as influential in shaping political behavior as constitutional provisions have been in shaping the dynamics of government. By "federal creed" is meant habitual skepticism with regard to centralized power. It was expressed vividly in Walt Whitman's *Leaves of Grass:*

> To the States or any of them or any city of the States,
> *Resist much, obey little.*
> Once unquestioning obedient, once fully enslaved, no nation state, city of this earth, ever afterward resumes its liberty.

These lines express a political reality of the nineteenth century, namely, that whenever a policy was considered, debate typically centered not only on the wisdom of the policy itself but also on the cognate question: what level of government—the states or Washington—ought legitimately to have responsibility? It was the enduring popular commitment to the values of federalism, some historians contend, that kept the nation from accepting full-scale reorganization as a consolidated, unitary government in the Civil War years. Instead, despite such centralizing measures as the wartime banking laws and the postwar adoption of the Fourteenth Amendment, there remained a strong faith in the desirability of a meaningful "state sovereignty." The culture of federalism was expressed in the enigmatic pronouncement of the Supreme Court in TEXAS V. WHITE (1869) that "the Constitution in all its provisions looks to an indestructible Union composed of indestructible states." Similar convictions about the states' continuing importance found voice in COLLECTOR V. DAY, two years later, when the Court asserted that surviving aspects

of state sovereignty made the states "as independent of the general government as [it] is independent of the states."

Opponents of centralized power appealed to such convictions in the late nineteenth century and early twentieth century, when they argued for narrow construction of the commerce clause and found in the due process clause of the Fifth Amendment authority for declaring unconstitutional congressional regulatory measures. The same federal creed led many reformers in the Progressive era to prefer uniform state codes to outright imposition of uniformity in law by congressional action. In the New Deal years and down to the present day, moreover, opponents of the welfare and regulatory features of modern policy have expressed their views in terms that extolled state sovereignty and deplored the centralizing of power in Washington as contrary to the Framers' intent.

The variety and ingenuity of such arguments have led many commentators to conclude that the federal creed is a convenient, all-purpose shield behind which to advocate special-interest positions. The most egregious example in the nation's history has been the invocation of STATES' RIGHTS as a justification for policies of RACIAL DISCRIMINATION. Conservative jurists also created a constitutional void within which neither the national government nor the states could legislate to regulate economic interests; federalism became the handmaiden of laissez-faire. Inconsistency in the application of federal principles in the 1920s led THOMAS REED POWELL to remark that "the sacred slogan of states' rights is easily forgotten when employers wish their laborers sober but unctuously invoked when they wish them young" (a reference to southern opposition to child-labor laws and support of national prohibition). In the post-WORLD WAR II era, moreover, some of the most outspoken champions of "small government" and states' rights, and opponents of the nationalization of economic and social policy, have also been most consistently in favor of massive increases in the size of the national armed forces and even of federal surveillance of political activists and other infringements on CIVIL LIBERTIES.

Even if one concedes that federalism can be a smokescreen behind which special interests can pursue selfish aims or hide inconsistencies, the prominence of the traditional values of federalism in political rhetoric indicates that such arguments are regarded as effective. They are, in effect, appeals to the values of a "federal" political culture: American political consciousness retains inherited and much reiterated notions that certain important values are best served by decentralization of power.

Some prominent contemporary students of American federalism claim that the abstract concept of separate governments (state and national), with separate responsibilities and constituencies, is—and indeed always has been—a fiction. According to this view, despite the "fiction" of ENUMERATED POWERS there has always been an overlap of responsibilities and a significant measure of federal-state sharing of power. "Dual federalism"—the concept of state and national governments occupying distinct, separate spheres of authority—is in this version of our history only a myth. Contrary to this view is another that contends that until 1861 the federal system in actuality functioned much as the model of "dual federalism" prescribed, and after the Civil War, there began a progressive centralization of power which continued until the 1980s.

The evaluation of such contending views depends upon analysis not only of doctrinal development but also of the system's practical operation. How has government actually behaved, and to what extent has power been centralized or decentralized in important areas of policy, at different stages of the nation's history? In fact, the story of American federalism is one of progressive centralization. Except for the overarching continuity infusing the whole record—the progressive centralization of power, step by step—distinct stages in the history of federalism indicate fundamental discontinuities.

The first stage was the period from the founding, in 1787–1789, to the Civil War. In this period, a remarkable array of governmental functions were exclusively, or nearly so, in the hands of the states. Power was diffused, and what "sharing" was found tended to be confined to the most superficial types of cooperation between state and national governments. Criminal law, definition of the requirements of due process, prison management, and criminal punishment were all state functions. So was the definition of property rights, confined only by the contract clause decisions of the Supreme Court. The power of EMINENT DOMAIN was exercised by the states virtually without a check by federal authority. Public education and labor relations, even slavery, were state matters. The states controlled the content of commercial law, family law, and such COMMON LAW matters as the rules of torts, nuisance, and liability. Also decentralized were CORPORATION law, most of taxation policy, and the design and control of the nation's transport system. At no other time after 1861 were the theoretical maxims of dual federalism so closely approximated by government in action.

The decentralization of real power before 1861 persisted even though the Marshall Court was handing down a series of landmark "nationalizing" decisions that lay the doctrinal groundwork for centralization. Even the Marshall Court left the door open for robust state regulatory activity. By the late 1830s, moreover, the Taney Court had begun to develop the doctrine of "concurrent powers," and it had shored up the STATE POLICE POWER with its decision in CHARLES RIVER BRIDGE V. WARREN BRIDGE (1837). Congress simply abstained from acting in many areas of

policy that had been left open to it by the Marshall Court's doctrines. The state governments, therefore, held the reins in many vital areas of policy; the structure and dynamics of power were decentralized. One consequence of this decentralization was significant state-to-state variation in the substantive content of law in property, labor, family, and criminal law. The differences between law in slave states and free states were only the most dramatic illustration of such diversity.

The period from 1861 to 1890 was the second stage in the development of American federalism. Formal constitutional change came with the Civil War and had transforming doctrinal and practical consequences, deriving from the Thirteenth, Fourteenth, and Fifteenth Amendments. Meanwhile, Congress in the 1860s was enacting CIVIL RIGHTS laws, instituting an income tax (terminated after the war), inaugurating a national banking system, subsidizing transcontinental railroad projects, and expanding the size and reach of the federal bureaucracy generally. Thus power was centralized at an entirely unprecedented level, both in control of the economy and in protection of individual rights. Laws expanding the jurisdiction of the federal courts further concentrated power in the national government. In 1887, the INTERSTATE COMMERCE ACT inaugurated federal ADMINISTRATIVE LAW and centralized the regulation of the railroads. In 1890, the SHERMAN ACT marked the beginning of federal business law. Although such measures continued the centralizing trend in the distribution of real power, nonetheless elements of dual federalism persisted: property law, criminal justice, family relations, labor law, and most of an infant system of business regulation all remained nearly exclusively with the states.

The third stage of American federalism occupied the years 1890–1933. It was an era of accelerating centralization of policy responsibilities—although diversity persisted and the states did continue to exercise a wide-ranging discretionary authority, without substantial federal interference or direction, in many areas of law. Large-scale aid for irrigation in the West commenced with the Carey Act of 1894; and the Newlands Act of 1902 established an even larger national policy presence in that area. The PURE FOOD AND DRUG ACT (1906) signaled a trend toward exercise of the NATIONAL POLICE POWER, augmenting controls imposed through use of the TAXING AND SPENDING POWER, POSTAL POWER, and commerce power. Both the Federal Reserve Act of 1913 and the CLAYTON ANTITRUST ACT of 1914 greatly extended federal administrative law, displacing state regulatory powers. Over the next seventy years, one of the most influential changes was the SIXTEENTH AMENDMENT, which set the stage for the national government's use of income taxes as a major source of revenues. Midway in this period, moreover, came the dramatic temporary expansion of centralized power occasioned by WORLD WAR I. Although the conservative dominance of Congress in the Republican 1920s slowed the centralizing trend, even in that decade new responsibilities were assumed or expanded by the national government. They included the institution of FEDERAL GRANTS-IN-AID to the states for infant and maternity care, and expansion of the federal roads program, established earlier. The 1920 Transportation Act and the Federal Power Act of the same year also enlarged the regulatory powers of the federal government.

Ironically, these expansions of centralized power occurred in counterpoint with recurrent expressions of dual federalism and LIMITED GOVERNMENT doctrines by the Supreme Court. The most important initiatives of Congress struck down by the Court were the income tax instituted in 1893 and the 1916 KEATING-OWENS CHILD LABOR ACT. Matters such as labor relations were "entrusted to local authority" by the Constitution, the Court asserted in HAMMER V. DAGENHART (1918); child labor was "a purely local matter in which federal authority does not extend," and to permit Congress to regulate child labor risked permitting "our system of government [to] be practically destroyed"! Yet the same judges who subscribed to such doctrines of federalism also adhered to the doctrine of economic due process. Hence, when the Court reviewed regulatory and welfare legislation enacted by the states, it frequently struck down such laws under the Fourteenth Amendment. The Court thus immunized many business interests against regulation by either the state or the national government. The federal judiciary's activism in the cause of laissez-faire and dual federalism, ironically, was evidence of a negative type of centralization: the Supreme Court stood as censor of the states in vital social and economic matters.

Against this background of mixed constitutional doctrine and new centralizing initiatives, intergovernmental relations in the modern "sharing" mode emerged. Its most important feature was grants of cash aid to the states. Congress often tied strings to such aid, requiring planning of state programs and some degree of auditing by federal officers. By 1920, eleven programs were paying $30 million annually to the states—about 2.5 per cent of state revenues, or about a tenth the proportion paid by such grants-in-aid in the early 1980s—with most of the payments representing highway construction funds.

In the field of civil rights, the Court made only a small dent in the solid shield of states' rights behind which Jim Crow legislation, disfranchisement of blacks, and control of racial violence remained the exclusive responsibility of state governments. In the South, white supremacy reigned. In the area of FREEDOM OF SPEECH and FREEDOM OF THE PRESS, however, there was some movement by the

Court toward applying Fourteenth Amendment constraints on state action.

The fourth stage of American federalism's development embraced the NEW DEAL and World War II years, from 1933 to 1945. This period witnessed the wholesale centralization of policy responsibilities, a movement spurred by the worst economic depression in the nation's history and by four years of total mobilization for war. In the wake of centralizing initiatives by Congress came a dramatic shift in constitutional doctrine by the Supreme Court. To be sure, the Court initially erected doctrinal barriers to the innovations of FRANKLIN D. ROOSEVELT's New Deal administration; but by 1937–1938 a modern "constitutional revolution" had occurred without benefit of formal constitutional amendment. The Court discarded the doctrine of economic due process, and it adopted an interpretation of the commerce clause that validated unprecedented expansion of federal interventions in the economy and of social welfare and relief programs.

One policy area after another that previously had been in the states' hands came into the domain of federal action. Congress made agriculture a managed sector beginning in 1933; and the NATIONAL INDUSTRIAL RECOVERY ACT had much the same effect in the manufacturing sector from 1933 to 1935. The TENNESSEE VALLEY AUTHORITY ACT inaugurated regional development under federal auspices, and national programs proliferated in the conservation and reclamation fields. The WAGNER ACT of 1935 established a comprehensive federal policy of collective bargaining in labor relations, instituting national administrative law in the labor field; and by 1938 wages and hours legislation had augmented the basic labor law by setting uniform national standards. Congress authorized massive federal relief and subsidized work programs; and the SOCIAL SECURITY ACT and unemployment-compensation legislation of 1935 marked a new era of nationally sponsored and directed welfare policy. The net of federal regulatory power was thrown over many areas of industry formerly controlled, if at all, by the states: BROADCASTING, trucking, waterways, the securities exchanges, and previously unregulated segments of the banking industry. Meanwhile grants-in-aid—and the model of COOPERATIVE FEDERALISM of which they were an essential component—began to dominate federal-state relationships. True "sharing," in which the bulk of funding came from Congress, thus became a prominent feature of the working federal system; yet decisions tended to be made at the center, both as to policy and as to funding, with the states exercising administrative functions and serving as conduits for federal money.

Still, except for the three and a half years of war, when emergency powers extended to the national control of virtually every feature of the nation's life, the states remained a source of diversity in the American system of government. Yet the number and the significance of policy areas under their control had been so reduced that a new-modeled federal system had clearly become dominant.

The final stage in the history of federalism dates from 1945 to the present day. Its main feature, at least until the administration of RONALD REAGAN beginning in 1981, was a continued trend toward centralization. Four characteristics of this centralization movement are particularly important. First is the permanent status of large-scale standing military forces, their support taking as much as half of the federal government's operating expenses—something without precedent in peacetime prior to 1940. Second is the tendency toward stronger federal guarantees of civil rights. All three branches of government contributed to the civil rights expansion. The executive branch enforced racial integration of the armed forces and required AFFIRMATIVE ACTION programs of firms taking government contracts. Congress defined new guarantees of rights in areas such as PUBLIC ACCOMMODATIONS, and employment; it also enacted legislation under which executive departments instituted affirmative action and equal opportunity policies in labor relations, education, and other areas. The judiciary played a leading role, with the line of DESEGREGATION cases elaborating the principles of BROWN V. BOARD OF EDUCATION (1954). The Court also carved out new areas of federal constitutional rights, such as the RIGHT OF PRIVACY and rights against SEX DISCRIMINATION.

The third major characteristic of centralization since 1945 is the rapid growth in the 1960s and 1970s, and the continued importance since then, of federal grants-in-aid to the states. The design and initiation of new grant programs, especially those associated with the "Great Society" measures of the LYNDON B. JOHNSON administration, led some analysts to speak of a "near monopolization of innovation by the central government" as a novel form of primary centralization. A fourth characteristic of post-1945 centralization is the continued enlargement of the scope of congressional regulatory concerns. Congress instituted far-reaching controls over air and water pollution, occupational health and safety, food and drug quality, and energy resources. Despite a strong movement in the Jimmy Carter and especially the Reagan years toward "deregulation," the federal regulatory presence in the mid-1980s remained far greater than that of the 1950s.

The Supreme Court seldom has stood in the way of such trends. Indeed, its role has been that of leader in the REAPPORTIONMENT and civil rights areas. In reviewing regulatory measures, only once since 1937 has the Court invoked states' rights or the commerce clause in such a way as to limit congressional power; that one exception was NATIONAL LEAGUE OF CITIES V. USERY (1976), a decision of

limited application although notable for its assertion of the rights of the states "as states." Some state activities, the Court held, were beyond the reach of national wage and hour standards. Yet the Court has validated all other federal regulatory measures.

The scores of modern grant-in-aid programs have included many that bypassed the state governments: federal funds were awarded directly to cities and local special-purpose districts. Another hallmark of recent intergovernmental relations is what may be termed "managerialism," taking the form of program realignments, reliance on new budgeting concepts, oversight of programs by regional-level federal offices, and increased attention by Congress to the quality of governmental services at all levels. In 1958, Congress created the Advisory Commission on Intergovernmental Relations, which became a major proponent of reforms in aid programs and also an exemplar of the new-style managerialism in action.

Successive Presidents have championed the realignment of powers and policy responsibilities, as between the nation and the states. Thus Lyndon Johnson called for a "creative federalism" that would involve private-sector institutions as well as all levels of government in jointly administered programs. Some of Johnson's Great Society program complicated intergovernmental relations by permitting community organizations to challenge the existing governmental and political establishments. A reaction to the Johnson-era programs and politics was embodied in RICHARD M. NIXON's call for a "new federalism." His proposals took the form of combining increased executive power with increasing reliance on REVENUE SHARING and "block grants" instead of categorical or conditional grants-in-aid. Although during Jimmy Carter's administration general revenue sharing was continued, the President sought to reemphasize the problems of major urban centers and depressed minority populations; he also sought to impose tighter control on grants-in-aid, to assure the realization of congressional objectives.

Ronald Reagan announced his own brand of "new federalism" on taking office in 1981. Both in his rhetoric and by administrative actions, he sought to turn the clock back dramatically on many features of modern federalism. National political dialogue was infused, for the first time in many years, with an orthodox small-government, anticentralist ideology little heeded since New Deal days. Previous Republican Presidents—DWIGHT EISENHOWER, Nixon, and GERALD R. FORD—had all accepted in varying degrees, and even expanded in some respects, the permanent legacy of the New Deal. But in the 1980s, Reagan led a much more deeply rooted challenge to some of the welfare state and regulatory state foundations of the modern federal system. At the same time, he endorsed legislation designed to curb the authority of the federal courts, especially in the civil rights and CRIMINAL PROCEDURE areas; and he gave his support to constitutional amendments designed to permit school prayer in public schools, to require balanced BUDGETS, and to permit the states to prohibit abortions. Reagan's programs underlined his admiration for the constitutional doctrines and policies of federalism dominant in Republican circles in the 1920s.

Once again, therefore, in the Reagan years, federalism was at the center of political debate in America; and once again, the values of federalism were being invoked for purposes that transcended the mere reordering of federal-state relationships. The classic concerns of federalism in theory—diffusion of power, diversity, liberty, efficiency—remained in the forefront of public attention. How to square the ideals expressed in the original understanding with the social and economic realities of the late twentieth century remained a profoundly important issue.

HARRY N. SCHEIBER
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Bibliography

BEER, SAMUEL 1973 The Modernization of American Federalism. *Publius* 3:49–95.

DAVIS, RUFUS 1978 *The Federal Principle: A Journey through Time in Quest of Meaning.* Berkeley: University of California Press.

GRODZINS, MORTON 1966 *The American System: A New View of Government in the United States*, ed. Daniel Elazar. Chicago: Rand, McNally.

MACMAHON, ARTHUR W., ed. 1955 *Federalism: Mature and Emergent.* New York: Columbia University Press.

PATTERSON, JAMES 1969 *The New Deal and the States: Federalism in Transition.* Princeton, N.J.: Princeton University Press.

SCHEIBER, HARRY N. 1975 Federalism and the American Economic Order, 1789–1910. *Law & Society Review* 10:57–118.

——— 1978 American Federalism and the Diffusion of Power. *University of Toledo Law Review* 9:619–680.

WALKER, DAVID 1981 *Toward a Functioning Federalism.* Cambridge, Mass.: Winthrop.

WRIGHT, DEIL 1978 *Understanding Intergovernmental Relations.* North Scituate, Mass.: Duxbury Press.

## FEDERALISM, THEORY OF

The American federal system came into existence when the United States declared its independence in 1776. Indeed, the very process of declaring independence involved a series of reciprocal initiatives and actions on the part of the colonies; the CONTINENTAL CONGRESS declared independence for all thirteen colonies in one act, federal to the extent that the declaration itself was a culmination of this interplay and was undertaken by delegates from the states, each state speaking with one voice.

The foundation of the United States was a federal act par excellence, involving a consistent and protracted interplay between the colonies (later states) and the Congress, which they created as a single, national body to speak in their collective name. In the year that the representatives of the people of the colonies collectively declared the independence of the United States, other representatives of the same people were reconstituting the colonies themselves as states. Four colonies—New Hampshire, South Carolina, Virginia, and New Jersey—adopted state CONSTITUTIONS in 1776 before the adoption of the DECLARATION OF INDEPENDENCE, and four more—Pennsylvania, Maryland, Delaware, and North Carolina—did likewise before the year was out. Within sixteen months, all the former colonies except Massachusetts had adopted constitutions.

At one time this fact was used to argue that considerable disagreement existed over whether the states preceded the Union. Today it is generally agreed that both came into existence simultaneously—in the original federal act of the United States as such. In sum, all of the ambiguities of diversity in unity endemic to federalism were present at the creation. Even local governments (in this case the towns and counties) participated in the constitutional drafting and ratifying processes.

As Americans moved westward, they created new states "from scratch," in virtually every case establishing local and territorial institutions under the aegis of the federal government, but generally as a result of local initiatives. Ultimately, these new polities, with their new populations, would be admitted to the federation as states, fully equal to their sisters under the Constitution. Thus the American federation expanded from the Atlantic to the Pacific by settling what were, to white Americans, empty lands and organizing them politically.

The last of the forty-eight contiguous states was admitted in 1912; and Alaska and Hawaii, the two noncontiguous states, were added in 1959 and 1960, respectively, after relatively long periods of territorial status. In the same decade, the United States embarked upon a new experiment in federalism by creating a category of commonwealth or "free associated state," whose people, as American citizens, voted to associate their polity with the United States under a special charter. This new arrangement was devised for Puerto Rico, which became the first "free associated state" in 1952. In 1976 a similar arrangement was made with the Northern Mariana Islands. In both cases small, populated TERRITORIES sought that status to increase their autonomy, not to diminish it. (See COMMONWEALTH STATUS.)

Historically, then, the United States model is that of a political entity that was federal from its founding. The American states did not have to find a common cultural denominator because they had one from the first. All of their regimes were of the same character and their level of economic development was roughly equal. No plan for intercolonial union was ever put forth that was not federal in character. The American colonial period, indeed, had been a period of incubation for a uniquely American approach to governance, which properly can be termed "federal democracy."

Federal democracy is the authentic American contribution to democratic thought and republican government. Its conception represents a synthesis of the Puritan idea of the covenant relationship as the foundation of all proper human society and the constitutional ideas of the English natural rights school of the seventeenth and early eighteenth centuries. Contractual noncentralization—the structured dispersion of power among many centers whose legitimate authority is constitutionally guaranteed—is the key to the widespread and entrenched diffusion of power that remains the principal characteristic of and argument for federal democracy.

Federal democracy is a composite notion that includes a strong religious component. The religious expression of federalism was brought to the United States through the theology of the Puritans, who viewed the world as organized through the covenants that God had made with mankind, binding God and man into a lasting union and partnership to work for the redemption of the world, but in such a way that both parties were free, as partners must be, to preserve their respective integrities. Implicit in the Puritan view is the understanding that God relinquished some of His own omnipotence to enable men to be free to compact with Him.

According to federal theology, all social and political relationships are derived from that original covenant. This theological perspective found its counterpart in congregationalism as the basis of church polity and the town meeting as the basis of the civil polity. Thus, communities of believers were required to organize themselves by covenant into congregations just as communities of citizens were required to organize themselves by covenant into towns. The entire structure of religious and political organization in New England reflected this application of a theological principle to social and political life.

Even after the eighteenth-century secularization of the covenant idea, the behavioral pattern resurfaced on every frontier, whether in the miners' camps of southwestern Missouri, central Colorado, and the mother lode country of California, in the agricultural settlements of the upper Midwest, or in the wagon trains that crossed the plains, whose members compacted together to provide for their internal governance during the long trek westward.

It should not be surprising that Americans early became socialized into a kind of federalistic individualism

that recognized the subtle bonds of partnership linking individuals even as they preserved their individual integrities. William James was later to write about the federal character of these subtle bonds in his prescription for a pluralistic universe as a "republic of republics."

In strictly governmental terms, federalism is a form of political organization that unites separate polities within an overarching political system, enabling all to maintain their fundamental political integrity and distributing power among general and constituent governments so that they all share in the system's decision-making and executing processes. In a larger sense, federalism represents the linking of free people and their communities through lasting but limited political arrangements to protect certain rights or liberties and to achieve specific common ends while preserving their respective integrities. To reverse the order, federalism has to do, first and foremost, with a relationship among entities, and then with the structure that embodies that relationship and provides the means for sustaining it. Originally federalism was most widely recognized as a relationship to which structural questions were incidental; but since the creation of the American federal system, in which a new structure was invented to accommodate that relationship, federalism has become increasingly identified in structural terms. This usage in turn has contributed to a certain emphasis on legal and administrative relations between the units and to a neglect of the larger question of the relationships federalism is designed to foster throughout the polity.

Although, in a strictly constitutional sense, American federalism is a means by which the national government shares authority and power with the states, the influence of federal principles actually extends far beyond the institutional relationships that link the federal, state, and local governments. The idea of the federal commonwealth as a partnership is a key principle of federalism and the basis of its integrative powers. Like all partnerships, the commonwealth is bound by a compact—the Constitution—that sets the basic terms of the partnership to insure, among other things, the preservation and continued political viability of its basic political units.

The principle of partnership has been extended far beyond its simple sense of a relationship between the federal and state governments. It has come to serve as the guiding principle in most of the political relationships that tie institutions, groups, interests, and individuals together in the American system. The term "partnership" describes a relationship that allows the participants freedom of action while acknowledging the ties that require them to function in partnership.

Partnership implies the distribution of power among several centers that must negotiate cooperative arrangements with one another in order to achieve common goals. Although the basic forms of the partnership are set forth in the United States Constitution, the actual character of the federal system is delineated, maintained, and made functional only partly by constitutional devices. The role of the Constitution (and of its primary interpreters, the courts) should not be minimized; yet equally important is the way in which the institutions and purposes of federalism are maintained through the political process. The political process, as it affects the federal-state-local relationship most directly, is made manifest through four basic political devices: territorial democracy, the dual system of laws and courts, the POLITICAL PARTY system, and the system of public-private "complexes."

The basic pattern of political organization in the United States is territorial. That is to say, American politics is formally organized around units of territory rather than economic or ethnic groups, social classes, or the like. The nation is divided into states, and the states are divided into counties, and the counties are divided into townships or cities or special districts, and the whole country is divided into election districts of varying sizes. This organization means that people and their interests gain political identity and formal representation through their location in particular places and their ability to capture political control of territorial political units.

A second basic device is the multiple system of laws and courts tied to the federal division of powers. In the nation as a whole, state law is the basic law. Federal law is essentially designed to fill in the gaps left by the existence of fifty different legal systems. Thus both state and federal courts are bound by state-made law unless it is superseded by the Constitution or by federal statutory law. The complexity of this system is compounded by the nature of the dual court structure, with each state and the federal government having its own complete court system. The federal courts have asserted extensive superiority in interpreting the manner in which the United States Constitution protects the rights of American citizens (who, of course, are also citizens of their states). Led by the United States Supreme Court, which is constitutionally placed at the apex of both court systems, the federal courts interpret federal law, review the work of the state courts, and enforce the laws of the states in which they are located in cases that come under federal JURISDICTION.

The third basic political channel is the party system. The Democratic and Republican parties represent two broad confederations of otherwise largely independent state party organizations that unite on the national plane primarily to gain public office. Despite the greater public attention given to the national parties, the real centers of party organization, finance, and power are on the state and local planes. This noncentralization of the parties helps to maintain generally noncentralized governments and to

perpetuate a high degree of local control even in the face of "big government." Thus the party system is of great importance in maintaining the basic structure of American politics and basic American political values, including those of federalism.

The fourth political device, the system of public-private "complexes," is partly reflected in the character of interest group activity. The partnership system extends outward to include private elements as well as governments—both public nongovernmental bodies, such as civic, philanthropic, educational, health, and welfare associations, and private profit-making bodies. These private associations and bodies often work so closely with their governmental allies that it is difficult to distinguish where the public interest ends and the private interest begins.

As a federation, the United States differs from a confederation of essentially separate political systems where the overarching authority is deliberately weak. At the same time, in the noncentralized American system, there is no central government with absolute authority over the states, but there is a strong national or general government coupled with strong state and local governments that share authority and power, constitutionally and practically.

The first important feature of a federation, following the American pattern, is the fundamental role and importance of the federal constitution as an organic law. The American Constitution reflects a federal approach to political SOVEREIGNTY, rejecting the idea that states or governments are sovereign as such, and holding that the people are the ultimate repositories of sovereignty and that governments have only "powers," delegated to them by the people. That approach precludes any notion of INHERENT POWERS. Under the Constitution, all powers possessed by the federal government are delegated to it by the people. The federal government has no inherent powers, although, as a result of those delegated, it gains some inherent extensions of its power. So, for example, because the people have delegated to the federal government the power to conduct some aspects of FOREIGN AFFAIRS, the President is understood to have acquired certain IMPLIED POWERS to negotiate with foreign governments. Once the people delegated the principal power, the implied power flowed automatically, but the second is theoretically dependent upon the first. From time to time, Presidents have claimed that they have inherent powers in the fields of foreign affairs and defense that are not subject to constitutional limitations but, rather, flow from the status of the United States as a sovereign state. Although the United States Supreme Court has recognized the existence of inherent powers, it has clearly limited them. This approach has been possible in the United States because of the dual character of the American founding, which enabled Americans to avoid confronting the issue of sovereignty head on.

Accordingly, as ANDREW C. MCLAUGHLIN suggested, the American federal system was designed to provide for the government of a large civil society without reliance upon hierarchical principles. In its original form, the American political system was designed as a matrix of polities, an indefinite number of structured political arenas linked to one another within the framework provided by the national and state constitutions. These arenas were to be distinguished from one another not on the basis of being "higher" or "lower" in importance but on the basis of the relative size of the constituencies they served. It was further assumed that the arenas were essentially equal, because size, of itself, was no measure of importance. Tasks were designed to be assumed or shared within the matrix on the assumption that sometimes a smaller arena is more appropriate than a larger one and that sometimes the reverse is true. The federal government was constitutionally mandated to serve the largest arena and to maintain the entire structure by assuring the continuity of the matrix itself. The role of the state governments in serving the basic divisions in the matrix was affirmed in the constitutional arrangement, and the states established local governments to serve the smallest arenas. Today the matrix consists of thousands of local arenas within the national framework, divided into fifty basic units—the states of the federal Union.

The American system has increasingly emphasized COOPERATIVE FEDERALISM rather than DUAL FEDERALISM as the basis of its operations. The American pattern of federalism has been cooperative since its beginnings, because since its inception most powers and competences have been treated as concurrent, shared by the various planes of government. In Morton Grodzins's terms, it is not a layer cake but a marble cake. Therefore, in the American polity, it is especially difficult to define what is exclusively in the federal sphere of competence, or in the state sphere, or in the local sphere.

The American federal system is at once extraordinarily simple and unusually complex. The simplicity of the federal system lies in a formal structure of federal, state, and local governments and in the outline of formal relationships between them. The complexity of the system lies in the myriad relationships that have developed between the governments and those who make them work. People often tend to take it for granted that national problems are handled in Washington; state problems in the state capital; and local problems at city hall or in the county courthouse. But, although it is easy to say that this is how things should be, it is well-nigh impossible to take a specific issue or function and to determine that it is exclusively national, state, or local.

The constitutional place of the states in the federal system is determined by four elements: the provisions in the federal and state constitutions that either limit or guar-

antee the powers of the states vis-à-vis the federal government; the provisions in the federal Constitution that give the states a role in the composition of the national government; the subsequent interpretations of both sets of provisions by the courts (particularly the United States Supreme Court); and the unwritten constitutional traditions that have evolved informally and have only later been formally recognized through the first three, directly or indirectly. The federal constitutional provisions outlining the general position of the states must always be taken into consideration even if some of them can be transcended through politics in specific situations. The specific limitations and guarantees of state powers fall into four basic categories: general concern for the integrity of the states as well as their subordination to the Union; some brief provisions ensuring the states a role in the common defense; a delineation of the role of the states in the two central areas of positive governmental activity at home, management of commerce and raising of revenues; and a description of state responsibilities in the administration of justice.

The procedure by which the basic status of the Union may be revised is found in Article V of the United States Constitution.

Similar procedures are found in most federal constitutions in the world. They underline one of the paramount characteristics of a federation: the revision of the basic status of the union is not totally dependent on the member states. Individual states have no right to veto changes adopted through the accepted procedure. When they oppose an amendment to the constitution—or demand an amendment—they are not sure to win.

One of the most important features of American federalism lies in the impossibility of the member states to abandon the federation. As the Civil War dramatically affirmed, there is no right of SECESSION. The United States Supreme Court, responding to that war, set down the accepted definition of the American federation in TEXAS V. WHITE (1869): "The Constitution in all its provisions, looks to an indestructible Union, composed of indestructible States."

Another characteristic of federalism in the United States is the existence of federal norms, whether legal, administrative, or judicial, that bear directly upon the federation citizens, without any need of intervention of the member states. The architects of the American system recognized that a successful federal system, something more than a loose confederation of states, required that both the national and the state governments be given substantial autonomy. They also recognized that each had to have some way to influence the other from within as well as through direct negotiation. The federal government has the power to deal directly with the public, that is to say, with the citizenry of the states. The states, in turn, have a major role in determining the composition of the federal government and the selection of those who make it work.

DANIEL J. ELAZAR
(1986)

Bibliography

ELAZAR, DANIEL J. 1962 *The American Partnership: Intergovernmental Cooperation in the Nineteenth Century United States.* Chicago: University of Chicago Press.

——— 1984 *American Federalism: A View from the States.* New York: Harper & Row.

GRODZINS, MORTON 1966 *The American System: A New View of Government in the United States.* Chicago: Rand McNally.

HART, HENRY and WECHSLER, HERBERT 1953 *The Federal Courts and the Federal System.* Mineola, N.Y.: Foundation Press.

MCLAUGHLIN, ANDREW C. (1932) 1972 *The Foundations of American Constitutionalism.* Gloucester, Mass.: Peter Smith.

OSTROM, VINCENT 1971 *The Political Theory of the Compound Republic.* Blacksburg: Virginia Polytechnic Institute, Center for the Study of Public Choice.

VILE, M. J. C. 1961 *The Structure of American Federalism.* Oxford: Oxford University Press.

WRIGHT, DEIL S. 1978 *Understanding Intergovernmental Relations.* North Scituate, Mass.: Duxbury Press.

## FEDERALISM AND CIVIL RIGHTS

In the scheme of the United States Constitution, the concept of FEDERALISM requires respect for the distinct legal authorities and diverse cultures of the separate states, but the concept of CIVIL RIGHTS requires adherence to uniform rules emanating either directly from the national Constitution or indirectly from various congressional enactments. The two concepts are thus bound in a structural tension.

This tension has persisted since the RECONSTRUCTION amendments, when the national government first seriously began to create federal civil rights that could be asserted against the states. These rights, together with the expansion of federal JUDICIAL POWER necessary to enforce them, were self-conscious efforts to eradicate aspects of the indigenous culture of the southern states traceable to the institution of SLAVERY. Federal civil rights were thus born in a burst of national centralization.

Ironically, these rights were interpreted by courts in such a way as to permit racial subordination to endure even in the absence of slavery. The FOURTEENTH AMENDMENT in particular was understood to establish civil rights that were primarily economic in nature, most notably the right of FREEDOM OF CONTRACT. In the era after LOCHNER V. NEW YORK (1905), federal courts were so persistent in using this right to strike down social reform legislation in the states that Thomas Reed Powell was moved to "ques-

tion whether judicial centralization is not pushed to an extreme under our federal system."

In this context, the values of federalism acquired a distinctively progressive cast. In 1932, for example, Justice LOUIS D. BRANDEIS, in his dissent in NEW STATE ICE COMPANY V. LIEBMANN, gave his influential and ringing defense of federalism as a "laboratory" for "novel social and economic experiments." When, after the constitutional crisis of the NEW DEAL, the Supreme Court backed off from its enforcement of laissez-faire economic rights, these same federalist values led some to challenge the Court's creation of a vigorous regime of noneconomic civil rights. In ADAMSON V. CALIFORNIA (1947), for example, Justice FELIX FRANKFURTER opposed Justice HUGO L. BLACK's proposal to "incorporate" the guarantees of the BILL OF RIGHTS into the Fourteenth Amendment for application against the states. Frankfurter argued that the INCORPORATION DOCTRINE would "tear up by the roots much of the fabric of law in the several States, and would deprive the States of opportunity for reforms in legal process designed for extending the area of freedom."

In this way the values of federalism became associated with conservative opposition to the establishment of federal noneconomic civil rights. This association reached its apex when the concept of STATES' RIGHTS was used to challenge the legitimacy of BROWN V. BOARD OF EDUCATION (1954, 1955) and the CIVIL RIGHTS MOVEMENT, a conjunction that came close to discrediting the values of federalism as effective limitations on the establishment of civil rights.

Certainly by the mid-1960s, as the nation committed itself to the recognition and implementation of civil rights, the values of federalism were in eclipse. The Supreme Court incorporated virtually all of the Bill of Rights into the Fourteenth Amendment for application against the states, and it aggressively enlarged its interpretation of the scope and application of those rights. The incorporation of most of the FOURTH AMENDMENT, Fifth Amendment, and Sixth Amendment forced the states to comply with uniform national standards in the area of CRIMINAL PROCEDURE. The Court's expansion of FIRST AMENDMENT guarantees of FREEDOM OF SPEECH and RELIGIOUS LIBERTY resulted in the invalidation of numerous state regulations that had heretofore been deemed perfectly acceptable reflections of local culture. And the Court's firm commitment to rights of racial and ethnic equality effectively outlawed the Jim Crow culture of the southern states. Congress significantly participated in this process of establishing national civil rights through its enactment of the CIVIL RIGHTS ACT OF 1964, the CIVIL RIGHTS ACT OF 1968, and the VOTING RIGHTS ACT OF 1965.

By the end of the WARREN COURT era, the rhetoric of federalism had virtually disappeared from the ongoing debate about the substance of civil rights. For example, when the BURGER COURT deliberated whether the EQUAL PROTECTION clause should require STRICT SCRUTINY of gender classifications, it argued the question almost entirely in terms of the independent merits of the position, rather than in terms of the effect that such scrutiny would have on the ability of diverse states to enact laws that reflected distinct cultural attitudes toward controversial issues of gender equality. Similarly, when the Burger Court in ROE V. WADE endowed women with the constitutional right to have an ABORTION, it barely discussed the implications of the decision for the values of federalism.

The end of the 1960s witnessed a political renaissance of the values of federalism, a renaissance that later intensified during the presidency of RONALD REAGAN. This renaissance found judicial expression in debates over the reach of federal judicial power, rather than in debates over the nature of the substantive civil rights protected by that power. Thus, both the Burger Court and the REHNQUIST COURT invoked values of federalism in order to curb the authority and accessibility of federal courts, which the Warren Court had greatly expanded in an attempt to enforce fully the civil rights that it had recognized.

For example, in an important line of cases that originated with YOUNGER V. HARRIS, the Burger Court invoked the principles of "our Federalism" in order to limit the availability of federal EQUITY relief. The Court explained these principles as a "notion of "comity,' that is, a proper respect for state functions," and the belief that the nation "will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." The Court invoked similar notions of COMITY to justify restrictions on ACCESS TO THE COURTS for federal writs of HABEAS CORPUS, expansive interpretations of state immunity from federal judicial power under the ELEVENTH AMENDMENT, strict presumptions against waivers of that immunity, and limitations on the authority of federal courts to issue injunctions broadly restructuring state and local government institutions. The tension between civil rights and federalism thus continued, although in a somewhat modulated key.

That tension may profitably be analyzed by inquiring into the values served by the concepts of civil rights and federalism. Civil rights, at least those that emanate from the Constitution, serve mainly to protect persons from the exercise of governmental authority. The persistent image is that of individuals safeguarded by courts from the domination of an overpowering government. From this perspective, it makes no difference whether government power is exercised at the state or federal level.

Yet federalism is committed to the proposition that it is usually preferable to exercise power at the local rather than national level. There are many different rationales for this preference, ranging from efficiency to experimen-

tation. But there are two justifications that are most directly responsive to the values underlying the claim for civil rights.

The first accepts the premise that it is vitally important to protect individual liberty from the excesses of state power, but it views courts as, in the long run, unreliable institutions for securing that protection. Individual freedom is better served, so the argument runs, by establishing the states as centers of power that are competitive with the federal government, in the expectation that the resulting diffusion of power will effectively check the potential for abusive government. To establish the states as independent centers of power, however, requires ceding to them autonomy from a uniform regime of civil rights emanating from the federal government. On this account, then, the resolution of the tension between civil rights and federalism ought to depend upon how the long-term benefits to civil rights anticipated from the structural arrangements of federalism compare against the short-term benefits that would result from judicial enforcement of federal civil rights.

The second justification for federalism strikes deeper, for it denies that the image underlying the rationale for civil rights is adequate as a description of local state governments. State governments, according to this argument, are closer to the people and hence more fully realize the values of political participation. Thus, they should not be pictured as overreaching and impersonal governments estranged from their citizens, but rather as more nearly authentic communities, in which political processes both form and express genuine social commitments. The national imposition of uniform civil rights would therefore be both unnecessary and deeply disruptive of these positive local processes. On this account, then, the resolution of the tension between civil rights and federalism ought to depend upon whether states can more accurately be described as representing authentic and inclusive communities or as impersonal and potentially oppressive governments.

Given the difficult and perplexing nature of these inquiries, it is clear why the tension between federalism and civil rights has endured, and in all likelihood will continue to do so.

ROBERT C. POST
(1992)

Bibliography

POST, ROBERT C. 1988 Justice Brennan and Federalism. In Harry N. Scheiber, ed., *Federalism: Studies in History, Law and Policy,* pp. 37–45. Berkeley, Calif.: Berkeley Press.

POWELL, THOMAS REED 1931 The Supreme Court and State Police Powers, 1922–1930. *Virginia Law Review* 17:529–556.

RAPACZYNSKI, ANDRZEJ 1985 From Sovereignty to Process: The Jurisprudence of Federalism After *Garcia. Supreme Court Review* 43:29–38.

SANDALOW, TERRANCE 1980 Federalism and Social Change. *Law and Contemporary Problems* 43:29–38.

## FEDERALISM AND ENVIRONMENTAL LAW

Environmental protection was viewed as a state or local responsibility until the post–WORLD WAR II era when pollution problems assumed national scope. Congress responded initially by providing financial assistance to encourage state and local governments to control pollution. Federal grants for construction of municipal sewage treatment plants were the most prominent of these programs. The perceived failure of state and local regulation led Congress during the 1970s and 1980s to establish comprehensive national regulatory programs to protect the environment.

Most of the federal laws employ a "cooperative" FEDERALISM approach in which a federal agency establishes minimum national standards that states may opt to implement or to leave implementation to federal authorities. The Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and federal hazardous waste LEGISLATION require the Environmental Protection Agency (EPA) to set minimum national standards, while authorizing delegation of authority to administer these programs to states. In states that fail to receive program delegation, the laws are administered by federal authorities.

Most federal environmental laws allow states to adopt more stringent standards than the federally mandated minimum. However, in a few instances Congress has chosen to preempt inconsistent state standards, usually when regulating products that are distributed nationally, such as chemicals regulated under the Toxic Substances Control Act and pesticide labels mandated under the Federal Insecticide, Fungicide, and Rodenticide Act.

The rise of the federal regulatory infrastructure has generated environmental policy conflicts between federal and state authorities. Four types of constitutional issues have arisen in conflicts over environmental federalism. First, states have argued that some federal environmental regulations impermissibly infringe on state SOVEREIGNTY in violation of the TENTH AMENDMENT. In NEW YORK V. UNITED STATES (1992), the Supreme Court struck down a federal requirement that states "take title" to any low-level radioactive waste generated within their borders if they had not made arrangements by a certain date for access to a disposal site for such waste. The Court found that the requirement violated the Tenth Amendment by "comandeering" the states' legislative processes to compel states

to enact and enforce a federal regulatory program. Few federal environmental laws are vulnerable to Tenth Amendment challenges because most offer states a choice between regulating an activity according to federal standards or having state law preempted by federal regulation.

This "cooperative federalism" approach is less intrusive on state sovereignty than direct PREEMPTION. Congress also may condition the receipt of federal funds on state participation in federal environmental programs, which is a proper use of Congress's SPENDING POWER and consistent with the Tenth Amendment so long as the conditions bear some relationship to the purpose of the federal spending. Thus, the Clean Air Act's denial of federal highway funds to states that fail to meet national air quality standards is constitutional.

The Court's decision in UNITED STATES V. LÓPEZ (1995) that Congress's regulatory authority under the COMMERCE CLAUSE of Article I, section 8, extends to intrastate activities only when they substantially affect INTERSTATE COMMERCE has spawned a second set of challenges to federal environmental regulations. Arguments that some federal environmental laws exceed Congress's authority by regulating noncommercial activity that is wholly intrastate have been rejected by most courts because of the potential cumulative impact of even localized environmental damage.

A third source of constitutional limitations on federal authority is the ELEVENTH AMENDMENT, which makes states immune from suits for damages in federal court. In *Seminole Tribe of Florida v. Florida* (1996), the Court held that Congress cannot abrogate state SOVEREIGN IMMUNITY by exercising its authority under the commerce clause. This overruled the Court's prior decision in *Pennsylvania v. Union Gas Co.* (1989), which had held that a state could be liable for the costs of environmental remediation under the federal "Superfund" law.

In a fourth set of cases, beginning with PHILADELPHIA V. NEW JERSEY (1978), the Court has used the DORMANT COMMERCE CLAUSE to strike down state laws that restrict the disposal of waste originating out-of-state or that seek to channel solid waste flows to local facilities, as in *C & A Carbone, Inc. v. Town of Clarkstown* (1994).

While federal regulations now dominate the field, states continue to play an important role in implementing and enforcing national environmental policy under a system of cooperative federalism.

ROBERT V. PERCIVAL
(2000)

(SEE ALSO: *Environmental Regulation; Waste, Pollution, and Federalism.*)

Bibliography

DWYER, JOHN P. 1995 The Practice of Federalism Under the Clean Air Act. *Maryland Law Review* 54:1183–1225.

ESTY, DANIEL C. 1996 Revitalizing Environmental Federalism. *Michigan Law Review* 95:570–653.

PERCIVAL, ROBERT V. 1995 Environmental Federalism: Historical Roots and Contemporary Models. *Maryland Law Review* 54:1141–1182.

PERCIVAL, ROBERT V.; MILLER, ALAN S.; SCHROEDER, CHRISTOPHER H.; and LEAPE, JAMES P. 1996 *Environmental Regulation: Law, Science, and Policy,* 2nd ed. Boston, Mass.: Little, Brown.

STEINZOR, RENA I. 1996 Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform? *Minnesota Law Review* 81:101–227.

## FEDERALISM AND SHARED POWERS

FEDERALISM and SEPARATION OF POWERS are the two principal techniques in America for dividing political power. Federalism allocates power between the national government and the states; separation of powers distributes power among three branches of the national government and within each of the state governments. Although these divisions of power characterize national and state government, many essential functions of government are shared. Justice ROBERT H. JACKSON deftly noted in YOUNGSTOWN SHEET & TUBE CO. V. SAWYER (1952), "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Jackson directed his observation to the doctrine of separation of powers, but it applies equally well to federalism.

Independence from England in 1776 left the thirteen American states without a central government. Under the ARTICLES OF CONFEDERATION, drafted in 1777 but not ratified until 1781, each state retained "its sovereignty, freedom and independence," with the exception of a few powers expressly delegated to the national government. Various attempts were made over the years to bring a measure of effectiveness to the Confederation, but it was finally agreed after the ANNAPOLIS CONVENTION in 1786 to meet in Philadelphia the following year "to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union."

The delegates at Philadelphia rejected MONTESQUIEU'S theory that republican government could function only in small countries. He had argued that as a country increased in size, popular control must be surrendered, requiring aristocracies for moderate-sized countries and monarchies for large countries. JAMES MADISON, in THE FEDERALIST #10, made precisely the opposite argument: that republican

government was more likely the larger the territory. In a small territory, a dominant faction could gain control. "Extend the sphere," Madison reasoned, "and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens."

Critics of the 1787 Constitution claimed that it promoted a national or consolidated form of government instead of preserving the independence of the states. An exceptionally blunt challenge came from the Virginia ratification convention, where PATRICK HENRY attacked the opening words of the Constitution: "What right had they to say, *We, the people?* . . . Who authorized them to speak the language of, *We, the people*, instead of, *We, the states?*" Madison answered these critiques in *Federalist* #39, pointing out that the Constitution contained features of a national character but also vested some power directly in the states. The proposed Constitution, he said, "is, in strictness, neither a national nor a federal Constitution, but a composition of both." By "federal" Madison meant *con*federal: a confederation of sovereign states, such as existed under the Articles of Confederation.

The Philadelphia Convention wrestled with two rival proposals. The VIRGINIA PLAN called for a strong central government, while the NEW JERSEY PLAN advocated a confederation with few national powers. The latter attracted little support. The GREAT COMPROMISE, promoted by OLIVER ELLSWORTH of Connecticut, combined two antagonistic ideas: representation by population in the HOUSE OF REPRESENTATIVES and equal voting power for each state in the SENATE. He explained to the Convention on June 29, "We were partly national; partly federal. The proportional representation in the first branch [the House] was conformable to the national principle & would secure the large States agst. the small. An equality of voices [in the Senate] was conformable to the federal principle and was necessary to secure the Small States agst. the large. He trusted that on this middle ground a compromise would take place."

The compromise gave the central government the power to collect taxes, regulate commerce, and declare war, along with other express functions, including the NECESSARY AND PROPER CLAUSE to carry into effect the ENUMERATED POWERS. National powers are reinforced by the SUPREMACY CLAUSE in Article VI, section 2: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." Article I, section 9, prohibits the national government from taxing articles exported from any state or preferring the ports of one state over another, while Article I, section 10, prohibits a number of state actions, including entering into any treaty, alliance, or confederation; coining money; passing any BILL OF ATTAINDER or EX POST FACTO LAW; impairing the OBLIGATION OF CONTRACTS; or laying any IMPOSTS or duties on imports or exports without the consent of Congress, except what is "absolutely necessary" to execute its inspection laws.

The TENTH AMENDMENT provides that the powers "not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Articles of Confederation gave greater protection to the states, which retained all powers, except those "expressly delegated" to the national government. When it was proposed in 1789 that the same phrase be inserted in the Tenth Amendment, Madison objected to the word "expressly" because it was impossible to delineate every function and responsibility of the federal government. There had to be, he said, room for IMPLIED POWERS "unless the Constitution descended to recount every minutiae." On the force of his argument, the word "expressly" was eliminated from the Tenth Amendment. In MCCULLOCH V. MARYLAND (1819), Chief Justice JOHN MARSHALL relied on Madison's argument in upholding the power of Congress to establish a national bank, even though that power is not expressly included in the Constitution.

The suggestion that the Tenth Amendment contains substantive powers for states, even to the point of reinserting the word "expressly," has been made in such cases as *Lane County v. Oregon* (1868) and HAMMER V. DAGENHART (1918). In MISSOURI V. HOLLAND (1920), however, the Supreme Court denied that the TREATY POWER was restricted in any way "by some invisible radiation from the general terms of the Tenth Amendment," and Justice HARLAN F. STONE, in UNITED STATES V. DARBY LUMBER COMPANY (1941), dismissed the Tenth Amendment as a "truism," meaning only "that all is retained which has not been surrendered." Nevertheless, the decisions in *Fry v. United States* (1975) and NATIONAL LEAGUE OF CITIES V. USERY (1976) demonstrate that the Tenth Amendment retains vitality.

Many of the turf battles between the national government and the states have been fought over the scope of the COMMERCE CLAUSE. Commercial friction among the states after 1776 was a principal reason for discarding the Articles of Confederation and adopting a government with greater national powers. The enumerated powers given to Congress in Article I include the power to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes." In GIBBONS V. OGDEN (1824), Chief Justice Marshall advanced a broad interpretation of the power of Congress to regulate commerce, but over the

years, the Court employed other doctrines to distinguish between national and state powers. At times the two levels of government could exercise CONCURRENT POWERS. States were able to regulate commerce within their borders unless preempted by Congress. The Court also created the doctrine of exclusive JURISDICTIONS, promoting the theory of DUAL FEDERALISM, under which the states and the national government exercised mutually exclusive powers.

These doctrines appeared to be increasingly artificial with the rapid nationalization of the American economy. Traditional boundaries between INTRASTATE COMMERCE and INTERSTATE COMMERCE were swept aside when the operations of railroads, agriculture, and livestock acquired national structures. The Court even held that Congress could regulate actions inside a state that were simply related to interstate commerce. During World War I and World War II commercial and economic activities that normally fell within the jurisdiction of the states were controlled by the federal government.

During the period of SUBSTANTIVE DUE PROCESS, which lasted from the 1890s to 1937, the Supreme Court struck down a number of regulatory efforts by Congress and state legislatures on the theory that the statutes interfered with the "liberty of contract," a fiction created by the judiciary to limit governmental power. Statutes enacted to establish minimum wages and maximum hours, to protect children from harsh labor practices, or to create better working conditions were regularly invalidated by state and federal courts.

Those judicial doctrines were eventually cast aside during the NEW DEAL revolution, especially after the COURT-PACKING PLAN in 1937. Although at one period the Court struck down congressional statutes because they invaded "local" activities within the control of state governments or because "manufacturing" was considered by the judiciary as local and thus beyond congressional control, these barriers to national action were eventually removed. A series of rulings, such as *NLRB v. Jones & Laughlin Steel Corp.* (1937) and *United States v. Darby Lumber Company* (1941), gave solid support to Congress's interpretations of its powers under the commerce clause. In PRUDENTIAL INSURANCE COMPANY V. BENJAMIN (1946), a chastened Court offered this revealing assessment: "The history of judicial limitation of congressional power over commerce, when exercised affirmatively, has been more largely one of retreat than of ultimate victory."

In *National League of Cities v. Usery* (1976), the Supreme Court appeared to resuscitate state SOVEREIGNTY and the Tenth Amendment. The case involved the decision of Congress to extend federal hours-and-wages standards to state employees. In *Maryland v. Wirtz* (1968), the Court had upheld the extension of federal minimum wages and overtime pay to state-operated hospitals and schools. It even upheld, in *Fry v. United States* (1975), the short-term power of the President to stabilize wages and salaries for state employees. Nevertheless, *National League* refused to permit federal minimum-wage and maximum-hour provisions to displace state powers in such "traditional governmental functions" as fire prevention, police protection, sanitation, public health, and parks and recreation. This 5–4 decision overruled *Wirtz* on the ground that the congressional statute threatened the independent existence of states. In his dissent, Justice WILLIAM J. BRENNAN objected that the Court had delivered "a catastrophic judicial body blow at Congress' power under the Commerce Clause."

The Court's bifurcation between "traditional" and "nontraditional" governmental functions spawned confusion in the lower courts. Many of the efforts of federal district courts to apply the standard in *National League* were rejected by the Supreme Court. Finally, in *Garcia v. San Antonio Metropolitan Transit Authority* (1985), Justice HARRY A. BLACKMUN, whose concurrence had provided the fifth vote in *National League*, swung in the other direction to join with the four dissenters in overruling *National League.* He called attention to the frustrating struggle in federal and state courts to distinguish between traditional and nontraditional functions. He called the criteria in *National League* "unworkable," "inconsistent with established principles of federalism," and "both impracticable and doctrinally barren." Because of this decision, the protection of federalism has been left largely to the political process of Congress. The tone of the four dissents, however, suggests that *Garcia* might be living on borrowed time, reflecting the position of older members of the Court: Blackmun, Brennan, THURGOOD MARSHALL, BYRON R. WHITE, and JOHN PAUL STEVENS. WILLIAM H. REHNQUIST, the author of *National League*, offered this advice in his *Garcia* dissent: "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."

Although the position of the Court on *National League* and *Garcia* might be in a state of flux and easily reversible, the judgment of ANTONIN SCALIA during his nomination hearings in 1986 to be Associate Justice seems well grounded in history: "The primary defender of the constitutional balance, the Federal Government versus the states, . . . the primary institution to strike the right balance is the Congress. . . . The court's struggles to prescribe what is the proper role of the Federal Government vis-à-vis the State have essentially been abandoned for quite a while."

LOUIS FISHER
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Bibliography

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS 1988 *State Constitutional Law: Cases and Materials.* Washington, D.C.: U.S. Government Printing Office.

ANTON, THOMAS J. 1989 *American Federalism and Public Policy.* Philadelphia: Temple University Press.

CONLAN, TIMOTHY 1988 *New Federalism: Intergovernmental Reform from Nixon to Reagan.* Washington, D.C.: Brookings Institution.

O'BRIEN, DAVID M. 1989 Federalism as a Metaphor in the Constitutional Politics of Public Administration. *Public Administration Review* 49, no. 5:411–419.

## FEDERALISM IN HISTORICAL PERSPECTIVE

See: Devolution and Federalism in Historical Perspective

## *FEDERALIST, THE*

In the eight months following the adjournment of the CONSTITUTIONAL CONVENTION OF 1787, ALEXANDER HAMILTON, JAMES MADISON, and JOHN JAY wrote a series of eighty-five essays in support of the proposed Constitution. These essays were published in newspapers and as a two-volume book under the title *The Federalist.* This work was intended to influence voters electing delegates to the ratifying conventions and the delegates themselves; and the length, detail, and subtlety of its argument suggest an additional intention of enlightening later generations. While some contemporaries thought other, simpler and briefer, writings better calculated to influence the decision of 1787–1788, *The Federalist* was regarded as a work of enduring value by THOMAS JEFFERSON ("the best commentary on the principles of government which ever was written"), GEORGE WASHINGTON, and others. It has remained the most comprehensive and profound defense ever written of the American form of government; and it has been, as Chief Justice JOHN MARSHALL wrote in MCCULLOCH V. MARYLAND (1819), "justly supposed to be entitled to great respect" by courts engaged in "expounding the constitution."

The first section of *The Federalist* (#2 through #14) explains the advantages of a union as compared to independent American states. A large country is better suited than small countries to avoid or win wars, to pursue profitable commercial arrangements, and to raise revenue. Moreover, a large country's relative freedom from fear of war makes it more likely to preserve a free government. (Small countries facing frequent wars eventually accept the risk of being less free in order to be more safe.) Most novel was *The Federalist*'s claim that a popular form of government would be more likely in a large country than in a small country to secure private rights and the public good. MONTESQUIEU and the Anti-Federalist writers who quoted him acknowledged that large countries ruled by monarchs enjoyed certain advantages in FOREIGN AFFAIRS, but insisted that only small republics could enjoy the internal advantages of a patriotic citizenry ruling itself for its own good. In the famous *Federalist* #10 Madison argued that even in the smallest republic the citizenry is not an "it" but a collection of diverse individuals. Those individuals' rights deserve protection, but their passions and interests can unite them in groups that oppose the rights of others or the public good. Madison offered a twofold defense of a large republic. First, the diversity of a large country makes it less likely that any single group will constitute a majority of the voters and therefore be able to oppress other groups by virtue of the republican principle of majority rule. Second, in a large republic elections will be more likely to choose "fit characters" who will pursue the public good. The conclusion that republican government was possible, indeed better, in a large country served to reconcile the unpleasant necessities that seem to require largeness with the deep-rooted desire to have a popular government.

Essays #15 through #36 explain the necessity of "energetic" government. Although the national government has limited purposes, it must be able to tax and raise armies. Under the ARTICLES OF CONFEDERATION, Congress could demand the necessary money and men but had to address its demands to the state governments, whose disobedience could not be punished and whose compliance therefore could not be counted on. The decisive innovation of the new Constitution was the government's ability to address its commands to individual citizens, each of whose inability to contemplate forcible resistance made him respectful of "the arm of the ordinary magistrate." By defending this innovation in the name of FEDERALISM, *The Federalist* transformed the meaning of that term. Whereas others regarded true federalism as requiring what Montesquieu called a "society of societies"—that is, a union composed of and ruling over political communities rather than individuals—*The Federalist* regarded that as a prescription for disunion, thus deserving the name "antifederal" for its inevitable tendency.

The prospect that the new government would be able to exercise its nominal powers and coerce citizens raised the question of how such an energetic government could be confined to its proper purposes and restrained from oppression. *The Federalist* did not look to a careful enumeration of granted or excluded powers to control the government, because mere "parchment" would do little by itself and because certain formidable powers (for example, taxation) could not be excluded or even limited in their extent. The government could only be controlled by

being "well modeled," by having a "general genius" and "internal structure" that made it trustworthy. This meant first of all that the government was "wholly popular"; its whole power was entrusted to the representatives of the people, and could therefore be controlled by the people in elections. *The Federalist* #37 through #84 explains the "conformity of the proposed Constitution to the true principles of republican government."

The fact that popular elections permit the people to "oblige the government to control itself" exhausts neither *The Federalist*'s prescription for a well-modeled government nor its argument for popular government. For one thing, the people are vulnerable to rulers who deceive them, misuse their powers between elections, or cancel elections. "A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." The auxiliary precautions are of various sorts, but all are designed to make ambition counteract ambition, so that no ruler's love of power is given free rein. A SEPARATION OF POWERS, legislative, executive, and judicial, insures that the people will be ruled in accordance with known laws that are enforced even against those who adopt them. The executive's VETO POWER both preserves this functional separation and, together with the legislature's BICAMERALISM, inhibits hasty lawmaking. The judiciary enjoys a tenure of GOOD BEHAVIOR to fortify judges in their task of preventing illegal executive acts and unconstitutional legislative acts. This last activity, now known as JUDICIAL REVIEW, was given its first sustained intellectual defense by Hamilton in *The Federalist* #78. Hamilton insisted on the court's duty to enforce the Constitution as law and indeed, because it was solemnly and authoritatively adopted by the people, as superior to the laws passed by the legislature, even if the legislature's laws were supported or instigated by the people themselves. The legislature's power of IMPEACHMENT provided a remedy against abuse of this judicial authority, or of the President's formidable powers. And the existence of state and national governments with independent powers to serve their own distinct objects gives each a platform and a motive to expose the other's encroachments.

*The Federalist* defended such auxiliary precautions (that is, precautions in addition to the people's electoral power) as reducing the chance that the government would betray and oppress the people as a whole. A more difficult problem, already explained in *The Federalist* #10, was that the people are not a whole, and that rulers elected by the majority might oppress the rights of minorities. The longer terms of senators, Presidents, and judges enabled them to oppose sudden and transient unjust impulses of the majority. A grateful people might reward such service once the heat of passion had cooled, or an excellent ruler might do his duty without reward; but the Constitution's institutions could not defend against an enduring majority's unjust passion or interest—hence the importance of a large country's diversity in making such majorities less likely.

*The Federalist* defends the "particular structure" of the Constitution not only as discouraging oppression but as encouraging good government. The task of a good national government is to secure the nation against foreign and domestic violence and to regulate its commerce so as to promote the general welfare. These activities in turn serve the most fundamental object of government, which is justice, meaning the protection of each individual's right to exercise his own faculties in the acquisition of property and in other activities. Thus an important accomplishment for any government is that it not itself be a source of injustice, that it achieve "the negative merit of not doing harm."

Further, positive merit of doing some good is encouraged by the Constitution's creation of offices in relatively small numbers and with relatively long terms, so as to encourage more capable candidates to seek office and to be elected and (more important) to put those elected in a situation in which they feel a personal motive to do some good. The experience officials could gain in office would help them devise means to promote the public good; and the distance of the people from direct rule would enable them to judge dispassionately and retrospectively the merit of their officials' policies according to their experience of the apparent effects of those policies. In the best case, officials moved by "the love of fame, the ruling passion of the noblest minds" would have an opportunity to "undertake extensive and arduous enterprises for the public benefit." Even in more ordinary cases, a durable senate would tend to foster stability in the laws and a single executive would be able to enforce them energetically.

*The Federalist*'s defense of these institutions does not, however, deduce them entirely from the requirements of safe and good government. By those standards, *The Federalist* would not have found indefensible the "mixed" government of England, whose popularly elected House of Commons permits the people to restrain the government from oppression, whose king is an energetic executive, and whose House of Lords provides a source of stability and of protection for the rights of a minority. *The Federalist* emphatically defends the "strictly republican," "wholly popular" character of the American Constitution, which is made necessary by "that honorable determination, which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government." Not a knowledge of human fitness for self-government but an assertion of that fitness, or a knowledge of the human impulse to assert that fitness, justifies popular government. To protect the faculties of

men requires protecting their faculty of passionately defending their own opinions, respecting their "pretension" to rule. *The Federalist* defended the American Constitution not only for its likely service of the interests of Americans but also for its tendency to "vindicate the honor of the human race."

*The Federalist* remains America's most important political book because it offers an explanation and defense of our form of government written by men who could not take the goodness or permanence of that regime for granted. Americans who study *The Federalist* today may find not only new reasons to appreciate the Constitution they inherit but also an account of government somewhat different from that assumed in contemporary opinion. For example, to *The Federalist* justice means impartial protection of the right to exercise one's faculties, not equal provision for the satisfaction of one's needs or desires. CONSTITUTIONALISM means that the people's solemn choice of their own form of government can be overridden only by a new, deliberate popular choice, not silently and gradually improved by judges trying to make the Constitution a living document. And REPRESENTATION is an arrangement that allows an opinionated people to select capable rulers and periodically pass formal judgment on their service of the public good, not an imperfect simulation of ancient direct democracy or a primitive version of modern opinion polling. *The Federalist* is thus both a source of understanding and appreciation of the American Constitution and a guide to reflection on its subsequent development.

DAVID F. EPSTEIN
(1986)

Bibliography

ADAIR, DOUGLASS 1974 *Fame and the Founding Fathers.* New York: Norton.

DIAMOND, MARTIN (1963) 1972 The Federalist. Pages 631–651 in Leo Strauss and Joseph Cropsey, eds., *History of Political Philosophy.* Chicago: Rand McNally.

EPSTEIN, DAVID F. 1984 *The Political Theory of The Federalist.* Chicago: University of Chicago Press.

## FEDERALISTS

Arguments about the meaning of the Constitution can be dated to the controversy over its adoption or to the congressional debates of 1789 about the power to remove subordinate executive officials. But not until the conflict over ALEXANDER HAMILTON'S proposal to create a BANK OF THE UNITED STATES did these disputes assume a partisan configuration and begin to take the form of two conflicting modes of CONSTITUTIONAL INTERPRETATION. When Hamilton's proposal came before the HOUSE OF REPRESENTATIVES in February 1791, Congressman JAMES MADISON remembered that the CONSTITUTIONAL CONVENTION OF 1787 had specifically declined to add the right to charter CORPORATIONS to the list of Congress's powers. Madison contended that incorporation of a bank was not an exercise of any of the delegated powers and could not be justified on other grounds without confiding an "unlimited discretion" to a limited regime and threatening its gradual transmutation into a unitary national system. Disturbed by Madison's objections, President GEORGE WASHINGTON requested the opinions of his principal advisers before he signed the bill. EDMUND RANDOLPH and Secretary of State THOMAS JEFFERSON agreed with their Virginia friend. Elaborating Madison's insistence that to step beyond the constitutional enumeration was "to take possession of a boundless field of power, no longer susceptible of any definition," Jefferson maintained that the incorporation of a bank was not a regulation of the nation's commerce, not a tax, and not a borrowing of money. To derive the power from the "general phrases," he continued, would render the enumeration useless, reduce the Constitution "to a single phrase," and, in practice, authorize the federal government to do anything it pleased.

Hamilton's rebuttal of his colleagues, which persuaded Washington to sign the bill, erected the essential framework for the BROAD CONSTRUCTION of the document that would prevail throughout the 1790s. In fact, the reasoning and phrasing of this great opinion would be closely followed by JOHN MARSHALL in MCCULLOCH V. MARYLAND in 1819. "If the *end* be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that *end*, and is not forbidden by any particular provision of the Constitution," Hamilton maintained, "it may safely be deemed to come within the compass of the national authority." Insisting that the Constitution's grant of sovereign powers necessarily implied a power to decide which means were most appropriate to federal ends, the secretary of the treasury rejected Jefferson's contention that the boundaries of federal power would be washed away if "NECESSARY AND PROPER" was construed to mean "convenient," "useful," "requisite," and "needful." A liberal interpretation of this phrase was vital, he observed, to an effective federal system: "The means by which national exigencies are to be provided for . . . are of such infinite variety, extent, and complexity that there must, of necessity, be great latitude of discretion in the selection and application of those means."

Hamilton's opinion on the national bank began with the assumption "that every power vested in a government is in its nature *sovereign*, and includes . . . a right to employ all the means requisite and fairly applicable to the attainment of the ends." It was not to be denied, the secretary argued, "that there are *implied* as well as *express powers*." Similar assumptions underpinned his "Letters of Pacifi-

cus" in 1793, with their defense of the inherent power of the chief executive to issue the Neutrality Proclamation. And yet, a "liberal" or "broad" construction of the reach of federal powers only partially describes the general tendency of Federalist interpretations of the Constitution. While the party was in power, Hamilton and other leaders generally assumed that the enduring dangers to the new regime would issue for the most part from the states' continual encroachments on the federal government's preserve and from a democratic people's tendency to favor an increasing concentration of the powers of the central government itself in the popularly elected lower house. Thus, the Federalists did seek as broad and flexible a definition of the general government's authority as reason would admit. They also usually attempted to defend the independence and prerogatives of the executive and the courts against encroachments by the Congress, which the Framers had intended to be more immediately responsive to the people. The most important constitutional collisions of the decade can all be helpfully illuminated in these terms. So could Federalist resistance to the Jeffersonians' repeal of the JUDICIARY ACT OF 1801, when many argued that the tenure of judges during GOOD BEHAVIOR should not be subverted by an abolition of their posts.

After 1793, foreign policy and its domestic repercussions dominated the intensifying party conflict, and Hamilton's defense of presidential leadership initiated an extended public argument about the meaning of the clause that vested "the executive power . . . in a President of the United States." "Pacificus" interpreted this phrase as granting an inherent body of executive prerogatives to the head of the executive department, "subject only to the *exceptions* and *qualifications*" defined by the Constitution. Writing as "Helvidius" at Jefferson's request, Madison condemned this doctrine as derived from the theory and practice of monarchical Britain and as striking "at the vitals" of a republican Constitution. Hamilton's interpretation, he insisted, would enable an ambitious President to take the country into war without congressional consent.

In practice, the conduct of the first two administrations did establish lasting precedents for firm executive direction of the country's international relations. In 1796 the House of Representatives asked Washington for documents relating to JOHN JAY's negotiation of a commercial treaty with Great Britain. Some members hoped to defeat the unpopular treaty by declining to appropriate the money necessary to carry it into effect. Washington's refusal to submit the papers to the House, which had no constitutional role in making treaties, was consistent with his general practice of an active leadership in foreign-policy concerns. JOHN ADAMS's decision to initiate a diplomatic resolution to hostilities with France, undertaken in the face of active opposition from his CABINET and from Federalists in Congress, was yet another potent contribution to the chief executive's command of his department and to presidential guidance in this field.

The diplomatic impasse that resulted in the naval war with France—undeclared but authorized by acts of Congress—also ended in the most ferocious constitutional collision of the decade. Fearing French collusion with their Jeffersonian opponents, as well as with a host of recent immigrants to the United States, Federalists in Congress took advantage of the patriotic fury sparked by revelation of the XYZ Affair to pass a range of crisis legislation. Their opponents sharply criticized the Alien Acts of 1798, which authorized the President—without judicial process and merely on suspicion—to deport any ALIEN whose presence he considered dangerous to the United States. But the Republicans reserved their most ferocious condemnations for a controversial companion law, aimed at the repression of domestic opposition.

The Sedition Act of 1798 made it a criminal offense to "write, print, utter, or publish . . . any false, scandalous, and malicious writing or writings against the government of the United States, or either House of Congress of the United States, or the President of the United States, with the intent to defame [them] or to bring them . . . into contempt or disrepute." To the Republicans, whose opposition culminated in the VIRGINIA AND KENTUCKY RESOLUTIONS, this legislation was a flagrant violation of the limits of Congress's delegated powers and of the FIRST AMENDMENT. Little less objectionable, they thought, were prosecutions grounded on the supposition that there was, in any case, a federal COMMON LAW of SEDITIOUS LIBEL.

The crisis laws of 1798 were major threats to private rights and public liberties as these would later be defined. Together with the argument for the existence of a FEDERAL COMMON LAW OF CRIMES, they were supreme examples of the readiness of many Federalists to broaden federal authority by means of constitutional constructions that advanced a sweeping doctrine of inherent sovereign powers along with a constricted reading of the BILL OF RIGHTS. In defense of the Sedition Law, the Federalists contended that the First Amendment's guarantee of FREEDOM OF THE PRESS extended only to a prohibition of true censorship (or PRIOR RESTRAINT), not to prosecutions in the aftermath of publication. Because the act provided that the truth of a seditious utterance would be an adequate defense—and because it allowed juries, rather than judges, to decide whether such an utterance was libelous or not—the Sedition Act, its advocates maintained, was actually a liberalization of existing common law. These arguments did not disguise the Federalists' desire to break an opposition that was intensifying as danger of a French invasion disappeared. Neither did they hide the party's underlying fear

of the results of open political competition; that fear was amply justified by the defeat of 1800.

From the LOUISIANA PURCHASE TREATY through the War of 1812, growing numbers of beleaguered Federalists retreated from the party's early, broad construction of the Constitution. In 1803 a few objected to the treaty, not because they shared the President's concern that there was no explicit constitutional foundation for the acquisition, but because the treaty promised that a territory not within the boundaries of the original United States (and likely to support their Jeffersonian opponents) would in time be granted statehood. If such a promise were constitutional at all, they argued, it lay within the prerogative of Congress. After 1808, with slighter strain, a larger number of Federalists bitterly denounced Jefferson's embargo, the Enforcement Acts, and other efforts to compel the warring European powers to respect the country's rights as a neutral. Congress's constitutional authority to regulate the nation's commerce, they maintained, did not include the power to prohibit it entirely. Moreover, the EMBARGO ACTS produced a vast extension of executive authority and nearly dictatorial intrusions by the military and the revenue collectors into the nation's economic life, violating both the spirit of the Constitution and the FOURTH AMENDMENT guarantees against UNREASONABLE SEARCHES and seizures. To New Englanders especially, the long experiment with economic warfare, which was pressed in a variety of ways through the next three years, seemed evidence of Jeffersonian hostility to commerce in general and to New England as a region. For them, accordingly, a narrow definition of the commerce power proved a milepost on a general withdrawal into constitutional interpretations that the Federalists had once condemned.

The quick retreat into a narrow, sometimes tortured understanding of the Constitution was primarily, though not exclusively, a sectional response to the Republican ascendancy in national affairs. Although this doctrinal switch ended by discrediting the party as a whole, it won approval neither from the Federalist judiciary nor from many of the greatest architects of Federalist ideas. After the commencement of the War of 1812, the Massachusetts legislature, governor, and courts, building on the compact theory of the Constitution, insisted that the state executive, not Congress, should determine whether an "invasion" authorized the federal government to call forth the militia. All the New England states impeded federal employment of these forces, practicing state interposition in a way that even the Virginia and Kentucky legislatures had never actually attempted. Regional resistance to the war extended to flirtations with SECESSION or a separate peace and culminated in the HARTFORD CONVENTION of December 1814. This effort to extort concessions in the midst of war discredited the Federalists beyond redemption and nationalized a constitutional interpretation that all New England states had once condemned. The constitutional amendments the convention urged would have gravely weakened the effective federal regime, which was the most impressive legacy of Federalist administrations. Yet, even as the party died, the nationalistic constitutional construction of its greatest years were winning the endorsement of the MARSHALL COURT.

LANCE BANNING
(1992)

(SEE ALSO: *Alien and Sedition Acts; Commerce Clause; Foreign Affairs; Implied Powers; Jeffersonianism; Militia Clause; Republicanism; Treaty Power.*)

Bibliography

MILLER, JOHN C. 1960 *The Federalist Era, 1789–1801.* New York: Harper & Row.

SMELSER, MARSHALL 1968 *The Democratic Republic, 1801–1815.* New York: Harper & Row.

SMITH, JAMES MORTON 1956 *Freedom's Fetters.* Ithaca, N.Y.: Cornell University Press.

# FEDERAL JUDICIAL APPOINTMENTS, TENURE, AND INDEPENDENCE

In the federal judicial system the appointment and tenure of judges are governed by the Constitution and by statutes enacted by Congress. Neither the Constitution nor Congress controls the structure of state judicial systems or the appointment and tenure of judges of those courts; under state laws, judges are variously popularly elected or appointed by the governor or another state officer, with or without the consent of the legislature, a commission, or a confirming election. State judges do not have life tenure.

Federal courts are classified as "Article III courts," also known as CONSTITUTIONAL COURTS, and "Article I courts," also known as LEGISLATIVE COURTS. The constitutional courts are those courts specified in Article III, section 1, vesting the JUDICIAL POWER of the United States "in one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish." These judges have lifetime tenure and compensation that cannot be reduced during their judicial service. Legislative courts encompass the remaining adjudicative tribunals that are congressionally established but do not have all of the characteristics required by Article III. Judges of legislative courts are appointed for terms of years; the jurisdiction of those courts is not coextensive with Article III courts' jurisdiction.

Except for recess appointments by the President to fill

vacancies when the Senate is not in session (Article II, section 1), constitutional Justices and judges hold their offices "during good behavior," as Article III provides. In UNITED STATES EX REL. TOTH V. QUARLES (1955), the Court held that the GOOD BEHAVIOR clause guarantees such judges lifetime tenure, subject to removal only by IMPEACHMENT.

Article II, section 2, requires nomination of Article III Justices and judges by the President "with the advice and consent of the Senate." The role of the Senate under the ADVICE AND CONSENT clause has been debated since the CONSTITUTIONAL CONVENTION OF 1787. The clause was adopted as a compromise in the closing days of the Convention as an alternative to proposals to grant appointing power to the President alone or to the Senate alone; the delegates did not discuss the meaning of the clause.

Senators have variously interpreted their constitutional obligations in proceedings to confirm presidential nominations to the judiciary. Some senators have treated their task as little more than a procedural formality unless the nominee is egregiously unfit for the judicial post to which he or she has been named or a serious flaw in the candidate's background is revealed during the deliberations. Other senators have expansively interpreted their responsibility to "advise" the President, including the advice that the President's choice is wrong. The history of confirmation battles strongly suggests that the fate of a particular nominee more often depends on the political views of the senators than on intellectual differences over CONSTITUTIONAL INTERPRETATION. Apart from the individual characteristics of the nominee and the personal and political philosophies of the senators who act on a nomination, the outcome of the process is heavily influenced by the sensitivity of the judicial post to which the candidate has been named, the existing composition of that particular court, the relative power of the President and the Senate at the time of the nomination, and the prevailing national political climate. The closest senatorial scrutiny is usually given to nominees for the Supreme Court. The obvious reason is the tremendous importance of the Court. Less obvious is that senatorial courtesies do not have the same significance in confirmation of Supreme Court nominees as they do in nominations to district courts and courts of appeals. In the latter instances, the opposition of one senator from the nominee's home state is usually enough to doom confirmation, especially if the senator is a member of the President's political party.

Scant attention was given to the public interest in judicial confirmations before 1929 because, until then, the Senate acted upon all nominations in closed executive session unless the hearing was ordered open by a two-thirds vote of the Senate. Except in rare instances, such as the nomination of Justice LOUIS D. BRANDEIS in 1916 and of Justice HARLAN FISKE STONE in 1925, the necessary votes could not be mustered. The Senate rules were amended in 1929 to open all confirmation hearings.

Even after hearings were open, they were usually quiet events. Nominees were not called to appear before the SENATE JUDICIARY COMMITTEE until 1939, when the nomination of FELIX FRANKFURTER was under consideration. Although he initially declined to appear, he later testified and was unanimously approved by the Senate. Since then, with few exceptions, nominees to Article III courts are routinely called to, and do testify before, the Judiciary Committee. The addition of televised hearings probably has not changed confirmation results, but at a minimum it has heightened the drama of controversial appointments and encouraged oratory.

Although the confirmation process is now generally available in living color, the roles of the actors in the prenomination process are neither public nor well known. The large cast includes the President, the inner circle of the White House, senators who are not members of the Judiciary Committee, congressional delegations, the ATTORNEY GENERAL, the Department of Justice, the Federal Bureau of Investigation, the American Bar Association, and sometimes others.

Presidential means and motives for selecting nominees to the Supreme Court defy facile description. Supreme Court vacancies occur unpredictably and sporadically. For example, no vacancies on the Court appeared during President JIMMY CARTER's term, but Justice POTTER J. STEWART'S retirement gave President RONALD REAGAN his first appointment to the Court within a few months of his assuming office.

History gives substance to Justice Felix Frankfurter's description of Supreme Court nominations as "that odd lottery." Sometimes the presidential motivation for a particular appointment is evident, even if the means by which the person came to presidential attention are not. Thus, President HERBERT HOOVER's reason for nominating CHARLES EVANS HUGHES as CHIEF JUSTICE in 1930 was the economic plight of the country and his belief that Hughes would forward views that would help the President's economic policies. On the other hand, the source of President ULYSSES S. GRANT's choice of Caleb Cushing is known, but his motives in selecting him are not. The nominee was seventy-four years old, and his political philosophy was unknown. President Grant withdrew the nomination after he discovered Cushing's ties to the Confederacy. Both the source and motive are occasionally clear, as is true of President LYNDON B. JOHNSON's nomination of Solicitor General THURGOOD MARSHALL.

History permits only a few generalizations about presidential choices for the Supreme Court. For example, the nominee will almost always be a member of the political

party of the President, and in making selections the President will rely on the advice of trusted friends within and outside his administration and of those persons whose support, or nonopposition, will be needed to confirm the nominee or to assist the President in achieving other objectives on his political agenda.

Presidents have sometimes selected candidates for lower courts without initial outside consultation. Usually, however, the President makes his choice from a list of potential nominees submitted to him. For district courts, typically a nomination is initiated by a senator of the candidate's home state if the senator is of the President's political party. When no senator of the candidate's home state is of the President's party, the names may be suggested by the state governor, leaders of the President's party, members of the congressional delegation, or members of his administration. President Carter encouraged all senators to use regional or local panels to gather and submit potential nominees for district courts before making recommendations to him. Some senators still use such panels, although the White House has not recently urged them to do so.

Proposals for appointments to courts of appeals are initiated by an analogous process. Because courts of appeals' geographical jurisdiction is not confined within state lines, as the jurisdiction of a district court is, more senators have a say in these appointments than in appointments of district judges. Senators of the President's party continue to play an important initiating role, but some degree of senatorial courtesy is also extended to other senators in the affected states. President Carter departed from prior practice by issuing an EXECUTIVE ORDER establishing a nationwide commission, with panelists chosen from all states within each circuit to propose nominations. Senators could propose nominees in addition to those proposed by panels. The Reagan administration abolished the commission, relying instead on members of his administration and selected senators to perform the task, a process that more nearly resembled the practices before President Carter.

When potential nominees have been reduced to a short list, the candidates are screened by the Department of Justice and discussed with key senators and with leaders of the congressional delegation of the President's party. The Federal Bureau of Investigation is directed to search the background of potential nominees to discover evidence that might disqualify the candidate or embarrass the administration. Further screening is usually done by White House personnel to whom the President has delegated that task.

If all these preliminary tests look positive, the names on the short list will be submitted to the American Bar Association's Standing Committee on Federal Judiciary to test their professional qualifications. Committee rankings of district and circuit judge nominees are self-explanatory: "exceptionally well qualified," "well qualified," "qualified," and "not qualified." The rating system for Supreme Court nominees describes the candidates as "well qualified," "not opposed," and "not qualified." In committee parlance, "not opposed" means that the nominee is considered barely qualified. Presidents do not have to accept these ratings, but it is rare that a nomination has been forwarded to the Senate when the candidate has received poor grades from the Bar Association.

Appointments and tenure of judges to Article I courts do not follow the same scenario. Article I courts display almost as many variations as Charles Darwin's "singular group of finches," and Congress has adapted the system to each of the jurisdictional environments in which these courts sit. Even a partial taxonomy of Article I courts reveals their jurisdictional diversity: the district courts of the Canal Zone, Virgin Islands, Guam, and Northern Mariana Islands; the High Court of American Samoa; certain ADMINISTRATIVE AGENCIES with adjudicative powers; the United States COURT OF MILITARY APPEALS; the TAX COURT; the bankruptcy courts; and the local judiciary of the DISTRICT OF COLUMBIA. Appointment to these courts is made variously by the President, with or without senatorial confirmation, and, in the instance of the bankruptcy courts, by federal district judges. Judges of these courts serve designated terms in office, rather than having life tenure.

The constitutional legitimacy of Congress's establishing courts other than Article III courts has been repeatedly questioned from the early days of our Republic. The issue first came before the Supreme Court in AMERICAN INSURANCE COMPANY V. CANTER (1828), testing the constitutionality of Congress's creating TERRITORIAL COURTS staffed by judges without life tenure. Chief Justice JOHN MARSHALL, writing for the Court, held that Congress had the power to create "legislative courts," having judges of limited tenure with jurisdiction that was not coextensive with that of Article III courts. Since then, the Court has had second thoughts about the vexing constitutional restrictions on congressional delegation of jurisdiction to adjudicative tribunals that do not have all of the characteristics of Article III courts. Although the former Court of Claims survived constitutional attack when the Supreme Court held that it was a peculiar Article III court in *Glidden Co. v. Zdanok* (1962), the reorganized bankruptcy courts did not fare so well in NORTHERN PIPELINE CO. V. MARATHON PIPE LINE CO. (1982), in which a sharply divided Court struck down part of the legislative grant of jurisdiction to bankruptcy courts as an unconstitutional delegation of Article III jurisdiction.

Although appointments to the federal judiciary are heavily politicized, federal judges are thereafter completely independent of the politics that brought them to

the bench, as some Presidents have unhappily learned when their appointees have not followed the philosophies they anticipated. Despite the divorce of the judges from politics, judges and Justices have not always been removed from the political realm. For example, in 1790, Chief Justice JOHN JAY and Associate Justice OLIVER ELLSWORTH temporarily shed their robes to represent the government in treaty negotiations with France and England. Chief Justice WILLIAM HOWARD TAFT actively participated in helping President WARREN G. HARDING select federal judges, and Chief Justice EARL WARREN in 1962 chaired the commission investigating the assassination of President JOHN F. KENNEDY. A number of Justices have been continuing confidants of Presidents and assisted them in formulating national policies.

Inevitable tensions are generated between independence and politics because the judiciary depends on Congress to authorize needed judgeships, to pay judicial salaries and authorize and pay for nonjudicial personnel assisting courts, and to provide for courtrooms and courthouses. Justices and judges commonly testify before Congress and write and speak on such issues affecting the judiciary and the administration of justice. Statutes and canons of judicial ethics announce rules designed to avoid collisions between independence and political influences.

Particularly sensitive conflicts are also generated when the need for judicial independence must be balanced against the need to sideline judges who are physically or mentally unable to perform their duties and to discipline errant federal judges short of impeachment. Little controversy has arisen from involuntarily retiring judges for disability. A storm of criticism followed the enactment of the 1980 Judicial Councils Reform and Judicial Conduct and Disability Act, which empowered a panel of judges to investigate complaints against a federal judge accused of "conduct prejudicial to the effective expeditious administration of the business of the courts" and authorized the panel to impose discipline, short of removal from office, if the panel should find wrongdoing. The act was attacked on two grounds: for infringing the constitutional freedom of judges from removal by procedures other than impeachment, and for posing a threat that such disciplinary proceedings could be used to subject judges to reprisals for unpopular decisions. Nonetheless, the statute has been sustained, and the opponents' fears of retaliation have not been realized.

The independence of the judiciary implies more than political neutrality. Numerous statutes, rules, and ethical principles seek to preserve judicial independence by foreclosing parties to litigation and other persons from improperly influencing judicial decisions. With a few carefully guarded exceptions, litigants, their lawyers, and others are forbidden to contact a judge about a pending case without prior permission and without contemporaneously informing all parties and their lawyers about the existence and substance of any such communications. Both civil and criminal penalties are used to punish persons who violate those rules.

SHIRLEY HUFSTEDLER
(1992)

(SEE ALSO: *Appointing and Removal Power, Presidential; Appointments Clause.*)

Bibliography

EDWARDS, DREW E. 1987 Judicial Misconduct and Politics in the Federal System: A Proposal for Revising the Judicial Councils Act. *California Law Review* 75:1071–1092.

FOWLER, W. GARY 1984 Judicial Selection Under Reagan and Carter: A Comparison of Their Initial Recommendation Procedures. *Judicature* 67:265–283.

FREUND, PAUL A. 1988 Appointment of Justices: Some Historical Perspectives. *Harvard Law Review* 101:1146–1163.

SLOTNICK, ELLIOT E. 1988 Federal Judicial Recruitment and Selection Research: A Review Essay. *Judicature* 71:317–324.

## FEDERAL JUDICIAL ROLE

Article III of the Constitution creates the federal judicial system, defines its boundaries, and describes the characteristics of its judges. The Constitution specifically vests JUDICIAL POWER in "one supreme court" and authorizes Congress to create lower federal courts. Article III defines "federal judicial power" in reference either to subject matter (extending to "all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made" and to admiralty) or to the parties in the case (e.g., cases involving ambassadors, states, or citizens of different states).

Article III also describes attributes of federal judges "of both the supreme and inferior Courts." Such judges hold their offices during "good Behavior" and their salaries are protected against diminution. The GOOD BEHAVIOR clause is now understood as providing these judges with life tenure, subject to IMPEACHMENT and removal by the U.S. SENATE. The compensation clause has been a source of debate about whether congressional withholding of benefits, such as cost-of-living increases and forms of insurance, constitute infringements of constitutional protections.

Although the Constitution is open-ended about the existence of lower federal courts, Congress has many times since 1789 exercised its powers to create a lower federal judiciary and to reorganize the structure of and mandates to that judiciary. The federal judiciary was initially comprised only of district judges and Supreme Court Justices

(who upon occasion joined together to create CIRCUIT COURTS). By early in the twentieth century, the federal judiciary had become a three-tiered structure, consisting of trial judges (district judges), intermediate appellate judges (circuit judges), and nine Supreme Court Justices. As of the 1920s, some 120 men held those positions; in several instances, a single federal district judge served the entire state.

Since the CIVIL WAR, Congress has steadily increased the role of the federal courts by exercising its constitutional powers to enact federal statutory rights and to vest enforcement powers in the government and/or private actors, authorized to file claims in federal courts. FEDERAL JURISDICTION is typically concurrent with state courts rather than exclusive. The federal court docket includes cases involving a wide array of subject matters, both civil and criminal, "arising under" federal law and including securities regulation, environmental laws, consumer protection, CIVIL RIGHTS, and pension and WELFARE benefits.

Given congressional decisions to expand the role of federal law, the federal judiciary has also needed to grow. Although one reading of the Constitution would have permitted such growth to occur only by the creation of more life-tenured, salary-guaranteed judges (what I term "constitutional judges" because, pursuant to Article III, they are nominated by the President, confirmed by the Senate and enjoy the structural protections detailed in the Constitution), neither the Congress nor the federal courts have insisted on that understanding of Article III.

Rather, beginning in the 1930s and blossoming since the 1960s, two other sets of "federal judges" have gained federal adjudicatory power. One group—magistrate and bankruptcy judges—are specified by statutes and work within Article III; these judges are selected by the constitutional judges and serve for renewable terms. A second set of judges—administrative law judges bearing a variety of titles—are also creatures of statute but are typically annexed to the agencies for which they decide cases, and their employment is governed by civil service provisions. Note that both sets of these statutory judges serve without constitutional protection for either their terms of office or their salaries.

In short, the three-tiered pyramid of the federal courts from the early part of the twentieth century has been replaced by a four-tiered system, with some 1,600–2,000 constitutional judges holding positions on the Supreme, intermediate appellate, and district courts, joined within Article III courts by another 750 statutory judges (magistrate and bankruptcy judges) who also work at the trial level, below or akin to the district court. The four tiers are supported by a staff of some 30,000, working in more than 500 court buildings. That structure is, in turn, augmented by two major groups of add-ons. First, some 2,000 administrative judges staff "courts" that are located in agencies. Second, arbitrators, mediators, and "neutrals" have been provided more recently under federal law, as both statutory and constitutional judges promote the use of alternative dispute resolution (ADR) in federal courts and in administrative agencies.

Reflective of the advent of ADR, the modes of judging have also shifted over the twentieth century. In 1938, the first uniform FEDERAL RULES OF CIVIL PROCEDURE were promulgated for all federal trial courts. Those rules specified a pretrial process that has since become the focus of contemporary litigation. Judges from the 1930s to the 1950s did not much use their powers under this discretionary pretrial rule. However, in the 1950s, when faced with what were then called "protracted cases" and what are now called "large-scale" or "complex" litigations, a group of judges within the federal judiciary began to advocate greater judicial control over attorneys. In the 1950s, the federal judiciary began systematic training—judicial education—to encourage judges to become "managerial judges." Judges were initially reticent to promote settlement of cases, but over the decades, leaders of the federal judiciary became increasingly insistent that the judicial role should encompass settlement efforts. The shift of role (from adjudicator to manager to settler) is reflected in a series of revisions during the 1980s and 1990s of civil procedure rules and in the enactment by Congress of statutes calling for additional efforts at management and for alternative dispute resolution in federal courts.

Just as the federal courts and Congress have worked in concert to enlarge the number of federal judges and to alter their daily practices, so have the federal courts and Congress reshaped the doctrinal requirements of Article III. The creation and institutionalization of a diverse set of federal judges result from congressional enactment of LEGISLATION for such judges, and also from federal judicial interpretation of Article III to permit the delegation of a range of judicial tasks to statutory judges who have neither life tenure nor salary protections. Early in the twentieth century, life-tenured judges were hesitant to permit much delegation, insisting, for example, on their own authority to review, de novo, certain kinds of facts as part of the "essential attributes of judicial power." More recently, however, life-tenured judges have upheld congressional statutes providing for trials (with parties' consent) by magistrate judges; conveying substantial powers to bankruptcy judges; authorizing administrative judges to hear related state claims in certain instances; and even, in narrow circumstances, permitting final decisionmaking power by arbitrators. In other words, creative readings of Article III have enabled the manufacture of federal judges outside its parameters. The charter for such judges is not unlimited; the Supreme Court insists on vaguely described con-

straints and some commentators argue that "Article III values" require access to life-tenured judges at least upon appeal of certain cases. But the decisions in the second half of the twentieth century recognize an ever- growing role for statutory federal judges.

In addition to the elaboration of tiers of judging, alteration of the modes of judging, and reinterpretation of Article III during the twentieth century, the federal judiciary also developed a corporate identity. In the early 1920s, Congress authorized a Judicial Conference, composed of senior appellate judges, to meet to consider systemic issues. In 1939, at the behest of the judiciary, Congress created the Administrative Office of the United States Courts to enable the judiciary to take on the staff work— budgeting, supplies, reports to Congress on the docket— that previously had been performed by the executive branch. In the early years of these institutional structures, federal judges saw their judicial role as limiting their dealings with Congress. Invoking constitutional obligations of adjudication, the federal judiciary as an institution generally declined to comment on legislation other than bills seeking additional judgeships or governing court procedure. In later years, the Judicial Conference began to take an active role in attempting to shape national policy about federal jurisdiction and to promote its vision of the federal courts' mandate and the work appropriate for life-tenured judges. In the 1970s, the federal judiciary started issuing "impact statements" arguing the likely effects of proposed legislation. In the 1990s, the Judicial Conference put forth its own Long Range Plan, making more than ninety recommendations to Congress. That plan's central premise is that federal courts should have limited jurisdiction; thus, Congress should adopt a presumption against creating new civil or criminal federal causes of action.

Because Article III's limitations of federal judicial power are tied to congressional powers to create federal law, the federal judicial role is closely linked to conceptions of congressional powers. During the last decade of the twentieth century, the Supreme Court revisited rulings made in the context of reviewing NEW DEAL and civil rights legislation. In a series of cases, the Court held that, when conferring jurisdiction on federal courts, Congress had exceeded its powers under either the COMMERCE CLAUSE, the FOURTEENTH AMENDMENT, or general FEDERALISM principles, or that Congress had failed to heed the limitations imposed by the ELEVENTH AMENDMENT'S SOVEREIGN IMMUNITY provisions. During the same decade, Congress also imposed new limitations on federal jurisdiction. These laws curtailed access for prisoners seeking review of their sentences through HABEAS CORPUS proceedings, and for immigrants contesting decisions by the U.S. Immigration and Naturalization Service. Congress has also limited the remedial authority of courts to enforce CONSENT DECREES mandating improved conditions in prisons. Litigants challenging the constitutionality of such restrictions have generally lost; the federal courts have thus far upheld most of these provisions. Federal judicial institutional advocacy for restrictions on federal jurisdiction are thus echoed in federal adjudication imposing or upholding such limits.

In sum, when one considers the federal judicial role, recurrent themes emerge, some that span this country's constitutional history and others that have arisen during the twentieth century. Debated, at the constitutional level, are the allocation of labor among adjudicatory bodies (state, federal, and tribal courts and administrative agencies) and among tiers of federal judges; the degree of deference owed to other court systems or state and local government officials (often referred to as "COMITY" and sometimes as "federalism"), to Congress and the executive (sometimes termed "SEPARATION OF POWERS"), to state executive officials, and to lower echelon judges within the system; and the respective roles of Congress and the courts in determining the permissible boundaries of federal judicial and LEGISLATIVE POWER. The issues that have come to prominence during the twentieth century include the boundaries, if any, of the federal judicial role as an administrative organization (using its corporate voice to advance a programmatic agenda developed by the Judicial Conference) and the question of how to deploy constitutional judges (as contrasted with statutory federal judges).

In light of such developments, Article III's description of federal judicial power requires reconsideration. Conventional constitutional discourse assumes that Article III is the paradigm of judicial independence and represents the pinnacle of political safeguards. Judicial independence on the federal side is often invoked in contrast to the perceived thinner protections afforded many state judges, serving for terms and by election.

But these distinctions recede when one considers the fit between the constitutional terms of federal judicial power and the current structures and deployment of that power. Article III—as read by judges chartered under its aegis—provides nothing for hundreds of federal judges existing outside its purview and little by way of institutional protection to the judiciary as an organization. Although judicial–congressional interactions have often resulted in agreements about how to expand resources, the growing reliance on statutory judges increases judicial dependence on Congress and leaves a large group of federal judges with authority to render an array of judgments but lacking attributes of independence associated with federal adjudication. On the other hand, given the willingness of life-tenured judges on the lower courts to delegate portions of their adjudicatory tasks elsewhere, and to assume roles as multipurpose dispute resolvers pressing

for settlements that reduce their roles as adjudicators, Article III's structural protections insulate actors decreasingly committed to formal adjudicatory roles that enable public scrutiny of their exercise of the power of judgment.

The growing distance between Article III's description and the practices of federal adjudicators raises normative questions. Article III stands for the concept of a distinct judicial branch of government and for the ability of individual judges to render judgment independent from fear of economic retribution. Should that constitutional commitment be elaborated in the context of statutory federal judges, so that the transfer of judicial power to them is conditioned on the creation of structural protections akin to those afforded constitutional judges? If not, by what terms can one assess the role allocation between constitutional and statutory judges? The Constitution, as currently interpreted, offers little guidance on either issue. Understandings of the DUE PROCESS clause provide a conception that all judges must be impartial, but standards for impartiality of agency judges are not exacting. And, while invoking "Article III values," the Supreme Court has approved most delegations to nonconstitutional judges, and the federal judiciary as an agenda setter has pressed for expansion of those judges' roles. If adjudicatory processes are to retain political and legal significance in the coming decades, the jurisprudence of Article III, intertwined with understandings of constitutional mandates for due process, will require significant development.

JUDITH RESNIK
(2000)

Bibliography

FALLON, RICHARD H.; MELTZER, DANIEL J.; and SHAPIRO, DAVID L. 1996 *Hart and Wechsler's The Federal Courts and the Federal System*, 4th ed. Westbury, N.Y.: Foundation Press.

JACKSON, VICKI C. 1998 Federalism and the Uses and Limits of Law. *Harvard Law Review* 111:2180–2259.

JUDICIAL CONFERENCE OF THE UNITED STATES 1995 *Long Range Plan for the Federal Courts*. Washington, D.C.: Committee on Long Range Planning.

MONAGHAN, HENRY P. Constitutional Fact Review. *Columbia Law Review* 85:229–276.

RESNIK, JUDITH 1982 Managerial Judges. *Harvard Law Review* 96:374–448.

SYMPOSIUM 1998 Congress and the Courts: Jurisdiction and Remedies. *Georgetown Law Journal* 86:2445–2636.

## FEDERAL MORTGAGE MORATORIUM ACT

See: Frazier-Lemke Acts

## FEDERAL POWER COMMISSION

See: Regulatory Agencies

## *FEDERAL POWER COMMISSION v. HOPE NATURAL GAS COMPANY*
320 U.S. 591 (1944)

In SMYTH V. AMES (1898) the Supreme Court saddled state REGULATORY COMMISSIONS with a specious DUE PROCESS rule for setting public utility rates. Forty-six years later the Justices repudiated the rule of a FAIR RETURN ON FAIR VALUE. Prior to *Hope*, the Court relied primarily on original construction costs and reproduction costs as a means of determining property value.

Justice WILLIAM O. DOUGLAS, speaking for a 5–3 Court, based rate regulation on the POLICE POWER. Douglas declared: "In so far as the power to regulate involves the power to reduce net earnings, it must involve the power to destroy." He adhered to the recent trend of decisions which removed the Court from such determinations. Without mentioning *Smyth*, Douglas accorded regulatory commissions broad power to choose methods of evaluating property: "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas." Henceforth, the determination of the reasonableness of a rate would be made by looking to the "end result" or "total effect." This pragmatic approach returned the burden of decision to the commissions because a rate order was "the product of expert judgment," carrying a presumption of validity. Even the dissenters did not feel bound to adhere to *Smyth;* they disagreed over the applicable statutory standard. In *Hope*, the Court eliminated judicial obstruction to effective administrative rate regulation.

DAVID GORDON
(1986)

## FEDERAL PROTECTION OF CIVIL RIGHTS

Although the story of federal protection of CIVIL RIGHTS is most conveniently told chronologically, two themes warrant separate mention. First, federal protection of civil rights has a paradoxical relationship with STATES' RIGHTS. All civil rights legislation has been opposed or limited in response to the argument that the federal government ought not involve itself in areas of state responsibility. The Supreme Court repeatedly has voiced this concern and, in the past, invalidated civil rights legislation partly on this ground. Deference to state law enforcement prerogatives

always has been a centerpiece of Justice Department civil rights enforcement policy. And for many years Congress repeatedly rebuffed so basic a measure as antilynching legislation in the name of states' rights. Yet the original federal civil rights statutes, and their underlying constitutional amendments, were responses to outrages by states or to private outrages that states failed to ameliorate. Given the origins of the need for federal protection of civil rights, states' interests may have received undue weight in shaping federal civil rights policy.

Second, there is a seedy underside to the topic of federal protection of civil rights. For many years the federal government was more involved with denying blacks' rights than with protecting them. Well into the twentieth century federal employment policy included racial SEGREGATION and exclusion. De jure segregation in Washington, D.C., and the armed forces, government participation in segregated and racially isolated housing projects, racially prejudiced federal judges, and other circumstances demonstrate the depth of federal involvement in discrimination. Since the 1940s, however, there has been a trend toward increased federal protection of civil rights.

The Bureau of Refugees, Freedmen, and Abandoned Lands (the FREEDMEN'S BUREAU), created near the end of the CIVIL WAR, may be viewed as the federal government's initial civil rights enforcement effort. The Bureau's statutory charge, "the control of all subjects relating to refugees and freedmen from rebel states," enabled it to perform a variety of social welfare functions. But this first effort to assist blacks was tainted by, among other factors, the Bureau's role in establishing the oppressive system of southern labor contracts. Although Bureau agents invalidated particularly harsh terms, such as those providing for corporal punishment, much depended on the local agent's views. The Bureau and the Union Army, no less than southern legislatures, felt most comfortable when blacks were on plantations under contract and not seeking their fortune in urban areas.

With few exceptions, federal protection of blacks via the Freedmen's Bureau terminated in 1868. Congress's other RECONSTRUCTION legislation employed a variety of techniques to protect civil rights. The CIVIL RIGHTS ACT OF 1866 and the FORCE ACT of 1870 imposed penalties on those who enforced discriminatory features of the southern BLACK CODES, and the 1870 act made it a crime to conspire to hinder a citizen's exercise of federal rights. The 1870 act also provided special protection for black VOTING RIGHTS and the Force Act of 1871 went further by providing for the appointment of federal supervisors to scrutinize voter registration and election practices. The Civil Rights Act of 1871 authorized civil actions and additional criminal penalties against those who violated constitutional rights and authorized the president to use federal forces to suppress insurrections or conspiracies to deprive "any portion or class of . . . people" of federal rights. The CIVIL RIGHTS ACT OF 1875, the culmination of the Reconstruction period civil rights program, imposed civil and criminal sanctions for discrimination in PUBLIC ACCOMMODATIONS, public conveyances, and places of amusement.

Armed with the criminal provisions of the civil rights program, federal prosecutors brought thousands of cases in southern federal courts and established criminal actions as the primary vehicle through which the federal government protected civil rights. This burst of protective activity, along with the rest of Reconstruction, disintegrated with the COMPROMISE OF 1877 and the attendant withdrawal of federal troops from the South. In 1878, only twenty-five federal criminal civil rights prosecutions were brought in southern federal courts.

There are many reasons why federal criminal prosecutions were and are ineffective to protect civil rights. First, shortly after enactment of the post-Civil War ANTIDISCRIMINATION LEGISLATION, the Supreme Court limited Congress's power to protect civil rights. UNITED STATES V. REESE (1876) and JAMES V. BOWMAN (1903) invalidated portions of the 1870 act. UNITED STATES V. HARRIS (1883) and *Baldwin v. Franks* (1887) struck down the CRIMINAL CONSPIRACY section of the 1871 act and the CIVIL RIGHTS CASES (1883) found the 1875 act to be unconstitutional. These and other cases, including the SLAUGHTERHOUSE CASES (1873) and UNITED STATES V. CRUIKSHANK (1876), also narrowly construed constitutional provisions and statutory provisions that were not struck down. The entire federal statutory civil rights program therefore depended upon those provisions that, almost by happenstance, survived judicial scrutiny. And some of these were eliminated by the CIVIL RIGHTS REPEAL ACT of 1894 and a reorganization of federal law in 1909.

The principal criminal provisions that survived, now sections 241 and 242 of Title 18, United States Code, are not well suited to protecting civil rights. They always have been plagued by doubts about the particular rights they protect and the conduct they reach, and more generally by doubt about the federal government's role in law enforcement. Similar difficulties characterized federal civil remedies to protect civil rights. Finally, southern juries, until recently all white, have rarely convicted whites for violating the rights of blacks.

From the Compromise of 1877 until about 1940, reference to federal "protection" of civil rights would be misleading. Racism in America peaked in the early twentieth century, a fact reflected in the federal government's attitude toward blacks. THEODORE ROOSEVELT's lunch with Booker T. Washington summarized his administration's concern with civil rights. Roosevelt's successor, WILLIAM HOWARD TAFT, did not even lunch with Washington, and

under Taft and WOODROW WILSON segregation in federal employment was adopted. Neither Warren Harding nor Calvin Coolidge showed any inclination to rise above the worst racial attitudes of their times. As secretary of commerce, HERBERT HOOVER did desegregate the Census Bureau.

Attorney General FRANK MURPHY's decision in 1939 to establish a CIVIL RIGHTS DIVISION within the Department of Justice represented a noticeable shift in federal enforcement activity. The new section studied the dormant post-Civil War statutes and adopted an enforcement program that led to such important decisions as UNITED STATES V. CLASSIC (1941) and SCREWS V. UNITED STATES (1945). Federal criminal civil rights prosecutions, however, did not grow beyond several dozen cases a year. But two decades later, in MONROE V. PAPE (1961), these cases served as precedents in establishing private enforcement of civil rights through SECTION 1983, TITLE 42, UNITED STATES CODE.

Creation of the Civil Rights Division combined with other events to generate pressure for progress in the civil rights field. In June 1941, President FRANKLIN D. ROOSEVELT issued an EXECUTIVE ORDER creating a Fair Employment Practices Committee (FEPC). A response to defense needs and black political pressure, the executive order prohibited discriminatory employment practices on account of race, color, creed, or national origin in government service, in defense industries, and by trade unions. The order, administered by the FEPC, helped many northern blacks to obtain defense jobs and encouraged many southern blacks to move north.

But the nation was not ready for an aggressive federal civil rights program. Roosevelt himself was reluctant to propose or endorse civil rights legislation. In the 1930s, he even refused to endorse an antilynching bill pending in Congress. And where Roosevelt did act, Congress balked. Until 1944, the President's Emergency Fund financed the FEPC. Congress then required congressional approval for all executive expenditures. In 1946, the FEPC expired for lack of funds and subsequent efforts to establish a statutory FEPC failed.

The end of WORLD WAR II seemed to trigger or coincide with renewed violence against blacks. Following a Democratic party defeat in the 1946 congressional elections, President HARRY S. TRUMAN, in Executive Order 9008, created a presidential civil rights committee to conduct inquiries and to recommend civil rights programs. In its report, *To Secure These Rights*, the committee made far-reaching recommendations in the areas of voting, employment, and federally assisted programs, many of which would be enacted in the 1960s. Although President Truman recommended legislation based on the commission's report, his administration's civil rights accomplishments were to be on other fronts.

Truman, like other presidents, fostered civil rights most effectively in areas not requiring legislative action. Southern political power in Congress precluded significant civil rights legislation. In 1947, under black and liberal pressure, Truman authorized the Justice Department to submit an amicus curiae brief opposing judicial enforcement of racially RESTRICTIVE COVENANTS. Some believe this brief to have been influential in the Supreme Court's decision in SHELLEY V. KRAEMER (1948), which rendered racially restrictive housing covenants judicially unenforceable. From 1948 through 1951, Truman issued a series of executive orders which prohibited discrimination by defense contractors, established a committee to study compliance with government contract provisions prohibiting discrimination, provided processes for handling EMPLOYMENT DISCRIMINATION complaints in federal departments and agencies, and called for equality of treatment and opportunity in the armed services.

Civil rights enforcement received little attention early in the administration of DWIGHT D. EISENHOWER, but there were important exceptions to this pattern. Executive Order 10479 (1953) extended the antidiscrimination provisions previously required in defense contracts to all government procurement contracts. And after BROWN V. BOARD OF EDUCATION (1954), Eisenhower could not avoid civil rights issues. Southern recalcitrance in the face of *Brown* led to a federal-state confrontation in Little Rock, Arkansas, which was settled through the presence of federal troops. (See COOPER V. AARON.) But Little Rock marked no general turning point in the administration's enforcement efforts. Even when armed with increased authority to investigate denials of voting rights by the CIVIL RIGHTS ACT OF 1957, the Justice Department brought few cases.

JOHN F. KENNEDY's administration also began with little impetus toward substantial civil rights achievement. But the rising tide of civil rights activity, increased public awareness, and continued southern resistance to DESEGREGATION made new federal–state confrontations inevitable. In May 1961, federal marshals were employed to protect freedom-riders. In September 1962, in connection with efforts to integrate the University of Mississippi, heavily outnumbered federal marshals and federalized National Guard troops withstood an assault by segregationists. Only the arrival of thousands of federal troops restored order. In the Birmingham crisis of 1963, which gained notoriety for the brutal treatment of demonstrators by state and local law enforcement officers, the federal government tried to act as a mediator. The administration's inability under federal law to deal forcefully with situations like that in Birmingham led Kennedy to propose further federal civil rights legislation.

Within the executive branch, the Interstate Commerce

Comminssion, at the administration's request, promulgated stringent rules against discrimination in terminals. Armed with the CIVIL RIGHTS ACTS OF 1957 and 1960, the Civil Rights Division established by the 1957 Act conducted massive voter registration suits but secured only token improvements in black registration. Sometimes the judges blocking progress were Kennedy appointees. In November 1962 President Kennedy issued an executive order prohibiting discrimination in public housing projects and in projects covered by direct, guaranteed federal loans. And in executive orders in 1961 and 1963 Kennedy both required AFFIRMATIVE ACTION by government contractors and extended the executive branch's antidiscrimination program in federal procurement contracts to all federally assisted construction projects.

Soon after LYNDON B. JOHNSON succeeded to the presidency, he publicly endorsed Kennedy's civil rights legislation. Due in part to his direct support, Congress enacted the CIVIL RIGHTS ACT OF 1964, the most comprehensive civil rights measure in American history. The act outlaws discrimination in public accommodations, in federally assisted programs, or by large private employers, and it extends federal power to deal with voting discrimination. Title VII of the act created a substantial new federal bureaucracy to enforce antidiscrimination provisions pertaining to employment. The 1964 act also marked the first time that the Senate voted cloture against an anti-civil rights filibuster.

Despite the efforts of the Kennedy and Johnson Justice Departments, the Civil Rights Acts of 1957, 1960, and 1964 proved inadequate to protect black VOTING RIGHTS. Marches and protests to secure voting rights led to violence, including an infamous, widely reported confrontation in Selma, Alabama, in which marchers were beaten. In March 1965, President Johnson requested new voting rights legislation. He included in his speech to the nation and a joint session of Congress the words of the song of the civil rights movement, "We shall overcome," thus emphasizing the depth of the new federal involvement in civil rights. By August, the VOTING RIGHTS ACT OF 1965 was in place. Within ten years of its passage many more than a million new black voters were registered without great fanfare, with corresponding gains in the number of black elected officials. In 1968, after the assassination of Martin Luther King, Jr., Congress enacted a fair housing law as part of the CIVIL RIGHTS ACT OF 1968.

Unlike the Reconstruction civil rights program, Congress's 1960s civil rights legislation survived judicial scrutiny. In a series of cases from 1964 to 1976, the Supreme Court both sustained the new civil rights program and revived the Reconstruction-era laws. In *Katzenbach v. McClung* (1964) and HEART OF ATLANTA MOTEL V. UNITED STATES (1964) the Court rejected constitutional attacks on the public accommodations provisions of the 1964 act. In SOUTH CAROLINA V. KATZENBACH (1966) and KATZENBACH V. MORGAN (1966) the Court rebuffed state challenges to the VOTING RIGHTS ACT OF 1965. And in JONES V. ALFRED H. MAYER CO. (1968) and RUNYON V. MCCRARY (1976) the Court interpreted the CIVIL RIGHTS ACT OF1866 to fill important gaps in the coverage of the 1964 and 1968 acts.

With the passage and sustaining of the 1964, 1965, and 1968 acts and the revival of the 1866 act, the legal battle against RACIAL DISCRIMINATION at least formally was won. The federal civil rights program encompassed nearly all public and private purposeful racial discrimination in public accommodations, housing, employment, education, and voting. Future civil rights progress would have to come through vigorous enforcement, through programs aimed at relieving poverty, through affirmative action, and through laws benefiting groups other than blacks.

Just as the civil rights movement was running out of traditional civil rights laws to support, two other issues brought federal civil rights protection near its outer limits. The comprehensive coverage of federal civil rights laws did not eliminate the inferior status of blacks in American society. Pressure mounted for assistance in the form of affirmative action programs. But these programs divided even the liberal community traditionally supportive of civil rights enforcement. Affirmative action, unlike antidiscrimination standards, meant black progress at the expense of what many believed to be legitimate opportunities of innocent individuals. In its most important aspects affirmative action survived the initial series of statutory and constitutional attacks.

In the 1970s, civil rights enforcement became engulfed in another controversy: whether to bus school children for purposes of desegregation. (See SCHOOL BUSING.) President RICHARD M. NIXON's 1968 "Southern strategy" included campaigning against busing. Within six months of Nixon's inaugural, the Justice Department for the first time opposed the NAACP LEGAL DEFENSE AND EDUCATION FUND in a desegregation case. But under the pressure of Supreme Court decisions, and given the momentum of the prior administration's civil rights efforts, the Nixon administration did help promote new levels of southern integration. The administration, however, continued to lash out at "forced busing."

School desegregation also triggered a legislative backlash. In the 1970s the Internal Revenue Service, under the pressure of court decisions, sought to foster integration by denying tax benefits to private segregated academies and their benefactors. Congress, however, intervened to limit the Service's use of funds for such purposes. Similarly, Congress restrained executive authority to seek busing as a remedy for school segregation.

In the 1960s and 1970s, federal protection of civil rights

reached beyond race. In the Age Discrimination in Employment Act, the AGE DECRIMINATION ACT OF 1975, the REHABILITATION ACT OF 1973, and other measures, Congress acted to protect the aged and the handicapped. And the Equal Pay Act of 1963, the Civil Rights Act of 1964, and the EDUCATION AMENDMENTS OF 1972 increased federal protection against sex descrimination. In each of these areas, attachment of antidiscrimination conditions to federal disbursements became a significant vehicle for civil rights enforcement.

THEODORE EISENBERG
(1986)

Bibliography

BERMAN, WILLIAM C. 1970 *The Politics of Civil Rights in the Truman Administration.* Columbus: Ohio State University Press.

BRAUER, CARL M. 1977 *John F. Kennedy and the Second Reconstruction.* New York: Columbia University Press.

CARR, ROBERT K. 1947 *Federal Protection of Civil Rights: Quest for a Sword.* Ithaca, N.Y.: Cornell University Press.

GRESSMAN, EUGENE 1952 The Unhappy History of Civil Rights Legislation. *Michigan Law Review* 50:1323–1358.

HARVEY, JAMES C. 1973 *Black Civil Rights During the Johnson Administration.* Jackson: University and College Press of Missouri.

KONVITZ, MILTON R. 1961 *A Century of Civil Rights.* New York: Columbia University Press.

LITWACK, LEON F. 1979 *Been in the Storm So Long: The Aftermath of Slavery.* New York: Knopf.

## FEDERAL QUESTION JURISDICTION

Article III of the Constitution provides that the JUDICIAL POWER OF THE UNITED STATES shall extend to all "Cases . . . arising under this Constitution, the laws of the United States, and Treaties. . . ." This power is called federal question jurisdiction, because typically it entails the construction, application, or enforcement of federal law, including federal COMMON LAW. Performance of this function includes interpretation of the Constitution itself; thus federal question jurisdiction provides the jurisdictional basis for the federal courts' important power of JUDICIAL REVIEW. It is also the means by which Congress can secure a sympathetic and uniform interpretation of federal laws.

Although Congress has the power to make exceptions to the Supreme Court's APPELLATE JURISDICTION over federal questions, it currently makes few of them. A few federal trial court decisions, such as those remanding cases to state court following removal, are unreviewable. The Supreme Court reviews state court decisions only when they are FINAL JUDGMENTS that have been rendered by the highest state court in which judgment is available. Such a judgment will not be reviewed if it rests on an independent and ADEQUATE STATE GROUND or if it lacks a substantial federal question (for example, raises only a federal issue already resolved in an earlier case).

Apart from these restrictions, the appellate federal question jurisdiction extends to every federal issue, factual or legal, part of the plaintiff's case or part of a defense, in either a civil or a criminal case. Even if federal law appears in a case solely because a state statute refers to and incorporates it, the Supreme Court may exercise its federal question jurisdiction if it finds an independent federal interest in assuring proper interpretation of the incorporated federal matter.

In contrast, when Congress first created the lower federal courts in 1789, it authorized them to hear only a few federal question cases of special importance, such as PATENT suits and suits involving treaty rights. After the CIVIL WAR, Congress realized that state courts would be reluctant to enforce newly created federal CIVIL RIGHTS, and authorized the federal courts to hear the enforcement actions. Then, in 1875, Congress used almost the exact language of Article III to empower federal courts to hear "all suits of a civil nature . . . arising under the Constitution or laws of the United States, or treaties made. . . ." The 1875 act, known as the general federal question statute, required that at least $500 be in controversy in the suit, a requirement that was increased gradually over time.

Notwithstanding the breadth of the general federal question statute, Congress has continued to enact more limited laws authorizing federal jurisdiction over particular kinds of federal questions. These laws, designed to aid in enforcing the vast array of federal rights created in recent decades, have not required any amount in controversy. The range of these specialized federal question statutes is so great that by 1970 few federal question cases drew only upon the general statute. In 1976 Congress eliminated the amount in controversy requirement for the only remaining significant group of such cases, suits alleging unconstitutional conduct by federal officers; and in 1980, it repealed the requirement altogether.

Because Congress's legislative powers are enumerated and limited, a complaint filed in federal court frequently invokes a combination of state and federal law. The issue then arises whether the federal element warrants labeling the case one that "arises under" federal law. For a federal court to have federal question jurisdiction, this inquiry must be determined affirmatively, both under Article III and under the general federal question statute.

Although some Supreme Court decisions, notably Justice BENJAMIM N. CARDOZO's opinion in *Gully v. First National Bank* (1936), have announced an equally demanding construction for both the Constitution and the statute, the

currently accepted view is that the statute should be construed more narrowly than Article III despite the near identity of their language. In other words, Congress has a broad power but is assumed not to have exercised all of it. Interpretations of Article III have required that the plaintiff invoke some federal law to support a part of the claim for relief, whether or not the federal right is actually disputed by the defendant. (See OSBORN V. BANK OF UNITED STATES.) In a theory known as "protective jurisdiction," some judges and scholars have advanced the view that Congress should have the power to confer federal question jurisdiction even over a case arising under state law, when the claim implicates a strong, legistimate federal interest. The Supreme Court has not yet been required to decide whether Article III extends this far, although in some fields, such as BANKRUPTCY, the Court has approved federal question jurisdiction over suits involving only minor elements of federal law.

The Supreme Court has struggled to develop a narrower interpretive principle for the general federal question statute, seeking to allow adequate implementation of federal policy while avoiding an unnecessary deluge of cases into federal courts. For example, the statute is read to require the plaintiff's reliance on federal law to be revealed in the complaint according to traditional rules of pleading. It also appears that if plaintiff's reliance on federal law is not at the forefront of the claim, as when there is a dispute over present property rights that at some remote time had their source in federal law, jurisdiction will be denied under the general statute even though Congress could constitutionally confer it more specifically. Also, if the plaintiff relies on, refers to, and incorporates state law, the Court may refuse to allow the claim into federal court under the general statute because federal law will not be sufficiently at issue.

No single principle explains all the cases interpreting the general federal question statute. Despite this confusion, most types of cases have been classified either within or outside the federal question jurisdiction. To determine whether a new type of case combining federal and state elements falls within the statute's scope, the courts pragmatically assess the degree of federal interest in the subject matter of the litigation, the relative prominence of state and federal issues, and the likely burden on the federal judicial system of accepting jurisdiction in cases of that type.

The federal question jurisdiction authorized in Article III encompasses cases removed from state to federal court upon the defendant's assertion of a federal defense. Congress has not, however, conferred such broad federal question removal jurisdiction upon the federal courts. With a few exceptions, it has limited removal to cases that fall within original federal question jurisdiction under the general statute.

CAROLE E. GOLDBERG-AMBROSE
(1986)

Bibliography

COHEN, WILLIAM 1967 The Broken Compass: The Requirement That a Case Arise "Directly" under Federal Law. *University of Pennsylvania Law Review* 115:890–916.

MISHKIN, PAUL J. 1953 The Federal "Question" in the District Courts. *Columbia Law Review* 53:157–196.

## FEDERAL RULES OF CIVIL PROCEDURE

Article I of the Constitution empowers Congress to "constitute" lower federal courts and thus, by conventional assumption, to regulate practice and procedure in the cases heard in those courts. When the lower federal courts were first created in 1789, Congress enacted a law, known as the Conformity Act, that required each federal trial court to follow, in civil actions at law, the procedural rules of the state in which it was situated. By contrast, Congress directed the Supreme Court to promulgate federal procedures for federal admiralty and EQUITY cases respectively.

Under the Conformity Act, hypertechnical and arbitrary state procedures hampered the federal courts. Also, uniform procedures were not available for administration of federal law nationwide under the general FEDERAL QUESTION JURISDICTION first conferred on the federal courts in 1875. Finally, in 1934, Congress adopted the Rules Enabling Act, which authorized the Supreme Court to promulgate federal procedural rules, subject to a congressional veto. Both Congress's power to delegate this authority and the Supreme Court's power to exercise it, consistent with the CASE OR CONTROVERSY requirement of Article III, have been upheld.

In accordance with the Act, the Supreme Court issued the Federal Rules of Civil Procedure in 1938. Congress declined to veto them. The new rules combined law and equity into a single form of action while preserving the SEVENTH AMENDMENT right to TRIAL BY JURY on any issue that would have been so tried before the merger. While they incorporated state law with respect to some matters, such as provisional remedies, the rules also made important innovations, such as simplified pleading, liberal joinder of claims and parties, and greater emphasis on pretrial discovery of facts. Many state procedures have come to resemble the Federal Rules. And the new joinder rules have resulted in enlargement of the definition of a "case" for purposes of determining ANCILLARY and PENDENT JURISDIC-

TION in the federal courts. In 1966, admiralty actions were made subject to the Federal Rules of Civil Procedure, as amended to retain a few specialized rules for suits designated as admiralty actions in the pleadings.

Special constitutional problems have arisen when the Federal Rules have been employed in diversity actions. Congress and the federal courts do not have general substantive lawmaking power over cases simply because they are within the DIVERSITY JURISDICTION. Thus, when a Federal Rule of Civil Procedure differs from the procedural rule that would be applied in state court, and the difference in rules could affect the outcome of the case, the question arises whether the Federal Rule exceeds federal lawmaking authority and impermissibly intrudes on reserved state power. In *Hanna v. Plumer* (1963) the Supreme Court held that so long as a rule is "rationally capable of classification" as procedural, it is an appropriate subject of legislation under Congress's Article I power to create and regulate the lower federal courts, even though the rule may also affect substantive rights. It is unlikely that the Supreme Court, which promulgates the rules of civil procedure, would decide that those rules are not rationally classifiable as "procedural."

CAROLE E. GOLDBERG-AMBROSE
(1986)

Bibliography

WRIGHT, C. 1976 *Federal Courts*, 3rd ed. St. Paul, Minn.: West Publishing Co.

## FEDERAL RULES OF CRIMINAL PROCEDURE

After the FEDERAL RULES OF CIVIL PROCEDURE (1938) established a uniform set of procedures for the trial of civil cases in federal courts, Congress authorized the SUPREME COURT to make rules for the trial of federal criminal cases as well. With two Justices dissenting, the Supreme Court adopted the rules in 1944 and submitted them to Congress, which, by silence, approved them.

Before adoption of the rules, the trial of federal criminal cases was regulated by a varying and uncertain mixture of state and federal rules. The first achievement of the Federal Rules was simplification and clarification. The second was uniformity: the same rules would govern the major aspects of federal criminal trials all over the country. The federal appellate courts would now need to know only one body of procedural law, and all federal defendants would now enjoy similar rights and bear similar burdens.

Certain of the changes worked by the rules—for example, the substitution of a simplified complaint for the old, highly technical forms of INDICTMENT, and the consolidation of defense motions under a single heading—were clear gains by any measure. But probably the most significant achievement of the rules was to focus national attention on the regulation of the criminal process, which has consumed an enormous amount of professional and public attention ever since. Surely it was no accident that *McNabb v. United States* (1943), holding inadmissible a statement obtained from a suspect whom federal officers illegally detained, was decided while the rules were being considered; nor that *McNabb* was later reaffirmed in *Mallory v. United States* (1957) on the basis of Rule 5. (See MCNABB-MALLORY RULE.)

The rules have played a significant part in the expansion and clarification of defendants' rights: as an independent source of law, as a model for constitutional judgments, and as a means by which constitutional judgments could be elaborated. Two examples are illustrative. Rule 11, governing guilty pleas, was used as a guide in constitutional decision making and was itself amended to reflect and to elaborate case law. Rule 41, governing SEARCH WARRANTS, has likewise been modified to elaborate Supreme Court holdings, with respect, for example, to the permissible objects of search, and has also been used as a guide by the Court.

The administration, amendment, and interpretation of the Federal Rules have been heavily charged with constitutional significance, especially in a time of fundamental rethinking of the relation between government and the accused. For the most part this process has been carried on in a public and openminded way, largely immune from politically motivated oversimplifications.

JAMES BOYD WHITE
(1986)

Bibliography

MOORE, JAMES WILLIAM and WAXNER, MARVIN 1985 *Rules of Criminal Procedure*. Volume 8 of *Moore's Federal Practice*, 2nd ed. New York: Matthew Bender.

## FEDERAL TEST ACTS

12 Stat. 430 (1862)
12 Stat. 502 (1862)
13 Stat. 424 (1865)
23 Stat. 21 (1868)

Early in the CIVIL WAR northern state and federal officials on an ad hoc basis administered oaths of allegiance to civilians suspected of disloyalty. In June 1862 Congress enacted the "jurors' test oath" which required persons sitting

on federal GRAND and PETIT JURIES to swear to future loyalty and that they had not, in the past, voluntarily supported or given "aid or comfort" to the rebellion. The "Ironclad Test Oath" statute, enacted by Congress in July 1862, required all federal officeholders, except the President and vice-president, to swear they had "never voluntarily borne arms against the United States," aided the rebellion, nor "sought nor accepted nor attempted to exercise" any office under the Confederacy. In 1864 the United States SENATE required that its members take this oath. In 1865 the "ironclad oath" was extended to attorneys practicing in federal courts, but in *Ex parte Garland* (1867) (one of the TEST OATH CASES) this extension was declared unconstitutional. From 1864 until 1868 the "ironclad oath" kept former Confederates from holding federal offices or being seated in Congress. After 1868 the Republican-dominated Congress allowed exceptions for members of their party (and later Democrats) who had served the Confederacy. The "jurors' oath" was used to prevent former Confederates from serving on juries until the repeal of all test oaths in 1884.

PAUL FINKELMAN
(1986)

Bibliography

HYMAN, HAROLD M. 1954 *Era of The Oath: Northern Loyalty Tests During the Civil War and Reconstruction.* Philadelphia: University of Pennsylvania Press.

## FEDERAL TORT CLAIMS ACT
60 Stat. 842 (1946)

The Federal Tort Claims Act, enacted in 1946, relinquished an important part of the SOVEREIGN IMMUNITY of the United States and was part of a larger twentieth-century trend toward relaxing absolute barriers to suits against governments and officials. By this act, the United States consented to be sued for its agents' torts when private persons would be liable for such torts under the law of the place where the tort occurred. But the act fell short of imposing liability for all torts of United States agents. Generally, the tort must be compensable under state law. In addition, the act excluded liability for a vague category of behavior known as "discretionary functions." As originally enacted, the act also excluded liability for many torts that might arise in the context of law enforcement, including assault, battery, false imprisonment, and false arrest. In 1974, however, the Intentional Tort Amendment Act expanded government liability to include these and other torts. The act continues to exclude liability for defamation, misrepresentation, deceit, and interference with contract rights.

THEODORE EISENBERG
(1986)

Bibliography

SCHUCK, PETER H. 1983 *Suing Government: Citizen Remedies for Official Wrongs.* New Haven, Conn.: Yale University Press.

## FEDERAL TRADE COMMISSION

See: Regulatory Agencies

## *FEDERAL TRADE COMMISSION v. GRATZ*
253 U.S. 421 (1920)

Section 5 of the FEDERAL TRADE COMMISSION ACT outlawed, but did not define, "unfair methods of competition." Justice JAMES MCREYNOLDS, for a 7–2 Supreme Court, upheld a contract exclusively binding customers to one supplier. Confining Federal Trade Commission (FTC) orders against unfair methods to those previously found illegal (a HOLDING reversed in 1934), the courts, not the commission, were henceforth to determine what section 5 meant. Justice LOUIS D. BRANDEIS, joined by Justice JOHN H. CLARKE, dissented. They would have voided this practice, contending that "the Act left the determination to the Commission." They agreed that courts might determine whether—based on FTC findings—a practice was unfair, but they cautioned against overturning commission decisions without substantial reason.

DAVID GORDON
(1986)

(SEE ALSO: *Economic Regulation; Regulatory Agencies.*)

## FEDERAL TRADE COMMISSION ACT
38 Stat. 717 (1914)

When the decisions in STANDARD OIL COMPANY V. UNITED STATES (1911) and *United States v. American Tobacco* (1911) demonstrated that trusts could be dissolved, public calls for a policy regulating combinations and monopolies increased. Responding to President WOODROW WILSON's appeal, Congress created the Federal Trade Commission (FTC) on September 26, 1914. The act created no criminal offenses; the commission would advise business on how to

conform to a policy of competition. Congress vested the commission with broad powers of investigation and recommendation regarding enforcement of the ANTITRUST laws, but the act did not cover banks or common carriers. (See INTERSTATE COMMERCE ACT.) Consisting of five commissioners, the FTC is a quasi-judicial tribunal whose findings of fact, if supported by testimony, are binding on the courts and whose decisions are reviewable there.

In furtherance of its goal of fostering competition, section 5 stated that "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are hereby declared illegal." Intentionally vague, this provision relied on judicial decisions and experience to give it meaning. By outlawing methods, it improved upon earlier statutes which prohibited only specific acts. Other sections (6 and 9) granted the commission power to require compliance: it could require written responses to inquiries, secure access to corporate books and records, and subpoena witnesses.

DAVID GORDON
(1986)

(SEE ALSO: *Federal Trade Commission v. Gratz.*)

## *FEINER v. NEW YORK*
340 U.S. 315 (1951)

Feiner was convicted of BREACH OF THE PEACE for derogatory remarks concerning President HARRY S. TRUMAN which provoked hostility and some threats from a "restless" crowd. Two police officers, fearing violence, ordered Feiner to stop. When he refused, they arrested him. Feiner marked the post-1920s Court's first use of the CLEAR AND PRESENT DANGER rule to uphold the conviction of a speaker. Chief Justice FRED M. VINSON spoke for the majority. JUSTICE FELIX FRANKFURTER's concurrence urged a balancing approach to replace the danger rule. This case, like TERMINIELLO V. CHICAGO (1949), raised the HOSTILE AUDIENCE problem.

MARTIN SHAPIRO
(1986)

# FELONY

The most common classification of crimes is between MISDEMEANORS and felonies. The Constitution does not control the definitions of felony and misdemeanor; the distinction usually is made by a state statute, or, in a few instances, by state constitution. Federal statutes define the scope of federal felonies and misdemeanors.

A state statute commonly will define a felony as a crime for which a person may be imprisoned in a state penitentiary (rather than a local jail) or as an offense for which a person may be imprisoned for a minimum length of time (such as six months or one year). The distinction between a felony and a misdemeanor may determine whether a police officer had statutory authority to arrest a person without a warrant, which state court has jurisdiction over a criminal charge, or whether the defendant will be subject to punishment under a habitual criminal statute which provides for increased punishment after conviction for several felonies.

Although the distinction between felonies and misdemeanors is an important one under state law, it is not significant for constitutional law purposes. There are three constitutional provisions, applicable to the prosecution of criminal cases, whose meaning or impact is dependent in part upon the seriousness of the crime charged, not upon the felony-misdemeanor distinction. These provisions are the Fifth Amendment GRAND JURY clause, the Sixth Amendment RIGHT TO COUNSEL, and the Sixth Amendment right to TRIAL BY JURY.

The Supreme Court has held that the FOURTEENTH AMENDMENT does not incorporate the Fifth Amendment's grand jury clause; that clause, therefore, is not applicable to state or local criminal prosecutions. In *Ex parte Wilson* (1885) the Supreme Court defined the federal crimes to which the grand jury clause applied as those "punishable by imprisonment at hard labor" in a federal penitentiary. Federal statutes and the FEDERAL RULES OF CRIMINAL PROCEDURE define a federal felony as any federal offense punishable by imprisonment for a term exceeding one year. A federal felony prosecution must be initiated by a grand jury indictment. Someone charged with a federal misdemeanor may be prosecuted based on either an INFORMATION filed by the federal prosecutor or a grand jury indictment.

The Sixth Amendment guarantee of a right to counsel in all criminal prosecutions applies to the states through the Fourteenth Amendment. The Supreme Court has held that the Sixth Amendment also gives an INDIGENT defendant the right to have the government provide him with an attorney in some, but not all, criminal cases. A defendant convicted of a crime cannot be sentenced to imprisonment for even one day unless he has had the opportunity to be represented by counsel at his trial. The government, however, need not appoint attorneys for indigent persons who are convicted of crimes that in fact are not punished by imprisonment. The determination whether the state is required to appoint counsel to represent an indigent defendant is not based on a felony-misdemeanor distinction. A state is not required to provide counsel to an indigent defendant charged with a serious crime so long as the conviction in fact does not

result in imprisonment. Any right to an attorney in a case in which incarceration is not imposed would be based upon a case-by-case DUE PROCESS analysis.

The Sixth Amendment also provides that an accused person has a right to "an impartial jury." The jury trial provision of the Sixth Amendment has been incorporated into the Fourteenth Amendment; it governs both state and federal prosecutions. Although the Sixth Amendment refers to the right to a jury trial in "all criminal prosecutions," the Supreme Court has ruled that the accused has a right to a jury trial, rather than a trial before a judge, only when he is charged with an offense that is not "petty." The Court has held that any offense punishable by incarceration for more than six months cannot be deemed "petty." Thus, regardless of the sentence a defendant actually receives, if the defendant is accused of an offense for which there is a possible sentence of more than six months of incarceration, he has a Sixth Amendment right to a trial by jury. The Supreme Court has not explained how courts are to distinguish between "petty" and "nonpetty" offenses where the crime is punishable by no more than six months' imprisonment.

JOHN E. NOWAK
(1986)

Bibliography

LAFAVE, WAYNE, and ISRAEL, JEROLD 1984 *Criminal Procedure.* St. Paul, Minn.: West Publishing Co.

## FEMINIST THEORY

Feminist theory encompasses such a large and diverse body of work that it can no longer be described succinctly. A partial definition might stress the relationships among and between, on the one hand, women, women's experience, perceptions and treatment of women, gender as a social category, masculinity and femininity, and sexuality, and, on the other, social and personal identity, language, religion, economic and social structures, law, philosophy, and knowledge. The multifaceted nature of current feminist theory has even led many feminists to use the term "feminist theories." This diversity also marks the use of feminist theory with respect to law.

Feminists trained in law tend to describe their theoretical work as "feminist legal theory" or "feminist jurisprudence." The early development of the field, in the late 1970s and early 1980s, was closely tied to traditional legal categories and analysis, even while it posed a significant challenge to the traditional use of such categories and methods. Its existence was made possible by the movement of significant numbers of women into the legal profession, and especially onto law school faculties, and by changes in interpretation of constitutional doctrine wrought by the CIVIL RIGHTS MOVEMENT. The extent of these changes began to manifest itself in *Reed v. Reed* (1971), in which the Supreme Court first interpreted the EQUAL PROTECTION clause as demanding significant justification for laws that formally discriminated against women. At first, then, feminist jurisprudence concerned itself primarily with elaboration of what equality might mean for women; a large proportion of the scholarship in the field remains focused on this question. However, in the 1990s the directions of feminist legal theory are likely to respond more to developments in feminist theory than to developments in legal theory or doctrine.

In some way all feminist theory concerns itself with describing, explaining, criticizing, and changing the social condition of women as a class from the perspective of, and on behalf of, all women. This project is pursued, however, in radically different ways, posing several kinds of challenges to traditional constitutional JURISPRUDENCE and practice: doctrinal, culture, textural, and structural.

Feminist theory criticizes constitutional doctrine primarily for its failure to center, or often even to consider, women's experience in fashioning, elaborating, and applying rules presented as "neutral." Decisions such as *Geduldig v. Aiello* (1974)—in which a majority of the Supreme Court rejected an equal protection challenge to the exclusion of pregnant women from a state disability insurance plan, finding the exclusion based on medical condition rather than on sex—are used to demonstrate the extent to which nonfeminist interpretations of equal protection treat as irrelevant or unimportant experiences that many women consider quite important to them as women. While agreeing on this criticism, however, feminist theorists tend to disagree among themselves on whether constitutional law should attempt to develop more "truly neutral" doctrines, what such doctrines might be like, and whether neutrality itself is possible or desirable.

Cultural challenges to constitutional law are of two primary types. Some theorists suggest that the replacement of a predominantly white male judiciary, legislature, and practicing bar with a profession that more closely represents the sex and race composition of the general population would tend to change law and legal practice in a variety of ways. Attempts to test these propositions range from examination of the opinions of women jurists, such as Supreme Court Justice SANDRA DAY O'CONNOR, to documentation of shifts in political language, to interviews with, and observations of, female lawyers. Other theorists abstract certain characteristics thought to be associated with women and attempt to elaborate the potential effects of a closer integration of such characteristics into constitutional law. Both of these types of cultural critique often draw on Carol Gilligan's suggestion that an "ethic of care,"

with its attendant focus on responsibility, connection, and relationship, could validly be added to the "ethic of justice" that biases both moral and legal theory toward an exclusive focus on rights, autonomy, and individualism.

Textual criticism focuses on the language of law, especially law's written texts. Judicial opinions, legislation, and even the Constitution itself may be read as examples of literary production not fundamentally dissimilar from novels, plays, or newspaper articles. Some feminist textual criticism examines language as it communicates certain assumptions about the appropriateness or relevance of women's presence or experience, and shares with doctrinal criticism the project of identifying the sex bias concealed under seemingly neutral practices. This type of criticism has led to some minor changes in legal language (e.g., the replacement of "reasonable man" with "reasonable person"), as well as to textual revisions with more substantive force, such as recrafting jury instructions on self-defense so that their language does not presume the situation of one man resisting another. More literary-oriented theory focuses on the use and deployment of words, images, and metaphors that may be understood as gendered, either in their conscious association with traditional notions of masculinity and femininity or in their historical or psychosocial association with sexuality, sexual courtship, or heterosexual intercourse. Such theorists find within legal texts a process of dichotomization between male and female and a hierarchical ordering of male over female that mirror the insights of structural theories.

Finally, feminist theory also examines both conceptual and rhetorical structures within law and the structure of law itself. Probably the most widely disseminated insight to arise from feminist theory with respect to law is the critique of the process by which law divides human life into a "public" realm, in which law, justice, equality, and politics are thought to be appropriate, and a "private" realm, in which ideals of harmony, sacrifice, and intimacy are to be protected from public scrutiny. The feminist critique of this public-private distinction makes several key points: (1) Legal actors, such as courts, which are themselves "public," decide where the line will be drawn between public and private, and thus shape "the private" through public actions. (2) The association of men with the public sphere and women with the private sphere is used to legitimize women's exclusion from the political life of the nation. (3) When women's experience with intimacy is one of violence—marital rape, wife battering, incest, or sexual coercion—the public-private distinction operates not to protect women's privacy from public scrutiny but to block women's ability to hold male intimates publicly accountable for their violence. (4) The very process of dichotomization that makes it possible to think of public and private life as two separate spheres reflects and strengthens the notion that women and men are fundamentally, necessarily, and naturally different, separate, and unequal. This critique has obvious implications for STATE ACTION doctrine, the choice to place women's reproductive rights under the rubric of the RIGHT OF PRIVACY, and interpretations of what PROCEDURAL DUE PROCESS requires in a variety of situations.

Other structural critiques question traditionally presumed relationships between the state and the individual, law and society, normality and deviance, identity and politics, freedom and coercion, and the subjective and objective. The results of these inquiries have led some feminists to characterize the state, the law, or both as "male" in the social, rather than biological, sense of that term.

The Constitution plays a major role in creating or maintaining the structures critiqued by feminist theory. Feminist theory suggests that the Framers' constitution of a polity that excluded women of all races and classes, as well as men of certain races and classes, did not simply result in a partial realization of a vision that could, over time, be extended to those who had been left out. Instead, that decision created gaps and contradictions within the very definitions of what it means to be a polity, to create and limit a government, to "promote the general welfare," and even what it means to subscribe to a rule of "laws, not men [sic]."

CHRISTINE A. LITTLETON
(1992)

(SEE ALSO: *Constitution as Literature; Gender Rights; Women in Constitutional History; Woman Suffrage.*)

Bibliography

DUBOIS, ELLEN et al. 1985 Feminist Discourse, Moral Values and the Laws—A Conversation. *Buffalo Law Review* 34:11–87.

KAY, HERMA HILL and LITTLETON, CHRISTINE A. 1988 Feminist Jurisprudence: What Is It? When Did It Start? Who Does It? Pages 844–887 in Herma Hill Kay, ed., *Sex-Based Discrimination*, 3rd ed. St. Paul, Minn.: West Publishing Co.

LITTLETON, CHRISTINE A. 1987 Reconstructing Sexual Equality. *California Law Review* 75:1279–1337.

MACKINNON, CATHARINE A. 1989 *Toward a Feminist Theory of the State.* Cambridge, Mass.: Harvard University Press.

SHERRY, SUZANNA 1986 Civic Virtue and the Feminine Voice in Constitutional Adjudication. *Virginia Law Review* 72:543–616.

WEST, ROBIN L. 1988 Jurisprudence and Gender. *Chicago Law Review* 55:1–72.

WILLIAMS, PATRICIA 1988 On Being the Object of Property. *Signs* 14:5–24.

WILLIAMS, WENDY 1985 Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate. *New York University Review of Law and Social Change* 13:325–380.

## *FERGUSON v. SKRUPA*
372 U.S. 726 (1963)

This decision is often cited as a leading modern example of the Supreme Court's permissive attitude toward ECONOMIC REGULATION challenged as a violation of SUBSTANTIVE DUE PROCESS.

Kansas prohibited "the business of debt adjusting" except as an incident of the practice of law. The Court unanimously upheld this statute against a challenge to its constitutionality. Justice HUGO L. BLACK wrote for the Court. Any argument that the business of debt adjusting had social utility should be addressed to the legislature, not the courts. "We refuse to sit as a "super legislature to weigh the wisdom of legislation." The Court had given up the practice, common during the years before WEST COAST HOTEL CO. V. PARRISH (1937), of using "the "vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise." Justice Black, unlike many of his brethren, carried this same view of the judicial function into other areas of CONSTITUTIONAL INTERPRETATION; see his dissents in GRISWOLD V. CONNECTICUT (1965) and HARPER V. VIRGINIA BOARD OF ELECTIONS (1966).

In *Ferguson* Justice JOHN MARSHALL HARLAN concurred separately on the ground that the law bore "a rational relation to a constitutionally permissible objective." Apparently Justice Harlan wanted to maintain some level of judicial scrutiny of economic regulations, even if it were only the relaxed RATIONAL BASIS standard, and thought the Black opinion suggested a complete abdication of the judicial role in such cases.

KENNETH L. KARST
(1986)

## FESSENDEN, WILLIAM PITT
(1806–1869)

A Maine lawyer, congressman (1841–1843; 1853–1854), senator (1854–1864; 1865–1869), and secretary of the treasury (1864–1865), William Pitt Fessenden chaired the Senate Finance Committee during the CIVIL WAR and later the Joint Committee on Reconstruction. Although sympathetic to many radical goals, Fessenden always demanded strict adherence to constitutional principles. Thus, he opposed aspects of the EMANCIPATION PROCLAMATION, the legal tender acts, the CONFISCATION ACTS, and the TENURE OF OFFICE ACT. Although Senate majority leader, he voted to acquit ANDREW JOHNSON in his 1867 IMPEACHMENT trial, because he did not believe the President had committed an impeachable offense within the meaning of the Constitution.

PAUL FINKELMAN
(1986)

Bibliography

JELLISON, CHARLES ALBERT 1962 *Fessenden of Maine, Civil War Senator.* Syracuse, N.Y.: Syracuse University Press.

## FEUDALISM AND THE CONSTITUTION

When the Framers referred to feudalism in the FEDERALIST, that abstraction served as a model of decentralized rule. Otherwise, they would have agreed with JOHN ADAMS, who in 1765 had authored a short dissertation on the topic: feudalism, merged perniciously with Romish religion, was what the Puritans left behind them in England; released from ignorance, dependence, and extreme poverty, their descendants were free to follow "the true map of man." This view was later endorsed by leading interpreters of "American exceptionalism." More recent research has shown it to be incomplete. Among the COMMON LAW hierarchies that ordered the relations of persons throughout medieval society, those in religious and commercial affairs were removed by the time Adams wrote and were now governed by Parliament. Other hierarchies remained; WILLIAM BLACKSTONE enshrined them as "private relations"—husband and wife, parent and child, master and servant, guardian and ward—still under the aegis of the courts. These survived the AMERICAN REVOLUTION.

The English development was transplanted into the United States as every state and territory except Louisiana received English common law and statutes into its own legal system. Ancient privileges still intact became VESTED RIGHTS, protected by the SEPARATION OF POWERS against legislative tampering. Following old rules of STATUTORY INTERPRETATION, and newer constitutional limitations, nineteenth-century judges read women's inheritance acts to preserve their husbands' interests against express language to the contrary, nullified maximum-hours statutes as invasions of FREEDOM OF CONTRACT between masters and servants, and struck down state liberty laws for violating slaveholders' common-law right of recaption.

The stubbornness of inherited hierarchy in the face of ideological and social democratization characterizes important constitutional struggles of the twentieth century. Among the most tumultuous was the conflict between employers and employees over the establishment of trade unions. Before the NEW DEAL, most judges held union activity to violate the master's ancient and constitutionally endorsed rights in the workplace. These rights were at issue

in the COURT-PACKING "crisis" of 1936, finally resolved in *NLRB v. Jones & Laughlin Steel Co.*, in which the Supreme Court upheld an act of Congress giving an employee a right to a reinstatement proceeding under the WAGNER ACT, a right "unknown to the common law."

Feudal privileges remained prominently on display in the setting of the family. Not until 1943 was a husband's common law right over the possession of his wife's earnings finally terminated. Justices on the REHNQUIST COURT have relied on Blackstone's codification of "private relations" between parents and children to support opinions on subjects ranging from ABORTION to school drug SEARCHES AND SEIZURES. In general, however, sufficiently pointed LEGISLATION in this realm will prevail.

These hierarchies by no means exhaust the feudal content of the Constitution. The writs of CERTIORARI, MANDAMUS, and HABEAS CORPUS, by which constitutional rights might be vindicated, are of medieval vintage. Habeas corpus, "the Great Writ," for instance, was put to its oldest purpose, of securing a party's custody rather than his or her release, in the case of slaves, and after the CIVIL WAR, of apprentices, children, and wives. The three branches of state, as well as the arrangements of FEDERALISM, redact, in their basic design, the intricate network of jurisdictions that was English government under Henry VII and his forebears.

KAREN ORREN
(2000)

Bibliography

ADAMS, JOHN 1765 An Essay on Canon and Feudal Law. In John Holroyd, Earl of Sheffield, ed., *Observations on the Commerce of the American States with Europe and the West Indies.* New York: Research Reprints (1783/1970).

BROWN, ELIZABETH GASPAR 1964 *British Statutes in American Law, 1776–1836.* Ann Arbor: University of Michigan Press.

HARTZ, LOUIS 1955 *The Liberal Tradition in America.* New York: Harcourt, Brace.

HURD, ROLLIN C. 1876 *Treatise on the Right of Personal Liberty.* Albany, N.Y.: W. C. Little.

SEDGWICK, THEODORE 1857 *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law.* New York: J. S. Voorhies.

## FEW, WILLIAM
(1748–1828)

William Few represented Georgia at the CONSTITUTIONAL CONVENTION OF 1787 and signed the Constitution. He attended the Convention irregularly (leaving to attend Congress), spoke infrequently, and served on only one committee. He afterward served as a senator and federal judge.

DENNIS J. MAHONEY
(1986)

## FIELD, DAVID D.
(1805–1894)

David Dudley Field, older brother of Justice STEPHEN J. FIELD, won a number of important cases before the Supreme Court in his career as a highly successful lawyer, EX PARTE MILLIGAN (1866), *Cummings v. Missouri* (1867), and UNITED STATES V. CRUIKSHANK (1876) among them. His appearance on behalf of Jay Gould and Jim Fisk in the celebrated Erie Railroad scandal brought him popular criticism and charges of misconduct from his peers. He would later represent the Tweed Ring when his free services were rejected by the prosecution. As one biographer remarked, Field "was essentially a protestant, an originator, a breaker of precedents."

Field devoted his last decades to codification of municipal and international law. He also played a fundamental role in reforming the substantive and procedural codes of New York State; those codes would serve as models for many other states. He served as president of the American Bar Association, 1888–1889.

DAVID GORDON
(1986)

## FIELD, STEPHEN J.
(1816–1899)

Stephen Johnson Field is a massive figure in the history of the United States SUPREME COURT. Appointed by ABRAHAM LINCOLN in 1863 following six years of distinguished service on the California Supreme Court, Field remained on the bench until 1897 and established a record for length of tenure since surpassed only by WILLIAM O. DOUGLAS. For two generations he preached a radically new gospel of constitutional interpretation that fused natural law concepts, a theory of adjudication based on formally bounded categories of public power and private right, and a designing foresight about the Court's unique capacity to shape American public life. Field's contributions to American constitutional development are conventionally summed up in the phrase laissez-faire CONSTITUTIONALISM. But his profound impact on the institutional character of the Court outlasted his doctrinal formulations. Field was arguably the Court's first self-conscious "activist," and he was certainly the first Justice to describe judicial protection of substantive rights as a democratic endeavor. "As I

look back over the more than a third of a century that I have sat on this bench," Field wrote in his valedictory letter, "I am more and more impressed with the immeasurable importance of this court. Now and then we hear it spoken of as an aristocratic feature of a Republican government. But it is the most Democratic of all. Senators represent their states, and Representatives their constituents, but this court stands for the whole country, and as such it is truly "of the people, by the people, and for the people" It was this fundamentally new conception of the Court's position in the American system of government and the manifold ways Field acted upon it during his long career that prompted EDWARD S. CORWIN to describe him as "the pioneer and prophet of our modern constitutional law."

Field's jurisprudence was essentially a constitutional version of the equal rights creed expounded by ANDREW JACKSON in his veto of the bill rechartering the Second Bank of the United States. Field understood democracy in terms of "the natural equal rights of the citizen," particularly equality in the marketplace; he was quick to distinguish the common good of the whole people from the focused demands of interest seekers that sometimes generated legislation favoring some and discriminating against others. Since the Court, like the President, represented "the whole country" rather than a narrow constituency, Field claimed that JUDICIAL REVIEW of legislation was at once the moral equivalent of the executive veto and a consummately democratic power. His two most famous opinions resonated with the substantive concerns of antebellum Jacksonians. The first was designed to protect the rights of the many against legal privileges granted to a few. Dissenting in the SLAUGHTERHOUSE CASES (1873) Field denounced the "odious monopoly" produced by legislative skulduggery in Louisiana and claimed that the newly adopted FOURTEENTH AMENDMENT would become "a vain and idle enactment, which accomplished nothing" if the Court continued to permit state legislatures "to farm out the ordinary avocations of life" to favored corporations. In the second, POLLOCK V. FARMERS LOAN & TRUST CO. (1895), Field resisted a statute that, in his view, was designed to enable the many to steal from the few under color of law. There he attacked the mildly progressive federal tax on incomes as an "assault on capital . . . the stepping stone to others, larger and more sweeping, till our political contests . . . become a war of the poor against the rich; a war constantly growing in intensity and bitterness." If Field had been successful in persuading his colleagues to conceptualize the case as he did, the income tax would have been invalidated not because it was a DIRECT TAX but on the ground that its graduated rates violated the Constitution's requirement that "all duties, imposts and excises shall be uniform throughout the United States." For Field, uniformity mandated equal treatment; the chief defect of the statute was that it created a different rule for rich and poor, thereby violating the first principle of republicanism articulated by his Jacksonian mentors.

Field's penchant for pouring his ideological predispositions into open-ended textual phrases such as "uniform" and "due process" was apparent to colleagues throughout his career. Many were alarmed by his expansive conception of the judicial function; some regarded him as a dangerous man. DAVID DAVIS called him a "damned rascal" in 1866 and HORACE GRAY likened him to a "wild bull" three decades later. HENRY B. BROWN said he was "a man of great determination and indomitable courage, though lacking in judicial temperament." Yet it was impossible to ignore him. What made Field so formidable was his skill in translating the featureless generalities of the Constitution into a coherent system of principled standards. He had an uncanny ability to diagnose recurrent problems almost immediately and to frame rules derived from the COMMON LAW or the structure of the federal system that accommodated his value-laden premises. He anticipated future controversies and supplied mutually consistent solutions to all of them. For Field, these solutions were neither contingent nor variable; they were "true."

Few of the twenty-eight men with whom Field sat on the bench perceived the whole truth in precisely the way he did. But every Justice shared at least some of his premises, and most were willing to articulate one or more of his pet doctrinal formulations in an opinion for the Court. With each new handhold Field secured, however, his colleagues found it increasingly difficult to resist the entire array of rules he had proposed at the outset. The analogies linking each component of his system to the others were very compelling. As late as 1890, Field remained confident that the whole truth, as he understood it, would eventually be embraced by the Court. "[A]ny grave departure from the purposes of the Constitution . . . will not fit harmoniously with other rulings," he explained at the Centennial Celebration of the Organization of the Federal Judiciary. "[I]t will collide with them, and thus compel explanations and qualifications until the error is eliminated. . . . [T]ruth alone is immortal, and in the end will assert its rightful supremacy."

The system of rules Field proposed for integrating the Fourteenth Amendment into the existing corpus of constitutional law was breathtaking in scope. It also had a deceptively simple and, in its day, alluring structure. First, he called for a clear and immutable boundary between the public and private spheres in order to forestall legislation that emptied one pocket only to fill another. Here the operable phrase in the amendment was not due process so much as "take property." Beginning in the *Slaughterhouse Cases,* Field claimed that some businesses were purely

private while others were public in "use." Firms that necessarily "held franchises of a public character appertaining to government," such as those that exercised the EMINENT DOMAIN power or occupied the public rivers or public streets, were public in "use." Consequently government might confer monopoly privileges on such firms, subsidize their operations with tax funds, and regulate their rates of charge. But manufacturers, food processors, warehouse operators, and other businesses that did not need to exercise public franchises were purely private. Those businesses had to be open to all entrants as a matter of common right and their operations could be subject neither to price regulations nor to public subsidy. In the GRANGER CASES (1877) Field added one corollary to this scheme. When government regulated the rates of firms public in "use," he asserted, the prices fixed must be subject to judicial review in order to ensure that service to the public was not "required without reward, or upon conditions amounting to the TAKING OF PROPERTY for PUBLIC USE without compensation." The Court's duty, he said, was "to draw the line between regulation and confiscation."

Field repeatedly claimed that judicial application of these doctrines required no great departure in constitutional interpretation. All the Court had to do was constitutionalize under the Fourteenth Amendment and apply in a systematic fashion the principles of "general constitutional law" articulated by SAMUEL F. MILLER in *Pumpelly v. Green Bay Co.* (1872) and LOAN ASSOCIATION V. TOPEKA (1874). There the Court proscribed exercises of the eminent domain and tax powers that amounted to "robbery," in the one case by designating irreparable injury to property as a taking and in the other by barring public spending "for purposes of private interest instead of public use." When the Court refused to apply the same principles to the POLICE POWER under the Fourteenth Amendment in the *Granger Cases*, Field dissented. "Of what avail is the constitutional provision that no State shall deprive any person of property except by DUE PROCESS OF LAW," he asked, "if the State can, by fixing the compensation which he may receive for its use, take from him all that is valuable in the property?" Beginning in STONE V. FARMER'S LOAN AND TRUST CO. (1886), however, the majority made one concession after another to Field's position. By 1898 only the doctrine of business AFFECTED WITH A PUBLIC INTEREST, which Field considered dangerously protean, remained to be pulled down before "the truth . . . asserted its rightful supremacy."

The second component of Field's Fourteenth Amendment system dealt with intergovernmental relations. His general theory was based on the Jacksonian principle of DUAL FEDERALISM: "a national government for national purposes, local governments for local purposes," and each "sovereign" within its assigned sphere such that neither was dependent upon or subordinate to the other nor, indeed, capable of clashing with it as long as the powers of each were properly defined. Thus Field eagerly joined majorities that imposed implied limitations on Congress's MONETARY POWER in *Lane County v. Oregon* (1869), its taxing power in COLLECTOR V. DAY (1871), and its commerce power in UNITED STATES V. E. C. KNIGHT CO. (1895). Beginning in *Tarble's Case* (1871) he also developed implied limitations on the states' authority to impair the national government's independent energy in the exercise of its "acknowledged powers." Yet Miller, speaking for the majority in the *Slaughterhouse Cases*, claimed that the Fourteenth Amendment threatened to unravel these "main features of the federal system." What frightened Miller most was the assumption that if the Court had JURISDICTION to protect FUNDAMENTAL RIGHTS under the amendment's first section, Congress must have jurisdiction to enact statutes affecting the same rights under the fifth section vesting it with power "to enforce, by appropriate legislation" the amendment's substantive provisions. One reason the majority gutted the PRIVILEGES OR IMMUNITIES clause, then, was to avoid articulating doctrine that might ultimately "fetter and degrade the State governments by subjecting them to the control of Congress."

In Field's view, the *Slaughterhouse* majority was afraid of a phantom, for a STATE ACTION doctrine could stay the hand of Congress without disturbing the Court's jurisdiction. Here the operable phrase in the text was: "No State shall make or enforce any law." The Fourteenth Amendment, he asserted in dissent, only "ordains that [fundamental rights] shall not be abridged by State legislation." "The exercise of these rights . . . and the degree of enjoyment received from such exercise," he added in anticipation of UNITED STATES V. CRUIKSHANK (1876), "are always more or less affected by the condition and the local institutions of the State, or city, or town where he resides." These rights had never been a concern of the United States and the amendment did not make them one. The enabling clause in the fifth section, whatever its meaning, could not constitutionally enlarge the modest accretion to national authority envisioned by the first section. Because the amendment was not a grant of power but a series of limitations on state legislation, moreover, the Court could readily distinguish between national remedies for prohibited state action (laws that were not "true" exercises of the eminent domain, taxing, and police powers reserved to the states) and inappropriate acts of Congress invading the sphere of state authority. In practical application, the amendment would affect the federal system in a way comparable to the clauses of the Constitution forbidding the states from passing EX POST FACTO, laws, and laws impairing the obligation of contracts.

The WAITE COURT tentatively endorsed the state action

doctrine in *Cruikshank*, and invoked it with a vengeance in UNITED STATES V. HARRIS (1883) and the CIVIL RIGHTS CASES (1883). These decisions not only assuaged previous doubts about Congress's authority to use the Fourteenth Amendment as a grant of power but also prompted the Court to reconsider Field's blueprint for judicial intervention in government-business relations. Meanwhile, Field elaborated the third component of his Fourteenth Amendment theory. It addressed what he called INVIDIOUS DISCRIMINATION. Here Field was a singularly important pioneer, for he decided the federal case of first impression on circuit. At issue in *Ho Ah Kow v. Nunan* (1879) was the San Francisco "queue ordinance" requiring county prisoners to have their hair cropped. As it was "universally understood" that the regulation had been designed "to be enforced only against [the Chinese] race," Field explained, the ordinance violated the equal protection clause. This decision, along with Field's 1882 opinion striking down an anti-Chinese laundry ordinance, supplied the conceptual foundations for the Court's ringing proclamation of the antidiscrimination principle in YICK WO V. HOPKINS (1886).

Yet Field's understanding of "invidious discrimination" did not compel state governments to be colorblind. Dissenting in STRAUDER V. WEST VIRGINIA (1880), where the Court invalidated a statute that limited jury service to whites, Field claimed that the equal protection clause dealt only with the CIVIL RIGHTS described in *Ho Ah Kow*. It "leaves political rights . . . and social rights . . . as they stood previous to its adoption." "Civil rights," he explained, "are absolute and personal and [a]ll persons within the jurisdiction of the State, whether permanent residents or temporary sojourners, whether young or old, male or female, are to be equally protected." But nobody in the *Strauder* majority was prepared to hold that the Fourteenth Amendment forbade the states from excluding Chinese aliens, women, or children from the jury box. The conclusion was inescapable that jury service could not be regarded as a "civil right," for which the amendment mandated "universality of the [equal] protection secured," but only as a "political right . . . conditioned and dependent upon the discretion of the elective or appointing power, whether that be the People acting through the ballot, or one of the departments of their government." The "social rights" to which Field only alluded in the *Strauder* stood on a similar footing. The capacity of individuals to marry or to have access to public goods such as libraries and schools had always been regulated by law on the basis of age, sex, race, and citizenship. "Such legislation is not obnoxious to the [equal protection] clause of the 14th Amendment," he said, "if all persons subject to it are treated alike under similar circumstances and conditions."

The *Strauder* majority flatly rejected the classification of rights that Field proposed. "The Fourteenth Amendment makes no attempt to enumerate the rights it is designed to protect," WILLIAM STRONG declared for the Court. "It speaks in general terms, and those are as comprehensive as possible." But once again a Field dissent proved to be prophetic. Three years later, speaking for a unanimous Court in PACE V. ALABAMA (1883), Field held that antimiscegenation laws were not forbidden by the Fourteenth Amendment as long as both parties received the same punishment for their crimes. Equal protection mandated equal treatment, not freedom of choice; antimiscegenation laws restricted the liberty of blacks and whites alike. Underlying this ruling was an unarticulated premise of enormous importance: the legal classification "Negro" was not suspect per se. The doctrine of SEPARATE BUT EQUAL enunciated in PLESSY V. FERGUSON (1896) followed almost as a matter of course, especially after the Court had distinguished "civil rights" from "social rights" under the THIRTEENTH AMENDMENT in the *Civil Rights Cases*. Even Field's distinction between "civil rights" and "political rights" eventually got incorporated into the Court's Fourteenth Amendment jurisprudence, albeit in a form substantially different from what he proposed in *Strauder*. The Waite Court conceded from the outset that jury selection officials might constitutionally employ facially neutral yet impossibly vague tests of good character, sound judgment, and the like. In the absence of state laws expressly restricting participation to whites, JOHN MARSHALL HARLAN explained in *Bush v. Kentucky* (1883), the Court had no choice but to presume that jury commissioners had acted properly. When the "civil right" of equal opportunity to pursue an "ordinary trade" was at issue in *Yick Wo*, however, the Court unanimously invalidated the law not only because it had been administered with "an evil eye and an unequal hand" but also because it lacked adequate standards for controlling the discretion of public officials authorized to license the regulated trade.

Simply to sketch the basic contours of Field's jurisprudence is to suggest the degree to which his views, forged into a coherent system at an astonishingly early date and reiterated with great force throughout his record-shattering tenure on the Court, shaped the course of American constitutional law. His associates resisted the whole "truth," as Field understood it, to the very end, and Harlan predicted that he would spend even the final days with "his face towards the setting sun, wondering . . . whether the Munn case or the eternal principles of right and justice will ultimately prevail." Yet appellate judging in America is inherently a collective enterprise. The remarkable thing about Field's career is not that he failed to win every battle but that he eventually celebrated so

many victories when the stakes were so very high. What endured was his claim that the Court was "the most [d]emocratic of all" governmental institutions. By acting on that belief Field not only transformed the character of judicial power in America but also influenced debate on the Court's legitimate role long after the structure of doctrine he helped to forge had been annihilated.

CHARLES W. MCCURDY
(1986)

Bibliography

CORWIN, EDWARD S. 1909 The Supreme Court and the Fourteenth Amendment. *Michigan Law Review* 7:643–672.

GRAHAM, HOWARD J. 1968 Everyman's Constitution: Historical Essays in the Fourteenth Amendment, the "Conspiracy Theory," and American Constitutionalism. Madison: State Historical Society of Wisconsin.

MCCURDY, CHARLES W. 1975 Justice Field and the Jurisprudence of Government-Business Relations. *Journal of American History* 61:970–1005.

SWISHER, CARL B. 1930 *Stephen J. Field: Craftsman of the Law.* Washington, D.C.: Brookings Institution.

## *FIELD v. CLARK*
### 143 U.S. 649 (1892)

This is a leading case on the subject of DELEGATION OF POWER. The Tariff Act of 1890 authorized the President to suspend its free-trade provisions indefinitely as to countries discriminating against American products. The Supreme Court held, 7–2, that though the act invested the President with discretion, it did not invest him with "LEGISLATIVE POWER"; Congress had fixed adequate standards for his guidance.

*Field* is also often cited as a POLITICAL QUESTION precedent. Appellants argued that the enrolled act contained one section that the HOUSE OF REPRESENTATIVES had not passed. The Court refused to examine this question; the act's transmission by the congressional leadership and its enrollment by the secretary of state conclusively established its content.

LEONARD W. LEVY
(1986)

## FIFTEENTH AMENDMENT
### (Framing and Ratification)

In January 1869 adult black males could vote in only twenty states. Blacks had received the franchise in ten states of the South under the Reconstruction Act of March 1867 as part of the price of readmission to the Union set by the Republicans in Congress. Because Republicans also controlled the state government of Tennessee, blacks were enfranchised there. But many lived in the ex-slave border states that had been loyal to the Union, and they were not enfranchised. In the North, most blacks did not have the right to vote; however, there were minor exceptions in those states where the black population was small. The New England states except Connecticut allowed black suffrage, as did four midwestern states, Wisconsin, Nebraska, Minnesota, and Iowa. But especially in the lower North, where most northern blacks lived, white voters in REFERENDUM after referendum had rejected their unrestricted enfranchisement. Indeed in 1868 the issue of black suffrage was thought to be so dangerous and debilitating to the Republican party that at the party's national convention the framers of the platform devised a double standard by endorsing black voting in the South while trying not to antagonize white voters in the North: thus each northern state could decide black suffrage without federal interference, but southern states must accept black voting as a matter of national policy.

In the presidential election of 1868 Republican candidate ULYSSES S. GRANT captured most of the electoral vote and the Republicans retained control of Congress. But beneath the surface the situation was not reassuring. Grant's electoral victory was much greater than his popular vote (only 52 percent). Without the southern black voter Grant would have lost the popular, though not the electoral, vote. In state after state Grant squeaked by with narrow margins. Indeed, a switch of a mere 29,862 votes out of the 5,717,246 cast for the two major party candidates (.52 percent) would have made the Democratic candidate president. Moreover, the Democrats gained seats in the HOUSE OF REPRESENTATIVES in Washington. And Republican majorities in state after state were slim indeed. Finally, Republican politicians throughout the South reported that little reliance could be placed on the southern black voter in the long run because of strong white influence and intimidation and because of black poverty, illiteracy, and inexperience. Danger signals in the South, defeats in state referenda in the North, and a narrow escape from defeat in the presidential election of 1868 taught the Republicans that their platform pledge to the North had to be ignored. Something must be done by the final session of the Fortieth Congress before the Democrats arrived in force.

The Republicans decided it was necessary to augment their strength by enfranchising more blacks, who could be expected to vote Republican en masse. Although egalitarians had begun the advocacy of black enfranchisement, politicians had made its achievement possible. Two years before, Congress had enfranchised blacks in the South because the Republicans then needed southern black votes

to counter southern white votes. Now the Republicans also needed the support of northern and border blacks, especially in closely balanced states, and were willing to run limited risks and promote political reform in order to maintain power.

Therefore, during early 1869 the Republicans in the lame-duck Congress pressed for a constitutional amendment to secure impartial manhood suffrage in every state, thereby avoiding further popular rejection in state referenda. They opted for the usual but more indirect method of having Republican state legislatures that were still in session ratify the amendment. Thus they avoided the risk of possible rejection by special conventions.

The amendment finally passed Congress in late February 1869 after a number of compromises. To secure enough moderate votes, the sponsors had to omit a clause that would have outlawed property qualifications and LITERACY TESTS. Such a clause was dispensable because the tests would affect more Negroes in the South than in the North, and because the proponents of the amendment were intent primarily upon securing the northern Negro voter for the Republican party. For the same reasons, they omitted any provision banning RACIAL DISCRIMINATION in qualifications for officeholding. A provision for federal authority over voter qualifications was defeated, and so the potential for evasion in the southern and border states was left wide open.

The legislative history of the Fifteenth Amendment indicated no triumph of radical idealism but rather served to demonstrate its failure—a fact underscored by the fury and frustration of that band of radicals who had favored idealistic and uncompromising reforms. A moderate measure, the amendment had the support of those who understood the limits of party power and who had practical goals in mind; they took into account the possible difficulties of ratification. Time was short, the pressures were great, and the options were limited.

The primary objective—the enfranchisement of blacks in the northern and border states—was clearly understood, stated, and believed by the politicians, the press, and the people during the time when the amendment was framed and then considered by the state legislatures. As the abolitionist organ, the *National Anti-Slavery Standard*, declared, "evenly as parties are now divided in the North, it needs but the final ratification of the pending Fifteenth Amendment, to assure . . . the balance of power in national affairs." A black newspaper, the Washington *New National Era*, predicted the same for the border states. Indeed, most newspapers both in the North and in the South during 1869 and 1870 unequivocally, incontrovertibly, and repeatedly spoke of the Republican objective of ensuring party hegemony by means of the Fifteenth Amendment. Moreover, congressmen and state legislators, in arguing for passage and ratification, referred again and again to the partisan need for those votes. The southern black, already a voter, was not irrelevant; an important secondary purpose of the amendment was to assure the continuance of black suffrage in the South by forbidding racial discrimination as to the franchise in a virtually unrepealable amendment to the federal Constitution. Still, the anticipated importance of the black electorate in the North and in the borderland was clearly the overriding concern.

To be sure, the political motives of many Republican politicians were not incompatible with a sincere moral concern. The idealistic motive reinforced the pragmatic one: there was no conflict at the outset between the ideal and the practical or between the interests of the black electorate and those of the Republican party. A radical Republican congressman declared, "party expediency and exact justice coincide for once." A black clergyman from Pittsburgh observed that "the Republican Party had done the negro good but they were doing themselves good at the same time." Indeed, the amendment as framed was both bold and prudent: bold in enfranchising blacks despite concerted opposition and in ordering change by establishing constitutional guidelines; prudent in adapting methods to circumstances so that the amendment would not only pass Congress but also be ratified by the states.

Although the struggle over ratification lasted only thirteen months, it was hard going and the outcome was uncertain until the very end. To be sure, ratification was easy in safe Republican territory (New England and most of the Middle West) and in the South where Republican legislators did their duty. But the fight was especially close in the Middle Atlantic states and in Indiana and Ohio, where the parties were competitive and a black electorate had the potential for deciding victory or defeat. In the Democratic border states and on the Pacific Coast, where racial feeling ran high, Republicans feared that pushing the amendment would lose them votes; so they refrained from pressing for ratification in these regions. Nevertheless, in clear-cut conflicts of interest between state and national Republican party organizations, the national party was everywhere victorious. Mutinies in Rhode Island and Georgia were suppressed. The amendment had the backing of the Grant administration, with its rich patronage. By endorsing the amendment in his inaugural address, Grant placed the indispensable prestige of the presidency behind it; he then went beyond pronouncements by swinging Nebraska to ratify it. Those Republican politicians who held or aspired to hold national office added the weight of their influence. As one Ohioan advised, "By hook or by crook you must get the 15th amendment through or we are gone up."

The Fifteenth Amendment became law on March 30,

1870. Republican euphoria followed the hard battle for ratification. Grant, in his message to Congress, wrote that the amendment "completes the greatest civil change and constitutes the most important event that has occurred since the nation came to life." Blacks everywhere celebrated; they regarded the Fifteenth Amendment as political salvation, as a solemn written guarantee that would never be abridged. They now felt secure, protected by both the vote and the "long strong arm of the Government." Whites believed that since the Negro was now a citizen and a voter, he could take care of himself. Antislavery societies throughout the country disbanded, now confident that equality before the law was sufficient and that in any event, "no power ever permanently wronged a voting class without its own consent." But subsequent events made a mockery of such predictions in the South where Democrats denied blacks the franchise for almost a century.

WILLIAM GILLETTE
(1986)

Bibliography

GILLETTE, WILLIAM (1979) 1981 *Retreat from Reconstruction, 1869–1879.* Baton Rouge: Louisiana State University Press.

——— (1965) 1969 *The Right to Vote: Politics and the Passage of the Fifteenth Amendment.* Baltimore: Johns Hopkins University Press.

MITTRICK, ROBERT 1985 *A History of Negro Voting in Pennsylvania during the Nineteenth Century.* Unpublished Ph.D. dissertation, Rutgers University, chap. 5.

## FIFTEENTH AMENDMENT
### (Judicial Interpretation)

The judicial interpretation of the Fifteenth Amendment has been closely intertwined with that of the FOURTEENTH AMENDMENT, largely in a Southern context. Within a year of ratification (1870) Congress passed three FORCE ACTS forbidding both public and private interference with voting on the basis of race or color. Federal officials tried hard at first to enforce these laws, but they were daunted by hostility in the South and growing indifference in Congress and the Supreme Court. Prosecutions dropped sharply in 1874; RECONSTRUCTION ended in 1877; the Jim Crow era of systematic SEGREGATION began around 1890; and the conspiracy provisions of the Force Acts were dropped in 1894.

From Reconstruction to WORLD WAR I the Supreme Court showed more ingenuity in voiding VOTING RIGHTS actions than in upholding them. Although it was willing, under Article I, section 4, to uphold convictions and damage awards for ballot box fraud in federal elections, as in EX PARTE YARBROUGH (1884), it would not allow INDICTMENTS for conspiracy to bribe, even in federal elections as in JAMES V. BOWMAN (1903). It steadfastly refused to uphold convictions for private interference with voting rights in state or local elections in UNITED STATES V. REESE (1875) and UNITED STATES V. CRUIKSHANK (1876), or to uphold civil actions for a state official's refusal to register blacks, in *Giles v. Teasley* (1904).

The Court did shrug off arguments in *Myers v. Anderson* (1915) that the Fifteenth Amendment was itself void for diluting the votes of enfranchised whites and thereby depriving their states of equal suffrage in the Senate without their consent. But it did almost nothing to thwart the new franchise restrictions of the Jim Crow era—literacy, property, POLL TAX, residence, character, and understanding tests—designed to cull black and upcountry white voters. (See WILLIAMS V. MISSISSIPPI.) Only in GUINN V. UNITED STATES (1915) did it strike down a GRANDFATHER CLAUSE exempting descendants of 1867 voters from Oklahoma's LITERACY TEST—without, however, striking down the test itself. *Guinn* had no practical impact on voting registration, but it was important for serving notice that the Fifteenth Amendment bars subtle as well as blatant discrimination.

The Court moved against white PRIMARY ELECTIONS with more deliberation than speed. Party primary elections emerged in response to the regional party monopolies, Republican in the North, Democratic in the South, which followed the "realigning" election of 1896. By World War I, primaries were universal. The dominant party's nomination became the choice that counted, and general elections merely rubber-stamped the dominant party's nominee. This trend was earliest and most pronounced in the South. It weakened party discipline, lowered turnout drastically in general elections, strengthened the dominance of plantation whites, and froze out blacks almost completely.

Blacks challenged this exclusion in a famous series of Texas cases. In NIXON V. HERNDON (1927) and NIXON V. CONDON (1932) NAACP attorneys successfully attacked statutes barring blacks, and letting the parties bar blacks, from voting in primary elections. Counsel for both sides in *Herndon* argued the Fifteenth Amendment, but Justice OLIVER WENDELL HOLMES, speaking for a unanimous Court, found the statute instead a "direct and obvious infringement of the Fourteenth." The Court followed this precedent in *Condon.*

In attacking the discriminatory law under the Fourteenth, rather than the denial of a voting right under the Fifteenth, the Court ignored its earlier view that the pertinent section of the Fourteenth was not intended to protect voting rights. (See MINOR V. HAPPERSETT.) It also left

Texas free to repeal the *Condon* statute, while permitting the Democrats to exclude blacks legally through their own "private" action. (See GROVEY V. TOWNSEND.)

The Court returned to the Fifteenth Amendment to overrule *Grovey* in SMITH V. ALLWRIGHT (1944), finding STATE ACTION in laws governing the timing and conduct of primary elections and by the "fusing [in UNITED STATES V. CLASSIC (1941)] of primary and general elections into a single instrumentality for the choice of officers." Later, in TERRY V. ADAMS (1953), the Court extended this concept of "fusion into a single instrumentality" to invalidate a whites-only "preprimary" election used by the Jaybird party since 1889 to capture Democratic nominations in a Texas county.

Without the white primary, segregationist whites had only franchise restrictions to block black votes. These restrictions had reduced black registrations by a third in the nineteenth century, but they had only limited and temporary effect by the 1950s. Black literacy was up, and only three of the eleven Southern states—Alabama, Mississippi, and Louisiana—retained blatantly discriminatory literacy tests. These the Court struck down, along with nondiscriminatory tests where blacks had been segregated in inferior schools.

Congress greatly aided in expanding the black vote with jucidial protection in the CIVIL RIGHTS ACTS of 1957, 1960, and 1964, and especially with the VOTING RIGHTS ACT OF 1965, which authorized suspension of state literacy and character tests and provision of federal examiners to register blacks where discrimination was found. In 1970, congress wholly forbade literacy tests as a condition on voting in state elections.

Though the Court took almost seventy-five years to give the Fifteenth Amendment much practical effect, its interventions since World War II have greatly changed both the constitutional and political landscapes. *Smith v. Allwright*, with its broad reading of the Fifteenth Amendment looking through form to substance foreshadowed such great Fourteenth Amendment cases as SHELLEY V. KRAEMER (1948) and BROWN V. BOARD OF EDUCATION (1954). GOMILLION V. LIGHTFOOT (1960), which struck down a racial GERRYMANDER under the Fifteenth Amendment, was a bridge to BAKER V. CARR (1962).

Opening the primaries and the franchise to blacks brought them out of political exile. Black registration in the South, only five percent in 1940, grew to twenty-eight percent in 1960 and sixty-three percent in 1976, narrowing the gap between black and white registrations from forty-four percent to five percent. Black elected officials in the South increased from fewer than 100 to more than 1,000. White politicians stopped waving ax handles, standing in the doorways of segregated schools, and using terms like "burrhead" in public debate. The Court's enforcement of the Fifteenth Amendment may properly be described as late, but not little.

WARD E. Y. ELLIOTT
(1986)

Bibliography

ELLIOTT, WARD E. Y. 1975 *The Rise of Guardian Democracy: The Supreme Court's Role in Voting Rights Disputes, 1845–1969.* Cambridge, Mass.: Harvard University Press.

KEY, V. O., JR. 1949 *Southern Politics.* New York: Knopf.

KOUSSER, J. MORGAN 1974 *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910.* New Haven, Conn.: Yale University Press.

LAWSON, STEVEN F. 1976 *Black Ballots: Voting Rights in the South, 1944–1969.* New York: Columbia University Press.

## FIFTH AMENDMENT

See: Double Jeopardy; Due Process of Law; Grand Jury; Right Against Self-Incrimination; Taking of Property

## FIGHTING WORDS

In CHAPLINSKY V. NEW HAMPSHIRE (1942) the Supreme Court upheld the conviction of a Jehovah's Witness who called a policeman "a God damned racketeer" and "a damned Fascist," holding that "fighting words"—face-to-face words plainly likely to provoke the average addressee to fight—were not protected by constitutional free speech guarantees. Viewed narrowly, the fighting words doctrine can be seen as a per se rule effectuating the CLEAR AND PRESENT DANGER principle, relieving the government of proving an actual INCITEMENT by taking the words themselves as decisive. Taken broadly, *Chaplinsky* strips "four-letter words" of free speech protection. "It has been well observed," Justice FRANK MURPHY said, "that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

The modern tendency of the Court has been to extend partial FIRST AMENDMENT protection to even the "excluded" areas of speech. To the extent that *Chaplinsky* refuses protection to four-letter words because they offend against taste or morality, it has been limited by recent decisions such as COHEN V. CALIFORNIA (1971), *Gooding v. Wilson* (1972), and *Rosenfeld v. New Jersey* (1972). The Justices appear to have been engaging in ad hoc analysis of what persons in what situations are entitled to a measure of protection from the shock to their sensibilities generated by words that, in the language of *Chaplinsky*, "by their very utterances inflict injury."

The shock aspect of four-letter words is obviously related to the shock element in OBSCENITY. In FCC V. PACIFICA FOUNDATION (1978) the Court upheld FCC regulation of "indecent" broadcasting that involved "patently offensive" four-letter words but was not obscene. While admitting that the words in question would warrant constitutional protection under certain circumstances, the Court held that in view of their capacity to offend, their slight social value in the conveying of ideas, and the intrusive character of speech broadcast into the home, their repeated use might constitutionally be banned at least in time slots and programming contexts when children might be listening.

The recent decisions suggest that outside the direct incitement to violence context the Court is prepared to balance PRIVACY against speech interests where four-letter words are at issue. Where statutes go beyond prohibiting incitement to violence, and also bar cursing or reviling, or using opprobrious, indecent, lascivious, or offensive language, they are likely to be held unconstitutionally vague or overbroad. (See *Lewis v. New Orleans*, 1974.)

MARTIN SHAPIRO
(1986)

(SEE ALSO: *Balancing Test; Freedom of Speech.*)

Bibliography

KONVITZ, MILTON 1978 *Fundamental Liberties of a Free People.* Chap. 17. Westport, Conn.: Greenwood Press.

SHEA, THOMAS 1975 Fighting Words and the First Amendment. *Kentucky Law Journal* 63:1–22.

# FILIBUSTER

A filibuster is the strategic use of delay to block LEGISLATION, to force an amendment, or to prompt other action by the U.S. SENATE. Filibusters occur in the Senate, but not in the U.S. HOUSE OF REPRESENTATIVES, because only the Senate allows unlimited debate on any measure, and no motion exists by which a simple majority of senators can bring any debatable measure to a vote. The only way the Senate can vote on any matter subject to filibuster over the objection of even a single senator is to obtain CLOTURE (an end of debate) under Senate Rule XXII, which requires the votes of 60 senators.

Contrary to popular belief, a filibuster today is seldom conducted through actual extended speech on the Senate floor, but is accomplished rather by a senator threatening to speak indefinitely if a matter is brought before the Senate for a vote. Consequently, a filibuster occurs when senators credibly threaten the Senate leadership that they possess the requisite 41 votes to block cloture under Rule XXII. The widespread use of filibuster threats has effectively increased the number of votes it takes to enact controversial legislation from 51 (or 50 plus the Vice-President's vote) to 60. A majority of senators cannot change this because any revision of Rule XXII requires a vote of two-thirds of the Senate.

The conventional objection to the filibuster is that it is antimajoritarian and thus antidemocratic. The supermajority requirement of Rule XXII, however, is not alone among Senate procedures that are antimajoritarian. Notably, Senate rules empower committees to determine the content of proposed legislation and to decide whether legislation reaches the floor for a vote. Over the years, committees have exercised their power to block or divert action favored by majorities of the House and Senate. The filibuster may counteract the antimajoritarian aspects of the committee system by enabling individual senators to block legislation favored by a committee or to force changes rejected by a committee. Thus, the filibuster may work not so much against majority rule as against other forms of minority power.

The attacks on the constitutionality of the filibuster nonetheless focus on its antimajoritarian character. The Constitution is silent on the topic of filibusters; it neither authorizes nor prohibits them. There are two aspects of the filibuster rule that may be unconstitutional: one is that it requires a supermajority to enact legislation; the second is that a supermajority is required to change the voting rules. As to the first, the strongest arguments against the constitutionality of filibuster are textual. The Constitution specifically requires a supermajority vote in only seven situations. This enumeration of the instances where a supermajority was required suggests that the Framers assumed that a simple majority vote in each house would suffice for all other congressional action. Other constitutional provisions support the argument that the constitution makes a majority vote sufficient for action in the Senate. For instance, the provision specifying that a two-thirds vote can override a presidential VETO of legislation suggests that the Framers assumed that a majority vote would be sufficient for action by the Senate.

The problem with this textual argument is that the Constitution explicitly grants the Senate the power to determine its own rules and procedures. The list of instances in which the Constitution specifies that a supermajority is required does not compel the Senate to act by majority vote at all other times. Rather, the Senate is free to adopt its own rules for voting on all other matters.

The stronger argument against the constitutionality of the Senate rules regarding the filibuster lies in the supermajority requirement for changing Rule XXII. Senators can filibuster efforts to amend the Senate rules and Rule XXII requires agreement of two-thirds of those present and voting to obtain cloture on any motion to amend the

rules. The Senate that adopted Rule XXII attempted to restrict the ability of all future Senates to change it. The entrenchment of the filibuster violates a fundamental constitutional principle that one legislature cannot bind a subsequent one. The popular sovereignty and legislative accountability upon which American democracy is premised are frustrated when one session of the legislature can prevent or limit action by future sessions, thus preventing the people's elected representatives from enacting laws favored by their constituents.

CATHERINE L. FISK
ERWIN CHEMERINSKY
(2000)

(SEE ALSO: *Supermajority Rules.*)

Bibliography

EULE, JULIAN N. 1987 Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity. *American Bar Foundation Research Journal* 1987:379–459.

FISK, CATHERINE and CHEMERINSKY, ERWIN 1997 The Filibuster. *Stanford Law Review* 49:181–254.

MCGINNIS, JOHN O. and RAPPAPORT, MICHAEL B. 1995 The Constitutionality of Legislative Supermajority Requirements: A Defense. *Yale Law Journal* 105:483–511.

## FILLMORE, MILLARD
(1800–1874)

A Buffalo, New York, lawyer and WHIG politician, Millard Fillmore was elected vice-president in 1848 and became President when ZACHARY TAYLOR died in 1850. Unlike Taylor, Fillmore enthusiastically supported passage of the COMPROMISE OF 1850 which he believed necessary to preserve the Union. His administration was particularly vigorous in enforcing the Fugitive Slave Law through the Christiana Treason Trials, and prosecutions of those involved in the Shadrach Rescue, the Jerry Rescue, and the abortive Sims Rescue. Fillmore was not renominated by the Whigs in 1852 and ran unsuccessfully as a Know-Nothing in 1856.

PAUL FINKELMAN
(1986)

Bibliography

RAYBACK, ROBERT J. 1959 *Millard Fillmore: Biography of a President.* Buffalo, N.Y.: Buffalo Historical Society.

## FINAL JUDGMENT RULE

By congressional statute the federal courts of appeals are permitted, in the usual case, to exercise their APPELLATE JURISDICTION only over final judgments of the district courts. An additional provision authorizes review of district court orders granting, denying, or otherwise dealing with INJUNCTIONS, and of certain other INTERLOCUTORY orders less frequently given. Furthermore, a district judge may certify an interlocutory order for review by the court of appeals, and that court can, in its discretion, review such a nonfinal order. The Supreme Court's appellate jurisdiction over cases coming from the state courts also is limited to final judgments of those courts. (The Supreme Court is not limited by this final judgment rule in hearing cases coming to it from a federal court of appeals; it can grant CERTIORARI in any case "in" the court of appeals.)

The final judgment rule, which aims at avoiding piecemeal appellate review, has so many judge-made exceptions that it has aptly been called "a permeable screen." Thus, a "collateral" order, unrelated to the merits of the case, may be reviewed if it presents an issue that might never be decided if the final judgment rule were strictly applied. Similarly, if rigorous application of the rule would do irreparable injury to some important federal policy, the Supreme Court has held that a nonfinal order can be reviewed. And in UNITED STATES V. NIXON (1974) the Court permitted review of a nonfinal order of a district court ordering the President of the United States to turn over the "Watergate tapes," in order to avoid putting the President to the "unseemly" choice between obeying the order and refusing and being cited for contempt. It is hard to avoid the conclusion that the final judgment "rule" has been made into a technique for allowing review of those interlocutory orders the Supreme Court thinks should be reviewed even though they are not final.

KENNETH L. KARST
(1986)

Bibliography

WRIGHT, CHARLES ALAN 1983 *The Law of Federal Courts,* 4th ed. Pages 697–717, 739–743. St. Paul, Minn.: West Publishing Co.

## *FIREFIGHTERS LOCAL UNION NO. 1784 v. STOTTS*
467 U.S. 561 (1984)

The City of Memphis, Tennessee, laid off white firefighters with more seniority to protect the positions of less senior blacks who had been employed under a "race conscious" AFFIRMATIVE ACTION plan. The white firefighters sued, alleging that their seniority rights were explicitly protected by the CIVIL RIGHTS ACT OF 1964.

Justice BYRON R. WHITE, writing for the Supreme Court's majority, agreed, noting that "mere membership in the

disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him." White thus affirmed the proposition, which is explicit from the plain language of Title VII, that rights vest in the individual and not in the racial class, and that this fact demands a close fit between injuries and remedies. White's opinion raises some doubt about the power of courts to fashion classwide remedies where, as in race-conscious affirmative action plans, benefited individuals are not required to demonstrate individual injury. This case signals an important move toward the restoration of the principle that rests at the core of liberal jurisprudence—that rights adhere to the individual, and not to the racial class that one happens to inhabit.

EDWARD J. ERLER
(1986)

## FIRST AMENDMENT

The First Amendment today protects the overlapping realms of the spirit—of belief, emotion, and reason—and of political activity against intrusion by government. The amendment directly forbids federal violation of the individual's RELIGIOUS LIBERTY, freedom of expression, FREEDOM OF ASSEMBLY, and associated political liberties. The amendment indirectly forbids state violation because it is held to be incorporated into the FOURTEENTH AMENDMENT's restrictions upon the powers of the states. The body of law presently defining First Amendment liberties has been shaped not so much by the words or intent of the original sponsors as by the actors and events of much later history. The story is one of the continual expansion of individual freedom of expression, of the FREEDOM OF THE PRESS, and, until 1980, of widening SEPARATION OF CHURCH AND STATE.

The CONSTITUTIONAL CONVENTION OF 1787 saw no need to include guarantees of religious liberty, FREEDOM OF SPEECH, or other human rights. Most of the Framers believed in some such rights but supposed that the powers proposed for the new federal government were so severely limited by specific enumeration as to leave scant opportunity for either Congress or President to threaten individual liberty. The threats would come from state law and state governments. For protection against these, the Framers looked to the constitutions of the individual states. In the struggle for RATIFICATION OF THE CONSTITUTION, however, those who feared abuse of federal power exacted an undertaking that if the proposed Constitution were ratified by the states, the first Congress would be asked to propose amendments constituting a BILL OF RIGHTS. The First Amendment is thus the first and most far-reaching of the ten articles of amendment submitted by JAMES MADISON, proposed by Congress, and ratified by three-quarters of the states in 1791 solely as restrictions upon the new federal government, the powers of which were already severely limited.

The assumption that the amendment would have only a narrow function made it possible to ignore fundamental differences that would produce deep divisions more than a century later, after the amendment had been extended to the several states. The colonists held a variety of religious beliefs, though nearly all were Christian and a majority were Protestant. Whatever the limits of their tolerance back home in their respective states where one church was often dominant, they had reason to understand that the coherence of the federal union could be fixed only if the new federal government were required to respect the free exercise of religion. The men of South Carolina with their state-established religion and of Massachusetts with religion appurtenant to their state government could therefore support a prohibition against any *federal* ESTABLISHMENT OF RELIGION shoulder to shoulder with the deist THOMAS JEFFERSON and other eighteenth-century rationalists who opposed any link between church and state. Similarly, in applying ROGER WILLIAMS's vision of "the hedge or wall of separation between the garden of the church and the wilderness of the world," there was originally no need to choose between his concept of protection for the church against the encroachments of worldly society and Jefferson's concept of protection for the state against the encroachments of religion.

The conditions and political assumptions of 1791 also made it easy to guarantee "the freedom of speech or of the press" without accepting or rejecting the Blackstonian view that these guarantees bar only licensing and other previous restraints upon publication, leaving the government free to punish SEDITIOUS LIBELS and like unlawful utterances. Because the original amendment left the states unhampered in making and applying the general body of civil and criminal law, except as the people of each state might put restrictions into its own constitution, there was no need to consider how the First Amendment would affect the law of LIBEL and slander, the power of the judges to punish CONTEMPT of court, or the operation of laws punishing words and demonstrations carrying a threat to the public peace, order, or morality. Such questions could and would arise only after the First Amendment was extended to the states.

The fulcrum for extending the First Amendment to the states was set in place in 1868 by the adoption of the Fourteenth Amendment, which provides in part: ". . . nor shall any State deprive any person of life, liberty or property without DUE PROCESS OF LAW."

The effects of the new amendment upon religious and political liberty and upon freedom of expression were slow to develop. As late as 1922 the Court declared in *Pruden-*

*tial Insurance Co. v. Cheek* that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about "freedom of speech." Within another decade, however, the First Amendment's guarantee of freedom of expression had been incorporated into the Fourteenth by judicial interpretation. INCORPORATION of the other clauses, including the prohibition against laws "respecting an establishment of religion," followed somewhat later. Today the First Amendment restricts both state and federal governments to the same extent and in the same fashion.

Yet the historic sequence is important. Many questions of First Amendment law cannot be resolved truly in terms of the original intention because the questions could not arise while the original assumption held. Resolution of the issues was thus postponed until the middle decades of the twentieth century, an era in which liberalism, secularism, and individualism dominated American jurisprudence.

Disparate strains of thought were merged even in the writing of the First Amendment. Subsequent events, including current controversies, have poured new meaning into the words, yet the juxtaposition of the key phrases still tells a good deal about the chief strains in the philosophy underpinning and binding together guarantees of several particular rights.

The Framers put first the prohibition against any law "respecting an establishment of religion or prohibiting the free exercise thereof." The sequence attests the primacy ascribed to religion. The colonists belonged to diverse churches. Many had fled to the New World to escape religious oppression. Rigid though some might be in their own orthodoxy, probably a majority rejected the imposition of belief or the use of government to stamp out heresy. Certainly, they rejected use of federal power.

It was natural for the authors of the amendment to link "the freedom of speech, or of the press" with freedom of religious belief and worship. The one church was breaking up in late sixteenth- and seventeenth-century Britain. New faiths were emerging based upon individual study of the Holy Word. The man or woman who has discovered the road to salvation has a need, even feels a duty, to bring the gospel to others. Liberty of expression benefits more than the speaker. Suppression would deny the opportunity to hear and read the word of God, and thus to discover the road to salvation. Modern legal analysis recognizes the importance of the hearers' and readers' access to information and ideas in cases in which the author's interest lacks constitutional standing or would, if alone involved, be subject to regulation. (See LISTENERS' RIGHTS.)

Concern for a broader spiritual liberty expanded from the religious core. The thinking man or woman, the man or woman of feeling, the novelist, the poet or dramatist, and the artist, like the evangelist, can experience no greater affront to his or her humanity than denial of freedom of expression. The hearer and reader suffer violation of their spiritual liberty if they are denied access to the ideas of others. The denial thwarts the development of the human potential, the power and responsibility of choice. Although concerned chiefly with religion, JOHN MILTON stated the broader concern in *Areopagitica* (1644), the single most influential plea, known to the Framers, for unlicensed access to the printing press.

The Enlightenment gave the argument a broader, more rationalistic flavor. Thomas Jefferson and other children of the Enlightenment believed above all else in the power of reason, in the search for truth, in progress, and in the ultimate perfectibility of man. Freedom of inquiry and liberty of expression were deemed essential to the discovery and spread of truth, for only by the endless testing of debate could error be exposed, truth emerge, and men enjoy the opportunities for human progress.

After JOHN STUART MILL one should perhaps speak only of the ability to progress *toward truth*, and of the value of the process of searching. The compleat liberal posits that he has not reached, and probably can never reach, the ultimate truth. He hopes by constant search—by constant open debate, by trial and error—to do a little better. Meanwhile he supposes that the process of searching has inestimable value because the lessons of the search—the readiness to learn, the striving to understand the minds and hearts and needs of other men, the effort to weigh their interests with his own—exemplify the only foundation upon which men can live and grow together.

It was not chance that America's most eloquent spokesman for freedom of speech, OLIVER WENDELL HOLMES, was also a profound skeptic. Dissenting in ABRAMS V. UNITED STATES (1919), he wrote:

> When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

On the far side of the First Amendment's guarantee of freedom of speech and of the press one finds the political rights "peaceably to assemble, and to petition the Government for a redress of grievances." (See FREEDOM OF PETITION; FREEDOM OF ASSEMBLY AND ASSOCIATION.) The juxtaposition recalls that freedom of speech and of the press have a political as well as a spiritual foundation; and that the First Amendment protects political activity as part of and in addition to the world of the spirit. American

thought, especially in Supreme Court opinions, puts the greater emphasis on the political function of free expression. In *Garrison v. Louisiana* (1964), for example, the Court explained that "speech is more than self-expression; it is the essence of self-government." ALEXANDER MEIKLEJOHN, perhaps the foremost American philosopher of freedom of expression, argued that whereas other constitutional guarantees are restrictions protecting the citizens against abuse of the powers delegated to government, the guarantees of freedom of speech and of the press hold an absolute, preferred position because they are measures adopted by the people as the ultimate rulers in order to retain control over the government, the people's legislative and executive agents. James Madison, the author of the First Amendment, expressed a similar thought in a speech in 1794. "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people."

Despite the eloquence of Justice Holmes, most of us reject the notion that the ability of an idea to get itself accepted in free competition is the best test of its truth. Some propositions seem true or false beyond rational debate. Some false and harmful, political and religious doctrines gain wide public acceptance. Adolf Hitler's brutal theory of a "master race" is sufficient example. We tolerate such foolish and sometimes dangerous appeals not because they may prove true but because freedom of speech is indivisible. The liberty cannot be denied to some persons and extended to others. It cannot be denied to some ideas and saved for others. The reason is plain enough: no man, no committee, and surely no government, has the infinite wisdom and disinterestedness accurately and unselfishly to separate what is true from what is debatable, and both from what is false. To license one to impose his truth upon dissenters is to give the same license to all others who have, but fear to lose, power. The judgment that the risks of suppression are greater than the harm done by bad ideas rests upon faith in the ultimate good sense and decency of free people.

Constitutional law has been remarkably faithful to this philosophy in dealing with both religious and political ideas. In the prosecution of the leader of a strange religious cult for obtaining money by false pretenses, as in UNITED STATES V. BALLARD (1963), the truth or falsity of the leader's claims of miraculous religious experiences is legally irrelevant; conviction depends upon proof that the defendant did not believe his own pretenses. Similarly, although distaste for political ideology may have influenced some of the decisions in the 1920s affirming the convictions of anarchists and communists for advocacy of the overthrow of the government by force and violence, the social, political, or religious activists seeking changes that frighten or annoy all "right-minded" people receive wide protection in their resort to the SIT-INS, PICKETING, marches, mass demonstrations, coarse expletives, affronts to personal and public sensibilities, and other unorthodox vehicles that are so often their most effective means of expression. Such methods of expression may prejudice opposing public and private interests because of the time, place, or manner of communication, regardless of the content of the message; therefore, the amendment allows regulation of particular forms of expression, or of expression at a particular time or place, regardless of content, provided that the restriction protects important interests that cannot be secured by less restrictive means. The courts have typically scrutinized such restrictions, however, with an eye zealous to condemn as unconstitutional any statute or ordinance ostensibly designed to protect the public peace and order but phrased in such loose words as either to deter constitutionally protected expression or to invite discrimination by police, public prosecutors, or judges against radical "troublemakers" and other unpopular minorities. Thus, the American Nazis were secured the right to parade in uniform with swastikas in an overwhelmingly Jewish community many of whose residents had fled the Holocaust.

Distrust of official evaluation of the worth of ideas may also lie behind the decisions barring regulation of political debate in the interest of "fairness" or equality of opportunity. In BUCKLEY V. VALEO (1976), holding that the freedom of speech clause bars laws restricting the dollars that may be spent in a political campaign, the Court observed: "The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Similarly, in MIAMI HERALD V. TORNILLO (1974) the Court held a state law granting a political candidate a right of space in which to reply to a newspaper's attacks upon his or her record to be unconstitutional interference with the editorial freedom of the newspaper. Only in the area of BROADCASTING has the Court thus far recognized that realization of the ideal of free competition of ideas may be irreconcilable with total freedom from regulation in an era in which the public's chief sources of ideas and information are expensive media of mass communication, which are often under monopolistic control. Federal statutes and regulations subject radio and television broadcasters to loosely defined duties to present public issues fairly and to give a degree of access to political candidates and parties.

Although only deliberately false religious or political representations fall wholly outside the First Amendment, the law is more willing to try to separate the worthless from the valuable in the field of literature and the arts. The amendment gives no protection to "obscene" publi-

cations. For many years the definition of OBSCENITY was broad enough to cover works containing individual words or short passages that would tend to excite lustful thoughts in a particularly susceptible person. This standard condemned *Lady Chatterley's Lover*, *An American Tragedy*, and *Black Boy*. From 1930 to 1973 the legal definition of obscenity was gradually narrowed so tightly that many jurists concluded that the First Amendment would protect the most prurient of matter unless it was "utterly without redeeming social value." After 1973 changes in the composition of the Court led to a somewhat less permissive formulation. A work is obscene if a person applying contemporary community standards would find that it appeals to the prurient interest; if it represents or describes ultimate sexual acts, excretory functions, or the genitals in a patently lewd or offensive manner; and if it lacks serious literary, artistic, political, or scientific value. YOUNG V. AMERICAN MINI THEATRES (1976) suggests that explicity sexual books and motion pictures, even when not obscene, may be regulated as to the places and perhaps the time and manner of their distribution in ways that are forbidden for other materials.

These exceptions from the principle that bars any branch of government, including the judiciary, from judging the value of ideas and sensations seem attributable partly to the emphasis that American law puts upon the political values of the First Amendment, partly to the diminishing but still traditional concern of government for public morals, and partly to the actual or supposed links between producers and distributors of commercial pornography and the criminal underworld.

So long as one is dealing with beliefs and expressions separable from conduct harmful to other individuals or the community, the essential unity of the philosophical core of the First Amendment makes it unnecessary to distinguish for legal purposes among religious beliefs, political ideologies, and other equally sincere convictions. In upholding the First Amendment privilege of Jehovah's Witnesses to refuse to join other school children in a daily salute to the United States flag, the Court pointedly refrained from specifying whether the privilege arose under the free exercise clause or the guarantee of freedom of speech: ". . . compelling the flag salute and pledge . . . invades the sphere of intellect and spirit which it is the purpose of the First Amendment to reserve from all official control." (See FLAG SALUTE CASES.) Test oaths, like particular beliefs, cannot be required for holding public office or receiving public grants. In upholding the conviction of a Mormon for POLYGAMY in REYNOLDS V. UNITED STATES (1879), despite his plea that the free exercise clause protected him in obeying his religious duty, the Supreme Court sought to erect this distinction between the realm of ideas and the world of material action into a constitutional principle: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."

As the guarantees of the freedoms of speech and press and of free exercise of religion seek to bar hostile governmental intrusion from the realm of the spirit, so do modern interpretations of the establishment clause bar state sponsorship of, or material assistance to, religion. In the beginning religion and established churches were dominant forces in American life. Nearly all men and women were Christians; Protestants were predominant. In South Carolina the Constitution of 1778 declared the "Protestant religion to be the established religion of this State." Church and state were intertwined in Massachusetts. Where there was no official connection, both the laws and practices of government bore evidence of benevolent cooperation with the prevailing creeds. SUNDAY CLOSING LAWS were universal. Oaths were often required of state officials. Legislative sessions began with prayer. The crier in the United States Supreme Court still begins each session by invoking divine blessing. The coinage states, "In God We Trust." Church property was and remains exempt from taxation. As public education spread, prayers and Bible-reading became the first order of each school day.

These traditional links between church and state were challenged after incorporation of the First Amendment into the Fourteenth Amendment, not only by anticlerical secularists but also by religious minorities whose members were set apart by official involvement in religious practices and who were fearful that their isolation would hamper full assimilation into all aspects of American life and might stimulate INVIDIOUS DISCRIMINATION. The Supreme Court was then forced to choose among the competing strains of religious and political philosophy whose adherents had agreed only that the federal government, but not the States, should be barred from "an establishment of religion." The majority's inclination during the years 1945–1980 toward Jefferson's strongly secular, anticlerical view of the wall of separation between church and state led to two important lines of decision.

One line bars both state and federal governments from giving direct financial aid to sectarian primary and secondary schools even though the same or greater aid is given to the public schools maintained by government. The decisions leave somewhat greater latitude not only for aid to parents but also to include religious institutions in making grants for higher education. (See GOVERNMENT AID TO SECTARIAN INSTITUTIONS.)

The second important line of decisions required discontinuance of the widespread and traditional practice of starting each day in the public schools with some form of religious exercise, such as saying an ecumenical prayer or

reading from the Bible. The latter decisions provoked such emotional controversy that in the 1980s, more than two decades after the decisions were rendered, fundamentalist groups were actively pressing for legislation abolishing the Supreme Court's JURISDICTION to enforce the establishment clause in cases involving school prayer, thus leaving interpretation of the clause to the vagaries of judges in individual states. (See RELIGION IN PUBLIC SCHOOLS.)

Even though the line between the realm of the spirit and the world of material conduct subject to government regulation is fundamental to the jurisprudence of the First Amendment, the simple line between belief and conduct drawn in the polygamy cases was too inflexible to survive as a complete constitutional formula. Religious duties too often conflict with the commands of civil authority. Conversely, the public has compelling interests in the world of conduct that sometimes cannot be secured without interference with the expression of ideas.

Two cases suggest the line limiting constitutional protection for religious disobedience to the commands of the state. In WISCONSIN V. YODER (1972) the Supreme Court held that the free exercise clause secured Amish parents the privilege of holding fourteen- and fifteen-year-old children out of high school contrary to a state compulsory attendance law but pursuant to their religious conviction that salvation requires simple life in a church community apart from the world and worldly influence. The Court's constitutional, judicial duty—the Court said—required balancing the importance of the interests served by the state law against the importance to believers of adherence to the religious practice in question. Striking such a balance, the Court held in *Negre v. Larsen* (1971) that a faithful Roman Catholic's belief that the "unjust" nature of the war in Vietnam required him to refuse to participate did not excuse his refusal to be inducted into the armed forces.

When belief is invoked to justify otherwise unlawful conduct, it may become significant that the First Amendment speaks of the free exercise of "religion," but not of other kinds of belief held with equal sincerity. In UNITED STATES V. SEEGER (1965) the Court skirted establishment clause questions by refusing to make any distinction between the teachings of religion and other moral convictions for the purposes of the Selective Service Act. That act exempted from military service CONSCIENTIOUS OBJECTORS opposed to war in any form by reason of their "religious training and belief" and defined such belief as one "in relation to a Supreme Being involving duties superior to those arising from any human relation." A majority held that, despite the references to religion and a belief in a Supreme Being, the exemption extended "to any belief that occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." In the *Yoder* case, on the other hand, the opinion of the Court by Chief Justice WARREN E. BURGER, calling upon the example of Henry D. Thoreau, stated that a "philosophical and personal" belief "does not rise to the demands of the Religion Clauses." Perhaps this declaration of orthodoxy puts an end to the question, but in an age of subjectivism it is likely to press for fuller debate and deliberation.

Where religious objectors seek exemption from laws of general application, both federal and state governments must walk a narrow line. On the one hand, the free execise clause may require exception. On the other hand, excepting religious groups from laws of general application may be an unconstitutional "establishment of religion." Here again the decisions call for ad hoc balancing of the individual and public interests affected by the particular legislative act.

The requirement of self-preservation exerts the strongest pressures upon government to violate the realm of the spirit by suppressing the publication of ideas and information. Here, as in other areas, judicial elaboration of the First Amendment has been increasingly favorable to freedom of expression.

The expansion of the freedom by interpretation began within a decade from ratification. WILLIAM BLACKSTONE had taught that the freedoms of speech and press were freedoms from PRIOR RESTRAINTS, such as licensing, and did not bar subsequent liability or punishment for unlawful words, including seditious libels. Dispute arose when Congress enacted a Sedition Act and the Federalist party then in office prosecuted the editors of journals supporting their political opponents, the Jeffersonian Republicans, for publishing false, scandalous, and malicious writings exciting the hatred of the people. (See ALIEN AND SEDITION ACTS.) Thomas Jefferson and James Madison led the attack upon the constitutionality of the Sedition Act by drafting the VIRGINIA AND KENTUCKY RESOLUTIONS declaring that the act violated the First Amendment. The lower federal courts followed the orthodox teaching of Blackstone, upheld the act, and convicted the Republican editors. Jefferson pardoned them after his election to the presidency. Still later, Congress appropriated funds to repay their fines. Events thus gave the speech and press clauses an interpretation extending the guarantees beyond mere prohibition of previous restraints. The Supreme Court subsequently ratified the teaching of history.

The modern law defining freedom of expression began to develop shortly after WORLD WAR I when pacifists and socialists who made speeches and published pamphlets urging refusal to submit to conscription for the armed forces were prosecuted for such offenses as willfully obstructing the recruiting or enlistment service of the United

States. In affirming the conviction in SCHENCK V. UNITED STATES (1919), Justice Holmes coined the famous CLEAR AND PRESENT DANGER test: "The question in every case is whether the words used are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." When Justice Holmes wrote these words, they gave little protection to propaganda held subversive by dominant opinion. Speaking or circulating a paper, the Justice held, is not protected by the First Amendment if the "tendency" of the words and the intent with which they are uttered are to produce an unlawful act. Later, after Justice Holmes's sensitivity to the dangers of prosecution for words alone had been increased by the prosecution of tiny groups of anarchists and communists for holding meetings and distributing political pamphlets in time of peace, criticizing the government, and preaching its overthrow by force and violence, he and Justice LOUIS D. BRANDEIS in a series of dissenting opinions tightened their definition of "clear and present danger" and laid the emotional and philosophical foundation for the next generation's expansion of the First Amendment guarantees. Justice Brandeis's eloquent opinion in WHITNEY V. CALIFORNIA (1927) is illustrative:

> Those who won our independence by revolution were not cowards. They did not fear political liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is, therefore, always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.
>
> Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. . . . There must be the probability of serious injury to the state. Among freemen, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech and assembly.

In the 1920s a majority of the Justices consistently rejected the views expressed by Justices Holmes and Brandeis. GITLOW V. NEW YORK (1925) held that (1) a state, despite the First Amendment, may punish utterances inimical to the public welfare; (2) a legislative finding that a class of utterances is inimical to the public welfare will be accepted by the Court unless the finding is arbitrary or capricious; (3) the Court could not set aside as arbitrary or capricious a legislative finding that teaching the overthrow of the government by force or violence involves danger to the peace and security of the State because the spark of the utterance "may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration"; and (4) the Court would not consider the kind or degree of evil threatened by a particular utterance if it fell within a class of utterances found by the legislature to be dangerous to the state.

Ironically, in the very years in which the Court was deferential to legislative restrictions upon radical political expression, the Court was going behind legislative judgment to invalidate minimum wage laws, the regulation of prices and other restrictions upon FREEDOM OF CONTRACT. Beginning in 1937, however, a philosophy of judicial self-restraint became dominant among the Justices. "We have returned to the original proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws," the Court declared in FERGUSON V. SKRUPA (1963). (See JUDICIAL ACTIVISM AND JUDICIAL RESTRAINT.)

Such sweeping denigration of JUDICIAL REVIEW put civil libertarians in a dilemma. On the one hand, the need for consistency of institutional theory cautioned against activist judicial ventures even under the First Amendment. On the other hand, self-restraint would leave much CIVIL LIBERTY at the mercy of executive or legislative oppression. The only logical escape was to elevate civil liberties to a "preferred position" justifying standards of judicial review stricter than those used in judging economic regulations. The dissenting opinions by Justices Holmes and Brandeis seemed to point the way. Three rationales were offered:

(i) In a famous footnote in UNITED STATES V. CAROLENE PRODUCTS COMPANY (1938), Justice HARLAN FISKE STONE suggested that legislation restricting the dissemination of information or interfering with political activity "may be subject to more exacting judicial scrutiny . . . than most other types of legislation" where the legislation "restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation." The rationale fails to justify STRICT SCRUTINY in cases involving religious liberty, freedom of expression in literature, entertainment, and the arts, and other nonpolitical, personal liberties.

(ii) "Personal liberties" deserve more stringent protection than "property rights." The rationale does not explain why holding property is not a preferred "personal" liberty.

(iii) Stricter review is appropriate in applying the First Amendment, and the First when incorporated into the Fourteenth, because the guarantees of the First Amend-

ment are more specific than the general constitutional prohibitions against deprivation of life, liberty, or property without due process of law. The difference in specificity is considerable, but its relevance is less obvious. Justice HUGO L. BLACK stood almost alone in the supposition that the language of the First Amendment could be read literally. (See ABSOLUTISM.) Perhaps the most that can be said is that the Bill of Rights marks particular spheres of human activity for which the Framers deemed it essential to provide judicially enforced protection against legislative and executive oppression. During the debate in Congress, James Madison observed: "If they [the Amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardian of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive. . . ."

At bottom all the rationales assert that the ultimate protection for minorities, for spiritual liberty, and for freedom of expression, political activity, and other personal liberties comes rightfully from the judiciary. In this realm the political process, filled with arbitrary compromises and responsive, as in some degree it must be, to short-run pressures, is deemed inadequate to enforce the long-range enduring values that often bespeak a people's aspirations instead of merely reflecting their practices.

Propelled by this judicial philosophy, the Court greatly expanded the First Amendment guarantees of freedom of expression. The Court avowedly adopted the strict Holmes-Brandeis "clear and present danger" test for judging whether prosecution for a subversive utterance is justified by its proximity to activities the government has a right to prevent. The amendment bars restrictions upon the publication of information or ideas relating to public affairs because of harm which the government asserts will result from the impact of the message unless the government shows pressing necessity to avoid an immediate public disaster. The case of the Pentagon Papers (1971) illustrates the principle. (See NEW YORK TIMES V. UNITED STATES.) A consultant to the Department of Defense, cleared for access to classified information, gave copies of highly secret papers describing military operations and decision making to newspapers for publication. The Department of Justice upon instructions from the President asked the courts to enjoin publication, making strong representations that the risks of injury to national interests included "the death of the soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate . . . and the prolongation of the war." All the weight of these executive representations was insufficient to induce the Court to bar disclosure.

After 1940 the PREFERRED FREEDOMS theory coupled with the incorporation of the First Amendment into the Fourteenth led to Supreme Court review and invalidation or modification of many familiar state statutes and well-established COMMON LAW doctrines restricting or penalizing sundry forms of expression: libel and slander, contempt of court, obscenity, BREACH OF THE PEACE, and laws limiting access to the streets, parks, or other public places for the purposes of expression. A short reference to the law of contempt will illustrate the trend.

The interest in the impartial disposition of judicial business solely upon the evidence and arguments presented in court often conflicts with the interest in free discussion of public affairs. Newspaper editorials and like public pressures upon a judge may improperly influence or seem to influence the disposition of a pending judicial proceeding. In English and early American law such publications were enjoinable and punishable as contempt of court. Today the First Amendment is held to protect such expression. Similarly, the English law and some American decisions treated the pretrial publication of EVIDENCE as contempt of court where, as in a notorious criminal case, the publicity might reach actual or prospective jurors and serve to make it difficult to assure the accused a FAIR TRIAL and a jury verdict based solely upon the evidence presented in the court room. The Supreme Court has now set its face firmly against GAG ORDERS forbidding newspapers to print or broadcast or publicize confessions or other damaging evidence before their admissibility has been determined and they have been received in court.

The heavy emphasis that constitutional law puts upon the role of the First Amendment in the operation of representative government has led some commentators to ascribe special significance to the amendment's particular mention of "the freedom of the press" in addition to the more general guarantee of "the freedom of speech." In a crowded society, newspapers, radio, and television not only are the most effective vehicles for disseminating ideas and information but also have by far the best, if not the only, adequate resources for gathering information concerning the conduct of public affairs by the vast and omnipresent agencies of government. Starting from this premise, proponents of a "structural view" of the First Amendment argue that the special functions of the "fourth estate" entitle its members to special protection. Some of the claims to exemption from laws of general applicability have been patently excessive, such as the claims to exemption from antitrust laws, labor relations laws, and wage and hour regulation. With much greater force but scarcely greater success, the media have claimed that the First Amendment protects reporters in refusal to disclose their sources or give unpublished information to a court or GRAND JURY in compliance with the general testimonial obligation of all citizens. (See REPORTER'S PRIVILEGE.) On the

other hand, the near-immunity from liability for libels upon public figures which the Court has granted to the press under the First Amendment has not yet been extended by that Court to other writers and publishers.

The words of the First Amendment move from religion to speech and press and then to the purely political rights of free assembly and petition for redress of grievances. Denials of the rights of assembly and petition have been infrequent. The express mention of a "right of the people peaceably to assemble" is also taken, however, to symbolize the much broader freedom of association that the amendment is held to secure.

The freedom of association thus far held to be protected by the First Amendment, while broad, is narrower than the freedom of individuals to associate themselves for all purposes in which they may be interested, the right debated by Thomas Hobbes and Jean-Jacques Rousseau, on one side, and, on the other side, by JOHN LOCKE. The enactment of labor relations acts securing employees the right to form, join, and assist labor unions made it unnecessary for workers to appeal to a constitutional right of freedom of association. Only the antitrust laws barring unreasonable restraints on competition impose substantial restrictions upon business combinations. In consequence, the decisional law treats association as a necessary and therefore protected incident of other First Amendment liberties: speech, political action, and religious purposes. Associations formed to provide legal services in litigation have been treated as "political" not only in the plausible instances of suits to establish civil liberties and CIVIL RIGHTS but also in the incongruous instances of actions for damages for personal injuries.

Legislative efforts to outlaw associations formed for religious or political purposes have been infrequent, except in the case of the Communist party. A decision in 1961 sustained the power of Congress to require the party to register and disclose its membership as a foreign-dominated organization dedicated to subversion of the government, but the sanctions directed at members, for example, denial of passports and employment in defense facilities, were held unconstitutional. Associations and their members have had more occasion to complain of coerced disclosure under disclosure laws and in LEGISLATIVE INVESTIGATIONS. Prima facie the First Amendment protects privacy of association. Governmentally compelled disclosure must be justified by a showing of important public purpose. Where the unpopularity of the association makes it likely that disclosure will result in reprisals, an even stronger justification may be required. Similarly, a state must justify by a strong public purpose any interference with the conduct of a religious organization's or political party's internal affairs.

Any pressure for substantial new growth in First Amendment interpretation will probably come in three areas. First, the amendment was intended and has nearly always been construed as a prohibition against active government interference. Today government has a near-monopoly upon much information essential to informed self-government. Although FREEDOM OF INFORMATION ACTS may at least partially satisfy the need, there is likely to be pressure to read into the First Amendment's explicit verbal barrier to abridgment affirmative governmental duties to provide access to official proceedings and even to supply otherwise inaccessible information in the government's possession.

Second, in the crowded modern world broadcasters, newspapers, and other media of mass communication dominate the dissemination of information and formation of public opinion. New technologies make prediction hazardous, but the concentration of control over the most influential media appears to be increasing. In this context the old assumption, that the widest dissemination of information and freest competition of ideas can be secured by forcing government to keep hands off, is open to doubt. Such questions as whether the First Amendment permits government regulation to secure fair access to the mass media and whether the amendment itself secures a right of access to media licensed by government may well multiply and intensify.

Third, the electoral influence of political advertising through the mass media, coupled with its high cost, gives great political power to the individuals and organizations that can raise and spend the largest sums of money in political campaigns. Even though decisions already rendered tend to accord political expenditures the same protection as speech, important future litigation over legislative power to limit the use and power of money in elections seems assured. (See CAMPAIGN FINANCING.)

The First Amendment secures the people of the United States greater freedom against governmental interference in the realms of the spirit, intellect, and political activity than exists in any other country. The future may bring shifts of boundary lines and emphasis. A threat to national survival could revive earlier restrictions. Generally speaking, however, the modern First Amendment appears to meet the nation's needs.

ARCHIBALD COX
(1986)

(SEE ALSO: *Children and the First Amendment.*)

Bibliography

ABERNATHY, GLENN 1961 *The Right of Assembly and Association.* Columbia: University of South Carolina Press.

CHAFEE, ZECHARIAH, JR. 1948 *Free Speech in the United States.* Cambridge, Mass.: Harvard University Press.

COX, ARCHIBALD 1981 *Freedom of Speech in the Burger Court.* Cambridge, Mass.: Harvard University Press.

EMERSON, THOMAS I. 1970 *The System of Freedom of Expression.* New York: Random House.

HOWE, MARK DEWOLFE 1965 *The Garden and the Wilderness.* Chicago: University of Chicago Press.

KONVITZ, MILTON 1957 *Fundamental Liberties of a Free People: Religion, Speech, Press, Assembly.* Ithaca, N.Y.: Cornell University Press.

LEVY, LEONARD W. 1963 *Freedom of Speech and Press in Early American History: Legacy of Suppression.* New York: Harper & Row.

——— 1972 "No Establishment of Religion: The Original Understanding." Pages 169–224 in *Judgments: Essays in American Constitutional History.* Chicago: Quadrangle.

MEIKLEJOHN, ALEXANDER 1960 *Political Freedom: The Constitutional Powers of the People.* New York: Harper & Bros.

PFEFFER, LEO 1967 *Church, State, and Freedom.* Rev. ed. Boston: Beacon Press.

STOKES, ANSON PHELPS 1950 *Church and State in the United States.* 3 Vols. New York: Harper & Bros.

——— 1964 *Church and State in the United States.* Rev. ed., with Leo Pfeffer. New York: Harper & Row.

# FIRST AMENDMENT
## (Update 1)

Within the legal culture, the First Amendment is typically understood to protect from government abridgment a broad realm of what might be called "symbolic activity," including speech, religion, press, association, and assembly. Because these symbolic activities are intertwined with many other activities that the government is clearly empowered to regulate—for instance, education and economic relations—the courts have experienced considerable difficulty in distinguishing impermissible infringement on First Amendment freedoms from legitimate exercises of government authority. Much of Supreme Court doctrine in the First Amendment area is an attempt to develop and refine precisely this sort of distinction.

One dominant principle that has informed the Supreme Court's doctrinal development of this distinction is the principle of content neutrality. The principle of content neutrality suggests that government must be neutral as to the conceptual content of speech, religion, press, and symbolic activity in general. Hence, according to First Amendment doctrine, it is only in extreme circumstances and for the most important reasons that the Court will allow government to regulate symbolic activity because of its conceptual content. The converse of this judicial principle is that the Court will recognize a relatively broad governmental power to regulate symbolic activity because of its effects or its form. Putting these two principles side by side, the result is that content-based regulation is often found unconstitutional, whereas content-neutral regulation is often found to be constitutional. These two broad imperatives with their sharply divergent implications for case outcomes place great conceptual pressure on distinguishing the content-based from the content-neutral, or more specifically on distinguishing the conceptual or substantive content of symbolic activity from its form and effects.

Although there has been no shortage of attempts, both scholarly and judicial, to specify and refine the gist of this distinction, First Amendment doctrine remains relatively undeveloped and unstable in dealing with this recurrent tension. Indeed, the Supreme Court seems continually to shift the terrain for making the predicate determination of whether the government action is content-based or content-neutral. Often the Justices are divided on the question whether the critical content-neutrality determination should be made with respect to the express or apparent state interest, the underlying governmental intent or motivation, the statutory or regulatory description of the symbolic activity, the judicial description of the symbolic activities actually affected, or the judicial description of symbolic activities conceivably affected. Although the Supreme Court has fashioned numerous diverse and detailed doctrines to specify the appropriate grounds on which to make the content-neutrality determination, there is so much of this doctrine and it is so obviously overlapping that ample room remains for disagreement among the Justices, the advocates, and the commentators about how to characterize and hence decide particular First Amendment cases. The result is that in the 1980s the First Amendment—especially in the area of religion—has followed the FOURTH AMENDMENT in an entropic proliferation of fragmentary, ephemeral, and highly bureaucratized doctrine.

In consequence, it has become easy for Justices to find ample legal resources to disagree about whether some particular government action is content-neutral. The result is that a government action that is described as content-based by one group of Justices will often be characterized as effect-based or form-based by another group of Justices. Often the Justices will disagree about whether—and if so, to what extent—the conceptual content of a symbolic activity is divisible from its form or effects. In making determinations about whether some government action is content-neutral and in deciding to what extent the conceptual content of symbolic activity is distinguishable from its form, there is virtually no guiding Supreme Court doctrine. The result is that the importance of political ideology in the production of the legal conclusions of the Justices has become relatively transparent in the First Amendment area.

In *Texas v. Johnson* (1989), for instance, the Court over-

turned the conviction of a flag burner on the ground that the FLAG DESECRATION statute was aimed at suppressing speech on the basis of its content. Counsel for Texas had argued that the statute was aimed at preserving the flag as a symbol of nationhood and national unity. The majority concluded that this state interest was an instance of content-based suppression because it singled out for punishment those messages at odds with what Texas claimed to be the flag's meaning. For the majority, the state interest was intricately related to the content-based suppression of certain ideas. The dissent by Chief Justice WILLIAM H. REHNQUIST (joined by Justice BYRON R. WHITE and Justice SANDRA DAY O'CONNOR), by contrast, viewed flag burning in less conceptual, less content-oriented terms. The dissent characterized flag burning as "a grunt and a roar"—not an essential part of the expression of ideas. Unlike the majority, these dissenters characterized the form and the content of the flag burner's protest as easily divisible. Indeed, the dissenters argued that the defendant could easily have chosen any number of vehicles other than flag burning to express his views. Accordingly, for the dissenters the Texas flag desecration statute merely removed one of these vehicles from the defendant's arsenal of available forms of expression.

This pattern of conflicting characterizations of state interests aimed at content, on the one hand, or form or effect, on the other, recurs frequently throughout the law of FREEDOM OF SPEECH and FREEDOM OF THE PRESS. For instance, in *American Booksellers Assn., Inc. v. Hudnut* (1986), Judge Frank Easterbrook of the Seventh Circuit Court of Appeals, struck down the Indianapolis version of an antipornography civil rights ordinance originally drafted by Catharine MacKinnon and Andrea Dworkin. The ordinance defined PORNOGRAPHY as the graphic sexually explicit subordination of women and provided various civil rights remedies for injured parties. The proponents of the ordinance emphasized the subliminal socializing effects of pornography. They described pornography as harmful in its institutionalization of a subordinate role and identity for women. The proponents of the ordinance thus emphasized the material, constitutive, and hence instantaneous manner in which pornography visits its injurious effects on women. Judge Easterbrook, however, characterized the ordinance as based on content viewpoint, for the ordinance had the explicit aim and effect of condemning the view that women enjoy pain, humiliation, rape, or other forms of degradation. Judge Easterbrook noted that the harmful effects of poronography, like the effects of political views, depend upon—and are indeed indivisible from—the conceptual content of pornography.

In the related context of zoning restrictions on adult theaters, the Court, in CITY OF RENTON V. PLAYTIME THEATERS, INC. (1986), upheld a zoning ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of a residential zone, church, park, or school—the effect being to exclude such theaters from approximately ninety-four percent of the land in the city. Writing for the Court, Chief Justice Rehnquist rejected the view that this ordinance was content-based and instead found that the "predominate intent" was to prevent undesirable secondary effects such as crime or decrease in property value. On the basis of this conception of predominant intent, the Chief Justice classified the zoning ordinance as one that did not offend the fundamental principle against content-based regulation. By contrast, Justice WILLIAM J. BRENNAN, dissenting with Justice THURGOOD MARSHALL, argued that the ordinance's exclusive targeting of adult motion picture theaters—theaters that exhibit certain kinds of motion pictures—demonstrated the absence of content neutrality. For the dissent, the content-based character of the regulation was further evidenced by indications of the city council's hostility to adult motion pictures and by the failure of the ordinance to target other activities that could conceivably give rise to the undesirable secondary effects.

These divergences among the judges and commentators are readily understandable, given that as yet no coherent basis has been provided to distinguish content-neutral from content-based regulation or to specify the extent to which content is divisible from form or effect in the various kinds of symbolic activities. The absence of a coherent basis for such a distinction permits political preferences concerning the speech at issue and the importance of governmental interests at stake to play a role, though not necessarily a determinative role, in the decisions of the courts.

The same kind of politicization, the same problem of distinguishing content-neutral from content-based regulation, and the same tendency to produce more complex context-specific doctrine has been evident in the Supreme Court's treatment of religion cases. In COUNTY OF ALLEGHENY V. ACLU (1989), for instance, the Court fragmented over the constitutionality of two religious displays on public property during the Christmas-Hanukkah season. One display was of a crèche; the other display exhibited a Christmas tree and a menorah. On the basis of some exceedingly fine distinctions, the various opinions established that the menorah exhibition was constitutional while the crèche was not.

The importance of the distinction between content, on the one hand, and form and effect, on the other, was especially evident in the judicial disagreement over the constitutionality of the crèche display. Writing at times for the Court, for a plurality, and for himself, Justice HARRY A. BLACKMUN concluded that the display of a crèche on public property during the Christmas season violated the ESTABLISHMENT CLAUSE because it endorsed a patently Christian

message. Focusing on the message conveyed by the display, Justice Blackmun noted that the crèche was accompanied by the words "Glory to God in the Highest" and that unlike the crèche in the case of LYNCH V. DONNELLY (1984), there was nothing in the context of the display to detract from the crèche's religious message. Accordingly, Justice Blackmun concluded that the government was endorsing a religious message in violation of the establishment clause. One group of dissenting and concurring justices, Justice ANTHONY M. KENNEDY, Justice White, and Justice ANTONIN SCALIA, rejected Justice Blackmun's establishment clause requirement of no government endorsement of religion. Turning away from an inquiry into the meaning of the government display of a crèche, this group of Justices focused attention on the effects of the crèche: they noted that there was no evidence of coerced participation in religion or religious ceremonies or of significant expenditures of tax money. On the whole then, the judicial disagreement here also organized itself around the determination of whether it is the conceptual meaning of the government action that matters or its forms and effect.

In the area of freedom of the press, the distinction between content-based and content-neutral regulation also plays an important role. In *Arkansas Writers' Project, Inc. v. Ragland* (1987) the Court found unconstitutional a state law that imposed taxes on general-interest magazines but exempted newspapers and religious, professional, trade, and sports journals. The Court found this selective taxation scheme particularly disturbing because the different treatment accorded to the various magazines depended upon their content. The dissent of Justice Scalia and Chief Justice Rehnquist, by contrast, focused on the form and the effects of the tax scheme. Noting that the tax scheme merely withheld an exemption from the disfavored magazines, the dissent refused to equate the denial of an exemption to regulation or penalty on the disfavored magazines. The dissent noted that unlike direct regulation or prohibition, the denial of a subsidy was unlikely to be coercive. Focusing next on the effects of the tax scheme, the dissent noted that the tax was so small that it would be unlikely to inhibit the disfavored magazines. The dissent closed by hinting that given the indivisibility of form from subject matter in written material, it would not be possible to insist on a principled—that is, neutral—basis to distinguish permissible from impermissible subsidization.

It would be an overstatement to say that all of First Amendment doctrine turns upon the distinction between content-based regulation, on the one hand, and form-based or effect-based regulation, on the other. But the distinction does play an important role in the jurisprudence of the First Amendment. And yet, despite the important role played by this distinction, the Court has failed thus far to provide any coherent interpretation of the distinction. Indeed, at times, individual Justices deny the very possibility of making such a distinction—as in the selective yet oft-repeated claim that in a given symbolic context, form and effect are indeed inseparable from content.

PIERRE SCHLAG
(1992)

(SEE ALSO: *Extremist Speech; Freedom of Assembly and Association; Freedom of Petition; Religious Liberty; Separation of Church and State.*)

Bibliography

BOLLINGER, LEE 1986 *The Tolerant Society.* New York: Oxford University Press.

GREENAWALT, KENT 1988 *Religious Convictions and Political Choice.* New York: Oxford University Press.

LEVY, LEONARD W. 1985 *Emergence of a Free Press.* New York: Oxford University Press.

——— 1986 *The Establishment Clause: Religion and the First Amendment.* New York: Macmillan.

SHRIFFRIN, STEVEN 1990 *The First Amendment, Democracy, and Romance.* Cambridge: Harvard University Press.

TRIBE, LAURENCE H. 1988 *American Constitutional Law*, 2nd ed. Pages 785–1061, 1154–1301. Mineola, N.Y.: Foundation Press.

## FIRST AMENDMENT
### (Update 2)

As a general matter, the Supreme Court has held that laws directly restricting the freedom of individuals to express particular messages because those messages might have harmful or undesirable effects are presumptively—perhaps conclusively—unconstitutional. Indeed, the Court has not upheld a direct restriction on speech because it might persuade readers or listeners to engage in criminal activity since DENNIS V. UNITED STATES (1951); it has not upheld a direct restriction on speech because the ideas expressed might provoke a HOSTILE AUDIENCE response since FEINER V. NEW YORK (1951); and it has never upheld a direct restriction on the publication of truthful information because its disclosure would interfere with public or private interests in keeping the information confidential.

This powerful presumption against content-based restrictions on the FREEDOM OF SPEECH derives from the Court's judgment that such laws are particularly likely to distort public debate, to be enacted for constitutionally "improper" reasons (such as hostility to or disagreement with the particular views suppressed), and to be defended in terms of considerations that are thought to be inconsis-

tent with the basic premises of the First Amendment (such as paternalism and intolerance). The paradigm of such a content-based restriction—"no person may criticize the war"—clearly illustrates each of these concerns.

Despite its strong presumption against content-based restrictions, the Court has upheld such restrictions in the special context of LOW-VALUE SPEECH. The low-value concept had its genesis in CHAPLINSKY V. NEW HAMPSHIRE (1942), where the Court stated in dictum:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Although some commentators have criticized the low-value concept as incompatible with First Amendment theory, the DOCTRINE is essential to a well-functioning system of free expression. Without such a safety valve, one of two unacceptable results would follow: Either the burden of justification imposed on regulations of high-value speech, such as pure political expression, would be diluted, or the very demanding standards applied to regulations of high-value speech would have to be applied to low-value speech, with the result that government would not be able to regulate speech that should appropriately be regulated.

But even if the concept of low-value speech is legitimate, two questions remain: What categories of speech are "of such slight social value as a step to truth" that they may appropriately be regulated, and what are the circumstances in which such regulation is permissible? To answer these questions, the Court has employed two devices. First, the Court strongly presumes that all speech is of high value, and is thus entitled to the full protection of the First Amendment, unless the Court is persuaded that the particular category of speech at issue should fairly be found to be of only low First Amendment value. Second, if the Court concludes that a particular category of speech is of only low value, it then employs a form of categorical balancing to define the specific circumstances in which speech falling within the category may be regulated.

Examples of categories of expression the Court has held to be of low First Amendment value are OBSCENITY, FIGHTING WORDS, COMMERCIAL SPEECH, INCITEMENT TO UNLAWFUL CONDUCT, false statements of fact, and threats. Although the Court has insisted that, under the First Amendment, there is no such thing as a false idea, it has recognized that false statements of fact do not affirmatively contribute to public discourse. It has therefore held that actions for LIBEL do not implicate First Amendment values to the same extent as other restrictions on speech. Such actions are thus constitutionally permissible so long as the effort to establish liability for false statements of fact does not have an inadvertent CHILLING EFFECT on free speech more generally. In NEW YORK TIMES V. SULLIVAN (1964), for example, the Court held that civil actions for libel brought by public officials are consistent with the First Amendment, but only if the plaintiff can prove that the publisher acted with knowledge of falsity or reckless disregard for the truth.

Similarly, in the incitement context the Court has held that express advocacy of law violation does not affirmatively contribute to public debate because such advocacy is inconsistent with the basic assumption of the First Amendment—that political change should be brought about through the democratic process rather than through force or violence. On the other hand, to avoid the potential that prosecutions for such advocacy could chill valuable expression, as occurred during the Communist era, the Court held in BRANDENBURG V. OHIO (1969) that even express advocacy of law violation cannot be punished unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

In the fighting words context, the Court has concluded that such expression, which consists of the use of personal epithets directed at a particular individual, can be restricted as low-value speech because it is more akin to a punch in the nose than an effort to communicate ideas. But to avoid the possibility that the doctrine might be used to suppress more valuable expression, the Court has sharply limited the fighting words concept to the use of insulting and provocative epithets that describe a particular individual and are addressed specifically to that individual in a face-to-face encounter. Even the most offensive insults will not fall within the doctrine if they are delivered in a public speech or in a publication, or if they describe a group rather than a particular individual.

In recent years, the Court has resisted efforts to add three additional categories to the list of low-value speech—HATE SPEECH, PORNOGRAPHY, and indecent speech. Hate speech has been defined in many ways. Perhaps the most useful definition characterizes as hate speech any persecutorial, hateful, and degrading expression that conveys a message of group inferiority about a historically oppressed group. The argument for treating such speech as low value is that it presents an idea so historically untenable and so tied to the perpetuation of violence and discrimination that it is properly treated as outside the realm of protected discourse. The objection to this argument is that, unlike the established categories of low-value expression, laws against hate speech proscribe the advocacy of particular ideas because those ideas are offensive or dangerous. In R.A.V. V. CITY OF ST. PAUL (1992),

the Court accepted this objection and invalidated an ordinance that prohibited the use of fighting words only if they are based on race, color, creed, religion, or gender. Although a restriction on all fighting words would be permissible, the Court held that this "narrower" restriction was an impermissible content-based discrimination against "those speakers who express views on disfavored subjects." As the Court observed, a racist could be punished for using racist fighting words under the ordinance, but a civil rights advocate could not be punished for using fighting words in response. The Court rejected the argument that this distinction could be sustained as an effort "to ensure the basic human rights of members of groups that have historically been subjected to discrimination."

The Court has long held that obscenity is of only low First Amendment value because such expression appeals primarily to the prurient interest in sex, depicts sex in a patently offensive manner, and lacks serious political, artistic, or scientific value. More recently, efforts have been made similarly to regulate pornography, which is defined as sexually explicit but nonobscene expression that graphically depicts women dehumanized as sexual objects or as sexual objects who enjoy pain, humiliation, or rape. The argument here is that whereas obscenity is concerned with morality and puritanism, pornography is concerned with oppression, discrimination, and violence. Although the categories of obscenity and pornography seem superficially similar, they are different in several important respects. Most importantly, obscenity, unlike pornography, cannot have any serious political, artistic, or scientific value; and pornography, unlike obscenity, expressly restricts a particular point of view—sexually explicit speech that portrays women as subordinate is forbidden, sexually explicit speech that portrays women as equal is permitted. For these reasons, in cases like *American Booksellers Association v. Hudnut* (1985), courts have generally rejected the argument that pornography can be characterized as low-value speech.

Finally, efforts have been made to restrict indecent speech, defined in various ways, but generally referring to expression that depicts sexual or excretory activities or organs in a patently offensive manner. Because this category reaches beyond obscenity, and is not limited to expression that appeals primarily to the prurient interest and lacks serious political, artistic, and scientific value, the Court has rejected the argument that indecent speech is of only low First Amendment value. In *Reno v. American Civil Liberties Union* (1997), for example, the Court held that a prohibition on indecent speech over the INTERNET violates the First Amendment. On the other hand, the Court has occasionally upheld more modest regulations of indecent expression. Thus, in FEDERAL COMMUNICATIONS COMMISSION V. PACIFICA FOUNDATION (1978), the Court upheld an FCC regulation that "channeled" the BROADCASTING of indecent profanity to hours in which minors are unlikely to be in the audience; in CITY OF RENTON V. PLAYTIME THEATRES (1986), the Court upheld a municipal ZONING regulation that excluded "adult" theaters from residential neighborhoods; and in *National Endowment for the Arts v. Finley* (1998), the Court upheld a federal statute that directed the NEA, in establishing procedures to judge the artistic merit of grant applications, to take into consideration "general standards of decency." In each of these cases, the Court rejected the notion that indecent speech is of low First Amendment value, but nonetheless strained to find a way to uphold the challenged regulation.

Although the precise contours of the low-value doctrine are subject to continuing exploration and debate, the doctrine plays a salutary role in First Amendment jurisprudence. Without it, the Court would have to test restrictions on political advocacy by the same standards it uses to test restrictions of obscenity and threats, or it would have to test restrictions of obscenity and threats by the same standards it uses to test restrictions on political advocacy. The low-value doctrine is better than either of those alternatives.

GEOFFREY R. STONE
(2000)

Bibliography

FRIED, CHARLES 1992 A New First Amendment Jurisprudence: A Threat to Liberty. *University of Chicago Law Review* 59:225–255.

MATSUDA, MARI 1989 Public Response to Racist Speech: Considering the Victim's Story. *University of Michigan Law Review* 87:2320–2359.

MACKINNON, CATHERINE 1985 Pornography, Civil Rights, and Speech. *Harvard Civil Rights and Civil Liberties Law Review* 20:1–54.

SUNSTEIN, CASS 1993 Democracy and the Problem of Free Speech. Cambridge, Mass.: Harvard University Press.

# FIRST CONGRESS

One year after the CONSTITUTIONAL CONVENTION OF 1787 adjourned, the Confederation Congress called the first federal elections. An overwhelming majority of Federalists were elected to this First Congress, which was expected to function as a quasi-constitutional convention. The tasks facing the new Congress were formidable because, according to Congressman JAMES MADISON, the legislators would be traveling "in a wilderness without a single footstep to guide" them. If Congress acted wisely, however, Madison felt that its "successors [would] have an easier task."

Not surprisingly, experienced men were selected to

serve in the new Congress. Eleven of the first senators and nine congressmen had been delegates to the federal convention, and fourteen senators and twice as many congressmen had served in state ratifying conventions. GEORGE WASHINGTON told Lafayette that the new Congress "will not be inferior to any Assembly in the world."

The whole country anxiously anticipated the meeting of Congress at Federal Hall in New York City on March 4, 1789. However, much to the chagrin of Federalists, neither house had a quorum on the appointed day. Almost a month elapsed before the HOUSE OF REPRESENTATIVES attained a quorum on April 1, followed five days later by the SENATE; at this time, a joint session of Congress performed its constitutionally assigned function of counting the presidential electoral votes. George Washington was declared President by a unanimous vote, while JOHN ADAMS, a distant second, was proclaimed vice president. Messengers were sent to Washington and Adams as Congress made plans for their reception and inauguration.

Early in April the House elected Frederick A. Muhlenberg of Pennsylvania speaker and John Beckley of Virginia clerk. The Senate elected JOHN LANGDON of New Hampshire president pro tempore and Samuel A. Otis of Massachusetts secretary. The House voted to hold open sessions except on sensitive matters such as Indian or military policy, whereas the Senate chose to keep its sessions closed. Two delegations came to the House under a cloud; opponents formally contested the elections of William Loughton Smith of South Carolina and the entire New Jersey delegation. Acting under Article I, section 5, of the Constitution, the House investigated the elections and declared that Smith and the New Jersey congressmen had been duly elected. The Senate, acting under Article I, section 3, drew lots to determine which senators would have initial terms of two, four, or six years that would give the Senate its distinctive staggered election every second year.

A week before Washington's inauguration, the Senate debated the titles to be given the President and vice president. Advocates of grandiose titles, such as "His Highness the President of the United States of America, and Protector of their Liberties," felt that the new republic needed such titles to command the respect of European nations. The House, however, disagreed, and the first conference committee settled the matter when the Senate agreed to the simple title of "Mr. President." The debate set the tone for the new government and symbolically marked a clear break with monarchy.

As expected, the House of Representatives initiated most legislation and the Senate became primarily a revisory body. The House proposed 143 bills to the Senate's 24. Except for the JUDICIARY ACT OF 1789, the Residency bill, and the act establishing the postmaster general, all major legislation originated in the House. Because neither house established a system of standing committees, each bill was submitted to an ad hoc committee that drafted legislation which was then considered by the committee of the whole.

The first bill enacted by Congress required all federal and state officials to take an oath to support the new Constitution. Within two years, Congress created the executive departments, provided for the federal judiciary, set the country's finances in order, proposed a federal BILL OF RIGHTS, approved a federal tariff, reenacted the NORTHWEST ORDINANCE, took over the states' lighthouses, and passed legislation for NATURALIZATION and COPYRIGHTS and PATENTS.

Early in Congress's first of three sessions, James Madison notified the House that he intended to introduce amendments to the Constitution. With little support from other congressmen who thought that the consideration of amendments was premature, Madison persevered; and on August 24, the House sent seventeen amendments in the form of a bill of rights to the Senate. The Senate combined some of Madison's amendments, tightened the language of others, and eliminated the amendments prohibiting the states from infringing on the freedoms of conscience, speech, and press and the right to jury trial. On September 25, 1789, Congress approved twelve of Madison's amendments, which were sent to the states for their legislatures to adopt.

Unquestionably, the most controversial issues during the First Congress centered on the secretary of the treasury's *Report on Public Credit*. In his report ALEXANDER HAMILTON proposed the funding of the federal debt, the federal assumption of the states' debts, the levying of an excise on distilled spirits, and the incorporation of a federal bank. No one denied the responsibility of the federal government to pay its own debt; however, some congressmen, led by Madison, opposed paying the debt at face value to speculators who had over the years accumulated a large percentage of the outstanding federal securities at greatly depreciated prices. Madison advocated paying speculators only a fraction of the face value of their holdings while providing partial compensation to the original holders. Madison also led the fight against other aspects of Hamilton's plan, arguing that the Constitution gave Congress no authority to take over the states' debts or to create a bank. To a great extent, the debate over these issues centered over a strict or broad interpretation of the Constitution. Did Congress only have delegated powers or, as Hamilton argued, did the NECESSARY AND PROPER CLAUSE allow Congress to exercise implied powers? President Washington agreed with Hamilton's broader interpretation and refused to veto the bank bill. Madison, in fact, had earlier compromised his strict interpretation of the Constitution by supporting the federal assumption of

state debts in exchange for northern support for the movement of the federal capital from New York City, first to Philadelphia for ten years, and then permanently to a site on the banks of the Potomac River.

Precedents were also set by the First Congress in establishing the relationship between the Senate and the President. With some hesitation, the Senate welcomed President Washington to its chamber as he presented the Treaty of New York with the Creek Nation for ratification. The Senate felt uncomfortable with the executive waiting in its chamber for an immediate adoption of the treaty, and the President disliked the Senate's insistence on examining the treaty in greater detail. Washington vowed never again to present a treaty in person. Except in one case, the Senate confirmed Washington's appointments. A protracted debate occurred over the President's power to dismiss department heads without the Senate's approval. The controversy ended when John Adams broke a tie vote on a motion to strike wording from a foreign-relations bill giving the President the right of removal. By not specifying this right in terms of a congressional grant, Congress strengthened the presidency while restricting the Senate's executive power.

In two short years the new Congress had assuaged the fears of Anti-Federalists and stifled their attempts to call a second constitutional convention. Congress had breathed life into the new Constitution, set legislative precedents, created a structure of government, enacted the first phases of Hamilton's financial plan, and established working relationships between its two houses, between itself and the other two branches of the federal government, and between the federal government and the states. The actions of the First Congress, particularly its handling of the financial morass left by the Revolution, divided the new nation economically and ideologically and set the groundwork for the first nationwide political parties. John Trumbull wrote to Vice President Adams that "In no nation, by no Legislature, was ever so much done in so short a period for the establishing of Government, order public Credit & general tranquility." It was an auspicious beginning.

JOHN P. KAMINSKI
(1992)

Bibliography

BAKER, RICHARD ALLAN 1989 The Senate of the United States: "Supreme Executive Council of the Nation," 1787–1800. *Prologue* 21:299–313.

BICKFORD, CHARLENE BANGS and BOWLING, KENNETH R. 1989 *Birth of the Nation: The First Federal Congress 1789–1791.* Madison, Wis.: Madison House.

SILBEY, JOEL H. 1987 "Our Successors Will Have an Easier Task": The First Congress under the Constitution, 1789–1791. *This Constitution* 17:4–10.

SMOCK, RAYMOND W. 1989 The House of Representatives: First Branch of the New Government. *Prologue* 21:287–297.

# FIRST CONTINENTAL CONGRESS, DECLARATIONS AND RESOLVES OF

(October 1, 1774)

The Coercive or Intolerable Acts, passed by Parliament in 1774, threatened colonial self-government. The Boston Port Act sought to starve Boston into paying a tax on tea and making reparations for the "Boston Tea Party." The Massachusetts Government Act altered the charter of the colony: it stripped the lower house of power to choose the upper house, which became the creature of the royal governor; it took from the town meetings the power to choose jurors and vested that power in sheriffs appointed by the governor; and it banned all town meetings not approved by the governor. The Administration of Justice Act allowed the governor to transfer to England trials involving the enforcement of revenue acts. The Quartering Act and the Quebec Act also contained provisions deemed reprehensible by many colonists.

To decide on measures for the recovery of American liberties, delegates from all colonies but Georgia assembled in Philadelphia. After defeating the plan of union proposed by JOSEPH GALLOWAY, the congress adopted a statement that defined the American constitutional position on the controversies with Parliament. Congress grasped a rudimentary principle of FEDERALISM, asserted various American rights, and condemned as "unconstitutional" the Coercive Acts and all the acts by which Parliament sought to raise a revenue in America. Rejecting Parliament's claim of unlimited power to legislate for America, the congress repudiated TAXATION WITHOUT REPRESENTATION and any parliamentary governance over "internal polity" but recognized Parliament's power to regulate "external commerce." Congress also grounded American rights, for the first time, in "the immutable laws of nature" as well as the British CONSTITUTION and COLONIAL CHARTERS. Among the rights claimed were free government by one's own representatives, TRIAL BY A JURY of the VICINAGE according to the COMMON LAW, FREEDOM OF ASSEMBLY and petition (holding town meetings), freedom from standing armies in time of peace, and, generally, the rights to life, liberty, property, and all the liberties of English subjects. The document was a forerunner of the first state bills of rights.

LEONARD W. LEVY
(1986)

Bibliography

BURNETT, EDMUND CODY 1941 *The First Continental Congress.* Pages 33–59. New York: Macmillan.

## *FIRST NATIONAL BANK OF BOSTON v. BELLOTTI*
435 U.S. 765 (1978)

Although the Supreme Court had extended FIRST AMENDMENT protections to newspapers that were organized as CORPORATIONS, this was the first case to hold explicitly that the FREEDOM OF SPEECH was not a "purely personal" right such as the RIGHT AGAINST SELF-INCRIMINATION and so might be claimed by corporations. In this case and in VIRGINIA STATE BOARD OF PHARMACY V. VIRGINIA CITY CONSUMER COUNCIL (1976), the Justices adopted the position that where there is a willing speaker, he may be protected by the First Amendment not so much because of his own speech interest but because of the societal interest in maximizing the stock of information upon which the public may draw. Thus a banking corporation was held to have speech rights because limiting its speech would limit the electorate's access to vital information.

After defeat of a REFERENDUM authorizing a personal income tax, which was attributed by some to corporation-funded advertising, Massachusetts adopted a statute forbidding a corporation to spend money for the purpose of influencing the vote on referenda not directly affecting the corporation, including referenda on individual income taxation. In the face of this obvious attempt of protax legislators to muzzle their opponents, Justice LEWIS F. POWELL for the Court had little trouble concluding under a BALANCING TEST that the asserted state interests in preserving the integrity of the electoral process were not compelling and that the statute was not narrowly drawn to protect the interests of stockholders.

The dissent by Justices BYRON R. WHITE, WILLIAM J. BRENNAN, and THURGOOD MARSHALL sounds the theme of a legitimate state interest in limiting the influence of money on elections raised in BUCKLEY V. VALEO (1976). Justice WILLIAM H. REHNQUIST dissented alone on STATES' RIGHTS grounds.

With the recognition of corporate speech rights and the recognition of some First Amendment protection for COMMERCIAL SPEECH, the Court set the stage for a whole new area of freedom-of-speech jurisprudence, particularly in the light of the high levels of corporate institutional and issue advertising engendered by environmental, energy, and deregulation policies. Among the difficult problems are the rights of stockholders who oppose advertised corporate stances and the extent to which laws against false and misleading advertising constitutionally can be applied to advertisements that do more than offer a product for sale.

MARTIN SHAPIRO
(1986)

## FIRST WORLD WAR

See: World War I

## FISHER, SYDNEY GEORGE

See: Commentators on the Constitution

## FISKE, JOHN
(1842–1901)

A conservative Yankee educated at Harvard, where he later taught, John Fiske was a man of letters who published about a book a year, as many on science, philosophy, and religion as on history. He was essentially a great popularizer. His books were captivatingly written, bold in interpretation, and widely read. His most influential work as a historian was *The Critical Period in American History, 1783–1789* (1888), which vividly depicted the weaknesses and deficiencies of the United States under the ARTICLES OF CONFEDERATION. For Fiske the Constitution was "a Fifth Symphony of statesmanship" that saved the nation from Balkanizing into petty states.

LEONARD W. LEVY
(1986)

## *FITZPATRICK v. BITZER*
427 U.S. 445 (1976)

This case concerned Congress's power to modify states' ELEVENTH AMENDMENT immunity from suit in federal court. In the 1972 amendments to Title VII of the CIVIL RIGHTS ACT OF 1964, Congress extended Title VII to forbid employment discrimination by state employers. In *Fitzpatrick*, in an opinion by Justice WILLIAM H. REHNQUIST, the Court held that Congress, in exercising its FOURTEENTH AMENDMENT powers, and despite the Eleventh Amendment, could subject states to suit in federal courts for discriminatory behavior. *Fitzpatrick* was an important counterpoint to *Employees v. Department of Public Health and Welfare* (1973) and EDELMAN V. JORDAN (1974), cases that had held that other federal statutes were not meant to abrogate the states' Eleventh Amendment immunity.

THEODORE EISENBERG
(1986)

## FITZSIMONS, THOMAS
(1741–1811)

An Irish-born Roman Catholic and a successful merchant, Thomas FitzSimons signed the Constitution as a Pennsylvania delegate to the CONSTITUTIONAL CONVENTION OF 1787. He spoke infrequently and always in favor of a strong national government to foster and regulate commerce. He served in the first three Congresses under the Constitution, where he supported ALEXANDER HAMILTON'S policies.

DENNIS J. MAHONEY
(1986)

## FIVE KNIGHTS' CASE

See: Petition of Right

## FLAG BURNING

See: Flag Desecration

## FLAG DESECRATION

The American flag, as a unique symbol embodying national pride and patriotism, evidences the unity and diversity which the country represents, and the varying ideals and hopes of its people. By the same token, the flag has frequently been used by those who wish to communicate opposition to—or even ridicule of—government policies.

Congress has enacted statutes that prescribe how the flag may be displayed and disposed of, and how and for what purposes it may be used. Many state laws prohibit flag "desecration" (casting "contempt" on a flag by "mutilating, defacing, defiling, burning or trampling upon" it) and "improper use" of flags (placing on a flag "any word, figure, mark, picture, design, drawing or advertisement").

In *Halter v. Nebraska* (1907) the Supreme Court upheld a state statute prohibiting flag desecration and use of the flag for advertising purposes. But that decision was rendered twenty years before the Court applied the FIRST AMENDMENT to the States, and it was not dispositive when protesters later challenged the constitutionality of flag desecration statutes.

In *Smith v. Gorguen* (1973), the Court reversed a conviction for wearing an American flag on the seat of the pants, ruling that the Massachusetts flag desecration statute was void for VAGUENESS. In *Spence v. Washington* (1974) the Court invalidated a Washington statute prohibiting the affixing of a symbol to the flag, holding that the display of a flag with a peace symbol superimposed on it was protected free expression. The *Spence* decision was consistent with other cases in which the Supreme Court recognized SYMBOLIC SPEECH as a form of activity protected by the First Amendment. On the other hand, the Court has upheld statutes forbidding flag burning, concluding as in *Sutherland v. Illinois* (1976) that they rested on a "valid governmental interest unrelated to expression—that is, the prevention of breaches of the peace and the preservation of public order."

NORMAN DORSEN
(1986)

## FLAG DESECRATION
(Update)

The word "desecration" has religious overtones. It means defiling the sacred. Flag burning is the secular equivalent of the offense of BLASPHEMY, a verbal crime signifying an attack, by ridicule or rejection, against God, the Bible, Jesus Christ, Christianity, or religion itself. Flag burning is comparable to a verbal attack on the United States. Burning the nation's symbol signifies contempt and hatred by the flag burner of the things he or she believes the flag stands for, such as colonialism, imperialism, capitalism, exploitation, racism, or militarism. To the overwhelming majority of Americans, however, the flag embodies in a mystical and emotional way the loyalty and love they feel for the United States. With few exceptions we venerate the flag because it symbolizes both our unity and diversity; our commitment to freedom, equality, and justice; and perhaps above all, our constitutional system and its protection of individual rights.

Like blasphemy, therefore, flag burning tests the outermost limits of tolerance even in a free society. Burning the flag is a most offensive outrage that stretches to the breaking point the capacity of a nation to indulge dissidents. But that same form of desecration is not only an act of vandalism; it is symbolic expression that claims the protection of the free speech clause of the FIRST AMENDMENT. Therein lies the problem and the paradox: should the flag represent a nation whose people have a right to burn its revered symbol?

Imprisoning flag burners would not mean that book burning and thought control are next. We know how to distinguish vandalism from radical advocacy; we would not regard urinating on the Jefferson Memorial or spray painting graffiti on the Washington Monument as a form of constitutionally protected free speech. Special reasons exist for protecting the flag from the splenetic conduct of extremists. A society should be entitled to safeguard its most fundamental values, but dissenters have a right to express verbal opposition to everything we hold dear. Yet,

nothing is solved by saying that it is better to live in a country where people are free to burn the flag if they wish, rather than in a country where they want to burn it but cannot. We know the difference between suppressing a particularly offensive mode of conduct and a particularly offensive message. The problem is, however, that the particular mode of conduct may be the vehicle for communicating that offensive message. To suppress the message by suppressing the conduct involves governmental abridgment of a First Amendment freedom. So the Supreme Court held in *Texas v. Johnson* in 1989.

In 1984 in Dallas, Gregory Johnson, a member of the Revolutionary Communist Youth Brigade, a Maoist society, publicly burned a stolen American flag to protest the renomination of RONALD REAGAN as the Republican candidate. While the flag burned, the protesters, including Maoists, chanted, "America, the red, white, and blue, we spit on you." That the flag burning communicated an unmistakable political message was contested by no one. The police arrested Johnson not for his message but for his manner of delivering it; he had violated a Texas statute that prohibited the desecration of a venerated object by acts that seriously offended onlookers.

State appellate courts reversed Johnson's conviction on ground that his conduct constituted constitutionally protected SYMBOLIC SPEECH. Given its context—the Republican convention; Reagan's foreign policy; the protestors' demonstrations, marches, speeches, and slogans—Johnson's burning the flag was clearly speech of the sort contemplated by the First Amendment. The Texas courts also rejected the state's contention that the conviction could be justified as a means of preventing breach of the public peace. In fact, the state admitted that no BREACH OF THE PEACE occurred as a result of the flag desecration. The Supreme Court, 5–4, affirmed the judgment of the Texas Court of Criminal Appeals.

Justice WILLIAM J. BRENNAN, spokesman for the majority, showed his political savvy by emphasizing that the courts of the Lone Star State, where red-blooded John Wayne patriotism flourishes, recognized "that the right to differ is the centerpiece of our First Amendment freedoms." Government cannot mandate a feeling of unity or "carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol." Brennan added that although the First Amendment literally forbids the abridgment of only "speech," the Court had labeled as speech a variety of conduct that communicated opinions, including the wearing of black arm bands to protest war, a sit-in by blacks to protest racial segregation, picketing, and the display of a red flag. Indeed the state conceded that Johnson's conduct was politically expressive. The question was whether that expression could be constitutionally proscribed, like the use of FIGHTING WORDS calculated to provoke a breach of peace. Apart from the fact that no breach occurred here, Brennan reminded, a prime function of free speech is to invite dispute. The "fighting words" doctrine had no relevance in this case because the message communicated by flag burning did not personally insult anyone in particular.

Whether the state could justify the conviction as a means of preserving the flag as a symbol of nationhood and national unity depended on the communicative impact of the mode of expression. Brennan insisted that the restriction on flag desecration was "content-based." Johnson's political expression, he declared, was restricted because of the content of the message that he conveyed. This point is important and unpersuasive. As Chief Justice WILLIAM H. REHNQUIST for the dissenters said, burning the flag was no essential part of the exposition of ideas, for Johnson was free to make any verbal denunciation of the flag that he wished. He led a march through the streets of Dallas, conducted a rally on the front steps of the city hall, shouted his slogans, and was not arrested for any of this. Only when he burned the flag was he arrested. Texas did not punish him because it or his hearers opposed his message, only because he conveyed it by burning the flag.

Brennan replied that by punishing flag burning the state prohibited expressive conduct. "If there is a bedrock principle underlying the First Amendment," he wrote, "it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." By making an exception for the flag, Texas sought to immunize the ideas for which it stands. Whatever it stands for should not be insulated against protest. In the context of this case, the act of flag burning constituted a means of political protest. Compulsion is not a constitutionally accepted method of achieving national unity.

Brennan believed that the flag's deservedly cherished place as a symbol would be "strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength." This was the Court's strongest point.

*Texas v. Johnson* provided Court watchers with the pleasure of seeing judicial objectivity at work, for the Court did not divide in a predictable way. The majority included Justices ANTONIN SCALIA and ANTHONY M. KENNEDY, Reagan-appointed conservatives, whereas the dissenters included Justice JOHN PAUL STEVENS, a liberal moderate. Stevens wrote his own dissent. He believed, oddly, that public desecration of the flag "will tarnish its value." He also thought that the Texas statute that the Court struck down did not compel any conduct or profession of respect for any idea or symbol. The case had nothing to do with

disagreeable ideas, he said; it involved offensive conduct that diminishes the value of the national symbol. Texas prosecuted Johnson because of the method he used to express dissatisfaction with national policies. Prosecuting him no more violated the First Amendment than prosecuting someone for spray painting a message of protest on the Lincoln Memorial.

Rehnquist's dissent was suffused with emotional theatrics about the flag and patriotism. His point was that the flag was special, as two hundred years of history showed. Even if flag burning is expressive conduct, he reasoned, it is not an absolute. But he thought it not to be expressive conduct. Flag burning was no essential part of any exposition of ideas, he claimed, but rather was "the equivalent of an inarticulate grunt" meant to antagonize others. By the same reasoning, however, one might say that flag flying is also a grunt of patriotism. That does not alter the point that flag burning is malicious conduct—vandalism rather than speech.

Zealous politicians, eager to capitalize on their love for the flag and opposition to those who burned it, sought to gain political advantage from the Court's opinion. President GEORGE BUSH, a war hero, had helped spur a paroxysm of patriotism in 1988 by assaulting his opponent for having vetoed a bill that would have compelled teachers to lead their students in a Pledge of Allegiance every day. Bush, having made a photo opportunity of visiting a flag factory in 1988, made another after the decision in *Texas v. Johnson*, by holding a ceremony in the White House rose garden. Accepting a replica of the Iwo Jima Memorial, depicting the marines hoisting the flag on a bloody wartime site, Bush condemned flag burning as a danger to "the fabric of our country" and demanded a constitutional amendment outlawing desecration of the flag.

Cynical observers shouted "cheap politics" and criticized the President and his supporters for trying to cover up problems concerning the savings and loan scandals, the deterioration of the nation's schools, the ballooning national debt, the urban underclass, and the army of homeless beggars in American cities. Bush's opponents declared that he sought to desecrate the Constitution by indulging in escapist politics and seeking the first revision of the BILL OF RIGHTS in two centuries. Many conservatives in Congress agreed that tampering with the Bill of Rights was not the way to treat the problem of flag burning. Democrats, who felt obligated to "do something" at the risk of being branded unpatriotic, offered the Flag Protection Act of 1989, and so headed off the amendment movement. The new act of Congress provided that whoever knowingly mutilates, defaces, physically defiles, or burns the flag shall be fined or imprisoned for a year, or both.

Members of the "lunatic left" promptly defied the act of Congress by burning the flag on the Capitol steps for the benefit of the TV cameras. Shawn Eichman and company got the publicity they wanted and were arrested. They quickly filed motions to dismiss, on grounds that the act of Congress was unconstitutional; that is, the flag they burned symbolized their freedom to burn it. The government asked the Supreme Court to reconsider its holding in *Texas v. Johnson* by holding that flag burning is a mode of expression, like fighting words, that does not enjoy complete protection of the First Amendment.

The Court, by the same 5–4 split, refused to alter its opinion. Brennan, again the majority spokesman, acknowledged that the government may create national symbols and encourage their respectful treatment, but concluded that it went too far with the Flag Protection Act "by criminally proscribing expressive conduct because of its likely communicative impact." Desecrating the flag was deeply offensive to many people, like virulent racial and religious epithets, vulgar repudiations of conscription, and scurrilous caricatures, all of which came within the First Amendment's protection, notwithstanding their offensiveness.

The government sought to distinguish the Flag Protection Act from the state statute involved in *Johnson*, on the theory that the act of Congress did not target expressive conduct on the basis of the content of its message. The government merely claimed its authority to protect the physical integrity of the flag as the symbol of our nation and its ideals. Brennan replied that destruction of the flag could in no way affect those ideals or the symbol itself. The invalidity of the statute derived from the fact that its criminal penalties applied to those whose treatment of the flag communicated a message. Thus, *United States v. Eichman*, resulting in the voiding of the act of Congress, was a replay of *Johnson*.

Stevens, for the dissenters, recapitulated his previous contentions. He believed that the majority opinion concluded at the point where analysis of the issue ought to begin. No one, he declared, disagreed with the proposition that the government cannot constitutionally punish offensive ideas. But, he argued, certain methods of expression, such as flag burning, might be proscribed if the purpose of the proscription did not relate to the suppression of ideas individuals sought to express, if that proscription did not interfere with the individual's freedom to express those ideas by other means, and if on balance the government's interest in the proscription outweighed the individual's choice of the means of expressing themselves. Stevens expatiated on the flag as a symbol and insisted that the government should protect its symbolic value without regard to the specific content of the flag burner's speech. Moreover, Eichman and the other dissidents were completely free to express their ideas by means other than flag burning. Stevens apparently missed the point that Eich-

man had a right to choose his own means of communicating his political protest. What disturbed Stevens most was the belief that flag burners actually have damaged the symbolic value of the flag. And he added the following in a veiled allusion to the shenanigans of would-be amenders of the Constitution: "Moreover, the integrity of the symbol has been compromised by those leaders who seem to advocate compulsory worship of the flag even by individuals whom it offends, or who seem to manipulate the symbol of national purpose into a pretext for partisan disputes about meaner ends."

Every nation in the world has a flag, and many of them, including some democracies, have laws against desecrating their flag. No other nation has our Bill of Rights. The year 1991 marked the 200th anniversary of its ratification. It requires no limiting amendment. The American people understand that they are not threatened by flag burners, and the American people prefer the First Amendment undiluted. They understand that imprisoning a few extremists is not what patriotism is about. Forced patriotism is not American. Flag burning is all wrong, but a lot of wrongheaded speech is protected by the Constitution. When the nation celebrated the bicentennial of the Bill of Rights, it celebrated a wonderfully terse, eloquent, and effective summation of individual freedoms. Time has not shown a need to add "except for flag burners." That exception, as the Court majority realized, might show that the nation is so lacking in faith in itself that it permits the Johnsons and Eichmans to diminish the flag's meaning. They are best treated, as Brennan urged, by saluting the flag that they burn or by ignoring them contemptuously.

LEONARD W. LEVY
(1992)

Bibliography

GREENAWALT, KENT 1990 O'er the Land of the Free: Flag Burning as Speech. *UCLA Law Review* 37:925–947.

KMIEC, DOUGLAS W. 1990 In the Aftermath of *Johnson* and *Eichman*. *Brigham Young University Law Review* 1990:577–638.

## *FLAGG BROS., INC. v. BROOKS*
436 U.S. 149 (1978)

*Brooks* is one of a series of BURGER COURT decisions reestablishing the STATE ACTION limitation as a barrier to judicial enforcement of FOURTEENTH AMENDMENT rights against private persons acting under state authority. The Uniform Commercial Code, as adopted in New York, authorizes a warehouse operator to sell goods stored in order to pay overdue warehousing charges. This notion of a "warehouseman's lien" is an ancient COMMON LAW remedy. When Brooks and her family were evicted from their apartment, a city marshal had her goods stored with Flagg Bros. Ten weeks later, Flagg Bros. wrote to Brooks, demanding payment of storage charges and threatening to sell her goods to satisfy the charges accrued. Brooks brought a CLASS ACTION against Flagg Bros. for damages and injunctive relief under federal CIVIL RIGHTS laws claiming DUE PROCESS and EQUAL PROTECTION violations. (See Injunction.) The Supreme Court held, 5–3, that the proposed sale did not amount to state action; thus there had been no constitutional violation.

Justice WILLIAM H. REHNQUIST wrote for the majority, as he had done in other recent cases strengthening the state action limitation. The proposed sale did not fit the "public function" DOCTRINE of state action (here renamed the "sovereign function" doctrine), because the function of dispute resolution historically had not been the exclusive province of the states. Nor had the state authorized or encouraged the use of this creditor's remedy in such a way as to take responsibility for its exercise. The Uniform Commercial Code "permits but does not compel" a warehouse operator's threat to sell goods stored and merely announces the circumstances in which the state will not intervene with that private sale.

Justice WILLIAM J. BRENNAN did not participate in the decision. Justice JOHN PAUL STEVENS dissented, joined by Justices BYRON R. WHITE and THURGOOD MARSHALL. The distinction between state permission and state compulsion was untenable, Stevens argued; on the Court's theory, for example, the state could "announce" its intention not to intervene when a finance company entered a private home to repossess property, with no finding of state action. He also argued persuasively that the "exclusive sovereign function" notion had no basis in the Court's prior decisions. What the state had done here was to "order binding, nonconsensual resolution of a conflict between debtor and creditor"—which is "exactly the sort of power with which the Due Process Clause is concerned."

KENNETH L. KARST
(1986)

## FLAG SALUTE CASES
*Minersville School District v. Gobitis*
310 U.S. 586 (1940)
*West Virginia Board of Education v. Barnett*
319 U.S. 624 (1943)

The Supreme Court's encounter in the early 1940s with the issue of compulsory flag salute exercises in the public schools was one of the turning points in American consti-

tutional history. It presaged the civil libertarian activism that culminated in the WARREN COURT of the 1960s.

The flag salute ceremony developed in the latter half of the nineteenth century. In the original ceremony the participants faced the flag and pledged "allegiance to my flag and the republic for which it stands, one nation indivisible, with liberty and justice for all." While repeating the words "to my flag" the right hand was extended palm up toward the flag. Over the years the ceremony evolved slightly, with minor changes of wording and with the extended arm salute dropped in 1942 because of its similarity to the Nazi salute. At this point in its evolution, however, the salute had official standing; Congress had prescribed the form of words and substituted the right hand over the heart for the extended arm.

Beginning in 1898 with New York, some states began requiring the ceremony as part of the opening exercise of the school day. The early state flag salute laws did not make the ceremony compulsory for individual pupils, but many local school boards insisted on participation. Many patriotic and fraternal organizations backed the flag salute; opposition came from civil libertarians and some small religious groups. The principal opponents of the compulsory school flag salute were the Jehovah's Witnesses, a tightly knit evangelical sect whose religious beliefs commanded them not to salute the flag as a "graven image."

The Witnesses were blessed with legal talent. "Judge" Joseph Franklin Rutherford, who had become head of the sect, brought in Hayden Covington, who, as chief counsel for the Witnesses in the *Gobitis* litigation and in many other cases influenced the development of First Amendment doctrine.

The first flag salute case to reach the Supreme Court came out of Minersville, a small community in northwest Pennsylvania. Because of Rutherford's bitter opposition to required flag salute exercises, Lillian and William Gobitis stopped participating in the ceremony in their school and were expelled.

The argument for the Gobitis children was that requiring them to salute the flag, an act repugnant to them on religious grounds, denied that free exercise of religion protected against state action by the DUE PROCESS clause of the FOURTEENTH AMENDMENT. Arguments for the Minersville School Board relied on REYNOLDS V. UNITED STATES (1878), JACOBSON V. MASSACHUSETTS (1905), and the doctrine that a religious objection did not relieve an individual from the responsibility of complying with an otherwise valid secular regulation. The Gobitis children won in the lower federal courts, but the Supreme Court granted CERTIORARI.

The Court in the spring of 1940 had a very different cast from that which had survived FRANKLIN D. ROOSEVELT's effort to "pack" it three years before. Of the hard-core, pre-1937 conservatives only Justice JAMES C. MCREYNOLDS remained. Chief Justice CHARLES EVANS HUGHES and Justices HARLAN F. STONE and OWEN J. ROBERTS also remained. With them, however, were five Roosevelt appointees: FELIX FRANKFURTER, HUGO L. BLACK, WILLIAM O. DOUGLAS, STANLEY F. REED, and FRANK MURPHY. On three previous occasions the Court had sustained compulsory flag salutes against religious objection in PER CURIUM opinions. Whether because of the extraordinary persistence of the Jehovah's Witnesses or because of the nonconformance of the lower federal courts in this case, the Justices now gave the matter full dress consideration.

Speaking for the majority Justice Frankfurter concluded that "conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the persecution or a restriction of religious beliefs."

To Justice Stone, dissenting, the crucial issue was that the Gobitis children were forced to bear false witness to their religion. The flag salute compelled the expression of a belief, and "where that expression violate[d] religious convictions," the free exercise clause provided protection.

The reaction to the decision in the law reviews was negative. In the popular press the reaction was mixed but criticism predominated. Most important, the decision seems to have produced a wave of persecution of Jehovah's Witnesses which swept through the country. *Gobitis* emboldened some school authorities. The State Board of Education of West Virginia in January 1942 made the salute to the flag mandatory in the classrooms of that state.

Meanwhile, new decisions of the Supreme Court, notably the 5–4 division of the Justices in *Jones v. Opelika*, raised the hopes of opponents of the mandatory flag salute. Hayden Covington sought an INJUNCTION barring enforcement of West Virginia's new rule against Walter Barnett and other Jehovah's Witness plaintiffs. After a three-judge District Court issued an injunction, the State Board of Education appealed to the Supreme Court.

The case was argued on March 11, 1943, and the decision came down on June 14. Justice ROBERT H. JACKSON, who had joined the Court after *Gobitis*, wrote for a 6–3 majority, overruling the prior decision. Chief Justice Stone was with Jackson, as were Justices Douglas, Black, and Murphy, who had changed their minds. Justice Frankfurter, the author of *Gobitis*, wrote a long and impassioned dissent.

For Justice Jackson and the majority the crucial point was that West Virginia's action, while not intended either to impose or to anathematize a particular religious belief, did involve a required affirmation of belief: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be or-

thodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia was pursuing the legitimate end of enhancing patriotism, but had not borne the heavy burden of justifying its use of coercive power.

Justice Frankfurter began his dissent by noting that were the matter one of personal choice he would oppose compulsory flag salutes. But it was not for the Court to decide what was and was not an effective means of inculcating patriotism. West Virginia had neither prohibited nor imposed any religious belief. For Frankfurter this fact was controlling, and he reminded his brethren that a liberal spirit cannot be "enforced by judicial invalidation of illiberal legislation."

*Barnett* was a landmark decision in the strict sense of that overworked word. By 1943 the Roosevelt Court had largely completed its task of dismantling the edifice of SUBSTANTIVE DUE PROCESS erected by its predecessors to protect economic liberty. Now the Court set out on the path to a new form of JUDICIAL ACTIVISM in the service of individual rights. *Barnett* was the first long step on that path.

*Barnett* had doctrinal significance both for FREEDOM OF SPEECH and for RELIGIOUS LIBERTY. Jackson's opinion suggested that there were significant limitations on the kinds of patriotic affirmations that government might require, and the decision also moved away from the "secular regulation" rule that had dominated free exercise doctrine.

*Barnett* also had a significant effect on the Supreme Court. Justice Frankfurter was deeply offended by the majority's treatment of his *Gobitis* opinion and even more alarmed at what he regarded as a misuse of judicial power. The split between the activist disposition of Justices Black and Douglas and the judicial self-restraint championed by Frankfurter date from *Barnett*.

RICHARD E. MORGAN
(1986)

Bibliography

MANWARING, DAVID R. 1962 *Render unto Caesar: The Flag Salute Controversy.* Chicago: University of Chicago Press.

## *FLAST v. COHEN*
392 U.S. 83 (1968)

A WARREN COURT landmark regarding the JUDICIAL POWER OF THE United States, *Flast* upheld taxpayer STANDING to complain that disbursements of federal funds to religious schools violate the FIRST AMENDMENT prohibition of an ESTABLISHMENT OF RELIGION. The decision carved an exception from, but did not overturn, the rule of FROTHINGHAM V. MELLON (1923) that federal taxpayers lack a sufficiently individual or direct interest in spending programs to be allowed to attack them in federal court. To Justice JOHN MARSHALL HARLAN's dissenting chagrin, the Court so ruled knowing that Congress, cognizant of *Frothingham*, had decided against granting taxpayers a right to JUDICIAL REVIEW of federal support for religious education.

The Court was unanimous on one fundamental point: the taxpayers in *Flast* presented an Article III "case." (See CASES AND CONTROVERSIES.) For the majority, Chief Justice EARL WARREN reaffirmed the traditional Article III requirement of a "personal stake in the outcome of the controversy," but deemed that requirement satisfied whenever a taxpayer claims that Congress exercised its TAXING AND SPENDING POWER in derogation of specific constitutional limits on that power. The Court found the establishment clause a specific limit, because, historically, the clause was designed to block taxation to support religion.

Dissenting, Justice Harlan could not agree that taxpayers challenging spending, rather than their tax liability, had a personal stake. They had no financial stake, because victory would only change how the government's general revenues are spent—not their tax bill. Nor was the Court's exception tailored to the requirement of a personal stake. A taxpayer's interests did not vary with the power Congress exercised in appropriating funds or with the constitutional provision ("specific" or not) invoked to oppose the expenditures. For Harlan, the taxpayer's interest in government spending was not personal but public—a citizen's concern that official behavior be constitutional. Nonetheless, he thought the "public action" would satisfy Article III, apparently because the parties were sufficiently adversary. But because "public actions" would press judicial authority vis-à-vis the representative branches to the limit, he concluded the Court should not entertain them without congressional authorization.

The bearing of SEPARATION OF POWERS on taxpayer standing was the pivotal dividing point in *Flast*. Justice WILLIAM O. DOUGLAS, too, thought *Flast* a public action, the attempt to distinguish *Frothingham* a failure, and the requirements of Article III met. But he found *Frothingham* deficient, not *Flast*, for he perceived the judicial role as enforcement of basic rights against majoritarian control without awaiting congressional authorization—even in "public actions." Chief Justice Warren's view fell between the Harlan and Douglas poles by disavowing the connection between standing and the separation of powers. Justiciability requires that a suit be appropriate in form for judicial resolution and implicates separation of powers, said Warren, but standing, with its focus on the party suing, not the issues raised, looks only to form.

Under the BURGER COURT, separation of powers considerations have resurfaced in TAXPAYER SUITS, stunting the potential growth of *Flast* into the mature "public action."

Typical of the Burger Court approach was VALLEY FORGE CHRISTIAN COLLEGE V. AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE (1982). The *Flast* landmark has become a historical marker.

JONATHAN D. VARAT
(1986)

## *FLETCHER v. PECK*
6 Cranch 87 (1810)

*Fletcher* was the Court's point of departure for converting the CONTRACT CLAUSE into the chief link between the Constitution and capitalism. The case arose from the Yazoo land scandal, the greatest corrupt real estate deal in American history. Georgia claimed the territory within her latitude lines westward to the Mississippi, and in 1795 the state legislature passed a bill selling about two-thirds of that so-called Yazoo territory, some 35,000,000 acres of remote wilderness comprising a good part of the present states of Alabama and Mississippi. Four land companies, having bribed every voting member of the state legislature but one, bought the Yazoo territory at a penny and a half an acre. Speculation in land values was a leading form of capitalist enterprise at that time, provoking an English visitor to characterize the United States as "the land of speculation." Respectable citizens engaged in the practice; the piratical companies that bought the Yazoo included two United States senators, some governors and congressmen, and Justice JAMES WILSON. In a year, one of the four companies sold its Yazoo holdings at a 650 percent profit, and the buyers, in the frenzy of speculation that followed, resold at a profit. But in 1796 the voters of Georgia elected a "clean" legislature which voided the bill of sale and publicly burned all records of it but did not return the $500,000 purchase price. In 1802 Georgia sold its western territories to the United States for $1,250,000. In 1814 a Yazooist lobby finally succeeded in persuading Congress to pass a $5,000,000 compensation bill, indemnifying holders of Yazoo land titles.

*Fletcher v. Peck* was part of a twenty-year process of legal and political shenanigans related to the Yazoo land scandal. Georgia's nullification of the original sale imperiled the entire chain of Yazoo land speculations, but the ELEVENTH AMENDMENT made Georgia immune to a suit. A feigned case was arranged. Peck of Massachusetts sold 15,000 acres of Yazoo land to Fletcher of New Hampshire. Fletcher promptly sued Peck for recovery of his $3,000, claiming that Georgia's nullification of the sale had destroyed Peck's title: the acreage was not his to sell. Actually, both parties shared the same interest in seeking a judicial decision against Georgia's nullification of the land titles—the repeal act of 1796. Thus, by a collusive suit based on DIVERSITY OF CITIZENSHIP, a case involving the repeal act got into the federal courts and ultimately reached the Supreme Court. The Court's opinion, by Chief Justice JOHN MARSHALL, followed the contours of Justice WILLIAM PATERSON's charge in VAN HORNE'S LESSEE V. DORRANCE (1795).

Although the fraud that infected the original land grants was the greatest scandal of the time, the Court refused to make an exception to the principle that the judiciary could not properly investigate the motives of a legislative body. (See LEGISLATION.) The Court also justifiably held that "innocent" third parties should not suffer an annihilation of their property rights as a result of the original fraud. The importance of the case derives from the Court's resolution of the constitutionality of the repeal act.

Alternating in his reasoning between extraconstitutional or HIGHER LAW principles and constitutional or textual ones, Marshall said that the repealer was invalid. Before reaching the question whether a contract existed that the Constitution protected, he announced this doctrine: "When, then, a law is in its nature a contract, when absolute rights have been vested under that contract, a repeal of the law cannot devest those rights. . . ." In the next sentence he asserted that "the nature of society and of government" limits legislative power. This higher law doctrine of judicially inferred limitations protecting vested rights was the sole basis of Justice WILLIAM JOHNSON's concurring opinion. A state has no power to revoke its grants, he declared, resting his case "on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity." Explicitly Johnson stated that his opinion was not founded on the Constitution's provision against state impairment of the OBLIGATION OF CONTRACTS. The difficulty, he thought, arose from the word "obligation," which ceased once a grant of lands had been executed.

The difficulty with Marshall's contract clause theory was greater than even Johnson made out. The clause was intended to prevent state impairment of executory contracts between private individuals; it had been modeled on the provision of the NORTHWEST ORDINANCE, which had referred to "private contracts, or engagements *bona fide,* and without fraud previously formed." What was the contract in this case? If there was one, did its obligation still exist at the time of the repeal bill? Was it a contract protected by the contract clause, given that it was a land grant to which the state was a party? If the land grant was a contract, it was a public executed one, not a private executory one. The duties that the parties had assumed toward each other had been fulfilled, the deal consummated. That is why Johnson could find no continuing obligation. Moreover, the obligation of a contract is a

creature of state law, and the state in this instance, sustained by its courts, had recognized no obligation.

Marshall overcame all difficulties by employing slippery reasoning. A contract, he observed, is either executory or executed; if executed, its object has been performed. The contract between the state and the Yazoo land buyers had been executed by the grant. But, he added, an executed contract, as well as an executory one, "contains obligations binding on the parties." The grant had extinguished the right of the grantor in the title to the lands and "implies a contract not to reassert that right." Moreover, the Constitution uses only the term "contract, without distinguishing between those which are executory and those which are executed." Having inferred from the higher law that a grant carried a continuing obligation not to repossess, he declined to make a distinction that, he said, the Constitution had not made. Similarly he concluded that the language of the contract clause, referring generally to "contracts," protected public as well as private contracts. Marshall apparently realized that the disembodied or abstract higher law doctrine on which Johnson relied would provide an insecure bastion for property holders and a nebulous precedent for courts to follow. So he found a home for the VESTED RIGHTS doctrine in the text of the Constitution.

Marshall seemed, however, to be unsure of the text, because he flirted with the bans on BILLS OF ATTAINDER and EX POST FACTO laws, giving the impression that Georgia's repeal act somehow ran afoul of those bans, too, although the suit was a civil one. Marshall's uncertainty emerged in his conclusion. He had no doubt that the repeal act was invalid, but his ambiguous summation referred to both extraconstitutional principles and the text: Georgia "was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution. . . ." He did not, in the end, specify the particular provisions.

In the first contract clause decision by the Court, that clause became a repository of the higher law DOCTRINE of vested rights and operated to cover even public, executed contracts. The Court had found a constitutional shield for vested rights. And, by expanding the protection offered by the contract clause, the Court invited more cases to be brought before the judiciary, expanding opportunities for judicial review against state legislation.

LEONARD W. LEVY
(1986)

Bibliography

MAGRATH, C. PETER 1966 *Yazoo: Law and Politics in the New Republic, The Case of Fletcher v. Peck.* Providence, R.I.: Brown University Press.

## *FLORIDA BAR v. WENT FOR IT, INC.*
515 U.S. 618 (1995)

The Supreme Court upheld, 5–4, a Florida Bar rule prohibiting direct-mail solicitation of personal injury or wrongful death clients within thirty days of the event that was the basis for the claim. Justice SANDRA DAY O'CONNOR, writing for the majority, found that the regulation served the state's significant interests in protecting injured or grieving people from unwanted invasions of their privacy, and in avoiding harm to the reputation of the legal profession. She relied on a Florida Bar survey that purported to show that the public was deeply offended by the solicitations in issue. Justice ANTHONY M. KENNEDY, writing in dissent, challenged the merits of the survey, and the degree to which the rule actually served the state interests that justified it.

JAMES M. O'FALLON
(2000)

(SEE ALSO: *Attorney Speech; Commercial Speech.*)

## *FOLEY v. CONNELIE*
435 U.S. 291 (1978)

New York excluded ALIENS from employment as state troopers. In an opinion by Chief Justice WARREN E. BURGER, the Supreme Court held, 6–3, that this discrimination did not violate the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT. The Court took its cue from OBITER DICTA in SUGARMAN V. DOUGALL (1973) concerning "political community." Although the admission of aliens for permanent residence showed congressional intent to grant them full participation in earning a livelihood and receiving such state benefits as welfare and education, the "right to govern" could be limited to citizens. Police officers, like high executive officials, exercise discretionary governmental power, whose abuse can have "serious impact on individuals." (The Chief Justice may have had a vision of an alien trooper inviting a citizen to spreadeagle over the hood of a car.)

Justices THURGOOD MARSHALL, WILLIAM J. BRENNAN, and JOHN PAUL STEVENS dissented: the "execution of broad public policy" mentioned in *Sugarman* had not included the day-to-day execution of the law but the formulation of broad policy. The disloyalty of aliens could not be conclusively presumed.

KENNETH L. KARST
(1986)

## FOOD, DRUG, AND COSMETIC ACT
52 Stat. 1040 (1938)

Grounded on the COMMERCE CLAUSE, this act was a sweeping revision of the PURE FOOD AND DRUG ACT of 1906. It passed Congress after a five-year struggle and then only because of an uproar caused by nearly one hundred deaths from a new drug. Despite extensive compromise, this act substantially strengthened earlier legislation, affording greater consumer protection. Different chapters of the law dealt at length with food, drugs, and cosmetics, expanding coverage and increasing penalties. The act prohibited shipment in INTERSTATE COMMERCE of adulterated or misbranded products and broadened the definition of these terms. Indicative of the act's thrust, one section authorized the secretary of agriculture to establish standards of quality for foods to "promote honesty and fair dealing in the interest of consumers." Misbranding received special attention: imitations were to be clearly marked, flavoring or coloring additives noted, and the use of habit-forming ingredients was to be indicated on the label. Drugs had to meet federal formulations or disclose the differences. New drugs would have to pass rigorous tests. Congress partly remedied one of the act's weaknesses, a less stringent control over false advertising, in the Wheeler-Lea Act of the same year. The Supreme Court sustained the act in UNITED STATES V. SULLIVAN (1947).

DAVID GORDON
(1986)

## *FOOD LION, INC. v. AMERICAN BROADCASTING CO. (ABC)*
194 F. 3d 505 (4th Cir. 1999)

For the purpose of filming material for the ABC television network's *Prime Time Live* program, two reporters obtained jobs at a Food Lion store by misrepresenting their mission. Using concealed cameras, they obtained damaging footage of food handling and storage conditions. Food Lion sued unsuccessfully to bar the broadcast, and later sought large damages for lost business and consumer confidence.

Food Lion advanced two claims—that ABC personnel had breached a duty of loyalty owed to an employer, and that ABC had engaged in unfair and deceptive trade practices—including the alleged fabrication of conditions shown in the film. A federal judge held that such claims were not barred by the FIRST AMENDMENT, even as applied to gathering and disseminating truthful information that held obvious public interest.

A jury awarded Food Lion more than $3 million in damages. The judge sharply reduced the award, to $315,000. ABC appealed even that smaller damage amount on FREEDOM OF SPEECH and FREEDOM OF THE PRESS grounds.

In late October 1999, a panel of the U.S. Court of Appeals for the Fourth Circuit reduced the damage award to a nominal $2, ruling that Food Lion's tort-based claims represented a constitutionally forbidden "end-run" around First Amendment protections for the news-gathering activities of journalists. The absence of any LIBEL claims, or any showing that the camera crew's conduct had been unlawful, undoubtedly made such a judgment easier for the court of appeals.

ROBERT M. O'NEIL
(2000)

(SEE ALSO: *Journalistic Practices, Tort Liability, and the Freedom of the Press.*)

## FORCE ACT
4 Stat. 632 (1833)

Restive over the threat to slavery that they saw implicit in the growth of federal power, South Carolinians devised doctrines of NULLIFICATION and SECESSION in response to the Tariff Act of 1828. When the Tariff of 1832 failed to satisfy their demands for reduction, a special convention adopted an Ordinance of Nullification (1832), nullifying the tariff. President ANDREW JACKSON responded with his PROCLAMATION TO THE PEOPLE OF SOUTH CAROLINA (1832), denouncing the theory of secession, and with a request to Congress to enact legislation that would simultaneously avoid a military clash with the state over the collection of duties and permit a more prompt resort to federal force if confrontation could not be evaded.

Congress responded with the Force Act (Act of 2 March 1833), reaffirming the power of the President to use federal military and naval force to suppress resistance to the enforcement of federal laws, even if the source of resistance was the state itself. The act empowered him to call up states' militias after issuing a proclamation calling on those obstructing to disperse. It also permitted him to revise the procedure for collecting customs duties. Though South Carolina subsequently nullified the Force Act, federal authority had been vindicated.

WILLIAM M. WIECEK
(1986)

Bibliography

FREEHLING, WILLIAM W. 1966 *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836.* New York: Harper & Row.

## FORCE ACTS
16 Stat. 140 (1870)
16 Stat. 433 (1871)
17 Stat. 13 (1871)

Congress enacted three statutes in 1870 and 1871 to protect the right of blacks to vote in the southern states and to suppress anti-RECONSTRUCTION terrorism. They are sometimes called the Enforcement Acts. The Act of May 31, 1870, prohibited all forms of infringement of the RIGHT TO VOTE, not merely the exclusion prohibited by the FIFTEENTH AMENDMENT, and made nightriding a federal FELONY. The Act of February 28, 1871, provided for federal supervision of voter registration and congressional elections to prohibit ballot-box frauds and intimidation of black voters. The Act of April 20, 1871, commonly called the Ku Klux Klan Act, provided civil remedies to persons deprived of rights and privileges secured by the federal Constitution; prohibited violent resistance to federal authority, in order to protect civilian and military officials enforcing Reconstruction measures; authorized the President to use militia and federal military force to suppress insurrections and domestic violence when a state was unable to do so; defined "rebellion" against the federal government; and provided that when the president proclaimed that a rebellion exists, he could suspend the writ of HABEAS CORPUS in the rebellious district. Under authority of the Klan Act, President ULYSSES S. GRANT proclaimed nine counties in South Carolina to be in rebellion during October 1871, suspended the writ of habeas corpus, and used federal troops to suppress violence there and elsewhere in the South. The Klan Act was instrumental in breaking the power of the Klans and other terrorist organizations for the time being.

In UNITED STATES V. REESE (1876), the Supreme Court held sections of the 1870 Act unconstitutional on the grounds that "the Fifteenth Amendment does not confer the right of suffrage upon any one." The Court anticipated its later STATE ACTION doctrine in UNITED STATES V. CRUIKSHANK (1876), voiding INDICTMENTS under the Klan Act on the grounds that the FOURTEENTH AMENDMENT "adds nothing to the rights of one citizen as against another. It simply furnishes a federal guaranty against any encroachment by the States." The Court held parts of the Klan Act unconstitutional in UNITED STATES V. HARRIS (1883) because they were directed at the actions of private persons, not at the states or their officers. (These decisions have lost most of their force today. See UNITED STATES V. GUEST, 1966.) Later Congresses in 1894 and 1909, hostile to the goals of Reconstruction, repealed most of the 1870 Act and the Klan Act, but the prohibitions of conspiracies and nightriding survive today in the United States Code, and the civil remedies provided by the Klan Act are today the foundation for an overwhelming majority of federal court lawsuits challenging the constitutionality of actions of state officers. (See SECTION 1983, TITLE 42, UNITED STATES CODE.)

WILLIAM M. WIECEK
(1986)

Bibliography

HYMAN, HAROLD M. 1973 *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution.* New York: Knopf.

## FORD, GERALD R.
(1913– )

Gerald Rudolph Ford, Jr., a graduate of the University of Michigan and Yale University Law School, served in the HOUSE OF REPRESENTATIVES from 1949 to 1973. A moderately conservative Republican who opposed most social welfare legislation but supported all of the CIVIL RIGHTS ACTS, Ford was his party's floor leader in the House from 1965 to 1973. Among his more controversial undertakings in that capacity was his attempt to secure the IMPEACHMENT of Supreme Court Justice WILLIAM O. DOUGLAS in 1970.

President RICHARD M. NIXON appointed Ford vice-president of the United States when the office fell vacant in 1973; this was the first application of procedures set forth in the Twenty-Fifth Amendment. When Nixon resigned the presidency in August 1974, Ford succeeded him, thereby becoming the first President to serve without winning a national election. In September 1974 Ford granted Nixon a full pardon for any offense against the United States that he might have committed while in office. (See WATERGATE AND THE CONSTITUTION.)

As President, Ford used the VETO POWER extensively, disapproving some forty-eight bills. In 1974, after Congress failed to act, Ford granted conditional AMNESTY to VIETNAM WAR deserters and draft evaders, exercising the presidential PARDONING POWER. His dispatch of Marines to free the freighter *Mayaguez* from Cambodia in May 1975 demonstrated that the "consultation" provisions of the WAR POWERS RESOLUTION OF 1973 did not prevent the COMMANDER-IN-CHIEF from taking decisive action in an emergency. Ford sought election in his own right in 1976 but was narrowly defeated by JIMMY CARTER.

DENNIS J. MAHONEY
(1986)

## *FORD v. WAINWRIGHT*
477 U.S. 399 (1986)

The Supreme Court held, 5–4, that the infliction of CAPITAL PUNISHMENT on an insane prisoner violates the ban on

CRUEL AND UNUSUAL PUNISHMENTS imposed by the Eight Amendment and the FOURTEENTH AMENDMENT. Justice THURGOOD MARSHALL for the majority applied the principle that the Eighth Amendment recognizes the evolving standards of decency of a maturing society. No state today permits the execution of the insane. Even at the time of the adoption of the BILL OF RIGHTS, the COMMON LAW disapproved execution of the insane because it lacked retributive value and had no deterrence value. Marshall ruled that Florida's procedure for determining a condemned prisoner's sanity failed to rely on the judiciary to ensure neutrality in fact-finding.

The dissenting Justices contended that the Eighth Amendment did not mandate a right not to be executed while insane. Justice WILLIAM H. REHNQUIST observed that at common law the executive controlled the procedure by which the sanity of the condemned prisoner was judged. The dissenters refused to endorse a constitutional right to a judicial determination of sanity before the death penalty could be imposed. Justice LEWIS F. POWELL was the swing vote in this case. He agreed that the Eighth Amendment prohibited the execution of the insane, but declined to endorse Justice Marshall's virtual requirement of a judicial proceeding to determine sanity.

LEONARD W. LEVY
(1992)

## FOREIGN AFFAIRS

The words "foreign affairs" are not to be found in the United States Constitution. There are scattered references to "commerce with foreign nations," to TREATIES and ambassadors, to the law of nations, but there is nothing to suggest that the relations of the United States with other nations form a significantly discrete constitutional category. Yet every major theme of constitutional jurisprudence is played differently in respect of foreign affairs. Foreign affairs provide a unique exception to the dogma that the federal government has only the powers expressly enumerated in the Constitution. For the relations of the United States with other countries, FEDERALISM is virtually irrelevant and the United States is essentially a unitary state. The separation and allocation of authority among the branches of the federal government for conducting foreign affairs are different from what they are in respect to domestic matters. Individual rights, strongly safeguarded by the Constitution in the internal life of the country, bow quite readily before the foreign interests of the United States. In this and in other respects foreign affairs discourage JUDICIAL REVIEW and intervention, the hallmark of United States constitutionalism.

The Constitution vests some foreign affairs powers in the federal government in the same manner in which it vests domestic powers, by bestowing them on one or another of the three branches of that government. Thus, Congress in Article I, section 8, is given the power to regulate commerce with foreign nations, to define offenses against the law of nations, and to declare war. The President has the power under Article II, section 2, to appoint ambassadors and make treaties (with the ADVICE AND CONSENT of the Senate). The JUDICIAL POWER of the United States extends, according to Article III, section 2, to cases arising under treaties, and to certain controversies involving foreign states, their public ministers, or their citizens. Many powers of government relating to foreign affairs, however, are not mentioned: for example, the power to control IMMIGRATION, to regulate ALIENS in the United States or United States nationals abroad, to assert the rights of the United States and to respond to claims by other governments, to participate in the international process of developing customary law, to make international agreements other than treaties, to recognize states and governments, or generally to determine national policy and attitudes on friendship and intercourse with other nations. While some missing powers can plausibly be inferred from ENUMERATED POWERS, others cannot, and, under general principles, powers not enumerated and not fairly to be inferred from expressed powers were not granted to the federal government: the legislative powers of Congress are limited to those "herein granted" (Article I, section 1), and the powers not delegated to the United States are reserved to the states or to the people by the TENTH AMENDMENT. Yet the federal government has exercised all these foreign affairs powers and others from the beginning, and no one has doubted that the federal government had that authority, and that the states did not.

In foreign affairs, then, the principle that the federal government has only the enumerated powers does not apply. All foreign affairs are delegated to the federal government as though that were expressly provided. A hundred years ago the Supreme Court, in CHAE CHAN PING V. UNITED STATES (1889), held, for example, that Congress has the power to regulate immigration because the power to exclude or admit aliens is inherent in the nationhood and SOVEREIGNTY of the United States. In UNITED STATES V. CURTISS-WRIGHT EXPORT CORP. (1936) the Supreme Court expounded a special constitutional principle:

> The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are NECESSARY AND PROPER to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was

> thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. . . . And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. . . .
>
> As a result of the separation from Great Britain by the Colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. . . .
>
> The Union existed before the Constitution, which was ordained and established among other things to form "a more perfect Union." Prior to that event, it is clear that the Union, declared by the ARTICLES OF CONFEDERATION to be "perpetual,' was the sole possessor of external sovereignty and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise. The Framers' Convention was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one. . . .
>
> It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. . . . As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. The power to acquire territory by discovery and occupation . . . the power to expel undesirable aliens . . . the power to make such international agreements as do not constitute treaties in the constitutional sense . . . , none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. This the court recognized, and . . . found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations.

Although the theory underlying *Curtiss-Wright* has been criticized, it has never been questioned by the Supreme Court. In any event, the DOCTRINE resulting from the theory—plenary power of the federal government in matters relating to foreign affairs, beyond those explicitly granted in the Constitution—is firmly established. The Supreme Court has not often found it necessary to resort to "sovereignty" or "nationhood" as a source of power for the federal government. In large part, the foreign activities of the federal government that have come to court are amply supported by enumerated powers of Congress or the President, by powers reasonably implied in enumerated powers, or by construction of the Constitution as a whole. But sovereignty, nationhood, and their implications in international law and in the practice of other nations are ever available as a source of authority to supply any lack of enumerated power for the federal government in matters relating to foreign affairs. The network of regulation of immigration and of aliens in the United States, for a principal example, rests ultimately on United States sovereignty, and other exercises of authority not easily rooted in enumerated powers have been supported as exercises of "the foreign affairs powers" of Congress, with citations to *Curtiss-Wright*.

The powers expressly conferred upon branches of the federal government, and those additional powers implied in sovereignty, give the federal government full authority to act in the United States and for the United States in respect to its foreign affairs. Since plenary power has been delegated, state authority, STATES' RIGHTS, even state immunity (except in remote, hypothetical respects) do not limit federal authority in foreign affairs. When the federal government acts, its action is supreme, superseding any inconsistent state law. Federal action may also preempt, "occupy a field," excluding state action even if it is not inconsistent.

Some state actions in foreign affairs are excluded by Article I, section 10, even when the federal government has not acted. A state may not make a treaty. It may enter into an "Agreement or Compact" with a foreign nation only with the consent of Congress. Although here, as for other purposes, the difference between a treaty and another international agreement is uncertain, presumably if Congress should consent to an agreement by a state with a foreign government the agreement would not be successfully challenged as being a treaty to which Congress could not consent. An agreement requiring the consent of Congress may be formal or informal, even tacit. But, by analogy to doctrine that has developed in cases such as *Virginia v. Tennessee* (1893), with respect to compacts between states of the United States, probably a state may make a compact with a foreign government without congressional consent if the agreement does not tend to "the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."

The states are limited also by implication of the grant to Congress of power "to regulate commerce with foreign Nations and among the several States." Although that doctrine of implied limitations developed principally in respect of INTERSTATE COMMERCE it applies in essentially the same way to FOREIGN COMMERCE. The COMMERCE CLAUSE bars regulation by the states that excludes or discriminates against foreign commerce, or burdens such commerce unduly, as determined by weighing the local against the na-

tional interest. The courts continue to monitor such state regulations.

A single case, *Zschernig v. Miller* (1968), has held, more broadly, that even if the federal government has not acted, and even if there is no undue burden on foreign commerce, a state may not intrude on the federal monopoly in foreign affairs. In that case Oregon law required state courts to deny an inheritance to an alien unless the court were satisfied that the government of the alien's state of nationality would allow a United States national to inherit in reciprocal circumstances, and that the alien would be allowed to enjoy his inheritance without confiscation. That state law, the Supreme Court ruled, was impermissible under the Constitution because it involved the state courts in sitting in judgment on the policies of foreign governments. No other case has been decided on that principle.

"In respect of foreign relations generally, State lines disappear. As to such purpose the State . . . does not exist," the Supreme Court said in UNITED STATES V. BELMONT (1937). But while federal authority in foreign affairs is plenary, it is not exclusive. Federal law generally is superimposed on a network of state law; state law of property and contract, state tort and criminal law, state corporate law, tax law, and estate law govern activities and interests that implicate or impinge on foreign trade and other foreign relations of the United States. If in principle all of that state law could be superseded or excluded by federal statute or treaty, it has not been and could not effectively be done in fact, and foreign relations continue to be greatly affected by state law. State influence is reflected also in the system of selection of the national government—the President, the Senate, and the House of Representatives—and particular state interests weigh heavily in the determination of national interest by every branch of the federal government. Increasingly, states have also entered, independently if informally, on the international scene by commercial missions to promote local produce and industry abroad, and by participation in international cultural activities.

The principal field of constitutional uncertainty and the focus of constitutional controversy in foreign affairs have been the respective powers and authority of President and Congress.

The Framers of the Constitution, reflecting the painful lessons of the early years of independence, created the office of President and vested it with "executive power." They gave the President authority to appoint ambassadors and to make treaties but required that he obtain the advice and consent of the Senate. They designated the President the COMMANDER-IN-CHIEF of the army and navy. At the same time the Framers gave Congress the power to impose tariffs and otherwise regulate commerce with foreign nations; to define and punish piracy and other offenses against the law of nations; and to declare war. Other general powers given to Congress reach to foreign as well as domestic matters: the powers to tax and spend, to borrow and regulate the value of money, to establish post offices, to authorize and appropriate funds, to create and regulate a federal bureaucracy, and to make other laws necessary and proper to carry out the power of Congress and other federal powers.

Both Congress and the presidency have developed and changed, the President in particular now exercising his constitutional authority through a huge bureaucracy. The enumerated powers of each branch have grown as the United States has grown and achieved its large place in a transformed world. But the division of authority between President and Congress remains today essentially as it was expressly prescribed by the Framers. Although the President may propose, and his proposals weigh heavily, Congress exercises its expressed powers as they have developed. Congress decides whether the United States shall be at war or at peace, and passes the laws necessary to prepare for war, and to wage war successfully, and to deal with the consequences of war. Congress regulates "commerce with foreign nations"—trade, transportation, communication, and other intercourse—in its innumerable forms. Congress enacts laws to effectuate the powers of the federal government deriving from the sovereignty and nationhood of the United States. It passes laws constituting national policy toward other nations, for example, laws fixing the rights of their nationals in the United States or in our coastal waters. It also passes laws regulating our relations with other nations, for example, the 1976 statute determining the immunity of foreign governments in American courts. Congress enacts the laws—including any federal criminal law—necessary and proper for carrying out its own foreign affairs powers, the country's treaty obligations, and the foreign affairs powers of the President, including laws protecting the processes for making foreign policy or conducting foreign relations, *e.g.*, statutes protecting classified documents, or forbidding the harassment of foreign diplomats or the picketing of foreign embassies. Congress also uses its general lawmaking powers for foreign as for domestic affairs. Congress decides how much to spend for defense, and how much for foreign aid and to which countries. Its power to borrow money and to regulate the value of money (of the United States and that of other countries) has major transnational applications and implications. By its authority to establish post offices Congress has approved American participation in an international postal system; it has used its authority over PATENTS and COPYRIGHTS to authorize dealing with them by international arrangements. Congress appropriates money for the BUDGET of the State Department, or to pay our obligations to the United Nations. Congress

creates and regulates the Foreign Service. It investigates so that it can legislate (or not legislate).

For his part, the President (not Congress) makes treaties and appoints ambassadors (with the consent of the Senate) and receives ambassadors. Only the President acts as commander-in-chief of the armed forces; only he can take care that the laws are faithfully executed. A few powers have been inferred from those listed: for example, only the President speaks for the United States to other nations and only the President negotiates with other nations. The President recognizes governments, enters into diplomatic relations with them or terminates these relations, and gives his ambassadors their instructions and receives their reports.

There is more to foreign affairs, however, than is accounted for in the express allocations of the Constitution, and issues have arisen as to matters not clearly implied in those allocations or where argument can support allocation to one of the political branches as plausibly as to the other. The President makes treaties, but who can terminate them on behalf of the United States? Congress declares war, but who can decide to terminate a war? Who can make international agreements other than treaties, or otherwise commit the power and resources of the United States? Who can deploy forces for purposes short of war? Who can determine those general principles, guidelines, and attitudes that go to make up "foreign policy?"

There is no ready principle of allocation of authority between Congress and President, or of CONSTITUTIONAL INTERPRETATION generally, to determine to whom these unmentioned yet clearly federal powers are assigned. In domestic affairs the principle of allocation of authority between Congress and the President is reasonably clear: Congress makes the law; the President executes the law. In foreign affairs that principle of allocation did not obtain even in the original conception, and surely it does not as the two branches have developed. Clearly, the President has substantial authority to "legislate," to determine national policy, as well as to execute it. The President makes foreign policy when he makes treaties and other international agreements; he also makes law, since international agreements create international law, and some treaties and agreements have domestic effect and are the LAW OF THE LAND under the SUPREMACY CLAUSE. The President makes foreign policy also in representing the United States in the international arena—by recognizing states or governments and deciding on the character of relations with them; by making or responding to international claims; by declaring the attitudes of the United States, many of which he can implement or reflect in actions on his own authority. Inevitably, the President makes foreign policy also by the manner in which he conducts foreign relations.

The President and Congress have asserted opposing principles of constitutional jurisprudence to determine allocation of the unallocated federal powers in foreign affairs. The President has claimed a source of plenary authority in that he is the "sole organ of the United States in its international relations." He has argued that Article II, section 2, of the Constitution vests in him not only the power to execute laws but the whole "executive power" of the United States. It is urged that the Framers understood the executive power to include the whole of foreign relations, except insofar as the Constitution expressly limits the President's authority (as by requiring that he obtain the consent of the Senate to appoint ambassadors or to make treaties), or has expressly given some foreign affairs power to Congress, such as the power to regulate foreign commerce or to declare war. Congress, on the other hand, has claimed that its constitutional authority over foreign "commerce" includes all aspects of intercourse with foreign nations; by that authority, and by its control of war and peace, it has been claimed, Congress is the principal political organ of the nation and has all the authority of the United States in international relations except that expressly given to the President.

The competing constitutional doctrines have rarely come to court and the issue remains largely unresolved in principle. Constitutional history, however, has supplied some of the answers that constitutional law has left unanswered. From the beginning, many powers not expressly delegated by the Constitution have flowed to the President and have made his the predominant part in the foreign policy process. Presidential authority grew early and steadily by a kind of "accretion." Even when United States diplomatic missions abroad were few and United States international relations simple and minimal, the conduct of foreign affairs was a continuing process, and it raised issues every day. These came to the President, through his ambassadors and his secretary of state; Congress did not hear of them unless the President saw necessary or fit to tell Congress. The early issues—whether to declare our neutrality in European wars, or send a misbehaving French minister home—were not matters which the Constitution expressly left to Congress or expressly denied to the President. They did not call for general policy best reflected in formal legislation or resolution, but for ad hoc judgment and particular measures tailored to the case. Sometimes decision was urgent, and the President was always "in session" while Congress was not, and could readily or easily be informed and convened, especially in the conditions of communications and transportation of the early days. The President could act quickly and informally, often discreetly or secretly, while action by Congress would have been public and formal, slow and sometimes unduly dramatic. Often, unless the President acted, the United States could not act at all.

And so President GEORGE WASHINGTON declared neu-

trality, President JAMES MONROE his famous doctrine; later Presidents opened Japan, traded in China, intervened in Latin America. Presidents appointed "agents" (without Senate consent), concluded EXECUTIVE AGREEMENTS (without consent of Congress or the Senate), sent troops abroad, expanded intelligence and "covert activities," acted in the world arena for the United States, making its policies, committing its honor and credit. What early Presidents did became precedents for their successors to do likewise or to exceed. What successive Presidents did became the basis for assertions of authority to do them, supported in constitutional terms in the President's "foreign affairs power" often implemented by his power as commander-in-chief.

Congress contributed to the steady growth of presidential power. Congress early recognized and confirmed the President's control of daily foreign intercourse, and the resulting monopoly of information and experience promoted the President's claim of expertise and Congress's sense of inadequacy. A growing practice of informal consultations between the President and congressional leaders disarmed them as well as members of Congress generally, and helped confirm presidential authority to act without formal congressional participation. Often Congress later ratified or confirmed what the President had done, as in the KOREAN WAR. And repeatedly it delegated its own huge powers to the President in broad terms, so that he could later claim to act under the authority of Congress as well as his own, as in the VIETNAM WAR.

Congress has never formally conceded all these unspecified powers to the President. At most Congress has silently acquiesced in his power to act. Frequently, Congress asserted authority for itself to act in areas where the President also claimed authority. For example, although in 1945, President HARRY S. TRUMAN, without congressional participation, claimed for the United States the resources of its continental shelf, Congress in 1976 acted to declare an exclusive 200-mile fishing zone for the United States, and did so against the wishes of the executive branch. At times, Congress has also insisted on its authority to preclude, supersede, or control presidential action. In foreign affairs, as elsewhere, it has insisted that the President must execute the laws that Congress enacts and must spend (not impound) money that Congress appropriates. In foreign as in domestic affairs Congress has repudiated EXECUTIVE PRIVILEGE when its committees have sought information or documents. In foreign affairs, too, Congress has provided for LEGISLATIVE VETO to recoup delegation of authority and to oversee executive execution of the law. Whether the general invalidation of the legislative veto (IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA, 1983) will totally bar its use in foreign affairs legislation as well is yet to be determined.

A principal unresolved issue between President and Congress has been the claimed authority of the President to deploy the armed forces of the United States. The issue has not been about the WAR POWERS, expressed in the Constitution. The power to decide for war or peace is indisputably with Congress: Congress can declare war or authorize it by other resolution; it can decide for limited war, and though Presidents have claimed plenary authority as commanders-in-chief, theoretically Congress can probably regulate the conduct of war in general though perhaps not in detail. Wars apart, Presidents have claimed authority to deploy the armed forces for political ends and have done so on numerous occasions, sometimes engaging them in hostilities short of war. In Korea in 1950–1952 troops were engaged in war, President Truman claiming authority to act under a treaty—the UNITED NATIONS CHARTER—and Congress soon acquiesced in and ratified his action. In Vietnam, Congress gave two Presidents blanket authority to engage in hostilities. Members of Congress have often challenged the President's authority, although Congress has rarely done so formally. After Vietnam, however, in the WAR POWERS RESOLUTION adopted over President RICHARD M. NIXON's veto, Congress purported to regulate the power of the President to deploy armed forces in circumstances where they are or might be engaged in hostilities. Although Presidents have questioned the resolution's constitutionality, they have acquiesced in principle, but in several instances they may not have respected the resolution in fact.

The power that Presidents have claimed to enter into international agreements or otherwise commit the United States has also been an unresolved subject of controversy. Again, it is not the treaty power, expressed in the Constitution, that has raised serious issues. The President can make a treaty if the Senate consents, and the Senate can ask for changes and impose other relevant conditions upon its consent. The power to terminate treaties has been exercised by the President, often on his own authority. A challenge to the President's authority to terminate the treaty with the Republic of China (Taiwan) in 1979 did not prevail, although the Supreme Court did not decide the merits of the controversy in GOLDWATER V. CARTER (1980).

Since the beginnings of the nation, Presidents have made many international agreements other than by treaty. An agreement authorized or approved by resolution of Congress, by majority vote in both Houses (rather than by consent of two-thirds of the Senate to a treaty), is the equivalent of a treaty for virtually all purposes. But Presidents have also made agreements on their own authority. Some authority to do so is conceded. It is not disputed that the President can make agreements as commander-in-chief during war (for example, an armistice). He can make agreements also to implement his established foreign affairs power, for example, agreements incidental to recognizing a foreign government, as in the Litvinov

agreements with the Union of Soviet Socialist Republics in 1933. (See UNITED STATES V. BELMONT; UNITED STATES V. PINK.) At least some other international agreements have been held to be within his authority, for example, the Iranian Hostages Agreement, since, the Supreme Court said, in DAMES & MOORE V. REGAN (1981), the President's exercise of authority to resolve international claims had been acquiesced in by Congress. On the other hand, some agreements clearly require Senate consent (to a treaty) or congressional approval. There has been no authoritative determination, nor any accepted guidelines, as to which agreements the President can make on his own authority and which he cannot. The suggestion that "important" agreements cannot be made by the President alone is not self-defining, and Presidents have in fact made "important" agreements alone, especially when they desired to keep them confidential. The Senate has expressed its sense that the President cannot commit the forces or resources of the United States except by treaty or pursuant to act of Congress. Congress has considered numerous bills to regulate international agreements by the President on his own authority. But it has legislated only a limited measure, requiring the executive branch to transmit any executive agreement to Congress, if only to a congressional committee in confidence.

In general, Presidents and Congress have worked together even when Congress is not controlled by the President's POLITICAL PARTY. That party politics "stop at the water's edge" and do not trouble American foreign relations is not wholly true, and in the view of many would not be desirable. But throughout most of our national history the dominant voices in the two major parties have not differed sharply in foreign policy, and Congress has more or less willingly followed the President's lead, while Presidents have tried to lead chiefly where Congress would not be too reluctant to follow.

The respective authority of the political branches apart, there have been other constitutional issues relating to treaties and other international agreements. Some early issues have been resolved. Treaties and other international agreements, like other acts of the United States government, are subject to the BILL OF RIGHTS and other constitutional limitations. There are no limitations on the subject matter of such agreements other than those implied in the fact that there must be a bona fide agreement between the United States and one or more other nations in a matter related to foreign policy interests of the United States. A treaty or other agreement may deal with matters that might otherwise be regulated by the states or by congressional statute.

Treaties and international agreements have their own place in constitutional law. Some treaties or agreements are "self-executing": they are intended to be enforced by the executive or applied by the courts without waiting for implementation by Congress. Whether a treaty is self-executing is a matter of interpretation of the agreement, usually determined by the intent of the United States government in the matter. If a treaty or other agreement is self-executing it will be treated like a federal law, supreme over state law and superseding any earlier, inconsistent federal law. But the treaty is not superior to later federal law, and although the courts will interpret a statute, where fairly possible, consistently with international obligations of the United States, when Congress passes a law clearly inconsistent with a pre-existing treaty, the courts will apply the later statute, in effect putting the United States in default on its international obligation.

The role of the courts in foreign affairs is not essentially different from their role in domestic affairs. The JURISDICTION OF THE FEDERAL COURTS under Article III of the Constitution extends to cases arising under treaties of the United States as well as those arising under other international agreements of the United States or under customary international law. Foreign affairs may be implicated also in cases arising under the Constitution and various laws of the United States. The federal courts have jurisdiction also over "cases affecting Ambassadors, other public ministers and consuls," and over controversies between a foreign state or foreign citizen and a state or citizen of the United States, but such controversies have not loomed large in the history of the Constitution or of our foreign relations.

Thanks to both political and institutional limitations, the judicial prerogative of invalidating acts of the political branches has not troubled United States foreign affairs. Most constitutional issues in foreign affairs, including some big issues of competition between President and Congress, rarely come to court because in general there is not the required CASE OR CONTROVERSY and there is no one with the necessary STANDING to raise the issue. Challenge to an exercise of national authority in foreign affairs on grounds of "states' rights" is generally futile in view of the established monopoly of the federal government. Foreign affairs have also been a principal source of the POLITICAL QUESTION DOCTRINE, under which the courts have declared some foreign affairs issues "political" and therefore not justiciable. Federalism does provide the court a role relevant to foreign affairs when they scrutinize state activities that, a private party claims, unduly burden foreign commerce or that may be inconsistent with or preempted by congressional policy.

The courts exercise their usual lawmaking function in foreign affairs also. In addition to interpreting the Constitution and laws, the courts have determined and developed the maritime law which remains largely judge-made. They have also developed rules, if only for their own guid-

ance, such as the " ACT OF STATE" DOCTRINE, that courts will not sit in judgment on the acts of a foreign state in its own territory, as in *Banco Nacional de Cuba v. Sabbatino* (1964). Courts also make foreign relations law when they determine and apply customary international law. "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination," the Court said in *The Paquete Habana* (1900).

Nothing in the Constitution suggests that the rights of individuals in respect of foreign affairs are different from what they are in relation to other exercises of governmental power. But although arguments that individual rights and protections are fewer and narrower in foreign affairs than elsewhere have not prevailed in principle, constitutional guarantees sometimes look different and afford less protection.

In principle, constitutional safeguards apply in foreign as in domestic affairs and apply to governmental activities abroad as at home. The Bill of Rights limits the Congress and the President, foreign affairs legislation as well as treaties and other international agreements. Even temporary or unauthorized aliens in the United States are entitled to the protections of the Bill of Rights, for example, the safeguards for those accused of crime. But where an individual right is not absolute but might be outweighed by an important public interest, national interests in war and peace, and even lesser concerns of foreign relations, would have important weight in the balance. So, for example, courts have upheld prohibitions on picketing near embassies (*Frend v. United States*, 1938), or the cancellation of a passport of someone engaged in systematically identifying U.S. intelligence agents abroad (AGEE V. HAIG, 1981).

In regard to foreign relations as to other matters, DUE PROCESS OF LAW requires fair procedures, and that requirement applies to aliens as to citizens, in the United States or abroad. Trial under the authority of the United States, at least in time of peace, must provide a jury, RIGHT TO COUNSEL, and other constitutional safeguards for those accused of crime. An alien in the United States, subject to DEPORTATION on grounds prescribed by law, is entitled to a FAIR HEARING, and the government must prove by clear, unequivocal, and convincing evidence that the alien is deportable on the grounds provided by Congress. But an alien seeking admission to the United States is due no process beyond consideration and decision by the designated administrative officer.

Due process also limits the substance of what government can do, requiring that it not be "unreasonable, arbitrary or capricious, and [that] the means selected have real and substantial relation to the object sought to be attained," as the Court said in NEBBIA V. NEW YORK (1934). Courts have long refrained, however, from invalidating economic and social regulations, and they are even less likely to do so in matters affecting foreign relations. But SUBSTANTIVE DUE PROCESS protects also a person's liberty, and here the constitutional limitation has been greater, and judicial deference to the political branches far less. The Supreme Court declared in KENT V. DULLES (1955) that the RIGHT TO TRAVEL abroad is "a part of the liberty of which the citizen cannot be deprived without due process of law." In AFROYIM V. RUSK (1967) the Court invalidated a statutory provision making it a crime for members of certain communist organizations to obtain or use a passport, because the law "too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment." However, in *Agee v. Haig* the Court upheld withdrawal of a passport from one who systematically exposed the identity of United States intelligence agents. And to date the courts have held that even an alien lawfully admitted and long resident in the United States can be deported for whatever reasons commend themselves to Congress.

The EQUAL PROTECTION OF THE LAWS is required in foreign affairs matters as elsewhere. States cannot discriminate against aliens to deny them WELFARE BENEFITS, EDUCATION, access to the general civil service, or the right to practice their profession. States may not deny educational opportunities even to "undocumented" alien children, not lawfully admitted to the United States (*Plyer v. Doe*, 1982). But a state may reserve for citizens jobs as teachers, policemen, other "peace officers" (including deputy probation officers), and others involved in "the political function of governing." (See FOLEY V. CONNELIE; AMBACH V. NORWICK.) Some state discriminations against aliens are invalid because inconsistent with, or preempted by, the immigration laws or other acts of Congress (HINES V. DAVIDOWITZ, 1941; TAKAHASHI V. FISH & GAME COMMISSION, 1948). Unlike the states, however, Congress can limit the federal Civil Service to citizens, and may discriminate against aliens in other respects that do not infringe their basic rights. An act of Congress or treaty may give some rights to aliens on the basis of reciprocity, *i.e.*, that the country of which the alien is a national give such benefits to United States citizens.

Aliens may be denied the right to acquire some kinds of property or invest in some kinds of enterprises in the United States. But an alien (other than an enemy alien in time of war) may not be deprived of his property without due process of law, and it cannot be taken for public use without JUST COMPENSATION.

The constitutional provision that property not be taken for public use without just compensation may have special application in foreign affairs. The United States has frequently in its history entered into an agreement with an-

other government to settle claims of United States citizens against that government. Although the settlements sometimes did not have authorization or approval by the individual claimants, and often gave them only partial recovery, the courts have upheld such agreements as within the authority of the President to make, and have rejected claims that the agreements deprived the claimants of property without just compensation. But where private claims are sacrificed by the United States in settlement of other national interests, as was apparently the case in the early French spoliation cases, and as was claimed in the Iranian Hostages Agreement, the courts may yet find that there has been a taking of the claims requiring compensation.

There is much uncertainty in the constitutional law of foreign relations but it should not be exaggerated. The abiding uncertainties lie principally—almost wholly—in the separation, distribution, and fragmentation of powers between the President and Congress (or between President and Senate), a division different from those prevailing in domestic affairs. Some of the uncertainties and conflicts arise out of different constitutional interpretations, which might in theory be resolved but are not likely to be resolved soon, for courts are reluctant to step into intense confrontation between President and Congress or inhibit either when the other does not object. If the courts do speak to such "separation" issues occasionally, they are likely to reach for the narrowest ground, resolving as little as possible.

Much of the controversy in the conduct of foreign affairs, moreover, does not stem from constitutional uncertainty, but rather reflects what the Framers intended, or were willing to accept, when they separated powers and subdivided functions. If Congress refuses to authorize an anti-ballistic missile program requested by the President, if the President vetoes a tariff adopted by Congress, if the Senate refuses consent to a human rights treaty negotiated by the President, the controversy does not involve competition for constitutional power but the kind of conflict "prescribed" by the Constitution. There is no constitutional issue when the complaint is not that the Constitution has been violated but that it is not working to taste. For a contemporary example, the real complaint in the national crisis over Vietnam was not that the President usurped constitutional power, but that, acting within his powers, he virtually compelled Congress to go along. That is a complaint against the Constitution.

That under a less-than-certain and less-than-happy constitutional arrangement, the conduct of foreign relations continues to function with reasonable effectiveness owes in substantial part to extraconstitutional arrangements, including varieties of congressional committees and staff that have become integral to the foreign policy process. But the Framers thought they had good reasons for prescribing limits to cooperation, even some conflict. If effective government, in foreign relations as elsewhere, requires cooperation, democratic government, in foreign relations as elsewhere, abhors congressional abdication, and even enjoins it to provide legal opposition. The President provides initiative and efficiency, but Congress is the more representative branch and brings to bear the influence of public opinion, diversity, concern for local and individual rights. At its best, there is a counterpoint of presidential expertise and some inexpert congressional wisdom producing foreign policy and foreign relations not always efficient but supporting larger, deeper national interests.

LOUIS HENKIN
(1986)

(SEE ALSO: *Congress and Foreign Policy.*)

Bibliography

CORWIN, EDWARD S. 1957 *The President: Office and Powers.* 4th rev. ed. New York: New York University Press.

HENKIN, LOUIS 1972 *Foreign Affairs and the Constitution.* Mineola, N.Y.: Foundation Press.

LOFGREN, CHARLES A. 1972 War-Making Power Under the Constitution: The Original Understanding. *Yale Law Journal* 81:672–797.

MCDOUGAL, MYRES S. and LANS, ASHER 1954 Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy. *Yale Law Journal* 54:181–351, 534–615.

Report of the Commission on the Organization of the Government for the Conduct of Foreign Policy, and Appendices. 1975.

SOFAER, ABRAHAM D. 1976 *War, Foreign Affairs and Constitutional Power.* Cambridge, Mass.: Ballinger Publishing Co.

WRIGHT, QUINCY 1922 *The Control of American Foreign Relations.* New York: Macmillan.

## FOREIGN AFFAIRS
### (Update)

In the last decade of the twentieth century there have been several important developments in the constitutional balance affecting U.S. foreign relations. The most conspicuous changes have involved the relative power of the Congress (especially the U.S. SENATE) and the President. The political weakness of President WILLIAM J. CLINTON has permitted a resurgence of the Senate Foreign Relations Committee and a significant expansion of the Senate's role under the TREATY POWER, with a corresponding diminution of executive authority with respect to that power. Congress has also continued to use its LEGISLATIVE POWER and ap-

propriations power to specify details of foreign policy (maintaining a trend beginning with the Democratic Congress elected after WATERGATE). With respect to the WAR POWERS, Clinton has continued the past practice of executive-initiated uses of military force in limited engagements where the risk of American casualties was small. However, Clinton seems to have been especially cautious in this area. He has defended executive authority under the Constitution less vigorously than his immediate predecessor, GEORGE H. W. BUSH. Finally, the Supreme Court has revived judicial enforcement of principles of FEDERALISM, which in turn may call into question the virtually unlimited scope (subject to the BILL OF RIGHTS) of the federal treaty power. The basic lines of authority among the political branches, and the near total formal supremacy of the federal government over the states in foreign affairs, continued to be well established and uncontroversial. Political controversy affects issues at the margins, but the political weakness of the Clinton administration illustrates the vulnerability of EXECUTIVE POWER to the vicissitudes of domestic politics.

The Chair of the Senate Foreign Relations Committee, Senator Jesse Helms of North Carolina, has used his influence in recent years to block important ambassadorial appointments by Clinton, most predominantly when he blocked Clinton's nominee for Ambassador to Mexico. By declining to schedule hearings on important appointments and treaties, he also forced a reorganization (and diminution in stature) of that part of the executive branch dealing with arms control and foreign economic assistance. In 1999, the Senate rejected U.S. adherance to the Comprehensive Nuclear Test Ban Treaty, which had been a central part of the Clinton foreign policy program. In addition, the Senate has asserted its power in significantly expanded ways to attach conditions to its resolutions of ratification to arms control and INTERNATIONAL HUMAN RIGHTS treaties in ways unappealing to the executive branch. For example, the Senate has attempted to assure that no U.S. domestic law will be affected by human rights treaties. By attaching extensive and detailed conditions to arms control treaties the Senate has also successfully asserted its prerogative, albeit over protests by Clinton, in four distinct areas.

Historically, the executive branch has concluded treaty amendments of a technical, administrative, or minor substantive nature, on the basis of its own constitutional authority, and has likewise adjusted treaty relations to take account of the break-up of states and state succession. In addition, the executive branch has historically exercised the prerogative of determining whether to seek required legislative support for international agreements through the Article II procedure or, alternatively, through an act of Congress. In its interaction with the Senate over adjusting two major arms control treaties, however, the Clinton administration may have contributed to the erosion of executive authority on all these points.

First, the administration agreed to submit an agreement dealing with conventional weapons in Europe—the CFE Flank Agreement—to the Senate for its approval under Article II of the Constitution, abandoning its earlier decision to seek simple legislative approval from both houses of Congress. In doing so Clinton made two conceptually distinct concessions. He first acceded to the Senate's hitherto unsupportable position that "militarily significant" agreements had to be submitted to the Senate as Article II treaties rather than to Congress as Congressional–Executive agreements. Second, he failed to preserve executive prerogative to choose which constitutional procedure—Article II or an Act of Congress—to follow. The Clinton administration's concessions were qualified but the end result was that Clinton capitulated to an assertion of Senate power that is unsupported by historical practice.

Third, the Clinton administration accepted the Senate's position that the executive cannot subsequently change "shared understandings" between the executive branch and the Senate. Clinton thereby accepted, as a correct statement of constitutional law, the "Biden Condition" that grew out of the attempt by President RONALD REAGAN to amend the Anti-ballistic Missle (ABM) Treaty unilaterally under the guise of a "reinterpretation" of the treaty. The Biden Condition restricts the ability of the executive to change the interpretation of a treaty provision if it has made an "authoritative statement" of that provision's meaning to the Senate during the ratification process, such that there is a "shared understanding" of that meaning. The condition apparently applies even if the adjustment in interpretation of the provision is based on changed circumstances and is entirely uncontroversial. The consequence of this concession may be to restrict the future ability of the executive to adjust treaty relations in the normal course of diplomacy.

Finally, Clinton agreed to and then complied with a Senate condition that was both unrelated to the treaty under consideration and arguably unconstitutional as well. The condition in question—"Condition 9"—dealt with an agreement that would have extended obligations under the 1972 ABM Treaty to several new states, and also changed obligations under the treaty to account for the break-up of the Soviet Union. Condition 9 required the President to submit this agreement to the Senate for ADVICE AND CONSENT. When the Senate consents to ratification of a treaty, it may without question attach conditions to its consent that relate to the treaty obligations that it accepts and, more controversially, to associated domestic matters and the domestic effect of the treaty in question. On the other hand, the Senate presumably has no author-

ity to condition its consent on presidential action wholly unrelated to the treaty. Condition 9 fell in the middle of this spectrum in that it related to an entirely different treaty, the ABM Treaty, although that treaty also dealt with arms control and was therefore loosely related to the subject matter of the treaty to which Condition 9 was attached. The agreement also would have adjusted the operation of the ABM Treaty to take account of the breakup of the Soviet Union. Normally such matters involving the succession of states would be settled by EXECUTIVE AGREEMENT pursuant to the President's constitutional foreign affairs authority, but under Condition 9 this agreement must be submitted to the Senate.

The role of Congress in authorizing the use of military force has also continued to fluctuate, and the constitutional debate over the scope of congressional authority, executive prerogative, and the war power has continued as well. In defending executive power the Clinton administration has at times seemed more solicitous of Congress than prior administrations. For example, the legal opinion justifying military intervention in Haiti relied principally on arguments based on statutory authority rather than relying on generalized claims of constitutional authority as had often been done in the past. On the other hand, the President conducted an air war against Yugoslavia, and stated a willingness to use ground forces, without formal congressional authorization. Congress had indicated support for the President's policy, and the air war was crafted to minimize the risk of American casualties.

With respect to the power of Congress to declare war, recent scholarship has called into question the proposition that Congress has the ultimate power to determine whether the country will wage war or maintain peace. This proposition was based on the ORIGINAL INTENT of the Framers, which does not now seem to be so clear as it was to those who were passionately opposed to the VIETNAM WAR. The text of the Constitution gives Congress the power to "declare" war, but a declaration of war is different from making, initiating, or deciding upon war. It is different both semantically and in legal meaning. The intent of the Framers on this point is inscrutable. The sole drafting change in the relevant text at the CONSTITUTIONAL CONVENTION was to change Congress's war power from "make" to "declare." That change by itself plainly suggests a narrowing of Congress's power. The change may have been made for a different reason, or for no substantive reason at all, but it is one that under the normal canons of legal interpretation would be given some significance. Whether the change was designed to curtail congressional power or to clarify the COMMANDER-IN-CHIEF clause depends on inferences from isolated statements that seem at best inconclusive. In the end the record consists mostly of silence from which contradictory inferences can be drawn—either that "more people would have protested if they had understood that the President was given power to initiate war," or that "initiating war was an executive power that was so ingrained in the political and legal context that the Framers just naturally assumed that the President had that power as a result of being vested with the 'executive power.' "

In addition, original intent as commonly applied is a fragile basis for interpreting the Constitution in the context of contemporary foreign relations. Terms like "war" or the "executive power" do not have meanings fixed for all time in the eighteenth century. Subsequent practice by the political branches can provide a new gloss on original intent. A good example is the Senate's role to "advise" in the making of treaties. President GEORGE WASHINGTON and his successors effectively reinterpreted the original understanding to eliminate the Senate's formal role during the course of a negotiation, and the Senate has concurred for 200 years. Another example is the Framers' assumption that all treaties would be "self-executing" and applied by the courts as rules of decision, as is literally required by Article VI. Chief Justice JOHN MARSHALL created a category of non-self-executing treaties in the case of *Foster and Elam v. Neilson* (1829). Similarly the term "war," which in any event seems especially ambiguous and indeterminate, seems to have been reinterpreted over the course of two centuries. Perhaps there is a distinction between big wars and little wars, or offensive wars and defensive responses, or wars and police actions. Perhaps the use of small-scale military force for foreign policy purposes is not "war" at all. Looking at historical practice, especially since WORLD WAR II, one could conclude that the political branches have made some of those distinctions, reserving Congress's role to approving major wars in advance when such a decision was possible under the circumstances. The role of Congress in the GULF WAR supports this distinction. In other, minor war decisions Congress has acquiesced to presidential initiation of military action and has confined its role to influence through the authorization and appropriations process.

Even the way the debate is framed is misleading. The issue is normally described as one of reconciling Congress's so-called war power based on the declare war clause with the President's commander-in-chief power. This presentation of the issue in this way is at least incomplete, because both Congress and the President have many additional powers that bear on the question of how the use of military force must be authorized under the Constitution. In fact, Congress is intimately involved in the decisions to use military force, in focused and specific ways, through its authorization and appropriation functions. In recent years, Congress also has enhanced its role informally through the legislative process, for example in

a procedure negotiated by Congress and the President for prior consultation in connection with continued authorization and appropriations for UNITED NATIONS Peacekeeping forces.

In the 1990s, the Supreme Court revived judicial enforcement of STATES' RIGHTS and principles of federalism. These decisions may call into question the virtually unlimited scope of the treaty power (subject to the Bill of Rights) derived from MISSOURI V. HOLLAND (1920). Treaties dealing with human rights, government procurement, ENVIRONMENTAL REGULATION, and criminal law raise many federalism concerns. A conspicuous manifestation of the states' disregard of federal treaty obligations is their regular failure to notify criminal defendants of their rights under consular treaties to contact their consuls. The executive branch has neither sought LEGISLATION nor taken other action to implement these obligations via-à-vis the states, and in the case of *Breard v. Greene* (1998), the Supreme Court declined to intervene in the execution of a Paraguayan national by the state of Virginia, even though Virginia had violated this U.S. treaty obligation, which is entitled to supremacy over state law by virtue of Article VI, and even though the International Court of Justice and the U.S. Secretary of State had requested a STAY OF EXECUTION pending further proceedings in the Hague. Several states have violated and continue to violate this treaty obligation, and it may be unclear under the federalism decisions of the REHNQUIST COURT whether the federal government has constitutional power to require otherwise.

PHILLIP R. TRIMBLE
(2000)

Bibliography

BRADLEY, CURTIS A. 1998 The Treaty Power and American Federalism. *Michigan Law Review* 97:390–461.

HENKIN, LOUIS 1996 *Foreign Affairs and the Constitution*, 2nd ed. Mineolo, N.Y.: Foundation Press.

TRIMBLE, PHILLIP R. 1997 The War Power Twenty-Five Years Later. *UC Davis Journal of International Law and Policy* 3: 183–190.

TRIMBLE, PHILLIP R. and KOFF, ALEXANDER W. 1998 All Fall Down: The Treaty Power in the Clinton Administration. *Berkeley Journal of International Law* 16:55–70.

YOO, JOHN C. 1996 The Continuation of Politics By Other Means: The Original Understanding of War Powers. *California Law Review* 84:167–305.

## FOREIGN COMMERCE

The Constitution grants to Congress the power "To regulate Commerce with foreign Nations, and among the several States. . . ." A few cases in the 1800s indicated that the power to regulate foreign commerce was the same as the power to regulate INTERSTATE COMMERCE. Later, in *Brolan v. United States* (1915), the Supreme Court indicated that the power given Congress to regulate foreign commerce was so complete that it was limited only by other portions of the Constitution. So the Court upheld Congress in its regulating, prohibiting, and taxing commerce with other nations while sometimes restricting its power to regulate interstate commerce.

Today the issue is of no significance. The power of Congress to regulate interstate commerce is so great as to make any distinctions meaningless. Congress need only concern itself with the specific constitutional restrictions on the foreign commercial power: those preventing the taxation of exports and giving any preference to the ports of one state over those of another state.

In *Japan Line, Ltd. v. Los Angeles* (1979), however, the Court held that the foreign COMMERCE CLAUSE may serve to limit state taxation in cases in which the interstate commerce clause would not. The Court held invalid a nondiscriminatory, apportioned, state property tax on the value of shipping containers belonging to a Japanese shipping company. The Court said that the tax would have been valid if it had been applied to interstate shipments, but was not here because the containers were taxed on full value in Japan and the Court had no authority to require apportioned taxation in foreign lands. The Court said that state taxes on foreign commerce had to meet all the tests for interstate commerce; in addition, the Court must inquire whether even with apportionment a substantial risk of international multiple taxation persists, and whether the tax prevents the federal government from speaking with one voice when regulating commerce with foreign governments.

EDWARD L. BARRETT, JR.
(1986)

(SEE ALSO: *State Regulation of Commerce; State Taxation of Commerce.*)

Bibliography

HENKIN, LOUIS 1972 *Foreign Affairs and the Constitution.* Pages 69–71. Mineola, N.Y.: Foundation Press.

NOWAK, JOHN E.; ROTUNDA, RONALD D.; and YOUNG, NELSON J. 1980 *Handbook on Constitutional Law.* Pages 129–131. St. Paul, Minn.: West Publishing Co.

## FOREIGN POLICY

See: Congress and Foreign Policy; Congressional War Powers; Foreign Affairs; Senate and Foreign Policy

## FORFEITURE

See: Civil Forfeiture

## *FORSYTH COUNTY, GEORGIA v. NATIONALIST MOVEMENT*
505 U.S. 123 (1992)

Forsyth County, Georgia had described itself as "the whitest county in America," and when some ninety CIVIL RIGHTS demonstrators staged a march, about 400 counterdemonstrators broke up the march, throwing rocks and bottles. The next weekend the civil rights marchers returned, 20,000 strong, protected from 1,000 opponents (including members of the Ku Klux Klan and the Nationalist Movement) by 3,000 police officers and National Guardsmen. The protection cost $670,000, a small part of which was paid by the county. The county commissioners then adopted an ordinance requiring a permit for parading, conditioned on a permit fee of up to $1,000, depending on the expense incident to maintaining public order. Two years later the Nationalist Movement sought a permit to hold its own march on the birthday of MARTIN LUTHER KING, JR. The county demanded a permit fee of $100, based not on anticipated costs of policing but on the cost of ten hours of administrative work. In the previous year such fees had ranged from $5 (for the Girl Scouts) to $100 (for the Nationalist Movement). The Movement sued to enjoin the county from imposing the fee, lost in the District Court, but won in the U.S. Court of Appeals. The Supreme Court affirmed, 5–4.

For the majority, Justice HARRY A. BLACKMUN concluded that the ordinance was invalid because it gave "standardless discretion" to the licensing official, whose decision was unreviewable. Such a power carried the risk that the official might vary the fee according to his like or dislike for the parade's message content, or his anticipation of the degree of hostility to that content. Chief Justice WILLIAM H. REHNQUIST, for the dissenting Justices, would have upheld the ordinance against a facial attack on the basis of COX V. NEW HAMPSHIRE (1941), and would withhold judicial intervention until the ordinance was given a message-content-based application.

KENNETH L. KARST
(2000)

(SEE ALSO: *Freedom of Speech.*)

## FORTAS, ABE
(1910–1982)

Abe Fortas of Tennessee, a graduate of Yale Law School, became a NEW DEAL lawyer. As undersecretary of state, he opposed the removal and internment of Japanese Americans. In 1946 Fortas cofounded a Washington law firm whose corporate clients made him rich and influential, but he contributed his time to defending the rights of underdogs and alleged security risks. One client, LYNDON B. JOHNSON, became a close friend. Fortas continued as his adviser after Johnson became President, and Johnson later appointed Fortas to the Supreme Court.

Justice Fortas served for less than four years, from October 4, 1965, to May 14, 1969. In 1968, President Johnson nominated him to serve as Chief Justice of the United States, succeeding EARL WARREN, but a Senate delay in confirming him, initiated primarily by Republicans eager to save the appointment in case a Republican was victorious in November, caused Fortas to withdraw from consideration before the 1968 Supreme Court Term opened. Before that term was over, Justice Fortas had resigned his seat because of revelations of alleged improprieties in his financial activities.

Four years away from practice is a very brief period in which to develop an overall judicial philosophy. Nevertheless, Fortas developed a distinctive style, notable for flowery prose, the artful phrase, and emphasis on the underlying facts of the particular case. He also developed distinctive positions on particular issues.

Fortas's FIRST AMENDMENT analysis was the most well-developed aspect of his constitutional theory. He disparaged the speech-conduct distinction adhered to by Justice HUGO L. BLACK and others; Fortas thought both speech and conduct could warrant First Amendment protection. But while he gave full protection in cases like TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT (1969) to nonviolent, nondisruptive speech and conduct, he believed, as he said in *Barker v. Hardway* (1969), that speech or conduct that is "violent and destructive interference with the rights of others" falls outside the scope of First Amendment protections. In drawing this line in individual cases, Fortas focused tightly on the specific facts of the case. For instance, in *Brown v. Louisiana* (1966), the arrest of demonstrators for conducting a SIT-IN in a segregated public library was unconstitutional because the particular sit-in was "neither loud, boisterous, obstreperous, indecorous, nor impolite."

Those who disagreed with Fortas's approach asked, as in ADDERLEY V. FLORIDA (1966), whether the *type* of demonstration at issue could be disruptive and so was legitimately subject to state prohibition. Fortas reached opposite conclusions by weighing the potential for violence only of the *particular* demonstration involved. He thus gave greater protection to expression in cases the Supreme Court reviewed. But his opinions gave little guidance, simply reporting his own reactions to the facts of the case. Moreover, Fortas occasionally strayed from this ap-

proach. Dissenting in *Street v. New York* (1969), he was willing to affirm a conviction under a state FLAG DESECRATION statute, not because the particular flag-burning threatened disorder but because a government seeking to avoid fire hazards could have prohibited all public burning. There, Fortas stated "action, even if clearly for serious protest purposes, is not entitled to the pervasive protection that is given to speech alone." Seemingly, it again was reaction to the particular factual situation that stirred Fortas, but he was unable to articulate persuasively the reasons for the particular sanctity he attached to the American flag.

When appointed, Fortas already was well-known as the victorious attorney in GIDEON V. WAINWRIGHT (1963), establishing indigents' RIGHT TO COUNSEL in criminal cases. As a Justice, he continued to stress procedural regularity and the need for law enforcement officers to obey the law. He was not afraid to extend protections further than the WARREN COURT majority, as he urged in ALDERMAN V. UNITED STATES (1969) and *Desist v. United States* (1969). One example is the Fifth Amendment RIGHT AGAINST SELF INCRIMINATION which the majority limited to evidence of a testimonial or communicative nature in SCHMERBER V. CALIFORNIA (1966) and UNITED STATES V. WADE (1967). Fortas disagreed, saying it violated the privilege to subject a defendant to blood tests, or to make him repeat words uttered by the perpetrator of the crime, or to give a handwriting sample. His principle was that the privilege forbade compelling any evidence the gathering of which requires "affirmative, volitional action" on the part of the defendant. He applied that test in a somewhat conclusory fashion, however, maintaining that the accused could be made to stand in a LINEUP, "an incident of the state's power to ARREST, and a reasonable and justifiable aspect of the state's custody resulting from the arrest."

In EPPERSON V. ARKANSAS (1968) Fortas, for the Court, struck down an Arkansas statute that prohibited teaching evolution. *Epperson* suggests that the fact that a prohibition owes its existence to a particular religious dogma or religious campaign may be sufficient to invalidate it under the ESTABLISHMENT OF RELIGION clause—a position that Fortas might have preferred as an explanation for the invalidity of anti-abortion legislation, had he remained on the Court to decide that issue. That case and those in which Fortas championed the rights of children, such as *Tinker* and his landmark opinion IN RE GAULT (1967), or suggested the desirability of parents making some important decisions with their children rather than having a state-prescribed rule, such as *Ginsburg v. New York* (1968) (dissent), foreshadowed themes that have since proved important in other contexts (health services, EDUCATION, contraception, and abortion, for example). They suggest that Fortas would have had much to contribute to the Court had his service not been so limited in duration.

MARTHA A. FIELD
(1986)

Bibliography

GRAHAM, FRED 1969 Abe Fortas. Pages 3015–3027 in Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court, 1789–1969.* New York: Chelsea House.

MASSARO, JOHN 1982–1983 LBJ and the Fortas Nomination for Chief Justice. *Political Science Quarterly* 97:603–621.

SHOGAN, ROBERT 1972 *A Question of Judgment: The Fortas Case and the Struggle for the Supreme Court.* Indianapolis: Bobbs-Merrill.

## FOSTER FAMILIES

When a parent is unable to care for a child, the parent may temporarily transfer care and custody of the child to a public or charitable agency. Care and custody may also be transferred by court order when, for example, a parent has abused or neglected a child. The agency may place the child with an adult who is licensed and paid by the state to provide the child with care. The caretaker is commonly called a "foster parent." Voluntary relinquishment and foster care are regulated by statute and by contracts between the natural parent and the agency, and the agency and the foster parent. By statute and contract, children are removable from a foster home on short notice when the agency determines that the best interests of the child would be served by reunification with a natural parent, placement in another foster home, or adoption by a person other than the foster parent.

In theory, foster placement is intended to be short term and is not expected to engender strong emotional bonds between the foster parent and child. Nevertheless, foster placements often last a long time, and a foster parent and child may become deeply attached to one another. Consequently, foster parents have challenged removal procedures on the ground that they infringe FOURTEENTH AMENDMENT DUE PROCESS rights of the foster parent and child. Despite their initial contractual undertaking to relinquish the child to the agency upon demand, foster parents assert that a constitutionally protected liberty interest arises when a psychological parent–child relationship does in fact develop in foster placement. In the leading case, *Smith v. Organization of Foster Families for Equality and Reform (OFFER)* (1977), foster parents challenged New York removal procedures. The Supreme Court held that, even assuming the existence of a liberty interest in the foster family relationship, the removal procedures employed by New York were not constitutionally defective.

The Court observed that *OFFER* does not involve "arbitrary government interference in . . . family- like associations" but instead entails a potential collision of private liberty interests. The interest of natural parents in regaining their children may directly conflict with the interest of foster parents in keeping the children. The best the state can do in drafting removal provisions is give due respect to all interests, which New York had done.

Deciding the question left unanswered by *OFFER*, the U.S. Court of Appeals for the Second Circuit in *Rivera v. Marcus* (1982) held that a person who entered a foster care agreement to care for younger half-siblings had a constitutionally protected liberty interest in preserving the integrity of the family from state removal of the children, and that the Connecticut removal provisions did not adequately respect this interest. Acknowledging that several other circuits had concluded that foster parents do not possess a constitutionally protected liberty interest in the integrity of the foster family, *Rivera* relied, in part, on the biological relationship between the caregiver and her half siblings. Similarly, *Rodriguez v. McLoughlin* (1998), a federal district court decision, found a liberty interest where a child had spent all his life with the foster parent and the foster parent had signed an agreement to adopt the child before the child was removed from the foster home.

GRACE GANZ BLUMBERG
(2000)

Bibliography

CHAMBERS, DAVID L. and WALD, MICHAEL S. 1985 *Smith v. OFFER.* Pages 114–117 in Robert H. Mnookin, ed., *In the Interest of Children: Advocacy, Law Reform, and Public Policy.* New York: W.H. Freeman.

MNOOKIN, ROBERT H. and WEISBERG, D. KELLY 1995 *Child, Family and State,* 3rd ed. Boston: Little, Brown and Co.

## FOURTEENTH AMENDMENT
### (Framing)

The Fourteenth Amendment to the United States Constitution consists of a variety of provisions addressed to several problems that arose when the CIVIL WAR and the abolition of slavery transformed the American political order. One sentence—"No State shall make or enforce any law which shall abridge the PRIVILEGES OR IMMUNITIES of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without DUE PROCESS OF LAW; nor deny to any person within its jurisdiction the EQUAL PROTECTION OF THE LAWS"—has become the text upon which most twentieth-century constitutional law is a gloss. But this sentence may not have been the most important part of the amendment as it was conceived by its framers, adopted by Congress, and ratified by the states between 1865 and 1868.

The sentence was addressed most pointedly to one of the lesser problems that Congress faced in the winter of 1865–1866. During that winter congressional legislation protecting the CIVIL RIGHTS of former slaves had been vetoed by President ANDREW JOHNSON in part, he contended, because the Constitution entrusted the protection of civil rights to the states. The Republican proponents of the CIVIL RIGHTS ACT OF 1866 mustered the necessary two-thirds vote to override the veto, but doubt remained about the power of the federal government to protect civil rights. The quoted sentence in section 1 of the Fourteenth Amendment was written, at least in part, to resolve that doubt.

Another concern of some Northerners in the winter of 1865–1866 was that some future Congress might repudiate the debt that the federal government had amassed during the Civil War or might undertake to pay the Confederate debt or compensate former slaveholders for the loss of their slaves. Section 4 of the amendment guaranteed the national debt, prohibited the payment of the Confederate debt, and barred compensation to slaveholders.

However, the most urgent task that the Thirty-ninth Congress confronted when it began its first session in December 1865 was to establish governments in the South that would be loyal to the Union and send loyal representatives to Congress. The problem was compounded by the ratification of the THIRTEENTH AMENDMENT, which not only abolished slavery but also put an end to the original Constitution's THREE-FIFTHS CLAUSE. With the abolition of slavery, the former slaves would be fully counted as part of the population of the former Confederate states; as a result those states would have more power in Congress and the ELECTORAL COLLEGE than they had had before the Civil War. Something had to be done to insure that the war did not increase the political power of the disloyal groups that had brought the war about.

Three solutions were advanced to prevent those who had lost the Civil War from enhancing their power as a result of it. One was to confer the franchise on Southern blacks, whose votes were expected to bring about the election of loyal candidates. A second solution was to deny political rights—both the right to vote and the right to hold office—to some or all who had participated in the rebellion against national authority. This scheme would increase the number of districts in which Union loyalists had a majority or at least some power to tip the electoral balance in favor of loyal candidates.

A third solution was to alter the basis of representation: to base a state's number of representatives in the House and hence its votes in the Electoral College not on total

population but on the number of people eligible to vote. Thus, if a state excluded blacks from the right to vote, they would not be counted in determining its representation in Congress and its vote in the Electoral College. Thus the abolition of slavery and the end of the three-fifths compromise would reduce Southern political power in Congress unless Southern states gave blacks the right to vote and hence a share in that power.

The JOINT COMMITTEE ON RECONSTRUCTION, established by CONCURRENT RESOLUTIONS of the House and Senate in the opening days of the Congress, sought to put the possible solutions into some sort of order. Four members of this fifteen-man committee were most prominent in its activities: JOHN A. BINGHAM and THADDEUS STEVENS from the House and WILLIAM PITT FESSENDEN and JACOB M. HOWARD from the Senate.

At the third meeting of the Joint Committee on January 12, 1866, Bingham proposed a constitutional amendment that would give Congress "power to make all laws necessary and proper to secure to all persons in every State within this Union equal protection in their rights of life, liberty and property." The proposal was referred to a subcommittee which eight days later returned it to the Joint Committee in the following form: "Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty, and property." In this form the proposal addressed two of the problems then pending, because it gave Congress power to protect civil rights and to legislate VOTING RIGHTS for blacks. This proposal, however, was never presented to Congress. The committee spent two weeks debating its language, finally agreeing on February 3 to the following: "The Congress shall have power to make all laws which shall be necessary and proper to secure to citizens of each State all privileges and immunities of citizens in the several States [Art. IV, Sec. 2]; and to all persons in the several States equal protection in the rights of life, liberty and property [5th Amendment]." A key issue that subsequent judges and scholars have long debated is whether this change in language was meant to deprive Congress of power to legislate black suffrage or merely to put that power into more acceptable language.

On the same day that the subcommittee submitted the early version of the amendment to the Joint Committee, it also submitted a proposal basing representation on population, but further providing "[t]hat whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation." Thus, the total package as of January 20 not only gave Congress power to legislate civil rights and black suffrage—power which Congress might or might not exercise—but also deprived a state of representation based on its black population if blacks were not given suffrage either by Congress or by the state. The package, as altered by the language change of February 3, was submitted to the full House as two separate constitutional amendments.

On February 28, the House postponed consideration of the Bingham amendment conferring legislative power on Congress, and never again considered that amendment as a separate entity. Earlier it had passed and sent to the Senate the amendment depriving states of representation if blacks were denied the right to vote. The Senate, however, never acted on the proposal. Thus, by the end of February 1866, the two forerunners of the Fourteenth Amendment had come to nought.

Both reappeared in slightly different language, however, in the omnibus measure which the Joint Committee presented to both houses of Congress on April 30, 1866. Section 1 of the measure was the sentence containing today's privilege and immunities, due process, and equal clauses, while section 2 reduced the representation of states who denied the right to vote to males over the age of twenty-one. Section 3 deprived all persons who had voluntarily supported the Confederate cause of the right to vote in federal elections prior to 1870, while section 4 dealt with the war debt. Section 5 gave Congress power to enforce the other four sections.

The omnibus amendment passed the House as proposed, but it faced difficulties in the Senate. When it emerged from the Senate on June 8, it had been changed in two significant respects. One of the changes added to section 1a . . . definition of CITIZENSHIP. The Senate also weakened section 3; instead of disfranchising those who had supported the Confederacy, it merely barred from federal office those Confederate supporters who prior to the Civil War had taken an oath to support the Constitution.

After the House had concurred on June 13 in the Senate's changes, the amendment was sent to the states. Twelve days later, on June 25, Connecticut became the first state to ratify. Five additional states ratified the amendment in 1866, and eleven added their RATIFICATIONS in January 1867. By June of 1867, one year after the amendment had been sent to the states, a total of twenty-two had ratified it.

Ratification by six more states was needed, however, and that did not occur until July 1868. By that time two of the states that had previously ratified the amendment, New Jersey and Ohio, had voted to withdraw their assent. Nonetheless Congress ruled that their ratifications survived the subsequent efforts at withdrawal and remained valid. On July 28, 1868, Secretary of State WILLIAM SEWARD accordingly proclaimed the Fourteenth Amendment part of the Constitution of the United States.

In recent decades, historians and judges have extensively debated three questions about the meaning which the Thirty-Ninth Congress and the ratifying states attached to the Fourteenth Amendment, especially to section 1. First, does section 1 give Congress power to protect voting rights? Second, does section 1 overrule BARRON V. BALTIMORE (1833) and require the states to abide by the provisions of the BILL OF RIGHTS? Third, does section 1 prohibit compulsory racial SEGREGATION?

Did section 1 of the Fourteenth Amendment give Congress power to protect voting rights? The Justices of the Supreme Court have been divided in their answer to this question, although the weight of historical scholarship leans toward the view that section 1 was not concerned with voting rights. As the above summary of the progress of the amendment in Congress suggests, resolution of the issue depends on whether the privileges and immunities language in section 1 was meant to alter the substance or only the form of an earlier version of the section, which explicitly gave Congress power to secure to all citizens in every state "equal political rights and privileges." The question can never be answered definitively, for the substitution was made in committee and the committee left no record of its reasoning. The record of congressional debates is equally ambiguous. When the present language of section 1 was on the floor, some congressmen suggested that the section gave Congress power to protect voting rights, but others disagreed. Similarly, some congressmen claimed after the amendment had been adopted that it gave them power to legislate protection of voting rights—and again others disagreed.

Was section 1 meant to overrule *Barron v. Baltimore* and compel the states to abide by the provisions of the Bill of Rights? Justice HUGO L. BLACK, relying on explicit statements during congressional debates that the section would accomplish that end, declared in a dissenting opinion in *Adamson v. California* (1947) that the Fourteenth Amendment did incorporate the Bill of Rights and apply it to the states. Some scholars have supported Black's position. However, two years after *Adamson* Charles Fairman wrote an article challenging Black. Fairman noted that many states in the 1860s did not follow procedures mandated by the Bill of Rights, but that no one during state ratification proceedings seemed concerned that adoption of the Fourteenth Amendment would require changes in state practice. He thought it probable that, if the states were concerned that the amendment, through INCORPORATION of the Bill of Rights, would require changes in their practices, they would at least have discussed the issue. He concluded from the lack of discussion that the amendment had no such purpose. The view of several recent scholars has been that, in light of the conflicting and insubstantial evidence, the question raised by Justice Black can never be conclusively answered.

Finally, there is the question whether section 1 was intended to prohibit racial segregation. After asking the litigants in BROWN V. BOARD OF EDUCATION (1954) to address this question, the Court concluded that the historical evidence was too ambiguous to permit an answer. Some scholars, however, have been more confident. Raoul Berger concluded that the framers of the amendment did not intend to prohibit racial segregation. On the other hand, ALEXANDER BICKEL had argued some years earlier that the framers had consciously framed section 1 in broad, open-ended language that would permit people in the future to interpret it as prohibiting the practice of segregation. The historical record itself is sparse. During the debates in Congress on the amendment, little was said about segregation. Earlier, however, Congress had engaged in lengthy debates about the legality of segregation on DISTRICT OF COLUMBIA streetcars. Moreover, school segregation was opposed by some members of Congress, notably CHARLES SUMNER who had been counsel in ROBERTS V. CITY OF BOSTON, an 1849 school desegregation case. In the 1860s, however, Congress was permitting racially segregated schools to exist in the District of Columbia.

Questions about whether the Thirty-Ninth Congress and the states that ratified the Fourteenth Amendment intended it to protect voting rights, make the Bill of Rights binding on the states, or outlaw segregation can never be answered confidently. All that the person who inquires into the historical record in search of an answer can do is make a guess—a guess more likely to reflect his political beliefs than to reflect the state of the historical record. The questions that judges and historians have asked about the original meaning of the Fourteenth Amendment are simply the wrong ones, because they do not address the issues that Congress and the ratifying states in fact debated and decided during the era of Reconstruction.

On one point of political philosophy, nearly all Americans of the 1860s agreed. President Andrew Johnson stated the point in his 1865 State of the Union address: "Monopolies, perpetuities, and class legislation are contrary to the genius of free government, and ought not to be allowed. Here there is no room for favored classes or monopolies; the principle of our Government is that of equal laws. . . . We shall but fulfill our duties as legislators by according "equal and exact justice to all men, special privileges to none." Innumerable Republicans argued that the purpose of section 1 of the Fourteenth Amendment was to enact this political principle into law. John A. Bingham, the draftsman of section 1, said what others repeated: that he proposed "by amending the Constitution, to provide for the efficient enforcement, by law, of these

"equal rights of every man"—of "the absolute equality of all men before the law." Even Democrats from former slave states accepted the principle that the law should treat all persons equally. There was neither division nor sustained debate in the Thirty-Ninth Congress over the contrary principle that people who are in fact the same should receive equal treatment before the law and that people who are different may be treated differently. The issue on which Republicans and Democrats divided was whether black people, in essence, were equal to white people or inherently inferior.

Garrett Davis, a Democratic senator from Kentucky, used typical racist rhetoric. During an 1866 debate on the question whether blacks should be permitted to vote in the District of Columbia, Davis said:

> [T]he proposition that a nation of a superior race should allow an inferior race resident in large numbers among them to take part in their Government, in shaping, and controlling their destinies, is refuted by its mere statement. And the further proposition that a nation composed of the Caucasian race, the highest type of man, having resident in it more than four million negroes, the lowest type, of which race no nation or tribe, from the first dawning of history to the present day, has ever established a polity that could be denominated a Government, or has elaborated for itself any science or literature or arts or even an alphabet, or characters to represent numbers, or been capable of preserving those achievements of intellect when it has received them from the superior race; such a proposition is, on examination, revolting to reason, and in its practical operation would be productive of incalculable mischief.

Republicans responded to this "prejudice," which "belong[ed] to an age of darkness and violence, and is a poisonous, dangerous exotic when suffered to grow in the midst of republican institutions." Jacob M. Howard, a key member of the Joint Committee, told the Senate:

> For weal or for woe, the destiny of the colored race in this country is wrapped up with our own; they are to remain in our midst, and here spend their years and here bury their fathers and finally repose themselves. We may regret it. It may not be entirely compatible with our taste that they should live in our midst. We cannot help it. Our forefathers introduced them, and their destiny is to continue among us; and the practical question which now presents itself to us is as to the best mode of getting along with them.

Justin Morrill of Vermont added: "We have put aside the creed of the despot, the monarchist, the aristocrat, and have affirmed the right and capacity of the people to govern themselves, and have staked the national life on the issue to make it good in practice. . . . To deny any portion of the American people civil or political rights common to the citizen upon pretense of race or color, is to ignore the fundamental principles of republicanism." The only proper policy for the Government, according to Lyman Trumbull, chairman of the Senate Judiciary Committee, was "to legislate in the interest of freedom. Now, our laws are to be enacted with a view to educate, improve, enlighten, and Christianize the negro; to make him an independent man; to teach him to think and to reason; to improve that principle which the great Author of all has implanted in every human breast, which is susceptible of the highest cultivation, and destined to go on enlarging and expanding through the endless ages of eternity."

Trumbull and his fellow Republicans understood that God had created blacks as the equals of whites and that, if the law gave blacks an opportunity, they would demonstrate their equality. The Republicans made this equalitarian faith the basis of the Fourteenth Amendment. Although the faith was forgotten within a decade of the Fourteenth Amendment's ratification, it still offers a perspective from which to begin analysis of the issues of Fourteenth Amendment jurisprudence that confront us today.

WILLIAM E. NELSON
(1986)

(SEE ALSO: *Abolitionist Constitutional Theory.*)

Bibliography

BERGER, RAOUL 1977 *Government by Judiciary: The Transformation of the Fourteenth Amendment.* Cambridge, Mass.: Harvard University Press.

BICKEL, ALEXANDER M. 1955 The Original Understanding and the Segregation Decision. *Harvard Law Review* 69:1–65.

FAIRMAN, CHARLES 1949 Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding. *Stanford Law Review* 2:5–173.

HYMAN, HAROLD M. and WIECEK, WILLIAM M. 1982 *Equal Justice under Law: Constitutional Development 1835–1875.* New York: Harper & Row.

JAMES, JOSEPH B. 1956 *The Framing of the Fourteenth Amendment.* Urbana: University of Illinois Press.

TEN BROEK, JACOBUS 1951 *The Antislavery Origins of the Fourteenth Amendment.* Berkeley: University of California Press.

## FOURTEENTH AMENDMENT, SECTION 5
### (Framing)

The FOURTEENTH AMENDMENT was proposed by Congress in 1866 and ratified in 1868. Section 1 made persons born in the nation citizens and prohibited states from abridging the PRIVILEGES AND IMMUNITIES of citizens of the United

States and from denying DUE PROCESS or EQUAL PROTECTION to any person. Section 5 gave Congress the power to enforce the amendment by appropriate legislation. However, in 1866, the exact scope of the enforcement power was not clear. Particularly, it was unclear whether the amendment was designed to reach purely private action and conspiracies or only those in which state officials were involved. Controversy on this question has continued from 1866 to the present.

Although the debates on the Fourteenth Amendment did not emphasize the mechanics of the enforcement authorized by section 5, broad themes in the debate were clearly relevant to enforcement. Most members of the REPUBLICAN PARTY insisted on protection for FUNDAMENTAL RIGHTS of American citizens, were committed to a federal system that required states to respect basic rights, and were unwilling for the federal goverment to supplant the basic jurisdiction of the states over crimes and civil matters. At the same time, Republicans were determined to protect blacks and loyalists in the South.

A prototype of the Fourteenth Amendment written by Republican JOHN A. BINGHAM provided congressional power to pass all laws necessary to secure all persons equal protection in their rights to life, liberty, and property. Several Republicans objected to the prototype because they thought it would allow federal statutes broadly to supplant state civil criminal law. Bingham denied that was his purpose and said he intended to authorize Congress to punish state officers for violations of the BILL OF RIGHTS. Bingham's prototype was recast with limitations on the states in section 1 and the enforcement power in section 5. Bingham explained that the final version of the amendment would allow Congress to protect the privileges and immunities of citizens and the inborn rights of every person when these rights were abridged or denied by unconstitutional acts of any state.

Although Republicans generally believed that state laws denying privileges or immunities, due process, or equal protection could be struck down by the courts, they expected Congress to take a direct and substantial role in enforcing the guarantees of section 1. Many believed that the equal protection clause required the states to supply the protection of the laws to blacks, Unionists, Republicans, and others who faced private violence.

Republicans thought enforcement could reach state officials who violated the rights secured by the amendment. One object of the Fourteenth Amendment was to ensure that Congress had the power to pass the CIVIL RIGHTS ACT OF 1866. That act had punished persons who, under color of state law or custom, had deprived citizens of the rights it guaranteed. Senator LYMAN TRUMBULL, chairman of the SENATE JUDICIARY COMMITTEE and manager of the civil rights bill in the Senate, thought that state judges who maliciously violated rights secured in the act were subject to prosecution.

In 1871, Congress considered an act to deal with terrorism by the Ku Klux Klan. The most difficult issue confronting the Congress was whether the power to enforce the Fourteenth Amendment under section 5 allowed Congress to make private action a crime. Republicans generally supported provisions that would punish those, like state officers, who deprived persons of rights, privileges, and immunities of citizens of the United States under COLOR OF LAW. However, Democrats and several leading Republicans objected to provisions designed to reach private acts and private conspiracies to deny constitutional rights. They insisted that the power to enforce the Fourteenth Amendment was limited to STATE ACTION or, some Republican dissenters thought, to cases where the state failed to supply equal protection. Congressional critics pointed to the change from the prototype of the Fourteenth Amendment, which granted Congress power to secure equal protection in life, liberty, or property, to the amendment's final version, which provided restriction on the states in section 1 together with congressional power to enforce the amendment in section 5.

According to the state-action argument, Congress had less power to reach private terrorism intended to deny constitutional rights than the Supreme Court in 1842 had found it had to punish private individuals who interfered with the return of FUGITIVE SLAVES.

In 1871, most Republicans thought the states had the duty to protect their citizens against politically or racially motivated violence and that private individuals who interfered with this duty could be punished. As finally passed, the 1871 act punished private individuals who conspired to deprive persons of equal protection or equal privileges or immunities or who conspired to interfere with state officials supplying equal protection. In this form, the act secured the support of Republicans who had expressed constitutional doubts. Still, in UNITED STATES V. HARRIS (1883), the United States Supreme Court held a section of the 1871 act unconstitutional because it reached conspiracies by private persons to deny constitutional rights and did so regardless of how well the state had performed its duty of equal protection. In 1966, in the midst of a second RECONSTRUCTION, six Justices suggested that Congress could reach some private conspiracies designed to interfere with constitutional rights. In JONES V. ALFRED H. MAYER CO. (1968) the Supreme Court recognized power in Congress to enforce the THIRTEENTH AMENDMENT by prohibiting private racial discrimination in housing contracts. Still, the power of Congress to reach private conduct under the Fourteenth Amendment remains controversial.

MICHAEL KENT CURTIS
(1992)

Bibliography

AVINS, ALFRED 1967 The Ku Klux Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment. *Saint Louis University Law Journal* 11:331–381.

CARR, ROBERT K. 1947 *Federal Protection of Civil Rights.* Ithaca, N.Y.: Cornell University Press.

FRANTZ, LAURENT B. 1964 Congressional Power to Enforce the Fourteenth Amendment Against Private Acts. *Yale Law Journal* 73:1352–1384.

HYMAN, HAROLD and WIECEK, WILLIAM 1982 *Equal Justice Under Law.* New York: Harper & Row.

KACZOROWSKI, ROBERT J. 1985 *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights 1866–76.* New York: Chelsea House.

ZUCKERT, MICHAEL 1986 Congressional Power Under the Fourteenth Amendment—The Original Understanding of Section Five. *Constitutional Commentary* 3:123–155.

# FOURTEENTH AMENDMENT, SECTION 5

## (Judicial Construction)

Section 5 of the FOURTEENTH AMENDMENT empowers Congress to "enforce, by appropriate legislation" the other provisions of the amendment, including the guarantees of the DUE PROCESS and EQUAL PROTECTION clauses of section 1. Congress can, of course, enact criminal penalities or provide civil remedies to redress violations of the due process and equal protection clauses. The more difficult issue is whether the Fourteenth Amendment enforcement power is large enough to allow Congress to forbid conduct that does not violate due process or equal protection.

In the CIVIL RIGHTS ACT OF 1875, Congress made RACIAL DISCRIMINATION in "inns, public conveyances . . . , theatres and other places of public amusement" a crime. The CIVIL RIGHTS CASES (1883) held that the Fourteenth Amendment enforcement power did not provide sufficient support for the law. Congress only had the power under section 5 to "enforce" the amendment, which forbade only discrimination by the state. Therefore, legislation outlawing a "private wrong" was beyond the enforcement power. The same limit applies to the enforcement power in section 2 of the FIFTEENTH AMENDMENT, for section 1 of that amendment is similarly interpreted to forbid only state abridgment of the right to vote.

Despite the holding of *Civil Rights Cases*, it has been settled that the Fourteenth Amendment gives Congress power to prohibit some behavior by private individuals. In UNITED STATES V. GUEST (1966) six Justices agreed to an OBITER DICTUM that Congress can "punish private conspiracies that interfere with fourteenth amendment rights, such as the right to utilize public facilities." That concept supports provisions of 1968 legislation that make it a federal crime for private individuals to deny others, "because of . . . race, color, religion or national origin," their rights to attend public schools or participate in programs provided or administered by the state.

It is less clear whether the holding of the *Civil Rights Cases* is still valid in denying Congress the power, under section 5 of the Fourteenth Amendment, to control private conduct that is not connected to any relationship between the victim and the states. No Supreme Court decision since *Guest* has spoken to that question. Because Congress has a wide range of other legislative powers available to it, this abstract question probably will not be answered in the foreseeable future. The CIVIL RIGHTS ACT OF 1964, for example, went further than the law invalidated in the *Civil Rights Cases*, outlawing discrimination by hotels, restaurants, and private employers. The 1964 Act was upheld, in *Katzenbach v. McClung* (1964), under Congress's broad power to regulate INTERSTATE COMMERCE. The commerce power also supports 1968 federal legislation regulating private housing discrimination.

One question concerning the scope of the Fourteenth Amendment enforcement power may be more than academic. In cases like NATIONAL LEAGUE OF CITIES V. USERY (1976) and GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985), questions have been raised about the constitutionality of federal laws that impose obligations directly on state governments—for example, that the state pay its workers a minimum wage. It may be necessary to decide whether legislation imposing some obligations on state or LOCAL GOVERNMENTS can be sustained under the Fourteenth Amendment enforcement power. The Court has concluded in *City of Rome v. United States* (1980) that the three constitutional amendments enacted following the CIVIL WAR—the THIRTEENTH AMENDMENT, the Fourteenth Amendment, and the Fifteenth Amendment—"were specifically designed as an expansion of federal power and an intrusion on state sovereignty." Thus, constitutional limits on national power imposed to protect state sovereignty are inapplicable to legislation authorized by these amendments. In *City of Rome* the Court upheld federal VOTING RIGHTS legislation requiring the city to obtain approval of the United States ATTORNEY GENERAL before it could reduce the size of its city council.

The power to provide "remedies" to prevent violations of the Fourteenth and Fifteenth Amendments allows Congress to invalidate some state laws that courts otherwise would have sustained. State LITERACY TESTS for voters are a clear example. The Supreme Court upheld literacy tests as a requirement for voters in *Lassiter v. Northampton County Board of Elections* (1959). Federal voting rights laws, however, have since suspended all state literacy tests. The Court sustained that legislation in OREGON V. MITCHELL (1970). Congress could reasonably find that the states had

used literacy tests to engage in racial discrimination. Even if literacy tests for voting did not themselves violate the Constitution, Congress decided that they were being used to violate the Fifteenth Amendment. Congress could then invalidate all literacy tests as a remedy to prevent racial discrimination in voting.

Modern cases have uniformly sustained federal laws enacted to provide broad remedies for possible violations of the Fourteenth and Fifteenth Amendments. There has been more controversy concerning the question of whether Congress has power to interpret the guarantees of section 1 of the Fourteenth Amendment. In KATZENBACH V. MORGAN (1965) the Court sustained a provision of the VOTING RIGHTS ACT OF 1965 that suspended literacy tests for voting in New York by persons who had completed six grades of school in Puerto Rico. The Court sustained that legislation, in part on the ground that Congress could decide that New York's literacy test law, which waived the test only for citizens who had completed six grades of school in the English language, violated the equal protection clause of section 1 of the Fourteenth Amendment. Two dissenters argued that only courts could interpret the Constitution and warned that the power to interpret the Constitution's guarantees of liberty could authorize Congress to dilute those guarantees as well as amplify them.

The continuing authority of the interpretive theory of *Katzenbach v. Morgan* is now in some doubt. Amendments to the Voting Rights Act in 1970 extended the right to vote to eighteen-year-olds in both state and federal elections, interpreting the equal protection clause to declare that it was unconstitutional to deny them the right to vote because of their age. Different 5–4 majorities of the Court in *Oregon v. Mitchell* upheld the statute as applied to federal elections and invalidated it as applied to state elections. Four of the Justices would have upheld the statute in its entirety, while four would have held that Congress lacked the power to change the voting age in either state or federal elections. The specific issue of voting age has, of course, been mooted by enactment of the TWENTY-SIXTH AMENDMENT the following year. Since 1970 Congress has not relied on the interpretive theory in enactments enforcing the Fourteenth and Fifteenth Amendments.

WILLIAM COHEN
(1992)

Bibliography

BICKEL, ALEXANDER M. 1966 The Voting Rights Cases. *Supreme Court Review* 1966:79–102.

COHEN, WILLIAM 1975 Congressional Power to Interpret Due Process and Equal Protection. *Stanford Law Review* 27:603–620.

COX, ARCHIBALD 1971 The Role of Congress in Constitutional Determination. *University of Cincinnati Law Review* 40:199–261.

## FOURTEENTH AMENDMENT AS A NEW CONSTITUTION

The FOURTEENTH AMENDMENT transformed—reconstructed—the meaning of the Framers' Constitution. This transformation is most visible in the interpretations now given to the BILL OF RIGHTS. At the Founding, the first ten Amendments were primarily structural, emphasizing STATES' RIGHTS and majoritarian POPULAR SOVEREIGNTY. These amendments applied only against federal officials (as the Supreme Court made clear in the 1833 case of BARRON V. CITY OF BALTIMORE), and were never described by the antebellum Court as the "Bill of Rights." The Fourteenth Amendment changed all that. The Amendment aimed to make the various rights and freedoms of the original bill applicable against state and local governments—what twentieth-century jurists call "incorporation" of the Bill of Rights. In the process, the amendment reshaped the meaning of these rights, giving Americans a new birth of freedom featuring national protection more than states' rights, and minority rights more than majority rule. Only after and because of this amendment does it make sense to call the original amendments a true "Bill of Rights" for individuals and minorities. In addition, the amendment affirmed the idea of national CITIZENSHIP; highlighted the key value of equality (a word notably absent from the Framers' Constitution); sought to penalize denial of VOTING RIGHTS of black men; and tried to give Congress a broad substantive role in protecting liberty and equality.

The Founding Fathers forged their Constitution and early amendments in the afterglow of the AMERICAN REVOLUTION. That revolution showcased POPULISM and FEDERALISM—the people collectively had acted to throw off the yoke imposed on them by government officialdom, and democratic local regimes had banded together to help their citizens fight off an arrogant imperial center. Liberty held hands with localism—the rallying cry of "no taxation without representation" sounded in federalism as well as freedom, affirming the rights of local, representative legislatures even as it denied power to the central Parliament. Classical political theory also suggested that democracy thrived in small settings, and could not easily extend over a vast continent encompassing a large and diverse population. Thus, the patriots' initial scheme of government featured a loose-knit confederation of sovereign states with little effective central power. When these ARTICLES OF CONFEDERATION proved too weak to hold America together, the Federalists proposed a new Constitution that

they claimed would vindicate the principles of the revolution. Beginning with the words "We the People," the Constitution in both word and deed stressed popular sovereignty: the words became law by ratification in popular conventions via a process that was more participatory than anything before in the planet's history (though still woefully underinclusive from a modern-day perspective). The document also showcased federalism, limiting power of the central government to enumerated domains, and retaining important roles for states as constituent parts of the new system.

But Anti-Federalist critics of the Constitution remained skeptical, and demanded additional safeguards in the form of a Bill of Rights. As originally crafted, this bill focused less on individualistic liberty, and more popular sovereignty and states' rights. No phrase appeared in more of the first ten amendments than the phrase "the people," echoing the PREAMBLE and emphasizing popular rule. At its core the FIRST AMENDMENT right of "the people" to assemble affirmed the sovereign people's collective entitlement to assemble in constitutional conventions and other political conclaves, the SECOND AMENDMENT right of "the people" to keep and bear arms stressed the collective authority of the citizenry to check a standing army that might seek to tyrannize, and the NINTH AMENDMENT and TENTH AMENDMENT served as a reminder of the rights retained and reserved to "the people." (The FOURTH AMENDMENT spoke of "the people" but counterbalanced this collective noun with two individualistic references to "persons." The key collective idea of this amendment was that juries of ordinary citizens, representing the people, would help keep abusive officials in check by holding these officials liable for unreasonable SEARCHES AND SEIZURES.) The original bill was equally emphatic about states' rights. For example, the First Amendment affirmed that Congress lacked all enumerated power to regulate the press or religion in the states—and the ESTABLISHMENT CLAUSE prevented the federal government not only from establishing a national church but also from disestablishing state churches. Likewise, the Ninth and Tenth Amendments stressed the idea of the federal government's limited ENUMERATED POWERS. Perhaps the central idea of the original bill was the idea of TRIAL BY JURY, explicitly affirmed in the Fifth Amendment's guarantee of GRAND JURIES, the Sixth Amendment's protections of criminal PETIT JURIES, and the SEVENTH AMENDMENT's embrace of civil juries, and implicitly affirmed in many other provisions. The Founding-era jury was a populist and provincial institution, empowering ordinary citizens against government professionals (judges and prosecutors), and localists against centralizers. The key idea of the jury was not simply the right to be tried, but the right to try—the right of the people themselves to take part in government administration.

This Revolutionary-era vision was revised in the aftermath of the CIVIL WAR. The antebellum experience had proved that states could also threaten liberty, especially when SLAVERY dominated politics. Slave states had become increasingly oppressive in their efforts to prop up a legal regime of human bondage—stifling abolitionist FREEDOM OF SPEECH, suppressing antislavery preachers, invading the RIGHT OF PRIVACY, and violating virtually every right and freedom that Americans held dear. A new Bill of Rights was needed to affirm national rights against states, and individual rights against overweening local majoritarianism. Congressman JOHN A. BINGHAM drafted Section I of the Fourteenth Amendment to make clear that henceforth no state should be allowed to abridge fundamental PRIVILEGES AND IMMUNITIES of Americans, such as freedom of speech, RELIGIOUS LIBERTY, and the rest of the rights and freedoms mentioned in the original Bill of Rights. Although the Supreme Court disregarded this ORIGINAL INTENT for many years, twentieth-century Justices eventually came around to Bingham's view, using the amendment's DUE PROCESS clause rather than, as Bingham would have had it, its privileges or immunities clause (which the Court effectively buried in the 1873 SLAUGHTERHOUSE CASES). Today, virtually all the provisions of the first eight amendments apply against state and local governments, except for rules regarding guns, grand juries, and civil juries.

In the process of incorporating the bill against the states, modern judges have also—and quite properly, given the spirit of RECONSTRUCTION—reshaped the meaning of various rights. Whereas Founding-era liberty emphasized majority rule and popular sovereignty, the Reconstruction generation cared more about the individual and minority groups, such as the unpopular speaker (like Frederick Douglass or Harriet Beecher Stowe down South) and the religious outsider (like many of the abolitionists). States' rights were less central to Reconstructors, and so the Tenth Amendment properly plays a smaller role today than it did at the Founding. The local institution of the jury—which was central after a revolution born in localism—seems somewhat less central today in the wake of the more nationalistic Civil War amendments. Another example—which goes beyond current DOCTRINE but illustrates the general theme of this transformation— comes from the Second Amendment. The Founding generation intended to affirm the rights of local militias to resist an imperial army, in the spirit of Lexington and Concord and Bunker Hill. The Reconstruction generation had a different view, understandably less hostile to a central army and less enamored of local militias. Reconstructors believed in a different individualistic right to firearms: blacks must be entitled to keep guns in their homes to ward off Klansmen and other ruffians. In short, modern views about the Bill of Rights owe a great deal to the Reconstruction vision of

nationalist, individualistic liberty—even though conventional wisdom often reads these themes (anachronistically) back into the Founding.

Beyond its transformation of the Bill of Rights, the Fourteenth Amendment aimed to reconstruct the Framers' Constitution in several other key ways—not all of which have proved successful. The amendment's first sentence established a national definition of citizenship and affirmed the centrality of national BIRTHRIGHT CITIZENSHIP. Section 1 went on to affirm the civil equality of all persons via an EQUAL PROTECTION clause that has come to play an enormous role in the twentieth century on behalf of racial minorities and women. Whereas the Framers had rewarded slavery—for every new slave born or imported, a slave state would gain clout in the U.S. HOUSE OF REPRESENTATIVES and ELECTORAL COLLEGE—section 2 of the Fourteenth Amendment sought to penalize states that disenfranchised blacks by reducing their congressional REPRESENTATION. (This section inserted the word "male" into the Constitution for the first time, outraging many suffragists such as SUSAN B. ANTHONY and ELIZABETH CADY STANTON. Other suffragists at the time supported the amendment, noting that its first section protected all citizens and persons, male and female alike). Sections 3 and 4 sought to reduce the political and economic clout of slave owners and leading Confederates; and section 5 aimed to give broad power to Congress to implement the amendment's vision. Early Congresses tried to use this power to help blacks in the South, but the late-nineteenth-century Court stepped in to limit congressional Reconstruction. More recently, in the 1997 *City of Boerne v. Flores* case, the Court declared that Congress has a more limited role under section 5— a result that is hard to defend on grounds of text and original intent, and that is in sharp tension with THIRTEENTH AMENDMENT case law.

AKHIL REED AMAR
(2000)

(SEE ALSO: *Bill of Rights in Modern Application; Incorporation Doctrine.*)

Bibliography

AMAR, AKHIL REED 1998 *The Bill of Rights: Creation and Reconstruction.* New Haven, Conn.: Yale University Press.

CURTIS, MICHAEL KENT 1986 *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights.* Durham, N.C.: Duke University Press.

MEYER, HOWARD N. 1973 *The Amendment That Refused to Die.* Radnor, Penn.: Chilton Book Co.

## FOURTH AMENDMENT

The Fourth Amendment gives citizens the "right . . . to be secure" in their "persons, homes, papers, and effects" by prohibiting the government from engaging in unreasonable SEARCHES AND SEIZURES. The nature and scope of this "right" depends on how the Supreme Court resolves three central questions of Fourth Amendment jurisprudence: which government information-gathering techniques merit Fourth Amendment regulation, what type of regulation applies to these "searches" and "seizures" to ensure their "reasonableness," and what remedies follow Fourth Amendment violations.

The amendment's text yields no answers to the questions of coverage and remedy. It does not specify the criteria for determining whether a particular governmental practice qualifies as a Fourth Amendment "search" or "seizure." Nor does the amendment say whether the evidentiary products of "unreasonable" Fourth Amendment activity should be excluded from a defendant's criminal trial to deter future governmental violations of the amendment. The Supreme Court resolved this latter problem when it "read" an exclusionary remedy into the Fourth Amendment in WEEKS V. UNITED STATES (1914) and applied it to the states in MAPP V. OHIO (1961).

The amendment does provide some clues as to what constitutes "reasonable" Fourth Amendment activity because its "warrant" clause identifies the conditions that must be satisfied for the issuance of a valid SEARCH WARRANT or ARREST WARRANT. The government must show a neutral magistrate that it has PROBABLE CAUSE for believing that it will find what (or whom) it is looking for and that the seizure of such EVIDENCE serves a legitimate governmental purpose. The warrant must contain a particular description of the place to be searched or person or items to be seized. The violation of these guidelines could provide the exclusive or primary criteria for assessing what constitutes an unreasonable search or seizure prohibited by the first clause of the amendment. But the text certainly does not dictate this interpretation, and the Court has not consistently embraced this "warrant" model of Fourth Amendment regulation.

To aid its interpretation of the text, the Supreme Court has sought to ascertain the goals and concerns of those who drafted and ratified it. Translating the "Framers' intent"—when it can be discovered—to a radically different social, cultural, and institutional context is, however, an exercise of dubious value. We know that the Framers wanted to eliminate GENERAL WARRANTS because such warrants placed few limits on the scope of the search or on what could be seized. More generally, the Framers wanted to confine the nascent federal government's powers. However, their vision of what those powers entailed bears little resemblance to the vast regulatory capacities of the modern welfare state. Drawing comparisons between their concerns and ours works only at the highest level of generality. The vague principles generated by such analogies

cannot resolve the difficult interpretive questions the Court faces when it applies the amendment to governmental functions and uses of modern technology the Framers could not have imagined.

These intractable uncertainties in the text and historical record help explain why the Supreme Court has rarely relied on a "Framers' intent" methodology to resolve the three central questions of Fourth Amendment jurisprudence. Instead, the Court's fundamental interpretive strategy is to identify and balance the competing values implicated by this restraint on governmental power.

To resolve the threshold question of whether a particular governmental information-gathering practice constitutes Fourth Amendment activity, the Court has identified the individual "interests" protected by the Fourth Amendment and then determined whether that practice significantly implicates these Fourth Amendment values. A Fourth Amendment "seizure" of a person's tangible "effects" takes place when the government interferes with an individual's legitimate property interests. A fourth amendment "seizure" of a person occurs when the governmental agent takes some action that restrains a REASONABLE PERSON's liberty of movement. A Fourth Amendment "search" occurs when the government intrudes on the individual's REASONABLE EXPECTATION OF PRIVACY as to the place searched (including the individual's body) or information examined.

The Court's test for evaluating what constitutes a reasonable expectation of privacy comes from Justice JOHN MARSHALL HARLAN'S CONCURRING OPINION in KATZ V. UNITED STATES (1967). Harlan articulated "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Harlan subsequently rejected the subjective component of his test, and the Court endorsed his rejection of it in *Hudson v. Palmer* (1984). Focusing on the individual's subjective expectations is unsatisfactory because the government can destroy our actual privacy expectations by engaging in the very type of intrusive surveillance practices that the amendment was designed to regulate. Harlan insisted that the question of reasonable privacy expectations demanded a normative inquiry into the types of privacy expectations a free society *should* protect. Or, as Anthony Amsterdam put it, the Court should determine "whether if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."

Amsterdam's inquiry reminds us of the risks generated by the Court's decision *not* to subject some governmental information-gathering activity to constitutional constraints. When the courts hold that a surveillance practice does not qualify as Fourth Amendment activity, the government may employ the practice against any citizen without any basis for believing either that the citizen merits governmental scrutiny or that such attention will promote any legitimate public interest. Amsterdam's query brilliantly characterizes the ultimate issue implicated by this threshold question of Fourth Amendment coverage; it does not, however, provide any guidelines for resolving the coverage question.

First, application of Amsterdam's formulation requires an empirical prediction about how the police will use (or abuse) the information-gathering technique if it is not subject to any constitutional regulation. But whose prediction of future police behavior should govern? A majority of the Justices on the WARREN COURT feared potential abuse of unregulated police power against racial and ethnic minorities. In contrast, a majority of the Justices on both the BURGER COURT and the REHNQUIST COURT appear more sanguine about the police's good-faith use of unregulated surveillance tactics.

Second, Amsterdam's characterization of the ultimate normative judgment does not tell us *whose* norms should define what counts as a loss of privacy that is "inconsistent" with the aims of a free society. Do these norms come from some independent political theory about the minimal amount of privacy and liberty necessary for a free society; from a moral theory about the minimal privacy due to any human being; or from current majoritarian preferences as expressed by customs, laws, and moral conventions?

The Rehnquist Court does not appear to be relying on any independent normative account of the minimal privacy expectations necessary for a free society in its Fourth Amendment coverage decisions. According to the Court, individuals cannot legitimately demand privacy protection for information that they "knowingly" expose to the public. Thus, in *California v. Ciraolo* (1986) and *Florida v. Riley* (1989) the Court concluded that citizens cannot reasonably demand some privacy protection from governmental aerial surveillance of the private property adjoining their homes so long as these flights operate at altitudes where private flights frequently occur. By "exposing" their activity in this area to view from private aircraft, citizens have assumed the risk that this information will be disclosed to the public and therefore have no legitimate privacy expectation against unregulated govermental snooping. Similarly, in CALIFORNIA V. GREENWOOD (1988), the Court concluded that no Fourth Amendment search occurs when governmental agents rummage through people's discarded trash, because they have exposed that trash (and all the information about their lives that can be gleaned from its inspection) to any private citizen who wishes to examine it.

The question-begging nature of the Court's "assumption of risk" analysis hardly suggests that the Justices are relying on any coherent theoretical account of privacy. The Court fails to ask whether individuals have any meaningful choice to avoid exposure of some information to private third parties in these cases. How, for example, are homeowners supposed to protect their backyards from those curious airline passengers armed with high-powered binoculars? More importantly, the empirical risks of disclosure that citizens assume as to some private third party (for example, the scavenger going through their trash) cannot resolve the normative question of what risks of disclosure they should bear when the government is the information-gatherer. Must we incinerate our own trash to keep the government from rummaging through it to learn the most intimate details about our lives? Must we remain indoors behind shrouded windows to prevent the government from learning what we might otherwise do in our backyards? Why, in short, must information remain secret before we can demand that the government have some good reason for gaining access to it?

All of these objections have considerable force if the Fourth Amendment's privacy norms derive from some coherent theoretical account. But why does the constitution endorse any particular theoretical account about how to determine what constitutes a reasonable expectation of privacy? What if a majority of American citizens approved of these decisions because they accurately reflected their own judgments about what types of privacy expectations should be considered legitimate? Admittedly, the majority's normative judgments might reflect the public's acquiescence to a range of intrusive governmental information-gathering practices that have gradually lowered its normative expectations. But there are other possible explanations for such majoritarian views.

Majoritarian preferences about the degree of desirable protection from unregulated government surveillance may reflect an assessment of how much privacy and liberty is lost from the high incidence of crime in our communities. People who live in a drug-infested high-crime area might be happy to have the police engage in suspicionless searches of their trash in hope that these unregulated practices will generate more drug arrests, more convictions, and a lower level of criminal activity in their neighborhoods. In short, the majority might be willing to forgo some protection from unregulated governmental intrusions into their lives to increase their protection from violent criminal intrusions.

Linking a "reasonable expectation of privacy" test to majoritarian preferences is, of course, very problematic. Courts will have difficulty determining whether majoritarian preferences reflect acquiescence to intrusive governmental practices or considered judgments about the best trade-off between different types of privacy losses. Moreover, "majoritarian" calculations of this trade-off are suspect because the losses of privacy and liberty from governmental intrusion probably will not be equally distributed among all citizens. Finally, basing Fourth Amendment privacy norms on majoritarian preferences offers no constitutionally mandated minimal floor of privacy protection against the government. If crime sufficiently threatened the basic fabric of society, the majority might prefer a trade-off that gave governmental authorities the powers of a police state. If the majority expressed these preferences in a political process that gave equal weight to all citizens' choices, the Court could not invalidate any resulting crime-control legislation without appealing to some independent normative privacy theory.

The conclusory nature of the Court's analysis in cases like *Ciraolo* and *Greenwood* precludes any confident conclusion about the sources from which the Court is deriving its privacy-expectation norms. Indeed, the incoherence of these opinions might be the inevitable product of the Court's refusal to rely exclusively on either majoritarian preferences or some normative privacy theory to justify its coverage decisions.

However, an examination of the Rehnquist Court's answers to the second central question of Fourth Amendment jurisprudence—the type of regulation applicable to governmental practices that are covered by the amendment—strongly suggests that the Court's "reasonableness" analysis reflects current societal assessments of when these practices are cost-justified.

What constitutes a "reasonable" search or seizure depends in part on the nature of the Fourth Amendment "interest" or "right" at stake. Consider the RIGHT OF PRIVACY implicated by governmental intrusions into our bodies. The Supreme Court faced this issue in *Winston v. Lee* (1985) when it decided that a court-approved surgery to remove a bullet that could link the individual to a crime constituted an unreasonable search and seizure.

The Court could have justified this decision by viewing bodily privacy as a right of personhood that merits respect and protection regardless of the beneficial social consequences that might be generated by its impairment. A court-ordered surgical procedure performed for nonmedical reasons against the individual's will would constitute an "unreasonable" search because it violated this norm.

Instead, the Court said that a search's reasonableness "depends on a case by case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure." In this case, the balance tipped in the individual's favor. The state did not need the incriminating bullet because it already possessed sufficient independent evidence of Lee's guilt to secure his conviction. While acknowledging

that an intrusion into bodily privacy might be so egregious and life-threatening that it would be deemed unreasonable on that basis alone, the Court endorsed a utilitarian cost-benefit-balancing analysis to determine the reasonableness of intrusive BODY SEARCHES in future cases.

*Winston* offers an extreme example of a general judicial trend to view Fourth Amendment values in liberty, property, and privacy as "individual interests" that will be protected from state interference only when doing so will promote our general welfare. In theory, a comprehensive utilitarian calculation of whether a particular search was "reasonable" might consider several factors, including: the strength of the Fourth Amendment interest that is being impaired, the degree of its impairment, the strength of the societal interest at stake, the extent to which the Fourth Amendment activity under review actually furthers that societal interest, and whether the government could further that societal interest by means that intruded less on the individual's Fourth Amendment interests.

But who should balance these competing interests? From what sources should the balancer derive the standard for determining how much social cost the protection of the individual's Fourth Amendment interests is worth? And what kinds of regulatory guidelines should follow from this balancing methodology?

Courts could defer to majoritarian resolutions of such questions in those cases where majoritarian preferences are expressed through political processes that treat all individual choices with equal weight. Under such a "fair process" model, the Court might limit its constitutional inquiry to determining whether the manner by which these trade-off judgments were reached provided a fair opportunity for all interests, values, and alternatives to be considered by politically accountable decision makers. Searches and seizures would be unreasonable if the political process for making the cost-benefit judgment was flawed by some form of discrimination or if the trade-off judgment was delegated to the "arbitrary" discretion of officers in the field who do not qualify as "democratically accountable" officials.

Deriving Fourth Amendment norms exclusively from majoritarian preferences (even those expressed by a well-functioning democratic process) remains problematic for those who view the Constitution as a source of rights and principles that are designed in part to check majoritarian will. But what is the alternative if an assessment of reasonableness requires a cost-benefit analysis? Some commentators have suggested that the Framers of the Fourth Amendment have already done all the necessary balancing of competing interests and that their judgments are reflected in the amendment's warrant-clause requirements.

According to this "warrant" model of Fourth Amendment regulation, the probable cause requirement embodies the Framers' balancing judgment of what constitutes a reasonable search or seizure. Prior judicial authorization ensures that a neutral magistrate, and not the officer in the field, will decide whether the probable cause standard is satisfied. The warrant also controls the discretion of governmental field agents because its particular description of what can be searched and seized limits the scope of their justifiable intrusion.

The Warren Court appeared to embrace this warrant model; it treated searches and seizures without probable cause and most warrantless Fourth Amendment activity as presumptively unreasonable. That Court identified only two narrowly defined exceptions (STOP AND FRISK and ADMINISTRATIVE SEARCHES) where it was willing to engage in its own balancing analysis to assess the reasonableness of Fourth Amendment activity that did not satisfy the warrant clause's requirements.

In TERRY V. OHIO (1968) the Court applied a watered-down version of probable cause (individualized reasonable suspicion) to justify warrantless investigative seizures (stops) and protective searches (frisks) that were less intrusive than ARRESTS and full evidentiary searches. But these stop-and-frisk cases retained a core Fourth Amendment criterion for assessing reasonableness: the government had to demonstrate an individualized factual basis for engaging in Fourth Amendment activity.

The Warren Court's second deviation from the warrant model of regulation came in CAMARA V. MUNICIPAL COURT (1967), where it recognized that governmental civil regulatory interests may render some administrative searches reasonable even in the absence of any individualized factual bases for conducting them. *Camara* upheld the reasonableness of housing-code inspection searches even though there were no individualized ground for believing that the homes searched contained code violations. Having concluded that an individualized suspicion requirement would destroy the state's ability to promote its valid civil regulatory interest, the Court sustained the constitutionality of housing-code inspections conducted in conformity with "reasonable administrative or legislative standards" that limited the discretion of inspectors in the field.

The Burger and Rehnquist Courts have shown a far greater willingness to engage in their own context-specific balancing of competing interests to decide what constitutes reasonable Fourth Amendment activity. At a rhetorical level, they have not explicitly repudiated the warrant model of regulation for criminal cases. However, they have greatly expanded the range and scope of Fourth Amendment intrusions governed by the *Terry* exception to probable cause. On the basis of individualized reasonable suspicion, the police may now "frisk" the passenger compartment of cars to look for dangerous weapons and con-

duct protective "sweep" searches of homes to look for dangerous accomplices of the person they have arrested. Moreover, the Court has watered down the quality of the evidence needed to establish reasonable suspicion by holding in *Alabama v. White* (1990) that police corroboration of nonincriminating details from an anonymous tip may satisfy the standard of founded suspicion.

More importantly, the Court has greatly expanded both the rationale and scope of the administrative search doctrine. In several decisions, the Court has used a balancing approach to justify intrusive searches and seizures without a warrant, probable cause, or even individualized suspicion where the governmental interest furthered by the search is viewed as particularly compelling. Two significant themes emerge from these cases.

First, the Court has dispensed with individualized suspicion as a minimal Fourth Amendment requirement even in contexts in which such a requirement would not preclude the government from promoting the societal interests at stake. Thus, in NATIONAL TREASURY EMPLOYEES UNION V. VON RAAB (1988), the Court upheld the constitutionality of suspicionless DRUG TESTING of employees who were in or were seeking certain sensitive positions within the Customs Service. The Court found mandatory urine testing reasonable despite the absence of any showing that the Service had a drug problem or that a founded suspicion standard would prevent the Service from adequately dealing with any problem it did have.

Second, the Court has not confined its interest-balancing approach to civil regulatory searches and seizures. Despite language in *Von Raab* that some special "governmental need" beyond the normal imperatives of law enforcement must be shown for interest balancing to be appropriate, the Court used interest balancing in MICHIGAN DEPARTMENT OF STATE POLICE V. SITZ (1990) to uphold the reasonableness of seizures of all drivers at sobriety checkpoints. The Court did not concern itself with whether these suspicionless seizures better promoted the detection and deterrence of drunk driving than did police patrols that stopped drivers on the basis of individualized reasonable suspicion. Nor did the availability of less intrusive police practices that served the same societal interests render these checkpoint stops unreasonable. In essence, this law enforcement seizure was "reasonable" because the state's compelling interest in fighting drunk driving outweighed the individual's interest in liberty that was only "minimally" intruded on by a momentary detention and examination for signs of intoxication.

When the Court uses this interest-balancing approach, it never identifies the source of its standard for assessing why the state interest outweighs the individual's Fourth Amendment interests. But opinions like *Sitz* strongly suggest that the Court is relying on its interpretation of majoritarian assessments of when searches and seizures are cost-justified. The Court certainly is not making its own probing cost-benefit analysis. Instead, it defers to the judgments of upper-level law enforcement officials concerning the most appropriate use of their scarce law enforcement resources because the Fourth Amendment "was not meant to transfer [such decisions] from politically accountable officials to the courts." Left unstated is the assumption that the tenure of "politically accountable" officials depends on their ability to gauge accurately majoritarian preferences about the appropriate trade-off between individual and societal interests. Left unexamined is whether the political process generating these trade-off decisions has fairly considered the competing interests at stake or adequately examined alternative ways to accommodate them. The Court appears to be using a "fair process" model in name only to legitimate majoritarian preferences concerning what constitutes cost-justified Fourth Amendment activity.

The Court's Fourth Amendment jurisprudence reflects a fundamental tension within constitutional law concerning two different functions that can be served by constitutional principles in a democratic system. The Court sometimes treats the Constitution as a source of norms whose justification is not linked either to the satisfaction of majoritarian preferences or to the promotion of general social welfare. When the Court views the Fourth Amendment from this perspective, its determination of what constitutes "reasonable" Fourth Amendment activity will sometimes frustrate majoritarian preferences. Recently, the Court has viewed the Constitution's requirements as embodied in the expression of the preferences that emerge from a democratic process. The Rehnquist Court, however, does not engage in any searching inquiry about the nature of the process that generated these preferences; it simply assumes that a well-functioning democratic process was in place. When the Court views the Fourth Amendment from this more positivistic perspective, it shows far greater deference to the judgments and actions of the governmental actors subject to the amendment's constraints.

PETER ARENELLA
(1992)

(SEE ALSO: *Fourth Amendment, Historical Origins of; Search and Seizure; Unreasonable Search.*)

Bibliography

AMSTERDAM, ANTHONY G. 1974 Perspectives on the Fourth Amendment. *Minnesota Law Review* 58:349–477.

LAFAVE, WAYNE 1987 *Search and Seizure: A Treatise on the Fourth Amendment*, 2nd ed. Vols. 1–3. St. Paul, Minn.: West Publishing Co.

SCHULHOFER, STEPHEN J. 1989 On the Fourth Amendment Rights of the Law-Abiding Public. *Supreme Court Review* 1989:87–163.

WASSERSTROM, SILAS J. and SEIDMAN, LOUIS M. 1988 The Fourth Amendment as Constitutional Theory. *Georgetown Law Journal* 77:19–112.

# FOURTH AMENDMENT
## (Update)

During the 1990s, the Supreme Court continued to confront the central issues of the Fourth Amendment's scope: what conduct is covered by the Amendment, what regulations apply to that conduct, and how those limitations are to be enforced.

Just as the Court had earlier taken a narrow view of what the word "searches" means in the Fourth Amendment, in recent years the Court has given the "seizures" term a limited construction, again confining within too narrow a compass those police activities subject to the Amendment's restrictions. Illustrative is *Florida v. Bostick* (1991), holding that the state court erred in finding a seizure occurred during a suspicionless bus sweep involving confrontation and interrogation of the passengers. The Court objected that the state decision inappropriately (1) used the Court's previous test of whether "a reasonable person would have believed that he was not free to leave," which the Justices deemed inapplicable to one who had no desire to leave the bus; and (2) treated the on-bus locale of the encounter as especially significant. But the Court's own analysis was flawed. When police undertake a bus sweep, they act with the obvious connivance of the common carrier to which bus travelers have entrusted their care, thereby creating a highly coercive situation unlike any contact that might occur between two private citizens, contrary to the more common forms of nonseizure police–citizen encounters.

This police dominance has a uniquely heavy impact on interstate bus travelers precisely because they do not, as a practical matter, have available the range of avoidance options that pedestrians might use. Abandoning one's journey by leaving the bus is not feasible, so that the passenger's only remaining privacy-protection option is obstinate refusal to respond to the officers' questions. But the dynamics of the situation make a nonconforming refusal to cooperate an unlikely choice, especially when it is considered that bus transportation is used largely by people with low incomes and little influence.

When the Court determines the "reasonableness" of conduct amounting to a search or seizure, typically it balances the individual's interests in privacy and security against society's interests. The latter interests are usually crime detection and sometimes crime prevention, but yet another is ensuring that police are not unduly endangered while carrying out their duties, as reflected in the rules governing SEARCH INCIDENT TO AN ARREST and frisk incident to a stop. The Court's decisions in the 1990s, involving concern about police safety in other settings, highlight two competing considerations: (1) a risk of death or serious injury to police is less tolerable than a risk that some crimes will remain undetected, so that police authority to act in their own protection must generally be more broadly stated; and (2) general grants of authority to the police to act for their own protection are nonetheless undesirable when the contemplated activity is highly intrusive on individual privacy and freedom. The Court's efforts to thread a line between those two considerations are reflected in three decisions. *Maryland v. Wilson* (1997) held that passengers as well as drivers may be required to exit a vehicle incident to a traffic stop, because such minimal added intrusion is justified in the interest of the officer's safety. *Richards v. Wisconsin* (1997) rejected a state's blanket rule that police, for their own safety, could make a NO-KNOCK ENTRY when they are executing a SEARCH WARRANT regarding a felony drug crime, because such a broad category "contains considerable overgeneralization." *Maryland v. Buie* (1990) considered protective sweeps incident to in-premises arrests. The Court deemed it necessary to create a two-pronged test whereby police were given automatic authority to look into "spaces immediately adjoining the place of arrest" but were required to show facts warranting reason to believe persons posing danger were present before undertaking a more extensive sweep.

One shining beacon in our Fourth Amendment history is the brilliant argument of JAMES OTIS, JR., against writs of assistance, when he railed against the "power that places the liberty of every man in the hands of every petty officer." These words are an apt description of one of the most pervasive law enforcement techniques of the 1990s: An officer stops a vehicle on the highway (often as a result of a selection process that takes into account nothing other than the driver's race) for an insignificant traffic violation that would not provoke any police response but for the officer's desire to determine (by a plain-view observation, a consent search, or summoning a drug-detection dog) whether the vehicle contains drugs. This practice raises the important question of whether the Fourth Amendment's "reasonableness" requirement necessitates only that there be some factual basis for the action taken (such as the traffic violation), or whether in addition it is necessary that the conduct not be arbitrary or pretextual. That question was answered in the traffic-stop case of *Whren v. United States* (1996), which may turn out to be the Court's most significant, and most unfortunate, Fourth Amendment decision of the 1990s. The Court in *Whren*

reached three startling conclusions: (1) the pretextual nature of a traffic stop, even if shown by the subjective motivation of the officer, and even when absent such motivation no Fourth Amendment intrusion would have been made, does not make the stop unreasonable, (2) a showing of a departure from usual practice, again producing an intrusion a reasonable police officer would not have made, also does not constitute a Fourth Amendment violation, and (3) there is no violation even when, as in *Whren*, the departure is clearly shown by a deviation from a police regulation limiting the circumstances in which Fourth Amendment intrusions are permissible.

WAYNE R. LAFAVE
(2000)

(SEE ALSO: *Search and Seizure; Unreasonable Search.*)

Bibliography

LAFAVE, WAYNE R. 1996 *Search and Seizure: A Treatise on the Fourth Amendment*, 3rd ed. Vols. 1–5. St. Paul, Minn.: West Publishing Co.

## FOURTH AMENDMENT, HISTORICAL ORIGINS OF

Appended to the United States Constitution as part of the BILL OF RIGHTS in 1789, the Fourth Amendment declares that "The right of the people to be secure in their persons, houses, papers and effects against UNREASONABLE SEARCHES and seizures shall not be violated, and no warrants shall issue but upon PROBABLE CAUSE, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." In identifying the "specific" warrant as its orthodox method of search, the amendment constitutionally repudiated its antithesis, the GENERAL WARRANT.

The general warrant did not confine its reach to a particular person, place, or object but allowed its bearer to arrest, search, and seize as his suspicions directed. In 1763, a typical warrant by the British secretaries of state commanded "diligent search" for the unidentified author, printer, and publisher of a satirical journal, *The North Briton, No. 45*, and the seizure of their papers. At least five houses were consequently searched, forty-nine (mostly innocent) persons arrested, and thousands of books and papers confiscated. Resentment against such invasions ultimately generated an antidote in the Fourth Amendment and is crucial to its understanding.

General warrants and general searches without warrant had a lengthy pedigree. In 1662, a statute codified WRITS OF ASSISTANCE that allowed searching all suspected places for goods concealed in violation of the customs laws. Such writs had been used since at least 1621 and themselves absorbed the language of royal commissions that had for centuries authorized general searches without warrant. Similarly promiscuous searches had existed for numerous applications: the pursuit of felons, suppression of political and religious deviance, regulation of printing, medieval craft guilds, naval and military impressment, counterfeiting, bankruptcy, excise and land taxes, vagrancy, game poaching, sumptuary behavior, and even the recovery of stolen personal items.

Colonial America copied Britain's machinery of search but varied its applications. Most jurisdictions instituted general searches to collect taxes, discourage762 poaching, capture felons, or find stolen merchandise. In the southernmost colonies, general searches without warrant blossomed into a comprehensive system of social regulation of the civilian population by quasi-military "slave patrols."

Although general warrants were the basic method of search, numerous restraints qualified their operation. Writs of assistance were invalid at night; certain areas of legislation touching the guilds and excises confined the general searches involved to the persons vocationally concerned. Yet such measures were not a comprehensive guarantee, systematically applied. Moreover, social philosophy outweighed civil libertarianism as a motive for the most conspicuous restraints, for while general "privy searches" plagued the poor, the elite enjoyed immunity from whole classes of similar searches. Covered by a thin veneer of restraints different from the specific warrant, the centrality of the general search remained starkly visible. Conversely, although specific warrants existed in legal manuals, they were rare before 1750, thereby indicating that they were not the intended constitutional successor to the general warrant.

English legal thinkers, however, expressed far greater hostility to the general warrant than did the law itself. As early as 1589 Robert Beale charged that the general search warrants used by the "High Commission" against Puritans violated MAGNA CARTA (1215). In the next two centuries, such titans of English law as Sir EDWARD COKE, Sir Matthew Hale, and Sir WILLIAM BLACKSTONE embellished similar themes with citations from the COMMON LAW.

Such evidence, however, was more embroidery than substance. Magna Carta was a profoundly feudal document that said nothing on the intersection of searches, houses, and warrants. The master case usually cited against the general warrant, *Semayne's Case* (1602, 1604), actually drew a rigid line exempting the Crown from the protections elsewhere extended against invasion of the dwelling by private citizens. Unlike later scholars, the court had there emphasized that a man's house was *not* his castle against the government.

Like legal theorists, ordinary critics of the general

search did not identify the specific warrant as its solution. Those whose houses were searched were more likely to execrate being searched than the generality of the authorizing warrant. Indignation that the victim of a general search was a member of the nobility deflected hostility from the search process and implied that it could properly be inflicted on the overwhelming majority who were not nobles. Ubiquitous laments that pregnant wives had miscarried during violent searches simply substituted appeals to the reader's sympathy for criticism of the absence of the concrete laws against such actions. Yet these very mythologies provided legitimacy and impulse for a right against unreasonable SEARCH AND SEIZURE. Although the Magna Carta of the thirteenth century said nothing against general searches, that of the eighteenth century had swollen into a formidable ideological weapon against them.

The movement against general warrants accelerated from 1761 to 1787. The *North Briton* controversy culminated in dozens of trials and in resolutions by the House of Commons against the use of those warrants. In *Wilkes v. Wood* (1763) and *Huckle v. Money* (1763–1765), CHARLES PRATT (Lord Camden) and WILLIAM MURRAY (Lord Mansfield), the chief justices of the Courts of Common Pleas and King's Bench, respectively, condemned the general warrants of search and arrest used by the secretaries of state as incompatible with statute, natural justice, the common law, and Magna Carta. A dozen derivative cases surrounding *Entick v. Carrington* ended in decisions against the seizure of personal papers. (See WILKES CASES.)

Writs of assistance came under attack in the American colonial courts. JAMES OTIS, a fiery young Massachusetts attorney, made a brilliant "higher law" assault on the writs in PAXTON'S CASE (1761). Although Otis lost, most colonial courts refused to issue such writs when requuired to do so by the Townshend Act of 1767, and a series of pamphlets beginning with JOHN DICKINSON's *Farmer's Letters* joined in the assault. Eight states inserted some guarantee against general warrants in their constitutions of 1776–1784. Finally, four state conventions urged a corresponding restraint on searches by the new national government in ratifying the federal Constitution of 1787. JAMES MADISON of Virginia duly responded by including what became the Fourth Amendment among the Bill of Rights which he proposed to Congress on June 8, 1789.

Neither Britain nor the separate American states, however, immediately abolished general searches. Rhetorical implications notwithstanding, the British abandoned only the isolated form of general warrants issued by state secretaries. Writs of assistance and other kinds of statutory general SEARCH WARRANTS survived, for no comprehensive statute to the contrary ever emerged from the House of Commons. Despite their constitutions, the American states retained general search warrants not only as devices for [prosecuting the American Revolution] but also for a wide range of other purposes into the 1780s.

Although the right against unreasonable search and seizure has lengthy British roots, its cornerstone, the confinement of all searches, seizures, and arrests by warrant to the particular place, persons, and objects enumerated, derives from Massachusetts. A cluster of Massachusetts statutes and court decisions from 1756 to 1766, the third stage in a century-long process, uniformly restrained searches and arrests to the person or location designated in the warrant. Legislation in the 1780s extended this specificity to the objects of seizure. The Fourth Amendment is thus the marriage of an ancient British right and a new, colonial interpretation that vastly extended its meaning.

WILLIAM J. CUDDIHY
(1986)

Bibliography

CUDDIHY, WILLIAM and HARDY, B. CARMON 1980 A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution. *William and Mary Quarterly* 3: 371–400.

LASSON, NELSON 1937 *The History . . . of the Fourth Amendment.* Baltimore: Johns Hopkins University Press.

## FRAENKEL, OSMOND K.
(1888–1981)

Trained at Columbia University Law School, Osmond Kessler Fraenkel made his mark on American constitutional law as a CIVIL LIBERTIES advocate. He was counsel for the New York Civil Liberties Union from 1934 to 1955 and for the AMERICAN CIVIL LIBERTIES UNION from 1955 to 1977. During most of that time he was also an official of the National Lawyers Guild. In addition to being involved in much of the important civil liberties litigation of his time, Fraenkel wrote four books, including *Our Civil Liberties* (1945) and *The Supreme Court and Civil Liberties* (1960), as well as many law review articles.

DENNIS J. MAHONEY
(1986)

## FRANK, JEROME N.
(1889–1957)

Jerome Frank held important positions in FRANKLIN D. ROOSEVELT'S NEW DEAL, pioneered American legal realism, taught at Yale Law School, and served on the United States Court of Appeals for the Second Circuit from 1941 until his death in 1957. During this period the Second Circuit

was one of the most illustrious courts in the nation's history. On the court Frank developed a highly refined concept of his role as intermediate appellate judge. His decisions greatly influenced the United States Supreme Court by crystallizing and focusing legal issues and by articulating major considerations of precedent and policy. His opinions, even if written as concurrences or dissents, frequently became the law of the land when the Supreme Court followed Jerome Frank's lead. When the VINSON COURT and WARREN COURT protected CIVIL LIBERTIES, they often relied on the spadework of lower federal judges, prominently including Jerome Frank.

In his opinions Frank frequently addressed the Supreme Court as an advocate—urging, persuading, coaxing, and cajoling the Court to move in desired directions. At the same time, he recognized the limits imposed by his subordinate position, and he gracefully accepted those bounds. Frank faithfully followed Supreme Court precedent, but, if a rule seemed misguided, he would criticize the DOCTRINE and urge the Supreme Court to reexamine it. *United States v. Roth* (1956) illustrates Frank's technique. Although he considered a federal OBSCENITY statute unconstitutional, several Supreme Court decisions had assumed the statute's validity without squarely facing the issue. In a new challenge to the law, Frank did not dodge these earlier rulings by describing them as OBITER DICTA. Rather, he followed them and voted to uphold the convictions. At the same time, in a concurrence, he analyzed the serious constitutional issues with a coherence and lucidity that has not yet been surpassed. Frank's seminal effort anticipated many later Supreme Court cases which, over the next two decades, relied on Frank's opinion and reasoning. (See *Roth v. United States*, 1957.)

Protection for civil liberties was a persistent theme in Frank's judicial opinions. He believed that republican government maximized free choice and affirmed the dignity of the individual. On the Second Circuit he struggled to protect this vision. He regularly challenged the Supreme Court to expand the definition of, and protection for, civil liberties. For instance, he tried valiantly to humanize IMMIGRATION and DEPORTATION laws which perennially had treated ALIENS cavalierly. Frank wrote his most passionate opinions in the area of criminal law and procedure. He considered ELECTRONIC EAVESDROPPING a dangerous invasion of privacy which should be limited by the FOURTH AMENDMENT's prohibition on UNREASONABLE SEARCHES and seizures. His skepticism about the accuracy of the law's fact-finding processes led him to believe that courts wrongly convicted many innocent persons. He thought that police investigation practices frequently degenerated into brutal "third degree" tactics which coerced confessions in violation of the Fifth and Sixth Amendments. Following in Frank's path, the Supreme Court moved to curb prolonged POLICE INTERROGATIONS and to control offensive police practices. The progressive constitutionalization of American criminal process secured by the Vinson and Warren Courts reflected not merely the judgment of a majority of the Supreme Court but rather a broader legal movement led prominently by Jerome Frank.

ROBERT JEROME GLENNON
(1986)

Bibliography

GLENNON, ROBERT JEROME 1985 *The Iconoclast as Reformer: Jerome Frank's Impact on American Law.* Ithaca, N.Y.: Cornell University Press.

## *FRANK v. MANGUM*
### 237 U.S. 309 (1915)

Vicious anti-Semitism and bitter resentment against encroaching industrialization joined in Atlanta, Georgia, in the spring of 1913. Leo Frank, a young Jewish businessman from the North, was arrested and convicted of murdering a thirteen-year-old girl in a factory he superintended. Prejudice, disorder, and blatant public hostility characterized the trial and its coverage. The Georgia Supreme Court denied Frank a new trial, 4–2, dismissing claims of procedural errors, irregularities, and the trial judge's stated doubts about Frank's guilt.

Justices JOSEPH R. LAMAR and OLIVER WENDELL HOLMES each turned down requests for WRITS OF ERROR on procedural grounds (though Holmes was not convinced that Frank had received DUE PROCESS), as did the entire Supreme Court, without opinion. Frank then petitioned for a writ of HABEAS CORPUS because mob domination had effectively denied him PROCEDURAL DUE PROCESS. The Court likewise denied this relief, 7–2. Justice MAHLON PITNEY declared that habeas corpus could not be substituted for a writ of error to review procedural irregularities. Further, when Frank neglected to object during the trial, he effectively waived the right to claim a denial of due process later. Justices Holmes and CHARLES EVANS HUGHES dissented, pointing to the lack of a FAIR TRIAL: "Mob law does not become due process of law by securing the assent of a terrorized jury." Less than two months after the Georgia governor commuted his death sentence to life imprisonment, Frank was kidnapped from prison and lynched. That he was innocent of the crime for which he was convicted is no longer doubted.

The Supreme Court subsequently embarked on a series of decisions insuring the observance of the constitutional safeguards of procedural due process. In MOORE V. DEMPSEY (1923), the turning point, Holmes wrote for the Court, permitting the use of habeas corpus as a means of pre-

serving criminal defendants' rights. *Frank*'s rule of forfeiture through failure to object, however, returned with only slight modification in WAINWRIGHT V. SYKES (1977).

In 1982 a witness came forward and stated that shortly after the murder he had seen another man carrying the victim's body. In 1986 the governor of Georgia posthumously pardoned Leo Frank.

DAVID GORDON
(1986)

Bibliography

DINNERSTEIN, LEONARD 1968 *The Leo Frank Case.* New York: Columbia University Press.

## FRANKFURTER, FELIX
(1882–1965)

The immigrant son of Austrian Jews, Felix Frankfurter acquired a legendary reputation as a lawyer, law professor, intellectual gadfly, and presidential adviser even before President FRANKLIN D. ROOSEVELT named him to the Supreme Court in 1939. Unable to speak or write a word of English when he entered the public schools of New York City in the 1890s, he was graduated with honors from City College of New York and compiled a distinguished record at the Harvard Law School, where he fell under the influence of Dean James Barr Ames's historical methods, absorbed the constitutional theories of JAMES BRADLEY THAYER, and generally adopted the social and cultural trappings of the New England Brahmins, without their intellectual boorishness or political conservatism.

As a law professor at Harvard, Frankfurter introduced several generations of students to constitutional and ADMINISTRATIVE LAW, and invented a new field of study: the JURISDICTION of the federal courts. His students and protégés, including Dean Acheson, JAMES LANDIS, David Lilienthal, and Tom Corcoran, populated the federal bureaucracy from the days of WOODROW WILSON to those of JOHN F. KENNEDY. His 1917 report on the deportation of striking miners from Arizona by local vigilantes and his severe criticism of the procedural unfairness of the COMMONWEALTH V. SACCO & VANZETTI (1921) showed his deep concern for CIVIL LIBERTIES and political reform. That he should come to be known, at the end of his judicial career, as a conservative on many of these issues reflected not a weakening of personal convictions, but a strongly held view about the proper limits of the judicial function.

Frankfurter served on the Court between the two great periods of JUDICIAL ACTIVISM in this century. He arrived on the bench two years after the HUGHES COURT, retreating from its activism of 1935–1936, laid to rest the DUE PROCESS clause and the COMMERCE CLAUSE as instruments of judicial control over legislative ECONOMIC REGULATION. His retirement and replacement in 1962 by ARTHUR J. GOLDBERG permitted the Warren Court to enter its most activist phase through the expansion of due process and EQUAL PROTECTION to provide Americans with extensive new CONSTITUTIONAL REMEDIES against governmental encroachments upon personal liberties.

Frankfurter deplored both the conservative activism of the Hughes years and the liberal activism of the Warren era. From 1939 until 1962, he attempted to discover some middle ground for the Court to occupy that would be intellectually respectable, politically defensible, and morally satisfying. Although his ultimate posture of institutional self-restraint won him few plaudits from liberals and captured the fancy of only a minority among the legal intelligentsia, it had the virtue of predictability.

He rejected the PREFERRED FREEDOMS doctrine articulated by Justice HARLAN FISKE STONE in UNITED STATES V. CAROLENE PRODUCTS CO. (1938), where the latter urged the Court to adopt a two-tiered system of JUDICIAL REVIEW that would take the justices out of the business of shaping economic policy at large but expand their role as the arbiters of civil liberties, race relations, and criminal justice. When passing upon all constitutional questions, Frankfurter responded, the Justices should always act with restraint, avoid ultimate issues of power, and insist only upon a RATIONAL BASIS test for legislation, whether the challenged law concerned filled milk, labor relations, FREEDOM OF SPEECH, or CRIMINAL PROCEDURE. This judicial posture led Frankfurter to uphold a broad range of social and economic measures adopted by the states and the federal government after 1940, but it also earned him the enmity of constitutional liberals when he applied the same tolerant standards to less enlightened manifestations of the political process, including the SMITH ACT, the McCarran Act (see INTERNAL SECURITY ACT), a GROUP LIBEL statute, and the investigative techniques of the HOUSE COMMITTEE ON UNAMERICAN ACTIVITIES.

Frankfurter also spurned Justice HUGO L. BLACK's arguments for incorporating the BILL OF RIGHTS into the FOURTEENTH AMENDMENT's due process clause. Like Frankfurter, the Alabama-born justice wished to chain the arbitrary power of judges in the wake of the Great Depression's constitutional crisis, and he urged the Court to replace "the vague contours of due process" with the specific prohibitions and guarantees of the first nine amendments. But beneath Black's façade of positivistic neutrality, Frankfurter suspected, there beat the heart of a judicial fundamentalist, moved by the plight of the poor and the oppressed but no less unbending than PIERCE BUTLER's or GEORGE SUTHERLAND'S. Frankfurter eschewed mechanical formulas such as Black's, and he believed that the INCORPORATION DOCTRINE lacked any historical basis in the

Fourteenth Amendment. Incorporation, he feared, would encourage the Supreme Court to impose a single code of criminal procedure upon the states and would establish a more rigid judicial tyranny than even the conservative "Four Horsemen" had espoused during the 1930s.

From BETTS V. BRADY (1942) to MAPP V. OHIO in 1961, he insisted that the framers of the Fourteenth Amendment had not intended to subject state criminal proceedings to the precise requirements of the federal Bill of Rights. That amendment, he argued in *Adamson v. California* (1947), was "not the basis of a uniform code of criminal procedure federally imposed. . . . In a federal system it would be a function debilitating to the responsibility of state and local agencies."

But this did not mean for Frankfurter that the Supreme Court of the United States had no obligation to review state criminal convictions under the due process clause. That clause, he believed, represented no explicit commands, but a requirement of fairness and reasonableness, above all, a prohibition against official conduct that "shocked the conscience" or offended contemporary standards of civilized behavior. Within this broad, subjective framework, the states had flexibility to manage their own affairs in the realm of criminal justice. Police officers could not, in the absence of friends or counsel, interrogate a suspect for days and claim that his confession had been voluntary; they could not recover physical evidence with the aid of a stomach pump (as in ROCHIN V. CALIFORNIA, 1952); or place a listening device in a suspect's bedroom (as in IRVINE V. CALIFORNIA, 1953, dissenting opinion). But due process did not require, in Frankfurter's judgment, that the state provide legal counsel in all felony cases; exclude evidence seized illegally by the police; or refrain from executing a person after a first attempt had failed, although he had strong personal objections to all of these practices (*Louisiana ex rel. Francis v. Resweber*, 1947, concurring opinion; *Mapp v. Ohio*, 1961, dissenting).

An early high point of Frankfurter's doctrinal influence came in the summer of 1940, when, over Stone's lone dissent, the Justices rejected a FIRST AMENDMENT—due process attack on the mandatory flag salute in the public schools of West Virginia. Within a year of that decision, however, Frankfurter's majority disintegrated. (See FLAG SALUTE CASES.) Led by Black and WILLIAM O. DOUGLAS, a coalition of from five to six Justices carved out a generous area of constitutional protection for both religious and political minorities under the First Amendment and the due process clause. This same majority also began to impose sharp limitations upon the conduct of state criminal trials and local police methods and to afford state prisoners greater ACCESS to federal courts by means of HABEAS CORPUS proceedings.

Throughout his judicial career, Frankfurter remained skeptical of absolutes. He preached a gospel of relativism and "balancing" that usually encouraged judicial modesty and retrenchment, yet, he too could be a fundamentalist on many constitutional questions. Few Justices took more literally the First Amendment's prohibition against an ESTABLISHMENT OF RELIGION, and his views in EVERSON V. BOARD OF EDUCATION (1947) and MCCOLLUM V. BOARD OF EDUCATION (1948) remained as uncompromising as Black's on freedom of speech. He abhorred CAPITAL PUNISHMENT and used every weapon in his considerable legal arsenal to set aside convictions that carried the death penalty.

Moreover, he consistently championed the FOURTH AMENDMENT by refusing to bend its language to accommodate SEARCHES AND SEIZURES made without a valid warrant or PROBABLE CAUSE as demonstrated by his dissenting opinion in UNITED STATES V. RABINOWITZ (1950). Finally, although he resisted the extension of the EXCLUSIONARY RULE to the states via the due process clause, he expected federal judges, prosecutors, and law enforcement officials to follow a strict code of fairness and decency when confronting persons accused or suspected of crimes (*McNabb v. United States*, 1943, see MCNABB-MALLORY RULE; *Nye v. United States*, 1941; *Rosenberg v. United States*, 1953, dissenting opinion).

In addition to institutional self-restraint, Frankfurter found in FEDERALISM—perhaps the oldest of our constitutional values—a major, articulate premise of his jurisprudence. His concern for maintaining the vitality of local governmental units distinguished him sharply from most other post-1937 Justices. "The states," he wrote, nine years before joining the Court, "need the amplest scope for energy and individuality in dealing with the myriad problems created by our complex industrial civilization. . . . For government means experimentation. To be sure, constitutional limitations confine the area of experiment. But these limitations are not self-defining and were intended to permit government. Opportunity must be allowed for vindicating reasonable belief by experience. The very notion of our federalism calls for the free play of local diversity in dealing with local problems." From 1939 until 1962, he attempted to apply these convictions.

A great many of Frankfurter's conflicts with other Justices, often viewed as disputes over civil liberties or judicial self-restraint, actually focused for him upon questions of federalism. A good example is the famous 1941 case of BRIDGES V. CALIFORNIA, which, many scholars agree, marked a turning point in his relationship with Justice Black and remains a landmark in the Court's post-1937 concern for civil liberties. In *Bridges*, speaking through Black, the Court reversed contempt sentences imposed by California judges upon a militant union leader and the Los Angeles *Times* for out-of-court publications that the local courts believed had disrupted pending cases. Unless such

statements represented a CLEAR AND PRESENT DANGER to the orderly administration of justice, Black wrote, the due process clause (incorporating the First Amendment's protection of speech and press) prohibited judicial punishment of this kind.

Frankfurter took issue with Black on several points, but the heart of his dissenting opinion reflected powerful federalist concerns for the independence and autonomy of local courts. "We are, after all," he noted, "sitting over three thousand miles away from a great state, without intimate knowledge of its habits and its needs, in matters which do not cut across the affirmative powers of the national government. . . . How are we to know whether an easy-going or stiffer view of what affects the actual administration of justice is appropriate to local circumstances?" Nine months earlier, in a similar contempt case that did not raise the problem of a direct conflict with state courts, Frankfurter had no difficulty in joining an opinion by Justice Douglas in *Nye v. United States* (1941) that sharply curtailed the power of federal judges to punish disruptive litigants. For Frankfurter, what distinguished *Nye* from *Bridges* was not the First Amendment, "the clear and present danger" test, or the degree of judicial misconduct involved, but the simple matter of the constitution's limited reach into the processes of state courts.

A passionate New Dealer, Frankfurter consistently upheld the power of Congress, acting under the commerce clause, to regulate the nation's economic affairs, even when these regulations touched activities within the traditional domain of the states. He sustained, for example, the judgment of the National Labor Relations Board that local newspaper boys, employed by the Hearst chain, were "employees" within the coverage of the WAGNER (NATIONAL LABOR RELATIONS) ACT, and he agreed that the administrator of the FAIR LABOR STANDARDS ACT could entirely prohibit homework in the embroidery industry as a reasonable means to enforce minimum wage decrees.

At the same time, he tended to read congressional regulation of commerce as permitting complementary state legislation, except where the national legislature acted with clarity to preempt local regulations. He insisted that Congress speak with precision on this matter, and he abhorred judicial expansion of congressional intentions, especially where the results limited local authority. In *Cornell Steamboat Co. v. United States* (1944), for instance, he rejected Black's interpretation of the 1940 Transportation Act that gave the Interstate Commerce Commission authority to fix the rates of tugboats operating on the Hudson River, where ninety-five percent of their business took place between New York ports, but where they passed briefly over the territorial waters of New Jersey. He rejected the idea that Congress had intended in the Wagner Act to exempt union officials from state regulation that did not touch directly upon the employee-employer relationship. In close cases, he often supported a solution that expanded federal authority the least.

In commerce clause cases, despite his concern for maintaining local authority, he refused to endorse the extreme views of Justice Black and others, who mechanically endorsed state economic regulations in the absence of specific federal legislation preempting certain fields. He voted to overturn, for example, Arizona's Train Limit Law and he likewise objected to a local milk ordinance that discriminated against competing products pasteurized beyond five miles of the city. On the other hand, he often allowed the states considerable latitude when they attempted to tax or regulate other aspects of interstate commerce, and he did not support wholeheartedly the economic nationalism of Justice ROBERT H. JACKSON, with whom he disagreed in cases such as *Duckworth v. Arkansas* (1941); *Northwest Airlines v. Minnesota* (1944); and *H. P. Hood & Sons v. DuMond* (1949; dissenting).

Frankfurter believed that federalism required the national judiciary, above all the Supreme Court, to respect the autonomy, sagacity, and integrity of state courts. He was a strong supporter of Justice LOUIS D. BRANDEIS's views (which had become law in ERIE V. TOMPKINS, 1938) that required federal judges to apply state law in cases involving diversity of state citizenship, and he often voted to restrict the role of federal courts in this area. (See DIVERSITY JURISDICTION.) State courts, he believed, could efficiently and honestly protect the interests of nonresidents. The Supreme Court should not construe federal statutes in such a manner as to preempt local judicial procedures unless that construction seemed inescapable. For instance, he rejected the idea that Congress intended in the federal bankruptcy laws to strip local courts of their control over their own procedures. "The state courts belong to the States," he wrote. "They are not subject to the control of Congress though of course state law may in words or by implication make the federal rule for conducting litigation the rule that should govern suits to enforce federal rights in the state courts."

America's continuing racial ordeal probably tested the limits of his deference to state authority more severely than did any other constitutional issue. An early member of the NAACP and the first Justice to hire a black clerk, he detested racial discrimination in all of its forms. Yet he refused to interpret the Reconstruction-era CIVIL RIGHTS ACTS to impose criminal and civil penalties on local officials who abused their authority and acted in a hostile manner against minorities. In SCREWS V. UNITED STATES (1945), Frankfurter, dissenting, argued that Congress had intended in the Reconstruction statute to attack only discrimination sanctioned by positive state laws, not the abuse of authority by local officials. "We should leave to

the States," he said, "the enforcement of their criminal law, and not relieve States of the responsibility for vindicating wrongdoing that is essentially local or weaken the habits of local law enforcement by tempting reliance on federal authority for an occasional unpleasant task of local enforcement."

Two decades later, Frankfurter still reaffirmed these views in MONROE V. PAPE (1961), when the Court sustained a civil action against several Chicago police officers who invaded a black family's home and illegally arrested a member of the household without a SEARCH WARRANT. The conduct of the police infuriated him, but in Frankfurter's judgment they had not acted with the approval of state law and therefore they could not be sued under the federal statute for damages. "To be sure," he wrote, "this leaves certain cases unprotected. . . . But the cost of ignoring the distinction in order to cover those cases—the cost, that is, of providing a federal judicial remedy for every constitutional violation—involves preemption by the National Government . . . of matters of intimate concern to state and local government."

History treated neither Justice Frankfurter nor his federalism kindly. By means of the commerce clause and its TAXING AND SPENDING POWERS, the federal government continued to absorb more and more authority at the expense of the states, usually with the Supreme Court's approval. Horrified by local police brutality and by the failure of local political elites to eradicate racial SEGREGATION, the federal judiciary became a powerful instrument of social reform in the decade after Frankfurter left the bench. Even during his tenure, American society was not usually prepared to pay the price of his attachment to federalism. As the *Screws* and *Monroe* cases demonstrated, the price could be very high: the inability of the national government to correct glaring denials of constitutional rights that the states themselves refused to correct, and the failure of the states to correct local ills of a kind already eliminated in the conduct of the national government.

From the perspective of many of his colleagues, Frankfurter too often sacrificed efficiency, uniformity, and morality on behalf of an archaic devotion to localism. They hoped to create a new world of prodigious economic growth and humanitarian social policy, where the enlightened judiciary helped to sweep away the provincial forces of commercial and political reaction. For Justice Frankfurter, however, federalism remained both a constitutional command as well as a viable method for ordering American life through the slower process of self-education and social experimentation.

Frankfurter enlivened American politics and immeasurably enriched the nation's legal literature for a half-century. "There is some talk here of replacing him on the Supreme Court," James Reston wrote when he retired in 1962, "but this is as silly as the doctor's bulletins. They may eventually put somebody in his place, but they won't replace him."

MICHAEL E. PARRISH
(1986)

Bibliography

FREEDMAN, MAX, ed. 1967 *Roosevelt and Frankfurter: Their Correspondence, 1928–1945.* Boston: Little, Brown.

HIRSCH, HARRY N. 1981 *The Enigma of Felix Frankfurter.* New York: Basic Books.

LASH, JOSEPH P. 1975 *From the Diaries of Felix Frankfurter.* New York: Norton.

PARRISH, MICHAEL E. 1982 *Felix Frankfurter and His Times.* Volume One. New York: Macmillan.

PHILLIPS, HARLAN B., ed. 1960 *Felix Frankfurter Reminisces.* New York: Reynal & Co.

## FRANKLIN, BENJAMIN
## (1706–1790)

Benjamin Franklin, president of Pennsylvania, was the oldest delegate to the CONSTITUTIONAL CONVENTION OF 1787. A beloved elder statesman of the young Republic, Franklin lent prestige to the Convention by his presence. His signature on the new Constitution was a symbol of the continuity of revolutionary principles and a warranty of the democratic character of the document.

Franklin's public career began in 1736, when he was appointed clerk of the Pennsylvania Assembly, and lasted for more than half a century. He served as a member of the assembly and as postmaster of British North America even while pursuing a private career as a printer and inventor.

In 1754, as a delegate to the Albany Congress, Franklin proposed the "Albany Plan" of colonial union. Under his plan, the British Crown would have appointed a president-general and the colonial legislatures would have chosen delegates to a Grand Council with power to raise an army and navy, to make war and peace with the Indian tribes, to control commerce with the Indians, and to levy taxes and customs duties to pay the expenses of the union. The plan, one of the earliest moves toward American FEDERALISM, was too consolidated to find support in the colonies and too democratic to be acceptable in England.

From 1757 to 1762, and again from 1766 to 1775, Franklin was the agent in England of Pennsylvania and several other colonies. In that capacity he explained to Parliament American opposition to the Stamp Act, that is, to TAXATION WITHOUT REPRESENTATION, and persuaded WILLIAM PITT to propose a plan of colonial union within the British Empire.

Returning to Pennsylvania in 1775, Franklin was named a delegate to the Second Continental Congress, where, in July, he proposed ARTICLES OF CONFEDERATION establishing a "league of friendship" among the colonies with a Congress that would exercise considerable legislative power. The following year he served on the committee that drafted the DECLARATION OF INDEPENDENCE.

From 1776 to 1785, Franklin served as minister of the United States to France (and was accredited to several other European governments as well). He negotiated the French military and financial assistance that was crucial to the success of the Revolution, and he carried out a propaganda campaign to win European support for the American cause. In 1781 he was named a commissioner to the peace negotiations that resulted in the Treaty of Paris and formal British recognition of American independence.

At the Constitutional Convention, Franklin was a conciliator and mediator. Although, at eighty-one, he was in failing health and had to have his speeches read by fellow delegate JAMES WILSON, Franklin attended almost all sessions. Such proposals as he put forward (for example, unicameral legislature, plural executive, elected judges, unpaid officials) were too radical to attract much support; but Franklin, with his humorous anecdotes and his commitment to the Union, served the Convention well by cooling tempers and encouraging compromise.

According to a legend, which serves as a warning still, Franklin, emerging from the Convention, was asked, "What have you given us?" "A republic," he replied, "if you can keep it."

DENNIS J. MAHONEY
(1986)

Bibliography

VAN DOREN, CARL 1938 *Benjamin Franklin.* New York: Viking.

## *FRAZEE v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY*
489 U.S. 829 (1989)

This case expanded the protection of the free-exercise clause of the FIRST AMENDMENT by allowing a Christian to refuse work on the Sabbath without being denied unemployment benefits. Earlier, the Court had held that such benefits may not be denied to persons whose religious beliefs obligated them to refuse work on the Sabbath, but in all the PRECEDENTS, such as SHERBERT V VERNER (1963), the claimant had belonged to a religious sect or particular church. Frazee was not a member of either and did not rely on a specific religious tenet. The Illinois courts therefore upheld the denial to him of unemployment compensation.

Unanimously, the Supreme Court sustained Frazee's free-exercise right. He had asserted that he was a Christian, and no authority had challenged his sincerity. As a Christian, he felt that working on Sunday was wrong. The Court held that a professing Christian, even if not a church-goer or member of a sect, was protected by the free-exercise clause from having to choose between his or her religious belief and unemployment compensation. Denial of compensation violated the clause.

LEONARD W. LEVY
(1992)

## FRAZIER-LEMKE ACTS
Federal Farm Bankruptcy Act
48 Stat. 1289 (1934)
Farm Mortgage Moratorium Act
49 Stat. 942 (1935)

Congress passed the Federal Farm Bankruptcy Act in June 1934 in an effort to stem the flow of foreclosures caused by the Depression. Enacted as an amendment to a general bankruptcy act of 1898, the first Frazier-Lemke Act allowed bankrupt farmers two choices. Under the first, court-appointed appraisers would assess the "fair and reasonable value, not necessarily the market value" of the property, which the debtor could then repurchase within six years according to a graduated scale of interest. Alternatively, a court could halt all proceedings for five years, during which time the debtor would retain possession "provided he pays a reasonable rent annually," preserving the right to buy it after five years.

Within a year a unanimous Supreme Court struck down the act as a TAKING OF PROPERTY belonging to the creditor without JUST COMPENSATION in LOUISVILLE JOINT STOCK LAND BANK V. RADFORD (1935). Congress passed a second Frazier-Lemke (Farm Mortgage Moratorium) Act in August 1935, effectively similar legislation to which they added a declaration of emergency and a discretionary provision allowing courts to shorten the stay of proceedings during which time the creditor retained a lien on the property. This act received the Court's approval in WRIGHT V. VINTON BRANCH OF MOUNTAIN TRUST BANK OF ROANOKE (1937).

DAVID GORDON
(1986)

## *FREEDMAN v. MARYLAND*
380 U.S. 51 (1965)

Although the Supreme Court often remarks that the FIRST AMENDMENT imposes a heavy presumption against the va-

lidity of any system of PRIOR RESTRAINT on expression, the Court has tolerated state censorship of motion pictures through advance licensing. Typically, such a law authorizes a censorship board to deny a license to a film on the ground of OBSCENITY. Other substantive standards ("immoral," "tending to corrupt morals") have been held invalid for VAGUENESS. In addition, the Court insists that the licensing system's procedures follow strict guidelines designed to avoid the chief evils of censorship. *Freedman* is the leading decision establishing these guidelines.

In a test case, a Baltimore theater owner showed a concededly innocuous film without submitting it to the state censorship board, and he was convicted of a violation of state law. The Supreme Court unanimously reversed the conviction. The *Freedman* opinion, by Justice WILLIAM J. BRENNAN, set three procedural requirements for film censorship. First, the censor must have the burden of proving that the film is "unprotected expression" (for example, obscenity). Second, while the state may insist that all films be submitted for advance screening, the censor's determination cannot be given the effect of finality; a judicial determination is required. Thus the censor must, "within a specified brief period, either issue a license or go to court to restrain showing of the film." Advance restraint, before the issue gets to court, must be of the minimum duration consistent with orderly employment of the judicial machinery. Third, the court's decision itself must be prompt. Maryland's statute failed all three parts of this test and accordingly was an unconstitutional prior restraint. Justices WILLIAM O. DOUGLAS and HUGO L. BLACK, concurring, would have held any advance censorship impermissible.

KENNETH L. KARST
(1986)

## FREEDMEN'S BUREAU

Congress created the Bureau of Refugees, Freedmen, and Abandoned Lands in March 1865, assigning it the disposition of rebels' lands and distribution of emergency relief to freed blacks and refugees of both races uprooted by the CIVIL WAR. Though the Freedmen's Bureau was the first federal human-services organization, its establishment reflected Congress's resistance to constitutional innovation, combined with the pervasive nineteenth-century belief that relief and welfare were beyond the constitutional authority of the federal government. Hence the Bureau was a public-private hybrid, drawing its personnel from the army, assisted by volunteers from the various private relief and welfare organizations working with blacks and soldiers in the South.

The 1865 Act provided that the agency would expire a year after cessation of hostilities. In February 1866, Congress enacted a bill to extend the Bureau's life indefinitely. The bill permitted the President "to extend military protection and jurisdiction over all cases" in which blacks were denied CIVIL RIGHTS enjoyed by whites or were punished in ways whites were not. This provision reflected Republicans' resentment at the de jure and de facto discrimination against blacks in the South, especially that authorized by the BLACK CODES. Democrats and other conservatives denounced trials before military commissions or "courts" composed of Freedmen's Bureau agents, citing the absence of guarantees of INDICTMENT or PRESENTMENT as violative of the prohibition against military trials of civilians implied in the Fifth Amendment. Republicans countered that the bill was authorized by the enforcement clause (section 2) of the recently ratified THIRTEENTH AMENDMENT. The bill thus provided the first opportunity to explore the meaning and extent of this new provision. President ANDREW JOHNSON vetoed the bill, charging its Republican sponsors with racial favoritism and a disregard of FEDERALISM. Congress narrowly sustained the veto, but a similar bill became law four months later over his veto.

In existence until 1874, the Bureau helped blacks to adjust to freedom in the turbulent conditions of the postwar South.

WILLIAM M. WIECEK
(1986)

Bibliography

NIEMAN, DONALD G. 1979 *To Set the Law in Motion: The Freedmen's Bureau and the Legal Rights of Blacks, 1865–1868.* Milwood, N.Y.: KTO Press.

## FREEDOM OF . . .

See also under Right . . .

## FREEDOM OF ASSEMBLY AND ASSOCIATION

The FIRST AMENDMENT's "right of the people peaceably to assemble" and the FOURTEENTH AMENDMENT have supplied a basis for federal protection of undefined FUNDAMENTAL RIGHTS from violation by the states. In the landmark case of UNITED STATES V. CRUIKSHANK (1876), the Supreme Court, in the course of allowing some lynchers to escape federal prosecution, said by way of OBITER DICTUM that the right peaceably to assemble was an attribute of CITIZENSHIP under a free government that antedated the Constitution, and that it was a privilege of national citizenship provided

that the assembly in question concerned matters relating to the national government. (See PRIVILEGES AND IMMUNITIES.)

With respect to STATE ACTION, the right of peaceable assembly is now regarded as a Fourteenth Amendment DUE PROCESS right. Thus, in DEJONGE V. OREGON (1937), the Supreme Court reversed a conviction for CRIMINAL SYNDICALISM under an Oregon statute of a man who had participated in a peaceful meeting called by the Communist party for a lawful purpose, on the grounds that the due process clause of the Fourteenth Amendment had been violated. Chief Justice CHARLES EVANS HUGHES wrote for a unanimous Court: "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental," and "peaceable assembly for lawful discussion cannot be made a crime," no matter under whose auspices the meeting is held.

In addition, the rights of assembly and petition are mentioned in rather standardized language in all but two of the fifty state CONSTITUTIONS. The first such statement appeared in the North Carolina constitution of 1776, and the New Hampshire constitution of 1784 began the practice of adding the word "peaceable" to the right of assembly guarantee. Furthermore, the constitutions of Missouri, New Jersey, and New York specifically guarantee a particular form of association, the right of employees to bargain collectively through representatives of their own choosing; the North Carolina constitution forbids "secret political societies" as being "dangerous to the liberties of a free people"; and there is a declaration in the Georgia constitution, of dubious validity, that "freedom from compulsory association at all levels of public education shall be preserved inviolate."

The right of assembly, like nearly all other rights, is not and cannot be regarded as without limit. As Justice LOUIS D. BRANDEIS wrote in 1927, concurring in WHITNEY V. CALIFORNIA, "although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral." The right of assembly does not protect an unlawful assembly, usually defined in American law as a gathering of three or more people for the purpose of committing acts that will give firm and courageous people in the neighborhood grounds to apprehend a BREACH OF THE PEACE. It must be shown that those who assembled intended to do an unlawful act or a lawful act in a violent, boisterous, or tumultuous manner. Thus the right to engage in peaceful PICKETING is protected by the Constitution, but picketing in a context of violence or having the purpose of achieving unlawful objectives, may be forbidden.

In American law the right of assembly extends to meetings held in such PUBLIC FORUMS as the streets and parks. This point was first spelled out in HAGUE V. C.I.O. (1939), extending constitutional protection to street meetings since, in the words of Justice OWEN J. ROBERTS, streets "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Public authorities may be given the power to license parades or processions on the public streets as to time, place, and manner, provided that the licensing law does not confer an arbitrary or unbridled administrative discretion upon them. (See PRIOR RESTRAINT.) In addition, Justice Roberts wrote in CANTWELL V. CONNECTICUT (1940) that "When a CLEAR AND PRESENT DANGER of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious." Thus, a leading decision has upheld the right to assemble on the grounds of a state house, but the Court has drawn the line at the picketing of a courthouse or holding a demonstration on jail grounds. The Court extended the concept of the right of assembly in RICHMOND NEWSPAPERS, INC. V. VIRGINIA (1980) by ruling invalid a state judge's order barring all members of the public and the press from the courtroom where a murder case was being tried, on the grounds that the First Amendment rights of speech, press, and assembly were violated.

Although the right of association is not mentioned specifically either in the United States Constitution or in the state constitutions, it is now recognized through judicial interpretation of various constitutional clauses, particularly those dealing with the rights of assembly and petition, the right of free press, and the privileges and immunities of citizens. The first forthright recognition by a majority of the Supreme Court that due process embraces the right to freedom of association, as distinguished from the more limited concept of assembly, came in NAACP V. ALABAMA (1958), although the idea had been advanced in several earlier minority opinions. In the *Alabama* case, the Court unanimously held unconstitutional a statute that required the NAACP to give to the state's attorney general the names and addresses of all its members, reasoning that such compelled disclosure of affiliation could constitute an effective restraint on freedom of association. Justice JOHN MARSHALL HARLAN wrote: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political,

economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." In later years the Supreme Court, in a series of decisions, protected the NAACP's associational rights from various forms of harassment, subtle as well as heavy-handed, by local authorities.

A leading case involving education was SHELTON V. TUCKER (1960), where the Supreme Court, by a 5–4 vote, declared unconstitutional an Arkansas statute requiring every teacher in the public schools to file annually an affidavit listing all organizations to which the teacher belonged or contributed money during the preceding five years, because disclosure of every associational tie undoubtedly impaired the teacher's right of free association. Furthermore, in *Healy v. James* (1972), the Court upheld the right of a student association to receive university recognition, including access to various campus facilities, even though the president of the college regarded the group's philosophy as abhorrent; the Court added that the university might lawfully require the group to agree to obey reasonable rules relating to student conduct.

The Court took an even more generous view of the right of association in GRISWOLD V. CONNECTICUT (1965), in which a state anticontraceptive statute was held unconstitutional. Justice WILLIAM O. DOUGLAS reasoned that the statute operated directly on the intimate relationship of husband and wife, thus invading the right of association broadly construed. In his opinion there was a first suggestion that although the right of association grows out of the PENUMBRA of the First Amendment, its scope is larger and extends to the marriage relationship. (See FREEDOM OF INTIMATE ASSOCIATION.)

The right of association, however vital it may be in a society committed to maximum freedom of speech and action, is not absolute but is subject to reasonable limitations required by substantial public interests. For example, the right of workers to organize and bargain collectively through representatives of their own choosing is firmly established in statute and judge-made law. But trade unions are not free to organize or participate in SECONDARY BOYCOTTS, since Congress did not intend "to immunize labor unions who aid and abet manufacturers and traders in violating the SHERMAN ACT. . . ." (See ALLEN BRADLEY CO. V. LOCAL UNION #3.) On the other hand, the Court has ruled that a labor leader cannot be required to secure a license to give a speech soliciting new members.

The right to form or engage in the activities of POLITICAL PARTIES is protected by the constitutional right of association. "The First Amendment," the Supreme Court said in BUCKLEY V. VALEO (1976), "protects political association as well as political expression." In that case the Court upheld a federal statute imposing limitations on contributions to political parties, on the theory that the limitations were designed to prevent corruption and the appearance of corruption, and to open up the political system to candidates who lacked access to large amounts of money. In addition, the right of political association extends to members of minor parties as well as to the two major parties. Many cases hold that government may protect the right to vote in party primaries, and ensure that voters cast ballots of approximately equal weight, but the two large parties are not obliged to apportion national convention delegates among the states according to the ONE PERSON, ONE VOTE concept, because party strength varies from state to state, and the parties must have the freedom to operate effectively. Similarly, the Supreme Court has ruled that a national party convention is not bound by state law and state judicial power in deciding which of two slates of delegates from a state should be seated. A state does have the power to decide upon the strength a party must demonstrate in order to get a place on the election ballot, but such a statute may not impose a rigid and arbitrary formula that applies equally to sparsely settled and populous counties, and unreasonably large signature requirements will not be permitted. Furthermore, the Supreme Court has conceded that, in order to protect the integrity of the electoral process, states may require some sort of party registration during a reasonable period before a primary election is held. Similarly, a state may require that candidates for party nominations pay filing fees, but the fees must not be so excessive as to be patently exclusionary.

Finally, in the unusual case of *Elrod v. Burns* (1976), a bare majority of the Court read something new into party membership by holding that in discharging persons in non-civil service positions because they were Republicans, the newly elected Democratic sheriff of Cook County was placing an unconstitutional restraint on freedom of belief and association. This ruling does not apply, however, to persons holding policymaking positions involving broad functions and goals.

Membership in the Communist party or subversive organizations has for some years posed complex issues of constitutional law. (See SUBVERSIVE ACTIVITIES AND THE CONSTITUTION.) In AMERICAN COMMUNICATIONS ASSOCIATION V. DOUDS (1950), the Court upheld a section of the TAFT-HARTLEY ACT of 1947 which denied access to the facilities of the National Labor Relations Board to any union whose officers were members of the Communist party. The Court reasoned that the act validly protected INTERSTATE COMMERCE from the obstruction caused by political strikes and applied only to those who believed in the violent overthrow of the government as a concrete objective and not merely as a prophecy. Similarly, in SCALES V. UNITED STATES (1961), the Court upheld the clause in the SMITH ACT of 1940 making membership in any organization advocating

the overthrow of government by force or violence (in that instance, membership in the Communist party) a criminal offense. But the Court stressed that it was reading the statute to mean that the Smith Act did not proscribe mere membership in the Communist party as such but only membership of an individual who knew of the party's unlawful purposes and specifically intended to further those purposes; the proscribed membership must be active and not nominal, passive, or merely theoretical. This construction of the Smith Act was fully consistent with the position the Court had taken in YATES V. UNITED STATES (1957). The distinction between INCITEMENT and abstract teaching was underscored by the Court in the important case of BRANDENBURG V. OHIO (1969), which held the Ohio Criminal Syndicalism Act unconstitutional. Thus, mere membership in the Communist party, without more, cannot be made a predicate for the denial of a passport, or a job in a defense facility, or of public employment. The Court has recognized that membership may be innocent, and that groups may change their positions from time to time.

Whether unions or other associations may engage the services of such regulated professionals as doctors and lawyers has been the subject of much recent litigation. Because the practice of medicine is subject to comprehensive and detailed regulation by the state under its POLICE POWER for compelling reasons, a state statute prohibiting laymen from forming CORPORATIONS for the delivery of medical care has been upheld on the theory that limiting the formation of such corporations to licensed physicians tends to preserve important doctor–patient relationships and prevents possible abuses which may result from lay control.

The constitutionality of regulation of lawyers presents more complex issues. The Supreme Court has ruled that a state may lawfully compel all lawyers in the state to belong to an integrated bar, and a state bar association may be authorized to discipline a lawyer for personally soliciting clients for pecuniary gain, although the Court ruled in BATES V. STATE BAR OF ARIZONA (1977) that a state, through its bar association, may not forbid lawyers to engage in truthful advertising of routine legal services. Furthermore, the Court held in KONIGSBERG V. STATE BAR OF CALIFORNIA (1961) that a state may refuse to admit to the practice of law a candidate who refuses to reply to questions regarding membership in the Communist party, although the Court has also ruled that there must be a showing of knowing, active membership before an applicant can be excluded on this ground.

The Supreme Court has decided that such associations as trade unions, the NAACP, and the AMERICAN CIVIL LIBERTIES UNION may employ lawyers to provide legal services for their members. In *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar* (1964), the Court held that a union has an associational right to advise injured members to use the services of specific approved lawyers. Moreover, a labor union is constitutionally entitled to employ a licensed attorney on a salary basis to represent any of its members who desire his services in prosecuting workers' compensation claims. In NAACP V. BUTTON (1963), the Court upheld the right of this association to finance certain types of litigation through its own staff of lawyers. The Court noted that NAACP litigation is not a mere technique for resolving private differences but a means of achieving the lawful objective of legal equality. Similarly, the Court has affirmed the right of the American Civil Liberties Union to employ attorneys in the pursuit of its objectives.

The right of association has been explored in a wide variety of other situations. Many years ago, in *Waugh v. Board of Trustees of the University of Mississippi* (1915), the Supreme Court held constitutional a Mississippi statute prohibiting Greek-letter fraternities and other secret societies in all public educational institutions of the state, on the theory that this was a reasonable moral and disciplinary regulation which the legislature might believe would save the students from harmful distraction. Several state appellate courts have sustained the validity of such regulations as applied to high schools. In New York ex rel. *Bryant v. Zimmerman* (1928), the Supreme Court upheld a state statute, aimed at the Ku Klux Klan, which required all secret oath-bound organizations having over twenty members to supply to a designated public official a roster of its members and a list of its officers. In NAACP V. ALABAMA (1958), holding unconstitutional a similar disclosure requirement of the NAACP, the Court noted that the *Zimmerman* decision "was based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence, which the Court assumed was before the state legislature when it enacted the statute, and of which the Court itself took judicial notice." (See COMMUNIST PARTY V. SUBVERSIVE ACTIVITIES CONTROL BOARD.) On the other hand, in *Lanzetta v. New Jersey* (1939), the Court ruled unconstitutional a state statute that purported to make it illegal to associate with gangsters, on the ground that the key words in the statute were so vague, indefinite, and uncertain that it lacked the specificity required of penal enactments.

Although the right of association as such is not mentioned in the Constitution, it holds a firm, indeed expanding, place in American constitutional law. This right is partly an emanation from the First Amendment's cognate guarantees of freedom of speech and assembly, partly a privilege or immunity of citizenship, and partly a by-product of democratic voting and representative government. However the right of association is tied to the text of the Constitution, it is regarded by the judges as such a

fundamental right that doubts are resolved in favor of protecting the right of association from governmental restraints.

DAVID FELLMAN
(1986)

Bibliography

ABERNATHY, GLEN 1961 *The Right of Assembly and Association.* Columbia: University of South Carolina Press.

FELLMAN, DAVID 1963 *The Constitutional Right of Association.* Chicago: University of Chicago Press.

HORN, ROBERT A. 1956 *Groups and the Constitution.* Stanford, Calif.: Stanford University Press.

KALVEN, HARRY, JR. 1965 The Concept of the Public Forum. *Supreme Court Review* 1965:1–32.

RAGGI, REENA 1977 An Independent Right to Freedom of Association. *Harvard Civil Rights-Civil Liberties Law Review* 12:1–30.

## FREEDOM OF ASSOCIATION

The freedom of association derives from the free speech and free assembly provisions of the FIRST AMENDMENT, and it protects the right of persons to enter into relationships with one another unhampered by intrusive governmental regulation. More precisely, the freedom of association encompasses two distinct guarantees: the FREEDOM OF INTIMATE ASSOCIATION and the freedom of expressive association. The freedom of intimate association protects "certain kinds of highly personal relationships," such as marriage. The freedom of expressive association, on the other hand, protects "the right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."

In recent cases the Court has made clear the limits of these two guarantees with respect to ANTIDISCRIMINATION LAWS. In *Roberts v. United States Jaycees* (1984) and *Board of Directors of Rotary International v. Rotary Club* (1987), the Court rejected arguments by both the Jaycees and Rotary International that laws prohibiting SEX DISCRIMINATION could not be applied to them without violating their members' freedom of association. Both organizations limited their regular membership to men. The Court held that neither the freedom of intimate association nor the freedom of expressive association protected this type of discrimination by the organizations in question. The freedom of intimate association did not apply at all because both organizations tended to have unlimited memberships and open meetings. The freedom of expressive association may have been implicated, but not sufficiently to override the government's COMPELLING STATE INTEREST to eradicate discrimination. As the Court said in *Rotary*, "The evidence fails to demonstrate that admitting women . . . will affect in any significant way the existing members' ability to carry out their various purposes."

In *New York State Club Association v. New York City* (1988), the Court turned back yet another free association challenge to an antidiscrimination law. New York City prohibits discrimination on the basis of race, gender, and other grounds by any "place of public accommodation, resort or amusement," but exempts from this restriction any group "which is in its nature distinctly private." In 1984 the city passed a new law providing that no groups shall be considered private if it "has more than four hundred members, provides regular meal service and regularly receives payment . . . from or on behalf of nonmembers. . . ." The new law exempted religious and benevolent associations from this provision. A consortium of private clubs and associations challenged the ordinance, claiming that it abridged on its face both the First Amendment and the EQUAL PROTECTION clause. The Supreme Court unanimously disagreed.

Writing for the Court, Justice BYRON R. WHITE argued that the First Amendment facial challenge failed both because the law was not invalid in all its applications and because its provisions were not overbroad. Under the previous rulings in *Roberts* and *Rotary*, the law clearly could be applied constitutionally to some of the groups that challenged it, and no evidence was presented showing that the law applied impermissibly to a substantial number of other groups. White acknowledged that the law still might be unconstitutional as applied to certain associations, but noted that these groups maintained the right to sue in order to invalidate particular applications of the ordinance. White also rejected the consortium's equal protection challenge, arguing that the city council could have reasonably believed that exempted religious and benevolent groups differ from those covered by the ordinance because of the level of business activity conducted by the groups.

No member of the Court has dissented in these cases, but Justice SANDRA DAY O'CONNOR has tried to clarify when discriminatory activities might be protected by the freedom of expressive association. In *Roberts* and again in *New York*, O'Connor filed concurring opinions that sought to distinguish expressive associations from commercial ones. An expressive association exists to promote a particular message; thus, according to O'Connor, it should be protected by the full force of the First Amendment against state control of its membership. A commercial association, however, exists primarily to engage in certain commercial activities, and the protection afforded it by the Constitution subsequently should be much more limited. In O'Connor's view, groups like the Jaycees are predominantly engaged in commercial activities; hence, the freedom of expressive association should not exempt them

from rational state regulations such as antidiscrimination laws. In contrast, gender-exclusive groups such as Boy Scouts or Girl Scouts probably should be protected as expressive associations because "even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement."

JOHN G. WEST, JR.
(1992)

## FREEDOM OF CONTRACT

Freedom of contract in the United States means that the law accepts and protects broad scope for private individuals and business firms to decide the uses of economic resources in seeking profits. Through the country's history, sharp controversies have centered on exercise of freedom of contract as it has affected concerns for the worth of individuals, the vitality of private markets, the natural and social environment, and the structure of practical as well as formal legal power in the society. Few other concepts touch as many dimensions of the history of American public policy and constitutional law.

The law's attention to freedom of contract has centered on fostering and sustaining the private market as a major institution of social control (ranking in importance with the law itself). Even the assessment of the interactions of freedom of contract and other values, not defined in market, has typically resulted from community reactions to the effects of market operations. Thus, to examine the place of freedom of contract in constitutional law entails examining the roles and working character of the market.

Law and public policy have historically responded to four salient characteristics of private contract activity in market, carrying both constructive and damaging aspects. These responses have provided the institutional setting within which the substantive legalconstitutional meaning of freedom of contract has emerged.

(1) Under the protection of the law of contract, private contract activity seeking profit in market energizes private will in producing and distributing goods and services. This activity promises efficiency in allocating limited resources, partly because the actors are motivated to obtain the most output for the least input, and partly because market bargaining allows flexibility in coordinating a great volume and diversity of private decisions. In the country's constitutional tradition, social and political values also favor freedom of contract. Proponents argue that individuals gain self-respect from the initiatives of will they exercise in markets, as well as courage to participate in and criticize government because their means of livelihood are not dependent on official favor. The law reflects this appraisal of positive values by presuming the legality of private contracts until a challenger demonstrates their unlawfulness, and by casting some constitutional protections around private contract activity and the property interests it produces. (See CONTRACT CLAUSE; SUBSTANTIVE DUE PROCESS; TAKING OF PROPERTY; ECONOMIC REGULATION AND THE CONSTITUTION.) But the driving dynamic of private contract activity is the focused self-interest of the bargainers. We value this dynamic because it counters the inertia prevalent in social relationships, but it largely ignores the impact of bargains on people other than the bargainers. A factory producing to meet its contractual obligations may deposit in a handy stream industrial wastes harmful to the public's interest in pure drinking water or recreational opportunities. The law responds to this narrow focus of the market with ENVIRONMENTAL REGULATIONS, the constitutionality of which may or may not be challenged.

(2) Large-scale markets cannot operate by barter but require use of money (including money-measured credit). Law responds to this need by regulating the money supply. But the money calculus required by extended contract activity carries dangers of a bias in identifying and weighing matters of public interest. Public opinion, public policymakers (including judges), and market-oriented pressure groups seeking to influence legislators and other public officers tend to identify interests deserving law's promotion or protection only with interests readily calculable in dollar terms. Thus, nineteenth-century COMMON LAW readily gave JUDGMENT for money damages if a factory failed to deliver promised goods to a buyer but was grudging in recognizing a community right to redress for more diffuse detriments—hard to measure in dollars—caused by the factory's deposit of industrial waste in a nearby stream. Today's public policy, with the blessings of today's constitutional law, increasingly seeks to offset the bias injected by a monetized calculus of interests by legislating to protect diffuse values and establishing administrative agencies to implement them.

(3) Whether tailored to particular transactions or standardized as in such commercial instruments as promissory notes or warehouse receipts, private contracts can be multiplied to any number of dealings and varied to shifting conditions of supply and demand. Contracts and the market thus permit flexible adaptation to changes in the conditions of the economy and the parties. Public policy recognizes the value of this adaptability in the law's readiness to enforce such terms of dealing as the parties choose and in legalconstitutional doctrine protecting the play of market competition. However, when change proceeds in this manner, its increments are so small that even the parties, let alone the environing society, may not be aware that the accumulation of relatively limited incremental

shifts is producing basic alterations in the social context which no one has predicted, assessed, or chosen to bring about.

(4) Private contracting parties and the markets in which they operate typically work within the distribution of wealth and income in society as they find it. Contract and property law reinforce this distribution; only in rare hard cases will courts set aside a bargain as unconscionable, and normally they will not examine the adequacy of the consideration a party accepted in return for what he promised to perform. But underlying the social utility of freedom of contract and the resource-allocations role of markets lies an assumption: that private bargainers enjoy a considerable range of practical and legal options in dealing with each other. Great inequalities of wealth may grossly distort some bargaining relations, so that freedom of contract becomes illusory and markets sharply accentuate inequalities of bargaining power. While constitutional law only rarely addresses such inequalities (see INDIGENTS; WEALTH DISTRIBUTION), it consistently validates legislation to this end. (See SUBSTANTIVE Due Process; ECONOMIC REGULATION; COMMERCE CLAUSE.) Sometimes lawmakers seek to encourage private organization of countervailing power, as in the law regarding COLLECTIVE BARGAINING between management and LABOR. Sometimes they interpose between focused centers of private market power and diffused bodies of customers a public bargaining agency, as in the law of public utilities. Such legal interventions and their constitutional underpinnings depart from an abstract model of freedom of contract in order to promote more real freedom of bargaining.

The span from the 1880s through the 1920s witnessed increased resort to state and national law to correct imperfections of private contract activity in market. In this period opponents of government intervention made "freedom of contract" a code phrase for imposing constitutional and other limits on legal regulation. This emphasis has been so prominent in past policy debate that there is danger of equating the idea of freedom of contract with limitations on the use of law. In fact, law operates at least as much to promote market activity as to regulate it. A realistic assessment of the relation of constitutional law to freedom of contract must recognize the range of such promotional roles of legal processes.

By the late eighteenth century, in this country of abundant land, the law of land titles made land fully transferable and thus readily marketable—thus promoting private contract activity. By the mid-nineteenth century, common law had established a strong presumption in favor of the legality of private agreements for market dealing. By the second half of the nineteenth century, state legislatures were actively removing the common law disability of married women to make binding contracts. The married women's property acts may have responded more to the wish of the husband's creditors to acquire effective pledge of the wife's assets to secure her husband's debts than to any concern for sex equality. Still, these statutes enlarged the potential scope for contract activity in market.

Legal development, often supported by constitutional law, has consistently fostered entrepreneurial energy. Contract law legitimized and standardized a growing range of trade documents and instruments for capital investment. In three respects law especially promoted increased reach and pervasive effect of private contract activity. Though often inefficiently, law provided a money supply to facilitate increased volumes of trade. Particularly under the commerce clause of the national Constitution, Congress and the Supreme Court protected markets of sectional or national scope against intrusion of state parochial interest. (See STATE REGULATION OF COMMERCE; STATE TAXATION OF COMMERCE.) With increasing liberality lawmakers made the device of incorporation available for the general run of business, providing means for mustering and directing otherwise scattered assets. (See CORPORATIONS AND THE CONSTITUTION.)

Many individuals had only their labor to offer in market, and only their wages to spend. For them law gave other positive promotion to freedom of contract. In the nineteenth century, statutes created mechanics' liens, exempted workers' tools from creditors' execution, and abolished imprisonment for debt. In the twentieth century, legislation created administrative agencies to implement laws designed to help consumers get money's worth for their purchases. The most dramatic expansion of freedom of contract for labor was the abolition of SLAVERY. Fulfillment of the substance of that policy through the THIRTEENTH AMENDMENT and the supplementary provisions of the FOURTEENTH AMENDMENT and the CIVIL RIGHTS ACT OF 1866 had a long and tortured history, but the general line of policy was clear. In the 1960s, CIVIL RIGHTS legislation gave that policy additional impetus, placing the affirmative support of law behind opening markets for labor, goods, and services free of barriers raised on grounds of race, sex, or religion. (See FEDERAL PROTECTION OF CIVIL RIGHTS; EMPLOYMENT DISCRIMINATION.)

Granted that law plays positive, promotional roles in fostering markets, freedom of contract also insists that law protect a substantial area of autonomy for private contract and market activity, to allow operative room for the efficiency criteria which legitimize private contract and market functions. Threats of invasion of this zone come from both private and official power. Accordingly the autonomy that public policy provides for private contract and private markets has two dimensions, relating to private and to official action.

The law protects market autonomy against private in-

terference not only by enforcing contractual obligations through damages or other relief against breach of contract but also by providing sanctions against interference by outsiders with the performance of those obligations. Furthermore, an elaborate body of statutory, judge-made, and ADMINISTRATIVE LAW offers criminal and civil sanctions against efforts to defeat market bargaining by achieving monopoly, or by fixing prices or other terms of trade, or by engaging in such predatory forms of competition as geographical price discriminations so as to limit or destroy competition. (See ANTITRUST AND THE CONSTITUTION.)

More controversy has surrounded the creation of legalconstitutional protections of limited autonomy for private contract activity in market as against interventions by government. Experience shows two quite different sources of concern. Some battles over legal regulation are fought on claims that one set of private interests seeks to handicap another by persuading a legislature to create barriers to free competition as when producers of dairy products obtained laws regulating the sale of oleomargarine. Other battles are fought on claims that in pursuing nonmarket objectives, such as protecting public health, lawmakers impose unreasonable costs on market-measured profitseeking—as when environmental regulations are opposed on the ground that they hamper "productivity" (meaning that they limit money-measured gains of regulated firms). Common to both types of concern is the objection that law is used in ways that interfere with economic efficiency defined according to the profit and loss calculus of the immediate bargainers in a competitive private market. "Efficiency" in this sense and freedom of contract are the same thing.

Common law imposes some limits on freedom of bargainers to set terms for which they may invoke the law's support and sets the standards for determining what constitutes an enforceable contract. Generally, however, the courts presume that private bargains are valid. The principal legal battlegrounds for defending freedom of contract against official invasion lie in constitutional law. Both national and state constitutions limit legislative restrictions on the freedom of private contract.

The national and state constitutions forbid government to take private property for PUBLIC USE without JUST COMPENSATION. These guarantees primarily protect property titles rather than contracts not yet performed. However, they help safeguard private contract activity; contracts that call for performance over time are likely to require commitments of assets which bargainers will not make if they do not consider the commitments secure against government appropriation. Some uncertainty attends the definition of what public action amounts to a "taking." However, these guarantees do not require government to pay all costs incurred by those subjected to laws regulating economic affairs. Particularly, when government intervenes in a situation where some detriment will in fact occur to either of two competing private interests whether government acts or not, there is no "taking" requiring compensation when the law determines which interest must bear the burden. (See TAKING OF PROPERTY.)

The national Constitution forbids any state to make a law that impairs the OBLIGATION OF CONTRACTS. This clause limits only retroactive state legislation; it does not affect state laws that operate only on future events. No comparable clause limits the Congress, and the Supreme Court applies a presumption of constitutionality to federal statutes of retroactive impact. (See RETROACTIVITY OF LEGISLATION.) The CONTRACT CLAUSE has not figured in so much litigation as the constitutional guarantees of DUE PROCESS and EQUAL PROTECTION OF THE LAWS. Where litigants invoke the clause, however, judges generally give it firm application in the types of situation that most directly challenge respect for outstanding private agreements in market—that is, where a retroactive state statute undertakes to readjust the terms of a contract or its legal context in order to give one party what the legislature in hindsight sees as a socially more acceptable exchange. The usual case of this kind has arisen when a legislature intervenes to relieve distressed debtors of the full measure of claims or remedies afforded their creditors. Moreover, the Supreme Court requires a state to enforce a contract between the state itself and a private party when the retroactive change has given the state an economic advantage not conferred by the original terms. On the other hand, the Supreme Court treats the contract clause more flexibly when the prime object of the challenged legislation appears to be not to alter terms of dealing between the bargaining parties but to protect public interests in a healthy social context without which private contracts have no meaning. Care for social context may include care for preserving the market itself. Thus the Supreme Court upheld a state statute that imposed a limited moratorium on foreclosing mortgages contracted before the statute was passed, where the Court was persuaded that the legislature reasonably believed the moratorium necessary not mainly to benefit mortgagors but to save the general economy from destruction by averting distress sales of land that would undermine the financial integrity of the banking and insurance systems of the state. (See HOME BUILDING AND LOAN ASSOCIATION V. BLAISDELL.) The Court has taken a like approach where the challenged legislation seeks to safeguard other than market interests; thus it has sustained against contract clause challenges retroactive legislation that, in the interest of public morals, abrogated an earlier statutory charter for a lottery and that, to protect public health, abrogated an earlier statutory charter for a slaughterhouse.

Another relatively specific constitutional limit on state legislation affecting freedom of contract developed under the COMMERCE CLAUSE of the national Constitution. The core purpose of granting Congress authority to regulate INTERSTATE COMMERCE was to use national law to protect from parochial state legislation contract activity that ranged over state lines into markets of interstate scope. Congress has used this authority notably to provide uniform national regulation of the terms on which private business provides interstate transportation and communication services. Most often, however, the commerce clause has operated to limit state interference with interstate contract activity through the United States Supreme Court. In the Court's construction, the commerce clause of its own force authorizes judges to rule invalid state legislation that discriminates against or unduly burdens interstate transactions. The Court most strictly limits state laws that in their terms or by their practical effect lay legal or economic burdens on dealings in an interstate market that they do not impose on intrastate transactions. Here the Court puts on the supporter of a challenged state statute a heavy burden of persuading the Court that some overriding local public interest warrants legislation that thus singles out interstate dealing for special regulation. But if a nondiscriminatory state statute affects interstate transactions for a nonmarket purpose, such as protecting public safety on the highways, it enjoys the benefit of a presumption of constitutionality, so that the challenger must persuade the Court that local interests are insufficient to warrant the regulation.

Constitutional guarantees of due process and equal protection are the protections most often invoked on behalf of substantial autonomy of private contract activity in market, as against government intervention. At the threshold of any examination of this body of constitutional law stands an issue of institutional legitimacy. Anglo-American political tradition includes high regard for public policy that favors initiatives of private will in the economy. JOHN LOCKE gave this tradition classic expression in seventeenth-century England, asserting that the individual normally needs no official license before he may make productive use of natural resources. Locke recognized that legislation might properly care for "commonwealth" interests, and particularly that the elected legislature might exercise the power to tax for public purposes. But the legislative authority, he said, was held in "trust," permitting the legislature to act only for the public interest (foreshadowing the Supreme Court's later standard of SUBSTANTIVE DUE PROCESS) and by equal laws. Of course, this English inheritance did not provide authority for judges to hold invalid legislation that infringed standards of public interest and equal protection. When judges in the United States asserted that authority—with some limited warrant in the history of adoption of the national Constitution—it was another, long step for them to conclude that the guarantee of due process of law included judicial protection of some extent of private contract autonomy. In its origins, "due process of law" meant assurance of fair procedures for applying law, not authority of courts to set limits on the substantive content of the policy legislatures might adopt. And the core historic meaning of the equal protection standard referred to application of law rather than to its substantive classifications. However, by the mid-twentieth century, some seventy-five years of Supreme Court practice had outweighed historic doubts; the live issue in the twentieth century is, rather, how the Court will use the authority it has staked out for itself. The fact that judges were able to extend their power of review beyond historic foundations attests to the strength of values which conservative opinion in the past has put on freedom of contract in market. On the other hand, the doubt which history has cast on the political legitimacy of the expanded judicial role correspondingly helps account for the limits set by the Court since the 1930s on its exercise of JUDICIAL REVIEW of economic regulations challenged as violations of due process and equal protection.

Early in the development of the doctrine of substantive due process, in *Powell v. Pennsylvania* (1888), the Court set sharp limits on the scope of judicial review. There a state had banned the sale of oleomargarine, for the declared goals of protecting public health and preventing fraud on consumers. The Court ruled that it would uphold the statute unless the challenger showed beyond a reasonable doubt that the legislature could not reasonably find that the act was an appropriate means to serve some public interest. Nonetheless, in some cases judges, especially state courts interpreting state constitutions, will enforce respect for some degree of autonomy of private contract activity in market. In some cases parties have successfully rebutted the strong presumption of constitutionality by showing that one set of business interests has won the law's favor simply in order to obtain a legal advantage against other socially useful competitors. Such resort to law violates the social justification of legally protected freedom of contract: the promotion of efficient allocation of limited resources through market competition. Thus, in a later case, where the challenger demonstrated that an anti-oleomargarine statute had no reasonable basis in protecting health or preventing fraud, the Wisconsin court held, in *John F. Jelke Co. v. Emery* (1927), that the act violated constitutional standards of due process and equal protection.

In counterpoint with the pattern of judicial self-restraint indicated by *Powell v. Pennsylvania*, over the span from about 1890 into the mid-1930s the Supreme Court developed three other interrelated doctrinal lines

which promoted aggressive judicial protection of private contract autonomy.

First, the Court identified freedom of private contract as a key component of the "liberty" protected by the due process and equal protection clauses. The founding decision was ALLGEYER V. LOUISIANA (1897). There the Court held unconstitutional a Louisiana statute forbidding performance of a contract to insure property in the state with a company not licensed to do business there. The Court ruled that in denying the parties the liberty to make the contract the statute violated limits that the due process clause put on the substantive policies which the legislature might enact into law.

Second, in the standard of substantive due process the Court found warrant for a judicial veto over legislative goals. Judicial scrutiny of these goals had two aspects. One concerned the relationship between private contract and the social context in which the contracting went on. Even in decisions most restrictive of legislative power, the Supreme Court did not deny that legislation might properly pay some regard to the impact of private contract activity on the lives and concerns of individuals or groups other than the contracting parties. However, the Court often spoke of legislative authority as the sum of a limited, closed number of categories of goals traditionally recognized as serving public interest, notably protection of health, safety, or morals. (See STATE POLICE POWER; NATIONAL POLICE POWER). The indication was that a statute would violate substantive due process if its objective did not fit handily under one of these familiar designations. Conspicuous in this approach were *Adair v. United States* (1908), COPPAGE V. KANSAS (1915), and WOLFF PACKING COMPANY V. COURT OF INDUSTRIAL RELATIONS (1923). These rulings refused to recognize promotion of peace in management-labor relations as a sufficient public-interest goal to sustain statutes that outlawed employment contracts binding employees not to join a union or providing for compulsory arbitration of labor disputes.

The third aspect of heightened judicial scrutiny of statutory goals was more specific. Substantive due process demanded that legislation serve what the Court regarded as the general welfare. A statute might appear to serve one of the judicially approved public-interest goals, such as protection of health. But also, it might have the purpose or likely effect of bringing about a different distribution of gains and costs among private bargainers than might result if bargainers operated simply within the frame of common law contract and property law. Between about 1890 and the mid-1930s many decisions treated the presence of a purpose or effect to alter the distribution of gains and costs among private bargainers as enough to show that a challenged statute did not meet the due process standard of serving the public interest; the redistributive character of such a statute made it "class legislation" or an effort, forbidden by constitutional law, to "take property from A and give it to B." Judges would accept statutes that protected groups commonly recognized as subject to exceptional hazards or weaknesses in bargaining power. Thus, in HOLDEN V. HARDY (1898), the Supreme Court upheld a statutory limit on working hours of men mining coal underground, emphasizing the well-known special hazards of the occupation and the accepted fact that in practice the employers fixed the terms of the employment contracts. So, too, in MULLER V. OREGON (1908), the Court sustained a working hours limit for women, to protect a class which the judges saw as peculiarly dependent. But where a statute apparently sought to offset the weak bargaining power of workers in situations not conventionally regarded as deserving law's special care, the fact that the statute would confer particular benefit on labor was taken as enough to show a lack of justifying public interest. Such was the Court's approach in LOCHNER V. NEW YORK (1905), which held invalid a statutory limit on working hours of bakers. Of similar character was Court doctrine that confined statutory regulation of prices and services of private contractors to what judges regarded as businesses AFFECTED WITH A PUBLIC INTEREST—those conventionally deemed public utilities. On this basis, in TYSON V. BANTON (1927) and in RIBNIK V. MCBRIDE (1928), the Court held invalid statutes regulating resale prices of theater tickets and fees of employment agencies.

There was unreconciled tension between many of these decisions and the approach taken in *Powell v. Pennsylvania*. In *Powell*, the fact that the statutory ban on selling oleomargarine might serve both the private, competitive interest of sellers of butter and the public interest in health was held insufficient to invalidate the regulation. In *Powell*, the favored private interest was that of one set of businessmen, the sellers of butter. In *Lochner* and in *Ribnik*, the interest the statutes immediately protected was that of labor. So, also, in *Adair*, *Coppage*, and *Wolff Packing*, the interest of labor suffered when the challenged legislation was upset. The pattern suggested a definite bias of policy.

Between 1890 and the mid-1930s the Supreme Court also usually required a positive showing of a "real and substantial" relation between the legislature's goal and the means it provided to reach the goal. That the Court could conceive of other, less burdensome means of achieving the desired result was likely, as in *Lochner v. New York*, to be treated as a distinct and sufficient basis for invalidating the statute. The climax of both lines of doctrine—regarding challenges to the end or to the means adopted by the legislature—came in ADKINS V. CHILDREN'S HOSPITAL (1923), when the Supreme Court held unconstitutional legislation setting minimum wages for women workers.

There a Court majority in effect repudiated the presumption of constitutionality by declaring that "Freedom of contract is . . . the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances." As late as MOREHEAD V. NEW YORK EX REL. TIPALDO (1936), a Court majority in effect reaffirmed the *Adkins* approach, but a new alignment of Justices repudiated that approach in WEST COAST HOTEL V. PARRISH (1937).

The Court's readiness through some forty years after 1890 to upset legislation limiting freedom of contract had serious implications for the role of legislatures and the interests legislatures sought to advance or protect. But we should not exaggerate the impact of judicial review. One inventory counts 197 cases between 1899 and 1937 in which the Supreme Court invalidated state or federal regulations under the standard of substantive due process, but another estimate notes that between 1889 and 1918 the Court upheld some 369 challenged statutes enacted under the state police power. Other tallies emphasize the more vigorous use of the judicial veto in the later years of the forty-year span; one count finds fifty-three state police power acts held invalid between 1889 and 1918, while another shows almost 140 laws held unconstitutional between 1920 and 1930. All such inventories must be seen in a wider perspective; a great bulk of economic regulatory legislation never came under constitutional challenge in lawsuits.

However, in a sharp turnabout beginning in the mid-1930s, the Court disavowed these enlargements of judicial protection for autonomy of private contract in market. In NEBBIA V. NEW YORK (1934) it ruled that a legislature might regulate pricing practices outside the field of traditional public utilities if legislators could reasonably find that regulation would serve a public interest. In UNITED STATES V. CAROLENE PRODUCTS COMPANY (1938), it ruled that no particular sanctity attached to the "liberty" or "property" interests involved in private contract activity; all regulatory legislation affecting ordinary commercial transactions enjoyed the presumption of constitutionality. *Nebbia* also made clear that there is no closed category of public interests to which legislatures may extend protection; even if a statute intervenes in private contract activity for a purpose not within familiar concerns with public health, safety, or morals, it is valid unless the judges determine that no reasonable legislators could find justification for it. Finally, in WEST COAST HOTEL COMPANY V. PARRISH (1937), the Court expressly overruled the formula declared in *Adkins;* that a statute limits freedom of contract does not cast on its supporter a burden of justifying it; rather, the general presumption of constitutionality applies.

The Court's permissive modern doctrine leaves the autonomy of private contract activity mostly in the hands of the legislature. Given the realities of the legislative process, in two respects this outcome implies a lessening of the preferred status of the private market. Statute law tends to speak more and more for interests of the general social context, as in regulation of burdens—such as air or water pollution—which private contract activity otherwise may place on parties outside the bargaining circle. Less appealing is the practical operation of the presumption of constitutionality to allow special interest lobbies to obtain legal favors, protected by plausible arguments of action taken for a presumed public interest. But this increased scope for lobby influence seems an inescapable cost of a proper division of functions between legislatures and courts in the area of economic regulation. In a more favorable light, the presumption of constitutionality as the Supreme Court defines it means that a statute is not invalid merely because in serving some public interest it may operate concurrently to provide special gain to some private interest. This result seems appropriate. Concurrence of public and private gain from legislation is so common in this society of diverse, interweaving interests that judges would substantially abrogate the legislative function if they held that such parallel effects alone made a statute unconstitutional.

Finally, we should recall that constitutional law is by no means the whole of what determines the realities of freedom of contract. In the second half of the twentieth century several factors other than direct legal regulation work to reduce, or at least realign, the operation of the freedom of contract. One element is the growth in relative economic importance of large-scale business corporations. In a big corporate organization many decisions that once would have been made by private bargains over supply of goods and services now occur through relations of hierarchy, as boards of directors instruct managers and managers plan and instruct subordinates. Thus, much resource allocation is done through internal discipline of firms, rather than by transactions in market. This internalizing of decisions has generated new concerns about the balance of power among affected interests. Such concerns have prompted new government regulation, as in the WAGNER (NATIONAL LABOR RELATIONS) ACT, in legislation governing corporate finance and administered by the Securities and Exchange Commission, and in the regulation of workplace safety under state and federal laws.

Statutes and administrative regulations now standardize many areas of contract dealing, sometimes providing optional standard forms, sometimes requiring adherence to forms fixed by law. Thus, large areas which are still governed by contract, in the sense that parties enter into relationships only by exchange of consents, are nonetheless areas in which individuals and firms no longer bargain out the details of their transactions. Such is the case with most

contracts of insurance, contract relations between corporate stockholders and their corporations, collective bargaining contracts for the supply of labor, and lending contracts.

From the 1930s on, national monetary and fiscal policy has greatly affected the practical scope of freedom of private contract. Government's roles in providing and regulating the money supply are not neutral ones; the qualities of public monetary policy affecting rates of deflation or inflation profoundly affect the extent to which people can control their affairs by private bargains. Similarly, as government enlarges the reach of its TAXING AND SPENDING POWERS, it enlarges or restricts practical freedom of private contract. Government-induced transfer payments—payment of interest on public debt, or payments of Social Security allowances or of unemployment compensation—shift purchasing power among groups. Government spending on goods or services for its own needs removes some proportion of material or labor from the field of private contract in market. In the late twentieth century the cumulative effects of public monetary and fiscal programs spell substantial complication of the patterns of private contract activity and public resource allocation, in comparison with the patterns that existed from the late eighteenth century to the end of the nineteenth century. Freedom of contract in the United States continues to stand for important propositions concerning the structure and working procedures of society, but the content of the idea has undergone significant change from the vision of society held by John Locke or by the Justices of the Supreme Court who spoke for strict judicial review of economic regulations between the 1890s and the middle 1930s.

JAMES WILLARD HURST
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Bibliography


CHANDLER, ALFRED D., JR. 1977 *The Visible Hand.* Cambridge, Mass.: Belknap Press of Harvard University Press.

FRIEDMAN, LAWRENCE M. 1973 *A History of American Law.* New York: Simon & Schuster.

HORWITZ, MORTON J. 1977 *The Transformation of American Law, 1760–1860.* Cambridge, Mass.: Harvard University Press.

HURST, JAMES WILLARD 1982 *Law and Markets in United States History.* Madison: University of Wisconsin Press.

JACOBS, CLYDE 1954 *Law Writers and the Courts.* Berkeley: University of California Press.

MACAULAY, STEWART 1963 Non-Contractual Relations in Business: A Preliminary Study. *American Sociological Review* 28: 55–67.

PAUL, ARNOLD M. 1960 *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887–1895.* Ithaca, N.Y.: Cornell University Press.

POUND, ROSCOE 1909 Liberty of Contract. *Yale Law Journal* 18:454–487.

TRIBE, LAURENCE H. 1978 *American Constitutional Law.* Chap. 8. Mineola, N.Y.: Foundation Press.

TWISS, BENJAMIN R. 1942 *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court.* Princeton, N.J.: Princeton University Press.


# FREEDOM OF INFORMATION ACT

80 Stat. 378 (1966)

The Freedom of Information Act of 1966 establishes a public disclosure policy for information in the custody of the executive branch of the federal government. It authorizes public access to government records and provides administrative and judicial APPEAL of decisions to withhold them. The law mandates that unreleased executive branch records be made available on request; however, it permits the withholding of information in nine categories upon government justification. Among them are classified national security information, information protected by other statutes, internal advisory memoranda, invasions of privacy, certain law enforcement records, and certain confidential business information.

The idea of a freedom of information law was first championed by journalists concerned with the effects of government censorship and discretionary bureaucratic secrecy on FREEDOM OF THE PRESS and the accountability of public officials. After eleven years of congressional hearings, the Freedom of Information Act was passed in 1966, amending the Administrative Procedures Act which had allowed the withholding of almost all government records. Initial compliance with the new law fell short of congressional expectations, and effectuating amendments were passed over a presidential veto in 1974.

As the keystone of "open government" legislation, the act was the first of several statutes that subject certain records and activities of the federal government to public scrutiny. These include the Federal Advisory Committee Act of 1972, the PRIVACY ACT of 1974, the Government in the Sunshine Act of 1976, and the Presidential Records Act of 1978.

The freedom of information policy established by the law does not flow from an express, constitutional RIGHT TO KNOW. Some controversy surrounds the question of whether a public right to know is merely political rhetoric or is an unenumerated constitutional right protected by the NINTH AMENDMENT. A majority of the Justices of the Supreme Court concluded, in RICHMOND NEWSPAPERS, INC. V. VIRGINIA (1980), that the FIRST AMENDMENT gave the public a right of access to criminal trials, which rests on the traditional importance of citizen scrutiny of the judicial trial process. In a separate opinion, Justice WILLIAM J. BREN-

NAN argued that the theory of citizen participation in self-government also supports the right, and that this logic is not confined to access to courtrooms. In another CONCURRING OPINION, Justice JOHN PAUL STEVENS pointed out that in this case the Court recognized for the first time a protected right of access to important government information.

EXECUTIVE PRIVILEGE is embodied in several exemptions to the 1966 Act. Although the scope of the privilege remains in dispute, the Supreme Court in OBITER DICTUM in UNITED STATES V. NIXON (1974) recognized the authority to withhold military and diplomatic national security information, as well as internal memoranda that are advisory and not factual in nature. Later that year, in his veto message returning the 1974 amendments to Congress, President Ford declared that the provision for judicial review of executive branch determinations as to national security classification violates constitutional principles. However, the government has never pressed that argument in litigation.

Individuals have found the act useful for obtaining business information and as an alternative to judicial discovery. Open government policies have affected administrative behavior. Federal law enforcement practices were somewhat restrained after dubious covert investigative activities were disclosed. A government study following the 1974 amendments found that attitudes in the bureaucracy had become more positive toward the release of information and that the quality of some government work had improved because of public scrutiny.

EVERETT E. MANN, JR.
(1986)

Bibliography

MANN, EVERETT E. 1984 The Public Right to Know Government Information: Its Affirmation and Abridgment. Ph.D. dissertation, Claremont Graduate School.

## FREEDOM OF INTIMATE ASSOCIATION

Since the 1960s the Supreme Court has decided scores of cases dealing with marriage and divorce, family relationships, the choice whether to procreate, and various forms of intimate association outside the traditional family structure. Although the factual settings of these cases and their opinions' doctrinal explanations have been diverse, in the aggregate they represent the emergence of a constitutional freedom of intimate association.

The Court had asserted as early as MEYER V. NEBRASKA (1923) and PIERCE V. SOCIETY OF SISTERS (1925) that the Constitution protected the freedom to marry and raise one's children, and SKINNER V. OKLAHOMA (1942) had subjected a compulsory STERILIZATION law to STRICT SCRUTINY. But the modern beginning for the freedom of intimate association was Justice WILLIAM O. DOUGLAS's opinion for the Court in GRISWOLD V. CONNECTICUT (1965). Although that case involved a prosecution of the operators of a BIRTH CONTROL clinic for dispensing advice on contraception and the means to achieve it, the focus of the opinion was a married couple's right to use contraceptive devices. Justice Douglas located that right in a "zone of privacy," created by "penumbras" of various specific guarantees in the BILL OF RIGHTS. He did not specify the scope of the new RIGHT OF PRIVACY, and one product of *Griswold* has been a distinguished body of literature rich with suggested approaches to that issue. In *Griswold* itself, however, the chief object of constitutional protection was the marital relationship.

*Griswold* has become a major precedent for several lines of doctrinal development. The right to marry has been recognized as a SUBSTANTIVE DUE PROCESS right in LOVING V. VIRGINIA (1967) and ZABLOCKI V. REDHAIL (1978). The right to use contraceptives has been extended to unmarried persons in EISENSTADT V. BAIRD (1972) on an EQUAL PROTECTION theory, and even the right to advertise and sell them has been defended in CAREY V. POPULATION SERVICES INTERNATIONAL (1977) on the basis of the FIRST AMENDMENT and the privacy right of potential buyers, married or not. These protections of intimate relationships outside marriage have been complemented by heightened scrutiny of legislative classifications visiting disadvantage on the status of ILLEGITIMACY. *Griswold*'s most famous doctrinal outgrowth was ROE V. WADE (1973), which squarely placed the new constitutional right of privacy within the liberty protected by substantive due process, and held that the right included a woman's freedom to choose to have an ABORTION.

Here as elsewhere, constitutional doctrine has followed in the wake of social change. After World War II the movement for racial equality accelerated, bringing new awareness and new acceptance of a cultural diversity extending well beyond differences based on race. By the 1970s the feminist movement had succeeded in engaging the nation's attention and changing attitudes of both men and women toward questions of "woman's role," and in particular toward marriage and the family. The white, middle-class "housewife marriage," with the father working and the mother and children at home in a one-family suburban house, may still be the image most often called to mind by general references to "the family." The image, however, represents less than half of America's population. The "wife economy" is now obsolete; increased longevity will place further strains on lifetime marriage; women now know they can choose marriage without motherhood, or

motherhood without marriage; racial and ethnic minorities will not again accept the idea that the diversity of their forms of intimate association is merely pathological. Indeed, large numbers of middle-class white couples are openly living together without marrying. What has changed is not so much the fact of diversity as the range of the acceptable in intimate association.

A strong egalitarian theme runs through our society's collective recognition of these changes; it is natural that both due process and equal protection have provided doctrinal underpinnings for the freedom of intimate association. As abstractions, "liberty" and "equality" may sometimes be in tension, but here they have nourished each other. As the civil rights movement sought to advance equality under the banner of "freedom," so the abortion rights movement has sought a new status for women under the banner of "choice."

Taking account of doctrinal development in this area, the Supreme Court, in its opinion in *Roberts v. United States Jaycees* (1984), referred for the first time to a "freedom of intimate association." "[C]ertain kinds of highly personal relationships," said the Court, had been afforded substantial constitutional protection: "marriage; childbirth; the raising and education of children; and cohabitation with one's relatives." The Court noted that these relationships tended to involve relatively small numbers of persons; a high degree of selectivity in beginning and maintaining the affiliations; and "seclusion from others in critical aspects of the relationship." Their constitutional protection reflected "the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."

For half a century the Court has performed much of its judicial interest-balancing by adjusting the STANDARDS OF REVIEW of the constitutionality of legislation. As the *Jaycees* opinion noted, heightened judicial scrutiny results when the Court perceives the importance of the values or interests impaired when government restricts freedom or imposes inequality. The Court has spoken of procreation as a "basic" right, and has labeled "fundamental" both the right to marry and the freedom of choice "whether to bear or beget a child." To understand what these characterizations may imply for the constitutional status of other forms of intimate association, it is necessary to ask why REPRODUCTIVE AUTONOMY and the freedom to marry are so important. To answer that question requires analysis of the substantive values that may be at stake in intimate associations.

The term "intimate association" is used here to mean a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship. Its connecting links may take the form of living together in the same quarters, or sexual intimacy, or blood ties, or a formal relationship, or some mixtures of these, but in principle the idea of intimate association also includes close friendship, with or without any such links. The values of intimate association are undeniably elusive; they are not readily reducible to items on a list. Yet such an exercise is implicit in any attempt to illuminate the principle underlying the decisions on marriage and reproductive choice. The potential values in intimate associations can be grouped in four clusters: society, caring and commitment, intimacy, and self-identification.

Intimate association implies some expectation of access of one person to another's physical presence, some opportunity for face-to-face encounter. A couple's claim of the right to live together, with or without a sexual relationship, directly implicates this interest in another's society; so does a divorced parent's claim of a right of access to a child in a former spouse's custody, or a prison rule wholly denying visitation rights. Other impairments of the interest in an intimate's society are indirect, as when welfare aid to a mother's family is terminated because she is living with a man. The latter case offers opportunity for manipulation; it might be characterized as a denial of no more than a money payment, or as a denial of the society of an intimate. To allow a claim of constitutional right to turn on such question-begging seems intolerable; yet that is just what the Supreme Court typically does in cases of indirect interference with the values of intimate association. Concededly, not every impairment of the freedom to enjoy an intimate's society requires the same degree of justification, but there is little to be said for distracting attention from substantive interest-balancing by engaging in definitional legerdemain.

For most people, mutual caring and commitment are the chief values of intimate association. Caring implies commitment, for it requires an effort to know another, trust another, hope for another, and help another develop. The commitment in question is not a legal commitment enforceable by law, but a personal commitment, the sense that one is pledged to care for another and intends to keep the pledge. It is possible to be committed to an association one has not chosen; a young child exercises no choice in forming an association with her family and yet may feel wholly committed to them. Still, the value of commitment is usually heightened for the partners to an intimate association when they know there is real and continuing choice to maintain the association. The caring partner continually reaffirms her autonomy and responsibility by choosing the commitment, and the cared-for partner gains in self-respect by seeing himself through his partner's eyes as one who is worth being cared for. Furthermore, al-

though commitment means an expectation of constancy over time, it is not paradoxical to say that effective legal shelter for this value must offer protection to casual intimate associations as well as lasting ones. Such a casual association may ripen into a durable one, and the value of commitment is fully realizable only in an atmosphere of freedom to choose whether a particular association will be fleeting or enduring. Finally, to limit the law's protection to lasting intimate associations would require intolerable inquiries into private behavior and private intentions.

Intimacy, in the context of intimate associations, is more than privacy in its ordinary sense of nondisclosure. When we speak of intimate friends, or of persons who share an intimate relationship, we refer to the intimacy of a close and enduring association, that is, intimacy in the context of caring and commitment. This sort of intimacy is something that a person can share with only a limited number of others, for it requires time and effort to know another and deal with her as a whole person.

Intimate associations are powerful influences over the development of most people's personalities. Not only do these associations give an individual his best chance to be seen (and thus to see himself) as a whole person rather than an aggregate of social roles; they also serve as statements to others. As the legal consequences of cohabitation come to approximate those of marriage, and as divorce becomes more readily available, marriage itself takes on a special significance for its expressive content as a statement that the couple wish to identify with each other. The decision whether to have a child is also a major occasion for self-identification. To become a parent is to assume a new status in the eyes of oneself and others. Plainly the freedom to choose one's intimate associations is at the heart of this notion of association-as-statement. And, just as the freedom of political nonassociation is properly recognized as a FIRST AMENDMENT right, the freedom not to form an intimate association is similarly linked to the freedom of expression.

These four sets of intimate associational values—society, caring and commitment, intimacy, and self-identification—coalesce in an area of the human psyche that is awkward to discuss in lawyers' language. Yet even before the *Jaycees* opinion the Supreme Court had occasionally suggested its awareness of the reasons why such values are important. In *Eisenstadt*, for example, Justice WILLIAM J. BRENNAN spoke of "unwarranted governmental intrusion into matters so fundamentally affecting a PERSON as the decision whether to bear or beget a child." Although the word "person" usually is no more than a prosaic reference to an individual, its use in this passage resonates in the registers of matters personal and the human personality. If freedoms relating to marriage and family and reproductive choice are "fundamental," the reason is that these concerns lie close to the center of one's sense of self.

Not all governmental restrictions on associational freedom are intrusive in the same degree on the values of intimate association. The constitutional freedom of intimate association is not a rule for decision but an organizing principle, demanding justification for governmental intrusions on close personal relationships in proportion to the magnitude of invasion of intimate associational values. One complicating feature of this interest-balancing is that the law's interference with the freedom of intimate association usually is not direct. Instead, government typically conditions some material benefit (employment, inheritance, welfare payments, Social Security) on the candidate's associations in fact or formal associational status.

In DANDRIDGE V. WILLIAMS (1970), for example, a state proportioned welfare benefits to family size but set an absolute limit on aid to any one family. The Supreme Court, treating the law as a restriction on money payments and ignoring its potential effects on family size, subjected it only to RATIONAL BASIS scrutiny. In CLEVELAND BOARD OF EDUCATION V. LAFLEUR (1974), however, pregnant school teachers were required to take a long maternity leave. The Court, emphasizing the right to procreate, rigorously scrutinized the law under the IRREBUTTABLE PRESUMPTIONS doctrine. This sort of question-begging without explanation, far from being aberrational, has been the norm for the Court's treatment of indirect restrictions on intimate association. It is not unusual for the Court to conceal its interest-balancing behind definitional assumptions.

When a state conditions a benefit on a formal associational status such as marriage or legitimacy of parentage, a further analytical complication arises. The state controls entry into the status as well as its legal consequences. Judicial evaluation of such a restriction on benefits must take into account the ease of entry. Alternatively, a law restricting entry into a formal associational status must be evaluated partly on the basis of the consequences of the status, including eligibility for benefits. The opportunities for circular reasoning are evident; only close attention to the associational values at stake will permit noncircular resolutions. The formal status of marriage, for example, must be seen not merely as a bureaucratic hurdle on the road to material benefits but also as a statement of the partners' commitment and self-identification.

In protecting the freedom of intimate association the Supreme Court has followed several different doctrinal paths. The *Griswold* opinion drew on the First Amendment's freedom of political association partly by way of analogy and partly in support of the Court's "zone of privacy" theory. Later decisions have both extended *Griswold*'s results in the name of equal protection and

recharacterized its right of privacy as a substantive due process right. For a brief time in the 1970s the Court even used the rhetoric of PROCEDURAL DUE PROCESS and irrebuttable presumptions to defend the freedom of intimate association—a development which some Justices called a disguised form of equal protection or substantive due process. Today the freedom's most secure doctrinal base is substantive due process; yet both the First Amendment and the equal protection clause counsel judicial sensitivity to the need to protect intimate associations that are unconventional or that may offend majoritarian morality. In a society that expresses its cultural diversity in a rich variety of family forms and other personal relationships, these constitutional claims of freedom and equality will overlap.

Whatever its doctrinal context, a claim to freedom of intimate association depends on the nature and magnitude of the intrusion into the substantive values of intimate association, weighed against the governmental interests asserted to justify the intrusion. To give life to this abstraction it is necessary to examine the freedom of intimate association in operation as an organizing principle in particular subject areas. The Supreme Court's decisions can be grouped in seven overlapping categories: marriage and husband-wife relations; divorce; nonmarital relationships; procreation; illegitimacy; family autonomy; and homosexual relationships.

The Supreme Court's clear recognition of a constitutional right to marry by no means forecloses a state from regulating entry into marriage. Some restrictions, in fact, promote the principle of associational choice: minimum age requirements, for example, or requirements demanding minimum competency to understand the nature of marriage. Other restrictions aimed at promoting public health, such as mandatory blood tests, also seem likely to pass the test of strict judicial scrutiny. It is less clear that the balance of state interests against the freedom of associational choice should uphold a prohibition against POLYGAMY, or a refusal to allow homosexuals a status comparable to marriage, or a prohibition on marriage between first cousins. Yet it is safe to predict that homosexual marriage will not gain judicial blessing in the immediate future, and that the constitutionality of incest and polygamy laws will not be questioned seriously in any future now foreseeable. The Supreme Court, after all, is an instrument of government in a human society. Still, in theory, any direct state prohibition of marriage must pass the test of strict scrutiny, and indirect restriction on the right to marry requires justification proportioned to the restriction's likely practical effects as a prohibition.

The freedom of intimate association speaks not only to state interference with the right to marry but also to state intrusion into the relations between husband and wife. A marriage is more than a list of contractual duties; the partners deal with each other on many levels, both practical and emotional, and their relations are necessarily diffuse rather than particularized, exploratory rather than fixed. Spouses who are committed to stay together in an intimacy characterized by caring need to heal their relationship for the future, not settle old scores. Long before *Griswold* recognized a married couple's constitutional right to autonomy over the intimacies of their relationship, our nonconstitutional law largely maintained a "hands-off" attitude toward interspousal disputes. This tradition once supported a system of patriarchy now discredited; today the values of intimate association counsel the state to leave the partners to an ongoing marriage alone and let them work out their own differences—or, if they cannot, to terminate the marriage with a minimum of state interference.

Although the Supreme Court has not formally recognized a constitutional "right to divorce" comparable to the right to marry, both in principle and in practical effect such a right can be derived from the Court's decisions. The freedom of intimate association demands significant justification for state restrictions on exit from a marriage. The relevance to divorce of the associational value of self-identification is evident. Even the value of commitment bears on such a case, and not merely because divorce is the legal key to remarriage. For those who choose to stay married, their commitment is heightened by the knowledge that it is freely chosen. The Constitution apart, state laws setting conditions for divorce have virtually eliminated the requirement of a showing of one partner's fault. The restrictions that remain concern ACCESS TO THE COURTS, and involve limitations such as filing fees, as in BODDIE V. CONNECTICUT (1971), or RESIDENCE REQUIREMENTS, as in SOSNA V. IOWA (1975).

When a marriage terminates, nothing in the principle of associational choice militates against judicial enforcement of interspousal contracts governing the division of property. Once the union is dissolved, application of the usual rules of contract law to postdissolution obligations threatens none of the values of intimate association and demands no special justification. (Issues of child custody, which do require careful balancing of associational values, are discussed along with other parent–child questions.)

When a couple live together in a sexual relationship without marrying, the associational values of society, caring, and intimacy are all present in important degrees. Although the couple's association may not be so definitive a statement of self-identification as marriage would be, such a statement it surely is. Even the commitment implicit in such a union, although it may be tentative, usually is not trivial. If the couple see the union as a trial marriage,

it takes on the instrumental quality that the *Griswold* court saw in sexual privacy. The Supreme Court's decisions on contraception and abortion have extended that right of privacy to unmarried persons. In 1968 the Court construed federal welfare legislation to prevent a state from terminating a mother's benefits merely because she had a man, not her husband, living in the house; Justice Douglas, concurring, would have held the state's attempted regulation of the mother's morals a denial of equal protection, by analogy to the Court's then recent decisions on illegitimacy. Some classifications based on marital status plainly are unconstitutional.

It seems no more than a matter of time before the Court, recognizing the expansion of the boundaries of the acceptable in intimate association, follows the logic of the contraception cases and holds invalid state laws forbidding fornication and unmarried cohabitation. Many lower courts have reached similar results, typically without addressing constitutional issues. Most of the cases have involved the claims of unmarried women denied employment, or child custody, or admission to the bar because they were living with men. The freedom of intimate association is, in important part, a product of the movement for equality between the sexes.

So are the Supreme Court's decisions on reproductive choice. "Birth control is woman's problem," said Margaret Sanger in 1920; it still is. The right to procreate, which another generation's Court called "one of the basic civil rights to man," is now matched with the constitutional right of man and woman alike to practice contraception and with a woman's right to have an abortion, even over her husband's objection. Although the right to choose "whether to bear or beget a child" is not reducible to an aspect of the freedom of intimate association, it is in part an associational choice. Given today's facility of contraception and abortion, generally one can choose whether to be a parent. The *Skinner* opinion properly connected marriage and procreation. An unmarried couple living together recognize this linkage when they decide to marry because they "want to have a family." Children are valued not only for themselves and the associations they bring but also as living expressions of their parents' caring for—and commitment to—each other. The decision whether to have a child is, in part, a choice of social identification and self-concept; it ranks in importance with any other a person may make in a lifetime.

Not only the right to be a parent, protected in *Skinner*, but also the right to choose to defer parenthood or to avoid it altogether implicates the core values of intimate association. *Griswold* and its successor decisions, defending these values in the context of nonassociation, protect men and women—but particularly women—against the enforced intimate society of unwanted children, against an unchosen commitment and a caring stained by reluctance, against a compelled identification with the social role of parent. Coerced intimate association in the shape of forced child-bearing or parenthood is no less serious an invasion of the sense of self than is forced marriage.

*Griswold* and its successors also protect the autonomy of a couple's association, whether it be a marriage or an association of unmarried intimates. The point was explicitly made in the *Griswold* opinion concerning marital autonomy, and *Eisenstadt v. Baird* (1972) effectively gave unmarried couples the same power to govern the intimacies of their association. What emerges from these decisions, along with *Skinner* and *LaFleur*, is not an absolute rule but a requirement of appropriate justification when the state burdens the decision whether to procreate.

The Supreme Court has focused on equal protection in dealing with the constitutionality of laws defining the incidents of illegitimacy. There is obvious unfairness in visiting unequal treatment on an illegitimate child in order to express the state's disapproval of her parents. Yet the freedom of intimate association suggests an additional perspective: the unfairness of state-imposed inequality between persons in traditional marriagefamily relationships and those in other comparable forms of intimate association. In particular, the illegitimacy laws discriminate against unmarried women and their children—as, indeed, such laws have done from their medieval beginnings. The principle of legitimacy of parentage assumes not only that a child needs a male link to the rest of the community but also that the claim of the child's mother to social position depends on her being granted the status of formal marriage. In historical origin and in modern application, the chief function of the law of illegitimacy is to assure male control over the transmission of wealth and status. Deviance from the principle of legitimacy is most likely in subgroups whose fathers lack wealth and status; it is no accident that the incidence of illegitimacy in our society is highest among the nonwhite poor.

As increased numbers of middle-class couples live together without marrying, surely there will be changes in the legal status of unmarried mothers and their children. In the perspective of the freedom of intimate association, the constitutional basis for the whole system of illegitimacy appears shaky. If the informal union of an unmarried couple is constitutionally protected, the relationship between that union's children and their parents is also protected. Significant impairment of the substantive values of such an intimate association must find justification, in proportion to the impairment, in state interests that cannot be achieved by other less intrusive means.

Ever since *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925) judges and commentators have assumed that the Constitution protects the autonomy of the

traditional family against excessive state interference. Those two decisions rested on substantive due process grounds, and they have been cited often by the Supreme Court during the modern revival of substantive due process as a guarantee of personal liberty. When a family is united concerning such matters as the children's education, only a COMPELLING STATE INTEREST will justify state interference with the family's choice.

When a family is not united, however, the constitutional principle of family autonomy is an imperfect guide. Generally, the law assumes that children prosper under their parents' control. For very young children, this assumption is little more than a corollary of the family autonomy principle. As children mature, however, it becomes sensible to speak of the continuing family relationship as a matter of choice. Within the family that stays together, parent–child relations are, from some point in a child's teenage years forward, a matter of intrafamily agreement. Even when parental discipline is the rule, it rests on the child's consent, once the child is capable of making an independent life. Not surprisingly, the Supreme Court held invalid a state law giving an unmarried minor female's parents the right to veto her decision to have an abortion. (See PLANNED PARENTHOOD OF MISSOURI V. DANFORTH.)

The freedom of intimate association thus counsels severe restrictions on the state's power to intervene either to enforce parental authority or to oppose it—just as considerations of intramarital associational choice and harmony dictate that state intervention into the husband-wife relationship be limited to cases of urgent necessity, such as wife abuse. Conceding that most children want and need parental discipline, it remains true that invoking the state's police officers and juvenile halls to enforce that discipline is destructive of the values of intimate association. For mature children, those values depend on their willingness to identify with their parents and to be committed to maintaining a caring intimacy with them. In cases of a parent's incapacity or serious neglect, state intervention into the zone of family autonomy may be constitutionally justified. Yet removals of children from parental custody and terminations of parental rights are extreme measures, intruding deeply into the values of intimate association—not only for parents but also for children. The most compelling justification is therefore required for so drastic a state intervention, justification found in the child's needs, not any interest the state may have in punishing parental misbehavior. The Supreme Court's refusal in LASSITER V. DEPARTMENT OF SOCIAL SERVICES (1981) to extend the full reach of the RIGHT TO COUNSEL to indigent parents in termination proceedings seems an unstable precedent.

While a marriage lasts, the law is no more likely to interfere in interspousal disputes over child-rearing than it is in other controversies between husband and wife. When a marriage ends, an agreement between the separating parents over child custody usually will prevail, absent some overriding factor such as the associational choice of a mature child. A custody contest upon divorce, involving competing claims of rights of association, demands discretionary, whole-person evaluations rather than application of specific rules of law. The Constitution comes to bear on such decisions only marginally, as appellate courts seek to assure that trial judges do, in fact, consider the whole persons before them and do not disqualify parents from custody by informally substituting unconstitutional "rules" for the discretion that is appropriate. Such a "rule," for example, might disqualify on the basis of a parent's race—or, as in PALMORE V. SIDOTI (1984), the race of the parent's spouse—or religion, or unmarried cohabitation, or sexual preference. *Stanley v. Illinois* (1972) is an instructive analogy; there the Supreme Court held that a law disqualifying a natural father from custody of his illegitimate child upon the mother's death was an unconstitutional irrebuttable presumption of unfitness.

It is now established beyond question that the "liberty" protected by the two due process clauses protects "freedom of personal choice in matters of marriage and family life"—Justice POTTER STEWART's words, concurring in *Zablocki v. Redhail* (1978). If the logic of that freedom extends beyond formal marriage and beyond the nuclear family, the reason is that the human family is a social artifact, not an entity defined in nature. In MOORE V. CITY OF EAST CLEVELAND (1977) a plurality of four Justices admitted the traditional "extended family" into the circle of due process protection, and that opinion is now regularly cited as if it were an OPINION OF THE COURT. The freedom Justice Stewart described is comprehensible only in the light of intimate associational values that are also found in families that depart significantly from traditional models. One result of the movement for women's liberation has been the increased adoption of alternative living arrangements: couples living together outside marriage; single mothers with children, sometimes combining with other similar families. Other groupings such as communes for the young and the old are responses to what their members see as the failings of traditional arrangements. These people do not risk prosecution under cohabitation laws or other "morals" statutes; they may, however, risk the loss of material benefits.

Any governmental intrusion on personal choice of living arrangements requires substantial justification, in proportion to its likely influence in coercing people out of one form of intimate association and into another. In DEPARTMENT OF AGRICULTURE V. MORENO (1973) the Supreme Court demanded such justification for a law denying food stamps to households composed of "unrelated" persons, and found it lacking. Yet in *Village of Belle Terre v. Boraas*

(1974) the Court made no search for justification beyond minimum rationality, and upheld a ZONING ordinance designed to screen out nontraditional families and applied to exclude occupancy of a home by six unrelated students. In design, the *Belle Terre* ordinance was a direct assault on the freedom of intimate association, an attempt to stamp out forms of personal association departing from a vision of family life that no longer fit a large proportion of the population. *Belle Terre*'s standing as a precedent surely will weaken as the Court comes to take seriously its own rhetoric about "family" values in nontraditional families. One occasion for such rhetoric was the opinion in *Smith v. Organization of Foster Families* (1977), recognizing the values of intimate association in a foster family.

Laws prohibiting homosexual conduct are only rarely enforced against private consensual behavior. The middle-class homosexual couple thus have each other's society, including whatever sort of intimacy they want; they care for each other and are committed to each other in the degree they choose. What government chiefly denies them is the dignity of self-identification as equal citizens, along with certain forms of employment and other material benefits that may be reserved for partners to a formal marriage.

Whatever may have been the original purpose of laws forbidding homosexual sex, today one of their chief supports is a wish to regulate the content of messages about sexual preference. One fear is that the state, by repealing its restrictions, will be seen as approving homosexual conduct. The selective enforcement of these laws is itself evidence that one of the main policies being pursued is the suppression of expression; the laws are enforced mainly against those who openly advertise their sexual preferences. The immediate practical effect of this enforcement pattern is to penalize public self-identification and expression, some of which is political expression in support of "gay liberation." Even thoroughgoing enforcement would severely impair expression, along with the values of caring and intimacy. For a homosexual, a violation of these laws is the principal form that a sexual expression of love can take.

The denial of the status of marriage, or some comparable status, does not merely limit homosexuals' opportunities for expressive self-identification; material benefits also are frequently conditioned on marriage. Some commentators argue that a state's refusal to recognize homosexual marriage raises a problem of sex discrimination, and others contend that homosexuality should be regarded as a SUSPECT CLASSIFICATION for equal protection purposes. In any case, the heart of the constitutional problem lies in the freedom of intimate association. Although the denial of formal recognition of a homosexual couple's union may not demand the same compelling justification that would be required by a total prohibition of homosexual relations, it nonetheless seems unlikely that government could meet any requirement of justification that was not wholly permissive.

The burden of justification is of critical importance in the area of regulation of homosexual conduct, precisely because most such regulations are the product of folklore and fantasy rather than evidence of real risk of harm. If, for example, the state had to prove that a lesbian mother, by virtue of that status alone, was unfit to have custody of her child, the effort surely would demonstrate that the operative factor in the disqualification was not risk of harm, but stigma. The results of serious constitutional inquiry into harms and justifications in such cases are easy to predict. First, however, that serious inquiry must be made, and the Supreme Court showed in *Doe v. Commonwealth's District Attorney* (1976) that it was not eager to embark on that course.

The freedom of intimate association serves as an organizing principle mainly by focusing attention on substantive associational values. In a given case, the impairment of those values is matched against the asserted justifications for governmental regulation. Those justifications are hard to discuss systematically, for they can be asserted on the basis of a range of interests as broad as the public welfare. One cluster of justifications, however, deserves attention: the promotion of a political majority's view of morality. The state may claim a role in socializing its citizens, and especially the young, to traditional values. When a legislature prohibits unmarried cohabitation or homosexual relations or other disapproved forms of intimate association, it does so primarily to promote a moral view and to protect the sensibilities of those who share that view. The freedom of intimate association does not wholly disable government from seeking these ends; however, as *Griswold* and its successor decisions show, neither can the state defeat every claim to the freedom of intimate association simply by invoking conventional morality.

The judicial interest-balancing appropriate to the evolution of many claims of freedom of intimate association thus must consider not only degrees of impairment of associational values but also questions of the kind raised by GOVERNMENT SPEECH cases involving official promotion of particular points of view. There is a difference, for example, between a "baby bonus" designed to assist parents with child-rearing and a state's offer of cash to any woman entering an abortion clinic, conditioned on her agreement to forgo an abortion. To say that the difference is one of degree is to remind ourselves that the judicial function in constitutional cases is one of judgment. The freedom of intimate association is not a machine that, once set in motion, must run to all conceivable logical conclusions. It is instead a constitutional principle, requiring significant jus-

tification when the state seeks to lay hands on life-defining intimate associational choices.

KENNETH L. KARST
(1986)

Bibliography

BURT, ROBERT A. 1979 The Constitution of the Family. *Supreme Court Review* 1979:329–395.

Developments in the Law—The Constitution and the Family 1980 *Harvard Law Review* 93:1156–1383.

GERETY, TOM 1977 Redefining Privacy. *Harvard Civil Rights-Civil Liberties Law Review* 12:233–296.

GLENDON, MARY ANN 1977 *State, Law and Family.* New York: North-Holland Publishing Company.

KARST, KENNETH L. 1980 The Freedom of Intimate Association. *Yale Law Journal* 89:624–692.

SYMPOSIUM 1975 Children and the Law. *Law and Contemporary Problems* 39, no. 3:1–293.

——— 1979 Children and the Law. *University of California, Davis Law Review* 12:207–898.

——— 1985 The Legal System and Homosexuality—Approbation, Accommodation, or Reprobation? *University of Dayton Law Review* 10:445–813.

TRIBE, LAURENCE H. 1978 *American Constitutional Law.* Chap. 15. Mineola, N.Y.: Foundation Press.

WILKINSON, J. HARVIE, III and WHITE, G. EDWARD 1977 Constitutional Protection for Personal Lifestyles. *Cornell Law Review* 62:563–625.

## FREEDOM OF PETITION

The freedom to petition the government for redress of grievances was recognized in MAGNA CARTA in 1215 and was well established in English law before the American Revolution. The king would summon Parliament to supply funds for the running of government and Parliament developed the habit of petitioning for a redress of grievances as the condition of supplying the money. The growing recognition of the right of subjects as well as of Parliament to petition the Crown culminated in the explicit affirmation in the English BILL OF RIGHTS of 1689 "That it is the right of the subjects to petition the King and all commitments and prosecutions for such petitioning are illegal."

In the United States Constitution, the FIRST AMENDMENT protects "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Historically, the FREEDOM OF ASSEMBLY was regarded as ancillary to the right of petition, as if the amendment guaranteed the right to assemble *in order to* petition the government. This view was expressed by the Supreme Court in UNITED STATES V. CRUIKSHANK (1876). Today, however, the right of assembly has independent significance equal to that of the FREEDOMS OF SPEECH, PRESS, and religion. (See DEJONGE V. OREGON.) The right to petition has received less judicial attention than the other First Amendment rights. Nevertheless, it is one of the freedoms protected by the DUE PROCESS clause of the FOURTEENTH AMENDMENT against infringement by the states. (See HAGUE V. CIO.) Comparable protections of the right of petition are found, expressly or by clear implication, in the constitutions of all the states. And the right to petition Congress for redress of grievances has been recognized as one of the privileges of national CITIZENSHIP protected against state infringement by the PRIVILEGES OR IMMUNITIES clause of the Fourteenth Amendment. (See TWINING V. NEW JERSEY.)

The right of petition includes the right not only to approach public officials directly with requests for redress of grievances but also to circulate petitions for signature so as to generate mass pressure on the Congress and other public bodies. It is in this context that the right of petition may have its greatest contemporary significance. For the exercise of the right of petition involves the exercise of other First Amendment rights, including not only the right of expression but the right of other people to be exposed to the ideas expressed in the petition. The act of preparing and circulating a petition is itself an exercise of the freedom to associate with others for the expression of political and other opinions. Justice WILLIAM J. BRENNAN, dissenting in *Boston v. Glines* (1980), remarked: "The petition is especially suited for the exercise of all these rights: It serves as a vehicle of communication; as a classic means of individual affiliation with ideas or opinions; and as a peaceful yet effective method of amplifying the views of the individual signers." As with other First Amendment rights, the freedom of petition cannot be infringed in the absence of a compelling governmental interest justifying the infringement; the right of petition is an essential component of the political liberties protected by the First Amendment.

CHARLES E. RICE
(1986)

## FREEDOM OF RELIGION

See: Religious Liberty

## FREEDOM OF SPEECH

Freedom of speech is guaranteed in the American Constitution by the FIRST AMENDMENT. Adopted in 1791 as the first provision of the BILL OF RIGHTS, the First Amendment reads (excluding the clauses on religion): "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Although the provision names four specific

rights—freedom of speech, FREEDOM OF THE PRESS, FREEDOM OF ASSEMBLY, and FREEDOM OF PETITION—the several guarantees have never been clearly differentiated; rather the First Amendment has been construed as guaranteeing a composite right to freedom of expression. The term "freedom of speech," therefore, in popular usuage as well as in legal doctrine, has been considered roughly coextensive with the whole of the First Amendment.

The precise intentions of the framers of the First Amendment have never been entirely clear. The debates in Congress when the amendment was proposed do not throw much light upon the subject. The right to freedom of speech derives from English law and tradition. And it is agreed that the English law of the time, following the lapse of the censorship laws at the end of the seventeenth century, did not authorize advance censorship of publication. The English law of SEDITIOUS LIBEL, however, did provide punishment, after publication, for speech that criticized the government, its policies or its officials, or tended to bring them into contempt or disrepute. These features of English law were under severe attack, both in England and in the American colonies, but whether the First Amendment was meant to abolish or change them has been a matter of dispute. Similarly, the application of the First Amendment to other aspects of free speech, such as civil libel, OBSCENITY, and the like, remained obscure.

Passage of the ALIEN AND SEDITION ACTS in 1798, which incorporated much of the English law of seditious libel, stimulated public discussion of the meaning of the First Amendment. The constitutional issues, however, never reached the Supreme Court. Nor, despite widespread suppression of speech at certain times in our history, such as took place during the abolitionist movement, the CIVIL WAR, and the beginnings of the labor movement, did the Supreme Court have or take the occasion to address in any major way the development of First Amendment doctrine. The reason for this failure of the constitutional guarantee to be translated into legal action seems to lie partly in the fact that the Bill of Rights had been construed by the Court to apply only to action of the federal government, not to state or local governments; partly in the fact that, insofar as suppression emanated from federal sources, it was the executive not the legislature that was involved; and partly in the fact that the role of the courts in protecting CIVIL LIBERTIES had not matured to the point it has reached today.

In any event this state of affairs ended at the time of WORLD WAR I. Legislation enacted by Congress in 1917 and 1918, designed to prohibit interference with the war effort, raised clear-cut issues under the First Amendment. Beginning in 1919, a series of cases challenging the wartime legislation came before the Supreme Court. These were followed by cases arising out of the Red scare of the early 1920s. In 1925, in *Gitlow v. United States*, the Court accepted the argument that the First Amendment was applicable to the state and local governments as a "liberty" that could not be denied without DUE PROCESS OF LAW under the FOURTEENTH AMENDMENT. It also became clear that, while the First Amendment literally refers only to "Congress," its provisions extend not only to the legislature but to the executive and judicial branches of government as well. As the First Amendment has come to be applied to more and newer problems growing out of the operation of a modern technological society, there has developed an extensive network of principles, legal rules, implementing decisions, and institutional practices which expand and refine the constitutional guarantee.

The fundamental values underlying the concept of freedom of speech, and the functions that principle serves in a democratic society, are widely accepted. They have been summarized in the following form:

First, freedom of speech is essential to the development of the individual personality. The right to express oneself and to communicate with others is central to the realization of one's character and potentiality as a human being. Conversely, suppression of thought or opinion is an affront to a person's dignity and integrity. In this respect freedom of speech is an end in itself, not simply an instrument to attain other ends. As such it is not necessarily subordinate to other goals of the society.

Second, freedom of speech is vital to the attainment and advancement of knowledge. As JOHN STUART MILL pointed out, an enlightened judgment is possible only if one is willing to consider all facts and ideas, from whatever source, and to test one's conclusion against opposing views. Even speech that conveys false information or maligns ideas has value, for it compels us to retest and rethink accepted positions and thereby promotes greater understanding. From this function of free speech it follows that the right to express oneself does not depend upon whether society judges the communication to be true or false, good or bad, socially useful or harmful. All points of view, even a minority of one, are entitled to be heard. The MARKETPLACE OF IDEAS should be open to all sellers and all buyers.

Third, freedom of speech is a necessary part of our system of self-government. ALEXANDER MEIKLEJOHN, the leading exponent of this view of the First Amendment, stressed that under our Constitution, sovereignty resides in the people; in other words, the people are the masters and the government is their servant. If the people are to perform their role as sovereign and instruct their government, they must have access to all information, ideas, and points of view. This right of free speech is crucial not only in determining policy but in checking the government in its implementation of policy. The implication of this position is that the government has no authority to determine

what may be said or heard by the citizens of the community. The servant cannot tell the master how to make up its mind.

Fourth, freedom of speech is vital to the process of peaceful social change. It allows ideas to be tested in advance before action is taken, it legitimizes the decision reached, and it permits adaptation to new conditions without the use of force. It does not eliminate conflict in a society, but it does direct conflict into more rational, less violent, channels. From this it follows, in the words of Justice WILLIAM J. BRENNAN in NEW YORK TIMES V. SULLIVAN (1964), that speech will often be "uninhibited, robust, and wide-open."

There is also general agreement that speech is entitled to special protection against abridgment by the state. Freedom of thought and communication are central to any system of individual rights. Most other rights of the person against the collective flow from and are dependent upon that source. Moreover, speech is considered to have less harmful effects upon the community—to be less coercive—than other forms of conduct. And, as a general proposition, the state possesses sufficient power to achieve social goals without suppressing beliefs, opinions, or communication of ideas. Hence, in constitutional terms, freedom of speech occupies a "preferred position."

One further background factor should be noted. Toleration of the speech of others does not come easily to many people, especially those in positions of power. As Justice OLIVER WENDELL HOLMES remarked in ABRAMS V. UNITED STATES (1919), "If you have no doubt of your premises or your powers and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition." Hence the pressures leading to suppression of speech are widespread and powerful in our society. The mechanisms for protecting freedom of speech, therefore, must rely heavily upon an independent judiciary, standing somewhat outside the fray, and upon the creation of legal DOCTRINES that are precise and realistic.

The principal controversies that have engaged our system of freedom of speech have concerned the formulation of these implementing rules. In general the issues have centered on two basic questions. The first is what kind of conduct is to be considered "speech" entitled to special protection under the First Amendment. The second concerns what degree of protection, or encouragement, must be given that speech under the constitutional mandate.

As to the first question—the issue of coverage—it has been argued from time to time that certain categories of speech are totally outside the purview of the First Amendment. Thus it has been contended that totalitarian and racist groups should not be permitted to advance antidemocratic ideas. The argument has been that political groups that would destroy democratic institutions if they came to power should not be entitled to take advantage of these institutions in order to promote their cause; only those who adhere to the rules of the game should be allowed to participate. Similarly it has been urged that racist speech violates the dignity and integrity of fellow persons in the community, performs no social function, and should not be tolerated in a civilized society dedicated to human rights.

While this position has been strongly urged it has not prevailed in the United States. For both theoretical and practical reasons the concept of freedom of speech has been interpreted to mean that all persons should be allowed to express their beliefs and opinions regardless of how obnoxious or "fraught with death" those ideas may be. As a matter of principle, all ideas must be open to challenge; even totalitarian and racist speech serves a useful purpose in forcing a society to defend and thereby better comprehend its own basic values. Moreover, groups that promote totalitarian or racist ideas do not operate in a political vacuum. Their speech reflects fears, grievances, or other conditions which society should be aware of and in some cases take action to deal with. Suppression of such speech simply increases hostility, diverts attention from underlying problems, and ultimately weakens the society.

In practical terms, experience has shown that it is difficult or impossible to suppress any set of ideas without endangering the whole fabric of free speech. The dividing line between totalitarian and racist speech, on the one hand, and "acceptable" speech, on the other, cannot be clearly drawn and thus is open to manipulation. The apparatus necessary to suppress a political movement—involving government investigation into beliefs and opinions, the compiling of dossiers, the employment of agents and informers—inevitably creates an atmosphere damaging freedom of all speech. Frequently actions ostensibly directed against the outlawed group are merely a pretext for harassment of unwanted political opposition. Most important, once the dike has been broken all unorthodox or minority opinion is in danger. The only safe course is to afford protection to all who wish to speak.

The Supreme Court, accepting the prevailing view, has consistently taken the position that antidemocratic forms of speech are within the coverage of the First Amendment. Thus, while upholding the conviction of the Communist party leaders under the Smith Act for advocating overthrow of the government by force and violence in DENNIS V. UNITED STATES (1951), the Court never suggested that the defendants were not entitled to the protection of the First Amendment. Likewise in BRANDENBURG V. OHIO (1969) racist speech by members of the Ku Klux Klan was given full First Amendment protection. The viewpoint taken by the Court was perhaps most dramatically for-

mulated by Justice Holmes when he said in *Gitlow v. New York:* "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the country, the only meaning of free speech is that they should be given their chance and have their way."

It has also been contended that the coverage of the First Amendment should be limited to speech that relates to "political issues." Meiklejohn, who emphasized the role of the First Amendment in the process of self-government, advocated this interpretation, although he ultimately reached a broad definition of "political speech." Other commentators, arguing for a similar limitation, have adopted a far more restrictive concept of "political speech." The position has not, however, been accepted. For one thing, the proposed restriction has no inner logic; virtually all speech has political overtones or ramifications. In any event, there is no convincing reason for restricting the coverage of the First Amendment in this way. Speech concerned with literature, music, art, science, entertainment, ethics, and a host of other matters serves the functions sought by the First Amendment and should be equally entitled to its protection. The Supreme Court has consistently so held.

Other, narrower, categories of speech have also been said to be excluded from First Amendment coverage. In CHAPLINSKY V. NEW HAMPSHIRE (1942) the Supreme Court observed that restrictions on speech that was obscene, profane, libelous, or involved FIGHTING WORDS had "never been thought to raise any Constitutional problem." But this OBITER DICTUM has been eroded in the course of time. Obscenity is still, in theory, excluded from First Amendment protection; but in formulating the definition of "obscenity" the Court has brought constitutional considerations back into the decision. The exception for profanity has been disregarded. The dictum concerning libel has been expressly overruled. And the "fighting words" exemption, which has been narrowly construed to apply only to face-to-face encounters, turns more on the proposition that "fighting words" are not really speech at all than upon a concept of exclusion from First Amendment protection. Thus virtually all conduct that can be considered "speech" falls within the coverage of the First Amendment.

There are certain areas of speech where, although the First Amendment is applicable, the governing rules afford somewhat less protection than in the case of speech generally. These areas include speech in military institutions, which are not structured according to democratic principles, and speech by or addressed to children, who are "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." COMMERCIAL SPEECH, that is, speech concerned solely with buying or selling goods or services for a profit, was at one time excluded from First Amendment protection. It is now covered by the First Amendment but is entitled to less stringent safeguards than noncommercial speech.

The most controversial aspect of the coverage question concerns not whether conduct that is recognized as speech is exempted from First Amendment protection but what conduct is to be considered speech and what is to be held non-speech, or "action," and hence not protected by the First Amendment. The resolution of this problem poses obvious difficulties. Clearly some verbal conduct, such as words exchanged in planning a CRIMINAL CONSPIRACY, does not constitute "speech" within the intention of the First Amendment. Likewise some nonverbal conduct, such as operating a printing press, is an integral part of the speech which it is the purpose of the First Amendment to protect. Some conduct, such as PICKETING, combines elements of speech and action.

Two approaches to this dilemma are possible. One is to attempt to define "speech" or "action" in light of the values and functions served by the First Amendment. The other is to abandon any effort at a sharp definition of "speech" and to hold that any conduct containing an "expressive element" is within the coverage of the First Amendment. The advantage of the first approach is that it allows the development of more clear-cut rules for protecting conduct found to be "speech," that is, all "speech" or most "speech" could be fully protected without the need for devising elaborate qualifications difficult to apply. The advantage of the second approach is that it avoids the necessity of making refined, and in some cases unpersuasive, distinctions between "speech" and "action." The Supreme Court has, on the whole, tended to follow the second path of analysis. However, in the overwhelming majority of cases where First Amendment protection is invoked, there is no serious question but that the conduct involved is properly classified as "speech."

The second major problem in interpreting and applying the First Amendment is the determination of what degree of protection from government interference, or encouragement by government, is to be afforded "speech." Most of the controversy over the meaning of the First Amendment has involved this issue. The Supreme Court has varied its approach from time to time and no consistent or comprehensive theory has emerged. The question arises in a great variety of situations, and only a brief summary of some of the principal results is possible.

The starting point is that, as a general proposition, the government cannot prohibit or interfere with speech because it objects to the content of the communication. Legitimate government interests must be achieved by methods other than the control of speech. Thus speech that is critical of the government or its officials, that interferes with government efficiency, that makes the at-

tainment of consensus in the society more difficult, that urges radical change, or that affects similar societal interests cannot be abridged.

Somewhat less stringent rules have been applied where the speech is of such a character as to lead to concern that it will provoke violence or other violation of a valid law. Many of the Supreme Court decisions have involved issues of this nature, and a series of legal doctrines emerged. In the earlier cases, mostly growing out of legislation designed to prevent interference with the conduct of World War I or to suppress emerging radical political parties, the Court adopted a BAD TENDENCY TEST under which any speech that had a tendency to cause a violation of law could be punished. Such a test, of course, gives very little protection to nonconforming speech. Subsequently, on the initiative of Justices Holmes and LOUIS D. BRANDEIS, the Court accepted the CLEAR AND PRESENT DANGER TEST. Under this doctrine speech could be penalized only when it created a clear and present danger of some significant evil that the government had a right to prevent. In some cases the Court has used an ad hoc BALANCING TEST, by which the interest in freedom of speech is balanced against the social interest in maintaining order. Ultimately the Court appears to have settled upon the so-called *Brandenburg* test. "[T]he constitutional guarantees of free speech and free press," the Court said in *Brandenburg v. Ohio*, "do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." An approach which attempts to separate "speech" from "action" and gives full protection to speech has never appealed to a majority of the Justices. But the Court has progressively tightened the originally loose restrictions on the government's power to punish militant political rhetoric.

In recent years the question has been posed in various forms whether or not speech can be curtailed where it may cause injury to NATIONAL SECURITY. The term "national security" has never been precisely defined and could of course include virtually every aspect of national life. Generally speaking it is clear that the usual First Amendment principles apply in national security cases; the society must seek to achieve national security by methods that do not abridge freedom of speech. Nevertheless, qualifications of the general rule have been urged with increasing vigor. The chief issues have involved publication of information alleged to jeopardize national security and the conduct of intelligence agencies seeking to acquire information relating to national security matters.

The Supreme Court in NEW YORK TIMES V. UNITED STATES (1971) (the Pentagon Papers case), a landmark decision in this area, rejected attempts by the government to enjoin the *New York Times* and the *Washington Post* from publishing a secret classified history of the VIETNAM WAR obtained illicitly by a former government employee, despite government claims that publication would cause "grave and irreparable injury" to the national security. The decision rested on the ground that the government had not met the "heavy burden of showing justification for the imposition of [a PRIOR] RESTRAINT." The majority were unable to agree, however, upon a single theory of the case. Three Justices thought that an INJUNCTION against publication of information should never, or virtually never, be allowed, but others, including the dissenters, would have accepted less rigorous standards. In *United States v. United States District Court* (1972), another critical decision in the national security area, the Court ruled that government intelligence agencies were bound to adhere to constitutional limitations (in that case the FOURTH AMENDMENT) in gathering information pertaining to national security, but it expressed no opinion as to "the issues which may be involved with respect to activities of foreign powers or their agents." The degree to which the Supreme Court will accept claims to national security as ground for qualifying First Amendment rights thus remains uncertain.

Cases where the exercise of free-speech rights runs into conflict with other social or individual interests frequently come before the Supreme Court. Interests invoked as ground for limiting speech have included the right of an accused person to obtain a FAIR TRIAL free from prejudice caused by adverse newspaper publicity; the interest of society in assuring fair elections through regulation of contributions and expenditures in political campaigns; the patriotic interest of the community in protecting the American flag against desecration by political dissenters; the aesthetic interests of the public in maintaining certain areas free from unsightly billboards; and many others. Where the countervailing interest is an appealing one the Court has tended to apply a balancing test: individual and social interests in freedom of speech are balanced against the opposing interests at stake. Likewise, where a government regulation is ostensibly directed at some other objective but has the effect of restricting speech, as in the case of government LOYALTY-SECURITY PROGRAMS or LEGISLATIVE INVESTIGATIONS, the balancing test is usually employed.

The balancing test has come to assume various forms. When most protective of free speech it requires that the government (1) has the burden of justifying any restriction on speech (2) by demonstrating "compelling" reasons and (3) showing that less intrusive means for advancing the government interest are not available. On the other hand, in some cases the balancing test is applied without giving any special weight to First Amendment considerations. The consequence of using a balancing test is that the out-

come in any particular case is difficult to predict. Thus in BUCKLEY V. VALEO (1976) the Supreme Court held, in substance, that limitations on the amount of funds that can be contributed to a candidate in a political campaign are permissible but limitations on expenditures are not. Moreover, the balancing test is such a loose standard that, in times of stress, it might afford very little protection to freedom of speech. Thus far, however, the balances struck by the Court have given a substantial degree of support to free-speech rights.

Special rules for measuring the protection accorded speech have evolved in several areas. With respect to laws punishing obscene publications the Supreme Court, as noted above, still adheres to the theoretical position that obscenity is not covered by the First Amendment but it does take constitutional factors into account in determining whether or not a particular publication is obscene. As set forth in MILLER V. CALIFORNIA (1972), the current definition of obscenity is "(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." In practical application, as nearly as it can be articulated, the *Miller* test allows regulation only of "hard-core pornography."

The Supreme Court has also imposed substantive limitations upon actions for libel. Criminal libel laws have been narrowly construed and, although a GROUP LIBEL law was upheld in BEAUHARNAIS V. ILLINOIS (1952), subsequent developments have cast doubt upon the present validity of that decision. In the field of civil libel the Supreme Court held, in *New York Times v. Sullivan*, that public officials could maintain a suit for libel only when they can establish that a damaging statement about them was not only false but was made with "actual malice," that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." Later the "actual malice" rule was extended to "public figures." As to others, namely "private individuals," the Court has held that the state or federal government could adopt any rule respecting libel so long as it required at least a showing of negligence on the part of the defendant. Although the Court in recent years has tended to take a narrow view of who is a "public figure," and the costs of defending libel actions frequently operate as a restraint upon speech, the curtailment of public discussion through libel laws has been somewhat held in check.

Constitutional doctrine for reconciling the right to freedom of speech with the RIGHT OF PRIVACY remains unformed. In most respects the two constitutional rights do not clash but rather supplement each other. Conflict may arise, however, at several points, such as where a communication contains information that is true, and hence is not covered by the libel laws, but relates to the intimate details of an individual's personal life that are not relevant to any issue of public concern. The scope of the constitutional right of privacy has never been clearly delineated. Nor has the Supreme Court ever held that the right of privacy prevails over the right to freedom of speech. Nevertheless the issue is a recurring one and sooner or later an accommodation between the two constitutional rights will have to be formulated.

The degree of protection afforded speech under the First Amendment may also hinge on various other factors. Where the physical facilities for communication are limited, and the government is therefore forced to allocate available facilities among those seeking to use them, the government has the power, indeed the obligation, to lay down certain conditions in order to assure that the scarce facilities will be used in the public interest. This is the situation with respect to radio and television BROADCASTING where, at least at the present time, the number of broadcast channels is limited. On this theory, government regulations such as the FAIRNESS DOCTRINE, requiring that broadcasting stations give adequate coverage to public issues and that such coverage be fair in accurately reflecting opposing views, have been upheld by the Supreme Court. Such regulatory powers, however, extend only to what might be termed a "macro level" of intervention. The government may require that a broadcasting station devote a certain proportion of its time to public interest programs, but it may not censor or determine the content of particular programs, that is, it may not exercise control at the "micro level."

Likewise special considerations enter when a person seeking to exercise rights to freedom of speech is an employee of the government or is confined in a government institution such as a mental hospital or a prison. Here the relationship of the individual to the government is somewhat different from the relationship of the ordinary citizen to the general community; the goals and interests of the particular institution involved are entitled to more immediate recognition. The Supreme Court has dealt with these issues by applying a balancing test, but the weights have been cast largely on the government side of the scales.

One further aspect of government attempts to regulate the content of speech should be noted. The letter and spirit of the EQUAL PROTECTION clause have had an important bearing upon the right to freedom of speech. The equal protection element guarantees the universality of the rules protecting the right to speak. It means that the government cannot differentiate, at least without a com-

pelling reason, between speakers on the basis of the content of their communications. Hence if the government allows a patriotic organization to march down the main street of town it must grant equal opportunity to unpopular or radical organizations. If it grants the use of a public building for a meeting to a group of one political persuasion it must grant the same use to all political groups. This combination of the First Amendment and the equal protection clause thus helps to assure that unorthodox speech will receive the same treatment as conventional speech.

Apart from attempts to control the content of speech, government regulation has also dealt with various issues in the administration of the free speech system. Thus the requirement of a permit to hold a meeting in a public building, or to conduct a demonstration that may interfere with traffic, clearly constitutes a justifiable regulation. Likewise, a municipal ordinance may legitimately keep soundtrucks from operating in a residential area during certain hours of the night. It is frequently said that "time, place, and manner" restrictions on speech are permissible so long as they are "reasonable." Such generalizations, however, are overbroad. In many situations, "time, place, and manner" restrictions can be used to curtail freedom of speech to the same degree as content regulations. And to accord them all validity would be inconsistent with the basic premise that the right of free speech is entitled to a preferential position among competing interests. A more precise statement of the applicable legal doctrine would be to say that administrative regulations dealing with physical incompatibilities between the exercise of free speech rights and other interests are permissible. Thus government could validly allocate use of the streets between those seeking to hold a demonstration and those using the streets for passage. And the physical intrusion of noises from soundtrucks would also be subject to control. The principle for resolving such physical conflicts is not mere "reasonableness" but a fair accommodation between the competing interests.

Other legal doctrines play an important role in maintaining the system of freedom of speech. Thus the courts have held that the rules against undue VAGUENESS or OVERBREADTH in legislation or administrative regulation will be applied with special rigor where First Amendment rights are affected. And the prohibition in the Fourth Amendment against UNREASONABLE SEARCHES and seizures is given added force when invoked to protect freedom of speech. Perhaps the most significant supportive doctrine of this nature is the rule against prior restraint. Attempts by the government to prevent publication in advance, through a system of censorship, an injunction, or similar measures, are presumptively invalid and rarely allowed. Thus the silencing of speech before it is uttered—a particularly effective form of suppression—is normally not available as a method of control.

The constitutional doctrines thus far discussed have been of a negative character in that they have been directed against government interference with freedom of speech. In recent years, however, increasing attention has been given to questions relating to the affirmative side of the constitutional guarantee: to what extent does the First Amendment allow or require the government to encourage or promote a more effective system of free speech? These issues are important because of growing distortions within the system. More and more, as the mass media have become concentrated in fewer hands and have tended to express a single economic, social, and political point of view, the concept of a marketplace of diverse ideas has failed to conform to original expectations. The problems are difficult to solve because they involve using the government to expand freedom of speech while at the same time continuing to prohibit the government from controlling or inhibiting speech.

Not only does government itself engage in speech, for example, through schools and libraries and the statements of officials (see GOVERNMENT SPEECH), but government also promotes the freedom of speech in many ways. One of the most significant involves assuring access to the means of communication. The courts have gone some distance in recognizing the obligation of government to make facilities for communication available. Thus the courts have held that the streets, parks, and other public places must be open for meetings, parades, demonstrations, canvassing, and similar activities. Other public facilities have likewise been considered PUBLIC FORUMS and available, to the extent compatible with other uses, for free speech purposes. At one time the Supreme Court ruled that SHOPPING CENTERS and malls, privately owned but open to the public, could not exclude persons seeking to engage in speech activities. However, the Court later withdrew from this position. A very limited right of access to radio and television, justified by the scarcity principle, has been upheld. On the other hand, the Court has refused to allow a right of access to the columns of privately owned newspapers, on the grounds that intervention of this nature would destroy the independence of the publisher. Expansion of a right of access, without jeopardizing the rights of those already using the facilities of communication, remains a critical problem, the solution to which appears to depend more upon legislative than judicial action.

Affirmative governmental promotion of speech also takes the form of subsidies. Government contributions to educational, cultural, research, and other speech activities are widespread. Most of these subsidies have gone unchallenged in the courts. In *Buckley v. Valeo*, however, the Supreme Court did consider the constitutionality of leg-

islation providing for the public financing of presidential election campaigns, upholding that measure upon the grounds that the use of "public money to facilitate and enlarge public discussion . . . furthers, not abridges, pertinent First Amendment values." The decision apparently accepts the basic validity of all government funding that can be found to promote public discussion. Nevertheless certain limitations on the power of government to finance nongovernment speech would seem to be clear. Thus government subsidy of religious speech would certainly be prohibited under the religion clauses of the First Amendment. And although the government would be free to choose at the "macro" level of intervention, that is, to determine the nature of the speech activity to be subsidized, it would have no power to intervene at the "micro" level, that is, to control the content of a particular communication. Likewise some rules against INVIDIOUS DISCRIMINATION, though giving government more leeway than when it is undertaking to regulate speech, would certainly apply. Development of these and other limiting principles, however, remains for the future.

Further support for affirmative promotion of speech rests on the constitutional doctrine of the RIGHT TO KNOW. The concept of a right to know includes not only the right of listeners and viewers to receive communications but also the right of those wishing to communicate to obtain information from the government. In earlier decisions the Supreme Court rejected right-to-know arguments that news reporters had a constitutional right to be admitted to prisons in order to observe conditions and interview inmates. But in RICHMOND NEWSPAPERS V. VIRGINIA (1980) the Court, changing directions, ruled that the public and the press could not be excluded from criminal trials, thereby holding for the first time that some right to obtain information from the government existed. How much further the Court will go in compelling the government to disclose information remains to be seen. Most likely the right of would-be speakers to obtain information from the government will continue to rest primarily upon FREEDOM OF INFORMATION and sunshine laws.

Efforts to expand and improve the system of free speech by affirmative governmental action, although they incur serious risks, remain essential to the continued vitality of the system. Major progress in this area will probably depend, however, more on legislative than judicial action.

The right to freedom of speech embodied in the First Amendment has expanded into an elaborate constitutional structure. This theoretical framework has some weaknesses. At some points it does not extend sufficient protection to speech, and at other places loosely formulated doctrine may not stand up in a crisis. On the whole, however, the legal structure provides the foundation for a workable system. The extent to which freedom of speech is actually realized in practice depends, of course, upon additional factors. The underlying political, economic, and social conditions must be favorable. Above all, freedom of speech, a sophisticated concept, must rest on public interest and understanding.

THOMAS I. EMERSON
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Bibliography

CHAFEE, ZECHARIAH, JR. (1920) 1941 *Free Speech in the United States.* Cambridge, Mass.: Harvard University Press.

DORSEN, NORMAN et al. 1976 Emerson, Haber and Dorsen's *Political and Civil Rights in the United States*, 4th ed. Vol. 1. Boston: Little, Brown.

EMERSON, THOMAS I. 1970 *The System of Freedom of Expression.* New York: Random House.

HAIMAN, FRANKLYN S. 1981 *Speech and Law in a Free Society.* Chicago: University of Chicago Press.

HUDON, EDWARD G. 1963 *Freedom of Speech and Press in America.* Washington, D.C.: Public Affairs Press.

LEVY, LEONARD W. 1960 *Legacy of Suppression.* Cambridge, Mass.: Harvard University Press.

MEIKLEJOHN, ALEXANDER (1948) 1960 *Political Freedom.* New York: Harper.

MILL, JOHN STUART 1859 *On Liberty,* R. B. McCallum, ed., London: Oxford University Press.

NIMMER, MELVILLE B. 1984 *Nimmer on Freedom of Speech.* New York: Mathew Bender.

REDISH, MARTIN H. 1984 *Freedom of Expression: A Critical Analysis.* Charlottesville, Va.: Michie Co.

## FREEDOM OF SPEECH
### (Update 1)

Although the Supreme Court decided almost thirty cases addressing freedom of speech issues between 1985 and 1989, most of these decisions merely reaffirmed or only modestly refined existing doctrine. Perhaps most important, the Court in this period continued to invoke its content-basedcontent-neutral distinction as a central precept of FIRST AMENDMENT jurisprudence. For purposes of this distinction, a content-based restriction may be defined as a law that limits speech because of the message it conveys. Laws that prohibit SEDITIOUS LIBEL, ban the publication of confidential information, or outlaw the display of the swastika in certain neighborhoods are examples of content-based restrictions. To test the constitutionality of such laws, the Court first determines whether the speech restricted occupies only "a subordinate position on the scale of First Amendment values." If so, the Court engages in a form of categorical balancing, through which it defines the precise circumstances in which each cate-

gory of LOW-VALUE SPEECH may be restricted. In this manner, the Court deals with such speech as false statements of fact, commercial advertising, FIGHTING WORDS, and OBSCENITY. If the Court finds that the restricted speech does not occupy "a subordinate position on the scale of First Amendment values," it accords the speech virtually absolute protection. Indeed, outside the realm of low-value speech, the Court has invalidated almost every content-based restriction it has considered in the past thirty years.

Content-neutral restrictions, the other half of the content-basedcontent-neutral distinction, limit expression without regard to the content of the message conveyed. Laws that restrict noisy speeches near a hospital, ban billboards in residential communities, or limit campaign contributions are examples of content-neutral restrictions. In dealing with such restrictions, the Court engages in a relatively open-ended form of balancing: the greater the restriction's interference with the opportunities for free expression, the greater the government's burden of justification.

It may seem odd that the Court uses a stricter standard of review for content-based restrictions (other than those involving low-value speech) than for content-neutral restrictions, since both types of restrictions reduce the sum total of information or opinion disseminated. The explanation is that the First Amendment is concerned not only with the extent to which a law reduces the total quantity of communication but also—and perhaps even more fundamentally—with at least two additional factors: the extent to which a law distorts the content of public debate, and the likelihood that a law was enacted for the constitutionally impermissible motivation of suppressing or disadvantaging unpopular or "offensive" ideas. These two factors, which are more clearly associated with content-based than with content-neutral restrictions, explain both why the Court strictly scrutinizes content-based restrictions of high-value speech and why it does not apply that same level of scrutiny to all content-neutral restrictions. As indicated, most of the Court's decisions about freedom of speech from 1985 to 1989 reaffirmed this basic analytical structure.

Perhaps the two most important Supreme Court decisions in the realm of freedom of speech in this era were HUSTLER MAGAZINE V. FALWELL (1988) and *Texas v. Johnson* (1989). In *Hustler Magazine* the Court held that the First Amendment barred an action by the nationally known minister Jerry Falwell against *Hustler* magazine for a "parody" advertisement. The ad contained a fictitious interview with Falwell in which he allegedly said that he had first engaged in sex during a drunken rendezvous with his mother in an outhouse. The Court held that a public figure may not recover DAMAGES for the intentional infliction of emotional harm caused by the publication of even gross, outrageous, and repugnant material. In *Johnson* the Court held that an individual may not constitutionally be prosecuted for burning the American flag as a peaceful political protest. The Court explained that "if there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of any idea simply because society finds the idea itself offensive or disagreeable." Justice ANTHONY M. KENNEDY observed in a concurring opinion, "It is poignant but fundamental that the flag protects those who hold it in contempt." In each of these decisions, the Court emphatically reaffirmed the central structure of free speech analysis and declined the invitation significantly to expand the concept of low-value speech.

Although *Hustler Magazine* and *Johnson* involved expansive interpretations of freedom of speech, in at least three other areas in this era the Court appreciably narrowed the scope of First Amendment protection. First, there is the issue of COMMERCIAL SPEECH. Although the Court once had held that commercial advertising is of such low value that it is entirely outside the protection of the First Amendment, the Court overturned that doctrine in 1974 and held that commercial advertising is entitled to substantial—though not full—First Amendment protection. Specifically, the Court held that government may not constitutionally ban the truthful advertising of lawfully sold goods and services on the "highly paternalistic" ground that potential consumers would be "better off" without such information. More recently, however, the Court has retreated from this position. Indeed, in POSADAS DE PUERTO RICO ASSOCS. V. TOURISM COMPANY OF PUERTO RICO (1986), which involved restrictions on advertising for lawful gambling activities, the Court held that even truthful advertising of lawful goods and services can be extensively regulated or banned in order to discourage "undesirable" patterns of consumption.

Second, the Court in recent years has increasingly granted broad authority to local governments to regulate expression that is sexually explicit, but not legally obscene. Although failing to classify sexually explicit expression as low-value speech, the Court has repeatedly sustained restrictions that curtail such expression in a discriminatory manner. In CITY OF RENTON V. PLAYTIME THEATRES (1986), for example, the Court upheld a city ordinance prohibiting adult-film theaters from locating within 1,000 feet of any residential zone, church, park, or school, even though this effectively excluded such theaters from more than 95 percent of the entire area of the city.

Third, in dealing with speech in "restricted environments," such as the military, prisons, and schools, which are not structured according to traditional democratic principles, the Court has increasingly deferred to the judgment of administrators in the face of claimed infringe-

ments of First Amendment rights. In BETHEL SCHOOL DISTRICT V. FRASER (1986), for example, the Court upheld the authority of a public high school to discipline a student for making a campaign speech that contained sexual innuendo; in HAZELWOOD SCHOOL DISTRICT V. KUHLMEIER (1988) the Court upheld the authority of a public high school principal to exclude from a student-edited school newspaper stories dealing with pregnancy and with the impact of divorce on students; in *Turner v. Safley* (1987) the Court upheld a prison regulation generally prohibiting correspondence between inmates at different institutions; and in *Thornburgh v. Abbott* (1989) the Court upheld a Federal Bureau of Prisons regulation authorizing wardens to prevent prisoners from receiving any publication found to be detrimental "to the security, good order or discipline of the institution." These decisions are in sharp contrast to earlier decisions that granted considerable protection to the freedom of speech even in such restricted environments. It should be noted that the Court's recent inclination to grant broad deference to administrative authority is evident not only in its restricted environment decisions but also in decisions dealing with PUBLIC FORUMS and with the speech of PUBLIC EMPLOYEES.

Although not involving the Supreme Court, there was extensive debate and activity with respect to several other free speech issues between 1985 and 1989. First, there has been considerable controversy concerning the law of LIBEL AND THE FIRST AMENDMENT. In NEW YORK TIMES V. SULLIVAN (1964) the Court held that in order to prevent the chilling of "uninhibited, robust and wide-open" debate, public officials could not recover for libel without proof that the libelous statements were false and that they were published with a knowing or reckless disregard of the truth. In recent years, critics have maintained that *New York Times* not only has prevented injured plaintiffs from obtaining judicial correction of published falsehoods but also has produced excessive damage awards against publishers. These critics argue that *New York Times* has thus effectively sacrificed legitimate dignitary interests of the victims of libel without protecting the "uninhibited, robust, and wide-open" debate the rule was designed to promote. Such criticism has provoked a wide range of proposals at both the state and national levels for either judicial or legislative reform. The most common and most intriguing of these proposals calls for the recognition of a civil action for a declaration of falsity, which would require no showing of fault on the part of the publisher but would authorize no award of damages to the plaintiff.

A second area that has generated increased attention in recent years concerns the advent and expansion of cable television. REGULATORY AGENCIES and state and federal courts have confronted a broad range of issues arising out of the cable revolution, including the regulation of sexually explicit programming, the applicability of political "fairness" principles, the constitutionality of mandatory access and "must carry" rules, the regulation of subscription rates and franchise fees, and the constitutionality of government restrictions on the number of cable systems. Most fundamentally, the expansion of cable television may ultimately undermine the "scarcity" rationale for government regulation of radio and television BROADCASTING.

Perhaps the most interesting and most controversial development in recent years relating to freedom of speech concerns the issues of obscenity and PORNOGRAPHY. Sixteen years after the 1970 Report of the Commission on Obscenity and Pornography, which found "no evidence that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior," a new government commission, the Attorney General's Commission on Pornography, concluded that there is indeed a causal relationship between exposure to sexually violent material and aggressive behavior toward women. This conclusion, which stirred immediate controversy among social scientists, led the 1986 commission to recommend additional legislation at both the state and federal levels and more aggressive enforcement of existing antiobscenity laws.

In a related development, many feminists in recent years have actively supported a more extensive regulation of pornography. Distinguishing "obscenity," which offends conventional standards of morality, from "pornography," which subordinates women, such feminists as Catharine MacKinnon and Andrea Dworkin have proposed legislation that would restrict the sale, exhibition, and distribution of pornography, which they define as "'the sexually explicit subordination of women, graphically depicted, in which women are presented dehumanized as sexual objects, as sexual objects who enjoy pain, humiliation or rape, as sexual objects tied up, or cut up or mutilated or physically hurt, or as whores by nature."

This type of legislation poses a profound challenge to free speech. Opponents maintain that these laws constitute censorship in its worst form and that they are nothing less than blatant attempts to suppress specific points of view because they offend some citizens.Supporters of such legislation maintain that pornography is of only low First Amendment value, that it causes serious harm by shaping attitudes and behaviors of violence and discrimination toward women, and that it is futile to expect "counter-speech" to be an appropriate and sufficient response to such material. Although the courts that have considered the constitutionality of this kind of legislation have thus far held it incompatible with freedom of speech, the pornography issue will no doubt continue to generate

constructive debate about the occasionally competing values of equality, dignity, and freedom of speech for some time to come.

GEOFFREY R. STONE
(1992)

(SEE ALSO: *Balancing Test; Child Pornography; Dial-a-Porn; Feminist Theory; Flag Desecration; Pornography and Feminism.*)

Bibliography

BOLLINGER, LEE C. 1986 *The Tolerant Society: Freedom of Speech and Extremist Speech in America.* Oxford: Clarendon Press.

KALVEN, HARRY, JR. 1988 *A Worthy Tradition: Freedom of Speech in America.* New York: Harper & Row.

STONE, GEOFFREY R. et al. 1986 *Constitutional Law*, Chap. 7. Boston: Little, Brown.

# FREEDOM OF SPEECH
## (Update 2)

Questions about freedom of speech can be divided into questions of coverage (or scope) and questions of protection (or strength). The question of coverage is the question, logically primary, whether some act, event, behavior, state of affairs, or case is indeed a free speech case at all. The question of protection, which follows, is the question of how much protection against legislative, executive, or judicial control an act has by virtue of the decision that it is an act covered by the concept of freedom of speech and thus covered by the free speech clause of the FIRST AMENDMENT.

In the earlier years of American free speech theory and adjudication, questions of protection were overwhelmingly more important than questions of coverage. Although it may seem that this reverses the logical relationship between coverage and protection, the initial focus on the degree of protection, primarily from the period between 1919 and 1969, was premised on the implicit understanding that the coverage of the free speech clause of the First Amendment was well-understood and noncontroversial. With virtually no question, free speech during this period, starting with such 1919 cases as SCHENCK V. UNITED STATES (1919) and ABRAMS V. UNITED STATES (1919) and then going through McCarthy-era cases such as DENNIS V. UNITED STATES (1951) and culminating with the incitement standard set forth in BRANDENBURG V. OHIO (1969), was widely understood to be largely restricted to attempted governmental interference with individual or otherwise nongovernmentally-sponsored acts of political, moral, social, religious, and ideological expression. The only questions raised were ones about the degree of the protection afforded to such acts, as with, for example, the debates about "CLEAR AND PRESENT DANGER" in *Schenck* and the "gravity of the evil discounted by its improbability" standard in *Dennis.* The 1969 Supreme Court decision in *Brandenburg*, which set forth the current (and extremely stringent) test for restrictions on the advocacy of unlawful conduct, can best be seen as the culmination of an era in which the primary focus was on the degree of protection.

In an intriguing inversion of the expected order of analysis, it is only recently that the focus has turned away from the degree of protection and toward the scope of coverage. This focus on coverage can be divided into two categories, the first being the nature of the behavior and the second being the nature of the restriction.

As to the nature of the behavior, consider first the question of so-called COMMERCIAL SPEECH, or, more precisely, the question whether pure commercial advertisements, such as the typical advertisement for a product which describes the product and urges consumers to buy it, fall within the coverage of the First Amendment. The Court first answered this question in the affirmative in VIRGINIA STATE BOARD OF PHARMACY V. VIRGINIA CONSUMERS COUNCIL (1976) and has continued, even in the wake of intense criticism, to hold ever since, as in *Rubin v. Coors Brewing Co.* (1995) and *44 Liquormart, Inc. v. Rhode Island* (1996). And if commercial advertising is covered by the First Amendment, does this entail the conclusion that something like the registration provisions of the federal SECURITIES LAWS, which condition lawful publication of a written offer to sell securities—"speech" in the literal sense of that word—upon prior approval by a government agency based on the agency's determination that the speech is neither false nor misleading, represent an unconstitutional PRIOR RESTRAINT? Thus, the decision to expand the coverage of the First Amendment into areas hitherto thought to have nothing whatsoever to do with the First Amendment implicates questions about the extent of the protection to be available within the expanded coverage. Not implausibly, it is often argued, as Justice LEWIS F. POWELL, JR., did in a commercial speech case, *Ohralik v. Ohio State Bar Association* (1978), that continually expanding the coverage of the First Amendment risks diluting the strength of its protection.

Similar issues arise in the context of criminal solicitation. In the United States, it is well-accepted after *Brandenburg* that, for example, speaking to a large crowd about the moral necessity of disobeying conscription under the SELECTIVE SERVICE ACTS is a central free speech case. But if the size of the audience is reduced, the nature of the

crime is changed, and the explicit advocacy subjugated to the provision of information, plans, or instructions, is the conclusion the same? To take a different example, if one person tells three others in a private room that the combination to the company president's safe is 37 left, 14 right, 22 left, the case looks far less like one in which free speech analysis is even relevant. And if this kind of situation is thought even to raise free speech concerns (it is, after all, the verbal transmittal of information desired by the recipient), is there then a risk that this dilutes First Amendment protection and trivializes the ideological core of the idea of freedom of speech?

As a final example, consider the employer who repeatedly makes sexually suggestive remarks to one of his employees. Is the application of WORKPLACE HARASSMENT law in this context subject to free speech constraints, or is this a context, as the Court has obliquely suggested by refusing even to mention free speech concerns in *Harris v. Forklift Systems, Inc.* (1993) (a verbal harassment case in which free speech issues had been briefed and argued), which is no more related to the First Amendment than are the registration provisions of the Securities Act of 1933? The employer in this case is, literally, speaking, and thus to hold the employer legally liable because of his conduct would appear to some to be a restriction on the employer's First Amendment rights. But, on the other hand, the closed environment of the workplace, the one- on-one nature of the speech, the typical lack of anything resembling ideological or political fact or argument, and the frequent similarity between unwanted verbal sexual advances and unwanted sexual touching have led others, including, it appears, the Court, to concluded that a large number of sexual harassment cases, even ones involving mostly or solely verbal conduct, still do not raise important free speech issues, and are thus uncovered by the First Amendment.

Similarly difficult questions about the boundaries of the First Amendment are presented when the issue is not about the nature of the behavior, as in the previous examples, but about the nature (rather than the degree) of the restriction. With respect to the nature of the restriction, in the traditional free speech case the state seeks to restrict the speech of someone, like Clarence Brandenburg or *The New York Times* or the Philip Morris Corporation or the flag desecrator in *United States v. Eichman* (1990), who wishes to communicate largely with his, her, or its own resources, and on his, her, or its own time. In numerous other contexts, however, this model does not reflect the issues that with increasing frequency are characterized in free speech or "censorship" terms.

Consider, for example, the issue of government funding for the arts. Under one view, the decision by the government about which artistic endeavors to fund raises no free speech question at all. Thus, to take some recent examples, if government funding were withheld from the homoerotic photographs of Robert Mapplethorpe because of their sexually explicit content, or from the blasphemous art of Andres Serrano because it offended people's religious beliefs, or from an exhibition that featured disrespectful images of the American flag, the concept of free speech—the coverage of the First Amendment—would not be implicated because Mapplethorpe, Serrano, and the flag desecrators would remain free to say, publish, and photograph whatever they wished, including the offending works, as long as they did so without the financial support of the state. The abortion-counseling decision in RUST V. SULLIVAN (1991) would support this conclusion. In addition, the argument continues, funding for the arts inevitably involves choices about what to fund and what not to fund. The First Amendment would not require the government to fund bad art, or render unconstitutional a Nebraska program for funding Nebraska artists. As a result, it is said, the choices that are inevitably a part of the decision to fund or sponsor public art lie well outside of the coverage of the First Amendment.

There is an argument on the other side, however, which would distinguish permissible from impermissible refusals to fund on the basis of whether the refusal was based on the form of government viewpoint-discrimination, which is inimical to the First Amendment in a wide variety of contexts. An example is ROSENBERGER V. RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA (1995), involving state funding of college newspapers. Although government might choose not to fund bad art because of its "badness," or even possibly (as long as it was not a pretense for viewpoint discrimination) refuse to fund art dealing with the flag, it cannot, having decided to fund art dealing with the flag, fund art that treats the flag respectfully but not art treating the flag disrespectfully. This strikes at the core of the First Amendment, and thus presents a clearly covered First Amendment case, even though it is about how the state chooses to allocate its "own" resources.

Similar issues arise in the context of library book selection, where some would argue, again, that the entire enterprise is not covered by the First Amendment because the question is one about state expenditure of state resources and not about state restriction of private conduct. But others, as with the arts funding example, maintain that to remove a book, or to refuse to select a book, solely because of its point of view (as with some recent controversies involving challenges to books that were sympathetic to gay and lesbian lifestyles), is to bring in the First Amendment, which, as R. A. V. V. CITY OF ST. PAUL (1992) reminds us, is as concerned about viewpoint-based restrictions as it is about total prohibitions.

Most commonly, this variety of question about the cov-

erage of the First Amendment comes up in the context of government employment. As with the other examples, one side of the argument maintains that no one is obliged to take government employment, and that for the state to restrict the speech of its employees, especially when they are in the very process of doing their job (as with teachers while actually teaching), is an inevitable part of the employer–employee relationship, and no part of the concept of freedom of speech. But on the other side is once again the argument against viewpoint-based restrictions, holding that it is one thing to tell a teacher that he or she must teach history and not mathematics (a much more permissible subject-matter distinction), and quite another, and one with serious First Amendment implications, to tell a teacher that he or she must teach one view of how to interpret a particular historical event to the exclusion of another.

In none of these cases is the existing legal DOCTRINE clear. With respect to teachers, for example, the courts appear to accept a fair amount of even viewpoint discrimination at the level of the primary and secondary schools, reasoning that the state may have a viewpoint, that the state may teach this viewpoint to its students, and that the state may compel its voluntary employees to serve as its agents in this task. At the college and university level, however, the doctrine is largely to the contrary, holding that both the free speech rights of the teachers and the First Amendment's commitment to the university classroom as an important forum for the MARKETPLACE OF IDEAS urge a moderately extensive amount of First Amendment– based judicial oversight. Similar distinctions apply to library book choices, where courts have been more willing to scrutinize removals than initial selections, as in BOARD OF EDUCATION V. PICO (1982), and arts funding, where a recent Supreme Court decision, *National Endowment for the Arts v. Finley* (1998), suggests that some of the most extreme forms of viewpoint discrimination might be subject to invalidation.

The larger issue raised by arts funding, by library book choices, and by restrictions on employee speech is again the question of the coverage of the First Amendment. Will cases like these be seen as instances of inevitable speech restriction and beyond the boundaries of the First Amendment, or will they instead be understood as recognizing that the First Amendment is relevant in previously untouched areas, and that the coverage of the First Amendment is becoming broader than historically understood. As with the expansion of coverage on the basis of the nature of the speech, the expansion of the coverage based on the context of the restriction is likely to be the dominant question of free speech in the decades to come, as courts and others wrestle with the question of the range of human conduct, obviously far less than the full universe of verbal, written, linguistic, and symbolic behavior, to which the First Amendment is even relevant. This is the question of coverage, and this is the question that unites the vast majority of the most important of current and likely future First Amendment controversies.

FREDERICK SCHAUER
(2000)

(SEE ALSO: *Anonymous Political Speech; Attorney Speech; Campaign Finance; Compelled Speech; Electoral Process and the First Amendment; Employee Speech Rights (Private); Free Speech and RICO; Libel and the First Amendment.*)

Bibliography

ALEXANDER, LAWRENCE A. 1989 Low Value Speech. *Northwestern University Law Review* 83:547–581.

ESTLUND, CYNTHIA L. 1990 Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category. *George Washington Law Review* 59:1–46.

——— 1997 The Architecture of the First Amendment and the Case of Workplace Harassment. *Notre Dame Law Review* 72:1361–1390.

GREENAWALT, R. KENT 1989 *Speech, Crime, and the Uses of Language.* New York: Oxford University Press.

LEFF, THOMAS P. 1995 The Arts: A Traditional Sphere of Free Expression?: First Amendment Implications of Government Funding to the Arts in the Aftermath of *Rust v. Sullivan. American University Law Review* 45:353–391.

SABRIN, AMY 1993 Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts? *Yale Law Journal* 102:1209–1232.

SCHAUER, FREDERICK 1981 Categories and the First Amendment: A Play in Three Acts. *Vanderbilt Law Review* 34:265–305.

——— 1988 Commercial Speech and the Architecture of the First Amendment. *University of Cincinnati Law Review* 56: 1181–1204.

——— 1988 Principles, Institutions and the First Amendment. *Harvard Law Review* 112:84–120.

SHIFFRIN, STEVEN H. 1983 The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment. *Northwestern University Law Review* 78:1212–1257.

WILLIAMS, SUSAN H. 1991 Content Discrimination and the First Amendment. *University of Pennsylvania Law Review* 139:615–654.

## FREEDOM OF SPEECH, LEGISLATOR'S

See: Legislative Immunity; Speech or Debate Clause

# FREEDOM OF THE PRESS

The constitutional basis for freedom of the press in the United States is the FIRST AMENDMENT, which provides: "Congress shall make no law . . . abridging the FREEDOM OF SPEECH, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." In a constitutional interpretation the separate rights enumerated in the First Amendment are merged into a composite right to freedom of expression. Within this general system freedom of the press focuses on the right to publish. Originally concerned with the product of printing presses—newspapers, periodicals, books, pamphlets, and broadsides—the term "press" now includes the electronic media. In general the constitutional issues involving freedom of the press are similar to those pertaining to other aspects of freedom of expression. However, certain areas are of special interest to the press, particularly to the mass media.

Freedom of the press has its roots in English history. When printing presses were introduced into England at the end of the fifteenth century they were quickly brought under total official control. Through a series of royal proclamations, Parliamentary enactments, and Star Chamber decrees a rigid system of censorship was established. No material could be printed unless it was first approved by a state or ecclesiastical official. Further, no book could be imported or sold without a license; all printing presses were required to be registered; the number of master printers was limited; and sweeping powers to search for contraband printed matter were exercised. (See PRIOR RESTRAINT AND CENSORSHIP.)

In 1695, when the then current licensing law expired, it was not renewed and the system of advance censorship was abandoned. The laws against SEDITIOUS LIBEL remained in effect, however. Under the libel law any criticism of the government or its officials, or circulation of information that reflected adversely upon the government, regardless of truth or falsity, was punishable by severe criminal penalties. Sir WILLIAM BLACKSTONE, summarizing the English law as it existed when he published his *Commentaries* in 1769, put it in these terms: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon public actions, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity."

Developments in the American colonies followed those in England. Censorship laws existed in some of the colonies well into the eighteenth century. Likewise, prosecutions for seditious libel were not uncommon. in both England and America, however, there was strong opposition to the seditious libel laws. Thus in the famous ZENGER'S CASE, where the publisher of a newspaper was prosecuted for printing satirical ballads reflecting upon the governor of New York and his council, the defense argued vigorously (but unsuccessfully) that truth should be a defense, and urged the jury (successfully) to give a general verdict of not guilty.

The law was in this state of flux when the First Amendment, with its guarantee of freedom of the press, was added to the Constitution in 1791. The specific intention of the Framers was never made explicit. It is generally agreed that the First Amendment was designed to make unconstitutional any system of advance censorship of the press, or "prior restraint," but its impact upon the law of seditious libel has been the subject of controversy. The latter issue was brought into sharp focus when the ALIEN AND SEDITION ACTS, which did include a modified seditious libel law, were enacted by Congress in 1798. Prosecutions under the Sedition Act were directed largely at editors of the press. The constitutionality was upheld by a number of trial judges, including some members of the Supreme Court sitting on circuit, but the issues never reached the Supreme Court. The lapse of the Alien and Sedition Acts after two years ended public attention to the problem for the time being.

For well over a century, although freedom of the press was at times not realized in practice, the constitutional issues did not come before the Supreme Court in any major decision. This situation changed abruptly after WORLD WAR I as the Court confronted a series of First Amendment problems. Two of these early cases were of paramount importance for freedom of the press. In NEAR V. MINNESOTA (1931) the Court considered the validity of the so-called Minnesota Gag Law. This statute provided that any person "engaged in the business" of regularly publishing or circulating an "obscene, lewd and lascivious" or a "malicious, scandalous and defamatory" newspaper or periodical was "guilty of a nuisance," and could be enjoined from further committing or maintaining such a nuisance. The Court held that the statutory scheme constituted a "prior restraint" and hence was invalid under the First Amendment. The Court thus established as a constitutional principle the doctrine that, with some narrow exceptions, the government could not censor or otherwise prohibit a publication in advance, even though the communication might be punishable after publication in a criminal or other proceeding. In a second decision, GROSJEAN V. AMERICAN PRESS CO. (1936), the Court struck down

a Louisiana statute, passed to advance the political interest of Senator Huey Long, that imposed a two percent tax on the gross receipts of newspapers and periodicals with circulations in excess of 20,000 a week. The *Grosjean* decision assured the press that it could not be subjected to any burden, in the guise of ECONOMIC REGULATION, that was not imposed generally upon other enterprises.

In the years since *Near* and *Grosjean* an elaborate body of legal doctrine, interpreting and applying the First Amendment right to freedom of the press in a variety of situations, has emerged. Before we turn to a survey of this constitutional structure, two preliminary matters need to be considered.

First, the functions that freedom of the press performs in a democratic society are, in general, the same as those served by the system of freedom of expression as a whole. Freedom of the press enhances the opportunity to achieve individual fulfillment, advances knowledge and the search for understanding, is vital to the process of self-government, and facilitates social change by the peaceful interchange of ideas. More particularly the press has been conceived as playing a special role in informing the public and in monitoring the performance of government. Often referred to as the "fourth estate," or the fourth branch of government, an independent press is one of the principal institutions in our society that possesses the resources and the capacity to confront the government and other centers of established authority. This concept of a free press was forcefully set forth by Justice HUGO L. BLACK in his opinion in NEW YORK TIMES CO. V. UNITED STATES (1971) (the Pentagon Papers case): "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government."

A second preliminary issue is whether the fact that the First Amendment specifically refers to freedom "of the press," in addition to "freedom of speech," means that the press is entitled to a special status, or special protection, different from that accorded other speakers. It has been suggested that the First Amendment should be so construed. Thus Justice POTTER STEWART has argued that the Framers of the Constitution intended to recognize "the organized press," that is, "the daily newspapers and other established news media," as "a fourth institution outside the Government," serving as "an additional check on the three official branches." As such an institution, he suggested, the press was entitled to enjoy not only "freedom of speech," available to all, but an additional right to "freedom of the press." Some commentators have echoed Justice Stewart's argument.

There are obvious drawbacks to according a special status to the "organized press." It is difficult to draw a line between "the press" and others seeking to communicate through the written or spoken word, such as scholars, pamphleteers, or publishers of "underground" newspapers. Nor are there persuasive reasons for affording the one greater advantages than the other. Any attempt to differentiate would merely tend to reduce the protection given the "nonorganized" publisher. In any event the Supreme Court has never accepted the distinction.

However, there are some situations where the capacities and functions of the "organized press" are taken into account. Thus where there are physical limitations on access to the sources of information, as where a courtroom has only a limited number of seats, or only a limited number of reporters can ride on the President's airplane, representatives of the "organized press" may legitimately be chosen to convey the news to the general public. Beyond this point, however, the rights of the "organized press" to freedom of expression are the same as those of any writer or speaker.

The constitutional issues that have been of most concern to the press fall into two major categories. One involves the constraints that may be placed upon the publication of material by the press. The other relates to the rights of the press in gathering information.

On the whole the press has won its battle against the law of seditious libel. The Sedition Act of 1798 has never been revived. In NEW YORK TIMES CO. V. SULLIVAN (1964) the Supreme Court, declaring that the Sedition Act violated the central meaning of the First Amendment, said: "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." Many states still retain criminal libel laws upon the books, but they have been so limited by the Supreme Court as to be largely inoperative. Even vigorous attacks upon the courts for their conduct in pending cases, traditionally a sensitive matter, are not punishable unless they present a CLEAR AND PRESENT DANGER to the administration of justice. (See CONTEMPT POWER.) Only the civil libel laws impose restrictions. The result is that the press is free to criticize the government, its policies, and its officials, no matter how harsh, vituperative, or unfair such criticism may be. Likewise it is free to publish information about governmental matters, even though incorrect, subject only to civil liability for false statements knowingly or recklessly made.

The extent to which the press can be prevented from

publishing material claimed to be injurious to NATIONAL SECURITY has become a matter of controversy in recent years. The issues are crucial to the operation of a democratic system. Clearly there are some areas, particularly those relating to tactical military operations, where government secrecy is justified. On the other hand, the process of self-government cannot go on unless the public is fully informed about matters pending decision. Moreover, the very concept of "national security," or "national defense," is virtually open-ended, capable of covering a vast area of crucial information. Hence any constitutional doctrine allowing the government to restrict the flow of information alleged to harm national security would be virtually without limits. In addition, claims of danger to national security can be, and have been, employed to hide incompetence, mistaken judgments, and even corruption on the part of government officials in power.

For these reasons no general statutory ban on the publication of material deemed to have an adverse effect upon national security has ever been enacted by Congress. Laws directed at traditional espionage do, of course, exist. And Congress has passed legislation, thus far untested, instituting controls in certain very narrow areas. Thus the Intelligence Identities Protection Act (1982) forbids disclosure of any information that identifies an individual as the covert agent of an agency engaged in foreign intelligence. Beyond this, however, statutory controls on freedom of the press in the national security area have never been attempted. Even during wartime, censorship of press reporting on information pertaining to military operations has taken place only on a voluntary basis.

The constitutional authority of the government to restrict the publication of national security information was considered by the Supreme Court in the Pentagon Papers case. There the government sought an INJUNCTION against the *New York Times* and the *Washington Post* to prevent the publication of a government-prepared history of United States involvement in the Vietnam War. The documents had been classified as secret but were furnished to the newspapers by a former government employee who had copied them. The government contended that publication of the Pentagon Papers would result in "grave and irreparable injury" to the United States.

The Supreme Court ruled, 6–3, that the attempt at prior restraint could not stand, concluding that the government had not met "the heavy burden of showing justification for the imposition of such a restraint." Several theories of the right of the government to prohibit the publication of national security information emerged, none of which commanded a majority of the Court. At one end of the spectrum Justices Black and WILLIAM O. DOUGLAS thought that the government possessed no power to "make laws enjoining publication of current news and abridging freedom of the press in the name of "national security." Justice WILLIAM J. BRENNAN held the same view, except that he would have allowed the government to stop publication of information that "must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea." Justices Stewart and BYRON WHITE believed that a prior restraint was permissible if the government could demonstrate "direct, immediate, and irreparable damage to our Nation or its people," a showing they concluded had not been made in the case before them. Justice THURGOOD MARSHALL, not passing on the First Amendment issues, took the position that, in the absence of express statutory authority, the government had no power to invoke the JURISDICTION OF THE FEDERAL COURTS to prevent the publication of national security information. At the other end of the spectrum Chief Justice WARREN E. BURGER and Justices JOHN M. HARLAN and HARRY L. BLACKMUN, the dissenters, urged that the function of the judiciary in reviewing the actions of the executive branch in the area of FOREIGN AFFAIRS should be narrowly restricted and that in such situations the Court should not attempt "to redetermine for itself the probable impact of disclosure on national security."

The result in the Pentagon Papers case was a significant victory for the press. Had the decision gone the other way the road would have been open for the government to prevent publication of any material when it could plausibly assert that national security was significantly injured. Yet the failure of the Court to agree upon a constitutional doctrine to govern in national security cases left the press vulnerable in future situations. Moreover, the issues were limited to an effort by the government to impose a prior restraint. The Justices did not address the question whether, if appropriate legislation were enacted, a criminal penalty or other subsequent punishment for publication of national security information would be valid.

In two subsequent cases the Supreme Court revealed some reluctance to restrict the executive branch in its efforts to control the publication of information relating to foreign intelligence. In SNEPP V. UNITED STATES (1980) the Court upheld an injunction to enforce an agreement, which the Central Intelligence Agency required each of its employees to sign, that the employee would not publish any information or material relating to the agency, either during or after employment, without the advance approval of the agency. The Court treated the issue primarily as one of private contract law; it dealt with First Amendment questions only in a footnote, saying that the government has "a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to effective operation of our foreign intelligence service." Likewise in

HAIG V. AGEE (1981) the Court upheld the action of the secretary of state in revoking the passport of a former CIA employee traveling abroad, on the grounds that he was causing "serious damage to the national security [and] foreign policy of the United States" by exposing the names of undercover CIA officers and agents. The constitutional RIGHT TO TRAVEL abroad, said the majority opinion, is "subordinate to national security and foreign policy considerations," adding that [m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." Unless these later decisions are limited to their somewhat unusual facts, the right of the press to publish national security information that the government wishes to keep secret could be sharply curtailed.

Civil libel laws have also been a matter of paramount concern to the press. For many years it was assumed that the First Amendment was not intended to restrict the right of any person, under COMMON LAW or statute, to bring a suit for damages to reputation arising out of false and defamatory statements. In its well-known OBITER DICTUM in CHAPLINSKY V. NEW HAMPSHIRE (1942) the Supreme Court had declared that there were "certain well-defined and narrowly limited classes of speech," including the "libelous," which had never been thought to raise any constitutional problem.

In time it became clear, however, that libel laws could be used to impair freedom of the press and other First Amendment rights. In 1964 the issue came before the Supreme Court in *New York Times Co. v. Sullivan*. In that case the commissioner of public affairs in Montgomery, Alabama, sued the *New York Times* for publication of an advertisement, paid for by a New York group called the Committee to Defend Martin Luther King, which criticized certain actions of the police in dealing with CIVIL RIGHTS activity in Montgomery. Some of the statements in the advertisement were not factually correct. The Alabama state courts, after a jury trial, awarded the police commissioner $500,000 in damages. The majority opinion of the Court, stating that "libel can claim no talismanic immunity from constitutional limitations," went on to say: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." The Court ruled that public officials could recover damages in a libel action only if they could prove that a false and defamatory statement was made with "actual malice," that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." Three Justices would have gone further and given the press full protection against libel suits regardless of proof of actual malice.

The "actual malice" rule for reconciling First Amendment rights with the libel laws was extended in 1967 to suits brought by "public figures," and in 1971 to all suits involving matters "of public or general interest." At this point it appeared that, although a majority of the Supreme Court had not gone the full distance, the press did have substantial protection against harassing libel suits. Weaknesses in the press position, however, soon developed. In 1974 the Court, changing directions, held that, apart from cases involving "public officials" and "public figures," libel laws would be deemed to conform to First Amendment standards so long as they did not impose liability in the absence of negligence. Moreover, the Court greatly narrowed the definition of "public figure," holding in one case that a person convicted of contempt of court for refusing to appear before a GRAND JURY investigating espionage was not a "public figure." In addition, juries in some cases began to award large sums in damages, legal expenses skyrocketed, and the costs in time and money of defending libel suits, even where the defense was successful, often became a heavy burden. By the same token, persons or organizations without substantial resources found it difficult to finance libel actions.

Efforts to dispose of unjustified libel suits at an early stage by motions to dismiss received a setback from the Supreme Court in HERBERT V. LANDO (1979). Lieutenant Colonel Anthony Herbert brought a libel suit against Columbia Broadcasting System because of a program on "60 Minutes" which suggested that Herbert had falsely accused his superior officers of covering up war crimes. Conceding he was a "public figure" and had to show "actual malice," Herbert sought in DISCOVERY proceedings to inquire into the mental states and editorial processes of the CBS officials who were responsible for the program. The Court held that, despite the CHILLING EFFECT of such probing and the resulting protraction of libel proceedings, the right to make such inquiries was inherent in the "actual malice" rule. The result of the *Herbert* case has been to diminish substantially the value to the press of the "actual malice" doctrine.

Because of these considerations, sections of the press as well as some commentators have urged that libel laws are incompatible with the First Amendment and should be abolished, at least where matters of public interest are under discussion. The courts, however, have shown no disposition to follow this course. The solution most in accord with First Amendment principles would be to provide for a right of reply by the person aggrieved. Yet this poses other difficulties. The press argues, with considerable justification, that it would be impossible for the government to supervise and enforce an effective right of reply system without sacrificing the independence of the media in the process. Federal Communication Commission regulations

now grant a limited right of reply where "personal attacks" are made over radio or television and, because of the pervasive governmental controls already in place, such regulation probably does not appreciably reduce existing freedoms of the electronic media. But any broad extension to the printed press or to other forms of communication would almost certainly be seriously inhibiting. Indeed in MIAMI HERALD PUBLISHING CO. V. TORNILLO (1974) the Supreme Court unanimously invalidated a state statute requiring a newspaper to grant equal space for a political candidate attacked in its columns to reply. Moreover, practical difficulties, such as finding a suitable forum, would greatly limit the effectiveness of any attempt to substitute a right of reply for an action for damages. Thus the tension between the libel laws and freedom of the press is likely to continue.

A similar tension exists between freedom of the press and the RIGHT OF PRIVACY. Common law and statutory actions for invasion of privacy are permitted in most states. Moreover, the Supreme Court has recognized a constitutional right of privacy, running against the government, which would seem to impose restrictions upon disclosure to the press of certain information in the government's possession. The Supreme Court has held that the publication of material already in the public domain, such as the name of a rape victim which is available from public records, cannot be prohibited. However, it has never ruled upon the broad issue whether publication of information that is true but is alleged to invade the privacy of an individual can under some circumstances be restricted. The press has expressed concern over the possibility that the right of privacy might be used to curtail its freedom to publish. If the right of privacy is not narrowly limited—and there is presently no agreement upon the scope of the right—the chilling effect upon the press could be substantial. Nevertheless, in view of the current power of the press and the relative weakness of persons seeking to preserve privacy, any danger to the independence of the press from recognition of the right of privacy would seem to be remote.

Another conflict between freedom of the press and rights of the individual arises over the publication of news relating to criminal proceedings. The administration of justice is, of course, a matter of great public concern, and the role of the press in informing the public about such matters is crucial to the maintenance of a fair and effective system of justice. In most cases no conflict arises. On the other hand press reporting of occasional sensational crimes can be of such a nature as to prejudice the right of an accused to a FAIR TRIAL guaranteed by the DUE PROCESS clause and the Sixth Amendment. (See FREE PRESS/FAIR TRIAL.)

A number of remedies are available to the courts by which fairness in criminal proceedings can be assured without imposing restrictions upon the conduct of the press. These include change of VENUE, postponement of the trial, careful selection of jurors to weed out those likely to be prejudiced by the publicity, warning instructions to the jury, sequestration of witnesses and jurors, and, as a last resort, reversing a conviction and ordering a new trial. By and large the courts have found the use of these devices adequate. In some cases, however, trial courts have issued "gag" orders prohibiting the press from printing news about crimes or excluding the press from courtrooms.

In NEBRASKA PRESS ASSOCIATION V. STUART (1976) the Supreme Court dealt at some length with the "gag order" device. The majority opinion pointed out that the trial judge's order constituted a prior restraint, "the most serious and least tolerable infringement on First Amendment rights," but declined to hold that the press was entitled to absolute protection against all restrictive orders. The issue, the Court ruled, was whether in each case the newspaper publicity created a serious and likely danger to the fairness of the trial. And that issue in turn depended upon what was shown with respect to "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger." The Court's ruling thus left the issue open to separate decision in each instance. The conditions laid down by the Court for issuance of a restrictive order, however, afford little room for use of that device except under rare circumstances. Three Justices urged that a prior restraint upon publication in this situation should never be allowed.

The exclusion of the press from courtrooms in criminal cases has also received the attention of the Supreme Court. Initially the Court rejected the contention that the Sixth Amendment's guarantee of a PUBLIC TRIAL entitled the press and the public to attend criminal trials, holding that the right involved was meant for the benefit of the defendant alone. Subsequently, however, in RICHMOND NEWSPAPERS, INC. V. VIRGINIA (1980) the Court recognized that the First Amendment extended some protection against exclusion from criminal trials. The Court again refused to hold that the First Amendment right was absolute, but it did not spell out the nature of any exceptions. Because it is always possible in a criminal trial for the judge to sequester the jury, few occasions for closing trials are likely to arise. On the other hand, the right of the press to attend pretrial hearings, where opportunity for sequestration does not exist, was left uncertain.

For many years the press has urged the courts to permit the use of radio, television, and photographic equipment

in courtrooms. The courts have been reluctant to allow such forms of reporting. And in 1964 the Supreme Court overturned the conviction of Billie Sol Estes, accused of a notorious swindle, on the grounds that the broadcasting of parts of the trial by radio and television had been conducted in such a manner as to deprive him of a fair trial. Recently the courts have been more willing to open the courtroom to the electronic media and many of them have done so. The movement received the sanction of the Supreme Court in CHANDLER V. FLORIDA (1981) when an experimental program in Florida, which allowed broadcast and photographic coverage of trials subject to certain guidelines and under the control of the trial judge, was upheld by a unanimous vote.

The right of the press to gather news, as distinct from its right to publish the news, raises somewhat different issues. Freedom of the press implies in some degree a right to obtain information free of governmental interference. Indeed the Supreme Court in BRANZBURG V. HAYES (1972) expressly recognized that news-gathering did "qualify for First Amendment protection," saying that "without some protection for seeking out the news, freedom of the press could be eviscerated." But the limits of the constitutional right are difficult to define and remain undeveloped. The issue has arisen in three principal areas: REPORTER'S PRIVILEGE, the application of the FOURTH AMENDMENT to the press, and the right of the press to obtain information from the government.

The press has consistently asserted a right to refuse to disclose the sources of information obtained under a pledge of confidentiality—a claim known as "reporters' privilege." From the point of view of the press the right to honor a commitment to secrecy is essential to much reporting, particularly investigative reporting into organized crime, government corruption, and similar sensitive areas. On the other hand, under certain circumstances the need to obtain evidence in the possession of a reporter is also pressing, particularly where the information is necessary for defense in a criminal prosecution or to prove malice in a libel suit. Over the years the courts have generally refused to recognize the reporters' privilege, but they have attempted to avoid open conflict with the press. Reporters nevertheless continued to urge their claim, often to the point of going to jail for CONTEMPT OF COURT. A number of states have passed legislation recognizing the privilege in whole or in part, but the courts have tended to construe such statutes in a grudging manner, sometimes invoking constitutional objections.

The question whether reporters could invoke the privilege as a constitutional right under the First Amendment came before the Supreme Court in the *Branzburg* case. The reporters, who had refused to appear before grand juries, did not assert an absolute privilege but claimed they should not be compelled to give testimony unless the government demonstrated substantial grounds for believing they possessed essential information not available from other sources. The Court, in a 5–4 decision, rejected their claims. The majority opinion said that reporters had no greater claims to refuse testimony than other citizens. However, Justice LEWIS F. POWELL, whose vote was necessary to make the majority, expressed a more qualified position in a CONCURRING OPINION: "if the newsman . . . has reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement," the court should strike the "balance of these vital constitutional and societal interests on a case-by-case basis." In practice the courts appear to have accepted the Powell formula. Thus, although reporters cannot count on substantial constitutional protection the courts still prefer to avoid direct confrontation with the press tradition that reporters will not reveal confidential sources.

The First Amendment right to freedom of the press and the Fourth Amendment right to be secure from unreasonable SEARCHES AND SEIZURES have historically been closely linked. It was the GENERAL WARRANTS, used in America to obtain evidence of customs violations (and in England to find seditious publications), that in large part prompted the framing of the Fourth Amendment. At times the Supreme Court has recognized that Fourth Amendment protection extends with particular rigor to governmental intrusions affecting First Amendment rights. In the much discussed case of ZURCHER V. STANFORD DAILY (1978), however, the Court displayed less sympathy for the traditional position. The issue was whether the police could search the offices of a student newspaper for evidence of criminal offenses growing out of a student demonstration, or whether they should be confined to the issuance of a SUBPOENA requiring the newspaper to produce what evidence it had. Despite the vulnerability of the press to police searches tht could result in the ransacking of their news rooms, the Court by a 5–3 vote approved the warrant procedure. The press greeted the decision with strong criticism, mixed with alarm.

The third major issue with respect to operations of the press relates to the right of the press to obtain information from the government. The constitutional basis for such a claim grows out of the broader doctrine of the RIGHT TO KNOW. For many years the Supreme Court has recognized that the First Amendment embraces not only a right to communicate but also a right to receive communications. (See LISTENERS' RIGHTS.) The press has insisted that this feature of the First Amendment includes a right to have access to information in the possession of the government. Because a major purpose of the First Amendment is to facilitate the process of self-government, a strong constitutional argument can be advanced that, apart from a lim-

ited area of necessary secrecy, all material relating to operations of the government should be made available to the public. The press urged this position in a series of cases where it sought access to prisons in order to interview inmates and report on conditions inside. The Supreme Court, however, was not receptive. In rejecting the press proposals four of the Justices expressly declared in *Houchins v. KQED* (1978) that "the First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government."

In 1980, in the Richmond Newspapers case, the Supreme Court shifted its position. In ruling that the press had a First Amendment right to attend criminal trials the majority relied heavily upon the right-to-know doctrine. Moreover, the concurring Justices were plainly willing to carry the right-to-know concept beyond the confines of the particular case before them. As Justice JOHN PAUL STEVENS correctly observed, the decision constituted "a watershed case": "never before has [the Court] squarely held that the acquisition of newsworthy material is entitled to any constitutional protection whatsoever." The full scope of the right to obtain information from the government remains to be seen. The development, however, is potentially one of great significance for the press.

Taken as a whole, freedom of the press in the United States rests upon a relatively firm constitutional footing. The press has not been granted any special status in the First Amendment's structure, but its general right to publish material, regardless of potential impacts on government operations or other features of the national life, has been accepted. There are some weaknesses in the position of the press. The law with respect to publication of national security information is obscure and, in its present form, poses some threat to press freedoms. The press is also vulnerable to libel suits, as the protections thought to have been afforded by the "actual malice" rule have not been altogether realized. Likewise the courts have been reluctant to assist the press in its news-gathering activities. From an overall view, however, constitutional developments have left the press in a position where it is largely free to carry out the functions and promote the values sought by the Framers of the First Amendment.

THOMAS I. EMERSON
(1986)

Bibliography

ANDERSON, DAVID A. 1983 The Origins of the Press Clause. *University of California at Los Angeles Law Review* 30:455–537.

BARRON, JEROME A. 1973 *Freedom of the Press for Whom?* Bloomington: Indiana University Press.

LEVY, LEONARD W., ed. 1966 *Freedom of the Press from Zenger to Jefferson.* Indianapolis: Bobbs-Merrill.

LOFTON, JOHN 1980 *The Press as Guardian of the First Amendment.* Columbia: University of South Carolina Press.

NELSON, HAROLD L., ed. 1967 *Freedom of the Press from Hamilton to the Warren Court.* Indianapolis: Bobbs-Merrill.

SCHMIDT, BENNO C., JR. 1976 *Freedom of the Press vs. Public Access.* New York: Praeger.

SIEBERT, FREDRICK SEATON 1952 *Freedom of the Press in England 1476–1776.* Urbana: University of Illinois Press.

SYMPOSIUM 1975 First Amendment and the Media. *Hastings Law Journal* 26:631–821.

## FREEDOM OF THE PRESS
(Update 1)

The FIRST AMENDMENT's guarantee of freedom of the press is vitalized, as is FREEDOM OF SPEECH, by the synergy among the justifications for the protection of freedom of expression: (1) the marketplace of ideas is the best way of ascertaining truth; (2) full discussion of options is necessary to maintain a self-governing polity; (3) choice of both the means and the content of conveying one's messages is inherent to the notion of individual self-expression; and (4) free discussion is necessary as a check on governmental power by providing information for a resisting citizenry. The justifications have been translated into a set of DOCTRINES that preclude the following in declining order of absoluteness: government licensing the printed press; prepublication censorship; demands that certain information be published; and with tightly circumscribed exceptions, civil or criminal liability for what is published. The right to publish is thus highly protected, but the right to gather news, although essential to the operation of freedom of the press, has proved difficult to implement by judicial decision.

Licensing the printed media, as Great Britain required before its Glorious Revolution, has never been seriously suggested. Occasionally, Congress has debated a specific wartime or national security preclearance censorship provision, but none has been adopted; and if adopted, it would almost certainly have been successfully challenged. When Minnesota did appear to have enacted a limited preclearance scheme with its so-called gag law, the Supreme Court held it UNCONSTITUTIONAL in NEAR V. MINNESOTA EX REL. OLSON (1931).

MIAMI HERALD PUBLISHING COMPANY V. TORNILLO (1974), invalidating a right-to-reply law, suggests that a newspaper may never be required to publish or be punished for not publishing an item it wishes to exclude. Tornillo, a candidate for the Florida legislature, had been savaged by a pair of editorials in the *Miami Herald* just before the election. He demanded that the *Herald* print his responses as required by a state law regulating electoral debates. The Court, however, unanimously held the law unconstitu-

tional, reasoning that it would "chill" the newspaper's willingness to enunciate its views and that it intruded into editorial choice. The latter rationale sweeps broadly enough to assure autonomy in deciding what to exclude.

The contested areas of freedom of the press involve attempts by the press to acquire information and attempts by the state to punish publication of certain sensitive information. Under very limited circumstances, government may successfully block publication by an INJUNCTION remedy. Under broader, but still limited circumstances both civil and criminal remedies may be allowable.

*Near* analogized the Minnesota gag law, which placed a newspaper under a permanent injunction banning future "malicious, scandalous and defamatory" publication, to the traditional common law PRIOR RESTRAINT created by preclearance licensing. Because a barebones guarantee of freedom of the press was a ban on prior restraints, the Minnesota gag law was unconstitutional—the first statute ever found to violate the First Amendment. *Near* did not go all the way and ban all prior restraints. Thus, in *Near*'s most famous passage, the Court implied that national security might well be a ground for a prior restraint: "No one would question but that a government [during actual war] might prevent actual obstruction to its recruiting service or the publication of the sailing dates of troops and transports or the number and location of troops." Subsequently, it has been assumed that if a prior restraint were ever appropriate, national security would be the justification. Nevertheless, in NEW YORK TIMES V. UNITED STATES (1971), its most publicized national security case, the Supreme Court concluded that the government had not met its BURDEN OF PROOF to prevent publication of the *Pentagon Papers*, which described top secret decision making involving the VIETNAM WAR. The modern reality of copying machines and computer disks has made injunctive prior restraints obsolete because the materials will always show up somewhere else and any injunction will be futile to prevent disclosure—facts not yet reflected in the doctrine.

Despite upholding the press in every single case involving PRIVACY AND THE FIRST AMENDMENT and in other noncopyright contexts where the press has published truthful information noncoercively obtained from governmental sources, the Court has avoided sweeping rules and always assumed that somewhere lies a situation where the press ought not publish. Again, national security heads the list, and the Court has recognized the enforceability of contracts that forbid publication without approval of the Central Intelligence Agency; it would undoubtedly sustain the federal prohibition on disclosing the identities of intelligence agents as part of a pattern of activities intended to expose covert action. Beyond national security, the protection of sensitive private information of nonpublic figures is the next most likely candidate for a limitation on publication, although any such limitation will have to be carefully circumscribed. Thus, in *Florida Star v. B.J.F.* (1989), a civil privacy case, the Court set aside an award of DAMAGES for negligent publication of a rape victim's name because the paper had lawfully obtained the information through governmental disclosure. The Court recognized, as it had previously, that the state is in the best position to protect against disclosure through careful internal procedures.

*Florida Star* may usefully be contrasted with *Seattle Times v. Rhinehart* (1984), where the Court held that a trial court can forbid publication of information acquired by the press in state-mandated DISCOVERY, unless the information actually comes out in the litigation. *Rhinehart's* balance demonstrates that there are some circumstances where it is too unfair to allow the press to publish (without sanction) information that it has. One may extrapolate from *Rhinehart* that, if the press were to break into property and pillage files (or plant bugs) and later to publish, then the publication could also be penalized.

But these examples of coercive acquisition of information are a far cry from the issue ducked ever since the *Pentagon Papers Cases* (1971): what if the press should publish information unlawfully taken by a third party (as federal law forbids)? Here, outcomes of the Court's decisions, rather than the reasons offered, appear to preclude sanctions in cases where the press does not coercively acquire the information, while leaving the potential deterrent of criminal penalties hanging as a last resort.

A similar outcome prevails in cases of efforts of the press to obtain information. Constitutional rhetoric surrounding the importance of information to a self-governing citizenry supports a right of the press to obtain the information necessary for self-governance, but this rhetoric also leaves no principled stopping places. As a result, the Court has stated that news gathering is part of freedom of the press, but has also found implementation of such a right to be largely beyond its skills. When BRANZBURG V. HAYES (1972) raised the claim of a reporter's privilege not to disclose sources, the Court rejected it, although in OBITER DICTA it stated that orders designed to "disrupt a reporter's relationship with news sources would have no justification." Despite fears of the press, government generally has not abused its limited right to require disclosure.

The Court initially rejected claims of the press of access to prisons and pretrial hearings, but in RICHMOND NEWSPAPERS V. VIRGINIA (1980), it held that the press and public have a right to watch criminal trials. Although the press acted as if *Richmond Newspapers* might convert the First Amendment into a freedom of information sunshine law, it is not. This decision opens courtroom doors, but not

those of GRAND JURIES or the other branches of government.

The least satisfying area of the Court's JURISPRUDENCE on freedom of the press is the one where the Court has been the most active: the constitutionalization of the law of LIBEL in the wake of NEW YORK TIMES V. SULLIVAN (1964). Despite this decision's promise to balance successfully the interests of reputation against the CHILLING EFFECT that civil liability imposes on the press, over the years the constitutional law of defamation has become an ever more intricate maze of rules that in operation protect neither reputation, the press, nor the public's interest in knowing accurate information.

Although the best-known feature of current libel law may be its division of defamed plaintiffs into two classes, PUBLIC FIGURES and private figures, with the former having to meet the *New York Times* actual-malice standard—this distinction has had little impact on litigation. The reason is that private figures also need to show actual malice if they are to recover punitive damages—the financial key to their attorneys' taking their cases on contingent fees. At trial, the current constitutional rules attempt to minimize jury discretion. According to *Milkovich v. Lorain Journal* (1990), the plaintiff bears the burden of proving falsity, and those statements that "cannot reasonably be interpreted as stating actual facts" are fully protected. There is also strict appellate supervision of the evidence, something unmatched in any other area of law.

The intricate structure of First Amendment libel law has been widely criticized. In operation, the overwhelming number of libel suits are disposed of before trial; in such a case, the plaintiff is never granted an opportunity to show that the defamatory statements were false. If the case goes to a jury, the odds shift heavily to the plaintiff, although the damage awards are likely to be set aside either by the trial judge or the appellate court. It is the rarest of plaintiffs who successfully hurdles all the rules designed to protect the press. As a result, the rules do not provide the public with an opportunity to know the truth about injured plaintiffs; the law underprotects reputation; and in all likelihood, individuals are deterred from entering the public arena where, rightly or wrongly, they are often perceived as fair game.

Nevertheless, current law also fails to serve the interests of the press. A wholly unanticipated aspect of *New York Times* was the way it turned the libel trial away from what the defendant said about the plaintiff to scrutiny of how the press put the story together. When the trial focuses on the practices, care, motives, and views of the press—especially when, as is likely for a case reaching trial, the story is false—the dynamics of the case invite punishment of the press. A good trial lawyer will be able to paint the dispute as a contest between good and evil, and the evidence necessary to prove reckless disregard of the truth leaves no doubt as to which side is evil. In the 1980s, the average jury award in cases where reckless disregard was found exceeded $2 million.

It does not reduce the chill on newspapers to learn that few plaintiffs get to keep their awards and that the average successful plaintiff receives a mere $20,000. There seems to be a damages explosion in tort verdicts generally, and newspapers know catastrophe can arrive with just one huge verdict. An example was the $9 million judgment against the *Alton* (*Illinois*) *Evening Telegraph*, which sent the paper to bankruptcy court (although a subsequent settlement allowed the 38,000-circulation paper to stay in business). What makes defamation a special tort is that the injury that plaintiffs suffer seems far less severe than that suffered by a physically injured tort plaintiff. Large jury verdicts, both for punitive damages and those for emotional pain and suffering, thus seem designed more to punish than to compensate.

The operation of *New York Times* has thus produced a strange landscape. Issues of truth and falsity rarely surface, and reputations are not cleared for the vast majority of plaintiffs. For those few that get to a jury, however, trying the press can lead to a large, albeit momentary, windfall. The possibility of that windfall, coupled with the necessary legal fees to avoid it, maintains a chilling effect, even though appellate supervision typically cuts the verdicts to size. Libel law, having been wholly remade in the wake of *New York Times*, needs to be rethought again. It is not that the Court has misunderstood what to balance; rather, its balance systematically undermines all the values it attempts to protect.

A free press is essential in a democracy, and the Court's doctrines have never lost sight of this. Typically, press cases parallel speech cases, but one area where the Court has split the two is taxation. To protect the press, the Court has struck down press taxes that are unique to the press or treat different parts of the press differently. Whatever the imperfections of the law of freedom of the press, few areas of constitutional law have achieved a more coherent whole than freedom of the press. Even an "outrageous" parody of the Reverend Jerry Falwell in HUSTLER MAGAZINE V. FALWELL (1988), found by a jury to have inflicted extreme emotional distress, received the unanimous protection of a Court certain that freewheeling caustic discussion must be a central object of constitutional protection if we are to have a free and therefore secure press.

L. A. POWE, JR.
(1992)

Bibliography

ANDERSON, DAVID A. 1975 The Issue Is Control of Press Power. *Texas Law Review* 54:271–282.

POWE, LUCAS A., JR. 1991 *The Fourth Estate and the Constitution: Freedom of Press in America.* Berkeley: University of California Press.

SMOLLA, RODNEY A. 1986 *Suing the Press.* New York: Oxford University Press.

SYMPOSIUM 1977 Nebraska Press Association v. Stuart. *Stanford Law Review* 29:383–624.

## FREEDOM OF THE PRESS
(Update 2)

The FIRST AMENDMENT sets forth the press clause in the same breath that announces the FREEDOM OF SPEECH. The Supreme Court generally has rejected the notion that these provisions have separate and independent meanings, especially when asked to give the press a privileged status reflecting its unique role in facilitating informed self-governance. Although the press may not have a preferred position in the First Amendment matrix, it nonetheless has a status distinguishable from speech and is governed by a body of principles reflecting this distinction.

Freedom of the press, in its modern sense, is not a function of a uniform principle governing all communications media. As new communications technologies have evolved, First Amendment analysis has focused on the unique characteristics and perils that each medium possesses and creates. As the Court initially put it in *Joseph Burstyn, Inc. v. Wilson* (1952), a given medium is not "necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." This decision and other rulings over the last half of the twentieth century reflect the view of Justice ROBERT H. JACKSON that "[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each . . . is a law unto itself."

Within this medium-specific constitutional framework, the editorial freedom of publishers is most protected. Striking down a right of reply statute governing newspapers, in MIAMI HERALD PUBLISHING CO. V. TORNILLO (1974), the Court found it inconsistent "with First Amendment guarantees of a free press as they have evolved to this time." A similar law governing BROADCASTING had been upheld in RED LION BROADCASTING CO. V. FCC (1969). Broadcasting was distinguished on grounds that the medium uses a scarce resource to disseminate its signals. Because there are more persons wanting to broadcast than frequencies to allocate, the Court found it "idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."

The wisdom of medium-specific regulation increasingly is challenged by growth in technology. With print and electronic media crossing into each other's domains, trading upon the same methods of distribution, and blurring distinctions of form, conventional constitutional thinking confronts an era of rapidly changing circumstance. The phenomenon of convergence—as televisions, telephones, and computers create networked possibilities for processing and transmitting voice, video, and data—presents particular risks to the established analytical order. Legal developments over the past decade have reflected a limited awareness of this reality. Following decades of criticism, the Federal Communications Commission (FCC) in 1987 abandoned the scarcity premise that had been the basis for much content regulation in broadcasting including the FAIRNESS DOCTRINE. Reasoning "that the role of the electronic press in our society is the same as that of the printed press," the FCC concluded "that full First Amendment protections against content regulation should apply to the electronic and the printed press."

Administrative repudiation of the scarcity premise has not prefaced constitutional redirection. In METRO BROADCASTING, INC. V. FCC (1990), the Court reaffirmed the scarcity premise in upholding minority preferences in the broadcast licensing process. Although the AFFIRMATIVE ACTION aspects of *Metro Broadcasting* were overruled a few years later, the Court has continued to reference the scarcity premise in broadcasting. Kindred concepts have extended to other electronic media. In TURNER BROADCASTING SYSTEM, INC. V. FCC (1997), the Court upheld a federal law requiring cable television operators to carry the signals of local broadcasters. Accepting Congress's concern that cable operators might use their economic power to the detriment of local broadcasting's viability, the Court in an earlier decision had stressed their "gatekeeping" function in selecting the programs they disseminate. Transcending the notion of scarcity and its derivatives, as a constitutional reference point for broadcasting in particular, is what the *Turner* Court cites as a "history of extensive regulation of the . . . medium." Assuming that the future of media is defined by convergence, this premise heralds a broad spectrum First Amendment competition between traditions of editorial freedom and regulation.

"MUST CARRY" LAWS, like fairness obligations, represent an official content diversification scheme. Such methods exist within a regulatory world also populated by medium-specific content restrictive regimens. In FEDERAL COMMUNICATIONS COMMISSION V. PACIFICA FOUNDATION (1978), the Court upheld the FCC's power to regulate the broadcast of "patently offensive sexual and excretory language." The prohibition was justified on grounds that broadcasting was a pervasive and intrusive medium easily accessible to children. Although indecency regulation has expanded in the field of broadcasting, it generally has not extended into

other media contexts. Because cable television typically provides viewers with greater control over programming, through subscription or blocking technology, the transferability of the *Pacifica* premise has been limited. Likewise, in *Sable Communications of California, Inc. v. FCC* (1989), the Court invalidated a congressional prohibition of DIAL-A-PORN services. Because consumers of these services have to take affirmative steps to obtain them, the Court distinguished indecent telephone communications from broadcast signals that may take a person "by surprise." Safeguards in the form of access codes, credit card payment, and scrambling rules, moreover, minimize the problem of easy availability to children.

Reviewing "the vast democratic fora of the Internet," the Court in *Reno v. American Civil Liberties Union* (1997) identified a multidimensional medium characterized by "traditional print and news services, . . . audio, video, and still images, as well as interactive, real-time dialogue." Against this backdrop, the Court determined that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." Even as it acknowledged the phenomenon of convergence, interactivity, and choice in the INTERNET context, the Court reaffirmed its investment in medium specific analysis. Rather than responding to a general media universe comprising interacting and complementary parts, First Amendment principle remains a function of microcosmic form and perspective.

With media evolving toward common attributes and capabilities, constitutional attention to unique characteristics is not without peril. To the extent that communications technology affords expanding opportunities for interactivity and choice, it redefines a mass media society accustomed to editorial centralization and one-way information flow. Insofar as technology enables consumers to avoid what offends them, individual choice may achieve the results of official control without taxing the interests of expressive pluralism. Within this context of change, regulatory intervention to facilitate diversity (or shield from its excesses) seems more likely to be justified on the basis of habit and custom rather than reason. Because methodologies of electronic communications tend to be the least constitutionally protected, even as they have emerged as the dominant media, it is not yet clear whether a First Amendment model based on market liberty or managed care will prevail. At stake as the republic progresses into its third century, however, is whether freedom of the press ultimately accounts for original notions of autonomous judgment or more recent traditions of authoritative selection.

DONALD E. LIVELY
(2000)

Bibliography

BLANCHARD, MARGARET A. 1992 The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—from Anthony Comstock to 2 Live Crew. *William and Mary Law Review* 33:741–851.

DE SOLA POOL, ITHIEL 1983 *Technologies of Freedom.* Cambridge, Mass.: Harvard University Press.

EMORD, JONATHAN W. 1991 *Freedom, Technology, and the First Amendment.* San Francisco, Calif.: Pacific Research Institute for Public Policy.

FERRIS, CHARLES D. and KIRKLAND JAMES A. 1985 Fairness—The Broadcaster's Hippocratic Oath. *Catholic University Law Review* 34:605–623.

FOWLER, MARK S. and BRENNER, DANIEL L. 1982 A Marketplace Approach to Broadcast Regulation. *Texas Law Review* 60: 207–257.

HAMMOND, ALLEN S., IV 1992 Regulating Broadband Communication Networks. *Yale Journal on Regulation* 9:181–235.

LIVELY, DONALD E. 1994 The Information Highway: A First Amendment Roadmap. *Boston College Law Review* 35:1067–1101.

LIVELY, DONALD E.; HAMMOND, ALLEN S., IV; MORANT, BLAKE D.; and WEAVER, RUSSELL L. 1997 *Communications Law.* Cincinnati, Ohio: Anderson Publishing Co.

POWE, LUCAS A., JR., 1987 *American Broadcasting and the First Amendment.* Berkeley: University of California Press.

## FREE EXERCISE OF RELIGION

See: Religious Liberty

## *FREEMAN v. HEWITT*
329 U.S. 249 (1946)

Justice FELIX FRANKFURTER, for a 6–3 Supreme Court, here voided an Indiana tax levied on proceeds realized from the sale of securities in another state. Frankfurter struck down the tax as a greater burden than police regulations on INTERSTATE COMMERCE. Justice WILLIAM O. DOUGLAS, dissenting, denied the existence of any interstate commerce.

DAVID GORDON
(1986)

## FREEPORT DOCTRINE

During the LINCOLN-DOUGLAS DEBATES of 1858, Senator STEPHEN A. DOUGLAS attacked ABRAHAM LINCOLN and the Republicans for their unwillingness to accept the Supreme Court's decision in DRED SCOTT V. SANDFORD (1857), which held that Congress could not proscribe SLAVERY in federal territories. But at the same time, Douglas and the Northern Democrats contended that the issue of slavery was to

be decided by the people who lived in each territory, a position for which Douglas appropriated the name POPULAR SOVEREIGNTY. At Freeport, Lincoln asked Douglas: "Can the people of a United States territory, in any lawful way, . . . exclude slavery from its limits prior to the formation of a state constitution?"

Douglas's reply is known as the "Freeport Doctrine." It was that "slavery cannot exist a day or an hour anywhere, unless it is supported by local police regulation." In other words, a territorial legislature could exclude slavery by "unfriendly legislation" or simply by failing to pass the laws necessary to enforce slaveholding. The Freeport Doctrine appeared intended to neutralize the *Dred Scott* decision, and it effectively cut Douglas off from the slaveholding interests and divided the Democratic party.

DENNIS J. MAHONEY
(1986)

Bibliography

JAFFA, HARRY V. 1959 *Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates.* Garden City, N.Y.: Doubleday.

## FREE PRESS/FAIR TRIAL

Although press coverage has challenged the fairness and dignity of criminal proceedings throughout American history, intensive consideration of free pressfair trial issues by the Supreme Court has mainly been a product of recent decades. The first free pressfair trial issue to receive significant attention was the extent of press freedom from judges' attempts to hold editors and authors in contempt for criticizing or pressuring judicial conduct in criminal proceedings. The next category of decisions to receive attention, reversals of convictions to protect defendants from pretrial publicity, began rather gingerly in 1959, but in the years following the 1964 Warren Commission Report the Supreme Court reversed convictions more readily and dealt in considerable detail with the appropriate treatment of the interests of both the press and defendants when those interests were potentially in conflict. More recently, the Court has considered whether the press can be enjoined from publishing prejudicial material, and whether the press can be excluded from judicial proceedings.

In view of the large number of free pressfair trial decisions handed down over the years by the Supreme Court, this particular corner of the law of FREEDOM OF THE PRESS is probably the best developed of any, and offers a particularly instructive model of how the Supreme Court seeks to accommodate colliding interests of constitutional dimension. Overall, the Court has sought a balance that respects Justice HUGO L. BLACK'S OBITER DICTUM in the seminal case of BRIDGES V. CALIFORNIA (1941) that "free speech and fair trial are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."

In one of our history's pivotal FIRST AMENDMENT cases, the Supreme Court in 1941 sharply restricted the power of state judges to hold persons in contempt for publishing material that attacked or attempted to influence judicial decisions. By a 5–4 vote in *Bridges* the Supreme Court struck down two contempt citations, one against a newspaper based on an editorial that stated that a judge would "make a serious mistake" if he granted probation to two labor "goons," the second against a union leader who had sent a public telegram to the secretary of labor criticizing a judge's decision against his union and threatening to strike if the decision was enforced. Black's majority opinion held that the First Amendment protected these expressions unless they created a CLEAR AND PRESENT DANGER of interfering with judicial impartiality. From the start, this test as applied to contempt by publication has been virtually impossible to satisfy. Black insisted that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished," and, in order to remove predictions about the likelihood of interference from the ken of lower courts, the Court reinforced the strictness of this standard by using an apparently IRREBUTTABLE PRESUMPTION that judges would not be swayed by adverse commentary. "[T]he law of contempt," wrote Justice WILLIAM O. DOUGLAS in *Craig v. Harney* (1947), echoing a position taken in *Bridges*, "is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." Under these decisions, it seems doubtful that anything short of a direct and credible physical threat against a judge would justify punishment for contempt.

For general First Amendment theory and more specifically for the rights of the press in free pressfair trial contexts, the chief significance of the contempt cases is the emergence of a positive conception of protected expression under the First Amendment. As Black put it in *Bridges*, "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public questions." Drawing upon the decisions in NEAR V. MINNESOTA (1931) and DE JONGE V. OREGON (1937), which stressed the Madisonian conception of free expression as essential to political democracy, opinions in the contempt cases shifted the clear and present danger rule toward a promise of constitutional immunity for criticism of government. The contempt cases are thus the primary doc-

trinal bridge between the Court's unsympathetic approach to political dissent during and after WORLD WAR I and the grand conception of NEW YORK TIMES CO. V. SULLIVAN (1964) that the central meaning of the First Amendment is "the right of free discussion of the stewardship of public officials." Beyond this, the contempt cases make it clear that protecting expressions about judges and courts is itself a core function of the First Amendment. Douglas put it this way in *Craig*, in words that have echoed in later free press-fair trial cases: "A trial is a public event. What transpires in the court room is public property. . . . There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."

Although the contempt cases focused on the rights of the press and others who sought to publicize information about trials, the next set of free press-fair trial cases, without dealing with the right to publish, looked with a sympathetic eye toward defendants who might have been convicted because of prejudice caused by such publications. Although individual Justices had objected bitterly to the prejudicial effects of media coverage on jurors, not until 1959 did the Supreme Court reverse a federal conviction because of prejudicial publicity. The first reversal of a state court conviction followed two years later in IRVIN V. DOWD (1961), where 268 of 430 prospective jurors said during their VOIR DIRE examination that they had a fixed belief in the defendant's guilt, and 370 entertained some opinion of guilt. News media had made the trial a "cause célébre of this small community," the Court noted, as the press had reported the defendant's prior criminal record, offers to plead guilty, confessions, and a flood of other prejudicial items.

In 1963, the special problems of television were introduced into the pretrial publicity fray by *Rideau v. Louisiana*, producing another reversal by the Supreme Court of a state conviction. A jailed murder suspect was filmed in the act of answering various questions and of confessing to the local sheriff, and the film was televised repeatedly in the community that tried and convicted him. The Supreme Court held that "[a]ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." Two years later, in ESTES V. TEXAS (1965), a narrowly divided Court held that, at least in a notorious case, the presence of television in the courtroom could generate pressures that added up to a denial of due process.

In the mid-1960s the Court took a more categorical and more aggressive stance against prejudicial publicity. The shift was consistent with the WARREN COURT's growing impatience toward ad hoc evaluations of fairness in its review of state criminal cases. This period of heightened concern for the defendant was triggered by the disgraceful media circus that surrounded the murder trial of Dr. Sam Sheppard. Before Sheppard's trial, most of the print and broadcast media in the Cleveland area joined in an intense publicity barrage proclaiming Sheppard's guilt. During the trial, journalists swarmed over the courtroom in a manner that impressed upon everyone the spectacular notoriety of the case. "The fact is," wrote Justice TOM C. CLARK in his most memorable opinion for the Court, "that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard." The deluge of publicity outside the courtroom, and the disruptive behavior of journalists inside, combined to make the trial a "Roman holiday' for the news media" that "inflamed and prejudiced the public."

In *Sheppard v. Maxwell* (1966) Clark adumbrated the techniques by which trial judges may control prejudicial publicity and disruptions of the judicial process by the press. The opinion is a virtual manual for trial judges, suggesting proper procedures initially by listing the particular errors in the case: that Sheppard was not granted a continuance or a change of VENUE, that the jury was not sequestered, that the judge merely requested jurors not to follow media commentary on the case rather than directing them not to, that the judge failed "to insulate" the jurors from reporters and photographers, and that reporters invaded the space within the bar of the courtroom reserved for counsel, created distractions and commotion, and hounded people throughout the courthouse.

But the *Sheppard* opinion went beyond these essentially traditional judicial methods for coping with publicity and the press. The Court identified the trial judge's "fundamental error" as his view that he "lacked power to control the publicity about the trial" and insisted that "the cure lies in those remedial measures that will prevent the prejudice at its inception." Specifically, Clark admonished trial judges to insulate witnesses from press interviews, to "impos[e] control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers," and to "proscrib[e] extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters. . . ."

*Sheppard* left open the central question whether the courts could impose direct restrictions on the press by INJUNCTIONS that would bar publications that might prejudice an accused. In NEBRASKA PRESS ASSOCIATION V. STUART (1976) the Supreme Court, unanimous as to result though divided in rationale, answered this question with a seemingly definitive No. The Nebraska state courts had ordered the press and broadcasters not to publish confessions or other information prejudicial to an accused in a pending murder prosecution. Some of the information covered by

the injunction had been revealed in an open, public preliminary hearing, and the Supreme Court made clear that a state could in no event bar the publication of matters disclosed in open judicial proceedings. As to other information barred from publication by the state courts, Chief Justice WARREN E. BURGER's majority opinion went by a curious and circuitous route to the conclusion that the impact of prejudicial publicity on prospective jurors was "of necessity speculative, dealing . . . with factors unknown and unknowable." Thus, the adverse effect on the fairness of the subsequent criminal proceeding "was not demonstrated with the degree of certainty our cases on PRIOR RESTRAINT require." Burger's opinion made much of the fact that the state court had not determined explicitly that the protections against prejudicial publicity set out in *Sheppard* would not suffice to guarantee fairness, as if trial court findings to this effect might make a difference in judging the validity of a prior restraint against publication. And Burger said again and again that he was dealing with a particular case and not laying down a general rule. But because Burger termed the evils of prejudicial publicity "of necessity speculative," and viewed the prior restraint precedents as requiring a degree of certainty about the evils of expression before a prior restraint should be tolerated, his opinion for the Court seems to be, in the guise of a narrow and particularistic holding, a categorical rejection of prior restraints on pretrial publicity. Lower courts have read the decision as an absolute bar to judicial injunctions against the press forbidding the publication of possibly prejudicial matters about pending criminal proceedings.

Beyond its rejection of prior restraints against the press to control pretrial publicity, the *Nebraska Press Association* decision emphatically affirmed all the methods of control set out in *Sheppard*, including the validity of judicial orders of silence directed to parties, lawyers, witnesses, court officers, and the like not to reveal information about pending cases to the press. Such orders, indeed, have flourished in the lower courts since the *Nebraska Press Association* decision.

The free press/fair trial conundrum has also presented the Supreme Court with the only occasion it has accepted to shed light on the very murky question whether the First Amendment protects the right to gather information, as against the right to publish or refuse to publish. No doubt in response to the Supreme Court's rejection of direct controls on press publication, either by injunctions or by the CONTEMPT POWER, several lower courts excluded news reporters and the public from preliminary hearings and even from trials themselves to prevent the press from gathering information whose publication might be prejudicial to current or later judicial proceedings. Initially, in GANNETT CO. V. DE PASQUALE (1979), reviewing a closing of a preliminary hearing dealing with the suppression of EVIDENCE, the Supreme Court found no guarantee in the Sixth Amendment of public and press presence. The decision produced an outcry against secret judicial proceedings, and only a year later, in one of the most precipitous and awkward reversals in its history, the Court held in RICHMOND NEWSPAPERS V. VIRGINIA (1980) that the First Amendment barred excluding the public and the press from criminal trials except where special considerations calling for secrecy, such as privacy or national security, obtained. The decision marks the first and only occasion to date in which the Court has recognized a First Amendment right of access for purposes of news gathering, and the Court was careful to limit its holding by resting on the long tradition of open judicial proceedings in English and American law. One year later, in *Chandler v. Florida* (1981), the Court held that televising a criminal trial was not invariably a denial of due process, thus removing *Estes* as an absolute bar to television in the courtroom.

The pattern of constitutional law formed by the free pressfair trial decisions has several striking aspects. While direct judicial controls on the right of publication have been firmly rejected, the courts have proclaimed extensive power to gag sources of information. (See GAG ORDERS.) Participants in the process can be restrained from talking, but the press cannot be restrained from publishing. However, the broad power to impose secrecy on sources does not go so far as to justify closing judicial proceedings, absent unusual circumstances. The interests of freedom of expression and control over information to enhance the fairness of criminal trials are accommodated not by creating balanced principles of general application but rather by letting each interest reign supreme in competing aspects of the problem. Moreover, the principles fashioned in the cases tend to be sweeping, as if the Supreme Court were acting with special confidence in fashioning First Amendment standards to govern the familiar ground of the judicial process. And in dealing with its own bailiwick, the judicial process, the Supreme Court has acted not defensively but with a powerful commitment to freedom of expression.

BENNO C. SCHMIDT, JR.
(1986)

Bibliography

FRIENDLY, ALFRED and GOLDFARB, RONALD 1967 *Crime and Publicity.* New York: Twentieth Century Fund.

JAFFE, LOUIS 1965 Trial by Newspaper. *New York University Law Review* 40:504–524.

LEWIS, ANTHONY 1980 A Public Right to Know about Public Institutions: The First Amendment as Sword. *Supreme Court Law Review* 1980:1–25.

SCHMIDT, BENNO C., JR. 1977 Nebraska Press Association: An

Expansion of Freedom and Contraction of Theory. *Stanford Law Review* 29:431–476.

TAYLOR, TELFORD 1969 *Two Studies in Constitutional Interpretation.* Evanston, Ill.: Northwestern University Press.

## FREE PRESS/FAIR TRIAL
(Update)

The Supreme Court has firmly established a FIRST AMENDMENT right of access to criminal proceedings. In *Press-Enterprise Co. v. Superior Court* (1986), the Court held that a "presumption of openness" in criminal trials extends to aspects of the trial beyond the actual testimony of witnesses. All trial matters, such as the jury selection (VOIR DIRE) process, are presumptively open. The media can be excluded only if the trial court specifically finds compelling reasons to close the trial and finds that less-restrictive alternatives cannot safeguard the defendant's right to a FAIR TRIAL.

Since 1984 the Court has defined the scope of the media's right of access. In *Waller v. Georgia* (1984), the Court expanded the right of access to pretrial evidentiary hearings, although it did so on the basis of the defendant's Sixth Amendment right to an open trial. In *Press-Enterprise,* the Court concluded that the media have a qualified First Amendment right of access to pretrial proceedings that can be overcome only by "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Therefore, courts must decide case-by-case whether any portion of a criminal proceeding can and should be closed. Laws that automatically close proceedings, such as the Massachusetts law in GLOBE NEWSPAPER COMPANY V. SUPERIOR COURT (1982) excluding the press from hearing the testimony of young victims of sex crimes, are constitutionally infirm.

Although the media's general right to attend and report on court proceedings has been secured, courts do possess limited power to restrict press access to information outside the courtroom door. Not only do courts retain the power to issue GAG ORDERS directed at parties, attorneys, and witnesses in a case, but attorneys are now subject to professional disciplinary action if they make extrajudicial statements that have a "substantial likelihood of materially prejudicing an adjudicative proceeding." The Court upheld the constitutionality of such orders in *Gentile v. State Bar of Nevada* (1991). The Court also held in *Seattle Times v. Rhinehart* (1984) that courts may limit the media's access to information by sealing information under a protective order.

Difficult issues still facing the courts include the use of cameras inside the courtroom and whether the press's right of access also applies in civil cases. The Court has never found that the press has a constitutional right to use cameras in the courtroom. However, in CHANDLER V. FLORIDA (1981), the Court held that televising trials is constitutionally permissible. Thus, it is left to the discretion of legislatures and trial judges to decide whether to permit the televising of trials. Courts typically will balance the interest of the public in viewing the proceedings against the possible disruption of the proceedings from televised coverage. Another major concern for courts is the possible effect of camera coverage on unsequestered jurors. The televised trials of high-publicity cases, including the 1994 murder trial of football star O.J. Simpson, has caused many courts to reconsider their willingness to allow cameras in the courtroom.

Traditionally, issues involving press access to trials have focused on the media's coverage of criminal proceedings. The Court has never explicity ruled on whether the same rights of access apply to civil proceedings. The First Amendment would seem to safeguard such access. Historically, the press has had access to civil, as well as criminal, proceedings. Even more importantly, the critical role of the press in allowing the public to scrutinize the performance of its governmental institutions and officials applies with equal force to civil trials. The free press, rather than being an obstacle to a fair trial, is one of the means by which a fair trial can be ensured.

LAURIE L. LEVENSON
(2000)

(SEE ALSO: *Freedom of the Press.*)

Bibliography

BARBER, SUSANNA 1987 *News Cameras in the Courtroom: A Free Press–Fair Trial Debate.* Norwood, N.J.: Ablex Publishing Corp.

FREEDMAN, WARREN 1988 *Press and Media Access to the Criminal Courtroom.* New York: Quorum Books.

UELMEN, GERALD F. 1997 Leaks, Gags, and Shields: Taking Responsibility. *Santa Clara Law Review* 37:943–979.

## FREE SPEECH AND RICO

In 1970, Congress enacted the ORGANIZED CRIME CONTROL ACT, Title IX of which is known as the RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO). RICO is enforced through criminal prosecutions and through private civil suits in which treble damages and awards of counsel fees are authorized. Organized crime, that is, groups such as the Mafia, gave rise to RICO, but it applies to conduct engaged in by "any person." For this reason, individuals have challenged RICO as a threat to FREEDOM OF SPEECH. Objections are made to its VAGUENESS, to its application to certain conduct, and to its administration by the courts.

Standards of guilt must be ascertainable, and yet vague-

ness is a question of degree. A statute is not vague merely because it is difficult to determine whether marginal or hypothetical cases fall within its terms; typically, too, a statute is judged "as applied" to the defendant's conduct. Only free speech challenges are "facial," that is, tested by looking to the text of the statute. Because RICO specifies "OBSCENITY" and "extortion" within its prohibited conduct, RICO implicates free speech. RICO's application to obscenity was upheld in 1989 in *Fort Wayne Books, Inc. v. Indiana.* The Supreme Court found that because the term "obscenity" itself was not vague, RICO was not vague. Because RICO requires a "pattern" of "obscenity" violations in connection with an "enterprise," "RICO is inherently *less* vague than obscenity [by itself]." According to the Court, any "obscenity" prosecution induces self- censorship, but RICO's enhanced sanctions, by themselves, do not implicate vagueness concerns.

RICO's application to extortion was challenged in 1994 in *National Organizations For Women, Inc. v. Scheidler.* ANTI-ABORTION MOVEMENT demonstrators argued that because RICO's legislative history indicated that Congress narrowed it in 1970 to avoid its application to antiwar protests it was improper to apply it to similar demonstrations today; courts, they argued, were turning "extortion" under RICO into "coercion." For example, the gay activists in 1988 who entered St. Patrick's Cathedral in New York City sought not the church's building, but a change in the church's policy. This raised the possibility that Dr. MARTIN LUTHER KING, JR., the CIVIL RIGHTS advocate, could be equated with John Gotti, the Mafia don. Unfortunately, the Court held in *Scheidler* that this legislative history argument was inconclusive, so no per se objection existed to using RICO against political demonstrators. The Court did not reach the "extortion" argument. Courts, therefore, continue to use the "extortion/coercion" theory to attack political demonstrations where the protestor's conduct goes beyond picketing. Instead of a minor trespass, the conduct is escalated into "racketeering."

Sadly, RICO litigation today is also conducted contrary to the earlier free speech teachings of the Court in *Watts v. United States* (1969) and *NAACP v. Claiborne Hardware Co.* (1982). In *Watts,* the Court distinguished between "true threats" and "political hyperbole." An antidraft protestor in 1966 who "threatened" to shoot President LYNDON B. JOHNSON was found not guilty of threatening the President; his remarks were found to be "crude and offensive" but reflecting "political opposition," not "criminal intent." That distinction is ignored today when anti-abortion groups publish posters identifying abortionists as "war criminals." Here, too, there is a CHILLING EFFECT on free speech.

Similarly, in *Claiborne Hardware Co.*, the Court held that where violent and nonviolent conduct were mixed in a civil rights BOYCOTT, the nonviolent conduct was free speech and could not be made the basis of suit. Only damage caused by unprotected conduct could be remedied, and individual liability had to be based on individual, not group, conduct unless the individual joined the group with the intent to further its unlawful objectives. To protect free speech, the Court required pleading, instructions, and jury verdicts to separate protected from unprotected activity.

Nevertheless, when Scheidler was tried in 1998, the jury assessed $85,926 for the security costs of clinics for anti-abortion demonstrations. Scheidler was not connected by the court to any conspiracy to murder or commit arson. The jury was, however, permitted to make generic findings and return its verdict in a lump sum, despite *Clairborne;* it was not required to apportion the costs between Scheidler's protected and unprotected conduct, nor between his conduct and that of others who might murder doctors or burn clinics. Similarly, in *Northeastern Women's Center v. McMonagle* (1989), an earlier decision of a federal appellate court, although $887 of injury was done by an unidentified party to equipment during a SIT-IN, all of the defendants, who had engaged in picketing over nine years, were held liable under RICO for treble damages ($2,661) and $65,000 in attorney's fees. Such indiscriminate jury verdicts and awards of disproportionate legal fees chill free speech.

Heavy-handed litigation under RICO against protest movements was not what Congress had in mind in 1970. If this kind of litigation is to be allowed, it ought to be conducted with a scrupulous concern for free speech. If not, RICO threatens free speech.

G. ROBERT BLAKEY
(2000)

Bibliography

BLAKEY, G. ROBERT and RODDY, KEVIN P. 1996 Reflections on *Reves v. Ernst & Young. American Criminal Law Review* 33: 1345, 1657–1675.

LAFAVE, WAYNE and SCOTT, AUSTIN 1986 *Criminal Law*, 2nd ed. St. Paul, Minn.: West Publishing Co.

# FREE SPEECH, MURDER MANUALS, AND INSTRUCTION OF VIOLENCE

The FIRST AMENDMENT guarantee of FREEDOM OF SPEECH is perhaps tested most severely when speech either advocates or instructs how to commit violent, illegal action. Even where speech does not do so directly, but merely has the potential to induce such illegality through suggestive words or images, juries are being asked to punish that speech by awarding substantial judgments in civil damages lawsuits. For their part, some trial and appellate court

judges are increasingly treating such speech as conduct—balancing the perceived social value of the speech against its perceived potential for causing harm. In the wake of a rash of tragic high school shootings across the United States that have killed or injured dozens of students and teachers, coupled with recent multimillion-dollar jury verdicts and settlements in high-profile cases, the pressure to bring and permit such litigation seems likely to increase.

In its 1919 decision in SCHENCK V. UNITED STATES, the Supreme Court considered whether one could be criminally punished for advocating resistance to military conscription. The Court held that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

Fifty years later, in BRANDENBURG V. OHIO (1969), the Court announced a more restrictive reformulation of *Schenck*'s CLEAR AND PRESENT DANGER standard: "[T]he constitutional guarantees . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." The *Brandenburg* Court found that an Ohio statute prohibiting advocacy of crime and terrorism was unconstitutional because it failed to "refine the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action."

Unfortunately, lower courts have frequently failed to follow the Supreme Court's *Brandenburg* edict. In cases involving speech urging tax evasion, courts have declined to protect speech that merely advocates or instructs how to commit unlawful conduct. Federal courts have also failed to protect speech advocating or instructing commission of a variety of other illegal acts, including the manufacture of the drug PCP and creation of an explosive device. In none of these cases, however, was it clearly shown that the speech was either intended to or likely to cause imminent lawlessness.

In *Rice v. Paladin Enterprises, Inc.* (1997), the U.S. Court of Appeals for the Fourth Circuit held that a book publisher could be liable for publishing speech that described how to be a contract killer. The court emphasized that the government had a COMPELLING STATE INTEREST "in preventing the particular conduct at issue" and that a jury could find that the only communicative value of the speech was the "indisputably illegitimate one of training persons how to murder and to engage in the business of murder for hire." The decision purported to distinguish *Brandenburg* on the grounds that it protected only the "abstract teaching of the moral propriety or even moral necessity for resort to lawlessness, or its equivalent," but not speech that instructs how to commit crimes.

Relying directly on *Rice*, the Louisiana Court of Appeal permitted discovery to proceed in *Byers v. Edmondson* (1998), a lawsuit claiming that the shooting of a convenience store clerk was inspired by the motion picture "Natural Born Killers." The Louisiana court's ruling—issued just weeks after the Supreme Court denied review of *Rice*—accepted plaintiffs' claims that "the film falls into the incitement to imminent lawless activity exception."

In truth, *Brandenburg* does not sanction any balancing of the perceived social value of speech against that speech's potential for harm. Indeed, doing so would appear to violate the First Amendment's fundamental proscription against content-based restrictions on speech articulated, for example, in the Supreme Court's opinion in R. A. V. V. CITY OF ST. PAUL (1992).

Although perceived social value is a factor that has been considered in the context of defining categorically unprotected speech, such as OBSCENITY, it should have no bearing on the protection of speech advocating or instructing how to commit illegal action. Rather, courts should adhere to the *Brandenburg* formulation by considering only whether speech is intended to and is likely to cause imminent lawlessness.

The wave of high school violence that has gripped America at the close of the 1990s has already begun to inspire litigation that will further test judicial fealty to *Brandenburg*. The parents of three students killed during a Paducah, Kentucky, high school shooting spree filed a $130 million lawsuit against two Internet websites, several computer game companies, and the makers and distributors of the 1995 movie "The Basketball Diaries." Moreover, for better or worse, *Rice* will not be the crucible in which the *Brandenburg* principles are tested. Rather than risk a trial just weeks after the massacre that left fifteen dead at Columbine High School in Littleton, Colorado, the defendant publisher reportedly agreed to a multimillion-dollar settlement and the removal of its book from the market.

DOUGLAS E. MIRELL
ROBERT N. TREIMAN
(2000)

## FREUND, ERNST
(1864–1932)

Ernst Freund, professor of law at the University of Chicago, is best remembered today for his huge and immensely influential *Police Power: Public Policy and Constitutional Rights* (1904), the first systematic exposition of its subject. POLICE POWER, said Freund, was the

"power of promoting the public welfare by restraining and regulating the use of liberty and property." Because Freund saw the power "not as a fixed quantity, but as the expression of social, economic, and political conditions," he praised that elasticity which helped adapt the law to changing circumstances. This endorsement, along with only minimal approval of laissez-faire doctrines such as FREEDOM OF CONTRACT, helped provide support for the Progressive movement. His views strongly contrasted with those of CHRISTOPHER TIEDEMAN, a vigorous and authoritative exponent of laissez-faire who decried the use of the police power. In *Standards of American Legislation* (1917), Freund attempted to formulate positive principles to guide legislators and to give DUE PROCESS OF LAW a more definite meaning.

DAVID GORDON
(1986)

## FREUND, PAUL A.
(1908–1992)

Paul A. Freund was the leading constitutional scholar in the United States in the generation following WORLD WAR II. Born in St. Louis in 1908, he graduated from Washington University and the Harvard Law School, where he was president of the Harvard Law Review. In the 1930s, he was successively law clerk to Justice LOUIS D. BRANDEIS of the Supreme Court, attorney for various government agencies, and then a lawyer in the office of the SOLICITOR GENERAL for ten years, with a brief stint in the middle of his service as a faculty member at Harvard Law School. Returning to Harvard in 1946, he quickly established himself as a constitutional scholar in a remarkable series of essays on a wide variety of constitutional law subjects. He remained at Harvard for the rest of his life, declining an offer from President JOHN F. KENNEDY to become Solicitor General and, many people thought, thereby forfeiting his chance of appointment to the Supreme Court.

Although FELIX FRANKFURTER was Freund's teacher and mentor, Freund more resembled BENJAMIN N. CARDOZO in both personality and constitutional philosophy. Like Cardozo, Freund was a shy bachelor, who had a zest for learning in all fields of human knowledge, and a photographic memory for stories and apt quotation that made him a popular speaker on all occasions. Like Cardozo, Freund sought to understand and accommodate the contending principles in all legal disputes. Freund taught that "[i]f the first requisite of a constitutional judge is that he be a philosopher, the second requisite is that he be not too philosophical. Success in the undertaking requires absorption in the facts rather than deduction from large and rigidly held abstractions. . . . In the familiar phrase, judgment from speculation should yield to judgment from experience."

Freund was no less eloquent in his vision of law: "in a larger sense all law resembles art, for the mission of each is to impose a measure of order on the disorder of experience without stifling the underlying diversity, spontaneity, and disarray. . . . In neither discipline will the craftsman succeed unless he sees that proportion and balance are both essential, that order and disorder are both virtues when held in a proper tension . . . new vistas give a false light unless there are cross-lights. There are, I am afraid, no absolutes in law or art except intelligence."

Freund's wit, grace, and style made him one of the foremost essayists of his time on subjects legal and nonlegal, but particularly on topics of constitutional law. He was a commanding presence and taught the virtues of tolerance, accommodation, and learning for its own sake to a whole generation of students, lawyers, and judges.

ANDREW L. KAUFMAN
(2000)

Bibliography

FREUND, PAUL A. 1961 *The Supreme Court of the United States.* Cleveland, Ohio: World Publishing Co.

——— 1968 *On Law and Justice.* Cambridge, Mass.: Harvard University Press.

## FRIENDLY, HENRY J.
(1903–1986)

Henry J. Friendly was among the greatest federal judges of the twentieth century. After graduating from Harvard Law School (where he was president of the *Harvard Law Review*) and clerking for Justice LOUIS D. BRANDEIS, Friendly entered private practice in New York City, where he had a distinguished career. Appointed to the UNITED STATES COURT OF APPEALS for the Second Circuit in 1959 by President DWIGHT D. EISENHOWER, Judge Friendly served on the court for twenty-seven years until his death.

Judge Friendly's unquestioned brilliance, his towering intellect, and his unrelenting concern with the facts are reflected in his judicial opinions in almost every area of the law. His contributions to ADMINISTRATIVE LAW and federal jurisdiction, two areas in which he took a special interest, are unsurpassed in their analytical power and insight. In addition, Judge Friendly's opinions on SECURITIES LAW and CRIMINAL PROCEDURE are widely regarded as unequaled in their thoughtfulness, craft, and scholarship. Perhaps Judge Friendly's extraordinary ability for deft analysis of legally and factually complex issues was most impressively displayed in the series of comprehensive opinions he wrote during the 1970s for the Special Rail-

road Court. This court was established to handle the litigation arising over the congressionally directed reorganization of the eastern railroads, many of which were in bankruptcy reorganization.

In addition to his prolific output of judicial opinions, Judge Friendly wrote a number of influential law review articles as well as a short book on federal jurisdiction. He was also active in the American Law Institute. Perhaps the unique combination of talents that Judge Friendly possessed are most succinctly captured by the thought that he was considered to be a lawyer's lawyer, a scholar's scholar, and a judge's judge.

WALTER HELLERSTEIN
(1992)

Bibliography

SYMPOSIUM 1984 In Honor of Henry J. Friendly. *University of Pennsylvania Law Review* 133:1–77.

## FRIES' REBELLION

In 1798 Congress levied a tax on houses, land, and slaves, to finance a possible war with France. There was considerable resistance to the tax and, in February 1799, an armed band led by John Fries rescued tax resisters from the United States marshal at Bethlehem, Pennsylvania. President JOHN ADAMS ordered the army and militia to suppress the uprising.

Fries and his followers were arrested and some seventy-two insurrectionists were tried for various offenses relating to the incident. Fries and two companions were tried before Justice SAMUEL CHASE and Judge RICHARD PETERS and were convicted of TREASON, the prosecution arguing that armed resistance to the enforcement of federal law amounted to levying war against the United States. President Adams, against the advice of his cabinet, subsequently granted a general pardon to all participants in the "rebellion."

DENNIS J. MAHONEY
(1986)

## *FRISBY v. SCHULTZ*
487 U.S. 474 (1988)

In response to anti-abortion protesters picketing the home of a local abortionist, a Wisconsin town passed an ordinance forbidding picketing "before or about the residence . . . of any individual." The Court held in a 6–3 vote that the ordinance did not on its face violate the FIRST AMENDMENT. Writing for five members of the majority, Justice SANDRA DAY O'CONNOR narrowly construed the law as applying only to picketing directed at a particular home. The law served a significant government interest, according to O'Connor, because it sought to protect the sanctity of the home from unwanted—and inescapable—intrusions. O'Connor noted that "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech. . . . [Here] [t]he resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech."

The dissenters sympathized with the intent of the law, but found that its language suffered from OVERBREADTH.

JOHN G. WEST, JR.
(1992)

## *FROHWERK v. UNITED STATES*
249 U.S. 204 (1919)

In the second major test of the wartime ESPIONAGE ACT to reach the Supreme Court, the Justices unanimously affirmed the conviction of the publisher of a pro-German publication for conspiring to obstruct military recruitment through publication of antidraft articles. Justice OLIVER WENDELL HOLMES invoked the CLEAR AND PRESENT DANGER test. "We do not lose our right to condemn either measures or men because the Country is at war," he wrote, "But . . . it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame. . . ." Holmes and his brethren declined to inquire themselves into the degree or probability of the danger represented by the publication.

MICHAEL E. PARRISH
(1986)

## *FRONTIERO v. RICHARDSON*
411 U.S. 677 (1973)

In *Reed v. Reed* (1971) a unanimous Supreme Court had invalidated a state law preferring the appointment of men, rather than women, as administrators of decedents' estates. The Court had used the rhetoric of the RATIONAL BASIS standard of review but had in fact employed a more rigorous standard of JUDICIAL REVIEW. Conceding the rationality of eliminating one type of contest between would-be administrators, the Court had concluded that the preference for men was an "arbitrary legislative choice" that denied women the EQUAL PROTECTION OF THE LAW.

In *Frontiero,* two years later, the Court came within one

vote of radically restructuring the constitutional doctrine governing SEX DISCRIMINATION. Under federal law, a woman member of the armed forces could claim her husband as a "dependent" entitled to certain benefits only if he was, in fact, dependent on her for more than half his support; a serviceman could claim "dependent" status for his wife irrespective of actual dependency. Eight Justices agreed that this discrimination violated the Fifth Amendment's equal protection guarantee, but they divided 4–4 as to their reasoning.

Justice WILLIAM J. BRENNAN, for four Justices, concluded that sex, like race, was a SUSPECT CLASSIFICATION demanding STRICT SCRUTINY of its justifications. Four other Justices merely rested on the precedent of *Reed*. Justice LEWIS F. POWELL, writing for three of them, added that it would be inappropriate for the Court to hold that gender was a suspect classification while debate over ratification of the EQUAL RIGHTS AMENDMENT was still pending. Justice WILLIAM H. REHNQUIST dissented.

The confusion in the wake of *Frontiero* ended three years later, in CRAIG V. BOREN (1976), when the Justices compromised on an intermediate STANDARD OF REVIEW.

KENNETH L. KARST
(1986)

## *FROTHINGHAM v. MELLON*
## *MASSACHUSETTS v. MELLON*
262 U.S. 447 (1923)

In the SHEPPARD-TOWNER MATERNITY ACT of 1921, a predecessor of modern FEDERAL GRANTS-IN-AID, Congress authorized federal funding of state programs "to reduce maternal and infant mortality." These companion cases involved suits to halt federal expenditures under the act, challenging it as a deprivation of property without DUE PROCESS OF LAW and a violation of the TENTH AMENDMENT. Justice GEORGE SUTHERLAND, for a unanimous Supreme Court, dismissed the *Massachusetts* case for failing to present a justiciable controversy. The state's suit in its own behalf presented a POLITICAL QUESTION calling on the Court to adjudicate "abstract questions of political power," not rights of property or even "quasi-sovereign rights actually invaded or threatened." The state was under no obligation to accept federal monies. The state also lacked STANDING to represent its citizens, who were also citizens of the United States.

Frothingham's due process argument relied on the premise that spending under the act would increase her tax liability. Sutherland concluded that she, too, lacked standing to sue. Any personal interest in federal tax monies "is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal." Because Frothingham could not demonstrate direct injury, her suit must fail. An OBITER DICTUM implying the constitutionality of grants-in-aid was the Court's only pronouncement on such programs until approved in STEWARD MACHINE COMPANY V. DAVIS (1937).

DAVID GORDON
(1986)

## FRUIT OF THE POISONOUS TREE

No DOCTRINE in constitutional CRIMINAL PROCEDURE has created more confusion than the disarmingly simple proposition that when the state has violated FUNDAMENTAL RIGHTS, it may receive no benefit from the violation. The "poisonous tree" is the violation, an illegal search for instance, in which the key to a safe deposit is found. Clearly under the EXCLUSIONARY RULE the government may not use as EVIDENCE the discovery of the key; but neither may it use whatever incriminating items are in the safe deposit box. These are the "fruits."

The existence of a "poisonous tree," however, does not mean that all that is discovered after the tree sprouts is automatically a "fruit." The issue in its classic though grammatically inelegant formulation is: "whether, granting establishment of the primary illegality, [the evidence] has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint" (WONG SUN V. UNITED STATES, 1963). Many exceptions to the fruits doctrine have evolved from these words and have been variously named by courts and commentators, although the basic question is always how far from the tree the fruit has fallen.

The exception used most often is "attenuation": too much has intervened between the primary illegality and the gathering of the fruit. In *Wong Sun* itself, a confession made after an illegal ARREST was found not to be a fruit because of the passage of time between the arrest and confession, during which the accused was free on BAIL. Another exception is labeled "independent source"; the idea is that although the evidence could have been a fruit, it was actually uncovered by means distinguishable from the primary illegality. Closely allied to the independent source exception is that of "inevitable discovery," which the Supreme Court endorsed in NIX V. WILLIAMS (1984). Although the body of the deceased was discovered through a blatant violation of the defendant's Sixth Amendment RIGHT TO COUNSEL, the Court held that it would have been found through other proper investigative techniques that the police were employing at the time that the primary illegality was committed. The burden is on

the government to show that the discovery would have been "inevitable." Finally, while refusing to establish an across-the-board rule that eyewitness testimony could never be a fruit, the Supreme Court has indicated that the free will of a witness expressed in the desire to testify would, in virtually every case, attenuate the taint, even when the witness would never have been found without the primary illegality.

As can be seen from the number and nature of the exceptions, the fruit of the poisonous tree doctrine is subject to much interpretation. For instance, in *Harrison v. United States* (1968) the Court held that the defendant's testimony at trial was a fruit of illegally obtained confessions introduced into evidence. Two years later, in *McMann v. Richardson* (1970), the Court found that a guilty plea entered after an arguably illegal confession was not induced by the prospect of the admission of the confessions. These cases can be reconciled by applying the attenuation exception—the defendant's decision to plead guilty was an intervening event that dissipated the poison. But this is hardly a satisfying distinction.

The case that most strikingly reveals the difficulties with the fruits doctrine and is also the key to future interpretation is *United States v. Crews* (1980). In connection with his illegal arrest, the police obtained Crews's photograph which would not otherwise have been available. They showed it in an array of pictures to the victims who made an immediate identification. Next, Crews was placed in a fair LINEUP where the victims also identified him. The first question was whether testimony about the pretrial identifications was fruit; this was easily resolved because the prosecution conceded that it was. The harder issue was whether the victim's identification at trial of Crews must be suppressed. In the metaphoric language that seizes courts when dealing with this doctrine, the Court concluded that: "At trial, [the victim] retrieved the [mental image of her assailant], compared it to the figure of the defendant, and positively identified him as the robber. No part of this process was affected by respondent's illegal arrest. . . . [T]he toxin in this case was injected only after the evidentiary bud had blossomed; the fruit served at trial was not poisoned."

The Court in *Crews* went on to say that there could be cases where the victim's in-court identification was a result of the primary illegality—in other words, that the photograph and lineup identifications had led to the ability to point to the defendant at trial. In finding that this was not such a case the Court implicitly emphasized that the analysis of whether evidence is the fruit of the poisonous tree will continue in a case-by-case, highly pragmatic, and utterly unpredictable vein.

BARBARA ALLEN BABCOCK
(1986)

Bibliography

LAFAVE, WAYNE R. 1978 *Search and Seizure: A Treatise on the Fourth Amendment.* Vol. 3:621–681. St. Paul, Minn.: West Publishing Co.

## FUGITIVE FROM JUSTICE

The second clause of Article IV, section 2, of the Constitution provides that a person charged with a crime in one state, who has fled to another to escape justice, "shall, on demand of the executive authority of the state from which he fled, be delivered up. . . ." The clause makes rendition (or extradition) of fugitives from justice a duty of state officials.

Although extradition of escaped felons from one political JURISDICTION to another was long recognized as an obligation of comity in international law, the process is not automatic. Between sovereign nations, extradition normally occurs only when there is a treaty providing for it. Permanent extradition arrangements were not common before the nineteenth century.

Among the earliest standing arrangements for extradition of accused criminals was the one embodied in the articles of the New England Confederation (1643), which provided for the surrender of a fugitive to the colony from which he had fled when demand was made by two magistrates of that colony. Interstate extradition has been from the first, therefore, a feature of American FEDERALISM. The ARTICLES OF CONFEDERATION contained a provision identical to that in the Constitution. The Constitution's fugitive from justice clause was proposed in the CONSTITUTIONAL CONVENTION as part of the New Jersey Plan and was given its present form by the committee of detail.

EDMUND RANDOLPH, the first attorney general, issued an opinion that the fugitive from justice clause was not self-executing, that is, the Constitution did not specify what official was to render fugitives or establish enforcible procedures. Congress therefore, in 1793, passed a law imposing the duty of rendition on state governors.

The first test of the clause in the Supreme Court was in *Kentucky v. Dennison* (1861). The governor of Ohio had refused to honor Kentucky's demand that he render a fugitive wanted in Kentucky for aiding the escape of a slave. Chief Justice ROGER B. TANEY, for the Court, rejected Ohio's contention that the crime in question was not one contemplated by the Framers of the Constitution as within the scope of the clause; the clause extends to any act defined as a crime in the place where it was committed. The Court held that rendition of a fugitive was a MINISTERIAL ACT, one which a state governor has a duty to perform and not one over which he has any discretion. However, the Court also held that there was no power in the federal courts to com-

pel compliance with the duty. Subsequently, governors have occasionally refused, for various reasons, to deliver fugitives to the states in which they were wanted.

Fugitives' careers are complicated by other factors. In 1934, Congress made it a federal crime to travel in INTERSTATE COMMERCE with the intent to avoid prosecution or confinement. The federal crime must be tried in the state from which the fugitive fled, and one practical effect of the statute is to return fugitives to the states in which they are wanted, facilitating arrest on state charges. Interstate rendition has also been facilitated by INTERSTATE COMPACTS and by adoption in most states of the Uniform Criminal Extradition Act.

DENNIS J. MAHONEY
(1986)

## FUGITIVE SLAVERY

The problem of runaways plagued American slave societies since the seventeenth century and was not solved until the abolition of SLAVERY itself during the CIVIL WAR. Statutes of the colonial period dealing with indentured servants and slaves contained extensive provisions providing for punishment of runaways. Those relating to black slaves became increasingly severe over time, culminating in various eighteenth-century provisions permitting death, whipping, branding, outlawry, castration, dismemberment, and ear-slitting for runaways and compensation by the colony to masters of "outlying" slaves who were killed.

Provisions for interjurisdictional rendition of fugitives began with the fugitive-servant provisions of the New England Confederation (1643), but until 1787 rendition was a matter of comity between the colonies/states. The NORTHWEST ORDINANCE (1787) contained a fugitive slave/servant clause. The Constitution contained a clause providing that a "Person held to Service or Labour" shall not be freed when he absconds into another state, "but shall be delivered up." The use of the passive voice and the location of the clause in Article IV blurred responsibility for its enforcement, which caused protracted constitutional controversies in the 1840s and 1850s.

In 1793, Congress enacted the first Fugitive Slave Act, which provided that any slave holder or his "agent or attorney" could seize an alleged runaway, take him before a federal judge or local magistrate, prove title to the slave by affidavit or oral testimony, and get a certificate of rendition entitling him to take the slave back to the master's domicile. The constitutionality of the statute was repeatedly upheld by eminent authority: implicitly in JOSEPH STORY's *Commentaries on the Constitution of the United States* (1833); explicitly by Chief Justice William Tilghman of the Pennsylvania Supreme Court in *Wright v. Deacon* (1819) and Chief Justice Isaac Parker of the Massachusetts Supreme Judicial Court in *Commonwealth v. Griffin* (1823). Early abolitionist societies worked to prevent free blacks from being kidnapped through the instrumentality of the 1793 act and provided counsel to alleged fugitives. Abolitionists challenged the statute on the grounds that Congress exceeded its powers in forcing state officials to participate in federal rendition proceedings, in permitting rendition from TERRITORIES as well as states, and in interfering with the rights of the states to protect their free citizens.

Before 1843, a few states enacted PERSONAL LIBERTY LAWS that provided various procedural safeguards, such as HABEAS CORPUS or TRIAL BY JURY, to alleged fugitives. The slave states resented these and challenged their constitutionality in PRIGG V. PENNSYLVANIA (1842). Speaking for a majority of the Court, Justice Joseph Story held that: the fugitive slave clause of the Constitution was an essential compromise necessary to ratification of the Constitution by the southern states; the 1793 act was constitutional; the master had a right of recapture of a runaway slave, derived either from the COMMON LAW or from the fugitive slave clause; and the Pennsylvania personal liberty law was unconstitutional because it infringed on masters' rights protected by the federal statute. In an OBITER DICTUM, Story stated that the federal government could not constitutionally oblige state officials to participate in enforcement of the act.

Insubstantial as this suggestion was, northern states after 1842 enacted new personal liberty laws prohibiting state officials from participating in enforcement of the federal statute and prohibiting the use of state facilities such as jails for detaining runaways. Abolitionists then mounted a more sophisticated, wide-ranging attack on the constitutionality of the 1793 statute, alleging that it violated the Fifth Amendment's DUE PROCESS clause and the FOURTH AMENDMENT'S SEARCHES AND SEIZURES clause.

Congress, as part of the COMPROMISE OF 1850, enacted a new Fugitive Slave Act, which was an extension of the 1793 Act, not a replacement for it. It contained these novel features: owners and agents were authorized to seize alleged fugitives with or without legal process; certificates of rendition could be granted by federal commissioners as well as federal judges; any adult male could be drafted into a posse to assist in capture and rendition; obstruction of the act was punishable by a fine of $1,000; the commissioner's fee was $5 if he determined that the black was not a runaway, but $10 if he awarded the certificate of rendition, prompting an abolitionist's remark that the statute set the price of a Carolina Negro at $1,000 and a Yankee soul at $5.

Residents of the free states objected vehemently to the new statute. Throughout the 1850s, dramatic rescues and

recaptures of runaways provided real-life drama to accompany the sensational success of the serialized, book, and stage versions of *Uncle Tom's Cabin*, with its melodramatic runaway scene. Federal authorities and northern conservatives responded to abolitionist challenges and to rescues of fugitives by affirming the constitutionality of the 1850 Act (Chief Justice LEMUEL SHAW of the Massachusetts Supreme Judicial Court in *In re Sims*, 1851) and by demanding that resistance to enforcement of the measure be prosecuted as treason. Two efforts at doing so, however (resulting from the Jerry rescue, Syracuse, New York, 1851, and the Oberlin-Wellington rescue, northern Ohio, 1858), ended in inglorious failure for the prosecution. In general, however, the northern states attempted to comply with the statute, and most blacks seized as fugitives under the act were sent into slavery.

In a dictum in ABLEMAN V. BOOTH (1859) Chief Justice ROGER B. TANEY declared the 1850 statute constitutional, but the question was soon to be mooted. After the outbreak of the Civil War, the policies of some Union commanders discouraged the return of runaways who fled behind Union lines. Congress partially repealed the Fugitive Slave Acts in 1862 and then fully in 1864. The whole issue, and the fugitive slave clause of the Constitution, became dead letters with the abolition of slavery in 1864–1865.

WILLIAM M. WIECEK
(1986)

Bibliography

CAMPBELL, STANLEY W. 1968 *The Slave Catchers: Enforcement of the Fugitive Slave Law, 1850–1860.* Chapel Hill: University of North Carolina Press.

DUMOND, DWIGHT L. 1961 *Antislavery: The Crusade for Freedom in America.* Ann Arbor: University of Michigan Press.

HYMAN, HAROLD M. and WIECEK, WILLIAM M. 1982 *Equal Justice under Law: Constitutional Development, 1835–1875.* New York: Harper & Row.

## FULL EMPLOYMENT ACT
60 Stat. 23 (1946)

Despite the post-WORLD WAR II desire to shake off wartime economic controls, Congress passed a Full Employment Act in February 1946, establishing a new concept of the relation of the government to the national economy. The measure declared officially that it was the responsibility of the national government to insure effective operation of the country's economic system and maintain maximum employment, production, and purchasing power. Through a newly created three-person Presidential Council of Economic Advisors, the nation's economic patterns were studied and analyzed with the government responsible for evolving new controls essential to the nation's economic security. These included: tax rates designed to produce a predetermined deficit or surplus based on whether the administration sought to stimulate or cool off the economy; controlling the ease or tightness of credit; raising or lowering public spending levels; and maintaining wage and price guidelines. Such use of deficit financing, public works, and economic controls might alleviate the negative effects of the business cycle and avoid another major economic depression.

The measure was a constitutional landmark. It formally rejected the concept that the government's main role in the economic sphere was negative: to maintain a free enterprise system by preserving, through laws and court decisions, a hands-off policy toward American economic activities.

PAUL L. MURPHY
(1986)

Bibliography

BAILEY, STEPHEN K. 1950 *Congress Makes a Law: The Story Behind the Employment Act of 1946.* New York: Columbia University Press.

## FULLER, MELVILLE W.
(1833–1910)

Melville Weston Fuller, eighth Chief Justice of the United States, was appointed by GROVER CLEVELAND in 1888 and presided over the Court until his death on July 4, 1910. Fuller's twenty-two-year tenure as Chief Justice, the longest during the Court's second century, spanned one of the most significant periods of constitutional development in American history. Fuller and his associates circumscribed the rights of state criminal defendants under the FOURTEENTH AMENDMENT, established an inferior legal status for residents of the new overseas colonies, articulated the infamous SEPARATE BUT EQUAL DOCTRINE, and devised a spate of other juristic strategies for avoiding interventions on behalf of black petitioners in the fields of education and VOTING RIGHTS. At the same time the FULLER COURT made so many new departures in decisions affecting the economic order that one scholar has described its work as "the new judicialism." Fuller and his colleagues invalidated the federal income tax, emasculated the Interstate Commerce Commission, put the Court's imprimatur on the labor INJUNCTION, construed the commerce clause so that the SHERMAN ANTITRUST ACT frustrated the activities of labor unions yet failed to impede the fusion of manufacturing corporations, and elaborated the concept of SUBSTANTIVE

DUE PROCESS as a guarantor of VESTED RIGHTS and LIBERTY OF CONTRACT.

The vast bulk of the Fuller Court's work in constitutional law reflected the Chief Justice's constitutional understanding, the contours of which had been firmly fixed before Fuller came to the bench. Beginning in 1856, when he left his native Maine and settled in Chicago, Fuller was an active stump speaker and essayist for the Illinois Democratic party; he styled himself a disciple of Thomas Hart Benton and STEPHEN A. DOUGLAS long after both were dead. Fuller spoke often in favor of free trade, hard money, and equal opportunity in the market. "Paternalism, with its constant intermeddling with individual freedom," he wrote in 1880, "has no place in a system which rests for its strength upon the self-reliant energies of the people." But Fuller's version of the equal rights creed had no place for blacks. An exponent of a conservative naturalism that stressed the importance of homogeneous communities and local autonomy in American public life, Fuller believed that union and republican liberty were possible only if the federal government acquiesced in local racial arrangements on the same ground that it acquiesced in state laws regulating the status of women. He objected to the EMANCIPATION PROCLAMATION on the ground that it was "predicated upon the idea that the President may annul the constitutions and laws of sovereign states." He claimed that the THIRTEENTH AMENDMENT and Fourteenth Amendment protected only the "common rights" of individuals against discriminatory classification. And he never ceased to insist that Congress's powers to regulate persons or property were limited, derivable only from specific grants and not from any assumption of an underlying national SOVEREIGNTY. Fuller's longest, most plaintive dissents came in the INSULAR CASES (1901), where he denied Congress's power to levy tariffs on the products of colonial possessions, and in CHAMPION V. AMES (1903), where he contended that Congress could not exercise police powers on the pretense of regulating commerce.

Fuller did not grapple with the Court's role in the American system of government following his appointment as Chief Justice. For Fuller, as for Benton, Douglas, and Cleveland, the Constitution was more than a text that allocated specific powers and secured particular rights against government. The Constitution was significant above all as the repository of values so integral to the existence of republicanism that any public official who failed to protect and defend them was guilty of a breach of trust. Consequently, Fuller conceptualized the judicial function in terms of duty rather than in terms of role; his approach to judging was instinctive rather than ratiocinative. Since he had long associated the Constitution with the Democratic party's mid-nineteenth-century dogmas, Fuller impulsively enforced those dogmas as the law of the land. It was no accident that JAMES BRADLEY THAYER published his path-breaking assessment of "The Origins and Scope of the American Doctrine of Constitutional Law" five years after Fuller's appointment or that a school of jurisprudence dedicated to "judicial self-restraint" grew increasingly large and vocal during his tenure. Other critics accused his Court of aiding the rich and powerful at the expense of the poor and helpless in the name of judicial neutrality. But Fuller neither replied to them nor sought to persuade others to do so. He simply hoped it would always be said of him, as he said of Cleveland in a 1909 eulogy, that "he trod unswervingly the path of duty, undeterred by doubts, single-minded and straight-forward."

The Chief Justice's constitutional understanding may have been "single-minded and straight-forward," but the Fuller era abounds with anomalies all the same. First there is the matter of Fuller's reputation. Until EARL WARREN's day, no Court was subjected to more strident criticism for a more sustained period of time than Fuller's. Yet when Fuller died the press concurred that none of his predecessors had been so successful in earning the respect and confidence of the country. Even THEODORE ROOSEVELT's *Outlook* conceded that Fuller was "perhaps the most popular" though "not the strongest or most famous Chief Justice." Perceptions of Fuller's capacity for judicial leadership were equally anomalous. The Chief Justice voted with the majority in virtually every leading case decided during his tenure. If STEPHEN J. FIELD is to be believed, moreover, Fuller was effective in setting the tenor of conference discussion. "Field told me on the bench this morning," Fuller informed his wife in 1891, "that in the conference I was almost invariably right. He said I was remarkably quick in seizing the best point." Yet contemporary observers invariably described him as a weak Chief Justice who neither led his Court nor exerted a substantial influence on its outlook.

The greatest anomaly of the Fuller era was the doctrinal structure of "the new judicialism." When Fuller contemplated the future of the republic in a centennial address on GEORGE WASHINGTON, two fears loomed especially large. One was that "the drift toward the exertion of the national will" might ultimately result in "consolidation," which in turn would impair the "vital importance" of the states and undermine self-government by extending the sphere of legislative authority to such a degree that the people no longer controlled it. The other was "the drift . . . towards increased interference by the State in the attempt to alleviate inequality of conditions." Fuller admitted that "[s]o long as that interference is . . . protective only," it was not only legitimate but necessary. "But," he added, "the rights to life, to use one's faculties in all lawful ways, and to acquire and enjoy property, are morally fundamental rights antecedent to constitutions,

which do not create, but secure and protect them." It was imperative, he said, that Americans never grow "unmindful of the fact that it is the duty of the people to support the government and not of the government to support the people." Each of these concerns soon reappeared as major premises in the Court's construction of Congress's COMMERCE POWER and in its articulation of the liberty of contract protected by the Fifth and Fourteenth Amendments. But the Chief Justice directed a cacophonous band, not an orchestra. Decisions which, in Fuller's view, were consistent with one another looked antithetical to other observers because different Justices expressed the Court's opinions in different language.

Fuller regarded the liberty of contract doctrine as a juristic device for distinguishing between "paternalism," which he thought was unconstitutional, and legislation that "is protective only." Thus the maximum hours law for miners at issue in HOLDEN V. HARDY (1898) was valid because it protected the health and safety of workers employed in an inherently dangerous occupation. But the maximum hours law for bakery workers invalidated in LOCHNER V. NEW YORK (1905) and the ERDMAN ACT of Congress prohibiting discrimination against union members were unconstitutional because neither statute was "protective only." In Fuller's view, government had no authority to redress inequalities in the bargaining relation. "The employer and the employee have equality of right," JOHN MARSHALL HARLAN explained for the Court in *Adair v. United States* (1908), "and any legislation that disturbs that equality is an arbitrary interference with liberty of contract, which no government can legally justify in a free land." Yet in *Holden* HENRY BROWN spoke at length about the inequality of bargaining power between employees and employers; he also implied that the worker's inability to contract for fair terms provided a legitimate rationale for government intervention. Although Brown apparently retreated from that position when he joined the *Lochner* majority seven years later, the language he used in *Holden* was never expressly disapproved.

The disparity between Fuller's constitutional understanding and the language used by colleagues in opinions he assigned was even more pronounced in the commerce field. Speaking for the Court in UNITED STATES V. E. C. KNIGHT CO. (1895), Fuller held that the Sherman Act could not be constitutionally construed to require the dissolution of manufacturing corporations when the transactions deemed unlawful in the government's complaint involved neither interstate transportation nor interstate sales. "Commerce succeeds to manufacturing," he explained, "and is not part of it." Underlying this distinction were three assumptions which Fuller elaborated with varying degrees of clarity. Congress could not regulate manufacturing combinations under the commerce clause, he said, for if that were permitted there was nothing to prevent Congress from regulating "every branch of human activity." Fuller also contended that that line between manufacturing and commerce was readily ascertainable. In a spate of recent dormant commerce clause decisions the Court had invalidated state tax laws and police regulations that burdened interstate transactions yet had sustained such legislation when it burdened the production process. With the exception of state laws that burdened commerce "indirectly" and might therefore be sustained under the rule of COOLEY V. BOARD OF WARDENS (1851), then, Congress could regulate only what the states could not and vice versa. Finally, Fuller made it clear that when manufacturing firms made "contracts to buy, sell, or exchange goods to be transported among the several states," the federal government had a duty to intervene under the Sherman Act if those contracts, or agreements pursuant to them, were in restraint of trade. In *Robbins v. Shelby County Taxing District* (1887), a leading dormant commerce clause case, the Court had held that "the negotiation of sales of goods which are in another state . . . is INTERSTATE COMMERCE."

Fuller believed that his construction of Congress's powers under the Sherman Act had two important virtues. It forestalled "consolidation" and it was easy to apply. Congress could certainly reach the agreement at issue in *Addyston Pipe & Steel Co. v. United States* (1899), for there a pool had been devised to allocate the interstate distribution of goods among the cooperating firms. And in LOEWE V. LAWLOR (1908) the hatter's union had not only gone on strike, thus disrupting the production process, but had engaged in a secondary boycott to prevent the sale of hats in interstate commerce. SWIFT & CO. V. UNITED STATES (1905) posed equally simple issues for Fuller. Some thirty firms had agreed to refrain from bidding against one another when livestock was auctioned prior to its delivery for slaughter at the Chicago packinghouses. Clearly, as the Court explained, "the subject-matter [was] sales and the very point of the combination . . . to restrain and monopolize commerce among the states in respect to such sales." But Fuller had designated OLIVER WENDELL HOLMES to speak for the Court in *Swift,* and Holmes had a great deal more to say. Holmes remarked that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." He spoke metaphorically about a current of commerce, suggesting that local production and interstate marketing were not distinct processes so much as parts of a single, undifferentiated process. (See STREAM OF COMMERCE DOCTRINE.) And he cast a pall of doubt on the idea, implicit in Fuller's *Knight* opinion, "that the rule which marks the point at which State taxation or regulation becomes permissible necessarily is beyond the scope of interference by Con-

gress in cases where such interference is deemed necessary for the protection of commerce among the States."

Each of the anomalies of the Fuller years is attributable to the personality of the Chief Justice and his conception of the office. Fuller was a self-effacing, amiable man who was gracious and courteous, even deferential, to his colleagues. He made every effort to secure harmonious relations among the Justices. Fuller inaugurated the custom, still followed today, that each Justice greet and shake hands with every other Justice each morning. And he used his authority to assign opinions when in the majority not to enhance his own reputation or to elaborate favorite doctrines but to cultivate the good will of his associates. The opinion in a leading case ordinarily went to the colleague who, in Fuller's judgment, was most likely to want to speak for the Court. Cases involving questions of JURISDICTION and practice or mundane matters of private law Fuller kept to himself. Thus he let Field deliver the Court's opinions in *Georgia Banking & Railroad Co. v. Smith* (1889), a rate regulation case, and *Chae Chan Ping v. United States* (1889), the Chinese Exclusion Case. Both controversies raised issues of enormous importance to Field; for that very reason Fuller's predecessor had been disinclined to permit Field to address them for the Court.

Fuller also assumed that Brown would consider *Holden* a plum, for he had recently addressed the American Bar Association on the labor question. RUFUS PECKHAM had earned the right to speak for the majority in *Lochner* by dissenting without opinion in every previous case involving legislative regulation of the labor contract. The *Adair* decision provided Fuller with an opportunity to elaborate his own liberty of contract views in a systematic fashion, but he gave the opinion to Harlan instead. Harlan had dissented in *Lochner* on the grounds that the Court had no authority to reject the legislature's reasonable claim that long hours affected the health and safety of bakery workers. In *Adair* the government advanced no such claim and Harlan's opinion barely noticed the Court's prior liberty of contract rulings. Holmes was the logical choice for *Swift*, for the opinion would show Roosevelt that the administration had drawn spurious conclusions about Holmes's antitrust views from NORTHERN SECURITIES CO. V. UNITED STATES (1904).

The Chief Justice's obsession with courtesy also accounts for the striking differences between his own views and the Court's language in opinions which he assigned. He stubbornly defended his convictions in conference and, if necessary, in dissent. But once he had voted with the majority and had authorized an associate to speak for the Court, Fuller never criticized the work produced by a colleague. Good will among the Justices might be lost forever because of a single quarrel; incongruities of DOCTRINE could always be repaired later. Fuller let it be known that forthright yet polite concurring opinions were preferable to postconference haggling over doctrine, and silent acquiescence in the opinion of the Court was more preferable still. Fuller's own behavior set high standards for his associates; he wrote only seven concurring opinions in twenty-two years.

Underlying Fuller's management of the Court was a belief that the Chief Justice's primary duty was to convey to the public the impression that in the Court, more than in any other institution of government, reason triumphed over partisanship and statesmanship prevailed over pettiness. Fuller's success in achieving that goal while rarely speaking for the Court in landmark cases accounts for misperceptions of his capacity for intellectual leadership and for his great popularity despite persistent criticism of his Court's work. But Fuller's winning personality and the apparent anomalies it produced should not overshadow the relationship between his convictions and the new principles of law his Court articulated. Not since JOHN MARSHALL's day had the constitutional understanding of the Chief Justice been more at odds with that of voters and party leaders for such a prolonged period of time. Nevertheless, Fuller presided over a Court that made fundamentally new departures in constitutional interpretation which, in the main, incorporated the values he had imbibed during the party battles of a bygone era in American public life. Although Fuller hoped that eulogists would compare him with Cleveland, it might be more appropriate to analogize his career with that of another charming nineteenth-century Democrat. Like MARTIN VAN BUREN, he rowed to his objectives with muffled oars.

CHARLES W. MCCURDY
(1986)

Bibliography

FULLER, MELVILLE 1890 Address in Commemoration of the Inauguration of George Washington as First President of the United States, Delivered Before the Two Houses of Congress, December 11, 1889. New York: Banks & Brothers.

KING, WILLARD L. 1950 *Melville Weston Fuller: Chief Justice of the United States, 1888–1910.* Chicago: University of Chicago Press.

PAUL, ARNOLD M. 1959 *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887–1895.* Ithaca, N.Y.: Cornell University Press.

## FULLER COURT
(1888–1910)

MELVILLE W. FULLER was Chief Justice of the United States from 1888 to 1910. Lawyers and historians know the period, and its significance for constitutional law, but do not

generally identify it with Fuller's name—and for good reason. He was no leader. Fuller discharged his administrative duties effectively, and in "good humor," to borrow a phrase from OLIVER WENDELL HOLMES, one of his admirers, but he was not an important source of the ideas and vision that shaped the work of the Court.

The year of Fuller's appointment, 1888, was nonetheless an important date in the life of the Court because it marked the beginning of a period of rapid turnover. From 1888 to 1895 there were a considerable number of vacancies, and the two Presidents then in office, GROVER CLEVELAND, a Democrat, and BENJAMIN HARRISON, a Republican—whose politics were conservative and largely indistinguishable—appointed six of the Justices. One was Fuller himself. At the time of his appointment he was a respected Chicago lawyer and, perhaps more significantly, a friend of Cleveland's. The others were DAVID J. BREWER, a federal circuit judge in Kansas; HENRY BILLINGS BROWN, a federal district judge in Detroit; RUFUS PECKHAM, a judge on the New York Court of Appeals; GEORGE SHIRAS, a lawyer from Pittsburgh; and EDWARD D. WHITE, a senator from Louisiana. (LUCIUS Q. C. LAMAR and HOWELL JACKSON were also appointed during this period, but served for relatively short periods.) The intellectual leaders of this group of six were Brewer and Peckham. They appeared in their written opinions as the most powerful and most eloquent, and the Chief Justice usually turned to one or the other to write for the Court in the major cases.

In constructing their majorities, Brewer and Peckham could usually count on the support of STEPHEN J. FIELD (Brewer's uncle), who earlier had achieved his fame by protesting various forms of government regulation in the SLAUGHTERHOUSE CASES and the GRANGER CASES. In the late 1890s Field was replaced by JOSEPH MCKENNA, who was chosen by WILLIAM MCKINLEY, a President who continued in the conservative tradition of Cleveland and Harrison. Another ally of this Cleveland-Harrison group, though perhaps not so steadfast as Field or McKenna, was HORACE GRAY. Gray was appointed in 1881 by President CHESTER A. ARTHUR and served until 1902.

As a result of these appointments, the Court over which Fuller presided was perhaps one of the most homogeneous in the history of the Supreme Court. Even more striking, its composition did not significantly change for most of Fuller's tenure. Fuller died in July 1910, just months after Brewer and Peckham. It was almost as though he could not go on without them. Brown resigned in 1906 and Shiras in 1903, but their replacements—WILLIAM H. MOODY and WILLIAM R. DAY—did not radically alter the balance of power. The only important break with the past came when THEODORE ROOSEVELT appointed Oliver Wendell Holmes, Jr., to replace Gray.

At the time of his appointment, Holmes was the Chief Justice of the Supreme Judicial Court of Massachusetts and had already written a number of the classics of American jurisprudence. Brown described Holmes's appointment as a "topping off." On the Court, however, Holmes played a different role, for he had no taste for either the method of analysis or general philosophical outlook of the Cleveland-Harrison appointees. His stance was fully captured by his quip in LOCHNER V. NEW YORK (1905) that "The FOURTEENTH AMENDMENT does not enact Mr. Herbert Spencer's Social Statics." In this remark Holmes was finally vindicated in 1937 with the constitutional triumph of the New Deal, but in the early 1900s he spoke mostly for himself, at least on the bench, and had no appreciable impact on the course of decisions. No other Justice joined his *Lochner* dissent.

The other significant presence on the Court at the turn of the century was JOHN MARSHALL HARLAN. He was originally appointed by President RUTHERFORD B. HAYES in 1877 and served until 1911. He is greatly admired today for his views on the rights of the newly freed slaves and on the power of the national government. But, like Holmes, Harlan suffered the fate of a prophet: He was a loner. He had his own agenda, and though he sometimes spoke for the Cleveland-Harrison group, Harlan seemed most comfortable playing the role of "the great dissenter."

At the turn of the century, as in many other periods of our history, the Court was principally concerned with the excesses of democracy and the danger of tyranny of the majority. In one instance, the people in Chicago took to the streets and, through a mass strike, tied up the rail system of the nation and threatened the public order. President Cleveland responded by sending the army, and the judiciary helped by issuing an INJUNCTION. In IN RE DEBS (1895) Brewer, writing for a unanimous Court, upheld the contempt conviction of the leader of the union, and legitimated the use of the federal injunctive power to prevent forcible obstructions of INTERSTATE COMMERCE. For the most part, however, the people fought their battles in the legislative halls, and presented the Court with a number of statutes regulating economic relationships. The question posed time and time again was whether these exercises of state power were consistent with the limitations the Constitution imposed upon popular majorities. Sometimes the question was answered in the affirmative, but the Court over which Fuller presided is largely remembered for its negative responses. It stands as a monument to the idea of limited government.

The most important such response consists of POLLOCK V. FARMERS' LOAN & TRUST CO. when, in the spring of 1895, the Court invalidated the first federal income tax enacted in peacetime. The statute impose . . . percent tax on all

annual incomes above $4,000, and it was estimated that, due to the exemption, the tax actually fell on less than 2 percent of the population, the wealthy few who resided in a few northeastern states. The tax was denounced by JOSEPH CHOATE, in arguments before the Supreme Court, as an incident in the "communistic march," but the Court chose not to base its decision on a rule that would protect the wealthy few from redistribution. The Court instead largely relied upon that provision of the Constitution linking REPRESENTATION and taxation and requiring the apportionment among the states according to population of all DIRECT TAXES.

The Constitution identified a POLL TAX as an example of a direct tax. It was also assumed by all that a real estate tax would be another example of a direct tax, and the Court first decided that a tax upon the income from real estate is a direct tax. This ruling resulted in the invalidation of the statute as applied to rents (since the tax was not apportioned according to population), but on all other issues the Court was evenly divided, 4–4. The ninth justice, Howell Jackson, was sick at the time. A second argument was held and then the Court continued along the path it had started. Just as a tax on income from real property was deemed a direct tax, so was the tax on income from personal property (such as dividends). This still left unresolved the question whether a tax on wages was a direct tax, but the majority held that the portions of the statute taxing rents and dividends were not severable and that as a result the whole statute would fall. As Fuller reasoned, writing for the majority, if the provision on wages were severable, and it alone sustained, the statute would be transformed, for "what was intended as a tax on capital would remain in substance a tax on occupations and labors."

A decision of the Court invalidating the work of a coordinate branch of government is always problematic. *Pollock* seemed especially so, however, because the Court was sharply divided (5–4), and even more so because one of the Justices (whose identity is still unknown) seems to have switched sides after the reargument. The Justice who did not participate the first time (Jackson) voted to uphold the statute, yet the side he joined lost. It was no surprise, therefore, that *Pollock*, like *Debs*, became an issue in the presidential campaign of 1896, when William Jennings Bryan—a sponsor of the income tax in Congress—wrested control of the Democratic Party from the traditional, conservative elements and fused it with the emerging populist movement. Bryan lost the election, but remained the leader of the party for the next decade or so, during which the political elements critical of the Court grew in number and persuasiveness. By 1913 a constitutional amendment—the first since Reconstruction—was adopted. The SIXTEENTH AMENDMENT did not directly confront the egalitarian issue, any more than did the Court, but simply declared that an income tax did not have to be apportioned.

The Court's first encounter with the SHERMAN ACT of 1890 was negative and thus bore some resemblance to *Pollock*. In UNITED STATES V. E. C. KNIGHT COMPANY, also announced in 1895, just months before *Debs* and *Pollock*, the Court refused to read the Sherman Act to bar the acquisition of a sugar refinery even though it resulted in a firm that controlled 98 percent of the market and aptly was described (by Harlan in dissent) as a "stupendous combination." The Court reasoned that manufacturing was not within the reach of Congress's power over "commerce." The difference with *Pollock*, however, lay in the fact that this decision (written by Fuller) was in accord with long-standing interpretations of the COMMERCE CLAUSE, which equated "commerce" with the transportation of goods and services across state lines. And this decision was not denounced by the populists; they had no desire whatsoever to have the federal government assume jurisdiction over productive activities such as agriculture. In any event, by the end of Fuller's Chief Justiceship, *E. C. Knight* was in effect eradicated by the Court itself. The Court fully indicated that it was prepared to apply the act to manufacturing enterprises, provided the challenged conduct impeded or affected the flow of goods across state lines.

In the late 1890s, almost immediately after *E. C. Knight*, the Court, speaking through Peckham, applied the Sherman Act to prohibit open price-fixing arrangements by a number of railroads. There was little issue in these cases about the reach of the commerce power, because they involved transportation, but the Court was sharply divided over an issue that was presented by these early antitrust cases, namely, whether such an interference with what was then perceived as ordinary or accepted business practices (supposedly aimed at preventing "ruinous competition") was an abridgment of FREEDOM OF CONTRACT. At first the argument about freedom of contract was presented as a constitutional defense of the application of the Sherman Act, wholly based on the DUE PROCESS clause, but starting with Brewer's separate concurrence in UNITED STATES V. NORTHERN SECURITIES COMPANY (1903) and then again in White's opinions for a near-unanimous Court in the STANDARD OIL COMPANY V. UNITED STATES (1911) and UNITED STATES V. AMERICAN TOBACCO COMPANY (1911), the liberty issue dissolved into a question of statutory interpretation. The Sherman Act was read to prohibit not all but only "unreasonable" restraints of trade, and if a business practice was "unreasonable," then it was, almost by definition, the proper subject of government regulation.

In the late 1890s and early 1900s, antitrust sentiments were the principal cause of the growing Progressive movement. While populists extolled cooperative activity, progressives tried to use the legislative power to preserve the market and the liberties that it implied. They condemned activities (such as mergers or price fixing) that stemmed from the ruthless pursuit of self-interest but that, if carried to their logical extreme, would destroy the social mechanism that both legitimates and is supposed to control such self-interested activity. Progressives were also concerned, however, with stopping certain practices that did not threaten the existence of the market, but rather offended some standard of "fairness" or "decency" that had a wholly independent source. And they used the legislative power for this end.

The Justices were not unmoved by the moralistic concerns that fueled the progressives, but they were also determined—as they had been in *Pollock*—to make certain that the majorities were not using the legislative power to redistribute wealth or power in their favor. In some instances the Court allowed redistributive measures that benefited some group that was especially disadvantaged and thus could be deemed a ward of the state. On that theory, the Court, in a unanimous opinion by Brewer, upheld in MULLER V. OREGON (1908) a statute creating a sixty-hour maximum work week for women employed in factories or laundries. More generally, however, the Court voiced the same fears that had animated *Pollock* and insisted that there be a "direct" connection between the legislative rule and an acceptable (that is, nonredistributive) end such as health. The statute at issue in *Lochner v. New York*, for example, was defended on the ground that a work week for bakers in excess of sixty hours would endanger their health. Justice Peckham's opinion for the majority acknowledged that there might be some connection between a maximum work week and health, but suspected redistributive purposes and argued that if, in the case of bakers, this connection with health were deemed sufficient—that is, direct—the same could be said for virtually every occupation or profession: "No trade, no occupation, no mode of earning one's living, could escape this all-pervading power."

Just as it was fearful of state intervention to control the terms of employment, the Court was also wary of legislation regulating consumer prices—a practice initiated by the Granger movement of the 1870s but continued by the populists and progressives in the 1890s and the early 1900s. In this instance the Court feared that the customers would enrich themselves at the expense of the investors. The danger was, as Brewer formulated it, one of legalized theft. In contrast to cases like *Lochner*, however, the Court took up this issue with a viable and highly visible precedent on the books, namely, *Munn v. Illinois* (1877). Some consideration was given to OVERRULING the decision (there was no limit to the daring of some of the Justices), but the Court finally settled upon a more modest strategy—of cabining *Munn*.

For one thing, the *Munn* formula for determining which industries would be regulated—a formula that allowed the state to reach "any industry AFFECTED WITH A PUBLIC INTEREST"—was narrowed. In *Budd v. New York* (1892) the Court upheld the power of the legislature to regulate the rates of grain operators, but placed no reliance on the *Munn* public interest formula. Instead, it stressed the presence of monopoly power and the place of the grain operation in the transportation system. Second, the Court began to surround the rate-settling power with procedural guarantees. Legislatures were now delegating the power of setting prices to administrative bodies, such as railroad commissions, and the Court, in *Chicago,Milwaukee & St. Paul Railway Co. v. Minnesota*, (1890), required agencies of that type to afford investors a full, quasi-judicial hearing prior to setting rates. Finally, the Court ended the tradition of judicial deference initiated by *Munn* by authorizing judicial review of the rate actually set. The purpose was to insure against confiscation and to this end Brewer articulated in REAGAN V. FARMERS' LOAN & TRUST (1894) a right of FAIR RETURN ON FAIR VALUE. In that case the rate was set so low as to deny the investors any return at all. In the next case, SMYTH V. AMES (1898), there was some return to the investors, but the Court simply concluded that the rate was "too low."

*Reagan v. Farmers' Loan & Trust* and *Smyth v. Ames* were both unanimous and thrust the federal judiciary into the business of policing state rate regulations. A particularly momentous and divisive exercise of this supervisory jurisdiction occurred when a federal judge in Minnesota enjoined the attorney general of that state from enforcing a state statute that set maximum railroad rates. The attorney general disobeyed the injunction and was held in criminal contempt. Peckham wrote the opinion for the Court in EX PARTE YOUNG (1908) affirming the contempt conviction, and in doing so, constructed a theory that, notwithstanding the ELEVENTH AMENDMENT, provided access to the federal EQUITY courts to test the constitutionality of state statutes—an avenue of recourse that was to become critical for the CIVIL RIGHTS movement of the 1960s. Ironically, Harlan, who, by dissenting in the CIVIL RIGHTS CASES (1883) and in PLESSY V. FERGUSON (1896), had already earned for himself an honored place in the history of civil rights, bitterly dissented in *Ex parte Young*, because, he argued, the Court was opening the doors of federal courts to test the validity of all state statutes.

The confrontations between the Court and political branches in economic matters such as antitrust, maximum hours, and rate regulation were considerable—*Northern*

*Securities*, *Lochner*, and *Ex Parte Young* were important public events of their day. Some of these decisions were denounced by political forces, particularly by the Progressive movement, which had begun to dominate national politics. Roosevelt made his disappointment with Holmes's performance in *Northern Securities* well known ("I could carve out of a banana a judge with more backbone than that"—a comment that seems only to have either amused or pleased Holmes) and finished his presidency in 1908 with a speech to Congress sharply critical of the Court. By 1912 the Supreme Court and its work were once again the subject of debate in a presidential election, as it had been in the election of 1896. It was as though the body politic was scoring the Court over which Fuller had presided for the past twenty years. Now the critical voices were more respected and covered a wider political spectrum than in 1896, but the results were mixed.

In the 1912 election the Democratic candidate, Woodrow Wilson, beat the incumbent WILLIAM HOWARD TAFT, who was generally seen as the defender, indeed the embodiment, of the judicial power. On the other hand, Wilson was less critical of the Court than Roosevelt, who ran as a Progressive. The legislation of this period also was two-sided. The CLAYTON ACT of 1914, for example, exempted labor from antitrust legislation (thus reversing the *Danbury Hatters* decision of 1908), and also imposed procedural limits on the use of the labor injunction (thus revising *Debs*), but it did not in fact have as critical an edge as the Sixteenth Amendment of 1913. The Clayton Act did not repudiate the idea of the labor injunction altogether nor did it repudiate the rule of reason in antitrust cases. Similarly, although Congress reacted in 1910 to *Ex Parte Young*, it did so only in a trivial, near-cosmetic way, by requiring three judges (as opposed to one) to issue an injunction against the enforcement of state statutes.

In attempting to construct limits on the power of the political branches, and to guard against the tyranny of the majority as it did in *Pollock*, *Ex Parte Young*, and *Lochner*, the Court assumed an activist posture. The Justices were prepared to use their power to frustrate what appeared popular sentiments. The activist posture was, however, mostly confined to economic reforms—redistributing income, regulating prices, controlling the terms of employment—as though the constitutional conception of liberty were structured by an overriding commitment to capitalism and the market. This characterization of their work, voiced in a critical spirit in their day and in ours, is strengthened when a view is taken of the Justices' overall receptiveness to the antitrust program of the progressives, and even more when account is taken of the pattern of decisions outside the economic domain, respecting human rights as opposed to property rights. The Justices were passive about human rights—by and large willing to let majorities have their way.

A particularly striking instance of this passivity consists of their reaction to the treatment of Chinese residents. Ever since the Civil War the Chinese were by statute denied the right to become naturalized citizens, but in the late 1880s and the early 1900s their situation worsened. The doors of the nation were closed to any further IMMIGRATION, and Congress (in the Geary Act of 1892) created an oppressive regime for those who had previously been admitted. Chinese residents were required to carry passes, and failure to have the passes subjected them to DEPORTATION proceedings that were to be conducted by commissioners (rather than judges or juries) and that put them to the task of producing "at least one credible white witness." YICK WO V. HOPKINS (1886), which invalidated, on EQUAL PROTECTION grounds, a San Francisco laundry ordinance that had disadvantaged the Chinese, was already on the books. But neither it nor the passionate dissent of Brewer ("In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius fairly ask, why do they send missionaries here?") was of much avail. The Court sustained the Geary Act in *Fong Yue Ting v. United States* (1893) in virtually all its particulars.

A few years later the Court held in UNITED STATES V. WONG KIM ARK (1898) that Chinese children born here were, by virtue of the FOURTEENTH AMENDMENT, citizens of the United States. But this decision sharply divided the Court, despite the straightforward language of the amendment ("All persons born . . . in the United States and subject to the jurisdiction thereof are citizens of the United States"), and did not materially improve the quality of the process the Chinese received. There was, by virtue of *Wong Kim Ark*, a chance that a Chinese person whom the government was trying to deport was a natural born citizen, yet the Court did not even require that this claim of CITIZENSHIP be tried by a judge. Holmes wrote the opinion in these cases, *United States v. Sing Tuck* (1904) and *United States v. Ju Toy* (1905), and once again Brewer, now joined by Peckham, dissented with an intensity equal to that he had exhibited in *Fong Yue Ting*.

The same spirit of acquiescence was manifest in the cases involving the civil rights of blacks, though here it was Harlan who kept the nation's conscience. In *Plessy v. Ferguson* (1896) the Court upheld a Louisiana statute requiring racial SEGREGATION of rail cars; Harlan dissented and, borrowing a line from Plessy's lawyer, Albion Tourgee, insisted that "our Constitution is colorblind." In HODGES V. UNITED STATES (1906) the Court dismissed a federal INDICTMENT against a group of white citizens in Arkansas who forced a mill owner to discharge the blacks who had been hired. Brewer, for the majority, said that the power

of the federal government under the Civil War–Reconstruction amendments (and thus under the criminal statute in question) extended only to acts by state officials. He reaffirmed the principle of the CIVIL RIGHTS CASES of 1883 by which the Court effectively ceded to the states exclusive jurisdiction to govern the treatment of one citizen by another. In *Hodges*, Harlan, the Union general from Kentucky, replayed his dissent in the *Civil Rights* cases, and denounced this principle as a fundamental distortion of the Thirteenth and Fourteenth Amendments. And in BEREA COLLEGE V. KENTUCKY (1908) the Court, over Harlan's dissent, upheld a state law that prohibited a private educational corporation from conducting its educational programs on an integrated basis.

*Berea College* was also written by Brewer. He was mindful of the contrast with a case such as *Lochner*, where the judicial power had been used to the utmost to protect the contractual freedom of worker and employer. Accordingly, Brewer stressed the fact that this law was applicable only to CORPORATIONS, which, to pick up a theme he had previously articulated in his concurring opinion in *Northern Securities*, were merely artificial entities created by government, not entitled to the same degree of protection as natural persons. He specifically left open the question of the validity of a similar statute if it regulated the conduct of natural persons. Harlan, in an equally equivocal dissent, said that a different result might follow if the statute regulated public rather than private education. In fact, the distorting impact of public subsidies upon the articulation of civil rights had been implicitly acknowledged some years earlier in *Cumming v. Board of Education* (1899). In that case Harlan dismissed a challenge by black parents to a decision of a local county, which ran its schools on a segregated basis, to close the only black high school and to send the black students out of the county for their education.

In the 1890s and early 1900s blacks, through one scheme or another, were disenfranchised on a grand scale. The FIFTEENTH AMENDMENT was reduced to a nullity, as Jim Crow was becoming more firmly entrenched. On several occasions, the Court was presented with challenges to these electoral practices, yet it was unable to respond with the energy that it had summoned in *Pollock* or *Lochner* or *Reagan* or, even more to the point, *Debs*. Holmes, the spokesman in these early VOTING RIGHTS cases, saw judicial relief as nothing but an "empty form": "[R]elief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States." Harlan dissented, as might be expected, but so did Brewer. They realized that, because the disenfranchisement was the work of state officials, something more was at issue than the allocation of power between states and nation approved in the *Civil Rights Cases*. What was at issue, according to Brewer and Harlan, was nothing less than the integrity of the judicial power and the duty of the judiciary, to borrow a line from *Debs*, to do whatever it could to fulfill the promise of the Constitution.

The principal issue before the Court at the turn of the century was democracy and, more specifically, the determination of what limits should be placed on popular majorities. As was evident in the civil rights cases, however, the Court was also asked to allocate power between the states and the national government. The FEDERALISM issue arose in many contexts, including antitrust, labor, and rate regulation, but the one in which it proved most troublesome was PROHIBITION. By the late 1880s the prohibition movement was an active force in the states, and Fuller began his Chief Justiceship with a set of constitutional decisions that were unstable. In MUGLER V. KANSAS (1887) the Court had held that prohibition was within the STATE POLICE POWER, yet, just weeks before Chief Justice MORRISON R. WAITE's death, the Court in *Bowman v. Iowa* (1888) had also held that the states were without power to prohibit the importation of liquor from other states. The Court seemed to take away in one decision what it gave in the other. Fuller confronted this problem early on in LEISY V. HARDIN (1890), and in probably his most lasting contribution to constitutional law, fashioned an odd response. First, he announced that the commerce clause barred the states from prohibiting the sale of imported liquor (as well as its actual importation). Second, he invited Congress to intervene, and to authorize states to pass laws that would prohibit out-of-state liquor. Congress quickly responded to this invitation, and in the Wilson Act of 1890 authorized states to enact measures aimed at erecting walls to out-of-state liquor.

The state laws in question in *Leisy v. Hardin* were invalidated on the theory that they sought to regulate a matter that required nationwide uniformity. When it came to judging the congressional response, Fuller found the requisite uniformity since it was Congress that had spoken (even though it did no more than allow the states to choose) and on that theory, in *In re Rahrer* (1891), upheld the Wilson Act. In 1898, however, after some change in the composition of the Court and after the responsibility of speaking on this issue had shifted to one of the new appointees, Edward White, a sharply divided Court cut back on the Wilson Act. *Rhodes v. Iowa* (1890) held that the Wilson Act authorized a ban on sales of imported liquor within the state but not a ban on the importation itself. White insisted that any other construction would raise grave constitutional doubts as to the validity of the Wilson Act. Fuller joined White's opinion.

Over the next decade, mail order business in out-of-state liquor grew. The conflict between the Court and the prohibition movement escalated. Then in 1913 Congress,

as part of the same era that saw the Sixteenth Amendment and the Clayton Act, passed the WEBB-KENYON ACT to remove any ambiguity over what it sought to accomplish in the Wilson Act. Congress allowed states to bar both the sale and the importation of out-of-state liquor. After considerable struggle and deliberation, the Webb-Kenyon Act was upheld in an opinion by White (then Chief Justice) on the theory (if that is what it can be called) that "liquor is different." For all other goods, the common market was deemed a constitutional necessity.

The federalism issue has recurred throughout the entire history of the Supreme Court. The Court over which Fuller presided did, however, confront one issue pertaining to structure of government that was unique to the times: colonialism. The issue arose from the "splendid little war," as Secretary of State John Hay called the Spanish American War of 1898, which left the United States with two former Spanish colonies, PUERTO RICO and the Philippines. (Much earlier the United States had purchased Alaska, and in the late 1890s it had also taken possession of Hawaii.) The assumption was that the United States would hold these territories as territories, for an indefinite period, and perhaps ultimately build a colonial empire along the European model. The question posed for the Supreme Court—not just by the litigants but by the nation at large—was whether colonialism was a constitutionally permissible strategy for the United States. Technically, the case involved a challenge to a statute imposing a tariff on goods (sugar) imported from Puerto Rico into the states. The Constitution bars Congress from imposing duties on the importation of goods from one state to another, and so the issue was whether a territory was to be treated the same as a state, or, as phrased in the language of the day, whether the Constitution followed the flag.

Three positions emerged in a series of decisions beginning in 1901 known as the INSULAR CASES. The first, most in keeping with the position of the Court in *Pollock* and the other economic cases, proclaimed the idea of limited government. The government of the United States was formed and established by the Constitution, and thus it was impossible to conceive of a separation of Constitution and government. This was the position taken by Brewer, Peckham, Fuller, and Harlan. At the opposite end of the spectrum was the so-called annexation position. It proclaimed the separation of Constitution and flag, and generally left the government unrestricted in its activities in the territories; whatever restrictions there were flowed from natural law or from a small group of provisions of the Constitution deemed essential (the tariff provision was not one). This position was most congenial to the government and yet at odds with the general jurisprudence of the Court. Only Justice Brown subscribed to it.

The remaining four Justices, in an opinion written by White, put forth what was called the incorporation theory. It tried to chart a middle course, as appeared to be White's trade. It made the Constitution fully applicable to a territory, but only after that territory was incorporated into the United States. (Prior to incorporation the government would be subject only to the restraints of natural law.) Justice White's opinion also made it clear that the decision to incorporate a territory resided in Congress. In the case before it the Court decided that the territory was not incorporated, but White also acknowledged that incorporation could be done by implication and, even more to the point, he reserved for the judiciary the power to determine whether that act of incorporation had taken place.

Ultimately incorporation was adopted as the position of the Court. But this did not occur until 1905, after an insurrection in the Phillipines and other developments in the world (such as the Boer War) had made the idea of a colonial empire seem less attractive, and the danger of further imperial acquisitions seemed to have waned. In fact, incorporation became majority doctrine in *Rassmussen v. United States* (1905) in which the Court held that Alaska had been *implicitly* incorporated and that the United States was bound by the BILL OF RIGHTS in its governance of that territory. The outcome in this case affirmed the idea of limited government and JUDICIAL SUPREMACY, the hallmarks of this Court, and made it possible for Fuller, and perhaps even more significantly, for Brewer and Peckham, to abandon their absolutist position and to support the middle-of-the-road theory of White—perhaps a sign of what was to come in 1910, when Fuller died and Taft, who had once served as the commissioner in the Philippines, replaced him with White.

OWEN M. FISS
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Bibliography

DUKER, WILLIAM 1980 Mr. Justice Rufus W. Peckham: The Police Power and the Individual in a Changing World. *Brigham Young University Law Review* 1980:47–67.

——— 1980 Mr. Justice Rufus W. Peckham and the Case of *Ex Parte Young:* Lochnerizing *Munn v. Illinois. Brigham Young University Law Review* 1980:539–558.

GOODWYN, LAWRENCE 1976 *Democratic Promise: The Populist Movement in America.* New York: Oxford University Press.

KING, WILLARD 1967 *Melville Weston Fuller, Chief Justice of the United States, 1888–1910.* Chicago: University of Chicago Press.

KOLKO, GABRIEL 1963 *The Triumph of Conservatism: A Reinterpretation of American History 1900–1916.* New York: Free Press.

PAUL, ARNOLD 1960 *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench 1887–1895.* Ithaca, N.Y.: Cornell University Press.

PIERCE, CARL 1972 A Vacancy on the Supreme Court: The Politics of Judicial Appointment, 1893–1894. *Tennessee Law Review* 39:555–612.

ROCHE, JOHN 1974 *Sentenced to Life.* New York: Macmillan.
ROGAT, YOSAL 1963 The Judge as Spectator. *University of Chicago Law Review* 31:231–278.
THORELLI, HANS 1954 *The Federal Antitrust Policy: Origination of an American Tradition.* Baltimore: Johns Hopkins University Press.
TWISS, BENJAMIN 1942 *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court.* Princeton, N.J.: Princeton University Press.
WESTIN, ALAN 1953 The Supreme Court, the Populist Movement and the Campaign of 1896. *Journal of Politics* 15:3–41.
——— 1958 Stephen J. Field and the Headnote to *O'Neil v. Vermont:* A Snapshot of the Fuller Court at Work. *Yale Law Journal* 67:363–383.
WOODWARD, C. VANN 1966 *The Strange Career of Jim Crow,* rev. ed. New York: Oxford University Press.

## FULL FAITH AND CREDIT

The full faith and credit clause of the Constitution (Article IV, section 1) provides that: "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The first sentence of the clause closely tracked language contained in Article IV of the ARTICLES OF CONFEDERATION, the precursor of our present Constitution. The second sentence, which authorizes Congress to enact implementing legislation, was new. "Faith and credit" was a familiar term in English law where it had been used on occasion for some centuries to describe the respect owed to judgments and other public records. Its precise meaning, however, was obscure; it was not clear whether it was concerned only with the admission of public records, including judgments, into evidence or whether it was intended to deal likewise with the effect as RES JUDICATA to which a judgment was entitled. There is similar uncertainty with respect to the meaning which the term was intended to bear in the Articles of Confederation.

The subject of full faith and credit evoked little discussion in the CONSTITUTIONAL CONVENTION, and it seems unlikely that there was any general understanding among the delegates of what the clause was designed to accomplish. In any event, Congress was quick to exercise its power to pass implementing legislation. The initial statute was enacted in 1790 by the First Congress. It provided for the manner of authenticating the acts of the legislatures and of the records and judicial proceedings of the several states and concluded that "the said records and judicial proceedings shall have such faith and credit given to them in every court of the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken." The second congressional act, that of 1804, extended the scope of full faith and credit by requiring that the same measure of respect should be given to the records and judicial proceedings of the TERRITORIES of the United States and of the countries subject to its JURISDICTION.

Judicial decisions have now made clear many things that the full faith and credit clause and its implementing statutes left uncertain. The Supreme Court has decided that, provided the requirements of jurisdiction, NOTICE, and opportunity to be heard have been satisfied, a judgment rendered in one state, territory, or possession of the United States shall in general be given the same res judicata effect that it has in the state of its rendition. Exceptions to this rule, if any there be, are few indeed. A state cannot, for example, deny effect to a judgment on the ground that the underlying claim was contrary to its public policy. Initially, some might have wondered whether Congress was empowered to extend the protection of full faith and credit to the records and judicial proceedings of territories and possessions of the United States. The full faith and credit clause itself gives no such authority, but the Supreme Court has held that this is to be found in those provisions of the Constitution that afford the United States with JUDICIAL POWER (Article III), authorize LEGISLATION that is NECESSARY AND PROPER to execute the powers entrusted to the federal government (Article II, section 8), and provide that the Constitution and the laws and treaties of the United States shall be the supreme law of the land (Article VI). Neither the clause nor the implementing statute refer to judgments of the federal courts. The Supreme Court has filled this gap by holding that these judgments are entitled to the same respect that is owed to state judgments.

A sharp distinction must be drawn between the recognition and the enforcement of judgments. With respect to recognition, the Supreme Court has held, as has already been said, that a judgment must be given the same res judicata effect that it enjoys under the law of the state of its rendition. On the other hand, the method of enforcing a judgment is determined by the law of the state where enforcement is sought. It is therefore for this latter law to determine whether a new action in the nature of debt must be brought on the judgment or whether it can be enforced by means of a registration procedure.

Full faith and credit is not owed to the judgments of foreign countries. Each state of the United States determines for itself the measure of respect that such judgments are to receive in its courts. Perhaps because of their experience in giving full faith and credit to federal and sister state judgments, American courts are extremely liberal, perhaps the most liberal in the world, in giving respect to the judgments of other countries.

The intentions of the original Framers may have been obscure. But the Supreme Court has said that the full faith and credit clause should become "a nationally unifying force" by establishing "throughout the federal system the salutory principle of the COMMON LAW that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered."

It will have been noted that whereas the full faith and credit clause speaks of "public Acts, Records and judicial Proceedings," the implementing statutes of 1790 and 1804 required only that full faith and credit be given to records and judicial proceedings. No definite information is available on why public acts were omitted, but it can be surmised that this omission was deliberate and stemmed from the realization that the circumstances, if any, in which one state should be required to apply another's law presented considerations infinitely more complex than those involving the recognition and enforcement of judgments. (See CHOICE OF LAW.) After some years, the Supreme Court held that the clause was self-executing and that there were limited circumstances in which a state was required to apply another's laws. By and large, the Supreme Court has now withdrawn from its earlier opinions and today the command of full faith and credit with respect to public acts is slight indeed. The Supreme Court has, however, held that full faith and credit imposes limitations upon the power of a state to refuse on public policy grounds to entertain suit on a claim arising under the law of a sister state. It can be expected that in due course restrictions will likewise be placed upon a state's power to dismiss a suit on the ground that the claim involved is one for a penalty.

The implementing statute remained substantially unchanged from 1804 to 1948. In the latter year, it was amended as part of a general revision of Title 28 of the United States Code. This revision was not intended to make controversial substantive changes in the law. Nevertheless, the implementing statute was amended to require that full faith and credit be given not only to records and judicial proceedings, as had been the case heretofore, but to acts as well. It seems improbable that this change in wording will lead to any substantial change in the law. No such change was presumably intended by the revisers, and, to date, the amendment has not influenced the decisions of the courts. But, taken literally, the statute, as now worded, requires the same measure of respect for statutes that it does for judgments. There is always the possibility that at some time in the future the courts will seize upon this new language to make substantial changes in what is owed under full faith and credit to the statutes of sister states and of United States territories and possessions.

WILLIS L. M. REESE
(1986)

Bibliography

AMERICAN LAW INSTITUTE 1971 *Restatement of the Law: Conflict of Laws, Second.* Chap. 5, pages 271–348. St. Paul, Minn.: American Law Institute Publishers.

NADELMANN, KURT 1957 Full Faith and Credit to Judgments and Public Acts. *Michigan Law Review* 56:33–88.

WHITTEN, RALPH U. 1981 The Constitutional Limitations on State-Court Jurisdiction: An Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses. *Creighton Law Review* 14:499–606.

## FULL FAITH AND CREDIT
(Update)

Until recently, four propositions regarding the full faith and credit clause were beyond doubt. First, a judgment consistent with DUE PROCESS rendered by any state or federal court was entitled to recognition in any other American court; indeed, this rule was so strong it could be said to be an "Iron Law." Second, the full faith and credit clause did not require state courts to recognize the judgments of foreign courts, leaving that issue a matter of state law. Third, statutes of other states were not entitled to full faith and credit despite the plain and contrary language of both the constitutional provision itself and the general federal implementing statute. Finally, state courts did not have to enforce sister-state judgments subject to modification, such as alimony and child custody and support judgments. Although each of the propositions remains true, there has been some movement in each area.

First, the Iron Law of full faith and credit remains secure. The Supreme Court has indicated, however, that it will not look fondly upon attempts to bind strangers (nonparties) to the first litigation.

Second, many a recent state decision has refused to recognize a foreign judgment even though rendered by an impeccably fair tribunal, such as a British court, when the judgment contradicts basic American notions of public policy. Most notable have been cases seeking to enforce large awards in defamation actions entered without the significant substantive and procedural safeguards American courts provide defendants in such cases. The United States has engaged in lengthy discussions with many other countries concerning an international convention on mutual recognition of judgments. Such a convention would cause dramatic changes. At the least, enforcement of foreign judgments will be a matter for federal, not state, law. Further, American courts might be called upon to enforce judgments they find repugnant, and, conversely, deny recognition to judgments they find congenial.

Third, a few prominent scholars have suggested that the full faith and credit clause requires recognition of the statutory law of other states. Although the Supreme Court

seems unlikely to adopt this interpretation, the topic was much discussed when Congress passed the Defense of Marriage Act (DOMA). This law expressly permitted a state to disregard any state rule authorizing SAME-SEX MARRIAGE. Although DOMA was redundant under existing law, which also permits nonrecognition by one state of the statutes of other states, it gave ammunition to both camps in the larger debate. Nevertheless, the practical difficulties of working out which of two or more competing statutes is entitled to full faith and credit—a difficulty confirmed by the Court's fruitless attempts to do so during the first four decades of this century—suggest that statutory law will long remain immune from the mandate of recognition under the full faith and credit clause.

Finally, Congress has decided to use its LEGISLATIVE POWERS to implement the full faith and credit clause to help enforce orders in child custody and support cases. This bundle of LEGISLATION is remarkable for several reasons. It represents the first specific legislation implementing the full faith and credit clause in our history. Second, it runs counter to the principle that the federal government should have nothing to do with family law. Finally, the legislation overcame the strong tradition that the full faith and credit clause did not require enforcement of modifiable orders.

The success of the family law legislation, as well as the proposed covention on recognition of foreign judgments, may lead to further congressional efforts, by full faith and credit legislation, to address problems caused by our federal system of government.

WILLIAM L. REYNOLDS
WILLIAM M. RICHMAN
(2000)

Bibliography

LAYCOCK, DOUGLAS 1992 Equal Citizens of Equal and Teritorial States: The Constitutional Foundations of Choice of Law. *Columbia Law Review* 92:249–337.

REYNOLDS, WILLIAM 1994 The Iron Law of Full Faith and Credit. *Maryland Law Review* 53:412–449.

## *FULLILOVE v. KLUTZNICK*
448 U.S. 448 (1980)

The Supreme Court's fragmentation in REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978) left open the question of the constitutionality of government-imposed RACIAL QUOTAS or preferences. The following year, in UNITED STEELWORKERS V. WEBER, the Court held that a voluntary AFFIRMATIVE ACTION plan, calling for a racial quota in hiring by a private employer and approved by a union, did not violate Title VII of the CIVIL RIGHTS OF 1964. *Fullilove* reopened *Bakke*'s question: Can government impose a racial quota to remedy the effects of past discrimination?

Congress, in a public works statute aimed at reducing unemployment, provided that ten percent of the funds distributed to each state should be set aside for contracts with "minority business enterprises" (MBE). An MBE was defined as a business at least half owned by persons who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts." Nonminority contractors challenged this limitation as a denial of the Fifth Amendment's guarantee of EQUAL PROTECTION, as recognized in BOLLING V. SHARPE (1954) and later cases.

The Supreme Court held, 6–3, that the MBE limitation was valid. Three Justices, speaking through Chief Justice WARREN E. BURGER, paid great deference to Congress's judgment that the racial quota was a "limited and properly tailored remedy to cure the effects of past RACIAL DISCRIMINATION." Emphasizing the flexibility provided for the law's administration, they said that the funds could be limited to MBEs that were in fact disadvantaged because of race. The other three majority Justices, speaking through Justice THURGOOD MARSHALL, took the position they had taken in *Bakke*, concluding that the racial quota was "substantially related to . . . the important and congressionally articulated goal of remedying the present effects of past racial discrimination."

Justice POTTER STEWART, joined by Justice WILLIAM H. REHNQUIST, dissented; they would forbid any statutory racial classification, allowing race-conscious remedies only in cases of proven illegal discrimination. Justice JOHN PAUL STEVENS was not prepared to take so absolute a position but dissented here because Congress had not sufficiently articulated the reasons for its racial quota and tailored its program to those reasons.

KENNETH L. KARST
(1986)

# FUNDAMENTAL INTERESTS

The idea that some interests are fundamental, and thus deserving of a greater measure of constitutional protection than is given to other interests, is an old one. Justice BUSHROD WASHINGTON, sitting on circuit in CORFIELD V. CORYELL (1823), held that the PRIVILEGES AND IMMUNITIES clause of Article IV of the Constitution protected out-of-staters against discriminatory state legislation touching only those privileges that were "in their very nature, fundamental; which belong, of right, to the citizens of all free governments." Washington's list of such interests was limited but significant: free passage through a state; HABEAS CORPUS; the right to sue in state courts; the right to hold and dispose of property; freedom from discriminatory taxation.

Although the *Corfield* doctrine suggested an active role for the federal judiciary in protecting NATURAL RIGHTS against state interference—at least on behalf of citizens of other states—the doctrine was not embraced by the full Supreme Court during Washington's lifetime. If some hoped that the FOURTEENTH AMENDMENT's privileges and immunities clause would breathe new life into the fundamental rights theory, those hopes were disappointed in the SLAUGHTERHOUSE CASES (1873). Rejecting the theory as propounded in two eloquent dissenting opinions, the Court again refused to find any special federal constitutional protection against state invasions of preferred rights.

Within a generation, however, the Court had identified a cluster of preferred rights of property and the FREEDOM OF CONTRACT, to be defended against various forms of ECONOMIC REGULATION. The Court did not use the language of fundamental interests; for doctrinal support it avoided both privileges and immunities clauses, relying instead on a theory of SUBSTANTIVE DUE PROCESS. When this doctrinal development played out in the late 1930s, the Court abandoned its STRICT SCRUTINY of business regulation in favor of a STANDARD OF REVIEW demanding no more than a RATIONAL BASIS for legislative judgments.

Even as the Court adopted its new permissive attitude toward economic regulation, it was laying the groundwork for another round of protections of preferred rights. (See UNITED STATES V. CAROLENE PRODUCTS CO.; SKINNER V. OKLAHOMA.) When the WARREN COURT set about its expansion of the reach of EQUAL PROTECTION doctrine, it not only followed these precedents but also revived the rhetoric of fundamental interests. A state law discriminating against the exercise of such an interest, the Court held, must be justified as necessary for achieving a COMPELLING STATE INTEREST.

The Warren Court hinted strongly that it would expand the list of fundamental interests demanding strict judicial scrutiny to include all manner of claims to equality. In fact, the Court's holdings placed only a limited number of interests in the "fundamental" category: VOTING RIGHTS and related interests in the electoral process; some limited rights of ACCESS TO THE COURTS; and rights relating to marriage, the family, and other intimate relationships. Even so modest a doctrinal development evoked the strong dissent of Justice JOHN MARSHALL HARLAN: "I know of nothing which entitles this Court to pick out particular human activities, characterize them as "fundamental,' and give them added protection under an unusually stringent equal protection test."

The BURGER COURT, making Harlan's lament its theme song, called a halt to the expansion of fundamental interests occasioning strict judicial scrutiny under the equal protection clause. However, in cases touching marriage and other close personal relationships, the Court continued to promote the notion of fundamental liberties deserving of special protection—now on a substantive due process theory. (See ABORTION AND THE CONSTITUTION; ILLEGITIMACY; FREEDOM OF INTIMATE ASSOCIATION.) The notion of natural rights as part of our constitutional law is deeply ingrained. Our modern doctrines about fundamental rights are novel only in the particular interests they have termed fundamental.

KENNETH L. KARST
(1986)

Bibliography

TRIBE, LAURENCE H. 1978 *American Constitutional Law.* Chaps. 8, 11, 15, and 16. Mineola, N.Y.: Foundation Press. 000 002

## FUNDAMENTALISTS AND THE CONSTITUTION

See: Religious Fundamentalism

## FUNDAMENTAL LAW
(History)

The institution of a written CONSTITUTION as fundamental law superior to and limiting ordinary statutory law and government, which we now take for granted, was distinctively American. The concept of fundamental law embodied in a written constitution was one of the most influential and radical ideas to emerge from the AMERICAN REVOLUTION. It involved a break with the recent English past.

The notion of fundamental law has had a continuing history in Western political thought. Mid-seventeenth century Englishmen anticipated the use of a written constitution as the foundation of government, but the half-hearted experiment did not last. Fundamental law remained an ill-defined and vague term then, standing for the customary constitution as distinguished from revolutionary change. Parliamentarians accused Charles I and James II of attempting by arbitrary acts to subvert the fundamental laws of the realm, especially the traditional rights of liberty and property. Although interest in fundamental law declined in the eighteenth century, the concept never lost its attractiveness for the English. However, the growing acceptance of the omnipotence of Parliament made the idea of a single written instrument creating and limiting the government decidedly obsolete, because no restraints existed on parliamentary power, and for that reason Americans would finally repudiate the unwritten En-

glish constitution as less than the embodiment of truly fundamental law.

Reformist ideas about law, current in early seventeenth-century England, influenced the settlers of early America in the creation of their legal systems. The colonists developed a conception of the sources and nature of law that was much more expansive than the traditionally narrow conception of the English COMMON LAW. This broad approach reflected the fundamentally altered state of many aspects of law in the New World. Leaders of the American colonies also assimilated new currents in political thought which led to the conclusion that fundamental or natural law lay behind the civil law of every nation. Fundamental law became equated in their minds with natural law or the law of nature. Many residents of the New World regarded their charters from the crown as a fundamental source for their basic rights as Englishmen.

The revolutionary ferment of the 1760s and 1770s in the American colonies produced the idea of a written constitution embodying fundamental law. Americans regarded as unconstitutional several of Parliament's statutes governing America. In 1761 JAMES OTIS argued that WRITS OF ASSISTANCE were "against the fundamental Principles of Law." Like the English a century earlier, Americans gravitated toward an understanding of a constitution as something antecedent and paramount to all branches of government, including even their legislative representatives. Fundamental law controlled statutory law. A 1760 *Letter to the People of Pennsylvania* noted the relevance to forming a plan of government of "the fundamental laws and rules of the constitution, which ought never to be infringed. . . ." Writing against the authority of Parliament over the colonies in 1774, JOHN ADAMS regarded New Englanders as deriving their laws "not from parliament, not from common law, but from the law of nature and the compact made with the king in our charter. . . . English liberties are but certain rights of nature, reserved to the citizen by the English constitution, which rights cleaved to our ancestors when they crossed the Atlantic. . . ."

The process of state constitution-making that began in 1776 led to eleven written constitutions by 1780, but the basic and largely unchanging nature of such documents was not fully recognized in practice in the first decade, mainly because the first constitutions granted predominant power to the legislatures. Criticisms of excessive legislative activity in the 1780s led to general acceptance of the idea that constitutions should serve as fundamental laws to control legislatures. THOMAS JEFFERSON eagerly sought a Virginia constitution that the legislature could not easily change.

The American states gradually came to regard their written constitutions as fundamental or HIGHER LAWS superior to ordinary legislative acts—which meant restrictions on legislative power, because ordinary courts of law eventually implemented the written constitutions through a process of JUDICIAL REVIEW. The argument in favor of the innovative practice of judicial review was that fundamental laws were predominant. Thus the CONSTITUTIONAL CONVENTION that met in Philadelphia in 1787 accepted the notion that a legislature could not change a constitution without the calling of a special constitutional convention. The recognition of the new federal Constitution as a fundamental law required the calling of special ratifying conventions to avoid disputes about its legitimacy. This process of creating fundamental law through constitution-making was the source of the basic appeal of the American Revolution to continental Europeans.

DAVID H. FLAHERTY
(1986)

Bibliography

GOUGH, J. W. (1955) 1971 *Fundamental Law in English Constitutional History.* Oxford: Clarendon Press.

MELLETT, CHARLES F. (1933) 1966 *Fundamental Law and the American Revolution 1760–1776.* New York: Octagon.

WOOD, GORDON S. 1969 *The Creation of the American Republic, 1776–1787.* Chapel Hill: University of North Carolina Press.

## FUNDAMENTAL LAW AND THE SUPREME COURT

The DECLARATION OF INDEPENDENCE explicitly invoked the concept of natural justice—a HIGHER LAW, timeless and universal—as a defense against tyranny. By the late eighteenth century there had evolved a conviction that the essence of this fundamental law could at one stroke be captured in a document that would endure for ages to come. Of the original state constitutions several were declared in force without constituent ratification and some made no provision for amendment. By the time of the federal CONSTITUTIONAL CONVENTION OF 1787, these extreme forms of immutability had given way. Article V provided a formalized process of constitutional amendment, while Article VII conditioned adoption on ratification by state conventions. But the concept of written constitutions as the embodiment of fundamental law was central to the federal Constitution and to later state constitutions.

The issue whether fundamental law had other appropriate functions in the American constitutional scheme arose early among Justices of the Supreme Court of the United States, and remains critical at the Constitution's bicentenary. Debate opened in CALDER V. BULL (1798). The Connecticut legislature had set aside a court decree refusing to probate a will, granting a new hearing at which

the will was admitted. Denied relief in the state courts, the disappointed heir appealed to the Supreme Court. Outraged at the destruction of the heir's expectancy, Justice SAMUEL CHASE declared "it is against all reason and justice, for a people to intrust a legislature with such powers, and therefore, it cannot be presumed that they have done it." In Chase's view, the fundamental law could not tolerate "a law that takes property from A and gives it to B," even in the absence of constitutional prohibition. Justice JAMES IREDELL challenged this claim of extraconstitutional power to nullify legislation, insisting that if legislation is within constitutional limits "the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice."

Iredell's logic prevailed in *Calder* but in the long run could not hold the line. Chief Justice JOHN MARSHALL hedged on the question in FLETCHER V. PECK (1810), declaring that Georgia's attempt to revoke fraudulent land grants was void "either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States. . . ." Similarly, Justice JOSEPH STORY rested the Court's opinion in TERRETT V. TAYLOR (1815) upon several grounds, among them "the principles of natural justice" and "the spirit and letter of the [federal] constitution. . . ." LOAN ASSOCIATION V. TOPEKA (1874), although decided following ratification of the FOURTEENTH AMENDMENT, was grounded by Justice SAMUEL F. MILLER on extraconstitutional principles founded in fundamental law. The taking from A (by taxation) in aid of B (bridge manufacturer not a public utility) was stricken as an "unauthorized invasion of private right." In contrast, DRED SCOTT V. SANDFORD (1857) and *Hepburn v. Griswold* (1869) invalidated congressional "takings" under the Fifth Amendment's due process clause.

At the turn of the century the issue of extraconstitutional adjudication intensified with an OBITER DICTUM in ALLGEYER V. LOUISIANA (1897). With LOCHNER V. NEW YORK (1905) and *Adair v. United States* (1908), the majority of the court opened a period in which much economic and social legislation was held unconstitutional, ostensibly under the due process clauses. However, the basis given was violation of FREEDOM OF CONTRACT, for which there was no constitutional warrant. Justice OLIVER WENDELL HOLMES, in his celebrated *Lochner* dissent, insisted that the Fourteenth Amendment, properly construed, should accord with "fundamental principles as they have been understood by the traditions of our people and our law." Yet to him that amendment correctly embraced condemnation of governmental expropriation of property from A for B's benefit, as he made clear in *Pennsylvania Coal Co. v. Mahon* (1922). Justice LOUIS D. BRANDEIS there dissented, but he later invoked the identical principle under both due process clauses: the Fifth Amendment clause in *Wright v. Vinton Branch of Mountain Trust Bank* (1937) upholding a revised moratorium law, and the Fourteenth Amendment clause in *Thompson v. Consolidated Gas Utilities Corp.* (1937). In the latter he declared, "Our law reports present no more glaring instance of the taking of one man's property and giving it to another."

The *Lochner-Adair* venture into noninterpretive constitutionalism was rejected by a split vote in NEBBIA V. NEW YORK (1934), followed by unanimity in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.* (1949). Yet only two years after categorical repudiation in FERGUSON V. SCRUPA (1963), the seductive appeal of the philosophy of *Lochner* and its progeny was back, this time in the service of noneconomic interests. In GRISWOLD V. CONNECTICUT (1965) the due process clause was used to invalidate an anticontraception law; in HARPER V. VIRGINIA BOARD OF ELECTIONS (1966) the EQUAL PROTECTION clause provided the basis for invalidating the POLL TAX as a condition for exercise of VOTING RIGHTS. In both cases the majority sought to ground decision in constitutional provisions, but Justice HUGO L. BLACK, unpersuaded, accused the Court of invoking "the old "natural-law-due-process formula," which, he declared, "is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights." ROE V. WADE (1973), insulating from governmental intervention a woman's decision to have an abortion during the first trimester of pregnancy, rested upon a doctrine of "personhood" demonstrably beyond the ambit of constitutional text, context, or structure. Reaffirmed in AKRON V. AKRON CENTER FOR REPRODUCTIVE HEALTH, INC. (1983) out of respect for STARE DECISIS, *Roe* highlights the Supreme Court's continuing temptation to give constitutional force to extraconstitutional values it finds lying in the recesses of unwritten fundamental law.

FRANK R. STRONG
(1986)

Bibliography

GREY, THOMAS 1978 Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought. *Stanford Law Review* 30:843–893.

HAND, LEARNED 1960 *The Spirit of Liberty,* 3rd ed. New York: Knopf.

PERRY, MICHAEL 1982 *The Constitution, the Courts, and Human Rights,* chap. 4. Columbus: Ohio State University Press.

## FUNDAMENTAL LAWS OF WEST NEW JERSEY

See: New Jersey Colonial Charters

## FUNDAMENTAL ORDERS OF CONNECTICUT
(January 14, 1639)

Historians almost invariably refer to this document as a CONSTITUTION, indeed as the first written constitution of the modern world. It was very probably a statute enacted by a provisional legislative body representing the freemen of three towns meeting in Hartford. It was not, however, an ordinary statute, because it described a frame of government, though the statute lacked any explicit provision for amendment. The assembly or "general court" which enacted it, derived its powers from it but could and did alter it.

THOMAS HOOKER, the founder of Hartford and the leading divine of the colony, was probably the principal author of the document. In a 1638 sermon he had declared that the foundation of authority in both state and church was the free consent of the people expressed in a covenant or SOCIAL COMPACT; the people, according to Hooker, had power to appoint officers for their governance and "to set the bounds and limitations of the power and place unto which they call them." But the Fundamental Orders did not impose such limitations or reserve any rights that the government could not abridge.

The preamble stated that the inhabitants of the towns joined together to become "one Public State or Commonwealth" to preserve their churches and be governed according to laws made and administered by the officers described in the document. The people, "all that are admitted inhabitants," chose an assembly or "general court" which in turn annually elected a governor and magistrates, who together exercised the judicial power. The document empowered the general court to make laws, impose taxes, dispose of lands, and admit freemen and deputies from other towns. The general court, "the supreme power of the Commonwealth," consisted of the governor, magistrates, and deputies, who were guaranteed "liberty of speech," probably the progenitor of the SPEECH OR DEBATE CLAUSE in Article I, section 6, of the Constitution.

LEONARD W. LEVY
(1986)

Bibliography

ANDREWS, CHARLES MCLEAN 1936 *The Colonial Period of American History.* Vol. 2, pages 94–113. New Haven, Conn.: Yale University Press.

## FUNDAMENTAL RIGHTS

Inherent in the Anglo-Saxon heritage of DUE PROCESS OF LAW, the concept of fundamental rights defies facile analysis. Yet it constitutes one of those basic features of democracy that are the test of its presence. As defined by Justice FELIX FRANKFURTER, dissenting in *Solesbee v. Balkcom* (1950), it embraces "a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society. . . ." The Justice whom Frankfurter succeeded on the high bench, BENJAMIN N. CARDOZO, had spoken in *Snyder v. Massachusetts* (1934) of "principles of justice so rooted in the traditions and conscience of our people as to be deemed fundamental." Three years later, in PALKO V. CONNECTICUT, Cardozo articulated fundamental rights as "implicit in the concept of ORDERED LIBERTY." Because these rights are "fundamental," they have been accorded special protection by the judiciary, which has thus viewed them as PREFERRED FREEDOMS that command particularly STRICT SCRUTINY of their infringement by legislative or executive action. In other words, to pass judicial muster, laws or ordinances affecting fundamental rights must demonstrate a more or less "compelling need," whereas those affecting lesser rights need only be clothed with a RATIONAL BASIS justifying the legislative or executive action at issue.

But which among our rights fall on the "fundamental" and which on the "nonfundamental" side of constitutional protection? The Supreme Court commenced to endeavor to draw a dichotomous line in the turn-of-the-century INSULAR CASES: on the "fundamental" side now fell such rights as those present in the FIRST AMENDMENT (religion, FREEDOMS OF SPEECH, PRESS, ASSEMBLY, and PETITION); on the other side, styled "formal rights," fell such "procedural" rights or guarantees as those embedded in the FOURTH, FIFTH, SIXTH, SEVENTH, and EIGHTH AMENDMENTS, including, for example, TRIAL BY JURY. Justice Cardozo reconfirmed the dichotomy with his *Palko* division, adding to the roster of "fundamental" rights those of assigned counsel to INDIGENT defendants in major criminal trials and the general right to a FAIR TRIAL. He relegated other procedural rights to the nonfundamental sphere, noting that "justice would not perish" in the absence of such "formal rights" at the state level.

Cardozo's dichotomy did not apply to the federal BILL OF RIGHTS, which was wholly enforceable against federal abridgment or denial by the terms of its specific provisions. He used it instead to explain which provisions of the Bill of Rights were, and which were not, made applicable to the states by the FOURTEENTH AMENDMENT. While the "formal" rights, as he explained, do have "value and importance . . . they are not of the essence of a scheme of ordered liberty. To abolish them is not to violate a principle of justice so rooted in the traditions and conscience of our people as to be deemed fundamental. . . . Few would be so narrow as to maintain that a fair and enlight-

ened system of justice would be impossible without them." This dichotomy stood until the 1960s when, through acceleration of the process known as INCORPORATION or "absorption," most of the enumerated safeguards in the Bill of Rights were made applicable to the states by judicial decisions. The Supreme Court's rationale for these decisions was its expanding view of the nature and reach of "fundamental" rights. In practical affect, the incorporation doctrine no longer draws an appreciable distinction between "formal" and "fundamental" rights.

Yet concurrently the WARREN COURT gave new life to the notion that certain fundamental rights should be protected by heightened judicial scrutiny of laws limiting them. This development built on Justice HARLAN FISKE STONE's famed formulation in UNITED STATES V. CAROLENE PRODUCTS CO. (1938). Voting rights and rights concerning marriage, procreation, and family relationships were identified as "fundamental" and clothed with special judicial protection. The Warren Court's other chief category of occasions for strict scrutiny of legislation—that of SUSPECT CLASSIFICATIONS—can also be seen in a similar light. If race is a suspect classification, surely the reason is that no interest in civil society is more fundamental than being treated as a full-fledged member of the community.

In effect, although all but a few of the enumerated rights in the Constitution and its amendments are now regarded as *fundamental*, and thus fully entitled to thorough judicial protection and scrutiny, the Court has embraced a hierarchical or "tiered" formulation. Some fundamental rights thus remain preferred. To what extent that arrangement will stand the test of time and experience will depend chiefly upon the judiciary's perception.

HENRY J. ABRAHAM
(1986)

Bibliography

ABRAHAM, HENRY J. 1987 *Freedom and the Court: Civil Rights and Liberties in the United States*, 5th ed. New York: Oxford University Press.

CORTNER, RICHARD C. 1981 *The Supreme Court and the Second Bill of Rights.* Madison: University of Wisconsin Press.

GUNTHER, GERALD 1972 The Supreme Court: 1971 Term; In Search of Evolving Doctrines on a Changing Court: A Model for a Newer Equal Protection. *Harvard Law Review* 86:1–48.

## *FURMAN v. GEORGIA*

See: Capital Punishment Cases of 1972

## FURNEAUX, PHILIP
(1726–1783)

Philip Furneaux, an English dissenter minister, in 1770 published a volume criticizing WILLIAM BLACKSTONE's exposition of the laws of toleration. Furneaux opposed all restraints on the expression of religious or irreligious opinions. He flatly rejected the BAD TENDENCY TEST, proposing in its place punishment of overt acts only. His book of 1770 was republished in Philadelphia in 1773 under the title *The Palladium of Conscience*. Furneaux influenced THOMAS JEFFERSON and the writing of the Virginia Statute of Religious Freedom.

LEONARD W. LEVY
(1986)

# G

## GAG ORDER

"Gag order" is the press's pejorative term for a judicial order forbidding public comment, usually about a pending criminal case. Judges issue the order in an effort to prevent publicity that might make it impossible for a criminal defendant to receive a fair trial by an impartial jury. The orders came into use as a result of criticism by the American Bar Association (ABA) and others of press coverage of notorious cases such as the 1932 kidnap-murder of Charles Lindbergh's baby, the murder trial of Dr. Sam Sheppard in 1954, and the assassination of President JOHN F. KENNEDY in 1963. Each of those cases generated a torrent of publicity, much of it prejudicial to the accused's right to a fair trial.

The Supreme Court first discussed gag orders in *Sheppard v. Maxwell* (1966), when it reversed Sheppard's conviction on the ground that he had been denied DUE PROCESS OF LAW. Although the decision turned on the trial judge's failure to control "the carnival atmosphere at trial" rather than prejudicial pretrial publicity, the Court went out of its way to suggest that the judge "should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides."

This *obiter dictum* finally made pretrial publicity a constitutional, rather than merely ethical, issue. In 1968 an ABA committee promulgated new "Standards on Fair Trial and Free Press," endorsing prohibitions against release of information by lawyers and law enforcement officers. Gag orders then came into widespread use, usually over the vehement opposition of the press.

The ABA report distinguished between gag orders directed at lawyers and other trial participants and those directed at the press itself. It did not endorse the latter, fearing that restrictions on the press would violate the FIRST AMENDMENT. This distinction is still widely observed, even though gag orders against lawyers operate as prior restraints on speech just as surely as those against the press.

The constitutionality of gag orders reached the Supreme Court in NEBRASKA PRESS ASSOCIATION V. STUART (1976). In a multiple murder case a state trial judge had forbidden the local press to publish confessions or "other information strongly implicative of the accused as the perpetrator of the slayings." The Supreme Court treated the order as a prior restraint on publication, and held it unconstitutional because there was no showing that less drastic alternatives, such as postponement or sequestration of jurors, would have been insufficient to protect the defendant's right to a fair trial. The Court also doubted the efficacy of the order, because of difficulties in controlling publicity by media beyond the trial judge's jurisdiction and by word of mouth within the community.

The *Stuart* opinion stopped short of saying that all gag orders against the press are unconstitutional, but three members of the Court would have said so, and two others doubted that such orders could ever be justified. Since *Stuart*, gag orders against the press have been rare. The Court reserved judgment on orders against trial participants, however, and these continue to be issued with some frequency. The lower courts generally have upheld narrowly drawn restrictions against lawyers and defendants when judges have determined that they are necessary to

prevent a "reasonable likelihood" or "a serious and imminent threat" of interference with a fair trial.

DAVID A. ANDERSON
(1986)

(SEE ALSO: *Free Press/Fair Trial.*)

Bibliography

BARRON, JEROME A. and DIENES, C. THOMAS 1979 *Handbook of Free Speech and Free Press.* Boston: Little, Brown.

HALLAM, OSCAR 1940 Some Object Lessons on Publicity in Criminal Trials. *Minnesota Law Review* 24:454–508.

PORTMAN, SHELDON 1977 The Defense of Fair Trial from *Sheppard* to *Nebraska Press Association:* Benign Neglect to Affirmative Action and Beyond. *Stanford Law Review* 29:393–410.

## GAG RULE

See: Civil Liberties and the Antislavery Controversy; Freedom of Petition; Slavery and the Constitution

## *GALLAGHER v. CROWN KOSHER SUPER MARKET*

See: Sunday Closing Laws

## GALLATIN, ALBERT
(1761–1849)

Born in Geneva, Switzerland, Albert Gallatin came to America in 1780 and settled in western Pennsylvania. He opposed RATIFICATION OF THE CONSTITUTION because he thought the union too consolidated and the presidency too monarchial. In 1788–1789, as a delegate to the Pennsylvania state CONSTITUTIONAL CONVENTION, Gallatin spoke out for virtually universal suffrage and for popular election of United States senators.

Gallatin served three terms in the Pennsylvania Assembly (1790–1792), where he was leader of the Republican minority. He there advocated public education and INTERNAL IMPROVEMENTS. In 1792 he was secretary of a convention called to denounce ALEXANDER HAMILTON's federal whiskey excise, and he drafted a petition to Congress against the excise; but two years later he publicly opposed the violence of the WHISKEY REBELLION.

Elected to the United States Senate in 1793, Gallatin was denied his seat on the grounds that he had not been a citizen for the requisite nine years. From 1795 until 1801 he served in the House of Representatives, the last four years as Republican floor leader; he rigorously opposed the ALIEN AND SEDITION ACTS.

As secretary of the treasury under Presidents THOMAS JEFFERSON and JAMES MADISON (1801–1814) Gallatin attempted to reorganize public finance on a Republican basis by abolishing both the national debt and all internal taxes and supporting the government by revenue from the tariff and sale of public lands. That design was ultimately frustrated by the War of 1812. During his tenure at the Treasury, Gallatin introduced more efficient statistical accountability and began the practice of issuing annual reports to Congress of revenues and expenditures.

In 1814 Gallatin helped negotiate peace with Great Britain. He continued his diplomatic career as minister to France (1816–1823) and to Britain (1826–1827). He later became a bank president and devoted his leisure to the study of American Indian languages.

DENNIS J. MAHONEY
(1986)

## GALLOWAY, JOSEPH
(1731–1803)

A conservative political leader, Joseph Galloway long sought compromise with England. At the FIRST CONTINENTAL CONGRESS (1774) he proposed establishment of an "inferior and distinct" branch of Parliament in America. A president-general, chosen by the king, would preside over a "grand council," execute its acts (to which he must assent), and direct all matters concerning more than one colony. Approval by both this council and Parliament would be required for all "general acts," but each colony would retain its own government. Galloway's plan lost by one vote. Although he opposed a parliamentary tax and defended the colonies' right to govern themselves, he accepted parliamentary supremacy and understood English attempts to have the colonies share in the cost of their defense. Galloway's loyalism doomed him to exile after Philadelphia's capture by American forces in 1778.

DAVID GORDON
(1986)

Bibliography

WERNER, RAYMOND C. 1931 Joseph Galloway. In *Dictionary of American Biography.* New York: Scribner's.

## *GANNETT CO., INC. v. DEPASQUALE*
443 U.S. 368 (1978)

In *Gannett* the trial judge excluded the public, including the press, from a pretrial hearing involving evidence of an

involuntary confession in a highly publicized murder case. The Supreme Court rejected arguments that the Sixth Amendment provided a constitutional public right to attend criminal trials. Reasoning that the constitutional guarantee of a public trial is designed to benefit the defendant, not the public, the Court concluded that where the litigants agree to close a pretrial proceeding to protect the defendant's right to a FAIR TRIAL, the Constitution does not require that it remain open to the public. The Court declined to address the corollary issue whether the FIRST AMENDMENT created a right of access to the press to attend criminal trials—a question later answered affirmatively in RICHMOND NEWSPAPERS, INC. V. VIRGINIA (1980).

Justice LEWIS F. POWELL, concurring, conceded that the press had an interest, protected by the First Amendment, in being present at the pretrial hearing, but said that this interest should be balanced against the defendant's right to a fair trial. The order excluding the press from attending the pretrial hearing in *Gannett* was distinguished from the GAG ORDER in NEBRASKA PRESS ASSOCIATION V. STUART (1976) because the press was merely excluded from one source of information; it was not told what it might or might not publish.

Justice HARRY A. BLACKMUN, joined by Justices WILLIAM J. BRENNAN, BYRON R. WHITE, and THURGOOD MARSHALL, also framed the issue as one of access to the judicial proceeding, not one of prior restraint on the press. Blackmun, upon a lengthy historical examination, concluded that the criminally accused did not have a right to compel a private pretrial proceeding or trial. Only in certain circumstances, with appropriate procedural safeguards, might a court give effect to the accused's attempts to waive the right to a public trial.

KIM MCLANE WARDLAW
(1986)

(SEE ALSO: *Free Press/Fair Trial.*)

## *GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY*
469 U.S. 528 (1985)

In NATIONAL LEAGUE OF CITIES V. USERY (1976) a 5–4 majority of the Supreme Court sought to establish a new doctrinal foundation for the concept of STATES' RIGHTS. Overruling its eight-year-old PRECEDENT in *Maryland v. Wirtz* (1968), the Court held unconstitutional the application of the wage and hour provisions of the federal FAIR LABOR STANDARDS ACT to state and local government employees in areas of "traditional governmental functions" such as police and fire protection. After eight more years, *Garcia* followed *Wirtz* and overruled *Usery*—again by 5–4 vote. Justice HARRY A. BLACKMUN, whose change of vote produced this second about-face, wrote the OPINION OF THE COURT.

Lower court decisions following *Usery*, said Justice Blackmun, had failed to establish any principle for determining which governmental functions were "traditional" and essential to state sovereignty, and thus immune from impairment by congressional regulations. Justice Blackmun did not mention his own contribution to the confusion, first in his *Usery* concurrence, which suggested that the reach of Congress's power depended on the importance of the national interests at stake, and later in his votes to uphold congressional power in cases only doubtfully distinguishable from *Usery*, such as *Federal Regulatory Commission v. Mississippi* (1982) and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION V. WYOMING (1983). The reasoning in those opinions—heatedly disputed by the four *Garcia* dissenters—had sapped *Usery*'s strength as a precedent by making the states pass through a doctrinal labyrinth before *Usery* could be applied.

The aspect of the *Garcia* opinion that drew the most fire, from within the Court and from the outside, was its announcement of the Court's virtual abdication from JUDICIAL REVIEW of acts of Congress challenged as invasions of state SOVEREIGNTY. The principal remedy for such potential abuses of congressional power, said Justice Blackmun, is not judicial but political. The constitutional structure assures the states a significant role in the selection of the national government; the influence of the states was demonstrated in the federal government's financial aid to the states and in the numerous exemptions for state activities provided in congressional regulations. The Court's abdication was not complete; Justice Blackmun acknowledged that some "affirmative limits . . . on federal action affecting the States" may remain. Yet he explicitly left to another day the specification of what those limits might be.

Justice LEWIS F. POWELL wrote the main opinion for the four dissenters. He began with a lament for the demise of STARE DECISIS—which he had not mourned when *Usery* overruled *Wirtz*. The *Usery* principle had been "reiterated consistently over the past eight years," he said—not mentioning that those same opinions uniformly had sustained congressional regulations against challenges founded on *Usery*. Justice Powell argued that the majority had abandoned the FEDERALISM envisioned by the Framers, leaving the states' role to "the grace of elected federal officials." In any event, he contended, the "political safeguards of federalism" are not what they used to be. Congressional regulatory techniques have changed, increasingly displacing or commandeering the states' sovereign functions. Furthermore, although the people of the states are rep-

resented in the federal government, the state governments as institutions are apt to have little influence on national decision making, in comparison with nationwide interest groups.

Some of the dissenters left no doubt that they expect the *Usery* principle to return when members of the *Garcia* majority are replaced by new Justices more attuned to the symbolism of states' rights. But symbolism may be all that is left of that once vital principle, whatever the future may hold for the *Garcia* precedent. First, Congress can dragoon the state into its regulatory schemes as it did in HODEL V. VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION (1981): regulating private conduct directly, but allowing a state to opt out of the federal regulation by adopting its own law under federal guidelines. Furthermore, if Congress wants to buy state sovereignty, it will find willing sellers. By placing conditions on FEDERAL GRANTS-IN-AID—which now amount to about one-fifth of state budgets—Congress can achieve through the spending power virtually anything it might achieve by direct regulation. Even if *Garcia* should be overruled and *Usery* reinstated, Congress can offer subsidies that are vital to local transit authorities or police departments, conditioned on promises to pay transit and police employees the federal minimum wage. The passion of the Justices on both sides may indicate that in these cases the symbolism is what counts.

KENNETH L. KARST
(1986)

Bibliography

FIELD, MARTHA A. 1985 *Garcia v. San Antonio Metropolitan Transit Authority:* The Demise of a Misguided Doctrine. *Harvard Law Review* 99:84–118.

VAN ALSTYNE, WILLIAM W. 1985 The Second Death of Federalism. *Michigan Law Review* 83:1709–1733.

## GARFIELD, JAMES A.
(1831–1881)

A CIVIL WAR general, James Abram Garfield served in Congress from 1863 until 1881, when he became President of the United States. In Congress Garfield was a skilled parliamentarian and self-taught expert on finance. After 1868 he was one of the most powerful Republicans in Congress, and served as minority leader from 1876 until 1880. In a period of pervasive corruption Garfield remained relatively untainted. In 1876 he helped frame the legislation that led to the COMPROMISE OF 1877 that settled the disputed presidential election. He served on the electoral commission, supporting President Rutherford B. Hayes on every issue. In 1880 the Ohio legislature chose him for the United States SENATE, for a term beginning in 1881. However, that summer he became a compromise candidate for the presidency, after the Republican convention deadlocked. As President, Garfield attempted to root out corruption in the Post Office Department and the notorious New York customs house. Garfield's insistence that he, as President, should make all appointments, regardless of long-standing notions of senatorial privilege, led ROSCOE CONKLING of New York to resign from the Senate. In July 1881 Garfield was shot and killed by a disappointed office seeker who shouted that he was a party "stalwart" and that now CHESTER A. ARTHUR would be President. In the wake of this tragedy Arthur continued Garfield's investigation of the Post Office and secured the passage of the first civil service reform law, the PENDLETON ACT.

PAUL FINKELMAN
(1986)

Bibliography

PESKIN, ALAN 1978 *Garfield.* Kent, Ohio: Kent State University Press.

## GARLAND, AUGUSTUS H.
(1832–1899)

Augustus Hill Garland, a WHIG lawyer, opposed SECESSION in 1861 but represented Arkansas in the Confederate Congress throughout the CIVIL WAR. He won readmission to the federal bar in *Ex parte Garland* (1867), one of the TEST OATH CASES; but the same year the United States Senate, to which he had been elected, denied him his seat. He served as governor of Arkansas (1874–1876) and United States senator (1877–1885) before becoming President GROVER CLEVELAND's attorney general (1885–1889). He was later a prominent lawyer practicing in Washington, D.C. He was co-author of a treatise on federal court JURISDICTION.

DENNIS J. MAHONEY
(1986)

## *GARLAND, EX PARTE*

See: Test Oath Cases

## GARRISON, WILLIAM LLOYD
(1805–1879)

William Lloyd Garrison edited America's leading abolitionist newspaper, *The Liberator* (1831–1865), and helped found the New England Anti-Slavery Society (1831) and the American Anti-Slavery Society (1833; president,

1843–1865). Garrison believed pacifism, nonresistance, and moral suasion could end SLAVERY. He argued that the Constitution supported slavery and was "a covenant with death and an agreement with Hell." Thus, he refused to vote or voluntarily support civil government, and after 1843 Garrison and his followers advocated a peaceful dissolution of the Union under the slogan "No Union with Slaveholders." More moderate abolitionists rejected Garrison's analysis of the Constitution, his opposition to antislavery political candidates and parties, and his extreme tactics, such as publicly burning the Constitution and declaring "So perish all compromises with tyranny." Despite his disunionist beliefs, he ultimately gave tacit support to ABRAHAM LINCOLN and the Union during the CIVIL WAR.

PAUL FINKELMAN
(1986)

Bibliography

THOMAS, JOHN L. 1963 *The Liberator.* Boston: Little, Brown.

## *GARRITY v. NEW JERSEY*
385 U.S. 493 (1967)

Justice WILLIAM O. DOUGLAS, for a 6–3 majority, ruled that coercion had tainted confessions exacted from police officers suspected of fixing traffic tickets, when they were made to choose between exercising their RIGHT AGAINST SELF-INCRIMINATION and retaining their jobs. The dissenters argued that the state could require police officers to assist in detecting unlawful activities, that the officers' confessions were not involuntary, and that their constitutional right was not burdened.

LEONARD W. LEVY
(1986)

## *GAULT, IN RE*
387 U.S. 1 (1967)

*In re Gault* is the Supreme Court's most important landmark concerning juveniles, both because of its specific requirements for delinquency proceedings and because of its unequivocal declaration of the broad principle that young persons, as individuals, have constitutional rights of their own. Rejecting the informality that had long characterized state juvenile courts, the Supreme Court held that DUE PROCESS OF LAW required four procedural safeguards in the adjudicatory (or guilt-determining) phase of delinquency proceedings: adequate written NOTICE to the juvenile and his parents of the specific charges; notification of the RIGHT TO COUNSEL, with appointed counsel for those who lack the means to retain a lawyer; the right of CONFRONTATION and cross-examination of witnesses; and the notification of the RIGHT AGAINST SELF-INCRIMINATION. For the first time the Supreme Court declared boldly, in a seminal opinion by Justice ABE FORTAS, that "whatever may be their precise impact, neither the FOURTEENTH AMENDMENT nor the Bill of Rights is for adults alone."

The facts of the case dramatically suggested the risks of procedural informality and "unbridled discretion," which the Court saw as a poor substitute for "principle and procedure." Fifteen-year-old Gerald Gault was found to be a delinquent and was committed for up to six years to the Arizona Industrial School for an offense that would have subjected an adult to a small fine and no more than two months' imprisonment. Neither Gerald nor his parents were ever served with a petition that disclosed the factual basis of the juvenile court proceedings. It was claimed that Gerald and a friend had made an obscene telephone call to a neighbor who never appeared in the proceedings. Although the judge subsequently reported that Gerald had made some sort of admission to him, no transcript was made of what was said at either of Gerald's two appearances before the judge, nor was Gerald offered counsel.

Although a few states had anticipated the Court's rulings in *Gault* by adopting new juvenile justice acts that provided greater safeguards, procedural informality had characterized most juvenile courts since their creation around 1900. This was typically justified on two interrelated grounds. First, the goal of JUVENILE PROCEEDINGS was said to be treatment and rehabilitation, not punishment or deterrence. Second, investigation, diagnosis, and treatment required individualized determinations of what was best for each particular child. Legalistic formalities were seen as inconsistent and counterproductive in a benevolent and paternalistic institution committed to the rehabilitative ideal. State courts had refused to impose safeguards that "restrict the state when it seeks to deprive a person of his liberty," typically with conclusory statements that minors had no interest in liberty (because they would be subject in all events to parental control) or that delinquency proceedings were civil, rather than criminal, because their purpose was not punitive.

*Gault* rejected these traditional justifications. Pointing to various empirical studies, the *Gault* majority challenged the rehabilitative effectiveness of the juvenile justice system by suggesting that juvenile crime had increased since the establishment of the juvenile courts; questioned the value of procedural informality as a means to shape desirable attitudes about justice in the young people caught up by the system; and disparaged the significance, in terms of loss of liberty, of the difference between detention in a "home" or "school" after a finding of delinquency and incarceration after conviction of a crime. The strength of

much of the social science evidence cited by the Court has been subsequently challenged, but the Court's willingness to attach substantial weight to the interest of a young person in avoiding the serious practical consequences of an erroneous determination of delinquency is certainly justified.

The Court did not suggest in *Gault* or in its subsequent decisions that the Constitution requires the state to treat a juvenile accused of delinquency in all respects like an adult accused of a similar act. The Court has extended other procedural safeguards to juveniles in delinquency proceedings—in IN RE WINSHIP (1970) it required proof beyond a REASONABLE DOUBT, for example, and in *Breed v. Jones* (1975) it held that the prohibition against DOUBLE JEOPARDY applied—but it has refused, as in MCKEIVER V. PENNSYLVANIA (1971), to require TRIAL BY JURY in delinquency proceedings. Although the traditional goals of the juvenile courts do not justify the absence of certain safeguards, *Gault* and its progeny suggest that the Constitution does not require abolition of the separate juvenile court system with some distinctive procedural features. Nor does *Gault* require the states to impose identical sanctions on minors and adults after a determination that a criminal statute has been violated. Indeed, by emphasizing that the procedural requirements extended only to the adjudicatory phase, and not to the dispositional phase, of delinquency proceedings, the Court in *Gault* argued that its decision did not threaten the emphasis juvenile courts have traditionally claimed to place on individualized treatment and rehabilitation.

ROBERT H. MNOOKIN
(1986)

(SEE ALSO: *Children's Rights.*)

Bibliography

STAPLETON, W. VAUGHAN and TEITELBAUM, LEE E. 1972 *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts.* New York: Russell Sage Foundation.

## *GELBARD v. UNITED STATES*
408 U.S. 41 (1972)

The Supreme Court held that a witness who refuses to answer a GRAND JURY question derived from illegal electronic surveillance may not be held in CONTEMPT. Title III of the OMNIBUS CRIME CONTROL AND SAFE STREETS ACT excludes from grand jury proceedings any EVIDENCE obtained from illegal surveillance and a witness need not answer a question based on such information.

HERMAN SCHWARTZ
(1986)

## *GELPCKE v. DUBUQUE*
1 Wallace 175 (1864)

In his introduction to the 1864 reports of the Supreme Court, John Wallace, the Supreme Court reporter, remarked that in *Gelpcke* the Court imposed "high moral duties . . . upon a whole community seeking apparently to violate them." The community was Dubuque, Iowa, which attempted to enhance its property values by issuing municipal bonds, backed by local taxes, to promote railroad development that would put Dubuque on the map. Dubuque acted on authority granted by the Iowa legislature, although the state constitution prevented the legislature from investing in private railroads, as Dubuque did, and from increasing the state's indebtedness as much as the legislature authorized the city to increase its indebtedness. Responding to railroad shenanigans and the objections of taxpayers, Dubuque repudiated its debt, and the Iowa Supreme Court held that the legislature had violated the state constitution when authorizing Dubuque to issue the bonds.

Bondholders, seeking federal relief against default, persuaded the Supreme Court to rule that a contract once valid under state law cannot have its validity or obligation impaired by the subsequent action of a state court. Justice NOAH H. SWAYNE, speaking for all but Justice SAMUEL F. MILLER, who dissented, refused to accept the state supreme court's ruling on a matter of state constitutional law. Swayne took the high ground by declaring, "We shall never immolate truth, justice, and the law, because a state tribunal has erected the altar and decreed the sacrifice." However, the ground of decision was not clear, and the Supreme Court construed a state judicial decision as a "law," contrary to conventional usage.

Justice OLIVER WENDELL HOLMES later remarked that the decision in *Gelpcke* took the Court a good while to explain. In fact, the explanation subsequently provided by the Court was that the state judicial decision had violated the CONTRACT CLAUSE. However construed, *Gelpcke* was a means of the Supreme Court's expansion of its JURISDICTION, either under the doctrine of SWIFT V. TYSON (1842) or under the contract clause, which had previously applied only to statutes, not judicial decisions. And the Court established a basis for curbing municipal repudiation of debts and protecting municipal bondholders.

LEONARD W. LEVY
(1986)

# GENDER DISCRIMINATION

See: Sex Discrimination

## GENDER RIGHTS

Strictly speaking, there can be no distinct class of gender rights under the Constitution, but only the same rights for all persons, or all citizens, regardless of sex. The Constitution secures rights only of individuals, not of groups, and makes no distinction between men and women.

No nouns or adjectives denote sex in the Constitution except for the use of the word "male" in the FOURTEENTH AMENDMENT, in a provision no longer operative, which never provided any positive authority for SEX DISCRIMINATION.

There are, to be sure, many masculine pronouns in the text, but they have always been understood to be genderless; to hold that these pronouns refer only to men would mean, unless the Constitution is amended, that women are ineligible to serve in the Congress or the presidency, that a female FUGITIVE FROM JUSTICE fleeing to another state need not "be delivered up" (Article IV, section 2), and that accused women do not have the RIGHT TO COUNSEL—absurdities that have not been indulged in by courts or responsible scholars.

The only mention of sex is in the NINETEENTH AMENDMENT, forbidding denial of the right of citizens to vote "on account of sex," but its ratification did not require any change in the text of the Constitution. If the EQUAL RIGHTS AMENDMENT, forbidding denial of "equality of rights . . . on account of sex," had been ratified, the same would have been true: nothing already in the text of the Constitution would have been altered, because there is in it no positive authorization for denial of the right to vote, or of any other right, "on account of sex."

There is another indication that no distinction between men and women is intended in the Constitution. For purposes of determining representation, "the whole number of persons" is to be counted (Article I, section 2, as amended by the Fourteenth Amendment, section 2)—that is, females and males equally. This contrasts strikingly with similar provisions in other documents of the time; for example, the NORTHWEST ORDINANCE of 1787 provides that only "male inhabitants" be counted for purposes of representation.

The fact that there has never been any constitutional justification for denying rights or privileges to any person or citizen on account of sex has not prevented legislatures and courts from discriminating against women. Judicial discrimination often relied on sources and doctrines extraneous to the Constitution and, ironically, was frequently expressed in terms of protective concern for the well-being of women. In BRADWELL V. ILLINOIS (1873), Justice JOSEPH P. BRADLEY gave classic form to the pronouncement that the denial of a woman's right was for her own good: "The civil law as well as nature herself has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, women's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."

To justify his denial that women have the same constitutional right as men "to engage in any and every profession, occupation, or employment," Justice Bradley cited "the civil law," "nature herself," "the divine ordinance," "the nature of things," "the law of the Creator," and, finally, "the general constitution of things"—but not the Constitution of the United States.

Well past the middle of the twentieth century, this combination of protective concern, extraneous doctrines, and silence about the text of the Constitution served as the foundation of sex discrimination in many areas, including employment, PROPERTY RIGHTS, jury duty, voting, pensions, EDUCATION, and WELFARE BENEFITS. The decisive turn around finally began in the courts in *Reed v. Reed* (1971) and FRONTIERO V. RICHARDSON (1973). But the correction of centuries of denying women their rights does not establish gender rights, which, like all other group rights, lacks constitutional justification.

In the series of cases since Reed, the Supreme Court sought for the appropriately strict "level of judicial scrutiny of legislation" under the Fourteenth Amendment's equal protection clause. The effort to afford EQUAL PROTECTION OF THE LAWS is a belated acknowledgment that there is no affirmative basis in the Constitution, and never was, for treating the rights of one person differently from the rights of others on account of sex.

ROBERT A. GOLDWIN
(1992)

(SEE ALSO: *Woman Suffrage; Women in Constitutional History.*)

Bibliography

GOLDWIN, ROBERT A. 1990 *Why Blacks, Women, and Jews Are Not Mentioned in the Constitution.* Washington, D.C.: Aei Press.

WORTMAN, MARLENE STEIN 1985 *Women in American Law.* Vol. 1. New York: Holmes and Meier.

## GENERAL LAWS AND LIBERTIES OF MASSACHUSETTS

See: Massachusetts General Laws and Liberties

## GENERAL WARRANT

General warrants command either apprehension for unstated causes or the arrest, search, or seizure of unspeci-

fied persons, places, or objects. Since the *Five Knights Case* (1628) English courts have consistently disallowed the first category of warrant, although its use survived a century later. The general warrant of the second sort, which allowed its bearer to search wherever or seize whomever or whatever he wished, was more common. It existed by the early fourteenth century and found ever growing applications. The Star Chamber and "High Commission" of the Tudor-Stuart period used such warrants vigorously to suffocate political and religious dissent. By the middle of the eighteenth century, general warrants were or had also been used to combat vagrancy, regulate publications, impress persons into the army and navy, pursue felons, collect taxes, and find stolen merchandise. A close relative, the WRIT OF ASSISTANCE, allowed customs officers to search all houses in which they suspected concealed contraband.

Beginning with the WILKES CASES (1763–1770), British courts undermined the use of general SEARCH WARRANTS by secretaries of state. Although they were widely used in colonial and revolutionary America, eight state constitutions of 1776–1784 forbade them, as does the FOURTH AMENDMENT to the federal Constitution.

WILLIAM CUDDIHY
(1986)

Bibliography

CUDDIHY, WILLIAM and HARDY, B. CARMON 1980 A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution. *William and Mary Quarterly* 37: 371–400.

## GENERAL WELFARE CLAUSE

With no enforceable power to tax under the ARTICLES OF CONFEDERATION, Congress "requisitioned" funds from the states each of which then decided how and whether to raise its share of the confederation's needs. Uneven responses brought resentment among the states and frequent frustration of congressional policies. Dissatisfaction with this system was a leading cause of the failure of the Articles. As a remedy, the CONSTITUTIONAL CONVENTION proposed to empower the new Congress to "lay and collect Taxes, Duties, IMPOSTS, and EXCISES, to pay the Debt and provide for the common Defense and general welfare of the United States." Some ANTI-FEDERALISTS said this language defeated the principle of ENUMERATED POWERS because it could be read to authorize action for the common defense and general welfare by any legislative means whatever. JAMES MADISON disclaimed this interpretation in THE FEDERALIST #41, saying that the general welfare clause conferred power to tax and spend only for purposes indicated by the enumerated powers that followed in Article I, section 8. Congress could tax and spend for armies and navies, for example, but not for purposes reserved to the states.

Later, during conflicts with the Jeffersonians over national economic policy, ALEXANDER HAMILTON argued that the enumerated powers did not exhaust the concept of "the general welfare" and that Congress could tax and spend for purposes beyond the enumerated powers, so long as it acted in the general interest. Constitutional history has thus produced three theories of the general welfare clause: as the Anti-Federalists charged, that Congress could claim unrestricted power to act in the general interest; that Congress could tax and spend only for purposes indicated by the enumerated powers, as Madison claimed; and that Congress could tax and spend for purposes beyond the enumerated powers, as Hamilton claimed. In OBITER DICTUM, the Supreme Court adopted the Hamiltonian theory in UNITED STATES V. BUTLER (1936).

In *Butler*, the court voided a federal tax as part of an unconstitutional scheme to use the spending power to invade powers reserved to the states. After first declaring that Congress could tax and spend for purposes beyond the enumerated powers, the Court then ignored the Hamiltonian theory by holding the act unconstitutional as an attempt to invade an area (agricultural production) beyond Congress's enumerated powers. Later decisions that were friendlier to the NEW DEAL effectively reversed this holding and rescued the Hamiltonian theory. The Court enlarged the scope of the COMMERCE CLAUSE by affirming Congress's authority directly to regulate any social or economic activity with an "effect" upon INTERSTATE COMMERCE, regardless of Congress's motives relative to the reserved powers of the states. (See UNITED STATES V. DARBY LUMBER COMPANY, 1941; IMPLIED POWERS.) In SONZINSKY V. UNITED STATES (1937) the Court refused to scrutinize Congress's motives for taxing socially harmful activities so long as the tax produced some revenue. And in STEWARD MACHINE COMPANY V. DAVIS (1937) the Court upheld the taxing scheme that was the foundation of the Social Security system, irrespective of any other enumerated power of Congress.

Such decisions eliminated doubts about the Court's acceptance of the Hamiltonian theory, and the era following WORLD WAR II saw a great increase in federal regulatory taxes and subsidies conditioned on conformity with policies (such as racial integration) which some state and local governments otherwise would more actively have opposed. The Hamiltonian theory has also supported federal regulatory taxes on narcotics, gambling, and other morally injurious practices. (See UNITED STATES V. KAHRIGER.) No development has had a more corrosive effect on the old idea that some concerns lay beyond the reach of Congress.

Given the broad regulatory uses of the TAXING AND SPENDING POWERS, the triumph of Hamilton's theory vindicated the Anti-Federalists' predictions of what the general welfare clause eventually would become.

SOTIRIOS A. BARBER
(1986)

(SEE ALSO: *National Police Power.*)

Bibliography

BARBER, SOTIRIOS A. 1984 *On What the Constitution Means.* Baltimore: Johns Hopkins University Press.

## GENETIC PRIVACY

See: DNA Testing and Genetic Privacy

## *GEORGIA v. STANTON*

See: *Mississippi v. Johnson*

## *GERENDE v. BOARD OF SUPERVISORS OF ELECTIONS*
341 U.S. 56 (1951)

A Maryland statute barred from public employment or office anyone who belonged to a "subversive" organization. In this unanimous PER CURIAM OPINION, the VINSON COURT sustained the law upon an understanding that the term "subversive" was limited to those somehow engaged in the attempt to overthrow the government by force or violence. The Court assumed that an affidavit negating such activity would satisfy the state's LOYALTY OATH required of those running for office.

MICHAEL E. PARRISH
(1986)

## GERRY, ELBRIDGE
(1744–1814)

A Massachusetts merchant, Elbridge Gerry was particularly active in Revolutionary politics and served as a delegate to the Second Continental Congress. He signed the DECLARATION OF INDEPENDENCE as an early and vigorous supporter of separation from a government and people that he believed had become "corrupt and totally destitute of Virtue."

Gerry devoted most of his life to public service. He represented Massachusetts in Congress from 1779 to 1785, signing the ARTICLES OF CONFEDERATION. As a Massachusetts delegate to the CONSTITUTIONAL CONVENTION OF 1787, Gerry was, at the outset, a moderate nationalist who favored a strong central government although emphasizing the need for certain "federal features." Gerry opposed democracy—"the evils we experience flow from the excess of democracy"—and he often supported his own business interests. Indeed, he early recognized the need for congressional power "competent to the protection of" FOREIGN COMMERCE in order for Congress to "command reciprocal advantages in trade." A firm believer in republicanism, Gerry insisted on the need for a SEPARATION OF POWERS and the inclusion of additional checks on the national government. He chaired the committee that formulated the GREAT COMPROMISE and helped secure its adoption. The absence of a BILL OF RIGHTS, however, and the concentration of power in the federal government led Gerry to oppose RATIFICATION OF THE CONSTITUTION.

Elected to Congress in 1789, he served for four years as a strong supporter of ALEXANDER HAMILTON's financial program. Gerry retired from Congress in 1793 and was elected Republican governor of Massachusetts in 1810 and 1811. He so opposed the idea of legitimate opposition that his second term saw the passage of a bill radically redistricting the state to assure the Republicans greater representation in the state legislature than their actual strength justified. This political technique was satirized in a cartoon showing one oddly shaped district in the form of a salamander, hence the name GERRYMANDER. JAMES MADISON selected Gerry as his vice-presidential running mate in 1812, and until his death in 1814 Gerry championed Madison's administration.

DAVID GORDON
(1986)

Bibliography

BILLIAS, GEORGE A. 1976 *Elbridge Gerry, Founding Father and Republican Statesman.* New York: McGraw-Hill.

## GERRYMANDER

A gerrymander is a political district drawn to advantage some and disadvantage others: candidates, parties, or interest groups. The name comes from a particularly spectacular partisan apportionment engineered by ELBRIDGE GERRY in 1812. Technically, any winner-take-all district can be called a gerrymander, for district lines inevitably favor some against others. But common usage limits the term to districts deemed unnatural in form or unfair in intent or effect. The Supreme Court boldly and unanimously attacked a blatant racial gerrymander in GOMILLION V. LIGHTFOOT (1960), but it has been almost uniformly acquiescent since then.

*Gomillion* voided an "uncouth, 28-sided figure" surgically excluding almost all of the blacks in Tuskegee, Alabama, from voting in the city while retaining every white. It cleared the way for BAKER V. CARR (1962) and the REAPPORTIONMENT revolution. But, apart from a few cases of municipal expansion challenged under the VOTING RIGHTS ACT OF 1965, the Court has never since been able or willing to find "cognizable discrimination" in gerrymandering cases.

The leading cases, *Wright v. Rockefeller* (1964) and UNITED JEWISH ORGANIZATIONS V. CAREY (1977), both involved packing of New York black and Puerto Rican voters into what dissenting Justice WILLIAM O. DOUGLAS (in *Wright*) called a "racial borough." Its packed nonwhite majority, if unpacked and spread to adjacent districts, might have formed two or three nonwhite majorities.

But it is difficult to tell clearly what packing does to a group's power, because "wasted" surplus votes in good years can be badly needed in bad years. In *Wright* the black plaintiffs wanted more "effective" black votes through dispersion, while the black incumbent, siding with the defendants, argued for strength through concentration: better one safe seat than two marginal ones. The baffled Court claimed it could find "no evidence of racial discrimination" in the obvious gerrymander, but the Court's real lack was simple rules for making sense of the evidence it had.

It is also impossible to equalize everyone's effective REPRESENTATION, short of ordering proportional representation, which could be a cure worse than the disease. In *UJO v. Carey* the United States attorney general had found the ethnically packed district discriminatory under the Voting Rights Act and ordered the state to create two more districts with nonwhite majority quotas. To do so, the state had to dismember a Hasidic Jewish community, which objected to the explicit RACIAL QUOTAS as a violation of the FOURTEENTH and FIFTEENTH AMENDMENTS. But the Court, ignoring the constitutional attack, argued that the racial quotas served the purposes of the Voting Rights Act by enhancing the black vote and did not involve "cognizable discrimination" against the Jews, who, as "whites in Kings County," might be submerged in their own districts but would have vicarious "fair representation" by white representatives of other districts.

Only in a few cases under the Voting Rights Act, with its heavy statutory burden on the state to prove nondiscrimination, has the Court intervened against racial gerrymandering since *Gomillion*. In constitutional terms, partisan and incumbent-favoring gerrymanders are deemed tolerable, perhaps because political districting is indeed a "mathematical quagmire" ill-suited for resolution with simple rules. The Court all but announced its retreat in *Gaffney v. Cummings* (1973).

Gerrymandering, largely unregulated, has flourished in reapportionment years. Theoretically, it could give the dominant party a manifold advantage over a numerically equal rival. In practice, it gives a thirty to forty percent advantage to the dominant party in seats per vote, often rewarding a minority of votes with a majority of seats.

Once it was hoped that objective standards—of compactness, contiguity, or competitiveness—or impartial judges or commissioners would curb gerrymandering. But standards have been largely ineffectual and judges and commissioners overwhelmingly partisan. A few states have limited partisan gerrymanders with bipartisan commissions, and roughly half the states have found protection through the happenstance of divided, two-party control of the elected branches. Ironically, despite *Gomillion* and the reapportionment revolution, the chief protection against gerrymandering has not come from courts but from the "weak" SEPARATION OF POWERS, and multiplication of competing factions—that court intervention was supposed to supplant.

WARD E. Y. ELLIOTT
(1986)

Bibliography

DIXON, ROBERT G. 1968 *Democratic Representation.* New York: Oxford University Press.

ELLIOTT, WARD E. Y. 1975 *The Rise of Guardian Democracy: The Supreme Court's Role in Voting Rights Disputes, 1845–1969.* Cambridge, Mass.: Harvard University Press.

SICKELS, ROBERT J. 1966 "Dragons, Bacon Strips, and Dumbbells—Who's Afraid of Reapportionment?" *Yale Law Journal* 75:1300–1308.

## GERRYMANDER
(Update)

By the mid-1980s the focus of attention in racial gerrymandering controversies had shifted from the FOURTEENTH AMENDMENT to the VOTING RIGHTS ACT OF 1965, which Congress had amended in 1982 to assist minority-group plaintiffs. In *Thornburgh v. Gingles* (1986) the Supreme Court laid down guidelines for application of the revised Section 2 of the act.

While constitutional controversy over racial gerrymandering was subsiding, the issue of partisan gerrymandering was nearing its climax. In *Davis v. Bandemer* (1986) a 6–3 majority held that attacks on partisan gerrymanders under the EQUAL PROTECTION clause were justiciable, but only two Justices voted to strike down the districting plan that was being challenged by Indiana Democrats.

Justice BYRON R. WHITE's plurality opinion for the four Justices who believed the question was justiciable but that the Indiana plan was constitutional has received divergent

interpretations. In one common view, the opinion is simply confused or self-contradictory. Others have read it to mean that plans yielding a legislative seat distribution sharply disproportionate to the statewide partisan vote will be struck down.

In *Davis*, the Republican National Committee supported the Indiana Democrats in an AMICUS CURIAE brief, while the Democratic congressional delegation from California supported the Indiana Republicans. This apparent display of political disinterestedness might have been influenced by the pending Republican challenge to the California congressional districting plan on similar grounds. After *Davis*, a lower court dismissed the California case, interpreting White's opinion in *Davis* to require pervasive discrimination against the plaintiff group beyond the gerrymander that is being challenged. Under this interpretation, major-party gerrymandering claims would rarely if ever be successful. The Supreme Court refused to review the California dismissal in *Badham v. Eu* (1988).

After much sound and fury, the prospects for judicial invalidation of partisan gerrymanders may have been no greater at the end of the 1980s than at the beginning.

DANIEL H. LOWENSTEIN
(1992)

Bibliography

GROFMAN, BERNARD, ed. 1990 *Political Gerrymandering and the Courts.* New York: Agathon Press.

SYMPOSIUM 1985 Gerrymandering and the Courts. *UCLA Law Review* 33:1–281.

## *GERTZ v. ROBERT WELCH, INC.*
418 U.S. 323 (1974)

In this major case on LIBEL AND THE FIRST AMENDMENT, the Supreme Court in an opinion by Justice LEWIS F. POWELL held, 5–4, that the rule of NEW YORK TIMES V. SULLIVAN (1964) did not apply when the party seeking damages for libel is not a public official or a public figure. *New York Times* had applied the rule of "actual malice": the First Amendment bars a public official from recovering damages for a defamatory falsehood relating to his conduct in office unless he proves that the publisher or broadcaster made the statement knowing it to be false or "with reckless disregard of whether it was false or not." The Court had extended that rule in 1967 to PUBLIC FIGURES. In *Rosenbloom v. Metromedia, Inc.* (1971) a plurality ruled that if the defamation concerned a public issue the actual malice rule extended also to private individuals, who were not public figures. In *Gertz* the Court, abandoning that rule, held that a private plantiff had to prove actual malice only if seeking punitive damages; the FIRST AMENDMENT did not require him to produce such proof merely to recover actual damages for injury to reputation.

Powell reasoned that public officers and public figures had a far greater opportunity to counteract false statements than private persons. Moreover, an official or a candidate for public office knowingly exposes himself to close public scrutiny and criticism, just as public figures knowingly invite attention and comment. The communications media cannot, however, assume that private persons similarly expose themselves to defamation. Powell declared that they "are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." Their only effective redress is resort to a state's libel laws. So long as a state does not permit the press or a broadcaster to be held liable without fault and applies the actual malice rule to requests for punitive damages, the Court held that the First Amendment requires a "less demanding showing than that required by *New York Times*" and that the states may decide for themselves the appropriate standard of liability for media defendants who defame private persons.

Each of the dissenting Justices wrote a separate opinion. The dissents covered a wide spectrum from greater concern for the defamed party to alarm about the majority's supposedly constrictive interpretation of the First Amendment. Chief Justice WARREN E. BURGER worried that the party libeled in this case was a lawyer who ought not to be invidiously identified with his client. Justice WILLIAM O. DOUGLAS thought all libel laws to be unconstitutional. Justice WILLIAM J. BRENNAN preferred the actual malice test to be applied to private individuals in matters of public concern. Justice BYRON R. WHITE, opposing the Court's restriction of the COMMON LAW of libels, condemned the nationalization of so large a part of libel law.

LEONARD W. LEVY
(1986)

## *GIBBONS v. OGDEN*
9 Wheaton 1 (1824)

Chief Justice JOHN MARSHALL's great disquisition on the COMMERCE CLAUSE in this case is the most influential in our history. *Gibbons* liberated the steamship business and much of American INTERSTATE COMMERCE from the grip of state-created monopolies. More important, Marshall laid the doctrinal basis for the national regulation of the economy that occurred generations later, though at the time his opinion buttressed laissez-faire. He composed that opinion as if statecraft in the interpretation of a constitutional clause could decide whether the United States remained just a federal union or became a nation. The New York act, which the Court voided in *Gibbons*, had closed

the ports of the state to steamships not owned or licensed by a monopoly chartered by the state. Other states retaliated in kind. The attorney general of the United States told the *Gibbons* Court that the country faced a commercial "civil war."

The decision produced immediate and dramatic results. Within two weeks, a newspaper jubilantly reported: "Yesterday the Steamboat *United States*, Capt. Bunker, from New Haven, entered New York in triumph, with streamers flying, and a large company of passengers exulting in the decision of the United States Supreme Court against the New York monopoly. She fired a salute which was loudly returned by huzzas from the wharves." Senator MARTIN VAN BUREN (Democrat, New York), who had recently advocated curbing the Court, declared that even those states whose laws had been nullified, including his own, "have submitted to their fate," and the Court now justly attracted "idolatry," its Chief respected as "the ablest Judge now sitting upon any judicial bench in the world." For a Court that had been under vitriolic congressional and state attack, *Gibbons* wedded a novel popularity to its nationalism.

One of the ablest judges who ever sat on an American court, JAMES KENT of New York, whose opinion Marshall repudiated, grumbled in the pages of his *Commentaries on American Law* (1826) that Marshall's "language was too general and comprehensive for the case." Kent was right. The Court held the state act unconstitutional for conflicting with an act of Congress, making Marshall's enduring treatise on the commerce clause unnecessary for the disposition of the case. The conflict between the two statutes, Marshall said, "decides the cause." Kent was also right in stating that "it never occurred to anyone," least of all to the Congress that had passed the Coastal Licensing Act of 1793, which Marshall used to decide the case, that the act could justify national supremacy over state regulations respecting "internal waters or commerce." The act of 1793 had been intended to discriminate against foreign vessels in the American coastal trade by offering preferential tonnage duties to vessels of American registry. Marshall's construction of the statute conformed to his usual tactic of finding narrow grounds for decision after making a grand exposition. He announced "propositions which may have been thought axioms." He "assume[d] nothing," he said, because of the magnitude of the question, the distinction of the judge (Kent) whose opinion he scrapped, and the able arguments, which he rejected, by Thomas Emmett and Thomas Oakely, covering over 125 pages in the report of the case.

Except for the arguments of counsel, the Court had little for guidance. It had never before decided a commerce clause case, and the clause itself is general: "Congress shall have power to regulate commerce with foreign nations and among the several states. . . ." The power to regulate what would later be called "interstate commerce" appears in the same clause touching FOREIGN COMMERCE, the regulation of which is necessarily exclusive, beyond state control. But the clause does not negate state regulatory authority over interstate commerce, and the framers of the Constitution had rejected proposals for a sole or EXCLUSIVE POWER in Congress. Interstate commerce could be, as counsel for the monopoly contended, a subject of CONCURRENT POWER. Marshall had previously acknowledged that although the Constitution vested in Congress bankruptcy and tax powers, the states retained similar powers. THE FEDERALIST #32 recognized the principle of concurrent powers but offered no assistance on the commerce clause. Congress had scarcely used the commerce power except for the EMBARGO ACTS, which had not come before the Supreme Court. Those acts had interpreted the power to "regulate" as a power to prohibit, but they concerned commerce with foreign nations and were an instrument of foreign policy.

Prior to *Gibbons* the prevailing view on the interstate commerce power was narrow and crossed party lines. Kent, a Federalist, differed little from the Jeffersonians. JAMES MADISON, for example, when vetoing a congressional appropriation for INTERNAL IMPROVEMENTS, had declared in 1817 that "the power to regulate commerce among the several states cannot include a power to construct roads and canals, and to improve the navigation of water courses." In 1821, when JAMES MONROE had vetoed the CUMBERLAND ROAD BILL, whose objective was to extend national authority to turnpikes within the states, he had virtually reduced the commerce power to the enactment of duties and imports, adding that goods and vessels are the only SUBJECTS OF COMMERCE that Congress can regulate. "Commerce," in common usage at the time of *Gibbons*, meant trade in the buying and selling of commodities, not navigation or the transportation of passengers for hire. That was the business of Mr. Gibbons, who operated a steamship in defiance of the monopoly, between Elizabethtown, New Jersey, and New York City, in direct competition with Ogden, a licensee of the monopoly. Had Gibbons operated under sail, he would not have violated New York law; as it was, the state condemned his vessel to fines and forfeiture.

In *Gibbons*, then, the Court confronted a stunted concept of commerce, a STRICT CONSTRUCTION of the commerce power, and an opinion bearing Kent's authority that New York had regulated only "internal" commerce. Kent had also held that the commerce power was a concurrent one and that the test for the constitutionality of a state act should be practical: could the state and national laws co-

exist without conflicting in their operation? Marshall "assumed nothing" and in his step-by-step "axioms" repudiated any argument based on such premises.

He began with a definition of "commerce." It comprehended navigation as well as buying and selling, because "it is intercourse." This sweeping definition prompted a disgruntled states-rightist to remark, "I shall soon expect to learn that our fornication laws are unconstitutional." That same definition later constitutionally supported an undreamed of expansion of congressional power over the life of the nation's economy. Having defined commerce as every species of commercial intercourse, Marshall, still all-embracing, defined "commerce among the several states" to mean commerce intermingled with or concerning two or more states. Such commerce "cannot stop at the external boundary line of each State, but may be introduced into the interior"—and wherever it went, the power of the United States followed. Marshall did not dispute Kent's view that the "completely internal commerce" of a state (what we call INTRASTATE COMMERCE) is reserved for state governance. But that governance extended only to such commerce as was completely within one state, did not "affect" other states, "and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the [United States] government." Marshall's breath-taking exposition of the national commerce power foreshadowed the STREAM OF COMMERCE DOCTRINE and the SHREVEPORT DOCTRINE of the next century. "If Congress has the power to regulate it," he added, "that power must be exercised whenever the subject exists. If it exists within the States . . . then the power of Congress may be exercised within a State."

Having so defined the reach of the commerce power, Marshall, parsing the clause, defined the power to "regulate" as the power "to prescribe the rule by which commerce is to be governed." It is a power that "may be exercised to its utmost extent, and acknowledges no limitations. . . ." In COHENS V. VIRGINIA (1821) he had said that the United States form, for most purposes, one nation: "In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people," and the government managing that people's interests was the government of the Union. In *Gibbons* he added that because the "sovereignty of Congress" is plenary as to its objects, "the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government. . . ." Were that true, the commerce power would be as exclusive as the TREATY POWER or WAR POWERS and could not be shared concurrently with the states.

Marshall expressly denied that the states possessed a concurrent commerce power; yet he did not expressly declare that Congress possessed an exclusive commerce power, which would prevent the states from exercising a commerce power even in the absence of congressional legislation. That was DANIEL WEBSTER' s argument in *Gibbons*, against the monopoly, and Marshall found "great force" in it. Notwithstanding the ambiguity in Marshall's opinion, he implicitly adopted Webster's argument by repeatedly rejecting the theory of concurrent commerce powers. He conceded, however, that the states can reach and regulate some of the same subjects of commerce as Congress, but only by the exercise of powers distinct from an interstate commerce power. Referring to the mass of state regulatory legislation that encompassed inspection laws, health laws, turnpike laws, ferry laws, "etc.," Marshall labeled them the state's "system of police," later called the POLICE POWER. But his jurisprudence-by-label did not distinguish interstate from intrastate commerce powers. Having declared that Congress might regulate a state's "internal" commerce to effectuate a national policy, he allowed the state police power to operate on subjects of interstate commerce, in subordination, of course, to the principle of national supremacy. (See WILLSON V. BLACKBIRD CREEK MARSH CO.)

Following his treatise on the commerce clause, Marshall turned to the dispositive question whether the New York monopoly act conflicted with an act of Congress. The pertinent act of 1793 referred to American vessels employed in the "coasting trade." It made no exception for steamships or for vessels that merely transported passengers. The New York act was therefore "in direct collision" with the act of Congress by prohibiting Gibbons's steamship from carrying passengers in and out of the state's ports without a license from the monopoly.

Justice WILLIAM JOHNSON, although an appointee of THOMAS JEFFERSON, was even more nationalistic than Marshall. Webster later boasted that Marshall had taken to his argument as a baby to its mother's milk, but the remark better suited Johnson. Concurring separately, he declared that the commerce clause vested a power in Congress that "must be exclusive." He would have voided the state monopoly act even in the absence of the Federal Coastal Licensing Act: "I cannot overcome the conviction, that if the licensing act was repealed tomorrow, the rights of the appellant to a reversal of the decision complained of, would be as strong as it is under this license." Johnson distinguished the police power laws that operated on subjects of interstate commerce; their "different purposes," he claimed, made all the difference. In fact, the purpose underlying the monopoly act was the legitimate state purpose of encouraging new inventions.

In a case of first impression, neither Marshall nor Johnson could lay down DOCTRINES that settled all conflicts be-

tween state and national powers relating to commerce. Not until 1851 did the Court, after much groping, seize upon the doctrine of SELECTIVE EXCLUSIVENESS, which seemed at the time like a litmus paper test. (See COOLEY V. BOARD OF PORT WARDENS OF PHILADELPHIA.) Yet *Gibbons* anticipated doctrines concerning the breadth of congressional power that emerged in the next century and still govern. Marshall was as prescient as human ability allows. The Court today cannot construe the commerce clause except in certain state regulation cases without being influenced by Marshall's treatise on it. "At the beginning," Justice ROBERT JACKSON declared in WICKARD V. FILBURN (1941), "Chief Justice Marshall described the federal commerce power with a breadth never exceeded."

LEONARD W. LEVY
(1986)

Bibliography

BAXTER, MAURICE G. 1972 *The Steamboat Monopoly: Gibbons v. Ogden, 1824.* New York: Knopf.

BEVERIDGE, ALBERT J. 1916–1919 *The Life of John Marshall.* 4 vols. Vol. IV:397–460. Boston: Houghton Mifflin.

FRANKFURTER, FELIX 1937 *The Commerce Clause under Marshall, Taney and Waite.* Pages 1–45. Chapel Hill: University of North Carolina Press.

## *GIBONEY v. EMPIRE STORAGE & ICE CO.*
336 U.S. 490 (1949)

Speaking through Justice HUGO L. BLACK, the Supreme Court unanimously sustained an INJUNCTION issued by a Missouri court against labor pickets who attempted to pressure a supplier of ice not to deal with nonunion peddlers. The pickets claimed that the injunction violated their right to FREEDOM OF SPEECH and also conflicted with THORNHILL V. ALABAMA (1940), where the Justices had protected peaceful PICKETING. The Court rejected these arguments, by pointing out that the dominant purpose of the picketing here was to induce a violation of state law forbidding agreements in RESTRAINT OF TRADE. The FIRST AMENDMENT, Black noted, does not protect speech used as part of conduct that violates a valid state criminal statute.

MICHAEL E. PARRISH
(1986)

## GIBSON, JOHN BANNISTER
(1780–1853)

John Bannister Gibson was a Pennsylvania judge for forty years, thirty-seven of which were spent on the state supreme court. Born in 1780, he studied at Dickinson College and was admitted to the bar in 1803. After a brief legislative experience, the governor appointed him to the Court of Common Pleas in 1813 and three years later elevated him to the state's highest court. In 1827, Gibson became chief justice, a position he retained until 1851 when a constitutional change inaugurated a rotation system. He spent the remaining two years of his life as an associate justice.

Gibson's views on judicial power form the bedrock of his reputation. In particular, his dissent in EAKIN V. RAUB (1825) presented the most important response to JOHN MARSHALL'S opinion in MARBURY V. MADISON (1803). Gibson insisted that without specific constitutional authorization, the judiciary had no power to nullify legislative acts. His permissive view of legislative power complemented the "commonwealth idea." For example, he held that state-created monopolies were not constitutionally prohibited and, furthermore, that they were "useful institutions" (*Case of "The Philadelphia and Trenton Railroad Company,"* 1840).

Legislative interference with the judicial process resulted in the only exception to Gibson's temporizing course. The Pennsylvania legislature traditionally had exercised EQUITY powers through private acts. But after the courts were granted substantially complete equity jurisdiction in 1836, Gibson and his colleagues struck down attempts by the legislature to maintain their own practice. When the legislature ordered a new trial in a simple trespass action, Gibson ruled that "the power to order new trials is judicial; but the power of the legislature is not judicial" (*De Chastellux v. Fairchild,* 1850).

Gibson's views of judicial power were eclipsed by the judicial activism of the post-CIVIL WAR era. But subsequent demands for judicial restraint in the twentieth century resulted in renewed interest in Gibson and respect for his ideas. ROSCOE POUND ranked him among the ten leading American jurists, and MORRIS R. COHEN praised him as one of the "great creative minds" in American law.

STANLEY I. KUTLER
(1986)

Bibliography

KUTLER, STANLEY I. 1965 John Bannister Gibson: Judicial Restraint and the "Positive State." *Journal of Public Law* 14: 181–197.

## *GIBSON v. FLORIDA LEGISLATIVE INVESTIGATION COMMISSION*
372 U.S. 539 (1963)

The committee ordered the president of the Miami branch of the NAACP to produce his membership records

and refer to them when the committee asked whether specific individuals, suspected of being communists, were NAACP members. Earlier committee attempts to expose the NAACP's entire membership list showed that the communist issue was a screen behind which the state sought to use publicity to weaken a group engaged in activities aimed at racial equality and DESEGREGATION.

The Supreme Court, 5–4, held that Gibson's conviction for contempt for refusal to produce the records infringed the FREEDOM OF ASSOCIATION, which protected associational privacy. The Court, in an opinion by Justice ARTHUR GOLDBERG, was prepared to balance the state interest in legislative investigation against this FIRST AMENDMENT interest, but it held that such an infringement could be constitutional only if "the state convincingly show[s] a substantial relation between the information sought and a subject of overriding and COMPELLING STATE INTEREST," and that Florida had not done so in this instance. Accordingly Gibson's conviction was invalidated.

*Gibson* and its predecessor, *Bates v. Little Rock* (1960), must be read in conjunction with the BALANCING TEST applied to a congressional investigation into communist activity in BARENBLATT V. UNITED STATES (1959). The later cases may be read narrowly to distinguish *Barenblatt* and provide greater constitutional protection from investigative exposure only for "groups which themselves are neither engaged in subversive or other illegal . . . activities nor demonstrated to have any substantial connections with such activities." Alternatively, *Bates* and *Gibson* can be seen to modify the balancing test of *Barenblatt* to a "preferred position" balancing in which the government must show a compelling interest before it can invade associational privacy.

MARTIN SHAPIRO
(1986)

## *GIDEON v. WAINWRIGHT*
372 U.S. 335 (1963)

From time to time in constitutional history an obscure individual becomes the symbol of a great movement in legal doctrine. Character and circumstance illuminate a new understanding of the Constitution. So it was in the case of Clarence Earl Gideon.

Gideon was a drifter and petty thief who had served four prison terms when, in 1961, he was charged with breaking and entering the Bay Harbor Poolroom in Panama City, Florida, and stealing a pint of wine and some coins from a cigarette machine. At the age of fifty he had the look of defeat: a gaunt wrinkled face, white hair, a trembling voice. But inside there was still passion—a concern for justice that approached obsession. Through it, in a manner of speaking, Gideon changed the Constitution.

When he went to trial in the Circuit Court of Bay County, Florida, on August 4, 1961, he asked the judge to appoint a lawyer for him because he was too poor to hire one himself. The judge said he was sorry but he could not do that, because the laws of Florida called for appointment of counsel only when a defendant was charged with a capital offense. Gideon said: "The United States Supreme Court says I am entitled to be represented by counsel." When the Florida courts rejected that claim, he went on to the Supreme Court. From prison he submitted a petition, handwritten in pencil, arguing that Florida had ignored a rule laid down by the Supreme Court: "that all citizens tried for a felony crime should have aid of counsel."

Gideon was wrong. The rule applied by the Supreme Court at that time was in fact exactly the opposite. The Constitution, it had held, did *not* guarantee free counsel to all felony defendants unable to retain their own. That was the outcome—the bitterly debated outcome—of a line of cases on the right to counsel.

The Supreme Court first dealt with the issue in 1932, in the Scottsboro Case, *Powell v. Alabama.* Due process of law required at least a "hearing," Justice GEORGE H. SUTHERLAND said, and the presence of counsel was "fundamental" to a meaningful hearing.

But Sutherland said that the Court was not deciding whether poor defendants had a right to free counsel in all circumstances, beyond the aggravated ones of this case: a capital charge, tried in haste and under public pressure.

In JOHNSON V. ZERBST (1938) the Court read the Sixth Amendment to require the appointment of counsel for all indigent *federal* criminal defendants. But in BETTS V. BRADY (1942), when considering the right of poor *state* defendants to free counsel in noncapital cases, the Court came out the other way. Justice OWEN J. ROBERTS said that "the states should not be straitjacketed" by a uniform constitutional rule. Only when particular circumstances showed that want of counsel denied FUNDAMENTAL FAIRNESS, he said, were such convictions invalid.

For twenty years the rule of *Betts v. Brady* applied. Counsel was said to be required only when a defendant suffered from "special circumstances" of disability: illiteracy, youth, mental illness, the complexity of the charges. But during that period criticism of the case mounted. No one could tell, it was said, when the Constitution required counsel. More and more often, too, the Supreme Court found "special circumstances" to require counsel.

That was the situation when Clarence Earl Gideon's petition reached the Court. The Justices seized on the occasion to think again about the Constitution and the right to counsel. Granting review, the Court ordered counsel to

discuss: "Should this Court's holding in *Betts v. Brady* be reconsidered?" And then it appointed to represent Gideon, who had had no lawyer at his trial, one of the ablest lawyers in Washington, ABE FORTAS—later to sit on the Supreme Court himself.

On March 18, 1963, the Court overruled *Betts v. Brady*. Justice HUGO L. BLACK, who had dissented in *Betts*, wrote the opinion of the Court: a rare vindication of past dissent. He quoted Justice Sutherland's words on every man's need for the guiding hand of counsel at every step of the proceeding against him. "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries," Justice Black said, "but it is in ours."

The decision in *Gideon v. Wainwright* was an important victory for one side in a general philosophical debate on the Court about whether constitutional protections should apply with the same vigor to state as to federal action: a victory for Justice Black over Justice Felix Frankfurter's more deferential view of state power. But on this particular issue changing ideas of due process would have led Justice Frankfurter in 1963 to impose a universal rule; retired and ill, he told a friend that he would have voted to overrule Betts. The case thus showed how time may bring a new consensus on the meaning of the Constitution.

And, not least, the *Gideon* case showed that the courts still respond to individuals in a society where most institutions of government seem remote and unresponsive. The least influential of men, riding a wave of legal history, persuaded the Supreme Court to reexamine a premise of justice. The case in fact represented more than an abstract principle. It was a victory for Clarence Earl Gideon. After the Supreme Court decision he was tried again in Bay County, Florida, this time with a lawyer—and the jury acquitted him. Gideon stayed out of prison until he died, on January 18, 1972.

ANTHONY LEWIS
(1986)

Bibliography

LEWIS, ANTHONY 1964 *Gideon's Trumpet*. New York: Random House.

## GILES, WILLIAM B.
(1762–1830)

Virginia ANTI-FEDERALIST William Branch Giles served in six of the first seven Congresses and opposed the policies of ALEXANDER HAMILTON, especially the BANK OF THE UNITED STATES (1791). He opposed the ALIEN AND SEDITION ACTS, endorsed the VIRGINIA AND KENTUCKY RESOLUTIONS, and advocated repeal of the JUDICIARY ACT OF 1801. As a Jeffersonian leader in the Senate (1804–1815) he voted to convict Justice SAMUEL CHASE, arguing that "if the judges of the Supreme Court should . . . declare an act of Congress unconstitutional, . . . it was the undoubted right of the House of Representatives to impeach them, and of the Senate to remove them." After the acquittal of AARON BURR (1807), Giles, at President THOMAS JEFFERSON's behest, introduced a bill to expand the definition of TREASON. In his declining years Giles was an outspoken champion of STATES' RIGHTS.

DENNIS J. MAHONEY
(1986)

## GILMAN, NICHOLAS
(1755–1814)

Nicholas Gilman represented New Hampshire at the CONSTITUTIONAL CONVENTION OF 1787 and signed the Constitution. Gilman was not an active participant in the deliberations or committee work of the Convention. He later served in Congress, first as a Federalist, later as a Republican.

DENNIS J. MAHONEY
(1986)

## *GINSBERG v. NEW YORK*
390 U.S. 629 (1968)

In *Ginsberg* the Supreme Court upheld the validity under the FIRST AMENDMENT and FOURTEENTH AMENDMENT of a New York criminal statute that prohibited the sale to persons under seventeen years of age of sexually explicit printed materials that would not be obscene for adults. Drawing upon the criteria suggested in ROTH V. UNITED STATES (1957) and MEMOIRS V. MASSACHUSETTS (1966), the New York statute broadly defined sexually explicit descriptions or representations as "harmful to minors" when the material: "(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors." Convicted for selling two "girlie" magazines to a sixteen-year-old, Ginsberg claimed that the statute was unconstitutional because the state was without the power to deny persons younger than seventeen access to materials that were not obscene for adults. Justice WILLIAM J. BRENNAN, for the 6–3 majority, rejected this challenge by introducing the concept of "variable obscenity." According to the majority, the New York statute had "simply adjust[ed] the definition of OBSCENITY to social realities

by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . . of such minors."

Although the decision rests on the legitimacy of protecting children from harm, the Court found it unnecessary to decide whether persons under seventeen were caused harm by exposure to materials proscribed by the statute. After suggesting that scientific studies neither proved nor disproved a causal connection, the majority held that it was "not irrational" for the New York legislature to find that "exposure to material condemned by the statute is harmful to minors."

To what extent does a minor's own First Amendment rights constrain the state's power to limit a minor's access to written or pictorial materials? Because of the nature of Ginsberg's challenge to the statute, the Court did not concern itself with the question whether a minor might have the constitutional right to buy "girlie" magazines. In ERZNOZNIK V. JACKSONVILLE (1975) the Court later indicated that while the First Amendment rights of minors are not coextensive with those of adults, "minors are entitled to a significant measure of First Amendment protection" and that under the *Ginsberg* variable obscenity standard "all nudity" in films "cannot be deemed as obscene even as to minors."

ROBERT H. MNOOKIN
(1986)

(SEE ALSO: *Children's Rights.*)

## GINSBURG, RUTH BADER
(1933– )

In 1960, Justice FELIX FRANKFURTER declined to offer a clerkship to recent law graduate Ruth Bader Ginsburg, explaining that the candidate was impressive but he was not "ready to hire a woman." Thirty-three years later, on August 10, 1993, Ginsburg took the oath of office as an Associate Justice of the Supreme Court. Ginsburg's legal career not only spanned this period of transformation, however; her work also catalyzed the change in women's employment opportunities. As a Columbia Law School professor and as director of the Women's Rights Project of the AMERICAN CIVIL LIBERTIES UNION (ACLU), she selected, briefed, and argued a series of constitutional challenges to laws that discriminated between men and women. Through these cases, often brought on behalf of male plaintiffs, Ginsburg sought to demonstrate that laws based on invalid stereotypes injured both women and men. Working incrementally, from the least controversial cases to the more challenging, Ginsburg persuaded the courts to establish gender equality in a range of public opportunities. As a Court of Appeals judge, and later as a Justice of the Supreme Court, Ginsburg has demonstrated many of the same qualities that marked her pathbreaking work as a litigator. She has manifested a strong commitment to gender equality, marking cases from sexual harassment to equal educational opportunity with her distinctive, liberal feminist vision. But she has also reflected the pragmatic, incrementalist strategy that distinguished her as a litigator. She has often decided cases narrowly, and she has sometimes urged procedural grounds as a basis for building consensus or deferring controversial choices.

Ruth Bader was born March 15, 1933, in the Flatbush section of Brooklyn. Her father, Nathan Bader, owned small clothing stores. Her mother, Celia Bader, whom Justice Ginsburg describes as a formative influence, died of cancer the day before her daughter's graduation from James Madison High School. Ginsburg attended Cornell University, where she graduated with high honors and was elected to Phi Beta Kappa. At Cornell, she met Martin Ginsburg, whom she married shortly after her graduation in 1954. The Ginsburgs then moved to Fort Sill, Oklahoma, where Martin Ginsburg served in the U.S. Army, and Ruth Ginsburg gave birth to their first child, Jane. (A second child, James, was born a decade later.) In 1956 the Ginsburgs moved to Cambridge, Massachusetts, where both were enrolled at Harvard Law School. At the time that the Justice was a first-year student, there were only nine women in a class of over five hundred students. Their presence was viewed not only as atypical, but as problematic. Dean Erwin Griswold, entertaining the women students at a dinner at his home, asked each to explain in turn how she justified taking a position in the class that would otherwise have gone to a man. Despite these pressures, Ginsburg excelled at her studies, and earned a place on the Harvard Law Review. She enjoyed comparable success at Columbia, to which she transferred when her husband took a job in New York City. Notwithstanding these achievements, she was not offered a single job on graduation. "Many firms were just beginning to hire Jews," Ginsburg has explained, "and to be a woman, a Jew and a mother to boot was an impediment . . . but motherhood was the major impediment. The fear was I would not be able to devote my full mind and time to a law job." Through the determined effort of her academic mentors, she obtained a clerkship with Judge Edmund Palmieri, of the U.S. District Court for the Southern District of New York, who resolved to hire her only after securing the agreement of a recent male law graduate that he would leave his law firm position to assume the clerkship if Ginsburg did not "work out."

Following her clerkship, Ginsburg joined the Columbia Project on International Civil Procedure. In 1963 she was

offered a teaching position at Rutgers Law School, only the second woman ever to be hired there. Despite the fact that the Equal Pay Act became law that same year, the dean explained to Ginsburg that, particularly given the state university's limited resources, "it was only fair to pay [her] modestly, because [her] husband had a very good job." She was later part of a large class of women faculty members who filed an Equal Pay Act claim against Rutgers and received a large salary increase in settlement of that claim. During her time at Rutgers, Ginsburg began to take on cases referred by the New Jersey affiliate of the ACLU. These cases, which involved facial inequalities in educational and employment opportunity for women, encouraged Ginsburg to develop and teach one of the first seminars on Women and the Law. At the same time, Ginsburg was invited to write the brief for *Reed v. Reed* (1971), the first successful constitutional challenge to any law mandating SEX DISCRIMINATION. Following this victory, Ginsburg became the director of the ACLU's Women's Rights Project, which orchestrated a series of constitutional challenges to official denials of equal opportunity to women. In 1972, she also assumed a tenured professorship at Columbia Law School.

Between 1972 and her appointment to the Court of Appeals in 1980, Ginsburg designed and implemented a strategic assault on state and federal LEGISLATION that distinguished between men and women. The challenge she faced was substantial, given that many of these legal distinctions were thought to reflect salutary protections for female frailty, and given that her judicial audience— the federal courts—consisted almost entirely of men. The approach she developed to address these difficulties was twofold. First, Ginsburg sought to demonstrate that laws thought to respond to basic, sex-based differences were actually grounded in flawed and injurious stereotypes. To make this point she arrived at the bold stroke of bringing cases involving male plaintiffs. The male plaintiffs, as Professor David Cole has explained, were more likely to elicit the sympathy of the all-male Court, both because the Justices would find it easier to identify with them, and because the harms they suffered as a result of the stereotypic legislation were more concrete. This strategy may be illustrated with the case of FRONTIERO V. RICHARDSON (1973), one of the earliest cases brought by Ginsburg and the Women's Rights Project. *Frontiero* challenged two statutes that provided servicemen with automatic dependency benefits, while servicewomen received benefits only if they demonstrated that their spouses depended on them for more than half of their support. Sharon Frontiero, the servicewoman whose benefits were in question, suffered the dignitary harm of the government's presumptive refusal to treat her as the family breadwinner. Joseph Frontiero, her spouse, however, suffered the more concrete denial of housing and medical benefits. Ginsburg believed that by focusing the Court first on the tangible disadvantage gender classifications created for male plaintiffs, she could ultimately lead them to recognize the dignitary damage done to their female spouses.

The second distinguishing characteristic of Ginsburg's strategy was its careful incrementalism. Her cases moved in a series of gradations from the most straightforward to the most ambitious, and in each case she used the legal premises established in the previous case to build a slightly larger analytic edifice. For example, Ginsburg used the Court's ambiguous invocation of RATIONAL BASIS scrutiny in *Reed*, to argue for a clarifying standard in *Frontiero;* and she used a plurality's endorsement of STRICT SCRUTINY in *Frontiero* to argue for heightened, or intermediate, scrutiny in *Weinberger v. Wiesenfeld* (1975), a strategy that bore fruit the next year in CRAIG V. BOREN (1976), in which Ginsburg wrote a brief AMICUS CURIAE. Ginsburg's incrementalism could be conceptual as well. *Reed*, which concerned a state legislative preference for male estate administrators, reflected a facial assumption of female inferiority; the differential treatment was not justified by reference to any motive of protection. Yet after her success in *Reed*, Ginsburg could move on to *Frontiero*, in which the statutory classification, while also injurious, could be justified by reference to a desire to protect women in their dependent familial roles. Ginsburg scrutinized potential cases closely for the optimal sequential effect, often telling colleagues that it was "not yet time" for a particular case. These strategic choices produced an impressive record of change: not only did Ginsburg persuade the Court to embrace intermediate scrutiny for gender classifications, but she also persuaded the Court to invalidate disparate treatment of men and women, in areas from "mothers' insurance benefits" (*Weinberger v. Wiesenfeld*, 1975) to JURY SERVICE (*Edwards v. Healy*, TAYLOR V. LOUISIANA, 1974).

After President JIMMY CARTER appointed Ginsburg to the U.S. Court of Appeals for the District of Columbia Circuit in 1980, she continued to define and extend the DOCTRINE of gender equality. Yet her record was, in some respects, less progressive than her supporters had expected. She ruled against the RIGHT OF PRIVACY claim of a discharged gay serviceman in *Dronenberg v. Zech* (1984) and developed a reputation as a conservative on criminal defense issues. Ginsburg also displayed a surprising tendency toward judicial restraint: she favored narrower, factually contained rulings, and in several contexts voted, as in *Randall v. Meese* (1988), to resolve controversial cases on procedural grounds. Her public statements about the judicial role also perplexed some longtime supporters. In a speech delivered shortly before her nomination to the Supreme Court, Ginsburg described ROE V. WADE (1973)

as having exacerbated the ABORTION conflict by injecting a broad judicial holding into a controversy that was beginning to be resolved by state legislatures. Her position remained pro-choice: she argued that a right to reproductive choice might better have been grounded in the EQUAL PROTECTION clause than in the right of privacy, so as to comprehend the rights of indigent women. Yet she also opined that a narrower ruling, simply striking down the Texas abortion statute, might have proved less divisive than the detailed opinion that emerged.

Commentators divided over how to interpret Ginsburg's record on the Court of Appeals. Some ascribed her more restrictive opinions to the limitations imposed by PRECEDENT; others concluded that her commitment to gender equality was simply a departure from a more substantively, and jurisprudentially, conservative bent. Her performance since her appointment to the Supreme Court in 1993 suggests that precedent may have constrained her on the Court of Appeals: notwithstanding her opinion in *Dronenberg*, she voted with the majority in striking down the Colorado state constitutional amendment that prevented the state or its subdivisions from legislating against discrimination on the basis of SEXUAL ORIENTATION in ROMER V. EVANS (1996). Yet Ginsburg's emerging record on the Supreme Court reflects ongoing tensions that continue to absorb of the judiciary.

Ginsburg has remained a resourceful champion of gender equality. Her opinion in UNITED STATES V. VIRGINIA (1996), reflecting the careful historicism and liberal feminist vision that animated her briefs, is to date the best example of this commitment. Ginsburg's opinion for the 7–1 majority not only edged the Court closer to strict scrutiny by demanding an "exceedingly persuasive justification" for sex-based classifications; it also established a right of educational access on behalf of a group of women whose taste for "adversative" military training was far from typical. Yet the typicality of these women, according to Ginsburg, was not the point. Generalizations about women, be they flattering or stereotypical, are precisely what the FOURTEENTH AMENDMENT proscribes. Women willing to endure the rigors of this method should not be prevented from doing so because of their gender, but should have the same opportunity to make authentic, if idiosyncratic, choices as do men. With this interpretation, Ginsburg's portrait of woman as an equal, autonomous chooser reached its fullest stage of elaboration.

Yet Ginsburg has also reflected a kind of judicial particularism that contrasts with the more ambitious intervention of WARREN COURT liberals, such as Justices WILLIAM J. BRENNAN, JR., and THURGOOD MARSHALL. She has continued to resolve many cases on narrow, fact-specific grounds: even *United States v. Virginia* does not proceed beyond declaring the unconstitutionality of this particular, SINGLE-SEX SCHOOL. She has also resolved some controversial cases on purely procedural grounds: in *Arizonans for Official English v. Arizona* (1997), the long-awaited challenge to Arizona's controversial "OFFICIAL ENGLISH" LAW, her MAJORITY OPINION dismissed the case on grounds of MOOTNESS.

This particularism, however, may reflect less tension with Ginsburg's earlier record than some analysts suggest. Ginsburg has always displayed an acute awareness of factual particularity and the importance of context. Her alertness to the sensibilities of an all-male Court; her understanding of the relations between the successive cases she brought to the Court; and her sensitivity to the "right time" to bring a particular case are all examples of this sensibility. This kind of awareness makes narrow decisions prudent; and procedural grounds—to a former professor of civil procedure—reflect a promising form of narrowness. There may also be a larger jurisprudential concern at play: part of the context that Ginsburg so carefully observes is the institution of which she is a part.

Ginsburg has publicly stated her concern to maintain the legitimacy of the Court, and the larger federal court system. She has warned that this legitimacy may be taxed by overreaching, or by unseemly discord among its members. One solution may be found in the avoidance of unnecessary controversy, and of fruitless antagonism among the Justices. Ginsburg has counseled against writing separately, particularly in divisive terms. The "effective judge," she wrote in 1992, "speaks in a 'moderate and restrained' voice, engaging in dialogue with, not a diatribe against, co-equal departments of government, state authorities, and even her own colleagues." She has also sought to preserve harmony by seeking common ground. Justices should continually ask, Ginsburg recently stated, "Is this conflict really necessary? Perhaps there is a ground, maybe a procedural ground, on which everyone can agree, so that the decision can be unanimous, saving the larger question for another day." Thus it may be today, as it was during her career as an advocate, that Ginsburg's activism is shaped by its emergence in a particular political and institutional context. That context was once the solipsistic paternalism of a male judiciary; it is now the embattled legitimacy of the Supreme Court.

KATHRYN ABRAMS
(2000)

Bibliography

COLE, DAVID 1984 Strategies of Difference: Litigating for Women's Rights in a Man's World. *Law and Inequality* 2:33–96.

GILLMAN, ELIZABETH and MICHELETTI, JOSEPH 1993 Justice Ruth Bader Ginsburg. *Seton Hall Constitutional Law Journal* 3:657–663.

GINSBURG, RUTH BADER 1975 Gender and the Constitution. *University of Cincinnati Law Review* 44:1–42.

——— 1992 Speaking in a Judicial Voice. *New York University Law Review* 67:1185–1209.

——— 1997 Remarks on Women's Progress in the Legal Profession in the United States. *Tulsa Law Journal* 33:13–21.

HALBERSTAM, MALVINA 1998 Ruth Bader Ginsburg: The First Jewish Woman on the United States Supreme Court. *Cardozo Law Review* 19:1441–1454.

MARKOWITZ, DEBORAH L. 1992 In Pursuit of Equality: One Woman's Work to Change the Law. *Women's Rights Law Reporter* 14:335–359.

ROSEN, JEFFREY 1997 The New Look of Liberalism on the Court. *New York Times Magazine*, October 5, p. 60.

## *GINZBURG v. UNITED STATES*

See: *Memoirs v. Massachusetts*

## *GIROUARD v. UNITED STATES*
328 U.S. 61 (1946)

An applicant for United States CITIZENSHIP declared that he could take the oath of allegiance ("support and defend the Constitution and laws of the United States against all enemies . . .") only with the reservation that he would not serve in the military in a combatant role.

The Court, speaking through Justice WILLIAM O. DOUGLAS, held that despite UNITED STATES V. SCHWIMMER (1929), *United States v. MacIntosh* (1931), and *United States v. Bland* (1931), Girouard met the requirements for NATURALIZATION. Justice Douglas argued that Congress had not specifically insisted upon willingness to perform combatant service. Chief Justice HARLAN F. STONE dissented, joined by Justices STANLEY F. REED and FELIX FRANKFURTER.

This case established the eligibility of CONSCIENTIOUS OBJECTORS to be naturalized as citizens of the United States.

RICHARD E. MORGAN
(1986)

## *GITLOW v. NEW YORK*
268 U.S. 652 (1925)

Gitlow was convicted under a state statute proscribing advocacy of the overthrow of government by force. In a paper called *The Revolutionary Age*, he had published "The Left Wing Manifesto," denouncing moderate socialism and prescribing "Communist revolution." There was no evidence of any effect resulting from the publication. Rejecting the CLEAR AND PRESENT DANGER test which OLIVER WENDELL HOLMES and LOUIS D. BRANDEIS reasserted in their dissent, Justice EDWARD SANFORD for the Court upheld the statute. Enunciating what subsequently came to be called the remote BAD TENDENCY TEST, Sanford declared that the state might "suppress the threatened danger in its incipiency." "It cannot reasonably be required to defer the adoption of measures for its own . . . safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction."

Unwilling to reverse its decision in SCHENCK V. UNITED STATES (1919), the Court limited the clear and present danger test enunciated there to the situation in which a speaker is prosecuted under a statute prohibiting acts and making no reference to language. Under such a statute the legislature has made no judgment of its own as to the danger of any speech, and the unlawfulness of the speech must necessarily depend on whether "its natural tendency and probable effect was to bring about the substantive evil" that the legislature had proscribed. In short, Sanford sought to confine the danger test to its origin in the law of attempts and to strip it of its imminence aspect. He argued that where a legislature itself had determined that a certain category of speech constituted a danger of substantive evil, "every presumption [was] to be indulged in favor of the validity" of such an exercise of the police power.

The PREFERRED FREEDOMS doctrine that became central to the speech cases of the next two decades was largely directed toward undermining the *Gitlow* position that state statutes regulating speech ought to be subject to no more demanding constitutional standards than the reasonableness test applied to state economic regulation.

The *Gitlow* formula was rejected in the 1930s, but the Court returned to some of its reasoning in the 1950s, particularly to the notion that where revolutionary speech is involved, government need not wait until "the spark . . . has enkindled the flame or blazed into the conflagration." Such reasoning, bolstered by the *Gitlow* distinction between advocacy and abstract, academic teaching informed the DENNIS V. UNITED STATES (1951) and YATES V. UNITED STATES (1951) decisions that upheld the Smith Act, a federal statute in part modeled on the New York criminal anarchy statute sustained in *Gitlow*.

The Court's language in *Gitlow* was equivocal, and it provided no rationale. Indeed, *Gitlow* is most often cited today for its dictum, "incorporating" FIRST AMENDMENT free speech guarantees into the DUE PROCESS clause of the FOURTEENTH AMENDMENT, thus rendering the Amendment applicable to the states as well as to Congress. (See INCORPORATION DOCTRINE.)

Holmes's *Gitlow* dissent did not address the question so troublesome to believers in judicial self-restraint: why should courts not defer to the legislature's judgment that

a particular kind of speech is too dangerous to tolerate when, in applying the due process clause, they do defer to other legislative judgments? He did attack the majority's distinction between lawful abstract teaching and unlawful INCITEMENT in language that has become famous:

> Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it. . . . The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. . . . If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

MARTIN SHAPIRO
(1986)

Bibliography

CHAFEE, ZECHARIAH 1941 *Free Speech in the United States.* Cambridge, Mass.: Harvard University Press.

## *GLIDDEN v. ZDANOK*

See: Claims Court; Legislative Court

## GLOBAL MARKETS AND THE CONSTITUTION

See: Multinational Corporations, Global Markets, and the Constitution

## *GLOBE NEWSPAPER COMPANY v. SUPERIOR COURT*
457 U.S. 596 (1982)

Writing for a 7–2 Court, Justice WILLIAM J. BRENNAN sweepingly broadened the right of the public and press to attend criminal trials. On FIRST AMENDMENT grounds the Court held unconstitutional a state act intended to protect the juvenile victims of sex crimes by closing the trial proceedings. The exclusion of the press and public rested chiefly on the state's interest in safeguarding those victims from additional trauma and humiliation by not requiring them to testify in open court. The Supreme Court did not find that interest adequately compelling to warrant a mandatory closure rule. The decision created an anomalous condition of law: states can close trials to protect juvenile rapists but not to protect their victims. Chief Justice WARREN E. BURGER and Justice WILLIAM H. REHNQUIST dissented.

LEONARD W. LEVY
(1986)

## *GLONA v. AMERICAN GUARANTEE & LIABILITY INSURANCE CO.*

See: *Levy v. Louisiana*

## *GODCHARLES v. WIGEMAN*

See: *Millett v. People of Illinois*

## *GODFREY v. GEORGIA*
446 U.S. 420 (1980)

This is another case in which the Supreme Court reversed a death sentence because it was imposed under the state's standardless discretion: death for murder "outrageously or wantonly vile, or inhuman." Justice POTTER STEWART for a PLURALITY ruled that those words lacked objectivity and provided no principled basis for distinguishing the few cases in which death is imposed from the many in which it is not. Georgia's standard therefore placed no restraint on arbitrary and capricious infliction of the ultimate penalty. Two Justices argued that the death penalty is always CRUEL AND UNUSUAL. Three found Georgia's standard unobjectionable.

LEONARD W. LEVY
(1986)

## *GOESAERT v. CLEARY*
335 U.S. 464 (1948)

*Goesaert* typified the Court's SEX DISCRIMINATION decisions in the century between BRADWELL V. ILLINOIS (1873) and the 1970s. Michigan denied a woman a bartender's license unless she were "the wife or daughter of the male owner" of a licensed establishment. The Supreme Court, 6–3, rejected an EQUAL PROTECTION attack on this limitation. For the majority, Justice FELIX FRANKFURTER applied a RATIONAL BASIS standard of review: the legislature might rationally have believed that the presence of a barmaid's husband or father would help avoid "moral or social problems." Thus the Court could not "give ear to the suggestion that the real impulse behind this legislation was the unchivalrous desire of male bartenders to try to monopolize the calling."

Justice WILEY B. RUTLEDGE, for the dissenters, argued that the law failed to serve these protective ends, because unrelated, nonowner males might be present in some cases, and related male owners might be absent.

KENNETH L. KARST
(1986)

## GOLDBERG, ARTHUR J.
(1908–1990)

Arthur Joseph Goldberg's tenure on the Supreme Court was a brief chapter in a long and distinguished career. He served fewer than three years, from October 1, 1962, until he resigned on July 25, 1965, to become the United States ambassador to the United Nations. Goldberg consistently voted with the WARREN COURT majority on CIVIL LIBERTIES and CRIMINAL PROCEDURE issues, although three terms as the Court's junior Justice scarcely gave him enough time to develop a distinctive voice on the major constitutional questions of that active period.

When Goldberg came to the Court, the unanimity of the earlier Warren years had begun to erode. The Court was struggling to give specific content to the broad principles established in the landmark rulings of the 1950s and early 1960s. Goldberg's appointment to replace FELIX FRANKFURTER allowed the flowering of the liberal JUDICIAL ACTIVISM for which the Warren Court is best remembered. Frequently his vote helped to create a bare majority for a FIRST AMENDMENT claim or for the rights of a criminal defendant.

ESCOBEDO V. ILLINOIS (1964), Justice Goldberg's best known opinion for the Court, was such a case. A year before, in GIDEON V. WAINWRIGHT, the Court had ruled unanimously that the state was required to provide counsel for an indigent defendant accused of a serious crime. The question in *Escobedo* was at what stage in the process from arrest through INDICTMENT the Sixth Amendment RIGHT TO COUNSEL attached. Voting 5–4, the Court overturned the murder conviction of a man whose request to consult a lawyer during interrogation by the police had been denied. In his opinion, Goldberg wrote: "The fact that many confessions are obtained during this period points up its critical nature as a "stage when legal aid and advice' are surely needed. The right to counsel would indeed be hollow if it began at a period when few confessions were obtained." Escobedo thus pried open the door for MIRANDA V. ARIZONA (1966).

Goldberg's opinions for the Court also contributed to the growth of the First Amendment's protection of the freedoms of expression and association. COX V. LOUISIANA (1965) promoted the development of the concept of the "public forum." GIBSON V. FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE (1963) remains a major precedent for protecting the privacy of political association. And APTHEKER V. SECRETARY OF STATE (1964) struck down a section of the Subversive Activities Control Act of 1950, which denied passports to members of various communist organizations. The law, Goldberg wrote for the Court, "sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment." *Aptheker* was an important stop in the elaboration of the First Amendment doctrine of OVERBREADTH. Goldberg also wrote the opinion for the Court in *Kennedy v. Mendoza-Martinez* (1963), striking down a federal law that automatically revoked the CITIZENSHIP of anyone who left the country during a time of war or national emergency in order to evade the draft.

Goldberg's area of professional expertise was labor law, and he was widely regarded as the nation's most eminent labor lawyer. But because he joined the Court directly from eighteen months as secretary of labor in the cabinet of President JOHN F. KENNEDY, he excused himself from participation in many of the labor cases that reached the Court during his tenure.

Goldberg was born in Chicago on August 8, 1908, and received his law degree from Northwestern University in 1929. He built a labor law practice in Chicago before moving to Washington, D.C., in 1948 to serve as general counsel to both the Congress of Industrial Organizations (CIO) and the United Steelworkers. He was instrumental in the 1957 merger of organized labor's two factions, the CIO and the American Federation of Labor (AFL), and continued to play a key role in AFL-CIO affairs until he joined the Kennedy cabinet in 1961. His appointment to the Supreme Court followed the next year.

In 1965, President LYNDON B. JOHNSON persuaded him to leave the Court to fill the United Nations post made vacant by the death of Ambassador Adlai Stevenson. He resigned his ambassadorship in 1968 and practiced law briefly in New York, where he ran unsuccessfully for governor on the Democratic ticket in 1970. He then returned to Washington, where he continued to practice law and to speak out on civil liberties issues.

LINDA GREENHOUSE
(1986)

Bibliography

CARMEN, IRA H. 1966 One Civil Libertarian among Many: The Case of Mr. Justice Goldberg. *Michigan Law Review* 65:301–336.

FRIEDMAN, STEPHEN J. 1969 Arthur J. Goldberg. In Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court 1789–1969.* New York: Chelsea House.

## *GOLDBERG v. KELLY*
397 U.S. 254 (1970)

Residents of New York receiving WELFARE BENEFITS brought suit challenging the state's procedures authorizing termination of a beneficiary's benefits without a prior hearing on his or her eligibility. The Supreme Court, 6–3, held that these procedures denied PROCEDURAL DUE PROCESS.

For the majority, Justice WILLIAM J. BRENNAN rejected the state's argument that because welfare benefits were a "privilege" and not a "right," their termination could not deprive a beneficiary of "property" within the meaning of the due process clause. Those benefits, said Brennan, were "a matter of statutory entitlement for persons qualified to receive them" and thus qualified as "property" interests whose termination must satisfy the requirements of due process.

These requirements included an evidentiary hearing prior to the termination of welfare benefits, including timely notice of the reasons for the proposed termination, the right to retain counsel, opportunity to confront any adverse witnesses, and opportunity to present the beneficiary's own evidence. The procedural safeguards thus required approximated those available in judicial proceedings; the Court underscored the point by insisting on an impartial decision maker who would "state the reasons for his determination and indicate the evidence he relied on."

*Goldberg* was the leading decision extending the guarantees of procedural due process in civil proceedings beyond the protection of traditional COMMON LAW property interests to "entitlements" defined by statute, administrative regulation, or contract. It was aptly called the beginning of a "procedural due process revolution." By the mid-1970s, however, the counterrevolution had begun. (See BISHOP V. WOOD; PAUL V. DAVIS; MATHEWS V. ELDRIDGE.)

KENNETH L. KARST
(1986)

## GOLD CLAUSE CASES

*Norman v. Baltimore & Ohio Railroad Co.*
294 U.S. 240 (1935)
*Nortz v. United States*
294 U.S. 317 (1935)
*Perry v. United States*
294 U.S. 330 (1935)

The decisions in these cases were virtually the only Supreme Court opinions upholding congressional NEW DEAL legislation before the judicial "revolution" of 1937. The Depression had caused an emergency in which contracts calling for payment in gold, rather than paper, "obstruct[ed] the power of Congress." So declaring, Congress passed the JOINT RESOLUTION of June 5, 1933, which asserted its regulatory power over gold as an item that "affect[ed] the public interest." Such gold clauses were "against public policy," and henceforth debtors could legally discharge their obligations in any other legal tender. Creditors resisted this action because, in conjunction with earlier legislation that had reduced the gold value of the dollar, it effectively devalued debts by allowing paper to be substituted for gold. Even though these suits involved relatively small amounts, they represented one hundred billion dollars in outstanding gold obligations (three-fourths of which were private debts) at a time when the Treasury had only some four billion dollars in gold reserves.

In *Norman v. Baltimore & Ohio Railroad Company*, the plaintiffs sought to enforce payment of $38.10 in currency, the equivalent of the value of the gold ($22.50) specified in the contract, a sixty-nine percent markup. Chief Justice CHARLES EVANS HUGHES, for a 5–4 Court, reviewed the MONETARY POWER and, resting on *Knox v. Lee* (1871), insisted on the government's power to void any private OBLIGATION OF CONTRACTS that interfered with the exercise of Congress's power to regulate currency. The majority said that requiring debtors to pay sixty-nine percent more in currency to match the gold value of their debts would cause "dislocation of the domestic economy." The majority opinion, while reaching perhaps the only possible satisfactory result for the stability of the economy, was, in the conventional constitutional wisdom of the time, tenuous. In a spiteful dissent, Justice JAMES MCREYNOLDS attacked Hughes's purely pragmatic approach as a monstrous miscarriage of justice. Delivering his opinion orally, he exclaimed, "This is Nero at his worst. The Constitution is gone!"

In cases involving public obligations, the majority rested on sturdier constitutional ground. In accordance with the EMERGENCY BANK ACT, E. C. Nortz had surrendered his gold certificates after the government refused his demand for payment in gold. He sued for the difference between the currency he received and the value of the gold, over $64,000. Hughes, writing in *Nortz v. United States*, declared that gold certificates were only one form of currency and were thus replaceable by any other valid currency. Because Nortz suffered only "nominal" damages, his suit failed. In so deciding, the Court avoided the question whether gold certificates amounted to a contract with the government. In *Perry v. United States*, however, an 8–1 Court admitted that a government Liberty bond was a contractual obligation. Insofar as the joint resolution abrogated gold clauses in public contracts, it must be unconstitutional. A 5–4 majority quickly moved to destroy the force of this concession, however. Because the rise in gold prices which formed the basis of Perry's suit resulted from government manipulation of monetary values, payment in excess of a simple dollar-for-dollar exchange would constitute "unjust enrichment." Perry, like Nortz, had sustained only minimal damages and his suit likewise failed.

As McReynolds's dissent aptly noted, the majority was more concerned with economic and political consequences than constitutional precedent. ROBERT H. JACKSON, later on the Court himself, wrote that "in the guise of private law suits involving a few dollars, the whole American economy was haled before the Supreme Court." In these cases, by theoretically destroying thousands of obligations, the Court sustained Congress's exercise of the monetary power—a course it found itself unable to follow when later confronted by other major New Deal legislation.

DAVID GORDON
(1986)

Bibliography

DAWSON, JOHN P. 1935 Gold Clause Decisions. *Michigan Law Review* 33:647–684.

## *GOLDFARB v. VIRGINIA STATE BAR*
421 U.S. 773 (1975)

By extending antitrust liability to the legal profession, this decision afforded consumers further protection against illegal business practices. The minimum fee schedule of the Fairfax County Bar Association, enforced by the Virginia State Bar, fixed the lowest charge for title searches at one percent of the value of the property involved. A unanimous eight-member Supreme Court, led by Chief Justice WARREN E. BURGER, sustaining a CLASS ACTION against the state and county bars, found violations of the price-fixing provisions of the SHERMAN ANTITRUST ACT as well as restraint of INTERSTATE COMMERCE.

DAVID GORDON
(1986)

## *GOLDMAN v. WEINBERGER*
475 U.S. 503 (1986)

Goldman, an orthodox Jew and ordained rabbi, was forbidden from wearing a yarmulke while on duty as an Air Force officer. The prohibition was pursuant to an Air Force regulation enjoining the wearing of headgear indoors "except by armed security police." Goldman sued, claiming that the prohibition violated his FIRST AMENDMENT right to the free exercise of religion. The Supreme Court disagreed, 5–4.

Writing for the majority, Justice WILLIAM H. REHNQUIST declined to require a government showing of either a COMPELLING STATE INTEREST or a RATIONAL BASIS to justify the yarmulke prohibition. Rehnquist argued that the military must be accorded wide-ranging deference by the courts in order to carry out its mission; hence he refused to second-guess the Air Force's "professional judgment" about how to maintain a uniform dress code. Rehnquist used similar reasoning a year later to uphold the power of prison authorities to restrict the free-exercise rights of prisoners in O' LONE V. ESTATE OF SHABAZZ (1987).

Justices WILLIAM J. BRENNAN, HARRY A. BLACKMUN, and SANDRA DAY O'CONNOR each filed separate dissents. All three believed that the Court should have attempted to weigh Goldman's free-exercise rights against the government interest at stake; they further agreed that the government interest should give way in this case because the military had made no attempt to show a reasonable basis for the regulation as applied to Goldman. They noted, in particular, that Goldman had been allowed to wear his yarmulke by the Air Force for almost four years before the practice was challenged.

JOHN G. WEST, JR.
(1992)

(SEE ALSO: *Armed Forces; Employment Division, Department of Human Resources of Oregon v. Smith.*)

## GOLD RESERVE ACT
48 Stat. 337 (1934)

Following the Gold Content Rider of mid-1933, the government sought to stabilize the gold value of the dollar in an effort to raise prices. Congress, fulfilling a request from President FRANKLIN D. ROOSEVELT, passed the Gold Reserve Act on January 30, 1934, under its MONETARY POWER and extended broad authority to establish a sound currency system. The act called in all gold and gold certificates in circulation, with specified exceptions, and granted the Treasury title to all monetary gold. The act also established an Exchange Stabilization Fund with which the secretary of the treasury was empowered to deal in gold in international markets to preserve a favorable balance of exchange and support the dollar. Congress also granted the President authority to regulate the gold content of the dollar. Further sections dealt with silver coinage and retroactively approved actions taken under authority of the EMERGENCY BANK ACT.

On January 31, Roosevelt reduced the gold content of the dollar to just under sixty percent of its former value. By mid-year the absence of circulating gold necessitated a congressional joint resolution abrogating clauses in private contracts and government bonds that called for pay-

ment in gold; the Supreme Court sustained this action in the GOLD CLAUSE CASES (1935).

DAVID GORDON
(1986)

## GOLDWATER v. CARTER
444 U.S. 285 (1979)

Members of Congress sued the President for declaratory and injunctive relief, claiming he had exceeded his powers in terminating a treaty with the Republic of China (Taiwan) without any congressional participation. Without briefing or ORAL ARGUMENT, a fragmented Supreme Court held, 6–3, that the case was not justiciable. Justice WILLIAM H. REHNQUIST, for four Justices, concluded that the case presented a POLITICAL QUESTION. Justice LEWIS F. POWELL rejected this argument but concluded that the case lacked ripeness because the President and Congress had not reached an impasse. Justice THURGOOD MARSHALL concurred in the result. Justice WILLIAM J. BRENNAN would have affirmed the court of appeals's decision upholding the President's action, and the other dissenting Justices would have set the case for full argument.

KENNETH L. KARST
(1986)

## GOMILLION v. LIGHTFOOT
364 U.S. 339 (1960)

Alabama redrew the boundaries of the city of Tuskegee in "an uncouth twenty-eight-sided figure" that excluded from the city all but a handful of black voters while excluding no whites. The lower federal courts refused to grant any relief from this racial GERRYMANDER, concluding on the basis of COLEGROVE V. GREEN (1946) that municipal boundaries, like legislative districting, presented only POLITICAL QUESTIONS that lacked JUSTICIABILITY.

The Supreme Court unanimously held the case justiciable, and eight Justices, speaking through Justice FELIX FRANKFURTER, concluded that the gerrymander violated the FIFTEENTH AMENDMENT. The effect of the law was so clear as to demonstrate a purpose to deprive blacks of their vote for city officials. Justice CHARLES E. WHITTAKER concurred, on the basis of the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT.

The door which *Gomillion* pried open was flung wide in BAKER V. CARR (1962), when the Court held that the malapportionment of state legislative districts presented a justiciable controversy under the equal protection clause.

KENNETH L. KARST
(1986)

## GOMPERS v. BUCK'S STOVE & RANGE COMPANY
221 U.S. 418 (1911)

In a decision that presaged the CLAYTON ACT, a unanimous Supreme Court held that an advertisement encouraging a SECONDARY BOYCOTT was unlawful and not protected by the FREEDOM OF SPEECH or of the PRESS. To support a local affiliate, the American Federation of Labor had run a notice in its magazine, the *American Federationist*, which transformed a local dispute into a national boycott by including the firm in a "We Don't Patronize" list. Prompted by a local strike, the company obtained an INJUNCTION prohibiting the AFL, its officers, and the local from obstructing sales or furthering any boycott, including use of the firm's name on the "We Don't Patronize" list. When Samuel Gompers and other union leaders ignored the injunction, they were jailed for contempt. Their APPEAL to the Court maintained that they could lawfully ignore the injunction because it abridged their rights of free speech and press.

Speaking for the Court, Justice JOSEPH R. LAMAR dismissed the free speech claim. Publication might provide a means of continuing an illegal boycott because the printing of words in an unlawful conspiracy might foster actions, thereby "exceeding any possible right of speech which a single individual might have." The resultant "verbal acts" would necessarily be subject to injunction. In this case, the publicity destroyed business and illegally restrained commerce. Here Lamar introduced the analogy of a SHERMAN ANTITRUST ACT violation, an analogy that has misled many authorities to believe that the case found such a violation—which it did not, for the company had not sought such relief. Declaring that the decision in LOEWE V. LAWLOR (1908) extended to any unlawful method of restraint, Lamar asserted that a failure to "hold that the restraint of trade under the Sherman anti-trust act, or on general principles of law, could be enjoined . . . would be to render the law impotent." This was no more than an analogy. Because the boycott constituted an illegal conspiracy, the Court had the power and the duty to sustain the injunction.

With the effectiveness of the boycott reduced by this decision, labor turned to politics to influence elections and legislation. In a well-intentioned, if ambiguous, attempt to eliminate the confusion over labor's rights and obligations under the Sherman Act, Congress passed the Clayton Act in 1914. Section 20 of this act, ostensibly addressed to the *Gompers* issue, prohibited the issuance of injunctions restraining unions from maintaining secondary boycotts or "from recommending, advising, or persuading others by peaceful and lawful means so to do." Although the Court

would virtually divest this section of meaning in DUPLEX PRINTING PRESS COMPANY V. DEERING (1921), Congress had the last word, passing the NORRIS-LAGUARDIA ACT in 1932.

DAVID GORDON
(1986)

Bibliography

BERMAN, EDWARD (1930) 1969 *Labor and the Sherman Act.* New York: Russell & Russell.

## *GONG LUM v. RICE*
275 U.S. 78 (1927)

Classifying a youngster of Chinese ancestry as "colored," thereby compelling her to attend a black school, did not deny her EQUAL PROTECTION under the FOURTEENTH AMENDMENT. By so ruling, a unanimous Supreme Court upheld a Mississippi decision. The Court declined to consider the issue at length; citing ROBERTS V. BOSTON (Massachusetts, 1850) and PLESSY V. FERGUSON (1896), the Court concluded that PRECEDENT had clearly established a state's right to settle such issues of racial SEGREGATION without "intervention of the federal courts."

DAVID GORDON
(1986)

## GOOD BEHAVIOR

Until the late seventeenth century, royal judges held their offices "during the king's good pleasure." After the Glorious Revolution (1688–1689), judges in England (but not in the colonies) were appointed "during good behavior." This was a crucial step toward insuring the independence of the judiciary. The phrase was used in several revolutionary state constitutions, and the CONSTITUTIONAL CONVENTION OF 1787 unanimously adopted it to define the tenure of federal judges. ALEXANDER HAMILTON, in THE FEDERALIST, defended such tenure on the grounds that judicial independence is as necessary in a republic as in a monarchy.

It is by no means certain that a judge deviates from "good behavior" only when he commits "high crimes and misdemeanors"; however, the Constitution provides for no means of removal except IMPEACHMENT.

DENNIS J. MAHONEY
(1986)

## GOOD FAITH EXCEPTION

The good faith exception to the EXCLUSIONARY RULE created to enforce the FOURTH AMENDMENT allows prosecutorial use of illegally seized EVIDENCE if the police made the seizure in good faith reliance on the validity of a SEARCH WARRANT, even though an appellate court later finds that the warrant was unconstitutionally issued. As Justice BYRON R. WHITE for the Supreme Court stated the doctrine in UNITED STATES V. LEON (1984), the Court "modified" the exclusionary rule "so as not to bar the use in the prosecution's case-in-chief of evidence seized on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by PROBABLE CAUSE."

Those who support the good faith exception claim that it does not prevent either the Fourth Amendment or the exclusionary rule from achieving its intended functions. They see the exclusionary rule as a judicially created remedy designed to deter violations of the amendment; and they stress that the substantial costs exacted by the rule often outweigh its benefits. By excluding genuine evidence from the truth-finding process, the rule allows guilty persons to escape punishment and offends basic concepts of criminal justice. These costs can be justified only if the rule deters police misconduct. Advocates of the good faith exception assert, too, that the rule does not lower the probable cause standard and that it loses its deterrent capability when the officer has acted on a good faith belief that he was executing a warrant properly issued by a neutral magistrate and based on probable cause.

Opponents of the exception defend the exclusionary rule as inherent in the Fourth Amendment, preventing law enforcement officials from making any use of evidence obtained through their misconduct or misjudgment. Opponents claim that the amendment itself, not just the rule, makes convictions difficult. They stress that empirical studies show that the social cost of the exclusionary rule in lost prosecutions and acquittals has been exaggerated, and they argue that the rule improves police work by giving real effect to requirements to which law enforcement officials must conform. The good faith exception, on the other hand, places a premium on police ignorance of the law. Although they concede that no individual officer is likely to be deterred from unconstitutional conduct by exclusion of evidence seized in reliance on a defective warrant, the opponents argue that a good faith exception weakens the rule's influence toward a systemic or institutional compliance with the Fourth Amendment. They point out, too, that an objectively reasonable reliance on an UNREASONABLE SEARCH or on a warrant lacking probable cause is *impossible,* because no search and seizure can simultaneously be reasonable and unreasonable. The warrant requirement lies at the heart of the amendment, they contend; and the good faith exception erodes the requirement of probable cause. The Framers of the amendment sought to condition search and seizure on probable cause. They were primarily concerned with illegal warrants—GENERAL WARRANTS and WRITS OF ASSISTANCE. The excep-

tion admits illegally seized evidence and in so doing implicates the integrity of the judicial process. The exclusionary rule exists to deter violations of the amendment by all law enforcement agencies, the courts included.

Proponents of the good faith exception regard the courts, including the magistrates who issue warrants, as independent of, not part of, law enforcement agencies. Proponents and opponents of the exception, and of the exclusionary rule, argue from different premises and rarely confront each other's arguments.

LEONARD W. LEVY
(1986)

Bibliography

KAMISAR, YALE 1984 Gates, "Probable Cause," "Good Faith," and Beyond. *Iowa Law Review* 69:551–615.

## GOODNOW, FRANK J.
(1859–1939)

Frank Johnson Goodnow, founding president of the American Political Science Association (1903–1905), professor at Columbia University (1891–1912) and subsequently president of Johns Hopkins University (1914–1929), was one of the leading proponents of PROGRESSIVE CONSTITUTIONAL THOUGHT. Rejecting the traditional doctrine of SEPARATION OF POWERS, he urged a new separation of political decision making from public administration. In *Social Reform and the Constitution* (1911) he condemned the STRICT CONSTRUCTION of the Constitution that blocked implementation of progressive reforms. He advocated a flexible CONSTITUTIONALISM that would reflect the pace of social change.

DENNIS J. MAHONEY
(1986)

Bibliography

MAHONEY, DENNIS J. 1984 A New Political Science for a World Made Wholly New: The Doctrine of Progress and the Emergence of American Political Science. Ph.D. dissertation, Claremont Graduate School.

## GORDON, THOMAS

See: Cato's Letters

## GORHAM, NATHANIEL
(1738–1796)

Nathaniel Gorham, a prominent businessman and political leader, signed the Constitution as a representative of Massachusetts. One of the handful of most active delegates to the CONSTITUTIONAL CONVENTION OF 1787, Gorham presided over the Committee of the Whole, served on several committees, including the Committee on Detail, and spoke frequently. He was a supporter of strong national government.

DENNIS J. MAHONEY
(1986)

## *GOSS v. LOPEZ*
419 U.S. 565 (1975)

Ohio law authorized a public school principal to suspend a misbehaving student for up to ten days, without a hearing. A 5–4 Supreme Court held that this law violated a student's right to PROCEDURAL DUE PROCESS. For the majority, Justice BYRON R. WHITE found a "PROPERTY" interest in the state's statute setting out a student's "entitlement" to attend school, and a "liberty" interest in the loss of reputation attending suspension for misconduct. While trivial school discipline might not require any hearing, a ten-day suspension demanded notice of the charges against the student, and, if the charges were denied, an explanation of the EVIDENCE and an opportunity to present his or her story. Justice LEWIS F. POWELL, a former school board president, led the dissenters. The statute authorizing suspension gave only a conditional entitlement to attend school—as Justice WILLIAM H. REHNQUIST had argued in ARNETT V. KENNEDY (1974)—and the injury to reputation was not serious enough to invade a "liberty" interest. Thus, Powell argued, the school discipline here did "not assume constitutional dimensions."

KENNETH L. KARST
(1986)

## GOUDY, WILLIAM CHARLES
(1824–1893)

The leader of the Chicago bar, William Goudy was a creative constitutional lawyer and railroad counsel who argued many cases before the Supreme Court. He familiarized the Court with the relationship of laissez-faire tenets and constitutional limitations on STATE POLICE POWER. In *Munn v. Illinois* (see GRANGER CASES), WABASH, ST. LOUIS, AND PACIFIC RAILROAD V. ILLINOIS (1886), and CHICAGO, MILWAUKEE, AND ST. PAUL RAILROAD V. MINNESOTA (1890), he advanced SUBSTANTIVE DUE PROCESS of law in the context of arguments, stressing that the right to property included its unfettered use as well as its title and possession. State regulation of rates, by reducing profits, consti-

tuted a TAKING OF PROPERTY without JUST COMPENSATION and a denial of due process, according to Goudy.

LEONARD W. LEVY
(1986)

Bibliography

TWISS, BENJAMIN 1942 *Lawyers and the Constitution.* Pages 76–84. Princeton, N.J.: Princeton University Press.

## GOVERNMENT AID TO RELIGIOUS INSTITUTIONS

Constitutionality of governmental aid to religious institutions, generally, though not exclusively, in the form of financial subsidies, is most often challenged under the FIRST AMENDMENT's ban on laws respecting an ESTABLISHMENT OF RELIGION. When the purpose of the subsidy is to finance obviously religious activities, such as the erection or repairing of a church building, UNCONSTITUTIONALITY is generally recognized. In large measure the purpose of the establishment clause was to forbid such grants, as is indicated by the Court's opinion and Justice WILEY RUTLEDGE'S dissenting opinion in EVERSON V. BOARD OF EDUCATION (1947). On the other hand, where the funds are used for what would generally be considered secular activities, such as maintaining hospitals or providing meals for pupils in church-related (often called parochial) schools, constitutional validity is fairly unanimously assumed.

Constitutional controversy revolves largely around governmental financing of church-related schools that combine the inculcation of religious doctrines and beliefs with what is generally considered the teaching of secular subjects, substantially, though not necessarily entirely, as they are taught in public schools.

In *Everson*, the Court upheld as a valid exercise of the POLICE POWER a state statute financing bus transportation to parochial schools, on the ground that the legislative purpose was not to aid religion by financing the operations of the schools but to help insure the safety of children going to or returning from them. A law having the former purpose would violate the establishment clause, which forbids government to set up a church, aid one or more religions, or prefer one religion over others. "No tax in any amount, large or small," the Court said, "can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

The *Everson,* or "no-aid," interpretation of the establishment clause as applied to governmental financing of religious schools next reached the Supreme Court in the case of BOARD OF EDUCATION V. ALLEN (1968). There the Court upheld a New York statute providing for the loan to pupils attending nonpublic schools of secular textbooks authorized for use in public schools. The Court concluded that the statute did not impermissibly aid religious schools within the meaning of *Everson*, nor did it violate the establishment clause ban on laws lacking a secular legislative purpose or having a primary effect that either advances or inhibits religion, as that clause had been interpreted in ABINGTON SCHOOL DISTRICT V. SCHEMPP (1963). In upholding the New York law, the Court recognized that the police power rationale of *Everson* was not readily applicable to textbook laws, but it adjudged that the processes of secular and religious training are not so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion.

It is fairly obvious that the *Allen* rationale could be used to justify state aid to religious schools considerably more extensive than mere financing of transportation or provision of secular textbooks. It could, for example, justify state financing of supplies other than textbooks, costs of maintenance and repair of parochial school premises, and, most important, salaries of instructors who teach the nonreligious subjects, which constitute the major part of the parochial school curriculum.

That this extension was intended by Justice BYRON R. WHITE, the author of the *Allen* opinion, is indicated by the fact that he thereafter dissented in all the decisions barring aid to church-related schools. The first of these decisions came in the companion cases of LEMON V. KURTZMAN and *Earley v. DiCenso* (1973). In *Lemon*, Pennsylvania purchased the services of religious schools in providing secular education to their pupils. In *DiCenso,* Rhode Island paid fifteen percent of the salaries of religious school teachers who taught only secular subjects.

A year earlier, in WALZ V. TAX COMMISSION (1970), the Court had expanded the purpose-effect test by adding a third dimension: a statute violated the establishment clause if it fostered excessive governmental entanglement with religion. The statutes involved in *Lemon* and *DiCenso* violated the clause, the Court held, because in order to insure that the teachers did not inject religion into their secular classes or allow religious values to affect the content of secular instruction, it was necessary to subject the teachers to comprehensive, discriminating, and continuing state surveillance, which would constitute forbidden entanglement of church and state.

In other cases the Court held unconstitutional laws enacted to reimburse religious schools for the cost of preparing, conducting, and grading teacher-prepared tests, of maintaining and repairing school buildings, of transporting students on field trips to museums and concerts as part of secular courses, and of purchasing instructional materials and equipment susceptible of diversion to religious use. The Court also held unconstitutional state tuition as-

sistance to the parents of parochial school pupils, whether by direct grant or through state income tax benefits.

On the other hand, the Court has upheld the constitutionality of reimbursement for noninstructional health and welfare services supplied to parochial school pupils, such as meals, medical and dental care, and diagnostic services relating to speech, hearing, and psychological problems. In COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY V. REGAN (1980) the Court allowed reimbursement for the expense of administering state-prepared and mandated objective examinations.

The Court has manifested a considerably more tolerant approach in cases challenging governmental aid to church-related institutions of higher education. While the purpose-effect-entanglement test is in principle equally applicable, the Court held that where a grant is used to finance facilities in colleges and universities used only for secular instruction, the primary effect of the law is not to advance religion. As for entanglement, religion does not necessarily so permeate the secular education provided by church-related colleges nor so seep into the use of their facilities as to require a ruling that in all cases excessive surveillance would be necessary to assure that the facilities were not used for religious purposes. The Court also gave consideration to the skepticism of college students, the nature of college and postgraduate courses, the high degree of academic freedom characterizing many church-related colleges, and their nonlocal constituencies. For all these reasons, in TILTON V. RICHARDSON (1973) the Court sanctioned substantial governmental financing of church-related institutions of higher education.

In *Walz v. Tax Commission* the Court upheld the constitutionality of tax exemption accorded to property used exclusively for worship or other religious purposes. Exemption, it held, does not entail sponsorship of religion and involves even less entanglement than nonexemption, since it does not require the government to examine the affairs of the church and audit its books or records. The longevity of exemption, dating as it does from the time the Republic was founded, constitutes strong evidence of its constitutionality.

The Court, in *Walz*, did not hold that the free exercise clause would be violated if exemption were disallowed (although it was urged to do so in the AMICUS CURIAE brief submitted by the National Council of Churches). Nor, on the other hand, did it decide to the contrary. As of the present, therefore, it seems that governments, federal or state, have the constitutional option of granting or denying exemption.

LEO PFEFFER
(1986)

(SEE ALSO: *Separation of Church and State.*)

Bibliography

MORGAN, RICHARD E. 1972 *The Supreme Court and Religion.* New York: Free Press.

PFEFFER, LEO 1967 *Church, State and Freedom.* Rev. ed. Boston: Beacon Press.

——— 1975 *God, Caesar and the Constitution.* Boston: Beacon Press.

TRIBE, LAURENCE 1978 *American Constitutional Law.* Chap. 14. Mineola, N.Y.: Foundation Press.

## GOVERNMENT AID TO RELIGIOUS INSTITUTIONS (Update 1)

A theme of equality has dominated recent Supreme Court decisions in the area of church-state relations. This may be seen most dramatically in the shrunken protection for RELIGIOUS LIBERTY under the Court's peyote ruling in EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990), which held that the free-exercise clause of the FIRST AMENDMENT affords no religious exemption from a neutral law that regulates conduct even though that law imposes a substantial burden on religious practice. Similarly, on the subject of RELIGION IN PUBLIC SCHOOLS, the Court held in BOARD OF EDUCATION OF WEST-SIDE COMMUNITY SCHOOLS V. MERGENS (1990) that the First Amendment's ban on laws respecting an ESTABLISHMENT OF RELIGION permits student religious groups in secondary schools to meet for religious purposes (including prayer) on school premises during noninstructional time as long as other non-curriculum-related student groups are allowed to do so. This theme of neutral treatment of religious and secular groups has been prominent in regard to the subject of governmental aid as well.

It has long been the rule that a government subsidy to religious institutions violates the ESTABLISHMENT CLAUSE when the subsidy's purpose or primary effect is to finance religious (rather than secular) activities. The decision in BOWEN V. KENDRICK (1988) affirmed this proposition and also revealed the present Court's inclination to give a generous interpretation to the term "secular" activities. The case upheld the constitutionality of Congress's granting funds to a variety of public and private agencies (including religious organizations) to provide counseling for prevention of adolescent sexual relations and to promote adoption as an alternative to ABORTION. Whereas this program may be fairly characterized as having a "secular" purpose (even though it coincides with the approach of certain prominent religious groups), there appears to be a substantial danger that the program's primary effect will be to further religious precepts when religiously employed

counselors deal with a subject so closely and inextricably tied to religious doctrine.

Substantial constitutional controversy continues to revolve around government financing of church-related schools that combine the inculcation of religious doctrines with the teaching of secular subjects substantially, although not necessarily entirely, as they are taught in public schools. Most forms of public aid for parochial schools, even to support secular courses, have been held to violate the establishment clause, particularly when the aid has been provided directly to the schools themselves rather than to the parents. The Court has usually reasoned that although the aid had a secular (in contrast to a religious) purpose, it was still invalid. The Court's analysis of the problem began with a critical premise: The mission of church-related elementary and secondary schools is to teach religion, and all subjects either are, or carry the potential of being, permeated with religion. Therefore, if the government funds any subjects in these schools, the primary effect will be to aid religion unless public officials monitor the situation to see to it that those courses are not infused with religious doctrine. However, if public officials engage in adequate surveillance, there will be excessive entanglement between government and religion—the image being government spies regularly in parochial school classrooms.

Although no holding of the Supreme Court has overturned this approach, the separate opinion of Justices ANTHONY M. KENNEDY and ANTONIN SCALIA in *Bowen v. Kendrick* reasons that the fact that the assistance goes directly to the schools is not important. Rather, these Justices believe that the use to which the aid is put is crucial. This opinion strongly suggests that a majority of the Court would no longer invalidate most forms of aid to the schools themselves as long as there were adequate controls to assure that the funds were not spent for religious purposes. This is a sound precept. If governmental assistance to parochial schools does not exceed the value of the secular educational service the schools render, then there is no use of tax-raised funds to aid religion and thus no threat of this historic danger to religious liberty.

Tax relief—either exemptions for property used exclusively for worship or other religious purposes, or income tax deductions for parents who send their children to parochial schools—had been held not to violate the establishment clause as long as the benefits extended beyond religion-related recipients. For example, the Court had upheld property-tax exemptions for educational and charitable institutions and tax deductions for school expenses to all parents of school children. By the same token, in TEXAS MONTHLY, INC. V. BULLOCK (1989) the Court invalidated a state sales-tax exemption for books and magazines that "teach" or are "sacred" to religious faith. Because the exemption was for religious purposes only and not the broad-based type of tax relief provided in the earlier cases, the Court held that this governmental aid violated the establishment clause.

In the mid-1980s, probably the most important uncertainty regarding governmental assistance to parochial schools concerned VOUCHERS. Although the decision in WITTERS V. WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND (1986) involved only a special type of voucher and did not speak to the constitutionality of school vouchers generally, its rationale goes a long way to sustaining their validity. The case upheld a state program giving visually handicapped persons a voucher (although it was not called that) for use in vocational schools for the blind. Witters was studying religion at a Christian college "in order to equip himself for a career as a pastor, missionary or youth director." A majority of the Court, even before Justices Kennedy and Scalia had been appointed, agreed that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the [establishment clause], because any aid to religion results from the private choices of individual beneficiaries." The state's money, however, was plainly being spent for religious purposes. If the government, whether through a voucher or a direct grant to parochial schools, is financing not only the value of secular education in those schools, but also all or part of the cost of religious education, the support is an expenditure of compulsorily raised tax funds for religious purposes and should be held to violate the establishment clause.

JESSE H. CHOPER
(1992)

Bibliography

CHOPER, JESSE H. 1987 The Establishment Clause and Aid to Parochial Schools—An Update. *California Law Review* 75: 5–14.

CORD, ROBERT L. 1982 *Separation of Church and State: Historical Fact and Current Fiction.* New York: Lambeth Press.

## GOVERNMENT AID TO RELIGIOUS INSTITUTIONS
### (Update 2)

The 1990s witnessed the slow demise of the three-pronged LEMON TEST articulated by the Supreme Court in LEMON V. KURTZMAN (1971) and the ascendancy of the neutrality principle for determining whether government aid to a religious institution violates the ESTABLISHMENT CLAUSE. This doctrinal change has occurred along two fronts, one involving FREEDOM OF SPEECH challenges to government refusals to aid religious expressive activities,

and the other involving challenges to government programs that benefit religious as well as secular institutions.

In LAMB'S CHAPEL V. CENTER MORICHES UNION FREE SCHOOL DISTRICT (1993), the Court held that public school officials had violated the free speech clause of the FIRST AMENDMENT when they refused to allow a religious group (wanting to show a film) the same access to the school gym granted to secular groups. According to the Court, providing equal access to school facilities after- hours does not amount to government advancement of religion, and therefore there was no compelling justification for this kind of viewpoint discrimination. Extending this rationale to government funding decisions in ROSENBERGER V. RECTORS & VISITORS OF THE UNIVERSITY OF VIRGINIA (1995), the Court held that a public university may not deny a religious group equal access to subsidies for student publications.

In cases decided during the 1990s involving challenges to government aid to religious institutions, the Court has ignored or significantly modified the 1970s-era *Lemon* test. In *Zobrest v. Catalina Foothills School District* (1993), the Court ruled that a government-paid sign language interpreter may assist a deaf student attending classes at a Roman Catholic high school. The Court reasoned that because the program provided interpreters to students on a religiously neutral basis, the interpreter's presence in the religious school was the "result of the private decision of individual parents" and "[could] not be attributed to state decision-making." Although the Court in *Zobrest* did not cite the *Lemon* test, its holding clearly conflicted with prior decisions under *Lemon* that had forbidden PUBLIC EMPLOYEES from providing educational services on the grounds of a religious school.

In AGOSTINI V. FELTON (1997), the only modern decision to expressly OVERRULE a *Lemon*-period PRECEDENT, the Court reversed its earlier holding in AGUILAR V. FELTON (1985) invalidating the use of federal funds to pay for remedial education provided by public school teachers on the grounds of parochial schools. Relying on *Zobrest*, the Court rejected the idea that government employees may never provide educational assistance on religious school grounds. The question, according to the Court, was whether the aid was provided on a religiously neutral basis and whether the program so entangled church and state as to have the effect of inhibiting religion. Writing for the Court, Justice SANDRA DAY O'CONNOR concluded that the funds were religiously neutral and that government oversight of the program would be no more intrusive than the oversight private religious schools already are subject to under state law. The innovation of *Agostini* was O'Connor's revision of the *Lemon* test. According to O'Connor, the no-entanglement prong of the *Lemon* test is best assessed as one aspect of the inquiry into whether or not a government program has a primary effect of advancing or inhibiting religion, and not as a separate requirement.

*Agostini* did not directly consider whether the state may include religious schools in government-funded school voucher programs. Nevertheless, the combined effect of recent religious expression and government funding cases seem to permit, if not require, equal participation by a religious school in a properly structured voucher program. In fact, in WITTERS V. WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND (1986), the Court upheld a voucher-like "college choice" program, on the ground that the program was religiously neutral and the aid arrived at the institution by way of private choice, not government direction. After *Agostini*, it seems but a small step to apply this rationale to uphold elementary and high school voucher programs. The issue the Court soon must face is whether the government may exclude religious institutions from general benefits programs when the establishment clause no longer stands as a barrier to their equal participation.

KURT T. LASH
(2000)

(SEE ALSO: *Establishment of Religion; Religion in Public Schools; Religious Liberty; Separation of Church and State; School Choice.*)

## GOVERNMENT AS PROPRIETOR

Constitutional litigants in disparate contexts have sought to characterize particular government acts as proprietary, rather than sovereign, in order to substitute for the constitutional standards otherwise applicable to government something like those applicable to private proprietors. Government at any level—local, state, or federal—not only may regulate and tax (the most coercive and quintessentially sovereign exercises of power), but may borrow, spend, buy or sell goods and services, build and operate offices or mass transit, manage property of many kinds, and employ workers. Our constitutional regime sharply differentiates between government and private spheres. When government acts in capacities that resemble the proprietary activities of private owners, managers, and employers, suggestions of modified constitutional analysis may be inevitable. Sometimes the litigant who suggests such a modification seeks to enlarge government power by skirting the constitutional limitations that normally bind federal or state sovereigns, but not private proprietors, in their treatment of individuals; the courts have grappled with this problem through the STATE ACTION doctrine. Sometimes the objective is to dislodge SOVEREIGN IMMUNITY in its various forms and render government accountable to individuals or to subject it to regulation and

taxation by superior sovereigns, just as other individuals are. As a double-edged sword that can cut down either constitutional obligation or constitutional immunity, the proprietary analogy is potentially a formidable and versatile tool.

This analogy's checkered past includes adoption, and later rejection, in some constitutional contexts and continuing influence in various forms in others. Courts that reject the government-proprietor distinction make two main arguments: first, it is impossible to draw a sensible line between government's proprietary and sovereign activities, and second, there is questionable legitimacy in drawing such a line in order to discount the value of using proprietary means to accomplish democratically chosen ends. The government-proprietor distinction's frequent recurrence and continued influence rests, in the strongest version, on the superficial appeal of the private analogy or, in a weaker version, on factors sometimes associated with the difference between proprietary and regulatory conduct. Proprietary activity sometimes may implicate other constitutional values to a lesser degree than does more "sovereign" activity: it may interfere less with individual freedom or other values such as interstate harmony; it may provide additional legitimate justifications for governmental policy; or, by analogy to the lesser constitutional protection afforded private COMMERCIAL SPEECH and activity than is afforded political speech and activity, sovereign immunity may be deemed less important for government's proprietary than for its "sovereign" behavior. But the proprietary designation is often too inexact a shorthand for these relevant elements of constitutional analysis. Furthermore, as a determinative or even very strong factor, the proprietary designation too readily slights other important considerations that sometimes should temper or overwhelm it. The designation's mixed success is partially attributable to the fact that it is far too broad and insensitive a constitutional measure and partially to the fact that stronger principles often obviate any value it might otherwise have.

Other drawbacks further limit the utility of treating government as if it were a private business. The government as proprietor may be analogous to a private proprietor, but it differs in its motivations and responsibilities. It is still government, subject to political as well as commercial or proprietary influences and to constitutional restraints inapplicable to private actors.

Imprecise and multiple meanings also limit the usefulness of the proprietary designation. Acting as an owner may differ from one kind of property to another and may differ from acting as a business, a consumer, or an employer. Not only are there varying kinds and gradations of proprietary activity, but the line between regulatory or other sovereign activity and proprietary activity is often blurred. The difference between management policy with respect to government property, business, or employees and regulation of the citizenry at large is a matter of degree, not kind.

Perhaps most fundamentally, in each kind of constitutional controversy, claims of proprietary prerogative or liability encounter varying responses depending on the perceived nature and strength of the countervailing constitutional values. According to PUBLIC FORUM analysis, people free to speak at home may be prevented from speaking at will in government offices—an example of a proprietary justification for limiting the locations of FREEDOM OF SPEECH—yet may not be prevented from speaking in parks or on street corners. Proprietary prerogatives of government thus may affect FIRST AMENDMENT free speech analysis with respect to some but not all publicly owned property. Nor may a government business discriminate on an invidious basis, such as by race or political viewpoint, any more than it may so discriminate in a tax or regulatory capacity. These antidiscrimination restrictions on government behavior are so strong that they may apply fully whether government behaves in a sovereign or proprietary capacity.

The idea of government as proprietor thus has not worked as a categorical concept of overarching importance. It must be understood by reference to the particular kind of proprietary activity involved, the reasons why that activity is thought relevant to solving the specific constitutional controversy, the nature and strength of the constitutional values with which the activity competes, and the practical consequences of the concept. A survey of relevant constitutional controversies reveals this complexity. The controversies include intergovernmental claims by municipalities that their proprietary acts, just like those of private parties, are constitutionally protected from state interference; claims by states of constitutional immunity from control by Congress or the federal courts; state claims of freedom to prefer their own citizens over residents of other states with respect to proprietary policies; and claims by government at all levels that the constitutional rights of individuals may be more circumscribed on government property than on private property. Each set of controversies has its own story.

The simplest story is the unsuccessful attempt of LOCAL GOVERNMENT to carve out a proprietary-rights exception from the principle that each state's power over its political subdivisions generally is unrestricted by the federal Constitution. The Supreme Court easily rejected municipal claims that constitutional provisions like those prohibiting impairment of the OBLIGATIONS OF CONTRACTS or the TAKING OF PROPERTY without JUST COMPENSATION should limit state interference, not only with private contracts and property, but with city contracts and property used in the city's pro-

prietary activities. Even with respect to contract and PROPERTY RIGHTS that the state had originally granted to a private business, that the business then assigned to a city, the Court refused in *City of Trenton v. New Jersey* (1923) to adopt a proprietor-sovereign distinction that would impose on the states constitutional obligations toward the "proprietary" acts of their constituent governments. Originally a judge-made distinction designed to circumvent the sovereign immunity doctrine of COMMON LAW and hold municipalities liable for tortious injuries caused by their proprietary conduct, the proprietor-sovereign distinction lacked a principled basis or definable content and would not be transferred to this area of constitutional law.

The proprietary notion had already been adopted in disputes about the extent of Congress's power to tax state activities, however, though it was ultimately rejected for some of the same reasons in this very different context. Congress expanded its tax programs at the turn of the century just as state trading activity increased. The Supreme Court, in cases like *South Carolina v. United States* (1905), sustained federal taxes on state-sold liquor and other commodities by holding that the constitutional DOCTRINE of INTERGOVERNMENTAL TAX IMMUNITY, which otherwise prohibited federal taxation of state operations, did not extend to state proprietary operations. This proprietary exception was designed to preserve common federal-revenue sources and, possibly, in this area of strong constitutional protection for private enterprise (LOCHNER V. NEW YORK also was decided in 1905), to equalize the competitive positions of state and private business. But by 1947, in *New York v. United States*, the Court, in sustaining a federal tax on state-bottled water, adopted new standards that were more generous to congressional authority and expressly rejected "limitations upon the taxing power of Congress derived from such untenable criteria as 'proprietary' against 'governmental' activities of the States."

Congress's power to regulate, rather than tax, state operations has followed a different story line. Even if some form of state tax immunity might be important to preserve, *United States v. California* (1936) established for forty years that, when Congress exercised a plenary regulatory power like the power to regulate INTERSTATE COMMERCE, there was no need to distinguish between sovereign and proprietary operations because both were subject to federal regulation. Federal safety, price control, and labor regulations could be applied to state operations because, as the Court said in *Maryland v. Wirtz* (1968), "the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary.'"

The overruling of the *Wirtz* decision, by a 5–4 vote, in NATIONAL LEAGUE OF CITIES V. USERY (1976) did backtrack and protect certain state operations from federal regulatory as well as taxing power. Ostensibly, the boundary was not drawn according to whether a state operation was governmental or proprietary, but by whether it was an "integral" or "traditional" government function. However, this formulation led to distinguishing between impermissible federal labor regulation of state police and fire-department employees and permissible labor regulation of the employees of state-owned railroads. The state as employer would sometimes be immune, but not with respect to employees providing services like those the private sector traditionally provided.

The *Usery* case was soon itself overruled, however, by the 5–4 decision in GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985), which held that, at least with respect to congressional regulation—if not possibly taxation—the states must rely on their political influence in Congress, not on judicial enforcement of the Constitution, for protection against burdensome congressional interference with state operations. By withdrawing from the task of defining any core of state SOVEREIGNTY, the *Garcia* decision again obviated the need to draw a government-proprietor or similar distinction. The Court had now concluded that such distinctions were not only "unworkable in practice," but "unsound in principle" because they wrongly devalued an important principle of federalism—each state's lawful and democratically selected means of carrying out its legitimate policy objectives should be equally respected, however unconventional the choice of means might be.

The complete rejection of the proprietor-sovereign distinction in virtually all hierarchical intergovernmental disputes—whether invoked by municipalities claiming more constitutional protection from state control for proprietary than for governmental activities or by states conversely claiming more constitutional immunity from Congress for governmental than for proprietary activities—so far has not been replicated outside the constitutional clashes between superior and subordinate levels of government. Yet, doctrinal turbulence and perennial dissatisfaction with reliance on proprietary notions remain.

The tale of changing Supreme Court responses to state policies that give preference to their residents in the distribution of "proprietary" commercial benefits is a major example. To further political and economic union, the PRIVILEGES AND IMMUNITIES clause of Article IV, Section 2, generally prohibits each state from discriminating against citizens of other states, and the DORMANT COMMERCE CLAUSE prohibits state discrimination against interstate business. However, each state's primary obligation to serve its own residents necessitates some resident preference. Various proprietary concepts have been employed to mediate the Constitution's interstateequality demands and its conflicting recognition of state sovereignty.

Under the privileges and immunities clause, no state, absent substantial justification, may limit nonresident access to private-sector commercial opportunities more severely than it limits resident access. Beginning in the nineteenth century, however, the Court permitted resident preference regarding commercial exploitation of state-owned natural resources. The Court concluded that government property owners, like private owners, generally may be selective in sharing what they own with whom they wish. This proprietary escape hatch from the regulatory nondiscrimination rule was criticized as "a fiction," but not fully abandoned, in TOOMER V. WITSELL (1948), just a year after the decision in *New York v. United States* had discarded the proprietor-sovereign distinction as a standard for demarcating the line between federal taxing authority and state tax immunity. *Toomer* rejected South Carolina's attempt to justify charging nonresidents 100 times more than it charged its own residents for a license to shrimp in state coastal waters; the Court called the state's claim to "own" the shrimp and the sea extravagant. Since then, even true state resource ownership does not render the privileges and immunities clause wholly inapplicable. Although ownership is "often the crucial factor" in evaluating the constitutionality of discriminatory resource distribution, the Court in HICKLIN V. ORBECK (1978) limited resident preference to the state's direct proprietary dealings and disallowed conditional policies requiring those in the immediate proprietary relationship to prefer residents in "downstream" relationships.

The proprietary idea followed a similar but not identical course in dormant-commerce-clause jurisprudence. At the end of the nineteenth century, the Court carved a generous proprietary exception from the usual rule that a state may not prevent the shipment of local goods to other states. In *Geer v. Connecticut* (1896), for example, it allowed a complete ban of shipping game birds out of state; the Court applied the fictitious theory that the state owned the wildlife within its borders and thus could control its disposition, even after the birds lawfully had been reduced to private possession. *Geer* was eventually overruled a year after *Hicklin* in *Hughes v. Oklahoma* (1979), which applied the same dormant-commerce-clause standards applicable to regulation of private goods to the regulation of wildlife. At a minimum, *Hughes* limited the proprietary justification to instances of actual, not pretended, state ownership.

Moving in the other direction, several decisions in the last two decades have allowed states to discriminate against interstate commerce on the basis of a different kind of proprietary prerogative—that of the state acting as a commercial buyer or seller, rather than just as owner of property. Whether favoring in-state suppliers for government purchases, as in *Hughes v. Alexandria Scrap Corp.* (1976), or preferring in-state customers when demand for state-manufactured goods exceeds supply, as in *Reeves v. Stake* (1980), states have been exempted from the normal dormant-commerce-clause antidiscrimination limits when acting as "market participants" rather than as regulators of private buyers or sellers in the interstate market. The Court's position articulated in *United Building and Construction Trades Council v. Mayor and Council of the City of Camden* (1984) is that the grant to Congress of the power to regulate interstate commerce serves only as an "implied restraint upon state regulatory powers." Thus, the nonregulatory activities of the states are not subject to dormant-commerce-clause scrutiny—a rationale that assumes a ready distinction between state regulatory and proprietary activity. Even so, the Court sought to limit the state-as-trader exception in two ways. First, as with proprietary prerogatives under the privileges and immunities clause, the market-participant doctrine allows local favoritism only in the state's dealings with its direct trading partners and disallows requiring those partners to favor residents in their independent economic relationships with others. Second, the Court in the *Camden* case held that discriminatory state market participation, which is free from dormant-commerce-clause restraints, is not wholly exempt from privileges-and-immunities-clause analysis. The latter provision directly restrains state action in the interests of interstate harmony, whether regulatory or not. Both these attempts to confine the damage that might be done by a wholesale lifting of interstate equality obligations for state proprietary activity are familiar symptoms of the beguiling but dubious use of proprietary justifications.

Several elements in the history of proprietary adjustments to interstate equality doctrine also appear in the history of proprietary adjustments to free-speech doctrine. The general question is whether government has power to deny the right to communicate on public property what freely may be communicated on private property. In the late nineteenth century era, when the Supreme Court forcefully protected private property from government intrusion and state property from nonresident demands of equal access, the excessive attribution of plenary control to property ownership prevailed. In *Davis v. Massachusetts* (1897) the Court affirmed a ruling by OLIVER WENDELL HOLMES, JR., then a state judge, that "[f]or the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of rights of a member of the public than for the owner of a private house to forbid it in the house." By the late 1930s, however, as the Court found constitutional room for extensive government regulation of private property, it also found government's proprietary claims insufficient to justify complete denial of public communication in streets and parks. The power associated with property, govern-

mental or private, would not categorically overwhelm other important considerations.

Neither was ownership always irrelevant. What ensued, with frequent division within the Court, was the development of public-forum doctrine, which sometimes distinguishes among different kinds of public property to determine what rights of access private speakers may enjoy. The core First Amendment principle that government may not discriminate against viewpoints it dislikes is so strong that it applies to all public property. Moreover, quintessential public forums like streets and parks cannot be completely closed to speech, even though banning all access would be viewpoint neutral. Yet, the Court remains excessively influenced by proprietary prerogatives. Rather than directly weighing the particular property-management interests of government against the First Amendment importance of speaker access to the particular public location, the Court has permitted government to deny access altogether—at least when the denial is not viewpoint selective—to other forms of public property, ranging from prison grounds to schools to offices to military bases, even where the speech would not interfere with the property's intended purpose. In the leading case of PERRY EDUCATION ASSOCIATION V. PERRY LOCAL EDUCATORS ASSOCIATION (1983) the Court said, "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." In that and other cases where access claims have been denied, the Court has hearkened back to Justice HUGO L. BLACK's statement for the majority in the jail-grounds case of ADDERLEY V. FLORIDA (1966): "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." The Court's deference to government's proprietary prerogatives thus depends not on property ownership alone, but at least formally, on distinctions among different kinds of public property.

If the fact of ownership is sometimes still weighed too heavily in public-forum doctrine generally, that weight may be even more excessive when, as with the market-participant exception to dormant-commerce-clause doctrine, government property is used in a commercial setting. Normally, if the government, with respect to public property that could be closed to all, voluntarily makes it available for speech on some subjects, it cannot deny access to speakers on other subjects. In *Lehman v. Shaker Heights* (1974), however, the Court allowed a city that sold space on its buses for commercial and public-service advertising to refuse to sell space for political and public-issue advertising. Putting aside First Amendment norms of equal treatment of subject matter in the "voluntary" public forum, four Justices emphasized that the city was "engaged in commerce" and acting "in a proprietary capacity."

Some deference to government's proprietary powers in managing its property, its business dealings, or its PUBLIC EMPLOYEES is undoubtedly appropriate, at least so long as those powers are not exercised for invidiously selective reasons. The Court's opinion in RUTAN V. REPUBLICAN PARTY OF ILLINOIS (1990) is a recent example of the limits of such deference; *Rutan* invalidated government personnel decisions based on political patronage over the dissent of three Justices, who complained that government should be less restricted as employer than as lawmaker. The extent to which proprietary interests permit regulation that otherwise would violate the individual rights of the general populace should, and sometimes (if not often enough) does, depend on additional considerations, such as the importance of the competing constitutional right and its claim to affirmative public support, including the availability of alternative opportunities to exercise that right and the degree to which government monopolizes those opportunities. These considerations surely support the Court's willingness to override proprietary prerogatives in favor of free speech in the streets, parks, and other traditional areas of popular assembly. (Although the recent 5–4 decision in *United States v. Kokinda* upheld a postal regulation barring solicitation on postal property as applied to soliciting political contributions on a sidewalk separating a post office from its parking lot, only four Justices relied on proprietary justifications for the exclusion; even they agreed that the "Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business.") Having safeguarded these public locales, perhaps the Court is more comfortable in approving limits on access rights in others.

In determining whether government has left too little room for individual liberty, however, the proprietary idea is too indirect and blunt an instrument, just as it is too imprecise a measure in determining whether state autonomy should be protected against congressional regulation and in determining whether a state's preferences for its own residents will threaten interstate harmony. The government-proprietor distinction's complete rejection in some spheres and its resilience and mutations in others counsel us to acknowledge its intuitive appeal, but to beware excessive reliance on its seductive power.

JONATHAN D. VARAT
(1992)

Bibliography

GILLEN, TERESA 1985 A Proposed Model of the Sovereign-Proprietary Distinction. *University of Pennsylvania Law Review* 133:661–684.

KREIMER, SETH F. 1984 Allocational Sanctions: The Problem of Negative Rights in a Positive State. *University of Pennsylvania Law Review* 132:1293, 1314–1324.

LINDE, HANS 1964 Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector. *Washington Law Review* 39:4–46.

——— 1965 Constitutional Rights in the Public Sector: Justice Douglas on Liberty in the Welfare State. *Washington Law Review* 40:10–77.

POST, ROBERT C. 1987 Between Governance and Management: The History and Theory of the Public Forum. *UCLA Law Review* 34:1713–1835.

VARAT, JONATHAN D. 1981 State "Citizenship" and Interstate Equality. *University of Chicago Law Review* 48:487–572.

WELLS, MICHAEL and HELLERSTEIN, WALTER 1980 The Governmental-Proprietary Distinction in Constitutional Law. *Virginia Law Review* 66:1073–1141.

## GOVERNMENT INSTRUMENTALITY

Government instrumentalities are agencies, including government-owned corporations, created by Congress or the state legislatures to carry out public functions or purposes. Since MCCULLOCH V. MARYLAND (1819) the doctrine of INTERGOVERNMENTAL IMMUNITY has precluded the state and federal governments from directly taxing one another's governmental instrumentalities.

DENNIS J. MAHONEY
(1986)

## GOVERNMENT REGULATION OF THE ECONOMY

See: Economic Regulation

## GOVERNMENT SECRECY

The FIRST AMENDMENT guarantees of FREEDOM OF SPEECH and FREEDOM OF THE PRESS are essential to democratic rule because they protect the right to communicate and receive information needed for self-government. Self-government might seem to require that "the public and the press" also enjoy "rights of access to information about the operation of their government," as Justice JOHN PAUL STEVENS stated in RICHMOND NEWSPAPERS V. VIRGINIA (1980). Yet, despite its broad protection of speech and the press, the Constitution imposes meager limits on government secrecy. Judicial recognition of a RIGHT TO KNOW generally has been limited to the right to learn what others may choose to disclose and not a right to know what the government elects to conceal.

The most prominent right of access to an official event recognized by the Supreme Court is the right to attend criminal trials and proceedings. Even here, however, early signs were inauspicious. In GANNETT CO., INC. V. DEPASQUALE (1979) a newspaper relied on the Sixth Amendment to require a judge to open pretrial hearings over objections from the accused and prosecutor. The Sixth Amendment guarantees "the accused . . . the right to [a] public trial." The Court rejected the newspaper's argument on the ground that the amendment gave *the public* no "right . . . to insist upon a public trial."

A year later, after much criticism, a fragmented Court found such a right in the First Amendment. In *Richmond Newspapers* the trial judge had closed a murder trial at the defendant's request. Chief Justice WARREN E. BURGER, writing for himself and Justices BYRON R. WHITE and John Paul Stevens, acknowledged that the First Amendment did not explicitly mention a right of access to governmental functions. But he found a right to attend criminal trials "implicit in the guarantees of the First Amendment." He emphasized that other "unarticulated rights" had been found implicit in the Constitution, including the right of association, the RIGHT OF PRIVACY, and the RIGHT TO TRAVEL. The CHIEF JUSTICE also cited the NINTH AMENDMENT, which he said was adopted "to allay . . . fears . . . that expressing certain guarantees could be read as excluding others."

Justice WILLIAM J. BRENNAN (joined by Justice THURGOOD MARSHALL) took a broader view of the right to government information, as did Justice Stevens in a separate opinion. For Justice Brennan, the First Amendment had "a *structural* role to play in securing and fostering our republican system of self-government. Implicit in this structural role is [the] assumption that valuable public debate . . . must be informed." His structural analysis extended to "governmental information" generally, not only criminal trials, with the "privilege of access . . . subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality." Justice WILLIAM H. REHNQUIST alone dissented.

The Court has since relied on the First Amendment to invalidate a law that excluded the press and public during the trial testimony of a minor alleged to be the victim of a sexual offense in GLOBE NEWSPAPER COMPANY V. SUPERIOR COURT (1982); to overturn a trial court's secret examination of prospective jurors in *Press-Enterprise Co. v. Superior Court* (1984); and to uphold public access to a pretrial hearing at which the prosecution must prove the existence of PROBABLE CAUSE to bring a defendant to trial in *Press-Enterprise Co. v. Superior Court* (1986). In each case, the Court said that the interest in public access could be out-

weighed in particular cases by demonstrated need for exclusion.

Beyond criminal proceedings, the argument for public access to government information has fared poorly. After suggesting in BRANZBURG V. HAYES (1972) that "news gathering is not without its First Amendment protections," the Court has recognized almost none. In *Houchins v. KQED, Inc.* (1978) the Court said that the Constitution accords the press no greater rights than it gives the public generally. But some members of the Court, notably Justice Stevens, have argued that the press should nonetheless receive greater access "to insure that the citizens are fully informed regarding matters of public interest and importance." The seven Justices participating in *Houchins* could not agree on a majority opinion, but a combination of views granted the press more frequent visits to a local jail than the public enjoyed and the right to bring recording equipment, which the public could not. But journalists had no right to enter a problem area of the jail or to interview randomly encountered inmates.

The Supreme Court has not recognized a First Amendment right of access to civil trials, although individual Justices have supported one, as have lower courts. A right of access in criminal matters is easier to uphold for two reasons. First, the Sixth Amendment, although not the source of an access right, already contemplates constitutional limits on societal efforts to close criminal proceedings. No equivalent limit exists for civil matters. Second, when the Constitution was adopted, "criminal trials both here and in England had long been presumptively open," as Chief Justice Burger pointed out in *Richmond Newspapers.*

A right of access to fiscal information would seem to reside in the accounts clause of the Constitution, which provides that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." Even if this provision does guarantee fiscal information, it is not clear who might be able to enforce it. In *United States v. Richardson* (1974) a taxpayer challenged the government's failure to disclose the CIA budget. The Court refused to address the merits of the challenge because the taxpayer lacked STANDING to assert it. Taxpayer status did not confer a right to sue.

Judicial and congressional SUBPOENAS would seem one way to require the executive branch of government to produce information. But a constitutional EXECUTIVE PRIVILEGE of uncertain dimension will sometimes entitle the President and other executive officers to maintain the secrecy of their communications by resisting such subpoenas. UNITED STATES V. NIXON (1974) recognized a qualified executive privilege, but declined to apply it to protect the President's Watergate tapes.

FREEDOM OF INFORMATION ACTS afford the single best route around official secrecy. These acts, which exist at the federal level and in many states, guarantee access to a great deal of information. However, the guarantee is legislatively, not constitutionally, created.

STEPHEN GILLERS
(1992)

Bibliography

BRENNAN, WILLIAM J. 1979 Address. *Rutgers Law Review* 32: 173–183.

LEWIS, ANTHONY 1980 A Public Right to Know About Public Institutions: The First Amendment as a Sword. *Supreme Court Review* 1980:1–25.

## GOVERNMENT SPEECH

FIRST AMENDMENT commentary has emphasized the danger of government as censor; thus lavish attention has been given to whether government can prevent Nazis from marching in Skokie, Illinois, Communists from advocating revolution, pornographers from selling their wares, or eccentrics from yelling fire in crowded theaters. Much less attention has been paid to the role of government as speaker; yet, one need only notice the ready access of government officials to the mass media, the constant stream of legislative and executive reports and publications, and the massive system of direct grants and indirect subsidies to the communications process (including federal financing of elections) to recognize that speech financed or controlled by government plays an enormous role in the marketplace of ideas. Sometimes the government speaks as government; sometimes it subsidizes speech without purporting to claim that the resulting message is its own. The term "government speech," therefore, includes all forms of state-supported communications: official government messages; statements of public officials at publicly subsidized press conferences; artistic, scientific, or political subsidies; even the classroom communications of public school teachers.

Basic assumptions of First Amendment law are sharply modified when governments speak. A basic canon of First Amendment law is that content distinctions are suspect. Indeed, in POLICE DEPARTMENT OF CHICAGO V. MOSLEY (1972) the Court insisted that government could not deviate " 'from the neutrality of time, place and circumstances into a concern about content.' This is never permitted." When governments speak, however, content distinctions are the norm. Government does not speak at random; it makes editorial judgments; it decides that some content is appropriate for the occasion and other content

is not. The public museum curator makes content distinctions in selecting exhibits; the librarian, in selecting books; the public official, in composing press releases. If government could not make content distinctions, it could not speak effectively.

The government speech problem is to determine the constitutional limits, if any, on the editorial decisions of government. BUCKLEY V. VALEO (1976) squarely presented the issue. Certain minor party candidates argued that their exclusion from the system of public financing of presidential elections violated the First Amendment and the DUE PROCESS CLAUSE of the Fifth Amendment. The Court briskly dismissed the relevance of the First Amendment challenge on the ground that a subsidy "furthers, not abridges, pertinent First Amendment values." This cryptic response has prompted criticism on the ground that it ignores the equality values in the First Amendment. One wonders, for example, how the Court would have reacted if the Congress had funded Democrats but not Republicans. Nonetheless, the Court did consider an equality claim grounded in Fifth Amendment due process, and concluded that the financing scheme was in "furtherance of sufficiently important government interests and has not unfairly or unnecessarily burdened the political opportunity of any party or candidate."

*Buckley* is important for two reasons. First, it affirms that government subsidies for speech enhance First Amendment values, recognizing that our "statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media . . . and preferential postal rates and antitrust exceptions for newspapers." Second, it seems to recognize that political subsidies are subject to constitutional limits under the equality principle, if not under the principle of free speech.

The First Amendment issues given short shrift in *Buckley* were fully aired in BOARD OF EDUCATION V. PICO (1982). Students alleged that the school board had removed nine books from school libraries because "particular passages in the books offended their social, political and moral tastes and not because the books, taken as a whole, were lacking educational value." The case produced seven different opinions and no clear resolution of the First Amendment issues. Over the dissent of four Justices, the Court ruled that the students' complaint could survive a summary judgment motion. Four of the Justices in the majority stated that if the allegations of the complaint were vindicated, the First Amendment barred the board's action. The fifth Justice, BYRON R. WHITE, thought that because of unresolved questions of fact the case should proceed to trial; he maintained, however, that discussion of the First Amendment issues was premature.

Most of the eight Justices who did discuss the issues expressed three important notes of agreement. First, they agreed that a major and appropriate purpose of government speech in the public schools is to transmit community values "promoting respect for authority and traditional values be they social, moral, or political." There was substantial disagreement, however, about the relevance of this purpose to book selections for a school library. Second, the Justices agreed that local authorities had wide latitude in making content decisions about library materials. Finally, most agreed that discretion could not be employed in a "narrowly partisan or political manner," such as removing all books written by Republicans. Beyond these agreements, however, the Justices struggled over differences between libraries and classrooms, between lower and higher levels of education, between acquiring books and removing books. *Pico* stands for little more than the proposition that government's broad discretion in subsidizing speech is not entirely unfettered by the First Amendment.

Perhaps the most serious challenges of government speech have surrounded government spending to influence the outcome of election campaigns. In many lower court cases, taxpayers have challenged the constitutionality of spending by cities or administrative agencies to influence the outcome of initiative campaigns. Lower courts have frequently avoided constitutional issues, concluding that state law does not authorize the city or administrative agency to spend the money. At least one question is implicitly resolved by these decisions, however, namely, that cities and administrative agencies do not have First Amendment rights against the state, at least none comparable to the rights of individuals or business corporations. The decisions have left open the question of the extent to which the Constitution permits governments to use their treasuries to help one side in an election campaign.

The establishment clause unquestionably prohibits some forms of religious government speech, and the EQUAL PROTECTION clause presumably prohibits some forms of racially discriminatory government speech. It remains to be seen what other limits the First Amendment or the equal protection clause may place on government's massive role in subsidizing speech.

STEVEN SHIFFRIN
(1986)

Bibliography

SHIFFRIN, STEVEN 1983 Government Speech. *UCLA Law Review* 27:565–655.

YUDOF, MARK 1983 *When Government Speaks: Politics, Law,*

*and Government Expression in America.* Berkeley and Los Angeles: University of California Press.

## GOVERNMENT WRONGS

In his *Commentaries on the Law of England* (1765), WILLIAM BLACKSTONE articulated what he took to be the fundamental principle governing legal redress against the Crown: "The King can do no wrong." This maxim, which Bracton had reported in the thirteenth century, was for Blackstone and for the legal historians who followed him an implication of the royal prerogative signifying that the Crown could not be brought to account judicially without its consent. Even in Bracton's time, however, the Crown had established remedies for many wrongs committed by royal officers. The maxim, then, probably meant not that the king was above the law but that he would not ordinarily suffer wrong to be done to his subjects by his officers without remedy.

Prior to the AMERICAN REVOLUTION the law in England, as summarized in *Lane v. Cotton* (1701), recognized the personal liability of individual officers for negligent wrongs committed in the course of their duties, but denied governmental liability for negligence. The American Constitution, however, established political and legal principles that were radically different from those that prevailed in English public law. State-law principles also reflected certain departures from the English model. This discussion focuses on tort claims, not contractual disputes. The discussion will distinguish between state and federal government wrongs, between immunity doctrine in the state courts and in the federal courts, and between actions asserting DAMAGE CLAIMS and suits for injunctive relief.

In CHISHOLM V. GEORGIA (1793) the Supreme Court upheld state government liability, ruling that Article III conferred federal court jurisdiction over COMMON LAW actions against states initiated by citizens of other states. In an OBITER DICTUM, however, the Court stated that Article III immunized the United States from suit, a position affirmed in later cases. The *Chisholm* ruling on state liability aroused a firestorm of political protest, culminating in the adoption of the ELEVENTH AMENDMENT, which was understood to bar any federal court action against a state, even one claiming a constitutional violation.

The JURISPRUDENCE relating to the states' Eleventh Amendment immunity soon became quite complex and remains so. For example, in *Hans v. Louisiana* (1890) the immunity was extended to suits brought against states by their own citizens, contrary to Article III's text, and to suits that were effectively, though not nominally, against states. In EX PARTE YOUNG (1908), however, the Court created what proved to be a transformative exception to the immunity. There, the Court permitted the federal courts to grant injunctive relief against state officials in their individual capacities if their actions, although valid under state law, violated the Constitution. From this seed, the CIVIL RIGHTS revolution in the courts would grow.

The most far-reaching federal-law limitation on states and local government wrongs, SECTION 1983, TITLE 42, U.S. CODE, authorizes courts to grant monetary or injunctive relief against "any person who, under color of [state or local] law," deprives the plaintiff of rights secured by federal law. Enacted in 1871 to implement the newly ratified FOURTEENTH AMENDMENT, it was of little significance until the Court, in *Monroe v. Pape* (1961), interpreted the statute to cover official wrongs that were authorized by state law. Only two years after the decision, section 1983 litigation had increased by more than sixty percent. Subsequently decisions expanded this remedy even further. In 1976 Congress authorized the award of attorneys' fees to successful plaintiffs in section 1983 cases.

Today, the main limitations on section 1983 liability are the following: A LOCAL GOVERNMENT is not liable for its officials' wrongs unless the illegal actions reflect an "official policy or custom"; punitive damages may be awarded against individual officials but ordinarily not against governments; comprehensive regulatory schemes may override section 1983's remedy; simple negligence is not actionable; and, most important, certain immunities may protect governments and officials from actions for damages and other retrospective relief. These immunities are absolute as to judicial, legislative, and prosecutorial actions, and are qualified (protecting an official who acts in good faith) as to administrative actions.

Each state has established its own regime of liability and immunity law for its officials' wrongs. These regimes usually center on statutory waivers of SOVEREIGN IMMUNITY. In interpreting these statutes, state courts often distinguish between "discretionary" and "governmental" decisions, which are absolutely immune, and "ministerial" and "proprietary" decisions, which are not. These state-law regimes are largely unaffected by the Constitution, although they may provide remedies under state law for federal-law violations.

Wrongs committed by federal officials are subject to three different remedies under federal law: (1) the Federal Tort Claims Act of 1946 (FTCA); (2) the "Bivens action" and (3) direct JUDICIAL REVIEW OF ADMINISTRATIVE ACTION under the Administrative Procedure Act of 1946 or particular review provisions in statutes.

The FTCA is a limited waiver of the United States's sovereign immunity derived, as noted above, from judicial interpretations of Article III. It creates a damage remedy

for federal officials' negligence and for certain intentional torts of "investigative or law enforcement officers" so long as the conduct is tortious under the applicable state law. The FTCA substitutes governmental for official liability; although it confers no immunities, it creates some broad exceptions. The two most important ones deny liability for most intentional torts, and for "any claim . . . based upon the exercise or performance or the failure to exercise a discretionary function or duty . . . whether or not the discretion involved be abused." Neither a jury trial nor punitive damages is available under the FTCA.

The eponymous *Bivens* action, from BIVENS V. SIX UNKNOWN NAMED AGENTS (1971), is a judicially created remedy against individual federal officials (not the government) for violations of certain constitutional rights; the Court has specifically extended it to FOURTH AMENDMENT, Fifth Amendment EQUAL PROTECTION, and Eighth Amendment rights. In *Bivens* actions, the FTCA exceptions do not apply, but the official may claim an absolute or qualified immunity (depending on the nature of the act). Punitive damages and jury trials are permitted.

The Administrative Procedure Act authorizes JUDICIAL REVIEW of the decisions of almost all federal agencies at the instance of one who is aggrieved by an agency action and seeks injunctive, mandatory, or declaratory relief. The only important exceptions are cases in which a statute precludes judicial review, as in *Block v. Community Nutrition Institute* (1984), or in which the agency action "is committed to agency discretion by law," as in *Heckler v. Chaney* (1985).

The legal structure for remedying governmental wrongs, especially at the federal level, is formidable. That structure, however, displays some problematic features. First, certain doctrines limit victims' redress. These include the Eleventh Amendment immunity; the Court's rejection, in MONELL V. DEPARTMENT OF SOCIAL SERVICES OF NEW YORK CITY (1978), of local governments' vicarious liability for their employees' section 1983 violations; and the limitations on liability, damages, and fee-shifting under the FTCA. Such doctrines, by effectively confining many victims to a remedy against an individual official, may defeat both the compensation and deterrence goals of the law. Individual officials are unlikely to be able to pay substantial damages. They are also likely to be poorly situated to alter the bureaucratic policies or practices that may have caused their wrongdoing and may cause more of it in the future. In addition, doctrines about STANDING, RIPENESS, and irreparable harm have sometimes been used to restrict access to injunctive relief against governmental wrongdoing of a more or less systematic nature. An example is *City of Los Angeles v. Lyons* (1983).

Second, this focus on the liability of individual officials, some of whom will be neither legally represented nor indemnified by the governments that employ them, creates incentives for the officials to adopt self-protective strategies of inaction, delay, formalism, and change in the character of their decisions. The circumstances in which many low-level officials work also provide ample opportunity to pursue such incentives. Although these strategies may succeed in minimizing the officials' personal exposure to liability, they tend to undermine the officials' functions and impose wasteful costs on the public.

A remedial structure that limited the liability of individual officials for damages, transferring remedial responsibility to the governmental entities that employed them, would strike a better balance among the competing social interests. Those interests are to deter official wrongdoing, maintain vigorous decision making, compensate victims of illegality, respect the distinctive institutional competences of different decision makers, and accomplish these ends at a tolerable public cost.

PETER H. SCHUCK
(1992)

Bibliography

NAHMOD, SHELDON 1986 *Civil Rights and Civil Liberties Litigation: The Law of Section 1983.* Colorado Springs, Colo.: Shepard'sMcGraw-Hill.

SCHUCK, PETER 1983 *Suing Government: Citizen Remedies for Official Wrongs.* New Haven, Conn.: Yale University Press.

## *GRACE v. UNITED STATES*
461 U.S. 171 (1983)

A federal statute forbids display of any flag or device designed to "bring into public notice any party, organization, or movement" in the United States Supreme Court building or on its grounds. The Supreme Court held this statute invalid, on FIRST AMENDMENT grounds, as applied to lone individuals engaging in expressive activity on the sidewalk adjoining the Court's building. The Court did not address the law's validity as applied to the building or the grounds inside the sidewalk, or to parades or demonstrations on the sidewalk.

KENNETH L. KARST
(1986)

## *GRAHAM v. RICHARDSON*
403 U.S. 365 (1971)

Arizona denied certain WELFARE BENEFITS to ALIENS who had not lived in the country fifteen years. Pennsylvania denied similar benefits to all aliens. The Supreme Court unanimously held these restrictions unconstitutional.

Justice HARRY A. BLACKMUN, for the Court, said that alienage, like race, was a SUSPECT CLASSIFICATION, demanding STRICT SCRUTINY by the Court of its justification. The state argued that its "special public interest" in aiding its own citizens justified discriminating against aliens, but the Court, citing TAKAHASHI V. FISH AND GAME COMMISSION (1948), rejected the argument. The discrimination thus denied aliens the EQUAL PROTECTION OF THE LAWS.

Again citing *Takahashi*, the Court concluded that the two state laws invaded the province of Congress to regulate aliens, encroaching on an area of "exclusive federal power." Justice JOHN MARSHALL HARLAN concurred only as to this FEDERALISM ground, refusing to join in the equal protection ground.

KENNETH L. KARST
(1986)

## GRAMM-RUDMAN-HOLLINGS ACT
99 Stat. 1037 (1985)

The Balanced Budget and Emergency Deficit Control Act of 1985 is better known by the names of its three principal Senate sponsors, Phil Gramm (Republican, Texas), Warren B. Rudman (Republican, New Hampshire), and Ernest Hollings (Democrat, South Carolina). Attached as a rider to the bill that raised the national debt ceiling to $2 trillion, theact amended the CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974. Under the Gramm-Rudman-Hollings Act the maximum budget deficit for fiscal year 1986 was set at $180 billion, and maximum deficits were set for the next four fiscal years, with deficits to be completely eliminated beginning in fiscal year 1991. To enforce the deficit limitation, the act established an automatic mechanism according to which the OFFICE OF MANAGEMENT AND BUDGET (an executive agency) and the Congressional Budget Office (a congressional agency) were required annually to report their estimates of the deficit to the comptroller general (the head of the General Accounting Office, another congressional agency), who was to average the two estimates and report the result to the President. The President would be required to issue an executive order "sequestering" appropriated funds to the extent that the estimated deficit exceeded the deficit authorized by the act. Other provisions of the act divided the sequestration equally between defense appropriations and nondefense domestic programs and exempted from sequestration funds appropriated for Social Security, interest payments on the national debt (the total of previous deficits), and certain other programs.

The constitutionality of some aspects of the act was questioned even before the act was passed by Congress; and President RONALD REAGAN alluded to outstanding constitutional questions even as he signed the act into law. Indeed, the act contained provisions facilitating JUDICIAL REVIEW. It authorized members of Congress to file suit challenging the constitutionality of the act, it provided for challenges to be heard by a special three-judge federal court with direct appeal to the Supreme Court, and it set up an expedited process at each level of the judiciary.

Within hours of President Reagan's signing the act, Representative Michael Synar (Democrat, Oklahoma) filed suit charging that Congress, in the act, unconstitutionally delegated its power to control federal spending and that, even if the DELEGATION OF POWER were constitutional, delegation to the comptroller general, who serves at the pleasure of Congress, was unconstitutional. The latter argument was based on the modern understanding of SEPARATION OF POWERS, exemplified by the Supreme Court's decision in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983). Should Synar's suit prevail, the deficit limits would be left intact, but the automatic enforcement provisions would be eliminated and imposition of spending controls to meet the limits would depend on the ability of members of Congress to agree to a JOINT RESOLUTION reducing spending. In early 1986, a three-judge federal court in the District of Columbia heard Synar's suit and held that the automatic provisions of the act, insofar as they delegated authority other than to executive branch officials, were unconstitutional.

DENNIS J. MAHONEY
(1986)

## GRANDFATHER CLAUSE

This expression, born of legislative skulduggery, has survived to serve more acceptable purposes. A number of southern states, seeking to circumvent the FIFTEENTH AMENDMENT's prohibition against RACIAL DISCRIMINATION in the field of VOTING RIGHTS, adopted LITERACY TESTS for voter eligibility. These provisions standing alone would have disqualified not only most black registrants but also a large number of whites. Under a typical exception, however, an illiterate might be registered if he had been eligible to vote before some date in 1865 or 1866, or if he were the descendant of a person eligible at that time. The Supreme Court, in GUINN V. UNITED STATES (1915) and *Lane v. Wilson* (1939), held such grandfather clauses invalid.

More recently, the same term has described any legislative exception relieving from regulation a person who has been engaging in a certain practice for a period of time. A new ZONING law, for example, might limit LAND USE in one zone to single-family residences, but contain a grandfather clause allowing the continuation of businesses or apartment houses already operating there. In part, such

an exception is designed to avoid constitutional problems that arguably might arise in its absence. (See TAKING OF PROPERTY; VESTED RIGHTS; SUBSTANTIVE DUE PROCESS.) But the exception itself may be challenged as unconstitutional. In NEW ORLEANS V. DUKES (1976), the city had prohibited the sale of food from pushcarts in the French Quarter, but had exempted pushcart vendors who had been operating there more than eight years. The Supreme Court unanimously upheld this grandfather clause against an EQUAL PROTECTION attack. Quite properly, the Court omitted mention of *Lane v. Wilson;* it did say, however, that in cases of ECONOMIC REGULATION, "only the INVIDIOUS DISCRIMINATION" was invalid.

KENNETH L. KARST
(1986)

Bibliography

SCHMIDT, BENNO C., JR. 1982 Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disfranchisement from the KKK to the Grandfather Clause. *Columbia Law Review* 82:835–905.

## GRAND JURY

Historians date the grand jury to King Henry II's Assize of Clarendon in 1166. That ancient ancestor was markedly different from its American descendants. The Grand Assize, as it was known, was comprised of local gentry, relying on personal knowledge and local rumor to report alleged cases of misconduct. Today's grand jury—surviving in America, but since 1933 abolished in England—normally considers events and people unknown to the grand jurors, who receive fairly formal testimony and other EVIDENCE, presented by prosecutors to decide whether or not alleged wrongdoers ought to be indicted.

Between 1166 and 1791, when the American BILL OF RIGHTS was adopted, the grand jury had come to be viewed as a safeguard for the people rather than an investigative arm of the executive. This is reflected in the portion of the Fifth Amendment that says: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a PRESENTMENT or INDICTMENT of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."

This means that nobody outside the armed forces may be put to trial for a serious federal crime unless a grand jury has heard enough evidence to satisfy it that there is PROBABLE CAUSE (enough evidence on the prosecution side, largely or wholly ignoring what the defendant may show, to make it reasonable) to issue an indictment. The good sense of the safeguard is the realization that "merely" being brought to trial can be an agonizing, expensive, destructive experience. In this light, the grand jury stands as a shield against arbitrary or wicked or careless prosecutors bringing people to trial on insufficient or improper grounds.

In modern times, this role as bulwark retains an exceedingly limited reality. As a practical matter, grand juries, especially in the busy urban settings where they do the bulk of their work, function largely as the investigative and indicting arms of prosecutorial officials. There could be no other feasible or acceptable way for them to operate. The detection of crime, the decision to investigate, the judgment as to where prosecution resources should be invested are no longer, if they ever were, subjects suitable for amateur, part-time management. Inevitably, then, grand jurors work almost entirely under the guidance and effective control of prosecutors. They consider cases brought to them by the government's lawyers. They tend almost always to indict when they are advised to indict, and not otherwise.

Although this quality of "rubber stamp" is markedly unlike the constitutional ideal, there is no agreeable alternative if we are to keep the grand jury as a body of lay citizens. The grand jury is a potent instrument for invading PRIVACY, threatening reputations, and cutting a swath of terror and anxiety if it proceeds without a prudent awareness of its impact and a deep sense of its duty to be fair and discreet. In the hands of untrained people, it would be an engine of destruction. Such considerations might point in the end to abolishing the grand jury altogether. But while and wherever it survives, the leadership role of professionals is probably desirable as well as inevitable.

The passive character of the grand jury should not, however, be overstated. In strict law, the grand jury is an agency of the court rather than of the prosecution. A judge of the court is required to instruct the jurors concerning their powers and responsibilities. A judge should be available to answer questions and give guidance as the group proceeds with its work. Properly performed, these judicial directions can promote some measure of the independent judgment and common-sense wisdom that grand jurors are in principle expected to supply. Grand jurors do in fact decline now and again to return indictments sought by the prosecution. In far fewer cases "runaway" grand juries may contrive to investigate and indict people whom the prosecutors, for reasons that may be good or bad, do not deem suitable targets. These occurrences are, however, rare indeed, and usually happen in circumstances of local disarray and political upset.

In its normal functioning, the grand jury operates as a peculiar variant of the familiar Anglo-American judicial process—in some measure aping courtroom procedures but differing in fundamental respects. The similarity con-

sists mainly in the types of evidence and, partially, in the mode of presentation. Grand juries hear witnesses under oath, proceeding by question and answer in something close to the style of the courtroom, with a prosecuting attorney doing most or all of the interrogation. Similarly, the grand jurors are given documents or other things as "exhibits" to assist in the attempted reconstruction, or partial reconstruction, of the events under inquiry. A critical difference from the courtroom is the one-sidedness of the presentation. In a system that prides itself on being "adversarial"—as distinguished from the so-called inquisitorial system of the European continent and many other countries—the grand jury is more purely inquisitorial and nonadversarial than almost any other criminal law agency anywhere. Subject to some variations among the states, the norm is that only one side, the prosecution, is heard. There is no opposing lawyer to object to questions or answers on grounds of relevance, fairness, privilege, or anything else. Nobody impartial presides; there are no disputes to umpire. In some places a potential defendant may be allowed on request to appear and present evidence that may persuade the grand jurors not to indict. More commonly, the prospective target will be heard only upon being summoned (and duly warned about the RIGHT AGAINST SELF-INCRIMINATION) by the prosecution.

The EX PARTE character of the proceeding means, in most states and in the federal courts, that the trial rules of evidence are not applicable. These rules require for effective operation the presence of an opposing lawyer to object and a judicial officer to rule on objections as the evidentiary record is being made. Free (or deprived) of all that, the grand jury may receive, and base indictments upon, hearsay or other evidence that would be excluded on objection in a trial.

Still more thoroughly ex parte, the grand jury's proceedings, until an indictment is published, are almost totally secret. This aspect accounts for a good part of what is perceived (and not infrequently functions) as fearsome and threatening in the grand jury. The concealed tribunal is by its nature more likely than the open courtroom to be a place where corners are cut and abuses are perpetrated, ranging from the tricking and bullying of witnesses to the misleading of the grand jurors themselves. Still, the received doctrine thought to justify the secrecy retains considerable vitality. As they were summarized in 1958 by the Supreme Court, the reasons are:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt. [*United States v. Procter & Gamble Company,* 356 U.S. 677, 681 n. 6 (1958).]

Granting these salutary concerns, the concealed proceedings of grand juries are pregnant with grave possibilities of abuse, too often realized in the work of insensitive or malevolent prosecutors. As mentioned, witnesses in the grand jury room face dangers of abuse, oppression, harassment, and entrapment. Judge LEARNED HAND, never tender in enforcing the criminal law, noted this familiar problem in *United States v. Remington* (2d Cir. 1953) where he thought decent bounds had been overstepped: "Save for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked ex parte examination."

A grand jury has the power to compel witnesses to testify. (See IMMUNITY GRANTS; BRANZBURG V. HAYES.) The plight of a grand jury witness is aggravated by the standard rule, in federal and most state courts, barring lawyers from accompanying witnesses to the grand jury room. Abstruse questions of privilege, the ever present dangers of later perjury prosecutions, and problems of relevance or other evidentiary objections must be discerned by the lay witness and somehow handled on the spot or made the subject of hurried consultation with counsel outside the grand jury room, an ungainly procedure that often has witnesses trotting back and forth between lawyer and grand jurors during hours or days of interrogation.

Among other grievances evoked by grand juries is the superficially paradoxical complaint against failures of secrecy. The grand jury "leak" is a familiar and pernicious phenomenon, scarring reputations and threatening the right to a FAIR TRIAL. The problems of preventing and sanctioning leaks remain among the unresolved doubts concerning the grand jury's net worth as an institution. Probably all these criticisms have helped persuade the Supreme Court not to extend the INCORPORATION DOCTRINE, applying the "right" to indictment by grand jury to state felony prosecutions. (See HURTADO V. CALIFORNIA.)

These unresolved doubts are subjects of ongoing debate. Many distinguished jurists and scholars argue that the grand jury has outlived its usefulness and should be abolished. That is a tall order at the federal level, where it would require amendment of the Fifth Amendment (which would be the first change in any portion of the Bill of Rights since its adoption). On the other hand, over half the states have dispensed with the requirement of grand

jury indictment, permitting felonies to be prosecuted by INFORMATION (a written accusation by the prosecutor), and that trend seems likely to continue.

Still, at the federal level and in at least a number of states, total abolition seems highly improbable through at least the remainder of the twentieth century. In this setting, grand jury reform is a recurrently lively topic. Among the proposals (and changes already effected in some states) are provisions that would allow counsel to accompany witnesses before the grand jury; require closer control and supervision by judges; prescribe more detailed accounting by prosecutors and records of grand jury proceedings; better advise and protect prospective defendants; and confine the abuses of leaks and prejudicial publicity by prosecutorial staffs. The prospects for sound reform are greatest when citizens outside the legal profession take an informed interest in the problems.

MARVIN E. FRANKEL
(1986)

Bibliography

DASH, SAMUEL 1972 The Indicting Grand Jury: A Critical Stage. *American Criminal Law Review* 10:807–828.

FRANKEL, MARVIN E. and NAFTALIS, GARY P. 1975 *The Grand Jury.* New York: Hill & Wang.

NOTE 1961 The Grand Jury as an Investigatory Body. *Harvard Law Review* 74:590–605.

YOUNGER, RICHARD D. 1963 *The People's Panel: The Grand Jury in the United States.* Providence, R.I.: Brown University Press.

## GRAND JURY
### (Update)

The grand jury clause of the Fifth Amendment is an anomaly. It gives constitutional stature to a secret inquisitorial process that is quite at odds with the open adversarial character of the remainder of the federal judicial system. The clause preserves the institution of the grand jury without placing it clearly within any of the three branches of the federal government. The federal grand jury, like its English progenitor, has two conflicting functions. The guarantee of review by a grand jury was included in the Fifth Amendment because the grand jury serves as a shield or buffer protecting individuals against baseless or malicious charges. But the grand jury also has another side: it serves as an investigatory agency that ferrets out crime.

Since the original publication of this encyclopedia in 1986 the Supreme Court has decided six grand jury cases. Four involved prosecutorial errors or abuses that could impair the grand jury's ability to shield individuals from unfounded charges. In each case, the question was the availability of a judicial remedy. The other two cases considered the ramifications of grand jury secrecy.

The issue of remedies for abuse of the grand jury reached the Supreme Court because of the lower courts' increasing willingness to invalidate federal INDICTMENTS if the government committed errors at the grand jury phase. Until the mid-1970s, federal courts showed little inclination to police the grand jury process to ensure that it fulfilled its constitutional function of protecting the accused against unfounded criminal charges. In *Costello v. United States* (1956) the Supreme Court held that the federal grand jury was to operate, like its English progenitor, free of technical rules of evidence and procedure. Under the influence of *Costello,* the lower federal courts typically refused to consider claims of error or abuse in the grand jury process. Beginning in the mid-1970s, some lower courts became increasingly willing to review grand jury proceedings and consider claims of abuse, with the understanding that the indictment might be dismissed if the claims were well founded. Grand jury litigation was attractive to the defense because, even if the indictment was not dismissed, the review process offered an opportunity for discovery otherwise precluded by jury secrecy.

Three of the Supreme Court's recent decisions rebuffed the lower courts' efforts to ensure that the grand jury fulfilled its protective function. In the first of the three decisions, *United States v. Mechanik* (1986), the Court held that any error that had occurred at the grand jury stage was harmless in light of the jury's guilty verdict. The Court stated that the federal rule limiting the persons who could be present during grand jury sessions was designed to protect against the danger of charges not supported by PROBABLE CAUSE. The trial jury's guilty verdict established that there was proof beyond a REASONABLE DOUBT of the defendant's guilt and thus any violation of the procedural rule at the grand jury phase was harmless. Reversal of a conviction entails significant social costs. A retrial burdens witnesses, victims, the prosecution, and the courts. If the prosecution is unable to retry the defendant after the first conviction is reversed, the social cost is even greater. These costs are not justified, the Court concluded, where an error at the grand jury stage had no effect on the outcome of the trial.

Although *Mechanik* was criticized as an open invitation to prosecutors to disregard grand jury procedures, it left open two possible avenues of JUDICIAL REVIEW and relief. First, some lower courts held that *Mechanik* did not limit the federal courts' supervisory powers. This interpretation left the courts free to grant relief from grand jury abuse, even in the absence of demonstrable prejudice in the exercise of supervisory power. Second, several circuits permitted defendants to bring interlocutory appeals seeking

review of unfavorable pretrial rulings on grand jury issues under the collateral order doctrine, on the theory that the issues would be mooted by the verdict.

The Supreme Court eventually resolved both of these issues, again rebuffing the lower courts' efforts to police the grand jury process. In *Bank of Nova Scotia v. United States* (1988), the Court applied the HARMLESS ERROR rule announced in *Mechanik* to supervisory power rulings. *Mechanik* and *Bank of Nova Scotia* increased the pressure on the appellate courts to grant interlocutory review on claims of grand jury abuse, and the Supreme Court was forced to turn next to the issue of interlocutory appeals. In *Midland Asphalt Corp. v. United States* (1989), the Court concluded that interlocutory review would be available on claims of grand jury abuse only when the defendant alleged a defect so fundamental that it caused the grand jury not to be a grand jury or the indictment not to be an indictment.

Taken together, *Mechanik*, *Bank of Nova Scotia*, and *Midland Asphalt* demonstrate the Supreme Court's unwillingness to subject the grand jury's internal proceedings to judicial review. *Midland Asphalt* holds that interlocutory appeal ordinarily is not permitted if the trial judge denies relief on a grand jury claim before trial. *Mechanik* and *Bank of Nova Scotia* hold that if the defendant is convicted and appeals, the jury's guilty verdict moots any error in the grand jury process. Relief is theoretically available in the district court before trial, but given grand jury secrecy, the defendant will seldom have sufficient information about the grand jury process at this point to make the necessary showing of government error and resulting prejudice. These decisions reflect a firm consensus on the Court. Eight members of the Court joined the opinion in *Bank of Nova Scotia*, and the opinion in *Midland Asphalt* was unanimous. Given the limited resources available to the CRIMINAL JUSTICE SYSTEM, the Court is simply unwilling to divert judicial resources to a preliminary trial of the grand jury process, particularly when there is no indication that the outcome of a case will change. The Court's decisions avoid not only the cost of reversals in cases where there has been a serious abuse of the grand jury but also the cost of extensive judicial review (with the resultant breach in grand jury secrecy) in all cases.

The Supreme Court did reverse one conviction because of an error at the grand jury stage in a case involving what the Court called the "special problem of racial discrimination." In *Vasquez v. Hillery* (1986) the Court held that racial discrimination in the selection of the grand jury required the reversal of a twenty-year-old murder conviction, even if the state could not reprosecute so long after the original conviction. In a striking contrast to *Mechanik*, which was decided during the same term, the Court rejected the argument that the discrimination at the grand jury phase was harmless error in light of the jury's guilty verdict after a fair trial. Emphasizing that racial discrimination strikes at the fundamental values of the criminal justice system, the Court concluded that the remedy of dismissing the indictment and reversing the resulting conviction was not disproportionate. Although the constitutional prohibition against racial discrimination was the driving force behind this decision, it is worth noting that claims of racial discrimination at the selection stage (unlike the claims in *Mechanik*, *Bank of Nova Scotia*, and *Midland Asphalt*) can be adjudicated without any breach of grand jury secrecy. Traditionally secrecy is required only after the grand jury has been impaneled.

The Court also decided two cases involving facets of grand jury secrecy. *United States v. John Doe, Inc. I* (1987) dealt with the question of when the government can use materials collected in a grand jury investigation. *Doe* effectively cut back on an earlier decision that held grand jury secrecy prohibits prosecutors from disclosing grand jury evidence to other government lawyers for use in civil proceedings unless the prosecutors obtain a court order based upon a showing of particularized need. This rule ensured that prosecutors had no incentive to misuse the grand jury for civil discovery and decreased the likelihood that grand jury secrecy will be breached. *Doe* gave the grand jury secrecy rule a narrow interpretation, allowing prosecutors conducting grand jury proceedings freely to disclose grand jury materials to civil division attorneys with whom they were consulting about the desirability of filing a civil suit. Permitting informal disclosure without judicial supervision facilitated the government's determination whether to proceed civilly or criminally without duplicative investigations by civil attorneys.

The Court also recognized that the FIRST AMENDMENT places limits on the principle of grand jury secrecy. *Butterworth v. Smith* (1990) held that the Florida rule prohibiting a witness from ever diclosing his own testimony violates the First Amendment. The Court found that the state's interests were not sufficient to justify a permanent ban on a reporter's right to make a truthful statement of information that he gathered on his own before he was called to testify. Although neither the federal rules nor those in the majority of states would have prohibited disclosure under those circumstances, fourteen other states have secrecy rules like Florida's. The Court did not question the validity of the more narrowly drawn federal and state secrecy rules.

SARA SUN BEALE
(1992)

Bibliography

ARNELLA, PETER 1980 Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication. *Michigan Law Review* 78:463–585.

BEALE, SARA SUN and BRYSON, WILLIAM C. 1986 and Supp. 1990 *Grand Jury Law and Practice.* Wilmette, Ill.: Callaghan.

NOTE [ARFAA, CHRISTOPHER M.] 1988 *Mechanikal* Applications of the Harmless Error Rule in Cases of Prosecutorial Grand Jury Misconduct. *Duke Law Journal* 1988:1242–1271.

## *GRAND RAPIDS SCHOOL DISTRICT v. BALL*

See: *Aguilar v. Felton*

## GRANGER CASES

(1877)

*Munn v. Illinois*, 94 U.S. 113

*Chicago, Burlington & Quincy Railroad Co. v. Iowa*, 94 U.S. 155

*Peik v. Chicago & Northwestern Railway Co.*, 94 U.S. 164

*Chicago, Milwaukee & St. Paul Railroad Co. v. Ackley*, 94 U.S. 179

*Winona and St. Peter Railroad Co. v. Blake*, 94 U.S. 180

*Stone v. Wisconsin*, 94 U.S. 181

The *Granger Cases*, decided on March 1, 1877, included *Munn v. Illinois*, in which state regulation of grain warehouse and elevator rates and practices was challenged, and five railroad cases in which the companies attacked the validity of state legislatures' imposition of fixed maximum rates. In these decisions, the Supreme Court upheld the state regulations. Conservative, pro-business voices—and Justice STEPHEN J. FIELD, in vigorous dissent in *Munn*—regarded the decisions as a catastrophic surrender of DUE PROCESS values in law and a mortal blow to entrepreneurial liberty. They left legislatures, Field contended, with an unfettered power over private PROPERTY RIGHTS of business firms. To the Court's majority, speaking through Chief Justice MORRISON R. WAITE, however, the issue of state regulation's legitimacy must turn on the difference in nature between business that was purely private and business that was AFFECTED WITH A PUBLIC INTEREST, hence peculiarly subject to regulation.

Laws for the regulation of railroads and grain warehouses, enacted in Illinois, Wisconsin, Iowa, and Minnesota during the period 1871–1874, were at issue in the 1877 decisions. Until recent years, historians and students of constitutional law have tended to accept the view that the Grange and other farm organizations provided the political muscle in the midwestern reform movements that produced those laws. Indeed, it was customary to regard the legislation as radical, antibusiness, and anti-private property in intent and content. Recent research (particularly the work of historian George L. Miller) has shown, however, that there was no general antagonism between agrarian and business interests in the debates over the regulatory laws. Instead, reform was sought by coalitions, in a pattern of intrastate sectionalism; farmers lined up with commercial interests in some sections that favored regulation, and similar interests joined against regulation in other sections. The division of views depended much more upon calculations of local advantage and disadvantage from regulation than upon political ideology, "agrarian" or otherwise, or even upon political party alignments.

Contrary to another view long held by scholars, the Granger laws did not lack legislative precedent. The charters of early railway companies typically had carried maximum rate provisions and other features that bespoke the state's interest in the efficient provision of transport services. And in the 1850s several states (notably New York and Ohio) had prohibited local discrimination in railroad rate-making and had levied special taxes on railroad companies to offset the effects of rail competition on state-owned canals. The Granger laws may be seen as an extension of a regulatory tradition well established in American railway law.

Still another common error of interpretation concerns the doctrinal basis of the "affectation" doctrine as employed in Waite's majority opinion in *Munn*. The concept of "business affected with a public interest," according to a long-standard view, was a surprising resort to a forgotten antiquity of English COMMON LAW—a concept reintroduced into American law after a lapse of nearly two centuries. In fact, the concept of affectation was well known in American riparian and ADMIRALTY law; and equally familiar was the jurist from whose writings Waite drew the affectation concept for use in *Munn*, for Lord Chief Justice Matthew Hale's tracts on common law had been cited in scores of important American cases in riparian and EMINENT DOMAIN law.

The Court's majority in the *Granger Cases* rejected the contention of railroad counsel that if state legislatures were permitted to mandate fixed, maximum rates, the result would be to deprive business of fair profits, and thus to produce effective "confiscation" of private property. The majority also rejected the view that the EQUAL PROTECTION and due process clauses of the Fourteenth Amendment warranted judicial review of the fairness of rates. Such regulatory power was subject to abuse, Waite conceded, but this was "no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."

Thus the *Granger Cases* decisions held back, at least for a time, the conservative efforts to make the Fourteenth Amendment a fortress for VESTED RIGHTS against the STATE POLICE POWER. The decisions were also of enduring importance in constitutional development for their elaborate formulation of the "affectation with a public interest" doctrine. Relying upon the advice of his colleague Justice JOSEPH P. BRADLEY, who was learned in the English law of common carriers and in admiralty law, Waite explored in his opinion the legitimate reach of the police power in regulation of business. He concluded that modern railroad companies and warehouses played a role in commerce that was analogous to the role played by ferry operators and others who in the seventeenth century had exercised a "virtual monopoly" of vital commercial services, hence were held subject to regulations not ordinarily imposed on other businesses. Thus the Court indicated, by implication at least, that businesses not so affected with a special public interest could not be regulated.

Not long after publication of the decisions, Waite wrote privately: "The great difficulty in the future will be to establish the boundary between that which is private, and that in which the public has an interest. The Elevators furnished an extreme case, and there was no difficulty in determining on which side of the line they properly belonged." This proved an accurate forecast of the Court's future travails, until in *Nebbia v. New York* (1934) the Court finally abandoned the "affectation" doctrine, holding that *all* businesses were subject to state regulation under the police power.

Within fifteen years after the *Granger Cases,* moreover, the Court had begun to invoke both the COMMERCE CLAUSE and the Fourteenth Amendment to strike down state regulations of interstate railroad operations and to review both procedural and substantive aspects of state regulation of business. The drive to establish a new constitutional foundation for vested rights, in sum, for many years relegated the *Granger Cases'* support of a broad legislative discretion to the status of a doctrinal relic.

HARRY N. SCHEIBER
(1986)

Bibliography

FAIRMAN, CHARLES 1953 "The So-Called Granger Cases, Lord Hale, and Justice Bradley." *Stanford Law Review* 5:587–679.

MAGRATH, C. PETER 1963 *Morrison R. Waite: The Triumph of Character.* New York: Macmillan.

MILLER, GEORGE L. 1971 *Railroads and the Granger Laws.* Madison: University of Wisconsin Press.

SCHEIBER, HARRY N. 1971 The Road to *Munn:* Eminent Domain and the Concept of Public Purpose in the State Courts. *Perspectives in American History* 5:327–402.

## GRANT, ULYSSES SIMPSON
(1822–1885)

Next to President ABRAHAM LINCOLN, Ulysses S. Grant was the most important individual in the struggle to maintain the Union and the RECONSTRUCTION of the nation in the CIVIL WAR period. A West Point graduate, Grant left the military in 1854 but returned as a colonel in the Illinois Volunteers in 1861. By 1864 Grant had risen to become America's first lieutenant general since Washington, and commander of all Union forces. Throughout the war Grant understood that victory was synonymous with preserving the Union and the Constitution. He developed strategies that devastated the South, because he believed that only a decisive defeat of the Confederacy, with a military abolition of SLAVERY and an unconditional surrender of southern troops, would remove SECESSION from the American constitutional vocabulary.

In 1866 Grant became America's first full general, and he gradually challenged ANDREW JOHNSON's leadership. Grant accepted an interim appointment as secretary of war, in defiance of the TENURE OF OFFICE ACT, but he relinquished the post to EDWIN M. STANTON, paving the way for Johnson's IMPEACHMENT. As President (1869–1877), Grant supported the FIFTEENTH AMENDMENT (1870), the Ku Klux Klan Act (1871), the Civil Rights Act of 1875, and the creation of a Department of Justice and SOLICITOR GENERAL's office to help enforce these new measures. However, after 1872 Grant gave little support to the freedmen and their white allies. He dismissed his aggressively integrationist attorney general, Amos Akerman, and in 1875–1876 he refused to send federal troops to protect black voters.

Three of Grant's Supreme Court nominees were never confirmed while a fourth, Edwin Stanton, died before he could take office. Apart from JOSEPH BRADLEY, Grant's successful Court appointments to the Court, WILLIAM STRONG, WARD HUNT, and MORRISON WAITE, were lackluster. Grant's administration was scandal-ridden. His secretary of war was impeached and avoided conviction only through resignation.

PAUL FINKELMAN
(1986)

Bibliography

MCFEELY, WILLIAM S. 1981 *Grant: A Biography.* New York: Norton.

## GRANTS-IN-AID

See: Federal Grants-in-Aid

## *GRAVEL v. UNITED STATES*
408 U.S. 606 (1972)

In the midst of efforts by the United States government to enjoin publication of the classified Pentagon Papers (see NEW YORK TIMES CO. V. UNITED STATES), Senator Mike Gravel (Democrat, Alaska) held a "meeting" of his subcommittee, read extensively from the papers, and placed their entire text in the record. In this case a federal GRAND JURY sought to question Gravel's aide concerning the senator's action and the subsequent private publication of the papers. The Supreme Court, in an opinion by Justice BYRON R. WHITE and over four dissents, confirmed that reading the papers in subcommittee was protected by the SPEECH OR DEBATE CLAUSE. The clause also extended its protection to congressional aides acting as alter egos to members of Congress. But *Gravel* held that dissemination of the papers to a private publisher was not a legislative act, and thus was not protected by the speech or debate clause. Therefore, Gravel's aide could be questioned about the private publication of the papers.

THEODORE EISENBERG
(1986)

## *GRAVES v. NEW YORK EX REL. O'KEEFE*
306 U.S. 466 (1939)

For practical purposes the decision in *Graves* by a 7–2 Supreme Court toppled an elaborate structure of INTERGOVERNMENTAL TAX IMMUNITIES, which the Justices had erected from assumptions about the federal system. The right of self-preservation immunized the United States and the states from taxation by competing governments within the system. Obviously the United States cannot tax the Commonwealth of Massachusetts or the state capitol in Sacramento, California, any more than the states can tax a congressional investigation. From a sensible assumption first advanced in MCCULLOCH V. MARYLAND (1819) protecting a national instrumentality from state taxation, the Court made progressively sillier decisions that hampered the TAXING POWER of the state and national governments and allowed many commercial activities to escape taxation. COLLECTOR V. DAY (1871) made the salaries of state judges exempt from federal income taxes. In time the Court held unconstitutional a federal tax on the income of a private corporation leasing state land, and a federal sales tax on a motorcycle sold by a private corporation to city police.

By 1939 the Court had already begun to retrench its doctrines of reciprocal tax immunities enjoyed by "government" instrumentalities. In *Graves,* Justice HARLAN FISKE STONE faced the question whether a state tax on the salary of an employee of a federal instrumentality created by Congress violated the principles of national supremacy. Stone observed that the tax was imposed on an employee's salary, not on the instrumentality itself. Because the Constitution did not mandate tax immunity and such immunity should attach only to a government instrumentality, the Court not only sustained the tax but also overruled *Day* and several related cases. A state may tax the income of officers or employees of the national government, and vice versa. In *New York v. United States* (1946), the Court upheld a national tax on soft drinks bottled by the state. To the extent that government functions cannot be be taxed by another government the core doctrine from *McCulloch* endures.

LEONARD W. LEVY
(1986)

## GRAY, HORACE
(1828–1902)

Horace Gray, Jr., reporter of the Supreme Judicial Court of Massachusetts (1854–1861) and Associate Justice (1864–1873) and Chief Justice (1873–1881) of the same court, was appointed to the United States Supreme Court in 1882 and served until his death twenty years later. Anglo-American legal history was his forte; he was the nation's leading judicial exponent of Harvard-style "legal science" during the second half of the nineteenth century. Like Dean Christopher Columbus Langdell, his Harvard classmate and lifelong friend, Gray viewed the law neither as the changing product of specific historical struggles nor as an imperfect reflection of "the spirit of the age" but rather as an array of immanent principles firmly rooted in a vibrant COMMON LAW tradition. Consequently he insisted on a radical separation of law from politics, linking the former with reason and the latter with will and power. According to John Chipman Gray, his commitment to these central concepts of "legal science" was complete yet unreflexive. "My brother's historical knowledge was confined to a knowledge of legal precedents," he wrote in 1902. "In this sphere he was not only learned, but his treatment of historical matter was strong and broad: but, outside of that, he made and had no pretensions. He was neither a philosophical historian nor a political economist."

Gray's understanding of Anglo-American legal history produced an idiosyncratic style of judging with significant implications for CONSTITUTIONAL INTERPRETATION. His treatise-like opinions were bereft of appeals to public policy or social advantage; because he assumed that the validity of legal rules was unrelated to particular historical contexts, Gray was virtually immune to both historicist and

functionalist arguments against the constitutionality of legislation. In *Wabash, St. Louis & Pacific Railway v. Illinois,* (1886), *Robbins v. Shelby County Taxing District* (1887), and LEISY V. HARDIN (1890), for example, he dissented when the majority invoked national market imperatives to invalidate state police regulations and tax laws of a sort that had never before run afoul of the COMMERCE CLAUSE. Gray also resisted the majority's contraction of what he regarded as venerable SOVEREIGN IMMUNITY doctrines in *United States v. Lee* (1882) and the *Virginia Coupon Cases* (1885).

Gray's metahistorical approach to judging was especially apparent in Fourteenth Amendment cases. In *Head v. Amoskeag Manufacturing Company* (1884) and *Wurts v. Hoagland* (1885) he conceded that mill acts and drainage laws invariably disturbed valuable rights of property. In each case, however, Gray provided a lengthy digest of statutes to demonstrate that the several states had authorized compulsory flooding or drainage of property for one hundred years or more. It was simply too late, then, for the Court to suggest that such legislation took property either for private use or without JUST COMPENSATION in violation of the DUE PROCESS clause. Similar considerations prompted Gray's dissent in the landmark SUBSTANTIVE DUE PROCESS case of CHICAGO, MILWAUKEE & ST. PAUL RAILWAY V. MINNESOTA (1890). And in *Budd v. New York* (1892), where the Court upheld a New York statute fixing rates of charge for grain storage, he supplied the majority's spokesman with a long memorandum "showing that the prices of necessary articles were controlled by the legislature, in England and America, at the time of the adoption of the State and National Constitutions." His authorities included Hening's statutes of colonial Virginia and a 1709 act of Parliament regulating coal prices.

Gray voted with the majority in every case involving the rights of racial minorities decided during his tenure on the Court. Yet his route to the results often differed substantially from that of his colleagues. If Gray had been assigned PLESSY V. FERGUSON (1896), for example, he would no doubt have supplied a thorough digest of state legislation, as well as acts of Congress pertaining to the DISTRICT OF COLUMBIA, in an attempt to show that racial classifications in "social" contexts had been just as common in American law after ratification of the FOURTEENTH AMENDMENT as before. Legal history, not the conservative sociology that figured so prominently in HENRY B. BROWN's opinion or the natural justice to which JOHN MARSHALL HARLAN appealed in dissent, shaped Gray's construction of minority rights. Thus his associates were not surprised by his opinion in UNITED STATES V. WONG KIM ARK (1898), confirming the CITIZENSHIP claim of a Chinese child born in the United States, even though he had also spoken for the Court in *Elk v. Wilkins* (1884), denying the same claim when filed by an American Indian who had left a government reservation and renounced all privileges of tribal membership. In Gray's view, the anomalous status of Indians as wards of the nation had already been fixed by nine decades of administrative usage. But the status of persons born of unnaturalizable ALIENS was a new question in American law. Consequently he assumed that *Wong Kim Ark* could be decided only after an examination of all the juridical authorities on birthright citizenship running back to CALVIN'S CASE (1608).

It is ironic that Gray is best known as the probable "vacillating Justice" in POLLOCK V. FARMER'S LOAN & TRUST CO. (1895). We shall never know for certain whether he changed his vote on the validity of the income tax following the second hearing; but, as EDWARD S. CORWIN observed, "the surprising thing would be not that Gray was the last Justice to line up against the act, but that he should have done so at all." Gray's extraordinarily BROAD CONSTRUCTION of Congress's IMPLIED POWERS in *United States v. Jones* (1883), *Juilliard v. Greenman* (1884), and *Fong Yue Ting v. United States* (1893) underscored his constitutional nationalism. Yet he set a face of flint to HOWELL E. JACKSON's claim, in dissent, that *Pollock* was "the most disastrous blow ever struck at the constitutional power of Congress." It is equally astonishing that a self-conscious practitioner of historical method concurred in an opinion that, as Corwin put it, "played ducks and drakes with the precedents." The unkind verdict of modern scholarship is that even Gray, a jurist for whom the separation of law and politics ordinarily served as the very touchstone for judging, succumbed in *Pollock* to the reactionary impulse that gripped the legal profession at large during the turbulent 1890s.

CHARLES W. MCCURDY
(1986)

Bibliography

CORWIN, EDWARD S. 1938 *Court over Constitution.* Princeton, N.J.: Princeton University Press.

FILLER, LOUIS 1969 Horace Gray. Pages 1379–1389 in Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court, 1789–1969: Their Lives and Major Opinions.* New York: Chelsea House.

## *GRAY v. SANDERS*
372 U.S. 368 (1963)

*Gray,* along with WESBERRY V. SANDERS (1964), was a waystation between BAKER V. CARR (1962) (legislative districting presents a justiciable controversy) and REYNOLDS V. SIMS (1964) (the ONE PERSON, ONE VOTE principle governs the issue). In *Gray,* the Supreme Court, 8–1, invalidated

Georgia's "county unit system," which weighed rural votes more heavily than urban votes in PRIMARY ELECTIONS for statewide offices. The state, said Justice WILLIAM O. DOUGLAS, was the electoral unit; within that unit, EQUAL PROTECTION demanded the principle of one person, one vote. Justice JOHN MARSHALL HARLAN dissented, drawing an analogy to the ELECTORAL COLLEGE.

KENNETH L. KARST
(1986)

## *GREAT ATLANTIC & PACIFIC TEA CO. v. COTTRELL*
424 U.S. 366 (1976)

Mississippi allowed the resale of milk from another state only if that state reciprocally accepted Mississippi milk. A. & P. stores were refused a permit to sell Louisiana milk in Mississippi, even though Louisiana milk satisfied all Mississippi quality standards, because Louisiana had not entered a reciprocity agreement with Mississippi. Citing DEAN MILK CO. V. MADISON (1951), the Supreme Court, 8–0, held that the Mississippi law was an unconstitutional STATE REGULATION OF COMMERCE. The law severely burdened INTERSTATE COMMERCE without significantly promoting public health objectives; sales of Louisiana milk would have been allowed in the state if Louisiana had signed a reciprocity agreement. Mississippi could not "use the threat of economic isolation" to force other states into such agreements.

KENNETH L. KARST
(1986)

## GREAT COMPROMISE

The defeat of the NEW JERSEY PLAN provoked the fiercest battle at the CONSTITUTIONAL CONVENTION OF 1787. Small-state nationalists believed that they could not obtain ratification of any constitution that put their states at the political mercy of the large ones. The struggle focused on representation in the bicameral Congress. Small-state delegates, seeking compromise, would accept representation in the lower house based on population, but as to the upper house they would not retreat from the principle of state equality. ROGER SHERMAN of Connecticut declared that he would agree to two houses with "proportional representation in one of them, provided each State have an equal voice in the other." WILLIAM S. JOHNSON of Connecticut explained that in one house "the people ought to be represented, in the other, the States." State representation was essential to a Union "partly national, partly federal," declared OLIVER ELLSWORTH of Connecticut. But the stubbornness of the large state faction resulted in a 5–5 tie vote on what would later be called the "Connecticut Compromise." Its initial defeat brought the convention, in Sherman's words, "to a full stop," and the convention stood at the brink of failure. Concessions were politically necessary. A special committee shrewdly recommended the compromise urged by Connecticut. That recommendation carried by the slimmest majority, averting a breakup of the convention. The principle of state equality having been won, small-state nationalists then supported a motion allowing members of the Senate to vote as individuals, although LUTHER MARTIN objected that individual voting violated "the idea of the *States* being represented."

LEONARD W. LEVY
(1986)

Bibliography

BRANT, IRVING 1950 *James Madison: Father of the Constitution, 1787–1800.* Pages 79–100. Indianapolis: Bobbs-Merrill.

## *GREEN v. BIDDLE*
8 Wheaton 1 (1823)

This case extended the CONTRACT CLAUSE to INTERSTATE COMPACTS, the obligation of which a state may not impair. The Supreme Court, in an opinion by Justice JOSEPH STORY, voided Kentucky acts that failed to protect property rights guaranteed by that state's compact with Virginia, entered into when Kentucky became an independent state. On reargument, Senator HENRY CLAY defended the state. His Kentucky colleague, Senator Richard Johnson, inveighing against judicial "despotism" and "oligarchy," demanded repeal of section 25 of the JUDICIARY ACT OF 1789, proposed packing the Court, and sought a restriction of JUDICIAL REVIEW. Justice BUSHROD WASHINGTON, grounding the Court's second opinion in the contract clause, declared that "we hold ourselves answerable to God, our consciences and our country . . . be the consequences of the decision what they may." Kentucky passed state-sovereignty resolves, but congressional measures to limit judicial review and to repeal section 25 failed, because the Court's enemies were unable to unite behind one bill. Nevertheless hostility to the Court, further aggravated by OSBORN V. BANK OF THE UNITED STATES (1824), remained intense.

LEONARD W. LEVY
(1986)

## *GREEN v. COUNTY SCHOOL BOARD OF NEW KENT COUNTY*
391 U.S. 430 (1968)

In states where racial segregation of school children had been commanded or authorized by law, the process of DESEGREGATION following BROWN V. BOARD OF EDUCATION (1954–1955) was impeded by officials' tactics of delay and evasion. One such tactic was the "freedom of choice" plan, which allowed pupils to select their schools. This "freedom" was often restricted by the fear of black parents that sending their children to formerly white schools would be followed by the loss of a job, or by violence and harassment directed at them or their children. In *Green*, the Supreme Court held that a rural Virginia county's "freedom of choice" plan was an insufficient remedy for segregation.

The Court took note of the practical restrictions on the freedom of black parents but did not rest decision on that ground. Instead the Court adopted a doctrinal position that reshaped the course of school desegregation. Justice WILLIAM J. BRENNAN, writing for a unanimous Court, reinterpreted *Brown II* (1955) to require "the dismantling of well-entrenched dual [segregated] systems." A school board had an affirmative duty "to come forward with a plan that . . . promises realistically to work *now.*" A "freedom of choice" plan might possibly suffice, but where other alternatives were "more promising" the board must use them. The Court left no doubt that it had in mind the actual integration of black and white children as the index of success in dismantling a dual system.

In a small rural county with no residential segregation, integration would be easily achieved through geographical attendance zones and neighborhood schools. The question remained whether the Court would similarly insist on integrative results in large cities where housing was segregated. That question was answered affirmatively, three years after *Green.* (See SWANN V. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION; SCHOOL BUSING.)

KENNETH L. KARST
(1986)

## *GREEN v. OKLAHOMA*

See: Capital Punishment Cases of 1976

## *GREGG v. GEORGIA*

See: Capital Punishment Cases of 1976

## *GREGORY v. ASHCROFT*
501 U.S. 452 (1991)

In GARCÍA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985), the Supreme Court eschewed its previous effort to insulate substantive enclaves of state activity from congressional regulation as "unsound in principle and unworkable in practice." According to the Court, state sovereign interests "are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."

The Court supplemented the Constitution's inherent procedural safeguards in *Gregory v. Ashcroft*, by deploying a clear statement rule to protect states from congressional regulation. After outlining the advantages purportedly preserved by our constitutional regime of "dual sovereignty," the Court announced that it would interpret federal statutes not to regulate state governmental functions unless Congress makes its intent to do so "unmistakably clear in the language of the statute." The Court then construed the Age Discrimination in Employment Act not to override Missouri's mandatory retirement age for state judges.

The clear statement rule is controversial because it neither reflects an objective inquiry into LEGISLATIVE INTENT, nor is grounded in constitutional text, history, or structure. In this respect, *Gregory* may support further process-based FEDERALISM doctrines that are not constitutionally compelled, but nevertheless reasonably balance the competing values of national authority and state autonomy.

EVAN H. CAMINKER
(2000)

(SEE ALSO: *Age Discrimination Act; Statutory Interpretation.*)

## GRIER, ROBERT C.
(1794–1870)

The SENATE on August 4, 1846, unanimously confirmed Robert Cooper Grier as the thirty-third Justice of the Supreme Court. President JAMES K. POLK nominated Grier because of his STATES' RIGHTS Democratic principles, his position on the FUGITIVE SLAVERY issue, and his familiarity through thirteen years of previous judicial experience with Pennsylvania's unique law of real property. The bar of Pennsylvania thought the last of these particularly important since Grier's duties included presiding over the Third Circuit which included Pennsylvania.

Grier embraced the concept of dual SOVEREIGNTY. He believed that the inherent state police powers included

the power to curb the flow of liquor for purposes of public health and morality. (See LICENSE CASES.) Yet Grier also believed that the states could not interfere in areas of responsibility granted by the COMMERCE CLAUSE to the Congress. Thus, he sided with the narrow majority in the PASSENGER CASES (1849) in striking down taxes levied by two states on ship masters bringing immigrants to the United States.

Grier contributed significantly to the constitutional law of CORPORATIONS and PATENTS. He formulated an important legal fiction in *Marshall v. Baltimore and Ohio Railroad* (1853) by holding that for purposes of establishing federal JURISDICTION federal judges could assume that corporate officers resided in the state of incorporation. The decision aided litigants seeking access to federal courts and prevented a corporation from electing officers in the state of a complaining party in order to avoid a suit in federal court.

Because of his experience with patent litigation in the Third Circuit, Grier spoke for the Court in several important patent cases. He wrote the opinions in *Seymour v. McCormick* (1854) and *McCormick v. Talbot* (1858), which involved the exclusivity of Cyrus McCormick's patent on the reaper. In the 1864 case of *Burr v. Duryee*, the most important patent decision to that time, Grier, writing for the Court, held that the patent clause protected inventors of machinery but did not extend to scientific principles. The decision guaranteed accessibility to technical information in a rapidly expanding economy while protecting manufacturers in recovering the costs of developing new machinery.

Grier staunchly enforced the fugitive slave acts. He regularly charged circuit court juries to find for the rights of masters, even when it meant a hostile public reaction. Contrary to the position of Justice JOSEPH STORY in PRIGG V. PENNSYLVANIA (1842), Grier employed the dual sovereignty theory (in *Moore v. Illinois*, 1852) to assert that state and national governments shared a CONCURRENT POWER of rendition over fugitive slaves so long as the states did not interfere with the performance of federal officers.

Grier compromised his dual sovereignty principles in DRED SCOTT V. SANDFORD (1857). He initially opposed any decision that addressed the issues, and he urged his colleagues to adopt the rule of STRADER V. GRAHAM (1851) that the laws of the state in which a slave resided should prevail. President JAMES BUCHANAN, at the urging of Justice JOHN CATRON, wrote Grier urging him to add bisectional unity to a forceful resolution by the Court of the SLAVERY controversy. Grier succumbed, although he did so equivocally. His one-paragraph opinion concurred in Chief Justice ROGER B. TANEY's holding that the MISSOURI COMPROMISE was unconstitutional and in Justice SAMUEL NELSON's position that the laws of Missouri established Dred Scott's legal status.

Grier's participation in the *Scott* case faded before his loyal unionism. His most notable constitutional contribution while a member of the Court came during the PRIZE CASES (1863). The owners of vessels and cargoes seized as prizes at the beginning of the CIVIL WAR argued that President ABRAHAM LINCOLN had imposed an unconstitutional blockade of southern ports, because Congress had not declared war. Grier spoke for a 5–4 majority in holding that Lincoln had acted constitutionally when confronted with hostilities of sizable proportions. The Justice circumvented the constitutional issues of presidential ursurpation and the definition of the conflict by stressing the President's inherent obligation to preserve the Union.

Grier tarnished his reputation by lingering on the Court after senility had taken its toll. The crisis came when the Justices considered the constitutionality of the Legal Tender Acts. In conference Grier voted in favor of the acts in *Hepburn v. Griswold* (1870), but when the Justices moved to consider the next case involving the same issue Grier's mind wandered. He switched his vote. (See LEGAL TENDER CASES.) With the prodding of Justice STEPHEN J. FIELD, Grier submitted his resignation in December 1869 and left the Court the following February. Six months later he died at his home in Philadelphia.

KERMIT L. HALL
(1986)

Bibliography

GATELL, FRANK O. 1969 Robert C. Grier. Pages 873–892 in Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court, 1789–1969: Their Lives and Major Opinions.* New York: Chelsea House.

## *GRIFFIN v. BRECKENRIDGE*
### 403 U.S. 88 (1971)

This decision provided a generous construction of section 1985(3) of Title 42 of the United States Code and of Congress's power to reach private deprivations of CIVIL RIGHTS. Casting aside some constitutional considerations that had led to a more constricted reading of section 1985(3) in *Collins v. Hardyman* (1951), and effectively overruling UNITED STATES V. HARRIS (1883), the Court, in an opinion by Justice POTTER STEWART, concluded that section 1985(3) provides a cause of action against private conspiracies to violate constitutional rights. To avoid the "constitutional shoals that would lie in the path of interpreting 1985(3) as a general federal tort law," the Court required that the

conspiracy be the product of some racial or other class-based animus.

THEODORE EISENBERG
(1986)

## *GRIFFIN v. CALIFORNIA*
380 U.S. 609 (1965)

Overruling *Adamson v. California* (1947) without saying so, the Court, speaking through Justice WILLIAM O. DOUGLAS, held that state laws allowing adverse comment on the failure of a criminal defendant to take the stand and deny or explain evidence of which he had knowledge violated his RIGHT AGAINST SELF-INCRIMINATION. A jury acting on its own might infer what it wished, said Douglas, but what it infers "when the court solemnizes the silence of the accused into evidence against him is quite another thing" and imposes a penalty on the exercise of a constitutional right. Two dissenters argued that adverse comment on the right to silence did not compel the accused to be a witness against himself.

LEONARD W. LEVY
(1986)

## *GRIFFIN v. COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY*
377 U.S. 218 (1964)

*Griffin,* one of the school segregation cases decided with BROWN V. BOARD OF EDUCATION (1954–1955), arose in Prince Edward County, Virginia. In 1956 Virginia adopted legislation aimed at closing mixed-race schools and providing state aid to private schools. The state courts held much of this "massive resistance" legislation unconstitutional in 1959. The legislature responded by making compulsory school attendance a matter of local option and by authorizing TUITION GRANTS and property tax credits to help support private schools.

Meanwhile, the federal district court in *Griffin* had ordered the commencement of DESEGREGATION in the 1959–1960 year. The county school commissioners refused to levy school taxes for the year, and in the fall of 1959 the public schools of Prince Edward County remained closed. Private schools for white children were established, taking advantage of the state's financial aid. The *Griffin* plaintiffs challenged the constitutionality of this new response to *Brown,* and the case returned to the Supreme Court.

In an opinion by Justice HUGO L. BLACK, the Court held that closing the schools denied EQUAL PROTECTION to black pupils in the county. The Court acknowledged that no general equal protection principle required a state to treat all counties alike. However, the only reason for different treatment of this county's children was to ensure the continuation of racial segregation—an unconstitutional objective. (See LEGISLATION.)

Only the question of remedy divided the Court. All the Justices agreed that the TUITION GRANTS and tax credits should be enjoined while the public schools remained closed. (A federal court of appeals later enjoined them, irrespective of the closure of the public schools.) But the majority went further, authorizing the district court to order county officials to open the schools and, if necessary, to levy taxes to support them: "the time for mere "deliberate speed' has run out." Justices TOM C. CLARK and JOHN MARSHALL HARLAN briefly noted their disagreement with the holding that the federal courts had power to order the opening of the county's schools.

*Griffin's* doctrinal importance is twofold. It is an early suggestion of the state's affirmative obligation to equalize educational opportunity, and it is an early example of federal court intervention deep in the processes of local government. (See INSTITUTIONAL LITIGATION.) In practical terms, the episode also provides a sad example of "white flight." (See DESEGREGATION.) The county's public schools opened, but they were populated almost entirely by black pupils. A whites-only private school flourished, even without the aid of the state's money. Today, while it is true that such "segregation academies" cannot lawfully exclude applicants on account of race (see RUNYON V. MCCRARY), it is also true that their tuition fees are beyond the reach of most black families. When middle-class white children withdraw from desegregated schools—in Chicago and Los Angeles as well as Prince Edward County—the result is segregation by economic status and the likely continuation of continued racial segregation.

KENNETH L. KARST
(1986)

## *GRIFFIN v. ILLINOIS*
351 U.S. 12 (1956)

*Griffin* was the first decision giving constitutional status to an INDIGENT person's claim to invalidate an economic barrier to his or her ACCESS TO THE COURTS.

Illinois normally required persons appealing from their criminal convictions to provide trial transcripts to the appellate courts. The state supplied free transcripts to INDIGENTS appealing in capital cases, but not in other cases. The Supreme Court held, 5–4, that the state must furnish a free transcript to an appellant in a noncapital case.

The opinion of Justice HUGO L. BLACK, for four Justices, rested on both due process and EQUAL PROTECTION grounds, asserting the state's constitutional obligation to provide "equal justice for poor and rich." Justice FELIX FRANKFURTER, concurring, emphasized the irrationality of the capitalnoncapital distinction. The dissenters found this distinction reasonable and argued that the state had no affirmative duty to alleviate the consequences of economic inequality.

*Griffin*, along with DOUGLAS V. CALIFORNIA (1963), raised expectations that the equal protection clause would be interpreted as a broad guarantee against WEALTH DISCRIMINATION, but these decisions are seen today as standing for a more modest proposition: that the right to state criminal appeals must not be foreclosed to the poor because of their poverty. (See ROSS V. MOFFITT.)

KENNETH L. KARST
(1986)

## *GRIFFITHS, IN RE*

See: *Sugarman v. Dougall*

## *GRIGGS v. DUKE POWER CO.*
401 U.S. 924 (1971)

Although subject to narrower interpretations, *Griggs* is viewed as establishing that employment selection criteria that disqualify blacks at higher rates than whites may violate Title VII of the CIVIL RIGHTS ACT OF 1964 even if the selection criteria are not chosen for discriminatory purposes. *Griggs* opened the door to vast numbers of Title VII actions seeking to establish violations through statistical analysis of the relative effect of employment criteria on minorities. *Griggs*'s emphasis on effects also influenced non-Title VII cases. Until WASHINGTON V. DAVIS (1976) was decided, many courts and analysts relied in part on *Griggs* to interpret the EQUAL PROTECTION clause to prohibit unequal effects. Even after *Davis*, *Griggs*'s effects test continued to influence litigation under Title VI of the Civil Rights Act of 1964, Title VIII of the CIVIL RIGHTS ACT OF 1968,and other provisions.

THEODORE EISENBERG
(1986)

(SEE ALSO: *Legislation.*)

## *GRIMAUD, UNITED STATES v.*
220 U.S. 506 (1911)

In 1905, Congress authorized the secretary of agriculture to administer public lands set aside as forest reservations. Varying local conditions had made congressional regulation impractical, so the act designated him to make regulations respecting the use of these lands, violation of which would constitute a criminal offense. A federal district court judge held the act unconstitutional on the grounds that it constituted a delegation of legislative power to the executive and that it empowered the secretary to define federal crimes.

Justice JOSEPH R. LAMAR, speaking for a unanimous Supreme Court, sustained the act. The Court validated the delegation of broad discretion because "the authority to make administrative rules is not a delegation of legislative power." Even the imposition of criminal penalties did not render the regulations legislative. When a statute prescribes the penalty for a violation of administrative regulations, Congress—not the administrative officer—fixes the penalty. The notion, nurtured by this and other cases, that legislative DELEGATION OF POWER had become unimportant received a shock when the Court revived it in 1935 to strike down portions of the NATIONAL INDUSTRIAL RECOVERY ACT. (See PANAMA REFINING COMPANY V. RYAN.)

DAVID GORDON
(1986)

## GRISWOLD, ERWIN N.
(1904–1994)

Erwin N. Griswold had a notable career as the dean of the Harvard Law School, SOLICITOR GENERAL of the United States, and a leading tax practitioner. Born in 1904, he was graduated from Oberlin College and from Harvard Law School, where he was president of the Harvard Law Review. Griswold served as an attorney in the Solicitor General's Office for five years, arguing many cases in the Courts of Appeals and the Supreme Court. Invited to join the Harvard Law faculty in 1934, he remained until 1967, serving as dean from 1946–1967. With his powerful, somewhat brusque personality, he was nevertheless a fair-minded man, and he was heavily responsible for reinvigorating the Harvard Law School after WORLD WAR II. He also managed to find time to argue many cases in the Supreme Court, mostly tax matters.

Griswold resigned as dean in 1967 when appointed Solicitor General by President LYNDON B. JOHNSON, and he continued in that increasingly difficult role under President RICHARD M. NIXON until 1973. As Solicitor General, Griswold argued the government's losing position in the *Pentagon Papers* case, NEW YORK TIMES V. UNITED STATES (1971), and its winning position in both the DRAFT CARD BURNING case UNITED STATES V. O'BRIEN (1968) and the DESEGREGATION case SWANN V. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION (1971), in which the use of large-scale

SCHOOL BUSING to remedy intentional segregation was first approved by the Court. He then went into private practice in Washington, D.C., where he continued an active appellate practice until his death in 1994.

In the 1950s, when Senator Joseph McCarthy was leading his anti-Communist crusade, Griswold, himself a Republican, made a major contribution to constitutional law in a series of lectures in which he defended the RIGHT AGAINST SELF-INCRIMINATION as an important part of our constitutional liberties. While at Harvard Law School, he also served the cause of racial justice by appearing as an expert witness for THURGOOD MARSHALL in CIVIL RIGHTS cases and by becoming an effective and energetic member of the United States Commission on Civil Rights. Griswold played a leading role in American law for sixty years as public and private practitioner, teacher, scholar, and legal educator.

ANDREW L. KAUFMAN
(2000)

Bibliography

GRISWOLD, ERWIN N. 1955 *The 5th Amendment Today.* Cambridge, Mass.: Harvard University Press.

## *GRISWOLD v. CONNECTICUT*
381 U.S. 479 (1965)

Seen in the perspective of the development of constitutional doctrine, *Griswold* stands among the most influential Supreme Court decisions of the latter part of the twentieth century. A full understanding of its effect on the constitutional future requires a look at *Griswold's* antecedents. Even seen narrowly, *Griswold* was something of a culmination. The BIRTH CONTROL movement had made two previous unsuccessful attempts to get the Court to invalidate Connecticut's law forbidding use of contraceptive devices. In *Tileston v. Ullman* (1943) a doctor was held to lack STANDING to assert his patients' constitutional claims, and in *Poe v. Ullman* (1961), when a doctor and his patients sued in their own rights, the Court again dismissed—this time on jurisdictional grounds that could charitably be called ingenuous. *Griswold* proved to be the charm; operators of a birth control clinic had been prosecuted for aiding married couples to violate the law, furnishing them advice and contraceptive devices. The Supreme Court held the law invalid, 7–2.

*Griswold* fanned into flames a doctrinal issue that had smoldered in the Supreme Court for nearly two centuries: the question whether the Constitution protects NATURAL RIGHTS or FUNDAMENTAL INTERESTS beyond those specifically mentioned in its text. (See CALDER V. BULL; FUNDAMENTAL LAW AND THE SUPREME COURT; HIGHER LAW.) In the modern era, that question of CONSTITUTIONAL INTERPRETATION had focused on Justice HUGO L. BLACK's argument that the FOURTEENTH AMENDMENT fully incorporated the specific guarantees of the BILL OF RIGHTS and made them applicable to the states. Black's dissent in *Adamson v. California* (1947) had scorned the competing view, limiting the content of the Fourteenth Amendment DUE PROCESS to the fundamentals of ORDERED LIBERTY. This "natural-law-due-process formula," said Black, not only allowed judges to fail to protect rights specifically covered by the Constitution but also permitted them "to roam at large in the broad expanses of policy and morals," trespassing on the legislative domain. In *Adamson* Justice FRANK MURPHY had also dissented; accepting the INCORPORATION DOCTRINE, Murphy argued that other "fundamental" rights, beyond the specific guarantees of the Bill of Rights, were also protected by due process. *Griswold* offered a test of the Black and Murphy views.

Justice WILLIAM O. DOUGLAS, who had agreed with Black in *Adamson*, recognized that the Connecticut birth control law violated no specific guarantee of the Bill of Rights. A number of other guarantees, however, protected various aspects of PRIVACY, and all of them had "penumbras, formed by emanations from those guarantees that [helped] give them life and substance." The *Griswold* case concerned "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." The NINTH AMENDMENT recognized the existence of other rights outside those specifically mentioned in the Bill of Rights, and the right of marital privacy itself was "older than the Bill of Rights." Enforcement of Connecticut's law would involve intolerable state intrusion into the marital bedroom. The law was invalid in application to married couples, and the birth control clinic operators could not be punished for aiding its violation.

In form, this "penumbras" theory was tied to the specifics of the Bill of Rights; in fact, it embraced the Murphy contention. Justices JOHN MARSHALL HARLAN and BYRON R. WHITE, concurring, candidly rested on SUBSTANTIVE DUE PROCESS grounds. Justice Black, dissenting, expressed distaste for the Connecticut law but could find nothing specific in the Constitution to prevent the state from forbidding the furnishing or the use of contraceptives. He chided the majority for using natural law to "keep the Constitution in tune with the times"—a function that lay beyond the Court's power or duty.

*Griswold* served as an important precedent eight years later when the Court held, in ROE V. WADE (1973), that the new constitutional right of privacy included a woman's right to have an abortion. (See REPRODUCTIVE AUTONOMY.) The *Roe* opinion, abandoning the shadows of *Griswold's* penumbras, located the right of privacy in the "liberty" protected by Fourteenth Amendment due process. *Gris-*

*wold* thus provided a bridge from the Murphy view in *Adamson* to the Court's modern revival of substantive due process. Underscoring this transition, later decisions such as EISENSTADT V. BAIRD (1972) and CAREY V. POPULATION SERVICES INTERNATIONAL (1977) have made plain that *Griswold* protected not only marital privacy but also the marital relationship—and, indeed, a FREEDOM OF INTIMATE ASSOCIATION extending to unmarried persons. If substantive due process is a vital part of today's constitutional protections of personal liberty, much of the credit goes to the *Griswold* decision and to Justice Douglas.

KENNETH L. KARST
(1986)

Bibliography

Kauper, Paul G. 1965 Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case. *Michigan Law Review* 64:235–258.

## *GROSJEAN v. AMERICAN PRESS CO., INC.*
297 U.S. 233 (1936)

In this unique case the Court unanimously held unconstitutional, as abridgments of the FREEDOM OF THE PRESS, any "taxes on knowledge"—a phrase, from British history, used to designate any punitive or discriminatory tax imposed on publications for the purpose of limiting their circulation. Louisiana, under the influence of Governor Huey Long, exacted a license tax (two percent of gross receipts) on newspapers with a circulation exceeding 20,000 copies weekly. By no coincidence the tax fell on thirteen publications, twelve of which were critics of Long's regime, and missed the many smaller papers that supported him. The large publishers sued to enjoin enforcement of the license tax and won a permanent INJUNCTION.

Justice GEORGE SUTHERLAND, writing for the Court, reviewed the history of taxes on knowledge, concluding that mere exemption from PRIOR RESTRAINT was too narrow a view of the freedom of the press protected by the FIRST and FOURTEENTH AMENDMENTS. In addition to immunity from censorship, that freedom barred any government action that might prevent the discussion of public matters. Sutherland declared that publishers were subject to the ordinary forms of taxation, but the tax here was an extraordinary one with a long British history, known to the framers of the First Amendment, of trammeling the press as a vital source of public information. Similarly, Louisiana's use of the tax showed it to be a deliberate device to fetter a selected group of newspapers. To allow a free press to be fettered, Sutherland said, "is to fetter ourselves." Deciding that the tax abridged the freedom of the press made unnecessary a determination whether it also denied the EQUAL PROTECTION OF THE LAWS. In subsequent cases the Court sustained nondiscriminatory taxes on publishers but extended the principle of *Grosjean* to strike down taxes inhibiting RELIGIOUS LIBERTY.

LEONARD W. LEVY
(1986)

## GROSSCUP, PETER S.
(1852–1921)

Peter Stenger Grosscup served nineteen years in the lower federal courts, the last twelve (1899–1911) on the Seventh Circuit Court of Appeals. Controversy dogged his judicial career. He preached the inevitability of industrial consolidation and the need for reasonable regulation of capital and LABOR. The judge's numerous critics within the Progressive movement charged that his conception of reasonableness merely disguised a probusiness bias.

Grosscup in 1894 gained national attention during the violent confrontation between Eugene V. Debs's American Railway Union and the Pullman Palace Car Company. The judge's sympathies were clear. Grosscup issued an INJUNCTION ordering the strikers to cease disruption of INTERSTATE COMMERCE and the mails. Grosscup, describing the strikers to a federal GRAND JURY, observed that "neither the torch of the incendiary, or the weapon of the insurrectionist, nor the inflamed tongue of him who incites to fire and sword is the instrument to bring about reform."

Grosscup's pronouncements in favor of reasonable regulation clashed with his advocacy of the abolition of the SHERMAN ANTITRUST ACT and his evanescent enforcement record. In *United States v. Swift & Co.* (1903) he did hold that since the commerce power included intercourse brought about by sale or exchange, application of the Sherman Act to outlaw price fixing by the Beef Trust was constitutional. However, in *Standard Oil Co. of Indiana v. United States* (1908), he spoke for a unanimous circuit court in reversing a district court fine of $29,240,000 against an oil company valued at $1,000,000. Grosscup testily wrote that the holding company—which could have afforded to pay—had not been on trial. The judge responded with mocking indifference to President THEODORE ROOSEVELT's sharp denunciation of the opinion.

Grosscup was publicly perceived as a tool of the corporations. His involvement as a shareholder and director of several businesses further undermined his judicial credibility. After resigning under pressure, Grosscup successfully defied his critics to prove misconduct.

KERMIT L. HALL
(1986)

Bibliography

VANCE, JOHN T. 1964 Peter Stenger Grosscup. *Dictionary of American Biography*, Vol. 4:21–22. New York: Scribner's.

## *GROSSMAN, EX PARTE*
267 U.S. 87 (1925)

This OPINION, elucidating the scope of the PARDONING POWER, declared executive discretion absolute in the matter. The President had commuted Grossman's sentence, but a court ordered him reimprisoned to serve a sentence for contempt. The Supreme Court, recurring to history, rejected arguments that extension of the pardoning power to criminal contempts would violate judicial independence or the SEPARATION OF POWERS: "Whoever is to make [the pardoning power] useful must have full discretion to exercise it."

DAVID GORDON
(1986)

## *GROSSO v. UNITED STATES*

See: *Marchetti v. United States*

## GROUNDS OF OPINION

The grounds of OPINION are the stated reasons given by a court or a judge for the DECISION (or dissent) in a case. The grounds are the principles, precedents, and logical steps relied upon to support the conclusion. In the opinion of the Court, the grounds are the RATIO DECIDENDI, as opposed to the OBITER DICTA. In CONCURRING and DISSENTING OPINIONS, the grounds are, correspondingly, the points necessary to establish the desired result.

DENNIS J. MAHONEY
(1986)

## GROUP CONFLICT AND THE CONSTITUTION

See: National Unity, Group Conflict, and the Constitution

## GROUP LIBEL

Group libel statutes pose uniquely difficult issues, for they produce a clash between two constitutional commitments: to equality and to FREEDOM OF SPEECH. Such laws impose punishments on the defamation of racial, ethnic, or religious groups. Group libel statutes were first enacted following WORLD WAR II. It was widely believed that the Nazis had come to power in Germany by means of systematic calumny of their opponents and of Jews and other groups that might serve as scapegoats. Group libel statutes were enacted to afford remedies for defamation, to prevent breaches of the peace, and ultimately to protect democracy against totalitarianism. On the other hand, as the Supreme Court stated in NEW YORK TIMES CO. V. SULLIVAN (1964), the FIRST AMENDMENT manifests "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." Group libel statutes test that commitment.

The Court purported to settle the question in BEAUHARNAIS V. ILLINOIS (1952). A deeply divided Court upheld an Illinois group libel statute by resort to constitutional premises that have been substantially eroded by subsequent decisions. Although the continuing force of *Beauharnais* as a precedent is subject to serious doubt, it has not been overruled and was cited by the Court with seeming approval in *New York v. Ferber* (1982).

Beauharnais had been convicted for circulating a leaflet calling on officials in Chicago "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods, and persons, by the Negro." Calling upon white people to unite, Beauharnais's leaflet counseled that "if persuasion and the need to prevent the white race from becoming mongrelized by the Negro will not unite us, then the . . . rapes, robberies, knives, guns and marijuana of the Negro surely will."

One of the dissenting Justices, WILLIAM O. DOUGLAS, found it an easy case. In his view, if the "plain command of the First Amendment was to be overridden, the state was required to show that "the peril of speech" was "clear and present."

Justice FELIX FRANKFURTER, writing for the Court's majority, found it unnecessary to consider any CLEAR AND PRESENT DANGER test; libel, he said, is beneath First Amendment protection. Given the history of racial violence in Illinois, he argued, the legislature was not "without reason" in concluding that expressions like Beauharnais's had contributed to the violence and should be curbed.

In dissent, Justice HUGO L. BLACK challenged the Court's equation of group libel and ordinary libel. He suggested that the limited scope of libel assured that it applied to "nothing more than purely private feuds." The move from libel to group libel, he declared, was a move "to punish discussion of matters of public concern" and "a corresponding invasion of the area dedicated to free expression by the First Amendment."

Although Justice Black's characterization of the law of libel exaggerated its limits, constitutional developments since *Beauharnais* strongly support his general perspec-

tive. In *New York Times Co. v. Sullivan* the Court ruled that despite prior history, fresh assessment of the First Amendment yielded the conclusion that some libel was indeed within the scope of First Amendment protection. In a trail of decisions from *Sullivan* to GERTZ V. ROBERT WELCH, INC. (1974), the Court concluded that the First Amendment afforded some protection for a broad range of defamatory material. The driving force behind this constitutionalization of the tort of defamation was *Sullivan's* recognition of the First Amendment's commitment to uninhibited debate; moreover, the profound First Amendment importance of expression on public issues has been echoed in many subsequent opinions.

*Sullivan* and its successor decisions undermine the premises of *Beauharnais.* No Justice today could write an opinion saying that because libel is beneath First Amendment protection, so is group libel. First, most libel is clearly entitled to some measure of First Amendment protection. Second, putting group libel aside, if some libel remains entirely outside the First Amendment's scope, it would be speech of a private or commercial character. Justice Black's point that the move from libel to group libel is a move from the private sphere to the public sphere describes today's doctrine more accurately than it described the doctrine of 1952.

Another reason to doubt *Beauharnais*'s continuing vitality is the Court's statement in *Gertz v. Robert Welch, Inc.* that "under our Constitution, there is no such thing as a false idea." That expression has generally been interpreted to mean that opinions are immune from any imposition of liability based on their asserted falsity. Although the line between fact and opinion is hard to draw, and although some group libel contains false assertions of fact, the sting of most group libel comes from unverifiable opinions. For example, what evidence could have proved the "truth" of Beauharnais's pejorative comments about black Americans? A separate issue is whether it is desirable for American trials to be conducted about the truth or falsity of various pejorative statements about ethnic groups. In the case of religious groups, the legal resolution of such questions could pose serious issues under the religion clauses of the First Amendment.

If group libel statutes are to find constitutional refuge, the necessary constitutional principles will have to be found beyond the defamation decisions. A growing body of opinions resonate with the theme of *Paris Adult Theatre v. Slaton* (1973) pronouncing the right to maintain "a decent society." From *Young v. American-Mini Theatres, Inc.* (1976) to FEDERAL COMMUNICATIONS COMMISSION V. PACIFICA FOUNDATION (1978) and a series of dissents in decisions involving FIGHTING WORDS, there is support for arguments based on concepts of civility, decency, and dignity. Whether or not these arguments succeed in validating group libel statutes, the conflict between public morality and freedom of speech will persist as an abiding theme of constitutional law.

STEVEN SHIFFRIN
(1986)

Bibliography

ARKES, HADLEY 1974 Civility and the Restriction of Speech: Rediscovering the Defamation of Groups. *Supreme Court Review* 1974:281–335.

KALVEN, HARRY, JR. 1965 *The Negro and the First Amendment.* Columbus: Ohio State University Press.

## GROUPS AND THE CONSTITUTION

ALEXIS DE TOCQUEVILLE famously observed, "Americans of all ages, all stations in life, and all types of dispositions are forever forming associations." Yet CONSTITUTIONAL THEORY hardly has begun to connect to reality in which individual identities are anchored within myriad associations, both voluntary and involuntary.

Judges, lawyers, and scholars have constructed quite different standards regarding the relationship between groups and the Constitution at varying moments in American history. No unified general theory of FREEDOM OF ASSOCIATION seems possible today. Yet there remains a need for careful, nuanced consideration of the constitutional position of groups in the United States. In some instances, an association is thought to merit greater protection and more expansive rights than would be afforded any single individual; in other situations, an association may merit substantially less protection and have rights more constricted than would a single individual. Often, associations are said to merit precisely the same rights any single individual would enjoy.

Prevailing opinion maintains that the Constitution protects no explicit independent freedom of association. This theory—largely derived from a binary approach within the central paradigm of individual and the state—considers groups of people as sums divisible into their parts. Even leading FIRST AMENDMENT scholars such as Thomas I. Emerson, for example, argued that it "is impossible to construct a meaningful constitutional limitation on government power based upon a generalized notion of the right to form or join an association." In those respects in which associations are unique, Emerson would allow additional governmental regulation.

In some cases, however, individuals are persecuted precisely because of their membership in groups. Some groups, moreover, have been punished for their very existence. Guilt by association periodically has dominated our legal landscape. In tense times, judges tend to acqui-

esce in restricting the rights of individuals because of their memberships—volitional or nonvolitional—in particular associations. In *New York ex rel. Bryant v. Zimmerman* (1926), for example, the Supreme Court upheld the conviction of a Ku Klux Klan officer based solely on the group's failure to disclose its membership list. As late as 1961, the Court reiterated a theory of restricted associational rights regarding membership in the Communist Party. Perhaps the most striking "guilt by association" decision, however, was KOREMATSU V. UNITED STATES (1944), which upheld the internment of Japanese Americans during WORLD WAR II. The Court deferred to revocation of constitutional rights because race positioned thousands of people as members of an identifiable, feared group.

In contrast to *Korematsu*, the Court occasionally has extended group rights that are decidedly more protective than the rights afforded to any individual. In a number of situations, members of groups are legally protected though a lone individual engaged in the same activity might not be: for example, members of groups who parade, report the news, engage in certain LABOR activities and boycotts, and gain protection from deportation because of persecution in their home countries. In NAACP V. ALABAMA (1958), Justice JOHN MARSHALL HARLAN'S OPINION FOR THE COURT described a First Amendment right of association and protected the NAACP from one of the attempts by Southern states to obtain membership lists in order to punish activists in the CIVIL RIGHTS MOVEMENT. In *NAACP v. Claiborne Hardware Co.* (1982), Justice JOHN PAUL STEVENS'S MAJORITY OPINION echoed Harlan's freedom of association approach. *Claiborne Hardware* insulated a local NAACP chapter from a huge fine imposed by a state court for organizing and enforcing a long BOYCOTT of white merchants in Port Arthur, Mississippi.

The Court also has recognized some First Amendment rights of business associations in the form of CORPORATIONS. *Consolidated Edison Company v. Public Service Commission* (1980), for example, categorized the huge power company as a private party protected in COMMERCIAL SPEECH communications via enclosures in its utility bills. Newspapers seek profits, Justice LEWIS F. POWELL, JR., reasoned for the majority, so other profit-seeking corporations also should be entitled to express themselves.

Nonetheless, recent Court decisions tend to limit special associational rights either to the FREEDOM OF INTIMATE ASSOCIATION or to "the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities," as described in *Board of Directors of Rotary Club International v. Rotary Club of Duarte* (1987). Rights surrounding intimate association are derived primarily from RIGHT OF PRIVACY and SUBSTANTIVE DUE PROCESS sources. The other main freedom of association source is anchored in the First Amendment. By deriving two different associational rights from other constitutional rights, the Court often seems to render freedom of association nearly otiose.

A few notable exceptions to this limiting approach have breathed new life into associational rights, albeit in a scattered and inconsistent way. In *Roberts v. United States Jaycees* (1984), *Federal Election Commission v. Massachusetts Citizens For Life* (1987), and AUSTIN V. MICHIGAN CHAMBER OF COMMERCE (1990), for example, the Court suggested that the group quality of the claimed right made a constitutional difference in striking the balance under the First Amendment. The communicative purposes of the association as well as the type of communication involved are key factors. Yet in BOB JONES UNIVERSITY V. UNITED STATES (1983), *Regan v. Taxation With Representation of Washington, Inc.* (1983), and CORNELIUS V. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. (1985), the Court deferred to the discretion of government agencies in deciding whether to recognize associations' First Amendment claims.

Some argue that, primarily through the First and the FOURTEENTH AMENDMENTS the Constitution entails direct protection for those concerned enough to assemble together. This right, whether or not linked explicitly to other constitutional protections, might provide guarantees for groups who would speak, write, petition, or pray against orthodoxy. Such an associational right would not always trump competing claims, of course—no constitutional right ever does—but it would establish a rebuttable presumption to be overcome only by a conflicting and COMPELLING STATE INTEREST. Another claim, akin to that made in the famous Footnote 4 of UNITED STATES V. CAROLENE PRODUCTS (1938), asserts that for marginalized or endangered groups—"DISCRETE AND INSULAR MINORITIES" — there ought to be more careful constitutional scrutiny of actions that intrude upon or discriminate against such groups as groups. Yet the Court recently has insisted, albeit inconsistently, that even EQUAL PROTECTION claims are limited to individuals.

As a matter of contemporary constitutional DOCTRINE groups generally are treated—with notable exceptions such as heterosexual couples, explicitly political associations, and the NAACP—as if they are simply conglomerations of individuals that accurately reflect the sums of their individual parts. Certainly no unified general theory of freedom of association seems possible today, if it ever could have been.

AVIAM SOIFER
(2000)

(SEE ALSO: *Asian Americans and the Constitution; Japanese American Cases.*)

Bibliography

EMERSON, THOMAS I. 1964 Freedom of Association and Freedom of Expression. *Yale Law Journal* 74:1–35.

GARET, RONALD A. 1983 Communality and Existence: The Rights of Groups. *Southern California Law Review* 56:1001–1075.

SOIFER, AVIAM 1995 *Law and the Company We Keep*. Cambridge, Mass.: Harvard University Press.

## *GROVES v. SLAUGHTER*
15 Peters 449 (1841)

*Groves* was the only case to come before the United States Supreme Court involving the relative powers of the state and federal governments over the interstate slave trade. Mississippi's Constitution forbade the importation of slaves for sale. In suit on a defaulted note given for an imported slave, the Court majority, speaking through Justice SMITH THOMPSON, held that the state constitutional provision was not self-executing and was unenforceable without legislation implementing it. Concurring opinions revealed a wide divergence of opinion among the justices on slavery-related questions. Justice JOHN MCLEAN asserted that slaves were essentially persons, not property. Chief Justice ROGER B. TANEY insisted that state power over blacks, slave or free, was exclusive and superseded any exercise of federal power under the slave-trade or COMMERCE CLAUSE. Justice HENRY BALDWIN denied that states could exclude the slave trade.

WILLIAM M. WIECEK
(1986)

## *GROVEY v. TOWNSEND*
295 U.S. 45 (1935)

Following the DECISION in NIXON V. CONDON (1932), the Texas state convention of the Democratic party adopted a rule limiting voting in PRIMARY ELECTIONS to whites. Grovey, a black, was refused a primary ballot and sued for DAMAGES. The Supreme Court unanimously held that the party's rule did not amount to STATE ACTION under the FOURTEENTH or FIFTEENTH AMENDMENT and thus violated no constitutional rights. Grovey was merely denied membership in a private organization. The Court distinguished *Nixon v. Condon* as a case in which the party's executive committee had acted under state authorization. Only nine years later, in SMITH V. ALLWRIGHT (1944), the Court overruled *Grovey*.

KENNETH L. KARST
(1986)

# GUARANTEE CLAUSE

Article IV, section 4, of the Constitution provides that "The United States shall guarantee to every State in this Union a REPUBLICAN FORM OF GOVERNMENT. . . ." Anticipated between 1781 and 1787 in various state and federal legislative requirements that territorrial governments be republican ideology in the Confederation era. At a minimum, it prohibited regression to monarchial and aristocratic government, but it also incorporated the principles of POPULAR SOVEREIGNTY, representative government, majority rule, SEPARATION OF POWERS, and federal supremacy.

The guarantee clause was first invoked under circumstances JAMES MADISON anticipated in THE FEDERALIST #43: to suppress an insurrectionary challenge to the authority of one of the states (Dorr's Rebellion, Rhode Island, 1842). Then, and in the earlier WHISKEY REBELLION (western Pennsylvania, 1794), it took on a repressive character as a bulwark of extant institutions, affirming GEORGE WASHINGTON's insistence in his Farewell Address (1796) that "the constitution which at any time exists till changed by . . . the whole people is sacredly obligatory upon all."

In the first significant judicial interpretation of the clause, LUTHER V. BORDEN (1849), Chief Justice ROGER B. TANEY declined to overturn the Rhode Island government established in the aftermath of the Dorr Rebellion. Taney held that the determination of whether a state government was republican rested exclusively with Congress, whose action was binding on the courts. In this case, Taney invoked the POLITICAL QUESTION doctrine, asserting that the issue presented "belonged to the political power and not to the judicial."

The guarantee clause figured prominently in debates on reconstruction of the Union during and after the Civil War. Democrats opposed to effective Reconstruction measures relied on a conservative interpretation of the clause as securing extant, nonmonarchical governments; they extolled self-government but limited it to whites. Republicans rejected the static, backward-looking, and racist implications of the Democratic view. Echoing earlier abolitionist contentions that slavery was incompatible with republican government, Republicans fashioned Reconstruction policies (including military Reconstruction, federal guarantees of blacks' CIVIL RIGHTS, and enfranchisement) that were conceptually derived from Taney's assertion of the exclusive power of Congress to assure republican government in the states. Chief Justice SALMON P. CHASE validated the Republican uses of the clause in TEXAS V. WHITE (1869).

The clause has played a less prominent role in public affairs during the twentieth century. The Supreme Court rejected a conservative interpretation of the clause that would have invalidated the initiative and referendum (*Pa-*

*cific States Telephone and Telegraph Co. v. Oregon*, 1912). Together with the political question doctrine, the clause became linked with the concept of JUSTICIABILITY (a characteristic of cases requisite to their resolution by judicial tribunals). But the majority opinion of Justice WILLIAM J. BRENNAN in BAKER V. CARR (1962) restricted the scope of the political question doctrine, thus creating the possibility of future judicial, as well as congressional, reliance on the clause to evaluate the republican character of state institutions.

WILLIAM M. WIECEK
(1986)

Bibliography

WIECEK, WILLIAM M. 1972 *The Guarantee Clause of the U.S. Constitution.* Ithaca, N.Y.: Cornell University Press.

## GUARANTEE CLAUSE
(Update)

The Constitution declares that "The United States shall guarantee to every State in this Union a Republican Form of Government" (Article IV, section 4). This guarantee clause has a rich political history, having been wielded as a potent legal and rhetorical weapon by various government reformers since the Constitution's framing. For example, ABOLITIONISTS in the early nineteenth century invoked the republican guarantee when urging extension of the concept of United States CITIZENSHIP, and later the franchise, to once-enslaved persons; and suffragists in the mid-nineteenth and early twentieth centuries invoked the republican guarantee when urging extension of the franchise to women. The guarantee clause proved an ineffective weapon in federal court litigation, however, because the courts generally steered clear of what they considered to be quintessentially political battles. In a series of cases stretching from the mid-1800s, starting with LUTHER V. BORDEN (1849), through the mid-1900s, the Supreme Court held that the questions whether a state government is republican in form, or which of two competing governments may properly claim the title, lack JUSTICIABILITY in federal court under the POLITICAL QUESTION DOCTRINE. State courts generally followed suit. From the perspective of judicially enforceable rights, therefore, the guarantee clause has long lain dormant. While occasionally a potent political weapon, the clause has not been deployed successfully as a legal one.

Recently, however, the guarantee clause has received renewed attention from both scholars and courts. Political theorists have revived the Founding Era's focus on ideals of REPUBLICANISM, and this revival in turn has spurred legal scholars to focus once again on the legal content of the clause. And in NEW YORK V. UNITED STATES (1992), the Supreme Court teasingly suggested that "perhaps not all claims under the guarantee clause present nonjusticiable political questions," though it found the particular legislative scheme under challenge in that case not to violate the clause.

Most of the recent legal scholarship considers whether the INITIATIVE and REFERENDUM forms of DIRECT DEMOCRACY used by states are consistent with the republican government guarantee. Modern scholars generally agree that the clause historically was designed to protect democratic states from both monarchy and mob rule. Some scholars argue that a REPUBLICAN FORM OF GOVERNMENT entails governance through elected agents. The concept of direct democracy was anathema to the Framers, they argue, and should be considered unconstitutional today. In contrast, other scholars argue that the Framers considered state government to be republican in form so long as the people ultimately retained SOVEREIGNTY, whether they exercised their sovereignty directly or through elected agents. In other words, they argue, the Framers used the terms "democracy" and "republican government" as synonyms. For these latter scholars, widespread governance through plebiscites is not constitutionally infirm. Given the zeal with which numerous states have recently employed direct democracy techniques to resolve deeply controversial matters, it is unsurprising that the current debate among legal scholars as to the validity of those techniques is vigorous indeed. As yet, however, courts have not engaged in this debate. Federal courts still reject guarantee clause challenges to initiatives and referenda as nonjusticiable, and state courts either do so as well, or reject such challenges on the merits.

EVAN H. CAMINKER
(2000)

(SEE ALSO: *Voting Rights.*)

Bibliography

LINDE, HANS A. 1989 When Is Initiative Lawmaking Not "Republican Government"? *Hastings Constitutional Law Quarterly* 17:159–173.

SYMPOSIUM 1994 Guaranteeing a Republican Form of Government. *University of Colorado Law Review* 65:709–946.

## GUEST, UNITED STATES v.
383 U.S. 745 (1966)

This case raised important questions about Congress's power to enforce the FOURTEENTH AMENDMENT and about the scope of section 241 of Title 18 of the United States Code, a federal criminal CIVIL RIGHTS statute deriving from

section 6 of the FORCE ACT of 1870. Section 241 outlaws conspiracies to interfere with rights or privileges secured by the Constitution or laws of the United States. A group of whites allegedly murdered Lemuel A. Penn, a black Army officer, while he was driving through Georgia on his way to Washington, D.C. Two of the whites were charged with murder and acquitted by a state court jury. They and others then were indicted under section 241 for conspiracy to deprive blacks of specified constitutional rights by shooting, beating, and otherwise harassing them and by making false criminal accusations causing the blacks to be arrested. The rights allegedly deprived included the right to use state facilities free of RACIAL DISCRIMINATION and the RIGHT TO TRAVEL freely throughout the United States. The Supreme Court held that the alleged conduct constituted a crime under section 241, punishable by Congress under the Fourteenth Amendment.

*Guest*'s principal significance stems from two separate opinions, joined by a total of six Justices, that addressed the question whether the Fourteenth Amendment empowers Congress to outlaw private racially discriminatory behavior. In an opinion concurring in part and dissenting in part, Justice WILLIAM J. BRENNAN, joined by Chief Justice EARL WARREN and Justice WILLIAM O. DOUGLAS, stated that section 5 of the Fourteenth Amendment grants Congress authority to punish individuals, public or private, who interfere with the right to equal use of state facilities. Justice TOM C. CLARK, in a concurring opinion joined by Justices HUGO L. BLACK and ABE FORTAS, in effect agreed with the portion of Justice Brennan's opinion relating to Congress's power. Justice Clark's opinion stated that there could be no doubt about Congress's power to punish all public and private conspiracies that interfere with Fourteenth Amendment rights, "with or without STATE ACTION."

*Guest* also raised the question whether, in light of the state action doctrine, the defendants, all private persons, were legally capable of depriving others of Fourteenth Amendment rights within the meaning of section 241. Justice POTTER STEWART's opinion for the Court, which, as to this point, Justice Clark's opinion expressly endorsed, avoided the issue by construing the INDICTMENT's allegation that the conspiracy was accomplished in part by "causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts" to be an allegation of state involvement. Justice Brennan read Justice Stewart's opinion to mean that a conspiracy by private persons to interfere with Fourteenth Amendment rights was not a conspiracy to interfere with a right secured by the Constitution within the meaning of section 241. Justice Brennan rejected this interpretation, arguing that private persons could deprive blacks of rights "secured" by the Constitution "even though only governmental interferences with the exercise of that right are prohibited by the Constitution itself."

Other aspects of *Guest* generated less disagreement among the Justices. The case revived a question addressed in SCREWS V. UNITED STATES (1945) when the Court interpreted section 242 (a remnant of the CIVIL RIGHTS ACT OF 1866). Sections 241 and 242 define proscribed behavior as conduct violating constitutional rights. Since constitutional standards change, defendants argued that the sections were unconstitutionally vague. As in *Screws*, the Court construed the statute to require a specific intent to violate constitutional rights and, therefore, found section 241 not unconstitutionally vague. And the Court found the right to travel throughout the United States to be a basic constitutional right that, like freedom from INVOLUNTARY SERVITUDE, is protected even as against private interference. Only Justice JOHN MARSHALL HARLAN dissented from the HOLDING that the right to travel is protected against private interference.

Both the suggestion by six Justices (through the Brennan and Clark opinions) concerning Congress's power under section 5 of the Fourteenth Amendment and Justice Brennan's views about the scope of section 241 are difficult to reconcile with important nineteenth-century decisions. In UNITED STATES V. CRUIKSHANK (1876), one of the first cases construing Reconstruction-era civil rights legislation, indictments charging violations of section 6 of the FORCE ACT of 1870 were ordered dismissed in part on the ground that Fourteenth Amendment rights could not be violated by private citizens. In UNITED STATES V. HARRIS (1883) the Court held unconstitutional a civil rights statute that punished private conspiracies to interfere with rights of equality. The provision struck down in *Harris*, which stemmed from section 2 of the Civil Rights Act of 1871, was so similar to section 241 that, until *Guest*, it seemed unlikely that section 241 could be applied to private conspiracies to interfere with rights of equality. And *Guest*'s expansive view of Congress's Fourteenth Amendment powers is difficult to reconcile with the Court's decision in the CIVIL RIGHTS CASES (1883).

*Guest* thus represents a shift in attitude toward Congress's Fourteenth Amendment power to reach private discrimination. But *Guest* also is part of a larger shift in attitude toward the Civil War amendments. In KATZENBACH V. MORGAN (1966) and SOUTH CAROLINA V. KATZENBACH (1966), cases decided during the same term as *Guest*, the Court for the first time found Congress to have broad powers to interpret and define the content of the Fourteenth and FIFTEENTH AMENDMENTS.

*Guest*'s generous attitude toward Congress's power has had less influence than might have been expected. Prior to *Guest*, HEART OF ATLANTA MOTEL, INC. V. UNITED STATES

(1964) and KATZENBACH V. MCCLUNG (1964) already had found Congress to have broad power under the COMMERCE CLAUSE to reach discrimination in facilities affecting INTERSTATE COMMERCE. In JONES V. ALFRED H. MAYER CO. (1968), the Court found Congress to have broad THIRTEENTH AMENDMENT powers to reach private discrimination in all areas. *Jones* and the Commerce Clause cases rendered moot much of the question about Congress's Fourteenth Amendment powers. GRIFFIN V. BRECKENRIDGE (1971), where the Court again faced the question of Congress's power to reach private discriminatory conspiracies, underscores *Guest*'s modest influence. *Griffin* involved a civil statute, section 1985(3), that is similar to section 241. By the time of *Griffin*, however, the Court could rely on Congress's Thirteenth Amendment powers to sustain legislation proscribing private racial conspiracies. *Guest*'s possible implications will be realized only in cases, if any, to which Congress's Thirteenth Amendment and commerce clause powers are inapplicable.

THEODORE EISENBERG
(1986)

Bibliography

COX, ARCHIBALD 1966 Foreword: Constitutional Adjudication and the Promotion of Human Rights. *Harvard Law Review* 80:91–122.

NOTE 1967 Fourteenth Amendment Congressional Power to Legislate Against Private Discrimination: The *Guest* Case. *Cornell Law Quarterly* 52:586–599.

——— 1974 Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments. *Columbia Law Review* 74:449–527.

TRIBE, LAURENCE H. 1978 *American Constitutional Law*. Pages 273–275. Mineola, N.Y.: Foundation Press

## GUFFEY-SNYDER ACT

See: Bituminous Coal Act; *Carter v. Carter Coal Co.*

## GUILT BY ASSOCIATION

The United States Supreme Court frequently proclaims that guilt by association has no place in our constitutional system (for example, *Schneiderman v. United States*, 1943; WIEMAN V. UPDEGRAFF, 1952). Sanctions imposed for membership in a group are said to be characteristic of primitive cultures, or elements of the early COMMON LAW long since eliminated with prohibitions against such punishments as attaint and forfeiture.

In 1920, CHARLES EVANS HUGHES made what is probably still the most famous statement attacking guilt by association as inconsistent with our individualistic legal norms. In protesting the action of the New York Assembly, which had suspended five elected members because they were members of the Socialist Party, Hughes argued: "It is the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion or of mere intent in the absence of overt acts."

Other Justices frequently quoted or paraphrased this argument by Hughes, made between the two periods Hughes served on the Court, in decisions invalidating deportations, employment dismissals, and denials of licenses, as well as in criminal prosecutions. It is obvious, however, that frequently ascription of guilt by association is permitted. For example, members of a CRIMINAL CONSPIRACY may be found guilty for actions by their co-conspirators based entirely on their association in the conspiracy. The Supreme Court recognized the potential for abuse in criminal conspiracy in *Krulewitch v. United States* (1949), but convictions of coconspirators still may be upheld without proof of their direct knowledge or participation in the range of crimes committed by other members of the conspiracy.

There are also striking examples of the Court's condoning of government action based on the presumption of guilt by association in constitutional law. These include the JAPANESE AMERICAN CASES (1943–1944), which upheld the internment of West Coast residents of Japanese ancestry during WORLD WAR II, and numerous decisions during the 1950s, such as AMERICAN COMMUNICATIONS ASSOCIATION V. DOUDS (1950) and BARENBLATT V. UNITED STATES (1959), which allowed sanctions for membership in communist organizations.

Despite reiteration of the unacceptability of punishment premised upon guilt by association, judgments about individuals based upon their membership in groups frequently—perhaps even necessarily—are made in a bureaucratized world in which personal knowledge of others seems increasingly elusive. Nevertheless, the assignment of individual guilt premised on one's associations remains anathema. It is still thought to be an important premise of constitutional law that the government may not use a gross shorthand such as guilt by association to stigmatize or to punish citizens.

Constitutional safeguards derived primarily from the FIRST AMENDMENT and the DUE PROCESS clauses are said to surround FREEDOM OF ASSOCIATION. When the government employs the technique of guilt by association, it endangers this freedom, which the Court proclaimed in DEJONGE V. OREGON (1937) to be among the most fundamental of constitutional protections. Guilt by association also is incon-

sistent with basic premises of individual responsibility, which lie close to the core of much of America's legal culture.

AVIAM SOIFER
(1986)

Bibliography

EMERSON, THOMAS I. 1970 *The System of Freedom of Expression*. Pages 105–110, 126–129, 161–204, 235–241. New York: Random House.

O'BRIAN, JOHN L. 1948 Loyalty Tests and Guilt by Association. *Harvard Law Review* 61:592–611.

## *GUINN v. UNITED STATES*
238 U.S. 347 (1915)

In an 8–0 DECISION, the Supreme Court sustained the conviction of two Oklahoma election officials of conspiracy to deprive blacks of their VOTING RIGHTS. In an opinion by Chief Justice EDWARD D. WHITE, the court held that a state constitutional amendment enacting a GRANDFATHER CLAUSE, which exempted from the literacy test the descendants of persons who had been entitled to vote before 1866, violated the FIFTEENTH AMENDMENT, and that officials could be prosecuted for attempting to enforce it. In a COMPANION CASE (*Myers v. Anderson*) the Court held that Maryland officials were liable for civil DAMAGES for enforcing that state's grandfather clause.

DENNIS J. MAHONEY
(1986)

## GULF OF TONKIN RESOLUTION
73 Stat. 384 (1964)
84 Stat. 2053 (1971) (repeal)

One criticism of American participation in the VIETNAM WAR was based on the Constitution: half a million troops had been committed to combat without a DECLARATION OF WAR by Congress. In 1964 President LYNDON B. JOHNSON reported that North Vietnamese boats had attacked United States naval vessels in the Gulf of Tonkin. Accepting the truth of these reports, Congress adopted a resolution supporting the President in "taking all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." The resolution further approved the use of armed force to defend other nations that had signed the Southeast Asia treaty. Massive escalation of the American involvement in South Vietnam soon followed; the President cited this resolution and successive appropriations measures as evidence of congressional ratification of his actions.

In 1971 Congress repealed the Gulf of Tonkin Resolution. President RICHARD M. NIXON did not oppose the repeal; he asserted that his power as COMMANDER-IN-CHIEF of the armed forces authorized continuation of American participation. After the American troops were withdrawn in 1973, Congress reasserted its authority, adopting the WAR POWERS RESOLUTION over Nixon's VETO.

KENNETH L. KARST
(1986)

## GULF WAR

On August 2, 1990 Iraq invaded and conquered the neighboring state of Kuwait. President GEORGE H. W. BUSH announced U.S. policy regarding the invasion and marshaled diplomatic efforts focused in the UNITED NATIONS (UN) to oppose it. The UN Security Council quickly condemned the invasion, demanded that Iraq withdraw, and imposed mandatory economic and diplomatic sanctions to coerce Iraqi compliance with UN demands. Over the next four months the United States created and led a coalition of allied forces to counter the Iraqi aggression. In November 1990 the United States deployed over 500,000 troops, including naval and air forces, to Saudi Arabia and the adjacent region. On November 29, 1990 the UN Security Council issued an ultimatum to Iraq to withdraw, which Iraq did not heed. The U.S.-led coalition forces counterattacked starting on January 17, 1991 with air strikes. Ground operations began February 24, and within four days the Iraqi forces had been expelled from Kuwait.

The President formulated U.S. policy and conducted diplomacy, including voting in the UN Security Council, pursuant to his constitutional FOREIGN AFFAIRS powers. He imposed economic sanctions against Iraq pursuant to delegated LEGISLATIVE POWERS under the International Emergency Economic Powers Act and the UN Participation Act. The President deployed U.S. ARMED FORCES to the Gulf region on the basis of his foreign relations and COMMANDER-IN-CHIEF powers. Existing LEGISLATION authorized, and appropriated funds for, those forces. The President complied with the consultation and reporting requirements of the WAR POWERS ACTS.

Congress had adjourned after the invasion of Kuwait and after the initial deployment of U.S. forces. When Congress reconvened each house passed a resolution supporting the President's policy, and Congress provided supplemental funds for the armed forces. It also passed the Iraq Sanctions Act of 1990 approving economic sanctions. However, the major troop deployment was made after the mid-term election in November. At that time Congress had adjourned "sine die" and its leaders seemed reluctant to reconvene the session to consider the decision of

whether to continue to rely on economic sanctions to pressure Iraq to withdraw or to vote for war. Under pressure from public opinion, the press, and opponents of military action, however, the congressional leadership reconvened Congress and, after a thorough debate, Congress authorized U.S. participation in the war that was soon to follow. The President had steadfastly maintained that he had the requisite legal authority to use military force to expel Iraq from Kuwait on the basis of EXECUTIVE POWER. Nevertheless, after some discussion, Bush wrote the congressional leaders a letter requesting a JOINT RESOLUTION. As a result the claim of presidential WAR POWERS was not tested. In the end the President had ample legislative support for all the actions taken up to and including the war itself.

Congressional action in the Gulf War situation, coupled with its authorization of U.S. participation in the VIETNAM WAR, goes far toward diluting the importance of the KOREAN WAR precedent for supporting a presidential war power to initiate major military actions without specific congressional authorization.

PHILLIP R. TRIMBLE
(2000)

Bibliography

GLENNON, MICHAEL J. 1991 The Gulf War and the Constitution. *Foreign Affairs* 70:84–101.

HENKIN, LOUIS; GLENNON, MICHAEL J.; and RODGERS, WILLIAM D., eds. 1990 *Foreign Affairs and the U.S. Constitution.* Ardsley-on-Hudson, N.Y.: Transnational Publishers.

## GUN CONTROL

"Gun control" is a constitutional issue because of the SECOND AMENDMENT: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Does this rather oddly phrased language place genuine constraints on the ability of government to regulate firearms? Those who favor vigorous control, including outright prohibition of the private ownership of handguns and other weapons, argue that the preamble to the amendment clearly rejects what has come to be called the "individual rights" view; instead, it limits any constitutional protection to members of an official militia, as organized (and regulated) by state governments. So long as Congress makes no effort to limit a state's right to place guns in the hands of its official militia, then the regulation of ordinary private citizens presents no problem. Opponents of gun control, on the other hand, read the amendment far more broadly, arguing that it protects the general public, all of whom were viewed by eighteenth-century theorists as members of the "general militia" (as distinguished from the "select militia" controlled by the state), and all with a right to keep and bear arms.

One should note that most argument about the meaning of the Second Amendment assumes that it applies to all governments. Yet the Supreme Court held, in a number of late-nineteenth-century cases, that it limited only the national government and did not extend to the states at all. In spite of the "INCORPORATION" of much of the BILL OF RIGHTS to the states through the FOURTEENTH AMENDMENT, the Court has certainly done nothing to suggest that the Second Amendment has been incorporated.

One might, then, argue that the Second Amendment, especially if construed in light of the likely aims of its original proponents in 1789, was designed to limit drastically the ability of a feared and mistrusted national government to limit the rights of members of the citizen-militia to keep and bear arms. But, just as the FIRST AMENDMENT notoriously limited only Congress while leaving states free to impair the FREEDOM OF SPEECH or to establish a religion, the states could be read as continuing to possess almost plenary power to regulate firearms however they wish. Not surprisingly, devotees of firearms, such as the National Rifle Association (NRA), are among the strongest proponents of incorporating the Second Amendment to apply it against the states. Indeed, there is evidence that the members of Congress who proposed the Fourteenth Amendment did assume that the "right to bear arms" would be extended to newly freed blacks who were facing violent repression from the Ku Klux Klan.

If one offers a limited interpretation of the Second Amendment, there are obviously no real barriers to regulation, by Congress or by states. But what if one accepts a view closer to the NRA's? Does that necessarily invalidate all governmental control of firearms? The answer most certainly is no.

One begins by noting the resistance among constitutional interpreters to almost any notion of exceptionless limits on governmental power. Whatever the linguisitic forms of, say, the First Amendment or the CONTRACT CLAUSE in Article I, section 10, both of which seem absoutely to limit the ability to infringe the freedom of speech or press or to impair the obligation of contracts, the Court has developed the COMPELLING STATE INTEREST doctrine (in regard to the First Amendment) that allows restriction when the reasons are good enough. Similarly, no serious person suggests that the Second Amendment would ever disallow even "compellingly" supported regulation. It is inconceivable, practically speaking, that even a far more "pro-gun" Court would refuse to limit access to guns by children or by convicted felons (who can, after all, be denied the FUNDAMENTAL RIGHT to vote). Nor can one imagine a Court's holding that what have come to be known as weapons of mass destruction are protected—and for good

reason, even if one takes the Second Amendment with utmost seriousness. After all, the most plausible explanation of the amendment's presence in the Constitution is the desire to allow ordinary citizens to "keep and bear arms" in case there is a need to use them against a corrupt or tyrannical government. (No one reads the amendment as actually protecting the use of arms. As a practical matter, one must win the struggle, as did the American revolutionaries in 1776, to escape punishment. Rather, the idea is that knowledge that the citizenry was armed and might resort to their use would serve to limit tyrannical propensities on the part of government.) The least plausible rationale for the amendment would be one that protected private tyrants who, for example, would be able to threaten mass destruction if the populace did not accede to their wishes. This suggests that the reach of the amendment could be legitimately confined to relatively low-level weapons whose practical power would depend on the joining together of many members of the community in rebellion against the presumptively tyrannical government.

It should be obvious that this rationale, even if faithful to the historical evidence, is shocking to many Americans. Thus most opponents of gun control emphasize far more the potential utility of firearms as a defense against criminals than the possible usefulness as a way of overthrowing the state. Ironically, though, the very word "militia," which can be used to justify a strong notion of Second Amendment liberties, itself suggests that the more palatable, at least to contemporary Americans, anticriminal argument as an attack on regulation of guns, probably has less constitutional warrant, at least from the perspective of ORIGINAL INTENT, than the more extreme argument emphasizing governmental tyranny.

SANFORD LEVINSON
(2000)

(SEE ALSO: *Militia, Modern; Right of Revolution.*)

Bibliography

AMAR, AKHIL REED 1998 *The Bill of Rights.* New Haven, Conn.: Yale University Press.

COTTROL, ROBERT J., ed. 1994 *Gun Control and the Constitution: Sources and Explorations on the Second Amendment.* New York: Garland Publishing Company.

NISBET, LEE, ed. 1990 *The Gun Control Debate.* Buffalo, N.Y.: Prometheus Books.

## GUTHRIE, WILLIAM D.
(1859–1935)

A corporation lawyer and professor of law at Columbia (1913–1922), William D. Guthrie was one of several prominent attorneys who successfully challenged the federal income tax in POLLOCK V. FARMERS' LOAN & TRUST COMPANY (1895). His most famous appearance before the Supreme Court, however, came in a losing cause: CHAMPION V. AMES (1903). In that case, he advocated a doctrine EDWARD S. CORWIN would later call DUAL FEDERALISM (and which the Supreme Court itself would adopt in HAMMER V. DAGENHART, 1918). Drawing on his *Lectures on the Fourteenth Article of Amendment to the Constitution* (1898), Guthrie argued that the suppression of lotteries did not fall under the national commerce power because no commerce was involved. Such regulation belonged solely to the STATE POLICE POWER, to which Guthrie accorded great deference. He also favored the RULE OF REASON in ANTITRUST cases (though he was unable to convince the Court to accept it in UNITED STATES V. TRANS-MISSOURI FREIGHT ASSOCIATION, 1897) and he vigorously opposed the SIXTEENTH AMENDMENT on dual federalism grounds.

DAVID GORDON
(1986)

# H

## HABEAS CORPUS

(Latin: "You shall have the body.") Habeas corpus is the most celebrated of Anglo-American judicial procedures. It has been called the "Great Writ of Liberty" and hailed as a crucial bulwark of a free society. Compared to many encomia, Justice FELIX FRANKFURTER's praise in BROWN V. ALLEN (1953) is measured:

> The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for such detention. Of course this does not mean that prison doors may readily be opened. It does mean that explanation may be exacted why they should remain closed. It is not the boasting of empty rhetoric that has treated the writ of *habeas corpus* as the basic safeguard of freedom in the Anglo-American world. "The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom." Mr. Chief Justice [SALMON P.] CHASE, writing for the Court, in *Ex parte Yerger*, 8 Wall. 85, 95. Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments.

Though even this rhetoric may be a bit overdone, it nonetheless reflects the importance that has come to be attached to habeas corpus. It is a symbol of freedom, as well as an instrument. What is significant in the rhetoric is not the degree of exaggeration but rather the extent of truth.

Habeas corpus is accorded a special place in the Constitution. Article I, section 9, of the basic document, included even before the BILL OF RIGHTS was appended, contains the following provision: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

This text of course presumes an understanding of what habeas corpus is. Technically, it is simply a writ, or court order, commanding a person who holds another in custody to demonstrate to the court legal justification for that restraint of personal liberty. The name "habeas corpus" derives from the opening words of the ancient COMMON LAW writ that commanded the recipient to "have the body" of the prisoner present at the court, there to be subject to such disposition as the court should order. A writ of habeas corpus, even one directed to an official custodian, can be obtained routinely by the prisoner or by someone on his behalf. As at common law, the writ that starts proceedings also defines the nature of those proceedings (and lends its name to them and, sometimes, to the final order granting relief). Thus, habeas corpus not only requires the custodian promptly to produce the prisoner in court but also precipitates an inquiry into the justification for the restraint and may result in an order commanding release.

The writ itself is no more than a procedural device that sets in motion a judicial inquiry. Yet the importance attached to habeas corpus necessarily posits that a court will not accept a simple showing of official authority as sufficient justification for imprisonment. Otherwise, the constitutional provision would indeed be much ado about nothing. "The privilege of the Writ" would hardly be worth guaranteeing if it did not invoke substantial criteria for what are sufficient legal grounds for depriving a person of liberty.

The principle that even an order of the king was not itself sufficient basis had been established in England before the time of our Constitution. In *Darnel's Case* (1627), during the struggle for parliamentary supremacy, a custodian's return to a writ of habeas corpus asserted that the prisoner was held by "special command" of the king, and the court accepted this as sufficient justification. This case precipitated three House of Commons resolutions and a PETITION OF RIGHT, assented to by the king, declaring habeas corpus available to examine the underlying cause of a detention and, if no legitimate cause be shown, to order the prisoner released. But even these actions did not resolve the matter. Finally, two HABEAS CORPUS ACTS, of 1641 and 1679, together established habeas corpus as an effective remedy looking beyond formal authority to examine the sufficiency of the actual cause for holding a prisoner.

Although the Habeas Corpus Acts did not extend to the American colonies, the principle that the sovereign had to show just cause for imprisoning an individual was carried over to the colonies. After the Revolution, the underlying principle was implicitly incorporated in the constitutional provision guaranteeing the regular availability of habeas corpus against suspension by the new central national government.

The broad assumptions underlying the Great Writ have been well articulated by HENRY HART. Speaking in the particular context of PROCEDURAL DUE PROCESS for ALIENS, but with general implications, he wrote of:

> the great and generating principle . . . that the Constitution always applies when a court is sitting with JURISDICTION in habeas corpus. For then the Court has always to inquire, not only whether the statutes have observed, but whether the petitioner before it has been "deprived of life, liberty, or property, without due process of law," or injured in any other way in violation of the FUNDAMENTAL LAW. . . .
>
> That principle forbids a CONSTITUTIONAL COURT with JURISDICTION in habeas corpus from ever accepting as an adequate return to the writ the mere statement that what has been done is authorized by act of Congress. The inquiry remains, if MARBURY V. MADISON still stands, whether the act of Congress is consistent with the fundamental law. Only upon such a principle could the Court reject, as it surely would, a return to the writ which informed it that the applicant for admission [to the United States] lay stretched upon a rack with pins driven in behind his fingernails pursuant to authority duly conferred by statute in order to secure the information necessary to determine his admissibility. The same principle which would justify rejection of this return imposes responsibility to inquire into the adequacy of other returns [Hart, 1953: 1393–1394].

It hardly requires demonstration that an executive directive can provide no more justification than an act of Congress. In fact the Supreme Court very early held in *Ex parte Bollman and Swartwout* (1807) that a President's order was not itself a sufficient basis for a return to a writ of habeas corpus.

The purpose of the habeas corpus clause of Article I, section 9, is to assure availability of the writ, but the provision clearly allows its suspension when necessary in the event of rebellion or invasion. The power to suspend the writ has been rarely invoked. Suspensions were proclaimed during the CIVIL WAR; in 1871, to combat the Ku Klux Klan in North Carolina; in 1905, in the Philippines; and in Hawaii during WORLD WAR II. Furthermore, two of these suspensions were limited by the Supreme Court. In the first case, EX PARTE MILLIGAN (1866), the Supreme Court held that the writ was not suspended in states (e.g., Indiana) where the public safety was not threatened by the Civil War. In the last case, DUNCAN V. KAHANAMOKU (1946), the Supreme Court held that the writ was not suspended in Hawaii eight months after the attack on Pearl Harbor because the public safety was no longer threatened by invasion.

The point is not the rarity with which the power to suspend the writ of habeas corpus has been invoked in this country's history. That can be seen as a function of the relative stability and insulation that the nation has enjoyed. Rather, the significant point is the basic acceptance of the proposition that the courts remain open in habeas corpus proceedings to consider the validity of an attempted suspension of the writ and, if they find it invalid, to examine the validity of the detention. This position has not always been respected by the immediately affected executive or military authorities, and such holdings by the Supreme Court have been handed down after immediate hostilities have ended. Nevertheless, the ultimate verdict of history has upheld the courts' position. The existence of those Supreme Court precedents, and their acceptance and perceived vindication by history, help bolster the likelihood of similar judicial action in response to future emergencies.

The habeas corpus writ described by Article I is not necessarily one issued by a federal court. The Constitution posits the existence of state courts as the basic courts of the nation; it does not require the creation of lower federal courts at all. Thus, the suspension clause was designed to protect habeas corpus in state courts from impairment by the new national government.

The clause may nonetheless have reflected a wider sense of moral duty. The first Congress, in establishing a system of lower federal courts, gave federal judges the power to issue the writ on behalf of prisoners held "under or by colour of the authority of the United States." The federal courts have always retained that habeas corpus jurisdiction, and it has since been much expanded.

Perhaps the most dramatic example of the use of ha-

beas corpus occurred in *Ex parte Milligan.* Milligan, a civilian living in Indiana, was sentenced to death by a court-martial during the Civil War though the local GRAND JURY had refused to indict him. The Supreme Court held that courts-martial do not have jurisdiction to try civilians so long as the civilian courts are open. The Court further held that the writ of habeas corpus was not suspended, despite the general language of a statute purporting to suspend the writ during the Civil War, because the public safety was not threatened in Indiana.

Habeas corpus also provided an effective remedy for challenging an extraordinary extension of military power during World War II. The government relocated Japanese Americans away from their homes on the West Coast to detention camps inland. Although the Supreme Court in *Korematsu v. United States* (1944) held the relocation to be constitutional, the Court on the same day held in a habeas corpus case, *Ex parte Endo* (1944), that the government was not authorized to confine Japanese Americans in the camps against their will. (See JAPANESE AMERICAN CASES, 1943–1944.)

Nor is the availability of habeas corpus to challenge extraordinary military actions limited to American citizens or residents. Even German saboteurs, landed in this country by submarine, were permitted during wartime to challenge the power of a special military commission over them. Though the Court rejected that challenge in EX PARTE QUIRIN (1942), the exercise of military power was drawn into question and examined; the Court denied relief on the merits, holding that the asserted jurisdiction was constitutional.

Habeas corpus is not restricted to testing major or extraordinary extensions of power. Particularly in the last few decades, the writ has provided a means by which federal courts have regularly controlled the reach and exercise of fairly commonplace court-martial jurisdiction. For example, in United States ex rel. *Toth v. Quarles* (1955), military police arrested an ex-serviceman in Pennsylvania and flew him to Korea to stand trial in a court-martial on charges related to his time in service. (See MILITARY JUSTICE AND THE CONSTITUTION.) A writ of habeas corpus issued, Toth was returned to the United States, and the civilian court that had issued the writ ordered him released on the ground that he was a civilian not subject to military jurisdiction. More generally and more routinely, habeas proceedings have provided the means to define and enforce constitutional boundaries determining which persons and events may be tried without civilian courts and their procedures. Habeas corpus is a residual font of authority to ensure that the Constitution is not violated whenever individuals are imprisoned.

Indeed, habeas corpus proceedings are not limited to the enforcement of constitutional rights; they also open for scrutiny other issues of basic legal authority. For example, the writ has been used as a means to invoke JUDICIAL REVIEW of individual administrative orders for military CONSCRIPTION or alien DEPORTATION. The issues raised have included questions of statutory authority and the existence of a basis in fact for the official order. Most significant, the federal courts were unwilling to take general language precluding judicial review as barring habeas corpus; habeas corpus proceedings were held to be available even though the applicable statutes expressly provided that the administrative action should be final. Here again that position, insisting on the primacy of habeas corpus, was subsequently vindicated, and indeed, ratified by Congress in statutory revisions. Whether the Constitution entitles an individual to judicial review of military draft or IMMIGRATION orders still has not been authoritatively resolved. One of the strengths of habeas corpus, however, is that it permitted that issue to be finessed. The availability of *habeas corpus* facilitated avoidance of an ultimate confrontation—which might well have resulted in a rejection of the constitutional claim—while securing reaffirmation of the principle that government is subject to the RULE OF LAW as applied in the ordinary courts.

Our focus to this point has been on the writ from a federal court directed to a federal officer or custodian. The matter becomes more complex when the issues involve the relationships between federal and state governments. Seizure of one government's agents by the other, and their release from resulting custody, can be crucial factors in a struggle for political power. It is no accident, then, that the writ has been involved—and had evolved—in jurisdictional battles within or among governments. This involvement was evident, as mentioned earlier, in the battle for parliamentary supremacy over the crown in Britain. The writ has also played an important role in the changing relationships of federal and state governments in this country, and has in turn been shaped by these evolving relationships.

When the first Congress gave the lower federal courts power to issue the writ, it limited the power to federal prisoners and, even as to them, did not provide for exclusive jurisdiction. The state courts, then, had CONCURRENT JURISDICTION to issue habeas corpus for federal prisoners and exclusive *habeas* jurisdiction for state prisoners. The succeeding centuries have witnessed a huge expansion of federal power, including a shift of much power from the states to the central government. As the power of the federal government grew, the federal courts gradually gained the power to issue writs of habeas corpus for state prisoners. At the same time, the power of state courts to issue habeas corpus for federal prisoners has narrowed and today is practically extinguished.

As with many American legal institutions the conflict

over slavery figured prominently in the development. The Fugitive Slave Act of 1850, which was enacted as part of the COMPROMISE OF 1850, increased federal power at the expense of the states. Enforcement of the act, which required return of escaped slaves to their owners, met strong resistance in Northern states. State courts would order the arrest of federal officers who attempted to enforce the act and would issue writs of habeas corpus to release individuals charged with violating the act. The federal officers were not helpless, however. Although the federal courts did not have general power to issue writs of habeas corpus for state prisoners, they had been empowered to release state prisoners imprisoned for actions taken pursuant to federal law. Congress had granted this power in 1833 in response to South Carolina's threat to arrest anyone who attempted to collect the federal tariff. The federal courts exercised the power in the 1850s and 1860s to release federal agents arrested for enforcing the Fugitive Slave Act. (See FUGITIVE SLAVERY.)

A more intractable problem was posed by state court writs of habeas corpus releasing individuals convicted in federal court of violating the Fugitive Slave Act. The Supreme Court resolved this problem in ABLEMAN V. BOOTH (1859), holding that state courts did not have the power to release prisoners held pursuant to proceedings in federal court. Otherwise, the laws of the United States could be rendered unenforceable in states whose courts were in opposition. After the Civil War, the Supreme Court went further and held in *Tarble's Case* (1872) that state courts could not issue habeas corpus to release someone held under authority, or color of authority, of the federal government. A state court may only require the federal officer to inform it of the authority for a prisoner's detention; all further questions as to actions under color of federal authority are to be resolved in the federal courts. Habeas corpus cannot be entirely barred, but so long as the writ is available from the federal courts, state courts are effectively precluded from issuing habeas corpus on behalf of persons held in custody by the federal government.

The power of federal courts to issue habeas corpus for state prisoners followed the opposite course. The JUDICIARY ACT OF 1789 did not give the federal courts any such power and, until after the Civil War, these courts were granted it only in a limited number of circumstances. An example was the release of those seized for enforcing federal law, mentioned earlier. The HABEAS CORPUS ACT OF 1867, however, was general, giving federal courts power to issue the writ "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States. . . ." Jurisdiction in essentially these terms continues to the present day.

The precise objectives of the 1867 act were never defined. The act aimed generally at extending the effectiveness of federal authority, particularly against resistance in the former slave states. Its terms extended to prisoners in state custody as to all other persons. Until well into the twentieth century, its thrust was principally against restraints without (or before) trial. Among other reasons, the federal Constitution had not yet been construed to impose any significant requirements for state criminal proceedings. In more recent times, federal habeas corpus has become a forum for challenging state criminal convictions on constitutional grounds. In terms of volume, this is the federal writ's principal use today.

This pattern evolved only sporadically, and only after a number of limiting concepts had been loosened. The first of these was a principle of long standing that habeas corpus was available to persons imprisoned under authority of a court, particularly following criminal trial and conviction, only on the grounds that the court had no jurisdiction to try him. If that court had jurisdiction, all challenges, including constitutional ones, were to be raised there. Trial court decisions were to be reviewable, if at all, by higher courts, not by COLLATERAL ATTACK in other courts of the same level. It was often stated that habeas corpus was not to serve as a substitute for appeal.

The formal doctrine that the habeas corpus court would not look beyond whether the holding or convicting court had jurisdiction prevailed until near the middle of the twentieth century. Nevertheless, the scope of federal habeas corpus grew substantially even before that time. The concept of "lack of jurisdiction" is not inelastic, and the Supreme Court gradually expanded the meaning of that term to include constitutional violations that might be said to preclude a fair trial.

The first step in this expansion of the meaning of the issue of jurisdiction was to allow habeas corpus relief for a prisoner convicted of violating an unconstitutional law. Unconstitutional laws were null and void, it could be rationalized; thus the state court was without jurisdiction because *no* law authorized the conviction. The next step was to issue habeas corpus to remedy constitutional violations so gross as effectively to deprive the prisoner of a real trial. Such violations were held to be so fundamental that a court, proceeding in those circumstances, lost jurisdiction. Examples included mob-dominated trials and denial to defendants of opportunity to be heard. Reliance on the concept of lack of jurisdiction became more and more attenuated until, in *Waley v. Johnston* (1942), the Supreme Court explicitly abandoned that formal concept as linch-pin. From that time forward, the Court focused on more realistic considerations: whether the constitutional claims being asserted could not have been presented effectively in the original court that tried the case or on direct review of the conviction.

The concerns over the proper "deference" to be accorded by the habeas corpus court to the court that originally tried and convicted a prisoner arose even where both courts were federal. When federal habeas corpus was being sought by a state-convicted prisoner, these concerns were reinforced by further considerations of mutual respect and comity between state and federal systems. In response to these considerations, there developed early two substantial limits on the availability of federal habeas corpus for state prisoners: if the state courts had fully and fairly litigated the prisoner's claim, or if the prisoner failed to exhaust all state remedies, federal habeas corpus would not lie.

The requirement that state remedies be exhausted was established in *Ex parte Royall* (1886). To meet it, the prisoner must first press his claims to be free based on federal law, through the state courts. Thus, the prisoner must appeal his conviction or must seek state habeas corpus or other available postconviction remedy. (See EXHAUSTION OF REMEDIES.) Under the Constitution's SUPREMACY CLAUSE, state courts are required to follow and apply federal constitutional law. Principles of comity—essentially respect for the state courts' responsibility and ability to reach a correct decision—were seen to require that state courts be allowed an opportunity to correct their own errors before federal habeas corpus could be issued. The general exhaustion requirement is now codified in the statute governing habeas corpus.

In view of the exhaustion requirement, it may seem ironic that for many years presentation of the federal claim in state proceedings might mean that it could not thereafter be considered in federal habeas corpus. Federal collateral attack was barred if the state courts had sufficiently considered and passed upon the prisoner's constitutional claim. This is not so perverse as might first appear. Habeas corpus, as a collateral remedy, was to deal with serious constitutional problems involving circumstances outside the record or cognizance of the state courts. It would also serve where appellate consideration was unavailable or ineffective. If the state courts had adjudicated the federal constitutional contention adversely to the prisoner, on full and fair consideration and with effective appellate review, the remedy for error was to seek review in the United States Supreme Court. This was another aspect of the principle that habeas corpus was not to do service as an appeal.

The soundness of this reasoning depends, of course, upon Supreme Court reviews being available and effective. But whatever may once have been true, by the middle of the twentieth century that premise had clearly become unreliable. The Court's docket had grown to the point that it could pass on the merits of no more than a sixth of the cases in which its review was sought. The percentage has become even smaller in recent years. Moreover, even when available, appellate review in particular cases may be innately limited in significant respects because it must be conducted on the basis of a "cold" written record. Tones, attitudes, inflections of voice, and other subtle factors may exert powerful influences on outcomes and yet not be evident on the record. Beyond that, in many criminal proceedings an adequate written record may not even be produced. The significance of these factors in limiting the utility of Supreme Court review is greatly heightened when the applicable federal law is developing rapidly, and particularly if state judges are hostile to or less than entirely sympathetic with the direction of that development. Both of these conditions existed in the 1930s and 1940s and both intensified in the period following World War II, when the Supreme Court greatly expanded the procedural requirements imposed by federal constitutional law in state criminal prosecutions. Many requirements that previously governed only federal CRIMINAL PROCEDURE were "incorporated" into the FOURTEENTH AMENDMENT and made applicable in state trials. (See INCORPORATION DOCTRINE.) Moreover, and surely of no less import, the Supreme Court was also expansively construing the EQUAL PROTECTION CLAUSE of the Fourteenth Amendment to heighten prohibitions against RACIAL DISCRIMINATION. That attitude enhanced federal scrutiny of jury selection and other elements of state criminal proceedings. Particularly in the early stages of the development of these growing constitutional demands, there was reason to believe that many state judges might be less than fully sympathetic, if not directly hostile, to these new federal principles and DOCTRINES.

Under these conditions, direct appellate review by the Supreme Court could not alone provide reliable and effective enforcement of federal constitutional guarantees in the state courts. Indeed, any tendency toward heel-dragging or resistance might well be encouraged by the knowledge that the statistical probability of federal appellate review was very low. Moreover, by diverting Supreme Court energy to enforcement of earlier holdings, resistance might effectively retard further development of the new doctrines.

Habeas corpus from federal courts probing the validity of state convictions could offer an alternative mode for securing effective enforcement of the new constitutional rights. Federal judges generally could be relied upon to be more in tune with Supreme Court developments than their state counterparts. Because the entire federal judiciary would be involved, case-load capacity would be much more equal to the task. Moreover, because trial-type hearings were possible, habeas corpus had the further advantage that the federal courts need not be dependent upon the state court record. These gains could, of course, be

achieved only by abandoning the rule that barred consideration on federal habeas corpus of contentions that had been adjudicated previously in the state courts. The Supreme Court took that step in 1953 in *Brown v. Allen.*

*Brown v. Allen* represented a major extension of the functions of habeas corpus. Its holding, allowing federal reconsideration of issues previously considered fully by state courts, also effectively opened wide the range of constitutional contentions that could serve as sufficient grounds for seeking federal habeas corpus. From that point forward, it was clear that at the very least any constitutional claim that could be said to raise any significant issue of trial fairness would be open to consideration. That expansion of the scope of habeas corpus serves important ends, but it has significant costs.

One of these costs is the adverse reaction of many state judges. The result of *Brown v. Allen* is that federal courts on habeas corpus may reexamine a state prisoner's constitutional challenges to his conviction after a state court has considered and rejected those same challenges. Because the prisoner must exhaust his state remedies before federal habeas corpus, normally the federal constitutional claims have been pressed not only at the state trial but throughout the state court system, including the state supreme court. The upshot of the new role of federal habeas corpus, then, is that a single federal district judge routinely may review the determination of the highest court of a state and, if he disagrees with it, overturn the conviction that the collegial, multimember court had upheld.

People and state officials in general, and state supreme court justices in particular, long since have become accustomed to review by the Supreme Court of the United States. Whatever may have been thought in their time of the challenges raised and rejected in MARTIN V. HUNTER'S LESSEE (1816) and COHENS V. VIRGINIA (1821), the higher authority of the Supreme Court in matters of federal law has been fully accepted. There has not been a corresponding acceptance of the habeas corpus authority of lower federal court judges. That federal judges may be more in accord with developing Supreme Court doctrines, though offered as justification, does not palliate the felt insult. On the contrary, if state judges are hostile to those developments, that fact exacerbates it. If the state court justices see themselves as entirely in accord with the Supreme Court's developing doctrines, the routine reexamination by a single district judge may still be offensive, to some perhaps even more so. On occasion, state courts have even openly refused to pass upon a constitutional claim on the grounds that a federal judge would pass on it anyway. On balance, the expansion of federal habeas corpus jurisdiction has almost certainly enhanced even state court enforcement of federal constitutional rights, but the felt slight to status and the consequent resentment are real.

At least as important as the resentment of state judges is the concern that the wide availability of federal habeas corpus may dilute the deterrent effect of the criminal law. Part of this concern grows out of the belief that deterrence is enhanced by certainty of punishment and that the expansion of federal habeas corpus increases the possibility that a conviction may be overturned. Certainly, the availability of federal habeas corpus, after the full range of state court remedies, does mean that the finality of a conviction is greatly delayed, even when the conviction is ultimately upheld. Moreover, the knowledge that the ultimate decision can always be greatly delayed itself diminishes any general sense in the community that punishment may be swift or certain.

When the conviction is overturned years after the trial and even longer after the alleged crime, these effects are exacerbated. Although the usual habeas corpus remedy is to order release only if the prisoner is not retried and convicted within a reasonable time, retrial after considerable delay may be practically impossible: witnesses may have died or disappeared; memories inevitably fade; other evidence may be lost. In those instances a reversal on procedural grounds amounts to a full release.

In fact, the proportion of habeas corpus proceedings that result in any victory for the prisoner is exceedingly small. But the effect of those few cases may be far greater than their number, particularly if a case was notorious in the community. Each such incident attracts attention and presumably lessens the deterrent effect of the criminal law. It may also be important that each raises questions for the citizenry at large who are already fearful about the capacity of the system to cope with crime.

Finally, the rehabilitative functions of the penal system may be affected. It has been suggested that demonstration of society's deep concern for fair procedure is useful, and even that channeling prisoners' efforts into litigation may be helpful. But it is more likely that the indefinite stringing-out of a conclusion is counterproductive. As Justice LEWIS F. POWELL, concurring in SCHNECKLOTH V. BUSTAMONTE (1973), wrote: "No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen."

The concerns expressed are real and significant, but they can be accommodated only by restricting the scope of federal habeas corpus. That in turn involves a judgment as to the necessity of having federal judges routinely avail-

able to consider particular claims of constitutional violations. Every constitutional claim is important. But the issue here is not whether a constitutional right shall be declared, or whether rights so declared shall be binding on state courts and subject to review and enforcement by the federal Supreme Court. The issue is whether there should be an additional, collateral channel for routine reexamination of every state court rejection of every constitutional claim asserted in a criminal proceeding.

While perhaps in theory all constitutional rights are equal, there are differences among them. For one thing, there may be substantial differences in the justifications for, and consequences of, seeking thoroughgoing enforcement of particular rights in every case where they may be colorably claimed. The Supreme Court has recognized as much in holding that some newly established constitutional rights should be given full retroactive effect (applying to all habeas corpus cases regardless of when the original conviction was obtained) and others should not. In at least one sense it is fair to characterize these decisions as holding some constitutional rights to be more fundamental than others.

Furthermore, constitutional rights serve different sets of purposes. Most procedural requirements in criminal prosecutions are designed to minimize the likelihood of an erroneous conviction, for example, the RIGHT TO COUNSEL or the right to confront prosecution witnesses. (See CONFRONTATION.) Others are designed to protect personal privacy or dignity at trial or in the society; among these are the rules against UNREASONABLE SEARCHES or seizures, and the RIGHT AGAINST SELF-INCRIMINATION. Finally, there may be relevant distinctions between rights and remedies. Thus, the rule excluding evidence obtained by prohibited police actions may be viewed as a means to deter official misconduct rather than an independent right.

These distinctions may be highly relevant in determining the appropriate scope of federal habeas corpus in reexamining state court convictions. Consider, for example, the EXCLUSIONARY RULE that evidence obtained by an unconstitutional search may not be used in a criminal prosecution. State convictions obtained after such evidence has been introduced are invalid and subject to reversal on direct Supreme Court review. (See MAPP V. OHIO, 1961). But if in a particular case the state courts should decide that the search was legal, how important is it that the decision be reviewable on federal habeas corpus—even assuming that the state decision might be wrong and yet not important enough to warrant Supreme Court attention? Illegally seized evidence does not mean actually unreliable evidence; in fact, such evidence is generally highly probative (for example, the drugs themselves in a prosecution for possession or sale of narcotics). The ban on unreasonable searches and the exclusionary rule do not protect against convicting the wrong person; they aim to protect individual privacy and control police conduct. Thus the sole purpose of extending habeas corpus to encompass the exclusionary rule would be to enhance the rule's deterrent effect. But that enhancement would be only marginal, *i.e.*, only to the extent of whatever additional disincentive might be generated by the extra possibility of a conviction, upheld by the state courts, being overturned years later on federal habeas corpus. At the same time, any such gain could be only obtained at the cost of the side effects of habeas corpus already described, including particularly the problems involved in releasing individuals who have been proven to have violated the law.

The Supreme Court has vacillated on precisely this issue. After many years in which federal habeas corpus was held to encompass claims under the exclusionary rule, the Court in STONE V. POWELL (1976) decided that it would not be available to review decisions of SEARCH AND SEIZURE issues reached after full consideration.

That decision stirred much debate. Perhaps as a result of the prominent role of lawyers and judicial review in interpreting the Constitution, there is a tendency to focus attention on the borderlines of case law development. That perspective can be misleading. What is more important than the decision to exclude search and seizure issues is the scope of federal habeas corpus for state prisoners that remains available. Constitutional claims need not be related to ultimate accuracy of conviction in order to be included. Moreover, despite strong suggestions from respected sources that the prisoner's factual innocence ought to be a major element in the availability of habeas corpus relief, the Court has not adopted that position. By any measure, the range of constitutional claims that may be raised and relitigated in federal habeas corpus is far greater than those few precluded—and then only after full and fair state consideration.

Similarly, much of the legal writing concerning habeas corpus today deals with its use to challenge criminal convictions. It is sometimes even suggested that Congress could not constitutionally restrict the scope of that kind of habeas corpus. Related to this, but more generally, it is argued that the provision of Article I, section 9, against the suspension of the privilege of habeas corpus should now be interpreted as prohibiting Congress from suspending or limiting federal habeas corpus—including habeas corpus for state convicted prisoners. The argument generally acknowledges that this was not the original intention of the suspension clause. It contends, rather, that in view of subsequent developments and present conditions, the original purpose now calls for extending it to cover habeas corpus from federal courts.

While these arguments, and the general issue of federal habeas corpus for persons held under state court convic-

tions, are important, too exclusive a focus on them risks distorted perspective. Far more significant than the existence of these arguments, or their validity, is their currently academic nature. Despite strenuous objections to the jurisdiction, Congress has not significantly restricted the scope of federal habeas corpus for state prisoners. Moreover, it does not derogate from the importance of this use of habeas corpus to point out that at base the availability of the Great Writ to challenge executive or military actions or other imprisonments without semblance of judicial process is far more vital to the maintenance of liberty. Even the most ardent advocates of collateral attack on judicial convictions are not likely to disagree.

It is surely a measure of the state of liberty in the United States that so much can be taken for granted. Habeas corpus for extraordinary assertions of executive, military, or other nonjudicial authority comes to the fore only rarely—and that is a measure of freedom's health in the nation. Yet it is that general freedom from that kind of arbitrary authority that is most crucial. Habeas corpus has helped to secure that freedom in the past, and its continuing availability helps secure it continually. It is true that liberty is most prevalent when habeas corpus is needed least. It is also true that the effectiveness of the remedy of habeas corpus is dependent upon the substantive criteria that come into play. Yet the existence of the Great Writ, indeed precisely in its taken-for-granted quality, plays a major role in supporting and reinforcing the conditions of freedom.

PAUL J. MISHKIN
(1986)

Bibliography


BATOR, PAUL M. et al. 1973 Supplement 1981 Chaps. I, IV, and X in *Hart & Wechsler's The Federal Courts and the Federal System*, 2nd ed. Mineola, N.Y.: Foundation Press.

CHAFEE, ZECHARIAH, JR. 1952 *How Human Rights Got into the Constitution*. Pages 51–74. Boston: Boston University Press.

COVER, ROBERT M. and ALEINIKOFF, T. ALEXANDER 1977 Dialectical Federalism: Habeas Corpus and the Court. *Yale Law Journal* 86:1035–1102.

DUKER, WILLIAM F. 1980 *A Constitutional History of Habeas Corpus*. Westport, Conn.: Greenwood Press.

FRIENDLY, HENRY J. 1970 Is Innocence Irrelevant? Collateral Attack on Criminal Judgments. *University of Chicago Law Review* 38:142–172.

HART, HENRY M. 1953 The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic. *Harvard Law Review* 66:1362–1402.

NOTE 1970 Developments in the Law—Federal Habeas Corpus. *Harvard Law Review* 83:1038–1280.

OAKS, DALLIN H. 1966 Legal History in the High Court—Habeas Corpus. *Michigan Law Review* 64:451–472.


# HABEAS CORPUS
## (Update 1)

A federal court is empowered to grant a writ of habeas corpus to any individual who is held in custody by federal or state government in violation of the Constitution of the United States. Although state courts also can provide habeas corpus relief to those in state custody, the most important contemporary use of habeas corpus is as a vehicle for federal court review of state court criminal convictions. After almost 200 years of habeas corpus litigation in the United States, including more than a century under the RECONSTRUCTION statutes that made federal court relief available to state prisoners, the scope of habeas corpus remains controversial.

Conservatives view habeas corpus as a means for guilty people to escape punishment. They seek to limit the availability of the writ, arguing that habeas corpus undermines the finality of criminal convictions and creates friction between federal and state courts. Liberals, in contrast, see federal habeas corpus review as an essential protection to assure that no person whose constitutional rights have been violated—whether factually innocent or guilty—is imprisoned.

The debate over the scope of habeas corpus review implicates major underlying disputes in constitutional law. For example, federal district court review of state court criminal convictions raises questions of FEDERALISM, along with the question of whether state judiciaries can be trusted to protect federal constitutional rights. Moreover, disagreements about the availability of habeas corpus reflect different views about the value of the constitutional rules governing CRIMINAL PROCEDURE.Those who oppose Supreme Court protections for criminal defendants (such as the EXCLUSIONARY RULE and MIRANDA RULE warnings) seek to limit their enforcement by narrowing the scope of habeas corpus review.

Not surprisingly, the Supreme Court frequently splits along ideological lines in ruling on habeas corpus issues. The WARREN COURT's expansion of habeas corpus relief was halted by the BURGER COURT, which adopted substantial new restrictions on federal court habeas review. Most recently, the REHNQUIST COURT has announced important additional limits on the matters that can be raised in federal habeas corpus proceedings. Three restrictions are particularly significant.

First, a petitioner is allowed to present in federal habeas corpus only those matters that were argued in the proceedings that led to his or her conviction, unless the

individual can demonstrate cause for the failure to raise the objection and prejudice from the asserted constitutional violation. Under the Warren Court decision in FAY V. NOIA (1963), an individual could present a constitutional issue on habeas corpus, even if not argued earlier, unless it could be demonstrated that the person "deliberately bypassed" the earlier opportunity to litigate the matter. But the Burger Court expressly overruled this standard, which presumptively allowed issues to be presented in federal court, and instead held that new matters could be raised only if there was "cause" for the earlier default and "prejudice" arising from it.

In recent years, the Court has made it clear that the "cause and prejudice" standard is a difficult one to meet. In *Murray v. Carrier* (1986) the Supreme Court summarized the circumstances under which an individual has sufficient cause to raise a new matter on habeas corpus. The Court explained that there was sufficient cause to permit a federal habeas petition to raise a new matter only if defense counsel could not reasonably have known of a legal or factual issue, if the government's attorney interfered with the presentation of the issue, or if there was ineffective assistance of counsel. Each of these proofs of cause is hard to accomplish, and the difficulty reflects the Court's expressly stated view that federal habeas corpus relief has significant costs and should be limited. The Court, however, has said, in *Smith v. Murray* (1986), that individuals who can demonstrate that they are probably innocent of the crime for which they were convicted should be able to secure relief, regardless of the reason for the earlier procedural default.

Although several Supreme Court opinions define "cause," the Court has found fewer occasions to clarify the meaning of "prejudice." The Court indicated in *United States v. Frady* (1982) that a petitioner can meet this requirement only by demonstrating that the constitutional violations caused "actual and substantial disadvantage" that infected the "entire trial with errors of constitutional dimension."

Second, the Supreme Court has restricted the ability of individuals to relitigate on habeas corpus issues that were raised and decided in state court. In BROWN V. ALLEN (1953) the Court ruled that individuals claiming to be held in custody in violation of the United States Constitution could present their claims in federal court even if those claims had been fully and fairly litigated in the state court. But in STONE V. POWELL (1976) the Burger Court limited this PRECEDENT, holding that a petitioner could not relitigate the claim that a state court improperly had admitted evidence that was the product of an illegal search or seizure, provided that the state court had offered a full and fair opportunity for a hearing on the issue. The Court emphasized that exclusionary rule claims do not relate to the accuracy of the fact-finding process. Furthermore, the Court said, state judges could be trusted to protect the FOURTH AMENDMENT.

The Court refused to extend *Stone v. Powell* to challenges to racial discrimination in GRAND JURY selection (*Rose v. Mitchell*, 1979), to BURDEN OF PROOF issues (*Jackson v. Virginia*, 1979), or to claims of ineffective assistance of counsel based on the failure to object to admission of evidence (*Kimmelman v. Morrison*, 1986). But in the 1989 case of *Duckworth v. Eagan*, two Justices, SANDRA DAY O'CONNOR and ANTONIN SCALIA, stated that they would apply *Stone* to bar habeas corpus review of claims of Fifth Amendment violations because of improper administration of *Miranda* warnings. In light of the evident desire of the conservative majority on the Court to constrict the availability of habeas corpus, the O'Connor-Scalia position may come to command a majority of the Court.

Finally, in *Teague v. Lane* (1989) the Supreme Court restricted the power of a federal court in habeas corpus to recognize new constitutional rights. Until *Teague*, federal courts considered habeas corpus petitions alleging constitutional violations, regardless of whether the court would be recognizing a new right that would not be applied retroactively in other cases. But in *Teague*, the Court held that habeas petitions may raise only claims to rights that are "dictated" by precedent, except where the recognition of a new right would have retroactive effect. Because few newly recognized criminal procedure rights are given retroactive application, *Teague* will effectively prevent federal habeas petitioners from presenting claims, except as to rights that have been established previously.

These three sets of restrictions on federal habeas corpus reflect the Supreme Court's desire to limit the procedural protections available to criminal defendants. But these decisions are disturbing for those who believe that a federal forum should be available to those convicted through violations of federal constitutional rights. Moreover, given a conservative Court that sees the costs of habeas corpus as generally outweighing its benefits given legislative pressures for federal statutes limiting habeas corpus review, further restrictions seem likely.

ERWIN CHEMERINSKY
(1992)

(SEE ALSO: *Procedural Due Process of Law, Criminal.*)

Bibliography

FRIEDMAN, BARRY 1988 A Tale of Two Habeas. *Minnesota Law Review* 73:247–347.

YACKLE, LARRY 1985 Explaining Habeas Corpus. *New York University Law Review* 60:991–1060.

# HABEAS CORPUS
## (Update 2)

The latin phrase "habeas corpus," literally translated as "produce the body," refers to a procedure in which persons held in custody by either the federal or state government may challenge their incarceration and/or sentence as unlawful. The person raising the challenge asks (or "petitions") a court to examine whether the custody or sentence is lawful. The relief sought—whether it be outright release, a new trial, or a change in the sentence—is in the form of a court order (or "writ").

Although Article I, section 9 of the Constitution refers to "[t]he privilege of the Writ of Habeas Corpus," it nowhere defines this right nor explains what circumstances will justify a court in granting a writ. Thus, the power of a federal court to issue a habeas corpus writ has always been defined by statute.

The first habeas corpus statute, the JUDICIARY ACT OF 1789, permitted federal courts to issue writs only with respect to federal prisoners. In the HABEAS CORPUS ACT OF 1867, Congress first provided that federal courts could also issue writs with respect to state prisoners who were "restrained in violation of the constitution, or of any treaty or law of the United States. . . ." In 1966, Congress enacted a habeas corpus statute using language virtually identical to that used in the 1867 act.

During the 1960s, the liberal WARREN COURT issued a series of rulings that greatly expanded the constitutional rights of criminal defendants. In a parallel development, the court also expanded the power of the federal courts to remedy unconstitutional state court convictions by granting habeas corpus relief. The combination of developments had an immediate practical consequence; state prisoners increasingly began to seek relief in federal court for violations of their constitutional rights.

This trend was perhaps most evident in CAPITAL PUNISHMENT cases. In 1976, the Supreme Court ruled that capital punishment was constitutional. In the decades since this ruling, habeas corpus became an extremely effective tool used by defense lawyers to prevent their clients from being executed.

With the expansion of rights in the 1960s, and with the increasing number of capital cases in the background, there was a reaction against the increasing use of habeas corpus to upset state court convictions. Many conservative jurists and scholars argued that grants of habeas relief imposed significant burdens on the CRIMINAL JUSTICE SYSTEM and caused tensions between state and federal courts. A state conviction upheld by the state supreme court could be overturned by a single federal judge who finds a constitutional violation. This power undercuts the concept of finality in state court proceedings. Conservatives argue that such a system breeds frustration among victims of crime and contempt for the criminal justice system. They claim that state judges are every bit as competent as federal judges to determine whether the federal Constitution has been violated, and that determinations made in state court should be respected by federal judges. Those advocating this view place a heavy emphasis on the finality of state court convictions as well as fostering COMITY between state and federal courts.

Moderate and liberal scholars have a distinctly different emphasis. They point out that the state judges who initially assess constitutional violations are, in many cases, locally elected officials. In criminal cases generally, and capital cases specifically, community tensions often run high. Frequently, a ruling in a defendant's favor, particularly in a high-profile capital case, could be extremely unpopular and have devastating consequences on the career of a popularly elected official.

In *Harris v. Alabama* (1995), Supreme Court Justice JOHN PAUL STEVENS examined statistics showing the startling frequency with which elected judges rule in favor of the state in capital cases. Stevens concluded that "[n]ot surprisingly, given the political pressures they face, judges are far more likely than juries to impose the death penalty." Because federal judges have lifetime tenure, their livelihood does not depend on maintaining the favor of an electorate. These judges, the argument goes, have a greater freedom to make decisions that may be unpopular. Those advocating this view are more concerned with the validity of a conviction in a particular case than with the more abstract notions of finality of state court convictions and comity between state and federal courts.

In light of these starkly different views of habeas corpus, it is not surprising that the conservative BURGER COURT and REHNQUIST COURT have reversed many rulings of the Warren Court and scaled back the power of federal courts to grant habeas relief. It is also not surprising that the debate over the appropriate role of habeas corpus has continued not only in the judicial branch, but in the legislative branch as well.

For many years conservative members of Congress sought to enact LEGISLATION that would curtail the ability of federal courts to grant habeas relief to persons in state custody. With the election of a Republican-controlled Congress in 1994, conservatives finally had an opportunity to pass this legislation. Motivated largely by concern over the increasing number of capital convictions found to be unconstitutional by federal courts throughout the country, Congress enacted the ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996.

The act represents a massive revision of habeas corpus law. Although the act contains many new provisions—

most of which have yet to be interpreted—two of its provisions stand out as stark departures from longstanding practice.

Initially, and for the first time ever, the new act imposes a time limit within which a prisoner must seek habeas corpus relief. Under the old law, there was no formal time limit, only equitable principles regarding delay. Federal courts took a flexible approach to the issue. If a prisoner showed a serious violation of his constitutional rights, relief could be granted years later so long as the delay was not unreasonable and did not prejudice the state in its ability to respond to the claimed constitutional violation.

The new act jettisons this flexible approach and imposes a strict one-year time limit within which prisoners must seek relief. In the typical case, the one-year time period begins to run from the date the state conviction is final on appeal. This provision—mainly fueled by concern over delays in capital cases—applies to both noncapital and capital cases. Thus, in cases where a state conviction is final on appeal, the prisoner must either seek relief within one year or potentially forfeit the right to seek relief. Moreover, because the vast majority of prisoners are indigent (and because there is no right to have a lawyer appointed to determine whether habeas relief is warranted), most prisoners with meritorious claims will forfeit their rights without even knowing they had any.

The second major change fashioned by the 1996 act appears to be an extraordinary departure from existing practice. At least as early as BROWN V. ALLEN (1953), the Court had recognized that in deciding whether habeas relief was appropriate, federal courts were required to make an independent inquiry into the constitutionality of a particular conviction or sentence. The fact that a state court had passed on the question, and found no constitutional violation, was irrelevant. If the federal courts found that there was a constitutional violation, relief was appropriate.

Some lower courts have held that the new act alters this longstanding practice as well. According to this view, the new act requires federal courts to defer to the conclusions of state judges. Thus, even when a conviction is marred by a constitutional violation, relief is no longer permissible in most cases unless the state court's decision to the contrary was unreasonable. In other words, the new statute requires that state convictions be affirmed even though the state courts incorrectly concluded there were no constitutional violations, so long as the state courts were at least close.

As these provisions show, the new act reflects an approach to habeas corpus which exalts the finality of state court convictions and seeks to minimize the tension between state and federal courts. The cost of this approach is extreme; the act explicitly eliminates any remedy for many individuals who have convictions and sentences that are plainly unconstitutional. Whether this is merely the latest and most politically expedient balance of the conflicting concerns that have been at the heart of the habeas debate for decades, or a lasting alteration of the habeas corpus landscape, remains to be seen.

CLIFF GARDNER
(2000)

Bibliography

GARDNER, CLIFF 1997 Litigating Habeas Cases Under the Antiterrorism and Effective Death Penalty Act of 1996: Retroactivity and Statutes of Limitations Questions. *California Criminal Defense Practice Reporter* 1997:441–446.

LIEBMAN, JAMES S. 1988 *Federal Habeas Corpus Practice and Procedure.* Chap. 2. Charlottesville, Virginia: Michie Co.

NOTE 1997 Rewriting the Great Writ: Standards of Review for Habeas Corpus Under The New 28 U.S.C. § 2254. *Harvard Law Review* 110:1868–1885.

YACKLE, LARRY W. 1996 A Primer on the New Habeas Corpus Statute. *Buffalo Law Review* 44:381–449.

## HABEAS CORPUS ACT OF 1679
### 31 Charles II c.2 (1679)

The right to the writ of HABEAS CORPUS, as ZECHARIAH CHAFEE, Jr., said, is "the most important human rights provision in the Constitution" (Article I, section 9) because it safeguards personal liberty, without which other liberties cannot be exercised. This act of Parliament created no new right; the writ was already about a century old as a mechanism by which a prisoner could test in court the legality of his imprisonment. But crown officers knew a variety of stratagems that hamstrung the writ. This statute, which runs on and on in dull detail without a word about the liberty of the subject or any high-sounding principle, sought to seal off every means of circumventing the writ. It is a technical instruction manual—how and what to do in any situation—to make the writ enforceable as a practical remedy for illegal imprisonment. It imposed steep penalties on every officer of government, from the local jailor to the lord high chancellor for breach, evasion, or delay. The only loophole in the statute, a failure to prohibit excessive BAIL, was plugged in 1689 by the BILL OF RIGHTS. Although the statute did not extend to the colonies, it provided a model, and Americans regarded the great writ as a fundamental right protected by COMMON LAW and gave it constitutional status.

LEONARD W. LEVY
(1986)

Bibliography

PERRY, RICHARD L., ed. 1959 *Sources of Our Liberties.* Pages 189–203. New York: American Bar Foundation.

## HABEAS CORPUS ACT OF 1863
12 Stat. 755 (1863)

Justice, before the CIVIL WAR and RECONSTRUCTION, was overwhelmingly state justice. Under the Constitution's Article III, implemented in the JUDICIARY ACT OF 1789, few litigants qualified for federal JURISDICTION. The 1863 Habeas Corpus law lessened this imbalance at least for federal officials who, enforcing EXECUTIVE ORDERS or statutes, were defendants in state courts. After legitimizing ABRAHAM LINCOLN'S HABEAS CORPUS suspensions since 1861 and authorizing future suspensions, Congress, in the Habeas Corpus Act, indemnified federal officials who had been found guilty in state courts of wrongs against civilians. Further, the law authorized a federal officer facing a state court proceeding to remove the case to a federal court. United States attorneys would act for the defendant if the state proceeding were prejudiced against him and if the defendant had been carrying out orders in a proper manner. Though federal proceedings were to flow from state rules, blacks could testify even adversely to whites, and all court officers and jurors were sworn to the TEST OATH. In extending these protections to its officials, the nation bridged, for them at least, ancient interstices in the dual system of courts. Congress exacted a price from the executive, however, by requiring relevant Cabinet department heads to report to federal judges on civilians arrested by soldiers for allegedly violating draft, internal security, emancipation, or trade-control policies. In the HABEAS CORPUS ACT of 1867, Congress further expanded the classes of protected persons who could resort to federal justice.

HAROLD M. HYMAN
(1986)

Bibliography

DUKER, WILLIAM F. 1980 *A Constitutional History of Habeas Corpus.* Pages 126–224. Westport, Conn.: Greenwood Press.

## HABEAS CORPUS ACT OF 1867
14 Stat. 385 (1867)

This act, whose intent one expert has called "unusually murky," fundamentally amended the HABEAS CORPUS provisions of the JUDICIARY ACT OF 1789. Where that act limited availability of the writ to those persons jailed under federal authority, the new act applied "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Section 1 vested power to issue the writ in all United States courts and judges, established procedures, and authorized APPEALS from inferior courts to CIRCUIT COURTS and to the Supreme Court. A writ could issue at any point in state court proceedings, halting them until the federal habeas corpus action ended. The second section made available WRITS OF ERROR from the Supreme Court in specified instances.

The act gave the Supreme Court JURISDICTION over the appeal of a Mississippi editor who challenged the constitutionality of military reconstruction, but in 1868 Congress withdrew the provisions establishing the Supreme Court's APPELLATE JURISDICTION, and in EX PARTE MCCARDLE (1869) the Court declined to hear the editor's case. The Court nevertheless asserted authority on another statutory basis in *Ex parte Yerger* (1869), and Congress restored the Court's power to hear habeas corpus appeals in 1885.

The federal courts' statutory authority to grant writs of habeas corpus to state prisoners unconstitutionally held in custody continues to this day.

DAVID GORDON
(1986)

## *HAGUE v. CONGRESS OF INDUSTRIAL ORGANIZATIONS*
307 U.S. 496 (1939)

In separate opinions yielding no majority, over two dissents, and with only seven Justices participating, the Court enjoined enforcement of a local ordinance used to harass labor organizers. Justices OWEN ROBERTS and HUGO L. BLACK and Chief Justice CHARLES EVANS HUGHES deemed the right to organize under and discuss the WAGNER (NATIONAL LABOR RELATIONS) ACT a privilege or immunity of national CITIZENSHIP. Justices HARLAN FISKE STONE and STANLEY F. REED held it a right protected by the FIRST AMENDMENT. Justice Stone's separate opinion, which suggested that SECTION 1983's jurisdictional counterpart authorized federal courts to hear actions involving personal liberty but not to hear actions involving property rights, influenced subsequent CIVIL RIGHTS cases. Some courts accepted the distinction and applied the dichotomy to section 1983 itself. *Lynch v. Household Finance Corp.* (1972) discredited the distinction.

THEODORE EISENBERG
(1986)

## *HAIG v. AGEE*
453 U.S. 280 (1981)

Philip Agee, a former employee of the Central Intelligence Agency (CIA) who was familiar with its covert intelligence gathering, revealed the identities of its agents and sources, disrupting the intelligence operations of the United States, and exposing CIA operatives to assassina-

tion. The secretary of state revoked Agee's passport because his activities abroad damaged national security. Agee objected that revocation of his passport violated his constitutional FREEDOM OF SPEECH, and PROCEDURAL DUE PROCESS. An 8–2 SUPREME COURT found his claims meritless, because his freedom to travel abroad was subordinate to national security considerations, his disclosures obstructed intelligence operations and therefore were unprotected by the FIRST AMENDMENT, and his right to due process was satisfied by the opportunity for a prompt hearing after revocation. The dissenters did not rely on constitutional grounds.

LEONARD W. LEVY
(1986)

## HAINES, CHARLES G.
(1879–1948)

Charles Grove Haines was an eminent scholar of American constitutional history who taught political science at the University of California, Los Angeles. In 1939 he was president of the American Political Science Association. His major books continue to be among the best on their subjects. His *Revival of Natural Law Concepts* (1930) is a comparative study of theories of FUNDAMENTAL LAW. *The American Doctrine of Judicial Supremacy* (revised edition, 1932) is the finest book on the history of JUDICIAL REVIEW from the standpoint of a critic of the institution. His *Role of the Supreme Court in American Government and Politics* (volume I, 1944; volume II, posthumous and coauthored by Forest Sherwood, 1957), covering the period 1789 to 1864, is a trenchant history from the viewpoint of a Jeffersonian democrat.

LEONARD W. LEVY
(1986)

## *HALL v. DECUIR*
95 U.S. 485 (1877)

In 1870 the operator of a steamboat regularly traveling between New Orleans, Louisiana, and Vicksburg, Mississippi, refused a black woman accommodation in the cabin reserved for whites. He thereby violated a Louisiana statute, adopted during the period of MILITARY RECONSTRUCTION, which prohibited RACIAL DISCRIMINATION by common carriers operating within the state. Speaking for the Court, Chief Justice MORRISON R. WAITE sought to avoid the "great inconvenience and unnecessary hardship" which might arise if all states bordering the Mississippi River were to enact divergent and conflicting laws. Waite stressed the importance of uniform regulations and struck down the state act as a "direct burden upon INTERSTATE COMMERCE" in violation of Article I, section 8. Nearly seventy years later, in MORGAN V. VIRGINIA (1946), the Supreme Court struck down a law requiring racial SEGREGATION on buses, on a similar commerce ground. Neither opinion discussed the EQUAL PROTECTION clause.

DAVID GORDON
(1986)

## HAMILTON, ALEXANDER
(1755–1804)

Alexander Hamilton, American statesman, member of the Constitutional Convention (1787), coauthor of THE FEDERALIST, first secretary of the Treasury (1789–1795), and leading member of the Federalist party in New York, was born on the island of Nevis in the British West Indies. He came to New York in 1773 and enrolled in King's College; he served with distinction in the Revolutionary War, from 1777 to 1781 as GEORGE WASHINGTON's aide-de-camp. Hamilton was a leading member of the New York bar before and after he served in President Washington's cabinet.

During the prelude to independence, Hamilton participated in the pamphlet controversies between American Whigs and supporters of Britain. His most important pamphlet, "The Farmer Refuted" (1775), expressed a conventional natural rights philosophy. He asserted that "nature has distributed an equality of rights to every man." He also upheld the right to resort to first principles above and beyond the "common forms of municipal law." He subscribed to the theory of government as a social compact between ruler and ruled (a model used by WILLIAM BLACKSTONE rather than JOHN LOCKE) and, like JOHN ADAMS and THOMAS JEFFERSON, argued that the British king was "King of America, by virtue of a compact between us and the King of Great Britain."

Hamilton, who by origin was not rooted in any one of the thirteen states, became an early and perhaps the most outspoken advocate of a stronger and more centralized government for the United States. In 1780 he developed a far-reaching program of constitutional reform. First, he pleaded for a vast increase in the power of Congress and asked for a convention for the purpose of framing a confederation, to give Congress complete sovereignty in all matters relating to war, peace, trade, finance, and the management of FOREIGN AFFAIRS. Second, he called for a more efficient organization of the executive tasks of Congress. Individuals were better suited than boards of administration (with the possible exception of trade matters), because responsibility was then less diffused; "men of the first pretentions" would be more attracted to these tasks if offered individual responsibility. Hamilton developed

his plea for strengthening Congress in "The Continentalist" (1781–1782) in which he revealed his future political program by pointing to the need "to create in the interior of each state a mass of influence in favour of the Foederal Government." As a delegate from New York to Congress (1782–1783), Hamilton criticized the ARTICLES OF CONFEDERATION. Only in September 1786 did he succeed having the Annapolis Convention endorse his resolution for calling a convention to meet in Philadelphia in May 1787 "to devise such further provisions as shall appear to them necessary to render the constitution of the Foederal Government adequate to the exigencies of the Union."

Hamilton took a strong stand during that period against New York state legislation discriminating against Loyalists. His "Letters of Phocion" (1784) defended individual rights and the rule of law against "arbitrary acts of legislature," as well as the supremacy of the state constitution over acts of the legislature. As counsel for the defense in the New York case of RUTGERS V. WADDINGTON (1784) Hamilton argued that the New York Trespass Act (1783), which enabled people who had fled New York when British forces occupied the city to recover damages from persons who had held their premises during the occupation, was incompatible with higher law—that of the law of nations, of the peace treaty, and of commands of Congress. The Court did not accept the argument for JUDICIAL REVIEW, but followed another of Hamilton's arguments: that the legislature could not have meant to violate the law of nations.

At the CONSTITUTIONAL CONVENTION OF 1787, Hamilton was somewhat an outsider for two reasons. First, the other two members of the New York delegation, JOHN LANSING and ROBERT YATES, opposed a stronger central government. Second, Hamilton's views, presented to the Convention in a five-hour speech on June 18, were extreme on two counts: he advocated the abolition of states as states, favoring a system that would leave them only subordinate jurisdiction; and he advocated tenure during GOOD BEHAVIOR both for members of the Senate and for the chief executive. He admitted that in his private opinion the British government was "the best in the world." Hamilton's constitutional proposals reflected the idea of "mixed government": the lower house of Congress should be elected on the basis of democratic manhood suffrage, yet the Senate and the President ought to be elected by electors with high property qualifications. A chief reason for Hamilton's "high-toned" constitutional ideas was that "he was much discouraged by the amazing extent of Country"; he feared disruptive tendencies, originating particularly from the larger and more powerful states.

Could his constitutional proposals influenced by the British model still be termed republican? Hamilton held that the standards of republican government were respected as long as "power, mediately, or immediately, is derived from the consent of the people," or as long as all magistrates were appointed by "the people, or a process of election originating with the people." Against later charges of "monarchism," Hamilton replied that his plan submitted at Philadelphia was conformable "with the strict theory of a Government purely republican; the essential criteria of which are that the principal organs of the Executive and Legislative departments be elected by the people and hold their offices by a responsible and temporary or defeasible tenure."

Though Hamilton absented himself during much of the Convention's work, he signed the Constitution on September 17, 1787, as the only member from New York, indicating that he saw only an alternative between anarchy, on the one hand, and "the chance of good to be expected from the plan," on the other.

During the struggle for ratification of the Constitution (1787–1788), Hamilton's two major achievements were the publication of *The Federalist* essays and his part in the New York ratifying convention at Poughkeepsie. He organized and coordinated publication of *The Federalist*, which appeared over the signature of "Publius" from late October 1787, to late May 1788. Of the eighty-five essays, Hamilton wrote fifty-one. In them he developed several major themes, some of which also recurred in his speeches in the New York Ratifying Convention.

Hamilton proved the utility of the union to America's political prosperity chiefly by painting a somber picture of international rivalry, ever ready to exploit dissensions among the states; he raised the specter of a disrupted Confederation, of war between the states, and of the rise of partial confederations, the most likely and most dangerous contingency being the formation of a northern and a southern confederacy. Hamilton then demonstrated the insufficiency of the Confederation to preserve the union by pointing to the necessity that the federal government, to be effective, "carry its agency to the persons of the citizens." He envisaged a broad scope for the powers granted to the federal government. The powers needed to provide for the common defense of the members of the Union "ought to exist without limitation." A vast scope for the federal power to regulate commerce and to provide for the financial needs of the Union, and the maxim that "every POWER ought to be in proportion to its OBJECT," foreshadowed Hamilton's later constructions of the Constitution while he directed the Treasury. The Constitution ought to allow a capacity "to provide for future contingencies," which were illimitable.

Hamilton's most important contribution to the analysis of institutions and procedures is his discussion of the executive branch in *The Federalist* #67–77. Believing that efficient administration was the very core of good govern-

ment, he supported an individual executive who would be less likely than a plural executive "to conceal faults, and destroy responsibility." The office of chief magistrate, if not shackled by brief duration or restrictions on reeligibility, might attract men imbued with "the love of fame, the ruling passion of the noblest minds" (#72).

Hamilton's analysis of the federal judiciary is best known for the justification of judicial review in *The Federalist* #78. There Hamilton tried to refute the argument presented by the Anti-Federalist "Brutus" that judicial review implied JUDICIAL SUPREMACY. Hamilton invoked the superiority of the will of the people as declared in the Constitution and the duty of the judges to be governed by that will. A constitution "is in fact, and must be regarded by the judges as fundamental law." His statement in *The Federalist* #81 "that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution" is similarly significant.

Hamilton argued against a federal bill of rights in *The Federalist* #84. His main point that bills of rights were not needed in constitutions founded upon the power of the people is rhetorical; it is contradicted by his own admission that the Constitution as drafted did in fact contain a rudimentary bill of rights, including provisions on habeas corpus, the prohibition of BILLS OF ATTAINDER and EX POST FACTO laws and the guarantee of TRIAL BY JURY in criminal cases.

The office of secretary of the Treasury, coveted by Hamilton more than any other, afforded him the opportunity to initiate policies for strengthening the public support, and particularly the support of the moneyed community, for the federal government. He considered leadership not only as compatible with, but incumbent on, executive office, and once spoke of the "executive impulse." He seems to have considered his office as that of a prime minister on the British model. Hamilton's major effort and achievement was the establishment of public credit for the new federal government. His measures included funding the foreign and domestic debt at par, assumption of the revolutionary state debts, creation of the Bank of the United States, and levying of federal excise taxes; his most important policy papers were his Report on Public Credit (January 1790) and his Report on the National Bank (December 1790). As a program for the future, Hamilton, in the Report on Manufactures (1791), envisaged protective tariffs, aid for agriculture, and INTERNAL IMPROVEMENTS. Increasingly, his policies encountered and provoked opposition from Thomas Jefferson, JAMES MADISON, and the Republican party forming around them.

There were two great constitutional issues on which Hamilton spoke out during his membership in Washington's cabinet: the constitutionality of the proposed Bank of the United States (1791), and the constitutionality of the President's PROCLAMATION OF NEUTRALITY (1793). In the dispute on the bank, both Attorney General EDMUND RANDOLPH and Secretary of State Jefferson denied that the United States had the power to incorporate a bank, this power not being enumerated in the catalogue of powers granted to Congress by the Constitution. Hamilton, in his "Opinion on the Constitutionality of an Act to Establish a Bank," developed the theory of IMPLIED POWERS granted by the Constitution, arguing that implied powers as well as express powers were in fact delegated by the Constitution; he also asserted the existence of such resulting powers as those resulting from the conquest of neighboring territory. Grants of power included means to attain a specified end, the criterion of constitutionality being met if the end was specified in the Constitution. To attain the objective of the "effectual administration of the finances of the United States," there was no "parsimony of power." Also, Hamilton argued that the NECESSARY AND PROPER CLAUSE ought to be construed "to give a liberal latitude to the exercise of specified powers" rather than construing the word "necessary" restrictively, as had Jefferson. These arguments were later adopted by the Supreme Court in MCCULLOCH V. MARYLAND (1819), and still guide the interpretation of Congress's legislative powers.

Hamilton's second major constitutional pronouncement concerned the power of the executive to issue a declaration of neutrality. In the first of his "Pacificus" articles justifying the President's action against Jeffersonian criticism, he presented an extremely broad construction of Article II. The grant of "executive power" (singular) as opposed to the "powers" (plural) granted to Congress meant a general grant of power; the enumeration of specific powers of the executive was merely demonstrative, "intended by way of greater caution." Hamilton also argued that the executive conducted the nation's foreign policy and that his duty obligated him to execute the laws including the law of nations.

During the years after his retirement from the Treasury, Hamilton, as leading Federalist politician, yet without federal office except for a brief spell as Inspector of the Army (1798–1800), on several occasions commented on constitutional matters.

Controversy over JAY'S TREATY (1794) involved constitutional issues between the executive and the House of Representatives. Was the President bound to submit papers pertaining to the treaty negotiations to the legislature? Did the treaty power, jointly exercised by President and Senate, oblige the legislature to appropriate the needed funds without any liberty of exercising legislative discretion? Hamilton denied any obligation on the part of the President to transmit papers, arguing that such a transmittal would "tend to destroy" the confidence of foreign

governments in the "prudence and delicacy" of the government. He further argued that a treaty could obligate the legislature to appropriate funds.

Representing the federal government in HYLTON V. UNITED STATES (1796), his only appearance as counsel before the Supreme Court, Hamilton argued that a federal tax on carriages (levied by Congress in 1794 on Hamilton's recommendation) was an excise rather than a direct tax, and so did not have to be apportioned among the states according to the census. Hamilton argued that as an excise the tax was constitutional, and the Court upheld his view.

In 1796 Hamilton was approached for a legal opinion on the Yazoo land grant affair in Georgia. An act of the Georgia legislature had repealed an earlier act providing for the sale of vast tracts of land, the repeal having been prompted by charges of fraud in the original transaction and a political changeover in the legislature. Hamilton argued that Article I, section 10, of the Constitution, prohibiting the states from passing any law "impairing the obligation of contracts," applied not merely to contracts between individuals but to contracts between states and individuals as well, and that a land grant was a contract covered by the contract clause. Hamilton's views became the basis of the Supreme Court's decision in FLETCHER V. PECK (1810).

When New York State election results in the spring of 1800 made it virtually certain that the state legislature would elect presidential electors favoring Jefferson as President, Hamilton suggested that Governor JOHN JAY call the outgoing legislature into special session to elect anti-Jefferson electors. Hamilton believed that it "is easy to sacrifice the substantial interests of society by a strict adherence to ordinary rules." Jay rejected this proposal, which shows Hamilton's readiness to neglect, in cases he considered extraordinary crises or emergencies, "ordinary rules." Hamilton approved, incidentally, the LOUISIANA PURCHASE.

Although not technically concerning the Constitution, Hamilton's defense of freedom of the press in PEOPLE V. CROSWELL (1804) deserves notice. Hamilton was counsel for the appellant before the high court of New York, the appellant having been convicted of LIBEL for publishing an anti-Jefferson piece. Hamilton's two main points, based on the successful plea of Andrew Hamilton in ZENGER'S CASE (1735), were that truth of an alleged libel should be admitted as evidence and that juries, in libel cases, ought to decide both on fact and on law. The Court divided and thus the conviction was allowed to stand, though no sentence was passed. State legislation to give effect to Hamilton's points was enacted soon afterward.

Hamilton's understanding of the federal Constitution was informed by his vision of the United States as one nation rather than thirteen states, and also by his conviction that the United States constituted one nation among many nations in a state of permanent rivalry. In his interpretation of the Constitution, three points stand out: the broad construction of federal powers as opposed to state powers; the broad construction of executive powers; and the doctrine of judicial review.

GERALD STOURZH
(1986)

Bibliography

COOKE, JACOB ERNEST 1982 *Alexander Hamilton.* New York: Scribner's.

GOEBEL, JULIUS, JR., et al., eds. 1964–1980 *The Law Practice of Alexander Hamilton: Documents and Commentaries.* 4 Vols. New York: Columbia University Press.

MITCHELL, BROADUS 1957–1962 *Alexander Hamilton.* 2 Vols. New York: Macmillan.

ROSSITER, CLINTON 1964 *Alexander Hamilton and the Constitution.* New York: Harcourt, Brace.

STOURZH, GERALD 1970 *Alexander Hamilton and the Idea of Republican Government.* Stanford: Stanford University Press.

SYRETT, HAROLD E. et al., eds. 1961–1978 *The Papers of Alexander Hamilton.* 26 Vols. New York: Columbia University Press.

## HAMILTON, ANDREW

See: Zenger's Case

## HAMILTON, WALTON HALE
(1881–1958)

Although Walton Hale Hamilton never formally studied law, he became an influential member of the faculty of Yale Law School and one of the nation's leading experts on government regulation of the economy. Hamilton's many books discussing the relationship between the government and the economic order include *Prices and Price Policies* (1938), *The Patterns of Competition* (1940), *Patents and Free Trade* (1941), and *The Politics of Industry* (1957). In these and other works, Hamilton criticized as unrealistic the traditional view of the American economy as a self-regulating free market; he pointed out that the government is deeply enmeshed in the economy, often at the urgent request of the private sector. Hamilton's most substantial contribution to constitutional scholarship, *The Power to Govern*, written with Douglass Adair (1937), followed naturally from his other interests. Exploring the intellectual background of the framing of the Constitution, Hamilton and Adair focused on the meaning of the word "commerce"; they concluded that the Framers intended to grant the national government broad powers through

the Constitution's COMMERCE CLAUSE to regulate all forms of economic activity resulting in transactions across state lines, thus implicitly supporting the constitutionality of NEW DEAL federal regulation.

RICHARD B. BERNSTEIN
(1986)

## *HAMILTON v. BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA*
292 U.S. 245 (1934)

This case raised the problem of CONSCIENTIOUS OBJECTION to military service in a state context. California required that male freshman and sophomore state university students enroll in a course of military science. Hamilton, a religious objector, argued that this requirement violated the liberty guaranteed him by the FOURTEENTH AMENDMENT. Justice PIERCE BUTLER spoke for a unanimous Supreme Court, and concluded that nothing in the Constitution relieved a conscientious objector from the obligation to bear arms.

RICHARD E. MORGAN
(1986)

## *HAMMER v. DAGENHART*
247 U.S. 251 (1918)

From 1903 to 1918, the Supreme Court consistently had approved NATIONAL POLICE POWER regulations enacted under the COMMERCE CLAUSE. But in *Hammer v. Dagenhart*, the Court deviated from this tradition and invalidated the KEATING-OWEN CHILD LABOR ACT, which prohibited the interstate shipment of goods produced by child labor. The Court's restrictive DOCTRINE nevertheless proved vulnerable and the decision itself eventually was overruled.

In CHAMPION V. AMES (1903) the Justices had sustained a congressional prohibition against the interstate shipment of lottery tickets. The ruling actually was quite narrow, holding that such tickets were proper SUBJECTS OF COMMERCE and that Congress could prevent the "pollution" of INTERSTATE COMMERCE. A more general, expansive doctrine seemed to emerge as the Court soon approved similar regulations of the interstate flow of adulterated foods and impure drugs, prostitutes, prize fight films, and liquor. The Court abruptly deviated from this course in the child labor case, perhaps signaling a reaction against some of the Progressive era's social reforms and the Court's prior tendency toward liberal nationalism.

Justice WILLIAM R. DAY, speaking for a 5–4 majority, maintained at the outset that in each of the other cases the Court had acknowledged that the "use of interstate transportation was necessary to the accomplishment of harmful results." But the child labor regulations, Day held, were different because the goods shipped were of themselves harmless in contrast with lottery tickets, impure foods, prize fight films, and liquor. It was an unsound distinction, but one perhaps anticipated by Justice JOHN MARSHALL HARLAN's remarks in the *Lottery Case* that the Court would not allow Congress arbitrarily to exclude every article from interstate commerce.

The Court refuted any suggestions that congressional authority extended to prevent unfair competition among the states, thus enabling it to ignore any discussion of the evils or deleterious effects of child labor. This argument was grounded in the majority's revival of rigid notions of dual federalism. Production, Day said, as he resurrected an older, dubious, and arbitrary distinction, was not commerce; the regulation of production was reserved by the TENTH AMENDMENT to the states. "If it were otherwise," Day noted, "all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the . . . Constitution." The regulation of child labor, he maintained, not only exceeded congressional authority but also invaded the proper sphere of local power. To allow such a measure, Day concluded, would end "all freedom of commerce," eliminate state control over local matters, and thereby destroy the federal system.

In dissent, Justice OLIVER WENDELL HOLMES uttered his oft-quoted remark that "if there is any matter upon which civilized countries have agreed—far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused—it is the evil of premature and excessive child labor." But Holmes offered more than his customary philosophical discourse on judicial restraint. Congress plainly had the power to regulate interstate shipments, and its motives of doing so were no less legitimate here than they had been in the regulations.

Whether "evil precedes or follows the transportation" was irrelevant, Holmes said; once states transported their goods across their boundaries, they were "no longer within their rights."

The *Hammer* decision did not significantly diminish the Court's willingness or ability to sustain congressional police regulations under the commerce clause. The ruling revealed that the Court seemed less concerned with the evils of child labor than Congress and was more interested in maintaining the purity of the federal system. In BAILEY V. DREXEL FURNITURE (1922), the Justices invalidated a congressional attempt to regulate child labor by using the TAXING POWER, again despite ample precedents justifying

national power. But three years later, Chief Justice WILLIAM HOWARD TAFT, who had written the child labor tax opinion, reverted to the Court's earlier POLICE POWER decisions and broadly approved the National Motor Vehicle Act (1919) which made the transportation of stolen automobiles across state lines a federal crime. In *Brooks v. United States* (1925), Taft agreed that Congress could forbid the use of interstate commerce "as an agency to promote immorality, dishonesty or the spread of any evil or harm of other States from the State of origin." *Hammer v. Dagenhart* marred an otherwise consistent pattern in the precedents, but Taft quickly disposed of it by reiterating the distinction that the products of child labor were not harmful. Yet his 1925 opinion refuted such doctrine as he demonstrated that a perceived evil required national action and the question of harmfulness was secondary.

Throughout the 1920s, the Supreme Court, following Taft's strong views, generally approved an ever expanding scope to the commerce clause. There was some retreat during the bitter constitutional struggle over the New Deal, but it proved temporary. After 1937, a number of decisions reaffirmed a broad nationalistic view of the commerce power. Finally, in 1941, the Court specifically overruled *Hammer*. Justice HARLAN FISKE STONE, in UNITED STATES V. DARBY, rebuked the earlier decision as "novel," "unsupported," "a departure," and "exhausted" as a precedent.

The most poignant historical commentary on *Hammer* came from the supposed victor, Reuben Dagenhart, whose father had sued in order to sustain his "freedom" to allow his fourteen-year-old boy to work in a textile mill. Six years later, Reuben, a 105-pound man, recalled that his victory had earned him a soft drink, some automobile rides from his employer, and a salary of one dollar a day; he had also lost his education and his health.

STANLEY I. KUTLER
(1986)

Bibliography

WOOD, STEPHEN 1968 *Constitutional Politics in the Progressive Era: Child Labor and the Law.* Chicago: University of Chicago Press.

## *HAMPTON v. MOW SUN WONG*
426 U.S. 88 (1976)

In this case the Supreme Court declined to extend to federal government action the constitutional limits it had imposed on the states' discrimination against ALIENS. The Court recognized that "overriding national interests" might justify a limitation of employment in the federal civil service to citizens—as required by the Civil Service Commission (CSC) here—despite the invalidity of a parallel state law. (See SUGARMAN V. DOUGALL.) But the interests identified by CSC were insufficient: some of them could be asserted only by the President or Congress; others, within CSC's purview, were after-the-fact rationalizations that had not been considered before the regulation was adopted. The regulation thus violated the Fifth Amendment's guarantee of DUE PROCESS OF LAW; that amendment's EQUAL PROTECTION component need not be reached. The vote was 5–4.

Shortly after the Court's decision in *Hampton*, President GERALD R. FORD issued an order embracing the policy of the invalidated CSC rule.

KENNETH L. KARST
(1986)

## *HAMPTON & CO. v. UNITED STATES*
276 U.S. 394 (1928)

In *J. W. Hampton, Jr., & Co. v. United States*, a unanimous Supreme Court, speaking through Chief Justice WILLIAM HOWARD TAFT, upheld Congress's DELEGATION OF POWER to the President to adjust tariffs in order to protect American business. The delegation was not improper because the law provided an intelligible standard to which tariffs had to conform. The Court also sustained the protective tariff itself, holding that, because its effect was to raise revenue, Congress's motive in enacting it was irrelevant.

DENNIS J. MAHONEY
(1986)

## HAND, AUGUSTUS N.
(1868–1954)

Born in upstate New York to a prominent legal family, Augustus Noble ("Gus") Hand, after graduating from Harvard College and Harvard Law School, practiced law in New York City from 1897 to 1914. President WOODROW WILSON appointed him in 1914 to the UNITED STATES DISTRICT COURT for the Southern District of New York. A defendant in a trial over which Hand presided described him as a judge of such integrity and impartiality that he could have sustained the dignity of the law in a hurricane. In 1927 President CALVIN COOLIDGE, deferring to the acclaim of the bench and bar, promoted Hand, a Democrat, to the UNITED STATES COURT OF APPEALS, Second Circuit, where he joined his famous cousin, LEARNED HAND.

No appellate judge was more austere than Gus Hand, who commanded the respect and influenced the votes of

his brethren for a quarter of a century. He preferred judicial self-restraint to JUDICIAL ACTIVISM. A moderate, he once declared that the ignorance of conservatives hardly exceeded the intolerance of liberals obsessed with change. The ardent crusaders who administered NEW DEAL agencies, he declared, should be left to "fry in their own fat" until Congress reformed them.

Hand dissented rarely and cultivated a passionless style, though he could be eloquent. His opinions tended to favor prosecutors in cases involving the rights of the criminally accused and the government in cases involving subversive activities. For example, he sustained the summary contempt conviction of the lawyers who defended the Communist party leaders tried under the SMITH ACT, even though the trial judge who convicted the lawyers gave them no hearing and waited until the trial's end, months after their contemptuous acts. Hand upheld the SEPARATE BUT EQUAL DOCTRINE and ruled that the Army's racially based quota system during WORLD WAR II did not violate the SELECTIVE SERVICE ACT. But he championed RELIGIOUS LIBERTY and extended the benefits of conscientious objection to persons who founded their claims on philosophical and political considerations as well as purely religious ones. "A mighty oak has fallen," said one of his colleagues on his death.

LEONARD W. LEVY
(1986)

Bibliography

SCHICK, MARVIN 1970 *Learned Hand's Court*. Baltimore: Johns Hopkins University Press.

## HAND, LEARNED
(1872–1961)

Learned Hand is widely viewed, with OLIVER WENDELL HOLMES, LOUIS D. BRANDEIS, and BENJAMIN N. CARDOZO, as among the leading American judges of the twentieth century. His influence on constitutional law stems more from his extrajudicial advocacy of judicial restraint and his modest, yet creative, performance on lower federal courts in fifty-two years of judging than from the relatively few constitutional rulings among his nearly 3,000 decisions.

Christened Billings Learned Hand, the son and grandson of upstate New York lawyers and judges, Hand dropped the Billings after graduating from Harvard Law School in 1896. Hand surrendered to family pressures in turning to law rather than pursuing his interest in philosophy engendered by his Harvard College teachers, including William James, Josiah Royce, and George Santayana. In six years of practice in Albany and seven in New York City, he performed competently but considered himself inadequate. But the young lawyer's associations with New York City intellectuals and reformers prompted President WILLIAM HOWARD TAFT to name the thirty-seven-year-old Hand to the federal trial bench in 1909. President CALVIN COOLIDGE elevated him to the Court of Appeals for the Second Circuit in 1924, where Hand served for the rest of his life.

Hand's persistent belief in judicial restraint antedated his appointment to the bench. He had been strongly influenced by JAMES BRADLEY THAYER at Harvard Law School. His major publication before the judgeship was an article attacking LOCHNER V. NEW YORK (1905). His deepseated skepticism and allergy to absolutes, as well as his devotion to democratic policymaking and his unwillingness to be ruled by a bevy of Platonic Guardians, made him disdainful of judges ready to pour subjective philosophies into vague constitutional phrases. He was unwilling to suppress his hostility to JUDICIAL ACTIVISM, developed in the era of the Nine Old Men and its use of SUBSTANTIVE DUE PROCESS to strike down ECONOMIC REGULATION, in the post-1937 years, when the philosophy of HARLAN FISKE STONE's footnote to UNITED STATES V. CAROLENE PRODUCTS COMPANY (1937), with its preference for personal rather than economic rights, gained ascendancy.

In his early years as a federal judge, Hand participated widely in extrajudicial activities. He was a member of the group that founded *The New Republic* magazine, and he helped draft THEODORE ROOSEVELT's Bull Moose platform in 1912. Indeed, he was so devoted to the Progressive cause that he permitted his name to be entered as that party's candidate for the New York Court of Appeals in 1913.

After WORLD WAR I, Hand decided that his position precluded extrajudicial involvements in controversial issues. But he had frequent occasion to continue airing his views of the judicial role in papers and addresses, many of which are collected in *The Spirit of Liberty* (1952). Hand's Holmes Lectures, delivered at Harvard three years before his death and published under the title *The Bill of Rights*, were an extreme restatement of Hand's hostility to the *Lochner* interventionist philosophy. The lectures even questioned the judicial enforceability of vague BILL OF RIGHTS provisions.

Hand's judicial reputation rests mainly on his craftsmanlike performance in operating creatively within the confines set by the political branches. His strength is best revealed in the way he handled many small cases in private law and statutory interpretation. He probed deeply to discover underlying questions, rejecting glib formulations and striving for orderly sense amidst the chaos of received legal wisdoms. Although constitutional issues seldom

came before his court, he touched upon a wide range of them, from favoring strong enforcement of FOURTH AMENDMENT guarantees in *United States v. Rabinowitz* (1949) to offering innovative views on defining OBSCENITY in *United States v. Kennerley* (1913).

Hand's most important judicial contributions dealt with political speech under the FIRST AMENDMENT. His most enduring impact stems from his controversial decision in MASSES PUBLISHING CO. V. PATTEN (1917). The ruling, overturned on appeal, protected the mailing of antiwar materials in the midst of national hostility to dissent. Hand's approach shielded all speech falling short of direct INCITEMENT TO UNLAWFUL CONDUCT. Two years later, the Supreme Court, in its first confrontation with the problem, refused to go so far as Hand had. Instead, SCHENCK V. UNITED STATES (1919) launched the CLEAR AND PRESENT DANGER test, under which the protection of speech turned on guesses about its probable impact. In a rare disagreement with his one judicial idol, Oliver Wendell Holmes, Hand criticized Holmes's approach, in ABRAMS V. UNITED STATES (1919) as well as *Schenck*, as an inadequate bulwark against majoritarian passions. With the Supreme Court adhering to Holmes's standard for decades, Hand assumed that his *Masses* approach had failed. But in 1969, Hand's incitement test, combined with the best elements of Holmes's approach, became the modern standard for First Amendment protection, in BRANDENBURG V. OHIO (1969).

Hand is equally well known for recasting and, many believe, diluting the clear and present danger test by affirming convictions of the Communist leaders in UNITED STATES V. DENNIS (1950). This ruling reflected not only Hand's mounting skepticism about judicial protection of fundamental rights but also his consistent obedience to Supreme Court pronouncements. In affirming the *Dennis* convictions, Chief Justice FRED M. VINSON'S PLURALITY OPINION adopted Hand's reformulation as the proper criterion. Hand, however, remained convinced even in the 1950s that his *Masses* approach offered better protection to dissenters.

The distinctive traits of Hand's model of judging—open-mindedness, impartiality, skepticism, restless probing—came naturally to him. Those traits were ingredients of his personality by the time Hand became a judge. Philosopher and humanist as well as judge, Hand remained intellectually engaged, ever ready to reexamine his own assumptions.

Hand's unmatched capacity to behave according to the model of the modest judge was not wholly a conscious deduction from the theory of judicial restraint instilled by Thayer and confirmed by Hand's early experiences. It was at least as much a product of Hand's temper and personality. The doubting, open-minded human being could not help but act that way as a judge. Hand's major legacy, to constitutional law as well as to all other areas of the law, lies in his demonstration that detached and open-minded judging is within human reach.

GERALD GUNTHER
(1986)

Bibliography

HAND, LEARNED (1952) 1960 *The Spirit of Liberty: Papers and Addresses*, ed. Irving Dilliard. New York: Knopf.

——— 1958 *The Bill of Rights*. Cambridge, Mass.: Harvard University Press.

SHANKS, HERSHEL, ed. 1968 *The Art and Craft of Judging*. New York: Macmillan.

## HARASSMENT

See: Sex Discrimination; Workplace Harassment and the First Amendment

## HARDING, WARREN G.
(1865–1923)

Warren Gamaliel Harding, twenty-ninth President of the United States, served one of the shortest presidential terms, from his inauguration on March 4, 1921, until his death on August 2, 1923. An Ohio newspaperman and politician, and a United States senator (1915–1921), Harding was nominated as a compromise candidate at the deadlocked 1920 Republican party convention and won a landslide victory over his Democratic opponent, James Cox.

Harding's policies flowed from an understanding of the American Constitution very different from that of his predecessor, WOODROW WILSON. His economic policy consisted of tax reduction, economy in government, a higher tariff, and various measures to aid agriculture in its recovery from the postwar depression. His foreign policy consisted of opposition to American participation in the League of Nations (but support for membership in the World Court), reduction of armaments, and refusal to forgive war debts owed to the United States or its citizens.

Harding's presidency was marred by scandals, which were exposed fully only after his death and in which he was not personally implicated. Despite his brief tenure as President, Harding appointed four Supreme Court Justices: WILLIAM HOWARD TAFT, PIERCE BUTLER, GEORGE H. SUTHERLAND, and EDWARD T. SANFORD.

THOMAS B. SILVER
(1986)

Bibliography

MURRAY, ROBERT K. 1969 *The Harding Era: Warren G. Harding and His Administration*. Minneapolis: University of Minnesota Press.

# HARLAN, JOHN MARSHALL
(1833–1911)

Among the Justices of the Supreme Court, few have provoked more diverse reactions from colleagues, contemporaries, and later generations than the first Justice John Marshall Harlan. Despite a distinguished tenure of over thirty-three years (1877–1911), during which he participated in many cases of constitutional significance and established himself as one of the most productive, independent, and voluble members of the Court, both jurists and historians were inclined to hold Harlan in low esteem from his death in 1911 to the middle of the twentieth century. But two signal events in 1954—the Court's implicit adoption of Harlan's famous solitary dissent in PLESSY V. FERGUSON (1896) in its decision of the public school SEGREGATION cases, BROWN V. BOARD OF EDUCATION and BOLLING V. SHARPE, and President DWIGHT D. EISENHOWER's appointment of his distinguished grandson and namesake to the highest bench—prompted historians to reevaluate the first Justice Harlan. No longer belittled and neglected, Harlan now began to be recast as a great dissenter who had foretold many of the most fundamental developments in later constitutional interpretation: the virtually complete INCORPORATION of the BILL OF RIGHTS into the FOURTEENTH AMENDMENT; the inherent inequality of racial segregation; and the plenary power of Congress under the COMMERCE CLAUSE. How can one account for the wide disparity between the traditional and revisionist interpretations of Mr. Justice Harlan?

Harlan was born in 1833 in Kentucky, the son of a two-term WHIG member of the United States House of Representatives. A stern Presbyterian, young Harlan grew up during the worsening estrangement of the South and the Union. Kentucky, as a border state, was sharply divided. Harlan was graduated from Centre College, and, at twenty, completed his law courses at Transylvania University and was admitted to the Kentucky bar.

Harlan participated actively as a moderate in the political struggles that racked the country on the eve of the CIVIL WAR. In 1859 he ran for Congress, but was narrowly defeated. A traditional southern gentleman and conservative, he refused to join the Republican party or to support ABRAHAM LINCOLN's 1860 campaign. He supported the Constitutional Union party which sought the peaceful preservation of the status quo.

After the attack on Fort Sumter, Kentucky declined to furnish troops. Harlan volunteered to fight on the northern side and, in the fall of 1861, organized the Tenth Kentucky Volunteer Infantry. Harlan rose rapidly to the rank of colonel and served as acting commander of a brigade until he resigned his military commission in 1863 upon the death of his father.

Shortly after returning to civilian life, Harlan campaigned for the Constitutional Union party and was elected attorney general of Kentucky, a post he held until 1867. Harlan stumped for General George McClellan in the presidential election of 1864, bitterly criticizing the Lincoln administration. He opposed the THIRTEENTH AMENDMENT and continued to hold slaves until forced to free them.

In 1867, however, Harlan changed his party affiliation, becoming the unsuccessful Republican gubernatorial candidate. As a southern slaveholder and Whig he had long sought to support both SLAVERY and a strong national government—a position that grew increasingly difficult in the political environment of *antebellum* Kentucky, where supporters of slavery based their political programs on opposition to the federal government. In the end Harlan resolved his dilemma in favor of the national government. Contending that he would rather be right than consistent, Harlan publicly repudiated his views favoring slavery and defended the civil war amendments as necessary to the reconstruction of the Union. A second try for the Kentucky governorship in 1871 also ended in failure.

At the national level, Harlan supported ULYSSES S. GRANT in the presidential election of 1868 and had attained sufficient prominence by 1872 to have been proposed as a vice-presidential candidate. Four years later Harlan led the Kentucky delegation to the Republican convention. When it became apparent that his friend, Benjamin Bristow, could not win, Harlan threw the Kentucky delegation's support to RUTHERFORD B. HAYES, enabling Hayes narrowly to defeat James G. Blaine and obtain the nomination.

On October 16, 1877, President Hayes nominated Harlan to the Supreme Court, an appointment that was widely regarded as a payment for political services rendered. Until five days before his death on October 15, 1911, for almost thirty-four years, Harlan served on the Court. With the exception of JOHN MARSHALL and JOSEPH STORY, none of its members up to that time had taken part in so many decisions that ultimately so crucially affected the future of American constitutionalism.

Harlan served on the Supreme Court during a period of rapid social and economic change. Although the era of RECONSTRUCTION had passed, the effect of the postwar amendments on the federal system remained a topic of bitter constitutional dispute. The Court was also increasingly obliged to rule on constitutional challenges to the validity of state and federal statutes purporting to regulate the economy in the public interest.

Harlan brought to the Court two fundamental convictions drawn from his upbringing and early experiences in Kentucky politics. He believed in a strong national government, especially in the spheres of commerce and eco-

nomic development. Hence Harlan would view federal laws regulating the economy much more favorably than similar state initiatives. Second, he would ardently support the rights of blacks, although he had developed that posture only late in his political career. While Harlan never wavered in his judicial support for black rights and a strong national economy, the political implications of his Whig principles varied widely during his judicial tenure. When he came to the Court in 1877 Harlan quickly established himself as its foremost defender of private contracts against state regulation since Marshall. Indeed, throughout his long career Harlan closely scrutinized any state law that impinged on private property rights. He often voted to invalidate such statutes under the contract, JUST COMPENSATION, or EQUAL PROTECTION clauses.

After the passage of the INTERSTATE COMMERCE ACT of 1877 and the SHERMAN ANTITRUST ACT of 1890, however, Harlan came to look quite favorably upon national, as opposed to state, regulation of the economy. Harlan's Whig philosophy explains much of his apparent inconsistency in decisions concerning private property rights. Harlan generally upheld national ECONOMIC REGULATION, but often voted to strike down state economic regulations that discriminated against interstate commerce without furthering significantly an important state interest under the POLICE POWER.

During his thirty-four years on the Court, Harlan articulated a broad body of constitutional principles respecting both governmental powers and individual rights. A convinced believer in legislative authority and judgment, he abhorred and denounced what he viewed as "judicial legislation" and advocated a straightforward application of the law as set forth in the Constitution and legislative enactments. But when it came to determining the provisions of a given law, his view was unique: "It is not the words of the law but the internal sense of it that makes the law: the letter is the body; the sense and reason of the law is the soul" (CIVIL RIGHTS CASES, 1883).

Justice Harlan lifted the practice of employing LEGISLATIVE INTENT as a guide to the sound construction of the law to the level of a philosophical principle. In addition, he, above all others, had an all but religious reverence for the Constitution as the fundamental instrument of the ideals of American democracy. A fervent Marshall disciple, he viewed the Court as the ultimate guardian of the Constitution. Harlan also adhered to Marshall's views on the proper distribution of powers within the federal system.

With respect to congressional power under the INTERSTATE COMMERCE clause, Harlan was a liberal national constitutionalist, with an almost slavish devotion to Chief Justice Marshall's opinions in general, and GIBBONS V. OGDEN (1824) in particular. Harlan displayed his broad interpretation of the commerce power most forcefully in opinions construing the Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890. He dissented in *Texas & Pacific Railroad Co. v. Interstate Commerce Commission* (1896) and INTERSTATE COMMERCE COMMISSION V. ALABAMA MIDLAND RAILWAY CO. (1897) when the Court interpreted the Interstate Commerce Act as not granting the commission the power either to void discriminatory railroad rates or to set nondiscriminatory rates itself. Harlan believed that these decisions went far "to make that commission a useless body for all practical purposes, and to defeat many of the important objectives designed to be accomplished by the various enactments of Congress relating to interstate commerce. . . ." Congress eventually agreed, amending the Interstate Commerce Act to give the commission the powers for which Harlan had contended in his dissents.

When the Court emasculated the Sherman Antitrust Act, Justice Harlan, again in dissent, registered his strong advocacy of congressional power and the spirit of the law. In UNITED STATES V. E. C. KNIGHT CO. (1895) the Court narrowly interpreted the Sherman Act as applying to monopolies in interstate commerce but not to intrastate monopolies in manufacture of goods; it also stated that Congress lacked power under the commerce clause to regulate manufacturing. In the majority's view, "Commerce succeeds to manufacture, and is not a part of it." Yet Harlan insisted that the statute applied because the goods, although manufactured in one state, entered into interstate commerce. Four decades later, in the WAGNER ACT CASES (1937), Harlan's expansive view of congressional power under the commerce clause would become the generally accepted view.

Although Harlan held to a broad interpretation of national power under the commerce clause, he nonetheless supported some positive uses of STATE POLICE POWER that affected interstate commerce. He believed that, although a state might not—under the guise of inspection laws—discriminate against meat imported from out of state (MINNESOTA V. BARBER, 1890), it might require certain passenger stops of interstate railroad trains unless Congress had superseded local laws. Indeed, Harlan thought that state power should prevail if the statute in question affected interstate commerce "only incidentally" and furthered an important state interest under the police power—as was the case with state laws prohibiting the importation or sale of intoxicating liquor (BOWMAN V. CHICAGO & NORTHWESTERN RAILWAY, 1888). Whether agreeing or dissenting, however, Harlan consistently stood for the freedom of commerce and the rights of citizens of other states. While he upheld state enactments genuinely aiming to protect the public morals, safety, health, or convenience, he

strongly expressed his disapproval of those that appeared to have been enacted for the ulterior purpose of discriminating against commerce from other states.

Although fervently opposed to Justice STEPHEN J. FIELD'S NATURAL RIGHTS philosophy, Harlan strongly defended the Bill of Rights and, in spite of his border state origin, became a vigorous and eloquent advocate of a nationalistic interpretation of the Thirteenth, Fourteenth, and FIFTEENTH AMENDMENTS. Harlan's most celebrated CIVIL RIGHTS dissent, *Plessy v. Ferguson* (1896), became law in the unanimous Warren Court holding in *Brown v. Board of Education* (1954). It was in *Plessy*, dissenting alone from the Court's decision upholding a Louisiana "Jim Crow" train-segregation statute under the SEPARATE BUT EQUAL doctrine, that Harlan had warned: "The thin disguise of "equal' accommodations . . . will not mislead anyone, nor atone for the wrong this day done. . . ."

However, it was his dissent in the CIVIL RIGHTS CASES (1883) that Harlan considered as his most notable. There the majority ruled that Congress lacked power under the Fourteenth Amendment to protect blacks against private discrimination; Harlan, in contrast, argued that Congress could prohibit discrimination "by individuals or CORPORATIONS exercising public functions or authority, against any citizen because of his race or previous condition of servitude."

In these and other cases involving racial discrimination, Harlan demonstrated his belief that the Thirteenth Amendment meant more than the mere prohibition of one person's owning another as property. He urged that the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments could not have expected the very states that had held blacks in bondage willingly to protect their new civil rights. Harlan thus championed congressional authority to define and regulate the entire body of civil rights of citizens.

Although Justice Harlan's dissents in racial segregation cases have received widespread attention, some of the most critical questions presented to the Court during his tenure centered on what later came to be termed the INCORPORATION DOCTRINE. Harlan joined the Court after a pattern of decisions had been set. Alone, except for Field, among Justices of his time, Harlan viewed the due process clause of the Fourteenth Amendment as encompassing at least the first eight amendments of the Bill of Rights (for example, HURTADO V. CALIFORNIA, 1884), a stand for which he was still severely castigated more than sixty years later by Justice FELIX FRANKFURTER, in *Adamson v. California* (1947). The process of "selective incorporation" of Bill of Rights guarantees, which was nearly complete by the end of the Warren Court, vindicated Justice Harlan's position in practice, if not in theory.

Interestingly, the emphasis accorded Harlan's famous dissents in civil rights cases concerning life and liberty interests resulted in a widespread neglect of his staunch defense of property rights. In CONTRACT CLAUSE cases involving states' attempts either to void or alter their obligations to bondholders, or to amend corporate charters without express reservation of the right to do so, Harlan strongly asserted the contractual rights of the individual. Under the equal protection clause Harlan voted to strike down state laws that imposed special contractual duties on corporations without imposing similar obligations on individuals.

More significant, Harlan wrote the opinion in Chicago, *Burlington Quincy Railroad Co. v. Chicago* (1898), frequently cited as the first "incorporation" of a Bill of Rights provision, the Fifth Amendment's just compensation clause, into the Fourteenth Amendment's due process clause. The famous rate case of SMYTH V. AMES (1898) provided an indication of how far Harlan would go in striking down, under SUBSTANTIVE DUE PROCESS principles, an exercise of state police power. Speaking for the Court, he voided a Nebraska statute that pegged intrastate freight rates, on the grounds that the rates were so low as to deprive railroads of property without due process of law. A public utility, asserted Harlan, has a judicially enforceable constitutional right to a "reasonable return" upon the "fair value" of its operating assets. (See FAIR RETURN ON FAIR VALUE.)

Harlan's constitutional doctrines evoked diverse reactions from contemporaries and later generations: patronization, neglect, disdain, and praise. His colleague and friend, Justice DAVID J. BREWER, described Harlan as a simple man who "retired at eight, with one hand on the Constitution and the other on the Bible, safe and happy in perfect faith in justice and righteousness." Justice OLIVER WENDELL HOLMES patronized him in private as "old Harlan . . . the last of the tobacco-spitting judges." Contemporaneous observers of the Court viewed Harlan as a militant dissenter who was inflexible on civil rights.

How could Harlan's contemporaries and historians in the first half of the twentieth century have held him in such low esteem when the prophetic nature of his many dissents appears so obvious today? Part of the answer is that traditional and revisionist interpreters of Justice Harlan have employed widely different analytical perspectives. Viewed narrowly in comparison with his contemporaries, Harlan was simply an "eccentric exception" on the Court. Many of his most famous dissents were solos. His constitutional doctrines were often "out of tune with the times."

Harlan's eccentricity, however, was principled. In a letter of 1870 Harlan described his conception of the proper

role of a Justice as that of "an independent man, with an opportunity to make a *record* that will be remembered long after he is gone." Throughout his tenure on the Court Harlan was constantly concerned with broad questions of the public interest; consequently his opinions often contained extraneous matter, referring to circumstances with no direct bearing on the case at hand.

When the Court in POLLOCK V. FARMERS' LOAN & TRUST COMPANY (1895) decided that a tax on the income from land and personal property constituted DIRECT TAXATION and thereby held unconstitutional the recently enacted Federal Income Tax Act, Harlan vehemently dissented. He correctly warned that the Court's decision would make a constitutional amendment necessary for the imposition of the income tax. Harlan's contemporaries, however, saw his denunciation of judicial legislation and his appeals to practical considerations as ignorance of the principles of legal argumentation.

Recent admirers have perhaps too strongly emphasized Harlan's opinion on civil rights and CIVIL LIBERTIES, recasting him as a Jeffersonian Democrat. Although he strongly defended the Bill of Rights against STATE ACTION and private action clothed in public functions, Harlan viewed himself as a staunch adherent to the views of John Marshall and rejected THOMAS JEFFERSON's states' rights views. Moreover, Harlan was one of the most vigorous defenders of individual property rights ever to sit on the Court, as his opinion in *Adair v. United States* (1908) illustrated. His STRICT CONSTRUCTION of the contract and just compensation clauses and his adherence to substantive property protections under the due process clause have been soundly rejected by subsequent Courts.

The composite figure emerging from history is that of a Southern gentlemen of the nineteenth century—absolute confidence in the correctness of his own views; a firm belief that human beings could clearly discern between right and wrong; and an inability to understand, once he had made this distinction, how any reasonable man could disagree with him. An ardent disciple of Chief Justice Marshall's views of the proper judicial role and the nature of the federal system, Harlan was an egalitarian when confronted with questions of civil rights.

But today's distinction between property and liberty interests, with enhanced judicial solicitude for the latter, found no place in Harlan's constitutional philosophy. This antebellum slaveholder applied substantive due process equally to liberty and property interests.

Although Harlan's legacy thus contains elements out of tune with contemporary constitutional fashion, many of his dissents presaged what our nation would become in the second half of the twentieth century. Succeeding generations owe a great debt to this solitary dissenter. Because his philosophy contained a touch of immortality, he will be numbered among the great Justices of the Supreme Court (and he was so voted as one of but twelve "greats" in a 1970 study).

HENRY J. ABRHAM
(1986)

Bibliography

ABRAHAM, HENRY J. 1955 John Marshall Harlan: A Justice Neglected. *Virginia Law Review* 41:871–891.

CLARK, FLOYD B. 1915 *The Constitutional Doctrines of John Marshall Harlan.* Baltimore: Johns Hopkins University Press.

FRIEDMAN, LEON and ISRAEL, FRED L. 1969 Pages 1281–1295 in *The Justices of the United States Supreme Court, 1789–1969.* New York: Chelsea House.

WATT, RICHARD F. and ORLIKOFF, RICHARD M. 1953 The Coming Vindication of Mr. Justice Harlan. *Illinois Law Journal* 44: 13–40.

WESTIN, ALAN F. 1958 The First Justice Harlan: A Self-Portrait from his Private Papers. *Kentucky Law Journal* 46:321–357.

WHITE, G. EDWARD 1975 John Marshall Harlan I: The Precursor. *American Journal of Legal History* 19:1–21.

## HARLAN, JOHN MARSHALL
(1899–1971)

John Marshall Harlan, grandson of the Justice of the same name, served as Associate Justice of the United States Supreme Court from 1955 to 1971. Educated principally at Princeton and Oxford, he enjoyed a highly successful career as a New York trial lawyer, with intervals for military service and in various public positions. Immediately prior to his appointment to the Supreme Court he served briefly on the United States Court of Appeals for the Second Circuit. His work on the Supreme Court was marked by rigorous intellectual honesty, unflagging industry, and an uncommon dedication to judicial craftsmanship. No Justice sought more earnestly to evaluate fairly every relevant fact and authority, and none labored more carefully to decide, not policies or causes, but actual and concrete cases. In the "measured" assessment of Judge Henry Friendly, no other Justice has "so consistently maintained a high quality of performance" or has enjoyed "so nearly uniform respect."

Influenced in his first years on the Court by FELIX FRANKFURTER, Harlan ultimately developed a constitutional philosophy distinctly his own. He combined dignity with an attractive modesty, personal qualities that were reflected in his conception of the judicial function. In REYNOLDS V. SIMS (1964) he emphasized that the Constitution required a "diffusion of governmental authority" within which the Court was assigned a "high" but "limited" function. Rigidly nonpolitical after his appointment to the bench, he believed that the Court could effectively per-

form its "limited" constitutional role only by studiously respecting the powers variously entrusted to the states, Congress, or the federal executive. He denied that courts are entitled to promote or compel reform whenever others fail to act, and warned that judges should not seek solutions to every social ill in the Constitution.

More than any Justice in recent years, Harlan regarded FEDERALISM as an important limitation upon the Court's authority. He believed, with Justice LOUIS D. BRANDEIS, that the states could serve as laboratories for the solution of social and political issues, and he willingly afforded them freedom to seek such solutions. In FAY V. NOIA (1963), MIRANDA V. ARIZONA (1966), and other cases he resisted the Court's imposition of federal standards upon the conduct of state criminal proceedings, arguing in *Fay* that the federal system would "exist in substance as well as form" only if the states were permitted, within the limits of FUNDAMENTAL FAIRNESS, to devise their own procedures. In HARPER V. VIRGINIA BOARD OF ELECTIONS (1966) he dissented from the Court's invalidation of a state's use of a POLL TAX as a condition on voting, despite his obvious doubts as to the law's wisdom, in part because the issue should be left for decision by the state itself. In ROTH V. UNITED STATES (1957) he urged that the states be permitted greater leeway than the federal government to control "borderline" PORNOGRAPHY because the risks of nationwide censorship were "far greater." Because the Court could not devise clear rules for regulating OBSCENITY, he saw "no overwhelming danger" if the states were given room to seek their own answers.

Harlan's federalism did not, however, prevent him in appropriate cases from denying the constitutionality of state legislation. In *Poe v. Ullman* (1961) he wrote one of the most important of his opinions, dissenting from the Court's refusal to decide a challenge to a Connecticut statute prohibiting the use of contraceptive devices. Observing that the statute intruded upon "the most intimate details of the marital relation" in order to enforce "a moral judgment," Harlan declared marital privacy to be a "most fundamental" right, any invasion of which requires STRICT SCRUTINY. He defined DUE PROCESS in terms of evolving national traditions and the balance between "liberty and the demands of organized society," and concluded on that basis that the statute was unconstitutional. Four years later, in GRISWOLD V. CONNECTICUT (1965), a majority of the Court reached the same result.

One of the issues most revealing of Harlan's constitutional outlook was the INCORPORATION DOCTRINE, by which large portions of the BILL OF RIGHTS have been held applicable to the states through "incorporation" in the FOURTEENTH AMENDMENT. Harlan vigorously resisted both the "total" incorporation theory advanced by Justice HUGO L. BLACK and the "selective" version adopted by other Justices. In POINTER V. TEXAS (1965), DUNCAN V. LOUISIANA (1968), and other cases he argued that the doctrine lacks historical basis and creates a "constitutional straitjacket" that risks preventing the states from responding to the nation's "increasing experience and evolving conscience." He preferred to test state LEGISLATION and procedures by a standard of fundamental fairness derived from the due process clause of the Fourteenth Amendment, whose generality affords room for future constitutional development. Indeed, in *Griswold* he expressed the fear that the incorporation doctrine might "restrict" the reach of the due process clause, limiting the Court's review of future state actions.

Due process formed the heart of Harlan's constitutional outlook, and two cases illustrate both the breadth of his conception and the restraint with which he employed it. In BODDIE V. CONNECTICUT (1971) Harlan held for the Court that filing and service fees imposed by the state upon persons seeking divorce were denials of due process when applied to INDIGENTS. Carefully avoiding reliance upon the EQUAL PROTECTION clause, whose scope and implications he evidently distrusted, he held that as a matter of fundamental fairness a state could not preempt the right to dissolve marriages unless all its citizens were afforded access to the mechanism prescribed for that purpose. The opinion provoked Justice Black in dissent to reiterate that Harlan's conception of due process permitted judges to determine constitutionality merely by their "sense of fairness." Quoting *Williams v. North Carolina* (1945), Black added that due process afforded judges "a blank sheet of paper" on which to order constitutional change.

The deaths of the two close friends prevented Harlan and Black from continuing their debate after *Boddie*, but part of Harlan's response may be inferred from IN RE GAULT (1967), in which the Court first addressed the constitutional issues presented by state systems of juvenile justice. Such systems often imposed penalties similar to those in criminal cases without the accompanying procedural protections. Harlan's concurring opinion emphasized the novelty of the questions, and urged caution in imposing detailed constitutional requirements. He feared that the hasty adoption of rigid standards might "hamper enlightened development," and found room in the spacious contours of due process to impose only selected procedural requirements. Harlan's caution illustrated his conviction, previously expressed in *Poe v. Ullman*, that the discretion afforded judges by the due process clause must be exercised with "judgment and restraint."

Harlan also made significant contributions to the development of FIRST AMENDMENT principles. In COHEN V. CALIFORNIA (1971) he wrote the opinion for a divided Court overturning the conviction of a man wearing a

jacket bearing an antidraft expletive in the halls of a Los Angeles courthouse. Although the protest's form was "distasteful," Harlan explained that "fundamental societal values" are implicated even in "crude" exercises of First Amendment rights. In GINZBURG V. UNITED STATES (1966), he dissented from the affirmance of a federal obscenity conviction in which the Court held that evidence of "commercial exploitation" could tip the balance toward a determination that a publication was obscene. Harlan responded that the Court, by "judicial improvisation," had created a new and impermissibly vague statutory standard, under which "pandering" could justify the censorship of otherwise protected materials. In contrast to his less rigid attitude toward state obscenity prosecutions, he argued that the federal government should be permitted to ban from the mails only hard-core pornography.

The concern for privacy interests expressed in *Poe v. Ullman* was also reflected in Harlan's First Amendment opinions. In NAACP V. ALABAMA (1958) he wrote the Court's opinion overturning an order holding the NAACP in civil contempt for failing to reveal the names of its members and agents in Alabama. He found that such disclosures had previously resulted in threats and reprisals, and explained the "vital relationship" between organizational privacy and freedom of association. Because the contempt order would adversely affect the NAACP's ability to foster beliefs it was constitutionally entitled to advocate, the association's privacy interests overrode the state's regulatory goals. In *Time, Inc. v. Hill* (1967) he argued that where private individuals had by misadventure become involuntary subjects of publicity, the state could constitutionally require the press to conduct a reasonable investigation and to limit itself to fair comment upon the facts. The denial of such state authority, he contended, would create a "severe risk of irremediable harm" to those who had not sought public exposure and were "powerless to protect themselves against it."

Harlan's contributions to constitutional law are not fully measured by the opinions he wrote or conclusions he reached. Time and again, his prodding compelled the Court to revise or reconsider its first assessment of a fact or an issue, drawing from others a higher quality of performance than they might otherwise have achieved. No Justice labored more earnestly to act with care and fairness, and none adhered to a more rigorous standard of judicial integrity. His reassuring example of craftsmanship and rectitude meant much in a period of rapid constitutional change, when the Court and its members were frequently the subject of hostility or question.

CHARLES LISTER
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Bibliography

DORSEN, NORMAN 1969 John Marshall Harlan. Pages 2803–2820 in Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court 1789–1969.* New York: Chelsea House.

FRIENDLY, HENRY J. 1971 Mr. Justice Harlan, as Seen by a Friend and Judge of an Inferior Court. *Harvard Law Review* 85:382–389.

SHAPIRO, DAVID L. 1969 *The Evolution of a Judicial Philosophy: Selected Opinions and Papers of Justice John M. Harlan.* Cambridge, Mass.: Harvard University Press.

## *HARLOW v. FITZGERALD*

See: *Nixon v. Fitzgerald*

## HARMLESS ERROR

Not all denials of a defendant's federal constitutional rights compel reversal of a conviction. The Supreme Court announced in *Chapman v. California* (1967) as a matter of federal constitutional law that, in criminal proceedings, if the beneficiary of the error can prove beyond a REASONABLE DOUBT that the error in no way contributed to the result, the case need not be reversed. This standard applies to state as well as federal proceedings and state rules requiring only a lesser showing of the harmlessness of error are not controlling when federal constitutional error has been shown.

Although the Supreme Court's standard is stricter than that of many state courts (which may adhere to a lesser standard than reasonable doubt or even in some cases shift the BURDEN OF PROOF to the victim of the error), it nevertheless falls short of a per se rule requiring automatic reversal for all violations of federal constitutional rights. Thus, for example, where EVIDENCE obtained through an UNREASONABLE SEARCH in violation of the FOURTH AMENDMENT is improperly admitted into a trial, reversal of a guilty verdict is not always required. The Supreme Court has stated that certain kinds of violations do, indeed, require automatic reversal—such as coerced confessions or unconstitutionally obtained guilty pleas—but these kinds of violation are few in number.

*Chapman* itself concerned a prosecutor's comments to the jury upon the defendants' failure to testify, in violation of defendants' Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION, and cases involving harmless error doctrine may arise from any part of the Constitution. The bulk of the decided cases, though, have involved application of the EXCLUSIONARY RULE to evidence unconstitutionally seized.

Where illegally obtained evidence is the sole or primary basis for a conviction, of course, the conviction must be reversed. On the other hand, where independent, admissible evidence of defendant's guilt is overwhelming, or illegally obtained evidence is noninflammatory and merely

cumulative, reversal is not required. But such a finding will often involve difficult determinations. First, which evidence is actually admissible, and which is a fruit of the federal constitutional error? Second, since the prosecutor in introducing the tainted evidence has represented that it tended to prove guilt, the Supreme Court may look carefully at later claims that the evidence was in fact harmless.

The Court has not yet definitively settled the issue of whether a federal constitutional error can be cured through the trial judge's instructions to the jury. *Chapman* suggests that such instructions may render the error harmless, if they are shown beyond a reasonable doubt to have prevented the error from affecting the jury's verdict. But none of the cases decided by the Court since *Chapman* has found this standard to have been met.

JOHN KAPLAN
(1986)

Bibliography

SALZBURG, STEPHEN A. 1984 *American Criminal Procedure*, 2nd ed. St. Paul, Minn.: West Publishing Co.

## HARMLESS ERROR
(Update)

When an appellate court finds that a criminal defendant's constitutional rights were violated at trial, it must then decide whether to reverse the defendant's conviction. In a case where the appellate court has little reason to believe that the constitutional error contributed to the jury's decision to convict, the court will conclude that the constitutional error was "harmless" and will affirm the defendant's conviction.

Often the appellate court's inquiry will focus on whether the government offered the jury overwhelming evidence of the defendant's guilt; whether the constitutional violation was likely to inflame or prejudice the jury; whether erroneously admitted evidence was merely duplicative of other properly admitted evidence; and whether the trial judge was able to dissipate the likely effect of the error on the jury through curative instructions.

A tiny category of constitutional errors are not subject to harmless error analysis but instead trigger automatic reversal. These include the complete denial of the Sixth Amendment RIGHT TO COUNSEL; the denial of the defendant's right to represent himself at trial; the denial of a PUBLIC TRIAL; the giving of an inaccurate instruction to the jury on the standard of proof beyond a reasonable doubt; the denial of an impartial factfinder; and the racially discriminatory selection of jurors. In *Arizona v. Fulminante* (1991), the Supreme Court explained that these constitutional violations are structural errors, basic defects in the trial framework which can be presumed to make the trial unfair. The Court distinguished this small group of structural errors from what it called "trial errors," the vast number of other constitutional violations that can occur during the presentation of the case to the jury. Because an appellate court can assess the likely impact of trial errors on the jury's assessment of the case, automatic reversal is not necessary, and harmless error analysis will apply.

ERIC L. MULLER
(2000)

Bibliography

EDWARDS, HARRY T. 1995 To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated? *New York University Law Review* 70:1167–1228.

TRAYNOR, ROGER J. 1970 *The Riddle of Harmless Error.* Columbus: Ohio State University Press.

## *HARPER v. VIRGINIA BOARD OF ELECTIONS*
383 U.S. 663 (1966)

*Harper* epitomizes the WARREN COURT's expansion of the reach of the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT. Virginia levied an annual $1.50 POLL TAX on residents over twenty-one, and conditioned voter registration on payment of accrued poll taxes. The Supreme Court, 6–3, overruled BREEDLOVE V. SUTTLES (1937), holding that the condition on registration denied the equal protection of the laws.

The *Harper* opinion, by Justice WILLIAM O. DOUGLAS, played an important part in crystallizing equal protection DOCTRINE by justifying heightened levels of judicial scrutiny. The Court did not quite hold that wealth or indigency was a SUSPECT CLASSIFICATION, saying only that "lines drawn on the basis of wealth of property, like those of race, are traditionally disfavored." It did say, following REYNOLDS V. SIMS (1964), that voting was a FUNDAMENTAL INTEREST, requiring STRICT SCRUTINY of its restriction. The poll tax by itself might be constitutionally unobjectionable; wealth as a condition on voting, however, not only failed the test of strict scrutiny; it was a "capricious or irrelevant factor."

For Justice HUGO L. BLACK, dissenting, *Harper* represented a relapse into judicial subjectivism through a variation on the "natural-law-due-process" formula he had decried in *Adamson v. California* (1947). The Virginia scheme was not arbitrary; it might increase revenues or ensure an interested electorate. The Court should not substitute its judgment for the Virginia legislature's. Justice JOHN MARSHALL HARLAN also dissented, joined by Justice POTTER STEWART. Harlan, who shared Black's views, added that it was arguable that "people with some property have a deeper stake in community affairs, and are consequently

more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means." That this belief was not his own did not matter; it was arguable, and that was all the RATIONAL BASIS standard demanded.

Commentators saw in *Harper* and other contemporary decisions a major shift away from the tradition of minimal judicial scrutiny of laws challenged under the equal protection clause. Invasions of interests of great importance, or discrimination against disadvantaged groups, appeared to call for judicial scrutiny more demanding than that required by the relaxed rational basis standard. Soon the Court found a formula for two levels of review: rational basis for most "social and economic" legislation, and strict scrutiny for laws invading fundamental interests or employing suspect classifications.

The Court has not pursued *Harper's* suggestion that WEALTH DISCRIMINATION is suspect. VOTING RIGHTS, however, are firmly established as interests whose invasion demands strict scrutiny. Implicitly, as in cases involving ALIENS or ILLEGITIMACY, and explicitly, as in cases on SEX DISCRIMINATION, the Court has transformed its two levels of judicial scrutiny into a sliding-scale approach that is interest balancing by another name: the more important the interest invaded, or the more "suspect" the classification, the more the state must justify its legislation. In broad outline this development was portended in *Harper*, which exemplified not only Warren Court egalitarianism but also Justice Douglas's doctrinal leadership.

KENNETH L. KARST
(1986)

Bibliography

KARST, KENNETH L. 1969 Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula." *UCLA Law Review* 16:716–750.

## *HARRIS, UNITED STATES v.*
106 U.S. 629 (1883)

*Harris*, like UNITED STATES V. CRUIKSHANK (1876), involved a federal prosecution under a general conspiracy statute, and like *Cruikshank* it was a victory for the Ku Klux Klan. The Supreme Court had gutted the *Cruikshank* statute but allowed it to survive; the *Harris* statute, though similar, did not survive. Section two of the FORCE ACT OF 1871 made it a federal crime, punishable by fine and up to six years in prison, for two or more persons to conspire for the purpose of depriving anyone of the EQUAL PROTECTION OF THE LAWS or hindering lawful authorities from securing equal protection for others. The United States prosecuted Harris who, at the head of an armed lynch mob, had broken into a Tennessee jail and captured four black prisoners, despite the efforts of the sheriff to protect them. The mob had beaten the four, killing one. Could the United States try them under the act of 1871? With Justice JOHN MARSHALL HARLAN dissenting silently, the Court held, in an opinion by Justice WILLIAM WOODS, that the act of Congress was unconstitutional. Woods declared that the FOURTEENTH AMENDMENT merely authorized Congress to take remedial measures against STATE ACTION that violated the amendment; it applied only to acts of the states, not to acts of private individuals. The THIRTEENTH AMENDMENT did not apply to the acts of private individuals, but this statute could apply to conspiracies by whites against whites, a subject having nothing to do with SLAVERY. The statute, therefore, had no constitutional basis.

LEONARD W. LEVY
(1986)

## *HARRIS v. MCRAE*
448 U.S. 297 (1980)

A 5–4 Supreme Court here sustained a series of restrictions on congressional appropriations for the Medicaid program. The restrictions went beyond the law sustained in MAHER V. ROE (1977) by refusing funding even for medically necessary abortions.

Justice POTTER STEWART's opinion for the Court relied heavily on *Maher* in rejecting claims based on the SUBSTANTIVE DUE PROCESS right of PRIVACY and on the EQUAL PROTECTION clause. A woman's right to be free from governmental interference with her decision to have an abortion did not imply a right to have government subsidize that decision. Equal protection demanded only a RATIONAL BASIS for the law's discrimination between therapeutic abortions and other medical necessities, and such a basis was found in the protection of potential life. Justice Stewart also rejected a claim that the law amounted to an ESTABLISHMENT OF RELIGION. Opposition to abortion might be a tenet of some religions, but the establishment clause did not forbid governmental action merely because it coincided with religious views.

The *Maher* dissenters were joined in *McRae* by Justice JOHN PAUL STEVENS, who had joined the *Maher* majority. The cases were different, he argued; here an indigent woman was denied a medically necessary abortion for lack of funds, at the same time that the government was funding other medically necessary services. ROE V. WADE (1973), allowing a state to forbid abortions in the later stages of pregnancy, had excepted abortions necessary to preserve pregnant women's lives or health. The government could not create exclusions from an aid program, Justice Stevens argued, solely to promote a governmental interest (pres-

ervation of potential life) that was "constitutionally subordinate to the individual interest that the entire program was designed to protect."

KENNETH L. KARST
(1986)

(SEE ALSO: *Abortion and the Constitution; Reproductive Autonomy.*)

## *HARRIS v. NEW YORK*
401 U.S. 222 (1971)

This case is significant as a limitation on MIRANDA V. ARIZONA (1966). Harris sold narcotics to undercover police officers. The police failed to inform him, after his arrest, that he had a RIGHT TO COUNSEL during a custodial POLICE INTERROGATION and they ignored his request for an attorney. Harris eventually admitted that he had acted as an intermediary, buying heroin for the undercover agent, but he denied selling it to the agent. During the trial Harris contradicted the statement that he had made during interrogation; the judge overruled defense objections that the custodial statement was inadmissible under the MIRANDA RULES because it was made involuntarily and in violation of his rights. The judge instructed the jury that although the statement was unavailable as EVIDENCE OF GUILT, they might consider it in assessing Harris's credibility as a witness.

The Supreme Court, 5–4, upheld Harris's conviction. *Miranda* dissenters JOHN MARSHALL HARLAN, BYRON R. WHITE, and POTTER J. STEWART along with Justice HARRY A. BLACKMUN joined in Chief Justice WARREN E. BURGER'S opinion holding that testimony secured without the necessary warnings could nevertheless be used to impeach contradictory testimony at trial. Burger flatly asserted that Harris made "no claim that the unwarned statements were coerced or involuntary"—a statement clearly controverted by the record. Burger also dismissed, as OBITER DICTUM, the assertion in *Miranda* that all such statements were inadmissible for any purpose. The majority relied heavily on *Walder v. United States* (1954), in which evidence secured in an UNREASONABLE SEARCH was admitted to impeach testimony although the EXCLUSIONARY RULE would have prohibited its use as evidence of guilt.

Justice WILLIAM J. BRENNAN, dissenting, said that *Miranda* prohibited the use of any statements obtained in violation of its guarantees and denied the contention that that was obiter dictum. Brennan also distinguished *Walder:* the statement there had no connection to the crime with which the defendant had been charged; in *Harris* the defendant's statements related directly to the crime. Moreover, the evidence there could have been used to assess credibility; here the jury could have misused it as evidence of guilt because the statement provided information about the crime charged.

DAVID GORDON
(1986)

Bibliography

LEVY, LEONARD W. 1974 *Against the Law: The Nixon Court and Criminal Justice.* New York: Harper & Row.

## *HARRIS v. UNITED STATES*

See: Search Incident to Arrest

## HARRISON, BENJAMIN
(1833–1901)

One of a series of "caretaker" Presidents in the last quarter of the nineteenth century, Benjamin Harrison exercised only minimal influence on constitutional issues during his administration from 1889 to 1893. Though Harrison favored civil service reform and a reduction in the labor workday, and opposed southern disenfranchisement of blacks, his philosophy of the executive function limited his actions. Harrison believed his duty lay solely in enforcing the public will, as expressed by Congress.

Although he had called for federal antitrust action in his first message to Congress, claiming that trusts "are dangerous conspiracies against the public good, and should be made the subject of prohibitory and even penal legislation," Harrison's only contribution to the SHERMAN ANTITRUST ACT, passed during his term, was his signature. His administration, moreover, was rather indifferent to the act; of seven cases instituted by the government, only two resulted in a government victory and none was pressed to the Supreme Court. Harrison appointed four Justices to the Court: DAVID J. BREWER, HENRY B. BROWN, GEORGE SHIRAS, and HOWELL E. JACKSON, all conservatives. These appointments indicated Harrison's desire to secure property interests and vested rights against the assaults of reformers.

DAVID GORDON
(1986)

Bibliography

VOLWILER, ALBERT T. 1932 Harrison, Benjamin. In *Dictionary of American Biography,* Vol. 8, pp. 331–335. New York: Scribner's.

## HARRISON ACT
38 Stat. 785 (1914)

Congress passed this act at the behest of the Treasury Department to implement the 1912 Hague Convention banning narcotics trafficking. As with other legislation of the period, the act reflected a belief in the necessity of federal regulation to curb social evils. Although most such acts relied on the COMMERCE CLAUSE, Congress here used the TAXING POWER to establish a complex network of national drug control.

The act required all manufacturers and dealers in certain narcotics to register with the government and to pay a $1 annual license tax. The act also mandated the use of federal forms to complete transactions and ordered these forms kept for two years, accessible to federal inspection. Sale or shipment of specified drugs in INTERSTATE COMMERCE—even their possession by an unregistered person—was illegal. The act exempted physicians and other professionals from filing the federal forms but required them to maintain separate records. A 5–4 Supreme Court sustained the act in UNITED STATES V. DOREMUS (1919). Justice WILLIAM R. DAY asserted Congress's complete discretion to levy taxes, subject merely to the constitutional requirement of geographical uniformity.

DAVID GORDON
(1986)

## HART, HENRY M., JR.
(1904–1969)

At Harvard Law School, Henry Hart was a disciple of FELIX FRANKFURTER. After a clerkship with Justice LOUIS D. BRANDEIS, Hart returned to Harvard as a member of the law faculty, where he remained—with an interruption during WORLD WAR II—all his life.

Hart was one of a handful of the most authoritative academic lawyers of his time. He was, above all, a teacher; his most important scholarship is embodied in two books designed for law school courses. In *The Federal Courts and the Federal System* (1953), co-authored with Herbert Wechsler, Hart introduced students to a conception of the functions of the federal judiciary that still dominates the thinking of courts and commentators. In *The Legal Process* (1958), co-authored with Albert Sacks, Hart expounded a view of the role of courts in lawmaking focused on "reasoned elaboration" of principle. For a generation that view was so influential that today's critics speak of a "legal process school" as the focus for their attack.

For Hart, reason was "the life of the law." His intellectual integrity was legendary. Nor was the integrity merely intellectual. He was a decent man, as generous and humane in personal dealings as he was formidable in print. During his last illness, he continued to meet his classes until he was physically unable to get to the classroom. To the end, he taught everyone around him.

KENNETH L. KARST
(1986)

Bibliography

HART, HENRY M., JR. 1971 *Southern California Law Review* 44: i-x, 305–498.

## HARTFORD CONVENTION
(December 15, 1814–January 5, 1815)

The Hartford Convention, called by the Federalists of the Massachusetts legislature, consisted of delegates chosen by the legislatures of Massachusetts, Connecticut, and Rhode Island. The delegates sought to promote the interests and policies of the New England Federalists, who vehemently opposed the War of 1812. Although secessionist sentiment flourished among extremists, moderates—those who opposed a separate New England confederacy and civil war—controlled the convention. The fact that it was held showed a respect for the Constitution, however perverse. Despite the convention's endorsement of theories of state NULLIFICATION and INTERPOSITION similar to those of the VIRGINIA AND KENTUCKY RESOLUTIONS of 1798–1799, the delegates unanimously advocated amendments to the Constitution as a means of curtailing federal powers. After a manifesto assailing the war, American foreign policy, national control of state militias, and the admission of western states, the convention proposed that congressional REPRESENTATION and federal taxation be based on the number of free persons only; embargoes be restricted to sixty days; Congress be prevented from declaring war, restricting foreign trade, or admitting new states except by a two-thirds majority; federal offices be restricted to native-born citizens; and the President be restricted to one term.

The convention had the misfortune of meeting while events were making it irrelevant. As three delegates left for Washington to present its proposals for constitutional amendments, the news arrived of ANDREW JACKSON's victory at New Orleans, and when the delegates arrived in Washington, the town celebrated peace reports from Ghent. President JAMES MADISON excoriated the convention as a "rebel Parliament" that had engaged in a treasonable conspiracy, and the public ridiculed it. It accomplished nothing, left a bitter heritage, and enhanced the respectability of the doctrine of interposition.

LEONARD W. LEVY
(1986)

Bibliography

BANNER, JAMES M., JR. 1970 *To the Hartford Convention.* New York: Knopf.

## HASTIE, WILLIAM HENRY
(1904–1976)

William Henry Hastie was the first black federal judge. He studied law at Harvard Law School, where he was elected to the *Harvard Law Review.* After graduation in 1930 he pursued a career that included service to the national government, the Howard Law School, and the NAACP.

Hastie in 1939 took the chair of that CIVIL RIGHTS organization's National Legal Committee, a post he used to influence the course of civil rights litigation. He argued successfully with THURGOOD MARSHALL in SMITH V. ALLWRIGHT (1941) that a Texas all-white PRIMARY ELECTION law violated the Fifteenth Amendment. He also joined with Marshall five years later in arguing MORGAN V. VIRGINIA. They persuaded the Court that a Virginia law imposing SEGREGATION on interstate buses unconstitutionally burdened the uniform flow of commerce. *Smith* and *Morgan* were critical victories in the NAACP's attack on the South's dual system of race relations: the former leveled a barrier to black voting; the latter marked the first victory in a transportation case.

Following appointment as judge of the Third Circuit in 1949, Hastie had few judicial opportunities to advance the cause of civil rights. Scarcely two dozen of his 486 opinions dealt with civil rights, and these reveal a commitment to constitutional law rooted in principle and judicial restraint. In *Lynch v. Torquato* (1965) Hastie declined to expand the STATE ACTION theories he had advanced in *Smith.* He held that the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT did not embrace the management of the internal affairs of the Democratic party. In an article he spurned AFFIRMATIVE ACTION programs that used "race alone as a determinant of eligibility or qualification."

William Hastie stood in the front rank of civil rights leaders. Notably, a strong sense of Madisonian constitutionalism balanced his commitment to legal activism.

KERMIT L. HALL
(1986)

Bibliography

RUSCH, JONATHON J. 1978 William H. Hastie and the Vindication of Civil Rights. *Howard Law Journal* 21:749–820.

## HATCH ACT
53 Stat. 1147 (1939); 54 Stat. 767 (1940)

The Hatch Act prohibits most federal employees from engaging in any of a broad range of partisan political activities. It was adopted in 1939, but its antecedents go back well into the nineteenth century. The act has twice been challenged on FIRST AMENDMENT, VAGUENESS, and OVERBREADTH grounds, and has twice been upheld: *Civil Service Commission v. National Association of Letter Carriers* (1973) and *United Public Workers v. Mitchell* (1947). Similar state legislation was upheld in BROADRICK V. OKLAHOMA (1973).

Although public employee organizations are among the most formidable lobbies in Congress and state legislatures, laws like the Hatch Act severely restrict the individual employee's political activities. These restrictions have been justified as assuring impartiality in public service, preventing the incumbent party from constructing a political machine, and preventing coercion of public employees.

The Hatch Act cases contrast sharply with later BURGER COURT decisions such as BUCKLEY V. VALEO (1976), protecting unlimited campaign spending, and FIRST NATIONAL BANK OF BOSTON V. BELLOTTI (1978), protecting corporate spending in ballot measure campaigns.

These decisions, in combination with the Hatch Act cases, suggest that, in the Burger Court's view, no liberty may be sacrificed to prevent unfair grasping of power by the use of concentrated wealth, but a great deal of liberty may be sacrificed to prevent unfair grasping of power by a mass-based device such as political patronage.

DANIEL H. LOWENSTEIN
(1986)

Bibliography

COMMISSION ON POLITICAL ACTIVITY OF GOVERNMENT PERSONNEL 1968 *A Commission Report.*

ROSE, HENRY 1962 A Critical Look at the Hatch Act. *Harvard Law Review* 75:510–526.

## HATE CRIMES

A hate crime is a crime committed as an act of prejudice against the person or PROPERTY of a victim as a result of that victim's real or perceived membership in a particular group. Although "hate crime" is the popular term used in connection with bias-motivated violence, "bias crime" is a more accurate label. Not every crime that is motivated by hatred for the victim is a bias crime. Hate- based violence is a bias crime only when this hatred is connected with antipathy for a group, such as a racial or ethnic group, or for an individual because of membership in that group. Some statutes define this bias in terms of actual animus. Others look to discriminatory selection of the victim on the basis of membership in the group. Bias crimes can arise out of mixed motivation where the perpetrator of a

violent crime is motivated to commit the crime by a number of different factors, bias among them. To constitute a bias crime, the bias motivation must be a substantial motivation for the perpetrator's criminal conduct. The requirement can be put as a question: but for the ethnicity of the victim, would this crime have been committed?

Bias crime statutes in the United States encompass crimes that are motivated by the race, color, ethnicity, national origin, or religion of the victim. Many statutes reach SEXUAL ORIENTATION or gender as well, and some include other categories such as age or disability. Bias crime laws may either create a specific crime of bias- motivated violence or raise the penalty of a crime when it is committed with bias motivation.

The justification for bias crime laws turns primarily on the manner in which bias crimes differ from other crimes. Bias crimes cause greater harm than parallel crimes—those crimes that lack a prejudicial motivation but are otherwise identical to the bias crime. The harm is greater on three levels: harm to the individual victim, harm to victim's group or community, and harm to the society at large.

Bias crimes generally have a more harmful emotional and psychological impact on the individual victim. The victim of a bias crime is not attacked for a random reason (as is the person injured during a shooting spree in a public place), nor is he attacked for an impersonal reason (as is the victim of a mugging for money). He is attacked for a specific, personal reason, such as, for example, his race. Moreover, the bias crime victim cannot reasonably minimize the risks of future attacks, for he is unable to change the characteristic that made him a victim. The heightened sense of vulnerability caused by bias crimes is beyond that normally found in crime victims. Studies have suggested that the victims of bias crimes tend to experience psychological symptoms such as depression or withdrawal, as well as anxiety, feelings of helplessness, and a profound sense of isolation.

The impact of bias crimes reaches beyond the harm done to the immediate victim or victims of the criminal behavior. There is a more widespread impact on the target community—the community that shares the race, religion or ethnicity of the victim. Members of the target community of a bias crime may experience that crime in a manner that has no equivalent in the public response to a parallel crime. Not only does the reaction of the target community go beyond mere sympathy with the immediate bias crime victim, it exceeds empathy as well. Members of the target community of a bias crime perceive the crime as if it were an attack on themselves directly and individually.

Finally, the impact of bias crimes may spread beyond the immediate victims and the target community to the general society. This effect includes a large array of harms from the very concrete to the most abstract. On the most mundane level—but by no means least damaging—the isolation effects discussed above have a cumulative effect throughout a community. Bias crimes cause an even broader injury to the general community because they violate not only society's general concern for the security of its members and their property but also the shared values of equality among its citizens and harmony in a heterogeneous society. A bias crime is therefore a profound violation of the egalitarian ideal and the antidiscrimination principle that have become fundamental not only to the American legal system but to American culture as well.

The enhanced punishment of bias motivated violence raises two sets of constitutional questions. The first questions, which apply to bias crime laws generally, concern the FIRST AMENDMENT right of FREEDOM OF SPEECH. The second set of questions, which apply only to federal bias crime laws, concern questions of FEDERALISM and the constitutional authority for such LEGISLATION.

The free expression challenges to hate crime laws were the subject of a flurry of judicial activity bracketed by the Supreme Court decisions in R. A. V. V. CITY OF ST. PAUL (1992), which struck down a municipal cross-burning ordinance, and WISCONSIN V. MITCHELL (1993), which upheld a state law that provided for increased penalties for bias crimes. Among courts and scholars alike, three general positions have emerged concerning the consonance of bias crime laws with principles of free expression. One position argues that the enhanced punishment of bias-motivated crimes is an unconstitutional punishment of thought because the increased punishment is due solely to the defendant's expression of a conviction or viewpoint of which the community disapproves. A second position permits the enhanced punishment of bias crimes based on a view that bias motivations and hate speech are unprotected by the First Amendment. Ironically, these two opposing positions share a common premise: that proscription of bias crimes involves regulation of expression and is therefore either impermissible or requiring of justification.

The third position, which appears to be that of the Supreme Court, distinguishes between hate speech and bias crimes, protecting the former but permitting the enhanced punishment of the latter. This has been understood in two related ways. One approach is to distinguish between speech and conduct—the premise of the decision in *Wisconsin v. Mitchell.* An alternative approach focuses on the actor's state of mind, and distinguishes behavior that is intended to communicate from behavior that is intended to cause harm to a targeted victim. Each approach protects some measure of hate speech and allows for the enhanced punishment of bias crimes.

The federalism challenges to the constitutionality of a federal bias crime law arise from the fact that the vast

majority of bias crimes are state law crimes. The question of constitutional authority for a federal bias crime law is especially acute in the aftermath of UNITED STATES V. LÓPEZ (1995), in which the Court struck down the Federal Gun-Free School Zones Act, holding that, because the act neither regulated a commercial activity nor contained a requirement that the firearm possession be connected to INTERSTATE COMMERCE, it exceeded Congress's authority under the COMMERCE CLAUSE. It is partially for this reason that, at the time of this writing, there is no pure federal bias crimes statute. Nevertheless, bias motivation is an element of certain federal CIVIL RIGHTS crimes, and in 1994 Congress directed the U.S. Sentencing Commission to promulgate guidelines enhancing the penalties for any federal crimes in which there is racial, religious, or ethnic motivation. These statutes, however, cover only a small range of cases involving bias motivation.

The commerce clause, which has been used as constitutional authority for ANTIDISCRIMINATION LEGISLATION or for laws barring discrimination in PUBLIC ACCOMMODATIONS, housing, and EMPLOYMENT, is a potential source for constitutional authority for a federal bias crime law. The more promising source for such authority lies in the post–CIVIL WAR constitutional amendments. Congress has expressly relied, in part, on the FOURTEENTH AMENDMENT and the FIFTEENTH AMENDMENT as authority for the federalization of bias motivated deprivation of rights individuals hold under state law. Not every bias crime, however, deprives the victim of the ability to exercise some right under state law. It may be that the THIRTEENTH AMENDMENT provides broad constitutional authority for a federal bias crime law. In a series of cases— most notably JONES V. ALFRED H. MAYER CO. (1968), and RUNYON V. MCCRARY (1976)—the Supreme Court articulated a theory of the Thirteenth Amendment as a source of broad proscription of all BADGES OF SERVITUDE, empowering Congress to make any rational determination as to what conduct constitutes a badge or incident of SLAVERY and to ban it, whether from public or private sources. Moreover, the abolition of slavery in the Thirteenth Amendment, although immediately addressed to the enslavement of African Americans, has been understood to apply beyond the context of race to include religious and ethnic groups as well. As a matter of constitutional authority, Congress may enact a federal bias crime law so long as it is rational to determine that bias motivated violence is as much a "badge" or "incident" of slavery as is discrimination in contractual or property matters, a determination that would appear to have ample support.

FREDERICK M. LAWRENCE
(2000)

(SEE ALSO: *Hate Speech.*)

Bibliography

JACOBS, JAMES B. and POTTER, KIMBERLY 1998 *Hate Crimes: Criminal Law and Identity Politics.* New York: Oxford University Press.

KELLY, ROBERT J., ed. 1991 *Bias Crime: American Law Enforcement and Legal Responses.* Chicago: University of Illinois.

LAWRENCE, FREDERICK M. 1999 *Punishing Hate: Bias Crimes Under American Law.* Cambridge, Mass.: Harvard University Press.

LEVIN, JACK and MCDEVITT, JACK 1993 *Hate Crimes: The Rising Tide of Bigotry and Bloodshed.* New York: Plenum Press.

WANG, LU-IN 1997 *Hate Crimes Law.* St. Paul, Minn.: Clark, Boardman & Callaghan.

## HATE SPEECH

Hate speech is usually thought to include communications of animosity or disparagement of an individual or a group on account of a group characteristic such as race, color, national origin, sex, disability, religion, or SEXUAL ORIENTATION. Hate speech takes many forms. Examples include Ku Klux Klan cross-burnings directed at racial or religious minorities; obscene phone calls threatening violence against women; epithets shouted at gay marchers; published diatribes against marginalized racial or immigrant groups; defacement of places of worship; and harassment of an interracial couple because of race. Some would define hate speech even more broadly, to include an expression that race or another characteristic "marks a person as suspect in morals or ability." Such a definition would encompass communications as broad and diverse as stereotypical descriptions of other groups; descriptions of women as suited for domestic life but not leadership positions; abstract advocacy of SEGREGATION; "jokes" stereotyping minorities; or, in sum, any communication that tends toward the stigmatization or marginalization of any individual or group on account of one of the mentioned characteristics.

Although few FIRST AMENDMENT advocates would argue that hate speech is worthy in itself, many oppose government regulation. Their reasons range from the necessity of wide latitude for FREEDOM OF SPEECH in a democratic society, to preserving the MARKETPLACE OF IDEAS and the free exchange of unpopular ideas, to a fear that repressing one idea or means of expressing that idea leads inevitably to repressing others (the "slippery slope"). In contrast, other scholars, some of whom have been instrumental in developing CRITICAL RACE THEORY in the late 1980s and 1990s, have emphasized that our history of segregation and RACIAL DISCRIMINATION make expressions of race hatred different, in that they tend to maintain subordinated peoples in a subordinated status. Some FEMINIST THEORY

scholars, notably Catherine MacKinnon, have contended that PORNOGRAPHY is a form of hate speech that at once oppresses and justifies the oppression of women. These scholars' arguments have provoked widespread debate among legal scholars.

To be sure, the courts have allowed much regulation of hate speech. The government can constitutionally ban targeted vilification of others on the basis of race, color, national origin, sex, or religion, where the expressions undermine others' equal enjoyment of rights to housing and employment. For example, the federal Fair Housing Act prohibits threats or intimidations directed at an interracial couple to discourage them from renting in one's neighborhood. A state can also punish verbal harassment designed to prevent others from exercising constitutional rights such as VOTING, or threats of violence that may have a racial or gender component to them. Moreover, a state can regulate expressions that are likely to incite others to imminent criminality, or even ban so-called FIGHTING WORDS, those expressions likely to lead to immediate responsive violence.

However, the mode the government chooses to regulate such expressions is critical. If the government targets expression because it does not like the content of the expression, the permissible arenas of regulation are extremely limited. Courts have repeatedly struck down regulations that targeted the racial or sexual character of speech, but have permitted other regulations whose effect might be the same but whose provisions focused more carefully on the secondary characteristics of expression, such as its effects, time, place, or manner. A general prohibition against cross-burnings would be invalid, while a prohibition against burning combustible materials in a forest during fire season would be constitutional, even as applied to cross burners. A regulation that prohibited parades at midnight in residential communities, or even one that banned picketing targeted at a single house, would be valid, but a regulation that banned marches by neo-Nazis in Jewish neighborhoods would be invalid.

Another example demonstrates the Supreme Court's hostility toward governmental regulations targeting hate speech because of the particular message conveyed. In cases arising prior to the 1990s the Court had indicated that government could ban fighting words; that is, those likely to incite others to engage in responsive violence. The City of St. Paul, Minnesota sought to use this DOCTRINE to defend an ordinance that, in effect, banned only racist fighting words. St. Paul argued that its law simply regulated a subcategory of regulable fighting words. However, in R. A. V. V. CITY OF ST. PAUL (1992), the Court disagreed, holding that St. Paul could not single out for special prohibition those fighting words the content of which was "racist."

Mere offensiveness of hateful language is never sufficient, as a constitutional matter, to warrant regulation of the expression. Even reprehensible diatribes against other racial or immigrant groups cannot constitutionally be forbidden unless the speech provokes imminent violence, or threatens or harasses specific persons. For example, a Ku Klux Klan cross-burning conducted away from minority neighborhoods or even a Nazi march through a Jewish neighborhood cannot constitutionally be forbidden to prevent the message from being heard. Both, however, might be punished under a properly drafted regulation prohibiting racially or ethnically motivated targeted threats against the homes of others.

On the other hand, the Court has approved other regulations of hate speech that focused on modes of regulation other than its racist or sexist content. As *R. A. V.* itself recognized, the Court has allowed the government to regulate much speech on the basis of its content. OBSCENITY, fighting words, and threats of violence can be regulated, but *R. A. V.* means the Court is unwilling to permit states to prohibit only racist obscenity, racist fighting words, or racist threats of violence.

The point of *R. A. V.* is not that hate speech may not be regulated. Rather, when regulations focus on the content of speech, targeting its racist or sexist character, for example, the Court has determined that the risk of suppressing free speech is too great. A permissible regulation must aim at a target that is different from the mere racist content of the expression. For example, in addition to CIVIL RIGHTS laws that protect housing rights, the Court has allowed regulation of sexually themed speech constituting WORKPLACE HARASSMENT on grounds that such speech is part of a broader regulatory regime attacking EMPLOYMENT DISCRIMINATION. In *R. A. V.* itself, where a white teenager had burned a cross on the lawn of an African American family's home, the Court emphasized that the conduct itself could have been punished under a trespass or criminal mischief statute. It is also likely that the conduct could have been punished under a statute that prohibited threats of violence. And, in WISCONSIN V. MITCHELL (1993), the Court allowed a state to give extra punishment for common crimes where those crimes were motivated by racial animosity, rejecting arguments that the criminal's thought processes were inevitably punished by such statutes. Decisions such as these suggest that in order to meet the Court's First Amendment tests, hate speech regulations must be drawn in ways that target their impact on one's enjoyment of common civil rights or CIVIL LIBERTIES rather than on their offensive content.

JOHN T. NOCKLEBY
(2000)

(SEE ALSO: *Hate Crimes.*)

Bibliography

KARST, KENNETH L. 1990 Boundaries and Reasons: Freedom of Expression and the Subordination of Groups. *University of Illinois Law Review* 1990:95–149.

MACKINNON, CATHERINE 1993 *Only Words.* Cambridge, Mass.: Harvard University Press.

MASSARO, TONI 1991 Equality and Freedom of Expression: The Hate Speech Dilemma. *William and Mary Law Review* 32:211–265.

MATSUDA, MARI J.; LAWRENCE, CHARLES R., III; DELGADO, RICHARD; and CRENSHAW, KIMBERLÉ WILLIAMS 1993 *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment.* Boulder, Colo.: Westview Press.

NOCKLEBY, JOHN T. 1994 Hate Speech in Context: The Case of Verbal Threats. *Buffalo Law Review* 42:653–713.

POST, ROBERT C. 1991 Racist Speech, Democracy, and the First Amendment. *William and Mary Law Review* 32:267–327.

## *HAUPT v. UNITED STATES*
330 U.S. 1 (1947)

Herbert Haupt, a German American, infiltrated into the United States during WORLD WAR II from a German submarine as part of a Nazi plot to sabotage American war industry. His father, Hans Max Haupt, allowed him to stay at the latter's home, bought a car for him, and helped him to get a job in a factory where Norden bomb sights were manufactured. There were at least two witnesses to each of these three acts, and on the basis of that testimony Hans Haupt was convicted of TREASON.

The Supreme Court sustained Haupt's conviction in an 8–1 decision. In an opinion by Justice ROBERT H. JACKSON, the Court held that the overt acts testified to met the test laid down in CRAMER V. UNITED STATES (1945): each constituted the actual giving of aid and comfort to an enemy spy. Unlike Anthony Cramer's public meetings with the saboteurs, Hans Haupt's "harboring and sheltering" of his son were of direct support to the enemy mission.

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Quirin, Ex Parte.*)

## *HAWAII v. MANKICHI*

See: Insular Cases

## HAWAIIAN SOVEREIGNTY

See: Native Hawaiian Sovereignty Movements

## *HAWAII HOUSING AUTHORITY v. MIDKIFF*
467 U.S. 229 (1984)

The system of feudal land tenure developed under the Hawaiian monarchy had modern consequences. Seventy-two landowners owned forty-seven percent of the land in the state, and the federal and state governments owned forty-nine percent; only four percent of the land was left for other owners. The Hawaii legislature, finding that this system distorted the land market, in 1967 adopted a land reform act. The law authorized use of the state's EMINENT DOMAIN power to condemn residential plots and to transfer ownership to existing tenants. Landowners challenged the law as authorizing TAKINGS OF PROPERTY for private benefit rather than PUBLIC USE. The Supreme Court unanimously rejected this argument, upholding the law's validity. The legislature's purpose to relieve perceived evils of land concentration was legitimately public, and the courts' inquiry need extend no further. Apart from issues of JUST COMPENSATION, the taking of property has virtually ceased to present a judicial question.

KENNETH L. KARST
(1986)

## HAYBURN'S CASE
2 Dallas 409 (1792)

*Hayburn's Case* was regarded in its time and has been regarded by many historians since as the first case in which a federal court held an act of Congress unconstitutional. Congress in 1791 directed the CIRCUIT COURTS to rule on the validity of pension claims made by disabled Revolutionary War veterans; the findings of the courts were to be reviewable by the secretary of war and by Congress. The circuit court in New York, presided over by Chief Justice JOHN JAY, and the circuit court in North Carolina, presided over by Justice JAMES IREDELL, addressed letters to President GEORGE WASHINGTON explaining why they could not execute the act in their judicial capacities but that out of respect for Congress they would serve voluntarily as pension commissioners.

In the Pennsylvania circuit, Justices JAMES WILSON and JOHN BLAIR, confronted by a petition from one Hayburn, decided not to rule on his petition, and they also explained themselves in a letter to the President. They would have violated the Constitution to have ruled on the petition, they said, because the business directed by the act was not of a judicial nature and did not come within the JUDICIAL POWER OF THE UNITED STATES established by Article III. They objected to the statute because it empowered officers of the legislative and executive branches to review

court actions, contrary to the principle of SEPARATION OF POWERS and judicial independence.

*Hayburn's Case* thus presented no suit, no controversy between parties, and, technically, no "case," and none of the courts rendered judicial decisions; they reported to the President their refusal to decide judicially. (See CASES AND CONTROVERSIES.) Some congressmen thought that *Hayburn's Case* was "the first instance in which a Court of Justice had declared a law of Congress to be unconstitutional," and the same opinion was delightedly trumpeted in anti-administration newspapers, which praised a precedent that they hoped would lead to judicial voiding of Hamiltonian legislation. The "case" reported in 2 Dallas 409 involved a motion for a WRIT OF MANDAMUS to compel the circuit court to grant a pension to Hayburn, but the court held the case over, and Congress revised the statute, providing a different procedure for the relief of pension-seeking veterans.

LEONARD W. LEVY
(1986)

## HAYES, RUTHERFORD B.
(1822–1893)

An Ohio lawyer and CIVIL WAR general, Rutherford Birchard Hayes briefly served in Congress and was thrice elected Governor. A compromise Republican presidential candidate in 1876, Hayes received a minority of the popular vote and probably should not have been elected. However, the electoral vote was uncertain because of disputed results in South Carolina, Florida, Louisiana, and Oregon. Claims of vote fraud and threats of civil war led to a crisis which was resolved by the COMPROMISE OF 1876 which gave the election to Hayes on the condition that federal troops would be removed from the South. During his Presidency the rights of the freedmen were severely undermined as Reconstruction came to an end.

PAUL FINKELMAN
(1986)

Bibliography

DAVISON, KENNETH E. 1972 *The Presidency of Rutherford B. Hayes.* Westport, Conn.: Greenwood Press.

## HAYNE, ROBERT YOUNG
(1791–1839)

As a United States senator from South Carolina, Robert Young Hayne debated DANIEL WEBSTER of Massachusetts in the famous Webster-Hayne Debate of 1830. The debate began over a bill to slow down the sale of western lands but developed into a heated discussion over slavery, the nature of the Union, and the relationship between the states and the federal government. Hayne argued for the right of states to nullify federal laws. After the debate—which most contemporaries and historians agree was won by Webster—Hayne was a key participant in the South Carolina NULLIFICATION Convention of 1833. The Convention asserted that the federal tariffs of 1828 and 1832 were unconstitutional and null and void in South Carolina. Hayne was then elected governor of the state. In his inaugural address he asserted "we will STAND OR FALL WITH CAROLINA." As governor he organized troops to defend South Carolina's SOVEREIGNTY from the federal government, but he ultimately accepted a compromise that peacefully ended the "Nullification Crisis."

PAUL FINKELMAN
(1986)

Bibliography

JERVEY, THEODORE D. (1909) 1970 *Robert Y. Hayne and His Times.* New York: DaCapo Press.

## *HAYNES v. UNITED STATES*

See: *Marchetti v. United States*

## *HAYNES v. WASHINGTON*
373 U.S. 503 (1963)

This was the last of many confessions cases, prior to ESCOBEDO V. ILLINOIS (1964), in which the Supreme Court decided the voluntariness of a confession by a DUE PROCESS standard. In 1944 the Court had held that due process was violated if the police obtained a confession by continuous interogation while the prisoner was held incommunicado in an inherently coercive situation. Thereafter, however, the Court frequently had deferred to a determination of voluntariness by state courts. *Haynes* was the first case since 1944 in which the Court revived the standard of inherent coerciveness where the facts showed incommunicado detention and the prisoner was not allowed to call his lawyer. The case foreshadowed *Escobedo* and MIRANDA V. ARIZONA (1966).

LEONARD W. LEVY
(1986)

## HAYS, ARTHUR GARFIELD
(1881–1954)

A leading defense counsel for and later director of the AMERICAN CIVIL LIBERTIES UNION, Arthur Garfield Hays de-

voted his career to protecting CIVIL LIBERTIES and FREEDOM OF SPEECH. Two of his books, *Let Freedom Ring* (1928) and *Trial by Prejudice* (1933), recount his participation in the Scottsboro cases (see NORRIS V. ALABAMA), the Scopes anti-evolution trial in Tennessee with Clarence Darrow (see TENNESSEE V. SCOPES), and on behalf of Sacco and Vanzetti (see COMMONWEALTH V. SACCO AND VANZETTI). Hays maintained a laissez-faire attitude toward government regulation of business and vigorously championed democracy, positions he elucidated in *Democracy Works* (1939).

DAVID GORDON
(1986)

## *HAZELWOOD SCHOOL DISTRICT v. KUHLMEIER*
484 U.S. 260 (1988)

In TINKER V. DES MOINES INDEPENDENT SCHOOL DISTRICT (1969) the Supreme Court held that school officials could not interfere with students' speech unless that speech threatened substantial disorder, a material disruption of the educational program, or invasion of the rights of others. The *Kuhlmeier* decision continues the erosion of *Tinker* that had begun in the BETHEL SCHOOL DISTRICT V. FRASER (1986).

A journalism class in a Missouri public high school wrote and edited the school newspaper. The school's principal, after reviewing proofs, ordered the deletion of two of the paper's projected six pages to avoid publication of two articles: one detailing the experiences of three pregnant students and another on students' feelings about their parents' divorces. The first story, the principal said, was inappropriate for the school's younger students; the second contained derogatory comments by a named student about her father. With no notice to the student writers or editors, the paper was printed with the offending pages deleted. Three of the students brought suit against school officials, seeking a DECLARATORY JUDGMENT that the censorship violated their FIRST AMENDMENT rights. They lost in the federal district court, but prevailed in the court of appeals on the theory of the *Tinker* decision. The Supreme Court reversed, 5–3.

Justice BYRON R. WHITE, for the Court, first concluded that the paper was not a PUBLIC FORUM because its pages had not been opened up to students generally or to any other segment of the general public. He distinguished *Tinker* in two main ways. First, the school could legitimately seek to inculcate the community's values, and thus could act to avoid the inference that it endorsed the conduct that led to student pregnancy. Second, the principal's control over the school paper was a series of decisions about the educational content of the journalism curriculum, and courts must pay deference to educators in such matters. Thus, the proper STANDARD OF REVIEW was not STRICT SCRUTINY but one of "reasonableness"—a standard satisfied by the principal's decision.

For the three dissenters, Justice WILLIAM J. BRENNAN, argued that the majority's "reasonableness" test effectively abandoned the much more demanding standards of *Tinker.* Surely some members of the *Kuhlmeier* majority would be satisfied to paint *Tinker* into a corner where its value as a PRECEDENT would be severely limited. Whether the Court will complete this process of doctrinal retrenchment remains to be seen.

KENNETH L. KARST
(1992)

## HEALTH INSURANCE FOR THE AGED ACT (MEDICARE)
79 Stat. 286 (1965)

The 1965 amendment of the SOCIAL SECURITY ACT establishing a system of health insurance operated by the Social Security Administration culminated thirty years of controversy over the proper role of the federal government in relation to medical care. Medicare provided hospital insurance and a variety of medical benefits for citizens sixty-five years or older. The act was designed to meet the serious problem of providing care for those who faced old age fearful of the financial ravages of illness.

Medicare's two insurance programs operated differently. The Hospital Benefit program automatically covered anyone over sixty-five with no "needs" test. It paid for hospitalization, nursing home care, home visits, and diagnostic services. It was financed by compulsory contributions from the protected persons and their employers and provided benefits as a matter of entitlement. The Supplementary Medical Insurance section created a voluntary individual program subsidized and administered by the government, using private insurance companies to assist in its administration.

Medicare influenced the entire pattern of medical care in the United States. With government financing a growing share of total health care expenditures, its power and role within the American health care system expanded proportionately. Not only administrators but also doctors and nurses adjusted their conduct to comply with newly mandated rules and procedures.

PAUL L. MURPHY
(1986)

Bibliography

FEDER, JUDITH 1977 *Medicare: The Politics of Federal Hospital Insurance.* Lexington, Mass.: Lexington Books.

## HEARING

See: Fair Hearing

## HEARSAY RULE

The hearsay rule is a nonconstitutional rule of EVIDENCE which obtains in one form or another in every JURISDICTION in the country. The rule provides that in the absence of explicit exceptions to the contrary, hearsay evidence of a matter in dispute is inadmissible as proof of the matter. Although jurisdictions define "hearsay" in different ways, the various definitions reflect a common principle: evidence that derives its relevance in a case from the belief of a person who is not present in court—and thus not under oath and not subject to cross-examination regarding his credibility—is of questionable probative value.

The Constitution does not explicitly refer to the hearsay rule or implicitly constitutionalize the hearsay rule in civil or criminal cases generally; but it does contain two provisions that share common purposes with the hearsay rule. The TREASON clause of Article III, section 3, prohibits a conviction for treason "unless on the testimony of two witnesses to the same overt act, or on a confession in open court." In CRAMER V. UNITED STATES (1945) the Supreme Court construed this clause to require the federal government to produce witnesses who possessed direct evidence—as opposed to circumstantial evidence—of the same overt act. Although *Cramer* itself did not involve hearsay evidence, its reasoning applies as well to hearsay evidence of overt acts, because hearsay evidence is itself a kind of circumstantial evidence.

The other provision of the Constitution that bears on the hearsay rule is the Sixth Amendment's CONFRONTATION clause, which entitles the accused in a criminal case "to be confronted with the witnesses against him." In contrast to the hearsay rule, the confrontation clause does not treat hearsay evidence as presumptively inadmissible against the accused, and it does not treat traditional exceptions to the hearsay rule as automatically admissible. Nevertheless, the confrontation clause addresses the questionable nature of hearsay evidence by requiring the state to produce at trial the hearsay declarants whose statements it uses against the accused, when it appears that the declarants are available to testify in person and that the defendant could reasonably be expected to wish to examine them in person at the time their hearsay statements are introduced into evidence.

PETER WESTEN
(1986)

(SEE ALSO: *Compulsory Process, Right to.*)

Bibliography

MCCORMICK, CHARLES 1972 *Evidence*, 2nd ed. Pages 579–756. St. Paul, Minn.: West Publishing Co.

## *HEART OF ATLANTA MOTEL v. UNITED STATES*
379 U.S. 241 (1964)

## *KATZENBACH v. MCCLUNG*
379 U.S. 294 (1964)

In these cases the Supreme Court unanimously upheld the portion of the CIVIL RIGHTS ACT OF 1964 forbidding RACIAL DISCRIMINATION by hotels, restaurants, theaters, and other PUBLIC ACCOMMODATIONS.

Congressional debates had discussed the appropriate source of congressional power to prohibit private racial discrimination. The COMMERCE CLAUSE was proposed as a safe foundation for the bill; since 1937 the Supreme Court had upheld every congressional regulation of commerce that came before it. Because Congress obviously was seeking to promote racial equality, some thought the commerce clause approach "artificial" and thus "demeaning." They argued for reliance on the power of Congress to enforce the FOURTEENTH AMENDMENT. That amendment's STATE ACTION limitation, however, seemed to obstruct reaching private discrimination. As enacted, the 1964 act's public accommodations provisions were limited to establishments whose operations "affect commerce" or whose racial discrimination is "supported by state action."

The Supreme Court moved swiftly, accelerating decision in these two cases. The majority relied on the commerce power, validating the act in application not only to a large whites-only motel that mainly served out-of-state guests but also to a restaurant with no similar connection to interstate travel. The latter case, *McClung*, illustrates how far the commerce power has been stretched in recent years to allow Congress to legislate on matters of national concern. The restaurant mainly served a local clientele; it served blacks, but only at a take-out counter. Almost half the food used by the restaurant had come from other states, but even the Court recognized that this fact was trivial. More persuasive was the fact, fully documented in congressional hearings, that discrimination in public accommodations severely hindered interstate travel by blacks. Justices WILLIAM O. DOUGLAS and ARTHUR J. GOLDBERG, concurring, argued that both the commerce clause and the Fourteenth Amendment empowered Congress to impose these regulations.

In retrospect the pre-enactment debate over which power Congress should assert seems unimportant, in either institutional or doctrinal terms. Congress need not,

after all, specify which of its powers it is using. And the Supreme Court has not needed to explore the full reach of Congress's Fourteenth Amendment power, because in JONES V. ALFRED H. MAYER CO. (1968) it held that the THIRTEENTH AMENDMENT empowered Congress to prohibit private racial discrimination. (See BADGES OF SERVITUDE.)

KENNETH L. KARST
(1986)

## *HEATH v. ALABAMA*
474 U.S. 82 (1985)

By the same act, Heath committed crimes in two states. Men whom he hired kidnapped his wife in one state and killed her in another. He pleaded guilty in one state to avoid CAPITAL PUNISHMENT, and he received a life sentence. However, the other state tried him for essentially the same offense, convicted him, and sentenced him to death. Heath claimed that the second trial exposed him to DOUBLE JEOPARDY in violation of the clause of the Fifth Amendment, applicable to the states via the INCORPORATION DOCTRINE.

In many cases, the Court had held that a state and the federal government may prosecute the same act if it was a crime under the laws of each. Never had the Court previously decided whether two states could prosecute the same act.

Justice SANDRA DAY O'CONNOR, for a 7–2 Court, declared that although the Fifth Amendment's double-jeopardy clause protects against successive prosecutions for the same act, if that act breached the laws of two states, it constituted distinct offenses for double-jeopardy purposes. The "dual sovereignty" rule in such cases meant that each affronted sovereign had criminal JURISDICTION. The states are as sovereign toward each other as each is toward the United States. In a sense, the case created no new law because the double-jeopardy clause had never previously barred different jurisdictions from trying the same person for the same act. Nevertheless, Justices WILLIAM J. BRENNAN and THURGOOD MARSHALL sharply dissented.

LEONARD W. LEVY
(1992)

## *HEFFRON v. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC.*
452 U.S. 640 (1981)

One rule governing the Minnesota State Fair allows the sale or distribution of literature, or the solicitation of funds, only at fixed booths. The International Society for Krishna Consciousness (ISKCON) sued in a state court challenging this rule's validity on its face and as applied. ISKCON contended that the rule violated its FIRST AMENDMENT rights of FREEDOM OF SPEECH and RELIGIOUS LIBERTY. The Minnesota Supreme Court held the law invalid as applied to ISKCON, saying that the state authorities had not shown that exempting ISKCON from the rule would significantly interfere with crowd control at the fair.

The Supreme Court reversed, upholding the rule on its face and as applied to distribution (5–4) and to sales and solicitation (9–0). Justice BYRON R. WHITE wrote for the Court. He concluded that the rule, which made no distinctions based on speech content and allowed no discretion to the licensing authorities, was valid as a regulation of the time, place, and manner of speech. The fair was a PUBLIC FORUM, but differed significantly from a public street. Considerations of safety and crowd control amounted to substantial state interests, justifying the rule restricting sales, distribution, and solicitation to booths. Exempting ISKCON would require exempting all applicants. Other less restrictive means for achieving those interests, such as penalizing disorder or limiting the number of solicitors, were unlikely to deal with the problems posed by large numbers of solicitors roaming the fairgrounds.

Justice WILLIAM J. BRENNAN's partial dissent, joined by two other Justices, argued that the rule was invalid in application to ISKCON's proposed distribution of literature. Such distribution, he argued, was no more disruptive than the making of speeches, or face-to-face proselytizing, both of which were permitted. Justice HARRY A. BLACKMUN also dissented as to the distribution of literature.

KENNETH L. KARST
(1986)

## *HELVERING v. DAVIS*
301 U.S. 619 (1937)

Plaintiff, a stockholder of an affected CORPORATION, challenged Titles II and VIII of the 1935 SOCIAL SECURITY ACT. Title II creates the old age benefits program, popularly known as "social security," and Title VIII contains the funding mechanism for that program. Under Title VIII, an employer must take a payroll deduction from each employee's wages and pay it, together with an equal amount directly from the employer, to the treasury.

Plaintiff's primary argument was that Congress lacked constitutional power to levy a tax for the purpose of providing old age benefits. Justice BENJAMIN N. CARDOZO, writing an opinion in which six other Justices joined, resoundingly rejected the argument that Congress had transgressed the TENTH AMENDMENT reservation to the

states of powers not delegated to the federal government. Only Justices JAMES C. MCREYNOLDS and PIERCE BUTLER dissented. The majority classified the old age benefits program as a legitimate exercise of Congress's power "to lay and collect taxes . . . to . . . provide . . . for the GENERAL WELFARE of the United States." The Court adopted a fluid definition of the general welfare. "Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of a nation." The Court then examined the effects on older workers of the "purge of nation-wide calamity that began in 1929" and concluded that the problem was national in scope, acute in severity, and intractable without concerted federal effort. State governments were deficient in economic resources and reluctant to finance social programs that would place them at comparative economic disadvantage with competitor states: industry would flee the new taxes and INDIGENTS would flock to any state that provided the new social benefits. (Justice Cardozo's analysis proved prescient. In the 1960s and 1970s a number of socially progressive northeastern and western states experienced these twin problems when they far exceeded national benefit norms in the federal-state cooperative programs of Aid to Families with Dependent Children and Medicaid.) Having determined that the purpose of Title II was well within the scope of the "general welfare" clause, the Court sustained the Title VIII funding provisions.

In its broad, though imprecise, reading of the term "general welfare," *Helvering v. Davis*, even more than its companion case, STEWARD MACHINE CO. V. DAVIS (1937), rejects the view that Congress, in exercising its power to tax for the general welfare, is required by the Tenth Amendment to eschew regulation of matters historically controlled by the states. In so doing, it repudiates that vein of case law, exemplified by UNITED STATES V. BUTLER (1936), that treats the Tenth Amendment as a limitation on the federal TAXING AND SPENDING POWER. Though *Butler* is factually distinguishable, the analysis used by Justice Cardozo in *Steward Machine Co.* and *Helvering v. Davis* would surely have sustained the agricultural price support provisions struck down in *Butler* a year earlier.

GRACE GANZ BLUMBERG
(1986)

## HENRY, PATRICK
(1736–1799)

Unsuccessful as a merchant, Patrick Henry turned to the law. He was admitted to the Virginia bar in 1760 and rose rapidly to prominence and prosperity. In 1765 Henry was elected to the House of Burgesses and, in his first term, won fame and popularity with a series of resolutions opposing the STAMP ACT as an unconstitutional imposition of TAXATION WITHOUT REPRESENTATION. A flamboyant and persuasive orator, Henry became the leader of the radical patriot faction in Virginia. As a delegate to the FIRST CONTINENTAL CONGRESS Henry favored both issuance of a declaration of grievances and formation of the ASSOCIATION. At home, he successfully urged the arming of the militia and served briefly as commander-in-chief of Virginia's forces. He was a member of the convention that, in 1776, adopted the VIRGINIA DECLARATION OF RIGHTS AND CONSTITUTION and instructed the state's congressional delegation to call for a DECLARATION OF INDEPENDENCE. Henry was himself a delegate to Congress but resigned in June 1776 when he was elected first governor of Virginia. In 1776 Governor Henry supported a BILL OF ATTAINDER (written by THOMAS JEFFERSON) against a notorious Tory brigand. When Jefferson and JAMES MADISON proposed to end the ESTABLISHMENT OF RELIGION in Virginia, Henry countered with a plan for general assessment to support all Christian churches and teachers.

Although Henry was a longtime self-proclaimed nationalist and had often called for enlargement of the powers of Congress under the ARTICLES OF CONFEDERATION, he declined appointment as a delegate to the CONSTITUTIONAL CONVENTION OF 1787. In the Virginia state convention of 1788 he was the leader of the anti-Federalists and spoke and voted against RATIFICATION OF THE CONSTITUTION. He argued that the document lacked a BILL OF RIGHTS and infringed on state SOVEREIGNTY, and he warned that the new federal Congress might someday abolish SLAVERY.

Henry later converted to the Federalist cause; in 1795 President GEORGE WASHINGTON offered to make Henry secretary of state, but Henry declined. In the 1796 case of WARE V. HYLTON Henry appeared with JOHN MARSHALL as counsel for Virginians who claimed that, the Treaty of Paris notwithstanding, state law precluded their obligation to repay debts due to British subjects. That same year Henry turned down Washington's offer of appointment as Chief Justice of the United States. Like SAMUEL ADAMS of Massachusetts, Henry proved better suited to making a revolution than to erecting a stable constitutional order.

DENNIS J. MAHONEY
(1986)

## HEPBURN ACT
34 Stat. 584 (1906)

A string of adverse decisions by the Supreme Court left the Interstate Commerce Commission (ICC) with few effective powers. Abuses abounded despite the ELKINS ACT of 1903, and in December 1905 THEODORE ROOSEVELT re-

iterated his earlier calls for corrective legislation. The resulting bill, which met significant opposition only in the Senate, expressly vested the ICC with the power to prescribe "reasonable" maximum rail rates only after current rates and practices had been condemned in a hearing. The bill, which became law on June 29, 1906, nonetheless failed to establish any standards for those rates, thus leaving the Court to apply the FAIR RETURN rule of SMYTH V. AMES (1898). Rates initiated by the ICC were subject to narrow JUDICIAL REVIEW; new rates became effective upon issuance unless challenged in the CIRCUIT COURTS and successfully enjoined, in which case they took effect only when sustained by the courts. The "commodities clause," which forbade carriers from transporting goods produced by railroads or in which they had an interest, was primarily addressed to rail lines serving mining interests. Additional provisions, effective immediately, shifted the burden of APPEALS to the carriers, not the commission. Congress followed this with the MANN-ELKINS ACT in 1910, further supporting the commission.

DAVID GORDON
(1986)

(SEE ALSO: *Interstate Commerce Commission v. Illinois Central Railroad.*)

Bibliography

SHARFMAN, ISAIAH L. 1931–1937 *The Interstate Commerce Commission*, 4 vols. New York: Commonwealth Fund.

## *HERBERT v. LANDO*
441 U.S. 153 (1979)

In *Herbert v. Lando* a majority of the Supreme Court soundly rejected the argument that the constitutional protections afforded journalists should be expanded to bar inquiry into the editorial processes of the press in libel actions. Anthony Herbert, a Vietnam veteran, received widespread media attention when he accused his superior officers of covering up atrocities and other war crimes. Herbert sued for libel when CBS broadcast a report and *The Atlantic Monthly* published an article, both by Barry Lando, about Herbert and his accusations. Herbert conceded that he was a PUBLIC FIGURE required by NEW YORK TIMES V. SULLIVAN (1964) to prove that the media defendants acted with "actual malice." During pretrial discovery, Lando refused to answer questions on the ground that the FIRST AMENDMENT precluded inquiry into the state of mind of those who edit, produce, or publish, and into the editorial process.

The Court recognized that the FIRST AMENDMENT affords substantial protection to media defendants in libel actions, citing specifically the *Sullivan* requirement that public figures and officials must prove knowing or reckless untruth. The Court noted, however, that the Framers did not abolish civil or criminal liability for defamation when adopting the First Amendment. It reasoned that upholding a constitutional privilege that barred inquiry into facts relating directly to the central issue of the defendant's state of mind would effectively deprive plaintiffs of the very evidence necessary to prove their case. That result would substantially eliminate recovery by plaintiffs who were public figures or public officials.

Justice LEWIS F. POWELL separately elaborated upon the majority's admonition that in supervising discovery in libel actions, trial judges should exercise appropriate controls to prevent abuse, noting the courts' duty to consider First Amendment interests along with plaintiffs' private interest. Justice WILLIAM J. BRENNAN, dissenting in part, asserted that the First Amendment provided a qualified editorial privilege which would yield once the plaintiff demonstrated a *prima facie* defamatory falsehood. Separately dissenting, Justice POTTER J. STEWART argued that inquiry into the editorial process is irrelevant, and Justice THURGOOD MARSHALL rejected the majority's balance of the competing First Amendment and private interests.

KIM MCLANE WARDLAW
(1986)

(SEE ALSO: *Balancing Test; Evidence; Freedom of the Press.*)

## *HERNDON v. LOWRY*
301 U.S. 242 (1937)

Herndon was a black organizer convicted of attempting to incite insurrection in violation of a state law. Herndon had sought to induce others to join the Communist party. At the time the party was seeking to organize southern blacks and calling for separate black states in the South. While only indirectly adopting the CLEAR AND PRESENT DANGER test, the Court refused to apply the BAD TENDENCY TEST of GITLOW V. NEW YORK (1925) and stressed the absence of any immediate threat of insurrection. In an opinion by Justice OWEN ROBERTS, a 5–4 Court held (1) that the evidence presented failed "to establish an attempt to incite others to insurrection" even at some indefinite future time; and (2) that the statute was unconstitutionally vague as applied and contrued because "every person who attacks existing conditions, who agitates for a change in the form of government, must take the risk that if a jury should be of opinion he ought to have foreseen that his utterances might contribute in any measure to some future forcible resistance to the existing government he may be convicted of the offense of inciting insurrection." The VAGUENESS

DOCTRINE invoked was not specifically articulated as a FIRST AMENDMENT standard; instead, the general criminal standard of "a sufficiently ascertainable standard of guilt" was applied.

The state supreme court believed that a conviction would be justified if the defendant intended that insurrection "should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce. . . ." This formula, which the Supreme Court found constitutionally infirm, must be compared with its own of the 1950s upholding convictions for conspiracy to advocate overthrow of the government where the intention was that of an organized group to bring about overthrow "as speedily as circumstances would permit."

MARTIN SHAPIRO
(1986)

## *HICKLIN v. ORBECK*
437 U.S. 518 (1978)

A unanimous court, speaking through Justice WILLIAM J. BRENNAN, held unconstitutional an Alaska law requiring private firms working on oil and gas leases or pipelines to give preference in hiring to Alaska residents. By discriminating against nonresidents, the "Alaska Hire" law violated the PRIVILEGES AND IMMUNITIES clause of Article IV of the Constitution.

DENNIS J. MAHONEY
(1986)

## HIGHER LAW

Americans have never been hesitant to argue that if a law is bad it must be unconstitutional. When no written constitutional provision suggests an interpretation that undermines the law under attack, American lawyers have often looked to the ancient tradition of unwritten higher law for support.

It is worth distinguishing two kinds of unwritten higher law. The first is natural law, conceived by the ancient Stoics as, in Cicero's words, "right reason, harmonious, diffused among all, constant, eternal." The Stoic conception was integrated with Christian theology by the medieval scholastics, and later was reformulated in a secular and individualistic direction by the NATURAL RIGHTS theorists of the Enlightenment. In this latter form, the natural law tradition provided the intellectual background for the American colonists' assertion of "certain inalienable rights" in the DECLARATION OF INDEPENDENCE.

The second kind of unwritten higher law, which we may call FUNDAMENTAL LAW, derives from those conventional and largely unquestioned values and practices that need be neither constant, eternal, nor dictated by reason. The members of a society may see their fundamentals as contingent, peculiar to themselves, and mutable—though, because fundamental, not easily or quickly mutable. On the other hand, those who see their own society's basic conventions as the only possible ones do not accept, perhaps cannot even understand, the distinction between "natural" and "fundamental" law.

In the practice of legal argument either natural or fundamental law can have priority, with the other regarded as ancillary. Thus one can argue that a principle is legally binding because it comports with right reason, as is incidentally confirmed by its acceptance in society; or one can reverse the priorities, leaving reason to confirm what convention and tradition primarily establish. Until about the mid-nineteenth century, American lawyers alternated between these rhetorical strategies, but since the Civil War the fundamental law strand has predominated.

The American idea of fundamental law derived originally from the seventeenth-century English habit of conducting political disputes in terms of an "ancient constitution," unwritten and believed (like the COMMON LAW itself) to be of "immemorial antiquity." Sir EDWARD COKE exemplified this habit when he merged natural with traditional law and both with English common law, and then asserted judicial authority to override legislation in the name of this powerful conglomerate. His declaration in BONHAM'S CASE (1608) that "when an Act of Parliament is against common right and reason . . . the common law will control it, and adjudge such act to be void" supplied a significant argument in the American colonists' struggle with Parliament between 1761 and 1776.

During the prerevolutionary period, the Americans argued for limitations on Parliament's authority over them on the basis of this same conglomerate of reason, common law, and constitutional tradition. Only when they broke with the English crown altogether in 1776—an avowedly revolutionary step—was their justification purely in terms of natural right.

With independence, the new states enacted popularly ratified written constitutions, a process later repeated in the adoption of the federal Constitution. The question then arose whether the new constitutions subsumed the older idea of unwritten constitutional law based on reason or tradition. The classic debate on this question was the exchange of OBITER DICTA between Justices JAMES IREDELL and SAMUEL CHASE of the Supreme Court in CALDER V. BULL (1798). Iredell argued that a law consistent with the applicable written constitutions was immune from further JUDICIAL REVIEW; because the "ablest and the purest minds differ" concerning the requirements of natural justice,

judges should assume no special authority to enforce so indeterminate a standard. Chase insisted that "certain vital principles in our free Republican governments" would invalidate inconsistent legislation whether the principle were enacted or not; thus a law that took the property of A and gave it to B could not stand, even if the applicable written constitution did not explicitly protect private property.

Chase's dictum followed the tenor of the NINTH AMENDMENT to the federal Constitution (1791): "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." But the Ninth Amendment does not settle the Chase-Iredell dispute, as it might if it said explicitly whether the unenumerated and retained rights have enforceable constitutional status.

During the first years of the republic, a number of state courts, as in *Ham v. McClaws* (South Carolina, 1789), anticipated Chase by invoking unenacted constitutional law to invalidate legislation. On the other hand, the most influential discussions of judicial review during the early federal period—ALEXANDER HAMILTON'S THE FEDERALIST #78 (1787) and JOHN MARSHALL'S opinion in MARBURY V. MADISON (1803)—echoed Iredell's view in basing power solely on the judicial authority to construe the written constitution, itself conceived as the expressed will of a fully sovereign people.

On the whole, judicial practice before 1830, particularly in the state courts but in a few federal cases as well, adopted Chase's view while also invoking his natural-law language with its appeal to "general principles of republican government." Marshall himself, in FLETCHER V. PECK (1810), ambiguously justified invalidation of a Georgia statute "either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States." The particular provision in question was the CONTRACT CLAUSE, which Marshall heroically stretched to fit the case, perhaps out of reluctance to rest decision solely on "general principles." In a few later cases, such as TERRETT V. TAYLOR (1815), the Supreme Court did invalidate state legislation without reference to constitutional text.

Even during their heyday before 1830, the "general principles" of the unwritten constitution were never regarded as federal constitutional law, binding on the states under the SUPREMACY CLAUSE. Because they did not count as "the Constitution or laws of the United States," unwritten general principles would not support appeal to the Supreme Court from the decision of a state court; federal courts invoked these principles against state legislatures only when acting as substitute state courts under DIVERSITY OF CITIZENSHIP JURISDICTION.

In their content, the unwritten "general principles" applied during this period were largely confined to the protection of traditional vested property rights against retroactive infringement. As such, they were equally well supported by common law tradition and by contemporary ideas of natural justice.

From about 1830 on, judicial assertion of pure unwritten constitutional law became less common, perhaps because of its conflict with Jacksonian ideas of popular sovereignty. The process of stretching the language of vague constitutional provisions to encompass notions of natural or traditional justice continued, however, and there began a historic shift in the favored vague provision from the federal contract clause to the clauses of state constitutions guaranteeing the LAW OF THE LAND and DUE PROCESS OF LAW—phrases that began to be construed to mean more than their originally understood sense as guarantees of customary common law procedures. Thus was born the concept bearing the oxymoronic name of SUBSTANTIVE DUE PROCESS, which ever since has been the main vehicle for the implementation of higher law notions in American constitutional law.

A leading case in this development was *Taylor v. Porter* (New York, 1843), which incorporated in "due process" the prohibition, earlier invoked by Chase as an unwritten general principle, against the state's taking the property of the worthy A only to give it to the undeserving B. In these early substantive due process decisions the language of immutable natural law mixed indiscriminately with talk of historically based common law and tradition; there was no felt conflict between the two rhetorical strands.

By contrast, the discourses of natural justice and of customary practice did conflict in the great constitutional debates over SLAVERY that occurred, largely outside the courts, during the period 1830–1860. Proslavery forces occasionally argued that the natural right of property protected the owners of human as of other chattels. Indeed, in the most notorious of constitutional slavery cases, DRED SCOTT V. SANDFORD (1857), Chief Justice ROGER B. TANEY held that congressional prohibition of SLAVERY IN THE TERRITORIES violated slaveholders' property rights guaranteed by the Fifth Amendment's due process clause. But the legal defenders of slavery did not generally have to rely on unwritten higher law; they could point to the positive guarantees the slave states had insisted on inserting in the federal Constitution.

On the other hand, antislavery lawyers had almost no basis for legal argument except the increasingly widespread conviction that slavery was intolerably unjust. With positive law and custom against them, they tried to translate natural law directly into constitutional doctrine. To this end, they invoked the PRIVILEGES AND IMMUNITIES clause of Article IV; the "liberty" protected by substantive due process; and the proclamation of human equality in

the Declaration of Independence, for which they claimed constitutional status. More radical abolitionists opposed these efforts to accommodate the Constitution, the "covenant with Hell," to the antislavery cause; on the other hand, the pre-Civil War courts found the antislavery constitutional arguments unacceptable because too radical. But abolitionist constitutional theory triumphed in larger arenas; it became part of the political program of the Republican party, and thus part of the world view of the politicians who led the war against slavery and afterward framed the Reconstruction amendments.

The language of section 1 of the FOURTEENTH AMENDMENT (1868) directly echoes the old triad of antislavery constitutional arguments in its guarantees of due process, EQUAL PROTECTION OF THE LAW, and the privileges and immunities of national citizenship. These general clauses have ever since provided the main textual basis for the continuation of the higher law tradition in constitutional law.

In the SLAUGHTERHOUSE CASE (1874) the Supreme Court at first by a 5–4 vote rejected the argument that the new amendment constitutionally bound the states to the whole array of unenumerated rights. But by the end of the century, the courts had accepted the arguments of commentators, chief among whom was THOMAS M. COOLEY (*Constitutional Limitations*, 1868), that due process prohibited all legislative intrusions upon basic liberties and property rights that did not reasonably promote the limited ends of public health, safety, or morals. Of the protected liberties, the dearest to the courts of this period was FREEDOM OF CONTRACT, and in a series of decisions epitomized by LOCHNER V. NEW YORK (1905) the courts invalidated economic regulatory laws on the grounds that they unreasonably constrained the terms on which adults could contract with each other.

In developing this doctrine, courts and commentators sometimes echoed the old language of natural law, but the more characteristic note of this aggressive laissez-faire constitutionalism was struck by Justice RUFUS PECKHAM, who condemned a price regulation law as a throwback to the past that ignored "the more correct ideas which an increase of civilization and a fuller knowledge of the fundamental laws of political economy . . . have given us today" (*Budd v. State*, New York, 1889). The notion of evolution had taken hold, and it not only supported the doctrines of Social Darwinism but also promoted the idea that fundamental legal principles evolved—a progress that the courts should accommodate by developing the law of the due process clause through a "gradual process of judicial inclusion and exclusion" (*Davidson v. New Orleans*, 1878). Tradition continued to play a role as well; thus the courts invalidated much new legislation regulating the price charged for goods while accepting old usury laws that regulated the price charged for the use of money, and generally tolerating public regulation of those businesses that had traditionally been treated as AFFECTED WITH A PUBLIC INTEREST.

The legal supporters of Progressive politics fiercely attacked "liberty of contract" and its associated doctrines in the name of popular sovereignty, which they argued required repudiation of the very idea of unwritten constitutional law. When laissez-faire constitutionalism was finally put to rest in the mid-1930s under the combined influence of FRANKLIN D. ROOSEVELT's court-packing plan and more long-run historical forces, it appeared that the higher law tradition might finally have come to the end of its long influence on American constitutionalism.

Only if higher law is given its narrower sense derived from classic natural law has this come to pass. The New Deal and post-New Deal courts found a new active role in the program of correcting for legislative failures sketched by the famous footnote four of the opinion in UNITED STATES V. CAROLENE PRODUCTS (1938). They promoted racial equality and electoral reform while protecting political dissidents, religious deviants, and criminal defendants, a role that reached its peak during the years of the WARREN COURT (1953–1969). The doctrinal vehicles for these projects have been the gradual incorporation within due process of the specific guarantees of the BILL OF RIGHTS and above all the evolutionary interpretation of the equal protection clause as a vehicle of fundamental law.

One of the most effective promoters of these developments, Justice HUGO L. BLACK (1937–1971), did wholly repudiate any invocation of higher law in their support; his characteristic stance was a rigorously exclusive appeal to constitutional text as a source of doctrine. While Justice Black's colleagues did not share his strict constructionist views, they too generally avoided invoking notions of natural or universal human rights, often resting decision on imaginative readings of original intent. Frequently, however, the Justices have openly construed vague constitutional language in light of an evolving fundamental law specific to American history and culture. During these years the Court has said that "notions of what constitutes equal treatment . . . do change" (HARPER V. VIRGINIA BOARD OF ELECTIONS, 1966); that due process requires states to institute criminal procedures that are "fundamental" in the sense of "necessary to an Anglo-American regime of ordered liberty" (DUNCAN V. LOUISIANA, 1968); and that the prohibition of CRUEL AND UNUSUAL PUNISHMENT is to be construed in the light of "those evolving standards of decency that mark the progress of a maturing society" (*Furman v. Georgia*, 1972).

Its association with laissez-faire constitutionalism had discredited substantive due process as a doctrinal tool during the generation following the New Deal, but beginning with GRISWOLD V. CONNECTICUT (1965) the Court moved toward reviving the use of this old rubric for the protection of substantive liberties. The role once held by "liberty of contract" was now taken by the RIGHT OF PRIVACY, a misleading name for what was at its core a constitutional protection for freedom of REPRODUCTIVE CHOICE, surrounded by a periphery of other doctrines limiting governmental power to regulate the FAMILY. The privacy decisions openly used as precedents substantive due process cases decided before the New Deal. Like those earlier decisions, the privacy cases avoided reference to universal right or natural law in support of their doctrines, with a plurality of Justices stating in MOORE V. EAST CLEVELAND (1977) that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."

The natural law strand of argument, though much muted in this century, has never entirely disappeared from American constitutional rhetoric. Justice WILLIAM O. DOUGLAS was at times inclined to argue in this vein; before the *Griswold* decision he supported constitutional protection for marriage and procreation on the grounds that they were, as he said in SKINNER V. OKLAHOMA (1945), "basic CIVIL RIGHTS of man." Since the 1970s a number of constitutional commentators have argued for the use of "the methods of moral philosophy" in constitutional decision, referring to philosophical theories that claim universality for their results, and in this sense directly descend from classic natural law approaches. Whether there will be a revival of natural law discourse in constitutional doctrine remains an open question. On the other hand, the broader tradition of an unwritten higher law of the Constitution, encompassing both fundamental and natural law, seems by now too firmly entrenched to be dislodged.

THOMAS C. GREY
(1986)

Bibliography

CORWIN, EDWARD S. (1928–1929) 1955 *The "Higher Law" Background of American Constitutional Law.* Ithaca, N.Y.: Cornell University Press.

——— 1948 *Liberty Against Government.* Baton Rouge: Louisiana State University Press.

GRAHAM, HOWARD JAY 1968 *Everyman's Constitution.* Madison: State Historical Society of Wisconsin.

HAINES, CHARLES GROVE 1930 *The Revival of Natural Law Concepts.* Cambridge, Mass.: Harvard University Press.

TEN BROEK, JACOBUS (1951) 1965 *Equal under Law.* New York: Collier Books.

WRIGHT, BENJAMIN F., JR. 1931 *American Interpretations of Natural Law.* Cambridge, Mass.: Harvard University Press.

## HILDRETH, RICHARD
(1807–1865)

A prolific pamphleteer, Richard Hildreth passionately opposed SLAVERY and took a Federalist or Whig stance on most issues. He was also a nationalist and an economic determinist who insisted on free competition. His *History of the United States* (1849–1852), ending in 1821, is meticulous in detail, scrupulously presenting each argument on major issues. His bias is nevertheless apparent in his championing of Federalist legislation; he minimized the effects of the ALIEN AND SEDITION ACTS, stressed the "virulence" of the VIRGINIA AND KENTUCKY RESOLUTIONS, and decried the repeal of the JUDICIARY ACT OF 1801. This six-volume study is still extraordinary for its realism and rejection of nineteenth-century romantic and heroic traditions.

DAVID GORDON
(1986)

## *HILLS v. GAUTREAUX*
425 U.S. 284 (1976)

Two years after MILLIKEN V. BRADLEY (1974) rejected metropolitan relief for school DESEGREGATION absent a showing of a constitutional violation by both city and suburban districts or by state officials, the Supreme Court encountered a parallel issue in the field of housing discrimination. The United States Department of Housing and Urban Development (HUD) had aided a Chicago city agency in locating low-income housing sites for the purpose of maintaining residential SEGREGATION. HUD, citing *Milliken*, argued that relief should be limited to the city. However, the Court approved the district court's order, which had regulated HUD's conduct beyond Chicago's boundaries. No restructuring or displacement of local government would result here, the Court said.

KENNETH L. KARST
(1986)

## *HINES v. DAVIDOWITZ*
312 U.S. 52 (1941)

*Hines* held that under the PREEMPTION doctrine, enforcement of a state alien registration law was barred by the federal ALIEN REGISTRATION ACT. Justice HUGO L. BLACK, for

the Court, emphasized the broad power of Congress over ALIENS. Justice HARLAN FISKE STONE, for three dissenters, noted the absence of any conflict between state and federal laws or any express congressional prohibition of state regulation.

KENNETH L. KARST
(1986)

## *HIPOLITE EGG COMPANY v. UNITED STATES*
220 U.S. 45 (1911)

A unanimous Supreme Court relied on the decision in CHAMPION V. AMES (1903) to sustain the PURE FOOD AND DRUG ACT's prohibition on the interstate transportation of adulterated food. Justice JOSEPH MCKENNA's opinion acknowledged few limits on congressional power over INTERSTATE COMMERCE, declaring that there was no trade "carried on between the states to which it does not extend," and that it was "subject to no limitations except those found in the Constitution." McKenna did not consider the purpose or intent of the act as the Court had previously done in *Champion* and would do so again in HOKE V. UNITED STATES (1913) and HAMMER V. DAGENHART (1918).

DAVID GORDON
(1986)

## *HIRABAYASHI v. UNITED STATES*

See: Japanese American Cases

## HISTORY IN CONSTITUTIONAL ARGUMENTATION

ALEXANDER HAMILTON, writing in THE FEDERALIST, declared: "Let experience, the least fallible guide of human opinions, be appealed to for an answer to these inquiries" about how best to frame a government. The Founders—the individuals who framed, debated, and ratified the Constitution—drew heavily from experience, both their own immediate past as well as the experience of governments long past. JAMES MADISON, for example, often cited the experience of ancient Greece. JAMES IREDELL turned to England under the Stuarts. Hamilton himself drew lessons from the fall of the Roman Republic. Just as the founding generation turned to the past when establishing the Constitution, many who seek to interpret the Constitution draw from its history, especially the experience of the Founders themselves.

The practice of using history in this interpretive sense dates back to the Constitution's earliest days. Historians tend to agree that the Founders initially had little desire for their own understandings of the Constitution to bind future generations. Yet many scholars also point out that this goal was increasingly honored more in theory than practice. Foes in constitutional disputes sought to bolster contending positions with what the authors of the document desired as early as the ratification debates. By the time President GEORGE WASHINGTON left office, arguments about the Constitution's meaning appealed to its history frequently—often with different Founders offering different accounts about the origins of the same provision. In one celebrated dispute, Hamilton and THOMAS JEFFERSON differed over whether history showed an original understanding that Congress have the power to charter a national bank. In another, Hamilton and Madison appealed to founding understandings in arguing radically different positions concerning presidential power in FOREIGN AFFAIRS.

The Supreme Court soon followed this lead. Faced with Jeffersonian appeals to ORIGINAL INTENT, Chief Justice JOHN MARSHALL responded in kind. When, for example, Marshall needed to refute the claim that the states established the Constitution in MCCULLOCH V. MARYLAND (1819), he turned to history. On his account, "the Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention."

The Court has invoked history along similar lines, off and on, ever since. Chief Justice ROGER BROOKE TANEY in part justified the infamous result in DRED SCOTT V. SANDFORD (1857) by making the disputable assertion that no, even free, African American could have been considered part of "We the People of the United States" when the Constitution was first established. In more recent times history has continued to serve as a cornerstone in a number of significant opinions. In REYNOLDS V. UNITED STATES (1878), Chief Justice MORRISON R. WAITE relied on an 1802 letter Jefferson wrote to a group of Connecticut Baptists to conclude that the Framers meant for the FIRST AMENDMENT to create a "wall of separation" between church and state. At the same time the Justices have engaged in a continuing historical debate over the original understand-

ing of RECONSTRUCTION and the FOURTEENTH AMENDMENT. Deploying history in a somewhat different fashion, Justice HARRY A. BLACKMUN's majority opinion in ROE V. WADE (1973) surveys ABORTION practices from contemporary America to the ancient Middle East.

In many ways the use of history in constitutional law has never been more central or controversial than today thanks to the ongoing debate over ORIGINALISM. This debate intensified during the 1980s when a number of advocates opposed to the perceived excesses of the WARREN COURT contended that judges should interpret the Constitution based primarily on the original views of those who wrote and ratified particular provisions. Champions of originalism, many of whom were associated with the administration of President RONALD REAGAN, included Attorney General Edwin Meese, Judge Robert Bork, and Justice ANTONIN SCALIA. After some initial hesitation, some more liberally inclined thinkers themselves responded in kind, asserting that more rigorous historical study often showed original understandings that were either more flexible or progressive than the original "originalists" contended. Leaders in this group include Bruce Ackerman in the academy and, to an extent, Justice DAVID H. SOUTER in the judiciary. Perhaps as never before, appeals to history now come from the political left as well as right, practitioners as well as academics, and even those who are not otherwise concerned with history in the first place.

Whether recent or longstanding, there have always been nearly as many reasons for using history as there have been persons using it. Among the most common, though least commonly stated, justifications for citing the past is simply that it appears to add authority, weight, and even "class" to what might otherwise be a mundane constitutional argument. The practice takes its most dubious form as "law office"—or more benignly, "forensic"—history, in which a lawyer or judge will "dress up" a preconceived conclusion with a few out-of-context quotations from celebrated historical figures.

Other justifications rely on good, or at least better, faith. The most obvious commitment to history comes from those who emphasize the Constitution's democratic foundations. For a wide array of thinkers, the keys to constitutional provisions lie with those who first established them. Since "We the People" ratify constitutional provisions and later generations govern themselves within the framework of that law, these later generations must follow the command of the "People" unless one of those generations successfully amends the Constitution and so acts as the "People" in its own right. Originalists take this claim the furthest in arguing that the historical understandings underlying constitutional provisions are dispositive.

Reliance on the past also figures heavily in those theories that emphasize the Constitution's commitment to rights and justice. The history that these approaches invoke, however, is less the background to certain constitutional clauses than to ongoing traditions that shape our constitutional culture. Nowhere do accounts of our evolving traditions figure more prominently than in the Court's SUBSTANTIVE DUE PROCESS jurisprudence. It was partly in this context that the majority in *Roe* considered historical abortion practices relevant to modern case law.

Yet however much lawyers cite to history, they are less enthusiastic about learning it. Constitutional law is replete with historical assertions that are at best problematic or at worst just plain laughable. Among historians, the reputation of lawyerly use of history is dismal. More than a few scholars agree that this reputation is not unjustified. Most lawyers, judges, and even legal academics lack the perspective, time, patience, and knowledge of sources to pursue historical study well. Some commentators defend this result by asserting that historians, in their attempts to reconstruct the past, and lawyers, in their effort to use it to win arguments, simply pursue different types of history. Many in both camps would agree, however, that at some point those who draw from history for greater authority must provide accounts that are at least minimally accurate and credible.

One obvious—though not uncontroversial—solution for this state of affairs would be for lawyers to respect standards that genuine historians employ in studying the past, including relying on the work of historians themselves. One scholar recently suggested what such guidelines would mean for examining the framing era, or by extension other periods of constitutional change: (1) examine specific sources on point such as the records of the Federal Convention; (2) survey more general sources, including contemporary newspaper articles and correspondence; (3) explore the general intellectual setting of the period; and, perhaps most important; (4) understand the political experience and context of those establishing the constitutional norms. Following just these guidelines is time-consuming work, often too time-consuming to meet the demands of legal calendars. But if lawyers cannot follow these strictures themselves, at least they can rely on those who do. The legal community would improve its reliance on history by first relying on respected and relevant accounts of such noted historians as Gordon S. Wood and Eric Foner, among many others. While this modest reform is itself hard work, it is more efficient than reading through the hundreds of sources that historians themselves study and more rigorous than quoting snippets of *The Federalist* without context or corroboration.

The past generation's turn to history in constitutional law has arguably led to some improvement in the level of

historical scholarship that lawyers, judges, and legal academics undertake. Only time will tell whether that level will ever become generally adequate. Until then, students wanting to learn about American history and tradition on its own terms should treat the accounts offered in legal writings with caution.

MARTIN S. FLAHERTY
(2000)

Bibliography

ACKERMAN, BRUCE 1991 *We The People: Foundations.* Cambridge, Mass.: Harvard University Press.

——— 1998 *We The People: Transformations.* Cambridge, Mass.: Harvard University Press.

BORK, ROBERT H. 1990 *The Tempting of America: The Political Seduction of the Law.* New York: Free Press.

FLAHERTY, MARTIN S. 1995 History "Lite" in Modern American Constitutionalism. *Columbia Law Review* 95:523–590.

KALMAN, LAURA 1986 *The Strange Career of Liberal Constitutionalism.* New Haven, Conn.: Yale University Press.

LEVY, LEONARD W. 1988 *Original Intent and the Framers' Constitution.* New York: Macmillan.

LOFGREN, CHARLES A. 1988 The Original Understanding of Original Intent? *Constitutional Commentary* 5:53–115.

NELSON, WILLIAM E. 1986 History and Neutrality in Constitutional Adjudication. *Virgina Law Review* 72:1237–1296.

POWELL, H. JEFFERSON 1985 The Original Understanding of Original Intent. *Harvard Law Review* 98:885–948.

RAKOVE, JACK N. 1996 *Original Meanings: Politics and Ideas in the Making of the Constitution.* New York: Knopf.

REID, JOHN PHILLIP 1993 Law and History. *Loyola Los Angeles Law Review* 27:193–224.

SYMPOSIUM 1997 Fidelity in Constitutional Theory. *Fordham Law Review* 65:1247–1854.

TREANOR, WILLIAM MICHAEL 1995 The Original Understanding of the Takings Clause and the Political Process. *Columbia Law Review* 95:782–887.

## *HITCHMAN COAL & COKE CO. v. MITCHELL*
245 U.S. 229 (1917)

In this case a 6–3 Supreme Court approved use of an INJUNCTION to enforce YELLOW DOG CONTRACTS. The injunction prohibited the union from inducing breach of contract by communicating with employees or potential employees of the company. The majority emphasized that Hitchman had as much right to condition employment contracts on promises not to join a union as the workers had to decline job offers. Indeed, "this is a part of the constitutional right of personal liberty and private property" protected by SUBSTANTIVE DUE PROCESS of law. The Court thus held that these workers were not free because they had signed the yellow dog contracts.

Justice LOUIS D. BRANDEIS dissented, joined by Justices OLIVER WENDELL HOLMES and JOHN H. CLARKE. The union, they said, had merely sought promises to join, and the yellow dog contracts were not genuine contracts because they were not freely entered into by the workers. The Court's hostility to LABOR would not change until 1937. (See HUGHES COURT.)

DAVID GORDON
(1986)

## *H. L. v. MATHESON*

See: Reproductive Autonomy

## *HODEL v. VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION*
452 U.S. 264 (1981)

The *Hodel* opinion provided a formula for interpreting the demands of NATIONAL LEAGUE OF CITIES V. USERY (1976). The Supreme Court unanimously upheld an act of Congress stringently regulating private stripmining operations, but providing for relaxation of the federal regulations when a state undertook to regulate the same activities according to standards set out in the act. Justice THURGOOD MARSHALL, for the Court, wrote that an act of Congress would not be held invalid under the *Usery* principle unless it satisfied three conditions: that the law regulated "the States as States"; that it addressed "matters that are indisputably "attributes of state SOVEREIGNTY"; and that it directly impaired the states' ability "to structure integral operations in areas of traditional governmental functions." In *Hodel* itself, the law failed the first part of the test, for it regulated only private parties. All three requirements were taken from the *Usery* opinion; in combination, they proved an insuperable hurdle to states seeking to rely on *Usery* to invalidate federal regulation of state activities, and ultimately led to the overruling of *Usery* in GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985). Justice WILLIAM H. REHNQUIST, who concurred only in the judgment, wrote separately to decry the majority's assumptions concerning the breadth of Congress's commerce power.

KENNETH L. KARST
(1986)

## *HODGES v. UNITED STATES*
203 U.S. 1 (1906)

Black laborers had agreed to work for a lumber firm. Hodges and the other white defendants, all private citi-

zens, ordered the blacks to stop working, assaulted them, and violently drove them from their workplace. The defendants were indicted for violating federal CIVIL RIGHTS laws. In a decision reconfirming much of the CIVIL RIGHTS CASES (1883) opinion, the Supreme Court indicated that the federal prosecution could not be supported under the FOURTEENTH or FIFTEENTH AMENDMENTS because those amendments restrict only STATE ACTION. The THIRTEENTH AMENDMENT did not support a federal prosecution because group violence against blacks was not the equivalent of reducing them to SLAVERY. In JONES V. ALFRED H. MAYER CO. (1968) and GRIFFIN V. BRECKENRIDGE (1971) the Court adopted a more generous attitude towards Congress's Thirteenth Amendment power to prohibit private discrimination.

THEODORE EISENBERG
(1986)

## *HODGSON v. MINNESOTA OHIO v. AKRON CENTER FOR REPRODUCTIVE HEALTH*
497 U.S. 417 (1990)

Minnesota and Ohio adopted laws requiring that parents be notified before abortions were performed on minors. By shifting 5–4 votes, the Supreme Court struck down one version of Minnesota's law and upheld another. The Court upheld the Ohio law, 6–3. Four Justices thought all the laws were valid, and three thought they were all invalid; the swing votes were Justices SANDRA DAY O'CONNOR and JOHN PAUL STEVENS.

Minnesota required notification to both of a minor's biological parents before she could have an abortion. A majority concluded that this law "[did] not reasonably further any legitimate state interest." This formulation avoided the question whether a restriction on the right to have an ABORTION must pass the test of STRICT SCRUTINY, as ROE V. WADE (1973) had held. Whatever the rhetoric, the effective STANDARD OF REVIEW was a demanding one. Justice Stevens, for the majority, acknowledged the state's interest in supporting parents' authority and counseling, but said that any such interest could be served by a one-parent notification rule. He also conceded that the state might wish to protect parents' interests in shaping their children's values, but said this interest could not "overcome the liberty interests of a minor acting with the consent of a single parent or court." Justice O'Connor, too, found this version of the Minnesota law "unreasonable," especially considering that only half the minors in the state lived with both biological parents.

The Minnesota legislature, anticipating that the Court might hold the statute invalid, had adopted a fall-back procedure: If a minor could convince a judge that she was mature enough to give her informed consent to an abortion or that an abortion without two-parent notification was in her best interests, the judge might dispense with that notification. This "judicial bypass" was enough to secure the approval of Justice O'Connor, and so was upheld, 5–4.

The Ohio law required notification of only one parent. Here Justices O'Connor and Stevens joined the four Justices who had considered both Minnesota laws valid. Justice ANTHONY M. KENNEDY wrote the principal opinion, most of which was joined by a majority of the Court. The dissenters in this case, who also dissented as to the Court's disposition of Minnesota's fall-back law, emphasized the severe costs of any parental notification requirement to a minor who dared not tell her parents she was pregnant and who was likely to find a judicial proceeding intimidating. As Justice THURGOOD MARSHALL said, those costs are not merely psychological; the fear of confronting parents may cause a young woman to delay an abortion, with attendant increases in risks to her health.

Justice ANTONIN SCALIA, who voted to uphold all three laws, took note of the way in which different majorities were pieced together in these cases and concluded that the reason lay in the lack of a principled way to distinguish the results when the Court persists in "this enterprise of devising an Abortion Code." Given the retirement from the Court of Justice WILLIAM J. BRENNAN, who formed part of the five-Justice majority that invalidated the first Minnesota law, the issue of parental notification seems sure to return to the Court. When it does so, some Justices seem prepared to avoid the complications identified by Justice Scalia in a single doctrinal stroke, sweeping abortion rights—and thus, in some states, abortions—into the back alley.

KENNETH L. KARST
(1992)

## *HODGSON AND THOMPSON v. BOWERBANK*
5 Cranch 303 (1809)

*Hodgson* is a constitutional trivium, of little doctrinal importance. Its interest today is captured in a question: Was *Hodgson* the one occasion between MARBURY V. MADISON (1803) and DRED SCOTT V. SANDFORD (1857) when the Supreme Court held an act of Congress unconstitutional? Various scholars have answered that question differently.

Article III of the Constitution does not explicitly authorize Congress to confer JURISDICTION on federal courts to decide a case in which one ALIEN sues another. The JUDICIARY ACT OF 1789, however, conferred such jurisdic-

tion on the circuit court when "an alien is a party." In *Hodgson*, plaintiffs were British subjects; defendants' CITIZENSHIP was unknown. Chief Justice JOHN MARSHALL, responding to counsel's claim of jurisdiction, was quoted by the reporter, Cranch, as saying only this: "Turn to the article of the constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the constitution."

*Hodgson* plainly holds that Congress cannot constitutionally confer federal court jurisdiction in the alien-versus-alien case. But was Marshall merely limiting the 1789 act's construction to avoid constitutional problems, or was he holding a part of the act's reach unconstitutional? Eighteen decades after the event, the debate goes on.

KENNETH L. KARST
(1986)

(SEE ALSO: *Unconstitutionality.*)

Bibliography

MAHONEY, DENNIS J. 1982 A Historical Note on *Hodgson v. Bowerbank*. *University of Chicago Law Review* 49:725–740.

## *HOFFA v. UNITED STATES*
385 U.S. 293 (1966)

Information received from a secret government informer and used to obtain a conviction of James Hoffa, the Teamsters' union leader, did not constitute an illegal search, because the informer was an invited guest; did not violate the RIGHT AGAINST SELF-INCRIMINATION, because compulsion was absent; and did not abridge the RIGHT TO COUNSEL, because the information did not breach the confidential relationship between petitioner and counsel. Hoffa's conviction for jury bribery was sustained.

LEONARD W. LEVY
(1986)

## *HOKE v. UNITED STATES*
227 U.S. 308 (1913)

## *CAMINETTI v. UNITED STATES*
242 U.S. 470 (1917)

Opinions in CHAMPION V. AMES (1903) and HIPOLITE EGG CO. V. UNITED STATES (1911) laid the foundation for a unanimous decision sustaining the MANN ACT, which prohibited the interstate transportation of women for immoral purposes. Justice JOSEPH MCKENNA, generously construing the power over INTERSTATE COMMERCE, declared in *Hoke* that Congress might exercise means that "may have the quality of police regulations." He denied that the Mann Act violated the TENTH AMENDMENT by usurping the STATE POLICE POWER. In *Caminetti*, the Court held that transportation was illegal under the act, even if not accompanied by financial gain: "To say the contrary would shock the common understanding of what constitutes an immoral purpose." These cases helped establish a broad basis for the growth of the NATIONAL POLICE POWER.

DAVID GORDON
(1986)

## *HOLDEN v. HARDY*
169 U.S. 366 (1898)

Utah adopted a maximum hours law fixing an eight-hour day for miners. A mine owner, convicted for working his employees ten hours a day, claimed that the statute violated his FOURTEENTH AMENDMENT rights. For a 7–2 Supreme Court, Justice HENRY B. BROWN declared that the right to FREEDOM OF CONTRACT protected by SUBSTANTIVE DUE PROCESS of law is subject to legitimate POLICE POWER regulations intended to protect the public health. The Court sustained the statute as a reasonable exercise of the police power on the ground that mining is a dangerous occupation that requires an exception to freedom of contract. Brown realistically observed that employees are often induced by fear of discharge to obey management rules that might be detrimental to health. In such cases self-interest is an unsure guide, justifying legislative intervention. Had the Court adhered to this understanding, LOCHNER V. NEW YORK (1905) might have been stillborn.

LEONARD W. LEVY
(1986)

# HOLDING

The holding of a court is the *ratio decidendi* or the ground(s) upon which it bases its DECISION of a case. The holding, includes all the court's declarations of law necessary to the decision of the case; other pronouncements are OBITER DICTA. The holding in a case establishes a precedent and may be generalized into a DOCTRINE. The term may also be used more narrowly to signify the court's resolution of any particular legal issue or question of constitutional interpretation presented in a case.

DENNIS J. MAHONEY
(1986)

## *HOLLAND v. ILLINOIS*

See: *Batson v. Kentucky*

# HOLMES, OLIVER WENDELL, JR.
(1841–1935)

When he was appointed to the Supreme Court in 1902, at the age of sixty-one, he was best known to the general public as the son of a famous poet and man of letters; when he retired, thirty years later, he had been called "the greatest of our age in the domain of jurisprudence, and one of the greatest of the ages." Oliver Wendell Holmes's thirty years on the Supreme Court unquestionably made his reputation, and yet those years, given the aspirations of Holmes's earlier career, were years in which his mood as a judge can best be described as resignation. He was not able to achieve anything like what he thought he could achieve as a judge; regularly he confessed his inability to do anything other than ratify "what the crowd wants." He wryly suggested that on his tombstone should be inscribed "here lies the supple tool of power," and he allegedly told JOHN W. DAVIS that "if my country wants to go to hell, I am here to help it." For these expressions of resignation he was called "distinguished," "mature," and "wise," the "completely adult jurist." The constitutional jurisprudence of Holmes could be called a jurisprudence of detachment, indifference, or even despair; yet it was a jurisprudence in which contemporary commentators reveled.

Holmes's career hardly began with his appointment to the Court. He had previously written *The Common Law*, a comprehensive theoretical organization of private law subjects, taught briefly at Harvard Law School, and served for twenty years as a justice on the Massachusetts Supreme Judicial Court. Although he had not considered many constitutional cases as a state court judge, he had a distinctive philosophy of judging. There was little difficulty in the transition from the Massachusetts court to the Supreme Court; Holmes simply integrated a new set of cases with his preexistent philosophy. That philosophy's chief postulate was that judicial decisions were inescapably policy choices, and that a judge was better off if he did not make his choices appear too openly based on the "sovereign prerogative" of his power.

Arriving at that postulate had been an unexpected process for Holmes. He was convinced, at the time he wrote *The Common Law* (1881), that private law could be arranged in a "philosophically continuous series." His lectures on torts, criminal law, property, and contracts stressed the ability of those subjects to be ordered by general principles and the desirability of having judges ground their decisions in broad predictive rules rather than deferring to the more idiosyncratic and less predictable verdicts of juries. Holmes had accepted a judgeship in part because he believed that he could implement this conception of private law. Academic life was "half-life," he later said, and judging gave him an opportunity to "have a share in the practical struggle of life."

In practice, however, Holmes found that the law resisted being arranged in regular, predictable patterns. Too many factors operated to create dissonance: the need for court majorities to congeal on the scope and language of a decision; the insignificance of many cases, which were best decided by routine adherence to precedent; the very difficult and treacherous policy choices truly significant cases posed, fostering caution and compromise among judges. The result, for Holmes, was that legal DOCTRINE developed not as a general progression toward a philosophically continuous series but rather as an uneven clustering of decisions around opposing "poles" that represented alternative policy judgments. "Two widely divergent cases" suggested "a general distinction," which initially was "a clear one." But "as new cases cluster[ed] around the opposite poles, and beg[a]n to approach each other," the distinction became "more difficult to trace." Eventually an "arbitrary . . . mathematical line" was drawn, based on considerations of policy.

Thus judging was ultimately an exercise in making policy choices, but since the choices were often arbitrary and judges had "a general duty not to change but to work out the principles already sanctioned by the practice of the past," bold declarations of general principles were going to be few and far between. Indeed in many cases whose resolution he thought to turn on "questions of degree," or "nice considerations," or line drawing, Holmes attempted, as a state court judge, to avoid decision. He delegated "questions of degree" to juries where possible; he relied on precedents even where he felt that they had ceased to have a functional justification; he adhered to the findings of trial judges; he resorted to "technicalities" to "determine the precise place of division." And on those relatively few occasions when he was asked to consider the impact of a legislature's involvement, Holmes tended to defer to legislative solutions, especially in close cases. "Most differences," he said in one case, were "only one[s] of degree," and "difference of degree is one of the distinctions by which the right of the legislature to exercise the STATE POLICE POWER is determined." Deference to the legislature was another means of avoiding judicial policy choices.

Holmes thus brought a curious, if consistent, theory of judging with him to the Supreme Court. Although his original aim as a legal scholar had been the derivation of general guiding principles in all areas of law, as a judge he had concluded that principles were not derived in a logical and continuous but in a random and arbitrary fashion, and that in hard cases, where principles competed, policy considerations dictated the outcome. Judges should be sensitive to the fact that cases did involve policy choices, but

they should exercise great caution in making them. Hard cases, turning on "questions of degree" or "nice considerations" should be delegated to other lawmaking bodies, such as the jury and the legislature, that were closer to the "instinctive preferences and inarticulate convictions" of the community. What started out as a theory of bold, activist judicial declarations of principle had ended as a theory of deference to lawmakers who were more "at liberty to decide with sole reference . . . to convictions of policy and right." The creative jurist of *The Common Law* had become the apostle of judicial self-restraint.

In his first month on the Supreme Court Holmes wrote to his longtime correspondent Sir Frederick Pollock that he was "absorbed" with the "variety and novelty of the questions." And indeed Holmes's docket was strikingly different from that he had encountered as a Massachusetts state judge: more federal issues, a greater diversity of issues, and far more cases involving the constitutionality of legislative acts. But the new sets of cases did not require Holmes to modify his theory of judging; they merely emphasized his inclination to defer hard policy choices to others. As a Massachusetts state judge Holmes had found only one act of the Massachusetts legislature constitutionally invalid; as a Supreme Court justice he was to continue that pattern. His first opinion, *Otis v. Parker* (1902), sustained a California statute prohibiting sales of stock shares on margin on the ground that although the statute undoubtedly restricted freedom of exchange, that "general proposition" did not "take us far." The question was one of degree: how far could the legislature restrict that freedom? Since the statute's ostensible purpose, to protect persons from being taken advantage of in stock transactions, was arguably rational, Holmes's role was to defer to the legislative judgments.

*Otis v. Parker* set a pattern for Holmes's decisions in cases testing the constitutionality of economic regulations. Rarely did he find that questions posed by statutes were not ones of "degree"; rarely did he fail to uphold the legislative judgment. He believed that the New York legislature could regulate the hours of bakers (LOCHNER V. NEW YORK, 1905) even though he thought that hours and wages laws merely "shift[ed] the burden to a different point of incidence." He supported PROHIBITION and antitrust legislation notwithstanding his beliefs that "legislation to make people better" was futile and that the SHERMAN ACT was "damned nonsense." His position, in short, was that "when a State legislature has declared that in its opinion policy requires a certain measure, its actions should not be disturbed by the courts . . . unless they clearly see that there is no fair reason for the law."

Deference for Holmes did not mean absolute passivity. He thought Congress and the states had gone too far in convicting dissidents in a number of war-related speech cases, including ABRAMS V. UNITED STATES (1919) (the case in which he proposed the CLEAR AND PRESENT DANGER test), GITLOW V. NEW YORK (1924), and UNITED STATES V. SCHWIMMER (1928). He invalidated a Pennsylvania statute that regulated mining operations without adequate compensation in *Pennsylvania Coal Company v. Mahon* (1922). He did not think that Congress could constitutionally allow the postmaster general to deny "suspicious" persons access to the mails, and said so in two cases, *Milwaukee Socialist Democratic Publishing Co. v. Burleson* (1920) and *Leach v. Carlile Postmaster* (1921). And he struck down a Texas statute denying blacks eligibility to vote in primary elections in NIXON V. HERNDON (1922), declaring that "states may do a good deal of classifying that it is difficult to believe rational, but there are limits."

Holmes was called, especially in the 1920s, the "Great Dissenter," and some of his dissenting opinions were memorable for the pithiness of their language. In *Lochner v. New York* (1905), Holmes protested against the artificiality of the FREEDOM OF CONTRACT argument used by the majority by saying that "the FOURTEENTH AMENDMENT does not enact Mr. Herbert Spencer's *Social Statics*." In *Abrams* he said that "the best test of truth is the power of the thought to get itself accepted in the competition of the market," and that "every year . . . we have to wager our salvation upon some prophecy based on imperfect knowledge." And in *Olmstead v. United States* (1928), he decried the use of WIRETAPPING by federal agents: "I think it a less evil that some criminals should escape than that the government should play an ignoble part."

Each of these dissents was subsequently adopted as a majority position by a later Court. Freedom of contract was repudiated as a constitutional doctrine in WEST COAST HOTEL V. PARRISH (1937); Holmes's theory of free speech was ratified by the Court in such decisions as HERNDON V. LOWRY (1937) and YATES V. UNITED STATES (1957); and KATZ V. UNITED STATES (1967) and BERGER V. NEW YORK (1967) overruled the majority decision in *Olmstead.* Despite the eventual triumph of Holmes's position in these cases and despite the rhetorical force of his dissents, "Great Dissenter" is a misnomer by any standard other than a literary one. Holmes did not write an exceptionally large number of dissents, given his long service on the Court, and his positions were not often vindicated.

Holmes's dissents also gave him the reputation among commentators as being a "liberal" justice. But for every Holmes decision protecting CIVIL LIBERTIES one could find a decision restricting them. The same Justice who declared in *Abrams v. United States* (1919) that "we should be eternally vigilant against attempts to check the expression of opinions" held for the Court in BUCK V. BELL (1927)

that a state could sterilize mental defectives without their knowing consent. "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind," Holmes argued. "Three generations of imbeciles are enough."

Holmes supported the constitutionality of laws prohibiting child labor, defended the right of dissidents to speak, and resisted government efforts to wiretap bootleggers. At the same time he upheld the compulsory teaching of English in public schools, supported the rights of landowners in child trespasser cases, and helped develop a line of decisions giving virtually no constitutional protection to ALIENS. For a time critics ignored these latter cases and followed the *New York Times* in calling Holmes "the chief liberal of the supreme bench for twenty-nine years," but recent commentary has asserted that Holmes was "largely indifferent" to civil liberties.

Holmes's constitutional thought, then, resists ideological characterization and is notable principally for its limited interpretation of the power of JUDICIAL REVIEW. How thus does one explain Holmes's continued stature? In an age where JUDICIAL ACTIVISM, especially on behalf of minority rights, is a commonplace phenomenon, Holmes's interpretation of his office appears outmoded in its circumscription. In an age where the idea of rights against the state has gained in prominence, Holmes's decisions appear to tolerate altogether too much power in legislative majorities. Only in the speech cases does Holmes seem to recognize that the contribution of dissident minorities can prevent a society's attitudes from becoming provincial and stultifying. Elsewhere Holmes's jurisprudence stands for the proposition that the state, as agent of the majority, can do what it likes until some other majority seizes power. That hardly seems a posture inclined to elicit much contemporary applause.

Yet Holmes's reputation remains, on all the modern polls, among the highest of those Justices who have served on the Supreme Court. It is not likely to change for three reasons. First, in an era that was anxious to perpetuate the illusion that judicial decision making was somehow different from other kinds of official decision making, since judges merely "found" or "declared" law, Holmes demonstrated that judging was inescapably an exercise in policymaking. This insight was a breath of fresh air in a stale jurisprudential climate. Against the ponderous intonations of other judges that they were "making no laws, deciding no policy, [and] never entering into the domain of public action," Holmes offered the theory that they were doing all those things. American jurisprudence was never the same again.

Second, Holmes, as a sitting judge, followed through the implications of his insight. If judging was inevitably an exercise in policy choices, if all legal questions eventually became "questions of degree," then there was much to be said for judges' avoiding the arbitrary choice. Other institutions existed whose mandate for representing current community sentiment seemed clearer than the judiciary's; judging could be seen as an art of avoiding decision in cases whose resolution appeared to be the arbitrary drawing of a line. In a jurisprudential climate that was adjusting to the shock of realizing that judges were making law, Holmes's theory of avoidance seemed to make a great deal of sense. Federal judges were not popularly elected officials; if they made the process of lawmaking synonymous with their arbitrary intuitions, the notion of popularly elected government seemed threatened. The wisdom in Holmes's approach to judging seemed so apparent that it took the WARREN COURT to displace it.

These first two contributions of Holmes, however, can be seen as having a historical dimension. To be sure, seeing judges as policymakers was a significant insight, but it is now a commonplace; judicial deference was undoubtedly an influential theory, but it has now been substantially qualified. The enduring quality of Holmes appears to rest on his having a first-class mind and in his unique manner of expression: his style. No judge has been so quotable as Holmes; no judge has come closer to making opinion writing a form of literature. Paradoxically, Holmes's style, which is notable for its capacity to engage the reader's emotions in a manner that transcends time and place, can be seen as a style produced out of indifference. The approach of Holmes to his work as a judge was that of a person more interested in completing his assigned tasks than in anything else. Holmes would be assigned opinions at a Saturday conference and seek to complete them by the following Tuesday; his opinions are notable for their brevity and their assertiveness. The celebrated epigrams in Holmes's opinions were rarely essential to the case; they were efforts to increase the emotional content of opinions whose legal analysis was often cryptic.

Holmes's style of writing was of a piece with his general attitude toward judging. Since judging was essentially an effort in accommodating competing policies, the outcome of a given case was relatively insignificant. Just where the line was drawn or where a given case located itself in a "cluster" of related cases insignificant. One might as well, as a judge, announce one's decision as starkly and vividly as one could. A sense of the delicacy and ultimate insignificance of the process of deciding a case, then, fostered a vivid, emotion-laden, and declarative style.

Thus the legacy of Holmes's constitutional opinions is an unusual one. As contributions to the ordinary mine run

of legal doctrine, they are largely insignificant. Their positions are often outmoded, their analyses attenuated, their guidelines for future cases inadequate. One feels, somehow, that Holmes has seen the clash of competing principles at stake in a constitutional law case, but has not probed very far. Once he discovered what was at issue, he either avoided decision or argued for one resolution in a blunt, assertive, and arbitrary manner. One cannot take a Holmes precedent and spin out the resolution of companion cases; one cannot go to Holmes to find the substantive bottomings of an area of law. Holmes's opinions are like a charismatic musical performance: one may be inspired in the viewing but one cannot do much with one's impressions later.

As literary expressions, however, Holmes's opinions probably surpass those of any other Justice. While it begs questions and assumes difficulties away to say that "a policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," the vivid contrast catches one's imagination. While "three generations of imbeciles are enough" was a misstatement of the facts in *Buck v. Bell* and represents an attitude toward mentally retarded persons one might find callous, it engages us, for better or worse. In phrases like these Holmes will continue to speak to subsequent generations; his constitutional opinions, and consequently his constitutional thought, will thus endure. It is ironic that Holmes bequeathed us those vivid phrases because he felt that a more painstaking, balanced approach to judging was futile. He thought of judging, as he thought of life, as "a job," and he got on with it.

G. EDWARD WHITE
(1986)

Bibliography

BURTON, DAVID 1980 *Oliver Wendell Holmes, Jr.* Boston: Twayne Publishers.

FRANKFURTER, FELIX 1938 *Mr. Justice Holmes and the Supreme Court.* Cambridge, Mass.: Harvard University Press.

HOWE, MARK DEWOLFE 1957 *Justice Oliver Wendell Holmes: The Shaping Years, 1841–1870.* Cambridge, Mass.: Harvard University Press.

——— 1963 *Justice Oliver Wendell Holmes: The Proving Years, 1870–1882.* Cambridge, Mass.: Harvard University Press.

KONEFSKY, SAMUEL J. 1956 *The Legacy of Holmes and Brandeis: A Study in the Influence of Ideas.* New York: Macmillan.

LERNER, MAX 1943 *The Mind and Faith of Justice Holmes.* Boston: Little, Brown.

ROGAT, YOSEL 1963 Mr. Justice Holmes: A Dissenting Opinion. *Stanford Law Review* 15:3–44, 254–308.

WHITE, G. EDWARD 1971 The Rise and Fall of Justice Holmes. *University of Chicago Law Review* 39:51–77.

——— 1982 The Integrity of Holmes' Jurisprudence. *Hofstra Law Review* 10:633–671.

## *HOLMES v. WALTON*
(New Jersey, 1780)

Decided by the Supreme Court of New Jersey in 1780, this is the first alleged state precedent for JUDICIAL REVIEW. The case, which was unreported, is referred to in *State v. Parkhurst*, 4 Halsted 427, supposedly decided in 1802 but not reported until 1828, where the state court said that in *Holmes* a state act providing for trial by a six-man jury violated the state constitution. In fact, the act, which involved the seizure and forfeiture of goods traded with the enemy, provided for a TRIAL BY JURY. New Jersey employed six-man juries in cases of small amounts (under six pounds) from colonial times to 1844, twelve-man juries in all other cases. The property in *Holmes v. Walton* being valued at $27,000, Holmes had a right to a trial by a twelve-man jury. The trial judge having allowed him only a six-man jury, Holmes contended not that the seizure act was unconstitutional but that the trial judge denied him a twelve-man jury to which he was entitled under the seizure act as well as under the state constitution; the high court so held. The constitutionality of the seizure act was not at issue, and there was no opinion given in which the court discussed, even by OBITER DICTA, its power to void an act for UNCONSTITUTIONALITY. Soon after the decision of the case, which allowed Holmes a new trial by a jury of twelve members, disaffected citizens of the locality alleged in a petition to the state assembly that the high court of the state had held the seizure act unconstitutional. The legislature, however, supported the court by enacting in 1782 that in any suit exceeding six pounds trial by jury meant a jury of twelve. Somehow, a misleading view of the case originated in the 1780s and survived, making *Holmes v. Walton* a "precedent," however inauthentic, for judicial review.

LEONARD W. LEVY
(1986)

## HOLMES AND FREE SPEECH

In the conventional mythology, Justice OLIVER WENDELL HOLMES, JR., is the judicial architect of the tradition of FREEDOM OF SPEECH in American constitutional law. According to that mythology, Holmes's formulation of the CLEAR AND PRESENT DANGER test for evaluating subversive speech in SCHENCK V. UNITED STATES (1919), coupled with his stirring dissent in ABRAMS V. UNITED STATES that same year, in which he claimed that "the theory of the Constitution" was that "the ultimate good desired is better reached by free trade in ideas," reoriented American thinking about the significance of the FIRST AMENDMENT in American culture. By the time Holmes retired from the

Supreme Court in 1932, the conventional account runs, a new generation of judges and legal commentators was ready to carry the libertarian torch that he had first lit.

As in all cases where a conventional mythology has endured, there are elements of accuracy in the standard account. The First Amendment was not generally taken to be a significant limitation on legislative restrictions of expression prior to WORLD WAR I. Holmes, together with Justice LOUIS D. BRANDEIS and several academic commentators, notably ZECHARIAH CHAFEE, JR., did carve out, and maintain, a more speech-protective position on freedom of expression issues than most judges of his time, including the majority of his colleagues on the Court. Holmes's capacity to write memorable, arresting paragraphs in his free speech opinions helped communicate, to many different American audiences, the political and philosophical justifications for protecting speech in a constitutional democracy. Finally, there is no doubt that by the time Holmes left the Court in 1932 his own free speech jurisprudence had evolved from a quite conventional posture that assumed a quite limited role for the First Amendment as a shield for unpopular expression, and no role at all for the DUE PROCESS clause of the FOURTEENTH AMENDMENT in that capacity, to a posture that can fairly be described as seeing a free speech issue lurking behind a great many legal bushes.

To understand the kernels of truth in the conventional mythology, however, is not to convert it to wisdom. The conventional account bristles with difficulties. The first difficulty is one of causal attribution. In *Patterson v. Colorado*, a 1907 case, Holmes wrote an opinion for the Court denying a free speech claim and intimating that the First or Fourteenth Amendment "liberties" of speech might be confined to protection against governmental "PRIOR RESTRAINTS" on expression. Similarly, in the 1915 case of *Fox v. Washington*, Holmes's opinion for the Court intimated that the "liberty" in the Fourteenth Amendment needed to be read narrowly and might not include protection of speech at all. In both cases criminal convictions of the speakers—one under a statute proscribing criticism of public officials and the other under a statute proscribing utterances that tended to cause breaches of the peace—were upheld under the conventional test: whether a particular expression had a "tendency" to encourage action that the state clearly had a right to prohibit.

Holmes's "clear and present" danger opinions in *Schenck* and *Abrams* appeared to be departures from the BAD TENDENCY TEST. But the former opinion was ambiguous in that respect. Although Holmes said in *Schenck* that "the question in every case" was whether a "clear and present danger" to the state followed from the expression being restricted, the speech of the defendants in *Schenck*—issuing circulars encouraging conscriptees in World War I to resist the draft—had a "bad tendency" but did not necessarily pose a clear and present danger. Yet Holmes's opinion for the Court in *Schenck* upheld the conviction.

Holmes's opinion in *Abrams*, in contrast, would have overturned the convictions of persons who dropped leaflets calling for a general strike in the vicinity of factory workers employed in the munitions trade. Since World War I was still going on when the leaflets were distributed, the defendants—Russian immigrants sympathetic to the Bolshevik regime—were prosecuted under the 1918 SEDITION ACT for interfering with the war effort, and a general strike clearly would have impeded that effort. Holmes's dissent in *Abrams* was a clear departure from his position in *Schenck*, notwithstanding his rhetorical efforts to make the opinions appear consistent. He had changed his mind about speech issues and begun to adopt a more expansive reading of the protective scope of the First Amendment. Subsequently Holmes and some of his academic admirers, especially Chafee, FELIX FRANKFURTER, and HAROLD J. LASKI, would treat the *Schenck*– *Abrams* sequence as all of a piece and identify Holmes as the modern founder of a robust free speech jurisprudence. The truth was more complicated.

As World War I drew to a close Holmes began a series of discussions with a group of younger legal intellectuals, including Chafee, Frankfurter, Laski, and Judge LEARNED HAND, about the importance of freedom of expression as a means by which citizens in a democratic society could reach "the truth" about public issues and thereby become more informed participants in government. Being an elitist, and being skeptical about the philosophical integrity of universal principles, Holmes doubted whether majoritarian sentiment could be equated with wisdom, but at the same time recognized that majoritarianism was a bedrock principle of democracy. Although some of his younger colleagues believed that freedom of expression was part of a more general liberalization and democratization of American life, Holmes tended to believe that if most "subversive" talk was permitted to be uttered, its intellectual worthlessness would soon be apparent. Although Holmes talked about the First Amendment as protecting "free trade in ideas," he believed that the MARKETPLACE OF IDEAS would result in only those expressions that had some significant intellectual weight surviving. He was contemptuous of the substantive value of most of the "radical" expressions his free speech opinions came to protect, but he was not contemptuous of the value of freedom of expression in a modern democracy. The latter insight he had gleaned from his younger colleagues. Thus the first set of Holmes's contributions to free speech jurisprudence, the *Schenck–Abrams* sequence—which also included two other opinions, FROHWERK V. UNITED STATES (1919) and DEBS

V. UNITED STATES (1919) in which Holmes upheld convictions for "seditious speech," ignoring his own clear and present danger language—cannot accurately be described as the work of a pioneer. It was the work of a gifted intellectual absorbing the contributions of others and making them part of his consciousness.

The second difficulty with the conventional account is that it fails to advance an adequate characterization of the remainder of Holmes's free speech opinions in the years following *Abrams*. A close reading of those opinions, which included two more memorable dissents, in GITLOW V. NEW YORK (1925) and UNITED STATES V. SCHWIMMER (1929), reveals nothing like jurisprudential consistency. In a series of cases in the 1920s involving state efforts to restrict the teaching of foreign languages in public schools, Holmes dissented from Court opinions striking down those statutes as invasion of the Fourteenth Amendment "liberties" of teachers or scholars. In *Gitlow*, where a majority of the Court summarily extended the application of the First Amendment to the states through "INCORPORATION" of that provision in the due process clause of the Fourteenth Amendment, Holmes's dissent accepted that result only grudgingly. Yet in *Gitlow* Holmes dissented from an opinion upholding the conviction of a writer of an anarchist manifesto even though the legislature had determined in advance that calls for the overthrow of the capitalist system constituted a clear and present danger to the existence of the state.

Similarly in *Schwimmer* Holmes converted a deportation proceeding, in which the Immigration and Naturalization Service (INS) determined that those ALIENS unprepared to defend the United States in time of war should no longer be entitled to remain in the country, into a free speech case. Traditionally aliens had not been treated as having the same constitutional rights as those with CITIZENSHIP, and were eligible for deportation at the pleasure of the INS. Rosika Schwimmer, a pacifist who was ineligible for military service on age and gender grounds, declined to affirm that she would defend the United States, and the INS's effort to deport her, although doubtless punitive, was not a violation of any constitutional right. Holmes turned the case into an essay on "freedom for the thought we hate," but his comments had no legal significance for the case before the Court. Schwimmer could have been deported simply for failing to affirm allegiance, whatever her reason. Holmes took the occasion to juxtapose his contempt for the ideology of pacifism against his belief that pacifists should be allowed to speak freely, but Schwimmer was an alien pacifist.

Holmes's last decade of free speech opinions thus reduced itself to a series of vivid rhetorical expressions and a somewhat inconsistent voting record. But the very eloquence of those expressions, his great stature as a judge, and the enticing image of a nineteenth-century Brahmin voicing support for the "poor and puny" communications issued by marginalized dissidents has been too much for a long line of commentators, themselves enthusiastic about free speech, to resist. Consequently Holmes's judicial career will invariably be associated with the libertarian progression of twentieth-century free speech jurisprudence in America. One hopes the association will be seen as more nuanced than the conventional mythology suggests.

G. EDWARD WHITE
(2000)

Bibliography

GUNTHER, GERALD 1975 Learned Hand and the Origin of Modern First Amendment Doctrine. *Stanford Law Review* 27:719–773.

LEWIS, ANTHONY 1991 *Make No Law: The Sullivan Case and the First Amendment*. New York: Random House.

WHITE, G. EDWARD 1993 *Justice Oliver Wendell Holmes: Law and the Inner Self*. New York: Oxford University Press.

——— 1996 The First Amendment Comes of Age. *Michigan Law Review* 95:299–392.

## *HOME BUILDING & LOAN ASSOCIATION v. BLAISDELL*
290 U.S. 398 (1934)

This was the most important CONTRACT CLAUSE case since CHARLES RIVER BRIDGE V. WARREN BRIDGE CO. (1837). The great Depression of the 1930s, by wiping out jobs and savings and savaging the economy, threatened homeowners, farmers, shopkeepers, and others with the loss of their property through foreclosures on mortgages. The states responded by enacting debtors' relief legislation that postponed the obligations of mortgagors to meet payments. Minnesota's statute authorized a state court, on application from a debtor, to exempt property from final foreclosure for no more than two years, during which time the creditor must be paid a reasonable rental value fixed by the court and the debtor might refinance the mortgage. The Supreme Court's precedents seemed to require a decision that the contract clause was violated by the statute, which operated retroactively on mortgages contracted prior to its enactment and delayed enforcement of the mortgagee's contractual rights.

By a 5–4 vote the Court sustained the statute in an opinion by Chief Justice CHARLES EVANS HUGHES. The prohibition of the contract clause, he declared, "is not an absolute one and is not to be read with literal exactness like

a mathematical formula." In times of acute economic distress the states might employ their RESERVED POLICE POWER, "notwithstanding interference with contract," to prevent immediate enforcement of obligations by a temporary and conditional restraint, in order to safeguard the vital public interest in private ownership. As Justice GEORGE SUTHERLAND, for the dissenters, trenchantly observed, the POLICE POWER, whether reserved or inalienable, had never previously justified impairing the OBLIGATION OF CONTRACT between private parties. Hughes, however, distinguished precedents such as BRONSON V. KINZIE (1843) by saying that they had not, as here, provided for securing the mortgagee the rental value of the property during the extended period. Although the statute affected contracts, it was addressed to a legitimate end of the police power and employed reasonable means to achieve it. The restraint and realism that characterized this opinion and that in NEBBIA V. NEW YORK (1934) of the same term did not dominate the Court's opinions during the next two critical terms, when it confronted NEW DEAL legislation. After *Blaisdell*, however, the contract clause lay almost dormant until the late 1970s.

LEONARD W. LEVY
(1986)

## HOMELESSNESS AND THE CONSTITUTION

The federal Constitution does not expressly address the condition of homelessness. Nor does it expressly create a right to housing, in contrast to the constitutions of France, Spain, Sweden, and Belgium.

Numerous commentators argue that there is also no implicit right to shelter or housing in the Constitution, relying on *Lindsey v. Normet*, a 1972 Supreme Court case. *Lindsey*, however, held that there is no right to *adequate* housing under the Constitution; it did not consider whether there is a right to *some* form of housing or shelter. Many would argue against recognizing such a right under our Constitution, which is generally considered to create "negative" rather than "positive" rights. Others, however, frame economic rights in "negative" terms, as President FRANKLIN D. ROOSELVELT did with his concept of "freedom from want."

Regardless of the resolution of this underlying issue, the Constitution still affects homelessness and homeless people. Particularly over the past two decades, courts have addressed the federal constitutional rights of homeless persons in several key areas.

Numerous courts have held that begging is speech protected by the FIRST AMENDMENT. In *Loper v. New York City Police Department* (1993), the U.S. Court of Appeals for the Second Circuit noted that begging is generally "intertwined" with a social or political message indicating extreme poverty and the need for help. In contrast, in *Young v. New York City Transit Authority* (1990), the same court had held that begging in the subway could be prohibited. At least one scholar has argued that begging is COMMERCIAL SPEECH and thus due lesser constitutional protection. The weight of authority is that begging is political speech, and thus subject to the highest protection under our Constitution. Broad bans on peaceful begging in public spaces are likely to be unconstitutional; however, narrowly tailored, content-neutral limitations on time, place, and manner are generally upheld.

More recently, prohibitions on begging have more narrowly targeted "aggressive panhandling." Such laws may also raise First Amendment concerns if they are not sufficiently precise or neutral. Moreover, they may also raise concerns under the EQUAL PROTECTION clause to the extent they target aggressive begging but not other forms of aggressive solicitation or speech.

Laws that criminalize sleeping or carrying out other "necessary life activities" in public places may also be unconstitutional as applied to homeless people. In *Pottinger v. Miami* (1992), a federal district court held that where there are insufficient shelter beds compared to the numbers of homeless people in a city, a law that makes it a crime to sleep—or to conduct other harmless, necessary life activities, such as eating or bathing—in any public area essentially punishes the involuntary "status" of homelessness and thus is CRUEL AND UNUSUAL PUNISHMENT in violation of the Eighth Amendment. Alternatively stated, such a law impermissibly punishes involuntary conduct. However, in *Joyce v. City of San Francisco* (1994), a federal district court reasoned that homelessness is not an immutable characteristic of the person and thus not properly a personal status in the Eighth Amendment sense. At least one commentator has argued that the constitutionality of such a law is fact-dependent: in the absence of sufficient indoor resources, there is no alternative to conducting necessary life activities in public and involuntary conduct—or status—is impermissibly punished.

Some courts have also upheld RIGHT TO TRAVEL challenges to such laws, reasoning that they effectively preclude homeless persons from remaining in the city or state that applies them; others have rejected such challenges, holding that the right to travel is not implicated in the absence of differential treatment of residents and nonresidents. In *Streetwatch v. National Railroad Passenger Corp.* (1995), a federal district court in New York held that policies prohibiting the presence of homeless people in a quasi-public place—a transportation station—infringe

their "fundamental freedom of movement" in violation of the DUE PROCESS clause. Furthermore, laws prohibiting loitering or vagrancy, which may be disproportionately enforced to "sweep" homeless people out of public areas, may be subject to constitutional challenge for VAGUENESS.

Homeless people enjoy some RIGHT OF PRIVACY under the FOURTH AMENDMENT. Generally, shelters are akin to homes for Fourth Amendment purposes; they cannot be entered and subjected to WARRANTLESS SEARCHES. Similarly, homeless people's PROPERTY, placed or wrapped in such a way as to suggest it is not abandoned, may be protected even if it is left in a public place. The criterion in these cases—as generally in Fourth Amendment analysis—is whether there is a reasonable expectation of privacy. As noted in the leading case on this issue, the Connecticut Supreme Court's *State v. Mooney* (1991), the circumstances of homeless persons must be taken into account in making this judgment.

Several courts have considered homeless persons' VOTING RIGHTS. In *Pitts v. Black* (1984), a federal district court held that under the equal protection clause, the lack of a traditional street address cannot be a basis for depriving a homeless person of his or her fundamental right to vote. As long as there is some identifiable location to which a homeless person regularly returns—be it a shelter, park bench, or street corner—that is sufficient to establish residency within a particular district for voting purposes.

MARIA FOSCARINIS
(2000)

Bibliography


ADES, PAUL 1989 Comment: The Unconstitutionality of "AntiHomeless" Laws. *California Law Review* 77:595–628.

AVRAMOV, DRAGANA 1996 *The Invisible Hand of the Housing Market: A Study of the Effects of Changes in the Housing Market on Homelessness in the European Union.* Brussels: FEANTSA (The European Federation of National Organizations Working with the Homeless).

BENNETT, SUSAN D. 1995 "No Relief but on the Terms of Coming into the House"—Controlled Spaces, Invisible Disentitlements, and Homelessness in an Urban Shelter System. *Yale Law Journal* 104:2157–2212.

ELLICKSON, ROBERT C. 1996 Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning. *Yale Law Journal* 105:1165–1248.

FOSCARINIS, MARIA 1996 Downward Spiral: Homelessness and Its Criminalization. *Yale Law and Policy Review* 14:1–63.

GARRETT, BETH D. and DANIELS, WES 1993 Law and the Homeless: An Annotated Bibliography. *Law Library Journal* 85: 463–529.

HERSHKOFF, HELEN and COHEN, ADAM 1991 Begging to Differ: The First Amendment and the Right to Beg. *Harvard Law Review* 104:896–916.

NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY 1999 *Out of Sight—Out of Mind? A Report on Anti-Homeless Laws, Litigation and Alternatives in 50 U.S. Cities.* Washington, D.C.: National Law Center on Homelessness & Poverty.

ROISMAN, FLORENCE W. 1991 Establishing a Right to Housing. *Clearinghouse Review* 25:203–227.

SIMON, HARRY 1995 The Criminalization of Homelessness in Santa Ana, California: A Case Study. *Clearinghouse Review* 29:725–729.

STONER, MADELEINE R. 1995 *The Civil Rights of Homeless People.* New York: Aldine de Gruyter.

WALDRON, JEREMY 1991 Homelessness and the Issue of Freedom. *UCLA Law Review* 39:295–324.


## HOMESTEAD ACT
12 Stat. 392 (1862)

The Homestead Act provided for distribution of public land to settlers who would live on the land and improve it. As enacted in 1862, the act provided for allocation of a quarter section (160 acres) to a homesteader who lived on it for five years and paid a ten dollar fee. The act was sponsored by Speaker of the House Galusha A. Grow (Republican of Pennsylvania), and its passage culminated more than a decade's efforts.

The act bespoke a national commitment to the farmer-freeholder as the prototypical American citizen. The system it established was designed, among other things, to solve the problem of SLAVERY IN THE TERRITORIES by insuring a permanent antislavery majority there; and, for that reason, earlier proposals for a homestead bill were supported by the Liberty and Free Soil parties. The homestead program populated the Midwest and plains with hundreds of thousands of independent farmers, and allowed rapid conversion of wilderness TERRITORIES into STATES.

The act was repealed in 1910, a victim of fraud and inefficiency, as well as of an antipathy during the Progressive era toward distribution of public land. In a little less than half a century, over 100 million acres had been distributed under the act.

DENNIS J. MAHONEY
(1986)

## HOMOSEXUALITY

See: *Bowers v. Hardwick*; Same-Sex Marriage; Sexual Discrimination; Sexual Orientation; Sexual Preference and the Constitution

## HOMOSEXUALS' RIGHTS

See: Sexual Preference and the Constitution

## *HOOD & SONS v. UNITED STATES*

See: *Wrightwood Dairy Co., United States v.*

## HOOKER, THOMAS
(1586–1647)

To escape persecution for his Puritan beliefs, Thomas Hooker fled England in 1633 and settled in Newton, Massachusetts, as its Congregational minister. In 1636 he led most of his congregation to a new settlement at Hartford, thus becoming a founder of Connecticut.

A leader among Puritan clergy, Hooker wrote a major defense of New England Congregationalism and extended his theological convictions into politics. Adopting his flexible stand on formal church affiliation, Connecticut refused to limit the franchise to church members.

In 1639 Hooker's preference for explicit covenants probably prompted Connecticut's leaders to organize the colony's government by drawing up a SOCIAL COMPACT, regarded by some historians as the first written American CONSTITUTION, known as the FUNDAMENTAL ORDERS. This document mirrored Hooker's beliefs that civil government should be a covenant between citizens for the promotion of peace and unity; that political authority should reflect the free choice of the people; that rulers were responsible to those they ruled; that the people, as the source of government's existence, had the right not only to choose magistrates but specifically to limit their powers; and that magistrates should consult with the people on issues involving the common good and heed popular judgment in such matters.

THOMAS CURRY
(1986)

Bibliography

MILLER, PERRY 1956 *Errand into the Wilderness.* Pages 16–47. Cambridge, Mass.: Harvard University Press.

## HOOVER, HERBERT C.
(1874–1964)

Born in Iowa and trained as a mining engineer at Stanford University, Herbert Clark Hoover initially became involved in politics as chairman of the Commission for Relief in Belgium and of the United States Food Administration Board during WORLD WAR I. After the war, President WOODROW WILSON made Hoover director of European economic relief, and in 1921 President WARREN G. HARDING appointed him secretary of commerce.

Hoover was elected President of the United States on the Republican ticket in 1928. Seven months after his inauguration, the stock market collapsed as the depression that had gripped Europe since the end of the war reached America as well. In the face of the economic crisis Hoover clung to his conservative constitutional principles. He advocated private, voluntary action to spur recovery and expanded relief programs at the state level. He resisted federal government intervention until the election year 1932, when he proposed the Reconstruction Finance Corporation.

Hoover's nominations to the Supreme Court were a mixed lot. He appointed former Justice CHARLES EVANS HUGHES to be Chief Justice in 1930. His nomination of conservative Judge John J. Parker of North Carolina to be an Associate Justice was narrowly rejected by the Senate, but two other appointments were confirmed: moderate OWEN J. ROBERTS of Pennsylvania in 1930 and liberal BENJAMIN N. CARDOZO of New York in 1932.

After FRANKLIN D. ROOSEVELT defeated him in the 1932 election, Hoover retired from public office, but remained influential within the Republican party. He was recalled to public service after WORLD WAR II to direct food relief programs in Europe, and he served as chairman of two Commissions on the Organization of the Executive Branch. The Hoover Commission Reports of 1949 and 1955 led to greater efficiency in the executive branch, mostly through regrouping of functions and agencies.

DENNIS J. MAHONEY
(1986)

Bibliography

NASH, GEORGE H. 1983 *The Life of Herbert Hoover.* New York: Norton.

## HOOVER, J. EDGAR
(1895–1972)

From his graduation from George Washington University Law School in 1917 until his death in 1972, John Edgar Hoover was continuously employed by the United States Department of Justice. He started as a file reviewer, but in 1919 Hoover became special assistant to Attorney General A. MITCHELL PALMER, with oversight responsibility for the DEPORTATION cases arising out of the PALMER RAIDS. In 1921 Hoover was assigned to the department's Bureau of Investigations, and in 1924 he became its director.

Over the next decade, Hoover transformed his small bureau into a national police agency. As federal criminal law expanded, the bureau expanded with it, acquiring a reputation for professionalism, competence, and efficiency. By the time it was renamed the FEDERAL BUREAU OF INVESTIGATION (FBI) in 1935, the bureau had estab-

lished a national fingerprint file, a crime laboratory, and a training academy. The FBI's dual mandate was to investigate violations of federal law and to serve as a domestic, civilian counterintelligence agency. The bureau's success in tracking down bootleggers, gangsters, kidnappers, and spies became legendary.

The FBI was largely Hoover's personal creation, and he ran it autocratically. Although formally supervised by the ATTORNEY GENERAL, Hoover operated with a great deal of independence, gained by tenure, public success, and, reputedly, maintenance of secret dossiers concerning his political superiors. Hoover used the FBI to conduct personal feuds, like that with MARTIN LUTHER KING, JR., and to publicize his own brand of anticommunism. In the end, his apparent indifference to CIVIL LIBERTIES compromised the very professionalism he had worked to instill in the FBI.

DENNIS J. MAHONEY
(1986)

Bibliography

DE TOLEDANO, RALPH 1973 *J. Edgar Hoover: The Man in His Times.* New Rochelle, N.Y.: Arlington House.

## *HOPWOOD v. TEXAS*
78 F.3d 932 (5th Cir. 1996)

Lawyers and policymakers have long looked to Justice LEWIS F. POWELL, JR.'s, solo opinion in REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE (1978) as a guide to creating and administering AFFIRMATIVE ACTION programs. The continuing import of Powell's opinion was questioned by the U.S. Court of Appeals for the Fifth Circuit in *Hopwood v. Texas,* where the court invalidated the University of Texas School of Law's affirmative action program and declared that Powell's "lonely opinion" was not binding PRECEDENT.

The law school adopted separate, segregated evaluation processes for white applicants on the one hand, and African American and Mexican American applicants on the other. Under this system, the law school admitted African American and Mexican American applicants with lower Law School Aptitude Test scores and college grade point averages than white applicants. Four rejected European American students brought suit against the law school, claiming the evaluation practices amounted to RACIAL DISCRIMINATION in violation of the FOURTEENTH AMENDMENT that could not be justified under STRICT SCRUTINY.

The law school defended its program in part as necessary to insure a diverse student body—a goal Powell had characterized in *Bakke* as a COMPELLING STATE INTEREST. The Fifth Circuit rejected the diversity argument, noting that Powell's opinion was not joined by other Justices and that subsequent Supreme Court opinions held that race-based affirmative action could only be justified to remedy prior discrimination by the relevant state entity. (The one exception, METRO BROADCASTING, INC. V. FCC (1990), was judged under a lower STANDARD OF REVIEW subsequently held to be inappropriate by the Court.) Although the law school offered a remedial justification for its program, the Fifth Circuit ruled that there was no record evidence of discrimination against the preferred minority groups by the law school to warrant a remedy.

The Supreme Court declined to hear the case, with two Justices noting that the case had become moot. Nevertheless, *Hopwood* became a symbol both of the mounting hostility to race-based affirmative action in the 1990s and of the JUDICIAL ACTIVISM of conservative judges appointed to the federal bench by Republican Presidents RONALD REAGAN and GEORGE H. W. BUSH.

ADAM WINKLER
(2000)

## HOSTILE AUDIENCE

Nothing is more antagonistic to the FREEDOM OF SPEECH than a mob shouting a speaker into silence. For state officials to suppress speech merely because the audience is offended by the speaker's message is a violation of the FIRST AMENDMENT. Although some lower courts have experimented with the notion of a heckler's First Amendment right, there is no place in our constitutional order for what HARRY KALVEN called the "heckler veto." The duty of the police, when the audience is hostile, is to protect the speaker so long as that is reasonably possible. Similarly, the potential hostility of an audience—even its potential violence—will not justify denying a license to meet or parade in a PUBLIC FORUM.

When police protection is inadequate, however, and audience hostility poses an immediate threat of violence, the police may constitutionally order a speaker to stop, even though the speech does not amount to INCITEMENT TO UNLAWFUL CONDUCT, and is otherwise protected by the First Amendment. The Supreme Court so held in FEINER V. NEW YORK (1951), a case involving no more than "some pushing, shoving and milling around" in an audience hostile to a speaker in a park. The principle retains vitality, although *Feiner* itself, on its facts, seems an insecure precedent.

The constitutionality of police action requiring someone to stop addressing a hostile audience depends on one form of the CLEAR AND PRESENT DANGER test: the police may not stop the speaker unless the threat of violence is immediate and police resources are inadequate to contain the threatened harm. Thus, if the speaker refuses to stop and is charged with BREACH OF THE PEACE, the court must look beyond the arresting officers' good faith—a point

emphasized by the Supreme Court in *Feiner*—to the objective likelihood of violence. Appellate courts, too, in reviewing convictions in such cases, must closely examine lower courts' findings of fact. An important difference between *Feiner* and *Edwards v. South Carolina* (1963), where the Court reversed breach of peace convictions of civil rights demonstrators facing a hostile audience, lay in the *Edwards* Court's willingness to scrutinize the record and reject the state courts' findings of danger.

KENNETH L. KARST
(1986)

Bibliography

KALVEN, HARRY, JR. 1965 *The Negro and the First Amendment.* Pages 139–145. Columbus: Ohio State University Press.

## HOT PURSUIT

See: Exigent Circumstances Search

## HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES

In 1938, because of a growing fear of Nazi and communist activity in the United States, conservative congressmen secured passage of a House Resolution creating a Special Committee on Un-American Activities (HUAC). Under publicity-conscious Texas congressman MARTIN DIES, the Committee set out to expose left-wing groups and individuals whom it considered security risks. After five renewals, by overwhelming votes, the group was made into an unprecedented standing committee of the House in 1945. From then until the mid-1950s, the Committee became a sounding board for ex-radicals, publicity seekers, and critics of the NEW DEAL and the Truman administration. It identified the following tasks for itself: to expose and ferret out communists and their sympathizers in the federal government; to show how communists had won control over vital trade unions; and to investigate communist influences in the press, religious and educational organizations, and the movie industry. The sensational Alger Hiss-Whittaker Chambers hearings, in connection with turning over security information, and the resultant perjury conviction of Hiss, a former New Deal official, added to the Committee's prestige. By 1948, the Committee sponsored legislation against the Communist party, pushing the MUNDT-NIXON BILL.

The activities of HUAC, however, raised important constitutional questions. The Committee's constant probing into political behavior and belief led critics to charge that such forced exposure abridged FREEDOM OF SPEECH and association, and punished citizens for their opinions. Also questioned was the legitimacy of its "exposure for its own sake" approach, when action did not seem to relate to legitimate legislative purpose, and when legislative "trials" violated many aspects of DUE PROCESS including the right to be tried in a court under the protection of constitutional guarantees.

The Supreme Court ultimately dealt with both questions, with contradictory and changing results. In three cases (*Emspack v. United States*, 1955; *Quinn v. United States*, 1955; and WATKINS V. UNITED STATES, 1957) the Court narrowly interpreted the statutory authority for punishing recalcitrant witnesses, and questioned forced exposure of views and activities in light of the FIRST AMENDMENT. Facing sharp criticism, the Court retreated in the cases of BARENBLATT V. UNITED STATES (1958), *Wilkinson v. United States* (1961), and *Braden v. United States* (1961), only to move back again to a more critical position as the 1960s progressed—from 1961 to 1966 reversing almost every contempt conviction which came to it from the Committee. By mid-1966, conservative legislators were condemning the "unseemly spectacles" HUAC chronically elicited. Thus, in 1969, it was rechristened the Internal Security Committee, and although its procedures were modified somewhat in this new form, the committee was eventually abolished by the House in 1975.

PAUL L. MURPHY
(1986)

Bibliography

GOODMAN, WALTER 1968 *The Committee: The Extraordinary Career of the House Committee on Un-American Activities.* New York: Farrar, Straus.

## HOUSE OF REPRESENTATIVES

The House of Representatives was born of compromise at the CONSTITUTIONAL CONVENTION OF 1787. Early during the Convention, the VIRGINIA PLAN, favored by the larger states, proposed a bicameral legislature in which states would be represented on the basis of wealth or population. New Jersey and other small states balked at this plan and proposed maintaining a unicameral legislature in which each state would have equal representation. The present structure of Congress was accepted as the heart of the GREAT COMPROMISE. In the SENATE each state was guaranteed equal representation, while in the House, representation was to be determined by each state's population, excluding Indians but including three-fifths of the slave population.

The compromise served dual purposes: it resolved a major conflict between the delegates, and it created one of the CHECKS AND BALANCES within the Congress to guard

against the flawed legislation that might come from a unicameral legislature. The House of Representatives was planned to reflect populist attitudes in society.

Article I, section 2, of the Constitution establishes the structure of the House. Members are chosen every second year. By law, this occurs the Tuesday after the first Monday in November in even-numbered calendar years. The frequency of elections was expected to make House members particularly responsive to shifting political climates. The Framers believed this influence would be balanced by requiring legislation to be passed by the Senate and House together. Senators are elected for six-year terms, with a third of the seats contested in each biennial election. The two-year term in the House was a compromise between those favoring annual elections and others, including JAMES MADISON, who favored elections once every third year. Subsequent attempts to set House terms at four years have failed. Opponents of such plans believe that having all congressional elections coincide with presidential elections would make House candidates unduly vulnerable to the effects of coattail politics. There is no limit to the number of terms a representative or senator may serve.

The Constitution requires that representatives be chosen by "the People of the several States," as opposed to the indirect election of the President and Vice-President by the ELECTORAL COLLEGE, and the original plan called for election of senators by the state legislatures. The SEVENTEENTH AMENDMENT now requires direct election of senators. The precise method of direct election is not constitutionally determined. Until 1842, some states allowed voters to select a slate of at-large represenatives, making it possible for voters to select every representative from a given state. Congress forbade this practice, mandating the use of congressional districts—that is, equally apportioned subdivisions within the states. Each district sends one representative to the House.

Congressional districts have been the subject of continuous controversy. Districts are drawn by the state legislatures, and the political parties in control of the individual legislatures often GERRYMANDER boundary lines, creating oddly shaped districts that benefit the fortunes of the majority party. The federal courts have been loath to intervene in these disputes, although the issue does not fall squarely into the category of the unreviewable POLITICAL QUESTION, and the Supreme Court has hinted that an extreme partisan gerrymander might be unconstitutional.

The Court has been far more strict in requiring that state legislatures draw district lines to achieve population equality among the several districts within a given state. This principle, first set forth in WESBERRY V. SANDERS (1964), has been consistently reaffirmed.

Anyone who can vote in an election for "the most numerous Branch of the State Legislature" can vote for members of the House of Representatives. Early in the country's history, VOTING RIGHTS were limited to white males and were often linked to property holdings. As a result, voter eligibility varied from state to state. The scope of suffrage has broadened over time, through the adoption of the FIFTEENTH AMENDMENT (vote for former slaves), the NINETEENTH AMENDMENT (vote for women), the TWENTY-FOURTH AMENDMENT (abolition of poll taxes), the VOTING RIGHTS ACT OF 1965, and the TWENTY-SIXTH AMENDMENT (vote for all citizens eighteen or older). Indians are also now eligible to vote and are counted for purposes of apportionment.

Article I, section 2, requires that representatives be at least twenty-five years old, U.S. citizens for at least seven years, and citizens of the states they represent. Although not constitutionally required, political practice in the United States requires House members to reside in the districts they represent. This practice is not common to all national legislatures, most notably the British House of Commons.

Under Article I, section 5, the House and the Senate are the judges of the qualifications of their members, as well as the final arbiters of contested elections. On ten occasions, elected candidates have failed to meet constitutional requirements for House membership. Prior to 1969, both chambers occasionally refused to seat victorious candidates who were thought unacceptable for moral or political reasons. The Supreme Court limited Congress's ability to make such judgments in POWELL V. MCCORMACK (1969). The Court ruled that the House could not refuse to seat Adam Clayton Powell, Jr., on the basis of his being held in contempt of court. So long as an elected candidate meets the constitutional requirements of age, CITIZENSHIP, and residence, the member's chamber must seat him or her, although members may be censured or expelled for violating internal chamber rules. Article I grants each chamber of Congress the power to establish and enforce internal rules.

The number of House seats allotted to each state is determined by the decennial census. Article I, section 2, paragraph 3, sets forth the original apportionment scheme. The apportioning mechanism remains, but the size of the House has increased with the growth of the country. The House was initially designed to seat 65 members, each representing not less than 30,000 countable constituents. During the twentieth century, allowing the maximum membership under the Constitution would have produced an unwieldly body of several thousand members, Congress has permanently capped the size of the House at 435 voting members. In the 1980s, members from all but the smallest states represented an average of approximately 520,000 constituents.

When a vacancy occurs in the House of Representatives

because of death or other circumstances, the governor of the state with the vacant seat calls a special election. Vacant Senate seats are filled by gubernatorial appointment. The special-election requirement reaffirms the constitutional principle that representatives are the elected national officals most directly tied to their constituents. In practice, when vacancies occur in the second year of a congressional term, seats often remain vacant until the next general election.

Article I, section 2, paragraph 5, provides for the election of the Speaker of the House and other officers. The Speaker is actually chosen by the majority-party caucus and then formally elected by the House. House rules dictate the specific functions of the Speaker and other officers, and by Act of Congress the Speaker is second in the line of PRESIDENTIAL SUCCESSION, behind the Vice-President. The Speaker is not constitutionally required to be a member of the House, although political practice has limited the Speaker's office to senior House members from the majority party.

Few specific powers are granted exclusively to the House of Representatives. In the event that no presidential candidate receives a majority of Electoral College votes, representatives, voting in state delegations with one vote per state, choose the President from among the three candidates with the greatest number of electoral votes. This process, set forth in Article II, section 1, and modified by the TWELFTH AMENDMENT, has been used only following the elections of 1800 and 1824.

The House has the sole constitutional power to impeach officers of the United States. When impeaching a federal officer, the House brings formal charges of high crimes or misdemeanors against the accused. Following a vote to impeach by the House, the Senate may vote to convict the officer by a two-thirds majority. The House has impeached only one President, ANDREW JOHNSON, in 1868. The Senate failed to convict him by a single vote. A dozen federal judges have been formally impeached, and four convicted. In July 1974 the House Committee on the Judiciary initiated IMPEACHMENT hearings against President RICHARD M. NIXON and recommended his impeachment on three counts. Nixon resigned following his court-ordered release of the Watergate tapes, and the House dropped its proceedings.

The final power held exclusively by the House is the "power of the purse." The Constitution requires that all bills to raise federal revenues originate in the House. The larger states at the Constitutional Convention insisted on linking taxation and representation, believing that the direct and frequent election of the representatives would cause them to proceed with caution in proposing tax measures. In fact, the Senate can propose revenue measures through the process of amending bills from the House. The adoption of the Seventeenth Amendment has diluted much of the original concern regarding taxation and direct representation.

ROBERT F. DRINAN, S.J.
(1992)

Bibliography

CONGRESSIONAL QUARTERLY 1982 *Powers of Congress*, 2nd ed. Washington, D.C.: Congressional Quarterly.

CORWIN, EDWARD SAMUEL 1985 *Corwin and Peltason's Understanding the Constitution*, 10th ed. New York: Holt, Rinehart & Winston.

GALLOWAY, GEORGE B. 1976 *History of the House of Representatives*, 2nd ed. New York: Thomas Y. Crowell.

HINCKLEY, BARBARA 1987 *Stability and Change in Congress*, 4th ed. San Francisco: Harper & Row.

## HOUSTON, CHARLES H.
(1895–1950)

Charles H. Houston was the foremost black CIVIL RIGHTS lawyer before THURGOOD MARSHALL. He was a member of the faculty of Howard Law School and from 1932 to 1935 served as dean. He obtained accreditation and respect for the institution, which trained many civil rights lawyers. From 1935 to 1940 Houston was special counsel for the National Association for the Advancement of Colored People (NAACP). Although he returned to private practice thereafter, he remained active with the NAACP and other civil rights organizations. Marshall later called him "The First Mr. Civil Rights." Houston was of counsel in NIXON V. CONDON (1932), arguing against the white primary, and he assisted in the defense of the Scottsboro Boys. He argued and won MISSOURI EX REL. GAINES V. CANADA (1938), which forced the state to open its law school to black students. He also won from the Supreme Court decisions prohibiting discrimination against black railroad employees. Perhaps his most difficult and greatest victory came in HURD V. HODGE (1948), in which the Court accepted his arguments that the CIVIL RIGHTS ACT OF 1866 outlawed the judicial enforcement of RESTRICTIVE COVENANTS by the courts of the DISTRICT OF COLUMBIA, and that even in the absence of the congressional act, the enforcement of such covenants would violate the public policy of the United States.

LEONARD W. LEVY
(1986)

Bibliography

MCNEIL, GENNA RAE 1982 *Charles Hamilton Houston and the Struggle for Civil Rights*. Philadelphia: University of Pennsylvania Press.

## *HOUSTON, EAST & WEST TEXAS RAILWAY CO. v. UNITED STATES*

(Shreveport Rate Case)
234 U.S. 342 (1914)

To relieve a competitive inequality in rail rates, the Interstate Commerce Commission (ICC) ordered the Texas Railroad Commission to raise intrastate rates to equal interstate rates. Shreveport, Louisiana, to east Texas rates, set by the ICC, were higher than west Texas to east Texas rates, fixed by the states, thereby placing INTERSTATE COMMERCE at a competitive disadvantage. With only Justices HORACE LURTON and MAHLON PITNEY dissenting, Justice CHARLES EVANS HUGHES relied on the INTERSTATE COMMERCE ACT and the COMMERCE CLAUSE in upholding the ICC order. Hughes distinguished the MINNESOTA RATE CASES (1913) as neither involving an attempt at federal regulation nor adversely affecting or burdening interstate commerce. Emphasizing Congress's "complete and paramount" power over interstate commerce, he announced the SHREVEPORT DOCTRINE: "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress and not the state, that is entitled to prescribe the final and dominant rule."

DAVID GORDON
(1986)

## HOWARD, JACOB M.
(1805–1871)

Jacob Merritt Howard was an abolitionist, a champion of CIVIL RIGHTS, and a leading northern politician whose constitutional legacy derived from his advocacy of Radical Republicanism. Born and educated in New England, Howard moved to Detroit where, after admission to the bar, he began his political career as a WHIG. In 1854 he helped found the Republican party and framed its resolutions.

In 1862 he became a United States senator, and for a decade he remained in the vanguard of the Radical Republican wing of his party. He advocated black VOTING RIGHTS, served influentially during the CIVIL WAR on both the SENATE JUDICIARY COMMITTEE and the Committee on Military Affairs, and vigorously supported the FREEDMEN'S BUREAU ACT and the CIVIL RIGHTS ACT OF 1866. Howard was a coauthor of the THIRTEENTH AMENDMENT and, as a ranking Senate Republican on the powerful JOINT COMMITTEE ON RECONSTRUCTION, chaperoned the approval by the Senate of the FOURTEENTH AMENDMENT.

LEONARD W. LEVY
(1986)

## HOWE, MARK DEWOLFE
(1902–1966)

Mark DeWolfe Howe began his legal career as a clerk to Justice OLIVER WENDELL HOLMES, and throughout his life Holmes was the focus of much of Howe's most valuable scholarly work. While professor of law at Harvard Law School, Howe prepared definitive editions of Holmes's correspondence with Sir Frederick Pollock (1941) and HAROLD J. LASKI (1953), his CIVIL WAR diary and letters (1947), his *Speeches* (1962), and *The Common Law* (1963). Although Howe never lived to complete his biography of Holmes, the two volumes he did publish (1957, 1963) are unparalleled for their illumination of Holmes's intellectual life up to his appointment to the Massachusetts Supreme Judicial Court. A pioneer in the field of American legal history, Howe specialized in the history of freedom of religion. In his last published book, *The Garden and the Wilderness* (1965), Howe criticized the Supreme Court's reading of the history of religion in America, pointing out that the "wall of separation" between church and state was based as much on evangelical theory as Jeffersonian rationalism; Howe suggested that the Constitution recognized a *de facto* ESTABLISHMENT OF RELIGION in American society. An activist as well as a scholar, Howe worked tirelessly for the NAACP LEGAL DEFENSE & EDUCATIONAL FUND, both as a teacher and as a litigator.

RICHARD B. BERNSTEIN
(1986)

## *H. P. HOOD & SONS v. UNITED STATES*

See: *Wrightwood Dairy Co., United States v.*

## *HUDGENS v. NATIONAL LABOR RELATIONS BOARD*

424 U.S. 507 (1976)

In terminating its experiment with extending MARSH V. ALABAMA (1946) to privately owned SHOPPING CENTERS, the Supreme Court, 7–2, announced in *Hudgens* that the refusal of owners to permit union picketing did not constitute STATE ACTION and thus did not violate the FIRST AMENDMENT, even though the private property was "open to the public." That vast shopping plazas, which are central features of American culture, are not required by the First Amendment to grant FREEDOM OF SPEECH is a highly significant feature of contemporary constitutional law.

MARTIN SHAPIRO
(1986)

## *HUDSON v. PALMER*

See: Prisoners' Rights

## *HUDSON AND GOODWIN, UNITED STATES v.*

See: Federal Common Law of Crimes

## HUGHES, CHARLES EVANS
(1862–1948)

The only child of a Baptist minister and a strong-willed, doting mother who hoped their son would become a man of the cloth, Charles Evans Hughes compiled a record of public service unparalleled for its diversity and achievement by any other member of the Supreme Court with the exception of WILLIAM HOWARD TAFT. In addition to pursuing a lucrative career at the bar, Hughes taught law at Cornell, served as a two-term governor of New York, was secretary of state under two Presidents during the 1920s, and served as associate Justice and Chief Justice of the United States. By the narrowest of margins, he lost the electoral votes of California in 1916 and thus the presidency to the incumbent, WOODROW WILSON. Hughes was a man of imposing countenance and intellectual abilities, who left an indelible mark upon the nation's politics, diplomacy, and law.

First appointed to the Court as associate justice by President William Howard Taft, Hughes brought to the bench the social and intellectual outlook of many American progressives, those morally earnest men and women from the urban middle class who wished to purge the nation's politics of corruption, infuse the business world with greater efficiency and concern for the public welfare, and minister to the needs of the poor in the great cities. In an earlier era, such people had found an outlet for their moral energies in religion. By the turn of the twentieth century, they practiced a social gospel and undertook a "search for order" through secular careers in law, medicine, public administration, journalism, engineering, and social welfare.

"We are under a Constitution," Governor Hughes remarked shortly before his appointment to the bench, "but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution." This statement reflected the ambivalence of many progressives about the nation's fundamental charter of government and its judicial expositers on the Supreme Court. On the one hand, Hughes and other progressives clearly recognized that constitutional decision-making was a subjective process, strongly influenced by the temper of the times and by the social biases and objectives of individual jurists. The Constitution, they believed, was flexible enough to accommodate the growing demands for reform that sprang from the manifold desires of businessmen, consumers, farmers, and industrial workers who wished to use government to promote economic security in an increasingly complex, interdependent capitalist economy. Like other progressives, Hughes saw government, both state and federal, as a positive instrument of human welfare that could discipline unruly economic forces, promote moral uplift, and guarantee domestic social peace by protecting the citizen from the worst vicissitudes of the marketplace.

At the same time, Hughes and other middle-class reformers had a morbid fear of socialism and resisted endowing government with excessive power over persons and property. They wanted social change under the rule of law, in conformity with American traditions of individualism, and directed by a disinterested elite of lawyers, administrators, and other experts of enlightened social progress.

By the time Hughes took his seat on the nation's highest court, the Justices had grappled inconclusively for almost five decades with the question of the reach of the constitutional power of the states and the national government to regulate economic activity. One group of Justices, influenced by the Jacksonian legacy of entrepreneurial individualism, equality, and STATES' RIGHTS, had combined an expansive reading of the FOURTEENTH AMENDMENT'S DUE PROCESS clause and a narrow interpretation of the COMMERCE CLAUSE and the TAXING AND SPENDING POWER in order to restrict both state and federal regulation of private economic decision making. Another group of Justices, heirs to the radical Republican tradition of moral reform and positive government, had been more receptive to governmental efforts at ECONOMIC REGULATION and redistribution.

Hughes placed his considerable intellectual resources on the side of the economic nationalists and those who refused to read the due process clause as a mechanical limitation upon state regulation of economic affairs. In *Miller v. Wilson* (1915), for example, he wrote for a unanimous bench to sustain California's eight-hour law for women in selected occupations against a challenge that the law violated FREEDOM OF CONTRACT. The liberty protected by the due process clause, he noted, included freedom from arbitrary restraint, but not immunity from regulations designed to protect public health, morals, and welfare.

More significant, he joined the dissenters in COPPAGE V. KANSAS (1915), where six members of the Court, speaking through Justice MAHLON PITNEY, invalidated a Kansas law prohibiting YELLOW DOG CONTRACTS on the ground that the

regulation deprived employers of their contractual liberty. Hughes endorsed the dissent by Justice WILLIAM R. DAY which argued that the law attempted only to protect the right of individual workers to join labor unions if they so pleased and represented a legitimate exercise of the STATE POLICE POWER, ", not to require one man to employ another against his will, but to put limitations upon the sacrifice of rights which one may exact from another as a condition of employment."

Hughes's views on the federal commerce power were equally generous during this period. He wrote the two leading opinions of the era supporting the authority of Congress and the Interstate Commerce Commission (ICC) to regulate both interstate railroad rates and purely intrastate rates that undermined the efficiency of the nation's transportation network. In the Minnesota Rates Cases (1913) he upheld the particular exercise of ratemaking by the state, although he and the majority affirmed that the power of Congress "could not be denied or thwarted by the commingling of interstate and intrastate operations" of the railroad. A year later, in the landmark Shreveport Case, *Houston, East & West Texas Railway Company v. United States*, (1914), he spoke for all but two Justices in sustaining an order of the ICC that effectively required an increase in intrastate rates in order to bring them into line with those fixed by the commission for interstate carriers over the same territory. The power of Congress to regulate interstate commerce, he wrote, was "complete and paramount"; Congress could "prevent the common instrumentality of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce."

Most progressives displayed little sympathy for the plight of either American blacks or the foreign immigrants who entered the country in large numbers during the decades before WORLD WAR I. Hughes was a striking exception to the usual pattern of collaboration with the forces of racial and ethnic intolerance. He began to speak out in these years against various forms of oppression and bigotry and to lay the foundation for many of his subsequent opinions on CIVIL RIGHTS during the 1930s.

In *McCabe v. Atchison, Topeka & Santa Fe Railroad* (1914), Hughes led a five-Justice majority in striking down a state law that authorized intrastate railroads to provide dining and sleeping cars only for members of the white race. The state and the carriers argued that the statute was reasonable in light of the limited economic demand by black passengers for such services, a point of view that also appealed to Justice OLIVER WENDELL HOLMES. Hughes, however, flatly condemned the law as a violation of the Fourteenth Amendment's EQUAL PROTECTION clause. With support from all but one of the Justices, he also overturned, in *Truax v. Raich* (1915), an Arizona law that had limited the employment of ALIENS in the state's principal industries to twenty percent of all workers in firms with five or more employees. Discrimination against such inhabitants "because of their race or nationality," he declared, "clearly falls under the condemnation of the FUNDAMENTAL LAW."

His most impressive effort in this regard came in the famous debt peonage case, BAILEY V. ALABAMA (1911), where he both invalidated the state's draconian statute and gained a notable rhetorical victory over Justice Holmes. Under the Alabama law, as under similar ones in force throughout the South, a person's failure to perform a labor contract without just cause and without paying back money advanced was prima facie evidence of intent to defraud, punishable by fine or imprisonment. The accused, furthermore, could not rebut the presumption with testimony "as to his uncommunicated motives, purposes, or intention." Hughes condemned this "convenient instrument for . . . coercion" as a violation of both the THIRTEENTH AMENDMENT and the Anti-Peonage Act of 1867.

With a few exceptions, the progressives also displayed more concern for the suppression of crime than for the rights of the accused. The due process clause had seldom been invoked successfully against questionable methods of law enforcement and CRIMINAL PROCEDURE on the state level. In this field, too, Hughes attempted to break new ground that anticipated the jurisprudence of a later era. One case in point is FRANK V. MANGUM (1915), arising out of the notorious Leo Frank trial in Georgia. A young Jewish defendant had been convicted of murder and sentenced to death with a mob shouting outside the courtroom, "Hang the Jew, or we'll hang you." Frank and his lawyers had not been present during the reading of the verdict, because the trial judge could not guarantee their safety in the event of an acquittal.

Despite this evidence of intimidation, the Georgia Supreme Court upheld the conviction and sentence; a federal district judge refused Frank's petition for HABEAS CORPUS, which raised a host of due process challenges; and a majority of the Supreme Court affirmed that decision. Hughes joined a powerful dissent written by Holmes, which chastised the majority for its reasoning and called upon the Justices to "declare lynch law as little valid when practiced by a regularly drawn jury as when administered by one elected by a mob intent on death."

Hughes's initial appointment to the Court, following in the wake of his progressive achievements as governor of New York, had been received with almost unanimous acclaim. However, his nomination as Chief Justice by President HERBERT HOOVER in 1930 sparked furious debate. Twenty-six senators, led by the redoubtable GEORGE NORRIS of Nebraska, voted against his confirmation. Many of them believed, as Norris did, that the former Justice's prof-

itable law practice during the 1920s had turned him into a pliant tool of the "powerful combinations in the political and financial world" and therefore rendered him incapable of fairly deciding the "contests between organized wealth and the ordinary citizen." Events proved Norris to be half right.

Beginning in 1930, Hughes was called upon to pilot the Court through the years of social and economic crisis spawned by the financial collapse of 1929 and the Great Depression. These were the most turbulent years in the Court's history since the decade before the CIVIL WAR and the economic crisis of the 1890s—two earlier occasions when the Justices had attempted to hold back the tide of popular revolt against the status quo.

Under Hughes's leadership, the Court majority became aggressively liberal with respect to the protection of CIVIL LIBERTIES and civil rights, often building upon the doctrinal structure erected by the Chief Justice himself during the Progressive Era. In STROMBERG V. CALIFORNIA (1931), NEAR V. MINNESOTA (1931), and DEJONGE V. OREGON (1937) Hughes's distinguished opinions significantly enlarged the scope of FIRST AMENDMENT rights protected against state abridgment via the due process clause. He personally drove the first judicial nail into the coffin of the SEPARATE BUT EQUAL doctrine with his opinion in MISSOURI EX REL. GAINES V. CANADA (1938), holding that a state university's refusal to admit a qualified black resident to its law school constituted a denial of equal protection. He endorsed Justice GEORGE H. SUTHERLAND'S opinion in the initial Scottsboro case, POWELL V. ALABAMA (1932), and wrote the second one, NORRIS V. ALABAMA (1935), himself. Both opinions tightened the Supreme Court's supervision over state criminal trials involving the poor and members of racial minorities.

Hughes contributed to Justice HARLAN F. STONE's famous fourth footnote in UNITED STATES V. CAROLENE PRODUCTS COMPANY (1938), where the latter suggested that the Court had a special role to play in defending PREFERRED FREEDOMS, including FREEDOM OF THE PRESS, and VOTING RIGHTS, from legislative abridgment and also to protect DISCRETE AND INSULAR MINORITIES from the tyranny of the majority. Under Hughes, finally, the Court broadened the reach of habeas corpus to attack constitutionally defective state criminal convictions, and greatly expanded the IN FORMA PAUPERIS docket which permitted INDIGENT defendants to seek Supreme Court review of their convictions. By any yardstick, Hughes as Chief Justice compiled a civil liberties record of impressive range and impact.

The Hughes who regularly cast his vote on the libertarian side in cases touching civil liberties and civil rights during the 1930s also voted in 1935 and 1936 against many of the social and economic reforms sponsored by the FRANKLIN D. ROOSEVELT administration and state governments in their efforts to cope with the economic crisis of the decade. It is this side of his performance as Chief Justice that has fueled the most controversy—and puzzlement, too, considering Hughes's toleration for many of the early anti-Depression nostrums of both the NEW DEAL and the individual states. It was Hughes, after all, who wrote for the five-Justice majority in HOME BUILDING & LOAN ASSOCIATION V. BLAISDELL (1934), upholding a far-reaching mortgage moratorium law that many observers found to be in flat violation of the Constitution's CONTRACT CLAUSE. He also wrote for the narrow majority in the GOLD CLAUSE CASES, where the Justices sustained the New Deal's monetary experiments over the protests of Justice JAMES C. MCREYNOLDS who declared, "This is Nero at his worst. The Constitution is gone."

The Chief Justice sided as well with Justice OWEN J. ROBERTS' views in NEBBIA V. NEW YORK (1934), which expanded the sphere of business activities subject to state regulation, and he spoke out forcefully against the crabbed interpretation of the federal commerce power in RAILROAD RETIREMENT BOARD V. ALTON RAILROAD COMPANY (1935), where five Justices voted to strike down a mandatory pension plan for railway workers. In 1935 and 1936, however, Hughes began to vote more consistently with Roberts and the Court's four conservatives—Justices McReynolds, PIERCE BUTLER, WILLIS VAN DEVANTER, and Sutherland—against the New Deal and various state reform programs.

Six months later, in the aftermath of Roosevelt's crushing reelection victory and his threats to reorganize the federal judiciary, the Court reversed gears once again when a bare majority of the Justices—including Hughes and Roberts—sustained a minimum wage law in WEST COAST HOTEL COMPANY V. PARRISH (1937) and the New Deal's major labor law in the WAGNER ACT CASES (1937). Hughes wrote both landmark opinions, the first laying to rest "liberty of contract" and the second affording Congress ample latitude to regulate labor-management conflicts under the commerce clause.

Various explanations have been advanced since the 1930s to explain both Hughes's alignment with the conservatives and his eventual return to the progressive fold in 1937. Hughes justified his behavior during the first period by casting blame upon the New Deal's lawyers, who, he complained, wrote vague, unconstitutional statutes. This thesis has some credibility with respect to the controversial NATIONAL INDUSTRIAL RECOVERY ACT which the Court invalidated in SCHECHTER POULTRY CORPORATION V. UNITED STATES (1935), but none at all when one reflects upon the care with which very good lawyers wrote both the AGRICULTURAL ADJUSTMENT ACT and the Guffey Bituminous Coal Act. (See CARTER V. CARTER COAL CO.) Others have suggested that Hughes voted with Roberts and the four conservatives on several occasions in 1935 and 1936

in order to avoid narrow 5–4 decisions that might damage the Court's reputation for constitutional sagacity. But this hypothesis does not explain why he found 5–4 decisions in favor of the New Deal any less injurious to the Court in 1937.

A more plausible explanation may be that Hughes regarded many New Deal regulatory programs and some on the state level as dangerously radical, both to the inherited constitutional system and to the social order, because of their redistributive implications. Other old progressives also fought the New Deal for similar reasons after 1935. Those who resisted the leftward drift of the administration in 1935 hoped that the electorate would repudiate Roosevelt's course of action in the 1936 referendum, but Roosevelt's landslide victory left them with few alternatives but capitulation to the popular will. In bowing to the election returns, Hughes became the leader of the Court's progressive wing once again, salvaged the basic power of JUDICIAL REVIEW, and at the same time administered a fatal blow to the President's misconceived reorganization bill. It was a stunning triumph for the Chief Justice.

Hughes accomplished this feat without serious damage to his intellectual integrity. The Justice who wrote *Miller v. Wilson* in 1915 did not find it too difficult to sustain minimum wage legislation two decades later. And the ideas expressed in *NLRB v. Jones & Laughlin* (1937) had already been given initial shape in the *Minnesota Rates Cases* and the Shreveport Case. For a Justice as brilliant and as crafty as Hughes, leading the constitutional revolution in 1937 was as easy as resisting it a year before, but the latter course assured his place in history.

MICHAEL E. PARRISH
(1986)

(SEE ALSO: *Constitutional History, 1933–1945.*)

Bibliography

FREUND, PAUL A. 1967 Charles Evan Hughes. *Harvard Law Review* 81:34–48.

HENDEL, SAMUEL 1951 *Charles Evans Hughes and the Supreme Court.* New York: Russell & Russell.

PUSEY, MERLO J. 1951 *Charles Evans Hughes.* 2 Vols. New York: Harper & Row.

## HUGHES COURT
## (1930–1941)

The years in which Chief Justice CHARLES EVANS HUGHES presided over the Supreme Court of the United States, 1930–1941, are notable for the skillful accomplishment of a revolution in CONSTITUTIONAL INTERPRETATION. The use of the DUE PROCESS clauses of the Fifth Amendment and FOURTEENTH AMENDMENT to protect FREEDOM OF CONTRACT and economic Darwinism against government regulation yielded to legislative supremacy and judicial self-restraint. The prevailing limits on the regulatory powers of Congress under the COMMERCE CLAUSE were swept away. The Hamiltonian view that Congress has power to spend money for any purpose associated with the general welfare was solidified by judicial approval. The Court acquiesced in the delegation of vast lawmaking power to administrative agencies. The groundwork was laid for expanding the constitutionally guaranteed FREEDOM OF SPEECH and freedom of the press.

Change was all about the Hughes Court. Of the eight Justices who flanked Hughes when he took his seat as Chief Justice, seven left the Court before he retired. The Court moved across the street from the cozy, old Senate Chamber in the Capitol to the gleaming white marble palace and ornate conference room used today. Profounder changes were occurring in the social, economic, and political conditions that give rise to constitutional litigation, that shape the briefs and arguments of counsel, and that the Court's decisions must address.

The preceding era had been marked by the rise to dominance of large-scale business and financial enterprise. Vast aggregations of men and women and material wealth were needed to develop America's resources, to harness the power unleashed by science and technology, and to capture the efficiencies of mass production for mass markets. Unlocking America's agricultural and industrial wealth made for higher standards of living and an extremely mobile society. With the gains had come corruption, hardships, injustices, and pressure for political action; but in the general prosperity of the 1920s the costs were too often ignored.

Yet the farmers were left behind and too much of the wealth was committed to speculation in corporate securities. The bursting of the latter bubble in November 1929 heralded an economic depression of unprecedented length and depth. Ninety percent of the market value of stock in industrial corporations was wiped out in three years. Twenty-five percent of the land in Mississippi was auctioned off in mortgage foreclosure sales. Factory payrolls were cut in half. One out of every four persons seeking employment was without work. The Depression destroyed people's faith in the industrial magnates and financiers, even in the ethic of individual self-reliance. The stability of American institutions seemed uncertain.

The election of FRANKLIN D. ROOSEVELT as President of the United States brought a new, more active political philosophy to government. Government, Roosevelt asserted, should seek to prevent the abuse of superior economic power, to temper the conflicts, and to work out the accommodations and adjustments that a simpler age had sup-

posed could safely be left to individual ability and the free play of economic forces. Government should also meet the basic need for jobs and, in the case of those who could not work, for food, clothing, and shelter. For the most part these responsibilities must be met by the federal government, which alone was capable of dealing with an economy national in scope and complexity.

Roosevelt's "NEW DEAL" not only provided money and jobs for the worst victims of the Depression; it enacted the legislation and established the government agencies upon which national economic policies would rest for at least half a century: the Agricultural Adjustment Acts, the WAGNER NATIONAL LABOR RELATIONS ACT, the Fair Labor Standards Act, the Social Security Act, and the Securities and Exchange Act.

JUDICIAL REVIEW permits those who lose battles in the executive and legislative branches to carry the war to the courts. Earlier in the century many courts, including the Supreme Court, had clung to the vision of small government, economic laissez-faire, and unbounded opportunity for self-reliant individuals. Judges had thus struck down as violations of the due process clauses of the Fifth and Fourteenth Amendments many measures now generally accepted as basic to a modern industrial and urban society: MAXIMUM HOURS AND MINIMUM WAGE LAWS, laws forbidding industrial homework, and laws protecting the organization of labor unions. The critical question for the Supreme Court in the Hughes era would be whether the Court would persevere or change the course of American constitutional law.

The response of Justices WILLIS VAN DEVANTER, JAMES C. MCREYNOLDS, GEORGE SUTHERLAND, and PIERCE BUTLER was predictable: they would vote to preserve the old regime of limited federal government and economic laissez-faire. Three Justices—LOUIS D. BRANDEIS, HARLAN F. STONE, and BENJAMIN N. CARDOZO—could be expected to eschew the use of judicial power to protect economic liberty, and might not condemn broader congressional interpretation of the commerce clause. The balance rested in the hands of Chief Justice HUGHES and Justice OWEN J. ROBERTS.

At first the Court challenged the New Deal. The National Recovery Administration sought to halt the downward spiral in wages and prices by stimulating the negotiation of industry-by-industry and market-by-market codes of "fair competition" fixing minimum prices and wages and outlawing "destructive" competitive practices. In SCHECHTER POULTRY CORPORATION V. UNITED STATES (1935) the Court held the underlying legislation unconstitutional. The major New Deal measure for dealing with the plight of the farmers was held unconstitutional in UNITED STATES V. BUTLER (1936) as "a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government." CARTER V. CARTER COAL COMPANY (1936) held that, because production was a purely local activity, Congress lacked power to legislate concerning the wages and hours of bituminous coal miners. In MOREHEAD V. NEW YORK EX REL. TIPALDO (1936) the four conservative Justices, joined by Justice Roberts, reaffirmed the 1923 decision in *Adkins v. Children's Memorial Hospital* invalidating a law fixing minimum wages for women. These opinions seemed to presage invalidation of such other fundamental New Deal measures as the National Labor Relations Act, a proposed federal wage and hour law, and even the Social Security Act.

President Roosevelt responded with strong criticism. The *Schechter* ruling, he said, was evidence that the Court was still living "in the horse and buggy age." On February 5, 1937, the President sent a special message to Congress urging enactment of a bill to create one new judgeship for every federal judge over the age of seventy who railed to retire. The message spoke of the heavy burden under which the courts—particularly the Supreme Court—were laboring, of the "delicate subject" of "aged or infirm judges," and of the need for "a constant infusion of new blood in the courts." No one doubted Roosevelt's true purpose. Six of the nine Supreme Court Justices were more than seventy years old. Six new Justices would ensure a majority ready to uphold the constitutionality of New Deal legislation. A month later the President addressed the nation more candidly, acknowledging that he hoped "to bring to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work."

Despite overwhelming popular support for New Deal legislation and despite the President's landslide reelection only a few months earlier, the Court-packing plan was defeated. The President's disingenuous explanation was vulnerable to factual criticism. Justice Brandeis, widely known as a progressive dissenter from his colleagues' conservative philosophy, joined Chief Justice Hughes in a letter to the Senate Judiciary Committee demonstrating that the Court was fully abreast of its docket and would be less efficient if converted into a body of fifteen Justices. Much of the political opposition came from conservative strongholds, but the current ran deeper. The American people had a well-nigh religious attachment to CONSTITUTIONALISM and the Supreme Court. They intuitively realized that packing the Court in order to reverse the course of its decisions would destroy its independence and erode the essence of constitutionalism. Yet no explanation is complete without recalling the contemporary quip: "A switch in time saves nine." The final defeat of the Court-packing plan came after a critical turning in the Court's own interpretation of constitutional limitations.

The shift first became manifest in WEST COAST HOTEL

COMPANY V. PARRISH (1937), a 5–4 decision upholding the constitutionality of a state statute authorizing a board to set minimum wages for women. The Chief Justice's opinion overruled the *Adkins* case and markedly loosened the standards of SUBSTANTIVE DUE PROCESS that had previously constricted regulation of contractual relations. To the old STATE POLICE POWER doctrine confining the permissible objectives of government to health, safety, and morals, the Chief Justice added broadly the "welfare of the people" and "the interests of the community." Where the old opinions declared as an abstract truth that "The employer and the employee have equality of right and any legislation that disturbs the equality is an arbitrary interference with liberty of contract," the new majority more realistically asserted that a legislature may consider the "relatively weak bargaining power of women" and may "adopt measures to reduce the evils of the "sweating system." There were also hints of greater judicial deference to legislative judgments: "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."

The *West Coast Hotel* case inaugurated a line of decisions sustaining every challenged economic regulation enacted by a state legislature or by the Congress. General minimum wage and maximum hour laws, price regulations, and labor relations acts—all were upheld. Even prior to Hughes's retirement, the trend was intensified by the normal replacement of all but one of the Justices who had sat with Hughes on his first day as Chief Justice. The philosophy of judicial self-restraint gradually became dominant on the Court, in the laws, and throughout the legal profession.

The troublesome problems of constitutional interpretation often call for striking a balance between the opposing ideals of democratic self-government and judicial particularization of majestic but general and undefined constitutional limitations. The philosophy of legislative supremacy and judicial self-restraint that came to dominate constitutional interpretation in the time of the Hughes Court was often asserted and widely accepted as broadly applicable to all constitutional adjudication except the enforcement of clear and specific commands. The Hughes Court thus set the stage for the central constitutional debate of the next major era in constitutional history. As claims to judicial protection of CIVIL LIBERTIES and CIVIL RIGHTS became the focus of attention, JUDICIAL ACTIVISM would be revived by substituting STRICT SCRUTINY for judicial deference in many areas of PREFERRED FREEDOMS and FUNDAMENTAL RIGHTS. Many of the new judicial activists would be liberals or progressives of the same stripe that had pressed for democratic self-government in the days when their political power confronted conservative dominance of the courts. But the opinions of the Hughes Court still mark the end of effective constitutional challenges to legislative regulation of economic activity.

The Hughes Court broke new ground in interpretation of the commerce clause only a few months after the minimum wage decision. In *National Labor Relations Board v. Jones & Laughlin Steel Corporation* (1937) the Labor Board, under authority delegated by the Wagner Act, had ordered Jones & Laughlin to reinstate four employees discharged from production and maintenance jobs in a basic steel mill because of their union activity. Both Jones & Laughlin's anti-union activities and the order for reinstatement were beyond the reach of federal power as delimited by the old line between production and interstate movement. The lower court had so decided. Led by Chief Justice Hughes, a bare majority of the Supreme Court Justices reversed that decision. Rejecting the old conceptualism that had asked whether the regulated activity had a "legal or logical connection to interstate commerce," the Court appraised the relation by "a practical judgment drawn from experience." Congress could reasonably conclude that an employer's anti-union activities and refusal to bargain collectively might result in strikes, and that a strike at a basic steel mill drawing its raw materials from, and shipping its products to, many states might in fact affect the movement of INTERSTATE COMMERCE. (See WAGNER ACT CASES.)

The *Jones & Laughlin* opinion appeared to retain some judicially enforceable constitutional check upon the congressional power under the commerce clause: "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so far as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." But the check proved illusory. The quoted admonition, while operable as a political principle guiding congressional judgment, yields no rule of law capable of judicial administration. Once the distinctions between interstate movement and production and between "direct" and "indirect" effects upon interstate commerce are rejected, the number of links in the chain of cause and effect becomes irrelevant. Federal power would reach to the local machine shop that repaired the chain saws that cut the trees that yielded the pulp wood that yielded the pulp that made the paper bought by the publisher to print the newspaper that circulated in interstate commerce. The size of the particular establishment or transaction also became irrelevant, for the cumulative effect of many small local activities might have a major impact upon interstate commerce. The new judicial deference, moreover, called for leaving such questions to Congress.

A second doctrinal development accelerated the trend. The Fair Labor Standards Act of 1938 required employers to pay workers engaged in the production of goods for shipment in interstate commerce no less than a specified minimum wage. The act also forbade shipping in interstate commerce any goods produced by workers who had not received the minimum wage. Congress claimed the power to exclude from the pipeline of interstate commerce things that would, in its judgment, do harm in the receiving state. Goods produced at substandard wages and shipped in interstate commerce might depress wages paid in the receiving states, and also in other producing states. The theory had been applied as early as 1903 to uphold a congressional law forbidding the interstate shipment of lottery tickets, but in 1918, under the doctrine barring federal regulation of production, the Court had struck down an act of Congress barring the interstate shipment of goods made with child labor. Having rejected that doctrine in the Labor Board Cases, the Hughes Court readily upheld the constitutionality of the Fair Labor Standards Act upon the theory of the lottery cases. The direct prohibition against paying less than the specified minimum wage was also upheld as a necessary and proper means of preventing goods made under substandard conditions from moving in interstate commerce and doing harm in other states. Years later similar reasoning supported broader decisions upholding the power of Congress to regulate or prohibit the local possession or use of firearms and other articles that have moved in interstate commerce.

Much more than legal logic lay behind the Hughes Court's recognition of virtually unlimited congressional power under the commerce clause. The markets of major firms had become nationwide. A complex and interconnected national economy made widely separated localities interdependent. A century earlier layoffs at the iron foundry in Saugus, Massachusetts, would have had scant visible effect in other states. During the Great Depression no one could miss the fact that layoffs at the steel mills in Pittsburgh, Pennsylvania, reduced the demand for clothing and so caused more layoffs at the textile mills in Charlotte, North Carolina, and Fall River, Massachusetts. Even as the Hughes Court deliberated the Labor Board Cases, a strike at a General Motors automobile assembly plant in Michigan was injuring automobile sales agencies in cities and towns throughout the United States.

The states were incapable of dealing with many of the evils accompanying industrialization. Many states were smaller and less powerful than the giant public utilities and industrial corporations. Massachusetts might forbid the employment of child labor, or fix a minimum wage if the due process clause permitted, but the cost of such measures was the flight of Massachusetts industries to North Carolina or South Carolina. New York might seek to ensure the welfare of its dairy farmers by setting minimum prices that handlers should pay for milk, only to watch the handlers turn to Vermont farmers who could sell at lower prices. The commerce clause barred the states from erecting protective barriers against out-of-state competition.

A shift in intellectual mode was also important. The rise of LEGAL REALISM stimulated by publication of OLIVER WENDELL HOLMES's *The Common Law* in 1881 had made it increasingly difficult for courts to find guidance in such abstractions as the equality of right between employer and employee or in such rhetorical questions as "What possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce?" The harsh facts of the Depression made both impossible.

The proper division of regulatory activity between the nation and the states is and may always be a much debated question of constitutional dimension. Today the question is nonetheless almost exclusively political. The Hughes Court yielded the final word to Congress.

The enormous expansion of the federal establishment that began in the 1930s and continued for half a century finds a second constitutional source in the power that Article I, section 8, grants to Congress: "to lay and collect taxes . . . and provide for the common defense and general welfare of the United States." Here, too, the key judicial precedents of the modern era are decisions of the Hughes Court.

The scope of the TAXING AND SPENDING POWER had been disputed from the beginning. Jeffersonian localists argued that the words "general welfare" encompassed only the purposes expressly and somewhat more specifically stated later in Article I. Spending for INTERNAL IMPROVEMENTS gradually became accepted practice in the political branches, but the Supreme Court had had no occasion to adjudicate the issue of constitutional power because no litigant could show that he or she had suffered the kind of particular injury that would sustain a cause of action.

The Roosevelt administration not only spent federal funds on an unprecedented scale in order to relieve unemployment; it also broke new ground in using subsidies to shape the conduct of both state governments and private persons. The Agricultural Adjustment Act of 1933 levied a tax upon processors in order to pay subsidies to farmers who would agree to reduce the acreage sown to crops. The aim was to stabilize the prices of agricultural commodities. Linking the subsidy payments to the processing tax gave the processors STANDING to challenge the tax on the ground that the payments exceeded the limits of the federal spending power. In *United States v. Butler* (1936) the Hughes Court held the act unconstitutional be-

cause conditioning the farmer's allotments upon the reduction of his planted acreage made the whole "a statutory plan to regulate and control agricultural production, a matter beyond the power delegated to the federal government."

The decision was a prime target of President Roosevelt's criticism. It aroused fears that the Hughes Court would also invalidate the Social Security Act, a key New Deal measure establishing systems of unemployment and old age and survivors insurance. The title of the act dealing with unemployment levied a federal payroll tax upon all employers of eight or more individuals but gave a credit of up to 90 percent of the federal tax for employer contributions to a state employment fund meeting federal standards specified in the act. Very few states had previously established unemployment insurance, but the act's combination of pressure and inducement proved effective. The combination was attacked as a coercive, unconstitutional invasion of the realm reserved exclusively to the states by the TENTH AMENDMENT, which, if generalized, would enable federal authorities to induce, if not indeed compel, state enactments for any purpose within the realm of state power, and generally to control state administration of state laws. In STEWARD MACHINE COMPANY V. DAVIS (1937) the five-Justice majority answered that offering a choice or even a temptation is not coercion. Spending to relieve the needs of the army of unemployed in a nationwide depression serves the general welfare, the majority continued; the spending power knows no other limitation.

In later decades congressional spending programs would grow in size, spreading from agriculture and social insurance to such areas as housing, highway construction, education, medical care, and local LAW ENFORCEMENT. Many FEDERAL GRANTS-IN-AID to both state and private institutions are conditioned upon observance of federal standards. The balance to be struck between federal standards and state autonomy is sharply debated, but in this area, as under the commerce clause, the question is now almost exclusively left to political discretion as a result of the decisions of the Hughes Court.

Questions concerning the DELEGATION OF POWER gave rise to the fourth major area of constitutional law shaped by the Hughes Court. Congress makes the laws, it is said; the executive carries out the laws; and the judiciary interprets the laws and resolves controversies between executive and legislative officials. Never quite true, this old and simple division of functions proved largely incompatible with the new role established for federal government by the Roosevelt administration. Much law, however denominated, would have to be made by executive departments or new administrative agencies authorized by Congress, such as the Securities and Exchange Commission and the Civil Aeronautics Board. Under the traditional division the new arrangements were subject to attack as unconstitutional attempts to delegate to other agencies part of the legislative power that Congress alone can exercise.

The flow of decisions in the Hughes Court upon this question paralleled the course taken under the due process, commerce, and spending clauses. At first the majority seemed disposed to resist the new political order as in PANAMA REFINING COMPANY V. RYAN (1935) and *Schechter Poultry Corporation v. United States* (1935). Later decisions, however, reversed the initial trend. UNITED STATES V. ROCK ROYAL COOPERATIVE, Inc., (1939) is illustrative. The AGRICULTURAL MARKETING AGREEMENT ACT gave the secretary of agriculture broad authority to regulate the marketing of eight agricultural commodities, including milk, with a view to reestablishing the purchasing power of farmers at the level in a base period, usually 1909–1914. In the case of milk, however, if the secretary found the prices so determined to be unreasonable, he was authorized to fix producer prices at a level that would reflect pertinent economic conditions in local milk markets, provide an adequate supply of wholesome milk, and be in the public interest. The purported standards were numerous and broad enough to impose no significant limit upon the secretary's decisions. Nevertheless, the Court upheld the delegation. It was enough that Congress had limited the secretary's power to specified commodities, had specifically contemplated price regulation, and had provided standards by which the secretary's judgment was to be guided after hearing interested parties. The decision set the pattern for all subsequent legislative draftsmen and judicial determinations.

The contributions of the Hughes Court to the law of the FIRST AMENDMENT were less definitive than in the areas of the commerce clause, economic due process, the spending power, and delegation; but they were not less important. The Hughes Court infused the First Amendment with a new and broader vitality that still drives the expansion of the constitutional protection available to both individual speakers and institutional press.

Apart from the WORLD WAR I prosecution of pacifists and socialists for speeches and pamphlets alleged to interfere with the production of munitions or conscription for the armed forces, federal law posed few threats to freedom of expression. State laws were more restrictive. The illiberal decisions of the 1920s sustaining the prosecution of leftists under state CRIMINAL SYNDICALISM LAWS assumed that the First Amendment's guarantees against congressional abridgment of freedom of expression are, by virtue of the Fourteenth Amendment, equally applicable to the states. These OBITER DICTA encouraged constitutional attack upon state statutes, municipal ordinances, and judge-made doctrines restricting political and religious expression. In this area Chief Justice Hughes and Justice Roberts quickly al-

lied themselves with the three Justices of established liberal reputation.

Two early opinions highlight the protection that the First and Fourteenth Amendments afford the press against previous restraints. NEAR V. MINNESOTA (1931) was decided upon appeal from a state court's injunction forbidding further publication of *The Saturday Press*, a weekly newspaper, upon the ground that it was "largely devoted to malicious, scandalous and defamatory articles." The newspaper had charged Minneapolis officials with serious offenses in tolerating gambling, bootlegging, and racketeering; the articles were scurrilous and anti-Semitic in tone and content. The decree was authorized by a Minnesota statute. Minnesota had experienced a rash of similar scandal sheets, some of whose publishers were believed to use their journals for blackmail. In an opinion by Chief Justice Hughes, the Supreme Court held that the injunction against publication was an infringement upon the liberty of the press guaranteed by the Fourteenth Amendment regardless of whether the charges were true or false. For any wrong the publisher had committed or might commit, public and private redress might be available; but this PRIOR RESTRAINT was inconsistent with the constitutional liberty.

The law's strong set against previous restraints was underscored a few years later by GROSJEAN V. AMERICAN PRESS COMPANY (1936), where a review of history led the Hughes Court to conclude that the First and Fourteenth Amendments bar not only censorship but also taxes that single out the press and are thus calculated to limit the circulation of information.

The chief danger to freedom or expression by the poor, the unorthodox, and the unpopular lies in state statutes and municipal ordinances that give local authorities wide discretion in preserving the peace and public order. Such laws not only invite suppression of unorthodox ideas by discriminatory enforcement but they also encourage self-censorship in hope of avoiding official interference. The Hughes Court laid the foundations for current constitutional doctrines narrowing the opportunities for abuse.

LOVELL V. CITY OF GRIFFIN (1938) introduced the doctrine that a law requiring a license for the use of the streets or parks for the distribution of leaflets, speeches, parades, or other forms of expression must, explicitly or by prior judicial interpretation, confine the licensing authority to considerations of traffic management, crowd control, or other physical inconvenience or menace to the public. From there it was only a short step to holding in CANTWELL V. CONNECTICUT (1941) that a man may not be punished for words or a street DEMONSTRATION, however offensive to the audience, under a broad, general rubric that invites reprisal for the expression of unorthodox views instead of requiring a narrow judgment concerning the risk of immediate violence. THORNHILL V. ALABAMA (1941), once important for the ruling that peaceful PICKETING in a labor dispute is a form of expression protected by the First Amendment, also introduced the then novel and still controversial doctrine that an individual convicted under a law drawn so broadly as to cover both expression subject to regulation and constitutionally protected expression may challenge the constitutionality of the statute "on its face" even though his own conduct would not be constitutionally protected against punishment under narrower legislation. (See OVERBREADTH DOCTRINE.)

Supreme Court Justices and other constitutionalists still debate the theoretical question how far the First and Fourteenth Amendments secure individuals a right to some PUBLIC FORUM for the purposes of expression. The Hughes Court's decision in HAGUE V. CONGRESS OF INDUSTRIAL ORGANIZATIONS (1939) recognized such a right to the use of streets, parks, and like public places traditionally open for purposes of assembly, communication, and discussion of public questions: "Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege . . . to use the streets and parks for communication of views on national questions may be regulated in the interest of all; . . . but must not in the guise of regulation be abridged or denied." On this ground *Schneider v. State* (1939) invalidated four city ordinances banning the use of the streets to hand out leaflets. Against this background later Justices would wrestle with the constitutional problems raised by restrictions upon house-to-house canvassing and the use of other government properties for the purpose of expression.

The Hughes Court presided over a revolution in constitutional interpretation. Many conservatives were convinced that in joining the liberal Justices, the Chief Justice and Justice Roberts unconscionably distorted the law to suit the winds of politics. Yet while the revolution is plain, the ground-breaking decisions did appreciably less violence than some reforming decisions of the later WARREN COURT and BURGER COURT to the ideal of a coherent, growing, yet continuing body of law binding the judges as well as the litigants. Doubtless the presence of two competing lines of authority in the Court's earlier decisions often made it easier for the Hughes Court to perform this part of the judicial function. Liberty of contract had never been absolute. The Court had previously sustained, in special contexts, the power of Congress to regulate local activities affecting interstate commerce. Acceptance of the Hughes Court's changes was also the easier because the Hughes Court was diminishing judicial interference with legislative innovations whereas the Warren and Burger Courts pressed far-reaching reforms without legislative support and sometimes against the will expressed by the people's

elected representatives. That the old structure and powers of government should be shaped to industrialization, urbanization, and a national economy seemed more inevitable than that public schools should be integrated by busing, that prayer and Bible-reading should be banned from the public schools, or that abortion should be made a matter of personal choice. Yet even when the differences are acknowledged, much of the success of the Hughes Court in managing its revolution in constitutional interpretation seems attributable to the Chief Justice's belief in the value of a coherent, though changing, body of law, to his character, and to his talents combining the perception and sagacity drawn from an earlier, active political life with his extraordinary legal craftsmanship, earlier finehoned as an Associate Justice.

ARCHIBALD COX
(1986)

Bibliography

ALSOP, JOSEPH and CATLEDGE, TURNER 1938 *The 168 Days.* Garden City, N.Y.: Doubleday.

JACKSON, ROBERT H. 1941 *The Struggle for Judicial Supremacy.* New York: Knopf.

MURPHY, PAUL 1972 *The Constitution in Crisis Times 1918–1969* New York: Harper & Row.

PUSEY, MERLO J. 1951 *Charles Evans Hughes.* New York: Macmillan.

STERN, ROBERT L. 1946 The Commerce Clause and the National Economy, 1933–1946. *Harvard Law Review* 59:645–693.

SWINDLER, WILLIAM F. 1970 *Court and Constitution in the Twentieth Century,* Part I. Indianapolis: Bobbs-Merrill.

## HUMPHREY, HUBERT H.
(1911–1978)

Hubert Horatio Humphrey was the latest in a line of distinguished United States senators whose influence has exceeded that of many Presidents. He served as senator from Minnesota from 1948 to 1964 and from 1972 to his death, during which time he wrote over forty acts of Congress and coauthored considerably more than twice that many on subjects as diverse as children's nutrition, aid to education, nuclear disarmament, full employment, solar energy, and medicare. He led the anticommunist liberal wing of the Democratic party and cofounded its political organ, Americans for Democratic Action, whose constitution barred membership by communists and Fascists. In 1954 Humphrey wrote the COMMUNIST CONTROL ACT; his original version would have made it a crime to be a member of the party. He never spoke against Senator Joseph R. McCarthy in the Senate. Otherwise he was the quintessential liberal, involved in nearly every achievement and failure of American liberalism from the close of WORLD WAR II until his untimely death. He believed that government existed to serve people, the more service to the larger number of people the better.

Humphrey's finest hours were devoted to CIVIL RIGHTS. In 1948 he became a national celebrity by leading a successful fight for a strong civil rights plank in his party's platform, provoking a walkout of intransigent Southerners who formed the Dixiecrat party. In 1964, when he was party whip, he was floor manager of the battle for the passage of the CIVIL RIGHTS ACT of that year.

As thirty-eighth vice-president, Humphrey was the most unflaggingly active of any in our history. When he was his party's nominee for President in 1968, he lost the election by half a million votes because his strong support of the VIETNAM WAR cost him the allegiance of antiwar voters, and because his civil rights record cost him southern votes that went to a third party candidate.

The pell-mell, all-directions-at-once character of the Great Society mirrored Humphrey as well as President LYNDON B. JOHNSON. Humphrey was not only an effective legislator. He was probably the gabbiest, most exuberant, open-hearted person in American public life.

LEONARD W. LEVY
(1986)

Bibliography

SOLBERG, CARL 1984 *Hubert Humphrey: A Biography.* New York: Norton.

## *HUMPHREY'S EXECUTOR v. UNITED STATES*
295 U.S. 602 (1935)

This decision probably more than any other contributed to President FRANKLIN D. ROOSEVELT's animus against the Supreme Court. As Attorney General ROBERT H. JACKSON wrote, the opinion of the unanimous Court by Justice GEORGE SUTHERLAND gave the impression "that the President had flouted the Constitution, rather than that the Court had simply changed its mind within the past ten years." In MYERS V. UNITED STATES (1926) a 6–3 Court had sustained the removal power of the President in a case involving a postmaster. Sutherland had joined the opinion of the Court, including its OBITER DICTUM that the removal power extended even to members of independent REGULATORY COMMISSIONS. Roosevelt, relying on *Myers*, removed from the Federal Trade Commission (FTC) William Humphrey, who had been reappointed for a six-year term in 1931. The FEDERAL TRADE COMMISSION ACT provided for removal for cause, including inefficiency or malfeasance.

Humphrey was a blatantly probusiness, antiadministration official who thwarted the objectives of the FTC. After he died, his executor sued for Humphrey's back pay, raising the question whether a member of an administrative tribunal created by Congress to implement legislative policies can be removed as if he were a member of the executive department. Ruling against the removal power, Sutherland distinguished *Myers*, overruled the dictum, and failed to mention that Roosevelt had acted in good faith when he relied on *Myers*. Liberal Justices joined Sutherland for the reason given privately by Justice LOUIS D. BRANDEIS: if a Huey Long were President and the administration's argument prevailed, the commissions would become compliant agents of the executive.

Despite the Court's unanimity, its strict reliance on a simplistic SEPARATION OF POWERS theory ignored the fact that the administrative agencies, however mixed their powers, were executive agencies and Congress acknowledged that fact. Moreover, had Roosevelt chosen to remove Humphrey for cause, the Court would not likely have challenged his judgment. The Court followed *Humphrey* in *Wiener v. United States* (1958), ruling that President DWIGHT D. EISENHOWER could not remove a member of a quasi-judicial agency without cause.

LEONARD W. LEVY
(1986)

## HUNT, WARD
(1810–1886)

Ward Hunt, a New York judge, was appointed to the Supreme Court by ULYSSES S. GRANT in late 1872; seven years later, although permanently incapacitated by a stroke, he refused to resign until Congress passed a special retirement act in 1882. His judicial contributions were largely unexceptional and insignificant. He consistently sided with the WAITE COURT majority in supporting bondholders' claims, upholding state regulation under traditional POLICE POWER doctrines, and denying claims for racial equality under the FOURTEENTH AMENDMENT.

Hunt also upheld claims of immunity from federal taxation for states or their instrumentalities. (See INTERGOVERNMENTAL IMMUNITY.) Earlier, in COLLECTOR V. DAY (1871), the Court had exempted state judges from the federal income tax. In one of his first opinions, Hunt treated municipally financed railroads as state agencies and as similarly exempt. "Their operation," he said in *United States v. Railroad Co.* (1873), "may be impeded and may be destroyed, if any interference is permitted." A few years later he dissented from the nationalistic holding in PENSACOLA TELEGRAPH CO. V. WESTERN UNION TELEGRAPH CO. (1877), in which the majority held that states could not interfere with telegraph lines established under federal law. Hunt, however, insisted that federal authority extended only to lands in the public domain.

Hunt usually followed his colleagues in ruling against claims advancing Negro rights. But in UNITED STATES V. REESE (1876) he alone dissented to support the constitutionality of the FORCE ACT (1870) which was designed to implement the FIFTEENTH AMENDMENT. Hunt interpreted the amendment as guaranteeing "the right to vote in its broadest terms" for all citizens, an all elections, state as well as federal. The majority had refused to sanction federal interference against acts of individual state officers who had refused on their own account to allow blacks to vote. For Hunt, it was obvious that such individual acts were tantamount to state action and subject to federal restraint. The word "state" in the Fifteenth Amendment, he maintained, included "the acts of all those who proceed under [a state's] . . . authority." The *Reese* decision reflected the growing national consensus for sectional reconciliation which inevitably meant abandonment of national protection for the freedmen's CIVIL RIGHTS. Hunt acknowledged this mood and he recognized that the majority's decision "brings to an impotent conclusion the vigorous amendments on the subject of slavery." Yet he silently acquiesced later that term in the further emasculation of the Force Act in UNITED STATES V. CRUIKSHANK (1876).

Hunt's fleeting concern for guaranteeing black suffrage did not extend to women. On circuit in 1873, he presided at the trial of SUSAN B. ANTHONY, who had voted in the 1872 presidential election in New York despite a state constitutional requirement limiting the franchise to men. Anthony claimed that the state denied her the PRIVILEGES AND IMMUNITIES guaranteed under the Fourteenth Amendment. Hunt flatly denied the argument. He invoked the reasoning of the recent SLAUGHTERHOUSE CASES (1873) and held that such regulations, however unjust, were under the absolute domain of the state. Hunt directed a guilty verdict, refused to poll the jury, and fined Anthony $100. The sentence was not enforced, and there was no APPEAL to the Supreme Court.

Hunt was a hard-working able craftsman during his brief career on the Court (1873–1882) but he had little apparent influence on his brethren or on constitutional law.

STANLEY I. KUTLER
(1986)

Bibliography

FAIRMAN, CHARLES 1971 *Reconstruction and Reunion, 1864–1888.* Volume 6 of the *Oliver Wendell Holmes Devise History of the Supreme Court of the United States.* New York: Macmillan.

MAGRATH, C. PETER 1963 *Morrison R. Waite: The Triumph of Character.* New York: Macmillan.

## *HUNTER v. ERICKSON*
393 U.S. 385 (1969)

In a perverse application of the EQUAL PROTECTION clause, an 8–1 Supreme Court struck down an amendment to the Akron, Ohio, city charter subjecting any council-passed OPEN HOUSING LAW to a REFERENDUM before it could take effect and requiring a referendum on an open housing law previously enacted.

Six Justices, speaking through BYRON R. WHITE, found in the referendum requirement an "explicitly racial classification," although they conceded that it drew "no distinctions among racial and religious groups." The majority argued that the charter amendment, by making open housing laws harder to enact, "disadvantaged those who would benefit" from such laws—and presumed that the potential beneficiaries were the members of ethnic and religious minorities. The FOURTEENTH AMENDMENT was held to protect minorities against barriers to enactment of favorable legislation.

Justice HUGO L. BLACK dissented, contending that referenda were part of the democratic political process and that advocates of particular types of legislation were not constitutionally disadvantaged merely because they might lose an election.

DENNIS J. MAHONEY
(1986)

## *HURD v. HODGE*

See: *Shelley v. Kraemer*

## *HURLEY v. IRISH-AMERICAN GAY, LESBIAN, AND BISEXUAL GROUP OF BOSTON*
515 U.S. 557 (1995)

The City of Boston authorized the South Boston Allied War Veterans Council to organize the annual St. Patrick's Day Parade. The Council refused a place in the parade to the Irish-American Gay, Lesbian, and Bisexual Group of Boston (GLIB), an organization formed for the purpose of expressing its members' pride in their Irish heritage as openly gay, lesbian, and bisexual individuals. GLIB filed suit claiming that this refusal violated a Massachusetts law prohibiting discrimination on account of SEXUAL ORIENTATION in places of PUBLIC ACCOMMODATION. The state courts sustained this claim, but the Supreme Court, in a unanimous opinion by Justice DAVID H. SOUTER, held that the application of the statute in this context violated the FIRST AMENDMENT rights of the council.

The Court explained that, because "every participating unit affects the message conveyed by the private organizers," the application of the statute in this situation effectively required the council "to alter the expressive content" of its parade. The Court declared that "this use of the State's power" violates "the fundamental rule" that "a speaker has the autonomy to choose the content of his own message." Thus, if the council "objects," for example, to GLIB's implicit assertion that homosexuals and bisexuals are entitled to full and equal "social acceptance," it has a right "not to propound" this message.

The Court distinguished PRUNEYARD SHOPPING CENTER V. ROBINS (1980), in which the Court had held that a state could constitutionally require the owner of a private shopping center to permit individuals to circulate petitions on the grounds of the shopping center. The Court explained that, unlike the council, the owner of a shopping center (1) is "running 'a business establishment that is open to the public,' " and (2) could more easily " 'expressly disavow any connection with the message by simply posting signs in the areas where the speakers or handbillers stand.' "

GEOFFREY R. STONE
(2000)

(SEE ALSO: *Compelled Speech; Freedom of Speech; Freedom of Assembly and Association.*)

## *HURON PORTLAND CEMENT COMPANY v. DETROIT*
362 U.S. 440 (1960)

In a case involving a major COMMERCE CLAUSE issue, a 7–2 Supreme Court sustained Detroit's Smoke Abatement Code. That city sued a Michigan manufacturer operating ships in INTERSTATE COMMERCE for violating its air pollution regulations. The manufacturer stressed its adherence to congressional regulations, claiming that Detroit could not impose stricter standards. Justice POTTER STEWART's opinion, devoted primarily to rejecting claims that federal laws had preempted the field, accorded a high priority to the STATE POLICE POWER. Exercise of that power must stand unless clearly discriminatory or violative of national uniformity, and nothing "suggest[s] the existence of any . . . competing or conflicting local regulations."

DAVID GORDON
(1986)

## HURST, J. WILLARD
(1911–1997)

James Willard Hurst was perhaps the outstanding twentieth-century figure in American legal historiography. Educated at the Harvard Law School, Hurst clerked for Justice LOUIS D. BRANDEIS on the U.S. Supreme Court, and then joined the faculty of the University of Wisconsin Law School in 1937, where he remained until his retirement.

In a series of path-breaking works, Hurst virtually created the field of American legal history. The little work done on the subject before he began to produce his own work had been written from the "internal" (lawyer's) standpoint—it was concerned with DOCTRINES and case law almost exclusively, and had few points of contact with mainstream historical writing. Hence, *The Growth of American Law: The Law Makers* (1950) was a revolutionary book. It announced that the "most creative, driving, and powerful pressures upon our law emerged from the social setting"; and in chapters on the legislature, the courts, the bar, and the executive branch, proceeded to flesh out and illustrate this thesis through an examination of the institutions that actually made law in the United States.

In *Law and the Conditions of Freedom in the Nineteenth-Century United States* (1956), originally a series of lectures at Northwestern University, Hurst described nineteenth-century American law as essentially developmental—as animated by the desire to "release . . . individual creative energy," stimulating the economy and establishing a vigorous market system. Americans, in other words, used law instrumentally, to further agreed-upon or dominant goals, mostly economic. In his most elaborate work, *Law and Economic Growth* (1964), Hurst produced an exhaustive and fine-grained case study to illustrate his general approach, using the legal history of one industry (lumber) in one state (Wisconsin), in the period 1835–1915. Later works included *A Legal History of Money in the United States* (1973) and *Law and Markets in United States History* (1982).

Hurst was the founder of what came to be called the Wisconsin school of legal history. He influenced a whole generation of younger historians. He directed and inspired a series of monographic studies of Wisconsin law in the nineteenth century—an emphasis on the state and local, and on everyday processes of law, which helped to cement the relationship between legal history and the emerging fields of economic and social history.

Hurst himself was a member of the NEW DEAL generation; he deplored what he saw as aimlessness and drift in public life and public policy in the generations before the New Deal. His scholarly work, however, though strikingly original, was exceptionally rigorous and meticulous. It influenced not only legal historians, but also scholars in other fields who studied the relationship of law and society.

LAWRENCE M. FRIEDMAN
(2000)

Bibliography

HURST, J. WILLARD 1950 *The Growth of American Law: The Law Makers.* Boston: Little, Brown.

——— 1956 *Law and the Conditions of Freedom in the Nineteenth-Century United States.* Madison: University of Wisconsin Press.

——— 1964 *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836–1915.* Cambridge, Mass.: The Belknap Press of Harvard University Press.

——— 1970 *The Legitimacy of the Business Corporation in the Law of the United States, 1780–1970.* Charlottesville: University Press of Virginia.

## *HURTADO v. CALIFORNIA*
110 U.S. 516 (1884)

DUE PROCESS OF LAW reached a watershed in *Hurtado.* For centuries due process had stood for a cluster of specific procedures associated especially with TRIAL BY JURY. Sir EDWARD COKE, for example, explicitly associated due process with INDICTMENT by GRAND JURY. The BILL OF RIGHTS enumerated many of the rights that the concept of due process spaciously accommodated. The FOURTEENTH AMENDMENT's due process clause was copied verbatim from the Fifth Amendment, where the same clause sat cheek-by-jowl with a number of specific guarantees that due process had embodied as a COMMON LAW concept. The framers of the Fifth Amendment had added the due process clause as an additional assurance, a rhetorical flourish, and a genuflection toward the traditions of MAGNA CARTA. In *Hurtado,* the Supreme Court began to whittle away at the conventional meanings of PROCEDURAL DUE PROCESS and did not pause until MOORE V. DEMPSEY (1923).

California tried and convicted Hurtado on an INFORMATION for murder, filed by his prosecutor. He claimed that because the state had denied him indictment by grand jury, it had violated the due process clause of the Fourteenth Amendment. The Court, sustaining the conviction, 7–1, rejected Hurtado's claim on the ground that "any legal proceeding" that protects "liberty and justice" is due process. Justice STANLEY MATTHEWS, for the Court, reasoned that the Constitution, having been framed for an undefined and expanding future, must recognize new procedures. To hold otherwise, he said, would render the Constitution "incapable of progress and improvement. It

would be to stamp upon our jurisprudence the unchangeableness attributed to the Medes and the Persians. . . ." Matthews also argued that no part of the Constitution was superfluous; the fact that the Fifth Amendment included both a guarantee of grand jury proceedings in federal prosecutions and the guarantee of due process showed that the latter did not mean the former.

Justice JOHN MARSHALL HARLAN, dissenting, had history on his side when he found grand jury proceedings to be an indispensable requisite of due process, but whether history should have disposed of the question is a different issue. Harlan did not think that prosecuting individuals for their lives by information inaugurated a new era of progress in the constitutional law of CRIMINAL PROCEDURE. The Court's inexorable logic, he asserted, as if asserting the unthinkable, would lead to the conclusion that due process did not even guarantee the traditional trial by jury. Later cases justified his fears. (See MAXWELL V. DOW.)

LEONARD W. LEVY
(1986)

## *HUSTLER MAGAZINE AND LARRY FLYNT v. JERRY FALWELL*
485 U.S. 46 (1988)

On first glance, this appears to be a case in which the FIRST AMENDMENT ran amok because the Supreme Court extended its constitutional protection to a malevolent and disgusting LIBEL that in no way expressed an opinion or an idea. *Hustler Magazine,* which caters to prurient interests, published a parody of an advertisement in which Jerry Falwell, a nationally syndicated television preacher and head of a political organization called The Moral Majority, was purportedly interviewed. By innuendo, the parody suggested that his first experience with sexual intercourse was with his mother in an outhouse when he was drunk. At the bottom of the page in small print was a disclaimer, "ad parody—not to be taken seriously."

Falwell sued for DAMAGES, claiming libel and the intentional infliction of emotional distress. A jury found for him on the issue of emotional distress but against him on the libel claim because the parody could not reasonably be understood to describe actual facts. *Hustler* appealed the verdict on the emotional distress issue, arguing that the "actual malice" standard of NEW YORK TIMES V. SULLIVAN (1964) must be met before one could recover for emotional distress. The Fourth Circuit sustained the verdict on ground that the *Sullivan* standard had been met because *Hustler* acted recklessly. Unanimously, the Supreme Court sustained *Hustler* in an opinion by Chief Justice WILLIAM H. REHNQUIST.

His opinion makes little sense unless one understands that the dispositive fact was the trial jury's refusal to find that *Hustler* had libeled Falwell. One might think that if the parody was not believable, it was false, and if it was false and recklessly published with malice, the *Sullivan* standard had been met; but the Court took as decisive the jury's finding that *Hustler* had not published a libel because no one would reasonably believe the parody described a fact. Accordingly, the question before the Court was not whether Falwell's reputation had been maliciously and recklessly libeled. Rather, the question was whether his emotional distress overcame a First Amendment protection for offensive speech calculated to inflict psychological injury, "even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved."

In response to this question, Rhenquist discoursed on the importance of the First Amendment to the free flow of "ideas and opinions" and the need for "robust debate" concerning PUBLIC FIGURES involved in important public issues. One might read this section of the opinion as a parody of the Court's great free-speech opinions, for nothing in *Hustler*'s alleged interview with Falwell related to any public issues or reflected the expresison of ideas or opinions. The interview reflected slime and sleaze.

More persuasive was Rehnquist's argument that to hold that public figures or public officials might recover damages for the infliction of emotional distress might mean that "political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject." Nevertheless, Thomas Nast's depictions of the Tweed Ring or Herblock's of Richard Nixon seem wholly different from *Hustler*'s of Falwell; *Hustler* carried no ring of truth and addressed no issues other than, broadly speaking, Falwell's moral character. The outrageousness of the allegation against him places it apart from traditional political cartooning and satire, but the Court was unable to make distinctions. It relied on the *Sullivan* standard by concluding that a public figure victimized by a publication inflicting emotional injury could not recover damages without showing false facts published with actual malice.

Justice BYRON R. WHITE in an inch of space, separately concurring, noted that as he saw the case, the *Sullivan* precedent was irrelevant because the jury found that the *Hustler* parody contained no assertion of fact. That being so, one may conclude that the Court correctly decided that the First Amendment barred Falwell from recovering damages on the sole ground that he had suffered emotional distress.

LEONARD W. LEVY
(1992)

## HUTCHINSON, THOMAS
(1711–1780)

Thomas Hutchinson, described by his biographer, Bernard Bailyn, as "the most distinguished, as well as the most loyal, colonial-born official of his time," was the leading exponent of "Tory" constitutional theory at the outbreak of the AMERICAN REVOLUTION. Hutchinson was not a political theorist, however, but a practical politician who turned to theory in order to justify his actions.

Hutchinson was the leader of the wealthy, interrelated clique that ruled Massachusetts in the eighteenth century. Although he was born in Boston, his loyalty was always to the ministry in England, and he defended his policies by appealing to the most extreme doctrines of royal and parliamentary supremacy. During his career he held every important office in the colony, and at one point (in 1763) he was simultaneously lieutenant governor, chief justice of the Supreme Court, president of the Council, and judge of probate.

In 1761 Hutchinson, as Chief Justice, presided over the PAXTON'S CASE, in which the Superior Court was asked to issue GENERAL WARRANTS to authorize searches by customs officials. He personally opposed the use of WRITS OF ASSISTANCE and as lieutenant governor had argued against their issuance on the governor's authority, but as a judge Hutchinson rejected the argument of JAMES OTIS that such writs were illegal under the COMMON LAW. It was sufficient that writs of assistance were valid in English law and that Parliament had, by statute, authorized their use in the colonies, and so the writs were issued.

Hutchinson became acting governor of Massachusetts in 1769 and governor in 1771. He was temperamentally unsuited for the position in so critical a time. When the policies he pursued became so unpopular that the Assembly would not appropriate money to pay his salary, Hutchinson secured for himself a special salary paid by the British crown. To insure that the courts would remain loyal to the British government he arranged that the judges' salaries, too, should be paid by the crown. These moves, which rendered the executive and judicial powers independent of the legislature and of the citizens, enraged public opinion.

Responding defiantly, Hutchinson summoned the General Court and, on January 6, 1773, delivered an address that spelled out his understanding of the principles of Anglo-American constitutionalism. The British Empire and Massachusetts's place in it, he argued, required the absolute and indivisible SOVEREIGNTY of the king-in-Parliament. The power of the British Parliament was unlimited and illimitable, but, since Parliament represented all British subjects, both in Britain and in the colonies, that power would necessarily be used benignly and humanely. As the American colonies were too weak to survive without British protection, the freedom of Americans depended upon their acceptance of absolute parliamentary authority. Hutchinson refused to concede the possibility that the General Court of Massachusetts exercised a separate legislative authority. "No line," he argued, "can be drawn between the supreme authority of Parliament and the total independence of the colonies."

If Hutchinson expected the address to quell criticism he was seriously mistaken. The effect was rather to enhance the standing of the most radical leaders of the opposition. The task of preparing the Assembly's response fell to SAMUEL ADAMS, the leader of the popular party and Hutchinson's chief rival. The Assembly adopted a resolution accepting, for argument's sake, Hutchinson's position that there could be no middle ground between absolute parliamentary authority and colonial autonomy. But the conclusion drawn was the opposite of Hutchinson's. The Assembly claimed that Massachusetts was a realm separate from Britain, sharing a common executive—the king—but with its own legislature. Only the General Court, and not Parliament, could legislate for Massachusetts.

Hutchinson was only reluctantly an enemy of his fellow colonists. He opposed many of the measures adopted by the British government, including the Sugar Act and the STAMP ACT. But Hutchinson's objections were prudential, not constitutional. He never doubted Parliament's right to legislate for the colonies, however disastrous the exercise of that right, or his own duty to obey and enforce such legislation.

After being forced in 1774 to flee to England, Hutchinson endured the six years until his death as a lonely pensioner of the crown. His career had a deep, if negative, influence on American constitutional thought: it was proof of the evils of plural office-holding and of an executive not dependent on the people's representatives for his pay. His outspoken insistence on the indivisibility of sovereignty helped to impel the formation of American theories of FEDERALISM.

DENNIS J. MAHONEY
(1986)

Bibliography

BAILYN, BERNARD 1974 *The Ordeal of Thomas Hutchinson.* Cambridge, Mass.: Harvard University Press.

HUTCHINSON, THOMAS 1936 *History of the Colony of Massachusetts Bay.* Cambridge, Mass.: Harvard University Press.

## *HUTCHINSON v. PROXMIRE*
443 U.S. 111 (1979)

This decision reaffirmed a line first drawn in GRAVEL V. UNITED STATES (1972) between official and unofficial com-

munications by members of Congress. Senator William Proxmire gave one Dr. Hutchinson a "Golden Fleece" award for what Proxmire considered to be wasteful government-sponsored research conducted by Dr. Hutchinson. Proxmire publicized the award through a press release and a newsletter to constituents. Under the Supreme Court's interpretation of the SPEECH OR DEBATE CLAUSE, members of Congress are absolutely immune from suit only for legislative acts. In *Hutchinson*, the Court found that Proxmire's communications were not "essential to the deliberations of the Senate" and, therefore, were not legislative acts protected from libel actions by the speech or debate clause.

THEODORE EISENBERG
(1986)

## HYDE AMENDMENT

Beginning in 1976, Congress adopted a series of measures (amendments to appropriation bills, and JOINT RESOLUTIONS) prohibiting the use of any federal funds in the Medicaid program to pay for the costs of ABORTIONS. These provisions were known collectively as the "Hyde Amendment," after their original sponsor, Representative Henry J. Hyde of Illinois.

All versions of the amendment contained exceptions permitting federal funding of an abortion when the woman's pregnancy endangered her life. Some of them also permitted funding of abortions when pregnancies resulted from rape or incest. One version included still another exception when two physicians determined that "severe and long-lasting physical health damage to the mother would result" from a full-term pregnancy.

The Medicaid program was designed to provide federal financial assistance to states that reimbursed needy persons for medical treatment. Funds were provided for reimbursing the expenses of childbirth—at an average cost per recipient around nine times the cost of abortions. Some states continued to provide funds for needy women's abortions. In other states, the effect of the Hyde Amendment was to deny to poor women the financial assistance they needed to exercise the constitutional right recognized in ROE V. WADE (1973): to decide whether to terminate their pregnancies. Critics argued that the amendment was an unconstitutional WEALTH DISCRIMINATION, but the Supreme Court upheld its validity, 5–4, in HARRIS V. MCRAE (1980).

KENNETH L. KARST
(1986)

Bibliography

PERRY, MICHAEL J. 1980 Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on *Harris v. McRae*. *Stanford Law Review* 32:1113–1128.

## *HYLTON v. UNITED STATES*
3 Dallas 171 (1796)

The first case in which the Supreme Court passed on the constitutionality of an act of Congress, *Hylton* stands for the principle that the only DIRECT TAXES are taxes on land and CAPITATION TAXES. The Constitution provides that no capitation "or other direct tax" be imposed except in proportion to the population of the states, but that "all duties, IMPOSTS and EXCISES" be levied uniformly, that is, at the same rate. Congress imposed a uniform tax of $16 on all carriages (horse-drawn coaches), despite protests that the tax should have been apportioned among the states according to the census. When Congress levied a direct tax it fixed the total amount of money it intended to raise, so that in a state with ten percent of the nation's population, the parties taxed (carriage-owners) would have paid ten percent of the total. Thus, if a tax on carriages were a direct tax, the amount raised in two states of equal population would be the same, but if one state had twice as many carriages as the other, the tax rate in that state would be twice as great. The contention in this case was that the carriage tax was unconstitutional because it was a direct tax uniformly levied.

The case seems to have been contrived to obtain a Court ruling on the constitutionality of Congress's tax program. To meet the requirement that federal JURISDICTION attached only if the amount in litigation came to $2,000, Hylton deposed that he owned 125 carriages for his private use, each of which was subject to a $16 tax; if he lost the case, however, his debt would be discharged by paying just $16. The United States paid his counsel, ALEXANDER HAMILTON, who defended the tax program he had sponsored as secretary of the treasury. Notwithstanding the farcical aspects of the case, its significance cannot be overestimated: if a tax on carriages were indirect and therefore could be uniform, Congress would have the utmost flexibility in determining its tax policies. As Justice SAMUEL CHASE said, "The great object of the Constitution was to give Congress a power to lay taxes adequate to the exigencies of government." Justice WILLIAM PATERSON, having been a member of the CONSTITUTIONAL CONVENTION OF 1787, explained why the rule of apportionment applied only to capitation and land taxes, making all other taxes indirect taxes. The judgment of the Court was unanimous.

LEONARD W. LEVY
(1986)

# I

## ILLEGAL ALIENS

See: Alien; Immigration and Alienage

## ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT
110 Stat. 3009 (1996)

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 adopted major new restrictions in both substantive immigration law and immigration procedure and raised numerous constitutional questions. PROCEDURAL DUE PROCESS issues arose from its authorization of "expedited removal" of unadmitted ALIENS by individual immigration inspectors after rudimentary hearings and without administrative or JUDICIAL REVIEW. The act's limitations on judicial review of decisions ordering removal of permanent residents have been challenged as violating ARTICLE III and the prohibition in Article I, section 9 against suspending HABEAS CORPUS. Its provisions imposing mandatory detention of aliens pending removal proceedings implicated not only personal liberty but also rights to humane conditions of confinement. Together with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the statute denied many government benefits to lawful residents, and authorized the states to do so in a manner that was questionable under prior EQUAL PROTECTION doctrines concerning IMMIGRATION AND ALIENAGE.

GERALD L. NEUMAN
(2000)

Bibliography

SYMPOSIUM 1997 Lady Liberty's Doorstep: Status and Implications of American Immigration Law. *Connecticut Law Review* 29:1395–1711.

## ILLEGITIMACY

The Anglo-American law of illegitimacy derives from two interrelated purposes of our institutional progenitors. First, imposing the legal disabilities of illegitimacy on a child was seen as a punishment of the parents for their sin. More importantly, the law of legitimacy supported a system of male control over economic resources. The chief effect of the principle of bastardy-as-punishment was to disable illegitimate children from making claims against their deceased fathers' estates. Similarly, formal marriage was the only basis for a woman's claim to inherit from the man who fathered her children. Thus the punishment was reserved for unmarried women and their children. Unmarried fathers, far from being punished, were strengthened in their power to control the transmission of wealth and status. As the Supreme Court began to recognize in two 1968 decisions, these themes are modern as well as medieval.

The cases were LEVY V. LOUISIANA and *Glona v. American Guarantee & Liability Insurance Co.* On EQUAL PROTECTION grounds, the Court invalidated provisions of Louisiana's wrongful death statute that allowed damages to a surviving child for the death of a parent, and vice versa, only in cases of legitimate parentage. From that time forward, most of the Court's decisions on illegitimacy have dealt with laws regulating inheritance by illegitimate chil-

dren (especially from their fathers), and laws restricting the right to death damages or benefits in cases of illegitimacy. Both in their results and in their doctrinal explanations, these decisions have pursued a crooked path.

Much of the early doctrinal uncertainty surrounded the question of the appropriate STANDARD OF REVIEW. *Levy* and *Glona* purported to apply the RATIONAL BASIS standard, but in fact they represented a more demanding judicial scrutiny. There were good reasons for categorizing illegitimacy as a SUSPECT CLASSIFICATION that would demand STRICT SCRUTINY of the state's asserted justifications. As the Court has said more than once, it is "illogical and unjust" to burden innocent children because their parents have not married. The status of illegitimacy is out of the child's control. Illegitimates have suffered historic disadvantage. The status has been the centuries-old source of stigma; such legislative classifications are apt to be the result of habit, prejudice, and stereotype rather than serious attention to public needs. After a series of cases characterized by doctrinal instability, in *Mathews v. Lucas* (1976) the Court rejected the assimilation of illegitimacy to the suspect classifications category. The Court did remark, however, that its standard of review in such cases was "not a toothless one."

Part of the reason for the tortuous doctrinal path from *Levy* and *Glona* to *Mathews v. Lucas* was that the Justices were closely divided on the general issue of the Court's approach to illegitimacy as a legislative classification; in these circumstances, trifling factual distinctions tended to affect the decisions of cases. Even after *Mathews v. Lucas* this pattern continued, as TRIMBLE V. GORDON (1977) and LALLI V. LALLI (1978) illustrate—although the Court has identified a verbal formula for its standard of review: An illegitimacy classification must be "substantially related to a permissible state interest." As Justice LEWIS F. POWELL said for a plurality in *Lalli*, the Court's concern for the plight of illegitimates must be measured against a state's interest in "the just and orderly disposition of property at death." A seventeenth century probate lawyer would not be surprised to learn that the justice and order emerging from *Lalli* offered protection for a father's estate against the claims of illegitimate children, even though paternity had been established beyond question.

The Supreme Court has invoked its intermediate standard of review to invalidate state laws imposing severe time restrictions on suits to establish paternity and compel fathers to support children born outside marriage. But if *Lalli* validated an ancient tradition of domination through control over the transmission of wealth and status, *Parham v. Hughes* (1978), just four months later, validated the tradition of the illegitimacy relation as punishment for sin. An illegitimate child and his mother were killed in an automobile accident. State law would have allowed only the mother to sue for wrongful death damages, if she had survived. Given the mother's death, the father would have been entitled to bring the suit if he had formally legitimated the child. Although he had not undertaken formal legitimation proceedings, the father had signed the child's birth certificate, and had supported the child and visited him regularly; the child had taken the father's name. The Court upheld the state's denial of a right to sue, 6–3.

The state court in *Parham* had said the law was a means of "promoting a legitimate family unit" and "setting a standard of morality." The *Parham* dissenters, focusing on SEX DISCRIMINATION, faulted the state for doing its promoting and standard-setting selectively, along lines defined by gender. The decision also intruded seriously on the FREEDOM OF INTIMATE ASSOCIATION. The father-son relationship was complete in every sense but the formal one. Four members of the majority said it was all right, nevertheless, for the state to "express its 'condemnation of irresponsible liaisons beyond the bounds of marriage'" by denying the father the right to damages for the death of his son. In other words, the father should be ashamed of himself.

In *Glona*, the Court had rejected precisely this sort of reasoning. The fact that the legislature was "dealing with sin," the Court said, could not justify so arbitrary a discrimination as the denial of wrongful death damages. *Glona* had involved the claim of a mother, and mothers of illegitimate children have been the historic victims of a system of illegitimacy in a way that fathers have not. But *Parham* involved a man who not only sired a child but was a father to him. What had been protected in *Glona* was not merely the damages claim of a mother, but the status of the intimate relationship between a mother and her son. The *Parham* law's arbitrariness lay in its assumption that significant incidents of the parent-child relationship should be denied because of the absence of a formal marriage. Seen in this light, the law's discrimination demands some substantial justification for its invasion of the freedom of intimate association. *Glona* teaches that the required justification is not to be found in the state's wish to punish "sin." The Supreme Court plainly is not yet prepared to hold that the status of illegitimacy is itself constitutionally defective. When that day arrives, however, *Glona* will serve as a precedent.

KENNETH L. KARST
(1986)

(SEE ALSO: *Nonmarital Children.*)

Bibliography

PERRY, MICHAEL J. 1979 Modern Equal Protection: A Conceptualization and Reappraisal. *Columbia Law Review* 79:1023–1084.

WALLACH, ALETA and TENOSO, PATRICIA 1974 A Vindication of

the Rights of Unmarried Mothers and Their Children: An Analysis of the Institution of Illegitimacy, Equal Protection, and the Uniform Parentage Act. *University of Kansas Law Review* 23:23–90.

## *ILLINOIS v. GATES*
462 U.S. 213 (1983)

This decision revived pre-WARREN COURT law of the FOURTH AMENDMENT concerning SEARCH WARRANTS issued on INFORMANTS' TIPS. Justice WILLIAM H. REHNQUIST for a six-member majority declared, "we . . . abandon the "two pronged test' established by our decisions in *Aguilar* and *Spinelli.* In its place we reaffirm the totality of circumstances analysis that traditionally had informed PROBABLE CAUSE determination." In AGUILAR V. TEXAS (1962) the Court had developed a test to govern a magistrate's probable cause hearing to determine whether a warrant should issue. Although HEARSAY information (an informer's tip not reflecting the personal knowledge of the police) may underlie an officer's affadavit for a warrant, the officer must also explain his belief that the informant is trustworthy or that his information is reliable. SPINELLI V. UNITED STATES (1969) made the magistrate's hearing a mini-trial controlled by strict rules of EVIDENCE; the Court insisted on a degree of corroboration that proved the truthfulness of a tip apart from any evidence that might subsequently verify it. In effect the Court had escalated the constitutional requirement of probable cause to reasonably certain cause in order to insure that a magistrate could evaluate all facts and allegations for himself. *Aguilar-Spinelli* meant that although the police secured a warrant based on a tip and their search uncovered evidence of crime, that evidence could be suppressed and a conviction set aside if a court later decided that the magistrate should not have issued the warrant. In *Illinois v. Gates* Rehnquist recalled that probable cause is founded on practical, nontechnical considerations and that magistrates should apply flexible standards based on all circumstances rather than on a rigid set of rules. Justice WILLIAM J. BRENNAN, dissenting, declared that the majority opinion reflected "an overly permissive attitude towards police practices" contrary to Fourth Amendment rights.

LEONARD W. LEVY
(1986)

## *ILLINOIS v. PERKINS*
496 U.S. 292 (1990)

An eight-member majority of the Supreme Court held that the RIGHT AGAINST SELF-INCRIMINATION is not abridged when prisoners incriminate themselves in statements voluntarily made to a cellmate who is an undercover officer. Justice ANTHONY M. KENNEDY for the Court reasoned that the officer posing as a prisoner did not have to give *Miranda* warnings before asking questions that sought incriminating responses because Perkins, although in custody, was not in a coercive situation when he boasted to his cellmate about a murder. He spoke freely to a fellow inmate. He was tricked, but the MIRANDA RULES prohibit coercion, not deception. Any statement freely made without compelling influences is admissible in evidence. The Court also held that because the prisoner had not yet been charged for the crime that was the subject of the interrogation, the RIGHT TO COUNSEL had not yet come into play. Therefore, the prisoner suffered no violation of his Sixth Amendment right. Justice WILLIAM J. BRENNAN who concurred separately, agreed completely on the Fifth Amendment issue, but believed that the police deception raised a question of DUE PROCESS OF LAW.

Justice THURGOOD MARSHALL, the lone dissenter, contended that because the prisoner was in custody, the interrogation should not have occurred without Miranda warnings. He believed that the Court had carved out of *Miranda* an undercover-agent exception.

LEONARD W. LEVY
(1992)

(SEE ALSO: *Miranda v. Arizona; Police Interrogation and Confessions.*)

## *ILLINOIS v. RODRIGUEZ*
497 U.S. 177 (1990)

This is another in a growing list of recent decisions that circumscribe the protections of the FOURTH AMENDMENT. In this case, a woman who made a criminal complaint against Rodriguez accompanied police to his apartment where they might arrest him. She had a key, claimed to be a cotenant, and consented to their entrance. In PLAIN VIEW, they found EVIDENCE of his possession of illegal drugs, and a state court convicted him for the narcotics violation. The facts showed that the woman was no longer a cotenant and possessed the key without Rodriguez's knowledge. The Court held that even if the police receive permission to search a home from one who does not have authority to grant consent, the SEARCH AND SEIZURE is reasonable if the police act in the good-faith belief that they have received consent from one entitled to give it.

The liberal trio of Justices, led by THURGOOD MARSHALL, dissented from Justice ANTONIN SCALIA's opinion for a six-member majority. Marshall asserted that THIRD-PARTY CONSENT must be more than "reasonable"; it must be based

on actual authority to give consent because one possesses a legitimate expectation of privacy in the home. Absent a voluntary limitation on one's expectation of privacy, the police should not be able to dispense with the Fourth Amendment's requirement of a SEARCH WARRANT. The majority had extended the exceptions to the warrant requirement by broadening the concept of a CONSENT SEARCH.

LEONARD W. LEVY
(1992)

## *IMBLER v. PACHTMAN*
424 U.S. 409 (1976)

*Imbler* established prosecutorial immunity from suit under SECTION 1983, TITLE 42, UNITED STATES CODE, for activities that are integral parts of the judicial process. *Imbler* left open the question whether prosecutors may be civilly liable for administrative or investigative activities. Justice LEWIS F. POWELL, writing for the Supreme Court, indicated in OBITER DICTUM that judges and prosecutors are subject to criminal prosecution for willful deprivations of constitutional rights.

THEODORE EISENBERG
(1986)

# IMMIGRATION AND ALIENAGE

The ambivalence that characterizes today's national policies toward immigration had antecedents in the colonial era. Although the DECLARATION OF INDEPENDENCE complained that the king and Privy Council had tried "to prevent the population of these states," many of the colonies had resisted Roman Catholic immigration, and in 1776 some of them still resounded with expressions of nativist resentment against populations that were non-English. The nation is justly proud of its tradition as a refuge for the oppressed and persecuted. Yet American immigration policy, from colonial times to our own, has been dictated by the "native" majorities' perceptions of self-interest. The perceived need for settlers and workers hangs in precarious balance against the suspicions and hostilities that flow out of cultural differences. Congress decides how the balance shall be struck; in the field of immigration, constitutional law has placed few limits on governmental power.

For almost a century, Congress took little part in the regulation of immigration. Even the ALIEN AND SEDITION ACTS (1798), for all their spirit of partisan nativism, were not conceived as immigration restrictions. An early minimal state regulation of the immigration process survived challenge under the COMMERCE CLAUSE in MAYOR OF NEW YORK V. MILN (1837), but more severe state regulations were held invalid in the PASSENGER CASES (1849). Direct state limits on immigration were held unconstitutional in *Henderson v. New York* (1875), the same year in which Congress adopted the first direct national restriction, forbidding immigration by convicts and prostitutes.

By 1875, Congress's constitutional power to control immigration had come to be seen as one aspect of its power to regulate foreign commerce. Later, the Supreme Court articulated a more sweeping doctrine: the power of the national government to control FOREIGN AFFAIRS was inherent in the idea of nationhood and did not need explicit recognition in the Constitution. That doctrine eventually found its fullest expression in UNITED STATES V. CURTISS-WRIGHT EXPORT CORP. (1936), but it had surfaced half a century earlier in the context of immigration. In CHAE CHAN PING V. UNITED STATES (1889) the Court announced that if Congress "considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, . . . its determination is conclusive upon the judiciary." Having cast itself in an acquiescent role, the Court in *Nishimura Eiku v. United States* (1892) justified nearly absolute congressional power over immigration as "inherent in SOVEREIGNTY." An exceedingly inscrutable image of a national community now formally protected Congress's immigration decisions from effective constitutional challenge.

The law upheld in the *Chae Chan Ping* decision was the CHINESE EXCLUSION ACT of 1882. In the years since 1850, some 300,000 Chinese had come to the Pacific Coast, most of them responding to active recruitment of labor for mines and railroad construction in the American West. By the 1860s Chinese had come to compose about nine percent of California's population, and an anti-Chinese crusade was in full cry, fueled by racism and fear. After a long campaign, the Chinese Exclusion Act suspended immigration from China for ten years, made the Chinese ineligible for CITIZENSHIP—not even the strongest congressional supporters of unrestricted immigration could conceive of the Chinese as permanent members of the community—and imposed other restrictions on them.

Although the act was accompanied by unashamedly sinophobic rhetoric, it was ostensibly passed to protect citizen workers. So, too, was the federal legislation of 1882 that added new categories of prohibited immigrants—lunatics, idiots, and persons likely to become public charges—and went on to impose a head tax of fifty cents on each immigrant who entered the United States. Similar justifications were offered for the acts of 1885 and 1887, prohibiting payment for an immigrant's transportation to the United States in return for a promise of labor. This series of laws in the 1880s imposed the first severe restrictions on immigration in the nation's history.

The Supreme Court upheld the head tax, in the *Head Money Cases* (1884), on the basis of Congress's power to regulate foreign commerce—a theory broad enough to sustain the whole series of enactments. However, all the laws were ineffective by design. Congress left border inspections and collection of the head tax to state agencies, which largely ignored the laws. The contract labor laws exempted both skilled workers and domestics, along with foreigners residing temporarily in the country and "coincidentally" working here. The practical effect was to permit a continued disregard for the border and a deepening disrespect for the law, especially among Mexican laborers and the employers who recruited them.

From the 1880s on, a steady trickle of minor immigration restrictions issued from Congress. Paupers and polygamists were excluded, and then epileptics, professional beggars, and anarchists or persons believing in the violent overthrow of the government—the latter provisions a reaction to the assassination of President WILLIAM MCKINLEY. Not surprisingly, the next major immigration restrictions accompanied a new surge of nativism associated with a wave of immigration from eastern and southern Europe that began in the 1890s, encouraged by the demand for workers in a growing industrial economy. This nativist impulse was accelerated by WORLD WAR I and reached a climax in the Red Scare of 1919–1920. Congress adopted a LITERACY TEST for immigrants in 1917, and in the early 1920s set in place a system of immigration quotas based on national origins. The quotas restricted the ethnic proportions of immigration to the ethnic proportions of the nation's population before 1890—that is, before the arrival of large numbers of eastern and southern Europeans. The quota system reflected some of the most respected "scientific" thought of the Progressive era; the racism that produced the Chinese Exclusion Act had broadened into Anglo-Saxonism, which extended its hostility and its assumptions of superiority beyond race to ethnicity.

The constitutionality of racial and ethnic restrictions on immigration was taken for granted in the 1920s. The *Chae Chan Ping* opinion had placed the whole matter outside the reach of substantive constitutional guarantees such as the EQUAL PROTECTION OF THE LAWS. To say the very least, however, this position is in tension with the Supreme Court's modern treatment of RACIAL DISCRIMINATION. Yet no recent decision has reexamined the premises of *Chae Chan Ping,* and the Court's opinions continue to refer, as in *Fiallo v. Bell* (1977), to "the limited scope of judicial inquiry in immigration litigation." Nonetheless, the modern constitutional climate in race cases seems to have contributed to the abandonment, in 1965, of the national origins quota system. In its place Congress has adopted a single worldwide annual ceiling on immigration, with a system of preferences designed to protect the interests of citizens and of aliens who are already documented residents.

The substantive problem of squaring the nation's constitutional commitment to equal protection with the tradition of judicial deference to Congress on immigration matters has a procedural counterpart. The *Nishimura Eiku* decision held that the DUE PROCESS clause of the Fifth Amendment imposed no limits on the power of Congress to govern procedures for entry into the United States. A few years later, in *Wong Wing v. United States* (1896), the Supreme Court did hold that due process forbade enforcement of the immigration laws by sentencing aliens to hard labor. In the modern era, *Landon v. Plascencia* (1982) has recognized due process rights of a resident alien who was seeking readmission after a short trip to Mexico. But such constitutional limitations are rare; the judicial protection of aliens in the exclusion process mainly has taken the form of interpretations of the immigration statutes.

A notable recent example is *Jean v. Nelson* (1985), in which the Court confronted the practice of long-term detention, without parole, of Haitian aliens who had been taken into custody as they attempted to enter the country without permission. The detention was challenged as unconstitutional discrimination based on race or national origin. Rather than decide that issue, the Court approved a REMAND of the case to determine whether immigration officials were observing the statutes and regulations, which, in the Court's interpretation, required individualized parole decisions without such discrimination. *Jean* appears to reflect an increasing judicial reluctance to keep the exclusion process unfettered by due process considerations. It also strongly suggests that if the Congress were to revive explicit racial exclusions, the PRECEDENT of *Chae Chan Ping* would not prevent judicial examination of their constitutionality.

The interpretation of the United States Constitution concerning immigration has always been influenced by widely shared attitudes concerning the constitution of American society. Today's issues of immigration policy focus on the use of "temporary" workers from other countries. Central to this theme is the story of Mexican labor migration. After 1882 Mexican and Japanese workers, along with immigrants from eastern and southern Europe, were recruited to help fill the void left by the exclusion of the Chinese. When Japanese immigration was effectively closed in 1907, employers in the Southwest intensified the recruitment of Mexicans. Assisted by statutory exemptions and waivers, many employers grew rich on the backs of immigrants who were poor and powerless. When poor whites competed for menial jobs, however—as after the crash of 1929—hundreds of thousands of Mexican workers were deported.

The pattern is repeated, from WORLD WAR II through the 1942–1964 Bracero Program (admitting temporary workers) and beyond, in a cycle that has not yet ended: Mexican workers are recruited when they serve the needs of domestic employers, and expelled when their usefulness seems to decline. They fill jobs as needed, and at a low wage, but they are not to be allowed to burden local communities. The Bracero Program amounted to an official (but unacknowledged) program of undocumented Mexican migration. At a time when the Border Patrol might have made a real difference in curbing undocumented entry—and thus restricting American growers from employing undocumented workers—the agency's budget was cut. Since 1952, Congress has exempted employers from liability for employing undocumented workers.

The result of all these developments is that the cheapest labor in the United States has become almost exclusively the province of undocumented workers. An entrenched migratory culture now supplies workers from Mexico and other countries to fill low-paying and socially undesirable jobs. If recruitment has become unnecessary, effective enforcement of formal immigration law has become virtually impossible. Very large numbers of undocumented workers are here to stay—and, predictably, America's long-standing ambivalence toward immigration is translated into a paradox of constitutional law. On the one hand, government is to be given the widest powers to seek out and deport undocumented workers, including such far-reaching methods as BORDER SEARCHES and the factory sweeps approved in *Immigration and Naturalization Service v. Delgado* (1984). On the other hand, PLYLER V. DOE (1982), holding it unconstitutional for Texas to deny free public education to children of the undocumented, almost certainly rested on the premise that most of those children are going to remain part of the American community, whether or not Texas chooses to educate them. The *Plyler* decision is one of major potential importance for the definition of the boundaries of that community, and for the recognition and fulfillment of the national community's concrete responsibilities to all its members.

GERALD P. LÓPEZ
KENNETH L. KARST
(1986)

Bibliography

GORDON, CHARLES and ROSENFELD, HARRY N. 1985 *Immigration Law and Procedure*, Rev. ed. Vol. 1. New York: Matthew Bender.

LOPEZ, GERALD P. 1981 Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy. *UCLA Law Review* 28:615–714.

NOTE 1983 Developments in the Law—Immigration and the Rights of Aliens. *Harvard Law Review* 96:1286–1465.

## IMMIGRATION AND ALIENAGE
(Update 1)

Federal regulation of immigration did not begin until late in the nineteenth century, and the current code of complex admissions categories and limitations is wholly a product of the twentieth century. The first significant tests of congressional authority to exclude and deport noncitizens came in CHAE CHAN PING V. UNITED STATES (1889) and *Fong Yue Ting v. United States* (1893), cases challenging federal immigration law that barred the entry of Chinese laborers, notably the CHINESE EXCLUSION ACT OF 1882. Although the Constitution includes no express provision authorizing the enactment of immigration laws, the Supreme Court held that such a power inhered in the notion of SOVEREIGNTY and was closely associated with exercise of the FOREIGN AFFAIRS power of the United States. It also ruled that congressional decisions as to which classes of aliens should be entitled to enter and remain in the United States are largely beyond judicial scrutiny.

Modern cases reaffirm that the Constitution provides virtually no limit on Congress's power to define the substantive grounds of exclusion and DEPORTATION. It is also well established that removal of aliens from the United States is not "punishment" in a constitutional sense, and therefore, prohibitions against CRUEL AND UNUSUAL PUNISHMENT, EX POST FACTO LAWS, and BILLS OF ATTAINDER are not deemed to apply to regulations of immigration. Nor does the due process clause of the Constitution offer protection to ALIENS applying for initial admission to the United States. Such an alien, the Court stated most recently in *Landon v. Plasencia* (1982), requests a "privilege" and has "no constitutional rights regarding his application" for admission.

It is a dramatic overstatement, however, to conclude that noncitizens in the United States have no constitutional rights. Aliens are generally afforded the constitutional rights extended to citizens (although they are not eligible for federal elective office and do not come within the protection of constitutional provisions prohibiting discrimination in voting). An alien arrested for a crime is entitled to the various protections of the FOURTH AMENDMENT, Fifth Amendment, Sixth Amendment, and Eighth Amendment; an alien may assert FIRST AMENDMENT rights in a situation in which such claims may be made by citizens. In the important case of *Wong Wing v. United States* (1896), the Court invalidated a provision of the 1892 immigration statute providing for the imprisonment at hard labor of any Chinese laborer determined by executive

branch officials to be in the United States illegally. Distinguishing this provision from immigration regulations that bar entry or mandate removal of aliens—which are virtually immune from judicial scrutiny—the Court held that such "infamous punishment" could not be imposed without a judicial trial.

Even within the immigration context, the Court has ruled that DUE PROCESS applies to proceedings aimed at removing an alien who has entered the United States. Similar protections must be afforded permanent resident aliens seeking to reenter the United States after a trip outside the country.

Furthermore, the Supreme Court has adopted interpretations of the immigration code that temper the harsher aspects of its constitutional doctrine. "Because deportation is a drastic measure and at times the equivalent of banishment or exile," the Court stated in *Fong Haw Tan v. Phelan* (1948), ambiguities in deportation grounds should be resolved in an alien's favor. In *Jean v. Nelson* (1985), the Court held that federal statutes do not authorize immigration officials to discriminate on the basis of race or national origin in deciding whether to release aliens from detention prior to a determination of their right to enter the United States.

While the current constitutional doctrine may be described in fairly short order, it is harder to provide a coherent theoretical justification for the case law. The cases may reflect the existence of two conflicting norms. One, based on a theory of membership in a national community, views immigration as a privilege extended to guests whose invitation may be revoked at any time for any reason; the other, grounded in a notion of fundamental human rights, protects all individuals within the United States, irrespective of their status.

Those two norms seem to underlie the Court's bifurcated approach to federal and state laws that discriminate on the basis of alienage. In YICK WO V. HOPKINS (1886), the Supreme Court held that a local ordinance invidiously applied against Chinese aliens violated the FOURTEENTH AMENDMENT. While *Yick Wo* may be read as a case primarily condemning racial prejudice, later cases make clear that state classifications drawn on the basis of alienage will be subjected to searching judicial scrutiny. Discriminatory state legislation is deemed suspect for two reasons. First, because immigration regulation is characterized as an exclusive federal power, state laws that burden aliens conflict with federal policy. Second, as announced by the Supreme Court in GRAHAM V. RICHARDSON (1971), aliens constitute a "discrete and insular minority for whom heightened judicial solicitude is appropriate." Since *Graham,* which struck down laws disqualifying aliens from state WELFARE BENEFITS, scores of state laws excluding aliens from public benefit programs and economic opportunities in the private sphere have been invalidated. Supreme Court opinions have sustained Fourteenth Amendment challenges to law prohibiting aliens from receiving state scholarships and from serving as lawyers, civil engineers, state civil servants, and notaries public.

In PLYLER V. DOE (1982), the Court held that the EQUAL PROTECTION clause protects undocumented aliens in the United States against some forms of state discrimination. The Court invalidated a Texas statute that authorized local school districts to exclude undocumented alien children from school. Although the Court eschewed STRICT SCRUTINY—concluding that EDUCATION was not a FUNDAMENTAL RIGHT protected by the Constitution and that laws discriminating against undocumented aliens were not based on a SUSPECT CLASSIFICATION—it nonetheless appeared to apply a standard more strict than the traditional RATIONAL BASIS test. Important to the Court were the nature of the interest burdened and the consequences of denying an education to children, many of whom were likely to remain resident in the United States. The Court also noted that no federal policy authorized the exclusion of children from local schools.

Not all state classifications that discriminate against aliens have fallen. CITIZENSHIP is viewed as a legitimate qualification for those jobs or functions deemed to be closely linked with the exercise of a state's sovereign power. According to Justice BYRON R. WHITE, writing for the Court in *Cabell v. Chavez-Salido* (1982), "exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of self-definition." Aliens may therefore be excluded from voting, eligibility for elective office, and jury service. The "political function" exception has also been applied where the linkage to usual conceptions of citizenship seems more attenuated. The Court has upheld state laws prohibiting aliens from serving as police officers, public school teachers, and probation officers. In these cases, the Court does not apply the strict scrutiny test. Rather, it deems the presence of the governmental function as warranting application of a rational basis test.

Federal statutes that draw distinctions based on alienage have been judged by a very lenient constitutional standard. In *Fiallo v. Bell* (1977), the Court refused to invalidate a section of the Immigration and Nationality Act that permitted children born out of wedlock to enter the United States based on their relationship with their natural mother but did not accord a similar entitlement to nonmarital children seeking to enter based on their relationship with their natural father. Noting that "Congress regularly makes rules that would be unacceptable if applied to citizens," the Court refused to apply heightened scrutiny to the statutory provision, despite its alleged "double-barreled" discrimination based on sex and illegitimacy.

Outside the immigration context, the Court has likewise demonstrated great restraint in its review of federal legislation regulating aliens. *Mathews v. Diaz* (1976) upheld a provision of the federal Medicare program that denied eligibility to permanent resident aliens unless they had resided in the United States for five years. The Court rejected the claim that the strict scrutiny applied to discriminatory state laws should control, reasoning that given congressional power to regulate immigration, federal laws may classify on the basis of alienage for noninvidious reasons. In *Diaz* the five-year RESIDENCE REQUIREMENT was not irrational, for "Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share" in "the bounty that a conscientious sovereign makes available to its own citizens and some of its guests." And although the Court held in HAMPTON V. MOW SUN WONG (1976) that a regulation excluding aliens from the federal civil service was beyond the authority of the Civil Service Commission, lower courts subsequently sustained a presidential order reimposing the exclusion.

Despite its constitutional authority to limit federal programs to citizens, Congress has generally made available to permanent resident aliens those benefits and opportunities provided to citizens. Such practice may indicate a political norm that membership in the American community arises from entry as a permanent resident alien rather than through NATURALIZATION several years later.

T. ALEXANDER ALEINIKOFF
(1992)

Bibliography

ALEINIKOFF, T. ALEXANDER 1989 Federal Regulation of Aliens and the Constitution. *American Journal of International Law* 83:862–871.

LEGOMSKY, STEPHEN H. 1984 Immigration Law and the Principle of Plenary Congressional Power. *Supreme Court Review* 1984:255–307.

MARTIN, DAVID A. 1983 Due Process and Membership in the National Community: Political Asylum and Beyond. *University of Pittsburgh Law Review* 44:165–235.

ROSENBERG, GERALD M. 1977 The Protection of Aliens from Discriminatory Treatment by the National Government. *Supreme Court Review* 1977:275–339.

SCHUCK, PETER H. 1984 The Transformation of Immigration Law. *Columbia Law Review* 84:1–90.

## IMMIGRATION AND ALIENAGE
(Update 2)

The Constitution's silences about immigration and the rights of ALIENS leave great room for interpretation and contestation. The text does not confer an express immigration power on the federal government. Before the CIVIL WAR, states often attempted to regulate immigration, directing their POLICE POWER against the poor, the sick, criminals, and free blacks. After 1875, the Supreme Court began to deny the states' authority, relying variously on Congress's FOREIGN COMMERCE power, its NATURALIZATION power, and IMPLIED POWERS of national SOVEREIGNTY in FOREIGN AFFAIRS. The Court's focus on a linkage to foreign affairs has contributed to extreme judicial deference to congressional determinations of substantive immigration policy, even where the constitutional rights of aliens or of citizens are affected.

The BILL OF RIGHTS makes no explicit reference to citizens, noncitizens, or CITIZENSHIP and terms like "person" and "accused" in the Fifth and Sixth Amendments presumably include aliens as well. In the debates over the Alien Act of 1798, some FEDERALISTS sought to reserve rights to citizens as the exclusive parties to the constitutional compact. Their Jeffersonian opponents' position, which emphasized the mutuality between subjection to the law and legal rights, has prevailed. Ambiguities remain, however, regarding rights of aliens against extraterritorial government action, and some judges and advocates have sought to reopen the question of the rights of aliens unlawfully present in the United States. In *United States v. Verdugo-Urquídez* (1990), a majority of the Court held that the FOURTH AMENDMENT did not limit the federal government's power to search the home in Mexico of a nonresident alien. The opinions reflect several different theories about the reach of constitutional rights. Portions of Chief Justice WILLIAM H. REHNQUIST's opinion invoked the Fourth Amendment's reference to "the people," a category that he viewed as including lawfully resident aliens, but not aliens outside the United States, and possibly not unlawfully resident aliens. Justice ANTHONY M. KENNEDY's crucial CONCURRING OPINION rejected this textual argument, and adopted instead a flexible DUE PROCESS approach to determining aliens' extraterritorial rights. The DISSENTING OPINIONS of Justices WILLIAM J. BRENNAN, JR., and HARRY A. BLACKMUN favored extension of the mutuality approach. The fact that the case involved EXTRATERRITORIAL government action deserves repetition; it is well settled, for example, that aliens outside the United States enjoy constitutional protection for their PROPERTY inside the United States.

Earlier predictions that permanent resident aliens were acquiring full social membership or that U.S. citizenship was suffering devaluation required revision after 1996 when Congress passed the ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT. Congress reinvigorated the historical policy against migration of the poor, and drew sharp distinctions between citizens and aliens in eligibility for many government benefits. Congress also authorized the states to draw similar distinctions in their own benefit programs, in a manner that challenged prior Court

cases such as GRAHAM V. RICHARDSON (1971). These changes in benefit policy, and the anti-immigrant atmosphere against which they were enacted, prompted enormous increases in the demand for naturalization. It may be debated in what sense these events restored the value of citizenship.

GERALD L. NEUMAN
(2000)

Bibliography

HING, BILL ONG 1998 Don't Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform. *Harvard Civil Rights–Civil Liberties Law Review* 33:159–182.

NEUMAN, GERALD L. 1996 *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law.* Princeton, N.J.: Princeton University Press.

SCHUCK, PETER H. 1997 The Re-Evaluation of American Citizenship. *Georgetown Immigration Law Journal* 12:1–34.

## *IMMIGRATION AND NATURALIZATION SERVICE v. CHADHA*

462 U.S. 919 (1983)

*Immigration and Naturalization Service v. Chadha* cast serious doubt on the use of the LEGISLATIVE VETO, a device by which Congress seeks to retain control over the use of DELEGATED POWERS. *Chadha* involved a provision in the IMMIGRATION AND NATIONALITY ACT that permitted either house of Congress, by resolution, to overturn orders of the attorney general suspending DEPORTATION of ALIENS.

The Supreme Court held, 7–2, that congressional review of such cases was legislative in character, and was therefore subject to the provisions of Article I requiring the concurrence of both houses and an opportunity for the President to exercise his VETO POWER before the resolution can have the force of law. The majority opinion, by Chief Justice WARREN E. BURGER, declared that the one-house legislative veto violated the constitutional principles of SEPARATION OF POWERS and BICAMERALISM.

Justice BYRON R. WHITE, dissenting, ascribed to the decision much greater scope than did the majority. White asserted that the *Chadha* decision effectively invalidated every legislative veto provision in federal law. A majority in future cases, however, may choose not to apply the *Chadha* rationale to two-house legislative vetoes or to legislative vetoes of agency actions that are clearly legislative rather than executive or quasi-judicial. It would be curious indeed if administrative agencies promulgating regulations with the force of law were freed from congressional oversight by a Court intent on preserving the separation of powers and bicameralism.

DENNIS J. MAHONEY
(1986)

## *IMMIGRATION AND NATURALIZATION SERVICE v. LOPEZ-MENDOZA*

See: Deportation

## IMMIGRATION REFORM AND CONTROL ACT

100 Stat. 3359 (1986)

The major innovation in the lengthy Immigration Reform and Control Act of 1986 was the adoption of employer sanctions penalizing businesses that hired or continued to employ ALIENS who were not legally authorized to work. On a symbolic level the statute corrected a policy that had condoned utilization of illegal workers while threatening those workers with deportation. The statute nonetheless impaired the enforceability of employer sanctions by prohibiting the development of a national identity card, in order to protect the RIGHT OF PRIVACY of citizens. The statute accompanied its new enforcement regime by an amnesty ("legalization") for undocumented aliens who were already residing in the United States. More than two million aliens, most of whom were Mexicans, achieved lawful resident status through this program. Ambivalence toward these former illegal aliens contributed to debates in the 1990s on IMMIGRATION AND ALIENAGE.

GERALD L. NEUMAN
(2000)

Bibliography

U.S. COMMISSION ON IMMIGRATION REFORM 1994 *U.S. Immigration Policy: Restoring Credibility.* Washington, D.C.: U.S. Commission on Immigration Reform.

CALAVITA, KITTY 1990 Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime. *Law and Society Review* 24:1041–1069.

## IMMUNITY

See: Executive Immunity; Immunity of Public Officials; Judicial Immunity; Legislative Immunity; Presidential Immunity; Sovereign Immunity; State Immunity from Federal Law

# IMMUNITY GRANT (SELF-INCRIMINATION)

"No person," the Fifth Amendment unequivocally states, "shall be . . . compelled in any criminal case to be a witness against himself. . . ." It does not add, "unless such person cannot be prosecuted or punished as a result of his testimony," and it does not refer to self-incrimination. Yet, if the government wants EVIDENCE concerning a crime, it can compel a witness to testify by granting immunity from prosecution. In law, such immunity means that the witness cannot incriminate himself and therefore has suffered no violation of his RIGHT AGAINST SELF-INCRIMINATION. The common sense of the matter is that to "incriminate" means to implicate criminally; in law, however, it means exposure to prosecution or penalties. The law indulges the fiction that when one receives a grant of immunity, removing him from criminal jeopardy, the right not to be a witness against oneself is not violated. If the witness cannot be prosecuted, the penalties do not exist for him, so that his testimony can be compelled without forcing him to incriminate himself or "be a witness against himself."

The first immunity statute in Anglo-American jurisprudence was probably the one enacted by Connecticut in 1698. That act specified that witnesses in criminal cases must give sworn evidence, on pain of punishment for refusal, "always provided that no person required to give testimonie as aforesaid shall be punished for what he doth confesse against himself when under oath." Similarly, an act that Parliament passed against gambling in 1710, which some colonies copied, guaranteed that gamblers who confessed their crimes and returned their winnings should be "acquitted, indemnified [immunized] and discharged from any further or other Punishment, Forfeiture, or Penalty which he or they may have incurred by the playing for or winning such Money. . . ." New York in 1758 obtained the king's pardon for certain ship captains in order to compel their testimony against the ships' owners. Although the pardons had eliminated the perils of the criminal law for the captains, they persisted in their claim that the law could not force them to declare anything that might incriminate them. A court fined them for contempt, on grounds that the recalcitrant captains no longer faced criminal jeopardy by giving evidence against themselves.

In modern language these colonial precedents illustrate grants of "transactional" immunity, an absolute guarantee that in return for evidence, the compelled person will not under any circumstances be prosecuted for the transaction or criminal episode concerning which he gives testimony. Absolute or transactional immunity was the price paid by the law for exacting information that would otherwise be actionable criminally. The paradox remained: one could be compelled to be a witness against oneself, but from the law's perspective the immunized witness would stand to the offense as if he had never committed it, or had received AMNESTY or a pardon despite having committed it.

Congress enacted its first immunity statute in 1857, granting freedom from prosecution for any acts or transactions to which a witness offered testimony in an investigation. Reacting against the immunity "baths" that enabled corrupt officials to escape from criminal liability by offering immunized testimony, Congress in 1862 supplanted the act of 1857 with one that offered only "use" immunity. Use immunity guarantees only that the compelled testimony will not be used in a criminal prosecution, but prosecution is possible if based on evidence independent from or unrelated to the compelled testimony. Under a grant of use immunity one might confess to a crime secure in the knowledge that his confession could not be used against him; however, if the prosecution had other evidence to prove his guilt, he might be prosecuted. By 1887 Congress extended the standard of use immunity from congressional investigations to all federal proceedings.

Until 1972 the Supreme Court demanded transactional rather than use immunity as the sole basis for displacing the Fifth Amendment right to remain silent. In COUNSELMAN V. HITCHCOCK (1892) the Court unanimously held unconstitutional a congressional act offering use immunity because use immunity was "not co-extensive with the constitutional provision." The compelled testimony might provide leads to evidence that the prosecution might not otherwise possess. To supplant the constitutional guarantee, an immunity statute must provide "complete protection" from all criminal perils; "in view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." Congress responded with a statute safeguarding against prosecution, forfeiture, or penalty for any transaction about which one might be compelled to testify. In BROWN V. WALKER (1896) the Court held that transactional immunity "operates as a pardon for the offense to which it relates," thus satisfying the constitutional guarantee. In effect the Court permitted what it had declared was impossible: congressional amendment of the Constitution. By a statute that served as a "substitute," Congress altered the guarantee that no one can be compelled to be a witness against himself criminally.

Until 1970 there were over fifty federal immunity statutes conforming with *Brown*'s transactional immunity standard, which the Court reendorsed in ULLMANN V. UNITED STATES (1956). When the Court scrapped its TWO SOVEREIGNTIES RULE in *Murphy v. Waterfront Commission* (1964), it held that absent an immunity grant, a state witness could not be compelled to testify unless his testimony

"and its fruits" could not be used by the federal government. *Murphy* was a technical relaxation of the transactional immunity standard, as ALBERTSON V. SUBVERSIVE ACTIVITIES CONTROL BOARD (1965) proved, because a unanimous Court reconfirmed the transactional immunity standard.

Through the ORGANIZED CRIME CONTROL ACT of 1970, Congress made use immunity and derivative-use immunity the standard for all federal grants of immunity, and most states copied the new standard. No compelled testimony or its "fruits" (information directly or indirectly derived from such testimony) could be used against a witness criminally, except to prove perjury. In KASTIGAR V. UNITED STATES (1972) the Court relied on *Murphy*, ignored or distorted all other precedents, and upheld the narrow standard as coextensive with the Fifth Amendment, which it is not. One who relies on his right to remain silent forces the state to rely wholly on its own evidence to convict him. By remaining silent he gives the state no way to use his testimony, however indirectly. When he is compelled to be a witness against himself, his admissions assist the state's investigation against him. The burden of proving that the state's evidence derives from sources wholly independent of the compelled testimony lies upon the prosecution. But use immunity permits compulsion without removing criminality.

In *New Jersey v. Portash* (1979) the Court held that a defendant's immunized grand jury testimony could not be introduced to impeach his testimony at his trial. Whether the state may introduce immunized testimony to prove perjury has not been decided. In *Portash*, however, the Court conceded, "Testimony given in response to a grant of legislative immunity is the essence of coerced testimony." The essence of the Fifth Amendment's provision is that testimony against oneself cannot be coerced. Any grant of immunity that compels testimony compels one to be a witness against himself—except, of course, that it is "impossible," as the Court said in *Counselman*, for the constitutional guarantee to mean what it says.

LEONARD W. LEVY
(1986)

Bibliography

LEVY, LEONARD W. 1974 *Against the Law: The Nixon Court and Criminal Justice*. Pages 165–187. New York: Harper & Row.

## IMMUNITY OF GOVERNMENT OFFICIALS

See: Executive Immunity; Immunity of Public Officials; Judicial Immunity; Legislative Immunity; Presidential Immunity; Sovereign Immunity

## IMMUNITY OF PUBLIC OFFICIALS

State and federal officials enjoy traditional immunity from state-law tort claims. These traditional immunities are more readily available for the discretionary functions of officials than for their ministerial functions. The post-1950s growth of constitutionally-based CIVIL RIGHTS actions created forms of public official liability not contemplated by the immunities. A federal body of official immunity DOCTRINE developed simultaneously with the new civil rights actions.

Federal immunity of public officials can be absolute or qualified. Both kinds of immunity shield officials from liability to disgruntled constituents, and thus promote fearless decisionmaking. Allowing immunity defenses implicitly rejects a literal interpretation of SECTION 1983, TITLE 42, U.S. CODE, which states that "every person . . . shall be liable" if they cause a deprivation of federal rights.

Absolute immunity shields legislative, judicial, and prosecutorial officials from liability even if they maliciously violate constitutional rights. Under the SPEECH OR DEBATE CLAUSE, members of Congress have absolute immunity from civil or criminal actions based on legislative acts. Under TENNEY V. BRANDHOVE (1951) and *Bogan v. Scott-Harriss* (1998), the legislative acts of state and local legislators are absolutely immune from federal civil rights actions. The Supreme Court endorsed absolute JUDICIAL IMMUNITY for judicial acts in *Randall v. Brigham* (1869), reaffirmed it in PIERSON V. RAY (1967) and STUMP V. SPARKMAN (1978), but denied it in cases seeking injunctive relief in *Pulliam v. Allen* (1984). The Federal Courts Improvement Act of 1996 narrowed *Pulliam*'s exception to cases in which declaratory relief is unavailable or has preceded injunctive relief. Absolute prosecutorial immunity has its recent origins in IMBLER V. PACHTMAN (1976). Prosecutors, however, are not absolutely immune for making false statements of fact in seeking an arrest warrant, *Kalina v. Fletcher* (1997); for conduct at a press conference, *Buckley v. Fitzsimmons* (1993); or for legal advice to the police during pretrial investigation, *Burns v. Reed* (1991). In LAKE COUNTRY ESTATES V. TAHOE REGIONAL PLANNING AGENCY (1979) and BUTZ V. ECONOMOU (1978), the Court extended absolute legislative, judicial, and prosecutorial immunity to officials, such as federal ADMINISTRATIVE LAW judges, who perform functions similar to absolutely immune officials but who are not traditional legislators, judges, or prosecutors.

Only NIXON V. FITZGERALD (1982) has granted an executive official, the President, absolute immunity for official actions. CLINTON V. JONES (1997) holds that the President has no immunity while in office from civil-damages litigation arising out of events that occurred before the President took office.

Qualified immunity from civil rights liability has its origins in COMMON LAW immunities of officials, especially police officers. Immunity at common law, however, is no longer a prerequisite to qualified immunity. Under *Harlow v. Fitzgerald* (1982), an official enjoys qualified immunity from damages actions whenever a reasonable official would believe his act to be constitutional, whether or not the act is in fact constitutional. To shelter officials further from the discovery and trial process, denials of qualified immunity are immediately appealable, *Mitchell v. Forsyth* (1985), and multiple appeals of a denial are possible, *Behrens v. Pelletier* (1996). Officials may assert a qualified immunity defense whether or not they are eligible for absolute immunity.

THEODORE EISENBERG
(2000)

Bibliography

EISENBERG, THEODORE 1996 *Civil Rights Legislation*, 4th ed. Charlottesville, Virginia: Michie.

## IMPEACHMENT

The English Parliament devised impeachment for the removal of ministers of the Crown, the House of Commons serving as prosecutor of charges that the House of Lords adjudged. This, ALEXANDER HAMILTON wrote, was the "model" of the American proceeding—the HOUSE OF REPRESENTATIVES files and prosecutes charges and the SENATE is the trial tribunal. The Framers of the Constitution also adopted the English grounds for removal, "TREASON, bribery, or other high crimes and MISDEMEANORS." They defined "treason" narrowly; "bribery" was a COMMON LAW term of familiar meaning; but the scope of "other high crimes and misdemeanors" remains a subject of continuing debate. Some would confine those terms to indictable crimes. At the other pole, Congressman GERALD FORD, in proposing the impeachment of Justice WILLIAM O. DOUGLAS in 1970, asserted that an impeachable offense is whatever the House, with the concurrence of the Senate, "considers [it] to be." The historical facts indicate, however, that an impeachable offense need not be indictable, but that such offenses have their limits, for which we must look to the English practice the terms expressed.

Advocates of the indictable crime interpretation point to the criminal terminology, for example, "high crimes and misdemeanors." Article III, section 2, of the Constitution provides, "The trial of all Crimes, except in cases of Impeachment, shall be by Jury"; Article II, section 2, confers a power to grant pardons "except in Cases of Impeachment," and pardons relieve from punishment for a crime. In England the House of Lords combined removal and punishment in the impeachment proceeding. But Article I, section 3, clause 7, made an important departure: "Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any [federal] office . . . but the party convicted shall nevertheless be liable and subject to INDICTMENT, trial, judgment and punishment, according to law." The separation of removal from criminal prosecution meant that political passions could no longer sweep an accused to his death, but that he would be tried by a jury of his peers.

In the North Carolina Ratification Convention, JAMES IREDELL explained that if the President "commits any misdemeanor in office, he is impeachable, removable from office. . . . If he commits any crime, he is punishable by the laws of his country," distinguishing an impeachable "misdemeanor" (which has a common law connotation of misconduct in office) from an indictable crime. Hamilton likewise distinguished between "removal from office" and "actual punishment in cases which admit of it," indicating that some impeachable offenses were not criminal. As will appear, some impeachable offenses were not and still are not punishable crimes; nor does the absence of fine and imprisonment, the customary criminal sanctions, comport with the view that impeachment is a criminal proceeding. The doctrine of DOUBLE JEOPARDY also conduces to this conclusion. Although double jeopardy at the framing of the Constitution referred to jeopardy of life, as the Fifth Amendment attests, Congress speedily made treason punishable by death. Impeachment for treason could not, therefore, be regarded as criminal without raising a bar to indictment. Such thinking was carried over to all impeachments by JAMES WILSON: because they "are founded on different principles . . . directed to different objects . . . the trial and punishment of an offense on impeachment, is no bar to a trial of the same offense at common law." Justice JOSEPH STORY deduced from the separation between removal and indictment that "a second trial for the same offense" would not be barred by double jeopardy. Thus double jeopardy requires impeachment to be read in noncriminal terms.

The Sixth Amendment furnishes further confirmation. Earlier Article III, section 2, clause 3, expressly exempted impeachment from the "Trial of all Crimes" by jury. With that exemption before them, the draftsmen of the Sixth Amendment required TRIAL BY JURY in "all criminal prosecutions," thereby canceling the former exception. Since the later Amendment controls, it must be concluded either that the Founders felt no need to exempt impeachment from the Sixth Amendment because they did not consider it a "criminal prosecution" or that jury trial is required if impeachment be in fact a "criminal" prosecution. The latter conclusion is inadmissible. Perhaps the use

of criminal terminology is attributable to the fact that words like "offenses," "convict," and "high crimes" had been employed in the English impeachments, and the Framers, engaged in hammering out a charter of government that required major political compromises, could not pause to coin a fresh and different vocabulary for every detail.

Treason and bribery, in contradistinction to crimes against the individual such as murder and robbery, are crimes against the State—political crimes. James Wilson, a chief architect of the Constitution, observed that "impeachments are confined to political characters, to political crimes and misdemeanors." And Justice Story added that they are designed "to secure the state against gross official misdemeanors." By association with "treason, bribery," the phrase "other high crimes and misdemeanors" likewise may be deemed to refer to "political" offenses. "High crimes and misdemeanors" meant "and *high* misdemeanors," not as a matter of grammatical construction but of historical usage. "High misdemeanors" are first met in a 1386 impeachment, long before there was such a crime as a "misdemeanor." At that time FELONIES were coupled with TRESPASSES, private as distinguished from political offenses. It was not until well into the sixteenth century that "misdemeanors" replaced "trespasses" in the general criminal law; and in England "high misdemeanors" remained a term peculiar to impeachment and did not find its way into ordinary criminal law, as is true of American law but for a very few statutory "high misdemeanors." Explaining "high misdemeanors," Sir WILLIAM BLACKSTONE stated that the "first and principal is the *maladministration* of such high officers as are in the public trust and employment. This is usually punished by the method of parliamentary impeachment," which proceeded not under the common law but under the *lex parliamentaria*, the "laws and course of parliament."

Though this arguably left Parliament free to fashion political offenses ad hoc, the Framers took a more restricted view. English impeachments proceeded largely for neglect of duty, abuse of power, betrayal of trust, corruption; and early state constitutions likewise provided for removal for misconduct in office, maladministration, corruption. In the Convention there were proposals for removal upon malpractice, neglect of duty, betrayal of trust, corruption, malversation (misconduct in office). Throughout, the focus was on machinery for removal rather than punishment for misconduct. When the impeachment provision came to the floor of the Convention, it employed "treason or bribery." GEORGE MASON protested that the narrow definition of treason would not reach "many great and dangerous offenses," among them "attempts to subvert the Constitution," which lay at the root of the leading English precedent. He therefore suggested the addition of "maladministration," but Madison objected that "so vague a term will be equivalent to a tenure during the pleasure of the Senate," whereupon Mason substituted "other high crimes and misdemeanors." Some two weeks earlier RUFUS KING had identified treason "agst. particular States" as "high misdemeanors"; a week before, "high misdemeanor" had been replaced in the extradition provision because it had "a technical meaning too limited." These facts show, first, that "other high crimes and misdemeanors" referred to "high misdemeanors," and second, that the terms were chosen precisely because they were "limited and technical" and would not leave the accused at the "pleasure of the Senate." As with other common law terms employed by the Framers, they expected them to have the meaning ascribed to them under English practice.

Justice Story stated that for the meaning of "high crimes and misdemeanors" resort must be had "to parliamentary practice" or "the whole subject must be left to the arbitrary discretion of the Senate," a "despotism" "incompatible" with "the genius of our institutions," and, it may be added, with the legislative history of the provision. Were impeachment restricted to common law crimes it would founder because there are no FEDERAL COMMON LAW crimes; all federal crimes are creatures of statute. Early on Congress enacted statutes that made treason and bribery crimes; a few statutes made certain minor acts criminal "high misdemeanors." But no statute declared "abuse of power," "neglect of duty," or "subversion of the Constitution" to be criminal, yet the Founders unquestionably regarded these as impeachable offenses. Except for treason and bribery, the "silence of the statute book," said Story, would render the power of impeachment "a complete nullity" and enable the most serious offender to escape removal. It is preferable to regard such silence as a continuing construction by Congress that its impeachment powers are not dependent on a statutory proscription and definition of impeachable offenses, particularly because most of its impeachment proceedings have involved nonindictable offenses. In extrajudicial statements, Chief Justice WILLIAM HOWARD TAFT and Justice CHARLES EVANS HUGHES recognized that such offenses were embraced by "high crimes and misdemeanors."

Another much debated issue is whether impeachment constitutes the sole means for removal of judges. Long before there was mention of impeachment of Justices in the Convention, it conditioned judicial tenure on "GOOD BEHAVIOR." This wording was not, as has been urged, "used simply to describe a life term," but a technical phrase of established meaning: "as long as he shall behave himself well." Hamilton noted that "good behavior tenure" was a "defeasible tenure," copied from the British model. At common law an appointment conditioned on "good behavior" was forfeited on nonperformance of the condition,

that is, it terminated on misbehavior. Given a lapse from "good behavior," WILLIAM MURRAY (Lord Mansfield) observed, there must be power to remove the officer lest the formula be impotent. The remedy, Blackstone wrote, was by writ of *scire facias* determinable by the judiciary. Attempts by the Crown to remove a couple of high court judges who enjoyed "good behavior" tenure, Sir John Walter, Chief Baron of the Exchequer, and Sir John Archer, a Justice of Common Pleas, met insistence on removal by *scire facias*. This view was endorsed by Chief Justice Holt, Lord Chancellor Erskine, the future Lord Justice Denman, William Holdsworth, and CHARLES MCILWAIN. When the Framers employed a common law term, they expected it would be given its accepted meaning, as is shown by their redefinition of treason to avoid historic excesses, by JOHN DICKINSON's caution that if EX POST FACTO were to be expanded beyond the Blackstonian association with criminal cases it "would require some further provision," and by assurances in the Virginia Ratification Convention that reference to "trial by jury" included all its attributes, including the right to challenge jurors.

The Framers conceived impeachment as a remedy for misconduct by the President, and throughout the Convention such was its almost exclusive focus. Hamilton explained that "the true light in which it ought to be regarded" is as "a bridle in the hands of the legislative body upon the executive servants of the government." Consequently the Framers placed the provision for impeachment of the President in Article II, the Executive article. Almost at the last minute they amplified it by the addition of the "Vice President, and all civil officers," suggesting it was to apply to officers of the Executive department. The interpretive canon that each provision of an instrument should, if possible, be given effect counsels recognition of judicial removal for breaches of "good behavior," particularly because the standards of "high crimes and misdemeanors" differ from those of "good behavior," so that to insist that impeachment is the sole means for removal of judges is to leave some judicial "misbehavior" beyond remedy.

A number of utterances may seem to require the exclusivity of impeachment; for example, Hamilton stated in THE FEDERALIST #79 that impeachment "is the only provision" for removal of judges found in the Constitution and "consistent with the necessary independence of judges." Yet he had said in *The Federalist* #78 that "the standard of good behavior" is an "excellent barrier . . . to the encroachments and oppression of the representative body"; independence from Congress, not from judges, was the aim. Hamilton recognized that the "standard of good behavior" created a "defeasible tenure," a tenure terminated by breach of "good behavior." So too, the debate in the First Congress respecting the President's power to remove his subordinates contains tangential references to the protection from removal (chiefly by the President) that "good behavior" tenure afforded judges. Removal of his subordinates by the President made a breach in the "exclusivity" of impeachment, notwithstanding the fact that they squarely fit within "all civil officers" of Article II. It is easier to recognize an "exception" from exclusivity for the forfeiture that was an established concomitant of "good behavior," thus giving effect to that separate provision, than to make an exception for Executive subordinates.

What the First Congress did do with respect to judges further undermines reliance upon such dicta. By the Act of 1790 it provided that upon conviction in court for bribery a judge shall "forever be disqualified to hold an office." Since the impeachment clause provides both for removal and disqualification upon impeachment and conviction, the Act represents a construction that the clause does not exclude other means of disqualification. As with "disqualification," so with "removal," for the two stand on a par in the impeachment clause. The action of the First Congress, whose constitutional constructions carry great weight, when it dealt with judges thus speaks against reliance upon passing remarks in a debate that did not involve their removal. The several remarks, moreover, do not meet the test laid down by Chief Justice JOHN MARSHALL, showing that had "this particular case been suggested"—that is, judicial removal of judges for "misbehavior"—"the language would have been so varied as to exclude it." Well aware of the perils posed to judges by "the gusts of faction which might prevail" in Congress, the Founders were little likely to jettison the time-honored nonpolitical removal trial of judges by the courts in favor of a factional proceeding in Congress. Impeachment could be reserved for the grave situation in which the judiciary neglects to cleanse its own house, exactly as impeachment remains available for removal of a wrongdoing subordinate or "favorite" whom the President fails to remove.

JAMES BRYCE observed that impeachment is so heavy a "piece of artillery" as to "be unfit for ordinary use." The Founders repeatedly stressed that impeachment was meant only for "great injuries"; like Solicitor General, later Lord Chancellor Somers, they were aware that "impeachment ought to be like Goliath's sword, kept in the temple, and used but on great occasions." Hamilton too referred in *The Federalist* #70 to the "awful discretion" of the impeachment tribunal to doom "to infamy the . . . most distinguished characters of the community." Such views do not square with the insistence that the wheels of the nation must grind to a halt so that Congress can oust a venal district judge. Congress is in fact reluctant to undertake the ouster of such judges even, said Senator Wil-

liam McAdoo, "in cases of flagrant misconduct," because an impeachment proceeding draws the Congress away for weeks from weightier tasks. That situation, he stated, constitutes "a standing invitation for judges to abuse their authority with impunity and without fear of removal." To insist that impeachment is the sole means of removal of judges is in practical effect to immunize grave misconduct. In the almost two hundred years since adoption of the Constitution hundreds of complaints have resulted in fifty-five investigations, followed in some cases by censure or resignation. But only nine judges have been impeached and only four convicted and removed.

Some regard the acquittal of Justice SAMUEL P. CHASE in 1805 as a triumph of justice over heated political partisanship. Others view his impeachment as a natural reaction to the gross partisanship of the Federalist judiciary, given to intemperate attacks upon the Republican opposition in harangues to the GRAND JURY, which might be regarded as an "abuse of power" for political ends. Of Chase's trial of James Callender for alleged violations of the ALIEN AND SEDITIONS ACTS, EDWARD S. CORWIN, said that Chase came to the case "with the evident disposition to play the hanging judge," and there is evidence that he prejudged the case. Callendar was entitled under the canons of his time to a trial free of "the tyrannical partiality of judges," and Chase was under statutory oath to administer justice impartially. Most students of the era consider that conviction failed of a two-thirds vote because the inept, acid-tongued manager of the impeachment, JOHN RANDOLPH, had alienated many Republicans as well as Federalists.

The *cause célèbre* is the impeachment of President ANDREW JOHNSON in 1868, essentially, as Justice SAMUEL F. MILLER foresaw, "for standing in the way of certain political purposes of the majority in Congress," but ostensibly for discharging his secretary of war, EDWIN M. STANTON, whom Congress had attempted to rivet in place by the TENURE OF OFFICE ACT. Critics of Johnson have noted Stanton's "defective loyalty," his conferences with Republican leaders behind Johnson's back respecting measures that divided Congress from the President. Finally Johnson removed him, presenting the issue whether a President who considered a statute to be an unconstitutional invasion of his prerogative to remove a disloyal subordinate—Stanton himself had advised Johnson that the statute was unconstitutional—and who felt that it was his constitutional duty to exercise his independent judgment, was impeachable. Such differences were contemplated as part of the CHECKS AND BALANCES of the Constitution.

The tone of the proceedings was sounded in BENJAMIN BUTLER's opening statement: "You are bound by no law," "you are a law unto yourselves." THADDEUS STEVENS asserted that Johnson was "standing at bay, surrounded by a cordon of living men, each with the ax of an executioner uplifted for his just punishment." Stevens dared the Senators who had voted for the Tenure of Office Act four times now to vote for acquittal "on the ground of its UNCONSTITUTIONALITY," condemning backsliders to the "gibbet of everlasting obloquy." Senator CHARLES SUMNER dismissed "the quibbles of lawyers" in a trial that "is a battle with slavery." One of the impeachment articles charged that on his "Swing Around the Circle" before the 1866 elections, Johnson attempted to bring Congress into ridicule, disgrace, and contempt. But as Senator John Sherman pointed out, members of Congress themselves had resorted to grossly abusive epithets, so that Johnson was not to be blamed for responding in kind. FREEDOM OF SPEECH, Senator James Patterson cautioned, was not solely for Congress. Current revulsion against Johnson does not overcome the verdict of Samuel Eliot Morison and Eric McKitrick that the impeachment was a "disgraceful episode," "a great act of ill-directed passion." Johnson's conviction failed by one vote. Whatever his faults, Johnson was entitled to a FAIR TRIAL, and that, the record amply discloses, was denied to him. Had Johnson been convicted, a revisionist historian wrote, it would have established a precedent "for the removal of any President refusing persistently to cooperate with Congress."

The failure of that impeachment led another revisionist historian to prophesy in 1973 that impeachment would never again be employed to remove a President. Shortly thereafter the House Judiciary Committee instituted an investigation whether President RICHARD M. NIXON participated in the WATERGATE conspiracy to obstruct justice. Once more the proceedings evidenced that impeachments are swayed by political affiliations; with a few notable exceptions, a Republican phalanx opposed impeachment until the judicially compelled disclosure of the "White House tapes" revealed that Nixon was a participant in the conspiracy. When he learned as a result of that disclosure that he could not count on more than ten votes in the Senate, he resigned from the presidency. In accepting a pardon from his successor, President GERALD FORD stated, he acknowledged his guilt. Fortunate it was for America that the Founders provided "Goliath's sword" for "great occasions."

RAOUL BERGER
(1986)

(SEE ALSO: *Articles of Impeachment of Andrew Johnson; Articles of Impeachment of Richard M. Nixon.*)

Bibliography

BERGER, RAOUL 1973 *Impeachment.* Pages 313–322. Cambridge, Mass.: Harvard University Press.

——— 1979 "Chilling Judicial Independence": A Judicial Scarecrow. *Cornell Law Quarterly* 64:822–854.

KAUFMAN, IRVING 1979 Chilling Judicial Independence. *Yale Law Journal* 88:681–716.

KURLAND, PHILIP 1974 Watergate, Impeachment and the Constitution. *Mississippi Law Review* 45:531–600.

# IMPEACHMENT
## (Update)

The power of impeachment is Congress's ultimate constitutional check against misconduct by executive and judicial branch officers of the United States. Article II, section 4 of the Constitution provides a single standard governing impeachment and removal of all such officers: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Article I of the Constitution gives to the U.S. HOUSE OF REPRESENTATIVES "the sole Power of Impeachment," meaning the power to charge an officer with having committed such an offense, and to the U.S. SENATE "the sole Power to try all Impeachments." The Senate's power to try impeachments is subject to just three procedural limitations: When sitting as a court of impeachment, the senators "shall be on Oath or Affirmation"; when the President of the United States is tried, the CHIEF JUSTICE (rather than the Vice President) is the presiding officer of the Senate; and a two-thirds majority of senators is necessary to convict the accused. Article I further specifies that judgment in cases of impeachment "shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, trust, or profit under the United States," but that "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."

The Constitution's impeachment provisions have produced much scholarly and political debate, especially in recent years by virtue of President WILLIAM J. CLINTON's impeachment, trial, and acquittal in 1998 and 1999. (See ARTICLES OF IMPEACHMENT OF WILLIAM J. CLINTON.) The most important question is the meaning of the term "high Crimes and Misdemeanors" for which officials may be impeached and removed. The best answer, confirmed by recent and perennial debates over the point, is that the term simply does not have a clear, fixed, or determinate meaning, and that application of this general standard was deliberately committed to the judgment of Congress in making the decision whether to impeach (by the House) and convict (by the Senate).

As ALEXANDER HAMILTON wrote in FEDERALIST No. 65 in explaining the justification for vesting the impeachment power in Congress rather than in the courts or some other body, "the nature of the proceeding" is such that it "can never be tied down by such strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the Judges, as in common cases serve to limit the discretion of courts in favor of personal security." Rather, the Constitution recognizes "[t]he awful discretion, which a court of impeachments must have, to doom to honor or to infamy. . . ." The Supreme Court has apparently endorsed this view, ruling unanimously in NIXON V. UNITED STATES (1993), involving the impeachment of federal judge Walter Nixon, that the Constitution's assignment of "sole Power" to impeach and try to the House and Senate, respectively, constitutes a textual commitment of virtually all impeachment questions to the judgment of these bodies, where the Constitution does not provide clear answers to the contrary.

Congress's constitutional power to interpret and apply the "high Crimes and Misdemeanors" standard is broad, but not limitless. Certain guidelines are clear from history or implicit in the structure of the Constitution as a whole. First, it is clear that misconduct need not be a crime in the ordinary sense of the term in order to justify impeachment and removal, but may include "political crimes" in the sense of perceived offenses against the Constitution or the People—such as violation of one's oath of office or breach of a public trust. Hamilton in *Federalist* No. 65, for example, said that proper grounds for impeachment and removal included "offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust." Such offenses, Hamilton wrote, constitute "injuries done immediately to the society itself."

At the same time, however, it is implicit in our constitutional structure of separate, independent legislative, executive, and judicial branches that impeachment must be more than simply a policy vote of "no confidence" in the executive, leading to the fall of an administration (akin to parliamentary systems of government) or, in the case of judges, attempted removal from office because of disapproval of a judge's rulings made in good faith. The narrow impeachment–acquittal of President ANDREW JOHNSON by a RECONSTRUCTION Congress strongly opposed to Johnson's policies, but with flimsy charges of "high Crimes and Misdemeanors," has been taken by many as a precedent against impeachment even for strongly felt reasons of policy believed to be of vital concern to the future of the nation. The impeachment–acquittal of Justice SAMUEL CHASE, early in our nation's history, similarly has been taken by many as a precedent against impeachment of judges merely because of disagreement (however intense and perhaps justified) with their judgments and demeanor.

While conduct need not be a crime in order to constitute an impeachable offense, it is clear that criminal acts in the ordinary sense of the term may themselves be "high

Crimes and Misdemeanors" sufficient to warrant removal from office, if Congress judges them to be serious enough offenses. The misconduct need not be a felony—high "Misdemeanors" fall within the standard—but the commission of felonies is a classic case in which the Constitution contemplates, and Congress's practice over the centuries confirms, that federal officers should be impeached and removed. (Moreover, Congress is not bound by the "proof beyond a reasonable doubt" standard that applies in a criminal prosecution in which an individual may be imprisoned or fined if found guilty; indeed, Congress has impeached and removed a federal judge, Alcee Hastings, who had been *acquitted* of essentially the same charges in a federal criminal prosecution.)

Thus, federal judges have been removed for bribery (Judge Hastings, in 1989), tax evasion (Judge Harry Claiborne, in 1986), and giving false testimony before a federal GRAND JURY (Judge Nixon, in 1989). President RICHARD M. NIXON resigned in 1974 rather than face near-certain impeachment (and probable conviction) for obstruction of justice. President Clinton was impeached for perjury and obstruction of justice, both serious federal felonies carrying substantial prison terms, but acquitted largely on the basis of votes of senators of his own party who concluded either that the charges were not proved or that such misconduct, even if proved, did not constitute "high Crimes and Misdemeanors."

Once again, as the Clinton case confirms, the question of what is sufficiently "high" criminal misconduct—sufficiently serious, important, weighty—is committed to the "awful discretion" (in Hamilton's terms) of Congress. Congress may exercise that judgment well or badly and need not be consistent or principled in its decisions. It seems highly likely, for example, that Congress in 1974 would have judged obstruction of justice to be an impeachable offense in the case of President Nixon (a scholarly report of the House Judiciary Committee indeed had so concluded), but many senators in 1999 concluded that it was not such an offense in the case of President Clinton.

One possible ground for distinguishing the Clinton and Nixon cases, advanced by Clinton's defenders (including numerous academics), is that Clinton's misconduct was of a "private" nature rather than an abuse of his office and that "private" crimes are not included within the meaning of "high Crimes and Misdemeanors." There must exist a nexus, the argument goes, between the criminal act and the official's public office. The text of the Constitution does not support this distinction, however, and Hamilton's argument that the impeachment power characteristically is directed at breaches of a public trust does not imply that the power may not be exercised to remove an official for crimes for which any citizen guilty of such offense might well be sent to prison. "Bribery," identified by the Constitution as an offense warranting removal from office, need not involve any use of a judge's or executive officer's official capacity. Other private-capacity corrupt conduct, like tax evasion, has served as a basis for impeachment and removal of federal judges (for example, Judge Claiborne in 1986). Clinton's prosecutors, and the fifty senators who voted to convict him, additionally maintained that there is no such thing as "private" perjury or obstruction of justice; that such crimes committed by the chief law enforcement officer of the nation do relate to the performance of his duties; that perjury is strongly akin to "Bribery," which is explicitly a ground for removal; and that Clinton's misconduct in any event involved a violation of his oath of office and a breach of trust with the People. On this account, the commission of serious crimes is itself a breach of the public trust.

There is a further flaw with the nexus-to-office limitation. Taken seriously, it would require the absurdity of permitting a federal officer to remain in office following commission of a "private" first-degree murder if that homicide was unrelated to the performance of his or her office. In an attempt to avoid this problem, a letter signed by law professors sympathetic to President Clinton argued that private criminal conduct does not warrant impeachment unless the crime is a "heinous" one. Again, however, the "heinous" standard does not appear in the Constitution, nor is it mentioned in the Framers' discussions and debates over impeachment. The standard chosen was "high" crimes and misdemeanors. It has been plausibly argued that "high" in this context denotes the rank or office of the alleged miscreant, but the better answer is that it creates a general standard of seriousness or importance (as judged by Congress). A crime can be serious without being "heinous." The Constitution clearly imposes no separate "heinousness" limitation on the impeachment power.

A final argument advanced during the Clinton case was that, for purposes of impeachment, the President should be held to a lower standard of conduct than federal judges and other federal officers; that is, that the "height" of "high" crimes needs to be higher in the case of the President before Congress is constitutionally justified in removing him from office. There is no basis for this argument in the text of the Constitution. Article III's provision that judges serve "during good behavior" is a description of judges' tenure (for life), not a substitute for Article II's statement of the impeachment–removal standard applicable to "all civil officers of the United States," a term that embraces Article III judges. While removal of a sitting President is obviously a more serious matter than removal of a single federal judge, this political reality does not alter the meaning of the Constitution's terms. Nor does the claim that removal of a President would "upset" the result of a national election change the Constitution's

standard. Presidential impeachment will nearly always seek to remove an elected leader; the Framers, in creating an impeachment standard that explicitly mentions the President and Vice President, obviously contemplated such a possibility.

Though the Constitution does not require it, a practical necessity for removal of the President is that he *both* has committed serious offenses *and* lost popular political support, extending to members of his own POLITICAL PARTY in the Senate. Experience has shown that the two- thirds majority requirement makes it extremely difficult to convict a sitting President, regardless of the merits of the charges. As the acquittal of President Johnson shows, even large partisan majorities strongly opposed to an unpopular President on policy grounds encounter principled defections of senators opposed to a removal that is based on constitutionally dubious grounds. Conversely, as the acquittal of President Clinton shows, a popular President retaining the unified support of senators of his own party may avoid removal from office even when few (in either party) doubt that he has committed serious criminal offenses. (President Nixon resigned, rather than face impeachment, once it became clear that he had lost the support even of his own political party.)

A related issue that arose in the Clinton impeachment is whether Congress has the power to punish presidential misconduct by "censure." Censure, in the form of a resolution of disapproval (without further penalty), is neither mentioned in nor expressly prohibited by the Constitution. Whatever its propriety, censure is a remedy outside the impeachment process. The Constitution prescribes that conviction carries a mandatory penalty of removal from office (Article II, section 4), and a discretionary penalty of disqualification from future office (Article I, section 3), but forbids Congress from imposing any "further" punishment—presumably including supposedly "lesser" punishments like fines—with the clarification that the party convicted is nonetheless subject to criminal prosecution in the courts. A "censure" consisting of mere words may or may not be thought meaningful punishment, but in any event such expression could be accomplished outside the impeachment process as a matter of collective speech of senators and representatives, and thus is permissible. (Congress has no analogous power to fine or otherwise punish a President outside the impeachment process.)

The proviso that "the Party convicted shall, nevertheless, be subject to Indictment, Trial, Judgment and Punishment, according to Law" has been thought by many to imply that the President must be removed from office before he may be indicted. But if this is so, it must be because of some other constitutional provision, not the punishment proviso, which in form merely holds that Congress's judgment is separate from and not preclusive of criminal prosecution. The proviso does not dictate that impeachment precede indictment; prosecution has preceded impeachment in the case of several removed federal judges. It is probably the case that the Framers *expected*, in the case of the President at least, that removal would precede prosecution, for the simple reason that federal prosecutors are subordinates of the President within the executive branch and might be expected not to indict the Chief Executive. State prosecutions of a sitting President or other federal officer, although also theoretically possible, may not be practically enforceable without federal judicial or congressional approval (through impeachment). But where an "INDEPENDENT COUNSEL" serves as federal prosecutor acting on behalf of the executive branch (an arrangement constitutionally dubious in its own right, but upheld by the Supreme Court in 1988 in the case of *Morrison v. Olson*), or where a federal prosecutor is not otherwise countermanded by the President, the Constitution would not seem to bar those stages of a criminal case—indictment, trial, entry of judgment—that do not effect the equivalent of removal of a President from office (arrest, imprisonment). Removal is the exclusive province of impeachment. But otherwise the President is not above the requirements and burdens of the law that apply to any other citizen, taking into account the needs of the nation, as the Supreme Court has twice held, unanimously, in different contexts: UNITED STATES V. NIXON (1974) (the President is not immune to subpoenas for evidence in a federal criminal case) and CLINTON V. JONES (1997) (the President is not immune from private civil litigation concerning his personal conduct).

It has been suggested that the Article I, section 3 mandate of removal upon conviction for "high Crimes and Misdemeanors" does not necessarily imply that Congress lacks power to impeach and, in the Senate's *discretion*, remove or impose some lesser punishment (like censure) for perceived *lesser* offenses. Otherwise, the argument goes, what mechanism would have existed (prior to adoption of the TWENTY-FIFTH AMENDMENT in 1967) for removing an incapacitated or incompetent President? The argument has some serious problems, however. First, it imports into the word "impeachment" a broader power than appears supported by the language of the various clauses of the Constitution, and one that would seem inconsistent with other structural provisions of the Constitution. For example, Congress could, under this view, remove a President for vetoing a law more readily than it could override his veto—which requires a two-thirds majority of both houses, not just the Senate. Such a power tends too much toward creating a quasi-parliamentary regime at odds with the Framers' design. Had such a sweeping discretionary power been intended, it seems probable it would have been set forth far more clearly, especially

given the extensive treatment of impeachment in fact contained in the Constitution's terms. Moreover, the breadth of the term "high Crimes and Misdemeanors" is already such as to permit impeachment—but, importantly, require removal upon conviction—for virtually any serious misconduct, including noncriminal misconduct, that Congress judges sufficiently serious to warrant such a remedy. At the same time, the mandatory punishment of removal deters unserious impeachments and creation by Congress of graduated penalties for perceived lesser political offenses, sapping the independence of the executive branch from Congress.

Finally, the apparent point-of-departure for this argument—the problem of presidential incapacity—is exactly the reason the Twenty-Fifth Amendment was adopted. The amendment filled a gap that was indeed left open by the impeachment power, and for which We the People felt further provision was needed. This highlights what should be a constitutional truism: The Constitution is not perfect and does not perfectly anticipate and address all of today's problems. But that does not mean that the Constitution's impeachment clauses (or any other clauses) should be distorted to suit the perceived needs of the moment. If the need for constitutional change is sufficiently great, the amendment process exists to address it.

Indeed, with respect to the power of impeachment, one can detect an embarrassing glitch that begs for a remedy: While the Chief Justice, rather than the Vice President, serves as presiding officer of the Senate when the President is tried (to remove obvious conflict-of-interest problems), no such substitution is prescribed in the case when the Vice President is put on trial, leaving open the prospect that the Vice President could preside at his own impeachment trial!

While imperfect in theory and even less perfect in practice, the Constitution's impeachment provisions provide a vital constitutional check against lawlessness and misconduct by executive and judicial officers—if Congress is prepared to employ that check in a serious manner. THOMAS JEFFERSON bemoaned the impeachment power as exercised in his day as a mere "scarecrow." But Jefferson's remark, as with the trials of Presidents Johnson and Clinton, simply highlights the fact that the application of the constitutional power of impeachment depends on the judgment of Congress and thus, for good or for ill, on the politics of the moment.

MICHAEL STOKES PAULSEN
(2000)

Bibliography

BERGER, RAOUL 1973 *Impeachment: The Constitutional Problems.* Cambridge, Mass.: Harvard University Press.

BLACK, CHARLES LUND 1974 *Impeachment: A Handbook.* New Haven, Conn.: Yale University Press.

GERHARDT, MICHAEL J. 1996 *The Federal Impeachment Process: A Constitutional and Historical Analysis.* Princeton, N.J.: Princeton University Press.

HAMILTON, ALEXANDER; JAY, JOHN; and MADISON, JAMES 1982 *The Federalist Papers*, Nos. 65 and 66. New York: Bantam Books.

PAULSEN, MICHAEL STOKES 1997 Someone Should Have Told Spiro Agnew. *Constitutional Commentary* 14:245–246.

——— 1999 *Nixon* Now: The Courts and the Presidency After Twenty-Five Years. *Minnesota Law Review* 83:1337–1404.

REHNQUIST, WILLIAM H. 1992 *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson.* New York: Wm. Morrow.

U.S. CONGRESS 1974 *Constitutional Grounds for Presidential Impeachment.* Report prepared by the Staff of the Impeachment Inquiry of the House. 93rd Congress, 2nd Session. Committee Print.

——— 1999 Committee on the Judiciary: Impeachment. [Documentation of the House Judiciary Committee hearings and of the House management of the impeachment trial of President William Jefferson Clinton.] <http://www.house.gov/judiciary/icreport.htm>.

——— 1999 Impeachment of President William Jefferson Clinton. Senate Document 106-3. <http://www.access.gpo.gov/congress/senate/sd106-3.html>.

——— 1999 Independent Counsel's Report to the United States House of Representatives. House Document 105-310. <http://www.access.gpo.gov/congress/icreport>.

## IMPLIED CONSTITUTIONAL RIGHTS OF ACTION

One may seek judicial vindication of federal constitutional rights in at least three ways. Constitutional protections may be used as a shield against governmental misbehavior, as for example, when one relies on the Sixth Amendment guarantee of the RIGHT TO COUNSEL to contest a criminal prosecution. Second, one may rely on a constitutional right to enjoin allegedly unconstitutional behavior such as enforcement of an unconstitutional statute. Third, an aggrieved party may seek monetary compensation for past violations of constitutional rights. When invoked without express stautory authorization, the second and third techniques depend upon inferring the existence of implied rights of action to vindicate constitutional rights.

There is disagreement over whether, prior to EX PARTE YOUNG (1908), the offensive assertion of a federal right without a corresponding state-created right was sufficient to invoke a federal court's injunctive power. *Young*, which endorsed a federal INJUNCTION against enforcement of an allegedly unconstitutional state law, became the leading case to suggest that a federal cause of action for injunctive relief was implied merely from the existence of a consti-

tutional right. This result has been a cornerstone of modern litigation contesting statutes and other government behavior. In later years, the Court interpreted SECTION 1983, TITLE 42, UNITED STATES CODE, to supply statutory support for both equitable and monetary relief in constitutional actions against state officials.

By 1971, in light of *Young* and section 1983, only the existence of implied damages actions against federal officials remained open to question. *Bell v. Hood* (1946) suggested that federal courts have JURISDICTION to consider whether alleged Fifth and FOURTH AMENDMENT violations by federal officials give rise to a cause of action for damages but it did not address the question of the cause of action's existence. In BIVENS V. SIX UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS (1971), however, the Court held that an implied damages action exists for Fourth Amendment violations. DAVIS V. PASSMAN (1979) held that a damages action was implied in the EQUAL PROTECTION guarantee that has been found in the Fifth Amendment and constituted the Court's first extension of *Bivens* beyond Fourth Amendment claims. *Carlson v. Green* (1980), in which plaintiffs were allowed to bring an implied action under the Eighth Amendment, confirmed that *Bivens*-type actions are available under many constitutional provisions. Significantly, the Court has not held that such actions exist against state officials, a holding that would render superfluous much of its section 1983 jurisprudence.

*Bivens*, *Davis*, and *Carlson* suggested that Congress has an important role to play in determining the availability and scope of implied damages actions. The Court has left open the possibility of not inferring an implied damages action when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress," or when, as in *Bush v. Lucas* (1983), Congress provides an effective alternative remedy. But *Davis* and *Carlson v. Green* indicated that the Court does not readily detect a congressional desire to foreclose *Bivens* actions. In *Davis*, Congress had declined to extend federal employment discrimination laws to preclude the behavior for which the Court inferred an implied private right of action. *Carlson* held that the existence of a remedy against the United States under the FEDERAL TORT CLAIMS ACT did not foreclose a *Bivens* action against individual officers alleged to have violated the Constitution.

THEODORE EISENBERG
(1986)

Bibliography

DELLINGER, WALTER E. 1972 Of Rights and Remedies: The Constitution as a Sword. *Harvard Law Review* 85:1532–1564.

HART, HENRY M., JR. 1954 The Relations between State and Federal Law. *Columbia Law Review* 54:489–542.

# IMPLIED POWERS

"Loose and irresponsible use of adjectives colors . . . much legal discussion. . . . "Inherent' powers, "implied' powers, "incidental' powers are used, often interchangeably and without fixed ascertainable meanings." Justice ROBERT H. JACKSON's remark in YOUNGSTOWN SHEET & TUBE COMPANY V. SAWYER (1952) was correct. The vocabulary of "implied powers" is frequently used indiscriminately with other terms. It is associated with not less than six quite different usages.

The original use of "implied powers" was to contrast, rather than to explain, the powers that would vest in the United States. The national government would not automatically possess all the customary attributes of SOVEREIGNTY, but only those expressly provided. As to these, JAMES MADISON declared (in THE FEDERALIST #45): "The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite." Writing for a unanimous Supreme Court in 1804, Chief Justice JOHN MARSHALL, in *United States v. Fisher*, agreed that there were no implied-at-large national powers: "[I]t has been truly said, that under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised." And more than a century later, Justice DAVID BREWER in *Kansas v. Colorado* (1907) confirmed the conventional wisdom: "[T]he proposition that there are legislative powers [not] expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of ENUMERATED POWERS."

In this original sense, then, it may be said that the Constitution does not imply a government of general legislative, executive, and judicial powers; it establishes a government of limited, express, enumerated powers alone.

In 1936, in UNITED STATES V. CURTISS-WRIGHT EXPORT CORPORATION, Justice GEORGE SUTHERLAND, in an OBITER DICTUM for the Supreme Court, suggested that the national government need not rely upon any express power to sustain an assertion of executive authority prohibiting American companies from foreign trade which (in the President's view) might compromise the nation's neutral status at international law. Sutherland observed that the United States, as a nation within an international community of sovereign national states possessed "powers of external sovereignty" *apart* from any one or any combination of the Constitution's limited list of powers respecting foreign relations. Accordingly, Sutherland declared: "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated

powers, is categorically true only in respect of our internal affairs." Such an extraconstitutional power may informally be described as one derived from the status of being a sovereign nation or as implied by the fact of national sovereignty.

The soundness of this view has been seriously questioned, however, and in fact its acceptance has not been necessary to the outcome of any case. Rather, its principal positive law use has been as a reference in support of very broad interpretations of the several provisions in the Constitution which expressly enumerate executive and congressional powers respecting FOREIGN AFFAIRS. It has also been relied upon to uphold extremely permissive DELEGATIONS OF POWER by Congress to permit the President to determine conditions of trade between American companies and foreign countries, or conditions of American travel and activity abroad.

Not inconsistent with the general view that any claim of implied-at-large national powers is precluded by the text and presuppositions of the Constitution, such specific powers as are conferred by the Constitution have been deemed to carry with them exceedingly wide-ranging implications. Partly this results merely from the doctrine of BROAD CONSTRUCTION that every specific grant of power is to be deferentially interpreted, rather than narrowly construed. For instance, the power vested in Congress to "regulate" commerce among the several states might have been interpreted quite narrowly, in keeping with the principal objectives of enabling Congress to provide for a nationwide free trade zone, as against the tendency of some states to enact discriminatory taxes, and other self-favoring economic barriers. Instead, the power was construed in no such qualified fashion. The power to regulate commerce among the several states is "the power to prescribe the rule by which such commerce shall be governed," which therefore includes the power to limit or to forbid outright such commerce among the states as Congress sees fit to disallow. The result has been that to this extent, the express power to regulate commerce among the states gives to Congress a limited NATIONAL POLICE POWER.

Beyond adopting an attitude of permissive construction respecting each enumerated power, however, the Supreme Court took an additional significant step. It accepted the view that acts of Congress not themselves direct exercises of conferred powers would be deemed authorized by the Constitution if they facilitated the exercise of one or more express powers. An act of Congress establishing a national bank under a corporate charter granted by Congress, vesting authority in its directors to set up branch banks with general banking prerogatives, may arguably facilitate borrowing on the credit of the United States, paying debts incurred by the United States, regulating some aspects of commerce among states, and serving as a place of deposit for funds to meet military payrolls. Each of these *uses* is itself identified as an express, enumerated power vested in Congress although the act establishing such an incorporated national bank may itself not be regarded as legislation that borrows money, pays debts, etc. Nevertheless, insofar as provision for such a bank might usefully serve as an instrument by means of which several expressly enumerated powers could be carried into execution, the Supreme Court unanimously concluded that the congressional power to furnish such a bank was "implied" "incidentally" in those enumerated powers. The opinion by Chief Justice Marshall in MCCULLOCH V. MARYLAND (1819) is crowded with the repeated use of both terms. In tandem with the principle of generous construction, this view of "implied" incidental powers has had a profound influence in assuring to Congress an immense latitude of legislative discretion despite the conventional wisdom that the national government is one of specific, enumerated powers alone. Laws not probably within even a latitudinarian construction of specific grants of power, but nonetheless instrumentally relatable to such grants, are thus deemed to be adequately "implied" by those grants as incidents of grants.

A contemporary example is furnished by WICKARD V. FILBURN (1942). Though some of the "commerce" regulated by the act upheld in that case was not commerce at all (because it was not offered for trade, but was used solely for the farmer's personal consumption), and although the activity regulated was entirely local (growing and consuming wheat on one's own farm), insofar as the regulation of these local matters was nonetheless instrumentally relatable to an act fixing the volume of wheat permitted to be grown for purposes of interstate sale, the power to include local growing and consumption, as part of the larger regulation, was deemed to be implied by the express power to regulate commerce among the several states. The imaginative capacity of Congress to relate the aggregate interstate effects of local activity, thus bringing it within a uniform and integrated national economic policy, has made the principle of incidental implied power at least as important as the principle of broad construction in respect to enumerated national power. Indeed, the combination of the two doctrines has led Justice WILLIAM H. REHNQUIST, in HODEL V. VIRGINIA SURFACE MINING (1981), to suggest: "It is illuminating for purposes of reflection, if not for argument, to note that one of the greatest "fictions" of our federal system is that the Congress exercises only those powers delegated to it, while the remainder are reserved to the States or to the people. The manner in which this Court has construed the COMMERCE CLAUSE amply illustrates the extent of this fiction." However that may be, the notion that express powers imply an authority to undertake action instrumentally relatable to the use of those

powers, albeit action not itself an exercise of any express power, has given to the national government a flexibility and discretion that it would not otherwise possess.

The bank case (*McCulloch*) and the wheat quota case (*Wickard*) are examples of implied powers incidental to *specific* enumerated powers. Each involved acts of Congress establishing an enterprise or furnishing a regulation instrumentally related to one or another express power. Different from this kind of "incidental implied power," but resting on much the same sort of constitutional justification, are implied powers common to each of the three branches of the national government. These powers, sometimes called INHERENT POWERS, are deemed to be implied as reasonably necessary to each department's capacity to discharge effectively its enumerated responsibilities. Because they are regarded as effecting that capacity generally (and not merely in respect to one or another specific enumerated power alone), however, they are generically implied, incidental powers.

A prominent example is the unenumerated (but implied) power of each house of Congress to hold legislative hearings, to subpoena witnesses, and otherwise to compel the submission of information thought useful in determining whether acts of Congress on particular subjects need to be adopted, repealed, or modified. The power to conduct LEGISLATIVE INVESTIGATIONS, nowhere expressly conferred, is deemed to be implied as a reasonable incident of the legislative function. Similarly, a power of federal courts to maintain order in adjudicative proceedings, independent of any act of Congress providing such a power (pursuant to the NECESSARY AND PROPER CLAUSE), rests on the same ground. And although never challenged, presumably the power of the Supreme Court to exclude all but its own members from its private conferences in which discussion is held and votes are taken on pending cases is an example.

A qualified power of EXECUTIVE PRIVILEGE, enabling the President to interdict discovery of advice, memoranda, and other internal executive communications is conceded by the Supreme Court to be implied as an incident of executive necessity and power. The principle common to these several examples was illustrated in a remark by ALEXANDER HAMILTON, in *The Federalist* #74, commenting briefly upon the express power vested in the President by Article II, authorizing the President to "require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices." As to this express provision, Hamilton suggested, "I consider [it] a mere redundancy in the plan; as the right for which it provides would result of itself from the office." And so, undoubtedly, it would, especially as the Supreme Court was subsequently to hold that the President has an implied power to dismiss any executive subordinate at will, though no express clause so provides, and the clause respecting appointment of such officers requires the consent of the Senate.

One may phrase the matter variously, as power "resulting" from the establishment of the executive, legislative, and judicial branches, or as powers "incidental" to their designated powers. The point is the same: instrumental powers deemed reasonably necessary generally to each department's independent capacity to exercise its express, vested powers are treated as generically implied by Articles I, II, and III.

As noted in *McCulloch* an act of Congress establishing a national bank in corporate form may be useful as a means of carrying into execution the several specific fiscal powers of the United States. Equally, a regulation of local commerce may be necessary to keep a regulation of INTERSTATE COMMERCE from frustration. In either case the Court has upheld such exercise of congressional power when instrumentally relatable to the exercise of an express, enumerated power. In neither case, however, is it necessary in fact to describe the power to adopt such instrumentally relatable laws as "implied" power. Rather, all such laws are themselves specifically and expressly authorized by an *enumerated* grant of enabling power vested in Congress: "Congress shall have power to make all laws necessary and proper to carry into execution the foregoing powers, and all other powers vested in the government of the United States or any officer or department thereof." This clause, located at the end of the enumerated powers of Congress in Article I, section 8, is known as the "necessary and proper" clause. Originally, in anticipation of its elasticizing effects, it was known as "the sweeping clause," vesting in Congress discretion to carry into effect its own enumerated powers, and those of the executive and judiciary as well, by means of its own choosing. Consistent with that background, and consistent also with the general doctrine of generous (or loose) construction, the sweeping clause has been construed by the Supreme Court very liberally: "necessary and proper" are regarded as synonymous with "reasonable." Thus, whatever acts of Congress may reasonably relate to a regulation of commerce among the several states are authorized by this clause. Likewise, whatever acts of Congress may reasonably relate to the conduct of the JUDICIAL POWER OF THE UNITED STATES, or the conduct of the executive powers (as described in Article II), as an aid to those departments to carry into execution the executive or judicial powers, are authorized by this clause.

Because of this interpretation of the sweeping clause, it is not clear why the Supreme Court developed the notion of incidental *implied* powers. From one point of view,

the latter doctrine is both redundant, because it duplicates a power *already* provided in the Constitution, and illogical because insofar as there is a clause expressly providing for such an instrumental power vested in Congress, to speak of such a power as "implied" rather than as "express" makes little sense. Had there been no necessary and proper clause, the innovation of a doctrine of implied power, incidental to enumerated powers, might be rested on the felt necessity of rendering the national government equal to ultimate growth and needs of the nation. But insofar as the necessary and proper clause was itself construed to provide for such flexibility, no need remained to be filled by the additional innovation of "implied, incidental" power. The doctrine of generous construction (respecting the scope of enumerated power) and the necessary and proper clause (itself generously construed), would in combination grant a vast instrumental latitude to Congress in respect both to its own powers and to those of the executive and the judiciary.

One consequence of this partial redundancy is that there is no particular consistency in the pattern of Supreme Court decisions respecting unsuccessfully challenged acts of Congress. Sometimes they are sustained as but implied incidents of one or more enumerated substantive powers. And sometimes, as happened in *McCulloch*, they are sustained on both grounds at the same time.

Were it not for a related problem, the question whether an exertion of national power not within an express enumerated power (but nonetheless instrumentally relatable to such a power) properly rests on the necessary and proper clause, or instead merely represents an implied power instrumentally incidental to an express power, would be merely academic. But, unfortunately, it is not always so. The necessary and proper clause vests its power in Congress. It implies, by doing so, that if Congress believes it appropriate to facilitate the executive and judicial enumerated powers, it may do so by enacting legislation helpful, albeit not indispensable, to those departments. Merely "helpful" instrumental powers assertable by the executive or by the judiciary will depend, therefore, on whether Congress has, by law, acting pursuant to the necessary and proper clause, provided for them. Correspondingly, the absence of any such act of Congress providing for such incidental executive or judicial powers would be a sufficient basis for a successful challenge to any such unaided assertions of executive or judicial power.

On the other hand, if the mere enumeration of executive and judicial powers (in Articles II and III) are themselves deemed to imply incidentally helpful (but not indispensable) ancillary powers, then the absence of a supportive act of Congress is not fatal to such claims. Thus, in this instance, it does make a difference to resolve the relationship between the necessary and proper clause (addressed solely to what Congress may provide) and the doctrine of implied, incidental powers.

Interestingly, two centuries into the positive law history of the Constitution, this particular question has not been addressed by the Supreme Court. Rather, an uneasy accommodation has been made. Each department of government has been regarded by the Court as possessing a range of incidental powers implied by its express powers, and such assertions of authority have been generally upheld. Nonetheless, insofar as Congress has legislated affirmatively, and by statute has found that such an assertion of incidental executive (or judicial) authority is *not* necessary or proper, the tendency of the Supreme Court is to defer to the authoritative judgment of Congress and, correspondingly, rule against the assertion of "implied" incidental executive power.

The pragmatic accommodation of the doctrine of implied incidental powers and the necessary and proper clause, therefore, has been to treat Congress as *primus inter pares*. Each department of the national government has separate enumerated powers of its own, not subject to abridgment by either of the other two departments. In addition, each may assert implied incidental powers, instrumentally relatable to its enumerated powers albeit not literally within those enumerated powers as even generously construed. But a specific determination by Congress with respect to this latter class of powers is regarded as virtually conclusive of the subject. If the act of Congress confirms such power, it is virtually certain to be sustained. If the act of Congress either expressly or implicitly denies the appropriateness of such incidental executive or judicial power, then that determination also is likely to govern. The case best known for this view is *Youngstown Sheet & Tube Co. v. Sawyer*.

The Constitution enumerates express WAR POWERS and express powers enabling Congress to insure each state against domestic violence. Curiously, however, it has no express clauses directed to the internal security of the national government. Nevertheless, the authority to provide for laws punishing attempts of violent overthrow has been sustained as an implied power of self-preservation. Depending upon how deeply such laws may affect certain freedoms to criticize the government or to bring about fundamental changes in its composition by peaceful means, these acts of Congress may be vulnerable to challenge under the FIRST AMENDMENT or other provisions of the Constitution. Nevertheless, a considerable implied power of self-preservation is deemed to vest in Congress, essentially on the common-sense inference that its express enumerated powers imply a residual existence of the gov-

ernment possessing those powers and thus, of necessity, a power of self-preservation. The Sedition Act of 1798 (see ALIEN AND SEDITION ACTS) was sustained in the lower federal courts partly on this rationale.

Less frequently drawn into litigation, but presumably resting on similar grounds, is the implied power of Congress to provide for incidents of national status. The adoption of a national flag rests on no particular enumerated power. Rather, like other acts of Congress identifying symbols of national status, it is but an implied incident of an expressly established government—of the United States of America.

In sum, the phrase "implied powers" houses a half-dozen quite discrete meanings. They are bound together by but one common element, namely the obviousness of contrast with express powers. Beyond that, however, they speak to distinct (and not always completely reconcilable) propositions. One is an implied residual sovereign power of national self-preservation and the incidental power to adopt ordinary insignia of nationhood. In addition, there are implied powers peculiar to each of the three branches of the national government, incidental to the exercise of all enumerated powers expressly vested in each branch. Such generic implied powers apart, there are also implied cognate powers incidental to each expressly enumerated power, extending the reach of those enumerated powers even beyond what might otherwise be their scope under a doctrine of loose or generous construction. Then, too, although the usage seems inept in reference to an *enumerated* general enabling power, the necessary and proper clause of the Constitution has often been used to anchor the textual source of extensive, instrumental powers. And last, there is also the claim of implied, extraconstitutional power in respect to the external sovereign relations of the United States, standing over and apart from the several enumerations of power provided by the Constitution.

The solidness of the foundations respecting these several varieties of implied powers are not all of a piece, that is, quite plainly they are not all of equally convincing legitimacy. Rather, they but illustrate in still one more way how two centuries of history have operated to show what has followed from Chief Justice Marshall's observation that it is a Constitution we are expounding.

WILLIAM W. VAN ALSTYNE
(1986)

Bibliography

GUNTHER, GERALD, ed. 1969 *John Marshall's Defense of McCulloch v. Maryland.* Stanford, Calif.: Stanford University Press.

HENKIN, LOUIS 1972 *Foreign Affairs and the Constitution.* St. Paul, Minn.: West Publishing Co.

VAN ALSTYNE, WILLIAM W. 1976 The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: The Horizontal Effect of the Sweeping Clause. *Law & Contemporary Problems* 1976:102–134.

## IMPORT-EXPORT CLAUSE

The Constitution provides: "No State shall . . . lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws." It also prohibits the federal government from placing any tax or duty on exports.

The limitation on state taxation of imports came before the Supreme Court in BROWN V. MARYLAND (1827). Chief Justice JOHN MARSHALL pointed out that the clear intention of the Framers was to prohibit the states from levying customs duties. Only Congress was to have this power. He recognized, however, that state power to raise revenues would be unduly restricted if goods that had come from another country could never be subject to taxation along with other goods within the state. He resolved the dilemma by holding that imported goods should be free from state taxation until they have been incorporated into the mass of property in the state. Such incorporation would take place when the importer sold the goods or when he took them out of the original package in which they were imported. Hence was born the ORIGINAL PACKAGE DOCTRINE, which survived as the measure for state taxation of imports until MICHELIN TIRE CORP. V. WAGES (1976).

In *Michelin* the Supreme Court held that the intention of the Framers was only to prevent the states from imposing special taxes on imports. Hence, it concluded that imported goods could, as soon as they came to rest in the taxing state, be subject to nondiscriminatory state property taxes.

The Supreme Court has long held that goods become exports—and thus free from either state or federal taxes—when they have actually commenced the journey to another country. Once the journey has commenced or they have been committed to a common carrier for transport abroad, they may not be taxed.

Application of the import-export clause to those businesses that transport or otherwise handle goods in FOREIGN COMMERCE has posed a separate problem. Recently the Court has held that nondiscriminatory taxes apportioned to cover only values within the taxing state may be imposed upon the instrumentalities of foreign commerce or the business of engaging in such commerce. Thus, in *Department of Revenue of Washington v. Association of Washington Stevedoring Companies* (1978), it upheld a Washington tax on the privilege of engaging in business

activities measured by gross receipts as applied to a stevedoring company that confined its activities to the loading and unloading in Washington ports of ships engaged in foreign commerce.

In general, the rules governing state taxation of INTERSTATE COMMERCE now seem to apply to imports and exports.

EDWARD L. BARRETT, JR.
(1986)

(SEE ALSO: *State Taxation of Commerce.*)

Bibliography

HELLERSTEIN, WALTER 1977 Michelin Tire Corp. v. Wages: Enhanced State Power to Tax Imports. *Supreme Court Review* 1977:99–123.

## IMPOST

In its broadest sense the term "impost" refers to any tax or tribute levied by authority. By usage it has come to have the narrower meaning of a tax or duty imposed on imports. The Supreme Court has recently stated that "imposts and duties" as used in the Constitution "are essentially taxes on the commercial privilege of bringing goods into a country."

EDWARD L. BARRETT, JR.
(1986)

(SEE ALSO: *Excise Tax; Import-Export Clause; Michelin Tire Company v. Administrator of Wages; State Taxation of Commerce.*)

## IMPOUNDMENT OF FUNDS

Presidents from time to time, and especially beginning with the regime of FRANKLIN D. ROOSEVELT, have asserted a right not to execute the laws or parts thereof, by a decision to "impound" the funds provided by Congress for the effectuation of the law. In effect, this would be an exercise of an item VETO POWER. There is no warrant in the Constitution for the exercise of the power of impoundment. The history of the veto provision in the CONSTITUTIONAL CONVENTION OF 1787 makes clear that the Founders were wary of any veto authority, no less one that would allow the President to rewrite the laws of Congress to suit his predilections. Instead, the Constitution clearly requires that the President "take Care that the Laws be faithfully executed." Only if the provisions of Article II vesting the "executive power" are read to create implicit authority in the President to do as he pleases—what Arthur Schlesinger, Jr., calls a "plebiscitary" presidency—can the impoundment authority be deemed a constitutional one.

This is not to say that a President may not be authorized to exercise the impoundment power. But that authority must derive from legislation and not from the Constitution. Where Congress has mandated the expenditure of funds in support of a legislative program, the President has no choice but to effectuate Congress's will. But legislation may explicitly create discretion in the executive branch as to whether programs are to be carried out in whole or in part. And the courts have suggested that legislation may imply that such presidential power exists. Arguments have also been made that certain general statutes such as those ordering the executive to choose the most economic means of enforcement of the laws, or putting ceilings on the national debt, create a legislative warrant for presidential impoundment. There is little merit in the proposals that these statutes create a general statutory authority for the President to pick and choose among congressional programs.

The President has a veto power. If it is used successfully, the congressional program need not be effected for it is not the law. If the veto be used unsuccessfully, however, it is clear that Congress has mandated the program and it is Congress's will, not the President's, that makes the law of the land. Although there is no item veto, no restriction exists on the veto message explaining that the veto was invoked in response to a particular item in the legislation. If Congress overrides the veto, it will be clear that the portion found objectionable by the President was found desirable by the Congress.

After particularly egregious efforts by President RICHARD M. NIXON to throttle congressional legislation through "impoundment," the CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT was enacted (1974). This statute requires the President to inform Congress if he proposes to rescind or defer appropriations. There can be no rescission unless Congress acting through both houses concurs within forty-five days. A deferral can be invalidated by a resolution of disapproval by one house but is valid unless disapproved. The statute is thorny with constitutional issues, but both the legislators and the executive seem willing to accept it as an appropriate accommodation of their respective interests.

The question whether a President may refuse to enforce a law that he deems unconstitutional is not really an "impoundment" question. That issue was mooted but not resolved in the IMPEACHMENT and trial of President ANDREW JOHNSON. Clearly the President can challenge or refuse to defend in the courts any legislation he finds unconstitutional.

PHILIP B. KURLAND
(1986)

Bibliography

FISHER, LOUIS 1972 *President and Congress: Power and Policy.* New York: Free Press.

GENERAL ACCOUNTING OFFICE 1977 *Review of the Impoundment Control Act of 1974.* Washington, D.C.: Government Printing Office.

## INALIENABLE POLICE POWER

THOMAS COOLEY, writing on the STATE POLICE POWER in 1868, concluded that the CONTRACT CLAUSE did not permit a state "under pretense of regulation, [to] take from the CORPORATION any of the essential rights and privileges which the charter confers." Constitutional law changed quickly. In BOSTON BEER CO. V. MASSACHUSETTS (1878), when holding that the RESERVED POLICE POWER allowed a state to revoke the charter of a brewery company, the Supreme Court declared that even in the absence of a reserved power to revoke, the revocation would be valid: the legislature cannot contract away or otherwise alienate the sovereign power to protect the lives, health, safety, or morals of its citizens. A legislature can, however, alienate its tax powers, as NEW JERSEY V. WILSON (1812) and PIQUA BRANCH BANK V. KNOOP (1854) demonstrated. As the Court frequently explained, the tax power is a right of government that the contract clause does not protect; it protects property rights only. That distinction scarcely explains why the power of EMINENT DOMAIN, a government right, cannot be contracted away. Nevertheless, the inalienable police power proved to be an effective rationale for supporting a variety of regulatory legislation against contract clause claims.

In NORTHWESTERN FERTILIZING COMPANY V. HYDE PARK (1878) the Court upheld as a protection of public health an ordinance forcing the removal of a fertilizer plant. In STONE V. MISSISSIPPI (1880) the Court sustained a state act revoking the charter of a lottery company; the contract clause could not limit a power to protect public morality from gambling. Within a few years the Court upheld one state act revoking a monopoly of the slaughterhouse business and another establishing a commission to fix the rates of a railroad company whose charter expressly authorized it to fix its own rates. In the rate case, STONE V. FARMERS' LOAN AND TRUST COMPANY (1886), the fact that the state had not reserved a power to alter or amend the charter made the defeat of the contract clause claim seem kindred to a victory for the inalienable police power. The unreliability of the contract clause, especially in rate cases, led shortly to the acceptance of SUBSTANTIVE DUE PROCESS OF LAW to defeat the police power.

That the inalienable police power was not limited to cases of public health, safety, or morality is shown by the unanimous opinion in *Chicago and Alton Railroad v. Tranbarger* (1915), sustaining a state requirement that railroads construct roadbeds that prevent water damage to private property. Justice MAHLON PITNEY for the Court declared that all contract and property rights are held subject to the exercise of a police power that "is inalienable even by express grant" and is not limited by either the contract clause or the DUE PROCESS clause. Pitney added that the power embraced regulations promoting "public convenience or the GENERAL WELFARE and prosperity" as well as the "public health, morals, or safety." Protection of the "general welfare and prosperity" figured prominently in the Court's decision in HOME BUILDING AND LOAN ASSOCIATION V. BLAISDELL (1934). In that case the Court referred to the reserved police power but meant the inalienable police power.

LEONARD W. LEVY
(1986)

Bibliography

WRIGHT, BENJAMIN F. 1938 *The Contract Clause of the Constitution.* Pages 195–213. Cambridge, Mass.: Harvard University Press.

## INCIDENTAL BURDENS ON CONSTITUTIONAL RIGHTS

Government actions may interfere with individual rights in two principal ways. First, government may disadvantage a person because that person exercised a right. A law that by its terms prohibits the "burning of an American flag as a statement of political protest" is an example of a law directed at a right in this way. Second, the government may enforce a law that is not directed at an individual right but has the incidental effect of burdening a right in the particular case. The application of a law prohibiting "the lighting of a public fire," to an act of politically motivated flag burning is an example of such an incidental burden. The Supreme Court has held that most constitutional rights are protected against direct burdens but not against incidental ones. Thus, in the above examples, the law directed at flag burning would be unconstitutional, while the application of the fire prohibition to the flag burner would be constitutional, so long as the law was not being used as a pretext for punishing unpopular expression. Similarly, a law using race as an express criterion is presumptively unconstitutional, while a facially neutral law that has a disparate impact on a racial group will be upheld if it was adopted for a nondiscriminatory purpose.

From the perspective of an individual right-holder, there may be little difference between direct and incidental burdens on constitutional rights. In each case, some

government policy infringes the right. However, to say that incidental burdens always raise the same constitutional concerns as targeted ones would open the floodgates of litigation, because every law can, under various circumstances, impose incidental burdens on rights. User fees for government services often have a disparate racial impact, and taxation of all CORPORATIONS increases the marginal cost of doing business for those corporations that run newspapers, thereby burdening FREEDOM OF THE PRESS. To avoid subjecting nearly all laws to searching constitutional scrutiny, the courts must either ignore incidental burdens entirely or find some way to identify some relatively small subset of incidental burdens that pose the gravest dangers. For the most part, the Court has chosen the former course. As a comparison of speech and religion cases illustrates, however, this strategy presents problems.

As a formal matter, in FREEDOM OF SPEECH cases, the Court treats some incidental burdens as constitutionally significant. In practice, however, the Court only gives serious scrutiny to direct content-based burdens on speech, which are presumptively invalid. For example, in *Simon & Schuster, Inc. v. Members of The New York State Crime Victims Board* (1991), the Court invalidated as content-based New York's "Son-of-Sam" law, which required publishers of accounts of crimes committed by their authors to set aside the royalties of those authors for a victim compensation fund.

Content-neutral laws target the noncommunicative element of communicative activity. For example, in KOVACS V. COOPER (1949), the Court upheld an ordinance prohibiting sound trucks because the ordinance aimed to control noise, regardless of the message conveyed. The Court has said that content-neutral laws will be upheld if they serve important interests unrelated to the suppression of ideas and burden no more expression than necessary. Although this test sounds forbidding in principle, in practice the courts have upheld virtually every regulation subject to it.

The Court's interpretation of the free exercise of religion clause makes explicit what is implicit in the speech cases: incidental burdens do not raise constitutional difficulties. In EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990), the Court rejected the claim that Native Americans who used peyote as part of a religious ritual had a free exercise right to an exemption from the state's prohibition on drug use. The Court held that the free exercise clause is essentially an antidiscrimination principle. It proscribes laws that target religious practices as such, but does not reach generally applicable laws that impose incidental burdens on religion.

It is easier to justify the Court's treatment of incidental burdens on speech than its treatment of incidental burdens on religion. A person who wishes to communicate a message may choose from a variety of means of expression, so that laws imposing incidental burdens on speech may be upheld while leaving open adequate alternative means of expression. The medium is not the message. By contrast, religious obligations do not ordinarily admit of alternatives. Thus, the *Smith* decision was widely viewed as unduly harsh to members of minority religions whose practices the legislative process often burdens indirectly.

MICHAEL C. DORF
(2000)

Bibliography

ALEXANDER, LARRY A. 1993 Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory. *Hastings Law Journal* 44:921–962.

DORF, MICHAEL C. 1996 Incidental Burdens on Fundamental Rights. *Harvard Law Review* 109:1175–1251.

EISGRUBER, CHRISTOPHER L. and SAGER, LAWRENCE G. 1994 The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct. *University of Chicago Law Review* 61:1245–1315.

MCCONNELL, MICHAEL W. 1990 Free Exercise Revisionism and the *Smith* Decision. *University of Chicago Law Review* 57: 1109–1153.

SCHAUER, FREDERICK 1985 Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications. *William & Mary Law Review* 26:779–791.

STONE, GEOFFREY R. 1987 Content-Neutral Restrictions. *University of Chicago Law Review* 54:46–118.

TRIBE, LAURENCE H. 1988 *American Constitutional Law*, 2nd ed. Mineola, N.Y.: Foundation Press.

## INCITEMENT TO UNLAWFUL CONDUCT

Incitement to unlawful conduct raises a central and difficult issue about the proper boundaries of freedom of expression and of the FIRST AMENDMENT. Many of the Supreme Court's most important FREEDOM OF SPEECH decisions have involved some form of incitement. Though the term incitement sometimes refers to emotionally charged appeals to immediate action, the word is most often used to cover any urging that others commit illegal acts.

The basic problem about incitement is fairly simple, involving a tension between a criminal law perspective and a free speech perspective. Any society seeks to minimize the number of crimes that are committed. Some people commit crimes because others urge them to do so. Although the person who actually commits a crime may usually seem more to blame than someone who encourages him, on other occasions the inciter, because of greater authority, intelligence, or firmness of purpose, may actually

be more responsible for what happens than the person who is the instrument of his designs. In any event, because the person who successfully urges another to commit a crime bears some responsibility and because effective restrictions on incitement are likely to reduce the amount of crime to some degree, sound reasons exist for punishing those who incite.

Anglo-American criminal law, like the law of other traditions, has reflected this view. In 1628, EDWARD COKE wrote that "all those that incite . . . any other" to commit a FELONY are guilty of a crime; and, at least by 1801, unsuccessful incitement was recognized as an offense in England. Modern American criminal law generally treats the successful inciter on a par with the person who performs the criminal act; the unsuccessful inciter is guilty of criminal solicitation, treated as a lesser crime than the one he has tried to incite.

From the free speech perspective, the problem of incitement takes on a different appearance. A basic premise of a liberal society is that people should be allowed to express their views, especially their political views. Some important political views support illegal actions against actual or possible governments. Indeed, one aspect of the political tradition of the United States is that revolutionary overthrow of existing political authority is sometimes justified. Other views deem certain illegal acts justified even when the government is acceptable. Were all encouragements of illegal activity suppressed, an important slice of political and social opinions would be silenced. Further, in the practical administration of such suppression some opinions that did not quite amount to encouragement would be proceeded against and persons would be inhibited from saying things that could possibly be construed as encouragements to commit crimes. Thus, wide restrictions on incitement have been thought to imperil free expression, particularly when statutes penalizing incitement have been specifically directed to "subversive" political ideologies.

The tension between criminal law enforcement and freedom of expression is addressed by both legislatures and courts. Legislatures must initially decide what is a reasonable, and constitutionally permissible, accommodation of the conflicting values. When convictions are challenged, courts must decide whether the statutes that legislatures have adopted and their applications to particular situations pass constitutional muster.

Most states have statutes that make solicitation of a crime illegal. These laws are drawn to protect speech interests to a significant extent. To be convicted of solicitation, one must actually encourage the commission of a specific crime. Therefore, many kinds of statements, such as disinterested advice that committing a crime like draft evasion would be morally justified, approval of present lawbreaking in general, or urging people to prepare themselves for unspecified future revolutionary acts, are beyond the reach of ordinary solicitation statutes.

One convenient way to conceptualize the First Amendment problems about incitement is to ask whether any communications that do amount to ordinary criminal solicitation are constitutionally protected and whether other communications that encourage criminal acts but fall short of criminal solicitation lack constitutional protection.

All major Supreme Court cases on the subject have involved political expression of one kind or another and have arisen under statutes directed at specific kinds of speech. Some of the cases have involved CRIMINAL CONSPIRACY charges, but because the conspiracy has been to incite or advocate, the constitutionality of punishing communications has been the crucial issue. In SCHENCK V. UNITED STATES (1919) the Court sustained a conviction under the 1917 ESPIONAGE ACT, which made criminal attempts to obstruct enlistment. The leaflet that Schenck had helped to publish had urged young men to assert their rights to oppose the draft. Writing the majority opinion that found no constitutional bar to the conviction, Justice OLIVER WENDELL HOLMES penned the famous CLEAR AND PRESENT DANGER test: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Much was unclear about this test as originally formulated and as subsequently developed, but the results in *Schenck* and companion cases show that the Court then did not conceive the standard as providing great protection for speech. During the 1920s, while the majority of Justices ceased using the test, eloquent dissents by Holmes and LOUIS D. BRANDEIS forged it into a principle that was protective of speech, requiring a danger that was both substantial and close in time in order to justify suppressing communication. Even these later opinions, however, did not indicate with clarity whether the test applied to ordinary criminal solicitation or whether an intent to create a clear and present danger would be sufficient for criminal punishment.

During the 1920s, the majority of the Supreme Court was willing to affirm convictions for expression, so long as the expression fell within a statutory prohibition and the statutory prohibition was reasonable. Thus, in GITLOW V. NEW YORK (1925) the Court upheld a conviction under a criminal anarchy statute that forbade teaching the propriety of illegally overthrowing organized government. The Court concluded that the legislature could reasonably anticipate that speech of this type carried the danger of a "revolutionary spark" kindling a fire. The standard applied in *Gitlow* and similar cases would permit suppression of virtually any type of speech that a legislature might con-

sider to create a danger of illegal activity, a category far broader than ordinary criminal solicitation.

In the 1930s the Supreme Court began to render decisions more protective of speech, and in HERNDON V. LOWRY (1937) the Court reversed a conviction for attempting to incite insurrection, when the evidence failed to show that the defendant, a Communist party organizer, had actually urged revolutionary violence. The majority in *Herndon* referred to the clear and present danger test with approval. In a series of subsequent decisions, that test was employed as an all-purpose standard for First Amendment cases.

In 1951, the Supreme Court reviewed the convictions of eleven leading communists in DENNIS V. UNITED STATES. The defendants had violated the Smith Act by conspiring to advocate the forcible overthrow of the United States government. As in *Gitlow*, the expressions involved (typical communist rhetoric) fell short of inciting to any specific crime. The plurality opinion, representing the views of four Justices, accepted clear and present danger as the appropriate standard, but interpreted the test so that the gravity of the evil was discounted by its improbability. In practice, this formulation meant that if the evil were very great, such as overthrow of the government, communication creating a danger of that evil might be suppressed even though the evil would not occur in the near future and had only a small likelihood that it would ever occur. The dissenters and civil libertarian observers protested that this interpretation undermined the main point of "clear and present" danger. *Dennis* is now viewed by many as a regrettable product of unwarranted fears of successful communist subversion. In subsequent cases, the Court emphasized that the Smith Act reached only advocacy of illegal action, not advocacy of doctrine. In the years since *Dennis* only one conviction under the act has passed this stringent test.

The modern constitutional standard for incitement cases arose out of the conviction of a Ku Klux Klan leader for violating a broad CRIMINAL SYNDICALISM statute, not unlike the statute involved in *Gitlow*. Unsurprisingly, the Court said in BRANDENBURG V. OHIO (1969) that the broad statute was unconstitutional. But it went on to fashion a highly restrictive version of clear and present danger: that a state may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." This test requires lawless action that is likely, imminent, and intended by the speaker. Only rarely could such a test possibly be met by speech that does not amount to criminal solicitation, and under this test both solicitation of crimes in the distant future and solicitation unlikely to be acted upon are constitutionally protected. In *Brandenburg*, however, the Court had directly in mind public advocacy; it is unlikely that this stringent test also applies to private solicitations of crime that are made for personal gain. The present law provides significant constitutional protection for political incitements, but how far beyond political speech this protection may extend remains uncertain.

KENT GREENAWALT
(1986)

Bibliography

AMERICAN LAW INSTITUTE 1985 *Model Penal Code*, Section 5.02 and Commentary. St. Paul, Minn.: West Publishing Co.

GREENAWALT, KENT 1980 Speech and Crime. *American Bar Foundation Research Journal* 1980:647–785.

LINDE, HANS A. 1970 "Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto. *Stanford Law Review* 22:1163–1186.

## INCOME TAX CASES

See: *Pollock v. Farmers' Loan & Trust Company*

## INCORPORATION DOCTRINE

According to the incorporation doctrine the FOURTEENTH AMENDMENT incorporates or absorbs the BILL OF RIGHTS, making its guarantees applicable to the states. Whether the Bill of Rights applied to the states, restricting their powers as it did those of the national government, was a question that arose in connection with the framing and ratification of the Fourteenth Amendment. Before 1868 nothing in the Constitution of the United States prevented a state from imprisoning religious heretics or political dissenters, or from abolishing TRIAL BY JURY, or from torturing suspects to extort confessions of guilt. The Bill of Rights limited only the United States, not the states. JAMES MADISON, who framed the amendments that became the Bill of Rights, had included one providing that "no State shall violate the equal rights of conscience, of the FREEDOM OF THE PRESS, or the trial by jury in criminal cases." The Senate defeated that proposal. History, therefore, was on the side of the Supreme Court when it unanimously decided in BARRON V. BALTIMORE (1833) that "the fifth amendment must be understood as restraining the power of the general government, not as applicable to the States," and said that the other amendments composing the Bill of Rights were equally inapplicable to the States.

Thus, a double standard existed in the nation. The Bill of Rights commanded the national government to refrain from enacting certain laws and to respect certain procedures, but it left the states free to do as they wished in relation to the same matters. State constitutions and COM-

MON LAW practices, rather than the Constitution of the United States, were the sources of restraints on the states with respect to the subjects of the Bill of Rights.

Whether the Fourteenth Amendment was intended to alter this situation is a matter on which the historical record is complex, confusing, and probably inconclusive. Even if history spoke with a loud, clear, and decisive voice, however, it ought not necessarily control judgment on the question whether the Supreme Court should interpret the amendment as incorporating the Bill of Rights. Whatever the framers of the Fourteenth intended, they did not possess ultimate wisdom as to the meaning of their words for subsequent generations. Moreover, the PRIVILEGES AND IMMUNITIES, due process, and EQUAL PROTECTION clauses of section 1 of the amendment are written in language that blocks fixed meanings. Its text must be read as revelations of general purposes that were to be achieved or as expressions of imperishable principles that are comprehensive in character. The principles and purposes, not their framers' original technical understanding, are what was intended to endure. We cannot avoid the influence of history but are not constitutionally obligated to obey history which is merely a guide. The task of CONSTITUTIONAL INTERPRETATION is one of statecraft: to read the text in the light of changing needs in accordance with the noblest ideals of a democratic society.

The Court has, in fact, proved to be adept at reading into the Constitution the policy values that meet its approval, and its freedom to do so is virtually legislative in scope. Regrettably in its first Fourteenth Amendment decision, in the SLAUGHTERHOUSE CASES (1873), the Court unnecessarily emasculated the privileges and immunities clause by ruling that it protected only the privileges and immunities of national CITIZENSHIP but not the privileges and immunities of state citizenship, which included "nearly every CIVIL RIGHT for the establishment and protection of which organized government is instituted." Among the rights deriving from state, not national, citizenship were those referred to by the Bill of Rights as well as other "fundamental" rights. Justice STEPHEN J. FIELD, dissenting, rightly said that the majority's interpretation had rendered the clause "a vain and idle enactment, which accomplished nothing. . . ." The privileges and immunities clause was central to the incorporation issue because to the extent that any of the framers of the amendment intended incorporation, they relied principally on that clause. Notwithstanding the amendment, *Barron v. Baltimore* remained controlling law. The Court simply opposed the revolution in the federal system which the amendment's text suggested. The privileges and immunities of national citizenship after *Slaughterhouse* were those that Congress or the Court could have protected, under the SUPREMACY CLAUSE, with or without the new amendment.

In HURTADO V. CALIFORNIA (1884) the Court initiated a long line of decisions that eroded the traditional procedures associated with due process of law. *Hurtado* was not an incorporation case, because the question it posed was not whether the Fourteenth Amendment incorporated the clause of the Fifth guaranteeing INDICTMENT by GRAND JURY but whether the concept of due process necessarily required indictment in a capital case. In cases arising after *Hurtado*, counsel argued that even if the concept of due process did not mean indictment, or freedom from CRUEL AND UNUSUAL PUNISHMENT, or trial by a twelve-member jury, or the RIGHT AGAINST SELF-INCRIMINATION, the provisions of the Bill of Rights applied to the states through the Fourteenth Amendment; that is, the amendment incorporated them either by the privileges and immunities clause, or by the due process clause's protection of "liberty." In *O'Neil v. Vermont* (1892), that argument was accepted for the first time by three Justices, dissenting; however, only one of them, JOHN MARSHALL HARLAN, steadfastly adhered to it in MAXWELL V. DOW (1900) and TWINING V. NEW JERSEY (1908), when all other Justices rejected it. Harlan, dissenting in *Patterson v. Colorado* (1907), stated "that the privilege of free speech and a free press belong to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by that clause of the Fourteenth Amendment forbidding a state to deprive any person of his liberty without due process of law." The Court casually adopted that view in OBITER DICTUM in GITLOW V. NEW YORK (1925).

Before *Gitlow* the Court had done a good deal of property-minded, not liberty-minded, incorporating. As early as *Hepburn v. Griswold* (1870), it had read the protection of the CONTRACT CLAUSE into the Fifth Amendment's due process clause as a limitation on the powers of Congress, a viewpoint repeated in the SINKING FUND CASES (1879). The Court in 1894 had incorporated the Fifth's JUST COMPENSATION clause into the Fourteenth's due process clause and in 1897 it had incorporated the same clause into the Fourteenth's equal protection clause. In the same decade the Court had accepted SUBSTANTIVE DUE PROCESS, incorporating within the Fourteenth a variety of doctrines that secured property, particularly corporate property, against "unreasonable" rate regulations and reformist labor legislation. By 1915, however, PROCEDURAL DUE PROCESS for persons accused of crime had so shriveled in meaning that Justice OLIVER WENDELL HOLMES, dissenting, was forced to say that "mob law does not become due process of law by securing the assent of a terrorized jury."

The word "liberty" in the due process clause had absorbed all FIRST AMENDMENT guarantees by the time of the

decision in EVERSON V. BOARD OF EDUCATION (1947). Incorporation developed much more slowly in the field of criminal justice. POWELL V. ALABAMA (1932) applied to the states the SIXTH AMENDMENT'S RIGHT TO COUNSEL in capital cases, as a "necessary requisite of due process of law." The Court reached a watershed, however, in PALKO V. CONNECTICUT (1937), where it refused to incorporate the ban on DOUBLE JEOPARDY. Justice BENJAMIN N. CARDOZO sought to provide a "rationalizing principle" to explain the selective or piecemeal incorporation process. He repudiated the notion that the Fourteenth Amendment embraced the entire Bill of Rights, because the rights it guaranteed fell into two categories. Some were of such a nature that liberty and justice could not exist if they were sacrificed. These had been brought "within the Fourteenth Amendment by a process of absorption" because they were "of the very essence of a scheme of ORDERED LIBERTY." In short, they were "fundamental," like the concept of due process. Other rights, however, were not essential to a "fair and enlightened system of justice." First Amendment rights were "the indispensable condition" of nearly every other form of freedom, but jury trials, indictments, immunity against compulsory self-incrimination, and double jeopardy "might be lost, and justice still be done."

The difficulty with *Palko*'s rationalizing scheme was that it was subjective. It offered no principle explaining why some rights were fundamental or essential to ordered liberty and others were not; it measured all rights against some abstract or idealized system, rather than the Anglo-American accusatory system of criminal justice. Selective incorporation also completely lacked historical justification. And it was logically flawed. The Court read the substantive content of the First Amendment into the "liberty" of the due process clause, but that clause permitted the abridgment of liberty with due process of law. On the other hand, selective incorporation, as contrasted with total incorporation, allowed the Court to decide constitutional issues as they arose on a case-by-case basis, and allowed, too, the exclusion from the incorporation doctrine of some rights whose incorporation would wreak havoc in state systems of justice. Grand jury indictment for all felonies and trials by twelve-member juries in civil suits involving more than twenty dollars are among Bill of Rights guarantees that would have that result, if incorporated.

In *Adamson v. California* (1947) a 5–4 Court rejected the total incorporation theory advanced by the dissenters led by Justice HUGO L. BLACK. Black lambasted the majority's due process standards as grossly subjective; he argued that only the Justices' personal idiosyncrasies could give content to "canons of decency" and "fundamental justice." Black believed that both history and objectivity required resort to the "specifics" of the Bill of Rights. Justices FRANK MURPHY and WILEY RUTLEDGE would have gone further. They accepted total incorporation but observed that due process might require invalidating some state practices "despite the absence of a specific provision in the Bill of Rights." Justice FELIX FRANKFURTER, replying to Black, denied the subjectivity charge and turned it against the dissenters. Murphy's total-incorporation-"plus" was subjective; total incorporation impractically fastened the entire Bill of Rights, with impedimenta, on the states along with the accretions each right had gathered in the United States courts. Selective incorporation on the basis of individual Justices' preferences meant "a merely subjective test" in determining which rights were in and which were out.

Frankfurter also made a logical point long familiar in constitutional jurisprudence. The due process clause of the Fourteenth, which was the vehicle for incorporation, having been copied from the identical clause of the Fifth, could not mean one thing in the latter and something very different in the former. The Fifth itself included a variety of clauses. To incorporate them into the Fourteenth would mean that those clauses of the Fifth and in the remainder of the Bill of Rights were redundant, or the due process clause, if signifying all the rest, was meaningless or superfluous. The answer to Frankfurter and to those still holding his view is historical, not logical. The history of due process shows that it did mean trial by jury and a cluster of traditional rights of accused persons that the Bill of Rights separately specified. Its framers were in many respects careless draftsmen. They enumerated particular rights associated with due process and then added the due process clause partly for political reasons and partly as a rhetorical flourish—a reinforced guarantee and a genuflection toward traditional usage going back to medieval reenactments of MAGNA CARTA.

Numerous cases of the 1950s showed that the majority's reliance on the concept of due process rather than the "specifics" of the Bill of Rights made for unpredictable and unconvincing results. For that reason the Court resumed selective incorporation in the 1960s, beginning with MAPP V. OHIO (1961) and ending with *Benton v. Maryland* (1969). The Warren Court's "revolution in criminal justice" applied against the states the rights of the Fourth through Eighth Amendments, excepting only indictment, twelve-member civil juries, and bail. IN RE WINSHIP (1970) even held that proof of crime beyond a REASONABLE DOUBT, though not a specific provision of the Bill of Rights, was essential to due process, and various decisions have suggested the Court's readiness to extend to the states the Eighth Amendment's provision against excessive bail.

The specifics of the Bill of Rights, however, have proved

to offer only an illusion of objectivity, because its most important clauses, including all that have been incorporated, are inherently ambiguous. Indeed, the only truly specific clauses are the ones that have not been incorporated—indictment by grand jury and civil trials by twelve-member juries. The "specific" injunctions of the Bill of Rights do not exclude exceptions, nor are they self-defining. What is "an ESTABLISHMENT OF RELIGION" and what, given libels, pornography, and perjury, is "the freedom of speech" or "of the press"? These freedoms cannot be abridged, but what is an abridgment? Freedom of religion may not be prohibited; may freedom of religion be abridged by a regulation short of prohibition? What is an "UNREASONABLE" SEARCH, "PROBABLE" CAUSE, or "excessive" bail? What punishment is "cruel and unusual"? Is it really true that a person cannot be compelled to be a witness against himself in a criminal case and that the Sixth Amendment extends to "all" criminal prosecutions? What is a "criminal prosecution," a "SPEEDY" TRIAL, or an "impartial" jury? Ambiguity cannot be strictly construed. Neutral principles and specifics turn out to be subjective or provoke subjectivity. Moreover, applying to the states the federal standard does not always turn out as expected. After DUNCAN V. LOUISIANA (1968) extended the trial by jury clause of the Sixth Amendment to the states, the Court decided that a criminal jury of less than twelve (but not less than six) would not violate the Fourteenth Amendment, nor would a non-unanimous jury decision. (See JURY SIZE.) Examples can be multiplied to show that the incorporation doctrine has scarcely diminished the need for judgment and that judgment tends to be personal in character.

On the whole, however, the Court has abolished the double standard by nationalizing the Bill of Rights. The results have been mixed. More than ever justice tends to travel on leaden feet. Swift and certain punishment has always been about as effective a deterrent to crime as our criminal justice system can provide, and the prolongation of the criminal process from arrest to final appeal, which is one result of the incorporation doctrine, adds to the congestion of prosecutorial caseloads and court dockets. However, the fundamental problem is the staggering rise in the number of crimes committed, not the decisions of the Court. Even when the police used truncheons to beat suspects into confessions and searched and seized almost at will, they did not reduce the crime rate. In the long run a democratic society is probably hurt more by lawless conduct on the part of law-enforcement agencies than by the impediments of the incorporation doctrine. In the First Amendment field, the incorporation doctrine has few critics, however vigorously particular First Amendment decisions may be criticized.

LEONARD W. LEVY
(1986)

Bibliography

ABRAHAM, HENRY J. 1977 *Freedom and the Court*, 3rd ed. Pages 33–105. New York: Oxford University Press.

CORTNER, RICHARD C. 1981 *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of Civil Liberties.* Madison: University of Wisconsin Press.

FRIENDLY, HENRY J. 1967 *Benchmarks.* Pages 235–265. Chicago: University of Chicago Press.

HENKIN, LOUIS 1963 "Selective Incorporation" in the Fourteenth Amendment. *Yale Law Journal* 73:74–88.

NORTH, ARTHUR A. 1966 *The Supreme Court: Judicial Process and Judicial Politics.* Pages 65–133. New York: Appleton-Century-Crofts.

## INCORPORATION DOCTRINE AND ORIGINAL INTENT

Scholars have variously concluded that the FOURTEENTH AMENDMENT was intended to require the states to obey all, some, or none of the guarantees of the federal BILL OF RIGHTS. To understand the relationship of the Fourteenth Amendment to the Bill of Rights requires examining history leading up to the 1866 framing of the Fourteenth Amendment.

In 1833 the Supreme Court ruled in BARRON V. CITY OF BALTIMORE that the guarantees of the Bill of Rights did not limit state and local governments. Confronted with abolitionist literature and fearing slave revolts, in the 1830s southern states made it a crime to criticize SLAVERY.

On the eve of the CIVIL WAR, two southern states prosecuted their citizens for disseminating an antislavery book. Republicans had used an abridged version of the same book as a campaign document. In the LINCOLN-DOUGLAS DEBATES both ABRAHAM LINCOLN and STEVEN DOUGLAS recognized that Republicans could not campaign in the South. To protect slavery, federal, territorial, and state governments violated other basic liberties as well.

In the 1857 case of DRED SCOTT V. SANFORD, Chief Justice ROGER BROOKE TANEY said blacks (even free blacks) belonged to a degraded class when the Constitution was written, could not be citizens of the United States, and were entitled to none of the rights, privileges, and immunities secured by the Constitution to citizens, including rights in the Bill of Rights.

Concern for CIVIL LIBERTIES became part of the ideology of the REPUBLICAN PARTY. The Republican campaign slogan in 1856 was "Free Speech, Free Labor, Free Soil, and Fremont."

Leading Republicans adhered to an unorthodox, antislavery legal philosophy. Although the Supreme Court had suggested that blacks could not be citizens of the United States, Republicans insisted that free blacks were citizens.

Leading Republicans also thought, contrary to Supreme Court decisions, that the Bill of Rights protected American citizens against state violation of their liberties. From 1864 to 1866 these views were expressed by Republican conservatives, moderates, and radicals.

When Congress met in 1866, the defeated southern states sought readmission to the Union and to Congress. Southern states and localities had passed BLACK CODES restricting for blacks many FUNDAMENTAL RIGHTS accorded to whites, including freedom to move, to own property, to contract, to bear arms, to preach, and to assemble. Congress appointed the Joint Committee on RECONSTRUCTION to consider the condition of the southern states and to consider whether further conditions should be required before their readmission.

To deal with the Black Codes, Congress passed the CIVIL RIGHTS ACT OF 1866. It provided that persons born in the United States were citizens and gave such citizens the same rights to contract, to own property, to give evidence, and "to full and equal benefit of laws and proceedings for the security of person and property as enjoyed by white citizens." Because leading Republicans accepted the idea that the Bill of Rights liberties limited the states even before the passage of the Fourteenth Amendment, they could read "the full and equal benefit of laws . . . for the security of person and property" to include Bill of Rights liberties.

Democrats, along with President ANDREW JOHNSON, denied the power of the federal government to pass the Civil Rights Act. Republicans insisted that the power to pass the act could be found in the THIRTEENTH AMENDMENT, which abolished slavery; in the original PRIVILEGES AND IMMUNITIES clause of Article IV, section 2; and, in the view of several leading Republicans, in the DUE PROCESS clause of the Fifth Amendment.

Although most Republicans thought Congress had the power to pass the Civil Rights Act, Congressman JOHN A. BINGHAM, later principal drafter of the Fourteenth Amendment's first section, argued that a constitutional amendment was required. Bingham and James Wilson, chairman of the House Judiciary Committee, understood the Civil Rights Act as an attempt to enforce the guarantees of the Bill of Rights.

The final version of Section 1 of the Fourteenth Amendment provided that all persons born in the United States and subject to its jurisdiction were citizens and that no state should make or enforce any law abridging the privileges and immunities of citizens of the United States or deny due process or EQUAL PROTECTION to any person. Bingham explained that the amendment provided the power "to protect by national law the privileges and immunities of all citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State."

Senator JACOB M. HOWARD presented the amendment to the Senate on behalf of the joint committee. He explained that court decisions had held that the rights in the Bill of Rights did not limit the states. The privileges and immunities of citizens of the United States, Howard said, included the rights in the Bill of Rights. "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guaranties."

Both in Congress and in the election campaign of 1866, discussion of Section 1 was brief. Republicans said variously that the amendment would ensure that the rights of citizens of the United States would not be abridged by any state; that it would protect the rights of American citizens; that it would protect constitutional rights, including free speech and the right to bear arms; or that it embodied the Civil Rights Act or its principles. Suggestions that the amendment was identical to the Civil Rights Act imply that the act incorporated the due process guarantee and that guarantees of the Bill of Rights limited the states prior to the ratification of the Fourteenth Amendment.

Many state ratification debates were not recorded. Often Republicans said nothing at all, being content to wait and vote. In Pennsylvania, Republicans said the amendment was necessary to secure freedom, including FREEDOM OF SPEECH; was needed to protect citizens in all their constitutional rights; and embodied both the principles of the Civil Rights Act and the inalienable rights to life and liberty referred to in the DECLARATION OF INDEPENDENCE. Radicals in Massachusetts insisted that the amendment was useless because it provided for things already secured by the Constitution, including black CITIZENSHIP and protection of Bill of Rights guarantees against state action.

In Congress and in the campaign of 1866, except for statements by Bingham and Howard, there were few extended discussions, and often none at all, of the legal meaning of Section 1. Discussions of application of one or more Bill of Rights liberties to the states under Section 1 of the Fourteenth Amendment were similarly brief. Republicans concentrated their attention on different questions—on the merits of the contest between President Andrew Johnson and Congress, on the readmission of southern states, and on broad statements of political principle. Still, in 1866 many Republicans indicated that Section 1 would protect particular Bill of Rights liberties, and none explicitly said that it would leave the states free to deny their citizens privileges set out in the Bill of Rights.

MICHAEL KENT CURTIS
(1992)

(SEE ALSO: *Freedom of Assembly and Association; Freedom of Contract; Freedom of the Press; Incorporation Doctrine; Property Rights; Second Amendment.*)

Bibliography

BERGER, RAOUL 1989 *The Fourteenth Amendment and the Bill of Rights.* Norman: University of Oklahoma Press.

CURTIS, MICHAEL KENT 1986 *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights.* Durham, N.C.: Duke University Press.

GRAHAM, HOWARD 1968 *Everyman's Constitution.* Madison: State Historical Society of Wisconsin.

HYMAN, HAROLD and WIECEK, WILLIAM 1982 *Equal Justice Under Law.* New York: Harper & Row.

TEN BROEK, JACOBUS 1965 *Equal Under Law.* New York: Macmillan.

WIECEK, WILLIAM 1977 *The Sources of Anti-Slavery Constitutionalism in America, 1760–1848.* Ithaca, N.Y.: Cornell University Press.

## INCORPORATION OF TERRITORIES

Incorporation is the process of formally making a territory part of the United States. Even before the Constitution was written, the United States exercised SOVEREIGNTY over lands not part of any state; but those TERRITORIES were to be organized and prepared for statehood. In the late nineteenth century the United States began to acquire territory outside North America, most of which appeared unsuited for statehood. The Constitution contains no provision for governing a colonial empire, but Congress, under Article IV, section 3, made rules and regulations respecting overseas possessions and dependencies. In the INSULAR CASES (1901–1911) the Supreme Court formulated a DOCTRINE to define the constitutional status of the territories. Those which Congress, expressly or implicitly, intends to make part of the United States are deemed to be incorporated. The people of incorporated territories are United States citizens with all the rights guaranteed by the Constitution. Absent such congressional intent, territories are unincorporated. The residents of unincorporated territories enjoy protection of fundamental NATURAL RIGHTS but not of rights merely procedural or formal—although Congress may, at its discretion, extend United States CITIZENSHIP and full CIVIL RIGHTS to the people of unincorporated territories. There are currently no incorporated territories.

DENNIS J. MAHONEY
(1986)

## INDEPENDENT COUNSEL

In 1978, Congress established a permanent framework for dealing with allegations that a senior official of the federal government had committed federal crimes. The fundamental element of the new process is the selection of a special officer with the sole responsibility of investigating the allegations. The special selection of a person from outside the government frees the person from the institutional and personal restraints that might affect the judgment and objectivity of a regular Justice Department prosecutor called upon to investigate his governmental superiors or colleagues.

As originally enacted as part of the Ethics in Government Act of 1978, this officer was called a SPECIAL PROSECUTOR. Congress later changed the officer's title to "independent counsel" in order to diffuse criticism that appointment of an official called a "special prosecutor" prejudged the outcome of the investigation. The original title seemed to suggest that the offense being investigated was special and that prosecution was probable or necessary. The title "independent counsel" signifies that the official's responsibility is to be more neutral and dispassionate.

Before Congress acted in 1978 to provide a permanent mechanism for appointing an independent counsel, the decision whether to take any unusual steps to respond to reports of high-level corruption was left to an unpredictable combination of public notoriety and political integrity. For example, in order to deal with reports of massive corruption in the WARREN HARDING administration concerning the sale of the Teapot Dome petroleum reserves, Congress enacted a special statute authorizing the President, with Senate confirmation, to appoint "special counsel" to investigate and prosecute criminal violations relating to the leases on oil lands in former naval reserves. The incumbent ATTORNEY GENERAL, Harry Daugherty, lacked public trust, since he himself faced separate criminal allegations. President CALVIN COOLIDGE appointed a former Ohio senator and a private lawyer from Pennsylvania (later a Supreme Court Justice) to serve as special counsel. Among those prosecuted was the former secretary of the interior, Albert B. Fall, who was convicted of bribery and sentenced to prison.

During the administration of HARRY S. TRUMAN, public pressure forced Attorney General J. Howard McGrath to appoint a highly respected former New York City official to serve as his "special assistant" to investigate widespread corruption in federal tax cases. The special assistant, however, had no statutory mandate. When he tried to press his investigation by seeking information from high-level Justice Department officials, including the attorney general himself, Attorney General McGrath fired him. President Truman immediately fired the attorney general, but did not see to the appointment of any replacement special prosecutor. Not until a new administration took over did the allegations yield prosecutions and convictions, including the convictions of the former assistant attorney general

in charge of the Tax Division and of President Truman's own appointments secretary.

Then came WATERGATE. Shortly after the beginning of President RICHARD M. NIXON's second term, allegations surfaced that his senior aides in his reelection committee, the White House, and the Justice Department had been personally involved in planning a burglary at the offices of the Democratic National Committee during the 1972 presidential campaign or had helped to cover up the guilt of the conspirators. Public skepticism about a Justice Department investigation led the new attorney general, Elliot Richardson, to appoint a Harvard Law School professor, Archibald Cox, as the "Watergate special prosecutor." When Cox insisted on subpoenaing tape recordings that President Nixon had made in his White House office and refused to yield voluntarily, the President fired him.

The public firestorm that followed Cox's firing and Richardson's resignation forced the President to agree to the appointment of a new special prosecutor, Leon Jaworski, whose authority was derived from newly issued Justice Department regulations that the President pledged to respect. Those regulations guaranteed that the special prosecutor would not be removed except for "gross impropriety" or other special cause. In UNITED STATES V. NIXON (1974), the Supreme Court upheld the constitutional authority of the Special Prosecutor to press another subpoena directed to the President, despite the President's objection that it invaded his constitutional right to invoke executive privilege. The Court concluded that the Justice Department regulations to which the President had agreed and which remained in effect provided the special prosecutor with autonomy to pursue the investigation, regardless of the President's wishes.

During the JIMMY CARTER administration, Attorney General Griffin Bell appointed an official outside the Justice Department to serve as his "special counsel" to investigate allegations concerning the financial interests of the President and his brother.

The 1978 legislation goes well beyond any of the prior approaches. It requires the attorney general to apply to a special court to appoint a special prosecutor (or independent counsel) whenever preliminary inquiry into allegations against the President or other senior government officials specified in the statute leads the attorney general to conclude that there are "reasonable grounds" for further investigation. The court then must appoint an independent counsel from outside the government. That counsel becomes vested with all of the investigative and prosecutorial authority that the attorney general and his subordinates would otherwise have. In exercising his judgment, the independent counsel is not subject to supervision or direction by the attorney general or even the President. The statute protects the independent counsel's autonomy by specifying that he may be removed only by the attorney general personally and only for "good cause." The statute also makes the removal decision subject to JUDICIAL REVIEW.

In the first ten years of experience under the statute, there were more than thirty instances in which the statute came into play and at least eight special prosecutors or independent counsels were formally appointed. In *Morrison v. Olson* (1988) the Supreme Court upheld the constitutionality of the independent-counsel provisions. Their constitutionality had been challenged by the target of an investigation, a former assistant attorney general. The Justice Department itself joined in urging the Court to strike down the statute as an invasion of the President's constitutional prerogatives. The constitutional attack rested on two basic arguments: first, that the provisions for court appointment and protected tenure violated the President's right to appoint and remove all senior "officers" of the government and, second, that the independent counsel's autonomy invaded the prerogatives assigned to the President under the SEPARATION OF POWERS, particularly the responsiblity for enforcing federal law.

The Court ruled, however, that an independent counsel is only an "inferior officer" within the meaning of the APPOINTMENTS CLAUSE of Article II of the Constitution, so that Congress may vest the appointment power in a court. The Court reasoned that the narrowness of the investigative charter and other statutory constraints put an independent counsel into the "inferior officer" status.

The Court also rejected the more fundamental objection that the independent-counsel mechanism violates the Constitution's separation of powers. The Court agreed that investigation and prosecution of federal crimes is essentially an executive-branch function, but concluded that the attorney general's role in the initial decision to apply for appointment of an independent counsel and his power to remove the counsel "for good cause" provide adequate executive-branch control over the assertion of these powers. The Court also concluded that Congress' solution to a difficult problem of assuring public confidence in the integrity of the criminal process satisfies the constitutional separation of powers because neither the legislature nor the judiciary had "aggrandized" its powers at the expense of the executive branch.

Although the Court's decision settles the constitutional question, doubts about the wisdom of the statute remain. An independent counsel lacks either an electoral base or public accountability. The appointment to investigate a particular set of allegations, with virtually no limit on the resources that can be devoted to the investigation, may tend to distort, rather than protect, the fair and objective judgment that the statutory mechanism is supposed to promote. This special charter may also lead to relentlessly

intensive and sweeping investigations that subject government officials to substantially more onerous treatment than an "ordinary" criminal suspect would receive at the hands of a full-time, professional prosecutor.

PHILIP A. LACOVARA
(1992)

Bibliography

BAKER, HOWARD H. 1975 The Proposed Judicially Appointed Independent Office of Public Attorney: Some Constitutional Objections and an Alternative. *Southwestern Law Journal* 29: 671–683.

CUMMINGS, HOMER S. and MCFARLAND, CARL 1937 *Federal Justice: Chapters in the History of Justice and the Federal Executive.* New York: Macmillan.

HUSTON, LUTHER A. 1967 *The Department of Justice.* New York: Praeger.

——— 1968 *Roles of the Attorney General of the United States.* Washington, D.C.: American Enterprise Institute.

JACOBY, JOAN E. 1980 *The American Prosecutor: A Search for Identity.* Indianapolis: Lexington Books.

TIEFER, CHARLES 1983 The Constitutionality of Independent Officers as Checks on Abuses of Executive Power. *Boston University Law Review* 63:59–103.

## INDEPENDENT COUNSEL
(Update)

By the end of the 1990s, the institution of the independent counsel had come to dominate political and legal events in a manner that its drafters could not have imagined. By 1998, independent counsel investigations had produced the second IMPEACHMENT and trial of a President in American history, the resignation and punishment of cabinet secretaries, and the judicial restriction of PRESIDENTIAL POWERS that had undergone little challenge during the Cold War (with the ever-applicable exception of President RICHARD M. NIXON). The activities and conduct of independent counsels also triggered vociferous reactions, including political attacks on individual counsels and their method of appointment, proposals to eliminate or alter the independent counsel law, and criticisms that the ATTORNEY GENERAL of the United States had appointed either too many or not enough counsels. Recovering from the strains of scandal and investigation, Congress let lapse the Independent Counsel law in 1999.

Independent counsels became the top political and legal story of the scandal-besieged administration of President WILLIAM J. CLINTON. Six independent counsels were appointed to investigate Clinton and various cabinet secretaries and advisers. Most notably, Kenneth G. Starr's inquiry into whether Clinton had committed fraud and obstruction of justice in regard to his investment (before he became President) in the Whitewater development deal mushroomed into an investigation of the President's sexual relationships and conduct. Starr came under unprecedented political attack as he examined whether the President had committed perjury and obstruction of justice in attempting to conceal his intimate relationship with a White House intern, Monica S. Lewinsky, from a federal court in a sexual harassment suit. In the course of the Starr investigation, which was vigorously contested by the President's government and private lawyers, the federal courts were confronted with several disputes concerning privilege, including executive immunity from suit, EXECUTIVE PRIVILEGE, attorney–client privilege, and a newly claimed one, U.S. Secret Service protective privilege. Allowing Starr's inquiries to go forward, the courts ruled against the administration on all of these claims, with the exception of attorney–client privilege.

Starr provided evidence to the U.S. HOUSE OF REPRESENTATIVES, under a special provision of the 1978 Independent Counsel Act, that the President had committed "high crimes and misdemeanors." In the course of the House's remarkable deliberations, Starr appeared as a witness to justify his investigatory tactics, which had included efforts to place a recording device on Lewinsky. The House even provided the President's lawyers, who had criticized the independent counsel's ethics, methods, and goals, with the opportunity to question Starr. Nonetheless, the House impeached Clinton by a close vote in late 1998, and the U.S. SENATE conducted an unsuccessful removal trial in 1999.

Although the constitutionality of the counsel's freedom from presidential control was settled by the Supreme Court in *Morrison v. Olson* (1988), many raised doubts about the policies behind the law. Chief among them was the ease with which independent counsels were appointed. Under the statute, a relatively low threshold of proof could trigger the Attorney General's duty to seek the appointment of an independent counsel. The Attorney General could not inquire into whether, for example, the target of the investigation had the requisite mens rea to commit the crime. The low standard of proof led to a proliferation of counsels, with no required showing that U.S. Department of Justice officials were politically or institutionally incapable of conducting these investigations. The statute might profitably have been limited to investigations of only the President, Vice President, and the Attorney General, where the threat of a conflict of interest would be greatest. Criticizing the unreviewable nature of the Attorney General's decisions, others pointed to Clinton administration Attorney General Janet Reno's failure to seek a counsel for the 1996 Clinton campaign fundraising scandals as a ground for even broadening the statute's reach where those officials are involved.

Many were in agreement, however, that the institutional freedom of the independent counsel required reform. Without budgetary or resource constraints, investigations had continued for many years and involved large sums of money that no regular federal prosecutor could expend. The investigation into the IRAN–CONTRA AFFAIR lasted for seven years and cost taxpayers almost $50 million; the Clinton Whitewater inquiry will last at least six years and cost even more. Without responsibility to any superior, independent counsels could pursue individuals and violations that normally would not receive Justice Department attention. Indeed, the statutory duty of the counsel was to pursue the issues over which he had JURISDICTION, rather than to make judgments about what crimes to pursue in light of overall prosecutorial resources.

Congress revisited these issues in 1999 when the Ethics in Government Act came up for its periodic re-authorization. One oft-mentioned approach to address these problems would have folded the independent counsel into the Justice Department's Office of Public Integrity, which already operates with substantial autonomy. Other proposals urged that Congress subject counsels to the same budgetary, time, and resource restraints that apply to other U.S. Attorneys. It should be noted, however, that even during the WATERGATE scandals, the federal justice system proved itself able to investigate and prosecute criminal wrongdoing at the highest levels without the assistance of an independent counsel. After twenty years of investigating counsels and presidential scandal, Congress concluded not to renew the law and that the time had come to end an ill-conceived experiment in creating independent operators with the powers of investigation and prosecution.

JOHN YOO
(2000)

Bibliography

CARTER, STEPHAN L. 1988 The Independent Counsel Mess. *Harvard Law Review* 102:105–141.

EASTLAND, TERRY 1989 *Ethics, Politics, and the Independent Counsel: Executive Power, Executive Vice.* Washington, D.C.: National Legal Center.

HARRIGER, KATY J. 1992 *Independent Justice: The Federal Special Prosecutor in American Politics.* Lawrence: University of Kansas Press.

O'SULLIVAN, JULIE 1996 The Independent Counsel Statute: Bad Law, Bad Policy. *American Criminal Law Review* 33: 463–509.

ROZELL, MARK 1994 *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability.* Baltimore, Md.: Johns Hopkins Press.

SYMPOSIUM 1998 The Independent Counsel Act: From Watergate to Whitewater and Beyond. *Georgetown Law Journal* 86:2011–2443.

# INDEPENDENT STATE GROUNDS

See: Adequate State Grounds

# INDIANS

See: American Indians and the Constitution; Tribal Economic Development and the Constitution

# INDICTMENT

An indictment is a formal written accusation charging an individual with a crime. An indictment is issued by a GRAND JURY when, in its view, there is PROBABLE CAUSE to believe that an individual has committed a crime.

Indictments generally arise in two ways. Most commonly, a prosecutor will submit a bill of indictment to the grand jury alleging specific criminal activity by an individual. If the grand jury believes the allegations, the grand jurors will endorse the bill of indictment with the words "a true bill" and thereby officially indict the accused individual. The grand jury can also decide that the accused should not be prosecuted, in which case the bill of indictment will be marked "no true bill" and be dismissed.

An indictment can also originate from a grand jury as a result of the grand jury's own information or as a result of an investigation conducted by a special or investigative grand jury. This type of indictment often arises in cases involving organized crime or political corruption after a secret, lengthy grand jury investigation.

Grand jurors need not be unanimous to indict. The federal grand jury, for example, consists of between sixteen and twenty-three persons, twelve of whom must concur to indict.

The indictment process had its origin in the English grand jury system. Indictments were designed, as the Supreme Court said in *Costello v. United States* (1956), to provide "a fair method for instituting criminal proceedings against persons believed to have committed crimes." Indictment by a grand jury was historically seen as a way of ensuring that citizens were protected against unfounded criminal prosecutions; however, there is now considerable debate as to whether indictment actually fulfills its protective function. Indictments are also designed to inform accused individuals of the charges against them so that they may adequately prepare their defense.

Under the Fifth Amendment an individual has a right to a grand jury indictment in all federal FELONY prosecutions. The Supreme Court, however, held in HURTADO V. CALIFORNIA (1884) that grand jury indictments are not constitutionally required in state criminal prosecutions. Nevertheless, some states, pursuant to their state consti-

tutions, require grand jury indictments in all felony prosecutions.

One recurring question about indictments has been whether they can be based on EVIDENCE that would be inadmissible at trial. The Supreme Court held in CALANDRA V. UNITED STATES (1974) that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." Indictments can be based even on evidence obtained illegally, which must therefore be excluded at trial.

Furthermore, a grand jury indictment can be based on HEARSAY evidence and other types of evidence that would not be admissible at trial. These decisions rest on the historical view of the grand jury as being a lay body with broad investigative powers that should not be restrained by technical rules of evidence. In addition, the Supreme Court has observed that an indictment is only a formal charge, not an adjudication of guilt or innocence. "In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict," the Court said in *Costello*, so defendants are not prejudiced by indictments based on inadmissible evidence. The prosecutor, therefore, is permitted to find some admissible evidence to support the indictment between the time it comes from the grand jury and the time of trial.

CHARLES H. WHITEBREAD
(1986)

Bibliography

FRANKEL, MARVIN E. 1977 *The Grand Jury: An Institution on Trial.* New York: Hill & Wang.

## INDIGENT

An indigent is a person too poor to provide for certain basic needs. It would be unconstitutional for a state or the national government deliberately to deny benefits or impose burdens on the basis of a person's indigency. To this extent, today's law fulfills Justice ROBERT H. JACKSON's prescription, concurring in EDWARDS V. CALIFORNIA (1941): "The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color." In a market economy, however, indigency is anything but an irrelevance; unrelieved, it bars access to virtually everything money can buy. Unsurprisingly, therefore, the Supreme Court has found in the Constitution affirmative obligations on government to supply to indigents certain benefits that they cannot afford to buy for themselves. These obligations are few in number; the very idea of a market economy implies de facto WEALTH DISCRIMINATION in the sense of differential access to goods and services, and in no sense has the Court declared capitalism unconstitutional. (See FREEDOM OF CONTRACT.)

The first focus for the Court's egalitarian concerns for relieving the poor from consequences of their poverty was the criminal process. In cases such as GRIFFIN V. ILLINOIS (1956) and DOUGLAS V. CALIFORNIA (1963), one doctrinal vehicle was the EQUAL PROTECTION clause. But the goal of "equal justice for poor and rich, weak and powerful alike" contained no easily discernible place to stop, and it was always clear that the Court would not require the states to make unlimited funds available so that all accused persons could match the spending of the very rich on their criminal defense. The alternative to the equality principle was insistence on minimum standards of criminal justice for everyone, and the Court's post-1950 decisions tightening those standards—not merely in areas such as the RIGHT TO COUNSEL or the setting of BAIL but throughout the criminal process—can be seen in this egalitarian light, reflecting a recognition that the criminal justice system generally bears most heavily on the poor.

A similar approach, setting minimum standards of justice, had characterized the Court's treatment of claims by the poor to access to civil courts and administrative hearings. PROCEDURAL DUE PROCESS, not equal protection, provides the doctrinal foundation for this development. A concern for hardship to the poor surely played an important role in decisions such as BODDIE V. CONNECTICUT (1971) (access to divorce courts for persons unable to afford filing fees), *Sniadach v. Family Finance Corp.* (1969) (prior hearings prerequisite for prejudgment garnishment), and GOLDBERG V. KELLY (1970) (prior hearings prerequisite for termination of WELFARE BENEFITS). But just as the Court has stopped far short of a general principle of equal access to criminal justice, so it has refused to make equality the guiding principle for its decisions on access to civil justice; in LASSITER V. DEPARTMENT OF SOCIAL SERVICES (1981) the Court denied the existence of a right to state-appointed counsel in proceedings to terminate parental rights.

The one area where the equality principle has guided the Supreme Court's treatment of poverty is the electoral process. The development began with HARPER V. VIRGINIA STATE BOARD OF ELECTIONS (1966), which invalidated a POLL TAX as a condition on voting in a state election. Property qualifications to vote, too, were invalidated, except in the elections of special-purpose districts. Not only VOTING RIGHTS but also rights of access to the ballot were secured against financial barriers that would disqualify the poor.

The early 1970s marked a turning point in the constitutional protection of indigents against the consequences

of their poverty. Since that time, the Court has drawn one line after another constricting the expansion of either equal protection or due process doctrines to impose on government further affirmative obligations to relieve the burdens of poverty—even when those burdens affect the quality of an indigent's relations with government itself.

KENNETH L. KARST
(1986)

Bibliography

BRUDNO, BARBARA 1976 *Poverty, Inequality, and the Law.* St. Paul, Minn.: West Publishing Co.

## INDIRECT TAXES

See: Direct and Indirect Taxes

## INFAMY

Our legal system depends upon the reliability of a person's word—his oath as an officer, his promise as a contractor, his testimony as a witness. Under the COMMON LAW, conviction of certain crimes so diminished a person's credibility that he permanently forfeited certain of his CIVIL RIGHTS, his oath was of no legal value, and he was incompetent to testify in court. Infamy, as this is called, resulted from conviction of FELONY, or a crime involving willful falsehood. The Fifth Amendment requires PRESENTMENT or INDICTMENT by a GRAND JURY before a person may be tried in federal court for an infamous crime.

In modern political rhetoric, the term "infamy" often means general harm done to a person's reputation, especially as a result of LEGISLATIVE INVESTIGATIONS or other governmental action.

DENNIS J. MAHONEY
(1986)

## INFLUENCE OF THE AMERICAN CONSTITUTION ABROAD

It can easily be argued that America's most important export has been the Constitution of the United States. It was the first single-document CONSTITUTION. It is the longest-lived. And in only two centuries, virtually every nation has come to accept the inevitability and value of having a constitution. This fact transcends differences of culture, history, and legal heritage. The United States Constitution is perceived as the fundamental point of reference, even by regimes whose philosophical outlook is antidemocratic. Furthermore, nearly every nation has accepted the "Philadelphia formula"—either internally or universally—as the means by which an effective constitution can best be produced.

The international impact of the U.S. Constitution is an ongoing reality: most of the world's constitutions have been written in the last forty years, and constitutions are rewritten and revised all the time. The Constitution of the United States continues to be the guiding pattern, and a wellspring of inspiration and innovation. The fundamental idea behind the U.S. Constitution was the belief that the people of a nation comprise the constituent power. The founders of this country, conceiving of the people as the sovereign, asserted that the people themselves could formulate and promulgate a constitution. The idea of a constitutional convention was the natural expression of this concept, for it literally embodied the SOVEREIGNTY of the people.

Universally influential also have been the American ratification and amending processes. For it was these that gave the U.S. Constitution—and all subsequent constitutions—the essential characteristic of permanence. Prior to the creation of such machinery, any law could be superseded by another law. Now it is no longer possible. A method had been created for public approbation of the work of the constitution-makers before the constitution could come into effect. And a method had been created for constitutional change to be effected by that public. Every constitution has since copied or been guided by those formulations. Indeed, the very nature of maintaining permanent written constitutions depends upon the creation of these political devices.

The federal structure—the essential product of the U.S. Constitution—innovated a means by which local and central power could be reconciled. The underlying assumption was that the citizenry, and not the government, is sovereign and is the source of derived power. Thus was established a basis for maintaining national unity, and it has been widely adapted.

Australia, Canada, West Germany, Switzerland, Yugoslavia, and, most recently, Nigeria boast of adherence to American concepts in the creation of their own federal structure and so to a lesser extent do Argentina, Brazil, Mexico, and Venezuela.

The United States was the first nation to have an elected head of state called a president. It was a constitutionally created president, described by HAROLD J. LASKI as "both more and less than a king; both more and less than a prime minister." Today more than half the world's nations have presidents as their chief executives, some with even more constitutional power than the American president (France, South Africa), many with only nominal ceremonial powers (India, Zimbabwe).

The American Constitution formalized the concepts required to make such a system work: the SEPARATION OF POWERS and the system of CHECKS AND BALANCES. The result balances leadership and minimizes abuse, encourages stability and obviates tyranny.

It is now universally understood—as it was by a vocal American citizenry that backed the BILL OF RIGHTS 200 years ago—that fundamental freedoms cannot be guaranteed merely by good intentions. The ratifiers of the U.S. Constitution taught that there could be no fundamental law of the land without a separate section listing individual rights. With the adoption of the Canadian Charter of Rights and Freedoms in 1982, the United Kingdom is the only major nation without a constitutional Bill of Rights, although such has been proposed. The belief that liberties require an explicit statement in order to assure their protection animates political endeavors and constitutionalism throughout the world today.

The sheer longevity of America's constitutional experiment illuminates with each passing year a great, yet hidden strength of the U.S. Constitution: It is a device for assuring national dialogue and conflict resolution. The legislative branch, the executive, and especially the judiciary are more than divisions of government. They are America's ongoing constitutional convention. And as much as anything, this aspect of their identities explains why the American constitutional model remains so attractive and thought-provoking at its bicentennial.

Any study of the international influence of the U.S. Constitution must take into account the fact that this influence is both historic and ongoing. And it should consider how American guidelines, practices, and innovations have been improved on by other nations. But more would be accomplished than just a study of the past. A new understanding would be achieved, of what is fundamental to the American Constitution and what is ephemeral, of what is exportable, and even universally applicable.

So pervasive has been the influence of the Constitution of the United States that most nations have followed its lead by adopting one-document constitutions of their own. Beginning in 1791 with Poland and France, the American concept of a constitution to create government speedily became the norm.

Although some nations are under martial rule or have a transitional government with their constitutions in suspension, all but the United Kingdom, New Zealand, and Israel are committed to the concept and principle of the one-document constitution and all have such a document in some stage of preparation or have one in place. Significantly, the act of constitutional suspension has become the most extreme political act of modern government. What makes this American-influenced constitutional universality so historically significant is its short duration on the world stage.

What has made the U.S. Constitution so admired and so imitated? It was not the establishment of a supreme LAW OF THE LAND; that was no innovation. Plato taught in *The Laws* that "some body of law should exist on a permanent basis, on a superior plane—neither subject to individual tyranny nor to raw majority democracy." Historian K. C. Wheare noted that "from the earliest times . . . people had thought it proper or necessary to write down in a document the fundamental principles upon which their government for the future should be established and conducted."

Nor was it the theory of LIMITED GOVERNMENT that intrigued foreign statesmen. Even the notions of establishing a republic or electing a president or the radical concept of POPULAR SOVEREIGNTY were already commonplace—at least in theory. The philosophers of the Enlightenment and their forebears all had written on such subjects and were familiar with each other's works. And there had already existed such governmental documents as the 1579 Act of Union of the United Provinces of the Netherlands, but until the American experience no one had thought of calling their documents "constitutions."

The written constitution is an American innovation. Its genesis can be traced to THOMAS HOOKER'S FUNDAMENTAL ORDERS OF CONNECTICUT (1639) which was the first to create a state or governmental entity. This prefigured the state constitutions of Virginia and Pennsylvania, which in turn influenced the French Declaration of the Rights of Man. The U.S. Constitution, however, was the document that influenced and continues to influence foreign constitution-makers. For since that date nationhood was to be achieved via a constitution.

The primary reason for the great influence of the U.S. Constitution abroad is that it institutionalized government based on the sovereignty of the people. Americans also created the machinery to translate constitutional philosophy into constitutional reality. Their main device was the CONSTITUTIONAL CONVENTION or constituent assembly. This device has been the most significant and most followed precedent in constitutional development. For in this way a nation can be formed and gets its "supreme law of the land" (save in those instances where the former colonial power grants independence and bestows a constitution for independence). The constituent assembly institutionalized democracy. It legitimized revolution, enabling men to do what they had not yet been able to do peacefully and legally—to alter or abolish government and institute new governments deriving their authority from the consent of the governed.

By following the United States model, all constitution

writers after 1787 could legitimize their revolutions, their independence, their nationhood. In his study of Latin American political institutions, Jacques Lambert wrote: "Here . . . was the worthy model of a constitution that repudiated monarchy and clearly proclaimed the principle of political freedom. . . . The Constitution of the United States lent authority the cloak of democratic respectability. A few countries very shortly adopted constitutions directly inspired by it—Venezuela in 1811, Mexico in 1824, the Central American Federation in 1825, and Argentina in 1826."

Just by being the first, the U.S. Constitution inevitably influenced constitutions abroad. It was the only available national model for the 1791 constitution-makers of Poland who copied its preamble and its impeachment provisions, and in their famous Article V provided Europe's first statement of popular sovereignty.

Another reason for the widespread influence of the United States Constitution abroad is that constitutions are largely written by lawyers, and lawyering normally involves the search for source and precedent. Lawyers have dominated the constituent assemblies and constitutional conventions abroad. The lawyer constitutionalists of America were also proselytizers. They shared the gospel so often proclaimed by THOMAS JEFFERSON. "We feel," he wrote, "that we are acting under obligations not confined to the limits of our own society. It is impossible not to be sensible that we are acting for all mankind."

This message has been well received, starting with France and the men who made the French Revolution. The fact that the constitution consisted of lawyers' ideas contributed to their ready transmittal. Lawyers were popular; the Dantons and Robespierres had sided with the people in their revolt against authority. Jacques Vincent de la Croix, a lawyer, offered a course on the Constitution of the United States at the Lycée de Paris, an institution of free higher education established in 1787. This pattern has continued. The lawyer has been the commoner charged with teaching constitutionalism and translating the needs and aspirations of the people into a legal document. Every constitutional lawyer in the world knows about the U.S. Constitution.

The lawyers who wrote the American constitutions also wrote about them. JOHN ADAMS, author of the MASSACHUSETTS CONSTITUTION and prime "inventor" of the concept of a constitutional convention, could not be in Philadelphia in 1787 as he was then envoy to England. But his *Defence of the Constitutions of Government of the United States of America* was one of the most influential works on constitutionalism, at home and abroad.

Even more influential was THE FEDERALIST, almost immediately translated into French, German, and Spanish to provide constitutional guidelines for a dozen or more nations in Europe and Latin America. Now translated into more than twenty languages, *The Federalist* is still taught in constitutional law classes abroad and new translations are still being published.

The records of the 1848 German constitutional assembly at Frankfurt contain references not only to the U.S. Constitution and *The Federalist* but also to the constitutional commentaries of Justice JOSEPH STORY and Chancellor JAMES KENT. Modern examples abound, with copious references in India's 1947 Constituent Assembly Debates, and, more recently, in the commentaries on the Nigerian Constitution of 1979.

The tradition of the American participant, counsel, or consultant in foreign constitution-making dates from the service of THOMAS PAINE as a member of the 1791 French constitutional assembly. Lawrence Ward Beer wrote of the American role in constitution-making in Asia: "A basic context for American influence has been the *consultation* of American experts on constitutionalism and law during the process of drawing up, applying, interpreting, or amending a national constitution. Concretely, the views of individual American judges and legal scholars have been solicited during visits by Asian constitutionalists to America; American legal literature (including judicial precedent) has been studied, and many Americans have been directly involved in Asian constitution-making."

And the tradition continues. Americans have influenced the writing of constitutions for nations throughout the world, including Liberia, China, Ethiopia, Nigeria, Zimbabwe, Bangladesh, and Peru. ALEXIS DE TOCQUEVILLE was the best known of the foreigners who came to study United States government and who returned home as advocates of the American system. His *Democracy in America*, published in French editions in 1835 and 1840, heightened interest in the United States constitutional system both in Europe and in Latin America.

But Tocqueville was preceded by scores of other Europeans who were attracted by the hope and promise of the new world, most notably Thaddeus Kosciusko, who was later to lead the struggle for democracy in Poland. And Tocqueville was followed by many thousands of scholars in law, government, history, and political science who likewise transported American constitutional ideology. Current manifestations of this development are apparent in the 1982 constitutions of Canada and Honduras and the 1983 constitution of El Salvador.

The United States, a great colonizer, has offered a solution to colonialism. As pointed out by HENRY STEELE COMMAGER:

> No Old World nation had known what to do with colonies except to exploit them for the benefit of the mother coun-

> try. The new United States was born the largest nation in the Western world and was, from the beginning and throughout the 19th century, a great colonizing power with a hinterland that stretched westward to the Mississippi and, eventually, to the Pacific. [And thence beyond the mainland to Alaska and Hawaii.] By the simple device of transforming colonies into states, and admitting these states into the union on the basis of absolute equality with the original states, the Founding Fathers taught the world a lesson which it has learned only slowly and painfully down to our own day.

This constitutional concept has been studied and followed in France, Portugal, Spain, Yugoslavia, and the Soviet Union, to provide a few examples, but not always with successful results. Algeria is no longer part of Metropolitan France, but French Guiana, Guadeloupe, Martinique, Reunion, and Saint Pierre and Miquelon are. Angola is no longer an integral part of Portugal, but Madeira and the Azores are.

Another reason for the influence of the American Constitution abroad is rooted in military conquest. Although the influence of the Philadelphia experience had been felt in Baden, Bavaria, Frankfurt, and Wrttemberg before there was a unified Germany, a more general reception of American style constitutionalism attended the preparation of the post-World War II 1949 Basic Law of the Federal Republic. Similarly, the "MacArthur Constitution" influenced—to use an understatement of the greatest order—Japan's 1947 constitution.

Under United States military authority following the Spanish American War, Cuba's 1901 constitution bears obvious American imprints. And so does the 1904 constitution of Panama, which in Article 136 gave the United States authority to intervene to establish "constitutional order." Haiti's 1918 constitution, putatively the work of then Assistant Secretary of the Navy FRANKLIN D. ROOSEVELT, was based on compromises between existing government forums and the ideologies of the American military forces which had occupied the country since 1915.

American influence was also significant in the preparation of the South Vietnam Constitution of 1967. The Vietnamese actually copied more from the United States model than was appropriate for a nation with a French legal tradition. (The preamble to the North Vietnamese Constitution had been taken directly from Lincoln's Gettysburg Address.)

Most pervasive has been the influence of the U.S. Constitution upon its former colony, the Republic of the Philippines. Under American sovereignty from 1896 until its independence in 1946, the Philippines were given a commonwealth constitution in 1935 which remained virtually unchanged until 1973. And on the eve of the American constitutional bicentennial there was a significant movement to call a new constitutional convention in Manila. A new constitutional structure will predictably once again follow the Philadelphia model.

ALBERT P. BLAUSTEIN
(1986)

Bibliography


BEER, LAWRENCE W. 1979 *Constitutionalism in Asia: Asian Views of the American Influence.* Berkeley: University of California Press.

BLAUSTEIN, ALBERT P. 1984 The United States Constitution: A Model in Nation Building. *National Forum* 64:14–17.

BLAUSTEIN, ALBERT P. and FLANZ, GISBERT H., eds. 1971 *Constitutions of the Countries of the World.* 20 Vols. looseleaf, updated quarterly. Dobbs Ferry, N.Y.: Oceana.

CAPPELLETTI, MAURO 1971 *Judicial Review in the Contemporary World.* Indianapolis: Bobbs-Merrill.

COMMAGER, HENRY STEELE 1977 *The Empire of Reason: How Europe Imagined and America Realized the Enlightenment.* Garden City, N.Y.: Anchor PressDoubleday.

HAWGOOD, JOHN A. 1939 *Modern Constitutions Since 1787.* New York: Macmillan.

HENDERSON, DAN FENNO, ed. 1968 The Constitution of Japan: Its First Twenty Years, 1947–67. Seattle: University of Washington Press.

PALMER, R. R. 1959 *The Age of the Democratic Revolution: A Political History of Europe and America, 1760–1800.* 2 Vols. Princeton, N.J.: Princeton University Press.

STARCK, CHRISTIAN, ed. 1983 *Main Principles of the German Basic Law.* Baden-Baden: Nomos.


## INFLUENCE OF THE AMERICAN CONSTITUTION ABROAD
(Update)

As Americans began their third century living under the constitutional system ordained by the Philadelphia Constitution, much of the world was undergoing constitutional transformation. The collapse of communism spawned constitutional reform in many parts of the former Soviet empire. The end of apartheid brought a new constitution to South Africa, while in many parts of Africa, Latin America, and elsewhere there were stirrings of democracy and constitutional change.

The Framers of the U.S. Constitution would have appreciated and understood these changes. From the beginning of the modern constitutional era, the American model has been a centerpiece in changing the face of constitutionalism around the world. The VIRGINIA DECLARATION OF RIGHTS (1776) profoundly influenced France's *Declaration of Rights of Man and the Citizen* (1789), and the early American state constitutions were invoked in the National Assembly's 1791 debates on the first French Constitution.

Nineteenth-century reformers looked to American precedents. At the Frankfurt National Assembly in 1849, German delegates spoke of the "instructive example of America." In Latin America, Juan Bautista Alberdi, father of Argentina's 1853 Constitution, drew heavily from American ideas, including the Constitution of California, in hopes that Argentina might replicate the economic success of the United States.

The most famous examples of direct American constitutional influence in the twentieth century are drawn, paradoxically, from colonialism and military conquest. The constitutional arrangements designed in the 1930s to carry the Philippines to independence closely tracked the American system. After WORLD WAR II, the military government of General Douglas MacArthur had a direct hand in the drafting of a new constitution for Japan, while the assembly that drafted Germany's Basic Law of 1949 (elected, like the delegates of 1787, by the constituent polities) was constrained to produce a constitution that was federal, republican, democratic, and protective of FUNDAMENTAL RIGHTS.

If one traces the relative influence of the American Constitution over the past two centuries and beyond, one finds that influence to have been most immediate and obvious in the early years. That was the period, after all, when there were few competing constitutional models to be had (for the Poles of 1791, for example). As time passed, however, and more countries entered the modern age of constitution-making, the constitutional path became wider and more varied. Especially in the twentieth century, alternative assumptions about the nature of state and society began to feature more conspicuously in constitution-making; for example, positive rights were prominent in such constitutions as those of Mexico in 1917 and Germany in 1919.

Today constitution-making is above all an eclectic exercise. Drafters borrow freely from other countries, the United States but one among them. In post-communist Central and Eastern Europe, for example, one finds the powerful pull of Western European models, partly because of the hope of new democracies to join regional arrangements such as the North Atlantic Treaty Organization (NATO) and the European Union. International and regional norms, such as United Nations conventions, the European Convention on Human Rights, and the expectations of the Organization on Security and Cooperation in Europe, are also influential.

No matter how attractive its broad principles, the American constitutional experience has obvious limitations as a model for foreign constitution-makers. The U.S. Constitution was written in the eighteenth century, long before the age of the modern administrative state. Moreover, it is by design an incomplete document, in that one cannot understand the American constitutional system without knowing about the state constitutions. Also, a full picture of American constitutionalism requires dealing with the extensive judicial gloss accumulated over the years. With the constitutions of most countries being of relatively recent origin, models such as those of Germany (1949) and France (1958) become especially attractive to a constitutional drafter.

Many factors bear on the relative influence of the American Constitution abroad. Among them are the forces of history, culture, and tradition. For example, the felt need to reinforce a sense of national identity in a country with significant minorities may lead to rejection of FEDERALISM in favor of a unitary state. Similarly, the identification of a nation with a historically dominant religion, as in Eastern Europe, often leads constitution-makers to eschew SEPARATION OF CHURCH AND STATE.

Other factors are at work. Countries with a civil law system are more likely to produce long, detailed constitutions, while COMMON LAW countries may be more inclined to allow constitutional law's details to take shape in the courts. Countries with a recent history of one-party or military rule may be drawn to code-like constitutions in an effort to cure the mistakes of the past in the constitution's text. The American example of treating the constitution as the place where fundamental principles are spelled out is often lost when drafters, as in Brazil in 1988, lose sight of the distinction between a constitution and a code of laws.

The enduring influence of the American Constitution does not turn, however, on whether the text of a country's constitution may be thought to resemble in its details that of the United States. The American constitutional experience remains even today the ultimate example of success in self-government. It still offers a stirring example of balancing democracy and accountable government against constitutional limitations.

Among America's most pervasive and influential exports is JUDICIAL REVIEW. The example set by Chief Justice JOHN MARSHALL in MARBURY V. MADISON (1803) has spread around the world. After Canada's adoption in 1982 of the Charter of Rights and Freedoms, that country's Supreme Court said that to look to a constitution's "larger objects" comports with the "classical principles of American constitutional construction" articulated by Marshall in MCCULLOCH V. MARYLAND (1819). One finds conspicuous examples of decisions of the U.S. Supreme Court being relied on even in countries of strikingly different cultural traditions, such as India. Justice WILLIAM J. BRENNAN, JR., may have been on the losing side in the Court's CAPITAL PUNISHMENT cases, but his opinions have had powerful influence in high court decisions of such countries as South Africa and Zimbabwe.

On the surface a particular country's constitutional arrangements may seem to bear little resemblance to those of the United States. Where post-communist countries in Central and Eastern Europe, for example, opt for judicial review, they inevitably look to a European model, especially to Germany's Constitutional Court. Yet it is through such intermediate models as that of Germany that American ideas, such as the principle of *Marbury*, become domesticated. The American Constitution's influence is nonetheless important when it takes a form shaped by local tastes. In the family tree of modern world constitutionalism, America's experience remains a respected and influential figure.

A. E. DICK HOWARD
(2000)

Bibliography

BILLIAS, GEORGE ATHAN, ed. 1990 *American Constitutionalism Abroad: Selected Essays in Comparative Constitutional History.* New York: Greenwood Press.

HENKIN, LOUIS and ROSENTHAL, ALBERT J., eds. 1989 *Constitutionalism and Rights: The Influence of the United States Constitution Abroad.* New York: Columbia University Press.

HOWARD, A. E. DICK, ed. 1993 *Constitution Making in Eastern Europe.* Washington, D.C.: Woodrow Wilson Center Press.

LESTER, ANTHONY 1988 The Overseas Trade in the American Bill of Rights. *Columbia Law Review* 88:541–561.

LUDWIKOWSKI, RETT R. 1996 *Constitution-Making in the Region of Former Soviet Dominance.* Durham N.C.: Duke University Press.

PERRY, BARBARA A. 1992 Constitutional Johnny Appleseeds: American Consultants and the Drafting of Foreign Constitutions. *Albany Law Review* 55:767–791.

## INFORMANT'S TIP

A police officer's own observations may not be required to establish PROBABLE CAUSE for an ARREST WARRANT or SEARCH WARRANT (or for an arrest without warrant). Probable cause may be established by an informant's tip, even if it is hearsay, if there is adequate basis to credit his word. The Supreme Court has, however, been troubled by the criteria necessary to determine an informant's truthfulness.

DRAPER V. UNITED STATES (1959) was the first case to hold that an informant's word, when corroborated, was sufficient to establish probable cause; the informant had previously proved reliable, and his story was later substantially verified by the officer's own observations. AGUILAR V. TEXAS (1964) established a "two-pronged" test, amplified in SPINELLI V. UNITED STATES (1969) and generally followed until 1983: the affidavit (or the officer's personal testimony) must make clear to the magistrate, first, some of the underlying circumstances from which the *informant* concluded that criminal activity was afoot (such as personal observation of the suspect's action), and second, some of the circumstances from which the *officer* concluded that the informant was telling the truth (for example, his previous record of reliability). Failure fully to satisfy either "prong" could be remedied by substituting highly detailed information (even of a nonsuspicious nature) demonstrating that the informant's statement was based neither on rumor nor on the suspect's bad reputation.

In ILLINOIS V. GATES (1983) the Court abandoned the *Aguilar-Spinelli* test in favor of a much looser "totality of the circumstances" approach, which would permit "a balanced assessment of the relative weight of all the various indicia of reliability." Thus, said the Court, the report of an informant who had previously been usually reliable would be acceptable even if it did not explain the basis of his knowledge.

The need to corroborate an informant's statement and demonstrate his reliability arises when the informant has a criminal past; his veracity is naturally suspect. The word of a law enforcement officer who provides information to another officer or that of an honest private citizen without ulterior motive requires no such corroboration according to the decision in *Ventresca v. United States* (1965). Uncorroborated anonymous tips to the police are worthless for establishing probable cause.

In order to prevent reprisals and maintain the future effectiveness of informants, the Court denied in MCCRAY V. ILLINOIS (1967) that a defendant has the right to demand the identity of a government informant at a suppression hearing on the question of probable cause. The accuracy of statements, including those of informants, in affidavits for warrants can be challenged at a hearing if the defendant offers proof that the affiant lied or acted with "reckless disregard for the truth" in statements pertinent to the establishment of probable cause. The warrant's legality will not be affected by an informant's misrepresentation, however, if the officer had no reason to doubt the truth of the informant's statement.

JACOB W. LANDYNSKI
(1986)

Bibliography

LAFAVE, WAYNE R. 1978 *Search and Seizure: A Treatise on the Fourth Amendment.* Vol. 1:489–586. St. Paul, Minn.: West Publishing Co.

## *IN FORMA PAUPERIS*

(Latin: "In the manner of a poor person.") To insure that ACCESS TO THE COURTS is not barred by inability to pay the

costs of litigation, poor persons may have fees and some procedural requirements waived and counsel appointed at public expense. In the federal courts this privilege is granted by law to anyone swearing he is without means.

More than half the petitions received by the Supreme Court are filed *in forma pauperis*, often by prisoners seeking review of criminal convictions or of denials of HABEAS CORPUS petitions on constitutional grounds. Probably the most famous case to arise in this way was GIDEON V. WAINWRIGHT (1963).

DENNIS J. MAHONEY
(1986)

## INFORMATION

An information is a formal written accusation against a person for a criminal offense presented under oath by a public officer, usually a prosecutor. An information is used to charge an individual with criminal activity in cases where an INDICTMENT by a GRAND JURY is unnecessary or is waived by the accused. Like an indictment, the filing of an information results in the commencement of a formal prosecution. Thus, the information must be clear and specific in order to give adequate notice to the accused of the charges against him and permit him to prepare his defense.

Most states permit prosecution by information or indictment at the option of the prosecutor. In these states, it is rare for a prosecutor not to use an information because it is easier and less time-consuming than an indictment. Grand jury indictments will be used in these jurisdictions only when the prosecutor wants to use the investigative powers of the grand jury. In other states, indictments are required in all FELONY cases or in all capital cases. However, even in these states, informations are used in MISDEMEANOR cases and in felony cases where the accused has waived his right to a grand jury indictment.

In federal misdemeanor cases, prosecutors have the option under the FEDERAL RULES OF CRIMINAL PROCEDURE to proceed by indictment or information. In federal felony cases, accused individuals have the right to insist on prosecution by indictment, but this right can be waived in all but capital cases.

Most jurisdictions limit the prosecutor's discretion to file an information. Generally, the prosecutor cannot file an information unless the accused has had a preliminary hearing before a magistrate. This requirement is designed to weed out groundless charges, thereby relieving an accused of the burden of preparing a defense. However, the effectiveness of this limitation on prosecutorial abuse in filing informations is undercut in several ways. First, in most jurisdictions, a finding of no PROBABLE CAUSE by one magistrate at a preliminary hearing does not preclude presenting the case to another magistrate. Thus, a prosecutor can "shop around" for a magistrate who will find the requisite probable cause and enable the prosecutor to file an information.

In addition, in filing an information, the prosecutor is not always bound by the findings of the magistrate at the preliminary hearing. Some states permit the prosecutor to charge the accused in the information only with the crimes for which the magistrate decided there was probable cause. In other states, the information can charge the offense for which the accused was bound over at the preliminary hearing and any other offenses supported by the EVIDENCE at the preliminary hearing.

Another problem with using the preliminary hearing as a check on the prosecutor's decision to file an information is that the prosecutor often dominates the magistrate's hearing. Furthermore, in *Gerstein v. Pugh* (1975), the Supreme Court implied that the federal Constitution does not require a preliminary judicial hearing to determine whether there is probable cause for the prosecutor to file an information.

CHARLES H. WHITEBREAD
(1986)

Bibliography

AMERICAN BAR ASSOCIATION, SECTION OF CRIMINAL JUSTICE 1977 *Policy on the Grand Jury*. Washington, D.C.: ABA Section of Criminal Justice.

## INGERSOLL, JARED
(1749–1822)

Jared Ingersoll represented Pennsylvania at the CONSTITUTIONAL CONVENTION OF 1787 and signed the Constitution. Although reputed the best trial lawyer in Philadelphia, he was not a frequent speaker at the convention. He unenthusiastically described the plan proposed by the convention as "all things considered, most eligible."

DENNIS J. MAHONEY
(1986)

## *INGRAHAM v. WRIGHT*
430 U.S. 651 (1977)

Two Florida junior high school students, disciplined by severe paddling, sued school officials for damages and injunctive relief, claiming that the paddling constituted CRUEL AND UNUSUAL PUNISHMENT. They also claimed that they had been deprived of their right to a prior hearing in

violation of their PROCEDURAL DUE PROCESS rights. The lower federal courts denied relief, and the Supreme Court affirmed, 5–4.

For the majority, Justice LEWIS F. POWELL, a former school board president, concluded that the guarantee against cruel and unusual punishment was limited to cases of punishment for criminal offenses and thus had no application to paddling as a means of school discipline. The openness of public schools provided a safeguard against abusive punishments of the kind that might be visited on prisoners. COMMON LAW restraints on the privilege of school officials to administer corporal punishment were sufficient to prevent excesses. As for due process, Powell conceded that the paddling had implicated a "liberty" interest, but he concluded that due process required no hearing, in view of the availability of common law remedies or damages.

For the dissenters, Justice BYRON R. WHITE argued that it was anomalous to conclude that some punishments are "cruel and unusual" when inflicted on convicts but raise no such problem when they are inflicted on children for breaches of school discipline. The relevant inquiry, White argued, was not the label of criminal punishment but the purpose to punish. While some spanking might be permissible in public schools, the majority was wrong in saying "that corporal punishment in the public schools, no matter how barbaric, inhumane, or severe, is never limited by the Eighth Amendment." Here the record showed not just spanking but severe beatings. Furthermore, the risk of erroneous punishment—a crucial aspect of the due process calculus established in MATHEWS V. ELDRIDGE (1976)—demanded at least some informal discussion between student and disciplinarian before paddling was administered. The common law damages remedy offered no redress for punishments mistakenly administered in good faith and obviously could not undo the infliction of pain.

*Ingraham* seems an unstable precedent. Constitutional law, following social practice, has increasingly insisted that children be treated as persons, as members of the community deserving of respect. (See CHILDREN'S RIGHTS.) The due process right to a hearing rests partly on the premise that the dignity of being heard, before the state takes away one's liberty or property, is one of the differences between being a participating citizen and being an object of administration. The *Ingraham* majority, unmoved by such concerns, reflected nostalgia for a day when children were seen and not heard.

KENNETH L. KARST
(1986)

## INHERENT POWERS

In theory the Constitution establishes the institutions of the national government and vests those institutions with their responsibilities. Such a government is one of delegated powers. Some of these powers are expressed, others are implied. But all powers of the government—expressed and implied—are delegated powers originating in deliberate acts of the sovereign people. This theory cannot successfully deny that the Constitution may in fact succumb to "necessity," or prove inadequate in contingencies beyond human foresight and control. Nor does it deny that the document's terms (like "due process" and "executive power") are open to construction in light of broader ideas and needs. It simply means that to be lawful, a move of the government must fall within a range permitted by arguable interpretations of constitutional language and tradition.

Constitutional theory can admit a notion of "inherent power" in a sense of IMPLIED POWER as in inherent powers of executive privilege and removal of certain administrative appointees. But constitutional theory cannot admit the doctrine of "inherent power" that finds governmental powers beyond those that have been delegated expressly or by implication on the argument that a government must have certain powers before it can be considered a real government. This strong sense of inherent power is the subject here.

A doctrine of inherent power is frequently asserted in connection with a right to national self-preservation, which, as an inherent power, would differ from implied powers, like an implied power of national defense. Looked upon as an implied but still delegated power, a power of national defense can be derived from such expressed constitutional provisions as authorizing Congress to raise, support, and govern military and naval forces, and to declare war. Questions about the scope of an implied power of national defense would have to be answered in ways that would retain its status as part of a greater whole. A constitutionally derived power of national defense would be consistent with the SEPARATION OF POWERS, individual rights, and other provisions, or arguable interpretations thereof. By contrast, inherent powers need not be consistent with other constitutional provisions; asserting them does not require the interpretive adjustments needed to make something fit into a greater whole. A power to suspend elections and declare a dictatorship during a foreign invasion might become a practical necessity, but it could not be considered an implied power of national defense because no plausible interpretation of the Constitution could make room for such a power.

Appeals to inherent power should be distinguished from appeals to HIGHER LAW to which the Constitution might be open. The latter provide arguments for interpreting the Constitution in certain ways. The former propose reasons that might justify violating or suspending the Constitution. Historically, the former usually invoke considerations of "necessity" or "self-preservation" as reasons

for ignoring the separation of powers and the BILL OF RIGHTS. These considerations have surfaced in decisions to put innocent Americans in war-time concentration camps and to deny that the government has an obligation to treat ALIENS fairly. They have been used to rationalize congressional abdications of responsibility, especially in FOREIGN AFFAIRS. They therefore imply the supremacy of material safety over constitutional ideals and structures, even over the Constitution itself as a product of deliberative reason.

A strong doctrine of inherent power may have seemed necessary to constitutional theory as a way to circumvent artificially narrow conceptions of national power originating largely in a STATES' RIGHTS parochialism. But this is no longer the problem it used to be. Understanding national powers in terms of the broad ends to which they point—national defense, for example,—reduces the need for a doctrine of inherent power—unless precisely what is sought is justification for ignoring the Constitution.

SOTIRIOS A. BARBER
(1986)

(SEE ALSO: *Constitutional Reason of State; Delegation of Power; Enumerated Powers; Necessary and Proper Clause; Tenth Amendment.*)

Bibliography

HENKIN, LOUIS 1972 *Foreign Affairs and the Constitution.* Mineola, N.Y.: Foundation Press.

LOFGREN, CHARLES A. 1973 United States v. Curtiss-Wright Export Corp.: An Historical Reassessment. *Yale Law Journal* 83: 1–32.

## INITIATIVE

Initiative is the practice by which legislation may be proposed and voted on directly by the people (rather than their representatives). Its adoption was an important element of the Progressive era political reform movement. Of some twenty states that now use the initiative all but Alaska adopted it before 1919. Initiative makes possible enactment of legislation that contravenes the class interest of politicians—such as tax reduction and limitation on public expenditure.

Restrictions on the initiative process, such as a requirement for an extraordinary majority to enact housing legislation, have been held to violate the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT when the Justices were convinced that the intent was to disadvantage racial minorities.

Although the people of a state may reserve a portion of the legislative power, they may not, by initiative, directly exercise powers (for example, RATIFICATION OF AMENDMENTS) conferred on the state legislatures by the federal Constitution.

DENNIS J. MAHONEY
(1986)

## INITIATIVE
### (Update)

Lawmaking by popular votes on initiatives or REFERENDA is a constitutional feature of the individual states rather than the United States. After a century in which some form of direct lawmaking by voters spread to about half the states, however, its legal status under the U.S. Constitution has not been finally settled. This results from the Supreme Court's choice of premises for reviewing the processes as well as the substance of state laws.

Lawmaking by popular vote on measures initiated or referred by signed petitions is a legacy of the late-nineteenth-century Populist and PROGRESSIVE political movements, along with the direct election of U.S. senators, WOMAN SUFFRAGE, local "home rule," and voter RECALL of elected officials. Combining democratic ideology with resentment against the domination of elected governments by large business and financial interests, the initiative and referendum gained wide acceptance during the first two decades of the twentieth century, especially in the western states. In the early and influential form added to the Oregon Constitution in 1902, the "people reserve to themselves the initiative power" to propose and to enact or reject laws and constitutional amendments, as well as "the referendum power" to approve or reject legislative acts upon the petition of a percentage of voters. Later amendments further "reserved" the same powers to the voters of municipalities and local districts. This local lawmaking must be distinguished from initiatives for statewide laws and constitutional amendments.

Opponents argued against direct lawmaking on the ground that it contradicted the U.S. Constitution's guarantee of a REPUBLICAN FORM OF GOVERNMENT in each state, and the Oregon Supreme Court seized the first opportunity to defend this innovation. In *Kadderly v. City of Portland* (1903), the court cited the definition of JAMES MADISON, written in THE FEDERALIST, of a republican government as one administered by elected representatives. Noting that Oregon continued to have a legislature, a governor, and courts, the court sustained the initiative and referendum in principle, before either had been used, on grounds that they left the legislature free to enact, change, or repeal the laws, and that the courts still could test their constitutional validity. *Kadderly* became the leading PRECEDENT in other states that adopted the initiative and referendum.

When the Pacific Telephone & Telegraph Company in

1908 challenged an initiated tax measure under the GUARANTEE CLAUSE, the Oregon court rejected this claim with a simple reference to its *Kadderly* opinion. The U.S. Supreme Court, in *Pacific Telephone & Telegraph Co. v. Oregon* (1912), dismissed the company's WRIT OF ERROR for lack of federal JURISDICTION, holding that the guarantee of republican government was the responsibility of Congress rather than of the Court. This left standing the Oregon court's decision in the case. Since *Pacific Telephone*, the status of initiative lawmaking and other state practices under the guarantee clause has been deemed to lack JUSTICIABILITY in the federal courts, though not necessarily in state courts, which are bound by the SUPREMACY CLAUSE to apply the Constitution in their states. Nevertheless, many state courts have assumed that they cannot decide claims under the guarantee clause.

Because direct legislation is designed to reflect popular desires (what Madison knew as "interests" and "passions"), the initiative or referendum often are less sensitive than legislatures to the concerns of identifiable minority groups. Examples are an Oregon initiative aimed at closing parochial schools, invalidated as a denial of DUE PROCESS in PIERCE V. SOCIETY OF SISTERS (1925); a California constitutional amendment against laws forbidding housing discrimination; Washington initiatives concerning SCHOOL BUSING and requiring plebiscites on ordinances against housing discrimination; and a Colorado constitutional amendment against equal rights laws for homosexuals. In the latter two cases, the Court invalidated the requirements under the EQUAL PROTECTION clause for depriving identifiable minorities of equal opportunities to gain favorable laws.

Late-twentieth-century experience showed new problems with unbounded statewide initiative powers. Sponsors turned to drafting measures as constitutional amendments in order to place them beyond the reach of the legislature and state courts, essentially excluding government altogether, contrary to the premise on which the *Kadderly* opinion had held the system compatible with republican government. Following California's lead, many amendments limited state and local fiscal powers, especially PROPERTY taxes, while others forced spending increases on state pensions, prisons, and mandatory prison sentences. Other measures abandoned century-old state guarantees in the law enforcement process under the guise of "victims' rights" amendments.

Moreover, sponsors increasingly relied on paid workers rather than citizen volunteers for the required signatures on petitions, after the Court held in *Meyer v. Grant* (1988) that the FIRST AMENDMENT prevents prohibition of this practice. The First Amendment also prohibits requiring petition circulators to be registered voters under *Buckley v. American Constitutional Law Foundation, Inc.* (1999), and protects campaign spending for and against ballot measures under FIRST NATIONAL BANK OF BOSTON V. BELLOTTI (1978). Begun as a progressive reaction against the political power of money, initiatives and referenda in time drew larger campaign expenditures than elections for any state office.

At the end of its first century, academic critics began to question the very premise of direct lawmaking—its democratic credentials—because it allows a fraction of all voters to make public law in private, for personal reasons, without any obligation to represent or to account to others for their votes. Nonetheless, initiated laws are accorded special deference in political rhetoric, and sometimes in state lawmaking requirements. Initiatives can force change in political structures, like TERM LIMITS and CAMPAIGN FINANCING, that elected officials will not make. Voters are unlikely to abandon the system where it exists.

HANS A. LINDE
(2000)

(SEE ALSO: *Direct Democracy.*)

Bibliography

LINDE, HANS A. 1993 When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality. *Oregan Law Review* 72:19–45.

MAGLEBY, DAVID 1984 *Direct Legislation.* Baltimore, Maryland: Johns Hopkins University Press.

SYMPOSIUM 1994 Guaranteeing a Republican Form of Government. *University of Colorado Law Review* 65:709–946

——— 1998 Redirected Democracy: An Evaluation of the Initiative Process. *Willamette Law Review* 34:391–773

# INJUNCTION

In use long before the Constitution, the injunction in the twentieth century came to play one of its most important roles as the enforcer of constitutional and CIVIL RIGHTS. Precisely because it is effective, flexible, and open-ended, the injunction has drawn opposition, and constitutional cases have often included fierce battles over whether the injunction ought to be used as a remedy. These battles have resulted in some complex judicially imposed limitations on the use of injunctions in public law cases.

The injunction rests on a simple idea: that a court may order someone to perform or to cease some action. However simple the idea, it was not a usual feature of the earliest English COMMON LAW. Although it is inaccurate to say that early common law never commanded the performance of an action, by the sixteenth century its typical judgment simply decreed that A, having won the suit, was entitled to "take" some sum of money from B. If B did not cooperate, A could often gain the assistance of the sheriff, but B was subject to no direct order to do anything.

By contrast to the common law courts, the Court of

Chancery administered a system of remedies that came to be called EQUITY, vindicated by an order directing someone to do or cease doing something. At an early stage only the imagination of the Chancellor, who presided over the court, limited the precise nature of such orders. Equity has never lost this tradition of flexibility and discretion, but as Chancery developed a sense of precedent, the occasions for such orders began to seem standardized. For example, a court might require a defendant to perform a trust, to convey land, to carry out a contract, or to pay money owed to a business partner. Some orders, typically those forbidding an action (for example, requiring a party to halt a lawsuit or to cease polluting a stream), came to be called injunctions, though the term "injunctive relief" is often used broadly to refer to direct judicial orders of many sorts. Such equitable remedies always remained relatively discretionary: Chancery would not, for example, enter an injunction in all cases; the litigant seeking such an order first had to convince that court that his remedy at law (i.e., from the common law courts) would be "inadequate," a deceptively simple term that over five centuries has taken on some surprising baggage. Because of this requirement a litigant can have a valid legal right for which, however, he cannot obtain injunctive relief.

In America before the civil rights era the injunction saw its most controversial use in labor disputes in which courts, acting on the view that union organizing and strikes were either common law torts or violations of antitrust statutes, frequently enjoined strikes or PICKETING by workers. Such actions engendered great bitterness and led to Congress's withdrawing from federal courts JURISDICTION to enter an injunction in any labor dispute. (See NORRIS-LAGUARDIA ACT.) That withdrawal in turn has bolstered arguments in favor of occasional proposals to withdraw injunctive jurisdiction in other areas in which courts were enforcing unpopular decisions.

In the late twentieth century the injunction has had its most prominent career not as a remedy in tort, contract, and property disputes but as a vindicator of civil rights. That new role flowed largely from EX PARTE YOUNG (1908), which held that although SOVEREIGN IMMUNITY might bar a damage action against a state, it did not bar injunctive relief against a state official acting unconstitutionally. This development meant that even if there was no remedy for past unlawful action, an injunction could halt continuation of that activity. Until the birth of the modern civil rights damage action with MONROE V. PAPE (1961) and the CIVIL RIGHTS ACTS of the 1960s, the injunction served as a primary tool for the enforcement of civil and constitutional rights.

Because the injunction is open-ended, it has the potential for use in a wide variety of contexts. Not only can simple acts be required or forbidden but, more important, elaborate public institutions can be restructured. Probably the most noteworthy and certainly the most controversial use of injunctive relief came in the years following BROWN V. BOARD OF EDUCATION (1954) as the courts ordered school systems to end racial SEGREGATION. Drawing on their experience in complex antitrust and BANKRUPTCY cases, the courts employed the injunction as a tool for the reorganization of the schools. In the case of recalcitrant systems, such desegregation decrees sometimes called forth elaborate and detailed orders concerning the assignment of students and teachers, the curriculum, and other details of the schools' operation. Such orders often engendered resistance and involved the courts in the conduct of the schools over a number of years in particularly intractable cases. Courts have also ordered injunctive relief in INSTITUTIONAL LITIGATION involving PRISONERS' RIGHTS and the rights of mental patients.

Part of what makes the injunction such a powerful and controversial tool is the enforcement power that stands behind it. One disobeying an injunction is subject to CONTEMPT penalties—with the threat of indefinite imprisonment and mounting fines until one obeys the order. Perhaps because the injunction carries with it such a formidable arsenal for enforcement, the Supreme Court has enunciated a series of restrictions on the use of injunctive relief in favor of litigants wishing to challenge official action. Thus a federal court may abstain from deciding the constitutionality of a state practice until the state courts have had an opportunity to clarify the law or practice in question, as in *Railroad Commission of Texas v. Pullman Co.* (1941). Moreover, even if the law or practice is clear, a federal court should refrain from adjudicating the constitutionality of a state statute if the challenger of the statute will have an adequate opportunity to present that challenge in pending litigation to which the state is a party (YOUNGER V. HARRIS, 1971). Both the so-called *Pullman* and *Younger* ABSTENTION doctrines have complexities not hinted at in these summaries; they testify to the power of the injunction and its centrality in much modern constitutional litigation.

STEPHEN C. YEAZELL
(1986)

Bibliography

FISS, OWEN 1978 *The Civil Rights Injunction.* Bloomington: Indiana University Press.

FRANKFURTER, FELIX and GREENE, NATHAN 1930 *The Labor Injunction.* New York: Macmillan.

## *IN PERSONAM*

(Latin: "Against the person.") A legal action or case is *in personam* if it is directed against a particular individual to

enforce an obligation. Cases in EQUITY proceed *in personam.*

DENNIS J. MAHONEY
(1986)

## *IN RE*

(Latin: "In the matter [of]. . . .") This is a way of titling a case that presents a question to be decided or an action to be taken in the absence of adversary parties.

DENNIS J. MAHONEY
(1986)

## *IN RE . . .*

See under name of party

## *IN REM*

(Latin: "Against the thing.") A legal action or case is *in rem* if it undertakes to establish the title to or status of a thing with respect to all persons.

DENNIS J. MAHONEY

## INSTITUTIONAL LITIGATION

"Institutional litigation" refers to cases in which the courts, responding to allegations that conditions in some institutions violate the Constitution or CIVIL RIGHTS statutes, become involved in supervising the institutions in question. Loosely used, the term might describe any number of lawsuits, ranging from an assertion of discriminatory employment practices in a CORPORATION to an attack by inmates on the conditions at a state prison. What such apparently diverse cases have in common is the possibility that if the plaintiffs convince the court that a violation of the law has occurred and if the institution proves recalcitrant in remedying the violation, the court may become involved in detailed supervision of the institution over long periods. Though details of such complex suits naturally vary widely, it is the combination of continuous judicial scrutiny and detailed substantive involvement that has characterized institutional litigation.

Laws such as those forbidding discrimination in employment apply to both public and private institutions. Many constitutional provisions, however, guarantee rights only against the government and most institutions to which individuals are involuntarily committed are run by the government. Consequently most of the institutions involved have been public: prisons, mental hospitals, school systems, and the like. Moreover, though the Constitution binds both state and federal courts, the latter tribunals have played the most active role in vindicating constitutional rights. The typical institutional case therefore has involved a federal district court supervising the conduct of a state institution, a setting that has raised constitutional concerns beyond those of the particular substantive law of the case.

From a wide perspective one can trace the roots of institutional litigation to earlier classes of cases: nineteenth-century EQUITY receiverships, bankruptcy reorganizations, antitrust decrees requiring the restructuring of a large industry, even to the efforts of fifteenth-century English chancellors to enforce the duties of trustees to establish and supervise the religious and charitable institutions endowed in a will. Modern institutional cases also have more recent origins in the efforts of the federal judiciary to desegregate schools in the 1950s and 1960s. Resistance to simple desegregation decrees forced federal courts to become involved in many details of local school administration. As some school boards adjusted their strategies for resistance, courts delved deeper into school board practices, to the point of displacing some traditional school board functions. In GRIFFIN V. SCHOOL BOARD OF PRINCE EDWARD COUNTY (1964) the Supreme Court even suggested that a federal court could order taxes imposed to raise funds to finance a public school system that officials had closed to avoid desegregation.

At about the same time courts were articulating other constitutional rights, including constitutional limitations on prison and mental hospital conditions. In cases such as *Wyatt v. Stickney* (1971) and *Holt v. Sarver* (1969) lower federal courts combined the procedural aggressiveness of the school desegregation cases with the newly developed constitutional rights, enforcing their decrees against recalcitrant officials with INJUNCTIONS backed by the force of the contempt power. In dozens of institutional cases in the 1970s these same forces triggered widespread court-ordered institutional reform that covered such details of institutional life as cell size, visiting hours, telephone privileges, hygiene, and disciplinary procedures.

Describing institutional litigation and tracing its origins are easier than isolating, much less resolving, the controversies that surround it. Nearly all the issues that arise in public discourse about a federal system and an independent judiciary eventually appear in some discussion of institutional litigation. Perhaps the most central of these issues are questions about the relationship of institutional litigation to (1) the nature of litigation; (2) the judicial capacity to run institutions; (3) the power of the purse; and (4) FEDERALISM.

Some view institutional cases as a form of litigation previously unknown to Anglo-American jurisprudence. In the contrasted traditional vision of litigation, a lawsuit involves

two parties who present an isolatable set of facts to a court, which issues a JUDGMENT; the losing party complies with the court's decree, and judicial involvement with the case ends. To the extent that this statement of traditional litigation is accurate, institutional litigation involves a substantial departure. In institutional litigation the set of facts presented to the court often constitutes all of the physical, psychological, and social conditions within the institution. Such widespread allegations prevent the court from addressing any single dispute which, when resolved, will restore the parties to a proper relationship. In several institutional cases, no matter how many disputes the court resolves, additional issues arise with respect to implementation of and compliance with previous orders.

The frequency with which institutional litigation requires courts to address some aspect of institutional life highlights the second central issue—judicial capacity to supervise large public institutions. By training, judges are neither wardens nor hospital administrators. Some critics question whether judges should substitute their judgment about institutional life for that of professional administrators appointed by elected officials. Courts often try to compensate for their inexperience by appointing SPECIAL MASTERS and expert advisory panels and by seeking the views of the defendant administrators. But these tactics may raise further questions about institutional litigation's departure from traditional ideas about litigation. Yet, once a court has concluded that institutional life is constitutionally deficient because of the acts of the regular administrators, it is difficult for courts simply to defer to the judgment of those same persons found to be responsible for the unconstitutional conditions.

In many cases, however, institutional conditions are constitutionally deficient less because of the acts of administrators than because the state has allocated insufficient funds to institutional budgets. Even willing administrators experience difficulty in upgrading conditions at some institutions. A new prison building may be necessary or more staff may need to be hired. When institutional reform may be accomplished only through expenditures of substantial sums, a new issue arises: may courts order the allocation of public funds against the wishes of legislators who presumably reflect their constituents' wishes?

For many observers, this fiscal confrontation reveals the least palatable aspect of institutional litigation—the antimajoritarian judicial usurpation of legislative and executive authority. Courts, self-conscious about express allocative decision making, sometimes disavow authority to order funds raised to carry out institutional reform. And, despite *Griffin*'s OBITER DICTUM about imposing taxes, there is doubt about how far courts may and ought to go in ordering funds raised to satisfy their orders. Yet it is also a commonplace for courts to state that lack of funds is no excuse for failure to comply with the Constitution. Since any public law decision may have important fiscal effects, perhaps institutional cases have been unjustifiably isolated from the rest of the public litigation on this issue. Indeed, if one assumes that, put to the choice between releasing inmates and rectifying the conditions of their institutional confinement, the public and their elected officials would choose the latter, judicially decreed funding may be more in accord with the majority's wishes than any other course of action.

Ironically, institutional cases flourished during the 1970s, while the Supreme Court was emphasizing that federal courts should not interfere with traditional state or local functions. In RIZZO V. GOODE (1976) and O'SHEA V. LITTLETON (1974) the Court rejected systemic attacks on, respectively, a police department and a city's system of criminal justice. In YOUNGER V. HARRIS (1971) and its progeny the Court established prohibitions on federal court interference with state adjudicative proceedings. As a doctrinal matter, the issues in most institutional cases proved distinguishable from the issues in *Rizzo*, *O'Shea*, and *Younger*. Nevertheless the Court's federalism theme could have been viewed as requiring curtailment of judicial receptivity to institutional litigation. Yet during this period of growing deference to states, the lower federal courts, without Supreme Court disapproval, continued to hear and resolve institutional cases.

THEODORE EISENBERG
STEPHEN C. YEAZELL
(1986)

Bibliography

CHAYES, ABRAM 1976 The Role of the Judge in Public Law Litigation. *Harvard Law Review* 89:1281–1316.

DIVER, COLIN S. 1979 The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions. *Virginia Law Review* 65:43–106.

EISENBERG, THEODORE and YEAZELL, STEPHEN C. 1980 The Ordinary and the Extraordinary in Institutional Litigation. *Harvard Law Review* 93:465–517.

FISS, OWEN M. 1979 The Supreme Court 1978 Term, Foreword: The Forms of Justice. *Harvard Law Review* 93:1–58.

## INSULAR CASES

Originally applied to three cases decided in 1901, the term "insular cases" has come to denominate a series of cases decided in the early twentieth century defining the place of overseas TERRITORIES in the American constitutional system. Following the acquisition of PUERTO RICO, the Philippines, Hawaii, and various other island possessions, the Supreme Court was called upon to decide whether, or to what extent, in William Jennings Bryan's phrase, "the Con-

stitution follows the flag." From the insular cases emerged the DOCTRINE of INCORPORATION OF TERRITORIES.

The first three insular cases (*DeLima v. Bidwell*, *Dooley v. United States*, *Downes v. Bidwell*) were argued together and decided in 1901. They raised the question whether Puerto Rico was part of the United States within the meaning of the "uniformity clause" for purposes of levying customs duties. In *DeLima* and *Dooley*, the Court held that from the Treaty of Paris (1899), by which Spain ceded Puerto Rico to the United States, until the Foraker Act (1900), by which Congress organized the territorial government, the collection of duties on goods moving between the United States and Puerto Rico was unconstitutional. In the far more important *Downes* case, the court upheld collection of duties after passage of the Foraker Act. The apparent meaning of the three cases was that the constitutional status of overseas possessions is for Congress to determine, but constitutional protection is to be assumed in the absence of congressional action. The Justices divided into three schools of thought: four Justices, led by Chief Justice MELVILLE W. FULLER and Justice JOHN MARSHALL HARLAN, contended that the Constitution applied automatically and completely to any territory under United States SOVEREIGNTY; Justice HENRY B. BROWN, who wrote the lead opinion in all three cases, believed that Congress, under Article IV, section 3, enjoyed plenary power over the territories and could extend to them all, any part, or none of the Constitution, at its discretion; and four Justices, led by Justice EDWARD D. WHITE, argued that the Constitution applied fully to the territories only after positive action by the Congress to incorporate them into the United States.

In 1903 and 1904 the Court decided four cases dealing with CRIMINAL PROCEDURE in Hawaii, Puerto Rico, and the Philippines (*Hawaii v. Mankichi*, *Crowley v. United States*, *Kepner v. United States*, *Dorr v. United States*). The Court made a distinction between fundamental or NATURAL RIGHTS, which are constitutionally protected everywhere, and rights merely procedural or remedial, peculiar to Anglo-American jurisprudence, which do not apply in the territories—at least "until Congress shall see fit to incorporate the . . . territory into the United States." In the former category was protection against DOUBLE JEOPARDY; in the latter were INDICTMENT by GRAND JURY, TRIAL BY JURY, and JURY UNANIMITY. *Dorr* (1904) was the first case in which the incorporation of territories doctrine received the formal assent of a majority of the Court.

In the 1905 case of *Rasmussen v. United States*, the Court unanimously held the jury trial guarantee of the SIXTH AMENDMENT applicable to Alaska. White, writing for himself and six colleagues, demonstrated that Congress had explicitly incorporated Alaska into the United States and thus had brought its residents under complete constitutional protection. Harlan and Brown, in separate CONCURRING OPINIONS, each reiterated his original position on the Constitution and the territories.

In *Trono v. United States* (1905) and *Dowdell v. United States* (1911), the Court sustained Philippine criminal convictions obtained through indigenous procedures which would have violated the Sixth Amendment had the Philippines been incorporated territory. But in WEEMS V. UNITED STATES (1910), the Court ruled that since Congress had extended the protection against CRUEL AND UNUSUAL PUNISHMENT to the Philippines, the protection was identical to that enjoyed by mainlanders under the Eighth Amendment.

The most forceful and consistent opposition to the incorporation doctrine came from Justice Harlan. He argued that all of Congress's power flows from the Constitution, and therefore Congress is bound in its every action by that document's limitations and guarantees. The "occult" doctrine of the insular cases, he said, permitted Congress, contrary to the spirit and genius of the Constitution, to erect a colonial empire and exercise absolute dominion over dependent peoples.

In *Board of Public Utilities Commissioners v. Ynchausti* (1920), White, by then Chief Justice, was able to report the Court's unanimous acceptance of the incorporation of territories doctrine; and in *Balzac v. Porto Rico* (1922), Chief Justice WILLIAM HOWARD TAFT, for a unanimous Court, applied it as the settled law governing the status of territories.

DENNIS J. MAHONEY
(1986)

Bibliography

BLOOM, JOHN PORTER, ed. 1973 *The American Territorial System*. Athens: Ohio University Press.

COUDERT, FREDERICK R. 1926 The Evolution of the Doctrine of Territorial Incorporation. *Columbia Law Review* 66:823–850.

FUSTER, JAIME B. 1974 Origins of the Doctrine of Territorial Incorporation and Its Implications Regarding the Power of the Commonwealth of Puerto Rico to Regulate Interstate Commerce. *Revista Juridica de la Universidad de Puerto Rico* 43:259–294.

SEMONCHE, JOHN E. 1978 *Charting the Future: The Supreme Court Responds to a Changing Society, 1890–1920*. Chaps 5 and 6. Westport, Conn.: Greenwood Press.

## INTEGRATION

See: Desegregation; Segregation

## INTEGRATION OF THE FEDERAL GOVERNMENT

See: Executive Orders 9980 and 9981

## INTELLECTUAL PROPERTY LAW AND THE FIRST AMENDMENT

COPYRIGHT law, trademark law, right of publicity law, and trade secret law are all speech restrictions. They restrict what people may say or write or perform. They do so based on the content of the speech. And they cover not just literal copying, but also the creation of new works. Saying that these laws protect PROPERTY RIGHTS cannot resolve the problem; the question still remains: To what extent may the government protect intellectual property rights by restricting speech?

The Supreme Court, in *Harper & Row Publishers v. Nation Enterprises* (1985), held that copyright law is a permissible speech restriction, essentially carving out a new exception to FIRST AMENDMENT protection: Speech that copies another's expression, and that is not a fair use, is unprotected by the First Amendment against a copyright infringement claim. Nonetheless, the Court suggested that these conditions—that copyright law restricts only the copying of expression and not of ideas or facts, and that copyright law provides a safe harbor for certain fair uses such as criticism or news reporting or parody— may be constitutionally required. Laws that restrict dissemination of facts, such as tort causes of action for misappropriation of news or statutes restricting copying of fact databases, might be unconstitutional.

Even given copyright law's substantive constitutionality, the First Amendment should impose the usual procedural safeguards on copyright litigation (and other intellectual property litigation). The PRIOR RESTRAINT doctrine, for instance, may bar preliminary injunctions in many copyright cases. The independent appellate review doctrine described in *Bose Corp. v. Consumer Reports* (1984) might require de novo review of findings of substantial similarity of expression. The rules related to strict liability, PUNITIVE DAMAGES, quantum of proof, and burden of proof might likewise in some measure affect copyright law. Most of these claims have not been seriously explored by courts.

Most trademark infringement cases involve commercial advertising that is allegedly likely to confuse. Restricting this advertising poses little constitutional difficulty, because FREEDOM OF SPEECH law allows restriction on misleading COMMERCIAL SPEECH. Nonetheless, some trademark cases, especially those involving uses that are not primarily advertising—for instance, book parodies that borrow the books' titles or cover layouts—do pose First Amendment problems. Lower courts are split about the extent to which the First Amendment provides a defense in these situations.

The relatively new state and federal trademark dilution statutes raise more serious First Amendment questions, because they restrict commercial uses of trademarks even when there is no likelihood of consumer confusion, and thus fall outside the doctrine that misleading commercial speech may be restricted. Courts have not yet had much occasion to confront this question. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee* (1987), which involved a specialized antidilution statute, suggests that such laws would probably be upheld; but the Court's recent, more speech-protective commercial speech jurisprudence makes the matter unclear.

The right of publicity gives people the exclusive ability to control use in commerce of their names, likenesses, voices, and other attributes that may remind the public of them. Lower courts have generally carved out exceptions, on First Amendment grounds, for news reporting, biography, fiction, and similar uses, even though these works are often sold for money; but courts have generally upheld the right of publicity as applied to commercial advertising and to merchandising (posters, busts, T-shirts, and the like).

It is not clear whether the right of publicity is always constitutional even when so narrowed. Even commercial advertising is usually entitled to considerable constitutional protection, and posters, busts, and T-shirts are as protected as movies or books or any other works that are commercially sold. Banning the unauthorized sales of, say, busts of MARTIN LUTHER KING, JR.—as one court did—poses considerable First Amendment difficulties. Nonetheless, outside the context of merchandising that constitutes a parody, lower courts have generally rejected free speech arguments in advertising and merchandising cases.

The Court's only right of publicity case, *Zacchini v. Scripps-Howard Broadcasting* (1977), sheds little light on this subject. *Zacchini* upheld an unusual sort of right of publicity—a performer's right to prevent rebroadcasts of his entire performance—and said little about the much more common name/likeness/voice/identity claims.

Many trade-secret claims can probably be upheld on the grounds that they merely enforce a confidentiality contract, something that COHEN V. COWLES MEDIA (1991) holds is constitutional. On the other hand, when the defendant is not bound by a contract—for instance, a media organization to which the information was leaked— the First Amendment may pose serious obstacles to imposing liability, and even more serious obstacles to injunctions. The Court has not fully confronted the matter, though one

Justice, granting a stay in *CBS, Inc. v. Davis* (1994), rejected on prior restraint grounds a request for an injunction against revealing trade secrets.

EUGENE VOLOKH
(2000)

Bibliography

LEMLEY, MARK and VOLOKH, EUGENE 1998 Freedom of Speech and Injunctions in Intellectual Property Cases. *Duke Law Journal* 48:147–242.

VOLOKH, EUGENE and MCDONNELL, BRETT 1998 Freedom of Speech and Independent Judgment Review in Copyright Cases. *Yale Law Journal* 107:2431–2470.

## INTEREST GROUP LITIGATION

Interest group litigation is sponsored by organizations whose attorneys typically are less interested in specific legal claims than in the constitutional principles that a litigation represents. In contrast, most court cases are pursued for the benefit of the parties directly involved.

In seeking their clients' immediate interests private attorneys sometimes invoke constitutional arguments, but these are incidental to the specific claims of the parties. A sponsored case, however, is often pursued in the name of a litigant even though it is initiated, financed, and supported by an organization seeking its own constitutional goals. INTEREST GROUPS are particularly attracted to cases involving constitutional principles because the judicial decisions emerging from such cases are relatively insulated from subsequent attacks by legislators and other public officials.

It is arguable, of course, that group-supported litigation has always been in existence. For example, following the WAGNER (NATIONAL LABOR RELATIONS) ACT and other NEW DEAL legislation, litigation was managed, or otherwise assisted, by LABOR unions, trade associations, stockholder groups, and other business interests. However, the social and economic ferment of the 1960s and 1970s brought interest group litigation into sharper focus. The CIVIL RIGHTS MOVEMENT and the VIETNAM conflict not only produced federal legislation but also stimulated new constitutional demands by litigious organizations representing women, welfare recipients, consumers, and persons resisting military service.

The strategies and tactics of interest group litigants are heavily influenced by SOCIOLOGICAL JURISPRUDENCE and LEGAL REALISM. These philosophies hold that judges, especially Supreme Court Justices, decide controversial cases by choosing among conflicting goals and policies. Such judges do not reach results or write opinions merely by construing statutes, analogizing cases, or analyzing DOCTRINES. Instead, inquiries into judicial decision making have focused on the ways litigation is influenced by the timing of cases and the quality of the constitutional arguments reaching the appellate courts.

Prototypes of interest group litigation are the cases managed by the United States Department of Justice and similar state agencies. Their attorneys select the appropriate government cases to be appealed, and by confessing error or by compromising cases brought against the government, they seek to inhibit the establishment of unfavorable precedents. Also, a federal Legal Service Corporation, independent of the Department of Justice, has become one of the principal sources for funding and supporting litigation aimed at social and economic reform. Consumers, poor people, prisoners, and other low-resource persons have been represented by government-subsidized attorneys in suits against federal and state agencies and private organizations. Besides managing their own cases, government agencies promote private interest group litigation by reimbursing attorneys who participate and intervene for them in administrative proceedings and in court cases involving ADMINISTRATIVE LAW.

Although strategically less favorably situated than government attorneys, those representing private interest groups are also in a position to choose cases for APPEAL and to control the flow of argument in the higher courts. Unlike government litigation, however, the legal requirements for participation in private law suits sometimes prevent an organization from suing on its own, in behalf of its members, or for a similarly situated class of people. This problem has been partially alleviated by Supreme Court decisions liberalizing rules of legal STANDING to permit lawsuits by environmentalists, taxpayers, and other special interests.

Litigation activity by interest groups is visible in constitutional civil cases as well as in the criminal *cause célèbre.* In some of these cases attorneys representing factions of social movements vie for litigation sponsorship. The extensive publicity often connected with such cases, the constitutional issues perceived to be intertwined in the conflict, and the opportunities for fund-raising sometimes result in interest group controversies. For example, in several church-state cases attorneys representing different organizations have quarreled over the management of litigation. In the "Scottsboro" case, involving blacks accused of rape, attorneys representing civil rights organizations and those representing a communist-sponsored legal defense organization disagreed about the use of trial publicity.

Ideological differences among lawyers are occasionally reflected in varying conceptions of litigation strategy. Some attorneys emphasize the importance of a complete

trial record raising all possible legal issues while others concentrate on the constitutional issues.

An alternative approach to a single TEST CASE is a litigation program aimed at accumulating a series of favorable decisions changing constitutional law. An incremental approach emphasizes narrow factual issues and specific claims, and groups with large legal staffs and cooperating attorneys are strategically positioned to conduct litigation in this way. Litigation programs of this kind have achieved changes in the constitutional doctrine governing racial CRIMINAL PROCEDURE, selective service, religion, and employment.

In politically tinged criminal cases the less provident and unpopular groups are not likely to use incremental litigation; they usually face immediate problems of securing relief for organization leaders and raising money for their causes. For example, in the 1950s when large numbers of cases involving congressional investigations of communism reached the Supreme Court, the lion's share was controlled by lawyers who depended on individual financial contributions to sustain their legal work.

When litigation is controlled by interest groups, constitutional issues are likely to be advanced and developed at the trial level. The "perfecting of a trial record" also gives the adversaries an opportunity to debate broader issues that are likely to be considered on appeal.

The development of a "good" trial record facilitates the preparation of appellate briefs interlaced with statistical and authoritative bibliographical references to social and economic facts supporting particular constitutional arguments. This technique was first used in the early-twentieth-century social legislation cases, and it has been used to illuminate fields ranging from racial equality to abortion. Similar forms of extralegal argument are found in complex court cases involving PUBLIC UTILITY REGULATION and other economic matters. (See BRANDEIS BRIEF.)

Besides expanding the scope of their arguments, interest group attorneys have become increasingly adept at coordinating litigation by discouraging the appeal of inconsistent cases or those with less developed records. They have also been successful in getting publication of sympathetic views in legal, scholarly, and popular journals. Networks of attorneys and other observers have also emerged to monitor court decisions and keep central clearinghouses informed about promising court cases.

Sometimes the immediate concerns of the litigants may conflict with those of the sponsoring interest group. A litigant's claim may be compromised or settled. Legal issues advanced by the parties may be formulated so as to avoid the constitutional issues raised by the sponsor. Also, the trial and appellate preparation may be a labor of love, or the work-product of an attorney who jealously guards his professional prerogatives.

A failure to control a litigation does not necessarily mean that an interest group lacks influence. When the issues defined in court are narrow, or the litigant's attorney has failed to develop the case's constitutional implications, an interest group attorney can still participate as AMICUS CURIAE (friend of the court). Nowhere has this phenomenon been more visible than in the medical school admission case, REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE (1978). In this case fifty-seven organizations submitted amicus curiae briefs to the Supreme Court. Although some interest group attorneys will refrain from submitting such briefs when a client's attorney adequately has argued the constitutional issues, the filing of such a brief does serve the political function of announcing the group's support for a constitutional argument. Amicus curiae participation usually requires the consent of both parties or the approval of the court, and the influence of either briefs or ORAL ARGUMENTS as amicus remains debatable.

Even though interest group litigation is growing, part of the increase is attributable to government legal services and private foundation philanthropy. If government support is curtailed and private foundations are subjected to closer tax scrutiny, individual contributions and voluntary legal services will be called upon to fill the gap. Such a decline in government support seems likely since some judges and political leaders have expressed concern about government-sponsored litigation directed against public officials. They also criticize lawyers who represent causes rather than clients and overburden the judicial process. Other factors affecting the growth of interest group litigation are the strictness of enforcement of traditional restrictions on the scope of law suits (see INSTITUTIONAL LITIGATION) and the rules governing the award of attorneys' fees to interest group attorneys.

Finally, no description of interest group litigation would be complete without noting that many highly publicized civil cases and "showcase" criminal trials as well as ordinary law cases are financed and carried forward without the participation of organized interest groups. The constitutional and policy arguments advanced by attorneys in these cases, in many instances, are just as likely to advance the development of legal and constitutional doctrine.

NATHAN HAKMAN
(1986)

(SEE ALSO: *Groups and the Constitution.*)

Bibliography

COUNCIL FOR PUBLIC INTEREST LAW 1976 *Balancing the Scales of Justice: Financing Public Interest Law in America.* Washington, D.C.: Council on Public Interest Law.

HAKMAN, NATHAN 1966 Lobbying the Supreme Court: An Appraisal of "Political Science Folklore." *Fordham Law Review* 35:15–50.

——— 1972 Political Trials in the Legal Order: A Political Scientist's Perspective. *Journal of Public Law* 21:73–126.

KIRCHHEIMER, OTTO 1961 *Political Justice: The Use of Legal Procedure for Political Ends.* Princeton, N.J.: Princeton University Press.

VOSE, CLEMENT E. 1972 *Constitutional Change: Amendment Politics and Supreme Court Litigation Since 1900.* Lexington, Mass.: D. C. Heath.

WEISBROD, BURTON A.; HANDLER, JOEL F., and KOMESAR, NEIL K. 1978 *Public Interest Law: An Economical and Institutional Analysis.* Berkeley: University of California Press.

## INTEREST GROUPS

Interest groups, or groups of people who try to use the power of government to advance their own interests, have played an important part in the development of both constitutional law and CONSTITUTIONAL THEORY.

CHARLES A. BEARD argued that a particular array of interest groups lay behind the support for and opposition to the Constitution in 1787–1789. Examining the property holdings of supporters and opponents, Beard argued that debtors and owners of real property opposed the Constitution, while personalty interests, especially creditors whose property consisted largely of promises to repay loans, supported it. Beard's specific conclusions have been rejected by later scholars, who have found more complex patterns of property holding than Beard's argument required. Even if the specific argument is rejected, however, consistent patterns of support and opposition based on interests can be found. Constitutional provisions like the ban on state impairments of the OBLIGATION OF CONTRACTS and the prohibition of state issuance of money are best explained by the fact that the supporters of the Constitution feared that they would be outvoted in state legislatures on important issues related to debt and might be able to defend their interests better in the national Congress. Similarly, the likelihood that the new government would be able to resolve controversies over ownership of the undeveloped lands to the west meant that speculators who had purchased western lands were inclined to support the Constitution. Many of the Constitution's compromises over SLAVERY resulted from the sort of interest-group bargaining that characterizes politics. At the same time, the action of interest groups alone seems insufficient to account for the RATIFICATION OF THE CONSTITUTION. Because too many people with too many conflicting interests supported ratification, interest alone cannot explain the adoption of the document. In the end, the Constitution was ratified because of the interaction between interest-group support and conviction that the new government promised to be better as a matter of principle than the Confederation.

Supporters of the new Constitution were alert to the problems that interest groups posed for good government. The central theme in THE FEDERALIST is probably the necessity of designing a government to "curb the influence of faction." *The Federalist*'s notion of "faction" is not precisely the same as modern ideas about interest groups, for "factions" included groups brought together by a common "passion" as well as those acting to advance a common "interest." Nonetheless, the arguments in *The Federalist* about the evils of faction capture many modern concerns about the problems interest groups pose for government. For *The Federalist*, factions must be checked because they are motivated by passions or interests "adverse to the rights of other citizens or to the permanent and aggregate interests of the community"—what we would today call the public interest. This remains true, even if the faction amounts to a majority; even a majority can invade the interests of others, and more controversially, even a majority can act in ways that fail to advance the public interest, conceived of as something different from the interests of a majority.

According to *The Federalist* the new government was well suited to check the influence of faction. Its federal structure allowed the government to extend over a rather large territory. By extending the geographic scope of government, the Constitution made it more difficult for individual factions to gain control of the government. Because the nation would be large, it was unlikely that any single faction or interest group would be represented in sufficient numbers throughout the country to gain control of the machinery of the national government. Even if different factions attempted to put together a coalition, the size of the nation would make coordination of their plans difficult. In addition, the SEPARATION OF POWERS in the national government meant that interest groups would have to mobilize their political forces for a long time and in a number of forums before they could control the government. DIRECT ELECTIONS for the HOUSE OF REPRESENTATIVES might register factional concerns every two years, but gaining control of the SENATE, elected by the people indirectly acting through their state legislatures, would be more difficult. In the initial conception, the ELECTORAL COLLEGE, which was to select the President, was another constraint on the ability of interest groups to control the government. The life-tenured judiciary, too, could stand in the way of factional control, invalidating legislation that contravened constitutional provisions designed to limit faction, such as the CONTRACT CLAUSE.

As a theoretical matter *The Federalist*'s defense of the new government as a means of checking the influence of

interest groups is quite powerful. Yet it has some limitations. The structures of the government of a territorially extended republic might be sufficient to protect against the influence of interest groups, but on *The Federalist*'s theory as here summarized, it is difficult to understand why the national government would be able to adopt programs that were truly in the national interest. Moreover, modern developments have undermined the cogency of *The Federalist*'s arguments. The rise of national political parties makes it somewhat easier for interest groups scattered throughout the nation to coordinate their programs. The direct election of members of the Senate and the elimination of the electoral college as a body that seriously deliberates about who the President should be have limited the power of those institutions to stand up to factional influence.

Modern constitutional law deals with interest groups in two ways. Where the interest groups are organized around economic concerns, in recent years the Supreme Court has never found their ability to secure government aid conclusively unconstitutional. WILLIAMSON V. LEE OPTICAL COMPANY (1955) is typical. The Court upheld a statute requiring that consumers purchase duplicate lenses for their glasses only with a prescription from an eye doctor. The statute obviously was the result of lobbying pressure from eye doctors facing competition from opticians who lacked medical training. According to the Court, the statute was constitutional because the state legislature might have believed that requiring a new prescription was helpful in assuring that consumers would get glasses whose prescriptions suited their needs. As most commentators have recognized, this explanation is extremely weak. In general, the Court's approach to constitutional claims by or against economic interest groups, framed as violations of the DUE PROCESS or EQUAL PROTECTION clauses, leaves the matter entirely to the legislature. In that sense, factions are now allowed to control the government.

Some areas of JUDICIAL REVIEW dealing with economic matters remain of interest. In enforcing the restrictions that the COMMERCE CLAUSE places on STATE REGULATION OF COMMERCE, the Court has sometimes been sensitive to the role that local interest groups play in securing restrictionist legislation. In *Washington State Apple Advertising Commission v. Hunt* (1977), the Supreme Court invalidated a statute requiring that apples be repackaged in ways that concealed from purchasers the fact—which they might be interested in learning—that some of the apples came from Washington, where particularly good apples are grown. The Court noted in passing that the statute had been adopted at the behest of North Carolina's apple growers, whose apples were less attractive to consumers. In other cases, however, the Court has not been so concerned about the interest group politics that lies behind legislation. *Exxon Corp. v. Governor of Maryland* (1978) upheld a statute, designed to aid corner gas station owners, prohibiting national gasoline producers from owning retail gas stations in the state.

In addition, the Constitution bars governments from TAKINGS OF PROPERTY without JUST COMPENSATION and from impairing the obligation of contracts. In extreme cases, the Supreme Court has been willing to invalidate laws that seem to it to be the product of pure interest-group motivation rather than of sincere consideration of the public interest. In UNITED STATES TRUST CO. OF NEW YORK V. NEW JERSEY (1977), the Court invoked the contract clause to invalidate a New Jersey statute that diverted revenue from tolls on automobiles, which were by contract supposed to be used to pay off road-building bonds, instead using them to support mass transit. In *Nollan v. California Coastal Commission* (1987), the Court invalidated a California statute that had been interpreted to allow an owner of a beachfront residence to expand his house only if he allowed the public to walk across the beach in front of the house. The New Jersey statute might be seen as the result of interest-group lobbying by mass transit commuters, who might be easier to organize than the holders of the road-building bonds, while the California law might be seen as imposing costs on isolated individual owners in the service of the interests of a majority faction.

The significance of these decisions, though, should not be exaggerated; they are controversial, in part because in both there does seem to be a genuine public interest promoted by each of the statutes the Court invalidated. In general, where economic interests are involved, the Court tolerates a great deal of interest-group legislation, even if there seems to be little "public interest" justification for the legislation, although the Court most often does require that the state offer a public interest justification, no matter how weak, for what it does.

Interest groups play another role in modern constitutional law. In UNITED STATES V. CAROLENE PRODUCTS CO. (1938), Justice HARLAN FISKE STONE suggested that laws adversely affecting DISCRETE AND INSULAR MINORITIES would have to be strongly justified to be constitutional. Such minorities might be thought of as a type of interest group, which because of its position in the society is unable to attain political power commensurate with its numbers. Their political opportunities might be blocked by a history of discrimination against them, which might lead members of the groups to believe that attempting to secure government assistance is futile or might demonstrate that a majority consistently undervalues the interests of the minority.

The idea that the courts should be alert to protect these minorities gains much of its force from the experience of blacks in the period before BROWN V. BOARD OF EDUCATION

(1954, 1955) and the VOTING RIGHTS ACT OF 1965. Other candidates for inclusion in the group of DISCRETE AND INSULAR MINORITIES are women, nonmarital children, and the poor. But the Supreme Court has been reluctant to expand the group of protected minorities. In CITY OF CLEBURNE V. CLEBURNE LIVING CENTER (1985), the Court refused to give the mentally retarded formal inclusion in the group, noting that many legislatures had acted to promote the interests of the mentally retarded and that, were they to be treated as a special group, many other groups with "perhaps immutable disabilities" and unable to "mandate the desired legislative responses" (e.g., the aging, the disabled, and the mentally ill) might "claim some degree of prejudice."

The Court has not expanded the list of discrete and insular minorities because it believes that with respect to most groups, the ordinary operation of politics allows any interest group to participate in the process of bargaining and trading votes that leads coalitions to achieve their goals. In many ways, that is the image of politics offered in *The Federalist*, and if the political process works in that way, the Court's reluctance is well founded. Yet Stone's insight regarding the imperfections of the political process suggests that on occasion interest groups might be unable to secure legislative action no matter how hard they try. Recent theories of the political process offered by students of "public choice" indicate, however, that the difficulty may not be that minority interest groups cannot get their way, but rather that majority groups, those that wish to advance the public interest, might find themselves defeated by well-organized interest groups: the members of the smaller interest groups are likely to have more at stake, and are therefore more likely to organize effectively, than the members of the majority, each of whom has so little at stake that none will make any effort to oppose legislation that imposes substantial costs on the group as a whole.

Public choice theories of the Constitution reinvigorate *The Federalist*'s concern that factions or interest groups might control the government and lead to the adoption of legislation that impairs the public interest. If those theories accurately describe the contemporary scene, however, they show that neither judicial review nor the structures of government on which *The Federalist* relied have been sufficient to curb the influence of faction.

MARK TUSHNET
(1992)

(SEE ALSO: *Economic Analysis; Mental Illness and the Constitution; Mental Retardation and the Constitution; Political Philosophy of the Constitution.*)

Bibliography

BEARD, CHARLES 1913 *An Economic Interpretation of the Constitution.* New York: Macmillan.

OLSEN, MANCUR 1965 *The Logic of Collective Action.* Cambridge, Mass.: Harvard University Press.

SUSTEIN, CASS 1985 Interest Groups in American Public Law. *Stanford Law Review* 38:29–87.

## INTERGOVERNMENTAL IMMUNITY

Intergovernmental immunities are exemptions of the state and national governments from attempts to interfere with each other's governmental operations. Thus, one government may claim immunity from the other's regulations and taxes. Though immunity claims may invoke specific provisions such as the TENTH AMENDMENT, they reflect deeper assumptions about the institutional structure envisioned by the Constitution as a whole. Immunity problems originate in the tension between the nation's need to acknowledge the supremacy of federal policies while respecting a tradition of indestructible states. Governmental structures are not ends in themselves in constitutional theory; their ultimate status depends on their efficacy in securing what THE FEDERALIST #45 called "the solid happiness of the people." Implying ends, institutions also imply powers. (See NECESSARY AND PROPER CLAUSE.) Grant the supremacy of national powers over state powers, and the erosion of state institutions follows eventually despite talk of indestructible states. Conversely, protection for state institutions will eventually defeat national power in some respects, talk of federal supremacy notwithstanding. On balance, judicial resolutions of this tension have favored national supremacy.

Immunity claims usually occur in the areas of taxation, regulation, and litigation. Most of the latter involve state claims of immunity from suits by private parties in federal court under the ELEVENTH AMENDMENT. The amendment, however, does not extend immunity that would be considered inconsistent with the Constitution's general plan of government, including the principle of national supremacy. The amendment grants no immunity from suits by other states and the national government. It is not a barrier to Supreme Court review of state court decisions involving federal law. Nor does the amendment bar private plaintiffs seeking federal court injunctions to enforce Congress's CIVIL RIGHTS laws or federal constitutional rights. In *Parden v. Terminal Railway* (1964) the Court declined to exclude state-owned railroads from a congressional act authorizing employees' suits for negligence. The Court reasoned that the state had effectively waived immunity by engaging in activity subject to congressional regulation. Though later decisions gave this doctrine of "constructive waiver" a STATES' RIGHTS twist by requiring clear statements of congressional intent, the Court still assumes that

Congress can lift state immunity as necessary for national objectives.

The doctrine that one government cannot tax the instrumentalities of the other is sometimes credited to the OBITER DICTUM in MCCULLOCH V. MARYLAND that power to tax is power to destroy. Chief Justice JOHN MARSHALL made this remark in the course of voiding a state tax on the Second Bank of the United States; he was not seeking to protect the states against Congress. But future Courts transformed Marshall's doctrine of federal immunity into a dual-federalist or states' rights doctrine of reciprocal immunity. In COLLECTOR V. DAY (1871) a Court grown fearful of RECONSTRUCTION voided a CIVIL WAR federal income tax on the salary of a Massachusetts judge, arguing that if immunity was necessary to preserve the federal government, the same held for the states. Laissez-faire Justices later expanded the immunity doctrine to protect both governments. Items held immune to state taxation included the income of lessees of federal oil lands, sales of gasoline to the national government, and royalties from a federal patent. Fewer decisions went against Congress, but the Court did void some federal taxes, including taxes on income from municipal bonds, profits of state oil leases, and motorcycle sales to a municipal police department.

This pattern of decision ended in the late 1930s as the HUGHES COURT began overruling the most important of the earlier decisions, including those conferring tax immunity on the incomes of governmental officials and contractors. Some tax immunity remains, however. On a theory that combines the principle of national supremacy with the argument that states' interests receive more representation in Congress than national interests receive in state legislatures, the modern Court recognizes a narrower tax immunity for the states than for the national government. Dicta identify state property, state revenues, and traditionally essential state activities as immune to federal taxation. These dicta did not prevent a recent decision upholding a federal registration on state police helicopters. As for federal tax immunity, Congress can confer it on federal contractors and others. Where Congress has not done so, the Court recognizes immunity from state taxation only when the tax legally falls on the federal government itself or its closely connected agencies and instrumentalities. This rule offers no protection to a federal government contractor even where, by contract, the economic impact of a state tax is passed on to the government. The Court continues to invalidate state taxes that discriminate against entities doing business with the federal government or that manifest hostility to federal policy.

Although the SUPREMACY CLAUSE protects federal officials and agencies from state attempts to control the performance of their duties, federal personnel are subject to state laws that do not conflict with federal policies. Indeed, under the federal Assimilative Crimes Act, state criminal law applies to persons on federal enclaves where Congress has not provided otherwise. Examples of state regulations held in conflict with federal policies include attempts to regulate liquor sales and milk prices on military bases and to inspect fertilizer distributed in a national soil conservation program. Until 1985 states were immune from direct federal attempts to interfere in the performance of "functions essential to [the states'] separate and independent existence." The Court failed to give a formula for identifying these essential functions, but they included decisions on where to locate a state capital and the hours and wages of certain state employees. (See NATIONAL LEAGUE OF CITIES V. USERY.) The Court permitted federal regulation of such "nonessential" state functions as state liquor, timber, and railroad operations and it declined to apply the *Usery* rationale against federal policies affecting state agencies in the areas of civil rights, environmental regulation, and energy policy. The Court overruled *Usery* in 1985 and all but eliminated direct regulatory immunity for the states. (See GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY.) Massive, though indirect, federal regulatory control of state policy continues through conditional FEDERAL GRANTS-IN-AID to the states. (See GENERAL WELFARE CLAUSE.)

SOTIRIOS A. BARBER
(1986)

Bibliography

POWELL, THOMAS REED 1940 Intergovernmental Tax Immunities. *George Washington Law Review* 8:1213–1220.

TRIBE, LAURENCE H. 1978 *American Constitutional Law*. Pages 131–143. Mineola, N.Y.: Foundation Press.

## INTERGOVERNMENTAL TAX IMMUNITIES

To what extent should the federal government be able to collect taxes from the states? To what extent should the states be able to collect taxes from the federal government? The Supreme Court has struggled with these questions for over 170 years.

In 1819, in MCCULLOCH V. MARYLAND, the Court held that a state tax on the operations of a bank created by the United States was in violation of the SUPREMACY CLAUSE of the Constitution. Speaking for the Court, Chief Justice JOHN MARSHALL asserted that "the power to tax is the power to destroy" and stated "that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into the execution the powers vested in the general government." This same logic

was used in WESTON V. CITY COUNCIL OF CHARLESTON (1829) to hold that a city tax imposed on stocks and bonds generally could not be applied to bonds issued by the federal government and in *Dobbins v. Commissioners of Erie County* (1842) to hold that states could not tax the salaries of federal employees.

In COLLECTOR V. DAY (1871) the Court took a major step and held the federal income tax could not be applied to the salaries of state officials. It said the immunity was reciprocal and that the exemption from taxation of the federal government by the states and the states by the federal government "rests upon necessary implication, and is upheld by the great law of self-preservation."

For over half a century the Court applied the intergovernmental immunity doctrine to permit large numbers of private taxpayers to escape federal and state taxes on the ground that the tax burden would be passed on to the federal or state governments. For example, in *Indian Motorcycle Co. v. United States* (1931) the Court held invalid a tax imposed by the United States on the sale of a motorcycle to a city for use in its police force. The Court said that the state and federal governments were equally exempt from taxes by the other. "This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system." The only exception to this broad doctrine recognized by the Court was that the federal government could impose taxes on state enterprises which departed from usual government functions and engaged in businesses of a private nature, such as running a railroad or selling mineral water.

In the late 1930s, the Court began a process of dismantling the tax immunity doctrine. In GRAVES V. NEW YORK EX REL. O'KEEFE (1939), the Court upheld the imposition of a state income tax on the salary of a federal official, saying, "So much of the burden of a non-discriminatory general tax upon the incomes of employees of a government, state or national, as may be passed on economically to that government through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power." And, in *Alabama v. King & Boozer* (1941) the Court upheld a state sales tax imposed on a government contractor, even though the financial burden of the tax was entirely passed on to the federal government through a cost-plus contract.

Over the past half-century the Court has reduced the tax immunity doctrine to a very narrow scope. Private parties doing business with the federal government or leasing government property, even for completing a government contract, may be subjected to state taxation. In *United States v. New Mexico* (1982) the Court upheld the right of a state to tax fixed fees paid by the United States to private contractors in return for managing government installations, saying that "tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities." The only limit on the states is that they cannot impose taxes that discriminate against the United States. Thus, in *Davis v. Michigan Department of Treasury* (1989), a state was not permitted to tax the pensions received by federal retirees when it exempted state employees from the same tax.

The immunity of the states is even narrower. The Court assumes that the states themselves or their property cannot be directly subjected to federal taxation, but even here there is an exception permitting the application of nondiscriminatory federal taxes directly to some kinds of state enterprises. Recently, in *South Carolina v. Baker* (1988), the Court said the intergovernmental tax immunity doctrine had been "thoroughly repudiated" and held that the federal government could impose its income tax on the income received from state and local bonds. The federal tax was limited in this case to income from bonds issued in bearer form, but the Court said it could apply to all such bonds if Congress so provided.

Under the supremacy clause the federal government has one additional power: it can expand or retract its immunity from state taxation, permitting states to tax what the Court otherwise would forbid or denying the states the right to tax what the Court would otherwise permit.

The intergovernmental tax immunity doctrine now has so little vitality that it should not interfere with any reasonable, nondiscriminatory taxation by either state or federal governments. Yet attempts to use it persist. In 1989 the Supreme Court had cases in which it held that a state could tax an oil company on profits from producing oil on an Indian reservation; that a state could tax BANKRUPTCY liquidation sales by a bankruptcy trustee; and that a tax on pensions of federal retirees was invalid when it exempted state employees from the same tax.

EDWARD L. BARRETT
(1992)

(SEE ALSO: *Federalism, Contemporary Practice of; Federalism, History of; Federalism, Theory of; Federalism and Shared Powers.*)

Bibliography

ROTUNDA, RONALD D. 1986 Intergovernmental Tax Immunity and Tax-Free Municipals After *Garcia. University of Colorado Law Review* 57:849–869.

## INTERLOCUTORY

The term means temporary, not final, provisional. An interlocutory order is one entered by a court before it renders FINAL JUDGMENT—for example, a preliminary INJUNCTION, to preserve conditions during trial.

KENNETH L. KARST
(1986)

## INTERNAL COMMERCE

See: Intrastate Commerce

## INTERNAL IMPROVEMENTS

"Internal Improvements" was the name given to large public works programs in the first half of the nineteenth century. State governments engaged in planning, subsidizing, building, and in some instances owning and operating roads, bridges, canals, and railroads. Most had ambitious programs. None was more successful than New York's Erie Canal. Completed in 1825, it had profound effects on American economic development.

Federal support for internal improvements commenced in 1806 when Congress appropriated money for construction of the Cumberland, or National, Road. The policy was not then a serious constitutional issue, although President THOMAS JEFFERSON, proposing a major program, called for a constitutional amendment to place it beyond cavil. It became a serious constitutional issue after the War of 1812. A federal program was advocated on several grounds: to bind the Union together, to lower the cost of transportation, to effect the "home market" of the American System. Henry Clay and others found constitutional warrant for federal assistance in the powers to establish post roads, to provide for the common defense and GENERAL WELFARE, and to regulate INTERSTATE COMMERCE. In 1817 Congress passed the Bonus Bill to create a permanent fund for internal improvements from the bonus paid by the Bank of the United States for its charter and future dividends on government-owned Bank stock. Surprisingly, President JAMES MADISON, in a return to STRICT CONSTRUCTION principles, vetoed the bill and called for an amendment. His successor, JAMES MONROE, at first took the same position. In 1822, however, he conceded the unlimited power of Congress to appropriate money for improvements of national character, though not to build or operate them. Two years later he approved the General Survey Bill, which offered substantial government assistance. Many projects, the greatest of which was the Chesapeake and Ohio Canal, were launched under federal auspices. The movement was then brought to a virtual halt by President ANDREW JACKSON's veto of the MAYSVILLE ROAD BILL in 1830. He, too, asserted strict construction principles and repeated the call, knowing it to be futile, for a constitutional amendment.

MERRILL D. PETERSON
(1986)

Bibliography

GOODRICH, CARTER 1960 *Government Promotion of American Canals and Railroads, 1800–1890.* New York: Columbia University Press.

HARRISON, JOSEPH HOPSON 1954 The Internal Improvements Issue in the Politics of the Union, 1783–1825. Ph.D., diss., University of Virginia.

## INTERNAL SECURITY ACT
64 Stat. 987 (1950)

The Internal Security Act, or McCarran Act, of 1950 was a massive and complex conglomeration of varied security measures as well as many features of the MUNDT-NIXON BILL and an Emergency Detention Bill, which had been introduced, unsuccessfully, earlier in 1950. Passed over President HARRY S. TRUMAN's veto in September, shortly after the outbreak of hostilities in Korea, the measure went beyond the Truman loyalty program for government employees and attempted to limit the operation of subversive groups in all areas of American life. It also sought to shift the authority for security matters to congressional leadership.

The measure, the most severe since the SEDITION ACT of 1918, was composed of two parts. Title I, known as the Subversive Activities Control Act, required communist organizations to register with the attorney general and furnish complete membership lists and financial statements. Although membership and office holding in a communist organization was not, by the act, a crime, the measure did make it illegal knowingly to conspire to perform any act that would "substantially contribute" to the establishment of a totalitarian dictatorship in the United States. It also forbade employment of communists in defense plants and granting them passports. Finally it established a bipartisan SUBVERSIVE ACTIVITIES CONTROL BOARD to assist the attorney general in exposing subversive organizations. In ALBERTSON V. SUBVERSIVE ACTIVITIES CONTROL BOARD (1965), the Court held the compulsory registration provisions unconstitutional. (See MARCHETTI V. UNITED STATES, 1968.)

Title II provided that when the President declared an internal security emergency, the attorney general was to apprehend persons who were likely to engage in, or conspire with others to engage in, acts of espionage or sabotage and intern them "in such places of detention as may be prescribing by the Attorney General." Congress sub-

sequently authorized funds for special camps for such purposes. (See PREVENTIVE DETENTION.) Other provisions denied entrance to the country to ALIENS who were members of communist organizations or who "advocate[d] the economic, international, and governmental doctrines of any other form of totalitarianism." Naturalized citizens joining communist organizations within five years of acquiring CITIZENSHIP were liable to have it revoked.

The courts subsequently held invalid the passport, registration, and employment sections of the act. Section 103, establishing detention centers for suspected subversives, was repealed in September 1971.

PAUL L. MURPHY
(1986)

Bibliography

HARPER, ALAN 1969 *The Politics of Loyalty: The White House and the Communist Issue, 1946–1952.* Westport, Conn.: Greenwood Press.

## INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT
### 91 Stat. 1625 (1977)

This act grants the President limited economic powers "to deal with any unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States" which arises "in whole or substantial part outside the United States" and which is declared by the President to constitute "a national emergency." The primary purpose of the act, however, was to restrict the Trading With the Enemy Act of 1917, under which the President had come to enjoy large discretionary power during times of declared emergency.

The 1977 act limits the authority created by declaration of a national emergency to an instant threat only and removes the President's authority to exercise during peacetime certain economic powers available in time of war. It also obligates the President to "consult" with Congress, if possible, prior to the declaration of a national emergency, to report on the circumstances said to necessitate the extraordinary measures, and to report to Congress every six months on the exercise of powers under the act.

Although the act permits the termination of a declared national emergency by concurrent resolution of Congress, the decision in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983), declaring the use of the LEGISLATIVE VETO unconstitutional, places this restraint in doubt. In sum, however much Congress may have intended to restrict presidential EMERGENCY POWERS over international economic transactions, the actual extent of the change is uncertain.

BURNS H. WESTON
(1986)

(SEE ALSO: *Dames & Moore v. Regan; Foreign Affairs; War Powers; War Powers Acts.*)

Bibliography

HENKIN, LOUIS 1972 *Foreign Affairs and the Constitution.* Pages 118–123. Mineola, N.Y.: Foundation Press.

NOTE 1978 Presidential Emergency Powers Related to International Economic Transactions: Congressional Recognition of Customary Authority. *Vanderbilt Journal of Transnational Law*, 11:515–534.

## INTERNATIONAL HUMAN RIGHTS

The Constitution includes, notably and famously, guarantees for individual rights. Indeed, other elements of U.S. "constitutionalism"—POPULAR SOVEREIGNTY, the RULE OF LAW, limited government of ENUMERATED POWERS, SEPARATION OF POWERS, and FEDERALISM—might also be seen as designed to safeguard individual rights and liberties. Americans have enjoyed the protections of the Constitution for more than two hundred years, and their constitutional rights have flourished particularly since WORLD WAR II.

The second half of the twentieth century has seen the birth and growth of "international human rights" as a universal ideology with an agreed catalog of rights, an ideology that the United States has supported and joined. The international human rights movement has engendered an international law of human rights and international institutions to induce compliance with that law.

International human rights relate to the Constitution in different ways. In substantial measure international human rights were inspired by the Constitution and by American life under the Constitution. To the extent that the international law of human rights is provided for in TREATIES to which the United States is party, it is law for and in the United States. Like other customary international law, customary international law of human rights is law of the land in the United States. In several additional contexts, the international law of human rights is given effect in courts in the United States, supplementing safeguards for individual rights under the Constitution, treaties, and laws. Although U.S. constitutional rights and international human rights are intimately related, they differ in their theory and sources, in their scope and content, in the means of their implementation, and in their contribution to individual well-being.

The Constitution, established at the end of the eigh-

teenth century, reflects the ideology articulated in the American DECLARATION OF INDEPENDENCE and in early state constitutions, an ideology rooted in inherent, individual, NATURAL RIGHTS. Natural rights of individuals were translated into the "sovereignty of the people," government with the consent of the governed, and rights retained by the individual even against government. The commitment to rights was reflected in several guarantees in the original Constitution, for example, the right to TRIAL BY JURY and the privilege of HABEAS CORPUS. It was confirmed and elaborated by constitutional amendment in the BILL OF RIGHTS and in subsequent amendments, notably the THIRTEENTH, FOURTEENTH, FIFTEENTH, NINETEENTH, and TWENTY-FIFTH. Thanks to JUDICIAL REVIEW, U.S. constitutional rights have been elaborated by the Supreme Court in a rich constitutional jurisprudence and implemented by acts of Congress. International human rights were born during World War II and confirmed at Nuremberg and in the UNITED NATIONS CHARTER. International human rights have been developed in subsequent international instruments, notably in the Universal Declaration of Human Rights, and in covenants and conventions that derive from it.

Indisputably, the international human rights movement, and international human rights law, drew heavily on the Constitution as it had developed during 150 years. But the Constitution was not the only source of, or influence on, international human rights. And differences in their birth-dates, their political contexts, and their biographies have produced two related but different systems of law and institutions.

Constitutional rights and international human rights differ in their sources and in their theoretical foundations. The Constitution derives from English political and legal tradition back to MAGNA CARTA, and from the English COMMON LAW as modified by occasional acts of Parliament. The theory of the Constitution reflects the writings of JOHN LOCKE and of the European Enlightenment, restated in the bills of rights of early state constitutions and succinctly and eloquently articulated in the American Declaration of Independence.

The international human rights ideology is the product of the international political system during and after World War II. Its principal instruments—the Universal Declaration of Human Rights and the two International Covenants—were produced by international political bodies in the post-war world, were eclectic in their sources, were designed for universal application, and strove for universal acceptance. By then, "natural law" and "natural rights" had long been discredited ("anarchical fallacies," Jeremy Bentham characterized them), and had suffered the onslaughts of "positivism"; the liberal state had been threatened by varieties of socialism and everywhere was transmuting, in some measure, into the WELFARE STATE. In influential countries, republican elitist government was moving steadily toward representative parliamentary democracy based on popular sovereignty and universal suffrage. The Universal Declaration of Human Rights (unlike the American Declaration of Independence) contains no reference to "the Creator" and no hint of natural rights (which would have been unacceptable to the U.S.S.R. with its atheist, socialist, positivist ideology). Indeed, the Universal Declaration of Human Rights eschews theory. Instead, it links human rights to one fundamental value, "human dignity," and justifies human rights by their aim and purpose: recognition of human rights is declared to be "the foundation of freedom, justice and peace in the world."

The Constitution guarantees the rights explicitly articulated in the Constitution, in the Bill of Rights, and in later amendments. No rights are protected unless rooted in constitutional text (as interpreted). Although the NINTH AMENDMENT declares that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," no rights have been recognized and held to be specifically protected by implication of the Ninth Amendment (or of the TENTH AMENDMENT, as rights reserved to "the people"). But the U.S. Supreme Court has interpreted the different provisions broadly, giving some of them (notably the "liberty" and the "DUE PROCESS" required by the Fifth and Fourteenth Amendments) meaning probably not anticipated by their authors.

International human rights also claim their principal foundation in various texts, but some international human rights are based in customary international law. Though its normative character is still debated, the Universal Declaration of Human Rights is recognized as an authoritative catalog of human rights, much of which has become customary law. And other rights not explicitly mentioned in the text—such as freedom from genocide, extralegal killing, systematic RACIAL DISCRIMINATION, prolonged arbitrary detention—when practiced as state policy are protected by customary international law even if not set forth in any authoritative text to which the violating state has adhered.

For the rest, international human rights are protected against state violation if the state has undertaken to honor them in a binding covenant or convention. Unlike the Constitution, which protects rights only against STATE ACTION (or, exceptionally, against private imposition of SLAVERY), the international obligation "to respect and ensure" rights implies an obligation on the state to protect the enumerated rights against private action as well.

In sum, U.S. constitutional rights at the end of the twentieth century, though rooted in a few authoritative provisions in the Constitution, have to be distilled from

hundreds of volumes of interpretation by the Supreme Court. In contrast, except for a few principles recognized as binding by customary law, the international law of human rights is rooted largely in international texts hammered out by governments. The texts are interpreted occasionally by the monitoring committees created by various treaties, but that jurisprudence is small and its authority disputed. Only the commission and court created by the European Convention on Human Rights (replaced in 1998 by a new, enlarged court), and, to an extent also, the parallel bodies established under the Inter American convention, have contributed significant interpretive jurisprudence.

The Constitution, it was said, protects not the rights of man but the rights of gentlemen. These were rights that the former colonists had enjoyed under British law, such as freedom from UNREASONABLE SEARCH and seizure and the right to trial by jury, and protections for life, liberty, and PROPERTY against deprivation without due process of law. The Bill of Rights also guaranteed rights its authors valued because they had been denied under British rule: hence the right to bear arms provided by the SECOND AMENDMENT and the right not to have troops quartered in private homes in time of peace provided by the THIRD AMENDMENT. But the Bill of Rights was not intended to be a complete declaration of rights, leaving many safeguards to be provided by state constitutions or by state or federal law. On the other hand, international human rights could not incorporate or rely on any existing body of law or on any domestic legal system (such as the English common law); the Universal Declaration, therefore, is a more explicit, more complete, catalog of rights.

International human rights include rights that in the United States were not explicitly guaranteed by the Constitution but which were later inferred by interpretation—for example, the FREEDOM OF ASSOCIATION, the presumption of innocence, and the RIGHT TO TRAVEL. Similar (or related) rights expressed in different terms in the Constitution or in international instruments may imply different protections: the Universal Declaration protects against torture and inhuman or degrading treatment or punishment; and explicitly, at least, the Constitution protects only against torture, and only if it is used to compel testimony or as CRUEL AND UNUSUAL PUNISHMENT for crime. International human rights include a right to a nationality: the Constitution has been held to protect only U.S. CITIZENSHIP, and only against involuntary termination. In an ambiguous provision, the Universal Declaration recognizes a right to "seek and to enjoy asylum from persecution"—a provision that has no American constitutional parallel. Both the Constitution and the Universal Declaration guarantee RELIGIOUS LIBERTY, but International Human Rights norms do not accord protection against an ESTABLISHMENT OF RELIGION.

The Universal Declaration and the International Covenant on Civil and Political Rights provide for universal suffrage. The Constitution protects VOTING RIGHTS against INVIDIOUS DISCRIMINATION in voting on grounds of race, gender, or age; not until the 1960s was the Constitution interpreted to safeguard the right to vote and provide, in effect, for universal suffrage.

The Universal Declaration and the covenants depart radically from U.S. constitutional jurisprudence in that they guarantee what have come to be described as "economic and social rights"—WELFARE RIGHTS such as social security, the right to work and leisure, a right to education, and a right to an adequate standard of living. In the United States some welfare rights are provided by law but they are not required by the Constitution, and inequalities in welfare assistance have been held not to deny the guarantee of EQUAL PROTECTION OF THE LAWS.

The Constitution has been held not to prohibit CAPITAL PUNISHMENT, and "life" is protected only to the extent implied in "due process of law," procedural and substantive. International human rights instruments have imposed some limitations on capital punishment, and international conventions requiring complete abolition have continued to gain adherents. The Constitution guarantees the right to an ABORTION (subject to some limitations); international human rights laws tend to be silent on the subject though the American Convention on Human Rights requires parties to protect the right to life, "in general, from the moment of conception." The International Covenant on Civil and Political Rights requires states to prohibit war propaganda and HATE SPEECH in circumstances where such expression might enjoy constitutional protection in the United States.

The Constitution protects rights against violation but does not provide, or explicitly require, remedies for violations. The courts exercise JUDICIAL REVIEW and invalidate state or federal laws that violate constitutional rights, but that protects only against future violation and provides no remedy for the past. Congress is authorized, but not required, to legislate remedies for violations of rights. In fact, Congress has enacted CIVIL RIGHTS laws to afford remedies for violation of rights, and in some cases the courts have created remedies on their own authority. In contrast, the International Covenant on Civil and Political Rights explicitly calls on participating states to adopt laws and take all necessary steps to give effect to the rights recognized in the covenant. "Each State Party . . . undertakes: To ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy . . . [and] [t]o ensure that the competent authorities shall enforce such remedies. . . ."

Indirectly, the Constitution has provided support for international human rights, as applied both in the United States and abroad. The Constitution declares treaties to

be the supreme law of the land. The United States has adhered to several human rights treaties, notably—as of 1999—the International Covenant on Civil and Political Rights, the Convention on Racial Discrimination, the Convention against Genocide, and the Convention against Torture. Ratifications by the United States have been subject to reservations, understandings, and declarations, but, subject to such qualification, international human rights obligations are law in the United States. The international customary law of human rights is also law in the United States.

The Constitution has contributed to international human rights by the powers it has conferred upon Congress, including, for example, power to impose sanctions against countries that are guilty of gross violations of human rights and the power to confer JURISDICTION on U.S. courts to provide remedies, in some circumstances, for violations of human rights in foreign countries.

The U.S. constitutional system and international human rights continue to influence each other. U.S. constitutional jurisprudence is invoked by international bodies, in particular by the European and the Inter American human rights courts. U.S. courts are only beginning to look at the growing jurisprudence in the judgments of foreign constitutional courts or of international human rights courts. But the heavy emphasis on equality and nondiscrimination in international human rights instruments has doubtless influenced U.S. interpretations of constitutional norms of flexible outline and contributed to expanding the scope of equal protection of the laws, for example, to end SEGREGATION.

Neither U.S. constitutional jurisprudence nor international human rights promises radical change in the years ahead. The Constitution is not likely to be amended, or radically reinterpreted, in respects that are of acute international interest; for example, the right to an abortion. International human rights are likely to maintain their movement toward the abolition of capital punishment, but there is no sign of any move toward abolition in U.S. constitutional jurisprudence. The differences between U.S. constitutional jurisprudence and international human rights in respect of FREEDOM OF SPEECH (including hate speech) seem likely to persist. Economic and social, welfare-state entitlements in the United States will not acquire constitutional character, though such benefits are likely to continue to be provided, subject to political forces and financial restraints.

The Constitution retains an older vision of human rights in the liberal state, rights of liberty and property; international human rights are contemporary and multicultural, marrying rights in the liberal state to those of the welfare state. Where the Constitution maintains a stronger commitment to freedom, including freedom of expression, international human rights are more sympathetic to competing claims of public interest—outlawing war propaganda and hate speech. Yet, ideally, the Constitution and international human rights support each other in pursuit of a clearer vision of human dignity.

LOUIS HENKIN
(2000)

Bibliography

HENKIN, LOUIS 1958 *Arms Control and Inspection in American Law.* New York: Columbia University Press.

——— 1978 *The Rights of Man Today.* Boulder, Colo.: Westview Press.

——— 1979 *How Nations Behave: Law and Foreign Policy,* 2nd ed. New York: Published for the Council on Foreign Relations by Columbia University Press.

——— 1990 *Constitutionalism, Democracy, and Foreign Affairs.* New York: Columbia University Press.

——— 1995 *International Law: Politics and Values.* Norwell, Mass.: Kluwer Academic Publishers.

——— 1996 *The Age of Rights.* New York: Columbia University Press.

——— 1996 *Foreign Affairs and the Constitution,* 2nd ed. New York: Oxford University Press.

HENKIN, LOUIS and HARGROVE, JOHN LAWRENCE, eds. 1994 *Human Rights: An Agenda for the Next Century.* Washington, D.C.: American Society of International Law.

## INTERNATIONAL LAW AND FEDERAL–STATE RELATIONS

One of the principal purposes of the Constitution was to create a national government with power over FOREIGN AFFAIRS. As JAMES MADISON wrote in FEDERALIST No. 42, "If we are to be one nation in any respect, it clearly ought to be in respect to other nations." Thus, the Constitution gives the President the power to make TREATIES with the approval of two-thirds of the U.S. SENATE and explicitly denies that power to the states. It gives Congress the power to regulate FOREIGN COMMERCE and to define and punish offenses against the law of nations. Moreover, the SUPREMACY CLAUSE makes not just acts of Congress but treaties "the Supreme Law of the Land."

The power of the federal government to PREEMPT state law by entering a treaty is broader than its power under the COMMERCE CLAUSE. In MISSOURI V. HOLLAND (1920), the Supreme Court upheld an act of Congress implementing a treaty with Canada on the hunting of migratory birds despite the fact that similar LEGISLATION had twice been struck down for exceeding Congress's commerce power. Concerned that the federal government might use treaties on INTERNATIONAL HUMAN RIGHTS to dismantle SEGREGATION, proponents of STATES' RIGHTS led by Senator John Bricker of Ohio tried unsuccessfully in the 1950s to reverse *Holland* with a constitutional amendment providing

that "[a] treaty shall become effective in the United States only through legislation which would be valid in the absence of a treaty."

EXECUTIVE AGREEMENTS are not mentioned in the supremacy clause, but the Court ruled that the President may preempt state law by entering such agreements in UNITED STATES V. BELMONT (1937) and UNITED STATES V. PINK (1942), both of which upheld the Litvinov agreement recognizing the Soviet Union and disposing of claims between the two countries.

Until 1938, customary international law was applied by state and federal courts alike as part of the general COMMON LAW without regard to its state or federal character. The Court declared in *The Paquete Habana* (1900): "International law is part of our law, and must be ascertained and administered by the courts of justice . . . as often as questions of right depending upon it are duly presented for their determination." The Court's pronouncement in ERIE RAILROAD V. TOMPKINS (1938) that "[t]here is no federal general common law" cast some doubt on the status of customary international law. Professor Philip Jessup soon argued, however, that *Erie* should not apply to international law, which should continue to be viewed as FEDERAL COMMON LAW. In *Banco Nacional de Cuba v. Sabbatino* (1964) the Court endorsed Jessup's position, firmly establishing customary international law's status as federal common law. Because customary international law is federal law, it preempts inconsistent state law just as a treaty or statute would.

Even in the absence of a treaty, executive agreement, or rule of customary international law, federal courts have found state laws to be preempted under the DORMANT COMMERCE CLAUSE or where they intrude on the federal government's foreign relations power. In *Japan Line v. County of Los Angeles* (1979), the Court struck down a California tax on foreign-owned containers under the commerce clause because it prevented the federal government from "speaking with one voice" in international trade; and in *Zschernig v. Miller* (1968) the Court invalidated an Oregon statute denying inheritance to residents of communist countries as an unconstitutional "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." Moves by state and local governments in the 1980s to oppose apartheid by divesting from South Africa were sometimes upheld, but a Massachusetts law that imposed sanctions against companies that did business in Burma was struck down by a DISTRICT COURT in 1998 as contrary to *Zschernig*.

While the Constitution and Supreme Court decisions give the federal government nearly complete power over international law and foreign relations, the federal government has tended to exercise that power in ways that are quite deferential—indeed, too deferential—to state SOVEREIGNTY. In order to avoid imposing obligations on the states (and head off the proposed Bricker Amendment), the administration of President DWIGHT D. EISENHOWER promised not to accede to international human rights conventions. When the United States finally did ratify treaties like the Genocide Convention, the Torture Convention, and the International Covenant on Civil and Political Rights, it declared them not to be "self-executing," so that they would grant no legally enforceable rights in the absence of implementing legislation passed by Congress. When implementing the General Agreement on Tariffs and Trade (GATT) and the NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA), Congress provided that only the federal government, and not private parties, could bring suit challenging state laws as inconsistent with GATT or NAFTA. And in 1998, the executive branch sided with Virginia in *Breard v. Greene*, arguing successfully to the Court that Virginia's failure to notify a criminal defendant of his right under the Vienna Convention on Consular Relations to speak with a consular official should not constitute grounds for staying his execution.

ALEXANDER HAMILTON observed in *Federalist* No. 80 that "[t]he Union will undoubtedly be answerable to foreign powers for the conduct of its members." The unfortunate practice of the federal government, particularly in the 1980s and 1990s, has been to give the states a license to violate the international obligations of the United States, violations for which the federal government bears responsibility under international law.

WILLIAM S. DODGE
(2000)

Bibliography

BILDER, RICHARD B. 1989 The Role of States and Cities in Foreign Affairs. *American Journal of International Law* 83: 821–831.

BRADLEY, CURTIS A. and GOLDSMITH, JACK L. 1997 Customary International Law as Federal Common Law: A Critique of the Modern Position. *Harvard Law Review* 110:815–876.

BRILMAYER, LEA 1994 Federalism, State Authority, and the Preemptive Power of International Law. *Supreme Court Review* 1994:295–243.

HENKIN, LOUIS 1995 U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker. *American Journal of International Law* 89:341–351.

——— 1996 *Foreign Affairs and the United States Constitution*, 2nd ed. Oxford, England: Clarendon Press.

JESSUP, PHILIP 1939 The Doctrine of *Erie Railroad v. Tompkins* Applied to International Law. *American Journal of International Law* 33:740–743.

KOH, HAROLD HONGJU 1998 Is International Law Really State Law? *Harvard Law Review* 111:1824–1861.

## *INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS v. LEE*
505 U.S. 672 (1992)

The Port Authority of New York and New Jersey, which owns and operates three major airports in the New York City area, adopted a regulation forbidding within the airport terminals the solicitation of money and the sale or distribution of any merchandise, "including . . . brochures, pamphlets, books or any other printed or written material." In a bewildering array of opinions, the Supreme Court upheld the ban on solicitation, but held that the ban on the sale or distribution of literature violates the FIRST AMENDMENT.

Chief Justice WILLIAM H. REHNQUIST delivered the opinion of the Court on the issue of solicitation. The Court explained that airport terminals are not PUBLIC FORUMS because they have not been used "time out of mind" for expressive purposes and have not "been intentionally opened by their operators to such activity." This being so, the Court held that the prohibition on solicitation "need only satisfy a requirement of reasonableness," a standard the Court held was easily met because of "the disruptive effect" that solicitation might have on "the normal flow of traffic" within the terminals.

In an opinion by Justice ANTHONY M. KENNEDY, four Justices disagreed with the Court's conclusion that the terminals were not public forums, arguing that "in these days an airport is one of the few government-owned spaces where people have extended contact with other members of the public" and that "the recent history of airports" demonstrates that some "expressive activity is quite compatible with the uses of major airports."

On the issue of sale or distribution of literature, Justice SANDRA DAY O'CONNOR concluded that, even though airport terminals are not public forums, the regulation was "unreasonable" because "leafleting does not necessarily entail the same kinds of problems presented by face-to-face solicitation." She therefore joined the four Justices who had argued that airport terminals are public forums to form a 5–4 majority to invalidate this part of the regulation.

GEOFFREY R. STONE
(2000)

# INTERNET AND FREEDOM OF SPEECH

The Internet is a worldwide network of networks that allows individuals to communicate in ways previously unimaginable. The two most popular forms of communication on the Internet are electronic mail and the World Wide Web. Through electronic mail, an individual can send a message—traditionally text but increasingly multimedia—to another individual, group of individuals, or to public forums. Through the World Wide Web, an individual can browse millions of pages of multimedia content that individuals, businesses, and other institutions have made available for public access. Individuals can also publish their own thoughts, complete orders and forms, and engage in commercial transactions.

The physical technology of the Internet comprises communication lines (imagine them as telephone lines), routers (specially designated computers that send packets of information to their proper addresses), and computers (which send, receive, and process the information transmitted). No single person or entity owns all this equipment. And no single national or international body governs the Internet. To understand this decentralized network, it is best to view the Internet as physical hardware, owned by myriad persons, both public and private, who all speak the same language of information exchange. That language, or protocol, is called TCP/IP (Transmission Control Protocol/Internet Protocol).

As individuals harness the Internet to expand their ability to speak and listen, they sometimes do so in harmful ways. Examples include anonymous defamation, e-mail death threats, and PORNOGRAPHY accessible to children. When the state responds, it confronts the FREEDOM OF SPEECH guarantee of the FIRST AMENDMENT. But the scope of constitutionally protected freedom of expression differs among various communication technologies. As Justice ROBERT H. JACKSON wrote in KOVACS V. COOPER (1949), "[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself."

The First Amendment has been most protective of the printing press; it has been least protective of television and radio BROADCASTING on the grounds of spectrum scarcity and intrusiveness. In RED LION BROADCASTING CO. V. FCC (1969), the Supreme Court upheld the Federal Communication Commission's FAIRNESS DOCTRINE, which required a broadcast licensee to grant a right of reply to any individual or group that was personally attacked, and to any political candidate editorialized against. Although this requirement would not be tolerated in newsprint, as would be made clear in MIAMI HERALD PUBLISHING CO. V. TORNILLO (1974), it was accepted in broadcasting. The principal justification was that broadcasting employs the electromagnetic spectrum, which is a scarce resource, subject to easy interference by competing users. The use of this spectrum must therefore be licensed by the state and managed to ensure that the public receive "suitable access to social, political, esthetic, moral, and other ideas and experiences."

In addition to scarcity, the Court has emphasized the intrusiveness and pervasiveness of broadcasting. For example, in FEDERAL COMMUNICATIONS COMMISSION V. PACIFICA FOUNDATION (1978), the Court upheld regulations that channeled profanity on the radio to those hours when children were not likely to listen. According to the Court, the broadcast media had a "uniquely pervasive presence" in our lives, in which airwaves confronted us not only in public but also in the privacy of the home. Further, such broadcasting was uniquely accessible to children. These characteristics required tolerating more regulation.

Thus, traditional print and broadcasting mark the two extremes on an axis of First Amendment protection. The central question for governing any new communication technology has been its placement on that axis. Recently, the Court has struggled with the proper positioning of telephone communications in the context of DIAL-A-PORN, as well as cable systems in the context of "MUST CARRY" LAWS (which force cable operators to carry certain speakers). The Internet's place on that axis was addressed for the first time in *American Civil Liberties Union v. Reno* (1997).

As part of the Telecommunications Act of 1996, Congress enacted the COMMUNICATIONS DECENCY ACT. This act criminalized the knowing transmission of "obscene or indecent" messages to any minor through a telecommunications device. It also prohibited the knowing sending or displaying to a minor, through an interactive computer service, of any message "patently offensive as measured by contemporary community standards."

The Court rejected the broadcasting analogy. First, the spectrum scarcity rationale simply did not apply to the Internet, which "provides relatively unlimited, low-cost capacity for communication of all kinds." Second, information on the Internet was not so "invasive" as broadcast information. In contrast to broadcast profanity, which might shock an unexpecting listener changing radio stations, indecent content on the Internet does not generally arrive unexpectedly on one's computer screen. Instead, it must be more actively sought out. Finally, the Internet lacked the history of extensive government regulation that broadcasting had, and the Court was uninterested in starting one now. Having rejected the broadcasting analogy, the Court applied the rigorous standard for regulating the content of traditional print. Under this STRICT SCRUTINY, the indecency provisions were struck down as unconstitutional.

JERRY KANG
(2000)

Bibliography

THORNE, JOHN; HUBER, PETER W.; and KELLOGG, MICHAEL K. 1995 *Federal Broadband Law.* Boston: Little, Brown.

# INTERPOSITION

State governments have occasionally declared that acts of Congress are unconstitutional and have sought to "interpose" their authority between their citizens and the national government. This interposition has taken several forms, from refusals to cooperate with federal administration to the purported NULLIFICATION of federal acts, SECESSION, and even armed rebellion. JAMES MADISON and THOMAS JEFFERSON lent their prestige to the general notion of interposition when they wrote, respectively, the VIRGINIA AND KENTUCKY RESOLUTIONS in opposition to the ALIEN AND SEDITION ACTS of 1798. New England Federalists claimed powers of interposition in opposition to trade embargoes and the federal use of state militias during the War of 1812. Acting on the state sovereignty theory of JOHN C. CALHOUN in 1832, South Carolina declared two tariff acts "null, void, and no law." Antislavery legislatures enacted PERSONAL LIBERTY LAWS to obstruct federal fugitive slave laws. Long after the CIVIL WAR, southern legislatures attempted "massive resistance" to school DESEGREGATION. And in 1970 Massachusetts sought to prohibit the conscription of its citizens for the VIETNAM WAR.

Although these and other attempts express no single constitutional philosophy, interposition is usually associated with the theory that the sole basis of the Union is the written Constitution, not a common culture or other integrative forces; that the people who created the Constitution were members of separate and still sovereign states, not a national community; and that the Constitution is a mere contract among the states for establishing a general government with but few, well-defined objectives. From these premises it was supposed to follow that individual states could interpose to protect their reserved powers. To Calhoun and his followers in the 1830s interposition included nullifying federal laws and, in extreme cases, secession. The nullificationists cited the Virginia and Kentucky Resolutions and presented their position as consistent with the Constitution. Madison, then in his eighties, bitterly opposed and sought to disclaim paternity of any nullificationist theory. He insisted that his original version of interposition sanctioned no more than nonbinding state expression of constitutional opinion as steps toward arousing the public or amending the Constitution. This kind of interposition was fully consistent with national supremacy, the divisibility of sovereignty between nation and states, and a perpetual union. The nullificationists, said Madison, were asserting a RIGHT OF REVOLUTION, not a constitutional right.

Scholars point out that an extended constitutional debate would hardly have been necessary in the 1790s if all that Madison had then contemplated was a state's right to express and invite other states to express nonbinding opin-

ions. But, Madison's candor aside, his final version of interposition need not have been toothless. The history of interposition shows that the states' role in the AMENDING PROCESS gives even the nonbinding opinions of a small number of states a special potential for awakening public interest in constitutional questions and undermining the perceived legitimacy of national policy. Practiced with sufficient regularity by enough states, the tamest kind of interposition might have had a strong influence on the pace and direction of constitutional change.

SOTIRIOS A. BARBER
(1986)

(SEE ALSO: *Theories of the Union.*)

Bibliography

CORWIN, EDWARD S. 1912 National Power and State Interposition. *Michigan Law Review* 10:535–551.

KILPATRICK, JAMES JACKSON 1957 *The Sovereign States: Notes of a Citizen of Virginia.* Chicago: Henry Regnery Co.

## INTERPRETIVISM

The rationale that JOHN MARSHALL provided for constitutional review in MARBURY V. MADISON (1803) declared that the Constitution is law and that the courts as courts of law are obliged to apply its dictates, even when the consequence is invalidation of a duly enacted statute. JUDICIAL REVIEW has, of course, evolved into a major pillar of the American governmental system, but exercise of the power has never ceased to arouse controversy. Marshall used several examples of clear violations of explicit constitutional language to bolster the case for judicial review, but such easy cases seldom get to court. In cases that typically do get to court, the constitutional language leaves room for doubt and debate, and the consequent clash between democratic decision making and judicial choice has been a focal point of an ongoing national concern about judicial review.

The contemporary phase of the national soul-searching about judicial review can be traced to a period of JUDICIAL ACTIVISM that began with the Supreme Court's 1954 decision in BROWN V. BOARD OF EDUCATION, holding that racial SEGREGATION in public schools is a violation of the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT. Starting with *Brown*, the Supreme Court, under the leadership of EARL WARREN, tackled a broad range of controversial social issues in the name of the Constitution. Much legislation was struck down, and Warren himself and the WARREN COURT became familiar targets in political debate in 1950s and 1960s. Despite the controversy, the Court did not really approach center stage of the nation's politics until 1973, when, under the leadership of WARREN E. BURGER, it held in ROE V. WADE that a woman's interest in decisions about ABORTION was constitutionally protected from most state criminal laws and many forms of state regulation. *Brown* had led the way to a rough social consensus in opposition to racial segregation, but *Roe*'s resolution of the abortion issue proved much less prescient. Abortion became the most divisive public issue in the United States in the late twentieth century, and the Supreme Court found itself the object of a great deal of attention in the ensuing political controversy.

Before *Roe*, opponents of the Court's activism had not found much common theoretical ground for their concern. *Roe*, like *Brown*, was decided under the Fourteenth Amendment, but the abortion issue, unlike the racial segregation issue in *Brown*, was rather remote from the problems that had originally inspired the amendment. This fact helped stimulate an academic literature questioning the Court's activism on the ground of its disregard of the ORIGINAL INTENT behind constitutional provisions. These critics urged that constitutional language and original intentions were the preeminent sources on which courts were permitted to draw for guidance in CONSTITUTIONAL INTERPRETATION. This general approach was dubbed "interpretivism," and the neologism stuck, as did the even uglier NONINTERPRETIVISM to mean an insistence that the courts could legitimately be guided in constitutional decisions by values of the culture not fairly traceable to constitutional language or to original intentions.

The dispute between interpretivists and noninterpretivists found its way into political discourse, especially during the presidency of RONALD REAGAN, when Attorney General Edwin Meese railed against judicial activism and called for a return to a "jurisprudence of original intention." The dispute achieved an unusual degree of public visibility in 1987 when President Reagan nominated Robert Bork to succeed LEWIS F. POWELL for a seat on the Supreme Court. Powell had been a swing vote on a Court closely divided on a variety of issues, and the identity of his successor drew unusual attention from various interested groups. Bork had aligned himself with the interpretivist position, first in academic writings and later in speeches he gave while serving as a judge on the United States Court of Appeals for the District of Columbia Circuit. He viewed noninterpretivism as rampant among judges and scholars and as an illegitimate intrusion by the courts into both LEGISLATIVE POWER and EXECUTIVE PREROGATIVE. On that ground, Bork had expressed doubt about such decisions as GRISWOLD V. CONNECTICUT (1965), protecting access to BIRTH CONTROL devices against state prohibition. This and other positions on constitutional law that Bork viewed as matters of interpretivist principle became points of contention in the televised hearings on his

nomination and surely contributed to his defeat in the Senate.

In addition to being ugly, the terms "interpretivism" and "noninterpretivism" were never terribly apt, for both sides purported to "interpret" the constitution. Gradually the synonymous and more descriptive (though perhaps not much less ugly) terms ORIGINALISM and "nonoriginalism" gained currency in the 1980s. Terminology aside, the distinction between interpretivism and noninterpretivism proved elusive under close examination. The most extreme form of interpretivism insisted that constitutional questions must be referred to an almost mechanical process of application of constitutional language and original intentions. In this strong form, interpretivism would surely defang the activist tiger, but commentators quickly exposed weaknesses in any pretense of interpretivism to answer constitutional questions by resorting to constitutional language and intention alone. Many of the criticisms suggested difficulties in softer versions of interpretivism as well.

Perhaps the most obvious problem is with the inadequacy of the historical record for so many key constitutional provisions. Lawyers and judges are not trained in historical research, and even if they were, they would find that history itself requires interpretation that necessarily draws on the cultural framework, and hence the values, of the inquirer. But those interpretive difficulties are substantially compounded by the sparseness of the historical record in the case of the original Constitution and many of the amendments. Reports of the debates in the state conventions called to ratify the original Constitution are particularly sketchy. In some cases, the official reports are virtually nonexistent, and newspaper or other informal reports that have survived are suspect or even demonstrably inaccurate.

This historical problem plays on another—the conceptual difficulty of combining intentions of the individual actors in enactment of constitutional provisions into an authoratative corporate intention. The Confederation Congress, the CONSTITUTIONAL CONVENTION OF 1787, and the several state ratifying conventions all played important roles in the original Constitution. But there is no consensus about the right way to sum the individual states of mind of the participants for any one body, let alone for all the relevant bodies combined. In the case of the original Constitution, for instance, we usually recur to the intentions of the Framers at the Constitutional Convention, who did not have a formal role in the adoption of the document, and ignore the intentions of the delegates to the state ratifying conventions, who did. This is done without any particular theoretical justification. Just suggestive of the many questions that any thoroughgoing response to the summing problem would have to address are whether the mental frameworks of persons who voted against the Constitution or some provision of it are to be counted, whether views of sponsors of language count more than views of others with equal votes, and whether ratifying conventions after the required nine initial ratifications matter.

In practice, of course, we do rely comfortably on explanations by participants expressed contemporaneously with the enactment process. The dominant source in the case of the original Constitution is THE FEDERALIST. The essays of *The Federalist* are attractive for a variety of reasons, but most especially because of JAMES MADISON's authorship of so many of them and because they represent an intellectual tour de force that provides a compelling rationale for the Constitution. But those are hardly answers to the historical difficulty or to the summing problem. Indeed, *The Federalist* was produced after the Convention and as advocacy, rather than as a faithful reflection of the contemporaneous intentions of the Constitution's draftsmen. As such, *The Federalist* may well have been influential for members of the ratifying conventions in ways it could not have been for members of the Constitutional Convention. Ironically, *The Federalist* may thus provide evidence of intention—albeit strictly circumstantial evidence—for a group that is largely ignored in the literature about original intentions, while not providing much evidence at all for the group with which, because of Madison's central role at the Convention, they are more commonly associated.

It is interesting that the summing and historical problems have caused so little anguish. We have not seemed disabled by the lack of a summing algorithm or by the lack of historical evidence. This is probably so because we appreciate intuitively that all those states of mind were important as inputs to the real product of the constitutional process, the language of the document itself, about which there is no doubt at all. Intentions, in contrast, are suggestive guides to interpretation, helpful because language does not apply itself, because the views of those involved in the process are likely to provide useful perspectives, and because we have come to learn that the views of some—Madison and ALEXANDER HAMILTON in particular—contain special insight and special wisdom about the American constitutional system. The usefulness of what can be learned about original intentions is surely not unrelated to their historic association with the enactment of the Constitution, but their usefulness is not logically bound up with that association. And we need neither summing formulas nor definitive evidence to make use of the ideas those intentions provide.

Other critics of interpretivism have emphasized the ambiguity of what in an individual's mental framework is meant by his "intentions." Ronald Dworkin, for example,

has pointed out that there may be a distinction between the hopes and the expectations of a constitutional draftsman. And these two may be different from what the draftsman fears his language may come to mean. A further difficulty of this sort is in specifying the level of generality at which the authoritative intentions are taken to be held. Lawmakers, for instance, will typically have had exemplary instances in mind of things that would be fostered or forbidden by the law. The language they enact, however, will usually be expressed generally rather than as a list of specific goals or specific evils. The framers of the Fourteenth Amendment, for instance, clearly assumed that specific discriminatory statutes of the southern states, known collectively as the BLACK CODES, would be forbidden by the amendment, while the constitutional language they chose is exceedingly general. When the language is that general, it would be strange indeed to confine the reach of the amendment to the exemplary instances, or even to matters closely analogous to those exemplary instances. Nor would it likely be faithful to any probable reconstruction of original intentions. The generality of the language suggests that many of those involved must have had more general norms in mind in addition to the exemplary instances. Thus, even if the historical evidence is plentiful and the summing problem somehow overcome, the interpreter must at a minimum mediate between levels of generality at which intentions almost surely were simultaneously held.

A further difficulty lies in the role of PRECEDENT in an interpretivist scheme. The animating force behind the interpretivist approach is a desire for stability and certainty in constitutional law that requires the taming of judicial activism. Original intentions are assumed to be an unchanging lodestar providing both stability and certainty. But what then happens if there has been an earlier decision that now appears mistaken by original-intention lights? The earlier decision will have induced reliance and will for a time at least have defined the "law" on the question. If that decision must be overruled on the basis of persuasive new historical data—to say nothing of a new judgment about the import of old data—the goals of stability and certainty are not served, but undermined. In addition, it is not clear how one would approach the role of precedent in original-intention terms. This is really part of a larger problem that Paul Brest has referred to as the problem of "interpretive intention." It is perfectly possible for someone involved in constitution making to believe that a given problem will be resolved one way under language he votes to enact but that precedential developments, a change in external circumstances, or even a change of heart by judges might appropriately lead to a different result. It is perfectly possible, that is, for constitution makers to appreciate that they are setting in motion a decisional process, grounded in a desire to eradicate certain bad things or foster certain good ones, but not inextricably tied to any list of what is forbidden or desired. In that case, the intender's substantive and interpretive intentions can well suggest opposed results. If we somehow had access to the full complexity of original intention, we might resolve the conflict, but not necessarily in any way that would provide stability and certainty in the law. This problem of interpretive intention is particularly acute in a system like the American one, where long tradition antedating the Constitution requires courts to defer significantly to prior decisions. In such a context, it seems quite likely that constitution makers took for granted that STARE DECISIS would have its due in constitutional law.

Interpretivist responses to these criticisms were complex and varied. While some interpretivists clung to a vision of original intentions that virtually applied themselves, most acknowledged that generally stated constitutional language had to leave room for judgment and hence choice by the courts. Some interpretivists, for instance, acknowledged that the intentions the judges were to apply were appropriately conceived at a level of substantial generality. Others embraced a role for precedent in constitutional law. Still others saw room for arguments from changed circumstances or from aspects of the constitutional system that did not come neatly packaged in a clause or an amendment. But the more these extratextual and extraintentional considerations are allowed to intrude, the more blurred becomes the line between the opposed interpretivist and noninterpretivist camps.

This is not to say that either side relented or that there was no difference between the two. Noninterpretivism had no unified approach to interpretation to offer. Some noninterpretivists advanced moral and POLITICAL PHILOSOPHY as the appropriate source for constitutional values when constitutional language ran out. Others urged judges to search for answers in conventional morality. Some saw judges as striving for a sort of global coherence in the law, while others urged adherence to precedent in more restricted domains. They were united only in their disdain for the oversimplified view of interpretation advanced by interpretivists, but the lack of any coherent noninterpretivist program reinforced the interpretivist view that noninterpretivism invited judicial tyranny.

As the debate proceeded, it became increasingly apparent that what was really at issue was the appropriate degree of judicial activism in a constitutional democracy, that interpretivism represented an appealing if ultimately unpersuasive theoretical grounding for the position that judges are constitutionally bound to exercise the judicial veto in only the clearest of cases. Despite protestations to the contrary, the two sides differed more in how clear the case had to be than in the type of evidence that could be

considered. Differences over the role of original intentions were thus really ones of attitude and degree rather than anything more fundamental. It was interesting that, aside from Robert Bork, few judges joined the fray, and when they did, they seldom did so in the language of interpretivism and noninterpretivism. As the 1980s drew to a close, it appeared that political conservatives had largely prevailed in their campaign for a constrained judiciary. After ANTHONY M. KENNEDY succeeded to Lewis Powell's seat on the Court, Chief Justice WILLIAM H. REHNQUIST presided over a Supreme Court majority that articulated a philosophy of "judicial restraint" in constitutional review, but it was not a majority that did so under the banner of interpretivism.

ROBERT W. BENNETT
(1992)

(SEE ALSO: *Bork Nomination; Judicial Activism and Judicial Restraint; Ratifier Intent.*)

Bibliography

BENNETT, ROBERT W. 1984 Objectivity in Constitutional Law. *University of Pennsylvania Law Review* 132:445–496.

BREST, PAUL 1980 The Misconceived Quest for Original Understanding. *Boston University Law Review* 60:204–238.

DWORKIN, RONALD 1981 The Forum of Principle. *New York University Law Review* 56:469–518.

MONOGHAN, HENRY P. 1981 Our Perfect Constitution. *New York University Law Review* 56:353–396.

## INTERSTATE COMITY

See: Full Faith and Credit; Privileges and Immunities

## INTERSTATE COMMERCE

The term "interstate commerce" does not appear in the Constitution. Nor do the few debates in the CONSTITUTIONAL CONVENTION OF 1787 over the wording of the COMMERCE CLAUSE offer much help in discerning what the Framers meant by granting Congress the power to regulate commerce "among the several states." The absence of expressed specific intent led WILLIAM W. CROSSKEY to examine contemporary usage and to theorize that the national power over commerce was intended to be virtually exclusive and to include not only interstate commerce but INTRASTATE COMMERCE as well. One of the Framers' intentions was to eliminate the destructive conflicts between contradictory state practices under the Confederation government. Chief Justice JOHN MARSHALL so assumed when he defined the term in GIBBONS V. OGDEN (1824), a case that has guided interpretation to this day. Interstate commerce, he wrote, is that "which concerns more states than one" and it even extends "to those internal concerns which affect the states generally." In the nineteenth century the clause was more often applied as a restriction on state powers than as a positive grant of national power, and as EDWARD S. CORWIN remarked, "the word "commerce,' as designating the thing to be protected against State interference, long came to dominate the clause, while the potential word "regulate' remained in the background." In *Houston, East & West Texas Railway v. United States,* (1914), the Court expanded the reach of congressional power by permitting federal regulation of purely intrastate commerce because, in the railroad case before it, the two were inextricably linked.

The scope of the commerce clause has encouraged the Court to devise a number of tests throughout its history to determine limits to the term, the best known of which is the STREAM OF COMMERCE DOCTRINE. (See also SELECTIVE EXCLUSIVENESS, EFFECTS ON COMMERCE, and SHREVEPORT DOCTRINE). The Supreme Court has thus held that "interstate commerce" means both movement that crosses state lines and movement that does not but that adversely affects interstate commerce. It includes tangible items as well as intangible ones. In *Gibbons,* Marshall defined it as "commercial intercourse," but even this expansive reading has been widened. *Caminetti v. United States* (1917) is only one of many cases in which the Court decided that no commercial motive need be present. Moreover, movement itself is not essential; in WICKARD V. FILBURN (1942), Justice ROBERT H. JACKSON disdained semantic formulas and declared that agricultural PRODUCTION affects interstate commerce. Such a broad view of the commerce power has allowed Congress to regulate not only traditional SUBJECTS OF COMMERCE but also criminal activity, professional sports, antitrust cases, and RACIAL DISCRIMINATION.

DAVID GORDON
(1986)

Bibliography

STERN, ROBERT L. 1955 The Scope of the Phrase *Interstate Commerce. American Bar Association Journal* 41:823–826, 871–874.

## INTERSTATE COMMERCE ACT
24 Stat. 379 (1887)

This act, which initiated federal authority in ECONOMIC REGULATION, created an administrative commission to wield federal power. Congress's approach, in Isaiah Sharfman's words, was "tentative and experimental" because doubts existed whether the government could so act. The

legislation nevertheless marked a first attempt to organize an increasingly chaotic field.

Until the 1870s railroads had been free to expand and operate, essentially unregulated, yet encouraged by land grants and public subsidies. As speculation, rate discrimination, and other abuses increased, popular opinion grew correspondingly negative. State legislatures, especially in the Midwest, began setting maximum rail rates and establishing commissions to maintain their reasonableness. Although the Supreme Court sustained such regulation in the GRANGER CASES (1877), it soon retrenched and, in *Wabash, St. Louis & Pacific Railway v. Illinois*, (1886) the Court asserted the states' inability to regulate rates even partly interstate. The Court thus created a vacuum—the states could not regulate and Congress had not regulated.

Compromise legislation finally passed Congress in 1887, the outcome of over 150 bills in nearly twenty years. The act applied to "any common carrier or carriers engaged in the [interstate or foreign] transportation of passengers or property," and specifically exempted INTRASTATE COMMERCE. Reiterating the COMMON LAW, the act ordered all charges to be "reasonable and just." The act created the INTERSTATE COMMERCE COMMISSION (ICC), empowered it to set aside unjust rates, but neglected to give it the power to replace them with new ones. The ICC also had authority to investigate complaints; significantly, an individual need not demonstrate direct damage to file a complaint. Several sections forbade devices such as rebates, pooling, and LONG HAUL-SHORT HAUL DISCRIMINATION. The act also required publication of rate schedules, rendering the carriers liable for injuries sustained as a result of any violations. Courts were to consider ICC findings *prima facie* EVIDENCE but commission orders became effective immediately *only* if voluntarily obeyed. Carriers took advantage of this loophole to APPEAL virtually every order, leaving them free to disregard the ICC until a court sustained it. Demanding to hear cases *de novo*, the courts implicitly invited the carriers to withhold evidence from the ICC; courts reversed ICC orders regularly on both legal and policy grounds. As Sharfman noted, the commission's powers were thus "restricted in scope and feeble in effect." In 1897 the Supreme Court dealt the ICC two stunning blows. Even though the act had not expressly granted the ICC rate-setting authority, the commission had assumed the power. In INTERSTATE COMMERCE COMMISSION V. CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY, the Court denied the commission this power. *ICC v. Alabama Midland Railway Co.* (1897) rendered the long haul-short haul clause a dead letter.

In part because of the judicial evisceration of the act, Congress amended it nearly a dozen times by 1925. Among the most important supplementary legislation were the ELKINS ACT, the HEPBURN ACT, and the MANN-ELKINS ACT. The Supreme Court endorsed Congress's efforts in several cases, culminating in INTERSTATE COMMERCE COMMISSION V. ILLINOIS CENTRAL RAILROAD (1910).

DAVID GORDON
(1986)

Bibliography

HOOGENBOOM, ARI and OLIVE 1976 *A History of the ICC: From Panacea to Palliative.* New York: W. W. Norton.

SHARFMAN, ISAIAH L. 1931 *The Interstate Commerce Commission.* Vol. I. New York: Commonwealth Fund.

## INTERSTATE COMMERCE COMMISSION

See: Regulatory Agencies

## *INTERSTATE COMMERCE COMMISSION v. ALABAMA MIDLAND RAILWAY COMPANY*

See: *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Railway*

## *INTERSTATE COMMERCE COMMISSION v. CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY*

167 U.S. 479 (1897)

## *INTERSTATE COMMERCE COMMISSION v. ALABAMA MIDLAND RAILWAY COMPANY*

168 U.S. 144 (1897)

As one of Justice JOHN MARSHALL HARLAN's dissents in these cases declared, these decisions stripped the Interstate Commerce Commission (ICC) "of authority to do anything of an effective character." The ICC succeeded in only one APPEAL to the Supreme Court between 1897 and 1906. The INTERSTATE COMMERCE ACT required "reasonable and just" rates and, although it gave the commission the right to set aside unreasonable rates, it did not expressly grant them power to revise rates. The ICC had operated for a decade on the assumption that it had had such power; without it, the statute's injunction to provide reasonable rates could hardly be accomplished. In *ICC v. Cincinnati, New Orleans & Texas Pacific Railway* (1897) the Court majority insisted that if the act's framers had intended to grant them such powers, they "would have said so." The

act provided no explicit authority, however, and the extent of the power militated against "such a grant . . . by mere implication." If the commission exercised such rate-making powers, it would have been making law and it had only the power to "execute and enforce, not to legislate." Such a quasi-legislative DELEGATION OF POWER could not yet secure approval from the Court; denied power to set rates, the commission now had only the right (of questionable use) to void unreasonable rates. Justice Harlan dissented from that decision as well as from Justice GEORGE SHIRAS's opinion in *ICC v. Alabama Midland Railway Company* (1897), decided a few months later. That case nearly destroyed the LONG HAUL-SHORT HAUL provision in the act as well as the commission's fact-finding authority. Despite unequivocal language declaring the ICC findings of fact to be conclusive and binding on courts, Shiras decided that the clause empowering CIRCUIT COURTS to hear appeals necessarily implied a right of the courts to reexamine all the facts; they could not overrule the commission in both law and fact. By not presenting all EVIDENCE until an appeal, the railroads could and soon did mock ICC orders. These decisions severely restricted the commission's usefulness; not until the HEPBURN ACT of 1906 and the MANN-ELKINS ACT of 1910 would Congress move to revive the commission.

DAVID GORDON
(1986)

## *INTERSTATE COMMERCE COMMISSION v. ILLINOIS CENTRAL RAILROAD*
215 U.S. 452 (1910)

The HEPBURN ACT of 1906 and a decision by the Supreme Court the following year began reviving the Interstate Commerce Commission (ICC) after a series of devastating decisions. The Court had denied the commission the power to revise rates in INTERSTATE COMMERCE COMMISSION V. CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY (1897), and had struck hard at the provision of the INTERSTATE COMMERCE ACT outlawing LONG HAUL-SHORT HAUL DISCRIMINATION in *Interstate Commerce Commission v. Alabama Midland Railway Co.* (1897). The Court reversed ICC orders on both legal and policy grounds at an astonishing rate, and the commission spent nearly the first twenty years of its existence fighting Court-imposed obstacles.

The Interstate Commerce Act had declared that ICC findings were to be considered *prima facie* evidence but until 1907 the Court, in fact, reviewed all evidence *de novo*, thereby allowing the railroads to present previously withheld EVIDENCE on APPEAL. This practice discredited the commission and put the Court in the business of rate regulation. In *Illinois Central Railroad Company v. Interstate Commerce Commission* (1907), the Court declared that it would no longer reexamine the facts of a case on appeal; the commission was a responsible tribunal and its findings of fact would be accorded "probative force."

Because of the passage of the MANN-ELKINS ACT and a favorable 8–1 decision in *Interstate Commerce Commission v. Illinois Central Railroad*, 1910 was a good year for the ICC. In this case the Court indicated its willingness to support the commission, laying down its guidelines for the determination of the validity of ICC orders. The Justices expected to continue to review commission orders, but solely in reference to constitutional issues, statutory construction of "the scope of the delegated authority" under which the ICC issued the order, and the practical "substance" of the order. Nevertheless, the Court henceforth specifically refused "under the guise of exerting judicial power, [to] usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised. Power to make the order and not the mere expediency or wisdom of having made it is the question."

DAVID GORDON
(1986)

# INTERSTATE COMPACT

The Constitution, in Article I, section 10, recognizes the right of the states to enter into compacts and agreements with one another, but provides that the right shall not be exercised without the consent of Congress. In this respect, the Constitution continued the practice that had obtained under the ARTICLES OF CONFEDERATION. The right to enter into compacts and agreements is, as the Supreme Court said in *Hinderlider v. La Plata Company* (1938), the survival under the Constitution of "the age-old treaty-making power of independent sovereign nations."

Before 1921, most interstate compacts involved two (or at most three) states, and were either about boundaries or about boundary streams. One notable exception was the Chesapeake and Ohio Canal Compact (1825), involving Virginia, Maryland, Pennsylvania, and the District of Columbia, providing for joint incorporation of the canal company and mutual acceptance of legislation in its favor. Another was the Virginia-West Virginia Compact (1862) by which seceding Virginia agreed to the creation of West Virginia from part of its territory while the latter assumed part of the state debt.

The modern era of interstate compacts began with the New York Port Authority Compact (1921) and the Colorado River Compact (1923). The former created a single commission, jointly appointed by New York and New Jersey, to administer the Port of New York and the surround-

ing area. The latter was the first true multistate compact, allocating irrigation water among six states drained by the Colorado.

The success of these two agreements led politicians and scholars to see in interstate compacts a great potential for solving multistate problems without national legislation. FELIX FRANKFURTER and JAMES M. LANDIS, in an influential article published in 1925, advocated "imaginative adaptation" of the device to reach a multitude of subjects they deemed beyond the scope of congressional power under the Constitution, such as the generation and distribution of electricity. Buoyed by this public optimism, states proposed open-membership compacts on subjects such as WORKERS' COMPENSATION and child labor. Experience, however, demonstrated that interstate compacts were not a panacea for the ills of FEDERALISM, and, although the number negotiated steadily increased, after the 1930s compacts were confined to more narrowly interstate matters. This is true even of compacts to which all the states are parties, such as the Interstate Compact for Supervision of Parolees and Probationers.

Compacts between states are somewhat more binding than treaties between sovereign nations, because the states are subject to the CONTRACT CLAUSE, and, within the limits of the ELEVENTH AMENDMENT, the obligations imposed by interstate compacts are enforceable in federal courts.

On its face, the Constitution seems to require congressional consent to all interstate compacts and agreements. However, in *Virginia v. Tennessee* (1893) the Supreme Court held that a boundary agreement of 1802 had received Congress's consent through acquiescence because, although it never voted to approve the agreement, Congress followed its terms in such matters as establishing judicial districts. The court reasoned that only compacts touching on the powers of the national government or substantially affecting intergovernmental relationships within the federal system required explicit congressional approval. On the other hand, Congress may veto *any* compact or agreement, even if the states would have been fully competent to act in the absence of the compact.

When explicit approval is required, it may be given either before or after the compact is negotiated by the states. But the failure of Congress to enact a resolution of consent is not equivalent to a denial of consent: it may signify no more than that Congress believes its explicit consent to a particular compact is unnecessary.

DENNIS J. MAHONEY
(1986)

Bibliography

FRANKFURTER, FELIX and LANDIS, JAMES M. 1925 "The Compact Clause of the Constitution—A Study in Interstate Adjustments." *Yale Law Journal* 34:685–729.

ZIMMERMAN, FREDERICK L. and WENDELL, MITCHELL 1951 *The Interstate Compact Since 1925.* Chicago: Council of State Governments.

——— 1976 *The Law and Use of Interstate Compacts.* Chicago: Council of State Governments.

## INTIMATE ASSOCIATION

See: Freedom of Intimate Association

## INTOLERABLE ACTS

See: First Continental Congress, Declarations and Resolves of

## INTRASTATE COMMERCE

The CONSTITUTIONAL CONVENTION OF 1787, by listing among Congress's enumerated powers the power to regulate commerce "among the several states" as well as with Indian tribes and foreign countries, appeared to reserve for regulation by each state its own domestic commerce. Indeed, notwithstanding Chief Justice JOHN MARSHALL's dictum that commerce does not stop at the state line but penetrates into the interior, for most of American constitutional history Congress respected and the Supreme Court enforced that division of power over commerce. After WICKARD V. FILBURN (1938), the distinction between intrastate and INTERSTATE COMMERCE effectively ceased to have any significance in constitutional law.

DAVID GORDON
(1986)

## INVALID ON ITS FACE

Legislation may be unconstitutional as applied to all, some, or none of the behavior it addresses. Usually, affected parties challenge a law's constitutionality only as applied to their own behavior. Occasionally, they claim a law is constitutionally invalid on its face—and therefore unenforceable against anyone, including them—because it would be unconstitutional ever to apply it. A penal law is invalid on its face, for example, when it so vaguely describes the conduct outlawed that it cannot give fair warning to anyone, or when every act the law prohibits is constitutionally protected. A challenge to such a law would present no STANDING problem. Sometimes, however, a litigant will assert that, regardless of whether a law is constitutional as applied to him it should be held invalid on its face because its coverage includes unconstitutional regulation of others.

Normally a federal court will deny standing to raise

such a facial challenge when the law constitutionally regulates the would-be challenger, for the court perceives the claim as a request to go beyond the case before it. Responding to the request would require the court to decide what other situations the law governs—frequently an unresolved question of statutory interpretation—and then to decide whether some of the law's unapplied coverage would be unconstitutional. If the court should conclude that part of the law is invalid and part valid, it would have to decide whether the legislative framers would want the valid part to stand separately or the whole law to fall. Finally, if the law is constitutional as applied to the litigant, but would be unconstitutional in hypothetical application to others, the court may still have to decide whether to hold the law facially invalid despite a legislative desire to have the law's valid applications stand.

Formidable considerations militate against judicial rulings that laws are facially invalid. JUDICIAL REVIEW originates in the need to apply constitutional law to decide the case before the court, and a corollary principle requires courts to refrain from deciding hypothetical questions. When a court focuses only on the situation before it, it minimizes the need for unnecessary decisions of issues of both statutory and constitutional interpretation, and avoids considering other possible applications of the law in a factual vacuum. Finally, a conclusion of facial invalidity would prevent the valid enforcement of the law against a party whom the legislature intended to regulate. Normally, then, the Supreme Court denies a litigant STANDING to assert the unconstitutionality of legislation as it would be applied to others, except when the most compelling reasons are present.

The reason most often found compelling is the need to protect the freedom of expression of persons not before the court whom the law might inhibit. That was the rationale, for example, of THORNHILL V. ALABAMA (1940). Specifically, the FIRST AMENDMENT doctrines of OVERBREADTH and VAGUENESS sometimes permit one whose conduct the law constitutionally could reach to escape punishment, arguing that the law is invalid on its face because its seeming application to others discourages their protected expression. Intense controversy surrounds these facial challenges, however, largely because of differing perceptions of how inhibiting such laws really are. In areas involving other fundamental freedoms, such as the RIGHT TO TRAVEL, facial challenges have occasionally been successful, as in APTHEKER V. SECRETARY OF STATE (1964), again to protect persons who are never likely to be before a court from having their liberty circumscribed by the seeming applicability of an unconstitutional regulation.

A court will hold a law invalid on its face only in a case of necessity: where the law's very existence may affect the exercise of cherished liberties by nonparties lacking opportunity or willingness to challenge them, and where the inhibiting feature of the law cannot easily be cured by statutory interpretation. Absent such conditions federal courts will not, at the request of one whose behavior may constitutionally be regulated, decide how a law might apply and whether the law's potential application to other situations warrants holding it invalid on its face. The degree to which the Supreme Court permits facial challenges to legislation directly reflects the Justices' collective perception of the Court's institutional role in enforcing the Constitution. Narrow views of that role incline the Court to restrict facial challenges; a broader view commends it to entertain and encourage such a challenge in the interest of assuring the constitutional governance of society beyond the immediate case.

JONATHAN D. VARAT
(1986)

## INVASION OF PRIVACY

See: Right of Privacy

## INVERSE CONDEMNATION

The course of action which a property owner may pursue against a governmental defendant to recover the JUST COMPENSATION guaranteed by the Fifth and FOURTEENTH AMENDMENTS when the defendant, without initiating an eminent domain proceeding, "takes" private property is called "inverse condemnation."

The elements of a compensable TAKING OF PROPERTY can occur under many different circumstances. An action to establish inverse condemnation is clearly proper when a governmental entity has destroyed, confiscated, or substantially abridged some right or privilege in the plaintiff's property or when the normal operation of governmental facilities results in a destructive interference with the use of the plaintiff's property by third persons, as by jet aircraft noise. Excessive regulation, resulting in an effective prohibition of substantially all use and value of the interest regulated, may also constitute a taking.

The most intractable issue in inverse condemnation litigation currently relates to regulatory takings. Although government may carry out many types of programs that adversely affect economic values without its actions constituting a taking, in some contexts POLICE POWER regulations may be so restrictive in character as to constitute a compensable taking, as in *Pennsylvania Coal Co. v. Mahon* (1922). However, no "set formula" has been developed for determining when a legislative measure has adversely affected property interests to that degree. The relative magnitude of the loss sustained by the property owner is relevant but not controlling. Factors suggestive of a taking, however, include the extent to which the government's

actions have impaired legitimate investment-backed expectations of the owner and the fact that the regulation has resulted in an uncompensated acquisition of resources by the public entity. (See PENN CENTRAL TRANSPORTATION CO. V. NEW YORK CITY.) Factors often relied upon to negate a taking include the existence of widely shared compensating benefits resulting from the restrictions and the reflecting in the regulation of a rational legislative choice between mutually incompatible private interests.

Inverse condemnation jurisprudence is also complicated by uncertainty, so far not resolved by the Supreme Court, as to the scope of the relief available for regulatory takings. In many cases, for example, *Pennsylvania Coal Co.*, the taking rationale has been invoked to invalidate excessive regulatory action; in others, an award of monetary compensation has been granted. In *San Diego Gas & Electric Co. v. City of San Diego* (1981), four Justices, with a supporting dictum from a fifth, intimated that when a taking is enjoined, compensation for interim losses sustained by the property owner should be granted. And when overriding public interest so requires, governmental action that effects a taking may even be declared valid, subject to the payment of just compensation to those persons whose property has thereby been taken. (See DAMES & MOORE V. REGAN.)

Some commentators have argued, and a few courts have held, that the exclusive remedy for a regulatory taking is invalidation of the offending measure. These decisions generally reflect judicial reluctance to impose onerous burdens that could interfere with orderly fiscal planning by governmental agencies engaged in regulatory functions. They appear to be based on the questionable assumption that invalidation will necessarily be less disruptive to the achievement of public objectives than payment of compensation. As Justice WILLIAM J. BRENNAN suggested in *San Diego Gas & Electric Co.*, a more appropriate remedial posture would permit the governmental entity to choose whether to repeal the offensive regulation with payment of compensation for temporary losses or to retain it in force with payment of full compensation.

ARVO VAN ALSTYNE
(1986)

Bibliography

MICHELMAN, FRANK I. 1967 Property, Utility, and Fairness: Commentaries on the Ethical Foundations of "Just Compensation Law." *Harvard Law Review* 80:1165–1258.

SAX, JOSEPH L. 1973 Takings and the Police Power. *Yale Law Journal* 74:36–76.

## INVESTIGATIVE POWER

See: Legislative Investigation

## INVIDIOUS DISCRIMINATION

Justice WILLIAM O. DOUGLAS led the Supreme Court's modern expansion of the guarantee of EQUAL PROTECTION OF THE LAWS. As early as 1942, in SKINNER V. OKLAHOMA, Douglas used the term "invidious discrimination" to differentiate state-imposed inequalities demanding strict judicial scrutiny from other discriminations (particularly economic regulations) that were valid so long as they had a RATIONAL BASIS. The word "invidious," which suggests a tendency to provoke envy or resentment, is an appropriate label for governmental discriminations imposing the stigma of caste, especially RACIAL DISCRIMINATIONS. Fittingly, Douglas used the same label in LEVY V. LOUISIANA (1968) to describe discrimination based on the status of ILLEGITIMACY.

In HARPER V. VIRGINIA STATE BOARD OF ELECTIONS (1966), Douglas termed "invidious" the state's use of a POLL TAX as a condition on voting. As a WEALTH DISCRIMINATION case, *Harper* fit the dictionary definition of "invidious." In another view, however, *Harper* required STRICT SCRUTINY because the state impaired the FUNDAMENTAL INTEREST in voting. In this perspective, "individious discrimination" broadens into a label for the Court's ultimate conclusion on the issue of an equal protection violation. For Justice Douglas, either use of the term was acceptable.

In more recent racial discrimination decisions, the Court has turned the dictionary meaning of "invidious" upside down, using it to denote not the tendency of a discrimination to provoke ill will, but the malevolent purpose of government officials. In WASHINGTON V. DAVIS (1976), for example, the Court held that a law's racially selective impact did not demand strict scrutiny, absent a showing of "invidious discriminatory purpose." The language of constitutional doctrine, like the language of diplomacy, stands ready to serve causes both fair and foul.

KENNETH L. KARST
(1986)

Bibliography

KARST, KENNETH L. 1969 Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula." *UCLA Law Review* 16:716–750.

## INVOLUNTARY SERVITUDE

See: Peonage; Slavery and the Constitution

## IRAN-CONTRA AFFAIR

The Iran-Contra hearings by a joint committee of both houses of Congress (the Senate Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House of Representatives Select Committee to

Investigate Covert Arms Transactions with Iran) were but one more episode in the almost constant twentieth-century battle between the presidency—not necessarily the President, but the executive branch and particularly the officials of the White House—and Congress for power over FOREIGN AFFAIRS assigned by the Constitution to the national government. Iran-Contra, like WATERGATE and the Steel Seizure Controversy, stands out among the few instances in which Congress mounted a successful, albeit short-lived, challenge to a thrust for power by the White House.

Following the debacle of the VIETNAM WAR, initiated by President JOHN F. KENNEDY and carried on disastrously by Presidents LYNDON B. JOHNSON and RICHARD M. NIXON without a specific congressional declaration of war, the United States found itself chastened, but not necessarily enlightened, by the experience. A large but by no means unanimous portion of the population wished to continue the fight against communism wherever it could be found, but preferably on foreign soil and, if necessary, without the endorsement of Congress. If American lives were wasted by unsuccessful military adventures in Korea and Vietnam, eventually bringing peace without honor, perhaps clandestine support of anticommunist guerrillas, in Central America with the approval of Congress could bring us honor without peace. After many years of unrestrained but unsuccessful activity in which American matériel and largess were profligately expended, along with the lives of the residents, Congress decided to call a halt to at least some of its clandestine support for insurgent forces below America's southern border, absent congressional approval. And when Congress discovered—it was an all but open secret—that secret operations in the foreign affairs apparatus of the White House were providing the wherewithal for much of the military resistance in Central America, in defiance of congressional law, a hearing was called to establish who, what, why, and when. As in Watergate, the hearings were politically dangerous because they came so close to involving the President himself in illegality. Unlike the case of Watergate, however, the President—in this instance, RONALD REAGAN—seemed more guilty of nonfeasance than malfeasance, as an investigation by a committee that the President had appointed, with former Senator John Tower as chairman, seemed to indicate in its report.

Fundamentally, the obligation of the President and his aides to abide by the terms of the laws enacted by Congress are not to be gainsaid. According to Article II, section 3, of the Constitution, the President "shall take care that the Laws be faithfully executed." Occasionally, the question may legitimately arise whether in fact that language rightfully cabins the chief executive in the circumstances and there is a conflict between the two branches, which becomes a question of constitutional dimensions. Usually, the contesting sides reach a peaceful understanding. Sometimes the issue has to be resolved by the courts, as was the case when President HARRY S. TRUMAN seized the steel mills or when the executive branch froze the assets of the Iranian government without congressional authorization. Sometimes the controversy reaches the forum of a congressional hearing, as was the case with Watergate and again with the Iran-Contra controversy.

Prior to WORLD WAR I, the United States was governed by what Woodrow Wilson could label "congressional government" in his 1913 book of that title, which did not mean that Congress did not succumb to strong presidential leadership, such as ABRAHAM LINCOLN's, in times of crisis. During and after WORLD WAR II, government in the United States became the eponymous "presidential dictatorship" of CLINTON ROSSITER's 1985 volume, with Congress usually subordinated to the will expressed by the President. Since the KOREAN WAR, there has been a further realignment of power, again described by an astute critic's title, Arthur Schlesinger's *The Imperial Presidency* (1973), this time marking not a shift between Congress and the President but a development within the presidency of an unelected, politically irresponsible BUREAUCRACY.

It may well be that a congressional investigation of alleged wrongdoing at the level of the White House serves its function when it is called to the public's attention, when the wrongdoing that has taken place is brought to an end, and when some of the principal responsible presidential subordinates are subjected to criminal processes in the United States courts or otherwise chastised. Clearly the intent of the Framers was to fix the responsibility on the President for the conduct of his office. But we live now in more perilous times. If the continued threat of serious malefaction is to be eliminated, the price of the IMPEACHMENT process to determine whether the chief executive has erred is nevertheless too destabilizing in times of crisis for the nation to pay for such hearings. The national government was paralyzed for months in the Watergate crisis. Thus, the Iran-Contra affair may not have afforded as satisfying a resolution of the questions first raised by Senator Howard Baker: "What did the President know? And when did he know it?" But the Constitution's interests were served, and the nation's interests were protected.

The Iran-Contra hearings, however consequential in theory, were a contest for constitutional power between President and Congress, and were generally regarded by the American public as entertainment rather than enlightenment. It was as if some of Hollywood's second-rate script writers had concocted a "B" version of the Watergate hearings. Everyone was covering up for a generally beloved and pathetically inept President, who could not remember what had occurred in his meetings with his

national security staff. There was a handsome Marine veteran wrapped in the flag and dedicated to the extermination of communists and communism by means in or out of the Constitution's limits. There was his beauteous secretary devoted to her boss, who helped destroy and remove secret documents. There were professional spies, cabinet officers locked out of the deliberations, national security chiefs, past and present. There were strange and sinister-looking Middle Eastern arms merchants. And there was a Rasputin figure, who, fortunately for the goals of the hearings, had died before his evidence could be secured. If the purpose of the Iran-Contra hearings were to prove that congressional hearings about the conduct of the presidential office can be a futile and useless CHECK AND BALANCE of one branch of the government on the other, the hearings succeeded beyond a peradventure of doubt. They also proved what "every schoolboy knew," that the American government had been secretly negotiating with Iran for the release of American prisoners and that it was supplying weapons to the Contra forces in Nicaragua—the first, in contradiction of the Reagan administration's own frequently announced policy; the second, at least without and likely in contradiction of congressional mandate. This is not the way American government is supposed to work.

After the hearings, many of the witnesses were indicted and some pleaded guilty to various offenses while others were found guilty. None of the major figures received heavy sentences. Lt. Col. Oliver North, the popular hero of the tale, was sentenced to 1200 hours of community service and fined $150,000 on three felony counts of willfully obstructing the congressional investigation, but his conviction was reversed—ironically, on civil liberties grounds. Robert McFarlane, former national security adviser to the President, pleaded guilty to four misdemeanor counts of assisting in secret efforts illegally to aid the Contras. He received two years probation, a $20,000 fine and 200 hours of community service. Admiral John M. Poindexter, Reagan's national security adviser and North's superior, did get six months on five counts of conspiracy.

PHILIP B. KURLAND
(1992)

(SEE ALSO: *Constitutional History, 1980–1989.*)

Bibliography

COHEN, WILLIAN and MITCHELL, GEORGE 1988 *Men of Zeal.* New York: Viking.

JOINT HEARINGS ON THE IRAN-CONTRA INVESTIGATION. 1987–1988 Washington D.C.: U.S. Government Printing Office.

REPORT OF THE JOINT CONGRESSIONAL COMMITTEE INVESTIGATING THE IRAN-CONTRA AFFAIR 1988 Washington, D.C.: U.S. Government Printing Office.

# IREDELL, JAMES
## (1751–1799)

James Iredell was one of the most active and important members of the United States Supreme Court during the 1790s. Although he was a strong nationalist and vigorous advocate of judicial power, he also was a political realist who understood, in a way that his contemporaries on the High Court did not, the widespread distrust of centralized government and an independent judiciary that existed in America following the AMERICAN REVOLUTION.

Iredell was the eldest son of a well-connected but financially troubled merchant from Bristol, England. When his father suffered a paralytic stroke, his mother's family, in 1768, arranged for him to become comptroller of the customs in Edenton, North Carolina. While performing his duties, Iredell studied law with Samuel Johnston, a leading member of the North Carolina bar, whose sister he married in 1773. Although he remained in the service of the king until the spring of 1776, his real sympathies were with the colonists, and after independence he became a firm supporter of the patriot cause. Following the break with England he served on a committee to revise old laws and draft new legislation to make government in North Carolina compatible with republicanism. He also helped create a judiciary system for the state, and reluctantly accepted an appointment as a Superior Court judge, a position from which he resigned after six months because he disliked riding circuit. In 1779 he was appointed attorney general of North Carolina.

In the sharp struggle that took place over the writing of a state constitution, Iredell sided with the more moderate and conservative Whigs who favored as few changes as possible from the old colonial form of government and wanted to see an independent judiciary, a strong executive, and property qualifications for voting. And in the political struggle of the 1780s, Iredell aligned himself with those who favored the enforcement of contracts, opposed debtor relief legislation, and defended the rights of Tories as protected by the Paris Peace Treaty of 1783. He denounced a number of laws adopted in the mid-1780s to confiscate Loyalist property, and in "An Address to the Public" in 1786 expressed his belief in the need for limitations upon the authority of the legislature: "I have no doubt but that the power of the Assembly is limited, and defined by the Constitution. It is the creature of the Constitution." Iredell further elaborated on how unbridled legislative authority could be checked in an August 26, 1787, letter to RICHARD DOBBS SPAIGHT, a delegate to the CONSTITUTIONAL CONVENTION, which contained one of the earliest and clearest theoretical expressions of the doctrine of JUDICIAL REVIEW: "I confess it has ever been my

opinion that an act inconsistent with the Constitution was void; and that the judges consistently with their duties, could not carry it into effect. The Constitution appears to me to be a fundamental law, limiting the powers of the legislative, and with which every exercise of those powers must, necessarily, be compared."

Iredell was a warm proponent of the adoption of the United States Constitution in 1787–1788, even though the opposition to it was particularly intense in North Carolina. In fact, North Carolina at first refused to ratify the Constitution, and did not accept the new government until November 1789, eight months after it had begun operations. During the course of the debate over ratification Iredell published a pamphlet entitled "Answers to Mr. [George] Mason's Objections to the New Constitution," which attracted national attention. In February 1790, President GEORGE WASHINGTON, recognizing Iredell to be a firm friend of the central government, appointed him to the United States Supreme Court.

Although Iredell continually complained about the hardships entailed in riding circuit, he performed his duties conscientiously and participated in almost all the important cases of the 1790s. Despite the fact that his various decisions were knowledgeable in the law, intelligent, and forcefully presented, it is not easy to classify Iredell according to the political and intellectual currents of his day. To be sure, as a Federalist he supported ALEXANDER HAMILTON's financial program, JAY'S TREATY, and the ALIEN AND SEDITION ACTS. Moreover, his opinions in *Penhallow v. Doane's Administrators* (1795) and HYLTON V. UNITED STATES (1796) had strong nationalist implications, and in CALDER V. BULL (1798) he reiterated his belief in judicial review. He also argued in behalf of an independent judiciary by taking strong exception to an attempt by Congress to require the Justices of the United States Supreme Court to serve as pension commissioners. But Iredell's experiences with North Carolina politics made him not only aware of but also sensitive to the jealousy of the states for their rights and the popular hostility that existed toward the federal judiciary. He thus dissented when the Supreme Court ruled against the state of Georgia in a suit brought by a citizen of South Carolina in CHISHOLM V. GEORGIA (1793). Iredell argued that the decision would be viewed as a dangerous assault upon the sovereignty of the states. His fears were well founded, for the protests against the decision were so widespread and intense that the ELEVENTH AMENDMENT to the Constitution was quickly adopted to deny jurisdiction to the federal courts in suits brought against a state by the citizens of another state or by foreigners. He also dissented in WARE V. HYLTON (1796) when the High Court declared invalid a Virginia statute of 1777 sequestering pre-Revolutionary debts of British creditors. Although ultimately upheld and enforced, the decision, as Iredell recognized, was the source of much popular dissatisfaction.

RICHARD E. ELLIS
(1986)

Bibliography

GOEBEL, JULIUS, JR. 1971 *History of the United States Supreme Court: Antecedents and Beginnings to 1801.* New York: Macmillan.

MCREE, GRIFFITH J., ed. 1857 *Life and Correspondence of James Iredell.* New York: D. Appleton.

## IRREBUTTABLE PRESUMPTION

Virtually any statutory classification can be seen as an irrebuttable presumption. A law forbidding automobile driving by anyone under sixteen may be described as a conclusive presumption that younger persons are unfit to drive—a presumption that is not universally true. The irrebuttable presumptions DOCTRINE was never applied to strike down an age classification, but its reasoning would have served: the law arguably denied PROCEDURAL DUE PROCESS by denying an individualized hearing on the fitness to drive of a person under sixteen. For a brief season in the mid-1970s, the Supreme Court was fond of this sort of analysis, but the infatuation soon ended.

The doctrine was foreshadowed in Chief Justice HARLAN FISKE STONE'S concurrence in SKINNER V. OKLAHOMA (1942), which invalidated an Oklahoma law requiring the STERILIZATION of three-time felons. The Court rested on the EQUAL PROTECTION clause, but Stone argued that the law denied due process by denying a hearing on the inheritability of the defendant's criminal traits. He might have called the law an irrebuttable presumption of the inheritability of criminal traits of three-time felons. We can speculate that Stone thought the sterilization law was an irrational deprivation of liberty, but he was disinclined to revive SUBSTANTIVE DUE PROCESS so soon after the Court had tried to lay that doctrine to rest.

When, a generation later, the Court explicitly invoked the irrebuttable presumptions theory, one contributing factor surely was a similar wish to avoid resting decision on another theory. In the mid-1970s the Court was struggling with the question whether sex, like race, should be characterized as a SUSPECT CLASSIFICATION for purposes of equal protection analysis. (See FRONTIERO V. RICHARDSON, 1973.) In two cases, the Court avoided that issue by resorting to irrebuttable presumptions analysis. *Stanley v. Illinois* (1972) invalidated a law providing that the children of an unwed father became wards of the state upon the death of the mother. The law was attacked on SEX DISCRIMINATION grounds, but the Court escaped that issue, holding

that the law violated due process by denying Stanley an individualized hearing on his fitness as a parent. Similarly, in CLEVELAND BOARD OF EDUCATION V. LAFLEUR (1974), a school board insisted that a pregnant teacher take maternity leave of several months before the expected birth of her child, and the Court avoided the sex discrimination issue by calling the law an irrebuttable presumption of unfitness to teach during the months of mandatory leave. The denial of a teacher's right to a hearing on her individual fitness was held to deny procedural due process.

The Court's strongest articulation of the irrebuttable presumptions doctrine came in VLANDIS V. KLINE (1973), which invalidated a state law conclusively presuming that a person who was a nonresident upon entering a state college remained a nonresident (for tuition purposes) throughout his college career. It violated due process to deny resident tuition rates on the basis of this presumption which was "not necessarily or universally true."

The irrebuttable presumptions doctrine was severely criticized both within and outside the Court. It was accurately seen as an equal protection or substantive due process doctrine in disguise, demanding the strictest sort of STRICT SCRUTINY of the necessity of legislative classifications. The Court plainly could not invalidate all classifications resting on factual assumptions "not necessarily or universally true." By 1975, the Court had had enough. In *Weinberger v. Salfi* (1975) the Court considered an antifraud provision of the SOCIAL SECURITY ACT allowing death benefits to a surviving spouse only when the couple had been married nine months before the decedent's death. A widow claimed benefits even though she had been married a shorter time, noting that her husband had died of a sudden, unexpected heart attack. The law was an excellent candidate for irrebuttable presumptions reasoning, but the Court blandly upheld it on grounds of administrative convenience. The whole doctrinal development had run its course in four terms of court.

KENNETH L. KARST
(1986)

Bibliography

NOTE 1974 The Irrebuttable Presumption Doctrine in the Supreme Court. *Harvard Law Review* 87:1534–1556.

## *IRVIN v. DOWD*
366 U.S. 717 (1961)

The Supreme Court ordered a new trial for a convicted mass murderer in Indiana on the ground that extensive pretrial coverage of the case by newspapers and radio had made it impossible for him to receive a FAIR TRIAL, even after one change of VENUE to a nearby county. In his opinion for the Court, Justice TOM C. CLARK noted that two-thirds of the jurors had been familiar with the facts of the case and believed Irvin to be guilty of the crimes. Justice FELIX FRANKFURTER used this occasion for one of his patented denunciations of overzealous reporting in criminal cases.

MICHAEL E. PARRISH
(1986)

## *IRVINE v. CALIFORNIA*
347 U.S. 128 (1954)

California police installed a listening device in a bedroom. Although this action violated fundamental constitutional principles protecting personal security, the Supreme Court held that under WOLF V. COLORADO (1949) the unconstitutionally obtained EVIDENCE could be used; the bedroom microphone did not sufficiently "shock the conscience," under ROCHIN V. CALIFORNIA (1952), to warrant exclusion.

HERMAN SCHWARTZ
(1986)

## *ISLAND TREES BOARD OF EDUCATION v. PICO*

See: *Board of Education v. Pico*

## ITEM VETO

See: Line-Item Veto

# J

## JACKSON, ANDREW
(1767–1845)

Andrew Jackson, the seventh President of the United States, was the son of Irish immigrant parents who had settled in the South Carolina backcountry. Drifting to North Carolina after the Revolutionary war, he read enough law to gain admission to the bar. When only twenty-one he was appointed prosecuting attorney for the Western District at Nashville. There he built a flourishing practice, married, and became a leading planter-aristocrat. In 1796 he was elected a delegate to the CONSTITUTIONAL CONVENTION of Tennessee, then was chosen the new state's first representative in Congress. His service there was brief and undistinguished; it was followed by appointment to the Tennessee Superior Court, where he sat for six years, retiring in 1804. In the factional brawls of Tennessee politics Jackson won a reputation for hot-blooded courage. He killed an adversary in a celebrated duel and barely escaped with his own life in another.

Jackson rose to national fame during the War of 1812. It was mainly an Indian war on the southwest frontier. As major general of the Tennessee militia, Jackson defeated the Creeks and then imposed a humiliating treaty. In 1814 he was commissioned major general in the United States Army and was entrusted with the defense of the Gulf country from Mobile to New Orleans. He defeated the British in the Battle of New Orleans, the last and the greatest victory of the war; and although it occurred after the peace treaty was signed, the victory made Jackson a national hero. Criticized by a local citizen for refusing to lift martial law after the battle, Jackson arrested him; and when a federal judge, Dominick Hall, issued a writ of HABEAS CORPUS for the citizen, Jackson arrested the judge as well. Upon his release Judge Hall hauled the errant general into court. Jackson pleaded "the law of necessity" in his defense and got off with a thousand dollar fine. He paid, yet bristled at the alleged injustice until finally, in 1844 a Democratic Congress returned the fine with interest.

Jackson had a more serious scrape with the law in 1818. In command of an army ordered to suppress Indian disturbances along the Spanish border, he invaded Florida, executed two British subjects for stirring up the Seminoles, and captured Pensacola together with other Spanish posts. President JAMES MONROE disavowed the general's conquest, said it was unauthorized, and ordered surrender of the posts. Two cabinet officers wished to punish Jackson. Not only had he violated orders, he had violated the Constitution by making war on Spain, a power reserved to Congress. When Congress convened, a sensational month-long debate occurred in the House of Representatives on resolutions condemning Jackson for his behavior and recommending legislation to prohibit invasion of foreign territory without the consent of Congress except in direct pursuit of a defeated enemy. The resolutions failed. Jackson insisted he had acted within the broad confines of his orders. Monroe, while admitting none of this, conceded that Jackson had acted honorably on his own responsibility.

In 1822 the Tennessee legislature nominated Jackson for President. At first no one took the nomination seriously; it was obviously a stratagem of the General's political friends to avail themselves of his popularity in order to regain control of the state government. But the candidacy of "the military hero" caught fire in 1824. Jackson

emerged from the election with a plurality of the popular vote; but since no candidate received a majority of the electoral vote the final choice was referred to the House, and there the influence of HENRY CLAY led to the election of JOHN QUINCY ADAMS. Jackson and his party immediately accused Adams and Clay of a "corrupt bargain." Trailing clouds of democratic rhetoric the Jacksonian politicians forged a powerful coalition that elected Old Hickory President in 1828.

The new President, though in wretched health, was a man of distinguished bearing, fascinating manners, resolute character, and still uncertain politics. In his first annual message to Congress, he called for constitutional amendments to limit the President to a single term of four or six years and, in a case like the 1824 election, to transfer the choice from the House to the people. Nothing came of this, of course. Jackson extended the old republican idea of "rotation in office" to the federal civil service, thereby laying the basis for wholesale partisan removals and appointments. He called for Indian removal. Reiterating his support for a "judicious tariff," he seemed as little inclined to back southern demands for reform as to make war on the AMERICAN SYSTEM. He pledged himself to extinguish the debt; and rather than reduce the tariff when that was accomplished, he proposed to distribute the surplus revenue to the states for works of INTERNAL IMPROVEMENTS. Finally, he pointedly raised the question of the constitutionality of the BANK OF THE UNITED STATES, whose charter would expire in 1836.

Congress responded quickly to Jackson's call for legislation to remove eastern Indian tribes west of the Mississippi. For many years he had regarded the policy of treating with the Indians "an absurdity." Now as President he sided with Georgia's policy of extending the laws of the state to Indians within its borders. When the Supreme Court in WORCESTER V. GEORGIA ruled against Georgia and upheld the Cherokee claim to federal protection, Jackson reputedly declared, "John Marshall has made his decision, now let him enforce it." The President, certainly, had no intention of coercing Georgia. By a mixture of force and persuasion he got the Cherokee and other tribes to cede their lands and migrate westward under the terms of the Removal Act. (See CHEROKEE INDIAN CASES, 1831–1832.)

Indian removal upon the pain of subjection to state authorities was the first indication of the sweeping denationalization of public policy that came to characterize the Jackson administration. Seeking to return the government to "that simple machine which the Constitution created," he struck at federal aid and planning of internal improvements by vetoing the MAYSVILLE ROAD BILL. Finding the bill unconstitutional because of its "purely local character," he nevertheless went on to express opposition to any general system of internal improvements; and after Congress adjourned he pocket-vetoed two improvement bills that could not be dismissed on local grounds. Jackson thereafter signed many improvement bills, mostly of the "pork barrel" variety, yet he repeatedly denounced the "sinister" policy matured by previous administrations and boasted of overthrowing it.

In 1832 Jackson again struck at the foundations of national authority when he vetoed the bill to recharter the Bank. The veto message adroitly combined the democratic appeals of western agrarianism with the STATES' RIGHTS prejudices of the South. On the question of constitutionality Jackson rejected the result of forty years' experience and placed his own independent judgment above that of Congress and the Supreme Court. "The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges," Jackson declared, "and on that point the president is independent of both." This was radical doctrine. In the eyes of opposition leaders, who would soon call themselves Whigs, it presaged a government of men, not of laws. (See JACKSON'S VETO OF THE BANK BILL.)

Not all of his actions were denationalizing in tendency, however. JACKSON'S PROCLAMATION TO THE PEOPLE OF SOUTH CAROLINA, condemning that state's NULLIFICATION of the protective tariff in 1832, was boldly nationalistic. Jackson ridiculed nullification as an "absurdity," defended the constitutionality of the tariff, and set forth the theory of the supremacy and indivisibility of the Union. The Constitution had created a national union, a government of "one people," to which had been committed sovereign powers heretofore belonging to the state governments; and no state could violate this union or secede from it without dissolving the whole. A month later, as South Carolina persisted in its course, Jackson called upon Congress for additional powers to enforce the revenue laws, including use of the army, navy, and militia if necessary. Congress enacted the FORCE ACT, as it was called. Use of force was averted, however, because South Carolina accepted the terms of Henry Clay's Compromise Tariff and rescinded the ordinance of nullification.

Jackson was the first President to exercise strong, independent leadership in domestic affairs. The Bank veto, while shrinking congressional powers, expanded the President's. Overwhelmingly reelected in 1832, Jackson took his victory as a mandate to destroy the Bank. He proceeded on his own responsibility to remove the government deposits from the Bank, placing them in so-called pet banks operating under state charters. Congress had delegated authority over the government deposits to the secretary of the treasury. When that officer, William Duane, refused to remove the deposits, Jackson fired him

and appointed a willing accomplice, ROGER B. TANEY, in his place. Congress convened in an uproar in December 1833. The opposition led by Clay called on the President for a paper he was known to have read to his cabinet outlining the removal policy. Jackson peremptorily refused to forward the paper on the grounds that communications to cabinet officers were privileged. (See EXECUTIVE PRIVILEGE.) Clay then introduced two resolutions censuring the President, as well as the new treasury secretary, for assuming powers "not conferred by the constitution and laws, but in derogation of both." The old issue of banking policy virtually disappeared as the opposition concentrated on the new issue of executive tyranny. The Senate, though not the House, adopted Clay's resolutions. Jackson was furious. He returned a lengthy "Protest" in which he argued that the entire executive power rested in the President, that he alone could decide how the laws should be executed, and that regardless of acts of Congress his authority to direct and remove subordinates was absolute. Congress, moreover, could not censure him; it could only impeach him. The Senate indignantly refused to enter the Protest in its journal. This bitter conflict finally came to an end in 1837, as Jackson's presidency expired, when the Senate voted to expunge the censure from the journal.

The relationship between Jackson's presidency and the Constitution was complex and confused. In the nullification crisis he placed the preservation of the Union above extravagant states' rights claims. Thirty years later, in a much deeper crisis of Union, ABRAHAM LINCOLN had no need to search for higher ground than Jackson had provided in his most famous state paper. But Jackson's presidency also gave renewed vigor to ideas of STRICT CONSTRUCTION and states' rights. It reversed the twenty-year trend toward consolidation in the general government and returned power to the states. Finally, Jackson magnified the power of the presidency at the expense of Congress. Exploiting popular democratic sentiments, he appealed to the will of the people, which he also claimed to embody, against the will of Congress. He vetoed more bills than all his predecessors combined; he was the first to employ the POCKET VETO and used it seven times. Paradoxically, his actions weakened the office. After him every President was thrown on the defensive; none would be reelected until Lincoln and none would serve two terms until ULYSSES S. GRANT. The Supreme Court, too, was challenged, for Jackson shook the ground from under the emerging consensus that the Court was the final arbiter of the Constitution. The appointment of his friend Taney as Chief Justice in 1835 terrified the Whigs, who feared that it would extend Jackson's baneful influence far into the future.

Jackson retired to his home, The Hermitage, near Nashville, and resumed the life of the planter. The patriarch of the Democratic party, he continued to influence its leaders and policies. He died at the Hermitage on June 8, 1845.

MERRILL D. PETERSON
(1986)

Bibliography

BASSETT, JOHN S. and JAMESON, J. FRANKLIN, eds. 1926–1935 *The Correspondence of Andrew Jackson*, 7 Vols. Washington: American Historical Association.

JAMES, MARQUIS 1938 *The Life of Andrew Jackson.* Indianapolis: Bobbs-Merrill.

REMINI, ROBERT 1977 *Andrew Jackson and the Course of American Empire, 1767–1821.* New York: Harper & Row.

——— 1981 *Andrew Jackson and the Course of American Freedom, 1822–1832.* New York: Harper & Row.

RICHARDSON, J. D., ed. 1896 *A Compilation of the Messages and Papers of the Presidents*, Vol. II. Washington: Government Printing Office.

## JACKSON, HOWELL E.
(1832–1895)

Howell Edmunds Jackson, a native of Tennessee, was appointed to the Supreme Court by BENJAMIN HARRISON in 1893. Although a Democrat, Jackson had Whig antecedents and had long been a vigorous exponent of the "New South" creed. He led the conservative opposition to repudiation of the Tennessee debt in the 1870s and represented some of the region's most prominent corporations in his law practice. GROVER CLEVELAND appointed him to a Sixth Circuit judgeship in 1886. His opinions in cases on the INTERSTATE COMMERCE ACT and the SHERMAN ANTITRUST ACT underscored his solicitude for big business.

Jackson's Supreme Court career lasted about a year and a half. Poor health precluded his participation in UNITED STATES V. E. C. KNIGHT CO. (1895) and IN RE DEBS (1895), two of the most important cases decided during his tenure. But Jackson sat with an equally divided Court at the second hearing of POLLOCK V. FARMERS LOAN & TRUST CO. (1895). His eloquent dissent, in which he insisted that the invalidation of the income tax was "the most disastrous blow ever struck at the constitutional power of Congress," remains his most famous opinion. It also sparked an enduring controversy over which, if any, of the Justices switched his vote between hearings.

CHARLES W. MCCURDY
(1986)

Bibliography

SCHIFFMAN, IRVING 1970 Escaping the Shroud of Anonymity: Justice Howell Edmunds Jackson and the Income Tax Case. *Tennessee Law Review* 37:334–348.

# JACKSON, ROBERT H.
## (1892–1954)

The orderly, middle-class world of Jamestown, New York, the economic calamity of the Great Depression, and the horrors of Nazi Germany—these were the crucial experiences that shaped the jurisprudence of Robert Houghwout Jackson, the only Supreme Court Justice to serve both as SOLICITOR GENERAL and ATTORNEY GENERAL of the United States, and the last to learn his law initially through the old-fashioned apprentice method.

Appointed to the Court by FRANKLIN D. ROOSEVELT in 1941 and facing the most important constitutional issues of the post-Depression era—the scope of federal economic management and the nationalization of the BILL OF RIGHTS—Jackson helped to accelerate the former but resisted the latter. In alliance with his close friend and colleague FELIX FRANKFURTER, he often found himself locked in combat between 1941 and 1954 with Justices HUGO L. BLACK and WILLIAM O. DOUGLAS, the ideological leaders of the Court's liberal block.

Few Justices in the Court's history articulated a more robust version of economic nationalism than Justice Jackson who, despite his small-town heritage and solicitude for independent entrepreneurship, supported consistently the expansion of federal ECONOMIC REGULATION and the growth of an integrated national marketplace, which soon became dominated by giant CORPORATIONS. Jackson wrote a sweeping validation of congressional authority under the COMMERCE CLAUSE in WICKARD V. FILBURN (1942), and he also used that provision absent federal law in *H. P. Hood & Sons v. DuMond* (1949) to strike down state regulations that insulated local economic activities from the rigors of interstate competition.

The crisis of the Great Depression convinced Jackson of the dangers of both *laissez-faire* and economic Balkanization. His later confrontation with Nazism when he served as chief American prosecutor at Nuremberg persuaded him of the dangers posed to human freedom by the growth of a monolithic police state. His firm commitment to economic nationalism never wavered, except near the end of his life in situations where the federal government began to employ the COMMERCE CLAUSE in an effort to regulate more than traditional economic activities. A year before his death, for example, Jackson narrowly construed a federal anticrime statute, voting to sustain the dismissal of INDICTMENTS for failure to register as dealers in gambling machines in *United States v. Five Gambling Devices* (1953). In the course of making their arrests in the case, FBI agents had stormed into a Tennessee country club and seized slot machines that were not shown to have been transported in interstate commerce. Jackson read into the statute a requirement of such a showing.

Jackson's fears of expanded federal police controls became so pronounced that he resisted efforts to attack RACIAL DISCRIMINATION by means of the criminal and civil provisions of the Reconstruction-era CIVIL RIGHTS ACTS, especially where these efforts threatened to undermine the autonomy of local law enforcement officials, such as SCREWS V. UNITED STATES (1945) and *Collins v. Hardyman* (1951). He also opposed federal judicial intervention under the FOURTEENTH AMENDMENT to correct local abuses in the administration of criminal justice. Although he interpreted the FOURTH AMENDMENT strictly as to federal SEARCHES AND SEIZURES, as in his dissent in BRINEGAR V. UNITED STATES (1949), he refused to extend the EXCLUSIONARY RULE to state criminal prosecutions, and he exhibited broad toleration for local police practices that shocked other members of the Court. "Local excesses or invasions of liberty," he wrote, "are more amenable to political correction," a point of view which no doubt surprised Mississippi Negroes and many state criminal suspects who endured the third degree. Even Frankfurter broke with Jackson on these issues, for example, in IRVINE V. CALIFORNIA (1954).

Jackson's small-town roots and his fear of mass-based political movements such as Nazism colored his views of other CIVIL LIBERTIES issues as well. He often defended the lone individual against the repressive machinery of the state, but he thoroughly distrusted people in groups, especially well-organized, zealous minorities who threatened to disrupt what Jackson regarded as the community's peace, stability, and proper order. The Constitution, he believed, prohibited West Virginia officials from imposing a mandatory flag salute observance on the children of Jehovah's Witnesses. (See FLAG SALUTE CASES.) The federal government, likewise, could not convict without a finding of criminal intent, condemn for TREASON without substantial proof, or hold a hapless ALIEN indefinitely on Ellis Island without charging him with a specific crime. "This man, who seems to have led a life of unrelieved insignificance," he wrote angrily, in SHAUGHNESSY V. UNITED STATES EX REL. MEZEI (1953) (dissenting opinion), "must have been astonished to find himself suddenly putting the Government of the United States in such fear that it was afraid to tell him why it was afraid of him. . . . No one can make me believe that we are that far gone."

Yet Jackson did not believe that the Constitution gave cadres of Jehovah's Witnesses the right to distribute their religious literature in defiance of local ordinances prohibiting house-to-house canvassing and ringing doorbells. "I

doubt if only the slothfully ignorant wish repose in their homes," he wrote sarcastically in *Martin v. City of Struthers* (1943), responding to Justice Black's opinion upholding the Witnesses' claim, "or that the forefathers intended to open the door to such forced "enlightenment' as we have here." A similar loathing for collective political behavior informed his attitude toward the Communist party which, like the Nazi organizations condemned at Nuremberg, he equated with a conspiracy against the social order in a concurring opinion in *Dennis v. United States* (1951).

Jackson's belief in the fragility of the political system also made him a conservative on most FREEDOM OF SPEECH issues, witness his dissenting opinion in KUNZ V. NEW YORK (1950). He objected, for instance, to the specific law upheld in the famous Illinois GROUP LIBEL case, BEAUHARNAIS V. ILLINOIS (1952), but he acknowledged the state's "commendable desire to reduce sinister abuses of our freedom of expression—abuses which I have had occasion to learn can tear society apart, brutalize its dominant elements, and persecute, even to extermination, its minorities."

Witty, combative, and gifted with an eloquent prose style, Jackson remained a person of many paradoxes: the rugged individualist who helped to fashion the New Deal's welfare state; the two-fisted prosecutor who wished to be the disinterested judge; and the economic nationalist who distrusted the growth of centralized, bureaucratic authority.

MICHAEL E. PARRISH
(1986)

Bibliography

GERHART, EUGENE C. 1958 *America's Advocate: Robert H. Jackson.* Indianapolis: Bobbs-Merrill.

JAFFE, LOUIS L. 1955 Mr. Justice Jackson. *Harvard Law Review* 68:940–998.

WHITE, G. EDWARD 1976 The Dilemmas of Robert Jackson. Pages 230–250 in White, *The American Judicial Tradition: Profiles of Leading American Judges.* New York: Oxford University Press.

## *JACKSON v. GEORGIA*

See: Capital Punishment Cases of 1972

## *JACKSON v. METROPOLITAN EDISON CO.*
419 U.S. 345 (1974)

In the WARREN COURT years, the STATE ACTION doctrine was progressively weakened as a limitation on the FOURTEENTH AMENDMENT; more and more "private" conduct fell under the Amendment's reach. The *Jackson* decision illustrates how the BURGER COURT called a halt to this trend, limiting the substantive scope of the Amendment by giving new life to the state action limitation.

Metropolitan Edison turned off Jackson's supply of electricity, asserting that she had not paid her bill. She sued for damages and injunctive relief under federal CIVIL RIGHTS laws, claiming PROCEDURAL DUE PROCESS rights to NOTICE, hearing, and an opportunity to pay any amounts due the company. The lower courts denied relief, holding that the company's conduct did not amount to state action. The Supreme Court affirmed, 6–3, in an opinion by Justice WILLIAM H. REHNQUIST, systematically rejecting a series of arguments supporting the contention that state action was present in the case.

The fact of state regulation was held insufficient to constitute state action. As in MOOSE LODGE NO. 107 V. IRVIS (1972), there was no showing of a "close nexus" between the company's no-hearing policy and the state. The approval by the state's public utilities commission of the company's tariff, stating the right to terminate service for nonpayment, was held insufficient to demonstrate explicit state approval of the no-hearing policy. Where *Moose Lodge* had relied on the absence of a monopoly under a state liquor license, *Jackson* characterized *Moose Lodge* as a near-monopoly case and said there was no showing of a connection between the utility's monopoly status and its no-hearing policy. Finally, the Court rejected the notion that Metropolitan Edison was performing a "public function" by supplying electricity, saying there had been no delegation to the company of a power "traditionally associated with sovereignty." The latter comment looked forward to the Court's decision in FLAGG BROS., INC. V. BROOKS (1978).

Justice WILLIAM J. BRENNAN dissented without reaching the merits. Justices WILLIAM O. DOUGLAS and THURGOOD MARSHALL dissented on the merits, pointing out how the majority was departing from the teaching of the Warren Court—something that Justice Rehnquist likely did not need to have explained. *Jackson* did more than reverse currents in the various individual streams of state action DOCTRINE (public functions, monopolies, state encouragement). By taking up each of these arguments separately and rejecting them one by one, the Court also implicitly abandoned the approach of BURTON V. WILMINGTON PARKING AUTHORITY (1961), which had called for determining state action questions by looking at the totality of circumstances in a particular case.

KENNETH L. KARST
(1986)

## JACKSONIANISM

The election of ANDREW JACKSON to the presidency in 1828 was only the second time since the adoption of the Con-

stitution that the "out" party came to power. The first occurred in 1800 with the election of THOMAS JEFFERSON, who at that time opted for a course of action that stressed moderation and reconciliation. Jefferson revised several of the government's policies and changed many of its personnel, but he refused to go along with any assault on the Constitution itself or on major FEDERALIST enactments. If anything, through the LOUISIANA PURCHASE TREATY and the EMBARGO ACTS of 1807–1809, he increased the powers of the national government. Jackson took a very different approach. He favored amendment of the Constitution and other policies to make the central government more amenable to popular control. Jackson also championed a strict interpretation of the Constitution and the decentralization of authority, stressing the close links between the will of the people, majority rule, and STATES' RIGHTS. He also was critical of the broad powers of interpretation that the Supreme Court had arrogated to itself over the preceding quarter-century.

Although the campaign of 1828 was particularly scurrilous, with much of it centered on the candidates' personalities, it also involved fundamental constitutional and even ideological considerations. Jackson's opponent, JOHN QUINCY ADAMS, had organized his whole administration and run for reelection on a platform of the AMERICAN SYSTEM—a federal program of INTERNAL IMPROVEMENTS, a high protective tariff, and the second BANK OF THE UNITED STATES—which was predicated upon a loose interpretation of the Constitution and the need for a strong and active national government. These views were a major issue in the election of 1828, and opposition to them explains much of the support Jackson received in the South, the Old West, and the Middle Atlantic states, from people who had strong emotional and ideological ties to ANTIFEDERALISM and Old Republicanism. This group—which included THOMAS HART BENTON, Amos Kendall, Silas Wright, Francis Preston Blair, NATHANIEL MACON, and Thomas Ritchie—was strongly committed to the view of the origin and nature of the Union that had been articulated in the VIRGINIA AND KENTUCKY RESOLUTIONS of 1798–1799. These resolutions viewed the Constitution as the product of a compact between the different states and asserted that the federal government was one of clearly defined and specifically delegated and limited powers. The resolutions denied that the Supreme Court was either the exclusive or final arbiter of constitutional questions and argued instead that the states should act as sentinels to watch over the activities of the federal government. They believed that these principles had been validated by Jefferson's election in 1800, but that they had been abandoned as the country pursued wealth and power between 1801 and 1828. Jackson's most avid supporters wanted him to reverse this development and to return the country to plain republican principles, and they justified this by invoking the "Spirit of '98."

Jackson did not disappoint them. He began by advocating the principle of rotation of office for federal officeholders. This had been a popular constitutional concept in the 1780s and had found expression in the ARTICLES OF CONFEDERATION, the PENNSYLVANIA CONSTITUTION OF 1776, and a number of other STATE CONSTITUTIONS. The failure to include it in the United States Constitution had been a major concern of the Antifederalists, and Jackson's espousal of it in regard to presidential appointments was considered by his opponents to be a direct assault on the Constitution. Throughout his first administration Jackson also urged that the Constitution be amended to eliminate the ELECTORAL COLLEGE, limit the tenure of the President and vice-president to a single term of four or six years, provide for the popular election of senators and members of the federal judiciary, and give self-government to the DISTRICT OF COLUMBIA. He and most of his closest advisers also favored a repeal of section 25 of the JUDICIARY ACT OF 1789.

But these proposals were never endorsed by Congress, which was at odds with Jackson throughout most of his two terms in office. As a consequence, Jackson was forced to enunciate his views of the Constitution through his various annual addresses, veto messages, proclamations, policy decisions, and appointments. In these ways, Jackson made clear his opposition to a federal program of internal improvements on both constitutional and policy grounds. He also vetoed the bill to recharter the second Bank of the United States, in large part because its activities impinged on the rights of the states. Moreover, in exercising this veto and in implementing his policy toward AMERICAN INDIANS, he took direct issue with the nationalist claim that the Supreme Court was the exclusive or final arbiter in disputes between the federal and state governments. Jackson also appointed five Justices to the Supreme Court—JOHN MCLEAN, HENRY BALDWIN, JAMES M. WAYNE, PHILIP P. BARBOUR, and ROGER BROOKE TANEY as CHIEF JUSTICE—who were unsympathetic to the BROAD CONSTRUCTION and the nationalist decisions of the MARSHALL COURT.

Although deeply committed to the concept of states' rights, the Jacksonians had no sympathy for the doctrine of NULLIFICATION, promulgated by JOHN C. CALHOUN and South Carolina, who believed that the protective tariffs of 1828 and 1832 were unconstitutional and who were concerned with protecting the institution of SLAVERY from outside interference. The Jacksonians, for their part, advocated states' rights as a way of achieving majority rule, while the proslavery interests espoused the doctrine of states' rights as a way of protecting the interests of a minority. The difference can be seen most clearly in the two

groups' positions on the issues of when and by whom the Constitution should be amended. The Jacksonians, consistent with their faith in majority rule, took upon themselves the burden of obtaining amendments to the Constitution in order to make the federal government more directly responsive to the will of the people and to limit and clarify the powers of the Supreme Court. Such a course would require the approval of two-thirds of both houses of Congress and three-quarters of the states. Historically, these have been difficult majorities to obtain, and the Jacksonians were never successful. Proslavery interests, on the other hand, argued during the nullification crisis that a single state had a right to nullify federal law and that, in the event of nullification, the law's proponents would have the responsibility of gaining the requisite majorities to alter the Constitution. This argument shifted in a decisive way the burden of obtaining the amendment.

Jacksonians also opposed Calhoun's version of the states' rights doctrine because they believed it threatened the existence of the Union. The right of states to secede from the Union had not traditionally been part of the concept of states' rights. The Jacksonian commitment to the rights of the states in no way precluded a belief that the Union was perpetual or that within its properly limited sphere of power (like the making of tariff laws) the federal government was supreme. The Jacksonians rejected the nullifiers' claim that SECESSION was a legal or constitutional right that could be peacefully exercised. Instead, they insisted it was only a natural or revolutionary right that had to be fought for and could be suppressed.

After Jackson left office, the Jacksonian interpretation of the Constitution dominated the administrations of three other Presidents. MARTIN VAN BUREN was a product of the Virginia-New York alliance that played such a dominant role in the politics of the early Republic and that had its roots in the strong Antifederalist tradition in both these states. As President, Van Buren was a strong advocate of states' rights, opposed a federal program of internal improvements, and implemented the independent treasury system, which divorced banking from the federal government. JAMES K. POLK was also a doctrinaire Jacksonian. He prevented the creation of a third Bank of the United States, reinstated the independent treasury system, and further circumscribed federal spending on internal improvements. FRANKLIN PIERCE also viewed the world from a Jacksonian perspective. He had a great respect for states' rights and opposed the federal government's involvement in the ECONOMY.

The Jacksonians were never proslavery in the sense that Calhoun and other southerners were, but they shared an antipathy to abolitionists, who wanted the federal government to move against the "peculiar institution." In fact, the Jacksonians never developed an effective position on the slavery question—a failure that, as much as anything else, explains the lack of success of two other Presidents who had roots in Jacksonianism, JAMES BUCHANAN and ANDREW JOHNSON.

Nonetheless, while the Jacksonian constitutional position did not lead to any basic changes in the Constitution itself and its orientation toward states' rights and strict interpretation was overturned by the extreme nationalist thrust of the CIVIL WAR, it did dominate much of American politics in the second third of the nineteenth century.

RICHARD E. ELLIS
(1992)

Bibliography

ELLIS, RICHARD E. 1987 *The Union at Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis.* New York: Oxford University Press.

REMINI, ROBERT V. 1988 *The Legacy of Andrew Jackson: Essays on Democracy, Indian Removal, and Slavery.* Baton Rouge: Louisiana State University Press.

VAN DEUSEN, GLYNDON G. 1959 *The Jacksonian Era, 1828–1848.* New York: Harper & Row.

## JACKSON'S PROCLAMATION TO THE PEOPLE OF SOUTH CAROLINA
(December 10, 1832)

On November 24, 1832, a state convention adopted the SOUTH CAROLINA ORDINANCE OF NULLIFICATION declaring that the federal tariff acts of 1828 and 1832 were "null, void, and no law, nor binding upon this State, its officers or citizens." Sixteen days later President ANDREW JACKSON responded with a proclamation directed at the people of South Carolina, rather than at the state government. Jackson declared the NULLIFICATION ordinance "incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed." After a detailed and withering analysis of the legality and constitutionality of the ordinance, Jackson turned to the question of SECESSION, which South Carolina threatened if the tariffs were enforced in that state. Jackson warned the people of South Carolina that "Disunion by armed force is TREASON " and that on their heads "may fall the punishment" for that crime. Congress subsequently modified the tariffs but also passed the FORCE ACT authorizing the use of military power to enforce federal laws. South Carolina then repealed its Nullification Or-

dinance, but in a final flurry of defiance passed an ordinance purporting to nullify the Force Act.

PAUL FINKELMAN
(1986)

Bibliography

FREEHLING, WILLIAM W. 1965 *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836.* New York: Harper & Row.

## JACKSON'S VETO OF THE BANK OF THE UNITED STATES BILL
(July 10, 1832)

The first Bank of the United States was chartered in 1791 despite Jeffersonian opposition. In 1811 its charter expired, but in 1815 the bank was rechartered, with little opposition, as the Second Bank of the United States. The Supreme Court in MCCULLOCH V. MARYLAND (1819) upheld the constitutionality of the bank. In 1832 Congress extended the charter of the Second Bank. For a variety of reasons President ANDREW JACKSON opposed the extension. In his veto message Jackson asserted, more emphatically than previous Presidents, the necessity of exercising the presidential VETO POWER on constitutional grounds, rather than on grounds of policy or expediency. Jackson rejected *McCulloch,* arguing that "Mere PRECEDENT is a dangerous source of authority," which should not decide "questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled." Furthermore, Jackson believed Supreme Court opinions "ought not to control the coordinate authorities of this Government." Rather, each branch of the government must "be guided by its own opinion of the Constitution" because a public official swears to support the Constitution "as he understands it, and not as it is understood by others." Jackson argued that the Bank was neither a necessary nor a proper subject for congressional legislation, and so he felt constitutionally obligated to veto the bill.

PAUL FINKELMAN
(1986)

Bibliography

REMINI, ROBERT V. 1967 *Andrew Jackson and the Bank War: A Study in the Growth of Presidential Power.* Norton Essays in American History. New York: Norton.

## *JACOBELLIS v. OHIO*
378 U.S. 184 (1964)

The Supreme Court reversed Jacobellis's conviction for possessing and exhibiting an obscene motion picture, finding the movie not obscene under ROTH V. UNITED STATES (1957). Justice WILLIAM J. BRENNAN's plurality opinion announced two significant constitutional developments and presaged a third. First, in any case raising the issue whether a work was obscene, the Court would determine independently whether the material was constitutionally protected. Second, in judging the material's appeal to prurient interests against "contemporary community standards," courts were to apply a national standard, not the standards of the particular local community from which the case arose. Finally, purporting to apply standards based on *Roth* and foreshadowing his opinion in MEMOIRS V. MASSACHUSETTS (1965), Brennan noted that a work could not be proscribed unless it was "utterly' without social importance."

*Jacobellis* is best known, however, for Justice POTTER J. STEWART's concurring opinion. Contending that only hardcore pornography constitutionally could be proscribed, Stewart declined to define the material that term included, stating only, "I know it when I see it."

KIM MCLANE WARDLAW
(1986)

## *JACOBS, IN RE*
98 N.Y. 98 (1885)

This exceptionally influential decision, cited hundreds of times by state and federal courts, reflected laissez-faire principles against government regulation of the economy. New York in 1884 enacted a statute to improve the public health by penalizing the manufacture of cigars on the same floor of tenement houses where people lived. Jacobs, a tenement occupant prosecuted under the statute, somehow retained WILLIAM M. EVARTS, "the Prince of the American Bar," whose powerful defense of free enterprise convinced the New York Court of Appeals to decide unanimously against the constitutionality of the regulation. Judge Robert Earl, drawing heavily on Evarts's argument, larded his opinion with polemics against state infringement on liberty and property conducted under the pretext of the POLICE POWER. The constitutional basis of the opinion is not clear because Earl stopped short of invoking the DOCTRINE OF FREEDOM OF CONTRACT, but the rhetoric of SUBSTANTIVE DUE PROCESS as a limitation on LEGISLATIVE POWER to regulate the economy stands out. "Under the mere guise of police regulations," Earl said, "personal rights and private property cannot be arbitrarily invaded," and JUDICIAL REVIEW determines whether the legislative power exceeded the limits. The court found that the state plainly had not passed a health law but had trampled personal liberty.

LEONARD W. LEVY
(1986)

## *JACOBSON v. MASSACHUSETTS*
197 U.S. 11 (1905)

A Massachusetts statute required VACCINATION of a town's inhabitants when health authorities so ordered. For the Supreme Court, Justice JOHN MARSHALL HARLAN concluded the regulation was within the POLICE POWER of the commonwealth and violated no federal constitutional right.

The FIRST AMENDMENT was not then interpreted to apply to the states. Jacobson relied on the liberty guaranteed by the FOURTEENTH AMENDMENT'S DUE PROCESS clause, although his objection to vaccination was religious. Harlan concluded that SUBSTANTIVE DUE PROCESS implied no absolute right to control one's body. Justices DAVID BREWER and RUFUS PECKHAM dissented.

RICHARD E. MORGAN
(1986)

## *JAMES v. BOWMAN*
190 U.S. 127 (1903)

A provision of the FORCE ACTS, passed to protect FIFTEENTH AMENDMENT guarantees, forbade bribery or intimidation to prevent the exercise of VOTING RIGHTS. Bowman, a private citizen, was indicted for preventing several blacks from voting in a Kentucky congressional election. Justice DAVID BREWER for a 6–2 Supreme Court, relying mainly on UNITED STATES V. REESE (1876), declared that the amendment applied to abridgments of the right to vote by the federal government or by a state on account of race; it did not reach private actions. A congressional measure purporting to punish "purely individual action," said Brewer, could not be sustained as an enforcement of the Fifteenth Amendment's prohibition against STATE ACTION abridging the right to vote on account of race. Further, the statute was not limited to RACIAL DISCRIMINATION denying the right to vote. Congress had not relied on its power under Article I to regulate federal elections.

DAVID GORDON
(1986)

## *JAMES v. VALTIERRA*
402 U.S. 137 (1971)

The California state constitution required voter approval in a local REFERENDUM for the building of public low-rent housing projects. The Supreme Court, 5–3, sustained this requirement against an EQUAL PROTECTION attack.

Justice HUGO L. BLACK wrote for the majority. It was not the business of the courts to analyze governmental structures to see whether they disadvantaged one group or another. In any case, advocates of low-rent housing had not been singled out for disadvantage; California required referenda for the adoption of a number of kinds of legislation. Black distinguished HUNTER V. ERICKSON (1969), which had struck down a similar referendum requirement imposed on fair housing laws. Here no RACIAL DISCRIMINATION was shown.

Justice THURGOOD MARSHALL, for the dissenters, argued that discrimination "between "rich' and "poor' as such" was forbidden, quoting Justice JOHN MARSHALL HARLAN'S dissent in DOUGLAS V. CALIFORNIA (1963). "[S]ingling out the poor to bear a burden not placed on any other class of citizens tramples the values that the FOURTEENTH AMENDMENT was designed to protect."

KENNETH L. KARST
(1986)

(SEE ALSO: *Indigent; Wealth Discrimination.*)

## JAPANESE AMERICAN CASES
*Hirabayashi v. United States*
320 U.S. 81 (1943)
*Korematsu v. United States*
323 U.S. 214 (1944)
*Ex parte Endo*
323 U.S. 283 (1944)

For more than a month after the Japanese attack on Pearl Harbor in December 1941, no one of high authority in the armed services or elsewhere in the national government suggested seriously that persons of Japanese ancestry should be moved away from the West Coast. The Army's historian wrote that in February and March of 1942 the military estimates were that "there was no real threat of a Japanese invasion" of the area. Yet by March 1942 a program was fully underway to remove about 120,000 persons from their West Coast homes and jobs and place them in internment camps in the interior of the country. About 70,000 of these people were citizens of the United States; two out of every five people sent to the camps were under the age of fifteen or over fifty. All were imprisoned for an indefinite time without any individualized determination of grounds for suspicion of disloyalty, let alone charges of unlawful conduct, to be held in custody until their loyalty might be determined. (See PREVENTATIVE DETENTION.) The basis for their imprisonment was a single common trait—their Japanese ancestry.

The military services came to discover the "military necessity" of relocating the Japanese Americans in response to pressure from the West Coast congressional delegations and from other political leaders in the region—including,

to his later regret, EARL WARREN, then attorney general of California. These politicians were responding, in turn, to a clamor from certain newspapers and labor unions, along with (as U.S. Attorney General FRANCIS BIDDLE later listed them) "the American Legion, the California Joint Immigration Committee, the Native Sons and Daughters of the Golden West, the Western Growers Protective Association, the California Farm Bureau Federation [and] the Chamber of Commerce of Los Angeles." The groups' campaign was aided by newspaper accounts of American military defeats and Japanese atrocities in the early days of the war, and by false reports of sabotage at Pearl Harbor. Anti-Asian racism, long a feature of California, now had a focus. In Hawaii, which *had* been attacked, no evacuation was proposed; persons of Japanese ancestry constituted almost one third of that territory's population. On the West Coast, Japanese Americans barely exceeded one percent of the population; thus, no political force resisted the mixture of fear, racism, and greed. "The Japanese race is an enemy race," said General John DeWitt in his official report to the War Department. Once the Army urged wholesale evacuation, the opposition of Biddle and the Justice Department was unavailing. President FRANKLIN D. ROOSEVELT sided with the Army, and the evacuation began.

The program, first established by EXECUTIVE ORDER 9066 and then partly ratified by Congress, called for three measures in "military areas"—that is, the entire West Coast. First, persons of Japanese descent were placed under curfew at home from 8:00 p.m. to 6:00 a.m. Second, they would be excluded from "military areas" upon military order. Third, they would be "relocated" in internment camps until their "loyalty" could be determined. The loyalty-determining process was leisurely; as late as the spring of 1945 some 70,000 persons remained in the camps.

The three parts of the program, all of which raised serious constitutional problems, were considered separately by the Supreme Court in three cases: *Hirabayashi v. United States* (1943), *Korematsu v. United States* (1944), and *Ex Parte Endo* (1944).

The *Hirabayashi* case offered the Court a chance to rule on the validity of both the curfew and the exclusion orders. A young American citizen was charged with violating the curfew and refusing to report to a control station to be evacuated from Seattle, where he lived. He was convicted on both counts, and sentenced to three months of imprisonment. In June 1943 the Supreme Court unanimously upheld the curfew violation conviction, and said that it need not consider the validity of the exclusion order, because the two sentences were to run concurrently.

Not until December 1944 did the Court reach the other parts of the evacuation program. In *Korematsu*, the Court divided 6–3 in upholding an order excluding an American citizen from his home town, San Leandro, California. On the same day, the Court in *Endo* avoided deciding on the constitutional validity of internment. Instead, it concluded that the act of Congress ratifying the evacuation program had not authorized prolonged detention of a citizen whose loyalty was conceded. The Court assumed that some brief detention was implicitly authorized as an incident of an exclusion program aimed at preventing espionage and sabotage. Any further detention would have to rest on an assumption the Court was unwilling to make: that citizens were being detained because of their ancestry, in response to community hostility. Justice OWEN ROBERTS, concurring in the result, found congressional authority for internment in the appropriation of funds to operate the camps. Reaching the constitutional issues the majority had avoided, he concluded the Endo's detention violated "the guarantees of the BILL OF RIGHTS . . . and especially the guarantee of DUE PROCESS OF LAW."

The Japanese American cases have made two positive contributions to the development of egalitarian constitutional doctrine. The *Hirabayashi* and *Korematsu* opinions were links in a chain of precedent leading to the Supreme Court's recognition that the Fifth Amendment's due process clause contains a guarantee of equal protection as a substantive limit on the conduct of the national government. (See BOLLING V. SHARPE; EQUAL PROTECTION OF THE LAWS.) And *Korematsu* first announced the principle that legal restrictions on the civil rights of a racial group are "suspect." (See SUSPECT CLASSIFICATIONS.) Even so, these decisions deserve Eugene Rostow's epithet: "a disaster." The Supreme Court's evasion of issues, its refusal to examine the factual assumptions underlying the "military necessity" of evacuation—in short, its failures to perform as a court—are easier to forgive than to excuse. There is little comfort in the fact that the Court's *Hirabayashi* and *Korematsu* opinions were authored by Justices celebrated as civil libertarians.

Chief Justice HARLAN FISKE STONE wrote for a unanimous Court in *Hirabayashi*, approaching the validity of the curfew not so much as a question about the liberties of a citizen but as a question about congressional power. The WAR POWERS, of course, are far-reaching; they include, as Justices often repeat, "the power to wage war successfully." Thus, for Stone, the only issue before the Court was whether there was "a RATIONAL BASIS" for concluding that the curfew was necessary to protect the country against espionage and sabotage in aid of a threatened invasion. As to that necessity, the Chief Justice said: "We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry." There was no effort to examine into the likelihood of invasion, or to specify what

experience demonstrated the "fact" assumed. The one hard fact was that no sabotage or espionage had been committed by persons of Japanese ancestry at the time of the Hawaii attack or afterward. (California's Attorney General Warren had been equal to that challenge, however: " . . . that is the most ominous sign in our whole situation. It convinces me more than perhaps any other factor that the sabotage we are to get, the fifth column activities that we are to get, are timed just like Pearl Harbor was timed. . . .")

Another question remained: Why impose wholesale restrictions on persons of Japanese ancestry, when Germans and Italians were being investigated individually? Here the Court took refuge in a presumption: "We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour [disloyal] persons could not readily be isolated and separately dealt with. . . ." This is the classical language of "rational basis" review; government officials have made a factual determination, and a court "cannot say" they are mistaken. That standard of review serves well enough to test the reasonableness of a congressional conclusion that some type of activity substantially affects INTERSTATE COMMERCE. It is utterly inappropriate to test the justification for selectively imposing restrictions on a racial minority.

Justice HUGO L. BLACK began his opinion for the majority in *Korematsu* by recognizing this difference. Racial distinctions, he said, were "immediately suspect," and must be subjected to "the most rigid scrutiny." Following that pronouncement, however, all judicial scrutiny of the racial discrimination at hand was abandoned. The opinion simply quoted the "We cannot say" passage from the *Hirabayashi* opinion; stated, uncritically, the conclusions of the military authorities; observed that "war is an aggregation of hardships"; and—unkindest cut—concluded that "Citizenship has its responsibilities as well as its privileges."

Justice Roberts, dissenting, argued that Korematsu had been subjected to conflicting orders to leave the military area and to stay put, a plain due process violation. It was left to Justice FRANK MURPHY—in his finest hour—to expose the absence of imperial clothing. He demonstrated how the "military" judgment of the necessity for evacuation had departed from subjects in which Army officers were expert and had embarked on breathtaking sociological generalization: the Japanese American community were "a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion" (quoting General DeWitt).

Decades later, Peter Irons discovered in government archives irrefutable evidence that government officers had deliberately misled the Supreme Court on questions directly related to the claim of military necessity for the evacuations. In response to this evidence, in the mid-1980s federal district courts set aside the convictions of Gordon Hirabayashi, Fred Korematsu, and Minoru Yasui (whose conviction had been affirmed along with Hirabayashi's).

Justice ROBERT H. JACKSON, dissenting in *Korematsu*, said, in effect: There is nothing courts can do to provide justice in this case, or in any case in which the military and the President are determined to take action in wartime; yet we should not lend our approval to this action, lest we create a precedent for similar extraconstitutional action in the future. Of all the oft-noted ironies of the Japanese American cases, this topsy-turvy prediction may be the most ironic of all. *Korematsu* as a judicial precedent has turned out to provide a strong doctrinal foundation for the Supreme Court's vigorous defense of racial equality in the years since mid-century. The disaster of the Japanese American cases was not doctrinal. It was instead the betrayal of justice there and then for Gordon Hirabayashi, Fred Korematsu, Minoru Yasui, and some 120,000 other individuals—and thus for us all.

KENNETH L. KARST
(1986)

(SEE ALSO: *World War II.*)

Bibliography

GRODZINS, MORTON 1949 *Americans Betrayed: Politics and the Japanese Evacuation.* Chicago: University of Chicago Press.

IRONS, PETER 1983 *Justice at War.* New York: Oxford University Press.

ROSTOW, EUGENE V. 1949 The Japanese American Cases—A Disaster. *Yale Law Journal* 54:489–533.

## JAPANESE AMERICAN RELOCATION

See: Executive Order 9066 and Public Law 503

## JAY, JOHN
(1745–1829)

John Jay was a major figure during the Revolutionary era. Born into one of colonial New York's leading families, he was aristocratic in appearance, well educated, and a hard worker with a precise and orderly mind. He graduated from King's College in 1764, was admitted to the bar four years later, and soon had a prosperous practice. He early took an interest in the constitutional debate between England and the American colonies; although uneasy about the radical implication of some of the resistance to imperial policies in the 1770s, he nevertheless was a firm patriot. He served as a member of the New York Committee of Correspondence and in the Provincial Congress,

as well as in the first and second Continental Congresses in Philadelphia. In 1776 he returned to New York to help draft a state constitution (1777) and to become New York's first chief justice. His major interests, however, lay in the field of diplomacy: he became the United States Minister to Spain in 1779 and later joined BENJAMIN FRANKLIN and JOHN ADAMS in Paris to negotiate the treaty of 1783 that recognized American independence and formally ended the fighting with Great Britain.

Returning to the United States in 1784 Jay assumed the position of secretary of foreign affairs under the ARTICLES OF CONFEDERATION. Unhappy over the weakness of the central government during the 1780s, he sympathized with the movement to create a new constitution that would strengthen the power of the federal government over the states. Jay was not a member of the CONSTITUTIONAL CONVENTION OF 1787, but he strongly advocated adoption of the Constitution in the closely contested ratification struggle in New York the following year. Joining forces with ALEXANDER HAMILTON and JAMES MADISON, Jay contributed several pieces (#2-#5 and, after a bout with illness, #64) to THE FEDERALIST. In these essays Jay warned that failure to adopt the new government would probably lead to the dissolution of the Union and the creation of separate confederacies. He also stressed that only through the creation of a strong and energetic central government could the discord and jealousies of the various states be brought under control and the territorial integrity of the United States be protected from foreign encroachment.

Shortly after becoming President, GEORGE WASHINGTON appointed Jay the first Chief Justice of the United States, a position he held from 1789 to 1795. Two main themes ran through Jay's decisions. The first stressed the supremacy of the newly created national government. CHISHOLM V. GEORGIA (1793) involved the constitutional question of whether a state could be sued in a federal court by a citizen of a different state without its permission, thus limiting its SOVEREIGNTY. The question had been raised during the debate over ratification, and the supporters of the Constitution had given assurances that such suits would not be allowed. Nevertheless, under Jay's leadership the Court handed down an affirmative decision, couched in extremely nationalistic terms. Jay stressed the role of the people of the United States in the creation of the Union, and deemphasized the powers and sovereignty of the states. A very controversial decision, *Chisholm* was vitiated when reaction to it culminated in the adoption of the ELEVENTH AMENDMENT.

While riding circuit in 1793 Jay delivered a dissenting opinion in WARE V. HYLTON arguing that a Virginia statute sequestering prerevolutionary debts of British creditors was invalid because it had been nullified by the Treaty of Paris (1783) which specifically indicated that such debts would be honored. The case was appealed in 1796, and the Supreme Court, from which Jay had already resigned, adopted the former Chief Justice's reasoning and reversed the lower court's decision. In another important case, *Glass v. The Sloop Betsy* (1794), the Supreme Court overturned a Maryland District Court ruling that allowed French consuls in America to function as prize courts and dispose of prizes captured by French privateers. Writing for the Court, Jay concluded that United States sovereignty required that these cases be handled by American courts.

Jay's other major concern as Chief Justice was to protect the independence of the Supreme Court by insisting on a strict SEPARATION OF POWERS. He rejected various attempts to incorporate the Court into the activities of the legislative and executive branches. For example, when Congress passed an act that required the circuit courts to review the applications of military invalids for pensions, Jay, while riding circuit in New York, declared that "neither the Legislative nor Executive branch can constitutionally assign to the Judicial any duties but such as are properly judicial and to be performed in a judicial manner." This position was upheld a short time later by the United States Circuit Court of Pennsylvania, in what has become known as HAYBURN'S CASE (1792), when the constitutionality of the law was actually challenged. Jay also rejected occasional requests from the President and Secretary of the Treasury Alexander Hamilton for ADVISORY OPINIONS on controversial matters, arguing that the Supreme Court should render opinions only in actual lawsuits brought by contending parties.

Jay was never happy serving on the Court. He thought the circuit riding duties too arduous. He also believed the Court lacked "the energy, weight and dignity which are essential to its affording due support to the national government." Hoping to return to a more active political life, he was defeated in a bid to become governor of New York in 1792. In 1794, while still holding the position of Chief Justice, he went on a special diplomatic mission to try to resolve existing controversies with Great Britain. The result was the controversial but successful JAY'S TREATY. Resigning his post on the Court, Jay became governor of New York in 1795 for two terms. Following the Jeffersonian successes in 1800 he declined reappointment as Chief Justice of the United States Supreme Court and retired from public life.

RICHARD E. ELLIS
(1986)

Bibliography

MONAGHAN, FRANK 1935 *John Jay.* Indianapolis: Bobbs-Merrill.

MORRIS, RICHARD B. 1967 *John Jay, the Nation and the Court.* Boston: Boston University Press.

## *JAY BURNS BAKING COMPANY v. BRYAN*

See: *Burns Baking Company v. Bryan*

## JAY COURT

See: Supreme Court, 1789–1801

## JAY'S TREATY
8 Stat. 116 (1795)

Although obligated by the treaty that ended the Revolutionary War to evacuate its military posts in the Northwest Territory, the British government held the posts, established new ones, and, in 1793, began a policy of encouraging Indian depredations against American settlers in the territory. At the same time, the British fleet, then at war with France, began seizing American ships that called at French ports.

In April 1794, President GEORGE WASHINGTON appointed Chief Justice JOHN JAY envoy extraordinary to Britain to negotiate for neutral shipping rights and evacuation of the Northwest Territory. The treaty Jay negotiated in London and signed in November 1794 provided for both; but it also made many concessions to the British, especially at the expense of Western settlers. Several questions were left to be decided by joint commissions, which would require appropriated funds for their operation.

The congressional debate on Jay's Treaty raised constitutional issues that endure to the present day. Republicans in the House of Representatives, led by ALBERT GALLATIN, objected to a treaty with the force of supreme law that required appropriation of money but from the making of which the House was excluded. They attempted to hold the TREATY POWER hostage to the spending power.

After the treaty was ratified, during the debate on the appropriation, Gallatin induced the House to request from the President documents related to the negotiations. Washington refused to comply, invoking EXECUTIVE PRIVILEGE in order that "the boundaries fixed by the Constitution between the different departments should be preserved."

DENNIS J. MAHONEY
(1986)

Bibliography

COMBS, JERALD A. 1970 *The Jay Treaty: Political Battleground of the Founding Fathers.* Berkeley: University of California Press.

## JEFFERSON, THOMAS
(1743–1826)

Thomas Jefferson, statesman, philosopher, architect, champion of freedom and enlightenment, was United States minister to France when the federal CONSTITUTIONAL CONVENTION met in 1787. Long an advocate of a strengthened confederation, he applauded the convention and anxiously awaited the result of its deliberations. On seeing the roster of delegates, he exclaimed to his diplomatic colleague and friend JOHN ADAMS, "It is really an assembly of demigods." Jefferson soon made the Constitution the polestar of his politics, aligning its principles with those of aspiring American democracy, with momentous consequences for the future of the republic.

Educated for the law in his native Virginia, tutored by GEORGE WYTHE, young Jefferson was a keen student of the English constitution. Like a good Whig, he traced the venerable rights and liberties of Englishmen back to Saxon foundations. The degeneration under George III turned on the system of minsterial influence to corrupt the Parliament. This upset the balance of king, lords, and Commons upon which the freedom and order of the constitution depended; and it threatened, Jefferson came to believe, tyranny for America. He was thus led in his first published work, *A Summary View of the Rights of British America* (1774), to repudiate the political authority of the mother country over the colonies. When he penned the DECLARATION OF INDEPENDENCE two years later, he placed the American claim not in the prescriptive guarantees of the English constitution but on the Lockean ground of the NATURAL RIGHTS of man. In recoil from the treacheries of an unwritten constitution, he concluded with the mass of American patriots that a CONSTITUTION should be written; in this and other ways he sought to secure the supremacy of FUNDAMENTAL LAW over statutory law, which was the great failure of the English constitution. Finally, Jefferson entered upon the search for a new system of political balance consonant with American principles and capable of breaking the classic cycle of liberty, corruption, and tyranny, thereby ensuring the permanence of free government.

Jefferson's constitutional theory first found expression in the making of the VIRGINIA CONSTITUTION OF 1776. In June, while he was drafting the Declaration of Independence for Congress, Jefferson also drafted a plan of government for Virginia and sent it to the revolutionary

convention meeting in Williamsburg. The work of framing a new government, he wrote, was "the whole object of the present controversy." In his mind, the relationship of one state paper to the other was that of theory to practice, principle to application. Endeavoring to reach all the great objects of public liberty in the constitution, he included a number of fundamental reforms in Virginia society and government. The constitution adopted at Williamsburg contained none of these reforms, however. Jefferson at once became its severest critic, not only because of its conservative character but also because it failed to meet the test of republican legitimacy. The "convention" that adopted it, as he observed, was the revolutionary successor of the House of Burgesses, elected in April to perform the ordinary business of government. It could not, therefore, frame a supreme law, a law binding on government itself. Jefferson was groping toward the conception of constituent SOVEREIGNTY, in which the government actually arises from "the consent of the governed" through the constitution-making authority of the people. Thus it was that he proposed a form of popular ratification of the constitution—a radical notion at that time. He also proposed, and included in his plan, a provision for amendment by the consent of the people in two-thirds of the counties. This proposal was unprecedented. Jefferson made the omission of any provision for constitutional change a leading count in his indictment of the Virginia frame of government.

Jefferson returned to Virginia in 1776, served his state as a legislative reformer, then as wartime governor, and reentered Congress in the fall of 1783. Turning his attention to the problems of the confederation, he followed his young friend JAMES MADISON in advocating the addition of new congressional powers to raise revenue and regulate FOREIGN COMMERCE. He persuaded Congress to try the provision of the ARTICLES OF CONFEDERATION for an interim executive in the form of a committee of the states, thereby overcoming the dilemma of a congress in perpetual session, which was one source of its debility, or virtual obliteration of the government of the United States. The plan promptly collapsed under trial. Congress seemed as incapable of exercising the powers it already had as it was of obtaining new powers from the states. Jefferson was no "strict constructionist" where the Articles were concerned. In the case of the LAND ORDINANCE OF 1784 for the government of the western territory, he prevailed upon Congress to adopt a bold nation-building measure without a stitch of constitutional authority.

Jefferson's congressional career ended in May 1784, when he was appointed minister plenipotentiary to join BENJAMIN FRANKLIN and John Adams, in Paris, on the commission to negotiate treaties of amity and commerce with European states. He had helped reformulate policy on this subject in Congress. The policy concerned trade, of course; but it also concerned the strength and character of the confederation. Although the front door to congressional commercial regulation was closed, the back door was open through the power of Congress to negotiate treaties. "The moment these treaties are concluded the JURISDICTION of Congress over the commerce of the states springs into existence, and that of particular states is suppressed," Jefferson wrote. Only in treating with foreign nations could the United States act as "one Nation," and so acting not only expand trade abroad but strengthen the bonds of union at home. Indeed, Jefferson asserted that the latter was his "primary object." His hopes were quickly disappointed, however. The European courts, with two or three exceptions, rebuffed the American overtures for freer trade; and as the various state legislatures undertook to regulate foreign trade, Jefferson's political objective was undermined. He reluctantly concluded with Madison and other nationalists that there was no alternative to the outright grant of commercial power to Congress. It was the logic of commercial policy, basically, that led Jefferson to support the federal convention.

Jefferson's position in France, where he had succeeded Franklin as minister, conditioned his response to the new constitution in opposite ways. On the one hand, he had seen the infant republic jeered, kicked, and scoffed at from London to Algiers, all respect for its government annihilated from the universal opinion of its feebleness and incompetence. He had been frustrated in commercial diplomacy even at Versailles; and he and Adams had gone begging to Dutch bankers to keep the confederation afloat. A stronger government, more national in character, with higher tone and energy, was therefore necessary to raise the country's reputation in Europe. On the other hand, Jefferson pondered the new constitution in Paris, where tyranny, not anarchy, was the problem, where the drama of the French Revolution had just begun, and where he had come to recognize the inestimable blessings of American liberty. Learning of SHAY'S REBELLION, which terrified Adams in London, Jefferson declared philosophically, "I like a little rebellion now and then. It is like a storm in the atmosphere." In this spirit, reading the convention's plan in November, he thought the delegates had overreacted to the insurrection in Massachusetts and set up "a kite to keep the hen yard in order." He was staggered, too, by the boldness of the work, a wholly new frame of government, when he had looked for reinvigorating amendments to the Articles.

But the more Jefferson studied the Constitution the more he liked it. He had two main objections. The perpetual reeligibility of the chief magistrate aroused monarchical fears in his mind. Most of the evils of European governments were traceable to their kings, he said; and an

American president reeligible every fourth year would soon become a king, albeit an elective one. The fears were little felt at home, however, chiefly because of the universal confidence in GEORGE WASHINGTON, whose election to the first office was a foregone conclusion. So, increasingly, Jefferson concentrated on his second objection, the omission of a BILL OF RIGHTS. In this, of course, he was supported by the mass of anti-Federalists. At first he unwittingly played into their game of using the demand for a bill of rights to delay or defeat RATIFICATION OF THE CONSTITUTION. His suggestion in a private letter that four states withhold their assent until the demand was met contributed to the initial rejection of the Constitution in North Carolina. Actually, Jefferson always wanted speedy adoption by the necessary nine states; and when he learned of the Massachusetts plan of unconditional ratification with recommended amendments, he backed this approach. Meanwhile, in a lengthy correspondence, he converted Madison, the Federalist leader, to the cause of a bill of rights. Acknowledging the inconveniences and imperfections of all such parchment guarantees and conceding the theoretical objection to denying powers that had not been granted, he nevertheless insisted "that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference."

Jefferson returned from France in 1789 and became secretary of state in the Washington administration. Great issues of foreign and domestic policy, which struck to the bedrock of principle, soon brought him into conflict with treasury secretary ALEXANDER HAMILTON. The conflict symbolized the rising opposition, first in the government, then in the country at large, between two nascent POLITICAL PARTIES, Republican and Federalist. The Constitution itself became an issue in February 1791, on Hamilton's plan to incorporate a national bank. After Washington received the bank bill from Congress, where Madison had pointedly questioned its constitutionality, he asked the secretaries f or their opinions. Jefferson returned a brisk 2,200-word brief against the bill. No power to incorporate a bank had been delegated to Congress. None could be found among the ENUMERATED POWERS, nor could it be fairly inferred from either of the general clauses appealed to by the bank's advocates. The power of Congress to provide for the GENERAL WELFARE was only the power to lay taxes for that purpose; the NECESSARY AND PROPER CLAUSE, unless construed strictly, would "swallow up all the DELEGATED POWERS, and reduce the whole to one power." The bank bill, he concluded, would breach the limits of the Constitution, trample on the laws of the states, and open "a boundless field of power, no longer susceptible to definition." Washington, however, was persuaded by Hamilton's opinion founded on the doctrine of IMPLIED POWERS and signed the bill. The issue of congressional power was reargued a year later on Hamilton's Report on Manufactures. No legislation resulted, but Jefferson told the President that on the principles of the report Congress could tax and spend without limit on the apology of aiding the general welfare. The deeper grounds of division involved matters of morals, interests, and politics; but because policies were debated in constitutional terms, the question of who was loyal to the Constitution—whether it was best served by strict or loose construction, by STATES' RIGHTS or national consolidation, whether it ought to be viewed as a superintending rule of political action or as a point of departure for vigorous statesmanship—became a major issue between the parties.

The general doctrine of states' rights had been present from the beginning of the controversy, but only in 1798, when Jefferson was vice-president, did it become firmly associated in his mind with the preservation of the Constitution, the Union, and republican liberty. (See UNION, THEORIES OF.), All were threatened, in his opinion, by the ALIEN AND SEDITION ACTS enacted during the war crisis with France. Under the pretense of saving the country from Jacobins and incendiaries, the Federalists, he believed, aimed by these laws to cripple or destroy the Republican party. Because of the danger of criminal prosecution, the delusion of public opinion, and Federalist control of the government, including the courts, the usual means of opposition were ineffectual; so Jefferson turned to the state legislatures as the point of protest and resistance. There was nothing novel in the proceeding. As early as 1790 the Virginia assembly had protested against the allegedly unconstitutional acts of the federal government; in fact, opposition of this kind had been contemplated, and approved, in THE FEDERALIST #28. But the resolutions secretly drafted by Jefferson, and adopted by the Kentucky legislature in November, offered an authoritative theory of "state interposition" that was destined to have great influence. (See VIRGINIA AND KENTUCKY RESOLUTIONS.) The Kentucky Resolutions set forth the theory of the Constitution as a compact among the states. Acts beyond the delegated powers were unconstitutional and void; and since the contracting parties had created no ultimate arbiter, each state had "an equal right to judge for itself, as well of infractions as of the mode and measure of redress." How far Jefferson meant to go was unclear. He called for NULLIFICATION of the oppressive laws; but rather than cause overt state defiance of federal authority, his aim was to arouse opposition opinion through the legislatures to force repeal of the laws. When this political strategy failed, he got Kentucky, as well as Virginia, to renew its protest in 1799, again to no avail. Nevertheless, Jefferson always believed that the Virginia and Kentucky Resolutions were crucial to "the revolution of 1800" that elevated him to

the presidency. They had saved the party and the freedom of the political process upon which victory at the polls depended. To this extent, certainly, the resolutions strengthened principles of freedom and self-government under the Constitution. But in appealing to states' rights and state resistance—interposition or nullification or SECESSION—Jefferson struck a course potentially as dangerous to the Constitution and the Union as the odious laws were to civil and political liberty.

Jefferson entered the presidency pledged to return the government to the original principles of the Constitution. These principles included, first, the protection of the state governments in all their rights as the primary jurisdictions of domestic affairs; second, a frugal and simple administration of the federal government; and third, a sharp contradiction of executive power and influence, which had threatened to "monarchize" the Constitution. Such principles were likely to prove embarrassing to the President's leadership. The story of the administration became the story of how Jefferson escaped, evaded, or overcame the restraints of his own first principles in order to provide the strong leadership the country required.

Jefferson's first test concerned the judiciary. He had always favored an independent judiciary as the guardian of individual rights against legislative and executive tyranny. But in "the crisis of '98" the courts became the destroyers rather than the guardians of the liberties of the citizen. The power of this partisan judiciary had been increased by the JUDICIARY ACT OF 1801 passed in the waning hours of the Adams administration. The Federalists, Jefferson believed, had retired to the judiciary as a stronghold from which to assail his administration; and he promptly called for repeal of the Judiciary Act. This was done, although it involved the abolition of judgeships held on GOOD BEHAVIOR tenure. The case of MARBURY V. MADISON (1803) arose at the same time. It, too, was significant primarily in its political character, as a duel between the President and the new Chief Justice, JOHN MARSHALL. Jefferson, who disliked his Virginia cousin, objected to the decision not because the Court asserted the ultimate power to interpret the Constitution, for in fact it did not go that far, but because Marshall traveled out of the case, pretending to a JURISDICTION he then disclaimed, in order to slap the chief magistrate for violating constitutional rights.

With regard to JUDICIAL REVIEW, Jefferson consistently held to the theory of "tripartite balance," under which each of the coordinate branches of government had the equal right to decide questions of constitutionality for itself. This equality of decisional power was as necessary to maintaining the constitutional SEPARATION OF POWERS, in his view, as the doctrine of states' rights was to preserving the division of authority in the federal system. Under the theory he considered the Sedition Act, which had expired, unconstitutional from the beginning and pardoned those still suffering its penalties. The idea of governmental adaptation and change through construction of the Constitution was repugnant to Jefferson. Even more repugnant was the idea of vesting the ultimate authority of interpretation in a court whose members had no accountability to the people. But Jefferson, though he held the judiciary at bay, was unwilling to push his principles to conclusion and left the foundations of judicial power undisturbed for Marshall to build upon later.

Jefferson overcame the restraints of his whiggish view of executive power by capitalizing on his personal magnetism and influence as a party leader. In FOREIGN AFFAIRS, the principal field of the general government, he had generally taken a more expansive view. Yet the foreign affairs triumph of his administration, the LOUISIANA PURCHASE, became a constitutional crisis for him. While other Republicans easily discovered legal warrant for the treaty, he could not. It was "an act beyond the Constitution," and there was nothing for the President and Congress to do but "throw themselves on the country for doing them unauthorized, what we know they would have done for themselves had they been in a situation to do it." So he drafted a constitutional amendment—"an act of indemnity"—to sanction the treaty retroactively. "I had rather ask an enlargement of power from the nation," he wrote to a Virginia senator, "than to assume it by construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction." Congress was less scrupulous, however, and when it declined to follow him, he acquiesced. A revolution in the Union perforce became a revolution in the Constitution as well. He found justification for other executive actions—in foreign affairs, in the suppression of the Burr Conspiracy—above and beyond the law. "It is," he wrote, "incumbent on those only who accept of great charges, to risk themselves on great occasions, when the safety of the nation, or some of its very high interests are at stake." In Jefferson's thinking, actions of this kind, which were exceptional and uncodified, were preferable to false and frivolous constructions of the Constitution, which permanently corrupted it. Yet he took little comfort from the theory of "higher obligation" in the case of the Louisiana Purchase.

In retirement at Monticello from 1809 until his death seventeen years later, Jefferson repeatedly confronted the problem of constitutional preservation and change. He knew there could be no preservation without change, no constructive change without preservation. He knew, as he wrote in again championing reform of the Virginia constitution, "that laws and institutions must go hand in hand with the progress of the human mind." And he did not hesitate to declare again his belief, formed in 1789 in the

shadow of the Bastille, that each generation, representing a new constituent majority, should make its own constitution. Change should occur, fundamentally, by CONSTITUTIONAL CONVENTION. Next to that, it should occur by regular amendment. As President he had advocated the TWELFTH AMENDMENT, approved in 1804, and several others that were stillborn. Now, from Monticello, he advocated amendments authorizing federal INTERNAL IMPROVEMENTS, the direct election of the president, and the two-term limitation on the president. Nothing happened. Finally, not long before his death, he "despair[ed] of ever seeing another amendment to the Constitution," and observed, "Another general convention can alone relieve us." Thus in the nation, as in the state, he appealed to both lawmaking and constitution-making authorities to keep the fundamental law responsive to new conditions and new demands.

Jefferson continued to the end to reject constitutional change by construction or interpretation. In the wake of the Panic of 1819, which threw his affairs into hopeless disorder, he reacted sharply against the course of consolidation in the general government, above all the bold nationalism of the Supreme Court. "The judiciary of the United States is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric," he wrote in 1820. "They are construing our constitution from a coordination of a general and special government to a general and supreme one. This will lay all things at their feet." Only by combining the revolutionary theory of "constituent sovereignty" with the rule of "strict construction" would it be possible, Jefferson believed, to maintain constitutional government on the republican foundations of "the consent of the governed."

MERRILL D. PETERSON
(1986)

Bibliography

BOYD, JULIAN P., ed. 1950–1974 *The Papers of Thomas Jefferson.* 19 Vols. Princeton, N.J.: Princeton University Press.

LEVY, LEONARD W. 1963 *Jefferson and Civil Liberties: The Darker Side.* Cambridge, Mass.: Harvard University Press.

LIPSCOMB, A. A. and BERGH, A. E., eds. 1904 *The Writings of Thomas Jefferson.* 20 Vols. Washington, D.C.: Thomas Jefferson Memorial Association.

MALONE, DUMAS 1948–1982 *Jefferson and His Times.* 6 Vols. to date. Boston: Little, Brown.

PETERSON, MERRILL D. 1970 *Thomas Jefferson and the New Nation: A Biography.* New York: Oxford University Press.

# JEFFERSONIANISM

THOMAS JEFFERSON wished to be remembered as the author of the DECLARATION OF INDEPENDENCE and as the founder of the University of Virginia, but history has credited him with much more. In the world of practical politics, Jefferson's achievements were legion—legal reformer, wartime governor of Virginia, author of the VIRGINIA STATUTE OF RELIGIOUS LIBERTY, draftsman of the great Ordinance of 1784, first secretary of state, leader of the "loyal opposition" in the administration of JOHN ADAMS, third President of the United States, purchaser of Louisiana, father of the Democratic party, and founder of the first political party system. In the world of ideas, Jefferson was the nation's premier advocate of political democracy, POPULAR SOVEREIGNTY, and a republican system of government. He was also a staunch advocate of public education, progressivism, and the RULE OF LAW both at home and abroad.

Somewhat less appreciated than these enduring contributions to the nation's history was Jefferson's role in the development of a theory of CONSTITUTIONALISM that, after two centuries, continues to inform the American commitment to constitutional government. Jefferson's first inaugural address (March 4, 1801), one of the nation's great state papers, provides a glimpse into part, though not all, of Jefferson's constitutional vision. Directing his remarks to the Washington community in the newly established seat of government in the DISTRICT OF COLUMBIA, Jefferson reflected upon those axioms of the American system that he prized above all. Referring to majoritarian rule as a "sacred principle," Jefferson reminded his listeners "that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression." In one of the most remarkable statements on the value of FREEDOM OF SPEECH in a free society, Jefferson declared, "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." And with a single phrase, Jefferson identified the constitutional value whose full implementation has been the cornerstone of modern American constitutional JURISPRUDENCE: "Equal and exact justice to all . . . of whatever state or persuasion, religious or political."

The elements of Jeffersonian constitutionalism were these: the preservation of FUNDAMENTAL RIGHTS; the preeminence of the legislative branch in a government of separated powers; the integrity of the sovereign states in a federal union of shared and divided powers; strict adherence by Congress to those powers delegated to it in the written Constitution; RELIGIOUS LIBERTY as guaranteed by a regime in which church and state remained apart; and a recognition of the need for frequent constitutional change through the process of constitutional amendment. The fact that Jefferson himself, out of political necessity,

may have trespassed upon some of these principles when he became President does not undercut their value, importance, and durability to the development of American constitutionalism.

Jeffersonian constitutionalism emerged in sharp relief to the constitutionalism of the Federalists in the political crisis brought on by the passage of the ALIEN AND SEDITION ACTS in 1798. These Federalist enactments had two chief purposes—to undermine the support the Jeffersonian opposition was receiving from French refugees, recent immigrants, and resident aliens (the Alien Act) and to stifle the Jeffersonian press (the Sedition Act). Although never tested definitively in the Supreme Court, the Sedition Act was recognized and implemented by the lower federal courts. The Jeffersonian response took cogent form as resolutions of principle adopted by the legislatures of Kentucky and Virginia. Jefferson, who was then vice-president of the United States in the administration of the Federalist John Adams, secretly prepared the Kentucky Resolutions, while JAMES MADISON, Jefferson's closest political ally, wrote the Virginia Resolutions.

The VIRGINIA AND KENTUCKY RESOLUTIONS vigorously defended the cause of CIVIL LIBERTIES against encroachment by the federal government. At a time when the Supreme Court had yet to assert its power of JUDICIAL REVIEW over Congress and when FIRST AMENDMENT and Fifth Amendment guarantees were nothing more than "parchment barriers" against governmental tyranny, the resolutions represented the only formal defense then available against the exercise of excessive federal power. The resolutions are replete with Jeffersonian principles of constitutionalism—defense of civil liberties, support for the integrity of the states, LIMITED GOVERNMENT, DUE PROCESS OF LAW, faithfulness to the language of the written constitutional text, fear of federal "consolidation," and the importance of having an authority located somewhere (in this case, the states) with jurisdiction to declare federal laws unconstitutional.

Although the Virginia and Kentucky resolutions were primarily designed as a "solemn protest" against the abuse of power, the resolutions also advanced a theory of federal union. Both Jefferson and Madison characterized the union as a "compact" among the several states. Under this theory of FEDERALISM, each state reserved to itself, as a contracting party to the compact, the "equal right to judge for itself, as well of infractions [by the general government] as of the mode and measure of redress." In subsequent resolutions, the Virginia and Kentucky legislatures even proposed the doctrine of state NULLIFICATION as a proper remedy against unlawful federal usurpations. However, the states north of Virginia repudiated this notion as well as the compact theory itself and called upon the federal judiciary rather than the states to decide upon matters of constitutionality. As the Rhode Island legislature would put it, Article III of the Constitition "vests in the Federal Courts, exclusively, and in the Supreme Court, ultimately, the authority of deciding on the constitutionality of any act or law of the Congress of the United States." Thus, the Virginia and Kentucky Resolutions, in an indirect way, helped to pave the way for MARBURY V. MADISON (1803), the Supreme Court's first clear assertion of its power of judicial review.

The compact theory proposed by the Jeffersonians in the Virginia and Kentucky Resolutions did not die with the demise of the Alien and Sedition Acts. Rather, it was resurrected and then distorted by the state of South Carolina in an ordinance nullifying the tariff of 1832. Even James Madison repudiated South Carolina's version of the compact theory. So did the then President ANDREW JACKSON. Subsequently, the theory became closely identified with the cause of the slaveholding states, who used it to defend SECESSION in the winter of 1860–1861. The Union victory in the CIVIL WAR thoroughly discredited the theory once and for all, and the Supreme Court finally repudiated it as a doctrine of constitutional law in the case of TEXAS V. WHITE (1869). Nevertheless, compact theory continued to show signs of life in the twentieth century in the fight for STATES' RIGHTS against centralization in Washington during the NEW DEAL, in the conservative response to the CIVIL RIGHTS MOVEMENT in the 1950s and 1960s, and even more recently when states with unique problems, such as Alaska, have protested against perceived unfairness in treatment by the national government.

Jeffersonian constitutionalism had many notable adherents. The well-known Virginia senator John Taylor of Caroline County attacked Federalist constitutional theories and defended local democracy and states' rights in numerous books and pamphlets. St. George Tucker, the Virginia jurist, annotated the most influential edition of *Blackstone's Commentaries* (five volumes, 1803). But Jeffersonian constitutionalism achieved its most forceful and articulate expression in the jurisprudence of Judge SPENCER ROANE of the Virginia Supreme Court of Appeals. From the time of his election to that court in 1794 until his death in 1822, Roane became one of the staunchest advocates of Jeffersonianism, speaking from one of the nation's most important state courts. He became Chief Justice John Marshall's chief antagonist in the debate over federal power, a debate that surfaced in a series of great constitutional cases. In numerous pamphlets and newspaper articles, as well as in his judicial opinions, Roane applied Jeffersonian constitutional principles with unparalleled consistency. He believed in the coequal power of the states, he challenged the JUDICIAL SUPREMACY of the Supreme Court in deciding matters of federal constitutionality, and he believed that the preservation of the Un-

ion depended upon a narrow construction of the powers delegated to Congress.

But the Jeffersonians were not single-minded in their views on the federal Constitution. Justice WILLIAM JOHNSON, a Jefferson appointee to the Supreme Court who sat from 1804 to 1834, shared the Jeffersonian belief in the primacy of the legislative branch in any government of separated powers and the Jeffersonian fear of the federal judiciary. Thus, in the case of *United States v. Hudson and Goodwin* (1812), Johnson wrote that the federal courts did not have jurisdiction to try COMMON LAW crimes without expressed legislative authorization from Congress. But where powers were given to the legislature, as in Article I, section 8, of the Constitution, Johnson believed that they should be amply interpreted. Although he was noted for his many dissents to the strongly nationalist jurisprudence of the Marshall Court, Johnson went along with Marshall's great decision in MCCULLOCH V. MARYLAND (1819), which broadly defined congressional power under the NECESSARY AND PROPER CLAUSE. And in a CONCURRING OPINION in the famous COMMERCE CLAUSE case of GIBBONS V. OGDEN (1824), Johnson declared that "the [commerce] power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon." Johnson thus invited the wrath of Jeffersonian purists, who rejected the doctrines of IMPLIED POWERS and exclusive federal control over commerce. They believed that Johnson had become something of a crypto-Federalist.

JOHN C. CALHOUN, secretary of war in the administration of JAMES MONROE, vice-president under both JOHN QUINCY ADAMS and Andrew Jackson, United States senator from South Carolina from 1832 to 1844, and secretary of state under John Tyler, was one of Jefferson's principal political heirs. While history has rightly tagged Calhoun as the architect of southern nationalism and as a principal defender of southern SLAVERY, Calhoun also composed one of America's most original political treatises, the *Disquisition on Government* (1853), which advanced novel theories of the Constitution. Although Calhoun's specific interest was the antebellum South's sectional concern for its "peculiar institution" (slavery), his articulation of the special problems of minorities in a majoritarian culture and his efforts to devise mechanisms to protect minority interests—such as the notion of the "concurrent majority"—contributed much to the totality of the American political experience. This, too, was part of the tradition of Jeffersonian constitutionalism.

Despite the checkered history of the compact theory, Jeffersonian views on the importance of the states in the structure of the Union have become the basis of modern neofederalism. Neofederalism rests upon an efficiency-utility theory that posits that the central government cannot take repsonsibility for all domestic issues and that, as Justice LOUIS D. BRANDEIS said in dissent in the case of NEW STATE ICE COMPANY V. LIEBMAN (1932), states can serve as "laboratories" for social experimentation, particularly in times of economic distress. Because the states have often been ahead of the federal government in devising innovative solutions to novel social problems, state power and authority need to be promoted. A second rationale for modern neofederalism is that some states have unique problems that only they can properly address. A national solution may be inappropriate. Therefore, the integrity of state power deserves respect because state governments are, as Jefferson himself said in his first inaugural, "the most competent administrations of domestic concerns."

Jeffersonian constitutionalism has had its most dramatic manifestation in the twentieth century in the Supreme Court's development of civil liberties as the cornerstone of constitutional law. In their protest against the Alien and Sedition Acts, the Jeffersonians anticipated this development when they articulated a very liberal theory of speech and press freedom. And it was Jefferson who spoke of "a wall of separation between church and state," a concept that the modern Supreme Court has repeatedly affirmed. American religious pluralism, nurtured by the Supreme Court's sensitivity to the requirements of the ESTABLISHMENT CLAUSE of the First Amendment, owes much to the works and thought of Jefferson and Madison, the foremost champions of religious freedom in the early Republic.

The revival of state constitutional law as an alternative forum and mechanism for constitutional adjudication is another legacy of the Jeffersonian tradition. As the Supreme Court continues to consolidate and, in some instances, to cut back on its past advances in the field of individual rights, state supreme courts, under their own separate STATE CONSTITUTIONS, have broadened the scope of constitutional law and have broken new ground in rights jurisprudence. This is a development that the original Jeffersonians would have understood and approved.

GEORGE DARGO
(1992)

Bibliography

HORSNELL, MARGARET E. 1986 *Spencer Roane: Judicial Advocate of Jeffersonian Principles.* New York: Garland.

KOCH, ADRIENNE and PEDEN, WILLIAM, eds. 1944 *The Life and Selected Writings of Thomas Jefferson.* New York: Modern Library.

MORGAN, DONALD G. 1954 *Justice William Johnson, The First Dissenter: The Career and Constitutional Philosophy of a Jeffersonian Judge.* Columbia: University of South Carolina Press.

PATTERSON, CALEB P. 1953 *The Constitutional Principles of Thomas Jefferson.* New York: Books for Libraries.

PETERSON, MERRILL D. 1962 *The Jeffersonian Image in the American Mind.* New York: Oxford University Press.

## JENCKS ACT
71 Stat. 595 (1957)

In *Jencks v. United States*, in June 1957, the Supreme Court, speaking through Justice WILLIAM J. BRENNAN, reversed the conviction of a labor leader, Clinton E. Jencks, charged with perjury for falsely swearing he was not a communist. The five-man majority held that reports filed by FBI-paid informants alleging Jencks's participation in Communist party activities should have been available to his counsel when requested. The majority ruled that the prosecution must either disclose to the defense statements made by government witnesses or drop the case.

Justice TOM C. CLARK wrote a near-inflammatory dissent contending that unless Congress nullified the decision, "those intelligence agencies of our government engaged in law enforcement may as well close up shop." The decision, he warned, would result in a "Roman holiday" for criminals to "rummage" through secret files. Congress seized upon Clark's dissent and a Jencks Act was quickly passed, amending the United States Code. In sharply restricting the Court's decision, the measure provided that a defendant in a criminal case could, following testimony by a government witness, request disclosure of a pretrial statement made by that witness, so long as the statement was written and signed by the witness or was a transcription of an oral statement made at the time the statement was given. Other requested material was to be screened by the trial judge for relevance, with the judge given the right to delete unrelated matters. In subsequent challenges, raised in *Rosenberg v. United States* (1959) and *Palermo v. United States* (1959), the Justices upheld the law, carefully conforming to its provisions.

PAUL L. MURPHY
(1986)

Bibliography

NOTE 1958 The Jencks Legislation: Problems in Prospect. *Yale Law Journal* 67:674–699.

## JENIFER, DANIEL OF ST. THOMAS
(1723–1790)

Daniel of St. Thomas Jenifer signed the Constitution as a Maryland delegate to the CONSTITUTIONAL CONVENTION OF 1787. The most national-minded of Maryland's delegates, he quarreled often with LUTHER MARTIN. His late arrival on July 2 permitted approval of equal votes for the states in the SENATE.

DENNIS J. MAHONEY
(1986)

## *JENKINS v. ANDERSON*
447 U.S. 231 (1980)

The Fifth Amendment allows a criminal defendant to remain silent during his trial and prevents the prosecution from commenting on his silence, in order to prevent the jury from drawing adverse inferences. In *Jenkins* the defendant surrendered to the police two weeks after killing a man and claimed that he had acted in self-defense. When he told that self-defense story at his trial, the prosecutor countered that he would have surrendered immediately had he killed in self-defense. After conviction the defendant, seeking HABEAS CORPUS relief, argued that the use of his prearrest silence violated his RIGHT AGAINST SELF-INCRIMINATION and fundamental fairness. The Supreme Court, like the federal courts below, denied relief. Justice LEWIS F. POWELL, for a 7–2 Court, ruled that the use of prearrest silence to impeach a defendant's credibility, if he testifies in his own defense, does not violate any constitutional rights. Powell's murky reasoning provoked Justices THURGOOD MARSHALL and WILLIAM J. BRENNAN, dissenting, to declare that a duty to incriminate oneself now replaced the right to remain silent. Powell had supported no such duty, but he rejected a "right to commit perjury," which no one claimed. His opinion weakened the right to remain silent.

LEONARD W. LEVY
(1986)

## JENSEN, MERRILL
(1905–1980)

Author and editor of many books on American colonial and revolutionary history, Merrill Monroe Jensen is best known for his challenge of the traditional interpretation of the ARTICLES OF CONFEDERATION as an inadequate form of government whose weaknesses required that it be replaced by the Constitution of 1787. Jensen argued in his most influential books, *The Articles of Confederation* (1940) and *The New Nation* (1950), that the AMERICAN REVOLUTION was as much a political and social upheaval as the winning of independence from Great Britain and that the Articles of Confederation were the logical result of the democratic philosophy of the DECLARATION OF INDEPENDENCE and the state constitutions of the 1770s. Jensen also contended that the Articles' weaknesses were exaggerated both by the

Federalists of 1787–1788, who actually supported the Constitution as a check on the democratic tendencies of which the Articles were the clearest expression, and by most historians.

RICHARD B. BERNSTEIN
(1986)

## JIM CROW LAWS

See: Segregation; Separate but Equal Doctrine

## *JIMMY SWAGGART MINISTRIES v. BOARD OF EQUALIZATION OF CALIFORNIA*
493 U.S. 378 (1990)

In conjunction with its evangelistic activities in the state of California, Jimmy Swaggart Ministries sold religious books, tapes, records, and other merchandise. The group agreed to pay state sales tax on the nonreligious merchandise sold, but maintained that merchandise with specific religious content—such as Bibles, sermons, and Bible study manuals—were exempt from taxation on the basis of the FIRST AMENDMENT. The Supreme Court unanimously disagreed, holding that application of a sales tax to the religious merchandise did not violate either the free exercise clause or the excessive entanglement provision read into the ESTABLISHMENT CLAUSE by the LEMON TEST.

The Court distinguished the case from prior precedents that had invalidated the application of general licensing fees to those who sold and distributed religious materials door-to-door. In both MURDOCK V. PENNYSLVANIA (1943) and *Follett v. McCormick* (1944), the Court had objected to such licensing fees because they acted as a prior retraint on the free exercise of religion. In the same cases, however, the Court made clear that the First Amendment did not exempt religious groups from generally applicable taxes on income and property. The Court reaffirmed that principle here, noting that the tax under attack was a general levy on revenues raised from the sale of certain products. The Court acknowledged that in some cases a generally applicable tax of this sort might "effectively choke off an adherent's religious practices," but reserved for the future a determination on whether such a tax would violate the free exercise clause.

JOHN G. WEST, JR.
(1992)

(SEE ALSO: *Employment Division, Department of Human Resources of Oregon v. Smith; Texas Monthly, Inc. v. Bullock.*)

## *JOHNS, UNITED STATES v.*
469 U.S. 478 (1985)

This case continued a trend of decisions by which the automobile exception to the FOURTH AMENDMENT'S SEARCH WARRANT requirement expands without discernible limits. Warrantless AUTOMOBILE SEARCHES were first tolerated because a culprit might suddenly drive away with the evidence of his guilt before a warrant could be obtained. That possibility became the basis of holdings that if a vehicle can constitutionally be searched at the time it is found or stopped, it can be impounded and searched later; and if the vehicle can be searched, sealed containers found within may be opened and searched, too. In *Johns* the Court ruled that if officers unload the containers and store them, instead of searching them on the spot, three days later the containers may be opened without a warrant and any contraband that may be found can be introduced in EVIDENCE. Only Justices WILLIAM J. BRENNAN and THURGOOD MARSHALL dissented from the OPINION OF THE COURT by Justice SANDRA DAY O'CONNOR.

LEONARD W. LEVY
(1986)

(SEE ALSO: *Chambers v. Maroney; Ross, United States v.*)

## JOHNSON, ANDREW
(1808–1875)

Born in 1808, Andrew Johnson became a Tennessee legislator in 1833, congressman in 1843, governor in 1853, United States senator in 1856, Tennessee's military governor in 1862, Vice-President of the United States in March 1865, and, on ABRAHAM LINCOLN's death in April 1865, President. Early in his career Johnson mixed STRICT CONSTRUCTION and STATES' RIGHTS views with an unusually warm nationalism, stern loyalty to the Democratic party (until the CIVIL WAR: Johnson returned to the Democratic allegiance in late 1866), and a remarkable devotion to white supremacy. By 1860 Johnson's sponsorship of homestead legislation (see HOMESTEAD ACT) and frontier-style campaign rhetoric had won him a reputation as a latter-day Jacksonian.

In the 1860–1861 winter, Johnson, the only slave-state senator who refused to follow his state into SECESSION, openly counseled Tennesseans against seceding. For his temerity he had to flee to Washington. In the SENATE, Johnson, achieving at last his homestead goal, won Republicans' appreciation also for supporting Lincoln's and Congress's policies on TEST OATHS, military arrests of civilians, confiscation, emancipation, and RECONSTRUCTION. Johnson insisted that the Constitution's WAR POWERS and

TREASON clauses authorized the nation, not to coerce a state, but to punish disloyal individuals directly. This believer in a fixed, state-on-top, race-ordered FEDERALISM in 1862 accepted from Lincoln assignment as Tennessee's military governor, a position unknown to the Constitution or statutes, supportable only from the most flexible contemporary ideas on national primacy under martial law.

As military governor, Johnson employed test oaths and troops against alleged pro-Confederates, sometimes purging unfriendly government officeholders and officials of private CORPORATIONS, to rebuild local and state governments. Johnson's policies helped the Republican-War Democratic "Union" coalition win Tennessee in 1864. That party named Johnson its vice-presidential candidate in order to attract the support of other Unionists in the reconquered South and border states, who seemed to be educable on race. Then, just as the Confederacy's collapse made Reconstruction an immediate concern, Johnson became President.

Although no specific Reconstruction statute constrained him, the 1861–1862 CONFISCATION ACTS, the 1862 test oath act, and the 1865 FREEDMEN'S BUREAU law limited and defined executive actions. Johnson arrogated to himself an unprecedented right to enforce them selectively or not at all in order to further his Reconstruction policy. (For a modern parallel, see IMPOUNDMENT OF FUNDS.)

That policy (announced May 29, 1865, for North Carolina and later for other states) he based on the war powers (but Johnson later insisted that the end of hostilities cut off this source of authority) and on the GUARANTEE CLAUSE: the same authorities Lincoln and Congress employed in wartime Reconstructions (later Johnson insisted that the guarantee clause did not justify a national interest in state residents' CIVIL RIGHTS). Without authority from statute, he appointed a provisional (that is, military) governor for every defeated state, who, with Army help, initiated elections for a CONSTITUTIONAL CONVENTION among qualified voters, including ex-rebels Johnson amnestied and pardoned. The convention was to renounce secession and ratify the THIRTEENTH AMENDMENT. Johnson secretly counseled his provisional governors to appoint officials who could swear to required test oaths and even, as Lincoln had advised publicly, to grant suffrage to token Negroes. But no states obeyed their creator; several only very reluctantly ratified the Thirteenth Amendment, balking at its enforcement clause.

In "reconstructing" thirteen states, Johnson had the largest federal patronage opportunity in American history, especially with respect to postal and tax officers, traditional nuclei of political parties. He filled these influential offices with pardoned ex-Confederates who could not subscribe to the required test oaths, exempting them from the stipulation, thus returning power to recent rebels. Johnson canceled prosecutions under the confiscation laws and inhibited the work of the Freedmen's Bureau, thereby blighting blacks' prospects for a secure economic base. "Johnson" state and local officers, including judges, state attorneys, and police encouraged lawsuits against the Bureau and Army officers for alleged assaults and trespasses and for violating the BLACK CODES. Johnson did not protect his harassed military personnel under the HABEAS CORPUS ACT of 1863. In April 1866, he proclaimed that peace existed everywhere in the South and that all federal Reconstruction authority ended.

His policies made the security of blacks, white Unionists, and federal officials woefully uncertain and seriously distorted the Constitution's CHECKS AND BALANCES. Johnson insisted that Congress should admit delegates-elect from the Southern states, though conceding that Congress had independent authority (Article I, section 5, on CONGRESSIONAL MEMBERSHIP) to judge the qualifications of its members; he reiterated that the nation had no right to intervene in those states and assigned the Army to police them. Johnson unprecedentedly enlarged the VETO POWER. His stunning vetoes of bills on CIVIL RIGHTS, the Freedmen's Bureau, and military Reconstruction, among others, antagonized even congressmen sympathetic to his views. His vetoes invoked the decision in EX PARTE MILLIGAN (1866), paid tribute to the STATE POLICE POWER, and decried the centralized military despotism he claimed to discern in these bills. But Johnson appealed also to the lowest race views of the time. And he never dealt with the question, with which congressmen at least tried to grapple, of individuals' remedies when the states failed to treat them equally in civil and criminal relationships. The President's decision to campaign in the fall 1866 elections against the party that had elected him, his opposition to the FOURTEENTH AMENDMENT (public disapprobation by a President of a proposed amendment was itself unprecedented), and his intemperate attacks against leading congressmen further alienated many persons.

Johnson rejected the idea of an adaptable Constitution and of a federal duty to seek more decent race relations. There was no halfway house between the centralization he insisted was occurring and a total abandonment of any national interest in the rights of its citizens, who were also state citizens. Johnson's rigidity reflected his heightening racism and his yearning for an independent nomination for the presidency in 1868 from Democrats and the most conservative Republicans.

Johnson himself destroyed his presidential prospects. After obeying the TENURE OF OFFICE ACT by suspending (August 1867) Secretary of War EDWIN M. STANTON, Johnson decided, upon the Senate's nonconcurrence (February 1868), to violate that law. He ousted Stanton and named ULYSSES S. GRANT as interim secretary. Republican con-

gressmen in 1867 had shied away from IMPEACHMENT but in February 1868 the HOUSE OF REPRESENTATIVES (128–74, 15 not voting) impeached Johnson for "high crimes and misdemeanors," an offense undefined in the few earlier American impeachments, especially as to whether the "high crimes" had to be criminally indictable (Article I, section 2; Article II, sections 2, 4; Article III, section 2). Contemporary legal scholar JOHN NORTON POMEROY held that indictability was not a prerequisite for impeachability, conviction, and removal from office. The impeachment committee's charges (Articles I-X) nevertheless stressed largely indictable offenses, including Johnson's obstructions of the military Reconstruction Tenure of Office, and Army Appropriations Acts. Article XI was a catch-all to attract senators who did not hold with indictability as a minimum for impeachability. (See ARTICLES OF IMPEACHMENT OF ANDREW JOHNSON.)

From February through May 1868 the President's able counsel HENRY STANBERY, by insisting on indictability as the test of impeachability, confused senators who formed the court in the impeachment trial. Johnson, at last restraining his intemperateness, now enforced the military reconstruction law and other statutes he had vetoed. He replaced Grant as secretary of war with John M. Schofield, who, though conservative on race, was trusted on Capitol Hill. The Republican majority, wedded to checks and balances, hesitated to subordinate the presidency by convicting and removing Johnson. The House "managers" of the trial harassed witnesses and journalists, outraging some Republican senators. And 1868 was an election year. Johnson, his hopes for a nomination destroyed, must leave office by March 1869. These factors combined to leave Johnson unconvicted by a single Senate vote, 35–19.

Johnson was not the victim of a Radical Republican conspiracy but was the architect of his own remarkably successful effort to thwart improvements in race equality. He won because he exploited men's lowest race fears, cloaking them in glorifications of states' rights. His return to Congress in 1875 as a Tennessee senator (he died later that year), when sentiment was rising even among Republicans to dump the Negro, symbolized his triumph.

HAROLD M. HYMAN
(1986)

Bibliography

BENEDICT, MICHAEL L. 1973 *The Impeachment and Trial of Andrew Johnson.* New York: Norton.

BERGER, RAOUL 1973 *Impeachment: Constitutional Problems.* Cambridge, Mass.: Harvard University Press.

SEFTON, JAMES 1980 *Andrew Johnson and the Uses of Constitutional Power.* Boston: Little, Brown.

TREFOUSSE, HANS L. 1975 *Impeachment of a President: Andrew Johnson, the Blacks, and Reconstruction.* Knoxville: University of Tennessee Press.

# JOHNSON, LYNDON B.
## (1908–1973)

Lyndon Baines Johnson was a strong President whose performance was tempered by an affectionate reverence for the constitutional system as a whole. He exploited the cumulative precedents for presidential leadership and authority in domestic, foreign, and military policy; protected presidential power against congressional intrusion while working with vigor to carry Congress with him; and turned the office over to his successor intact. Jointly with Congress, he extended federal power greatly in CIVIL RIGHTS, education, and welfare. He appointed the first black Supreme Court Justice, THURGOOD MARSHALL; but Johnson's attempt to assure liberal leadership beyond his term by the nomination of ABE FORTAS as Chief Justice failed when Fortas withdrew in 1968.

All this tells us little of how the American constitutional process actually operated in the turbulent, creative, and tragic days between November 22, 1963, and January 20, 1969. The agenda Lyndon Johnson confronted was unique. Aside from the urgent need to unify the nation and establish his legitimacy in the wake of JOHN F. KENNEDY's assassination, he faced simultaneous protracted crises at home and abroad: a crisis in race relations and a disintegrating position in Southeast Asia. WOODROW WILSON and FRANKLIN D. ROOSEVELT had also confronted both urgent domestic problems and war; but the course of events permitted them to be dealt with in sequence. Johnson faced them together and they stayed with him to the end.

By personality and conviction, Johnson was a man driven to grapple with problems. But he also carried into office a passionate moral vision of an American society of equal opportunity—a vision he proved capable of translating into LEGISLATION, above all in the fields of civil rights, education, and medical care. The CIVIL RIGHTS ACT OF 1964, the VOTING RIGHTS ACT OF 1965, and the Fair Housing and Federal Jury Reform Acts of 1968 were major results of his crusade for racial equality. The ELEMENTARY AND SECONDARY EDUCATION ACT and HEALTH INSURANCE FOR THE AGED ACT (MEDICARE) of 1965 were outstanding among dozens of acts passed in both fields. In carrying the religious constituencies on the Education Act, Johnson displayed skill bordering on wizardry. As proportions of gross national product, social welfare outlays of the federal government rose dramatically between 1964 and 1968 while national security outlays rose only slightly. This was

possible because of an average real growth rate of 4.8 percent in the American economy.

Johnson had been a man of the Congress for some thirty years before assuming the presidency. No President ever came to responsibility with a deeper and more subtle working knowledge of the constitutional tensions between Congress and the President, and of the requirement of generating a partnership out of that tension, issue by issue. But Johnson knew from experience that, on domestic issues, a President's time for leading Congress and achieving major legislative results was short. From his first days as President, Johnson expected Congress would, in the end, mobilize to frustrate one of his initiatives and then progressively reduce or end his primacy. He was, therefore, determined to use his initial capital promptly. Although momentum slowed after mid-1965, Johnson proved capable of carrying Congress on significant domestic legislation virtually to the end of his term.

Johnson was opportunistic in the best sense. He exploited the Congress elected with him in November 1964; but he also channeled the powerful waves of popular feeling in the wake of the assassinations of John Kennedy, MARTIN LUTHER KING, JR., and ROBERT F. KENNEDY into support for his legislative program.

Johnson believed the presidency was the central repository of the nation's ideals and the energizing agent for change in the nation's policy. He understood the advantage a President enjoys relative to a fragmented Congress: the power to initiate. He brought into the White House every constructive idea he could mobilize from both private life and the bureaucracies, setting in motion some one hundred task forces, sixty within the government, forty made up of outside experts. Where possible, he also engaged members of Congress in the drafting of legislation at an early stage in the hope that their subsequent interest and support would be more energetic.

Johnson also understood that in domestic affairs there was little a President could constitutionally do on his own. His was primarily a license to persuade. He used the conventional levers of presidential influence in dealing with Congress. But his most effective instrument was his formidable power of persuasion, based on knowledge of individual members and a sensitive perception of the possibility of support from each on particular issues. He spent far more time with members of Congress than any President before or since—face to face, by telephone, or in group meetings at the White House.

Johnson judged that he had come to responsibility at a rare, transient interval of opportunity for social progress. Therefore, he used up his capital and achieved much. He left Washington with a sense of how much more he would have liked to have done; but he also realized that the nation was determined to pause and catch its breath rather than continue to plunge forward. Nevertheless, the programs initiated in Johnson's time continued to expand in the 1970s. As Ralph Ellison, the black novelist, said, Johnson will perhaps be recognized as "the greatest American President for the poor and for Negroes . . . a very great honor indeed."

But all did not go smoothly with the Great Society. In 1965, five days after the signing of the VOTING RIGHTS ACT, rioting broke out in Watts, and riots in urban ghettoes continued for three years. Despite vigorous and imaginative efforts, these problems proved relatively unyielding although violence subsided in 1968 as it became increasingly clear that the costs were primarily borne by the black community. Moreover, as new welfare programs moved from law to administration, resistance gradually built up both to their cost and to intrusions on state and local authority. Although significant modifications in the Great Society programs were made in the 1970s and 1980s, it seems unlikely that the basic extensions of public policy in civil rights, education, and welfare will be withdrawn.

Although Johnson led public opinion and drove Congress in domestic affairs, he conducted the war in Southeast Asia with a reserve that did not match the nation's desire for a prompt resolution of the conflict. Johnson's relations with the Congress on the VIETNAM WAR thus differed markedly from his approach on domestic policy. HARRY S. TRUMAN had decided, with the agreement of the congressional leadership, to resist the invasion of South Korea on the basis of his powers as COMMANDER-IN-CHIEF. Johnson preferred the precedents of the Middle East and Formosa Resolutions which he, when Democratic leader in the Senate, had recommended to DWIGHT D. EISENHOWER. He followed that course in the Tonkin Gulf Resolution in 1964. Despite later controversy over the resolution, the record of the Senate debate indicates that its members understood the solemn constitutional step they were taking. Johnson consulted the bipartisan leadership and received their unanimous support on July 27, 1965, before announcing the next day that he had ordered substantial forces to Vietnam—a decision which, at the time, had overwhelming popular as well as congressional support. The possibilities of a formal DECLARATION OF WAR or new congressional mandate were examined and rejected on the ground that they might have brought into effect possible secret military agreements between North Vietnam and other communist powers.

Johnson's determination to consult with and to carry the Congress in 1964 and 1965 was real. But he knew that legislative support at the initiation of hostilities would not prevent members of Congress, disciplined by changes in public opinion, from later opposing him. In the end, he was convinced, the primary responsibility under the Constitution in matters of war and peace rested with the President; and he accepted the implications of that judgment, including the possibility that support for his decision

would fade and leave him, like some of his predecessors, lonely and beleaguered.

Johnson made his decision when the entrance of North Vietnamese regular units into South Vietnam had created a crisis, compounded by the Malaysian confrontation instigated by Indonesia with Chinese support. The choice before him was to accept defeat or to fight. He chose to fight because, in his view, the Southeast Asia Treaty (SEATO) reflected authentic United States interests in Asia; a failure to honor the treaty would weaken the credibility of American commitments elsewhere; and the outcome of withdrawal would not be peace but a wider war.

The strategy Johnson adopted was gradually to reduce communist military capabilities within South Vietnam; to use air power against the lines of supply; to impose direct costs on North Vietnam by attacks on selected targets in the Hanoi area; and to support the South Vietnamese in their efforts to create a strong military establishment and to build a viable economy and a democratic political system. His objective was to convince North Vietnam that the takeover of South Vietnam was beyond its military and political grasp and that the costs of continuing the effort were excessive. From the beginning to the end of his administration, Johnson was in virtually continuous diplomatic contact with the North Vietnamese. Protracted formal negotiations began in April 1968 in the wake of the Tet offensive, during which the communist cause suffered a severe military setback but gained ground in American public opinion.

Johnson's cautious strategy in Vietnam conformed to the views of neither the hawkish majority in American public opinion and the Congress, nor the dovish minority. Johnson realized that his conduct of the war was unpopular and that public support had eroded; the nation resisted a protracted engagement with limited objectives and mounting casualties. He nevertheless held to his strategy and resisted those who advocated decisive military action on the ground outside South Vietnam. As Commander-in-Chief, Johnson was determined to conduct the war in a way that minimized the chance of a large engagement with Chinese Communist or Soviet forces. The memory of Chinese Communist entrance into the KOREAN WAR may well have played an important part in Johnson's determination; and he knew that he would be judged in history, in part, on whether his assessment of the risks of a more decisive course of action was correct. Johnson's strategy may also have been affected by two other considerations: a determination to maintain the momentum of his domestic initiatives; and fear that an all-out mobilization might regenerate an undifferentiated anticommunism, with disruptive consequences for foreign policy and McCarthyite implications at home.

The tension between impatient public opinion and Johnson's cautious strategy led to a quasi-constitutional crisis in the early months of 1968. The bipartisan unity of the American foreign policy establishment, which began in 1940, ended, for a generation at least, in 1968. Johnson's distinguished outside advisers, who had been united in November 1967 in support of Johnson's Vietnam policy, were hopelessly divided four months later.

Many complex factors contributed to the schism, but in part it was the product of conflicting images. For Johnson and others who had foreseen the Tet offensive and acted to frustrate it, the communist military failure was apparent, and Johnson's March 31 bombing reduction and proposal to negotiate were designed to exploit a position of relative strength. For those to whom the offensive was a shock and a demonstration of the futility of the American effort, Johnson's negotiation initiative seemed an admission of defeat. Johnson's simultaneous announcement of his decision not to seek reelection may have strengthened the latter image in the public mind.

Thus, Johnson left to his successor a greatly improved military, political, and economic situation in Southeast Asia, a weary and discouraged majority of Americans, and a divided foreign policy establishment in addition to an ardent minority that had been advocating withdrawal from Vietnam for several years.

The antiwar crusaders challenged Johnson's assessment on multiple grounds, among them: the importance of American interests in Southeast Asia; the legality and morality of the war itself; and the belief that Vietnamese nationalism was overwhelmingly on the side of the communists. Johnson weighed carefully the antiwar views, but he remained convinced to the end of his life that his assessment of the issues at stake was correct. He was less sure that his cautious military strategy had been correct.

There was a great deal more to Johnson's foreign policy than the war in Southeast Asia. He stabilized NATO in the wake of French withdrawal from its unified military command; saw the Dominican Republic through a crisis in 1965 to a period of economic and social progress under democracy; and encouraged regional cohesion in Latin America, Africa, and Asia.

Like all American Presidents in the nuclear age, Johnson consciously bore an extraconstitutional responsibility to the human race to minimize the risk of nuclear war. He sought to normalize relations with the Soviet Union; he carried forward efforts to tame nuclear weapons through the Non-proliferation and Outer Space treaties; and he laid the foundation for strategic arms limitation talks.

But the central fact of his administration was the convergence of war and social revolution that resulted in an accelerated inflation rate and yielded four years of antiwar demonstrations and burning ghettoes against a backdrop of prosperity and social reform. Johnson was required, at the request of the governor of Michigan, to send regular Army units to suppress riots in Detroit in July 1967; and

troops had to be deployed again in Washington, D.C., in April 1968 after the assassination of Martin Luther King, Jr.

In 1967, after reading the results of a poll assessing his presidency, Johnson said: "In this job you must set a standard for making decisions. Mine is: "What will my grandchildren think of my administration when I'm buried under the tree at the Ranch, in the family graveyard.' I believe they will be proud of two things: what I have done for the Negro and in Asia. But right now I've lost twenty points on the race issue, fifteen on Vietnam." As Lyndon Johnson's voice repeats many times each day on a tape played at the LBJ Library, ". . . it is for the people themselves and their posterity to decide."

W. W. ROSTOW
(1986)

Bibliography

BURNS, JAMES MCGREGOR 1968 *To Heal and to Build: The Programs of Lyndon B. Johnson.* New York: McGraw-Hill.

JOHNSON, LYNDON B. 1971 *The Vantage Point.* New York: Holt, Rinehart & Winston.

MCPHERSON, HARRY 1972 *A Political Education.* Boston: Little, Brown.

MUELLER, JOHN E. 1973 *War, Presidents and Public Opinion.* New York: Wiley.

REDFORD, EMMETTE S. and BLISSETT, MARLAN 1981 *Organizing the Executive Branch: The Johnson Presidency.* Chicago: University of Chicago Press.

ROSTOW, W. W. 1972 *The Diffusion of Power.* New York: Macmillan.

## JOHNSON, REVERDY
(1796–1876)

A leading constitutional lawyer and Maryland Unionist, Reverdy Johnson argued numerous important Supreme Court cases, including *Seymour v. McCormick* (1854), DRED SCOTT V. SANDFORD (1857), and UNITED STATES V. CRUIKSHANK (1876). At President ABRAHAM LINCOLN's request Johnson published a rebuttal to Chief Justice ROGER B. TANEY's opinion in *Ex parte Merryman* (1861), in which Johnson argued that the President had authority to suspend HABEAS CORPUS. Johnson approved the use of Negro troops and as a senator (1854–1859; 1863–1868) voted for the THIRTEENTH AMENDMENT. However, Johnson broke with Lincoln over the suppression of civilians in Maryland and war aims. Johnson believed that the Confederate states had never been legally out of the Union, and thus once the rebellion was militarily suppressed, the states should be allowed to resume their antebellum status. Johnson opposed LOYALTY OATHS and was President ANDREW JOHNSON's leading SENATE supporter during the IMPEACHMENT trial.

PAUL FINKELMAN
(1986)

Bibliography

STEINER, BERNARD C. 1914 *Life of Reverdy Johnson.* Baltimore: Norman, Remington Co.

## JOHNSON, THOMAS
(1732–1819)

Thomas Johnson served in Maryland's colonial House of Delegates and was a member of committees to instruct delegates to the STAMP ACT CONGRESS and to draft a protest against the TOWNSHEND ACTS. He sat in the Continental Congress but was absent when the DECLARATION OF INDEPENDENCE was signed. He was a member of the convention that drafted Maryland's revolutionary constitution (1776) and served as its first governor (1777–1779). Johnson served in Congress from 1781 to 1787 and was a judge of the special federal court to settle a boundary dispute between New York and Massachusetts. He supported RATIFICATION OF THE CONSTITUTION in the state convention of 1788.

His longtime friend, President GEORGE WASHINGTON, offered Johnson a district judgeship in 1789, but Johnson accepted instead the chief judgeship of the Maryland General Court. When JOHN RUTLEDGE resigned in 1791, Washington appointed Johnson to the Supreme Court.

Serving only fourteen months on the Court, Johnson took part in no major decision. He sat for a single term (during which the JAY COURT heard only four cases) and wrote a single short opinion. In 1793, plagued by illness and fatigued by circuit duty, he resigned and was replaced by WILLIAM PATERSON.

DENNIS J. MAHONEY
(1986)

## JOHNSON, WILLIAM
(1771–1834)

Justice William Johnson of Charleston, South Carolina, was THOMAS JEFFERSON's first appointee to the Supreme Court. Johnson was the son of a blacksmith and revolutionary patriot. After attending Princeton and reading law with CHARLES COTESWORTH PINCKNEY, Johnson was elected to serve three terms in the state legislature as a member of the new Republican party. During his third term he became speaker of the House. In 1799, he was elected to the state's highest court, and on March 22, 1804, he was

appointed to the Supreme Court, where he served until his death. Of all the fifteen Justices who sat on the MARSHALL COURT, Johnson was, at least to 1830, the most independent and vocal in advancing opinions different from those of Chief Justice JOHN MARSHALL. In treating the accountability of the members of the Court, the distribution of the national power among the three branches, the powers reserved to the states, and VESTED RIGHTS, Johnson often found himself in disagreement with the majority of the Marshall Court. At the time of his appointment, Johnson objected to Marshall's practice of rendering unanimous opinions. He felt that the judicial role required freedom of expression, and he fought to revive the practice of SERIATIM OPINIONS. "Few minds," he protested in a separate opinion in 1816, "are accustomed to the same habit of thinking. . . ." From his advent until 1822, Johnson wrote twelve of twenty-four CONCURRING OPINIONS and sixteen of thirty-two DISSENTING OPINIONS. Toward the end of his career, new Justices joined the Court who agreed with Johnson and frequently spoke out separately with him. Johnson succeeded in establishing the right to dissent, so important in later years.

Johnson also ran into conflict with other members of the Court concerning the allocation of power among the branches of the national government. Like the rest of the Marshall Court, he believed that a strong national government was vital to national unity, and he was willing to delegate broad powers to the government. However, he believed that Congress should be the chief recipient of these powers, and he was willing to construe more narrowly the powers of the judiciary and the President, as he did, for example, in *United States v. Hudson and Goodwin.* In relation to Congress, Johnson made assertions of broad power that surpassed even those of Marshall. For a unanimous Court, in *Anderson v. Dunn,* Johnson upheld Congress's LEGISLATIVE CONTEMPT POWER, and in so doing defended the legislative discretion. Every grant of congressional power draws with it "others, not expressed, but vital to its exercise; not substantive and independent, indeed, but auxiliary and subordinate." Johnson thought IMPLIED POWERS were essential to a responsive government that served the needs of the people. Securities against the abuse of discretion rested on accountability and appeals to the people. Individual liberty stood in little danger "where all power is derived from the people, and at the feet of the people, to be resumed again only at their will."

Johnson's conception of FEDERALISM was in many ways quite modern. In broadly construing powers of Congress, he looked on these less as limitations on the states than as means of strengthening national unity and improving the lot of individuals. In a separate opinion in GIBBONS V. OGDEN, Johnson wrote that where the language of the Constitution leaves room for interpretation, the judges should consult its overriding purpose: "to unite this mass of wealth and power for the protection of the humblest individual: his rights civil and political, his interests and prosperity, are the sole end; the rest are nothing but means." Chief among the means was "the independence and harmony of the states." As Justice Johnson knew from experience, some collisions between state and federal government was inevitable; the only remedy where two governments claimed power over the same individuals was a "frank and candid co-operation for the general good."

Finally, on the rights of property, Johnson showed somewhat less reverence than did the rest of the Court. Toward the end of his career, Johnson lost some of his esteem for a powerful judiciary enforcing property rights against the states, and he began to look to the states for economic and social regulation. In OGDEN V. SAUNDERS Johnson spoke for the majority. He argued that the CONTRACT CLAUSE did not prohibit "insolvent debtor laws" as applied to contracts made subsequent to the laws' enactment. In *Ogden* Johnson objected to construing that contract clause literally. He argued that contracts should receive a "relative, and not a positive interpretation: for the rights of all should be held and enjoyed to the good of the whole." Johnson seemed to foresee the notion of STATE POLICE POWERS when he insisted that the states had the power to regulate the "social exercise" of rights.

In winning tolerance for dissenting opinions and in contributing creatively and prophetically to the body of constitutional doctrine, William Johnson won a niche as an outstanding member of the early Court.

DONALD G. MORGAN
(1986)

Bibliography

MORGAN, DONALD G. 1954 *Justice William Johnson: The First Dissenter.* Columbia: University of South Carolina Press.

## JOHNSON, WILLIAM SAMUEL
(1727–1819)

Dr. William Samuel Johnson signed the Constitution as a Connecticut delegate to the CONSTITUTIONAL CONVENTION OF 1787. A lawyer and educator, he had already served his state as a legislator and judge. Johnson, a conciliator respected by all delegates, formally proposed the Connecticut Compromise (GREAT COMPROMISE). He also proposed the words defining the extent of the JUDICIAL POWER OF THE UNITED STATES, inserting the key phrase, "all cases arising under *the Constitution and* laws of the United States," and he chaired the Committee on Style. Johnson helped keep the Convention from dissolving in the heat of factional

dispute. He was later a United States senator (1789–1791).

DENNIS J. MAHONEY
(1986)

## *JOHNSON v. AVERY*
393 U.S. 483 (1969)

In a 7–2 decision, the Supreme Court, through Justice ABE FORTAS, upheld the right of state prisoners to receive the assistance of fellow convicts in the preparation of writs. The Court overturned a Tennessee prison rule aimed at abolishing the "jailhouse lawyer" practice by which a few convicts, relatively skilled at writ-writing, achieved a position of power among the inmates. Because the rule might have the effect of denying the poor and illiterate the right of HABEAS CORPUS, Tennessee was ordered either to abolish the rule or to provide alternative legal assistance for prisoners wishing to seek postconviction review of their cases.

DENNIS J. MAHONEY
(1986)

## *JOHNSON v. LOUISIANA*
406 U.S. 356 (1972)

## *APODACA v. OREGON*
406 U.S. 404 (1972)

In DUNCAN V. LOUISIANA (1968) the Supreme Court declared that every criminal charge must be "confirmed by the unanimous suffrage of twelve jurors," and in WILLIAMS V. FLORIDA (1970) the Court found little reason to believe that a jury of six people functions differently from a jury of twelve "particularly if the requirement of unanimity is retained." Justice BYRON R. WHITE, the Court's spokesman in these cases, also wrote its opinion in *Johnson* and for a plurality of four Justices in *Apodaca;* he found nothing constitutionally defective in verdicts by a "heavy" majority vote and no constitutional mandate for verdicts by unanimous vote. The Court upheld the laws of two states that permitted verdicts of 9–3 and 10–2 respectively. These 1972 cases, according to the dissenters, diminished the BURDEN OF PROOF beyond REASONABLE DOUBT and made convictions possible by a preponderance of jurors.

For centuries the standard of proof of guilt beyond reasonable doubt was inextricably entwined with the principle of a unanimous verdict, creating a hedge against jury bias. The requirement of JURY UNANIMITY had meant that a single juror might veto all others, thwarting an overwhelming majority. Accordingly, Johnson contended that DUE PROCESS OF LAW, by embodying the standard of proof beyond a reasonable doubt, required unanimous verdicts and that three jurors who possessed such doubt in his case showed that his guilt was not proved beyond such doubt. White answered that no basis existed for believing that the majority jurors would refuse to listen to the doubts of the minority. Yet Johnson's jurors, who were "out" for less than twenty minutes, might have taken a poll before deliberating, and if nine had voted for a guilty verdict on the first ballot, they might have returned the verdict without the need of considering the minority's doubts. The dissenters saw the jury as an entity incapable of rendering a verdict by the undisputed standard of proof beyond a reasonable doubt if any juror remained unconvinced. The Court majority saw the jury as twelve individuals, nine of whom could decide the verdict if they were satisfied beyond a reasonable doubt, regardless of minority views.

If the prosecution's burden of proving guilt beyond a reasonable doubt does not change when a 9–3 verdict is permissible, verdicts returned by a nine-juror majority ought to be the same as those returned by unanimous juries of twelve. In fact, the 9–3 system yields a substantially higher conviction ratio and substantially fewer hung juries by which defendants avoid conviction, thus substantially lowering the prosecution's burden of proof.

Johnson also contended that Louisiana's complicated three-tier system of juries—unanimous verdicts of twelve in some cases, unanimous verdicts of five in others, and 9–3 verdicts in still others—denied him the EQUAL PROTECTION OF THE LAWS. In fact, the standard of proof varied with the crime, but White rejected the equal protection argument, claiming instead that Louisiana's three-tier scheme was "not invidious" because it was rational: it saved time and money. The Court hardly considered whether it diluted justice.

In *Apodaca*, the 10–2 verdict came under attack from an argument that the FOURTEENTH AMENDMENT extended to the states the same standard as prevailed in federal courts, where unanimity prevails. Four Justices, led by White, would have ruled that the SIXTH AMENDMENT does not require unanimous verdicts even in federal trials; four, led by Justice WILLIAM O. DOUGLAS, believed that because the amendment embodies the requirement of unanimous jury verdicts, no state can permit a majority verdict. LEWIS F. POWELL's opinion was decisive. He concurred with the Douglas wing to save the unanimous verdict in federal criminal trials and with the White wing to allow nonunanimous verdicts for states wanting them. In *Apodaca*, White contradictorily conceded that the reasonable doubt standard "has been rejected in *Johnson v. Louisiana.*" Douglas proved, contrary to White, that the use of the nonunani-

mous jury altered the way the jury functioned, stacking it against the defendant. He interpreted the majority opinions as reflecting "a "law and order' judicial mood."

LEONARD W. LEVY
(1986)

(SEE ALSO: *Jury Size.*)

Bibliography

LEVY, LEONARD W. 1974 *Against the Law: The Nixon Court and Criminal Justice.* Pages 276–298. New York: Harper & Row.

## *JOHNSON v. TRANSPORTATION AGENCY*
480 U.S. 616 (1987)

Paul Johnson sought promotion to the position of road dispatcher with the Transportation Agency of Santa Clara County, California; he was deemed the best-qualified applicant for the job by a board of interviewers and by the Road Operations Division Director, who normally would have made the promotion decision. But the agency's affirmative-action officer intervened, recommending to the agency director that a woman seeking the position be appointed instead. The agency director agreed, and the woman was selected over Johnson. Johnson subsequently filed a suit alleging SEX DISCRIMINATION, and a federal district court found gender to be "the determining factor" in the promotion. The Supreme Court nevertheless sustained the agency's action, 6–3.

Writing for the majority, Justice WILLIAM J. BRENNAN invoked the language of UNITED STEELWORKERS V. WEBER (1979) and argued that the agency's AFFIRMATIVE ACTION program was justified because it sought to correct a "manifest imbalance" that existed in job categories that had been "traditionally segregated" on the basis of gender. According to Brennan, the determination of whether a "manifest imbalance" exists usually rests on the disparity between the percentage of a protected group employed in specific job categories and the percentage of the protected group in the local labor force who are qualified to work in those categories. Precisely how high the disparity has to be before a "manifest imbalance" arises, Brennan did not say; but he did indicate that the requisite disparity was something less than that required in cases like WYGANT V. JACKSON BOARD OF EDUCATION (1986), where employees had to establish a prima facie case of discrimination against their employer.

Concurring, Justice JOHN PAUL STEVENS sought to push open the door to affirmative action still further. He implied that private employers should be able to discriminate in favor of "disadvantaged" racial and gender groups for a wide variety of reasons, including improving education, "averting racial tension over the allocation of jobs in a community," and "improving . . . services to black constituencies."

Justice SANDRA DAY O'CONNOR concurred in the Court's judgment, but on narrower grounds than the majority. She maintained that affirmative-action programs can be invoked only to remedy past discrimination. But her standard of proof for past discrimination was nearly the same as the majority's standard for "manifest imbalance": a statistical disparity between the percentage of an organization's employees who are members of a protected group and the percentage of the relevant labor pool that is made up of members of the group. Unlike Brennan, however, O'Connor did claim that the disparity must be enough to establish a prima facie case that past discrimination in fact occurred. In the present case this was a distinction without a difference, because O'Connor found that her standard had been met.

Writing for the dissenters, Justice ANTONIN SCALIA attacked the Court for converting "a statute designed to establish a color-blind and gender-blind workplace . . . into a powerful engine of racism and sexism. . . ." Scalia noted that although Brennan cited *Weber* as controlling, he had in fact dramatically extended *Weber* by redefining the meaning of the phrase "traditionally segregated job categories." In *Weber*, the phrase had "described skilled jobs from which employers and unions had systematically and intentionally excluded black workers. . . ." But in the present case, few women were employed in categories such as road maintenance workers because women themselves did not want the jobs. "There are, of course, those who believe that the social attitudes which cause women themselves to avoid certain jobs and to favor others are as nefarious as conscious, exclusionary discrimination. Whether or not that is so . . . the two phenomena are certainly distinct. And it is the alteration of social attitudes, rather than the elimination of discrimination, which today's decision approves as justification for state-enforced discrimination. This is an enormous expansion. . . ."

JOHN G. WEST, JR.
(1992)

Bibliography

UROFSKY, MELVIN I. 1991 *A Conflict of Rights: The Supreme Court and Affirmative Action.* New York: Scribners.

U.S. COMMISSION ON CIVIL RIGHTS 1987 *Toward an Understanding of Johnson.* Clearinghouse Publication 94. Washington, D.C.: U.S. Government Printing Office.

## *JOHNSON v. ZERBST*
304 U.S. 458 (1938)

Defendants who neither sought nor were offered counsel were convicted in a federal court. The Supreme Court held that the SIXTH AMENDMENT requires counsel in all federal criminal proceedings unless the right is waived. This HOLDING is mainly of historical interest, but the case retains remarkable vitality and is often cited because of its definition of WAIVER. Starting with the proposition that there is "every reasonable presumption against "waiver," the Court declared: "A waiver is ordinarily an intelligent relinquishment or abandonment of a known right or privilege."

*Johnson*'s strong suspicion of waiver of the RIGHT TO COUNSEL is reiterated in many decisions. In *Von Moltke v. Gillies* (1948) the Supreme Court established a duty of the trial judge "to investigate [waiver of counsel] as long and as thoroughly as the circumstances of the case before him demand." The Court has also said that waiver must affirmatively appear on the record and will not be presumed from a silent record.

Although the Court's definition of waiver applies to all FUNDAMENTAL RIGHTS, and although *Johnson* is cited in FOURTH AMENDMENT and Fifth Amendment cases, the definition has been rigorously applied only in the right to counsel context that spawned it.

BARBARA ALLEN BABCOCK
(1986)

## *JOINT ANTI-FASCIST REFUGEE COMMITTEE v. MCGRATH*
341 U.S. 123 (1951)

Five members of the VINSON COURT dealt a setback to the HARRY S. TRUMAN administration's anticommunist crusade by condemning the procedures through which the ATTORNEY GENERAL of the United States listed certain organizations as "totalitarian, fascist, communist or subversive" under the President's Executive Order of 1947 creating a LOYALTY-SECURITY PROGRAM for all federal employees. Three organizations designated as "communist" by the attorney general complained that they had been stigmatized without an opportunity for a hearing at which they could rebut the government's presumption. Justice HAROLD H. BURTON concluded that the executive order did not permit the attorney general to make arbitrary, EX PARTE findings without a hearing. In separate concurring opinions, four Justices concluded that the President's order may have authorized such *ex parte* proceedings, but did so in violation of the DUE PROCESS clause. Justice HUGO L. BLACK also condemned the list as a violation of the FIRST AMENDMENT and as a BILL OF ATTAINDER. Justice STANLEY F. REED, for three dissenters, said the attorney general's actions were appropriate "to guard the Nation from espionage, subversion and SEDITION."

MICHAEL E. PARRISH
(1986)

## JOINT COMMITTEE ON RECONSTRUCTION

In December 1865, Congress by CONCURRENT RESOLUTION created the Joint Committee of Fifteen on Reconstruction to provide a deliberative body for consideration of RECONSTRUCTION policy, because Republicans refused to accept President ANDREW JOHNSON's "Restoration" as an accomplished fact. All legislation directly affecting Reconstruction was referred to it.

The majority report of the Joint Committee (1866), prepared by Senator WILLIAM P. FESSENDEN (Republican, Maine), rejected punitive theories of Reconstruction as "profitless abstractions" and repudiated the lenient policies of President Johnson and congressional Democrats. The Committee's Republican majority insisted that only Congress had final power to regularize the constitutional status of the seceded states. The Democratic minority report countered that the states were entitled to immediate readmission and self-government. The Joint Committee fashioned the FOURTEENTH AMENDMENT as a compendium of Republican Reconstruction objectives as of the summer of 1866: freedmen's CITIZENSHIP and voting, equality before the law and assurance of DUE PROCESS for freedmen, Confederate disfranchisement, repudiation of the Confederate war debt, denial of compensation for slaves, and confirmation of the Union debt. When the inadequacy of the Fourteenth Amendment as a comprehensive Reconstruction measure became apparent, Republican committee members drafted the first MILITARY RECONSTRUCTION ACT, which created legal machinery for beginning the process of congressional Reconstruction.

WILLIAM M. WIECEK
(1986)

Bibliography

KENDRICK, BENJAMIN B. 1914 *The Journal of the Joint Committee of Fifteen on Reconstruction.* New York: Columbia University Press.

## JOINT RESOLUTIONS

Joint resolutions, unlike CONCURRENT RESOLUTIONS, have the force of law and require the signature of the President

to be enacted. They are therefore subject to the VETO POWER. A joint resolution may be used when a permanent statutory enactment is inappropriate. Joint resolutions may be used to issue a DECLARATION OF WAR, to end a STATE OF WAR, to annex territory, or to extend the effective life of previously enacted legislation.

As part of the AMENDING PROCESS, joint resolutions are used to propose constitutional amendments. Such resolutions require a two-thirds vote in each house, but not the President's signature.

DENNIS J. MAHONEY
(1986)

## *JONES v. ALFRED H. MAYER CO.*
392 U.S. 409 (1968)

This opinion contains important interpretations of a CIVIL RIGHTS statute and of Congress's power to prohibit private discrimination. Jones alleged that the defendants had refused to sell him a home because he was black. He brought an action under section 1982 of Title 42, United States Code, a remnant of the CIVIL RIGHTS ACT OF 1866, which states in part that all citizens shall have the same right as white citizens to purchase property.

Because Jones relied on a federal law to challenge private discrimination, and because the Supreme Court found that section 1982 encompassed Jones's claim, the case raised the question whether the Constitution grants Congress authority to outlaw private discrimination. The degree to which Congress may do so under the FOURTEENTH AMENDMENT has been a recurring unsettled question. (See UNITED STATES V. GUEST.) In *Jones*, Justice POTTER STEWART's opinion for the Court avoided that complex matter by sustaining section 1982's applicability to private behavior under Congress's THIRTEENTH AMENDMENT power to eliminate slavery. But even this HOLDING generated tension with the Court's nineteenth-century pronouncements on Congress's power to reach private discrimination.

In the CIVIL RIGHTS CASES (1883) the Court seemed to concede that the Thirteenth Amendment vests in Congress power to abolish all badges or incidents of slavery. (See BADGES OF SERVITUDE.) In that case, however, the Court viewed those badges or incidents narrowly and limited Congress's role in defining them. In striking down the CIVIL RIGHTS ACT OF 1875, a provision barring discrimination in PUBLIC ACCOMMODATIONS, the Court commented, "It would be running the slavery argument into the ground" to make it apply to every act of private discrimination in the field of public accommodations. In *Jones*, however, the Court acknowledged Congress's broad discretion not merely to eliminate the badges or incidents of slavery but also to define the practices constituting them.

*Jones* thus granted Congress virtually unlimited power to outlaw private RACIAL DISCRIMINATION. In later cases, *Jones* provided support for Congress's power to outlaw private racial discrimination in contractual relationships. Section 1981, another remnant of the Civil Rights Act of 1866, confers on all persons the same right "enjoyed by white citizens" to make and enforce contracts, to be parties or witnesses in lawsuits, and to be protected by law in person and property. RUNYON V. MCCRARY (1976) held section 1981 to prohibit the exclusion of blacks from private schools, and *Johnson v. Railway Express Agency, Inc.* (1974) held it to prohibit discrimination in employment.

As Justice JOHN MARSHALL HARLAN's dissent noted, *Jones*'s interpretation of section 1982 established it, more than a hundred years after its enactment, as a fair housing law discovered within months of passage of the CIVIL RIGHTS ACT OF 1868, which itself contained a detailed fair housing provision. (See OPEN HOUSING LAWS.) In finding that section 1982 reaches private discrimination not authorized by state law, *Jones* offers a questionable interpretation of the 1866 act's structure and manipulates legislative history. Whether a candid opinion could support *Jones*'s interpretation of section 1982 remains a subject of debate.

THEODORE EISENBERG
(1986)

Bibliography

CASPER, GERHARD 1968 *Jones v. Mayer:* Clio, Bemused and Confused Muse. *Supreme Court Review* 1968:89–132.

FAIRMAN, CHARLES 1971 Reconstruction and Reunion 1864–88: Part One. Volume 6 of The Oliver Wendell Holmes Devise History of the Supreme Court of the United States. New York: Macmillan.

## *JONES v. SECURITIES & EXCHANGE COMMISSION*
298 U.S. 1 (1936)

Although unimportant as a matter of constitutional law, *Jones* has significance in constitutional history. The Court's decision and the tone of Justice GEORGE SUTHERLAND's opinion for the majority helped convince President FRANKLIN D. ROOSEVELT that the Court was prejudiced against the NEW DEAL. A Wall Street manipulator had withdrawn a securities offering on learning that the Securities and Exchange Commission was investigating his fraud. The commission had continued its investigation, raising the question whether it had exceeded its statuory authority. Sutherland called its action arbitrary, inquisitional, odious,

and comparable to Star Chamber procedure. Justices BENJAMIN N. CARDOZO, LOUIS D. BRANDEIS, and HARLAN FISKE STONE answered Sutherland's charges and defended the commission. The opinion of the Court hardened Roosevelt's attitude toward it, culminating in his COURT-PACKING plan of 1937.

LEONARD W. LEVY
(1986)

## *JONES v. VAN ZANDT*

See: Fugitive Slavery

## *JONES v. WOLF*

See: Religious Liberty

## *JOSEPH BURSTYN, INC. v. WILSON*

See: *Burstyn, Inc. v. Wilson*

## JOURNALISTIC PRACTICES, TORT LIABILITY, AND THE FREEDOM OF THE PRESS

Two seemingly clear precepts come into sharp conflict when journalists are charged with wrongful acts in gathering news. On one hand, the media have never been held to be immune from the general civil and criminal laws that govern the rest of society. Thus, if a reporter pursuing a lead commits an assault or a trespass, or destroys the PROPERTY of another, the special nature of his or her mission creates no shield from general liability. When journalists sought to withhold from a GRAND JURY the identity of a confidential source, the Supreme Court rejected such requests for immunity; reporters, said the Court, must testify like other citizens, even though such a duty may inhibit or deter certain forms of newsgathering.

On the other hand, the FIRST AMENDMENT clearly confers on the press a special status, notably when it comes to printing or BROADCASTING the truth. Time and again the Court has barred civil and criminal sanctions against the media for publishing sensitive and confidential information like the name of a rape victim or of a juvenile offender. So long as the material was lawfully obtained, is accurate, and of public interest, whatever interest government may claim in enforcing secrecy must yield to the FREEDOM OF THE PRESS. Indeed, even where the material was obtained unlawfully—as with the Pentagon Papers—the First Amendment bars government from imposing a PRIOR RESTRAINT in the interest of NATIONAL SECURITY.

The difficult cases arise between these relatively clear extremes. There the guiding principles become confused and contentious. When a tobacco company threatened in 1995 to sue CBS if the television network broadcast an interview with a former employee of the company, seasoned First Amendment lawyers were sharply at odds over the validity of such a suit.

The underlying tort claim—inducing a breach of contract—was a novel one that had never been tested against the media. Some experts argued that freedom of the press would bar such a damage claim, because a large award could severely inhibit expressive activity and freedom of communication. Other equally respected experts insisted that such a claim would be seen by the courts as part of the "generally applicable law" by which the media have always been held accountable. Because the particular case was settled, we still do not know how a court would have ruled on this novel issue.

The relatively few such cases that have been decided leave many uncertainties. On one hand, when a newspaper reporter promised confidentiality to a source, but her editors insisted on revealing that source in the resulting story, the source successfully sued the publisher for breach of promise in COHEN V. COWLES MEDIA CO. (1991). When a television network obtained damaging footage from a supermarket by posing two reporters as legitimate employees, the store owner recovered damages for the workers' alleged breach of a duty of loyalty and for the network's "unfair and deceptive trade practices" in FOOD LION, INC. V. AMERICAN BROADCASTING CO. (ABC) (1997).

On the other hand, a meat packer was unsuccessful in seeking to bar the broadcast of potentially damaging footage another network had obtained by getting a packing employee to carry a concealed camera into the freezer. In such cases, direct liability for causing tangible harm seems never to be in doubt. Of course the network must pay if the camera crew physically damages the freezer controls, or causes the contents to spoil while being filmed, or coerces or violates the privacy of a regular employee.

What remains uncertain and contentious is the degree to which collateral or indirect liability may also be imposed—for the intangible effects on consumer confidence of material obtained by trespass, for example, rather than for tangible harm inflicted by the trespasser's feet or hands.

Several possibly helpful principles emerge from these cases. For one, no matter how reprehensible the journalist's conduct may have been, it seems never likely to justify imposing a prior restraint against publication. That was the teaching of the Pentagon Papers case, NEW YORK TIMES CO. V. UNITED STATES (1971), where the fact that the ma-

terials had been taken in violation of trust seemed of virtually no importance to the Supreme Court.

Moreover, information that is both truthful and of public interest is likely to fare better when it comes to liability of any sort. The relative strength of the opposing interests—those of the media on one hand, and of the victim of wrongful media conduct on the other—are likely to help resolve otherwise close cases. On one side, favoring the media, there is the powerful interest of readers, listeners, and viewers in maximizing the flow of information. On the other side, there may be the interests of persons who are actual or potential victims of wrongful newsgathering practices. Both sets of interests may be considered and weighed in the process of striking a balance in cases that are inescapably close and difficult.

Finally, courts are likely to take into account the availability of less drastic alternative forms of regulation. Most clearly, if a victim of wrongful newsgathering could seek damages after publication, the always tenuous case against publication would be even weaker. Among various forms of postpublication relief, courts are likely to choose the one that least-severely affects or impairs the freedom of the press.

ROBERT M. O'NEIL
(2000)

Bibliography

O'NEIL, ROBERT M. 1996 Tainted Sources: First Amendment Rights and Journalistic Wrongs. *William and Mary Bill of Rights Journal* 4:1005–1025

SIMS, JOHN C. 1993 Triangulating the Boundaries of the Pentagon Papers Case. *William and Mary Bill of Rights Journal* 2:341–452.

# JOURNALISTS AND THE SUPREME COURT

At the heart of the complex relationship between the Supreme Court and the journalists who cover it lies a contradiction. Due to its inherent inaccessibility, and to the fact that its members speak only through their written opinions without elaboration through news conferences or press releases, the Court, more than most other public institutions, depends on press coverage for public understanding of its work. Yet the Court fails to take a number of modest, relatively unobtrusive steps to achieve better, more accurate journalism about the Court.

The press therefore has a particularly heavy responsibility to provide comprehensive and accurate Court coverage. When it comes to learning about the Court's work, the public has few alternative channels of information available. Yet covering the Court is an afterthought for many news organizations that would not think of taking such a casual, almost haphazard approach to reporting about the White House or Congress.

Arguments and decisions in a handful of major cases each year attract a crowd of print and electronic journalists, but on most days when the Court is in session, the two rows of seats set aside in the courtroom for the press are empty, or nearly so. On days when the Court is not sitting, the number of journalists who spend time in the press room on the ground floor, reading briefs and petitions to prepare for upcoming cases, can usually be counted on the fingers of one hand.

The habits of these two institutions, the Court and the press, are mutually reinforcing. Neither pays due attention to the other. The result is journalism about the Court that is too often skimpy, imprecise, and lacking in context. That in itself is no doubt an improvement, however, from earlier decades, during which major developments at the Court could go entirely unreported.

In 1938, for example, the press missed the landmark ruling in ERIE RAILROAD CO. V. TOMPKINS, which revolutionized FEDERAL JURISDICTION by holding that there is no universal COMMON LAW and that federal courts are bound to apply state law in cases of DIVERSITY JURISDICTION. As Justice RUTH BADER GINSBURG recounted the incident to an audience at the Georgetown University Law Center, Justice HARLAN FISKE STONE let a week go by and then complained to Arthur Krock, the chief of *The New York Times* Washington Bureau, about the newspaper's failure to report on the decision. Mr. Krock soon produced an account of what he called a "transcendentally significant opinion" that had "generally eluded public notice."

In the media-saturated world in which the Court and the Washington press corps exist today, an omission of this sort would be most unlikely, because interested parties, served by public relations firms and aided by fax machines, would quickly bring a major ruling to the attention of the press. Today's lapses are likely to be of a more subtle variety, understating or overstating an opinion's significance or degree of conclusiveness. There is such a cacophony of voices responding to any important Court ruling, in fact, that reporters who are uncertain how to assess a decision often fall back on simply quoting the responses of the parties or outside experts, leaving readers to draw their own conclusions.

From a journalist's point of view, perhaps the most salient fact about covering the Court is the inaccessibility of the Justices themselves. Justices and reporters may encounter one another at social functions at the Court, or casually in the building's hallways. But the Justices are not available for off-the-record conversations about the Court's work. A reporter who finds an opinion ambiguous cannot call the author for an explanation.

While not unique to the Court, this ethos of distance between judges and journalists is not universally shared by other courts. Journalists occasionally find judges elsewhere who are willing to explain finer points of their rulings, albeit always on a background basis. Judge Richard S. Arnold, chief judge of the U.S. Court of Appeals for the Eighth Circuit and one of the most widely respected members of the federal bench, said in a 1998 interview in *Media Studies Journal* that he had "spoken many times, off the record, to reporters, to help them understand an opinion." He said he had even on occasion given a reporter an opinion a day early, under an embargo, so the reporter could read it at leisure for greater comprehension. "We can't control them," Arnold said of members of the press. "We can't manipulate them. But we can at least give them the tools that they can use, if they're well-disposed, to explain the subject better to the public."

This is not the attitude at the Supreme Court. Informal requests by reporters that the Justices space the opinions out at the end of the term, to avoid issuing two or three landmark rulings on a single day, have gone unanswered. When technology evolved in the early 1990s to permit the private company that prepares transcripts of the Court's oral arguments to provide automatic, same-day service of the transcripts—a substantial benefit to the accurate reporting of oral arguments, and one that is routinely available for legislative and administrative hearings in Washington—the Justices rejected the company's offer, preferring instead to continue receiving the transcripts some two weeks after the argument. Further diminishing the utility of the transcripts, the Justices asking the questions are not identified by name. The transcribed questions come from "the Court."

The Court has resisted numerous requests to open oral arguments to television; based on recent statements from individual Justices, that position is not likely to be reexamined in the near future.

In the absence of sources and personal contact with the newsmakers on their beat, Supreme Court reporters spend most of their time dealing with documents. Through the Public Information Office—the only source of formal contact between journalists and the Court—the Clerk's Office regularly makes available the lists of new petitions for WRITS OF CERTIORARI that are ready for distribution to the Justices at their weekly conference.

In this way, the press can track the progress of petitions, copies of which are reserved for inspection by reporters. By the time the Monday orders list is released, reporters who have studied the cases on the conference list have already identified the newsworthy petitions that might be granted, as well as those cases that might make news even if certiorari is denied.

The Public Information Office also distributes the schedule of oral arguments. It reserves seats in the press section of the courtroom for the relatively few arguments each term that attract enough press attention to require departing from the usual first come, first served seating. The office also keeps full sets of briefs that are filed on the merits of granted cases and distributes copies of the occasional speech or lecture by a Justice. But because the Court has no requirement that Justices inform the Public Information Office of their personal schedules, the public appearances of Justices tend to go unreported.

The Supreme Court press corps is small, with only about two dozen print reporters and television correspondents holding permanent credentials. Dozens more can get a one-day pass to cover a particular argument. But even that number pales in comparison to the press corps that covers Congress: some 5,000 journalists hold congressional press credentials.

With approximately 8,000 petitions for certiorari filed every term, the Court's docket provides almost limitless reporting opportunities. Journalism about the Court tends to fall under one of six basic headings. First, cases sometimes make news simply by being filed, even if the predictable disposition is denial of certiorari; at least the conclusion of what may have been a highly visible odyssey through the legal system is now in view.

Second, the Court's decision to hear or turn down a case is often highly newsworthy. A grant of certiorari, in particular, with its promise of imminent resolution, can initiate a wide-ranging national conversation about the underlying issue in the case.

Third, the period leading up to the argument date often provides an occasion for a story that explores the issues in the case, perhaps including interviews with the parties themselves.

The oral argument itself, the fourth type of Court story, offers more inherent drama than the other categories because it provides a stage on which the Justices conduct their business in public, interacting both with each other and with counsel for the parties. Lawyers often get a second chance to make their arguments, in front of the television cameras that await them on the plaza outside the Court building.

The fifth category, articles about the Court's actual decisions, is perhaps the most obvious, yet the writing of such an article is often far from routine. Especially when the Court is divided or when the question decided differs to some measurable degree from the question presented, simply summarizing the holding may be a challenge. To fully inform readers, the article must also provide the context of the case as well as responses from the parties and an indication of the decision's likely impact.

The sixth category comprises analyses of decisions as well as articles about trends on the Court, the role of in-

dividual Justices, and other related events. A vacancy on the Court, and the resulting confirmation process, usually provides still another occasion for taking stock, looking back, and—something that journalism does often but not well— predicting the future.

LINDA GREENHOUSE
(2000)

(SEE ALSO: *Public Understanding of Supreme Court Opinions.*)

Bibliography

ARNOLD, RICHARD S. and MERRITT, GILBERT S. 1998 Justice by the Consent of the Governed. *Media Studies Journal* 12:80–91.

DAVIS, RICHARD 1994 *Decisions and Images: The Supreme Court and the Press.* Englewood Cliffs, N.J.: Prentice Hall.

GINSBURG, RUTH BADER 1995 Communicating and Commenting on the Court's Work. *Georgetown Law Journal* 83:2119–2129.

GOLDFARB, RONALD L. 1998 *TV or Not TV: Television, Justice, and the Courts.* New York: New York University Press.

GREENHOUSE, LINDA 1996 Telling the Court's Story: Justice and Journalism at the Supreme Court. *Yale Law Journal* 105: 1537–1561.

MAURO, TONY 1998 "Getting a Beat on the Court." *Legal Times*, April 27, p. 7.

## *JUDGE PETERS, UNITED STATES v.*
5 Cranch 115 (1809)

This case bears historical significance as an episode in defiance, expressed in NULLIFICATION and bordering on rebellion, by a state against the United States courts. The state was Pennsylvania, which suggests that doctrines of state sovereignty have never been merely sectional. The case was the occasion of Chief Justice JOHN MARSHALLS's first nationalist opinion, but more important is the fact that Pennsylvania successfully thwarted the federal courts, exposing their helplessness in enforcing their writs, until a President of the Virginia dynasty unhesitatingly backed the judiciary, still Federalist-dominated, against the political machine of his own party in Pennsylvania.

The case originated during the Revolution as the result of a dispute between the state and Gideon Olmstead over the proceeds from the sale of a captured enemy ship. A state court denied Olmstead's claim, but a prize court established by Congress ruled in his favor; the state court refused to obey the federal order and the state treasurer retained the money. Litigation went on for years. In 1803 Judge RICHARD PETERS of the United States District court in Philadelphia decided in favor of Olmstead in his suit against the treasurer's estate, which held the money for the state. The state legislature, invoking the ELEVENTH AMENDMENT, resolved that Peters had "illegally usurped" JURISDICTION and instructed the governor to protect the rights of the state. In 1808 Olmstead, then in his eighties, obtained from the Supreme Court an order against Peters to show cause why a WRIT OF MANDAMUS should not be issued compelling him to enforce his decision of 1803. The judge stated that the state legislature had commanded the governor "to call out an armed force" to prevent the execution of a federal process. Peters asked for a resolution of the issue by the supreme tribunal of the nation, saying that he had withheld process to avoid a conflict between the state and federal governments.

In 1809, at a time when New England was disobeying the EMBARGO ACTS, Marshall, speaking for the Court, declared:

> If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgements, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves.

(That passage was quoted by the Court in the 1950s and 1960s in cases involving southern defiance of federal orders commanding DESEGREGATION.) The Court awarded a "peremptory mandamus" against Peters, but neither he nor Marshall could force the state to comply.

The state governor called out the militia, and the state legislature, supporting him, announced that "*as guardians of the State rights*, we cannot permit an infringement of those rights by an unconstitutional exercise of power in the United States Courts." Those actions were not the only reply to Marshall's declaration that the Eleventh Amendment did not apply inasmuch as the suit had not been commenced against the state. Pennsylvania also denied that the Supreme Court had appellate powers over the state courts or that it was the final arbiter in a dispute between the United States and any state. When a federal marshal attempted to execute Peters's judgment, 1400 men of the state militia opposed him; he summoned a federal *posse comitatus* of 2,000 men, but to avoid bloodshed fixed the day for service in three weeks. At this juncture, while the papers in the country were still carrying news about Federalist New England's defiance of the EMBARGO ACTS, the Democratic governor of Pennsylvania turned to the Democratic national administration for support. "The issue is in fact come to this," said *The Aurora*, the administration newspaper in Philadelphia, "whether the Constitution of the United States is to remain in force or to become a dead letter. . . . The decree of the Court

must be obeyed." President JAMES MADISON, mindful of the repercussions of the case, chastised the state governor. "The Executive," he replied, "is not only unauthorized to prevent the execution of a decree sanctioned by the Supreme Court of the United States, but is expressly enjoined, by statute, to carry into effect any such decree, where opposition may be made to it."

The incipient rebellion immediately collapsed. The state withdrew its militia and appropriated the money to pay Olmstead. In the aftermath of the affair, the United States arrested and tried the commanding general of the state militia and eight of his officers for having obstructed the federal marshal. A federal jury convicted them in a trial before Justice BUSHROD WASHINGTON, who sentenced the defendants to fines and imprisonment, but the President pardoned them. Eleven state legislatures adopted resolutions condemning Pennsylvania's resistance to the federal courts. Every southern state rejected Pennsylvania's doctrines of STATES' RIGHTS. That northern state had also proposed the establishment of "an impartial tribunal" to settle disputes between "the general and state governments." The legislature of Virginia replied that "a tribunal is already provided by the Constitution of the United States, *to wit:* the Supreme Court, more eminently qualified . . . to decide the disputes aforesaid . . . than any other tribunal which could be erected." In a few years, however, Virginia would be playing Pennsylvania's tune. (See MARTIN V. HUNTER'S LESSEE, 1816.) The supremacy of the Supreme Court had by no means been established yet.

LEONARD W. LEVY
(1986)

Bibliography

HIGGINBOTHAM, SANFORD W. 1952 *The Keystone in the Democratic Arch: Pennsylvania Politics 1800–1816.* Pages 177–204. Harrisburg: Pennsylvania Historical and Museum Commission.

TREACY, KENNETH W. 1957 The Olmstead Case, 1778–1809. *Western Political Quarterly* 10:675–691.

WARREN, CHARLES 1923 *The Supreme Court in American History,* 3 vols. Vol. I:375–387. Boston: Little, Brown.

## JUDGMENT

The judgment of a court is its conclusion or sentence of the law applied to the facts of a case. It is the court's final determination of the rights of the parties to the case. A judgment, once entered (unless successfully appealed), is conclusive as to the rights of the parties and ordinarily may not be challenged either in a future suit by the same parties or in a collateral proceeding. The judgment is essentially equivalent to the DECISION of the court. Judgments in EQUITY and admiralty cases are called "decrees"; judgments in criminal and ecclesiastical cases are called "sentences."

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Final Judgment Rule; Habeas Corpus; Res Judicata.*)

## JUDICIAL ACTIVISM AND JUDICIAL RESTRAINT

"Judicial activism" and "judicial restraint" are terms used to describe the assertiveness of judicial power. In no sense unique to the Supreme Court or to cases involving some construction of the Constitution, they are editorial summations of how different courts and different judges conduct themselves.

The user of these terms ("judicial activism" and "judicial restraint") presumes to locate the relative assertiveness of particular courts or individual judges between two theoretical extremes. The extreme model of judicial activism is of a court so intrusive and ubiquitous that it virtually dominates the institutions of government. The antithesis of such a model is a court that decides virtually nothing at all: it strains to find reasons why it lacks JURISDICTION; it avows deference to the superiority of other departments or agencies in construing the law; it finds endless reasons why the constitutionality of laws cannot be examined. It is a model of government virtually without useful recourse to courts as enforcers of constitutional limits.

The uses of "judicial activism" and "judicial restraint," however, are not entirely uniform. Often the terms are employed noncommittally, that is, merely as descriptive shorthand to identify some court or judge as more activist or more restrained than some other, or more than the same court formerly appeared to be. In this sense, the usage is neither commendatory nor condemnatory. Especially with reference to the Supreme Court, however, the terms are also used polemically. The user has a personal or professional view of the "right" role of the Court and, accordingly, commends or condemns the Court for conforming to or straying from that right role. Indeed, an enduring issue of American constitutional law has centered on this lively controversy of right role; procedurally and substantively, how activist or how restrained ought the Supreme Court to be in its use of the power of constitutional JUDICIAL REVIEW?

Ought that Court to confront the constitutionality of the laws as speedily as opportunity affords, the better to furnish authoritative guidance and settle political controversy in keeping with its unique competence and function as the chief constitutional court of the nation? Or ought it, rather, to eschew any unnecessary voluntarism, recog-

nizing that all participants in government are as bound as the Court to observe the Constitution and that the very insularity of the Supreme Court from representative government is a powerful reason to avoid the appearance of constitutional arrogance or constitutional monopoly? In brief, what degree of strict necessity should the Supreme Court require as a condition of examining the substantive constitutionality of government acts or government practices?

Substantively, the issues of "proper" activism or proper restraint are similar. When the constitutionality of governmental action is considered, what predisposition, if any, ought the Supreme Court to bring to bear? Should it take a fairly strict view of the Constitution and, accordingly, hold against the constitutionality of each duly contested governmental act unless the consistency of that act with the Constitution can be demonstrated virtually to anyone's satisfaction? Or, to the contrary, recognizing its own fallibility and the shared obligation of Congress (and the President and every member of every state legislature) fully to respect the Constitution as much as judges are bound to respect it, should the Court hold against the constitutionality of what other departments of government have enacted only when virtually no reasonable person could conclude that the act in question is consistent with the Constitution?

Disputes respecting the Supreme Court's procedural judicial activism (or restraint) and substantive judicial activism (or restraint) are thus of recurring political interest. Most emphatically is this the case with regard to judicial review of the constitutionality of legislation, as distinct from nonconstitutional judicial review. For here, unlike activism on nonconstitutional issues (such as the interpretation of statutes), the consequences of an adverse holding on the merits are typically difficult to change. An act of Congress, held inapplicable to a given transaction, need only be approved in modified form to "reverse" the Supreme Court's impression. On the other hand, a holding that the statute did cover the transaction but in presuming to do so was unconstitutional is a much more nearly permanent boundary. It may be overcome only by extraordinary processes of amending the Constitution itself (a recourse successfully taken during two centuries only four times), or by a reconsideration and overruling by the Supreme Court itself (an eventuality that has occurred about 130 times). Thus, the special force of adjudication of constitutionality, being of the greatest consequence and least reversibility, has made the proper constitutional activism (or proper restraint) of the Supreme Court itself a central question.

An appraisal of the Supreme Court in these terms involves two problems: the activism (or restraint) with which the Court rations the judicial process in developing or in avoiding occasions to decide constitutional claims; and the activism (or restraint) of its STANDARDS OF REVIEW when it does decide such claims.

The Supreme Court's own description of its proper role in interpreting the Constitution is one of strict necessity and of last resort. In brief, the Court has repeatedly held that the Constitution itself precludes the Court from considering constitutional issues unless they are incidental to an actual CASE OR CONTROVERSY that meets very stringent demands imposed by Article III. In addition, the Court holds that prudence requires the complete avoidance of constitutional issues in any case in which the rights of the litigants can be resolved without reference to such an issue.

In 1982, in VALLEY FORGE CHRISTIAN SCHOOLS V. AMERICANS UNITED, Justice WILLIAM H. REHNQUIST recapitulated the Court's conventional wisdom. Forswearing any judicial power generally to furnish advice on the Constitution, and denying that the Supreme Court may extend its jurisdiction more freely merely because constitutional issues are at stake, he declared: "The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity to "adjudge the legal rights of litigants in actual controversies." Even when the stringent prerequisites of jurisdiction have been fully satisfied, moreover, "[t]he power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, "is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy." For emphasis, he added, "The federal courts were simply not constituted as ombudsmen of the general welfare. [Such a philosophy] has no place in our constitutional scheme."

In so declaring, Justice Rehnquist was relying substantially upon a similar position adopted by Chief Justice JOHN MARSHALL in MARBURY V. MADISON (1803). Explaining that the Court's determination of constitutional questions was but an incident of its duty to pass upon legal questions raised in the due course of litigation, in no respect different from its duty when some statutory issue or COMMON LAW question might likewise be presented in a case, Marshall had insisted: "The province of the Court is, solely, to decide on the rights of individuals," and not to presume any larger role.

Accordingly, though a constitutional issue may be present, if the dispute in which it arises does not otherwise meet conventionally strict standards of STANDING, RIPENESS, genuine adverseness of parties, or sufficient factual concreteness to meet the demands of a justiciable case or controversy as required by Article III, the felt urgency or gravity of the constitutional question can make no difference. In steering a wide course around the impropriety of deciding constitutional questions except as incidental to a

genuine adversary proceeding, moreover, the Court has also declared that it will not entertain COLLUSIVE SUITS. As Marshall declared in *Marbury*, "it never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of a legislative act." Similarly, if during the course of genuine litigation the grievance has become moot in light of subsequent events, it must then be dismissed insofar as there remains no necessity to address the original issue.

When, moreover, all requisites of conventional, genuine litigation remain such that adjudication of the parties' rights is an unavoidable judicial duty, the Court has still insisted that it should determine whether the case can be disposed of without addressing any issue requiring it to render an interpretation of the Constitution itself. Accordingly (within the conventional wisdom), even with respect to disputes properly before it, well within its jurisdiction and prominently featuring a major, well-framed, well-contested constitutional question, the Supreme Court may still refuse to address that question. In his famous concurring opinion in ASHWANDER V. TENNESSEE VALLEY AUTHORITY (1936), Justice LOUIS D. BRANDEIS insisted that constitutional questions were to be decided only as a last resort: "When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Indeed, Brandeis continued, the Court will not "pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." Moreover, though there may be no other ground, if the constitutional question arises at the instance of a public official, "the challenge by a public official interested only in the performance of his official duty will not be entertained." Even when the issue is raised by a private litigant, his challenge to the constitutionality of a statute will not be heard "at the instance of one who has availed himself of its benefits."

Self-portrayals of the Court as a wholly reluctant constitutional tribunal that is not an oracle of constitutional proclamation but a court of law that will face constitutional questions only when a failure to do so would involve it as a tribunal in an unconstitutional oppression of a litigant go even further. A litigant may have much at stake, and nothing except his reliance upon some clause in the Constitution may remain to save him from jeopardy. Still, if the clause in the Constitution is deemed not to yield objective criteria adequate to guide its application by the Court, the Court may decline to attempt to fix any meaning for the clause on the basis that it is nonjusticiable. (See POLITICAL QUESTIONS.) Similarly, if the relief requested should require the Court to consider an order against the Congress itself, an order the Court cannot be confident would be obeyed and which it is without resources otherwise to enforce, it may refuse to consider the case. Identically, if an adjudication of the constitutional question, though otherwise imperative to the litigant's case, might involve conflict with the President respecting decisions already made, communicated to, and relied upon by other governments, the case may also be regarded as nonjusticiable.

In rough outline, then, these are the principal elements of the orthodoxy of extreme judicial restraint. Consistent with them, even when the Court does adjudicate a constitutional question, its decision is supposed to be "no broader than is required by the precise facts." Anything remotely resembling an advisory opinion or a gratuitous judicial utterance respecting the meaning of the Constitution is to be altogether avoided.

Although this combination of Article III requirements and policies has characterized a large part of the Court's history (most substantially when the constitutional questions involved acts of Congress or executive action), the Court's practice has not, in fact, been at all uniform. Collusive suits have sometimes been entertained, and the constitutional issues at once examined. Public officials sometimes have been deemed to have sufficient standing to press constitutional questions, though they have had no more than an official interest in the matter. Holdings on the Constitution occasionally have been rendered in far broader terms than essential to decide the case, often for the advisory guidance of other judges or for the benefit of state or local officials. When the constitutional issue seemed clear enough and strongly meritorious, parties placed in positions of advantage solely by force of the very condition of which they later complained on constitutional grounds have not always been estopped from securing a decision. On occasion when third parties would be unlikely or unable to raise a constitutional claim on their own behalf, moreover, other litigants deemed suitable to represent their claim have been allowed to proceed on the merits of the constitutional issues. And some utterly moot cases have been decided on the merits of their constitutional questions on the paradoxical explanation that unless the moot cases were treated as still lively, then conceivably the merits of the constitutional issues would forever elude judicial review. Indeed, the nation's most famous case, *Marbury v. Madison*, was in many respects an example of extreme procedural activism despite its disclaimer of strict necessity.

At issue in Marbury's case was the question of the Supreme Court's power to hear the case in the first instance, within its ORIGINAL JURISDICTION, rather than merely on appeal. The statute William Marbury relied upon to dem-

onstrate his right to commence his action in the Supreme Court was altogether unclear as to whether it authorized his suit to begin in the Supreme Court. Avoidance of the necessity of examining the constitutionality of the statute was readily available merely by construing the statute as not providing for original jurisdiction: an interpretation thus making clear that Marbury had sued in the wrong court, resulting in his case's being dismissed for lack of (statutory) jurisdiction and obviating any need to say anything at all about the constitutionality of an act of Congress.

Rather than pursue that course, however, Chief Justice Marshall "actively" interpreted the act of Congress, that is, he interpreted it to draw into issue its very constitutionality and then promptly resolved that issue by holding the act unconstitutional. Beyond that, rather than be content to dismiss the case for lack of either statutory or constitutional jurisdiction, the Chief Justice also (and quite gratuitously) addressed every other question raised by the complaint, including Marbury's right to the public office he sought, the appropriateness of the remedy he asked for, the illegality of the secretary of state's refusal to give it to him, and the lack of immunity from such suits by the secretary of state. Each of these other issues was of substantial controversy. Several of them raised substantial constitutional questions. Marshall resolved all in an opinion most of which was purely advisory, that is, of no necessity in light of the ultimate holding, which was that the Court was (constitutionally) without power (jurisdiction) to address the merits of the case at all. Marshall addressed all these questions on the basis of a factual record supplied principally on affidavit of his own brother. Still, Marshall, far from recusing himself on that account or on account of his own participation as the secretary of state who failed to deliver Marbury's commission, fully participated in the case, voted, and wrote the opinion for the Court. In these many respects, the case of *Marbury v. Madison* was an extraordinary example of extreme procedural activism. Its resemblance to what the Court has otherwise said (as in the Brandeis *Ashwander* guidelines or the *Valley Forge* case) is purely ironic. Indeed, the unstable actual practices of the Court which has so often described its institutional role in constitutional adjudication as one of the utmost procedural restraint, while not uniformly adhering to that description, have contributed to the Court's great controversiality in American government.

As we have seen, procedural activism (and restraint) has consisted principally of two parts. The first part is the rigor or lack of rigor with which the Court has interpreted the limitation in Article III of the Constitution, according to which the use of the judicial power can operate solely on "cases and controversies." The second part is the extent to which the Court has also adopted a number of purely self-denying ordinances according to which it will decline to adjudicate the merits of a constitutional claim in any case in which a decision can be reached on some other ground.

In contrast, substantive activism (and restraint) has consisted principally of three parts, each reflecting the extent to which the Court has interpreted the Constitution either aggressively to invalidate actions taken by other departments of government, or diffidently to acquiesce in these actions. The first part pertains to the Court's substantive interpretations of the ENUMERATED and IMPLIED POWERS of the other departments of the national government, that is, the powers vested by Article I in Congress and the powers vested by Article II in the President. The second part pertains to the Court's interpretation of the Constitution as implicitly withdrawing from state governments a variety of powers not explicitly forbidden to them by the Constitution. And the third part pertains to the Court's interpretations of those clauses in the Constitution that impose positive restrictions on the national and the state governments, principally the provisions in Article I, sections 9 and 10, in the BILL OF RIGHTS, and in the FOURTEENTH AMENDMENT. Although there may be no a priori reason to separate the substantive activism and restraint of the Supreme Court into these three particular categories, it is nonetheless practically useful to do so: overall, the Court has responded to them quite distinctly. Indeed, in practice, despite very great differences among particular Justices, the general tendency has been to develop a constitutional jurisprudence of selective activism and selective restraint.

In respect to constitutional challenges to acts of Congress for consistency with Article I's enumeration of affirmative powers, the Court's standard of review has generally been one of extraordinary restraint. With the exception of the first three and a half decades of the twentieth century, the Court has largely deferred to Congress's own suppositions respecting the scope of its powers. During the first seventy-five years of the Constitution, for instance, only two acts of Congress were held not to square with the Constitution. During the most recent forty years (a period of intense and extremely far-reaching national legislation), again but two acts have been held to fail for want of enumerated or implied constitutional authorization. Indeed, even when the comparison is enlarged to include cases challenging acts of Congress not merely for want of enacting authority but rather because they were alleged to transgress specific prohibitions (for example, the FIRST AMENDMENT restriction that Congress shall make no law abridging the FREEDOM OF SPEECH), still the record overall is one of general diffidence and restraint. Over the entirety of the Court's history, scarcely more than 120 acts of Congress have been held invalid.

An influential rationale for such restraint toward acts of Congress was set forth in 1893, in an essay by JAMES BRADLEY THAYER that Justice FELIX FRANKFURTER subsequently identified as uniquely influential on his own thinking as a judicial conservative. Thayer admonished the judiciary to bear in mind that the executive and legislative departments of the national government were constitutionally equal to the judiciary, that they were equivalently bound by oath of office to respect the Constitution, and that each was a good deal more representative of the people than the life-tenured members of the Supreme Court. Accordingly, Thayer urged, the Court should test the acts of coordinate national departments solely according to a rule of "clear error." In brief, such acts were to be examined not to determine whether their constitutionality necessarily conformed to the particular interpretation which the judges themselves might independently have concluded was the most clearly correct interpretation of the Constitution. Rather, such acts should be sustained unless they depended on an interpretation of constitutional power that was itself manifestly unreasonable, that is, an interpretation *clearly* erroneous.

Thayer's rule provided a strong political rationale for extreme judicial deference in respect to enumerated and implied national powers. Of necessity, however, it also tended practically to the enlistment of the judiciary less as an independent guardian of the Constitution (at least in respect to the scope of enumerated and implied powers) than as an institution tending to validate claims of national authority against state perspectives on the proper boundaries of FEDERALISM. It is a thesis that has periodically attracted criticism on that account, but it does not stand as the sole explanation for the general restraint reflected in the Supreme Court's permissive construction of national legislative and executive powers. Rather, without necessarily assuming that Congress and the President possess a suitably reliable detachment to be the presumptive best judges of their respective powers, decades before the appearance of Thayer's essay the Supreme Court had already expressed a separate rationale: a judicial rule of BROAD CONSTRUCTION respecting enumerated national powers.

The most durable expression of that rule is reported in a famous OBITER DICTUM by Chief Justice John Marshall. In MCCULLOCH V. MARYLAND (1819), Marshall emphasized to his own colleagues, the federal judges: "We must never forget, that it is a *constitution* we are expounding." In full context, Marshall plainly meant that it was a Constitution for the future as well as for the present, for a nation then quite small and new but expected to become much more considerable. To meet these uncertain responsibilities, Congress would require flexibility and legislative latitude. Thus, powers granted to it by the Constitution should be read generously.

The point was expanded upon more than a century later by Justice OLIVER WENDELL HOLMES, in MISSOURI V. HOLLAND (1920), defending the judiciary's predisposition to interpret the TREATY POWER very deferentially: "When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . [I]t has taken a century and has cost their successors much sweat and blood to prove that they created a nation." This rule of generous construction, like Thayer's rule of "clear error," tends to support a judicial policy of substantive interpretative restraint. And while not free of criticism on its own account (as federalism critics will tend to fault it as unfaithful to their view of the extent to which substantive legislative authority was meant to be reserved to the states), it is not contingent upon doubtful assumptions respecting the capacity of the President or of the Congress fairly to assess the scope of powers they are given by the Constitution. Arguably, it is as well that this policy of judicial restraint not be made to rest on such assumptions. Although reference to the early constitutional history of the United States tends to support Thayer's thesis (early members of Congress included many persons who had participated in the shaping of the Constitution and who frequently debated proposed legislation in terms of its consistency with that Constitution), two centuries of political change have weakened its suppositions considerably. Persons serving in Congress are far removed from the original debates over enumerated powers; the business of Congress is vastly greater than it once was; the electorate is itself vastly enlarged beyond the limited numbers of persons originally eligible to vote; and such attention as may be given within Congress to issues of constitutionality is understandably likely to be principally political in its preoccupations rather than cautious and detached. Thus, the Marshall rule of generous construction in respect to national powers, rather than the Thayer proposal (of yielding to not-unreasonable interpretations by Congress), tends more strongly to anchor the general policy of judicial restraint in this area. (When the issue had been one of conflict between Congress and the President, on the other hand, the Court has tended to defer to the position of Congress as first among equals.)

In contrast, there is less evidence of a consistent policy of substantive judicial restraint in the Supreme Court's examination of state laws and state acts. Here, to the contrary, the role of the Court has emphatically been significantly more activist, procedurally as well as substantively. The Court will more readily regard the review of govern-

mental action as within the JUDICIAL POWER OF THE UNITED STATES in the litigation of state laws. A principal example is the ease with which state TAXPAYER SUITS impugning state laws on federal constitutional grounds will be deemed reviewable in the Supreme Court, when in most instances an equivalently situated federal taxpayer is deemed to have inadequate standing in respect to an act of Congress. In addition, the Court has interpreted the Constitution to create a judicial duty to determine the constitutionality of certain kinds of state laws, though the clauses relied upon do not themselves expressly confer such a judicial duty (or power) and speak, rather, solely of some preemptive power in Congress to determine the same matter. For instance, the COMMERCE CLAUSE provides merely that Congress shall have power to regulate commerce among the several states. But in the absence of congressional regulation, the Court has actively construed the clause as directing the federal courts themselves to determine, by their own criteria, whether state statutes so unreasonably or discriminatorily burden INTERSTATE COMMERCE that they should be deemed invalid by the courts as an unconstitutional trespass upon a field of regulation reserved to Congress.

Here also the rationales have differed, and indeed not every Supreme Court Justice has embraced either rationale. (Justice HUGO L. BLACK, for instance, preferring a constitutional jurisprudence of "literal" interpretation, generally declined to find any basis in the commerce clause for judicial intervention against state statutes.) In part, the substantive activism of the Court has been explained by a "political marketplace" calculus that is the obverse of Thayer's rule for deference to Congress. According to this view, as the state legislatures are not equal departments to the Supreme Court (in the sense that Congress is an equal department), and as national interests are not necessarily as well represented in state assemblies as state interests are said to be represented in Congress (insofar as members of Congress are all chosen from state-based constituencies), there are fewer built-in political safeguards in state legislatures than in Congress. To the extent of these differences, it is said that there is correspondingly less reason for courts to assume that state legislatures will have acted with appropriate sensitivity to federal constitutional questions and, accordingly, that there is more need for closer judicial attention to their acts. The sheer nonuniformity of state legislation may be of such felt distress to overriding needs for greater uniformity in a nation with an increasingly integrated economy that a larger measure of judicial activism in adjudicating the constitutional consistency of state legislation may be warranted in light of that fact. Something of this thought may lie behind Justice Holmes's view respecting the relative importance of constitutional review itself: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states." Finally, more activist substantive review of state laws has been defended on the view that, assuming Congress itself may presume to substitute a uniform rule or otherwise forbid states to legislate in respect to certain matters, the frequency with which state statutes may be adopted and the resulting interference they may impose upon matters of national importance prior to any possibility of corrective congressional action require that the federal courts exercise an interim and activist responsibility of their own. In any event, this much is clear. In respect to substantive standards of constitutional review and challenges to state laws on grounds that they usurp national authority, the overall position of the Supreme Court has been that of an activist judiciary in umpiring the boundaries of federalism.

Finally, and most prominently within the last half-century, selective judicial activism has made its strongest appearance in the judicial review of either federal or state laws that, in the Court's view, bear adversely on one or more of the following three subjects: participation in the political process, specific personal rights enumerated in the Bill of Rights, and laws adversely affecting "DISCRETE AND INSULAR MINORITIES." The scope of these respective activist exceptions (to the general rule of procedural and substantive restraint) is still not entirely settled. Indeed, each is itself somewhat unstable. Nonetheless, the indication of more aggressive, judicially assertive constitutional intervention in all three areas was strongly suggested in a footnote to UNITED STATES V. CAROLENE PRODUCTS CO. (1938). There, the Court suggested that the conventional "presumption of constitutionality" would not obtain, and that "searching judicial inquiry" would be applied to the review of laws that, on their face, appeared "to be within a specific prohibition of the Constitution," or to "restrict those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation," or to bear heavily on "discrete and insular minorities" suffering from prejudice likely to lead to their neglect in the legislative process.

In respect to the first of these categories, however, it is doubtful whether the standards applied by the Supreme Court should be defined as unconventionally activist at all. To the extent that a constitutional provision explicitly forbids a given kind of statute, its mere application by the Court scarcely seems exceptional. To the contrary, it would require an extreme version of "restraint" to do otherwise.

The second category (principally concerned with limitations on voting eligibility or with varieties of unfairness in REPRESENTATION) is differently reasoned. The Court has assumed generally that deference is ordinarily due the constitutional interpretations of legislative bodies because they are themselves representatives of the people (who have the greatest stake in the Constitution). But if the law in question itself abridges the representative character of the legislatures, it tends by that fact to undermine the entire foundation of judicial restraint in respect to all other legislative acts. As it tends thereby also to reduce the efficacy of the legislative process to repeal improvident legislation, such representation-reducing statutes ought to be severely questioned.

The third category (such legislation as bears adversely on insular and discrete minorities) has emerged as by far the most controversial and unstable example of modern judicial activism. Its theory of justification is one of rationing the activism of constitutional review inversely, again in keeping with the perceived "market failure" of representative government. And, up to a point, it is quite straightforward in keeping with that theory. Thus, when the numbers of a particular class are few and their financial resources insignificant, and when the class upon whom a law falls with great force is not well-connected but, to the contrary, seems left out of account in legislative processes (by prejudices entrenched within legislatures), the resulting market place failure of political power or ordinary empathy is felt to leave a gap to be filled by exceptional judicial solicitude.

The paradigm case for such activism is that of legislation adversely affecting blacks, when challenged on grounds of inconsistency with the EQUAL PROTECTION clause of the Fourteenth Amendment. On its face, the equal protection clause provides no special standards of justification that race-related legislation must satisfy that other kinds of adverse legislative classifications need not meet. Nonetheless, on quite sound historical grounds, race-related legislation was singled out for exceptional judicial activism by the WARREN COURT. Although many of the Warren Court decisions remain of enduring controversy, it is generally conceded that the Court's STRICT SCRUTINY of such race-based laws was itself consistent with the special preoccupation of the Fourteenth Amendment with that subject. Thus, as early as 1873, in the SLAUGHTER-HOUSE CASES, the Court had observed: In the light of the history of [the THIRTEENTH, Fourteenth, and FIFTEENTH] AMENDMENTS, and the pervading purpose of them, [it] is not difficult to give a meaning to [the equal protection clause]. The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden."

As this historical CIVIL WAR basis for that one exception was left behind, the Supreme Court plied an increasingly complicated sociology of political marketplace failure to explain an equivalent interventionism on a much broader front. Thus, gender-based laws, laws restricting ALIENS vis-à-vis citizens, and laws restricting minors vis-à-vis adults came also to be examined much more stringently under the equal protection clause than laws adversely affecting particular businesses, particular classes of property owners, certain groups of taxpayers, or others. The determination of "adequate representation" (whether direct or vicarious), the conjecture as to whether such legislative classifications were based on "stereotypes" rather than real differences, and ultimately the tentative extension of equal protection activism even to require a variety of state support for poor persons, produced unstable and largely unsustainable pluralities within the Supreme Court.

Indeed, the difficulties of selective activism in this area have been the principal object of contemporary criticism in American constitutional law. The most serious questions have been addressed to the apparent tendency of the Court to adjust its own interpretations of the Constitution not according simply to its own best understanding of that document, but rather according to its perceptions respecting the adequacy of representative government. Given the fact that far more cases compete for the opportunity to be determined by the Supreme Court than its own resources can permit it to hear, the Court might be expected to pursue a course of selective procedural activism according to which it would more readily entertain cases and more readily reach the merits of constitutional claims it should consider not to have been adequately considered elsewhere because of built-in weaknesses of representative government. On the other hand, it remains much more problematic why the Court should utilize its impressions respecting the adequacies of representative government twice over: once to determine which cases to review, and again to determine whether the Constitution has in fact been violated.

Descriptions of judicial activism and judicial restraint in constitutional adjudication are, of course, but partial truths. In two centuries of judicial review, superintended by more than one hundred Justices who have served on the Supreme Court and who have interpreted a Constitution highly ambiguous in much of its text, consistency has not been institutional but personal. Individual judges have maintained strongly diverse notions of the "proper" judicial role, and the political process of APPOINTMENT OF SUPREME COURT JUSTICES has itself had a great deal to do with the dominant perspectives of that role from time to

time. Here, only the most prominent features of judicial activism and judicial restraint have been canvassed.

It is roughly accurate to summarize that in respect to interpreting the Constitution, procedurally the Supreme Court has usually exercised great restraint. Subject to some notable exceptions, it has eschewed addressing the constitutional consistency of acts of government to a dramatically greater degree of self-denial than it has exercised in confronting other kinds of legal issues seeking judicial resolution. Substantively, the Court has been predisposed to the national government in respect to the powers of that government: except for the early twentieth century, Thayer's law, requiring a showing of "clear error," has been the dominant motif. In respect to the states, on the other hand, the Court has been actively more interventionist, construing the Constitution to enforce its own notions of national interest in the absence of decisions by Congress. And, most controversially in recent decades, it has been unstably activist in deciding whether it will interpret the Constitution more as an egalitarian set of imperatives than as a document principally concerned with commerce, federalism, the SEPARATION OF POWERS, and the protection of explicitly protected liberties.

WILLIAM W. VAN ALSTYNE
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Bibliography

BICKEL, ALEXANDER M. 1962 *The Least Dangerous Branch: The Supreme Court at the Bar of Politics.* Indianapolis: Bobbs-Merrill.

ELY, JOHN H. 1980 *Democracy and Distrust: A Theory of Judicial Review.* Cambridge, Mass.: Harvard University Press.

JACKSON, ROBERT H. 1941 *The Struggle for Judicial Supremacy.* New York: Knopf.

THAYER, JAMES B. 1893 "The Origin and Scope of the American Doctrine of Constitutional Law." *Harvard Law Review* 7:129.

WECHSLER, HERBERT 1959 "Toward Neutral Principles of Constitutional Law." *Harvard Law Review* 73:1.

# JUDICIAL ACTIVISM AND JUDICIAL RESTRAINT
## (Update)

In contemporary constitutional rhetoric, "judicial activism" is almost always a term of opprobrium. Prospective Supreme Court nominees regularly disclaim activist inclinations, and political and academic critics of the Court regularly decry activist overreaching. Yet despite the term's salience, there is considerable confusion as to its precise meaning.

In a loose sense, the attack on judicial activism, and the defense of its cognate virtue, judicial restraint, rest on a distrust of judicial discretion and an insistence on RULE OF LAW values. On this view, judicial decisions are entitled to respect because they are legal, objective, impersonal, and apolitical. An "activist" judge risks bringing constitutional law into disrepute by using it as an excuse to implement merely personal or political values.

To be sure, most sophisticated contemporary students of constitutional law reject this dichotomy between the "personal" and "objective," at least in its simplest form. Although Justice OWEN J. ROBERTS once insisted that the task of Supreme Court Justices was simply to "lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former," there are few modern adherents to mechanical jurisprudence among observers of constitutional law. Yet, despite persistent and trenchant efforts to discredit the mechanical view, it retains a powerful hold on popular perceptions of the appropriate judicial function and, at least in diluted form, plays some role in most standard justifications for JUDICIAL REVIEW.

Moreover, perhaps paradoxically, the modern attack on the mechanical theory, as well as the theory itself, tends to buttress arguments for judicial restraint. For if it is indeed true that judges must inevitably insert their personal values into the task of constitutional review, as critics of the mechanical theory insist, then there is all the more reason to constrict sharply the occasions for this review. Restraint is especially important, these critics maintain, because policy decisions by judges, implemented under the guise of constitutional review, often have unintended and unfortunate consequences. It is claimed, for example, that the Court's invalidation of ABORTION laws in ROE V. WADE (1973) served only to obstruct an emerging, sensible compromise to the abortion dispute, and that the Court's condemnation of school SEGREGATION in BROWN V. BOARD OF EDUCATION (1954) did little or nothing to advance the cause of racial equality. Often these criticisms are linked to the claim that constitutional review is elitist and divisive. On this view, constitutional decisions unjustifiably reduce the space for democratic deliberation and needlessly bring to the fore contested and unresolvable issues of fundamental principle.

There are, then, a complex of powerful arguments that support judicial restraint. To some degree, however, these arguments conceal important fissures within the critique of activism. For example, it is not always clear whether critics of activism are referring to its procedural or substantive manifestations. Procedural restraint requires judges to limit the occasions for, and scope of, constitutional decisions. Among the tools that accomplish these objectives are DOCTRINES concerning STANDING, RIPENESS,

MOOTNESS, POLITICAL QUESTIONS, and AVOIDANCE of unnecessary constitutional exposition. In contrast, substantive restraint requires judges to interpret the substantive provisions of the Constitution narrowly. Familiar manifestations of this position include the insistence on no more than "mere rationality" for statutes challenged under the EQUAL PROTECTION clause, the rejection of SUBSTANTIVE DUE PROCESS, and the limitation of FREEDOM OF SPEECH protections to the kinds of political speech protected at the time of the Constitution's framing.

On some occasions, the procedural and substantive versions of restraint are in tension with each other. Sometimes, procedural restraint will prevent a Court from reaching the merits in circumstances where doing so might lead to greater substantive restraint. For example, in a 1986 decision, *Diamond v. Charles*, the Court rejected an appeal on standing grounds in circumstances where the appellant asked the Court to loosen substantive constitutional constraints on anti-abortion statutes.

Matters are made still more complicated by tensions internal to each version of restraint. Procedural devices like standing and political question can be used to avoid constitutional decisions, but they also increase the degree of judicial discretion. Many commentators have argued that these doctrines are not "principled" or firmly rooted in determinate constitutional doctrine and therefore allow courts great freedom to indulge personal, nonlegal preferences.

There are similar tensions internal to the substantive version of restraint. On one view, the argument against judicial activism pushes one toward some form of TEXTUALISM or ORIGINALISM. Only by tying constitutional doctrine closely to the text, or the ORIGINAL INTENT of the Framers, can judicial discretion be controlled. A second view holds that judges should be respectful of PRECEDENT, which makes their decisions more general and rule-like. Still a third view holds that judges ought to interpret the Constitution so as to maximize the space for political decisionmaking.

It should be apparent that these three views will often lead to different outcomes. For example, in a prior generation, both Justices HUGO L. BLACK and FELIX FRANKFURTER claimed to practice judicial restraint—Black, when he read the FIRST AMENDMENT free speech clause literally, resulting in the invalidation of many statutes; and Frankfurter, when he read it more loosely, so as to uphold many statutes. More recently, Justices WILLIAM J. BRENNAN, JR., and THURGOOD MARSHALL often accused their colleagues of "judicial activism" when they failed to follow prior precedent that the majority overruled or distinguished precisely because the precedent authorized more judicial intervention than the majority thought appropriate.

The upshot of this confusion is that almost everyone in contemporary constitutional debate can claim the mantle of judicial restraint, while almost no one need actually exercise much of it. The plain truth is that, despite all the rhetoric to the contrary, the modern Supreme Court lacks a single consistent proponent of judicial restraint. For example, the modern Court has embarked on an ambitious program of revitalizing FEDERALISM and SEPARATION OF POWERS limitations on the political branches; overseeing ELECTORAL DISTRICTING; protecting PROPERTY RIGHTS and the right to COMMERCIAL SPEECH; and invalidating AFFIRMATIVE ACTION programs. Critics of the Court complain that these decisions are "activist," but many of these critics would, themselves, like to make the Court more activist in the protection of reproductive and sexual freedom, racial minorities, and political dissidents.

All of this suggests that the real fault line in contemporary constitutional argument is not between activism and restraint, but between styles of activism. While conservative activists would make the Court active so as to keep the rest of government passive, thereby leaving more space for free markets and individual decisionmaking, liberal activists would make the Court active so as to require more aggressive programs of government regulation and redistribution. To a significant extent, rhetorical attacks on judicial activism have served only to distract attention from this central disagreement.

LOUIS MICHAEL SEIDMAN
(2000)

(SEE ALSO: *Constitutional Theory; Courts and Social Change.*)

Bibliography

BICKEL, ALEXANDER M. 1962 *The Least Dangerous Branch: The Supreme Court at the Bar of Politics.* Indianapolis, Ind.: Bobbs-Merrill.

BLASI, VINCENT 1983 The Rootless Activism of the Burger Court. Pages 198–217 in Vincent Blasi, ed., *The Burger Court: The Counter-Revolution That Wasn't.* New Haven, Conn.: Yale University Press.

BORK, ROBERT H. 1990 *The Tempting of America: The Political Seduction of the Law.* New York: Free Press.

DWORKIN, RONALD H. 1996 *Freedom's Law: The Moral Reading of the American Constitution.* Cambridge, Mass.: Harvard University Press.

GUNTHER, GERALD 1964 The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Review. *Columbia Law Review* 64:1–25.

ROSENBERG, GERALD 1991 *The Hollow Hope: Can Courts Bring about Social Change?* Chicago: University of Chicago Press.

SUNSTEIN, CASS 1996 Foreword: Leaving Things Undecided. *Harvard Law Review* 110:4–101.

## JUDICIAL APPOINTMENTS

See: Confirmation Process; Senate and Judicial Appointments

## JUDICIAL CODE

The Judicial Code of the United States is an official collection and codification of laws governing the federal judiciary and federal court procedures. Codified as Title 28 of the United States Code, the Judicial Code is an exercise of the Article I power of Congress to make such laws as it deems NECESSARY AND PROPER for carrying into execution the broad and ill-defined powers vested in the judiciary by Article III of the Constitution.

The present code, enacted in 1948, is the lineal descendant of the original JUDICIARY ACT OF 1789, the judiciary portions of the REVISED STATUTES of 1877, and the Judicial Code of 1911. It is an effort by judicial, legislative, and legal experts to rearrange, update, and improve the many laws dealing with the federal judicial system. Additions and improvements are periodically made by Congress, and integrated into the structural scheme of the code. The code itself is divided into six main parts, with numerous subdivisions, each relating to a particular subject matter. Among the more important subjects covered by the code are: the organization, personnel, and administration of the federal courts, including the SUPREME COURT; the JURISDICTION conferred by Congress on these various courts, including the Supreme Court; provisions for determining the proper VENUE for instituting a case in a UNITED STATES DISTRICT COURT, and provisions governing the REMOVAL to a federal court of a case instituted in a state court; and the procedures to be followed in various kinds of federal court proceedings.

The 1948 revision and recodification have been both highly praised and highly criticized. Criticism has often been focused on the provisions dealing with the jurisdiction of the federal district courts, for it is the exercise of that jurisdiction that most directly affects the delicate and controversial federal-state court relationships. Concern for these relationships led the American Law Institute to undertake a major study of the Judicial Code, culminating in a 1968 proposal to revise substantial portions of the code. Specifically, the institute suggested major modifications and limitations respecting district courts' DIVERSITY-OF-CITIZENSHIP JURISDICTION, as well as clarifications of FEDERAL QUESTION JURISDICTION and ADMIRALTY AND MARITIME JURISDICTION, and changes as to venue and removal of actions from state courts. Some of the institute's proposals bore legislative fruit and influenced judicial thinking. But the major proposals have lain fallow, and in some respects they have been outmoded by the passage of time and the birth of new tensions in the JUDICIAL SYSTEM.

Controversy about some of the Judicial Code's provisions is endless, especially those that concern the scope and exercise of the diversity jurisdiction of the federal courts. Such controversy reflects the historic and perhaps unresolvable concern that, as Chief Justice EARL WARREN once said, "we achieve a proper jurisdictional balance between the Federal and State court systems, assigning to each system those cases most appropriate in the light of the basic principles of FEDERALISM."

EUGENE GRESSMAN
(1986)

Bibliography

CURRIE, DAVID P. 1968–1969 The Federal Courts and the American Law Institute. *University of Chicago Law Review* 36:1–49, 268–337.

WECHSLER, HERBERT 1948 Federal Jurisdiction and the Revision of the Judicial Code. *Law and Contemporary Problems* 13:216–243.

## JUDICIAL COLLEGIALITY

"Collegiality" is defined by *Webster's Third New International Dictionary* (1993) as "the relationship of colleagues." "Colleagues" are "associate[s] or co-worker[s] typically in a profession or a civil or ecclesiastical office and often of similar rank or state." The derivation, common with "college," is the Latin *collegium*, although a purist might refer to the verb *legare*, meaning to send or choose a deputy.

For a court, collegiality consists in the relationship among equals in rank, and usually carries positive connotations of cooperativeness and joint efforts toward achieving appropriate aims, operations, and functioning of the court as an institution.

Thus, there may be collegiality among, say, trial judges, even though it does not necessarily extend to decision-making on particular cases. Trial judges have basically monarchial power over their own courtrooms, even though they may work with their colleagues, for example, in accomplishing trial court aims or fashioning trial court rules. At the same time, they may consult with their trial court colleagues on matters that do affect particular cases; for example, sentences, jury instructions, admissibility of particular evidence, or the like. But it is a collegiality of a different kind from that of appellate judges.

Appellate judges need collegiality in order to decide particular cases. Sitting generally in groups or panels of three or more—usually an odd number—a joint, one hopes cooperative, effort is needed to decide cases; to de-

cide whether to hear arguments or to write opinions or summary orders, as well as how to write them; to fashion relief to the parties; to give guidance to the trial courts or to the bar or to the public; and, in a difficult or complex case, simply to reach a workable result. Three judges can sometimes approach a case with different viewpoints, resulting in different outcomes, yet needing resolution. Something has to give in such a situation, and "collegiality" is what helps bring about resolution.

It may be best to define "collegiality" in terms of what tends to promote it and what tends to discourage it. Means of promotion include friendship, civility, intellectual respect, consideration, dialogue and communication, good humor, and shared meals and events. Thus, personal elements, communications, socialization, and court ceremonies all tend to further collegiality. As former Chief Judge Jon O. Newman of the United States Court of Appeals for the Second Circuit put it recently, the term "collegiality" does not begin to capture "the subtle elements of respect, trust, cooperation, and accommodation that characterize members of a group court at work."

Discouraging collegiality follows from the contrary—geographic or social remoteness of the judges; the size of the court; or ill-feeling. One could add as examples of discouraging practices criticizing another's writing style; delegating opinion critiques to law clerks who are given free rein; or personalized attacks in opinions or memoranda on the motives or aims of other judges. But these examples are not inclusive.

Collegiality is an elusive concept. To borrow the description of obscenity of Justice POTTER J. STEWART in his CONCURRING OPINION in JACOBELLUS V. OHIO (1964), we know it when we see it, but to define it is almost impossible. We do know that, without collegiality, courts tend to become politicized, angry, or lacking in civility. Indeed, without it the independence of judges that we try to maintain may be undermined, as public and political criticism of the courts is promoted.

JAMES L. OAKES
(2000)

## JUDICIAL CONFERENCE OF THE UNITED STATES

The Judicial Conference of the United States is a legacy of WILLIAM HOWARD TAFT's chief justiceship. Its establishment in 1922 constituted a part of the former President's broad campaign against progressives' demands for changes in the substance of then-prevailing federal law. Taft responded with a structural reform proposal: unprecedented administrative integration of a geographically dispersed court system manned by virtually autonomous judges. Thus, the third branch as a whole would achieve enhanced independence coincident with, and protective of, the uniqueness of the essential judicial function.

The Judicial Conference remains the linchpin of national judicial administration. From its beginnings as an annual meeting of the presiding judges of the UNITED STATES COURTS OF APPEALS chaired by the CHIEF JUSTICE, the organization's membership has grown to include a representative from one of the UNITED STATES DISTRICT COURTS in each of the eleven numbered circuits and the District of Columbia and the chief judges of those circuits, the UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, and the COURT OF INTERNATIONAL TRADE. Biennial meetings at Washington, held in executive session, are largely repositories for reports from an extensive committee system involving the participation of approximately two hundred federal judges. This system provides status differentiation among the more than 700-member federal judiciary, but more significantly responds to a work load spawned both by the brevity of conference sessions and by a voluminous and complex agenda associated with the growth of judicial business and personnel.

Further structural changes in the conference-related administrative organization originated in causes both within and without the third branch. Congress in 1939 established the Administrative Office of the United States Courts and provided for regional administrative units: circuit judicial councils and circuit judicial conferences. Chief Justice CHARLES EVANS HUGHES promoted the Administrative Office Act as a response to FRANKLIN D. ROOSEVELT's 1937 "COURT-PACKING" bill, perceived by conference members as threatening executive-branch domination of the judiciary.

The new act vastly increased the functions performed by the Judicial Conference and its committees. Although the director and deputy director are appointed by the Supreme Court, the Office acts under "the supervision and direction" of the conference. Consequently, housekeeping, personnel, and budgetary duties once performed by the ATTORNEY GENERAL AND DEPARTMENT OF JUSTICE now fall within the oversight of the conference. These and subsequent congressionally mandated duties, some of which affected the district judges, ignited trial judge demands for conference representation, achieved in 1957, and led to establishment in 1967 of the Federal Judicial Center. This research, development, education, and training arm of the courts is directed by a governing board whose members are appointed by the conference.

The Judicial Conference has from its inception promoted administrative centralization, a functional tendency enhanced by the information-gathering and supportive services available from the Administrative Office. Consonant with the 1922 act's charge "to promote uniformity of

management procedures and expeditious conduct of court business," the conference formulates policies for allocating budgetary, personnel, and space resources. It similarly addresses administrative questions raised in areas such as legal defenders, bankruptcy, probation, magistrates, and rules of practice and procedure.

The Judicial Conference promulgates standards of judicial ethics. Its role in disciplining wayward judges received explicit congressional authorization in 1980. The Judicial Councils Reform and Judicial Conduct Act empowered the circuit judicial councils to certify intractable misbehavior problems to the conference for "appropriate action." Remedies include referral of such cases to the House Judiciary Committee upon finding "that consideration of IMPEACHMENT may be warranted," a procedure followed in three instances from 1986 through 1988.

The SEPARATION OF POWERS makes the federal judiciary dependent on Congress for support. Since Taft's chairmanship and later with congressional authorization, the Judicial Conference has developed and promoted legislative programs. Additional judgeships, appropriations, judicial salaries, court organization, jurisdiction, procedural rules, and impeachment recommendations have been among the proposals brought to Capitol Hill, usually by conference committee chairmen. Thus, judges do and must lobby Congress to obtain necessary resources. Yet, legislative liaison may embroil the judiciary in visible political conflict, as occurred when Chief Justice WARREN E. BURGER lobbied against portions of the 1978 BANKRUPTCY ACT.

The strategic position of the Judicial Conference, its policymaking functions, and its implementation responsibilities pose dilemmas. A quest by the conference for efficiency, uniformity, and equity has induced intrabranch policies favorable to development of "managerial" judges and has produced unavoidable tensions between centralized policymaking and individual court administration. Conference recommendations to Congress permit submission of proposals freighted with substantive public policy implications packaged in the wrappings of judicial administration, a characteristic that marked the struggle to divide the Fifth Circuit.

PETER GRAHAM FISH
(1992)

(SEE ALSO: *Progressive Constitutional Thought; Progressivism.*)

Bibliography

BARROW, DEBORAH J. and WALKER, G. THOMAS 1988 *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform.* New Haven, Conn.: Yale University Press.

FISH, PETER GRAHAM 1973 *The Politics of Federal Judicial Administration.* Princeton, N.J.: Princeton University Press.

# JUDICIAL IMMUNITY

In *Randall v. Brigham* (1869) the Supreme Court endorsed the principle of judicial immunity. Under doctrine "as old as the law," Justice STEPHEN J. FIELD wrote for the Court, judges of courts of general jurisdiction are immune from suit for judicial acts "unless perhaps where the acts, in excess of JURISDICTION, are done maliciously or corruptly." In *Bradley v. Fisher* (1872) Justice Field, again writing for the Court, extended *Randall*'s standard for protecting judges to preclude liability for all judicial acts except "acts where no jurisdiction whatever" existed and illustrated the difference between acts "in excess of jurisdiction" and acts clearly without jurisdiction. A probate judge acts clearly without jurisdiction when he tries a criminal case. A judge who improperly holds an act to be a crime or sentences a defendant to more than the statutory maximum merely acts in excess of jurisdiction. *Bradley* also disavowed the suggestion in *Randall* that a malicious or corrupt motive might affect a judge's immunity.

The Civil War Amendments, ratified at about the time *Randall* and *Bradley* were decided, led many years later to a vast growth in individual constitutional protections. This development caused both a reexamination and an eventual reaffirmation of judicial immunity. Because actions against state officials for constitutional violations are brought under SECTION 1983, TITLE 42, UNITED STATES CODE, the scope of judicial immunity from suit for constitutional violations has been defined mainly in answer to the question whether judges may be sued under section 1983.

The unequivocal language of section 1983 led some lower courts to find judges subject to suit. In TENNEY V. BRANDHOVE (1951), however, the Supreme Court held that Congress did not intend section 1983 to overturn the traditional immunity of legislators from suit. Although judicial immunity was less firmly established at COMMON LAW than was legislative immunity, *Tenney* led courts to conclude that judges, like legislators, are immune from suit under section 1983. In PIERSON V. RAY (1967), with limited discussion of the issue, the Supreme Court adopted this view in holding a judge immune from suit for convicting defendants under a statute later found to be unconstitutional.

In STUMP V. SPARKMAN (1978) the Court reaffirmed the immunity in a case that presented extreme facts. Without a hearing and without NOTICE to the victim, the defendant judge had granted a mother's petition to have her daughter sterilized. Because granting the petition was found to be a judicial act and because no state law or decision expressly denied the judge authority to grant the petition, the judge was immune.

There are, however, some limits to judicial immunity.

In *Pulliam v. Allen* (1984) the Supreme Court held that state judges are not immune from section 1983 actions seeking injunctive relief or from awards of attorney's fees. In both O'SHEA V. LITTLETON (1974) and IMBLER V. PACHTMAN (1976) the Court suggested that judges are not immune from criminal prosecutions for violating constitutional rights.

A SEPARATION OF POWERS question lurks in the background of the judicial immunity DOCTRINE. Courts might well invalidate a federal statute that imposed liability on federal judges in what the courts believed to be inappropriate circumstances. Because the Court has been relatively generous in protecting its judicial colleagues from liability, and because most activity concerning judicial immunity involves actions against state judges under section 1983, the potential separation of powers issue goes largely unnoticed.

THEODORE EISENBERG
(1986)

Bibliography

NOTE 1969 Liability of Judicial Officers under Section 1983. *Yale Law Journal* 79:322–337.

## JUDICIAL IMPEACHMENT

The Constitution is remarkably Delphic on the subject of judicial removal. Article III provides that judges shall hold office during "good Behavior," but leaves that term undefined and fails to indicate who is authorized to define it. Article II provides that the President, Vice-President, and "all civil officers of the United States" shall be subject to IMPEACHMENT and removal, but is silent on whether judges, for this purpose, are to be considered "civil officers." Nonetheless, it has been consistent practice to treat federal judges as removable by impeachment, and to equate "good Behavior," for all practical purposes, with such behavior as has not yet led to such removal.

With regard to federal judges, there have been fifty-eight documented impeachment investigations by the U.S. HOUSE OF REPRESENTATIVES, eleven impeachment trials conducted by the U.S. SENATE, and seven impeachment convictions—three during the 1980s—two of which prompted not only removal, but also disqualification from holding further federal office. A Senate conviction in a case of impeachment is final; in NIXON V. UNITED STATES (1993), the Court held that the POLITICAL QUESTION doctrine precludes JUDICIAL REVIEW. The constitutional ambiguities concerning judicial removal have prompted three recurring legal debates: May Congress or the executive discipline judges through any unilateral mechanism other than impeachment? Are sitting federal judges subject to criminal prosecution? And, may the federal judiciary itself discipline its members?

Both constitutional history and SEPARATION OF POWERS theory support a negative answer to the first question. The susceptibility of judges to executive removal was decried in the DECLARATION OF INDEPENDENCE, and the CONSTITUTIONAL CONVENTION debated and rejected the other political removal mechanism short of impeachment known to the former colonists—removal upon "legislative address" to the executive. Both ALEXANDER HAMILTON and Brutus described impeachment as the Constitution's sole judicial removal mechanism, although one applauded and one deplored the resulting degree of JUDICIAL INDEPENDENCE. Given that the Supreme Court, in *Bowsher v. Synar* (1986), held that Congress may participate in executive removals only through impeachment, it seems implausible that Congress has greater authority over judges.

Whether sitting judges may legitimately be prosecuted is less certain. Although no such prosecution had been brought prior to 1980, the U.S. Department of Justice launched five in the ensuing decade, all successful but none reaching the Supreme Court. Perhaps the strongest argument against such authority is that the vulnerability of sitting judges to criminal prosecution threatens judicial independence, and especially judicial evenhandedness in cases involving the government as party. Those lower courts that have thus far addressed the issue, however, have concluded that the importance of judicial integrity outweighs the potential harm.

In 1980, the Judicial Councils Reform and Judicial Conduct and Disability Act authorized a discipline process within the federal judiciary that may result in a variety of sanctions short of removal, including private or public reprimand or censure, the temporary nonassignment of cases, or a request for voluntary retirement. Congress avoided the most obvious separation of powers objections by stopping short of authorizing removals and by excluding Supreme Court Justices from the system's purview. In 1993, a commission charged by Congress to investigate the discipline and removal of judges concluded that the act did not represent an unconstitutional intrusion into judicial independence—an issue the Supreme Court has yet to address.

PETER M. SHANE
(2000)

Bibliography

GERHARDT, MICHAEL J. 1996 *The Federal Impeachment Process: A Constitutional and Historical Analysis.* Princeton, N.J.: Princeton University Press.

NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 1993 *Research Papers of the National Commission on Ju-*

*dicial Discipline and Removal*, 2 vols. Washington, D.C.: U.S. Government Printing Office.

SIMON, MARIA 1994 Note: Bribery And Other Not So "Good Behavior": Criminal Prosecution as a Supplement to Impeachment of Federal Judges. *Columbia Law Review* 94:1617–1673.

SYMPOSIUM 1993 Disciplining the Federal Judiciary. *University of Pennsylvania Law Review* 142:1–430.

# JUDICIAL INDEPENDENCE

Long recognized as one of the hallmarks of American constitutionalism, judicial independence takes several different forms, each of which is essential to good judging, but none of which is absolute.

One form—"party detachment"—concerns the relationship between the judge and the parties before the court and is rooted in the aspiration for impartiality. It requires that the judge not be related to these parties nor be in any way under their control or influence. Such a requirement guards against gross threats to impartiality, such as bribery and close kinship ties between judges and litigants, but many less blatant violations, such as cultural ties and ideological sympathy, cannot realistically be prevented. Judicial independence with respect to litigating parties is therefore an ideal that can be achieved only imperfectly.

A second form of judicial independence—"individual autonomy"—concerns the relationship between individual judges and other members of the judiciary. It demands that the judge be unconstrained by collegial and institutional pressures when deciding questions of fact and law. According to this rule, judicial decisions are matters of individual conscience and responsibility.

This aspect of judicial independence has its roots in broad cultural norms, largely of an individualist character, and is reinforced by the American practice of recruiting judges after they have had successful careers in practice or in politics. It is also reinforced by, and reflected in, the practice of having judges sign their own rulings and opinions. This practice requires judges to assume individual responsibility for legal decisions and thus fosters judicial accountability.

Like party detachment, individual autonomy is an ideal that is only partially realized. All judges are expected to adhere to the prior decisions of other judges through the doctrine of STARE DECISIS. Lower court judges are even more constrained: They are subject to appellate review and, more recently, bureaucratic control. For example, the Judicial Councils Reform Act of 1980 allows groups of federal circuit judges to bypass ordinary appellate procedures and form committees to investigate and impose sanctions on individual district court judges.

A third form of judicial independence—"political insularity"—is perhaps the most complex. It requires the judiciary to be independent from popularly controlled governmental institutions, in particular the executive and legislative branches. This form of independence overlaps with party detachment whenever one of the political branches is itself a party before the court, but it is a distinct requirement that encompasses a variety of other circumstances as well. Even when the parties before the court are purely private, the judge is expected to remain free from the influence or control of the political branches of government.

Political insularity is essential for the pursuit of justice, which requires courts to do what is right, not what is popular. This form of independence is also in keeping with SEPARATION OF POWERS doctrine, for it enables the judiciary to act as a countervailing force within the government, checking abuses of power by the legislature and the executive.

One important source of political insularity is Article III. It provides federal judges with life tenure and protection against diminution of pay. Another arises from the limits on the power of the legislature to overrule the courts. Because the federal judiciary is the authoritative interpreter of the Constitution, only an amendment can override a CONSTITUTIONAL INTERPRETATION, and the AMENDMENT PROCESS is a cumbersome one, requiring special majorities in each house of Congress and approval by three-fourths of the states.

Despite its importance, political insularity poses a certain dilemma for democratic theory: The more insulated the judiciary is from the popularly controlled governmental institutions, the more it is able to interfere with their policies and thereby frustrate the popular will. Accordingly, the demand for political insularity, perhaps even more so than party detachment and individual autonomy, is a qualified one. Indeed, the federal judiciary, long taken as one of the most independent of all judicial systems in the world, is best understood not as a fully insulated branch of government, but as one unit of an interdependent political system.

One of the primary constraints on the judiciary's political independence is the appointment process. In some countries, the judiciary is given authority to select its own members as a way of enhancing its political insularity. In the United States, the power to appoint federal judges is vested in the President, and this arrangement necessarily introduces an element of political control over the judiciary's composition. Presidents naturally will try to select judges whose concept of justice approximates their own and who are likely to further the policies of their administrations. The President is constrained by public expectations as to the qualifications of nominees, but even the

most insistent demand for excellence still allows the President wide latitude. The need to obtain SENATE approval also qualifies the prerogatives of the President, yet this hardly depoliticizes the appointment process, as the Senate is a political institution driven by its own agenda.

Even after a judge takes the oath of office, the President's control over the promotion process may serve as a continuing source of influence. Those who desire a higher position in the judicial hierarchy, or perhaps another government post altogether, may avoid decisions that would put them in disfavor with the President or pose an obstacle to their CONFIRMATION. In addition, every judge is likely to feel a special debt toward the President responsible for his or her appointment. This sense of gratitude may produce a judicial bias in favor of the administration, though this risk is likely to wane over time as the judge comes to confront the policies of a President with whom he or she has no prior relationship. On a number of notable occasions, one involving Justice LOUIS D. BRANDEIS and President FRANKLIN D. ROOSEVELT, sitting Justices have acted as informal advisors to Presidents, compromising their insularity most egregiously.

Another important source of political influence over the judiciary is the IMPEACHMENT process. Article II provides for the impeachment of all civil officers for "Treason, Bribery, or other high Crimes and Misdemeanors." However, Article III uses more general language, stating that judges "shall hold their Offices during good Behaviour." Indeed, in the nineteenth century, Congress invoked its impeachment power simply because it disapproved of certain judicial decisions, the most notable example being the impeachment of Justice SAMUEL J. CHASE. In fact, none of these particular proceedings resulted in the removal of the judge, and a general understanding has evolved that a judge may be impeached only for violation of the most elemental duties of office, say chronic drunkenness, corruption, or conviction of a crime. Still, the threat of impeachment, often voiced by ideologues who have no hope of ultimate success, may have an inhibiting influence.

Aside from the political elements introduced by the appointment and impeachment processes, and by the judge's own desire for higher office, economic imperatives may also compromise the judiciary's independence. Although the Constitution provides a guarantee against pay diminution, it is now settled law in the United States that Congress is not obliged to raise federal judicial salaries to keep pace with inflation. Judges seeking to protect the real value of their compensation might therefore tailor their actions so as not to offend the political branches. A judge's attachment to certain incidental benefits of office, such as secretaries, law clerks, and chauffeurs, can produce a similar effect, for these too are within the control of Congress and the President. In these matters, the political branches cannot target individual judges but must establish rules applicable to all federal judges, or at least to specific categories (e.g., the Supreme Court, the lower courts). This limitation blunts the usefulness of this method of control as a sanction, unless, of course, the situation has so deteriorated as to warrant a blanket assault.

A more precise form of control may come in through the exercise of Congress's lawmaking power. Although a judicial decision interpreting the Constitution may be overridden only by recourse to the constitutional amending process, Congress may reverse a STATUTORY INTERPRETATION with a simple legislative enactment. This power has been exercised countless times, though it is subject to a rule that denies Congress the power to prescribe or alter the rule of decision in a case that is already pending.

Congress may also intervene by limiting the JURISDICTION of the federal courts and thereby remitting the claimants to state courts or to other federal agencies (for example, ADMINISTRATIVE AGENCIES, bankruptcy judges, or magistrates, none of whom are as insulated from the political branches as Article III judges). The most notable so-called jurisdiction-stripping measure is the 1932 NORRIS–LAGUARDIA ACT, which denied federal courts jurisdiction over "labor disputes." As with efforts to prescribe the rule of decision, congressional power to withdraw jurisdiction is limited by a rule that denies it this power in pending cases. Although the Supreme Court, in EX PARTE MCCARDLE (1869), upheld a statute that withdrew its jurisdiction over a pending case that challenged various RECONSTRUCTION statutes, the continuing validity of that PRECEDENT is in doubt. Jurisdiction-stripping measures have also been resisted on the theory that a federal right necessarily implies a federal remedy.

In more recent years, Congress has occasionally sought to exercise control over the adjudication of constitutional claims by placing limitations on judicial remedies as opposed to stripping the federal courts of jurisdiction over those claims. With educational SEGREGATION, for example, Congress has limited the conditions under which SCHOOL BUSING may be ordered. Congress recently employed a similar strategy to affect federal court litigation aimed at reforming prison conditions, though the validity of this act is now being tested in the courts.

The political branches can also influence the course of decision through their control over the number of judgeships. Although the Constitution establishes the Supreme Court, it does not prescribe the number of Justices, nor does it set down any rule as to the number of lower court judges. Because the power of appointment lies with the President, subject of course to confirmation by the Senate, Congress may endow a President whose policies or stance

toward the judiciary it supports with new judgeships to fill. Conversely, Congress may try to freeze or shrink the number available to a President with whom it disagrees.

In the nineteenth century, Congress occasionally manipulated the number of Justices on the Court as a way of influencing the course of judicial decisions. However, ever since President Franklin Roosevelt's unsuccessful attempt to pack the Court in the 1930s—a scheme that envisioned adding a new Justice for every one who had turned seventy as a way of undermining decisions striking down NEW DEAL programs—an informal norm has emerged in the United disfavors such manipulation. Yet there are many reasons, including population growth and caseload volume, for altering the size of the judiciary, and Congress may appeal to any or all of them to mask manipulative motivations. Furthermore, because maintaining the status quo is less likely to be perceived as a manipulative act, Congress may exert pressure on federal judges by failing to increase their number in response to increases in the number of cases. These exercises in legislative control are all the more feasible when it comes to the lower federal courts, because no general norms have evolved as to the number of lower court judges (whereas the popular imagination seems to have fixed on the number nine for the Supreme Court), and the lower courts are rarely a subject of widespread public attention.

Finally, the judiciary is dependent on the other branches to enforce its decrees. President ANDREW JACKSON once responded to a Supreme Court decision upholding the Cherokee Nation's claim to federal protection against the state of Georgia in rather sharp terms: "JOHN MARSHALL has made his decision, now let him enforce it." In the modern period, the President has been more cooperative and in fact called out the troops during the CIVIL RIGHTS era to enforce decrees requiring the DESEGREGATION of the Little Rock schools and the University of Mississippi. Such measures were welcomed by the judiciary, but they also underscored the judiciary's dependency and its inability to enforce policies strongly and persistently opposed by the other branches. Judges are possessed with CONTEMPT POWER, but contempt orders are not self-enforcing and may themselves require the assistance of the other branches.

Thus, the much-celebrated independence of the federal judiciary is in many ways limited. Federal judges enjoy a substantial amount of independence with respect to litigating parties and other members of the judiciary, but this independence is far from absolute. It is also true that federal judges are insulated from the political branches of government because they have life tenure, are assured that their pay cannot be diminished by legislative fiat, and, thanks to an evolving public understanding, cannot be removed simply because of disagreement with their decisions. Yet they are by no means fully independent of the political branches. Because the Constitution grants the executive and the legislature the power to make appointments, to decide whether salaries should be adjusted for inflation, and to define the judiciary's jurisdiction and structure, and because the courts often need the political branches to implement their decisions, these branches are able to exercise significant influence over the courts. Judges are independent, but not too independent, as is indeed appropriate in a democracy.

OWEN M. FISS
(2000)

Bibliography

BASS, JACK 1981 *Unlikely Heroes.* New York: Simon & Schuster.

BURT, ROBERT A. 1993 Judicial Independence and Constitutional Democracy. Pages 287–298 in Irwin P. Stotzky, ed., *Transition to Democracy in Latin America.* Boulder, Colo.: Westview Press.

FRIEDMAN, RICHARD D. 1986 Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations. *Yale Law Journal* 95:1283–1320.

GUNTHER, GERALD 1984 Congressional Power to Curtail Federal Jurisdiction. *Stanford Law Review* 36:895–922.

LEUCHTENBURG, WILLIAM E. 1995 *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt.* New York: Oxford University Press.

REHNQUIST, WILLIAM H. 1992 *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson.* New York: Morrow.

SAGER, LAWRENCE GENE 1981 Constitutional Limitations of Congress's Authority to Regulate the Jurisdiction of the Federal Courts. *Harvard Law Review* 95:17–89.

# JUDICIAL LEGISLATION

The term "judicial legislation" appears to be something of an oxymoron, as the Constitution clearly assigns the principal task of LEGISLATION to the Congress. The Constitution does, of course, give the President a role in the legislative process through the VETO POWER and through his power to recommend legislation to Congress that "he shall judge necessary and expedient." The Framers explicitly rejected, however, a similar role for the judiciary. Several attempts to create a council of revision, composed of the executive and members of the Supreme Court, to review the constitutionality of proposed legislation, were defeated in the CONSTITUTIONAL CONVENTION. The most effective arguments against including the Court in a council of revision were derived from considerations of the SEPARATION OF POWERS. Elbridge Gerry, for example, remarked

that including members of the Supreme Court in a revisory council "was quite foreign from the nature of the office," because it would not only "make them judges of the policy of public measures" but would also involve them in judging measures they had a direct hand in creating. Assigning ultimate legislative responsibility to the Congress apparently reflected the Framers' belief that, in popular forms of government, primary lawmaking responsibility should be lodged with the most representative branches of the government. In JAMES MADISON' s words, "the people are the only legitimate fountain of power."

Justice FELIX FRANKFURTER expressed the same view in his concurring opinion in *American Federation of Labor v. American Sash and Door Co.* (1949). "Even where the social undesirability of a law may be convincingly urged," he said, "invalidation of the law by a court debilitates popular democratic government. . . . Such an assertion of JUDICIAL POWER deflects responsibility from those on whom in a democratic society it ultimately rests—the people." Frankfurter continued his brief for judicial restraint by arguing that because the powers exercised by the Supreme Court are "inherently oligarchic" they should "be exercised with rigorous self-restraint." The Court, Frankfurter laconically concluded, "is not saved from being oligarchic because it professes to act in the service of humane ends."

The modern Supreme Court is not so easily deterred as Frankfurter was by charges of oligarchy. Since the landmark BROWN V. BOARD OF EDUCATION decision in 1954, the Court has actively and overtly engaged in the kind of lawmaking and policymaking that in previous years was regarded as exclusively the province of the more political branches of government. William Swindler explained the Court's transition from judicial deference to judicial activisim in these terms: "If the freedom of government to act was the basic principle evolving from the Hughes-Stone decade, from 1937–1946, the next logical question—to be disposed of by the WARREN COURT—was the obligation created by the Constitution itself, to compel action in the face of inaction. This led in turn to the epochal decisions in *Brown v. Board of Education*, BAKER V. CARR, and GIDEON V. WAINWRIGHT."

Some scholars have argued that it was the identification of EQUAL PROTECTION rights as class rights and the attendant necessity of fashioning classwide remedies for class injuries that gave the real impetus to the Court's JUDICIAL ACTIVISM in the years immediately following *Brown.* The Court, in other words, effectively legislated under its newmolded EQUITY powers. (See INSTITUTIONAL LITIGATION.)

The Court's legislative role is usually justified in terms of its power of JUDICIAL REVIEW. But judicial review—even if it be regarded as a necessary inference from the fact of a written constitution—is not a part of the powers explicitly assigned to the Court by the Constitution. The Court made its boldest claim for the legitimacy of judicial legislation in COOPER V. AARON (1958). Justice WILLIAM J. BRENNAN, writing an opinion signed by all the members of the Court, outlined the basic constitutional argument for JUDICIAL SUPREMACY. Brennan recited "some basic constitutional propositions which are settled doctrine," and which were derived from Chief Justice JOHN MARSHALL's argument in MARBURY V. MADISON (1803). First is the proposition, contained in Article VI of the Constitution, that the Constitution is the supreme law of the land (see SUPREMACY CLAUSE); second is Marshall's statement that the Constitution is "the fundamental and paramount law of the nation"; third is Marshall's declaration that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Justice Brennan concluded that *Marbury* therefore "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the FOURTEENTH AMENDMENT enunciated by this Court in the Brown Case is the supreme law of the land. . . ." The defect of Brennan's argument, of course, is that it confounds the Constitution with constitutional law.

Marshall did indeed say that the Constitution was "the fundamental and paramount law of the nation," and that any "ordinary legislative acts" "repugnant to the constitution" were necessarily void. But when Marshall wrote the famous line relied upon by Brennan that "it is emphatically the province and duty of the judicial department to say what the law is," he was referring not to the Constitution but to "ordinary legislative acts." In order to determine the law's conformity with the Constitution it is first necessary to know what the law is. And once the law is ascertained it is also necessary to determine whether the law is in conformity with the "paramount law" of the Constitution. This latter, of course, means that "in some cases" the Constitution itself "must be looked into by the judges" in order to determine the particular disposition of a case. But Marshall was clear that the ability of the Court to interpret the Constitution was incident to the necessity of deciding a law's conformity to the Constitution, and not a general warrant for CONSTITUTIONAL INTERPRETATION or judicial legislation. Marshall was emphatic in his pronouncement that "the province of the court is, solely, to decide on the rights of individuals."

"It is apparent," Marshall concluded, "that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature." As he laconically noted in the peroration of his argument, "it is also not entirely unworthy of observation, that in

declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank." For Marshall, Brennan's assertion that the Court's decision in *Brown* was "the supreme law of the land" would indeed make "written constitutions absurd" because it would usurp the "original right" of the people to establish their government on "such principles" that must be "deemed fundamental" and "permanent." If the Supreme Court were indeed to sit as a "continuing constitutional convention," any written Constitution would certainly be superfluous since, under the circumstances there would be no "rule for the government of courts." After all, by parity of reasoning, if one were to accept Brennan's argument, it would also be necessary to hold that the Court's decision in DRED SCOTT V. SANDFORD (1857) was the supreme law of the land. But *Dred Scott* gave way because forces other than the Supreme Court decided that it was a decision not "pursuant" to the "fundamental and paramount law" of the nation. As John Agresto has cogently remarked; "If Congress can mistake the meaning of the text [of the Constitution], which is what the doctrine of judicial review asserts, so, of course, can the Court. And if it be said that it is more dangerous to have interpretive supremacy in the same body that directs the nation's public policy—that is, Congress—then (especially in this age of pervasive judicial direction of political and social life) an independent judicial interpretive power is equally fearsome for exactly the same reasons."

In SWANN V. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION (1971) the Court was confronted with the question of the federal judiciary's equity powers under the equal protection clause of the Fourteenth Amendment. At issue was whether the Court could uphold SCHOOL BUSING as a "remedy for state-imposed segregation in violation of Brown I." As part of the CIVIL RIGHTS ACT OF 1964 the Congress had included in Title IV a provision that "nothing herein shall empower any official or court . . . to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another . . . or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." Chief Justice WARREN E. BURGER, writing for a unanimous Court, remarked that on its face this section of Title IV is only "designed to foreclose any interpretation of the Act as expanding the *existing* powers of federal courts to enforce the Equal Protection Clause. There is no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers." According to Burger these equity powers flow directly from the Fourteenth Amendment—despite the fact that section 5 of the Amendment gives Congress explicit enforcement authority, an authority that was mistakenly restricted by the Court in the SLAUGHTER-HOUSE CASES (1873) and the CIVIL RIGHTS CASES (1883).

A serious question arises, however, concerning Burger's claim that forced busing is one of the "historic" equity powers of the Court. It was never asserted as such by the Court prior to 1964, and as late as two years *after* the *Swann* decision it was still being described by Justice LEWIS F. POWELL as "a novel application of equitable power—not to mention a dubious extension of constitutional doctrine." Congress's response to *Swann*, the Equal Educational Opportunity and Transportation of Students Act of 1972, contained restrictions similar to those included in Title IV. These provisions suffered the same fate as the Title IV provisions, only now the Court was able to use *Swann* as authority for its ruling.

The *Swann* rationale derives equity powers directly from the Constitution. But the way in which the Court exercises its equity powers is indistinguishable from legislation. Thus, in effect, the Court now derives what is tantamount to legislative power from the Constitution. Because this power rests upon an interpretation of the Constitution, no act of Congress can overturn or modify the interpretation. Many scholars argue that if the Congress were to attempt to curtail the Court's power to order forced busing under the exceptions clause, the Court would be obligated, under the *Swann* reasoning, to declare such an attempt unconstitutional, because the Court's obligation to require busing as a remedy for equal protection violations is derived directly from the Constitution.

Judicial legislation incident to statutory interpretation is less controversial, for the Congress can overturn any constructions of the Court by repassing the legislation in a way that clarifies congressional intent. The interpretation of statutes necessarily involves the judiciary in legislation. In many instances the courts must engage in judicial legislation in order to say what the law is. In years past the Court's sense of judicial deference confined such judicial legislation to what Justice OLIVER WENDELL HOLMES called the "interstices" of the law. It was generally believed that the plain language of the statute should be the controlling factor in statutory construction and that extrinsic aids to construction such as legislative history should be used only where they were necessary to avoid a contradictory or absurd result.

The courts are not always the aggressive agents in the process of judicial legislation. In recent years courts have acted to fill the void created by Congress's abdication of legislative responsibility. Many statutes passed by Congress are deliberately vague and imprecise; indeed, the Congress in numerous instances charges administrative agencies and courts to supply the necessary details. This

delegation of authority to administrative agencies with provisions for judicial oversight of the administrative process has contributed to the judiciary's increased participation in judicial legislation. This tendency was intensified by the Court's decision in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983), holding the LEGISLATIVE VETO unconstitutional. Congress had for years used the single-house legislative veto as a device for overseeing the activities of administrative agencies. But, as Judge Carl McGowan has noted, "the question inevitably recurs as to whether judicial review is an adequate protection against the abdication by Congress of substantive policy making in favor of broad delegation of what may essentially be the power to make laws and not merely to administer them."

The volume of litigation calling for "legislation" on the part of the courts also increases in proportion with the liberalization of the rules of STANDING. In previous years the Court's stricter requirements for standing were merely a recognition that the province of the judiciary, in the words of John Marshall quoted earlier, "was solely to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion." Liberalized rules of standing tend to produce what Court of Appeals Judge ATONIN SCALIA has called "an overjudicialization of the process of self-governance." Judge Scalia reminds us of the question posed by Justice Frankfurter—whether it is wise for a self-governing people to give itself over to the rule of an oligarchic judiciary. James Bradley Thayer wrote more than eighty-five years ago that "the exercise of [judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility."

If, on the other hand, the processes of democracy are unsuited for protecting democratic ends—if, that is, in the words of Jesse Choper, it is necessary for the Supreme Court generally to act "contrary to the popular will" to promote "the precepts of democracy"—then the question whether the American people can be a self-governing people is indeed a serious one. It was once thought that constitutional majorities could rule safely in the interest of the whole of society—that constitutional government could avoid the formation of majority faction. Today many scholars—and often the Supreme Court itself—simply assume that the majority will always be a factious majority seeking to promote its own interest at the expense of the interest of the minority. This requires that the judiciary intervene not only in the processes of democracy but also as the virtual representatives of the interest of those who are said to be permanently isolated from the majoritarian political process. If American politics is indeed incapable of forming nonfactious majorities—and America has never had such a monolithic majority—then the American people should give itself over honestly and openly to "government by judiciary," for if constitutional government is impossible, then so too is the possibility of self-governance.

EDWARD J. ERLER
(1986)

(SEE ALSO: *Judicial Policymaking; Judicial Review and Democracy.*)

Bibliography

AGRESTO, JOHN 1984 *The Supreme Court and Constitutional Democracy.* Ithaca, N.Y.: Cornell University Press.

ERLER, EDWARD J. 1985 Sowing the Wind: Judicial Oligarchy and the Legacy of *Brown v. Board of Education. Harvard Journal of Law and Public Policy* 8:399–426.

LEVY, LEONARD W. 1967 Judicial Review, History, and Democracy. Pages 1–42 in Leonard W. Levy, ed., *Judicial Review and the Supreme Court.* New York: Harper & Row.

SWINDLER, WILLIAM 1969 *Court and Constitution in the 20th Century.* Indianapolis: Bobbs-Merrill.

## JUDICIAL POLICYMAKING

Judicial policymaking and related terms—JUDICIAL ACTIVISM, judicial creativity, and JUDICIAL LEGISLATION—emphasize that judges are not mere legal automatons who simply "discover" or "find" definite, preexisting principles and rules, as the declaratory or oracular conception of the judicial function insisted, but are often their makers. As Justice OLIVER WENDELL HOLMES remarked, they often exercise "the sovereign prerogative of choice," and they "can and do legislate." Indeed, that is why the Supreme Court has often been viewed as "a continuing constitutional convention."

Policymaking is deciding what is to be done by choosing among possible actions, methods, or principles for determining and guiding present and future actions or decisions. Courts, especially high appellate courts such as the SUPREME COURT, often make such choices, establishing new rules and principles, and thus are properly called policymakers. That was emphasized by CHARLES EVANS HUGHES's famous rhetorical exaggeration, "The Constitution is what the judges say it is," and by his remark that a federal statute finally means what the Court, as ultimate interpreter of congressional LEGISLATION, says it means.

The persistent "declaratory" conception of the judicial role, a view critics derided as MECHANICAL JURISPRUDENCE, and simplistic notions of the SEPARATION OF POWERS principle long obscured the reality of judicial policymaking. Today it is widely recognized that, as C. Herman Pritchett has explained, "judges are inevitably participants in the process of public policy formulation; that they do in fact "make law'; that in making law they are necessarily guided in part by their personal conceptions of justice and public policy; that written law requires interpretation which involves the making of choices; that the rule of STARE DECISIS is vulnerable because precedents are typically available to support both sides in a controversy."

As a system of social control, law must function largely through general propositions rather than through specific directives to particular persons. And that is especially true of the Constitution. The Framers did not minutely specify the national government's powers or the means for executing them: as Chief Justice JOHN MARSHALL said, the Constitution "is one of enumeration, rather than of definition." Many of its most important provisions are indeterminate and open-textured. They are not self-interpreting, and thus judges must read specific meanings into them and determine their applicability to particular situations, many of which their authors could not have anticipated.

Among the Constitution's many ambiguous, undefined, pregnant provisions are those concerning CRUEL AND UNUSUAL PUNISHMENT; DOUBLE JEOPARDY; DUE PROCESS OF LAW; EQUAL PROTECTION OF THE LAWS; ESTABLISHMENT OF RELIGION; excessive BAIL and fines; EX POST FACTO LAWS; FREEDOM OF SPEECH, press, assembly, and religion; life, liberty, and property; the power to regulate commerce among the several states; and unreasonable SEARCHES AND SEIZURES. Also undefined by the Constitution are such fundamental conceptions as JUDICIAL REVIEW, the RULE OF LAW, and the separation of powers. Small wonder, then, that Justice ROBERT H. JACKSON plaintively remarked that the Court must deal with materials nearly as enigmatic as the dreams of Pharaoh which Joseph had to interpret; or that Chief Justice EARL WARREN emphasized that the Constitution's words often have "an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government."

Because the Constitution embodies in its ambiguous provisions both common and conflicting community ideals, the Supreme Court serves, as Edward H. Levi has said, as "a forum for the discussion of policy in the gap of ambiguity," which allows the infusion into constitutional law of new meanings and new ideas as situations and people's ideas change. That is the process which Justice FELIX FRANKFURTER described as "the evolution of social policy by way of judicial application of the Delphic provisions of the Constitution." Brief accounts of some notable Supreme Court decisions reveal their policymaking features.

Although the Constitution nowhere explicitly grants Congress the power to incorporate a national bank, the Supreme Court in MCCULLOCH V. MARYLAND (1819) held that power to be implied by the Constitution's NECESSARY AND PROPER CLAUSE. That clause empowers Congress, in executing its various enumerated powers, to make all laws for that purpose which are "necessary and proper." But those ambiguous words are not further defined by the Constitution.

In making its *McCulloch* decision, the Court chose between two historic, diametrically opposed interpretations. The narrow, STATES' RIGHTS, STRICT CONSTRUCTION, Jeffersonian interpretation of the clause was restrictive and limited Congress to legislation that was "absolutely necessary," that is, literally indispensable. The opposing interpretation, which the Court adopted, was the broad, nationalist, loose constructionist, Hamiltonian view that "necessary and proper" were equivalent to "convenient and useful" and thus were facilitative, not restrictive. The bank, declared the Court, was a convenient and useful means to legitimate ends and thus was constitutional.

Viewed broadly as the great implied powers case and the "fountainhead of national powers," *McCulloch* laid down the Hamiltonian doctrine as the authoritative rule of construction to be followed in interpreting Congress's various undefined powers. Subsequently, on that foundation, Congress erected vast superstructures of regulatory and social service legislation. The profound policy considerations underlying the Court's choices are highlighted by the contrast between Jefferson's warning that the dangerous Hamiltonian doctrine would give Congress a boundless field of undefined powers, and Chief Justice Marshall's emphasis upon the "pernicious, baneful," narrow construction which would make the national government's operations "difficult, hazardous, and expensive" and would reduce the Constitution to "a splendid bauble."

The RIGHT TO PRIVACY was recognized by the Supreme Court in GRISWOLD V. CONNECTICUT (1965). There, and in other cases, the Court variously discerned the "roots" of that right, which is not explicitly mentioned in the Constitution, in the FIRST, FOURTH, Fifth, NINTH, and FOURTEENTH AMENDMENTS and in "the penumbras of the BILL OF RIGHTS." Later, in ROE V. WADE (1973), the Court included a woman's right to an abortion in the right of privacy, and, in the detailed manner characteristic of legislation, divided the pregnancy term into three periods and prescribed specific rules governing each. Balancing a woman's interests against a state's interests during these three periods, the Court held that any decision regarding abortion during the first was solely at the discretion of the woman and her physician. But it further ruled that a state's

interests in protecting maternal health, maintaining medical standards, and safeguarding potential human life—interests growing in substantiality as the pregnancy term extended—justified greater state regulation later. Thus, state regulations relating to maternal health and medical standards would be permissible in the second period, and more stringent state regulations, even extending to prohibition of abortion, would be permissible in the third period in the interest of safeguarding potential life.

The protests by dissenting Justices in the *Griswold* and *Roe* cases emphasized the judicial policymaking which those decisions revealed. The *Griswold* dissenters objected that no right of privacy could be found "in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court." And dissenters in *Roe* complained that the Court's decision was "an improvident and extravagant exercise of the power of JUDICIAL REVIEW"; that the Court had fashioned "a new constitutional right for pregnant mothers"; and that the Court's "conscious weighing of competing factors" and its division of the pregnancy term into distinct periods were "far more appropriate to a legislative judgement than to a judicial one."

The Supreme Court's "REAPPORTIONMENT revolution" remedied long-standing discriminations against urban and metropolitan areas in favor of rural areas, by requiring states to reapportion their legislatures in conformity with the rule that legislative districts must be as nearly of equal population as is practicable.

That rule is not found in any constitutional provision specifically addressed to legislative apportionment, for none exists. It is a Court-created rule which clearly demonstrates the leeway for policymaking that open-ended constitutional provisions give the Court. Equal population, the Court said in WESBERRY V. SANDERS (1964), is required for congressional districts by "the command" of Article I, section 2, of the Constitution, that representatives "be chosen by the People" of the states; and is required for state legislative districts, the Court held in REYNOLDS V. SIMS (1964), by "the clear and strong command" of the FOURTEENTH AMENDMENT's equal protection clause, forbidding states to deny to any persons "the equal protection of the laws."

Courtesy may ascribe the Court's rule to CONSTITUTIONAL INTERPRETATION; but candor ascribes it to judicial policymaking. The dissenting Justices' objections in these cases made that clear. They included complaints that the Court had frozen one political theory of REPRESENTATION into the Constitution; had failed to exercise judicial self-restraint; had decided questions appropriate only for legislative judgment; had violated the separation of powers doctrine; and had excluded numerous important considerations other than population.

Supreme Court overruling decisions, in which it rejects its earlier positions for those later thought more fitting, often strikingly exemplify judicial policymaking. In MAPP V. OHIO (1961) the Court imposed upon state courts its judicially created EXCLUSIONARY RULE making illegally obtained evidence inadmissible in court. It overruled WOLF V. COLORADO (1949) which, in deference to state policies, had held an exclusionary rule not essential for due process of law.

Some overruling decisions illustrate "the victory of dissent," when earlier dissenting Justices' views in time became the law. Thus in GIDEON V. WAINWRIGHT (1963) the Court applied its rule that indigent defendants in all state felony trials must have court-appointed counsel. Overruling BETTS V. BRADY (1942), the Court adopted Justice Black's dissenting position from it, thus repudiating its *Betts* pronouncement that such appointment was "not a fundamental right, essential to a fair trial."

According to the Court in BARRON V. BALTIMORE (1833), the Bill of Rights—the first ten amendments—limits the national government but not the states. But the Court, by its INCORPORATION DOCTRINE, has read nearly all the specific guarantees of the Bill of Rights into the due process clause of the Fourteenth Amendment which provides simply that no state shall "deprive any person of life, liberty, or property, without due process of law." The incorporation has been called selective because the Court, proceeding case by case, has incorporated those guarantees which it considers "fundamental" and "of the very essence of a scheme of ORDERED LIBERTY."

Selective incorporation has involved two kinds of Supreme Court policymaking: adopting the FUNDAMENTAL RIGHTS standard for guiding incorporation, and making the separate decisions incorporating particular Bill of Rights guarantees. Thus the Court, applying its open-textured rule, has given specific meaning to "the vague contours" of the due process clause. And it has become "a perpetual censor" over state actions, invalidating those that violate fundamental rights and liberties.

Clearly the Supreme Court is more than just a legal body: the Justices are also "rulers," sharing in the quintessentially political function of authoritatively allocating values for the American polity. Representing a coordinate branch of the national government, they address their mandates variously to lawyers, litigants, federal and state legislative, executive, and judicial officials, and to broader concerned "publics." Concerning their role, no sharp line can be drawn between law and politics in the broad sense. They do not expound a prolix or rigid legal code, but rather a living Constitution "intended to be adapted to the various *crises* of human affairs," as Chief Justice Marshall said in the *McCulloch* case. And the Justices employ essentially COMMON LAW judicial techniques: they are inher-

itors indeed, but developers too—"weavers of the fabric of constitutional law"—as Chief Justice Hughes observed. The nature of the judicial process and the growth of the law are intertwined. The Constitution, itself the product of great policy choices, is both the abiding Great Charter of the American polity and the continual focus of clashing philosophies of law and politics among which the Supreme Court must choose: "We are very quiet there," said Justice Holmes plaintively, "but it is the quiet of a storm center, as we all know."

HOWARD E. DEAN
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Bibliography

CARDOZO, BENJAMIN N. 1921 *The Nature of the Judicial Process.* New Haven, Conn.: Yale University Press.

LEVI, EDWARD H. 1948 *An Introduction to Legal Reasoning.* Chicago: University of Chicago Press.

MILLER, ARTHUR SELWYN 1978 *The Supreme Court: Myth and Reality.* Westport, Conn.: Greenwood Press.

MURPHY, WALTER F. 1964 *Elements of Judicial Strategy.* Chicago: University of Chicago Press.

PRITCHETT, C. HERMAN 1969 The Development of Judicial Research. Pages 27–42 in Joel B. Grossman and Joseph Tanenhaus, eds., *Frontiers of Judicial Research.* New York: Wiley.

# JUDICIAL POWER

"[T]he legislative, executive, and judicial powers, of every well constructed government," said JOHN MARSHALL in OSBORN V. BANK OF THE UNITED STATES (1824), "are coextensive with each other; . . . [t]he executive department may constitutionally execute every law which the Legislature may constitutionally make, and the judicial department may receive from the legislature the power of construing every such law." The ARTICLES OF CONFEDERATION fell far short of this model. Not only was there no federal executive with authority to enforce congressional measures against individuals, but, apart from a cumbersome procedure for resolving interstate disputes, Congress was authorized to establish courts only for the trial of crimes committed at sea and for the determination of "appeals in all cases of captures." The remedy for these shortcomings was one of the major accomplishments of the Constitution adopted in 1789. As Article II gave the country a President with the obligation to "take care that the Laws be faithfully executed," Article III provided for a system of federal courts that more than satisfied Marshall's conditions for a "well constructed government."

Article III consists of three brief sections. The first describes the tribunals that are to exercise federal judicial power and prescribes the tenure and compensation of their judges. The second lists the types of disputes that may be entrusted to federal courts, specifies which of these matters are to be determined by the SUPREME COURT in the first instance, and guarantees TRIAL BY JURY in criminal cases. The third defines and limits the crime of TREASON.

"The judicial Power of the United States," Article III declares, "shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The text itself indicates that the Supreme Court was the only tribunal the Constitution required to be established, and the debates of the CONSTITUTIONAL CONVENTION demonstrate that the latter words embodied a deliberate compromise.

In fact, however, Congress created additional courts at the very beginning, in the JUDICIARY ACT OF 1789. Since 1911 the basic system has consisted of the UNITED STATES DISTRICT COURTS—at least one in every state—in which most cases are first tried; a number of regional appellate courts now called the UNITED STATES COURTS OF APPEALS; and the Supreme Court itself, which functions largely as a court of last resort. From time to time, moreover, Congress has created specialized courts with JURISDICTION to determine controversies involving relatively limited subjects. All this lies well within Congress's broad discretion under Article III to determine what lower courts to create and how to allocate judicial business among them. Specialization at the highest level, however, seems precluded; Congress can no more divide the powers of "one Supreme Court" among two or more bodies than abolish it altogether.

"The Judges, both of the supreme and inferior Courts," section 1 continues, "shall hold their Offices during GOOD BEHAVIOUR and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Under the second section of Article II the judges have always been appointed by the President subject to Senate confirmation; under the fourth section of that article they may be removed from office on IMPEACHMENT and conviction of "Treason, Bribery, or other high Crimes and Misdemeanors." The central purpose of the tenure and salary provisions, as ALEXANDER HAMILTON explained in THE FEDERALIST #78, was to assure judicial independence.

The Supreme Court has repeatedly enforced the tenure and salary provisions. In EX PARTE MILLIGAN (1867), for example, the Court held even the Civil War no excuse for submitting civilians to military trials in states where the civil courts were open, and in *O'Donoghue v. United States* (1933), it held that the Great Depression did not justify reducing judicial salaries.

On a number of occasions, however, the Court has permitted matters within the judicial power to be determined by LEGISLATIVE COURTS whose judges do not possess tenure

and salary guarantees. State courts may decide Article III cases, as the Framers of the Constitution clearly contemplated; the tenure and salary provisions do not apply to the TERRITORIES or to the DISTRICT OF COLUMBIA, where there is no SEPARATION OF POWERS requirement; Article III did not abolish the traditional COURT-MARTIAL for military offenses; federal magistrates may make initial decisions in Article III cases provided they are subject to unlimited reexamination by tenured judges.

Early in the twentieth century the Supreme Court appeared to give judicial blessing to the numerous quasi-judicial bodies that have grown up since the creation of the Interstate Commerce Commission in 1887, although scholars have debated heatedly whether there is any satisfactory way to distinguish them from the nontenured trial courts plainly forbidden by Article III. That these developments did not mean the effective end of the tenure and salary requirements, however, was made clear in 1982, when the Court in NORTHERN PIPE LINE CONSTRUCTION CO. V. MARATHON PIPE LINE CO. invalidated a statute empowering judges with temporary commissions to exercise virtually the entire jurisdiction of the district courts in BANKRUPTCY cases. Where to draw this line promises to be a continuing problem.

The power to be vested in federal courts is the "judicial power," and the various categories of matters that fall within this power are all described as CASES OR CONTROVERSIES—"Cases," for example, "arising under this Constitution," and "Controversies to which the United States shall be a Party." From the beginning the Supreme Court has taken this language as a limitation: federal courts may not resolve anything but "cases" and "controversies," and those terms embrace only judicial functions.

Thus, for example, when President GEORGE WASHINGTON asked the Justices for legal advice respecting the United States' neutrality during hostilities between England and France, they declined to act "extra-judicially"; and when Congress directed them to advise the war secretary concerning veterans' pensions, five Justices sitting on circuit refused, saying the authority conferred was "not of a judicial nature" (HAYBURN'S CASE, 1792). Washington's request for advice did not begin to resemble the ordinary lawsuit, but later decisions have invoked the "case" or "controversy" limitation to exclude federal court consideration of matters far less remote from the normal judicial function. The essential requirement, the Court has emphasized, is a live and actual dispute between adversary parties with a real stake in the outcome.

One dimension of this principle is the doctrine of RIPENESS or prematurity: the courts are not to give advice on the mere possibility that it might be of use in the future. Occasionally the Court has appeared to require a person to violate a law in order to test its constitutionality—causing one commentator to remark that "the only way to determine whether the subject is a mushroom or a toadstool, is to eat it." The DECLARATORY JUDGMENT ACT, passed to mitigate this hardship, has generally been applied to allow preenforcement challenges when the intentions of the parties are sufficiently firm, and it has been held consistent with the "Case" or "Controversy" requirement.

At the opposite end of the spectrum is the MOOTNESS doctrine, which ordinarily forbids litigation after death or other changed circumstances deprive the issue of any further impact on the parties. A series of debatable decisions essentially dating from *Moore v. Ogilvie* (1969), however, has relaxed the mootness doctrine especially in CLASS ACTIONS, so as to permit persons with no remaining interest to continue litigating issues deemed "capable of repetition, yet evading review."

The "case or controversy" requirement has also been held to forbid the decision of COLLUSIVE SUITS, and to preclude the courts from exercising the discretion of an administrator, as by reviewing de novo the decision to grant a broadcasting license. The most important remaining element of that requirement, however, is the constitutional dimension of the doctrine of STANDING to sue.

While standing has been aptly characterized as one of the most confused areas of federal law, its constitutional component was simply stated in *Warth v. Seldin* (1975): "[t]he Article III power exists only to redress or otherwise to protect against injury to the complaining party." Injury in this context is hardly self-defining, but it plainly requires something more than intellectual or emotional "interest in a problem." This principle puts under a serious cloud the periodic congressional attempts to authorize "any person" to obtain judicial relief against violations of environmental or other laws. On the other hand, other aspects of the standing doctrine are not of constitutional dimension and thus do not preclude Congress from conferring standing on anyone injured by governmental action.

One of the principal points of contention of the law of standing has been the right of federal taxpayers to challenge the constitutionality of federal spending programs. When a taxpayer attacked expenditures for maternal health on the ground that they exceeded the powers granted Congress by Article I, the Court in FROTHINGHAM V. MELLON (1923) found no standing: "the taxpayer's interest in the moneys of the treasury . . . is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating, and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of EQUITY."

Although the apparent reference to equitable discretion made it uncertain that the Court was saying taxpayer

suits were not "cases or controversies" within Article III, the remainder of the passage suggests that the taxpayer could not show the constitutionally required injury because it was uncertain that a victory would mean reduced taxes. Nevertheless, in FLAST V. COHEN (1968) the Court allowed a federal taxpayer to challenge expenditures for church-related education as an ESTABLISHMENT OF RELIGION in violation of the FIRST AMENDMENT. Unlike the taxpayer in *Frothingham*, who "was attempting to assert the States' interest in their legislative prerogatives," the plaintiff in *Flast* asserted "a federal taxpayer's interest in being free of taxing and spending in contravention of specific constitutional limitations," for one purpose of the establishment clause was to prevent taxation for religious ends. Whether the distinction was of constitutional scope the Court did not say; interestingly, the taxpayer opinions have tended to avoid entirely the traditional constitutional inquiry into the existence of an injury that will be redressed if the plaintiff's claim prevails.

Underlying the constitutional "case or controversy" limitation are a variety of policy concerns. The first group relates to reducing the risk of erroneous decisions. Concrete facts enable judges to understand the practical impact of their holdings; adverse parties help to assure that arguments on both sides will be considered; as argued by FELIX FRANKFURTER, "the ADVISORY OPINION deprives CONSTITUTIONAL INTERPRETATION of the judgment of the legislature upon facts." A second group of reasons focuses upon strengthening the Court's institutional position. Lawmaking by appointed judges is least difficult to reconcile with democratic principles when it is the inevitable by-product of the stock business of judging; the courts should not squander their power of moral suasion or multiply conflicts with other branches by deciding unnecessary legal questions. Third, and of considerable importance, is a concern for the separation of powers. The courts are not to exercise a general superintendence over the activities of the other branches.

The costs of the "case or controversy" limitation include the delay, uncertainty, and disruption incident to determining the constitutionality of legislation only in the course of subsequent litigation, and the danger that some legislative and executive actions may escape JUDICIAL REVIEW entirely. Whether the latter is cause for concern has much to do with one's perception of the function and importance of judicial review itself; it seems reasonable to expect that perception to influence the definition of a "case" or "controversy."

In addition to restricting federal courts to the decision of "cases" and "controversies" of a judicial nature, section 2 of Article III enumerates those categories of "cases" and "controversies" to which the "judicial Power shall extend." As the former limitation serves the interests of separating federal powers, the latter serves those of FEDERALISM. In accord with the spirit of the TENTH AMENDMENT the Supreme Court has held that Congress may not give the federal courts jurisdiction over disputes of types not listed in Article III. John Marshall set the tone in cutting down to constitutional size a statute providing for jurisdiction over cases involving ALIENS in HODGSON V. BOWERBANK in 1809: "Turn to the article of the constitution of the United States, for the statutes cannot extend the jurisdiction beyond the limits of the constitution."

Article III's provision that federal judicial power "shall extend to" certain classes of cases and controversies has generally been taken to mean that it shall embrace nothing else. From the text alone one might think it even more plain that federal courts *must* be given jurisdiction over all the matters listed, for section 1 commands that the federal judicial power "shall be vested" in federal courts. Indeed, Justice JOSEPH STORY suggested just such an interpretation in MARTIN V. HUNTER'S LESSEE in 1816. This conclusion, however, was unnecessary to the decision, contrary to the understanding of the First Congress, and inconsistent with both earlier and later decisions of the Supreme Court.

Article III, in other words, has been read to mean only that Congress may confer jurisdiction over the enumerated cases, not that it must do so. This arguably unnatural construction has been defended by reference to the limited list of controversies over which the Supreme Court has original jurisdiction, the explicit congressional power to make exceptions to the Supreme Court's appellate authority, and the compromise at the Constitutional Convention permitting Congress not to establish inferior courts at all.

This is not to say, however, that Congress has unfettered authority to deny the courts jurisdiction, for all powers of Congress are subject to limitations found elsewhere in the Constitution. A statute depriving the courts of authority to determine cases filed by members of a particular racial group, for instance, would be of highly doubtful vitality under the modern interpretation of the Fifth Amendment DUE PROCESS clause, and one part of Marshall's reasoning in MARBURY V. MADISON (1803) supports an argument that closing all federal and state courts to free-speech claims would defeat the substantive right itself. Proposals to remove entire categories of constitutional litigation from the ken of one or more federal courts often follow controversial judicial decisions. Out of respect for the tradition of CHECKS AND BALANCES, however, such bills are seldom enacted; we have so far been spared the constitutional trauma of determining the extent to which they may validly be adopted.

The cases and controversies within federal judicial power fall into two categories: those in which jurisdiction

is based upon the nature of the dispute and those in which it is based upon the identity of the parties. In the first category are three kinds of disputes: those "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"; those "of ADMIRALTY AND MARITIME Jurisdiction"; and those involving competing land claims "under Grants of different States." The provision last quoted is of minor importance; the second formed the staple business of the district courts throughout their early history; the first fulfills Marshall's condition for a "well constructed government" and is by any measure the most critical ingredient of federal jurisdiction today.

The provision for jurisdiction in cases arising under the Constitution and other federal laws has two essential purposes: to promote uniformity in the interpretation of federal law, and to assure the vindication of federal rights. The First Congress sought to accomplish the second of these goals by providing, in section 25 of the 1789 Judiciary Act, for Supreme Court review of state-court decisions denying federal rights; the additional uniformity attendant upon review of state decisions *upholding* federal claims was not provided until 1914. In sustaining section 25, the opinion in *Martin v. Hunter's Lessee* demonstrated the difficulty of achieving Article III's purpose without Supreme Court review of state courts: while plaintiffs might be authorized to file federal claims directly in federal courts and defendants to remove state court actions to federal courts on the basis of federal defenses, it was not easy to see how a state court opposing removal "could . . . be compelled to relinquish the jurisdiction" without some federal court reviewing the state court decision.

Conversely, although Congress failed to give federal trial courts general jurisdiction of federal question cases until 1875, Marshall made clear as early as 1824, in *Osborn v. Bank of the United States*, that it had power to do so. Supreme Court review alone was no more an adequate protection for federal rights, Marshall argued, than was exclusive reliance on litigation beginning in federal trial courts. As the latter would leave claimants without remedy against a recalcitrant state court, the former would give a state tribunal the critical power to shape the factual record beyond assurance of federal appellate correction.

The *Osborn* opinion also settled that jurisdiction of a federal trial court over a case arising under federal law was not defeated by the presence of additional issues dependent upon state law. In a companion case, indeed, the Court upheld jurisdiction over a suit by the national bank on notes whose validity and interpretation were understood to depend in substantial part upon nonfederal law: it was enough that the plaintiff derived its existence and its right to contract from the act of Congress incorporating it. The courts have not followed this broad approach, however, in determining whether FEDERAL QUESTION JURISDICTION lies under general *statutory* provisions; when the federal ingredient of a claim is remote from the actual controversy, as in a dispute over ownership of land whose title is remotely derived from a federal land grant, the district courts lack statutory jurisdiction.

In the contract dispute discussed in *Osborn*, federal and state law were bound together in the resolution of a single claim; in such a case, as HENRY HART and Herbert Wechsler said, "a federal trial court would . . . be unable to function as a court at all" if its jurisdiction did not extend to state as well as federal matters. In the interest of "judicial economy," however, as the Supreme Court put it in *United Mine Workers v. Gibbs* (1966), jurisdiction over a case arising under federal law embraces not only a plaintiff's federal claim but also any claims under state law based on the same facts. This so-called PENDENT JURISDICTION doctrine, however, is inapplicable when the Supreme Court reviews a state court decision. With one exception, in such a case the Court may review only federal and not state questions, as the Court held in *Murdock v. Memphis* (1875); for to reverse a state court in the interpretation of its own law would be a major incursion into state prerogatives not required by the purposes for which Supreme Court review was provided.

A corollary of the *Murdock* principle is that a state court decision respecting state law often precludes the Supreme Court from reviewing even federal questions in the same case. If a state court concludes, for example, that a state law offends both federal and state constitutions, the Supreme Court cannot reverse the state law holding; thus, however it may decide the federal issue, it cannot alter the outcome of the case. This independent and ADEQUATE STATE GROUND for the state court decision means there is no longer a live case or controversy between the parties over the federal question. In light of this relation between state and federal issues, *Martin* itself announced the sole exception to the *Murdock* rule: when the state court has interpreted state law in such a way as to frustrate the federal right itself—as by holding that a contract allegedly impaired in violation of the CONTRACT CLAUSE never existed—a complete absence of power to review the state question would mean the Court's authority to protect federal rights "may be evaded at pleasure."

"The most bigoted idolizers of state authority," wrote Alexander Hamilton in THE FEDERALIST #80, "have not thus far shown a disposition to deny the National Judiciary the cognizance of maritime causes"; for such cases "so generally depend upon the law of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace." Jurisdiction over what Article III refers to as "Cases of admiralty, and maritime Jurisdiction" has been vested by

statute in the district courts since 1789. Today federal admiralty jurisdiction extends, as the Court stated in another context in *The Daniel Ball* (1871), to all waters forming part of "a continued highway over which commerce is or may be carried on with other states or foreign countries."

Not everything occurring on navigable waters, however, is a proper subject of admiralty jurisdiction; in denying jurisdiction of claims arising out of an airplane crash in Lake Erie, the Supreme Court made clear that the case must "bear a significant relationship to traditional maritime activity . . . involving navigation and commerce on navigable waters." Conversely, the relation of an activity to maritime concerns may bring it within admiralty cognizance even if it occurs on land. Marine insurance contracts, for example, are within the jurisdiction although both made and to be performed on land. Similarly, the Court has acquiesced in Congress's provision for jurisdiction over land damage caused by vessels on navigable waters.

Because an additional purpose of federal judicial power over maritime cases is understood to have been to provide a uniform law to govern the shipping industry, the Supreme Court also held in *Southern Pacific Company v. Jensen* (1917) that Article III empowers the federal courts to develop a "general maritime law" binding even on state courts, and that Congress may supplement this law with statutes under its authority to adopt laws "necessary and proper" to the powers of the courts. Indeed the Court has held that this aspect of the judicial power, like the legislative authority conferred by the commerce clause of Article I, has an implicit limiting effect upon state law. Not only does state law that contradicts federal law yield under the SUPREMACY CLAUSE, but, as the Court said in rejecting the application of a state workers' compensation law to longshoremen in the case last cited, no state law is valid if it "interferes with the proper harmony and uniformity" of the general maritime law "in its international and interstate relations."

The remaining authorization of federal court jurisdiction protects parties whose fortunes the Framers were for various reasons unwilling to leave wholly at the mercy of state courts. Many of these categories involve government litigation: "Controversies to which the United States shall be a Party; . . . between two or more States; between a State and Citizens of another State, . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." A federal forum for the national government itself protects against possible state hostility; federal jurisdiction over interstate conflicts provides not only a neutral forum but also a safeguard against what Hamilton in THE FEDERALIST #80 called "dissentions and private wars"; that "the union will undoubtedly be answerable to foreign powers, for the conduct of its members," was an additional reason for jurisdiction over disputes involving foreign countries as well as the related jurisdiction over "Cases affecting Ambassadors, other public Ministers and Consuls."

The most interesting issue concerning these provisions has been that of SOVEREIGN IMMUNITY. In CHISHOLM V. GEORGIA (1793), ignoring the assurances of prominent Framers like James Madison and Alexander Hamilton as well as the common law tradition that the king could not be sued without his consent, the Supreme Court relied largely on the text of Article III to hold that the power over "Controversies . . . between a State and Citizens of another State" included those in which the state was an unwilling defendant. Obviously, as the Justices pointed out, this was true of the parallel authority over "Controversies . . . between two or more States," and Justice JAMES WILSON added his understanding that the English tradition was a mere formality, since consent to sue was given as a matter of course.

Whether this decision was right or wrong as an original matter, within five years it was repudiated by adoption of the ELEVENTH AMENDMENT, which provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens or Subjects of any Foreign State." Notably, the amendment does not mention admiralty cases, suits by foreign countries, suits against a state by its own citizens under federal law, or suits against the United States. Nevertheless the Supreme Court, taking the amendment as casting doubt on the reasoning underlying *Chisholm*, has denied jurisdiction in all of these instances. The best explanation has been that, although not excepted by the amendment, they are outside the power conferred by Article III itself. One state may still sue another, however, and the United States may sue a state. The Court has found such jurisdiction "essential to the peace of the Union" and "inherent in the constitutional plan." Why this is not equally true of a suit by a state against the United States has never been satisfactorily explained.

At least since the 1824 decision in *Osborn v. Bank of the United States*, however, both the Eleventh Amendment and its related immunities have been construed to allow certain actions against state or federal officers even though the effect of the litigation is the same as if the government itself had been named defendant. The theoretical explanation that the officer cannot be acting for the state when he does what the Constitution forbids is inconsistent with the substantive conclusion, often reached in the same cases, that his action is attributable to the state for purposes of the FOURTEENTH AMENDMENT. A more principled explanation is that suits against officers are necessary if the Constitution is to be enforced at all; the

response is that those who wrote the amendment could not have intended to allow it to be reduced to a hollow shell.

In any event, the *Osborn* exception has not been held to embrace all suits against government officers. At one time it was said generally that an officer could be prevented from acting but could not be ordered to take affirmative action such as paying off a government obligation, for if he was not acting for the state he had no authority to reach into its treasury. The simplicity of this distinction was shattered, however, by opinions acknowledging the availability of a WRIT OF MANDAMUS to compel an officer to perform a nondiscretionary duty. The more recent formulation in EDELMAN V. JORDAN (1974), which essentially distinguishes between prospective and retrospective relief, seems difficult to reconcile with the language of the Constitution, with its apparent purposes, or with the fiction created to support the *Osborn* rule.

Even when the government is itself a party, it may consent to be sued, and the books are filled with a confusing and incomplete array of statutes allowing suits against the United States. Some judges and scholars have argued that suits against consenting states are inconsistent with the language of the amendment, which declares them outside the judicial power; the Court's persuasive explanation has been that, like venue and personal jurisdiction, immunity is a privilege waivable by the party it protects (*Clark v. Barnard*, 1883). More debatable was the Court's decision in *Parden v. Terminal Railway* (1964) that a state had "waived" its immunity by operating a railroad after passage of a federal statute making "every" interstate railway liable for injuries to its employees; in *Edelman v. Jordan*, retreating from this conclusion, the Court emphasized that "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights." Still later, however, in FITZPATRICK V. BITZER (1976) the Court held that Congress had power to override a state's immunity in legislating to enforce the Fourteenth Amendment, although it has never suggested that that amendment allowed Congress to ignore other constitutional limitations, such as the BILL OF RIGHTS.

The two remaining categories of disputes within federal judicial power are "controversies . . . between Citizens of different States" and between state citizens and "Citizens or Subjects" of "foreign States." Once again the reasons for federal jurisdiction are generally said to be the avoidance of state-court bias and of interstate or international friction. In contrast not only to the admiralty cases but also to those between states, federal jurisdiction based solely on the diverse citizenship of the parties does not carry with it authority to make substantive law. Absent a federal statute, the Court held in ERIE RAILROAD V. TOMPKINS (1938), "the law to be applied . . . is the law of the State." Later cases such as *Textile Workers Union v. Lincoln Mills* (1957) have qualified the effect though not the principle of this decision by finding in silent statutes implicit authorization to the federal courts to make law. An occasional decision has upheld FEDERAL COMMON LAW, without the pretense of statutory authority, on matters mysteriously found to be "intrinsically federal"; an example was the Court's refusal in *Banco Nacional de Cuba v. Sabbatino* (1964) to look behind official acts of foreign governments. (See ACT OF STATE DOCTRINE.)

In early decisions the Supreme Court took a narrow view of what constituted a controversy between citizens of different states for purposes of the statute implementing this provision of Article III. More recently, however, the Court has generously interpreted the power of Congress to confer DIVERSITY JURISDICTION on the federal courts. And as early as the mid-nineteenth century, recognizing that corporations can be the beneficiaries or victims of state court prejudice without regard to the citizenship of those who compose them, the Court effectively began to treat corporations as citizens by employing the transparent fiction of conclusively presuming that the individuals whose citizenship was determinative were citizens of the state of incorporation.

The best known decision involving the diversity jurisdiction was DRED SCOTT V. SANDFORD (1857), in which three Justices took the position that a black American descended from slaves could never be a state citizen for diversity purposes because he could not be a citizen of the United States. Questionable enough at the time, this conclusion was repudiated by the Fourteenth Amendment's provision that all persons born in this country are citizens of the United States "and of the state wherein they reside." Nevertheless the courts have held that only American citizens are "Citizens of . . . States" within Article III, and conversely that only foreign nationals are "Citizens or Subjects" of "foreign States."

"In all Cases involving Ambassadors, other public Ministers and Consuls, and those in which a state shall be Party," Article III, section 2 provides, "the supreme Court shall have ORIGINAL JURISDICTION. In all the other Cases before mentioned, the supreme Court shall have APPELLATE JURISDICTION, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Original jurisdiction is the power to determine a dispute in the first instance; appellate jurisdiction, the power to review a decision already made. *Marbury v. Madison* (1803) held that Congress had no power to give the Supreme Court original jurisdiction of a case to which neither a diplomat nor a state was a party; a contrary result, Chief Justice Marshall argued, would make the constitutional distribution between original and appellate jurisdic-

tion "mere surplusage." This reasoning is not especially convincing, and the converse is not true; in COHENS V. VIRGINIA in 1821 Marshall himself conceded that Congress could give the Court appellate jurisdiction over cases for which Article III provided original jurisdiction. *Cohens* also held that the Supreme Court had original authority not over all Article III cases in which a state happened to be a party but only over those "in which jurisdiction is given, because a state is a party," and thus not over a federal question case between a state and one of its own citizens. Inconsistently, however, the Court allowed the United States to sue a State in the Supreme Court in *United States v. Texas* (1892).

*Marbury*'s implicit conclusion that the exceptions clause quoted above does not allow Congress to tamper with the original jurisdiction strongly suggests that the enumeration of original cases is a minimum as well as a maximum, and the Court has described as "extremely doubtful" the proposition that Congress may deprive it of original power over state or diplomat cases; yet the Court has concluded that it has discretion not to entertain cases within its original jurisdiction.

Unlike the original jurisdiction provision, that giving the Court appellate authority in "all the other" Article III cases contains an explicit escape valve: "with such Exceptions . . . as the Congress shall make." In THE FEDERALIST #81, Hamilton explained that this clause permitted Congress to limit review of facts decided by juries, but he did not say this was its sole objective. From the beginning Congress has denied the Court jurisdiction over entire classes of controversies within the constitutional reach of appellate power—such as federal criminal cases, most of which were excluded from appellate cognizance for many years even if constitutional issues were presented. The Court itself accepted this particular limitation as early as *United States v. More* (1805), without questioning its constitutionality. Moreover, when Congress repealed a statute under which a pending case attacking the Reconstruction Act had been filed, the Court in EX PARTE MCCARDLE (1869) meekly dismissed the case, observing that "the power to make exceptions to the appellate jurisdiction of this court is given by express words."

As the *McCardle* opinion noted, however, other avenues remained available for taking similar cases to the Supreme Court, and three years later the Court made clear in *United States v. Klein* (1872) that Congress could not under the guise of limiting jurisdiction effectively dictate the result of a case by directing dismissal if the Court should find for the plaintiff. Respected commentators have contended that the Supreme Court must retain appellate authority over certain constitutional questions, arguing that the exceptions clause cannot have been intended, in Henry Hart's words, to "destroy the essential role of the Supreme Court in the constitutional plan." The persuasiveness of this position depends on one's perceptions of the function of judicial review. (See JUDICIAL SYSTEM.)

In order for the Court in *Marbury v. Madison* to dismiss an action that it found Congress had authorized, it had first to conclude that it had the right to refuse to obey an unconstitutional act of Congress. Marshall's argument that this power was "essentially attached to a written constitution" is contradicted by much European experience; and his assertion that choosing between the Constitution and a statute was an inescapable aspect of deciding cases begged the question, for the Constitution might have required the courts to accept Congress's determination that a statute was valid. For the same reason one may object to his reliance on Article VI's requirement that judges swear to support the Constitution: one does not offend that oath by enforcing an unconstitutional statute if that is what the Constitution requires.

The SUPREMACY CLAUSE of Article VI is no better support; the contrasting reference to "Treaties made, or which shall be made" in the same clause strongly suggests that the phrase "laws . . . which shall be made in Pursuance of" the Constitution, also invoked by Marshall, was meant to deny supremacy to acts adopted under the Articles of Confederation, not to those that were invalid. Most promising of the provisions brought forward in *Marbury* was Article III's extension of judicial power to "Cases . . . arising under this Constitution"; as Marshall said, it could scarcely have been "the intention of those who gave this power, to say that in using it the constitution should not be looked into." Yet even here the case is not airtight. For while Article III provides for jurisdiction in constitutional cases, it is Article VI that prescribes the force to be given the Constitution; and while the latter article plainly gives the Constitution precedence over conflicting *state* laws, it appears to place *federal* statutes on a par with the Constitution itself.

Nevertheless the *Marbury* decision should be regarded as neither a surprise nor a usurpation. Though Marshall did not say so, judicial review had a substantial history before *Marbury,* and despite occasional scholarly denials it seems clear that most of the Framers expected that the courts would refuse to enforce unconstitutional acts of Congress. Moreover, there is force to Marshall's argument that a denial of this power would effectively undermine the express written limitations on congressional power; the natural reluctance to assume that the Framers meant to leave the fox in charge of the chickens lends credence to the conclusion that judicial review is implicit in the power to decide constitutional cases or in the substantive constitutional limitations themselves.

In fact the *Marbury* opinion espouses two distinct the-

ories of judicial review that have opposite implications for a number of related issues, some of which have been discussed above. If, as Marshall at one point seemed to suggest, judicial review is only an incidental by-product of the need to resolve pending cases, it is no cause for constitutional concern if Congress eliminates the Supreme Court's jurisdiction over First Amendment cases, or if no one has standing to attack a federal spending program. If, on the other hand, as argued elsewhere in *Marbury*, judicial review is essential to a plan of constitutional checks and balances, one may take a more restrictive view of Congress's power to make exceptions to the appellate jurisdiction, and perhaps a broader view of what constitutes a case or controversy as well.

Dissenting from the assertion of judicial authority over legislative reapportionment cases in BAKER V. CARR (1962), Justice Felix Frankfurter argued for a broad exception to judicial review of both federal and state actions: even unconstitutional acts could not be set aside if they presented POLITICAL QUESTIONS. Some have attempted to trace this notion to *Marbury* itself, where the Court did say that "[q]uestions in their nature political" were beyond judicial ken. The context suggests, however, that Marshall meant only that the Court would respect actions taken by other branches of government within their legitimate authority, and Louis Henkin has shown that most later decisions using "political question" language can be so explained.

The Court itself, however, spoke in *Baker* of a general "political question" doctrine preventing decision of the merits when, among other things, there was "a lack of judicially discoverable and manageable standards for resolving" a "political" issue. A number of lower courts relied on such a doctrine in refusing to decide the legality of the VIETNAM WAR. While the doctrine as so conceived appears at cross-purposes with the checks-and-balances aspect of *Marbury*, nothing in that decision bars a finding that a particular constitutional provision either gives absolute discretion to a nonjudicial branch (such as the power to recognize foreign governments) or makes an exception to Article III's grant of the judicial power itself (as, arguably, in the case of impeachment).

In most respects, then, Article III amply satisfies Marshall's conditions for a "well constructed government." Though the governmental immunities associated with the Eleventh Amendment may seem anachronistic today, unsympathetic judicial interpretation has blunted their interference with the enforcement of federal law. Decisions since the 1950s have generally rejected Justice Frankfurter's broad conception of the political question. Thus with rare exceptions the federal judiciary, as Marshall insisted, may be given authority to construe every federal law; and the extension of judicial power to controversies between citizens of different states means that the federal courts may often be given power to apply state law as well. Though increased mobility has led to serious efforts to repeal the statutory basis for the diversity jurisdiction, it served an important function in the past and conceivably may become more important in the future. Moreover, the Framers were farsighted enough to assure federal judges the independence necessary to do their appointed job. The weakest point in the system is the arguable authority of Congress to take away all or a substantial part of the Supreme Court's appellate power in constitutional cases; for such an authority undermines other elements of the system of checks and balances that the Framers so carefully constructed.

DAVID P. CURRIE
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Bibliography

BICKEL, ALEXANDER 1962 *The Least Dangerous Branch.* Pages 111–199. Indianapolis: Bobbs-Merrill.

BORCHARD, EDWIN 1928 *Hearings on H.R. 5623 before the Subcommittee of the Senate Committee on the Judiciary.* 70th Cong., 1st Sess., pp. 75–76.

FARRAND, MAX, ed. 1911 *Records of the Federal Convention of 1787.* Vol. 1, pp. 119–129. New Haven, Conn.: Yale University Press.

HART, HENRY and WECHSLER, HERBERT 1973 *The Federal Courts and the Federal System.* Pages 309–418, 833–1103. Mineola, N.Y.: Foundation Press.

HENKIN, LOUIS 1976 Is There a "Political Question" Doctrine? *Yale Law Journal* 85:597–625.

## JUDICIAL POWER AND LEGISLATIVE REMEDIES

Article III of the Constitution states that "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Article itself fails to detail the nature and extent of the phrase "judicial Power." However, the Constitution, taken as a whole, is not so silent as to its meaning.

The Framers, borrowing from MONTESQUIEU the idea of SEPARATION OF POWERS, believed that each of the branches had to have a discrete role if the overall government was to avoid tyranny. Each branch was to have specific functions and tasks that would prevent the acquisition of too much power by any one branch. Montesquieu, writing in *The Spirit of the Laws*, stated that "there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were

it joined to the executive power, the judge might behave with violence and oppression."

The Constitution is more explicit in its explanation of legislative and executive powers. Article I, section 8, lists many of the specific powers to be exercised by Congress in carrying out its constitutional duties. Section 8 contains, among many duties, the power "to lay and collect Taxes, Duties, Imposts, and Excises . . . [t]o coin Money . . . [t]o establish Post Offices . . . [t]o raise and support Armies." Likewise, the executive powers described in Article II include the power to fill vacancies and to act as COMMANDER-IN-CHIEF of the ARMED FORCES.

Nevertheless, when one reviews the Constitution as a complete document and notes the placement of powers under specific articles, the power of the judiciary becomes something clear and distinct as well. That power is by nature a limited one. Publius wrote in THE FEDERALIST #78, "Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous . . . [It] has no influence over either the sword or the purse, no direction either of the strength or of the wealth of society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment."

The debate concerning judicial power should not focus on JUDICIAL REVIEW. In fact, the question as to whether the Court should exercise judicial review is a moot one, at best. The writings of both *The Federalist* and the ANTI-FEDERALISTS assumed that the Court would rule on matters of law to determine whether statutory law complied with the standards of constitutionality.

The nature of judicial power, however, remains a subject of debate in the political arena because the Supreme Court continues to expand its role by directly implementing specific public-policy choices. In doing so, it has employed such constitutional provisions as EQUAL PROTECTION and DUE PROCESS in order to secure remedies in cases such as BROWN V. BOARD OF EDUCATION (1954), which effectively overturned the SEPARATE BUT EQUAL DOCTRINE of PLESSY V. FERGUSON (1896). More recently, courts have begun to propose remedies that encroach on the powers specifically delegated to the legislative branch. In some cases, courts have formulated the exact legislative programs by which wrongs will be righted. Two cases from the 1989 term illustrate the difference between legitimate exercise of judicial power and encroachment on legislative prerogatives.

In *Spallone v. United States* (1990) the Supreme Court reversed, by a 5–4 vote, the civil CONTEMPT charges and fines imposed by a UNITED STATES DISTRICT COURT on the city council members of Yonkers, New York. The city had been found in violation of Title VIII of the CIVIL RIGHT ACT OF 1968 and the equal protection clause of the FOURTEENTH AMENDMENT by "intentionally engag[ing] in a pattern and practice of housing discrimination." Chief Justice WILLIAM H. REHNQUIST, writing the majority opinion, framed the question narrowly, asking "whether it was a proper exercise of judicial power for the District Court to hold petitioners, four Yonkers city councilmembers, in contempt for refusing to vote in favor of legislation implementing a consent decree earlier approved by the city."

The Supreme Court, concluding that the district court lacked authority to impose the contempt fines against the individual members of the city council, upheld the contempt fines levied against the city. With the question framed so narrowly, the five-Justice majority explained that "[t]he imposition of sanctions on individual legislators is designed to cause them to vote, not with a view to the interest of their constituents or of the city, but with a view solely to their own personal interest." In so doing, the district court jeopardizes the legitimate exercise of deliberation by representative institutions accountable to a legitimate constituency and removes the legislative immunity that is essential to enable elected representatives to consider the common good of the community.

Although the mounting fines against the city (nearly one million dollars a day) had forced the council to vote in favor of the housing plan, the members of the council still could have decided that it was in the best interest of the city to go bankrupt, thereby defying the court. However, when the individual members of the council were forced to vote under threat of personal financial catastrophe, they were no longer able to represent the interest of the community. This point is of great consequence. A legislative body must have a will of its own while working collectively (and even if at time in conflict) with the courts toward the implementation of the Constitution and laws passed pursuant to it.

The second recent Supreme Court case concerning the limits of judicial power is MISSOURI V. JENKINS (1990). In this case, a unanimous Court agreed that a federal district court had exceeded its authority when, in fashioning a remedy for school desegregation, it ordered an increase in a school district's property tax levy, even though the increase exceeded the limits imposed by state law. The majority opinion by Justice BYRON R. WHITE, however, raises a serious question as to the limits of judicial authority. Justice White "agree[d] with the State that the tax increase contravened the principles of comity." But he went on to suggest that the district court, under the SUPREMACY CLAUSE of the Constitution, could order the school district to levy taxes at the rate needed to pay for the desegregation remedy.

In a CONCURRING OPINION by Justice ANTHONY M. KEN-

NEDY, a four-Justice minority argued that the majority opinion's OBITER DICTUM had endorsed "an expansion of power in the federal judiciary beyond all precedent." The minority argued that "while courts have undoubted power to order that schools operate in compliance with the Constitution, the manner and methods of school financing are beyond federal judicial authority." It was apparent from the majority's decision that there was a "fear that failure to endorse judicial taxation power might in some extreme circumstance leave a court unable to remedy a constitutional violation." But, as the minority noted, "this possibility is nothing more or less than the necessary consequence of *any* limit on judicial power."

*Spallone* and *Jenkins* are merely the most recent examples in a long history of judicial attempts to impose remedies on legislative bodies. With the growing reluctance of representatives to raise taxes and to fashion rules and laws to meet the costs of constitutional obligations determined by the courts, the conflict between the branches is sure to continue.

Thus, the basic question concerning the nature and extent of judicial power returns to the focus. Judicial power obviously is not the same as the power of the legislative or executive branches. The courts have the power to order officials to comply with the Constitution's demands; however, the extent of this judicial power is limited in scope. An extraordinary situation may arise in which a court is unable to enforce a judicial remedy—in effect lowering the status of the court, but granting courts unlimited remedial power derogates from the principle of representative government.

JEFFREY D. SCHULTZ
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Bibliography

BICKEL, ALEXANDER M. 1978 *The Supreme Court and the Idea of Progress.* New Haven, Conn.: Yale University Press.

CAREY, GEORGE W. 1989 *The Federalist: Design for a Constitutional Republic.* Urbana: University of Illinois Press.

COX, ARCHIBALD 1987 *The Court and the Constitution.* Boston: Houghton Mifflin.

WOLFE, CHRISTOPHER 1985 Three Contemporary Theories of Judicial Review. *The Political Science Reviewer* 15:215–260.

## JUDICIAL RESTRAINT

See: Judicial Activism and Judicial Restraint

## JUDICIAL REVIEW

Judicial review, in its most widely accepted meaning, is the power of courts to consider the constitutionality of acts of other organs of government when the issue of constitutionality is germane to the disposition of lawsuits properly pending before the courts. This power to consider constitutionality in appropriate cases includes the courts' authority to refuse to enforce, and in effect invalidate, governmental acts they find to be unconstitutional.

Judicial review is America's most distinctive contribution to CONSTITUTIONALISM. Although courts have exercised judicial review almost from the beginning of American constitutional government, the question of the legitimacy of that JUDICIAL POWER has often provoked controversy as well as recurrent charges that American judges usurped the authority. Nearly two centuries of exercises of and popular acquiescence in the power have quieted the storms over its basic justifiability in recent decades, but vehement controversy continues regarding the proper scope and authority of judicial rulings on constitutionality. Moreover, particular exercises of judicial review continue to stir passionate political debates, as they have from the beginning.

The classic justification for judicial review was set forth by Chief Justice JOHN MARSHALL in MARBURY V. MADISON (1803). Marshall relied on general principles and constitutional text. His arguments from principle are not compelling. For example, his unchallengeable assertion that the Constitution was designed to establish a limited government does not demonstrate that *courts* should enforce those limitations. Constitutions prescribing limits on government had been adopted before 1803, as many have been since; but relatively few look to the judiciary for enforcement. Similarly, the fact that judges take an oath to support the Constitution does not imply judicial review, for the Constitution requires the oath of all federal and state officers. Far more persuasive are Marshall's references to two passages of the constitutional text. First, Article III lists cases "arising under the Constitution" as one of the subjects included within the JUDICIAL POWER OF THE UNITED STATES, suggesting that constitutional questions can give rise to judicial rulings. Second, the SUPREMACY CLAUSE of Article VI lists the Constitution first as among the legal sources that "shall be the supreme Law of the Land."

Although the inferences derivable from the constitutional text are not unchallengeable, they provide the strongest available support for Marshall's justification for judicial review. True, Article VI is specifically addressed only to state judges, for the "supreme Law of the Land" clause is followed by the statement that "Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Still, the CONSTITUTIONAL CONVENTION debates and federal LEGISLATION, ever since Section 25 of the JUDICIARY ACT OF 1789, have contemplated Supreme Court review of

state court rulings on constitutional questions, and it is surely plausible to argue that the Supreme Court's authority on review would be no less than that of state judges obeying the command of the supremacy clause.

Federal court review of state court judgments is an especially plausible aspect of judicial review, for it is a typical policing technique to maintain the delineations of governing authority in federal systems. That strand of judicial review is common in other federal schemes as well, as in Switzerland and Australia. Yet even federal systems are conceivable without judicial review. Thus, nationalists at the Constitutional Convention initially urged reliance on the congressional veto and on military force to curb excesses by the states. The supremacy clause, and its reliance on routine judicial power to enforce federalistic restraints, stemmed from suggestions by states' rights forces at the convention.

Judicial review in the interest of FEDERALISM has played an important role in the United States; some observers, indeed, view it as the most essential function of judicial review. As Justice OLIVER WENDELL HOLMES once put it: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." The supremacy clause goes a long way toward assuring this protection of the Union; but it provides less compelling justification for judicial review of congressional acts.

The constitutional text cited by John Marshall supports judicial review in all its aspects in a more basic sense. Article III and Article VI both reflect the premise central to judicial review—the premise that the Constitution is to be considered a species of law and accordingly cognizable in courts of law. Judicial review is essentially the judicial enforceability of constitutional norms, and viewing the Constitution as law rather than mere policy or precatory adjuration is the keystone of the more persuasive argument that the American constitutional scheme was designed to rely on judges, not merely troops or political restraints, to enforce constitutional limits.

This view of the Constitution as law—the view central to the argument for giving courts a major role in constitutional enforcement—made it relevant for Marshall to state that it was "emphatically the province and duty of the judicial department to say what the law is," and to describe judicial review as an outgrowth of the normal task of judges: to adjudicate the cases before them on the basis of all relevant rules of law, rules that include those stemming from the Constitution. And that in turn made it plausible for him to say that, where a statute and the Constitution conflict, the courts must enforce the superior Constitution and "disregard" the statute. That, to Marshall, was "of the very essence of judicial duty."

Even if Marshall's views of the Constitution as law and of the "judicial duty" were unanswerable, charges of usurpation would not be stilled. Whatever the strength of the inferences from Articles III and VI, it is undeniable that the power of judicial review is not explicitly granted by the Constitution—in contrast to the constitutions of the nations that, in modern times, have embraced systems similar to the American scheme of judicial review, such as West Germany, Italy, India, and Japan. Defenders of judicial review have accordingly sought to find added support for Marshall's conclusion in historical understandings and practices. None of the sources relied on, however, conveys overwhelming force.

For example, it is true that Marshall's argument was to a considerable extent anticipated by ALEXANDER HAMILTON in THE FEDERALIST #78; but Hamilton's essay was after all only a propagandistic defense of the Constitution during the ratification debates. Similarly, the arguments from historical practice are inconclusive at best. The much invoked statement by EDWARD COKE in BONHAM'S CASE (1610)—that "the COMMON LAW will controul Acts of Parliament, [and] adjudge them to be utterly void" when they are "against common right and reason"—was inconsistent with British practice at the time and thus is not even respectable OBITER DICTUM. More relevant was the APPELLATE JURISDICTION of the PRIVY COUNCIL over colonial courts; but invalidation of legislation through that route was rare and unpopular. And the much debated alleged PRECEDENTS in the practice of state courts during the years immediately following independence hardly establish a well-entrenched practice of judicial review in the era of the ARTICLES OF CONFEDERATION. The preconstitutional examples that withstand scrutiny are few and controversial, and in any event it is not clear that many delegates at the Constitutional Convention knew about the scattered actual or alleged instances of invalidation of state laws by state judges.

Nor do the statements in the Constitutional Convention and the state ratification debates provide ironclad proof that judicial review was intended by the Framers. While it is true that most of the statements addressing the issue supported such a judicial power, it is equally true that only a minority of speakers at the Constitution framing and ratifying conventions expressed their views. The most important statements at the Constitutional Convention came during the discussion of the council of revision proposal—a proposal that the Justices join with the President in exercising the VETO POWER. That proposal was rejected, partly on grounds supporting the legitimacy of judicial review. Thus, LUTHER MARTIN, in criticizing "the association of the Judges with the Executive" as a "dangerous innovation," argued that, "as to the Constitutionality of laws, that point will come before the Judges in their

proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative."

Some scholars have argued, questionably, that judicial review was so normal a judicial function that it was taken for granted by the Framers. HENRY M. HART and Herbert Wechsler claimed to find clear support in the Convention debates: "The grant of judicial power was to include the power, where necessary in the decision of cases, to disregard state or federal statutes found to be unconstitutional. Despite the curiously persisting myth of usurpation, the Convention's understanding on this point emerges from its records with singular clarity." But with regard to original intent, EDWARD S. CORWIN's Senate testimony on the 1937 Court-packing plan still represents a fair summary of the state of the record. Corwin stated that the "people who say the framers intended [judicial review] are talking nonsense," but he added that "people who say they did not intend it are talking nonsense." As Leonard W. Levy commented after noting Corwin's assessment that there is "great uncertainty" on the issue: "A close textual and contextual examination of the evidence will not result in an improvement on these propositions."

Most important in the search for preconstitutional bases for judicial review authority is probably the late-eighteenth-century prevalence of general ideas conducive to the acceptance of the power asserted in *Marbury v. Madison*. The belief in written CONSTITUTIONS to assure LIMITED GOVERNMENT was hardly an American invention, but Americans had an unusually extensive experience with basic, HIGHER LAW documents of government, from royal charters to state constitutions and the Articles of Confederation. Yet it is possible to have constitutions without judicial review: to say that a government cannot exceed constitutional limits does not demonstrate who is to decide. It bears reiterating, then, that viewing a constitution as a species of "law" was the vital link between constitutionalism and judicial competence to decide constitutional issues. Moreover, the view that the Constitution was an act of the people rather than of the state governments helped provide an ideology congenial to Marshall's insistence that the courts could, in the name of the people, refuse to enforce the acts of the people's representatives.

Accepting the persuasiveness of Marshall's core argument is not tantamount to endorsing all of the alleged implications of judicial review that are pervasive in the late twentieth century. Marshall's stated view of the role of courts in constitutional cases was a relatively modest one; after nearly two centuries of exercise of judicial review by courts, and especially the Supreme Court, the scope and binding effect of judicial rulings are far broader. Most of Marshall's argument was largely defensive, designed to undergird judicial competence and authority to adjudicate issues of constitutionality. He insisted that the Constitution is "a rule for the government of *courts* as well as the legislature" and concluded that "*courts*, as well as other departments, are bound by that instrument." Modern perceptions, by contrast, often view the courts as playing a superior or supreme role in CONSTITUTIONAL INTERPRETATION. Claims of JUDICIAL SUPREMACY and sometimes even exclusiveness are widespread in scholarly statements and popular understandings. The extent to which such impressions are justifiable continues to give rise to sharp controversy.

Marshall's claims about judicial competence and authority were closely tied to a tripartite theory of government reflecting the SEPARATION OF POWERS. He did not deny that other branches, including the President in the exercise of the veto power and Congress in enacting legislation, could and—under the oath to support the Constitution emphasized in *Marbury* itself—presumably must consider issues of constitutionality. Marshall's argument that courts *also* have competence to take the Constitution into account in their work was essentially a "me too" position. Modern variants on justifications for judicial review—and a number of statements from the modern Supreme Court itself—lend stronger support than anything in Marshall's reasoning to a "me superior" or even a "me only" view.

Nearly from the beginning, Presidents have taken issue with Supreme Court rulings. THOMAS JEFFERSON insisted that "nothing in the Constitution has given [the judges] a right to decide for the Executive, more than to the Executive to decide for them." And he argued that considering "the judges as the ultimate arbiters of all constitutional questions" was "a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy." Similarly, ANDREW JACKSON insisted, in vetoing the bill to recharter the Bank of the United States in 1832, that MCCULLOCH V. MARYLAND (1819) did not preclude his action: "Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled." Similar statements are found in the utterances of later Presidents, from Abraham Lincoln to FRANKLIN D. ROOSEVELT and beyond.

John Marshall was no doubt unhappy with the political statements of Jeffersonians and Jacksonians. Clearly, he would have preferred ready acceptance of his Court's glosses on the Constitution by all governmental officials and the entire nation. But nothing in the stances of the leaders of his day or since was in sharp conflict with anything in *Marbury v. Madison*. Jefferson, Jackson, and their successors did not deny the binding effect of the judges' constitutional rulings in the cases before them. But the

Presidents insisted on their right to disagree with the principles underlying the Court decision. As Lincoln said in the course of his debates with STEPHEN A. DOUGLAS, he did not propose that after Dred Scott had been held to be a slave by the Court—in DRED SCOTT V. SANDFORD (1857)—"we, as a mob, will decide him to be free." But, he added, "we nevertheless do oppose that decision as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision. [We] propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject."

Does it follow that, if such presidential statements are consistent with *Marbury v. Madison*, the scheme sketched by Marshall in 1803 contemplated never-ending chaos—a state of chaos in which the political branches of the national government, and the states as well, might forever disagree with the principles of Supreme Court decisions, in which the only way to implement the Court's principles would be to bring the resisting parties to court in multiple lawsuits, in which no constitutional question would ever be settled? Not necessarily, and certainly not in American experience. Judicial review has not meant that the Supreme Court's reasoning ends all constitutional debate, but neither has it meant endless litigation and dispute over every constitutional issue. Yet the reasons for the growing role of the Supreme Court in settling constitutional issues rest less on any legal principle underlying judicial review than on considerations stemming from institutional arrangements and from prudence. The only arguable basis in *Marbury* itself for viewing the courts as the ultimate arbiters of constitutional issues is Marshall's ambiguous statement that it is "emphatically the province and duty of the judicial department to say what the law is." That statement establishes judicial competence, as noted; but its ambiguity also may provide the basis for arguments for a special judicial expertise in constitutional matters and for a de facto judicial supremacy. Marshall's statement is not so strong, however, as a similar one from Hamilton, in *The Federalist* #78: "The interpretation of laws is the proper and peculiar province of the courts."

The widely observable phenomenon that a Court interpretation of the Constitution has significance beyond the parties to a particular lawsuit rests on other, stronger bases. A central one is that, to the extent a disputed constitutional issue arises in a lawsuit, and to the extent that the Supreme Court is the highest court in the judicial hierarchy, a Supreme Court interpretation is final. Technically, it is final only with respect to the parties in the case, to be sure; but the Court gives general reasons in resolving specific controversies, and the Justices normally operate under a system of PRECEDENT and STARE DECISIS. Similarly situated parties not before the Court in the particular case ordinarily recognize that, other things being equal, the Court will adhere to precedent, will apply the same rule to them if litigation ensues, and accordingly choose not to engage in needless litigation.

Basically, then, the reason that the courts generally and the Supreme Court in particular wield such vast influence in Americans' understanding of their Constitution is that most constitutional issues can and do arise in lawsuits; and once they do, the courts, with the Supreme Court at the apex, do have the final say. As a result, most potential opponents of Court rulings follow the course implied in Lincoln's First Inaugural Address. Lincoln did not deny that Supreme Court decisions "must be binding in any case upon the parties to a suit as to the object of that suit" and "are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government." He added: "And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with a chance that it may be overruled or never become a precedent for other cases, can better be borne than could the evil of a different practice." From that position, Herbert Wechsler's rhetorical question plausibly follows: When the chance that a judicial ruling "may be overruled and never become a precedent for other cases . . . has been exploited and has run its course, with reaffirmation rather than REVERSAL of decision, has not the time arrived when its acceptance is demanded, without insisting on repeated litigation? The answer here, it seems to me, must be affirmative, both as to a necessary implication of our constitutional tradition and to avoid the greater evils that will otherwise ensue." Wechsler's admonition, it should be noted, is one of prudence, not of any necessary legal mandate stemming from the *Marbury* rationale.

Beginning in the late twentieth century, however, the Supreme Court has repeatedly claimed a greater import for its exercises of judicial review than anything clearly set forth in *Marbury.* A major example came in one of the cases stemming from the school DESEGREGATION controversy, COOPER V. AARON (1958). The opinion in that case, signed by each of the Justices, provides the strongest judicial support for a view widely held by the public—that the Court is the ultimate, the supreme interpreter of the Constitution. Rejecting the premise of the actions of the legislature and of the governor of Arkansas in that case—that they were not bound by the ruling in BROWN V. BOARD OF EDUCATION (1954)—the Court purported to "recall some basic constitutional propositions which are settled doctrine." The Justices quoted Article VI and Marshall's "province and duty of the judicial department" passage in

*Marbury* and added: "This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution. [It] follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Article VI of the Constitution makes it of binding effect on the States. [Every] state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Article VI, 3, "to support this Constitution."

Similar statements have surfaced in other controversial cases in recent years, especially in BAKER V. CARR (1962) (referring to the "responsibility of this Court as ultimate interpreter of the Constitution") and POWELL V. MCCORMACK (1969) ("[It] is the responsibility of this Court to act as the ultimate interpreter of the Constitution. *Marbury v. Madison.*"). The Court in these cases was no doubt marshaling all possible rhetorical force in efforts to ward off actual or potential resistance from the states or from other branches of the federal government; but these broad modern assertions no doubt also reflect widespread popular understandings of the "ultimate" role of the Court, understandings bolstered by the nation's general acceptance of that role, despite frequent and continuing disagreements with particular decisions.

From the relatively modest assertions of the judicial review power in *Marbury v. Madison*, nearly two centuries of history have brought the Court increasingly close to the self-announced dominant role in constitutional interpretation it set forth in *Cooper v. Aaron.* That does not mean that Supreme Court interpretations are entitled to immunity from criticism, popular or academic. Nor does it signify the end of all political restraints on the Court, restraints stemming from the same Constitution that Marshall relied on in defending judicial review. Judges may be subjected to congressional IMPEACHMENT and Congress may arguably curtail the federal courts' JURISDICTION in constitutional cases. (See JUDICIAL SYSTEM.) But both weapons, though frequently brandished, have rarely been used. Moreover, the constitutional AMENDING PROCESS, albeit difficult to invoke, is available to overturn unpopular Court rulings. More significant, the composition of the Court as well as its size rest with the political branches, and the President's nominating role, together with the Senate's in confirmation, have been major safeguards against judges deviating too far from the national consensus. Despite these potential and actual checks, however, the Supreme Court's role in American government has outgrown both the view that it is the weakest branch and Marshall's own delineation of the judicial review power. What ALEXIS DE TOCQUEVILLE recognized over a century and a half ago has become ever more true since he wrote: "Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate."

Even though historical exercises of judicial review and popular acquiescence have largely stilled the outcries that the federal courts usurped the power to consider the constitutionality of legislation, the core arguments on behalf of the legitimacy of judicial review, summarized by Marshall in *Marbury v. Madison,* continue to generate controversial implications. Two especially important and recurrent modern debates involve arguments reaching back all the way to *Marbury.* The first issue is whether courts should strain to avoid decisions on controversial constitutional issues by invoking such devices as the POLITICAL QUESTION doctrine. The second issue concerns the proper sources of constitutional adjudication: Must courts limit themselves to "interpretation" of the Constitution, or are "noninterpretive" decisions also legitimate?

Courts confident about the legitimacy of judicial review may tend to exercise that power assertively; judges in doubt about the underpinnings of that authority may shrink from exercising the power to invalidate legislative acts and may indeed seek to escape altogether from rulings on the merits in constitutional cases. The connection between views of legitimacy and modern exercises (or nonexercises) of judicial review is illustrated by an exchange between LEARNED HAND and Herbert Wechsler. Hand insisted that there was "nothing in the United States Constitution that gave courts any authority to review the decisions of Congress" and that the text "gave no ground for inferring that the decisions of the Supreme Court [were] to be authoritative upon the Executive and the Legislature." He found the sole justification for judicial review in the practical need "to prevent the defeat of the venture at hand"—to keep constitutional government from foundering. Wechsler retorted: "I believe the power of the courts is grounded in the language of the Constitution and is not a mere interpolation."

These contending positions have contrasting implications. Thus, Hand concluded that "since this power is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised whenever a court sees, or thinks it sees, an invasion of the Constitution. It is always a preliminary question how importunately the occasion demands an answer." Wechsler countered that there was no such broad discretion to decline constitutional adjudication in a case properly before a court: "For me, as for anyone who finds the judicial power anchored in the Constitution, there is no such escape from the judicial obligation; the duty cannot be attenuated in this way." (That "duty," he cautioned, was "not that of policing or advising legislatures or executives," but rather simply "to decide the litigated case [in] accordance with the law.")

It is true that courts do often abstain from deciding constitutional questions pressed upon them. There is no

question about the legitimacy of that phenomenon to the extent that courts rely on nonconstitutional, narrower grounds of decision in disposing of a case. Nor is there any doubt that courts need not—and under the *Marbury* rationale may not—decide constitutional issues if they are not properly presented in a case because, for example, the litigation does not square with the CASE AND CONTROVERSY requirement of Article III. But twentieth-century courts have occasionally gone beyond such justifiable ABSTENTIONS to claim a more general and more questionable authority to resort to considerations of prudence in refusing to issue rulings on the merits even though a case falls within the contours of Article III and even though congressional statutes appear to confer obligatory jurisdiction on the courts.

Some commentators have defended judicial resort to the "passive virtues"; others have attacked such refusals to adjudicate as often unprincipled and illegitimate. The controversy about the political question doctrine is illustrative. To the extent that the doctrine rests on constitutional interpretation, as it does under its strand regarding what the Court in *Baker v. Carr* (1962) called "a textually demonstrable constitutional commitment of the issue to a coordinate political department," it is undoubtedly legitimate. But the courts have often gone beyond that concern to refuse adjudication on the ground of a lack of judicially "manageable standards" and on the basis of even broader, wholly prudential considerations as well. Wechsler argued that, in political question cases, "the only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issues to another agency of government than the courts. [What] is involved is in itself an act of constitutional interpretation, to be made and judged by standards that should govern the interpretive process generally. That, I submit, is *toto caelo* [by all heaven] different from a broad discretion to abstain or intervene." ALEXANDER M. BICKEL strongly disagreed, insisting that "only by means of a play on words can the broad discretion that the courts have in fact exercised be turned into an act of constitutional interpretation." He saw the political question doctrine as something different from the interpretive process—"something greatly more flexible, something of prudence, not construction and not principle."

To the extent that the Supreme Court rests largely on discretionary, prudential concerns in refusing to adjudicate—as, for example, it appears to have done in holding federalistic restraints on congressional power largely nonjusticiable in GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985)—it raises questions of legitimacy under *Marbury v. Madison.* Courts deriving their authority from a premise that the Constitution is law, as the *Marbury* argument does, are not authorized to resort to discretionary abstention devices not justified by law. As Marshall himself pointed out in COHENS V. VIRGINIA (1821): "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." But discretionary devices of self-limitation have become commonplace in judicial behavior, as a result of glosses articulated by modern judges rather than because of anything in the Constitution itself or in Marshall's reasoning. (See COMITY.)

There is a second modern issue, especially pervasive and controversial, in which the rationale of *Marbury v. Madison* affects debates about judicial review: Are the courts bound to limit themselves to "interpretations" of the Constitution in exercising judicial review? Marshall's reasoning in *Marbury* suggests that "noninterpretive" rulings are illegitimate. A justification that derives judicial review from the existence of a written constitution and from the premise that the Constitution is a species of law implies that the courts are confined by the Constitution in delineating constitutional norms. And courts indeed almost invariably purport to rest their constitutional rulings on "interpretations" of the basic document.

But modern academic commentary is sharply divided on this issue. Most scholars who insist on "interpretation" as the sole legitimate ingredient of constitutional rulings do not argue for a narrow, strict interpretation based solely on a literal reading of the constitutional text or a specific basis in the Framers' intent. But their "broad interpretivist" position does insist that constitutional rulings must rest on a clear nexus to—and plausible inference from—the Constitution's text, history, or structure. The "noninterpretivist" critics of that position emphasize the many opaque and open-ended phrases in the Constitution and the changing interpretations of these phrases over the years. They claim that the Court's behavior cannot be squared with even a broad interpretivist position and argue that the Court has always relied on extraconstitutional norms. These critics insist that "noninterpretivist" decision making is justified not only by the history of the Court's elaborations of such vague yet pervasive concepts as SUBSTANTIVE DUE PROCESS but also by the appropriate role of courts in American constitutional democracy. The noninterpretivist literature accordingly abounds with suggestions of sources courts might rely on in the search for fundamental, judicially enforceable values—sources that range from moral philosophy to contemporary political consensus and analogies to literary and scriptural analyses.

The interpretivist arguments that draw in part on Marshall's justification for judicial review have difficulty explaining the Court's performance in "reinterpreting" the Constitution in light of changing societal contexts. The noninterpretivist position has difficulty squaring its arguments with the *Marbury* view of the Constitution as a

species of law. That position has difficulty as well in articulating limits on the legitimate ingredients of constitutional decision making that safeguard adequately against excessive judicial subjectivism—against the specter reflected in Learned Hand's fear of being "ruled by a bevy of Platonic Guardians." Whether constitutional decision making by judges can continue to contribute to the flexibility and durability of the Constitution without deteriorating into merely politicized and personalized rulings that risk subverting the legitimacy of constitutional government is the central and unresolved challenge confronting modern judicial review.

GERALD GUNTHER
(1986)

(SEE ALSO: *Interpretivism; Noninterpretivism.*)

Bibliography

BICKEL, ALEXANDER M. 1962 *The Least Dangerous Branch: The Supreme Court at the Bar of Politics.* Indianapolis: Bobbs-Merrill.

ELY, JOHN H. 1980 *Democracy and Distrust: A Theory of Judicial Review.* Cambridge, Mass.: Harvard University Press.

GREY, THOMAS 1975 Do We Have an Unwritten Constitution? *Stanford Law Review* 27:703–718.

GUNTHER, GERALD 1964 The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Review. *Columbia Law Review* 64:1–25.

HAND, LEARNED 1958 *The Bill of Rights.* Cambridge, Mass.: Harvard University Press.

HART, HENRY M., JR. and WECHSLER, HERBERT 1973 Pages 1–241 in Paul Bator, Paul Mishkin, David Shapiro, and Herbert Wechsler, eds., *The Federal Courts and the Federal System*, 2nd ed. Mineola, N.Y.: Foundation Press.

LEVY, LEONARD W. 1967 Judicial Review, History, and Democracy: An Introduction. Pages 1–42 in Leonard W. Levy, ed., *Judicial Review and the Supreme Court: Selected Essays.* New York: Harper & Row.

MCCLOSKEY, ROBERT G. 1960 *The American Supreme Court.* Chicago: University of Chicago Press.

MCLAUGHLIN, ANDREW C. 1935 *A Constitutional History of the United States.* New York: Appleton-Century-Crofts.

PERRY, MICHAEL J. 1982 *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary.* New Haven, Conn.: Yale University Press.

WECHSLER, HERBERT 1961 *Principles, Politics, and Fundamental Law.* Cambridge, Mass.: Harvard University Press.

——— 1965 The Courts and the Constitution. *Columbia Law Review* 65:1001–1014.

# JUDICIAL REVIEW AND DEMOCRACY

The American ideal of democracy lives in constant tension with the American ideal of JUDICIAL REVIEW in the service of individual liberties. It is a tension that sometimes erupts in crisis. THOMAS JEFFERSON planned a campaign of IMPEACHMENTS to rid the bench, and particularly the Supreme Court, of Federalist judges. The campaign collapsed when the impeachment of Associate Justice SAMUEL CHASE failed in the Senate. FRANKLIN D. ROOSEVELT, frustrated by a Court majority that repeatedly struck down New Deal economic measures, tried to "pack" the Court with additional Justices. That effort was defeated in Congress, though the attempt may have persuaded some Justices to alter their behavior. In recent years there have been movements in Congress to deprive federal courts of JURISDICTION over cases involving such matters as abortion, SCHOOL BUSING, and school prayer (see RELIGION IN PUBLIC SCHOOLS)—topics on which the Court's decisions have angered strong and articulate constituencies.

The problem is the resolution of what Robert Dahl called the Madisonian dilemma. The United States was founded as a Madisonian system, one that allows majorities to govern wide and important areas of life simply because they are majorities, but that also holds that individuals have some freedoms that must be exempt from majority control. The dilemma is that neither the majority nor the minority can be trusted to define the proper spheres of democratic authority and individual liberty.

It is not at all clear that the Founders envisaged a leading role for the judiciary in the resolution of this dilemma, for they thought of the third branch as relatively insignificant. Over time, however, Americans have come to assume that the definition of majority power and minority freedom is primarily the function of the judiciary, most particularly the function of the Supreme Court. This assumption places a great responsibility upon constitutional theory. America's basic method of policymaking is majoritarian. Thus, to justify exercise of a power to set at naught the considered decisions of elected representatives, judges must achieve, in ALEXANDER BICKEL's phrase, "a rigorous general accord between JUDICIAL SUPREMACY and democratic theory, so that the boundaries of the one could be described with some precision in terms of the other." At one time, an accord was based on the understanding that judges followed the intentions of the Framers and ratifiers of the Constitution, a legal document enacted by majorities, though subject to alteration only by supermajorities. A conflict between democracy and judicial review did not arise because the respective areas of each were specified and intended to be inviolate. Though this obedience to original intent was occasionally more pretense than reality, the accord was achieved in theory, and that theory stated an ideal to which courts were expected to conform. That is no longer so. Many judges and scholars now believe that the courts' obligations to intent are so highly generalized and remote that judges are in fact free

to create the Constitution they think appropriate to today's society. The result is that the accord no longer stands even theoretically. The increasing perception that this is so raises the question of what elected officials can do to reclaim authority they regard as wrongfully taken by the judiciary.

There appear to be two possible responses to a judiciary that has overstepped the limits of its legitimate authority. One is political, the other intellectual. It seems tolerably clear that political responses are of limited usefulness, at least in the short run. Impeachment and COURT-PACKING, having failed in the past, are unlikely to be resorted to again. Amending the Constitution to correct judicial overreaching is such a difficult and laborious process (requiring either two-thirds of both houses of Congress or an application for a convention by the legislatures of two-thirds of the states, followed, in either case, by ratification by three-fourths of the states) that it is of little practical assistance. It is sometimes proposed that Congress deal with the problem by removing federal court jurisdiction, using the exceptions clause of Article III of the Constitution in the case of the Supreme Court. The constitutionality of this approach has been much debated, but, in any case, it will often prove not feasible. Removal of all federal court jurisdiction would not return final power either to Congress or to state legislatures but to fifty state court systems. Thus, as a practical matter, this device could not be used as to any subject where national uniformity of constitutional law is necessary or highly desirable. Moreover, jurisdiction removal does not vindicate democratic governance, for it merely shifts ultimate power to different groups of judges. Democratic responses to judicial excesses probably must come through the replacement of judges who die or retire with new judges of different views. But this is a slow and uncertain process, the accidents of mortality being what they are and prediction of what new judges will do being so perilous.

The fact is that there exist few, if any, usable and effective techniques by which federal courts can be kept within constitutional bounds. A Constitution that provides numerous CHECKS AND BALANCES between President and Congress provides little to curb a judiciary that expands its powers beyond the allowable meaning of the Constitution. Perhaps one reason is that the Framers, though many of them foresaw that the Supreme Court would review laws for constitutionality, had little experience with such a function. They did not remotely foresee what the power of judicial review was capable of becoming. Nor is it clear that an institutional check—such as Senator ROBERT LA FOLLETTE's proposal to amend the Constitution so that Congress could override a Supreme Court decision by a two-thirds majority—would be desirable. Congress is less likely than the Court to be versed in the Constitution. La Follette's proposal could conceivably wreak as much or more damage to the Court's legitimate powers as it might accomplish in restraining its excesses. That must be reckoned at least a possibility with any of the institutional checks just discussed and is probably one of the reasons that they have rarely been used. In this sense, the Court's vulnerability is one of its most important protections.

If a political check on federal courts is unlikely to succeed, the only rein left is intellectual, the widespread acceptance of a theory of judicial review. After almost two centuries of constitutional adjudication, we appear to be further than ever from the possession of an adequate theory.

In the beginning, there was no controversy over theory. JOSEPH STORY, who was both an Associate Justice of the Supreme Court and the Dane Professor of Law at Harvard, could write in his *Commentaries on the Constitution of the United States*, published in 1833, that "I have not the ambition to be the author of any new plan of interpreting the theory of the Constitution, or of enlarging or narrowing its powers by ingenious subtleties and learned doubts." He thought that the job of constitutional judges was to interpret: "The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms and the intention of the parties."

The performance of the courts has not always conformed to this interpretivist ideal. In the last decade or so of the nineteenth century and the first third of the twentieth the Supreme Court assiduously protected economic liberties from federal and state regulation, often in ways that could not be reconciled with the Constitution. The case that stands as the symbol of that era of judicial adventurism is LOCHNER V. NEW YORK (1905), which struck down the state's law regulating maximum hours for bakers. That era ended when Franklin D. Roosevelt's appointments remade the Court, and *Lochner* is now generally regarded as discredited.

But, if the Court stopped defending economic liberties without constitutional justification in the mid-1930s, it began in the mid-1950s to make other decisions for which it offered little or no constitutional argument. It had been generally assumed that constitutional questions were to be answered on grounds of historical intent, but the Court began to make decisions that could hardly be, and were not, justified on that basis. Existing constitutional protections were expanded and new ones created. Sizable minorities on the Court indicated a willingness to go still further. The widespread perception that the judiciary was recreating the Constitution brought the tension between democracy and judicial review once more to a state of intellectual and political crisis.

Much of the new judicial power claimed cannot be de-

rived from the text, structure, or history of the Constitution. Perhaps because of the increasing obviousness of this fact, legal scholars began to erect new theories of the judicial role. These constructs, which appear to be accepted by a majority of those who write about constitutional theory, go by the general name of noninterpretivism. They hold that mere interpretation of the Constitution may be impossible and is certainly inadequate. Judges are assigned not the task of defining the meanings and contours of values found in the historical Constitution but rather the function of creating new values and hence new rights for individuals against majorities. These new values are variously described as arising from "the evolving morality of our tradition," our "conventional morality" as discerned by "the method of philosophy," a "fusion of constitutional law and moral theory," or a HIGHER LAW of "unwritten NATURAL RIGHTS." One author has argued that, since "no defensible criteria" exist "to assess theories of judicial review," the judge should enforce his conception of the good. In all cases, these theories purport to empower judges to override majority will for extraconstitutional reasons.

Judges have articulated theories of their role no less removed from interpretation than those of the noninterpretivist academics. Writing for the Court in GRISWOLD V. CONNECTICUT (1965), Justice WILLIAM O. DOUGLAS created a constitutional RIGHT OF PRIVACY that invalidated the state's law against the use of contraceptives. He observed that many provisions of the BILL OF RIGHTS could be viewed as protections of aspects of personal privacy. These provisions were said to add up to a zone of constitutionally secured privacy that did not fall within any particular provision. The scope of this new right was not defined, but the Court has used the concept in a series of cases since, the most controversial being ROE V. WADE (1973). (See JUDICIAL ACTIVISM AND SELF RESTRAINT.)

A similar strategy for the creation of new rights was outlined by Justice WILLIAM J. BRENNAN in a 1985 address. He characterized the Constitution as being pervasively concerned with human dignity. From this, Justice Brennan drew a more general judicial function of enhancing human dignity, one not confined by the clauses in question and, indeed, capable of nullifying what those clauses reveal of the Framers' intentions. Thus, the address states that continued judicial tolerance of CAPITAL PUNISHMENT causes us to "fall short of the constitutional vision of human dignity." For that reason, Justice Brennan continues to vote that capital punishment violates the Constitution. The potency of this method of generalizing from particular clauses, and then applying the generalization instead of the clauses, may be seen in the fact that it leads to a declaration of the unconstitutionality of a punishment explicitly assumed to be available three times in the Fifth Amendment to the Constitution and once again, some seventy-seven years later, in the FOURTEENTH AMENDMENT. By conventional methods of interpretation, it would be impossible to use the Constitution to prohibits that which the Constitution explicitly assumes to be lawful.

Because noninterpretive philosophies have little hard intellectual structure, it is impossible to control them or to predict from any inner logic or principle what they may require. Though it is regularly denied that a return to the judicial function as exemplified in *Lochner v. New York* is underway or, which comes to the same thing, that decisions are rooted only in the judges' moral predilections, it is difficult to see what else can be involved once the function of searching for the Framers' intent is abandoned. When constitutional adjudication proceeds in a noninterpretive manner, the Court necessarily imposes new values upon the society. They are new in the sense that they cannot be derived by interpretation of the historical Constitution. Moreover, they must rest upon the moral predilections of the judge because the values come out of the moral view that most of us, by definition (since we voted democratically for a different result), do not accept.

This mode of adjudication makes impossible any general accord between judicial supremacy and democratic theory. Instead, it brings the two into head-on conflict. The Constitution specifies certain liberties and allocates all else to democratic processes. Noninterpretivism gives the judge power to invade the province of democracy whenever majority morality conflicts with his own. That is impossible to square either with democratic theory or the concept of law. Attempts have, nonetheless, been made to reconcile, or at least to mitigate, the contradiction. One line of argument is that any society requires a mixture of principle and expediency, that courts are better than legislatures at discerning and formulating principle, and hence may intervene when principle has been inadequately served by the legislative process. Even if one assumes that courts have superior institutional capacities in this respect, which is by no means clear, the conclusion does not follow. By placing certain subjects in the legislative arena, the Constitution holds that the tradeoff between principle and expediency we are entitled to is what the legislature provides. Courts have no mandate to impose a different result merely because they would arrive at a tradeoff that weighed principle more heavily or that took an altogether different value into account.

A different reconciliation of democracy and noninterpretive judicial review begins with the proposition that the Supreme Court is not really final because popular sentiment can in the long run cause it to be overturned. As we know from history, however, it may take decades to over-

turn a decision, so that it will be final for many people. Even then an overruling probably cannot be forced if a substantial minority ardently supports the result.

To the degree, then, that the Constitution is not treated as law to be interpreted in conventional fashion, the clash between democracy and judicial review is real. It is also serious. When the judiciary imposes upon democracy limits not to be found in the Constitution, it deprives Americans of a right that is found there, the right to make the laws to govern themselves. Moreover, as courts intervene more frequently to set aside majoritarian outcomes, they teach the lesson that democratic processes are suspect, essentially unprincipled and untrustworthy.

The main charge against a strictly interpretive approach to the Constitution is that the Framers' intentions cannot be known because they could not foresee the changed circumstances of our time. The argument proves too much. If it were true, the judge would be left without any law to apply, and there would be no basis for judicial review.

But that is not what is involved. From the text, the structure, and the history of the Constitution we can usually learn at least the core values the Framers intended to protect. Interpreting the Constitution means discerning the principle the Framers wanted to enact and applying it to today's circumstances. As John Hart Ely put it, interpretivism holds that "the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution. That the complete inference will not be found there—because the situation is not likely to have been foreseen—is generally common ground."

This, of course, requires that constitutional DOCTRINE evolve over time. Most doctrine is merely the judge-made superstructure that implements basic constitutional principles, and, because circumstances change, the evolution of doctrine is inevitable. The FOURTH AMENDMENT was framed by men who did not foresee electronic surveillance, but judges may properly apply the central value of that amendment to electronic invasions of personal privacy. The difference between this method and that endorsed by Justices Douglas and Brennan lies in the level of generality employed. Adapting the Fourth Amendment requires the judge merely to recognize a new method of governmental search of one's property. The Justices, on the other hand, create a right so general that it effectively becomes a new clause of the Constitution, one that gives courts no guidance in its application. Modifying doctrine to preserve a value already embedded in the Constitution is an enterprise wholly different in nature from creating new values.

The debate over the legitimate role of the judiciary is likely to continue for some years. Noninterpretivists have not as yet presented an adequate theoretical justification for a judiciary that creates rather than interprets the Constitution. The task of interpretation is often complex and difficult, but it remains the only model of the judicial role that achieves an accord between democracy and judicial review.

ROBERT H. BORK
(1986)

Bibliography

AGRESTO, JOHN 1984 *The Supreme Court and Constitutional Democracy.* Ithaca, N.Y.: Cornell University Press.

BICKEL, ALEXANDER M. 1962 *The Least Dangerous Branch: The Supreme Court at the Bar of Politics.* Indianapolis: Bobbs-Merrill.

BORK, ROBERT H. 1985 Styles in Constitutional Theory. *South Texas Law Journal* 26:383–395.

CHOPER, JESSE 1980 *Judicial Review and the National Political Process.* Chicago: University of Chicago Press.

ELY, JOHN HART 1980 *Democracy and Distrust: A Theory of Judicial Review.* Cambridge, Mass.: Harvard University Press.

LEVY, LEONARD W., ed. 1967 *Judicial Review and the Supreme Court.* New York: Harper & Row.

## JUDICIAL REVIEW OF ADMINISTRATIVE ACTS

To conform to basic SEPARATION OF POWERS precepts, JUDICIAL REVIEW of administrative actions must be limited yet effective. It must be limited to avoid entangling courts in policy decisions that belong to other branches; it must be effective to bind ADMINISTRATIVE AGENCIES to the RULE OF LAW. Many ADMINISTRATIVE LAW doctrines attempt to accommodate these two purposes. Often they do so by adapting COMMON LAW remedies against government to the American scheme of separated powers. This process began with MARBURY V. MADISON (1803), which announced that a court having jurisdiction could issue common law MANDAMUS against a cabinet officer. The Supreme Court emphasized the need to avoid judicial intrusion in the political discretion of executive officers, while conforming their decisions to the dictates of law.

Modern administrative agencies perform functions that are characteristic of all three constitutional branches: adjudication, rule-making, and execution. The legitimacy of these activities depends on the relationships between the agencies and the branches that the courts have defined. For example, *Crowell v. Benson* (1932) allowed agencies to exercise adjudicative authority only because judicial review could assure that agency decisions had adequate factual and legal support.

The delegation doctrine states that when Congress

grants LEGISLATIVE POWER to agencies it must provide intelligible standards to guide and confine agency discretion. Yet this dictrine is aspirational today: no congressional delegation to an agency has been invalidated for over fifty years. The delegation doctrine has been supplanted by a series of inquires into the legality of particular agency actions.

First, courts review the substantive conformity of agency actions with constitutional requisites, such as those in the BILL OF RIGHTS. Substantive constitutional criteria apply to statutes.

Second, courts review the fairness of agency procedures under DUE PROCESS and statutory guarantees. PROCEDURAL DUE PROCESS involves a two-stage inquiry that identifies the presence of an interest that constitutes "liberty" or "property," and then considers the individual and government interests at stake and the value of a more elaborate process. Statutory guarantees often flow from the generally applicable Administrative Procedure Act (1946), which defines the basic procedures of federal agencies for adjudication and rulemaking, and further defines the scope of judicial review of administrative acts. Such statutory procedures often are more elaborate than the minimal constitutional requisites.

Third, courts review the statutory interpretations that underlie administrative acts. Courts usually defer to agency interpretations of law that are consistent with ascertainable LEGISLATIVE INTENT and that are otherwise reasonable. The purpose of this doctrine is to give maximum scope to agency discretion within statutory bounds.

Fourth, courts review the factual basis for agency actions. Here they compare administrative explanations for decisions with materials in the administrative record and accept conclusions of fact and policy that are reasonable. The courts try to ensure that agencies have carefully considered the policy options before them and have inquired fully into the facts. Thus, ordinary rationality review is much more demanding in administrative law than it is under constitutional EQUAL PROTECTION or SUBSTANTIVE DUE PROCESS guarantees.

Any of several threshold considerations can prevent courts from reviewing the merits of administrative actions. STANDING to seek review is partly a constitutional doctrine. To present a "case" or "controversy" within the federal JUDICIAL POWER, parties must show that they are injured in fact by the government and that judicial relief will remedy the injury. In administrative cases, courts also require the parties challenging agency actions to be within the zone of interests affected by the governing statute. There are constitutional overtones in this latter test, because it denies review to persons so tangentially interested in a statute's administration that they are unlikely to present a concrete, sharply adversarial claim.

Parties must ordinarily exhaust their administrative remedies before seeking judicial review. Separation of powers considerations partly explain this doctrine, which enforces delegations of decision-making power to agencies. The courts make exceptions to this exhaustion requirement when the issues are ready for judicial review, delay would cause hardship to private parties, or agency autonomy would be unduly threatened by immediate judicial review.

Finally, not all administrative acts are reviewable. Statutes sometimes entirely preclude judicial review, subject to uncertain due process limitations. As in *Johnson v. Robinson* (1974), courts usually interpret statutes that preclude review to allow at least inquiries into the constitutionality of agency actions. In this way, the courts avoid deciding whether Congress can forbid all review of an administrative act for which review is otherwise appropriate. Courts do hold that certain agency functions are intrinsically unsuited for review, such as agency decisions not to undertake enforcement action. Here as elsewhere, courts attempt to control agencies only to an extent that is consistent with traditional notions of the limits of the JUDICIAL ROLE.

HAROLD H. BRUFF
(1992)

(SEE ALSO: *Cases and Controversies; Procedural Due Process, Civil.*)

Bibliography

DAVIS, KENNETH CULP 1978–1984 *Administrative Law Treatise*, 2nd ed., vols. 1–5. San Diego, Calif.: K. C. Davis.

PIERCE, RICHARD J., JR., et al. 1985 *Administrative Law and Process.* Mineola, N.Y.: Foundation Press.

# JUDICIAL ROLE

Theories about the proper role of the Supreme Court have proliferated in recent decades. These theories have been too political in one sense and not political enough in another. They are too political in that they tend to be thinly veiled rationalizations of political preferences, valued less for their own sakes than for the results they entail in specific controversies. Today, knowing someone's attitude about the role of the Court, one can usually deduce his or her political positions, not so much on ECONOMIC REGULATION as on some divisive social questions.

To arrive at a consensus about JUDICIAL ACTIVISM, we need a political situation in which most groups feel that they have at least as much to gain as to lose by subscribing to an agreed conception of the Court's role. No such consensus exists. Today the country is divided over several

major social issues: crime, PORNOGRAPHY, race, women's roles, homosexuality, and religion. Ever since the 1950s, social liberals have believed that on most of those issues they have everything to gain and little to lose by judicial intervention; conversely, social conservatives have usually had a stake in confining the Court's role. Each camp has fashioned jurisprudential theories that reflect its perceived stake in judicial activism or restraint. In this sense, the debate about the Court's role is basically political.

Yet the debate is usually couched in legal terms, and in this sense, it is excessively legalistic. Commentators usually do not directly discuss the appropriate role of the Court; instead, they argue about how to interpret the Constitution. Thus, proponents of judicial activism espouse loose-constructionist theories of interpretation, and advocates of judicial restraint usually defend a more literal adherence to the text and its original meaning.

This familiar argument has long since become repetitive and unenlightening. Worse still, it treats fundamental political questions as if they were analogous to disputes over the meanings of contracts. To analyze judicial governance solely in legal terms implies that objections to a broad judicial role can be fully met by a cogent legal response, such as an interpretation of a PRECEDENT, the NINTH AMENDMENT, or the EQUAL PROTECTION clause. Admittedly, such analyses are essential, and they may indeed solve the purely legal aspect of a constitutional problem. But fidelity to law is not the only constitutional virtue, for the Constitution is a political charter as well as a legal text. If judicial lawlessness were the sole issue, we could solve every problem with a constitutional amendment saying, "It shall be unconstitutional to treat any social problem unwisely; the Supreme Court may enforce this provision on its own motion." That would eliminate every legal ground for objecting to a large judicial role, and yet the political objections obviously would remain.

Legalism is popularly identified with a restrictive view of the Court's role, but as this hypothetical amendment illustrates, that assumption is only a half-truth. After the Justices sweep past the Maginot Line of ORIGINAL INTENT, legalism is as likely to justify judicial activism as restraint, offering no solid resistance to continual enlargement of JUDICIAL POWER. Legal training breeds indifference to trends; in most fields of law, lawyers ordinarily evaluate decisions as correct or incorrect, not as contributing to a tendency that should be evaluated as such. The law is expected to evolve and grow toward the limits of its logic; indeed, the very word "trend" connotes gradualism, a legal virtue. In COMMON LAW fields, that attitude is generally harmless. The doctrine of promissory estoppel, idling in a backwater of the law of contracts, does not affect our system of government, and even if it did, the legislature could change it. In constitutional law, by contrast, the Court's role has enormous political implications; as in all politics, constitutional trends may be ominous well before the day of reckoning arrives.

In an effort to supplement narrow legal standards, some scholars have offered political objections to judicial activism. The most common of these objections may be called "the argument from democracy": America is a democracy, but the Court is not electorally accountable; therefore, excessive judicial activism is illegitimate, undermines public respect for the institution, and thus impairs its ability to perform its proper functions.

The argument from democracy, and the usual responses to it, are not narrowly legalistic, and their emphasis on democratic theory is explicitly political. Still, the search for criteria of democratic legitimacy has important similarities to conventional legal analysis: it focuses on individual decisions and doctrines, it asks whether each of them is correct (legitimate) or incorrect, and it seeks to answer that question by applying broad, consistent principles.

Without denying the value of such neolegalistic inquiries, it is important to emphasize that there is another way of looking at the Court's role, focusing less on individual decisions and more on trends and aggregates and recognizing that a decision may be justifiable from one point of view yet harmful from another. Conventional discussions of constitutional JURISPRUDENCE, with their legalistic tendency to label decisions as correct or incorrect, tend to obscure the fact that judicial governance, even when it is lawful and legitimate, exacts a price—not always an excessive or even a high price, but a price. For constitutional rights tend to diminish the role of self-government. This is not simply a question of lawfulness or legitimacy. When the Court enforces a constitutional right—even one fairly discoverable in text, traditions, and precedents—it reduces, however slightly, the responsibilities of politicians and reformers. Within the scope of legal expectations aroused by a specific right, they have less incentive to participate in politics. Within the scope of hopes aroused by the Court's general willingness to create rights, they may choose to forgo the onerous burden of self-government, waiting instead for an edict from Washington. Even if reformers lose in the Court, three or four dissents may nourish the hope that new Justices will solve the problem. To that extent, rights tend to relieve reformers of the tasks of CITIZENSHIP: studying public policy, creating reform commissions, drafting statutes, talking to bureaucrats and politicians, bargaining with opponents, persuading the uncommitted, and compromising. Likewise, judicially created rights sometimes enable politicians to avoid accountability to sharply divided constituencies.

Even as a legal issue, one open to creative solutions, a constitutional right is a problem that has been removed

from the fifty states, with all their judges, to one Supreme Court. All other judges, though still free to interpret and suggest, cease to be ultimately responsible.

Admittedly, these hidden prices are nebulous and incalculable. No doubt the price of judicial governance is often low in individual cases, and even when it seems to be high, it may be worth paying. It may be offset by the beneficial effects of judicial intervention, for example, in opening up opportunities for an oppressed class (as in BROWN V. BOARD OF EDUCATION (1954)), in protecting FREEDOM OF SPEECH, or in purifying the electoral process. The essential point is that the citizenry should try to appraise the enlarged judicial role cumulatively—as it appraises the federal budget—and as a problem in government, not merely in law. In constitutional jurisprudence one should consider the destination, not just the next step of the journey. Do we want the Supreme Court to decide, case-by-case over the decades, just when and how the government may regulate sex, marriage, and privacy? To establish national standards for criminal punishment, fashioned case-by-case in litigation? To oversee regulation of the economy? Or provision of housing, under the aegis of a "constitutional right to shelter?" We generally discuss such questions as if they were discrete and legal. Yet they are more than that. They are political choices, most of which can be resolved either way in the long run by the accumulation of precedent, without violating the conventions of legal reasoning and the RULE OF LAW. It may sometimes take a more or less lawless decision to get the process started, but every kingdom begins as a usurpation. Given the leading role of precedent in legal analysis, judicial activism is ultimately self-legitimating.

*Powell v. Texas* (1967) exemplifies the difference between legal and political grounds for judicial restraint. In *Powell* the issue was whether it was CRUEL AND UNUSUAL PUNISHMENT for Texas to punish a chronic alcoholic for public drunkenness. The trial judge had found that chronic alcoholism is a disease whose symptoms include loss of will power and "a compulsion" to appear drunk in public. This being so, argued Powell's attorney, it would be unconstitutional to treat Powell as a criminal. By a 5–4 vote, the Court rejected this argument and upheld the conviction.

A proponent of STRICT CONSTRUCTION would presumably applaud this decision on the ground that it conformed to the original meaning of "cruel and unusual." But as precedents accumulate, such arguments often lose much or all of whatever cogency they originally possessed. The leading precedent in *Powell* was *Robinson v. California* (1962), in which the Court had reversed a conviction for the crime of being "addicted to the use of narcotics." The opinion in *Robinson* distinguished between punishing someone for an act and punishing him for a "status," the latter being unconstitutional. Some of the language of the opinion implied that the basic defect of a status crime is that a status (insanity or a disease, for example) is, or may be, involuntary. Arguably, therefore, the rationale of *Robinson* extended beyond status crimes to involuntary acts, including drunken behavior by an alcoholic. To so hold might have been scientifically unsound or unwise, and it might not have been the most persuasive interpretation of *Robinson*, but given *Robinson* it could hardly have been described as a blatantly lawless decision. It would have been the sort of expansive but plausible interpretation of a precedent that courts have been handing down for centuries.

A decision in Powell's favor would also have been consistent with some of the neolegalistic criteria fashioned by jurisprudents to identify fields in which the Supreme Court's activism is legitimate. Criminal law is an area in which the courts have traditionally played a major role, and properly so because of their expertise and the tendency of popular majorities to be insensitive to the need for fairness toward criminals. Criminal defendants can be thought of as the functional equivalent of racial and religious minorities. In displacing a state court's rules of criminal responsibility, the Supreme Court is not overriding democracy but merely correcting other judges.

Although not violative of the rule of law, a broad reading of *Robinson* would have vastly expanded the Court's role, for it would have made a potential constitutional case out of every issue of free will—for example, defenses based on drunkenness and insanity. Legalistic arguments for judicial restraint do not adequately describe the implications of this sort of decision. On one side of the scale are the virtues, real or imagined, of uniformity and rationality. On the other side is the impact not only on the Court's caseload but on the values of FEDERALISM: freedom, diversity, and relatively widespread citizen participation in government. Federalism's values are embedded in our constitutional order, but in a case like *Powell* they are not "the law" in the usual sense of an authoritative rule of decision on whose binding force well-trained lawyers would agree; they are, rather, the political virtues without which constitutional jurisprudence becomes sophistry.

DAVID P. BRYDEN
(1992)

Bibliography

BRYDEN, DAVID P. 1986 Politics, the Constitution, and the New Formalism. *Constitutional Commentary* 3:415–437.

HARLAN, JOHN M. 1964 The Bill of Rights and the Constitution. *American Bar Association Journal* 50:918.

NAGEL, ROBERT F. 1989 *Constitutional Cultures: The Mentality and Consequences of Judicial Review.* Berkeley: University of California Press.

THAYER, JAMES BRADLEY 1893 The Origin and Scope of the American Doctrine of Constitutional Law. *Harvard Law Review* 7:129–156.

## JUDICIAL STRATEGY

That judges shape much public policy is a fact of political life. The significant questions are how, how often, how effectively, and how wisely they influence policy. Each of these inquiries poses normative as well as empirical problems. Here we shall be concerned only with legitimate strategies that a Justice of the United States Supreme Court can employ to maximize his or her influence. We shall focus mainly on marshalling the Court.

A Justice, like any strategist, must coordinate limited resources to achieve goals. He or she must make choices—about goals and priorities among goals and also about means to achieve those goals. Intelligent choices among means depend in part on accurate assessments of the resources the Justice controls and of the limitations that others may impose on use of those resources.

The Justices can order litigants, including government officials, to act or not act in specified ways. Less tangibly, judges also have the prestige of their office, supported by a general cultural ethos of respect for the RULE OF LAW. In particular, a Justice has a powerful weapon, an opinion—a document that will be widely distributed by the Government Printing Office and several private firms. That opinion will justify—well or poorly—a particular decision and, explicitly or implicitly, the public policy it supports.

A Justice's power is limited by the nature of judicial institutions. Judges lack self-starters. Someone has to bring a case to them. Furthermore, while they can hold acts of other public officials constitutional or unconstitutional and so allow or forbid particular policies, it is much more difficult for judges to compel government to act. The Supreme Court can rule that blacks are entitled to vote, but it cannot force Congress to pass a CIVIL RIGHTS law to make that right effective. Moreover, the Court can hear only a limited number of cases. It depends on thousands of state and federal judges to carry out its jurisprudence. And no Justice plays an *official* role in selecting, retaining, or promoting judges.

Second, a Supreme Court Justice needs the agreement of at least four colleagues. And each Justice can write a separate opinion, dissenting or concurring, in any case.

Third, and more broadly, the Court is dependent on Congress and the President for appropriations and enforcement of decisions. Each of these branches has other important checks: The House can impeach and the Senate can then remove a Justice. Congress can increase the size of the Court, remove at least part of its APPELLATE JURISDICTION, propose constitutional amendments to erase the effects of decisions or strike at judicial power itself, and use its access to mass media to challenge the Court's prestige. The President can even more effectively attack the Court's prestige, and he can persuade Congress to use any of its weapons against the Justices. He can also choose new judges who, he hopes, will change the course of CONSTITUTIONAL INTERPRETATION.

Fourth, state officials can influence public opinion to pressure Congress and the President. State officers can also drag their heels in carrying out judicial decisions and select judges who are hostile to the Court's jurisprudence.

Fifth, leaders of interest groups can pressure elected officials at all levels of government. And when judicial decisions threaten or support their values, these people seldom hesitate to apply whatever political leverage is in their self-interest.

Commentators—journalists and social scientists as well as law professors—constitute a sixth check. If judges make law, EDWARD S. CORWIN said, so do commentators. Justices who want their jurisprudence to endure must look not only to immediate reactions but also to the future. What commentators write may influence later generations of voters, lawyers, and public officials.

A Justice confronts these limitations simultaneously, and each of these groups will include a range of opinion. Any ruling will elate some and infuriate others, and the political power of various factions is likely to vary widely. In short, problems of synchronizing activities are always present and are typically complex.

The first audience a Justice must convince is composed of other Justices. The most obvious way of having one's views accepted by one's colleagues is to have colleagues who agree with one's views. Thus ability to influence the recruiting process is a difficult but fruitful means of maximizing influence. (See APPOINTMENT OF SUPREME COURT JUSTICES.) Justices who cannot choose their colleagues must consider how to persuade them.

Although treating others with courtesy may never change a vote or modify an opinion, it does make it more likely that others will listen. When others listen, intellectual capacity becomes critical. The Justice who knows "the law," speaks succintly, writes clearly, and analyzes wisely gains distinct advantages.

Practical experience can be a valuable adjunct. Logic is concerned with relations among propositions, not with their desirability or social utility. According to WILLIAM O. DOUGLAS, several Justices were converted to Chief Justice EARL WARREN's position in BROWN V. BOARD OF EDUCATION (1954) because of his vast political experience. Strength of character is also crucial. Although neither learned nor gifted as a writer, Warren led the Court and the country through a constitutional revolution. It was his "passion for

justice," his massive integrity, Douglas also recalled, that made Warren such a forceful leader. "Is it right?" was his typical question, not "Do earlier decisions allow it?"

In another sense, intellect alone is unlikely to suffice. Justices are all apt to be intelligent, strong-willed people with divergent views about earlier rulings as well as public policy. They are also apt to differ about the Court's proper roles in the political system—in sum, about fundamentals of jurisprudence. At that level of dispute, it is improbable that one Justice, no matter how astute and eloquent, will convert another.

Facing disagreements that cannot be intellectually reconciled, a Justice may opt for several courses. Basically, he can negotiate with his colleagues or go it alone. Most often, it will be prudent to negotiate. Like policymaking, negotiation, even bargaining, is a fact of judicial life. Writing the opinion of the Court requires "an orchestral, not a solo performance." All Justices can utilize their votes and freedom to write separate opinions. The value of each depends upon the circumstances. If the Court divides 4–4, the ninth Justice, in effect, decides the case. On the other hand, when the Court votes 8–0, the ninth Justice's ability to negotiate will depend almost totally on his capacity to write a separate opinion that, the others fear, would undermine their position.

To be effective, negotiations must be restrained and sensitive. Justices are likely to sit together for many years. Driving a hard bargain today may damage future relations. The mores of the Court forbid trading of votes. The Justices take their oaths of office seriously; and, while reality pushes them toward accommodation, they are not hagglers in a market, peddling their views.

The most common channels of negotiating are circulation of draft opinions, comments on those drafts, and private conversations. A Justice can nudge others, especially the judge assigned the task of producing the OPINION OF THE COURT, by suggesting additions, deletions, and rephrasings. In turn, to retain a majority, the opinion writer must be willing to accede to many suggestions, even painful ones, as he tries to persuade the Court to accept the core of his reasoning. OLIVER WENDELL HOLMES once complained that "the boys generally cut one of the genitals" out of his drafts, and he made no claim to have restored their manhood.

Drafts and discussions of opinions can and do change votes, even outcomes. Sometimes those changes are not in the intended direction. After reading FELIX FRANKFURTER' s dissent in BAKER V. CARR (1961), TOM C. CLARK, changed his vote, remarking that if those were the reasons for dissenting he would join the majority.

Although the art of negotiation is essential, a Justice should not wish to appear so malleable as to encourage efforts to dilute his jurisprudence. He would much prefer a reputation of being reasonable but tough-minded. He thus might sometimes find it wise to stand alone rather than even attempt compromise. It is usually prudent for a Justice, when with the majority, to inject as many of his views as possible into the Court's opinion, and when with the minority to squeeze as many hostile ideas as possible out of the Court's opinion. There are, however, times when both conscience and prudence counsel standing alone, appealing to officials in other governmental processes or to future judges to vindicate his jurisprudence.

Although Justices have very limited authority to make the other branches of government act, they are not powerless. Judges can often find more in a statute than legislators believe they put there. OBITER DICTA in an opinion can also prod other officials to follow the "proper" path. The Court might even pursue a dangerous course that might push a reluctant President to carry out its decisions lest he seem either indifferent to the rule of law or unprotective of federal power against state challenges.

Lobbying with either branch is also possible. Indeed, judicial lobbying has a venerable history running back to JOHN JAY. Advice delivered through third parties may have been even more common. Over time, however, expectations of judicial conduct have risen so that even a hint of such activity triggers an outcry. Thus a judge must heavily discount the benefits of direct or indirect contacts by the probability of their being discovered.

The most obvious weapon that a Justice has against unwelcome political action is the ability to persuade his colleagues to declare that action unconstitutional or, if it comes in the shape of a federal statute or EXECUTIVE ORDER, to disarm it by interpretation. These are the Court's ultimate weapons, and their overuse or use at the wrong time might provoke massive retaliation.

A Justice must therefore consider more indirect means. Delay is the tactic that procedural rules most readily permit. The Justices can deny a WRIT OF CERTIORARI, dismiss an REMAND, the case for clarification, order reargument, or use a dozen other tactics to delay deciding volatile disputes until the political climate changes.

Under other circumstances, it might be more prudent for a Justice to move the Court step by step. Gradual erosion of old rules and accretion of new ones may win more adherents than sudden statements of novel DOCTRINES. The Court's treatment of segregation provides an excellent illustration. If MISSOURI EX REL. GAINES V. CANADA (1938) had struck down SEPARATE BUT EQUAL, the Court could never have made the decision stick. Indeed, years later, when it excommunicated Jim Crow, enforcement created a generation of litigation that still continues.

Strategy is concerned with efficient utilization of scarce resources to achieve important objectives. Its domain is that of patience and prudence, not of wisdom in choosing

among goals nor of courage in fighting for the right. The messages that a study of judicial strategy yields are: A web of checks restrains a judge's power; and If he or she wishes to maximize his or her ability to do good, a judge must learn to cope with those restrictions, to work within and around them, and to conserve available resources for the times when he or she must, as a matter of conscience, directly challenge what he or she sees as a threat to the basic values of constitutional democracy.

WALTER F. MURPHY
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Bibliography

BICKEL, ALEXANDER M. 1957 *The Unpublished Opinions of Mr. Justice Brandeis.* Cambridge, Mass.: Harvard University Press.

——— 1961 The Passive Virtues. *Harvard Law Review* 75: 40–79.

DOUGLAS, WILLIAM O. 1980 *The Court Years, 1939–1975.* New York: Random House.

KLUGER, RICHARD 1976 *Simple Justice.* New York: Knopf.

MURPHY, BRUCE 1982 *The Brandeis/Frankfurter Connection.* New York: Oxford University Press.

MURPHY, WALTER F. 1964 *Elements of Judicial Strategy.* Chicago: University of Chicago Press.

O'BRIEN, DAVID M. 1986 *Storm Center: The Supreme Court in American Politics.* New York: Norton.

# JUDICIAL SUPREMACY

Stripped of the partisan rhetoric that usually surrounds important decisions of the Supreme Court, debate about judicial supremacy raises a fundamental question: Who is the final, authoritative interpreter of the Constitution? The response of judicial supremacy is that courts perform that function and other officials are bound not only to respect judges' decisions in particular cases but also, in formulating future public policy, to follow the general principles judges have laid down.

JUDICIAL REVIEW does not necessarily entail or logically imply judicial supremacy. One can, as THOMAS JEFFERSON did, concede the legitimacy of courts' refusing on constitutional grounds to enforce statutes and EXECUTIVE ORDERS and still deny either that officials of a coordinate branch must obey a decision or follow its rationale in the future. This view, called "departmentalism," sees the three branches of the national government as equal in CONSTITUTIONAL INTERPRETATION. Each department has authority to interpret the Constitution for itself, but its interpretations do not bind the other two.

There are other possible answers to the basic question: Congress, the President, the states, or the people. A claim for the states presupposes the Constitution to be a compact among sovereign entities who reserved to themselves authority to construe their obligations. Such was Jefferson's assertion in the KENTUCKY RESOLUTIONS (1798), and it echoed down decades of dreary debates on NULLIFICATION and SECESSION. The CIVIL WAR settled the matter, though some southern states briefly tried to resurrect nullification to oppose BROWN V. BOARD OF EDUCATION (1954).

A claim for the President as the ultimate, authoritative interpreter smacks too much of royalty for the idea to have been seriously maintained. On the other hand, Presidents have frequently and effectively defended their independent authority to interpret the Constitution for the executive department.

A case for the people as the final, authoritative interpreter permeates the debate. American government rests on popular consent. The people can elect officials to amend the Constitution or create a new constitution and so shape basic political arrangements as well as concrete public policies. Jefferson advocated constitutional conventions as a means of popular judging between conflicting departmental interpretations.

Although even JAMES MADISON rejected Jefferson's solution, indirect appeals to the people as the ultimate interpreters are reflected in claims to the supremacy of a popularly elected legislature. On the other hand, in THE FEDERALIST #78, ALEXANDER HAMILTON, rested his argument for judicial review on the authority of the people who have declared their will in the Constitution. Judicial review, he argued, does not imply that judges are superior to legislators but that "the power of the people is superior to both."

Although JOHN MARSHALL partially incorporated this line of reasoning in MARBURY V. MADISON (1803), neither he nor Hamilton ever explicitly asserted that the Supreme Court's interpretation of the Constitution was binding on other branches of the federal government. One might, however, infer that conclusion from Marshall's opinions in *Marbury* and in *McCulloch v. Maryland* (1819), where he expressly claimed supremacy as far as state governments were concerned.

We know little of the Framers' attitudes toward judicial supremacy. In *The Federalist* #51, Madison took a clear departmentalist stand, as he did in the First Congress. In 1788 Madison wrote a friend that the new Constitution made no provision for settling differences among departments' interpretations: "[A]nd as ye Courts are generally the last in making the decision, it results to them by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Dept paramount in fact to the Legislature, which was never intended and can never be proper."

In the Senate in 1802, however, GOUVERNEUR MORRIS argued that the judges derived their power to decide on

the constitutionality of laws "from authority higher than this Constitution. They derive it from the constitution of man, from the nature of things, from the necessary progress of human affairs. The decision of the Supreme Court is and, of necessity, must be final."

What turns a brief for judicial review into one for judicial supremacy is, of course, the claim of finality. Partially, that claim rests on the notion that interpretation of law is a uniquely judicial function (and, by its own terms, the Constitution is "the supreme law"); partially, on the ambiguity of the Constitution about the interpretive authority of other branches; and partially on the need for a supreme arbiter to assure the supremacy and uniform interpretations of the Constitution. The claim also rests on the belief that judges, because they are protected from popular pressures, are more apt to act fairly and coherently than elected officials. "It is only from the Supreme Court," CHARLES EVANS HUGHES once asserted, "that we can obtain a sane, well-ordered interpretation of the Constitution." The Court itself has seldom explicitly claimed judicial supremacy and has never articulated a full argument for it vis-à-vis Congress or the President. Indeed, through such DOCTRINES as the presumption of constitutionality and POLITICAL QUESTIONS, the Court often defers to interpretations by other departments.

The first modern, categorical claim by the Court to supremacy came in COOPER V. AARON (1958), where the Justices said that "the federal judiciary is supreme in the exposition of the law of the Constitution," and thus that *Brown v. Board of Education* was "the supreme law of the land." But *Cooper* involved state officials as did BAKER V. CARR (1962), where the Court first referred to itself as the "ultimate interpreter of the Constitution." Still, it was not until POWELL V. MCCORMACK (1969) that the Court so designated itself in a dispute involving Congress, an assertion the Justices repeated about the President in UNITED STATES V. NIXON (1974) and about both in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983). *Powell*, however, addressed only the authority of the House to exclude a duly elected member and it did not require that he be readmitted or be given back pay. *Nixon* upheld a SUBPOENA to a President whose political situation was already desperate. What would have happened to the Court's claim as "ultimate interpreter" had it faced a politically secure chief executive in *Nixon* or tried to force Congress to take action in *Powell* might well have produced examples of departmentalism, as did Jefferson's refusal to obey Marshall's subpoena in *United States v. Burr* (1807). And early congressional reactions to *Chadha's* declaring the LEGISLATIVE VETO unconstitutional have been mixed. Formally as well as informally, Congress has continued the practice, though in a more guarded fashion and on a smaller scale.

Although the constitutional text does not require judicial supremacy, Congress and the President have usually gone along with the Court's constitutional interpretations. Yet the exceptions have been sufficiently frequent and important that it is difficult to demonstrate a firm tradition requiring coordinate federal branches to accept the Court's doctrines. In matters strictly judicial—whether or not courts will enforce particular statutes—judges have been supreme, though subject to checks regarding JURISDICTION and appointment of new personnel. The other branches, however, have frequently denied that they have an obligation, when setting policy, to follow the Court's constitutional interpretations.

There is a stronger argument for a duty of enforcing a judicial decision in a particular case. Certainly where the government has brought the case to the courts, an obligation to obey is obvious, as even Jefferson admitted. Where, however, the government is the defendant, the matter is much more complicated, especially when a court commands an official to perform a positive action. Jefferson and ANDREW JACKSON said they had no duty to obey such orders; ABRAHAM LINCOLN acted as if he did not; and FRANKLIN D. ROOSEVELT was prepared to ignore the GOLD CLAUSE CASES (1934) had they been decided against the government.

Typically, Congress and the President acquiesce in judicial interpretations of the Constitution because they agree with the results of judicial decisions, or fear public opinion, or recognize the difficulty of securing a congressional response. Often, too, the Justices reinforce Congress's tendency toward inertia by not pressing a claim to supremacy. Always hovering in the background of any department's assertion of supremacy is the possibility of an appeal to "the people" through the AMENDING PROCESS. Yet even such an appeal, when directed against the Court's jurisprudence, implies an admission of the tactical if not theoretical superiority of the Court as constitutional interpreter.

WALTER F. MURPHY
(1986)

Bibliography

CORWIN, EDWIN S. 1914 *Marbury v. Madison* and the Doctrine of Judicial Review. *Michigan Law Review* 12:538–572.

FISHER, LOUIS 1985 Constitutional Interpretation by Members of Congress. *North Carolina Law Review* 63:701–741.

MIKVA, ABNER J. 1983 How Well Does Congress Support and Defend the Constitution? *North Carolina Law Review* 61: 587–611.

MURPHY, WALTER F.; FLEMING, JAMES E.; and HARRIS, WILLIAM F., II 1986 *American Constitutional Interpretation*. Chaps. 6–7. Mineola, N.Y.: Foundation Press.

# JUDICIAL SYSTEM, FEDERAL

The charter of the federal judicial system is Article III of the Constitution, authorizing the creation of federal tribunals vested with the JUDICIAL POWER OF THE UNITED STATES of the United States, that is, the authority to adjudicate a specifically enumerated set of CASES AND CONTROVERSIES. Article III also specifies the method of appointment of federal judges and lays down rules designed to guard their independence.

The Framers, mindful of the problems that the absence of a national judiciary had caused under the ARTICLES OF CONFEDERATION, easily agreed that there must be a national Supreme Court with power to assure the uniformity and supremacy of federal law. But the Framers were divided over the question whether further provision should be made for national courts. Some favored the creation of a complete system of federal courts. Some thought that this would unnecessarily narrow the preexisting general JURISDICTION of the state courts; they argued that national interests could be sufficiently protected by providing for Supreme Court review of state court decisions involving questions of federal law. This division was settled by a compromise: Article III itself mandates that there shall be "one Supreme Court"; but beyond this the federal judicial power is simply vested in "such inferior Courts as the Congress may from time to time ordain and establish."

Article III specifies that the Supreme Court (and whatever inferior federal courts Congress may establish) are to be courts of a strictly limited jurisdiction: they may adjudicate only nine enumerated categories of cases. Some of these were included because they touch on issues of national interest: most important, cases "arising under" the Constitution and laws of the United States (the FEDERAL QUESTION JURISDICTION); cases of ADMIRALTY AND MARITIME JURISDICTION; and cases to which the United States is a party. Federal courts were also empowered to decide certain controversies implicating the nation's FOREIGN AFFAIRS (for example, disputes affecting ambassadors and other alien parties; cases arising under treaties). The remaining categories authorize the federal courts to engage in interstate umpiring in cases where it was feared that parochial interests would prevail in the state courts. Examples are controversies between states, between a state and a citizen of another state, and between citizens of different states.

Article III's specification that the judicial power consists of adjudicating "cases" or "controversies" itself embodies a fundamental political decision: the national courts were to exercise only a judicial power. Thus the CONSTITUTIONAL CONVENTION OF 1787 repeatedly and explicitly rejected a variety of proposals to allow federal courts or judges to participate as advisers or revisers in the legislative process or to render ADVISORY OPINIONS; their authority was to be limited to "cases of a judiciary nature." On the other hand, the historical evidence establishes the Framers' understanding that the grant of the judicial power was to include the authority, where necessary to the lawful decision of a case properly within a court's jurisdiction, to disregard federal or state statutes found to be unconstitutional. This power of JUDICIAL REVIEW, occasionally challenged as a usurpation because it is not explicitly mentioned in Article III, has been settled since MARBURY V. MADISON (1803).

Besides defining the outer bounds of the federal judicial power, Article III protects federal judges from political pressures by guaranteeing tenure during GOOD BEHAVIOR without reduction in compensation.

Article III is not self-executing; it needs LEGISLATION to bring it to life, most particularly because Congress must determine whether there should be "inferior" federal courts and what should be the scope of their jurisdiction. It is to this task that the First Congress turned in its twentieth enactment: the seminal JUDICIARY ACT OF 1789. Obeying the Constitution's command, the act constituted a Supreme Court, consisting of a CHIEF JUSTICE and five associates. Next, the act, establishing a tradition persisting without interruption to this day, took up the constitutional option to create a system of federal courts of ORIGINAL JURISDICTION. The structure created was curious, but survived for a century. The country was divided into districts (at least one for each state), with a district court manned by a district judge. In addition, the country was divided into circuits (originally three), each with another trial court—a CIRCUIT COURT—manned not by its own judges but by two Supreme Court Justices (sitting "on circuit") and a district judge.

Only a fraction of the constitutional potential for original federal court jurisdiction was exploited by the first Judiciary Act, attesting to the clear contemporaneous understanding of the Constitution that it is for Congress to determine which (if any) of the cases and controversies encompassed by the federal judicial power should be adjudicated in the first instance in a lower federal (rather than a state) court. (The modest original jurisdiction of the Supreme Court, limited to controversies where a state is a party and certain cases involving foreign diplomats, is thought to flow "directly" from the Constitution and thus represents a special case.) The district courts were given the jurisdiction most clearly felt to be a national one: authority to adjudicate admiralty cases. In a controversial decision, the First Congress set a precedent by opening the circuit courts to some cases involving controversies between citizens of different states and involving ALIENS. The federal trial courts were also granted jurisdiction over

most civil suits brought by the United States and over the then negligible federal criminal caseload. Notably, the act did not give the federal trial courts jurisdiction over cases "arising under" federal law, leaving these to be adjudicated in the state courts.

The appellate structure of the new court system was rudimentary. Federal criminal cases were left without direct review (and remained so for a century). The circuit courts were given a limited APPELLATE JURISDICTION over the district courts, and the Supreme Court was authorized to review civil cases decided by the circuit courts involving more than $2,000.

Finally, in its famous section 25, the act—consistent with the Framers' intention to assure the supremacy of federal law—gave the Supreme Court power to review final state court judgments rejecting claims of right or immunity under federal law. (State court judgments upholding claims of right under federal law were not made reviewable until 1914.) Supreme Court review of state judgments involving questions of federal law has been a feature of our judicial FEDERALISM ever since 1789, and has served as a profoundly significant instrument for consolidating and protecting national power.

The institutional structure created by the first Judiciary Act proved to be remarkably stable; major structural change did not come until 1891. The Supreme Court has had a continuous existence since 1789, with changes only in the number of Justices. So also have the district courts (though their number has of course undergone major change). Even the circuit courts—architecturally the weakest feature of the system—survived for more than a century.

As to the jurisdiction of the federal courts, changes were incremental in the pre-CIVIL WAR period, with the state courts acting as the primary enforcers of the still rudimentary corpus of national law. But the Civil War brought a sea change: Congress was no longer prepared to depend on the state judiciaries to enforce rights guaranteed by the new FOURTEENTH AMENDMENT and by the Reconstruction legislation. By the HABEAS CORPUS ACT of 1867 and the various CIVIL RIGHTS ACTS, Congress extended the lower federal courts' jurisdiction to include claims against state officials for invasion of federal constitutional and statutory rights. These extensions were in turn overtaken by the JUDICIARY ACT OF 1875, giving the federal courts a general jurisdiction to adjudicate civil cases arising under federal law, subject only to a minimum amount-in-controversy. These expansions, supplemented by subsequent numerous specific extensions of federal trial jurisdiction over various sorts of actions involving national law, signaled the transformation of the federal courts from narrow forums designed to resolve maritime and certain interstate disputes into catholic tribunals playing a principal role in enforcing the growing body of national rights, privileges, and immunities.

The growth of the federal judicial business in the post-Civil War era placed an ever-growing pressure on the federal judicial system. The Supreme Court was especially burdened by the duties of circuit riding and by an increasing caseload. By 1890 the Court had a backload of 1800 cases; in the same year, 54,194 cases were pending in the lower federal courts. Congress responded to the crisis in the CIRCUIT COURTS OF APPEALS ACT (Evarts Act) of 1891, which fixed the outline of the contemporary federal judicial system. The act established a system of intermediate appellate courts called Circuit Courts of Appeals (not to be confused with the old circuit courts, which were finally abolished in 1911), one for each of (the then) nine circuits and staffed with its own judges. Although a narrow category of district court decisions continued (and continue) to be reviewed directly by the Supreme Court, the Evarts Act created the standard modern practice: appeals went normally from the district courts to the new courts of appeals; the judgments of the latter were in turn reviewable by the Supreme Court.

The second major and seminal innovation of the Evarts Act related to appellate review in the Supreme Court: the act introduced the principle of review at the Court's own discretion (by writ of CERTIORARI) of judgments in the lower courts. This principle was in turn greatly expanded in the so-called Judges' Bill of 1925, which sharply reduced the availability of Supreme Court review as of right of decisions of state and federal courts and substituted for it discretionary review on certiorari—the method of review that, to this day, dominates the Court's docket.

Changes in the structure of the federal judicial system have been few and minor since 1925, although both the statutory jurisdiction and the business of the courts have undergone major transformations. In essence the system remains a three-tier system, with the district courts serving as the trial courts, the courts of appeals as the appellate tribunals of first instance, and the Supreme Court as the court of final review (having also the power to review state court decisions involving issues of federal law). The picture is completed by the existence of special federal tribunals empowered to decide particular categories of cases, and by numerous federal administrative tribunals; the decisions of all of these are typically subject to review in the regular federal courts.

The most important component of the contemporary statutory jurisdiction of the UNITED STATES DISTRICT COURTS encompasses diversity cases involving more than $10,000, criminal prosecutions and civil actions brought by the United States, a large range of actions against the United States and its agencies and officials, federal HABEAS CORPUS, and—most significant—all civil cases in which a plaintiff

sues on a claim arising under the Constitution and laws of the United States. The latter, all-encompassing rubric includes not only cases brought pursuant to the hundreds of federal statutes specifying a right to sue but also the numerous cases where that right is a judge-created ("implied") right to enforce a federal statutory or—(of profound significance)—constitutional provision not itself explicitly containing a right of action. In addition, the statutes allow certain diversity and federal question cases brought in the state courts to be removed for trial to a federal district court. Finally, the district courts exercise a significant jurisdiction to review the work of many federal administrative agencies and to review and supervise the work of the system of bankruptcy courts. The jurisdiction of the district courts is occasionally specified as exclusive of the state courts (for example, admiralty, COPYRIGHT, and PATENT); most of their civil jurisdiction is, however, concurrent with that of the state courts.

The country is, in the mid-1980s, divided into ninety-seven districts (including the DISTRICT OF COLUMBIA and PUERTO RICO). Each state has at least one district; districts have never encompassed more than one state. The district courts are staffed by 576 active district judges—almost three times the 1950 figure (182 new district judgeships were created between 1978 and 1984 alone). The growth in number of judges has, nevertheless, failed to keep pace with the explosive increase in the caseload that has occurred since the 1960s. In 1940 about 70,000 criminal and civil (nonbankruptcy) cases were filed in the federal courts; in 1960, about 80,000; by 1980, the figure was almost 200,000, and in 1984 it exceeded 275,000. (The compound annual rate of increase in the federal district court case load was under one percent between 1934 and 1960; it has been five percent since 1960.) The increase is due primarily and naturally to the vast growth in the total corpus of federal (constitutional, statutory, common, and administrative) law applied in turn to a growing country with an expansive and mobile economy. It has also been fed, however, in the past twenty-five years by congressional and court-initiated changes in substantive and remedial rules that have made the federal courts into powerful litigation-attracting engines for the creation and expansion of rights and the redistribution of entitlements and powers in our society. Thus open-ended constitutional and statutory formulas have been used to fuel aggressive judicial review of the validity of federal and state legislative and administrative action and to create an expansive system of remedies against federal and state government (including affirmative claims on the resources of these governments). JUSTICIABILITY requirements (such as STANDING) that previously narrowed the scope of jurisdiction over public law actions have been significantly eroded. And federal court litigation has become increasingly attractive to plaintiffs as a result of provisions for attorneys' fees, the elimination (or inflation-caused erosion) of amount-in-controversy requirements, and the increasing use of CLASS ACTIONS.

These developments are reflected in the changing content of the federal district courts' workload. There were 6,000 suits against the United States in 1960, and almost 30,000 in 1983. There were only 300 CIVIL RIGHTS cases in 1960, almost 20,000 in 1983; 2,100 prisoner postconviction cases in 1960, more than 30,000 in 1983; 500 social security law cases in 1960, more than 20,000 in 1983. In general, about thirty-five to forty percent of the mid-1980s district court civil caseload involve the United States or its officials as a plaintiff or defendant; sixty to sixty-five percent of the civil caseload is "private" (including, however, litigation against state and local governments and officials). Diversity cases have contributed about twenty percent of the caseload since the 1970s. The number of criminal prosecutions has, historically, fluctuated widely in response to special federal programs (peaking during PROHIBITION); since the mid-1970s the criminal caseload has been quite stable and in the mid-1980s contributed about fifteen to twenty percent of the total.

In response to the explosive caseload Congress has acted to allow the district courts to rely substantially on the work of so-called federal magistrates—officials appointed by district judges with wide powers (subject to review by the district judge) to issue warrants, conduct preliminary hearings, try minor criminal offenses, supervise civil discovery, rule on preliminary motions and prisoner petitions, and (with the consent of the parties) even to hear and enter judgment generally in civil cases. The conferring of additional powers on magistrates has evoked controversy as well as some (so far unsuccessful) constitutional attacks.

The UNITED STATES COURTS OF APPEALS (as they are now called) have jurisdiction to review all final (and some interlocutory) decisions of the district courts. Pursuant to special statutory provisions they also review some cases coming directly from federal administrative agencies (this being an especially significant component of the business of the Court of Appeals for the District of Columbia Circuit). About fifteen percent of their cases are criminal cases, and another fifteen percent are federal and state prisoner postconviction and civil rights cases; only fourteen percent of their docket consists of diversity cases.

The caseload of the courts of appeals has increased dramatically in the last twenty-five years and is, in the mid-1980s, commonly described as constituting a crisis. In the forty years before 1960 that caseload hovered between 1,500 and the peak of 3,700 reached in 1960. In 1970 the figure was almost 11,500, and in 1980 it was over 21,000. From 1980 to 1983 the caseload jumped again to 29,580. From 1960 to 1983 there was an increase of almost 800

percent in the number of appeals from the district courts; the compound annual rate of increase for all cases from 1960 to 1983 was 9.4 percent (compared to 0.5 percent in the preceding twenty-five years).

To manage this workload there exist (in the mid-1980s) twelve courts of appeals assigned to geographical circuits (eleven in the states and one for the District of Columbia) and an additional one (described below) for certain special categories of subject matter. The number of judges in each circuit ranges from six (First) to twenty-eight (Ninth). There are 156 authorized circuit judgeships; in 1960 there were sixty-eight (and as recently as 1978 only ninety-seven). Cases are typically heard by panels of three judges; a few cases of special importance are in turn reheard by the court sitting EN BANC. The increase in number of judges has by no means kept pace with the expansion of the caseload since 1960. As a result, there have been substantial changes in the procedures of these courts: opportunities for oral argument (and even for briefing) have been sharply curtailed and an increasing proportion of cases is disposed of summarily, without opinion. Central staff attorneys (as well as a growing army of conventional law clerks) assist the judges.

From the beginning of our national history Congress has perceived a need to create special tribunals for the adjudication of cases falling outside the traditional areas of federal court jurisdiction. Military tribunals have, from the outset, administered a special body of law through special procedures. The administration of justice in the TERRITORIES in transition toward statehood was perceived as requiring special temporary federal tribunals that would become state courts upon statehood; the District of Columbia and the territories and dependencies of the United States also require a full panoply of special federal courts to administer local law. Beginning in 1855, with the establishment of a rudimentary Court of Claims, Congress has created a series of special tribunals to adjudicate money claims against the United States. And, particularly with the advent in this century of the modern administrative state, Congress has created numerous administrative agencies and tribunals whose business includes adjudication.

Unlike the ordinary federal courts, the institutional hallmark of most of these tribunals has been specialization. Further, the transitory nature of some of these tribunals, the perceived need to allow some of them to function inexpensively with expeditious or informal procedures, and (in the case of the administrative agencies) the equally strongly perceived need to endow them with a range of policymaking functions in addition to adjudicative functions, has typically led Congress to create them not as tribunals constituted under Article III (with lifetime judges performing an exclusively judicial function) but as special LEGISLATIVE COURTS or administrative tribunals. Their judges typically serve temporary terms and are removable for misfeasance without IMPEACHMENT. The constitutional authority for such tribunals has been much discussed and litigated; Congress's authority to constitute them has virtually always been upheld.

The most important specialized tribunals in the current federal judicial system are: the local courts of the District of Columbia, Puerto Rico, and the territories and dependencies; the system of military courts; the system of bankruptcy courts; the TAX COURT and the CLAIMS COURT, adjudicating certain tax refund claims and certain damage actions against the federal government; the Court of International Trade, adjudicating certain customs disputes; and a large and variegated array of administrative tribunals and agencies. The work of all of these tribunals is typically subject to review, through various forms of proceedings, in the regular federal courts.

In addition, in 1982 Congress created a thirteenth court of appeals, the UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT. This is a regular Article III court, whose jurisdiction is not territorial but is defined in terms of subject matter, including appeals from the Claims Court and the Court of International Trade and many patent and trademark cases.

Continuously since 1789 the Supreme Court has been the single institution with nationwide authority to supervise the inferior federal courts and to give voice to a uniform national law. The Court's size has varied from five to ten Justices; since 1869 it has consisted of a Chief Justice and eight associate Justices. The Supreme Court acts *en banc*, not in panels, though individual Justices have the conventional authority to issue stays and take emergency action. The Court acts by majority, but in this century the practice has been to grant a certiorari petition (setting the case for plenary review) if four Justices are in favor.

The caseload explosion in the lower federal courts has imposed major burdens on the Court. The Court disposed of over 4,000 cases in its 1983 term (compared to about 3,300 in 1970, 1,900 in 1960, and 1,200 in 1950). The task is possible because only a small number of cases (usually about 150) are decided on the merits by full opinion after plenary briefing and oral argument. Another 100 to 150 cases are decided on the merits by MEMORANDUM ORDER. The remaining dispositions consist of summary denials of petitions for certiorari (or other writs); there were almost 3,900 of these in 1983–1984. In 1960 there were just under 2,000 new cases docketed in the Court; in 1970, about 3,400; in 1983, about 4,200. The increase in cases docketed means more and more resources devoted to "screening" cases for decision and less to the hearing and disposition of cases on the merits. Thus the time devoted to oral argument has shrunk steadily in this century and now almost never exceeds one hour per case. The length

of briefs is limited; and an ever-growing battery of law CLERKS assists in legal research and in the drafting of opinions.

The content of the Court's work reflects the scope and content of the national law. In the 1983 term the Court's decisions by full opinion included three cases within the original jurisdiction; ninety-six civil cases coming from the lower federal courts (of which forty-six involved the federal government, twenty-eight involved state and local governments, and twenty-two were private cases); sixteen federal habeas corpus cases; and thirty-two cases from the state courts (eighteen civil and fourteen criminal). Diversity cases are rarely reviewed. The Court is, increasingly, a constitutional court; about half of its cases tend to involve a constitutional question as the (or a) principal issue. The United States (as party or AMICUS CURIAE) participates in over half of the cases that the Court decides on the merits.

Although the federal judicial system has grown substantially in its 200 years, the federal courts continue to constitute only a small—though disproportionately powerful—component of the American judicial system. (Fewer than three percent of the country's judges are federal Article III judges; the biggest states have judicial systems larger than the federal system.)

The relations between state and federal courts are multifarious and exceedingly complex. Except where Congress has specified that federal court jurisdiction is exclusive, state courts of general jurisdiction exercise a normal competence to adjudicate cases involving issues of federal law (particularly in that many such issues arise by way of defense in civil and criminal cases arising under state law). Their decisions of these cases are subject to Supreme Court review, usually on certiorari; but that Court's jurisdiction in such a case is limited to the federal question in the case and may not be exercised at all if the judgment rests on a valid and dispositive state-law ground. State court judgments on issues of federal law (unless reversed by the Supreme Court) have normal RES JUDICATA effect.

The federal district courts, in turn, adjudicate many questions of state law, not only in diversity cases but also in cases arising under federal law where state law governs one or more issues. No provision for review by the state courts of the correctness of federal court decisions on issues of state law has ever existed; but in a narrow class of cases federal courts will abstain from exercising an otherwise proper federal jurisdiction in order to allow a state law issue to be determined in the state courts. (See ABSTENTION DOCTRINE.) Under the decision in ERIE RAILROAD V. TOMPKINS (1938), on issues of state law (including issues of state common law) state court precedents are accepted as authoritative by the federal courts.

Special problems are presented by the politically sensitive role of the federal courts in controlling the legality of the actions of state and local governments and their officials. Although the ELEVENTH AMENDMENT bars the federal courts from asserting jurisdiction over actions against a state as such, a wide range of remedies against state and local governments and their officials exist in the federal courts. Federal courts routinely review the constitutional validity of state criminal convictions through the writ of habeas corpus. Since the adoption of the Civil Rights Act of 1871, they have exercised jurisdiction to grant INJUNCTIONS and DAMAGES against state and local officials (and, more recently, against local governmental entities as such) for conduct under color of state law—including conduct by officials asserting official power even where the conduct is prohibited by state law—that infringes on the ever-growing corpus of federal constitutional and statutory rules governing STATE ACTION. Federal courts may enjoin state officials from enforcing unconstitutional state statutes and administrative schemes; moreover, the courts' injunctive remedial powers are frequently exercised to assume broad managerial supervision over state agencies and bureaucracies (for example, schools, mental hospitals, prisons). And the ever-burgeoning array of federal conditions and restrictions that accompany federal economic and social programs available to the states are, as a matter of routine, enforceable in the federal courts.

The political sensitivities aroused by the federal courts' jurisdiction to control the validity of state and local government action has led to some statutory and judge-made restrictions on the exercise of this jurisdiction. For over half a century federal court actions to enjoin the enforcement of state statutes on constitutional grounds had to be litigated before THREE-JUDGE COURTS and were subject to direct review by APPEAL to the Supreme Court. (The institution of the three-judge district court was virtually abolished in 1976.) During the NEW DEAL, statutory restrictions were placed on the jurisdiction of the federal courts to interfere with state tax statutes and public utility rate orders. Statutory and judge-made rules restrict the power of the federal courts to enjoin or interfere with pending state court proceedings; and state prisoners who fail to exhaust state court remedies or fail to comply with state procedural rules do not have access to federal habeas corpus.

The federal judicial system appears to operate on one-hundred-year cycles. The structure created in 1789 became increasingly unwieldy after the Civil War and was—after some twenty years of pressure for reform—finally transformed by the Evarts Act of 1891. That act created a stable system which has, in turn, come under increasing pressure from the caseload explosion that began in the 1960s. Relief could come in the form of diminutions in

the district courts' original jurisdiction (such as a long-discussed abolition of or reduction in the diversity jurisdiction); but the need for architectural revision has also become increasingly clear in the 1970s and 1980s.

Structural problems center on the appellate tiers. Further substantial increases in the number of circuit judges is an uncertain remedy. Some circuits are already unwieldy and are finding it increasingly difficult to maintain stability and uniformity in the intracircuit law. Increasing the number of circuits would increase intercircuit instability and disuniformity and place further pressure on the finite appellate capacity of our "one Supreme Court"—the latter constituting the obvious structural bottleneck in the system.

More generally, a judicial system administering an enormous and dynamic corpus of national law and adjudicating a rising caseload (approaching 300,000 cases a year) cannot operate forever on an appellate capacity that is limited to some 150–200 judicial opinions with nationwide authority. There is rising concern, too, about the quality of federal justice as the growing caseload leads to an increasing bureaucratization of the federal judicial process, with the judges reduced to an oversight capacity in managing a growing array of magistrates, central staff, and law clerks.

Since the 1970s, two methods of increasing the system's capacity to provide authoritative and uniform judicial pronouncements on issues of national law have been discussed. One consists of greater subject-matter specialization at the appellate level, with special courts of appeals having nationwide authority to deal with specified subjects of federal litigation (for instance, tax cases, administrative appeals); such courts would remove pressure from the regional courts of appeals and the Supreme Court. The alternative (or additional) possibility is to create an additional appellate "tier": a national court of appeals with power to render decisions of nationwide authority, receiving its business by assignment from the Supreme Court or by transfer from the regional courts of appeals. In addition, if the number of certiorari petitions continues to mount, the Supreme Court will eventually have to make some adjustments in its screening procedures (perhaps dealing with these petitions in panels).

Behind these structural problems lie more fundamental questions about the enormous power that the federal courts have come to exercise over the political, economic, and social policies of the nation. Throughout our history intense controversy has surrounded the question whether (and to what extent) a small corps of appointed life-tenured officials should exercise wide-ranging powers to supervise and invalidate the actions of the political branches of federal, state, and local governments. From time to time these debates have threatened to affect the independence of the federal judicial system. Thus, in the 1930s, facing wholesale invalidations of the New Deal program by a "conservative" Supreme Court, President FRANKLIN D. ROOSEVELT proposed to "pack" the Court with additional judges; his plan was widely perceived to be contrary to the spirit of the Constitution and was defeated in Congress. (Shortly thereafter a Court with a new membership and a new judicial philosophy in effect accomplished Roosevelt's purposes.)

In the second half of the twentieth century retaliatory proposals have mostly consisted of attempts to strip a "liberal" Supreme Court of appellate jurisdiction in certain categories of constitutional litigation (for example, REAPPORTIONMENT or abortion), leaving the state courts to be the final arbiters of federal law in these areas. Intense controversy surrounds the question whether Congress has constitutional power to divest the Supreme Court of appellate jurisdiction over specific categories of constitutional litigation. (The one explicit Supreme Court pronouncement on the question, the celebrated EX PARTE MCCARDLE [1869], in sweeping language upheld this power pursuant to the explicit provision of Article III providing that the Court's appellate jurisdiction is subject to "such Exceptions" and "such Regulations" as "the Congress shall make.") Even if Congress has jurisdiction-stripping power, however, its exercise—much like the exercise of the power to "pack" the Court—would be widely perceived as anticonstitutional in spirit. In fact, no such legislation has come near to achieving acceptance, attesting to the vast reservoir of ideological and political strength that the ideal of an independent federal judiciary continues to possess.

The more important and authentic debate that continues to rage as the federal court system enters its third century relates to the proper role of an independent federal judiciary in a nation that is democratic but also committed to the ideal of fidelity to law. The federal courts have come to exercise a power over the political, economic, and social life of this nation that no other independent judicial system in the history of mankind has possessed. Whether that power is wholly benign—or whether it should and can be reduced—is one of the great questions to which the twenty-first century will have to attend.

PAUL M. BATOR
(1986)

Bibliography

AMERICAN LAW INSTITUTE 1969 Study of the Division of Jurisdiction Between State and Federal Courts. Washington D.C.: American Law Institute.

BATOR, PAUL M. et al. 1973 *The Federal Courts and the Federal*

*System*, 2nd ed., with 1981 Supplement. Mineola, N.Y.: Foundation Press.

CARRINGTON, PAUL D.; MEADOR, DANIEL J.; and ROSENBERG, MAURICE 1976 *Justice on Appeal.* St. Paul, Minn.: West Publishing Co.

DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS [annually] *Annual Reports.* Washington, D.C.: United States Government Printing Office.

FRANKFURTER, FELIX and LANDIS, JAMES M. 1928 *The Business of the Supreme Court: A Study in the Federal Judicial System.* New York: Macmillan.

FRIENDLY, HENRY J. 1973 *Federal Jurisdiction: A General View.* New York: Columbia University Press.

POSNER, RICHARD A. 1985 *The Federal Courts: Crisis and Reform.* Cambridge, Mass.: Harvard University Press.

WRIGHT, CHARLES ALAN 1983 *The Law of Federal Courts.* St. Paul, Minn.: West Publishing Co.

# JUDICIARY ACT OF 1789

1 Stat. 73 (1789)

Article III of the Constitution constitutes an authorizing charter for a system of national courts to exercise the JUDICIAL POWER OF THE UNITED STATES, but is not self-executing, needing legislation to bring it to life. Accordingly, the First Congress, in its twentieth enactment, turned to the creation of a JUDICIAL SYSTEM for the new nation. Its work—the First Judiciary Act, approved September 24, 1789—has ever since been celebrated as "a great law." The statute, obeying a constitutional command, constituted a SUPREME COURT. It created the office of Attorney General of the United States. It devised a judicial organization that was destined to survive for a century. And, by providing for Supreme Court review of state court judgments involving issues of federal law, it created a profoundly significant instrument for consolidating and protecting national power.

But it is the decision of the First Congress to take up the constitutional option to establish a system of federal courts "inferior" to the Supreme Court that has been characterized as the act's "transcendent achievement." The Constitution does not require the creation of inferior courts. Nevertheless, the decision to do so came swiftly, actuated by the unanimously shared view that an effective maritime commerce—trading lifeblood for the thirteen states—needed a dependable nationwide body of maritime law, and by a consensus that the most reliable method to assure its development would be to entrust it to a distinctive body of national courts. (Far more controversy surrounded the view, also finding expression in the act, that national courts were needed to assure out-of-state litigants protection against parochial prejudices.)

The act thus created a system of federal courts of original (trial) jurisdiction, establishing a tradition that has survived without interruption to this day. On the other hand, the act gave these courts the authority to adjudicate only a small fraction of the CASES AND CONTROVERSIES encompassed by the federal judicial power, attesting to the clear contemporaneous understanding of the Constitution that it is for Congress to determine which, if any, of the cases, within the federal judicial power should be adjudicated in the first instance in a federal tribunal.

The first section of the act provided for a Supreme Court, consisting of a Chief Justice and five associates. Below this, the act created a curious bifurcated system. The country was divided into districts generally coterminous with state boundaries (Massachusetts and Virginia each had two districts), each with a district court manned by a district judge. In addition, the act divided the country into three circuits, in each of which another trial court, called a CIRCUIT COURT—manned not by its own judges but by two Supreme Court Justices and a district judge—was to sit twice a year in each district within the circuit. These circuit courts, in addition, received a limited APPELLATE JURISDICTION to review district court decisions. The system of circuit courts set up in 1789, with its requirement that Supreme Court Justices sit on circuit as trial judges, persisted for more than a century; it proved to be the weakest architectural feature of the first Judiciary Act.

The act exploited only a fraction of the constitutional potential for original federal court jurisdiction. Significantly, the constitutional grant of federal judicial power over cases arising under the Constitution and laws of the United States (FEDERAL QUESTION JURISDICTION) was largely unused and remained so until 1875. (A notable exception was section 14, the All Writs Act, which, among other matters, authorized Supreme Court Justices and district judges to "grant writs of HABEAS CORPUS" to inquire into the legality of federal detentions.) The act made important use, however, of the power to locate litigation affecting out-of-staters in the new national courts. Thus, the circuit courts were given CONCURRENT JURISDICTION with the state courts over civil cases involving more than $500 "between a citizen of the State where the suit is brought, and a citizen of another State," as well as over civil cases involving more than $500 in which an ALIEN was a party.

The most important grant of jurisdiction to the new district courts gave them "exclusive original cognizance of all civil causes of ADMIRALTY AND MARITIME JURISDICTION," subject to a savings clause preserving COMMON LAW remedies.

The litigation interests of the national government were given narrow recognition in the First Judiciary Act. The circuit courts were given power to adjudicate civil cases involving more than $500 in which the United States were "plaintiffs or petitioners" (suits against the United

States were not contemplated); the district courts had power to adjudicate suits at common law involving $100 brought by the United States. The act gave the district courts exclusive original cognizance over certain seizures, penalties, and forfeitures. And, finally, Congress provided for the then tiny criminal business of the national government by giving the circuit courts "exclusive cognizance of all crimes and offenses cognizable under the authority of the United States," subject to a concurrent jurisdiction in the district courts to try certain minor criminal offenses.

The circuit courts were given the authority to review final decisions of the district courts in civil and admiralty cases involving more than $50 or $300, respectively. In addition, the first Judiciary Act originated the device, in continuous use ever since, of providing for pretrial removal of certain cases from state to federal court (for example, removal in civil cases to a circuit court by alien defendants and by out-of-staters sued in the plaintiff's home-state court).

The framers of the first Judiciary Act, notwithstanding the later established DOCTRINE that the ORIGINAL JURISDICTION of the Supreme Court does not depend on legislative grant, specified in section 13 what this original jurisdiction was to be; the listing nearly (but not completely) exhausted the constitutional grant, encompassing controversies between states, between a state and a citizen of another state, and suits involving foreign diplomats. Setting another lasting precedent, the act designated only a portion of the original jurisdiction of the Supreme Court as exclusive jurisdiction. In his opinion for the Court in MARBURY V. MADISON (1803), Chief Justice JOHN MARSHALL read section B to give the Supreme Court original jurisdiction over certain cases that Article III had not expressly placed within the Court's original jurisdiction. Accordingly, the Court held this narrow provision of the 1789 act unconstitutional.

Not all lower federal court decisions were made reviewable. For instance, no provision at all was made for review of federal criminal cases (which remained, in the large, unreviewable for a century). The act authorized the Supreme Court to review final judgments in civil cases decided by the circuit courts if the matter in dispute exceeded $2,000.

In its celebrated section 25, Congress asserted the constitutional authority—sustained in MARTIN V. HUNTER'S LESSEE (1816) and COHENS V. VIRGINIA (1821)—to give the Supreme Court authority to review certain final judgments or decisions in the "highest" state court in which a decision "could be had" (language that survives to this day). Significantly, this authority did not encompass all cases involving issues of federal law: review was limited to cases where a state court had *rejected* a claim of right or immunity under federal law. (This limitation eventually proved to create an unacceptable institutional gap and was eliminated by the Judiciary Act of 1914.) A seminal feature of section 25 was its specification that Supreme Court review is limited to the question of federal law in the case.

The first Judiciary Act originated a fundamental structural feature of our legal topography in its section 34, called the Rules of Decision Act, providing (in language that still survives) that, except where federal law otherwise requires, the laws of the several states shall be regarded as "rules of decision" in trials at common law in the federal courts "in cases where they apply." Interpretations of this delphic provision—including the reversal from SWIFT V. TYSON (1842) to ERIE RAILROAD V. TOMPKINS (1938)—have had a significant impact on our judicial FEDERALISM. In addition, the act contained elaborate boilerplate with respect to many matters no longer of current interest, (for example, the exact days for court sessions, quorums, clerks, forms of oaths, bail).

The first Judiciary Act, passed by a Congress many of whose members had participated in the framing of the Constitution, has had a lasting effect, not only on the shape of the federal judicial system but on our thought about the constitutional and structural premises on which that system is based. Created by great statesmen, it set on foot an enterprise that 200 years later still bears its imprint.

PAUL M. BATOR
(1986)

Bibliography

FRANKFURTER, FELIX and LANDIS, JAMES M. 1928 *The Business of the Supreme Court: A Study of the Federal Judicial System.* New York: Macmillan.

GOEBEL, JULIUS 1971 *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801.* Pages 457–508. New York: Macmillan.

WARREN, CHARLES 1923 New Light on the History of the Federal Judiciary Act of 1789. *Harvard Law Review* 37:49–132.

## JUDICIARY ACT OF 1801
2 Stat. 89 (1801)

This maligned congressional enactment was the final achievement of the Federalists and one of their most constructive, but the Federalists so enmeshed it in partisanship that the first important action of THOMAS JEFFERSON'S administration was the repeal of the act. It created resident circuit judgeships and enormously expanded federal JURISDICTION. The JUDICIARY ACT OF 1789 had created circuit courts consisting of district court judges and Supreme Court Justices. From the outset the Justices complained about the arduous duty of riding circuit and the necessity

of deciding in their appellate capacity the same cases they had decided on circuit. Congress had done nothing to separate the Justices from the circuit courts, despite presidential recommendations. The Republican victories in 1800 spurred judicial reform that was "worth an election to the [Federalist] party," said a Federalist leader. A lame-duck Congress belatedly passed a much needed bill that created six circuit courts staffed by sixteen circuit judges. More important, the bill extended the JURISDICTION OF THE FEDERAL COURTS to include virtually the entire JUDICIAL POWER of the United States authorized by Article III, including a general grant of FEDERAL QUESTION JURISDICTION—something which Congress did not grant again until 1875. But the bill also reduced the size of the Supreme Court to five when the next vacancy occurred, to prevent Jefferson from making an appointment. Also, President JOHN ADAMS at the last hour appointed sixteen Federalists to the new circuit judgeships. Enraged Republicans determined to pass the JUDICIARY ACTS OF 1802.

LEONARD W. LEVY
(1986)

Bibliography

TURNER, KATHRYN 1965 Federalist Policy and the Judiciary Act of 1801. *William and Mary Quarterly* 22:3–32.

## JUDICIARY ACT OF 1837

See: Circuit Courts

## JUDICIARY ACT OF 1869

See: Circuit Courts

## JUDICIARY ACT OF 1875
18 Stat. 470 (1875)

For three-quarters of a century after the abortive JUDICIARY ACT OF 1801, federal courts lacked any general FEDERAL QUESTION JURISDICTION, that is, JURISDICTION over cases arising under federal law. The 1875 act, adopted on the same day as the CIVIL RIGHTS ACT OF 1875, was one of Congress's last pieces of nationalizing legislation during the era of RECONSTRUCTION; its primary purpose was to provide a federal judicial forum for the assertion of newly created federal rights. Using the language of Article III of the Constitution, Congress gave the CIRCUIT COURTS jurisdiction over cases "arising under the Constitution or laws of the United States" or under national treaties, provided that the matter in dispute exceeded $500. The act also authorized the REMOVAL OF CASES from state to federal courts by either plaintiffs or defendants, when those cases could have been brought originally in the federal courts.

In part, the 1875 Judiciary Act's sponsors justified this widening of federal jurisdiction as a response to a commerce that had become national in scope. In particular, they sought to relieve railroads from the need to contend with unfriendly state courts in cases involving foreclosure, receivership, taxation, and even injuries to person and property—an objective which Populists came to criticize. In the *Pacific Railroad Removal Cases* (1885) the Supreme Court read the new jurisdictional grant so expansively that in 1887 Congress increased the jurisdictional amount, eliminated removal by plaintiffs, and insulated from APPEAL federal court orders remanding removed cases to the state courts.

The chief long-term significance of the 1875 act was its establishment of a generalized federal question jurisdiction—the jurisdiction that is seen today as the federal courts' indispensable function. In FELIX FRANKFURTER's words, in 1875 the lower federal courts "ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."

KENNETH L. KARST
(1986)

Bibliography

CHADBOURN, JAMES H. and LEVIN, LEO 1942 Original Jurisdiction of Federal Questions. *University of Pennsylvania Law Review* 90:639–674.

FRANKFURTER, FELIX and LANDIS, JAMES M. 1928 *The Business of the Supreme Court.* Pages 64–69. New York: Macmillan.

## JUDICIARY ACT OF 1891

See: Circuit Courts of Appeals Act

## JUDICIARY ACT OF 1911

See: Judicial Code

## JUDICIARY ACT OF 1925
43 Stat. 936 (1925)

The Supreme Court's desire to reduce the burden of postwar litigation reaching its docket, combined with Chief Justice WILLIAM HOWARD TAFT's aggressive program of reform, resulted in the Judiciary Act of 1925. As litigation increased, efforts to expand the Court's discretionary con-

trol over its JURISDICTION—begun in the CIRCUIT COURTS OF APPEALS ACT of 1891—gained favor. Taft took the administrative functions of the Chief Justiceship seriously and sponsored a three-man committee of justices charged with formulating a detailed plan to regulate the Court's workload. The eventual proposal, framed mainly by Justice WILLIS VAN DEVANTER, entailed what Professor FELIX FRANKFURTER would later describe as a "drastic transfer of existing Supreme Court business to the circuit courts of appeal." This draft bill was submitted to Congress in 1922. The patchwork appearance of existing national legislation regulating the federal judiciary had prompted confusion and delay, and Taft, testifying in favor of the bill, applauded its "revision and restatement—a bringing together in a harmonious whole" of the earlier "wilderness of statutes." After three years of inaction, Congress finally passed the "Judges' Bill" in early 1925.

The new act reorganized the Court's APPELLATE JURISDICTION, allowing it to center its energies on constitutionally or nationally significant issues. Henceforth, cases would reach the Court from three avenues. Some district court decisions would go directly to the Supreme Court, but most would be shunted to the circuit courts of appeals. Among those exceptional cases that could be directly appealed because of their national importance were those arising under INTERSTATE COMMERCE or antitrust statutes, suits to enjoin enforcement of either ICC orders or state laws, and appeals by the federal government in criminal cases. Review of circuit courts of appeals' decisions was made largely discretionary; unless the Court chose to examine such a case by means of a WRIT OF CERTIORARI, most circuit decisions would be final. This provision thus superseded some of the reforms enacted in the 1891 legislation. Only two kinds of cases might be appealed directly from state courts: where a state law had been sustained against federal constitutional attack or where the state court had voided a federal law or treaty. Although the act left some problems unsolved, it successfully abated the flood of cases inundating the Court.

DAVID GORDON
(1986)

Bibliography

FRANKFURTER, FELIX and LANDIS, JAMES M. 1927 *The Business of the Supreme Court.* New York: Macmillan.

## JUDICIARY ACTS OF 1802
2 Stat. 132, 2 Stat. 156 (1802)

Gloating Federalists declared that the JUDICIARY ACT OF 1801 was as valuable for their party as an election victory. The appointment of only Federalists to the new circuit judgeships, the attempt by a new circuit court to get a Jeffersonian editor indicted for SEDITIOUS LIBEL, and the issuance in 1801 of the show cause order in MARBURY V. MADISON (1803) convinced President THOMAS JEFFERSON's administration that the Federalists meant to continue party warfare against them from the bench. Republicans also opposed the expanded JURISDICTION OF THE FEDERAL COURTS; they wanted litigants to remain primarily dependent on state courts and the United States as dependent as possible on the states for the execution of its laws. The upshot was the repeal of even the constructive reforms of 1801.

Federalists in Congress argued that repeal would subvert the independence of the judiciary and was unconstitutional because the circuit judges had tenure during good behavior. The Republicans answered that the Constitution empowered Congress to establish and therefore to abolish inferior federal courts. The debate on the repealer triggered a prolonged congressional discussion on national JUDICIAL REVIEW. Federalists supported the power of the Supreme Court to hold acts of Congress unconstitutional, while Republicans assaulted judicial review as an undemocratic judicial usurpation, a violation of SEPARATION OF POWERS, and a subversion of LIMITED GOVERNMENT. The only proper check on the popularity elected and politically responsible branches of the national government, Republicans argued, was the outcome of elections. Chief Justice JOHN MARSHALL's opinion in *Marbury* was the Federalist reply from the bench.

Apprehensive about the possibility that the Supreme Court might declare the repealer unconstitutional, Congress passed another judiciary act which abolished the August term of the Court. By fixing one term a year, to be held in February, Congress managed to postpone the next meeting of the Court for fourteen months, allowing a cooling-off period, during which time the Justices could resume their circuit duties. They did, and in STUART V. LAIRD (1803) they sustained the power of Congress to assign them to circuit work. The Judiciary Act of 1802 also increased the number of circuits from three to six. Until the Reconstruction period, the federal judicial system remained basically unchanged after 1802.

LEONARD W. LEVY
(1986)

Bibliography

ELLIS, RICHARD E. 1971 *The Jeffersonian Crisis: Courts and Politics in the Young Republic.* Pages 4–60. New York: Oxford University Press.

## JUDICIARY REFORM ACT
50 Stat. 751 (1937)

This act, a remnant of President FRANKLIN D. ROOSEVELT's court-packing proposal, provided that "whenever the con-

stitutionality of any Act of Congress affecting the public interest is drawn in question in any court of the United States . . . the court shall permit the United States to intervene and become a party." The act further provided for direct APPEAL to the Supreme Court when a lower court held a congressional act unconstitutional in a case to which the United States or a federal officer was a party. Moreover, such appeals were to be expedited on the Court's calendar.

The act also forbade the issuance by any district court of an INJUNCTION suspending enforcement of an act of Congress upon constitutional grounds, unless approved by a specifically convened THREE-JUDGE COURT. (A single judge might grant temporary injunctive relief to prevent "irreparable loss" to a petitioner.) The three-judge court's grant or denial of an injunction was directly appealable to the Supreme Court. The remainder of the act amended the JUDICIAL CODE to provide a replacement when a district court judge was unable to perform his work. The constitutionality of the act was never challenged; although the three-judge court requirement was largely repealed in 1976, other sections are still good law.

DAVID GORDON
(1986)

## JULIAN, GEORGE
(1817–1899)

An Indiana abolitionist, lawyer, and congressman (1849–1851; 1861–1871), George Washington Julian was an early advocate of emancipation under the government's WAR POWERS. In 1862 he guided the HOMESTEAD ACT through Congress. Julian advocated confiscation of rebel lands and black suffrage. In 1867 he was a member of the committee of seven which drew up ARTICLES OF IMPEACHMENT against President ANDREW JOHNSON. In 1868 he introduced a constitutional amendment that would have granted women's suffrage. After 1871 Julian became a liberal Republican and then a radical Democrat. He published much, including his political memoirs (1884) and a biography of his father-in-law, Congressman Joshua R. Giddings (1892).

PAUL FINKELMAN
(1986)

Bibliography

JULIAN, GEORGE W. 1884 *Political Reflections, 1840–1872*. Chicago: Jansen, McClurg & Co.

## *JULLIARD v. GREENMAN*

See: Legal Tender Cases

## *JUREK v. TEXAS*

See: Capital Punishment Cases of 1976

## JURISDICTION

Jurisdiction is a magical and protean term. In American law it refers to the power of legislatures, the competence of courts to deal with certain types of cases, the allocation of cases between state and federal courts, the power of both state and federal courts over defendants who have only peripheral attachments to the locale of the court, and the territory in which a unit of government exercises its power. Not surprisingly the word shifts its meanings as it moves among these quite different tasks.

The term's confusing spread of meanings has its roots in the English medieval experience. What modern observers would think of as political power accompanied the grant of property; the landlord was lord of more than land; he exercised powers of justice over the people who tilled that soil. Yet that jurisdiction also had limits: above it stood the powers of the monarch, who at least in theory had the power and responsibility to see that the lords rendered justice. Thus the word emerged from the Middle Ages carrying several meanings: the power to make law, the power to adjudicate cases, and, loosely, the territory within which that power was exercised.

We use all three senses today. We speak, for example, of legislative jurisdiction, meaning legislative power, generally allocated by state and federal constitutions. Thus the earliest opinion of the Supreme Court applying the limits of SUBSTANTIVE DUE PROCESS to state economic regulation, in *Allegeyer v. Louisiana* (1897), said that the state had exceeded its territorial jurisdiction. Territorial considerations aside, any decision holding a law unconstitutional can be described as a holding that the legislative body has transgressed the limits of its jurisdiction—its lawful authority. The courts have employed this rhetoric especially in defining a state's jurisdiction to tax.

We use the extended, territorial sense of the term when we write of a fugitive's having fled a jurisdiction, or when lawyers ask about which jurisdiction's law applies. Article IV, section 3, of the Constitution uses the term in this sense when it prohibits creation of a new state within the jurisdiction of an existing state without the latter's consent.

The most distinctively legal, though not exclusively constitutional, sense of the term refers to the authority of a court to decide a matter or to issue an order—its subject matter jurisdiction. Some state courts are courts of so-called general jurisdiction, competent to decide all cases within the ordinary bounds of the law. Other state courts are courts of limited jurisdiction, empowered only to decide specified types of cases or to grant only specified

forms of relief. A municipal court, for example, may have jurisdiction to award damages only up to a limited dollar amount and may have no jurisdiction at all to grant an INJUNCTION.

In constitutional law jurisdiction has two special meanings, both involving civil cases. One flows from the limitation of the subject matter jurisdiction of the federal constitutional courts in Article III of the Constitution; the other grows from the due process clauses of the Fifth and FOURTEENTH AMENDMENTS.

Fundamental to the constitutional scheme is the proposition that each branch of the federal government must share powers and observe limits not only in regard to the other two branches of government but also in regard to the states. Article III and many statutes thus limit the subject matter jurisdiction of the federal courts to certain types of cases; that article, for example, ordinarily would prohibit a federal court from deciding a case between two citizens of the same state in which no question of federal or maritime law was involved. Because the limitations of Article III describe a fundamental division of authority between state and federal governments, the federal courts have been scrupulous, some would say zealous, not to overstep those subject matter boundaries. Thus even though no party to a lawsuit evinces the least concern about it, a federal court has an independent duty to investigate the basis for its subject matter jurisdiction and to dismiss the suit if jurisdiction is lacking. Such dismissals, like the jurisdictional rules that require them, protect the interests of the state court systems, to which the litigation must go if the federal courts cannot hear it.

The Constitution also limits the powers of the federal government and the states over individual citizens. State courts, for example, must observe a limitation that flows from the Fourteenth Amendment's due process clause. Since *Pennoyer v. Neff* (1878) the Supreme Court has insisted that, regardless of the kind of case involved, the defendant have some connection with the state in which the suit occurs. Over the past century the Court has remolded the basis and expanded the range of personal jurisdiction—changes that, some have suggested, have come in response to an increasingly mobile population and an economy increasingly national in scope. The Court has sometimes based the requirement of personal jurisdiction on the state's lack of power over persons not within its borders—thus harking back to the territorial sense of the term; more recently it has tended to speak less of territorial power and more of unfair inconvenience to a defendant forced to litigate in a distant forum. Whether it has grounded the requirements in FEDERALISM or in fairness to the defendant, however, the Court has insisted that such connections exist in order for a judgment of a court to be entitled to FULL FAITH AND CREDIT.

Whether similar constitutional restrictions on personal jurisdiction apply to federal courts is a more obscure matter. Because the federal government is sovereign throughout the United States, notions of geographical territoriality play no role, and only the inconvenience to the defendant would be at issue in such a case. In a number of instances involving the national economy, such as federal securities law cases, Congress has provided for nationwide personal jurisdiction in the federal courts, and such grants of power have been upheld, presumably because any harm to the defendant is outweighed by the need for a nationally available system of courts supervising the national economy. The outer limits of congressional power have not been tested, for in most cases either venue statutes (controlling the districts in which civil suits may be brought) or the FEDERAL RULES OF CIVIL PROCEDURE limit federal courts to essentially the same reach of personal jurisdiction that a state court would have.

Unlike subject matter jurisdiction, personal jurisdiction can be waived by those entitled to its protection: the Supreme Court has repeatedly held that either by prior agreement or by the simple failure to raise the issue at an early stage of litigation defendants may lose their opportunity to challenge the court's power to decide the case. COLLATERAL ATTACK on a judgment on the ground that the court lacked personal jurisdiction is available only to a defendant who did not appear in the original suit.

Article III's limits on the subject matter jurisdiction of federal courts allocate cases as between state and federal courts; the due process limitations in personal jurisdiction allocate cases between a court, either state or federal, in a particular place and courts in other places more convenient to the defendant. Though both doctrines in their more technical aspects are quintessential lawyer's law, their roots lie in the Constitution's allocations of governmental power and in a tradition of individualism. The same origins underlie the idea of jurisdiction as the limitations on the power of various branches of government. Ultimately all the uses of "jurisdiction" derive from the medieval Western tradition that distinguished between power and justice, making the ability to dispense the latter a function of allocations of the former.

STEPHEN C. YEAZELL
(1986)

Bibliography

BATOR, PAUL M. et al. 1973 *Hart and Wechsler's The Federal Courts and the Federal System.* Mineoloa, N.Y.: Foundation Press.

HAZARD, GEOFFREY C. 1965 A General Theory of State-Court Jurisdiction. *Supreme Court Review* 1965:241–289.

MECHREN, ARTHUR T. VON, and TRAUTMAN, DONALD 1966 Juris-

diction to Adjudicate: A Suggested Analysis. *Harvard Law Review* 79:1121–1179.

## JURISDICTION, FEDERAL

As ALEXANDER HAMILTON stressed in THE FEDERALIST #78, the power and obligation of federal judges to measure the conduct of public officials and bodies against the precepts of the Constitution mean that federal courts must sometimes act to thwart these officials and bodies. On occasion this is, at least in some quarters, a very unpopular enterprise. From time to time, Congress has entertained the possibility of responding to controversial decisions by the Supreme Court or the lower federal courts by strategically removing the JURISDICTION of part or all of the federal judiciary over the controverted matters.

Proposals of this sort raise the important and sensitive question of whether the lower federal courts and, possibly, even the Supreme Court, ultimately act at the sufferance of Congress or whether the Constitution secures the existence of an independent federal judicial voice. Article III of the Constitution, which provides for the establishment of the federal judiciary, invites rather than stills speculation on this fundamental question of institutional structure. The first sentence of Article III provides: "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Following this is the provision without which Hamilton felt the Constitution would have been "inexcusably defective": "The Judges, both of the supreme and inferior Courts, shall hold their Offices during GOOD BEHAVIOR, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."

Section 2 of Article III begins with a menu of matters over which the judicial power "shall extend." Nine categories are delineated. The first three are styled as classes of "cases," the most important being cases "arising under this Constitution, the Laws of the United States, and treaties." The remaining six are styled as classes o "controversies," the most prominent being controversies "between Citizens of different States." Section 2 then specifies two narrow classes of cases over which the Supreme Court has ORIGINAL JURISDICTION and concludes with the following stipulation: "In all the other Cases before mentioned, the supreme Court shall have APPELLATE JURISDICTION, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Remarkably, there is no well-settled understanding of the scope of Congress's authority under these provisions to restrict federal jurisdiction. Cooler and more responsible heads have usually prevailed in Congress when "court-stripping" proposals have been floated, and the Supreme Court has been carefully diplomatic in sounding deference to Congress when it can afford to do so; as a result, there is little authority on the question. Most of the Court's pertinent statements have been by way of broad OBITER DICTUM and have been Janus-faced. Broad statements welcoming Congress's plenary license to sculpt federal jurisdiction have been balanced by the Court's insistence that the very fabric of national union depends on the existence of final federal judicial authority over legal affairs.

The two most prominent cases in this area both grew out of the CIVIL WAR. In EX PARTE MCCARDLE (1869) the Court faced jurisdiction-limiting legislation plainly intended to protect Reconstruction LEGISLATION from constitutional invalidation. Although the legislation gestured at pushing the Court aside, it only touched one statutory basis of the Court's appellate jurisdiction, leaving—as the Court itself pointedly observed—another statutory route to the same end. With an angry and somewhat dangerous Congress in the wings and with little at stake for the moment, the Court gave broad deference to Congress's power to reduce its appellate jurisdiction. Three years later, in an attempt to prevent the presidential pardon of supporters of the Confederacy from entitling them to compensation for property lost during the hostilities, Congress denied the federal courts jurisdiction over property claims that depended on presidential pardon. In *United States v. Klein* (1872) the Court promptly struck down this law as a means to the unconstitutional end of interfering with the President's authority to grant pardons and as an unconstitutional attempt to dictate how federal courts otherwise seized with jurisdiction should decide cases. Most commentators are skeptical about the applicability of either the generous tone of *McCardle* or the special circumstances of *Klein* to modern court-stripping issues.

A few propositions are reasonably clear. In one sense, the lower federal courts do indeed exist at the sufferance of Congress. Although there is some scholarly dissent, most commentators agree that Congress was not obliged to create the lower federal courts at all and could disband them today. Most also agree that when Congress does establish lower courts it need not give them all or any particular part of the jurisdiction enumerated in Article III. Events at the CONSTITUTIONAL CONVENTION OF 1787 support the conclusion that the Framers intended to resolve their sharp division over what form, if any, the lower federal judiciary should assume by leaving the matter for congressional resolution, and the first sentence of Article III plainly executes this compromise. Although it is logically possible to hold that Congress must give all of the federal judicial power to any lower federal court it creates, such

an inflexible view seems arbitrary and at odds with the idea of remanding the shape of the lower federal courts to the judgment of Congress in the first place. Congress has never given all of Article III jurisdiction to the lower federal courts, and the Supreme Court, from *Sheldon v. Sill* (1850) forward, has firmly assumed that Congress can order à la carte from the Article III menu.

*Sheldon v. Sill* can be read to say that Congress can choose any package of lower-court jurisdiction it likes, as long as the bounds of Article III jurisdiction are not exceeded. But this is surely not the case. Were Congress to parse access to civil plaintiffs on the ground of their religion or political affiliation, for example, the FIRST AMENDMENT would surely be violated. A diversity case with no pertinent wrinkles, *Sheldon* reliably stands only as a negation of the binary view of congressional authority over the lower federal courts.

With respect to the Supreme Court, once it is observed that the first sentence of Article III clearly contemplates the existence of a Supreme Court with some modicum of jurisdiction, the textual focus shifts to the last sentence of Article III: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Most commentators agree that Congress's authority under this provision includes the power to remove some Article III CASES or CONTROVERSIES from the appellate jurisdiction of the Supreme Court. Congress has always kept some classes of cases from the Supreme Court, and the Court consistently has endorsed this reading of the exceptions language. Substantial housekeeping concerns support this institutional consensus. Some Article III matters have seemed unnecessary or even inappropriate candidates for the Court's appellate jurisdiction, such as controversies between citizens of different states that have been fully adjudicated in the courts of one of the states.

But beyond the propositions that the Supreme Court must have some jurisdiction and that Congress can take some cases out of the Court's appellate jurisdiction, little is clear, and much remains open to scholarly reflection. The orthodox view among legal scholars has been very generous to Congress. As long as Congress leaves the jurisdiction of state courts intact, avoids patent constitutional problems such as selecting plaintiffs on the basis of their religious beliefs, and avoids untoward interference with the federal courts that do have jurisdiction, the orthodox view licenses Congress to tailor federal jurisdiction, including that of the Supreme Court, as it pleases. On this view, for example, Congress could respond to decisions by the Supreme Court that extended the protections of the First Amendment to the burning of the American flag by depriving the entire federal judiciary of jurisdiction over FLAG DESECRATION cases. Most, if not all, of the scholars who hold this view—their ranks have included Paul Bator, Charles Black, Gerald Gunther, Michael Perry, and Herbert Wechsler—would deplore such an event, and they would urge Congress not to trifle with the federal judiciary in this fashion. But the orthodox view rests on the unshakable conviction that the first section of Article III gives Congress unlimited plenary authority over the Supreme Court. For some, this reading of the Constitution has been a cause for regret; but others have seen an important institutional virtue in the federal judiciary's vulnerability to such treatment. Charles Black and Michael Perry, for example, have urged that Congress's power to silence the federal, when not exercised, supports the claim that Congress has acquiesced in the general run of the courts' decisions and, hence, lends democratic legitimacy to these nonmajoritarion tribunals.

A revisionist strand of Article III scholarship has developed, arguing for substantial constitutional restraints on Congress's power to shape federal jurisdiction. The claims for such restraints group around two propositions: first, that the Constitution secures a core function for the federal judiciary against congressional interference; and second, that Congress cannot act to reduce federal jurisdiction selectively out of manifest hostility to federal judicial doctrine.

Henry Hart, in a famous written dialogue on Congress's jurisdiction-limiting authority, first argued that there was an essential role of the Supreme Court that Congress could not constitutionally impair. Leonard Ratner has given more concrete content and support to what is called the "essential functions" thesis, arguing that the demands of supremacy and uniformity require that the Supreme Court be available to review all matters of federal legal substance. Although lacking in explicit textual support in its Hart-Ratner form, the essential-functions thesis can draw support from the commitment of the Constitutional Convention and its product, the Constitution, to subordinate the states to federal authority and to do so through the federal judicial process. In some of its variations, the thesis can also draw support from congressional precedent: in the course of two centuries of meandering Supreme Court appellate jurisdiction, the Court has always been permitted jurisdiction to review unrequited claims of constitutional right against state and local conduct.

A structurally distinct form of the essential-functions thesis has also emerged, attached not to the Supreme Court alone but to the Article III federal judiciary as a whole. The claim is that there are certain matters for which *some* Article III court must be provided. Only in default of Congress's having provided a lower federal

court with jurisdiction over these matters does the Constitution require that the Supreme Court be available to them. Although given modern voice in the past decade, this appears to have been Alexander Hamilton's view, as reflected in *The Federalist* #82, and is familially related to Justice JOSEPH STORY's views in MARTIN V. HUNTER'S LESSEE (1816). The scholars who have been attracted to this version of the essential-functions thesis have regarded it as better supported by legally relevant materials. This author, in the first modern statement of this form of the essential-functions thesis, has argued that Article III's textually explicit commitment to an independent judiciary can be honored only if politically sensitive cases—those involving claims of constitutional right being the strongest possible candidates—are assured review in an Article III forum. Robert Clinton has argued from a close analysis of events at the Constitutional Convention that the Framers intended to oblige Congress to distribute all Article III jurisdiction among the federal courts and used the "exceptions and regulations" language only to permit Congress to distribute Article III matters among Article III courts. Akhil Amar, observing, in effect, that every instance of the word "cases" in Article III is modified by a preceding "all," has argued that the first three items on the Article III menu—those styled as categories of "cases"—are textually required to be assigned to some Article III court.

The alternative revisionist claim, that Congress cannot act to reduce federal jurisdiction selectively out of manifest hostility to federal judicial doctrine, has been advanced on a number of connected grounds. Laurence Tribe has borrowed equal-protection analysis from the HUNTER V. ERICKSON (1969) tradition to argue that it is unconstitutional for Congress to burden the exercise of particular constitutional rights by depriving those who claim such rights the benefits of a federal forum. John Hart Ely has argued that the motive of Congress in such cases—hostility to federal judicial doctrine—is impermissible and can serve to invalidate selective removals of jurisdiction. This author has argued that some selective deprivations of jurisdiction carry the appearance of congressional hostility to controversial constitutional claims, invite the disregard of those claims, and are for that reason unconstitutional.

Although the best possible protection against untoward congressional manipulation of federal jurisdiction is the sound judgment of Congress, there is a growing, but still much disputed, view among academic commentators that the Constitution protects against a lapse of congressional responsibility here as elsewhere.

LAWRENCE G. SAGER
(1992)

Bibliography

AMAR, AKHIL 1985 A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction. *Boston University Law Review* 65:205–272.

BATOR, PAUL M. 1982 Congressional Power over the Jurisdiction of Federal Courts. *Villanova Law Review* 27:1030–1041.

CLINTON, ROBERT L. 1984 A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding. *University of Pennsylvania Law Review* 132:741–866.

EISENBERG, THEODORE 1974 Congressional Authority to Restrict Lower Federal Court Jurisdiction. *Yale Law Journal* 83: 498–533.

GUNTHER, GERALD 1984 Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate. *Stanford Law Review* 36:895–922.

HART, HENRY M., JR. 1953 The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic. *Harvard Law Review* 66:1362–1402.

REDISH, MARTIN H. and WOODS, CURTIS E. 1975 Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis. *University of Pennsylvania Law Review* 124:45–109.

SAGER, LAWRENCE GENE 1981 Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts. *Harvard Law Review* 16:129–156.

TRIBE, LAURENCE H. 1981 Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts. *Harvard Civil Rights-Civil Liberties Law Review* 16:129–156.

WECHSLER, HERBERT 1965 The Courts and the Constitution. *Columbia Law Review* 65:1001–1014.

## JURISDICTION, FEDERAL
(Update)

In the 1990s, there have been two notable statutes, and one bill not yet enacted, regulating the jurisdiction of the federal courts to accomplish particular policy goals.

The ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 cuts back federal HABEAS CORPUS for state prisoners and limits JUDICIAL REVIEW in deportation proceedings against ALIENS. In habeas cases, the act limits the APPELLATE JURISDICTION of the Supreme Court. A prisoner whose first habeas petition has been denied may file a second petition only if authorized to do so by the court of appeals, and a denial of authorization may not be appealed to the Supreme Court. In *Felker v. Turpin* (1996), the Supreme Court upheld the constitutionality of this provision, finding that the act had not entirely eliminated review because the prisoner still had a right to file an original habeas petition in the Supreme Court. This construction of the act allowed the Supreme Court to avoid the constitutional question that would have been presented if Supreme Court review had been entirely foreclosed. In deportation

proceedings, the act eliminates all appellate review of deportation orders against aliens who have committed certain crimes. The CIRCUIT COURTS have sustained the constitutionality of this provision, but only on the understanding that habeas corpus remains available as a means to challenge the deportations. The Supreme Court has not yet addressed the issue.

The Prison Litigation and Reform Act of 1995 makes litigation more difficult for prisoners seeking better prison conditions. The act limits the "remedial jurisdiction" of courts by imposing stringent new criteria on future injunctions reforming prison conditions and by terminating previously entered CONSENT DECREES that do not comply with the criteria. As of the summer of 1999, six courts of appeals had sustained the constitutionality of the act, and one court of appeals had struck down the termination provision as a violation of constitutional SEPARATION OF POWERS. The Supreme Court had not yet addressed the issue.

The proposed Judicial Reform Act of 1998 would, if enacted, require a three-judge district court for any constitutional challenge to a state voter INITIATIVE. Such a challenge is now heard by a single district judge. The bill would represent a partial return to a jurisdictional structure that existed between 1910 and 1976. The 1910 statute was enacted in response to EX PARTE YOUNG (1908), which allowed a single district judge to enjoin the enforcement of state laws found by that judge to be unconstitutional. The current bill was introduced in the wake of a decision by a district judge (later reversed by the court of appeals) enjoining the enforcement of California's anti-AFFIRMATIVE ACTION initiative.

In all three instances, Congress has sought to achieve relatively narrow policy goals by changes in the jurisdictional structure of the federal courts. The Supreme Court has given little indication that it will find either of the two acts unconstitutional, and there is no doubt that if enacted, a modern three-judge court statute would survive constitutional scrutiny.

WILLIAM A. FLETCHER
(2000)

Bibliography

NOTE 1997 The Constitutional Requirement of Judicial Review for Administrative Deportation Decisions. *Harvard Law Review* 110:1850–1867.

TUSHNET, MARK 1996 "The King of France with Forty Thousand Men": *Felker v. Turpin* and the Supreme Court's Deliberative Processes. *Supreme Court Review* 1996:163–190.

TUSHNET, MARK and YACKLE, LARRY 1997 Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act. *Duke Law Journal* 1997:1–86.

# JURISDICTION AND REMOVAL ACT

See: Judiciary Act of 1875

# JURISDICTION TO TAX

Prior to the adoption of the FOURTEENTH AMENDMENT, the Supreme Court derived from principles "inhering in the very nature of constitutional government" the rule that states do not have jurisdiction to impose taxes upon persons, things, or activities outside their borders. In modern times, such limits on the legislative jurisdiction of states are derived from the DUE PROCESS clause.

The jurisdictional limitations have been applied in a variety of settings. A state may not impose a property tax on real or tangible personal property physically located in another state, even though the owner of the property is domiciled and present in the taxing state. However, where movable instrumentalities of commerce—railroad rolling stock, ships, trucks, airplanes—are involved, a state is not limited to taxing those instrumentalities actually in the state on tax day. Instead, the state may use a formula to compute the average presence of such instrumentalities within the state. Such apportionment formulas have been upheld so long as they fairly allocate values to the taxing state.

Property taxes imposed on intangibles—such as stocks and bonds—are not subject to similar limitations. The Court initially permitted the state of domicile of the owner to tax the total value of such intangibles, reasoning that intangible property is often held secretly and might otherwise escape taxation entirely. During the 1920s and 1930s the Court attempted to derive rules that would prevent the multiple taxation of intangibles, but eventually it came to hold that any state within which some interest in an intangible exists can tax. For example, if stocks are held in a trust, the state of domicile of the trustee, the state of domicile of the beneficiary, and the state where the certificates are located may each impose a tax on the total value.

Domicile of the taxpayer is an adequate jurisdictional basis for taxing net income from property and activities outside the state. The only constitutional limitation is the COMMERCE CLAUSE. Nondomiciliary states may also tax the income arising from property and activities within their borders subject to two limitations. A 1959 federal statute (section 381, Title 18, United States Code) provides that a state may not impose a net INCOME TAX if the taxpayer does no more within the state than solicit orders to be delivered from without the state by common carrier. For-

mulas used to apportion income must not have the effect of reaching out and taxing values beyond the state.

The long-standing rule that states may not levy sales taxes when the seller is in another state and does no more than solicit orders in the taxing state is justified in jurisdictional terms. The buyer's state cannot impose the tax because to do so would be to project its powers beyond its boundaries. A use tax, resting on the purchaser within the state, however, is within the jurisdiction of the buyer's state. But in order to collect use taxes effectively, the buyer's state must be able to compel the seller to collect and remit the tax. The Supreme Court holds that such a duty of collection can be imposed only when there is some definite link, some minimum connection (such as ownership of property or the presence of solicitors or other employees) between the seller and the state.

Often jurisdictional and commerce problems overlap. For example, if a state seeks to tax income of an interstate business attributable to activities outside the state, the tax can be invalidated either as an assertion of jurisdiction over out-of-state activities or as disadvantaging INTERSTATE COMMERCE because more than one state taxes the same income.

EDWARD L. BARRET, JR.
(1986)

Bibliography

HELLERSTEIN, JEROME R. 1968 Recent Developments in State Tax Apportionment and the Circumscription of Unitary Business. *National Tax Journal* 21:487–503.

NOTE 1975 Developments in the Law: Federal Limitations on State Taxation of Interstate Business. *Harvard Law Review* 75:953–1036.

# JURISPRUDENCE AND CONSTITUTIONAL LAW

Constitutional jurisprudence is the most abstract and philosophical part of CONSTITUTIONAL THEORY. We may divide the subject into general areas or departments, although these areas will be densely interconnected. The most general division is between "foundational" and "interpretive" constitutional jurisprudence.

Foundational constitutional jurisprudence considers abstract normative questions about ideal constitutional structure. Is a written political CONSTITUTION better than a conventional or informal one? Does the best constitutional structure vest EXECUTIVE POWER in a president independent of the legislature, as the American Constitution does? Would it have been better to adopt the British practice that vests executive power in the head of the party that controls the legislature? Should a constitution protect the interests of individual citizens against the wishes or interests of the majority? If so, which interests should it protect? Should it protect economic interests, for example? Should it deny either the national or state government power to raise taxes for purposes of redistributing the wealth? Should the constitution guarantee moral liberty or independence? Should it ensure homosexuals their own SEXUAL ORIENTATION? Should it ensure women freedom of ABORTION?

Most of these questions raise issues of philosophical depth. What reasons could justify granting individuals legal rights of immunity from a decision a majority of citizens want, for example? Two answers are common among philosophers, and these answers lead to different conclusions about which individual rights a constitution should protect. The first is instrumental: It holds that constitutional rights are legitimate if, but only if, recognizing and enforcing the right produces an aggregate benefit for the community as a whole. Some philosophers have argued in favor of a constitutionally protected right to FREEDOM OF SPEECH on this instrumental ground, for example. They argue that protecting free speech for individuals benefits the community as a whole by providing it with valuable information, challenge, and debate.

The second answer insists that constitutional rights are justified not because they produce aggregate benefits, but because they protect rights that individuals have on intrinsic moral grounds. Under this latter view, people have rights as "trumps" over collective-interests goals. Obviously, these different views about the ground of constitutional rights produce different views about their scope. An instrumental approach to free speech, for example, will not support extending this right to speech that has little or no chance of producing collective benefit, even indirectly or in the long term—to racist or obscene speech, for example, or to speech that calls for revolutionary or illiberal change. But someone who thinks that people have an inherent right to express their opinions, even in circumstances in which it is against the interests of their community for them to do so, would not use this test for limiting freedom of speech.

Another independent distinction is of great importance in foundational jurisprudence: the distinction between procedural issues of fairness and substantive issues of justice. The question as to whether an ideal constitution would grant individuals a right of choice in sexual orientation, for example, raises both sorts of issues. Some might deny that individuals should have a right even in principle; they might believe that every society should force its members to follow the traditional moral code with which most citizens identify because this is the best way to preserve the proper sense of communal integrity and unity. But even if they do *not* believe this—even if they think

that a society of this sort would be deeply unjust—they still might resist a constitutional right to sexual independence on grounds of procedural fairness. They might say that democracy is the only acceptable form of government, and that it is undemocratic to use a constitution to prevent the majority from having the law it thinks best, even when the majority is profoundly wrong. This last claim—that individual constitutional rights are undemocratic—is one of the two most widely discussed issues of foundational constitutional jurisprudence in America and will be discussed further.

The second, interpretive part of constitutional jurisprudence considers issues closer to those of traditional jurisprudence and also closer to constitutional legal practice. It asks not what constitution would be ideal but what constitution we actually have, both in general and in detail. The central question of interpretive jurisprudence is a methodological one. It is only indirectly concerned with the right answer to the substantive questions the Supreme Court must eventually decide, like the question as to how far the Constitution as it stands, properly interpreted, now grants individuals constitutional rights to free speech, abortion, or economic protection. Interpretive jurisprudence is concerned, rather, with the strategies of investigation and argument that should be used to answer these questions.

The clauses of the Constitution that grant individual rights are drafted in very abstract language. The FOURTEENTH AMENDMENT, for example, says that no state may deny DUE PROCESS OF LAW or EQUAL PROTECTION OF THE LAW. How should lawyers and judges decide whether the legal effect of that language is to create a constitutional right for blacks to attend integrated rather than segregated schools, for whites to resist AFFIRMATIVE ACTION, or for a woman to have an abortion when she and her doctor believe it necessary or desirable? One answer, which is particularly popular among conservative politicians, insists that CONSTITUTIONAL INTERPRETATION can only be a matter of discovering and respecting the wishes of those who made the Constitution, who are often called, compendiously, the "Framers." Did the framers of the Fourteenth Amendment intend blacks (or whites or women) to have such a constitutional right? If so, then the correct interpretation of the amendment's legal force includes that right; but if not, then it does not.

The question as to whether this ORIGINAL INTENT method of constitutional interpretation is appropriate is the second of the two most debated issues of constitutional jurisprudence and will be further discussed. Two other answers to the methological question as to how the abstract language of the Constitution should be interpreted each have support among constitutional lawyers and teachers. "Passivism" holds that when the language of the Constitution is abstract or its legal effect is for another reason unclear or debatable, then it should be interpreted to interfere least with the power of state or national legislators or other political officials to do what they think best for the community. Passivism presupposes the foundational thesis that individual constitutional rights are in principle antidemocratic. It therefore acts to shrink the scope of such rights whenever possible.

The method of "integrity" presupposes a very different interpretive attitude: the Constitution is not just a set of discrete political decisions allocating power in different ways but a system of principle. It therefore insists that each of the abstract clauses and provisions should be interpreted and applied in a way that makes it coherent in principle with accepted interpretations of other parts of the Constitution and with principles of political morality that provide the best available foundational justification for the constitutional structure as a whole.

This brief and schematic discussion illustrates the inevitable interconnections between foundational and interpretive issues. Although the original-understanding method denies that foundational morality should figure prominently in constitutional interpretation, it cannot be applied without relying on controversial foundational positions, as will be discussed. The passivist method presupposes a contoversial foundational position about the conflict between CONSTITUTIONALISM and democracy, and the method of integrity insists that foundational morality must play an overt, although limited, role in detailed constitutional interpretation.

The Constitution contains both structural and disabling provisions. The structural provisions describe the various branches of the national government, provide methods for electing or selecting their members, and define the powers of these institutions and officials vis-à-vis the institutions and officials of the various states. These structural provisions constitute the American form of democracy; they create government by the people. In contrast, the disabling provisions of the BILL OF RIGHTS and the Civil War amendments, like the FIRST AMENDMENT and the due process clause and the equal protection clause, set limits to the overall authority of elected officials. Many lawyers and politicans believe these provisions impede government by the people and are undemocratic for that reason.

Some who take this view regard this friction as a cardinal defect of our constitutional system. They argue that the antidemocratic provisions should be narrowly interpreted to give individuals as few trumps over majority decision as possible. Other lawyers who agree that the disabling provisions are antidemocratic do not agree this is a cause for regret; they believe that a limited democracy is superior to a pure one simply because the former respects individual rights. Is the assumption both these

views share—that the Constitution impedes as well as creates democracy—correct? This depends on what we take democracy to be.

Democracy is collective government by the people. But which sense of collective is meant? There are two kinds of collective actions—statistical and communal—and our conception of democracy will turn on which kind we take democratic government to require. Collective action is statistical when what the group does is only a matter of some function—rough or specific—of what the individual members of the group do on their own, that is, with no sense of doing something as a group. In contrast, collective action is communal, when it cannot be reduced to some statistical function of individual action because it is collective in the deeper sense that requires individuals to assume the existence of the group as a separate entity or phenomenon. An orchestra can play a symphony, although a single musician cannot. This is a case of communal rather than statistical action because it is essential to an orchestral performance, not just that a specified function of musicians each plays some appropriate score, but that the musicians play *as* an orchestra, each intending to make a contribution to the performance of the group and not just as isolated individual recitations.

On the statistical understanding, democracy is government according to the wishes of a majority or at least a plurality of the eligible voters. Under communal understanding, democracy is government by distinct entity—the people as such—rather than any set of individuals one by one. These two conceptions of democracy take different views of the distinction previously drawn between the structural and disabling provisions of the Constitution. By the statistical reading, structural provisions are mainly limited to those that are procedurally structural—those that define how members of Congress are elected, what proportion of them it takes to enact legislation, and so forth. By the communal conception, the structural provisions include not only those that are procedurally structural in these ways but also provisions needed to create a genuine political community that can be understood to be acting as a collective unit of political responsibility. A genuine community is one in which government is not only of and for the majority, but of and for all the people, and a genuine community will therefore need to insure not only that each citizen have an opportunity to participate in political decisions through a vote, but that each decision allows each citizen equal concern and respect.

Several of the apparently disabling constitutional provisions can be understood as necessary to guarantee equal respect and concern and, therefore, to be functionally structural rather than disabling of democracy understood by the communal conception. The First Amendment guarantee of free speech, for example, might be thought necessary not only to full and equal participation, but to equal respect as well, and the equal protection clause can be interpreted as requiring equality of concern for all citizens in the deliberations that produce political decisions. Thus, the foundational question of constitutional jurisprudence—whether and how far the Constitution is undemocratic—is actually a deep question that draws on the most fundamental parts of moral and POLITICAL PHILOSOPHY.

But how should lawyers and judges decide whether some state or statute violates the requirement that states follow "due" process, deny no one the "equal" protection of the laws, or avoid punishments that are cruel and unusual? The original-understanding thesis insists that abstract constitutional provisions should be interpreted to have only the force that the Framers intended or expected them to have. Although this thesis has generally been rejected in Supreme Court practice, lawyers and politicians have offered various arguments in its support. Some say, for example, that because the Framers were the people whose decision made the Constitution our FUNDAMENTAL LAW, their convictions about its correct application should be respected.

We must recognize three points about this kind of argument, however. First, any such argument for the original-understanding thesis necessarily draws on normative assumptions about the proper allocation of authority in a democracy among remote constitutional architects, contemporary legislators, and past and contemporary judges. Second, these normative assumptions cannot be justified, without the most blatant and absurd circularity, by appealing to the intentions, wishes, or decisions of the people whose authority they propose to describe. It would absurd to argue that judges should respect the expectations of the Framers because the Framers expected that they would or believed or decided that they should.

The third point is particularly important: Such arguments, even if supported by independent normative assumptions, are radically incomplete if they purport to establish only the general proposition that lawyers and judges should respect the Framers' wishes or intentions. In most pertinent cases, the question at issue is not whether judges should respect the convictions of the Framers but which of their convictions judges should respect, and how. Suppose the following historical information is discovered: All the framers of the equal-protection clause believed, as a matter of political conviction, that people should all be equal in the eye of the law and the state. They were convinced that certain forms of official RACIAL DISCRIMINATION against blacks were morally wrong for that reason, and they adopted the amendment mainly to prevent states from discrimination against blacks in those ways. They agreed, for example,

that it would be morally wrong for a state to create certain special remedies for breach of contract and make these remedies available to white plaintiffs, but not black ones. The framers assumed that the clause they were adopting would prohibit that form of discrimination.

They also shared certain opnions about which forms of official discrimination were not wrong and would not be prohibited by the clause. They shared the views, for example, that racial SEGREGATION of public schools did not violate the clause. (Many of them, in fact, voted to segregate schools.) None of them even considered the possibility that state institutions would one day adopt affirmative-action RACIAL QUOTAS designed to repair the damages of past segregation; therefore, none of them had any opinion about whether such quotas would violate the clause. Some of them thought that laws that discriminate in favor of men treat women unjustly. Most framers of the equal protection clause did not outlaw the gender-based distinctions then common. Most of them thought that homosexual acts were grossly immoral and would have been mystified by the suggestion that laws prohibiting such acts constituted an unjustified form of discrimination.

Many contemporary lawyers and judges think that some or all these concrete convictions are inconsistent with the framers' more abstract intention to establish a society of equal citizenship. Almost everyone now agrees, for example, that racially segregated schools are inconsistent with this ideal. Many people think that affirmative action is inconsistent with the ideal as well, and many people, although not necessarily the same people, think that laws that subordinate women or homosexuals violate the ideal. If a contemporary judge believes that the framers' concrete convictions were inconsistent with their abstract ones on one or more of these matters because the framers of the clause did not reach the correct conclusions about the moral consequences of their own principles, then that judge has a choice to make. It is unhelpful to tell him or her to follow the framers' intentions. The judge needs to know which intentions—at how general a level of abstraction—he or she should follow and why.

In other words, a judge can compose sharply different versions of the original understanding of the equal protection clause, each of which has support in the collection of framers' convictions and expectations. The judge might adopt a reductive version that emphasizes the framers' concrete opinions and hold that the clause condemns only the cases of discrimination that the framers of the clause collectively expected it to condemn. So understood, the clause forbids discrimination against blacks in legal remedy for breach of contract, but it does not forbid racially segregated schools, affirmative-action quotas that disadvantage whites, or discrimination against women or homosexuals. Or, the judge might adopt an abstract version of the original understanding that emphasizes the framers' general conviction to provide equal citizenship, properly understood, for all Americans. Under this version, if we assume that equality is in fact denied by school segregation, quota systems, or laws that subordinate people on the basis of gender or sexual orientation, the clause condemns these discriminations, despite what the framers themselves thought or would have approved.

The important choice judges and other interpreters of the Constitution must make, therefore, is not between the original understanding and some other method of interpretation but between reductive and abstract versions of the original understanding. Many proponents of the original-understanding method have not made this choice coherently; they believe the equal protection clause outlaws racial segregation and affirmative action quotas, but does not outlaw laws discriminating against women or homosexuals, for example. Lawyers and judges must not only choose between the reductive and abstract versions coherently but also on principle, that is, with adequate support in foundational jurisprudence. The passivist interpretive method, which supports the choice of reductive understanding of the framers' intention, is based on the statistical conception of democracy and, accordingly, fails if this conception is rejected. The method of integrity, which presupposes an abstract understanding, is based on a communal conception in which individual rights are not subversive, but constitutive of genuine democracy. Even at the practical level of adjudication, constitutional law is deeply embedded in political philosophy.

RONALD DWORKIN
(1992)

Bibliography

DWORKIN, RONALD 1985 *A Matter of Principle*. Cambridge, Mass.: Harvard University Press.

——— 1986 *Law's Empire*. Cambridge, Mass.: Belknap Press of Harvard University Press.

PERRY, MICHAEL J. 1988 *Morality, Politics, and Law*. New York: Oxford University Press.

## JURORS AND THE FREEDOM OF SPEECH

See: Witnesses, Jurors, and the Freedom of Speech

## JURY

See: Blue Ribbon Jury; Grand Jury; Petit Jury; Trial by Jury

## JURY CHALLENGES

See: Peremptory Challenges

## JURY DISCRIMINATION

Jury discrimination was first recognized as a constitutional problem shortly after the CIVIL WAR, when certain southern and border states excluded blacks from jury service. The Supreme Court had little difficulty in holding such blatant RACIAL DISCRIMINATION invalid as a denial of the EQUAL PROTECTION OF THE LAWS guaranteed by the recently adopted FOURTEENTH AMENDMENT. But, beyond such obvious improprieties, what should the principle of nondiscrimination forbid? Some kinds of "discrimination" in the selection of the jury are not bad but good: for example, those incompetent to serve ought to be excused from service, whether their incompetence arises from mental or physical defect, from demonstrably bad character, or from bias. No one has seriously argued that American jury service ought to be determined wholly by lot, as it was among the citizens of Athens. In addition, it has been the uniform policy of American jurisdictions to excuse from service some who are competent, but whose service would work a hardship on them or others: doctors, ministers, and parents who care for small children have been exempted from service on such grounds.

The history of the constitutional law regulating jury composition has been a story of expanding and compulsory democratization. In our early national history property and voting qualifications were common, and women were systematically excluded or exempted from jury service. At COMMON LAW, indeed, special juries were sometimes employed: a jury of merchants to decide certain kinds of mercantile questions, for example, or in the trial of an ALIEN, a jury half of which spoke his language. Even in the early and middle decades of this century, the Supreme Court upheld against constitutional attack a BLUE RIBBON JURY system, by which jurors were selected supposedly for intelligence and character in a way that resulted in the vast overrepresentation of professional and business classes, in *Fay v. New York* (1947); a highly discretionary and easily abused "key man" system for selecting potential jurors by consultation with community leaders, in SWAIN V. ALABAMA (1965); and the voluntary exemption of women from jury service, in *Hoyt v. Florida* (1961). At present, however, a federal statute requires that the federal jury be drawn from a pool that represents a "fair cross section of the community," and a similar constitutional standard has been imposed by the Supreme Court on the states as well, in TAYLOR V. LOUISIANA (1975).

There are normally three stages in the selection of an American jury at which improper discrimination may occur: the establishment of the master list of all persons eligible for jury service within the JURISDICTION of a particular court (this is called the jury roll); the selection of the panel of potential jurors (called the venire) who will be asked to appear at the courthouse; and the selection from that panel of those who will actually serve on a jury in a particular case or set of cases. The question of discrimination can arise in both civil and criminal cases, but the courts have paid far more attention to the criminal jury. Two distinct provisions of the Constitution of the United States bear upon jury selection: the equal protection clause of the Fourteenth Amendment and the SIXTH AMENDMENT.

In STRAUDER V. WEST VIRGINIA (1879) and NEAL V. DELAWARE (1880) the Court held that the equal protection clause forbade a state to try a black defendant by a jury from which members of his race had been affirmatively excluded, either by statute or by administrative practice. A federal statute passed shortly after the Civil War made such discrimination a crime.

In *Hernandez v. Texas* (1954), dealing with the exclusion of Mexican Americans, the Supreme Court extended the *Strauder* ruling to other ethnic groups. On the other hand, the Court has repeatedly said that the Constitution does not entitle a defendant to a jury that consists in whole or in part of members of his race, or of any other particular composition. The idea of the jury affirmed in these cases is not that it is a microcosm of society at large, but that it is an institution of justice for which participants may properly be required to be qualified. The equal protection clause does not guarantee a particular mix but protects only against improper exclusions.

What exclusions, beyond racial ones, are improper? In *Hernandez* the Court said that where any group in a community is systematically discriminated against it will need the protection of the Constitution, and added: "Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based upon some reasonable classification, the guarantees of the Constitution have been violated." But what is a reasonable classification? This question is complicated by the fact that the law has traditionally imposed qualifications for jury service which may, or may not, have differential impact on racial or other protected groups. The Court has accordingly upheld, against equal protection attack, qualifications for jury service that are extremely vague and easily susceptible to abuse—"generally reputed to be honest and intelligent . . . esteemed in the community for their integrity, good character, and good judgment." The burden is on the defendant to show that such qualifications

have in fact been abused. Generally speaking, racially disproportionate impact alone is not enough to invalidate a classification under the equal protection clause: actual intent to discriminate must be proved, by direct or circumstantial evidence, as the Court held in WASHINGTON V. DAVIS (1976). But in jury discrimination, proof of a substantial disproportionality in racial (or sexual) balance between the jury pool and the community at large constitutes a prima facie case of intentional discrimination which the government must rebut. (The Sixth Amendment is more protective than the equal protection clause, in those cases to which it applies, for it has no intent requirement, and the Court held in *Duren v. Missouri* (1979) that it not only prohibits discrimination but affirmatively requires that the pool from which the jury is drawn contain a "fair cross section" of the relevant community.)

Who may object to an improper exclusion? In *Peters v. Kiff* (1972), the Supreme Court held that any defendant is entitled to object to improper exclusions from the panel from which his jury is selected, whether or not he is a member of the excluded race. In addition, the Court held in *Carter v. Jury Commission of Greene County* (1976) that members of the excluded race who wish to serve on juries are entitled to bring independent proceedings to attack their exclusion, for they are deprived of equal protection with respect to an important right of CITIZENSHIP.

A separate source of constitutional restrictions on jury discrimination is the Sixth Amendment's guarantee of an "impartial jury" in criminal cases. DUNCAN V. LOUISIANA (1968) held that this provision, which originally applied only to the federal government, was "incorporated" within the Fourteenth Amendment's due process clause, and thus was applicable to the states as well. (See INCORPORATION DOCTRINE.) In *Taylor v. Louisiana* the Court held that the concept of the jury as a "fair cross section of the community" was at the core of the Sixth Amendment and thus applicable to the states. Thus exclusions will be tested not merely under the equal protection clause, which focuses on improper exclusions, but by the affirmative "cross section" principle. The latter principle conceives of the jury not as a group of citizens who are qualified for a task and chosen in a manner free from INVIDIOUS DISCRIMINATION, but as a body fairly chosen from a group that represents the community of which it is a part.

But what does "fairly chosen" mean? The federal statute requires that the jury roll reflect a fair cross section of the community, and that the venire be drawn at random from the roll; this scheme meets any standard of fairness. The courts might impose similar standards on the states. But there remains the crucial stage at which the particular jury panel is selected from the venire, and none of the rulings cited above speak to this matter. This selection is made just before trial in a process in which lawyers and the judge cooperate. Certain jurors are excused "for cause," that is, because there are good reasons why they should not sit in the particular case: admitted bias, acquaintance with one of the parties, and so on. In addition, the parties are allowed a limited number of discretioniary, or "peremptory," challenges to other potential jurors. What happens if the prosecution should exercise its peremptory challenges to keep blacks or women off the jury? If that can be done with impunity, the insistence upon fairness at the other stages of jury selection becomes an empty ritual; but how can a discriminatory exercise of peremptory challenges be established? To require the prosecutor to accept any juror of a particular race or class would be unfair to the state, and upset the balance of the selection process. The Supreme Court held in *Swain v. Alabama* that the use of peremptory challenges against potential minority jurors is not always unconstitutional, but that systematic racial discrimination is impermissible under the equal protection clause. In *Batson v. Kentucky* (1986) the Court partially overruled *Swain*, holding that a prosecutor cannot constitutionally use peremptory challenges to exclude potential jurors solely on account of their race. If the circumstances raise an inference of such a use of peremptory challenges, the burden shifts to the state to provide "a neutral explanation" for the exclusions.

The effect of the antidiscrimination holdings has also been undercut by the Supreme Court's decision in APODACA V. OREGON (1972) that the states are not required to insist upon unanimous verdicts. (See JURY UNANIMITY.) Even if some members of a discriminated-against class make it to the jury, *Apodaca* means that their views can be disregarded by the majority. On the other hand, the proposition that jurors of the defendant's race or sex will be especially likely to vote for him is an assumption more easily made than proved, and arguably demeaning both to the jurors and to the class to which they belong. And even minority jurors who are outvoted will have a chance to have their views considered. The true basis of the fair cross-section requirement is assurance of the kind of diversity of view and experience that will most advance the kind of collective decision making that, as Harry Kalven and Hans Zeisel show, represents the jury at its best.

As for the distinct institution known as the GRAND JURY, which sits before trial to decide whether the evidence of a particular defendant's guilt is sufficient to justify his INDICTMENT, racial discrimination in its selection is also a violation of the equal protection clause. The indicted individual is entitled to the dismissal of his indictment, as the Court held in *Carter v. Texas* (1900), even though in some sense the defect may be thought to be cured by a properly composed trial jury. The Court has not applied the affirmative "fair cross section" requirements to the state grand jury, nor indeed, as the Court held in HURTADO

V. CALIFORNIA (1884), are the states required to employ the institution of the grand jury at all. Discrimination in the selection of state grand juries remains regulated by the equal protection clause, which forbids only intentional discrimination. The federal statute does apply the "fair cross section" requirement to federal grand juries as well as trial juries.

The continued existence of both the grand jury and the trial jury appears to rest on two assumptions. First, judicial decisions, especially in criminal cases, are assumed to be more just when they are not left to professionals but are also influenced by the views of ordinary people. Second, jury service—again, especially in the criminal process—is seen as popular participation in government. Our constitutional protections against discriminatory selection of jurors are aimed at promoting the ends of justice and the ideal of citizenship.

JAMES BOYD WHITE
(1986)

Bibliography

JUDICIAL CONFERENCE OF THE UNITED STATES 1961 The Jury System in the Federal Courts. *Federal Rules Decisions* 26: 411–504.

KALVEN, HARRY and ZEISEL, HANS 1966 *The American Jury.* Boston: Little, Brown.

LARUE, L. H. 1976 A Jury of One's Peers. *Washington & Lee Law Review* 33:841–876.

# JURY DISCRIMINATION
## (Update)

The problem of improper discrimination in the jury selection process was considered repeatedly by the Supreme Court throughout the 1990s. Since its decision in BATSON V. KENTUCKY (1986) involving race-based jury selection in criminal cases, the Court has decided a dozen or so cases involving claims that impermissible selection criteria have been used to constitute GRAND JURIES and, more commonly, PETIT JURIES. Most of the cases have focused on the PEREMPTORY CHALLENGE device, and the way in which it may be used by lawyers to remove members of disfavored groups from serving on petit juries. Certainly, most observers would agree that trail courts often find it difficult, if not impossible, to police lawyers' use of peremptories to ensure that an impermissible criterion such as race is not motivating challenges. For this reason, many have argued that the peremptory challenge device itself— which has historical but not constitutional foundation— should be abandoned as a prophylactic matter, to make good *Batson*'s promise of racial equality in criminal jury decisionmaking. This prophylactic argument seems even more forceful now that the Court, in *J. E. B. v. Alabama* (1994), has extended the reasoning of *Batson* to invalidate gender-based peremptories as well. As the Court is faced with challenges to more and more arguably impermissible criteria in the selection and constitution of juries, such as age, class, and SEXUAL ORIENTATION, the Court may have an increasingly harder time reconciling the peremptory challenge device with the inclusionary impulse that has characterized most of the Court's jurisprudence in the last half-century concerning access to political participation. The more the Court thinks and writes about JURY SERVICE AS A POLITICAL RIGHT, the more the Court will be constrained to hold various selection criteria to be impermissible, and the more vulnerable the practice of peremptories will become.

Two underdiscussed aspects of the modern jury exclusion cases are their STATE ACTION and STANDING analyses. As to state action, in *Batson* the race-based peremptories were exercised by a state prosecutor, so that government action was apparent. But what about peremptories exercised by private criminal defense counsel, or by plaintiffs' counsel and defense counsel in civil cases? The Court has found state action in all these circumstances, emphasizing that the trial judge—undoubtedly a state actor—is the person who formally implements the peremptory challenge, regardless of the private character of the lawyer who may initiate it. Perhaps more crucial is a recognition that picking jurors, like picking voters, is quintessentially a public function, so that the state cannot avoid constitutional constraints by delegating the selection process to private lawyers.

As to standing, the Court has held that litigants, regardless of their race, have third-party standing to assert the rights of excluded black would-be jurors. Behind these standing holdings is the idea that courts cannot presume that black jurors would be sympathetic to the interests of black litigants alone. On the one hand, this notion is in perfect keeping with the Court's emerging colorblind constitutional vision most forcefully articulated in the racial restricting cases such as SHAW V. RENO (1993) AND ITS PROGENY. In these cases, the Court has explicitly stated that government may not constitutionally presume that persons of one race will, because of their race, have any distinct viewpoint and exercise voting and other political power to support particular persons or political causes. On the other hand, a number of earlier lines of Court authority had suggested that racial minorities could be assumed to hold distinct political points of view, at least in the main. These earlier cases involved topics such as minority vote dilution, restructuring of political decisionmaking processes, and exclusion of women and blacks from juries. The modern Court's insistence that government not think nor act based on assumptions about racial

minority group political attitudes is also in tension with the history of the FIFTEENTH AMENDMENT itself. The drafters and ratifiers of the Fifteenth Amendment assumed, expected, and indeed counted on the idea that, when it comes to political activity, voters, because of their race, would—to use the Court's words in *Shaw*—"think alike, share the same political interests, and prefer the same candidates at the polls." Whether the insistence of the REHNQUIST COURT on colorblindness is justifiable or not, the Court certainly has not adequately explained how its modern reasoning fits in with this constitutional tradition and history. When this tradition is taken into account, arguments could be made that not each and every instance of governmental RACE-CONSCIOUSNESS in the political-rights realm is equally constitutionally problematic.

VIKRAM D. AMAR
(2000)

(SEE ALSO: *Hunter v. Erickson; Voting Rights.*)

Bibliography

ABRAMSON, JEFFREY 1994 *We the Jury: The Jury System and the Ideal of Democracy.* New York: Basic Books.

AMAR, VIKRAM DAVID 1995 Jury Service as Political Participation Akin to Voting. *Cornell Law Review* 80:203–259.

## JURY NULLIFICATION

Jury nullification occurs when the prosecutor convinces a jury beyond a REASONABLE DOUBT that the defendant committed the crime charged, but the jury nevertheless decides to acquit. Also called an "acquittal against the evidence," nullification represents a conclusion by the jurors that the literal application of the penal law would be inappropriate on the facts presented, and they thus effectively "nullify" the criminal law by refusing to convict.

There are many reasons a jury might nullify, but cases where the power is exercised generally fall into one of two groups. The first is when the jury decides that the law itself is unfair or unpopular, regardless of what the defendant has done. Juries have acquitted against the evidence when defendants were charged with minor vice crimes like gambling, liquor law violations, or other offenses that are sufficiently common or underenforced that a conviction of one offender seems unfair. Crimes that carry an especially harsh sentence are also candidates for nullification. The Supreme Court has recognized, for example, that when crimes carried a mandatory death penalty, some juries preferred to acquit a factually guilty defendant rather than impose CAPITAL PUNISHMENT. More recent examples include a refusal to convict a defendant accused of simple possession of drugs, where the prescribed punishment is severe and mandatory.

The second, and more common, group of cases is when the law itself is uncontroversial, but there is something about the defendant that makes an acquittal seem appropriately merciful. Cases where the defendant's motives seemed good, or where the defendant has already suffered great harm can result in nullification—a mercy killing, or a parent's negligent killing of his or her own child, for example. Other instances include cases in which the police officers or prosecutors seem to be overreaching in trying to convict a particular defendant, or in which the victim brought much of the harm on himself, as when an unarmed thief is shot by the defendant while fleeing the scene of a crime. In each of these cases, the jury is using its power to acquit to make a statement about the prosecutor's judgment in bringing this defendant to trial.

Jury nullification has a long but murky history. The practice has its roots in English COMMON LAW, where the rule gradually emerged that juries had a power to acquit that was beyond the judge's power to overrule. One English case often identified with the nullification power is the 1670 trial of WILLIAM PENN and William Mead, who were charged with disturbing the peace and unlawful assembly for holding a public meeting in defiance of the Anglican Church. Although the evidence of guilt was clear, the jury refused to convict. When the jurors refused the court's request to reconsider, the judge fined and jailed them for CONTEMPT. The foreman of the jury, named Bushell, filed a HABEAS CORPUS petition, and the court eventually ordered that the jurors be released. Although BUSHELL'S CASE (1670) is sometimes erroneously said to have approved the right to acquit against the evidence—the English court never made such a determination—it did help establish the important principle that jurors cannot be coerced into reaching a particular verdict.

The jury's power to nullify found a welcome home in the American colonies, where the power was sometimes used as a form of political protest. The best known colonial example was ZENGER'S CASE, in which the jury acquitted John Peter Zenger, accused of SEDITIOUS LIBEL for publishing articles critical of the Royal Governor. His acquittal in the face of strong evidence of guilt helped solidify the view that juries generally, and the power to nullify in particular, were a critical protection against government tyranny.

Despite its deep historical roots, there is little evidence that the jury's power to nullify was critical to those who drafted or ratified the Constitution and the BILL OF RIGHTS. Perhaps this is because the power was assumed to exist—jurors were frequently instructed by the trial judge that they had the duty to "find the law" as well as the facts, an instruction that allowed juries to decide whether the crim-

inal law should be applied to the case before them. But as judges became better trained and as the criminal law became more complex, courts increasingly came to instruct juries on the precise law that they were obligated to apply to the facts before them.

As the relationship between judges and juries changed, so did the nature of the nullification debate. There was never any doubt that juries had the raw power to acquit against the evidence, and so the controversial question became whether juries must be told of the power. When the Supreme Court finally addressed the issue in *Sparf & Hansen v. United States* (1895), it implicitly rejected the idea that the constitutional right to a TRIAL BY JURY included the right to a jury instructed that it might acquit against the evidence. Although the Court's opinion did not use the phrase "jury nullification," it left little doubt that the ability to nullify was merely a power incident to the jury system, not a right that could be enforced by a defendant.

*Sparf & Hansen* resolved the issue, at least in the federal courts. Although the question of instructing the jury was revived during the mid-twentieth century, often in criminal cases filed against those involved in political protests over CIVIL RIGHTS and the VIETNAM WAR, federal courts again rejected the view of nullification proponents. State courts are in accord: although a few state constitutions still provide that juries have the power to find the law, it does not appear that any state routinely permits argument to the jury on the nullification power.

Still, jury nullification continues to occur, although it is hard to say how often. There are enough examples of it in high-profile cases to create the impression that juries frequently acquit against the evidence, and in some jurisdictions for some crimes (usually nonviolent ones) there is evidence to support this view. Most observers believe, however, that juries in general rarely exercise the power, and when they do, they limit its use to cases that are close on the evidence. As a leading jury study put it, "the jury does not often consciously and explicitly yield to sentiment in the teeth of the law. Rather it yields to sentiment in the apparent process of resolving doubts as to the evidence."

Nevertheless, the mere possibility that a jury might nullify has a significant impact on the criminal law. One example is the legal system's tolerance of inconsistent verdicts. Sometimes two defendants are tried together, and the evidence against them is identical, yet the jury convicts one and acquits the other. Logic suggests that if the jury had a reasonable doubt against one defendant, it must have had a reasonable doubt about the other. In federal courts, however, the conviction may stand despite the inconsistency; the Supreme Court has said that because the jury might have decided to nullify when it acquitted the second defendant, the first defendant's conviction will not be disturbed if there was enough evidence to sustain that conviction. This inconsistency will be tolerated even if there is no evidence that the jury intended to nullify with respect to the defendant it set free.

A second example of the influence of jury nullification is the legal system's distrust of the "special" verdict—a verdict that requires the jury to answer specific questions that explain its decision. Although there are many reasons why special verdicts are disfavored, one reason is that forcing a jury to be too specific in its decision might interfere with its power to nullify. As one court put it, in *United States v. Desmond* (1982), "Underlying this aversion [to special verdicts] is the feeling that denial of a general verdict might deprive the defendant of the right to a jury's finding based more on external circumstances than the strict letter of the law."

The exercise of jury nullification evokes strong reactions, both for and against. Advocates of nullification argue that without this power, the jury would not be able to fulfill its role as the conscience of the community, dispensing individual justice in appropriate cases. Proponents note that laws prohibiting drug use, for example, may be fair in almost every case, but the legislature may not have anticipated the exceptional one, such as the use of marijuana for medical purposes. If the prosecutor decides to charge a patient with a crime for using marijuana, the jury is free to step in and prevent an injustice from occurring. If such nullifications are repeated, juries can also perform an important function by signaling the legislature that certain laws should be reassessed because they are no longer in line with community values.

Some proponents have argued that juries should take an even more aggressive role in monitoring and shaping the laws. Advocacy groups lobby for "fully informed jury" laws, under which jurors would be told by the judges that they are the ultimate decisionmakers in all criminal cases about both the law and the facts. Some scholars have echoed similar themes, arguing that jury nullification should be encouraged both in and outside the courtroom to help bring about desired social change.

There are also those who criticize the exercise of jury nullification. They note, for example, that when a jury nullifies, it often does so on the basis of incomplete, even misleading information. Jurors who believe that a young defendant should not have his future ruined by one drunk driving conviction, for example, would surely want to know before nullifying that the defendant had been in trouble with the law before; yet, that evidence often will not be admissible at trial. Because the jury has the power, but not a right, to acquit against the evidence, relevant information that the jury would like to hear on this issue will never be presented.

One remedy for the problem of imperfect information would be to change current practice and allow lawyers to

argue to the jury for nullification. Critics object to such a candid course of action, however, arguing that if juries were told of the power to nullify, they would nullify much more often, thereby undermining the RULE OF LAW. Critical federal judges have agreed that explicit allowance of nullification would give "every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable."

A related concern of critics is that although the power to nullify can be used for wise and merciful ends, it can also reflect a jury's improper motives. When juries refused to convict white defendants who had violated the civil rights of minority citizens trying to register to vote, this was an exercise in jury nullification. Likewise when defendants in sexual assault cases are treated leniently because the victim was allegedly "asking for it," jurors may well be expressing the sentiments of the community, but most would not defend these actions as just or merciful.

Finally, those who oppose instructing the jury on the power to nullify note that many controversial political questions are played out in the courtroom, and that the resolution of those issues should not be left to randomly selected juries. Questions about ABORTION are raised in cases where defendants are charged with trespassing at family planning clinics, just as questions about the legitimacy of GUN CONTROL may be raised in a case charging illegal possession of assault rifles by hunters. Critics contend that social issues like these should be resolved in the legislature, and that once they are, a proper respect for the rule of law means that juries should be required to apply the law as written.

The strength of the jury's power to nullify is also its weakness. Juries have the discretion to acquit any defendant for any reason, a power that can be used for both proper and improper purposes. Jurors are quite properly charged with making an important, perhaps life-and-death, decision about whether a defendant is guilty of the crime charged. Whether the jury should be more specifically charged with their power to consider larger issues that go beyond the law and the facts presented—a procedure that is today rejected by almost all courts—is at the heart of the jury nullification debate.

ANDREW D. LEIPOLD
(2000)

Bibliography

ABRAMSON, JEFFREY 1994 *We the Jury.* New York: Basic Books.

KALVEN, HARRY, JR. and ZEISEL, HANS 1966 *The American Jury.* Boston, Mass.: Little, Brown.

KING, NANCY 1998 Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom. *University of Chicago Law Review* 65:433–500.

LEIPOLD, ANDREW 1996 Rethinking Jury Nullification. *Virginia Law Review* 82:253–324.

WEINSTEIN, JACK B. 1993 Considering Jury "Nullification": When May and Should a Jury Reject the Law to do Justice? *American Criminal Law Review* 30:239–254.

## JURY SERVICE AS A POLITICAL RIGHT

In his article in this encyclopedia on JURY DISCRIMINATION, James Boyd White identified a, if not the, central question as being "[w]hat exclusions, beyond racial ones, are improper?" The dozen or so cases the Supreme Court decided during the 1990s have served to heighten the need for a CONSTITUTIONAL THEORY to identify the groups whose exclusion from or underrepresentation on juries ought to be troubling. In the 1970s the Court invoked the Sixth Amendment, which guarantees to criminal defendants the right to a TRIAL BY JURY. This amendment, however, offers an explanation that is incomplete in at least two respects. First, few would doubt that jury discrimination raises constitutional problems outside the criminal setting. Second, and more basic, the Sixth Amendment tells us only about some circumstances in which a jury must be provided, not about how juries must be constituted. That is, there is nothing in the text or history of the Sixth Amendment that tells when exclusion of certain groups or individuals renders a body less than a "jury."

An approach that would focus on the DUE PROCESS OF LAW rights of litigants to a fairly selected jury would also be plagued with problems. If a jury that, because of intentional official action is all white, was held to deprive a black litigant of her due process rights, then why shouldn't the same be said for a jury that turns out to be all white not because of official design but rather because of random chance? Moreover, a due process approach that stressed the possibility that jurors of different races will treat litigants differently would not provide a basis for attacking exclusion of black jurors when the litigants are white. This due process approach can create unfortunate dilemmas when black jurors are excluded in a case where the defendant is white but the victim is black.

For these reasons, the Court in recent jury exclusion cases beginning with BATSON V. KENTUCKY (1986) and continuing with cases such as *Powers v. Ohio* (1991), *Edmonson v. Leesville Concrete Co.* (1991), and *J. E. B. v. Alabama* (1994) has focused less on the rights of the litigants, and more on the rights of excluded jurors—in particular, their rights to EQUAL PROTECTION OF THE LAWS under the FOURTEENTH AMENDMENT. The newfound focus on the rights of the would-be jurors is welcome, but the equal protection analysis employed by the Court thus far

is at best incomplete and at worst incorrect. Traditional equal protection analysis may be too narrow; the use of wealth and age criteria ordinarily does not trigger any heightened scrutiny under equal protection, and yet the use of these criteria to exclude jurors ought to be troubling. Indeed, the Court has already (and quite properly) suggested that wealth ought play no part in jury selection, *Thiel v. Southern Pacific Co.* (1946).

More generally, a problem with the traditional equal protection approach is that the equal protection clause—like everything else in the Fourteenth Amendment—was originally intended to be limited to what nineteenth-century lawyers called "CIVIL RIGHTS" such as PROPERTY RIGHTS, FREEDOM OF CONTRACT, and inheritance rights. Political rights, which included voting and jury service, were excluded from the coverage of the Fourteenth Amendment and were addressed more specifically in the VOTING RIGHTS amendments, beginning with the FIFTEENTH AMENDMENT and running through the TWENTY-SIXTH AMENDMENT. And the groups protected by these voting amendments are not necessarily the same as those protected under a traditional equal protection approach.

The modern Court is beginning to understand the close linkage between jury service and other political rights, such as office holding and especially voting. In both *Powers* and *Edmonson*, Justice ANTHONY M. KENNEDY writing for the Court likened jury service to voting, both to support its finding of STATE ACTION, and to draw strength from PRECEDENT removing race from voter selection. This "juror as voter" theme in Kennedy's writings has surface plausibility. After all, jurors vote to decide winners and losers in cases. Thus, the plain meaning of various constitutional provisions concerning the "right to vote" might be interpreted literally to apply to jurors. Beyond this plain meaning, jury service eligibility historically has been limited as a general matter to those who are registered voters.

The connection, however, runs deeper still. The link between jury service and other rights of political participation such as voting is an important part of our overall constitutional structure, spanning three centuries and eight amendments: the Fifth Amendment, Sixth Amendment, SEVENTH AMENDMENT, Fourteenth, Fifteenth, NINETEENTH AMENDMENT, TWENTY-FOURTH AMENDMENT, and the Twenty-Sixth. The voting–jury service linkage was recognized by the Framers, who saw juries as a lower branch of the judicial department, just as the House was the lower branch of the legislature. Indeed, THOMAS JEFFERSON thought that as between electing legislators and doing direct law administration through juries, the people's voice in the latter was more important than in the former in order to preserve liberty and democracy. This connection noted at the founding between voting and jury service was recognized by the Framers and ratifiers of the RECONSTRUCTION amendments—who used the phrase "right to vote" in the Fifteenth Amendment as a shorthand for political participation more generally, including serving on juries—and by the authors of twentieth-century amendments patterned after the Fifteenth.

Thus, when deciding which criteria cannot be used to select jurors, we should self-consciously ask ourselves whether the criteria under consideration would be permissible as a basis for excluding voters. Given the modern Court's characterization of voting as a FUNDAMENTAL RIGHT whose burdening usually triggers STRICT SCRUTINY, many grounds for excluding jurors are constitutionally dubious. Indeed, the fact that we would never think of permitting peremptory challenges to voters should cause us to consider whether peremptories in juries are consistent with our modern commitment to inclusion and REPRESENTATION in political participation. Some believe that the Court's characterization of voting as a fundamental right under the Fourteenth Amendment itself raises problems. This position has some support in ORIGINAL INTENT; as suggested above, political rights were excluded from the scope of the Fourteenth Amendment. At the very least, however, the criteria the Constitution prohibits as bases for selecting votes are impermissible bases for selecting jurors as well. These include race (Fifteenth Amendment); sex (Nineteenth Amendment); class, at least in federal forums (Twenty-Fourth Amendment); and age (Twenty-Sixth Amendment).

VIKRAM D. AMAR
(2000)

(SEE ALSO: *Procedural Due Process of Law, Criminal.*)

Bibliography

AMAR, AKHIL REED 1995 Reinventing Juries: Ten Suggested Reforms. *UC Davis Law Review* 28:1169–1194.

AMAR, VIKRAM DAVID 1995 Jury Service as Political Participation Akin to Voting. *Cornell Law Review* 80: 203–259.

## JURY SIZE

Traditionally, in the United States, a criminal trial jury—the PETIT JURY—has been composed of twelve persons. Early Supreme Court opinions assumed that in federal criminal cases juries of that size were required by the Constitution. In PATTON V. UNITED STATES (1930) the Court ruled that during the course of a federal trial a criminal defendant could, with the consent of the prosecutor and judge, waive the participation of one or two jurors and agree to have the verdict rendered by less than twelve.

In DUNCAN V. LOUISIANA (1968) the Supreme Court held that under the FOURTEENTH AMENDMENT a person accused

of a serious crime in a state court is guaranteed the right to TRIAL BY JURY according to the same standards applied under the Sixth Amendment in the federal courts. Later, in BALDWIN V. NEW YORK (1970), the Court held that a serious, nonpetty crime for purposes of the jury trial guarantee is one where imprisonment for more than six months is authorized. In the wake of *Duncan*, the Court in WILLIAMS V. FLORIDA (1970) decided that trial of a serious crime by a jury of six persons did not violate the constitutional right to trial by jury. Eight years later, the Court in BALLEW V. GEORGIA (1978) ruled that six was the constitutional minimum—that a jury of five persons did not meet the constitutional standard. In *Colgrove v. Battin* (1973) the Court had also ruled that a six-person jury in a civil case in the federal courts did not violate the SEVENTH AMENDMENT right to jury trial.

In early England, the number of jurors on a petit jury came to be firmly fixed at twelve some time in the fourteenth century. The reasons for choosing the number twelve for the jury at common law are shrouded in obscurity; the same number was also in wide use in other countries of Europe from early times. Some writers ascribe this number to mystical and religious considerations, for example, the twelve tribes and the twelve apostles. At the time of the adoption of the Constitution and the BILL OF RIGHTS, the idea of the twelve-person jury was entrenched in the English COMMON LAW system and practice of the colonial society.

In *Williams*, the Court rejected the idea that the history of the drafting of the Sixth Amendment jury trial provision enshrined the twelve-person jury in the Constitution. Instead, the Court adopted a functional approach, relating jury size to the purposes of jury trial. The goals of the jury system were seen as interposing the common-sense judgment of laypersons, permitting community participation in the decision-making process, and making the group large enough to promote group deliberation and obtain a fair cross-section of the community. With respect to these various goals, the court majority found "little reason to think" that there is a significant difference between six and twelve, citing in support "the few experiments" and asserting that neither currently available evidence nor theory suggested contrary conclusions.

The interval between *Williams* and *Ballew* saw the publication of a significant body of SOCIAL SCIENCE RESEARCH examining the effects of changes in jury size. In *Ballew*, although the Court was unanimous on the jury size issue, only two Justices relied on these social science studies in concluding that five-person juries did not adequately fulfill the functions of jury trial outlined in *Williams*. Three Justices had "reservations as to the wisdom—as well as the necessity—of . . . heavy reliance on numerology derived from statistical studies." The same three Justices suggested that the Constitution does not require every feature of the jury to be the same in both federal and state courts, implying that a different, presumably higher, minimum size standard might be applied in the federal courts.

The studies done since *Williams*, through experiment, use of statistical analysis, and theorizing, have inquired whether the size of the jury affects: the likelihood of representation on a jury of ethnic and racial minorities and minority viewpoints that might influence results or the incidence of hung juries; the propensity of juries to reach compromise verdicts; the consistency of verdicts; the likelihood that verdicts reflect community sentiment; and the overall quality of group decision making. A few researchers have also studied the cost savings that might be achieved by reductions in jury size.

In the main, the social scientists have criticized the Court's conclusion in *Williams*, and have argued that decreasing jury size has undesirable effects. Some of these studies have been subjected to methodological criticism, such as the objections to their reliance on small group research. Definitive research on the subject remains to be done. On the issue of the jury's representative character, however, social science has already contributed fairly definitive conclusions. Although it is not possible for a single jury to be representative of the community, six-person juries are less likely than twelve-person juries to contain individuals from minority groups or those who have minority viewpoints. Richard Lempert has suggested that "there may be a positive value in minimizing the number of situations in which minority group members are judged by groups lacking minority representation. . . ."

In other constitutional contexts, judges often rely on intuition and common sense to reach judgments on functional issues, or they take into account constitutional values that transcend a functional approach. The jury size issue, however, involves specific numbers, and intuition and other constitutional values do not provide an adequate basis for drawing the required fine distinctions. One who is not persuaded by the social science studies is therefore relegated to the type of statement made by Justice Powell in *Ballew*, defending the line between five and six: "[A] line has to be drawn somewhere." Under such an approach, the constitutional line could as easily have been drawn between twelve and eleven, and with more historical justification.

Because of the Court's reluctance to overrule recent precedents and because of uncertainty whether social science research can ever demonstrate a sufficient basis for drawing a different line, it seems probable that, for a long time to come, six will remain the constitutional minimum for a criminal jury in the state courts under the Fourteenth Amendment. (Whether the Court will some day adopt Justice Powell's view and apply a different minimum size

standard for juries in federal criminal trials is problematic.) Perhaps in some future century when legal historians try to deduce the reasons for choosing six as the constitutionally significant number, they, like their predecessors, may speculate about the possible mystical value of the number. In the end, they are likely to conclude that its origins, like those of the number twelve, are shrouded in obscurity.

NORMAN ABRAMS
(1986)

Bibliography

LEMPERT, RICHARD 1975 Uncovering "Nondiscernible Differences: Empirical Research and the Jury Size Cases. *Michigan Law Review* 73:644–708.

## JURY TRIAL

See: Trial by Jury

## JURY UNANIMITY

The requirement that a jury in a criminal case reach a unanimous decision became generally established in England during the fourteenth century—about the same time that juries came to be composed of twelve persons. Unanimity began to be generally required for jury verdicts in the American colonies in the eighteenth century. The unanimity requirement as commonly applied means that all the members of the jury must agree upon the verdict—whether for conviction or acquittal. If any of the jurors fail to agree, the jury is "hung"—that is, unable to reach a verdict. Under well-established DOCTRINE, after a hung jury the defendant may be retried.

In a series of cases dating back to the end of the nineteenth century, the Supreme Court has assumed that under the Sixth Amendment the verdict of a criminal jury in the federal courts must be unanimous. This assumption has not been tested, however, for there is no provision for less than unanimous criminal verdicts in the federal courts. The decision in DUNCAN V. LOUISIANA (1968) opened the way for the Court to consider the constitutionality of efforts made by many states to change elements in the COMMON LAW jury system. *Duncan* ruled that the FOURTEENTH AMENDMENT protected the right to TRIAL BY JURY in state courts according to the same standards applied under the Sixth Amendment.

To understand the Court's subsequent decisions regarding jury unanimity, it is necessary also to consider its related decisions on JURY SIZE. The Court in WILLIAMS V. FLORIDA (1970) upheld the use of six-person juries for serious criminal cases. The question whether state criminal juries must reach unanimous verdicts was presented for the first time in 1972 in two companion cases, APODACA V. OREGON and JOHNSON V. LOUISIANA. In *Apodaca*, the constitutionality of 10–2 verdicts was sustained under the Sixth and Fourteenth Amendments. In *Johnson*, 9–3 verdicts were upheld under the Fourteenth Amendment alone. In *Apodaca*, a state case, five Justices (one concurring Justice and four dissenters) also expressed the view that the Sixth Amendment required unanimity in federal criminal trials.

In BALLEW V. GEORGIA (1978) the Court rendered its second size-of-jury decision, holding five-person juries to be unconstitutional. Thus, by the time the Court considered the issue in BURCH V. LOUISIANA (1979), it had upheld six-person juries, sustained the constitutionality of 10–2 and 9–3 majority verdicts, and held five-person juries to be unconstitutional. In *Burch*, the Court held that conviction by a 5–1 vote of a six-person jury violated the constitutional right to trial by jury.

The Court has not in modern times decided whether the SEVENTH AMENDMENT requires unanimity in federal civil trials. It can be argued that it so held in two early cases, *American Publishing Company v. Fisher* (1897) and *Springville v. Thomas* (1897), but the Court's nonunanimous verdict decisions in state criminal cases and its decision in *Colgrove v. Battin* (1973) that six-person juries are constitutional in federal civil trials, arguably have undermined those early decisions.

In addressing the unanimity issue in *Apodaca* and *Johnson*, the Court relied heavily on the analysis used in the first size-of-jury case, *Williams v. Florida*, and applied the same functional approach relating the size of the jury to the purposes of a jury trial. From a functional perspective, the unanimity issue has much in common with but is not identical to the jury size question. For example, both involve concerns that juries represent a cross-section of the community and that minority viewpoints be represented. In connection with jury size, the concern is that if the jury is too small, it will not reflect minority views. Where unanimity is departed from, the concern is that minority viewpoints represented on the jury will simply be disregarded and outvoted. A majority of the Court in *Apodaca* rejected this latter claim on the grounds that there was no reason to believe that majority jurors will fail to weigh the evidence and consider rational arguments offered by the minority. The dissenters argued that jury reliability was diminished in a nonunanimous system because there is less pressure to debate and deliberate. Professor Hans Zeisel has made a similar point: "[T]he abandonment of the unanimity rule is but another way of reducing the size of the jury. But it is reduction with a vengeance, for a majority verdict requirement is far more effective in nullifying the potency of minority viewpoints than is the outright reduction of a jury to a size equivalent to the majority

that is allowed to agree on a verdict. Minority viewpoints fare better on a jury of ten that must be unanimous than on a jury of twelve where ten members must agree on a verdict" (1971, p. 722).

The less than unanimous verdict also poses a question not raised in the jury size cases. A majority of the Court in *Johnson* held that nonunanimous verdicts are not inconsistent with proof beyond a REASONABLE DOUBT and therefore do not violate DUE PROCESS. The fact that some members of the jury are not convinced of guilt does not itself establish reasonable doubt, a concept that apparently applies only to the standard of proof that each individual juror subjectively must apply, not a concept applicable to the jury as a group.

Are criminal defendants as well protected from conviction under a nonunanimous verdict system as under a unanimity requirement? The majority in *Apodaca* and *Johnson* conceded that juries would be hung somewhat less frequently under a nonunanimous system but also relied on SOCIAL SCIENCE RESEARCH for the proposition that "the probability that an acquittal minority will hang the jury is about as great as that a guilty minority will hang it." Data in the same study, however, persuaded some of the dissenters that the prosecution would gain "a substantially more favorable conviction ratio" under a nonunanimous system.

By the time *Burch* was decided in 1979, the Court, following the pattern suggested in the 1978 jury size case of *Ballew*, appears to have abandoned any attempt to rely on social science to support its conclusions regarding required jury attributes. In holding 5–1 verdicts unconstitutional, the Court concluded that "having already departed from the strict historical requirements of jury trial, it is inevitable that lines must be drawn somewhere" and relied upon "much the same reasons that led [us] in *Ballew* to decide that use of a five-member jury threatened the fairness of the proceeding. . . ."

The constitutionality of other numerical combinations—for example, 8–4 or 7–5 verdicts or the various possible majorities on juries of seven to eleven members—remains in doubt. In *Burch*, the Court expressly reserved opinion on the constitutionality of nonunanimous verdicts by juries of more than six. Only Justice HARRY A. BLACKMUN, concurring in *Apodaca*, commented that a 7–5 verdict standard would afford him "great difficulty."

The Court's decisions in the nonunanimous verdict cases have been designed to leave room for the states to experiment with different majority verdict systems. But the uncertainty produced by these decisions may discourage experimentation. If the states do introduce additional variations, the notions that "lines must be drawn somewhere" and that at some point "the fairness of the proceeding" is threatened hardly provide an adequate basis for selecting among the numerous lines that may be presented. If the Court is unwilling to rely upon social science research to back up its functional approach, it may find itself without a calculus for resolving constitutional issues in which specific numbers count.

NORMAN ABRAMS
(1986)

Bibliography

ZEISEL, HANS 1971 And Then There Were None: The Diminution of the Federal Jury. *University of Chicago Law Review* 38:710–724.

## JURY UNANIMITY
(Update)

The issue of jury unanimity is tied to, among other things, JURY SIZE. The Supreme Court has allowed states to deviate from the historical norm of twelve-person juries, and has upheld criminal convictions by juries composed of as few as six persons. In criminal cases, where juries were intended to protect defendants against oppression and governmental overreaching, allowing a jury composed of less than twelve persons to convict by less than unanimous agreement may present a dangerous slippery slope. But there may be stopping points along this slope. Unlike the number six, majority rule and SUPERMAJORITY RULE have unique and stable mathematical properties. Surely, everyone would agree that there is a difference between majority and minority rules, and no one would permit conviction of a defendant by less than a majority. Majority and supermajority rules also govern political institutions other than juries, such as legislatures and appellate judicial panels, to which juries were analogized by the Framers. If jury service is similar in essence to voting and other forms of majoritarian political participation, then the historical tradition of unanimity may not be sacrosanct. Moreover, unanimity traditions at the time of the framing of the Constitution were easier to justify given the homogeneity of jurors at that time. It bears recalling that initially only white men could serve as jurors. As juries have become more racially and sexually diverse, a rule that gives each individual an absolute veto seems less necessary, and perhaps unwise. The challenge for those who advocate a departure from unanimity, of course, is to find a way to ensure that majorities on juries listen to and in good faith consider the views of minorities whose votes can be overridden. Minority vetoes may be problematic; however, minority voices need to be heard.

VIKRAM D. AMAR
(2000)

## *JUS DARE*

(Latin: "To give the law.") This is the traditional function of the legislature in a constitutional government with SEPARATION OF POWERS and is contrasted with JUS DICERE, the function of courts. A court may be said to have invaded the realm of *jus dare* when it engages in JUDICIAL POLICY-MAKING.

DENNIS J. MAHONEY
(1986)

## *JUS DICERE*

(Latin: "To say [what] the law [is].") This is the traditional function of courts, and it is usually understood as a limitation upon their power (*jus dicere, et non jus dare*). "It is emphatically the province of the judicial department to say what the law is"—Chief Justice JOHN MARSHALL in MARBURY V. MADISON (1803).

DENNIS J. MAHONEY
(1986)

## JUST COMPENSATION

The just compensation clause of the Fifth Amendment demands that a private PROPERTY owner be made whole financially when property is taken by the federal government for PUBLIC USE. The same requirement is made applicable to the states by the DUE PROCESS clause of the FOURTEENTH AMENDMENT. The requisite compensation is the monetary equivalent of the property taken, putting the owner in as good a position pecuniarily as before the taking, as the Supreme Court held in *Monongahela Navigation Co. v. United States* (1893). Compensation for losses peculiar to the owner, such as loss of investment or business profits, litigation expenses, and relocation costs, is not constitutionally required, but often is made payable by statute.

In recognition of the somewhat elusive nature of the "monetary equivalent" standard, a variety of working rules have been developed to aid the courts. The most important of these rules is the concept of fair market value. Under this concept, the owner is entitled to receive, as just compensation, the price for the property interest taken that would be agreed upon, as of the time of the taking, by a willing and informed seller and a willing and informed buyer, considering the highest and best use for which the property was available and suitable.

The market value test, however, is not an inflexible one, and other methods of estimating value have been held appropriate when reference to actual market data is impossible because there is no actual market for the property, or when the market value test would result in manifest injustice by diverging to an impermissible degree from the full indemnity principle of the Fifth Amendment.

If the property taken is only a part of a single parcel, just compensation includes payment to the owner for any diminution in value of the remainder resulting from the planned use of the part taken, but the value of benefits to the remainder may be offset against the value of the "take." These results, which ordinarily can be measured by the difference in value of the property before and after the taking, can theoretically, although seldom in fact, result in a zero award. Many states, deeming it unfair to deduct enhancements to the remainder, reject the "before and after" test and award the full value of the part taken plus any net consequential damages realized by the remainder after offsetting any special benefits thereto. That either approach is constitutionally permissible was affirmed in *Bauman v. Ross* (1897).

ARVO VAN ALSTYNE
(1986)

Bibliography

ORGEL, LESTER 1953 *Valuation under the Law of Eminent Domain*, Vol. 1. Charlottesville, Va.: Michie Co.

## JUSTICE DEPARTMENT

See: Attorney General and Department of Justice

## JUSTICIABILITY

Federal judges do not establish legal norms at will or on demand, but only when deciding cases that are justiciable, that is, appropriate for federal court decision. What makes a case justiciable is thus itself an important threshold question, because it determines whether a federal court will exercise its power to formulate and apply substantive law, rather than leaving the issues in the case to be resolved by political or other means. Hence, when the Supreme Court fashions the criteria of justiciability for itself and the lower federal courts, it effectively defines the nature and scope of the JUDICIAL POWER of the United States—the power to make decisions in accordance with law.

Most justiciability issues arise when litigants who are primarily motivated to vindicate public rights seek to contest the validity of government behavior, especially on constitutional grounds. Such public interest suits are usually

designed not so much to redress traditional personal grievances as to vindicate fundamental principles. Commonly the plaintiffs seek DECLARATORY JUDGMENTS or INJUNCTIONS to prevent government officials from carrying on objectionable practices that affect a wide segment of the population. These actions often test and illustrate the degree to which federal judges, particularly Supreme Court Justices, view their power of constitutional oversight as warranted only by the necessity to resolve traditional legal disputes or, instead, by a broader judicial mission to ensure government observance of the Constitution.

In demarcating the federal judicial function, the law of justiciability comprises a complex of subtle doctrines, including MOOTNESS, ADVISORY OPINIONS, and POLITICAL QUESTIONS, among others. The Supreme Court has derived that law from two sources: Article III, which limits federal judicial power to the decision of CASES AND CONTROVERSIES, and nonconstitutional "prudential" rules of the Court's own creation. Both Article III and the rules of prudence incorporate notions of the attributes or qualities of litigation that make the legal issues presented appropriate for judicial determination. The difference between the two is that if Congress wants to have the federal courts entertain public actions, it may override the Court's prudential barriers, but not the constitutional limits of "case" and "controversy."

Three primary, and often mutually reinforcing, conceptions of appropriateness shape the many manifestations of justiciability. One concerns judicial capability. It centers on making federal court adjudication competent, informed, necessary, and efficacious. In this conception, a judicial decision is proper only when adversely affected parties litigate live issues of current personal consequence in a lawsuit whose format assures adversary argument and judicial capacity to devise meaningful remedies. The second conception of appropriateness concerns fairness. It promotes judicial solicitude for parties and interests not represented in the lawsuit, whose rights might be compromised unfairly by a substantive decision rendered without their participation. The third conception concerns the proper institutional and political role in our democracy of the appointed, electorally unaccountable federal judiciary. It cautions federal courts to be sure of the need for imposing restraints, especially constitutional restraints, on other, particularly more representative, government officials.

Whether the policies underlying justiciability doctrine are (or should be) applied in a principled, consistent fashion, depending on the form and characteristics of litigation alone, as the Supreme Court professes, or whether the Court does (or should) manipulate them for pragmatic reasons, is a subject of major controversy among the Court's commentators. Inevitably, the Court has discretion to adjust the degree to which these imprecise and flexible policies must be satisfied in particular cases, given individual variations in the configuration of lawsuits and the inherently relative nature of judgments about judicial capability, litigant need, and the propriety of JUDICIAL ACTIVISM AND RESTRAINT. Assessments of the information and circumstances needed for intelligent, effective adjudication will vary with the levels of generality at which issues are posed and with judicial willingness to act under conditions of uncertainty. Appraisals frequently diverge concerning hardship to, and representation of, present and absent parties who will be affected by rendering or withholding decision. Perhaps most dramatically, Justices differ in their evaluations of the relative importance of judicial control of government behavior and the freedom of politically accountable officials to formulate policy without judicial interference.

In view of the latitude and variation in the Court's self-conscious definition of federal judicial power, it is not surprising that justiciability is a sophisticated, controversial, and difficult field, or that many decisions provoke the skepticism that justiciability DOCTRINE has been manipulated to avoid decision of some issues and advance the decision of others. The Court certainly considers (and is willing to articulate) the degree of concrete focus and clarity with which issues are presented, and how pressing is the need for judicial protection of the litigants. The Court may also consider (but almost certainly will not articulate) a number of the following factors: how substantial, difficult, and controversial the issues are; whether a decision would likely legitimate government action or hold it unconstitutional; how important the Court believes the principle it would announce is and whether the principle could be expected to command public and government acceptance; the possibility of nonjudicial resolution; whether a decision would contribute to or cut off public debate; the expected general public reaction to a decision; the Justices' own constitutional priorities; and a host of other practical considerations that may implicate the Court's capacity to establish and enforce important constitutional principles.

Such judgments appear to have influenced a number of notable justiciability rulings in diverse ways. For example, in *Poe v. Ullman* (1961) the Court held a declaratory judgment challenge to Connecticut's contraception ban nonjusticiable because the statute was not being enforced, but later held the ban unconstitutional in the context of a criminal prosecution. By contrast, in a declaratory judgment challenge to an unenforced prohibition on teaching evolution, the Court, in EPPERSON V. ARKANSAS (1968), held the case justiciable and the prohibition unconstitutional without awaiting a prosecution. Similarly, the Court twice dismissed a seemingly justiciable appeal

challenging Virginia's ban on MISCEGENATION, as applied to an annulment proceeding, within a few years of declaring public school segregation unconstitutional in 1954, but in 1967, following the CIVIL RIGHTS advances of the early 1960s, held the law unconstitutional on appeal of a criminal conviction. Moreover, although the Court has deferred decision in some cases where it ultimately held state statutes unconstitutional, it also occasionally appears to have lowered justiciability barriers and rushed to uphold the constitutionality of important federal legislation (the Tennessee Valley Authority and nuclear liability limitation statutes) or to invalidate it when Congress wanted constitutional assistance with ongoing legislative reform (the FEDERAL ELECTION CAMPAIGN ACT.)

Perhaps the Court is inclined to insist on a greater showing of justiciability where it expects to hold governmental action unconstitutional than where it expects to uphold the action, in part because of a substantive presumption of the constitutionality of government conduct. Yet any generalization about the relations between justiciability and the Court's substantive views is hazardous, given the many factors and subtle judgments that may be weighed in any given case. What seems certain is that decisions on questions of justiciability will always be influenced by visions of the judicial role and will be difficult to comprehend without understanding those visions.

JOHNATHON D. VARAT
(1986)

Bibliography

BICKEL, ALEXANDER M. 1962 *The Least Dangerous Branch: The Supreme Court at the Bar of Politics.* Chap. 4. Indianapolis: Bobbs-Merrill.

GUNTHER, GERALD 1964 The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Review. *Columbia Law Review* 64:1–25.

VARAT, JOHNATHON D. 1980 Variable Justiciability and the *Duke Power* Case. *Texas Law Review* 58:273–327.

WRIGHT, CHARLES A.; MILLER, ARTHUR R.; and COOPER, EDWARD H. 1984 *Federal Practice and Procedure.* Vol. 13:278–293. St. Paul, Minn.: West Publishing Co.

## JUVENILE CURFEW LAWS

Curfew laws generally run counter to American constitutional principles of freedom and liberty. Consequently, the state's power to restrict the movements of its citizenry has been limited to times of civil unrest, crisis, or emergency and is justified by legitimate governmental concerns for the health, safety, and welfare of the community. Juvenile curfew laws, however, differ: usually there is no emergency; only a discrete segment of the population is affected; and the curfew may remain in effect for years. Public concern about juvenile delinquency and victimization has renewed support for curfew ordinances and has encouraged government officials, primarily at the local level, to enact curfews for youths.

Although curfew laws aimed at youths have proliferated, only a few juvenile curfew ordinances have been challenged in the courts. The Supreme Court has never ruled on the constitutionality of any juvenile curfew ordinance, but some state courts and a few lower federal courts have considered the issue. Most of these challenges are based on alleged violations of the FIRST AMENDMENT rights of children and their parents to FREEDOM OF ASSOCIATION, movement, and expression; the FOURTEENTH AMENDMENT rights of children to EQUAL PROTECTION OF THE LAWS, SUBSTANTIVE DUE PROCESS, and PROCEDURAL DUE PROCESS; and the Fourteenth Amendment rights of parents to parental autonomy and familial privacy. Unfortunately, the opinions do not clearly define the parameters of state authority to enact curfew ordinances, in part because the laws themselves vary significantly from jurisdiction to jurisdiction, thus making it difficult to draw comparisons across cases.

Curfew opponents have had mixed success when challenging curfew ordinances on constitutional grounds. Most courts reject the equal protection claim that the state cannot treat minors differently because of their age or because a FUNDAMENTAL RIGHT is infringed; but even when a fundamental right is affected, some courts have upheld such regulations on the ground that the state has compelling interests in the protection of children and the reduction of juvenile crime. Of course, if no fundamental right is implicated then a substantive due process claim also will fail; some courts thus have rejected such a challenge on the ground that the curfew ordinance does not violate a fundamental right. If a fundamental right has been implicated, some courts have found the state's interest sufficiently compelling to warrant the intrusion while others have found the curfew unconstitutional. Similarly, First Amendment claims that the ordinances infringe on expressive or associative rights have been rejected because of the state's greater authority to regulate minors or the importance of the governmental interest, while others have been upheld.

Fourteenth Amendment challenges to curfew ordinances, however, have been upheld on the grounds that the laws are too vague and fail to apprise children and their parents of the prohibited conduct. VAGUENESS challenges also have been sustained when the ordinances delegate too much legislative authority or discretion to those charged with enforcement of the laws. The Fourteenth Amendment claims of parents that juvenile curfew ordinances invade familial privacy and infringe on parental autonomy also have had some limited success, although

the courts appear willing to permit some degree of governmental intrusion. The boundaries of state and parental power, however, remain uncertain as do the nature and extent of children's constitutional rights.

KATHERINE HUNT FEDERLE
(2000)

Bibliography

FEDERLE, KATHERINE H. 1995 Children, Curfews, and the Constitution. *Washington University Law Quarterly* 73:1315–1368.

JORDAN, MICHAEL 1993 From the Constitutionality of Juvenile Curfew Ordinances to a Children's Agenda for the 1990's: Is It Really A Simple Matter of Supporting Family Values and Recognizing Fundamental Rights? *St. Thomas Law Review* 5:389–431.

VEILLEUX, DANNY R. 1993 Annotation: Validity, Construction, and Effect of Juvenile Curfew Regulations. *American Law Reports*, 4th ed. 83:1056–1123.

## JUVENILE PROCEEDINGS

In a juvenile proceeding, a state court is asked to decide whether and how to intervene in the life of a child who may need supervision or protection. These proceedings often take place in a juvenile or family court and usually have two distinct phases: a "jurisdictional" stage, at which the judge must decide whether there are grounds for intervention; and a "dispositional" phase, in which the judge decides how to intervene. Juvenile court statutes typically provide for JURISDICTION in three types of cases: the delinquency case, where a young person is found to have violated a criminal law; the case where the child's conduct is not criminal, but the child is found to be beyond parental control, or in need of supervision because of improper or protocriminal conduct, such as truancy, or running away; and the dependency case, where by reason of parental neglect or abuse the child is in need of protection. Once jurisdiction is established, the court typically has broad discretionary authority in the "dispositional phase" of juvenile proceedings to intervene into the child's life through supervision, or out-of-home placement in foster care or a residential institution.

At COMMON LAW, there were neither special courts nor separate proceedings for minors accused of violating the law. "Infancy" provided a defense, somewhat akin to insanity, in a case where because of immaturity a child lacked the capacity to form the requisite criminal intent. Presumptions made it impossible to find the requisite intent in children under seven, and difficult to find it in those between seven and fourteen. Youths over fourteen were presumed capable. Except for this possible defense, a child could be arrested, indicted, tried, and convicted just like an adult. Minors were regularly charged with crimes, tried like adults, and jailed and imprisoned with adult offenders.

In the nineteenth century, reformers began questioning the appropriateness of treating youthful and adult offenders alike. A revolution began in 1899, when Illinois established the first juvenile court. Hailed as a more humane and effective way of helping children in trouble get back on the track to good citizenship, the Illinois court became a model; by 1925 nearly every state had adopted LEGISLATION providing for some sort of juvenile proceedings. For these new juvenile proceedings, the implicit model of authority was not the traditional criminal trial with adversarial procedures but the family itself, with the state as *parens patriae.*

The philosophy of the early juvenile court emphasized four tenets. The first was rehabilitation, rather than deterrence or punishment. The state's goal was to save the wayward child through appropriate treatment. The second was individualization: justice for children was to be personalized. The court's primary goal was to determine whether a child needed help, and then to prescribe on an individualized basis the appropriate treatment. The third was separation: children were to be kept away from adult criminals who might physically brutalize minors or teach them criminal habits. Finally, juvenile procedure emphasized procedural informality. Although the adversarial determination of facts might be appropriate for a criminal trial where the purpose was punishment, legalistic formalities were thought to be counterproductive in a juvenile proceeding where the purpose was rehabilitation.

Before 1967, because of the philosophy of the juvenile court and its traditions of procedural informality, juvenile proceedings typically offered none of the safeguards afforded adults in criminal trials. Juvenile court practices were virtually unaffected by the recent decisions of the Supreme Court interpreting DUE PROCESS to impose increasingly high procedural standards imposed on state criminal proceedings. Except in a few states, a young person accused of delinquency would not be assigned counsel, had no broad RIGHT AGAINST SELF-INCRIMINATION, was judged by a preponderance of the evidence standard (not proof beyond a REASONABLE DOUBT), had no right to TRIAL BY JURY, and often faced HEARSAY evidence.

The Supreme Court had hinted that due process might demand more. *Haley v. Ohio* (1948) held that a confession given by a fifteen-year-old boy and used in a criminal trial was involuntary. Justice WILLIAM O. DOUGLAS wrote that "[n]either man nor child can be allowed to stand condemned by methods that flout constitutional requirements of due process of law." More pointed doubts about the procedural informality of juvenile proceedings were expressed in *Kent v. United States* (1966). The Court's hold-

ing could be read narrowly: the District of Columbia must use fair procedures to transfer minors from juvenile to adult courts. But in Justice ABE FORTAS's opinion the landmark ruling that was to come the next year was foreshadowed in two respects: first, in the suggestion that the *parens patriae* doctrine of the juvenile court is not "an invitation to procedural arbitrariness"; and second, in the expression of the fear that notwithstanding the paternalistic philosophy of juvenile proceedings, the child may in fact receive "the worst of both worlds: that he gets neither the protections accorded to adults, nor the solicitous care and regenerative treatment postulated for children."

The constitutional watershed came in IN RE GAULT (1967), which held that due process required the states to apply various procedural safeguards to the guilt (or jurisdictional) phase of delinquency proceedings. The Court found that fifteen-year-old Gerald Gault, who had been committed for up to six years at an Arizona Industrial School for making an obscene telephone call, had been deprived of his constitutional rights to adequate written NOTICE of the charges, notice of his RIGHT TO COUNSEL, including assigned counsel, and of his right to confront and cross-examine witnesses; and advice of his privilege against self-incrimination. In a broad opinion rejecting the claim that *parens patriae* and the rehabilitative ideal justified procedural informality, Fortas declared that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." Although the holdings of *Gault* were expressly limited to the guilt phase of delinquency proceedings, *Gault* broadly declared a principle that children have constitutional rights of their own: "Whatever may be their precise impact, neither the FOURTEENTH AMENDMENT nor the BILL OF RIGHTS is for adults alone."

During the years following *Gault*, the Supreme Court decided several cases that expanded the constitutional rights of children in delinquency proceedings. IN RE WINSHIP (1970) held that the "beyond a reasonable doubt" standard of proof was constitutionally mandated in the adjudicatory stage of delinquency proceedings. *Breed v. Jones* (1975) held that the protections of the DOUBLE JEOPARDY clause were applicable to minors. The juvenile in *Breed* had been put in jeopardy by the original adjudicatory hearing where jurisdiction was established, and the Court found that the juvenile's subsequent criminal trial for the same offense constituted double jeopardy. But in *Swisher v. Brady* (1978) the Court held that the double jeopardy clause did not prohibit Maryland officials from taking exceptions to a SPECIAL MASTER's nondelinquency findings.

Despite the decisions in *Gault*, *Breed*, and *Winship*, the Court's decision in MCKEIVER V. PENNSYLVANIA (1971) reflects the Court's continued commitment to a separate system of justice for children and adults. In *McKeiver* the Court held that jury trials are not constitutionally required in delinquency proceedings. The Court reasoned that because a jury is not "a necessary component of accurate factfinding," denying a juvenile a jury trial would not violate the FUNDAMENTAL FAIRNESS component of the due process clause. In addition, the Court pointed out that "the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding."

Since *Gault*, juvenile proceedings involving noncriminal misbehavior, or juveniles thought to be beyond parental control, have been questioned on both procedural and substantive grounds. What does *Gault* imply about appropriate procedural safeguards? To what extent may a state restrain the liberty of a minor on the basis of acts that if committed by adults would not be criminal? The Supreme Court has not yet ruled on the due process requirements applicable to these proceedings, and most states do not provide the procedural safeguards now applicable in delinquency proceedings. In addition to voicing procedural concerns, critics have also criticized as vague and overly broad the language defining these "status offenses": running away from home, sexual promiscuity, truancy, and the like. With few exceptions, however, appellate courts have upheld the constitutional validity of these statutes against such attacks. The Supreme Court, which has written no opinion dealing with such proceedings, has sent mixed signals in summary opinions.

Today every state has juvenile proceedings that allow a court, typically a juvenile or family court, to assume jurisdiction over a neglected or abused child and remove the child from the parents' care. Although not protected by explicit language in the Constitution, the interest of parents in their children's upbringing plainly carries great constitutional weight. Beginning with MEYER V. NEBRASKA (1923), the Supreme Court has recognized the constitutional right of parents to direct the rearing of their children. The parents' claim to authority, however, is not absolute. Since the early nineteenth century, the *parens patriae* power has been held sufficient to empower courts of equity to remove a child requiring protection from parental custody and to appoint a suitable person as guardian.

Statutes authorizing state intervention have been criticized on substantive and procedural grounds. Vague substantive standards of abuse and neglect often leave judges to base their determinations on their own subjective values. As the Supreme Court noted in *Santosky v. Kramer* (1982), the Court has not precisely determined what forms of parental conduct justify state intrusion.

The Court has, however, decided several cases with respect to the procedural requirements where parental rights are terminated on grounds of abuse or neglect. In *Stanley v. Illinois* (1972) the Court relied on the doctrine of IRREBUTTABLE PRESUMPTIONS to hold that it is a denial of DUE PROCESS for unwed fathers to be disqualified from custody of their children without individualized hearings on their fitness. In *Santosky* the Court decided that the "fair preponderance of the evidence" standard, applied in New York parental rights termination proceedings, violated due process: "Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." In LASSITER V. DEPARTMENT OF SOCIAL SERVICES (1981), however, the Court held that due process does not require assignment of counsel in every case involving the termination of parental rights. Although most jurisdictions do provide counsel for parents in such cases, few provide separate counsel for the children.

*Gault* has forced revolutionary changes in delinquency proceedings, but the requirements imposed in other sorts of juvenile proceedings have been modest. In the twenty years since that landmark, Supreme Court decisions have extended to young people accused of crime those procedural safeguards essential to an accurate determination of their guilt. To that extent, the Constitution no longer permits the procedural informality that characterized juvenile proceedings for over half a century. *Gault* and its progeny have substantially narrowed but not obliterated the differences between the adult criminal justice process and the juvenile justice process for delinquents. *McKeiver* underlines the conclusion that the Constitution does not require identical procedures for delinquents and adults. The Court has never held that equal protection requires the legal system to treat all those accused of crime the same, whether adults or minors.

Outside the guilt phase of delinquency proceedings, the Court has shown substantial caution, notwithstanding the potentially expansive announcement in *Gault* that children have rights, and that juvenile proceedings will be judged by their performance, not their promise. A number of factors probably underlie this caution. For one thing, the protective and rehabilitative aspirations of the juvenile court have never been rejected by the Court. As *McKeiver* suggests, the traditions of the juvenile court and the values of informality, flexibility, and protection still may carry some weight in constitutional adjudication. More fundamentally, decisions affecting children are special in two important respects that must affect constitutional analysis. First, defining constitutional rights in juvenile proceedings implicates defining parental rights, particularly in cases involving noncriminal misbehavior where the state may be reinforcing parental prerogatives, and in abuse and neglect proceedings, where the state directly challenges parental adequacy. Second, by reason of immaturity, young people may be more susceptible to coercion, and less able to make informed and responsible decisions. Whether considering the VOLUNTARINESS of a confession, the "knowing" WAIVER OF CONSTITUTIONAL RIGHTS, or the need for supervision and control, it would be foolish for the courts to conclude that age is irrelevant.

ROBERT H. MNOOKIN
(1986)

(SEE ALSO: *Children's Rights; Schall v. Martin.*)

Bibliography

FLICKER, BARBARA 1982 *Standards for Juvenile Justice: A Summary and Analysis.* Juvenile Justice Standards Project. Cambridge, Mass.: Ballinger Publications.

FOX, SANFORD J. 1970 Juvenile Justice Reform: An Historical Perspective. *Stanford Law Review* 22:1187–1239.

MACK, JULIAN W. 1925 The Chancery Procedure in the Juvenile Court. Pages 310–319 in Jane Addams, ed., *The Child, the Clinic, and the Court.* New York: New Republic, Inc., and the Wieboldt Foundation.

PLATT, ANTHONY M. 1977 *The Child Savers: The Invention of Delinquency.* Chicago: University of Chicago Press.

PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 1967 *Task Force Report: Juvenile Delinquency and Youth Crime.* Washington, D.C.: Government Printing Office.

STAPLETON, W. VAUGHAN and TEITELBAUM, LEE E. 1972 *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts.* New York: Russell Sage Foundation.

## *J. W. HAMPTON, JR. & CO. v. UNITED STATES*

See: *Hampton & Co. v. United States*

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## *KAHRIGER, UNITED STATES v.*

See: *Marchetti v. United States*

## KALVEN, HARRY, JR.
(1914–1974)

Commencing the lectures that became his book, *The Negro and the First Amendment* (1965), Harry Kalven remarked that constitutional law was his hobby. He considered himself a torts teacher who had become interested in some constitutional subjects, and certainly his writings on the constitutional law of DEFAMATION and invasions of PRIVACY show deep understanding of the underlying private law. But Kalven was no constitutional amateur; his work on the jury system and on the FIRST AMENDMENT placed him in the first rank of scholars in both fields.

A long collaboration with Hans Zeisel culminated in the publication of *The American Jury* (1966), a work still hailed for its pathbreaking combination of traditional legal analysis and imaginative empirical study. His essays on defamation and OBSCENITY set patterns of thought that can be seen in scores of later scholarly works, and his article on "the PUBLIC FORUM" probably influenced the course of Supreme Court decisions more than any other single work of its era. (See also: TWO-LEVEL THEORY.)

An effervescent man, Kalven was much beloved by a generation of his students at the University of Chicago Law School, some of whom are numbered today among our leading constitutional scholars. His legacy to them, and to all of us through his scholarship, was a passion for applying careful, particularized analysis—in short, the lawyer's craft—to the ends of justice.

KENNETH L. KARST
(1986)

Bibliography

In Memoriam: Harry Kalven, Jr. 1975 *The University of Chicago Law Review* 43:1–149. (Includes a complete bibliography of Kalven's writings.)

## KANSAS-NEBRASKA ACT
10 Stat 277 (1854)

The Kansas-Nebraska Act declared the MISSOURI COMPROMISE of 1820 void and in its place enacted the policy of "POPULAR SOVEREIGNTY," thereby potentially opening all American territories to SLAVERY.

Democrats had extolled the finality of the COMPROMISE OF 1850 as a permanent resolution of the slavery controversy. Its constitutional elements included the stringent Fugitive Slave Act of 1850; the organization of New Mexico and Utah Territories without a prohibition of slavery; abolition of the slave trade in the DISTRICT OF COLUMBIA; and the "Clayton Compromise," which made all questions arising in the TERRITORIAL COURTS involving blacks' personal freedom or title to slaves directly appealable to the Supreme Court of the United States. The Illinois Democrat STEPHEN A. DOUGLAS, chairman of the Senate Committee on the Territories, disrupted this settlement in 1854, however, by introducing a bill to organize the remainder of the LOUISANA PURCHASE territory in order to facilitate construction of a transcontinental railroad that would have Chicago as its midcontinent terminus.

Douglas's original bill contained minor concessions to slavery, including reenactment of the Clayton Compromise provisions for Kansas Territory. But dissatisfied proslavery senators wrested further concessions. These included the declaration that the Missori Compromise of 1820 (which prohibited slavery in the Louisiana Purchase territory north of latitude 36° 30′, except in Missouri) had been superseded by the Compromise of 1850 and was void. The Kansas-Nebraska Bill enacted the principle of popular sovereignty, declaring that "all questions pertaining to SLAVERY IN THE TERRITORIES . . . are to be left to the decision of the people residing therein." It included a vague suggestion that the federal Constitution might in some unspecified way inhibit the power of a territorial legislature to exclude slaves. The bill explicitly endorsed "nonintervention," a code word for an indefinite congeries of proslavery constitutional principles that hinted at an absence of power in any government to inhibit the intrusion of slavery into the territories prior to statehood.

The Kansas-Nebraska Act, together with the Compromise of 1850, surrounded the free states and the free territory of Minnesota with a cordon of territories open to slavery, thus threatening to make the Great Plains a vast proslavery chasm between the free states of the northeast and the free states and territories of the Pacific coast. The Whig party distintegrated, and its place in the North was taken by the new Republican party, which combined Whig economic objectives (free homesteads, federal aid to INTERNAL IMPROVEMENTS) with elements of the Free Soil platform of 1848. These Free Soil principles included the idea that Congress could not establish or permit slavery in a territory and that it could not constitutionally support slavery anywhere outside the extant slave states. Thus the proslavery concessions of 1854 paradoxically resulted in no immediate practical gain for slavery but rather in a widespread dissemination of antislavery constitutional beliefs.

Kansas Territory, organized by the Act, became a theater of struggle for sectional advantage between proslavery Missourians and free-state settlers. The ensuing violence disrupted the Democratic party, especially after President JAMES BUCHANAN tried to force the proslavery LECOMPTON CONSTITUTION on the free-soil majority of Kansas settlers. The Kansas-Nebraska Act thus contributed substantially to the disruption of the Union.

WILLIAM M. WIECEK
(1986)

Bibliography

RUSSEL, ROBERT R. 1963 The Issues in the Congressional Struggle over the Kansas-Nebraska Bill, 1854. *Journal of Southern History* 29:187–210.

## *KASSEL v. CONSOLIDATED FREIGHTWAYS CORPORATION*

See: *Raymond Motor Transportation Company v. Rice*

## *KASTIGAR v. UNITED STATES*
406 U.S. 441 (1972)

Until this case the rule was that the Fifth Amendment requires a grant of transactional immunity to displace a claim of the RIGHT AGAINST SELF-INCRIMINATION. Title II of the ORGANIZED CRIME CONTROL ACT of 1970 fixed a single comprehensive standard applicable to grants of immunity in all federal judicial, GRAND JURY, administrative, and legislative proceedings. The new law provided that when a witness is required to testify over his claim of the Fifth Amendment right, "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal cases," except in a prosecution for perjury or failure to comply. The statute thus provided for use immunity, permitting a prosecution based on EVIDENCE not derived from the testimony forced by a grant of immunity. (See IMMUNITY GRANT.)

Kastigar was cited for contempt after he persisted in his refusal to testify concerning unnecessary dental services affecting the draft status of persons seeking to evade the draft. His refusal to testify raised the question whether the grant of use immunity was sufficient to displace the Fifth Amendment right.

A seven-member Supreme Court, voting 5–2, sustained the constitutionality of use immunity. Justice LEWIS F. POWELL declared: "We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. . . . Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted." Powell dismissed COUNSELMAN V. HITCHCOCK (1892) and its progeny, which established the transactional immunity standard, as OBITER DICTA and therefore not binding. Powell reasoned that a witness who had use immunity against his compelled testimony is in substantially the same position as if he had invoked the Fifth Amendment in the absence of a grant of immunity.

But one who relies on his constitutional right to silence

gives the state no possible way to use his testimony, however indirectly, against him, and he has not remotely, from the standpoint of the law, criminally implicated himself. Use immunity permits compulsion without removing the implication of criminality. On the other hand, the values of the Fifth Amendment are not infringed if the state prosecutes on evidence not related to the compelled testimony, and the state has the burden of proving that the prosecution relies on evidence from sources independent of the compelled testimony. The trouble is, as Justice THURGOOD MARSHALL pointed out in dissent, that only the prosecuting authorities know, if even they can know, the chains of information by which evidence was gathered. In any case, use immunity compels a person to be a witness against himself criminally.

LEONARD W. LEVY
(1986)

Bibliography

LEVY, LEONARD W. 1974 *Against the Law: The Nixon Court and Criminal Justice.* Pages 173–187. New York: Harper & Row.

## *KATZ v. UNITED STATES*
389 U.S. 347 (1967)

*Katz* ended one era of constitutional protection for FOURTH AMENDMENT rights and began another. In OLMSTEAD V. UNITED STATES (1928) the Supreme Court had virtually exempted from the Fourth Amendment's ban on UNREASONABLE SEARCHES and seizures any search that did not involve a physical intrusion on property and a seizure of tangible things. Although eroded by subsequent decisions, and superseded by a federal statute where wiretapping was required, *Olmstead*'s physical intrusion requirement inhibited constitutional control of aural and visual surveillance for forty years, until *Katz* was decided.

Federal agents, believing that Katz was using a pay telephone to transmit gambling information, attached a listening and recording device to the outside of the phone booth without trying to meet Fourth Amendment requirements. With the information obtained from the device, the police were able to convict Katz, but the Supreme Court overturned the conviction. The Court ruled that Katz was entitled to Fourth Amendment protection for his conversations and that a physical intrusion into an area occupied by Katz was not necessary to bring the amendment into play. "The Fourth Amendment protects people, not places," wrote Justice POTTER STEWART for a virtually unanimous Court (only Justice HUGO L. BLACK dissented). Justice JOHN MARSHALL HARLAN, concurring, developed a test for determining what interests are protected, which has come to be the accepted standard: "first that a person have exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as "reasonable."

The Court also set out some of the requirements for lawful ELECTRONIC EAVESDROPPING, supplementing those in BERGER V. NEW YORK (1967), many of which were incorporated in Title III of the OMNIBUS CRIME CONTROL AND SAFE STREETS ACT of 1968.

HERMAN SCHWARTZ
(1986)

## *KATZENBACH v. MCCLUNG*

See: *Heart of Atlanta Motel v. United States*

## *KATZENBACH v. MORGAN*
384 U.S. 641 (1966)

This decision upheld the constitutionality of section 4(e) of the VOTING RIGHTS ACT OF 1965. Section 4(e) provided that no person who had successfully completed sixth grade in a school in which the language of instruction was other than English should be denied the right to vote in any election because of his inability to read or write English. In *Lassiter v. Northampton County Board of Elections* (1959) a unanimous Supreme Court had rejected a black citizen's attack on North Carolina's LITERACY TEST for voting. In *Morgan* the Court, in an opinion by Justice WILLIAM J. BRENNAN and over the dissents of Justices JOHN MARSHALL HARLAN and POTTER STEWART, rejected New York State's argument that in enforcing section 5 of the FOURTEENTH AMENDMENT Congress may prohibit enforcement of state law only if courts determine that the state law violates the FOURTEENTH AMENDMENT. In light of *Lassiter*, it seemed unlikely that New York's literacy requirement would be judicially found to violate the Constitution. Instead, the Court found Section 4(e) appropriate legislation to enforce the Fourteenth Amendment by assuring the franchise to those who migrated to New York from PUERTO RICO after completing sixth grade, whether or not that right to vote had been unconstitutionally infringed. The *Morgan* view that the Fourteenth Amendment confers diescretion upon Congress to act both remedially and prophylactically to protect Fourteenth Amendment rights makes the case a centerpeice for analysis of how far Congress may go to protect or restrict Fourteenth Amendment rights.

THEODORE EISENBERG
(1986)

## KEATING-OWEN CHILD LABOR ACT
39 Stat. 675 (1916)

This law marked the federal government's first attempt to regulate the use of child labor, culminating a decade-long effort by organized labor, social reformers and workers, publicists, and progressive politicians. The act prohibited the shipment in interstate or foreign commerce of any commodity produced in a mine or factory that employed children under the ages of sixteen and fourteen respectively.

Congressional debates over child labor legislation centered on the scope of national power. Opponents of the measure insisted that it involved a regulation of PRODUCTION, not commerce, and hence violated the TENTH AMENDMENT and the controlling precedent of UNITED STATES V. E. C. KNIGHT (1895). Although that decision had been distinguished in other cases involving NATIONAL POLICE POWER uses of the COMMERCE CLAUSE, such as the regulation of adulterated foods, STATES RIGHTS' oriented southern congressmen insisted that the national government could only prohibit harmful items from INTERSTATE COMMERCE. Goods made by children, they insisted, were not harmful in and of themselves. Supporters of a child labor law countered that congressional power over interstate commerce was plenary except for Fifth Amendment limitations. They also maintained that congressional action was imperative because state regulations had proven ineffective.

Supporters of the bill mobilized a broad array of interested groups, coordinated by the highly effective National Child Labor Committee. In addition, some traditionally conservative northern manufacturers lobbied for national action to counter the competitive advantage of new southern industries that operated under ineffectual state laws against child labor. A House committee report reflected this concern, noting that only national power could maintain a national marketplace and prevent unfair competition among the states. Finally, in the summer of 1916, independent progressives convinced a hitherto reluctant President WOODROW WILSON that his support was necessary to insure progressive backing in the forthcoming presidential election. Wilson decisively intervened with southern senators who had prevented passage for nearly six months, and the bill became law on September 1, 1916.

The Keating-Owen Act proved short-lived, for in less than two years the Supreme Court invalidated it in HAMMER V. DAGENHART (1918). A 5–4 majority held that the act regulated production, not interstate commerce, and violated the Tenth Amendment. The *Knight* precedent was reconfirmed, and the Court distinguished its approval of police power regulations of the flow of lottery tickets, adulterated foods, prostitutes, and liquor on the grounds that child labor products were not injurious.

Congress followed the Court's action with a new law based on the taxing power, but it, too, was voided. An effort to secure a child labor amendment to the Constitution languished in the 1920s and 1930s, but finally, in 1938, the FAIR LABOR STANDARDS ACT revived the essential elements of Keating-Owen. The Court sustained the new law in UNITED STATES V. DARBY (1941), expressly overruling *Hammer v. Dagenhart.*

STANLEY I. KUTLER
(1986)

Bibliography

WOOD, STEPHEN 1968 *Constitutional Politics in the Progressive Era: Child Labor and the Law.* Chicago: University of Chicago Press.

## KELLY, ALFRED H.
(1907–1976)

Alfred Hinsey Kelly taught constitutional history for many years at Wayne State University. With his colleague Winfred A. Harbison he wrote *The American Constitution: Its Origins and Development* (1948; 6th ed., with Herman Belz, 1982), now widely regarded as the best single-volume constitutional history ever written. In 1953 Kelly researched the background of the FOURTEENTH AMENDMENT for the NAACP LEGAL DEFENSE FUND's brief in BROWN V. BOARD OF EDUCATION (1954), concentrating on establishing the views of the framers of the amendment. He and Fund attorneys THURGOOD MARSHALL and William R. Ming prepared the final version of the historical sections of the brief submitted to the Court; in this brief and in later articles on the Amendment, Kelly distinguished "between the narrow scope of the CIVIL RIGHTS ACT OF 1866 and the much broader purposes of the Fourteenth Amendment itself" and emphasized the "broad equalitarian objectives" advocated by Representatives JOHN A. BINGHAM, THADDEUS STEVENS, and other members of Congress in the debates on the amendment. Kelly also provided inside accounts of the *Brown* litigation in his essay in *Quarrels That Shaped the Constitution* (John Garraty, ed., 1962) and in interviews with Richard Kluger for the latter's *Simple Justice* (1976).

RICHARD B. BERNSTEIN
(1986)

## *KEMMLER, IN RE*
136 U.S. 436 (1890)

## *MCELVAINE v. BRUSH*
142 U.S. 155 (1891)

## *O'NEIL v. VERMONT*
144 U.S. 155 (1892)

These cases dealt with the meaning of the ban on CRUEL AND UNUSUAL PUNISHMENT and with the INCORPORATION DOCTRINE of the FOURTEENTH AMENDMENT. Kemmler was sentenced to die in the electric chair, then recently invented. He argued that infliction of death by that device would violate the Fourteenth Amendment, because its PRIVILEGES AND IMMUNITIES clause or its DUE PROCESS clause meant that no state could inflict a cruel execution. The Court unanimously ruled that a cruel execution would be one involving torture or lingering death, "something inhuman and barbarous," but that the electric chair was a "humane" form of execution. The Court also held that no clause of the Fourteenth Amendment banned punishments not deemed cruel by state courts. Unlike Kemmler, McElvaine explicitly argued that the Fourteenth Amendment incorporated the Eighth Amendment's ban on cruel punishments; he also argued that solitary confinement of a convict sentenced to death was cruel. Unanimously the Court met and rejected both contentions. In O'Neil's case, however, Justices STEPHEN J. FIELD, DAVID J. BREWER, and JOHN MARSHALL HARLAN in DISSENTING OPINIONS declared that the Fourteenth Amendment applied Eighth Amendment rights and all "fundamental" rights to the states.

LEONARD W. LEVY
(1986)

# KENNEDY, ANTHONY M.
(1936– )

Anthony M. Kennedy has fulfilled the objectives of President RONALD REAGAN in choosing him to fill the vacancy on the Supreme Court created by the retirement of Justice LEWIS F. POWELL.

First, President Reagan expected that Kennedy's noncontroversial background would ensure him swift confirmation by the Senate. After graduating from Harvard Law School in 1961, Kennedy had worked as a lawyer and lobbyist in California until President GERALD R. FORD appointed him to the Ninth Circuit Court of Appeals in 1975. While on the bench, Kennedy, who also taught constitutional law at McGeorge School of Law, evolved as a relatively colorless, nonideological conservative, but gained notoriety for writing the lower court opinion striking down the LEGISLATIVE VETO—a result subsequently affirmed by the Supreme Court in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983). In February 1988 the Senate unanimously confirmed Kennedy.

President Reagan also hoped that Kennedy would join Chief Justice WILLIAM H. REHNQUIST and Justices BYRON R. WHITE, SANDRA DAY O'CONNOR, and ANTONIN SCALIA to form a conservative majority that would curtail the initiatives of both the WARREN COURT and the BURGER COURT. During his first two terms on the Court, Kennedy did in fact cast the crucial fifth vote with these Justices in several 5–4 decisions expanding state control in the fields of ABORTION, CAPITAL PUNISHMENT, CRIMINAL PROCEDURE, and CIVIL RIGHTS.

However, Kennedy has demonstrated little potential as a leader of the current conservative Justices, others of whom have striven to apply complex interpretative theories to constitutional issues. Instead, Kennedy has emerged as a classically conservative Justice: he has thus far avoided articulating any overarching philosophy of CONSTITUTIONAL INTERPRETATION and has been reluctant to challenge PRECEDENT.

Kennedy's votes support a view of FEDERALISM under which the states check federal power and are responsible for matters on which the Constitution provides no clear prohibitions. For example, Kennedy joined Justice Scalia's separate opinion in *Pennsylvania v. Union Gas Co.* (1989), which would have denied Congress the power to lift the states' ELEVENTH AMENDMENT immunity in exercising its legislative powers under Article I. Kennedy also joined *Will v. Michigan* (1989) and DESHANEY V. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES (1989), which effectively held that neither the FOURTEENTH AMENDMENT nor SECTION 1983, TITLE 42, U.S. CODE significantly altered state sovereignty. Similarly, Kennedy maintained in dissent in MISSOURI V. JENKINS (1990) that by upholding a federal court order commanding a school district to impose a tax, the majority impermissibly expanded federal court power at the expense of "fundamental precepts for the democratic control of public institutions."

Kennedy's opinions reflect his belief in a living constitution that recognizes, even against claims of individual liberties, the need for government to adapt to changes in technology and its responsibilities. For example, in SKINNER V. RAILWAY LABOR EXECUTIVES ASSOCIATION (1989) and TREASURY EMPLOYEES UNION V. VON RAAB (1989) Kennedy explained that the FOURTH AMENDMENT did not preclude DRUG TESTING of railway workers after railroad accidents and of customs workers when there was no individualized suspicion and no evidence of drug abuse in the customs service. Similarly, Kennedy rejected FIRST AMENDMENT

challenges to a municipal regulation in *Ward v. Rock Against Racism* (1989) that required performers at an outdoor theater to use the city's sound system and technician, even though the requirement restricted certain speakers and messages.

Kennedy's hesitancy to reverse or to expand precedent reflects his preference for deciding cases on the narrowest available grounds and to affect settled doctrine as little as possible. Accordingly, in *Saffle v. Parks* (1990) Kennedy read precedents narrowly in order to deny federal HABEAS CORPUS relief because the respondent had raised a new legal claim that could not be applied retroactively on collateral review. Kennedy also hewed closely to precedent in *Barnard v. Thorstenn* (1989) in holding that residency requirements for admission to the Virgin Islands bar violated the PRIVILEGES AND IMMUNITIES clause of Article IV.

In WEBSTER V. REPRODUCTIVE HEALTH SERVICES (1989), Kennedy refused to join Justice Scalia's concurrence urging overruling of ROE V. WADE (1973), but joined Chief Justice Rehnquist's PLURALITY OPINION that rejected the trimester analysis used by the *Roe* Court for measuring the importance of the state's interest. Similarly, in CITY OF RICHMOND V. J. A. CROSON CO. (1989) Kennedy refused to join Justice Scalia's concurrence challenging a city's set-aside of public funds for minority contractors, as well as the congressional program on which it was modeled, which had been upheld in FULLILOVE V. KLUTZNICK (1980). Kennedy's concurrence emphasized that *Fullilove* posed a difficult but separate issue concerning the scope of congressional power under section 5 of the FOURTEENTH AMENDMENT.

In PATTERSON V. MCLEAN CREDIT UNION (1989), Kennedy narrowly reaffirmed RUNYON V. MCCRARY (1976). Although the *Runyon* Court had applied 42 U.S.C. section 1981 to restrict racial discrimination in private school admissions, Kennedy refused to apply the statute's prohibitions of discrimination in the "formation" or "making" of contracts to racial harassment in the conditions of employment.

Dissenting in *James v. Illinois* (1990), Kennedy reluctantly accepted precedents imposing the EXCLUSIONARY RULE on the states, but suggested the rule should not have been applied to prevent the prosecution from using illegally obtained evidence to impeach the defendant and other defense witnesses in a criminal trial. Similarly, in *Jones v. Thomas* (1989), Kennedy acknowledged, but refused to extend, the traditional DOUBLE JEOPARDY prohibition (against multiple sentences for the same offense) to preclude the petitioner's continued confinement under a longer sentence after he had completed a commuted sentence imposed for the same offense. He also explained in WASHINGTON V. HARPER (1990) that the involuntary administration of antipsychotic drugs to a violent prisoner comported with both SUBSTANTIVE DUE PROCESS and PROCEDURAL DUE PROCESS.

However, in his dissent in COUNTY OF ALLEGHENY V. ACLU (1989), Kennedy urged abandoning the Court's traditional test in ESTABLISHMENT CLAUSE cases. He argued that the Court's test separated church and state more than the Framers intended.

The major exception to Kennedy's narrow construction of individual rights is his concurrence in TEXAS V. JOHNSON (1989), in which the Court held 5–4 that the First Amendment protected flag burning as political speech. Kennedy explained that "the flag protects even those who would hold it in contempt."

Kennedy's steadfast refusal to offer a sophisticated alternative to the grander constitutional visions of his fellow conservatives may foretell a modest role for him. Ironically, such a role would reflect Kennedy's vision of the Court's modest role in a system governed by traditional notions of federalism.

MICHAEL J. GERHARDT
(1992)

(SEE ALSO: *Flag Desecration; Fourteenth Amendment, Section 5 (Framing); Fourteenth Amendment, Section 5 (Judicial Construction).*)

Bibliography

CHEMERINSKY, ERWIN 1989 Foreword: The Vanishing Constitution. *Harvard Law Review* 103:43–104.

MALTZ, EARL M. 1990 The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence. *Georgia Law Review* 24:629–668.

## KENNEDY, ANTHONY M.
(1936– )
(Update)

After spending his first few terms on the Supreme Court as a reliable if nonideological conservative Justice, Anthony M. Kennedy has emerged as a "swing vote" on the REHNQUIST COURT. His predecessor, Justice LEWIS F. POWELL, JR., played a similar role on the BURGER COURT, but unlike Powell, Kennedy does not tend to stake out intermediate positions on controversial issues. Instead, Kennedy has strong views that happen to place him at the Court's center. In some areas he joins the conservative bloc, consisting of Chief Justice WILLIAM H. REHNQUIST, and Justices ANTONIN SCALIA, CLARENCE THOMAS, and (on many issues) SANDRA DAY O'CONNOR. In other areas, Kennedy joins the moderate-to-liberal bloc, consisting of Justices JOHN PAUL STEVENS, DAVID H. SOUTER, RUTH BADER GINSBURG, and STE-

PHEN G. BREYER. The one near-constant is that Kennedy's position commands at least four other votes.

Kennedy's views about the relation between the states and the federal government are illustrative. He has joined the conservative bloc in a string of decisions invalidating federal laws as infringing upon state SOVEREIGNTY. These cases alternatively invoke the TENTH AMENDMENT, *Printz v. United States* (1997); the ELEVENTH AMENDMENT, *Seminole Tribe of Florida v. Florida* (1996); or Congress's limited enumerated powers, UNITED STATES V. LÓPEZ (1995), *City of Boerne v. Flores* (1997); but they consistently display a skepticism toward federal power. Kennedy does not, however, romanticize the states in the way that the other conservatives appear to do. He was the only member of the Court who voted to invalidate both the federal Gun-Free School Zones Act and a state's efforts to impose TERM LIMITS on members of its congressional delegation, *Thornton v. U.S. Term Limits* (1995). As he wrote in a concurrence in the latter case: "That the States may not invade the sphere of federal sovereignty is as incontestable, in my view, as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States." The driving force behind Kennedy's FEDERALISM jurisprudence is neither nationalism nor STATES' RIGHTS, but an abiding belief in limited government at all levels.

Kennedy's libertarian streak also informs his individual rights jurisprudence. He generally takes an expansive view of FREEDOM OF SPEECH rights under the FIRST AMENDMENT, although he recognizes a legitimate role for government regulation in cases involving a risk of private monopolization of speech, TURNER BROADCASTING SYSTEM V. FCC (1997), and government-funded speech, RUST V. SULLIVAN (1991), *NEA v. Finley* (1998). The funding "exception" has its limits, though, as Kennedy argued in a (partially) DISSENTING OPINION sympathetic to speakers claiming a right to access to public spaces, even nontraditional spaces such as public airports, INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS V. LEE (1992).

Kennedy's sharpest disagreement with the conservative bloc concerns the role of the Court in enforcing constitutional rights beyond those expressly enumerated in the text, under the doctrine of SUBSTANTIVE DUE PROCESS. In PLANNED PARENTHOOD V. CASEY (1992), Kennedy, O'Connor, and Souter jointly authored an opinion reaffirming the "central holding" of ROE V. WADE (1973). Although the *Casey* opinion relied in part on the doctrine of STARE DECISIS, it also contained a ringing endorsement of the practice of judicial protection for unenumerated rights. In other contexts as well, Kennedy has disagreed with the claim that the Constitution protects only those rights spelled out in the text or widely accepted at the time of its adoption.

If Kennedy's endorsement of a right to ABORTION and other unenumerated rights has disappointed conservatives' hopes, they have found his jurisprudence on questions of race more to their liking. He interprets the constitutional requirement of EQUAL PROTECTION OF THE LAWS to mandate "color-blindness" in nearly all circumstances, and has thus voted to strike down AFFIRMATIVE ACTION programs and ELECTORAL DISTRICTING in which race was the predominant factor in the drawing of district lines.

The principal themes of Kennedy's equal protection jurisprudence—and much of his rights jurisprudence more generally—are inclusion and fairness. Outside the context of affirmative action, this has often led Kennedy to cast liberal votes. For example, in *Edmonson v. Leesville Concrete Co.* (1991), he found that the Constitution bars race-based PEREMPTORY JURY CHALLENGES, even in civil cases. Kennedy's opinion in that case reflects an extremely expansive view of the doctrine of what constitutes STATE ACTION, because he saw this approach as necessary to ensure that persons not be denied the opportunity to carry out their duty as jurors simply on the basis of their race. The theme of inclusion also explains his opinion for a 5–4 Court in LEE V. WEISMAN (1992). Although Kennedy usually votes to permit significant state ACCOMMODATION OF RELIGION, his opinion in *Lee* invalidated an official prayer at a public high school graduation. The opinion roundly condemns the suggestion that no violation occurred simply because the students were not required to participate in the graduation ceremony in order to receive their degrees: "to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme," Kennedy wrote.

ROMER V. EVANS (1996) may be the apotheosis of Kennedy's individual rights jurisprudence. In that case, the Court addressed a challenge to an amendment to the Colorado constitution prohibiting the state or any of its subdivisions from enacting or enforcing laws protecting homosexuals from discrimination. Without deciding whether governmental discrimination on the basis of SEXUAL ORIENTATION is inherently suspect, and without even citing BOWERS V. HARDWICK (1986), which upheld the criminalization of homosexual sodomy, Kennedy's opinion in *Romer* invalidates the Colorado amendment as born of an irrational antipathy towards an unpopular group. Although Kennedy nominally uses the least demanding test for constitutionality under the equal protection clause— the RATIONAL BASIS test—the opinion's great strength (or from the perspective of those who disagree, its glaring weakness), is its extremely sparse use of formal legal categories.

In *Romer*, Kennedy appears to be speaking to the nation at large, explaining why the Colorado amendment offends basic principles of fairness and inclusion, and thus offends the Constitution as well. These principles lie at the center of Kennedy's constitutional vision, and thus at the center of the Rehnquist Court's constitutional vision as well.

MICHAEL C. DORF
(2000)

Bibliography

AMAR, AKHIL R. 1997 Justice Kennedy and the Ideal of Equality. *Pacific Law Journal* 28:515–532.

EDELMAN, PAUL H. and CHEN, JIM 1996 The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics. *Southern California Law Review* 70:63–105.

FRIEDMAN, LAWRENCE 1993 The Limitations of Labeling: Justice Anthony M. Kennedy and the First Amendment. *Ohio Northern University Law Review* 20:225–262.

SULLIVAN, KATHLEEN M. 1992 The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards. *Harvard Law Review* 106:22–123.

## KENNEDY, JOHN F.
(1917–1963)

John Fitzgerald Kennedy entered the White House in 1961 as the heir to the liberal, Democratic party tradition of WOODROW WILSON, FRANKLIN D. ROOSEVELT, and HARRY S. TRUMAN. Youthful, vigorous, and blessed with extraordinary rhetorical powers, Kennedy saw himself as an activist chief executive and pledged to "get the country moving again," especially with respect to economic growth and international competition with the Soviet Union. But during his one thousand days in office, Kennedy's performance often lagged behind his promises.

His appointments to the Supreme Court were unexceptional. To the first vacancy, created by the retirement of CHARLES WHITTAKER, he named deputy attorney general BYRON R. WHITE, a former All American football player, Rhodes Scholar, and campaign adviser. White's intellect and productivity exceeded those of his predecessor; he often aligned himself with the conservative faction on the WARREN COURT. To replace Justice FELIX FRANKFURTER and to fill the chair once occupied by OLIVER WENDELL HOLMES and BENJAMIN N. CARDOZO, Kennedy named ARTHUR GOLDBERG, a hard-working, conscientious labor lawyer, who usually voted with the liberals on the Warren Court but was blessed with neither intellectual brilliance nor a dashing prose style.

Kennedy's appointments to the lower federal courts were often dreadful, especially in the southern circuits, where "senatorial courtesy" gave great influence to segregationist Democratic senators. The result was Kennedy's appointment of a number of federal district judges who were openly segregationist and, in some instances, openly racist. On the other hand, Kennedy did place THURGOOD MARSHALL on the circuit court in New York; the Department of Justice, under the prodding of Attorney General ROBERT F. KENNEDY, began to intervene to protect CIVIL RIGHTS workers in the South; and Solicitor General Archibald Cox became a forceful and articulate spokesman for racial justice.

The struggle of black Americans to batter down the walls of segregation and win access to the voting booths of the deep South was the great domestic constitutional issue of the Kennedy years. The administration's response to this crisis blended pragmatism and expediency with idealism and occasional moral outrage. While forcing the South to accept the token integration of higher education, the administration did not push hard for similar results in the primary and secondary grades. The official violence inflicted upon civil rights activists during the Birmingham, Alabama, demonstrations led Kennedy to propose to Congress legislation which became, after his death, the landmark CIVIL RIGHTS ACT OF 1964. Many students of the Kennedy presidency regard his televised address in support of this legislation as his finest hour. On the other hand, the Kennedy brothers were not enthusiastic supporters of the 1963 March on Washington, and under pressure from FBI Director J. EDGAR HOOVER they endorsed the electronic surveillance of civil rights leader MARTIN LUTHER KING, JR.

If civil rights received growing constitutional protection from the Kennedy administration, CIVIL LIBERTIES often suffered at the hands of a regime that espoused vigorous presidential leadership and believed that the ends usually justified the means. Outraged that the nation's leading steel producers had raised prices in defiance of an informal agreement with labor and the White House, Kennedy threatened the offending corporations with tax audits, securities law investigations, and cancellation of defense contracts. Robert Kennedy's unremitting war against organized crime figures skirted the boundary of assorted illegalities, including WARRANTLESS SEARCHES and ELECTRONIC EAVESDROPPING. By waging a clandestine war against Fidel Castro's communist regime in Cuba, the Kennedy brothers also displayed a cavalier attitude about the RULE OF LAW. Operation Mongoose, directed by the attorney general, involved acts of sabotage and terrorism against the Cuban regime, most of them in violation of the neutrality laws.

Although their motives were sometimes the highest, John Kennedy and his closest advisers often fostered a disrespect for legal norms and an inflated conception of

executive power that would haunt the nation during the decade after his assassination in 1963.

MICHAEL E. PARRISH
(1986)

Bibliography

NAVASKY, VICTOR 1977 *Kennedy Justice.* New York: Atheneum.
PARMET, HERBERT S. 1983 *JFK: The Presidency of John F. Kennedy.* New York: Dial Press.

## KENNEDY, ROBERT F.
(1925–1968)

After brief service in the Department of Justice, Robert F. Kennedy joined the Permanent Subcommittee on Investigations of the United States Senate (then headed by JOSEPH MCCARTHY) in 1953 as assistant counsel. When John McClellan became chairman in 1955 he appointed Kennedy chief counsel. In 1957 Kennedy became chief counsel of McClellan's Senate Rackets Committee and achieved national fame during the committee's investigations of teamsters' union leaders David Beck and James Hoffa.

Kennedy was appointed attorney general in 1961 by his brother, President JOHN F. KENNEDY. In this post he distinguished himself by vigorous enforcement of CIVIL RIGHTS—desegregating schools and interstate transportation facilities—and by finally securing the conviction of Hoffa on jury-tampering charges. (See HOFFA V. UNITED STATES.) As the President's closest adviser he exerted more influence on FOREIGN AFFAIRS than most attorneys general, heading the "executive committee" of the National Security Council during the Cuban missile crisis of 1962.

As a United States senator from New York (1965–1968), Kennedy voted for the GULF OF TONKIN RESOLUTION but later opposed President LYNDON B. JOHNSON's conduct of the VIETNAM WAR. He was assassinated by a Palestinian nationalist while campaigning for the Democratic presidential nomination in 1968.

DENNIS J. MAHONEY
(1986)

Bibliography

LASKY, VICTOR 1968 *Robert F. Kennedy: The Man and the Myth.* New York: Trident.

## KENNEDY, ROBERT F.
(1925–1968)
(Update)

Robert Kennedy was named ATTORNEY GENERAL of the United States in 1961 by his brother President JOHN F. KENNEDY. A graduate of Harvard College and the University of Virginia Law School, he had served as counsel for Senate committees in the 1950s and acquired a reputation as an able and relentless prosecutor. His appointment was ascribed to nepotism and provoked widespread criticism.

Kennedy surrounded himself with an exceptionally able group of lawyers, headed by Archibald Cox of the Harvard Law School as SOLICITOR GENERAL and by BYRON R. WHITE, later of the Supreme Court, as deputy attorney general. In time, he won general respect for capable, humane, and nonpolitical administration of the Department of Justice.

The major challenge was the enforcement of CIVIL RIGHTS statutes and decisions. Robert Kennedy brought about the end of SEGREGATION in interstate transportation and used government intervention, including federal marshals, to support black students seeking entry to the University of Mississippi (1962) and the University of Alabama (1963).

Civil rights activists criticized the Justice Department for segregationist appointments to the southern bench and for unwillingness to assume local POLICE POWER in protection of civil rights workers. The problem of FEDERALISM and civil rights caused Kennedy anguish, but he believed that LOCAL GOVERNMENTS had primary responsibility for law enforcement and feared the implications of a national police force.

The key to racial justice in his view was voting: "From participation in the elections," he said, "flow all other rights." Department of Justice lawyers fanned out across the South to fight VOTING RIGHTS cases. In 1963, after outrages in Birmingham and elsewhere in the South, the Kennedys submitted a comprehensive civil rights bill to Congress. The CIVIL RIGHTS ACT OF 1964, passed after President Kennedy's assassination, was the most far-reaching civil rights statute since RECONSTRUCTION.

Like all attorneys general from 1920 to 1970, Kennedy had the problem of J. EDGAR HOOVER, the autocratic and increasingly tendentious chief of the FEDERAL BUREAU OF INVESTIGATION (FBI). Kennedy required the FBI to hire black agents, to reduce its obsession with communism, and to move into such neglected fields as civil rights and organized crime.

Kennedy personally argued the case of GRAY V. SANDERS (1963), in which the Supreme Court struck down the Georgia county-unit system and affirmed the principle of ONE PERSON, ONE VOTE. He secured provision of counsel and reform of the BAIL system in the interests of INDIGENT defendants, and his Committee on Juvenile Delinquency laid the foundation for the War on Poverty in the later 1960s.

He also played a role in FOREIGN AFFAIRS but as the President's troubleshooter, not as his legal adviser. The Central Intelligence Agency covert action that the younger

Kennedy promoted against Fidel Castro's Cuba, like all covert action, violated international law. During the Cuban missile crisis, however, he opposed a surprise air strike on Cuba, observing that "a sneak attack was not in our traditions." After serving nine prickly months as LYNDON B. JOHNSON's attorney general, Kennedy resigned and ran successfully for the Senate from New York. He was assassinated in 1968.

As attorney general, Robert Kennedy, though not a legal technician himself, had a high appreciation of technical legal ability in others, sought impartial enforcement of domestic law, gave new impetus to the movement for racial justice, and organized one of the strongest Departments of Justice in recent times.

ARTHUR M. SCHLESINGER, JR.
(1992)

Bibliography

NAVASKY, VICTOR 1971 *Kennedy Justice.* New York: Atheneum.
SCHLESINGER, ARTHUR M., JR. 1978 *Robert F. Kennedy and His Times.* Boston: Houghton Mifflin.

## KENT, JAMES
(1763–1847)

James Kent, a New York jurist, influenced American constitutional jurisprudence through both his writings and his judicial opinions. Largely because of his *Commentaries on American Law*, Kent was as important a legal figure as any in nineteenth-century America. The *Commentaries* went through fourteen editions by 1900 and innumerable popular abridgments. After publication of the fifth edition, editors came and went, but they wrought their changes mostly in the notes, leaving Kent's work intact. For approximately three-quarters of a century Kent was for many lawyers, throughout the country, their primary legal authority.

Originally a two-volume set when it appeared in 1826, the *Commentaries* were quickly expanded to four. Ostensibly the book was commenced after Kent's mandatory retirement from the bench on reaching age sixty in 1823. Yet, it is possible to see the work in process through Kent's carefully crafted opinions beginning with his appointment to the New York Supreme Court in 1798, and continuing while he was the state's chancellor, 1814–1823. And it is scarcely stretching matters to consider the writing of the *Commentaries* a lifelong process.

Kent's twenty-five years of judicial opinions were imbued with the federalism of the late eighteenth century. At the heart of Kent's jurisprudence was an independent judiciary whose role was to maintain society's moral order. Because of a quirk in New York's 1777 constitution, Kent participated in the veto process as a member of the Council of Revision, which considered all bills passed by the legislature. This process meant that New York judges would have little reason to exercise JUDICIAL REVIEW when a statute's constitutionality was questioned in a case. Having approved the steamboat monopoly bill on several occasions while sitting on the council, for example, New York judges would be unlikely to declare the law contrary to the federal constitution when such a challenge was made in *Livingston v. Van Ingen* (1812) and GIBBONS V. OGDEN (1819, 1820).

The moral order that Kent and his brethren sought to maintain covered many facets of life, including freedom of expression. There was no room in Kent's order of things for BLASPHEMY—"it tends to corrupt the morals of the people, and to destroy good order," he wrote in *People v. Ruggles* (1811)—but a Federalist printer was afforded the defense of truth to the COMMON LAW charge of criminal libel against THOMAS JEFFERSON in PEOPLE V. CROSWELL (1804). The New York Supreme Court was evenly divided in *Croswell*, so that Kent's opinion, based on ALEXANDER HAMILTON's argument, did not become law in itself. A year later the legislature made truth a defense in libel suits, provided the alleged libelous matter "was published with good motives and for justifiable ends." Kent and his colleagues were careful, moreover, in their interpretation of the law, subsequently inserted in the state constitution of 1821, to protect officeholders, setting the groundwork for *Root v. King* (1829), which kept a bridle on attacks on New York public officials until NEW YORK TIMES V. SULLIVAN (1964).

Kent made another major contribution to constitutional law in *Livingston v. Van Ingen* (1812), by elaborately enunciating the doctrine of concurrent commerce powers. The Livingston-Fulton steamboat monopoly symbolized New York's encouragement of commercial enterprise. Under the statute creating the monopoly, any competitor was required to get a license in order to run a steamboat on New York waters. In his opinion for the state's court of last resort, Kent legitimized the monopoly in a decision that reversed Chancellor JOHN LANSING's refusal to grant the monopoly an INJUNCTION against unlicensed competition. Of particular constitutional moment was the argument that the monopoly violated the federal Constitution's COMMERCE CLAUSE. In rejecting this argument, Kent asserted that in the absence of actual conflict between state and national laws, states retained the powers to regulate commerce. Seven years later in *Ogden v. Gibbons* (1819), Kent found no such conflict between the monopoly and the federal coasting act of 1793. In the United States Supreme Court, however, that served as the basis for JOHN MARSHALL's invalidation of the monopoly in GIBBONS V. OGDEN (1824). Kent's doctrine of concurrent commerce powers

persisted, though, largely through the efforts of his former law clerk and judicial colleague, SMITH THOMPSON, and for a time it won the support of the TANEY COURT.

Kent was also responsible for first enunciating what would become the Cherokee doctrine. Speaking for the New York court in *Goodell v. Jackson* (1823), Kent fully developed the paternalistic notion that American Indian peoples, though subject, were sovereign nations, a theme adopted by Thompson in his *Cherokee Nation v. Georgia* dissent (1831), which in turn was adopted by Marshall for the Supreme Court in *Worcester v. Georgia* (1832). (See CHEROKEE INDIAN CASES.)

Important as Kent's occasional constitutional opinions may have been, his major contribution to constitutional development remains the *Commentaries.* There is apparent irony in this accomplishment because Kent did not emphasize constitutional law; instead, he salted that subject into the great body of American law between the law of nations and the construction of wills. Kent succeeded in putting constitutional law in its proper perspective compared to other important aspects of the law. In addition, Kent admirably digested the great Marshall opinions so as, in the opinion of THOMAS REED POWELL, to make them decidedly more palatable than they were in the original. Needless to say, the *Commentaries* continued to vote Federalist.

DONALD ROPER
(1986)

Bibliography

BAUER, ELIZABETH KELLEY 1952 *Commentaries on the Constitution 1790–1860.* New York: Columbia University Press.

HORTON, JOHN T. 1939 *James Kent: A Study in Conservatism 1763–1847.* New York: Appleton-Century Co.

## *KENT v. DULLES*
357 U.S. 116 (1958)

This decision severely limited the State Department's discretionary passport policies. During the Cold War era, the department routinely denied passports to those who refused to sign a noncommunist affidavit. The Supreme Court held that the department lacked statutory authority for this policy and went on to remark in OBITER DICTUM that the RIGHT TO TRAVEL, which it traced back to MAGNA CARTA, was protected by the DUE PROCESS clause of the FIFTH AMENDMENT.

STANLEY I. KUTLER
(1986)

## KENTUCKY RESOLUTIONS

See: Virginia and Kentucky Resolutions

## *KER v. CALIFORNIA*
374 U.S. 23 (1963)

In *Ker* the Supreme Court clarified the constitutional standards governing the states in SEARCH AND SEIZURE cases. MAPP V. OHIO (1961), in applying the federal EXCLUSIONARY RULE against the states, had left undetermined whether they would retain some latitude to fashion their own search rules. The Court answered this question in *Ker,* holding that the protection against state searches granted by the FOURTEENTH AMENDMENT is coextensive with that of the FOURTH AMENDMENT against federal searches. Only Justice JOHN MARSHALL HARLAN disagreed. The Court's single-standard position, he feared, might lead to dilution of federal search safeguards because the Court would be reluctant to fetter the states with standards beyond their reach.

JACOB W. LANDYNSKI
(1986)

## *KEYES v. SCHOOL DISTRICT NO. 1*
413 U.S. 189 (1973)

*Keyes,* the Denver school DESEGREGATION case, was the first such case to reach the Supreme Court from a district outside the South. The case gave the Court an opportunity to decide whether the fact of separation of the races in a city's schools was sufficient to justify desegregation remedies, even in the absence of any history of state law commanding SEGREGATION or any deliberate segregative action by the school board. The Court found it unnecessary to decide this question. Deliberate segregative actions of the board in one substantial part of the city, the Court said, raised a presumption of de jure segregation affecting the whole district; absent a showing that the district's parts were truly unrelated, a districtwide remedy would be approved on the basis of SWANN V. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION (1971). The Court thus affirmed a busing order affecting twelve percent of the district's pupils. Justice WILLIAM J. BRENNAN wrote for a Court that was no longer unanimous.

Justice LEWIS F. POWELL, in a separate opinion that was more dissent than concurrence, argued that the time had come to scrap the DE FACTO/DE JURE distinction. In his view, *Swann* effectively required a school board to provide a remedy not only for segregation deliberately brought about by its own action or by state law but also for residential segregation—a fact of urban life throughout the country. "Segregative intent" was an illusory concept, he said. Once the fact of racial separation is shown, a board should have the duty to take appropriate steps to minimize school segregation. Massive busing, however, was not an

appropriate remedy in his opinion, chiefly because of its costs to the values of the neighborhood school. Justice WILLIAM O. DOUGLAS, concurring, also thought that the de facto de jure distinction made no sense but thought busing an appropriate remedy. Chief Justice WARREN E. BURGER concurred in the result, Justice WILLIAM H. REHNQUIST dissented, and Justice BYRON R. WHITE did not participate.

KENNETH L. KARST
(1986)

(SEE ALSO: *Columbus Board of Education v. Penick; School Busing.*)

## *KEYISHIAN v. BOARD OF REGENTS*
385 U.S. 589 (1967)

ADLER V. BOARD OF EDUCATION (1952) was one of the cases in which the Supreme Court upheld a wide range of regulations barring "subversives" from government employment. *Keyishian* overruled *Adler* and was the culmination of a series of later decisions restricting LOYALTY-SECURITY PROGRAMS, typically by invoking the VAGUENESS and OVERBREADTH doctrines. *Keyishian* struck down some parts of a complex New York law limiting employment in public teaching; the law's use of the term "seditious" was unconstitutionally vague. Other parts of the law were invalid because they prohibited *mere* knowing membership in the Communist party without the specific intent required by ELFBRANDT V. RUSSELL (1966). *Keyishian* confirmed the Court's previous decisions rejecting the doctrine that public employment is a privilege to which government may attach whatever conditions it pleases.

MARTIN SHAPIRO
(1986)

## *KIDD v. PEARSON*
128 U.S. 1 (1888)

A unanimous Court distinguished manufacturing and all forms of PRODUCTION from INTERSTATE COMMERCE, holding that a state act prohibiting the manufacture of intoxicants did not conflict with the national power to regulate interstate commerce and that the manufacture of a product for export to other states did not make it an article of interstate commerce.

LEONARD W. LEVY
(1986)

## *KILBOURN v. THOMPSON*
103 U.S. 168 (1881)

Until this case Congress believed that its power of conducting investigations was unlimited and that its judicial authority to punish contumacious witnesses for contempt was unquestionable. After this case both the investigatory and CONTEMPT POWERS of Congress were distinctly limited and subject to JUDICIAL REVIEW. Not until MCGRAIN V. DAUGHERTY (1927) did the Court firmly establish the constitutional basis for oversight and investigatory powers. The decision in *Kilbourn* was so negative in character that the legitimate area of LEGISLATIVE INVESTIGATIONS seemed murky.

*Kilbourn* developed out of the House's investigation, by a select committee, into the activities of a bankrupt banking firm that owed money to the United States. The committee subpoenaed Kilbourn's records, which he refused to produce, and interrogated him, but he refused to answer on the ground that the questions concerned private matters. The House cited him for contempt and jailed him. He in turn sued for false arrest, and on a writ of HABEAS CORPUS he obtained a review of his case before the Supreme Court.

Unanimously, in an opinion by Justice SAMUEL F. MILLER, the Court held that neither house of Congress can punish a witness for contumacy unless his testimony is required on a matter concerning which "the House has jurisdiction to inquire," and, Miller added, neither house has "the general power of making inquiry into the private affairs of the citizen." The subject of this inquiry, Miller said, was judicial in nature, not legislative, and a case was pending in a lower federal court. The investigation was fruitless also because "it could result in no valid legislation" on the subject of the inquiry. Thus, the courts hold final power to decide what constitutes a contempt of Congress, and Congress cannot compel a witness to testify in an investigation that cannot assist remedial legislation.

LEONARD W. LEVY
(1986)

## KING, MARTIN LUTHER, JR.
(1929–1968)

Martin Luther King, Jr., preeminent leader of the black freedom movement of the 1950s and 1960s, repeatedly challenged America to live up to the egalitarian principles set forth in the three RECONSTRUCTION era amendments. "If we are wrong, the Constitution of the United States is wrong," King told his Alabama colleagues in an unpublished speech on December 5, 1955, the day that Montgomery's black citizens began a year-long campaign

against discriminatory seating practices on city buses. Victory in that struggle catapulted King to national prominence as an exponent of nonviolent protest against racial oppression, and throughout the twelve remaining years of his life King pursued and expanded his challenge to injustice and exploitation internationally as well as domestically.

Pointing out in his 1964 book, *Why We Can't Wait*, that the United States was "a society where the supreme law of the land, the Constitution, is rendered inoperative in vast areas of the nation" because of explicit RACIAL DISCRIMINATION, King described the CIVIL RIGHTS struggle as a resumption "of that noble journey toward the goals reflected in the PREAMBLE to the Constitution, the Constitution itself, the BILL OF RIGHTS and the Thirteenth, Fourteenth, and FIFTEENTH AMENDMENTS." Protest campaigns in segregationist strongholds such as Birmingham and Selma, Alabama, stimulated national support for landmark legislative achievements such as the CIVIL RIGHTS ACT OF 1964 and the VOTING RIGHTS ACT OF 1965, and produced an all-but-complete victory over de jure segregation by the middle of that decade.

Recognizing that other evils more subtle than segregation also tangibly afflicted the daily lives of millions of black people, King broadened his attack to include all forms of poverty and economic injustice, saying that the movement had to go beyond civil rights to human rights. That progression, coupled with King's outspoken condemnations of America's militaristic foreign policy, particularly its participation in the VIETNAM WAR, led King to advocate basic changes in American society reaching far beyond his previous attacks on racial discrimination.

Identified as a prominent advocate of CIVIL DISOBEDIENCE against immoral segregation statutes even before his influential 1963 "Letter from Birmingham Jail," King defended his position by reference to the long tradition of NATURAL RIGHTS thinking. In his early years of civil rights activism King said that peaceful, willing violation of such statutes forced courts to void unconstitutional provisions, but toward the end of his life King expanded his argument, contending that the weightier moral demands of social justice sometimes required that nondiscriminatory laws also be violated. If any laws blocked the oppressed from confronting the nation with moral issues of human rights and economic justice, then such laws rightfully could be breached. Although King until 1966 had believed that depicting the brutalities of racism best attracted national support for civil rights, in his final years King repeatedly suggested that protesters might have to coerce concessions from unwilling federal officials by obstructing the orderly functioning of society until the desired policy changes were made.

King's challenge to American racism helped to close the gap between constitutional principles and discriminatory practices; his broader struggle against other forms of human injustice left a legacy that will stimulate future generations for years to come.

DAVID J. GARROW
(1986)

Bibliography

GARROW, DAVID J. 1986 *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference, 1955–1968.* New York: William Morrow.

KING, MARTIN LUTHER, JR. 1964 *Why We Can't Wait.* New York: New American Library.

## KING, RUFUS
(1755–1827)

Rufus King, a Harvard-educated lawyer who had been an officer in the Revolutionary War, represented Massachusetts in the Congress of the Confederation from 1784 to 1787. He was a principal author of the NORTHWEST ORDINANCE, and wrote its provisions prohibiting SLAVERY and protecting the OBLIGATION OF CONTRACTS against legislative impairment.

Although he originally opposed either calling a convention or radically altering the ARTICLES OF CONFEDERATION, he represented Massachusetts at the CONSTITUTIONAL CONVENTION OF 1787. King soon became a spokesman for those who favored a strong national government and for the interests of the large northern states. Very early in the debates he advocated consolidation rather than confederation: although he recognized that it was impossible to annihilate the states, he thought they should be stripped of much of their power. He argued against equal representation of the states in the SENATE, and he favored popular election of the President. King proposed the CONTRACT CLAUSE, and, although it was voted down in the Committee of the Whole, he saw that it was inserted into the Constitution by the Committee on Style, of which he was a member. In opposition to GOUVERNEUR MORRIS, he supported the admission of new states on terms of equality with the old. King was also one of the first to recognize publicly that the politically important division of the country was not between large and small states, but between North and South.

Almost immediately after attending the Massachusetts ratifying convention, he moved to New York and was elected one of its original United States senators. King served in the Senate from 1789 to 1796, and was a leading spokesman for ALEXANDER HAMILTON (his political patron) and the Federalist administration.

King returned to the Senate in 1813. Although an op-

ponent of the War of 1812, he refused to attend the HARTFORD CONVENTION, denounced New England's threat of SECESSION, and supported the government financially. Serving in the Senate until 1825, King participated in the debates over the MISSOURI COMPROMISE. Although not an abolitionist, King opposed the extension of slavery, and he contended that it was within the power of Congress to make permanent abolition of slavery a condition of Missouri's admission as a state. He insisted upon constitutional guarantees of the rights of black Missourians.

In his public career, King was the Federalist candidate for vice-president (1804, 1808) and President (1816), and was twice minister to Great Britain (1796–1803, 1825–1826).

DENNIS J. MAHONEY
(1986)

## *KINGSLEY BOOKS, INC. v. BROWN*
354 U.S. 436 (1957)

*Kingsley* authorized broad civil remedies to control the merchandising of OBSCENITY. The Supreme Court upheld a New York statute permitting state officials to obtain INJUNCTIONS against the sale of allegedly obscene materials before a judicial determination that the materials were obscene and, after trial, to seize and destroy any material found to be obscene. Rejecting assertions that the statutory scheme was an unconstitutional PRIOR RESTRAINT, the majority concluded that the scheme in actual application did not differ from the criminal remedies sanctioned in *Alberts v. California* (1957), decided the same day. (See ROTH V. UNITED STATES.)

The dissenters argued that numerous procedural defects rendered the statute unconstitutional. The seizure and destruction of the obscene books were tantamount to "book burning," according to Chief Justice EARL WARREN, for books were judged outside the context of their use. Justices WILLIAM O. DOUGLAS and HUGO L. BLACK, jointly dissenting, argued that an injunction before trial was censorship. They also would have required a finding of obscenity for each publication of the condemned work rather than regulating speech like "diseased cattle and impure butter." Justice WILLIAM J. BRENNAN contended that the statute was vastly defective for permitting a judge, rather than a jury, to determine a work's obscenity.

KIM MCLANE WARDLAW
(1986)

## *KINGSLEY INTERNATIONAL PICTURES CORP. v. REGENTS*
360 U.S. 684 (1959)

In *Kingsley International Pictures Corp. v. Regents* the state of New York had refused to issue a license for the motion picture *Lady Chatterley's Lover* because it "alluringly portrays adultery as proper behavior." There was no claim that the film constituted an INCITEMENT TO UNLAWFUL CONDUCT. Without deciding whether all licensing schemes for motion pictures were unconstitutional the Supreme Court held that the refusal to grant this license violated the FIRST AMENDMENT. The Court reaffirmed that motion pictures were within the scope of the First Amendment and proclaimed that the amendment's "basic guarantee" is "the freedom to advocate ideas," including the idea that adultery may in some cases be justified.

STEVEN SHIFFRIN
(1986)

## *KINSELLA v. KRUEGER*

See: *Reid v. Covert*

## *KIRBY v. ILLINOIS*
406 U.S. 682 (1972)

In an effort to eviscerate UNITED STATES V. WADE (1967) without overruling it, a plurality of the Supreme Court held that the RIGHT TO COUNSEL does not apply to pretrial identification procedures that occur before INDICTMENT or other indicia of formal criminal charges. The case involved the most suggestive confrontation imaginable: a one-to-one presentation of the person upon whom police had found a robbery victim's credit cards. Yet the Court held that because this confrontation occurred before Kirby had been formally charged, it was not a "critical stage" of the proceedings requiring counsel to preserve a future right to a FAIR TRIAL.

The distinction between pre- and postindictment identification procedures is dubious for two reasons. First, the vast majority of LINEUPS occur while cases are under investigation, and thus before indictment. Second, all the dangers of irreparable mistaken identification and the inability of counsel to reconstruct the pretrial confrontation—which had been the foundation of *Wade*—apply whether the identification occurs before or after formal charging. The plurality's startling misreading of precedent was highlighted when Justice BYRON R. WHITE, who dissented in *Wade*, dissented in *Kirby* also, saying that *Wade* compelled the opposite result.

*Kirby* leaves untouched the possible DUE PROCESS objections to an unfair pretrial confrontation. Proof of unfairness would require suppression of testimony about the pretrial procedure as well as the in-court identification by a witness whose perceptions were possibly tainted. A due process objection may be made whether the pretrial confrontation has occurred before or after formal charging.

Of course, it is much more difficult for the accused to show that a confrontation was fundamentally unfair than to prove that it was done without counsel.

BARBARA ALLEN BABCOCK
(1986)

## *KIRSCHBAUM v. WALLING*
316 U.S. 517 (1942)

After UNITED STATES V. DARBY (1941) the Court decided many cases on the coverage of the FAIR LABOR STANDARDS ACT, which benefited employees "engaged in commerce or in the PRODUCTION of goods for commerce." Congress by no means had made the statute coextensive with the limits of its power over INTERSTATE COMMERCE, but every time the Court ruled that the statute covered certain employees, it brought their activities within the scope of the COMMERCE CLAUSE. The leading case is *Kirschbaum*, which extended statutory coverage—and thus the commerce power—to employees who were at least one step away from production. On the theory that service and maintenance employees kept a building safe and habitable, the Court held that a landlord who rented space to a firm that manufactured goods destined for interstate commerce had to pay his janitors and elevator operators the minima fixed by the statute. In *Borden Milk Co. v. Barella* (1945), the Court upheld application of the statute to service employees in a building occupied by the executive offices of a company that carried on its interstate manufacturing elsewhere. In *Martino v. Michigan Window Cleaning Co.* (1946), the employees who benefited from the statute—window cleaners employed by a company to service an industrial building—were two steps removed from production for commerce. Similarly, in *D. A. Schulte v. Gangi* (1946), the Court extended the statute and the commerce power to the maintenance people employed by a building owner who rented space to a firm that worked on intrastate goods and returned them to a contractor who subsequently shipped some of them across state lines. Employees sometimes did lose, but the Court's interpretations in these cases showed that the commerce power virtually authorized Congress to regulate any business, however remote its economic connection with interstate commerce.

LEONARD W. LEVY
(1986)

## *KLOPFER v. NORTH CAROLINA*
386 U.S. 213 (1967)

Prior to the Supreme Court's decision in *Klopfer*, only defendants in federal courts enjoyed the Sixth Amendment right to a SPEEDY TRIAL. Consequently, legislation in many states permitted prosecutors to postpone bringing pending cases to trial indefinitely. Declaring such state laws unconstitutional, the Court, in an opinion by Chief Justice EARL WARREN, held that the right to a speedy trial is a FUNDAMENTAL RIGHT incorporated by the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT and thus fully applicable in state trials.

WENDY E. LEVY
(1986)

(SEE ALSO: *Incorporation Doctrine.*)

## *KNIGHT COMPANY, E. C., UNITED STATES v.*
156 U.S. 1 (1895)

The issue in the Supreme Court's first interpretation of the SHERMAN ANTITRUST ACT hung on the lawfulness of the Sugar Trust's acquisition of its competitors, and the decision nearly eviscerated the act. An 8–1 Court used the doctrine of DUAL FEDERALISM in dismissing a government suit to dissolve the trust.

When the American Sugar Refining Company (the Sugar Trust) acquired four Philadelphia refineries in 1892 it controlled ninety-eight percent of domestic sugar manufacturing. Attorney General RICHARD OLNEY, who inherited the case from his predecessor, believed that the Sherman Act was founded on a false economic theory; he believed that free competition had been "thoroughly discredited" and that the act should have regulated trusts as a natural development, not prohibited them. There is, however, little evidence of deliberate carelessness in Olney's preparation of the case. Although the MAJORITY OPINION commented upon a lack of EVIDENCE to demonstrate a restraint of trade, the government never believed that such a showing was necessary. Prior decisions had clearly held sales to be a part of commerce; the majority would admit as much here, and a lower court conceded that the trust had sought control of both refining and sales. Clever defense strategy successfully shifted the Court's attention from restraint of INTERSTATE COMMERCE to a consideration whether the commerce power extended to manufacturing.

Chief Justice MELVILLE W. FULLER's opinion for the Court endorsed the defendants' argument. By repeating that manufacturing was separable from commerce, the Court made a formally plausible distinction based solely on precedent. (See KIDD V. PEARSON.) Although the Sugar Trust had monopolized manufacturing, the Court found no Sherman Act violation because the acquisition of the Philadelphia refineries involved INTRASTATE COMMERCE. Although manufacturing "involves in a certain sense the control of its disposition . . . this is a secondary and not the primary sense." The trust did not lead to control of inter-

state commerce and so "affects it only incidentally and indirectly." This directindirect effects test of the reach of federal regulation had been mentioned in earlier cases (see EFFECTS ON COMMERCE) and was here employed to reach unrealistic ends: "Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, PRODUCTION in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination or conspiracy."

Justice JOHN MARSHALL HARLAN, dissenting, posed the basic question: "What, in a legal sense, is a restraint of trade?" The trust was in business to sell as well as manufacture sugar, and most of its sales obviously constituted interstate commerce. Relying on GIBBONS V. OGDEN (1824), Harlan posited a broad view of the commerce power. Any obstruction of commerce among the states was an impairment of that commerce and must be treated as such. The majority's construction of the Sherman Act left the public "at the mercy of combinations." The Sugar Trust's inevitable purpose of preventing free competition doomed it as a restraint of trade. "The general government is not placed by the Constitution in such a condition of helplessness that it must fold its arms and remain inactive while capital combines . . . to destroy competition." Harlan correctly believed that the issue should not have been the contracts of acquisition but rather the trust's control over commerce in sugar.

By excluding manufacturing monopolies from the scope of the antitrust act, the decision in *Knight* cleared the way for the greatest merger and consolidation movement in American history. Chief among the industries taking advantage of the opportunities given them by the Supreme Court were manufacturing and the railroads. Such massive combines as United States Steel Corporation, American Can Company, International Harvester, and Standard Oil of New Jersey can trace their origins to this period. From 1879 to 1897 fewer than a dozen important combinations had been formed, with a total capital of around one billion dollars. Before the century ended, nearly two hundred more combinations formed, with a total capital exceeding three billion dollars. Of some 318 CORPORATIONS in business in 1904, nearly seventy-five percent had been formed after 1897.

The Court's opinion also seriously injured the concept of national supremacy; Fuller's distinction between production and commerce lasted until 1937. In the meantime, the Court had created what EDWARD S. CORWIN called a "twilight zone" in which national regulation of corporations was uncertain and haphazard. Although the Court would apply the Sherman Act to railroads within two years (see UNITED STATES V. TRANS-MISSOURI FREIGHT ASSOCIATION), not until the reinterpretation in NORTHERN SECURITIES CO. V. UNITED STATES (1904) would the Sherman Act become an effective tool against big business.

DAVID GORDON
(1986)

Bibliography

EICHNER, ALFRED S. 1969 *Emergence of Oligopoly: Sugar Refining as a Case Study.* Westport, Conn.: Greenwood Press.

## KNOX, PHILANDER C.
(1853–1921)

Although Philander Chase Knox, a Pittsburgh corporation lawyer, had helped create the United States Steel Corporation, he became an active antitrust prosecutor as THEODORE ROOSEVELT'S ATTORNEY GENERAL (1901–1904). Knox initiated the efficient and meticulous prosecution in NORTHERN SECURITIES CO. V. UNITED STATES (1904) and successfully argued that case before the Supreme Court. He also began victorious cases against the Salt Trust, the Coal Trust, and the Beef Trust, the latter culminating in the STREAM OF COMMERCE doctrine in SWIFT & COMPANY V. UNITED STATES (1905). Knox's actions helped revive the SHERMAN ANTITRUST ACT and insured a prominent political career after his resignation in 1904. He served as WILLIAM HOWARD TAFT's secretary of state (1909–1913) and later, in the Senate, played a major role in railroad rate legislation. An "irreconcilable" over the League of Nations, Knox believed it imposed unconstitutional obligations under the TREATY POWER.

DAVID GORDON
(1986)

## *KNOX v. LEE*

See: Legal Tender Cases

## *KOLENDER v. LAWSON*
461 U.S. 352 (1983)

The facts of this case, not revealed by the official report, enhanced its interest. Lawson was a law-abiding black man of unorthodox attire and grooming who suffered frequent police harassment when he walked in white neighborhoods. A 7–2 Supreme Court held VOID FOR VAGUENESS a California statute obligating persons who "wander" the streets to provide credible and reliable identification and to explain their business to the police. The majority rea-

soned that the statute vested excessive discretion in the police to decide whether to stop and interrogate a suspect or leave him alone in the absence of PROBABLE CAUSE to arrest him. The Court also suggested that the statute compromised the constitutional right to freedom of movement.

LEONARD W. LEVY
(1986)

## *KONIGSBERG v. STATE BAR*
353 U.S. 252 (1957)
366 U.S. 36 (1961)

In *Konigsberg* I the Supreme Court held that refusal to answer questions about political associations was constitutionally insufficient to justify a state bar association finding of failure to demonstrate good moral character, and consequent denial of bar admission. In *Konigsberg* II the Court upheld a second denial of admission based on the ground that refusal to answer obstructed full investigation of the applicant's qualifications.

MARTIN SHAPIRO
(1986)

## KOREAN WAR

In June 1950 North Korea attacked South Korea; within a week President HARRY S. TRUMAN committed American air, sea, and ground forces to South Korea's defense. The resulting three-year involvement lasted into the administration of DWIGHT D. EISENHOWER and became the largest undeclared war in American history prior to the Vietnam involvement.

The initial rush of events created enduring confusion about the constitutional basis for the American intervention. On June 25, the day following the attack, the United States obtained a United Nations Security Council resolution ordering North Korean withdrawal. Two days later, with fighting continuing, the Security Council requested U.N. members to assist in repelling the aggression. That day, without congressional approval, President Truman publicly ordered American air and naval support for the South Koreans, and throughout his remaining tenure in office he persistently called the conflict a United Nations POLICE ACTION. The key American decisions had actually preceded the U.N. request, however, and critics, led by Senator Robert A. Taft, convincingly demonstrated that pertinent provisions of the UNITED NATIONS CHARTER (having status as treaty law in the United States) and the United Nations Participation Act gave no constitutional authority to the American President. The necessary agreements for United States peacekeeping forces had never been concluded with the Security Council.

Careful defenders of Truman's actions, especially Secretary of State Dean Acheson, argued that Truman's authority derived from his duty as COMMANDER-IN-CHIEF to protect American interests. One such interest was the preservation of the United Nations as an instrument for peace; another was the security of American forces in the Pacific area. The defenders relied, too, on presidential control of FOREIGN AFFAIRS and on the alleged precedent of eighty-five prior instances of presidential use of military forces without a DECLARATION OF WAR. Not surprisingly, critics also found these sources insufficient, strongly disagreeing about the meaning of Congress's power "to declare war" and about the legal relevance of past episodes of unilateral presidential action. Truman nonetheless followed Acheson's advice and explicitly refused to request formal authorization from Congress.

The war had other constitutional dimensions, as well. In April 1951, after serious policy disagreements, Truman dismissed his outspoken Korean and Far Eastern commander, General of the Army Douglas MacArthur, thereby reaffirming the principle of civilian control over the military. (See CIVIL-MILITARY RELATIONS). Later, in April 1952, when a strike threatened military production for Korea, the President seized American steel mills, an action subsequently held unconstitutional in YOUNGSTOWN SHEET AND TUBE CO. V. SAWYER (1952), a decision that arguably narrowed future presidential prerogatives. The Korean engagement also intensified clashes over the FIRST AMENDMENT by contributing to the anticommunist sentiment tapped by Senator Joseph R. McCarthy. Similarly, the war provided context and impulse for the partially successful congressional effort, in the "Great Debate" of 1951, to restrict additional presidential commitment of troops to Europe. Finally, the war figured rhetorically in calls for limiting the TREATY POWER and EXECUTIVE AGREEMENTS through the BRICKER AMENDMENT.

By the time of the Korean armistice on July 27, 1953, American casualties numbered 142,000, including 33,600 deaths. The war thus stands squarely as de facto precedent for presidential war-making of substantial magnitude, and more so because American courts, in typical fashion, refrained from ruling on its constitutional base. Ironically, memories of the domestic debates over Korea helped generate later efforts, such as the GULF OF TONKIN RESOLUTION (1964), to obtain prior congressional endorsement of foreign military ventures.

CHARLES A. LOFGREN
(1986)

Bibliography

LOFGREN, CHARLES A. 1969 Mr. Truman's War: A Debate and Its Aftermath. *Review of Politics* 31:223–241.

MURPHY, PAUL L. 1972 *The Constitution in Crisis Times, 1918–1969.* New York: Harper & Row.

## *KOREMATSU v. UNITED STATES*

See: Japanese American Cases

## *KOVACS v. COOPER*
336 U.S. 77 (1949)

After earlier suggesting that a ban on SOUND TRUCKS would be invalid, the Supreme Court held that "loud and raucous" loudspeakers could be prohibited as a reasonable regulation of time, place, and manner of speech. The opinion by Justice STANLEY REED noted interests in residential tranquillity, and it is cited as a PRIVACY decision. Justice FELIX FRANKFURTER, concurring, delivered a major attack on the PREFERRED FREEDOM doctrine.

MARTIN SHAPIRO
(1986)

## *KRAMER v. UNION FREE SCHOOL DISTRICT NO. 15*
395 U.S. 621 (1969)

New York limited school district VOTING RIGHTS to residents who owned (or leased) real property or were parents (or guardians) of public school children. Following HARPER V. VIRGINIA BOARD OF ELECTIONS (1966), the Supreme Court held, 6–3, that this restriction denied the EQUAL PROTECTION OF THE LAWS to an adult resident living in his parents' home.

Chief Justice EARL WARREN wrote for the Court. A RATIONAL BASIS for the voting limitation was not enough; it must be justified as necessary to promote a COMPELLING STATE INTEREST. Assuming that New York could limit voting to persons especially interested in school affairs, this law's classification was insufficiently tailored to that purpose; an uninterested, non-taxpaying renter could vote, but Kramer, a taxpayer interested in school matters, could not.

The *Harper* dissenters also dissented here, speaking through Justice POTTER STEWART. The Constitution conferred no right to vote, and no racial classification was involved. Thus there was no reason to heighten judicial scrutiny, and there was a rational basis for limiting the vote to probably-interested persons.

On the same day, in *Cipriano v. Houma*, the Court unanimously invalidated a Louisiana law allowing only property taxpayers to vote on a revenue bond issue.

KENNETH L. KARST
(1986)

## KU KLUX KLAN ACT

See: Force Acts

## *KUNZ v. NEW YORK*
340 U.S. 290 (1951)

In a case involving a street-corner preacher whose sermons vigorously denounced other religions, the Supreme Court struck down an ordinance requiring a permit to hold religious meetings in public places. Chief Justice FRED M. VINSON, for an 8–1 majority, wrote that "New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action." The ordinance was "clearly invalid as a PRIOR RESTRAINT on the exercise of FIRST AMENDMENT rights."

DENNIS J. MAHONEY
(1986)

## KURLAND, PHILIP B.
(1921–1996)

Philip B. Kurland was, with ALEXANDER M. BICKEL, one of the principal scholarly critics of the WARREN COURT. Beginning with a sharply pointed and controversial foreword in 1964 to the *Harvard Law Review*'s annual survey of the Supreme Court's work, Kurland condemned what he saw as the Court's penchant to undertake social reform at the expense of PRECEDENT, history, and practical consequences. His Cooley Lectures at the University of Michigan, published as *Politics, the Constitution, and the Warren Court* (1970), were a lawyer's meticulous, and often sarcastic, critique of almost every aspect of the Court's work. He also edited collections of extrajudicial essays (*Felix Frankfurter and the Supreme Court*, 1970) and judicial opinions by Justice FELIX FRANKFURTER (*Mr. Justice Frankfurter and the Constitution*, 1971), for whom he had clerked after a clerkship with JEROME N. FRANK following his graduation from Harvard Law School and the University of Pennsylvania. Kurland readily identified himself with Frankfurter's view of the judicial role. The emphasis of both was on "judicial restraint," although not to the point of ignoring what both viewed as bright lines established either by the text of the Constitution or by settled precedent.

Although often mentioned in speculative short lists for an appointment to the Court in the 1970s, he never sought judicial office and spent all but three years of his forty-three-year career teaching at the University of Chicago, in both the College and the Law School. He served as an

adviser to numerous federal and state governmental bodies, including the SENATE JUDICIARY COMMITTEE on several occasions. Senator SAMUEL J. ERVIN consulted him during the WATERGATE affair. Near the end of his career, Kurland played a prominent role in op-ed pages and as an adviser to the chairman of the Senate Judiciary Committee, opposing the nomination of Robert H. Bork to the Court in 1987.

Kurland's scholarly legacy rests less on his theoretical work—although *Religion and the Law* (1960) remains influential—than on his trenchant critiques of particular cases or issues, such as school DESEGREGATION and SEPARATION OF POWERS (*Watergate and the Constitution*, 1978); and on his editorial work, which included founding *The Supreme Court Review* in 1960 and co-editing the multivolume collection of commentaries on the Constitution, *The Founders' Constitution* (1986, with Ralph Lerner). At his death, he left two unfinished projects, an edition of Frankfurter's letters and the authorized biography of ROBERT H. JACKSON.

DENNIS J. HUTCHINSON
(2000)

(SEE ALSO: *Judicial Activism and Judicial Restraint.*)

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## LABOR AND THE ANTITRUST LAWS

Problems relating to the application of antitrust law to labor result from a basic incompatibility between two public policies: the first, embodied in the SHERMAN ACT of 1890, prohibits efforts by anyone to monopolize or restrain competition in the product market; the second, embodied in the NORRIS-LAGUARDIA ACT of 1932 and the WAGNER ACT of 1935, permits workers to combine into unions in order to bargain collectively with employers. COLLECTIVE BARGAINING necessarily assumes, however, the elimination of competition between employees in dealings with their employers; hence the unions' need to achieve a monopoly of the labor market. The ultimate goal of every union is to remove wages, hours, and working conditions as factors in the competition between employers.

The hotly debated question whether Congress intended to include unions within the coverage of the Sherman Act was resolved by the Supreme Court in LOEWE V. LAWLOR (1908), which held a union liable for violation of the Act. Efforts to reverse this result in the CLAYTON ACT of 1914, which declared that the "labor of a human being is not a commodity or article of commerce," and which forbade federal courts from granting INJUNCTIONS against specified kinds of peaceful conduct in labor disputes, were frustrated by extremely narrow constructions of the statutory language by the Supreme Court.

*United States v. Hutcheson* (1941), which held that the Sherman Act does not reach acts by a union in its own self-interest that do not involve combination with nonlabor groups, marked the beginning of a new period of virtual immunity for unions under the antitrust laws. And in *Allen Bradley v. Local 3, International Brotherhood of Electrical Workers* (1945) the Court, while holding that a conspiracy between the union and electrical parts manufacturers and contractors to monopolize the industry in New York City violated the Sherman Act, declared that if the union had achieved the same result through parallel but separate agreements with each employer, the arrangement would not have been illegal. Thus, Norris-LaGuardia's comprehensive prohibition against the issuance by federal courts of injunctions in labor disputes, the Wagner Act's authorization of the granting by the National Labor Relations Board of "official patents of monopoly" through its certification procedures, and the rise of industry-wide bargaining combined to create a doctrine of "licit monopoly" of the labor market by unions, while the Sherman Act continued to prevent similar domination of the product market by business enterprises.

By the mid-1960s, however, the pendulum had begun to swing back. In *United Mine Workers v. Pennington* (1965) a badly divided Supreme Court held that a union's conspiracy with large mine operators to drive small operators out of the market by establishing wage scales that the latter could not afford to pay violated the antitrust laws. Ten years later, in *Connell Construction Company v. Plumbers & Steamfitters Local 100* (1975), the Supreme Court distinguished union activity that eliminates competition over wages and working conditions—immune under the antitrust laws, even though it affects price competition among employers, because such restriction is the inevitable consequence of collective bargaining—from union activity restricting competition in the product market—unprotected because (in this case) its effect was to drive all nonunion employers, including the more effi-

cient ones, out of the market, whether or not they met union standards for wages and working conditions. The Court's 5–4 decision also held that even though the union's conduct violated the secondary boycott and "hot cargo" provisions of the TAFT-HARTLEY ACT of 1947, for which express penalties are prescribed in that statute, the union was not shielded from additional liability under the Sherman Act.

The critics of the Court's decisions in *Pennington* and *Connell* point out that in both cases the issues involved were mandatory subjects of bargaining under the labor laws. They contend that the legislative history of those laws makes clear that Congress intended to provide specific and exclusive remedies for violations of their substantive provisions (e.g., illegal "secondary boycotts" and "hot cargo" clauses) and rejected the proposed revival of remedies such as injunctions at the request of private parties, as well as punitive damages, which are available under the antitrust laws.

Unquestionably, judicial application of the antitrust laws to labor not only has seriously hampered union efforts to impose uniform wages, hours, and working conditions in the labor market but also has created considerable confusion in the administration of laws governing labor-management relations. It is also true, however, that unrestricted union efforts to monopolize labor markets adversely affect product markets in respect of the cost and availability of products. The question is whether antitrust laws are the proper mechanism for striking a proper balance between the right of workers to organize and to bargain collectively and the right of employers and the general public to be free of union coercive practices that raise prices, restrict output, or otherwise control the product to the detriment of consumers.

Inasmuch as unions derive their coercive powers from industry-wide and market-wide organizations, it is often proposed that they should be precluded from organizing more than one employer in an industry, and that collusion between separate unions should be proscribed. This proposal for "fragmented bargaining" probably is not politically feasible; moreover, it would have its least effect in oligopolistic industries, where, presumably, it is needed the most, and would have its greatest impact in atomized industries, where it is needed the least. Finally, fragmented bargaining would so weaken union organizations as to undermine completely the national labor policy favoring collective bargaining.

It appears that no satisfactory way has been found to reconcile free-market competitive policies with those permitting workers to combine and to engage in peaceful concerted activities for their mutual aid and protection. The preferable way to establish the necessarily shifting equilibrium between them would seem to be through legislation dealing with specific problems rather than through the application by the judiciary of antitrust laws designed primarily for other purposes.

BENJAMIN AARON
(1986)

Bibliography

HILDEBRAND, GEORGE H. 1962 *Public Policy and Collective Bargaining.* Pages 152–187. New York: Harper & Row.

MELTZER, BERNARD D. 1965 Labor Unions, Collective Bargaining, and the Antitrust Laws. *University of Chicago Law Review* 32:659–734.

ST. ANTOINE, THEODORE J. 1976 *Connell:* Antitrust Law at the Expense of Labor Law. *Virginia Law Review* 62:603–631.

## LABOR AND THE CONSTITUTION

An important aspect of constitutional law has been the connection between individual rights and state or national power to regulate economic affairs. The constitutional treatment of employment is a paradigmatic example: what is the status of the relationship between employer and employee? What power does government have to change it? Of course, the answers to these questions depend on whether they are asked about the pre- or post-NEW DEAL era.

Before the mid-1930s, labor legislation was subjected to searching JUDICIAL REVIEW by a Supreme Court committed to a laissez-faire treatment of economic issues under the DUE PROCESS clauses and a limited conception of federal authority under the COMMERCE CLAUSE. Since the New Deal, constitutional questions involving labor have been dominated by issues of expression and association, and the classification of labor activity as "economic" or "political."

The constitutional treatment of employment prior to the New Deal is best understood against the background of the COMMON LAW, a law dominated by concepts of FREEDOM OF CONTRACT and employment at will. The employer had the right to discharge an employee at any time, and the employee had supposedly equivalent right to quit at any time.

At an early stage, concerted actions by workers to affect contractual relations sometimes were treated as criminal conspiracies. Thus, in the *Philadelphia Cordwainers' Case* (1806), a strike for higher wages by a group of shoemakers was held to be illegal. "A combination of workmen to raise their wages may be considered in a twofold view: one is to benefit themselves, the other is to injure those who do not join their society. The rule of law condemns both."

Later in the nineteenth century, the courts recognized the right of workers to join together. *Commonwealth v.*

*Hunt* (1842) is the landmark. Chief Justice LEMUEL SHAW, for the Supreme Judicial Court of Massachusetts, held that, for a combination of workers to constitute a CRIMINAL CONSPIRACY, the state must prove that the workers had specific criminal objectives or used specific criminal methods. Thereafter, the common law treatment of labor focused on the limits of legitimate labor activity—whether combinations of workers had illegal purposes or used illegal methods.

But many courts at common law continued to take a restrictive view of legal labor activity. In *Vegelahn v. Gunter* (1869), for example, the Massachusetts Court found that strikers had used "intimidation" to interfere with the contractual relationship of the employer and strikebreakers. The "coercive" methods ranged from threats of personal injury to simple "persuasion and social pressure." Similarly, in *Plant v. Woods* (1900), the same court found that a threat by strikers that the employer could "expect trouble in his business" indicated that the strike was "only the preliminary skirmish" in violent industrial warfare; the workers had given "the signal, and in doing so must be held to avail themselves of the degree of fear and dread which the knowledge of such consequences will cause in the minds of those . . . against whom the strike is directed." Thus, in measuring "illegal" objectives and methods, common law courts often assumed that even a low level of labor activity constituted a "signal" that was inherently coercive.

This common law view of the permissible limits of labor activity was read into the Constitution by the Supreme Court in the late nineteenth century, as it interpreted SUBSTANTIVE DUE PROCESS and elaborated a restrictive conception of the federal commerce power.

The Supreme Court constitutionalized the common law of employment by placing "freedom of contract" within the liberty protected by the FIFTHand FOURTEENTH AMENDMENTS, Many important cases concerned legislation designed to regulate the labor market as to hours, wages, and working conditions. This type of legislation—such as the wages and hours law in the leading case of LOCHNER V. NEW YORK (1905)—was invalidated if, in the Court's view, it unreasonably interfered with the contractual freedom of employer and employee. Even when such legislation was upheld, as in MULLER V. OREGON (1908), the Court made a detailed inquiry into the substantive reasonableness of the law.

Notions of freedom of contract were also applied to the activities of labor unions. In 1898, in the aftermath of a violent Pullman strike, Congress passed the ERDMAN ACT, outlawing YELLOW DOG CONTRACTS—contracts by which employees agreed not to join labor unions. In *Adair v. United States* (1908) the Supreme Court held that the act violated the due process clause of the Fifth Amendment: "the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land. . . ." The Court struck down a similar state statute in COPPAGE V. KANSAS (1915), and, in the 1917 case of HITCHMAN COAL V. MITCHELL, relied on the constitutional protection of yellow dog contracts in holding that federal courts could prevent unions from organizing at plants they knew to be covered by such contracts. And in TRUAX V. CORRIGAN (1921) the Court held that an Arizona statute forbidding INJUNCTIONS against PICKETING was unconstitutional, since it protected an activity (picketing) that wrongfully interfered with employers' property rights, in violation of due process.

The Supreme Court narrowly interpreted the commerce power at the beginning of the New Deal, striking down measures such as "Hot Oil" Codes, the AGRICULTURAL ADJUSTMENT ACT, and the NATIONAL INDUSTRIAL RECOVERY ACT. This development was nothing new. Although there had been swings in doctrine, the Court had generally viewed congressional power under the commerce clause with suspicion in the area of employment relations. In HAMMER V. DAGENHART (1918), for example, the Court struck down an act banning commerce in goods produced by child labor, and twenty years later, in CARTER V. CARTER COAL CO. (1936), it struck down an act regulating hours and wages in the coal industry.

The constitutional treatment of employment was changed radically by the watershed events of the New Deal. This period saw the Supreme Court reject its earlier laissez-faire interpretations of due process and its narrow vision of federal commerce power.

During the New Deal the Court abandoned its view of freedom of contract in employment relations. In WEST COAST HOTEL V. PARRISH (1937) the Court sustained a state minimum wage law for women, holding that contractual freedom could be limited by a reasonable exercise of STATE POLICE POWERS: "Even if the wisdom of the policy be regarded as debatable and its effect uncertain, still the legislature is entitled to its judgment."

*National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937) upheld the WAGNER NATIONAL LABOR RELATIONS ACT (NLRA), which entitled workers to organize and required employers to bargain with their employees' chosen representatives. The Court found that the act did not invade freedom of contract: an employer was not compelled to make any agreement, but only to bargain with the employees' representatives in recognition of the "fundamental right" of workers to organize. The Court distinguished the "yellow dog" contract cases on the grounds that the NLRA did not interfere with an employer's right to discharge employees, but only prohibited coercion of employees in the guise of discharge. Despite this dis-

claimer, it is clear that the Court was departing radically from the rule of its prior cases: the employer was prohibited from discharging employees for union activities, and was required to bargain in good faith with its employees' unions. (See WAGNER ACT CASES.) This new treatment of labor activity was reinforced the same year in *Senn v. Tile Layers Union,* in which the Court upheld a state law permitting peaceful picketing in conjunction with a labor dispute; although the Court distinguished cases such as *Truax,* the picketing involved was neither more peaceful nor less coercive than in prior cases.

The new approach to due process was exemplified by Justice FELIX FRANKFURTER, writing for the Court in *Osborn v. Ozlin* (1940), in an opinion reminiscent of Justice OLIVER WENDELL HOLMES's classic dissent in *Lochner:* "It is immaterial that state action may run counter to the economic wisdom either of Adam Smith or of J. Maynard Keynes, or may be ultimately mischievous even from the point of view of avowed state policy. Our inquiry must be much narrower. It is whether [the state] has taken hold of a matter within her power, or has reached beyond her borders to regulate a subject which was none of her concern. . . ."

In the 1937 *Jones & Laughlin* case, the Court upheld the NLRA under the commerce clause. The act regulated industrial strife, which had a "close and substantial relation" to commerce, and which was therefore within Congress's "plenary" power to regulate commerce.

The Court also upheld the NATIONAL POLICE POWER in the field of employment relations. UNITED STATES V. DARBY (1941) sustained the constitutionality of the FAIR LABOR STANDARDS ACT, which prohibited the interstate shipment of goods not meeting wage and hour requirements. Overruling the *Hammer* and *Carter Coal* cases, the Court confined its inquiry to the question whether the activity regulated had substantial EFFECTS ON COMMERCE. "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon which the Constitution places no restriction and over which the courts are given no control. . . ."

In sum, the New Deal saw the Supreme Court abandon its protection of the common law of employment in the name of the Constitution. The Court dropped its laissez-faire reading of due process and its restrictive interpretation of the commerce power. Employers are no longer apt to be successful if they claim that their constitutional rights to liberty or property are invaded by ECONOMIC REGULATION, or by state protection of union activity. They have little chance should they claim that congressional regulation of employment exceeds the commerce power.

While the Court has never explicitly revived the due process protection for freedom of contrast or similar economic rights in the context of labor relations, it has continued to see a residuum of inherent employer economic freedom that has a quasi-constitutional dimension manifested in statutory interpretation. This residuum has emerged around the issues of the right of an employer to subcontract work formerly done by its employees, or to close down all or part of its operations. Two questions have presented themselves: whether the employer may be required to bargain with its employees' union about such a decision, and whether such a decision would constitute discriminatory discharge of employees if motivated by antiunion animus.

The NLRA requires an employer to bargain over wages, hours, and working conditions; as to subjects not affecting these areas, an employer may act unilaterally. In *Fibreboard Paper Products v. NLRB* (1964) the Supreme Court held that an employer is required to bargain over a decision to subcontract work, where such subcontracting would simply replace employees with nonemployees doing the same work, and where the employer's motive is to cut costs by reducing the work force. Justice POTTER STEWART, in a concurring opinion, argued that an employer could not be compelled to bargain over managerial decisions "which lie at the core of entrepreneurial control," "those management decisions which are fundamental to the basic direction of a corporate enterprise. . . ."

The Court adopted Justice Stewart's position in *First National Maintenance v. NLRB* (1981), holding that the employer may unilaterally "shut down part of its business purely for economic reasons. . . ." The Court, as if this were a constitutional holding, read Congress's intent narrowly to avoid interference with entrepreneurial freedom: "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise. . . . Management must be free from the restraints of the bargaining process to the extent essential for the running of a profitable business."

The NLRA also prohibits an employer from discharging employees in retaliation for union activities. In *Textile Workers Union v. Darlington Manufacturing Co.* (1965) the Court held that it was not a discriminatory discharge for an employer to close his entire operation and discharge his entire work force, even if motivated by antiunion animus, because the employer would derive no "future benefit" from such a decision. As for a partial shutdown, this would constitute a discriminatory discharge only if it served to discourage union activity in the remainder of the employer's enterprise. Again, the Court construed congressional intent narrowly, as if it were avoiding a constitutional issue: the proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be

entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act. These cases were decided on statutory grounds, but they have clear constitutional emanations. The decisions are couched in terms of an inherent, absolute economic liberty untouched by regulatory statutes that look in a contrary direction.

For four decades after the New Deal, no congressional enactment was declared to have exceeded the limits of the commerce power. Congress was allowed virtually unlimited discretion. The consensus was that, as the Supreme Court stated in WICKARD V. FILBURN (1942), "effective restraints on its exercise must proceed from political rather than judicial processes"—anything Congress passed was within the commerce power.

In 1976, in NATIONAL LEAGUE OF CITIES V. USERY, however, the Court invalidated the application of the Fair Labor Standards Act to public employees, holding that the TENTH AMENDMENT prevents Congress from exercising its commerce power with respect to "functions essential to [the] separate and independent existence" of states and their subdivisions. Nevertheless, it does not seem likely in the labor field that Congress will lose much power to regulate by further restriction of the commerce power or the rebirth of economic due process. Indeed, early in 1985 in GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, the Court explicitly overruled *National League of Cities.*

With the proposition established during the New Deal that government support of organized labor does not threaten the constitutional freedom of employers, the fundamental issues shifted to problems of association and expression. These problems arise in the framework of a constitutional jurisprudence which generally distinguishes sharply, for purposes of legislative authority and judicial review, between issues of economic regulation (narrow judicial review) and of the regulation of political activity (substantial review).

In this jurisprudence a key question becomes the classification of activity as "economic" or "political." With a few early exceptions, labor activity generally has been viewed, by both Congress and the Supreme Court, as economic. The "proper" role of unions has been confined to "economic" issues surrounding the collective bargaining process, with the consequence that labor's rights of expression are narrower than those attaching to organizations classified as political, and that Congress has a broader power to regulate association and expression in the labor context.

Prior to the New Deal, the right to organize a union was constitutionally unprotected. Since the New Deal, however, it has become well established (for example, in NAACP V. ALABAMA, 1958) that the protection of the FIRST AMENDMENT encompasses a right of association. But in the labor context it has not been necessary for the Supreme Court explicitly to find that the right to join a union is protected by FREEDOM OF ASSEMBLY AND ASSOCIATION. The right is protected by statute, most prominently Section 7 of the National Labor Relations Act: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

What the Supreme Court has held is that peaceful organizing activities are constitutionally protected. In HAGUE V. CONGRESS OF INDUSTRIAL ORGANIZATIONS (1939) the Court held that FREEDOM OF SPEECH and assembly attached to the dissemination of information regarding the NLRA, as well as peaceful assembly "for the discussion of the Act, and of the opportunities and advantages offered by it. . . ." And in *Thomas v. Collins* (1945) the Court held that freedom of speech and assembly were violated by a statute requiring union organizers to register prior to engaging in any organizing activities, including giving speeches to groups of workers. Although the Court characterized the union activity as economic, it rejected the proposition that "the First Amendment's safeguards are wholly inapplicable to business or economic activity." The case was therefore treated under the First Amendment's requirement that a restriction on speech or assembly be justified by clear public interest, threatened not doubtfully or remotely but by CLEAR AND PRESENT DANGER.

Most lower courts have interpreted the *Hague* and *Thomas* cases to establish a constitutional right to join a labor union. Thus, despite being clearly classified as economic activity, joining a union is protected by the First Amendment. However, the classification of labor activity as economic has consequences for the constitutional treatment of strikes and picketing.

The THIRTEENTH AMENDMENT, prohibiting involuntary servitude, probably protects the right of an individual employee to withhold his or her services. The constitutional status of strikes, however, is unclear. One reason for this is that strikes are "concerted activity" protected by the NLRA; it is therefore usually possible to decide strike questions without facing the constitutional question. However, extensive regulation and limitation of the right to strike has been permitted ever since the New Deal; it thus seems that, at most, the right has a low level of constitutional protection.

Legal limitations on strikes have been based on both their objectives and their methods. Prior to the NLRA, strikes were treated under the "illegal objectives" test of the common law; work stoppages with purposes held by

courts to be illegal were prohibited. And today, strikes with certain objectives are unprotected under Section 7 of the NLRA. Thus, for example, a strike loses its protection if its purpose is to compel the employer to commit an unfair labor practice or violate other laws.

Section 7 also withholds protection from strikes that use illegal methods. For example, in *NLRB v. Fansteel Metallurgical Corp.* (1939) the Supreme Court declared unprotected a sitdown strike involving TRESPASS, destruction of property, and violation of state court injunctions. In *Mastro Plastics v. NLRB* (1956) the strike violated the NLRA's requirement of NOTICE to the employer; in *Local 174 v. Lucas Flour* (1962) the strike violated a "no-strike" clause in the union's contract with the employer.

Prior to the New Deal, labor picketing was readily enjoined, either because the ends sought were disapproved or because it was assumed to be intrinsically coercive. The Supreme Court turned this law around in the leading case of THORNHILL V. ALABAMA (1940). That case held unconstitutional a state statute banning all picketing near a business where the purpose of the picketing was to hinder the business. The Court adopted the "clear and present danger" test, treating labor activity as political activity: "The freedom of speech and of the press guaranteed by the constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." The Court explicitly rejected the assumption that all labor picketing is inherently coercive; it also stated that some "coercion" is permitted by the First Amendment: "Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the Group in power at any moment may not impose penal sanctions on peaceful and truthful discussions of matters of public interest merely on showing that others might thereby be persuaded to take action inconsistent with their interests." The Court thus treated labor picketing as full-fledged political activity.

But the Court quickly retreated from this position. Since *Thornhill*, it has become well accepted that labor picketing may be regulated, without violating freedom of speech and assembly, if the picketing is found to be illegal in method or objective.

While violence is an easy case, the Court has—to some extent—returned implicitly to the old assumption that labor picketing is an inherently coercive "signal." This means that picketing can be extensively regulated. Justice WILLIAM O. DOUGLAS, concurring in *Bakery Drivers v. Wohl* (1942), put it this way: "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."

The Court has also, as with other types of labor activity, maintained an "illegal objectives" limitation on picketing. The limitation has been most visible in two areas. The first is picketing with an objective to compel violation of state law or policy. This limitation was first articulated in *Carpenters' & Joiners Union v. Ritter's Cafe* (1942), where the Court held that the First Amendment did not protect picketing that urged an employer to act contrary to a state antitrust statute. By 1950, in *Hughes v. Superior Court*, the Court found a sufficient basis for prohibition in a purpose to violate a state "policy" announced by its courts.

The second visible category of picketing for an improper purpose is picketing for an object outlawed by the NLRA as "union unfair labor practices." For instance, the act explicitly prohibits some types of picketing designed to persuade an employer to recognize and bargain with the picketing union. But it is the secondary boycott that is the union unfair labor practice that is constitutionally most troublesome.

The act forbids a union to "threaten, coerce, or restrain" any person—usually a business—with the object of "forcing or requiring" that person to stop dealing with an employer with whom the union has a labor dispute.

The Supreme Court has recognized the potential conflict between such a prohibition and the First Amendment. In the *Tree Fruits* case, *NLRB v. Fruit & Vegetable Packers* (1964), the Court announced that it would construe the statute narrowly to avoid this constitutional difficulty: "Congress has consistently refused to prohibit peaceful picketing except where used as a means to achieve specific ends which experience has shown are undesirable." The Court therefore distinguished between picketing that attempted to persuade persons not to deal with the secondary employer (which was prohibited), and picketing attempting to persuade people not to buy products made by the primary employer (which was outside the act's prohibition). The Court thus permitted secondary picketing that was narrowly confined to the labor dispute with the primary employer. Subsequently, it limited even this narrow protection. In *Safeco NLRB v. Retail Store Employees Union* (1980), the Court held that the NLRA prohibits picketing confined to the primary employer's products, if those products constitute most of the secondary employer's business. In such a situation, boycotting the struck product is the same as boycotting the secondary employer.

Comparisons of the constitutional treatment of picketing with the treatment of other uses of the PUBLIC FORUM

show that labor picketing is treated under standards different from other, similar activities. Consider two cases decided in 1982 by the Supreme Court, both decided without dissent. The cases had one thing in common: each involved a BOYCOTT and picketing by a group. The first, *Longshoremen's Association v. Allied International, Inc.*, was a suit for damages arising out of the refusal of the Longshoremen's Union to unload cargo shipped from the Soviet Union, in protest against the Russian invasion of Afghanistan. The boycott was entirely peaceful, it was totally effective, and it was unanimously held to be illegal. The boycott violated the labor statute, and that statute, as applied to this situation, did not infringe anyone's First Amendment rights.

Two months later the Court handed down its opinion in *NAACP v. Claiborne Hardware.* That case involved a suit for damages brought by white merchants in Claiborne County, Mississippi. Their businesses had been disrupted by a boycott, organized by the NAACP in protest against the failure of public officials in the county to desegregate public schools and facilities, hire black policemen, select blacks for jury duty, and end verbal abuse of blacks by law enforcement officers. The boycott, which was held by the Mississippi courts to violate state law, was executed in a less than peaceful, if considerably effective fashion. And it was—in most respects—found by the Supreme Court to be protected by the First Amendment.

Although there are a number of nice legal distinctions that might be noted between these cases and although it may be that the NAACP could not have survived if the Mississippi courts had been affirmed, one is forced to conclude that the two decisions are deeply inconsistent with one another. Of course, there is considerable inconsistency in our decisional law. The trouble here is that the inconsistency grows out of stereotypical thinking. Although labor unions ordinarily are organizations dedicated to economic activity and although economic activity is subject to substantial governmental regulation, sometimes unions engage in political action. The NAACP is often, but perhaps not always, a political action organization and political activity is rightly subject to substantial government protection.

The distinction between economic and political activity is difficult to maintain. At the margin it is difficult to designate conduct as economic and not political, or as political and not economic. But maintenance of the distinction is necessary unless we are prepared either to reduce substantially our political freedom or to reestablish substantive judicial review of economic regulation. (See COMMERCIAL SPEECH.)

Nor is the difficulty of sustaining the distinction in these cases really the problem. All legal distinctions, after all, give actors and decision makers trouble at the margin. The real problem is that even as it is wrong to stereotype individuals, so too is it wrong to stereotype the organizations through which individuals seek to achieve their economic and political goals. In deciding what is protected and what may be regulated, legislatures and courts should look at the organizations' specific conduct, not their general characteristics.

Employer speech—communications by employers with their employees during union organization campaigns—is given significantly lower protection than is the political speech often said to be at the core of the First Amendment. During the early post-New Deal period, the National Labor Relations Board viewed any antiunion speeches or literature from the employer as "interference, restraint or coercion," in violation of the NLRA. This position was rejected in *NLRB v. Virginia Electric & Power Co.* (1941). The Supreme Court held that the act could not, within the First Amendment, prohibit employer speech unless it could be demonstrated, from a total course of conduct, that the speech was coercive. This view was codified in 1947, when the NLRA was amended to provide that speech may be used as evidence of an unfair labor practice only if it contains a "threat of reprisal or force or promise of benefit." In *NLRB v. Gissel Packing* (1969), the Supreme Court made clear that employer speech is entitled to some First Amendment protection, and that the 1947 amendment to the NLRA simply "implements the First Amendment. . . ."

But the actual treatment of employer speech in union organization campaigns makes clear the low level of First Amendment protection that speech enjoys. The NLRB announced as long ago as 1948 that it would regulate union certification elections under a "laboratory conditions" standard: "it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." This approach has entailed extensive restriction and regulation of employer speech, on several grounds. For example, implied threats of harm to employees for unionization have been held to be illegal except where the consequences are beyond the employer's control and are based on demonstrable probabilities. And under NLRB rulings racial appeals are prohibited unless the party making the appeal proves "that it was truthful and germane. . . ."

As with employee speech and association, this framework differs significantly from mainstream First Amendment doctrine. First, this framework suffers from a vagueness problem; the NLRB and the courts regulate, on an ad hoc basis, speech that in the political arena could be regulated, if at all, only under narrow and precise statutes. Second, with respect to employer threats, labor law turns the First Amendment on its head: an employer may

not threaten to close its operation if a union wins an election despite the fact that it would be legal for the employer to close. Thus, the employer is prohibited from advocating or predicting *legal* activity.

Finally, employer speech that appeals to racial prejudice is severely restricted, even though the First Amendment protects such speech in the political arena. Indeed, Nazis may march down the streets in a predominantly Jewish community, but an employer may not state that a union advocates "race-mixing."

The rights of PUBLIC EMPLOYEES, and the relationships of such employees to their employers, raise constitutional questions different from those in private employment. Initially one might think that the major reason for treating public employees differently is that the public employer is a governmental body, and thus that STATE ACTION is involved. This distinction, however, is far less important than the differing economic and political relationships between the union and employer in the two sectors. These differences were summarized by the Supreme Court in ABOOD V. DETROIT BOARD OF EDUCATION (1977):

> A public employer, unlike his private counterpart, is not guided by the profit motive and constrained by the normal operation of the market. Municipal services are typically not priced, and where they are they tend to be regarded as in some sense "essential" and therefore are often price-inelastic. . . . The government officials making decisions as the public "employer" are less likely to act as a cohesive unit than are managers in private industry, in part because different levels of public authority . . . are involved, and in part because each official may respond to a distinctive political constituency. . . . Finally, decisionmaking by a public employer is above all a political process. The officials who represent the public employer are ultimately responsible to the electorate. . . . Through exercise of their political influence as part of the electorate, the employees have the opportunity to affect the decisions of government representatives who sit on the other side of the bargaining table. . . . [P]ermitting public employees to unionize . . . gives the employees more influence in the decision making process than is possessed by employees similarly organized in the private sector.

These differences have justified differences in the constitutional treatment of the rights of public employees to join unions and to strike.

As with private employees, the Supreme Court has never explicitly held that public employees have a constitutional right to join a labor union. The Court has, however, found that public employees do not sacrifice their freedoms of association and expression by accepting positions with government. In KEYISHIAN V. BOARD OF REGENTS (1967), for example, the Court specifically rejected the premise that "public employment . . . may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." Based on this principle and on the implicit constitutional protection of private union membership under the right of association, the prevailing authority in the lower courts is that public employees have a constitutional right to join a labor union. This right, however, appears to be subject to greater restriction than is the similar right of private employees. Some state courts have held that certain employees, such as police officers or fire-fighters, may be prohibited from joining unions on the grounds that membership in a union would be inconsistent with the performance of their important governmental functions.

The authority is virtually unanimous that public employees do not have a constitutional right to strike. Nor does the statutory protection of strikes by private employees raise a serious question of equal protection. The test here is whether the distinction between public and private employment is rational; it plainly is.

The other side of the expression and association issue is whether employees—in the private or public sector—have the right not to associate. In other words, does the Constitution permit employees to be compelled to support a union against their wishes and beliefs? In this area the economic view of labor activity is prominent: compulsion has been permitted, but only for the economic purposes of COLLECTIVE BARGAINING.

The issue has arisen primarily with regard to agreements between unions and employers to require all employees to pay dues or "agency shop fees" to the union. Most labor statutes, including the NLRA, explicitly permit unions and employers to agree to these requirements. The Supreme Court has found such statutes to be consistent with the First Amendment. In *Railway Employees Department v. Hanson* (1956) and *Machinists v. Street* (1961) the Supreme Court upheld the relevant provision of the Railway Labor Act. In the *Abood* case, the Court upheld a similar state statute that applied to public employees. The Court reasoned that the "free rider" problem (employees who would benefit from, but not pay for, representation) was sufficient justification for Congress and states to permit these agreements.

The courts have, however, consistently emphasized the constitutional limits of this doctrine: dues collected under compulsion may be used only for collective bargaining, and not for political or ideological ends. In both *Street* and *Abood*, the Supreme Court held that, were statutes to permit political use of these funds, the statutes would violate the employees' freedom of association.

Over the years major labor issues have presented themselves as important constitutional problems. *Lochner v. New York* (1905), for example—a case involving labor legislation—is perhaps the best known substantive due process decision of the pre-New Deal period. And the

downfall of that doctrine in the economic area can be observed in Court decisions upholding labor legislation; so too can the expansion of federal power under the commerce clause. Moreover, labor issues have influenced the development of the constitutional rights of speech and association.

In the future, the Supreme Court is apt to render fewer constitutional decisions involving labor. Regulation dominates the field and its constitutionality is seldom in doubt. But it can be predicted with considerable confidence that statutory interpretation of labor statutes will reflect any changes in constitutional law that may occur.

HARRY H. WELLINGTON
(1986)

Bibliography

COX, ARCHIBALD et al. 1981 *Labor Law: Cases and Materials*, 9th ed. Mineola, N.Y.: Foundation Press.

GETMAN, JULIUS and BLACKBURN, JOHN 1983 *Labor Relations: Law, Practice, and Policy*, 2nd ed. Mineola N.Y.: Foundation Press.

GORMAN, ROBERT 1976 *Basic Text on Labor Law: Unionization and Collective Bargaining*. St. Paul, Minn.: West Publishing Co.

GREGORY, CHARLES and KATZ, HAROLD 1979 *Labor and the Law*, 3rd ed. New York: W. W. Norton.

SUMMERS, CLYDE; WELLINGTON, HARRY; and HYDE, ALAN 1982 *Cases and Materials on Labor Law*, 2nd ed. Mineola, N.Y.: Foundation Press.

WELLINGTON, HARRY 1968 *Labor and the Legal Process*. New Haven, Conn.: Yale University Press.

WELLINGTON, HARRY and WINTER, RALPH 1971 *The Unions and the Cities*. Washington, D.C.: Brookings Institution.

## LABOR AND THE CONSTITUTION
(Update)

Labor relations present three principal kinds of constitutional issues. First, to what extent does the FIRST AMENDMENT protect employees' efforts to organize labor unions and solicit support, and to what extent does it limit the power of unions over their members? Second, how does the doctrine of federal preemption restrict the states in regulating union and management activities? Third, what DUE PROCESS guarantees may employers and employees invoke in response to federal and state laws establishing new substantive rules and remedies in employment?

Although the Supreme Court has never squarely determined whether there is a constitutional right to form a labor organization, the existence of such a right has generally been assumed since the decision of the Seventh Circuit in *McLaughlin v. Tilendis* (1968), dealing with public school teachers. Many Supreme Court cases have considered the validity of restrictions on unions' collective action, including attempts to enlist the aid of fellow employees or the public. In *Dorchy v. Kansas* (1926) the Court declared that there is no "absolute right to strike" under the Constitution and held that a state could prohibit a strike or group work stoppage for an illegal purpose, such as extortion. The Court also sustained, in *Steelworkers v. United States* (1959), the constitutionality of the provisions in the TAFT-HARTLEY LABOR RELATIONS ACT authorizing an eighty-day INJUNCTION against a strike that "imperil[s] the national health or safety." Finally, summary affirmance in *Postal Clerks v. Blount* (1971) of a three-judge federal district court decision seems to confirm that government employees have no constitutional right to strike. But the Court has never ruled whether there are any circumstances that would give rise to such a right on the part of private employees.

Separate articles in the main volumes of this encyclopedia cover the constitutionality of restraints on BOYCOTTS and PICKETING by labor unions. In *DeBartolo Corp. v. Florida Gulf Coast Building Trades* (1988), the Supreme Court engaged in some rather strained statutory interpretation to avoid "serious constitutional concerns" and held that a union's handbilling, as distinguished from picketing, did not "coerce" a shopping mall's tenants within the meaning of the National Labor Relations Act. (The handbills asked customers not to deal with any of the neutral or "secondary" retailers in the mall.) The Court pinpointed the critical distinction between handbilling and picketing: "The loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion." This emphasis on the means of communication does not fully explain why the same message, if delivered by a solitary picket wearing a large placard, should necessarily be intimidating and not persuasive.

Federal laws governing private employment and many state laws governing public employment authorize "union security" agreements. Such an agreement requires financial support of the union that acts as COLLECTIVE BARGAINING agent by all employees benefiting from its representation. The Supreme Court sustained these provisions against First Amendment claims of freedom of association in *Railway Employees' Department v. Hanson* (1956) and ABOOD V. DETROIT BOARD OF EDUCATION (1977). But to counter constitutional free speech issues, the Court also held in *Machinists v. Street* (1961) and *Abood* that a union could use compulsory financial contributions only for collective bargaining activities and not for political or ideological purposes opposed by an employee. The Court recognized there would be "difficult problems in drawing lines" in this area.

The WAGNER ACT enacted in 1935 and substantially re-

vised in 1947 and 1959, forbids both employers and unions in INTERSTATE COMMERCE from coercing employees in their right to join, or not join, a labor organization. In addition, the 1947 Taft-Hartley Act amendments made the contracts of such employers and unions enforceable in the courts under federal law. Previously, state law generally applied to all these matters. In *San Diego Building Trades v. Garmon* (1959), the Supreme Court held that if activity in the labor field is "arguably subject" to federal protection or prohibition, the states must ordinarily yield jurisdiction. The Court added in *Machinists Lodge 76 v. Wisconsin Employment Relations Commission* (1976) that the states also cannot regulate conduct that Congress intended to leave unregulated.

There are several exceptions to this doctrine of federal PREEMPTION. Compelling local interests in the maintenance of domestic peace or minimum labor standards enable the states to deal with violence, malicious LIBEL, or TRESPASS to private property, and to prescribe requirements for job safety and insured health care plans. Even if conduct is arguably protected by federal law such as union access to employer premises during an organizing campaign—thus implicating federal supremacy most acutely—preemption does not follow invariably. In *Sears, Roebuck and Co. v. San Diego Carpenters* (1978), the Court concluded that a state court could determine whether a union's trespassory picketing was actually protected by federal law when the union had declined to seek a federal ruling on the issue, the employer had no way of obtaining one, and the trespass was "far more likely to be unprotected than protected." Finally, although federal substantive law is now applicable to union-employer contracts, the Supreme Court held in *Dowd Box Co. v. Courtney* (1962) that state courts retain concurrent jurisdiction over suits for their violation.

Federal and state labor legislation enacted during the twentieth century has often abrogated COMMON LAW claims, created new statutory rights and obligations, and substituted administrative proceedings for TRIAL BY JURY. These laws have posed due process and other constitutional questions. After some initial opposition, the courts have tended to sustain these innovations. The Supreme Court upheld the constitutionality of a state WORKERS' COMPENSATION law in NEW YORK CENTRAL RAILROAD COMPANY V. WHITE (1917), of the federal unemployment tax in STEWARD MACHINE COMPANY V. DAVIS (1937), and of the National Labor Relations Act in *NLRB v. Jones and Laughlin Steel Corp.* (1937). But to avoid constitutional problems, the Court declared in *Steele v. Louisville & Nashville Railroad Co.* (1944) that the federal labor laws, in granting majority unions the power of exclusive representation, also implied a duty to represent all the members of a bargaining unit fairly and nondiscriminatorily. A new round of battles over due process may have opened when the Montana Supreme Court ruled 4–3 in *Meech v. Hillhaven West, Inc.* (1989) that the state's pioneering "wrongful discharge" statute, which displaced common law claims for dismissal, did not violate the Montana Constitution's guarantee of "full legal redress."

THEODORE J. ST.ANTOINE
(1992)

(SEE ALSO: *Freedom of Assembly and Association; Freedom of Speech.*)

Bibliography

GORMAN, ROBERT A. 1976 *Basic Text on Labor Law: Unionization and Collective Bargaining.* Pages 209–215, 257–262, 655–661, 695–728. St. Paul, Minn.: West Publishing Co.

WELLINGTON, HARRY H. 1968 *Labor and the Legal Process.* Pages 145–184, 223–266. New Haven, Conn.: Yale University Press.

## LABOR BOARD CASES

See: Wagner Act Cases

## LABOR MOVEMENT

The American labor movement has had a passionate, paradoxical, and often bitter relationship with the Constitution. During the era of LOCHNER V. NEW YORK (1905), from the 1880s to the 1920s, most judges agreed that labor was a commodity like any other; the Constitution guaranteed workers the right freely to sell their labor "just as the employer may sell his iron or coal." During these decades, state and federal courts protected employers' and individual workers' rights to contract and compete in the marketplace free from what judges deemed unwarranted governmental interferences. Courts voided many hours and safety laws as unconstitutional interferences with liberty of contract. Courts enjoined strikes and BOYCOTTS as tortious interferences with employers' freedom of enterprise. Even in "legal" strikes, many state and federal courts held that there was no such thing as peaceful PICKETING.

The burdens of repression and semi-outlawry drove trade unionists to develop an alternative constitutional outlook. They assailed the COMMON LAW view that labor was a mere commodity and that employers could acquire a property right in their workers' labor or "human capacities." The INJUNCTIONS that forbade strikers' "interference" with this right were, in labor's view, "judicial re-enactments of slavery." The THIRTEENTH AMENDMENT—even some of the Supreme Court's own Thirteenth

Amendment decisions—seemed to support these claims. According to the unions, the Thirteenth Amendment, which abolished slavery, was a "glorious labor amendment" that stood not only for self-owernship but also for labor's dignity and independence. These ideas drew upon the Lincolnian "Free Labor" philosophy of the Thirteenth Amendment's framers who vowed that the amendment would always stand as a shield against the oppression of "free labor both black and white."

Labor's constitutional critique of the injunction also invoked the FIRST AMENDMENT. However slight a feature of official constitutional doctrine, the First Amendment, in the eyes of nineteenth-century trade unionists, always stood for the sanctity of association by citizens and "uniting peaceably to redress wrongs." Injunctions against peaceful persuasion, meetings, publications, parades, and picketing "trampled on" this vision of the First Amendment.

During the *Lochner* era, only a few dissenting jurists embraced aspects of labor's constitutional vision. But labor's constitutional views were seconded by many NEW DEAL congressmen who championed the NORRIS-LAGUARDIA ACT and WAGNER ACT. These statutes supplanted the old common law regime and ushered in the modern labor-law era. Then, with the demise of *Lochner*-era SUBSTANTIVE DUE PROCESS and the emergence of a New Deal majority on the Supreme Court, the Court began to extend First Amendment protection to labor protest.

In THORNHILL V. ALABAMA (1940) the Court struck down a state antipicketing statute, declaring that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." Picketing was a means of communicating with the public about matters of public concern. Although decided on the narrow ground of OVERBREADTH, *Thornhill* established that restrictions on picketing were subject to the constraints of the First Amendment.

In *Thornhill*, the Court did not adopt organized labor's—and New Deal reformers'—view that liberty of labor protest was bound up with an alternative conception of labor and of industrial democracy. Instead, the *Thornhill* Court classified picketing as political speech, perhaps because it had just abandoned the economic due-process doctrines of the *Lochner* era and did not want to appear to be meddling anew in economic affairs. But the marketplace dimension of picketing was inescapable. Picketing is inextricable from strikes and boycotts: a form of moral and political expression at the same time it aims to produce marketplace pressure and advantage. The Court could not recognize and define a constitutional right to picket without confronting the question of constitutional protection for strikes and boycotts. After *Thornhill*, several lower federal courts began to forge substantial First and Thirteenth Amendment limits on the states' power to bar peaceful strikes and boycotts.

But the Supreme Court soon dissappointed those who expected it to recognize these nascent rights. Instead, the Court returned the issue to the common-law terrain, reaffirming the law's traditional role of restricting the scope of allowable protest and mutaul aid. In *Carpenters & Joiners Union, Locale 213 v. Ritter's Cafe* (1942) the Court upheld a state court injunction against peaceful picketing. "[R]ecognition of peaceful picketing as an exercise of free speech," the Court reasoned, "does not imply that the states must be without power" to confine the bounds of industrial disputes—in this case, to forbid any pickets urging the public to boycott a cafe whose owner "had awarded a building contract to a man who was unfair to organized labor." The state court had found that the boycott violated the state's ANTITRUST LAWS; the Supreme Court held that state courts and legislatures remained free to "draw the line" in this fashion, balancing "the effort of the employer to carry on his business free from the interference of others against the effort of labor to further its economic self-interest."

But the Supreme Court soon disappointed those who expected it to recognize these nascent rights. Instead, the Court returned the issue to the common-law terrain, reaffirming the law's tradtional role of restricting the scope of allowable protest and mutual aid. In *Carpenter and Joiners Union, Local No. 213 v. Ritter's Cafe* (1942) the Court upheld a state court injunction against peaceful picketing. "[R]ecognition of peaceful picketing as an excercise of free speach," the Court reasoned, "does not imply that the state must be without power" to confine the bounds of industrial disputes—in this case, to forbid any pickets urging the public to boycott a cafe whose owner "had awarded a building contract to a man who was unfair to organized labor." The state courts had found that the boycott violated the state's ANTITRUST LAWS; the Supreme Court held that state courts and legislatures remained free to "draw the line" in this fashion, balancing "the effort of the employer to carry on his business free from the interference of others against the effort of labor to further its economic self-interest.

In the new regime of judicial deference toward state regulation of business and commerce, this characterization of labor conflicts—as clashes of private economic interests—was a gloomy sign from labor's perspective. Beginning with *Ritter's Cafe*, the Court ceased characterizing industrial disputes and labor picketing as involving matters of public concern. By the 1950s, labor protest was held to involve "purely commercial activities which may be regulated by the state upon any reasonable basis." Organized workers once again were sellers of a commodity

like any other, and judicial restraint was therefore the appropriate posture. Since the New Deal, primary strikes over wages and working conditions have enjoyed considerable statutory protection; but strikes or boycotts that fall outside the narrow circle of statutory or state court approval have found almost no shelter in the Constitution. Today, even peaceful picketing urging consumers not to buy the products of "unfair" employers continues to be routinely enjoined, and First Amendment challenges are routinely rebuffed.

Meanwhile, First Amendment doctrine has undergone transformations that render its treatment of labor protest anomalous. Nonlabor picketing now enjoys full First Amendment protection from content-based restrictions. Moreover, in *NAACP v. Claiborne Hardware Co.* (1982), the Court held that peaceful picketing by CIVIL RIGHTS groups in support of a boycott of white merchants was fully shielded by the First Amendment. The Court rejected the argument that the picketing was unprotected because the pickets frequently had no direct dispute with the merchants. The pickets' main goal was DESEGREGATION of local public facilities; thus, the boycott was largely a "secondary" one, in labor-law jargon. The *Claiborne* Court noted that no similar First Amendment protection shields picketing in support of labor boycotts, but the Court found the difference in constitutional status justified by the difference it perceived between the two kinds of boycotts. The black citizens' boycott involved "expression on public issues, which has always rested on the highest rung of the hierarchy of first amendment values." Labor boycotts, by contrast, involve mere clashes of economic interests. Forgetting what it once had recognized—that labor protest also involves "public issues"—the Court relegated labor picketing to a second-class status.

Many commentators have assailed the Court's "public issue" versus "labor" picketing distinction, particularly in light of the elevation of commercial advertising to the status of constitutionally protected speech. At the time of *Thornhill*, the Court regarded government regulation of COMMERCIAL SPEECH as falling within that domain of social and economic policy that it behooved the Court to leave alone. More recently, however, the Court in CENTRAL HUDSON GAS AND ELECTRIC CORP. V. PUBLIC SERVICE COMMISSION (1980) extended substantial First Amendment protection to commercial advertising so that it now enjoys more constitutional protection than peaceful labor picketing.

It may be that the Court continues to relegate labor protest to a second-class constitutional status because it does not view industrial conflict as a matter of much public concern. Other factors may also figure. Many current decisions rest on the hoary nineteenth-century assumption that picketing is inherently coercive. Today's courts still frequently seem unable to distinguish physical coercion on the part of pickets from the economic force exerted on an employer if uncoerced listeners are simply persuaded by the pickets' message.

Courts may also tolerate severe governmental restraints on labor protest in part because they see unions as powerful political and economic players, more or less evenly matched with their employer-adversaries. In fact, this parity has rarely existed; today, the labor movement is extremely weak—as weak, in some respects, as it was before the New Deal reforms. But it is unlikely that the courts will change the Constitution's treatment of labor protest unless workers and unions themselves again create on a massive scale a protest movement that appeals beyond existing law to an alternative constitutional tradition and the moral imagination of the public.

WILLIAM E. FORBATH
(1992)

Bibliography

FORBATH, WILLIAM 1989 The Shaping of the American Labor Movement. *Harvard Law Review* 102:1109–1256.

NOTE (Cynthia Estlund) 1982 Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech. *Yale Law Journal* 91:938–960.

POPE, JAMES 1987 Labor and the Constitution: From Abolition to Deindustrialization. *Texas Law Review* 65:1071–1136.

## *LADUE (CITY OF) v. GILLEO*
512 U.S. 43 (1994)

For communities seeking order and stability, political speech is often disruptive and disquieting. In recent years, private homeowners associations and public municipalities have sought to preserve order and aesthetic values by prohibiting political signs and placards from public display on lawns and from windows of homes. The Supreme Court held one such effort, by the City of Ladue in Missouri, to be an unconstitutional infringement of the FREEDOM OF SPEECH.

Ladue banned homeowners from posting on their property signs other than "for sale" and identification signs. Margaret Gilleo, who wished to post a small sign advocating a peaceful resolution to the GULF WAR, challenged the municipal ordinance as violative of the FIRST AMENDMENT. Justice JOHN PAUL STEVENS, writing for a unanimous Court, invalidated the law, reasoning that political signs on residential property were a "venerable means of communication" important for political campaigns and for "animat[ing] change in the life of a community."

The Court rejected the city's argument that the ban was essential to avoid "visual blight and clutter" and was justifiable as a "time, place or manner" restriction. Commer-

cial signs also created visual clutter, and even if content neutral the ban foreclosed a vehicle of political speech for which persons of "modest means" had "no practical substitute." Residential signs, the Court explained, were too important a feature of American political culture to be prohibited absent truly compelling reasons.

ADAM WINKLER
(2000)

## LA FOLLETTE, ROBERT M.
(1855–1925)

Robert Marion La Follette was one of the few giants in the history of the United States SENATE, ranking with HENRY CLAY and DANIEL WEBSTER. Born in a Wisconsin log cabin, he was graduated from his state's university in Madison, began his legal practice there, and spent three undistinguished terms (1885–1891) in Congress. During the farmer-labor unrest of the 1890s, La Follette grew considerably more liberal, and in 1901 he entered the governor's mansion with a reform program later called the "Wisconsin idea." It became the basis of the Progressive movement. La Follette, always a Republican, advocated the direct PRIMARY ELECTION as a method of nominating candidates, MINIMUM WAGE AND MAXIMUM HOURS laws, trade unionism, the popular REFERENDUM, strict regulation of the rates and services of railroads and public utilities by government commissions of experts, and radical tax reforms. His success as governor led to his election in 1905 as a United States senator.

During his twenty-year career as a senator he rivaled THEODORE ROOSEVELT and WOODROW WILSON as an influence for political liberalism. The leader of the Senate's Republican insurgents, he exerted special efforts on behalf of increasing the powers of the Interstate Commerce Commission, energetic enforcement of ANTITRUST LAW, a federal income tax law, direct election of senators, and women's suffrage. After the Supreme Court decided STANDARD OIL COMPANY V. UNITED STATES (1911), La Follette denounced the RULE OF REASON and judicial usurpation of the legislative function. Unlike most Republicans he supported the appointment to the Supreme Court of LOUIS D. BRANDEIS; the two men were close friends, thought alike on most matters of political economy, and had collaborated in framing many reform measures. They differed on foreign policy. La Follette opposed American entry into WORLD WAR I and the League of Nations. Although unpopular for a while during the war, because of pro-German and pacifist sympathies, La Follette emerged from the war as the undisputed leader of American liberalism.

He excoriated illiberal decisions of the Supreme Court. When the Court held unconstitutional congressional measures against child labor and construed antitrust laws to cover trade union activities, La Follette began a national campaign to curb the Court. Because he opposed JUDICIAL REVIEW over Congress, he proposed a constitutional amendment that would have authorized Congress to overcome a judicial veto in the same way as it did a presidential veto, by reenacting the statute by a two-thirds majority.

In 1924, at the peak of his career, La Follette refused to support CALVIN COOLIDGE and formed the Independent Progressive party, which nominated him and BURTON K. WHEELER, a Democrat. The party had only a presidential ticket, no local, state, or other federal candidates. It supported La Follette's Court-curbing amendment and would have restricted judicial invalidation of congressional acts to the Supreme Court only; in addition, it would have fixed a ten-year tenure for federal judges. The Progressives also denounced the Ku Klux Klan, then at the height of its popularity, and the Communist party. They also favored collective bargaining by labor through union representatives of their choice, antimonopoly measures, the restoration of competition, and extensive government ECONOMIC REGULATION. La Follette drew one vote out of every six, compared to the one in twelve received by the Populists in 1892, but carried only his own state.

When "Fighting Bob" died in 1925, his casket was placed in the rotunda of the Capitol, a rare honor, and the nation remembered him, in the words of his own epitaph, as one who "stood to the end for the ideals of American democracy."

LEONARD W. LEVY
(1986)

Bibliography

LA FOLLETTE, BELLE CASE and LA FOLLETTE, FOLA 1953 *Robert M. La Follette.* 2 Vols. New York: Macmillan.

## *LAIRD v. TATUM*
408 U.S. 1 (1972)

Protesters against American involvement in the VIETNAM WAR sued to stop Army intelligence surveillance which they claimed had a CHILLING EFFECT on the exercise of their FIRST AMENDMENT rights. Chief Justice WARREN E. BURGER's opinion for the Court, in a 5–4 decision, held that the case lacked RIPENESS because the protesters had presented no "claim of specific present objective . . . or . . . future harm" but only the fear that "the army may at some future date misuse the information in some way" that would harm them.

MARTIN SHAPIRO
(1986)

## *LAKE COUNTRY ESTATES, INC. v. TAHOE REGIONAL PLANNING AGENCY*
440 U.S. 391 (1979)

Landowners claimed that an appointed bi-state agency regulating development had, through overregulation, unconstitutionally destroyed the economic value of their property. The Supreme Court, over Justice THURGOOD MARSHALL's dissent, extended TENNEY V. BRANDHOVE (1951) to acts of unelected officials and found members of the planning agency to be absolutely immune from suit under SECTION 1983, TITLE 42, UNITED STATES CODE for their legislation-like acts. The Court also found the agency not to be protected by the ELEVENTH AMENDMENT immunity available to states.

THEODORE EISENBERG
(1986)

## *LALLI v. LALLI*
439 U.S. 259 (1978)

In *Lalli* a fragmented Supreme Court brought further confusion to the body of EQUAL PROTECTION doctrine governing classifications based on ILLEGITIMACY. A 5–4 majority upheld a New York law that allowed an illegitimate child to inherit from his or her father only if a court, during the father's lifetime and no later than two years after the child's birth, had declared the father's paternity. Justice LEWIS F. POWELL, who had written the MAJORITY OPINION in TRIMBLE V. GORDON (1977), wrote for a plurality of three Justices. Powell distinguished *Trimble* as a case in which even a judicial order declaring paternity would not have allowed inheritance; only the marriage of the child's parents would suffice. In *Lalli* the state could properly insist on the "evidentiary" requirement of a judicial order to establish paternity. The other six Justices all thought *Lalli* and *Trimble* indistinguishable: the four *Lalli* dissenters, plus two who joined the majority in upholding the law. The latter two Justices voted in accordance with their *Trimble* dissents.

The precedential force of *Trimble* may be uncertain, but at least seven Justices (the *Lalli* plurality and dissenters) all agreed that the STANDARD OF REVIEW for testing classifications based on illegitimacy was more rigorous than the RATIONAL BASIS test. Such classifications, said the plurality, would be invalid unless they were "substantially related to permissible state interests."

The state's interest in *Lalli* was the achievement of finality in the settlement of decedents' estates. The court order requirement provided sure proof of paternity. The artificiality of the requirement, however, was illustrated dramatically by the facts of *Lalli* itself, as Justice BYRON R. WHITE, for the dissenters, made clear. The decedent had often acknowledged his children openly; he had even executed a notarized document referring to one of them as "my son" and consenting to his marriage. Paternity had been proved clearly; what was missing was the formality of a court order. Such a judicial proceeding, of course, is least likely in the case in which the father and his illegitimate child are closest, and the father's acknowledgment of paternity has been most clearly established by nonjudicial means. The New York estate planners who wrote the law contrived its inertia to lean against the children of informal unions. *Lalli* is thus reminiscent of an earlier legal order designed to assure a man that his wealth and status would attach to a woman only when he chose to formalize their union and would pass only to the children of such a union.

KENNETH L. KARST
(1986)

(SEE ALSO: *Freedom of Intimate Association.*)

## LAMAR, JOSEPH R.
(1857–1916)

Joseph Rucker Lamar, "an old-fashioned southern gentleman," served on the Supreme Court from 1911 until his death in 1916. As a Justice, Lamar approved the received doctrines of the time such as FREEDOM OF CONTRACT and AFFECTATION WITH A PUBLIC INTEREST. Lamar had been a leading Georgia attorney and had served as a state legislator and member of the Georgia Supreme Court (1903–1905) before his appointment to the Court. He was the fourth of President WILLIAM HOWARD TAFT's appointees and replaced EDWARD D. WHITE, whom Taft had promoted from Associate to Chief Justice.

Lamar joined a Court that included Justices OLIVER WENDELL HOLMES and JOHN MARSHALL HARLAN, leaning to the progressive side. Lamar usually voted with the majority of the Court; he wrote only eight dissents in four years, and one writer counted agreement in 150 of 154 cases sustaining exercise of STATE POLICE POWER and in 71 of 74 cases striking down such legislation. Lamar's apparent conciliation should not be taken to indicate disinterested acquiescence. In UNITED STATES V. GRIMAUD (1911) Lamar substantially strengthened the force of administrative rulings. *Grimaud* placed the law squarely behind such rulings; Lamar denied that administrative decisions constituted legislative DELEGATIONS OF POWER, and he upheld Congress's right to punish violations as criminal acts if it chose. Although he sometimes supported CIVIL RIGHTS,

his most famous opinion came in a labor case: GOMPERS V. BUCK'S STOVE AND RANGE COMPANY (1911). Writing for a unanimous Court, Lamar declared that a secondary boycott constituted an illegal conspiracy in restraint of trade which could be forbidden by INJUNCTION. He rejected the union's claim of FREEDOM OF SPEECH.

Lamar served on the WHITE COURT, a Court that increasingly favored propertied interests. His lack of imagination and creativity were likely seen as virtues by his contemporaries, characteristics of a man well-fitted for the Court.

DAVID GORDON
(1986)

Bibliography

DINNERSTEIN, LEONARD 1969 Joseph R. Lamar. Pages 1973–1997 in Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court, 1789–1969.* New York: Chelsea House.

## LAMAR, L. Q. C.
(1825–1893)

Lucius Quintus Cincinnatus Lamar, draftsman of the Mississippi Ordinance of Secession, celebrated eulogist of CHARLES SUMNER, and "Great Pacificator" during the electoral crisis of 1877, was appointed to the Supreme Court by GROVER CLEVELAND in 1888. He was the first Democrat to be appointed in a quarter-century and the first ex-Confederate to serve on the Court. Lamar was sixty-two years old when he received his commission, the second oldest new Justice in the Court's history. But he had been the South's most prominent apostle of sectional reconciliation for more than a decade and the President was primarily interested in the nomination's symbolic dimensions.

Judging exhilarated Lamar, and he was among the Court's most productive members until debilitated by ill health in the spring of 1892. Construction of the public land laws was his specialty, reflecting his experience as Cleveland's reform-minded secretary of the interior. He was also valuable at the conference table. "His was the most suggestive mind that I ever knew," Chief Justice MELVILLE W. FULLER reported, "and not one of us but has drawn from his inexhaustible store." Lamar was equally impressed by his brethren, calling them "the smartest old fellows I ever saw." In 1893, when reminiscing about a long career of public service as Confederate diplomat, congressman, senator, and cabinet official, he described his judicial experience as "the most impressive incident in my entire intellectual and moral life."

STRICT CONSTRUCTION and traditional canons of interpretation characterized his work in constitutional law. Lamar had no sympathy for the newly fashioned concept of SUBSTANTIVE DUE PROCESS, and he concurred with Justice JOSEPH P. BRADLEY's strident dissent in *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota* (1890), maintaining that the REASONABLENESS of price regulations was a legislative, not a judicial, question. He also resisted extension of the SWIFT V. TYSON (1842) "general jurisprudence" doctrine to industrial accident cases. Only in the well-trodden COMMERCE CLAUSE field did Lamar consistently vote to restrict the autonomy of the states. And though he was quick to strike down tax laws and police regulations that burdened interstate transactions, Lamar remained obsessed with the necessity of setting limits to Congress's commerce power. In KIDD V. PEARSON (1888), his most influential opinion, Lamar not only formulated the mischievous distinction between commerce and manufacturing but also stated its rationale. "If it be held that the term [commerce] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future," he explained, "it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry." For a former Confederate whose cherished doctrine of state SOVEREIGNTY already had been extinguished, such a state of affairs was at once imaginable and unthinkable.

CHARLES W. MCCURDY
(1986)

Bibliography

MAYES, EDWARD 1896 *Lucus Q. C. Lamar, His Life, Times, and Speeches.* Nashville, Tenn.: Publishing House of the Methodist Episcopal Church South.

MURPHY, JAMS B. 1973 *L. Q. C. Lamar, Pragmatic Patriot.* Baton Rouge: Louisiana State University Press.

## *LAMB'S CHAPEL v. CENTER MORICHES UNION FREE SCHOOL DISTRICT*
508 U.S. 384 (1993)

In *Lamb's Chapel v. Center Moriches Union Free School District,* the Supreme Court first established the important proposition that religion is a "viewpoint" that is entitled to protection from the unequal allocation of government benefits. Prior to this decision, it was often argued that religion is merely a subject matter, and that the government could exclude "religious" speakers from government benefits so long as it remained neutral among religions, and between religion and atheism or agnos-

ticism. In a wide range of cases involving access to government PROPERTY or public benefits, the state may discriminate on the basis of subject matter but not viewpoint.

The case arose when a church, named Lamb's Chapel, sought to use an auditorium in a public school during nonschool hours to show a religious film on the subject of child rearing. Under rules set by the school district, school facilities could be used during nonschool hours for social, civic, or recreational meetings or entertainment. Pursuant to state law, however, the district adopted a rule prohibiting the use of this property "by any group for religious purposes."

The church sued, arguing that the school property was a designated PUBLIC FORUM and that it is unconstitutional to exclude a group from such a forum on the basis of the religious viewpoint of its speech. Although the DISTRICT COURT and the Court of Appeals for the Second Circuit rejected this argument, the Supreme Court unanimously reversed and adopted the plaintiffs' position.

The decision was an extension of WIDMAR V. VINCENT (1981), which had permitted university students to use university facilities for religious speech. *Lamb's Chapel* further opened the door to expanded FREEDOM OF SPEECH rights by religious groups on government property and in other government-subsidized forums. If religion is a "viewpoint" then it cannot be used as a basis for exclusion, no matter what type of forum may be involved, in the absence of a COMPELLING STATE INTEREST to justify it. The only such justification that appears plausible is compliance with the ESTABLISHMENT CLAUSE. The Court held that the establishment clause does not bar a religious group from using government property on a neutral basis.

That analysis sparked a colorful CONCURRING OPINION by Justice ANTONIN SCALIA, who objected to the Court's reliance on the three-part test of LEMON V. KURTZMAN (1971), which he described as similar to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."

MICHAEL W. MCCONNELL
(2000)

(SEE ALSO: *Accommodation of Religion; Government Aid to Religious Institutions; Lemon Test; Religion and Free Speech; Religious Liberty.*)

## *LAMONT v. POSTMASTER GENERAL OF THE UNITED STATES*
381 U.S. 301 (1965)

A 1962 act of Congress required the postmaster general to detain all unsealed mail of foreign origin determined to be "communist political propaganda," and to notify the addressee that the mail would be delivered only if he requested it by returning an official reply card. The Supreme Court, 8–0, held the act unconstitutional as an abridgment of the addressee's FIRST AMENDMENT rights. Justice WILLIAM O. DOUGLAS, for the Court, declared that the act sought to control the flow of ideas and was at war with the wide-open discussion of ideas protected by the amendment.

LEONARD W. LEVY
(1986)

(SEE ALSO: *Listeners' Rights.*)

## LANDIS, JAMES M.
(1899–1964)

James McCauley Landis was a gifted lawyer, professor and dean at Harvard Law School, and writer, whose outstanding contribution to American law was his theoretical analysis and practical championing of REGULATORY COMMISSIONS. He was a student of FELIX FRANKFURTER and coauthored *The Business of the Supreme Court* (1928) with him. Landis chaired both the Securities and Exchange Commission (1934–1937) and the Civil Aeronautics Board (1946–1947), served on the Federal Trade Commission (1933–1934), and wrote *The Administrative Process* (1938), a sympathetic analysis of regulatory commissions. The book discussed the limits on agencies imposed by Congress and the checks on them afforded by JUDICIAL REVIEW, and Landis downplayed the likelihood of administrative abuses of power, arguing that the true danger lay in lethargic enforcement of congressional policy. The efficiency with which these commissions could focus on economic problems by merging executive, legislative, and judicial powers impressed Landis, who saw administrative action as a practical means to achieve realistic ends.

DAVID GORDON
(1986)

Bibliography

RITCHIE, DONALD A. 1980 *James M. Landis, Dean of the Regulators.* Cambridge, Mass.: Harvard University Press.

## LAND ORDINANCE OF 1784

See: Ordinance of 1784

## LANDRUM-GRIFFIN ACT
73 Stat. 519 (1959)

Known as the Labor Management Reporting and Disclosure Act, Landrum-Griffin brought internal administra-

tion of labor unions within the realm of federal regulation and guaranteed union members certain basic rights. Its goal was union self-regulation and voluntary democratization.

Passage of the measure resulted from a growing national concern influenced by a Senate committee's findings of union leaders' corruption and autocratic behavior. Relying on Congress's constitutional authority to insure the free flow of INTERSTATE COMMERCE, the act restricted secondary BOYCOTTS; strictly controlled union elections; required strict reporting of the unions' financial transactions; outlawed extortion PICKETING; authorized state JURISDICTION over labor disputes not handled by the National Labor Relations Board; and modified union security provisions for certain national unions. In setting forth a Bill of Rights of Members of Labor Organizations, the act reversed the courts' tendency to allow union governance by self-established rules.

The act also made it a criminal offense for a Communist party member to serve as an officer or employee of a labor union until five years after termination of party membership. In UNITED STATES V. BROWN (1965) the Supreme Court ruled this section unconstitutional as a BILL OF ATTAINDER.

PAUL L. MURPHY
(1986)

Bibliography

MCLAUGHLIN, DORIS and SCHOOMAKER, ANITA 1979 *The Landrum-Griffin Act and Union Democracy.* Ann Arbor: University of Michigan Press.

## LAND USE

See: Eminent Domain; Zoning

## *LANE v. WILSON*

See: Literacy Test

## LANGDON, JOHN
(1741–1819)

John Langdon, a financier and businessman who risked his large personal fortune in support of the Revolution, had, by 1787, already served in the Continental Congress and as a colonel in the Revolutionary War; he had also supervised shipbuilding for the navy and had been president of New Hampshire.

As chairman of New Hampshire's delegation to the CONSTITUTIONAL CONVENTION OF 1787, Langdon personally paid the delegation's expenses. He spoke often at the Convention and served on three committees. He favored such nationalist measures as a congressional veto over state legislation and a prohibition of state taxes on exports. He advocated prohibiting Congress, as well as the states, from emitting BILLS OF CREDIT.

After signing the Constitution, Langdon returned home to become leader of the proratification forces in the state convention. He was elected to the United States Senate and became its first president *pro tempore;* and he served seven more years as governor of New Hampshire.

DENNIS J. MAHONEY
(1986)

Bibliography

ROSSITER, CLINTON 1966 *1787: The Grand Convention.* New York: Macmillan.

## LANSING, JOHN, JR.
(1754–1829?)

Mayor John Lansing of Albany was one of three delegates from New York to the CONSTITUTIONAL CONVENTION OF 1787. A former member of Congress and an ally of Governor George Clinton, Lansing was chosen to represent the antinationalist sentiment of the state's political leadership. Lansing was a coauthor of the PATERSON PLAN and a spokesman for the faction that opposed creating a strong national government. He and fellow New York delegate ROBERT YATES withdrew on July 10 charging that the convention was exceeding its congressional mandate to propose amendments to the ARTICLES OF CONFEDERATION.

In the New York debate over RATIFICATION OF THE CONSTITUTION Lansing was one of the anti-Federalist leaders. He was a delegate to the state ratifying convention where he urged defeat of the new Constitution and summoning of a new federal convention. After a proratification majority was assured, Lansing urged conditional ratification and then ratification reserving the right to secede. The long series of proposed amendments—including a BILL OF RIGHTS—that accompanied New York's instrument of ratification was largely Lansing's work.

After 1788 Lansing held state judicial office—serving as Chief Justice and Chancellor—but he never held any federal office except presidential elector.

DENNIS J. MAHONEY
(1986)

Bibliography

ROSSITER, CLINTON 1966 *1787: The Grand Convention.* New York: Macmillan.

## *LANZA, UNITED STATES v.*
260 U.S. 377 (1922)

There is no DOUBLE JEOPARDY when both state and federal governments outlaw an offense and each prosecutes an individual for the same act. The United States indicted Lanza for violating the VOLSTEAD ACT after the state of Washington had already prosecuted him under a state statute enforcing PROHIBITION. A unanimous Supreme Court, dismissing Lanza's double jeopardy claim, declared that the double jeopardy forbidden by the Fifth Amendment was a second trial for the same offense in the same JURISDICTION. The Court concluded: "It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both, and may be punished by each." *Lanza* is still good law.

DAVID GORDON
(1986)

## *LARKIN v. GRENDEL'S DEN, INCORPORATED*
459 U.S. 116 (1982)

Dissenting alone, Justice WILLIAM H. REHNQUIST observed that "silly cases" like this one, as well as great or hard cases, make bad law. Chief Justice WARREN E. BURGER for the Court aimed its "heavy FIRST AMENDMENT artillery," in Rehnquist's phrase, at a statute that banned the sale of alcoholic beverages within 500 feet of a school or church, should either object to the presence of a neighboring tavern. Originally, Massachusetts had absolutely banned such taverns but found that the objective of the STATE POLICE POWER, promoting neighborhood peace, could be fulfilled by the less drastic method of allowing schools and churches to take the initiative of registering objections. In this case a church objected to a tavern located ten feet away. Burger held that vesting the church with the state's veto power breached the prohibition against an ESTABLISHMENT OF RELIGION, on the grounds that the church's involvement vitiated the secular purposes of the statute, advanced the cause of religion, and excessively entangled state and church. Rehnquist argued that a sensible statute had not breached the wall of SEPARATION OF CHURCH AND STATE.

LEONARD W. LEVY
(1986)

## *LARSON v. DOMESTIC AND FOREIGN COMMERCE CORPORATION*
337 U.S. 682 (1949)

This is a leading decision concerning the SOVEREIGN IMMUNITY of the United States. Plaintiff sued the head of the War Assets Administration (WAA), alleging that the Administrator had sold certain surplus coal to plaintiff, had refused to deliver the coal, and had entered into a contract to sell the coal to others. Because plaintiff sought injunctive relief against WAA officials, ordering them not to sell the coal or to deliver it to anyone other than plaintiff, and because the suit concerned property of the United States, the Supreme Court found the suit to be one against the United States and, therefore, to be barred by sovereign immunity. The Court distinguished *Larson* from suits against officers for acts beyond their statutory powers and from suits seeking to enjoin allegedly unconstitutional behavior, both of which the Court stated would not constitute suits against the sovereign, even if the plaintiff alleges the officer acted unconstitutionally or beyond his statutory powers, "if the relief requested cannot be granted merely by ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." In cases involving suits against state officials, part of this passage apparently was contradicted by EDELMAN V. JORDAN (1974) and MILLIKEN V. BRADLEY (1977). In each of these cases the Court found that litigation to require a state to pay the costs of future compliance with the Constitution did not constitute a suit against the sovereign. The precise holding in *Larson* became an important and debated issue in PENNHURST STATE SCHOOL AND HOSPITAL V. HALDERMAN (1984), where the Court relied in part on *Larson* to hold that actions in federal court against state officials, alleging violations of state law, are prohibited by the ELEVENTH AMENDMENT.

THEODORE EISENBERG
(1986)

## *LARSON v. VALENTE*
456 U.S. 228 (1982)

Minnesota required charitable organizations to register and make disclosure when they solicited contributions. Religious organizations were exempted if more than half their contributions came from members. Members of the Unification Church sued in federal court to challenge the law's constitutionality. The Supreme Court, 5–4, held the law invalid.

Justice WILLIAM J. BRENNAN, for the Court, said that the law effectively granted denominational preferences, favoring well-established churches and disfavoring newer churches or churches that preferred public solicitation. This discrimination took the case out of the purpose-effects-entanglement test of LEMON V. KURTZMAN (1971) for ESTABLISHMENT OF RELIGION. Instead, Brennan invoked a searching form of STRICT SCRUTINY, which the state here failed to pass. The state's purported interests in preventing abuse in solicitation were not supported in the record. In any case, Brennan said, the Minnesota law failed *Lemon*'s "entanglement" test by risking the politicizing of religion; one Minnesota legislator had remarked, "I'm not sure why we're so hot to regulate the Moonies [Unification Church] anyway."

The four dissenters thought the plaintiffs lacked STANDING to challenge the law. Two of them also dissented on the merits of the case, arguing that the law did not constitute an intentional discrimination among religions.

KENNETH L. KARST
(1986)

## LASKI, HAROLD J.
(1893–1950)

British political scientist and Socialist party leader Harold Joseph Laski influenced American constitutional thought both through his public writings and through his friendship with leading American jurists and political leaders. Laski studied political science at Oxford University under Ernest Barker, and from 1916 to 1920 was an instructor in government at Harvard University. While teaching at Harvard he met, and began a twenty-year correspondence with, Justice OLIVER WENDELL HOLMES, and he established an even longer-lasting friendship with Professor (later Justice) FELIX FRANKFURTER. He also numbered among his friends and correspondents President FRANKLIN D. ROOSEVELT and Justice BENJAMIN N. CARDOZO.

From 1920 until his death in 1950 Laski taught at the London School of Economics and Political Science. He continued to correspond with his American friends and frequently visited the United States. He affected American jurisprudence mainly by influencing those whose general approach to legal and constitutional problems is called LEGAL REALISM.

Although in his early books, written in America, he had embraced a pluralist doctrine of politics, Laski had by 1931 adopted the Marxist theory of history as class struggle, and thereafter he attempted to formulate a non-Soviet Marxist political theory. He never lost interest in American politics, and his last book was *The American Democracy*, a Marxist account of American history and institutions.

DENNIS J. MAHONEY
(1986)

Bibliography

DEANE, HERBERT A. 1954 *The Political Ideas of Harold Laski.* Ph.D. dissertation, Columbia University.

HOWE, MARK DEWOLFE 1953 *The Holmes-Laski Correspondence.* 2 Vols. Cambridge, Mass.: Harvard University Press.

## *LASSITER v. DEPARTMENT OF SOCIAL SERVICES*

See: Right to Counsel

## *LAU v. NICHOLS*
414 U.S. 563 (1974)

San Francisco failed to provide non-English-speaking students of Chinese ancestry with an adequate education. The Supreme Court, without dissent, found such an effect to violate Title VI of the CIVIL RIGHTS ACT OF 1964 even absent any intent to discriminate against the students. *Lau*'s employment of an "effects" test under Title VI may not have survived REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE (1978), a question that divided the Court in *Guardians Association v. Civil Service Commission* (1983). Congress later expressed approval of *Lau* in enacting legislation to assist non-English-speaking students.

THEODORE EISENBERG
(1986)

## LAW AND ECONOMICS THEORY

The "positive" economic theory of law argues that one can discern an economic logic implicit in law, constitutional as well as any other. Economic analysis can also play a normative role, providing a benchmark for assessing the soundness of any particular constitutional clause or interpretation. (As economics itself does not establish indisputable criteria of judgment, the benchmark itself may be blurry.) For some constitutional provisions or doctrines, the relevance of economics is obvious; the Fifth Amendment's takings clause is an example.

A market economy requires private property. One can imagine an economy of government firms relating to each other, to workers, and to consumers primarily through market operations. But if capital were allocated by government, this would be an odd parody of a market economy, and if capital were allocated by markets in the sense

that individuals were free to place their capital where they chose, the firms would not be government firms. The Fifth Amendment's requirement of JUST COMPENSATION for the TAKING OF PROPERTY thus supplies a qualified protection for the market economy. The economist naturally asks how alternative constructions of the clause will affect incentives—the feature of a market economy that accounts in large measure for its productivity.

One might view the clause as aimed at assuring owners correct incentives to invest and improve property. The Supreme Court's focus on "investment-backed expectations" in PENN CENTRAL TRANSPORTATION CO. V. NEW YORK CITY (1978) suggests such a concern. But insurance against such risks could be provided by private insurers, and so the question arises why the duty to pay should fall on government. At least one answer—again look ing at incentives—is that such a duty will improve incentives for government decision makers, deterring the pursuit of programs that sacrifice a greater value than they produce.

Does such a view lead to a rule that compensation is required for government acts that fail some sort of cost-benefit test, and not for ones that pass? Clearly not. To resolve claims on such a basis would require the courts to assess the wisdom of virtually every government decision, a costly repetition of other branches' work. Because many of the benefits and costs of a program are political, this inquiry would take courts into areas where other institutions might have a comparative advantage. Finally, the Constitution establishes rights. Whether created for instrumental or for ethical reasons (e.g., a sense of the moral fitness of people's owning themselves and what they receive in free exchanges with others), a right would hardly be worthy of the name if it succumbed whenever a cost-benefit test ran against it. Thus, the economist, along with everyone else, would not define the protections of the taking clause by reference to "case utilitarianism" (assessing particular acts in terms of their direct effect on aggregate utility).

But the criterion of maximizing utility may help define the rules that embody constitutional rights—"rule utilitarianism." Reading the takings clause to require compensation for all government acts, for instance, would provide a strong incentive against wasteful government acts. But such a rule would entail enormous administrative and information costs—though never the costs of evaluating the program's benefits, as the rejected case-utilitarian view would. The concern for administrative costs suggests a reading of the takings clause that requires compensation for any act (or class of acts), except where its costs are relatively widespread—in the extreme case, for example, those of a change in monetary policy—so that the administrative costs of awarding compensation are high. (The compensation itself is not a social cost, but a transfer from taxpayers or users to whoever's property is taken. Effecting the transfer through raising taxes will usually impose secondary costs, however, by reducing economic incentives to engage in the taxed activity.)

In fact, many features of taking law seem to fit such a notion comfortably: the refusal to view all regulatory losses as automatically compensable, coupled with compensability for at least some extreme cases; consideration of "average reciprocity of advantage," offsetting benefits that a property owner may gain from a scheme as a whole, such as a historic district, and that would complicate any effort to compute compensation; and award of compensation for even a very small loss where it takes the form of a complete taking of all rights in a diminutive piece of property.

On the other hand, the courts' relative indifference to regulations sweeping away much of the value of undeveloped land raises a question about the judicial vision of the clause. Focus on incentives for property owners might support such relative indifference; the existence of land, as opposed to buildings, typically requires no investor effort. (In *Kaiser Aetna v. United States*, 1979, where human effort had created a waterway, the Supreme Court extended protections to private interests beyond what it would have afforded similar interests in a natural waterway.) Focus on incentives for government and recognition of the opportunity costs of undeveloped resources preempted by government might tilt the balance toward protection in some of these cases.

The takings clause may seem easy territory for demonstrating a constitutional concern for economic incentives, but broadly defined, such a concern pervades the document. The Framers' fear of excessive governmental power led them to rely on institutional incentives as a check. The SEPARATION OF POWERS rests on an assumption about human behavior familiar to economists: even in government, people will pursue personal advantage to a large degree. Thus, as in the private marketplace, the Constitution used private incentives to achieve a public end, ambition being made to counteract ambition, as JAMES MADISON put it in THE FEDERALIST #51.

The system of checks exposes a complex relation between effiiciency at different levels. While Judge Richard Posner has argued that seperation of powers is at least in part an effort to increase government efficiency by tailoring the institutional structure to particular government tasks, the structure also impedes government action, making it less efficient as an institution, But if some sort of overall efficiency by forstalling inefficient ECONOMIC REGULATION. On the other hand, once inefficient regulations exist, seperation of powers may decrease efficiency by delaying deregulation long after a consensus has developed that government intervention is unwise.

Another example of a per se inefficient activity may be

the FIRST AMENDMENT ban on an ESTABLISHMENT OF RELIGION, which would seem to negate even government subsidies to religion that offset market failure and would thus presumably be efficient. But reading the clause as a requirement of government neutrality in religion, one can readily find a justification in economics, broadly conceived. The Framers could easily have thought that the costs of any government nonneutrality, in social and political divisiveness, would generally outweigh benefits.

If the Constitution does prefer a set of social "goods," such as minimal government and government neutrality toward religion and speech, there remains the problem of defining the degree of preference. Few good things come without costs, and one would naturally expect courts to be wary of constitutional interpretations that extend constitutional goods to a point of extravagant cost. The Constitution is not a "suicide pact," as Justice ROBERT H. JACKSON cautioned in TERMINIELLO V. CHICAGO (1949). Similarly, if "cost-benefit" sounds like an economist's approach, "balancing" the costs of alternative rules is surely no more than recognition that at some point one set of rights must yield to another. Justice OLIVER WENDELL HOLMES, JR., wrote in *Hudson County Water Co. v. McCarter* (1908), "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."

Still, the economist's concern for cost may be special. The subject of economics is the problem of maximizing something (e.g., utility, wealth), subject to the constraint of scarcity. Whether the relevant scarcity is of conventional commodities or of constitutional goods, such as opportunities to communicate, the economist should have something useful to say. Indeed, an important insight of economics is that costs are simply benefits (goods) given up in pursuit of other goods. An economist should be quicker than most to spot opportunity costs and to dispel the fallacy that costs could ever be purely pecuniary. The costs of a policy, including a constitutional rule, are the goods, services, and benefits that it destroys or sacrifices. To the extent economic analysis of law flourishes, one may expect to find cost arguments more common, explicit, and sophisticated. Thus, although in CLEVELAND BOARD OF EDUCATION V. LAFLEUR (1974) the Court declared that "administrative convenience alone is insufficient to make valid what is otherwise a violation of due process of law," MATHEWS V. ELDRIDGE (1976) made such costs integral to its analysis of procedural due process.

What, then, is distinctive about the economic approach? Neither the interest in costs nor the balancing of the costs of various approaches seems unique to analysts of economic bent, even if economists typically press them furthest. There are, however, analytic tools employed by economists as a matter of course, but by others rarely, if at all.

One specialty of economics is the search for the true incidence of the costs of taxes, subsidies, and regulations. Inelastic suppliers and demanders bear these costs. A supply is inelastic if suppliers have few alternative uses of the relevant resources. A tax on coal production is likely to fall largely on the owners of coal in place, as there are few activities to which they can divert their coal-mining property. This is still more true if users of coal have many alternatives—that is, if demand is quite elastic. This is clearest where the coal tax of a single state is at issue, and demanders' substitutes include the supply of all coal producers outside the taxing state.

Use of the analysis is obvious for issues of the constitutionality of state taxes or regulations that are challenged as offending the DORMANT COMMERCE CLAUSE, that is, the courts' implied authority to strike down state rules that unduly intrude on INTERSTATE COMMERCE, even where Congress has been silent. Indeed, in assessing a coal severance tax against a COMMERCE CLAUSE attack, the Court alluded in *Commonwealth Edison Co. v. Montana* (1981) to the elasticity of demand as an important consideration, but declined to pursue the matter. The decision not to pursue it appears correct, for the "export" of the tax seems unlikely unless the taxing state has market power in the good. This will not be true unless the state accounts for a high proportion of supply or colludes with other supplying states. In either case, the state is likely to be so drastically outnumbered by importing states as to make a congressional remedy easy.

The search for incidence is useful in other, less obvious areas. The Supreme Court's PUBLIC FORUM jurisprudence, for example, rests on the notion that for a special class of speakers the burden of restrictions on the communicative use of public property is relatively severe because of their lack of alternative means of reaching an audience. Thus, Justice HUGO L. BLACK argued in *Martin v. City of Struthers* (1943) that "door to door distribution of circulars is essential to the poorly financed causes of little people." The question raised is a good one, but the asserted answer may be an oversimplification. Though doubtless the poor buy a lower per capita share of the food supply than the nonpoor, the nonpoor obviously do not "buy up" all the food. Similarly, it is far from clear that messages relating to causes involving the poor are underrepresented in market channels of communication. (To the extent that the poor are a demoralized underclass, they likely would not initiate many communications of any kind, including circulars and street demonstrations.)

The economist's training generally leads to a search for

effects on ultimate consumers and providers. Where would-be speakers challenge a private property owner's speech restrictions, as at the shopping center in *Lloyd Corp. v. Tanner* (1972), or where a shopping center owner challenges a state's limits on his ability to restrain speech, as in PRUNEYARD SHOPPING CENTER V. ROBINS (1980), the Court has framed the dispute as one between the property rights of the owner and the free speech rights of speakers. But to the economist a more relevant formulation is the conflict between one set of property users' interest in communication and another set's interest in being free from the communications. A profit-seeking owner of a shopping center is a middleman, presumably seeking an economically optimal tradeoff: to allow speech up to the point where the benefit (captured by him in rents) exceeds the costs (suffered by him as diminished rentals as result of user resistance). The point suggests yet another perspective on the idea that the cost of communication on sidewalks, streets, or other government property is low. The speaker's out-of-pocket cost is low, to be sure, but in part because some of the burden is borne by those whose convenience or tranquillity is reduced. Of course, if government officials cannot charge fees to capture some of the benefits of free communication, yet do bear some of its costs (in the form of less personal tranquillity themselves), the public forum doctrine may be a justifiable subsidy to offset their skewed incentives in other branches.

If there is an economic logic implicit in constitutional law, is the reason that the Framers and the courts hace used the tools of ecconomic analysis intuitively rather than explicitly or that some process (e.g., the selectionof cases for litigation as a opposed to settlement) tends to screen out ecconomically unsound precedents? To the extent that the first explaination is sound, there may appear some tension between the positive economic theory—with incentives, with maximizing values subject to constraints, with tradeoffs at the margin, with identifying the true nature and incidence of costs—seem basic to any coherent approach to social nomic analysis thus seems inextricably linked to CONSTITUTIONAL INTERPRETATION, with perhaps no more at stake than degrees of sophistication.

STEPHEN F. WILLIAMS
(1992)

(SEE ALSO: *Economic Analysis and the Constitution; Economic Equal Protection; Economic Liberties and the Constitution.*)

Bibliography

COASE, R. H. 1977 Advertising and Free Speech. *Journal of Legal Studies* 6:1–34.

CONFERENCE 1975 Economic Analysis of Political Behavior. *Journal of Law and Economics* 18:587–918.

EASTERBROOK, FRANK H. 1984 Foreword: The Court and the Economic System. *Harvard Law Review* 98:1–60.

EPSTEIN, RICHARD A. 1985 *Takings.* Cambridge, Mass.: Harvard University Press.

MCCONNELL, MICHAEL W. and POSNER, RICHARD A. 1989 An Economic Approach to Issues of Religious Freedom. *University of Chicago Law Review* 56:1–60.

POSNER, RICHARD A. 1986 *Economic Analysis of Law*, 3rd ed. Boston: Little, Brown.

SOWELL, THOMAS 1980 *Knowledge and Decisions.* New York: Basic Books.

SYMPOSIUM 1987 The Constitution as an Economic Document. *George Washington Law Review* 56:1–186.

## LAW ENFORCEMENT AND FEDERAL–STATE RELATIONS

This country has long been committed to the notion that primary responsibility for law enforcement should reside in state and local governments. Over the past century, however, changes in the federal criminal system have affected the traditional balance among federal, state, and local responsibilities for law enforcement. We may be slowly moving in the direction of a national police force.

The Supreme Court has affirmed the constitutionality of an expanded federal legislative authority in the realm of criminal enforcement. Congress has enacted numerous statutes under this expanded federal authority. As a result, the federal criminal code has begun to look more and more like a state criminal code in its substantive content and even in its jurisdictional reach and form.

Over the long term, the balance among the several law enforcement JURISDICTIONS will be determined not only by the breadth of the law on the books but also by its implementation in practice. The type and magnitude of police resources available to the federal government and the attitudes of the electorate and decision makers in key governmental institutions are likely to determine whether a broad federal criminal authority will supplant state and local responsibilities. Here, too, some changes have begun.

The traditional allocation of law enforcement responsibilities assigns to local governments the basic policing of crimes such as homicide, theft, robbery, rape, burglary, muggings, and the like. Local police have responsibility for patrol, for immediate response to reports of crime, and for investigations. A huge number of local officers presently performs those functions nationwide, particularly in metropolitan areas. The idea of a "national police force" directed from Washington, D.C. taking over these functions seems far-reaching. But one can imagine substantial shifts in the traditional division between federal and local responsibilities that would be accompanied by growth of a significantly larger corps of federal police that might fairly be called a national police force.

The jurisdictional reach of the federal criminal code has expanded in many ways over the past century. Most federal criminal legislation not aimed at protecting direct federal interests, such as federal funds or property, has been constitutionally based in Congress's enumerated powers—for example, the POSTAL POWER, the TAXING AND SPENDING POWER, and the power to regulate commerce among the states. (See NATIONAL POLICE POWER.)

Use of the postal and taxing powers as a basis for federal criminal jurisdiction has not changed much over the years. The use of the mails was relied upon early in the mail fraud statute enacted in 1872. A comprehensive registration-tax scheme was utilized in the original major antinarcotics legislation, the HARRISON ACT of 1914. The COMMERCE CLAUSE which began its criminal law history as a fairly narrow jurisdictional base—requiring transportation or travel across a state line—in modern times has been expanded. In a number of statutes, federal jurisdiction is now based on the use of the facilities of commerce such as interstate telephone calls, telegrams, and any kind of interstate movement of persons or goods.

The EFFECT ON COMMERCE formula, originally developed in the economic regulation sphere, has also broadened the bases for federal criminal jurisdiction. The nexus with commerce required under that formula is not very substantial. And the "effect on commerce" formula itself has been extended to situations where the criminal activity merely takes place on the premises of a business whose operations affect commerce. Furthermore, in PEREZ V. UNITED STATES (1971) the Court accepted congressional findings that a type of criminal conduct was part of a class of activities affecting commerce, and held that that type of conduct could be made a federal crime without any showing of an effect upon commerce in the individual case. Although in most cases similar to *Perez* proof of an effect upon commerce probably can be shown, *Perez* represents the furthest expansion of the reach of federal criminal jurisdiction under the commerce power.

The necessity to rely upon enumerated powers led Congress to enact crimes in forms differing markedly from the usual state penal code. Often, otherwise innocuous conduct that provided the basis for federal jurisdiction became the central element of the offense. Congress made criminal the transportation in commerce of lottery tickets, or obscene literature, or women for immoral purposes; depositing a letter in the mails to execute a fraudulent scheme; or affecting commerce by robbery or extortion.

The odd form of these crimes has produced concerns peculiar to federal criminal law. The prosecution of federal crimes often overemphasizes the jurisdiction element. The Supreme Court in four decades has, in five mail fraud cases, faced the question whether mailing was done for purposes of the fraudulent scheme; during the same period, the Court has not once considered the sometimes perplexing question of what constitutes fraudulant conduct under the statute.

The jurisdictional reach of federal criminal statutes has also developed in an odd checkerboard pattern. For example, originally, federal law made it a crime to use the mails to defraud but not the telegraph or telephone. Many such inconsistencies have been eliminated, but some still remain.

The *Perez* decision may also have far-reaching effects on the form of federal crimes. The case is usually cited for its effect in expanding the jurisdictional reach of federal criminal laws. However, the more important impact of the case may be that Congress can now, if it is so minded, draft a criminal code in a form substantially identical to a state penal code. Under such a code, the federal prosecutor would not have to prove the jurisdictional element in a crime belonging to a commerce-related class of activity; the proof would resemble the evidence offered in comparable state prosecutions.

Congress has not yet fully taken up the *Perez* invitation. In addition to the consumer credit statute enacted in 1964, the most significant statutes using this drafting approach are the illegal gambling business statute and the Comprehensive Drug Abuse Prevention and Control Act, both enacted in 1970. Federal drug crimes, which were historically based on the taxing power, are now based on the commerce power and defined in traditional criminal law terms.

Many traditional crimes have long been subject to punishment under the federal criminal code where a direct federal interest is involved, when the offense occurs on federal property or in a location for which the federal government has a special responsibility, or when federal funds are involved or persons are injured. Thus murder, manslaughter, and rape are federal crimes when committed "within the special maritime and territorial jurisdiction of the United States." And where criminal conduct on federal lands is not punishable by any specific federal enactment but would be a crime under state law, federal law incorporates state law and makes the conduct punishable.

However, traditional crimes have also been made federal offenses where no direct federal interest is involved. Legislation of this type is usually justified on the ground that the crimes involved are often committed by criminal groups organized and operating in more than one state, thus calling for nationwide investigation and prosecution. Such offenses are broadly defined, however, and do not limit federal prosecution to instances where the conduct involved can conveniently only be investigated and prosecuted by federal authorities.

There is today hardly a major crime category treated in state penal codes that is not also a federal crime, even in

the absence of a direct federal interest. Ignoring for the moment the jurisdictional limits, examples of such crimes include: prostitution (MANN ACT, 1910); various forms of theft involving stolen motor vehicles, other stolen property, and theft from interstate shipments (Dyer Act, 1919); bank robbery (1934); robbery (Anti-Racketeering Act, 1934); extortion (Anti-Racketeering Act, 1934); kidnaping (1932); threats (1934); arson (Travel Act, 1961); bribery (Travel Act, 1961); rioting (1968); sexual exploitation of children (1978); and murder (RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT, RICO, 1970).

In several instances, state crimes have played a more direct role in the federal criminal code. In three important pieces of complex criminal legislation—the Travel Act of 1961, the gambling business statute of 1970, and the RICO statute of 1970—Congress adopted the legislative technique of making the commission of certain crimes in violation of state law a federal crime under specified circumstances. In these instances, federal law did not simply cover the same ground as the state crime; it became identical to it.

The effect of these changes in jurisdictional reach, form, and substantive coverage has been to move the federal criminal code closer to the form and content of the fifty state penal codes with which it overlaps. Certain benefits have resulted from these changes. Many anomalies and inconsistencies in federal crime coverage have been eliminated. It is now also easier for the federal government, in a limited fashion, directly to supplement state and local efforts to combat ordinary crime.

These changes also have their costs. The old emphasis on jurisdiction and the checkerboard pattern of coverage have served as a constant reminder of the limited role of the federal government in protecting local communities against ordinary crime. As these elements in the code are eliminated, it becomes easier to think in terms of an expanded federal role.

The balance of responsibility necessarily will continue to remain with the states as long as federal law enforcement resources remain small in comparison to state and local forces, and federal prosecutions remain a small percentage of the total prosecutorial caseload of the country. Overall, there are about fifty major federal criminal enforcement agencies with approximately 50,000 field personnel. Most of these have specialized duties and limited jurisdiction. Approximately 35,000 federal felony prosecutions are initiated annually by about 2,000 federal prosecutors. This federal picture should be contrasted with that at the state and local levels where approximately 19,000 police agencies employ about 500,000 sworn officers, and in excess of 700,000 prosecutions are begun each year by more than 20,000 state and local prosecutors.

A dramatic increase in the number of federal law enforcement personnel or their combination in a single agency would have to occur in order to create the conditions for a major shift of law enforcement responsibilities to the federal realm. However, such a shift could also conceivably occur through a shift of military personnel into domestic law enforcement, or by the development of federal control over state and local agencies.

The growth of existing federal law enforcement agencies has been significant although not dramatic. In the past thirty years, the FEDERAL BUREAU OF INVESTIGATION (FBI), the largest federal law enforcement agency and the one with the most general criminal enforcement authority, has grown from 3,000 to 8,000 agents; the Secret Service has expanded from 300 to 1,500; and the Customs Service, from 150 to 600 agents. The Drug Enforcement Administration (DEA) has grown tenfold from 200 to 2,000 agents.

The 1970s and 1980s have seen moves toward consolidation of separate agencies. The Bureau of Narcotics, originally located in the Treasury Department, was shifted to the Department of Justice, and later became the DEA. Recently the FBI, which had never before had any significant investigative responsibility for drug matters, moved strongly into that field and began working closely with DEA. DEA personnel may eventually be absorbed into the FBI, a move that would increase the personnel of that agency by more than one-fifth.

Even if agencies continue to grow and merge, a dramatic shift of law enforcement responsibility from state and local governments to the federal government seems unlikely in the foreseeable future. The creation of a single, really large corps of federal enforcement personnel would require considerable expansion of either the rate of growth or the practice of combining agencies.

Resources for a national police operation might also conceivably become available through increased use of the military to enforce domestic law. There is a strong tradition, founded in part in the same concerns as the commitment to local responsibility for law enforcement, against the involvement of the military in law enforcement. In the context of military surveillance activities directed against civilians, Justice WILLIAM O. DOUGLAS once suggested that "turning the military loose on civilians even if sanctioned by act of Congress . . . would raise serious and profound constitutional questions." A statutory prohibition against the use of the military to enforce domestic law, the POSSE COMITATUS ACT, was enacted in 1878. The act makes it a crime to use the military forces "to execute the laws" except as expressly authorized by Congress or the Constitution.

The Supreme Court has not yet authoritatively interpretated the Posse Comitatus Act. Existing lower court interpretations permit some limited involvement of the

military in domestic law enforcement. Several different constructions of the act were advanced in a series of decisions growing out of the occupation of Wounded Knee, South Dakota, by American Indian Movement members, for example, that the act is violated only by direct active use of federal troops in domestic law enforcement. Specific statutory exceptions also allow the domestic use of the military to enforce the laws, in cases of civil disorder, threats to federal property, and protection of federal parks, foreign dignitaries, and certain federal officials.

Increased federal efforts to combat drug smuggling have strained the Posse Comitatus Act. The desire to use navy ships and air force planes against smugglers led to enactment in 1982 of a statute that made further inroads on the act. Though limited, the new law is important because it is the first statutory modification of the Posse Comitatus Act for ordinary law enforcement purposes in the more than 100 years since its enactment. This is an area where special care should be taken; by a single stroke, Congress can effect a major change in the traditional law enforcement balance.

In the decades of the 1970s and 1980s there has been increasing federal involvement with state and local law enforcement. The Law Enforcement Assistance Administration, established in 1968 and terminated in the late 1970s, involved a massive FEDERAL GRANT-IN-AID program to state and local governments for law enforcement purposes. The potential of this technique for giving the federal government control over local law enforcement policy decisions has not been fully realized.

Formal arrangements of cooperation between federal and state and local agencies are also increasing. Fourteen federal organized crime strike forces and twelve special drug task forces involving cooperating teams of federal, state, and local law enforcement agents have been established in major cities throughout the country. Policymaking committees composed of federal, state, and local law enforcement officials also meet.

The picture presented is one of increasingly close cooperation and interdependence of law enforcement agencies at the federal, state, and local levels. The existing programs do not yet, however, add up to the establishment of a basis for federal control.

As long as there is a national consensus that the primary responsibility for law enforcement should remain at the local level there is no serious likelihood that Congress would authorize the resources to create a national police force to enforce what is becoming a true national criminal code. Any assessment of trends in the national consensus on an issue of this nature is, of course, difficult to make. One can only point to certain factors which serve as general indicators.

The focus and rhetoric of national discourse on the role of federal criminal law enforcement have changed somewhat in recent years. Crime has increasingly become a source of public concern and a standard topic of national political discussion. Correspondingly, the federal government's public pronouncements have assumed increasingly larger responsibilities for federal law enforcement. The federal emphasis in the 1950s and 1960s focused on organized crime and political corruption. In the 1970s the emphasis shifted to white-collar crime. In the 1980s the federal government has added to its emphasized responsibilities a massive attack on drugs and violence.

In the 1960s, the ATTORNEY GENERAL of the United States never spoke of the federal government's role in law enforcement without at least paying lip service to the principle that primary responsibility rests at the local level. In the 1980s the attorney general in his major addresses generally speaks of working closely with state and local law enforcement officials and the development of a national strategy.

Any serious moves toward substantial enlargement of federal law enforcement responsibilities might be opposed by state and local governments. As matters stand, these authorities typically welcome increasing federal assistance and involvement, because the crime problem is too big for local officials to handle alone. Of course, this condition augurs continued growth of the federal arm. One wonders when that growth will begin to be seen as a threat.

Congress itself continues to recite the local responsibility credo even while it expands the scope of the federal code. Although the Supreme Court has not imposed significant constitutional restraints on the reach of federal penal legislation, it has adopted a restrictive maxim of interpretation: unless Congress expresses itself unambiguously it will be presumed not to have intended to change the traditional state-federal balance in law enforcement. If the prospect of a national police force loomed on the horizon, would the Court resurrect significant constitutional limits?

Perceiving the prospect of a national police force simply in the continued expansion of the federal criminal code would be foolish. That growth, however, creates one of the conditions that would enable a national police force to function. And the very existence of an enlarged code may generate some pressure to enforce it actively. Nothing can happen, of course, unless the national consensus breaks down. There, too, some signals could mean that the "impossible" is at least possible. The development of a national police force is not imminent, but there are enough portents to suggest that we should keep in mind words uttered by Justice FELIX FRANKFURTER in YOUNGSTOWN SHEET & TUBE CO. V. SAWYER (1952), a case involving assertion of national executive power: "The accretion of

dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."

NORMAN ABRAMS
(1986)

Bibliography

ABRAMS, NORMAN 1970 Report on Jurisdiction. Pages 33–66 in *National Commission on Reform of Federal Criminal Laws: Working Papers*, vol. 1. Washington, D.C.: The Commission.

——— 1986 Federal Criminal Law and Its Enforcement. St. Paul, Minn.: West Publishing Co.

SCHWARTZ, LOUIS B. 1948 Federal Criminal Jurisdiction and Prosecutors' Discretion. *Law and Contemporary Problems* 13:64–87.

STERN, ROBERT L. 1973 The Commerce Clause Revisited: The Federalization of Intrastate Crime. *Arizona Law Review* 15: 271–285.

## LAW ENFORCEMENT AND FEDERAL–STATE RELATIONS (Update)

In 1995, the Supreme Court handed down an opinion that had the potential to rewrite federal–state relations in criminal enforcement. The ruling in UNITED STATES V. LÓPEZ, a decision on the power of Congress to regulate INTERSTATE COMMERCE, involved a criminal prosecution of a twelfth-grade student for a violation of the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."

In *López*, the Court held that this statute was "invalid as beyond the power of Congress under the Commerce Clause." For the first time since the 1930s, the Court declared a federal statute unconstitutional on such a ground and thereby raised doubts about the COMMERCE CLAUSE underpinnings of much of the Federal Criminal Code.

Chief Justice WILLIAM H. REHNQUIST reviewed the traditional commerce power bases that have been upheld by the Court and found none of them present in *López*. Initially the Court's decision seems sound; upon reflection, however, doubts arise. After all, what is the guiding principle in the decision? Simply the absence of express connection to interstate commerce? If so, could Congress cure the constitutional defect by including findings in the statute regarding the impact on commerce of the possession of guns on school grounds; or using another approach, by requiring that the gun, or some of its parts, or the possessor of the gun, have traveled recently in interstate commerce? If so, the decision loses its significance and becomes formalistic in the extreme.

In the wake of the decision, numerous symposia were organized discussing the impact of *López*. Nor was there a stirring only in academia. Within the next few years, in reliance on the decision, frequent challenges to the constitutionality of other commerce-based federal criminal LEGISLATION were raised in the lower federal courts. A key question addressed in the academic consideration of the implications of the decision was whether this was an opening salvo in an attack by the Court on the practically unlimited scope of the exercise of commerce power authority by the Congress. Or was it simply "an isolated deviation from the strong current of precedents"?

If the lower court decisions are any index, *López* does not signal a revolution in commerce power DOCTRINE. Although there have been some decisions holding federal statutes unconstitutional, most of the case law has upheld the challenged statutes. Yet, the issue has not returned to the Court, and until that body rules again, the significance of *López* remains uncertain.

If *López* is not the harbinger of a revolution, one wonders why the Court chose this particular case to draw a constitutional line in the sand. Examining the case in light of how its facts bear on the federal–state relationship in criminal enforcement may shed some light on this issue. While such an examination may not produce a doctrinal principle underlying the decision, it does steer us toward pragmatic policy concerns relating to the enforcement of federal criminal statutes that may be quite relevant to the constitutional issues in such cases.

Articulated concerns about the federal–state relationship in criminal enforcement have surfaced in a set of Supreme Court cases involving issues of STATUTORY INTERPRETATION. One such early case is *Rewis v. United States* (1971), which involved the interpretation of the Travel Act that, among other things, makes it a federal crime to travel across a state line in aid of gambling. In *Rewis*, the Court construed the act as not covering the interstate travel of mere customers of a gambling establishment, stating, "an expansive Travel Act [i.e., one that would include the interstate travel of gambling customers within its coverage] would alter sensitive federal–state relationships, could overextend limited federal police resources, and . . . would transform relatively minor state offenses into federal felonies."

One can examine *López* through the same prism as *Rewis* and make strikingly similar observations. As in *Rewis*, the likely number of persons who would violate the federal statute, countrywide, might be substantial. Extensive enforcement of the *López* statute would disproportionately use up limited federal police resources, while limited enforcement inevitably would involve prosecutors in select-

ing a very few cases from a large number of possible prosecutions, making the selection, inevitably, rather arbitrary and capricious. Either way, serious stresses would be put on the sensitive federal–state relationship.

Further, although the nature of the crime and the criminal in *López* is undoubtedly different from that in *Rewis*, there nevertheless are similarities. However concerned we are about not having guns present where children are regularly found, the nature of the conduct involved in *López* is not, in and of itself, directly a form of serious criminality. The perpetrator is likely to be "a local student at a local school," and most of the persons likely to be prosecuted under the statute would not be typical criminals. While the underlying concern about potential violence in *López* is quite different from *Rewis*, federal prosecution of school children may be viewed, arguably, as not significantly different from prosecuting gambling customers. In *Rewis*, the Court had the luxury of being able to construe the statute narrowly to avoid federal–state concerns. Where that option is not available, the same type of concerns may have some impact on the constitutional decision that is rendered.

*López* probably is not the forerunner of a major upheaval in federal–state relations in criminal enforcement. Such a change may one day come, but it is more likely to come from the actions of legislators and officials in the U.S. Department of Justice and the work of scholars in the field, than from a sea change in commerce clause doctrine handed down by the Supreme Court.

NORMAN ABRAMS
(2000)

(SEE ALSO: *Federal Criminal Law.*)

Bibliography

SYMPOSIUM 1995 Federalization of Crime: The Roles of the Federal and State Governments in the Criminal Justice System. *Hastings Law Journal* 46:965–1338.

——— 1995 Reflections on *United States v. López. Michigan Law Review* 94:533–831.

——— 1996 The Federal Role in Criminal Law. *The Annals* 543:9–166.

## LAW OF THE LAND

The phrase "law of the land" has two connotations of constitutional dimension. In general usage it refers to a HIGHER LAW than that of COMMON LAW declaration or legislative enactment. As a result of the SUPREMACY CLAUSE, the Constitution is such a higher law; it is the "supreme law of the land." In the exercise of JUDICIAL REVIEW, the SUPREME COURT claims the office of ultimate interpreter of the Constitution. It has thus become commonplace to think of decisions of the Court as the law of the land.

A second connotation has a specialized meaning that reaches far back into English history and leaves its indelible mark on American constitutional law. In 1215, the barons of England forced King John to sign MAGNA CARTA, pledging his observance of obligations owed to them in return for their fealty to him. Among the provisions was one that declared (in translation from the Latin): "No freeman shall be taken or imprisoned or dispossessed or outlawed or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the judgment of his peers, or by the law of the land." Magna Carta was necessarily a feudal document, but this provision was so worded that it retained meaning long after feudalism gave way to the modern constitutional state.

The term "law of the land" consequently continued in English usage, representing that body of FUNDAMENTAL LAW to which appeal was made against any oppression by the sovereign, whether procedural or substantive. By 1354 there had appeared an alternate formulation, "due process of law." In his *Second Institute of the Laws of England* (1642), Sir EDWARD COKE asserted that "law of the land" and "due process of law" possessed interchangeable meanings; nevertheless, the older version was not thereby supplanted. The PETITION OF RIGHT (1628) played no favorites with the two terms, demanding "that freemen be imprisoned or detained only by the law of the land, or by due process of law and not by the king's special command, without any charge."

In the politically creative period after Independence, American statesmen preferred "law of the land" to "due process," apparently because of its historic association with Magna Carta. All eight of the early state CONSTITUTIONS incorporating the guarantee in full or partial form employed the term "law of the land"; and the same was true of the NORTHWEST ORDINANCE (1787). The first appearance of "due process of law" in American organic law occurred in the Fifth Amendment to the United States Constitution (1791). But that switch of usage did not displace "law of the land." Throughout the nineteenth century state constitutions and state courts spoke in one voice or the other, or even both. As of 1903 a listing by THOMAS M. COOLEY of state constitutions incorporating the legacy from Magna Carta showed "law of the land" outrunning "due process of law." The trend subsequently has been to the latter phrase; yet a 1980 count found eleven states still expressing the guarantee as "law of the land."

The Glorious Revolution of 1688, embodying the political theory that parliamentary enactment was the practical equivalent of the "law of the land," presented a dilemma in interpretation when the versions of the guarantee were introduced into American thought and incor-

porated into most American constitutions. Legislative supremacy was unacceptable in the New World; the American view was that when sovereignty changed hands the English concept of limitations upon the crown now applied to the legislative as well as the executive branch. It followed that to construe the guarantee as forbidding deprivation of life, liberty, or property except by legislative enactment would be to render its protection meaningless. The puzzlement of American judges is understandable; only in the latter part of the nineteenth century had the concept been fully disentangled from the related concepts of regularized legislative process and SEPARATION OF POWERS.

The guarantee inherited from Magna Carta is unusual among constitutional limitations. On its face it is not absolute but conditional. The government may not act against persons except by the law of the land or by due process. The thrust is arguably procedural, suggesting original intent may have been to guarantee the protection of a trial. But it can carry substantive meanings as well; those meanings emerged early and had fully developed in England by the late seventeenth century.

Although the wording and position of the state constitutional guarantees varied—some using "law of the land," others "due process of law"; some appending the guarantee to a list of procedural rights, others making it a separate provision—the variation made little difference in judicial response at the procedural level. Not so, however, with respect to substantive content. Where, as in the constitutions of the Carolinas, Illinois, Maryland, and Tennessee, the wording was close to a literal translation of Magna Carta, the guarantee was extended to VESTED RIGHTS, independently of the criminal provisions of the procedural connotation. On the other hand, Connecticut and Rhode Island courts sustained PROHIBITION laws in the 1850s, holding that the phrase "due process of law" in their state constitutions was so enmeshed with entitlements of the criminally accused as to preclude inclusion of substantive right. A third series of cases, from Massachusetts, New Hampshire, New York, and Pennsylvania, read substantive content into the guarantee despite close interrelation with procedural protections. WYNEHAMER V. NEW YORK (1856) requires special consideration. In that case the state's highest court invalidated a prohibition law, insofar as it destroyed property rights in existing liquor stocks, resting its decision on separate constitutional guarantees of both "due process" and "law of the land." Contrary to the opinion of some scholars, *Wynehamer* was not overruled by *Metropolitan Board v. Barrie* (1866); the former case applied to a law with retroactive application, the latter to one that was purely prospective.

The Fifth Amendment associates "due process" with other constitutional guarantees clearly procedural in character, and separates the guarantee of due process from the RIGHT AGAINST SELF-INCRIMINATION only by a comma. Yet in major decisions, DRED SCOTT V. SANDFORD (1857), *Hepburn v. Griswold* (1870), and *Adair v. United States* (1908), the Supreme Court found substantive content in the clause.

In the FOURTEENTH AMENDMENT, due process is not linked to criminal procedure protections, but resembles those state constitutional provisions that had been held in state courts to have substantive content. However, the Supreme Court has disregarded the distinction between the two due process clauses in the federal Constitution. The Court has been abetted by numerous COMMENTATORS ON THE CONSTITUTION who, intent on denying the substantive element in due process, have ignored or misinterpreted the history of state constitutional guarantees of "due process" and "law of the land." The freedom from procedural connotation of Fourteenth Amendment due process made easier the path of substantive content from dissent in the SLAUGHTERHOUSE CASES (1873), to reception in *Chicago, Milwaukee & St. Paul Railway Company v. Minnesota*, (1890), to full embrace in LOCHNER V. NEW YORK (1905). The Court's acceptance of the INCORPORATION DOCTRINE, with consequent reading into the Fourteenth Amendment of the various procedural protections enumerated in the BILL OF RIGHTS, largely equates the content of the two due process clauses. This development has written the final chapter in the reinterpretation of "law of the land."

FRANK R. STRONG
(1986)

Bibliography

HOWARD, A. E. DICK 1968 *The Road from Runnymede: Magna Carta and Constitutionalism in America.* Charlottesville: University Press of Virginia.

REMBAR, CHARLES 1980 *The Law of the Land: The Evolution of Our Legal System.* New York: Simon and Schuster.

## *LEARY v. UNITED STATES*
395 U.S. 6 (1969)

Timothy Leary, a celebrated 1960s connoisseur of mind-altering substances, was found in possession of marijuana and convicted of (1) failure to pay the federal marijuana tax; and (2) transportation and concealment of marijuana, knowing it had been illegally imported into the country. A unanimous Supreme Court held both convictions unconstitutional. Paying the tax would have incriminated Leary under state law; his omission to pay was justified by his RIGHT AGAINST SELF-INCRIMINATION. His other conviction had rested on a statutory presumption that a person in possession of marijuana knew it had been illegally imported. This presumption was irrational; much

marijuana was grown in the United States. The presumption thus violated PROCEDURAL DUE PROCESS.

KENNETH L. KARST
(1986)

## LEAST RESTRICTIVE MEANS TEST

When the Supreme Court, in reviewing the constitutionality of legislation, uses the permissive RATIONAL BASIS standard, it demands only that a law be a rational means for achieving a legitimate governmental purpose. When the STANDARD OF REVIEW is more exacting, however, the Court looks more closely at the legislative choice of means, insisting on more than some minimal showing of rationality. In a SEX DISCRIMINATION case, for example, the legislation must be "substantially related" to achieving some important governmental purpose; when STRICT SCRUTINY is the appropriate standard of review, the law must be "necessary" to achieving a COMPELLING STATE INTEREST. However such a heightened standard of review may be phrased, it aims at providing as much protection for constitutional values and interests as may be consistent with the accomplishment of legislative goals. One commonly used formulation of this aim is the Court's insistence that legislation be the "least restrictive means" for attaining the ends the legislature seeks—that is, least restrictive on such constitutionally protected interests as the FREEDOM OF SPEECH, or equality, or the free flow of INTERSTATE COMMERCE.

Some commentators have urged the Supreme Court to use a similar analysis in testing the reasonableness of legislative means even under the "rational basis" standard of review, as in cases involving challenges to ECONOMIC REGULATION. Thus far, however, the Court has employed "least restrictive means" reasoning only when it has consciously used a more demanding standard of review. Thus, in DEAN MILK COMPANY V. MADISON (1951), the Court struck down an ordinance specifying that milk sold in the city as "pasteurized" be pasteurized at an approved plant within five miles of the city center. The Court emphasized that "reasonable nondiscriminatory alternatives" were available to serve the city's health interests. (See STATE REGULATION OF COMMERCE.) And in *Shelton v. Tucker* (1960) the Court invalidated a law requiring every Arkansas teacher to file an annual affidavit listing every organization to which he or she had belonged or made contributions within five years. The Court agreed that Arkansas had a strong interest in teacher fitness, but said the legislature's sweeping intrusion into associational privacy "must be viewed in the light of less drastic means for achieving the same basic purpose." A narrower inquiry, presumably, would serve that purpose.

Both decisions illustrate how the "least restrictive means" formula can help a court avoid casting aspersions on legislative motive. (See Legislation; Legislative Intent.) Madison's ordinance might have been designed to capture the pasteurization business; Arkansas undoubtedly was seeking to expose and dismiss teachers who were members of the NAACP. In neither case did the Supreme Court openly question the legitimacy of the legislative purpose; taking the government's statement of objective at face value, it said, in effect, "There are ways you could have accomplished that without intruding on constitutionally protected ground." One excellent reason for heightening the standard of review—and thus for insisting on "least restrictive means"—is the suspicion that legislators have acted for questionable purposes. (See SUSPECT CLASSIFICATION.)

KENNETH L. KARST
(1986)

Bibliography

NOTE 1969 Less Drastic Means and the First Amendment. *Yale Law Journal* 78:464–474.

## *LEBRON v. NATIONAL RAILROAD PASSENGER CORP.*
513 U.S. 374 (1995)

In *Lebron v. National Railroad Passenger Corp.*, the Supreme Court held that the National Railroad Passenger Corporation (Amtrak) must comply with the Constitution. Amtrak is a CORPORATION created by federal law, with a governing board appointed by the President, and it receives substantial federal funding. However, the statute creating Amtrak declares that it "will not be an agency or establishment of the United States government."

Michael Lebron signed a contract to display an advertisement on a huge billboard—about 103 feet long and 10 feet high—at Amtrak's Penn Station in New York City. Lebron's advertisement was a photomontage criticizing the Coors beer company's conservative political activities and especially its involvement in Central America. When Amtrak refused to allow display of the advertisement, Lebron sued, claiming infringement on his FIRST AMENDMENT right of FREEDOM OF SPEECH.

The Supreme Court ruled that Amtrak is the government for STATE ACTION purposes. Justice ANTONIN SCALIA, writing for the majority, declared: "We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment."

The Court emphasized that Amtrak was created by a federal statute to serve the national interest of providing railroad passenger service.

*Lebron* is important in that it makes it clear that government-created corporations such as the Overseas Private Investment Corporation, the Communications Satellite Corporation (COMSAT), the Corporation for Public Broadcasting, and the Legal Services Corporation, are part of the government and thus the Constitution applies to their activities.

ERWIN CHEMERINSKY
(2000)

## LECOMPTON CONSTITUTION

In June 1857 less than thirty percent of registered voters in Kansas Territory elected a CONSTITUTIONAL CONVENTION dominated by proslavery delegates. Meeting in Lecompton, the convention drew up a constitution preparatory for statehood that guaranteed the rights of owners of slaves in the territory, excluded free blacks, and submitted to a REFERENDUM the question whether the constitution should be accepted with or without a clause prohibiting the importation of slaves into Kansas (rather than a referendum on the constitution as a whole). Viewing this as a travesty of his principle of territorial SOVEREIGNTY, Illinois Senator STEPHEN A. DOUGLAS broke with the administration of JAMES BUCHANAN, which was pressuring Congress to accept the Lecompton constitution, and led the struggle against it. In three referenda on the constitution, Kansas voted first to accept the constitution with slavery (6,226 to 569, with free-state voters abstaining), then to reject the constitution entirely (10,226 to 166 with proslavery voters abstaining), then finally to reject it entirely again (11,300 to 1,788).

The struggle over the Lecompton constitution left Kansas a territory until 1861, dissipated the influence of the Buchanan administration, drove Douglas into opposition, and destroyed the capacity of the Democratic party to serve as a unifying transsectional force.

WILLIAM M. WIECEK
(1986)

Bibliography

JOHANSES, ROBERT W. 1973 *Stephen A. Douglas.* New York: Oxford University Press.

## LEE, REX EDWIN
(1935–1996)

United States SOLICITOR GENERAL, educator, and one of the nation's foremost Supreme Court advocates, Rex E. Lee was born in Los Angeles on February 27, 1935. He was undergraduate student body president at Brigham Young University and first in his class at the University of Chicago Law School. After law school, he served as a law clerk to Supreme Court Justice BYRON R. WHITE.

As a public servant, Lee held the positions of Assistant U.S. Attorney General in the administration of President GERALD R. FORD and Solicitor General in the administration of President RONALD REAGAN. During his four years as Solicitor General, he Served as the chief appellate advocate for the federal government and argued a number of cases of constitutional significance, with a particular emphasis on RELIGIOUS LIBERTY, SEPARATION OF POWERS, and FEDERALISM. In total, Lee presented oral argument before the U.S. Supreme Court on fifty-nine occasions.

In 1972, at the age of thirty-seven, Lee became the founding dean of the J. Reuben Clark Law School at Brigham Young University. After serving in the federal government and practicing law in the firm of Sidley & Austin, Lee returned to Brigham Young University where he became its tenth president.

A man of faith, Lee served his church, The Church of Jesus Christ of Latter-Day Saints, in a number of capacities throughout his life. At the young age of nineteen, he worked as a missionary in Mexico. Later in life, he served as a lay leader of congregations in the Washington, D.C. area and in Utah. Probably his most significant church service occurred while he served as law school dean and university president for Brigham Young University, the nation's largest church-owned university.

During his life, Lee wrote a number of books and essays on subjects ranging from law to religion. Two of his books, *A Lawyer Looks at the Constitution* (1981) and *A Lawyer Looks at the Equal Rights Amendment* (1980) provide insight into his moderate conservative philosophy of government. Lee also published a number of essays on religion and a book entitled *What Do Mormons Believe* (1992).

Lee had a family of seven children with his wife, Janet. He often depended on his family for support as he suffered the effects of cancer during the final eight years of his life. On March 11, 1996, Lee died after a ten-month battle with pneumonia. It was reported that from his hospital bed before his death he was preparing to give his sixtieth oral argument before the Supreme Court.

MICHAEL W. MCCONNELL
(2000)

Bibliography

FRIED, CHARLES 1991 *Order and Law: Arguing the Reagan Revolution.* New York: Simon & Schuster.

LEE, REX E. 1980 *A Lawyer Looks at the Equal Rights Amendment.* Provo, Utah: Brigham Young University Press.

——— 1981 *A Lawyer Looks at the Constitution.* Provo, Utah: Brigham Young University Press.

## LEE, RICHARD HENRY
(1732–1794)

Educated in England, Richard Henry Lee practiced law in his native Virginia and became a justice of the peace in 1757. The next year he was elected to the House of Burgesses where his first speech was in favor of a measure to check the spread of SLAVERY. Lee was a leader of opposition to parliamentary taxation of the colonies and wrote the protest of the House of Burgesses against the Sugar Act (1764). When the royal governor dissolved the House of Burgesses in 1774, Lee introduced a resolution, adopted by the rump of the house, calling for a continental congress. As a delegate to the FIRST CONTINENTAL CONGRESS Lee proposed formation of committees of correspondence (a plan he originated with PATRICK HENRY and THOMAS JEFFERSON) and adoption of the continental ASSOCIATION. In June 1776 Lee made the original motions in the Continental Congress for a DECLARATION OF INDEPENDENCE, confederation, and seeking of foreign alliances. He later advocated Virginia's cession of western territorial claims in order to facilitate ratification of the ARTICLES OF CONFEDERATION; and, in 1784, he was elected President of the United States in Congress Assembled.

Lee was chosen as a delegate to the CONSTITUTIONAL CONVENTION OF 1787 but declined appointment, citing conflict with his responsibilities as a member of Congress. When the new Constitution was submitted to Congress, Lee opposed it on the ground that the convention had exceeded its mandate. Seeing that he could not block the proposal, he attempted, but failed, to have Congress add a BILL OF RIGHTS (drafted by GEORGE MASON).

Lee was a leading opponent of RATIFICATION OF THE CONSTITUTION. His seventeen "Letters from the Federal Farmer," widely printed in newspapers, were among the most influential of the various ANTI-FEDERALIST writings. In the letters Lee presented a wide-ranging critique of the new Constitution: it was consolidationist, not federal, and would rob the states of their SOVEREIGNTY; it was aristocratic, or even monarchical, in tendency, not republican; the coexistence of state and federal courts would lead inevitably to conflict; the JUDICIAL POWER OF THE UNITED STATES was so broadly drawn as to permit foreigners and citizens of other states to sue a state in federal court; and, most important, there was no bill of rights. Lee argued and voted against ratification in the Virginia convention of 1788.

Lee was one of Virginia's original United States senators (1789–1792). He was chairman of the committee that drafted the JUDICIARY ACT OF 1789 and floor leader in the Senate for the Bill of Rights. Later in his senatorial career he became a supporter of the Federalist party and the economic program of ALEXANDER HAMILTON. A fervent opponent of slavery, Lee himself held about three dozen slaves.

DENNIS J. MAHONEY
(1986)

## *LEE, UNITED STATES v.*
455 U.S. 252 (1982)

Members of the Amish religion object, on religious grounds, to paying taxes or receiving benefits under the SOCIAL SECURITY ACT. An Amish employer of Amish workers claimed a constitutional right to refuse to pay Social Security taxes. The Supreme Court unanimously rejected that claim. Chief Justice WARREN E. BURGER, for the Court, accepted STRICT SCRUTINY as the appropriate STANDARD OF REVIEW in cases involving RELIGIOUS LIBERTY, but concluded that the government had established that mandatory participation was necessary to achieving the "overriding governmental interest" in maintaining the Social Security system. In a concurring opinion, Justice JOHN PAUL STEVENS argued against the strict scrutiny standard, saying that claimants of special religious exemptions from laws of general applicability must demonstrate "unique" reasons for being exempted—a standard that would be nearly impossible to meet.

KENNETH L. KARST
(1986)

## *LEE v. WEISMAN*
505 U.S. 577 (1992)

The principal of a public junior high school in Providence, Rhode Island, invited a clergyman, a rabbi, to give opening and closing prayers as part of the school's graduation ceremony. Although the rabbi composed the prayers himself, the officials gave him guidelines and advised that the prayers should be "nonsectarian." When a student challenged the constitutionality of this practice, the Supreme Court held, 5–4, that the school violated the ESTABLISHMENT CLAUSE of the FIRST AMENDMENT by informally pressuring students to participate in a state-sponsored and state-controlled religious exercise.

Before *Weisman,* it was widely thought that the appointment of several "conservative" Justices might lead the REHNQUIST COURT to overrule WARREN COURT decisions and permit school-sponsored prayers or other religious exercises as long as the school did not directly coerce anyone

to participate. *Weisman* did not decide the broad question of whether noncoercive exercises would ever be an unconstitutional ESTABLISHMENT OF RELIGION. Instead, the opinion (authored by Justice ANTHONY M. KENNEDY, an appointee of President RONALD REAGAN) held that the school placed "subtle" coercive pressure on students to participate in prayer. The graduation ceremony, though formally voluntary, was important enough to students that they should not have to miss it in order to avoid exposure to prayer. And although the audience was only required to stand silently during the prayers, the Court said that a "reasonable dissenter" might feel this forced her to signify her approval of them.

*Weisman* showed that even those who limit the establishment clause's prohibitions to government "coercion" can disagree on the meaning of that term. Justice ANTONIN SCALIA, dissenting, argued that only coercion "by threat of penalty" should be unconstitutional; the majority's broader notion of "psychological" coercion, he argued, would require forbidding the Pledge of Allegiance in schools as well (since the state cannot compel citizens to endorse political ideas either).

The broad coercion analysis suggested that most official religious exercises by public schools would be forbidden. The majority also looked beyond issues of coercion, stating that with religious ideas, unlike political or social ideas, "government is not a prime participant" in debate and should remain uninvolved. However, *Weisman* did leave open the possible permissibility of religious acts sponsored by government in settings that arguably are less important or pressure-laden than a high school graduation, such as a courthouse open to all citizens, or even a high school football game.

THOMAS C. BERG
(2000)

Bibliography

CONKLE, DANIEL O. 1993 Lemon Lives. *Case Western Reserve Law Review* 43:865–882.

GREENE, ABNER S. 1995 The Pledge of Allegiance Problem. *Fordham Law Review* 64:451–490.

PAULSEN, MICHAEL STOKES 1993 Lemon is Dead. *Case Western Reserve Law Review* 43:795–863.

## LEGAL CULTURE

The expression "legal culture" refers to opinions, attitudes, values, and expectations with regard to law and legal institutions. Every man and woman in society has at least some opinions on this subject—about judges, courts, the Supreme Court, or lawyers—but the expression, as the word "culture" implies, refers not so much to individuals as to generalizations about the opinions and values of members of some distinct group, class, category, or jurisdiction. One can speak about the legal culture of men as opposed to women, blacks as opposed to whites, or of salespeople, teachers, drug addicts, or people who live on farms. It may also be possible to make statistical generalizations about particular countries, so that it may make sense to talk about American legal culture as opposed to Portuguese or Korean legal culture.

One can distinguish between an "external" and an "internal" legal culture. The internal legal culture is the legal culture of those members of society "inside" the legal system, so to speak—that is, those who perform specialized legal tasks, for example, lawyers and judges. The legal culture of everybody else is external legal culture.

Concepts of legal culture are, or ought to be, significant for the understanding of constitutional history and in explaining how constitutional doctrine gets made. Political and social movements always provide the motor force for constitution making and for constitutional change; the decisions of high courts, which create the fabric of constitutional law, are always the product of concrete lawsuits, in which real parties with real social and economic interests are contending. In both cases, purposes, goals, and ideals of litigators and other actors (and of lawyers and judges) are the immediate cause of both stasis or change. Hence, legal culture, it can be argued, is what creates constitutional law and gives meaning and life to the constitutional system.

It is obvious that the texture of constitutional law has changed radically in the course of American history; yet the text of the Constitution itself has been extremely durable, not to say sluggish. The leading cases of modern constitutional law are or pretend to be "interpretations" or glosses on the post-CIVIL WAR amendments, which have not been altered in over a century; the BILL OF RIGHTS; or the text of the original Constitution, which is now some two centuries old. A scholar of 1870 or 1880 who woke from a century's sleep would simply not recognize today's body of constitutional doctrine; current EQUAL PROTECTION doctrine, for example, would be totally beyond his or her comprehension. Yet much of the standard work on both CONSTITUTIONAL THEORY and constitutional history has a strongly normative flavor, and it fails to come to grips with the powerful forces that have turned old doctrines topsy-turvy and pulled new doctrines into existence like rabbits from a magician's hat.

The radical changes in constitutional doctrine imply radical changes in internal legal culture; but these in turn are reflexes of radical changes in external legal culture, the culture of the educated community, of business and political leaders, and indeed, of the public at large. The Constitution, in fact, is always interpreted (and necessarily so) in the light of ruling ideas of the times. The Justices may make use of general social norms either consciously

or unconsciously; because of the standardized and formalistic style in which Supreme Court decisions are written, it is not easy to know the level of awareness of the Justices or the way in which they conceive of their judicial role.

In the broadest sense, studies of constitutional doctrine and constitutional history that are sensitive to social context are studies of legal culture, although they do not necessarily use this term. Other studies deal with American culture and the Constitution more explicitly: Michael Kammen, for example, has written a history of the meaning and imagery of the Constitution in American culture—an exploration, among other things, of the symbolic importance of the Constitution in American politics and the cult of the Constitution as a "sacred" document.

Constitutional doctrine itself is a reflection of legal culture, but it would be naive to assume that the general public or any particular segment of it share the same views as the justices who enunciate legal doctrine. There has been some research on public attitudes toward CIVIL LIBERTIES and the Bill of Rights; such studies are necessarily studies of the congruence (or lack of congruence) of external and internal legal culture. The most important recent study (by Herbert McClosky and Alida Brill, in 1983) found that the general public tends to agree strongly with the general ideas behind the Bill of Rights, but on many specific issues, public opinion differs from the current state of doctrine—and from the views of legal and political elites. These differences tilt in a particular direction. The general public is less "liberal" than the Court and less "liberal" than legal and political elites on such issues as whether PORNOGRAPHY can be banned, whether atheists should be allowed to teach or hold public office, or how far to carry the SEPARATION OF CHURCH AND STATE.

So-called impact studies are also relevant to the study of legal culture. These are studies of the ways in which decisions of the Supreme Court, or other courts, are received, used, followed, evaded, or flouted by the public, or some particular part of the public. Legal culture is not only the source of doctrine; it monitors the reaction to doctrine and to specific decisions of the courts. There is a sizeable literature, for example, on reactions to the Supreme Court's decisions barring prayers from public schools. In the broadest sense, much of the vast literature on the controversy over ABORTION or on school DESEGREGATION is impact literature and, hence, relevant to the role of legal culture in the constitutional system. But there has not been much success as yet in framing general theories about impact or about the role of legal culture in producing compliant or noncompliant behavior.

The neglect of legal culture by constitutional scholars has undoubtedly impoverished the understanding of constitutional law. Normative arguments are tossed back and forth on many crucial issues: for example, what ways of "interpreting" the Constitution are legitimate and what ways are illegitimate. "Originalists" claim that the duty of judges is to seek out the ORIGINAL INTENT of the Framers; judges have no legitimate right to read their own values into the Constitution. Such arguments, rhetorically speaking, put the issue very starkly as a kind of either-or position. Apparently, the only alternative to STRICT CONSTRUCTION is a situation in which judges act arbitrarily, according to whim, and simply spin constitutional doctrines out of their heads. In a system of CHECKS AND BALANCES, where are the checks and balances on the power of the Supreme Court Justices to create law out of thin air?

One answer (there are many others) is that the Justices are constrained by internal and external legal cultures. The internal legal culture is inescapably inside the heads of the Justices. The Justices are lawyers, trained in a particular tradition. The internal legal culture has its own powerful symbols, its own language and etiquette; and the Justices operate in this context. Of course, each Justice is an individual man or woman; each has his or her own take on the internal legal culture. But this culture sets boundaries and limits within which the Court, of necessity, does its work.

The external legal culture is an even more powerful curb, in fact, if not in theory. The concept of legal culture assumes that judges never "invent" doctrine; that in any given period, the general legal culture sets limits, defines boundaries, and establishes a range of opinions no less than does the internal legal culture (the legal tradition). It is out of the question for a Supreme Court Justice today, no matter how "conservative," to be as retrograde on racial issues as the most "liberal" judge of the 1880s. The whole spectrum of opinion has shifted in the direction of racial equality, and the corresponding interpretation of the meaning of equal protection has shifted accordingly. The social context is the source of the norms that mold general opinion on matters of race. The norms change over time as context changes. The Justices today live in a world of computers, gene-splicing, and communication satellites, and their views are profoundly affected by the world all about them. They also live in a society dedicated more deeply to individual rights and to race and gender equality than the world of their predecessors. The study of legal culture is a study of this world, and those who stress this factor believe it is one of the best ways to understand where the Court has been, where it is, and where it is going.

LAWRENCE M. FRIEDMAN
(1992)

Bibliography

FRIEDMAN, LAWRENCE M. 1975 *The Legal System: A Social Science Perspective.* New York: Russell Sage Foundation.

——— 1990 *The Republic of Choice: Law, Authority, and Culture.* Cambridge, Mass.: Harvard University Press.

KAMMEN, MICHAEL 1986 *A Machine that Would Go of Itself: The Constitution in American Culture.* New York: Alfred A. Knopf.

MCCLOSKY, HERBERT and BRILL, ALIDA 1983 *Dimensions of Tolerance: What Americans Believe About Civil Liberties.* New York: Russell Sage Foundation.

MUIR, WILLIAM K., JR. 1967 *Prayer in the Public Schools: Law and Attitude Change.* Chicago: University of Chicago Press.

UROFSKY, MELVIN I. 1988 *A March of Liberty: A Constitutional History of the United States.* New York: Alfred A. Knopf.

## LEGAL POSITIVISM

See: Philosophy and the Constitution

## LEGAL PROCESS

The legal process school of legal theory was a movement among legal scholars beginning in the 1950s and continuing through the end of the 1960s, a movement that represented an effort to craft a comprehensive theory of legal decisionmaking, especially in the public law area, to combat LEGAL REALISM and the doctrinal shifts reflected in the jurisprudence of the WARREN COURT. The foundation of this work was laid in a series of influential books and articles, most notably HENRY M. HART, JR., and Albert Sacks's magnum opus *The Legal Process: Basic Problems in the Making and Application of Law* (1958).

Although the sources of the legal process school are complex, the basic principles grew out of public law scholars' critiques of modern legal thought in both its theoretical and doctrinal aspects. Out of the post-war period came a skepticism about legal positivism, that is, the view that law represents nothing more nor less than the executable commands of the sovereign, and a skepticism about NATURAL LAW theory. Scholars working within the legal process tradition were determined to substitute both for positivism and natural law theory a theory of legal decisionmaking which would help students, scholars, and judges focus not on the outcomes of legal decisions but on the *processes* of legal institutions, especially courts. Moreover, in the period of the late 1950s and 1960s, these same scholars grew ever more concerned with the direction of the Warren Court's decisions. Critics of the era described the Warren Court as substituting a "jurisprudence of values" for the previously more restrained and moderate patterns of decisions in the NEW DEAL era. The problem, as these critics viewed it, was that the Court was writing particular ideological values and preferences into DOCTRINE, thus leaving the Court vulnerable to the essential legal realist charge that judicial decisionmaking was unprincipled, subjective, and chaotic.

In response both to the post-war angst about positivistic and natural law jurisprudence and to the perceived subjectivity of Warren Court jurisprudence, there emerged a cadre of legal academics who set out to rescue judicial decisionmaking from these threats. The result was the legal process movement of this era. While the legal process school describes a large and diverse collection of academic agendas, the school can be described as a project following four basic tenets: (1) a focus on neutral principles as guides to judicial decisionmaking, (2) a focus on reasoned elaboration as a method of adjudication, (3) a focus on comparative institutional competence in considering which institutions and processes ought to be employed in legal decisionmaking, and (4) a focus on restrained innovation in the implementation and development of law and legal reasoning.

The focus on neutral principles grew out of the legal realists' critique of judicial decisionmaking. In its strong form, legal realists decried the courts' tendencies toward inconsistent, unprincipled decisionmaking. Legal reasoning was, critics argued, at least unpredictable and at most nihilistic and driven by judges' personal ideologies. Scholars working in the legal process tradition, most notably Herbert Wechsler in his influential article "Toward Neutral Principles of Constitutional Law," reacted decisively to legal realists' somewhat fatalistic view by offering the insight that there are durable legal principles worth following. These principles are drawn from various sources including legal texts, earlier decisions applied through STARE DECISIS, and general legal principles. Moreover, the task of the judge in adjudication is to recover these principles and to apply them in a neutral, principled way.

Neil Duxbury argues that this strain in legal process theory echoes classical legal thought in its rigid adherence to principled decisionmaking; therefore, he suggests, there is a fundamental connection between Langdellian formalism and process theory. Upon closer reflection, however, the differences outweigh the similarities. Whereas Langdellian classical legal thought emphasized logically coherent decisionmaking and syllogistic reasoning, the emphasis in legal process theory is on reason and neutral principles and not on the uncritical application of logical reasoning to legal disputes. Process theorists were dissatisfied with Langdell and his disciples on the one hand and with Karl Llewelyn and his fellow legal realists on the other.

Related to this emphasis on neutral principles is a focus on reasoned elaboration in adjudication. Process theorists maintained a scrupulous faith in reason. They favored a system of law in which legal institutions would make and apply law in a deeply analytical, transparent, and purposive way. Here the key intellectual figure was Lon Fuller.

In analyzing the "forms and limits of adjudication" and in tracing through the judicial reasoning process with the use of his famous hypothetical, the "Case of the Spelunchean Explorers," Fuller brought to life his conclusion that courts were well situated to resolve cases and further the sound development of law through fidelity to reason. This system of reasoned elaboration was juxtaposed against what process theorists regarded as the excesses of the jurisprudence of the era, especially the "incoherent" decisions of the Warren Court. For the most part, these theorists demurred on questions concerning the desirability of the results reached in cases such as BROWN V. BOARD OF EDUCATION (1954), BAKER V. CARR (1962), and MIRANDA V. ARIZONA (1966), decisions that obviously touched ideological nerves in the body politic. Rather, process theorists criticized these and other decisions for failing to accord with either neutral, principled decisionmaking or the recommended process of reasoned elaboration.

A third tenet of process theory is a focus on comparative institutional competence. In their legal process materials, Hart and Sacks offered through various extended examples and commentary an approach to legal reasoning and decisionmaking in the context of adjudication, LEGISLATION, and administration. Hart and Sacks began with the premise that law is made and applied in many different institutional contexts; they developed an analysis not only for the use of courts, legislatures, and ADMINISTRATIVE AGENCIES in carrying out their functions, but also for decisionmakers in assessing and evaluating the strengths and weaknesses of different institutions. A key assumption in this normative enterprise is that the legislature—the key lawmaker in a democratic polity—is made up of "reasonable persons pursuing reasonable aims reasonably." From this assumption, process theorists derived a structure of circumspect institutional power in matters concerning, for example, STATUTORY INTERPRETATION and the development of the law through COMMON LAW reasoning. They insisted on attention to the question of which institution is best suited to decide a particular dispute. Beyond offering rich comparative institutional analysis, perhaps the main contribution of Hart and Sacks's legal process enterprise is the intellectual spotlight it shines on the multiple sources and functions of law in modern society. In this respect, it provides a bridge to the law and society movement that emerged somewhat later as a significant enterprise emphasizing, among other things, the role of law in action and the complementary and competing institutions of legal decisionmaking in the modern era.

A fourth and final tenet of legal process theory is restrained innovation in the making and application of law. Process scholars emphasized the limits of adjudication and also the limited capacities of all legal institutions to move forward with legal change. In his influential Holmes lectures, *The Bill of Rights* (1958), Judge LEARNED HAND built upon the foundations of process theory in counseling caution on the part of judges in deciding constitutional cases. Hand's message was that courts ought to be extremely circumspect in the face of social and political change. Restrained innovation is counseled not merely by a particularly narrow conception of the judge's proper role but also by the anticipation of adverse effects of unnecessarily ambitious judicial creativity. In offering faith in reason and attentiveness to process values, scholars working in the legal process tradition hoped to elide some of the more serious consequences that, in their view, plagued more dynamic, expansive approaches to legal interpretation.

The legal process movement came under substantial criticism in the 1970s and 1980s. Scholars noted that there was an inadequate positive or empirical basis for process theory. In particular, the assumption of reasonable persons pursuing reasonable aims reasonably was regarded as quaint and unrealistic. Moreover, process theorists were criticized as having a too-crabbed picture of law as an instrument of social engineering. Finally, prominent critics of process theory, such as Ronald Dworkin on the right and the CRITICAL LEGAL STUDIES movement on the left, maintained that process theory ultimately masks substantive outcomes. The test for the utility of the theory, therefore, was whether it produced favorable substantive ends.

Perhaps the principal impact of the legal process movement was on the judges and Justices who came to the bench having been influenced by their legal process–inspired teachers in the 1960s and 1970s. The emphasis on restrained innovation and on reasoned elaboration is especially notable in the Supreme Court's contemporary constitutional and statutory interpretation jurisprudence. At the same time, these proceduralist patterns of restraint are in tension with strains of both liberal and conservative activism in modern judicial decisionmaking.

DANIEL B. RODRIGUEZ
(2000)

Bibliography

DUXBURY, NEIL 1995 *Patterns of American Jurisprudence.* Oxford, England: Clarendon Press.

FULLER, LON L. 1949 The Case of the Spelunchean Explorers. *Harvard Law Review* 62:616–645.

——— 1978 The Forms and Limits of Adjudication. *Harvard Law Review* 92:353–409.

HAND, LEARNED 1958 *The Bill of Rights.* Cambridge, Mass.: Harvard University Press.

HART, HENRY M., JR. and SACKS, ALBERT M. 1994 *The Legal Process: Basic Problems in the Making and Application of Law*, William Eskridge, Jr. and Philip Frickey, eds. St. Paul, Minn.: Foundation Press.

PELLER, GARY 1988 Neutral Principles in the 1950's. *University of Michigan Journal of Law Reform* 21:561–622.

VETTER, JAN 1983 Postwar Legal Scholarship on Judicial Decision Making. *Journal of Legal Education* 33:412–423.

WECHSLER, HERBERT 1959 Toward Neutral Principles of Constitutional Law. *Harvard Law Review* 73:1–35.

WHITE, G. EDWARD 1973 The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change. *Virginia Law Review* 59:279–302.

## LEGAL REALISM

Legal realism was the most significant movement that emerged within American jurisprudence during the 1920s and 1930s. Numerous factors conditioned this development, including pragmatism, SOCIOLOGICAL JURISPRUDENCE, and certain ideas of Justice OLIVER WENDELL HOLMES. The legal realists were not, however, an organized or highly unified group of thinkers. Their concepts had diverse sources, their work branched out in many directions, and their responses to particular issues often varied. The substantial differences between Judge JEROME N. FRANK and Karl N. Llewellyn illustrate these tendencies. Even so, these men and the other realists shared a number of distinctive attitudes and ideas.

The term "legal realism" signifies the basic thrust of the movement, which was to uncover and to explain legal realities. This effort reflects the allegation that some of the most cherished beliefs of lawyers are myths or fictions. The major purpose of the realists' provocative criticisms of these beliefs was not, however, to undermine the American legal system. Rather, it was to facilitate development of an accurate understanding of the nature, interpretation, operation, and effects of law. The realists insisted that achievement of this goal was essential for intelligent reform of legal rules, doctrines, and practices.

This outlook contributed to the realists' intense dissatisfaction with prevailing modes of legal education and scholarship. Both were under the spell of the case method pioneered by Christopher Columbus Langdell, the influential dean of the Harvard Law School from 1870 to 1895. He conceived of legal science as a small number of fundamental principles derived from study of relatively few cases. This conception was anathema to the realists, most of whom taught at leading American law schools. Their objective was to reform and to supplement, however, rather than to discard, the case method. The changes they advocated included focus on the *behavior* of judges and other officials, on their actual *decisions* rather than broad precepts. This emphasis was essential for the understanding of "real" instead of mere "paper" rules. The realists also urged the broadening of legal education to embrace not only the law on the books but also its administration and social impact. The development of this approach required a much closer integration of law and the social sciences than was traditional.

Some of these ideas were an outgrowth of major themes of ROSCOE POUND's sociological jurisprudence. Still, the realists tended to develop criticisms of legal orthodoxies more radical than Pound's. This tendency is apparent from both the fact-skepticism of Judge Frank and the rule-skepticism of virtually all of the realists. The first of these doctrines stresses the difficulty of predicting findings of fact by judges or jurors, while the second emphasizes the limitations of legal rules. Rule-skepticism takes various forms, one of which is the conception of law as the past or future decisions of judges or other officials. Legal rules are descriptive or predictive rather than prescriptive generalizations about their behavior. This idea stems from Justice Holmes's predictive conception of law, which is one reason for the large shadow he cast over the realist movement.

Rule-skepticism also signifies distrust of the assumption that traditional legal rules or principles are the most influential determinant of judicial decisions. Numerous considerations explain this distrust, the degree of which varied among the realists. The most important factors were: a conviction of the possibility of widely different interpretations of established legal rules and principles; a belief in the existence of competing precedents, each of which could justify conflicting decisions in most cases; an awareness of the ambiguity inherent in legal language; a perception of the rapidity of socioeconomic change; and a study of the teachings of modern psychology. This last factor also influenced the realists' critique of judicial opinions. They attacked the syllogistic reasoning of judges on the ground that it failed to explain their choice of premises, which was all-important. This failure meant that opinions were often misleading rationalizations of decisions, the real reasons for which were unstated.

Rule-skepticism is the basis of some of the most important ideas of the legal realists. Their rejection of the conventional belief that judges do or should interpret rather than make law is a significant example. That belief is untenable because judicial legislation is unavoidable. Judges frequently must choose between competing decisions or interpretations, each of which is consistent with at least some precedents, rules, or principles. Although these generalizations limit judicial freedom, judges retain a substantial amount of room to maneuver.

This analysis underlies the realists' pragmatic approach to the evaluation of law, which emphasizes its practical results or effects. Rule-skepticism also influenced their de-emphasis of legal doctrine for the purpose of explaining and predicting judicial decisions. Instead, the realists stressed the importance of such factors as the personality,

attitudes, or policies of judges. A similar emphasis characterized the behavioral jurisprudence developed largely by political scientists after WORLD WAR II.

Although most of the realists did not specialize in constitutional law, their ideas facilitate understanding of the decisions of the Supreme Court. The Justices frequently must choose between conflicting interpretations of the Constitution, each of which has some legal basis. Their choices depend most basically upon their values, which may vary among Justices and may change over time. These variations help to explain disagreements among the Justices as well as changes in constitutional doctrine. Realism was also a formative influence on the legal philosophy of Justice WILLIAM O. DOUGLAS.

Despite the influence of the realists on American legal thought, the reaction to their ideas has not been uniform. In fact, large numbers of lawyers expressed varying degrees of dissatisfaction with the realist movement from its inception. If some of the concepts of the realists are unsatisfactory, others are enduring contributions to the study of law and the judicial process. Legal realism therefore warrants close scrutiny by students of constitutional law and judicial behavior.

WILFRID E. RUMBLE
(1986)

Bibliography

FRANK, JEROME 1949 *Law and the Modern Mind.* New York: Coward-McCann.

LLEWELLYN, KARL N. 1962 *Jurisprudence: Realism in Theory and Practice.* Chicago: University of Chicago Press.

RUMBLE, WILFRID E. 1968 *American Legal Realism: Skepticism, Reform, and the Judicial Process.* Ithaca, N.Y.: Cornell University Press.

TWINING, WILLIAM 1973 *Karl Llewellyn and the Realist Movement.* London: Weidenfeld & Nicolson.

## LEGAL TENDER CASES

The Legal Tender Cases include the decisions in *Hepburn v. Griswold* (1870), invalidating CIVIL WAR legislation authorizing paper money, and *Knox v. Lee* (1871) and *Parker v. Davis* (1871), sustaining postwar legal tender legislation. The various decisions reflect important developments in the nation's economic history, as well as in the Supreme Court's history, concerning the judicial role in questions of political economy, the nature and scope of judicial power, and the relation of politics to judicial opinions.

The greenback legislation of 1862 was designed to facilitate the financing of the Civil War, authorizing payments in demand notes, redeemable not in gold or silver but in interest-bearing twenty-year bonds. The notes were made "lawful money and a legal tender in payment of all debts, public and private, within the United States." The Treasury issued over $400 million in paper money during the war. After 1865, as inflation grew and greenbacks depreciated, creditors demanded payment in specie or at least in paper money equivalent to the rising premium on specie.

Secretary of the Treasury SALMON P. CHASE presided over the government's wartime greenback program. His outward support for paper money only masked his deep-seated hostility. In March 1864, he composed an epigram reflecting his true feelings: "When public exigencies require, Coin must become paper. When public exigencies allow, Paper must become coin." Six years later, as Chief Justice, he invalidated his previous policy.

Chase's role in the first legal tender case provoked intense partisan wrangling, both on and off the bench, and raised questions of the Chief Justice's behavior as the Court's administrative leader. The legal tender controversy had become entangled in partisan politics, as Republicans defended their greenback policy and the opposition Democrats attacked it as unconstitutional and improper. The Justices lined up on the same political grounds. (Chase and the Republicans by then were mutually alienated and the Chief Justice already was courting the Democrats in hopes of winning their presidential nomination.) In numerous state cases, judges similarly voted along party lines.

Chase apparently was determined to project the Court into the political maelstrom of monetary policy. But he did so with a precarious majority. Following the arguments in *Hepburn v. Griswold* in 1869, Republican Justices DAVID DAVIS, SAMUEL F. MILLER, and NOAH SWAYNE unhesitatingly endorsed the greenback policy. Chase, joined by Democrats NATHAN CLIFFORD, STEPHEN J. FIELD, ROBERT C. GRIER, and SAMUEL NELSON voted to invalidate the 1862 law. Grier by then was so senile that his colleagues persuaded him to resign. Chase, however, included his vote in the majority.

Meanwhile, Congress had authorized increasing the number of Justices to nine, giving President ULYSSES S. GRANT two new appointments, including Grier's replacement. On February 7, 1870, he nominated WILLIAM STRONG, who as a member of the Pennsylvania Supreme Court had supported the legal tender legislation, and JOSEPH P. BRADLEY, a railroad lawyer whose clients clearly favored the paper money scheme. On that same day, Chase defiantly announced the decision holding the law unconstitutional. The resulting charge of "court packing" against Grant and the Republicans misses the point: Presidents always seek judges who will support their political goals. In this case, Chase and his allies must bear the responsibility for the Court's embarrassment when it reversed itself a year later.

Chase's opinion invoked some of JOHN MARSHALL's best aphorisms. The Court, he insisted, must declare what the law is and not enforce any law inconsistent with the Constitution. To a point, Chase followed Marshall's MCCULLOCH V. MARYLAND (1819) discussions of IMPLIED POWERS, the NECESSARY AND PROPER clause, and the validity of laws consistent with the "letter and spirit of the Constitution." But where Marshall had appealed to the "spirit" of the Constitution to justify a BROAD CONSTRUCTION of congressional powers, Chase turned the notion on its head, construed those powers narrowly, and used the spirit to discover a limitation nowhere mentioned in the Constitution.

The Constitution, Chase maintained, was designed to establish justice, and a fundamental principle of justice was that preexisting private contracts should not be impaired by governmental action. The CONTRACT CLAUSE of the Constitution, however, applied to STATE ACTION; it said nothing regarding the federal government. But, Chase argued that the Constitution's Framers "intended that the spirit" of the contract clause would apply against all legislative bodies. His reliance on the Fifth Amendment was similarly strained. He found that the prohibition of contracts requiring specie payment in effect deprived people of their property without DUE PROCESS OF LAW; indeed, he maintained that the property was "taken" for a PUBLIC USE without the required JUST COMPENSATION.

Justice Miller's dissent pleaded for judicial restraint. He rebuked Chase's "abstract and intangible" arguments about the "spirit" of the Constitution. Following Marshall's broad reading of the necessary and proper clause, Miller suggested that "the degree of that necessity is for the legislature and not for the court to determine."

Partisan reactions to the decision were predictable. But the focused concerns for the result obscured the majority's far-reaching notions of judicial authority. Chase's bold assertions of judicial superintendence provoked virtually no negative reaction. The political and public acceptance of that doctrine gave a new legitimacy to judicial power. The nation had come a great distance from the protests against judicial excesses following DRED SCOTT V. SANDFORD (1857); indeed, Chase's opinion signaled a new chapter in judicial activism.

Significantly, the newly appointed Justice Strong, and not Miller, spoke for the majority in *Knox v. Lee* (1871) when the Court reversed itself. Strong largely followed Miller's interpretation of Congress's power and the necessity of congressional control over currency policy. But he responded only indirectly to Chase's presumptions of judicial power, contending that judges must assume the constitutionality of congressional acts and rely on congressional determination of what was "necessary and proper." He failed to rebuke Chase's reliance on the "spirit" of the Constitution. Finally, anticipating criticism for the dramatic reversal, Strong chided Chase for having forced the earlier decision when the Court was so divided and on the verge of receiving new appointees. The Chief Justice, joined by Nelson, Clifford, and Field dissented, with the latter two offering additional, separate opinions. The dissenting remarks largely reiterated the majority views of *Hepburn v. Griswold.*

Thirteen years later, in *Juilliard v. Greenman*, the Court, with only Field dissenting, sustained the peacetime use of greenbacks. Justice HORACE GRAY not only used the occasion to reaffirm the constitutionality of greenbacks but flatly declared that the policy involved "a POLITICAL QUESTION, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the Court." A half century later, Chief Justice CHARLES EVANS HUGHES invoked *Juilliard* as the Court, in the GOLD CLAUSE CASES (1935), narrowly acquiesced in President FRANKLIN D. ROOSEVELT's decision to abandon the gold standard. What had begun as one of the most politically conscious and aggrandizing decisions by the Supreme Court ended in self-abnegation and deference to the political branches of the government.

STANLEY I. KUTLER
(1986)

Bibliography

DAM, KENNETH W. 1982 The Legal Tender Cases. *The Supreme Court Review* 1982:367–412.

FAIRMAN, CHARLES 1971 *Reconstruction and Reunion, 1864–1888,* Vol. XVI of the Oliver Wendell Holmes Devise *History of the Supreme Court of the United States.* New York: Macmillan.

KUTLER, STANLEY I. 1968 *Judicial Power and Reconstruction Politics.* Chicago: University of Chicago Press.

## LEGISLATION

In addition to the separation of powers, there are at least two intersections of the Constitution and the legislative process. One concerns the obligation and capacity of legislatures to assess the constitutionality of their proposed enactments. The other concerns the federal judiciary's role in inducing legislatures to meet their constitutional obligations. Within this context there are issues common to state and congressional lawmaking.

The American constitutional scheme obligates legislatures to assess the constitutionality of proposed enactments and to enact only legislation they deem constitutionally permissible. Although this proposition may seem obvious, it has often been contradicted by respectable lawmakers, who assert that legislatures should engage in policymaking without regard to the Constitution

and leave constitutional questions exclusively to the courts. Therefore the reasons that legislatures are obligated, no less than courts, to determine the constitutionality of proposed enactments deserve explanation.

If, as Chief Justice JOHN MARSHALL asserted in MARBURY V. MADISON (1803), the Constitution is a law paramount to ordinary legislation, then to assert that legislatures need not consult the Constitution is the equivalent of asserting that individuals need not consult the law before acting. To be sure, people sometimes act in disregard of the law, subject only to the risk of sanctions if they are caught and a court holds their actions to be unlawful. But it would be perverse to conclude from this observation that we are not obligated to obey the law.

The structure and text of the Constitution certainly imply that legislatures must initially determine the legality of their enactments. For example, how would Congress know whether it had the authority to enact a bill without consulting Article I and the other provisions that delegate limited powers to the national government? Indeed, some provisions of the Constitution are explicitly addressed to legislators. Article I, section 9, provides, "No bill of attainder or ex post facto law shall be passed." The FIRST AMENDMENT says, "Congress shall make no law," and the FOURTEENTH AMENDMENT's prohibitions begin with the words, "No state shall make or enforce any law. . . ." Article VI binds legislators and officials "by Oath or Affirmation to support this Constitution. . . ." Although this command does not entail that all constitutional questions are open to all institutions at all times, it does imply that a legislator must vote only for legislation that he or she believes is authorized by the Constitution. If history matters, the obligation of legislatures to interpret the Constitution was affirmed and acted on by various of the Framers and by early legislators and Presidents—some of whom, indeed, expressed this duty or prerogative even in the face of contrary judicial interpretations.

The existence of JUDICIAL REVIEW is sometimes thought to relieve legislatures of the obligations to determine the constitutionality of their enactments. But Chief Justice Marshall's classic justifications for judicial review in *Marbury* do not necessarily imply a privileged judicial function. As Herbert Wechsler wrote: "Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so they must give effect to the supreme law of the land. That is, at least, what *Marbury v. Madison* was all about." (Wechsler, 1965, p. 1006.) Other arguments for judicial review have accorded the judiciary a special role, and in COOPER V. AARON (1958) the modern Court claimed that it was "supreme in the exposition of the law of the Constitution." But the Court has never implied that JUDICIAL SUPREMACY implies judicial exclusively, or that its privileged position relieves other institutions of the responsibility for making constitutional judgments.

Indeed, some constitutional issues—so-called POLITICAL QUESTIONS—may be committed to the legislative and executive branches to the exclusion of the judiciary. For example, it is widely assumed that the Senate's judgment in an IMPEACHMENT proceeding is not reviewable by the courts even though the decision may involve controverted constitutional questions, and even though the Senate's role in cases of impeachment is more judicial than legislative. In such cases, at least, if the legislature does not consider the constitutional questions, no one will.

If legislatures are obligated to consider constitutional questions, what deference, if any, should they accord prior judicial interpretations of the Constitution? In what might be called the judicial supremacy view, a legislature is in essentially the same position as a state or lower federal court: it must treat the Supreme Court's rulings as authoritative and binding. This was the view expressed by the Court in *Cooper v. Aaron*. Quoting Marshall's assertion in *Marbury* that "[i]t is emphatically the province and the duty of the judicial department to say what the law is," the Justices continued: "This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

The polar view is that legislators and other officials may, or must, apply the Constitution according to their best lights. This position was asserted by Thomas Jefferson, ANDREW JACKSON, and ABRAHAM LINCOLN, among others. In vetoing the bill to recharter the Bank of the United States in 1832, Jackson wrote:

> It is maintained by advocates of the bank that its constitutionality in all its features ought to be considered settled by the decision of the Supreme Court [in MCCULLOCH V. MARYLAND (1819)]. To this conclusion I can not assent. . . . The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress

> than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

The issues presented by these opposed positions are of more than theoretical or historical interest. They have surfaced in recent years in debates over Congress's authority under section 5 of the Fourteenth Amendment to interpret or apply the amendment differently from the Court, and over Congress's power to limit the JURISDICTION OF FEDERAL COURTS over particular issues. For present purposes, I will assume that Congress, as well as state legislatures, must operate within the constitutional doctrines exposited by the United States Supreme Court. What does this obligation entail?

The dimensions of legislative responsibility and some of the difficulties in meeting it are illustrated by considering a bill introduced in the 89th Congress to punish the destruction of draft cards. The bill was enacted in 1965, seemingly in response to public DRAFT CARD BURNING to protest the VIETNAM WAR. It was challenged on First Amendment grounds and upheld by the Court in UNITED STATES V. O'BRIEN (1968).

The governing constitutional standard (as the Court later recapitulated it in *O'Brien*) was that "a governmental regulation is sufficiently justified . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest."

Because this area of judicial doctrine was already well developed in 1965, legislators considering the draft card destruction law did not have to engage in much independent constitutional interpretation. They were, however, required to apply existing doctrine to the situation that faced them.

First, a legislator had to determine that his or her reasons for supporting the bill were "unrelated to the suppression of free expression." This obligation meant that he could not vote for the bill if his dominant, or causative, reason for favoring it was to suppress antiwar protests (rather than, say, to facilitate the administration of the selective service). The obligation demanded only introspection, a modicum of self-awareness, and the courage or will to follow the law.

It is worth pausing for a moment to ask why the Constitution should be concerned with a legislator's motivation in voting for a measure rather than simply with the legislation itself. The answer begins with the observation that the First Amendment is designed to protect citizens' freedom to protest against government policies. The Amendment does not, however, forbid all laws that inhibit protests to any extent. For example, the Congress surely may prohibit burning anything, including draft cards, if the activity poses a fire hazard to property that Congress has the power to protect. Thus, legislators have discretion to compromise constitutional values in the pursuit of other legitimate ends of government. However, as the Court's reference to "important or substantial" interests suggests, the First Amendment demands that a legislator treat a law's inhibition of expression as a cost, indeed a cost that should not be lightly imposed. But a legislator who votes for the bill in order to suppress protest, treats the inhibition as a benefit, not a cost. He has confused the credits and debits column on the constitutional balance sheet, for he seeks to bring about the very result that the First Amendment seeks to avert.

The second factual determination—actually a mixture of law, fact, and judgment—stems from the requirement that the law further an "important or substantial governmental interest." In *O'Brien* the Court was required to speculate about the nature and importance of the interests furthered by the draft card law. As happens frequently in matters concerning the national defense, the Court gave Congress the benefit of the doubt. But, of course, the legislators know what ends they intend a law to serve. Judgments about the importance of those ends, and how well a proposed law will actually accomplish them, are among the core responsibilities of legislators—who do not owe themselves any benefit of the doubt. It would be ironic, to say the least, if the Court deferred to Congress's judgments in these matters when Congress had not actually considered the issues carefully and in good faith.

The preceding paragraphs have not distinguished between the responsibilities of "legislators" and the "legislature." How, in fact, is responsibility for constitutional decision making allocated within the lawmaking process?

The answer seems easiest with respect to motivation. Granting that not even psychoanalysis can always reveal our deepest motivations, a conscientious legislator usually knows why he or she supports or opposes a law. (A contrary position would call into doubt the very foundations of the legislative process.) The Constitution demands that legislators assure themselves that illicit motivations, such as suppressing expression or disadvantaging racial minorities, play no role in their decisions to support the legislation. A legislator who "personally" does not care to pursue an illicit end but who supports a measure to satisfy her constituents' or colleagues' desires for those ends must be taken to have incorporated their ends as her own.

However intimately legislators know their own minds,

they often lack the expertise and time to assimilate the complex factual and legal information bearing on the constitutionality of a proposed law. In the ordinary run of cases, these issues must be addressed and resolved through institutional mechanisms. A number of such mechanisms exist and are actually employed.

Federal legislation is typically drafted by lawyers and other specialists—either in an executive agency or department or in a congressional committee—who are familiar with any potential constitutional issues presented by the legislation. The committee to which a bill is referred can call upon its own legal staff or on the American Law Division of the Congressional Research Service of the Library of Congress for assistance with constitutional questions. Individual legislators can also seek advice from the research service and from their own staffs, and constitutional issues may be raised in debates on the floor of the House and Senate. Before signing a bill, the President can consult with the Office of Legal Counsel or seek an opinion from the attorney general. Although most state legislators cannot avail themselves of such rich resources, all have analogous methods for assessing the constitutionality of proposed legislation.

It is sometimes said that legislators have too little time and too much political interest to take constitutional issues seriously. Surely, however, this remark cannot justify legislative inattention to questions of constitutionality—unless one believes that legislators should be held to a lower standard of law-abidingness than individuals or enterprises, who may also lack the time or inclination to follow the law. To the extent that the observation is accurate, it is a source of concern to anyone committed to constitutional democracy.

The principal deterrent against unconstitutional legislative action is the threat of judicial invalidation of a law on the ground of its substantive unconstitutionality. From time to time, courts have also engaged in what might be called "procedural review" of legislative decisions—review that focuses on the process by which the law was enacted.

Procedural review encompasses two different inquiries. One is whether the legislators acted out of unconstitutional motives; the other is whether the legislators adequately considered the factual and legal bases for the law. Chief Justice Marshall alluded to both inquiries in *McCulloch v. Maryland* (1819). With respect to unconstitutional motivation, he wrote: "Should Congress, . . . under the pretext of executing its powers, pass laws for the accomplishment of objectives not entrusted to the government, it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land." And he invoked the Executive's and Congress's attention to the underlying constitutional issues as a basis for judicial deference to their decision:

> The bill for incorporating the [first] bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became law. . . . It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gives no countenance.

Judicial inquiry into legislative motivation has had a checkered career. The Court in HAMMER V. DAGENHART (1918) and BAILEY V. DREXEL FURNITURE COMPANY (1922) relied on Marshall's "pretext" statement to strike down federal child labor legislation, and the Court in LOCHNER V. NEW YORK (1905) expressed doubt whether the maximum hours law had been adopted for permissible motives.

Inquiries into legislative motivation declined with the judicial modesty of the late 1930s, but it reappeared with the WARREN COURT's resurgence of activism. The Court in ABINGTON SCHOOL DISTRICT V. SCHEMPP (1963) articulated this standard for assessing establishment of religion claims: "[W]hat are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." EPPERSON V. ARKANSAS (1968) applied the "purpose" aspect of this test to strike down a law forbidding the teaching of evolutionary theory. GOMILLION V. LIGHTFOOT (1960) struck down the Alabama legislature's redrawing of the boundaries of Tuskeegee on the ground that it was designed to exclude black citizens from the city limits. And GRIFFIN V. PRINCE EDWARD COUNTY SCHOOL BOARD (1964) held that the county could not constitutionally close its public schools with the motive of avoiding integration.

In contrast to these decisions, *United States v. O'Brien* (1968) refused to consider the defendant's contention that Congress enacted the draft-card destruction law in order to suppress antiwar protest rather than for any legitimate administrative purposes. And PALMER V. THOMPSON (1971) dismissed the plaintiff's claim that Jackson, Mississippi, had closed its swimming pools in order to avoid integrating them. Writing for the Court in *Palmer*, Justice HUGO L. BLACK emphasized that it was extremely difficult to determine an official's motivation and especially difficult "to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators." Black also remarked that

"there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If a law is struck down for this reason, rather than because of its facial contents or effect, it would presumably be valid as soon as the legislature . . . repassed it for different reasons."

More recently, the Court has repudiated the broadest implications of *O'Brien* and *Palmer.* In ARLINGTON HEIGHTS V. METROPOLITAN HOUSING DEVELOPMENT CORPORATION (1977) Justice LEWIS F. POWELL noted the importance of "[p]roof of racially discriminatory intent or purpose" to claims under the EQUAL PROTECTION clause. The Court held that the complainant was entitled—indeed, required—to prove that the town's refusal to rezone an area to permit multiple-family housing was discriminatorily motivated. The relevent standard was not whether the decision was solely or even dominantly motivated by racial considerations. Rather, proof that racial motivation played any part in the decision shifts to the decision maker "the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." In *Mt. Healthy City Board of Education v. Doyle* (1977) the Court applied a similar standard in reviewing an employee's claim that he had been discharged for exercising First Amendment rights.

The current doctrine is correct. Legislative motives are not always obscure; nor does judicial review usually require inquiring into and aggregating the motives of individual legislators. As Justice Powell noted in *Arlington Heights*, the bizarrely shaped boundaries of Tuskeegee in *Gomillion* revealed "a clear pattern, unexplainable on grounds other than race." Sometimes, as in the school- and pool-closing cases, the historical background and sequence of actions leading up to the contested event may reveal invidious purposes. Placing a substantial burden on the complainant and permitting the respondent to show that the decision was in fact overdetermined by legitimate purposes amply protect against judicial invalidation of legislative policies that were based on legitimate considerations.

Indeed, this objective might be better achieved simply by invalidating a law where unconstitutional motives played any substantial role and permitting the legislature to consider the measure anew. Justice Black's concern to the contrary, such a course is not inevitably futile. Although a legislature may disguise its motivation and reenact the law for illicit reasons, it may also choose to reenact the law for entirely legitimate reasons—or the legislature may have lost whatever interest motivated it to act in the first instance. The Alabama legislature did not attempt to gerrymander Tuskeegee again, nor did Prince Edward County try to close its schools again for a "better" reason.

Judicial inquiry into unconstitutional motivation is sometimes said to be especially intrusive because it requires the judiciary to concern itself directly with the legislative process. In an important sense, however, any form of procedural review is less intrusive than substantive review. The Court leaves to the legislature its assigned task of weighing the costs and benefits of proposed legislation, and requires only that the legislature not count a constitutionally illicit objective as a benefit.

When a law is challenged on the ground that it does not further any valid interests, or does not further them sufficiently, the Supreme Court typically does not ask what ends the legislature actually sought to achieve, but hypothesizes possible objectives and asks whether the law can be upheld in terms of them. For example, in *United States v. O'Brien*, lacking any information about what legitimate objectives Congress actually sought to achieve through the draft card destruction law, the Court upheld the law on the basis of several administrative objectives that the Justices thought the law might serve.

In a widely cited 1972 article Gerald Gunther urged that the Court should be "less willing to supply justifying rationale by exercising its imagination. . . . [It] should assess the means in terms of legislative purposes that have substantial basis in actuality, not mere conjecture." Gunther asserted that a court need not delve into "actual legislative motivation" but can rely on legislative materials such as debates and reports or on a "state court's or attorney general office's description of purpose."

The Court has sometimes taken this approach. For example, in GRISWOLD V. CONNECTICUT (1965) the Court held that the state's anticontraceptive law was not justified as a means of deterring illicit sexual intercourse—the only purpose urged by the state attorney general. The Court did not consider whether the law might be upheld on the more plausible (though constitutionally problematic) ground that the Connecticut legislature believed that contraception was immoral. Whatever the justification for this judicial strategy, it is not likely to identify the legislature's actual purposes: state courts and attorneys general have no privileged access to actual legislative purposes but must rely on the same public materials available to the Supreme Court.

In recent years some Justices, and occasionally a majority of the Court, have limited the objectives that can be considered in support of a challenged regulation to the decision maker's (supposed) actual objectives. This course is easiest for a court to follow when statutory limitations on an agency's mandate foreclose it from pursuing a broad range of objectives. For example, HAMPTON V. MOW SUN WONG (1976) invalidated a United States Civil Service regulation barring resident ALIENS from federal civil service jobs. Writing for the Court, Justice JOHN PAUL STEVENS assumed that Congress or the President might constitu-

tionally have adopted such a requirement for reasons of foreign policy, but held that the commission's jurisdiction was limited to adopting regulations to "promote the efficiency of the federal service." Similarly, in REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE (1978), Justice Powell refused to consider whether the university's preferential admissions policy was justified as a remedy for past discrimination, holding that the regents were empowered only to pursue educational objectives.

The Supreme Court has sometimes relied on legislative history to refuse to uphold legislation on the basis of objectives that were not intended. For example, in *Weinberger v. Wiesenfeld* (1975), in assessing the constitutionality of the "mother's insurance benefit" provision of the SOCIAL SECURITY ACT, Justice WILLIAM J. BRENNAN wrote for the Court that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against an inquiry into the actual purposes underlying a statutory scheme." Although the provision might have been designed to compensate for past economic discrimination against women, the legislative history belied this purpose and the Court refused to uphold the law on a false basis.

Legislative history is often sparse or nonexistent, however. A complex legislative scheme may make a myriad of classifications; the chances are slight that legislative materials will illuminate the classification challenged in any particular case; and the absence of legislative history does not mean that the legislators did not intend to pursue a particular objective. Partly because of these complexities, judicial efforts to limit the purposes on the basis of which laws can be justified have not followed a consistent pattern. The current state of the law is captured in *Kassell v. Consolidated Freightways Corporation* (1981), which struck down a state's highway regulation prohibiting double trailers as an undue burden on INTERSTATE COMMERCE. In a concurring opinion, Justice Brennan wrote that he would give no deference to the state's arguments based on safety because the law was not actually designed to promote safety but to protect local industries. Justice WILLIAM H. REHNQUIST, dissenting, asserted that there was "no authority for the proposition that possible legislative purposes suggested by a state's lawyers should not be considered in COMMERCE CLAUSE cases." The plurality avoided the issue by rejecting the state's safety claims on the merits.

In *McCulloch* Marshall implied that the BANK OF THE UNITED STATES ACT was entitled to special deference because of the attention paid to the constitutional issues within the executive and legislative branches. Because of the difficulty of such an inquiry, however, and perhaps because of its perceived impropriety, the court has seldom conditioned deference on the extent to which the legislature actually considered the factual and legal issues bearing on the constitutional questions at stake. In *Textile Workers Union v. Lincoln Mills* (1957) the Court gave a strained interpretation to a federal statute in order to avoid a difficult constitutional question of federal jurisdiction, to which Congress had apparently paid no attention. In a separate opinion, Justice FELIX FRANKFURTER noted that "this Court cannot do what a President sometimes does in returning a bill to Congress. We cannot return this provision to Congress and respectfully request that body to assume the responsibility placed upon it by the Constitution."

In an article on the *Lincoln Mills* case, ALEXANDER M. BICKEL and Harry Wellington responded that the Court could properly perform such a "remanding function" and that it had sometimes done so, albeit surreptitiously. KENT V. DULLES (1958) is often cited as an example. Rather than decide whether the secretary of state could constitutionally refuse to issue passports to members of the Communist party, the Court held that Congress had not delegated the secretary this authority, thus in effect returning the matter to Congress. More recently, Justice Stevens, dissenting in FULLILOVE V. KLUTZNICK (1980), explicitly urged such a "remand." *Fullilove* upheld a congressional provision requiring that ten percent of the federal funds allocated to public work projects be used to procure services from minority contractors. Justice Stevens's dissent started from the premise that the Constitution disfavors all racial classifications. Noting that the challenged provision was scarcely discussed in committee or on the floor of the Congress, he wrote:

> Although it is traditional for judges to accord the same presumption of regularity to the legislative process no matter how obvious it may be that a busy Congress has acted precipitately, I see no reason why the character of their procedures may not be considered relevant to the decision whether the legislative product has [violated the Constitution]. A holding that the classification was not adequately preceded by a consideration of less drastic alternatives or adequately explained by a statement of legislative purpose would be far less intrusive than a final decision [of unconstitutionality]. . . . [T]here can be no separation-of-powers objection to a more tentative holding of unconstitutionality based on a failure to follow procedures that guarantee the kind of deliberation that a fundamental constitutional decision of this kind obviously merits.

"Procedural" judicial review, which takes account of the legislature's consideration of relevant constitutional issues, has two objectives. First, it may foster legislative attention to the Constitution in the first instance. Second, it prevents constitutional concerns from falling between two stools—which happens when a court blindly defers to a judgment that the legislature did not in fact make.

Procedural review seems appropriate where a legislature evidently has ignored issues of law or fact that bear on the constitutionality of an enactment. It is questionable whether a general practice of procedural review would prove workable, however. Among other things, a court will have difficulty in assessing the adequacy of constitutional deliberation from external indicia. Justice Powell, concurring in *Fullilove*, thus responded to the argument that the legislation was not adequately supported by factual findings or debate:

> The creation of national rules for the governance of our society simply does not entail the same concept of record-making that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. One appropriate source [of facts] is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

In addition to the specific powers and limitations found in the Constitution, the Court has interpreted the DUE PROCESS and equal protection clauses to impose general requirements of "rationality" on the outcome of the legislative process. As stated in *F. S. Royster Guano Company v. Virginia* (1920), the equal protection STANDARD OF REVIEW requires that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . ." The modern Court has usually articulated an even less demanding RATIONAL BASIS requirement: the law, and any classifications it makes, must plausibly promote some permissible ends to some extent.

The rationality standards may provide a minimal judicial safeguard against laws whose only purpose is constitutionally illicit, without requiring a direct inquiry into legislative motivation. But they may also impose a broader requirement on the legislative process. They may imply what Frank Michelman has described as a "public interest" rather than a "public choice" model of the legislative process.

The public interest model is premised on the possibility of shared public values or ends. "[T]he legislature is regarded as the forum for identifying or defining, and acting towards those ends. The process is one of mutual search through joint deliberation, relying on the use of reason supposed to have persuasive force" (Michelman, 1977, p. 149). The public choice model regards "all substantive values and ends . . . as strictly private. . . . There is no public or general social interest, there are only concatenations of particular interests or private preferences. There is no reason, only strategy. . . . There are no good legislators, only shrewd ones; no statesmen; only messengers" (ibid., p. 148).

The constitutional implications of the two models can be illustrated by the city ordinance challenged in RAILWAY EXPRESS AGENCY V. NEW YORK (1949). The ordinance prohibited advertisements on the side of vehicles but exempted business delivery vehicles advertising their own business. The most obvious beneficiaries of the exemption were the city's newspapers.

If the Court had adopted a "public choice" model, it would have been pointless to subject the New York ordinance to a rationality requirement: the exemption would be permissible even if its only rationale were to "buy off" the newspapers to get the ordinance enacted or, indeed, to favor the newspapers over other advertisers. Under a "public interest" model, however, the Court would at least ask whether the exemption was related to some extrinsic purpose—and this it did. Justice WILLIAM O. DOUGLAS wrote for the Court that the "local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use." In a concurring opinion, Justice ROBERT H. JACKSON pointed to "a real difference between doing in self-interest and doing for hire."

Thus, the Court seems nominally to adhere to a public interest model. But the weakness of the rationality standards, and the Court's generosity in imagining possible rationales for classifications (exemplified by *Railway Express Agency* itself), suggest some judicial ambivalence about the extent to which this model should be treated as a constitutional norm. There is some academic controversy about both the norm itself and its judicial enforceability.

JAMES BRADLEY THAYER asserted in his 1901 biography of John Marshall that judicial review implies a distrust of legislatures and that the legislatures "are growing accustomed to this distrust, and more and more readily incline to justify it, and to shed the consideration of constitutional restraints, . . . turning that subject over to the courts; and what is worse, they insensibly fall into a habit of assuming that whatever they can constitutionally do they may do. . . . The tendency of a common and easy resort to this great function is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility." Assessing Thayer's argument is practically impossible, but it seems at least as plausible that the practice of judicial review is a necessary reminder to legislators that their actions are constrained by fundamental public law and not only by their constituents' interests or even their own moral principles.

Thayer's argument nonetheless underscores the point

that the Constitution speaks directly to legislatures. In a properly functioning constitutional system, judicial review should be just that—the review of the legislature's considered judgment that the challenged act is constitutionally permissible. Whether this position is "realistic" is another matter. Surely, however, one cannot expect legislators to take their constitutional responsibilities seriously if they and the citizenry at large assume that they have none.

PAUL BREST
(1986)

Bibliography

BENNETT, ROBERT 1979 "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory. *California Law Review* 67:1049–1103.

BICKEL, ALEXANDER and WELLINGTON, HARRY 1957 Legislative Purpose and the Judicial Function: The Lincoln Mills Case. *Harvard Law Review* 71:1–39.

BREST, PAUL 1971 An Approach to the Problem of Unconstitutional Legislative Motive. *Supreme Court Review* 1971:95–146.

ELY, JOHN H. 1970 Legislative and Administrative Motivation in Constitutional Law. *Yale Law Journal* 79:1205–1341.

GUNTHER, GERALD 1982 In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection. *Harvard Law Review* 86:1–48.

LINDE, HANS 1976 Due Process of Lawmaking. *Nebraska Law Review* 55:197–255.

MICHELMAN, FRANK 1977 Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy. *Indiana Law Journal* 53:145–206.

MORGAN, DONALD G. 1966 *Congress and the Constitution: A Study in Responsibility.* Cambridge, Mass.: Belknap Press.

THAYER, JAMES BRADLEY 1901 *John Marshall.* Boston: Houghton Mifflin.

WECHSLER, HERBERT 1965 The Courts and the Constitution. *Columbia Law Review* 65:1001–1014.

## LEGISLATIVE CONTEMPT POWER

Anglo-American legislative bodies have exercised the power to punish nonmembers for contempt of their dignity and proceedings since the time when the High Court of Parliament exercised undifferentiated legislative and judicial power. There is no explicit constitutional warrant for the exercise of the power by Congress, but Congress has exercised it, nonetheless, at least since 1795. There were several instances in the nineteenth century of summary judgments being rendered against nonmembers for such acts of contempt as publishing abusive language about Congress or attempting to bribe its members. In *Anderson v. Dunn* (1821) the Supreme Court held that the power to punish contempts—at least of the latter sort—was inherent in "a deliberate assembly, clothed with the majesty of the people." In KILBOURNE V. THOMPSON (1881), however, the Supreme Court held that Congress did not possess COMMON LAW power to punish as contempt Kilbourne's failure to produce documents subpoenaed by an investigatory committee for a nonlegislative purpose.

Congress defined the statutory offense of contempt of Congress in 1857; this offense was triable before the house against which the contempt was committed, and a contemnor, once convicted, might be confined in the Capitol for the duration of the congressional session. Contempt of Congress remains a statutory offense, but it is no longer prosecuted at the bar of the house. Because bribery of members of Congress is now punishable as a separate offense, the most common contemporary form of contempt of Congress is refusal to testify at or to provide evidence for LEGISLATIVE INVESTIGATIONS. The presiding officer of the offended house (ordinarily only if directed by a vote of the full house) certifies the circumstances of the contempt to the United States attorney in the district where the contempt was committed; the federal attorney may then prosecute the contemnor in federal court.

DENNIS J. MAHONEY
(1986)

Bibliography

GOLDFARB, RONALD L. 1963 *The Contempt Power.* New York: Columbia University Press.

## LEGISLATIVE COURT

The term "legislative court" was coined by Chief Justice JOHN MARSHALL to describe the status of courts created by Congress to serve United States TERRITORIES lying outside the boundaries of any state. Congress had not given the judges of the territorial courts the life tenure and salary guarantees that Article III of the Constitution required for judges of CONSTITUTIONAL COURTS, and Marshall needed to explain the anomaly of federal courts outside the contemplation of Article III. In AMERICAN INSURANCE CO. V. CANTER (1828) he concluded that Congress, in exercising its power to govern the territories, could establish courts that did not fit Article III's specifications. Today this concept of legislative courts embraces all courts created by Congress and staffed by judges who do not enjoy constitutional protection of their tenure and salaries. Examples include territorial courts, consular courts, the Tax Court of the United States, the Bankruptcy Court, the Court of Military Appeals, and the courts of local jurisdiction operating in the DISTRICT OF COLUMBIA and the Commonwealth of PUERTO RICO.

Just as a legislative court's judges fall outside Article III's guarantees of independence, so it is capable of handling business outside that Article's definition of "the JUDICIAL POWER OF THE UNITED STATES"—something a constitutional court cannot constitutionally do. A legislative court, for example, can be assigned JURISDICTION to give ADVISORY OPINIONS to the President or Congress. Yet, despite Marshall's OBITER DICTUM in the *Canter* opinion that a legislative court is "incapable of receiving" jurisdiction lying within the judicial power, it is clear today that such courts, like administrative agencies, can constitutionally be assigned the initial decision of a great many cases within Article III's definition of that power. (See NORTHERN PIPELINE CONSTRUCTION CO. V. MARATHON PIPE LINE CO.) Their decisions on such Article III matters are reviewable by constitutional courts, including the Supreme Court, when Congress so provides.

With some difficulty, the Supreme Court has resolved controversies over the status of several courts. The federal courts formerly serving the District of Columbia were held protected by Article III's guarantees of life tenure and salary protection. In this sense, they were constitutional courts. However, the Court also held that the same courts could constitutionally be given work falling outside Article III's specification of CASES AND CONTROVERSIES within the judicial power. In 1970, Congress replaced these "hybrid" courts with a dual court system: the constitutional courts operate under Article III's strictures and the legislative courts handle the local judicial business of the District. In *Palmore v. United States* (1973) the Supreme Court upheld the local courts' power to try local crimes (established by congressional statute), despite their judges' lack of life tenure and salary guarantees.

Similarly, in *Glidden Co. v. Zdanok* (1962), the Court staggered to the ruling—based on two inconsistent opinions, pieced together to make a majority for the result—that the old Court of Claims (see CLAIMS COURT; UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT) and the COURT OF CUSTOMS AND PATENT APPEALS were constitutional courts, not legislative courts.

In essence a legislative court is merely an administrative agency with an elegant name. While Congress surely has the power to transfer portions of the business of the federal judiciary to legislative courts, a wholesale transfer of that business would work a fundamental change in the status of our independent judiciary and would seem vulnerable to constitutional attack.

KENNETH L. KARST
(1986)

Bibliography

NOTE 1962 Legislative and Constitutional Courts: What Lurks Ahead for Bifurcation. *Yale Law Journal* 71:979–1012.

# LEGISLATIVE FACTS

The growth of American constitutional doctrine has been influenced, from the beginning, by the traditions of the Anglo-American COMMON LAW. Judges make constitutional law, as they make other kinds of law, partly on the basis of factual premises. Sometimes these premises are merely assumed, but sometimes they are developed with the aid of counsel. However they may be determined, the facts on which a court's lawmaking is premised are called "legislative facts." In modern usage they are sometimes contrasted with "adjudicative facts," the facts of the particular case before the court.

Not all constitutional questions concern the validity of legislation. In the 1970s and 1980s, for example, the Supreme Court went through a period of reappraisal of the EXCLUSIONARY RULE, which excludes from a criminal case some types of EVIDENCE obtained in violation of the Constitution. One factual issue repeatedly raised during this reconsideration was whether the rule actually served to deter police misconduct. In considering that question, the Court was not second-guessing the judgment of a legislature. Yet the question was properly regarded as one of legislative fact; its resolution would provide one of the premises for the Court's constitutional lawmaking.

More frequently, however, the courts consider issues of legislative fact in reviewing the constitutionality of legislation. In many cases, particularly when the laws under review are acts of Congress, the legislature itself has already given consideration to the same fact questions. Congress sometimes writes its own factual findings into the text of a law, explicitly declaring the actual basis for the legislation. In such cases the courts typically defer to the congressional versions of reality. Similar legislative findings are only infrequently written into the enactments of state and local legislative bodies, but even there the practice has recently increased. It seems unlikely, however, that judges, especially federal judges, will pay the same degree of deference to those legislative findings.

The courts' treatment of issues of legislative fact is thus seen as a function of the STANDARD OF REVIEW used to test a law's validity. When a court uses the most permissive form of the RATIONAL BASIS standard, it asks only whether the legislature could rationally conclude that the law under review was an appropriate means for achieving a legitimate legislative objective. The BRANDEIS BRIEF was invented for use in just such cases, presenting evidence to show that a legislature's factual premises were not irrational. When the standard of review is heightened—for example, when the courts invoke the rhetoric of STRICT SCRUTINY—arguments addressed to questions of legislative fact can be expected to come from both the challengers and the defenders of legislation. A court's fact-finding task

in such a case is apt to be more complicated; the complication is implicit in any standard of review more demanding than the "rational basis" standard, any real interest-balancing by the courts. Arguments about the proper judicial approach to the factual premises for legislation are, in fact, arguments about the proper role of the judiciary in the governmental system. (See JUDICIAL REVIEW; JUDICIAL ACTIVISM AND JUDICIAL RESTRAINT.)

The technique of the Brandeis brief was invented for the occasion of the Supreme Court's consideration of MULLER V. OREGON (1908), upholding a law regulating women's working hours, and has been in fairly frequent use ever since. Increasingly, however, counsel have sought to present evidence on issues of legislative fact to trial courts. An early example was SOUTHERN PACIFIC CO. V. ARIZONA (1945), in which the Supreme Court struck down a law limiting the length of railroad trains. For five and a half months the trial judge heard evidence filling some 3,000 pages in the record; he made findings of legislative fact covering 148 printed pages. Justice HUGO L. BLACK, dissenting, complained that this procedure made the judiciary into a "super-legislature," but courts cannot escape from this kind of factual inquiry unless they adopt Justice Black's permissive views and abandon most constitutional limits on STATE REGULATION OF COMMERCE.

Nor are such trials of legislative fact limited to issues lying within the competence of people like safety engineers. When the California school finance case, SERRANO V. PRIEST (1972), was remanded for trial, the court took six months of expert testimony centered on a single question: Does differential spending on education produce differences in educational quality? (The court's unsurprising answer: Yes.)

As the *Serrano* and *Southern Pacific* cases show, proving legislative facts at trial is considerably more costly than filing a Brandeis brief. It permits cross-examination, however, and sharpens the focus for evidentiary offerings. Even when appellate review seems certain, the trial court's sorting and evaluation of a complex record can aid the appellate court greatly. Expert testimony, the staple of such a trial, typically rests on the sort of opinion and hearsay about which nonexperts ordinarily would not be permitted to testify. Legislative facts, of course, are tried to the judge and not to a jury; furthermore, questions of legislative fact, by definition, touch a great many "cases" not in court that will be "decided" by the precedent made in the court's constitutional ruling. Just as a constitutional case is an especially appropriate occasion for hearing the views of an AMICUS CURIAE, the widest latitude should be allowed to the parties (and to an amicus) to present evidence broadly relevant to the lawmaking issues before the court.

Ultimately there is no assurance that counsel's efforts to educate a court about the factual setting for constitutional lawmaking will improve the lawmaking itself. Yet our courts, with the Supreme Court's encouragement, continue to invite counsel to make these efforts. One of America's traditional faiths, which judges share with the rest of us, is a belief in the value of education.

KENNETH L. KARST
(1986)

Bibliography

FREUND, PAUL A. 1951 *On Understanding the Supreme Court.* Boston: Little, Brown.

KARST, KENNETH L. 1960 Legislative Facts in Constitutional Litigation. *Supreme Court Review* 1960:75–112.

## LEGISLATIVE IMMUNITY

The SPEECH OR DEBATE CLAUSE immunizes federal legislators from civil or criminal actions based on legislative acts. In TENNEY V. BRANDHOVE (1951) the Supreme Court, relying on the COMMON LAW immunity of legislators and the speech or debate clause, held legislators to be immune from federal civil suits based on legislative acts. This legislative immunity, however, does not preclude evidence of legislative acts in criminal prosecutions for corruption.

In what may be an expansion of common law legislative immunity, LAKE COUNTRY ESTATES, INC. V. TAHOE REGIONAL PLANNING AGENCY (1979) held that the appointed members of a bistate agency enjoyed legislative immunity from suits for constitutional violations. The Court also suggested that state legislative immunity does not depend on the existence of the speech or debate clause. *Lake Country Estates'* extension of absolute legislative immunity to un-elected officials may enable many public bodies or officials that promulgate rules of general application to rely on legislative immunity. For example, in *Supreme Court of Virginia v. Consumers Union of the United States* (1980) the Court concluded that state supreme court justices enjoyed legislative immunity from damages actions based on their promulgation of unconstitutional rules of conduct for the state bar.

THEODORE EISENBERG
(1986)

Bibliography

EISENBERG, THEODORE 1982 Section 1983: Doctrinal Foundations and an Empirical Study. *Cornell Law Review* 67:492–505.

## LEGISLATIVE INTENT

Legislative intent is a construct that courts use to discern the meaning of legislative action, usually in the form of

LEGISLATION. The concept is employed in many fields of law—including constitutional law—in the interpretation and application of statutes. In constitutional law, courts also use the concept in determining the purposes or goals of a legislature when they are relevant to deciding the constitutionality of the legislation.

In searching for legislative intent, courts appear to assume that legislation is aimed, in an instrumentally rational fashion, at achieving certain objectives or goals. Sometimes these objectives or goals are stated in rather discrete terms. In HINES V. DAVIDOWITZ (1941), for example, the Supreme Court decided that in passing a law requiring ALIENS to register with federal authorities, Congress had the objective of barring enforcement of state laws that required aliens to register with state officials. At other times, legislative intent is cast in more general terms. Thus in RAILWAY EXPRESS AGENCY V. NEW YORK (1949), the Supreme Court decided that the legislative goal in banning advertisements from some motor vehicles was the promotion of traffic safety.

There has been controversy about reference to legislative intent as a method of giving meaning to legislation, much as there has been controversy about reference to the Framers' intent as a means of giving meaning to the provisions of the Constitution itself. Two lines of criticism have developed, one rooted in doubt about the intelligibility of the concept of legislative intent, the other grounded in skepticism about the legitimacy of the political theory that an appeal to legislative intent presupposes.

Those who question the intelligibility of attempting to ascertain the intent of a legislature argue that it is impossible to ascribe an intent to a multi-member body. First, they point out the difficulty of ascertaining the individual intents of all the legislators and, second, they argue that even if the individual intents could be ascertained, there is no theoretically sound way to combine them to produce a coherent intent of the group.

Those who question the legitimacy of an appeal to legislative intent argue that as a matter of political theory, courts should not be bound by beliefs or wishes of legislators that were not written into the text of the statute but rather only the printed words of the legislation. OLIVER WENDELL HOLMES, for example, urged that courts should ask not what the legislature intended but rather only what the statute means. Instead of looking for evidence of legislative intent, courts should, according to Holmes, consult dictionaries and evidence of contemporary usage to construct the most acceptable interpretation of the statute's meaning.

More recent scholarly criticism has also questioned the validity of the assumption about legislative behavior that legislative intent presupposes. According to these critics, legislatures are merely market arenas in which private interests trade with each other through their legislators to further their own particular advantages. A search for a legislative intent beyond the immediate effects that the statute accomplishes is, according to his view, nonsensical and perhaps politically illegitimate as well.

Legislative intent has remained an important concept in constitutional law in spite of these criticisms. First, courts have developed various methods of dealing with the practical difficulties of constructing a legislative intent. Thus the difficulties associated with discovering the intent of each legislator and of aggregating these individual intents into a group intent have been addressed through the use of presumptions and, in some cases, outright fictions. Often, particularly in the case of state legislation, there is no evidence of legislative intent beyond the words of the statute, but the courts nevertheless generally say they are seeking legislative intention when they are deciding what the legislation means.

The courts indulge in similar assumptions when additional evidence does exist. For example, courts generally credit statements in committee reports as evidence of legislative purpose, even though there may be little reason to believe that many legislators read the report or agreed with it. Similarly, the speeches of proponents during floor debates (or even in public discourse outside the legislative arena) are also treated as evidence of legislative intent, even though few legislators may have been present during the floor debate (or heard the nonlegislative remarks). Some have argued that the legislative draftsmen or proponents are the "agents" of the legislature and therefore that their intent is the relevant legislative intent. Others urge that silent legislators who vote for the enactment share the intent of those who do speak in favor of the legislation. Another view is that legislatures in effect delegate to identifiable subgroups, such as committees, the task of setting legislative goals in the areas of the subgroups' specialties. Thus the intent of the legislature with respect to a transportation law would be assumed to be the same as the intent of the legislative committee on transportation. Whatever the rationale, courts have created a concept of legislative intent that does not purport to be a true measurement of the intents of the individual legislators. In effect, courts have personified legislatures and sought to ascribe to them an intent as if the legislature were a single person, one who sometimes speaks with several, often conflicting voices about what he wants to accomplish.

The more fundamental questions of political theory which challenge the legitimacy of looking to legislative intent have not been systematically addressed, at least by the courts. Courts have, by and large, assumed that if legislative intent can be constructed, it is relevant and even controlling in the interpretation of legislative action, at

least where the terms of the statute are perceived to provide leeway for interpretation.

Legislative intent may have remained important for several reasons. First, the concept is used widely outside of constitutional law for statutory interpretation. Legislatures have learned what courts will consider in searching for legislative intent, and they have adjusted their processes in some measure to provide the appropriate signals to the courts—thus encouraging continued judicial reliance on legislative intent.

Second, adherence to legislative intent may be grounded in judicial support of what the judges believe to be a political ideal. Although courts may recognize that trading among private interests does occur, they may believe that our society nevertheless aspires to a model of legislation that is an instrumentally rational pursuit of objectives that further the public interest.

Finally, courts have evolved several STANDARDS OF REVIEW in constitutional law that make the legislature's goals or objectives relevant to the constitutionality of the legislation. These standards, such as the RATIONAL BASIS test, LEAST RESTRICTIVE MEANS analysis, and the tests for federal PREEMPTION of state regulatory authority, have no doubt helped insure that the search for legislative intent remains a significant part of constitutional adjudication.

Legislative intent is thus important in several areas of constitutional adjudication. Three examples are illustrative. First, courts look to legislative intent to determine whether a legislature gave an administrative official power to take the challenged action. In KENT V. DULLES (1958), for example, the secretary of state denied a passport because the applicant failed to state whether or not he was or had been a communist. The Supreme Court held that Congress had not intended to give the secretary of state the power to deny passports on those grounds. Similarly, courts have ruled on numerous occasions—*Hines* is an example—that a state statute cannot be enforced because Congress, by enacting legislation on the same subject matter, "intended" to preempt the field from state regulation.

Second, courts often look to legislative intent because the constitutionality of the challenged legislative action depends on the legislature's purpose. Thus legislation mandating that only single-family residences may be built in a certain zone is constitutional if the purposes of the law are to reduce traffic, limit demand on municipal resources, and provide a suburban atmosphere. It will be unconstitutional, however, if the legislative purpose is to exclude minorities from the municipality, as the Supreme Court suggested in ARLINGTON HEIGHTS V. METROPOLITAN HOUSING DEVELOPMENT CORPORATION (1977).

Third, legislative intent is relevant in those areas of constitutional decision making in which courts purportedly scrutinize the "fit" between legislative means and ends. In EQUAL PROTECTION law, for example, legislative classification that disadvantages one person vis-à-vis another is said to be constitutional only if the classification is rationally related to a legitimate legislative goal. While courts tend to hypothesize rather freely about what the legislature could have intended to achieve with the classification, evidence of legislative intent is clearly relevant. More important, when circumstances call for more rigorous scrutiny—as when the classification is based on sex or race—the courts are less willing to speculate about the legislature's possible purposes, and they search for concrete evidence of legislative intent.

The meaning of legislation—what the legislature sought to accomplish—is often important in constitutional law. Even though theoretical and practical problems are attendant on the concept of legislative intent, courts use the concept in ascribing meaning to legislation in the numerous doctrinal areas in which the courts themselves have made that meaning relevant.

SCOTT H. BICE
(1986)

Bibliography

DICKERSON, REED 1975 Statutory Interpretation: A Peek into the Mind and Will of a Legislature. *Indiana Law Journal* 50: 206–237.

MACCALLUM, GERALD C., JR. 1966 Legislative Intent. *Yale Law Journal* 75:754–787.

RADIN, MAX 1930 Statutory Interpretation. *Harvard Law Review* 43:863–885.

# LEGISLATIVE INVESTIGATION

Although congressional power to conduct investigations and punish recalcitrant witnesses is nowhere mentioned in the United States Constitution, the inherent investigative power of legislatures was well established, both in the British Parliament and in the American colonial legislatures, more than a century before the Constitution was adopted. Mention of such power in the early state constitutions was generally regarded as unnecessary, but the Massachusetts and Maryland constitutions both gave explicit authorization; the latter, adopted in 1776, empowered the House of Delegates to ". . . inquire on the oath of witnesses, into all complaints, grievances, and offenses, as the grand inquest of this state," and to ". . . call for all public or official papers and records, and send for persons, whom they may judge necessary in the course of inquiries concerning affairs relating to the public interest."

The basic theory of the power was and is that a legislative house needs it in order to obtain information, so that its law-making and other functions may be discharged on

an enlightened rather than a benighted basis. Under the Constitution, the power was first exercised by the HOUSE OF REPRESENTATIVES in 1792, when it appointed a select committee to inquire into the defeat by the Indians suffered the previous year by federal forces commanded by General Arthur St. Clair. The House empowered the committee "to call for such persons, papers and records as may be necessary to assist in their inquiries." After examining the British precedents, President GEORGE WASHINGTON and his cabinet agreed that the House "was an inquest and therefore might institute inquiries" and "call for papers generally," and that although the executive ought to refuse to release documents "the disclosure of which would endanger the public," in the matter at hand "there was not a paper which might not be properly produced," and therefore the committee's requests should be granted.

For nearly a century thereafter, investigations were conducted frequently and without encountering serious challenge, in Congress and the state legislatures alike. They covered a wide range of subjects, and their history is in large part the history of American politics. Among the most interesting state investigations were those conducted in 1855 by the Massachusetts legislature and the New York City Council, under the leadership of the "Know-Nothing" party, in which Irish Roman Catholicism was the target. Inquiries by the New York City Council into alleged Irish domination of the police force were challenged in the New York Court of Common Pleas, and Judge Charles Patrick Daly's opinion in *Briggs v. McKellar* (1855) was the first to hold that, unlike in Britain, in the United States the legislative investigative power is limited by the Constitution.

Fifteen years later, a congressional investigation was for the first time successfully challenged on constitutional grounds, in KILBOURN V. THOMPSON (1881). The House of Representatives had authorized a select committee to investigate the bankruptcy of the Jay Cooke banking firm (which was a depository of federal funds), and when the witness Kilbourn refused to answer questions, the House cited him for contempt and imprisoned him. After his release on HABEAS CORPUS, Kilbourn sued the House sergeant-at-arms for damages from false imprisonment. In an opinion by Justice SAMUEL F. MILLER, the Supreme Court sustained his claim on the grounds of constitutional SEPARATION OF POWERS, declaring that the Jay Cooke bankruptcy presented no legislative grounds for inquiry and that "the investigation . . . could only be properly and successfully made by a court of justice." The Court has never since invalidated a legislative inquiry on that particular basis, and it is probable that today, under comparable circumstances, a sufficient legislative purpose would be found. But the Court's ruling, that Congress's investigative and contempt powers are subject to JUDICIAL REVIEW and must conform to constitutional limitations, has not since been seriously questioned.

Exclusively until 1857, and commonly until 1935, Congress enforced its investigative power against recalcitrant witnesses by its own contempt proceedings: a congressional citation for contempt, and its execution through arrest and confinement of the witness by the sergeant-at-arms. (See LEGISLATIVE CONTEMPT POWER.) Judicial review of the contempt was usually obtained by habeas corpus. But the system was cumbersome, and effective only when Congress was in session. To remedy these shortcomings, Congress in 1857 enacted a statute making it a federal offense to refuse to produce documents demanded, or to answer questions put, by a duly authorized congressional investigatory committee. For some years both the contempt and the statutory criminal procedures were used, but since 1935 the contempt procedure has fallen into disuse. Challenges to congressional investigative authority are currently dealt with by INDICTMENT and trial under the criminal statute, now found in section 192, Title 2, United States Code, the constitutionality of which was upheld by the Supreme Court in *In re Chapman* (1897).

The tone of Justice Miller's opinion in the *Kilbourn* case raised doubts about the scope and even the existence of the congressional contempt power, which were repeatedly voiced during the early years of the twentieth century, when Congress conducted investigations damaging to powerful business and financial institutions. In 1912 the House Committee on Banking and Currency launched what became known as the "Money Trust Investigation," in which practically all the leading financiers of the time—J. P. Morgan the elder, George F. Baker, James J. Hill, and others—were called to answer charges of undue concentration of control of railroads and heavy industries in the hands of a few New York bankers. In 1924, SENATE committees probed allegations of corruption and maladministration in the Justice, Interior, and Navy departments.

The legality and propriety of these inquiries aroused vigorous public debate. The famous jurist JOHN HENRY WIGMORE wrote of a "debauch of investigations" which raised a "stench" and caused the Senate to fall "in popular esteem to the level of professional searchers of the municipal dunghills," while then Professor FELIX FRANKFURTER accused the critics of seeking to "divert attention and shackle the future," and argued that the investigative power should be left "untrammeled." The doubters and critics were encouraged when a federal district judge, relying on the *Kilbourn* case, quashed a Senate contempt citation against Attorney General Harry M. Daugherty's brother, but the investigative and contempt powers were vindicated when the Supreme Court reversed that decision and ruled in MCGRAIN V. DAUGHERTY (1927) that the investigation was proper as an aid to legislation, and that

Mally Daugherty could be required to testify on pain of imprisonment. Consequently, there were no serious or successful legal challenges to the many congressional investigations born of the Great Depression and the "NEW DEAL" period of President FRANKLIN D. ROOSEVELT's administration. (See CONSTITUTIONAL HISTORY, 1933–1945.)

Until this time the main subjects of legislative investigations had been the civil and military operations of the executive branch, industrial and financial problems, and the operation of social forces such as the labor movement. Except for state investigations in the middle years of the nineteenth century directed at Masons and Roman Catholics, ideological matters had not been much involved.

The Russian Revolution of 1917, the spread of communist doctrine, and the Nazi seizure of dictatorial power in Germany soon emerged as major subjects of congressional concern. There were short-lived congressional investigations of communist propaganda in 1919 and 1930, and of Nazi propaganda in 1934. With the establishment of the HOUSE COMMITTEE OF UN-AMERICAN ACTIVITIES in May 1938, SUBVERSIVE ACTIVITIES emerged as the most publicized subject of congressional investigation.

During WORLD WAR II, in which the United States and the Soviet Union were allies, there was a lull in these inquiries, but the "Iron Curtain" and "Cold War" revived them, and by 1947 they were again front-page news. Soon, names of prosecutors and witnesses—for example, MARTIN DIES, RICHARD M. NIXON, Alger Hiss, Whittaker Chambers, JOSEPH R. MCCARTHY, and Patrick McCarran—became household words. The Senate authorized two bodies to join in the hunt for subversion: the Judiciary Committee's Subcommittee on Internal Security headed by Senator McCarran, and the Government Operations Committee's Subcommittee on Investigations under Senator McCarthy, respectively established in 1946 and 1950.

The principal activity of these agencies was summoning individuals to testify about the communist connections of themselves or others, and their proceedings contributed mightily to a period of public recrimination and bitter controversy that lasted for more than a decade. It was also a period of frequent criminal litigation involving congressional investigative power, as numerous witnesses were indicted for refusing to answer such questions. Some witnesses invoked the Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION, and the Supreme Court, in three cases decided in 1955, was unanimously of the opinion that the right is available to witnesses before legislative committees, though three of the Justices thought that the witnesses had not clearly invoked it. Writing for the majority, Chief Justice EARL WARREN confirmed the congressional investigative power and stated further (*Quinn v. United States*):

> But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate. Similarly, the power to investigate must not be confused with any of the powers of law enforcement; these powers are assigned under our Constitution to the Executive and Judiciary. Still further limitations on the power to investigate are found in the specific individual guarantees of the BILL OF RIGHTS, such as the Fifth Amendment's privilege against self-incrimination which is in issue here.

Other witnesses, however, invoked the FIRST AMENDMENT's guarantee of FREEDOM OF SPEECH as justification for their refusal to answer, and in 1956 and 1957 two such cases, SWEEZY V. NEW HAMPSHIRE and WATKINS V. UNITED STATES, the first involving a congressional and the second a state investigation, reached the Court. With only Justice TOM C. CLARK dissenting, the Court held that, as a general proposition, First Amendment rights are enjoyed by witnesses in legislative investigations.

But did the First Amendment protect these witnesses from the obligation to answer questions about individual connections with communism? The Court did not meet that issue and based its reversal of both convictions on nonconstitutional grounds. Watkins had not been told that the questions put to him were (as the federal statute requires) "pertinent to the question under inquiry," while in Sweezy's case it was not shown that the state legislature had authorized the investigative agency to ask the questions he declined to answer.

Three years later, however, by a 5–4 vote, the Court held that the First Amendment did not bar requiring a witness to answer questions regarding his own or others' communist connections. (See BARENBLATT V. UNITED STATES; UPHAUS V. WYMAN.) In his opinion for the Court in the former case, Justice JOHN MARSHALL HARLAN undertook a "balancing . . . of the private and public interests at stake," and concluded that since the Communist party was not "an ordinary political party" and sought overthrow of the government "by force and violence," Congress had "the right to identify a witness as a member of the Communist Party." (See BALANCING TESTS.)

The authority of these two cases was somewhat tarnished in 1963 after Justice ARTHUR J. GOLDBERG had replaced Justice Frankfurter, who had been in the five-member majority. A Florida court authorized a state investigatory committee to require a local branch of the NAACP to produce its membership lists so that the committee could determine whether certain individuals suspected of communist connections were members of the NAACP. Once again the Court divided 5–4, and Justice Goldberg, writing for the majority in GIBSON V. FLORIDA

LEGISLATIVE COMMITTEE, ruled that, in the absence of any prior showing of connection between the NAACP and communist activities, such required disclosure was barred by the First Amendment. Three years later, in another New Hampshire investigations case, *DeGregory v. New Hampshire Attorney General,* the Court ruled, 6–3, that the state's interest was "too remote and conjectural" to justify compelling a witness in 1964 to testify about communist activities in 1957.

Since then there have been no Supreme Court and no important state or lower federal court decisions on the constitutional aspects of legislative investigative power. The *Barenblatt* case has not been overruled, and it is perhaps noteworthy that both the *Gibson* and *DeGregory* cases involved state rather than congressional investigations. The attitudes of the Justices who have joined the Court since 1966 remain untested.

It may be surmised, for the future, that if a plausible relation between a legislative inquiry and a valid legislative purpose can be shown, and there are no procedural flaws or manifestations of gross abuse, the Court will be reluctant to deny, on constitutional grounds, the power of a legislative investigating committee to require witnesses to answer questions or produce records.

A different situation might well obtain if a congressional investigating committee should seek to enforce the production of government documents involving NATIONAL SECURITY or for some other reason inappropriate for public disclosure. Presidents have on numerous occasions exercised the right first asserted by George Washington in 1792, to withhold documents "the disclosure of which would endanger the public" or otherwise contravene the public interest. (See EXECUTIVE PRIVILEGE.) Congressional committee efforts to force the production of records of judicial conferences, or other confidential court papers, might likewise encounter constitutional objections based on the separation of powers. Up to the present time, these issues have not confronted the Supreme Court, and the political wisdom of avoiding such confrontations is manifest.

TELFORD TAYLOR
(1986)

Bibliography

CARR, ROBERT K. 1952 *The House Committee on Un-American Activities.* Ithaca, N.Y.: Cornell University Press.

GOODMAN, WALTER 1968 *The Committee.* New York: Farrar, Straus & Giroux.

LANDIS, JAMES M. 1926 Constitutional Limits on the Congressional Power of Investigation. *Harvard Law Review* 40:153–226.

OGDEN, AUGUST RAYMOND 1945 *The Dies Committee.* Washington, D.C.: Catholic University of America Press.

POTTS, CHARLES S. 1926 Power of Legislative Bodies to Punish for Contempt. *University of Pennsylvania Law Review* 74: 691–780.

TAYLOR, TELFORD 1955 *Grand Inquest: The Story of Congressional Investigations.* New York: Simon & Schuster.

## LEGISLATIVE JURISDICTION

See: Jurisdiction

## LEGISLATIVE POWER

"Legislative power" is a distinctly modern conception which presupposes a modern understanding of "law." In medieval Europe the authority of laws was variously attributed to God, nature, or custom; human authorities "found" or "declared" or enforced the law but were not thought to create it. Consequently, medieval jurists did not distinguish "legislative" from "judicial" powers. Through the end of the sixteenth century, the English Parliament (like its continental counterparts) was primarily regarded as a court, an ultimate court of APPEAL for individuals as well as communities. It was at most an incidental consideration whether Parliament was "representative" because law was not a matter of will but of knowledge.

The modern conception traces the authority of law precisely to the will of the lawmakers. It is this assumption of a pure power to make or unmake the laws that allows for our artificially clear distinction between "legislative" (that is lawmaking) and "judicial" or "executive" (law-applying) powers. In acknowledging law as the creation of particular human wills, the modern view liberates government from encrusted tradition, from folklore and superstition, above all from manipulation by legalistic conjurings. At the same time, however, this view of law opens the chilling prospect of an unlimited coercive power, since the power to create the laws seems, by its very nature, superior to the constraints of law. This sort of reasoning, powerfully advanced by theorists of SOVEREIGNTY in the seventeenth century, was treated by WILLIAM BLACKSTONE in the next century as virtually self-evident: for any court to declare invalid an act of Parliament, he observed, "were to set the judicial power above that of the legislature, which would be subversive of all government."

The Framers of the American Constitution were nonetheless intent on curbing legislative power. Historians have noted that by the standards of their European contemporaries the constitutional perspective of the American Framers was somewhat archaic, most notably in the Framers' acceptance of a HIGHER LAW limitation on legislative power and in their indifference to questions about sovereignty or ultimate authority. But in the decisive re-

spect, the concerns and accomplishments of the Framers reflected their quite modern recognition that no laws are simply given, that the scope of legislative assertion is vast and, as THE FEDERALIST conceded, "the legislative authority necessarily predominates." Thus they set out the legislative powers in the first and longest article of the Constitution, suggesting the primacy of these powers in the governmental scheme and implicitly identifying the reach of the federal government with the reach of its legislative powers. At the same time, the language of Article I emphasizes the open-endedness of legislative power precisely by its focus on the powers rather than the duties, objectives, or obligations of the legislative branch.

Perhaps the most important checks on legislative power in the Constitution are those that seem merely procedural or institutional. In the first place, the Constitution sets up a formidable institutional gauntlet for legislative proposals, requiring that they obtain majorities in each house of Congress and then secure approval from the President (or extraordinary majorities in Congress). The Constitution also seeks to assure some independent authority for the executive branch and the judiciary by removing the selection and tenure of these officers from immediate congressional control. Ultimately, almost all executive and judicial action depends on prior statutory authority and funding from Congress. And it is impossible to say with confidence when a legislative enactment (apart from an actual BILL OF ATTAINDER—imposing criminal sanctions on particular individuals) would be so specific and peremptory as to infringe the essential law-applying authority of the executive or the judiciary. But in practice the institutional reality of the SEPARATION OF POWERS usually does preserve a protective screen of independent judgment between the legislative will and the force of law as applied.

Direct limitations on legislative power in the Constitution are perhaps the most dramatic legacy of the Framers' distrust of legislative power, but they are probably not the most efficacious or important. From the outset, Congress has been emboldened to exercise powers beyond those specifically enumerated in Article I, either by construing implied powers or appealing to the requisites of national SOVEREIGNTY. The Supreme Court sought to give some force to these limitations in the early decades of this century in order to prevent Congress from preempting the legislative authority of the states. But these efforts were repudiated by the Court after the 1930s and the repudiation of judicially enforceable limits has been explicitly reconfirmed in the current era. Even the limitations imposed by the BILL OF RIGHTS on behalf of individual liberty have very rarely been construed by the Supreme Court in ways that threatened federal legislation.

As it has expanded, however, federal legislative power has also been dispersed in striking ways. In recent decades, the federal courts, invoking vague or general constitutional clauses, have assumed the power to impose elaborate requirements on states and localities in a more or less openly legislative (law-creating) manner. Meanwhile, since the 1930s, Congress has delegated more and more legislative power to federal administrative agencies. Though Congress retains the ultimate power to block what courts and agencies do, its passivity may or may not be properly construed as acquiescence. Thus the dispersal of legislative powers seems to threaten the central promise in the modern conception of law—that there is always an identifiable human authority to hold responsible for the law.

JEREMY RABKIN
(1986)

Bibliography

CORWIN, EDWARD S. 1955 *The "Higher Law" Background of American Constitutional Law.* Ithaca, N.Y.: Cornell University Press.

FISHER, LOUIS 1985 *Constitutional Conflicts between Congress and the President.* Princeton, N.J.: Princeton University Press.

## LEGISLATIVE PURPOSES AND MOTIVES

Article I of the Constitution vests all legislative powers in the Congress of the United States. Congress is thus ordained to be the policymaking arm of the government. Since Congress exercises this authority through the separate flexing of 435 members of the HOUSE OF REPRESENTATIVES and the 100 members of the SENATE, the statutes passed by Congress are always collective works—written, amended, and propounded by many. As a result, discerning a single purpose or motive for most statutes is not easy.

An individual member of Congress proposes legislation to solve a problem. As that proposal winds its way through the legislative process, many forces affect the proposal and its meaning. Witnesses favoring and opposing the proposal testify before committees, and their testimony may present an interpretation altogether different from that intended by the proposal's sponsor. While the bill remains in committee, amendments may be offered and voted upon, further changing the purposes or effects of the proposal. Constituents, hearing about the proposal, will express their views to their representatives, voicing still other potentially competing concerns and perceptions about the proposal. After the proposal comes out of the committee, frequently in amended form, it is further refined and amended in floor debate. Again, the purposes and perceptions of the legislators are vast and varied.

Once the proposal is approved in one chamber, the whole process is replicated in the other chamber. If further amendments are adopted in the second chamber, the differences between the two chambers' versions are ironed out in a "conference committee," consisting of legislators from both chambers. Only when the House and Senate approve an identical bill does the proposal go to the President for his approval.

With such a tortuous journey to complete, a piece of legislation rarely survives its odyssey with a clear purpose intact. As a result, judges and lawyers must devote much of their time and attention to the process of interpreting statutes. Although the judges, lawyers, and lawmakers have developed many rules and strictures for performing this task, there is much disagreement on what rules or strictures apply in a particular case.

Sometimes a legislative body will seek to ease the task of interpretation by putting a "preamble" or "statement of purposes" into the statute. Unfortunately, such efforts frequently end up as broad platitudes that do not help readers to discern more subtle nuances, such as the LEGISLATIVE INTENT or purpose of a statute. On occasion, the preamble is used to reassure dubious legislators that the statute does not have the effect that its plain words imply. Because these preambles are usually included as window dressing, most courts have rejected efforts to use the preamble to "trump" the plain meaning of the words of the statute. The title of a statute can also be misleading as to the law's real purposes. An infamous example from one of the state legislatures involved a statute entitled An Act Relative to Sheep and Swine that also imposed a residence requirement for candidates for public office.

The rules that the courts use in interpreting statutes are usually called the "canons of construction." There are perhaps a dozen well-known canons that are most frequently employed. The most commonly accepted canon is the "plain-meaning rule," which requires that a court first look at the words of the statute without regard to the floor debate or committee reports. On this view, if the plain meaning of the statute can be discerned from such a review of the wording, the court should look no further; the statute should be construed in accord with such plain meaning. Few statutes lend themselves easily to the plain-meaning approach. When the meaning is not clear, both judges and lawyers differ as to where to look next. Some look to the floor debate, and others look to the committee reports that accompany such a legislative proposal when it goes to the floor for debate. Some judges and scholars apply other canons of construction, on the theory that the legislators knew and used such canons in deciding what words to use. Still others delve into the testimony of committee witnesses for clues about congressional intent. All of the congressional activities that took place before the statute was passed are called collectively the "legislative history" of the statute. Because the activities are so multifarious, use of legislative history by the courts is sometimes disparaged as being comparable to a performer looking out at an audience and waving to his friends.

There is not much to indicate that the legislators in fact do their work with the canons of construction in mind. One of the canons states that expression of one thing excludes another, similar thing. Legislators frequently will insert specific amendments to emphasize a particular concern without considering this canon. Another canon (ejusdem generis) states that when an enumeration of examples is followed by a general catchall phrase, the catchall phrase can apply only to persons or things of the same general kind or class that were specifically mentioned. Notwithstanding this canon, the statutes and court decisions are full of examples where the catchall phrase was not so limited. In any event, the canons frequently contradict each other, and even when they are consistent, they are not always consistently applied.

All agree that the individual expressions of purposes by individual members of Congress ought not be controlling—not even when such an expression comes from the sponsor of the legislation. Statements of purpose voiced after the statute is passed are almost never given any weight; the theory of legislative interpretation turns on deciphering the purposes of the legislative body *before* the statute was voted upon.

Even the record of congressional debate may be suspect. Members of Congress frequently engage in artificial floor debate in an effort to influence the way in which a statute will be interpreted in the future. A dialogue will be written out between two or more members in which questions of interpretation of particular parts of the statute will be asked and answered. Because these dialogues usually involve only a few members and are not voted upon by the entire membership, the weight to be accorded such "debate" should be light. However, many judges are beguiled by such artificial legislative maneuvers.

Congress sometimes avoids elaborating the minute details of its intent by delegating the effectuation and elaboration of its purpose to an ADMINISTRATIVE AGENCY. A large number of statutes establish agencies to administer programs created by Congress. Two examples are the Environmental Protection Agency, which is mandated to administer and enforce the environmental laws passed by Congress, and the Securities and Exchange Commission, which is mandated to administer and enforce the securities laws passed by Congress. The laws usually provide that an appeal may be taken from the final decision of the administrative agency to the federal courts. In such an appeal, the interpretation placed on the statute by the agency charged with its administration is to be given great

weight by the reviewing courts. Unless the agency has violated the plain meaning of the statute, the courts are supposed to defer to whatever interpretation the agency places upon the statute. The theory behind this doctrine, derived from *Chevron USA, Inc. v. Natural Resources Defense Council* (1984), is that the agency has been charged by Congress to be the main actor in that particular field, and the courts should not interfere with the discretion exercised by the agency.

Many STATE CONSTITUTIONS require the state legislatures to enact statutes limited to a single subject. This limitation makes it easier for the legislators and the citizenry to know what is in a statute and assists courts in interpreting the meaning of a statute. The United States Constitution has never contained such a limitation, and Congress routinely includes a variety of provisions and subjects in a single bill. A single continuing appropriation bill passed by the Congress can contain substantive law provisions covering a wide range of topics. Because some of these provisions are inserted during floor debate and do not have much legislative history, it is frequently difficult to decipher a provision intention or purpose except from the brief explanation that may be made by the sponsor.

Finding the legislative purpose or motive of a particular statute is one of the difficult tasks given over to administrative agencies and the courts.

ABNER J. MIKVA
(1992)

(SEE ALSO: *Environmental Regulation and the Constitution; Securities Law and the Constitution.*)

Bibliography

FRANKFURTER, FELIX 1947 Some Reflections on the Reading of Statutes. *Columbia Law Review* 47:527–546.

LLEWELLYN, KARL N. 1950 Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed. *Vanderbilt Law Review* 3:395–406.

MIKVA, ABNER J. 1987 Reading and Writing Statutes. *University of Pittsburgh Law Review* 48:627–637.

## LEGISLATIVE VETO

The legislative veto emerged in the 1930s as an effort to reconcile two conflicting needs. Executive officials sought greater discretionary authority, while Congress wanted to retain control over delegated authority without having to adopt new legislation for that purpose. The resulting accommodation permitted administrators to submit proposals that would become law unless Congress acted to disapprove by simple resolution (a one-house veto) or concurrent resolution (a two-house veto). Evolving forms of the legislative veto came to include requirements of congressional approval as well as opportunities for disapproval; Congress even vested some of the controls in its committees.

Although the legislative veto acquired a reputation as a congressional usurpation of executive power, initially the device favored the President. In 1932 Congress authorized President HERBERT C. HOOVER to reorganize the executive branch. His plans would become law within sixty days unless either house disapproved. The President did not have to secure the support of both houses, as would have been necessary through the regular legislative process. Instead, the burden was placed on Congress to veto his initiatives. Furthermore, to prevent presidential proposals from being buried in committee, filibustered, or changed by Congress, the law limited each opportunity for legislative veto by rules for discharging committees, restricting congressional debate, and prohibiting committee or floor amendments.

The executive branch began to view the legislative veto apprehensively when Congress attached it to statutes governing such important subjects as lend lease, IMMIGRATION, public works, energy, IMPOUNDMENT, federal salaries, foreign trade, and the WAR POWERS. As part of the congressional reassertion after the VIETNAM WAR and WATERGATE, legislative vetoes proliferated in the 1970s. By the late 1970s, Congress seemed on the verge of subjecting every federal regulation to some form of legislative veto.

The lower federal courts upheld some legislative vetoes and invalidated others, but carefully restricted their opinions to the particular statutes challenged. In 1982, however, the UNITED STATES COURT OF APPEALS for the District of Columbia Circuit struck down three laws on such broad grounds as to cast a shadow of illegality over every type of legislative veto. The Supreme Court adopted this comprehensive approach in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983), invalidating the Immigration and Nationality Act's authorization for either house of Congress to set aside the attorney general's decision to suspend the DEPORTATION of an alien.

Chief Justice WARREN E. BURGER, joined by five Justices, wrote the OPINION OF THE COURT. The one-house legislative veto in *Chadha* was unconstitutional because it violated both the principle of BICAMERALISM and the presentment clause of the Constitution, which requires every bill, resolution, or vote to which the concurrence of the SENATE and the HOUSE OF REPRESENTATIVES is necessary (except a vote of adjournment) to be presented to the President. Whenever congressional action has the "purpose and effect of altering the legal rights, duties and relations of persons" outside the legislative branch, the Court said, Congress must act through both houses in a bill presented to the President.

Justice LEWIS F. POWELL concurred in the judgment on

a narrower ground. Justice BYRON R. WHITE delivered a lengthy dissent, generally supporting the constitutionality of the legislative veto. Justice WILLIAM H. REHNQUIST also dissented, but only on the question of SEVERABILITY. He said that if the Court declared the legislative veto invalid, it should also strike down the attorney general's authority to suspend deportations.

The majority's opinion raises numerous questions. First, in holding the legislative veto severable from the attorney general's authority, the Court ignored clear evidence of a quid pro quo between Congress and the President. If severability could be discerned in this legislative history, presumably it can be found in nearly every statute establishing a legislative veto. This reasoning gives the executive branch a temporary one-sided advantage from an accommodation meant to balance executive and legislative interests.

Second, the Court asserted that the legislative veto's efficiency or convenience would not save it "if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government. . . ." Although the legislative veto might be a "convenient shortcut" and an "appealing compromise," the Court said, it is "crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency." Here the Court played loose with history, for efficiency was indeed an important consideration for the Framers. The decade prior to the CONSTITUTIONAL CONVENTION saw an anxious and persistent search for a form of government that would perform more efficiently than the ARTICLES OF CONFEDERATION.

Third, the Court characterized the presentment clause as a means of giving the President the power of self-defense against an encroaching Congress. The President's veto would check "oppressive, improvident, or ill-considered measures." This argument is misleading in suggesting that the legislative veto, by evading the President's veto, threatened the independence of the executive branch. In fact, the legislative veto was directed only against measures submitted by the President. Congress could not amend his proposals, but must vote yes or no. A legislative veto, if exercised, simply reestablished the status quo. For example, if either house defeated a reorganization plan the structure of government would remain as before. The President did not need his veto for purposes of "self-defense."

Fourth, the Court said that the Framers had unmistakably expressed their "determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process." But both houses of Congress regularly use "shortcut" methods that pose no problems under *Chadha:* suspending the rules, asking for unanimous consent, placing legislative riders on appropriations bills, and even passing bills that have never been sent to committee.

The Court's theory of government contradicts practices developed over a period of decades by the political branches. Neither administrators nor members of Congress want the static model proffered by the Court. The conditions that spawned the legislative veto over a half-century ago have not disappeared. Executive officials still want substantial latitude in administering delegated authority; legislators still want to maintain control without having to pass new legislation. Surely the executive and legislative branches will develop substitutes to serve as the functional equivalent of the legislative veto. Forms will change; the substance will not.

Instead of a one-house veto over executive reorganization, Congress is likely to require a joint resolution of approval. This device, which satisfies the tests of bicameralism and presentment, requires the President to obtain the support of both Houses within a specified number of days. If one house withholds its support, the effect is a one-house veto.

Internal House and Senate rules offer another option. Congress can require that funds be appropriated only after an authorizing committee has passed a resolution of approval. Although this procedure amounts to a committee veto, the Justice Department may acquiesce, accepting Congress's distinction between authorization and appropriation and reasoning that Congress can control its own internal processes.

Congress can also attach a rider to an appropriations bill to prevent an agency from implementing a proposed action. Because a President will rarely veto an appropriations bill (and probably will never do so because of an objectionable rider), the practical effect of this device is that of a two-house veto. Indeed, House-Senate comity will often produce the effect of a one-house veto.

Statutes can require that selected committees be notified before agency implementation of certain programs. Notification raises no constitutional issue, for it falls within the report-and-wait category already sanctioned by court rulings. But "notification" can become a code word for prior committee approval. Only in unusual circumstances would an agency defy the wishes of its oversight committees.

After *Chadha,* Congress will continue to use informal and nonstatutory methods to control the executive branch. Congress allows agencies to shift funds within an appropriation account provided they obtain committee approval for major changes. Agencies comply because they want to retain this administrative flexibility. Because these "gentlemen's agreements" are not placed in statutes, they are unaffected by *Chadha.* They are not legal in effect. They are, however, in effect legal.

Last, Congress has continued to authorize legislative vetoes in statutes adopted after *Chadha*. Although these provisions are unconstitutional under the Court's decision, agencies are likely to abide by them rather than alienate powerful support committees on Capitol Hill. When the practical needs of executive officials and legislators coincide, they nearly always prevail over formalistic notions of SEPARATION OF POWERS.

LOUIS FISHER
(1986)

Bibliography

BOLTON, JOHN R. and ABRAMS, KEVIN G. 1984 The Judicial and Congressional Response to the Invalidation of the Legislative Veto. *Journal of Law and Politics* 1:299–355.

STRAUSS, PETER L. 1983 Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision. *Duke Law Journal* 1983:789–819.

SYLVESTER, KATHLEEN 1984 After Chadha, A Legal Void. *National Law Journal*, April 23, 1984, pp. 1, 8, 10.

## *LEHMAN v. SHAKER HEIGHTS*

See: Captive Audience

## *LEISY v. HARDIN*
135 U.S. 100 (1890)

Chief Justice MELVILLE W. FULLER, speaking for a six-member majority, ruled that because Congress possesses an EXCLUSIVE POWER under the COMMERCE CLAUSE to regulate interstate transportation, no state may enact a liquor PROHIBITION statute that bars the sale in that state of liquors imported from other states and sold in their original packages. That Congress had not exercised its commerce power was equivalent to a declaration that commerce shall be free. Any DOCTRINE to the contrary, deriving from the LICENSE CASES (1847), said Fuller, was "overthrown." Congress might, however, specifically authorize a state to ban interstate liquors; the Court sustained such an act of Congress in *In re Rahrer* (1891).

LEONARD W. LEVY
(1986)

## LELAND, JOHN
(1754–1841)

A native of Massachusetts and a Baptist minister, John Leland preached in Virginia from 1776 to 1791, becoming a leader in the Baptists' struggle against the Anglican church establishment there and helping to bring about its dismantlement. At first he opposed the federal Constitution on the grounds that it lacked a BILL OF RIGHTS and safeguards against taxsupported clergy; but he later switched his stand—possibly converted by JAMES MADISON personally—and swung Virginia's Baptists behind ratification.

Leland held that state attempts to foster religion only corrupted religion. A defender of both civil and RELIGIOUS LIBERTY, he supported religious rights for all, repudiating the notion of a Christian commonwealth. He opposed attempts to halt Sunday mail delivery, and by denying that government had power to pass sabbath laws, proclaim public days of prayer, or pay chaplains, he assumed a more radical stance on church and state than did most contemporary evangelicals.

THOMAS CURRY
(1986)

Bibliography

BUTTERFIELD, L. H. 1952 Elder John Leland, Jeffersonian Itinerant. *American Antiquarian Society Proceedings* 62:155–242.

## *LEMON v. KURTZMAN*
403 U.S. 602 (1971) (I)
411 U.S. 192 1973) (II)

This case involved one of the school aid statutes produced by state legislatures in the wake of BOARD OF EDUCATION V. ALLEN (1968). *Lemon* I stands for three cases joined for decision by the Court. Lemon challenged the constitutionality of a Pennsylvania statute that authorized the Superintendent of Public Instruction to reimburse nonpublic schools for teachers' salaries, textbooks, and instructional materials in secular subjects. *Erley v. DiCenso* and *Robinson v. DiCenso* (1971) challenged a Rhode Island statute that made available direct payments to teachers in nonpublic schools in amounts of up to fifteen percent of their regular salaries.

Both statutes were unconstitutional, Chief Justice WARREN BURGER concluded, and he set forth a threefold test which continues to be invoked in ESTABLISHMENT OF RELIGION cases: any program aiding a church-related institution must have an adequate secular purpose; it must have a primary effect that neither advances nor inhibits religion; and government must not be excessively entangled with religious institutions in the administration of the program. The Pennsylvania and Rhode Island schemes provided GOVERNMENT AID TO RELIGIOUS INSTITUTIONS. Burger argued that in order to see that these dollars were not used for religious instruction, the states would have to monitor compliance in ways involving excessive entanglement.

*Lemon v. Kurtzman* returned to the Court (*Lemon* II) two years later on the question of whether the Pennsylvania schools could retain the monies that had been paid out in the period between the implementation of law and the decision of the Supreme Court invalidating it in *Lemon* I. In a PLURALITY OPINION for himself and Justices HARRY BLACKMUN, LEWIS F. POWELL, and WILLIAM H. REHNQUIST, Chief Justice Burger held that they could. An unconstitutional statute, he suggested, is not absolutely void but is a practical reality upon which people are entitled to rely until authoritatively informed otherwise. Justice BYRON R. WHITE concurred. Justice WILLIAM O. DOUGLAS, joined by Justices WILLIAM J. BRENNAN and POTTER STEWART, dissented. Douglas argued that there was "clear warning to those who proposed such subsidies" that they were treading on unconstitutional ground. "No consideration of EQUITY," Douglas suggested, should allow them "to profit from their unconstitutional venture."

RICHARD E. MORGAN
(1986)

## *LEMON* TEST

The *Lemon* test is the three-part formula used by the Supreme Court to decide whether or not a government action violates the ESTABLISHMENT CLAUSE. The first part requires that the government action have a secular purpose; the second part demands that the action neither advance nor inhibit religion as its primary effect; and the final part dictates that the act not cause an excessive entanglement between church and state. The test was first announced in LEMON V. KURTZMAN (1971), though its major components date back, at least, to the majority opinion in ABINGTON TOWNSHIP SCHOOL DISTRICT V. SCHEMPP (1963).

The test's first prong remained noncontroversial throughout most of the 1970s, with the Court invariably finding a secular purpose for statutes under review. Then came the Court's decision in *Stone v. Graham* (1979), which struck down a Kentucky law requiring the posting of the Ten Commandments in public classrooms. Kentucky claimed that the purpose of the posting was to inform students of the influence of the Ten Commandments on secular history—and, in fact, the Commandments were to be accompanied by a message pointing out their influence on the development of Western law. But the Court found this "avowed" secular purpose insufficient and claimed that the state's actual purpose was to promote religion. This distinction between "actual" and "avowed" secular purposes was adopted by Justice SANDRA DAY O'CONNOR in her restatement of the *Lemon* test in LYNCH V. DONNELLY (1984), and the distinction became increasingly important thereafter. In WALLACE V. JAFFREE (1984) the Court struck down a law providing for a schoolroom moment of silence because the legislators' actual motive was to promote religion; and in *Edwards v. Aguillard* (1987) the Court invalidated for the same reason Louisiana's Balanced Treatment Act, which claimed to promote ACADEMIC FREEDOM in the discussion of CREATIONISM.

The actual-purpose approach has drawn serious criticism; the most sustained critique of the approach was delivered by Justice ANTONIN SCALIA in his dissent in *Aguillard*. If religious motivation by itself invalidates a piece of legislation, wrote Scalia, then a great deal of legislation indeed may have to be invalidated: "Today's religious activism may give us the Balanced Treatment Act, but yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims." Moreover, if the Court really wants to strike down legislation on the basis of motivations, it had better go about it in a more thorough manner. Scalia suggested that to ascertain the dominant motivation behind a bill reliably, one would need to tally the views of every legislator. Scalia's criticism may have had an effect, for Justice O'Connor took a step back from the actual-purpose standard in her majority opinion in WESTSIDE COMMUNITY SCHOOLS V. MERGENS (1990).

But the first prong of *Lemon* is not the only part of the test to spark debate in recent years; controversy has also erupted over its second prong—spurred in part by the Court's maze of contradictory decisions involving GOVERNMENT AID TO RELIGIOUS INSTITUTIONS. Seeking greater clarity in the application of the second prong, Justice O'Connor has convinced a majority of her colleagues to reformulate it. The inquiry under the second prong has shifted from determining the primary effect of a government act to ascertaining whether the government action has "in fact conveyed a message of endorsement or disapproval" of religion. Under this new inquiry, an act may (or may not) violate the establishment clause, regardless of whether it advances or inhibits religion as a primary effect; the crucial factor is the public message conveyed by the act.

Justice ANTHONY M. KENNEDY has been the Court's most vocal critic of O'Connor's endorsement inquiry, and in COUNTY OF ALLEGHENY V. AMERICAN CIVIL LIBERTIES UNION (1989) he offered his own reformulation of *Lemon's* second prong in response. Kennedy's reformulation prohibits two types of government action: direct government benefits that tend to establish a state religion, and government coercion to engage in religious activity. Kennedy's opinion was joined by Chief Justice WILLIAM H. REHNQUIST and Justices Antonin Scalia and BYRON R. WHITE. All four Justices have indicated a dislike for the *Lemon* test, and

Kennedy may be laying the groundwork to replace it altogether.

JOHN G. WEST, JR.
(1992)

(SEE ALSO: *Religious Fundamentalism; Separation of Church and State.*)

Bibliography

LEVY, LEONARD W. 1986 *The Establishment Clause: Religion and the First Amendment.* Chapter 6. New York: Macmillan.

THEUER, JEFFREY S. 1988 The Lemon Test and Subjective Intent in Establisment Clause Analysis: The Case for Abandoning the Purpose Prong. *Kentucky Law Journal* 76:1061–1075.

## *LEMON* TEST
(Update)

In LEMON V. KURTZMAN (1971), the Supreme Court announced a three-part ESTABLISHMENT CLAUSE test, under which a challenged government action, to be valid, must satisfy each of the following criteria: (1) it must have a secular purpose, (2) its "primary effect" must neither advance nor inhibit religion, and (3) it must not create an "excessive government entanglement with religion." The Court applied this test regularly for about fifteen years. Since the mid-1980s, however, the test increasingly has been criticized as excessively hostile to religion, historically misguided, and incoherent. Although the three *Lemon* factors remain relevant to judicial decisions, their strength has been modified substantially, and the future of even this modified *Lemon* test remains uncertain.

Only rarely has the Court invalidated a statute under the first part of the *Lemon* test. In *Stone v. Graham* (1979), the Court held that a statute requiring posting of the Ten Commandments in public classrooms was unconstitutional for want of a secular purpose. Similarly, in WALLACE V. JAFFREE (1984) and *Edwards v. Aguillard* (1987), the Court invalidated statutes that required, respectively, a moment of silence in public classrooms and the teaching of creationism in public schools. In other cases, the Court readily has found a secular purpose and proceeded to *Lemon*'s effects and entanglement inquiries.

The Court has developed and modified its criteria for unconstitutional effects and entanglement primarily in cases reviewing GOVERNMENT AID TO RELIGIOUS INSTITUTIONS. Through the 1970s and 1980s, the premise of the Court's effects analysis was that religious schools are "pervasively sectarian" institutions in which religious and secular education are inextricably intertwined; accordingly, any "direct and substantial aid" to religious schools' "educational function" unconstitutionally advances religion. On this approach, modified substantially in recent years, the Court was most concerned that government-paid teachers or guidance counselors, sent into religious schools to perform even secular tasks, might conform to the sectarian environment and engage in religious indoctrination. The Court invariably invalidated such programs. Government must be certain that its employees do not engage in religious indoctrination, the Court said, and the sectarian environment made such certainty unattainable. Furthermore, even when government tried to avoid these unconstitutional effects—by monitoring its aid programs to ensure that they neither provided nor subsidized religious indoctrination—the Court held that these monitoring efforts unconstitutionally entangled government and religion.

The high-water mark of this approach came in the 1985 companion cases, *School District of Grand Rapids v. Ball* and AGUILAR V. FELTON. Even by that time, however, sharp criticism had begun to develop, both off the Court and among the Justices. The year before, in her LYNCH V. DONNELLY (1984) concurrence, Justice SANDRA DAY O'CONNOR had proposed what she called a "clarification" of the *Lemon* test, under which courts should inquire whether government has acted with the purpose or effect of conveying its endorsement or disapproval of religion. Alongside this endorsement test, O'Connor presented a weakened version of the *Lemon* entanglement inquiry. O'Connor's approach was less aggressively separationist than the conventional *Lemon* analysis, but more demanding than the other theories that began to proliferate on the Court.

One of those other theories was the "nonpreferentialist" approach that then-Justice WILLIAM H. REHNQUIST, announced in his 1985 *Wallace v. Jaffree* dissent. According to Rehnquist, the establishment clause's meaning is defined by its drafters' intention to bar only governmental preference for one sect over another. Four years later, Justice ANTHONY M. KENNEDY proposed yet another alternative test, under which the clause prohibits government from coercing participation in religious activity or delegating government power to religious groups. While Kennedy obtained a bare majority for his opinion in LEE V. WEISMAN (1992), holding that a clergy-led SCHOOL PRAYER at a public-school graduation was unconstitutionally coercive, he was unable to persuade his majority that coercion is the appropriate test.

Many commentators in the late 1980s and early 1990s believed that the *Lemon* test was either dead or in its death throes. But the Court was unable to establish majority support for any of the alternative tests. Still, by 1994 it became clear that five Justices agreed on a more limited

modification of the *Lemon* framework. In three separate opinions filed in BOARD OF EDUCATION OF KIRYAS JOEL VILLAGE SCHOOL DISTRICT V. GRUMET (1994), Chief Justice Rehnquist, and Justices O'Connor, ANTONIN SCALIA, Kennedy, and CLARENCE THOMAS, suggested OVERRULING the *Ball* and *Aguilar* PRECEDENTS at the next opportunity.

Those five Justices seized that opportunity in AGOSTINI V. FELTON (1997). *Agostini*'s procedural context was unusual: the City of New York, still enjoined from providing the program of remedial instruction invalidated in *Aguilar,* moved for relief from the *Aguilar* judgment. This context had an important effect: under the Court's earlier interpretation of the relevant procedural rule, the Court could not change the law in its *Agostini* decision. Instead, the Court could only recognize post-*Aguilar* changes already in place. *Agostini*'s five-Justice majority, with O'Connor writing, found those changes in WITTERS V. WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND (1986), and *Zobrest v. Catalina Foothills School District* (1993). Both decisions had held that if government aid is available generally and neutrally, without regard to the nature of the institution at which it is expended, then the program is not readily subject to establishment clause challenge. Both decisions, further, held that because the challenged aid reached religious schools only through recipients' private choices, the state had not unconstitutionally subsidized religious indoctrination.

In *Agostini*'s revised establishment clause test, *Lemon*'s purpose inquiry remains unchanged, and the clause still bars the effect of advancing or inhibiting religion. But entanglement now is but one of three factors in the effects test, not a separate inquiry. The other two criteria of unconstitutional effect are whether the government action results in government indoctrination—either by government employees' own actions, or by state subsidization of religious education—and whether the action operates by reference to religion.

Some aspects of this revision are clear. *Agostini* decisively repudiates the presumption that publicly employed teachers and guidance counselors are likely to engage in religious indoctrination when charged with purely secular tasks. *Agostini* is clear, also, that government monitoring for indoctrination is not by itself unconstitutional entanglement. But other aspects are unclear, particularly when one considers the issue of school vouchers, or SCHOOL CHOICE, that seems destined for Court review. On one hand, a program making vouchers available to all needy students, regardless of whether they attend sectarian or nonsectarian schools, would have the generality and neutrality that now point toward constitutionality. Further, whether vouchers actually benefit religious schools would depend on recipients' private choices—a second factor *Agostini* identified as favoring constitutionality. On the other hand, however, the Court could invalidate such a program as an unconstitutional subsidy to religious indoctrination. A comprehensive voucher program would have the two consequences *Agostini* considers relevant to unconstitutional subsidy: government money would flow into religious schools' coffers, and the program likely would relieve religious schools of costs they otherwise would have borne. A program making vouchers generally available for specifically religious education, not just for secular instruction, would go well beyond the programs so far approved.

No doubt one reason for *Agostini*'s ambiguity is continuing disagreement as to the proper establishment clause test. Another reason concerns the case's procedural context, which prevented the Court from reformulating—or admitting it was reformulating—establishment clause DOCTRINE. The Court would have done better to reconsider *Aguilar* and *Ball* in a context that would have allowed *Lemon*'s systematic reexamination. The Court's claim not to have innovated in *Agostini* is unpersuasive, and the apparent agreement on a constitutional test could dissolve in the next case, in which the Court would be more free to revise its doctrinal position.

That next case will be before the Court in its 1999–2000 term. The issue in *Mitchell v. Helms* (CERTIORARI granted on June 14, 1999) is whether the government may provide secular instructional materials, such as computers, to sectarian as well as non-sectarian schools. The lower court applied *Lemon* precedents from the 1970s to invalidate the challenged aid. Those precedents are at least in tension with *Agostini*'s rendition of the *Lemon* test, and the Court may well overrule them. Because the Court will be free in *Mitchell* from the procedural complications that affected *Agostini,* it could use the case as a vehicle for altering the constitutional test more systematically—perhaps adopting one of the alternative tests that various Justices have urged in separate opinions, or perhaps adopting a compromise version that presses the neutrality theme less ambiguously than did *Agostini.* But the Court need not do so to uphold the aid challenged in *Mitchell,* and nothing indicates that the Court is less divided as to the ideal establishment clause inquiry than it has been in the past. The long-term durability of *Agostini*'s modified *Lemon* test likely will remain uncertain until the Court considers the voucher issue.

HUGH BAXTER
(2000)

Bibliography

BAXTER, HUGH 1998 Managing Legal Change: The Transformation of Establishment Clause Law. *UCLA Law Review* 46: 343–457.

LAYCOCK, DOUGLAS 1997 The Underlying Unity of Separation and Neutrality. *Emory Law Review* 46:43–74.
LEVINSON, SANFORD 1997 Religious Language and the Public Square. *Harvard Law Review* 105:2061–2079.
LEVY, LEONARD W. 1986 *The Establishment Clause: Religion and the First Amendment.* New York: Macmillan.
MCCONNELL, MICHAEL 1992 Religious Freedom at a Crossroads. *University of Chicago Law Review* 59:115–194.

## *LEON, UNITED STATES v.*

See: Good Faith Exception

## LESBIANISM

See: *Bowers v. Hardwick*; Same-Sex Marriage; Sexual Discrimination; Sexual Orientation; Sexual Preference and the Constitution

## LETTERS OF MARQUE AND REPRISAL

Letters of marque and reprisal are commissions that governments of belligerent powers grant to private shipowners (called "privateers") authorizing them to seize the vessels and property of enemy subjects on the high seas. During the Revolutionary War both the STATES and the CONTINENTAL CONGRESS issued letters of marque; but the Constitution grants Congress the power to issue them and denies it to the states. Although not a signatory to the Declaration of Paris (1856), which condemned privateering as contrary to the law of nations, the United States has issued no letters of marque since that time.

DENNIS J. MAHONEY
(1986)

## LEVER FOOD AND DRUG CONTROL ACT
40 Stat. 276 (1917)

The administration proposed this legislation to Congress, arguing that "the existence of a STATE OF WAR" made it "essential to the national security and defense" for the federal government to control the supply and pricing of food and fuel. By subjecting those industries AFFECTED WITH A PUBLIC INTEREST to federal regulation, Congress effectively delegated control of significant sectors of the economy to the President. Section 4, the heart of the act, outlawed the destruction, waste, hoarding, or price-fixing of commodities. Further sections, in an exceptionally broad DELEGATION OF POWER, authorized the President to regulate the food industry and to seize and operate "any factory, packing house, oil pipe line, mine, or other plant" engaged in commodity production.

In *United States v. L. Cohen Grocery Company* (1921), a unanimous Supreme Court struck down section 4 for failing to set adequate standards for prices. The criminal provisions unconstitutionally delegated "legislative power to courts and juries" and deprived "the citizen of the right to be informed of the nature and cause of the accusation against him," violating the Fifth and Sixth Amendments. Although the Court struck down particular provisions for VAGUENESS, it did not reach the issue of the government's authority to regulate prices under the WAR POWERS, and the Lever Act would later serve as a model for other regulatory legislation

DAVID GORDON
(1986)

## *LEVY v. LOUISIANA*
391 U.S. 68 (1968)

## *GLONA v. AMERICAN GUARANTEE & LIABILITY INSURANCE CO.*
391 U.S. 73 (1968)

In these decisions the Supreme Court began to subject legislative classifications based on ILLEGITIMACY of parentage to heightened judicial scrutiny. Both cases arose out of Louisiana's statute allowing an action for damages on behalf of the survivors of a decedent against a person who wrongfully caused the decedent's death. *Levy* invalidated, 6–3, a provision denying an illegitimate child the right to recover damages for the death of a parent, and *Glona* invalidated, 6–3, a corresponding provision disallowing a parent's recovery of damages for the death of an illegitimate child.

The two opinions for the Court, by Justice WILLIAM O. DOUGLAS, were very brief. Douglas purported to accept the RATIONAL BASIS STANDARD OF REVIEW. The rights asserted, however, involved "the intimate, familial relationship between a child and his own mother." And illegitimacy bore no relation to the nature of the harm inflicted in either case. The accident of a child's illegitimate birth did not justify denying his rights, and if the state sought to punish the mother of an illegitimate child for her "sin," denying her wrongful death damages was an irrational means for doing so.

It is plain that in these cases the Court was employing a standard of review considerably more demanding than its "rational basis" language suggested. Justice JOHN MARSHALL HARLAN, for the dissenters, took note of this heightened scrutiny, and opposed it. Any definition of the

plaintiff class in a wrongful death statute must be artificial; a biological definition would attune the law neither to degrees of love nor to degrees of economic dependence between decedents and survivors. It was not irrational for Louisiana to "simplify" its wrongful death proceedings by using formal marriage as the key to defining the plaintiff class.

Left unspoken by both Douglas and Harlan was the time-dishonored use of the law of illegitimacy in many southern states as a covert form of RACIAL DISCRIMINATION in controlling the transmission of wealth from white fathers to their racially diverse offspring.

KENNETH L. KARST
(1986)

## LIBEL AND THE FIRST AMENDMENT

A central historical question about the FIRST AMENDMENT is to what extent it embodied the received eighteenth-century legal traditions of English law and governmental practice as they were reshaped and renewed in the colonial, revolutionary, and formative periods in America. Or was the amendment a break from these traditions? This issue can be stated either as a question of the intent of the Framers and ratifiers or as a matter of the normative impact of an authoritative text, elaborated in our century within an institutional matrix of JUDICIAL REVIEW radically different from that of the eighteenth century on either side of the Atlantic. However the question be stated, the historical problem is in essence whether the First Amendment is to be regarded as expressing a principle of continuity with the received legal tradition or as constituting a declaration of independence from English law, thereby projecting the American law of freedom of expression on a path of autonomous development.

The general view emphasizes continuity, both as a matter of the original understanding of the Framers of the First Amendment and as a matter of the amendment's later—much later—doctrinal elaborations. Indeed, we conventionally measure continuity or discontinuity by reference to the basic conceptual dichotomy of the English legal tradition, as formulated by WILLIAM BLACKSTONE, the oracle of the COMMON LAW for the framing generation:

> where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law . . . the liberty of the press, properly understood, is by no means infringed or violated. The *liberty of the press* is indeed essential to the nature of a free state, but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity [*Commentaries on the Laws of England*, 1765, Bk. 4, chap. II, pp. 151–52].

The issue whether the First Amendment embraced or departed from the English legal tradition with respect to subsequent punishment tends to be fixed on the treatment of SEDITIOUS LIBEL. The historical argument for the law of seditious libel has been that government ought to have power to punish its most abusive or subversive critics because criticism of government contains the seeds of a variety of evils—disobedience to government, public disorder, even violence—and that no government can subsist if people have the right to criticize it or to call its agents corrupt or incompetent. This is seen in the work of Leonard W. Levy, ZECHARIAH CHAFEE, and others who have lately examined the First Amendment's historical foundations by looking at seditious libel as the exclusive focus for probing the question of continuity and discontinuity with respect to subsequent punishments. Having narrowed the issue to seditious libel, the scholarly tradition put the question of continuity and discontinuity in all-or-nothing terms: Does the First Amendment as a matter of original understanding, or as a matter of latter doctrinal connotation, repudiate or embrace the concept of seditious libel?

When a question about the relationship of a controversial legal tradition to a broadly phrased constitutional text is put in such terms, the answers are likely to fall out along dialectical lines. So it has been with the rejection-or-reception issue concerning seditious libel. The heated debate on the question by the Federalists and Republicans in connection with the passage of the ALIEN AND SEDITION ACTS of 1798 has been echoed through our history. In modern scholarship, the dialectic begins in 1919 when Zechariah Chafee, troubled deeply by the World War I ESPIONAGE ACT prosecutions, wrote in the *Harvard Law Review* that the Framers of the First Amendment "intended to wipe out the common law of SEDITION, and to make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America." Six months later, and plainly in emulation, Justice OLIVER WENDELL HOLMES added the weight of his and LOUIS D. BRANDEIS's authority to the Chafee thesis, when he declared in his great dissent in the *Abrams* case: "I wholly disagree with the argument . . . that the first Amendment left the common law as to seditious libel in force. History seems to me against the notion." But the Chafee position never won the broad adherence that most modern scholars seem to think it had. In the World War I free speech cases before the Supreme court, John Lord O'Brien, who briefed the

cases for the Justice Department, stated as the official view of the government that seditious libel prosecutions were not rendered invalid by the First Amendment, either as a matter of original intent or as correctly understood in 1919. And others, including EDWARD S. CORWIN, dissented from the Chafee position. Indeed, Chafee himself seems to have changed his tune by 1949, at least on the issue of the Framers' original intent: "The truth is, I think, that the framers had no very clear idea as to what they meant by 'the freedom of speech or the press.' " The dialectic about seditious libel and the First Amendment entered a new phase with the publication of Leonard W. Levy's seminal work, *Legacy of Suppression,* in 1960. This book argued that with respect to the general conceptions of FREEDOM OF THE PRESS prevalent at the time of the framing and ratification of the First Amendment, there was no solid evidence of a consensus to move away from a purely Blackstonian conception of freedom, that is, a conception limited to protecting only against previous restraints. In particular, Levy found considerable evidence that supported the continuing validity of seditious libel prosecutions, and no clear evidence that any lawyer, pamphleteer, philosopher, or statesman repudiated the concept of seditious libel. There was, Levy recognized, a growing sense of the necessity of the defense of truth, although far from a clear consensus even on that. And there was also a growing insistence on the independent power of the jury in a seditious libel prosecution to determine the issue of truth and the question of the seditious quality of any publication, as well as the other factual issues in the case.

Levy's account of the relationship of the First Amendment as a formal constitutional limitation on the power of Congress and his overall conception of intellectual and legal history respecting freedom of expression has from the beginning been confused by the problem of FEDERALISM. At the same time that he has insisted that the conception of freedom of the press guarded against abridgment by the First Amendment does not invalidate seditious libel, he has described the amendment as denying any power whatever by Congress to legislate with respect to the press, except to protect COPYRIGHT. Thus, he concluded that Congress had no power to pass the Sedition Act of 1798, but on federalism grounds, not because the Sedition Act violated any understandings about press freedom embodied in the First Amendment. The states and the federal courts remained empowered to try seditious libel prosecutions.

But Levy's interpretation of the "Congress shall make no law" language in the First Amendment has taken a distant backseat, in his own writing and in that of others, to his overriding emphasis that "the freedom of speech or of the press" was not understood to repudiate the concept of seditious libel. In other words, the First Amendment was understood to embody a Blackstonian conception of freedom of expression as a matter of original intent.

In NEW YORK TIMES CO. V. SULLIVAN (1964) the Supreme Court gave an authoritative modern answer to the question whether prosecution of seditious libel would survive the First Amendment. An advertisement in March 1960, placed by supporters of MARTIN LUTHER KING, JR., in the *New York Times;* recited the repressive activities of Alabama police with several minor inaccuracies and exaggerations. An Alabama jury awarded a local official $500,000 damages against the *New York Times.* The Supreme Court reacted with sweeping changes in the constitutional status of defamation law. Libel would no longer be viewed as a category of expression beneath First Amendment protection. Instead, the Court found that the political repudiation of the Sedition Act of 1798 had revealed the "central meaning" of the First Amendment: a right to criticize government and public officials. As the Court put it, "[A] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions . . . leads to . . . 'self-censorship.' " The Alabama act, "because of the restraint it imposed upon criticism of government and public officials," was inconsistent with the First Amendment.

In place of actual falsity as a basis for liability, the Court imposed a new standard to govern defamation actions brought by public officials. Now, a public official could recover damages for a defamatory falsehood relating to his official conduct only upon a showing "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

*Sullivan* effected important changes in constitutional law and practice. Defamation law previously had been left to the states, subject to gradual common law evolution in state courts not often exposed to First Amendment issues. *Sullivan* federalized this diversity of local rules into a single national body of doctrine overseen by a Court peculiarly sensitive to First Amendment problems. Furthermore, the intangibility of defamation law had left wide discretion in trial court juries; *Sullivan* imposed independent appellate court review of the facts in defamation actions as a First Amendment guarantee. And, in place of the complexity of overlapping liabilities, offsetting privileges, and jurisdictional diversity, *Sullivan* instituted a simple national rule that put a stringent burden of proof on plaintiffs.

Decisions following *Sullivan* extended the "actual malice" limitation on the law of defamation beyond the case of criticism of high public officials. The rule was expanded to apply to PUBLIC FIGURES in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker* (1967). A plurality of the Court even stretched the rule to cover private figures, if the matter was "a subject of public or general interest,"

in *Rosenbloom v. Metromedia, Inc.* (1971). But the Court retreated from *Rosenbloom* three years later in GERTZ V. ROBERT WELCH, INC. (1974). *Gertz* held that a private person may recover without meeting the actual malice standard. Because private figures have only limited access to the media to correct misstatements of others, and because they have not assumed the risk of injury due to defamatory falsehoods against them, the Court found the interests of private figures to weigh more heavily than those of public figures. The states were left free to establish an appropriate standard of liability, provided they do not impose liability without fault. Moreover, the states were forbidden from awarding presumed or punitive DAMAGES absent a showing of actual malice. More recently, in DUN & BRADSTREET, INC. V. GREENMOSS BUILDERS, INC. (1985), the Court retreated still further, permitting recovery of presumed and punitive damages by a private plaintiff without a showing of actual malice, because the defamatory statements did not involve a matter of public concern.

The defamation decisions beginning with *New York Times Co. v. Sullivan* have had the twofold effect of highlighting the core purpose of the First Amendment and constitutionalizing the law of defamation. By invalidating the law of seditious libel, the Court recognized that criticism of government is the type of speech most deserving of First Amendment protection. By establishing minimum standards of liability and limitations on damages for public figures and some private plaintiffs, the Court federalized the law of defamation.

BENNO C. SCHMIDT, JR.
(1986)

Bibliography

KALVEN, HARRY, JR. 1964 The New York Times Case: A Note on "The Central Meaning of the First Amendment." *Supreme Court Review* 1964:191.

LEVY, LEONARD W. 1960 *Legacy of Suppression: Freedom of Speech and Press in Early American History.* Cambridge, Mass.: Harvard University Press.

——— 1984 *Emergence of a Free Press.* New York: Oxford University Press.

## LIBEL AND THE FIRST AMENDMENT (Update)

The structure of the Supreme Court's libel DOCTRINE has changed very little since the mid-1980s—remarkably so given the breadth and depth of dissatisfaction that this doctrine has engendered. While NEW YORK TIMES V. SULLIVAN (1964) deservedly remains an icon of modern FIRST AMENDMENT law, *Sullivan*'s progeny—an extensive and highly complex body of cases constitutionalizing almost every aspect of the law of defamation—has come under attack for failing to protect the legitimate interests of either defamed individuals or the press and other speakers. Yet the Court's libel law doctrine by now has acquired, seemingly despite itself, the virtue of stability—an achievement itself likely to prevent any ambitious reform proposals from making headway.

*Sullivan* derives its importance from two essentially independent features. First, the decision stands as the Court's strongest statement of general First Amendment principle—that the "central meaning" of the First Amendment, revealed in the controversy over the ALIEN AND SEDITION ACTS of 1798, is to protect against all infringements the right of a sovereign people to criticize government policy and public officials. Second, the decision began the process by which the Court brought the federal Constitution to bear on the state COMMON LAW of defamation. In the course of this doctrinal development, the Court provided some level of constitutional protection to libelous speech extending far beyond attacks on official conduct.

The Court put in place the main building blocks of its libel law doctrine in the two decades following *Sullivan*. First, in *Curtis Publishing Company v. Butts* (1967), the Court held that the "actual malice" standard adopted in *Sullivan* for libel cases brought by public officials also applied in cases brought by PUBLIC FIGURES. The latter, just like the former, would have to show that the speaker had acted with knowledge of a statement's falsity or reckless disregard as to its truth. Although the Court tried on several occasions to put some limits on the "public figure" category, lower courts have interpreted it expansively, to apply both to celebrities of all kinds and to any individual involved, voluntarily or not, in any sort of public controversy. Next, in GERTZ V. ROBERT WELCH, INC. (1974), the Court held that private figures must prove negligence (itself a heightened standard compared to the common law rule of strict liability) to recover compensatory damages and actual malice to obtain presumed or PUNITIVE DAMAGES. Because of the difficulty of proving actual injury to reputation, as well as the expense of bringing libel litigation, many private figures subject to *Gertz* discover that their suits are tenable only with evidence of actual malice. Finally, the Court held in DUN & BRADSTREET V. GREENMOSS BUILDERS, INC. (1985) that in the small category of cases in which a private figure is defamed on "a matter of purely private concern" (like the faulty credit rating in the case), the actual malice standard does not apply to any part of the litigation. The upshot of the system is that the actual malice standard today governs most libel cases, although the occasional plaintiff manages to escape its strict proof requirements.

Since *Dun & Bradstreet*, the Court has tinkered with the actual malice standard, while also elaborating on the lesser included requirement of proving a defamatory statement's falsity. In *Anderson v. Liberty Lobby* (1986), the Court held that a public figure can defeat summary judgment only by showing with "convincing clarity" sufficient evidence of actual malice to create a genuine issue of material fact. And in *Harte-Hanks Communications v. Connaughton* (1989), the Court made clear that the actual malice standard requires proof of a libel defendant's actual state of mind, so that purposeful avoidance of truth, but not a gross failure to comply with professional standards, can establish the requisite liability. Further increasing the difficulty of bringing a libel suit, the Court held in *Philadelphia Newspapers, Inc. v. Hepps* (1986) that not only public but also private figures bear the burden of proving a defamatory statement's falsity, at least if the speech is of public concern and the defendant is a member of the media. With respect to the nature of this proof, MASSON V. NEW YORKER MAGAZINE, INC. (1991) adopted as a constitutional requirement the common law rule that the falsity at issue must be material.

One problem with this body of law is sheer complexity. The Court now categorizes libel suits along multiple dimensions. The primary distinction, established in *Gertz*, relates to the status (public or private) of the plaintiff. A secondary but still important distinction relates to the nature (public or private) of the speech. This inquiry functions in two ways: by entering into the initial determination whether a plaintiff is a public or private figure (because one way to become a public figure is to participate in a "public controversy") and then, as held in *Dun & Bradstreet*, by dividing the private-figure category into two. Finally, a possible distinction lurks between media and nonmedia defendants; in *Hepps* and several other cases, the Court explicitly reserved the question whether this distinction too should have constitutional relevance. The intricate, even convoluted nature of this categorical scheme, governing as it does every important aspect of libel litigation, ill comports with the Court's usual concern for certainty and predictability in matters affecting FREEDOM OF SPEECH.

A related though more comprehensive problem is that the Court's libel doctrine often manages to frustrate the interests of both sides in libel cases—and in doing so, to frustrate as well the interests of the public. Application of the *Sullivan* rule usually deprives falsely defamed individuals of the ability to obtain monetary damages or any other effective remedy for reputational injury, however grievous. By the same token, application of the rule may prevent the public from ever learning of the falsity of widely disseminated libelous statements. The justification for accepting these consequences is that the actual malice standard promotes what the *Sullivan* Court called "uninhibited, robust, and wide-open" debate by removing the press's fear of liability for inevitable errors. Whether this trade-off makes sense may depend on whether the speech at issue lies at the core of First Amendment protection, as was true in *Sullivan*, or nearer to its periphery, as in the many libel cases involving celebrity gossip. But even if this issue is set to one side, the question remains whether the trade-off is in fact a trade-off—whether, that is, the public gets the uninhibited debate promised for the price paid. With regard to this question, the press routinely claims, and probably with good reason, that although the actual malice regime reduces the number of libel judgments, it greatly increases the size of judgments and, even more important, the costs of defense. Current libel law thus may thwart the correction and remedy of false defamatory statements without in any way lessening the self-censorship that the *Sullivan* Court acted to prevent.

This arguably miserable accommodation of competing interests spawned in the 1980s a kind of cottage industry in proposals for reforming libel law. Most of these proposals relied on reduced damage awards rather than heightened standards of liability to strike the appropriate balance in the area. One proposal would have relieved the libel plaintiff of any burden of proving fault, but offered as a remedy only a declaratory judgment of the defamatory statement's falsity. Other variants would have allowed the plaintiff to recover modest actual damages or given the plaintiff a choice between bringing a no-money, no-fault suit and trying to recover unlimited damages under the actual malice standard. The essential idea of this reform movement was to create a low-cost mechanism for correcting defamatory error, which would protect better than the *Sullivan* regime both reputational and free speech interests.

Even as these proposals multiplied, however, the Court's libel law doctrine began to acquire a surprising air of permanence. The Court took fewer and fewer libel cases in the 1990s, and the few decisions it did issue had little significance. Perhaps the Court believed that its accommodation of interests was superior to any of the alternatives. Or perhaps the Court thought that the need for stability counseled against further changes, even if a different approach might have been better in the first instance. Regardless of the cause, libel doctrine at the turn of the century seems settled in a way that few commentators would have predicted in the mid-1980s. And this very rootedness, with its attendant virtues, makes the prospects for the significant reforms urged at that time ever more unlikely.

ELENA KAGAN
(2000)

Bibliography

ANDERSON, DAVID 1991 Is Libel Law Worth Reforming? *University of Pennsylvania Law Review* 140:487–554.

EPSTEIN, RICHARD 1986 Was *New York Times v. Sullivan* Wrong? *University of Chicago Law Review* 53:782–818.

FRANKLIN, MARC A. 1986 A Declaratory Judgment Alternative to Current Libel Law. *California Law Review* 74:809–845.

KAGAN, ELENA 1993 A Libel Story: *Sullivan* Then and Now. *Law and Social Inquiry* 18:197–217.

LEVAL, PIERRE N. 1988 The No-Money, No-Fault Libel Suit: Keeping *Sullivan* in its Proper Place. *Harvard Law Review* 101:1287–1302.

LEWIS, ANTHONY 1991 *Make No Law: The Sullivan Case and the First Amendment.* New York: Random House.

POST, ROBERT C. 1986 The Social Foundations of Defamation Law: Reputation and the Constitution. *California Law Review* 74:691–742.

SCHAUER, FREDERICK 1984 Public Figures. *William and Mary Law Review* 25:905–935.

——— 1992 Uncoupling Free Speech. *Columbia Law Review* 92:1321–1357.

SMOLLA, RODNEY A. 1986 *Suing the Press: Libel, the Media, and Power.* New York: Oxford University Press.

SUNSTEIN, CASS R. 1984 Hard Defamation Cases. *William and Mary Law Review* 25:891–904.

## LIBERAL CONSTITUTIONAL CONSTRUCTION

The liberal attitude toward the Constitution—admitting a range of internal differences—centers on the proposition that the Framers, as talented a group of democratic politicians as ever lived, expected their descendants to be at least as experimental as they were. When the Framers gathered in Philadelphia, they were improvising a *novus ordo seclorum* without a blueprint. JOHN ADAMS, working feverishly in London compiling the history of attempts at republican government, tried to summarize the lessons of history. JAMES MADISON had prepared himself by reading every relevant work that he and his mentor THOMAS JEFFERSON, then in Paris, could lay their hands on. ALEXANDER HAMILTON was satisfied that Thomas Hobbes had provided the essentials.

But delegates to the CONSTITUTIONAL CONVENTION OF 1787 mainly brought with them their experience in running provincial, state, and Confederation government. Collectively they had well over a thousand years of experience in office, from governor and Chief Justice down to mayor and justice of the peace. Of the fifty-five chosen, forty-four were, or had been, members of the CONTINENTAL CONGRESS; at a time when being a lawyer was very different from emerging from a law school assembly line and vanishing into a vacuum-packed corporate enviroment, thirty-five had done their apprenticeships, and JAMES WILSON and GEORGE WYTHE were eminent professors and legists. The only outstanding absentees from the political class were JOHN JAY a secretary of foreign affairs under the Confederation; John Adams in London; Thomas Jefferson in Paris; and PATRICK HENRY who was elected but refused to attend as he "smelt a rat," that is, he thought Jefferson was masterminding the convention through Madison, as had been the case in the Virginia legislature with the VIRGINIA STATUE OF RELIGIOUS LIBERTY.

Although with the exception of Madison and perhaps Hamilton they had not arrived with specific plans, they clearly shared a sense of mission: The United States government under the ARTICLES OF CONFEDERATION had to be strengthened to prevent the infant nation from being eaten by the sharks that infested the international environment. Here the presence of GEORGE WASHINGTON was of immense symbolic value because of his known dedication to the principles of a free republic and the respect he had from the people. Washington was unanimously elected president of the Convention.

The Framers were well aware that they were not free-floating Platonic "guardians" who could impose their concept of a "republic" upon an unresisting populace. Hence, when the final document was signed on September 17, its principal architects considered it the best they could get rather than the fulfillment of an ideal. George Washington put it well in a letter: "You will readily conceive . . . the difficulties which the Convention had to struggle against. The various and opposit [*sic*] interests which were to be subdued, the diversity of opinions and sentiments which were to be reconciled; and in fine, the sacrifices which were necessary to be made on all sides for the General Welfare, combined to make it work of so intricate and difficult a nature that I think it is much to be wondered at that any thing could have been produced with such unanimity."

Hamilton and Madison, disappointed by the convention's rebuff to their centralizing initiative, agreed that the Constitution was an improvement over the Articles and set to work to get it ratified. South Carolina's PIERCE BUTLER probably spoke for most of his fellow Framers when he wrote, "View the system then as resulting from a spirit of Accommodation to different Interests, and not the most perfect one that the Deputies cou'd devise for a Country better adapted for the reception of it than America is at this day, or perhaps ever will be."

In the course of RATIFICATION OF THE CONSTITUTION by the state conventions, questions inevitably arose on the meaning of various articles. When one reads the replies that were given—in a universe wholly lacking in modern communications techniques—it rapidly becomes clear that a number of the delegates often were not quite sure what they had approved. They knew that in general terms

they had established a republic with strong legislative and executive branches—the judicial article received little attention either in the Convention or in ratification debates—and hoped that the new government would provide the United States with the authority and the funds that were so sorely lacking under the Articles.

To head off a potentially dangerous demagogic anticonstitutionalist attack—claiming in essence that Hobbes's Leviathan was being covertly imposed on unsuspecting citizens—the Framers promised a BILL OF RIGHTS. The Constitution was ratified, the states organized presidential and congressional elections for that fall, and the Founding Fathers set to work finding appropriate positions for themselves and their friends in the new administration. Now they had to make this experiment in republican government work.

To summarize, the Framers had not descended from Mount Sinai with the Law carved in stone; they had contrived a mechanism designed to establish law and, if necessary, change it. The FIRST CONGRESS, for example, set up the Treasury Department as a dependency of Congress with the secretary reporting in person or in writing to the House and Senate. Alexander Hamilton's masterful recommendations on the public credit, the BANK OF THE UNITED STATES, and the encouragement of manufactures were in the form of reports to Congress. In practice, however, the secretary was responsible to the President, and the law was later changed to reflect this. The Constitution requires the President to get the ADVICE AND CONSENT of the Senate to treaties; the advice provision vanished after Washington's one attempt to discuss pending Indian treaties with the Senate ended on such a chilly note that no President since has made the pilgrimage.

Indeed, there is a substantial body of evidence to suggest that the widely discussed "intent of the Framers" is a will-o'-the-wisp. We know their intention on structural matters—the division of powers between the executive, legislative, and judicial branches—but beyond that, things get murky. Once again the First Congress gives us a sense of the extent to which the Framers were not sure of their own objectives, for an intense debate arose over the question of the Senate's role in the President's dismissal power. In other words, if Senate approval is necessary for the appointment of, say, an ambassador, is Senate approval required to fire him? The consensus seemed to be that it was not, but the matter was not settled until MYERS V. UNITED STATES in 1926, and even today there is some ambiguity on the status of members of so-called independent regulatory commissions.

Without going into further detail, it is obvious that early generations of politicians and jurists were more concerned with how a problem could be solved than with how the Framers would have dealt with it. ABRAHAM BALDWIN, one of the most intelligent men who was both a politician and jurist, put it thus to his House colleagues in March 1796:

> It was not to disparage [the Constitution] to say that it had not definitely, and with precision, absolutely settled everything on which it had spoke. He had sufficient evidence to satisfy his own mind that it was not supposed by the makers of it at the time but that some subjects were left a little ambiguous and uncertain. It was a great thing to get so many difficult subjects definitely settled at once. . . . The few that were left a little unsettled might without any great risk be settled by practice or by amendments. . . . When he reflected on the immense difficulties and dangers of that trying occasion—the old Government prostrated and a chance whether a new one could be agreed on—the recollection recalled to him nothing but the most joyful sensations that so many things had been so well settled, and that experience had shown there was very little difficulty or danger in settling the rest.

This liberal spirit of experimentation was brilliantly exemplified by the Supreme Court under the leadership of Chief Justice JOHN MARSHALL. Marshall's enmity toward his cousin Thomas Jefferson was surely fortified by the latter's penchant (at least before and after he served as President) for STRICT CONSTRUCTION of the Constitution. In the famous 1819 case MCCULLOCH V. MARYLAND, the Chief Justice, in the course of echoing Hamilton's 1791 defense of the constitutionality of the Bank of the United States, took some time out to condemn this unimaginative perception of the nature of the Constitution. Wrote Marshall:

> A constitution to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature therefore requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose these objects be deducted from the nature of the objects themselves. . . . To have prescribed the means by which government should in all future time execute its powers . . . would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur.

Five years later in the steamboat case of GIBBONS V. OGDEN (1824) the Chief Justice really dispatched the narrow-minded critics of federal power: "Powerful and ingenious minds taking as postulates that the powers expressly granted to the government of the Union are to be contracted by construction into the narrowest possible compass, and that the original powers of the states be retained if any possible construction will retain them, may by a course of well-digested but refined and metaphysical

reasoning, founded on these premises, explain away the constitution of our country and leave it a magnificent structure indeed to look at, but totally unfit for use." So much for metaphysicians and political philosophers.

In concrete terms Marshall's talent for improvisation to cope with pressing problems was spectacular. He invented the doctrine of POLITICAL QUESTIONS to provide the Court with a safe exit from risky enfilades in *Foster v. Nielson* (1829); in AMERICAN INSURANCE COMPANY V. CANTER (1828) he belatedly provided the constitutional rationale for acquiring new territories and, while he was at it, invented LEGISLATIVE COURTS, created under Article I and distinct from the CONSTITUTIONAL COURTS of Article III; and, to mention only two more, he developed the ORIGINAL PACKAGE DOCTRINE in BROWN V. MARYLAND (1827) and the status of Indian tribes as "dependent domestic nations" in *Worcester v. Georgia* (1831). One could argue that John Marshall, following in the footsteps of the Framers (and he had been a delegate to the Virginia ratifying convention), set the pattern of creative experimentation for liberal CONSTITUTIONALISM.

Rather than compiling a catalog of constitutional improvisations, many of which have been initiated by the executive (ABRAHAM LINCOLN moved the power to suspend the writ of HABEAS CORPUS into Article II, where it has since remained) and the legislature (Congress in 1871 conferred citizenship on corporations for federal jurisdictional purposes), it would be wise to narrow the inquiry to a few specific areas. For example, what do steamships and television waves have in common? The answer is that they are subject to regulation by the federal government under the COMMERCE CLAUSE. The first stages in this triumph of fungibility were easy, for interstate water shipping, interstate railways, interstate trucking, and interstate telegraphs were tangible. The big jump took place in 1933 when the Supreme Court, in *Federal Radio Commission v. Nelson Bros.*, held radio waves to be analogous to telegraph signals and subsequently widened this to include television. The principle applied was Marshall's, namely, that it did not make any difference whether a boat was propelled by sail or engine; the vital aspect was that something was going from one state to another.

The liberal approach to constitutionalism has infuriated a lot of individuals and groups of all political persuasions. The focus here is not on whether the experiments were successful but on the modus operandi. At some points the improvisations were considered politically "reactionary" (for example, when the Court in the YELLOW DOG CONTRACT Case assumed that individual workers and industrial giants were bargaining-table equals and when it negated state minimum-wage laws). In other cases a howl went up that the Justices were "radical" (for example, when the Court protected criminal rights and when it legitimized ABORTION). Whatever the outcome, the result was founded on the experimental attitude. To put it differently, it would be extremely difficult to find a decision in which the majority view was buttressed by better probative evidence of the intention of the Framers than was the view of the dissenting minority.

To say that experimentation has been the only game in town since 1787 is a statement of historical fact, a fundament of the liberal tradition. Indeed, one could argue that the one area where stasis set in and experimentation became increasingly difficult and finally impossible was the mesh of SLAVERY and STATES' RIGHTS, leading to a ferocious Civil War in which roughly a million males out of a population of sixteen million ages fifteen to thirty-nine were killed or wounded. The Constitution of 1787 was a sanguinary failure.

If this is the liberal attitude toward the Constitution, what are the critical differences between it and the conservative view? In candor, it is hard to find substantial differences at the level of principle, for America's so-called conservatives have always found themselves carrying the intellectual baggage of that magnificent cadre of improvisers who founded the Republic. In Ireland in the 1690s many a big house had a portrait of the king over the mantelpiece mounted on pivots top and bottom. When the Jacobites came to town one pushed the picture around to display King James II; when the forces of William and Mary appeared, a similar push put their visages front and center. The problem with such a portrait in the context of the founding era is that the same portraits would appear on both sides: conservative constitutionalists have always endorsed experimentation *sub silentio*, but then denied that this in fact was their methodology. Presumably they have learned the technique at the feet of John Marshall.

For example, JOHN C. CALHOUN has been described as a man of rigid conservative principles, the hero of the states' rights cause. Yet in 1817 Calhoun casually observed that the Constitution "was not intended as a thesis for the logician to exercise his ingenuity on it. It ought to be construed with plain good sense."

Similarly, Robert H. Bork has become an icon of contemporary conservative jurisprudence, but in his book *The Tempting of America: The Political Seduction of the Law* (1990) he provides us with an example of the liberal, experimental mode worthy of John Marshall himself. In discussing BAKER V. CARR (1962)—which required states to establish election districts based on the formula ONE PERSON, ONE VOTE—Bork excoriated the WARREN COURT not for the result ("There is no doubt in my mind . . . that plaintiffs [demanding the end of rigged districting] deserved to win") but because the Court based its decision on the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT.

As it happens, the authors of the Fourteenth Amend-

ment, like the Framers, had a talent for ambiguity, so it is an exercise in soothsaying to attempt a reconstruction of the precise meaning of equal protection. Let us simply say that the jury is still out, and will doubtless remain out indefinitely, on the legal consequences the drafting Committee of Fifteen had in mind in 1866. What is interesting is Bork's solution to the inequities created by malapportionment and how he explicates the constitutional rationale that would enable those who "deserved to win" to win. Let no one deny his imaginative creativity: he indicates that the Court could have avoided the equal protection quagmire quite simply by using the provision in Article IV, section 4, that "the United States shall guarantee to every State in this Union a REPUBLICAN FORM OF GOVERNMENT."

This provision, launched by Madison in the VIRGINIA PLAN, was discussed on two occasions during the Convention. The weight of the evidence suggests it was designed to prevent any state from setting up, or having imposed upon it from without, a monarchical form of government. When it was invoked by the Dorrite rebels against the obsolete Rhode Island Charter in 1849, the Court said in LUTHER V. BORDEN that the legitimacy of Rhode Island's government was a "political question"; and when the clause was subsequently invoked in a desultory fashion in several other cases, the Justices echoed Chief Justice ROGER BROOKE TANEY's decision in *Luther* and held that the determination of republican governance was nonjusticiable.

Bork states that "for no very good reason" the Court held the proviso to be judicially unenforceable and suggests it should be overruled after 113 years as STARE DECISIS. Actually, some supporters of the liberal, experimental approach who thought of this at the time of COLEGROVE V. GREEN (1946) (the first major assault on malapportionment) and hit a brick wall would cheer Bork on. However, the historical evidence for the use of the "guarantee clause" is tenuous, at least as flimsy as that underpinning the equal protection clause of the Fourteenth Amendment, for at the time of the ratification of the Constitution malapportionment was a major concern in a number of states. ELBRIDGE GERRY, a Framer, refused to sign the document, but not because it forbade the GERRYMANDER. It would seem that even Bork cannot resist temptation. As David Hume pointed out, creating a useful past is a delightful form of political entertainment. It is also a persistent highlight of American judicial behavior.

JOHN P. ROCHE
(1992)

(SEE ALSO: *Bork Nomination; Cherokee Indian Cases; Conservatism; Justiciability; Original Intent; Political Philosophy of the Constitution; Pragmatism; Progressive Constitutional Thought; Progressivism.*)

Bibliography

BORK, ROBERT H. 1990 *The Tempting of America: The Political Seduction of the Law.* New York: Free Press.

JACKSON, ROBERT H. 1941 *The Struggle for Judicial Supremacy.* New York: Knopf.

LEVY, LEONARD W. 1988 *Original Intent and the Framers' Constitution.* New York: Macmillan.

MCDONALD, FORREST 1985 *Novus Ordo Seclorum.* Lawrence: University Press of Kansas.

PETERSON, MERRILL 1987 *The Great Triumvirate.* New York: Oxford University Press.

ROCHE JOHN P. 1961 *Courts and Rights.* New York: Random House.

——— 1974 *Shadow and Substance.* New York: Macmillan.

WARREN, CHARLES 1922 *The Supreme Court in United States History,* 2 vols. Boston: Little, Brown.

# LIBERALISM

In today's America the term "liberalism" is circulated mainly by those who pronounce it with scorn—by the political right and by academic theorists who have little else in common with the right. Yet the American nation was conceived in liberalism. The DECLARATION OF INDEPENDENCE proclaimed the liberal ideals of individual liberty, legal equality, and the rule of law. It also embraced the liberal doctrine that located the legitimacy of governmental power not in divine right but in the consent of the governed.

The Constitution, too, was mainly seen by its Framers through liberal lenses. What they saw was a SOCIAL COMPACT deriving its authority from "the people of the United States" and designed in major part to serve liberal purposes: "to establish justice," "to secure the blessings of liberty," and by dampening the causes of civil strife, "to insure domestic tranquility." What they did not see—or would not see—was the fundamental inconsistency of SLAVERY with all these purposes. Putting this enormity out of their minds, the Framers of the Constitution and the BILL OF RIGHTS saw the chief source of oppression in the power of the state and placed much of their hope for achieving liberal ends in a system of LIMITED GOVERNMENT.

The limits were both structural and substantive. Liberty was to be achieved both by the dispersal of the powers of government (see FEDERALISM; SEPARATION OF POWERS) and by broadly worded prohibitions on various kinds of governmental interference with the rights of individuals. Although the liberalism of the Framers was strongly influenced by the Enlightenment's notions of rationality, these substantive limitations were not the product of abstract

reason. Rather, they were designed to serve intensely practical purposes for the new nation. The liberal doctrines of FREEDOM OF SPEECH and FREEDOM OF THE PRESS, for example, seemed essential to the citizen participation on which the continued legitimacy of government would depend. Similarly, the liberal doctrine rejecting divine authority as the basis for governmental legitimacy served the cause of domestic peace. The Framers, well versed in recent British history, need not stretch their imaginations to see how the interactions of religion and government might plunge a nation into civil strife. A major purpose of both the SEPARATION OF CHURCH AND STATE and the guarantee of RELIGIOUS LIBERTY was to promote tolerance and thereby to moderate religion's capacity for political divisiveness.

Today's Constitution, the product of two centuries' worth of interpretation, differs dramatically from the Constitution of the Framers. Yet, what Louis Hartz called "the liberal tradition" has remained central in American constitutional law, surviving political and social upheavals and even a civil war of our own. Like all paradoxes, this contradiction of continuity and change is more apparent than real. Over the years liberalism, like the Constitution, has taken on a series of new meanings in response to changes in America's economic, social, and political conditions. Jacksonian democracy, the CIVIL WAR and RECONSTRUCTION, the late-nineteenth-century industrial expansion, the NEW DEAL, and the CIVIL RIGHTS MOVEMENT each brought a new version of liberalism that made its mark on the Constitution. The constitutional law of our time—like the term liberalism itself—evidences overlays of all these eras of social change, from the days of Adam Smith to the days of MARTIN LUTHER KING, JR. The decisions of the Supreme Court, the nation's leading expositor of the Constitution, have both reflected the transformations of liberalism and contributed to them.

In the nation's early years the individualist liberalism of JOHN LOCKE was tempered by a vision of REPUBLICANISM that imposed on the people's governors a moral responsibility to attune their public decisions to the general good, not merely their own self-interest or the interests of their constituents. This republican ideal was not wholly unrealistic so long as government was largely in the hands of the gentry. By around 1820, however, gentry rule had crumbled under the dual pressures of democratization and geographical expansion. In the era of ANDREW JACKSON the consent of the governed implied an electorate that was expanded to include most adult white men, and the body of citizens who could make effective use of individual freedom—especially economic freedom—was similarly expanded by a doctrine of equal liberties. The widening of the franchise was almost entirely the work of legislatures. The protection of economic freedom, however, became the business of the courts, acting in the name of the Constitution. The JUDICIAL ACTIVISM of the MARSHALL COURT (1803–1835) led the way in promoting a nationwide free-trade unit by striking down a number of state regulatory laws (see STATE REGULATION OF COMMERCE; CONTRACT CLAUSE).

During the period before the Civil War, another doctrine of liberalism came to the fore, with major assists from the adherents of ABOLITIONIST CONSTITUTIONAL THEORY and from those who opposed SLAVERY IN THE TERRITORIES. "Free labor" became a slogan of the new REPUBLICAN PARTY and of ABRAHAM LINCOLN in particular (see LABOR MOVEMENT AND CONSTITUTIONAL DOCTRINE). The doctrine of free labor, infused with the liberal goals of democracy and individualism, received a strong impetus when the EMANCIPATION PROCLAMATION converted a war to save the Union into a war to free the slaves—a process that culminated in the THIRTEENTH AMENDMENT, ratified in 1865.

Generously interpreted, the Thirteenth Amendment might have served as a foundation for a sweeping constitutional guarantee of racial equality and for congressional legislation serving this end. The politics of Reconstruction impeded such an expansive interpretation, but did produce the FOURTEENTH AMENDMENT, with its broad guarantees of EQUAL PROTECTION and DUE PROCESS, and the FIFTEENTH AMENDMENT, prohibiting racial discrimination in VOTING RIGHTS. The three Civil War amendments, along with a series of civil rights acts, were seen by their proponents as establishing a principle of equal citizenship that would carry out some of the unfulfilled liberal promises of the Declaration of Independence.

These hopes were soon dashed. By the end of the century, politics—North and South—had turned away from a concern for racial equality. The Supreme Court had followed suit in a series of decisions that converted the Civil War amendments and the Reconstruction CIVIL RIGHTS laws into guarantees of formal equality that offered little real protection for the substantive values of equal citizenship: respect, responsibility, and participation (see CIVIL RIGHTS CASES; PLESSY V. FERGUSON).

As politics increasingly turned to the business of industrial expansion, the dominant version of liberal individualism now focused on the freedom of industry and enterprise from ECONOMIC REGULATION. Beginning in the 1880s, for half a century the Supreme Court policed the boundaries of economic liberty, striking down a great many regulatory laws in the name of ECONOMIC DUE PROCESS and holding a number of federal statutes invalid as exceeding the power of Congress under the COMMERCE CLAUSE. During this period, and especially during WORLD WAR I and the Red Scare of 1919–1920, the Court gave little comfort to those who were urging a similarly expan-

sive reading of other constitutional legacies of the Framers' liberal individualism—such as FIRST AMENDMENT freedoms.

It took the Great Depression and WORLD WAR II to effect a realignment that would give the center of the political stage to the liberalism of the New Deal. This rendering of liberalism, like the liberalism of Reconstruction, emphasized the necessity of substantive underpinnings for individual liberty. The New Deal's legislative program centered on economic democracy and social welfare, and to achieve these ends its leaders sought to guide the national economy with governmental regulation on an unprecedented scale. During the first term of President FRANKLIN D. ROOSEVELT, an activist majority of the Supreme Court fought a rear-guard action against the new liberalism in the name of the old. In 1937, however, before Roosevelt had made a single appointment to the Court, the majority shifted. From that day to the present, the Court has routinely upheld economic regulation both by Congress and by the states and has also upheld the legislative framework of the modern welfare state (see TAXING AND SPENDING POWERS; SPENDING POWER). During the 1930s and 1940s, the Court also took its first steps toward reinvigorating the First Amendment.

All these developments in constitutional doctrine supported a liberalism in which equality meant not just formally equal laws but the substance of equal citizenship. The Court cooperated with the political branches in an effort to bring freedom and security to people who had been seen as outsiders and so to achieve a more inclusive definition of the national community. For a time, the Cold War, like the Red Scare before it, laid a restraining hand on political freedom and also marked a group of dissidents as outsiders. But just as the Cold War reached the peak of its influence on domestic politics, the new liberalism, with its impulse to extend the blessings of liberty to all Americans, took a giant step forward. The WARREN COURT opened the modern civil rights era with the decision in BROWN V. BOARD OF EDUCATION (1954).

The *Brown* decision began a "second Reconstruction," not only by expanding the meaning of constitutional doctrines of racial equality, but also by providing a catalyst for a vigorous political movement, Congress responded with two momentous laws aimed at extending the substance of equal citizenship to the members of racial and ethnic minorities: the CIVIL RIGHTS ACT OF 1964 and the VOTING RIGHTS ACT OF 1965. In its active liberal reshaping of constitutional doctrine, the Warren Court began in the civil rights field, but did not end there. Particularly during the last six years of the tenure of EARL WARREN as Chief Justice, the court not only extended judicial remedies for racial DESEGREGATION but also promoted political equality by ordering REAPPORTIONMENT of legislatures on the principle of "one person, one vote." The court also greatly expanded the substantive protections of the First Amendment and recognized a constitutional RIGHT OF PRIVACY. In the field of criminal justice the Court accomplished the INCORPORATION of nearly all the guarentees of the Bill of Rights into the Fourteenth Ammendment, thus applying them to the states as well as the national government. Furthermore, the court tightened the requirements of many of those guarantees, making th Constitution a significant limitation on police practices and the proceedures of state criminal courts.

Even after Chief Justice Warren retired in 1969, the constitutional momentum of the Warren Court carried the Court to further liberal activism. Most notably, the BURGER COURT in the 1970s expanded the reach of the equal protection clause to the field of SEX DISCRIMINATION and held in ROE V. WADE (1973) that the right of privacy largely forbade a state to criminalize a woman's choice to have an ABORTION. These two developments were closely related; women's right to control their own sexuality and maternity is critical to their ability to participate in society as equal citizens.

Political liberals generally have applauded all these constitutional developments. Yet each of them has produced its own "backlash" in the political arena. When President LYNDON B. JOHNSON signed the 1964 act into law, he predicted that the South would thus be handed to the Republican party. In Presidential politics, this prediction has been validated, starting with the successful "southern strategy" of RICHARD M. NIXON in 1968. Nixon explicitly criticized the Warren Court's decisions in the criminal justice area, and the four Justices that he appointed to the Court began the process that would eventually dismantle a considerable part of that doctrinal structure. As for civil rights, critics of the REHNQUIST COURT have said that the second Reconstruction lasted only a little longer than the first one did. In the 1980s a firm majority of the Court has embraced a doctrinal model centered on formal racial equality, sharply limiting the uses of AFFIRMATIVE ACTION and other group-based remedies for the group harm of racial discrimination. The right of privacy has not yet fulfilled its promise as a generalized protection of individual freedom in matters of intimate personal relations, but rather has been narrowed even in the area of abortion rights. Recent First Amendment developments are typified by the PUBLIC FORUM doctrine, which began as a means to expand expressive freedom and now serves mainly as a threshold barrier to turn away would-be speakers' claims. In the world of constitutional doctrine, as in the larger political world, modern liberalism has been obliged to assume a posture of defense.

The constitutional liberalism that animates political liberals today—and serves as the political right's *bête noire*—is a far cry from the liberalism of nineteenth-century economics that dominated constitutional doctrine for five decades. Its primary modern sources are the New Deal's social welfare concerns and the Warren Court's concerns for CIVIL LIBERTIES and for the inclusion of subordinated groups in the promise of America. Even so, today's liberalism continues to draw on the liberalism that infused the framing of the Constitution and the Fourteenth Amendment: the rule of law, tolerance as a means to civil peace, individual rights to freedom from excessive governmental intrusion, and equal citizenship.

Although the political resistance to the New Deal had its main base in the business sector, today business has largely made its peace with the newer liberalism—not exactly embracing regulation, but accepting it. The most vehement opposition to affirmative action programs, for example, comes not from business groups, but from "social issues" conservatives who equally oppose the recognition of abortion rights or claims to sexual freedom. These citizens, who are presently the dominant voices on the political right, do not reject the liberal constitutional ideals of equality, individual rights, or tolerance, but argue that in recent decades liberals on the bench have abused their power to write a perverted version of those ideals into constitutional law.

For the "social issues" conservatives, these constitutional ideals are unchangeable; they took permanent shape when they were written into the Constitution. In this view constitutional equality means formally equal laws and no more; individual constitutional rights are limited to the specific rights of life, liberty, and property that the Framers had in mind; and the reach of constitutionally required tolerance is permanently confined by the morality of the Framers (see CONSERVATISM AND THE CONSTITUTION). They emphatically reject, for example, any claim to equality or rights of tolerance in the context of governmental discrimination on the basis of SEXUAL ORIENTATION, insisting that such matters be left to majoritarian community morality.

Constitutional liberalism is also under attack from quite another political direction, notably by theorists in the CRITICAL LEGAL STUDIES movement. These writers seek to "deconstruct" the very idea of rights by showing that all legal doctrine is indeterminate and therefore subject to manipulation in the interest of the powerful. Here, a countercurrent has developed among racial and ethnic minority writers who argue the practical utility of claims of rights in overcoming group subordination and point to the civil rights movement as an example of the liberating possibilities of rights—an argument the Framers of the Constitution surely would understand.

Another attack on liberalism by critical theorists, now joined by a number of feminist writers, centers on the potential of liberal-individualist attitudes for impoverishing the sense of self and submerging the sense of community responsibility—especially responsibility toward the down-and-out. Related to these concerns is the criticism that classical liberalism, locating the threat to individual freedom in the power of the state, neglects the oppressive capacity of nongovernmental actors, compounding the wrong by insisting on a strong publicprivate distinction. (See STATE ACTION—BEYOND RACE.)

From both sides, then, liberalism is challenged for undercutting the claims of community. A liberal tolerance may result in constitutional protections not only for consensual homosexual behavior but for racist speech or PORNOGRAPHY. (The antipornography cause in particular has produced an alliance between the political right and one branch of feminists.) Similarly, liberalism's long-standing devotion to Enlightenment-style rationality is under attack from both sides. The dominance of secular rationality is attacked by those who would promote SCHOOL PRAYERS or the teaching of CREATIONISM in public schools; and feminists and others argue that the instrumental rationality of the liberal welfare state's BUREAUCRACY is alienating and dehumanizing.

The critical theorists' critique of liberalism has yet to make a significant impact on constitutional law. The critique from the right, however, has been warmly received by the federal judiciary, which in large measure was reconstituted during the 1980s. Now it is liberal judges who are fighting a rear-guard action. Yet some important elements of the liberal constitutional inheritance from the New Deal and the Warren Court seem secure. Citizens at all points on the political spectrum continue to hold the federal government responsible for maintaining the health of the national economy, including high levels of employment. Although social welfare programs perceived as aiding the minority poor are anything but robust, SOCIAL SECURITY is the nearest thing we have to a political sacred cow, and some form of national health insurance seems likely to emerge soon. Explicit governmental discrimination against the members of subordinated racial or ethnic groups, we can assume, will be unconstitutional as long as we have the Constitution.

These examples are modest when they are measured against the modern liberal agenda; saying that the constitutional clock will not be turned back to 1950 or 1930 is not saying very much. For the moment, surely, liberals must seek their goals primarily in political arenas. In these arenas, however, we have already seen some important effects of racial equality in voting rights—for example, in the process of confirmation of Supreme Court Justices.

Undoubtedly, "the liberal tradition" will remain central

in American constitutional jurisprudence because our constitutional culture is indelibly imprinted with the rhetoric of liberalism: equality, tolerance, individual rights. Another certainty, however, is that the meanings of these large abstractions will change in response to changes in American society. Today's political liberals will applaud some of those changes and regret others. But the process is one that no true liberal can lament.

KENNETH L. KARST
(1992)

Bibliography

ALTMAN, ANDREW 1990 *Critical Legal Studies: A Liberal Critique.* Princeton, N.J.: Princeton University Press.

CRENSHAW, KIMBERLÉ 1988 Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law. *Harvard Law Review* 101:1331–1387.

DIGGINS, JOHN P. 1984 *The Lost Soul of American Politics: Virtue, Self-Interest, and the Foundations of Liberalism.* New York: Basic Books.

FERGUSON, KATHY E. 1984 *The Feminist Case Against Bureaucracy.* Philadelphia: Temple University Press.

HARTZ, LOUIS 1955 *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution.* New York: Harcourt Brace Jovanovich.

KARST, KENNETH L. 1989 *Belonging to America: Equal Citizenship and the Constitution.* New Haven, Conn.: Yale University Press.

SHIFFRIN, STEVEN 1983 Liberalism, Radicalism, and Legal Scholarship. *UCLA Law Review* 30:1103–1217.

SMITH, ROGERS M. 1985 *Liberalism and American Constitutional Law.* Cambridge, Mass.: Harvard University Press.

UNGER, ROBERTO MANGABEIRA 1975 *Knowledge and Politics.* New York: Free Press.

WOLFF, ROBERT PAUL 1968 *The Poverty of Liberalism.* Boston: Beacon Press.

## LIBERTY OF CONTRACT

See: Freedom of Contract

## LICENSE CASES
5 Howard 504 (1847)

In three related cases decided the same day, the Court sustained the constitutionality of temperance statutes of states that had restricted the sale of liquor and required all dealers to be licensed. Although the Justices unanimously concurred in the disposition of the cases, six men wrote nine opinions, and there was no opinion for the Court because a majority could not agree on the reasoning. At one extreme Justice JOHN MCLEAN took the position that the DORMANT POWERS of Congress under the COMMERCE CLAUSE utterly excluded the exercise of CONCURRENT POWERS by the states; but McLean found that the statutes were not regulations of commerce but reasonable exercises of the POLICE POWER. At the other extreme Justice PETER DANIEL supported an exaggerated view of concurrent state commerce powers.

Chief Justice ROGER B. TANEY' s view was the least doctrinaire. He observed that two of the three *License Cases* dealt with the retail sale of liquor that was no longer in the original package and therefore raised no INTERSTATE COMMERCE issue. (See ORIGINAL PACKAGE DOCTRINE.) The third case, however, involved liquor imported in the original package from another state and sold in that unbroken package. Thus the business affected by the state's license law was in interstate commerce. Taney therefore confronted the question "whether the grant of power to Congress is of itself a prohibition to the States, and renders all State laws on the subject null and void." His answer to the question, unlike Chief Justice JOHN MARSHALL's, was that unless a state act came into conflict with a law of Congress, the state could constitutionally exercise a concurrent commerce power. On the other hand, he muddled his position by arguing that such a power was no more than the police power of the state, which he defined, promiscuously, as "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions." His refusal to distinguish the police power from the commerce power and other powers left his opinion doctrinally murky, and like the opinions by the other Justices it failed to provide a usable test. At least two state judges, JAMES KENT and LEMUEL SHAW, avoided the Supreme Court's quest for a system of definitional categories by suggesting that if Congress did not brush away state legislation, it should be sustained in the absence of an actual or operational conflict with national legislation.

LEONARD W. LEVY
(1986)

## LIEBER, FRANCIS

See: Commentators on the Constitution

## LILBURNE, JOHN
(1614–1657)

John Lilburne, whose entire career was a precedent for freedom, was the catalytic agent in the history of the RIGHT AGAINST SELF-INCRIMINATION. Primarily because of him, that right became a respected, established rule of the COMMON LAW. An agitator with an incurably inflamed sense of injustice, Lilburne was called Freeborn John, because of

his incessant demands on behalf of the rights of every freeborn Englishman. No one in England could silence or outtalk him, no one was a greater pamphleteer, and no one was more principled in his devotion to political liberty, the rights of the criminally accused, and the freedoms of conscience and press. Making CIVIL DISOBEDIENCE a way of life, Lilburne successively defied king, parliament, and protectorate.

He first focused the attention of England on the injustice of forcing anyone to answer incriminating questions during his 1637 trial. After his release from prison in 1641, he joined the parliamentary cause, rose to a high military position, and became close to Oliver Cromwell; but he resigned his commission to be free to oppose the government. Four times he stood trial for his life, and he spent much of his last twenty years in jail, from which he smuggled out a torrent of tracts. He advocated a special CONSTITUTIONAL CONVENTION to write a constitution for England embodying the reforms proposed by the Levellers, the faction of constitutional democrats that he led.

When Parliament itself arrested and interrogated him, Lilburne became the first hostile witness in a LEGISLATIVE INVESTIGATION to claim a right not to answer questions against or concerning himself. He successfully made the same claim, under his view of MAGNA CARTA and the PETITION OF RIGHT, before a common law court in 1649, when tried for TREASON. He appealed to the jury above the heads of the judges and convinced the jury to decide on the injustice of the laws used to persecute political prisoners. Twice he persuaded juries to acquit him. In his trials and writings he educated England on the relation of liberty to fair play and DUE PROCESS OF LAW. At his last trial he won the unprecedented right to secure a copy of the INDICTMENT against him and to be represented by counsel in a capital case. Cromwell finally imprisoned him without trial, and Lilburne died in jail.

LEONARD W. LEVY
(1986)

Bibliography

LEVY, LEONARD W. 1968 *Origins of the Fifth Amendment.* Pages 271–312. New York: Oxford University Press.

## LIMITED GOVERNMENT

The idea of limited government is closely associated with political thinkers, mostly of medieval and modern periods, who placed special emphasis on preventing abuses of government. Some spoke of limitations connected with divine law and natural law; others spoke of a SOCIAL COMPACT establishing government for the sake of protecting property and other individual rights. Limited government was also a corollary of the more affirmative approach of ancient philosophers, who taught that ruling bodies could best maintain themselves by respecting social customs, moderating their policies, honoring the contributions of each social class in distributing governmental offices, and fostering self-restraint, patriotism, and other attitudes conducive to the general welfare.

In American constitutional thought limited government is often synonymous with CONSTITUTIONALISM itself. It has three more specific connotations resulting from the three principal ways in which the government can be said to be constitutionally limited: in a jurisdictional sense, limited in the objectives it may pursue; in a procedural sense, limited in the ways it may decide policy questions and adjudicate disputes involving individuals; and limited by the requirement that its policies be compatible with individual rights.

The first sense of limited government refers to the ENUMERATION OF POWERS through which the Constitution outlines the jurisdictional concerns of the national government. This method of limitation has failed. The enumeration of powers is now a dead letter as a result of the nationalizing tendencies of American economic and social life, which the Supreme Court has accommodated through its interpretations of the TENTH AMENDMENT, the COMMERCE CLAUSE, the NECESSARY AND PROPER CLAUSE, the GENERAL WELFARE CLAUSE, and the CIVIL WAR amendments.

As for the second, or procedural, mode of limitation (structural limitations on policy formation and due process limitations on adjudication), some contemporary constitutionalists regard it as the only philosophically acceptable variety. These theorists tend to follow a value-neutral conception of constitutional democracy which is both at odds with citizen presuppositions about the goals of politics and supported by no compelling historical or philosophic argument. Respect for procedural ideas like SEPARATION OF POWERS, representative government, and DUE PROCESS is indeed central to American constitutionalism, but not because that tradition is indifferent to different ways of life and the ends of government. A traditional respect for procedure is rather an aspect of the Enlightenment commitment to liberal toleration or reasoning in human affairs, as opposed especially to precipitous decision and government in the name of divine authority. The value-neutral variety of proceduralism is inconsistent with this tradition because it denies the possibility of rationally defending the practices, conditions, and attitudes conducive to reasoning itself.

Americans typically associate limited government first and foremost with constitutional rights and JUDICIAL REVIEW. "By a limited constitution," wrote ALEXANDER HAMILTON in THE FEDERALIST #78, "I understand one which contains certain specified exceptions to the legislative au-

thority; such, for instance, as that it shall pass no BILLS OF ATTAINDER, no EX POST FACTO laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."

Yet courts are also agencies of government, and groups throughout American history have opposed judicial protection of some rights as the least majoritarian and therefore least legitimate subordination of other rights. Some theorists believe society has a way of arriving at pragmatic adjustments of conflicting views (lax enforcement of laws against CONTRACEPTION and ABORTION, for example) that cannot be reconciled at the level of moral principle. They regard judicial intervention in behalf of those persons who brook no compromise as divisive to the point of undermining everyone's right to live in a peaceful society. Many citizens seem profoundly bitter over their loss of freedom to live and raise their children in communities that exclude sexually suggestive entertainment, political deviants, and others, including members of other races and religions. Their criticism of the judiciary's protection of rights suggests a community oriented understanding of rights, for they themselves want the right to be members of communities that use official power to exclude some kinds of people as equals or to exclude them altogether. This community-oriented conception is highly visible in the demands of some religious groups for organized prayer in public schools despite offense to others.

But a community orientation of sorts is also implicit in demands for public recognition of the RIGHTS OF PRIVACY like those involving property, sexual freedom, and conscience. In effect, persons who demand these rights seek the right to live in communities that honor the rights demanded. Rights to property, for example, are hardly secure if the general public is unwilling to exercise the restraint and undertake the sacrifices that honoring such rights entails. It is therefore not surprising that defenders of property should treat "free enterprise" as an article of the community's gospel and special identity. For if any rights are genuine exemptions from LEGISLATIVE POWER, their enjoyment must not be left to prudential calculation. And if the government has no authority to invade them, those rights must at once be grounded in higher authority and be essential to the nation's identity in a way that it would make no sense to violate them for the sake of saving the nation. The religious right wing of American politics has a point in contending that "secular humanism" is itself something of a religious imposition on fundamentalists, who are thereby forced to live among what they regard as evil practices. Maxims of liberal toleration are no answer to these people because liberals themselves cannot tolerate being governed by thoroughly dedicated fundamentalists—those who would live every aspect of their lives as they think they should, even if that should mean employing coercive government against those who would stop them. Religiously committed folk can be excused for believing that liberalism tolerates illiberalism only by degrading it to a form of play-acting to be confined to churches, the home, or wherever one goes for respite from the serious world of education, work, and government. Defending liberalism thus requires an argument (eventually a persuasive one) that liberalism is a better way of life—that, wherever feasible, it is better for human beings to have a liberal outlook and live in secular communities that tolerate illiberal speech only, not action.

Deepening ideological divisions in American life indicate that constitutional rights can place real limits on government only where public morality favors honoring rights. Hamilton said as much in *The Federalist* #84 where he criticized naïve reliance on BILLS OF RIGHTS to protect the rights themselves. "[W]hatever fine declarations may be inserted in any constitution," he said, the security of rights "must altogether depend on public opinion, and on the general spirit of the people and of the government." It follows that governments that would honor rights effectively should work for the social and economic conditions and attitudes that are favorable to honoring rights. If rights are to remain effective limits on government, the ends of government will have to include the virtue of its citizens. Limited government in a modern sense will have to converge toward limited government in an ancient sense.

SOTIRIOS A. BARBER
(1986)

(SEE ALSO: *Checks and Balances; Unwritten Constitution.*)

Bibliography

BARBER, SOTIRIOS A. 1984 *On What the Constitution Means.* Baltimore: Johns Hopkins University Press.

BERNS, WALTER 1982 Judicial Review and the Rights and Laws of Nature. *Supreme Court Review* 1982:49–83.

CORWIN, EDWARD S. 1928 The "Higher Law" Background of American Constitutional Law. *Harvard Law Review* 42:149–365.

DWORKIN, RONALD 1981 The Forum of Principle. *New York University Law Review* 56:469–518.

PURCELL, EDWARD A., JR. 1973 *The Crisis of Democratic Theory.* Lexington: University Press of Kentucky.

## LINCOLN, ABRAHAM
(1809–1865)

Abraham Lincoln of Illinois served as President of the United States during the nation's greatest crisis, the CIVIL WAR. He had previously represented Illinois in the HOUSE

OF REPRESENTATIVES for a single term (1847–1849), during which he introduced the SPOT RESOLUTIONS, implicitly critical of President JAMES K. POLK's administration of the Mexican War, and supported the WILMOT PROVISO, which would have banned slavery from the territory acquired in that war. Lincoln rose to national prominence opposing the policies of Senator STEPHEN A. DOUGLAS, especially Douglas's KANSAS-NEBRASKA ACT, which extended SLAVERY IN THE TERRITORIES on a local-option basis. In 1856 he joined the fledgling Republican party. Lincoln opposed Douglas's reelection to the Senate in 1858, and the two candidates toured the state together, publicly debating the issues of slavery, POPULAR SOVEREIGNTY, and CONSTITUTIONALISM. During the LINCOLN-DOUGLAS DEBATES, Lincoln severely criticized Chief Justice ROGER B. TANEY's decision in DRED SCOTT V. SANDFORD (1857) as a betrayal of the principles embodied in the DECLARATION OF INDEPENDENCE.

Lincoln's election to the presidency in 1860 triggered the long-impending SECESSION of several slaveholding southern states. Lincoln's presidency was devoted to saving the Union, which meant, in his mind, the rededication of the nation to the principles of the Declaration of Independence, and especially to the proposition that all men are created equal. This work of saving the Union, tragically cut short by an assassin's bullet, was Lincoln's great contribution to American constitutionalism.

In the Lincoln Memorial, directly behind the statue of the Great Emancipator, these words are inscribed:

> In this temple
> as in the hearts of the people
> for whom he saved the Union
> the memory of Abraham Lincoln
> is enshrined forever.

Lincoln did indeed save the Union. But the Union Lincoln saved was older than the Constitution; the Constitution was intended to form a "more perfect Union." When Lincoln began the Gettysburg Address with the magisterial "Fourscore and seven years ago . . ." he intended his listeners to understand that the birth date of the nation was 1776, not 1787, and that the principles of "government of the people, by the people, for the people" were those of the Declaration of Independence. The Constitution was intended to implement those principles more perfectly than had been done by the ARTICLES OF CONFEDERATION. Lincoln at Gettysburg also intended his listeners—and the world—to know that there would be "a new birth of freedom" that would be accomplished by the EMANCIPATION PROCLAMATION, followed, as he intended that it would be, by the THIRTEENTH AMENDMENT. (We may be confident that, had he lived, Lincoln would also have given his support to the FOURTEENTH and FIFTEENTH AMENDMENTS, as part of that same "new birth.")

To understand the Constitution as Abraham Lincoln did must mean, primarily and essentially, to understand the Constitution as an expression of the principles of the Declaration. To do this is to separate the interpretation of the Constitution from all forms of legal positivism, historicism, and moral relativism, that is to say, from all those forms of interpretation that are dominant today in the law schools, universities, and courts of the nation. For, contrary to Lincoln's expectations, his words at Gettysburg have been greatly noted and long remembered: it is their meaning that has been forgotten.

Lincoln did indeed save the Union. At the time of his inauguration, March 4, 1861, seven states had already seceded and joined together to form an independent government called the Confederate States of America. JAMES BUCHANAN, the outgoing President, had been confronted with the SOUTH CAROLINA ORDINANCE OF SECESSION on December 20, 1860, six weeks after Lincoln's election, and more than ten weeks before his inauguration. Buchanan declared secession to be unconstitutional, but coupled his denunciation of secession with a much harsher denunciation of abolitionism. He denied, moreover, that he as President could take any lawful action against secession. Whatever action the federal government ought to take, he lamely concluded, must originate in laws enacted by Congress. But Buchanan had nothing to suggest to Congress, and Congress, at this juncture—the representatives of eight slave states remaining on March 4, 1861—was as divided as the nation itself. No congressional majority could have been formed then for decisive action against the rebellion. Lincoln waited until Congress had gone home, and cannily maneuvered the South Carolinians into firing those shots against Fort Sumter that electrified the North and consolidated public opinion behind his leadership. He then issued his call for 75,000 troops, and set on foot those measures that eventually resulted in the forcible subjugation of the rebellion.

Lincoln insisted that the Constitution ought not to be construed in such a way as to deny to the government any power necessary for carrying out the Constitution's commands. The Constitution required the President to take an oath "to preserve, protect, and defend the Constitution," and made it the duty of the President to "take care that the laws be faithfully executed." Lincoln held it to be absurd to suppose that it was unlawful for him to do those things that were indispensably necessary to preserve the Constitution by enforcing the execution of the laws. Even an action that might otherwise be unlawful, he said, might become lawful, by becoming thus indispensable. Lincoln never conceded that any of his wartime actions were un-

constitutional. But supposing that one of them had been so, he asked, ". . . are all the laws but one to go unexecuted, and the Government itself go to pieces, lest that one be violated?"

Lincoln saved the Union. He prevented the United States from being divided into two or more separate confederacies. It was entirely likely that the North American continent would have been "Balkanized" had the initial secession succeeded. Like the Balkan states, the petty American powers would have formed alliances with greater powers, and North America would have become a cockpit of world conflict. All the evils that the more perfect Union was designed to prevent, those particularly described in the first ten numbers of THE FEDERALIST—large standing armies, heavy taxation, the restriction of individual liberties characteristic of an armed camp—would have come to pass. Civil and religious liberty, the supreme ends of republican government, would, with the failure of the American experiment, "perish from the earth." The "central idea of secession," Lincoln held, "is the essence of anarchy." A constitutional majority, checked and limited, and able to change easily with deliberate changes in public opinion and sentiment, "is the only true sovereign of a free people." To reject majority rule is to turn necessarily either to anarchy or to despotism.

The Lincoln Memorial says that Lincoln saved the Union for "the people." At the outset of the war Lincoln said, "This is essentially a people's contest." Today, when the foulest despotisms call themselves "people's republics," it requires a conscious effort to restore to our minds the intrinsic connection in Lincoln's mind between the cause of the people and fidelity to individual liberty under the rule of law in a constitutional regime. "Our adversaries," Lincoln said, at the outset of the war, "have adopted some declarations of independence, in which, unlike the good old one, penned by THOMAS JEFFERSON, they omit the words 'all men are created equal.' Why? They have adopted a temporary national constitution, in the preamble of which they omit, 'We the People,' and substitute 'We, the deputies of the sovereign and independent States.' Why? Why this deliberate pressing out of view the rights of men and the authority of the people?" Here is the core constitutional question of the Civil War. Lincoln was elected on a platform that called for the recognition of STATES' RIGHTS, "and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively." Such rights, the Republican platform asserted, and Lincoln repeated in his inaugural, were "essential to that balance of power on which the perfection and endurance of our political fabric depend." For Lincoln, however, the rights of the states were themselves the political expression of the rights of the people, which in turn were the political expression of the rights of men. The proposition that embodied the rights of men was that to which—as he said at Gettysburg—the nation was dedicated at its conception. The Civil War was a result of the fact that the idea of states' rights, and of popular sovereignty, had become divorced, in the public mind of the Confederacy, from the original doctrine of equality in the Declaration of Independence.

The question posed by the Civil War, Lincoln said, was addressed to "the whole family of man." That Lincoln conceived of mankind as in some sense a "family" was of course but another expression of his belief in human equality. Lincoln's question was essentially the same as that addressed by ALEXANDER HAMILTON in *The Federalist* #1: "whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions upon accident and force." The election of Abraham Lincoln was a deliberate decision of the American people, in accordance with the canons of reflection and choice embodied in the Constitution. It remained to be seen therefore whether, in Lincoln's words, "discontented individuals, too few in numbers to control administration according to organic law [can arbitrarily] break up their government, and thus practically put an end to free government upon the earth." But because the leaders of the rebellion "knew their people possessed as much of moral sense, as much devotion to law and order . . . as any other civilized and patriotic people," it was necessary for them to invent "an ingenious sophism which, if conceded, was followed by perfectly logical steps . . . to the complete destruction of the Union. The sophism itself is, that any State of the Union may, consistently with the national Constitution . . . withdraw from the Union without the consent of the Union or of any other State."

The secessionists claimed that membership in the Union resulted from the acts by which the states had ratified the Constitution and that they might therefore withdraw by the same procedure. The Constitution itself, according to this theory, had no higher authority than the will of the people of the several states, acting in their constituent capacity.

In contradiction of this position, Lincoln presented a historical argument, that the Union was older than the states, that the rights of the states were only rights within the Union, and never rights outside of it or independent of it. Although the Declaration of Independence speaks, in its next to last sentence, of all those "Acts and Things which Independent States may of right do," none of them were ever done by any of the United States independently of each other. This argument, however, is not as conclusive as that other argument, independent of history, which fol-

lows from that "abstract truth applicable to all men and all times," to which, at Gettysburg, Lincoln said the nation had been dedicated. This argument Lincoln had been developing throughout his mature life, and is the ground of his constitutionalism, as indeed it is of all his moral and political thought. According to Lincoln, the Civil War was a "people's contest" because the rights of the states, and of the United States, were the rights of the people, either severally or generally. But what are the rights of the people? They are the rights with which the Creator has equally endowed all men—all human beings. These are the unalienable rights, among which are the rights to life, to liberty, and to the pursuit of happiness. Since all men have these rights equally, no man can rule another rightfully except with that other man's consent. Nothing better illuminates the division within the American mind that brought about the Civil War than this passage from a speech in reply to Douglas in 1854: "Judge Douglas," said Lincoln, "frequently, with bitter irony and sarcasm, paraphrases our argument by saying: 'The white people of Nebraska are good enough to govern themselves, *but they are not good enough to govern a few miserable negroes*!' Well, I doubt not that the people of Nebraska are, and will continue to be as good as the average of people elsewhere. I do not say the contrary. What I do say is, that no man is good enough to govern another man, *without that other's consent*. I say this is the leading principle—the sheet anchor of American republicanism." Slavery, Lincoln observed, is a violation of this principle, not only because "the Master . . . governs the slave without his consent; but he governs him by a set of rules altogether different from those which he prescribes for himself." Republicanism, for Lincoln, meant that those who live under the law share equally in the making of the law they live under, and that those who make the law live equally under the law that they make. Here in essence is the necessary relationship between equality, consent, majority rule, and the rule of law in Lincoln's thought. Here in essence is what unites the principles of the Declaration with the forms of the Constitution. Here is what enables us to distinguish the principles of the Constitution from the compromises of the Constitution (in particular, the compromises with slavery). Here is the essence of Lincoln's understanding of why the argument against slavery and the argument for free government are distinguishable but inseparable aspects of one and the same argument.

The people are collectively sovereign because the people individually, by their consent, have transferred the exercise of certain of their unalienable rights—but not the rights themselves—to civil society. They have done so, the better "to secure these rights." A just government will act by the majority, under a constitution devised to assure with a reasonable likelihood that the action of the majority will fulfill its purpose, which is the equal protection of the indefeasible and equal rights of all. The majority is the surrogate of the community, which is to say, of each individual. Majority rule is not merely obliged to respect minority rights; in the final analysis it has no higher purpose than to secure the rights of that indefeasible minority, the individual. The sovereignty of the people—or of the states—cannot be exerted morally or lawfully for any purpose inconsistent with the security of those original and unalienable rights. Although Lincoln denied any constitutional right to secede, he did not deny a revolutionary right, which might be exercised justly if "by the mere force of numbers, a majority should deprive a minority of any clearly written constitutional right."

In his inaugural address Lincoln repeated his oft-repeated declaration that he had no purpose, "directly or indirectly, to interfere with slavery where it exists." He had, he said, "no lawful right to do so" and he had "no inclination to do so." This, he held, was implied constitutional law, but he was willing to make it express, by an amendment to the Constitution. Lincoln would not, however, agree to any measures that might have as their consequence the extension of slavery to new lands where it did not already exist. As he wrote to his old friend ALEXANDER H. STEPHENS in 1861, "You think slavery is *right*, and ought to be extended; while we think it is *wrong* and ought to be restricted. That I suppose is the rub. It certainly is the only substantial difference between us." Many complex and elaborate explanations have been made of the causes of the Civil War. Lincoln's is at once the shortest and the most profound.

The South claimed the right to extend slavery on the ground that it was a violation of the fundamental equality of the states to allow the citizens of one state or section to emigrate into a federal TERRITORY with their property, while prohibiting the citizens of any other state or section from emigrating into that same federal territory with their property. Lincoln dealt with this argument in 1854—in his first great antislavery speech—as follows: "Equal justice to the South, it is said, requires us to consent to the extending of slavery to new countries. That is to say, inasmuch as you do not object to my taking my hog to Nebraska, therefore I must not object to you taking your slave. Now, I admit this is perfectly logical, if there is no difference between hogs and negroes."

Southerners had come to deny the essential difference between hogs and Negroes, in part because of the enormous economic stake that they had come to have in slave labor, because of the enormous burgeoning of the cotton economy. This was one cause of the change in their opinion of slavery, from a necessary evil to a positive good. Another may be seen in the following from one of Lincoln's 1859 speeches. Douglas, Lincoln said, had "de-

clared that while in all contests between the negro and the white man, he was for the white man . . . that in all questions between the negro and the crocodile he was for the negro." Lincoln interpreted Douglas's statements as "a sort of proposition in proportion, which may be stated thus: As the negro is to the white man, so is the crocodile to the negro; and as the negro may rightfully treat the crocodile as a beast or reptile, so the white man may rightfully treat the negro as a beast or reptile." Douglas's references to "contests" between negroes and crocodiles, and between negroes and whites, reflected popular ideas of "the survival of the fittest" in the evolutionary process. Lincoln, in commenting on these remarks of Douglas, also went out of his way to deny the necessity of any such "contests." Alexander Stephens, who was inaugurated vice-president of the Confederacy in February 1861, conceded that the United States had been founded upon the proposition "that all men are created equal," and that that proposition had indeed (contrary to what Chief Justice Roger B. Taney had said in *Dred Scott v. Sandford*) included black men as well as white. But, Stephens went on, the Confederacy was "founded [and] its corner stone rests upon . . . the great truth that the negro is not the equal to the white man. That slavery—the subordination to the superior race, is his natural and normal condition." "This our new Government," Stephens added, "is the first in the history of the world, based upon this great physical and moral truth." The doctrine of racial superiority became a vital element in the conviction that slavery was a positive good. Without the conviction and the doctrine there could not have been a belief in the South of a constitutional right to extend slavery. That science, in one or another version of evolution, had established the inequality of the races, became the ground for the rejection of the doctrine that all men are created equal.

In fact, the doctrine of racial inequality involves the denial that there is any natural right, or that there are any "laws of nature and of nature's God." And this is to deny that constitutionalism and the RULE OF LAW rest upon anything besides blind preference. Justice would then be nothing but the interest of the stronger. Abraham Lincoln's speeches, before and during the Civil War, are the supreme repository for that wisdom that teaches us that we as moral beings ought to live under the rule of law. According to this wisdom, it is also in our interest to do so, because upon our recognition of the humanity of other men depends the recognition of our own humanity. And upon the recognition of our own humanity—by ourselves and by others—depends the possibility of our own happiness as human beings. Surely Lincoln was right in saying that the source of all moral principle—no less than of all political and constitutional right—was the proposition "that all men are created equal."

It is doubtful that the history of the world records another life displaying an integrity of speech and deed equal to that of Abraham Lincoln. With an almost perfect understanding of the theoretical ground of free, constitutional government was united an unflinching courage, and a practical wisdom, in doing what had to be done, lest popular government "perish from the earth." Whether, in the third century of the Constitution, Lincoln's legacy will survive in deed depends upon whether we can recover anything of his character and intelligence. But whether or not this republic lasts, as long as the world lasts Lincoln's speeches and deeds will remain as an emblem and a beacon of humanity to all men everywhere who may be struggling out of the dark valley of despotism and aspiring to the broad, sunlit uplands of freedom.

HARRY V. JAFFA
(1986)

Bibliography

BELZ, HERMAN 1969 *Reconstructing the Union.* Ithaca, N.Y.: Cornell University Press.

FEHRENBACHER, DON E. 1978 *The Dred Scott Case: Its Significance in American Law and Politics.* New York: Oxford University Press.

——— 1979 Lincoln and the Constitution. Pages 121–166 in Cullom Davis, ed., *The Public and Private Lincoln: Contemporary Perspectives.* Carbondale: Southern Illinois University Press.

JAFFA, HARRY V. (1952) 1983 *Crisis of the House Divided: An Interpretation of the Lincoln-Douglas Debates.* Chicago: University of Chicago Press.

NEVINS, ALAN 1950 *The Emergence of Lincoln.* 2 Vols. New York: Scribner's.

RANDALL, JAMES G. 1951 *Constitutional Problems under Lincoln,* rev. ed. Urbana: University of Illinois Press.

## LINCOLN, LEVI
(1749–1820)

Graduated from Harvard University and trained in law, Levi Lincoln fought as a Minuteman in the AMERICAN REVOLUTION and subsequently held several offices in the revolutionary government of Massachusetts. In 1780 he was a delegate to the convention that drafted the state constitution. After the Revolution he became a leader of the Massachusetts bar as well as a member of the legislature.

In 1781, Lincoln successfully argued in *Quock Walker's Case* (*Caldwell v. Jennison*) that the passage in the MASSACHUSETTS CONSTITUTION declaring that "all men are born free and equal" prohibited any legal recognition of slavery in the state. The decision effectively abolished slavery in Massachusetts.

Having early become a leader of the Republican party,

Lincoln served from 1801 to 1805 as attorney general of the United States in the first administration of THOMAS JEFFERSON. In 1811 he declined, on the ground of failing eyesight, President JAMES MADISON's offer of appointment as an associate Justice of the Supreme Court.

DENNIS J. MAHONEY
(1986)

## LINCOLN AND CONSTITUTIONAL THEORY

Throughout his political career, most notably in the performance of his duties as chief executive during the CIVIL WAR, ABRAHAM LINCOLN was required to construe the Constitution. Three of Lincoln's constitutional constructions have assumed fundamental significance in American CONSTITUTIONAL THEORY. Basic to the decision to resist disruption of the Union, these constructions were presented in Lincoln's first inaugural address, on March 4, 1861.

The first of Lincoln's constitutional constructions denied a monopoly of CONSTITUTIONAL INTERPRETATION to the judicial branch and asserted the authority of the political branches of the government to determine the meaning of the Constitution. Discussing the nature of a liberal REPUBLICAN FORM OF GOVERNMENT, Lincoln considered the proposition that constitutional questions are to be decided by the Supreme Court. He said that constitutional decisions of the Court were binding on the parties to a suit as to the object of that suit, and were entitled to very high respect and consideration by the other departments of government in parallel cases. Nevertheless, "if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by the decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent, practically resigned their government, into the hands of that eminent tribunal." Reiterating his criticism of the DRED SCOTT V. SANDFORD (1857) decision, Lincoln affirmed the SEPARATION OF POWERS and the POLITICAL QUESTION DOCTRINE as essential elements in constitutional interpretation.

Lincoln's second constitutional construction asserted the necessity of majority rule as a fundamental principle in liberal republican government. Rejecting the Southern view that the right of SECESSION was the basic principle in the American political tradition, Lincoln said: "A majority, held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people." Stating that unanimity was impossible and that the rule of a minority was not legitimate as a permanent arrangement, Lincoln declared the majority principle to be the only alternative to anarchy or despotism. In deciding constitutional controversies, he reasoned: "If the minority will not acquiesce, the majority must, or the government must cease." And if "a minority, in such case, will secede rather than acquiesce, they make a precedent which, in turn, will divide and ruin them; for a minority of their own will secede from them, whenever a majority refuses to be controlled by such minority."

The third theoretically significant constitutional construction, providing further reason for rejecting secession as an American constitutional principle, concerned the nature of the Union and the Constitution. Claiming authority to prevent the disruption of the Union, Lincoln said: "I hold, that in contemplation of universal law, and of the Constitution, the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper, ever had a provision in its organic law for its own termination." Lincoln meant that the federal government, in essence, was the sovereign government of a nation and national people, not the coordinating authority or agent of "an association of States in the nature of a contract merely." Like all national governments, the government of the Union-nation was intended to last indefinitely. By the principles of political science and the law of nations, it possessed rightful authority to maintain its own existence against disintegration, as a means to the end of maintaining the purposes of the nation and of the Constitution by which the establishment of the government was ordained.

Lincoln's constitutional constructions crystallized earlier constitutional arguments and had a formative effect on constitutional law and theory for the indefinite future. Politically controversial, they were integral to practical decisions aimed at upholding the ends of the Constitution. Lincoln did not conceive of constitutional theory as an activity aimed at developing abstract normative propositions based on principles of moral philosophy external to the existing constitutional order.

HERMAN BELZ
(2000)

(SEE ALSO: *Nonjudicial Interpretation of the Constitution.*)

Bibliography

ABBOT, PHILIP 1996 The Lincoln Propositions and the Spirit of Secession. *Studies in American Political Development* 10: 103–129.

BELZ, HERMAN 1998 *Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era.* New York: Fordham University Press.

DIETZE, GOTTFRIED 1968 *America's Political Dilemma: From*

*Limited to Unlimited Democracy.* Baltimore, Maryland: Johns Hopkins Press.

## LINCOLN-DOUGLAS DEBATES (1858)

STEPHEN A. DOUGLAS, running for reelection to the United States Senate, agreed to debate his Republican challenger, ABRAHAM LINCOLN, at seven joint appearances in rural Illinois during the summer of 1858. The resulting discourse, promptly reprinted in full in newspapers, produced a classic survey of alternatives for the future of SLAVERY and black people in the American constitutional system.

Douglas defended the concept of territorial SOVEREIGNTY: let the people of the territories, rather than Congress, decide the future of slavery there. He stated that he "cared not whether slavery be voted up or voted down" and accused Lincoln of advocating racial equality. Lincoln emphasized the incompatibility of Douglas's position with the decision in DRED SCOTT V. SANDFORD (1857), in which Chief Justice ROGER B. TANEY had stated that a territorial legislature lacked power to exclude slavery. Douglas responded with the "FREEPORT DOCTRINE": a territorial legislature could exclude slavery simply by not enacting legislation supporting it. Lincoln hinted at a conspiracy involving Taney, Douglas, and the Pierce and BUCHANAN administrations to force slavery into the free states, an allegation Douglas indignantly denied by reasserting the power of each state to fully control its domestic policy.

WILLIAM M. WIECEK
(1986)

Bibliography

JAFFA, HARRY V. 1959 *Crisis of the House Divided: An Interpretation of the Lincoln-Douglas Debates.* Garden City, N.Y.: Doubleday.

## LINCOLN'S PLAN OF RECONSTRUCTION (1863)

By 1863, President ABRAHAM LINCOLN adopted policies that affected RECONSTRUCTION in some of the seceded states. He appointed military governors in Louisiana, Tennessee, and North Carolina and recognized the provisional government of Virginia. The EMANCIPATION PROCLAMATION took effect on January 1, 1863.

Lincoln issued his Proclamation of Amnesty and Reconstruction on December 8, 1863. In it, he offered AMNESTY to all participants in the rebellion, except high-ranking military and civilian officers. He announced his intention to appoint a military governor in each occupied state and to require each occupied state to accept all extant and future policy concerning SLAVERY and emancipation. But otherwise Lincoln's policy was conservative. It assumed preservation of the states' boundaries, constitutions, and laws (except those relating to slavery) and required neither black suffrage nor confiscation. Lincoln proposed to recreate an enfranchised citizenry in each state by requiring all persons to take an oath of future loyalty and support of the laws. When ten percent of a state's 1860 voters had taken the oath, they could reorganize the state's government.

The President's authority to recreate loyal state governments derived from several provisions of Article II, including his powers as COMMANDER-IN-CHIEF, his PARDONING POWER, and his duty to see to the faithful execution of the laws. But, as with his earlier actions in calling for volunteers and suspending HABEAS CORPUS, Lincoln had to make the most of a document that had not contemplated SECESSION, CIVIL WAR, or Reconstruction.

Though Arkansas and Louisiana complied with Lincoln's terms, Congress refused to seat their representatives. Lincoln and Congress clashed over the more stringent congressional plan of Reconstruction embodied in the WADE-DAVIS BILL of 1864. President ANDREW JOHNSON later pursued Reconstruction policies similar to Lincoln's.

WILLIAM M. WIECEK
(1986)

Bibliography

BELZ, HERMAN 1969 *Reconstructing the Union: Theory and Policy During the Civil War.* Ithaca, N.Y.: Cornell University Press.

## LINE-ITEM VETO

The Constitution permits the President to sign or veto a bill as a whole. He may not pick and choose among the parts of a bill, signing some portions while vetoing others. Although most governors have VETO POWER over individual items, constitutional amendments to grant similar authority to the President have thus far been unsuccessful.

The Framers were familiar with the powers exerted by the British Board of Trade, which routinely reviewed thousands of acts submitted by the mainland of American colonies and disallowed some "in whole or in part." These disapprovals were more similar to JUDICIAL REVIEW than to an item veto, in the sense that vetoes prevent proposals from taking effect, while the board's actions came after the colonial measures were law. In any event, the Framers did not find the British precedent appealing for the Constitution being drafted.

The item veto did not materialize until the CONFEDERATE CONSTITUTION of 1861. Since that time, forty-three states have adopted some variation of the item veto for their governors. In 1873 President ULYSSES S. GRANT requested an item veto for the national executive, and at least a dozen Presidents have made similar appeals.

The fact that so many governors have the item veto is not a sufficient justification for giving the same power to the President. The federal-state analogy suffers from a number of deficiencies. The item veto exercised by governors is inseparable from a constitutional design that differs dramatically from the design of the federal Constitution, especially in the distribution of executive and legislative powers. A much greater bias against LEGISLATIVE POWER operates at the state level. State budget procedures also differ substantially from federal procedures. Appropriation bills in the state are structured to facilitate item vetoes by governors, but appropriation bills passed by Congress contain few items. Money is provided in large, lump-sum accounts.

Presidents regularly claim that with item-veto power they could carve out the "boondoggles and pork" that Congress supposedly includes in bills. However, Congress does not specify "pork barrel" projects in the bills presented to the President. Particular projects are identified in the conference report that accompanies a bill. These reports, which are not submitted to the President for his signature or veto, explain to executive departments and agencies how lump-sum funds are to be spent. The President cannot veto items, because there are no items to veto.

Congress could pattern itself after the states, taking the details from conference reports and inserting them into public laws. The results would not be attractive for agency officials, who like the latitude and flexibility of lump-sum funding. They do not want details, or items, locked into public law.

During the administration of RONALD REAGAN, the editorial page of the *Wall Street Journal* argued that the President already had item-veto authority. The theory is that the Framers anticipated that each discrete subject would be placed in a separate bill and presented to the President, giving him maximum discretion in using the veto power. Because Congress currently passes omnibus bills—including continuing funding and authorization for various programs—it is argued that an effective veto requires a power in the President to exercise item veto within these massive bills.

The historical record does not support this theory's view of the Framers' expectations. The first appropriations bill passed in 1789 was an omnibus measure, containing all funds for civilian and military programs. The same kinds of bills were enacted in 1790 and 1791. Evidently the members of the First Congres, which included many of the Framers who had participated in the CONSTITUTIONAL CONVENTION OF 1787, did not believe that Congress should pass seperate appropriations bills for every discrete program or activity.

A presidential item veto would have little effect on reducing federal deficits. Most of the federal budget is "uncontrollable" because of fixed costs to pay interest on the federal deficit, provide ENTITLEMENTS (such as SOCIAL SECURITY) for individuals, and reimburse contractors for work already done. Those appropriations could not be vetoed. However, an item veto could greatly increase EXECUTIVE POWER. Presidents and their assistants could use the threat of an item veto to coerce legislators into supporting presidential nominees, treaties, legislative goals, and spending priorities.

LOUIS FISHER
(1992)

(SEE ALSO: *Budget Process.*)

Bibliography

FEIN, BRUCE and REYNOLDS, WILLIAM BRADFORD 1989 Wishful Thinking on a Line-Item Veto. *Legal Times*, November 13, pp. 20, 24.

FISHER, LOUIS and DEVINS, NEAL 1986 How Successfully Can the States' Item Veto Be Transferred to the President? *Georgetown Law Journal* 75:159–197.

## LINE-ITEM VETO
### (Update)

The Line Item Veto Act of 1996 authorized the President to cancel in whole any dollar amount of discretionary budget authority (appropriations), any item of new direct spending (entitlements), and any limited tax benefit. Unlike the item veto available to forty-three governors, this measure did not allow the President to cancel items in bills presented to him. Only after signing a bill into law could the President exercise the cancellation authority, and he had to do that within five days. Congress could pass a bill disapproving the cancellations, but the President could veto that bill. Congress would then need a two-thirds majority in each chamber to override the veto.

President WILLIAM J. CLINTON canceled eighty-two items, all of them appearing in appropriations bills except for one item of direct spending and two items of limited tax benefits. The seventy-nine appropriation items totaled $477 million, a tiny percentage of the $526 billion appropriated in those bills. After Congress successfully reversed the cancellation of thirty-eight military construction projects ($287 million), the net reduction in appropriations

was only $190 million. The three nonappropriation items amounted to $225 million, but the administration conceded that Clinton lacked authority to cancel one involving the federal retirement system.

Senator Robert C. Byrd and several colleagues challenged the constitutionality of the Line Item Veto Act. In *Raines v. Byrd* (1997), the Supreme Court ruled that the legislators lacked STANDING to bring the suit. A year later, the Court accepted a case from private parties who had been denied federal assistance because of Clinton's cancellations. In *Clinton v. City of New York* (1998), the Court held that the act violated the lawmaking procedures established by the Constitution, especially the PRESENTMENT clause that requires that all bills and resolutions be presented to the President for his signature or veto. Congress, said the Court, could not authorize the President to repeal parts of a statute.

Writing for a 6–3 majority, Justice JOHN PAUL STEVENS acknowledged that Congress in previous years had authorized the President to suspend certain statutory provisions in the field of international trade. He argued that those statutes "all relate to foreign trade," suggesting that the issue was not merely procedural (presentment clause) but possibly substantive as well (foreign versus domestic affairs).

Stevens said that if Congress wanted to give the President item-veto authority, it would have to act by constitutional amendment, not by statute. However, several of the dissenters identified line-item options that would have no problems under the presentment clause. Justice ANTONIN SCALIA pointed out that Congress could direct the President to spend "not in excess" of certain amounts, allowing the President not to spend anything. In a separate dissent, Justice STEPHEN G. BREYER said that Congress could direct the President to carry out certain programs unless he issued a certification that the program not take effect. In 1995, the U.S. SENATE passed a version of line-item authority that would not raise presentment problems either. Under a procedure called "separate enrollment," Congress could break the large appropriations bills into individual items and present each one to the President. Thus, despite the Court's opinion, the item-veto issue might return under a different name.

LOUIS FISHER
(2000)

(SEE ALSO: *Veto Power.*)

Bibliography

DEVINS, NEAL E. 1997 In Search of the Lost Chord: Reflections on the 1996 Item Veto Act. *Case Western Reserve Law Review* 47:1605–1642.

FISHER, LOUIS 1997 Line Item Veto Act of 1996: Heads-up from the States. *Public Budgeting & Finance* 17:3–17.

JOST, KENNETH 1997 Line-Item Veto: Can It Control Wasteful Federal Spending? *CQ Researcher* 7:529–552.

JOYCE, PHILIP G. and REISCHAUER, ROBERT D. 1997 The Federal Line-Item Veto: What Is It and What Will It Do? *Public Administration Review* 57:95–104.

## LINEUP

In opinions whose subtext is unease about eyewitness identification procedures and testimony, the Supreme Court ruled in 1967 that a suspect is entitled to the presence of counsel at a lineup in order to preserve a FAIR TRIAL at which the witnesses can be meaningfully cross-examined. The opinions were delivered in the cases of UNITED STATES V. WADE and *Gilbert v. California.*

If a lineup is conducted without counsel, testimony about the lineup identification is automatically excluded. The question then becomes whether the witness who attended the illegally conducted lineup should be allowed to identify the witness at trial. This question centers on whether the witness could have made the in-court identification without having attended the lineup at which counsel was not present: whether, in other words, the witness had an independent source for the identification.

The lineup cases have generated much litigation and writing, both of a practical and a scholarly sort, about the role of counsel. The Court seemed to envision the attorney as a passive observer who would use what he saw to reconstruct for the fact-finder any unfairness in the lineup procedure. But a lawyer's skills are not necessary for observing, and reconstruction on cross-examination creates the risk that through the knowledge he displays in asking questions a lawyer may become a witness in his own case. Perhaps recognizing that having counsel at lineups was an interim measure and perceiving the analytical difficulties, the Court suggested that other techniques, such as photographing or videotaping lineups, could obviate the need for counsel.

The RIGHT TO COUNSEL at lineups was greatly undercut in *Kirby v. Illinois* (1972), in which the Court held that the right begins only "at or after the initiation of adversary criminal proceedings—whether by way of formal charge, preliminary hearing, INDICTMENT, INFORMATION, or arraignment." Because most lineups are part of the investigative stage of a case and occur before any of the indices of a formal charge, *Kirby* necessarily implied that a lawyer or some other observer was not, in fact, generally required.

Untouched by *Kirby,* however, is the argument, made in *Stovall v. Denno* (1967), that identification procedures may be so "unnecessarily suggestive and conducive to irreparable mistaken identification" as to violate DUE PROCESS OF LAW. An example of a due process violation would

be showing a crime victim only the suspect dressed in clothes like those of the perpetrator when there was time to arrange a proper lineup. Once such a due process violation is proven, the issue shifts to whether it tainted the in-court identification: whether there was "a very substantial likelihood of irreparable mistaken identification." This decision mirrors that of a court in deciding whether a victim can make an in-court identification after attending a lineup where counsel was not present.

The effect of the lineup decisions has been to focus attention on all of the procedures used in pretrial CONFRONTATION of witnesses and suspects and thus to improve the fairness of these previously unobserved, but critically important, occasions.

BARBARA ALLEN BABCOCK
(1986)

Bibliography

LEVY, LEONARD W. 1974 *Against the Law.* Pages 242–258. New York: Harper & Row.

## *LINMARK ASSOCIATES v. WILLINGBORO*
431 U.S. 85 (1977)

Without dissent, the BURGER COURT invalidated a local ordinance prohibiting real estate "For Sale" and "Sold" signs. The ordinance sought to reduce the flight by white homeowners from racially integrated neighborhoods. Although a ban upon all signs for aesthetic purposes might survive a constitutional test, wrote Justice THURGOOD MARSHALL, this ordinance violated the FIRST AMENDMENT because the township had selected a particular message for prohibitions.

MICHAEL E. PARRISH
(1986)

## LISTENERS' RIGHTS

The constitutional commitment to FREEDOM OF SPEECH is in part based on the simple idea that people have a right to say what they want to say without government interference. That is, freedom of speech protects the speaker. Yet the FIRST AMENDMENT themes of self-expression and speaker liberty have been recognized only sporadically in Supreme Court opinions. The more prevalent themes in First Amendment jurisprudence have been audience-oriented, albeit implicitly.

One classic justification of freedom of speech has been based on optimistic assessments about the capacity of the marketplace of ideas to distinguish between the false and the true. The emphasis of this justification is not that speakers have a right to say what they want to say, but that speakers must be free to speak so that the society can find truth, that is, so that listeners can hear and evaluate what is said. Listeners' rights are also strongly implicated by the notion that freedom of speech reflects a commitment to democratic self-government. If citizens are to decide how to respond to public issues, they must hear what others have to say. The listeners' rights emphasis of the self-government perspective is best illustrated by ALEXANDER MEIKLEJOHN's observation, approvingly cited by the Supreme Court in COLUMBIA BROADCASTING SYSTEM V. DEMOCRATIC NATIONAL COMMITTEE (1981): "What is essential is not that everyone shall speak, but that everything worth saying shall be said."

For many years, listeners' rights were protected with nary a listener before the Court. In routine cases, the aggrieved speaker invoked the rights of the listeners. In *Thomas v. Collins* (1945), for example, the Court invalidated an attempted prior restraint at the behest of the speaker, in part because of the rights of others "to hear what he had to say."

Ultimately, listeners were permitted to invoke their own rights without any speakers before the Court. In VIRGINIA STATE BOARD OF PHARMACY V. VIRGINIA CITIZENS CONSUMER COUNCIL (1976), for example, consumers challenged a statute that prohibited pharmacists from advertising the prices of prescription drugs. No pharmacist was before the Court, only potential members of the audience for drug price advertising. The Court recognized the rights of "listener" plaintiffs to sue on their own behalf, observing that the First Amendment gives protection "to the communication, to its source and its recipients both."

LAMONT V. POSTMASTER GENERAL (1965) stands for an even broader principle. There the Court struck down a statute directing the postmaster general not to deliver certain "communist political propaganda" unless the addressee, upon notification, requested its delivery. The Court found this to be "an unconstitutional abridgment of the addressee's rights." Many of the potential senders of this "propaganda" were aliens outside the country who had no First Amendment rights of their own. The Court made this distinction explicit in *Kleindeist v. Mandel* (1972). Thus recipients of messages have a First Amendment right to hear that does not depend upon corresponding rights in the speaker. Such rights may extend to situations where the speaker is unwilling to speak; they are then usually referred to as the RIGHT TO KNOW. On the other hand, an unwilling recipient of a message may have a right not to hear, deriving from notions such as a right of privacy.

STEVEN SHIFFRIN
(1986)

Bibliography

BEVIER, LILLIAN 1980 An Informed Public, an Informing Press: The Search for a Constitutional Principle. *Stanford Law Review* 68:482–517.

EMERSON, THOMAS I. 1976 Legal Foundations of the Right to Know. *Washington University Law Quarterly* 1976:1–24.

## LITERACY TEST

Many states used to require voters to be literate in English. The main constitutional problems raised by this practice arose from the use of literacy tests in southern and border states as a form of RACIAL DISCRIMINATION aimed at denying black citizens their VOTING RIGHTS in violation of the FIFTEENTH AMENDMENT. A typical law conditioned voter registration on the ability to read and write a provision of the state constitution selected by the registrar, to the registrar's "satisfaction." (An Alabama registrar once wrote this explanation for rejecting a black applicant: "Error in spilling.") Some laws also required the applicant to "interpret" or "explain" the constitutional provision, offering even greater opportunities for discriminatory application.

In *Davis v. Schnell* (1949) the Supreme Court summarily affirmed a lower court decision invalidating a requirement that a voter "understand and explain" an article of the United States Constitution; the registrar's discretion was so great that the test was an obvious "device to make racial discrimination easy." However, in *Lassiter v. Northampton County Board of Elections* (1959) the Court unanimously upheld a bare literacy requirement, in the absence of any showing of discriminatory application. This distinction had been suggested by the Court as early as WILLIAMS V. MISSISSIPPI (1898).

Meanwhile, the Court had fought two minor voting rights skirmishes with Oklahoma. That state had required voters to pass a literacy test, but excepted any voter whose ancestors had been registered to vote in 1866. Because of this GRANDFATHER CLAUSE, only black registrants were required to take literacy tests; the Court readily invalidated this law in GUINN V. UNITED STATES (1915). After the decision, Oklahoma adopted a law requiring all new voters to register within a twelve-day period; because virtually all the new voters were black, this onerous procedure fell before the Fifteenth Amendment, which "nullifies sophisticated as well as simple-minded modes of discrimination," in *Lane v. Wilson* (1939).

The death blow to voter literacy tests was delivered not by the Court but by Congress, which approached the question gingerly. The VOTING RIGHTS ACT OF 1965 required certain states and counties to suspend their use of literacy tests for five years. This feature of the law was upheld in SOUTH CAROLINA V. KATZENBACH (1966). In the same year, KATZENBACH V. MORGAN (1966) upheld another feature of the 1965 act requiring states to confer the vote on some citizens who, having been educated in Puerto Rico, were literate in Spanish. In 1970, Congress suspended literacy tests for voting throughout the nation, a provision which the Court upheld in OREGON V. MITCHELL (1970) as a valid exercise of the power to enforce the Fifteenth Amendment. Finally, in 1975, Congress made the ban on literacy tests permanent. In practical terms, literacy tests for voters are a thing of the past, and the Supreme Court is unlikely to confront the *Lassiter* issue again.

KENNETH L. KARST
(1986)

Bibliography

LEIBOWITZ, ARNOLD H. 1969 English Literacy: Legal Sanction for Discrimination. *Notre Dame Lawyer* 45:7–67.

## LITIGATION

See: Public Law Litigation

## LITIGATION STRATEGY

Litigation strategy in constitutional cases is shaped by a single animating principle—a desire to increase the likelihood that a black-robed bureaucrat called a judge will act on behalf of a politically vulnerable applicant to alter or set aside the act of a popularly accountable official. Although the degree of tension that exists between democratic political theory and constitutional litigation varies widely depending on the nature of the case and the attributes of the forum—a police brutality case litigated before an elected state judge poses no threat to democratic decision making; an EQUAL PROTECTION challenge to an act of Congress argued before an appointed, life-tenured, federal judge poses a more direct conflict—constitutional cases generally involve persons who are unable to secure redress through more conventional appeals to the political process. Litigation strategy in constitutional cases is designed to increase the potential that a judicial forum will rule in favor of such politically disfavored plaintiffs.

Sustained constitutional litigation in the United States has involved many sets of litigants, including abolitionists versus slaveholders in the period prior to the CIVIL WAR; radical reconstructionists versus southern revisionists in the period immediately following the Civil War; business CORPORATIONS versus populist reformers during the first third of the twentieth century; and civil libertarians versus majoritarians during the modern era. Although the political goals of the participants have varied widely, the stra-

tegic choices of the contestants have remained remarkably stable, involving five areas: choice of forum; selection of parties; articulation of theories of recovery; choice of tactics; and articulation of antidemocratic apologia.

Choice of forum is the most important strategic decision for a constitutional litigator. In choosing a forum, a constitutional litigator must choose between state and federal court; between a judge and jury; and sometimes between one judge and another. The outcome of many, if not most, constitutional cases turns as much on the wisdom of those strategic choices as on the intrinsic merits of the cases.

Because a constitutional plaintiff is generally seeking to trump a decision that enjoys the imprimatur of democratic decision making, the institutional capacity of the forum to render sustained anti- (or, at least, counter-) majoritarian doctrine is critical to the success of any constitutional litigation campaign. Judges who are themselves elected by the political majority or who are otherwise closely tied to the political process are least likely to enunciate sustained countermajoritarian doctrine. Judges who enjoy maximum political insulation are, on the other hand, in a position to ignore the short-term political consequences of their unpopular decisions. It would, for example, have been impossible for elected judges to have effectively enforced the fugitive slave clause in the pre-Civil War North on behalf of southern slaveholders, or the equal protection clause in the post-World War II South on behalf of black schoolchildren seeking an integrated education.

The search for an insulated judge in constitutional cases has generally led politically vulnerable plaintiffs—whether slaveholders, business corporations, or CIVIL RIGHTS activists—to seek a federal judicial forum, for federal judges are appointed and enjoy life tenure. Much of the procedural infighting that characterizes constitutional litigation revolves around attempts by plaintiffs to force claims into insulated federal forums and by defendants to deflect them to more politically accountable state courts.

The search for an insulated forum has led many constitutional litigators to view juries with suspicion. Not surprisingly, a principal litigation strategy of the abolitionist bar was to choreograph disputes about alleged fugitive slaves before free state juries in the hope that juries would decline to enforce the Fugitive Slave Act. (See FUGITIVE SLAVERY.) Modern civil rights lawyers have experienced analogous difficulty in persuading juries to return verdicts in favor of unpalatable plaintiffs whose rights may have been violated by a popularly responsible official.

Finally, the choice of forum involves a decision about the identity of the judge or, in less polite terms, judge-shopping. The identity of the judge in a constitutional case is extremely important for two reasons, one obvious and one less well understood. The obvious reason for judge-shopping involves the judge's politics. Because constitutional cases often turn on a clash of values and because the urgency with which a judge views a constitutional case may well depend on his or her view of the relative importance of the conflicting values, the same case may be decided differently by equally competent judges with differing value systems.

The less obvious reason why judge-shopping is important in constitutional cases involves the judge's technical competence. Victory for the plaintiff in constitutional cases depends upon persuading a judge that constitutional doctrine requires the overturning of a presumptively valid decision by another government official. Unless a judge is equipped to understand and evaluate complex argumentation about the meaning of ambiguous textual provisions and judicial PRECEDENT, it will be impossible to persuade the judge that doctrinal factors compel a decision for the plaintiff. Because the inertial advantage in constitutional cases almost always favors government defendants—failure to persuade the judge to act results in perpetuation of the challenged status quo—the inability of a judge to grapple with complex argumentation generally works to the disadvantage of a constitutional plaintiff.

In addition to care in selecting a forum, constitutional litigators expend a good deal of energy on the choice of a plaintiff, seeking to project the most sympathetic and appealing fact pattern. Because the judge's view of the equities may play a substantial role in the outcome of a constitutional case, the capacity of a constitutional plaintiff to evoke sympathy can be crucial. Constitutional lawyers have learned, moreover, that courts respond most favorably to fact patterns that emerge naturally from the interrelationship between a constitutional plaintiff and the government, but balk at being asked to decide artificially constructed TEST CASES.

A difficult decision constitutional litigators face in selecting a plaintiff is whether to bring the case as an individual action involving only named individuals or as a CLASS ACTION on behalf of all similarly situated persons. Militating in favor of class action status is its increased impact. A single class action can provide relief to thousands of people. Class actions, however, have drawbacks. Against the prospect of increased impact must be weighed the risk of loss, for members of a losing class are generally bound by the loss. Moreover, class actions can act as red flags to judges who would be sensitive to the claims of an individual plaintiff but who are reluctant to become involved in litigation seeking institutional change.

The selection of a defendant in a constitutional case also requires careful thought. Most important, the defendant must be capable of providing adequate relief. If injunctive relief is sought, the defendant must be sufficiently senior in the bureaucratic hierarchy to be able to pro-

mulgate and implement the changes sought by the action. At the same time, of course, the defendant must be sufficiently involved in the factual dispute giving rise to the lawsuit to justify naming him as an adverse party. If DAMAGES are sought, the defendant must have a sufficiently "deep pocket" to pay the judgment. A damage award against a judgment-proof defendant is hardly worth the effort.

One method of dealing with both the need for a high-ranking defendant and the quest for financial solvency is the naming of an entity-defendant such as the City of New York or the United States in addition to the individual defendants. The extremely complicated interplay between rules limiting the extent to which government entities can be sued in constitutional cases and plaintiffs' interest in suing government entities poses one of the serious tactical dilemmas in constitutional litigation.

A final—and less empirically verifiable—concern in selecting a defendant flows from what may be called the "Redneck-Mandarin dichotomy," which seeks to match a defendant and a judge from different educational and social backgrounds in the hope that the judge will be less constrained in exercising vigorous review powers. Although such an assumption is highly speculative, many constitutional litigators believe, for example, that they perceive a difference between many judges' willingness to exercise vigorous review of the actions of low-ranking police officers and the same judges' willingness to review the decisions of police commissioners.

Given the difficulty of overcoming the inertial advantage enjoyed by the government in constitutional cases, strategic considerations often play a role in the articulation of plaintiff's theory of recovery. It is often advisable to proceed by incremental stages and to develop alternatives to the primary constitutional theory. Thus, for example, litigation aimed at the OVERRULING of the SEPARATE BUT EQUAL DOCTRINE enunciated by PLESSY V. FERGUSON (1896) proceeded by carefully calibrated constitutional steps designed to develop sufficient momentum to make the final decision in BROWN V. BOARD OF EDUCATION (1954) possible. It is, however, extremely difficult to execute a sustained litigation campaign over time, for the factors of chance and changing tides of legal analysis are difficult to predict. On the other hand, asking for too much too soon in the absence of a carefully laid doctrinal foundation places an intolerable degree of pressure on even a sympathetic judge.

In an effort to lessen the tension between constitutional litigation and democratic political theory, litigators often seek to articulate a process-based alternative to their principal substantive theory. Thus, litigators attacking FIRST AMENDMENT violations often invite the court to seize upon a narrower, process-based claim such as VAGUENESS or OVERBREADTH as the basis for invalidating a statute, rather than confront the substantive question of the legislature's power to enact it at all. Similarly, constitutional litigators often seek to link their constitutional theories with non-constitutional claims, such as a claim based on a statute or a COMMON LAW tort. Posing alternative theories of recovery provides a judge with a less dramatic means of protecting a constitutional value while providing effective relief to the plaintiff. Of course, many such alternative theories of recovery are subject to modification by the legislature, but the short-term result is often indistinguishable from success of the constitutional claim.

Although much litigation strategy depends on a perception of the degree to which constitutional law is shaped by value judgments, constitutional lawyers also recognize the extent to which constitutional litigation shapes community values. The process of bringing a constitutional lawsuit is educational as well as remedial. It seeks to expose the judge to a set of facts and a legal reality that would ordinarily be far from his or her consciousness. It seeks to inform the public of the existence of a social problem that, even if not ultimately amenable to constitutional resolution, requires increased public attention. Viewed as a part of the process by which the interests of the politically powerless can be protected in a democracy, constitutional litigation provides a mechanism not only for classic remedial action but for a sharpening of the underlying social issues for ultimate political resolution. Thus, for example, although under current legal standards it is difficult to establish a violation of the constitutional right of a minority community to receive equal municipal services (discriminatory purpose, not merely disparate effect, must be proven), constitutional litigation provides a forum for the dramatization of unequal treatment as a first step to a political resolution. Similarly, although only the most optimistic believed that courts would actually stop the VIETNAM WAR because it was supposedly carried on in violation of Article 1, section 8, of the Constitution, the repeated presentation of the issue both shaped public perception of the war and helped pave the way for the passage of the War Powers Resolution which attempted to deal with the legal issue of undeclared war.

Two major constraints limit the use of constitutional litigation as an educational vehicle. First is the ethical obligation to refrain from presenting frivolous or inappropriate claims to a court. Judicial attention is a scarce national resource which must be rationed, and lawyers must be prudent in presenting claims that cannot win. In the absence of a good faith belief in the legal—as opposed to the moral—soundness of a claim, it should not be presented to a court. Moreover, even if a claim is sufficiently substantial to satisfy ethical considerations, tactical considerations often argue against presenting a weak claim

for adjudication. Losing a constitutional case risks the enunciation of dangerous precedent and acts to legitimate the challenged activity. Thus, although constitutional litigation plays an educational as well as a remedial role, its educational role should be a by-product of a bona fide attempt to secure a legal remedy.

A significant dilemma in planning and executing litigation strategy in constitutional cases is posed by the potential for conflict between the best interest of a plaintiff and the furtherance of the cause that precipitated the case into court. For example, a plaintiff who has gone to court to vindicate a principle and who poses a powerful TEST CASE may be confronted with a settlement offer which, while advantageous to the plaintiff, leaves the legal issue unresolved. Constitutional lawyers, while recognizing this conflict, generally resolve it in favor of the plaintiff and recommend acceptance to their clients, who then make the final decision. Despite the recognition that the interest of the client in a constitutional case should predominate over the advancement of the cause, a disturbing tendency exists on the part of both bench and bar to use a constitutional plaintiff as a convenient vehicle to trigger the enunciation of norms that may benefit society as a whole but which do little for the parties before the Court. William Marbury never did get his commission. (See MARBURY V. MADISON.)

Once a constitutional case is underway, three recurring tactical issues arise. Should immediate relief be sought, usually in the form of a preliminary INJUNCTION? Should the case be pursued as an abstract issue of law or should substantial resources be expended in developing the facts? And how broad a remedy should be sought? It is impossible to formulate even a general rule governing these three issues, except that attorneys with weak cases rarely seek preliminary injunctions and that issues of law should not be presented to a potentially hostile court in the absence of clearly established fact, given that a judge's freedom of action is greatest in determining the facts on an ambiguous record.

A parallel tactical issue defendants in a constitutional case face is whether to move to dismiss—and, thus, to assume the truth of the facts alleged in the complaint for the purposes of the motion—or to force plaintiffs to prove their facts by going to trial. Surprisingly, most defendants, in an effort to save time and resources, attempt dismissal motions, which require courts to rule on the theoretical validity of plaintiff's case without requiring plaintiff to establish the facts. Much constitutional law has been made in denying motions to dismiss and thus creating important legal precedents in cases where plaintiffs might have experienced difficulty in proving their allegations.

Finally, in presenting a constitutional case to a judge, a constitutional litigator will often seek to place it within one of three categories posing the least tension with democratic political theory in order to free the judge to exercise vigorous review. If the case involves a member of a DISCRETE AND INSULAR MINORITY, constitutional litigators will stress the inability of unpopular or disadvantaged minority groups to protect themselves within the traditional political process, thus invoking the special responsibility of courts to act as a bulwark against majoritarian overreaching. If the case involves significant political values, constitutional litigators will stress the responsibility of courts to guarantee the proper functioning of the democratic process. It is not antidemocratic, they argue, for a court to prevent the majority from refusing to permit the democratic process to function properly. If the case involves a "fundamental" value, like marriage or REPRODUCTIVE AUTONOMY, constitutional litigators will argue that the importance of such values warrants increased judicial protection. This third category involves the most controversial exercises of judicial power, because the selection of "fundamental" values appears subjective.

Ultimately, litigation strategy in constitutional cases, even at its most sophisticated, can exert only a relatively weak influence on the outcome. The adjudication of issues that impinge on deeply held values and in many other systems would be relegated solely to the political process is an inherently unpredictable phenomenon. No other area of law fits Tolstoy's vision of history so well as the claim of constitutional lawyers to be able to influence the ocean on which they most often bob like corks.

BURT NEUBORNE
(1986)

Bibliography

COVER, ROBERT M. 1975 *Justice Accused: Anti-Slavery and the Judicial Process.* New Haven, Conn.: Yale University Press.

GREENBURG, JACK 1977 *Judicial Process and Social Change: Constitutional Litigation.* St. Paul, Minn.: West Publishing Co.

KLUGER, RICHARD 1975 *Simple Justice.* New York: Knopf.

NEUBORNE, BURT 1977 The Myth of Parity. *Harvard Law Review* 90:1105.

## LIVING CONSTITUTION

The phrase "the living Constitution" emerged from two developments at the end of the nineteenth century. The first was the influence of Darwinism and PRAGMATISM on traditional CONSITUTIONAL THEORY, and in particular their challenge to a more traditional, and conservative emphasis on remaining faithful to ORIGINAL INTENT and designs. The second development was the rising constituency for political reform in the early twentieth century after industriali-

zation began putting pressure on eighteenth-century institutional arrangements.

The idea of the living Constitution should be seen in light of a relatively straightforward feature of our constitutional system: the document was intended to be the basis of American government for an indefinite period of time. The Framers believed that the Constitution embodied principles of a REPUBLICAN FORM OF GOVERNMENT that had withstood the test of time. Thus, despite warnings from THOMAS JEFFERSON against imposing on future generations the "dead hand of the past," the supporters of the Constitution felt it was acceptable to entrench these arrangements in a constitutional system that was perpetual and marked by a difficult, formal AMENDING PROCESS.

It is sometimes claimed that the idea of the living Constitution received its first clear expression in MCCULLOCH V. MARYLAND (1819) when Chief Justice JOHN MARSHALL wrote that "we must never forget that it is a *constitution* we are expounding," one that was "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." But it should be remembered that Marshall's intent was to offer an explanation for why the doctrine of IMPLIED POWERS, supplemented by the NECESSARY AND PROPER clause, should be interpreted to give the government flexibility in selecting "the necessary means for the execution of the powers conferred on the government." Marshall did not mean to imply that the actual powers of government might be reinterpreted whenever old understandings proved inconvenient or anachronistic. As Justice JOSEPH STORY explained in his *Commentaries on the Constitution of the United States* (1833), while the "means" by which the government pursues its ENUMERATED POWERS "must be subject to perpetual modification" it is equally important "not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous. If it be mischievous, the power of redressing the evil lies with the people by an exercise of the power of amendment. . . . [The Constitution] is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and for ever."

By the end of the nineteenth century Charles Darwin's image of change had begun to replace Sir Isaac Newton's rule-bound universe as the exemplar of natural science, and philosophical pragmatism had begun to challenge older protestant commitments to the ongoing authority of inherited texts or principles. WOODROW WILSON would later explain in his *Constitutional Government in the United States* (1908) that although the Framers believed that politics "was a variety of mechanics" and the Constitution a "display [of] the laws of nature," we have since come to realize that "[s]ociety is a living organism and must obey the laws of life, not of mechanics" and "all that progressives ask or desire is permission—in an era when 'development,' 'evolution,' is the scientific word—to interpret the Constitution according to the Darwinian principle; all they ask is recognition of the fact that a nation is a living thing and not a machine."

Wilson and other reformers were obviously not asking for an opportunity to use the amendment process to establish new structures. Rather, they were challenging the inherited principle that the Constitution is to have a "permanent construction," arguing instead that judges should update their interpretations to make them more consistent with current assumptions and more serviceable to current problems. On the Supreme Court the theory of the living Constitution found expression in two related but distinct judicial traditions. The first is associated with Justice OLIVER WENDELL HOLMES, JR., whose famous aphorism "the life of the law has not been logic: it has been experience" was initially intended as a description of COMMON LAW reasoning but would later inform much of his constitutional decisionmaking. As he put it in MISSOURI V. HOLLAND (1920), the words of the Constitution "have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters," and to be faithful to this "organism" the "case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." Importantly, Holmes believed that if the political system was to be capable of addressing the new challenges of a rapidly changing world, it was important for judges to get out of the habit of impeding legislative experimentation with reference to inherited, anachronistic constitutional principles. As he put it in his DISSENTING OPINION in LOCHNER V. NEW YORK (1905), judges should not use the Constitution to prevent the "natural outcome of dominant opinion" from prevailing in LEGISLATION, except in extraordinary circumstances.

The second tradition associated with the new theory of the living Constitution can be traced to Justice LOUIS D. BRANDEIS. Brandies often agreed with Holmes about the advantages of deferring to experimental legislation, but unlike Holmes he also believed that a commitment to a living Constitution meant that judges had an obligation to update constitutional protections to enable them to address contemporary threats to liberty. When the Court ruled in OLMSTEAD V. UNITED STATES (1928) that there was nothing in the language or origin of the FOURTH AMENDMENT that would apply to the practice of WIRETAPPING, Brandeis objected, saying that the Constitution "must have a . . . capacity of adaptation to a changing world"—not just the clauses that empower the government to address innovative problems, but also those clauses

"guaranteeing to the individual protection against specific abuses of power. . . . Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth."

The years leading up to the NEW DEAL saw a pitched battle between an older tradition of interpretive stability against the emergent reformist tradition of the living Constitution. As increasing numbers of reform-minded lawyers and judges followed the example of Holmes and Brandeis, conservatives on and off the Court kept insisting, like Justice GEORGE SUTHERLAND in his dissent in HOME BUILDING & LOAN ASSOCIATION V. BLAISDELL (1934), that "[c]onstitutional grants of power and restrictions upon the exercise of power are not flexible as the doctrines of the common law are flexible," and that legitimate constitutional change had to take the form of amendment and not interpretive updates. This battle intensified after President FRANKLIN D. ROOSEVELT aligned himself firmly behind those who argued that the meaning of the Constitution had to change with the times. This political development led increasing numbers of scholars sympathetic to the New Deal to speak out more strongly in favor of the living Constitution. Of this group none was more vocal or prolific than EDWARD S. CORWIN, who led the charge in favor of the view "that the Constitution must mean different things at different times if it is to mean what is sensible, applicable, feasible" and that its words must be "construed from a point of view which is sympathetic with the aspirations of the existing generation of American people, rather than that which is furnished by concern for theories as to what was intended by a generation long since dissolved into its native dust."

With the "switch in time" in 1937—when the Court abandoned its *Lochner*-era commitment to limited national government—the theory of the living Constitution became the dominant position on the Court, but it did not congeal into a unified new theory of interpretation. The original Holmes/Brandeis split continued to shape post–New Deal constitutional theory and practice. The Holmes version of constitutional adaptation through judicial deference was given voice by the former progressive, Justice FELIX FRANKFURTER. It is a fairly straight line from this position to the attempts of ALEXANDER M. BICKEL to convince the Court to embrace "the passive virtues" of judicial restraint, and then to the claim of Chief Justice WILLIAM H. REHNQUIST that the key feature of the living Constitution is "to enable the popularly elected branches of government, not the judicial branch, to keep the country abreast of the times."

Alongside this commitment to judicial deference is the modern liberal version of the tradition, articulated by Justices such as WILLIAM J. BRENNAN, JR., who wrote that "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs." Within constitutional theory this Brandeisian version of the living Constitution is most notable in the work of legal philosopher Ronald Dworkin, particularly when he suggests that the specific provisions of the Constitution should be viewed as carriers of more general concepts of political morality that should be abstracted away from the specific understandings (or conceptions) of their drafters and applied in ways that more accurately reflect contemporary convictions and challenges.

Whether either version of the living Constitution can be reconciled with the original understanding of our constitutional system has been a central locus for debate among post–New Deal constitutional theorists. Still, if it be true that the alternative to this move is the kind of activist ORIGINALISM practiced by pre–New Deal conservatives, then we may come to see the theory of the living Constitution as an understandable—but still controversial—response to the pressures for political change within a difficult-to-amend constitutional system.

HOWARD GILLMAN
(2000)

(SEE ALSO: *Amendment Process (Outside Article V); Judicial Activism and Restraint; Nonjudicial Interpretation of the Constitution; Transformation of Constitutional Law.*)

Bibliography

CORWIN, EDWARD S. 1987 *Corwin on the Constitution, Volume Two: The Judiciary,* edited with an introduction by Richard Loss. Ithaca, N.Y. and London, England: Cornell University Press.

GILLMAN, HOWARD 1997 The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building. *Studies in American Political Development* 11:191–247.

HAMBURGER, PHILIP A. 1989 The Constitution's Accommodation of Social Change. *Michigan Law Review* 88:239–327.

HORWITZ, MORTON J. 1993 Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism. *Harvard Law Review* 107:30–117.

KAMMEN, MICHAEL 1994 *A Machine That Would Go of Itself.* New York: St. Martin's Press.

KYVIG, DAVID E. 1996 *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776–1995.* Lawrence: University Press of Kansas.

RAKOVE, JACK N., ed. 1990 *Interpreting the Constitution: The Debate Over Original Intent.* Boston, Mass.: Northeastern University Press.

REHNQUIST, WILLIAM H. 1976 The Notion of a Living Constitution. *Texas Law Review* 54:693.

SIEGEL, STEPHEN A. 1990 Historicism in Late Nineteenth-

Century Constitutional Thought. *Wisconsin Law Review* 1990: 1431–1547.

VARIOUS AUTHORS 1936 The Constitution in the Twentieth Century. *The Annals of the American Academy of Political and Social Science* 185:1–200.

WHITE, G. EDWARD 1997 The "Constitutional Revolution" as a Crisis in Adaptivity. *Hastings Law Journal* 48:867–912.

## LIVINGSTON, HENRY BROCKHOLST (1757–1823)

There is a modest puzzle regarding Henry Brockholst Livingston's more than sixteen years on the Supreme Court (1806–1823): why was he comparatively silent? Livingston, a New York Jeffersonian, was among the best qualified appointees ever named to the Court. Before his appointment to the New York Supreme Court in 1802, he was at the top of the legal profession, ranked as an equal of his frequent sparring mate, ALEXANDER HAMILTON. Livingston's opinions during his five years on the New York court demonstrated legal erudition, style, and wit. Some of his opinions are still required reading for law students. The New York reports indicate that Livingston had a constant urge to express his thoughts, and he was not only an extremely active dissenter but also constantly rendered SERIATIM OPINIONS. In his four years of New York judicial tenure, Livingston dissented twenty times, concurred on fourteen occasions, and delivered twenty-four seriatim opinions. Those statistics only begin to indicate the battle on the New York court, largely between Livingston and JAMES KENT, both of whom were first-rate jurists. The business of the New York court involved many significant matters but few constitutional questions. Livingston's dissent in *Hitchcock v. Aicken* (1803) argued that the FULL FAITH AND CREDIT clause should be interpreted broadly; ultimately, the MARSHALL COURT, including Livingston, agreed with this reasoning in *Mills v. Duryee* (1813).

In contrast to his active role on the New York court, Livingston was scarcely noticeable on the Marshall Court. In fifteen TERMS he dissented but three times and delivered only five CONCURRING OPINIONS. The fact that he had not shrunk from confronting some of the ablest judges in the country when on the New York court precludes any notion that he was overwhelmed by JOHN MARSHALL and associates. The difference in Livingston's roles on the state court and the Supreme Court is important largely for what it explains about the Marshall Court's constitutional jurisprudence. By the time of Livingston's appointment, Marshall's practice of having one Justice deliver a single opinion for the Court was settled. The Justices, moreover, willingly stifled their differences, save on questions of great moment, usually constitutional. Within this practice, the Justices' common values, regardless of party affiliation, normally made compromise possible. There are indications that Livingston initially had difficulty in adjusting to the ways of the Marshall Court. In the first few cases he heard, Livingston seemed particularly active in questioning counsel, as if he might have wished to dissent, but did not. Apparently, Livingston's policy preferences blended well with the Marshall Court's general mercantile orientation. While on the New York bench Livingston had served as a precursor for nineteenth-century instrumentalist judges who shaped the law to promote commercial development. In this respect, Livingston resembled a fellow Jeffersonian on the Court, WILLIAM JOHNSON. Because of the commercial atmosphere of his home community of Charleston, South Carolina, Johnson, like Livingston, had good reason for thinking as his brethren did on commercial questions. Johnson was even more nationalistic than Marshall. Unlike Johnson, however, THOMAS JEFFERSON apparently did not attempt to goad Livingston into expressing his differences as he had done while a state judge. Another reason that Livingston did not join Johnson and make plural the "first dissenter" may have been that Livingston got along with the rest of the Court much better than Johnson did. When Livingston died, JOSEPH STORY's rich eulogy to him indicated how fondly he was remembered. Finally, Livingston was a ready adherent to precedent, as he had demonstrated on the New York bench. When a question was settled, Livingston was unlikely to challenge its resolutions, even obliquely. In short, Livingston was a good team player, and our constitutional jurisprudence may be poorer for it. A clear example of the consequences of Livingston's proclivity for compromise is seen in STURGES V. CROWNINSHIELD (1819), in which the Court invalidated a New York insolvent law of 1811 because it had been applied retroactively. On circuit, Livingston had emphatically sustained the same law in *Adams v. Storey* (1817); yet he proceeded to compromise in *Sturges*. It seems likely that Marshall did not wish to say in his opinion that the states had CONCURRENT POWER to pass bankruptcy or insolvency laws, but he did—probably in response to Livingston's urging. Livingston's main role on the Marshall Court and in the development of constitutional jurisprudence was that of a compromiser. His opinions, with few exceptions, are forgettable.

DONLAD ROPER
(1986)

Bibliography

DUNNE, GERALD T. 1969 Brockholst Livingston. In Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court*. New York: Chelsea House.

HASKINS, GEORGE LEE, and JOHNSON, HERBERT A. 1981 *Foun-*

*dations of Power: John Marshall, 1801–1815*, volume II of Freund, Paul A., general editor, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States.* New York: Macmillan.

## LIVINGSTON, ROBERT R., JR.
(1746–1813)

The son of a New York judge, Robert R. Livingston, Jr., was a member of the committees that drafted the DECLARATION OF INDEPENDENCE (which he regarded as premature and did not sign) and the ARTICLES OF CONFEDERATION. With JOHN JAY and GOUVERNEUR MORRIS he drafted the New York constitution of 1777. From 1777 to 1801 he was chancellor of New York. In 1788 he was chairman of the New York state convention where he vigorously supported RATIFICATION OF THE CONSTITUTION. He was later minister to France (1801–1804) and, with JAMES MONROE, negotiated the LOUISIANA PURCHASE TREATY. Livingston became a partner of inventor Robert Fulton and secured a New York steamboat monopoly not broken until GIBBONS V. OGDEN (1824).

DENNIS J. MAHONEY
(1986)

## LIVINGSTON, WILLIAM
(1723–1790)

Governor William Livingston, poet, lawyer, and Revolutionary general, signed the Constitution as a New Jersey delegate to the CONSTITUTIONAL CONVENTION OF 1787. Unable to attend regularly, Livingston was not active in the debates; but he was influential in securing New Jersey's early and unanimous ratification. He was the father of Justice BROCKHOLST LIVINGSTON and the guardian of young ALEXANDER HAMILTON.

DENNIS J. MAHONEY
(1986)

## *LOAN ASSOCIATION v. TOPEKA*
20 Wall. (87 U.S.) 655 (1875)

The Supreme Court has frequently resorted to HIGHER LAW doctrine to buttress an opinion, but only twice in its history, in TERRETT V. TAYLOR (1815) and in this case, has it relied exclusively on the higher law as the ground for decision. An 8–1 Court, in an opinion by Justice SAMUEL F. MILLER, held unconstitutional a Kansas statute that authorized the city of Topeka to issue public bonds, payable by taxes, for the benefit of a private company that built iron bridges. In the absence of some usable clause of the Constitution, Miller relied on judicially implied limitations on government power "which grow out of the essential nature of all free governments" and protect individual rights "without which the SOCIAL COMPACT could not exist." Topeka and the state legislature had believed that attracting a bridge company promoted public prosperity as did a railroad or a public utility, but because the Court saw only an improper exercise of the tax power "to aid private enterprise and build up private fortunes," it called the statute "a robbery" of the public. Taxation, the Could held, can be exercised only for a public use or public purpose. Justice NATHAN CLIFFORD, the sole dissenter, believed that JUDICIAL REVIEW should be exercised only when the Constitution imposed a prohibition either express or necessarily implied, but not when the Court believed that a legislature had violated "natural justice" or "a general latent spirit" supposedly underlying the Constitution.

LEONARD W. LEVY
(1986)

## LOBBYING DISCLOSURE ACT
109 Stat. 691 (1995)

The first full-scale lobbying reform LEGISLATION passed into law since 1946, the Lobbying Disclosure Act of 1995 requires paid lobbyists to register with a national Office of Lobbying Registration and Public Disclosure and prohibits such lobbyists from providing gifts to legislators.

In previous decisions, the Supreme Court has recognized the protection of lobbyists by the FIRST AMENDMENT guarantee of the RIGHT TO PETITION. The 1946 Federal Regulation of Lobbying Act, the only other omnibus lobbying regulation measure, was severely limited in its scope by the Court in *U.S. v. Harriss* (1954). *Harriss* established a very narrow definition of the term "lobbyist"; only those who have "direct communication with Members of Congress" were so defined for the purpose of the act, effectively excluding nearly all individuals from its regulatory mechanism.

The Lobbying Disclosure Act substantially broadens the definition of "lobbyist" established in *Harriss*. The act also significantly limits the actions of those defined as lobbyists, banning gifts to members of Congress and prohibiting lobbyists from receiving federal grants. The act thus clearly restricts the broad freedoms presently claimed by lobbyists under the First Amendment. Whether the Court will accept or reject this departure from *Harriss* will have a significant effect on its interpretation of First Amendment petitioning guarantees.

DAVID K. RYDEN
(2000)

## LOCAL GOVERNMENT

The Constitution does not mention local governments, but because of their ubiquity and importance questions have inevitably arisen about how they are to be fitted into the conceptual world it creates. Differences in the structures and functions of local governments might have led the Supreme Court to develop a complex set of responses to those questions. Both history and state law, for example, furnish materials that would have permitted the Court to conclude that some activities of some local governments should be characterized as "private," thereby freeing those local governments from the limitations the Constitution imposes on the exercise of governmental power and permitting them to claim the protections it confers upon private interests.

Instead, the Court has, with minor exceptions, treated all local governments alike. In all their activities, all are "political subdivisions of the State created as convenient agencies for exercising such of the powers of the State as may be entrusted to them," as the Court wrote of municipal corporations in *Hunter v. City of Pittsburgh* (1907). Several important conclusions flow from this conception of local government.

First, in exercising whatever authority the state may have conferred on them, local governments are subject to the same limitations the Constitution imposes on the exercise of state power. Second, local governments have no constitutional rights against the state that created them. A state may, for example, dispose of a local government's property as though it were the state's own, with no obligation to compensate the local government from which the property is "taken." Third, states have plenary control over the distribution of governmental authority within their borders. Individuals do not have a constitutional right to be governed by local institutions rather than by the state directly, nor do they have a right to be governed by one rather than another local government.

The states' plenary authority over governmental organization is, of course, subject to the limitations the Constitution imposes on the exercise of all state authority. Thus, in GOMILLION V. LIGHTFOOT (1961), a state statute redrawing the boundaries of a municipality so as to exclude virtually all its black, and none of its white, residents was invalidated as racially discriminatory. And in *Washington v. Seattle School District No. 1* (1982), the Court sustained a challenge to a statewide initiative that denied local school boards authority to bus students for the purpose of eliminating DE FACTO school SEGREGATION. Relying on HUNTER V. ERICKSON (1969), the Court held that a state could not structure its decision-making process "in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." But in so holding, the Court was careful to reaffirm the state's power to assume control of the schools or, presumably, of all decisions concerning student placement. The invalidated initiative differed from such measures, in the Court's view, because it did not operate "in a race-neutral manner."

The states' plenary authority over their local governments may also be circumscribed by federal legislation. Thus, in *Lawrence County v. Lead-Deadwood School District* (1985) a federal statute authorizing local governments that receive federal payments in lieu of property taxes to spend funds "for any governmental purpose" was held to preempt a state statute which required that the funds be spent in the same way as general tax revenues. Just how far Congress may intrude on the states' power to control their local governments is uncertain, but in principle the question appears to be no different from that which arises whenever Congress regulates internal affairs of the states. In *FERC v. Mississippi* (1982) the Court sustained Congress's power to impose certain duties on state utility commissions, and in GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985) the Court sustained Congress's power to subject states to the wage and hour provisions of the FAIR LABOR STANDARDS ACT. These decisions establish that the power of Congress is very broad, perhaps extending to the limits of Congress's authority under its ENUMERATED POWERS. Neither decision, however, quite forecloses the possibility that the Court may yet find in the TENTH AMENDMENT a principle of state autonomy that imposes some limits on Congress's power to interfere with state control of the agencies of state government.

The doctrine that local governments are merely state agencies, if taken to a logical extreme, might be understood to undermine the devolution of state authority to them. To the extent that a state relies on local governments for the performance of various governmental functions, differences in the circumstances and policies of the local governments inevitably lead to disparate treatment of the state's citizens. If local governments are merely state agencies, it can be argued, the state should be held responsible for the disparities to the same extent it would if it had directly ordered them. Although territorial discrimination by the state often can be justified and has in particular circumstances been upheld by the Court, it seems plain that the acceptance of that argument would seriously threaten the institution of local self-government. Thus far, however, the Supreme Court has refused to apply the *Hunter* doctrine in so drily logical a fashion.

In SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ (1973), the Court held that a state policy of relying on local school districts to finance a substantial percentage of the cost of operating local schools did not violate the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT, even though there were marked differences among the

school districts in both taxable resources and expenditures per pupil. Among the considerations that influenced the Court were the deeply embedded national tradition of local financing and control of schools and the more general threat that a contrary decision would have posed to traditional reliance on local governments to support and provide a broad range of other services.

MILLIKEN V. BRADLEY (1974) reflects similar deference to the tradition of local self-government. In that case, the Court reversed a decree ordering interdistrict SCHOOL BUSING as a remedy for unlawful segregation of the Detroit schools. In doing so, it rejected the district court's argument that "school district lines are no more than arbitrary lines on a map drawn "for political conve nience" that may be ignored whenever interdistrict relief is necessary to achieve an effective remedy. Said the Court, "No single tradition in public education is more deeply rooted than local control over the operation of schools." Due respect for that tradition, the Court held, precluded an interdistrict remedy unless other districts participated in bringing about the unlawful segregation or the state drew district lines to foster segregation.

A number of commentators have argued that *Rodriguez*, *Milliken*, and several other recent Supreme Court decisions that accord weight to the nation's traditions of local self-government are, if not inconsistent with the *Hunter* doctrine, at least in tension with it. But the Court has gone no further than to recognize those traditions when they are expressed in state law. For that reason, its recent decisions seem more an affirmation of the state's plenary authority over governmental organization than a retreat from it.

For reasons that have never been adequately explained, however, the Court has not followed the logic of *Hunter* in determining the reach of federal JUDICIAL POWER. A local government is treated as a "citizen of a state" for purposes of DIVERSITY JURISDICTION, though the same is not true of either the state or those of its political subdivisions of statewide authority that are regarded as merely its alter ego. Nor do local governments share the state's ELEVENTH AMENDMENT immunity from federal court suit.

TERRANCE SANDALOW
(1992)

(SEE ALSO: *Racial Discrimination; State Action.*)

Bibliography

BRIFFAULT, RICHARD 1989 Our Localism. *Columbia Law Review* 89:85–111.

LEE, CAROL F. 1982 The Federal Courts and the Status of Municipalities: A Conceptual Challenge. *Boston University Law Review* 62:1–73.

## *LOCHNER v. NEW YORK*
198 U.S. 45 (1905)

*Lochner v. New York*, a landmark decision of 1905, has been discredited by the evolution of constitutional law. Justice RUFUS W. PECKHAM, writing for a 5–4 majority of the Supreme Court, invalidated a New York state statute forbidding employment in bakeries for more than sixty hours a week or ten hours a day. The rationale for the Court's opinion was that the statute interfered with the FREEDOM OF CONTRACT and thus the FOURTEENTH AMENDMENT's right to liberty afforded both the employer and the employee. The Court stated that under the statute, viewed as a labor law, the state had no reasonable ground for interfering with liberty by determining the hours of labor. Seen as a health law, the statute affected only the bakers and not the public. Accordingly, the Court concluded that the law was neither necessary nor appropriate to accomplish its health objective. Moreover, the Court was of the view that if the law were upheld for the bakers, laws designed to protect other workers would also have to be upheld. In either case, said the Court, the statute was an illegal interference with the right to contract.

Justice OLIVER WENDELL HOLMES, in an important and historic dissent, concluded that the legislature had the power to enact a law that interfered with full freedom to contract and that the personal biases of judges could not justify declaring a statute unconstitutional. Said Justice Holmes: "The constitution is not intended to embody a particular economic theory," an obvious reference to the laissez-faire view then widely accepted. Holmes's view was that a law interfered with the Fourteenth Amendment's guarantee of liberty only if "a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles of our people and our law." The dissent's view was that the statute, viewed either as a health or a labor law, did not violate these principles.

Justice JOHN MARSHALL HARLAN also dissented, arguing with Justice Holmes that the wisdom of the statute or of a particular economic theory is judicially irrelevant. Citing studies that showed the hazards of bakery work, Harlan noted that legislatures in many states had enacted legislation dealing with the number of hours in a work day. Said Justice Harlan: "[I]t is enough for the determination of this case, and it is enough for this Court, to know that the question is one about which there is room for debate and for at least honest difference of opinion." If there are "weighty substantial" reasons for enacting a law it ought "to be the end of [the] case, for the State is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States."

The Court implicitly overruled the *Lochner* result in BUNTING V. OREGON (1917), but for three decades the decision influenced the Court as it scrutinized carefully and often struck down economic regulations as violations of SUBSTANTIVE DUE PROCESS. It was not until the mid-1930s, in the wake of the Court-packing furor and especially the Court's approval of the constitutionality of the National Labor Relations Act in *National Labor Relations Board v. Jones & Laughlin Steel Corporation* (1937), that judicial intervention in economic legislation declined. Although *Lochner* is now discredited, its focus upon substantive due process and FUNDAMENTAL RIGHTS has emerged in cases dealing with both contraception and abortion, namely GRISWOLD V. CONNECTICUT (1965) and ROE V. WADE (1973).

WILLIAM B. GOULD
(1986)

## LOCKE, JOHN
(1631–1704)

John Locke, the English philosopher of enlightenment, formulated the basic doctrines that influenced the American Framers of 1787. While his famous *Second Treatise*, "Of Civil Government" (1688), alludes to various traditional ways to limit governments, it sets forth an effectual new way, later called liberal CONSTITUTIONALISM. That comprised a sphere of individual liberty, fenced by a right to property, and fixed government, constituted by a majority's consent. Constitutional or civil government is to be representative, responsible, and limited, with powers separated as well as effective, and it is to be kept to its FUNDAMENTAL LAW by a perpetual threat of popular rebellion.

The first of Locke's *Two Treatises of Government* rebutted Robert Filmer's contention that monarchy exists by divine right, derived from the fatherly authority of Adam and of God. Locke thrust at paternalism, which he regarded as the natural foundation of uncivil government and of inhumane civilization in general. Mankind has inclined unthinkingly to obey fathers, who grew to be patriarchs of families and chiefs of tribes, and finally to be oppressive kings and nobles upheld by wealth, power, and the servile flatteries of traditional faiths. The *Letter concerning Toleration* (1689) espoused freedom of conscience and SEPARATION OF CHURCH AND STATE. Locke tried to remove religion from the magistrate's armory and to remake churches into voluntary associations keeping watch on government and on one another. The *Letter* counsels public toleration of religion, but as a thing merely private, and only of civil religions willing to tolerate other faiths and to obey the civil powers. In other writings Locke advocated a reasonable Christianity and a worldly and private education, and he explained human understanding prosaically, as reliably derived from sense impressions rather than from intuitions or divinations.

The first chapters of the *Second Treatise* set forth the famous doctrine of individualism: human beings are naturally free, equal, and occupied with securing themselves, not naturally subordinate to a superior or oriented to something noble or true above themselves. They are not subject to fathers or mothers so soon as they can "shift for themselves," or to husbands or wives if they no longer consent to be spouses, or to some gentleman or lord in his vineyard or estate. On the contrary, they have a natural right to acquire the means of life, to obtain the fruits of their own labor. Locke devised a private right of unlimited acquisition which implicitly indicts any leisured class, authorizes opportunity for the "industrious and rational," and provides powerful incentives for work, invention, and production. Locke was the philosophic father of capitalism, his plan whereby freedom of enterprise produces economic growth and the means of collective security. The profits of entrepreneurs, which Locke defended as incentives, occasioned the later attacks on capitalism as unjust and LIMITED GOVERNMENT as callously narrow.

The central chapters of the *Second Treatise* are Locke's prescription for public powers that will serve the people instead of exploiting them. He insisted upon powerful institutions, what THE FEDERALIST was to call effective or energetic government. A condition without government, Locke eventually maintained, is "very unsafe, very insecure," and people are "driven" to establish a LEGISLATIVE POWER to define laws, judges to apply them, and an executive to enforce them. Despite this agreement with the authoritarian Thomas Hobbes, Locke insisted that raising a state is easy compared to domesticating it. For domesticated or civil government the key is constitutionalism—government according to a man-made fundamental law agreeable to a majority. In particular, the supreme power, which Locke defines as a lawmaking power, is to be set up with a majority's consent (immediate or eventual, express or tacit). This supreme legislative power, however, is also and primarily to be shaped by Locke's enlightened prescriptions for a legislative limited, conditional, and rather democratic. Every actual legislature has by right only this legislative power, the natural CONSTITUTION behind any written constitution, and a consenting majority is to be supposed an enlightened majority. The legislature must aim to preserve individual rights, to govern by declared laws, not to impose TAXATION WITHOUT REPRESENTATION, and not to delegate its powers. Also, a legislature must be broadly representative of "populous" places filled with "wealth and inhabitants." Locke required an assembly of "deputies" of the people, while cautiously but pervasively impugning an aristocratic senate or house.

Locke provided for an executive power that is (unlike a monarch) subordinate to law and yet (like a monarch) able to act beyond law when public necessities require. The executive enforces law, unites the nation's forces for FOREIGN AFFAIRS (Locke's "federative" power), includes the judiciary, and remains, unlike the legislature, permanently on duty. For purposes of lawmaking Locke subordinated the executive to the legislature and attacked executives (such as the British king) who shared in lawmaking. Locke's argument led discreetly toward government by a responsible ministry, a dependence on a popular legislature that was rejected when the American Founders devised the Presidency, and a constitutional monarchy, which is only a "head of the republic," "a badge or emblem" representing the people. Still, executive power is extended by political necessity. In extraordinary situations, such as civil war, executive "prerogative" may extend to actions without authorization of law or even in violation of fundamental law, as when ABRAHAM LINCOLN in 1861 raised troops and monies before Congress had assembled. *Salus populi suprema lex est* is the Two Treatises' motto: the people's benefit is the supreme law. Locke repeated this maxim, which shows the limits of constitutional law, as he urged a king to reapportion an oligarchic house into a representative legislature.

The *Second Treatise* ends by insisting on an extraconstitutional RIGHT OF REVOLUTION, to secure a constitutional order against tyranny and also to help bring about popular constitutionalism. While executive prerogative may extend to reform, it is not to include a "godlike" prince with "a distinct and separate interest," a despot who violates the fiduciary "trust" of office, a conqueror, a usurper, a tyrannical king, or a clique of the rich. Such excesses make power revert to the people, who may set up anew their legislature. Locke repeatedly called this doctrine new. Each of the last six chapters ends by holding up to governors and peoples the new right of popular rebellion. In effect, Locke justified rebellion against every regime not a constitutional republic, and justified "revolution" of traditional beliefs inimical to individualism and popular government, that is, of almost all traditional beliefs.

The American Framers accepted Locke's broad framework of NATURAL RIGHTS and civil government, while varying details of the Constitution in accord with the cautious versions of MONTESQUIEU and his followers, David Hume and Sir WILLIAM BLACKSTONE. Fearing a political zealotry that might rival the old religious wars, Montesquieu, in his *Spirit of the Laws* (1748), abstained from Locke's fiery language of natural and popular liberty. His modified Lockeanism would allow forms and structures to vary with circumstance, make the judiciary a third separate power, and allow a senate of the successful and wealthy. Montesquieu also sought to introduce humane civilization less by rebellion and more by the spread of commerce and by changes in the private law of contract and inheritance.

ROBERT K. FAULKNER
(1986)

Bibliography

HARTZ, LOUIS 1955 *The Liberal Tradition in America.* New York: Harcourt, Brace.

STRAUSS, LEO 1953 *Natural Right and History.* Chicago: University of Chicago Press.

VILE, M. J. C. 1967 *Constitutionalism and the Separation of Powers.* Oxford: Clarendon Press.

## LOCKHART, WILLIAM B.
(1906–1995)

William B. Lockhart was a major constitutional law figure for more than a half century. Closely identified with the University of Minnesota Law School, where he taught for twenty-eight years and was dean from 1956 to 1972, Lockhart also served on the law faculties at Stanford (1938–1946) and the University of California, Hastings (1975–1994). Although he occupied several prestigious administrative positions—president of the Association of American Law Schools, a longtime member of the Council of the American Law Institute, and chairman of President LYNDON B. JOHNSON's controversial National Commission on Obscenity and Pornography—he was most prominently recognized for his seminal contributions to constitutional law scholarship. His series of articles on STATE TAXATION OF COMMERCE and OBSCENITY significantly influenced the Supreme Court and were often cited in its opinions, beginning in 1940 and continuing to the present time. On state taxation, he contended that the Court should abandon the so-called Formal Rule—that states may not tax any activity viewed by the Court as a part of INTERSTATE COMMERCE, even though the tax threatens no discriminatory burden on commerce—which had been used for a century to invalidate many state taxes. His view was finally accepted by the Court in 1977. His position on obscenity—that normal FIRST AMENDMENT protection should be afforded to all sex-related expression except for material treated as hard-core PORNOGRAPHY by its primary audience and the manner in which it is sold—has been less successful as a matter of constitutional DOCTRINE, although essentially followed in actual practice. Finally, Lockhart co-authored eight editions of a widely used casebook on constitutional law— the first edition published in 1964 and the most recent published in 1996—the hallmark of which was the inclusion of many selections from the lit-

erature woven into notes and questions that were contained throughout the materials.

JESSE H. CHOPER
(2000)

Bibliography

LOCKHART, WILLIAM B. 1975 Escape from the Chill of Uncertainty: Explicit Sex and the First Amendment. *Georgia Law Review* 9:533–587.

——— 1981 A Revolution in State Taxation of Commerce? *Minnesota Law Review* 65:1025–1061.

LOCKHART, WILLIAM B. and MCCLURE, ROBERT C. 1960 Censorship of Obscenity: The Developing Constitutional Standards. *Minnesota Law Review* 45:5–121.

## LODGE, HENRY CABOT
(1850–1924)

A Harvard-trained lawyer who also earned the Ph.D. degree in history, Henry Cabot Lodge was elected three times to the HOUSE OF REPRESENTATIVES and six times to the United States SENATE from Massachusetts. He was a close friend of President THEODORE ROOSEVELT and a national leader of the Republican party.

During his second term in Congress Lodge introduced a bill that would have provided for federal supervision of elections in order to protect the VOTING RIGHTS of black citizens in southern states. But he was wary of such Progressive innovations as women's suffrage and the DIRECT ELECTION of senators. He advocated the constant expansion of the United States through the annexation of Hawaii and other island TERRITORIES, and he supported the Spanish American War because it promised to lead to annexation of the Philippine Islands. During Roosevelt's administration Lodge was a leading congressional supporter of the Panama Canal project.

In 1918, Lodge used his position as chairman of the Senate Foreign Relations Committee to lead the fight against the Treaty of Versailles. He based his opposition to the League of Nations, a key element of the treaty, on the unconstitutionality of commiting American military forces to combat without the express consent of Congress.

Lodge was known during his lifetime as "the scholar in politics." His vision of an American constitutionalism that was both conservative and nationalistic was presented, in part, in his biographies of GEORGE WASHINGTON, ALEXANDER HAMILTON, and DANIEL WEBSTER.

DENNIS J. MAHONEY
(1986)

Bibliography

GARRATY, JOHN A. 1965 *Henry Cabot Lodge: A Biography.* New York: Knopf.

## *LOEWE v. LAWLOR*
208 U.S. 274 (1908)

This case fits a pattern of antilabor decisions that supported INJUNCTIONS against trade unions and struck down maximum hours acts, minimum wage acts, and acts prohibiting YELLOW DOG CONTRACTS. In *Loewe*, the Court, while crippling secondary boycotts, held that unions were subject to the antitrust laws and therefore were civilly liable for triple damages to compensate for injuries inflicted by their restraints on INTERSTATE COMMERCE.

*Loewe* originated in an attempt by the United Hatters Union, AFL, to organize a manufacturer of hats in Danbury, Connecticut. Most hat firms in the country were unionized. The few nonunion firms sweated their workers and were able to undersell unionized competitors, threatening their survival as well as the jobs of their unionized labor. Loewe's firm refused to negotiate a union contract and defeated a strike. The union retaliated with a secondary boycott, a refusal by the national membership of the AFL to buy Loewe's hats or patronize retailers who sold them. Loewe sued the union under the SHERMAN ANTITRUST ACT after the boycott resulted in a substantial loss of orders. The union demurred to the charges, admitting that it had engaged in the boycott but alleging that it had not violated the antitrust law, because that law did not cover the activities of trade unions and because the boycott in this case was not a conspiracy in restraint of commerce among the states. Invoking the DOCTRINE of the Sugar Trust Case (UNITED STATES V. E. C. KNIGHT CO., 1895) that manufacturing is a purely local activity, the union claimed that neither it nor the manufacturer engaged in interstate commerce. Although Loewe's hats, once manufactured, were shipped to purchasing retailers in twenty-one states, the union argued that it did not interfere with the actual transportation across state lines and that any restraint on interstate commerce resulting from the boycott was, according to the Sugar Trust Case, remote and indirect.

Overruling a lower federal court decision in favor of the union, the Supreme Court, in a unanimous opinion by Chief Justice MELVILLE W. FULLER, for the first time held that the Sherman Act applied to union activities; that a secondary boycott conducted across state lines is a conspiracy in restraint of interstate commerce; and that even

if the restraint were remote and indirect, the Sherman Act applied because it covered "every" combination in the form of a trust "or otherwise" in restraint of interstate commerce. In 1911, however, the Court embraced the RULE OF REASON, enabling it subsequently to find that corporations, not unions, might engage in reasonable restraints; that is, the act did not prohibit all restraints except by unions. In *Loewe*, however, the Court construed the act broadly, even to the point of using the STREAM OF COMMERCE DOCTRINE to show the scope of the commerce power. There is no evidence, however, that Congress, when adopting the Sherman Act, intended to cover union activities.

The case presents the phenomenon of a labor union being held within the terms of an antitrust act and contrasting opinions of the Court. In the Sugar Trust Case the Court held a ninety-eight percent monopoly not to violate the act because manufacturing is local and any effect upon or relationship with interstate commerce is necessarily indirect; here, though, a small hatmakers' union came within the act because its boycott was interstate, despite its having done nothing to control the price or transportation of the product of a manufacturer. Moreover, the decision in this case came one week after the decision in *Adair v. United States* (1908), where the Court declared that there is "no connection between interstate commerce and membership in a labor organization," as it struck down an act of Congress prohibiting the use of yellow-dog contracts by railroads against railroad workers engaged in interstate commerce. If *Adair* correctly invalidated the attempt by Congress to protect railroad workers under the commerce power, then a week later the Court should have decided that Congress under the same commerce power cannot, via the Sherman Act, reach an admittedly indirect relationship between a hatters' union and interstate commerce. Both the legislative history of the antitrust law and the Sugar Trust and *Adair* precedents opposed the decision in the Danbury Hatters' Case. Following the Court's decision, a triple-damages suit against the union in the lower federal court resulted in a fine of $252,000. The Danbury Hatters went unorganized, hatmakers everywhere suffered, and unionization everywhere was thwarted to an inestimable extent by the threat of Sherman Act suits. *Loewe* is one of the major cases on the subject of LABOR AND THE CONSTITUTION.

LEONARD W. LEVY
(1986)

Bibliography

LIEBERMAN, ELIAS 1960 *Unions Before the Bar.* Pages 56–70. New York: Harper & Row.

## LONG HAUL-SHORT HAUL RATE DISCRIMINATION

Long haul-short haul discrimination was one of the most notorious abuses practiced by railroads in the late nineteenth and early twentieth centuries. The practice involved charging a higher rate for a short haul that was included within a longer haul over the same line. Although Congress outlawed this discriminatory practice in Section 4 of the INTERSTATE COMMERCE ACT (1887), the Supreme Court effectively nullified that section in *ICC v. Alabama Midland Railway Company* (1897). The Court rested its decision on the commission's power to grant exemptions if the long and short hauls did not occur "under substantially similar circumstances and conditions." Sufficient differences existed between hauls to justify departures from Section 4's prohibition. In 1910 Congress revived the prohibition by reenacting the long haul-short haul clause minus the "similar circumstances" clause. Carriers were now forbidden to charge higher rates for shorter (included) hauls *regardless* of different conditions, although the commission was still authorized to make exceptions. A unanimous Supreme Court sustained this provision to *United States v. Atchison, Topeka, & Santa Fe Railway Co.* (1914).

DAVID GORDON
(1986)

Bibliography

SHARFMAN, ISAIAH L. 1931–1937 *The Interstate Commerce Commission.* 4 Vols. New York: Commonwealth Fund.

## *LONGSHOREMEN'S ASSOCIATION v. ALLIED INTERNATIONAL*

See: Labor and the Constitution

## LOOSE CONSTRUCTION

See: Broad Construction

## *LÓPEZ, UNITED STATES v.* 514 U.S. 549 (1995)

In *United States v. López,* a 5–4 Supreme Court struck down the Gun-Free School Zones Act, a federal statute that made it unlawful to carry a gun in a school zone. The law was supposedly passed under Congress's power to regulate INTERSTATE COMMERCE, but the statute did not require any specific "commercial" act. That is, the mere

possession of a gun in a school zone, no matter how acquired or what its intended use, was made unlawful. In a cautiously stated but revolutionary opinion, Chief Justice WILLIAM H. REHNQUIST objected to the law principally on the ground that the mere possession of a gun had nothing to do with "commerce" or any kind of economic enterprise. The Chief Justice was particularly critical of the statute's failure to require that a particular act of gun possession be shown to have some kind of impact on interstate commerce, in the sense of commercial enterprise. While striking down the statute, the Court also emphasized that Congress had not made "findings regarding the effects of firearm possession in and around schools upon interstate and foreign commerce." To summarize, under the majority's opinion (1) federal power to regulate interstate commerce must have some limits; and (2) those limits are exceeded when the government shows no relationship between interstate commerce and a specific act of gun possession; but (3) Congress probably could save the statute either by requiring that in each particular case an impact on interstate commerce be shown, or by making specific background findings that gun possession generally has such an effect.

Three DISSENTING OPINIONS representing the views of four Justices criticized the majority for (1) underestimating the impact of guns on interstate commerce, which seemed obvious and could well be presumed; and (2) rolling back congressional power to regulate under the COMMERCE CLAUSE—an area where the Court had given Congress virtually unlimited discretion since the NEW DEAL, after several decades of close scrutiny during the late nineteenth and early twentieth centuries.

The most controversial opinion in *López* is a concurrence by Justice CLARENCE THOMAS, arguing that the Court should reconsider the meaning of the commerce clause in light of the way that the constitutional words "commerce among the several states" were used in the late eighteenth century when the Constitution was written. Under his reading those words conveyed to Congress much less power than Congress had actually assumed, and in fact reached only commercial transactions ("commerce") where the goods or services in question actually crossed a state line ("interstate").

The original meaning of "commerce among the several states" has been subject to a great deal of historical scholarship, much of which is inconsistent with Thomas's position. For example, late-eighteenth-century writers were much more careful than most people today about the different usage of "between" and the commerce clause word "among." Thomas's requirement of an activity that moves from one state to another is more consistent with the term "between." Something that happened "among" the states in the eighteenth century could easily have included interstate and purely intrastate activities. For example, "there is a great deal of activity among the bees this morning" would not necessarily mean that the bees were engaging in transactions with one another; each could be busily doing its own work. In his very famous 1953 book, *Politics and the Constitution in the History of the United States*, the late WILLIAM W. CROSSKEY also pointed out that the late-eighteenth-century meaning of "commerce" was significantly less technical than it is today, and could refer to a variety of commercial and noncommercial activities, including such things as conversation or household management. Nevertheless, Thomas's opinion invites constitutional historians to return to these issues.

HERBERT HOVENKAMP
(2000)

(SEE ALSO: *Federalism.*)

Bibliography

GRAGLIA, LINO 1996 *United States v. López:* Judicial Review under the Commerce Clause. *Texas Law Review* 74:719–771.

HOVENKAMP, HERBERT 1996 Judicial Restraint and Constitutional Federalism: the Supreme Court's *López* and *Seminole Tribe* Decisions. *Columbia Law Review* 96:2213–2247.

SYMPOSIUM 1995 Reflections on *United States v. López. Michigan Law Review* 94:533–830.

## *LOPEZ v. UNITED STATES*
373 U.S. 427 (1963)

The Supreme Court held that a government agent may surreptitiously record a conversation with a criminal suspect and use the recording to corroborate his testimony. Lopez, a tavern keeper, offered a bribe to a federal tax agent who thereupon recorded the conversation. The Court refused to exclude the recording. Because the agent was on the premises with Lopez's consent, there was no TRESPASS and therefore no violation of the FOURTH AMENDMENT. Because the agent could testify to the conversation, he could use the recording to corroborate his testimony.

HERMAN SCHWARTZ
(1986)

## *LORETTO v. TELEPROMPTER MANHATTAN CATV CORP.*
458 U.S. 419 (1982)

The Supreme Court in the modern era has used an interest balancing analysis to determine whether government

regulation amounts to a TAKING OF PROPERTY for which JUST COMPENSATION must be paid. Here a New York law required landlords to allow cable television companies to install equipment on the landlords' property in order to serve tenants. The Supreme Court, 6–3, held that this governmental authorization of a "permanent physical occupation" of property was, of itself, a "taking"; in such a case no interest balancing need be done.

KENNETH L. KARST
(1986)

## LOTTERY CASE

See: *Champion v. Ames*

## LOUISIANA PURCHASE TREATY
(1803)

The Louisiana Purchase Treaty (April 30, 1803) provided for the cession of the French province of Louisiana to the United States for approximately $11,250,000. France had reacquired Louisiana from Spain as part of Napoleon's plan to reestablish a French empire in the New World. The United States had tolerated weak Spanish control at the mouth of the Mississippi, especially since the Pinckney Treaty of 1795 gave Americans the right to navigate the river and use the port of New Orleans; but Louisiana in the hands of Napoleonic France threatened the security, commerce, and growth of the country. President THOMAS JEFFERSON sought a diplomatic resolution, hoping to obtain from France at least the continuation of Spanish guarantees and, at best, the cession of New Orleans together with the Floridas, if France possessed them. In a surprising about-face, however, Napoleon renounced the whole of Louisiana.

The acquisition of Louisiana—some 828,000 square miles, virtually doubling the land area of the United States—challenged the government in several ways. First, the boundaries were obscure. Was Texas included? Or West Florida? Jefferson made pretensions to both. Article III of the treaty said that the inhabitants should be incorporated in the Union and enjoy all the rights of citizens of the United States. Unfortunately, the Constitution Jefferson and his party were pledged to construe strictly made no provision for acquiring foreign territory, much less admitting that territory and its people into the Union. The treaty, Jefferson declared, was "an act beyond the Constitution" and ought to be sanctioned retroactively by amendment. He drafted a 375-word amendment. When congressmen objected that Louisiana might be lost because of constitutional scruples, Jefferson acquiesced in silent expansion of the TREATY POWER even as he reiterated his belief that it made the Constitution "a blank paper by construction." (The Supreme Court, in AMERICAN INSURANCE COMPANY V. CANTER, 1828, later upheld the authority to acquire and govern territory under the treaty and WAR POWERS.) The Senate ratified the treaty on October 20, 1803. Two months later the American flag was raised at New Orleans.

Government of the territory also raised constitutional difficulties. The Enabling Act, in October, vested the President and his agents with full powers, civil and military. Querulous Federalists said it made Jefferson "as despotic as the Grand Turk." The Louisiana Government Act six months later created the Orleans Territory in populous lower Louisiana, extended to it many federal laws, and vested authority in a strong governor and weak legislative council, both appointed by the President. In the view of the President and Congress the rights of self-government, for which Creole Louisianans were unprepared, should be introduced gradually as the territory became "Americanized" in its population, habits, and institutions. The Louisianans demanded immediate statehood. Although this was denied, Congress in March 1805 introduced the second stage of territorial government, including a representative assembly, more or less on the plan of the NORTHWEST ORDINANCE. Five years later the statehood commitment of the treaty was met. The American theory of an expanding union of equal self-governing states thus survived its severest test.

MERRILL D. PETERSON
(1986)

(SEE ALSO: *Theories of the Union.*)

Bibliography

BROWN, EVERETT S. 1920 *The Constitutional History of the Louisiana Purchase, 1803–1812.* Berkeley: University of California Press.

## *LOUISVILLE JOINT STOCK LAND BANK v. RADFORD*
295 U.S. 555 (1935)

During the Great Depression of the 1930s foreclosure or default on payments threatened to extinguish the small, independent farmer who owned his own property. Congress, exercising its BANKRUPTCY POWER, came to his rescue by passing the FRAZIER-LEMKE (Farm Mortgage) ACT of 1934. The act provided that bankrupt farmers might require a federal bankruptcy court to stay farm mortgage payments for a period of five years, during which time the debtor retained possession of his property and paid his

creditor a reasonable rental sum fixed by the court, and at the end of the five years the debtor could buy the property at its appraised value. Because the act operated retroactively it took away rights of the mortgagee, but the CONTRACT CLAUSE limits only the states, not Congress. In the face of that clause the Court had sustained a similar state act in HOME BUILDING & LOAN ASS'N V. BLAISDELL (1934). Nevertheless Justice LOUIS D. BRANDEIS, for a unanimous Court, ruled the act of Congress void. He distinguished *Blaisdell* as less drastic: the statute there had stayed proceedings for two, not five, years. In effect Brandeis read the contract clause into the Fifth Amendment's DUE PROCESS clause, holding that the bankruptcy power of Congress must be exercised subject to SUBSTANTIVE DUE PROCESS. The statute deprived persons of property without due process by not allowing the mortgagee to retain a lien on mortgaged property. The oddest feature of this strained opinion is that it did not mention due process; Brandeis referred only to the clause that prohibited the taking of private property for a public purpose without just compensation, though the government took nothing and sought by the statute to preserve private property. The Court retreated from its position in WRIGHT V. VINTON BRANCH BANK (1937).

LEONARD W. LEVY
(1986)

## *LOUISVILLE, NEW ORLEANS & TEXAS PACIFIC RAILWAY v. MISSISSIPPI*
133 U.S. 587 (1890)

A 7–2 Supreme Court held here that a state might lawfully require railroads to provide "equal but separate accommodations" without burdening INTERSTATE COMMERCE. The majority distinguished HALL V. DECUIR (1878) because the Louisiana Supreme Court had held in that case that the state act prohibiting SEGREGATION unlawfully regulated interstate commerce. Here, the Mississippi Supreme Court had said that the Mississippi statute applied solely to INTRASTATE COMMERCE. Moreover, this case did not involve a refusal of accommodations (as in *DeCuir*), so no question of "personal rights" arose. Justice JOHN MARSHALL HARLAN, dissenting, relied on *DeCuir*.

DAVID GORDON
(1986)

## *LOVELL v. CITY OF GRIFFIN*
303 U.S. 444 (1938)

A municipal ordinance prohibited the distribution of circulars or any other literature within Griffin without a permit from the city manager. Chief Justice CHARLES EVANS HUGHES, for a unanimous Court, held the Griffin ordinance unconstitutional. The ordinance provided no standards to guide the city manager's decision. To vest an official with absolute discretion to issue or deny a permit was an unconstitutional prior restraint that violated the FIRST AMENDMENT. Because the ordinance was INVALID ON ITS FACE, Lovell was entitled to distribute her literature without seeking a permit, and to challenge the ordinance's validity when she was charged with its violation.

RICHARD E. MORGAN
(1986)

## *LOVETT, UNITED STATES v.*
328 U.S. 303 (1946)

In an opinion by Justice HUGO L. BLACK the Court declared unconstitutional a rider to an appropriation act of 1943 which provided that no salary or other compensation could be paid after November 1943 to three specified employees of the executive branch who had been branded as "subversives" by the HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES. Congress, Black wrote, had passed a BILL OF ATTAINDER, prohibited by Article I, section 9.

Justices FELIX FRANKFURTER and STANLEY F. REED rejected Black's bill of attainder analysis; but both agreed that the employees were entitled to recover money for the value of services rendered to the government, even after Congress had refused to disburse money to pay their salaries.

MICHAEL E. PARRISH
(1986)

## *LOVING v. VIRGINIA*
388 U.S. 1 (1967)

For more than a decade following its decision in BROWN V. BOARD OF EDUCATION (1954) the Supreme Court avoided direct confrontation with the constitutionality of MISCEGENATION laws. In *Loving*, the Court faced the issue squarely and held invalid a Virginia law forbidding any interracial marriage including a white partner. The decision is a major precedent in the area of RACIAL DISCRIMINATION as well as the foundation of the modern "freedom to marry." (See MARRIAGE AND THE CONSTITUTION.)

A black woman and a white man, Virginia residents, went to the DISTRICT OF COLUMBIA to be married, and returned to live in Virginia. They were convicted of violating the Racial Integrity Act and given one-year prison sentences, suspended on condition that they leave Virginia. The Virginia appellate courts modified the sentences but

upheld the constitutionality of the law. The Supreme Court unanimously reversed; Chief Justice EARL WARREN wrote for the Court.

Citing the SUSPECT CLASSIFICATION language of *Korematsu v. United States* (1944) (see JAPANESE AMERICAN CASES), Warren said that a "heavy burden of justification" must be carried by a state seeking to sustain any racial classification. The fact that the law punished both the white and black partners to a marriage did not relieve the state of that burden. The law's announced goal of "racial integrity" was promoted only selectively. A white was prohibited from marrying any nonwhite except the descendants of Pocahantas; a black and an Asian, for example, could lawfully marry. The law's obvious goal was the maintenance of white supremacy; it had no legitimate purpose independent of racial discrimination and thus violated the EQUAL PROTECTION clause. PACE V. ALABAMA (1883) was assumed to be overruled.

The Court's opinion also rested on an alternative ground: the statute violated SUBSTANTIVE DUE PROCESS, by interfering with "the freedom to marry." Quoting from the STERILIZATION case, SKINNER V. OKLAHOMA (1942), Chief Justice Warren called marriage "one of the 'basic civil rights of man,' fundamental to our very existence and survival." (See ZABLOCKI V. REDHAIL; FREEDOM OF INTIMATE ASSOCIATION.)

Justice POTTER STEWART, concurring, merely repeated his earlier statement in *McLaughlin v. Florida* (1964) that a state could never make an act's criminality depend on the race of the actor.

KENNETH L. KARST
(1986)

## LOW-VALUE SPEECH

The role that assessments of the value of particular speech or categories of speech should play in FIRST AMENDMENT theory is much contested. Everyone agrees, however, that at some point judges should be barred from making assessments about the value of particular speech in deciding whether it may be regulated or prohibited. Moreover, the image of a content-neutral government, at least as a regulative ideal, is a powerful force in First Amendment law.

Commentators ordinarily describe judicial judgments about the value of speech as "exceptions." The norm is said to be that speech is protected and that judgments about the value of speech are foreign to the judiciary. Exceptions are often explained in terms of "low value" theory. Speech does not get protection or it gets less protection than other speech because it has low value.

Geoffrey R, Stone, the theory's principal exponent, argues that low-value theory justifiably plays a major role in the JURISPRUDENCE of the First Amendment. It is neccesary, he argues, because otherwise we should have to apply the same standards to private blackmail as to public debate. If we do not treat harmful, but relatively unimportant speech differently, we will dilute the expression "at the very heart of the guarentee." As Stone charecterizes the law, "the Court, applying [the low-value] approach, has held that several classes of speech have only low first amendment value, including express incitement, false statements of fact, obscenity, commercial speech, fighting words and child pornography." Once the Court has decided that speech has low value, according to Stone, it engages in "categorical balencing, through which it defines the precise circumstances in which the speech may be restricted." By contrast, in assesing high-value speech, "the court employees, not a balancing approach akin to its content-neutral balancing, but a far more speech-protective analysis." Thus low-value theory functions to preserve the autonomy of high-value speech from government regulation.

No doubt, many categories of unprotected speech are explainable in part because they are thought to be of low value. Moreover, some forms of otherwise protected speech are afforded less generous protection than is given to other forms of protected speech almost exclusively because they are seen to have less value. But no sharp line divides low-value from high-value speech, and low value theory cannot account for all of its important exceptions.

Consider the First Amendment's standard testing ground: advocacy of illegal action. Such advocacy is protected unless it is directed to inciting imminent lawless action and is likely to incite or produce imminent lawless action. Is unprotected advocacy really a form of low-value speech? One approach might be to say that any speech that can be prohibited is low-value by definition. This approach, however, substitutes tautology for analysis, and it does nothing to provide an *ex ante* divide between high-value and low-value speech.

In what sense, then, is INCITEMENT or unprotected advocacy a form of low-value speech? Notice that advocacy of illegal action is not in itself a form of low-value speech. Indeed, noninciting advocacy of illegal action in itself is fully protected by the First Amendment. This conclusion has been reached in light of powerful opinions by Justices OLIVER WENDELL HOLMES, JR., and LOUIS D. BRANDEIS about the value of such speech. Thus, advocacy of illegal action appears to be high-value speech. The reason why some types of advocacy of illegal action can be prohibited seems to have less to do with their value as speech than with their potential for harm.

Alternatively, even if the Court had silently repudiated Holmes and Brandeis, the label "low-value speech" would obscure the decision-making process. The Court did not

start, and need not have started, its analysis of illegal action by asking wheter the category of speech was valuable or not. Indeed, in dealing with the issues, the Court has ordinarily begun with an assesssment of state interests. What ultimately is at stake in this context is an accommodation of the values of order and FREEDOM OF SPEECH. If the rules in the context of advocacy of illegal action are good ones, the reason is that those rules have protected order without unneccessary sacrifice of the First Amendment values. But First Amendment values have surely been sacrificed. If the rules governing advocacy of illegal action have the effect of muffling the voices of those who are most agitated against the system, we have suffered a substancial First Amendment loss. It demeans the speech and underestimates that loss to think about this as a part of low-value theory.

The same can be said for the rules attempting to regulate false statements of fact in LIBEL law. Certainly, from one perspective, high-value speech is at risk. Many think criticism of public officials and other PUBLIC FIGURES is "at the very heart of the guarantee." To fashion a set of rules in which plaintiffs succeed in allowing juries to scrutinize that criticism risks a major chilling effect. Moreover, the fact-finding process may simply mask the unleashing of juror prejudices about what speech should be free.

Presumably the protection of reputation requires findings of truth and falsity by juries, but that protection must be accompanied by a sense of First Amendment loss. To characterize any such process as a part of low-value theory would deemphasize the major risk to high-value speech, however the latter might be defined. The conflict between reputation and free speech necessitates a difficult choice. Something important must be abandoned, and that choice deserves emphasis.

Low-value theory avoids that emphasis. It offers the soothing prospect of characterizing free-speech doctrine as generally unthreatening to speech of general importance, but low-value theory cannot deliver. Like it or not, so-called high-value speech is subject to government regulation if a strong enough showing can be made.

STEVEN SHIFFRIN
(1992)

(SEE ALSO: *Balancing Test; Child Pornography; Commercial Speech; Fighting Words; Obscenity; Pornography; Pornography and Feminism.*)

Bibliography

SHIFFRIN, STEVEN H. 1990 *The First Amendment, Democracy, and Romance.* Cambridge, Mass.: Harvard University Press.

STONE, GEOFFREY R. 1983 Content Regulation and the First Amendment. *William and Mary Law Review* 25:189–252.

# LOYALTY OATH

A mild form of loyalty oath is embedded in the Constitution itself. The President must swear (or affirm): "that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the constitution of the United States." And Article VI, in conjunction with the supremacy clause, requires that members of Congress, state legislators, and "all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution." These are usually called affirmative oaths, in contrast to negative oaths in which oath-takers are required to abjure certain beliefs, words, or acts. In their most searching form, negative oaths probe the past as well as the future.

In Article VI, the constitutional oath of support is immediately followed by the proscription of any religious test for holding office. Loyalty oaths, called test oaths, were rife in an age of warring faiths defended by princes. They tested orthodoxy of belief and thus loyalty to the sovereign. Henry VIII launched Anglo-American constitutional practice on a sea of oaths, whose chief purpose was to root out followers of the pope of Rome. The Stuart kings exacted oaths from the first settlers, and the settlers in turn invoked them against each other. When George Calvert, the Roman Catholic first Lord Baltimore, attempted to settle in Virginia, he was confronted with an oath that he could not take. He perforce made the hard voyage back to England; his successors got their own grant to what became Maryland and promptly imposed an oath pledging fidelity to themselves.

Wary though they became of oaths with a religious content, those who made our Revolution, as well as those who resisted it, routinely exacted political loyalty oaths from military and civilians under their control. When one occupying force displaced the other, it could become a matter of life and liberty to have one's name on the wrong roster. At the same time, there was room for claims of duress and duplicity. BENJAMIN FRANKLIN expressed with his usual pithiness what was doubtless a shared cynicism when he wrote in 1776: "I have never regarded oaths otherwise than as the last recourse of liars."

One might have thought that the Framers, with revolutionary excesses fresh in their memories, meant the constitutional oaths to be exclusive of any others; but when the CIVIL WAR came, loyalty oaths again became ubiquitous. In the Confederacy, oaths were linked to the passes routinely required for any travel. Of more gravity, taking an oath was often for captives and hostile civilians the only alternative to rotting in prison or starving. The multiplicity of oaths and the pressure to yield to them resulted in their becoming unreliable indicia of loyalty. Union authorities

were impelled to create a bureaucracy to interrogate oath-takers, thus anticipating modern LOYALTY-SECURITY PROGRAMS.

President ABRAHAM LINCOLN favored relatively mild oaths pledging only future loyalty. The sterner Congress fashioned the "ironclad" test oath that required denials of past conduct that secessionists could not possibly make. Those oaths barred even repentant rebels from government and the professions. The Supreme Court plausibly characterized such oaths as legislative punishment, and declared them BILLS OF ATTAINDER, in the TEST OATH CASES (1867).

Little was heard of loyalty oaths in WORLD WAR I. After that war, many states singled out teachers for loyalty oaths; but they were only affirmative oaths on the constitutional model, repugnant chiefly because of the mistrust implicit in demanding them.

The waves of anticommunist sentiment that subsided only during the WORLD WAR II alliance with Russia led to a new proliferation of oaths that penalized membership in subversive organizations (sometimes specifying the Communist party) and advocacy or support of violent overthrow of governments.

All this came to a boil in the tormented Cold War–McCarthy era, when oaths old and new, state and federal, were combined with loyalty-security programs to purge communist influences from public employment and licensed occupations.

When oath cases came before the Court in the 1950s, it first sustained the constitutionality of elaborate oaths, requiring only that communist affiliations must be with knowledge of illegal ends (WIEMAN V. UPDEGRAFF, 1952), and suggesting that an employee must have an opportunity for an explanatory hearing (*Nostrand v. Little*, 1960). But in the 1960s, when the tide of public opinion turned against the excesses of the 1950s, the Court turned too. In half a dozen cases, of which the climactic one was KEYISHIAN V. BOARD OF REGENTS (1967), the Court found oaths that were barely distinguishable from those it had upheld in the 1950s to be void for vagueness or overbreadth. The majority opinions paraded an alarming catalog of possible dilemmas that teachers in particular could not escape and overwhelmed the expostulations of dissenters that the Court had created a "whimsical straw man" who was "not only grim but Grimm." For good measure, the Court, in UNITED STATES V. BROWN (1965), unsheathed the bill of attainder weapon of 1867 to strike down an oath that would exclude a former communist from any office in a labor union.

Such successes against negative oaths emboldened teachers and other public servants who resented having essentially affirmative oaths directed at them. But variants of the Article VI oath to support the Constitution were uniformly upheld. The capstone case was *Cole v. Richardson* (1972). There the Court, while reaffirming in generous FIRST AMENDMENT terms the 1960s cases, found no fault in an obligation first to support and defend the constitutions of the United States and the Commonwealth of Massachusetts and, second, to oppose their violent overthrow. The second clause, Chief Justice WARREN E. BURGER wrote, "does not expand the obligation of the first; it simply makes clear the application of the first clause to a particular issue. Such repetition, whether for emphasis or cadence, seems to be the wont of authors of oaths." He added in a footnote that "The time may come when the value of oaths in routine public employment will be thought not 'worth the candle' for all the division of opinion they engender." Justice THURGOOD MARSHALL, arguing in partial dissent that the second clause should be repudiated, reflected the persisting division between willing and unwilling oath-takers when he wrote, understatedly, that "Loyalty oaths do not have a very pleasant history in this country."

The fear that hellfire would follow a false oath must have faded since the seventeenth century. Nowadays public exposure, and a perjury prosecution, are the serious sanctions. Compulsory oath-taking is welcome to some, a matter of indifference to others, an offense to conscience for a few. A notable instance of a loyalty oath that hit the wrong targets occurred at the University of California in 1949–1952. When the university regents, after prolonged and wounding controversy, insisted on their power to impose a noncommunist oath, twenty-six members of the faculty refused to take it and were ejected. They won a pyrrhic victory in the California Supreme Court, which held that the regents' oath had been supplanted by an oath required of all state employees, but that the statewide oath somehow did not contravene a state constitutional prohibition of any test oath beyond the constitutional oath of support. Some of the nonsigners in time returned; one became president of the university and so did the historian of the episode, who called it "a futile interlude."

RALPH S. BROWN
(1986)

Bibliography

GARDNER, DAVID P. 1967 *The California Oath Controversy.* Berkeley and Los Angeles: University of California Press.

HYMAN, HAROLD M. 1959 *To Try Men's Souls: Loyalty Tests in American History.* Berkeley and Los Angeles: University of California Press.

SAGER, ALAN M. 1972 The Impact of Supreme Court Loyalty Oath Decisions. *American University Law Review* 22:39–78.

## LOYALTY-SECURITY PROGRAMS

This hyphenated phrase refers chiefly to the measures that were taken under Presidents HARRY S. TRUMAN and DWIGHT D. EISENHOWER to exclude from public employment, and from defense industries, persons who were believed to pose risks to national security. Because the gravest threat to security was believed to flow from world communism, loyalty and security programs were designed almost entirely to counter communist influence and penetration.

In earlier periods of tension attendant upon wars, LOYALTY OATHS were the preferred device for separating the loyal from the disloyal. If oaths were taken seriously, they were self-enforcing. But when necessity or duplicity led to bales of unreliable oaths, the authorities responded by empowering officials to go behind the oaths with investigations and to make their own judgments. Such procedures, usually under military control and untrammeled by judicial control, were widespread during the CIVIL WAR and RECONSTRUCTION.

WORLD WAR I was distinguished by the overzealous prying of the American Protective League and other amateurs who were given extraordinary aid and comfort by the Department of Justice. In WORLD WAR II the military departments, both determined to avoid the excesses of the crusade against the Kaiser, effectively centralized loyalty screening. They emerged with a minimum of criticism. After the war, the Soviet Union abruptly came to be viewed as enemy rather than ally. The insecurities of the postwar world aroused mistrust and anxiety. President Truman, aiming to forestall harsher congressional action, launched a new kind of program with his EXECUTIVE ORDER 9835 of March 21, 1947.

The Truman loyalty program covered all civilian employees. The Department of Defense had its own program for the armed services. Defense and the Atomic Energy Commission had programs for employees of defense contractors. The Coast Guard screened maritime workers. A few states developed systematic programs of their own. Many millions thus became subject to proceedings that sought to establish whether, in the language of E.O. 9835, there were "reasonable grounds" for a belief that they were disloyal (softened in 1951 to require only a finding of "reasonable doubt" as to loyalty). In 1953 President Eisenhower's Executive Order 10450 replaced the Truman program. It required employment to be "clearly consistent with the interests of the national security." That standard remains in effect.

All of these programs worked from personal histories supplied by the employee (or applicant) backed up by investigative reports. If "derogatory information" led to a tentative adverse judgment, that was usually the end for an applicant's chances of employment. But an incumbent could have the benefit of formal charges, a hearing, and review. The trouble was that the investigations ranged widely into associations, opinions, and flimsy appraisals. The sources of none of these were accessible to the employee. He could only guess who his detractors were.

These programs were only one array in the frantic mobilization against subversion. They were flanked by oaths and affidavits and questionnaires. To falsify any of these was a criminal offense. In order to establish what associations were forbidden, the 1947 executive order systematized the secret preparation and open use of the Attorney General's List of Subversive Organizations. Long before and for some years after the heyday of Senator Joseph R. McCarthy (1950–1954), congressional investigating committees took as their specialty the exposure of groups and individuals with communist ties. Their disclosures encouraged blacklists in private employment, notoriously in films and broadcasting. Senator McCarthy took the lead in stigmatizing the "Fifth-Amendment Communist"—a witness who invoked the RIGHT AGAINST SELF-INCRIMINATION. Senator Patrick A. McCarran initiated the idea that naming names was the only true badge of repentance for those who said they were no longer communists. A mass of legislation sought to expose and condemn the Communist party and its affiliates, while the Department of Justice jailed its leaders for sedition.

All of these measures raised intertwining constitutional problems, so those of loyalty-security programs are not easily isolated. However, two strands can be picked out. First, there were demands for fair process, notably to confront the source of accusations. Second, there were claims for First Amendment rights, set against the supposed necessities of national security. However, the courts often trimmed the reach of the programs without deciding such issues. They would invoke their usual preference for avoiding constitutional collisions, and simply find that executive or legislative authority was lacking.

The position that DUE PROCESS OF LAW was wanting in the rules and administration of employment tests first had to surmount the proposition that employment was not a right but only a privilege that could be summarily withheld. First Amendment claims also encountered this barrier, curtly expressed in Justice OLIVER WENDELL HOLMES's now battered epigram: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." After some early hesitation, this dismissive argument was itself dismissed, notably by Justice TOM C. CLARK, who was usually a steadfast supporter of security measures. In an oath case, WIEMAN V. UPDEGRAFF (1952), he wrote for the Court: "We need not pause to consider whether an abstract right to

public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary or discriminatory."

What process is then due? The government perennially opposes the right of confrontation by invoking the need to protect confidential informants. The court came close to requiring a trial-type hearing, with confrontation and cross-examination, in the industrial security case of *Greene v. McElroy* (1959). But it used the avoidance technique. It said that there would have to be, at the threshold, explicit authorization from the President or Congress to conceal sources, and that it could not find such authorization. The decision had little effect. The statute authorizing security removals of government employees still requires only that charges "be stated as specifically as security considerations permit." It is doubtful that, in a time of perceived crisis, and in sensitive employment, the Constitution would be read to compel confrontation.

The Court worked its way to a firmer position on narrowing grounds for removal. It found that First Amendment rights to freedom of association were impaired by a flat proscription of employing communists in a "defense facility." In UNITED STATES V. ROBEL (1967) the employee, a shipyard worker, was an avowed Communist party member. A majority of the Court, declaring that "the statute quite literally establishes guilt by association alone," held that some less restrictive means would have to be employed to guard against disruption or sabotage. If *Robel* and like cases are followed where charges of disloyalty are brought, and where the accusation stems from political associations, the government may be unable to remove an employee except for conduct that would support a criminal prosecution.

This does not mean an end to the reliance on prying and gossiping that made loyalty-security programs disreputable. In satisfying itself of the reliability of applicants for employment, the government (or a private employer) can still probe for flaws of character, so long as standards for expulsion do not invade areas protected by the First Amendment or by ANTIDISCRIMINATION LEGISLATION. Investigators may even demand answers to questions, for example, on communist connections, that come close to protected zones, as long as the ultimate standards are correct, and the questions are helpful in seeing that the standards are satisfied. This seems to be the upshot of a tortuous line of cases involving admission to the practice of law.

From these unavoidable clashes between individual rights and security claims, a remarkable course of events has followed. Once the fevers of the 1950s had subsided, loyalty-security programs simply shrank to very modest levels. It is noteworthy that the VIETNAM WAR did not check the decline. Yet the KOREAN WAR, which broke out in 1950, undoubtedly deepened the fears of that era.

The contraction has been helped along by the courts. Congress and the executive have perhaps done more to limit the scale at which the federal programs have been operating (the last dismissal on loyalty grounds was in 1968). The PRIVACY ACT of 1974 and similar statutes greatly restricted the flow of official information about misbehavior. President RICHARD M. NIXON abolished the Attorney General's List in the same year. Nudged by lower court decisions, the Civil Service Commission first stopped asking applicants for nonsensitive positions about subversive associations, and then in 1977 scrapped the questions for sensitive jobs too. Appropriations for investigative staff both in the Federal Bureau of Investigation and in the Defense Department have declined.

Do recent developments represent a slackening of our defenses? A revulsion against the excesses of McCarthyism? Because the prime mover in all the loyalty-security programs was hostility to communism, the programs may revive if our relations with the Soviet Union worsen. If the programs do revive, it seems unlikely that the courts will check recurrence of past excesses.

RALPH S. BROWN
(1986)

Bibliography

BROWN, RALPH S. 1958 *Loyalty and Security: Employment Tests in the United States.* New Haven, Conn.: Yale University Press.

CAUTE, DAVID 1978 *The Great Fear: The Anti-Communist Purge under Truman and Eisenhower.* New York: Simon & Schuster.

DEVELOPMENTS IN THE LAW 1972 The National Security Interest and Civil Liberties. *Harvard Law Review* 85:1130–1326.

LEWY, GUENTER 1983 *The Federal Loyalty-Security Program: The Need for Reform.* Washington and London: American Enterprise Institute.

## *LUCAS v. 44TH GENERAL ASSEMBLY OF COLORADO*

See: *Reynolds v. Sims*

## *LUCAS v. SOUTH CAROLINA COASTAL COUNCIL*

505 U.S. 1003 (1992)

If the government takes land—say, to build a road—it has to pay the owner JUST COMPENSATION. But one of the most contested issues of constitutional law arises when the gov-

ernment, rather than physically appropriating land, affects its value through legislative or administrative action.

Lucas bought two oceanfront lots before South Carolina adopted the Beachfront Zone Management Act. Although houses had previously been built on neighboring parcels, the Coastal Council prevented Lucas from erecting new structures. Lucas challenged the act as an unconstitutional TAKING OF PROPERTY without just compensation. The Supreme Court, 6–2, agreed.

Writing for five Justices, Justice ANTONIN SCALIA held that where a regulation "denies all economically beneficial or productive use" of private PROPERTY, it requires compensation. This formalizes a per se rule for "total" REGULATORY TAKINGS. The Court remanded the case to determine whether Lucas's construction was already forbidden by COMMON LAW principles of nuisance or property. Of broader significance than the narrow facts of the case is the Court's attempt to clarify and strengthen a line of analysis begun by Justice OLIVER WENDELL HOLMES, JR., in *Pennsylvania Coal Co. v. Mahon* (1922). Justice ANTHONY M. KENNEDY concurred in the judgment.

Justice HARRY A. BLACKMUN, in dissent, accused the Court of "launching a missile to kill a mouse." Justice JOHN PAUL STEVENS questioned the new rule's arbitrariness: "A landowner whose property is diminished in value 95 percent recovers nothing, while an owner whose property is diminished 100 percent recovers the land's full value." Justice DAVID H. SOUTER would have dismissed the WRIT OF CERTIORARI as not ripe for review.

EDWARD J. MCCAFFERY
(2000)

## *LUJAN v. DEFENDERS OF WILDLIFE*
504 U.S. 555 (1992)

The Supreme Court, in an opinion by Justice ANTONIN SCALIA, held that an environmental organization had no STANDING because its members lacked "injury in fact" as required under Article III of the Constitution. Defenders of Wildlife sued under the federal Endangered Species Act (ESA), which provides that "any person" may sue to enjoin a federal agency from violating the ESA. Plaintiff sought expansion of a U.S. Interior Department rule requiring federal agencies to consult with the Secretary of the Interior to ensure that development projects within the United States do not threaten endangered species. Plaintiff contended that the ESA also required such consultation for projects in foreign countries. Two projects that would have been included under the broader rule were located in Egypt and Sri Lanka. Two members of Defenders of Wildlife had previously visited those countries. Neither had current travel plans, but both intended to return and hoped to see endangered species on their return visits.

The "any person" standing provision of the ESA is based on a "private attorney general" concept under which private individuals are authorized to enforce statutes for the benefit of the general public. Private attorney general statutes have repeatedly been upheld by the Court.

As a practical matter, *Lujan* may not be very important. For example, Scalia's opinion distinguishes *Lujan* from a qui tam standing case in which a plaintiff acting as a private attorney general gets a cash bounty. Further, Justices ANTHONY M. KENNEDY and DAVID H. SOUTER indicated that standing would have been proper if Defenders of Wildlife members had purchased airplane tickets or announced specific dates for future trips. As a theoretical matter, however, *Lujan* is a significant watershed. For the first time, the Court has held unconstitutional a grant of standing to a private person to enforce a federal statutory duty because that person does not satisfy the Court's understanding of injury in fact under Article III.

WILLIAM A. FLETCHER
(2000)

Bibliography

NICHOL, GENE R. 1993 Justice Scalia, Standing, and Public Law Litigation. *Duke Law Journal* 42:1141–1169.

SCALIA, ANTONIN 1983 The Doctrine of Standing as an Essential Element of the Separation of Powers. *Suffolk Law Review* 17:881–899.

SUNSTEIN, CASS R. 1992 What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III. *Michigan Law Review* 91:163–236.

## LURTON, HORACE H.
(1844–1914)

President WILLIAM HOWARD TAFT's nomination of his close friend and former colleague, Horace Lurton, to replace Justice RUFUS PECKHAM in December 1909 engendered some skepticism. A Confederate veteran of the CIVIL WAR, Lurton was sixty-six and a pronounced conservative. He was, however, known as a patient and gentle man who sought compromise, and his experience clearly fitted him for the office. Lurton had sat on the Tennessee Supreme Court and the Sixth Circuit Court of Appeals (with Taft and WILLIAM R. DAY) and had also taught constitutional law and served as dean of the Law School at Vanderbilt University.

Lurton did not write many majority opinions during his tenure on the Supreme Court. He was usually among a

silent majority voting in favor of government authority to sustain, for example, the NATIONAL POLICE POWER (e.g., HOKE V. UNITED STATES, 1913) and the SHERMAN ANTITRUST ACT (STANDARD OIL COMPANY V. UNITED STATES, 1911); he dissented without opinion in HOUSTON, EAST & WEST TEXAS RAILWAY CO. V. UNITED STATES (1914). Most of his opinions dealt with procedural technicalities or the intricacies of employer liability laws.

One of the more frequent, though hardly regular, dissenters, Lurton was often in a minority with Justice OLIVER WENDELL HOLMES. Lurton's particular regard for precedent prompted extensive research to uncover those cases that would justify apparently inconsistent stances.

Shortly after his fourth term of court, in June 1914, Lurton died. His belief in law as the cement of society had led him to oppose JUDICIAL ACTIVISM, particularly when "a valid law, under the Constitution, is to be interpreted or modified so as to accomplish . . . [what a court] shall deem to the public advantage." Despite Lurton's prior experience, his career as a Justice provided little evidence of distinguished achievement.

DAVID GORDON
(1986)

Bibliography

WATTS, JAMES F., JR. 1969 Horace H. Lurton. In Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court, 1789–1969.* New York: Chelsea House.

## *LUTHER v. BORDEN*
### 7 Howard (48 U.S.) 1 (1849)

In *Luther v. Borden*, a case arising from the aftermath of the Dorr Rebellion (1842), Chief Justice ROGER B. TANEY enunciated the DOCTRINE of POLITICAL QUESTIONS and provided the first judicial exposition of the clause of the Constitution guaranteeing REPUBLICAN FORMS OF GOVERNMENT (Article IV, section 4).

Though Rhode Island was in the forefront of the Industrial Revolution, its constitutional system, derived from the royal charter of 1663 (which was retained with slight modifications as the state's organic act after the Revolution), was an archaic and peculiar blend of democratic and regressive features. Malapportionment and disfranchisement grew intolerably severe as the industrial cities and mill villages filled with propertyless native and immigrant workers. (Perhaps as many as ninety percent of the adult males of Providence were voteless in 1840.) Reform efforts through the 1820s and 1830s were unsuccessful. In 1841–1842, suffragist reformers adopted more radical tactics derived from the theory of the DECLARATION OF INDEPENDENCE, asserting that the people had a right to reform or replace their government, outside the forms of law if need be. They therefore drafted a new state constitution (the "People's Constitution") and submitted it to ratification by a vote open to all adult white male citizens of the state. The regular government, meanwhile, also submitted a revised constitution (the "Freeholders' Constitution") to ratification, but only by those entitled to vote under the Charter. The people's Constitution was ratified, the Freeholders' rejected. Reform leaders then organized elections for a new state government, in which Thomas Wilson Dorr was elected governor. The two governments organized, each claiming exclusive legitimacy. The Freeholders' government declared martial law and, with the tacit support of President John Tyler, used state militia to suppress the Dorrites in an almost bloodless confrontation. It then submitted another revised constitution, ratified in late 1842, that alleviated the problems arising under the Charter.

Dorrites dissatisfied with this outcome created a TEST CASE from an incident of militia harassment and requested the Supreme Court to determine that the Freeholders' government and the subsequent 1842 constitution were illegitimate, on the grounds that the Freeholders' government was not republican and that the people of the state had a right to replace it, without legal sanction if necessary. Taney, for a unanimous Court (Justice LEVI WOODBURY dissenting in part on a martial law point), declined to issue any such ruling. After noting the insuperable practical difficulties of declaring the previous seven years of Rhode Island's government illegitimate, Taney stated that "the courts uniformly held that the inquiry proposed to be made belonged to the political power and not to the judicial." He went on to explain that Dorrite contentions "turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline doing so." Taney thus amplified a distinction, earlier suggested by Chief Justice JOHN MARSHALL, between judicial questions (which a court can resolve), and political ones, which can be resolved only by the political branches of government (executive and legislative).

Taney further held that the GUARANTEE CLAUSE committed the question of the legitimacy of a state government to Congress for resolution, and that Congress's decision was binding on the courts, a point later reiterated by Chief Justice SALMON P. CHASE in cases involving the legitimacy of congressional Reconstruction policies. Taney concluded his opinion with an empty concession to the political theory of the Dorrites: "No one, we believe, has ever doubted the proposition that, according to the institutions of this country, the SOVEREIGNTY in every State resides in the people of the State, and that they may alter and change

their form of government at their pleasure. But whether they have changed it or not," Taney repeated, "is a question to be settled by the political power," not the courts.

Though the political question doctrine thereby created has never been explained by a definitive rationale, it has proved useful in enabling the courts to avoid involvement in controversies that are not justiciable, that is, not suitable for resolution by judges. (See BAKER V. CARR.)

WILLIAM W. WIECEK
(1986)

## *LYNCH v. DONNELLY*
465 U.S. 668 (1984)

The Supreme Court significantly lowered the wall of SEPARATION OF CHURCH AND STATE by sanctioning an official display of a sacred Christian symbol. Pawtucket, Rhode Island, included a crèche, or nativity scene, in its annual Christmas exhibit in the center of the city's shopping district. The case raised the question whether Pawtucket's crèche violated the Constitution's prohibition of ESTABLISHMENT OF RELIGION.

Chief Justice WARREN BURGER for a 5–4 Court ruled that despite the religious nature of the crèche, Pawtucket had a secular purpose in displaying it, as evinced by the fact that it was part of a Christmas exhibit that proclaimed "Season's Greetings" and included Santa Claus, his reindeer, a Christmas tree, and figures of carolers, a clown, an elephant, and a teddy bear. That the FIRST AMENDMENT, Burger argued, did not mandate complete separation is shown by our national motto, paid chaplains, presidential proclamations invoking God, the pledge of allegiance, and religious art in publicly supported museums.

Justice WILLIAM BRENNAN, dissenting, construed Burger's majority opinion narrowly, observing that the question was still open on the constitutionality of a public display on public property of a crèche alone or of the display of some other sacred symbol, such as a crucifixion scene. Brennan repudiated the supposed secular character of the crèche; he argued that "[f]or Christians the essential message of the nativity is that God became incarnate in the person of Christ." The majority's insensitivity toward the feelings of non-Christians disturbed Brennan.

A spokesman for the National Council of Churches complained that the Court had put Christ "on the same level as Santa Claus and Rudolph the Red-Nosed Reindeer." Clearly, the Court had a topsy-turvy understanding of what constitutes an establishment of religion, because in LARKIN V. GRENDEL'S DEN (1982) it saw a forbidden establishment in a STATE POLICE POWER measure aimed at keeping boisterous patrons of a tavern from disturbing a church, yet here saw no establishment in a state-sponsored crèche.

LEONARD W. LEVY
(1986)

## *LYNG v. NORTHWEST INDIAN CEMETERY*
485 U.S. 439 (1988)

The U.S. Forest Service planned to build a paved road and allow timber harvesting in an area held sacred by certain AMERICAN INDIANS. The Indians used the area, now part of a national forest, to perform religious rituals. The Supreme Court held 5–3 that the Forest Service action would not violate the free exercise clause of the FIRST AMENDMENT.

Writing for the majority, Justice SANDRA DAY O'CONNOR maintained that the free exercise clause was not implicated here because the Indians would not be coerced by the government's action into violating their religious beliefs. Hence, the government did not have to supply a COMPELLING STATE INTEREST to justify its action. The fact that the government activity would interfere with the Indians' religion was irrelevant because "the Free Exercise Clause is written in terms of what the govenment cannot do to the individual, not in terms of what the individual can extract from the government." Moreover, even if the Forest Service actions should 'virtually destroy the Indians' ability to practice their religion,' . . . the Constitution simply does not provide a principle that could justify upholding" their claims.

Writing for the dissenters, Justice WILLIAM J. BRENNAN rejected the majority's narrow reading of the free exercise clause and argued that because the beliefs and activities implicated by the government action were "central" to the religion of the American Indians, the government must supply a compelling state interest to justify its action.

JOHN G. WEST, JR.
(1992)

(SEE ALSO: *Religious Liberty.*)

# M

## *MACDONALD, UNITED STATES v.*
456 U.S. 1 (1982)

Chief Justice WARREN E. BURGER for a 6–3 Supreme Court reaffirmed that the protection of the SPEEDY TRIAL provision of the Sixth Amendment does not extend to the period before a defendant is officially accused of the crime and ceases once charges are dismissed. Thus, the period between dismissal of military charges and indictment later in a civil court could not be considered in determining whether delay violated the right to a speedy trial. Dissenters disagreed with the majority's reasoning that the interests served by the right to a speedy trial stood in no jeopardy before accusation or after dismissal of charges.

LEONARD W. LEVY
(1986)

## MACON, NATHANIEL
(1757–1837)

Nathaniel Macon, a North Carolina planter, opposed RATIFICATION OF THE CONSTITUTION because he thought the new government too powerful. Joining THOMAS JEFFERSON's Republican party, Macon was elected to Congress in 1791; with his party he opposed ALEXANDER HAMILTON's economic policies and the ALIEN AND SEDITION ACTS. As speaker (1801–1807), Macon, with his deputy, JOHN RANDOLPH, firmly guided the HOUSE OF REPRESENTATIVES along administration lines. Although he briefly broke with Jefferson (1807–1809), he supported the unpopular EMBARGO ACTS. In the House (1791–1815) and later in the SENATE (1815–1826), Macon was a spokesman for STRICT CONSTRUCTION, and individual liberty.

DENNIS J. MAHONEY
(1986)

## *MADDEN v. KENTUCKY*
309 U.S. 83 (1940)

A Kentucky statute taxing bank deposits outside the state at a rate five times higher than the tax on intrastate deposits was assailed as breaching several clauses of section one of the FOURTEENTH AMENDMENT. By a 7–2 vote the Supreme Court, speaking through Justice STANLEY F. REED, declared that the states have broad discretion in their tax policies. Reed dismissed the arguments against the statute based on the EQUAL PROTECTION and DUE PROCESS clauses as insubstantial, but the decision in COLGATE V. HARVEY (1935) supported the argument based on the PRIVILEGES AND IMMUNITIES clause. On reconsideration the Court found that lending or depositing money is not a privilege of national CITIZENSHIP and therefore overruled *Colgate*.

LEONARD W. LEVY
(1986)

## MADISON, JAMES
(1751–1836)

James Madison, "the father of the Constitution," matured with the AMERICAN REVOLUTION. Educated at a boarding school and at patriotic Princeton, he returned to the family plantation in Virginia at age twenty-one, two years before

the infamous Coercive Acts. As Orange County mobilized behind the recommendations of the CONTINENTAL CONGRESS, he joined his father on the committee of safety, practiced with a rifle, and drilled with the local militia company. As he wrote much later, in a sketch of an autobiography, "he was under very early and strong impressions in favor of liberty both civil and religious."

Civil and religious liberty were intimately linked in Madison's career and thinking. His early revolutionary ardor is the necessary starting point for understanding his distinctive role among the Founders. The young man first involved himself in local politics, in 1774, to raise his voice against the persecution of dissenters in neighboring Virginia counties. When feeble health compelled him to abandon thoughts of active military service, the gratitude of Baptist neighbors may have helped him win election to the state convention of 1776, which framed one of the earliest, most widely imitated revolutionary constitutions. (See VIRGINIA CONSTITUTION AND DECLARATION OF RIGHTS.) It seems appropriate that Madison's first major office should have been in this convention, his first important act to prepare amendatory language that significantly broadened the definition of freedom of conscience in the Virginia Declaration of Rights. The American Revolution, as he understood it, was a grand experiment, of world-historical significance, in the creation and vindication of governments that would combine majority control with individual freedom, popular self-government with security for the private rights of all. Through more than forty years of active public service, he was at the center of the country's search for a structure and practice of government that would secure both sorts of freedom. His conviction that democracy and individual liberty are mutually dependent—and, increasingly, that neither would survive disintegration of the continental Union—guided his distinctive contributions to the writing and interpretation of the Constitution.

Defeated in his bid for reelection to the state assembly—he refused to offer the customary treats to voters—the promising young Madison was soon selected by the legislature as a member of the Council of State. Two years later, in December 1779, the legislature chose him as a delegate to Congress. Here he gradually acquired a national reputation. He was instrumental in the management of Virginia's western cession, which prepared the way for ratification of the ARTICLES OF CONFEDERATION and creation of a national domain. He introduced the compromise that resulted in the congressional recommendations of April 18, 1783, calling on the states to approve an amendment to the Articles granting Congress power to impose a five percent duty on foreign imports, to complete their western cessions, and to levy other taxes sufficient to provide for the continental debt. He learned that the confederation government's dependence on the states for revenues and for enforcement of its acts and treaties rendered it unable to perform its duties and endangered its very existence.

Reentering Virginia's legislature when his term in Congress ended, Madison became increasingly convinced that liberty in individual states depended on the Union that protected them from foreign intervention and from the wars and rivalries that had fractured Europe and condemned its peoples to oppressive taxes, swollen military forces, and the rule of executive tyrants. In 1786, as he prepared for the Annapolis Convention, Northerners and Southerners clashed bitterly in Congress over the negotiation of a commercial treaty with Spain. When Madison and other delegates decided to propose the meeting of a general convention to revise the Articles of Confederation, they acted in a context of profound, immediate concern for the survival of the Union.

By 1786, however, Madison no longer hoped that a revision of the Articles might reinvigorate the general government, nor was he worried solely by the peril of disunion. In all the states popular assemblies struggled to protect their citizens from economic troubles. Although Virginia managed to avoid the worst abuses, Madison thought continentally. Correspondents warned him of a growing disillusionment with popular misgovernment, particularly in New England, where SHAYS' REBELLION erupted in the winter of 1786. Virginia's own immunity from popular commotions or majority misrule appeared to him in doubt. He had not been able to achieve revision of the revolutionary constitution and had often suffered agonizing losses when he urged support for federal measures or important state reforms. In 1785, in his opinion, only the presence of a multitude of disagreeing sects had blocked the passage of a bill providing tax support for teachers of the Christian religion, which would have been a major blow to freedom of conscience and an egregious violation of the constitution. Personally disgusted by the changeability, injustices, and lack of foresight of even Virginia's laws, Madison feared that the revulsion with democracy, confined thus far to only a tiny (though an influential) few, could spread in time through growing numbers of the people. The crisis of confederation government, as he conceived it, was compounded by a crisis of republican convictions. Either could reverse the Revolution. Neither could be overcome by minor alterations of the Articles of Confederation. To save the Revolution, he wrote to EDMUND PENDLETON, constitutional reform must both "perpetuate the union and redeem the honor of the republican name."

No one played a more important part than Madison in bringing on the CONSTITUTIONAL CONVENTION OF 1787, turning its attention to a sweeping transformation of the

federal system, or achieving national approval of its work. Returning from Annapolis, he won Virginia's quick consent to a general convention, wrote the resolutions signaling the Old Dominion's serious commitment to the project, and helped persuade GEORGE WASHINGTON to lead a delegation whose distinguished quality encouraged other states to call upon their best. Reeligible at last, he rushed from Richmond to New York, reentered the Confederation Congress, and worked successfully for measures that significantly improved the prospects for a full, successful meeting. He researched the histories and structures of other ancient and modern confederations and somehow found the time to write a formal memorandum on the "Vices of the Political System of the United States," in which he argued that the mortal ills of the confederation government and the concurrent crisis in the states alike demanded the abandonment of the Articles of Confederation and the creation of a carefully constructed national republic. In Madison's vision, the republic would rise directly from the people; would possess effective, full, and independent powers over matters of general concern; and would incorporate so many different economic interests and religious sects that majorities would seldom form "on any other principles than those of justice and the general good." Urging other members of Virginia's delegation to arrive in Philadelphia in time to frame some general propositions with which the meeting might begin, he reached the city himself the best prepared of all who gathered for the Constitutional Convention.

Madison made several distinctive contributions to the writing of the Constitution. He was primarily responsible for the VIRGINIA PLAN: the resolutions that initiated the Convention's thorough reconstruction of the federal system and served throughout the summer as the outline for reform. In the early weeks of the deliberations, he persuasively explained why no reform could prove effective if it left the general government dependent on the states. Together with JAMES WILSON, he led the delegates who insisted on proportional representation, popular ratification of the fundamental charter, and a careful balance of authority between a democratic House of Representatives and branches more resistant to ill-considered popular demands. He also urged his fellows not to limit their attention to the weaknesses of the confederation, but to come to terms as well with the vices of democratic government in the states. Constitutional reform, he argued, must also overcome the crisis of republican convictions, both by placing limitations on the states and by creating a greater republic free from the structural errors of the local constitutions. With the latter plea particularly, he opened members' minds to a complete rethinking of the problems of democracy and to the possibility that liberty and popular control might both be safest in a large republic. Although the finished Constitution differed in a number of significant respects from his original proposals, Madison was, by general agreement of historians and his colleagues, the most important of the Framers.

All of which was only part of his enormous contribution to the Constitution's great success. Before departing for Virginia, where he led the Federalists to victory in a close and capably contested state convention, Madison reassumed his seat in the Confederation Congress, helped provide some central guidance for the ratification struggle, and joined with ALEXANDER HAMILTON to write the most important explanation and defense of the completed Constitution. His numbers of THE FEDERALIST, perhaps the greatest classic in the history of American political writing, rationalized the compromises made in the Convention, rendered the document intelligible in terms of democratic theory, and thus contributed as surely to the shaping of the Constitution as the work of the preceding summer. Since early in the nineteenth century, these essays have been recognized as an essential source for understanding the intentions of the Framers, and Madison's essential theme—that the Convention's work was perfectly consistent with the principles of the Revolution, a genuinely democratic remedy for the diseases most destructive to democracy—was still but the beginning of his effort to interpret and insure the triumph of the finished plan.

The reconstructed federal government initiated operations in April 1789. Madison immediately assumed the leading role in the first Congress, which was responsible for filling in the outline of the Constitution as well as for the national legislation it had been created to permit. He drafted parts of Washington's inaugural address, prepared the House of Representatives' reply, and helped defeat proposals to address the President as "highness"—important contributions to the early effort to define the protocol between the branches and to set a democratic tone for the infant regime. He initiated the deliberations that resulted in the first federal tariff and assured a steady source of independent federal revenues. He seized the lead again in the creation of executive departments, successfully insisting that the concept of responsibility required a presidential power to remove executive officials without the consent of Congress. Finally, he took upon himself the principal responsibility for preparing the constitutional amendments that became the BILL OF RIGHTS.

Early in the contest over RATIFICATION OF THE CONSTITUTION, Madison had denied the need for such amendments. He argued that the federal government had not been granted any powers that might threaten the liberties protected in the declarations of the states, and he warned that any effort to prepare a federal bill might actually endanger rights it was intended to preserve: an inadvertent error or omission could become the basis for a claim of

positive authority to act. This very train of reasoning, however, suggests why he was open to a change of mind and offers some important clues to understanding his political and constitutional position in the years after 1789.

Throughout the course of constitutional reform, Madison had insisted no less strongly on the need for an effective central government than on a governmental structure that would guarantee the continuing responsibility of rulers to the ruled, along with a considerable residual autonomy for the people in their several states. Even as he worried over the excesses of majorities, he reminded correspondents of the perils posed by rulers who escaped a due dependence on the people; and even as he warned the Constitutional Convention not to leave the general government dependent on the states, he recognized the danger of excessive concentration of authority in federal hands. His contributions to *The Federalist* describe the new regime as neither wholly national nor purely federal in nature, but as a novel, complicated mixture under which concurrent state and central governments, each possessed of only limited authority, would each perform the duties for which they were best equipped and would both resist disturbance of a federal equilibrium that offered new protection for the people. During the ratification contest, Madison was forced to promise that amendments would be added once the Constitution was approved. He realized how useful this could be in reconciling skeptics to the system. But he was also predisposed to be receptive when THOMAS JEFFERSON insisted that a bill of rights would be a valuable, additional security for the liberties and powers that the states and people had intended to reserve.

Among the most consistent themes of Madison's career was his profound respect for FUNDAMENTAL LAW. Written constitutions, in his view, were solemn compacts which created governments and granted them the only powers they legitimately possessed. Rulers guilty of transcending them, he had written in his 1785 Memorial and Remonstrance against religious assessments, were "Tyrants," those who submitted "slaves." And usurpations of this sort, he added, ought to be resisted on their first appearance, as they had been early in the Revolution, before they could be strengthened by repeated exercise and "entangle the question in precedents." This scrupulous regard for fundamental charters encouraged Madison to change his mind about a bill of rights and shaped his conduct throughout the rest of his career.

Early in Washington's administration, Madison became alarmed about the sectional inequities and other consequences of Hamilton's political economy. He broke with Hamilton entirely when the secretary of the treasury proposed the creation of a national bank, protesting that the Constitution granted Congress no explicit power to charter such a corporation and that a doctrine of IMPLIED POWERS, justifying federal measures by a BROAD CONSTRUCTION of the general clauses, could completely change the character and spirit of a limited, federal system. During the 1790s, as Madison and Jefferson concluded that Hamilton and his supporters were deliberately attempting to subvert the Revolution—to concentrate all power in the general government and most of that in its executive departments—their insistence on a strict construction of the Constitution and a compact theory of its origins became an organizing theme of the Democratic-Republican opposition. Madison's Virginia Resolutions of 1798, part of a larger effort to arouse the states against the ALIEN AND SEDITION ACTS, which the Republicans regarded as a flagrant violation of the FIRST AMENDMENT, identified a Hamiltonian construction of the Constitution as a central feature of a Federalist conspiracy to sweep away all limitations on the exercise of federal power. Madison's great Report of 1800, explaining and defending the resolutions of 1798 against objections from other states, still stands as a striking landmark in the evolution of a modern, literalist interpretation of the First Amendment. In opposition to prevailing understandings that FREEDOM OF THE PRESS afforded guarantees against PRIOR RESTRAINT AND CENSORSHIP, but did not protect a publisher or author from criminal responsibility for statements tending to bring the government or its officers into disrepute, Madison insisted that the federal government was "destitute" of all authority whatever to interfere with the free development and circulation of opinion. In passages with major implications for the future, he denied that a FEDERAL COMMON LAW OF CRIMES had ever operated and suggested that the essence of elective governments was inconsistent with even STATE ACTION to restrain "that right of freely examining public characters and measures and of free communication of the people thereon, which has ever been justly deemed the only effectual guardian of every other right."

In its constitutional dimensions, the Jeffersonian "Revolution of 1800" was intended by its leaders to restore the threatened federal balance and return the general government to the role and limits originally intended by the people. As Jefferson's secretary of state, principal lieutenant, and eventual successor, Madison continued to believe that governmental actions should "conform to the constitution as understood by the Convention that produced and recommended it, and particularly by the state conventions that *adopted* it." He conceded that there were occasions that might justify or even command departures from the letter of the Constitution. He defended the LOUISIANA PURCHASE on these grounds, suggesting that a power to acquire new TERRITORIES was inherent in the concept of a sovereign nation. As President, he acted on the basis of implied executive authority in ordering the occupation of West Florida. He even came to recommend rechartering

a national bank, maintaining that repeated acts of every part of government, repeatedly approved of by the nation, had overruled his earlier opinion of the institution's unconstitutionality. In his final days in office, nevertheless, he vetoed a bill providing federal support for INTERNAL IMPROVEMENTS. Although he favored federal action, he insisted on a constitutional amendment in advance. He still believed, as he had written in his "Letters of Helvidius" in 1793, that "a people who are so happy as to possess the inestimable blessing of a free and defined constitution cannot be too watchful against the introduction nor too critical in tracing the consequences of new principles and new constructions that may remove the landmarks of power."

Madison's regard for fundamental law is not to be confused with a minimalist conception of the constitutional scope of federal powers. He recommended the creation of a national university, although the Constitution delegated no explicit power to erect one. He believed that the Constitution granted Congress plenary authority over commerce, not merely ample power to impose a protective tariff but power even to require a temporary end to foreign trade as in the complete embargo or the various non-intercourse experiments preceding the War of 1812. He was as willing to defend the powers plainly granted to the federal government—over state militias, for example—as he was to guard the liberties protected by the Bill of Rights. Nevertheless, his leadership as President was characterized by deep respect for both the letter and the spirit of the federal compact. If he was diffident in leading Congress into proper preparations for a war, his serious regard for legislative independence was as much at fault as personality or circumstances. If he forbore perhaps too much in the face of flagrantly seditious opposition to the war, this forbearance was not for want of an imaginable alternative. ABRAHAM LINCOLN claimed the powers needed for a greater crisis. Madison deliberately attempted to conduct the War of 1812 at minimal expense to the republican and federal nature of the country. It was at once his weakness and his glory.

The father of the Constitution outlived all the other signers, becoming in his final years a rather troubled, though revered, authority on the creation and construction of the federal charter. The source of his discomfort was his own insistence that the Constitution was a compact among the sovereign peoples of the several states, who remained the only power competent to alter it or to deliver a definitive decision on its meaning. The great Virginian repeatedly denied that this interpretation justified the developing southern doctrine of state INTERPOSITION and NULLIFICATION. He had, in fact, warned Jefferson in 1798 against confusing the constituent authority of the peoples of the states with the powers of an individual state government. Yet neither was he willing to permit the federal courts a power of interpretation that would make the general government the final or exclusive judge in its own cause (or even to concede the courts the power to override the constitutional opinions of the executive and legislative branches). Trapped between his love of Union and his fear of grasping power, he was never able, never willing, to identify an agency or a procedure that, in case of a collision of conflicting understandings of the Constitution, could prevent a revolutionary recourse to the sovereign people. But, then, James Madison was Revolution's child. Admitting that the best constructed government could not secure a nation's liberty if it were not supported by a proper public spirit, he trusted to the end that mutual conciliation and restraint would prove sufficient to preserve the Union he had done so much to shape.

LANCE BANNING
(1986)

Bibliography

BANNING, LANCE 1984 "The Hamiltonian Madison: A Reconsideration." *Virginia Magazine of History and Biography* 92: 3–28.

BRANT, IRVING 1941–1961 *James Madison.* 6 Vols. Indianapolis: Bobbs-Merrill.

KETCHAM, RALPH 1971 *James Madison: A Biography.* New York: Macmillan.

MCCOY, DREW R. 1980 *The Elusive Republic: Political Economy in Jeffersonian America.* Chapel Hill: University of North Carolina Press.

WOOD, GORDON S. 1969 *The Creation of the American Republic, 1776–1789.* Chapel Hill: University of North Carolina Press.

## MADISONIAN CONSTITUTION

Constitutional scholars often describe the original Constitution of 1787 and its first ten amendments as Madisonian, and they have two good reasons to do so. First, JAMES MADISON was arguably the central historical actor in every phase of the political movement that led to the adoption of the Constitution, from the calling of the federal CONSTITUTIONAL CONVENTION OF 1787 to the ratification of the BILL OF RIGHTS in 1791. His preparations for the federal convention shaped its basic agenda and its politics. Even though several of the proposals he most favored were rejected, the completed Constitution still carried the marks of his substantial influence. Second, scholars typically rely on Madison's political writings— especially his most celebrated contributions to THE FEDERALIST—as the most authoritative statements of the underlying theory of politics and government that the Constitution embodied.

If Madison did play the critical role that historians as-

cribe to him, the reason was not only that experience and intellect suited him to do so, but also that he consciously made the task of promoting the project of constitutional reform his own cause. During his service in the CONTINENTAL CONGRESS (1780–1783), Madison was deeply involved in the effort to ratify and then amend the ARTICLES OF CONFEDERATION, and he pursued the same ends as a member of the Virginia assembly from 1784 to 1786. Though Madison initially worried that the assembly's decision to invite other states to a conference to consider national problems of commerce might backfire, he went to the Annapolis Convention in September 1786 convinced that a radical step was necessary to break the impasse over reforming the Confederation. When it became evident that the meeting was too poorly attended to propose anything of substance, Madison joined the other commissioners in issuing a call for a general convention to meet in Philadelphia in May 1787. He then returned to Virginia to make sure that the assembly took the lead in inviting the other states to appoint delegates for the new convention.

Madison prepared for the convention by reflecting on both the history of other confederations and his own political experiences. These reflections supported one critical conclusion: Any federal union that relied, as did the Confederation, on the voluntary compliance of its member states with national decisions must always prove defective. Instead, the national government needed to be empowered to act directly upon the people, by enacting, executing, and adjudicating its own laws. This conclusion led to two others. First, the convention would need to think seriously about the proper composition of the three essential departments of government—legislative, executive, and judicial. Second, because a well-constructed legislature was bicameral, the rules of apportioning REPRESENTATION in both houses of a future Congress would become a source of controversy. Here Madison was intent on establishing that seats in both houses should be apportioned on the basis of population and perhaps wealth.

The deeper impetus for the solutions Madison wished the convention to adopt reflected his diagnosis of the problems of legislative misrule and popular politics in the individual states. Madison believed that the great source of instability in American government lay in the tendency of the state legislatures to act impulsively and unwisely, especially by enacting laws that violated the due rights of minorities and individuals. The legislature, and especially its lower house, was the branch of government most likely to encroach upon the legitimate powers of the other departments. The great challenge of designing the institutions of republican government was thus to protect the two weaker departments, the executive and judiciary, against legislative domination. But the problem was not merely an institutional one. For when legislatures overstepped their bounds or acted unjustly, Madison reasoned, they were likely to be acting in response to the improper desires of their constituents, or more to the point, the popular majorities whom they represented. To bring stability to republican government, Madison believed, required finding ways to insulate elected representatives from the passions and interests that swayed the electorate.

In drafting the VIRGINIA PLAN just before the Constitutional Convention assembled in May 1787, Madison converted this general diagnosis into a program of reform. Over the next four months, however, he met defeat on most of the crucial proposals that he supported most strongly. The rule of representation adopted for the U.S. SENATE, giving each state an equal vote, Madison thought fundamentally unjust. The Senate would also be elected by the state legislatures, which Madison regarded as nests of political demagoguery. To protect the executive and judiciary against legislative domination, Madison had proposed uniting these two weaker branches into a council of revision armed with a limited VETO POWER over Congress; instead the Constitution gave the veto to the President alone. To correct the vices of state LEGISLATION, Madison proposed giving Congress a veto over all state laws; instead, the Constitution envisioned limited JUDICIAL REVIEW of state legislation by a federal judiciary that Madison feared would be too weak to carry out this task.

The completed Constitution was thus far less Madisonian than Madison would have wished. Yet it is equally true that both the debates at Philadelphia and the document they produced were deeply influenced by Madison's diagnosis of what he called the "vices of the political system of the United States." No other delegate played a more important role in framing the convention's agenda, steering its deliberations, or elevating the tenor of its debates. And even if the Constitution disappointed his expectations, Madison's criticisms of the defects of the Confederation were the foundation on which the new plan of government rested.

After the Constitution was published, Madison agreed to contribute to the series of essays that ALEXANDER HAMILTON planned to publish to support its ratification. Madison's first essay, the tenth *Federalist*, appeared on November 22, 1787. Its importance was largely neglected by nineteenth-century commentators. But in his influential work, *An Economic Interpretation of the Constitution* (1913), CHARLES A. BEARD treated *Federalist* No. 10 as the paradigmatic statement of the political theory of the Constitution, and a host of later commentators who rejected most of Beard's reading of this text have nevertheless echoed the same judgment. Several of Madison's other essays for *The Federalist*—notably his discussion of FEDERALISM in Nos. 39, 45, and 46, and of the SEPARATION OF POWERS in Nos. 47–51—have attained nearly the same status.

*Federalist* No. 10 is a critical document because it disputes the conventional wisdom which then held that stable republican governments could safely exist only in compact, relatively homogeneous societies. This posed a formidable objection to the Constitution, because Americans could never approve a national government that did not take a suitably REPUBLICAN FORM. *Federalist* No. 10 turned this conventional wisdom on its head. The greatest danger to liberty arose when self-interested factions seized control of government, Madison argued, and this was far more likely to happen in small, homogeneous societies than in extended, diverse polities. Creating an extended national republic of diverse interests would reduce this danger, Madison concluded, and it might have the further benefit of enabling a superior class of lawmakers to gain election to Congress, where they could legislate more wisely than their counterparts in the states.

*Federalist* No. 10 explained why a national republican government was possible, but it did not describe how its institutions would be constructed or how they would operate. These were the subjects to which Madison turned in later essays. In *Federalist* No. 39, he patiently explained why the new government could only be described as a complicated amalgam of national, federal, and republican features—neither a confederation of fully sovereign states nor a consolidated unitary nation-state. The succeeding essays then provided a case-by-case defense of the particular powers that the proposed Constitution delegated to Congress. In *Federalist* Nos. 45–46, Madison further suggested that the states would retain significant political advantages over the national government. All of these essays sought to demonstrate that creating an effective national government would still leave the states in possession of their essential powers and even their political influence.

It was in *Federalist* Nos. 47–51, however, that the second fundamental element of the Madisonian theory of the Constitution became apparent. Here Madison set out to counter two other axioms of contemporary constitutional theory. One held that the best way to protect each of the three branches of government from encroachments by the others was to keep them rigidly separated in their powers and personnel; the other held that the greatest danger to this institutional separation of powers arose from the executive.

Madison countered these positions in several ways. He argued, first, that the theory of rigid separation was rarely followed in either British or American practice, and that indeed some mixture of powers across the branches might prove a better way of preserving the essential separation than an adherence to their rigid separation. Second, in republican governments the real danger to separation came from the "impetuous vortex" of the legislature, which could deploy its rulemaking authority and its superior political influence to overwhelm the other branches. From this it followed, third, that the people could not be expected to rally to the support of the threatened departments; it was far more likely that their passions and interests would inspire the legislature to overstep its bounds. The only security for protecting each branch within its proper sphere, Madison concluded in *Federalist* No. 51, was to give each branch of government some means of defense (the veto for the President, JUDICIAL REVIEW of legislation for the judiciary, the power of the purse for Congress), but also to encourage alliances between the weaker institutions against the stronger. Read carefully, *Federalist* No. 51 is really a defense of the potential alliance between the President and Senate against the danger from the U.S. HOUSE OF REPRESENTATIVES. But its general principle extends further. Rather than rely on a rigid theory of separation, a truly Madisonian constitution would strive to fashion pragmatic mechanisms for preventing any one branch of government from gaining lasting supremacy over the others.

Madison ended *Federalist* No. 51 with a restatement of the argument of *Federalist* No. 10, and this provides a revealing clue to his own understanding of the Constitution. If the extended republic worked as the latter essay had earlier predicted, Madison concluded, the actual danger that Congress would dominate the other branches might be mitigated, for the diversity of interests in the larger society should work to discourage the wrong kinds of majorities from forming to pursue their vicious ends. This restatement confirms that Madison himself believed that the benefits of the extended republic would lay the essential foundation of a truly Madisonian constitution.

JACK N. RAKOVE
(2000)

Bibliography

ADAIR, DOUGLASS 1951 The Tenth Federalist Revisited. William and Mary Quarterly 8:48–67.

——— 1957 "That Politics May Be Reduced to a Science": David Hume, James Madison, and the Tenth Federalist. *Huntington Library Quarterly* 20:343–360.

BANNING, LANCE 1995 *The Sacred Fire of Liberty: James Madison and the Founding of the American Republic.* Ithaca, N.Y.: Cornell University Press.

BEARD, CHARLES A. 1913 *An Economic Interpretation of the Constitution.* New York: Macmillan.

BOURKE, PAUL 1975 The Pluralist Reading of James Madison's Tenth Federalist. *Perspectives in American History* 9:271–295.

DAHL, ROBERT 1956 *A Preface to Democratic Theory.* Chicago: University of Chicago Press.

DIAMOND, MARTIN 1959 Democracy and The Federalist: A Reconsideration of the Framers' Intent. *American Political Science Review* 53:52–68.

EPSTEIN, DAVID F. 1984 *The Political Theory of* The Federalist. Chicago: University of Chicago Press.

KETCHAM, RALPH 1971 *James Madison: A Biography.* New York: Macmillan.

NEDELSKY, JENNIFER 1990 *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy.* Chicago: University of Chicago Press.

RAKOVE, JACK N. 1996 *Original Meanings: Politics and Ideas in the Making of the Constitution.* New York: Alfred Knopf.

ZVESPER, JOHN 1984 The Madisonian Systems. *Western Political Quarterly* 37:236–256.

## MADISON'S "MEMORIAL AND REMONSTRANCE" (1785)

This remonstrance is the best evidence of what JAMES MADISON, the framer of the FIRST AMENDMENT, meant by an ESTABLISHMENT OF RELIGION. In 1784 the Virginia legislature had proposed a bill that benefited "Teachers of the Christian Religion" by assessing a small tax on property owners. Each taxpayer could designate the Christian church of his choice as the recipient of his tax money; the bill allowed non-church members to earmark their taxes for the support of local schools, and it upheld the "liberal principle" that all Christian sects and denominations were equal under the law, none preferred over others. The bill did not speak of the "established religion" of the state as had an aborted bill of 1779, and it purported to be based on only secular considerations, the promotion of the public peace and morality rather than Christ's kingdom on earth. Madison denounced the bill as an establishment of religion, no less dangerous to RELIGIOUS LIBERTY than the proposal of 1779 and differing "only in degree" from the Inquisition.

In an elaborate argument of fifteen parts, Madison advocated a complete SEPARATION OF CHURCH AND STATE as the only guarantee of the equal right of every citizen to the free exercise of religion, including the freedom of those "whose minds have not yet yielded to the evidence which has convinced us." He regarded the right to support religion as an "unalienable" individual right to be exercised only on a voluntary basis. Religion, he contended, must be exempt from the power of society, the legislature, and the magistrate. In his trenchant assault on establishments including the one proposed by this mild bill—"it is proper to take alarm at the first experiment on our liberties"—and in his eloquent defense of separation, Madison stressed the point that separation benefited not only personal freedom but also the free state and even religion itself. His remonstrance, which circulated throughout Virginia in the summer of 1785, actually redirected public opinion, resulting in the election of legislators who opposed the bill, which had previously passed a second reading. Madison then introduced THOMAS JEFFERSON's proposal which was enacted into law as the VIRGINIA STATUTE OF RELIGIOUS FREEDOM.

LEONARD W. LEVY
(1986)

Bibliography

BRANT, IRVING 1948 *James Madison, Nationalist 1780–1787.* Pages 343–355. Indianapolis: Bobbs-Merrill.

## MADISON'S *NOTES OF THE DEBATES*

In the oral arguments in OGDEN V. SAUNDERS (1824), a lawyer wondered what the intentions were of those who framed the Constitution when they included the CONTRACT CLAUSE. "Unhappily for this country and for the general interest of political science," he added, "the history of the Convention of 1787 which framed the Constitution of the United States is lost to the world." It was not lost, but no one who was not an intimate of JAMES MADISON knew that. Incredibly, JOHN MARSHALL wrote his great opinions on constitutional law and JOSEPH STORY wrote his *Commentaries on the Constitution* (1833) without knowing that Madison had in his possession his elaborate manuscript record of the CONSTITUTIONAL CONVENTION.

The Father of the Constitution not only wielded the greatest influence on its formation at the Convention, where he delivered over 200 speeches, but he also kept a record of the debates for nearly four months, a task that he later said "almost killed" him. He sat front and center in a "favorable position for hearing all that passed," and daily he composed a transcript from detailed notes kept of each session. Yet the memory that he had performed the task faded from the minds of participants.

In Madison's will of 1835, leaving his papers to his wife, he wrote that given the interest the Constitution "has inspired among friends of free Government, it was not an unreasonable inference that a report of the proceedings and discussions . . . will be particularly gratifying to the people of the United States, and to all who take an interest in the progress of political science and the course of true liberty." Why he failed to publish those records during his lifetime, indeed, why he kept them a secret, is inexplicable.

Madison worked on his manuscript intermittently for many years, revising and expanding as additional information became available. For example, he incorporated material from the official *Journal, Acts and Proceedings of the Convention* (1819) and even from ROBERT YATES's *Secret Proceedings and Debates* (1821), an Anti-Federalist

work that contained useful details through July 5, 1787, including versions of Madison's own speeches. Madison's revisions of his original manuscript revealed his objective of making the record as full and accurate as possible.

After his death in 1836, Dolley Madison offered his papers to the United States. In 1837 Congress agreed on a price of $30,000, and in 1840, fifty-three years after the Convention, Madison's *Notes of the Debates* was published for the first of many times. It remains our most important source by far of what happened at the Constitutional Convention.

LEONARD W. LEVY
(1986)

Bibliography

MADISON, JAMES 1977 *The Papers of James Madison*, Robert A. Rutland, ed., vol. 10. Chicago: University of Chicago Press.
WARREN, CHARLES 1928 *The Making of the Constitution.* Boston: Little, Brown.

# MAGNA CARTA
## (1215)

Magna Carta (Latin, great charter), one of the enduring symbols of LIMITED GOVERNMENT and of the RULE OF LAW, was forced upon an unwilling King John by rebellious barons in June of 1215. Since his accession in 1199, John had made enemies at every quarter. The barons resisted heavy taxation exacted to support the king's expensive and unsuccessful wars with the French. Lesser folk complained that royal officials requisitioned, often without payment, food, timber, horses, and carts. Justice in the courts became more sporadic. Quarreling with Pope Innocent III over the election of a new archbishop of Canterbury, John seized church properties, yielding only when the pope threatened to release the English people from their allegiance to the Crown.

By spring of 1215, the barons' discontent had ripened to the point that they formally renounced their allegiance after the king refused their demands that he confirm their liberties by a charter. Under severe pressure, John agreed to meet the barons at Runnymede. There the barons presented a list of demands, the Articles of the Barons, which were then reduced to the form of a charter—the document that later generations came to call Magna Carta.

The charter to which John agreed is an intensely practical document. Rather than being a philosophical tract redolent with lofty generalities, the charter was drafted to provide concrete remedies for specific abuses. Moreover, although the barons were rebelling against the abuse of royal power, they were not seeking to remake the fabric of feudal society. They sought instead to restore customary limits on the power of the Crown, distinguishing between rule according to law and rule by the imposition of arbitrary will.

The barons' interests were essentially selfish. They did not see themselves as disinterested advocates for the common good of the realm. Nevertheless, because the abuses of John's reign touched so many elements of English society, his opponents' demands had implications far beyond the barons' own interests. For example, the charter begins with the declaration that the liberties therein guaranteed run to "all the free men of our kingdom."

Many of Magna Carta's provisions concern feudal relationships having no counterpart in modern times. Certain of the charter's decrees, however, raise issues as vital now as then. Indeed, some of its provisions anticipate rights now embedded in American constitutional law. Among the more relevant are the following:

Chapter 39 declares, "No freed man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the LAW OF THE LAND." One should not read this language too broadly; for instance, "judgment of his peers" did not mean, as many have supposed, TRIAL BY JURY. But the requirement of proceedings according to the "law of the land" was significant in the development generally of the rule of law and more specifically of the concept of DUE PROCESS OF LAW. Indeed, "due process of law" and "law of the land" became interchangeable.

Chapter 40 states, "To no one will We sell, to none will We deny or delay, right or justice." Like chapter 39, this provision aimed at curbing abuses in the administration of justice. Several chapters (28, 29, 30, 31) relate to abuses in royal officials' requisitioning of private property and thus are the remote ancestor of the requirement of JUST COMPENSATION in the Fifth Amendment to the United States Constitution. Other chapters (20, 21, 22) require that fines be "according to the measure" of the offense and that fines not be so heavy as to jeopardize one's ability to make a living—reflecting the principle that the criminal law ought not to be administered in a vindictive or unduly oppressive way. Still other provisions deal with the liberties and free customs of cities and towns, with the free flow of commerce, and with church and state—all of these subjects being continuing concerns of American constitutional law.

Beginning with Henry III (who at age nine succeeded John in 1216), king after king reaffirmed Magna Carta. By the end of the fourteenth century, Magna Carta (which had been placed on the statute books in 1297) had established itself as more than a venerable statute; by then it was a FUNDAMENTAL LAW. In 1368, for example—over 400 years before MARBURY V. MADISON (1803)—a statute of Ed-

ward III commanded that Magna Carta "be holden and kept in all Points; and if there be any Statute made to the contrary, it shall be holden for none." Here one sees an early germ of the principle contained in the SUPREMACY CLAUSE of the United States Constitution.

The political turmoil of seventeenth-century England saw such parliamentarians as Sir EDWARD COKE and such pamphleteers as JOHN LILBURNE ("Free-born John") invoking Magna Carta against the pretensions of the Stuart kings. By the end of that century, climaxed by the Glorious Revolution, three new "liberty documents" had been brought into being to stand alongside Magna Carta as assuring the liberties of the subject—the PETITION OF RIGHT (1628), the HABEAS CORPUS ACT (1679), and the BILL OF RIGHTS (1689).

Magna Carta was early carried to the New World. In 1646, some discontented freemen in the Massachusetts colony complained that the laws and liberties they were entitled to as Englishmen were not being enforced. The colony's magistrates responded by drawing up the famous "parallels" of Massachusetts—one column entitled "Magna Charta," the other "fundamentalls of the Massachusetts," the purpose being to argue that the rights assured by Magna Carta and the common law were indeed not denied to the people of Massachusetts. When WILLIAM PENN founded Pennsylvania, he drew upon Magna Carta in drafting the new colony's Frame of Government and, in 1687, was responsible for the first publication in America of Magna Carta.

In the decade between the STAMP ACT (1765) and the outbreak of hostilities with the mother country, Magna Carta became part of the fabric of colonial arguments against British policies. In the petition by the Stamp Act Congress to the king, the Congress declared that both the colonists' right to tax themselves and the right of trial by jury (a right the Crown had circumvented by giving ADMIRALTY courts JURISDICTION to try cases under the Stamp Act) were "confirmed by the Great Charter of English Liberty."

During the period leading up to revolution, the colonists' arguments, in tracts and resolutions, were essentially eclectic. Appeals to the British Constitution, including Magna Carta, were intertwined with arguments that the colonists' entitlement to such rights as taxation only with their consent were based also on the colonial charters and on natural law. As SAMUEL ADAMS put it, Magna Carta itself was a declaration of Britons' "original, inherent, indefeasible NATURAL RIGHTS."

Independence accomplished, the Americans turned to the work of building their own constitutional governments, both state and ultimately federal. The new constitutions reveal both the legacy of British institutions, including Magna Carta, and their perceived limitations. By and large, the contributions of Magna Carta and the other British "liberty" documents are most evident in American bills of rights. Virtually every state constitution has a due process clause, some using the phrase "due process," others using Magna Carta's formulation of "law of the land." For example, the debt owed Magna Carta's chapter 39 is obvious in North Carolina's Declaration of Rights, framed in 1776, "That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land."

From the outset, however, American constitutional draftsmen understood their handiwork to go beyond Magna Carta. In North Carolina's ratifying convention (1789), JAMES IREDELL (later to serve on the Supreme Court) called Magna Carta "no constitution" but simply a legislative act, "every article of which the legislature may at any time alter." What Britain lacked, he concluded, the new American constitution supplied.

Throughout the nineteenth century, American courts, both state and federal, commonly invoked Magna Carta in shaping constitutional rights. Thus Magna Carta was relied on in cases involving (to give but a few examples) excessive court costs, open courts and certain remedies, notice and hearing, general application of the laws, and BILLS OF ATTAINDER. Gradually, as a corpus of indigenous American law developed, reliance upon Magna Carta became more and more attenuated, indeed largely rhetorical. By the twentieth century, Magna Carta had long since been irrevocably embedded into the fabric of American CONSTITUTIONALISM, both by contributing specific concepts such as due process of law and by being the ultimate symbol of constitutional government under a rule of law.

A. E. DICK HOWARD
(1986)

Bibliography

HOWARD, A. E. DICK 1968 *The Road from Runnymede: Magna Carta and Constitutionalism in America.* Charlottesville: University Press of Virginia.

## *MAHAN v. HOWELL*
410 U.S. 315 (1973)

The ideal REAPPORTIONMENT, following REYNOLDS V. SIMS (1964), would establish state legislative districts of equal populations. The question remained: How much deviation from pure mathematical equality would be tolerated? In *Mahan*, the Supreme Court approved, 6–3, a deviation of sixteen percent in the districting of Virginia's lower house,

justified by the state's "policy of maintaining the integrity of district lines."

In congressional districting, no such deviation from equality is tolerated (*White v. Weiser*, 1973). However, state legislative districting may include DE MINIMIS departures from equality (up to around ten percent) without any justification (*White v. Regester*, 1973).

KENNETH L. KARST
(1986)

## *MAHER v. ROE*
### 432 U.S. 464 (1977)

The Supreme Court here sustained, 6–3, a Connecticut law limiting state medicaid assistance for abortions in the first trimester of pregnancy to "medically necessary" abortions (including "psychiatric necessity"), but providing such aid for childbirth. Justice LEWIS F. POWELL, for the Court, rejected both the claim that the law violated the right of PRIVACY recognized in ROE V. WADE (1973) and the claim that the state's WEALTH DISCRIMINATION violated the EQUAL PROTECTION clause.

There was to be "no retreat from *Roe*," but Connecticut had placed "no obstacles . . . in the pregnant woman's path to an abortion." An indigent woman suffered no disadvantage from the state's funding of childbirth; she might still have an abortion if she could find the wherewithal; Connecticut had not created her indigency. Nor did the scheme deny equal protection. There was no SUSPECT CLASSIFICATION requiring STRICT SCRUTINY of the law; neither had the state invaded any FUNDAMENTAL INTEREST by discriminating against the exercise of a constitutional right. The law satisfied the RATIONAL BASIS standard, for it was rationally related to promoting the state's interest in protecting potential life—an interest recognized in *Roe* itself.

Two companion decisions, *Poelker v. Doe* and *Beal v. Doe*, upheld a city's refusal to provide hospital services for an indigent woman's nontherapeutic abortion, and read the SOCIAL SECURITY ACT not to require a state to aid nontherapeutic abortions in order to receive federal medicaid grants.

Justices WILLIAM J. BRENNAN, THURGOOD MARSHALL, and HARRY BLACKMUN all filed opinions dissenting in the three cases. They emphasized the "coercive" effect on poor women of the state's financial preference for childbirth, and the particularly harsh effect of adding unwanted children to poor households.

Even before *Roe*, wealthy women could have abortions by traveling to other states or abroad. *Roe* brought abortion within the means of middleclass women. The *Maher* majority Justices declined to extend the effective right to have an abortion beyond the boundaries of their own socioeconomic environment.

KENNETH L. KARST
(1986)

(SEE ALSO: *Abortion and the Constitution; Harris v. McRae; Reproductive Autonomy.*)

## MAJORITY OPINION

See: Opinion of the Court

## *MALLORY v. UNITED STATES*

See: McNabb-Mallory Rule

## *MALLOY v. HOGAN*
### 378 U.S. 1 (1964)

This is one of a series of cases in which the WARREN COURT nationalized the rights of the criminally accused by incorporating provisions of the Fourth through the Eighth Amendments into the FOURTEENTH AMENDMENT. (See INCORPORATION DOCTRINE.) In *Malloy* it was the RIGHT AGAINST SELF-INCRIMINATION. Malloy, a convicted felon on probation, was ordered to testify in a judicial inquiry into gambling activities. He refused to answer any questions concerning the crime for which he had been convicted, and he was held in contempt. Connecticut's highest court, relying on TWINING V. NEW JERSEY (1908) and *Adamson v. California* (1947), ruled that Malloy's invocation of the Fifth Amendment right had no constitutional basis in the state and that the Fourteenth Amendment did not extend the right to a state proceeding.

The Supreme Court reversed on the ground that the "same standards must determine whether an accused's silence in either a federal or a state proceeding is justified." Had the inquiry been a federal one, said Justice WILLIAM J. BRENNAN for a 5–4 majority, Malloy would have been entitled to refuse to answer because his disclosures might have furnished a link in a chain of evidence to connect him to a new crime for which he might be prosecuted. The Court held that "the Fifth Amendment exception from compulsory self-incrimination is also protected by the Fourteenth against abridgment by the States." *Twining* and *Adamson*, which had held to the contrary, were overruled, although the specific holding in *Adamson* relating to comments on the accused's failure to testify was not overruled until GRIFFIN V. CALIFORNIA (1965). Thus, *Malloy* stands for the DOCTRINE that the Fourteenth Amendment protects against state abridgment the same

right that the Fifth protects against federal abridgment. Justices BYRON R. WHITE and POTTER STEWART did not expressly dissent from this doctrine; they contended, rather, that Malloy's reliance on his right to silence was groundless on the basis of the facts. Justices JOHN MARSHALL HARLAN and TOM C. CLARK opposed the incorporation of the Fifth Amendment right into the Fourteenth.

LEONARD W. LEVY
(1986)

## MANDAMUS, WRIT OF

(Latin: "We command.") A writ of mandamus is a judicial order to a lower court or to any agency or officer of any department of government, commanding the performance of a nondiscretionary act as a duty of office for the purpose of enforcing or recognizing an individual right or privilege. (See MARBURY V. MADISON.)

LEONARD W. LEVY
(1986)

## MANN ACT
36 Stat. 825 (1910)

Congress sought to suppress prostitution in the so-called White Slave Act under the commerce power. Anyone transporting or aiding the transportation of a woman in INTERSTATE or FOREIGN COMMERCE "for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl" to such immoral acts was guilty of a FELONY. Persuasion to cross state lines for these purposes "whether with or without her consent" was likewise a felony. Another section doubled the already stiff penalties (five years imprisonment or $5,000) in cases involving women under eighteen years of age. The act also authorized the Commissioner-General of Immigration to "receive and centralize information concerning the procuration of alien women and girls" for such purposes and required brothel-keepers to file statements regarding alien employees, exempting the keepers from prosecution for "truthful statements."

In HOKE V. UNITED STATES (1913) the Supreme Court sustained congressional power to enact the law under the COMMERCE CLAUSE, relying squarely on CHAMPION V. AMES (1903): "Congress, as an incident to [the commerce power] may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations."

DAVID GORDON
(1986)

## MANN-ELKINS ACT
36 Stat. 539 (1910)

The ELKINS ACT of 1903 and the HEPBURN ACT of 1906, as well as the decisions they prompted, had reinvigorated the Interstate Commerce Commission (ICC) after disastrous Supreme Court decisions such as INTERSTATE COMMERCE COMMISSION V. CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO. (1897). The Mann-Elkins Act granted the ICC, for the first time, the power to set original rates; it also authorized the commission to suspend applications for proposed rate increases until it had ascertained their reasonableness. Despite the statute's vesting the commission with such powers, determinations of reasonableness would still be subject to the extraordinarily flexible guidelines of the FAIR RETURN rule laid down in SMYTH V. AMES (1898). The act placed the ICC firmly in control by shifting the BURDEN OF PROOF on the question of reasonableness from the commission to the carriers. In addition, the act revived a prohibition against LONG HAUL-SHORT HAUL DISCRIMINATION, except where specifically allowed by the commission. The act also brought telephone, telegraph, and cable lines under ICC JURISDICTION. A unanimous Supreme Court sustained many of the act's provisions in *United States v. Atchinson, Topeka & Santa Fe Railroad* (1914).

DAVID GORDON
(1986)

## MANSFIELD, LORD

See: Murray, William

## *MAPP v. OHIO*
367 U.S. 643 (1961)

*Mapp v. Ohio* brought to a close an abrasive constitutional debate within the Supreme Court on the question whether the EXCLUSIONARY RULE, constitutionally required in federal trials since 1914, was also required in state criminal cases. *Mapp* imposed the rule on the states.

WOLF V. COLORADO (1949) had applied to the states the FOURTH AMENDMENT's prohibition against UNREASONABLE SEARCHES, but it had not required state courts to exclude from trial evidence so obtained. *Mapp*'s extension of *Wolf* was based on two considerations. First, in *Wolf* the Court had been persuaded by the rejection of the exclusionary rule by most state courts; by 1961, however, a narrow majority of the states had independently adopted the rule. Second, the *Wolf* majority was convinced that other remedies, such as suits in tort against offending officers, could

serve equally in deterring unlawful searches; time, however, had shown that such remedies were useless. "Nothing can destroy a government more quickly than its failure to observe its own laws," wrote Justice TOM C. CLARK for the Court, "or worse, its disregard of the charter of its own existence."

In *Mapp v. Ohio* the Court asserted emphatically that the exclusionary rule was "an essential part" of the Fourth Amendment and hence a fit subject for imposition on the states despite "passing references" in earlier cases to its being a nonconstitutional rule of evidence. Yet, in some hazy phrasing, the opinion also suggested that the Fifth Amendment's RIGHT AGAINST SELF-INCRIMINATION was the exclusionary rule's constitutional backbone. Equally confusing was the Court's characterization of the rule as "the most important constitutional privilege" (that is, personal right) guaranteed by the Fourth Amendment while at the same time pointing to the rule's deterrent effect as justification for its imposition. More recently, the Court has settled on deterrence as the crucial consideration, and thus has refused to apply the rule in situations, such as GRAND JURY proceedings in CALANDRA V. UNITED STATES (1974), where in the Court's view the deterrent effect is minimal.

Three dissenters, in an opinion by Justice JOHN MARSHALL HARLAN, expressed "considerable doubt" that the federal exclusionary rule of WEEKS V. UNITED STATES (1914) was constitutionally based and argued that, in any event, considerations of FEDERALISM should allow the states to devise their own remedies for unlawful searches.

(Unlike the well-entrenched federal exclusionary rule, which has gone well-nigh unchallenged on the Court from the beginning, controversy concerning the rule for the states has continued unabated, both on and off the Court, since *Mapp* was decided.)

JACOB W. LANDYNSKI
(1986)

## *MARBURY v. MADISON*
1 Cranch 137 (1803)

*Marbury* has transcended its origins in the party battles between Federalists and Republicans, achieving mythic status as the foremost precedent for JUDICIAL REVIEW. For the first time the Court held unconstitutional an act of Congress, establishing, if only for posterity, the doctrine that the Supreme Court has the final word among the coordinate branches of the national government in determining what is law under the Constitution. By 1803 no one doubted that an unconstitutional act of government was null and void, but who was to judge? What *Marbury* settled, doctrinally if not in reality, was the Court's ultimate authority over Congress and the President. Actually, the historic reputation of the case is all out of proportion to the merits of Chief Justice JOHN MARSHALLS unanimous opinion for the Court. On the issue of judicial review, which made the case live, he said nothing new, and his claim for the power of the Court occasioned little contemporary comment. The significance of the case in its time derived from its political context and from the fact that the Court appeared successfully to interfere with the executive branch. Marshall's most remarkable accomplishment, in retrospect, was his massing of the Court behind a poorly reasoned opinion that section 13 of the JUDICIARY ACT OF 1789 was unconstitutional. Though the Court's legal craftsmanship was not evident, its judicial politics—egregious partisanship and calculated expediency—was exceptionally adroit, leaving no target for Republican retaliation beyond frustrated rhetoric.

Republican hostility to the United States courts, which were Federalist to the last man as well as Federalist in doctrine and interests, had mounted increasingly and passed the threshold of tolerance when the Justices on circuit enforced the Sedition Act. (See ALIEN AND SEDITION ACTS.) Then the lame-duck Federalist administration passed the JUDICIARY ACT OF 1801 and, a week before THOMAS JEFFERSON's inauguration, passed the companion act for the appointment of forty-two justices of the peace for the DISTRICT OF COLUMBIA, prompting the new President to believe that "the Federalists have retired into the Judiciary as a stronghold . . . and from that battery all the works of republicanism are to be beaten down and erased." The new Circuit Court for the District of Columbia sought in vain to obtain the conviction of the editor of the administration's organ in the capital for the common law crime of SEDITIOUS LIBEL. The temperate response of the new administration was remarkable. Instead of increasing the size of the courts, especially the Supreme Court, and packing them with Republican appointees, the administration simply repealed the Judiciary Act of 1801. (See JUDICIARY ACTS OF 1802.) On taking office Jefferson also ordered that the commissions for the forty-two justices of the peace for the district be withheld, though he reappointed twenty-five, all political enemies originally appointed by President JOHN ADAMS.

*Marbury v. Madison* arose from the refusal of the administration to deliver the commissions of four of these appointees, including one William Marbury. The Senate had confirmed the appointments and Adams had signed their commissions, which Marshall, the outgoing secretary of state, had affixed with the great seal of the United States. But in the rush of the "midnight appointments" on the evening of March 3, the last day of the outgoing administration, Marshall had neglected to deliver the commissions. Marbury and three others sought from the

Supreme Court, in a case of ORIGINAL JURISDICTION, a WRIT OF MANDAMUS compelling JAMES MADISON, the new secretary of state, to issue their commissions. In December 1801 the Court issued an order commanding Madison to show cause why the writ should not be issued.

A congressman reflected the Republican viewpoint when saying that the show-cause order was "a bold stroke against the Executive," and JOHN BRECKINRIDGE, the majority leader of the Senate, thought the order "the most daring attack which the annals of Federalism have yet exhibited." When the debate began on the repeal bill, Federalists defended the show-cause order, the independence of the judiciary, and the duty of the Supreme Court to hold void any unconstitutional acts of Congress. A Republican paper declared that the "mandamus business" had first appeared to be only a contest between the judiciary and the executive but now seemed a political act by the Court to deter repeal of the 1801 legislation. In retaliation the Republicans passed the repealer and altered the terms of the Court so that it would lose its June 1802 session and not again meet until February 1803, fourteen months after the show-cause order. The Republicans hoped, as proved to be the case, that the Justices would comply with the repealer and return to circuit duty, thereby averting a showdown and a constitutional crisis, which the administration preferred to avoid.

By the time the Court met in February 1803 to hear arguments in *Marbury*, which had become a political sensation, talk of IMPEACHMENT was in the air. A few days before the Court's term, Federalists in Congress moved that the Senate should produce for Marbury's benefit records of his confirmation, provoking Senator James Jackson to declare that the Senate would not interfere in the case and become "a party to an accusation which may end in an impeachment, of which the Senate were the constitutional Judges." By no coincidence, a week before the Court met, Jefferson instructed the House to impeach a U.S. District Court judge in New Hampshire, and already Federalists knew of the plan to impeach Justice SAMUEL CHASE. Jefferson's desire to replace John Marshall with SPENCER ROANE was also public knowledge. Right before Marshall delivered the Court's opinion in *Marbury*, the Washington correspondent of a Republican paper wrote: "The attempt of the Supreme Court . . . by a mandamus, to control the Executive functions, is a new experiment. It seems to be no less than a commencement of war. . . . The Court must be defeated and retreat from the attack; or march on, till they incur an impeachment and removal from office."

Marshall and his Court appeared to confront unattractive alternatives. To have issued the writ, which was the expected judgment, would have been like the papal bull against the moon; Madison would have defied it, exposing the Court's impotence, and the Republicans might have a pretext for retaliation based on the Court's breach of the principle of SEPARATION OF POWERS. To have withheld the writ would have violated the Federalist principle that the Republican administration was accountable under the law. ALEXANDER HAMILTON's newspaper reported the Court's opinion in a story headed "Constitution Violated by President," informing its readers that the new President by his first act had trampled on the charter of the peoples' liberties by unprincipled, even criminal, conduct against personal rights. Yet the Court did not issue the writ; the victorious party was Madison. But Marshall exhibited him and the President to the nation as if they were arbitrary Stuart tyrants, and then, affecting judicial humility, Marshall in obedience to the Constitution found that the Court could not obey an act of Congress that sought to aggrandize judicial powers in cases of original jurisdiction, contrary to Article III of the Constitution.

The Court was treading warily. The statute in question was not a Republican measure, not, for example, the repealer of the Judiciary Act of 1801. Indeed, shortly after *Marbury*, the Court sustained the repealer in STUART V. LAIRD (1803) against arguments that it was unconstitutional. In that case the Court ruled that the practice of the Justices in sitting as circuit judges derived from the Judiciary Act of 1789, and therefore derived "from a contemporary interpretation of the most forcible nature," as well as from customary acquiescence. Ironically, another provision of the same statute, section 13, was at issue in *Marbury*, not that the bench and bar realized it until Marshall delivered his opinion. The offending section, passed by a Federalist Congress after being drafted by OLIVER ELLSWORTH, one of the Constitution's Framers and Marshall's predecessor, had been the subject of previous litigation before the Court without anyone having thought it was unconstitutional. Section 13 simply authorized the Court to issue writs of *mandamus* "in cases warranted by the principles and usages of law," and that clause appeared in the context of a reference to the Court's APPELLATE JURISDICTION.

Marshall's entire argument hinged on the point that section 13 unconstitutionally extended the Court's original jurisdiction beyond the two categories of cases, specified in Article III, in which the Court was to have such jurisdiction. But for those two categories of cases, involving foreign diplomats or a state as a litigant, the Court has appellate jurisdiction. In quoting Article III, Marshall omitted the clause that directly follows as part of the same sentence: the Court has appellate jurisdiction "with such exceptions, and under such regulations as the Congress shall make." That might mean that Congress can detract from the Court's appellate jurisdiction or add to its original jurisdiction. The specification of two categories of cases in

which the Court has original jurisdiction was surely intended as an irreducible minimum, but Marshall read it, by the narrowest construction, to mean a negation of congressional powers.

In any event, section 13 did not add to the Court's original jurisdiction. In effect it authorized the Court to issue writs of *mandamus* in the two categories of cases of original jurisdiction and in all appellate cases. The authority to issue such writs did not extend or add to the Court's jurisdiction; the writ of *mandamus* is merely a remedial device by which courts implement their existing jurisdiction. Marshall misinterpreted the statute and Article III, as well as the nature of the writ, in order to find that the statute conflicted with Article III. Had the Court employed the reasoning of *Stuart v. Laird* or the rule that the Court should hold a statute void only in a clear case, giving every presumption of validity in doubtful cases, Marshall could not have reached his conclusion that section 13 was unconstitutional. That conclusion allowed him to decide that the Court was powerless to issue the writ because Marbury had sued for it in a case of original jurisdiction.

Marshall could have said, simply, this is a case of original jurisdiction but it does not fall within either of the two categories of original jurisdiction specified in Article III; therefore we cannot decide: writ denied, case dismissed. Section 13 need never have entered the opinion, although, alternatively, Marshall could have declared: section 13 authorizes this Court to issue such writs only in cases warranted by the principles and usages of law; we have no jurisdiction here because we are not hearing the case in our appellate capacity and it is not one of the two categories in which we possess original jurisdiction: writ denied, case dismissed. Even if Marshall had to find that the statute augmented the Court's original jurisdiction, the ambiguity of the clause in Article III, which he neglected to quote, justified sustaining the statute.

Holding section 13 unconstitutional enabled Marshall to refuse an extension of the Court's powers and award the judgment to Madison, thus denying the administration a pretext for vengeance. Marshall also used the case to answer Republican arguments that the Court did not and should not have the power to declare an act of Congress unconstitutional, though he carefully chose an inoffensive section of a Federalist statute that pertained merely to writs of mandamus. That he gave his doctrine of judicial review the support of only abstract logic, without reference to history or precedents, was characteristic, as was the fact that his doctrine swept way beyond the statute that provoked it.

If Marshall had merely wanted a safe platform from which to espouse and exercise judicial review, he would have begun his opinion with the problems that section 13 posed for the Court; but he reached the question of constitutionality and of judicial review at the tail-end of his opinion. Although he concluded that the Court had to discharge the show-cause order, because it lacked jurisdiction, he first and most irregularly passed judgment on the merits of the case. Everything said on the merits was OBITER DICTA and should not have been said at all, given the judgment. Most of the opinion dealt with Marbury's unquestionable right to his commission and the correctness of the remedy he had sought by way of a writ of mandamus. In his elaborate discourse on those matters, Marshall assailed the President and his cabinet officer for their lawlessness. Before telling Marbury that he had initiated his case in the wrong court, Marshall engaged in what EDWARD S. CORWIN called "a deliberate partisan *coup.*" Then Marshall followed with a "judicial *coup d'etat,*" in the words of ALBERT J. BEVERIDGE, on the constitutional issue that neither party had argued.

The partisan *coup* by which Marshall denounced the executive branch, not the grand declaration of the doctrine of judicial review for which the case is remembered, was the focus of contemporary excitement. Only the passages on judicial review survive. Cases on the REMOVAL POWER of the President, especially concerning inferior appointees, cast doubt on the validity of the dicta by which Marshall lectured the executive branch on its responsibilities under the law. Moreover, by statute and by judicial practice the Supreme Court exercises the authority to issue writs of mandamus in all appellate cases and in the two categories of cases of original jurisdiction. Over the passage of time *Marbury* came to stand for the monumental principle, so distinctive and dominant a feature of our constitutional system, that the Court may bind the coordinate branches of the national government to its rulings on what is the supreme LAW OF THE LAND. That principle stands out from *Marbury* like the grin on the Cheshire cat; all else, which preoccupied national attention in 1803, disappeared in our constitutional law. So too might have disappeared national judicial review if the impeachment of Chase had succeeded.

Marshall himself was prepared to submit to review of Supreme Court opinions by Congress. He was so shaken by the impeachment of Chase and by the thought that he himself might be the next victim in the event of Chase's conviction, that he wrote to Chase on January 23, 1804: "I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the judge who has rendered them unknowing of his fault." The acquittal of Chase meant that the Court could remain independent, that Marshall had no need to announce publicly his desperate plan for congressional review of the Court, and that *Mar-*

*bury* remained as a precedent. Considering that the Court did not again hold unconstitutional an act of Congress until 1857, when it decided DRED SCOTT V. SANDFORD, sixty-eight years would have passed since 1789 without such a holding, and but for *Marbury*, after so long a period of congressional omnipotence, national judicial review might never have been established.

LEONARD W. LEVY
(1986)

Bibliography

BEVERIDGE, ALBERT J. 1916–1919 *The Life of John Marshall*, 4 vols. Vol. III:50–178. Boston: Houghton Mifflin.

CORWIN, EDWARD S. 1914 *The Doctrine of Judicial Review*. Pages 1–78. Princeton, N.J.: Princeton University Press.

HAINES, CHARLES GROVE 1944 *The Role of the Supreme Court in American Government and Politics, 1789–1835*. Pages 223–258. Berkeley: University of California Press.

VAN ALSTYNE, WILLIAM W. 1969 A Critical Guide to Marbury v. Madison. *Duke Law Journal* 1969:1–47.

WARREN, CHARLES 1923 *The Supreme Court in United States History*, 3 vols. Vol. I:200–268. Boston: Little, Brown.

## *MARCHETTI v. UNITED STATES*
390 U.S. 39 (1968)

## *GROSSO v. UNITED STATES*
390 U.S. 62 (1968)

## *HAYNES v. UNITED STATES*
390 U.S. 85 (1968)

## *UNITED STATES v. UNITED STATES COIN & CURRENCY*
401 U.S. 715 (1971)

In *Marchetti* and *Grosso* the Supreme Court, in opinions by Justice JOHN MARSHALL HARLAN from which only Chief Justice EARL WARREN dissented, held that the RIGHT AGAINST SELF-INCRIMINATION constituted an ironclad defense against a criminal prosecution for failure to register as a gambler pursuant to federal gambling statutes or to pay federal occupational and EXCISE TAXES on gambling. The Court overruled *United States v. Kahriger* (1953) and *Lewis v. United States* (1955), which had held that the Fifth Amendment right could not be asserted by professional gamblers because the federal gambling laws did not compel self-incrimination. In those earlier cases the Court reasoned that the right was inapplicable to prospective acts: a gambler had the initial choice of deciding whether to continue gambling at the price of surrendering his right against self-incrimination, or cease gambling and thereby avoid the need to register and pay the taxes. In 1968 the Court found its earlier reasoning "no longer persuasive."

Justice Harlan explained how the statutes worked. A gambler had an obligation to register annually with the Internal Revenue Service as one engaged in the business of accepting wagers. He paid a $50 occupational tax plus an excise tax of ten percent on the gross amount of all bets. He had to keep daily records of all bets and reveal those records to IRS inspectors. The issue posed by such congressional requirements was not whether the United States may tax gambling, for the unlawfulness of an activity did not preclude its taxation. The issue, rather, was whether the registration, record-keeping, and tax provisions whipsawed gamblers into confessing criminal activities. Federal and state laws made gambling illegal, and the IRS made available to law enforcement agencies the identities of those who complied with the gambling statutes. Gamblers therefore confronted substantial hazards of self-incrimination. On pain of punishment for not complying, they had to provide prosecutors with evidence of their guilt.

Marchetti was convicted of failing to register and pay the occupational tax, Grosso for failing to pay that tax and the excises. Reversing their convictions, the Court distinguished their cases from those in which a criminal had failed to file income tax returns for fear of self-incrimination and another in which the government had required record keeping from persons not engaged in an inherently suspect activity. The mere filing of a tax return, required of all, or the failure to keep routine business records did not identify anyone as a suspect of a crime. In *Haynes*, the Court ruled that a person possessing a sawed-off shotgun is suspect and therefore cannot be compelled to register his weapon, under the National Firearms Act, because of the hazard of self-incrimination. In *United States Coin & Currency* a 5–4 Court applied the *Marchetti* reasoning to a forfeiture proceeding involving property used to violate federal gambling laws.

LEONARD W. LEVY
(1986)

# MARKETPLACE OF IDEAS

The "marketplace of ideas" argument in FIRST AMENDMENT jurisprudence was first enunciated in Justice OLIVER WENDELL HOLMES's dissenting opinion in ABRAMS V. UNITED STATES (1919):

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of

> thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. . . . While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purpose of the law that an immediate check is required to save the country.

Holmes's stirring words recall similar but distinct passages from JOHN MILTON and JOHN STUART MILL. Extravagant as Holmes's passage is, it is in significant respects more careful than the implications of Milton's rhetorical question: "[W]ho ever knew truth put to the worse, in a free and open encounter?" Holmes did not claim that truth always or even usually emerges in the marketplace of ideas. Holmes's claim was more confined—that the best test of truth is the competition of the marketplace.

On the other hand, Milton spoke of a free and open encounter; Holmes spoke of the competition of the marketplace. A recurrent problem in First Amendment cases is that these two notions are not the same. Those who seek access to the broadcast media, as in RED LION BROADCASTING V. FCC (1969), or to powerful newspapers, as in MIAMI HERALD PUBLISHING CO. V. TORNILLO (1974), argue that the competition of the marketplace is not free and open. They urge that truth cannot emerge in the market if the gatekeepers do not let it in. A more general criticism of the Holmes position is that the claim that the marketplace is the best test of truth cannot itself be tested without an independent test of truth, yet the argument by its terms denies any superior test of truth that is independent of the marketplace.

These criticisms aside, the question arises whether the marketplace argument overvalues truth. Holmes's view that the expression of opinion should be free until an immediate check is needed to "save the country" has never been adopted by the Supreme Court. Advocacy of illegal action, for example, may be restricted when it is directed to and likely to incite or produce imminent lawless action, whether or not the country itself is endangered. Indeed, if the marketplace argument extends to facts as well as opinions, it is clear that showings far more pedestrian than Holmes's proposed requirements are sufficient to justify repression. The expression of factual beliefs can be restricted in order to protect reputation or privacy, and, in the commercial sphere, to further any substantial government interest.

Nonetheless, the marketplace argument has been a powerful theme in First Amendment law. For example, some defamatory facts and all defamatory opinion are protected in order to guarantee the breathing space we need for robust, uninhibited, and wide-open debate. Ironically, however, the marketplace argument serves to restrict speech as well as to protect it. "Under our Constitution," said the Court in GERTZ V. ROBERT WELCH, INC. (1974), "there is no such thing as a false idea," yet obscenity is divorced from speech protection because it is thought to be unnecessary for the expression of any idea. At bottom, First Amendment methodology is grounded in a paradox. Government must be restrained from imposing its views of truth. But government itself determines when this principle has been abandoned.

STEVEN SHIFFRIN
(1986)

Bibliography

SCHAUER, FREDERICK 1978 Language, Truth and the First Amendment: An Essay in Memory of Harry Canter. *Virginia Law Review* 64:263, 268–272.

## MARRIAGE AND THE CONSTITUTION

Although the constitutional "right to marry" was not securely confirmed by the Supreme Court until its decision in ZABLOCKI V. REDHAIL (1978), the Court had spoken of the freedom to marry as a FOURTEENTH AMENDMENT "liberty" as early as MEYER V. NEBRASKA (1923). Two WARREN COURT decisions had also laid the foundations for SUBSTANTIVE DUE PROCESS protections of marriage. GRISWOLD V. CONNECTICUT (1965) had recognized a RIGHT OF PRIVACY for the marital relationship, and LOVING V. VIRGINIA (1967) had struck down a MISCEGENATION law not only as an unconstitutional RACIAL DISCRIMINATION but also as a due process violation. The *Loving* opinion was explicit enough in speaking of the "freedom to marry," but doubt lingered that the Court meant to carry the principle beyond the racial context of the decision.

*Zablocki* ended the doubt. The Court held invalid, on equal protection grounds, a law forbidding a resident to marry without a judge's approval when he or she had court-ordered child support obligations. The judge could not approve the marriage unless support payments were kept current and the children were unlikely to become public charges. Some concurring Justices thought the law defective on due process grounds. *Zablocki*'s importance turns not on this doctrinal distinction but on its explicit recognition of marriage as a FUNDAMENTAL INTEREST, requiring STRICT SCRUTINY by the courts of direct and substantial governmental interference.

Just two months earlier, however, in *Califano v. Jobst* (1977), the Court had upheld a portion of the SOCIAL SE-

CURITY ACT terminating disability benefits for a disabled dependent child of a wage earner when the child married a person not entitled to benefits under the act, even though that person was also disabled. Much of the discussion in *Zablocki*'s several opinions was devoted to *Jobst*. The majority distinguished *Jobst* as lacking the "directness and substantiality of the interference with the freedom to marry" present in *Zablocki*. The message was clear: interferences with marriage would demand justification in proportion to their degrees of severity. In *Zablocki* as in *Jobst* a money cost was attached to marriage; in *Zablocki* that cost would be prohibitive in most cases covered by the law.

This version of judicial interest-balancing seems likely to uphold such state restrictions on marriage as blood tests, reasonable age requirements, and insistence on a mentally retarded person's ability to understand the nature of the marriage relationship, even when those restrictions are strictly scrutinized. On principle, the state's power to prohibit POLYGAMY or to deny homosexual couples marriage or some comparable status seems more vulnerable to attack. It would be unrealistic, however, to expect an extension of the constitutional right to marry to homosexuals in the near future. (See SEXUAL PREFERENCE AND THE CONSTITUTION.) And recognition of a constitutional right to multiple marriage is a poor bet even for the distant future.

The extension of constitutional protection to other intimate relationships more closely resembling traditional marriage is already at hand. *Griswold*'s "privacy" protections have been effectively extended to the unmarried in EISENSTADT V. BAIRD (1972) and CAREY V. POPULATION SERVICES INTERNATIONAL (1977). Some states continue to recognize common law marriage, and others have concluded that support obligations may attach to the partners to some informal unions, once the unions end. As the number of unmarried couples living together increases, and as the incidents of unwed union come to resemble those of traditional marriage, formal marriage itself is more clearly seen in its expressive aspects, as a statement of commitment. In these circumstances it makes good sense to think of the right to marry as, in part, a FIRST AMENDMENT right.

KENNETH L. KARST
(1986)

(SEE ALSO: *Freedom of Intimate Association; Same-Sex Marriage.*)

Bibliography

KARST, KENNETH L. 1980 The Freedom of Intimate Association. *Yale Law Journal* 89:624–692.

NOTE 1980 Developments in the Law: The Constitution and the Family. *Harvard Law Review* 93:1156–1383, 1248–1296.

## *MARSH v. ALABAMA*
326 U.S. 501 (1946)

When a person sought to distribute religious literature on the streets of a company town, the Supreme Court, 5–3, upheld her FIRST AMENDMENT claim against the owner's private property claims. Stressing the traditional role of free speech in town shopping districts open to the general public, Justice HUGO L. BLACK for the Court noted that, aside from private ownership, this town functioned exactly as did other towns which were constitutionally forbidden to ban leafleting. *Marsh* served as the basis for the later attempt, aborted in HUDGENS V. NLRB (1976), to extend First Amendment rights to users of privately owned SHOPPING CENTERS.

MARTIN SHAPIRO
(1986)

## *MARSH v. CHAMBERS*
463 U.S. 783 (1983)

A 6–3 Supreme Court sustained the constitutionality of legislative chaplaincies as not violating the SEPARATION OF CHURCH AND STATE mandated by the FIRST AMENDMENT. Chief Justice WARREN E. BURGER for the Court abandoned the three-part test of LEMON V. KURTZMAN (1971) previously used in cases involving the establishment clause and grounded his opinion wholly upon historical custom. Prayers by tax-supported legislative chaplains, traceable to the FIRST CONTINENTAL CONGRESS and the very Congress that framed the BILL OF RIGHTS, had become "part of the fabric of our society." Justice JOHN PAUL STEVENS, dissenting, asserted that Nebraska's practice of having the same Presbyterian minister as the official chaplain for sixteen years preferred one denomination over others. Justices WILLIAM J. BRENNAN and THURGOOD MARSHALL, dissenting, attacked legislative chaplains generally as a form of religious worship sponsored by government to promote and advance religion and entangling the government with religion, contrary to the values implicit in the establishment clause—privacy in religious matters, government neutrality, freedom of conscience, autonomy of religious life, and withdrawal of religion from the political arena.

LEONARD W. LEVY
(1986)

## MARSHALL, JOHN
(1755–1835)

John Marshall, the third CHIEF JUSTICE of the Supreme Court (1801–1835), is still popularly known as the "Great

Chief Justice" and the "Expounder of the Constitution." He was raised in the simple circumstances of backwoods Virginia, but his mother was pious and well educated and his father was a leader of his county and a friend of GEORGE WASHINGTON. Even though Marshall had little formal education, his extraordinary powers of mind, coupled with equity and good humor, made him a natural leader as a young soldier of the Revolution, as a member of the Richmond bar (then outstanding in the country), and as a general of the Virginia militia. He became nationally prominent as a diplomat, having outwitted the wily Charles Talleyrand while negotiating with France's Directory (1797–1798), and as a legislator, having supported Washington's FEDERALISM first in the Virginia Assembly (1782–1791, 1795–1797) and then in the HOUSE OF REPRESENTATIVES (1799–1800). In June 1800 President JOHN ADAMS named Marshall to replace the Hamiltonian John Pickering as secretary of state, and in January 1801, after the strife-ridden Federalists' epochal defeat, appointed him Chief Justice when JOHN JAY, the first Chief Justice, declined to preside again over "a system so defective."

From its inception Marshall had defended the Constitution. His experience in Washington's ragtag army had made him a national patriot while rousing his disgust with the palsied Confederation. At the crucial Virginia ratifying convention (June 1788) he replied in three important speeches to the fears of PATRICK HENRY and other Anti-Federalists. The proposed Constitution, he argued, was not undemocratic, but a plan for a "well-regulated democracy." It set forth in particular the great powers of taxing and warring needed by any sound government. The state governments would retain all powers not given up expressly or implicitly; they were independently derived from the people. A mix of dependence upon the people and independence and virtue in the judges would prevent federal overreaching. If a law were not "warranted by any of the powers enumerated," Marshall remarked prophetically, the judges would declare it "void" as infringing "the Constitution they are to guard." Two other nonjudicial interpretations of the Constitution are notable. In 1799 Marshall wrote a report of the Virginia Federalists defending the constitutionality of the ill-famed Sedition Act of 1798 (a law he nevertheless had opposed as divisive in the explosive political atmosphere surrounding the French Revolution). If the NECESSARY AND PROPER CLAUSE authorizes punishment of actual resistance to law, he argued, it also authorizes punishment of "calumnious" speech, which is criminal under the COMMON LAW and prepares resistance. A speech to Congress in 1800, once famous in collections of American rhetoric, defended the President's power required by JAY'S TREATY to extradite a British subject charged with murder on a British ship. Because the criminal and the location were foreign, Marshall argued, the question was not a case in law or equity for United States courts; although a treaty is a law, it is a "political law," the execution of which lies with the President, not the courts. The judiciary has no political power whatever; the President is "the sole organ of the nation in its external relations."

As Chief Justice, Marshall raised the office and the Supreme Court to stature and power previously lacking. After having two Chief Justices in eleven years, the Court had Marshall for thirty-four, the longest tenure of any Chief Justice before or since. Individual opinions SERIATIM largely ceased, and dissents were discouraged. The Court came to speak with one voice. Usually the voice was Marshall's. He delivered the OPINION OF THE COURT in every case in which he participated during the decisive first five years, three-quarters of the opinions during the next seven years, and almost all the great constitutional opinions throughout his tenure. Marshall's captivating and equable temper helped unite a diverse group of justices, many appointed by Republican Presidents bent on reversing the Court's declarations of federal power and restrictions of state power. In the face of triumphant Jeffersonian Republicans, suspicious of an unelected judiciary stocked with Federalists, Marshall was wary and astute. His Court never erred as the JAY COURT did in CHISHOLM V. GEORGIA (1793), which had provoked the ELEVENTH AMENDMENT as a corrective. Nor did he cast antidemocratic contentions in the teeth of the Jeffersonians or their Jacksonian successors, thus to provoke (as had Justice Samuel Chase) impeachment proceedings. Marshall's judicial opinions encouraged grave respect for law, treated the Constitution as sacred and its Founding Fathers as sainted men, and fashioned a protective and compelling shield of purpose, principle, and reasoning.

His crucial judicial accomplishment was MARBURY V. MADISON (1803), which laid down the essentials of the American RULE OF LAW. Judges are to oversee executive and legislature alike, keeping the political departments faithful to applicable statutes, to the written Constitution, and to "general principles" of law protecting individual rights and delimiting the functions of each department. A series of important decisions secured individual rights, especially the right to acquire property by contract, against state and general governments. *United States v. Burr* (1807) expounded a narrow constitutional definition of TREASON and made prosecution difficult. STURGES V. CROWNINSHIELD (1819) set strict standards for voiding debts by bankruptcy. FLETCHER V. PECK (1810) and DARTMOUTH COLLEGE V. WOODWARD (1819) enforced as judicially protected contracts a state's sale of land and a state's grant of a corporate charter. Finally, several of Marshall's most famous opinions elaborated great powers for the national government and protected them from state encroachment.

MCCULLOCH V. MARYLAND (1819) sustained Congress's authority to charter a bank and in general to employ broad discretion as to necessary and proper means for carrying out national functions. GIBBONS V. OGDEN (1824), the steamboat case, interpreted congressional power under the COMMERCE CLAUSE to protect a national market, a right of exchange free from state-supported monopoly. COHENS V. VIRGINIA (1821) eloquently defended Supreme Court review of state court decisions involving FEDERAL QUESTIONS.

The presupposition of Marshall's CONSTITUTIONALISM was that the Constitution is FUNDAMENTAL LAW, not merely a fundamental plan, written to impose limits, not just to raise powers, and designed to be permanent, not to evolve or to be fundamentally revised. Interpretation is to follow the words and purposes of the various provisions; amendment is for subordinate changes that will allow "immortality" to the Framers' primary work. Marshall called a written constitution America's "greatest improvement on political institutions." It renders permanent the institutions raised by popular consent, which is the only basis of rightful government. Besides, the American nation was fortunate in its founding: it benefited from a remarkable plan, from a fortunate ratification in the face of jealousy and suspicion in states and people, and from the extraordinary firmness of the first President. Washington had settled the new federal institutions and conciliated public opinion, despite the "infinite difficulty" of ratification and a crescendo of attacks upon his administration as monarchic, aristocratic, and anglophile. So Marshall argued in the penetrating (if somewhat wooden) *Life of George Washington,* a biography he condensed into a schoolbook to impress on his countrymen the character and political principles of "the greatest man in the world."

Marshall understood the Constitution to establish a government, not a league such as that created by the ARTICLES OF CONFEDERATION. The new government possessed sovereign powers of two sorts, legal (the judicial power) and political (legislative and executive). The special function of judges is to apply the law to individuals. It is a power extensive although not, Marshall consistently said, political or policy-oriented. Judicial JURISDICTION extends as far as does the law: common law, statute law, Constitution, treaties, and the law of nations (which Marshall influenced by several luminous opinions). In applying the law to individuals, courts are to care for individual rights, the very object of government in general. By "nature" or by "definition," courts are "those tribunals which are established for the security of property and to decide on human rights." Such rights are contained either in explicit constitutional provisions and amendments, or in "unwritten or common law," which the Constitution presupposes as the substratum of our law (and which Marshall thought was spelled out in traditional law books, such as Sir WILLIAM BLACKSTONE's *Commentaries on the Laws of England*). In short, courts are to construe all law in the light of the rights of person and property that are the object of law—as well as in the light of the constitutional authority of the other branches.

Marshall was fond of contrasting the Americans' "rational liberty," which afforded "solid safety and real security," with revolutionary France's "visionary" civic liberty, which had led to a despotism "borrowing the garb and usurping the name of freedom." While trying AARON BURR, Marshall repeatedly noted the "tenderness" of American law for the rights of the accused. His *Life of Washington* mixes praise of FREEDOM OF SPEECH and of conscience with attacks on religious persecution. Yet Marshall also said that morals and free institutions need to be "cherished" by public opinion; he would not suppose that a free MARKETPLACE OF IDEAS insures progress in public enlightenment. He did suppose that a rather free economic marketplace would lead to progress in national wealth. Marshall defended property rights in the sense of rights of contract or vested rights, rights that vest under contract and originate in a right to the fruits of one's labor and enterprise. By protecting industrious acquisitions the judiciary fosters the dynamic economy of free enterprise. Rational liberty is prudent liberty, which breeds power as well as wealth: the "legitimate greatness" of a "widespreading, rising empire," extending from "the Ste. Croix to the Gulph of Mexico, from the Atlantic to the Pacific." By directly securing the rights of property, courts indirectly secure the "vast republic."

While courts are "the mere instruments of the law, and can will nothing," or at most possess a legal discretion governed by unwritten principles of individual rights, the executive and legislature enjoy broad political discretion for the safety and interrelation of all. President and Congress are indeed subordinate to the Constitution of ENUMERATED POWERS and explicit restrictions. Marshall did not follow ALEXANDER HAMILTON, and would not have followed some later Supreme Courts, in inferring a plenary legislative power. His arguments, however, take aim at enemies on the other flank, at Jeffersonian strict constructionists who allowed only powers explicit in the Constitution or necessarily deduced from explicit powers. A constitution of government is not a "legal code," Marshall replied, and its enumerated powers are vested fully and encompass the full panoply of appropriate means. In *McCulloch*, Marshall set forth the core of the American doctrine of SOVEREIGNTY: the need for great governmental powers to confront inevitable crises. Maryland had placed a prohibitive tax on a branch of the national bank, and its counsel denied federal authority to charter a bank (a power not explicit in the Constitution). Ours is a constitution, Marshall replied, "intended to endure for ages to come, and,

consequently, to be adapted to the various *crises* of human affairs." Armies must be marched and taxes raised throughout the land. "Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive?" In a similar spirit Marshall defended an executive vigorous in war and FOREIGN AFFAIRS and able to overawe faction and rebellion at home. He struck down, as violating Congress's power to regulate commerce among the states, state acts imposing import taxes or reserving monopolistic privileges. The arguments are typical. Great powers are granted for great objects. A narrow interpretation would defeat the object: the words must be otherwise construed. Thus a nation is raised. Individual enterprise, a national flow of trade, and the bonds of mutual interest breach barriers of state, section, and custom. The machinery of government is geared for great efforts of direction and coercion. The national sovereign, limited in its tasks, supreme in all means needed for their accomplishment, rises over the once independent state sovereignties. Marshall acknowledged the states' independent powers as well as the complexities of federalism: America was "for many purposes an entire nation, and for others several distinct and independent sovereignties." He tried above all to protect the federal government's superior powers from what the Framers had most feared, the encroachments of the states, more strongly entrenched in the people's affections.

Like virtually all of the Framers, Marshall was devoted to popular government. Yet SHAYS' REBELLION of western Massachusetts farmers (1786–1787) had made him wonder whether "man is incapable of governing himself." He thought the new Constitution a republican remedy for the flaws of republican government, and for some time he thought constitutional restraints might suffice to rein the people to sound government. Marshall's republicanism encompassed both representative government and balanced government. The people are to grant their sovereignty to institutions for exercise by their representatives. A more substantial, virtuous, and enlightened Senate and President would balance the more popular House of Representatives, the dangerous house in a popular republic. Marshall came to be troubled by a decline in the quality of American leaders, from the great statesmen of the Revolution and founding, notably Washington, to the "superficial showy acquirements" of "party politicians." He came to be deeply disheartened by the tumultuous growth of democratic control, inspired by THOMAS JEFFERSON and consummated by ANDREW JACKSON. A "torrent of public opinion," inflamed by the French Revolution, aroused the old debtor and STATES' RIGHTS party during Washington's administration. It led to democratic societies, set up to watch the government, and then to a legislature that conveyed popular demands without much filtering. Marshall had anticipated that Jefferson would ally himself with the House of Representatives, and become leader of the party dominating the whole legislature, thus increasing his own power while weakening the office of President and the fundamentals of balanced government. During Jackson's terms (1828–1836), with the presidency transformed from a check on the majority to the tribune of the majority, Marshall favored reduction of its power, a tenure limited to one term, and even selection of the President by lot from among the senators. He called his early republicanism "wild and enthusiastic democracy," and came to doubt that the constitutional Union could endure in the face of resurgent sectionalism and populism.

The eventual dissolution of political balances made crucial Marshall's decisive accomplishment as he and Jefferson began their terms of office: the confirmation of the judiciary as interpreter and enforcer of the fundamental law. Although Marshall's opinion in *Marbury* denied that courts can exercise political power, it gave courts power to circumscribe the forbidden sphere, to determine the powers of legislatures and executives. Marshall's argument for this unprecedented judicial authority recalled "certain principles . . . long and well established." In deciding cases judges must declare what the law is. The Constitution is the supreme law. Judges must apply the Constitution in preference to statute when the two conflict—else the Constitution is not permanent but "alterable when the legislature shall please to alter it." The argument established the Supreme Court as enforcer of the constitutional government central to America's constitutional democracy. Marshall pointed to the horrors of "legislative omnipotence," only inconspicuously bestowing on courts a ruling potency as the voice of the Constitution. Marshall's opinion, the object of intense scrutiny ever since, was faithful to the CONSTITUTIONAL CONVENTION's supposition that there will be some JUDICIAL REVIEW of statutes and to its suspicion of democratic legislatures. It did not confront certain difficulties, notably those of a Supreme Court (like the TANEY COURT in DRED SCOTT V. SANDFORD, 1857) whose decisions violate the principles of the Constitution. Marshall's judicial reasonings were his attempt to keep judges, and his country, from violating the Constitution that preserves those principles.

ROBERT K. FAULKNER
(1986)

Bibliography

BEVERIDGE, ALBERT J. 1916–1919 *The Life of John Marshall.* 4 Vols. Boston: Houghton Mifflin.

CORWIN, EDWARD S. 1919 *John Marshall and the Constitution.* New Haven, Conn.: Yale University Press.

FAULKNER, ROBERT K. 1968 *The Jurisprudence of John Marshall.* Princeton, N.J.: Princeton University Press.

HOLMES, OLIVER WENDELL 1952 John Marshall. Pages 266–271 in *Collected Legal Papers.* New York: Peter Smith.

WHITE, G. EDWARD 1976 *The American Judicial Tradition.* Pages 7–34. New York: Oxford University Press.

ZIEGLER, BENJAMIN MUNN 1939 *The International Law of John Marshall.* Chapel Hill: University of North Carolina Press.

## MARSHALL, THURGOOD
(1908– )

Thurgood Marshall, the first black Justice of the Supreme Court, was born in Baltimore in 1908. After graduation from Lincoln University in Pennsylvania, Marshall attended Howard University Law School. Graduating first in his class in 1933, Marshall became one of CHARLES H. HOUSTON's protégés. He began practice in Baltimore, where he helped revitalize the local branch of the National Association for the Advancement of Colored People (NAACP). Houston, who had become special counsel to the NAACP in New York, was developing a program of litigation designed to attack segregated education in the South; Marshall joined the NAACP staff as Houston's assistant in 1936.

Of all the Justices who have served on the Supreme Court, Marshall has the strongest claim to having contributed as much to the development of the Constitution as a lawyer as he has done as a judge. At the start of his career, race relations law centered on the SEPARATE BUT EQUAL DOCTRINE. In his initial years at the NAACP, Marshall brought a number of lawsuits challenging unequal salaries paid to black and white teachers in the South. After Marshall succeeded Houston as special counsel in 1938, he became both a litigator and a coordinator of litigation, most of it challenging segregated education. He also successfully argued a number of cases involving RACIAL DISCRIMINATION in the administration of criminal justice before the Supreme Court. When social and political changes during WORLD WAR II led to increased black militancy and support for the NAACP, Marshall was able to expand the NAACP's legal staff by hiring an extremely talented group of young, mostly black lawyers. Although he continued to conduct some litigation, Marshall gradually assumed the roles of appellate advocate and overall strategist. Relying on his staff to generate helpful legal theories, he selected the theory most likely to accomplish the NAACP's goals. This process culminated in the five lawsuits decided by the Supreme Court as BROWN V. BOARD OF EDUCATION (1954). Marshall had used his staff to develop these cases and the legal theory that segregation was unconstitutional no matter how equal were the physical facilities. After the Supreme Court held that segregation was unconstitutional and that it should be eliminated "with ALL DELIBERATE SPEED," Marshall and the NAACP staff devoted much of their attention to overcoming the impediments that southern states began to place in the way of DESEGREGATION. These impediments included school closures and investigations and harassment of the NAACP and its lawyers.

Marshall left the NAACP in 1961, having been nominated by President JOHN F. KENNEDY to a position on the UNITED STATES COURT OF APPEALS for the Second Circuit. His confirmation to that position was delayed by southern opposition for over eleven months. During Marshall's four years on the Second Circuit, he wrote an important opinion holding that the DOUBLE JEOPARDY clause applied to the states, anticipating by four years the position that the Supreme Court would adopt in BENTON V. MARYLAND (1969), a decision written by Justice Marshall. He also urged in dissent an expansive interpretation of statutes allowing persons charged with crimes in state courts to remove those cases to federal court. (See CIVIL RIGHTS REMOVAL.) Marshall was nominated as solicitor general by President LYNDON B. JOHNSON in 1965. He served as solicitor general for two years, during which he supervised the disposition of criminal cases imperiled by illegal WIRETAPPING. Johnson appointed him in 1967 to succeed Justice TOM C. CLARK on the Supreme Court.

Justice Marshall's contributions to constitutional development have been shaped by the fact that for most of his tenure his views were among the most liberal on a centrist or conservative Court. As he had at the NAACP, and as have most recent Justices, Marshall relied heavily on his staff to present his views forcefully and systematically in his opinions.

For a few years after Marshall's appointment to the Court, he was part of the liberal bloc of the WARREN COURT. Despite the tradition that newly appointed Justices are not assigned important majority opinions, Justice Marshall wrote several important free speech opinions during his first two years on the Court. In STANLEY V. GEORGIA (1969), he held that a state could not punish a person merely for possessing obscene materials in his home; the only justification for such punishment, guaranteeing a citizenry that did not think impure thoughts, was barred by the First Amendment. *Amalgamated Food Employees Union v. Logan Valley Plaza* (1968) recognized the contemporary importance of privately owned SHOPPING CENTERS as places of public resort, holding that centers must be made available, over their owners' objections, to those who wish to picket or pass out leaflets on subjects of public interest. *Pickering v. Board of Education* (1968) established the right of public employees to complain about the way in which their superiors were discharging their responsibilities to the public.

With the appointment of four Justices by President

RICHARD M. NIXON, Justice Marshall rapidly found himself in dissent on major civil liberties issues. *Stanley* was limited by *United States v. Reidel* (1971) to private possession and not extended to what might have seemed its logical corollary, acquisition of obscene material for private use. *Logan Valley Plaza* was overruled in HUDGENS V. NATIONAL LABOR RELATIONS BOARD (1976), and *Pickering* was limited by a relatively narrow definition of complaints relating to public duties in *Connick v. Myers* (1983). Marshall became part of a small liberal bloc that could prevail only by attracting more conservative members, who could be kept in the coalition by allowing them to write the majority opinions. In the series of death penalty cases, for example, Justice Marshall stated his conclusion that capital punishment was unconstitutional in all circumstances, but when a majority for a narrower position could be found to overturn the imposition of the death penalty in a particular case, he joined that majority.

Thus, after 1970, Marshall rarely wrote important opinions for the Court regarding FREEDOM OF SPEECH, CRIMINAL PROCEDURE, or EQUAL PROTECTION. Two of his opinions in cases about the PREEMPTION of state law by federal regulations, *Jones v. Rath Packing Co.* (1977) and *Douglas v. Seacoast Products* (1977), seem likely to endure as statements of general principle. More often he was assigned to write opinions in which a nearly unanimous Court adopted a "conservative" position. For example, in *Gillette v. United States* (1971), Justice Marshall's opinion for the Court rejected statutory and constitutional claims to exemption from the military draft by men whose religious beliefs led them to oppose participation in some but not all wars. Undoubtedly because of his race and because of his desire to see a majority support positions helpful to blacks, Marshall rarely wrote important opinions in cases directly implicating matters of race, although he did write two significant dissents, one defending AFFIRMATIVE ACTION in REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE (1978), and another emphasizing blacks' lack of access to political power in MOBILE V. BOLDEN (1980). But Justice Marshall's major contributions have come in areas where the experience of race has historically shaped the context in which apparently nonracial issues arise.

Marshall occasionally received the assignment in important civil liberties cases. His opinion in POLICE DEPARTMENT OF CHICAGO V. MOSLEY (1972) crystallized the equality theme in the law of freedom of speech. There he emphasized the importance for free expression of the rule that governments may not regulate one type of speech because of its content, in a setting where speech with a different content would not be regulated: "[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views . . . Selective exclusions . . . may not be based on content alone, and may not be justified by reference to content alone." Unless it were prohibited, discrimination based on content would allow governments, which ought to be controlled by the electorate, to determine what the electorate would hear. Although the *Mosley* principle is probably stated too broadly, because differential regulation of categories of speech such as OBSCENITY or COMMERCIAL SPEECH is allowed, still it serves as a central starting point for analysis, from which departures must be justified.

His opinion in *Memorial Hospital v. Maricopa County* (1974) synthesized a line of cases regarding the circumstances in which a state might deny benefits such as nonemergency medical care for INDIGENTS to those who had recently come to the state. If the benefit was so important that its denial could be characterized as a penalty for exercising the RIGHT TO TRAVEL, it was unconstitutional.

Because of the relatively rapid shift in the Court's composition, most of Justice Marshall's major contributions to the constitutional development have come through dissents. Several major dissenting opinions by Justice Marshall have helped shape the law of equal protection. The opinions criticize a rigid approach in which classifications based on race and a few other categories are to be given STRICT SCRUTINY while all other classifications must be "merely rational." Marshall, in dissents in DANDRIDGE V. WILLIAMS (1970) and SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ (1973), offered a more flexible approach. He argued that the courts should examine legislation that affects different groups differently by taking into account the nature of the group—the degree to which it has been discriminated against in the past, the actual access to political power it has today—and the importance of the interests affected. Under this "sliding scale" approach, a statute differentially affecting access to WELFARE BENEFITS might be unconstitutional while one with the same effects on access to public recreational facilities might be permitted. A majority of the Court has not explicitly adopted the "sliding scale" approach, but Justice Marshall's sustained criticisms of the rigid alternative have produced a substantial, though not entirely acknowledged, acceptance of a more nuanced approach to equal protection problems.

As *Logan Valley Plaza* showed, Justice Marshall has urged, usually in dissent, an expansive definition of those actors whose decisions are subject to constitutional control. In JACKSON V. METROPOLITAN EDISON CO. (1974) the majority found that the decision of a heavily regulated utility to terminate service for nonpayment was not "state action" under any of the several strands of that DOCTRINE. Justice Marshall's dissent argued that state involvement was significant when looked at as a whole and, more important, pointed out that on the majority's analysis the utility could,

without constitutional problems, terminate service to blacks. On the assumption, confirmed in later cases, that the result is incorrect, Justice Marshall's argument effectively demonstrated that the "state action" doctrine is actually a doctrine about the merits of the challenged decision: if it is a decision that the Justices believe should not be controlled by the Constitution, there is no "state action," whereas if it is a decision that the Justices believe should be controlled by the Constitution, there is state action.

Finally, after joining the seminal opinion in GOLDBERG V. KELLY (1968), which held that the Constitution defined the procedures under which public benefits, the "new property" of the welfare state, could be taken away, Justice Marshall dissented in later cases where the Court substantially narrowed the scope of *Goldberg*. His position, in cases such as BOARD OF REGENTS V. ROTH (1972), has been that everyone must be presumed to be entitled to those benefits, and that the presumption can be overcome only after constitutionality-defined procedures have been followed.

In most of the areas of law to which Justice Marshall's opinions have made significant contributions the linked strands of race and poverty appear. Discrimination by nominally private actors and suppression of speech on racial issues have played an important part in the black experience. Similarly, wealth and poverty as grounds for allocating public resources are classifications closely linked to race. Justice Marshall's desire to adopt a more flexible approach to equal protection law stems from his awareness that only such an approach would allow the courts to address difficulties that the ordinary routines of society cause for the poor. For example, his dissent in *United States v. Kras* (1973) objected to the imposition of a fifty dollar filing fee on those who sought discharges of their debts in bankruptcy. But it would be misleading to conclude that Thurgood Marshall's most important role in constitutional development was what he did as a Justice of the Supreme Court. Rather it was what he did as a lawyer for the NAACP before and after the decision in *Brown v. Board of Education.*

MARK TUSHNET
(1986)

Bibliography

KLUGER, RICHARD 1976 *Simple Justice.* New York: Knopf.

## MARSHALL, THURGOOD
(1908–1993)
(Update)

Thurgood Marshall has earned a unique place in American history on the basis of a long, varied, and influential career as a private attorney, governement lawyer, and appellate jurist. Two achievements in particular stand out. First, as counsel for the National Association for the Advancement of Colored People (NAACP), he has shaped the litigation that destroyed the constitutional legitimacy of state-enforced racial SEGREGATION. Second, as an Associate justice of the Supreme Court—the nation's first black Justice—he boldly articulated a liberal jurisprudence on a Court dominated by conservatives. No person in the history of the Supreme Court better illustrates the limits and possibilities of the jurist as dissenter.

Marshall was born July 2, 1908, in Baltimore, Maryland, attended that city's racially segregated public schools, and was graduated from Lincoln University. Excluded from the University of Maryland Law School by that state's racial policies, he received his law degree from Howard Law School. He excelled at Howard and came to the attention of the school's dean, CHARLES H. HOUSTON, a pioneer in the use of litigation as a vehicle of social reform. Although Marshall embarked on a conventional commercial practice upon graduation, he also participated, under Houston's guidance, in important, albeit unremunerative, CIVIL RIGHTS cases. Appropriately enough, his first consisted of a successful suit against the same state university system that had earlier excluded him. In *Murray v. Maryland* (1937) Marshall convinced the Court of Appeals of Maryland that the Constitution required the state to do more for black residents seeking legal education than merely offer them scholarships to attend out-of-state law schools.

In 1939 Marshall succeeded Houston as special counsel of the NAACP. Over the next two decades he traveled ceaselessly, addressing problems of racial inequality in a wide array of settings: from obscure local courts in which he sought to extract from hostile juries and judges a measure of justice for black defendants, to Korea where he investigated the treatment of black soldiers by United States military authorities, to black churches and lodges where he encouraged people in aggrieved communities to seek to vindicate their rights. He also argued thirty-two cases before the Supreme Court, prevailing in twenty-nine of them. His brilliant advocacy helped to convince the Supreme Court to invalidate practices that excluded blacks from primary elections (SMITH V. ALLWRIGHT), to prohibit segregation in interstate transportation (MORGAN V. VIRGINIA), to overturn convictions obtained from juries from which blacks had been illicitly barred (PATTON V. MISSISSIPPI), and to prohibit state courts from enforcing racially restrictive real estate covenants (SHELLEY V. KRAEMER). Marshall's greatest triumph arose from the skillfully orchestrated litigation that culminated in BROWN V. BOARD OF EDUCATION (1954), which invalidated state-enforced racial segregation in public schooling. By the close of the 1950s, Marshall had attained widespread recognition as a leading

public figure and was known affectionately in much of black America as "Mr. Civil Rights."

The next stage in Marshall's career was marked by a series of high-level appointments. In 1961, President JOHN F. KENNEDY appointed him to the United States Court of Appeals for the Second Circuit over the strong objections of segregationist senators who delayed his confirmation for nearly a year. In 1965, President LYNDON B. JOHNSON appointed Marshall SOLICITOR GENERAL of the United States. The first black American to hold this post, Marshall argued several important cases before the Court, including MIRANDA V. ARIZONA (1966), in which he successfully urged the Court to impose greater limitations on the power of police to interrogate criminal suspects; HARPER V. VIRGINIA STATE BOARD OF ELECTIONS (1966), in which he successfully argued that state POLL TAXES violated the federal Constitution; and UNITED STATES V. GUEST (1966), in which he successfully defended the federal prosecution of white supremacists in Georgia who committed a racially motivated murder during the era of the CIVIL RIGHTS MOVEMENT.

In 1967, President Johnson set the stage for Marshall to cross the color line in another area of governmental service when he named him to a seat on the Supreme Court. Marshall's elevation vividly symbolized the ascendancy of values and interests he had long sought to advance. At the outset of Marshall's career on the Court, it was presided over by Chief Justice EARL WARREN and animated by a decidedly reformist ethos. Ironically, however, the liberal wing whose ranks Marshall fortified began to disintegrate soon after he took his seat. By the mid-1970s, the appointments of Chief Justice WARREN E. BURGER and associate Justices LEWIS F. POWELL and WILLIAM H. REHNQUIST had brought to the fore a conservative ethos that has long confined Justice Marshall to the periphery of judicial power.

During his years on the Court, Justice Marshall has seldom held sway in the middle as a "swing" vote. Rather, he has made his mark as a judicial maverick—always independent, consistently bold, frequently dissenting. Keenly attentive to allegations of INVIDIOUS DISCRIMINATION, Justice Marshall has been strongly favorable to the claims of members of historically oppressed groups. However, he has repeatedly found himself at odds with the Court. MEMPHIS V. GREENE (1981) involved a city's decision to close a street, mainly used by blacks, which traversed a predominantly white neighborhood. The Court upheld the legality of the city's action. Justice Marshall perceived a violation of the THIRTEENTH AMENDMENT, concluding that the city's action constituted a racially prejudiced "badge or incident of slavery." PERSONNEL ADMINISTRATOR OF MASSACHUSETTS V. FEENEY (1979) called into question a state law that provided an absolute preference for veterans of the ARMED FORCES in civil service positions, a system of selection that tended overwhelmingly to disadvantage women in relation to men. The Court upheld the statute. Justice Marshall condemned it as a violation of the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT. MOBILE V. BOLDEN (1980) concerned an at-large voting scheme under which, for almost seventy years, no black had ever been elected to a seat on the ruling city commission in Mobile, Alabama, even though blacks constituted nearly a third of the city's population. The Court held that this electoral arrangement could be invalidated only if it were used as a vehicle of purposeful discrimination. Justice Marshall concluded that the system's racially disparate impact violated the FIFTEENTH AMENDMENT. ROSTKER V. GOLDBERG (1981) brought into question the constitutionality of a federal statute that requires men but not women to register for the military draft. Differing with the majority of his colleagues, Justice Marshall declared that the Court erred in placing its "imprimatur on one of the most potent remaining public expressions of "ancient canards about the proper role of women."

Critical of the Court for showing too little solicitude for those who have been historically victimized on the basis of race and gender, Justice Marshall has also rebuked the Court for displaying undue aggressiveness in defending the asserted rights of those who challenge affirmative action policies that provide preferences to women and racial minorities. Sharply distinguishing between benign and invidious discrimination, he has voted to uphold every AFFIRMATIVE ACTION plan the Court has reviewed. Here, too, he has been forced into dissent, objecting bitterly to decisions that have increasingly limited the permissible scope of affirmative action measures. In REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978), the first affirmative action case that the Court resolved, Justice Marshall declared that "It must be remembered that during most of the past 200 years, the Constitution as interpreted by the [Supreme] Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier."

A decade later, Justice Marshall continued to rail against an interpretation of the Fourteenth Amendment that he considers perverse. In RICHMOND V. J. A. CROSON CO. (1989), for instance, he dissented against a ruling that invalidated Richmond, Virginia's policy of reserving that for enterprises owned by racial minorities a designated percentage of business generated by the city. Observing that "It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of RACIAL DISCRIMINATION in its midst," he angrily chided his colleagues for taking "a deliberate and giant

step backward." The Court's decision, he predicted, "will inevitably discourage or prevent governmental entities, particularly States and localities, from acting to rectify the scourge of past discrimination. This is the harsh reality of the majority's decision, but it is not the Constitution's command."

Other areas in which Justice Marshall's strongly held views have frequently been at odds with the Court's conclusions involve CAPITAL PUNISHMENT, ABORTION and the legal status of the poor—areas in which Marshall's jurisprudential commitments frequently overlap. Insisting that death penalties under all circumstances violate the Eighth Amendment's prohibition against CRUEL AND UNUSUAL PUNISHMENT, Justice Marshall has filed dissents against all executions that the Court has sanctioned. In AKE V. OKLAHOMA (1985), his advocacy on behalf of those charged with capital crimes succeeded in wringing from his colleagues a rare broadening of rights to which criminal defendants are entitled. Writing for the Court, Justice Marshall held that, at least in cases possibly involving the death penalty, DUE PROCESS requires states to afford indigent defendants the means to obtain needed psychiatric experts.

With respect to abortion, Justice Marshall has been among the most stalwart defenders of ROE V. WADE (1973), dissenting in every case in which the Court has upheld legislative inroads on what he views as a woman's broad right to decide whether or not to terminate a pregnancy. An example of his allegiance to *Roe v. Wade* (1973) is his dissenting opinion in MAHER V. ROE (1977), where he maintained that a state violated the Constitution by denying poor women funding for abortions while making funds available to them for expenses of childbirth. "Since efforts to overturn [*Roe v. Wade*] have been unsuccessful," he charged, "the opponents of abortion have attempted every imaginable means to circumvent the commands of the Constitution and impose their moral choices upon the rest of society." Articulating his anger with characteristic sharpness, Justice Marshall asserted that this case involved "the most vicious attacks yet devised" in that they fell on poor women—"those among us least able to help or defend themselves."

Throughout Justice Marshall's career on the Court he has vigorously attempted to improve the legal status of the poor. He has argued, for instance, that the federal courts should subject to heightened scrutiny state laws that explicitly discriminate on the basis of poverty. For the most part, however, his efforts have been stymied. One particularly memorable expression of Justice Marshall's empathy for the indigent is his dissent in *United States v. Kras* (1973), a case in which the Court held that federal law did not violate the Constitution by requiring a $50 fee of persons seeking the protections of bankruptcy. Objecting to the Court's assumption that the petitioner could readily accumulate this amount, Justice Marshall wrote that he could not agree with the majority

> that it is so easy for the desperately poor to save $1.92 *each week* over the course of six months. . . . The 1970 Census found that over 800,000 families in the Nation had annual incomes of less than $1,000 or $19.23 a week. . . . I see no reason to require that families in such straits sacrifice over 5% of their annual income as a prerequisite to getting a discharge in bankruptcy. . . . It may be easy for some people to think that weekly savings of less than $2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. . . . It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.

On occasion Justice Marshall's dissents have succeeded in changing the mind of the Court. An example is the Court's response to claims of racially invidious discrimination in peremptory challenges. In SWAIN V. ALABAMA (1965) the Court had ruled that prosecutors could properly use race as a basis for peremptorily excluding potential jurors so long as they did so as a matter of strategy relating to a particular trial and not for the purpose of barring blacks routinely from participation in the administration of justice. By repeatedly dissenting from orders in which the Court refused to reconsider *Swain* and by showing in detail this decision's dismal practical consequences, Marshall finally convinced the Court to reverse itself—though even when it did in BATSON V. KENTUCKY (1986), Marshall still maintained that his colleagues had neglected to go far enough in ridding the criminal justice system of invidious practices.

For much of Justice Marshall's career on the bench, he seems to have deliberately avoided any extrajudicial controversies. Beginning in the 1980s, however, he appears to have altered his habits. He publicly criticized RONALD REAGAN, declaring that his civil rights record as President of the United States was among the worst in the twentieth century. He also chided President GEORGE BUSH for selecting DAVID H. SOUTER to occupy the seat on the Court vacated by Justice Marshall's long-time ally, Justice WILLIAM J. BRENNAN. In an unprecedented action, Justice Marshall declared on a televised broadcast that, in his view, the President's choice was inappropriate.

Although Justice Marshall recieved considerable criticism for his comments on Presidents Regan and Bush, extrajudicial remarks that generated an even greater amount of contraversy stemmed from a speech that he gave in 1987 in the midst of the bicentenial celebration of the United States Constitution. Bodly challenging the iconography of American CONSTITUTIONALISM, he asserted

that he did not find "the wisdom, foresight, and sense of justice exhibited by the framers [to be] particularly profound. To the contrary," he declared, "the government they devised was defective from the start," omitting, for example, blacks and women as protected members of the polity. Eschewing "flag waving fervor," Justice Marshall noted his intention to commemerate the bicentennial by recalling "the suffering, struggle, and sacrifice that has triumphed over much of what was wrong with the original document" and by also acknowleging the Constitution's unfulfilled promise.

Some detractors fault Justice Marshall on the grounds that his penchant for dissent has robbed him of influence that he might otherwise have wielded. Judging influence, however, is a dangerous endeavor. Justices JOHN MARSHALL HARLAN, OLIVER WENDELL HOLMES, JR., and LOUIS D. BRANDEIS are as well respected on the basis of their dissenting opinions as they are respected for any other aspect of their illustrious careers. History may well bequeath the same fate to Justice Thurgood Marshall. Justice Marshall resigned from the Court in 1991.

RANDALL KENNEDY
(1992)

(SEE ALSO: *Badges of Servitude; NAACP Legal Defense Fund; Race and Criminal Justice; Race-Consciousness.*)

## *MARSHALL v. BARLOW'S, INC.*
436 U.S. 307 (1978)

In *Marshall* the Supreme Court held unconstitutional a congressional enactment authorizing Occupational Safety and Health Administration inspectors to conduct WARRANTLESS SEARCHES of employment facilities to monitor compliance with regulations. PROBABLE CAUSE for a warrant can, however, be satisfied on a lesser showing than that required in a search for criminal EVIDENCE.

JACOB W. LANDYNSKI
(1986)

## MARSHALL COURT
(1801–1835)

In 1801 the Supreme Court existed on the fringe of American awareness. Its prestige was slight, and it was more ignored than respected. On January 20, 1801, the day President JOHN ADAMS nominated JOHN MARSHALL for the chief justiceship, the commissioners of the DISTRICT OF COLUMBIA informed Congress that the Court had no place to hold its February term. The Senate consented to the use of one of its committee rooms, and Marshall took his seat on February 4 in a small basement chamber. At the close of 1809, Benjamin Latrobe, the architect, reported that the basement had been redesigned to enlarge the courtroom and provide an office for the clerk and a library room for the Justices. In 1811, however, Latrobe reported that the Court "had been obliged to hold their sittings in a tavern," because Congress had appropriated no money for "fitting up and furnishing the Court-room. . . ." After the British burned the Capitol in 1814 Congress again neglected to provide for the Court. It held its 1815 term in a private home, and for several years after met in temporary Capitol quarters that were "little better than a dungeon." The Court moved into permanent quarters in 1819. In 1824 a New York correspondent described the Court's Capitol chamber: "In the first place, it is like going down cellar to reach it. The room is on the basement story in an obscure part of the north wing. . . . A stranger might traverse the dark avenues of the Capitol for a week, without finding the remote corner in which Justice is administered to the American Republic." He added that the courtroom was hardly large enough for a police court.

The Supreme Court, however, no longer lacked dignity or respect. It had become a force that commanded recognition. In 1819 a widely read weekly described it as so awesome that some regarded it with reverence. That year THOMAS JEFFERSON complained that the Court had made the Constitution a "thing of wax," which it shaped as it pleased, and in 1824 he declared that the danger he most feared was the Court's "consolidation of our government." Throughout the 1820s Congress debated bills to curb the Court, which, said a senator, the people blindly adored—a "self-destroying idolatry." ALEXIS DE TOCQUEVILLE, writing in 1831, said: "The peace, the prosperity, and the very existence of the Union are vested in the hands of the seven Federal judges. Without them, the Constitution would be a dead letter. . . ." Hardly a political question arose, he wrote, that did not become a judicial question.

Chief Justice Marshall was not solely responsible for the radical change in the Court's status and influence, but he made the difference. He bequeathed to the people of the United States what it was not in the political power of the Framers of the Constitution to give. Had the Framers been free agents, they would have proposed a national government that was unquestionably dominant over the states and possessed a formidable array of powers breathtaking in flexibility and scope. Marshall in more than a figurative sense was the supreme Framer, emancipated from a local constituency, boldly using his judicial position as an exalted platform from which to educate the nation to the true meaning, his meaning, of the Constitution. He wrote as if words of grandeur and power and union could make dreams come true. By the force of his convictions he tried to will a nation into being.

He reshaped the still malleable Constitution, giving clarification to its ambiguities and content to its omissions that would allow it to endure for "ages to come" and would make the government of the Union supreme in the federal system. Marshall is the only judge in our history whose distinction as a great nationalist statesman derives wholly from his judicial career. Justice OLIVER WENDELL HOLMES once remarked, "If American law were to be represented by a single figure, sceptic and worshipper alike would agree without dispute that the figure could be one alone, and that one, John Marshall." That the Court had remained so weak after a decade of men of such high caliber as JOHN JAY, OLIVER ELLSWORTH, JAMES WILSON, JAMES IREDELL, WILLIAM PATERSON, and SAMUEL CHASE demonstrates not their weakness but Marshall's achievement in making the Court an equal branch of the national government.

Until 1807 he cast but one of six votes, and after 1807, when Congress added another Justice, but one of seven. One Justice, one vote has always been the rule of the Court, and the powers of anyone who is Chief Justice depend more on the person than the office. From 1812, BUSHROD WASHINGTON and Marshall were the only surviving Federalists, surrounded by five Justices appointed by Presidents Thomas Jefferson and JAMES MADISON; yet Marshall dominated the Court in a way that no one has ever since. During Marshall's thirty-five-year tenure, the Court delivered 1,106 opinions in all fields of law, and he wrote 519; he dissented only eight times. He wrote forty of the Court's sixty-four opinions in the field of constitutional law, dissenting only once in a constitutional case. Of the twenty-four constitutional opinions for the Court that he did not write, only two were important: MARTIN V. HUNTER'S LESSEE (1816), a case in which he did not sit, and OGDEN V. SAUNDERS (1827), the case in which he dissented. He virtually monopolized the constitutional cases for himself and won the support of his associates, even though they were members of the opposing political party.

Marshall's long tenure coincided with the formative period of our constitutional law. He was in the right place at the right time, filling, as Holmes said, "a strategic place in the campaign of history." But it took the right man to make the most of the opportunity. Marshall had the character, intellect, and passion for his job that his predecessors lacked. He had a profound sense of mission comparable to a religious "calling." Convinced that he knew what the Constitution should mean and what it was meant to achieve, he determined to give its purposes enduring expression and make them prevail. The Court was, for him, a judicial pulpit and political platform from which to address the nation, to compete, if possible, with the executive and legislative in shaping public opinion.

Marshall met few of the abstract criteria for a "great" judge. A great judge should possess intellectual rectitude and brilliance. Marshall was a fierce and crafty partisan who manipulated facts and law. A great judge should have a self-conscious awareness of his biases and a determination to be as detached as human fallibility will allow. In Marshall the judicial temperament flickered weakly; unable to muzzle his deepest convictions, he sought to impose them on the nation, sure that he was right. He intoxicated himself with the belief that truth, history, and the Constitution dictated his opinions, which merely declared the law rather than made the law. A great judge should have confidence in majority rule, tempered by his commitment to personal freedom and fairness. Marshall did not think men capable of self-government and inclined to favor financial and industrial capitalism over most other interests. A great judge should have a superior technical proficiency, modified by a sense of justice and ethical behavior beyond suspicion. Marshall's judicial ethics were not unquestionable. He should have disqualified himself in MARBURY V. MADISON (1803) because of his negligent complicity. He overlooked colossal corruption in FLETCHER V. PECK (1810) to decide a land title case by a doctrine that promoted his personal interests. He wrote the opinion in MCCULLOCH V. MARYLAND (1819) before hearing the case. Marshall's "juridical learning," as Justice JOSEPH STORY, his reverent admirer and closest colleague, conceded, "was not equal to that of the great masters in the profession. . . ." He was, said Story, first, last, and always, "a Federalist of the good old school," and in the maintenance of its principles "he was ready at all times to stand forth a determined advocate and supporter." He was, in short, a Federalist activist who used the Constitution to legitimate predetermined results. A great judge should have a vision of national and moral greatness, combined with respect for the federal system. Marshall had that—and an instinct for statecraft and superb literary skills. These qualities, as well as his activism, his partisanship, and his sense of mission, contributed to his inordinate influence.

So too did his qualities of leadership and his personal traits. He was generous, gentle, warm, charming, considerate, congenial, and open. At a time when members of the Court lived together in a common boarding house during their short terms in Washington, his charismatic personality enabled him to preside over a judicial family, inspire loyalty, and convert his brethren to his views. He had a cast-iron will, an astounding capacity for hard work (witness the number of opinions he wrote for the Court), and formidable powers of persuasion. He thought audaciously in terms of broad and basic principles that he expressed axiomatically as absolutes. His arguments were masterful intellectual performances, assuming that his premises were valid. Inexorably and with developing momentum he moved from an unquestioned premise to a foregone conclusion. Jefferson once said that he never ad-

mitted anything when conversing with Marshall. "So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone." Marshall's sophistry, according to Jefferson, was so great, "you must never give him an affirmative answer or you will be forced to grant his conclusion. Why, if he were to ask me if it were daylight or not, I'd reply, "Sir, I don't know. I can't tell." Marshall could also be imperious. He sometimes gave as the OPINION OF THE COURT a position that had not mustered a majority. According to one anecdote, Marshall is supposed to have said to Story, the greatest legal scholar in our history, "That, Story, is the law. You find the precedents."

The lengthy tenure of the members of the Marshall Court also accounts for its achievements. On the pre-Marshall Court, the Justices served briefly; five quit in a decade. The Marshall Court lasted—BROCKHOLST LIVINGSTON seventeen years, THOMAS TODD nineteen, GABRIEL DUVALL twenty-four, WILLIAM JOHNSON thirty, Bushrod Washington thirty-one, and Marshall outlasted them all. Story served twenty-four years with Marshall and ten more after his death; SMITH THOMPSON served fifteen years with Marshall and eight years after. This continuity in personnel contributed to a consistent point of view in constitutional doctrine—a view that was, substantially, Marshall's. From 1812, when the average age of the Court's members was only forty-three, through 1823—twelve successive terms—the Court had the same membership, the longest period in its history without a change, and during that period the Marshall Court decided its most important cases except for *Marbury*.

Marshall also sought to strengthen the Court by inaugurating the practice of one Justice's giving the opinion of the Court. Previously the Justices had delivered their opinions SERIATIM, each writing an opinion in each case in the style of the English courts. That practice forced each Justice to take the trouble of understanding each case, of forming his opinion on it, and showing publicly the reasons that led to his judgment. Such were Jefferson's arguments for seriatim opinions; and Marshall understood that one official opinion augmented the Court's strength by giving the appearance of unity and harmony. Marshall realized that even if each Justice reached similar conclusions, the lines of argument and explanation of doctrine might vary with style and thought of every individual, creating uncertainty and impairing confidence in the Court as an institution. He doubtless also understood that by massing his Court behind one authoritative opinion and by assigning so many opinions to himself, his own influence as well as the Court's would be enhanced. Jefferson's first appointee, Justice Johnson, sought to buck the practice for a while. He had been surprised, he later informed Jefferson, to discover the Chief Justice "delivering all the opinions in cases in which he sat, even in some instances when contrary to his own judgment and vote." When Johnson remonstrated in vain, Marshall lectured him on the "indecency" of judges' "cutting at each other," and Johnson soon learned to acquiesce "or become such a cypher in our consultations as to effect no good at all." Story, too, learned to swallow his convictions to enhance the "authority of the Court." His "usual practice," said Story, was "to submit in silence" to opinions with which he disagreed. Even Marshall himself observed in an 1827 case, by which time he was losing control of his Court, that his usual policy when differing from majority was "to acquiesce silently in its opinion."

Like other trailblazing activist judges, Marshall squeezed a case for all it was worth, intensifying its influence. For Marshall a constitutional case was a medium for explaining his philosophy of the supreme and FUNDAMENTAL LAW, an occasion for sharing his vision of national greatness, a link between capitalism and CONSTITUTIONALISM, and an opportunity for a basic treatise. Justice Johnson protested in 1818, "We are constituted to decide causes, and not to discuss themes, or digest systems." He preferred, he said, to decide no more in any case "than what the case itself necessarily requires." Ordinary Justices decide only the immediate question on narrow grounds; but Marshall, confronted by some trivial question—whether a justice of the peace had a right to his commission or whether peddlers of lottery tickets could be fined—would knife to the roots of the controversy, discover that it involved some great constitutional principle, and explain it in the broadest possible way, making the case seem as if the life of the Union or the supremacy of the Constitution were at stake. His audacity in generalizing was impressive; his strategy was to take the highest ground and make unnerving use of OBITER DICTA; and then, as a matter of tactics, almost unnoticeably decide on narrow grounds. *Marbury* is remembered for Marshall's exposition of JUDICIAL REVIEW, not for his judicial humility in declining JURISDICTION and refusing to issue the WRIT OF MANDAMUS. COHENS V. VIRGINIA (1821) is remembered for Marshall's soaring explication of the supremacy of the JUDICIAL POWER OF THE UNITED STATES, not for the decision in favor of Virginia's power to fine unlicensed lottery ticket peddlers. GIBBONS V. OGDEN (1824) is remembered for its sweeping discourse on the COMMERCE CLAUSE of the Constitution, not for the decision that the state act conflicted with an obscure act of Congress.

Marshall's first major opinion, in *Marbury*, displayed his political cunning, suppleness in interpretation, doctrinal boldness, instinct for judicial survival, and ability to maneuver a case beyond the questions on its face. Having issued the show cause order to Madison, the Court seemingly was in an impossible position once Jefferson's sup-

porters called that order a judicial interference with the executive branch. To decide for Marbury would provoke a crisis that the Court could not survive: Madison would ignore the Court, which had no way to enforce its decision, and the Court's enemies would have a pretext for IMPEACHMENT. To decide against Marbury would appear to endorse the illegal acts of the executive branch and concede that the Court was helpless. Either course of action promised judicial humiliation and loss of independence. Marshall therefore found a way to make a tactical retreat while winning a great strategic victory for judicial power. After upbraiding the executive branch for violating Marbury's rights, Marshall concluded that the Court had no JURISDICTION in the case, because a provision of an act of Congress conflicted with Article III. He held that provision unconstitutional by, first, giving it a sweeping construction its text did not bear and, second, by comparing it to his very narrow construction of Article III. Thus he reached and decided the great question, not argued by counsel, whether the Court had the power to declare unconstitutional an act of Congress. By so doing he answered from the bench his critics in Congress who, now that they were in power, had renounced judicial review during the debate on the repeal of the JUDICIARY ACT OF 1801. Characteristically Marshall relied on no precedents, not even on the authority of THE FEDERALIST #78. Significantly, he chose a safe act of Congress to void—section 13 of the JUDICIARY ACT OF 1789, which concerned not the province of the Congress or the President but of the Supreme Court, its authority to issue writs of mandamus in cases of ORIGINAL JURISDICTION. But Marshall's exposition of judicial review was, characteristically, broader than the holding on section 13. Jefferson, having been given no stick with which to beat Marshall, privately fumed: "Nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them," he wrote in a letter. "The opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but also for the Legislature and Executive also, in their spheres, would make the judiciary a despotic branch."

The Court did not dare to declare unconstitutional any other act of Congress which remained hostile to it throughout Marshall's tenure. STUART V. LAIRD (1803), decided shortly after *Marbury,* upheld the repeal of the Judiciary Act of 1801. (See JUDICIARY ACTS OF 1802.) A contrary decision would have been institutionally suicidal for the Court. Marshall's opinion in *Marbury* was daring enough; in effect he courageously announced the Court's independence of the other branches of the government. But he was risking retaliation. Shortly before the arguments in *Marbury,* Jefferson instructed his political allies in the House to start IMPEACHMENT proceedings against JOHN PICKERING, a federal district judge; the exquisite timing was a warning to the Supreme Court. Even earlier, Jeffersonian leaders in both houses of Congress openly spoke of impeaching the Justices. The threats were not idle. Two months after *Marbury* was decided, Justice Chase on circuit attacked the administration in a charge to a GRAND JURY, and the House prepared to impeach him. Senator WILLIAM GILES of Virginia, the majority leader, told Senator JOHN QUINCY ADAMS that not only Chase "but all the other Judges of the Supreme Court," except William Johnson, "must be impeached and removed." Giles thought that holding an act of Congress unconstitutional was ground for impeachment. "Impeachment was not a criminal prosecution," according to Giles, who was Jefferson's spokesman in the Senate. "And a removal by impeachment was nothing more than a declaration by Congress to this effect: you hold dangerous opinions, and if you are suffered to carry them into effect, you will work the destruction of the Union. We want your offices for the purposes of giving them to men who will fill them better."

Intimidated by Chase's impending impeachment, Marshall, believing himself to be next in line, wrote to Chase that "impeachment should yield to an APPELLATE JURISDICTION in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the Judge who has rendered them unknowing of his fault." Less than a year after his *Marbury* opinion the fear of impeachment led an anguished Marshall to repudiate his reasoning and favor Congress as the final interpreter of the Constitution. Fortunately the greatest crisis in the Court's history eased when the Senate on March 1, 1805, failed to convict Chase on any of the eight articles of impeachment. Marshall and his Court were safe from an effort, never again repeated, to politicize the Court by making it subservient to Congress through impeachment.

The Court demonstrated its independence even when impeachment hung over it. In *Little v. Barreme* (1804) Marshall for the Court held that President Adams had not been authorized by Congress to order an American naval commander to seize a ship sailing from a French port. Justice Johnson on circuit vividly showed his independence of the President who had appointed him. To enforce the EMBARGO ACTS, Jefferson had authorized port officers to refuse clearance of ships with "suspicious" cargoes. In 1808 Johnson, on circuit in Charleston, ordered the clearance of a ship and denounced the President for having exceeded the power delegated by the Embargo Acts. Jefferson could not dismiss as partisan politics Johnson's rebuke that he had acted as if he were above the law. Justice Brockholst Livingston, another Jefferson appointee, also had occasion in 1808 to show his independence of the President. Jefferson supported a federal prosecution for

TREASON against individuals who had opposed the embargo with violence. Livingston, who presided at the trial, expressed "astonishment" that the government would resort to a theory of "constructive treason" in place of the Constitution's definition of treason as levying war against the United States and he warned against a "precedent so dangerous." The jury speedily acquitted. After the tongue-lashing from his own appointees, Jefferson won an unexpected victory in the federal courts in the case of the brig *William* (1808). Federal district judge John Davis in Massachusetts sustained the constitutionality of the Embargo Acts on commerce clause grounds. Davis, a lifelong Federalist, showed how simplistic was Jefferson's raving about judicial politics.

The evidence for the Court's nonpartisanship seems plentiful. For example, Justice Story, Madison's appointee, spoke for an independent Court in *Gelston v. Hoyt* (1818), a suit for damages against government officials whose defense was that they had acted under President Madison's orders. Story, finding no congressional authority for these orders, "refused an extension of prerogative" power and added, "It is certainly against the general theory of our institutions to create discretionary powers by implication. . . ."

On the other hand, the Court supported the theory of IMPLIED POWERS in *McCulloch v. Maryland* (1819), which was the occasion of Marshall's most eloquent nationalist opinion. *McCulloch* had its antecedent in *United States v. Fisher* (1804), when the Court initially used BROAD CONSTRUCTION to sustain an act of Congress that gave to the government first claim against certain insolvent debtors. Enunciating the DOCTRINE of implied powers drawn from the NECESSARY AND PROPER CLAUSE, Marshall declared that Congress could employ any useful means to carry out its ENUMERATED POWER to pay national debts. That the prior claim of the government interfered with state claims was an inevitable result, Marshall observed, of the supremacy of national laws. Although a precursor of *McCulloch*, *Fisher* attracted no opposition because it did not thwart any major state interests.

When the Court did confront such interests for the first time, in UNITED STATES V. JUDGE PETERS (1809), Marshall's stirring nationalist passage, aimed at states that annulled judgments of the federal courts, triggered Pennsylvania's glorification of state sovereignty and denunciation of the "unconstitutional exercise of powers in the United States Courts." The state called out its militia to prevent execution of federal judgments and recommended a constitutional amendment to establish an "impartial tribunal" to resolve conflicts between "the general and state governments." State resistance collapsed only after President Madison backed the Supreme Court. Significantly, eleven state legislatures, including Virginia's, censured Pennsylvania's doctrines and endorsed the Supreme Court as the constitutionally established tribunal to decide state disputes with the federal courts.

The *Judge Peters* episode revealed that without executive support the Court could not enforce its mandate against a hostile state, which would deny that the Court was the final arbiter under the Constitution if the state's interests were thwarted. The episode also revealed that if other states had no immediate stake in the outcome of a case, they would neither advance doctrines of state sovereignty nor repudiate the Court's supreme appellate powers. When Virginia's high court ruled that the appellate jurisdiction of the Supreme Court did not extend to court judgments and that section 25 of the Judiciary Act of 1789 was unconstitutional, the Marshall Court, dominated by Republicans, countered by sustaining the crucial statute in *Martin v. Hunter's Lessee* (1816). Pennsylvania and other states did not unite behind Virginia when it proposed the constitutional amendment initiated earlier by Pennsylvania, because *Martin* involved land titles of no interest to other states. The fact that the states were not consistently doctrinaire and became aggressive only when Court decisions adversely affected them enabled the Court to prevail in the long run. A state with a grievance typically stood alone. But for the incapacity or unwillingness of the Court's state enemies to act together in their proposals to cripple it, the great nationalist decisions of the Marshall Court would have been as impotent as the one in *Worcester v. Georgia* (1832). *Worcester* majestically upheld the supreme law against the state's despoliation of the Cherokees, but President ANDREW JACKSON supported Georgia, which flouted the Court. Even Georgia, however, condemned the SOUTH CAROLINA ORDINANCE OF NULLIFICATION, and several state legislatures resolved that the Supreme Court was the constitutional tribunal to settle controversies between the United States and the states.

The Court made many unpopular decisions that held state acts unconstitutional. *Fletcher v. Peck*, which involved the infamous Yazoo land frauds, was the first case in which the Justices voided a state act for conflict with the Constitution itself. *Martin v. Hunter's Lessee*, which involved the title to the choice Fairfax estates in Virginia, was only the first of a line of decisions that unloosed shrill attacks on the Court's jurisdiction to decide cases on a WRIT OF ERROR to state courts. In *McCulloch* the Court supported the "monster monopoly," the Bank of the United States chartered by Congress, and held unconstitutional a state tax on its Baltimore branch. In *Cohens* the Court again championed its supreme appellate powers under section 25 of the Judiciary Act of 1789 and circumvented the ELEVENTH AMENDMENT. In STURGES V. CROWNINSHIELD (1819) the Court nullified a state bankruptcy statute that aided victims of an economic panic. In

GREEN V. BIDDLE (1821) the Court used the CONTRACT CLAUSE when voiding Kentucky acts that supported valuable land claims. In OSBORN V. BANK OF THE UNITED STATES (1824) it voided an Ohio act that defied *McCulloch* and raised the question whether the Constitution had provided for a tribunal capable of protecting those who executed the laws of the Union from hostile state action.

When national supremacy had not yet been established and claims of state sovereignty bottomed state statutes and state judicial decisions that the Court overthrew, state assaults on the Court were inevitable, imperiling it and the Union it defended. Virginia, the most prestigious state, led the assault which Jefferson encouraged and SPENCER ROANE directed. Kentucky's legislature at one point considered military force to prevent execution of the *Green* decision. State attacks were vitriolic and intense, but they were also sporadic and not united. Ten state legislatures adopted resolutions against the Marshall Court, seven of them denouncing section 25 of the 1789 Act, which was the jurisdictional foundation for the Court's power of judicial review over the states. In 1821, 1822, 1824, and 1831 bills were introduced in Congress to repeal section 25. The assault on the Court was sharpest in the Senate, whose members were chosen by the state legislatures. Some bills to curb the Court proposed a constitutional amendment to limit the tenure of the Justices. One bill would have required seriatim opinions. Others proposed that no case involving a state or a constitutional question could be decided except unanimously; others accepted a 5–2 vote. One bill proposed that the Senate should have appellate powers over the Court's decisions.

Throughout the 1820s the attempts to curb the Court created a continuing constitutional crisis that climaxed in 1831, when Marshall despondently predicted the repeal of section 25 and the dissolution of the Union. In 1831, however, the House, after a great debate, defeated a repeal bill by a vote of 138–51; Southerners cast forty-five of the votes against the Court. What saved the Court was the inability of its opponents to mass behind a single course of action; many who opposed section 25 favored a less drastic measure. The Court had stalwart defenders, of course, including Senators DANIEL WEBSTER and JAMES BUCHANAN. Most important, it had won popular approbation. Although the Court had enemies in local centers of power, Americans thrilled to Marshall's paeans to the Constitution and the Union and he taught them to identify the Court with the Constitution and the Union.

A perceptible shift in the decisions toward greater tolerance for state action also helped dampen the fires under the Court in Marshall's later years. The coalition that Marshall had forged began to dissolve with the appointments of Justices Smith Thompson, JOHN MCLEAN, and Henry Baldwin. *Brown v. Maryland* (1827), MARTIN V. MOTT (1827), AMERICAN INSURANCE COMPANY V. CANTER (1828), WESTON V. CHARLESTON (1829), CRAIG V. MISSOURI (1830), and the CHEROKEE INDIAN CASES (1832) continued the lines of doctrine laid down by the earlier Marshall Court. But the impact of new appointments was felt in the decisions of *Ogden v. Saunders* (1827), WILLSON V. BLACKBIRD CREEK MARSH COMPANY (1829) and PROVIDENCE BANK V. BILLINGS (1830). In Marshall's last decade on the Court, six decisions supported nationalist claims against seventeen for state claims. During the same decade there were ten decisions against claims based on VESTED RIGHTS and only one sustaining such a claim. The shift in constitutional direction may also be inferred from the inability of the Marshall Court, because of dissension and illness, to resolve CHARLES RIVER BRIDGE V. WARREN BRIDGE, MAYOR OF NEW YORK V. MILN, and BRISCOE V. BANK OF KENTUCKY, all finally decided in 1837 under Marshall's successor against the late Chief Justice's wishes. Before his last decade the only important influence on the Court resulting from the fact that Republicans had a voting majority was the repudiation of a FEDERAL COMMON LAW OF CRIMES.

What was the legacy of the Marshall Court? It established the Court as a strong institution, an equal and coordinate branch of the national government, independent of the political branches. It established itself as the authoritative interpreter of the supreme law of the land. It declared its rightful authority to hold even acts of Congress and the President unconstitutional. It maintained continuing judicial review over the states to support the supremacy of national law. In so doing, the Court sustained the constitutionality of the act of Congress chartering the Bank of the United States, laying down the definitive exposition of the doctrine of implied powers. The Court also expounded the commerce clause in *Gibbons v. Ogden* (1824), with a breadth and vigor that provided the basis for national regulation of the economy generations later. Finally, the Court made the contract clause of the Constitution into a bulwark protecting both vested rights and risk capital. *Fletcher* supported the sanctity of public land grants to private parties, encouraging capital investment and speculation in land values. NEW JERSEY V. WILSON (1812) laid down the doctrine that a state grant of tax immunity constituted a contract within the protection of the Constitution, preventing subsequent state taxation for the life of the grant. DARTMOUTH COLLEGE V. WOODWARD (1819) protected private colleges and spurred the development of state universities; it also provided the constitutional props for the expansion of the private corporation by holding that a charter of incorporation is entitled to protection of the contract clause. The Marshall Court often relied on nationalist doctrines to prevent state measures that sought to regulate or thwart corporate development. Just as national supremacy, judi-

cial review, and the Court's appellate jurisdiction were often interlocked, so too the interests of capitalism, nationalism, and judicial review were allied. Time has hardly withered the influence and achievements of the Marshall Court.

LEONARD W. LEVY
(1986)

Bibliography

BAKER, LEONARD 1974 *John Marshall.* New York: Macmillan.
BEVERIDGE, ALBERT J. 1919 *The Life of John Marshall.* Vols. 3 and 4. Boston: Houghton Mifflin.
CORWIN, EDWARD S. 1919 *John Marshall and the Constitution: A Chronicle of the Supreme Court.* New Haven: Yale University Press.
HAINES, CHARLES G. 1944 *The Role of the Supreme Court in American Government and Politics, 1789–1835.* Berkeley: University of California Press.
HASKINS, GEORGE LEE and JOHNSON, HERBERT Q. 1981 *Foundations of Power: John Marshall, 1801–1815.* Volume 2 of the *Oliver Wendell Holmes Devise History of the Supreme Court of the United States.* New York: Macmillan.
KONEFSKY, SAMUEL J. 1964 *John Marshall and Alexander Hamilton.* New York: Macmillan.
MORGAN, DONALD G. 1954 *Justice William Johnson: The First Great Dissenter.* Columbia: University of South Carolina Press.
WARREN, CHARLES 1923 *The Supreme Court in United States History,* 3 vols. Boston: Little, Brown.

## MARSHALL PLAN

At the Harvard University commencement exercises on June 5, 1947, Secretary of State George C. Marshall proposed that the United States undertake a vast program of postwar economic aid to assist the countries of Europe to rebuild from WORLD WAR II. Neither Secretary Marshall nor President HARRY S. TRUMAN offered any constitutional authority for such a program, although some members of Congress, led by Senator ROBERT A. TAFT of Ohio, contended that the expenditure could not be justified under either the FOREIGN AFFAIRS power or the TAXING AND SPENDING POWER. Acting on the initiative of the United States, sixteen European nations formed the Organization of European Economic Cooperation (OEEC) which in turn issued a report setting forth Europe's collective needs and resources. The Soviet Union and other East European countries were invited to participate, but declined. Thereafter, on April 3, 1948, following the Soviet-sponsored coup in Czechoslovakia, which turned the tide of congressional opinion and caused the Marshall Plan expenditures to be justified as a national defense measure, the United States Congress passed the Economic Cooperation Act, to be administered by the Economic Cooperation Administration. Within four years and after the expenditure of $12-$13 billion in American loans and grants-in-aid, Europe made tremendous strides toward economic recovery. Coupled with increased military security (evidenced primarily in the signing of the NORTH ATLANTIC TREATY in 1949 and formation of the North Atlantic Alliance), this extensive economic recovery helped quell fears of Soviet expansion into Western Europe. The Marshall Plan and the OEEC resulting from it also created a precedent for further economic integration among the participating states of Western Europe.

BURNS H. WESTON
(1986)

Bibliography

PRICE, HARRY BAYARD 1955 *The Marshall Plan and Its Meaning.* Ithaca, N.Y.: Cornell University Press.

## MARTIAL LAW

See: Civil-Military Relations

## MARTIN, LUTHER
(1748–1826)

Luther Martin represented Maryland in the CONTINENTAL CONGRESS and signed the DECLARATION OF INDEPENDENCE. He was attorney general of Maryland from 1778 to 1805 and one of the early leaders of the American bar. Martin also represented Maryland at the CONSTITUTIONAL CONVENTION OF 1787, where he was a leader of the small-state faction. Although he favored the Convention's purpose, he consistently advocated positions that would have prevented the establishment of a strong central government. Fearing tyranny, he endorsed a one-term presidency and opposed JAMES MADISON's plan to allow a congressional veto of state or local laws.

The question of congressional REPRESENTATION seemed to him one of the most vexing problems. He favored a unicameral legislature and spoke fervently against proportionate representation at the HOUSE OF REPRESENTATIVES, both in the Convention and afterward. His opposition in Philadelphia helped produce the deadlock that nearly wrecked the convention, but he served on the committee that framed the GREAT COMPROMISE and supported its recommendation. Martin favored JUDICIAL REVIEW but opposed authorizing Congress to create federal courts on the ground that state courts would suffice; they were bound by federal law and their decisions could be appealed to the Supreme Court. Martin also thought that the clause prohibiting interference with the OBLIGATION OF

CONTRACTS was unwise; he warned of the inevitability of "great public calamities and distress" when such intervention would become essential—an argument vindicated in HOME BUILDING & LOAN V. BLAISDELL (1934). As the summer progressed, Martin grew increasingly restive. He opposed allowing suspension of the writ of HABEAS CORPUS and he strongly favored granting Congress power to tax or completely prohibit the slave trade. An opponent of SLAVERY, he labeled its recognition in the Constitution "absurd and disgraceful to the last degree." Martin also concluded that later changes rendered the SUPREMACY CLAUSE, which he originally had proposed, "worse than useless." For these reasons, and because the Constitution contained no BILL OF RIGHTS, he opposed its ratification. In his influential tract of 1788 against RATIFICATION OF THE CONSTITUTION, a major anti-Federalist statement, Martin presented the fullest argument of the time in favor of equal representation of the states in Congress. Despite his opposition to the Constitution, Martin later switched his party allegiance and became known as the "Federalist bulldog."

A brilliant lawyer despite his later alcoholism, Martin appeared frequently in the Supreme Court and in state trials; he defended his old friend Justice SAMUEL CHASE at the latter's IMPEACHMENT trial in 1804 and represented AARON BURR against a TREASON charge three years later, winning both cases. (See EX PARTE BOLLMAN AND SWARTWOUT.) Among dozens of Court appearances, his most famous cases were FLETCHER V. PECK (1810) and MCCULLOCH V. MARYLAND (1819). In *McCulloch*, he eloquently defended Maryland's right to tax the federally chartered Bank of the United States, arguing for the application of the Tenth Amendment. Shortly after losing *McCulloch*, Martin suffered a severe stroke. After living as a penniless derelict for some time, he was eventually taken in by Burr. He died in 1826.

DAVID GORDON
(1986)

Bibliography

CLARKSON, PAUL S. and JETT, R. SAMUEL 1970 *Luther Martin of Maryland.* Baltimore: Johns Hopkins University Press.

## *MARTIN v. HUNTER'S LESSEE*
1 Wheaton 304 (1816)

Appomattox ultimately settled the issue that bottomed this case: were the states or was the nation supreme? As a matter of law, the opinion of the Supreme Court supplied the definitive answer, but law cannot settle a conflict between competing governments unless they agree to abide by the decision of a tribunal they recognize as having JURISDICTION to decide. Whether such a tribunal existed was the very issue in this case; more precisely the question was whether the Supreme Court's APPELLATE JURISDICTION extended to the state courts. In 1810 Virginia had supported the Court against state sovereignty advocates. Pennsylvania's legislature had resolved that "no provision is made in the Constitution for determining disputes between the general and state governments by an impartial tribunal." To that Virginia replied that the Constitution provides such a tribunal, "the Supreme Court, more eminently qualified . . . to decide the disputes aforesaid in an enlightened and impartial manner, than any other tribunal which could be erected." (See UNITED STATES V. JUDGE PETERS.) The events connected with the *Martin* case persuaded Virginia to reverse its position. The highest court of the state, the Virginia Court of Appeals, defied the Supreme Court, subverted the JUDICIAL POWER OF THE UNITED STATES as defined by Article III of the Constitution, circumvented the SUPREMACY CLAUSE (Article VI), and held unconstitutional a major act of Congress—all for the purpose of repudiating JUDICIAL REVIEW, or the Supreme Court's appellate jurisdiction over state courts and power to declare state acts void.

The *Martin* case arose out of a complicated and protracted legal struggle over land titles. Lord Fairfax died in 1781, bequeathing valuable tracts of his property in Virginia's Northern Neck to his nephew, Denny Martin, a British subject residing in England. During the Revolution Virginia had confiscated Loyalist estates and by an act of 1779, which prohibited alien enemies from holding land, declared the escheat, or reversion to the state, of estates then owned by British subjects. That act of 1779 did not apply to the estates of Lord Fairfax, who had been a Virginia citizen. The Treaty of Peace with Great Britain in 1783, calling for the restitution of all confiscated estates and prohibiting further confiscations, strengthened Martin's claim under the will of his uncle. In 1785, however, Virginia had extended its escheat law of 1779 to the Northern Neck, and four years later had granted some of those lands to one David Hunter. JAY'S TREATY of 1794, which protected the American property of British subjects, also buttressed Martin's claims. By then a Virginia district court, which included Judge ST. GEORGE TUCKER, decided in Martin's favor; Hunter appealed to the state's high court. JOHN MARSHALL, who had represented Martin, and James Marshall, his brother, joined a syndicate that arranged to purchase the Northern Neck lands. In 1796 the state legislature offered a compromise, which the Marshall syndicate accepted: the Fairfax devisees relinquished claim to the undeveloped lands of the Northern Neck in return for the state's recognition of their claim to Fairfax's manor lands. The Marshall syndicate accepted the compromise, thereby seeming to secure Hunter's claim, yet thereafter completed their purchase. In 1806, Martin's

heir conveyed the lands to the syndicate, and in 1808 he appealed to the Court of Appeals, which decided in favor of Hunter two years later.

The Martin-Marshall interests, relying on the Treaty of 1783 and Jay's Treaty, took the case to the Supreme Court on a WRIT OF ERROR under section 25 of the JUDICIARY ACT OF 1789. That section provided in part that the nation's highest tribunal on writ of error might reexamine and reverse or affirm the final judgment of a state court if the state court sustained a state statute against a claim that the statute was repugnant to the Constitution, treaties, or laws of the United States, or if the state court decided against any title or right claimed under the treaties or federal authority. Chief Justice Marshall took no part in the case, and two other Justices were absent. Justice JOSEPH STORY, for a three-member majority and against the dissenting vote of Justice WILLIAM JOHNSON, reversed the judgment of the Virginia Court of Appeals, holding that federal treaties confirmed Martin's title. In the course of his opinion Story sapped the Virginia statutes escheating the lands of alien enemies and ignored the "compromise" of 1796. The mandate of the Supreme Court to the state Court of Appeals concluded: "You therefore are hereby commanded that such proceedings be had in said cause, as according to right and justice, and the laws of the United States, and agreeable to said judgment and instructions of said Supreme Court . . ." (*Fairfax's Devisee v. Hunter's Lessee,* 1813).

The state court that received this mandate consisted of eminent and proud men who regarded the Supreme Court as a rival; the man who dominated the state court was SPENCER ROANE, whose opinion Story had reversed. Roane, the son-in-law of PATRICK HENRY, was not just a judge; he was a state political boss, an implacable enemy of John Marshall, and the man whom THOMAS JEFFERSON would have appointed Chief Justice, given the chance. To Roane and his brethren, Story's opinion was more than an insulting encroachment on their judicial prerogatives. It raised the specter of national consolidation, provoking the need to rally around the STATES' RIGHTS principles of the VIRGINIA AND KENTUCKY RESOLUTIONS. Roane consulted with Jefferson and JAMES MONROE, and he called before his court the leading members of the state bar, who spoke for six days. Munford, the Virginia court reporter, observed: "The question whether this mandate should be obeyed excited all that attention from the Bench and Bar which its great importance truly merited." The reporter added that the court had its opinions ready for delivery shortly after the arguments. That was in April 1814, when the Republican political organization of Virginia dared not say anything that would encourage or countenance the states' rights doctrines of Federalist New England, which opposed the War of 1812 and thwarted national policies. Not until December 1815, when the crisis had passed and secessionism in the North had dissipated, did the Virginia Court of Appeals release its opinions.

Each of four state judges wrote opinions, agreeing that the Constitution had established a federal system in which SOVEREIGNTY was divided between the national and state governments, neither of which could control the other or any of its organs. To allow the United States or any of its departments to operate directly on the states or any of their departments would subvert the independence of the states, allow the creature to judge its creators, and destroy the idea of a national government of limited powers. Although conflicts between the states and the United States were inevitable, the Constitution "has provided no umpire" and did not authorize Congress to bestow on the Supreme Court a power to pass final judgment on the extent of the powers of the United States or of its own appellate jurisdiction. Nothing in the Constitution denied the power of a state court to pass finally upon the validity of state legislation. The states could hold the United States to the terms of the compact only if the state courts had the power to determine finally the constitutionality of acts of Congress. Section 25 of the Judiciary Act was unconstitutional because it vested appellate powers in the Supreme Court in a case where the highest court of a state has authoritatively construed state acts. In sum, the position of the Court of Appeals was that the Supreme Court cannot reverse a state court on a matter of state or even federal law, but a state court can hold unconstitutional an act of the United States. Thus, Roane, with Jefferson's approval, located in the state courts the ultimate authority to judge the extent of the powers of the national government; in 1798 Jefferson had centered that ultimate authority in the state legislatures. At the conclusion of their opinions, the Virginia judges entered their judgment:

> The court is unanimously of opinion, that the appellate power of the Supreme Court of the United States does not extend to this court, under a sound construction of the constitution of the United States; that so much of the 25th section of the act of Congress to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the constitution of the United States; that the writ of error, in this cause, was improvidently allowed, under the authority of that act; that the proceedings thereon in the Supreme Court were *Coram non judice* [before a court without jurisdiction], in relation to this court, and that obedience to its mandate be declined by the court.

When the case returned a second time to the Supreme Court on writ of error, Marshall again absented himself and Story again wrote the opinion. The *Martin* Court, consisting of five Republicans and one Federalist, was unanimous, though Johnson concurred separately. Story's

forty-page opinion on behalf of federal judicial review is a masterpiece, far superior to Marshall's performance in MARBURY V. MADISON (1803) on behalf of national judicial review. In its cadenced prose, magisterial tone, nationalist doctrine, incisive logic, and driving repetitiveness, Story's opinion foreshadowed Marshall's later and magnificent efforts in MCCULLOCH V. MARYLAND (1819), COHENS V. VIRGINIA (1821), and GIBBONS V. OGDEN (1824), suggesting that they owe as much to Story as he to Marshall's undoubted influence on him. Because the Constitution, as Roane pointed out, had neither expressly empowered Congress to extend the Court's appellate jurisdiction to the state courts nor expressly vested the Court itself with such jurisdiction, Story had to justify BROAD CONSTRUCTION. The Constitution, he observed, was ordained not by the sovereign states but by the people of the United States, who could subordinate state powers to those of the nation. Not all national powers were expressly given. The Constitution "unavoidably deals in general language," Story explained, because it was intended "to endure through a long lapse of ages, the events of which were locked up in the inscrutable purpose of Providence." The framers of the Constitution, unable to foresee "what new changes and modifications of power might be indispensable" to achieve its purposes, expressed its powers in "general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects. . . ." From such sweeping premises on the flexibility and expansiveness of national powers, Story could sustain section 25. He found authority for its enactment in Articles III and VI.

Article III, which defined the judicial power of the United States, contemplates that the Supreme Court shall be primarily an appellate court, whose appellate jurisdiction "shall" extend to specified CASES AND CONTROVERSIES. "Shall" is mandatory or imperative: the Court *must* exercise its appellate jurisdiction in *all* cases, in law and EQUITY, "arising under the Constitution, the Laws of the United States, and Treaties made. . . ." It is, therefore, the case, not the court from which it comes, that gives the Supreme Court its appellate jurisdiction, and because cases involving the Constitution, federal laws, and treaties may arise in state courts, the Supreme Court must exercise appellate jurisdiction in those cases. Contrary to Roane, that appellate jurisdiction did not exist only when the case came from a lower federal court. The Constitution required the establishment of a Supreme Court but merely authorized Congress to exercise a discretionary power in establishing lower federal courts. If Congress chose not to establish them, the Court's mandatory appellate jurisdiction could be exercised over only the state courts. The establishment of the lower federal courts meant that the appellate jurisdiction of the Supreme Court extended concurrently to both state and federal courts.

Article VI, the supremacy clause, made the Constitution itself, laws in pursuance to it, and federal treaties the supreme law of the land, binding on state courts. The decision of a state court on a matter involving the supreme law cannot be final, because the judicial power of the United States extends specifically to all such cases. To enforce the supremacy clause, the Supreme Court must have appellate jurisdiction over state court decisions involving the supreme law. That a case involving the supreme law might arise in the state courts is obvious. Story gave the example of a contract case in which a party relied on the provision in Article I, section 10, barring state impairments of the OBLIGATIONS OF A CONTRACT, and also the example of a criminal prosecution in which the defendant relied on the provision against EX POST FACTO laws. The Constitution, he pointed out, was in fact designed to operate on the states "in their corporate capacities." It is "crowded" with provisions that "restrain or annul the sovereignty of the States," making the Court's exercise of appellate power over state acts unconstitutional no more in derogation of state sovereignty than those provisions or the principle of national supremacy. Not only would the federal system survive the exercise of federal judicial review; it could not function without such review. The law must be uniform "upon all subjects within the purview of the Constitution. Judges . . . in different States, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties and the Constitution of the United States would be different in different states," and might never have the same interpretation and efficacy in any two states.

Story's opinion is the linchpin of the federal system and of judicial nationalism. It remains the greatest argument for federal judicial review, though it by no means concluded the controversy. Virginia's hostility was so intense that a case was contrived in 1821 to allow the Supreme Court to restate the principles of *Martin.* (See COHENS V. VIRGINIA, 1821.) As a matter of fact, though, federal judicial review and the constitutionality of section 25 remained bitterly contested topics to the eve of the CIVIL WAR.

LEONARD W. LEVY
(1986)

Bibliography

BEVERIDGE, ALBERT J. 1916–1919 *The Life of John Marshall*, 4 vols. Vol. IV:145–167. Boston: Houghton Mifflin.

CROSSKEY, WILLIAM WINSLOW 1953 *Politics and the Constitution*, 2 vols. Pages 785–817. Chicago: University of Chicago Press.

HAINES, CHARLES GROVE 1944 *The Role of the Supreme Court*

*in American Government and Politics, 1789–1835.* Pages 340–351. Berkeley: University of California Press.

## *MARTIN v. MOTT*
12 Wheaton 19 (1827)

Mott, having avoided militia duty during the War of 1812, was fined by a court-martial. The Constitution authorized Congress to call forth the militia, and President JAMES MADISON, under congressional authority, had called upon the state militias for military service. Several states, which opposed the war, obstructed compliance, arguing that the national government had no authority to determine when the state militias could be called or to subject them to federal governance. Mott relied on such arguments. The Court unanimously held, in an opinion by Justice JOSEPH STORY, that the President, with congressional authorization, had exclusive power to decide when and under what exigencies the militia might be called to duty, and that his decision not only binds the states but places their militias under the control of officers appointed by the President.

LEONARD W. LEVY
(1986)

## *MARYLAND v. CRAIG*
497 U.S. 836 (1990)

This is another Sixth Amendment case in which the Supreme Court declined to follow the express words of the text. Although the Court engaged in what is usually described as JUDICIAL ACTIVISM, it acted in a good cause and had PRECEDENT for its exception to the CONFRONTATION clause of the amendment. In every case in which HEARSAY evidence of any sort is admitted, the right of the accused to confront the witnesses against him or her becomes empty. In this case the Court held, 5–4, that the victim of child abuse may testify on closed circuit television to avoid the trauma of face-to-face confrontation with the accused.

Justice SANDRA DAY O'CONNOR, for the Court, reasoned that the state had a legitimate interest in protecting the child witness from psychological trauma. Face-to-face confrontation, assured by the text of the Sixth Amendment, turned out not to be an indispensable element of the confrontation guarantee.

Justice ANTONIN SCALIA, an unlikely spokesman for the liberal Justices who joined him, rested his dissent on the clear language of the text. He accused the majority of a line of reasoning that "eliminates the right." But his view on the admission of hearsay ("not expressly excluded by the Confrontation Clause") would also justify admission of television testimony in the presence of defense counsel—because the amendment does not expressly exclude such a procedure. Scalia further questioned whether the evidence of a frightened child was reliable. But the state, not the Court, should decide whether the child required protection. Scalia's final proposition, that the Court is not at liberty to ignore the confrontation clause, was at war with his several illustrations to the contrary.

LEONARD W. LEVY
(1992)

## MARYLAND TOLERATION ACT
(April 2, 1649)

This landmark in the protection of liberty of conscience was the most liberal in colonial America at the time of its passage by the Maryland Assembly under the title, "An Act Concerning Religion," and it was far more liberal than Parliament's TOLERATION ACT of forty years later. Until 1776 only the Rhode Island Charter of 1663 and Pennsylvania's "Great Law" of 1682 guaranteed fuller RELIGIOUS LIBERTY.

Maryland's statute, framed by its Roman Catholic proprietor, Lord Baltimore (Cecil Calvert), was the first public act to use the phrase "the free exercise" of religion, later embodied in the FIRST AMENDMENT. More noteworthy still, the act symbolized the extraordinary fact that for most of the seventeenth century in Maryland, Roman Catholics and various Protestant sects openly worshiped as they chose and lived in peace, though not in amity. The act applied to all those who professed belief in Jesus Christ, except antitrinitarians, and guaranteed them immunity from being troubled in any way because of their religion and "the free exercise thereof." In other provisions more characteristic of the time, the act fixed the death penalty for blasphemers against God, Christ, or the Trinity, and it imposed lesser penalties for profaning the sabbath or for reproaching the Virgin Mary or the apostles. Another clause anticipated GROUP LIBEL laws by penalizing the reproachful use of any name or term such as heretic, puritan, popish priest, anabaptist, separatist, or antinomian.

At a time when intolerance was the law in Europe and most of America, Maryland established no church and tolerated all Trinitarian Christians, until Protestants, who had managed to suspend the toleration act between 1654 and 1658, gained political control of the colony in 1689.

LEONARD W. LEVY
(1986)

Bibliography

HANLEY, THOMAS O'BRIEN 1959 *Their Rights and Liberties: The Beginnings of Religious and Political Freedom in Maryland.* Westminister, Md.: Newman Press.

## MASON, GEORGE
(1725–1792)

An influential Virginia leader of the Revolutionary period, George Mason served only a single term (1759–1760) in the colony's House of Burgesses. Family responsibilities and a dislike for routine legislative work kept him at his estate in Fairfax County, where he was active in local public affairs. He was a member and treasurer of the Ohio Company (1752–1773), the Virginia enterprise to explore and settle the Northwest Territory. Mason opposed parliamentary taxation of the colonies and, as justice of the peace, connived at evasion of the Stamp Act. His Fairfax Resolves of 1774 were introduced by his friend and neighbor GEORGE WASHINGTON in the House of Burgesses and prefigured the Declaration and Resolves of the FIRST CONTINENTAL CONGRESS. In 1775 Mason succeeded Washington as a member of Virginia's provisional legislature and was elected to the Committee of Safety, the de facto executive. At the Virginia convention of 1776, Mason wrote the VIRGINIA DECLARATION OF RIGHTS and a major part of the constitution. At the same convention he was appointed, along with GEORGE WYTHE, EDMUND PENDLETON, and THOMAS JEFFERSON, to a committee to revise the state's laws; and, although he resigned from the committee, many of his drafts were included in the final product. Throughout the Revolution he remained active in military and western affairs, and he was the author of an early plan for ceding the Northwest Territory to Congress and organizing its government.

Mason was at the meeting at Mount Vernon in 1785 that set in train the movement toward a constitutional convention; and he was elected to, but did not attend, the Annapolis Convention. He was a delegate to the CONSTITUTIONAL CONVENTION OF 1787 where he was one of the five most frequent speakers. He made his mark at the convention as a spokesman for republican nationalism. He favored a president elected directly by the people for a single seven-year term and assisted by a council. He opposed any mention of slavery in the Constitution as degrading to the document. He was a member of the committee that proposed the GREAT COMPROMISE but bitterly opposed the later compromise which gave twenty years' protection to the slave trade. Most decisively he desired to see a BILL OF RIGHTS included in the new constitution: "The laws of the United States are to be paramount to state bills of rights," he warned, and a constitutional guarantee of rights "would give great quiet to the people." The motion to draft a bill of rights was defeated, and Mason, who had been active in framing the new Constitution, accordingly refused to sign it. He sent his proposed bill of rights to RICHARD HENRY LEE who tried, but failed, to have Congress add it before transmitting the Constitution to the states.

Mason opposed RATIFICATION OF THE CONSTITUTION in the Virginia convention of 1788 because of its supposed antirepublican tendencies, its compromise with SLAVERY, and its want of a bill of rights. When the convention voted to ratify the Constitution it appended a declaration of rights that closely followed Mason's declaration of 1776.

Mason thereafter retired from public life. He declined appointment as a United States senator in 1790. Shortly before his death he told Thomas Jefferson that the machinations of ALEXANDER HAMILTON in favor of urban monied interests were bearing out Mason's predictions about the Constitution.

Throughout his public career Mason adhered to principle even in apparent contradiction to his self-interest. Although he held some 300 slaves he abominated slavery as an institution and favored a plan of gradual compensated emancipation preceded by education. Although he was an active Anglican layman, he favored measures to end the ESTABLISHMENT OF RELIGION in Virginia.

DENNIS J. MAHONEY
(1986)

Bibliography

ROWLAND, KATE MASON 1892 *The Life of George Mason, Including His Speeches, Public Papers, and Correspondence.* New York: Putnam's.

RUTLAND, ROBERT ALLEN 1961 *George Mason, Reluctant Statesman.* Williamsburg, Va.: Colonial Williamsburg, distributed by Holt, Rinehart & Winston, New York.

## *MASSACHUSETTS v. LAIRD*
400 U.S. 886 (1970)

In 1969, the legislature of Massachusetts attempted to nullify the VIETNAM WAR. It passed an act declaring the war unconstitutional, exempting Massachusetts citizens from service in the war, and directing the state attorney general to seek a Supreme Court ruling on the constitutionality of the war. Accordingly, the attorney general filed suit in the state's name against the secretary of defense, Melvin Laird, requesting an order prohibiting the secretary from sending any Massachusetts citizen to Vietnam. As the suit was between a state and a citizen of another state, it would have come within the ORIGINAL JURISDICTION of the Supreme Court. The Court, however, voted 6–3 to deny leave to file the complaint. Justice WILLIAM O. DOUGLAS, who passionately desired an opportunity to rule on the constitutionality of the war, filed an unusual fourteen-page dissent from the denial memorandum.

DENNIS J. MAHONEY
(1986)

## *MASSACHUSETTS v. MELLON*

See: *Frothingham v. Mellon*

## MASSACHUSETTS BAY, COLONIAL CHARTERS OF (1629, 1691)

In 1629 King Charles I granted a royal charter to Puritan leaders of the New England Company, incorporating them as the Massachusetts Bay Colony. In the same year Puritan leaders received authorization to migrate to New England and take the charter with them. As a result the Puritans controlled Massachusetts and sought to create a godly commonwealth. The charter authorized the freemen of the company to meet in a General Court or legislature, and to choose a governor, a deputy governor, and assistants, seven of whom could function as the General Court. The charter vested power in these men to govern Massachusetts Bay in every respect and guaranteed that all inhabitants "shall have and enjoy all liberties and immunities of free and natural subjects . . . as if they . . . were born within the realm of England." The Puritans, who governed themselves, enjoyed the rights of Englishmen, and put an ocean between themselves and England, became obstinately independent.

Massachusetts admitted only church members to freemanship, but the little oligarchy in control refused to allow the freemen a right to participate in governing, a violation of the charter. In 1634 the freemen, on seeing the charter for themselves, demanded full participation in government. From then on, the freemen in the towns chose two deputies from each town as members of the General Court, making it a representative body. Conflict between the freemen and the assistants led to an agreement that without a majority vote of each no law should be passed; that soon led to BICAMERALISM. In the 1640s the battle of the freemen for their charter rights led to the MASSACHUSETTS BODY OF LIBERTIES and to the MASSACHUSETTS GENERAL LAWS AND LIBERTIES, which, with the charter, became the basis of FUNDAMENTAL LAW in the colony, the functional equivalent of a written CONSTITUTION.

In the succeeding decades Massachusetts proved to be aloof from English concerns and refractory in many ways, even claiming that its charter made it independent of Parliament. Relations deteriorated after the Restoration and finally, in 1684, England vacated the charter of 1629. In 1686 James II appointed his own governor of the new Dominion of New England, which combined the New England colonies, New York, and New Jersey. The king's governor ruled without a representative legislature and sought to insinuate the Church of England into Puritan New England. News of the overthrow of James II led to a parallel Glorious Revolution in New England—and elsewhere in America. Each of the colonies that had been absorbed within the dominion resumed its prior governmental practices.

In 1691 King William III, advised by people who had experienced the independence of Massachusetts, officially restored self-government to Massachusetts on royal terms. The charter of 1691 turned Massachusetts from comparative autonomy to a royal colony. The king appointed its governor and his deputy, and the governor could veto legislation—a model for a strong executive in later American history. The General Court consisted of two houses, the lower one elected by the people of the towns who sent two deputies each to the General Court; these elected representatives chose the governor's council, which also served as the upper house. The freemanship of church members disappeared under the new charter, which replaced the religious test with a property qualification on the right to vote. The General Court was empowered to legislate, to create a judicial system, and to elect the upper house—subject to the governor's veto. The government established by the second charter recognized a clear SEPARATION OF POWERS between the three branches. The charter also embodied the principle of liberty of conscience for "all Christians (Except Papists)" and, like the first charter, also guaranteed the rights of Englishmen.

LEONARD W. LEVY
(1986)

Bibliography

OSGOOD, HERBERT L. (1904) 1957 *The American Colonies in the Seventeenth Century.* 3 Vols. Gloucester, Mass.: Peter Smith.

## *MASSACHUSETTS BOARD OF RETIREMENT v. MURGIA* 427 U.S. 307 (1976)

In *Murgia* the Supreme Court, asked to subject AGE DISCRIMINATION to heightened judicial scrutiny, declined the invitation, 7–1. In a per curiam opinion the Court upheld a state law limiting membership in the uniformed state police to persons under the age of fifty, irrespective of an older person's ability to pass physical or other tests of qualification. There was not a murmur in the Court's opinion about IRREBUTTABLE PRESUMPTIONS, nor was age a SUSPECT CLASSIFICATION; although the aged were not free from discrimination, they had not experienced "purposeful unequal treatment" or disabilities imposed "on the basis of stereotyped characteristics not truly indicative of their abilities." With that breathtaking inaccuracy behind it, the Court applied the most permissive form of RATIONAL BASIS

review, noted that physical ability generally declines with age, and concluded that because the mandatory retirement rule was not "wholly unrelated" to the objective of maintaining a physically fit police force, the law was valid. Justice THURGOOD MARSHALL, in lone dissent, repeated his long-standing argument that the Court should abandon its "two-tier" system of STANDARDS OF REVIEW in favor of a system that matched the level of judicial scrutiny in EQUAL PROTECTION cases to the interests at stake in each case.

KENNETH L. KARST
(1986)

## MASSACHUSETTS BODY OF LIBERTIES (1641)

The Massachusetts Body of Liberties, which resulted from popular demand that the fundamental law of the colony be written, was primarily a set of constitutional safeguards protecting personal freedom and the procedures of DUE PROCESS. By 1634 the colonists were demanding publication of the colony's laws as a curb on the magistrates' discretionary powers. The magistrates opposed publication as a restraint of their lawful powers; they believed that law should develop in Massachusetts Bay as had the COMMON LAW in England, over time and by custom. More to the point, publication would invite direct comparison with English law and one provision of the charter forbade establishment of any laws repugnant to those of England.

For the remainder of the decade a number of attempts were made to formulate a document that would satisfy these demands. One plan, drawn up by the Reverend John Cotton, may have been rejected because of its biblical severity or its failure to be sufficiently comprehensive. In 1638, the Reverend Nathaniel Ward, a barrister active at Lincoln's Inn before his emigration, submitted a proposal that was eventually sent to the towns for their consideration and revision early in 1641. Despite years of inaction and obstruction by the magistrates the General Court finally adopted this draft that autumn.

The first "liberty," paraphrasing the thirty-ninth article of MAGNA CARTA, specified conformity to the traditional rights of Englishmen, as exemplified in Magna Carta and the common law, and to "the word of God." The Body of Liberties was undeniably a product of the Puritan colony: a large portion outlined ecclesiastical rights and responsibilities. One section, drawn from Cotton's code, listed twelve capital crimes and cross-referenced each one to the appropriate biblical verse.

Over forty liberties were devoted to "Juditiall Proceedings" and their adjunct rights. In addition to defining a few lesser offenses, the Body of Liberties provided extensive guarantees for each step in legal proceedings. The use of summonses was regulated and a right to BAIL was assured. Written pleadings were permitted in court and, unlike English practice, cases would not be abated for minor technical errors. Parties were granted the right to TRIAL BY JURY and to challenge any of the jurors. Other liberties protected rights now taken for granted. Among these were provisions for a SPEEDY TRIAL, a limited privilege against self-incrimination, as well as prohibitions of DOUBLE JEOPARDY and "inhumane barbarous and cruel" punishments. (See CRUEL AND UNUSUAL PUNISHMENT.) The Body of Liberties also guaranteed FREEDOM OF SPEECH in courts and public assemblies and freedom of movement. Other sections covered the "Liberties of Women," children's rights, and those of servants.

Despite these and other innovations the deputies were dissatisfied with the document. They found it overly broad and poorly defined and insisted upon specified penalties—the Body of Liberties provided them only for capital crimes—and precise limits to magisterial power. Eventually, widespread discontent resulted in the passage in 1648 of the extensively detailed MASSACHUSETTS GENERAL LAWS AND LIBERTIES.

DAVID GORDON
(1986)

Bibliography

HASKINS, GEORGE L. 1960 *Law and Authority in Early Massachusetts.* New York: Macmillan.

## MASSACHUSETTS CIRCULAR LETTER (February 11, 1768)

This document reveals the American conception of a CONSTITUTION as a supreme FUNDAMENTAL LAW limiting government by definite restraints upon power. SAMUEL ADAMS drafted the document, which the Massachusetts House of Representatives adopted and sent to the assemblies of other colonies to secure their assent to the contention that the TOWNSHEND ACTS of 1767 and all other taxes levied by Parliament on America were unconstitutional. The right to private property, Adams wrote, is an unalterable natural and constitutional right "engrafted into the British Constitution, as a fundamental law. . . ." Parliament had violated that right by TAXATION WITHOUT REPRESENTATION. Although Parliament was the supreme legislature in the empire, it could act lawfully only within the sphere of its legitimate powers. Echoing the Swiss jurist EMERICH DE VATTEL, who distinguished a constitution from ordinary statutory law, Adams declared that in all free states the constitution is fixed, and "as the supreme Legislative de-

rives its Power and Authority from the Constitution, it cannot overleap the bounds of it, without destroying its own foundation. . . ." The constitution, Adams stated, "ascertains and limits" both SOVEREIGNTY and allegiance.

London censured the "Seditious Paper" of Massachusetts and declared that Massachusetts had subverted "the true principles of the constitution." To the British, as Sir WILLIAM BLACKSTONE contended in his *Commentaries*, Parliament could not act unconstitutionally; it knew no practical limits. To the Americans, an unconstitutional act was one that exceeded governmental authority. "Unconstitutional" did not mean impolitic or inexpedient, as it meant in Britain; it meant a lawless government act that need not be obeyed. The Massachusetts Circular Letter thus fortified the emergence of a new conception of constitutional law.

LEONARD W. LEVY
(1986)

Bibliography

MILLER, JOHN C. 1943 *Origins of the American Revolution.* Pages 257–264. Boston: Little, Brown.

## MASSACHUSETTS CONSTITUTION
(October 25, 1780)

The "Constitution or Form of Government for the Commonwealth of Massachusetts" is the classic American state CONSTITUTION and the oldest surviving written constitution in the United States (or the world), distinguished in addition by the fact that it was framed by the world's first CONSTITUTIONAL CONVENTION. But for two states which merely modified their COLONIAL CHARTERS, all the original thirteen states except Massachusetts had adopted their first constitutions by 1778 and in every case the body that enacted ordinary legislation framed the constitution and promulgated it. The Massachusetts legislature also framed a constitution but resorted to the novel step of submitting it to the voters for approval, and they rejected it. Then, in accordance with a proposal first advanced in the CONCORD TOWN RESOLUTIONS of 1776, a special constitutional convention elected for the sole purpose of drawing up a document of FUNDAMENTAL LAW performed the task and sent it out for ratification, article by article. Universal manhood suffrage prevailed in the vote for delegates to the convention and for popular ratification. Massachusetts, following democratic procedures for institutionalizing the SOCIAL COMPACT THEORY of government to devise a frame of government and a supreme law, provided the model that subsequently became common throughout the United States. The Massachusetts constitution of 1780, with amendments, still continues as the constitution of that commonwealth.

JOHN ADAMS, the principal framer of the constitution, once proudly wrote, "I made a Constitution for Massachusetts, which finally made the Constitution of the United States." His exaggeration was pardonable, because no other state constitution so much influenced the framing of the national Constitution. Some earlier state constitutions had referred to the principle of SEPARATION OF POWERS but had made their legislatures dominant, even domineering. Massachusetts not only provided the fullest statement of the principle but also put it into practice. Its judges, appointed by the governor, were to hold office "during GOOD BEHAVIOR" with undiminishable salaries. Its governor was the model for the presidency of the United States. He was to be elected by the voters, rather than by the legislature as in other states, and be a strong executive. He appointed the members of his own council or cabinet and, indeed, appointed all judicial officers down to local magistrates and registers of probate as well as sheriffs, coroners, and the state attorney general. He was "commander-in-chief of the army and navy"; he had the PARDONING POWER; and he alone among the first governors of the thirteen states had a sole VETO POWER over legislation, which could be overridden only by a two-thirds vote of both houses. The state senate and house of representatives were also precursors of the national bicameral system. No original state constitution had a better system of CHECKS AND BALANCES than Massachusetts's.

Its constitution was divided into three parts: a preamble, a declaration of rights, and a frame of government. The preamble, on the general purposes of the state, explicitly embodied the social compact theory of the origin of the body politic. The declaration of rights, although containing little not found in constitutions previously framed by other states, was the most comprehensive compendium of its kind, and it phrased the rights which it guaranteed in language most influential in framing the BILL OF RIGHTS of the Constitution of the United States. The injunction against " UNREASONABLE SEARCHES and seizures" in the FOURTH AMENDMENT derives from the Massachusetts Declaration of Rights, and the injunction "shall not" instead of the pallid "ought not" ("liberty of the press ought not be restrained") was also a Massachusetts innovation. The one grave deficiency of the Massachusetts document was its creation of a multiple ESTABLISHMENT OF RELIGION that was inconsistent with its guarantee of RELIGIOUS LIBERTY.

LEONARD W. LEVY
(1986)

Bibliography

ADAMS, WILLI PAUL 1980 *The First American Constitutions.* Chapel Hill: University of North Carolina Press.

PETERS, RONALD M., JR. 1978 *The Massachusetts Constitution of 1780: A Social Compact*. Amherst: University of Massachusetts Press.

## MASSACHUSETTS GENERAL LAWS AND LIBERTIES

In 1646, the General Court of Massachusetts Bay appointed a committee to "correct and compose in good order all the liberties, lawes, and orders extant with us." The committee's work, publication of which was delayed until 1648, was far more comprehensive than the earlier MASSACHUSETTS BODY OF LIBERTIES. The framing of the General Laws and Liberties capped a movement for codification that had grown because the Body of Liberties had failed to curb the magistrates' discretion. Frequent legislation compounded popular confusion over the state of the law, but even so, the General Laws did not include all the laws in force.

The new code incorporated eighty-six of the one hundred items in the Body of Liberties and covered subjects from business regulations to property laws. It generally followed English practice. Plaintiffs could easily attach land, the law guaranteed a SPEEDY TRIAL, and juries could return "special" verdicts—practices foreign to English proceedings. Also unlike English practice, forms of action were relatively unimportant; substance took precedence in Massachusetts. Like contemporary English statutory abridgments and practice manuals, the General Laws were listed alphabetically to encourage reference and use. They were revised in 1660 and 1672 and served as the prototype for other colonies' legal codes.

DAVID GORDON
(1986)

## MASSACHUSETTS RESOLUTIONS

See: Embargo Acts

## *MASSES PUBLISHING COMPANY v. PATTEN*
244 Fed. 535 (1917)

Judge LEARNED HAND's *Masses* opinion was one of the first federal opinions dealing with free speech. It remains influential even though Hand was reversed by the court of appeals and many years later himself abandoned his initial position. A postmaster had refused to accept the revolutionary monthly *The Masses* for mailing, citing the ESPIONAGE ACT. Hand, sitting in a federal district court, interpreted the act not to apply to the magazine. He noted that any broad criticism of a government or its policies might hinder the war effort. Nevertheless, to suppress such criticism "would contradict the normal assumption of democratic government." Hand advanced a criminal incitement test. He conceded that words can be "the triggers of action" and, if they counseled violation of law, were not constitutionally protected. If, however, the words did not criminally incite and if the words stopped short "of urging upon others that it is their duty or their interest to resist the law . . . one should not be held to have attempted to cause its violation."

Hand's concentration on the advocacy content of the speech itself is thought by some to be more speech-protective than the CLEAR AND PRESENT DANGER rule's emphasis on the surrounding circumstances.

MARTIN SHAPIRO
(1986)

## *MASSIAH v. UNITED STATES*
377 U.S. 201 (1964)

After a defendant had been indicted and released on BAIL, a bugged co-defendant who had turned police informer, engaged him in an incriminating conversation. The Supreme Court held that the Sixth Amendment prohibits deliberate elicitation of information from an indicted person in the absence of his counsel and ruled that defendant's incriminating statements were inadmissible at trial.

BARBARA ALLEN BABCOCK
(1986)

## *MASSON v. NEW YORKER MAGAZINE, INC.*
501 U.S. 496 (1991)

A case more interesting for its facts than important for its holding, *Masson v. New Yorker Magazine, Inc.* required the Supreme Court to consider the circumstances in which the press is subject to LIBEL claims for deliberately fabricating quotations.

The case arose from an article written by Janet Malcolm for *The New Yorker* concerning Jeffrey Masson's tenure as Projects Director of the Sigmund Freud Archives—a tenure abruptly terminated when Masson accused Freud of fraud and declared the "sterility of psychoanalysis throughout the world." Malcolm's article included lengthy quotations attributed to Masson that made him appear less than attractive. As one review of the article quoted by the Court said: "Masson, the promising psychoanalytic scholar, emerges gradually as a grandiose egoist—mean-spirited, self-serving, full of braggadocio, impossibly ar-

rogant and, in the end, a self-destructive fool. But it is not Janet Malcolm who calls him such: His own words reveal this psychological profile." Masson claimed, however, that he had not in fact said many of the words that Malcolm put in his mouth. He brought a libel suit, which focused on six statements that Malcolm had attributed to him in the article but that nowhere appeared in the more than forty hours of tape recordings she had made of their conversations.

As the case was presented to the Court, Malcolm conceded for purposes of her summary judgment motion that she had deliberately fabricated the quotations. Masson for his part conceded that he was a PUBLIC FIGURE under the Court's libel jurisprudence and therefore would have to show at trial that Malcolm published a defamatory statement with "actual malice"—that is, knowledge of the statement's falsity or reckless disregard as to its truth. The question on the summary judgment motion was whether a reasonable jury could find, on the basis of the fabricated quotations, that Masson met this constitutional requirement.

The Court held that the appropriate standard in a case of this kind was whether the deliberate alteration of the speaker's words effected a "material change" in their meaning. If the fabrication did so, and if the changed meaning then caused harm to reputation, even a public figure could recover in a libel action; if, however, the fabrication carried with it no such change in meaning, then dismissal of the suit was appropriate. The Court saw this standard as but one variant of the usual COMMON LAW principle, now treated as an integral part of the actual malice standard, that "substantial" even if not complete or literal truth will defeat a libel action. Applying its standard, the Court held that five of the six fabricated quotes at issue materially changed the meaning of what Masson had said and therefore could go to a jury.

Although the *Masson* case received considerable press attention, perhaps because of the striking contrast between the professional reputation of the journalistic defendants and the seriousness of the charges leveled against them, the Court's decision probably will matter little either to the press or to defamed individuals. The press should have little difficulty living with a rule that subjects them to liability for fabricated quotes only when these materially depart from, rather than essentially paraphrase, the substance of what their subjects say; even within the journalistic profession, almost no one believes that this rule imposes a substantial or an unreasonable burden. And the victims of deliberate falsification should have little difficulty recovering under this rule if and to the extent that they have suffered real injury; the Court's standard cuts off suit only when the alteration of the subject's words cannot be thought to have harmed reputation. However sensational, the problem of fabricated quotes lies at the margin of journalistic behavior (indeed, this is precisely what makes the problem sensational), and the *Masson* decision occupies a similar place in the Court's by now expansive libel doctrine.

ELENA KAGAN
(2000)

Bibliography

BOLLINGER, LEE 1991 The End of *New York Times v. Sullivan:* Reflections on *Masson v. New Yorker Magazine. Supreme Court Review* 1991:1–46.

## MASTER, SPECIAL

See: Special Master

## *MATHEWS v. ELDRIDGE*
424 U.S. 319 (1976)

GOLDBERG V. KELLY (1970) established a PROCEDURAL DUE PROCESS right to an evidentiary hearing prior to the termination of state WELFARE BENEFITS. Eldridge, whose Social Security disability benefits had been terminated without a prior hearing, could be pardoned for thinking that *Goldberg* controlled his case. In the event, a 6–2 Supreme Court explained how that view was mistaken, and established its basic test for determining whether a particular procedure satisfied the demands of DUE PROCESS.

The government conceded that the disability benefit was the sort of statutory "ENTITLEMENT" that constituted a "PROPERTY" interest protected by the due process guarantee. The government nonetheless argued that a *prior* hearing was not required; rather, due process was satisfied by a posttermination hearing at which the beneficiary might review the evidence, submit evidence of his own, and make arguments for reconsideration. Under the existing procedures, a beneficiary who prevailed in such a posttermination hearing was entitled to full retroactive relief. A majority of the Court agreed with the government's argument.

In a passage often quoted in later opinions, the Court set out the factors relevant to determining "the specific dictates of due process," once a "liberty" or "property" interest is impaired: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional

or substitute procedural requirement would entail." Here, eligibility for disability benefits was not based on need, the standard for welfare eligibility in *Goldberg*. The Court assumed that a delayed payment would harm the typical disability beneficiary less than the typical welfare recipient. The medical question of disability, in contrast with the "need" question in a welfare case, was more focused and less susceptible to erroneous decision. The costs of pretermination hearings would be great. In short, the Court balanced its factors on the government's side.

The *Eldridge* due process calculus implies a strong presumption of constitutionality of whatever procedures a legislative body or government agency may choose to provide persons deprived of liberty or property. This presumption grows naturally out of the Court's limited choice of factors to be balanced, emphasizing material costs and benefits and ignoring the role of procedural fairness in maintaining each individual's sense of being a respected, participating citizen.

KENNETH L. KARST
(1986)

## MATTHEWS, STANLEY
(1824–1889)

Stanley Matthews's political connections and his legal work for railroads led to his Supreme Court nomination in 1881; these same activities also nearly prevented him from taking a place on the bench. Like his predecessor, NOAH SWAYNE, Matthews had been an Ohio antislavery Democrat and a Democratic appointee as a United States attorney. By 1860, however, he had switched to the Republican party. After CIVIL WAR military service, he became an important leader of the Cincinnati bar. Before the Ohio Supreme Court, Matthews represented the Cincinnati Board of Education and supported its authority to abolish religious instruction in the public schools. His eloquent argument defended SEPARATION OF CHURCH AND STATE as the best way to insure RELIGIOUS LIBERTY.

Matthews served as one of RUTHERFORD B. HAYES's lawyers during the contested electoral battle in 1877. Near the end of his administration, Hayes nominated Matthews to succeed Swayne, but because of internal Republican patronage feuds, as well as questions about Matthews's railroad connections, the SENATE took no action. President JAMES A. GARFIELD, under pressure from Hayes's allies and prominent business interests, resubmitted the nomination. After a long, bitter fight, the Senate confirmed Matthews by a one-vote majority.

Matthews clearly served railroad interests when he joined the Court's decision in WABASH, ST. LOUIS & PACIFIC RAILROAD CO. V. ILLINOIS (1886), substantially weakening the state regulatory doctrine of *Munn v. Illinois* (1877). Similarly, he concurred in the nearly unanimous decision in the CIVIL RIGHTS CASES (1883), which capped a legal and political counterassault against racial equality.

The *Wabash* case, while limiting state regulation, decisively stimulated federal ECONOMIC REGULATION under the COMMERCE CLAUSE. Matthews relied on an expansive conception of national power in BOWMAN V. CHICAGO AND NORTHWESTERN RAILWAY CO. (1888), ruling invalid a state's prohibition of liquor shipments from other states. However desirable the state's regulation, Matthews said, it infringed on Congress's EXCLUSIVE POWER. In *Poindexter v. Greenhow* (1885) Matthews relied on the CONTRACT CLAUSE when he held that states could not lawfully repudiate their debts.

Matthews's most important cases involved the interpretation of the FOURTEENTH AMENDMENT. In HURTADO V. CALIFORNIA (1884) he held for the Court that even in a capital case an accusation by INFORMATION rather than INDICTMENT by a GRAND JURY did not deny DUE PROCESS OF LAW contrary to the FOURTEENTH AMENDMENT. The *Hurtado* ruling stood for nearly a half century as a barrier to any tendency toward nationalizing CIVIL RIGHTS and CIVIL LIBERTIES. Yet in YICK WO V. HOPKINS (1886) Matthews spoke for the Court on one of those rare occasions when it advanced civil rights. Holding unconstitutional the discriminatory application of a San Francisco ordinance requiring licensing of wooden laundries, used to destroy Chinese businesses, Matthews described the Fourteenth Amendment in libertarian terms that usually were reserved for corporate cases. Indeed, he cast the plight of the Chinese in language that any good entrepreneur could understand: "For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Matthews spoke for the Court in one of the Mormon anti-polygamy cases, sustaining congressional action and invoking the prevailing norms of the family and marriage. He also voted to strike down the Ku Klux Klan laws in UNITED STATES V. HARRIS (1883); he agreed with the majority that AMERICAN INDIANS were not citizens in *Elk v. Wilkins* (1884); and he concurred that state MISCEGENATION laws were constitutional in PACE V. ALABAMA (1883).

Matthews epitomized the nation's retreat from the reforming zeal of RECONSTRUCTION. The controversy surrounding Matthews's appointment eventually subsided, and he carried out his duties until his death in early 1889.

STANLEY I. KUTLER
(1986)

Bibliography

FILLER, LOUIS 1969 Stanley Matthews. In Leon Friedman and Fred L. Israel, eds., *The Justices of the Supreme Court*, Vol. 2:1351–1378. New York: Chelsea House.

MAGRATH, C. PETER 1963 *Morrison R. Waite: The Triumph of Character.* New York: Macmillan.

## MAXIMUM HOURS AND MINIMUM WAGES LEGISLATION

Regulation of the employment relationship was an important aspect of the movement toward state intervention in economic affairs, which began in the late 1800s. The transition from small individual to large corporate employers and the development of a factory system with a numerous wage-earning class resulted in pervasive exploitation of employees. The principal method of alleviating the economic injustice was statutory regulation of employment conditions. The spectrum of protective legislation was wide, including factory safety, child labor, workers' compensation, and the hours and wages of employment. In these early days the laws were state laws.

The protracted constitutional contest over hours and wage legislation was one aspect of the larger theme of SUBSTANTIVE DUE PROCESS, a concept developed by the Supreme Court at the turn of the century. Liberty included FREEDOM OF CONTRACT, which included the employment contract, of which hours and wages were the main components. The Court held that laws regulating hours and wages violated the guarantee of DUE PROCESS OF LAW if the purpose of the law was invalid or if the means were not reasonably related to a valid purpose.

Hours legislation began in the 1870s. Reformers perceived the duration of the workday as related to the employees' health and safety, protection of which was a valid legislative purpose. In its first opinion on the subject, HOLDEN V. HARDY (1898), the Court sustained a law limiting the hours of men working in mines to eight a day. The hazardous nature of the work justified the limitation as a valid health and safety measure. In MULLER V. OREGON (1908) an hours limitation for women was sustained on the theory that the "weaker sex" required special protection.

Beyond these two exceptional situations the Court at first prohibited hours regulation. The prototype case was LOCHNER V. NEW YORK (1905). A 5–4 Court invalidated a law restricting the work of bakery employees to ten hours a day and sixty hours a week. Despite massive documentation, the Court refused to recognize that the baking industry posed any special health danger to which hours of work were reasonably related. More broadly, the Court concluded that the law was not truly a health law, but a "purely labor law" to regulate hours, an impermissible objective.

This strict view yielded to persistent pressures. In BUNTING V. OREGON (1917) hours regulation of adult males in factories was sustained as a valid health measure, a result clearly inconsistent with *Lochner,* which was not even mentioned in the opinion. Thereafter the validity of hours regulation was not seriously questioned.

Massachusetts passed the first minimum wage statute in 1912 and within ten years there were fifteen such state laws. Proponents urged that health was impaired by wages below a subsistence level. The Court was at first unpersuaded, and, in ADKINS V. CHILDREN'S HOSPITAL (1923), it invalidated a District of Columbia minimum wage law for women. Wages were the "heart of the contract" and, unlike hours, had no relation to health. Contrary to hours regulation, women were entitled to no special wage protection. The minimum wage was invalid also because it bore no relation to the value of the service rendered. But a law curing this deficiency was invalidated in MOREHEAD V. NEW YORK EX REL. TIPALDO (1936).

One principal justification for protective legislation was that the inequality of economic power between employers and employees made true freedom of contract illusory. This argument was expressly rejected by the Court, which candidly declared in COPPAGE V. KANSAS (1915) that it was "impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights." Social Darwinism was thus enshrined in the Constitution.

In 1937, that year of constitutional revolution, minimum wage legislation became constitutional by a 5–4 vote. WEST COAST HOTEL CO. V. PARRISH upheld a minimum wage for women. *Adkins* was overruled. The Court purported surprise at the employer's reliance on liberty of contract. Not only was the health/subsistence rationale accepted but, more broadly, it was now accepted as a valid legislative purpose to prevent "exploitation of a class of workers who are in unequal position with respect to bargaining power."

Federal regulation of hours and wages was first exercised in limited contexts. An eight-hour day for railroad workers was upheld under the COMMERCE CLAUSE in WILSON V. NEW (1917). Congress has long regulated both wages and hours of work performed by employees of contractors with the federal government. Examples are the Davis-Bacon Act, which regulates wages for work on public buildings and other public works, and the Walsh-Healey Public Contracts Act, which regulates both wages and hours for work on supply contracts. The constitutionality of both statutes is unquestioned under the TAXING AND SPENDING POWER.

Finally, in the FAIR LABOR STANDARDS ACT of 1938, Congress legislated for private employment generally, superseding most state laws. The act required the payment of a minimum wage and overtime for all hours over forty a week to all employees engaged in commerce or the production of goods for commerce. The main purpose was not health but to bolster the economy. The FLSA was sus-

tained under the commerce power in UNITED STATES V. DARBY (1941). A substantive due process argument was rejected without analysis. It was "no longer open to question" that neither Fifth nor FOURTEENTH AMENDMENT due process limited the fixing of minimum wages or maximum hours, and it made no difference that the regulations applied to both men and women.

That has been the view of the matter ever since. In other contexts the Court repudiated the *Lochner* substantive due process approach to protective legislation. What was once a burning issue now appears to be a closed chapter in constitutional law. The scope of the STATE POLICE POWER was underscored in striking fashion by the upholding in *Day-Brite Lighting, Inc. v. Missouri* (1952) of a law that required employers to give employees four hours off from work in order to vote—with full pay.

WILLIAM P. MURPHY
(1986)

Bibliography

DE VYVER, FRANK T. 1939 Regulation of Wages and Hours Prior to 1938. *Law and Contemporary Problems* 6:323–332.

DODD, E. MERRICK 1943 From Maximum Wages to Minimum Wages: Six Centuries of Regulation of Employment Contracts. *Columbia Law Review* 43:643–687.

## *MAXWELL v. DOW*
176 U.S. 581 (1900)

This case was decided at a time when the Court was subjecting the FOURTEENTH AMENDMENT to an accordionlike motion, expanding SUBSTANTIVE DUE PROCESS to protect the rights of property and contracting PROCEDURAL DUE PROCESS for persons accused of crime. After HURTADO V. CALIFORNIA (1884), when the Court held that the concept of due process did not guarantee INDICTMENT by GRAND JURY, persons accused of crime resorted to the INCORPORATION DOCTRINE, claiming that the Fourteenth Amendment, through either its due process clause or its PRIVILEGES AND IMMUNITIES clause, incorporated provisions of the BILL OF RIGHTS, thus extending to the states the same trial standards. Utah accused Maxwell by an INFORMATION, rather than an indictment, and tried him by a jury of eight rather than twelve. The Fifth and SIXTH AMENDMENTS would have made such procedures unconstitutional in federal courts. Maxwell argued that the Fourteenth Amendment guaranteed the federal standards in state proceedings. Justice JOHN MARSHALL HARLAN, dissenting, adopted Maxwell's arguments. Justice RUFUS PECKHAM, for the remainder of the Court, held that neither the due process nor the privileges and immunities clause of the Fourteenth Amendment embodied Fifth or Sixth Amendment rights. Peckham also ruled that TRIAL BY JURY "has never been affirmed to be a necessary requisite of due process of law" and that an eight-member jury was constitutional. In 1968 DUNCAN V. LOUISIANA, overruling *Maxwell*, held trial by jury to be a fundamental right of due process of law for persons accused of crime, but under today's constitutional law, the JURY SIZE need not be twelve members in a state proceeding.

LEONARD W. LEVY
(1986)

## MAYFLOWER COMPACT

See: Social Compact Theory

## *MAYOR OF NEW YORK v. MILN*
11 Peters 102 (1837)

This was the first case decided by the TANEY COURT involving a COMMERCE CLAUSE issue, and the Supreme Court finessed that issue. Justice JOSEPH STORY, dissenting alone, said that he took consolation in knowing that the late Chief Justice (JOHN MARSHALL) concurred in his view that the city of New York had unconstitutionally regulated FOREIGN COMMERCE, a subject exclusively belonging to Congress. The city required incoming ship captains to supply vital statistics on every immigrant they brought to harbor. The city argued that passengers were not commerce, but if they were, the voyage having ceased, no foreign commerce was involved; the requirement of the information on passengers was an exercise of the POLICE POWER, a precautionary measure against paupers, vagabonds, convicts, and pestilence.

By a vote of 6–1, in an opinion by Justice PHILIP BARBOUR, the Court sustained the regulation as a valid exercise of the police power. Barbour disavowed giving any opinion on the question whether the states shared CONCURRENT POWERS over foreign commerce. Justice SMITH THOMPSON, concurring separately, agreed with Story that the facts showed a regulation of foreign commerce, but he believed that in the absence of congressional legislation, the states retained a CONCURRENT POWER. The early and simplistic victory for the police power in this case solved little, because the Court did not face the question of the scope of the police powers when they affected SUBJECTS OF COMMERCE.

LEONARD W. LEVY
(1986)

## MAYSVILLE ROAD BILL
(1830)

President ANDREW JACKSON's veto of the Maysville Road Bill challenged the INTERNAL IMPROVEMENTS component of

HENRY CLAY'S AMERICAN SYSTEM on constitutional and policy grounds and enhanced the role of the President in the legislative process.

In 1816, President JAMES MADISON vetoed the "Bonus Bill," which would have provided federal support for internal improvements such as the Cumberland Road, on the ground that the Constitution did not authorize expenditure of federal funds for anything except the powers explicitly enumerated in it. The Maysville Road Bill would have funded completion of a twenty-mile spur of the National Road entirely within the state of Kentucky. Jackson defended his veto on the ground that the Maysville Road was wholly intrastate and therefore outside the power of the federal government. Jackson also vetoed the bill in order to promote economy in the national government. He thus asserted a presidential prerogative in legislative policy, as well as a quasi-constitutional position, associated with the Democratic Party for the next thirty years, of hostility to expenditure of federal funds for internal improvements.

WILLIAM M. WIECEK
(1986)

(SEE ALSO: *Veto Power.*)

## *MCCARDLE, EX PARTE*
7 Wallace (74 U.S.) 506 (1869)

In *Ex Parte McCardle*, Chief Justice SALMON P. CHASE, for the Supreme Court, validated congressional withdrawal of the Court's jurisdiction over appeals in HABEAS CORPUS proceedings under an 1867 statute but reasserted the Court's appellate authority in all other habeas cases.

A federal circuit court remanded William McCardle, a Mississippi editor hostile to Republican Reconstruction policies, to military custody. When he appealed to the Supreme Court, Democrats predicted that the Justices would use his case as a vehicle to hold unconstitutional the trial of civilians by military commissions in southern states undergoing RECONSTRUCTION. Democrats inferred from the earlier decision of EX PARTE MILLIGAN (1866) that a majority of the Court believed that military commissions could not constitutionally try civilians accused of crimes where courts were functioning in peacetime. Alarmed congressional Republicans, seeing this essential machinery of Reconstruction threatened, enacted a narrow statute in 1868 that revoked Supreme Court appellate authority in habeas cases under the HABEAS CORPUS ACT OF 1867.

In the *McCardle* opinion, Chief Justice Chase acknowledged the validity of this repeal under the "exceptions clause" of Article III, section 2, but pointedly reminded the bar that the 1868 repealer "does not affect the JURISDICTION which was previously exercised." In *Ex Parte Yerger* (1869), the Court promptly affirmed this OBITER DICTUM, accepting a *habeas* appeal under section 14 of the JUDICIARY ACT OF 1789 and rebuking Congress for the 1868 repealer. *McCardle* is therefore historically significant as evidence not of judicial submission to political threats during Reconstruction but rather of the Court's uninterrupted determination to preserve its role in questions of CIVIL LIBERTIES.

*McCardle* remains important in the modern debate on congressional power to curtail the Supreme Court's APPELLATE JURISDICTION over cases raising controversial issues such as SCHOOL BUSING, school prayer, and abortion. Some constitutional scholars have argued that Congress cannot erode the substance of the JUDICIAL POWER of the United States vested in the Supreme Court by Article III, section 1, through jurisdictional nibbling at the Court's appellate authority, but the extent to which Congress can affect substantive rights by jurisdictional excisions remains controverted.

WILLIAM M. WIECEK
(1986)

(SEE ALSO: *Judicial System, Federal.*)

## MCCARRAN ACT

See: Internal Security Act

## MCCARRAN-WALTER ACT

See: Immigration and Alienage

## MCCARTHY, JOSEPH R.

See: McCarthyism

## MCCARTHYISM

On February 9, 1950, Senator Joseph R. McCarthy of Wisconsin claimed that 205 communists were presently "working and shaping the policy of the State Department." Although McCarthy produced no documentation for this preposterous charge, he quickly emerged as the nation's dominant Cold War politician—the yardstick by which citizens measured patriotic or scurrilous behavior. McCarthy's popularity was not difficult to explain. Americans were frightened by Soviet aggression in Europe. The years since WORLD WAR II had brought a series of shocks—

the Hiss trial, the fall of China, the KOREAN WAR—which fueled the Red Scare and kept it alive.

President HARRY S. TRUMAN played a role as well. In trying to defuse the "Communist issue," he established a federal LOYALTY-SECURITY PROGRAM with few procedural safeguards. The program relied on nameless informants; it penalized personal beliefs and associations, not just OVERT ACTS; and it accelerated the Red hunt by conceding the possibility that a serious security problem existed inside the government and elsewhere. Before long, state and local officials were competing to see who could crack down hardest on domestic subversion. Indiana forced professional wrestlers to sign a LOYALTY OATH. Tennessee ordered the death penalty for those seeking to overthrow the *state* government. Congress, not to be outdone, passed the INTERNAL SECURITY ACT of 1950 over Truman's veto, requiring registration of "Communist action groups," whose members could then be placed in internment camps during "national emergencies."

Despite his personal commitment to CIVIL LIBERTIES, President Truman appointed four Supreme Court Justices who opposed the libertarian philosophy of WILLIAM O. DOUGLAS and HUGO L. BLACK. As a result, JUDICIAL REVIEW was all but abandoned in cases involving the rights of alleged subversives. The Court upheld loyalty oaths as a condition of public employment, limited the use of the Fifth Amendment by witnesses before congressional committees, and affirmed the dismissal of a government worker on the unsworn testimony of unnamed informants. As ROBERT G. MCCLOSKEY noted, the Court "became so tolerant of governmental restriction on freedom of expression as to suggest it [had] abdicated the field."

By the mid-1950s, the Red Scare had begun to subside. The death of Joseph Stalin, the Korean armistice, and the Senate's censure of Senator McCarthy all contributed to the easing of Cold War fears. There were many signs of this, though none was more dramatic than the Supreme Court's return to libertarian values under Chief Justice EARL WARREN. In *Slochower v. Board of Higher Education* (1956) the Court overturned the discharge of a college teacher who had invoked the Fifth Amendment before a congressional committee. In *Sweezy v. New Hampshire* (1956) it reversed the conviction of a Marxist professor who had refused, on FIRST AMENDMENT grounds, to answer questions about his political associations. In WATKINS V. UNITED STATES (1957) it held that Congress had "no general authority to expose the private affairs of individuals without justification. . . ." "No inquiry is an end in itself," wrote Warren. "It must be related to and in furtherance of a legitimate [legislative] task of Congress."

The reaction in Congress was predictable. A South Carolina representative called the WARREN COURT "a greater threat to this union than the entire confines of Soviet Russia." Bills were introduced to limit the Court's JURISDICTION in national security cases, and legislators both state and federal demanded Warren's IMPEACHMENT. Although this uproar probably caused some judicial retreat in the late 1950s, the Supreme Court played an important role in blunting the worst excesses of the McCarthy era.

DAVID M. OSHINSKY
(1986)

Bibliography

OSHINSKY, DAVID M. 1983 *A Conspiracy So Immense: The World of Joe McCarthy.* New York: Free Press.

## *MCCLESKEY v. KEMP*
481 U.S. 279 (1987)

McCleskey, a black Georgian, on being sentenced to death for the murder of a white person, sought a writ of HABEAS CORPUS on the claim that Georgia's capital-sentencing procedures violated the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT and the CRUEL AND UNUSUAL PUNISHMENT clause of the Eighth Amendment. He based his claim on "the Baldus study," a statistical examination of Georgia's more than 2,000 murder cases during the 1970s. The study showed a significant correlation between race and prosecutors' decisions to seek the death penalty and jurors' recommendations of the death penalty. For example, death was the sentence in twenty-two percent of the cases involving black defendants and white victims, in eight percent of the cases involving white defendants and white victims, and in three percent of the cases involving white defendants and black victims. The Supreme Court, held 5–4, that McCleskey did not show that Georgia had acted unconstitutionally in sentencing him to CAPITAL PUNISHMENT.

The infirmity of McCleskey's argument, according to Justice LEWIS F. POWELL, for the Court, consisted in his failure to prove that he personally had been the target of RACIAL DISCRIMINATION or that the race of his victim had anything to do with his sentence. Anyone invoking the equal-protection clause in a capital-sentencing case has the burden of showing that deliberate discrimination had a discriminatory effect "in *his* case." McCleskey's reliance on the Baldus study proved nothing with respect to him; moreover, every jury is unique, so that statistics concerning many juries do not establish anything regarding a particular one.

McCleskey also argued that the state violated the equal protection clause by enacting the death penalty statute and retaining it despite its supposedly discriminatory application. Powell dismissed this argument because it had no support from proof that the legislature passed and kept

a capital punishment act because of its racially discriminatory effect. The Court had previously held in *Gregg v. Georgia* (1976) that Georgia's capital-sentencing system could operate fairly.

The Court found McCleskey's Eighth Amendment argument no more persuasive. In *Gregg* it had ruled that the jury's discretion was controlled by clear and objective standards. The statute even required the trial court to review every sentence to determine whether it was imposed under the influence of prejudice, whether the evidence supported it, and whether the sentence was disproportionate to sentences in similar cases. Moreover, the judge had to consider the question whether race had any role in the trials. Absent proof that the Georgia system operated arbitrarily, McCleskey could not prove a violation of the Eighth Amendment by showing that other defendants had not received the death penalty.

McCleskey also argued that Georgia's system was arbitrarily applied "because racial considerations may influence capital sentencing decisions." Statistics, Powell replied, show only a "likelihood," which was insufficient to establish an "unacceptable risk" of racial prejudice.

Justice WILLIAM J. BRENNAN, for the dissenters, argued the Eighth Amendment issue. He believed that a death sentence should be voided if there was a risk that it might have been imposed arbitrarily. Brennan believed that McCleskey should not have to prove discrimination in his own case; it was enough that the risk of prejudice, which Brennan believed was established by the statistical study, "might have infected the sentencing decision." McCleskey's claim warranted the Court's support because his was the first case challenging the system, not on how it might operate but "on empirical documentation of how it does operate." Black Georgians who killed whites were sentenced to death at nearly twenty-two times the rate of blacks who killed blacks and at more than seven times the rate of whites who kill blacks. This proved the point about disproportionate sentencing for the dissenters.

Justice HARRY A. BLACKMUN, who also spoke for them, used similar evidence to maintain that Georgia's capital-sentencing procedures conflicted with the equal-protection clause. Racial factors impermissibly affected the system from indictment to sentencing: "The Baldus study demonstrates that black persons are a distinct group that are singled out for a different treatment in the Georgia capital sentencing system." The BURDEN OF PROOF, Blackmun contended, should be on the state to demonstrate that racially neutral procedures yielded the racially skewed results shown by the study.

The Court's opinion is not easy to explain, unless one accepts the belief of dissenters that the Court did not wish to open a can of worms. McCleskey's claims taken to their logical conclusion undermined principles that buttressed the entire CRIMINAL JUSTICE SYSTEM. His equal-protection and "cruel and unusual punishment" arguments, if accepted, could have applied to punishments in noncapital cases and to procedures before SENTENCING and might have resulted in abolition of the death penalty as well.

LEONARD W. LEVY
(1992)

(SEE ALSO: *Capital Punishment and Race; Capital Punishment Cases of 1972; Capital Punishment Cases of 1976; Race and Criminal Justice.*)

## MCCLOSKEY, ROBERT G.
(1916–1969)

Robert G. McCloskey earned his Ph.D. at Harvard University, and he taught American government at Harvard from 1948 to 1969. He was by training a political scientist and by scholarly instinct a historian concerned with contemporary events; the modern Supreme Court created a challenge that filled the major portion of his intellectual life. The philosophy of judicial self-restraint in the light of the Court's limited competence and resources appealed to McCloskey at least in part because it struck a chord in his own character. He distrusted the flamboyant, preferring cautious interpretation. By nature judicious, he was suspicious of a Court that too precipitously proclaimed eternal verities. He wrote *American Conservatism in the Age of Enterprise* (1951), *The American Supreme Court* (1961), and *The Modern Supreme Court* (published posthumously in 1972), and he edited the papers of Justice JAMES WILSON.

MARTIN SHAPIRO
(1986)

## *MCCOLLUM v. BOARD OF EDUCATION*
333 U.S. 203 (1948)

During the late 1940s and 1950s "RELEASED TIME programs" were popular around the country. Public school boards and administrators cooperated with churches and synagogues to provide religious education for students according to their parents' choices. Under the arrangement in Champaign-Urbana, Illinois, students whose parents had so requested were excused from their classes to attend classes given by religious educators in the school buildings. Nonparticipating pupils were not excused from their regular classes.

McCollum, whose child Terry attended the public schools, challenged the Illinois practice on the grounds

that it violated the establishment clause of the FIRST AMENDMENT. The case was the first church-state controversy to reach the Court since EVERSON V. BOARD OF EDUCATION the year before, and Justice HUGO L. BLACK again delivered the opinion of the Court.

Referring to the theory of strict separation announced as OBITER DICTUM in his *Everson* opinion, Black held that the Illinois arrangement fell squarely within the First Amendment's ban. He stressed particularly the utilization of tax-supported facilities to aid religious teaching.

Justice FELIX FRANKFURTER concurred in an opinion in which Justices ROBERT JACKSON, WILEY B. RUTLEDGE, and HAROLD H. BURTON joined. These four had dissented from *Everson*'s approval of state aid to the transportation of children to religious schools.

Justice Jackson also concurred separately, rejecting the sweeping separationism of the Black opinion. Pointing out that there was little real cost to the taxpayers in the Illinois program, he agreed that the Court should end "formal and explicit instruction" such as that in the Champaign schools, but cautioned against inviting ceaseless petitions to the Court to purge school curricula of materials that any group might regard as religious.

Justice STANLEY F. REED, the lone dissenter, had concurred in the result in *Everson*. Here he argued that the majority was giving "establishment" too broad a meaning; unconstitutional "aid" to religion embraced only purposeful assistance directly to a church, not cooperative relationships between government and religious institutions.

*McCollum* seemed to represent a deepening Supreme Court commitment to the theory of strict SEPARATION OF CHURCH AND STATE, but it was significantly limited by another released-time case, ZORACH V. CLAUSEN (1952).

RICHARD E. MORGAN
(1986)

## *MCCRAY v. UNITED STATES*
195 U.S. 27 (1904)

Together with CHAMPION V. AMES (1903), the decision in *McCray* played a seminal role in the expansion of a NATIONAL POLICE POWER. Responding to lobby pressure, Congress in 1902 passed a clearly discriminatory EXCISE TAX on oleomargarine colored yellow to resemble butter. Relying on its power to regulate INTERSTATE COMMERCE, Congress sought to force yellow oleo off the market by taxing it at a rate forty times greater than naturally colored oleo. The act was attacked as an encroachment on STATE POLICE POWERS, a TAKING OF PROPERTY without DUE PROCESS, and a violation of the fundamental principles inherent in the Constitution.

Justice EDWARD D. WHITE, for a 6–3 Court, refused to inquire into Congress's intent and sustained the tax. He argued that the Court could not examine the wisdom of a particular act and, reiterating an OBITER DICTUM from *Champion*, said the remedy for "unwise or unjust" acts ". . . lies not in the abuse by the judicial authority of its functions, but in the people, upon whom . . . reliance must be placed for the correction of abuses." The Court pointedly dismissed WILLIAM GUTHRIE's argument that the validity of a tax ought to be determined by its natural and reasonable effect, regardless of pretext, though it would adopt his reasoning in BAILEY V. DREXEL (1922). The act's purpose—to suppress the sale of yellow oleo rather than to raise revenue—was immaterial. White concluded a judicial abdication of power in this case (although the Court would reassert it in *Bailey*) by stating that the Court could not help but sustain a congressional act even if that body "abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress."

Chief Justice MELVILLE W. FULLER and Justices HENRY B. BROWN and RUFUS PECKHAM dissented without opinion.

DAVID GORDON
(1986)

## MCCREE, WADE HAMPTON, JR.
(1920–1987)

Wade McCree was a member of the generation of black lawyers Governor G. Mennen Williams of Michigan once described as "revolutionaries," individuals who by talent and determination succeeded in opening doors that previously had been closed to members of their race. A graduate of Fisk University and Harvard Law School, McCree spent several years in private practice, but then entered upon a career of public service that continued through four decades and earned for him a reputation as one of the most distinguished lawyers of his time.

After serving as a member of the Michigan Workmen's Compensation Commission and as an elected Wayne County circuit judge, he was appointed by President JOHN F. KENNEDY to the UNITED STATES DISTRICT COURT for the Eastern District of Michigan. Five years later, in 1966, President LYNDON B. JOHNSON elevated him to the UNITED STATES COURT OF APPEALS for the Sixth Circuit, on which he served until 1977, when President JIMMY CARTER appointed him SOLICITOR GENERAL. In 1981, he joined the faculty of the University of Michigan Law School, where he served as the Lewis M. Simes Professor until his death. McCree was the first black or among the first blacks to hold each of these positions.

Widely admired for his judicious manner and temper-

ament, his careful craftsmanship, and the breadth and depth of his knowledge, McCree quickly gained a reputation as a judge's judge. As a judge, and more particularly as a judge on an "inferior court," he was constrained within limits set by others, but within the limits of his office he sought to advance what he regarded as the deepest purposes of law, the fair treatment of individuals and the protection of their liberty and security. McCree's career, both on the bench and off, demonstrates the contribution to those goals that can be made in a life spent in the law.

TERRANCE SANDALOW
(1992)

Bibliography

TRIBUTES 1987 Wade Hampton McCree, Jr. *Michigan Law Review* 86:217–265.

## *MCCULLOCH v. MARYLAND*
4 Wheat. 316 (1819)

Speaking for a unanimous Supreme Court, Chief JUSTICE JOHN MARSHALL delivered an opinion upon which posterity has heaped lavish encomiums. JAMES BRADLEY THAYER thought "there is nothing so fine as the opinion in *McCulloch v. Maryland.*" ALBERT BEVERIDGE placed it "among the very first of the greatest judicial utterances of all time," while William Draper Lewis described it as "perhaps the most celebrated judicial utterance in the annals of the English speaking world." Such estimates spring from the fact that Marshall's vision of nationalism in time became a reality, to some extent because of his vision. Beveridge was not quite wrong in saying that the *McCulloch* opinion "so decisively influenced the growth of the Nation that, by many, it is considered as only second in importance to the Constitution itself." On the other hand, Marshall the judicial statesman engaged in a judicial coup, as his panegyrical biographer understood. To appreciate Marshall's achievement in *McCulloch* and the intense opposition that his opinion engendered in its time, one must also bear in mind that however orthodox his assumptions and doctrines are in the twentieth century, they were in their time unorthodox. With good reason Beveridge spoke of Marshall's "sublime audacity," the "extreme radicalism" of his constitutional theories, and the fact that he "rewrote the fundamental law of the Nation," a proposition to which Beveridge added that it would be more accurate to state that he made of the written instrument "a living thing, capable of growth, capable of keeping pace with the advancement of the American people and ministering to their changing necessities."

The hysterical denunciations of the *McCulloch* opinion by the aged and crabbed THOMAS JEFFERSON, by the frenetically embittered SPENCER ROANE, and by that caustic apostle of localism, JOHN TAYLOR, may justly be discounted, but not the judgment of the cool and prudent "Father of the Constitution," JAMES MADISON. On receiving Roane's "Hampden" essays assaulting *McCulloch,* Madison ignored the threat of state nullification and the repudiation of JUDICIAL REVIEW, but he agreed with Roane that the Court's opinion tended, in Madison's words, "to convert a limited into an unlimited Government." Madison deplored Marshall's "latitude in expounding the Constitution which seems to break down the landmarks intended by a specification of the Powers of Congress, and to substitute for a definite connection between means and ends, a Legislative discretion as to the former to which no practical limit can be assigned." Few if any of the friends of the Constitution, declared Madison, anticipated "a rule of construction . . . as broad as pliant as what has occurred," and he added that the Constitution would probably not have been ratified if the powers that Marshall claimed for the national government had been known in 1788–1789. Madison's opinion suggests how far Marshall and the Court had departed from the intentions of the Framers and makes understandable the onslaught that *McCulloch* provoked. Although much of that onslaught was a genuine concern for the prostration of STATES' RIGHTS before a consolidating nationalism, Taylor hit the nail on the head for the older generation of Jeffersonians when he wrote that *McCulloch* reared "a monied interest."

The case, after all, was decided in the midst of a depression popularly thought to have been caused by the Bank of the United States, a private corporation chartered by Congress; and *McCulloch* was a decision in favor of the hated bank and against the power of a state to tax its branch operations. The constitutionality of the power of Congress to charter a bank had been ably debated in Congress and in Washington's cabinet in 1791, when ALEXANDER HAMILTON proposed the bank bill. Constitutional debate mirrored party politics, and the Federalists had the votes. The Court never passed judgment on the constitutionality of the original BANK OF THE UNITED STATES ACT, though it had a belated opportunity. In 1809 a case came before the Court that was remarkably similar to *McCulloch:* state officials, acting under a state statute taxing the branches of the bank, forcibly carried away from its vaults money to pay the state tax. In *Bank of the United States v. Deveaux* (1809), Marshall for the Court, deftly avoiding the questions that he confronted in *McCulloch,* found that the parties lacked the DIVERSITY OF CITIZENSHIP that would authorize JURISDICTION. With the bank's twenty-year charter nearing expiration, a decision in favor of the bank's constitutionality might look like pro-Federalist politics by the Court, embroiling it in a dispute with President

Madison, who was on record as opposing the bank's constitutionality, and with Congress, which supported Madison's policies.

The United States fought the War of 1812 without the bank to help manage its finances, and the results were disastrous. The war generated a new wave of nationalism and a change of opinion in Madison's party. In 1816 President Madison signed into law a bill chartering a second Bank of the United States, passed by Congress with the support of young nationalists like HENRY CLAY and JOHN C. CALHOUN and opposed by a Federalist remnant led by young DANIEL WEBSTER. The political world was turned upside down. The bank's tight credit policies contributed to a depression, provoking many states to retaliate against "the monster monopoly." Two states prohibited the bank from operating within their jurisdictions; six others taxed the operations of the bank's branches within their jurisdictions. The constitutionality of Maryland's tax was the issue in *McCulloch*, as well as the constitutionality of the act of Congress incorporating the bank.

Six of the greatest lawyers of the nation, including Webster, WILLIAM PINKNEY, and LUTHER MARTIN, argued the case over a period of nine days, and only three days later Marshall delivered his thirty-six-page opinion for a unanimous Court. He had written much of it in advance, thus prejudging the case, but in a sense his career was a preparation for the case. As Roane conceded, Marshall was "a man of profound legal attainments" writing "upon a subject which has employed his thoughts, his tongue, and his pen, as a politican, and an historian for more than thirty years." And he had behind him all five Jeffersonian-Republican members of the Court.

Arguing that Congress had no authority to incorporate a bank, counsel for Maryland claimed that the Constitution had originated with the states, which alone were truly sovereign, and that the national government's powers must be exercised in subordination to the states. Marshall grandiloquently turned these propositions around. When Beveridge said that Marshall the solider wrote *McCulloch* and that his opinion echoed "the blast of the bugle of Valley Forge" (where Marshall served), he had a point. Figuratively, Old Glory and the bald eagle rise up from the opinion—to anyone stirred by a nationalist sentiment. The Constitution, declared Marshall, had been submitted to conventions of the people, from whom it derives its authority. The government formed by the Constitution proceeded "directly from the people" and in the words of the PREAMBLE was "ordained and established" in their name, and it binds the states. Marshall drove home that theme repeatedly. "The government of the Union . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." A bit later Marshall declared that the government of the Union though limited in its powers "is supreme within its sphere of action. . . . It is the government of all; its powers are delegated by all; it represents all, and acts for all." And it necessarily restricts its subordinate members, because the Constitution and federal laws constitute the supreme law of the land. Reading this later, ABRAHAM LINCOLN transmuted it into "a government of the people, by the people, for the people."

Marshall's opinion is a state paper, like the DECLARATION OF INDEPENDENCE, the Constitution itself, or the Gettysburg Address, the sort of document that puts itself beyond analysis or criticism. But there were constitutional issues to be resolved, and Marshall had not yet touched them. Madison agreed with Roane that "the occasion did not call for the general and abstract doctrine interwoven with the decision of the particular case," but *McCulloch* has survived and moved generations of Americans precisely because Marshall saw that the "general and abstract" were embedded in the issues, and he made it seem that the life of the nation was at stake on their resolution in the grandest way.

Disposing affirmatively of the question whether Congress could charter a bank was a foregone conclusion, flowing naturally from unquestioned premises. Though the power of establishing corporations is not among the ENUMERATED POWERS, seeing the Constitution "whole," as Marshall saw it, led him to the doctrine of IMPLIED POWERS. The Constitution ought not have the "prolixity of a legal code"; rather, it marked only "great outlines," with the result that implied powers could be "deduced." Levying and collecting taxes, borrowing money, regulating commerce, supporting armies, and conducting war are among the major enumerated powers; in addition, the Constitution vests in Congress the power to pass all laws "necessary and proper" to carry into execution the powers enumerated. These powers implied the means necessary to execute them. A banking corporation was a means of effectuating designated ends. The word "necessary" did not mean indispensably necessary; it did not refer to a means without which the power granted would be nugatory, its object unattainable. "Necessary" means "useful," "needful," "conducive to," thus allowing Congress a latitude of choice in attaining its legitimate ends. The Constitution's Framers knew the difference between "necessary" and "absolutely necessary," a phrase they used in Article I, section 10, clause 2. They inserted the NECESSARY AND PROPER CLAUSE in a Constitution "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." They intended Congress to have "ample means" for carrying its express powers into effect. The "narrow construction" advocated by Maryland would abridge, even "annihilate," Congress's discretion in

selecting its means. Thus, the test for determining the constitutionality of an act of Congress was: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." That formula yielded the conclusion that the act incorporating the bank was valid.

Such was the BROAD CONSTRUCTION that "deduced" implied powers, shocking even Madison. The Court, he thought, had relinquished control over Congress. He might have added, as John Taylor did, that Marshall neglected to explain how and why a private bank chartered by Congress was necessary, even in a loose sense, to execute the enumerated powers. In *Construction Construed* (1820) Taylor gave five chapters to *McCulloch*, exhibiting the consequences of Marshall's reasoning. Congress might legislate on local agriculture and manufactures, because they were necessary to war. Roads were still more necessary than banks for collecting taxes. And:

> Taverns are very necessary or convenient for the offices of the army. . . . But horses are undoubtedly more necessary for the conveyance of the mail and for war, than roads, which may be as convenient to assailants as defenders; and therefore the principle of implied power of legislation will certainly invest Congress with a legislative power over horses. In short, this mode of construction completely establishes the position, that Congress may pass any internal law whatsoever in relation to things, because there is nothing with which war, commerce and taxation may not be closely or remotely connected.

All of which supported Taylor's contention that Marshall's doctrine of implied powers would destroy the states and lead to a government of unlimited powers, because "as ends may be made to beget means, so means may be made to beget ends, until the co-habitation shall rear a progeny of unconstitutional bastards, which were not begotten by the people."

Marshall's reasoning with respect to the second question in the case incited less hostility, though not by much. Assuming Congress could charter the bank, could a state tax its branch? Marshall treated the bank as a branch or "instrument" of the United States itself, and relying on the SUPREMACY CLAUSE (Article VI), he concluded that if the states could tax one instrument to any degree, they could tax every other instrument as well—the mails, the mint, even the judicial process. The result would cripple the government, "prostrating it at the foot of the States." Again, he was deducing from general principles in order to defeat the argument that nothing in the Constitution prohibits state taxes on congressionally chartered instruments. Congress's power to create, Marshall reasoned, implied a power to preserve. A state power to tax was a power to destroy, incompatible with the national power to create and preserve. Where such repugnancy exists, the national power, which is supreme, must control. "The question is, in truth, a question of supremacy," with the result that the Court necessarily found the state act unconstitutional.

That was Marshall's *McCulloch* opinion. Roane and Taylor publicly excoriated it, and Jefferson spurred them on, telling Roane, who rejected even federal judicial review, "I go further than you do." The Virginia legislature repudiated implied powers and recommended an amendment to the Constitution "creating a tribunal for the decision of all questions, in which the powers and authorities of the general government and those of the States, where they are in conflict, shall be decided." Marshall was so upset by the public criticism that he was driven for the first and only time to reply in a series of newspaper articles. Still, Ohio allied itself with Virginia and literally defied, even nullified, the decision in *McCulloch*. (See OSBORN V. BANK OF THE UNITED STATES; COHENS V. VIRGINIA.) Pennsylvania, Indiana, Illinois, and Tennessee also conducted a guerrilla war against the Court, and Congress seriously debated measures to curb its powers. Fortunately the common enemies of the Court shared no common policies. *McCulloch* prevailed in the long run, providing, together with GIBBONS V. OGDEN (1824), the constitutional wherewithal to meet unpredictable crises even to our time. *McCulloch* had unforeseen life-giving powers. Marshall, Beveridge's "supreme conservative," laid the constitutional foundations for the New Deal and the Welfare State.

LEONARD W. LEVY
(1986)

Bibliography

BEVERIDGE, ALBERT J. 1916–1919 *The Life of John Marshall*, 4 vols. Vol. IV: 283–339. Boston: Houghton Mifflin.

HAINES, CHARLES GROVE 1944 The Role of the Supreme Court in American Government and Politics, 1789–1835 Pages 351–368. Berkeley: University of California Press.

WARREN, CHARLES 1923 *The Supreme Court in United States History*, 3 vols. Vol. I:499–540. Boston: Little, Brown.

## *MCELVAINE v. BRUSH*

See: *Kemmler, In Re*

## MCGOWAN, CARL
(1911–1987)

Carl McGowan served on the UNITED STATES COURT OF APPEALS for the District of Columbia Circuit from 1963 until his death. Before his appointment, he had a private prac-

tice and served on the law faculty of Northwestern University. He was a judge whose intelligence and humanity made him suited to the craft. His opinions were lucid in style and expression, sound in analysis, and combined intellectual acuity, practical understanding, and good sense.

McGowan could not be pigeonholed as a "liberal" or a "conservative." He was the sort of judge a lawyer might wish for before knowing which side of the case he had to argue. McGowan won the respect and affection of his colleagues on the bench as well as of the bar of the DISTRICT OF COLUMBIA. He counseled not by preaching but by example. He was learned in the law, evenhanded in approach, honest, and wise. His ability to conciliate between opposing views allowed his court to resolve cases on common ground. McGowan's dissents barely match the number of terms he served on the court—some twenty-five dissents in a quarter century's service. From the mid-1960s to the mid-1980s, the overall dissent rate in the D.C. Circuit in cases with published opinions hovered around 13 percent; indicative of McGowan's moderating influence, in cases in which he was a panel member, that rate was five percent.

Judge McGowan's patient genius worked through many perplexing constitutional issues. In *Rothstein v. Wyman* (2d Cir. 1972), for example, his opinion delineated the critical line drawn by the ELEVENTH AMENDMENT between what federal courts can and cannot order states to do. In *Nixon v. Administrator of General Services* (D.D.C. 1976) he persuasively analyzed a panoply of constitutional objections pressed on behalf of a former president. In high tribute to Judge McGowan, the Supreme Court's majority essentially adopted his reasoning on the hard questions of SEPARATION OF POWERS, EXECUTIVE PRIVILEGE, invasion of privacy, freedom of expression, and BILL OF ATTAINDER.

RUTH BADER GINSBURG
(1992)

Bibliography

POWELL, LEWIS F., JR., et al. 1988 In Memoriam Judge Carl McGowan. *George Washington Law Review* 56:681–702.

## *MCGOWAN v. MARYLAND*

See: Sunday Closing Laws

## *MCGRAIN v. DAUGHERTY*
273 U.S. 135 (1927)

In KILBOURN V. THOMPSON (1881) the Supreme Court had held that because Article I of the Constitution assigned Congress no power beyond the lawmaking power, Congress might constitutionally investigate "the private affairs of individuals" only for the purpose of gathering information to write new legislation. *McGrain* restated this requirement of legislative purpose, but rejected, 8–0, a challenge to the contempt conviction of the brother of Harry M. Daugherty who had failed to appear before a Senate committee investigating the failure of former Attorney General Daugherty to prosecute the malefactors in the Teapot Dome scandal.

In reality the investigation was not aimed at developing new legislation but at exposing malfeasance in the executive branch, a task that might have been deemed constitutionally appropriate for Congress if it were not for the simplistic *Kilbourn* theory. The gap between theory and reality was bridged by the creation of a presumption that congressional investigations had a legislative purpose, a presumption that was not to be overcome simply by showing that an investigation also had a purpose of public exposure.

The *McGrain* technique of requiring a legislative purpose for a congressional investigation, and then invoking a presumption of legislative purpose even when exposure was clearly a principal motive, had important consequences in post-World War II cases where anticommunist investigating committees were seeking to punish leftist speakers by public exposure precisely because the FIRST AMENDMENT prohibited Congress from passing legislation punishing such speech. The Court invoked the presumption of legislative purpose both to blind itself to the actual "exposure for exposure's sake" being conducted and to establish a congressional interest in lawmaking that outweighed whatever incidental infringement on speech the Court was willing to see.

MARTIN SHAPIRO
(1986)

(SEE ALSO: *Legislative Investigation.*)

## MCHENRY, JAMES
(1753–1816)

Irish-born physician James McHenry was a Maryland delegate to the CONSTITUTIONAL CONVENTION OF 1787 and a signer of the Constitution. Absent for most of June and July, he participated little in debate; but, when present, he took detailed notes which are a valuable record of the deliberations. He was later secretary of war (1796–1800).

DENNIS J. MAHONEY
(1986)

## MCILWAIN, CHARLES H.
(1871–1968)

Charles Howard McIlwain, a lawyer and political scientist, taught at Princeton and Harvard Universities. His major

fields of interest were political theory and British constitutional history. His *The American Revolution: A Constitutional Interpretation* won the Pulitzer Prize in 1923. In that book he showed that the revolution was "the outcome of a collision between two mutually incompatible interpretations of the British constitution." His *Constitutionalism: Ancient and Modern* (1940, revised 1947) argued that the essence of CONSTITUTIONALISM was the balance between governmental power and the JURISDICTION of an independent judiciary and traced the roots of American constitutionalism through English history to classical Rome.

DENNIS J. MAHONEY
(1986)

## *MCKEIVER v. PENNSYLVANIA*
403 U.S. 528 (1971)

Although IN RE GAULT (1967) extended some basic procedural rights to juvenile offenders, young people continued to be tried in most states before judges who exercised great discretion, supposedly to protect juveniles. McKeiver, a juvenile defendant, faced possible incarceration for five years and requested TRIAL BY JURY, which the state denied. By a 6–3 vote, the Supreme Court decided that DUE PROCESS OF LAW does not guarantee trial by jury to juvenile offenders. Justice HARRY BLACKMUN for a plurality of four wrote an opinion based on the unrealistic premise that the juvenile system is fundamentally sound and enlightened, but he did not explain how it assured fundamental fairness. Justice JOHN MARSHALL HARLAN found Blackmun's opinion romantic but concurred nevertheless because he still opposed DUNCAN V. LOUISIANA (1968), which extended trial by jury to the states. Justice WILLIAM J. BRENNAN concurred because he thought, mistakenly, that publicity served as a check on juvenile court judges. Justices WILLIAM O. DOUGLAS, HUGO L. BLACK, and THURGOOD MARSHALL dissented. *McKeiver* short-circuited expectations that the Court would require essentially all the rights of the criminally accused for juveniles who commit adult crimes and face the prospect of serious punishment.

LEONARD W. LEVY
(1986)

## MCKENNA, JOSEPH
(1843–1926)

Few Justices sat longer upon the Supreme Court than Joseph McKenna, the son of an Irish immigrant baker, who served for twenty-seven years from 1898 until 1925 under three Chief Justices. During McKenna's tenure, the nation's political system grappled with the problems generated by industrialization, urbanization, and rising class conflict. The same problems followed many of the issues that came before the Court, whose decisions lacked consistency and predictability.

When President WILLIAM MCKINLEY named McKenna, his old House of Representatives colleague, to the seat vacated by Justice STEPHEN J. FIELD, he recognized not distinction at the bar or on the bench but loyal service. McKenna had been a four-term representative from California, a member of the Ninth Circuit Court of Appeals, and attorney general of the United States. In these roles McKenna had earned a justified reputation for devotion to the Republican party, the protective tariff, and the interests of his chief patron, the railroad mogul Leland Stanford. Even as a member of the circuit court, McKenna had written several opinions protecting Stanford's powerful Southern Pacific company from the unfriendly behavior of local and state officials who sought to regulate the carrier's rates and terminal facilities.

As a member of the Supreme Court during the high tide of the Progressive era, however, McKenna supported the efforts of THEODORE ROOSEVELT's and WILLIAM HOWARD TAFT's administrations to bring the country's major railroads under a larger measure of administrative control through the Interstate Commerce Commission (ICC). Times had changed. By the turn of the century, even the railroads desired a degree of federal regulation that would protect them from conflicting state laws and the debilitating rate wars which drained away profits. McKenna wrote opinions for the Court that confirmed the new relationship between the carriers and the federal government by upholding the ICC's statutory powers with respect to fact-gathering and rate-making.

McKenna also became a robust supporter of congressional efforts to regulate other aspects of the nation's economic and social life under authority of the COMMERCE CLAUSE. He joined Justice JOHN M. HARLAN's crucial opinion in CHAMPION V. AMES (1903), which laid the foundation for a NATIONAL POLICE POWER by giving Congress the authority to exclude from the channels of INTERSTATE COMMERCE supposedly harmful goods such as lottery tickets. McKenna later applied this principle in his own opinions, which sustained the PURE FOOD AND DRUG ACT and also the Mann Act, banning the transportation of women in interstate commerce for immoral purposes.

To his great credit, McKenna was able to accept the extension of the national power doctrine to child labor in the famous case of HAMMER V. DAGENHART (1918), even while others who had endorsed the earlier decisions turned their backs upon logic and history. Nor did he join the majority in the case of ADAIR V. UNITED STATES (1908), where six Justices overturned Congress's attempt to ban YELLOW DOG CONTRACTS on the nation's railroads. McKenna's dissent placed the authority of Congress to reg-

ulate commerce above the contractual freedom of corporate management.

A stout nationalist and a moderate Republican who remained capable of accepting many progressive reforms, McKenna nonetheless displayed a checkered record with regard to state and federal efforts to assist the working class and organized labor. He refused, for example, to permit the state of Kansas to outlaw yellow dog contracts in all private industry, although he endorsed Congress's effort to do so on the interstate railroads. He cast his vote with RUFUS PECKHAM in LOCHNER V. NEW YORK (1905) and with GEORGE H. SUTHERLAND in ADKINS V. CHILDREN'S HOSPITAL (1923), when the majority struck down MAXIMUM HOURS AND MINIMUM WAGE LEGISLATION on the grounds of FREEDOM OF CONTRACT. Yet McKenna spurned that conservative shibboleth in MULLER V. OREGON (1908), WILSON V. NEW (1917), and BUNTING V. OREGON (1917). On the other hand, not many opinions could match in reactionary tone McKenna's dissent in the *Arizona Employers' Liability Cases* (1919), where he argued that liability without fault violated the DUE PROCESS clause of the FOURTEENTH AMENDMENT.

Like most of his brethren on the WHITE COURT, McKenna gave the green light to federal and state efforts to stamp out dissent during WORLD WAR I. He voted to uphold the convictions of Charles Schenck and Eugene V. Debs as well as those of Jacob Abrams and Joseph Gilbert, although the latter two cases provoked sharp dissents from OLIVER WENDELL HOLMES and LOUIS D. BRANDEIS. If sometimes contractual freedom had to give way before the power of Congress, McKenna believed, so, too, did the liberty to protest against the government in time of war.

MICHAEL E. PARRISH
(1986)

Bibliography

MCDEVITT, BROTHER MATTHEW 1946 *Joseph McKenna: Associate Justice of the United States.* Washington, D.C.: Catholic University Press.

SEMONCHE, JOHN E. 1978 *Charting the Future: The Supreme Court Responds to a Changing Society, 1890–1920.* Westport, Conn.: Greenwood Press.

## MCKINLEY, JOHN
(1780–1852)

Like several other Jacksonian Justices on the TANEY COURT, John McKinley was a product of the Southwest. Born in Virginia, he went with his family to Kentucky where he learned law and began practice. In 1818 he moved to Huntsville, Alabama, then a frontier town, where he practiced law and pursued a diversified political career—first as a supporter of HENRY CLAY and then, when Clay's fortunes waned in Alabama, of ANDREW JACKSON. This timely shift got him a Senate seat in 1826. He served there until 1830, when he lost reelection. He then returned to the Alabama legislature, and in 1832 he went to the United States House of Representatives where he served for one term. After another term in the state legislature in 1836, he was elected by that body to the Senate but chose instead to accept an appointment to the Supreme Court from MARTIN VAN BUREN in 1837.

McKinley's legislative career lacked distinction, but the policy preferences he revealed were those that would guide his work on the Court: in addition to unswerving loyalty to Jackson and Van Buren, he was a strict states' rights man, though he never argued out his case philosophically or constitutionally. In good Jacksonian fashion he was suspicious of monopolies and hated the second Bank of the United States. He also had a strong preference for land laws that favored small settlers and a firm belief that SLAVERY was a state problem and that property in slaves was entitled to legal protection.

McKinley's fifteen years on the Supreme Court (1837–1852) were unproductive and frustrating, both for him and for those who worked with him. In general, states' rights ideas guided his judicial behavior, but he never spoke for the Court in any important cases. He took his duties seriously, as Chief Justice ROGER B. TANEY pointed out in his brief eulogy, and was decent and fairminded to the best of his ability. But during his entire tenure, which was interrupted by illness and frequent absences, he wrote only about twenty opinions for the Court, all routine.

Perhaps his most notorious opinion came in BANK OF AUGUSTA V. EARLE (1839) where, both on circuit and in a lone dissent at Washington, he held that a CORPORATION chartered in one state (a bank in the *Earle* case) could not do business within the boundaries of another state without the latter's express consent. McKinley's position was consistent with a deep concern for state SOVEREIGNTY, but it was, as Justice JOSEPH STORY observed in dismay, totally unrealistic in an age when interstate corporate business was increasingly the norm. McKinley dissented twenty-three times but none of his dissents attracted support and none pioneered new law. Many were unwritten, evidence of the Justice's increasing isolation from the ongoing operations of the Court.

McKinley was also isolated on his own circuit, although Supreme Court Justices, as senior circuit judges, ordinarily dominated the district judges with whom they sat. Not so on the Fifth Circuit where district judges Philip K. Lawrence and, to a lesser extent, Theodore H. McCaleb held the upper hand. There is evidence also that leading members of the circuit bar held the Justice in disrepute. Part of the problem was the 10,000 miles of annual travel

(which left McKinley little time to study cases) and the large number of cases (2,700 at each of the two terms in 1839 by his reckoning). His circuit also included Louisiana, where the civil law received from France and the COMMON LAW formed a mixture that was well-nigh incomprehensible to all save lawyers who grew up with it. The main difficulty on circuit as on the full Court, however, was McKinley himself. His talents were simply too modest for the duties of his office. Even his eulogizers found nothing about his legal ability to praise, and all evidence points to the correctness of CARL B. SWISHER's assessment: that John McKinley, of all the Justices on the Taney Court, was the least distinguished.

R. KENT NEWMYER
(1986)

Bibliography

GATELL, FRANK O. 1969 John McKinley. In Leon Friedman and Fred L. Israel (eds.), *The Justices of the United States Supreme Court 1789–1969*, Vol. 1, pages 769–792. New York: Chelsea House.

*Proceedings* in Relation to the Death of the Late Judge McKinley 1852 14 Howard iii–v.

## MCKINLEY, WILLIAM
(1843–1901)

William McKinley, an Ohio Republican who was President of the United States from 1897 to 1901, spent most of his term in office preoccupied with foreign affairs. An imperialist, he advocated the annexation of Hawaii and, after successfully prosecuting a war against Spain, acquired the Philippines and PUERTO RICO for the United States. McKinley continued the domestic policies of his predecessor, GROVER CLEVELAND, but unlike most Chief Executives in the late nineteenth century, McKinley saw the presidency as a powerful office. He frequently relied on expert and academic commissions to offer him advice on specific problems.

McKinley's lack of interest in enforcing the SHERMAN ANTITRUST ACT paralleled BENJAMIN HARRISON's, but McKinley's failure to enforce the law vigorously is more significant because he held office during the second greatest merger movement in American history. His three attorneys general—one of whom, JOSEPH MCKENNA, would be his sole appointment to the Supreme Court—initiated only three cases under the act. The most important ANTITRUST cases decided during McKinley's tenure, UNITED STATES V. TRANS-MISSOURI FREIGHT ASSOCIATION (1897) and *Addyston Pipe & Steel Co. v. United States* (1899), had been started under prior administrations.

DAVID GORDON
(1986)

Bibliography

GOULD, LEWIS L. 1980 *The Presidency of William McKinley*. Lawrence: Regents Press of Kansas.

## MCLAUGHLIN, ANDREW C.
(1861–1947)

A protégé of THOMAS COOLEY at the University of Michigan, Andrew Cunningham McLaughlin took over his course in American constitutional history and later taught that subject at the University of Chicago for thirty years. In his 1914 presidential address before the American Historical Association, McLaughlin criticized CHARLES BEARD's monolithic emphasis on economic factors. McLaughlin also rejected the tone of exaltation that imbued the work of JOHN FISKE and others on the CONSTITUTIONAL CONVENTION OF 1787. In his first major book, *Confederation and Constitution* (1905), McLaughlin emphasized the constructive aspects of the ARTICLES OF CONFEDERATION and of the Confederation period. He construed the Articles as the product of a war against centralism and as the world's first written CONSTITUTION to establish a federal system, whose origins he traced to the British Empire. His other important works, distinguished for their judicious interpretations, were *Courts, Constitutions, and Parties* (1912), *Foundations of American Constitutionalism* (1932), and *Constitutional History of the United States* (1935), which won a Pulitzer Prize.

LEONARD W. LEVY
(1986)

## *MCLAUGHLIN v. FLORIDA*

See: Miscegenation

## *MCLAURIN v. OKLAHOMA STATE REGENTS*

See: *Sweatt v. Painter*

## MCLEAN, JOHN
(1785–1861)

John McLean's appointment to the Supreme Court on March 6, 1829, was ANDREW JACKSON's first and the first from the old Northwest and Ohio, where McLean had grown to manhood. He studied law with Arthur St. Clair, Jr., was admitted to the bar in 1807, and maintained an active full-time practice in Lebanon, Ohio, until his 1812 election to Congress, where he served two terms. As a

National Republican, he favored a protective tariff and a national bank. From 1816 to 1822 he served as judge of the Ohio Supreme Court where he gained a respect for the COMMON LAW and developed a penchant for bending it "to the diversity of our circumstances," as he put it in one case. While serving on that court, McLean assiduously cultivated political favor, first with JAMES MONROE and JOHN QUINCY ADAMS, and, when the latter began to falter, with Jackson. His efforts paid off, first in 1822 with an appointment as Commissioner of the General Land Office, then in 1823 as Postmaster General, where his brilliant administrative abilities won him a national reputation. Adams reappointed him to head the Post Office Department, and Jackson was willing to do the same but nominated him to the Supreme Court when McLean indicated an unwillingness to make political removals.

McLean served as Associate Justice from 1829 to 1861, during a period of rapid transition in American law. At the outset the new Justice inclined toward Jacksonian STATES' RIGHTS dogma, as in his dissent from CONTRACT CLAUSE orthodoxy in CRAIG V. MISSOURI (1830). More revealing yet was his practical-minded opinion for the majority in BRISCOE V. BANK OF THE COMMONWEALTH OF KENTUCKY (1837), which held that the notes of the Commonwealth Bank were not BILLS OF CREDIT prohibited by Article I, section 10, even though the state owned the bank and the notes circulated as legal tender.

Despite his result-oriented approach in such cases as *Briscoe* and MAYOR OF NEW YORK V. MILN (1837) (where he supported STATE POLICE POWER regulations against the charge that they were regulations of INTERSTATE COMMERCE), McLean was not a Jacksonian judge. Indeed, he moved steadily toward a conservative nationalism similar to that of Justice JOSEPH STORY, who became his closest friend on the Court. That McLean was solidly conservative on property rights and CORPORATION questions is clear from his majority opinion in behalf of contractual sanctity in PIQUA BRANCH BANK V. KNOOP (1854). His nationalism was apparent in the CHEROKEE INDIAN CASES (*Worcester v. Georgia*) in 1832 (where he joined JOHN MARSHALL against Georgia and Jackson), and in *Holmes v. Jennison* in 1840 (where he concurred in ROGER B. TANEY's dissent which asserted the supremacy of the federal government in the area of foreign policy). His "high-toned FEDERALISM" in COMMERCE CLAUSE cases can be seen in the LICENSE CASES (1847) and PASSENGER CASES (1849) and in his majority opinion in *Pennsylvania v. Wheeling and Belmont Bridge Company* (1852) which struck down a Virginia law authorizing a bridge that obstructed commerce over a navigable river. His dissent in COOLEY V. BOARD OF WARDENS OF PHILADELPHIA (1851) reaffirmed the theory of his friend Story that the power to regulate foreign and interstate commerce belonged exclusively to Congress.

McLean disliked SLAVERY and his opinions often revealed his free-soil sentiments; but he regularly conceded the legality of the institution. Thus his separate opinion in PRIGG V. PENNSYLVANIA (1842) upheld the right of northern states to protect free Negroes from unlawful rendition, but it also affirmed the power of Congress to require the states to return fugitives. Equivocation was unavoidable, too, in GROVES V. SLAUGHTER (1841) where in a separate opinion McLean argued that slavery was a local institution under state control and that the power of Congress to regulate interstate commerce did not prevent a state from regulating the importation of slaves. Free states presumably could prohibit slaves from being brought into their jurisdiction and liberate slaves once they arrived, but slave states could also regulate imports and exports of slaves for sale. On circuit McLean also ruled against freedom when he thought the law obliged him to do so.

McLean's proslavery decisions, which were condemned in the free-soil press, increasingly ran counter to his presidential plans which, to the distress of some of his colleagues, he relentlessly pursued from the bench. In DRED SCOTT V. SANDFORD (1857) his political ambition, now focused on the Republican party, influenced his judicial behavior. In a separate dissent, he argued that Congress had the power to prohibit slavery in the TERRITORIES, that Negroes could be citizens, and that Dred Scott was free by virtue of his residence in a free state and a free territory. McLean has been unfairly blamed for the Court's wide-ranging, politically explosive decision—a burden we now know should fall most heavily on Taney and JAMES M. WAYNE. But there is no doubt that McLean's determination to dissent gave Taney and Wayne a good excuse to confront the whole problem of SLAVERY IN THE TERRITORIES.

McLean was not a legal scholar, he pioneered no new DOCTRINE, and he did not greatly refine the process of constitutional adjustment to new circumstances that was the hallmark of the TANEY COURT. Greatness, however, is not only rare but relative, and on a Court burdened with mediocrity McLean looked good. His opinions were generally solid and persuasive (as in the great copyright case of *Wheaton v. Peters* in 1834) and he assuredly carried more than his share of the Court's heavy work load (with nearly 250 majority opinions and numerous dissents). He was one of the few Justices of the period who went to the considerable trouble of publishing his circuit opinions (in six volumes) and whose circuit opinions were worth publishing. It is true that his political ambition contributed to the politicization of the judicial process. Still, he cherished the Court as an institution and worked diligently through it to preserve the Union under the Constitution.

R. KENT NEWMYER
(1986)

Bibliography

GATELL, FRANK O. 1969 John McLean. In Leon Friedman and Fred L. Israel (eds.), *The Justices of the United States Supreme Court, 1789–1969,* Vol. 1, pages 535–567. New York: Chelsea House.

WEISENBURGER, FRANCIS P. 1937 *The Life of John McLean: A Politician on the United States Supreme Court.* Columbus: Ohio State University Press.

## MCNABB-MALLORY RULE

Partly in response to the problem posed by the VOLUNTARINESS test, the Supreme Court made an unexpected departure from that test in *McNabb v. United States* (1943) and *Mallory v. United States* (1957). Under the "McNabb-Mallory Rule," a confession obtained by law enforcement officers during a period of unnecessary delay in bringing an arrested person before a magistrate for arraignment was inadmissible in federal prosecutions. The rule was based not on constitutional grounds but on the Court's supervisory authority over the administration of criminal justice in the federal courts. The rule created more problems than it attempted to solve, and in 1968, Congress abolished it.

In *McNabb,* five brothers were arrested for murder and held in barren detention cells for forty-eight hours. Isolated from friends and family, and without the assistance of counsel, they were repeatedly interrogated until confessions were obtained. (See POLICE INTERROGATIONS AND CONFESSIONS.) Only after they confessed were they taken before a magistrate for arraignment. The confessions were admitted into EVIDENCE at trial and the McNabbs were convicted.

The Court, with only Justice STANLEY F. REED dissenting, reversed the convictions on the ground that they were unlawfully obtained during a period of prolonged custodial delay. Federal laws in effect at the time of the Court's decision required officers to take an arrested person "immediately" before a magistrate for arraignment. At arraignment, the magistrate advises the defendant of the charges against him, of his constitutional rights, and sets a preliminary hearing date at which the government must show legal cause for the detention.

Justice FELIX FRANKFURTER devoted much of his opinion for the Court to an analysis of the policies behind the immediate arraignment laws. He concluded that they were intended to protect the rights of arrested persons and to deter the police from secret third-degree interrogation of persons not yet arraigned.

Finding that the officers who arrested the McNabbs had acted in willful disobedience of the laws requiring immediate arraignment, the Court suppressed the confessions. Suppression, Frankfurter explained, would promote the policies behind the laws and ensure the fair and effective administration of the federal criminal justice system by disallowing convictions based on unfair police procedures.

Two years after *McNabb,* Congress adopted Rule 5(a) of the FEDERAL RULES OF CRIMINAL PROCEDURE. The rule required that an arrested person be taken, "without unnecessary delay," before the nearest available commissioner or any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. The rule, by failing to include remedies for its violation, left intact the *McNabb* mandate that confessions obtained during a period of unlawful detention be suppressed. Any questions regarding the continuing viability of the *McNabb* rule were put to rest by the Court's opinion in *Mallory.*

Mallory was arrested with two other suspects on rape charges. Although the police had sufficient evidence to consider Mallory the prime suspect, he was not arraigned until ten hours after his arrest, during which time he was continually interrogated and finally signed a written confession. At trial, the signed confession was introduced into evidence; Mallory was convicted and received the death sentence.

Frankfurter delivered the opinion of a unanimous Court, which held the confession inadmissible because Mallory had not been arraigned without unnecessary delay as required by Rule 5(a). The Court's interpretation of Rule 5(a) was based on the principles announced earlier in the *McNabb* decision. Delays in arraignment must be prevented in order to prevent abusive and unlawful law enforcement practices aimed at obtaining confessions of guilt from suspects in custody who have not been informed by a judicial officer of the charges against them or of their constitutional rights.

After *Mallory* the law prevailing in the federal courts, commonly referred to as the "McNabb-Mallory Rule," was that any confession made by a suspect under arrest, in violation of Rule 5(a), was inadmissible in evidence. The problem with the McNabb-Mallory Rule was that it operated arbitrarily to exclude from evidence otherwise free and voluntary confessions merely because of delay in arraignment. In other words, the United States Supreme Court had failed to consider the obvious: a delayed arraignment does not imply the involuntariness of a confession.

Criticized as illogical and unrealistic, the McNabb-Mallory Rule was abolished in 1968 when Congress enacted Title II of the OMNIBUS CRIME CONTROL AND SAFE STREETS ACT. The act provides in part that confessions shall not be inadmissible solely because of delay in arraignment, if they are voluntary and made within six hours of arrest or during a delay in arraignment that is reasonable,

considering the transportation problems in getting a defendant before a magistrate. Thus, the voluntary nature of the confession is the test of its admissibility, and delay in arraignment is only one factor for the judge to consider.

WENDY E. LEVY
(1986)

Bibliography

STEPHENS, OTIS H., JR. 1973 *The Supreme Court and Confessions of Guilt.* Pages 63–89. Knoxville: University of Tennessee Press.

## MCREYNOLDS, JAMES C.
(1862–1946)

James Clark McReynolds, a Tennessee Democrat, first came to national attention as an antitrust prosecutor during the THEODORE ROOSEVELT and WILLIAM HOWARD TAFT administrations. He was a Tennessee Gold Democrat, friendly with Colonel Edward House, WOODROW WILSON's key adviser. His antitrust reputation led to his appointment as Wilson's attorney general in 1913. Within a year, however, McReynolds found himself at odds with the administration and powerful congressmen. Wilson "kicked McReynolds upstairs" to the Supreme Court in 1914. From then until his retirement in 1941, McReynolds distinguished himself as a consistent and implacable foe of Progressive and NEW DEAL regulatory programs.

McReynold's hostility to trusts largely derived from his ideas of individualism and freedom from arbitrary restraints. Throughout his judicial career he resolutely supported the business community and was instinctively suspicious of governmental regulation. "If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved," McReynolds wrote in FEDERAL TRADE COMMISSION V. GRATZ (1920). In that case, the Court limited the authority of the FTC, the creation of which had been one of the Wilson administration's primary achievements; McReynolds wrote that the courts, not the commission, would decide the meaning of "unfair method of competition." In *St. Louis and O'Fallon Railroad v. United States* (1929) the Court resolved a long-standing dispute between the Interstate Commerce Commission (ICC) and railroads as to whether original or replacement costs should be considered for valuation and rate purposes. Speaking for a narrow majority, McReynolds overturned ICC policy by ruling that the commission had to base its determination of rates on replacement costs, which were higher.

McReynolds resisted the claims of organized labor. For example, he joined his colleagues in rejecting federal child labor laws and a District of Columbia minimum wage statute. When the Court in 1919 sustained an Arizona law holding employers responsible for on-the-job accidents whether or not they were negligent, McReynolds dissented, caustically arguing that such laws served "to stifle enterprise, produce discontent, strife, idleness and pauperism."

Without exception, McReynolds supported the conviction of political radicals during the "Red Scare" period following WORLD WAR I a decade later, when the Court turned against restrictive state measures on speech and press, McReynolds parted company with the majority, dissenting in STROMBERG V. CALIFORNIA (1931) and NEAR V. MINNESOTA (1931). Similarly, McReynolds's ill-concealed contempt for blacks led to dissent from decisions striking down an all-white primary law and ordering a new trial for the Scottsboro defendants. Finally, when the Court, in MISSOURI EX REL. GAINES V. CANADA (1938), began its long process of overturning segregation, McReynolds bitterly assailed the majority opinion.

Some of McReynolds's opinions defending individual rights remain relevant. In MEYER V. NEBRASKA (1923) he spoke for the Court in striking down a state statute prohibiting German language instruction in the public schools; in PIERCE V. SOCIETY OF SISTERS (1925) he ruled against an Oregon statute that had the effect of proscribing parochial school education; and in CARROLL V. UNITED STATES (1925) he vehemently protested against violations of the FOURTH AMENDMENT in enforcing PROHIBITION. In MYERS V. UNITED STATES (1926) he dissented from what he considered to be an almost unlimited approval of presidential power to remove federal officials, a view vindicated nine years later when the Court unanimously rejected President FRANKLIN D. ROOSEVELT's attempt to remove a federal trade commissioner.

The New Deal years provide the sharpest focus for McReynolds's views of constitutional law, both when he joined in majority opinions and later in the bitter dissents that represent his most familiar legacy. McReynolds combined his ideological reaction to the New Deal with a passionate, almost pathological, hatred for Franklin D. Roosevelt. The Justice was scathing in his private remarks and, at times, indiscreet in public. In his courtroom dissent in the GOLD CLAUSE CASES (1935) McReynolds emotionally proclaimed: "This is Nero at his worst. The Constitution is gone!" When the New Deal gained a few early Court victories, McReynolds dissented, as in the gold clause cases, in NEBBIA V. NEW YORK (1934), and in ASHWANDER V. TENNESSEE VALLEY AUTHORITY (1936). As one of the "Four Horsemen," he participated in striking down thirteen New Deal measures between 1934 and 1936. When the Court made its famous shift, beginning in 1937 with WEST COAST HOTEL COMPANY V. PARRISH and the WAGNER ACT

CASES, McReynolds joined his fellow conservatives in outraged dissent. As their spokesman in *National Labor Relations Board v. Friedman-Marks Clothing* (1937), he argued that the WAGNER ACT regulated production, not commerce, and thus exceeded the boundaries of congressional power as set in long-standing precedents. Similarly, he considered the SOCIAL SECURITY ACT unconstitutional; he registered a lone dissent against the approval of the securities registration provisions of the PUBLIC UTILITIES HOLDING COMPANY ACT; and, finally, he provided the sole dissent to the Court's recognition in 1940 that labor PICKETING was entitled to protection as an exercise of FREEDOM OF SPEECH.

Few Supreme Court Justices have been more outspoken or more doctrinaire than McReynolds; and few have been so incompatible with colleagues. McReynolds refused to speak to fellow Wilson appointee John H. Clarke, who was too liberal, and to LOUIS D. BRANDEIS and BENJAMIN N. CARDOZO, who were both liberal and Jewish. Even Chief Justice Taft found him "selfish and prejudiced" and difficult to like. He was committed to laissez-faire individualism and racial segregation, and he was unyielding and hostile to any political beliefs he regarded as deviant.

STANLEY I. KUTLER
(1986)

Bibliography

MASON, ALPHEUS THOMAS 1956 *Harlan Fiske Stone: Pillar of the Law.* New York: Viking.

PASCHAL, JOEL F. 1951 *Mr. Justice Sutherland: A Man Against the State.* Princeton, N.J.: Princeton University Press.

## MECHANICAL JURISPRUDENCE

This pejorative epithet was introduced in 1908 by the American jurist ROSCOE POUND. It and similar rubrics—"the jurisprudence of conceptions," "slot machine, phonograph, T-square theories of law"—were widely used to caricature patterns of juristic thought and judicial action that deduced conclusions from unexamined, predetermined conceptions by purely mechanical logical processes, disregarded socioeconomic realities and practical consequences, and understated the degree of judicial lawmaking by attributing a machinelike automatism to the judicial process.

The "sociological jurisprudence" and "legal realism" of Justices OLIVER WENDELL HOLMES, HARLAN FISKE STONE, and BENJAMIN N. CARDOZO were often hailed as correctives for mechanical jurisprudence because they viewed law and logic instrumentally as means to social ends, and they acknowledged judicial lawmaking.

A perennial juristic allurement, mechanical jurisprudence was exemplified by many Supreme Court "economic DUE PROCESS" and COMMERCE CLAUSE decisions between 1895 and 1937. In due process cases such as LOCHNER V. NEW YORK (1905) and ADKINS V. CHILDREN'S HOSPITAL (1923), the Court invoked the laissez-faire doctrine, FREEDOM OF CONTRACT, which regarded workers and employers as bargaining equals, in holding state and federal legislation unconstitutional. In commerce clause cases such as UNITED STATES V. E. C. KNIGHT CO. (1895) and CARTER V. CARTER COAL CO. (1936), the Court used economically unrealistic distinctions between "commerce" and PRODUCTION, and "direct" and "indirect" EFFECTS ON COMMERCE in invalidating federal legislation. A classic expression of mechanical jurisprudence is the passage of Justice Owen Roberts's opinion in UNITED STATES V. BUTLER (1936) where he said the Court had only to compare the statute with the appropriate constitutional clause to see if they squared.

Such decisions led finally to President FRANKLIN D. ROOSEVELT's 1937 "Court reform" bill, designed, he said, "to save the Constitution from the Court and the Court from itself." But the Court swiftly reversed and reformed itself, abandoning these mechanical constitutional interpretations. Later, in WICKARD V. FILBURN (1942), it reemphasized that its recognition of economic realities had made "the mechanical application of legal formulas no longer feasible."

HOWARD E. DEAN
(1986)

Bibliography

POUND, ROSCOE 1908 Mechanical Jurisprudence. *Columbia Law Review* 8:605–623.

STERN, ROBERT L. 1951 The Problems of Yesteryear—Commerce and Due Process. *Vanderbilt Law Review* 4:446–468.

## MEDIA AND THE CONSTITUTION

See: Broadcasting; Freedom of the Press; Free Press/Fair Trial; Journalistic Practices, Tort Liability, and the Freedom of the Press

## MEESE COMMISSION

The Attorney General's Commission on Pornography, better known as "The Meese Commission" after Attorney General Edwin Meese, was charged to "determine the nature, extent, and impact on society of pornography in the United States, and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees." The committee in-

cluded three attorneys, two psychologists, a city council member, a federal judge, a social worker, a magazine editor, and a priest. It had a balanced religious and political composition as well.

After a year of extensive hearings, field trips, and study, the commission produced a 1,960-page report. If the size of the report were not daunting enough, the findings of the commission were relatively inconclusive. Although the commission did take a stand on the issue of PORNOGRAPHY—something a similar presidential commission established during the Nixon administration failed to do—it did not wholly condemn pornography as the right, especially the religious right, and feminists had hoped. Instead, it unanimously condemned sexually explicit material that is violent in nature; sexually explicit materials that show situations where women are humiliated, demeaned, and subjugated; and CHILD PORNOGRAPHY in any form.

A major problem the commission faced was its inability to define key terms. The commission found it difficult to define "pornography," "obscenity," and "hardcore." In the end, it could do no better than Justice POTTER J. STEWART had in JACOBELLIS V. OHIO (1964). Stewart, although not defining pornography, qualified it by stating, "I know it when I see it." Hampered by the inability to define key terms, the commission called for further research.

JEFFREY D. SCHULTZ
(1992)

Bibliography

ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 1986 *Final Report*. Washington, D.C.: U.S. Government Printing Office.

KEATING, CHARLES H., JR., 1970 *Report of Charles H. Keating, Jr., Commissioner: Commission of Obscenity and Pornography*. Cincinnati, Ohio: Charles H. Keating, Jr.

STANMEYER, WILLIAM 1986 The Pornography Commission Report: A Plea for Decency. *Benchmark* II:227–236.

## MEIKLEJOHN, ALEXANDER
(1872–1964)

Alexander Meiklejohn was a philosopher, president of Amherst College, and director of an experimental college at the University of Wisconsin. After his long academic career he became a CIVIL LIBERTIES publicist. His *Free Speech and Its Relation to Self-Government* (1948) presented the FIRST AMENDMENT as the foundation of political democracy. He advocated that citizens should have the same unlimited FREEDOM OF SPEECH as their representatives. Regarding the CLEAR AND PRESENT DANGER TEST and BALANCING TESTS as annulments of the First Amendment, he criticized OLIVER WENDELL HOLMES and ZECHARIAH CHAFEE as proponents of a stunted interpretation of free speech. In the McCarthy period he defended the right of communists to teach. His essay, "The First Amendment Is An Absolute," written when he was almost ninety, summarized his position, which was not really absolutist. Distinguishing "the freedom of speech" from "speech," he believed that private defamation, OBSCENITY, perjury, false advertising, and solicitation of crime were not constitutionally protected. His ABSOLUTISM seems to have extended to speech concerning all matters of public policy, education, philosophy, arts, literature, and science, but he believed that even protected speech was subject to reasonable regulations of time and place. Meiklejohn was closer to Holmes and Chafee than he admitted.

LEONARD W. LEVY
(1986)

## *MEMOIRS v. MASSACHUSETTS*
383 U.S. 413 (1966)

Nine years after ROTH V. UNITED STATES, still unable to agree upon a constitutional definition of OBSCENITY, the Supreme Court reversed a state court determination that John Cleland's *Memoirs of a Woman of Pleasure*, commonly known as *Fanny Hill*, was obscene. The three-Justice PLURALITY OPINION, written by Justice WILLIAM J. BRENNAN, held that the constitutional test for obscenity was: "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

Despite an OBITER DICTUM in JACOBELLIS V. OHIO (1964), it was believed—and the Massachusetts courts had held—that *Roth* did not require unqualified worthlessness before a book might be deemed obscene. Justice Brennan twisted the *Roth* reasoning (that obscenity was unprotected because it was utterly worthless) into a constitutional test that was virtually impossible to meet under criminal standards of proof. Thus a finding of obscenity would become rare, even where the requisite prurient interest appeal and offensiveness could be demonstrated.

The Massachusetts courts had tried the book in the abstract; a host of literary experts testified to its social value. The circumstances of the book's production, sale, and publicity were not admitted. Justice Brennan noted that evidence that distributors commercially exploited *Fanny Hill* solely for its prurient appeal could have justified a finding, based on the purveyor's own evaluation, that *Fanny Hill* was utterly without redeeming social importance.

Justices HUGO L. BLACK, WILLIAM O. DOUGLAS, and POTTER J. STEWART concurred in the result, Black and Douglas ad-

hering to their view that obscenity is protected expression. Stewart reiterated his view that the First Amendment protected all but "hard-core pornography."

Justice TOM C. CLARK, dissenting, rejected the importation of the "utterly without redeeming social value" standard into the obscenity test, which he believed would give the "smut artist free rein." Reacting against the continuous flow of pornographic materials to the Supreme Court, he reasserted that the Court should apply a "sufficient evidence" standard of review of lower courts' obscenity decisions.

Justice JOHN MARSHALL HARLAN, dissenting, argued that although the federal government could constitutionally proscribe only hard-core pornography, the states could prohibit material under any criteria rationally related to accepted notions of obscenity.

Justice BYRON R. WHITE, also dissenting, argued that *Roth* counseled examination of the predominant theme of the material, not resort to minor themes of passages of literary worth to redeem obscene works from condemnation.

KIM MCLANE WARDLAW
(1986)

## MEMORANDUM ORDER

Most orders of any court are not accompanied by opinions, but are simply stated in memorandum form. The Supreme Court issues thousands of such memorandum orders each year, granting or denying such requests as applications for review, applications for permission to appear IN FORMA PAUPERIS, applications for permission to file briefs AMICI CURIAE, or PETITIONS FOR REHEARING.

Some memorandum orders effectively decide cases; the denial of a petition for CERTIORARI is one example, and another is the dismissal of an APPEAL "for want of a substantial federal question." Occasionally the Court summarily affirms the decision of a lower court, issuing no opinion but only a memorandum order. The denial of certiorari generally has little force as a PRECEDENT; however, both lower courts and commentators do draw conclusions concerning the Court's view when they see a consistent pattern of refusal to review lower court decisions reaching the same conclusion. The summary affirmance of a decision in a memorandum order does establish a precedent, but the precedent is limited to the points necessarily decided by the lower court, and does not extend to the reasoning in that court's opinion. The practice of deciding major issues through memorandum orders is often criticized on the ground that decisions will not be understood as principled if they are not explained.

KENNETH L. KARST
(1986)

Bibliography

BROWN, ERNEST J. 1958 The Supreme Court, 1957 Term—Foreword: Process of Law. *Harvard Law Review* 72:77–95.

## *MEMPHIS v. GREENE*
### 451 U.S. 100 (1981)

Because the City of Memphis blocked a street at the point where a white neighborhood bordered a black neighborhood, residents of the black neighborhood had to drive around the white neighborhood in order to get to and from the city center. Black residents brought a CLASS ACTION against the city, seeking an INJUNCTION to keep the street open. They failed in the federal district court, but the court of appeals held that the closing violated their right to hold and enjoy property, guaranteed by the CIVIL RIGHTS ACT OF 1866.

The Supreme Court, with Justice JOHN PAUL STEVENS writing for a 6–3 majority, rejected the statutory claim, saying the street closing had caused only minor inconvenience, and had not damaged the plaintiff's property values. The question remained whether the THIRTEENTH AMENDMENT, of its own force, forbade anything but slavery itself. The Court did not reach this broad question, saying only that the street closing here was not a BADGE OF SERVITUDE. Justice THURGOOD MARSHALL, for the dissenters, scored the majority for ignoring "the plain and powerful symbolic message of the 'inconvenience' ": to fence out "undesirables."

KENNETH L. KARST
(1986)

## MENTAL ILLNESS AND THE CONSTITUTION

Mental illness has played two apparently different roles in American law generally: as a limitation on state authority to impose ordinary legal standards on individuals and as a basis for increasing state authority over individuals. The paradigmatic limiting use of mental illness is the defense of insanity for conduct that would otherwise be subject to criminal liability. Its paradigmatic use to increase state authority is in civil commitment of people who, apart from their mental illness, would not be subject to state confinement or control. In both guises, however, the same underlying justification is advanced—that a mentally ill person deserves specially beneficial treatment from the state, either to excuse him from ordinary standards of criminal liability or to protect and treat him under civil commitment laws.

Until the 1960s, constitutional doctrine paid scant at-

tention to any of the legal usages for mental illness. Beginning in that decade, lower federal courts began to scrutinize these uses and to invoke constitutional norms in the service of that scrutiny. The central problem was that the promise of special beneficence for mental illness proved false on close examination. Although insanity was denoted a defense to criminal liability, in practice defendants thus found "not guilty" were automatically confined to state maximum security institutions indistinguishable from prisons (and often with harsher custodial conditions), were provided with virtually no psychiatric treatment, and were typically held for longer terms than if they had been convicted of the offenses charged. Similarly, individuals who were civilly committed, ostensibly for protection and treatment, in fact were regularly confined in brutal state institutions, provided no semblance of psychiatric treatment, subjected to degrading impositions such as numbing, physically harmful drug dosages, strait-jacketed isolation, and confined for long terms.

Confronted with these facts, federal courts found various violations of constitutional rights, all derived essentially from the proposition that DUE PROCESS required the state to justify any deprivation of liberty and, where that justification was based on a promise of beneficent treatment, to fulfill that promise. Thus the District of Columbia Circuit Court held in *Rouse v. Cameron* (1966) that those found not guilty by reason of insanity had a "right to treatment" and not simply custodial confinement, and in *Bolton v. Harris* (1968) that these defendants could not be automatically confined after an insanity acquittal but only if found "mentally ill" and "in need of treatment" according to civil commitment standards. For civilly committed people generally, that court found in *Lake v. Cameron* (1966) a liberty-based presumption against automatic commitment to a secure institution and a consequent right to treatment in the "least restrictive alternative" setting. Other federal courts concluded that civilly committed people generally had a constitutional right to treatment and that civil commitment must rest on proof of "danger to self or others," not simply mental illness as such, and proof moreover that would satisfy the criminal law "beyond REASONABLE DOUBT."

For more than a decade after these rulings, the Supreme Court held back from any definitive holding either to endorse or to reject these doctrinal innovations. During the 1960s, the Court did demonstrate concern for the problem of unfulfilled and even hypocritical state promises of therapeutic benefits as a justification for increased social controls. The most significant context for this Supreme Court concern was not mental illness but rather the juvenile court system, where states sought to justify the absence of criminal law procedural protections by invoking the promise of therapy. In IN RE GAULT (1967) the Court found these promises insufficiently convincing and required extensive recasting of juvenile court procedures.

In 1972 the Supreme Court first addressed the systemic implications of this same problem for state authority generally premised on mental illness. In *Jackson v. Indiana* the Court overturned common state practice regarding criminal defendants found mentally incompetent to stand trial. Traditional doctrine purported to excuse such disabled defendants from standing trial, ostensibly to benefit them; but the practical consequence was that these defendants were treated in the same way and as badly as those found not guilty by insanity. The defendants were given long-term, even lifetime, confinement in harsh facilities without semblance of psychiatric care, even if the offense charged were a petty MISDEMEANOR. The Court ruled in *Jackson* that this disposition violated due process; the conditions of this confinement must provide treatment with reasonable prospect that the defendant will be made competent to stand trial. The practical result of this ruling has been substantially to increase the treatment resources provided to defendants found incompetent for trial. To justify the confinement of defendants who, after a substantial period of confinement, remain disabled for trial purposes, a state must invoke its civil commitment laws.

With this one exception, however, the Supreme Court was hesitant during the 1970s to address the constitutional law issues raised by state invocations of mental illness. The dominant motif of the Court's work during this time can be seen in its resolution in 1979 of the question of the requisite BURDEN OF PROOF in civil commitment proceedings. The Court acknowledged that substantial due process liberty interests were at stake, but nonetheless concluded that the state's beneficent purpose toward the allegedly mentally ill person justified a less stringent burden than the criminal standard of proof; hence in *Addington v. Texas* (1979) the Court required an intermediate standard of "clear and convincing evidence."

This impulse to find some seeming middle ground between fundamentally opposed premises is also apparent in the Court's equivocal approach to the question of a constitutional right to treatment for persons confined to state mental institutions. In O'CONNOR V. DONALDSON (1975) the Court ruled that a state could not commit a person on grounds of mental illness alone but only with an added finding of danger to self or others. The Court refused, however, to decide whether a state was obliged to provide treatment to such a person rather than impose merely custodial confinement. The same issue returned to the Court in *Youngberg v. Romeo* (1982), this time regarding an institutionalized person who was retarded rather than mentally ill. Again the Court avoided a definitive resolution,

ruling that the plaintiff was constitutionally entitled to "minimal treatment" that reasonably promised to reduce his aggressive outbursts—as opposed to the harsh behavior controls, such as prolonged shackling, that the state had used. The Court did not, however, reach the broader issue whether the state was obliged to provide treatment with any promise of greater benefits such as ultimate freedom from confinement.

In 1983 the Court departed from its previous pattern of equivocation in these matters. In a 5–4 decision the Court held in *Jones v. United States* that a criminal defendant found not guilty by insanity could be confined to a mental institution without regard to the maximum term for which he might have been sentenced for the offense charged. The Court ruled, moreover, that the insanity acquittal itself justified the defendant's confinement without any necessary invocation of civil commitment standards, thus effectively disapproving the 1968 court of appeals decision in *Bolton*. The Court in effect treated the "criminally insane" as different from either "criminals" or the "insane." This differential treatment can work a marked disadvantage, as the defendant in the *Jones* case found. But, the Court appeared to conclude, the defendant chooses to plead criminal insanity and thus knowingly embraces the risk of his ultimate disadvantage. Indeed, in AKE V. OKLAHOMA (1985) the Court made it easier to invoke the insanity defense by ruling that an indigent defendant is entitled to a court-appointed psychiatrist. The specific context of that case was a capital offense, where the risk of indefinite confinement following an insanity acquittal might seem invariably worthwhile; but the Court did not limit its holding to capital cases.

It is not clear whether the Court's definitive rulings in the context of criminal insanity will be followed by similar resolutions in other aspects of state authority regarding mentally ill people. The Court may have felt a special need to address criminal insanity as such because of the extraordinary public attention resulting from John Hinckley's acquittal for insanity in 1982 on the charge of attempting to assassinate President RONALD REAGAN. Whatever the future directions of judicial rulings, however, the underlying questions regarding the justifications for and scope of state authority in these matters remain difficult.

The dominant theme of the constitutional principle set out by lower courts in the 1960s and 1970s has been that mental illness is relevant to the exercise of state power only where the state promises therapeutic benefit, and that the Constitution requires that this promise be kept. Keeping the promise, however, is easier said than done. Both diagnosis and treatment of mental illness is uncertain. Furthermore, adequate therapy, either in state institutions or in community treatment facilities, will require supervision of complex bureaucracies and large expenditures of funds. Supervision of this process will severely strain both the courts' enforcement capacities and traditional conceptions of judicial authority. Some observers thus conclude that the lower courts were correct in seeing the failure and even hypocrisy of states regarding their therapeutic promises, but these courts merely compounded this error by invoking the Constitution to add new promises that similarly cannot be fulfilled.

If courts cannot and should not attempt to enforce the promise of therapy, what response is proper in the face of egregious state abuses? Some have argued that states should simply be barred from giving mental illness special legal relevance in any circumstances, as a justification either for increasing or withholding state power over individuals. In this view, states could confine people for "dangerousness" only by applying ordinary criminal law standards, and those standards should make no special dispensation for the mentally ill. A few states have essentially abolished the insanity defense and sharply limited the availability of civil commitment. Similarly, some judicial decisions such as *Rogers v. Okin* (1980) have found a constitutional right to *refuse* treatment, notwithstanding that a person has been civilly committed as mentally ill and dangerous. The premise of these decisions is not that the state might fail to keep its therapeutic promise; it is rather that the promise may be kept with excessive rigor, and that the state may thereby transgress valued boundaries of individual integrity and dignity. Though these lower court decisions do not directly embrace the view that would abolish all state mental illness powers, they share the underlying suspicion of therapeutically justified state impositions, and they apparently prefer modes of social control that do not directly purport to invade mental processes, such as imprisonment for criminal convictions.

This underlying premise is a temptingly plausible response to the sorry history of state abuse of the mentally ill. But the premise fails both as social policy and as constitutional doctrine. The consequences were disastrous for large numbers of people who were removed from state institutions in the 1960s and 1970s, in part as a response to court decisions, and were "dumped" into communities with no facilities to receive them or willingness to respond to their special needs. As constitutional doctrine, the abolitionist doctrine relies on a conception of due process "liberty" that takes insufficient account of the psychological conditions of individual autonomy that lie beneath this prized constitutional right. This conception ignores the ways in which mental illness can distort an individual's capacity to acknowledge his need for help, including state-administered assistance. It may be that state power can never be trusted to provide this help, that this is the lesson

of the history of state abuse of mentally ill people in the criminal and civil law context. But this lesson has not yet been clearly written into constitutional doctrine.

ROBERT A. BURT
(1986)

(SEE ALSO: *Disabilities, Rights of Persons With; Disability Discrimination.*)

Bibliography

BROOKS, ALEXANDER D. 1974 *Law, Psychiatry and the Mental Health System*, and 1980 *Supplement.* Boston: Little, Brown.

BURT, ROBERT A. 1979 *Taking Care of Strangers: The Rule of Law in Doctor-Patient Relations.* New York: Free Press.

SCULL, ANDREW 1977 *Decarceration: Community Treatment and the Deviant: A Radical View.* Englewood Cliffs, N.J.: Prentice-Hall.

## MENTAL ILLNESS AND THE CONSTITUTION (Update)

Beginning in the 1960s, lower federal courts scrutinized with increasing intensity state claims that special statutory treatment of mental illness, either as a basis for civil commitment to psychiatric institutions or for apparent exemptions from ordinary criminal liability, were in fact beneficial to the affected individual. For almost two decades the Supreme Court was cautiously supportive of this effort, though only equivocally addressing the lower courts' most expansive findings of constitutional protections. In 1983, however, the Court definitively rejected one protective path that some lower courts had pursued; in *Jones v. United States*, the Court ruled that a criminal defendant found not guilty by reason of insanity could be confined to a mental institution without regard to the maximum term for which he might have been sentenced for the offense charged and, moreover, that the defendant could be confined without regard to the standards for mental illness civil commitment.

Two significant decisions since 1983 suggest that the Court more generally has resolved to abandon its prior tolerance, if not wholehearted support, for judicial scrutiny of state authority regarding mental illness. In *Allen v. Illinois* (1986), the Court ruled that the Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION does not apply to commitment proceedings based on mental illness, thus upholding the use of derogatory evidence obtained from a court-ordered psychiatric interview. The Court accepted at face value both the state's characterization of the proceedings as "civil" (even though the statute under review applied only to mentally ill people who were "sexually dangerous" and had already been charged with a criminal offense) and the state's claim that the purpose of the commitment was "treatment, not punishment" (even though the person would be confined for an indeterminate term in a maximum-security facility adjoining, though administratively distinct from, a state prison). Similarly, in WASHINGTON V. HARPER (1990) the Court ruled that a criminally convicted prisoner could be compelled to take psychotropic medication without any recourse to judicial proceedings to examine either the prisoner's mental competency or need for the medication. The Court thus effectively disapproved the extensive prior efforts of lower federal courts to establish constitutional protections against forced medication for civilly committed people, as in *Rennie v. Klein* (1983) and *Rogers v. Okin* (1984).

The Supreme Court's disavowal of this kind of judicial scrutiny comes at a time of popular arousal about homeless people in urban areas, many of whom appear to be mentally ill. Their visibly disturbing presence has been widely blamed on past judicial inquiries into conditions in mental institutions and the "deinstitutionalization" movement given impetus by these court decisions. Many states have responded to this popular concern by enacting more liberal standards for civil commitment, not only to avert "dangerous" conduct but also to forestall "substantial mental deterioration." Though some lower courts have constitutionally invalidated such liberalized criteria, it is unlikely that the Supreme Court today would agree.

In one limited context the Supreme Court has recently enlarged the state's obligation to give special advantage to mentally ill people; in FORD V. WAINWRIGHT (1986) the Court ruled that states are constitutionally prohibited from executing a mentally incompetent person. But this apparent beneficence has a twist that ironically corresponds to the overall direction of the Court's recent jurisprudence regarding mental illness: the state will now provide psychiatric treatment to incompetent people so that, when cured, they can be killed.

ROBERT A. BURT
(1992)

Bibliography

KIESLER, CHARLES A. and SIBULKIN, AMY E. 1987 *Mental Hospitalization: Myths and Facts About a National Crisis.* Newbury Park, Calif.: Sage.

## MENTAL RETARDATION AND THE CONSTITUTION

The Supreme Court first addressed the constitutional status of mentally retarded people in BUCK V. BELL (1927).

In an opinion by Justice OLIVER WENDELL HOLMES, the Court upheld a state statute authorizing compulsory STERILIZATION of "mental defectives." In dismissing the claim that this imposition wrongly discriminated against retarded people and thereby denied them EQUAL PROTECTION under the FOURTEENTH AMENDMENT, Holmes appeared to invoke "minimal scrutiny" (as it was later termed), holding that the legislature might reasonably find retardation both inheritable and socially harmful. It was not until the 1970s that courts took a different, more protective stance toward retarded people. In so doing, they challenged the social attitudes of fear and aversion that lay beneath not only sterilization laws but also the general state policy, dating from the late nineteenth century, of excluding retarded people from community facilities (such as public schools) and consigning them to large, geographically isolated residential institutions.

The modern decisions involved two constitutional approaches. The first approach was to recognize a constitutional "right to treatment" for residents of state institutions. This right was initially formulated in 1971 when a federal district court held that brutal custodial conditions in an Alabama institution must be remedied by intensive educational and treatment programs conducted by new cadres of professionally qualified staff. In *Youngberg v. Romeo* (1982) the Supreme Court effectively endorsed this constitutional holding, deriving as a proposition of SUBSTANTIVE DUE PROCESS that, although the state was not required to offer any services to retarded people, if the state chose to provide residential facilities, then those facilities must meet certain minimal standards.

The second constitutional approach was initially formulated in 1972, when a federal district court overturned a state statute excluding retarded children from public schools on the ground that they were "ineducable." The court appeared to conclude that all retarded people were educable to some degree. This holding was quickly adopted by other federal courts to overturn similar state statutes and, moreover, was endorsed by Congress in the EDUCATION OF ALL HANDICAPPED CHILDREN ACT (1975) requiring education of all children, no matter how severely impaired, as a condition on federal funding of public schools.

These two constitutional approaches of substantive due process and equal protection analysis were blended by a 1977 district court ruling that a state institution for the retarded must be wholly closed and its residents moved to small-scale community homes on the grounds that the "right to treatment" could not be effectively protected in any large, isolated institutional setting and that, like racial SEGREGATION, separation of retarded people from contact with mentally normal people was INVIDIOUS DISCRIMINATION. A congressional act of 1975 also indicated preference for community over institutional retardation facilities; but the Supreme Court, in PENNHURST STATE SCHOOL V. HALDERMAN (1981) without addressing the initial constitutional ruling, held that Congress had spoken only with "hortatory" rather than mandatory intention.

In 1985 the Supreme Court finally did address the question whether mentally retarded people warranted specially protected constitutional status, but its answer was ambiguous. The specific issue in CLEBURNE V. CLEBURNE LIVING CENTER (1985) was the validity of a local ZONING ordinance that specifically excluded group residences for "feeble-minded" people, even though fraternity and sorority houses, dormitories, and nursing homes for "convalescents or aged" people were explicitly permitted. The Fifth Circuit overturned the ordinance, citing the immutability of retardation, its stigmatized social history (as evidenced by sterilization laws based on spurious scientific findings and by brutalizing, isolated institutional residences), and the political vulnerability of retarded people. Because retardation could be relevant to some state classifications such as school programming or employment eligibility, however, the court found that it was more like gender than like race, a "quasi-suspect" rather than a SUSPECT CLASSIFICATION. Applying intermediate scrutiny, the court found insufficient justification for the zoning exclusion.

The Supreme Court declined to follow this analysis. It concluded that retardation classifications warranted no special judicial scrutiny for several reasons: the legitimate relevance of retardation for some classificatory purposes, the nonjudicial expertise seemingly required to evaluate such purposes, and the political strength of retardation advocates as evidenced by the 1975 congressional acts (notwithstanding that Congress had also acted against race and gender discrimination in recent decades). The Court nonetheless invalidated the zoning ordinance on the ground that it was based merely on "vague, undifferentiated fears" about retarded people. This rationale does not readily fit the conventional conception of "minimal scrutiny" equal protection analysis, given that fears regarding the irrationality and uncontrollability of retarded people have some plausible claim to factuality, even though this claim is unreliably documented and inapplicable to most retarded people.

The Court's invalidation of the zoning ordinance in *Cleburne* must thus rest on an unacknowledged premise, either that minimal scrutiny equal protection analysis (as applied to all state classifications) now requires more clearly demonstrated reasonableness than has heretofore been demanded or that retarded people do warrant some degree of special judicial protection to ensure that differ-

ential classifications of them have factual bases beyond "vague, undifferentiated fears."

ROBERT A. BURT
(1986)

(SEE ALSO: *Disabilities, Rights of Persons With; Disability Discrimination.*)

Bibliography

BURT, ROBERT A. 1985 Pennhurst: A Parable. Pages 265–364 in Robert Mnookin, ed., *In the Interest of Children.* New York: W. H. Freeman.

## MERCY KILLING

See: Euthanasia; Right to Die

## MERE EVIDENCE RULE

A SEARCH WARRANT must identify the place to be searched and the items to be seized. Such items may include fruits or instrumentalities of crime (such as stolen money or burglar's tools) or contraband (such as illegal drugs). In *Gouled v. United States* (1921) the Supreme Court held that search warrants could not issue to seize mere EVIDENCE of crime.

In WARDEN V. HAYDEN (1967), however, the Court held that warrants could issue for mere evidence so long as there was a "nexus" between the evidence and the criminal behavior. ZURCHER V. STANFORD DAILY (1978) illustrates the effect of the rule's abandonment. The Stanford University student newspaper published photographs of a campus disturbance between the police and demonstrators. Because the police observed only two of their assailants, a warrant was obtained for a search of the newspaper's offices. The warrant affidavit did not allege any involvement in the unlawful acts by newspaper staff members. During the search, police examined the paper's photographic labs, files, desks, and waste paper baskets. Since no new evidence was discovered, no items were taken.

One commentator has summarized the "mere evidence rule" after *Zurcher* as follows: *Zurcher* represents a case in which none of the items searched for by the police was a fruit or instrumentality of a crime, or contraband. Under the pre-*Hayden* rule, the warrant used in *Zurcher* could not have been issued. Yet the present broad rule is so well established that the Supreme Court's majority opinion did not even discuss the issue.

CHARLES H. WHITEBREAD
(1986)

Bibliography

WHITEBREAD, CHARLES H. 1980 *Criminal Procedure.* Mineola, N.Y.: Foundation Press.

## *MERITOR SAVINGS BANK, FSB v. VINSON*
477 U.S. 57 (1986)

In *Meritor* the Supreme Court unanimously held that sexual harassment that created a "hostile environment" in the workplace constituted EMPLOYMENT DISCRIMINATION in violation of Title VII of the CIVIL RIGHTS ACT OF 1964. The Court thus gave its blessing to an interpretation that was already well established in the guidelines of the Equal Employment Opportunity Commission (EEOC) and in the lower federal courts.

A woman who had been employed by a bank for four years sued her branch manager and the bank for injunctive relief and for both compensatory and punitive damages, alleging that the manager had demanded and obtained sexual favors from her, including some incidents of forcible rape. She stated that she had not reported these facts to the manager's superiors because she was afraid of her manager. The manager disputed these allegations, and the bank contended that it neither knew nor approved of any sexual harassment by the manager. The bank further argued that the prohibitions of Title VII were limited to discrimination causing economic or tangible loss, not psychological harm.

Justice WILLIAM H. REHNQUIST, writing for the Court, rejected the latter argument. Title VII was intended to strike at all disparate treatment of men and women. The EEOC guidelines were also persuasive authority that Title VII is concerned with noneconomic injury. The guidelines had explicitly recognized sexual harassment that creates "an intimidating, hostile, or offensive working environment" to be a form of SEX DISCRIMINATION that violates the act, and lower courts had arrived at a similar interpretation in cases involving both racial harassment and sexual harassment.

Even if the plaintiff's sexual relationship with the manager were "voluntary," the Court said, that is not a defense to a Title VII action; rather, the question is whether the manager's sexual advances were "unwelcome," a determination to be made on the totality of the circumstances shown in the record. The Court declined to rule in the abstract on the question of the bank's liability for the actions of its manager. It followed the EEOC's brief, agreeing that an employer is absolutely liable when a supervisory employee offers economic benefits for sexual favors, but refusing to extend the rule of absolute liability to a "hostile environment" case. The Court also rejected

the bank's argument that the mere existence of a grievance procedure insulated it from liability. The issue of the employer's liability, the Court suggested, should first be addressed by the lower courts in the context of specific findings of fact.

Justice THURGOOD MARSHALL, writing for four Justices, concurred separately to address the question of employer liability. He would follow the EEOC guidelines on this point. These guidelines went beyond the EEOC's own brief to the Court, making an employer generally responsible for supervisory employees' sexual harassment whether or not that conduct was authorized or forbidden and whether or not the employer knew or should have known of the conduct.

KENNETH L. KARST
(1992)

Bibliography

ABRAMS, KATHRYN 1989 Gender Discrimination and the Transformation of Workplace Norms. *Vanderbilt Law Review* 42: 1183–1248.

MACKINNON, CATHARINE A. 1979 *Sexual Harassment of Working Women.* New Haven, Conn.: Yale University Press.

## *METRO BROADCASTING, INC. v. FCC*
## 497 U.S. 547 (1990)

In this decision the Supreme Court, 5–4, upheld two aspects of an AFFIRMATIVE ACTION program approved by Congress in the area of BROADCASTING. In 1986 members of racial and ethnic minorities, who constitute about one-fifth of the nation's population, owned just over two percent of the radio and television broadcasting stations licensed by the Federal Communications Commission (FCC). Two FCC policies aim to bring a greater racial and ethnic diversity to broadcast ownership. First, the FCC considers minority ownership as one factor among many in making comparative judgments among applicants for new licenses. Second, the FCC seeks to increase minority ownership through a "distress sale" policy. Normally, a licensee cannot transfer its license during the time when the FCC is considering whether the license should be revoked. As an exception to this policy, such a broadcaster may sell its license before the revocation hearing to a minority-controlled broadcaster that meets the FCC's qualifications, provided that the price does not exceed seventy-five percent of the station's value. Congress, in appropriating money for the FCC, ordered that these programs be continued.

In *Metro Broadcasting* both of these policies were challenged as denials of the guarantee of EQUAL PROTECTION that the Court has recognized in the Fifth Amendment's DUE PROCESS clause. Writing for the majority, Justice WILLIAM J. BRENNAN strongly emphasized Congress's adoption of the two minority ownership policies. The proper STANDARD OF REVIEW for congressional affirmative action was not STRICT SCRUTINY but the intermediate standard that the Court has previously used, for example, in cases of SEX DISCRIMINATION. This standard requires that Congress have an "important" purpose for its legislation and that the racial classification be "substantially related" to achieving that purpose.

For the majority of the Court, the FCC's policies easily satisfied this test. The interest in diversifying broadcast programming accorded with the long-recognized policy of the Federal Communications Act to ensure the presentation of a wide variety of views. The Supreme Court had recognized this need in the context of the scarcity of electronic frequencies in RED LION BROADCASTING CO. V. FCC (1969), sustaining the FCC's "fairness doctrine." The FCC had quite reasonably determined that racial and ethnic diversity in broadcast ownership would promote diversity in programming, and Congress had repeatedly endorsed this view by rejecting proposals that would arguably reduce opportunities for minority ownership, such as a proposal to deregulate broadcasting. The Court, said Justice Brennan, must give great weight to the joint administrative-congressional determination of a connection between minority ownership and programming diversity. The minority ownership policies did not rest on impermissible stereotyping, but on the need to diversify programming. The FCC had considered other means of achieving this diversification and had reasonably concluded that these means were relatively ineffective. The burden imposed by these two policies on nonminority applicants for broadcast licenses was not impermissibly great.

Justice SANDRA DAY O'CONNOR wrote for the four dissenters. Arguing that any race-conscious program must pass the test of strict scrutiny, she rejected the claim that broadcasting diversity was a COMPELLING STATE INTEREST or even an important one. Furthermore, the policies were not narrowly tailored; they assumed a connection between minority ownership and program content, and they ignored other race-neutral means of assuring programming to serve a diversity of audiences, such as direct regulation of programming.

The importance of *Metro Broadcasting* as a precedent remains to be seen. Justice Brennan's retirement from the Court may lead to a resurgence of the rhetoric of strict scrutiny, even for congressional programs of affirmative action. However, as Justice O'Connor noted in her concurrence in WYGANT V. JACKSON BOARD OF EDUCATION (1986), the practical difference between compelling and impor-

tant purposes, or between necessary and substantially related means, may be less than a surface reading of opinions suggests.

KENNETH L. KARST
(1992)

Bibliography

EULE, JULIAN N. 1990 Promoting Speaker Diversity: *Austin* and *Metro Broadcasting*. *Supreme Court Review* 1990:105–132.

## *METROPOLITAN LIFE INSURANCE CO. v. WARD*
470 U.S. 869 (1985)

This decision departed from a long series of Supreme Court decisions upholding the constitutionality of state taxes against attack under the EQUAL PROTECTION clause. Alabama taxed the gross premiums of insurance companies by imposing a one percent tax on companies organized in Alabama, and a tax of three percent or four percent on companies organized in other states. In an opinion by Justice LEWIS F. POWELL, the Supreme Court held, 5–4, that this discrimination failed even the RATIONAL BASIS test, because its only articulated purpose—to create a tax advantage for domestic economic interests over out-of-state interests—was illegitimate. Congress, in its 1945 act permitting the states to discriminate in favor of local insurance companies, had insulated such laws from attack under the COMMERCE CLAUSE, but had not purported to speak to any issue of equal protection.

In an unusual division of the Court, Justice SANDRA DAY O'CONNOR dissented, joined by Justices WILLIAM J. BRENNAN, THURGOOD MARSHALL, and WILLIAM H. REHNQUIST. Justice O'Connor pointed to previous decisions recognizing the legitimacy of state efforts to promote domestic industry, and made the unanswerable point that Alabama's tax scheme was rationally related to such a purpose. Furthermore, she said, Congress in 1945 understood that it was authorizing laws of this very kind. She also accused the majority of reviving active judicial scrutiny of state ECONOMIC REGULATION. Although the latter prediction seems unlikely to come true, the fear that it expresses is not dispelled by the majority's opinion.

KENNETH L. KARST
(1986)

Bibliography

COHEN, WILLIAM 1985 Federalism in Equality Clothing: A Comment on *Metropolitan Life Insurance Company v. Ward*. *Stanford Law Review* 38:1–27.

## *MEYER v. NEBRASKA*
262 U.S. 390 (1923)

*Meyer* represented an early use of SUBSTANTIVE DUE PROCESS doctrine to defend personal liberties, as distinguished from economic ones. Nebraska, along with other states, had prohibited the teaching of modern foreign languages to grade school children. Meyer, who taught German in a Lutheran school, was convicted under this law. The Supreme Court, 7–2, held the law unconstitutional. Justice JAMES C. MCREYNOLDS wrote for the Court in *Meyer* and in four companion cases from Iowa, Ohio, and Nebraska. Justice OLIVER WENDELL HOLMES, joined by Justice GEORGE SUTHERLAND, dissented in all but the Ohio cases.

McReynolds began with a broad reading of the "liberty" protected by the FOURTEENTH AMENDMENT: "it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." State regulation of this liberty must be reasonably related to a proper state objective; the legislature's view of reasonableness was "subject to supervision by the courts." The legislative purpose to promote assimilation and "civic development" was readily appreciated, given the hostility toward our adversaries in World War I. However, "no adequate reason" justified interfering with Meyer's liberty to teach or the liberty of parents to employ him during a "time of peace and domestic tranquillity."

Holmes concurred in the Ohio cases, because Ohio had singled out the German language for suppression. But he could not say it was unreasonable for a state to forbid teaching foreign languages to young children as a means of assuring that all citizens might "speak a common tongue." Because "men might reasonably differ" on the question, the laws were not unconstitutional.

*Meyer* was thus a child of LOCHNER V. NEW YORK (1905), taking *Lochner*'s broad view of the judicial role in protecting liberty. Yet, although substantive due process has lost its former vitality in the field of ECONOMIC REGULATION, *Meyer*'s precedent remains vigorous in the defense of personal liberty. *Meyer* was reaffirmed in GRISWOLD V. CONNECTICUT (1965), LOVING V. VIRGINIA (1967), and ZABLICKI V. REDHAIL (1978), three modern decisions protecting the FREEDOM OF INTIMATE ASSOCIATION.

KENNETH L. KARST
(1986)

## *MIAMI HERALD PUBLISHING COMPANY v. TORNILLO*
418 U.S. 241 (1974)

It may be argued that FREEDOM OF SPEECH is meaningless unless it includes access to the mass media so that the speech will be heard. Here the Supreme Court unanimously struck down a Florida statute requiring a newspaper to provide a political candidate free space to reply to its attacks on his personal character. Noting that the statute infringed upon "editorial control and judgment," the Court held that "any [governmental] compulsion to publish that which 'reason' tells . . . [the editors] . . . should not be published is unconstitutional."

*Tornillo* was a major blow to proponents of a right of access. When compared to RED LION BROADCASTING COMPANY V. FEDERAL COMMUNICATIONS COMMISSION (1969), it raises the question whether the FIRST AMENDMENT provides greater protection for the press than for the electronic media. In light of the large number of one-newspaper towns, the scarcity rationale for allowing government to compel access to broadcast channels would seem to apply even more strongly to the print media. Ultimately the distinction may be between the public ownership of the channels and the private ownership of the print media. If so, the Court has not explained or defended this linking of speech rights to property rights.

MARTIN SHAPIRO
(1986)

## *MICHAEL M. v. SUPERIOR COURT*
450 U.S. 464 (1981)

A boy of 17 was convicted of rape under a California statute making it a crime for a male to have intercourse with a female under 18; the girl's age was 16. A fragmented Supreme Court voted 5–4 to uphold the conviction against the contention that the statute's SEX DISCRIMINATION—the same act was criminal for a male but not for a female—denied the EQUAL PROTECTION OF THE LAWS.

There was no opinion for the Court. The majority Justices, however, agreed in accepting the California Supreme Court's justification for the law: prevention of illegitimate teen-age pregnancies. The risk of pregnancy itself, said Justice WILLIAM H. REHNQUIST, served to deter young females from sexual encounters; criminal sanctions on young males only would roughly "equalize" deterrents.

The dissenters argued that California had not demonstrated its law to be a deterrent; thirty-seven states had adopted gender-neutral statutory rape laws, no doubt on the theory that such laws would provide even more deterrent, by doubling the number of persons subject to arrest. When both parties to an act are equally guilty, argued Justice JOHN PAUL STEVENS, to make the male guilty of a FELONY while allowing the female to go free is supported by little more than "traditional attitudes toward male-female relations."

KENNETH L. KARST
(1986)

## *MICHELIN TIRE COMPANY v. ADMINISTRATOR OF WAGES*
423 U.S. 276 (1976)

Opening the way for increased local revenue, a unanimous Court overruled *Low v. Austin* (1872) and sustained a state property tax on imported goods even though they retained their character as imports. The Court held that the IMPORT-EXPORT CLAUSE did not prohibit such a tax if it were imposed without discrimination on all goods in the state.

DAVID GORDON
(1986)

(SEE ALSO: *Original Package Doctrine.*)

## *MICHIGAN v. LONG*

See: Adequate State Grounds; Stop and Frisk

## *MICHIGAN v. SUMMERS*
452 U.S. 692 (1981)

A 6–3 Supreme Court held that if the police had a valid warrant to search a home for illegal drugs, they had authority to detain the occupants of the premises during the search. They could therefore lawfully require a suspect to remain in the house, arrest him after finding the contraband, and search his person incident to the arrest. The dissenters argued that the FOURTH AMENDMENT prevented the police from seizing a person without PROBABLE CAUSE in order to make him available for arrest should probable cause be revealed by the search.

LEONARD W. LEVY
(1986)

## *MICHIGAN DEPARTMENT OF STATE POLICE v. SITZ*
496 U.S. 444 (1990)

Recent FOURTH AMENDMENT cases reflect a pattern of rejection by the Supreme Court of claims based on the right

against unreasonable SEARCH AND SEIZURE. This case fits that pattern, yet the decision of the Court seems right.

Because of the slaughter on public highways caused by drunk drivers, the Michigan State Police instituted a program of sobriety checkpoints. All drivers passing through a checkpoint, usually after midnight, were stopped and examined briefly for signs of intoxication. Suspected drunk drivers were directed out of the flow of traffic for further investigation; all others were permitted to continue. The average stop took twenty-five seconds.

A 6–3 Supreme Court held that although the stop was a seizure in the sense of the Fourth Amendment, it was a reasonable one because the intrusion was slight and served a substantial public interest. The dissenters, led by Justice JOHN PAUL STEVENS, believed that the intrusion violated the Fourth Amendment. Much of Steven's opinion challenged the wisdom of the legislative policy authorizing the sobriety-checkpoint program. His challenge to its constitutionality was founded on the absurd proposition that "unannounced investigatory seizures are, particularly when they take place at night, the hallmarks of regimes far different from ours," and he referred to Nazi Germany. Moreover, Stevens weakened his argument based on the Fourth Amendment by offering the opinion that a permanent, nondiscretionary checkpoint program would not violate the amendment. He supposed that a state could condition the use of its roads on the uniform administration of a breathalizer test to all drivers, thereby keeping drunks off the roads.

The intrusiveness of the means upheld by the Court's majority, led by Chief Justice WILLIAM H. REHNQUIST, was considerably less than that of the means favored by Stevens. In addition, the majority did not debate the wisdom of the policy before it. Its deference to the legislature seemed submissive, however, and its constitutional analysis stopped when it took notice of the twenty-five-second intrusion.

LEONARD W. LEVY
(1992)

## *MIDDENDORF v. HENRY*
425 U.S. 25 (1976)

A 5–3 Supreme Court ruled that servicemen have no RIGHT TO COUNSEL in summary courts-martial. Justice WILLIAM H. REHNQUIST's majority opinion concluded that such proceedings did not constitute criminal prosecutions within the Sixth Amendment's guarantee, and he also disposed of a Fifth Amendment DUE PROCESS claim as without merit.

DAVID GORDON
(1986)

## MIFFLIN, THOMAS
(1744–1800)

General Thomas Mifflin, a wealthy Philadelphia Quaker, was a member of the Pennsylvania Assembly and of the First and Second Continental Congresses before serving as quartermaster general of the Army (1775–1778). He was elected to Congress in 1782, and in 1783 became President of the United States in Congress Assembled. Mifflin was speaker of the Pennsylvania Assembly in 1787, when he was chosen as chairman of his state's delegation to the CONSTITUTIONAL CONVENTION OF 1787. The records of the convention do not indicate that Mifflin ever spoke in the debates, although he did sign the Constitution. In 1790 he presided over the state CONSTITUTIONAL CONVENTION. He served as governor of Pennsylvania from 1790 to 1799, a period that included the WHISKEY REBELLION.

DENNIS J. MAHONEY
(1986)

Bibliography

ROSSITER, CLINTON 1966 *1787: The Grand Convention.* New York: Macmillan.

## MILITARY AND THE CONSTITUTION

See: Armed Forces; Military Justice; Sexual Orientation and the Armed Forces

## MILITARY JUSTICE

The Constitution, in language taken from the ARTICLES OF CONFEDERATION, empowers Congress to "make Rules for the Government and Regulation of the land and naval Forces." Congress has enacted Articles of War and Articles for the Government of the Navy since 1775, but in 1950 the two systems were fused in the Uniform Code of Military Justice (UCMJ).

Criminal justice under the UCMJ resembles that in civilian courts more than it differs. As in most states, the type of trial court depends on the gravity of the offense. Petty offenses are dealt with by nonjudicial punishment or summary court-martial; more serious offenses may be tried before a special or general court-martial. The types of court-martial differ in number of members and in the maximum punishment they may impose. The rules of EVIDENCE are about the same as in the federal courts; and a defendant tried by a special or general court-martial enjoys the RIGHT TO COUNSEL at government expense. The Supreme Court held in *Middendorf v. Henry* (1976) that

the right to free counsel does not apply in summary courts-martial, which more closely resemble administrative hearings than criminal trials.

The major difference between military and civilian criminal justice is the absence of a jury. The members of the court are appointed by the convening authority, who can, theoretically, "pack the court." However, the accused can avoid the possibility of command influence by electing trial by a military judge sitting alone, who is responsible only to the Judge Advocate General of his service. When the military judge sits with members of a court-martial his role is like that of a civilian judge, except that the members determine the sentence if the accused is convicted. There is an elaborate system of review but, except in a limited class of cases, APPEAL to the Court of Military Appeals (three civilian judges appointed by the President) is not by right.

The UCMJ does not provide for review by any civilian court: findings and sentences of courts-martial, as affirmed under the code, are "final and conclusive" and "binding upon all . . . courts . . . of the United States." The Supreme Court has always held that, absent provision by Congress, there can be no direct appeal from the decisions of military tribunals. The federal courts have, however, developed several techniques of collateral review—notably HABEAS CORPUS, MANDAMUS, and suits for back pay in the COURT OF CLAIMS—which effectively ensure that military courts are subject to constitutional supervision.

The federal courts had long collaterally reviewed court-martial convictions to ensure that there was JURISDICTION over person, offense, and sentence. The Supreme Court after World War II imposed new limits on court-martial jurisdiction over person and offense. In the UCMJ, courts-martial were granted jurisdiction over many categories of civilians, including honorably discharged servicemen and civilians accompanying the armed forces outside the United States. In a series of decisions, including UNITED STATES EX REL. TOTH V. QUARLES (1955) and REID V. COVERT (1956), the Supreme Court held that a court-martial could not constitutionally try any civilian in peacetime. There are still some gray areas, such as jurisdiction over retired regulars and certain reservists.

Thereafter the Court held that a court-martial could not constitutionally try a member of the armed forces for an offense that had no "service connection"; the leading case, *O'Callahan v. Parker* (1969), involved the attempted rape of a civilian by a soldier off-post, on leave, and out of uniform. Despite a subsequent decision in which the Court suggested a dozen factors to be considered in determining whether a crime was "service-connected," there are still many doubtful cases, particularly those involving off-post use or possession of drugs. The Court of Military Appeals and the inferior federal courts have made two exceptions to the requirement of service connection. Considering that *O'Callahan* was based on the loss of TRIAL BY JURY, they have permitted courts-martial to try offenses regardless of service connection committed outside the jurisdiction of American civilian courts or punishable by not more than six months' confinement, so that the accused would not in any case be constitutionally entitled to a jury.

Until after World War II the BILL OF RIGHTS had no application to courts-martial: if jurisdiction existed over person, offense, and sentence, federal courts would not consider allegations of even the grossest unfairness. Chief Justice SALMON P. CHASE, concurring in EX PARTE MILLIGAN (1866), declared that "the power of Congress, in the government of the land and naval forces, is not affected by the fifth or any other amendment." Historical evidence concerning the framers of the Bill of Rights justifies Chase's dictum: President JAMES MADISON, for example, approved the conviction of General William Hull in 1814, although the court-martial had denied Hull's request for the assistance of counsel.

The Supreme Court has never set aside a court-martial conviction for denial of constitutional DUE PROCESS, but it would almost certainly do so if confronted with a clear case of such denial. No such case has yet reached the Court because the protections of the Bill of Rights (except trial by jury and the right to BAIL) are embodied in the UCMJ. A coerced confession, for example, would violate not only the Fifth Amendment but also the UCMJ and thus constitute a denial of "military due process." In addition the Court of Military Appeals has consistently construed the UCMJ in such a way as to avoid conflict with the Supreme Court's construction of the Constitution. Military exigency may, however, justify some relaxation of civilian standards. Military rulings on constitutional issues must conform to Supreme Court standards, absent a showing that special military conditions require a different rule. Thus PARKER V. LEVY (1974) held that the "general articles" which prohibit "conduct unbecoming an officer and a gentleman" and "disorders and neglects to the prejudice of good order and discipline" are not unconstitutionally vague or overbroad.

JOSEPH W. BISHOP, JR.
(1986)

(SEE ALSO: *Armed Forces.*)

Bibliography

BISHOP, JOSEPH W., JR. 1974 *Justice under Fire: A Study of Military Law.* Chaps. 2, 3, 4. New York: Charterhouse.

WIENER, FREDERICK BERNAYS 1958 Courts-Martial and the Bill of Rights: The Original Practice. *Harvard Law Review* 72:1–49, 266–304.

## MILITARY RECONSTRUCTION ACTS
15 Stat. 2 (1867)
15 Stat. 14 (1867)

The first Military Reconstruction Act established procedures for the resumption of self-government and normalized constitutional status for ten states of the former Confederacy. Though it preserved extant governments intact for the time being, it authorized military peacekeeping and required adoption of new state constitutions. It also mandated black suffrage.

By February 1867, congressional Republicans realized that the FOURTEENTH AMENDMENT, even if ratified, constituted an insufficient program of RECONSTRUCTION. They were unwilling to accept the forfeited-rights theory of southern state status propounded by Rep. THADDEUS STEVENS, or to sanction indefinite military governance. However, the intransigence of President ANDREW JOHNSON and the Machiavellian politics of congressional Democrats, who both demanded immediate and unconditional restoration of white rule in the South, convinced the Republicans that federal supervision of the process of recreating state governments was essential if the freedmen and Republican war objectives were not to be abandoned.

The first Military Reconstruction Act divided the ex-Confederate states (Tennessee excepted) into five military districts each under the command of a regular brigadier general, who was charged with peacekeeping responsibilities. He was empowered to use either ordinary civilian officials or military commissions to accomplish this objective. Though the commissions were authorized to overrule civilian authorities if necessary, the act did not replace the state governments previously created under presidential authority. Rather, under the first and subsequent Military Reconstruction Acts (1867–1868), the commanding general was required to call for the election of delegates to CONSTITUTIONAL CONVENTIONS. In these elections, blacks were entitled to vote, and whites disfranchised by the Fourteenth Amendment were excluded. The new state constitution had to enfranchise blacks. When it was ratified by a majority of eligible voters, elections were to be held under it for new state governmental officials. Only then would the existing governments cede authority. The new legislature had to ratify the Fourteenth Amendment and present its state constitution to Congress. Congress would then complete the process by admitting the state's congressional delegation to their seats.

President Johnson vetoed the first measure, asserting several grounds for its unconstitutionality. First, it imposed an "absolute domination of military rulers" whose "mere will is to take the place of all law," subjecting the southern people to "abject slavery." Second, Congress lacked power to impose governments on the southern states, particularly because those states remained part of the Union. Third, the act would deny individual liberties, including the requirements of TRIAL BY JURY, warrants, DUE PROCESS, and HABEAS CORPUS. Johnson also opposed the measure because the requirements of black suffrage would "Africanize the southern part of our territory," and, finally, because the anomalous status of the ten states which had been denied representation in Congress since 1865 cast a cloud over legislation affecting them. Congress immediately overrode the veto.

Under the procedure specified by the Military Reconstruction Acts, all southern states were reorganized and readmitted between 1868 and 1870. The military presence remained for nearly another decade, however, because of turbulence caused by antiblack and anti-Unionist terrorism. The Republican governments established under congressional Reconstruction were overthrown by "Conservative" or "Redeemer" white-supremacist Democratic regimes by 1877, when the process of Reconstruction was effectively terminated.

WILLIAM M. WIECEK
(1986)

(SEE ALSO: *Constitutional History, 1865–1877.*)

## MILITIAS, MODERN

The mid-1990s have included the presence in American political life of paramilitary "militia movements" organized, by their lights, to serve as the first line of defense against the loss of basic constitutional freedoms. Their opponents altogether plausibly describe them as ultrachauvinistic, often racist, radical movements based largely in rural America and threatened by the modern bureaucratic state, general social developments within American society, and the implications of an increasingly globalized political economy. From this perspective, they are far more likely to be threats to, rather than defenders of, constitutional liberty.

What entitles these modern militias to a place in a book on the U.S. Constitution is their claim to be the entities protected by the very words of the SECOND AMENDMENT: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." That is, members of organized militias describe themselves as precisely those persons explicitly protected against federal (and, through the FOURTEENTH AMENDMENT, state) regulation of the private possession of firearms.

Their opponents instead argue that the amendment's

reference to "a well regulated Militia" limits any constitutional protection to an official militia organized and regulated by states themselves. The modern militia movement, on the other hand, has no ties with any formal government and therefore has no special constitutional protection.

An 1886 decision by the Supreme Court, *Presser v. Illinois*, offers some support for this view, inasmuch as it upheld an Illinois law prohibiting "any body of men whatever, other than the regular organized volunteer militia of the State, and the troops of the United States . . . to drill or parade with arms in any city, or town, of this State, without the license of the Governor thereof." The Court, however, also rejected the applicability of the Second Amendment to the states at all—this was well before the Court began "incorporating" the BILL OF RIGHTS against the states—so it is not dispositive as to the meaning of the amendment, though it would occasion great surprise if the modern Court were in fact to deviate from the *Presser* DOCTRINE. (A number of western states have adopted similar prohibitions of military training.)

Still, defenders of the legal rights of the modern militia movement would undoubtedly note that "militia," as an eighteenth-century term of art, referred to a group considerably broader than a discrete body of citizens organized into a state-regulated body. No less a worthy than George Mason, one of the primary advocates of a Bill of Rights—indeed, he refused to sign the Constitution because it lacked one—wrote "Who are the Militia? They consist now of the whole people." He was not alone in this view, and many discussants at the time distinguished the "general militia" from a "select militia." Given that one of the reasons to protect the right to bear arms was a profound fear of a corrupt state, they would scarcely have been happy with a definition of militia that protected only those deemed worthy by the state itself.

These arguments are scarcely frivolous, as an intellectual matter, but it is impossible, as a practical matter, to believe that mainstream legal analysts able to gain nomination and confirmation to the federal courts will be receptive to them. Instead, one can fairly confidently predict that the judiciary will be no more willing to interpret the Second Amendment in ways that would protect members of the militia movement than were judges to interpret the considerably clearer words of the FIRST AMENDMENT in the 1950s to protect members of the Communist Party. Those viewed by the mass public as genuine security threats will rarely be protected by the judiciary, regardless of constitutional language.

SANFORD LEVINSON
(2000)

(SEE ALSO: *Incorporation Doctrine; Radical Constitutional Interpretation; Right of Revolution.*)

Bibliography

KONIAK, SUSAN 1996 When Law Risks Madness. *Cardozo Studies in Law & Literature* 8:65–107.

MALCOLM, JOYCE 1994 *To Keep and Bear Arms: The Origins of an Anglo American Right.* Cambridge, Mass.: Harvard University Press.

WILLIAMS, DAVID C. 1996 The Militia Movement and the Second Amendment Revolution: Conjuring with the People. *Cornell Law Review* 81:879–952.

## *MILKOVICH v. LORAIN JOURNAL CO.*
497 U.S. 1 (1990)

This is a major free press case that has been widely misunderstood, especially by the news media. The *Los Angeles Times*, for example, called it a "huge setback" for freedom of the press. Under the heading, "Supreme Court Strips Away 'Opinion' as Libel Defense," the *Times* announced that the Court had unanimously demolished "a widely used media defense against libel suits, ruling that a writer or speaker may be sued for statements that express opinion." The *Times* censured the Court for having acted "with astonishing recklessness . . . when it overturned nearly two decades of precedent and ruled that the First Amendment does not automatically protect expressions of opinion from being found libelous." A dramatic increase in LIBEL litigation was foreseen as a result of the Court's chilling just the sort of "serious speech the First Amendment was intended to protect." Every critic, editorialist, cartoonist, and commentator faced trial, the *Times* predicted.

In fact, the Court did not diminish the First Amendment's protection of opinion and overruled no precedents, let alone two decades of them. It did hold, however, that opinion requires no new constitutional protection because the conventional safeguards of freedom of expression adequately protect opinion in libel cases. It held, too, that if an expression of opinion implied an assertion of objective fact on a matter of public concern, no liability for defamation would exist unless the party bringing suit proved that the publication was false and published with malice in the case of a public official or a PUBLIC FIGURE, or false and published with "some level of fault" in the case of a private individual involved in a matter of public concern.

In this case, the publication accused a private individual of perjuring himself in a judicial proceeding on a matter of public concern, but the accusation was couched in terms of opinion, for example, "anyone who attended the [wrestling] meet . . . knows in his heart that [Coach] Milkovich . . . lied at the hearing." Chief Justice WILLIAM H. REHNQUIST, for the Court, observed that the writer should

not escape liability merely because he used words such as "I think," because he might do as much damage to an individual's reputation as he would by saying flatly that he had lied.

The publishing company sought a special rule distinguishing "fact" from "opinion" and exempting opinion from the law of libel. This is what the Court refused to do because some opinions connoted facts for which their authors ought to be responsible. The Court made clear, however, that "a statement of opinion relating to a matter of public concern which does not contain a provably false factual connotation will receive full constitutional protection."

Justices WILLIAM J. BRENNAN and THURGOOD MARSHALL dissented, but only on the question as to whether the publisher in this case should be held accountable for libel. Significantly, Brennan, who was the Court's foremost exponent of FREEDOM OF THE PRESS in libel cases, declared that Rehnquist addressed the issue of First Amendment protection of opinion "cogently and almost entirely correctly. I agree with the Court that . . . only defamatory statements that are capable of being proved false are subject to liability under state libel law." Thus, the Court did not diminish constitutional protections of opinion and held, properly, that existing First Amendment doctrines adequately served to insulate from libel prosecutions the expression of sheer opinion in matters of public interest.

LEONARD W. LEVY
(1992)

## MILL AND FREEDOM OF EXPRESSION

Chapter Two of John Stuart Mill's *On Liberty,* first published in 1859, remains to this day the classic exposition of the liberal argument for FREEDOM OF SPEECH. Mill wrote the essay with the active collaboration of his wife Harriet Taylor, who died during the interval between its original composition and publication. Although the argument purports to rest on a utilitarian claim regarding the net consequences of unregulated expression, his treatment of the subject can be read instead as grounded in the character ideal of the inquisitive, open-minded person, an ideal that might justify a policy of toleration independent of any empirical calculation of collective consequences.

Mill wrote *On Liberty* at what he perceived to be the dawn of the age of mass society, in the wake of the Industrial Revolution and the most significant broadening of the franchise in English history. In the essay he identifies the greatest threat to liberty to be not the transgressions of tyrants or corrupt factions but rather laws and informal social sanctions supported by large popular majorities. He considered the spirit of his age to be inhospitable to independent thought and unconventional experiments in living. He lamented that mid-Victorian England had become a nation of timid, complacent, constricted persons, conformist in outlook and suspicious of innovators. He urged a robust principle of free expression, together with a more general principle of liberty, as an antidote.

Mill's treatment of the liberty of thought and discussion considers the reasons for tolerating speech under three different assumptions regarding its truth. First, an unconventional idea, at risk of suppression by means of legal or social sanctions, might be true. Second, it might be wholly false. Third, it might be partly true and partly false.

If an idea is true, there is an obvious case for letting it circulate. However, why should would-be regulators be guided by this possibility in the case of heretical ideas they know with great confidence to be false? Mill responds that such confidence is frequently misplaced. To act on it is to assume one's infallibility. Mill's point is more empirical than logical. Proponents of speech regulation usually concede the logical possibility that ideas they hold to be true could be false, and vice versa. But they seldom, in particular instances, give credence to that possibility for the purpose of guiding their actions. Mill finds this troubling because he is impressed by how regularly the conventional wisdom of one time and place is seen by later ages and different peoples to be the sheerest folly. In *On Liberty* he catalogues many such dramatic alterations of understanding, including the modern assessment in retrospect of the executions of Socrates and Christ, and of the persecution of the early Christians by the Emperor Marcus Aurelius, one of the wisest, most learned men of his day.

In the course of urging a greater appreciation of the possibility that heretical ideas might actually be true, Mill addresses the argument that truth has inherent power to prevail over falsehood. If so, the costs of suppressing nascent true ideas would be only temporary, and the fact that a widely held belief has gained adherents over time would be strong evidence of its validity. Mill denies that truth has any such inherent power to prevail: "the dictum that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes." The only advantage truth possesses, he asserts, is that a suppressed true idea may be rediscovered at a later time when conditions for its reception are more favorable.

A final argument for suppressing heretical ideas even if they might be true is that the received wisdom may be socially useful independent of its truth value. Mill is scornful of this notion. He asserts that an idea's social utility depends to a large extent, even if not exclusively, on its truth. We cannot assess the usefulness of an idea if we cannot consider reasons why it may not be true.

Mill does not deny that the received wisdom could in

fact be true. Indeed, among the strongest arguments in *On Liberty* are those that proceed from the assumption that the ideas society wishes to suppress are wholly false. Mill concedes that a society's confidence in its most cherished tenets could strengthen the capacity to act on those beliefs. He maintains, however, that such confidence flows not from the suppression of false ideas but from the willingness to consider all points of view, and from the consequent perception that the best that could be said in opposition to the received wisdom has been articulated and found wanting.

Not only confidence but lively understanding ensues from the experience of fending off the challenges of dissenters, Mill claims. He decries "the deep slumber of a decided opinion" and asserts that in the absence of controversy "teachers and learners go to sleep at their post." He notes that Cicero claimed to study the arguments of his opponents with much greater care and imagination than he devoted to learning his own side of a case. Mill recommends that practice for those engaged in truth seeking as well as forensics. He goes so far as to say that we ought to thank someone who has produced a skillful challenge to our beliefs, for such a person has done for us that which we otherwise should feel the need to do on our own.

Most ideas at risk of legal or social suppression, Mill observes, are neither wholly true nor wholly false but rather contain a mixture of truth and falsity. It is important that such ideas be allowed to circulate because they contribute to the process of adaptation. Wisdom is not so much a matter of demonstrative proof or refutation but of finding the right balance between "the standing antagonisms of practical life"—between, for example, stability and reform, cooperation and competition, luxury and abstinence, or liberty and discipline. Progress ordinarily entails the replacement of one partial truth with another that is somewhat better adapted to its time.

Although his critics sometimes accuse him of intellectual elitism, Mill himself considered his principle of liberty to be for the masses. It is not, he says, "to form great thinkers that freedom of thinking is required. On the contrary, it is as much, and even more indispensable, to enable average human beings to attain the mental stature which they are capable of." Progress is most often achieved, he maintains, when "the dread of heterodox speculation is for a time suspended" and "the yoke of authority" is broken. Only then, will "the mind of a people" be stirred up from its foundations so as to raise "even persons of the most ordinary intellect to something of the dignity of thinking beings."

Mill did not advocate an unqualified freedom of expression. "[E]ven opinions lose their immunity," he says, "when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act." He offered an example to illustrate the limits of his principle: "An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard."

Mill's discussion of the liberty of thought and expression constitutes just one part of his comprehensive treatment of the subject of liberty. The full essay *On Liberty*, he states in the introduction, is designed to assert "one very simple principle." He describes that principle as follows: "The only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others." Given the centrality of this harm principle to Mill's overall project, it is perhaps surprising that his discussion of free speech does not explore the various ways that expression and communication might cause harm. This omission has led some observers to conclude that his argument for free speech has more to do with a claim about the irreducible attributes of personhood or the essential conditions for human flourishing than with any sort of balanced calculation of consequences. Although Mill disclaims any reliance on the notion of NATURAL RIGHT, his emphasis on individual character and on "the liberty of conscience, in the most comprehensive sense" suggests that he wished to protect free speech not because he thought it does no or little harm but because he considered it fundamental to life itself.

VINCENT BLASI
(2000)

Bibliography

BERLIN, ISAIAH 1969 John Stuart Mill and the Ends of Life. In *Four Essays on Liberty.* London: Oxford University Press.

MCCLOSKEY, H. J. 1970 Liberty of Expression: Its Grounds and Limits. *Inquiry* 13:219–237.

STEPHEN, JAMES FITZJAMES 1873 *Liberty, Equality, Fraternity.* New York: Holt & Williams.

WALDRON, JEREMY 1992 Mill and the Value of Moral Distress. In *Liberal Rights.* Cambridge, Eng.: Cambridge University Press.

## MILLER, SAMUEL F.
(1816–1890)

Samuel Freeman Miller was a towing figure on the Supreme Court from his appointment by ABRAHAM LINCOLN in 1862 until his death in 1890. He sat with four Chief Justices, participated in more than 5,000 decisions of the Court, and was its spokesman in ninety-five cases involving construction of the Constitution. No previous member of the Court had written as many constitutional opinions.

Miller's contemporaries regarded him as one of the half-dozen great Justices in American history, a remarkable achievement for a self-educated lawyer who had never held public office, either in his native Kentucky or in adopted Iowa, prior to his appointment to the Court. Justice HORACE GRAY claimed that if his legal training had been less "unsystematic and deficient," Miller would have been "second only to [JOHN] MARSHALL."

Miller looked and acted the part of a great magistrate. He was tall and massive; he had a warm, unaffected disposition and was said to be "as ready to talk to a hod-carrier as to a cardinal." His instinct for what he often called "the main points, the controlling questions," his impatience with antique learning and philosophical abstraction, and his unrivaled reputation for industry, integrity, and independence all enhanced his stature. Candor and intellectual self-reliance pervaded his opinions, and he often stated quite bluntly his assumption that law and practical good sense were of one piece: "This is the honest and fair view of the subject, and we think it conflicts with no rule of law" (*Pettigrew v. United States*, 1878); "if this is not DUE PROCESS OF LAW it ought to be" (*Davidson v. New Orleans*, 1878); "this is just and sound policy" (*Iron Silver Mining Co. v. Campbell*, 1890).

Statecraft rather than formal jurisprudence was Miller's forte, and he emerged as the Court's balance-wheel soon after coming to the bench. His career ultimately spanned three tumultuous decades in which the Justices constantly quarreled, often rancorously, about the scope of federal and state powers and the Court's role in protecting private rights against the alleged usurpations of both. Scores of cases involved highly charged political issues. Yet Miller always remained detached. He never permitted differences of opinion to affect personal relations with his brethren; he met counsels of heat and passion with chilly distaste. Miller's capacity for detachment was, in part, a matter of personality. But it was also a function of his modest view of the Court's role in the American system of government. He resisted doctrinal formulations that curtailed the discretion of other lawmakers, spoke self-consciously about "my conservative habit of deciding no more than is necessary in any case," and often succeeded in accommodating warring factions of more doctrinaire colleagues by narrowing the issue before the Court. As early as 1870, Chief Justice SALMON P. CHASE said he was "beyond question, the dominant personality upon the bench."

The first principles of Miller's constitutional understanding were derived from HENRY CLAY and the Whig party. Although he abandoned the Whigs for the Republican party in 1854, Miller never ceased to regard Clay as the quintessential American statesman or to reaffirm the Kentucky sage's belief in a BROAD CONSTRUCTION of national powers, the primacy of the legislative department in shaping public policy, and the duty of government at all levels to encourage material growth. Miller's adherence to the first two principles was especially apparent in his work on the CHASE COURT. In EX PARTE MILLIGAN (1866), he joined the minority of four, concurring, who suggested that Congress might constitutionally have established martial rule in Indiana. And in *Tyler v. Defrees* (1870), a confiscation case, Miller flatly rejected the doctrine "long inculcated, that the Federal Government, however strong in a conflict with a foreign foe, lies manacled by the Constitution and helpless at the feet of a domestic enemy." Early in 1868, when the movement to impeach President ANDREW JOHNSON gathered momentum and the Court initially established jurisdiction in EX PARTE MCCARDLE, Miller conceded privately that "in the threatened collision between the Legislative branch of the government and the Executive and judicial branches I see consequences from which the cause of free government may never recover in my day." He added, however, that "the worst feature I now see is the passion which governs the hour in all parties and persons who have a controlling influence." In contrast, Miller not only counseled caution and delay while Congress proceeded to divest the Court of jurisdiction over *McCardle* but also dissented in TEXAS V. WHITE (1869). He regarded the status of states still undergoing military reconstruction as a POLITICAL QUESTION which only Congress could decide. *Hepburn v. Griswold* (1870), the first of the LEGAL TENDER CASES, evoked his most celebrated defense of congressional authority. There Miller sharply criticized the majority's reliance on the "spirit" of the Constitution, which, he insisted, "substitutes . . . an undefined code of ethics for the Constitution, and a court of justice for the National Legislature. . . . Where there is a choice of means, the selection is for Congress, not the Court."

Miller was not always such a positivist in rejecting considerations arising from the spirit of the Constitution. In the SLAUGHTERHOUSE CASES (1873), which came up during fierce public debate over the Enforcement and Klu Klux Klan Acts, Miller intervened decisively to preserve "the main features" of the federal system. Although the powers of Congress were not directly at issue, his opinion for the Court undercut every FOURTEENTH AMENDMENT theory that had been advanced in other cases to justify federal jurisdiction over perpetrators of racially motivated private violence. The Fourteenth Amendment's PRIVILEGES AND IMMUNITIES clause, Miller explained for a majority of five, protected only the handful of rights that necessarily grew out of "the relationship between the citizen and the national government." The really fundamental privileges and immunities of CITIZENSHIP, including the rights to protection by the government, to own property, and to contract, still remained what they had been since 1789—rights of state citizenship. To bring all CIVIL RIGHTS under the um-

brella of national citizenship, Miller concluded, would be "so great a departure from the structure and spirit of our institutions" and would so "fetter and degrade the State governments by subjecting them to the control of Congress" that it should not be permitted "in the absence of language which expresses such purpose too clearly to admit of doubt."

Over the succeeding seventeen years, Miller's voting record in civil rights cases remained consistent with the views he expounded in 1873. He joined the majority in UNITED STATES V. CRUIKSHANK (1876) and the CIVIL RIGHTS CASES (1883), both of which severely reduced the range of "appropriate legislation" Congress was authorized to enact; he voted to invalidate the Ku Klux Klan Act altogether in UNITED STATES V. HARRIS (1883). In EX PARTE YARBROUGH (1884), an important Enforcement Act case, Miller consolidated his formal approach to protecting civil rights in a federal system. Speaking for a unanimous Court, he sustained federal jurisdiction over persons who violently interfered with the exercise of VOTING RIGHTS in a federal election. Congress's authority to reach private action in *Yarbrough*, he explained, flowed not from the FIFTEENTH AMENDMENT but from both its power to regulate the time, place, and manner of federal elections and its duty "to provide, in an election held under its authority, for security of life and limbs to the voter." By emphasizing the national ramifications of private action in *Yarbrough*, Miller managed to distinguish *Cruikshank* in much the same way that he had distinguished between rights of national citizenship and rights of state citizenship in the *Slaughterhouse Cases*. Both formulations were designed to set principled limits to the exercise of Congress's affirmative powers to protect civil rights.

The impulse to preserve "the main features" of the federal system also shaped Miller's work in cases involving governmental interventions in economic life. He was certainly not immune to the laissez-faire ethos of the late nineteenth century, and his opinion for the Court in LOAN ASSOCIATION V. TOPEKA (1875) has long been regarded as one of the most significant expressions of natural law constitutionalism in American history and as an important building block in the growth of SUBSTANTIVE DUE PROCESS. There he held that a contract for $100,000 in municipal bonds, issued to lure a manufacturing firm to Topeka, was unenforceable. The people's tax dollars, he proclaimed, could not "be used for purposes of private interest instead of public use." Yet Miller resisted the urge, spearheaded by Justice STEPHEN J. FIELD, to link the "public use" principle with the Fourteenth Amendment and the concept of "general jurisprudence" in order to limit the exercise of all the states' inherent powers—police, taxation, and eminent domain.

The sweeping doctrines advanced by Field and other doctrinaire advocates of laissez-faire conflicted with three working principles of Miller's constitutional understanding, each of which militated against dramatic enlargement of federal judicial power at the expense of the states. The first was his Whiggish predisposition to allow state governments ample room to channel economic activity and develop resources for the general good. A broad construction of the Fourteenth Amendment, he asserted in the *Slaughterhouse Cases*, "would constitute this Court a perpetual censor upon all legislation of the States" and generate state inaction, even in the face of clear public interests, for fear of endless litigation. Miller also believed that it was not the function of federal courts to sit in judgment on state courts expounding state law. He repeatedly invoked this second working principle in the long line of cases that began with GELPCKE V. DUBUQUE (1864). There the Court insisted that municipal bonds issued to subsidize railroad construction were unquestionably for a "public use" despite recent state court decisions to the contrary. The *Gelpcke* majority defended federal judicial intervention on the ground that municipal bonds were a species of commercial paper and therefore the question of bondholder rights "belong[ed] to the domain of general jurisprudence." Miller dissented. In his view, extension of the principle of SWIFT V. TYSON (1842) to the construction of state statute law was an unconscionable act of federal usurpation, and he accurately predicted that it would spawn a generation of conflict between federal courts and recalcitrant state and local officials.

The apparent inconsistency between Miller's opinion in *Loan Association v. Topeka* and his stance in the *Slaughterhouse Cases* and in the *Gelpcke* line of municipal-bond cases is readily explained. All of them did raise similar conceptual issues; each hinged, in part, on the application of the "public use" principle to governmental aid of private enterprise in the form of either monopoly grants or cash subsidies. But for Miller, if not for his colleagues, the controlling factor in *Loan Association v. Topeka* was that it had been tried under the DIVERSITY JURISDICTION of a federal court, and pertinent state law had not yet been framed on the subject. As a result, Miller later explained in *Davidson v. New Orleans* (1878), the Court had been free to invoke "principles of general constitutional law" which the Kansas court was equally free to adopt or reject in subsequent cases involving similar circumstances. The concepts of substantive due process and "general jurisprudence," on the other hand, failed to maintain the ample autonomy for state governments which Miller regarded as an indispensable component of the American polity.

Miller ultimately failed to stave off the luxuriation of substantive due process, just as he had failed to curb the majority's impulse to invoke *Swift* in the municipal-bond cases. "It is in vain to contend with judges who have been

at the bar the advocates for forty years of rail road companies, and all the forms of associated capital," he told his brother-in-law late in 1875. "I am losing interest in these matters. I will do my duty but will fight no more." Yet Miller's views did make a difference, particularly in the conference room. What remained influential was Miller's third working principle of constitutional interpretation. He recommended resistance to Field's syllogistic reasoning and quest for immutable principles; he suggested, instead, that once the Court had determined to protect private rights against state interference, it was best to decide cases on the narrowest possible grounds, to employ open-ended doctrinal formulas amenable to subsequent alteration, and to elaborate the meaning of due process through what he called a "gradual process of inclusion and exclusion." Thus Miller described local aid of manufactures as "robbery" in *Loan Association v. Topeka*, but he added that "it may not be easy to draw the line in all cases so as to decide what is a public use in this sense and what is not." He also endorsed the notoriously vague doctrine of "business AFFECTED WITH A PUBLIC INTEREST" in *Munn v. Illinois* (1877). And in CHICAGO, MILWAUKEE & ST. PAUL RY. V. MINNESOTA, (1890), when the Court finally invalidated a state law on due process grounds, Miller concurred "with some hesitation" but filed an opinion cautioning his colleagues against the adoption of a rigid formula, such as "fair value," to determine whether rate-making authorities had acted "arbitrarily and without regard to justice and right."

Miller's immediate successors disregarded the advice, but during the 1930s interest revived in his conception of the judicial function, particularly among FELIX FRANKFURTER's circle at the Harvard Law School. Frankfurter, who called Miller "the most powerful member of his Court," insisted in 1938 that judging was not at all like architecture. Rather than framing doctrinal structures with clean lines and the appearance of permanence, Frankfurter explained, "the Justices are cartographers who give temporary location but do not ultimately define the evershifting boundaries between state and national power, between freedom and authority." Miller could not have described his own views with greater clarity or force.

CHARLES W. MCCURDY
(1986)

Bibliography

FAIRMAN, CHARLES 1938 *Mr. Justice Miller and the Supreme Court, 1862–1890.* Cambridge, Mass.: Harvard University Press.

FRANKFURTER, FELIX (1938) 1961 *Mr. Justice Holmes and the Supreme Court.* Cambridge, Mass.: Harvard University Press.

GILLETTE, WILLIAM 1969 Samuel Miller. Pages 1011–1024 in Leon Friedman and Fred Israel, eds., *The Justices of the Supreme Court, 1789–1965.* New York: Chelsea House.

## *MILLER v. CALIFORNIA*
413 U.S. 15 (1973)

## *PARIS ADULT THEATRE I v. SLATON*
413 U.S. 49 (1973)

For the first time since ROTH V. UNITED STATES (1957), a Supreme Court majority agreed on a definition of OBSCENITY. The Court had adopted the practice of summarily reversing obscenity convictions when at least five Justices, even if not agreeing on the appropriate test, found the material protected. The states were without real guidelines; and the requirements of JACOBELLIS V. OHIO (1964) that each Justice review the material at issue had transformed the Court into an ultimate board of censorship review.

To escape from this "intractable" problem, the *Miller Court* reexamined obscenity standards. Chief Justice WARREN E. BURGER's majority opinion, reaffirming *Roth*, articulated specific safeguards to ensure that state obscenity regulations did not encroach upon protected speech. The Court announced that a work could constitutionally be held to be obscene when an affirmative answer was appropriate for each of three questions:

> (a) whether "the average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interes. . . . ;
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Three aspects of the *Miller* formula are noteworthy. First, the work need not be measured against a single national standard, but may be judged by state community standards. Second, state obscenity regulations must be confined to works that depict or describe sexual conduct. Moreover, the states must specifically define the nature of that sexual conduct to provide due NOTICE to potential offenders. Third, the Court rejected the "utterly without redeeming social value" standard of MEMOIRS V. MASSACHUSETTS (1966). To merit FIRST AMENDMENT protection, the work, viewed as a whole, must have serious social value. A token political or social comment will not redeem an otherwise obscene work; nor will a brief erotic passage condemn a serious work.

In a COMPANION CASE, *Paris Adult Theater I*, the Court held that regulations concerning the public exhibition of obscenity, even in "adult" theaters excluding minors, were permissible if the *Miller* standards were met. The prohibition on privacy grounds against prosecuting possession of obscene material in one's home, recognized in STANLEY

V. GEORGIA (1969), does not limit the state's power to regulate commerce in obscenity, even among consenting adults.

Justice WILLIAM J. BRENNAN, joined by Justices POTTER J. STEWART and THURGOOD MARSHALL, dissented in both cases. Abandoning the views he expressed in *Roth* and *Memoirs*, Brennan concluded that the impossibility of definition rendered the outright suppression of obscenity irreconcilable with the First Amendment and the FOURTEENTH AMENDMENT. The Court's inability to distinguish protected speech from unprotected speech created intolerable fair notice problems and chilled protected speech. Furthermore, "institutional stress" had resulted from the necessary case-by-case Supreme Court review. Instead of attempting to define obscenity, Brennan would balance the state regulatory interest against the law's potential danger to free expression. He recognized the protection of juveniles or unconsenting adults as a state interest justifying the suppression of obscenity. Justice WILLIAM O. DOUGLAS, separately dissenting, also denounced the vague guidelines that sent persons to jail for violating standards they could not understand, construe, or apply.

The Court's attempt to articulate specific obscenity standards was successful to the extent it reduced the number of cases on the Supreme Court docket. Nevertheless, as Justice Brennan noted, and the history of obscenity decisions confirms, any obscenity definition is inherently vague. The Court thus remains the ultimate board of censorship review.

KIM MCLANE WARDLAW
(1986)

Bibliography

LOCKHARD, WILLIAM B. 1975 Escape from the Chill of Uncertainty. *Georgia Law Review* 9:533–587.

## *MILLER v. JOHNSON*
515 U.S. 900 (1995)

In *Miller v. Johnson*, the Supreme Court overturned Georgia's Eleventh Congressional District, which was nowhere near as ill-compact as North Carolina's Twelth Congressional District challenged in SHAW V. RENO (1993) but whose creation could be laid almost entirely to insistence by the U.S. Department of Justice that Georgia create two additional black-majority congressional districts. Writing for the majority, Justice ANTHONY M. KENNEDY asserted that the Department of Justice had made improper use of its preclearance authority under section 5 of the VOTING RIGHTS ACT OF 1965 (as amended) in pursuit of a policy of maximizing the number of black-majority districts, and that racial considerations were predominant in the creation of the Eleventh District. *Miller* demonstrated that even districts that were not especially ill-compact or in blatant violation of traditional districting criteria could be struck down under the *Shaw* standard if the Court majority were convinced that existing irregularities could only be explained in racial terms.

*Miller* also showed the importance of the views of Justice SANDRA DAY O'CONNOR as a pivotal vote. O'Connor, in addition to joining the MAJORITY OPINION, wrote a two-paragraph CONCURRING OPINION in which she sought to reassure critics of *Shaw* that the Court was not going throw out all use of race as a districting criterion. In particular, she asserted that the *Shaw* test was "a demanding one," and that to invoke STRICT SCRUTINY, "a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices." However, what this latter phrase means in practice seems very much in the eyes of the beholder. The DISSENTING OPINION, written by Justice RUTH BADER GINSBURG (and joined in whole or part by three other Justices), in effect denied that the district violated this test.

BERNARD GROFMAN
(2000)

(SEE ALSO: *Electoral Districting; Voting Rights.*)

Bibliography

GROFMAN, BERNARD, ed. 1998 *Race and Redistricting in the 1990s.* New York: Agathon Press.

## *MILLETT v. PEOPLE OF ILLINOIS*
117 Illinois 294 (1886)

This was the first case in which a court held a regulatory statute unconstitutional on the ground that it violated the doctrine of FREEDOM OF CONTRACT. Illinois required coal-mine owners to install scales for the weighing of coal in order to determine the wages of miners. Millett, an owner, contracted with his miners, in violation of the statute, to pay by the boxload rather than by weight. The state supreme court, overturning his conviction, unanimously declared that the statute deprived him of DUE PROCESS substantively construed. Miners, the court said, could contract as they pleased in regard to the value of their labor, and owners had the same freedom of contract. The court summarily dismissed the contention that the regulation was a valid exercise of the POLICE POWER on the ground that the legislature had not protected the miners' safety or the property of others. A few months later the Pennsylvania high court, in *Godcharles v. Wigeman* (1886),

held unconstitutional a state act that prohibited owners of mines or factories from paying workers in kind rather than in money wages. Such cases were forerunners of LOCHNER V. NEW YORK (1905) and its progeny.

LEONARD W. LEVY
(1986)

## *MILLIGAN, EX PARTE*
4 Wallace 2 (1866)

In 1861, Chief Justice ROGER B. TANEY contrived a possibility of executive-judicial, civil-military clashes (*Ex parte Merryman*); in 1863 the Supreme Court averted similar confrontations (EX PARTE VALLANDIGHAM; PRIZE CASES). But in 1866–1867, the CHASE COURT, in the TEST OATH and *Ex parte Milligan* decisions, overcame its restraint.

In 1864, an Army court sentenced Lambden (spelling various) Milligan, a militantly antiwar, Negrophobe Indianan, to death for overtly disloyal activities. President ANDREW JOHNSON commuted the sentence to life imprisonment. Milligan's lawyer, employing the 1863 HABEAS CORPUS ACT, in 1865 appealed to the federal circuit court in Indiana for release. The judges, including Justice DAVID DAVIS, divided on whether a civil court had JURISDICTION over a military tribunal and on the legitimacy of military trials of civilians. This division let the petition go to the Supreme Court. There, in 1866, Attorney General HENRY STANBERY denied that any civil court had jurisdiction; special counsel BENJAMIN F. BUTLER insisted on the nation's right to use military justice in critical areas.

Milligan's lawyers included JAMES A. GARFIELD, JEREMIAH BLACK, and DAVID DUDLEY FIELD. Milligan, they argued, if indictable, was triable in civil courts for TREASON. Alternatively, they insisted that the Army court had failed to obey the 1863 Habeas Corpus Act's requirement to report on civilian prisoners. Further, they asserted that the Constitution's barriers against the use of military power in a state not in rebellion were fixed and unmodifiable, though Congress, they admitted, had authority to use military justice in the South.

All the Justices concurred about the military court's dereliction in not reporting Milligan's arrest. For the Court's bare majority, Justice Davis held that neither President nor Congress could establish military courts to try civilians in noninvaded areas, and, implicitly, that the final decision as to what areas were critical was the Court's. Martial law must never exist where civil courts operated, he stressed, although both had co-existed since the war started. SALMON P. CHASE, speaking also for Justices Samuel Miller, Noah Swayne, and JAMES WAYNE, disagreed. Congress could extend military authority in Indiana under the WAR POWERS without lessening BILL OF RIGHTS protections, Chase asserted. The option was Congress's, not the Court's.

The majority view in *Milligan* was at once seized upon by supporters of President Johnson, the white South, and the Democratic party, though even Justice Davis stressed that he referred not at all to the South. Until military reconstruction clarified matters, the duties of the Army, acting under President Johnson's orders and the FREEDMEN'S BUREAU statute, were complicated greatly by misuses of the *Milligan* decision in the southern state courts, complications increased by the Test Oath decisions. Taken together, the *Milligan* and the Test Oath decisions greatly limited the capacity of both the nation and the states to provide more decent, color-blind justice in either civil or military courts (including those of the Freedmen's Bureau), and to exclude from leadership in politics and the professions persons who had sparked SECESSION and war.

In subsequent decades, legal writers THOMAS COOLEY and ZECHARIAH CHAFEE reconstructed *Milligan* into a basic defense of individual liberty and of civilian primacy over the military. Both men were flaying dragons perceived by Victorian Social Darwinists and by critics of WORLD WAR I witch-hunts. Milligan was never a merely theoretical threat. Neither the civil police and courts of Indiana nor the federal government, except for the Army, evidenced capacity to deal with him. In light of existing alternatives, the Army's decision to try Milligan (not its failure to report its decision and verdict) is defensible.

Republican criticism of the *Milligan* decision never threatened the Court. Instead, from 1863 through 1875, the Congress increased the Court's habeas corpus jurisdiction as well as that in admiralty, bankruptcy, and claims. The *Milligan* decision, paradoxically, became a major step in the Court's successful effort to regain the prestige that it had squandered in DRED SCOTT V. SANDFORD (1857), and that Taney had risked dissipating altogether in *Merryman*.

HAROLD M. HYMAN
(1986)

Bibliography

GAMBIONE, JOSEPH G. 1970 *Ex Parte Milligan:* The Restoration of Judicial Prestige? *Civil War History* 16:246–259.

KUTLER, STANLEY I. 1968 *Judicial Power and Reconstruction Politics.* Chaps. 6–8. Chicago: University of Chicago Press.

## *MILLIKEN v. BRADLEY*
418 U.S. 717 (1974)
433 U.S. 267 (1977)

The DESEGREGATION of public schools in many large cities poses a problem: the cities are running out of white pupils, as white families move to the suburbs. In the early 1970s,

some federal district judges began to insist on desegregation plans embracing not only city districts but also surrounding suburban districts. In the first such case to reach the Supreme Court, the Justices divided 4–4, thus affirming without opinion the DECISION of the court of appeals, which had reversed the district court's order for metropolitan relief. The case had come from Richmond, Virginia; Justice LEWIS F. POWELL, the former president of the Richmond school board, had disqualified himself.

*Milliken*, the Detroit school desegregation case, came to the Court the next year. Justice Powell participated, and a 5–4 Court held that interdistrict remedies were inappropriate absent some showing of a constitutional violation by the suburban district as well as the city district. Chief Justice WARREN E. BURGER wrote for the majority, joined by the other three appointees of President RICHARD M. NIXON and by Justice POTTER STEWART. Justices THURGOOD MARSHALL, BYRON R. WHITE, and WILLIAM O. DOUGLAS all wrote dissenting opinions, and Justice WILLIAM J. BRENNAN also dissented.

This decision was the first major setback for school desegregation plaintiffs, but it did not entirely foreclose metropolitan relief. Justice Stewart, who joined the majority opinion, concurred separately as well, saying he would be prepared to accept metropolitan relief not only where a suburban district had committed a constitutional violation, but also where state officials had engaged in racially discriminatory conduct such as racial gerrymandering of district lines or discriminatory application of housing or ZONING laws.

When the Detroit case returned to the Court three years later, it added a weapon to the arsenal of desegregation remedies. As part of a desegregation decree, the district court ordered the establishment of remedial education programs; the Supreme Court unanimously affirmed, with the Chief Justice again writing for the Court. The remedy must not exceed the constitutional violation, he wrote, but here, unlike the situation in *Milliken I*, the remedy was "tailored to cure the condition that offend[ed] the Constitution."

KENNETH L. KARST
(1986)

## MILTON AND FREEDOM OF EXPRESSION

The renowned poet John Milton's *Areopagitica*, written in 1644, is the earliest extended essay on the FREEDOM OF THE PRESS that continues to be read today. The essay was prompted by a decision of Parliament to reinstate the practice of licensing all books and pamphlets. This occurred a few short years after the institutions of crown censorship, including the infamous Star Chamber, had been abolished as part of a general challenge by the legislature to royal authority. In the interim after the abolition of crown licensing, as a civil war was raging, the leaders of Parliament became distressed both by the efflorescence of radical religious ideas circulating in the streets and by the effectiveness of propaganda then being disseminated by forces loyal to the King. Milton, along with many of his Puritan brethren, was disillusioned by this return to centralized control over thought. He implored the Parliament to have more faith in the English people by trusting them with unlicensed books and pamphlets.

Milton's argument is divided into four parts. First, he asserts that licensing writings is a relatively recent practice, developed by the Roman Catholic Church to thwart the Protestant Reformation and reaching its logical culmination in the Spanish Inquisition. Enlightened regimes tracing back to ancient Greece and Rome eschewed the policy of licensing, Milton claims. In identifying the regulation of speech with the Catholic Church, Milton appealed to the sympathies of his overwhelmingly Protestant audience, and to their widely held fears that the Stuart monarchs planned to return England to the Catholic fold.

Second, Milton argues that exposure to evil is necessary to knowledge of the good. He notes how the wisest thinkers throughout history have made it a point to study the systems of thought they were ultimately to reject and refute. "I cannot praise," says Milton, "a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary. . . ." The theological notion of temptation figures prominently in this part of the argument. "[T]hat which purifies us is trial," Milton asserts, "and trial is by what is contrary."

The third section of the essay develops the claim that as a practical matter the licensing of books and pamphlets will not achieve its intended objectives. It is not easy, Milton observes, to determine which writings are truly evil and dangerous. What is to be done, for example, with "books which are partly useful and excellent, partly culpable and pernicious. . . ." If all such works were denied publication, the "commonwealth of learning" would be badly damaged. To evaluate writings in a discerning manner, a licenser "had need to be a man above the common measure, both studious, learned, and judicious. . . ." But this sort of work will not attract such a person, for "there cannot be a more tedious and unpleasing journey-work, a greater loss of time levied upon his head, than to be made the perpetual reader of unchosen books and pamphlets, oft times huge volumes." Given the drudgery of the job, "we may easily foresee what kind of licensers we are to expect hereafter, either ignorant, imperious, and remiss, or basely pecuniary."

Moreover, even if censors were discerning, evil writings

would circulate underground. And evil ideas can be spread by means other than books and pamphlets. Milton likens the futile project of licensing to "the exploit of that gallant man who thought to pound up the crows by shutting his park gate."

The fourth part of the argument of *Areopagitica* is the longest and the most impassioned. Here Milton waxes poetic regarding the harm that censorship does to the spirit of inquiry, both religious and political. It is an assault on the dignity of a writer, he says, to distrust him as though he were a truant schoolboy, to make him "trudge to his leave-giver" to obtain permission to publish. This demeaning distrust extends also to the general population of readers. If we "dare not trust them with an English pamphlet," says Milton, "what do we but censure them for a giddy, vicious, and ungrounded people, in such a sick and weak state of faith and discretion, as to be able to take nothing down but through pipe of a licenser."

One crucial consequence of the distrust implicit in licensing is its devastating effect on the general level of spiritual and political energy. Images of sloth and torpor abound in the essay. "[O]ur faith and knowledge thrives by exercise," Milton contends. Truth can be compared to "a streaming fountain; if her waters flow not in perpetual progression, they sicken into a muddy pool of conformity and tradition." The aim of censorship is a debilitating stasis, "a dull ease and cessation of our knowledge," an "obedient unanimity," the "forced and outward union of cold and neutral and inwardly divided minds."

Milton's regard for dynamism and ferment caused him to express a much higher opinion of the religious radicals of his day than was common, even among other proponents of toleration. Parliament's return to the practice of licensing had been prompted in part by the outpouring of bizarre, extravagant versions of Protestant theology that had greeted the lifting of crown censorship. This caught the mainstream Protestants who controlled Parliament by surprise and alarmed them greatly because they took seriously the notion of blasphemy and considered the stakes to be nothing less than divine favor at a pivotal moment in the history of both the Reformation and the English nation. Milton, in contrast, viewed the radical sectarians as a source of energy and potential revelation, despite his own rather more conventional theological views. "Where there is much desire to learn, there of necessity will be much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making." Parliament's fear of heresy, he says, is exactly the wrong theological response: "Under these fantastic terrors of sect and schism, we wrong the earnest and zealous thirst after knowledge and understanding which God hath stirred up in this city. What some lament of, we rather should rejoice at, should rather praise this pious forwardness among men, to reassume the ill-deputed care of their religion into their own hands again."

Milton's disdain for censorship derived in part from his belief that each person must take responsibility for his religious convictions and must form those convictions by an active process of inquiry. Also central to his position was his belief that the capacity of mortals to know the truth is very limited such that human laws designed to protect the known truth from heretical opinions are more likely to preserve error than to serve their intended purposes. Milton considered the search for truth to be never-ending until the Second Coming, and a matter of slow, fitful, halting progress. "[H]e who thinks we are to pitch our tent here, and have attained the utmost prospect of reformation that the mortal glass wherein we contemplate can show us, till we come to beatific vision, that man by this very opinion declares that he is yet far short of truth." The problem of false appearances figures prominently in Milton's argument. Truth, he asserts, "may have more shapes than one." Its "first appearance to our eyes, bleared and dimmed with prejudice and custom, is more unsightly and unplausible than many errors, even as the person is of many a great man slight and contemptible to see to."

Milton's understanding of the relationship between the FREEDOM OF SPEECH and the search for truth was informed not only by his notions of personal responsibility and human incapacity but also by his belief in divine providence. The circulation of heretical ideas is not as threatening as the proponents of censorship suppose because just when "false teachers" are "busiest in seducing" the populace, "God then raises to his own work men of rare abilities, and more than common industry" to revise previous errors and "go on some new enlightened steps in the discovery of truth." "For who knows not that truth is strong, next to the Almighty?" Because of divine providence, "though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting, to misdoubt her strength. Let her and falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?"

As much as he insisted upon personal responsibility and struggle in matters of faith, and as impressed as he was with the limitations of human knowledge, Milton nevertheless explicitly excepted Roman Catholics from his argument for toleration. "I mean not tolerated popery," he says, "and open superstition, which, as it extirpates all religions and civil supremacies, so itself should be extirpate. . . ." Defenders of Milton have observed that almost all his fellow proponents of toleration made this exception and that the fear of Catholic military designs dominated the politics of Stuart England, not least the political struggle during the civil war between the Parliament and the Crown for the allegiance of the general populace. Had

Milton urged the toleration of Catholics he would have lost credibility with his intended Parliamentary audience. Milton's critics point out that an argument that emphasizes the need to confront supposed falsehood would seem to require the toleration of the most feared and powerful "supposed falsehood" of the day.

The *Areopagitica* is noteworthy as a rich repository of images and characterizations pertaining to censorship and free inquiry, and as an imaginative development of the point that there is positive value in grappling with ideas that may turn out to be false and evil. Interpretative debates persist regarding whether Milton's argument is limited solely to controversies over the regulation of *religious* speech, whether it constitutes only a case against the prior licensing of speech with no implications for disputes over other forms of control such as criminal penalties, and whether the author's refusal to tolerate Catholics renders his plea for free expression incoherent and/or hypocritical. The extent to which Milton's analysis was informed by his deep faith in divine providence and by the particular view of truth he derived therefrom raises questions regarding how much the *Areopagitica* has to offer the modern age. However these matters are resolved, Milton's observations about the importance of maintaining energy and his penetrating satirical comments about the dynamics and pretensions of censorship preserve the continuing value of the essay.

VINCENT BLASI
(2000)

Bibliography

BARKER, ARTHUR 1942 *Milton and the Puritan Dilemma.* Toronto: University of Toronto Press.

HALLER, WILLIAM 1955 *Liberty and Reformation in the Puritan Revolution.* New York: Columbia University Press.

KOLBRENER, WILLIAM 1997 *Milton's Warring Angels.* Cambridge, Eng.: Cambridge University Press.

LOEWENSTEIN, DAVID 1992 *Milton and the Drama of History.* Cambridge, Eng.: Cambridge University Press.

SMITH, NIGEL 1990 Areopagitica: Voicing Contexts 1643–45. In David Loewenstein and James Turner, eds., *Politics, Poetics, and Hermeneutics in Milton's Prose.* Cambridge, Eng.: Cambridge University Press.

## *MINERSVILLE SCHOOL DISTRICT v. GOBITIS*

See: Flag Salute Cases

## MINIMUM WAGES

See: Maximum Hours and Minimum Wages Legislation

## MINISTERIAL ACT

A ministerial act is one an official performs as a matter of legal duty, without any personal discretion and without judging the merits. For example, in MARBURY V. MADISON (1803), Chief Justice JOHN MARSHALL described delivery of an appointee's commission as a ministerial act of the secretary of state.

DENNIS J. MAHONEY
(1986)

## *MINNESOTA v. BARBER*
136 U.S. 313 (1890)

The Supreme Court unanimously held unconstitutional as a violation of the COMMERCE CLAUSE a Minnesota statute that prohibited the sale for human consumption of meat slaughtered in another state and not inspected in Minnesota. The statute, the Court declared, forced citizens to buy only Minnesota meat, denying them the benefits of competition in INTERSTATE COMMERCE.

LEONARD W. LEVY
(1986)

## MINNESOTA RATE CASES
230 U.S. 352 (1913)

In these cases a unanimous Supreme Court reaffirmed state power to regulate INTRASTATE COMMERCE even if it should indirectly affect INTERSTATE COMMERCE. Justice CHARLES EVANS HUGHES stressed the supremacy of federal authority but, reaching back to COOLEY V. BOARD OF WARDENS OF PHILADELPHIA (1852), held that states could regulate interstate commerce when Congress had not yet chosen to act.

The cases before the Court represented extensive litigation throughout the country. The Railroad & Warehouse Commission of Minnesota and the state legislature had issued orders fixing maximum rail rates within the state. Although the rates they set were purely intrastate, both sides agreed that interstate rates would be affected. The cases arose as STOCKHOLDERS' SUITS to prevent the application of the prescribed rates to interstate operators. (See EX PARTE YOUNG.) On the principal question whether the orders fixed rates that interfered with interstate commerce, Hughes agreed that if the rates imposed a direct burden on commerce, they must fall. He then began a lengthy exposition of the nature of commercial regulation in the federal system, concluding that "it is competent for a state to govern its internal commerce . . . although interstate commerce may incidentally or indirectly be in-

volved." Unless and until Congress acted, state action might well be legal even if touching interstate commerce. Only Congress could judge the necessity for action and, having decided to, it could intervene "at its discretion for the complete and effective government" of even local conduct affecting interstate commerce. The Minnesota actions were, therefore, within the state's power but would be superseded if Congress acted. The Court thus broadly upheld state ratemaking authority; it also implicitly affirmed federal power over intrastate railroad activity affecting interstate commerce, a significant step it would take explicitly the following year in HOUSTON, EAST & WEST TEXAS RAILWAY COMPANY V. UNITED STATES, (1914).

DAVID GORDON
(1986)

## *MINOR v. HAPPERSETT*
21 Wallace 162 (1875)

MORRISON R. WAITE delivered the unanimous opinion of the Supreme Court holding that a woman, though a citizen of the United States and of the state in which she resides, had no right to vote as a privilege of national CITIZENSHIP protected by the PRIVILEGES AND IMMUNITIES clause of the FOURTEENTH AMENDMENT. The laws of her state allowed only men to vote, and the amendment did not change that by making any new voters.

LEONARD W. LEVY
(1986)

## MINTON, SHERMAN
(1890–1965)

Born in Indiana in 1890, Sherman Minton attended Indiana University and Yale Law School. After military service during WORLD WAR I, several years in private practice, and brief service as attorney for an Indiana state agency, Minton was elected to the United States Senate in 1934. A fervent advocate of President FRANKLIN D. ROOSEVELT'S "NEW DEAL," Minton supported measures expanding the federal government's role in ECONOMIC REGULATION powers despite his concern that the Supreme Court might declare such measures unconstitutional. As the Court repeatedly struck down New Deal legislation, Minton proposed that the votes of at least seven Justices be necessary to invalidate an act of Congress; in 1937, Minton worked vigorously for the enactment of Roosevelt's Court reorganization plan. After Minton was defeated for reelection in 1940, he served briefly as one of Roosevelt's special assistants. In the spring of 1941 Roosevelt appointed Minton to the Seventh Circuit Court of Appeals. In 1949 President HARRY S. TRUMAN appointed Minton to the Supreme Court to fill the vacancy created by the death of Justice WILEY B. RUTLEDGE; this appointment was as much a product of Truman's close friendship with Minton as of Truman's desire to appoint Justices with prior judicial experience. Ill health forced Minton's retirement in 1956.

Minton believed that the Supreme Court could not impose libertarian standards upon a government and a people that did not favor them. Minton's commitment to judicial restraint and his resistance to what he perceived as JUDICIAL POLICYMAKING followed directly from his frustration as a senator with the Court's opposition to New Deal legislation and his participation in efforts to curb the Court's powers.

Minton disappointed liberals who had hoped that he would work as vigorously for judicial protection of individual liberties as for the legitimation of governmental economic regulation. He consistently voted to uphold statutes and other governmental programs intended to protect the national security, rejecting challenges asserting violation of individual liberties. In CRIMINAL PROCEDURE cases, Minton tended to uphold convictions. For example, in UNITED STATES V. RABINOWITZ (1950) Minton held for the Court that the FOURTH AMENDMENT permits WARRANTLESS SEARCHES and seizures, so long as they are reasonable. Where litigants sought review of state criminal decisions, Minton was reluctant to disturb state procedures or court decisions absent a showing of significant unfairness affecting the verdict. Minton was ready to invalidate STATE ACTION discriminating against minorities, but he was disinclined to find state action. He emphasized the literal meaning of congressional statutes, rarely resorting to external aids or evidence of legislative intent; in the absence of express statutory language, federal regulation did not preempt concurrent state regulation.

Minton stressed the importance of the Court's collegial atmosphere. He disliked personal disputes among the Justices and did his best to reduce their intensity or to dissipate them altogether. Minton viewed the task of writing opinions for the Court as the preparation of functional instruments of collective policy. He rarely wrote concurrences or dissents, for he believed that separate opinions tended to vitiate the authority of majority opinions and to sow discord among the Justices. After his retirement in 1956, Minton minimized the significance of his tenure on the Court; he believed that his most important judicial act was his vote in BROWN V. BOARD OF EDUCATION (1954) to strike down SEGREGATION of public schools.

RICHARD B. BERNSTEIN
(1986)

Bibliography

WALLACE, HARRY L. 1959–1960 Mr. Justice Minton: Hoosier Justice on the Supreme Court. *Indiana Law Journal* 34:145–205, 383–424.

## *MIRANDA v. ARIZONA*
384 U.S. 436 (1966)

*Miranda* is the best known as well as the most controversial and maligned self-incrimination decision in the history of the Supreme Court. Some of the harshest criticism came from the dissenters in that case. Justice BYRON R. WHITE, for example, declared that the rule of the case, which required elaborate warnings and offer of counsel before the RIGHT AGAINST SELF-INCRIMINATION could be effectively waived, would return killers, rapists, and other criminals to the streets and have a corrosive effect on the prevention of crime. The facts of *Miranda*, one of four cases decided together, explain the alarm of the four dissenters and of the many critics of the WARREN COURT. The majority of five, led by Chief Justice EARL WARREN, reversed the kidnap-and-rape conviction of Ernesto Miranda, who had been picked out of a LINEUP by his victim, had been interrogated without mistreatment for a couple of hours, and had signed a confession that purported to have been voluntarily made with full knowledge of his rights, although no one had advised him that he did not need to answer incriminating questions or that he could have counsel present. The Court reversed because his confession had been procured in violation of his rights, yet had been admitted in EVIDENCE. Warren conceded that the Court could not know what had happened in the interrogation room and "might not find the . . . statements to have been involuntary in traditional terms." Justice JOHN MARSHALL HARLAN, dissenting, professed to be "astonished" at the decision. Yet the Court did little more than require that the states follow what was already substantially FEDERAL BUREAU OF INVESTIGATION (FBI) procedure with respect to the rights of a suspect during a custodial interrogation.

The doctrinal significance of the case is that the Fifth Amendment's self-incrimination clause became the basis for evaluating the admissibility of confessions. The Court thus abandoned the traditional DUE PROCESS analysis that it had used in state cases since BROWN V. MISSISSIPPI (1936) to determine whether a confession was voluntary under all the circumstances. (See POLICE INTERROGATIONS AND CONFESSIONS.) Moreover, the Court shifted to the Fifth Amendment from the Sixth Amendment analysis of ESCOBEDO V. ILLINOIS (1964), when discussing the RIGHT TO COUNSEL as a means of protecting against involuntary confessions. *Miranda* stands for the proposition that the Fifth Amendment vests a right in the individual to remain silent unless he chooses to speak in the "unfettered exercise of his own will." The opinion of the Court lays down a code of procedures that must be respected by law enforcement officers to secure that right to silence whenever they take a person into custody or deprive him of his freedom in any significant way.

In each of the four *Miranda* cases, the suspect was not effectively notified of his constitutional rights and was questioned incommunicado in a "police-dominated" atmosphere; each suspect confessed, and his confession was introduced in evidence against him at his trial. The Court majority demonstrated a deep distrust for police procedures employed in station-house interrogation, aimed at producing confessions. The *Miranda* cases showed, according to Warren, a secret "interrogation environment," created to subject the suspect to the will of his examiners. Intimidation, even if only psychological, could undermine the will and dignity of the suspect, compelling him to incriminate himself. Therefore, the inherently compulsive character of in-custody interrogation had to be offset by procedural safeguards to insure obedience to the right of silence. Until legislatures produced other procedures at least as effective, the Court would require that at the outset of interrogation a person be clearly informed that he has the right to remain silent, that any statement he makes may be used as evidence against him, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed to represent him.

These rules respecting mandatory warnings, Warren declared, are "an absolute prerequisite to interrogation." The presence of a lawyer, he reasoned, would reduce coercion, effectually preserve the right of silence for one unwilling to incriminate himself, and produce an accurate statement if the suspect chooses to speak. Should he indicate at any time before or during interrogation that he wishes to remain silent or have an attorney present, the interrogation must cease. Government assumes a heavy burden, Warren added, to demonstrate in court that a defendant knowingly and intelligently waived his right to silence or to a lawyer. "The warnings required and the waiver necessary in accordance with our opinion today are prerequisites," he emphasized, "to the admissibility of any statement made by a defendant."

Warren insisted that the new rules would not deter effective law enforcement. The experience of the FBI attested to that, and its practices, which accorded with the Court's rules, could be "readily emulated by state and local law enforcement agencies." The Constitution, Warren admitted, "does not require any specific code of procedures" for safeguarding the Fifth Amendment right; the Court would accept any equivalent set of safeguards.

Justice TOM C. CLARK, dissenting, observed that the FBI had not been warning suspects that counsel may be present during custodial interrogation, though FBI practice immediately altered to conform to Warren's opinion. Clark, like Harlan, whose dissent was joined by Justices POTTER STEWART and Byron White, would have preferred "the more pliable dictates" of the conventional due process analysis that took all the circumstances of a case into account. Harlan also believed that the right against self-

incrimination should not be extended to the police station and should not be the basis for determining whether a confession is involuntary. White wrote a separate dissent, which Harlan and Stewart joined, flaying the majority for an opinion that had no historical, precedential, or textual basis. White also heatedly condemned the majority for weakening law enforcement and for prescribing rules that were rigid, but still left many questions unanswered. (See MIRANDA RULES.)

LEONARD W. LEVY
(1986)

Bibliography

KAMISAR, YALE 1980 *Police Interrogations and Confessions.* Pages 41–76. Ann Arbor: University of Michigan Press.

WHITEBREAD, CHARLES H. 1980 *Criminal Procedure.* Pages 292–310. Mineola, N.Y.: Foundation Press.

## MIRANDA RULES

In MIRANDA V. ARIZONA (1966) the Supreme Court held that a person subject to custodial POLICE INTERROGATION must be warned that any statement he makes can be used against him, that he has a right to remain silent, and that he has a right to the presence of an attorney and that one will be appointed for him if he is indigent. A defendant may waive these rights. A WAIVER must be voluntary and intelligent. In the absence of a fully effective alternative, these warnings must be given and a valid waiver taken as the constitutional prerequisite to the admissibility of any product of custodial police interrogation.

The *Miranda* opinion left unresolved numerous issues. For example: When is a person in custody? What constitutes interrogation? What are the standards for measuring the validity of a purported waiver of the *Miranda* rights? May voluntary statements that are inadmissible for failure to comply with *Miranda* be introduced to impeach the credibility of a defendant's trial testimony? How is the burden of proving VOLUNTARINESS and compliance with the *Miranda* requirements allocated?

Post-*Miranda* cases have lessened considerably the constraints the decision had imposed upon law enforcement officials. For example, the police are required to give a suspect the *Miranda* warnings only if the suspect is in custody at the time of interrogation. In OROZCO V. TEXAS (1969) the Court held that a person is in custody any time that he is not free to leave whether in his own home, a hospital, a police car, or the stationhouse. ESTELLE V. SMITH (1981) held that when an indicted defendant, who has not put his mental state in issue, is compelled to undergo a court-ordered psychiatric examination, he is in custody and is entitled to the *Miranda* warnings prior to the evaluation by a mental health professional. However, most courts have held that a suspect is not in custody when in an open, natural environment. Examples include STOP AND FRISK situations, traffic arrests, accident investigations, or searches at international borders.

The second prerequisite to requiring the *Miranda* warnings is that the suspect be the subject of interrogation. The *Miranda* opinion defined interrogation as "questioning initiated by law enforcement officers." In RHODE ISLAND V. INNES (1980), the Court elaborated, stating that "interrogation" meant "express questioning or its functional equivalent" including "any words or actions on the part of the police . . . reasonably likely to elicit an incriminating response from the subject." By contrast, a statement freely and voluntarily made without any interrogation is admissible as a "threshold confession" or "spontaneous statement." If, for example, a person walks into a police station and states that he has killed someone, the police are not required to stop the person wishing to speak and give that person the warnings.

If both custody and interrogation are present, the police must give the warnings or take a valid waiver before proceeding. The police may not presume that a suspect knows of the *Miranda* rights. The form of the warnings may vary, however, so long as the words used give a clear, understandable warning of all the rights, taking into account the circumstances and the characteristics of the suspect.

In OREGON V. ELSTAD (1985) the Supreme Court held that an invalid confession obtained without the suspect being informed of his *Miranda* rights would not invalidate a later confession made after the suspect was informed of his rights, so long as the confession was obtained without coercion. However, in NEW YORK V. QUARLES (1984) the Court established a "public safety" exception, stating that if reasonable concern for public safety is present, a police officer need not recite the *Miranda* warnings before questioning a suspect in custody.

The accused, after receiving the warnings, may voluntarily waive any of his *Miranda* rights. The government must demonstrate voluntariness under all the circumstances. A signed waiver form is strong, but not conclusive, evidence of voluntariness. An effective waiver need not be written, however, and it may be implied from the accused's conduct.

Once the suspect terminates the interrogation or requests counsel, he may not be reinterviewed without being provided access to the requested attorney even if the suspect is given a second set of *Miranda* warnings. In EDWARDS V. ARIZONA (1981) the Court held that once an accused requests counsel, questioning must cease until counsel is present or until the accused "initiates further communication, exchanges or conversation with the po-

lice." In *Smith v. Illinois* (1984), the Court followed this precedent by holding that, once the accused has requested an attorney, no further questions or responses may be used to cast doubt on the request.

By contrast, in *Fare v. Michael C.* (1979) the Court held that a juvenile's request for a probation officer during questioning does not have the same constitutional effect as a request for a lawyer. The Court based its distinction on the fact that a lawyer's principal responsibility is to defend his client, while a probation officer has a duty to report and prosecute misconduct by a juvenile. In addition, probation officers are not necessarily qualified to provide legal assistance. Consequently, a juvenile's request for his probation officer is not a per se invocation of the *Miranda* RIGHT TO COUNSEL.

The issue of voluntariness arises in nonwaiver contexts as well. The Court has held that voluntary confessions obtained in violation of the *Miranda* rules, though not admissible in the State's case-in-chief as evidence of guilt, may be admitted to impeach a testifying defendant's credibility. In the leading case, HARRIS V. NEW YORK (1971), the defendant denied in court that he had sold heroin to an undercover agent. During cross-examination, Harris was asked whether he had made certain statements following his arrest that were inconsistent with his in-court testimony. Even though the prosecution conceded that the statements were obtained in violation of *Miranda*, the Supreme Court upheld the trial judge's ruling that the statements could be considered by the jury in evaluating the defendant's credibility.

When the defendant's statements are truly involuntary, they may not be admitted into evidence for any purpose. *Mincey v. Arizona* (1978) is illustrative, holding that the defendant's statements were inadmissible because they were obtained while the defendant was hospitalized and barely able to speak.

Whether the issue arises in the waiver or in the impeachment context, the burden of proving voluntariness under all the circumstances rests on the government. *Miranda* described it as a "heavy burden," a term which a number of courts have interpreted as requiring proof beyond a REASONABLE DOUBT. The Supreme Court, however, stopped this trend by holding, in *Lego v. Twomey* (1972), that proof by a preponderance of the evidence will suffice in federal court, though the states may impose a higher burden in state proceedings.

CHARLES H. WHITEBREAD
(1986)

Bibliography

WHITEBREAD, CHARLES H. 1980 *Criminal Procedure.* Mineola, N.Y.: Foundation Press.

## MIRANDA RULES
(Update)

MIRANDA V. ARIZONA (1966) held that a statement obtained from a criminal defendant through custodial interrogation is inadmissible against that defendant unless the police obtained a waiver of the RIGHT AGAINST SELF-INCRIMINATION after warning the suspect of both the right to remain silent and the RIGHT TO COUNSEL. Recently, the Supreme Court has issued decisions favorable to the government concerning several *Miranda* issues: the definition of custodial interrogation, in *Arizona v. Mauro* (1989); the adequacy of warnings provided to persons in custody, in *Duckworth v. Eagan* (1989); and the standard that governs the validity of waiver, in *Colorado v. Spring* (1987) and *Colorado v. Connelly* (1986). Although in *Arizona v. Robertson* (1988) the Court reaffirmed the proscription of questioning until counsel appears, once the suspect requests counsel, the police need not advise the suspect of a lawyer's efforts to consult with him or her, as the Court held in *Moran v. Burbine* (1986).

The most significant of these developments is the holding in *Connelly* and *Spring* that a *Miranda* waiver is valid so long as the police did not obtain the waiver through conduct that would render a confession "involuntary" as a matter of PROCEDURAL DUE PROCESS. The *Miranda* opinion stated that "a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to . . . counsel." Connelly, a lunatic, confessed at the behest of "the voice of God." Spring waived *Miranda* rights after government agents led him to believe that the questioning would concern an illegal firearms transaction, but the interrogation eventually included questions about a homicide. Spring's waiver was not knowing, and Connelly's was not intelligent. The Court nonetheless approved admission of both CONFESSIONS, stating in *Connelly* that "there is obviously no reason to require more in the way of a "voluntariness' inquiry in the *Miranda* waiver context than in the FOURTEENTH AMENDMENT confession context."

The Justices would not likely approve waiver of the right to counsel *at trial* by a person in Connelly's condition or by a person like Spring, who misunderstood the seriousness of the charge. Yet in *Patterson v. Illinois* (1988), the Court held that in the interrogation context the claimed waiver of the Sixth Amendment right to counsel, a right initiated by a formal charge with the prospect of a trial, is tested under the *Connelly* standard. Ironically, the standard governing the waiver of rights is strictest in the courtroom, where coercion and deception are least likely, and most lenient in the stationhouse or the police cruiser, where these dangers are greatest.

Not many police departments are likely to depart from the verbal formulation of the warnings given by the *Miranda* opinion, and in few cases does a lawyer attempt to advise an arrested person who did not invoke the *Miranda* right to counsel. Commonly, however, the government claims that the accused waived his or her *Miranda* rights. The ability of police interrogators to induce suspects to waive their rights explains the consistent empirical finding that the *Miranda* doctrine has had a negligible effect on police effectiveness. Because *Miranda* was inspired by dissatisfaction with the vacuous and unpredictable due process approach, stating the test for waiver in the same terms as the voluntariness test comes close to full circle from the law that preceded *Miranda*.

But the Court's retrenchment of the *Miranda* doctrine is not the whole story. In one sense, the most important development in confessions law is *Miranda*'s continued survival, emphasized by cases such as *Roberson*, in which the Court approved the exclusion of valuable evidence obtained without police brutality. At least since HARRIS V. NEW YORK (1971), a majority of the Justices have believed that *Miranda* was wrongly decided. A majority continues to describe the *Miranda* rules as prophylactic safeguards rather than constitutional entitlements, a distinction that is not compatible with *Miranda*'s presumption that statements obtained without a valid waiver are compelled within the meaning of the Fifth Amendment. Despite the erosion of their Fifth Amendment foundation, the Court refuses to abandon the *Miranda* rules.

The failure of recent efforts to have *Miranda* overruled confirms that STARE DECISIS, even without more, will sustain the decision. During the presidency of RONALD REAGAN, the Justice Department's Office of Legal Policy issued a lengthy report calling for *Miranda*'s demise. The report effectively pointed out the inconsistency of *Harris* and its progeny with *Miranda* itself; but on several points, including the key issue of law enforcement effectiveness, the report made an embarassingly weak case for obliterating a landmark. Not only did the Court as a whole reject the department's effort; the report was not approved by a single Justice in any concurring or dissenting opinion.

So *Miranda* lives, a symbol of commitment to civil liberty that conveniently does little to obstruct the suppression of crime. But at the borders of the *Miranda* rules, a skeptical Supreme Court majority has taken frequent opportunities to limit their scope. The most likely future development along these lines is approval of the suggestion advanced by two Justices, concurring in *Duckworth v. Eagan*, to the effect that claims by state prisoners that their convictions violated *Miranda* should not be cognizable in federal HABEAS CORPUS proceedings.

DONALD A. DRIPPS
(1992)

(SEE ALSO: *Police Interrogation and Confessions; Procedural Due Process of Law, Criminal.*)

Bibliography

KAMISAR, YALE et al. 1989 *Modern Criminal Procedure*, 6th ed. St. Paul, Minn.: West Publishing Co.

UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF LEGAL POLICY 1986 *Report to the Attorney General on the Law of Pre-trial Interrogation.* Washington, D.C.: U.S. Government Printing Office.

## MISCEGENATION

The fear of racial mixture migrated to the New World with the earliest colonists. In 1609, planters headed for Virginia were reminded by a preacher of the injunction that "Abrams posteritie keepe to themselves." Of course, they did no such thing. From the beginning, there was a shortage of women; white men freely interbred with both Indian and black women, even before the great waves of slave importation. During the era of SLAVERY, interracial sex cut across all strata of the white male population, from the poorest indentured servants to the wealthiest planters. THOMAS JEFFERSON was merely the most celebrated of the latter. Mulattoes were, in fact, deliberately bred for the slave market. Miscegenation laws, forbidding an interracial couple to marry or live together, were not designed to prevent interracial sex but to prevent the transmission of wealth and status from white fathers to their interracial offspring. Laws governing ILLEGITIMACY served a similar purpose, particularly in southern states. To this day, a majority of "blacks" in the United States are of interracial descent.

The adoption of the FOURTEENTH AMENDMENT offered an obvious opportunity for the Supreme Court to hold miscegenation laws unconstitutional on EQUAL PROTECTION grounds. When the occasion arose in PACE V. ALABAMA (1883), however, the Court unanimously upheld such a law, saying that it applied equally to punish both white and black partners to an intimate relationship. The constitutional validity of miscegenation laws went largely unquestioned until the great mid-twentieth-century rediscovery of racial equality as the Fourteenth Amendment's central meaning. Following BROWN V. BOARD OF EDUCATION (1954), it was only a matter of time before the miscegenation issue would reach the Supreme Court. As it happened, the period of time was short. In *Naim v. Naim* (1955–1956) the Court fudged, dismissing an appeal in a jurisdictional evasion that Herbert Wechsler properly scored as "wholly without basis in the law." Unquestionably, the Court adopted this avoidance technique because of the political storm that had greeted the *Brown* decision. Playing on the white South's fear of race

mixture was a standard scare tactic of politicians favoring SEGREGATION. Recognizing this fear, the NAACP, in planning its assault on segregated higher education, had deliberately chosen as its plaintiff in MCLAURIN V. OKLAHOMA STATE REGENTS (1950) a sixty-eight-year-old graduate student. The *Brown* opinion itself had been carefully limited to the context of education, and the *Naim* evasion was cut from the same political cloth.

For a decade, the Court was spared the inevitable confrontation. In *Mclaughlin v. Florida* (1964), it invalidated a law forbidding unmarried cohabitation by an interracial couple. Assuming for argument the validity of the state's law forbidding interracial marriage, the Court nonetheless held that the cohabitation law denied equal protection. The reasoning of *Pace v. Alabama*, the Court said, had not withstood analysis in more recent decisions. Finally, in LOVING V. VIRGINIA (1967), the Court put an end to the whole ugly pretense about "racial purity," holding invalid a law forbidding interracial marriage. Equal protection and SUBSTANTIVE DUE PROCESS grounds served as alternative basis for the decision. *Loving* thus stands not only for a principle of racial equality but also for a broad "freedom to marry." (See FREEDOM OF INTIMATE ASSOCIATION.) The principle of equality is often liberty's cutting edge.

KENNETH L. KARST
(1986)

Bibliography

FRAZIER, E. FRANKLIN 1939 *The Negro Family in the United States.* Chap. IV. (rev. ed. 1966). Chicago: University of Chicago Press.

MYRDAL, GUNNAR 1944 *An American Dilemma: The Negro Problem and Modern Democracy.* Chap. 5. New York: Harper & Brothers.

## MISDEMEANOR

A misdemeanor is one of a class of offenses considered less heinous, and punished less severely, than FELONIES. Generally, misdemeanors are punishable by fine or by incarceration in facilities other than penitentiaries for terms of up to one year. Federal law and most state statutes classify all crimes other than felonies as misdemeanors. Two standards have traditionally been used to distinguish felonies from misdemeanors: the place of imprisonment (a penitentiary as opposed to a jail); and the length of imprisonment (more than one year for felonies, a lesser term for misdemeanors).

The Supreme Court has held that criminal defendants charged with misdemeanors are entitled to certain guarantees of the BILL OF RIGHTS. In ARGERSINGER V. HAMLIN (1972), an indigent defendant was convicted of carrying a concealed weapon, a misdemeanor offense, and sentenced to ninety days in jail. An attorney was not appointed to represent the defendant even though he did not waive this right. The Supreme Court ruled that the RIGHT TO COUNSEL was applicable to misdemeanors where the defendant received a jail term. In *Scott v. Illinois* (1979), however, the Supreme Court declined to find a right to counsel at trial where loss of liberty is merely a possibility and does not, in fact, occur.

The Supreme Court also held, in BALDWIN V. NEW YORK (1970), that the Sixth Amendment requires that defendants accused of serious crimes be afforded the right to TRIAL BY JURY. This right applies to misdemeanors where imprisonment for more than six months is authorized. (See INFORMATION.)

CHARLES H. WHITEBREAD
(1986)

Bibliography

LAFAVE, W. and SCOTT, A. 1972 *Criminal Law.* St. Paul, Minn.: West Publishing Co.

## *MISHKIN v. NEW YORK*

See: *Memoirs v. Massachusetts*

## *MISSISSIPPI v. JOHNSON*
4 Wallace (71 U.S.) 475 (1867)

## *GEORGIA v. STANTON*
6 Wallace (73 U.S.) 50 (1868)

In these cases, the Supreme Court refused to enjoin President ANDREW JOHNSON and Secretary of War EDWIN M. STANTON from enforcing the MILITARY RECONSTRUCTION ACTS. The Justices unanimously refused to act in the Mississippi case, holding that legislatively mandated executive duties were not enjoinable. Georgia subsequently argued that the military laws threatened its corporate sovereignty, but Justice SAMUEL NELSON found this a POLITICAL QUESTION unfit for judicial scrutiny. Nelson hinted, however, that the Court might favorably consider an action based on property rights. Shortly afterward, in an unreported case (*Mississippi v. Stanton*, 1868), the Justices evenly divided on that question. Consequently, the judiciary never ruled on the constitutionality of military reconstruction; yet these decisions involved an important recognition of SEPARATION OF POWERS and the limits of JUDICIAL POWER.

STANLEY I. KUTLER
(1986)

## *MISSISSIPPI UNIVERSITY FOR WOMEN v. HOGAN*
458 U.S. 718 (1982)

Joe Hogan, a male registered nurse, was rejected by a state university's all-female school of nursing. A 5–4 Supreme Court held that Hogan's exclusion violated his right to EQUAL PROTECTION OF THE LAWS. For the majority, Justice SANDRA DAY O'CONNOR rejected the argument that, by excluding males, the university was compensating for discrimination against women. Rather, the all-female policy "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job." The university thus failed the test set by CRAIG V. BOREN (1976) for SEX DISCRIMINATION cases. The dissenters, making a case for diversity of types of higher education, emphasized that Hogan could attend a coeducational state nursing school elsewhere in Mississippi.

KENNETH L. KARST
(1986)

## *MISSOURI v. HOLLAND*
252 U.S. 416 (1920)

*Missouri v. Holland* confirmed the status of treaties as supreme law. Although becoming "perhaps the most famous and most discussed case in the constitutional law of foreign relations" it arose from a narrower Progressive era desire to prevent indiscriminate killing of migratory birds, which key states had proved unable or unwilling to end by themselves. Congress first legislated hunting restrictions in March 1913, but lower federal courts invalidated them on TENTH AMENDMENT grounds as exceeding the federal government's commerce power, intruding on STATE POLICE POWERS, and usurping the states' well-established position in American law as trustees for their citizens of wild animals. The federal government feared the outcome of a final test of the 1913 act sufficiently to delay Supreme Court action. Instead, responding to suggestions from Elihu Root and others, the Wilson administration concluded the Migratory Bird Treaty of 1916 with Great Britain (acting on behalf of Canada). This committed both nations to restrict hunting of the birds, and in the United States President WOODROW WILSON signed implementing legislation in July 1918.

Several lower courts, including one that had ruled against the 1913 legislation, quickly upheld the 1918 act. In one of these cases the state of Missouri had sought to enjoin federal game warden Ray P. Holland from enforcing the new law. Appealing to the Supreme Court, Missouri argued that because, in the absence of a treaty, the legislation would be clearly invalid on Tenth Amendment grounds, it must fall even with a treaty base, for otherwise constitutional limitations would become a nullity. The Supreme Court upheld the 1918 legislation in a 7–2 vote (but with no written dissent filed).

Echoing the government's defense of the challenged act, the core of Justice OLIVER WENDELL HOLMES's opinion for the Court was a standard federal supremacy argument. Whether or not the 1913 legislation had been invalid, the 1918 act implemented a treaty; because the Constitution explicitly delegated the TREATY POWER to the federal government and gave status as supreme law to treaties made "under the authority of the United States," Tenth Amendment objections had no force.

Less restrained, even cryptic, was Holmes's language, which provided a basis for years of controversy. After questioning whether the requirement that treaties be made under the authority of the United States meant more than observance of the Constitution's prescribed forms for treaty-making, Holmes defended an organic, expansive conception of the Constitution. Its words had "called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters." The Migratory Bird Case needed consideration "in light of our whole experience." The question finally became whether the treaty was "forbidden by some invisible radiation from the general terms of the 10th Amendment." Holmes thereby camouflaged his admissions that treaties must involve matters of national interest and must not contravene specific constitutional prohibitions.

In the 1920s and early 1930s, when the Court often adhered to the doctrine of DUAL FEDERALISM, *Missouri v. Holland* arguably offered constitutional grounds for otherwise suspect federal legislation if appropriate treaties were concluded. (Proponents of child labor regulation toyed with the approach.) Fears about its potential in this respect lingered into the 1950s, when the case was a frequent target for backers of the BRICKER AMENDMENT. Yet after 1937 the Supreme Court routinely accepted broader interpretations of TAXING AND SPENDING POWERS, the COMMERCE CLAUSE, and the FOURTEENTH AMENDMENT, so in practice the case's importance diminished.

CHARLES A. LOFGREN
(1986)

Bibliography

HENKIN, LOUIS 1972 *Foreign Affairs and the Constitution.* Mineola, N.Y.: Foundation Press.

LOFGREN, CHARLES A. 1975 *Missouri v. Holland* in Historical Perspective. *Supreme Court Review* 1975:77–122.

## *MISSOURI v. JENKINS*
495 U.S. 33 (1990)

Jenkins produced a unanimous result but with two sharply differing opinions on an important question concerning the power of federal courts to remedy school DESEGREGATION. A federal district court, after ordering the desegregation of the Kansas City school district, ordered the state of Missouri and the district to share the costs of the remedy, which included substantial capital improvements to make the integrated schools more attractive and thus to reduce "white flight." The district had exhausted its capacity to tax as defined by state law, and so the court ordered the district's property-tax levy increased through the next several fiscal years. The court of appeals affirmed the tax increase order, but the Supreme Court unanimously reversed. The majority, in an opinion by Justice BYRON R. WHITE, held that the district court had abused its discretion in imposing the tax itself when an alternative to such an intrusive order was available. That alternative, said Justice White, would be for the district court to order the school district to levy property taxes at a rate adequate to fund the desegregation remedy.

Justice ANTHONY M. KENNEDY, joined by three other Justices, concurred in the result but disagreed strongly with the majority's conclusion that the district court had power to order the district to levy such a tax. That order, he said, would exceed the JUDICIAL POWER OF THE UNITED STATES established in Article III of the Constitution. Taxation would be a legislative function, and the hiring and supervision of a staff to administer the funds so levied would be a political function. Justice Kennedy distinguished GRIFFIN V. COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY (1964), in which the Court had upheld the power of a district court to order a school district to levy taxes to reopen schools that had been closed in evasion of a desegregation order. *Griffin*, he said, involved an order to exercise an existing power to tax; in *Jenkins*, the school district would have to exceed its powers under state law. He suggested that the district court might have accomplished the desegregation of Kansas City's schools—although not with the particular remedies chosen—by means that did not require funding beyond the district's current means. Desegregating schools was an important objective, he said, but the limits on judicial power must be strictly observed.

KENNETH L. KARST
(1992)

(SEE ALSO: *Judicial Power and Legislative Remedies.*)

## *MISSOURI v. JENKINS*
515 U.S. 70 (1995)

In *Missouri v. Jenkins*, the Supreme Court considered once again the limits on the type of relief that a federal district court judge can order in a SCHOOL DESEGREGATION case. At issue was an ambitious DESEGREGATION order requiring salary increases for teachers and staff in the Kansas City school district and the continued funding of an extensive remedial education program.

The Court, in a 5–4 decision, struck down this desegregation order, holding that it went beyond the scope of the constitutional violation it sought to redress. The Court, with Chief Justice WILLIAM H. REHNQUIST writing for the majority, argued that the dominant purpose of the desegregation order was to attract nonminority students from outside the predominantly minority Kansas City school district and thereby to increase racial mixing in the Kansas City schools. The Court concluded that because the district court had found unlawful segregation only within the Kansas City school district, it did not have authority, in accordance with MILLIKEN V. BRADLEY (1974), to fashion a remedy for the purpose of increasing interdistrict desegregation.

In a DISSENTING OPINION, Justice DAVID H. SOUTER argued that district judges in school desegregation cases must have broad latitude to remedy the vestiges of segregation and to utilize remedies that may affect other school districts.

The decision reflects the Court's ongoing desire to end the era of judicial supervision of school districts and to return the control of schools to local officials.

DAVISON M. DOUGLAS
(2000)

Bibliography

JOONDEPH, BRADLEY W. 1996 *Missouri v. Jenkins* and the De Facto Abandonment of Court-Enforced Desegregation. *Washington Law Review* 71:597–681.

# MISSOURI COMPROMISE
(1820)

The Missouri Compromise provided a simple constitutional and geographical expedient for resolving a crisis of the Union growing out of SLAVERY's expansion into the western TERRITORIES. Because the compromise formed the basis of a balance of the free and slave states in the Union for a generation, its abrogation in the 1850s destabilized the constitutional system and intensified the disruption of the Union.

In 1819, Representative James Tallmadge of New York offered an amendment to the Missouri statehood enabling bill that would prohibit the further introduction of slavery into Missouri and would free all children born to slaves after the state's admission, but hold them in servitude until age 25. Free-state congressmen supported congressional power thus to restrict the admission of Missouri by arguments derived from four constitutional sources: the new states clause of Article IV, section 3, giving Congress discretionary authority to admit new states into the Union; the territories clause of the same article and section, empowering Congress to make "Regulations respecting the Territory" of the nation; the slave trade clause of Article I, section 9, permitting congress to control the "Migration" of persons; and the GUARANTEE CLAUSE of Article IV, section 4, which required all states to have a REPUBLICAN FORM OF GOVERNMENT. Supporters of the Tallmadge amendment, citing the DECLARATION OF INDEPENDENCE, argued that slavery was incompatible with republican government.

Opponents of the Tallmadge amendment rejected all these arguments, insisting particularly that the logical implications of the republicanism argument would subvert slavery in the states where it already existed. The first Missouri crisis was resolved by a package of statutes that admitted Missouri without the Tallmadge restriction, admitted Maine as a free state, and prohibited the introduction of slavery into the remainder of the Louisiana Purchase territory north of Missouri's southern boundary. This compromise was subsequently supplemented by an informal process of admitting paired free and slave states, thus preserving a balance between the sections in the SENATE.

On the eve of its statehood Missouri precipitated the second crisis by adopting provisions in its new constitution that would have prohibited the abolition of slavery without the consent of slaveholders and that required the state legislature to prohibit the ingress of free blacks. Constitutional arguments over the second controversy turned on the PRIVILEGES AND IMMUNITIES clause of Article IV, section 2, which introduced the question of the constitutional status of free black people. This issue went unresolved because the compromise that settled the second crisis simply provided that nothing Missouri might do in legislative compliance with the constitutional mandate should be construed to deny any citizen a privilege or immunity to which he was entitled, a toothless provision that Missouri flouted in 1847 by excluding free blacks.

THOMAS JEFFERSON warned at the time that "a geographical line, coinciding with a marked principle, moral and political, once conceived and held up to the angry passions of men, will never be obliterated." His somber prediction was fulfilled in the 1850s. The WILMOT PROVISO of 1846, which would have prohibited the introduction of slavery into territories acquired as a result of the Mexican War, inaugurated a period of controversy that terminated in the destruction of the Union in 1860. Democrats and southern political leaders in 1848 began to insist that the first Missouri restriction was unconstitutional and to demand its repeal. Repeal was accomplished by the KANSAS-NEBRASKA ACT of 1854; and Chief Justice ROGER B. TANEY gratuitously held that the Missouri Compromise had been unconstitutional all along in his opinion in DRED SCOTT V. SANDFORD (1857). Yet during Secession Winter, Senator JOHN J. CRITTENDEN resurrected the Missouri Compromise as the centerpiece of his compromise proposals, which recommended extrapolating the Missouri line all the way to the Pacific. But by 1860 sectional developments had made the constitutional settlement of 1820 obsolete.

WILLIAM M. WIECEK
(1986)

Bibliography

MOORE, GLOVER 1953 *The Missouri Controversy, 1819–1821.* Lexington: University of Kentucky Press.

## *MISSOURI EX REL. GAINES v. CANADA*
305 U.S. 337 (1938)

This was the first decision establishing minimum content for equality within the SEPARATE BUT EQUAL DOCTRINE. Missouri law excluded blacks from the state university; Gaines, a black applicant, was thus rejected by the university's law school. Missouri's separate university for blacks had no law school, and so the state offered to pay his tuition at a law school in a neighboring state. Represented by NAACP lawyers, Gaines sought a WRIT OF MANDAMUS to compel his admission to the state university law school. The state courts denied relief, and the Supreme Court reversed, 6–2.

Chief Justice CHARLES EVANS HUGHES, for the majority, said, "The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State." The case was thus a doctrinal milestone on the road to BROWN V. BOARD OF EDUCATION (1954). Henceforth the Court would demand real equality in a segregated system of education. Because the education of blacks in the southern and border states had emphasized separateness and deemphasized equality—even equality of physical facilities and school spending—it would have been enormously expensive for the states to satisfy the test of *Gaines* by providing parallel educational systems. *Brown*'s question—whether segre-

gation itself imposed an unconstitutional inequality—was a natural extension of the inquiry launched in *Gaines*.

KENNETH L. KARST
(1986)

## *MISSOURI PACIFIC RAILROAD v. HUMES*
115 U.S. 512 (1885)

A CORPORATION, invoking the FOURTEENTH AMENDMENT, employed SUBSTANTIVE DUE PROCESS against a state statute, but the Supreme Court, led by Justice STEPHEN J. FIELD, unanimously construed due process in an exclusively procedural sense. A statute might seriously depreciate the value of property, Field declared, but "if no rule of justice is violated in the provisions for the enforcement of such a statute," it could not be said to deprive a person of property without due process. The case was a replay of *Davidson v. New Orleans* (1878), which Field quoted. In 1886, the Court began to abandon the *Davidson-Humes* view of due process. (See STONE V. FARMERS' LOAN & TRUST CO.)

LEONARD W. LEVY
(1986)

## *MISTRETTA v. UNITED STATES*
488 U.S. 361 (1989)

In *Mistretta* the Supreme Court, 8–1, upheld the Sentencing Reform Act of 1984 against the constitutional challenges that it was an unconstitutional DELEGATION OF POWER and that it violated the principle of SEPARATION OF POWERS by intruding the federal judiciary into functions that are legislative.

Congress has the power to fix the sentence for a federal crime. Historically Congress has, in practical effect, delegated a considerable part of this power to the judicial branch through the mechanism of setting a range of possible sentences for the same offense—for example, one to five years of imprisonment. This scheme gives the judge authority to select the sentence appropriate in a particular case—typically including the possibility of probation—in light of the circumstances of the offense, the defendant's history and sense of responsibility, and the like. The possibility of a presidential pardon remained. In recent years, too, Congress allowed the judge to sentence the defendant to an indeterminate term, leaving the actual release date to the U.S. Parole Commission, an agency located in the executive branch. The system not only divided power among the three branches of the federal government, but also produced wide-ranging variation in the severity of sentences.

These disparities persisted despite the best efforts of sentencing institutes, judicial councils, and the Parole Commission. Concern for sentencing inequities, combined with a desire to express a tough attitude toward crime, led Congress to adopt the 1984 act. This act authorized the creation of the United States Sentencing Commission, "an independent commission in the judicial branch" composed of seven members appointed by the President with the ADVICE AND CONSENT of the Senate. Three of the members must be federal judges chosen by the President from a list of six submitted by the JUDICIAL CONFERENCE OF THE UNITED STATES. The commission was authorized to prepare guidelines for essentially determinate SENTENCING, specifying sentences for various types of crimes and categories of defendants. A judge must adhere to the guidelines except when a case presents aggravating or mitigating circumstances of a kind not specified in the guidelines. The commission is to review and revise the guidelines periodically.

John Mistretta, sentenced on the basis of the guidelines by a federal district court for the sale of cocaine, appealed to the UNITED STATES COURT OF APPEALS and petitioned the Supreme Court for CERTIORARI before judgment in the court of appeals. The Supreme Court granted the petition and affirmed the sentence. Justice HARRY A. BLACKMUN, writing for the Court, quickly rejected *Mistretta*'s delegation of power challenge. Congress can constitutionally delegate its legislative power to an agency if it specifies clear standards for the agency to follow in carrying out its rule-making power. Congress gave the Sentencing Commission a clear set of specific goals, including lists of the factors to be considered in establishing grades of offense and categories of defendants. These lists leave considerable discretion to the commission, but the statute's standards are sufficiently clear to allow a reviewing court to determine whether the commission had followed the will of Congress.

Justice Blackmun wrote at greater length in rejecting the broader separation of powers challenge that the Sentencing Commission was a judicial body exercising legislative powers. The commission's work undoubtedly involved political judgment, but the practical consequences of locating the commission within the judicial branch did not threaten to undermine either the integrity of the judiciary or the power of Congress. On the question of locating the commission within the judicial branch, Justice Blackmun emphasized that the commission is not a court and does not exercise judicial power; that Congress can override the commission's determinations at any time; and that the questions assigned to the commission had long been exercised by the judiciary in the aggregate, deciding case by case.

Justice Blackmun found "somewhat troublesome" the

participation in the commision of judges appointed under Article III of the Constitution. Nonetheless, he concluded that the constitution does not prohibit Article III judges from taking on extrajudicial functions in their individual capacities, that Congress and the President had historically aquiesced in federal judges' assumption of such duties, and that the Court's own precedents supported the constitutionality of the practice. Some kinds of extrajudicial service might have adverse effects on the public's sense of the judiciary's independence, but the commision's work was "essentially neutral" in the political sense and designed primarily to govern tasks done entirely within the judicial branch. Although the President could remove the commision members for neglect of duty or malfeasance, this power did not extend to the dismissal of federal judges as judges. Justice Blackmun made clear that there were limits to such extrajudicial services by judges of the CONSTITUTIONAL COURTS, but he could find no constitutionally significant practical effect on the work of the judicial branch from these judge's service on this commision. The emphasis on "practical" and "functional" considerations is the central theme throughout Justice Blackmun's opinion.

Justice ANTONIN SCALIA dissented, arguing that Congress could not constitutionally delegate its legislative power to an agency whose sole power was to make laws, even laws going under the name of "guidelines." This opinion represents the strongest effort in the modern era to revive the delegation doctrine as a serious limit on congressional authority to enlist other agencies in lawmaking. Justice Scalia lamented the Court's tendency to tolerate blurring of the lines separating the powers of the three branches of the federal government. Scolding the majority in a manner now familiar, he offered a restatement of today's operative rule: "the functions of the Branches should not be commingled too much—how much is too much to be determined, case-by-case, by this Court." If we disregard the tone, this restatement seems exactly on the mark. Even so, it is not clear how the national government can be run on a formalistic model of separation of powers that already seemed too confining in 1794 when JOHN JAY, while he was Chief Justice of the United States, went to London to negotiate the agreement we now call JAY'S TREATY.

KENNETH L. KARST
(1992)

## *MITCHUM v. FOSTER*
407 U.S. 225 (1972)

The federal anti-INJUNCTION statute prohibits a federal court from granting an injunction to stay state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its JURISDICTION, or to protect or effectuate its judgments." In *Mitchum*, relying on the "basic alteration" in our federal system wrought by the RECONSTRUCTION-era legislation, the Supreme Court decided that SECTION 1983, TITLE 42, UNITED STATES CODE (originally part of the Civil Rights Act of 1871), constituted an exception to the prohibition despite the absence of an express reference in section 1983 to the anti-injunction statute. Recent scholarship, which implicitly supports *Mitchum*, suggests that the original 1793 version of the anti-injunction statute sought merely to prohibit individual Supreme Court Justices from enjoining state proceedings and was not intended to be a comprehensive ban on federal injunctions against state proceedings. The Court's prior decision in YOUNGER V. HARRIS (1971) limits *Mitchum*'s practical importance. *Younger*, which relied on nonstatutory grounds, severely restricted federal courts' discretion to enjoin pending state proceedings.

THEODORE EISENBERG
(1986)

## *M. L. B. v. S. L. J.*
519 U.S. 102 (1996)

A Mississippi trial court terminated M. L. B.'s parental rights to two minor children. When she sought to appeal, the state insisted on advance payment of some $2,300 in fees for preparation of the trial record; because she lacked the money to pay the fees, her appeal was dismissed. The Supreme Court held, 6–3, that conditioning appeal from a trial court termination of parental rights on a parent's ability to pay violated the DUE PROCESS and EQUAL PROTECTION clauses of the FOURTEENTH AMENDMENT.

Writing for the Court, Justice RUTH BADER GINSBURG recognized that previous decisions had not extended the rule of GRIFFIN V. ILLINOIS (1957) to guarantee ACCESS TO THE COURTS in all civil cases. She noted, however, that in cases "involving controls or intrusions on family relationships" the Court had been more receptive to both due process and equal protection claims. Mississippi's policy was not an ordinary refusal to subsidize the exercise of a constitutional right. Here, by analogy to a criminal case, M. L. B. sought "to be spared from the State's devastatingly adverse action." Justice ANTHONY M. KENNEDY, concurring, would have placed the decision solely on due process grounds.

Dissenting, Justice CLARENCE THOMAS relied on the argument of the second Justice JOHN MARSHALL HARLAN in his dissent in *Griffin:* that due process did not require an appeal, and that equal protection was not violated by a state's failure to make up for an indigent's ability to pay for a service necessary to secure an appeal. Chief Justice WILLIAM H. REHNQUIST and Justice ANTONIN SCALIA joined in this

part of the dissent. Thomas, joined only by Scalia, also said he would be inclined to OVERRULE *Griffin*.

KENNETH L. KARST
(2000)

## *MOBILE v. BOLDEN*
446 U.S. 55 (1980)

A fragmented Supreme Court majority upheld, 6–3, Mobile's at-large system for electing city commissioners, although the system diluted the voting strength of black voters by submerging them in a white majority. The plurality found that purposeful RACIAL DISCRIMINATION had not been demonstrated. (See WASHINGTON V. DAVIS; ROGERS V. LODGE.) In 1982 Congress amended the VOTING RIGHTS ACT OF 1965 to permit reliance on racially discriminatory "results" to show a violation of the act's prohibitions.

KENNETH L. KARST
(1986)

## *MONELL v. DEPARTMENT OF SOCIAL SERVICES*
436 U.S. 658 (1978)

In 1961, MONROE V. PAPE had held municipalities effectively immune from suit under SECTION 1983, TITLE 42, UNITED STATES CODE. *Monell* reinterpreted the legislative history relied upon in *Monroe* to conclude that municipalities may be sued under section 1983 but are liable only for acts constituting official policy. Not every violation of federal rights by municipal employees gives rise to an action against the municipality.

THEODORE EISENBERG
(1986)

# MONETARY POWER

The monetary power of Congress flows from one express constitutional grant and a melange of others, cemented by the NECESSARY AND PROPER CLAUSE. The enumerated power deals with coin and has never been significant in American constitutional law. Congress's more important powers over the money supply—to charter banks and endow them with the right to issue circulating notes, to emit BILLS OF CREDIT, and to make government paper a legal tender—are only implied. From the administration of GEORGE WASHINGTON to the age of FRANKLIN D. ROOSEVELT, few questions were debated with more intensity than the nature and scope of Congress's IMPLIED POWERS over the currency. At no point, however, did the Supreme Court offer sustained resistance to the extension of Congress's authority. In MCCULLOCH V. MARYLAND (1819), the lodestar case on the monetary power, the MARSHALL COURT upheld incorporation of a bank as an appropriate means for executing "the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies." The HUGHES COURT invoked the same undifferentiated list of enumerated powers, reinforced by the necessary and proper clause, in the GOLD CLAUSE CASES (1935), where the last potential limitation on Congress's monetary power was swept away.

Two factors account for the Court's acquiescence. The ambiguous legacy of the CONSTITUTIONAL CONVENTION OF 1787 was especially important. Monetary questions loomed large in the political history of the Confederation era, and some of the Founders, perhaps a majority, wanted to constitutionalize a settlement. They acted decisively to curtail state power. Article I, section 10, provides that "no state shall . . . coin money; emit bills of credit; [or] make anything but gold and silver coin a tender in payment of debts." But the Founders were more circumspect when dealing with the scope of national power. JAMES MADISON's motion to vest Congress with a general power "to grant charters of incorporation" was not adopted because, as RUFUS KING explained, the bank question might divide the states "into parties" and impede ratification. JAMES WILSON suggested that the power to incorporate a bank was implied anyway; but GEORGE MASON, the only other delegate to speak on the matter, disagreed.

Conflicting conceptions of implied powers also materialized without being resolved in the much longer debate on Congress's authority to augment the money supply with government paper. The original draft of the Constitution, as reported to the convention by the Committee of Detail, empowered Congress "to borrow money and emit bills on the credit of the United States." When this section was reached in debate, GOUVERNEUR MORRIS moved to strike out the emission clause; the motion was ultimately carried by a vote of nine states to two. Yet there was no meeting of minds on the implications of Morris's motion before the roll call. Wilson, Mason, and virtually everyone else who spoke assumed that striking out the emission power was equivalent to prohibiting congressional exercise of such a power. Morris said that "the monied interest will oppose the plan of government if paper emissions be not prohibited." But NATHANIEL GORHAM remarked that he was for "striking out, without inserting any prohibition." And that was precisely what happened. Gorham neither mentioned the concept of implied powers nor flatly stated that eliminating the power to emit was by no means equivalent to prohibiting it. His remarks nonetheless suggest that at

least some of the Founders assumed, despite Morris's protestations to the contrary, that to vote for his motion was to leave the paper money question to be settled as problems arose.

The sequence of federal legislation on banking and the currency was the second factor that shaped the growth of Congress's monetary power in constitutional law. Once the Constitution had been ratified, Congress was required to assert implied powers either to incorporate a bank or to issue paper money. Sanctioned exercise of one power could be expected to provide at least a modicum of constitutional authority for assertion of the other. Yet the Founders' distrust of government paper was so intense that it was possible for a skillful statesman to obscure the close constitutional relationship between the powers to incorporate banks and emit paper money by treating the former as a conservative policy alternative to the latter. ALEXANDER HAMILTON was such a statesman.

In his Report on the National Bank (1790) Hamilton stressed the "material differences between a paper currency, issued by the mere authority of Government, and one issued by a Bank, Payable in coin." The proposed national bank, he said, would serve as a financial arm of the government and a ready lender to the Treasury; its capital stock, consisting primarily of public securities, would be monetized in the form of bank notes redeemable in specie, thereby multiplying the nation's active capital and stimulating trade. Paper money, in contrast, was just too "seducing and dangerous an expedient," for "there is almost a moral certainty of its becoming mischievous." Much of the constitutional theory he mustered later to justify Congress's power to incorporate a bank was equally applicable to its power to issue paper money. But it is unlikely that the congressmen who approved the BANK OF THE UNITED STATES ACT or President Washington, who signed the bill despite forceful constitutional arguments against it by THOMAS JEFFERSON and others, would have sanctioned Hamilton's BROAD CONSTRUCTION of the government's implied powers in order to facilitate emissions of paper money. In view of JOHN MARSHALL's language regarding the sanctity of contracts in OGDEN V. SAUNDERS (1827), it is equally significant the *McCulloch* involved national bank notes rather than depreciated government paper.

Between 1812 and 1815 there occurred another series of events with implications almost as great as *McCulloch* for the development of Congress's monetary power. The First Bank's charter expired in 1811; its successor was not created until 1816. When the War of 1812 began, then, the government had to finance its operations without the aid of a national banking system. On four separate occasions Congress followed President Madison's recommendation and authorized the emission of Treasury notes, fundable into government bonds and receivable for all duties and taxes owed to the government. Every piece of paper issued in 1812, 1813, and 1814 had a large denomination, carried a fixed term, and bore interest. But the 1815 issue was of bearer notes without interest, in denominations from three, five, and ten dollars upward, receivable in payments to the United States without time limit. Debate in Congress suggests that the notes were fully expected to circulate as currency. Nobody objected to them on constitutional grounds and all were retired soon after the war. Nevertheless, the 1815 Treasury notes provided what John Jay Knox later called "a fatal precedent."

Knox's was a shrewd observation. The Madison administration's Treasury notes were indistinguishable from the bills of credit which Gouverneur Morris and others thought they had prohibited at the Constitutional Convention. In defense of his motion to strike the emission clause, Morris had emphasized that "a responsible minister" could meet emergencies without resort to bills of credit. The remaining power "to borrow money," he had explained, would enable the Treasury to issue "notes"—a term which he understood to mean interest-bearing, fixed-term paper in contradistinction to "bills" which he defined as interest-free paper issued by the government in payment of its obligations. The Treasury notes emitted by the Madison administration were clearly of the latter variety. Moreover, the receivability of those notes for all public debts undermined Madison's own constitutional understanding of 1787. He had suggested that the Convention ought to retain the emission power while expressly prohibiting the power to make government paper a legal tender.

As he noted in his journal, however, Madison had "acquiesce[d]" in the Convention's decision once he "became satisfied that striking out the words would not disable the Government from the use of public notes as far as they could be safe and proper; and would only cut off the pretext for a paper currency and particularly for making the bills a tender either for public or private debts." At Philadelphia, moreover, only Madison had emphasized the legal tender question. And as the bullionists on the Court learned during the post-Civil War LEGAL TENDER CASES, it was extremely difficult to deny Congress the legal tender power once its power to emit bills of credit had been conceded and *McCulloch* had established its discretion in the choice of appropriate means.

Yet the distrust of money-supply decisions made by legislation retained such great vitality during the nineteenth century that an attempt was made to proscribe irredeemable government paper on constitutional grounds. It came in *Hepburn v. Griswold* (1870). Speaking for a 4–3 majority, Chief Justice SALMON P. CHASE declared that the legal tender legislation he had recommended during his tenure as ABRAHAM LINCOLN's secretary of the treasury was invalid insofar as it impaired the value of preexisting private debts. Chase began by reiterating Marshall's *McCulloch*

commentary on implied powers and "the painful duty of this tribunal" with regard to laws inconsistent with the "letter and spirit" of the Constitution. He admitted that Congress had an "undisputed power" to emit bills of credit; in VEAZIE BANK V. FENNO (1869) he had said that Congress might even levy prohibitive taxes on the notes of state-chartered banks in order "to provide a currency for the whole country." But the legal tender power was distinguishable. It was not necessary, though perhaps convenient, for Congress to impart legal tender qualities to its paper in order to guarantee circulation. And legislation that impaired contracts was not only contrary to the "spirit" of the Constitution as Marshall and others had understood it but also deprived creditors of property without DUE PROCESS or JUST COMPENSATION.

The narrow construction of Congress's authority expounded in *Hepburn* did not endure. SAMUEL MILLER, dissenting along with NOAH SWAYNE and DAVID DAVIS, had claimed that the majority's reliance on the "spirit" of the Constitution substituted "an undefined code of ethics for the Constitution." In their view, *McCulloch* had established that "where there is a choice of means, the selection is for Congress, not the Court." WILLIAM STRONG and JOSEPH BRADLEY, whom ULYSSES S. GRANT nominated to the Court on the very day *Hepburn* was decided, agreed with the *Hepburn* dissenters and voted to overrule Chase's previous majority in *Knox v. Lee* (1871). Bradley stated in a concurring opinion that once the power to emit bills of credit had been conceded, "the incidental power of giving such bills the quality of legal tender follows almost as a matter of course." Strong's opinion for the Court responded forcefully to the "TAKING" claims advanced in *Hepburn*. An 1834 act passed pursuant to Congress's power "to coin money and regulate the value thereof," he pointed out, had established a new regulation of the weight and value of gold coins. Creditors had sustained consequential injuries as a result, for antecedent debts had become "solvable with six per cent less gold than was required to pay them before." But it had never been imagined that Congress had taken property without due process of law. Congress's implied monetary powers, Strong concluded, were as plenary as its enumerated monetary power: "Contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of contract can extend to the defeat of legitimate governmental authority."

Two other Chase Court decisions, *Bronson v. Rodes* (1869) and *Trebilock v. Wilson* (1872), reflected the law's continuing favor for freedom in private contract despite Strong's sweeping language regarding the plenary nature of Congress's monetary power. There the Court held that agreements specifically requiring payment in gold and silver coin could not be satisfied by tenders of irredeemable government paper. Coin was still a legal tender under federal law, the Court explained; because the Legal Tender Acts did not expressly prohibit parties from drafting contracts requiring payment in specie, it remained "the appropriate function of courts . . . to enforce contracts according to the lawful intent and understanding of the parties." Creditors found *Bronson* and *Trebilock* particularly reassuring in the Populist era. Although the Civil War greenbacks became redeemable at par in 1879, apprehensions of currency devaluation by "free coinage" of silver prompted virtually all draftsmen of long-term debt obligations to specify repayment in gold coin of a given weight and fineness. But the monetary crisis of 1933 led not only to another, apparently final abandonment of the gold standard and a substantial depreciation of the currency but also to a joint resolution of Congress that proclaimed gold clauses in private contracts to be "against public policy" and void. Eight years later, EDWARD S. CORWIN remarked that "no such drastic legislation from the point of view of property rights had ever before been enacted by the Congress."

The Court nonetheless sustained the resolution by a 5–4 margin in the GOLD CLAUSE CASES (1935). In *Bronson* and *Trebilock*, Chief Justice CHARLES EVANS HUGHES explained for the majority, the Court had mandated the enforcement of contracts containing gold clauses at a time when Congress had not prohibited such agreements. Now Congress had acted; "parties cannot remove theirs transactions from the reach of dominant constitutional power by making contracts about them." JAMES MCREYNOLDS filed a discursive dissent in which he claimed, among other things, that the Constitution "is gone." In one respect his argument had some merit. Many of the Founders, perhaps a majority, had assumed that adoption of Gouverneur Morris's motion to strike the power to emit bills of credit precluded all government paper designed to circulate as money. Yet contracts were enforceable in government paper and only government paper after 1933. From another perspective, however, McReynolds's claim was simply perverse. The constitutional text does not forbid Congress to issue paper money, and American constitutional law not only sets limitations on what government does but also legitimizes government's authority to act affirmatively in the face of changing public interests. It was no accident that when Marshall emphasized the importance of remembering that "it is a *constitution* we are expounding," he did so in the leading case involving Congress's monetary power.

CHARLES W. MCCURDY
(1986)

Bibliography

CORWIN, EDWARD S. 1941 *Constitutional Revolution, Ltd.* Claremont, Calif.: Claremont Colleges.

DAM, KENNETH W. 1982 The Legal Tender Cases. *Supreme Court Review* 1981:367–412.

HURST, JAMES WILLARD 1973 *A Legal History of Money in the United States, 1774–1970.* Lincoln: University of Nebraska Press.

KNOX, JOHN JAY 1882 *United States Notes: A History of the Various Uses of Paper Money by the Government of the United States.* New York: Scribner's.

## MONROE, JAMES
(1758–1831)

James Monroe was the last veteran of the AMERICAN REVOLUTION to serve as President of the United States. He had abandoned his studies at the College of William and Mary to join the army, and he rose to the rank of lieutenant colonel. He later read law under THOMAS JEFFERSON and, in 1782, was elected to the legislature of his native Virginia. From 1783 to 1786 he represented Virginia in Congress, where one of his chief concerns was the unsuccessful attempt to amend the ARTICLES OF CONFEDERATION to provide for a stronger central government. A committee chaired by Monroe drafted an amendment that would have given Congress the power to regulate commerce, but no action was taken on the amendment.

Notwithstanding his views on the Confederation, Monroe opposed RATIFICATION OF THE CONSTITUTION, primarily because it created too strong a central government and vested too much power in the President. He publicly professed to see in the proposed system a tendency toward monarchy and aristocracy, and he privately complained that the South would be outvoted on sectional issues.

From 1790 to 1794, Monroe represented Virginia in the United States Senate. There he was a leader of the Republican party and an opponent of the programs of ALEXANDER HAMILTON and especially of the BANK OF THE UNITED STATES ACT. He left the Senate in 1794 to become ambassador to France. He served as governor of Virginia (1799–1802), then held diplomatic posts abroad for the Jefferson administration, including an assignment as one of the negotiators of the LOUISIANA PURCHASE TREATY. He was again elected governor in 1811 but resigned to become secretary of state under President JAMES MADISON. During the War of 1812 he also acted as secretary of war.

Monroe's presidency (1817–1825) was notable for the rhetoric of constitutional literalism and STRICT CONSTRUCTION. He opposed congressional schemes for federally funded INTERNAL IMPROVEMENTS (such as highways and canals) on the grounds that there was no constitutional authority for them; but he suggested a constitutional amendment to confer such authority. In 1820, despite reservations about the constitutionality of its conditions on admission of a state, Monroe approved the MISSOURI COMPROMISE limiting expansion of SLAVERY IN THE TERRITORIES. And in 1823, on the advice of Secretary of State JOHN QUINCY ADAMS, he asserted presidential control over FOREIGN AFFAIRS by proclaiming the MONROE DOCTRINE. During his administration, the opportunity for peaceful westward development was assured by the negotiation of treaties fixing the borders of the United States with Canada and with the Spanish and Russian possessions in North America.

The most pressing constitutional question of his time was the place of slavery in the American republic. Himself a slaveholder, Monroe favored gradual, compensated emancipation followed by settlement of ex-slaves in Africa. To that end he was a founding member of the American Colonization Society; and the capital of Liberia, the African state settled through the society's efforts, was named in his honor.

Monroe's last active role in public affairs was as president of the Virginia CONSTITUTIONAL CONVENTION of 1829.

DENNIS J. MAHONEY
(1986)

Bibliography

AMMON, HARRY 1971 *James Monroe: The Quest for National Identity.* New York: McGraw-Hill.

## *MONROE v. PAPE*
365 U.S. 167 (1961)

This case, a fountainhead of modern CIVIL RIGHTS doctrine, arose out of an unconstitutional search conducted by Chicago police officers. The victim sought damages in an action brought under SECTION 1983, TITLE 42, UNITED STATES CODE, which authorizes suits for deprivations, under COLOR OF LAW, of rights, privileges, or immunities secured by the Constitution and laws of the United States. *Monroe* settled that section 1983 protects all FOURTEENTH AMENDMENT rights and not merely those narrowly defined rights that the SLAUGHTERHOUSE CASES (1873) found to be protected by the Fourteenth Amendment's PRIVILEGES AND IMMUNITIES clause. Early litigation under section 1983 had suggested possible links between the scope of the privileges and immunities clause and the rights protected by section 1983. *Monroe* also confirmed earlier holdings in federal civil rights cases that the phrase "under color of" law in section 1983 includes official acts not authorized by state law. *Monroe*'s third holding, that cities could not be made defendants in section 1983 cases, was overruled in MONELL V. DEPARTMENT OF SOCIAL SERVICES (1978).

THEODORE EISENBERG
(1986)

## MONROE DOCTRINE

2 Richardson, *Messages and Papers of the Presidents* 207 (1823)

The United States, the first true revolutionary nation, became, in 1823, the guardian of the emerging revolutionary states of the New World. The American constitutional ideal of republican, LIMITED GOVERNMENT, founded on NATURAL RIGHTS and SOCIAL COMPACT, stood in opposition to the constitutional system of Europe, based on hereditary privilege. The countries of the Western Hemisphere, becoming independent in the early nineteenth century, would, in rejecting the European system, seem naturally to embrace the American ideal.

JOHN QUINCY ADAMS, secretary of state to President JAMES MONROE, perceived the threat to the Americas from the reactionary Concert of Europe and the Holy Alliance. Adams formulated, and Monroe announced, a policy of resistance to any attempt to restore European hegemony in the Americas. Although Adams counseled use of diplomatic channels, Monroe, on the advice of Secretary of War JOHN C. CALHOUN, announced the doctrine in his 1823 State of the Union Message.

The proclamation of the Monroe Doctrine was a significant assertion of executive power in FOREIGN AFFAIRS. Although Monroe's address repeatedly stressed America's neutrality in European wars and in the colonial revolutions against Spain, his declaration that "we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety" was a clear warning that American interests would be vindicated by force, if necessary. The President, therefore, committed the country to potential military action outside its borders and announced the fact to Congress rather than asking for congressional authorization.

The Constitution, of course, makes no provision for so sweeping an assertion of executive authority over foreign affairs or so general a commitment of American power abroad. Yet the Monroe Doctrine swiftly became part of the UNWRITTEN CONSTITUTION, the accretion of customs and precedents that fill the constitutional lacunae.

DENNIS J. MAHONEY
(1986)

Bibliography

PERKINS, DEXTER 1955 *A History of the Monroe Doctrine*. Boston: Little, Brown.

## MONTESQUIEU
(1689–1755)

The political philosophy of Charles de Secondat, Baron de la Brede et de Montesquieu, was an important influence on American constitutional thought. The leading republican theorist of the generation immediately preceding the American Revolution, he was referred to more frequently by the delegates to the CONSTITUTIONAL CONVENTION OF 1787 than any other theoretical writer. JAMES MADISON (in THE FEDERALIST #43) called him "the oracle . . . who is always consulted and cited." In the debates on the RATIFICATION OF THE CONSTITUTION the authority of Montesquieu was invoked by partisans ranging from Luther Martin to ALEXANDER HAMILTON.

Montesquieu's most important work was *The Spirit of the Laws* (1748). The book seems obscure and difficult to most readers, at least partly because the author tried to combine a philosophic inquiry, intended for a few readers only, with practical political advice meant for a much wider audience. In Montesquieu's practical teaching, based on observation, philosophic reflection, and firsthand experience, the American founders found the apparent resolution of two key problems of American politics: how to reconcile popular government with a vast extent of territory and how to reconcile energetic government with the security of liberty.

Montesquieu was the first political philosopher to treat FEDERALISM at any length. He believed, with the classical theorists, that republican government was possible only in small societies, for there alone could be found the virtue and public-spiritedness necessary if people are to govern themselves. But small republics are in constant danger from larger, despotic neighbors. The solution was the federal republic: "a convention by which several bodies politic consent to become citizens of a larger state . . . a society of societies who form a new one, which can enlarge itself through new associates who join."

But a large republic, even a federal republic, is liable to destruction through internal strife. Sectional and religious differences divide the people and make republican virtue impossible. For this, too, Montesquieu had an answer: "Commerce cures destructive prejudices; and it is almost a general rule that wherever there is commerce there are gentle ways of life." Commerce tends to make people peaceful and tolerant, and it makes them aware of their interdependence for security and comfort.

Montesquieu's greatest influence on American CONSTITUTIONALISM is seen in the twin doctrines of SEPARATION OF POWERS and CHECKS AND BALANCES. Montesquieu adopted the idea of separation of powers from JOHN LOCKE, but he fundamentally modified it by defining the three branches of government as legislative, executive, and judicial. Although Montesquieu introduced separation of powers in a famous chapter "On the Constitution of England," that chapter actually comprises not a description of the English government but rather a presentation of the conditions necessary for liberty and safety. Checks and balances, ac-

cording to Montesquieu, are modifications of separation of powers necessary to keep any one branch of government from becoming despotic and to promote harmony of action.

DENNIS J. MAHONEY
(1986)

Bibliography

ALLEN, WILLIAM BARCLAY 1972 Montesquieu: The Federalist-Anti-Federalist Debate. Unpublished Ph.D. dissertation, Claremont Graduate School.

PANGLE, THOMAS L. 1973 *Montesquieu's Philosophy of Liberalism.* Chicago: University of Chicago Press.

## MOODY, WILLIAM H.
(1853–1917)

After studying law in the offices of novelist-lawyer Richard Henry Dana, William Henry Moody of Massachusetts first came to national attention as a special prosecutor in the Fall River ax-murder case of Lizzie Borden (1892). In 1895 he went to Congress where he served as a Republican until President THEODORE ROOSEVELT appointed him secretary of the navy in 1902. When PHILANDER C. KNOX left the administration for the Senate in 1904, Moody replaced him as attorney general. Philosophically comfortable with the President, Moody spent much of his tenure directing the prosecution of the Beef Trust. Although Knox had begun the case, Moody successfully argued SWIFT & COMPANY V. UNITED STATES (1905) before the Supreme Court, helping to lay the basis for the STREAM OF COMMERCE doctrine. As attorney general, Moody directed active participation by the Department of Justice in many facets of national ECONOMIC REGULATION, from antitrust proceedings to railroad regulation under the ELKINS ACT.

Roosevelt rewarded Moody's service and his commitment to a strong national government by appointing him to succeed Justice HENRY B. BROWN on the Supreme Court in 1906. Although Moody's service on the Court formally lasted until 1910, he was rarely present the last two years. Moody took part in relatively few cases during his tenure, but his opinions fulfilled Roosevelt's expectations and reflected Moody's moderate PROGRESSIVISM. As a Justice, Moody continued his support of regulatory legislation, often voting with the Court to extend or strengthen federal authority. Moody joined the majority in LOEWE V. LAWLOR (1908), holding that the SHERMAN ANTITRUST ACT covered labor boycotts, and he wrote for the dissenters in the first EMPLOYERS' LIABILITY CASES (1908), asserting that Congress had power to regulate employer-employee relations in INTERSTATE COMMERCE issues. Although that dissent typified Moody's willingness to expand the reach of federal powers, he also supported exercises of STATE POLICE POWER when they worked no interference with federal powers. An adherent of judicial self-restraint, Moody opposed judicial legislation and he silently concurred in MULLER V. OREGON (1908), in which the BRANDEIS BRIEF offered convincing EVIDENCE to the Court of the benefits of maximum hours legislation. In TWINING V. NEW JERSEY (1908), perhaps his best-known opinion, Moody, for the Court, declared that the RIGHT AGAINST SELF-INCRIMINATION was not an "essential element" of DUE PROCESS OF LAW incorporated in the FOURTEENTH AMENDMENT and applicable to the states. If the people of the state were dissatisfied with the law, he declared, recourse "is in their own hands."

Stricken with acute rheumatism, Moody retired in 1910 and died, a semi-invalid, seven years later.

DAVID GORDON
(1986)

## MOORE, ALFRED
(1755–1810)

A staunch FEDERALIST in an ANTI-FEDERALIST state, Alfred Moore served as North Carolina's attorney general from 1782 to 1791 and was prominent in securing RATIFICATION OF THE CONSTITUTION there. He defended the state Confiscation Act in BAYARD V. SINGLETON (1787), opposing JUDICIAL REVIEW. President JOHN ADAMS appointed him to the Supreme Court in 1799 but he resigned in 1804 because of ill health. During his tenure Moore wrote only one opinion, in *Bas v. Tingy* (1800), a prize case. Moore's unexceptional opinion, together with those of the other Justices, lent support to congressional legislation dealing with the quasi-war with France.

DAVID GORDON
(1986)

## *MOORE v. CITY OF EAST CLEVELAND*
431 U.S. 494 (1977)

Although it produced no OPINION OF THE COURT, *Moore* is a major modern Supreme Court precedent confirming the Constitution's protection of the family. A 5–4 Court held invalid a city ordinance limiting occupancy of certain residences to single families and defining "family" in a way that excluded a family composed of Inez Moore, her son, and two grandsons who were not brothers but cousins. Justice LEWIS F. POWELL, for a plurality of four Justices, concluded that "such an intrusive regulation of the family" required careful scrutiny of the regulation's justification. The city's asserted justifications—avoiding overcrowding,

traffic and parking problems, and burdens on its schools—were served only marginally by the ordinance. The plurality thus concluded that the ordinance denied Mrs. Moore liberty without DUE PROCESS OF LAW.

Justice JOHN PAUL STEVENS, concurring, characterized the ordinance as a TAKING OF PROPERTY without due process or compensation. Chief Justice WARREN E. BURGER, dissenting, would have required Moore to exhaust her state administrative remedies before suing in federal court. Three other Justices dissented on the merits, rejecting both due process and EQUAL PROTECTION attacks on the ordinance and more generally opposing heightened judicial scrutiny of legislation merely on the basis of its effect on a family like the Moores.

The PLURALITY OPINION has become a standard citation for the reemergence of SUBSTANTIVE DUE PROCESS, and more specifically for a constitutional right of an extended—but traditional—family to choose its own living arrangements. In a wider perspective the decision can be seen as part of the growth of a FREEDOM OF INTIMATE ASSOCIATION. The decision was not, however, a blow against covert RACIAL DISCRIMINATION. East Cleveland was a predominantly black city, with a black commission and city manager. The ordinance, like ordinances in many white communities, was designed to maintain middle-class nuclear family arrangements. In this perspective, the PLURALITY OPINION is seen to collide with *Village of Belle Terre v. Boraas* (1974), which had upheld an ordinance excluding "unrelated" groups from single-family residences. Justice Powell's distinction of *Belle Terre* amounted to this: families are different. But he offered no definition of "family" apart from a generalized bow to "a larger conception of the family," including an extended family of blood relatives, for which he found support in "the accumulated wisdom of civilization." Of such stuff is substantive due process made.

KENNETH L. KARST
(1986)

Bibliography

BURT, ROBERT A. 1979 The Constitution of the Family. *Supreme Court Review* 1979:329, 388–391.

## *MOORE v. DEMPSEY*
261 U.S. 86 (1923)

*Moore* was a landmark for two of the twentieth century's most important constitutional developments: the emergence of the DUE PROCESS clause of the FOURTEENTH AMENDMENT as a limitation on state CRIMINAL PROCEDURE, and the assumption by the federal judiciary of a major responsibility for supervising the fairness of state criminal processes, through HABEAS CORPUS proceedings.

For all its importance, the case began as a squalid episode of racist ferocity. Returning from WORLD WAR I, a black Army veteran sought to organize black tenant farmers of Phillips County, Arkansas, into a farmers' union. In October 1919—a year disfigured by racial violence in both North and South—these farmers held a meeting in a rural church to plan efforts to obtain fair accountings from their white landlords. At this remove in time it requires effort to understand that such a meeting, in such a place, for such a purpose, was seen as revolutionary. A sheriff's deputy fired at the church; blacks who were armed fired back, killing the deputy and wounding his companion. Hundreds of new deputies were sworn; they and hundreds of troops arrested most of the county's black farmers, killing resisters. Responsible estimates of the black dead ranged from twenty-five to 200.

About 120 blacks were indicted for various crimes, including the murder of the deputy. The trial juries, like the grand jury that had issued the INDICTMENTS, were all white. Twelve men were convicted of murder and sentenced to death; dozens of others were sentenced to long prison terms. The twelve sentenced to death filed APPEALS in two groups of six each. One group, after multiple appeals, was released in 1923 by order of the Arkansas Supreme Court, for excessive delay in their retrial. The convictions of the remaining six, however, were affirmed by the state supreme court, and the U.S. Supreme Court denied certiorari. They unsuccessfully sought habeas corpus in the state courts, and again the Supreme Court declined to review the case.

By now the NAACP had mounted a national fundraising drive to support the six petitioners. Their execution, set for September 1921, was postponed by the filing of a habeas corpus petition in the federal district court. That court dismissed the writ. On direct appeal, the Supreme Court reversed, 7–2, with an opinion by Justice OLIVER WENDELL HOLMES. (The opinion refers, apparently erroneously, only to the five petitioners who were tried together; the petition of the sixth was consolidated for hearing and decision.)

On REMAND to the district court, counsel for the six petitioners struck a deal; the habeas corpus petition would be dismissed and the sentence commuted to twelve years' imprisonment, making the men eligible for immediate parole. In 1925 the governor of Arkansas granted an "indefinite furlough," releasing them along with the others convicted following the Phillips County "insurrection."

The federal habeas corpus petition in *Moore* alleged that counsel appointed to represent the five defendants tried together did not consult with his clients before the trial; requested neither delay nor change of VENUE nor

separate trials; challenged not a single juryman; and called no defense witnesses. The trial took forty-five minutes, and the jury "deliberated" less than five minutes. A lynch mob had been dissuaded from carrying out its purpose by a local committee, appointed by the governor to combat the "insurrection," who assured the mob that justice would be done swiftly. Two black witnesses swore they had been whipped and tortured into testifying as the prosecution wished. Holmes summarized the petition: "no juryman could have voted for an acquittal and continued to live in Phillips county, and if any prisoner, by any chance, had been acquitted by a jury, he could not have escaped the mob."

The Supreme Court held that these facts, if proved, justified two conclusions: the state had violated PROCEDURAL DUE PROCESS, and the federal district court should grant the writ of habeas corpus. Today both conclusions seem obvious. In 1923, however, the Supreme Court had not yet begun to impose significant federal constitutional limitations on the fairness of state criminal proceedings. *Moore* lighted the path that would lead, in less than half a century, to an expansion of the liberty protected by the due process clause, applying virtually the entire BILL OF RIGHTS to the states. (See INCORPORATION DOCTRINE.)

*Moore*'s other conclusion, concerning the reach of federal habeas corpus, also broke new ground. In FRANK V. MANGUM (1915), a case involving strikingly similar facts, the Court had rejected a claim to federal habeas corpus relief on the ground that the state courts had provided a full "corrective process" for litigating the accused's federal constitutional claims. Only in the absence of such a corrective process, the Court had held, could a federal habeas corpus court intervene. *Moore* did not explicitly overrule *Frank*, but it did look in a different direction. Justice Holmes, in his characteristically laconic way, said only that if "the whole proceeding is a mask," with all participants in the state trial swept to their conclusion by a mob, and if the state courts fail to correct the wrong, "perfection in the [state's] machinery for correction" could not prevent the federal court from securing the accused's constitutional rights. The right claimed in *Moore*, of course, goes to the essence of due process of law; when the basic fairness of a state criminal trial is challenged, the fact that the state courts have already had a chance to look into the matter seems a weak justification for barring federal habeas corpus.

From *Moore* through FAY V. NOIA (1963), the Supreme Court steadily widened access to federal habeas corpus for persons challenging constitutionality of state convictions. STONE V. POWELL (1976) and WAINWRIGHT V. SYKES (1977) marked the BURGER COURT's reversal of the direction of doctrinal change. Indeed, *Stone* revived the doctrine of *Frank v. Mangum* in cases involving claims based on the FOURTH AMENDMENT's guarantee against UNREASONABLE SEARCHES and seizures. Yet, despite these limitations, *Moore*'s legacy, even in the field of federal habeas corpus, remains vital to a system of national constitutional standards of fairness for persons accused of crime.

KENNETH L. KARST
(1986)

Bibliography

BATOR, PAUL M. 1963 Finality in Criminal Law and Federal Habeas Corpus for State Prisoners. *Harvard Law Review* 76: 441, 483–493.

WATERMAN, J. S. and OVERTON, E. E. 1933 The Aftermath of Moore v. Dempsey. *St. Louis Law Review* (now *Washington University Law Review*) 18:117–126.

## *MOOSE LODGE #107 v. IRVIS*
### 407 U.S. 163 (1972)

Irvis, a black, was refused service at a Harrisburg, Pennsylvania, branch of the Moose Lodge, a fraternal organization whose fraternity knew bounds. Irvis sued under federal CIVIL RIGHTS laws for an INJUNCTION requiring the Pennsylvania liquor board to revoke the lodge's license so long as it continued to discriminate on the basis of race. The Supreme Court held, 6–3, in an opinion by Justice WILLIAM H. REHNQUIST, that Irvis was not entitled to the relief he sought. The state's licensing was not, of itself, sufficient to satisfy the STATE ACTION limitation of the FOURTEENTH AMENDMENT, and the Constitution offered no protection against RACIAL DISCRIMINATION by a private club.

In the majority's view, nothing in the case approached the "symbiotic relationship" between the state and private racial discrimination shown in BURTON V. WILMINGTON PARKING AUTHORITY (1961). Although Pennsylvania liquor licensees were subjected to a number of state regulations, that supervision did not "encourage" racial discrimination. Furthermore, because many liquor licenses had been issued in the area, the lodge's license fell short of creating a state-supported monopoly. Thus the state had not implicated itself in the lodge's discriminatory policies.

Justices WILLIAM O. DOUGLAS and WILLIAM J. BRENNAN wrote separate DISSENTING OPINIONS, each joined by Justice THURGOOD MARSHALL. The dissenters emphasized the degree of monopoly power of clubs licensed to sell liquor and the state's detailed regulation of licensees.

KENNETH L. KARST
(1986)

# MOOTNESS

Article III's CASE OR CONTROVERSY restriction precludes federal courts from declaring law except in the context of

litigation by parties with a personal stake in a live dispute that judicial decision can affect. They may not resolve moot questions—questions whose resolution can no longer affect the litigants' dispute because events after the commencement of litigation have obviated the need for judicial intervention. However live the issues once were, however much the parties (and the public) may desire a declaration of law, and however far the litigation may have progressed when the mooting events occur, Article III requires dismissal of the lawsuit. Common examples include a criminal defendant's death during appeal of a jail sentence, enactment of a new statute superseding one whose enforcement the plaintiff seeks to enjoin, or full satisfaction of a party's litigation demands.

Other cases exhibit less certainty that the substantive issues raised no longer need judicial action to forestall anticipated harm. In these cases, mootness questions are more troublesome. They inevitably introduce discretion to exercise or withhold judgment, discretion potentially influenced by the substantive issues' public importance. Thus, in DEFUNIS V. ODEGAARD (1974) a divided Supreme Court refused to decide the constitutionality of a race-conscious AFFIRMATIVE ACTION program for law school admissions when it appeared fairly certain that the challenger, who had only become a student through lower court victories, would be graduated irrespective of the lawsuit's outcome.

Several DOCTRINES reveal mootness to be a matter of degree. First, when changed circumstances moot the main dispute, but adjudication could produce collateral consequences, the issue is not moot, as when a prisoner's sentence expires before his appeal is decided, but the conviction might subject him to other civil or criminal penalties. Second, cases where defendants voluntarily agree to refrain from challenged behavior are not moot absent proof that they are unlikely to resume the behavior. This rule protects plaintiffs by preventing defendants from manipulating the mootness doctrine to avoid adverse decisions. Third, issues are not moot, despite passage of the immediate problem, when they are "capable of repetition, yet evading review," that is, when they arise sporadically, do not persist long enough to be reviewed before ceasing each time, and are reasonably likely to threaten the challengers again. Suits challenging ELECTION rules, where the immediate election passes before judicial resolution but the rules probably would affect the challengers in subsequent elections, or litigation challenging an abortion restriction that necessarily can apply to a woman only during the term of pregnancy are important instances where an unbending application of the mootness doctrine might deny judicial protection to persons periodically subject to harm. Finally, the Court generously allows a CLASS ACTION to continue, despite developments eliminating any need to protect the party bringing the lawsuit on behalf of the class, if the case is not moot as to other members of the class.

These refinements give federal courts some flexibility either to reach issues of their choice without pressing necessity to protect the parties or to decline to rule by insisting on a higher degree of probability that the threat of harm continues. Like other JUSTICIABILITY doctrines, mootness is not only a constitutional doctrine itself but a somewhat pliable tool of constitutional governance.

JONATHAN D. VARAT
(1986)

Bibliography

NOTE 1974 The Mootness Doctrine in the Supreme Court. *Harvard Law Review* 88:373.

## MOOTNESS
(Update)

Constitutional litigation often takes place on two distinct planes. First, the parties disagree about whether government has wrongfully injured the plaintiff's liberty or PROPERTY interests. Second, the subject matter of the litigation sets the stage for a larger legal and ideological debate. If some event ends the parties' disagreement about the plaintiff's injury, so that a judicial decision would have no consequences for the parties, the case is said to be moot. The question is whether the case may continue to serve as a vehicle for settling the larger debate.

In general, the Supreme Court has answered this question negatively. A relatively straightforward case of mootness was presented in *Arizonans for Official English v. Arizona* (1997). The voters of Arizona had narrowly approved a ballot INITIATIVE establishing English as the state's official language. The plaintiff, Maria-Kelly Yñíguez, was a state insurance claims manager who in her daily work spoke Spanish to clients who understood only Spanish. Worried that the new law would prohibit her from speaking any Spanish on the job, she sued state officials, claiming that the initiative violated the EQUAL PROTECTION clause.

After the trial court ruled in her favor, Yñíguez resigned from state employment to take another job, thus mooting the case. Yet both Yñíguez and backers of the initiative urged the courts to settle the constitutionality of the "OFFICIAL ENGLISH" LAW. The Supreme Court not only refused to allow the suit to go forward, but vacated all the proceedings in the courts below. Lacking a personal stake in the constitutionality of the initiative, Yñíguez no longer had a JUSTICIABLE dispute against the state.

The Court sometimes uses the mootness rules to adjust

the timing of controversial decisions. In DEFUNIS V. ODEGAARD (1974), the Court refused to decide a challenge to AFFIRMATIVE ACTION in law school admissions, even though the "capable of repetition, yet evading review" exception used the previous term in ROE V. WADE (1973) appeared to apply. After the issue had percolated for four years, the Court decided REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978), brushing aside a weighty argument that the case was moot. In another dubious opinion, *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP* (1983), the Court found a challenge to affirmative action in public hiring moot, only to decide the same issue the next year in a case that seemed no less moot, FIREFIGHTERS LOCAL UNION NO. 1784 V. STOTTS (1984).

In using the mootness DOCTRINE to refine the timing of its controversial decisions, the Court has consciously or unconsciously followed a practice once urged by Professor ALEXANDER M. BICKEL. He argued that the Court should use the mootness, STANDING, RIPENESS, and POLITICAL QUESTION doctrines in a frankly unprincipled manner so that proper timing would allow the Court to decide the merits of cases in a principled manner. Rather than hand down a decision when it would be especially divisive, the Court should wait until public opinion has matured to some degree.

History has yet to pronounce on the wisdom of this practice. Making unprincipled rulings on mootness grounds creates a tension with the Court's tradition of giving reasoned explanations for its decisions. Lawyers and lower court judges puzzle over technical-looking opinions that add up to little more than, "Better wait." Worse yet, unprincipled decisionmaking threatens the very public credibility that the Court seeks to protect.

EVAN TSEN LEE
(2000)

Bibliography

BICKEL, ALEXANDER M. 1986 *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed. New Haven, Conn.: Yale University Press.

FALLON, RICHARD H., JR. 1984 Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of *Lyons*. *New York University Law Review* 59:1–75.

LEE, EVAN TSEN 1992 Deconstitutionalizing Justiciability: The Example of Mootness. *Harvard Law Review* 105:603–669.

## *MOREHEAD v. NEW YORK EX REL. TIPALDO*
298 U.S. 587 (1936)

In June 1936 the Supreme Court ended its term with an opinion so startling that even the Republican party repudiated it at the party's national convention. The Republican plank read: "We support the adoption of State laws to abolish sweatshops and child labor and to protect women and children with respect to MAXIMUM HOURS, MINIMUM WAGES and working conditions. We believe that this can be done within the Constitution as it now stands." "This" was precisely what the Court had ruled could not be done. It had defended STATES' RIGHTS as it struck down national legislation, and in NEBBIA V. NEW YORK (1934) it had declared, "So far as the requirement of DUE PROCESS of law is concerned, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare. . . ." Just two weeks before the *Tipaldo* decision, the Court had announced, in CARTER V. CARTER COAL COMPANY (1936), as it had in the SCHECHTER POULTRY CORP. V. UNITED STATES (1935), that the regulation of labor was a local matter reserved by the TENTH AMENDMENT to the states, and specifically the Court had referred to the fixing of wages as a state function. Thus the resolution of *Tipaldo* came as a surprise. The Court used the FREEDOM OF CONTRACT doctrine, derived from SUBSTANTIVE DUE PROCESS, to hold that the states lack power to enact minimum wage laws. The precedent that controlled the case, the Court ruled, was ADKINS V. CHILDREN'S HOSPITAL (1923).

Although *Adkins* had seemed to block minimum wage legislation, the Court grounded that decision on the statute's failure to stipulate that prescribed wages should not exceed the value of labor services. New York had carefully framed a minimum wage law for women and children that embodied the Court's *Adkins* standard: the state labor commission was empowered to fix wages "fairly and reasonably commensurate with the value of the service or class of service rendered." By a 5–4 vote the Court held the state act unconstitutional. Justice PIERCE BUTLER, speaking for the majority, declared, "Forcing the payment of wages at a reasonable value does not make applicable the principle and ruling of the Adkins Case." The right to make contracts for wages in return for work "is part of the liberty protected by the due process clause," Butler said, and the state was powerless to interfere with such contracts. Women were entitled to no special consideration. Any measure that deprived employers and women employees the freedom to agree on wages, "leaving employers and men employees free to do so, is necessarily arbitrary."

Chief Justice CHARLES EVANS HUGHES dissented on ground that the statute was a reasonable exercise of the POLICE POWER, and he distinguished this case from *Adkins* because the *Tipaldo* statute laid down an appropriate standard for fixing wages. Justices HARLAN FISKE STONE, LOUIS D. BRANDEIS, and BENJAMIN N. CARDOZO concurred in Hughes's opinion but in a separate dissent by Stone they went much further. Stone accused the majority of having decided on the basis of their "personal economic predi-

lections." He repudiated the freedom of contract DOCTRINE, adding: "There is grim irony in speaking of the freedom of contract of those who, because of their economic necessities, give their services for less than is needful to keep body and soul together." Following the reasoning of Justice OLIVER WENDELL HOLMES, dissenting in *Adkins*, Stone declared that it made no difference what wage standard the statute fixed, because employers were not compelled to hire anyone and could fire employees who did not earn their wages. Stone would have followed the principle of *Nebbia*, which the majority ignored, and he would have overruled *Adkins*. A year later, after President FRANKLIN D. ROOSEVELT proposed packing the Court, it overruled *Adkins* and *Tipaldo* in WEST COAST HOTEL V. PARRISH (1937).

LEONARD W. LEVY
(1986)

Bibliography

LEONARD, CHARLES A. 1971 *A Search for a Judicial Philosophy: Mr. Justice Roberts and the Constitutional Revolution of 1937.* Pages 88–93. Port Washington, N.Y.: Kennikat Press.

## *MORGAN v. VIRGINIA*
328 U.S. 373 (1946)

This was the first transportation SEGREGATION case brought to the Supreme Court by the NAACP; counsel for the appellant were THURGOOD MARSHALL and WILLIAM H. HASTIE. A Virginia law required racial segregation of passengers on buses. A black woman, riding from Virginia to Maryland, refused to move to a rear seat; she was convicted of a MISDEMEANOR and fined $10. Eighteen states forbade such segregation of passengers, and ten states required it. In 1878 the Supreme Court had invalidated a state law forbidding racial segregation on an interstate carrier as an undue burden on INTERSTATE COMMERCE in HALL V. DECUIR. The NAACP lawyers rested on the *Hall* precedent, and did not argue that the Virginia law violated the FOURTEENTH AMENDMENT.

In an opinion by Justice STANLEY F. REED, the Supreme Court held, 7–1, that the law unduly burdened interstate commerce. Although the usual analysis of a STATE REGULATION OF COMMERCE involves a balance of burdens on commerce against competing state interests such as health or safety, the Court avoided any discussion of a state interest in segregation, saying only that a uniform national rule of passenger seating was required for interstate carriers, if any rule was to be adopted. Justice HAROLD BURTON dissented.

KENNETH L. KARST
(1986)

## *MORMON CHURCH v. UNITED STATES*

See: *Church of Jesus Christ of Latter Day Saints v. United States*

## MORRILL ACT
12 Stat. 503 (1862)

The Morrill Land Grant College Act provided a basis for state support of public universities and thereby profoundly influenced the course of American higher EDUCATION.

Under the Land Ordinance of 1785, section 16 of every township was sold and the proceeds used to create a "school fund." In the late 1850s, Vermont Republican Justin Morrill promoted the "Illinois Idea," which would have authorized further land grants to create an "industrial college" in each state. But southern Democrats objected on constitutional grounds, seeing in Morrill's bill a threat to STATES' RIGHTS. In 1862, with these opponents withdrawn from Congress, the Land Grant College Act was passed. It provided that 30,000 acres of public lands be assigned to each state for each of its senators and representatives (or land scrip in an equivalent amount issued to states lacking available public lands). The proceeds of the land sales were to be invested to support a college "to teach such branches of learning as are related to agriculture and the mechanic arts," as well as "military tactics," "in order to promote the liberal and practical education of the industrial classes." The American land-grant colleges are the result of this policy.

WILLIAM M. WIECEK
(1986)

## MORRIS, GOUVERNEUR
(1752–1816)

A lawyer and businessman descended from a wealthy, landed family, Gouverneur Morris was elected to New York's first provincial congress in 1775. The next year, he was a member of the committee that drafted the state's first CONSTITUTION and wrote the message to New York's delegates to the Continental Congress instructing them to vote for the DECLARATION OF INDEPENDENCE. He was himself sent to the Continental Congress in 1778 and was a signer of the ARTICLES OF CONFEDERATION. In 1780 he moved to Philadelphia and served as assistant superintendent of finance under ROBERT MORRIS. In this last capacity, he drafted a report to Congress that contained the first

official proposal for a national currency: a decimal coinage based on the Spanish dollar.

Gouverneur Morris was elected to Pennsylvania's delegation to the CONSTITUTIONAL CONVENTION OF 1787. In the debates of the Convention he spoke more frequently than any other delegate. He was an advocate of strong national government, but also of aristocratic privilege. His view of humankind was extraordinarily cynical, and, distrusting any higher motives, he desired to institutionalize private interests as a guarantee of liberty. Although, like Robert Morris, he proposed a senate chosen for life from men of great wealth, the proposal arose partly out of fear that otherwise the rich would corrupt the democratic elements of the regime. He favored a provision to allow Congress to veto state laws and wanted to unite the executive and judiciary in a council of revision to veto national legislation. He favored direct election of the President and congressional representation proportional to taxation; he opposed any constitutional protection of slavery or the slave trade. He was against giving Congress the power to admit new states on terms of equality, and throughout his life he advocated governing the western territories as provinces while retaining power in the East.

Morris was elected to the Committee on Style, along with WILLIAM SAMUEL JOHNSON (its chairman), JAMES MADISON, JAMES WILSON, and RUFUS KING. The committee entrusted Morris with the duty of preparing its report, and so Morris became the principal author of the actual words of the Constitution. He also devised the formula for signing the document—the signatures bearing witness to the unanimous consent of the states—and drafted the letter by which the Convention transmitted its work to Congress.

ALEXANDER HAMILTON asked Morris to collaborate in writing THE FEDERALIST, but Morris declined. He served as a senator from New York from 1800 to 1803, supporting the JUDICIARY ACT OF 1801 and advocating the annexation—by force if necessary—of Louisiana. His public career also included a brief term as minister to France and the founding chairmanship of the Erie Canal Commission.

Morris opposed the War of 1812 as sectional and ill-conceived. The former champion of strong national government became an advocate of STATES' RIGHTS; he even counseled SECESSION of New York and New England from the Union. Morris was disappointed when the HARTFORD CONVENTION resolutions failed to embody that step.

DENNIS J. MAHONEY
(1986)

Bibliography

MINTZ, MAX M. 1970 *Gouverneur Morris and the American Revolution.* Norman: University of Oklahoma Press.

ROOSEVELT, THEODORE 1888 *Gouverneur Morris.* (American Statesman Series.) Boston: Houghton Mifflin.

# MORRIS, ROBERT
## (1734–1806)

The English-born merchant and patriot Robert Morris was an early supporter of colonial rights, opposing the Stamp Act and signing the Non-Importation Agreement in 1765. As a member of the Second Continental Congress (1776–1788), Morris voted against the DECLARATION OF INDEPENDENCE because it was premature; but he later signed the Declaration as well as the ARTICLES OF CONFEDERATION. He earned the nickname "Financier of the Revolution" because of his role in raising money to support the Army. In 1781, Congress chose him to be superintendent of finance. While serving in that capacity he organized the Bank of North America, chartered by Congress as a device for borrowing money to pay the costs of the new government. In 1783, he resigned the "insupportable situation" of superintendent of finance, giving as his reason that "to increase our debts while the prospect of paying them diminishes does not consist with my ideas of integrity."

He was a member of the Pennsylvania delegation to the CONSTITUTIONAL CONVENTION OF 1787. There he nominated GEORGE WASHINGTON to be presiding officer, but otherwise, despite his reputation in Pennsylvania politics as a speaker who "bears down all before him," he remained silent throughout the debates. He was a strong nationalist, and desired a Senate comprising men of great and established property appointed for life. Morris signed the Constitution, and, in a letter, recommended it as "the subject of infinite investigation, disputation, and declamation," but still the work not of angels or devils but of "plain, honest men."

Morris and his friends supported the Constitution not least because it promised economic stability, security of contracts, and relief from the harassment of the Bank of North America by the state governments. But Morris's support for ratification seems only to have increased the fervor of some anti-Federalists.

Morris would have been a leading candidate to become the first secretary of the treasury, but he did not want the post. Instead, in 1789, he was elected to the United States SENATE, where he became a leader of the FEDERALIST faction and a key ally of ALEXANDER HAMILTON in the matter of the assumption of state debts.

Morris retired from public life in 1795, and devoted his time to the management of his financial affairs, including his speculation in western lands. That speculation brought

him, in 1797, to financial ruin and to three and one-half years in debtors' prison.

DENNIS J. MAHONEY
(1986)

## *MORRISON v. OLSON*

See: Constitutional History, 1980–1989; Independent Counsel; Special Prosecutor

## MORROW, WILLIAM W.
(1843–1929)

William W. Morrow served nearly thirty-two years on the federal bench. President BENJAMIN HARRISON in 1892 appointed him to the Northern District of California; President WILLIAM MCKINLEY in 1897 elevated him to the Ninth Circuit Court of Appeals, where he served until retirement in 1923.

His most influential opinion came in *In Re Wong Kim Ark* (1897). Morrow relied on history and precedent in the Ninth Circuit to define a COMMON LAW basis for CITIZENSHIP. He held that under the first section of the FOURTEENTH AMENDMENT a child whose parents were subjects of the emperor of China but domiciled in the United States at the time of the child's birth derived his citizenship from the place of birth rather than the father's citizenship. Morrow's opinion, which the Supreme Court affirmed in UNITED STATES V. WONG KIM ARK (1898), confirmed the claims of thousands of Chinese to American citizenship.

Morrow's opinion in *United States v. Wheeler et al.* (1912) revealed his profound suspicion of federal authority. Arizona officials had refused to prosecute the perpetrators of the Bisbee deportations, in which private citizens had forcibly removed over 200 members of the Industrial Workers of the World from Arizona to New Mexico. The United States sought to prosecute the leaders of the deportation under the conspiracy section of the FORCE ACT OF 1870. Morrow, however, rejected federal intervention. He held that the Fourteenth Amendment applied only to those rights explicitly provided for by Congress and which had not been historically entrusted to the states. Morrow reasoned that the acts of private individuals did not constitute STATE ACTION under the amendment, that the 1870 act applied only to the rights of freedmen, and that Congress had not passed any statute making kidnapping a federal crime. Morrow refused to allow the federal government to intervene, no matter how just the cause, in an area traditionally left to the STATE POLICE POWER.

Morrow's conservative jurisprudence paralleled his Republican politics. Through three decades of service on the Ninth Circuit he provided leadership to a court committed, like himself, to precedent and DUAL FEDERALISM.

KERMIT L. HALL
(1986)

Bibliography

JURY, JOHN G. 1921 William W. Morrow. *California Law Review* 10:1–7.

## *MUELLER v. ALLEN*
463 U.S. 388 (1983)

In this major case on the SEPARATION OF CHURCH AND STATE, the Supreme Court altered constitutional law on the issue of state aid to parents of parochial school children. The precedents had established that a state may not aid parochial schools by direct grants or indirectly by financial aids to the parents of the children; whether those aids took the form of tax credits or reimbursements of tuition expenses did not matter. In this case the state act allowed taxpayers to deduct expenses for tuition, books, and transportation of their children to school, no matter what school, public or private, secular or sectarian.

Justice WILLIAM H. REHNQUIST for a 5–4 Court ruled that the plan satisfied all three parts of the purpose, effect, and no-entanglement test of LEMON V. KURTZMAN (1971). That all taxpaying parents benefited from the act made the difference between this case and the precedents, even though parents of public school children could not take advantage of the major tax deduction. Rehnquist declared that the state had not aided religion generally or any particular denomination and had not excessively entangled the state with religion even though government officials had to disallow tax deductions for instructional materials and books that were used to teach religion. According to the dissenters, however, the statute had not restricted the parochial schools to books approved for public school use, with the result that the state necessarily became enmeshed in religious matters when administering the tax deductions. The dissenters also rejected the majority point that the availability of the tax deduction to all parents distinguished this case from the precedents. The parents of public school children simply were unable to claim the large deduction for tuition. Consequently the program had the effect of advancing the religious mission of the private sectarian schools.

LEONARD W. LEVY
(1986)

## *MUGLER v. KANSAS*
123 U.S. 623 (1887)

In *Mugler* the Supreme Court took a significant step toward the acceptance of SUBSTANTIVE DUE PROCESS, announcing it would henceforth examine the reasonableness involved in an exercise of STATE POLICE POWER. A Kansas statute prohibited the manufacture or sale of intoxicating liquor; the state arrested Mugler for making and selling malt liquor and also closed a brewery for being a public nuisance.

Justice JOHN MARSHALL HARLAN addressed the issue: did the Kansas statute violate the FOURTEENTH AMENDMENT guarantee of DUE PROCESS OF LAW? He declared that such a prohibition "does not necessarily infringe" any of those rights. Although an individual might have an abstract right to make liquor for his own purposes, as Mugler contended, that right could be conditioned on its effect on others' rights. The question became who would determine the effects of personal use on the community? Harlan found that power lodged squarely in the legislature which, to protect the public health and morals, might exercise its police power. But, bowing to JOSEPH CHOATE's argument, he admitted that such power was limited. Harlan asserted that the courts would not be bound "by mere forms [or] . . . pretenses." They had a "solemn duty—to look at the substance of things"; absent a "real or substantial relation" of the act to its objects, the legislation must fall as a "palpable invasion of rights secured by the FUNDAMENTAL LAW." The Kansas statute easily passed this test, however, and Harlan denied any interference or impairment of property rights. Harlan likewise dismissed the contention that the closing of a brewery amounted to a TAKING OF PROPERTY without JUST COMPENSATION, thereby depriving its owners of due process. Justice STEPHEN J. FIELD dissented in part, urging the Court to adopt substantive due process.

DAVID GORDON
(1986)

(SEE ALSO: *Allgeyer v. Louisiana*.)

## *MULLER v. OREGON*
208 U.S. 412 (1908)

Despite the Supreme Court's previous rejection of a maximum hour law for bakers in LOCHNER V. NEW YORK (1905), here the Justices unanimously sustained an Oregon statute limiting women to ten hours' labor in "any mechanical establishment, or factory, or laundry." The sole issue was the law's constitutionality as it affected female labor in a laundry. Lawyers for Muller contended that the law violated FREEDOM OF CONTRACT, that it was class legislation, and that it had no reasonable connection with the public health, safety, or welfare. The state countered with LOUIS D. BRANDEIS's famous brief elaborately detailing similar state and foreign laws, as well as foreign and domestic experts' reports on the harmful physical, economic, and social effects of long working hours for women.

Justice DAVID BREWER, speaking for the Court, based his opinion on the proposition that physical and social differences between the sexes justified a different rule respecting labor contracts, thereby allowing him to distinguish *Lochner*. Although the Constitution imposed unchanging limitations on legislative action, Brewer acknowledged that the FOURTEENTH AMENDMENT's liberty of contract doctrine was not absolute. He invoked HOLDEN V. HARDY (1898), sustaining an eight-hour day for Utah miners, and portions of *Lochner* that similarly approved some exceptional regulations. Brewer declared that although the legislation and opinions cited in the BRANDEIS BRIEF were not "authorities," the Court would "take judicial cognizance of all matters of general knowledge."

The accepted wisdom that women were unequal and inferior to men animated Brewer's opinion. Women's physical structure and their maternal functions, he said, put them at a disadvantage. Long hours of labor, furthermore, threatened women's potential for producing "vigorous" children; as such their physical well-being was a proper object of interest "in order to preserve the strength and vigor of the race." Beyond Brewer's concerns for the "future well-being of the race," he contended that the long historical record of women's dependence upon men demonstrated a persistent reality that women lacked "the self-reliance which enables one to assert full rights." Legislation such as the Oregon maximum hour law, Brewer concluded, was necessary to protect women from the "greed" and "passion" of men and therefore validly and properly could "compensate for some of the burdens" imposed upon women.

Taken out of context, Brewer's remarks obviously reflected paternalistic and sexist notions. Yet they also reflected prevailing sentiments, which he invoked to justify an exception to his normally restrictive views of legislative power. The same arguments were advanced by those who sought an opening wedge for ameliorating some of the excesses of modern industrialism.

Although the *Muller* decision did not overrule *Lochner*, it reinforced a growing line of precedents to counter *Lochner*. *Muller* eventually led to BUNTING V. OREGON (1917), approving maximum hour laws for both sexes, a decision that Chief Justice WILLIAM HOWARD TAFT believed in 1923 had tacitly overruled *Lochner*—mistakenly, as it turned out, for the Court invoked *Lochner* to strike down a minimum wage law in ADKINS V. CHILDREN'S HOSPITAL (1923).

STANLEY I. KUTLER
(1986)

(SEE ALSO: *Sex Discrimination.*)

Bibliography

MASON, ALPHEUS T. 1946 *Brandeis: A Free Man's Life.* New York: Viking Press.

## MULTIMEMBER DISTRICT

A multimember district (MMD) is a political district with more than one representative. European countries with proportional REPRESENTATION divide multiple representatives proportionally by party vote, normally producing many small, doctrinaire parties and volatile, schismatic governments. In United States MMDs, at-large, winner-take-all elections have been the rule, notably with ELECTORAL COLLEGE delegations. Winner-take-all puts more than proportional value on shiftable votes. Scholars believe that it has helped produce the American pattern of stable, center-seeking, two-party coalitions attentive to minorities who can form part of a winning coalition.

A ten-member, winner-take-all MMD offers less demographic variety—and less direct claim on any particular representative—than ten single-member districts; so MMDs have often been attacked for depersonalizing representation and submerging minorities. On the other hand, voters in MMDs have a mathematical advantage over voters in single-member districts (SMDs) because a 110 vote for ten representatives has more chance of affecting the overall election outcome than a full vote for one representative. Moreover, MMD representatives, who answer to one large constituency rather than to ten small ones, are thought more likely to vote as a bloc than SMD representatives. Hence, an MMD voter may have less access to his representative than does an SMD voter, but he also may have more power over electoral and legislative outcomes.

MMDs share with GERRYMANDERS the "standards problem": the incommensurability of the various ways in which dilution or concentration of a group can enhance or diminish the group's power for different purposes. Short of ordering proportional representation, there is no way to equalize a group's (or a group member's) effective power. Accordingly, the Supreme Court has been cautious in intervening against MMDs, as it has against gerrymanders. In *Delaware v. New York* (1966) it was unmoved by Delaware's argument that New York voters, with sixty-four delegates to the Electoral College, has 2.3 times as much chance to affect the election outcome as Delaware voters, with only three delegates.

Likewise, with the exceptions of judicially created MMDs and legislatively created ones drawn with the proven intent of submerging minorities, the Court has been tolerant of MMDs, even where their effect has been to submerge minorities. In *Whitcomb v. Chavis* (1971) and MOBILE V. BOLDEN (1980) the Court held that submerging a minority is not per se a violation of the FOURTEENTH or FIFTEENTH AMENDMENT. Purposeful discrimination must also be shown, as in *White v. Regester* (1973) and ROGERS V. LODGE (1982), where the plaintiffs demonstrated intentional discrimination against minority groups. Congressional critics (of the *Mobile* case) in 1982 succeeded in amending the VOTING RIGHTS ACT OF 1965 to make racially disproportionate election results one "circumstance" relevant to the determination of a violation of the act. The amendment added a proviso that racially proportional representation is not required, but it left to the courts the task of giving meaning to its calculatedly uncertain operative language.

WARD E. Y. ELLIOT
(1986)

Bibliography

BANZHAF, JOHN E. 1966 Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle? *Yale Law Journal* 75:1309–1338.

ELLIOT, WARD E. Y. 1975 *The Rise of Guardian Democracy: The Supreme Court's Role in Voting Rights Disputes, 1845–1969.* Cambridge, Mass.: Harvard University Press.

## MULTINATIONAL CORPORATIONS, GLOBAL MARKETS, AND THE CONSTITUTION

Multinational corporations (MNCs) are regulated by domestic and INTERNATIONAL LAW. In the United States, CORPORATIONS are normally established pursuant to state law, and their activities are regulated by state and federal law as limited by the Constitution. The authority of the United States to regulate activities of MNCs abroad is subject to limits established by international law.

Typically a "parent" MNC will conduct its operations in countries abroad through "subsidiary" corporations that the parent owns or controls. Under international law a corporation takes the nationality of the country in which it is incorporated, and that country thereby acquires the authority to regulate the conduct of its corporate nationals anywhere in the world. Thus, the United States has international law authority to tax and otherwise to regulate the worldwide conduct of its parent MNCs. In cases such as *Blackmer v. United States* (1932), the Supreme Court has confirmed the constitutional authority of Congress to adopt such LEGISLATION. Politically, however, Congress has generally been reluctant to impose U.S. economic regulation on American MNCs abroad for fear of putting them

at a competitive disadvantage as against European and Asian competitors. The principal exceptions have been where regulation had high foreign policy significance, as in economic sanctions, or was important domestically, as in ANTITRUST and anticorruption legislation.

Most controversially the United States has claimed authority to regulate the conduct of foreign subsidiaries of U.S. parent MNCs in the case of economic sanctions legislation, even though those subsidiaries are also nationals of the foreign country where they are incorporated. The result has often been a conflict between the respective countries' trade and economic policies (involving countries such as China, the former Soviet Union, Iran, Libya, and Cuba), with the result that major trading partners of the United States have challenged its authority under international law to impose such regulation extraterritorially. In the face of intense opposition the United States has negotiated compromises, provided administrative and judicial relief to otherwise applicable penalties, and otherwise moderated its claims in particular cases, but it continues to defend the legitimacy under international law of its extraterritorial application of nationality-based economic sanctions law. The Supreme Court has never denied Congress's constitutional authority to adopt such legislation. Indeed, the Supreme Court has repeatedly held that, for purposes of determining the law to be applied in American courts, a subsequent statute supersedes an earlier inconsistent international rule—that is to say, Congress may violate international law. The International Court of Justice has not ruled on the U.S. position regarding the legality of its extraterritorial economic sanctions legislation under international law, although European courts have rejected it.

Under international law a country also has authority to regulate the conduct of MNCs within its territory, and Congress has similar power in the United States under the COMMERCE CLAUSE. Here too the United States has asserted the power to apply its law extraterritorially, for example, over the foreign conduct of foreign MNCs having a direct and substantial effect in the United States. These assertions have also been controversial politically and have been challenged as violative of international law. The Supreme Court has nevertheless upheld Congress's authority to pass such legislation. American courts normally construe ambiguous statutes to be consistent with international law, and Justice ANTONIN SCALIA has recently opined that international law requires a narrow construction of the antitrust laws in an extraterritorial context. The majority of the Supreme Court, however, declined to so hold. Thus, even the foreign activities of foreign MNCs are constitutionally subject to U.S. regulation if they cause a direct and substantial effect here. Again, an act of Congress supersedes international law as far as American courts are concerned.

Despite the potentially bewildering maze of nationality- and territorial-based regulation, and the potentially significant conflict that could result, MNCs' exploitation of global markets has been facilitated by international law. To the extent that legitimate economic regulation is strictly limited to a nation's territory or to its own corporate nationals, MNCs can better plan their operations. In addition, the free-trade regime centered on the World Trade Organization (WTO) provides stable rules on tariffs, quotas, taxation, subsidies, and unfair pricing of traded goods. The objective of the regime is to promote free trade, and the WTO now supervises related subjects including trade in services, intellectual property protection, and protection of investment and capital flows. All these international law guarantees significantly benefit MNCs in their development of global markets. Moreover, the WTO has introduced a legal dispute–settlement system, which promises to be more effective than previous international law institutions. Some of the U.S. assertions of extraterritorial application of law described above can even be challenged in the new WTO courts, so that Congress may be further inhibited from exercising its full constitutional power to regulate MNCs abroad.

To date, the focus of international law has been to support MNCs, with less attention to the ancillary social and environmental consequences of their access to global markets. Efforts in the United Nations to draft a Code of Conduct to regulate the behavior of MNCs have never been completed. Other codes, like those produced by the Organization for Economic Cooperation and Development (OECD), the International Labor Organization (ILO), and MNCs themselves, are either voluntary or are not legally binding. Consequently, the only effective regulation of MNCs is national legislation and even this alternative is limited by international law.

PHILLIP R. TRIMBLE
(2000)

Bibliography

BORN, GARY B. and WESTIN, DAVID 1992 *International Civil Litigation in United States Courts*, 2nd ed. Boston: Kluwer Law and Taxation Publishers.

## MUNDT-NIXON BILL
(1948–1949)

Karl Mundt of South Dakota and RICHARD M. NIXON of California, members of the HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES, sponsored the first anticommunist bill of the

Cold War era. They contended that a house-cleaning of the executive department and a full exposure of past derelictions regarding communists would come only from a body in no way corrupted by ties to the administration. The measure (HR 5852) contained antisedition provisions but also reflected the view that the constitutional way to fight communists was by forcing them out into the open. The bill thus would have required the Communist party and "front" organizations to register with the Department of Justice and supply names of officers and members. It would also require that publications of these organizations, when sent through the mails, be labeled "published in compliance with the laws of the United States, governing the activities of agents of foreign principals."

The measure passed the HOUSE by a large margin but failed in the SENATE after becoming a controversial factor in the presidential campaign of 1948. The bill was denounced by the Republican candidate, Thomas E. Dewey, and numerous respected national publications as a form of unwarranted thought control.

PAUL L. MURPHY
(1986)

(SEE ALSO: *Subversive Activity.*)

Bibliography

COHEN, MURRAY and FUCHS, ROBERT F. 1948 Communism's Challenge and the Constitution. *Cornell Law Quarterly* 34: 182–219, 352–375.

## MUNICIPAL BANKRUPTCY ACT
48 Stat. 798 (1934)

This legislation, amending the Bankruptcy Act of 1898, declared "a national emergency caused by increasing financial difficulties of many local governmental units." Hearings on the bill disclosed that over 2,000 municipalities in all forty-eight states were in default—including such cities as Detroit and Miami—to an estimated total of nearly three billion dollars. The act conferred ORIGINAL JURISDICTION on federal bankruptcy courts in proceedings for the relief of "any municipality or other political subdivision of any State." Such taxing districts were thus enabled to file petitions asserting their inability to meet their debts. The act required submission of a "plan of readjustment" to accommodate a municipality's debts. The courts could enforce a plan that was "fair [and] equitable" and was approved by either two-thirds or three-quarters of the creditors, depending on the nature of the district. Section 80(k) stated that "nothing contained in this chapter shall be construed to limit or impair the power of any State to control . . . any political subdivision" and required state approval of these bankruptcy petitions.

A 5–4 Supreme Court invalidated this act in ASHTON V. CAMERON COUNTY WATER DISTRICT (1936), but the Court sustained a substantially similar act in *United States v. Bekins* (1938).

DAVID GORDON
(1986)

Bibliography

JACKSON, ROBERT H. 1941 *The Struggle for Judicial Supremacy.* New York: Knopf.

## MUNICIPAL IMMUNITY

Although precise practice varied among the states, two distinctions shaped municipalities' COMMON LAW liability. First, cities were immune from harms resulting from the exercise of governmental functions, such as fire protection, but they were not immune for harms attending proprietary functions, such as running a business. This sovereignlike immunity drew upon cities' legal connection to sovereign states, but it was independent of the ELEVENTH AMENDMENT immunity which states enjoy from suit in federal court. Since *Lincoln County v. Luning* (1890), cities and counties have not been viewed as part of the state for Eleventh Amendment purposes. Second, courts distinguished between discretionary functions, for which cities were immune, and ministerial activities, for which cities were not immune. As long as municipal liability was largely a branch of common law liability, courts articulated no significant distinctions between the treatment of federal claims against cities and claims brought under state law.

MONROE V. PAPE (1961), which reinvigorated SECTION 1983, TITLE 42, UNITED STATES CODE, and transformed the liability of state and local officials for violations of federal law into a question of federal statutory interpretation, laid the groundwork for greater municipal liability for violations of federal rights. But *Monroe* also retarded this development by interpreting section 1983 not to authorize suits against municipalities for violations of federal law. Indeed, the Court suggested that Congress doubted its constitutional authority to do so.

Between 1961 and 1978 litigants employed, with mixed success, various techniques to exploit *Monroe*'s federalization of official liability law, while at the same time avoiding *Monroe*'s holding that section 1983 did not authorize suits against cities. While these techniques were still developing, MONELL V. DEPARTMENT OF SOCIAL SERVICES (1978) drastically changed the law of municipal liability. *Monell*

reinterpreted the legislative history relied on in *Monroe*, concluded that Congress had meant to subject cities to suit for violations of federal law, and overruled *Monroe*'s limitation on suits against cities. But *Monell* also held that Congress had not intended cities to be liable merely because they had employed an individual wrongdoer. Under *Monell*, cities are liable for violation of federal law only if the violation is "by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy."

The question whether an alleged violation of federal law may be characterized as official policy became even more critical when, in OWEN V. CITY OF INDEPENDENCE (1980), the Court held that cities may not rely on the good faith defense available to individual officials as part of the law of EXECUTIVE IMMUNITY. *Owen* also severed the final links between municipalities' common law immunities and their modern amenability to suit under federal law. The Court rejected reliance by cities on sovereign-based immunities; a higher sovereign, the United States, had in section 1983 commanded municipal liability. The immunity for discretionary acts fell because "a municipality has no 'discretion' to violate the Federal Constitution." Cities achieved a modest victory when, in *City of Newport v. Fact Concerts, Inc.* (1981), the Court reaffirmed their traditional immunity from punitive damages claims.

THEODORE EISENBERG
(1986)

Bibliography

SCHNAPPER, ERIC 1979 Civil Rights Litigation After *Monell*. *Columbia Law Review* 79:213–266.

## *MUNN v. ILLINOIS*

See: Granger Cases

## *MURDOCK v. PENNSYLVANIA*
319 U.S. 105 (1943)

A city ordinance required anyone offering goods for sale or engaged in solicitation (as opposed to sale from fixed premises) to obtain a license and pay a fee. Jehovah's Witnesses charged with violating the ordinance challenged it as a violation of the free exercise clause of the FIRST AMENDMENT.

Justice WILLIAM O. DOUGLAS, delivering the OPINION OF THE COURT, held that although the Witnesses offered literature for sale, their activity was "as evangelical as the revival meeting," occupying the same high estate under the First Amendment as worship in churches and preaching from pulpits. On the same day the Court vacated the judgment in *Jones v. Opelika* (1942), where the Court had previously upheld such an ordinance against a similar challenge.

Justice STANLEY F. REED dissented, arguing that *Jones v. Opelika* had been correctly decided. Justices OWEN ROBERTS, FELIX FRANKFURTER, and ROBERT H. JACKSON joined Reed's dissent. Justice Frankfurter also dissented separately, arguing that persons are not constitutionally "exempt from taxation merely because they may be engaged in religious activities or because such activities may constitute the exercise of a constitutional right."

*Murdock* represented a step away from the traditional doctrine of REYNOLDS V. UNITED STATES (1879) which had held that otherwise valid secular regulations could be enforced against nonconforming behavior even if that behavior were religiously motivated. (See RELIGIOUS LIBERTY.)

RICHARD E. MORGAN
(1986)

## MURPHY, FRANK
(1890–1949)

President FRANKLIN D. ROOSEVELT appointed Frank Murphy to the Supreme Court in 1940. Murphy, who had been mayor of Detroit and governor of Michigan, was ATTORNEY GENERAL at the time of his appointment as a Justice. As attorney general he created the Civil Rights Section (now division) of the Department of Justice and supported a vigorous antitrust program. As spokesman for the Supreme Court in constitutional matters, Murphy made modest but significant contributions. But as author of CONCURRING and DISSENTING OPINIONS in constitutional areas of individual freedom, Murphy voiced some of the more eloquent and impassioned defenses of human liberty in the Court's history.

Murphy's tenure on the Court spanned the decade of the 1940s. That period witnessed the consolidation of the federal and state power to deal with pressing economic and social problems. Murphy eagerly joined in this judicial retreat from the philosophy of LOCHNER V. NEW YORK (1905). Murphy's contribution to the de-Lochnerization of constitutional law was highlighted by his opinions for the Court in *North American Co. v. Securities & Exchange Commission* (1946) and *American Power & Light Co. v. Securities & Exchange Commission* (1946). Those decisions validated the "death sentence" clauses of the PUBLIC UTILITY HOLDING COMPANY ACT of 1935, the last major piece of NEW DEAL legislation to be challenged. In language reminiscent of JOHN MARSHALL's language in GIBBONS V. OGDEN (1824), Murphy declared that the COMMERCE CLAUSE

is "an affirmative power commensurate with the national needs." It gives Congress authority "to undertake to solve national problems directly and realistically, giving due recognition to the scope of state power," as well as to other constitutional provisions.

His first assignment to write a Court opinion produced a historic chapter in the development of FREEDOM OF SPEECH. In THORNHILL V. ALABAMA (1940) the Court held an Alabama antipicketing statute unconstitutional on its face. Murphy wrote that information concerning labor disputes is "within the area of free discussion . . . guaranteed by the Constitution." Such speech can be abridged only if there is a CLEAR AND PRESENT DANGER that substantive evils may arise before the merits of the discussion can be tested in the market of public opinion. The Court, though later permitting certain "time, place, and manner" restrictions on picketing, has never repudiated the *Thornhill* doctrine.

Another landmark free speech opinion written by Murphy was CHAPLINSKY V. NEW HAMPSHIRE (1942). Although controversial, the decision proved to be an influential forerunner of the Court's doctrinal notion that certain kinds of speech are of such slight social value as not to deserve full FIRST AMENDMENT protection. Such speech, said Murphy, includes "the lewd and obscene, the profane, the libelous, and the insulting or 'FIGHTING' WORDS—those which by their very utterance inflict injury or tend to incite an immediate BREACH OF THE PEACE."

Murphy also made a provocative contribution to the once raging judicial battle over whether the FOURTEENTH AMENDMENT totally or only selectively incorporates the BILL OF RIGHTS. While agreeing with Justice HUGO L. BLACK's total INCORPORATION DOCTRINE, Murphy in a dissent in *Adamson v. California* (1947) proposed an "incorporation-plus" approach. A state proceeding, he wrote, may be so wanting in DUE PROCESS as to warrant constitutional condemnation "despite the absence of a specific provision in the Bill of Rights." Murphy's suggestion has proved functionally similar to the Court's final choice of the "selective incorporation approach."

Murphy was seldom assigned to write majority opinions in other constitutional areas. Among the few that he did write were the short-lived Fourth Amendment opinion in TRUPIANO V. UNITED STATES (1948) and the influential FULL FAITH AND CREDIT opinion in *Industrial Commission v. McCartin* (1947). Thus most of his deeply held views on the constitutional rights of individuals had to find expression in concurring and dissenting opinions. Through these he developed his judicial philosophy and expressed his ardent opposition to restricting the constitutional rights of racial and religious minorities, the economically disadvantaged, and those accused of crime.

The most durable and the most highly praised of all these individualized opinions is his dissent from what Murphy called "this legalization of racism" in KOREMATSU V. UNITED STATES (1944). The Court there upheld the wartime relocation of all persons of Japanese ancestry residing on the West Coast. Murphy dissected the military report upon which the relocation was based, and found the report filled with discredited and questionable racial and sociological factors beyond the realm of expert military judgment. To Murphy, the relocation was nothing more than racial discrimination that was "utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States." This dissent has been described by commentators as a classic in Supreme Court literature, and as one that "should be engraved in stone."

In *Falbo v. United States* (1944), Justice Murphy wrote that the law "knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution." His instinctive empathy for the constitutional rights of the oppressed and the unpopular constitutes Murphy's lasting contribution to the development of constitutional law.

EUGENE GRESSMAN
(1986)

Bibliography

FINE, SIDNEY 1984 *Frank Murphy: The Washington Years.* Ann Arbor: University of Michigan Press.

HOWARD, J. WOODFORD 1968 *Mr. Justice Murphy.* Princeton, N.J.: Princeton University Press.

## MURPHY, PAUL L.
(1923–1997)

Born in Caldwell, Idaho in 1923, Paul L. Murphy earned his B.A. at the College of Idaho in 1947 and his M.A. and Ph.D. at the University of California at Berkeley in 1948 and 1953, respectively. At the time of his death in 1997, he was Regents' Professor of History and American Studies and Adjunct Professor of Political Science at the University of Minnesota, Twin Cities, and Distinguished Adjunct Professor at Hamline University School of Law. He was also serving as President of the American Society for Legal History. Murphy expressed his deep personal commitment to individual autonomy, individual dignity, and individual self-determination in his teaching and scholarship and his active involvement in the AMERICAN CIVIL LIBERTIES UNION. He was an inspirational teacher, a superb scholar, and a loving friend.

In 1963 Murphy reminded scholars, lawyers, and judges of the importance of history in CONSTITUTIONAL INTERPRETATION. He challenged historians to reclaim consti-

tutional history and accord the field its proper place within American history generally and to provide "the most accurate, thoroughly documented, and impeccable history we are capable of producing" to help lawyers and judges build "a new order seeking a new level of equal rights and social justice through law." Murphy set the example with his own scholarship. His books include *The Constitution in Crisis Times, 1918–1969* (1972); *The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR* (1972), which won the ABA's Silver Gavel Award; and *World War I and the Origin of Civil Liberties in the United States* (1979). With James Morton Smith, he edited a document collection, *Liberty and Justice*, long regarded as a standard text in United States constitutional history. Murphy also published numerous articles, essays, and reviews in professional journals, law reviews, and book chapters on such diverse subjects as POLITICAL PARTIES, Native American rights, the Passaic Textile Strike of 1926, various BILL OF RIGHTS guarantees, and judges.

Murphy's scholarship, like his teaching, was interdisciplinary. His approach emphasized the importance of social, economic, political, and cultural contexts in which constitutional cases arise and judicial decisions are made. Through prodigious research in remarkably wide-ranging materials, which he synthesized into crisp narrative, Murphy explained changing legal DOCTRINE within the evolving social, economic, and political structures of twentieth-century America. Political activists, minorities, social and political elites, public interest groups, economic and social organizations, business institutions, professional associations, and academics play important roles in shaping public attitudes toward CIVIL LIBERTIES and individual rights, which, in turn, affect judicial outcomes. As a scholar and an academic, Murphy embodied the best of the American liberal tradition. A student and custodian of the FIRST AMENDMENT, a sacred article of his personal constitution, Murphy championed the role of law in securing individual freedom, justice, and equality.

ROBERT J. KACZOROWSKI
(2000)

Bibliography

MURPHY, PAUL L. 1963 Time To Reclaim: The Current Challenge of American Constitutional History. *American Historical Review* 69:64–79.

——— 1972 *The Constitution in Crisis Times, 1918–1969.* New York: Harper & Row.

——— 1972 *The Meaning of Freedom of Speech: First Amendment Freedoms From Wilson to FDR.* Westport, Conn.: Greenwood Press (Winner of the American Bar Association Gavel Award).

——— 1979 *World War I and The Origin of Civil Liberties in the United States.* New York: W.W. Norton.

## *MURPHY v. FLORIDA*
421 U.S. 794 (1975)

Jack "Murph the Surf" Murphy appealed a Florida robbery conviction. He claimed that he was denied a FAIR TRIAL because the jurors learned about his previous robbery and murder convictions, and about the circumstances of the instant case, from newspaper reports. The Supreme Court, 8–1, sustained his conviction.

Speaking through Justice THURGOOD MARSHALL, the Court held that juror exposure to information concerning the accused does not presumptively deny DUE PROCESS OF LAW. Since the VOIR DIRE did not discover juror hostility and there was no inflamed community sentiment, the totality of circumstances did not show inherent or actual prejudice.

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Free Press/Fair Trial.*)

## *MURPHY v. FORD*
390 F. Supp. 1372 (1975)

On September 8, 1974, President GERALD R. FORD granted to his predecessor, RICHARD M. NIXON, a "full, free and absolute pardon . . . for all offenses" that he might have committed while President. A Michigan lawyer brought suit in federal District Court for a DECLARATORY JUDGMENT invalidating the pardon. The District Court judge dismissed the suit, holding that the PARDONING POWER is unlimited, except in cases of IMPEACHMENT, and may as properly be exercised before criminal proceedings begin as after conviction. Citing THE FEDERALIST, the judge argued that the intention of the Framers in establishing the pardoning power was to provide for just such instances.

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Articles of Impeachment of Richard M. Nixon; Watergate and the Constitution.*)

## *MURPHY v. WATERFRONT COMMISSION OF N.Y. HARBOR*

See: Two Sovereignties Rule

## MURRAY, WILLIAM
(Lord Mansfield)
(1705–1793)

The leading Tory constitutionalist of the eighteenth century, William Murray was appointed a judge after a career

as a barrister and parliamentarian and service as attorney general. As Baron (later Earl) Mansfield, he was Lord Chief Justice of the Court of King's Bench from 1756 until 1788. He was active in the debates of the House of Lords and served for fifteen years in the cabinet. He opposed repeal of the Stamp Act in 1766, arguing that since the colonists were virtually represented in Parliament their complaints of TAXATION WITHOUT REPRESENTATION were without merit. Mansfield was a firm advocate of coercion in dealing with America, and he was the author of the Quebec Act of 1775.

In the WILKES CASES of 1763–1770 he held GENERAL WARRANTS illegal. He was tolerant of religious deviance and disapproved of prosecution of either Roman Catholic recusants or Protestant dissenters. In SOMERSET'S CASE (1772) he freed an escaped slave who had been recaptured in England, ruling that slavery was too odious to be supported by COMMON LAW. In SEDITIOUS LIBEL cases he allowed the jury to decide only the fact of publication, reserving the question of law—whether the published words were libelous—to be decided by the judge.

DENNIS J. MAHONEY
(1986)

## *MURRAY'S LESSEE v. HOBOKEN LAND & IMPROVEMENT COMPANY*
18 Howard 272 (1856)

This case raised the question whether an act of Congress provided DUE PROCESS OF LAW in the proceedings it laid down for exacting payments due to the treasury by collectors of the customs. For the first time the Supreme Court expounded the meaning of due process of law, which limited all branches of government. The Court interpreted due process exclusively in terms of PROCEDURAL DUE PROCESS. The settled usages and modes of proceedings in English law, "before the emigration of our ancestors," that were not unsuited to the civil and political conditions of America constituted due process.

LEONARD W. LEVY
(1986)

## *MUSKRAT v. UNITED STATES*
219 U.S. 346 (1911)

In one of a series of TEST CASES, the Court here refused to hear the suits involved because the parties failed to meet the constitutional requirement of CASES OR CONTROVERSIES (Article III, section 2). Congress had authorized certain Indians to sue the United States in the COURT OF CLAIMS and directed the ATTORNEY GENERAL to defend. The object was to determine the validity of certain congressional acts regarding Indian lands. The Court dismissed the suits, denying that Congress had the authority to create a case and designate parties to it.

DAVID GORDON
(1986)

(SEE ALSO: *Ashwander v. Tennessee Valley Authority; Collusive Suit.*)

# "MUST CARRY" LAW

The development of the cable television industry has revolutionized the way most Americans watch television. Until the 1960s, television signals were broadcast through the air into people's homes and picked up by receivers in the television sets. Such signals used the electromagnetic spectrum, which has limited frequencies, and could only travel relatively short distances. Because of these technological limitations, Congress, through the Federal Communications Commission, claimed the power to regulate BROADCASTING in order to license and control the use of the limited number of frequencies or "channels" and to impose certain content restrictions and public interest obligations on the broadcasters given those licenses.

Because of the short range of broadcast signals, viewers could only receive programs transmitted by local broadcasting "stations," and people in remote areas got very poor signal reception. Cable television fundamentally changed the picture. First, cable transmits video signals through fiberoptic cables, not electromagnetic frequencies, and thus has the capacity to carry dozens, if not hundreds, of different channels at one time. Second, by transmitting their signals through cable wires, rather than through the air, cable operators can easily send their programs to distant places.

Initially, cable was used primarily to improve reception of broadcast stations in crowded urban or remote rural areas. But because of the large number of channels a cable station could transmit, the cable industry developed a large number of new sources of programming, and hundreds of new cable networks, such as Nickelodeon, The Discovery Channel, and Cable News Network (CNN), were created. Because of better reception and wider programming, cable soon became the source of transmission of programming to approximately 60 percent of the households in America.

Broadcasters felt threatened by this new source of programming and, more importantly, by the control that cable operators had over the broadcasters' ability to reach their audience. The broadcasters were dependent on cable operators to carry their programs over cable wires into homes that had switched to cable. Yet, the broadcasters

were in competition with the cable industry over channels and programming. What was to keep the local cable company from refusing to carry the local broadcasting stations in order to enhance the market for the new cable networks and programs? And, if broadcasters were forced out of business, they argued, that would reduce the diversity of programming, and also harm the 40 percent of the American families that did not subscribe to cable. Cable operators had a "chokehold" over broadcasters and television programming.

At the urging of the broadcast industry and others, Congress passed the Cable Television Consumer Protection and Competition Act of 1992. That law mandated that all cable operators had to carry a reasonable number or percentage of "local commercial television stations" and local "noncommercial educational television stations" among the channels on their cable systems. The larger the number of channels, the more broadcast stations the system had to carry. Overall, the result was that approximately one-third of the channels on any cable system had to be made available for use by local commercial or noncommercial broadcast stations.

These "must carry" rules were challenged as violating the FIRST AMENDMENT rights of cable operators and programmers. But in a 1994 ruling, TURNER BROADCASTING SYSTEM V. FCC, the Supreme Court held that those rules were constitutional.

JOEL M. GORA
(2000)

Bibliography

MASETH, MICHAEL W. 1995 Comment: The Erosion of First Amendment Protections of Speech and Press: The "Must Carry" Provisions of the 1992 Cable Act. *Capital University Law Review* 24:423–456.

MEYERSON, MICHAEL I. 1995 Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media. *Notre Dame Law Review* 71:79–125.

SYMPOSIUM 1997 Telecommunications Law: Unscrambling the Signals, Unbundling the Laws. *Columbia Law Review* 97:819–1201.

## *MYERS v. UNITED STATES*
272 U.S. 52 (1926)

An 1876 statute authorized presidential appointment and removal of postmasters with the ADVICE AND CONSENT of the SENATE. (See APPOINTING AND REMOVAL POWER.) President WOODROW WILSON appointed Myers with Senate consent but later removed him without consulting that body. Myers filed suit in the COURT OF CLAIMS and appealed that court's adverse decision to the Supreme Court.

Chief Justice, and former President, WILLIAM HOWARD TAFT, in a broad construction of Article II, found the statute unconstitutional. For a 6–3 majority he insisted upon the necessity for the nation's chief executive officer to be able to remove subordinates freely: "To hold otherwise would make it impossible for the President . . . to take care that the laws be faithfully executed."

Justices OLIVER WENDELL HOLMES, JAMES C. MCREYNOLDS, and LOUIS D. BRANDEIS dissented. Brandeis declared that implying an unrestricted power of removal from the power of appointment "involved an unnecessary and indefensible limitation upon the constitutional power of Congress." History and present state practice demonstrated "a decided tendency to limit" the executive's removal power, and he also cited the DOCTRINES of CHECKS AND BALANCES and the SEPARATION OF POWERS.

The Court limited the doctrinal reach of *Myers* in HUMPHREY'S EXECUTOR V. UNITED STATES (1935).

DAVID GORDON
(1986)

# N

## *NAACP v. ALABAMA*
357 U.S. 449 (1958)

In this decision the Supreme Court first recognized a FREEDOM OF ASSOCIATION guaranteed by the FIRST AMENDMENT. Alabama, charging that the NAACP had failed to qualify as an out-of-state CORPORATION, had sought an INJUNCTION preventing the association from doing business in the state. In that proceeding, the state obtained an order that the NAACP produce a large number of its records. The association substantially complied, but refused to produce its membership lists. The trial court ruled the NAACP in contempt and fined it $100,000. The state supreme court denied review, and the U.S. Supreme Court unanimously reversed.

Justice JOHN MARSHALL HARLAN wrote for the Court. First, the NAACP had STANDING to assert its members' claims; to rule otherwise would be to require an individual member to forfeit his or her political privacy in the act of claiming it. On the constitutional merits, Harlan wrote: "Effective advocacy . . . is undeniably enhanced by group association"; thus "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." The privacy of association may be a necessary protection for the freedom to associate "where a group espouses dissident beliefs." Here, disclosure of NAACP membership in Alabama during a time of vigorous civil rights activity had been shown to result in members' being fired from their jobs, physically threatened, and otherwise harassed. Only a COMPELLING STATE INTEREST could justify this invasion of political privacy. That compelling interest was not shown here. The names of the NAACP's rank-and-file members had no substantial bearing on the state's interest in assuring compliance with its corporation law.

This same technique—solemnly accepting the state's account of its purposes, ignoring possible improper motives, and concluding that those state interests were not "compelling"—was employed in other cases involving efforts by southern states to force disclosures of NAACP membership such as *Bates v. Little Rock* (1960) and *Shelton v. Tucker* (1960).

KENNETH L. KARST
(1986)

(SEE ALSO: *Gibson v. Florida Legislative Investigation Commission.*)

## *NAACP v. BUTTON*
371 U.S. 415 (1962)

The Supreme Court held that Virginia statutes forbidding one person to advise another that his legal rights had been violated and to refer him to a particular attorney were unconstitutional as applied to activities of the NAACP and its legal defense fund. The furtherance of litigation designed to challenge the constitutionality of RACIAL DISCRIMINATION was a mode of expression and association protected by the FIRST and FOURTEENTH AMENDMENTS. The Court acknowledged that INTEREST GROUP LITIGATION, aimed at changing constitutional law through TEST CASES, was not only professional legal activity subject to state regulation but also constitutionally protected political activity.

MARTIN SHAPIRO
(1986)

## *NAACP v. CLAIBORNE HARDWARE COMPANY*

See: Labor and the Constitution

## NAACP LEGAL DEFENSE & EDUCATIONAL FUND

The NAACP Legal Defense & Educational Fund, Inc., was founded in 1939 by board members of the National Association for the Advancement of Colored People to conduct the legal program of the association through a corporation qualified to receive tax deductible contributions. The association was not tax exempt, because it lobbied. Board members of the association served on the board of the Fund; the Fund's director and some of its lawyers also were employees of the association.

In 1957 the Internal Revenue Service (IRS) objected to the interlocking staff and board because it enabled an organization not tax exempt to influence one entitled to tax exemption. The IRS required termination of the interlocking arrangement. Thereafter the Fund and the association were no longer formally linked, and the Fund functioned entirely independently with its own board, staff, budget, and policies. The Fund has since represented individuals and organizations with no relationship to the association at all as well as members and branches of the association.

In 1984 the Fund's staff consisted of twenty-four lawyers, with offices in New York and Washington, D.C., and several hundred cooperating lawyers across the United States. Its budget was $6.7 million. It has served as a model for the public interest law movement generally, including other legal defense funds, such as those dealing with discrimination against Hispanics, Asians, women, the handicapped, homosexuals, and the aged, as well as public interest firms representing environmental, consumer, migrant worker, and other groups.

The Fund's director-counsel was THURGOOD MARSHALL, who served until 1961 and was succeeded by Jack Greenberg, who directed the organization until 1984, when he was succeeded by Julius L. Chambers. The Fund has been involved in most of the leading cases dealing with racial discrimination in the United States, including BROWN V. BOARD OF EDUCATION (1954), which held unconstitutional racial SEGREGATION in public education, the principle of which was ultimately extended to all other governmental activities. *Brown* was the culmination of a planned litigation effort which built upon earlier Fund cases involving RACIAL DISCRIMINATION in graduate and professional schools. In the 1960s, the Fund provided representation in most of the cases generated by the CIVIL RIGHTS movement, including representation of MARTIN LUTHER KING, JR., Thereafter, following passage of the Civil Rights Acts of the mid-1960s, the Fund brought most of the leading cases enforcing those laws. The Fund has represented civil rights claimants in more than 2,000 cases dealing with education, employment, VOTING RIGHTS, housing, CAPITAL PUNISHMENT, health care, and other areas of the law.

JACK GREENBERG
(1986)

Bibliography

RABIN, ROBERT L. 1976 Lawyers for Social Change: Perspectives on Public Interest Law. *Stanford Law Journal* 28:207–261.

## NAFTA

See: North American Free Trade Agreement

## NARCOTICS REGULATION

See: Drug Regulation

## *NARDONE v. UNITED STATES*
302 U.S. 379 (1937)

After the Supreme Court largely exempted ELECTRONIC EAVESDROPPING from constitutional control in OLMSTEAD V. UNITED STATES (1928), protection against WIRETAPPING was sought legislatively. In 1934, Congress passed the COMMUNICATIONS ACT, section 605 of which provided that "no person" could intercept and divulge radio and wire communications. In *Nardone v. United States* the Supreme Court ruled that section 605 extended to federal agents; later the Court applied it also to state officers in *Benanti v. United States* (1957). The Justice Department construed section 605 very narrowly, however, and it was rarely invoked. It has been largely superseded by Title III of the OMNIBUS CRIME CONTROL AND SAFE STREETS ACT (1968).

HERMAN SCHWARTZ
(1986)

## NASHVILLE CONVENTION RESOLUTIONS
(1850)

Fearing that Congress might enact the WILMOT PROVISO, abolish the slave trade in the DISTRICT OF COLUMBIA, or

adopt other antislavery measures, southern separatists called for a convention of slave states to meet at Nashville in June 1850. The convention adopted resolutions asserting that: the TERRITORIES were the joint property of the people of all the states; Congress could not discriminate among owners of different kinds of property in the territories, and hence could not exclude slaves; and the federal government must protect all forms of property, including slaves, in the territories. However, the moderates who dominated the convention added that if the free states refused to recognize these principles, the slave states would accept a division of the territories by extending the MISSOURI COMPROMISE line to the Pacific, an extraordinary concession on the central constitutional issue that disgusted the radicals. A poorly attended adjourned session of the convention, dominated by radicals, met in November 1850, denounced the COMPROMISE OF 1850, advocated SECESSION, but proposed no immediate program. The resolutions of the Nashville Convention are thus significant principally as an indication of the slave states' inability to unite on a secessionist platform.

WILLIAM M. WIECEK
(1986)

(SEE ALSO: *Slavery and the Constitution.*)

Bibliography

POTTER, DAVID M. 1976 *The Impending Crisis, 1848–1861.* New York: Harper & Row.

## NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

See: NAACP Legal Defense & Educational Fund

## NATIONAL EMERGENCIES ACT

See: Emergency Powers

## *NATIONAL ENDOWMENT FOR THE ARTS v. FINLEY*

See: First Amendment; Freedom of Speech; Public Forum

## NATIONAL ENVIRONMENTAL POLICY ACT

See: Environmental Regulation and the Constitution

## NATIONAL INDUSTRIAL RECOVERY ACT
48 Stat. 195 (1933)

The National Industrial Recovery Act (NIRA) was the best-known and, perhaps, in President FRANKLIN D. ROOSEVELT's words, "the most important and far-reaching legislation ever enacted" by the NEW DEAL Congress. The act was designed to curb unemployment, stimulate business recovery, and end the competitive wars of the Great Depression. By May 1935, over 750 codes covering some twenty-three million people had been created under the NIRA's authority. Even before Roosevelt's inauguration, his "brain trust" had begun to plan a recovery bill. Introduced May 17, 1933, the bill raised questions of constitutionality. Congress passed it, however, and Roosevelt signed it into law on June 16.

The act declared a national emergency and justified congressional action under the COMMERCE CLAUSE and the GENERAL WELFARE CLAUSE. Section 2 established the National Recovery Administration (NRA) to supervise the NIRA, limiting its operation to two years. The heart of the act, section 3, provided for the framing of "codes of fair competition" by private businessmen and trade associations. After meeting certain requirements and obtaining presidential approval, these codes became "standards of fair competition" with the full force of federal law, regulating industrywide prices, wages, and practices. Such an extraordinary DELEGATION OF POWER was unprecedented: it allowed private citizens to draft codes to rule industry and provided, at best, minimal policy guidelines and standards. Violations of the codes "in any transaction in or affecting INTERSTATE or FOREIGN COMMERCE [were] deemed an unfair method of competition in commerce within the meaning of the FEDERAL TRADE COMMISSION ACT." Upon complaint or failure of an industry to formulate a code, the President could establish a compulsory code. Section 7 prescribed three mandatory provisions for every code: availability of COLLECTIVE BARGAINING, employee freedom from coercion to join or refrain from joining a union, and compliance with regulated MAXIMUM HOURS AND MINIMUM WAGES. The various clauses of this section constituted the broadest regulation of wages and hours in American history to that date. The NRA also incorporated in its "blanket code" a provision outlawing child labor in industries without specific codes. Although the NIRA prohibited monopolies and monopolistic practices, it exempted code-covered industries from the antitrust laws. Title II of the NIRA established a Public Works Administration to stimulate construction and, by spending its $3.3 billion budget, to increase purchasing power.

Serious questions of the act's constitutionality eventu-

ally reached the Supreme Court, however, and in SCHECHTER POULTRY CORP. V. UNITED STATES (1935) a unanimous Court voided the NIRA for unconstitutionally delegating power to the President and exceeding the limits of the commerce power. Despite this decision and PANAMA REFINING COMPANY V. RYAN (1935), invalidating other provisions, Congress gradually replaced the act with new and more effective legislation. Although historians debate whether the NRA impeded or encouraged recovery and reform, the lessons of this experiment in economic planning provided valuable experience for drafting later legislation such as the WAGNER (NATIONAL LABOR RELATIONS) and FAIR LABOR STANDARDS ACTS.

DAVID GORDON
(1986)

Bibliography

LYON, LEVERETT S. et al. 1935 *The National Recovery Administration: An Analysis and Appraisal.* Washington, D.C.: Brookings Institution.

ROOS, CHARLES F. 1937 *NRA Economic Planning.* Bloomington: Indiana University Press.

## NATIONAL LABOR RELATIONS ACTS

See: Taft-Hartley Labor Relations Act; Wagner Act

## *NATIONAL LEAGUE OF CITIES v. USERY*
426 U.S. 833 (1976)

This case proved that obituaries for DUAL FEDERALISM were premature. It arose after Congress amended the FAIR LABOR STANDARDS ACT (FLSA), in 1974, to extend wages-and-hours coverage to nearly all public employees. Several states, cities, and intergovernmental organizations sought to enjoin enforcement of the new provisions. Admitting that the employees in question would come within the federal commerce power if they worked in the private sector, the plaintiffs argued that congressional regulation of employment conditions for state and municipal workers violated "the established constitutional DOCTRINE of INTERGOVERNMENTAL IMMUNITY." A three-judge district court disagreed, ruling that under *Maryland v. Wirtz* (1968), which had upheld the application of wages and hours regulations to public schools and hospitals, an employee's public status was irrelevant to the scope of congressional authority. On APPEAL, the Supreme Court reversed the lower court, 5–4, holding that the FLSA amendments could not constitutionally be applied to public employees performing "traditional governmental functions."

Writing for the Court, Justice WILLIAM H. REHNQUIST initially confronted the sweep of the COMMERCE CLAUSE recognized in GIBBONS V. OGDEN (1824). The grant of congressional power was plenary, he conceded, but did not override "affirmative limitations" on Congress. The TENTH AMENDMENT provided the most explicit source for such a limitation, for in *Fry v. United States* (1975) the Court had offered the dictum that the amendment "expressly declared the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Yet Rehnquist emphasized a less explicit limitation—the overall federal structure. Within it, states perform essential governmental functions, and state decisions about these functions, which include fire protection and law enforcement, must be free from federal interference. Wages and hours legislation constituted a forbidden infringement, because it "operate[s] directly to displace the States' freedom to structure integral operations in areas of traditional governmental functions. . . ." Indeed, he expressly held the Court had wrongly decided *Wirtz.*

But the meaning of *National League of Cities* as precedent is not clear. Justice HARRY A. BLACKMUN qualified his crucial fifth vote with a concurrence that interpreted the Court as "adopt[ing] a balancing approach." For him, the decision did not preclude regulation of states in areas, such as environmental protection, where the federal interest was demonstrably greater. And the Court itself expressly left open the power of Congress to regulate even traditional state functions by employing the TAXING AND SPENDING POWER or by enforcing the FOURTEENTH AMENDMENT. (See FITZPATRICK V. BITZER.)

In dissent, Justice WILLIAM J. BRENNAN charged that the decision contained "an ominous portent of destruction of our constitutional structure" and delivered a "catastrophic body blow" to the commerce power. In his view, Rehnquist had misread earlier case law and had abandoned the plain meanings of the commerce and SUPREMACY CLAUSES. Moreover, Rehnquist's "essential function test" was "conceptually unworkable," for it failed to clarify the distinction between essential and other state activities.

The Court's opinion did lack a reasoned test for determining the essential functions of states "*qua* states." It also ran counter to forty years of judicial acceptance of broad congressional power under the commerce clause. Accordingly, *National League of Cities* led to further litigation over state immunity from federal regulation and injected the Supreme Court into issues long dormant. In GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985) a different 5–4 majority flatly overruled *National League of*

*Cities*, but the dissenters promised that disinterment of the 1976 decision awaited only one more vote.

CHARLES A. LOFGREN
(1986)

Bibliography

BARBER, SOTIRIOS A. 1976 *National League of Cities v. Usery:* New Meaning for the Tenth Amendment? *Supreme Court Review* 1976:161–182.

LOFGREN, CHARLES A. 1980 The Origins of the Tenth Amendment: History, Sovereignty, and the Problem of Constitutional Intention. Pages 331–357 in Ronald K. L. Collins (ed.), *Constitutional Government in America.* Durham, N.C.: Carolina Academic Press.

NAGEL, ROBERT F. 1981 Federalism as a Fundamental Value: *National League of Cities* in Perspective. *Supreme Court Review* 1981:81–109.

## NATIONAL POLICE POWER

The "national police power" is not, strictly speaking, a constitutional power of Congress. Rather, it is a phrase describing the power of Congress, acting under the enumerated powers, to enact "police legislation." The term "police legislation" includes criminal law as well as health, morals, safety, antidiscrimination, and environmental statutes.

Under our federal system, national police power regulation has always been controversial. Police matters are historically state or local concerns, and yet some problems seem to call for a national solution. The recurring issues, therefore, are whether Congress should address a problem that has historically been attacked at the state or local level and whether the courts can articulate any principled limits on congressional power to do so.

The Constitution provides a number of sources of power for national police legislation. The most important are the congressional powers to regulate commerce, to tax, and to spend. However, several other powers should not be overlooked. The postal power makes possible laws to protect consumers from fraudulent or obscene materials transmitted through the mails, subject to significant First Amendment limitations. The enabling clauses of the THIRTEENTH and FOURTEENTH AMENDMENTS open the way for a variety of antidiscrimination laws. (See JONES V. ALFRED H. MAYER CO. (1968), racial discrimination in housing; UNITED STATES V. GUEST (1966), violence against minorities in the use of public facilities.)

Because such local activities as manufacturing or gambling are not themselves interstate commerce, they are not, without more, subject to federal commerce clause regulation. However, constitutional developments during the twentieth century have marked out two techniques which, alone or in combination, permit virtually unlimited regulation of local activity under the aegis of the COMMERCE CLAUSE: prohibition of INTERSTATE COMMERCE and linking a local activity to an "effect" on interstate commerce.

A few early statutes prohibited particular forms of interstate commerce (such as transportation of diseased cattle or use of unsafe locomotives) because they physically endangered the stream of commerce. In 1895, however, Congress took a further critical step by prohibiting the interstate transportation of lottery tickets. Transportation of the tickets harmed nobody; Congress was obviously concerned that the use of the tickets in the receiving state was harmful to public morals. Thus the prohibition on transportation really was a technique to assist the states in stamping out national (or international) lotteries. Under traditional assumptions, of course, the regulation of gambling or of consumer fraud was a state responsibility, but individual state regulation of lotteries had proved ineffectual.

In CHAMPION V. AMES (1903), often referred to as "The Lottery Case," the Supreme Court upheld the federal statute by a 5–4 vote. The majority believed that the shipment of articles in interstate commerce that were harmful to the public safety or morals was a "misuse" of commerce, the prohibition of which lay well within the commerce power. This rationale paved the way for many later statutes which treated various goods or persons as "outlaws" of commerce and thus prohibited their shipment. For example, the courts upheld regulation or prohibition of interstate transportation of adulterated food, prostitutes, obscene literature, and stolen cars upon the authority of *Champion.* In addition, the Court upheld statutes banning the interstate shipment of items (such as liquor or goods produced by convict labor) that violated the laws of the receiving state.

In addition to permitting regulation of interstate transportation of goods, *Champion* provided authority for regulation of the use of the goods after they arrived. Finally, although most of the commerce-prohibition cases involved regulation of purely commercial activity, the Court in *Caminetti v. United States* (1917) found no constitutional objection to punishing a man for transporting a woman to whom he was not married across the state lines for immoral, but wholly noncommercial, purposes. (See HOKE V. UNITED STATES.)

The usefulness of the commerce-prohibiting technique suffered a temporary but sharp reverse after Congress decided to use it for the purpose of abolishing child labor. In HAMMER V. DAGENHART (1918) the Supreme Court held that Congress could not prohibit the transportation in in-

terstate commerce of goods made by children, because the goods were lawfully produced in the state of origin and harmless both to interstate commerce and to users in the receiving state. The government tried to show that the law was necessary to achieve fair interstate competition, because states allowing child labor had an unfair advantage over those prohibiting it. The Court said that Congress had no power to equalize comparative advantages or disadvantages among the states.

Justices OLIVER WENDELL HOLMES's dissent in *Hammer* seemingly demolished the majority opinion and ultimately became the law when UNITED STATES V. DARBY overruled *Hammer* in 1941. *Darby* made clear that Congress could prohibit the interstate shipment of harmless goods manufactured by workers whose wages or working hours violated the FAIR LABOR STANDARDS ACT. The Court in *Darby* accepted the theory, rejected by the *Hammer* majority, that Congress could use the commerce-prohibiting technique to improve labor conditions in the state of origin and to achieve fair competition among states. After *Darby*, therefore, there was no longer any obstacle to the achievement of police goals by the prohibition of interstate commerce in people or goods, absent the violation of some other constitutional norm.

In the landmark commerce clause case of GIBBONS V. OGDEN (1824) Chief Justice JOHN MARSHALL seemingly established that a local activity could be regulated by Congress under the commerce clause if the activity "affected" other states. Nevertheless there arose a confusing body of case law on the extent to which local affairs could be regulated because of their effect on interstate commerce. On the one hand, for example, the Shreveport case, HOUSTON, EAST AND WEST TEXAS RAILWAY V. UNITED STATES (1914), allowed the Interstate Commerce Commission to regulate intrastate railroad rates because low rates for intrastate hauls and high rates for interstate hauls unfairly discriminated against interstate commerce. On the other hand, early antitrust cases, including UNITED STATES V. E. C. KNIGHT CO. (1895), cast doubt on Congress's power to regulate monopolies in manufacturing because manufacturing was considered local; the Court evidently assumed that granting regulatory power to the national government would prevent the states from regulating the activity.

In several cases during the 1930s, narrow majorities of the Supreme Court invalidated New Deal legislation that sought to regulate local activity affecting interstate commerce (such as labor relations in coal mining in CARTER V. CARTER COAL CO., 1936). By the late 1930s, however, these cases had been disapproved. By the time of WICKARD V. FILBURN (1942) there was no longer any dobt that Congress had power to regulate purely local and individually trivial activities which (when cumulated) substatially affected interstate commerce. In that case the Court ruled that Congress could regulate home consumption of wheat because of its aggregate effect on an inerstate market.

Thus the "affecting commerce" rationale was available when Congress turned to national police legislation. The Fair Labor Standards Act not only prohibited interstate transportation of goods manufactured by persons whose wages or hours violated the act; it also directly prohibited the production of such goods for interstate commerce. *United States v. Darby* upheld the manufacturing prohibition on two distinct theories. The Court held that manufacturing could be prohibited (even if transportation had not been prohibited) because production of goods under substandard labor conditions was a form of unfair competition that substantially affected interstate commerce. In addition, the Court upheld the manufacturing ban as a necessary and proper incident of Congress's power to prohibit interstate transportation of the goods. This latter theory opened the way for Congress to ban virtually any local activity if it also bans interstate transportation of the persons who conduct the activity or the goods produced by it.

Congress has frequently resorted to the "affecting commerce" rationale when it pursues fundamentally noneconomic objectives. The Court has generously upheld federal statutes upon determining that Congress has "rationally" concluded that a local activity substantially affected commerce. For example, the Court upheld in KATZENBACH V. MCCLUNG (1964) a federal prohibition on racial discrimination, as applied to a restaurant that had purchased food from a local seller who had purchased it in interstate commerce. The Court's tenuous theory was that Congress could rationally conclude that discrimination in such restaurants decreased interstate sales of food. (See HEART OF ATLANTA V. UNITED STATES.)

The "affecting commerce" rationale has opened the way for a vast expansion of federal criminal law. In PEREZ V. UNITED STATES (1971) the Court upheld a conviction under the federal loan-sharking statute, even though the defendant had no apparent contact with interstate commerce. In previous cases, such as *Katzenbach v. McClung*, the characteristic used to identify the regulated party had a connection to interstate commerce, but in *Perez*, the characteristic ("loan-sharking") had no such connection. However, the Court deferred to congressional findings that loan-sharking is used by multistate organized crime rings to raise or launder money to take over legitimate businesses. It then held that because loansharks as a "class" substantially affect interstate commerce, any member of the class can be reached by a federal criminal statute, regardless of the individual's actual interstate connections. Of course, this approach is drastically over-

inclusive, but it is justifiable because it is difficult to ascertain in a given case whether a particular loanshark has connections to organized crime and thus to interstate commerce. The *Perez* theory that Congress can criminalize an entire class, when some members of that class substantially affect interstate commerce, undergirds several other federal racketeering, gambling, and drug abuse statutes. (See LAW ENFORCEMENT AND FEDERAL-STATE RELATIONS.)

The "prohibiting commerce" and the "affecting commerce" techniques, used separately or together, thus provide the authority for virtually limitless expansion of national police power. Given only slight ingenuity in statute-drafting, a local activity which Congress wishes to regulate or prohibit can be linked somehow to interstate commerce.

Nevertheless, the Court has employed a number of low-visibility judicial techniques to slow the federalization of police power. It has frequently construed narrowly statutes that make unexpected intrusions into local domains, reasoning that Congress should clearly state its intention to expand national police power. Moreover, in construing federal criminal statutes, the Court takes into account its view of an appropriate balance between state and federal law enforcement. These constructional techniques require Congress at least to face and consider the implications of a drastic extension of federal power. Similarly, the Court may hold that an ambiguous criminal statute fails to give fair warning to those affected by it if a broad construction would punish essentially local activity.

In considering congressional police power under the commerce clause, the most important open question is whether a majority of the Supreme Court will hold that a "trivial" effect on interstate commerce is an insufficient foundation. A number of Justices have written that questions of degree are important to them and that the cumulative effect on commerce of the class of regulated activities must be "substantial." In several cases involving federal stripmining legislation, for example, including HODEL V. VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION and *Hodel v. Indiana* (1981), the court unanimously upheld statutes which regulated stripmining on steep slopes and on farmland against claims that land use control is a uniquely local function. The Court found that Congress had acted rationally in identifying the environmental effects of stripmining as substantial burdens on interstate commerce and that the means chosen by Congress were rational. Two Justices wrote separately to emphasize that their concurrence was based on the substantiality of the effect. In the past, other Justices have expressed similar reservations. If a majority of the Supreme Court were actually to assess the substantiality of the effect on commerce of the class of regulated activities before upholding a statute, it would be much less clear than it seems today that the Constitution imposes no effective limit on the national police power under the commerce clause.

By using its power to tax an activity, Congress can discourage, regulate, or prohibit the activity. Consequently, a power intended to furnish Congress with the means for raising revenue can be effectively employed for police purposes. Occasional taxpayers have contended that a so-called tax is really regulatory in purpose and effect, and consequently not a tax at all. In early cases, such as UNITED STATES V. DOREMUS (1919), the Court upheld tax statutes with patently obvious regulatory goals, taking the tax label at face value. The court turned a blind eye to the fact that the tax would destroy the taxed business, that it produced little or no revenue, or that its administrative provisions were inappropriate for tax collection.

However, when Congress sought to prohibit child labor by taxing income from the sale of products made by children, the Court rebelled. In BAILEY V. DREXEL FURNITURE CO. (1922) it concluded that the tax was actually a regulatory measure, for it provided for a tax of ten percent on annual net income if the taxpayer knowingly used child labor on even a single occasion. Thus, said the Court, Congress had used the taxing power as a pretext for an attempt to regulate manufacturing—something it had previously held beyond Congress's power.

Ultimately, the court abandoned any effort to distinguish taxation from regulation. In upholding the federal gambling tax, which obviously was intended to stamp out illegal gambling rather than to raise revenue, the Court noted that a federal tax is valid even though it may destroy the taxed activity, raises little revenue, and contains enforcement provisions more appropriate to a criminal statute than a tax provision. In *United States v. Kahriger* (1953), decided over a strong dissent by Justice FELIX FRANKFURTER, the Court held that unless the tax law contains penalty or administrative provisions "extraneous to any tax need," it is valid.

The Court later limited its *Kahriger* precedent. MARCHETTI V. UNITED STATES (1968) held that the registration requirement for gamblers entailed coerced self-incrimination, in violation of the Fifth Amendment. Nevertheless, unless a tax runs afoul of a specific provision of the Bill of Rights, it seems unlikely that the Court will ever again seek to patrol the troubled border between taxation and regulation. There is little need for the distinction, now that virtually any activity it seeks to regulate through taxation could be easily reached through the commerce power.

Through its power to spend for the general welfare,

Congress can enlist state or private cooperation in achieving an endless list of regulatory goals. All it needs to do is place conditions on offers of federal money. If the offer is sufficiently generous, the recipients are virtually certain to accept the conditions.

In the 1930s the Supreme Court made a doomed attempt to limit the traditional practice of regulation through conditional grants. It held that a federal program of payments to farmers, upon condition that they contractually agree to limit their acreage, was an invalid attempt to regulate agriculture and thus an incursion into a matter left to the states. In UNITED STATES V. BUTLER (1936) it declared that Congress could not purchase submission to a regulation that it could not impose directly.

The *Butler* prohibition on conditional spending lasted only a year. The SOCIAL SECURITY ACT contained a joint federal-state taxing and spending program to pay unemployment compensation. To induce the states to participate, Congress imposed a payroll tax on employers. However, a taxpayer received a credit of ninety percent of the federal tax if its state levied a payroll tax and adopted a system for distributing benefits that complied with the federal statute. As a practical matter, this credit, which had the effect of a federal expenditure, required states to participate in the program. Nevertheless, the court upheld that statute in STEWARD MACHINE COMPANY V. DAVIS (1937), approving the concept of "cooperative federalism" and declaring that no state was coerced into adopting an unemployment compensation system. However, the Court indicated that it might have some doubts if the federal law imposed conditions that were unreasonable or unrelated in subject matter to legitimate national objectives or entailed surrender by states of quasi-sovereign powers.

Since *Steward Machine,* the Court has consistently upheld conditional spending programs in the few cases that have raised the issue. For example, in *Oklahoma v. Civil Service Commission* (1947) it sustained a system of conditional highway construction grants to states. A recipient state had to consent to a provision in the HATCH ACT precluding administration by any person involved in political campaigns. Because the state was free to reject federal funding, no coercion was involved.

Conditional federal grants have been used to achieve a wide variety of federal police objectives, particularly in the areas of environmental protection, affirmative action, education, and health services. However, in PENNHURST STATE SCHOOL V. HALDERMAN (1981) the Court sounded a warning. If a state is to be bound by a condition on its receipt of federal funds, the condition must be unambiguously stated in the statute. Otherwise, a state's acceptance might not have been knowing and voluntary. Like the requirement that Congress make a clear statement that it intends a criminal statute to reach an essentially local activity, the clear statement rule of *Pennhurst* requires Congress to focus on the issue of federalism when it adopts a conditional spending program.

Congress has ample power to achieve national police power objectives. The commerce clause, the postal, taxing, and spending power, and the enabling clauses of the Thirteenth and Fourteenth Amendments furnish authority for almost any conceivable expansion of national regulatory jurisdiction. However, the Court has suggested (sometimes in OBITER DICTUM) potential limitations on these powers which might someday be invoked to constrain an extension of federal authority.

Much more important than any judicially imposed limits are the political constraints on the national police power. Various structural elements of the national government assure sympathetic treatment for arguments based on federalism; for example, states opposing federal intrusion are protected by the fact that each state has two senators (regardless of population). Among other factors, state legislative control over House districting and the state-oriented organization of national political parties also assure respectful treatment for state or local contentions that extension offederal regulation is unnecessary. Similarly, the selection of the President by the Electoral College emphasizes the importance of states. The powerful representation of states at the national level, the tradition that police regulation is performed at the state level, and the inertia of Congress all work together to assure that intrusions by the national government into matters of state concern are likely to occur only when a broad national consensus emerges that centralization is necessary.

MICHAEL ASIMOW
(1986)

Bibliography

CUSHMAN, ROBERT E. 1919 National Police Power under the Commerce Clause of the Constitution. *Minnesota Law Review* 3:289–319, 381–412, 452–483.

——— 1920 National Police Power under the Postal Power of the Constitution. *Minnesota Law Review* 4:402–440.

KADEN, LEWIS B. 1979 Politics, Money and State Sovereignty: The Judicial Role. *Columbia Law Review* 79:847–897.

STERN, ROBERT L. 1973 The Commerce Clause Revisited: Federalization of Intrastate Crime. *Arizona Law Review* 15:271–285.

WECHSLER, HERBERT 1954 The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government. *Columbia Law Review* 54:543–560.

## NATIONAL PROHIBITION CASES

See: Amending Process; Eighteenth Amendment

## NATIONAL SECURITY ACT
69 Stat. 495 (1947)

This act embodies the most comprehensive reorganization ever undertaken of the means by which the WAR POWERS are to be exercised. The act unified the command of the armed forces, officially organized the Joint Chiefs of Staff, created the Air Force department, and established the office of secretary of defense. The separate army and navy establishments recognized in the Constitution, together with the air force, became a single, permanent "National Military Establishment."

Furthermore, the act erected, within the executive branch, the National Security Council. The original intention of Congress seems to have been to constrict the President's freedom of action in defense and FOREIGN AFFAIRS by prescribing the persons to be consulted and the manner of consultation in national security decision making. In fact, however, strong and politically skillful Presidents have used the council to strengthen their own positions, as, for example, President JOHN F. KENNEDY did during the Cuban missile crisis of 1962.

Under the National Security Council the act created the Central Intelligence Agency (CIA), with a broad charter to conduct foreign intelligence-gathering activities, as well as to process and disseminate intelligence gathered by other agencies. The act specifically prohibited domestic intelligence activities on the part of the CIA.

DENNIS J. MAHONEY
(1986)

## NATIONAL SECURITY AND THE FOURTH AMENDMENT

The right to individual privacy and the preservation of national security have jarred against each other for centuries. "National security cases . . . often reflect a convergence of First and FOURTH AMENDMENT values not present in cases of 'ordinary' crime," wrote Justice LEWIS F. POWELL for a unanimous Supreme Court in UNITED STATES V. UNITED STATES DISTRICT COURT (1972). The early English cases, such as the WILKES CASES (1763–1770), establishing the right to keep the government out of a home unless it has PROBABLE CAUSE and a judicially approved warrant to enter, arose from successful challenges by political dissidents to searches by royal officers hunting for seditious writings. Preventing such infringements on both personal security and free expression was the main purpose of the Fourth Amendment. Today, Presidents claim inherent executive power to break into homes, to make physical SEARCHES AND SEIZURES, to open mail, and to video-tape, WIRETAP, and bug—again in order to protect national security.

Where the surveillance is directed against national security threats by *domestic* groups or individuals, the Supreme Court has held that the President has no inherent executive power, and a warrant must first be obtained. The government's needs will not be presumed to outweigh the threats such a power poses for the rights of free speech and personal security; rather, a search against domestic threats must be approved in advance by a neutral magistrate. The Court did suggest that Congress could authorize less stringent procedures for domestic intelligence gathering than for crime detection, but so far Congress has not done so.

*Foreign* national security issues have been treated very differently. Courts have generally accepted the claim of inherent presidential power to use electronic surveillance, video-tapes, and physical entries against both foreigners and Americans in order to obtain foreign intelligence, without obtaining prior judicial approval. The power is justified on several grounds: the need for stealth, speed, and secrecy to counter foreign threats; the executive's superior experience and knowledge of FOREIGN AFFAIRS and the judiciary's relative lack of competence in such matters; and the executive's primacy in foreign affairs in the constitutional scheme. This power is limited to intelligence gathering, so that when the investigation becomes a criminal investigation and the warrantless interception is made for the purpose of gathering evidence for a prosecution, the requirements of Title III of the OMNIBUS CRIME CONTROL AND SAFE STREETS ACT must be satisfied. This inherent intelligence gathering power, moreover, can be exercised only by the President or the attorney general; a lower-level official cannot authorize intelligence-gathering break-ins or wiretaps on his own, without judicial approval.

In 1976, a Senate committee issued a massive documentation of the many abuses of Fourth Amendment rights perpetrated by executive officers and the intelligence agencies from the 1930s through the 1970s. The Central Intelligence Agency, for example, admitted wiretapping people it considered "left-wingers" both in this country and abroad in a project it called "Operation Chaos," even though the agency had no authority to operate domestically. It was trying to find links between antiwar groups and foreign powers, which were never found. The military eavesdropped on radio messages in the late 1960s and early 1970s in connection with civil disorders, with full knowledge that such eavesdropping was illegal. In 1969, President RICHARD M. NIXON authorized taps on four journalists and thirteen government employees, allegedly to discover who was leaking foreign affairs information; these taps were kept in operation for over two years even though it quickly became clear that nothing pertinent to the leaks was being learned.

In reaction to these revelations and to the Watergate

abuses, Congress in 1978 banned electronic surveillance for foreign national security purposes within the United States, without prior judicial approval. Under the Foreign Intelligence Surveillance Act (FISA) the executive branch no longer has inherent power to tap and bug for foreign intelligence-gathering purposes. With the approval of the attorney general, a federal official may apply to a specially selected court (composed of regular federal judges) which sits in secret. The court must issue a warrant if it finds probable cause to believe, first, that the target is a foreign power or agent, and, second, that certain procedures to minimize the interception have been set up; an American who, on behalf of a foreign power, engages in clandestine intelligence gathering that may involve criminal activity, may be considered a foreign agent, though not for activities protected by the FIRST AMENDMENT. Other control procedures are also established, though they are less stringent than those for electronic surveillance for crime detection under Title III. The FISA applies to foreign intelligence gathering by any type of electronic, mechanical, or other surveillance device, but not to physical break-ins, mail openings, and the like—these remain subject to the more traditional claims of inherent presidential power.

Although the FISA was held constitutional by a federal district court, there is still no definitive Supreme Court ruling on the existence of inherent executive power to break into homes for foreign national security purposes or to eavesdrop on Americans without a warrant.

HERMAN SCHWARTZ
(1986)

Bibliography

CARR, JAMES G. 1977 (1981 supp.) *The Law of Electronic Surveillance.* New York: Clark Boardman.

SCHWARTZ, HERMAN 1977 *Taps, Bugs, and Fooling the People.* New York: Field Foundation.

UNITED STATES, CONGRESS, SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES 1976 *III Final Report.* 94th Congress, 2d session.

## *NATIONAL TREASURY EMPLOYEES UNION, UNITED STATES v.*
513 U.S. 454 (1995)

The U.S. Congress in 1989 prohibited federal employees from receiving any compensation for any outside speeches or articles. In challenging the statute's constitutionality, the National Treasury Employees Union condemned the law's broad sweep, noting that postal workers were banned from accepting fees for lectures on religion and federal scientists could not supplement their income by writing dance reviews. The Supreme Court, by a 6–3 vote, agreed that the statute violated the FREEDOM OF SPEECH rights of federal employees below the level of GS-16, but left questions concerning upper-level federal employees unanswered.

The MAJORITY OPINION, authored by Justice JOHN PAUL STEVENS, emphasized the public interest in permitting federal employees to speak on matters of public concern, and the ways in which bans on compensation might chill such speech. Nathaniel Hawthorne and Herman Melville wrote major works while on the public payroll, and the Justices seemed concerned that the statute under attack might deter future literary geniuses in the civil service. The majority opinion further recognized that banning low-level PUBLIC EMPLOYEES from being compensated for their outside speeches and articles would not improve the efficiency of the workplace by improving morale or preventing corruption, though few employers encourage their employees to moonlight.

*United States v. National Treasury Employees Union* offers less to public employees than meets the eye. A Court committed to judging the free-speech rights of public employees on a case-by-case basis merely seemed offended by the crudeness of the restriction under constitutional attack. In the last half of the 1990s, federal employees retain the right to criticize the local production of *Swan Lake*, but place themselves at risk if they publicly challenge decisions made by their agencies.

MARK A. GRABER
(2000)

(SEE ALSO: *First Amendment; Patronage; Public Employees and Free Speech; Waters v. Churchill.*)

## *NATIONAL TREASURY EMPLOYEES UNION v. VON RAAB*
489 U.S. 656

In this companion case to SKINNER V. RAILWAY LABOR EXECUTIVES ASSOCIATION, the Supreme Court upheld 5–4, the constitutionality of federal regulations requiring urine testing of all Customs employees involved in drug interdiction, carrying weapons, or handling classified materials. Justices ANTONIN SCALIA and JOHN PAUL STEVENS, who had supported the majority in *Skinner*, joined the *Skinner* dissenters in this case.

Scalia believed that considerations of public safety and the relation between drugs and accidents had justified the departure from individualized suspicion in *Skinner.* These considerations did not prevail in this case. NO EVIDENCE existed to show that Customs employees used drugs, let alone that such use jeopardized the public. Accordingly,

the public safety could not be furthered by the urinalysis required of these employees. The search itself, Scalia believed, was "particularly destructive of privacy and offensive to personal dignity." The Court majority, however, remained convinced that the government had a compelling interest in ensuring the physical fitness of the employees required to submit to urine testing.

LEONARD W. LEVY
(1992)

## NATIONAL UNITY, GROUP CONFLICT, AND THE CONSTITUTION

Writing on behalf of the Supreme Court in SHAW V. RENO (1993), Justice SANDRA DAY O'CONNOR complained that race-sensitive REAPPORTIONMENT schemes reinforce "the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls." In her view, "Racial GERRYMANDERS, even for remedial purposes, may balkanize us into competing racial factions." She accordingly concluded that the Constitution prohibits states from drawing bizarrely shaped legislative districts on the basis of racial criteria.

O'Connor's argument highlights some basic principles of American democracy. Democracy cannot be reduced to majoritarianism. In a purely majoritarian system, 40 percent of the people can lose 100 percent of the time. That would be unfair; true democracy requires that government speak on behalf of the whole people, rather than a mere part of the people—even if the part is a majority.

Nevertheless, American democracy relies heavily on majoritarian elections. These elections are likely to be a satisfactory means for implementing democracy only if one of two conditions holds. The first possibility is that interests might vary greatly from person to person, so that everybody is in the majority on some issues. If so, everybody would occasionally benefit from majoritarian procedures.

The second possibility is that citizens might take an interest in one another. They might, in other words, place an affirmative value upon the happiness of their fellow citizens, including citizens in the minority. If so, members of the minority would enjoy virtual REPRESENTATION through the concerns of the majority.

Both conditions are put in jeopardy by enduring, cohesive political factions. When such factions exist, interests vary from group to group, rather than from person to person. As a result, members of minority groups may find that they are consistent losers in a polarized political process. Moreover, people in one faction are likely to be hostile to those in competing factions.

*Shaw* thus relied on sound premises. National unity is a structural principle of American democracy, much like FEDERALISM or the SEPARATION OF POWERS. The constitutional aspiration to establish democratic government requires that the state presume Americans can best flourish if they live and work together. Laws that "balkanize [Americans] into competing factions" may thus be unconstitutional even if they meet with the approval of minority groups. Indeed, when rival factions dislike or distrust one another, they may find separation more appealing than cooperation.

As the *Shaw* Court recognized, racial divisions—and especially the divisions between black and white Americans—have always been the most potent source of political factionalism in the United States. Nevertheless, although *Shaw* relied on sound principles, its application of them was dubious. The Court treated racial gerrymanders as though they segregated citizens on the basis of race. In fact, though, the districts reviewed in *Shaw* were among the most integrated in America.

*Shaw*'s antisegregation rhetoric would have been more appropriate in BOARD OF EDUCATION OF KIRYAS JOEL VILLAGE SCHOOL DISTRICT V. GRUMET (1994). *Kiryas Joel* involved a school district gerrymandered so that a village inhabited solely by Hasidic Jews could run its own school system. The Hasidim had previously sent their children to the neighboring Monroe-Woodbury school district, but the Hasidic children had been teased and mistreated. Since neither community liked the other, both were happy with the segregated district.

The constitutional commitment to national unity, however, forbids the state from endorsing this kind of separatist impulse. The Court rightly held the Kiryas Joel school district unconstitutional under the ESTABLISHMENT CLAUSE. In a CONCURRING OPINION, Justice JOHN PAUL STEVENS called attention to the fact that New York had "affirmatively support[ed] a religious sect's interest in segregating itself." Stevens rightly said that it would have been better for New York to "further the strong public interest in promoting diversity and understanding in the public schools."

CHRISTOPHER L. EISGRUBER
(2000)

(SEE ALSO: *Electoral Districting; Religious Liberty.*)

Bibliography

EISGRUBER, CHRISTOPHER L. 1994 Political Unity and the Powers of Government. *UCLA Law Review* 41:1297–1336.

——— 1997 Democracy, Majoritarianism, and Racial Equal-

ity: A Response to Professor Karlan. *Vanderbilt Law Review* 50:347–360.

KARST, KENNETH L. 1989 *Belonging to America: Equal Citizenship and the Constitution.* New Haven, Conn.: Yale University Press.

SYMPOSIUM 1997 Group Conflict and the Constitution: Race, Sexuality and Religion. *Yale Law Journal* 106:2313–2561.

## NATIVE AMERICANS

See: American Indians and the Constitution; Cherokee Indian Cases; Tribal Economic Development and the Constitution

## NATIVE HAWAIIAN SOVEREIGNTY MOVEMENTS

The Kingdom of Hawai'i was an independent country with formal treaty relationships with the United States and other countries until it was overthrown in 1893 by a rebellious group of westerners, many of whom were U.S. citizens, with the active support of U.S. diplomats and military troops. President GROVER CLEVELAND condemned the overthrow and rejected the request of the rebels that Hawai'i be annexed to the United States. But congressional leaders refused to support his desire to restore the monarchy and for five years Hawai'i was governed by those that had led the revolution. In 1898, after WILLIAM MCKINLEY had become President and gave his support to annexation, this option was formally presented to Congress. The two-thirds vote necessary for the U.S. SENATE to ratify a TREATY could not be obtained, but a simple majority in both the U.S. HOUSE OF REPRESENTATIVES and the Senate adopted a JOINT RESOLUTION supporting annexation, and Hawai'i became a TERRITORY OF THE UNITED STATES. Pursuant to this annexation, 1,800,000 acres of land that had been previously governed by the monarchs and government of the Kingdom of Hawai'i were "ceded" to the United States.

In 1921, Congress transferred 200,000 of these acres to the Hawaiian Home Lands Commission to be made available to persons with at least 50 percent Native Hawaiian ancestry. In 1959, the residents of Hawai'i voted overwhelmingly to became the fiftieth state. Congress then accepted Hawai'i into the Union and transferred about 1,200,000 acres of the ceded lands to the state, to be used for specific public purposes, including "the betterment of the conditions of the Native Hawaiian people." In 1978, the people of Hawai'i amended the state constitution to create the Office of Hawaiian Affairs (OHA), which thereafter received 20 percent of the revenues produced by the ceded lands held by the state government to promote Native Hawaiian culture and economic interests.

The U.S. Congress passed another joint resolution in 1993, which President WILLIAM J. CLINTON signed, apologizing for the participation of U.S. agents in the overthrow, characterizing the overthrow as "illegal" and in violation of INTERNATIONAL LAW, acknowledging that the subsequent "cession" of 1,800,000 acres of lands to the United States was "without the consent of or compensation to the Native Hawaiian people of Hawai'i or their sovereign government," and calling for steps to be taken to achieve a "reconciliation" between the Native Hawaiian people and the U.S. government. Hawai'i's state legislature has enacted statutes expressing similar views, and has taken steps to facilitate the establishment of a sovereign Native Hawaiian nation.

Since 1972, Congress has included Native Hawaiians in many federal programs designed to benefit AMERICAN INDIANS and Alaskan Natives. In *Morton v. Mancari* (1947), the Court ruled that preferential and separate programs for natives are based on a "political" relationship rather than a "racial" classification, and are constitutional if they are rationally linked to the protection or promotion of self-government, self-sufficiency, or native culture. Congress has stated explicitly in many enactments that a special political relationship exists between the United States and the Native Hawaiian people, similar to the status of other Native Americans. However, the legitimacy of this conclusion is occasionally challenged by those who argue that preferences for Native Hawaiians constitute RACIAL DISCRIMINATION. This issue is being reviewed by the Supreme Court in *Rice v. Cayetano* during the 1999–2000 session.

Many Native Hawaiians have acted individually or through organizations to promote the establishment of a sovereign Native Hawaiian government. Some Native Hawaiians favor complete independence from the United States, arguing that the 1993 Apology Resolution recognizes the illegitimacy of U.S. annexation of Hawai'i and that the 1959 vote for statehood was tainted because Native Hawaiians were not properly educated, because the option of independence was not given to the voters, and because the United States violated international law by allowing nonnatives to immigrate to the islands and surpass the Native Hawaiians numerically.

Other Native Hawaiians favor a nation-within-a-nation model similar to the relationship between federally recognized Indian tribes and the United States. Under this approach, the Native Hawaiian nation would determine its own membership, control land and resources, tax and zone, charter CORPORATIONS, establish schools, administer justice, and so on. It would have a direct relationship with the U.S. government and would be immune from most state regulations. A final approach sometimes mentioned

is the state-within-a-state model; that is, to become a political subdivision of the state. Under this model, Native Hawaiians would have the same rights as a county or municipality, with some autonomy and control of land and resources, but subject to overall regulation by the state.

In 1996, the Hawaiian Sovereignty Elections Council, a twenty-member group established by the state legislature, organized the Native Hawaiian Vote, a mail ballot asking whether Native Hawaiians supported moving toward self-determination. About 73 percent of those who responded voted yes, but this process was criticized by some Native Hawaiians because fewer than half of those who received the mail ballots returned them. In 1997, the Hawai'i Legislature enacted a statute calling for a "lasting reconciliation" and "a comprehensive, just, and lasting resolution," and established a joint committee to determine which lands should be transferred to the Native Hawaiians.

As of this writing, most of the Native Hawaiian groups interested in sovereignty are meeting together to develop a process to create a Native Hawaiian nation. Although difficult issues remain to be resolved, the momentum to achieve this goal now seems irreversible.

JON M. VAN DYKE
(2000)

## NATURAL GAS REGULATION

See: Economic Regulation

## NATURALIZATION

Naturalization was defined by the Supreme Court in *Boyd v. Nebraska ex rel. Thayer* (1892) as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen." Congress, under Article I, section 8, of the Constitution, has complete discretion to determine what classes of ALIENS are eligible for naturalization; an individual may claim naturalization as a right only upon compliance with the terms that Congress imposes. Exercising this discretion in the Immigration and Nationality Act of 1952, Congress denied eligibility to those persons who advocate the violent overthrow of the government and limited it to those who have resided in the United States for at least five years, are of "good moral character," and take an oath in open court to support and defend the Constitution, to bear true faith and allegiance to the same, and to bear arms or perform noncombative service in behalf of the United States.

Any naturalized citizen who is proved to have taken the oath of CITIZENSHIP with mental reservations or to have concealed acts or affiliations that, under the law, would disqualify him for naturalization, is subject, upon these facts being conclusively shown in a proper proceeding, to cancellation of his certificate of naturalization. While this action remedies a fraud on the naturalization court that the United States would otherwise be powerless to correct, it subjects a naturalized citizen to possible loss of CITIZENSHIP from which native-born citizens are spared and thus arguably calls into question Justice WILLIAM O. DOUGLAS's announcement in *Schneider v. Rusk* (1964) that "the rights of citizenship of the native-born and of the naturalized person are of the same dignity and are coextensive."

Although naturalization normally is accomplished through individual application and official response on the basis of general congressional rules, naturalization can also be extended to members of a group, without consideration of their individual fitness. Such collective naturalization can be authorized by Congress, as in cases of naturalization of all residents of an annexed TERRITORY or of a territory made a state, or by a treaty.

RALPH A. ROSSUM
(1986)

Bibliography

GORDON, CHARLES and ROSENFIELD, HARRY N. 1984 *Immigration Law and Procedure*, Vol. 3, chaps. 14–18. New York: Matthew Bender.

HERTZ, MICHAEL T. 1976 Limits to the Naturalization Power. *Georgetown Law Journal* 64:1007–1045.

## NATURAL LAW

See: Higher Law; Natural Rights and the Constitution

## NATURAL RIGHTS AND THE CONSTITUTION

The Constitution as it came from the Philadelphia convention contained no bill of rights. Indeed, the word right (or rights) appears only once in it, and there only in the context of Congress's power to promote the progress of science and useful arts "by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (Article 1, section 8). In the view of the Anti-Federalists, the Constitution should have begun with a statement of general principles, or of "admirable maxims," as PATRICK HENRY said in the Virginia ratifying debates, such as the statement in the VIRGINIA DECLARATION OF RIGHTS OF 1976: "That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter a state of society, they cannot by any compact deprive or divest their pos-

terity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." In short, a bill of rights ought to be affixed to the Constitution containing a statement of natural rights.

The Federalists disagreed. They conceded that the Constitution might properly contain a statement of *civil* rights, and they were instrumental in the adoption of the first ten amendments which we know as the BILL OF RIGHTS, but they were opposed to a general statement of first principles in the text of the Constitution. However true, such a statement, by reminding citizens of the right to abolish government, might serve to undermine government, even a government established on those principles. And, as Publius insisted, the Constitution was based on those principles: "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS" (THE FEDERALIST #84). It is a bill of natural rights, not because it contains a compendium of those rights but because it is an expression of the natural right of everyone to govern himself and to specify the terms according to which he agrees to give up his natural freedom by submitting to the rules of civil government. The Constitution emanates from us, "THE PEOPLE of the United States," and here in its first sentence, said Publius, "is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State bills of rights and which would sound much better in a treatise of ethics than in a constitution of government." Natural rights point or lead to government, a government with the power to secure rights, and only secondarily to limitations on governmental power.

This is not to deny the revolutionary character of natural rights, or perhaps more precisely, of the natural rights teaching. The United States began in a revolution accompanied by an appeal to the natural and unalienable rights of life, liberty, and the pursuit of happiness. But these words of the DECLARATION OF INDEPENDENCE are followed immediately by the statement that "to secure these rights, Governments are instituted among Men." Natural rights point or lead to government in the same way that the Declaration of Independence points or leads to the Constitution: the rights, which are possessed by all men equally by nature (or in the state of nature), require a well-governed civil society for their security.

The link between the state of nature and civil society, or between natural rights and government, is supplied by the laws of nature. The laws of nature in this (modern) sense must be distinguished from the natural law as understood in the Christian tradition, for example. According to Christian teaching, the natural law consists of commands and prohibitions derived from the inclinations (or the natural ordering of the passions and desires), and is enforced, ultimately, by the sanction of divine punishment. According to Hobbes and Locke, however—the principal authors in the school of natural rights—the laws of nature are merely deductions from the rights of nature and ultimately from the right of self-preservation. Because everyone has a natural right to do whatever is necessary to preserve his own life, the state of nature comes to be indistinguishable from the state of war where, in Hobbes's familiar phrase, life is solitary, poor, nasty, brutish, and short; even in Locke's more benign version, and for the same reason, the state of nature is characterized by many unendurable "inconveniences." In short, in the natural condition of man the enjoyment of natural rights is uncertain and human life itself becomes insufferable. What is required for self-preservation is peace, and, as rational beings, men can come to understand "the fundamental law of nature" which is, as Hobbes formulates it, "to seek peace, and follow it." From this is derived the second law of nature, that men enter in a contract with one another according to which they surrender their natural rights to an absolute sovereign who is instituted by the contract and who, from that time forward, represents their rights. More briefly stated, each person must consent to be governed, which he does by laying down his natural right to govern himself. In Locke's version, political society is formed when everyone "has quitted his natural power"—a power he holds as of natural right—and "resigned it up into the hands of the community." In the same way, Americans of 1776 were guided by "the Laws of Nature and of Nature's God" when they declared their independence and constituted themselves as a new political community. Commanding nothing—for these are not laws in the proper sense of commands that must be obeyed—the laws of nature point to government as the way to secure rights, a government that derives its "just powers from the consent of the governed." (See SOCIAL COMPACT THEORY.)

It is important to understand that in the natural rights teaching neither civil society nor government exists by nature. By nature everyone is sovereign with respect to himself. Civil society is an artificial person to which this real person, acting in concert with others, surrenders his natural and sovereign powers, and upon this agreement civil society becomes the sovereign with respect to those who consented to the surrender. It is civil society, in the exercise of this sovereign power, that institutes and empowers government. So it was that "we [became] the People of the United States" in 1776 and, in 1787–1788, that we ordained and established "this Constitution for the United States of America." The Constitution is the product of the "will" of the sovereign people of the United States (*The Federalist* #78).

The power exercised by this people is almost unlimited. Acting through its majority, the people is free to deter-

mine the form of government (for, as the Declaration of Independence indicates, any one of several forms of government—democratic, republican, or even monarchical—may serve to secure rights) as well as the organization of that government and the powers given and withheld from it. It will make these decisions in the light of its purpose, which is to secure the rights of the persons authorizing it. This is why the doctrine of natural rights, if only secondarily, leads or points to limitations on government; and this is why the people of the United States decided to withhold some powers and, guided by the new "science of politics" (*The Federalist* #9), sought to limit power by means of a number of institutional arrangements.

Among the powers withheld was the power to coerce religious opinion. Government can have authority over natural rights, said THOMAS JEFFERSON, "only as we have submitted [that authority] to them, [and] the rights of conscience we never submitted, we could not submit."

Among the institutional arrangements was the SEPARATION OF POWERS, and the scheme of representation made possible by extending "the sphere of society so as to take in a greater variety of parties and interests thus making it less probable that a majority of the whole will have a common motive to invade the rights of other citizens" (*The Federalist* #10). First among these rights, according to Locke, is the property right, for, differing somewhat from Hobbes in this respect, Locke understood the natural right of self-preservation primarily as the right to acquire property. Publius had this in mind when he said that "the first object of government . . . [is] the protection of different and unequal faculties of acquiring property" (*The Federalist* #10). The large (commercial) republic is a means of securing this natural right as well as the natural right of conscience, for, within its spacious boundaries, there will be room for a "multiplicity of [religious] sects" as well as a "multiplicity of [economic] interests" (*The Federalist* #51).

Just as a "respect to the opinions of mankind" required Americans to announce the formation of a people that was assuming its "separate and equal station . . . among the powers of the earth," so a jealous concern for their natural rights required this people to *write* a Constitution in which they not only empowered government but, in various complex ways, limited it.

WALTER BERNS
(1986)

Bibliography

JAFFA, HARRY V. 1975 *The Conditions of Freedom: Essays in Political Philosophy.* Pages 149–160. Baltimore: Johns Hopkins University Press.

STORING, HERBERT J. 1978 The Constitution and the Bill of Rights. Pages 32–48 in M. Judd Harmon, ed., *Essays on the Constitution of the United States.* Port Washington, N.Y.: Kennikat.

STRAUSS, LEO 1953 *Natural Right and History.* Introduction and chap. 5. Chicago: University of Chicago Press.

## NAVIGABLE WATERS

See: Subjects of Commerce

## NAZIS

See: Extremist Speech

## *NEAGLE, IN RE*

See: Sawyer, Lorenzo

## *NEAL v. DELAWARE*
103 U.S. 370 (1881)

Justice JOHN MARSHALL HARLAN, for a majority of 7–2, laid down an important principle in JURY DISCRIMINATION cases: the fact that no black person had ever been summoned as a juror in the courts of a state presents "a *prima facie* case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection" secured by the FOURTEENTH AMENDMENT. *Neal* differed from VIRGINIA V. RIVES (1880), here reaffirmed, because the prisoner in *Rives* had merely alleged the exclusion of blacks, which the state denied, while here the state conceded the exclusion. The state chief justice explained that "the great body of black men residing in this State are utterly unqualified by want of intelligence, experience or moral integrity, to sit on juries." Harlan called that a "violent presumption." *Neal* did nothing to prevent the elimination of blacks from juries in the South, because in the absence of a state confession of constitutional error, blacks had the burden of proving deliberate and systematic exclusion of their race. (See NORRIS V. ALABAMA.)

LEONARD W. LEVY
(1986)

## *NEAR v. MINNESOTA*
283 U.S. 697 (1931)

Although GITLOW V. NEW YORK (1925) had accepted for the sake of argument that the FIRST AMENDMENT'S FREEDOM OF SPEECH guarantees were applicable to the states through the DUE PROCESS clause of the FOURTEENTH AMENDMENT,

*Near* was the first decision firmly adopting the INCORPORATION DOCTRINE and striking down a state law in its totality on free speech grounds. Together with STROMBERG V. CALIFORNIA (1931), decided in the same year and also with a 5–4 majority opinion by Chief Justice CHARLES EVANS HUGHES, *Near* announced a new level of Supreme Court concern for freedom of speech.,

A Minnesota statute authorizing injunctions against a "malicious, scandalous and defamatory newspaper, magazine or other periodical" had been applied against a paper that had accused public officials of neglect of duty, illicit relations with gangsters, and graft. Arguing that hostility to PRIOR RESTRAINT AND CENSORSHIP are the very core of the First Amendment, the Court struck down the statute. Yet *Near*, the classic precedent against prior restraints, is also the doctrinal starting point for most defenses of prior restraint. The Court commented in OBITER DICTUM that "the protection even as to previous restraint is not absolutely unlimited," and listed as exceptions wartime obstruction of recruitment and publication of military secrets, OBSCENITY, INCITEMENTS, to riot or forcible overthrow of the government, and words that "may have all the effect of force."

In emphasizing the special First Amendment solicitude for criticisms of public officials, whether true or false, *Near* was an important way station between *Gitlow*'s implicit acceptance of the constitutional survival in the United States of the English COMMON LAW concept of SEDITIOUS LIBEL and the rejection of that concept in NEW YORK TIMES V. SULLIVAN (1964).

MARTIN SHAPIRO
(1986)

## *NEBBIA v. NEW YORK*
291 U.S. 502 (1934)

Both the desperate economic conditions in the American dairy industry and the legal responses to the dairy crisis, during the depression years 1929–1933, exemplified the dilemmas that the Great Depression posed for American law. Vast, unmarketable surpluses of fluid milk and other dairy products, widespread mortgage foreclosures in dairy centers of rural America, and wild swings in dairy prices and consumption, all spelled extreme distress for the industry and its marketing institutions.

Among the states that responded with new legislation was New York, whose dairy industry constituted about half the value of its farm income and served the great urban concentration of population in the city of New York and its metropolitan area. In framing a program to deal with the crisis, New York's lawmakers knew they were forced to walk through a constitutional minefield. Despite provisions of the 1933 federal AGRICULTURAL ADJUSTMENT ACT intended to give the states some latitude in control of dairy commerce involving interstate milksheds, federal district courts around the country had struck down state laws seeking to control interstate movements of fluid milk or the terms on which it could be marketed. In addition, even laws seeking to regulate only in-state production and distribution were challenged as invalid under the AFFECTED WITH A PUBLIC INTEREST rule; indeed, in numerous previous decisions the Supreme Court had in obiter dicta listed dairies among the enterprises that clearly were "ordinary" or "purely private" businesses, not affected with a public interest and therefore not subject to price regulation. In NEW STATE ICE CO. V. LIEBMANN (1932), for example, the Court had denied the legislature of Oklahoma authority to regulate ice manufacturing and selling on the ground that it was "a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor."

Mindful of this background, the New York legislature conducted a lengthy investigation of the fluid milk industry and its travails. In addition to making a record, thereby, as to the condition of the farmers and distribution system, the price collapse and its consequences, and the extensive effects of the crisis on the state's economy, when the legislature drafted a new Milk Control Law in March 1933, it explicitly denominated it as emergency legislation and provided for its termination one year following. By this maneuver, the legislators hoped to slip the knot of "affected with a public interest" and give the Milk Control Law safe harbor in the EMERGENCY POWERS and POLICE POWER area in the event that courts proved unimpressed with the statute's assertion that the milk industry was "a business affecting the public health and interest."

Like similar legislation enacted in New Jersey, Illinois, and other dairy states, the New York law included power to fix prices in the virtually plenary grant of authority to the milk control agency that was established. The board was also empowered to license producers, establish maximum retail prices and the spread between prices paid producers and charged consumers, and regulate interstate fluid milk entrants to the New York market.

The price-fixing provision came before the bench in an appeal from the conviction of a storekeeper for selling milk at retail below the price established by the new milk control agency. When the New York Court of Appeals affirmed the conviction, the case was carried to the Supreme Court. Counsel contended that price control violated the "affected with a public interest" standard, subjecting Nebbia to improper regulation in violation of his FOURTEENTH AMENDMENT right to DUE PROCESS.

By a 5–4 vote, the Court upheld the New York law.

Justice OWEN J. ROBERTS's opinion did not rest on the narrow grounds that the milk control program was of an emergency nature; instead, it addressed in broadest possible terms the nature of the police power and the constitutional limitations upon which states might exercise it. The long history of the "affected with a public interest" doctrine came to an end with *Nebbia*, the majority opinion going back to Chief Justice MORRISON R. WAITE's language in *Munn v. Illinois* (1877). (See GRANGER CASES.) Waite had used the phrase "affected with a public interest" as the equivalent of "subject to the exercise of the police power," the Court now declared: "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." By repudiating the doctrine of affection with a public interest, which was based on SUBSTANTIVE DUE PROCESS OF LAW, the Court weakened the due process clause as a bastion of property rights. The due process clause, Roberts observed, made no mention of sales, prices, business, contracts, or other incidents of property. Nothing, he added, was sacred about the prices one might charge. The state, Roberts declared, "may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." The crux of this opinion, which prefigured a transformation in constitutional law, was this statement: "So far as the requirement of due process is concerned . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it."

Handed down not long after HOME BUILDING LOAN ASSOCIATION V. BLAISDELL (1934), a decision that did extensive damage to once sacrosanct CONTRACT CLAUSE doctrine, the *Nebbia* decision was anathema to property-minded conservatives who saw the juridical scaffolding for VESTED RIGHTS as collapsing in the early New Deal years, even before the Court fight and the wholesale reversal of doctrine that came after 1935. Indeed, *Nebbia* may be read as present-day constitutional law.

HARRY N. SCHNEIBER
(1986)

Bibliography

GOLDSMITH, IRVING B. and WINKS, GORDON W. 1938 Price Fixing: From *Nebbia* to *Guffey*. Pages 531–553 in Douglas B. Maggs, ed., *Selected Essays on Constitutional Law*. Chicago: Association of American Law Schools.

## *NEBRASKA PRESS ASSOCIATION v. STUART*
427 U.S. 539 (1976)

In *Nebraska Press Association v. Stuart* the Court addressed for the first time the constitutionality of a prior restraint on pretrial publicity about a criminal case. Noting the historic conflict between the FIRST and SIXTH AMENDMENTS, the Court refused to give either priority, recognizing that the accused's right to an unbiased jury must be balanced with the interests in a free press. At issue was a narrowly tailored GAG ORDER in a sensational murder case restraining the press from publishing or broadcasting accounts of the accused's confessions or admissions or "strongly implicative" facts until the jury was impaneled.

Applying the standard of DENNIS V. UNITED STATES (1951) and inquiring whether "the gravity of the 'evil,' discounted by its improbability justified such invasion of free speech as is necessary to avoid the danger," the Court struck down the gag order. To determine whether the record supported the extraordinary measure of a prior restraint on publication, the Court considered the nature and extent of pretrial news coverage, the likelihood that other measures would mitigate the effects of unrestrained pretrial publicity, and the effectiveness of a restraining order to prevent the threatened danger, and, further, analyzed the order's terms and the problems of managing and enforcing it. The gag order was critically flawed because it prohibited publication of information gained from other clearly protected sources.

Justice WILLIAM J. BRENNAN, joined by Justices POTTER J. STEWART and THURGOOD MARSHALL, concurring, argued that a prior restraint on the press is an unconstitutionally impermissible method for enforcing the Sixth Amendment. Refusing to view the First and Sixth Amendments as in irreconcilable conflict, he noted that there were numerous less restrictive means by which a fair trial could be ensured. Justice BYRON R. WHITE doubted whether prior restraints were ever justifiable, but did not believe it wise so to announce in the first case raising that question. Justice LEWIS F. POWELL emphasized the heavy burden resting on a party seeking to justify a prior restraint.

KIM MCLANE WARDLAW
(1986)

(SEE ALSO: *Free Press/Fair Trial; Prior Restraint and Censorship.*)

## NECESSARY AND PROPER CLAUSE

The enumeration of powers in Article I, section 8, gives Congress the power to do such specific things as "regulate commerce . . . among the several States" and "raise and support Armies." At the end of the list is the power "to make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The ANTI-FEDERALISTS called this the "elastic clause" or the "sweeping power." They predicted it would centralize all governmental power in the national government. JAMES MADISON denied this charge in THE FEDERALIST #23. He observed that the clause spoke of power to execute only those powers that were specified elsewhere in the document, and that the power vested by the clause would have been implicit in the grant of other powers even without the clause. (See IMPLIED POWERS.) The clause, therefore, did not conflict with the principle of enumerated national powers, Madison argued. Events have vindicated Anti-Federalist fears.

THOMAS JEFFERSON and ALEXANDER HAMILTON took opposing positions on the meaning of the word "necessary" in the clause during their debate in 1791 on the constitutionality of the first BANK OF THE UNITED STATES ACT. Hamilton argued that the nation needed a BROAD CONSTRUCTION of congressional powers so that the government could employ a wide variety of means useful to the discharge of its responsibilities. Jefferson countered that a broad construction would enable Congress to encroach upon the reserved powers of the states whenever its measures might serve as means to ends within its enumerated powers. To safeguard STATES' RIGHTS, such encroachments should be permitted only when "absolutely necessary," said Jefferson—only, that is, when failure to encroach would nullify the grant of federal power. Hamilton's view prevailed first with President GEORGE WASHINGTON in 1791 and later in the Supreme Court, when JOHN MARSHALL's opinion in MCCULLOCH V. MARYLAND upheld the second national bank in 1819.

Marshall construed national powers in terms of a few authorized national ends. Most important, he understood the COMMERCE POWER and related powers as authorizing the pursuit of national prosperity and the various military and diplomatic powers as authorizing the pursuit of national security. This ends-oriented conception of national powers was the view of *The Federalist* #41, which also gave greatest emphasis to the goals of national prosperity and security. When Marshall held in *McCulloch* that Congress could pursue its authorized ends without regard for the reserved powers of the states, he was saying, in effect, that Congress could do what it wanted to relative to state powers so long as it gave the right reasons. Marshall suggested a hierarchy of constitutional values, with state powers subordinated to Congress's version of national prosperity and security. The opinion thus brought virtually all state powers within Congress's potential control, because, with changing conditions, Congress might consider any social practice (education, for example) as an instrument of the nation's prosperity and security.

But to suggest that Congress can act for the right reasons is not to say that Congress can disregard states' rights at will. Marshall's theory of the necessary and proper clause was still consistent with the idea of enumerated powers because it presupposed a limited number of nationally authorized ends. Marshall thus stated that the judiciary would be prepared to invalidate pretextual uses of national power to reach ends reserved to the states. In the twentieth century, the Supreme Court refused to give effect to Marshall's commitment to invalidate pretextual uses of congressional power, thus fulfilling the Anti-Federalist prediction of what the clause eventually would be.

The Court first upheld pretextual uses of power as means to eliminating state bank notes in VEAZIE BANK V. FENNO (1869) and margarine colored to resemble butter in *McRay v. United States* (1904). These acts were aimed at what Congress considered the nation's economic health. They were therefore valid under Marshall's theory of the commerce power. But, in the meanwhile, the Court had moved away from Marshall's conception to a limited view of the nation's commerce as those things that crossed state lines. Pretexts were necessary unless the Court chose to abandon this artificial view; instead of correcting the mistake which necessitated pretexts, the Court established precedents for them. Later the Court upheld enactments that obviously were not aimed at the national goals implicit in Congress's enumerated powers. The Court thus upheld the TAXING POWER as a weapon against drug abuse in UNITED STATES V. DOREMUS (1919) and the commerce power as a means of combating gambling, illicit sex, and other practices usually said to be reserved to the STATE POLICE POWER, as in HOKE V. UNITED STATES (1913). These decisions turned Marshall's theory of the necessary and proper clause on its head. Where Marshall had upheld incursions into state powers as means to nationally authorized ends, the Court was now upholding national powers as means to state ends. As a result the NATIONAL POLICE POWER can today be used to reach an indefinite variety of purposes, and the necessary and proper clause authorizes almost anything that might be useful for addressing what Congress views as a national problem.

Limits on national power do remain in the BILL OF RIGHTS, in other sources of individual rights such as the CIVIL WAR amendments, and in principles derived from the Constitution's institutional arrangements. Because the

states do constitute a part of those arrangements, the Court still says it will protect various state rights to participate in federal government action, such as the right to equal representation in the Senate. But such states' rights limitations on national power are of little contemporary significance. For the most part, the necessary and proper clause has been construed in a way that has destroyed the notion that the enumeration of powers limits the national government.

SOTIRIOS A. BARBER
(1986)

Bibliography

BERNS, WALTER 1961 The Meaning of the Tenth Amendment. Pages 126–148 in Robert A. Goldwin, ed., *A Nation of States.* Chicago: Rand McNally.

GUNTHER, GERALD, eds. 1969 *John Marshall's Defense of McCulloch v. Maryland.* Stanford, Calif.: Stanford University Press.

## NELSON, SAMUEL
(1792–1873)

On March 5, 1845, Samuel Nelson became a Justice of the Supreme Court and judge of the Second Circuit. President JOHN TYLER nominated the New York Democrat in the belief that his record of moderation compiled over twenty-one years in the New York courts, including thirteen as associate and then chief justice of the state supreme court, would resolve eighteen months of wrangling between the chief executive and the SENATE over the high court vacancy. Unanimous Senate confirmation made Nelson the Court's thirty-first justice.

Nelson's most significant contribution to constitutional development involved the admiralty clause in Article III, section 2, of the Constitution. That clause specified that the federal courts should exclusively exercise the ADMIRALTY AND MARITIME JURISDICTION. He interpreted the clause to extend federal JURISDICTION while retaining for the states an area of constitutional responsibility. Nelson first suggested the position, later adopted by the full Court in PROPELLER GENESEE CHIEF V. FITZHUGH (1851), that where INTERSTATE COMMERCE was involved the admiralty clause extended federal jurisdiction to inland rivers and lakes (*New Jersey Steam Navigation Co. v. Merchant's Bank*, 1848). He carefully rooted this expansion in an 1845 act that established admiralty jurisdiction in "certain cases, upon the lakes and navigable waters connecting with" the oceans. Nelson left to state courts responsibility for vessels that operated on lakes and rivers exclusively within the same state. This interpretation rested on two constitutional themes that pervaded his other opinions: congressional domination of matters of law as opposed to constitutional principles, and belief in a scheme of dual SOVEREIGNTY.

Even in this single instance of doctrinal leadership Nelson lost the initiative. New members of the Court and the quickening tempo of commercial life in the western United States rendered his emphasis on dual sovereignty obsolete. Almost always eager for accommodation, he acquiesced. In 1869 he spoke for the Court in holding that from the time of *Genesee Chief* federal admiralty jurisdiction on the lakes and rivers stemmed from the JUDICIARY ACT OF 1789 rather than from the act of 1845 (*The Eagle v. Frazer*, 1869). Through this about-face, Nelson acknowledged that litigants could use federal district courts in admiralty cases arising in INTRASTATE COMMERCE.

The concept of dual sovereignty also informed his attitude toward the COMMERCE CLAUSE. In the LICENSE CASES (1847) and PASSENGER CASES (1849) he concurred with Chief Justice ROGER B. TANEY's opinions sustaining STATE POLICE POWER, and in the 1849 cases he was the only Justice not to write a separate opinion. When Congress acted under the commerce clause, Nelson supported national power. Speaking for the Court in *Pennsylvania v. Wheeling and Belmont Bridge Co.* (1856), his most important commerce clause opinion, he confirmed Congress's power to deal with navigation and interstate commerce on inland rivers.

Nelson's constitutional jurisprudence also stressed JUDICIAL SELF-RESTRAINT and SEPARATION OF POWERS. He voted only once with a majority to strike down a federal law in *Hepburn v. Griswold* (1870). He deferred to presidential management of FOREIGN AFFAIRS, but dissented in the PRIZE CASES (1863) because he thought President ABRAHAM LINCOLN had infringed on Congress's war-making powers.

Nelson believed that federal JUDICIAL POWER should protect slaveholders, but that the Court should exercise it benignly. Acting on this belief, he persuaded the Court in 1856 to rehear DRED SCOTT V. SANDFORD (1857). In his draft opinion for the Court, he argued that the laws of Missouri made Scott a slave and that the Court could ignore the questions of the legal status of slaves and the constitutionality of the MISSOURI COMPROMISE. This position raised the hackles of Justices JOHN MCLEAN and BENJAMIN R. CURTIS, and Chief Justice Taney took from Nelson responsibility for preparing the Court's opinion. Nelson, believing that the Chief Justice's decision to reach major issues was unwise, submitted his draft opinion for the Court as his own, even retaining the pronoun "we" in the printed version.

Nelson continued in the post-CIVIL WAR era as a hard-working jurist and able legal technician. He agreed in February 1871 to serve on the *Alabama* Claims Commission. His appointment by a Republican president underscored

as much his reputation as an impartial jurist as it did his knowledge of admiralty, maritime, and prize law.

Nelson resigned from the Court on November 28, 1872. Often described as a doughface (a Northerner who took a southern view on slavery), Nelson is better understood as a political moderate concerned about the fate of the Union, disposed to antislavery rather than proslavery views, and committed to the position that the judicial role should emphasize discretion, restraint, and deference to legislative leadership. In view of his twenty-six years on the Court, he contributed surprisingly little to constitutional jurisprudence.

KERMIT L. HALL
(1986)

Bibliography

GATELL, FRANK OTTO 1969 Samuel Nelson. Pages 817–839 in Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court 1789–1969: Their Lives and Major Opinions.* New York: Chelsea House.

## NEUTRAL PRINCIPLES

"Neutral principles" refers to a debate that took place throughout the late 1950s and the 1960s (and still resonates today) regarding the role of the judiciary in American democracy. Participants in the debate were, for the most part, law professors and judges, but their debate spilled into the broader society in the form of widely publicized speeches and articles published in the popular press. In essence, the debate was about whether there is a way to distinguish the judicial function from ordinary politics, and about the power of judges to strike down laws as unconstitutional.

The neutral principles debate arose in the context of controversial decisions rendered by the Supreme Court under the leadership of Chief Justice EARL WARREN. In 1954, the Court decided BROWN V. BOARD OF EDUCATION, which ordered the DESEGREGATION of public schools. The Court was criticized, especially in the South, but academic commentary for a time was largely positive. Then, in 1957 and 1958, the Court decided a number of cases favoring the rights of Communists and communist-sympathizers, and there was a strong backlash against the Court in some quarters. It was against this backdrop that, in February 1958, Judge LEARNED HAND delivered his famous Holmes Lecture at the Harvard Law School. Hand was regarded as one of the preeminent judges in the country. His address surprised many people, for in it he was very critical of the Court. Hand attacked the idea of an activist judiciary, and even took the Court to task for its decision in *Brown*.

The following year, Professor Herbert Wechsler delivered his Holmes Lecture, entitled *Toward Neutral Principles of Constitutional Law*, in which he responded to Hand. Wechsler supported the idea of JUDICIAL REVIEW, but insisted that when courts decide constitutional cases, the most important factor is that they reach their decision by applying "neutral principles" that "transcend the case at hand." Although he said he personally favored the decision in *Brown*, Wechsler was unable to identify a neutral principle equally applicable to "a Negro or a segregationist" that made it clear that the Constitution's requirement of EQUAL PROTECTION OF THE LAWS required the desegregation of schools. According to Wechsler, *Brown* was about the FREEDOM OF ASSOCIATION, and he could not find a way to choose between "denying the association to those individuals who wish it or imposing it on those who would avoid it."

Wechsler's address set off a furious debate over the idea of neutral principles. Some, such as Professor Louis Pollak, supported the idea of neutrality, but felt it was possible to identify a neutral principle to justify *Brown:* No majority race should subjugate a minority race. Many other constitutional scholars felt that the very idea of neutrality as advanced by Wechsler was naïve or bankrupt. Although their views differed, these scholars, among them ALEXANDER M. BICKEL, Arthur Selwyn Miller, Eugene Rostow, Charles Black, Martin Shapiro, and Jan Deutsch generally believed that what mattered ultimately was whether any given decision of the Court was morally correct and could garner acceptance among the body politic.

The neutral principles position taken by Wechsler must be understood in its broader social and jurisprudential context. In the first half of the twentieth century, a group of scholars commonly referred to as the LEGAL REALISTS argued that legal outcomes inevitably were influenced by the views of the judges applying the law, and by the social milieu in which decisions were rendered. This Realist insight troubled many, for it seemed to deny law its neutrality and to equate law with politics. A later group of scholars developed a school of thought known as the "Legal Process" school, which sought to preserve a unique role for law apart from politics. In the view of the Legal Process school, the secret to sound constitutional decisions was "reasoned elaboration." By relying on reason, courts could differentiate their work from that of the more political branches of government. Wechsler was a Legal Process scholar, and it was in this context that he challenged the Court to rely on neutral principles to avoid being seen as a "naked power organ." Other Legal Process scholars who advocated reliance on reasoned elaboration were HENRY M. HART, JR., and PHILLIP B. KURLAND. Opponents of the Legal Process scholars doubted whether reason alone either achieved the sort of neutrality that

Wechsler advocated, or was a sufficient basis for deciding cases.

Neutral principles played an important role in the more enduring debate over the role of the Court and JUDICIAL REVIEW. Many of the WARREN COURT'S progressive decisions, such as those involving FREEDOM OF SPEECH, RACIAL DISCRIMINATION, and REAPPORTIONMENT won broad popular support, but that support declined by the late 1960s. The Court expanded the rights of criminal suspects at a time when crime rates were rising, and RICHARD M. NIXON was elected President vowing to appoint Justices to the Supreme Court who would follow closely the original meaning of the Constitution. The Court became a special target of controversy after it decided ROE V. WADE (1973), which guaranteed a woman the right to ABORTION. Many critics of *Roe* complained that the right to abortion could not be found in the Constitution. In the face of skepticism about neutral principles and the power of reasoned elaboration, these critics now began to insist that Supreme Court Justices adhere closely to the text of the Constitution and the intentions of those who drafted and ratified it, in order to avoid imposing judicial preferences on the body politic. Thus, the neutral principles debate served as a bridge between the insights of the Legal Realists, and the modern-day debate over the proper method of constitutional interpretation.

BARRY FRIEDMAN
(2000)

(SEE ALSO: *Constitutional Interpretation; Constitutional Theory; Original Intent; Originalism.*)

Bibliography


DUXBURY, NEIL 1995 *Patterns of American Jurisprudence.* New York: Oxford University Press.

FRIEDMAN, BARRY 1997 Neutral Principles: A Retrospective. *Vanderbilt Law Review* 50:503–536.

HAND, LEARNED 1958 *The Bill of Rights.* Cambridge, Mass: Harvard University Press.

HOROWITZ, MORTON J. 1992 *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy.* New York: Oxford University Press.

MILLER, ARTHUR SELWYN and HOWELL, RONALD F. 1960 The Myth of Neutrality in Constitutional Adjudication. *University of Chicago Law Review* 27:661–695.

PELLER, GARY 1988 Neutral Principles in the 1950's. *University of Michigan Journal of Law Reform* 21:561–622.

POLLAK, LOUIS H. 1959 Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler. *University of Pennsylvania Law Review* 108:1–34.

SEBOK, ANTHONY J. 1996 Reading the Legal Process. *Michigan Law Review* 94:1571–1595.

SHAPIRO, MARTIN 1963 The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles. *George Washington Law Review* 31:587–606.

WECHSLER, HERBERT 1959 Toward Neutral Principles of Constitutional Law. *Harvard Law Review* 73:1–35.


## NEW CHRISTIAN RIGHT

See: Religious Fundamentalism

## NEW DEAL

During the New Deal years, from 1933 to the end of WORLD WAR II, the nation experienced an era of protracted economic crisis and social dislocation, a dramatic change in national political alignments, and then mobilization for total war. A society contending with changes and emergencies of this order, especially with an enormously popular reformist President in office, cannot easily avoid profound challenges to its constitutional order; and so it was for America in this era. Every major aspect of political controversy in this period found expression of varying kinds in constitutional discourse and conflict, and these constitutional battles both reflected and actively intensified the bitter ideological polarization that bedeviled the nation's politics.

When the New Deal era came to a close just after the war, the constitutional as well as political landscape of the country had been transformed. With respect both to governmental institutions and policies and to formal constitutional doctrine, things as they had stood in 1933 had been largely swept away. The transformations of governance and politics in the New Deal era brought far-reaching reform of constitutional law, accomplished without benefit of formal constitutional amendment on any question except the repeal of PROHIBITION. The new constitutional order that emerged, moreover, would stand firmly for half a century as the basic framework of the modern welfare, regulatory, and national-security state. In most particulars, the new order proved durable enough to survive determined efforts by neoconservatives in the 1980s to overturn some of the most important New Deal doctrines and reforms.

President FRANKLIN D. ROOSEVELT at the outset of his presidency characteristically struck a pose that seemed to dismiss offhandedly the need for worries about constitutional difficulties. "Our Constitution is so simple and practical," he declared in his first inaugural address in 1933, "that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form." But what changes in "emphasis" and "arrangement" he had in mind! Even the legislative programs and executive actions of the "First Hundred Days" posed a broad challenge to prevailing doctrines in constitutional law, especially regarding the protection of vested eco-

nomic rights against government's hand and the proper limits of the national government's authority in the federal system. Nor did the challenge recede or soften significantly in the years immediately following, as Roosevelt and his party generated a prolix legislative and administrative record that would repeatedly inspire bitter constitutional controversies.

Virtually every element of the New Deal administration's policies, especially their idealistic nuances and implications, bore the imprint of Roosevelt's own thinking. The direction and extraordinary scope of the New Deal's challenge to the traditional role and perogatives of the states, for example, were signaled early by Rooselvelt when he was governor of New York: "In our business life and in our social contracts," he declared in 1929, "we are little controlled by the methods and practices employed by our forefathers." Why, then, he asked, be "content . . . to accept and continue to use the local machinery of government which was first devised generations or even centuries ago?" This kind of iconoclasm and willingness to experiment with governmental structures structures was soon to be directed against the states. Impatience with antiquated institutional legacies was linked with Roosevelt's robust "Old Progressive" faith in bringing enterprise to bear on social and economic problems. Hence, the President readily endorsed the regional approach (exemplified by the TENNESEE VALLEY AUTHORITY ACT OF 1933) to problems that trascended state lines. Similarly, he was sypathetic to a national planning approach (as was espoused by his National Resource Planning Board and the agricultural price-support and production-controll efforts); and he also fostered the system of direct federal grant-in-aid support to city governments for public housing, airports, and other projects in ways that dramaically enhanced municipal autonomy within the states.

Perhaps of greatest long-run importance to governmental practice was Roosevelt's own proclivity to devolve on appointive agencies and their expert staffs the responsibility for defining the "public interest" in the course of setting regulatory policies—a preference shared by the New Deal majorities in Congress as they crafted the design of new regulatory agencies. Roosevelt regularly pressed on Congress and the public the urgency of the social and economic programs he was proposing—both the programs of the "Hundred Days," designed to break the terrible spiral of despair, and those of the ensuing years, designed to effect enduring reforms, including a systematic (and, to many, a radical) redistribution of income and wealth. The argument for urgent action, for room to experiment, and for administration with maximal flexibility and discretion was cast from the start in terms of the necessities associated with a "national emergency." As New Deal programs expanded, however, this view was translated into the more general argument for wide-ranging agency discretion and a reliance on experts for policy making. In the context of the war emergency after 1938, this tendency became even more pervasive.

The question remained: what constitutional principles, if any, restrained such claims by the chief executive? The New Deal answer in light of the Depression crisis tended increasingly to be couched as a majoritarian rationale: "Does anybody believe," asked Senator Lewis Schwellenbach of Washington, one of Roosevelt's closest allies in Congress, "that the founding fathers intended to set up a form of government which would prevent that government from solving the current problems of the people?" Roosevelt phrased the issue similarly in his first radio speech of his second term, the address in which he fired the first shot in the COURT-PACKING battle. It was the entire "modern movement for social and economic progress through legislation" that was at stake, the President declared, referring dramatically to "one-third of a nation ill-nourished, ill-clad, ill-housed." He rejected as outrageous the notion that the judiciary might deny Congress the authority "to protect us against catastrophe by meeting squarely our modern social and economic conditions."

In private correspondence with Schwellenbach, the President referred to their common view of the constitutional issues as the cause of "liberal democracy." New Deal victories by "overwhelming" popular majorities in 1932 and 1936, the President repeatedly contended in his public messages on the constitutional question, had provided an "overwhelming mandate" for immediate action to put the programs of "liberal democracy" in place.

Roosevelt and the constitutional imperatives embodied in his programs for this "liberal democracy" successfully prevailed beginning in 1937, as a new majority in support of the New Deal emerged virtually overnight on the HUGHES COURT and later became a dependable reliance for Roosevelt as he made new appointments. Similarly, the President would prevail in virtually all particulars when he assumed vastly expanded executive emergency authority in the military and foreign-policy realms during the pre-war neutrality period and the years of combat in a global arena that followed the Pearl Harbor disaster.

The President thus placed his personal stamp on the most dramatic political initiatives of the era; however, there were also more enduring legacies of the New Deal in the nation's constitutional development. An inventory of this heritage from the 1930s and World War II must embrace not only the dramatic changes that were ardently debated in their own day, but also the various effects of conflict and innovation only dimly discerned by either friends or critics of Roosevelt's social and economic programs and the wartime initiatives.

Prominent in the inventory of change was the move-

ment of national authority and active intervention into many vital areas of social and economic life that before 1933 had been left by Congress largely to the states and had been only marginally affected by national law. A vast array of legislation from 1933 to 1937 bespoke this dramatic occupation by Congress of policy areas that traditionally had been extremely decentralized in practice; some of them, moreover, had been specifically designated by the Supreme Court's conservative majority as being within the exclusive purview of the states as a matter of TENTH AMENDMENT guarantees, or as a matter of judicially defined categories that differentiated "national" from "local" activities under terms of the COMMERCE CLAUSE or in light of the doctrine of a limited number of enumerated powers.

Thus, by 1941 the working constitutional system had become a system in which formal constitutional issues of FEDERALISM had been recast completely in light of new realities generated by New Deal innovations. A definitive redistribution of both policy responsibilities and power had occurred. There was comprehensive restructuring of agriculture as a managed sector, a formal preemption of labor law through the Wagner Act and its guarantees of the right to organize, adoption of minimal federal standards for wages and hours, and the establishment of a vast regional energy and economic development program through the Tennessee Valley Authority. Federal regulatory authority was extended over the securities markets, and there was a dramatic expansion of national regulation in the transportation, antitrust, and banking fields. The New Deal also instituted the first massive ENTITLEMENT programs with the passage of the SOCIAL SECURITY ACT in 1935; this measure became the foundation stone of the modern national WELFARE STATE.

One concomitant of this powerful move toward centralization of governmental responsibilities was a transformation in the distribution of funds and expenditures. In 1929, with expenditures of $2.6 billion, the budget of the national government was only one-third the amount of state and local expenditures; but a decade later, federal expenditures were $9 billion, exceeding the combined amounts spent by state and local government. Linked with this aspect of new "giant government"—emergence of the national government as a modern Leviathan—was the New Deal's explicit adoption in 1938 of Keynesian principles for fiscal policy. Although growth of the national government establishment was not in itself a development that implicated constitutional questions directly, as a reality of governance and power, "big government" transformed the entire context of the debate over constitutional principles.

More explicitly cast in constitutional terms was the matter of federal grants in aid to state and local government, which rose from $193 million in 1933 to a floodtide level of $2.9 billion in 1939. Although welfare and relief comprised some eighty percent of these sums in each year, the vast aggregate amount in 1939 embraced a range of new programs for natural-resources management, public housing, and health services as well as the more traditional highway aid and agricultural research funds. In this arena of initiative, the Supreme Court posed no serious obstacles; in the 1923 case of FROTHINGHAM V. MELLON, it already had upheld the practice of attaching conditions to federal grants. Decisions in the late 1930s reaffirmed this view. Taken as a whole, the grant-in-aid programs became an important element of what has been termed the modern system of COOPERATIVE FEDERALISM, displacing the older principles and practices of DUAL FEDERALISM.

In its devastating response to the early New Deal measures for industrial reorganization and agricultural market controls, the Supreme Court in SCHECHTER POULTRY CORPORATION V. UNITED STATES (1935) did strike down key legislation in part because of what it found to be a promiscuous violation of the principles of SEPARATION OF POWERS. After the new liberal majority had established the credo of Roosevelt's "liberal democracy" in a dominant position in the Court's decisions after 1936, however, the delegation of rule-making authority to the new administrative and regulatory agencies won virtually routine approval with the Justices. Indeed, judicial deference to agency discretion became one of the most durable—and also most problematic—features of the longer-term New Deal legacy in American law.

For the most part, it was regulation of economic interests that was at stake when challenges were raised against administrative prerogatives; and as the Court abandoned its commitment to defend economic or entrepreneurial liberty on the same basis as it would the political elements of liberty (see PREFERRED FREEDOMS), such challenges lost their doctrinal authoritativeness. Not until the 1960s did political leaders and legal scholars entirely sympathetic with the goals of New Deal-style benefit programs and regulatory regimes begin to worry much about excessive paternalism and discretion. They became concerned particularly with the degree to which the New Deal legacy had produced a system of social benefits, franchises, subsidies, and services that were dispensed by elaborate bureaucracies. In this system, some groups and individuals were favored, while others might be held virtually in thrall because of Byzantine or Kafkaesque procedural standards or simply because of high-handedness and capriciousness. Only then, thirty years after the system had begun to emerge from New Deal legislation and twenty years after the Administrative Procedure Act became law, were the Constitution's procedural guarantees reappraised with a view toward real equality of treatment and fairness in the

agencies' administration of social programs and regulations.

When war broke out in Asia and Europe, the Roosevelt administration's policies carried the "emergency" doctrine and delegation of powers to an entirely new level. In September 1939, the President declared a "limited emergency" by EXECUTIVE ORDER, thereby assuming the authority to expand the military forces and to take other measures under war statutes. After the Pearl Harbor attack, the two WAR POWERS ACTS (December 1941 and March 1942) gave the President unprecedented delegated powers under which he erected a massive bureaucracy with coercive powers to direct mobilization. The March 1941 Lend-Lease Act also delegated the spending power, providing the legal basis for over $50 billion in grants of supplies and credits to the Allies.

In one of the most extraordinary documents in the entire history of American constitutional law, Roosevelt in September 1942 threatened that if Congress failed to meet his wishes with respect to repealing a section of the price-control laws in light of the war emergency, he would assume the power to nullify the law on his own authority. Congressional deference averted a constitutional confrontation on the issue.

The war period was of special importance with respect to civil liberties. In one of the most grievous violations of any groups' rights in the modern era, the Roosevelt administration authorized by EXECUTIVE ORDER 9066 (later validated by Congress) the removal in 1942 of the entire Japanese-ancestry population from the West Coast and their prolonged internment in concentration camps until nearly the end of the war. Meanwhile, the army took advantage of a declaration of martial law in Hawaii by the territorial governor in the hours after Pearl Harbor, maintaining a comprehensive military regime with suspension of civilian justice in criminal matters until late 1944, long after any credible threat of invasion of the Hawaiian Islands had passed. In the notorious JAPANESE AMERICAN CASES (1943–1944), the Supreme Court upheld the removal and internment decisions; but when the Hawaiian policy was finally challenged (DUNCAN V. KAHANAMOKU), the Court ruled that the army had acted illegally in suspending civilian government and justice beyond the time justified by military necessity.

Although the wartime record on CIVIL LIBERTIES was thus marred by excesses of the military authorities—and although the army in each instance had full support of the White House—the more enduring heritage of the New Deal in race relations and constitutional equal protection has a different face. Although failing to support federal antilynching bills or any positive CIVIL RIGHTS legislation that would have attacked SEGREGATION, Roosevelt and the agency administrators generally pressed hard to see that blacks received an equitable share of the benefits of federal welfare and relief programs. The President supported the Justice Department's creation in 1939 of what became the Civil Rights Division; and within a few years, this unit's lawyers had undertaken a variety of prosecutions—the most significant being the case of UNITED STATES V. CLASSIC (1941)—challenging RACIAL DISCRIMINATION in the electoral process in the southern states. The Justice Department's new concern for equal rights and civil liberties also served to enhance the significance of Supreme Court decisions (including especially HAGUE V. CIO in 1939) (that were then strengthening FIRST AMENDMENT guarantees and laying the essential doctrinal groundwork for the much farther-reaching civil liberties and civil rights jurisprudence of the WARREN COURT era. In sum, racial equality and civil liberties had been brought within the ambit of the New Deal agenda—the essential counterweight to unrestrained majoritarianism that many feared was embodied in Roosevelt's attack on the Court in 1936 and even, albeit in a more reflective mode, in the constitutional theories calling for "judicial self-restraint" championed in the wake of the Court fight (see JUDICIAL REVIEW AND DEMOCRACY).

The American constitutional order in 1945, at President Roosevelt's death, had thus witnessed far-reaching changes in the allocation of state versus federal powers, in the extent and style of intervention by government in social and economic affairs, and in the role of the national authorities in regard to individual rights and liberties. In the realm of doctrine, the Supreme Court had reinterpreted the commerce clause so completely that the Justices would soon declare it to be simply "as broad as the economic needs of the nation" (*American Power & Light v. SEC*). After the decision of WICKARD V. FILBURN (1942), the economic regulatory powers of the Congress seemed to be plenary, with no economic activity protected from congressional determination of what was of national significance. As early as 1934, in NEBBIA V. NEW YORK, the Court had discarded traditional economic due process and AFFECTED WITH A PUBLIC INTEREST doctrine—two of the main props of traditional VESTED RIGHTS analysis that had been used to restrain severely the state's regulatory powers. In UNITED STATES V. DARBY LUMBER COMPANY (1941) the Court cast into the dustbin of history, it seemed, the old view of the Tenth Amendment, declaring now that the amendment "states but a truism" and was merely "declaratory." Meanwhile, the New Deal administration posed a new challenge to state sovereignty over valuable natural resources by asserting a federal property claim based on "paramount rights" over the offshore oil and any other resources of the continental shelf, long considered to be under state ownership out to a distance of three miles. With the emergence of the new civil rights and civil

liberties jurisprudence exemplified by *Classic*, the university-segregation decision of MISSOURI EX REL. GAINES V. CANADA (1938), and other decisions, the potentialities of the emerging changes in law became clear. Whether one interprets these changes, as friends of the Roosevelt Administration sought to do, as a "return to the Constitution" (a reversal of conservative doctrines that had become dominant in violation of correct principles), or instead, as a positive advancement of law to meet the urgent requirements of a modern industrial society in crisis, the New Deal era did indeed bequeath to postwar America a constitutional order dramatically transformed.

HARRY N. SCHEIBER
(1992)

Bibliography

BIXBY, DAVID M. 1981 The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic. *Yale Law Journal* 90:741–814.

HURST, JAMES WILLARD 1977 *Law and the Social Order in the United States.* Ithaca, N.Y.: Cornell University Press.

MURPHY, PAUL L. 1972 *The Constitution in Crisis Times, 1918–1969.* New York: Harper & Row.

PARRISH, MICHAEL E. The Great Depression, the New Deal, and the American Legal Order. *Washington Law Review* 59:723–750.

SCHEIBER, HARRY N. 1989 Economic Liberty and the Constitution. In *Essays in the History of Liberty.* San Marino, Calif.: The Huntington Library.

——— and SCHEIBER, JANE L. 1990 Constitutional Liberty in World War II: Army Rule and Martial Law in Hawaii. *Western Legal History* 3:341–378.

# NEW DEAL
## (Constitutional Significance)

The NEW DEAL era was a time of extraordinary constitutional ferment, witnessing significant constitutional change in a strikingly wide variety of areas. Just as the Supreme Court was evincing increasing solicitude for CIVIL RIGHTS and CIVIL LIBERTIES, particularly in the realms of FREEDOM OF SPEECH and CRIMINAL PROCEDURE, the Justices substantially eroded the DOCTRINE of INTERGOVERNMENTAL IMMUNITY from taxation, dramatically relaxed the restraints imposed upon state governments by the CONTRACT CLAUSE, and sanctioned a major reorientation of monetary policy. At the same time, the executive branch emerged with significantly enhanced authority in both domestic and FOREIGN AFFAIRS. Yet the expansions of the powers of Congress to regulate INTERSTATE COMMERCE and to spend for the GENERAL WELFARE, along with the demise of economic SUBSTANTIVE DUE PROCESS OF LAW, are generally regarded as the period's signal contributions to the modern American constitutional landscape.

Of these three, developments in the TAXING AND SPENDING POWER jurisprudence were arguably the least significant. To be sure, the Court's embrace of the Hamiltonian interpretation of the spending power, announced in UNITED STATES V. BUTLER (1936) and confirmed in the *Social Security Cases*, freed future Congresses from concern that the power to spend was limited to ends identified in the other ENUMERATED POWERS of Article I, section 8. Yet federal grants-in-aid to states and municipalities, widely employed in such New Deal programs as the Public Works Administration, were already a well-established feature of American "cooperative" FEDERALISM. Moreover, exercises of the spending power could easily be insulated from JUDICIAL REVIEW under the taxpayer STANDING doctrine announced in FROTHINGHAM V. MELLON (1923). So long as Congress appropriated the funds to be spent from general revenue rather than from an account funded by a particular tax, no taxpayers had standing to challenge the propriety of the expenditure. While the New Deal ushered in the modern welfare state with its dramatic increases both in the volume of federal expenditures and in the purposes to which Washington's largesse was directed, such congressional capacity was already latent in the structure of contemporary constitutional doctrine.

Indeed, the American constitutional order on the eve of the Great Depression was hardly an unregulated regime of *laissez-faire*. By 1930 the Court had already upheld a vast array of state POLICE POWER statutes, including regulations of working hours and child labor, worker's compensation statutes, wage and payment regulations, utility and price regulations, and state ANTITRUST laws. Far more notorious, however, were cases in which the Court had invalidated a workplace or price prescription on the ground that it interfered with the FREEDOM OF CONTRACT or applied to a business that was not "affected with a public interest." The HUGHES COURT excised these closely related substantive due process doctrines from the constitutional lexicon, upholding extensive legislative control of wages, prices, and collective bargaining. Henceforth "regulatory legislation affecting ordinary commercial transactions" would enjoy a virtually irrebuttable presumption that it provided DUE PROCESS OF LAW. In tandem with contemporaneous developments in COMMERCE CLAUSE jurisprudence, these decisions cleared the remaining impediments to the emergence of the modern regulatory state.

Federal regulation of the economy was of course not a New Deal innovation. By 1930 the Court had already sanctioned extensive regulation of business practices in interstate commerce, upholding initiatives ranging from the FEDERAL TRADE COMMISSION ACT and federal antitrust laws to the PURE FOOD AND DRUG ACT. The Court had similarly approved extensive federal supervision of the railroad in-

dustry, stamping its imprimatur on not only the INTERSTATE COMMERCE ACT, but the Federal Employers Liability Act, the Safety Appliance Act, and the Railway Labor Act as well. Under the SHREVEPORT DOCTRINE, federal regulatory power over the railroads extended even to intrastate activities when they bore a "close and substantial" relation to interstate commerce. Such "local" activities as mining, manufacturing, and agricultural production were typically held to affect interstate commerce only "indirectly," and were thus frequently beyond congressional control. However, even local activities such as transactions in stockyards and on grain exchanges could be reached by Congress if they were situated in a "current" or "stream" of interstate commerce. Under both the Shreveport doctrine and the current of commerce doctrine, however, federal regulation of local enterprise was limited by the due process requirement that the business regulated be, like railroads, stockyards, and grain exchanges, "affected with a public interest."

Two events of the New Deal period dramatically expanded the scope of federal power. First, by lifting the "affected with a public interest" limitation in due process jurisprudence, the Court allowed more general application of commerce clause PRECEDENTS previously restricted to a handful of enterprises. This development opened new opportunities for federal regulation of such domains as industrial labor relations and the agriculture and energy sectors. Second, by 1942 the Court had explicitly retired the old local/national and direct/indirect dichotomies that had framed commerce clause jurisprudence for more than half a century. The consequences of this abandonment were twofold. First, a plenary commerce power underwrote unprecedented expansion of both the national administrative state and the role of federal law in daily life. Much of the nation's economic activity would become subject to the JURISDICTION of REGULATORY AGENCIES, and the commerce power eventually became the vehicle of choice for federal oversight of everything from civil rights to street crime. Second, because these old distinctions had also been central to DORMANT COMMERCE CLAUSE jurisprudence, their exile from the affirmative commerce clause context prompted the Court to reformulate the clause's negative implications. In years to come such cases would focus not on whether the activity regulated was "local" or the regulation affected commerce "directly," but rather on whether the state or local government was discriminating against or unduly burdening interstate commerce. Decoupling affirmative and dormant commerce clause doctrine served to prevent omnicompetent federal power from implicitly obliterating state and local regulatory prerogatives.

Recent years have seen a revival of academic interest in the New Deal. Central to the lively scholarly discussion has been the question of how best to characterize the period's constitutional development. Some scholars see an abrupt constitutional "revolution" in 1937; others claim a more gradual "transformation" began earlier in the decade (if not earlier in the century) and concluded in the early 1940s. Some see in this development a "rediscovery" of the Constitution after a period of activist corruption, whereas others view it as a mistaken departure from established and appropriate constitutional norms. Where some detect a "translation" or adaptation of the Constitution to changed circumstances, still others observe a shift in interpretive practice that transformed the very meaning of constitutional adaptivity. One prominent scholar contends that the Constitution was actually "amended" outside the procedure specified by Article V when the Court forged new constitutional law in response to the will of the people expressed in the "critical election" of 1936. The debate has taken on greater urgency in an era of political and judicial retrenchment, as some commentators seek not only to describe the change, but also to legitimate and draw prescriptive force from it. Yet beneath these differences in characterization rests a consensus that the New Deal era was the principal constitutional watershed of the twentieth century.

BARRY CUSHMAN
(2000)

(SEE ALSO: *Amendment Process (Outside of Article V); Constitutional History, 1933–1945; Roosevelt, Franklin D.*)

Bibliography

ACKERMAN, BRUCE 1998 *We the People: Transformations.* Cambridge, Mass.: Harvard University Press.

CUSHMAN, BARRY 1998 *Rethinking the New Deal Court: The Structure of a Constitutional Revolution.* New York: Oxford University Press.

FRIEDMAN, RICHARD D. 1994 Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation. *University of Pennsylvania Law Review* 142: 1891–1984.

LESSIG, LAWRENCE 1995 Understanding Changed Readings: Fidelity and Theory. *Stanford Law Review* 47:395–472.

LEUCHTENBURG, WILLIAM E. 1995 *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt.* New York: Oxford University Press.

WHITE, G. EDWARD 1997 The "Constitutional Revolution" as a Crisis in Adaptivity. *Hastings Law Journal* 48:867–912.

## *NEW HAMPSHIRE SUPREME COURT v. PIPER*
### 470 U.S. 274 (1985)

In *Piper* the Supreme Court followed *United Building and Construction Trades Council v. Camden* (1984) and applied a two-step analysis for applying the PRIVILEGES AND IMMUNITIES clause of Article IV. The Court held, 8–1, that

New Hampshire's rule limiting the practice of law to New Hampshire citizens violated the clause. First, the clause was properly invoked; doing business in the state is a privilege that is "fundamental" to the preservation of interstate harmony. Second, the state had not sufficiently justified its exclusion of Piper, who lived in Vermont, 400 yards from the New Hampshire border, and intended to maintain a law office in New Hampshire.

KENNETH L. KARST
(1986)

## *NEW JERSEY v. T. L. O.*
469 U.S. 325 (1985)

In *New Jersey v. T. L. O.* a unanimous Supreme Court held that the FOURTH AMENDMENT's prohibition against unreasonable SEARCHES AND SEIZURES applies to searches of students conducted by public school officials. A majority of the Court (6–3) also held that school officials need not obtain a SEARCH WARRANT before searching a student under their authority and that their searches can be justified by a lower standard than probable cause to believe that the subject of the search has violated or is violating the law. Instead, the legality of the search depends on the reasonableness of the search under all the circumstances.

According to Justice BYRON R. WHITE's majority opinion, determining reasonableness requires a twofold inquiry: first, whether the search was justified at its inception, and, second, whether the search as actually conducted was reasonably related in its scope to the circumstances that initially justified it. Ordinarily, the search is justified at its inception if there are reasonable grounds for suspecting that the search will produce EVIDENCE that the student has violated or is violating either the law or the school rules. The search is permissible in scope if the measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

PATRICK DUTTON
(1986)

Bibliography

DUTTON, PATRICK 1985 School Searches: Recent Applications of the United States and California Constitutions. *Journal of Juvenile Law* 9:106–128.

## *NEW JERSEY v. WILSON*
7 Cranch 164 (1812)

This case was the vehicle by which the Supreme Court made a breathtaking expansion of the CONTRACT CLAUSE. In the colonial period New Jersey had granted certain lands to an Indian tribe in exchange for a waiver by the Indians of their claim to any other lands. The grant provided that the new lands would be exempt from taxation in perpetuity. In 1801, over forty years later, the Indians left the state after selling their lands with state permission. The legislation repealed the tax exemption statute and assessed the new owners, who challenged the constitutionality of the repeal act.

A unanimous Supreme Court, overruling the state court, held that the grant of a tax immunity was a contract protected by the contract clause. By some species of metaphysics the Court reasoned that the tax immunity attached to the land, not to the Indians, and therefore the new holders of the land were tax exempt. Chief Justice JOHN MARSHALL's opinion, voiding the state tax, gave a retroactive operation to the contract clause; the grant of tax immunity predated the clause by many years. More important, Marshall ignored the implications of his DOCTRINE that such a grant was a contract. According to this decision, a state, by an act of its legislature, may contract away its sovereign power of taxation and prevent a successive legislature from asserting that power. The doctrine of VESTED RIGHTS, here converted into a doctrine of tax immunity, handicapped the revenue capabilities of the states, raising grave questions about the policy of the opinion. As a matter of political or constitutional theory, the Court's assumption that an attribute of SOVEREIGNTY can be surrendered by a legislative grant to private parties or to their property was, at the least, dubious. Although Marshall restricted the states, he allowed them to cede tax powers by contract rather than thwart the exercise of those powers on rights vested by contract.

The growth of CORPORATIONS revealed the significance of the new doctrine of tax immunity. States and municipalities, eager to promote the establishment of banks, factories, turnpikes, railroads, and utilities, often granted corporations tax immunity or other tax advantages as an inducement to engage in such enterprises, and the corporations often secured their special privileges by corrupt methods. This case permitted the granting of tax preferences and constitutionally sanctioned political corruption and the reckless development of economic resources. But permission is not compulsion; the legislatures, not the judiciary, granted the contracts. The Court simply extended the contract clause beyond the intentions of its framers to protect vested rights and promote business needs.

LEONARD W. LEVY
(1986)

# NEW JERSEY COLONIAL CHARTERS

New Jersey received its first charter from its proprietors, John Berkeley and George Carteret, in 1664. The charter

established representative institutions of government, contained a clause on RELIGIOUS LIBERTY similar to that in the RHODE ISLAND CHARTER of 1663, and guaranteed that only the general assembly could impose taxes. In 1676 Berkeley sold his share of New Jersey to Quakers, leaving Carteret proprietor of East New Jersey. In 1677 the Quaker proprietors issued a "Charter or Fundamental Laws, of West New Jersey," the work, probably, of WILLIAM PENN. The charter included clauses on liberty of conscience, TRIAL BY JURY, and several protections for the criminally accused; the charter is memorable, however, because it functioned as a written CONSTITUTION of FUNDAMENTAL LAW. It began with the provision that the " COMMON LAW or fundamental rights" of the colony should be "the foundation of the government, which is not to be altered by the Legislative authority . . . constituted according to these fundamentals. . . ." The legislature was enjoined to maintain the fundamentals and to make no laws contradicting or varying from them.

In 1682 a Quaker group headed by Penn gained control of East New Jersey and in the following year issued "The Fundamental Constitutions" for that province. The charter of 1683, which was modeled on the Pennsylvania Frame of Government of 1682 (see PENNSYLVANIA COLONIAL CHARTERS), recognized CONSCIENTIOUS OBJECTION, banned any ESTABLISHMENT OF RELIGION, paraphrased chapter 39 of MAGNA CARTA, and included a variety of provisions that resembled a bill of rights, far more numerous than in the English BILL OF RIGHTS of 1689. Although New Jersey became a royal colony in 1702, the seventeenth-century Quaker charters are significant evidence of the grip which CONSTITUTIONALISM had upon influential colonial thinkers.

LEONARD W. LEVY
(1986)

Bibliography

ANDREWS, CHARLES MCLEAN 1936 *The Colonial Period of American History.* Vol. 3:138–180. New Haven, Conn.: Yale University Press.

## NEW JERSEY PLAN

The adoption of the VIRGINIA PLAN by the CONSTITUTIONAL CONVENTION OF 1787 frightened state sovereignty supporters and nationalists from small states. A BICAMERAL Congress apportioned on the basis of population would have enabled the great states to dominate the new government. On June 15, 1787, WILLIAM PATERSON of New Jersey introduced a substitute plan that retained the "purely federal" (confederated) character of the ARTICLES OF CONFEDERATION. Under the Article a unicameral Congress in which each state had one vote preserved the principle of state equality.

As CHARLES PINCKNEY observed, if New Jersey had an equal vote, she would "dismiss her scruples, and concur in the national system." The New Jersey plan, though merely amending the Articles, was a small states' nationalist plan, not a state sovereignty plan. It recommended a Congress with powers to regulate commerce and to raise revenue from import and stamp duties, and it would have authorized requisitions from the states enforceable by a national executive empowered to use the military against states defying national laws and treaties. The plan recommended a national judiciary with broad JURISDICTION, extending to cases arising out of the regulation of commerce and the collection of the revenue. The nucleus of the SUPREMACY CLAUSE, making national law the supreme law of the states, was also part of the plan. It was a warning to large-state nationalists that they would have to compromise on the issue of REPRESENTATION. The Committee of the Whole defeated the plan 7–3, with one state divided. The Convention was thereafter stymied until the GREAT COMPROMISE was adopted. (See CONSTITUTIONAL HISTORY, 1776–1789.)

LEONARD W. LEVY
(1986)

Bibliography

BRANT, IRVING 1950 *James Madison: Father of the Constitution, 1787–1800.* Pages 46–54. Indianapolis: Bobbs-Merrill.

## *NEW ORLEANS v. DUKES*
### 427 U.S. 297 (1976)

Only once since 1937 has the Supreme Court struck down a state ECONOMIC REGULATION as a denial of the EQUAL PROTECTION OF THE LAWS. That case was *Morey v. Doud* (1957). In *Dukes*, the Court unanimously overruled *Morey;* a per curiam opinion reaffirmed the appropriateness of the RATIONAL BASIS standard of review in testing economic regulations against the demands of both equal protection and SUBSTANTIVE DUE PROCESS.

*Dukes* involved a New Orleans ordinance prohibiting the sale of food from pushcarts in the French Quarter, but exempting vendors who had been selling from pushcarts for eight years. This GRANDFATHER CLAUSE, said the Court, was rationally related to the city's legitimate interest in preserving the area's distinctive character while accommodating substantial reliance interests of long-term businesses.

KENNETH L. KARST
(1986)

## NEW RIGHT

As a political phenomenon New Right jurisprudence is a reaction against the broad protection of individual rights advanced by the WARREN COURT. Intellectually the New Right proposes a style of CONSTITUTIONAL INTERPRETATION that emphasizes fidelity to received historical materials and legal forms in order to foreclose judicial reliance on moral philosophy. Among the most prominent proponents of New Right jurisprudence are former Attorney General Edwin Meese, Chief Justice WILLIAM H. REHNQUIST, and scholar-jurist Robert H. Bork.

The great aim in fashioning an approach to constitutional interpretation must, for the New Right, be to find public, politically neutral standards that curb judicial willfulness. "The framers' intentions with respect to freedoms," as Bork put it, "are the sole legitimate premise from which constitutional analysis may proceed." The great temptation for judges armed with the power to review legislative acts (and for losers in the political process who retain the capacity to influence judges) is to strike down laws that they do not like on the grounds furnished by some broad, vague, and easily manipulated constitutional phrase. The only antidote for judicial tyranny is history—the authority of the original, public sense of what a particular phrase or clause was meant to accomplish.

This reliance on ORIGINAL INTENT, however, cannot be a mechanical process. Principles must be discerned and applied to particular circumstances and problems (such as WIRETAPPING) that the Framers could not have foreseen. Most originalists seek to discern and apply the primary purpose of a clause rather than the Framers' specific intentions. And so even a practice specifically accepted by the Framers of the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT, such as segregated schooling, might be unconstitutional.

The second element in New Right jurisprudence is an emphasis on democracy or majority rule as the touchstone of constitutional authority. Against the background of POPULAR SOVEREIGNTY, the power of unelected judges to strike down laws made by the people's representatives appears anomalous and in need of close containment. The emphasis on popular rule also supports the resort to historical intentions: When judges rely on the Framers' intentions, they can claim simply to be upholding a superior expression of popular will (the Constitution as originally understood) to an inferior one (the will of this legislature).

The New Right's third basic commitment is its foursquare opposition to the role of moral theory in constitutional interpretation. Whatever one might think of natural law or moral objectivity, in political practice moral arguments must always be regarded as nothing more than expressions of personal preferences and desires. Thus, according to Bork, "every clash between a minority claiming freedom from regulation and a majority asserting its freedom to regulate requires a choice between the gratifications (or moral positions) of the two groups." The New Right believes that to allow moral judgment any substantial role in constitutional interpretation licenses judges to overturn duly made laws on personal, ideological grounds.

The fourth and final plank in the New Right program is the identification of the extension of individual rights with an assault on community in the name of moral relativism. Both Bork and Meese approvingly quote the conservative British jurist Lord Patrick Devlin: "What makes a society is a community of ideas, not political ideas alone but also ideas about the way its members should behave and govern lives." More judicially mandated individual freedom, it seems, equals more relativism and less community.

Each of the components of New Right jurisprudence has been subjected to criticism. Original intentions, it has been said, are often extremely difficult to discern. What is to count as evidence? How do we distinguish intentions from hopes and aspirations? Did the Framers intend us to be guided by their intentions? Perhaps most tellingly, what do we make of the broad moralistic language that was often chosen and written into the Constitution? Bork wants to regard the NINTH AMENDMENT and the Fourteenth Amendment's PRIVILEGES AND IMMUNITIES clause as unintelligible "ink blots" on the document because to treat them as the broad delegations that they appear to be would give too much power to judges. The New Right's sense of how much JUDICIAL POWER is too much seems, in spite of professions of political neutrality, rooted less in a careful reading of history than in a reaction against the JUDICIAL ACTIVISM spawned by the Warren Court.

The New Right's emphasis on the Constitution's basically democratic character misses, some have charged, the equally basic role of individual liberty in the founding design. A basic commitment to broad individual rights helps legitimate the powers of a Court remote from popular passions and prejudices. The practical moral skepticism of the New Right is also subjected to debate: Do we not have widely shared working standards of morality? Does not the New Right itself implicitly invoke and depend upon a democratic political morality and an ethic of judicial self-restraint?

The New Right's claim that individual rights will replace community morality with relativism seems highly dubious, not to mention odd, in light of the New Right's own professed skepticism. In becoming more tolerant, open, and respectful of individual freedom a community would seem to be changing, perhaps even improving, its morality rather than dropping it. With its capacity to insist that majorities treat minorities reasonably, the Supreme

Court appears well situated to improve community morality.

New Right jurisprudence appeals to political skeptics who identify judicial activism, new and old, with elite tyranny. The sharpest opponents of the New Right are those who believe that the Constitution itself raises moral questions for interpreters and that an active, morally reflective Court advances the causes of individual liberty and reasonable self-government.

STEPHEN MACEDO
(1992)

(SEE ALSO: *Bork Nomination; Conservatism; Constitution and Civic Ideals; Critical Legal Studies; Deconstructionism; Liberalism; Originalism; Political Philosophy of the Constitution; Segregation.*)

Bibliography

BERGER, RAOUL 1977 *Government by Judiciary.* Cambridge, Mass.: Harvard University Press.

BORK, ROBERT H. 1990 *The Tempting of America: The Political Seduction of the Law.* New York: Free Press.

MACEDO, STEPHEN 1987 *The New Right v. the Constitution.* Washington, D.C.: Cato Institute.

REHNQUIST, WILLIAM H. 1976 The Notion of a Living Constitution. *Texas Law Review* 54:693–704.

## NEWSMAN'S PRIVILEGE

See: Reporter's Privilege

## *NEW STATE ICE COMPANY v. LIEBMANN*
285 U.S. 262 (1932)

An Oklahoma law required ice dealers to obtain a license before entering the market because their business was AFFECTED WITH A PUBLIC INTEREST. A 6–2 majority could find no exceptional circumstances such as monopoly or emergency—that is, no public interest in regulation—justifying the restriction and so struck down the law as a violation of DUE PROCESS. Echoing Justice OLIVER WENDELL HOLMES'S dissent in TYSON BROTHER V. BANTON (1927), Justice LOUIS D. BRANDEIS, with Justice HARLAN FISKE STONE concurring, insisted that the assessment of local conditions and requirements was a legislative concern. Seeking to justify a state's right to experiment with social and economic legislation, Brandeis wrote: ". . . we must be ever on our guard, lest we erect our prejudices into legal principles."

DAVID GORDON
(1986)

(SEE ALSO: *Nebbia v. New York; Ribnik v. McBride.*)

## *NEW YORK v. BELTON*

See: Automobile Search

## *NEW YORK v. FERBER*
458 U.S. 747 (1982)

This decision demonstrated the BURGER COURT'S willingness to add to the list of categories of speech excluded from the FIRST AMENDMENT'S protection. New York, like the federal government and most of the states, prohibits the distribution of material depicting sexual performances by children under age 16, whether or not the material constitutes OBSCENITY. After a New York City bookseller sold two such films to an undercover police officer, he was convicted under this law. The Supreme Court unanimously affirmed his conviction.

Justice BYRON R. WHITE, for the Court, denied that state power in this regulatory area was confined to the suppression of obscene material. The state's interest in protecting children against abuse was compelling; to prevent the production of such materials, it was necessary to forbid their distribution. CHILD PORNOGRAPHY—the visual depiction of sexual conduct by children below a specified age—was "a category of material outside the protection of the First Amendment."

The Court also rejected the argument that the law was overbroad, thus abandoning a distinction announced in BROADRICK V. OKLAHOMA (1973) to govern OVERBREADTH challenges. Henceforth the overbreadth doctrine would apply only in cases of "substantial overbreadth," whether or not the state sought to regulate the content of speech.

KENNETH L. KARST
(1986)

## *NEW YORK v. MILN*

See: *Mayor of New York v. Miln*

## *NEW YORK v. QUARLES*
467 U.S. 649 (1984)

Justice WILLIAM REHNQUIST, for a 5–4 Supreme Court, announced a public safety exception to the MIRANDA RULES. In a situation where concern for the public safety must supersede adherence to MIRANDA V. ARIZONA (1966), the prosecution may use in EVIDENCE incriminating statements made during a custodial interrogation before the suspect receives notice of his constitutional rights. Here, the Court reinstated a conviction based on the evidence of a gun and information concerning its whereabouts. Dissenters disagreed on whether the case showed a threat to

the public safety, but produced no principled argument against the exception to *Miranda*.

LEONARD W. LEVY
(1986)

## *NEW YORK v. UNITED STATES*
505 U.S. 144 (1992)

IN GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985), the Supreme Court seemed to reject a strong JUDICIAL ROLE in protecting states from congressional regulatory authority. But in *New York v. United States* and *Printz v. United States* (1997), the Court renewed its earlier commitment to protecting state autonomy. Together, *New York* and *Printz* hold that Congress may not commandeer state or local legislative or executive officials to formulate or administer a federal regulatory program that otherwise falls within the Article I authority of Congress. These decisions leave Congress with ample authority to encourage states to implement federal policies, but limited authority to coerce them to do so.

In *New York*, the Court invalidated the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985. This provision required each state by 1996 either to regulate, in congressionally acceptable ways, the disposal of publicly or privately generated radioactive WASTE, or to take title to the waste and hence assume liability for it. The Court offered two main arguments for its conclusion. The first concerned ORIGINAL INTENT: In replacing the ARTICLES OF CONFEDERATION with the Constitution, claimed the Court, the Framers intended to replace an ineffectual regime in which Congress could regulate only the states and not individual citizens, with the conceptually opposite regime in which Congress could regulate only individual citizens but not states. The Court also professed a concern for maintaining clear lines of political accountability, and claimed that commandeering might lead citizens within a state erroneously to ascribe responsibility for unpopular policy decisions to "puppet" state officials rather than the actual federal decisionmakers behind the scenes.

*Printz* involved a challenge to provisions of the federal Brady Handgun Violence Prevention Act that required state law enforcement officers to expend a "reasonable effort" to conduct background checks as part of a federal handgun control policy. Defending the statute, the United States argued that *New York* was distinguishable because the Brady Act coerced only the administration of federally defined law, rather than state legislative lawmaking in pursuance of general federal objectives. By compelling only relatively ministerial activities, asserted the United States, the act neither interfered with the state's sovereign lawmaking capacity and autonomy, nor did it realistically threaten to muddle political accountability. But the Court rejected these efforts to distinguish *New York*, making clear that Congress cannot commandeer state executive officials any more than legislative ones, by imposing ministerial burdens any more than regulatory ones. The Court replied that the principle of state autonomy inherent in the notion of "dual sovereignty" is undermined whenever Congress targets states for the imposition of affirmative regulatory or executory duties.

The doctrinal rule emerging from *New York* and *Printz*—Congress may not conscript state officials to do its bidding—may seem intuitively appropriate as an interpretation of dual sovereignty, and has the further merit of establishing a bright line capable of easy judicial enforcement. The Court's reasoning in these decisions has been criticized, however, for its overly formalist quality. While the Court invoked commonplace clichés about how state autonomy may frustrate federal tyranny, the Court failed to consider carefully how an anticommandeering rule serves the values underlying our federalist regime. Moreover, the Court's formalist structural and historical arguments purporting to deduce an anticommandeering rule from abstract notions of dual sovereignty seem somewhat forced, belying any suggestion that the REHNQUIST COURT is less "activist" as defined by aggressive review of democratically enacted statutes than either the WARREN COURT or BURGER COURT.

Both *New York*'s and *Printz*'s practical impact on federal–state relations may be quite limited. First, the cases leave open the possibility that Congress may still commandeer state administrative resources pursuant to a few specific grants of power, including the power of Congress under the FOURTEENTH AMENDMENT, SECTION 5 to enforce that amendment's rights against the states. Second, the cases affirmed the authority of Congress to encourage states to enact and enforce regulations designed to achieve federal goals through either of two noncoercive means. Congress may condition federal subsidies on the willingness of states to administer federally desired programs, and Congress may threaten to PREEMPT state programs unless they conform to federal standards. As Congress has employed these noncoercive tools far more frequently than coercive ones, *New York* and *Printz* may have greater symbolic than practical import for our regime of FEDERALISM.

EVAN H. CAMINKER
(2000)

(SEE ALSO: *Dual Federalism; López, United States v.; Sovereignty; State Immunity from Federal Law.*)

Bibliography

CAMINKER, EVAN H. 1995 State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law? *Columbia Law Review* 95:1001–1089.

——— 1997 Printz, State Sovereignty, and the Limits of Formalism. *The Supreme Court Review* 1997:199–248.

PRAKASH, SAIKRISHNA B. 1993 Field Office Federalism. *Virginia Law Review* 79:1957–2037.

POWELL, H. JEFFERSON 1993 The Oldest Question of Constitutional Law. *Virginia Law Review* 79:633–689.

## *NEW YORK CENTRAL RAILROAD COMPANY v. WHITE*
243 U.S. 188 (1917)

The New York Workmen's Compensation Act of 1914 made employers liable to compensate injured workers in certain cases without regard to fault. The statute thereby departed from time-honored COMMON LAW rules of liability, particularly the fellow-servant doctrine and contributory negligence. The act established a graduated scale of compensation based on the loss of earning power, prior wages, and the character and duration of the disability suffered. Death benefits would be paid according to the survivors' needs.

Here, a night watchman was injured while guarding tools and materials used in the construction of a new station and tracks designed for INTERSTATE COMMERCE. A 9–0 Supreme Court held that the watchman was not in interstate commerce within the meaning of the first EMPLOYERS' LIABILITY ACT. Justice MAHLON PITNEY, for the Court, declared that his work "bore no direct relation to interstate transportation." Pitney rejected claims that the New York act violated the FOURTEENTH AMENDMENT's prohibition against a TAKING OF PROPERTY without DUE PROCESS OF LAW and deprived both parties of the FREEDOM OF CONTRACT. "It needs no argument to show that such a rule [fellow-servant] is subject to modification or abrogation by a state upon proper occasion." Because "the public has a direct interest in this as affecting the common welfare," the Court sustained the act as a reasonable exercise of the STATE POLICE POWER. Pitney also rejected the argument that the exclusion of certain workers from the statute's coverage was an arbitrary classification in violation of the EQUAL PROTECTION clause of the Fourteenth Amendment. He concluded that the classification was reasonable in view of the "inherent risks" associated with the various occupations.

DAVID GORDON
(1986)

## NEW YORK CHARTER OF LIBERTIES AND PRIVILEGES
(October 30, 1683)

The first enactment of the first general assembly in New York was a statute but had the characteristics of a charter or CONSTITUTION of FUNDAMENTAL LAW. Its purpose was to establish a government "that Justice and Right may be Equally done to all persons . . . ," an early forerunner of the principle of EQUAL PROTECTION OF THE LAWS. After describing the organs of government and empowering every freeholder to vote for representatives, the statute paraphrased chapter 39 of MAGNA CARTA and provided that no taxes should be imposed but by the general assembly. Then followed protections of the rights of the criminally accused, including a right to INDICTMENT by GRAND JURY in criminal cases. Another provision of the document, after protecting RELIGIOUS LIBERTY, created a multiple ESTABLISHMENT OF RELIGION. It allowed the towns on Long Island to elect Christian ministers of their choice, to be supported by town rates, and declared that "all" the other Christian churches in the province were "priviledged Churches . . . Established" by law. Elsewhere in Christendom, an established church meant a church of a single denomination preferred over all others.

The Privy Council disallowed the statute in 1686. In 1691, after James II was overthrown, the general assembly substantially reenacted it but again it was disallowed, probably because it curbed the royal prerogative. Although the statute never became law, it is early evidence of the high regard that colonists had for Magna Carta, written guarantees of their liberties, and the principle that there should be no TAXATION WITHOUT REPRESENTATION.

LEONARD W. LEVY
(1986)

Bibliography

ANDREW, CHARLES MCLEAN 1936 *The Colonial Period of American History.* Vol. 3:114–121. New Haven, Conn.: Yale University Press.

## *NEW YORK STATE CLUB ASSOCIATION v. NEW YORK CITY*

See: Freedom of Association

## *NEW YORK TIMES CO. v. SULLIVAN*
376 U.S. 254 (1964)

MARTIN LUTHER KING, JR., was arrested in Alabama in 1960 on a perjury charge. In New York a group of entertainers and civil rights activists formed a committee to help finance King's defense. They placed a full-page advertisement in the *New York Times* appealing for contributions. The ad charged that King's arrest was part of a campaign to destroy King's leadership of the movement to integrate public facilities and encourage blacks in the South to vote.

It asserted that "Southern violators" in Montgomery had expelled King's student followers from college, ringed the campus with armed police, padlocked the dining hall to starve them into submission, bombed King's home, assaulted his person, and arrested him seven times for speeding, loitering, and other dubious offenses.

L. B. Sullivan, a city commissioner of Montgomery, filed a libel action in state court against the *Times* and four black Alabama ministers whose names had appeared as endorsers of the ad. He claimed that because his duties included supervision of the Montgomery police, the allegations against the police defamed him personally.

Under the common law as it existed in Alabama and most other states, the *Times* had little chance of winning. Whether the statements referred to Sullivan was a fact issue; if the jury found that readers would identify him, it was immaterial that the ad did not name him. Because the statements reflected adversely on Sullivan's professional reputation they were "libelous per se"; that meant he need not prove that he actually had been harmed. The defense of truth was not available because the ad contained factual errors (for example, police had not "ringed the campus," though they had been deployed nearby; King had been arrested four times, not seven). A few states recognized a privilege for good faith errors in criticism of public officials, but Alabama was among the majority that did not.

The jury awarded Sullivan $500,000. In the Alabama Supreme Court, the *Times* argued such a judgment was inconsistent with FREEDOM OF THE PRESS, but that court merely repeated what the United States Supreme Court had often said: "The First Amendment of the United States Constitution does not protect libelous publications."

When the case reached the Supreme Court in 1964, it was one of eleven libel claims, totaling $5,600,000, pending against the *Times* in Alabama. It was obvious that libel suits were being used to discourage the press from supporting the CIVIL RIGHTS movement in the South. The *Times* urged the Court to equate these uses of libel law with the discredited doctrine of SEDITIOUS LIBEL and to hold that criticism of public officials could never be actionable.

Only three Justices were willing to go that far. The majority adopted a more limited rule, holding that public officials could recover for defamatory falsehoods about their official conduct or fitness for office only if they could prove that the defendant had published with "actual malice." This was defined as "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." The Court further held that this element had to be established by "clear and convincing proof," and that, unlike most factual issues, it was subject to independent review by appellate courts. The Court then reviewed Sullivan's evidence and determined that it did not meet the new standard.

The decision was an important breakthrough, not only for the press and the civil rights movement but also in FIRST AMENDMENT theory. Until then, vast areas of expression, including libel and commercial speech, had been categorically excluded from First Amendment protection. Also, the decision finally repudiated the darkest blot on freedom of expression in the history of the United States, the Sedition Act of 1798.

Over the next few years, the Court went out of its way to make the new rule effective. It defined "reckless disregard" narrowly (*St. Amant v. Thompson*, 1967). It extended the *Sullivan* rule to lesser public officials (*Rosenblatt v. Baer*, 1966), to candidates for public office (*Monitor Patriot Co. v. Roy*, 1971), to PUBLIC FIGURES (*Associated Press v. Walker*, 1967), and to criminal libel (*Garrison v. Louisiana*, 1964). After 1971 the Court retreated somewhat, declining to extend the *Sullivan* rule to private plaintiffs and permitting a de facto narrowing of the public figure category.

From its birth the rule has been criticized, by public officials and celebrities who believe it makes recovery too difficult, and by the news media, which argue that the rule still exposes them to long and expensive litigation, even though ultimately they usually win. The Court, however, has shown no inclination to revise the rule. In *Bose Corp. v. Consumers Union* (1984), the Court was invited to dilute it by abandoning independent appellate review of findings of "actual malice." The Court refused, holding such review essential "to preserve the precious liberties established and ordained by the Constitution."

DAVID A. ANDERSON
(1986)

Bibliography

KALVE, HARRY, JR. 1964 The New York Times Case: A Note on "The Central Meaning of the First Amendment." *Supreme Court Review* 1964:191–221.

PIERCE, SAMUEL R., JR. 1965 The Anatomy of an Historic Decision: *New York Times Co. v. Sullivan. North Carolina Law Review* 43:315–363.

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

*New York Times Co. v. United States*, more commonly known as the Pentagon Papers case, is one of the landmarks of contemporary prior restraint doctrine. Only NEAR V. MINNESOTA (1931) rivals it as a case of central importance in establishing the FIRST AMENDMENT's particular and ex-

treme aversion to any form of official restriction applied prior to the act of speaking or the act of publication.

The dramatic facts of the case served to keep it before the public eye even as it was being litigated and decided. On June 12, 1971, the *New York Times* commenced publication of selected portions of a 1968 forty-seven-volume classified Defense Department study entitled "History of United States Decision Making Process on Vietnam Policy" and a 1965 classified Defense Department study entitled "The Command and Control Study of the Tonkin Gulf Incident Done by the Defense Department's Weapons Systems Evaluation Group in 1965." Collectively these documents came to be known as the Pentagon Papers. Within a few days other major newspapers, including the *Washington Post*, the *Los Angeles Times*, the *Detroit Free Press*, the *Philadelphia Inquirer*, and the *Miami Herald* also commenced publication of the Pentagon Papers. The papers had been provided to the *New York Times* by Daniel Ellsberg, a former Defense Department official and former government consultant. Ellsberg had no official authority to take the Pentagon Papers; his turning over the papers to the *New York Times* was similarly unauthorized.

When the newspapers commenced publication, the United States was still engaged in fighting the VIETNAM WAR. Claiming that the publication of the Pentagon Papers jeopardized national security, the government sought an INJUNCTION against any further publication of the papers, including publication of scheduled installments yet to appear. In the United States District Court for the Southern District of New York, Judge Murray Gurfein issued a temporary restraining order against the *New York Times*, but then denied the government's request for a preliminary injunction against publication, finding that, in light of the extremely high hurdle necessary to justify a prior restraint against a newspaper, "the publication of these historical documents would [not] seriously breach the national security." (See PRIOR RESTRAINT AND CENSORSHIP.) The United States immediately appealed, and the Court of Appeals for the Second Circuit, on June 23, 1971, remanded the case for further consideration in light of documents filed by the United States indicating that publication might pose "grave and immediate danger to the security of the United States." The Second Circuit continued to enforce the stay it had previously issued, in effect keeping the *Times* under the restraint of the temporary restraining order. On the same day, however, the United States Court of Appeals for the District of Columbia Circuit, in a case involving the *Washington Post's* publication of the Pentagon Papers, affirmed a decision of the district court refusing to enjoin further publication. On June 24, the *New York Times* filed a petition for a WRIT OF CERTIORARI and motion for expedited consideration in the Supreme Court, and on the same day the United States asked that Court for a stay of the District of Columbia circuit's ruling in the *Washington Post* case. The two cases were consolidated and accelerated, with briefs filed on June 26, oral argument the same day, and a decision of the Supreme Court on June 30, only seventeen days after the first publication of the papers in the *New York Times*.

In a brief PER CURIAM opinion, the Supreme Court affirmed the District of Columbia Circuit, reversed the Second Circuit, and vacated the restraints. Noting the "heavy presumption" against prior restraints, and the consequent "heavy burden of . . . justification" necessary to support a prior restraint, the Court found that the United States had not met that especially heavy burden.

The Court's per curiam opinion was accompanied by a number of important separate opinions by individual Justices. Justices HUGO L. BLACK and WILLIAM O. DOUGLAS made it clear that in their view prior restraints were never permissible. Justice WILLIAM J. BRENNAN would not go this far, but found it noteworthy that "never before has the United States sought to enjoin a newspaper from publishing information in its possession." For him "only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an evil kindred to imperiling the safety of a transport already at sea [citing *Near v. Minnesota*] can support even the issuance of an interim restraining order." In agreeing that the restraint was improper, Justice THURGOOD MARSHALL emphasized the absence of statutory authorization for governmental action to enjoin a newspaper. And Justice JOHN MARSHALL HARLAN, joined by Chief Justice WARREN E. BURGER and Justice HARRY A. BLACKMUN, dissented. The dissenters were disturbed by the alacrity of the proceedings, and in addition thought that the executive's "constitutional primacy in the field of FOREIGN AFFAIRS" justified a restraint at least long enough to allow the executive to present its complete case for the necessity of restriction. The most doctrinally illuminating opinions, however, were those of Justices POTTER J. STEWART and BYRON R. WHITE. For them only the specific nature of the restriction rendered it constitutionally impermissible. Had the case involved criminal or civil sanctions imposed after publication—subsequent punishment rather than prior restraint—they indicated that the First Amendment would not have stood in the way.

As highlighted by the opinions of Justices Stewart and White, therefore, the *Pentagon Papers* case presents the problem of prior restraint in purest form. The judges had the disputed materials in front of them, and thus there was no question of a restraint on materials not before a court, or not yet published. And the evaluation of the

likely effect of the materials was made by the judiciary, rather than by a censorship board, other administrative agency, or police officer. Under these circumstances, why might a prior restraint be unconstitutional when a subsequent punishment for publishing the same materials would be upheld? What justifies a constitutional standard higher for injunctions than for criminal sanctions? It cannot be that prior restraints in fact "prevent" more things from being published, for the deterrent effect of a criminal sanction is likely to inhibit publication at least as much as an injunction. Someone who is willing knowingly to violate the criminal law, in order to publish out of conscience, may also be willing to violate an injunction. Is the special aversion against prior restraint, visible in the Pentagon Papers case, based on principle, or is it little more than an anachronism inherited from JOHN MILTON and WILLIAM BLACKSTONE, and transferred from a milieu in which prior restraint was synonymous with unreviewable determinations of an administrative censorship board?

The result in the Pentagon Papers case was not inconsistent with prior cases. The case did, however, present more clearly the puzzling nature of the virtually absolute prohibition against prior restraints under circumstances in which subsequent punishment of the very same material would have been permissible. Yet the case is also significant for reasons that transcend the doctrine of prior restraint. When confronted with a constitutional objection to a governmental policy, a court typically must evaluate the justification for the policy, and assess the likelihood of some consequences that the policy is designed to prevent. When that consequence and the governmental attempt to forestall it relates to war, national security, or national defense, judicial deference to governmental assertions of likely consequences has traditionally been greatest, even if the putative restriction implicates activities otherwise protected by the Constitution. When national security has been invoked, constitutional protection has often been more illusory than real. At every level in the Pentagon Papers case the courts conducted their own independent assessments of the likely dangers to national security and to troops overseas. The Supreme Court's decision was at least partly a function of the Justices' unwillingness to accept governmental incantation of the phrase "national security" as dispositive. Certainly executive determinations concerning the effect of publications on national security still receive greater deference than do other executive predictions about the effect of publications. But the Pentagon Papers case stands for the proposition that even when national security is claimed the courts will scrutinize for themselves the necessity of restriction. The decision, therefore, speaks not only to prior restraint but also, and more pervasively, to the courts' willingness to protect constitutional rights even against wartime governmental restrictions imposed in the name of national security.

FREDERICK SCHAUER
(1986)

Bibliography

HENKIN, LOUIS 1971 The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers. *University of Pennsylvania Law Review* 120:271–280.

JUNGER, PETER 1971 Down Memory Lane: The Case of the Pentagon Papers. *Case Western Reserve Law Review* 23:3–75.

KALVEN, HARRY, JR. 1971 Foreword: Even When a Nation Is at War. *Harvard Law Review* 85:3–36.

## *NIEMOTKO v. MARYLAND*
340 U.S. 268 (1951)

The VINSON COURT here unanimously reversed the convictions of two Jehovah's Witnesses who had been charged with disorderly conduct for attempting to hold religious services in a city park without a permit. Local officials had refused to issue the permit, citing ordinances or administrative standards that governed the procedure, but such permits had been routinely approved for other religious and patriotic groups. The city's refusal to issue a permit to the Jehovah's Witnesses under these circumstances, the Court held, was both an unconstitutional prior restraint on speech and a denial of EQUAL PROTECTION.

MICHAEL E. PARRISH
(1986)

## NIMMER, MELVILLE B.
(1923–1985)

After his graduation from Harvard Law School Melville Nimmer practiced law in Los Angeles for more than a decade. During that time he wrote the foundational article elaborating the "right of publicity," a right to control the commercial use of one's own identity. He also produced *Nimmer on Copyright* (1st ed., 1963), a four-volume treatise rightly called "magisterial," which soon became the nation's leading authority on copyright law. In 1962 he joined the law faculty of the University of California, Los Angeles, where he was a much-loved teacher of copyright law (later expanded into entertainment law), contracts, and constitutional law.

Although Nimmer's constitutional law scholarship ranged over such diverse topics as American CIVIL RIGHTS legislation and judicial review in Israel, the main focus of his attention was the FIRST AMENDMENT. He practiced what

he preached, serving the AMERICAN CIVIL LIBERTIES UNION as counsel in a number of cases, including COHEN V. CALIFORNIA (1971). In *Cohen* the Supreme Court adopted Nimmer's argument severely restricting the assumption, casually made in CHAPLINSKY V. NEW HAMPSHIRE (1942), that profanity lay outside the First Amendment's protection. The case produced one of Justice JOHN MARSHALL HARLAN'S most noteworthy opinions, and today it is widely taught in law school courses dealing with the FREEDOM OF SPEECH.

Nimmer's First Amendment articles dealt with movie censorship, LIBEL and invasion of privacy (see PRIVACY AND THE FIRST AMENDMENT), SYMBOLIC SPEECH, national security secrets, the special role of the press clause, and—inevitably—the relation of COPYRIGHT to the First Amendment. (He wrote on three of these topics for this *Encyclopedia.*) In these writings he developed a theory of "definitional balancing" that became one of the theoretical centerpieces of his last major work on constitutional law, *Nimmer on Freedom of Speech: A Treatise on the Theory of the First Amendment* (1984). Nimmer planned to supplement this treatise regularly, and specifically to apply his theories to "national security, breach of the peace, commercial speech and obscenity." When he died the next year, his colleagues and the larger community lost much more than those products of a gifted legal mind.

KENNETH L. KARST
(1992)

Bibliography

MELVILLE B. NIMMER SYMPOSIUM 1987 *UCLA Law Review* 34: 1331–1903 (includes a complete list of Nimmer's published works).

## NINETEENTH AMENDMENT

Ratification of the women's suffrage amendment in 1920 marked the culmination of a struggle spanning three quarters of a century. Under the leadership of organizations including the National Woman's Suffrage Association and the National Women's Party, over 2 million women participated in some 900 campaigns before state and federal legislators, party officials, and referendum voters. By the time the amendment was adopted, a majority of the states had already given some recognition to women's VOTING RIGHTS.

Political agitation for enfranchisement began in 1848, at the first women's rights convention in SENECA FALLS, New York. In its Declaration of Sentiments, the convention included suffrage as one of the "inalienable rights" to which women were entitled. As the century progressed, the vote assumed increasing importance, both as a symbolic affirmation of women's equality and as a means to address a vast array of sex-based discrimination in employment, education, domestic law, and related areas. Once the Supreme Court ruled in MINOR V. HAPPERSETT (1875) that suffrage was not one of the PRIVILEGES AND IMMUNITIES guaranteed by the FOURTEENTH AMENDMENT to women as citizens, the necessity for a state or federal constitutional amendment became apparent.

The struggle for women's rights was a response to various forces. Urbanization, industrialization, declining birth rates, and expanding educational and employment opportunities tended to diminish women's role in the private domestic sphere while encouraging their participation in the public sphere. So too, women's involvement, first with abolitionism and later with other progressive causes, generated political commitments and experiences that fueled demands for equal rights.

Those demands provoked opposition from various quarters. The liquor industry feared that enfranchisement would pave the way for PROHIBITION, while conservative political and religious leaders, as well as women homemakers, painted suffrage as an invitation to socialism, anarchism, free love, and domestic discord. Partly in response to those claims, many leading suffragists became increasingly conservative in their arguments and increasingly unwilling to address other causes and consequences of women's inequality. That strategy met with partial success. As they narrowed their social agenda, women's rights organizations expanded their political appeal. The growing strength of the suffrage movement, together with women's efforts in WORLD WAR I, finally helped prompt the United States to join the slowly increasing number of Western nations that had granted enfranchisement.

Yet to many leading women's rights activists, the American victory proved scarcely less demoralizing than defeat. The focus on enfranchisement had to some extent deflected attention from other issues of critical importance for women, such as poverty, working conditions, birth control, health care, and domestic relations. Without a unifying social agenda beyond the ballot, the postsuffrage feminist movement foundered, splintered, and for the next half century, largely dissolved. During that period, women did not vote as a block on women's issues, support women candidates, or, with few exceptions, agitate for women's rights. Despite their numerical strength and access to the ballot, women remained subject to a vast range of discrimination in employment, education, WELFARE BENEFITS, credit standards, family law, and related areas. Although the Nineteenth Amendment itself was urged as a ground for qualifying women to serve on juries, most courts rejected this argument except where jury service was tied to voter status.

Yet however limited its immediate affects, the Nineteenth Amendment marked a significant advance toward

equal rights. Enfranchisement was a necessary if not sufficient condition for women to exercise significant political leverage. Moreover, the skills, experience, and self-esteem that women gained during the suffrage campaign helped lay the foundation for a more egalitarian social order.

DEBORAH L. RHODE
(1986)

(SEE ALSO: *Anthony, Susan Brownell; Stanton, Elizabeth Cady; Woman Suffrage; Woman Suffrage Movement.*)

Bibliography

CATT, CARRIE CHAPMAN and SHULER, NETTIE ROGERS 1970 *Woman Suffrage and Politics.* New York: Americana Library Edition.

STANTON, ELIZABETH CADY et al., eds. 1881–1922 *History of Woman Suffrage.* New York: Fowler Wells.

## NINTH AMENDMENT

Largely ignored throughout most of our history, the Ninth Amendment has emerged in the past twenty years as a possible source for the protection of individual rights not specifically enumerated in the Constitution's text. Although no Supreme Court decision has yet been based squarely on an interpretation of the Ninth Amendment, it has been mentioned in several leading cases in which the Court enlarged the scope of individual rights. Lawyers, scholars, and judges are understandably intrigued by a provision that, on the basis of language, seems ideally suited to provide a constitutional home for newly found rights: "The enumeration of certain rights in the Constitution shall not be construed to deny or disparage others retained by the people."

The historical origins of the Ninth Amendment lay in JAMES MADISON's concern that the inclusion of specified rights in the BILL OF RIGHTS might leave other rights unprotected. He recognized, moreover, that the inherent limitations of language could thwart the intent of the authors of the Bill of Rights to provide a permanent charter of personal freedom. These concerns, which led Madison originally to question the wisdom of a Bill of Rights, caused him to propose, in the First Congress, a resolution incorporating the present language of the Ninth Amendment. It was adopted with little debate.

It is not surprising that the Ninth Amendment lay dormant throughout most of our history. The holding in BARRON V. BALTIMORE (1833) that the Fifth Amendment was not applicable to the states limited the scope of the Ninth Amendment also: all provisions of the Bill of Rights restricted the United States only. Moreover, the federal government, being one of limited powers, did not move into those areas of activity that would trigger claims of infringement of rights not specified in the Constitution. Challenges to federal actions were more likely to take the form that the President or Congress lacked power under the Constitution rather than that the actions abridged an individual right. Even the specific guarantees of the Bill of Rights spawned only a trickle of litigation until well into the twentieth century.

The states, of course, had broad POLICE POWERS to legislate in the areas of welfare, health, education, morality, and business. Until the latter part of the nineteenth century, however, the Supreme Court's review of state legislation served primarily to assure that states did not unduly burden or tax interstate businesses. Court decisions in these areas were not based on individual rights but rather on a judicially created doctrine that Congress's power to regulate INTERSTATE COMMERCE carried with it a prohibition against state laws that were viewed by the Court as unreasonably burdensome or discriminatory as applied to interstate businesses. The post-Civil War Amendments provided the textual basis for challenges to state law as violating individual rights.

The Supreme Court, however, moved quickly to limit the scope of the THIRTEENTH AMENDMENT and FOURTEENTH AMENDMENT. In the famous SLAUGHTERHOUSE CASES (1873) the Court virtually eliminated the PRIVILEGES AND IMMUNITIES clause of the Fourteenth Amendment as a protection for individual rights by limiting the clause to such rights as interstate travel, petitioning the federal government for redress of grievances, protection while abroad, or the privilege of HABEAS CORPUS. The EQUAL PROTECTION and DUE PROCESS clauses were also narrowly interpreted so as to preclude broad challenges to state regulatory statutes, as was the Thirteenth Amendment in *Slaughterhouse* and the CIVIL RIGHTS CASES (1883).

Despite the *Slaughterhouse Cases*, those seeking constitutional support for the protection of property rights against ECONOMIC REGULATION looked elsewhere in the Fourteenth Amendment, and ultimately found a home in the due process clause. Toward the end of the nineteenth century the Court expanded the meaning of "liberty" and "property" to include the right to enter into business relationships. Hundreds of state laws were invalidated under this expanded concept of SUBSTANTIVE DUE PROCESS. This view of the Fourteenth Amendment, together with narrow interpretations of Congress's power under the COMMERCE CLAUSE and the TAXING AND SPENDING POWER, led to the NEW DEAL constitutional crisis of the 1930s. In the spring of 1937 a narrow Court majority shifted ground, broadening Congress's enumerated powers and limiting the due process clause to its present scope, namely, that state regulatory laws should bear a reasonable relationship to a valid legislative purpose. Throughout this long constitutional

journey the Ninth Amendment was an unused instrument, because those who challenged state laws relied primarily on the Fourteenth Amendment's due process clause whose scope had been so broadened that there was no need to develop a theory of unenumerated rights.

As the Court in the 1930s and 1940s finally rejected the claim that the Constitution contained rights that protected business against government regulation, the enumerated rights in the Bill of Rights were gradually being incorporated into the meaning of the words "liberty" and "property" of the Fourteenth Amendment's due process clause. By the end of the 1960s, substantive rights guaranteed by the FIRST AMENDMENT, and most of the procedural rights of the Fourth, Fifth, Sixth, and Eighth Amendments were made binding on the states. In this legal development the Ninth Amendment was inconsequential, because the Court employed the judicial technique of incorporating into the due process clause rights enumerated in the Bill of Rights. There was little need to develop the concept of "unenumerated" rights, so long as the due process clause of the Fourteenth Amendment provided the vehicle for making the Bill of Rights binding on the states.

Thus, during the early 1960s, as the process of incorporating the Bill of Rights into the Fourteenth Amendment was moving forward, the Supreme Court maintained a consensus developed as early as UNITED STATES V. CAROLENE PRODUCTS CO. (1938). On matters of economic and social legislation (the type of law that gave rise to the substantive due process controversies of the pre-New Deal era) the Supreme Court would have a limited role to play. Legislation (either state or federal) would be assumed to be valid unless arbitrary or unreasonable, or unless shown to violate a specific provision of the Constitution. Laws reflecting prejudice against certain minorities, or laws infringing personal liberties of the kind enumerated in the Bill of Rights, or other specific provisions of the Constitution, would be subject to a more demanding form of judicial scrutiny.

The Court remained divided on the meaning of specific constitutional guarantees, but these divisions resulted from differences over the meaning of enumerated rights, rather than from differences over whether newly identified, unenumerated, rights should be read into the Constitution. In this constitutional world, an amendment that spoke of unenumerated rights had little to offer as a defense of personal rights. However, a Connecticut law that prohibited the use of contraceptives jolted this consensus and led to the emergence of the Ninth Amendment as a possible vehicle for the protection of rights not specifically guaranteed in other provisions of the Constitution. After two decades of not enforcing its statute, and after thwarting attempts to overturn it in the Supreme Court, Connecticut prosecuted a doctor who was giving contraceptive advice to a married couple in a BIRTH CONTROL clinic. He was charged with "aiding and abetting" a violation of the law prohibiting the use of contraceptives.

The case, GRISWOLD V. CONNECTICUT (1965), presented a difficult problem for a Court majority wedded to the notion that only arbitrary, or capricious, or invidiously discriminatory laws, or those that violated a specific constitutional right, could be invalidated. All of the Justices agreed that the Connecticut statute was foolish, but the Court was obviously troubled as to why it was unconstitutional for a state to decide that it wished to discourage extramarital sexual relations and that the ready availability of contraceptives, including contraceptives for married persons, increased the likelihood of extramarital sex by eliminating the fear of pregnancy. Connecticut claimed that in order to achieve the objective of deterring sex outside of marriage the state could prohibit the use of all contraceptives, thus making them less available. If no specific constitutional right had been violated, why could not Connecticut make its own mistakes, leaving it to the people, through their elected representatives, to correct them?

The Supreme Court's answer, in an opinion by Justice WILLIAM O. DOUGLAS, was to create a right of marital privacy which was found in "penumbras, formed by emanations" from other guarantees found in enumerated rights, specifically those in the First, Third, Fourth, and Fifth Amendments. The Ninth Amendment was also mentioned, but the constitutional approach of the majority was to expand existing rights in order to create a new right of marital privacy which the Connecticut law was held to contravene.

Three Justices (Chief Justice EARL WARREN and Justices ARTHUR GOLDBERG and WILLIAM J. BRENNAN), in an opinion by Goldberg, relied specifically on the Ninth Amendment as an additional basis for striking down the law. Justice Goldberg's standard for defining rights "retained by the people" seemed to strike a widely criticized note of open-ended substantive due process. He referred to FUNDAMENTAL RIGHTS and to the "traditions" and "conscience of our people" in order to determine whether a right was to be regarded as "fundamental." It is not surprising that this language prompted a vigorous dissent from Justice HUGO L. BLACK, who regarded the majority and concurring Justices as having engaged in the same unprincipled personal jurisprudence as the conservative Justices who had written the concept of FREEDOM OF CONTRACT into the Constitution in the early part of the twentieth century.

Viewed in isolation, the *Griswold* case might have been regarded merely as involving a slight broadening of enumerated rights to encompass the basic right to decide whether or not to conceive a child. Whether the Court reached this result by finding the new right lurking in "pe-

numbras" formed by "emanations" from existing rights, or by discovering new "unenumerated" rights, was probably of no great concern, because the Connecticut statute was so unreasonable, even in the context of the state's asserted objective of promoting moral behavior, that the law should have been declared invalid under a REASONABLENESS standard. But strong movements were developing in the country during the 1960s and 1970s. Women were moving rapidly toward equality of opportunity to participate in American life. Attitudes about private sexual behavior, marriage, cohabitation, and family relationships were all changing toward an increased respect for individual choice.

In the 1970s the Court responded by recognizing some of these new attitudes and enshrining them in constitutionally protected rights. In EISENSTADT V. BAIRD (1972), for example, the principles of *Griswold* were extended to include the right of an unmarried person to the acquisition and use of contraceptives. The culmination of this trend was ROE V. WADE (1973), where the Court recognized constitutional protection of a woman's right to procure an abortion, particularly during the first twenty-six weeks of pregnancy. *Roe v. Wade*, in turn, generated renewed debate among constitutional scholars over the proper role of the Court in intervening to overturn the legislative decisions of democratically elected legislatures. In this debate the Ninth Amendment started to assume new significance because it provided a possible textual basis for an expanded jurisprudence of individual liberty.

The Ninth Amendment was mentioned in *Roe v. Wade*, but only as one of a number of constitutional provisions to support the Court's conclusion that "liberty" encompassed a woman's child-bearing decision. Justice Douglas, who had written the majority opinion in *Griswold*, based his concurrence in *Roe v. Wade* primarily on the Ninth Amendment and suggested a broad range of personal autonomy rights such as "control over development and expression of one's intellect, interest, tastes, and personality," "freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children," "freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf."

After *Roe v. Wade* (perhaps relying on Justice Douglas's expansive concurrence) some litigants sought to use the Ninth Amendment as a basis for expanding personal autonomy rights beyond the scope of sexual privacy. Many lower courts appeared receptive to such claims as the right, under the Ninth Amendment, to control one's personal grooming and appearance and the right to be protected from disclosing personal information. However, in *Kelley v. Johnson* (1976) the Supreme Court upheld a regulation limiting the length of a police officer's hair. Personal autonomy issues continue to be litigated, but the Ninth Amendment is rarely involved as a basis for decision.

Because interest in the Ninth Amendment started with cases involving sexual privacy, it is not surprising that the amendment continues to be used to attack state antisodomy laws. Apart from a summary affirmance in 1976 of a district court opinion, the Court has not specifically addressed the issue of the rights of homosexuals. In 1985 the Court of Appeals for the Fourth Circuit upheld a Ninth Amendment claim that right of private consensual sexual behavior was beyond the reach of state regulation. But even if the Supreme Court should sustain the decision of the Circuit Court the Supreme Court's preferred rationale is likely to be substantive due process, that is, enlarging the definition of "sexual privacy" as part of the "liberty" protected by the Fourteenth Amendment.

One could well conclude that the Ninth Amendment should be allowed to return to the oblivion it experienced prior to the *Griswold* case. Persistent references to the Ninth Amendment by lower court judges, however, and even by Supreme Court Justices (for example, Chief Justice WARREN E. BURGER in RICHMOND NEWSPAPERS, INC. V. VIRGINIA, 1980) suggest that the amendment could serve as an analytical tool for the appraisal of new claims of constitutional rights. If it is to serve as something more than a superfluous additional citation, the Ninth Amendment must offer the promise of the development of a more coherent body of law than has thus far emerged as the Court has recognized new claims of unenumerated constitutional rights.

At present the Court deals with such rights primarily through the technique employed in *Griswold* and its progeny. The Court usually tries to base its decisions on one or more specific constitutional provisions, and then expands those provisions to include new rights. Typical was the *Richmond Newspaper* case, where the Court held that the public had a right of access to criminal trials. Chief Justice Burger's PLURALITY OPINION was based on principles said to derive from the First Amendment, even though the amendment itself specifically guarantees, for these purposes, only the rights of speech, press, and assembly. The Chief Justice made specific reference to rights that were not "enumerated" in the Constitution and pointed out that James Madison's concern with the danger of protecting only enumerated rights led to the adoption of the Ninth Amendment.

Despite his reference to the Ninth Amendment, the Chief Justice's approach in *Richmond Newspapers* would appear to be similar to earlier cases, including *Griswold*, where new rights were recognized because they were analogous to existing rights. Freedom of association is a

judicially recognized derivation of the First Amendment protection for freedom of expression, and the requirement of proof beyond a REASONABLE DOUBT is derived from the enumerated guarantee of due process. Recognizing the right of marital privacy or the right to terminate a pregnancy may involve a greater leap from the enumerated rights in the First, Fourth, and Fifth Amendments, but the technique of deriving the rights from enumerated rights did not start with *Griswold* or *Roe v. Wade*. Once the leap is made, the further development of the right becomes merely a matter of interpretation of the newly perceived rights.

An alternate approach to the development of unenumerated rights would look instead to the open-ended clauses of the Constitution such as the PRIVILEGES AND IMMUNITIES clauses in Article IV and the Fourteenth Amendment, or the due process clause—or even no clause at all. Some Justices have viewed the developments since *Griswold* as a revival of open-ended substantive due process. This view has characterized the approach of Justices FELIX FRANKFURTER and JOHN MARSHALL HARLAN to the incorporation of procedural rights into the Fourteenth Amendment. They would have relied on the meaning of "liberty" rather than on the lifting of a "right" from the Bill of Rights and transferring the right to the Fourteenth Amendment (the approach of Justice Brennan and ultimately a majority of the Court).

If the Ninth Amendment is to serve as a meaningful vehicle for the protection of UNENUMERATED RIGHTS, it should, at the least, have something more to offer than the expansion of enumerated rights exemplified by *Roe v. Wade* and *Richmond Newspapers* or the open-ended substantive due process approach of Justices Frankfurter, Harlan, and Stewart. The Ninth Amendment offers two potential contributions: historical justification and constitutional standard. The historical justification, articulated by Justice Goldberg in *Griswold* and by Chief Justice Burger in *Richmond Newspapers*, provides a powerful support for the argument that "unenumerated rights" have a place in the Constitution.

The same history also suggests a constitutional standard: a range of rights protected by the entire text of the Constitution. To leave the Ninth Amendment open-ended, with no obligation on the part of judges to link unenumerated rights to enumerated rights, would render the amendment indistinguishable from the nontextually based substantive due process. Moreover, confining "retained" rights to those analogous to enumerated rights would be consistent with Madison's conception of the Ninth Amendment. He was not seeking to create new rights. He was concerned that the enumeration of the rights in the Bill of Rights could not possibly take into account similar but undefined rights that could not be fully delineated in a constitutional text. The Ninth Amendment was the original "safety net" to compensate for the imperfection of language and the inability to provide for changing circumstances. Such an approach leaves room for a gradual expansion of rights, but requires some grounding for each newly recognized right in the constitutional text. A text-based standard is one that requires far less justification, in terms of democratic political theory, than a frankly noninterpretivist standard.

Does the Ninth Amendment, as so limited, add an additional dimension to the technique employed in *Griswold* or *Richmond Newspapers?* If rights "retained" under the Ninth Amendment are those analogous to rights found elsewhere in the Constitution, how does this approach differ from the approach of Justice Douglas in *Griswold*, which found rights in the "penumbras" formed by "emanations" from existing rights?

One obvious response is that the Ninth Amendment is itself a textual, historically valid justification for this approach to the enforcement of enumerated rights. It thus has a "leg-up" in the quest for legitimacy of judicial intervention. Moreover, Ninth Amendment analysis should derive from the entire text of the Constitution and not merely from other rights. Thus, as Justice Brennan noted in *Zobel v. Williams* (1982), the RIGHT TO TRAVEL can be discerned as a necessary consequence of nationhood as embodied in several constitutional provisions. Similarly, protection of VOTING RIGHTS can be derived from constitutional provisions that contemplate broad voter participation. The Ninth Amendment has never defined absolute rights. Rather, jurisprudence based on the Ninth Amendment will require placing on the balancing scales those individual unenumerated rights that might otherwise be ignored but that are sufficiently analogous to enumerated rights, or to our governmental structure, as to require constitutional protection.

NORMAN REDLICH
(1986)

Bibliography

BLACK, CHARLES 1981 *Decision According to Law*. New York: Norton.

DUNBAR, L. 1956 James Madison and the Ninth Amendment. *Virginia Law Review* 42:627–643.

ELY, J. H. 1980 *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, Mass.: Harvard University Press.

LAYCOCK, DOUGLAS 1981 Taking Constitutions Seriously: A Theory of Judicial Review by John Hart Ely. *Texas Law Review* 59:343–394.

PATTERSON, B. 1955 *The Forgotten Ninth Amendment* 27; *The Constitution of the United States of America: Analysis and Interpretations*, S. Doc. No. 92–82, 92d Cong.

REDLICH, N. 1961 Are There Certain Rights . . . Retained by the People? *NYU Law Review* 37:787, 802–808.

RHOADES, LYMAN and PATULA, RODNEY R. 1973 The Ninth Amendment: A Survey of Theory and Practice in the Federal Courts Since *Griswold v. Connecticut*. *Denver Law Journal* 50:153–176.

VAN ALSTYNE, WILLIAM 1981 Slouching Toward Bethlehem with the Ninth Amendment. *Yale Law Journal* 91:207–216.

## NINTH AMENDMENT
(Update)

The Supreme Court's reliance on the Ninth Amendment to justify a constitutional RIGHT OF PRIVACY in the landmark cases of GRISWOLD V. CONNECTICUT (1965) and ROE V. WADE (1973) ignited great interest in the long-ignored amendment. Scholars wrote a flurry of articles about it, and lower federal courts began accepting Ninth Amendment challenges to a variety of statutes. After *Roe*, however, the Supreme Court consistently abstained from any further use of the Ninth Amendment. Its most notable rejection came in BOWERS V. HARDWICK (1986). In *Bowers*, the federal court of appeals had held a statute criminalizing sodomy unconstitutional because it violated the right of privacy protected by, among other provisions, the Ninth Amendment. The Court, in a 5–4 decision, reversed. Though the Court noted that "[r]espondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment," its refusal to extend the right of privacy grounded in the DUE PROCESS clause to this type of statute, together with its earlier refusals to rely on the Ninth Amendment, signaled that future legal challenges based on the Ninth Amendment would not likely be successful.

This is where the situation might have remained had President RONALD REAGAN not nominated appellate court judge Robert H. Bork to the Court in 1987. During his famously televised confirmation hearing, Bork was questioned by SENATE JUDICIARY COMMITTEE Chairman Joseph Biden, as well as by Senators Strom Thurmond, Ted Kennedy, and Dennis DeConcini, about whether the right of privacy was supported by the Ninth Amendment. Bork initially suggested that the rights "retained by the people" referred solely to rights mentioned in state constitutions. Later he added: "I would be delighted" to use the Ninth Amendment "if anybody showed me historical evidence" as to what the Framers meant. Then Bork offered a provocative analogy that received wide attention: "I do not think you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says 'Congress shall make no' and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it." Bork said he knew of no evidence that the Framers of the Ninth Amendment intended it to protect a "dynamic category of rights, that is, under the ninth amendment the court was free to make up more Bill of Rights."

Analogizing any part of the Constitution's text to an "ink blot"—while invoking the absence of historical inquiry—was sure to elicit an academic response. Bork's very public dialogue, followed by the SENATE's denial of his confirmation, sparked a renewed interest in the Ninth Amendment among constitutional scholars and an explosion of new articles and books on the subject ensued. Most, but not all, academic writers were friendlier to the use of the amendment than was either Bork or the Court. New historical research undercut the state constitutional rights thesis posited by Bork and others and supported the view that the rights "retained by the people" was a reference to inherent or NATURAL RIGHTS. What still divides scholars is whether the Ninth Amendment authorizes the judicial protection of the natural rights to which it refers.

Paralleling the academic response to Bork's treatment of the Ninth Amendment was the reaction of subsequent Court nominees when each was asked about the amendment. Justice DAVID H. SOUTER, for example, testified that "the starting point for anyone who reads the Constitution seriously is that there is a concept of limited governmental power which is not simply to be identified with the enumeration of those specific rights or specifically defined rights that were later embodied in the bill. If there were any further evidence needed for this, of course, we can start with the ninth amendment." Souter's denial that he had anything novel to contribute to the jurisprudence of the Ninth Amendment provoked Biden to respond: "It is novel that you acknowledge it, based on our past hearings in this committee. One of the last nominees said it was nothing but a waterblot on the Constitution, which I found fascinating." Souter went on to testify that he had no reason to doubt that the Ninth Amendment "was an acknowledgment that the enumeration was not intended to be in some sense exhaustive and in derogation of other rights retained." In response to the question of whether a majority acting through government can violate inherent rights that precede the state, Souter testified that the job of the Court is "to define and protect this point beyond which government simply cannot go or cannot go without the most strong justification."

Souter's testimony was to prove prophetic. In PLANNED PARENTHOOD V. CASEY (1992), the Court overturned portions of a Pennsylvania ABORTION law. Speaking for a plurality in a rare jointly authored opinion, Justices ANTHONY M. KENNEDY, SANDRA DAY O'CONNOR, and Souter relied explicitly on the Ninth Amendment: "Neither the Bill of Rights nor the specific practices of States at the time of

the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. Const., Amdt. 9." It then quoted with approval the statement of the second Justice JOHN MARSHALL HARLAN that "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."

*Casey* represents the high-water mark, to date, of judicial willingness to use the Ninth Amendment. Following *Casey,* and throughout the 1990s, the Court did not employ the Ninth Amendment or even refer to it and, unlike the rush of enthusiasm that followed *Griswold* and *Roe*, neither did lower courts increase their receptivity to Ninth Amendment arguments. Off the bench, Justice ANTONIN SCALIA has expressed skepticism about the Ninth Amendment, and its future will undoubtedly depend on the judicial philosophies of future nominees to the Court. It will also depend on whether judges or academics can develop ways to put the Ninth Amendment into effect without seeming to authorize unbridled judicial discretion to strike down statutes. As Biden observed during Justice Kennedy's confirmation hearing, Justices "are reluctant to use it because once you start down that road on the ninth amendment, then it becomes very difficult to figure where to stop; what are those unenumerated rights."

One possibility involves modifying the prevailing "presumption of constitutionality." Under this judicially created DOCTRINE, as explained in the famous Footnote 4 of UNITED STATES V. CAROLENE PRODUCTS CO. (1938), courts will presume a statute to be constitutional unless "it appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. . . ." But if the courts shift the presumption only when a statute violates "a specific prohibition," do they not disparage or deny" the "other" rights "retained by the people" in violation of the Ninth Amendment? If courts do not even-handedly employ heightened scrutiny whenever a statute infringes on *any* rightful exercise of a citizen's liberty, have they not disparaged those liberties that were unenumerated?

Although distinguishing "rightful exercises of liberty" from mere "license" appears to pose the same problem of indeterminacy that attaches to identifying unenumerated rights directly, the problem may be less serious than first appears. State tort, property, and contract law doctrines routinely distinguish rightful from wrongful exercises of liberty, and federal judges regularly defer to state law in deciding cases between private parties in which there is DIVERSITY JURISDICTION. Moreover, federal courts frequently identify "liberty interests" that they then balance against governmental interests. Such liberty interests are, however, indistinguishable from rightful exercises of liberty (as opposed to license). In addition, the people, acting through state INITIATIVES or REFERENDUMS, could directly declare certain liberties to be fundamental.

Perhaps, then, federal courts could protect unenumerated rights by increasing the scrutiny of federal statutes restricting the exercise of individual liberties that constitute legitimate "liberty interests" insofar as they are neither tortious nor violative of the contract or property rights of another person. It would then fall to the federal government to show why such interferences with liberty are truly "necessary and proper," the legal standard supplied by the NECESSARY AND PROPER CLAUSE.

Adopting such a "presumption of liberty" would protect the unenumerated rights retained by the people in a manner very similar, if not identical, to the way the enumerated liberties of FREEDOM OF SPEECH and FREEDOM OF THE PRESS are protected under the FIRST AMENDMENT. Such a presumption would effectively negate the inference that JAMES MADISON sought to avoid when he drafted the Ninth Amendment: "that those rights which were not singled out, were intended to be assigned into the hands of the general government." As for protecting unenumerated liberties from infringements by states, the current weight of scholarly opinion is that, contrary to the SLAUGHTER-HOUSE CASES (1873), this protection is best accomplished by reference to the PRIVILEGES OR IMMUNITIES clause of the FOURTEENTH AMENDMENT—though the existence of the Ninth Amendment argues against rigidly limiting these privileges and immunities solely to "the enumeration in the constitution of certain rights."

RANDY E. BARNETT
(2000)

(SEE ALSO: *Bork Nomination.*)

Bibliography

BARNETT, RANDY E., ed. 1989, 1993 *The Rights Retained by the People: The History and Meaning of the Ninth Amendment*, Vols. 1 & 2. Fairfax, Va.: George Mason University Press.

BARNETT, RANDY E. 1997 Necessary and Proper. *UCLA Law Review* 44:745–793.

MASSEY, CALVIN R. 1995 *Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights.* Philadelphia: Temple University Press.

SYMPOSIUM 1988 Interpreting the Ninth Amendment. *Chicago-Kent Law Review* 64:37–268.

YOO, JOHN CHOON 1993 Our Declaratory Ninth Amendment *Emory Law Journal* 42:967–1043.

## *NIX v. WILLIAMS*
467 U.S. 431 (1984)

A 7–2 Supreme Court held that although an accused's incriminating statements could not be admitted as EVIDENCE because police had interrogated him in violation of his RIGHT TO COUNSEL, physical evidence discovered on the basis of his incriminating statements could be introduced against him if the prosecution, by a preponderance of proof, could show that such evidence would inevitably have been discovered even in the absence of accused's statements. The case produced an "inevitable discovery" exception to the EXCLUSIONARY RULE: any FRUIT OF THE POISONOUS TREE may be used as evidence if it would have been inevitably or ultimately discovered, just as if it had been discovered on the basis of independent or uncontaminated leads. (See BREWER V. WILLIAMS.)

LEONARD W. LEVY
(1986)

## NIXON, RICHARD M.
(1913–1994)

Richard Milhous Nixon, the thirty-seventh President of the United States, was born in Yorba Linda, California. An alumnus of Whittier College and Duke University Law School, he practiced law in Whittier, California, from 1937 to 1942. After a brief stint in the enforcement of wartime price controls, he entered the Navy and served with it in the South Pacific. Upon his release from duty he was elected to the HOUSE OF REPRESENTATIVES from the Twelfth District of California. Shortly he gained national prominence as a member of the HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES, and he played a decisive role in generating the perjury case against Alger Hiss. Nixon was elected to the SENATE from his home state in 1950, gaining new notoriety in denouncing the Democrats for having "lost" China to communism. In 1952 he was elected vice-president as the running mate of DWIGHT D. EISENHOWER. Nixon had riveted national attention—once again—with an impassioned defense on radio and television of his acceptance of money from a political "slush" fund. As vice-president he drew international notice through his "kitchen debate" with Soviet Premier Nikita Khrushchev. Nixon was nominated for President by his party in 1960, but lost to the Democrats' JOHN F. KENNEDY in a close election. Two years later Nixon ran for governor of California and lost. He reentered the private practice of law, this time in New York City. Maintaining and broadening his political contacts, he was again nominated for the presidency by the Republicans in 1968. His campaign theme was a pledge to heal the divisions in the nation that the Vietnam War had created and to bring the hostilities to an honorable conclusion. He won a plurality of the popular vote over the Democrats' HUBERT H. HUMPHREY and George C. Wallace, candidate of the American Independence Party.

As President, Nixon took advantage of the dramatic expansion of the office that had been taking place since the time of FRANKLIN D. ROOSEVELT, recognizing that the public had grown accustomed to regarding the Chief Executive as the undisputed architect of national policies. But Nixon stretched his authority with less restraint than his predecessors, undertaking steps violative of the law and of the Constitution itself. A full explanation for his actions may never be forthcoming. Possibly he felt keenly that his party's inability to capture or control Congress would continue to frustrate his desire to dismantle many New Deal and Great Society programs. He may also have been guided by inner compulsions of ambition and feelings of inadequacy he never articulated. Nixon, at any rate, interpreted by his own lights the constitutional prerogatives of his office, including an assumed right to ignore or modify the letter and intent of laws.

Nixon, for example, did not consider himself obligated to respect the law of 1972 requiring that EXECUTIVE AGREEMENTS arrived at with foreign governments be reported to Congress within sixty days, cavalierly submitting them late. Moreover, he sometimes negotiated them at a lower diplomatic level and labeled them "arrangements." Under Nixon's stewardship, executive agreements were entered into on major matters and formal treaties almost invariably on minor matters—a reversal of the traditional relationship between the two forms of diplomatic undertakings.

Although a few Presidents had sometimes impounded funds appropriated by Congress, the step was generally taken in conformity with congressional intent or under the President's authority as COMMANDER-IN-CHIEF. Nixon broke fresh ground in his assertion of a constitutional power to decline to spend appropriated funds. For him IMPOUNDMENT was a legitimate tool of the President to alter policy set by Congress—and he employed it on a scale hitherto unknown. While some of the funds he refused to release came out of military, space, and public works appropriations, vast amounts also came out of social and environmental programs. By 1973 Nixon's impoundments totaled about $18 billion, between seventeen and twenty percent of the funds he could claim to control. Nixon and his aides maintained that he was following patterns established by previous Presidents. The evidence is, however, that his

predecessors did not aim to contravene the will of Congress, but merely postpone immediate expenditure. Nixon, on the other hand, used impoundment to terminate or curtail programs. He defended his actions on the ground that the executive power of the President included a constitutional right to be the people's defender against Congress's inability to hold down nondefense spending.

Nixon's boldness had the effect of giving the executive an item veto of appropriation bills—a remedy long sought by Presidents, and provided for in the CONFEDERATE CONSTITUTION, but consistently withheld from Presidents since first requested by President ULYSSES S. GRANT in 1873. Whatever the merit of the device, Nixon's insistence on exercising it in defiance of Congress was a usurpation of power.

Although WIRETAPPING without formal authorization had long been employed occasionally by Presidents, Nixon was the first Chief Executive who systematically resorted to its use. His practice of it grew out of a determination to keep under wraps the "secret" B-52 raids over Cambodia in 1969. Nixon was apparently fashioning a new conception of his office, metamorphosing it into a "plebiscitary presidency"—one in which the Chief Executive would assume widened power under the Constitution, relying on a reshaped Supreme Court to validate his actions. Nixon's expressed concern was that leaks of information about the "secret war" were putting national security in jeopardy. He ordered the tapping of telephones of members of the National Security Council staff and of several newspaper reporters. The taps were conducted without court order and in patent violation of Title III of the OMNIBUS CRIME CONTROL AND SAFE STREETS ACT of 1968. By countenancing not only illegal wiretapping but, shortly, burglary (in the case of Daniel Ellsberg, who revealed the so-called Pentagon Papers), the hiring of *agents provacateurs* (to conduct "dirty tricks" in election campaigns), and the subverting of the Internal Revenue Service (to punish "enemies"), Nixon was substituting his personal sanction for established law.

In assuming this prerogative, Nixon believed he was exercising what he regarded as INHERENT POWER to maintain national and domestic security. This claim of "inherent power," sometimes also set forth by previous Presidents, has never been recognized as valid by the courts. In *United States v. United States District Court* (1972) the Supreme Court by an 8–0 vote ruled unconstitutional the Nixon administration's practice of engaging in domestic electronic surveillance without a judicial warrant.

Nixon's assertion of an EXECUTIVE PRIVILEGE to reject a SUBPOENA became the issue in the case of UNITED STATES V. NIXON (1974). The suit revolved around Nixon's refusal to surrender tapes containing information relevant to the prosecution of some of his close aides for offenses that included obstruction of justice by "covering up" the administration's involvement in the WATERGATE break-in. In its unanimous decision requiring the President to turn over the tapes, the Supreme Court recognized that a President is entitled to confidentiality of communication—needful for "protection of the public interest in candid, objective, and even blunt or harsh opinion in presidential decisionmaking." But, the Court concluded, "when the ground for asserting privilege as to subpoenaed material sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of DUE PROCESS OF LAW in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for EVIDENCE in a pending criminal trial."

Nixon toyed with the idea of disobeying the decision, but decided to comply, surrendering the tapes covered in the decision. Indeed, he published their contents, thus providing the House Judiciary Committee with the "smoking gun"—the now famous words in which the President counseled inducing the Central Intelligence Agency to limit the FBI's investigation of the Watergate burglary.

Nixon's use of the POCKET VETO was also remarkable. As intended by the Framers of the Constitution it may be used at the end of a session of Congress when a President who does not sign a bill cannot return it to Congress because it stands adjourned. Nixon unhesitatingly used pocket vetoes when Congress was merely in brief recess. In *Kennedy v. Simpson* (1973) a district court overturned as misused Nixon's pocket veto of the Family Practice of Medicine Bill, which had been opposed by only three members of Congress.

Nixon's transgressions of the law and the Constitution contributed to the passage of two major pieces of legislation. One was the CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT of 1974, which detailed the arrangements under which Congress may monitor the deferral by a President of appropriated funds. The second law, responding to the deployment of troops in Asia, first by President LYNDON B. JOHNSON and then by Nixon, was the War Powers Resolution of 1973, severely restricting the ability of a President to use military force outside the United States without congressional authorization. Nixon and all succeeding Presidents have denounced this law as an unconstitutional abridgment of the power of the President to direct the armed forces.

Nixon made two nominations to the Supreme Court that failed of confirmation. In 1969 he submitted the name of Judge Clement F. Haynsworth of South Carolina, a designation that met implacable opposition from CIVIL RIGHTS groups and labor unions. Early the following year Nixon

sent forward the name of Judge G. Harrold Carswell of the Fifth Circuit Court of Appeals in Florida. Denounced as a racist in many quarters, although he had renounced his older views on race, Carswell was also opposed as lacking the superior qualifications required for a seat on the highest court.

In addition to placing HARRY A. BLACKMUN of Minnesota, LEWIS F. POWELL, JR., of Virginia, and WILLIAM H. REHNQUIST of Arizona on the Supreme Court, Nixon also appointed the fourteenth Chief Justice, Judge WARREN E. BURGER of the District of Columbia Court of Appeals, whose conservative speeches and advocacy of judicial restraint appealed to the President. Nixon had been especially impressed by an address that Burger delivered in 1967 on the subject of "law and order," from which Nixon had borrowed during the 1968 campaign for the Presidency. He was mindful, too, of the support Burger had given him during his critical time in the 1952 campaign.

Nixon was the first Chief Executive to resign the Presidency—a consequence of the Watergate affair that convulsed the nation from 1972 to 1974. The reasons for the burglary—carried out by Nixon's political aides at the headquarters of the Democratic party—have never been adduced. From the start of the investigation the administration tried to cover up its connection to the crime. In the long drawnout effort to get at the truth, the focus of the quest became the President himself: what did he know and when did he know it? The evidence lay in the recordings of conversations in his office that Nixon was revealed to have been making for years. The President turned over the critical tapes just as the House of Representatives seemed on the verge of voting to impeach him. He surrendered his office on August 9, 1974. The following month, his successor, GERALD R. FORD, issued the former President a "full, free, and absolute" pardon for any crimes he may have committed.

HENRY F. GRAFF
(1986)

(SEE ALSO: *Articles of Impeachment of Richard M. Nixon; Impeachment.*)

Bibliography

KURLAND, PHILLIP B. 1978 *Watergate and the Constitution.* Chicago: University of Chicago Press.

NATHAN, RICHARD P. 1973 *The Plot That Failed: Nixon and the Administrative Presidency.* New York: Wiley.

NIXON, RICHARD M. 1978 *R.N.: The Memoirs of Richard Nixon.* New York: Grosset Dunlap.

SCHLESINGER, ARTHUR M., JR. 1973 *The Imperial Presidency.* Boston: Little, Brown.

WHITE, THEODORE H. 1975 *Breach of Faith: The Fall of Richard Nixon.* New York: Atheneum.

## *NIXON, UNITED STATES v.*
418 U.S. 683 (1974)

This litigation unfolded contemporaneously with congressional investigation of the Watergate affair and with proceedings in the HOUSE OF REPRESENTATIVES for the IMPEACHMENT of President RICHARD M. NIXON. (See WATERGATE AND THE CONSTITUTION.) A federal GRAND JURY had indicted seven defendants, including Nixon's former attorney general and closest White House aides, charging several offenses, including conspiracy to obstruct justice by "covering up" the circumstances of a burglary of Democratic party offices in Washington. The grand jury named Nixon as an unindicted co-conspirator. A special prosecutor had been appointed to handle this prosecution. To obtain evidence, the special prosecutor asked Judge John Sirica to issue a SUBPOENA ordering Nixon to produce electronic tapes and papers relating to sixty-four White House conversations among persons named as conspirators, including Nixon himself.

Judge Sirica issued the subpoena in mid-April 1974; on May 1, Nixon's counsel moved to quash the subpoena and to expunge the grand jury's naming of the President as a co-conspirator. Sirica denied both motions and ordered Nixon to produce the subpoenaed items. When Nixon appealed, the special prosecutor asked the Supreme Court to hear the case, bypassing the court of appeals. The Court granted that motion and advanced argument to July 8. On July 24 the Court upheld the subpoena, 8–0, including the votes of three Nixon appointees. Justice WILLIAM H. REHNQUIST, formerly a Justice Department official under the indicted ex-attorney general, had disqualified himself. A week following the decision, before Nixon had complied with it, the House Judiciary Committee recommended his impeachment. When Nixon turned over the tapes on August 5, they included a conversation that even his strongest supporters called a "smoking gun." On August 9 the President resigned.

A year earlier a White House press officer had said Nixon would obey a "definitive" decision of the Supreme Court about the tapes. At ORAL ARGUMENT in the Supreme Court, however, Nixon's counsel, pressed to say that the President had "submitted himself" to the Court's decision, evaded any forthright promise of compliance. Even after the Court's decision, the press reported, Nixon and his aides debated for some hours whether he should comply with the subpoena. Some have reported that the Court's unanimity was an important factor influencing that decision.

The Court itself seems to have been impressed with the need for unanimity; its bland opinion, formally attributed to Chief Justice WARREN E. BURGER, bore the external

marks of a document hurriedly negotiated—as investigative reporters have said it was. The Court brushed aside objections to its JURISDICTION, such as the FINAL JUDGMENT RULE. Nixon also argued that the courts had no jurisdiction over an "intra-branch" dispute between the President and his subordinate, the special prosecutor. Responding, the Court emphasized the "uniqueness" of the conflict, but apart from that comment its argument bordered on incoherence. After gratuitously remarking that the executive branch had exclusive discretionary control over federal criminal prosecutions, the Court reversed field, discovering a guarantee of independence for the special prosecutor in the regulation that appointed him and promised not to remove him absent a consensus among certain congressional leaders. Both the Court's propositions were dubious. (See APPOINTING AND REMOVAL POWER.) Yet the Court marched on to some heroic constitutional issues concerning relations between the executive and judicial branches.

Both sides had appealed to the abstraction of SEPARATION OF POWERS. Nixon argued first that the judiciary lacked power "to compel the President in the exercise of his discretion," and second that the President enjoyed an EXECUTIVE PRIVILEGE to keep confidential his conversations with his advisers. The first argument blurred two separate issues: the President's immunity from judicial process and the POLITICAL QUESTION issue of his discretion to control disclosure of his conversations. This latter claim of absolute executive privilege overlapped his second main argument. That argument began with an absolute privilege claim, but if that claim failed the President sought to persuade the Court to recognize a wide scope for a qualified privilege.

The special prosecutor, opposing both PRESIDENTIAL IMMUNITY and the claim of absolute privilege, assumed the existence of a qualified privilege. That privilege was lost, he argued, when there was substantial reason to believe that the participants in a presidential conversation had been planning a crime.

The Court's opinion, like Nixon's argument, blurred the boundaries of separate issues in the case. The decision to uphold the subpoena, however, implicitly rejected the claim of presidential immunity, and the Court expressly rejected the claim of absolute privilege. A qualified privilege did exist, the Court said—by way of assumption, not demonstration—but the privilege was defeated when the specific confidential information sought was shown to be relevant, admissible evidence for a pending federal prosecution. The Court thus disposed of the case without mentioning Nixon's own possible complicity in crime; it dismissed the question whether the President could constitutionally be named as a co-conspirator.

Today some form of a qualified executive privilege is assumed to exist, but the scope of the privilege remains largely undefined. *Nixon*'s most important contribution to our constitutional law, however, lay elsewhere: in its reaffirmation that even the highest officer of government is not beyond the reach of the law and the courts. Nixon's brief had included this remark, designed to reassure: "it must be stressed we do not suggest the President has the attributes of a king. *Inter alia*, a king rules by inheritance and for life." The *Nixon* decision reminded us that there are also other differences.

KENNETH L. KARST
(1986)

Bibliography

SYMPOSIUM 1974 United States v. Nixon. *UCLA Law Review* 22:1–140.

WOODWARD, BOB and ARMSTRONG, SCOTT 1979 *The Brethren: Inside the Supreme Court.* Pages 285–347. New York: Simon and Schuster.

## *NIXON v. ADMINISTRATOR OF GENERAL SERVICES*
433 U.S. 425 (1977)

Ex-president RICHARD M. NIXON sued to prevent implementation of the Presidential Recordings and Materials Preservation Act. In upholding the constitutionality of the act, the Supreme Court rejected Nixon's contentions that it violated SEPARATION OF POWERS and EXECUTIVE PRIVILEGE, abridged Nixon's RIGHT OF PRIVACY and FREEDOM OF ASSOCIATION, and constituted a BILL OF ATTAINDER.

DENNIS J. MAHONEY
(1986)

## *NIXON v. CONDON*
286 U.S. 73 (1932)

After the decision in NIXON V. HERNDON (1927), Texas amended its statute, giving a political party's state executive committee the power to set voting qualifications for the party's PRIMARY ELECTIONS. The Democratic party's committee limited primary voting to whites. Nixon, a black, again was denied a primary ballot and again sued election officials for DAMAGES. The Supreme Court reversed a dismissal of the action, holding, 5–4, that the committee's conduct was STATE ACTION in violation of the FOURTEENTH AMENDMENT. The line of "Texas primary cases" continued with GROVEY V. TOWNSEND (1935).

KENNETH L. KARST
(1986)

## *NIXON v. FITZGERALD*
457 U.S. 731 (1982)
## *HARLOW v. FITZGERALD*
457 U.S. 800 (1982)

In these cases the Supreme Court significantly expanded the scope of EXECUTIVE IMMUNITY in actions for DAMAGES brought by persons injured by official action. Fitzgerald sued former President RICHARD M. NIXON and two of his aides, alleging that he had been dismissed from an Air Force job in retaliation for revealing to a congressional committee a two billion dollar cost overrun for a transport aircraft.

In *Nixon* the Court held, 5–4, that the President is absolutely immune from civil damages—not merely for the performance of particular functions but for all acts within the "outer perimeter" of his official duties. Justice LEWIS F. POWELL, for the majority, rested his decision not on the text of the Constitution but on "the constitutional tradition of the SEPARATION OF POWERS." Unlike other executive officers, who have only a qualified immunity from damages actions, the President occupies a unique place in the government. He must be able to act without fear of intrusive inquiries into his motives. The dissenters agreed that some of the President's functions should be clothed in absolute immunity, but argued that a qualified immunity from suit was sufficient in most cases to protect presidential independence.

In *Harlow* the Court, 8–1, rejected the aides' claim of absolute immunity, but broadened the scope of qualified executive immunity. Under previous decisions, this immunity was lost when the official negligently violated "clearly established" rights or acted with malicious intention to deprive constitutional rights or to cause harm. The Court here eliminated the "malicious intention" test for losing the immunity. A great many actions for damages against executive officials are based on claims of right that are not "clearly established." *Harlow* forbids damages in such a case even though the official acts with malice.

KENNETH L. KARST
(1986)

## *NIXON v. HERNDON*
273 U.S. 536 (1927)

This decision was the first in a series of "Texas primary cases." Texas law disqualified blacks from voting in Democratic party PRIMARY ELECTIONS. Nixon, refused a ballot under this law, sued election officers for damages under the federal CIVIL RIGHTS laws, asserting a denial of EQUAL PROTECTION OF THE LAWS under the FOURTEENTH AMENDMENT and a denial of the right to vote on account of race, in violation of the FIFTEENTH AMENDMENT. (See VOTING RIGHTS.) The Supreme Court reversed a dismissal of the action, holding for Nixon on his equal protection claim and not discussing the Fifteenth Amendment. The next case in the series was NIXON V. CONDON (1932).

KENNETH L. KARST
(1986)

## *NIXON v. UNITED STATES*
506 U.S. 224 (1993)

In *Nixon v. United States,* the Supreme Court held that a challenge to the U.S. SENATE's practice of permitting a committee to hear evidence against an impeached judge presented a nonjusticiable POLITICAL QUESTION. The petitioner Walter Nixon, a federal judge, had made false statements to a federal GRAND JURY that was investigating him for bribery. He argued that having a body smaller than the Senate receive evidence deprived him of a "trial" by the Senate, which, under Article I, section 3 has "the sole Power to try all Impeachments." A six-member majority of Justices found that "the use of the word 'try' in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions." It further held that JUDICIAL REVIEW was precluded by the vesting in the Senate of the "sole" power of trial and conviction: "If the courts may review the actions of the Senate . . . , it is difficult to see how the Senate would be 'functioning . . . independently . . .' "

Had the majority reached the merits, Nixon probably still would have lost, as Justice BYRON R. WHITE argued in a CONCURRING OPINION. Many federal adjudications entail initial evidence-gathering by an official or entity other than the ultimate trier of fact. In contrast, the majority's nonmerits reasoning is peculiar. Given the constitutional inferences that the Court has confidently drawn in other adjudicative contexts, it seems incredible that the federal judiciary would be incompetent to determine what constitutes a legally sufficient impeachment trial. Nor would circumscribed judicial review seem to deprive the Senate of its "sole" power to conduct such trials.

Because impeachment is Congress's only constitutionally authorized check on miscreant judges, it is easy, however, to understand the Court's desire to exhibit self-restraint in policing the process. The Court may also have wanted to signal to the executive branch that it would not interfere with Congress's exclusive mechanism for forcing the removal of corrupt public officials.

PETER M. SHANE
(2000)

(SEE ALSO: *Judicial Impeachment.*)

Bibliography

GERHARDT, MICHAEL J. 1993 The Senate's Process for Removing Federal Judges. Pages 139–242 in National Commission on Judicial Discipline and Removal, *Research Papers of the National Commission on Judicial Discipline and Removal, Vol. I.* Washington, D.C.: U.S. Government Printing Office.

——— 1994 Rediscovering Nonjusticiability: Judicial Review of Impeachments after *Nixon*. *Duke Law Journal* 44:231–276.

## *NLRB v. FRIEDMAN-HARRY MARKS CLOTHING CO.*

See: Wagner Act Cases

## *NLRB v. FRUEHAUF TRAILER CO.*

See: Wagner Act Cases

## *NLRB v. JONES & LAUGHLIN STEEL CORP.*

See: Wagner Act Cases

## NO-KNOCK ENTRY

Police are not allowed to enter a house to search or make an ARREST unless they have procured a warrant based on PROBABLE CAUSE, according to PAYTON V. NEW YORK (1980) and *Vale v. Louisiana* (1970). If police cannot get a warrant because of EXIGENT CIRCUMSTANCES, they may act on probable cause alone. In either case, the Supreme Court has not articulated specific rules for no-knock entries. At COMMON LAW, police could not make a forcible entry unless admittance was refused after they announced their authority and purpose, and the FEDERAL CODE OF CRIMINAL PROCEDURE prescribes the same requirements. But the Court has not made this rule into a formal FOURTH AMENDMENT requirement. Rather, the Court emphasizes that entries must always be reasonable, and forcible entries must be based on exigent circumstances. A few states authorize by statute the issuance of no-knock warrants, but any blanket sanctioning of such entries probably would be held to violate the Fourth Amendment.

CATHERINE HANCOCK
(1986)

Bibliography

LAFAVE, WAYNE R. 1978 *Search and Seizure: A Treatise on the Fourth Amendment.* Vol. 2:122–140. St. Paul, Minn.: West Publishing Co.

## NOLO CONTENDERE

(Latin: "I do not choose to contest [it].") This statement, variously defined as plea and not a plea, indicates that the defendant will not fight a charge against him. Of the same immediate effect as a guilty plea, it admits the facts charged but cannot be used as a confession of guilt in any other proceeding. Acceptance by a court is discretionary.

DAVID GORDON
(1986)

## NONINTERPRETIVISM

This ungainly name was invented as a counterpart of INTERPRETIVISM, the view that courts, in deciding on the meaning of the Constitution, should find their authoritative sources only in the constitutional text and the clearly established intentions of those who adopted the text. A noninterpretivitst, then, was one who believed that courts might properly go beyond these sources, enforcing constitutional norms not readily discernible in the text or the Framers' intentions, narrowly conceived. These terms lost their vogue fairly quickly because few commentators (and no judges) wanted to admit that their views were anything other than interpretations of the Constitution.

Today's commentary uses other terms that are more descriptive of their referents. "Textualism," for example, refers to a view that focuses closely on the Constitution's words. Almost no commentators now profess to be strict textualists. Justice HUGO L. BLACK is the modern Supreme Court's strongest claimant to being a textualist, and even he had his moments of backsliding. ORIGINALISM, which limits the authoritative sources to the text and the ORIGINAL INTENT of the Framers, has a number of adherents among today's commentators and a smaller number among the federal judiciary, but none among the Justices. By the end of the 1980s, however, sightings of noninterpretivists had become rarer than sightings of Bigfoot.

KENNETH L. KARST
(1992)

Bibliography

BREST, PAUL 1980 The Misconceived Quest for the Original Understanding. *Boston University Law Review* 60:204–238.

ELY, JOHN HART 1980 *Democracy and Distrust: A Theory of Judicial Review*, chaps. 1 and 2. Cambridge, Mass.: Harvard University Press.

LEVY, LEONARD W. 1988 *Original Intent and the Framers' Constitution.* New York: Macmillan.

PERRY, MICHAEL J. 1982 *The Constitution, the Courts, and Human Rights.* New Haven, Conn.: Yale University Press.

TUSHNET, MARK V. 1983 Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles. *Harvard Law Review* 96:781–827.

## NONJUDICIAL INTERPRETATION OF THE CONSTITUTION

The requirement in Article VI, section 3, that public officers "support the Constitution" applies to all three branches of government, not merely the judiciary. In compliance with this constitutional mandate, legislators and executive officials have made major contributions over the years in interpreting and shaping the Constitution. Because jucidial doctrines often exclude the courts from deciding certain questions, the meaning of the Constitution may depend exclusively on determinations reached by the legislative and executive branches.

In the early decades of the American republic, before the Supreme Court began to establish PRECEDENTS for constitutional law, the Constitution had to be interpreted solely by members of Congress and executive officials. Such critical issues as FEDERALISM, INTERSTATE COMMERCE, the President's APPOINTING AND REMOVAL POWER, the investigative power of Congress, the TREATY POWER and FOREIGN AFFAIRS, SLAVERY, and INTERNAL IMPROVEMENTS were debated and resolved by the political branches without any assistance from the judiciary. Many of these constitutional judgments were later accepted by the federal courts as binding interpretations.

The idea of JUDICIAL SUPREMACY begins with Chief Justice JOHN MARSHALL's declaration in MARBURY V. MADISON (1803) that it is "emphatically the province and duty of the judicial department to say what the law is." Bold words, but the political situation required Marshall to finesse the legal issue to avoid a confrontation with President THOMAS JEFFERSON he knew he could not win. Significantly, Marshall never again, throughout his long tenure on the bench, invalidated another act of Congress.

It is doubtful whether Marshall actually believed that the Supreme Court possessed the exclusive authority to decide the meaning of the Constitution. After Congress impeached and removed Judge JOHN PICKERING in 1804 and began proceedings to impeach Supreme Court Justice SAMUEL J. CHASE (with Marshall probably next in line), Marshall wrote to Chase on January 23, 1804, suggesting that members of Congress did not have to impeach judges because they objected to their legal opinions. Congress could simply reverse the decisions. Marshall advised Chase, "I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislatures would certainly better comport with the mildness of our character that [would] a removal of the Judge who has rendered them unknowing of his fault."

Marshall's letter to Chase is somewhat ambiguous. Could Congress reverse only statutory interpretations or constitutional decisions as well? Did reversal require a constitutional amendment or merely a statute? The context of Marshall's statement implies that he was quite willing to share with the other two branches the task of CONSTITUTIONAL INTERPRETATION.

Obviously, neither Congress nor the Presidents accepted the Court as the final arbiter of constitutional law. Jefferson believed that constitutional decisions by one branch, including the judiciary, were to be given "no control to another branch." Each branch "has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action; and especially, where it is to act ultimately and without APPEAL." An example is the President's PARDONING POWER. Although the ALIEN AND SEDITION ACTS of 1798 had never been declared unconstitutional in the federal courts, Jefferson considered it a nullity when he became President and, accordingly, pardoned those who had been convicted under it. Congress later appropriated funds to reimburse individuals who had been fined under the Sedition Act, declaring in committee reports that the statute was "unconstitutional, null, and void." The Court later admitted in NEW YORK TIMES V. SULLIVAN (1964) that the Sedition Act had been repudiated not by a court of law, but by the "court of history."

President ANDREW JACKSON also believed that each branch of government had an independent duty to interpret the Constitution. The Court upheld the constitutionality of the BANK OF THE UNITED STATES in MCCULLOCH V. MARYLAND (1819), and Congress passed legislation to recharter it, but Jackson nevertheless vetoed the bill on the ground that Congress, the President, and the Court "must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others." This broad concept of the VETO POWER has been adopted by all subsequent Presidents.

In a series of speeches in 1858, ABRAHAM LINCOLN denied that the Court's decision in DRED SCOTT V. SANDFORD (1857) represented the "last word" on the slavery issue, particularly with regard to the power of Congress to prohibit SLAVERY IN THE TERRITORIES and the rights of blacks. Lincoln considered the Court a coequal, not a superior, branch of government. In his inaugural address in 1861, he warned that if government policy on "vital questions affecting the whole people is to be irrevocably fixed" by

the Court, "the people will have ceased to be their own rulers."

The Supreme Court may be the ultimate interpreter of the Constitution in a particular case, but once it releases an opinion, it is helpless to control the political forces and pressures that shape constitutional meaning. In 1918 and again in 1922, the Court struck down congressional efforts to regulate child labor. The first statute, according to the Court, exceeded Congress's power under the COMMERCE CLAUSE because manufacturing was not "interstate commerce." The second statute, the Court held, exceeded the taxing power because the tax was really a "regulation." Despite these precedents, the New Deal Congress passed legislation in 1938 to regulate wages and hours in manufacturing, relying again on the commerce clause, and a unanimous Court overrode the 1918 child labor decision and upheld the statute in UNITED STATES V. DARBY LUMBER COMPANY (1941).

For a period of several decades in the twentieth century, the Supreme Court invoked its power of JUDICIAL REVIEW to restrict the power of Congress to regulate the national economy. These decisions did little more than delay the momentum for national control. In time, the constitutional meaning of interstate commerce and federalism fell almost exclusively to Congress and the President. In PRUDENTIAL INSURANCE COMPANY V. BENJAMIN (1946) the Court conceded: "the history of judicial limitation of congressional power over commerce, when exercised affirmatively, has been more largely one of retreat than of ultimate victory." In GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985) the Court essentially delegated to Congress the responsibility for defining federalism.

Relying on the commerce clause and its powers to enforce the Civil War amendments, Congress has taken the initiative to establish the constitutional rights of black citizens in such areas as education, housing, VOTING RIGHTS, employment, and equal access to PUBLIC ACCOMMODATIONS. Virtually all these legislative actions in recent decades have been sustained by the courts.

Dissenting in GERTZ V. ROBERT WELCH, INC. (1974), Justice WILLIAM J. BRENNAN claimed that the courts are "the ultimate arbiters of all disputes concerning clashes of constitutional values." Two hundred years of history present quite a different picture. Clashes of constitutional values are fought out in every arena—national and state—and within all of the branches of government. No single branch can claim ultimate control. Constitutional judgments of the courts are frequently overturned by the political branches.

In ZURCHER V. STANFORD DAILY (1978) the Court balanced the right of a free press against the needs of law enforcement officials and sided with the latter. In 1980, Congress passed legislation giving much greater protection to FIRST AMENDMENT interests. In *United States v. Miller* (1976) the Court supported the right of law enforcement agents to subpoena banks for information in a depositor's account. Two years later, Congress passed legislation that placed limits on warrantless searches of bank and credit records.

Another example of a Court-Congress dialogue, with Congress again defending constitutional rights left unprotected by the judiciary, is GOLDMAN V. WEINBERGER (1986). The Court upheld an Air Force regulation that prohibited an Orthodox Jew from wearing his yarmulke indoors while on duty. The Court reasoned that the Air Force's values of obedience, discipline, and unity outweighed any interference with the religious beliefs of Captain Goldman. Congress disagreed, passing legislation the next year that told the Air Force to change its regulation to permit officers and airmen to wear religious apparel while in uniform.

On special occasion, an authoritative and binding decision by the Supreme Court may be helpful in resolving a political impasse. The unanimous decision in COOPER V. AARON (1958) defused the smoldering Little Rock crisis, but the CIVIL RIGHTS stalemate persisted until the two political branches confronted the issue squarely and passed the CIVIL RIGHTS ACT OF 1964. This statute provided more of a "last word" on the constitutional rights of black citizens than any court decision, including such landmark rulings as BROWN V. BOARD OF EDUCATION (1954). Similarly, the unanimous decision in UNITED STATES V. NIXON (1974) signaled a dramatic turn in the WATERGATE affair, leading to the resignation of President RICHARD M. NIXON, but the decision added little clarity to the constitutional meaning of EXECUTIVE PRIVILEGE and even introduced new areas of confusion and uncertainty.

Sometimes an effort by the Court to announce the last word on a divisive constitutional issue simply backfires, attempting to do through the judiciary what must be accomplished through the political process. A notable example is the inaugural address by one President who explained that a difficult constitutional issue was before the Supreme Court, where it belonged, and that it would be "speedily and finally settled." The address was by JAMES BUCHANAN, two days before the Court announced the *Dred Scott* case.

The belief that the judiciary is the ultimate arbiter of constitutional issues finds no support in our history. The Court itself often shows a keen awareness that CONSTITUTIONAL INTERPRETATION is an exceedingly delicate and complex task that must be shared with Congress, the President, the states, and society at large.

LOUIS FISHER
(1992)

Bibliography

ANDREWS, WILLIAM G., ed. 1969 *Coordinate Magistrates: Constitutional Law by Congress and the President.* New York: Van Nostrand Reinhold.

FISHER, LOUIS 1988 *Constitutional Dialogues: Interpretation as Political Process.* Princeton, N.J.: Princeton University Press.

MURPHY, WALTER F. 1986 Who Shall Interpret? The Quest for Ultimate Constitutional Interpreter. *Review of Politics* 48: 401–423.

# NONJUDICIAL INTERPRETATION OF THE CONSTITUTION
## (Update)

The Constitution of the United States demands interpretation. Its textual language is often less than clear, as is its surrounding history. As a result, ordinary citizens as well as constitutional scholars frequently debate the meaning of the Constitution's terms. Moreover, so too do government officials, legislative and executive, high and petty, in the numerous contexts in which the Constitution potentially constrains the performance of their duties. And of course judges, state and federal, and at all levels of the judicial hierarchy, must routinely engage in CONSTITUTIONAL INTERPRETATION in applying the law to the cases before them. In all of these settings, it is uncontroversial that the Constitution is the supreme law of the land, and that all other laws must be compatible with it, but it is often controversial just what it is that the Constitution means.

In situations in which there are no Supreme Court interpretations of the Constitution, government officials, including those sitting as judges of state courts and lower federal courts, must interpret the Constitution for themselves. In these circumstances, no question arises regarding the propriety of such officials doing the best they can to interpret the Constitution that both informs and constrains their work.

When the Supreme Court has offered an interpretation of some constitutional provision, however, a new question arises, because it is controversial whether lower court judges and nonjudicial officials must obey what they believe to be erroneous interpretations of the Constitution just because those interpretations come from the Supreme Court. May such lower court judges and nonjudicial officials follow their own interpretations of the Constitution regardless of what the Supreme Court has said?

The responses to this question, both in judicial opinions and in the scholarly literature, fall into three broad categories. One response denies to Supreme Court interpretations any binding force except in the specific case in which the interpretation was offered. In support of this position, some commentators argue that Article III of the Constitution, which describes and creates the JUDICIAL POWER OF THE UNITED STATES and thus the power of the Supreme Court, restricts the power of the federal courts to the decision of CASES AND CONTROVERSIES. Thus, although the Supreme Court may bind the parties and the lower courts to its interpretation in the particular case before it—a power that follows from the very idea of a supreme court—the Supreme Court has no power to bind officials or courts in other cases to its interpretation. Indeed, according to this position, the Court has no power even to bind itself, through the DOCTRINE of STARE DECISIS, to any constitutional interpretation that it subsequently deems to be erroneous.

This position, which denies to the Supreme Court the power to bind anyone other than the litigants and lower courts in particular cases, strikes many observers as anarchical, inevitably productive to an unworkable cacophony of conflicting constitutional interpretations. A second and less-extreme position, therefore, holds that Supreme Court interpretations of the Constitution should be accorded considerable but not absolute weight by courts other than the Supreme Court, and should be accorded moderate weight by the Supreme Court itself. Under this position, the fact of an existing Supreme Court interpretation is relevant (but not necessarily dispositive) in an authoritative and not merely persuasive way in cases other than the case in which the interpretation first arose. Especially with respect to interpretations by legislative and executive officials, the details of this position are often less than clear, since there is a great deal of room to maneuver around the question of what it is for a decision to have "considerable" but not "absolute" authoritative force. Thus, commentators who hold this second position have diverse views about when officials should act contrary to Supreme Court interpretations that those officials believe to be erroneous. All agree that some "dialogue" between the Court and other branches of government is a good thing and conducive to better constitutional interpretation, but there is disagreement about what is to happen when disagreement persists even after the most robust dialogue.

The third position, which is the one the authors endorse, accords Supreme Court interpretations of the Constitution the status of supreme law of the land, and thus the status that the Constitution declares itself to have. According to this position, a Supreme Court interpretation of the Constitution becomes part of the Constitution for all practical purposes, and to lower court judges and nonjudicial officials there should be no difference between what the Constitution says and what the Supreme Court

says the Constitution says. (The most extreme version of this position would make Supreme Court interpretations authoritative for the Supreme Court itself in later cases; and at a minimum this position entails that such interpretations may not be overturned by the Court merely because the Court thinks them wrong.) Undergirding this position is a respect for the values of consistency and uniformity that support the reason for having a constitution in the first place. The virtue of a constitution is not in the fact that it takes a position on controversial issues of political morality, but that it settles controversial issues of political morality. Insofar as the meaning of the Constitution itself remains unsettled, this central function and virtue of constitutionalism remains unsatisfied. A Supreme Court interpretation of the Constitution, if given the authoritative status of the Constitution itself, can provide the settlement that the Constitution is meant to provide but often does not.

The Supreme Court itself has endorsed this third position in COOPER V. AARON (1958), and again more recently in *City of Boerne v. Flores* (1997). That the Supreme Court itself has endorsed the position, however, is neither surprising nor dispositive, for the question of what weight others should give to Supreme Court interpretations cannot be settled by the Supreme Court itself. Thus, the question is not what the Supreme Court has said about the authoritativeness of its own interpretations, but whether this position—JUDICIAL SUPREMACY (but not exclusivity) with respect to matters of constitutional interpretation—best serves the goals of a constitutional system. And although such a view might on occasion produce excess deference to erroneous Supreme Court interpretations, the opposing view might, on even more frequent occasions, produce an unwillingness in the executive and legislative branches to take seriously the idea that the Constitution constrains and thus invalidates even some outcomes that might be desirable, in the short run, on both policy and political grounds. The question is therefore not whether the Supreme Court is in some way a "better" interpreter than the other branches. Rather, it is whether, in light of the relevant systemic incentives and goals, a system of authoritative Supreme Court interpretation of the Constitution will produce better results, in the aggregate and in the long term, than a system in which each judge, each legislator, and each executive official may decide for himself or herself what the Constitution means.

LARRY ALEXANDER
FREDERICK SCHAUER
(2000)

(SEE ALSO: *Religious Freedom Restoration Act.*)

Bibliography

ALEXANDER, LARRY and SCHAUER, FREDERICK 1997 On Extrajudicial Constitutional Interpretation. *Harvard Law Review* 110:1359–1387.

DEVINS, NEAL and FISHER, LOUIS 1998 Judicial Exclusivity and Political Instability. *Virginia Law Review* 84:83–106.

NAGEL, ROBERT F. 1998 Judicial Supremacy and the Settlement Function. *William and Mary Law Review* 39:849–864.

PAULSEN, MICHAEL STOKES 1994 The Most Dangerous Branch: Executive Power to Say What the Law Is. *Georgetown Law Journal* 83:217–345.

SYMPOSIUM 1987 Perspectives on the Authoritativeness of Supreme Court Opinions. *Tulane Law Review* 61:977–1095.

## NONMARITAL CHILDREN

Beginning with *Mills v. Hableutzel* (1982), the Supreme Court invalidated a series of laws that sharply limited the time during which a paternity suit might be brought to secure child support from the father of a child born outside marriage. In *Mills*, a Texas law imposed a limitation of one year from the birth of the child; the state imposed no limit on the time in which such a suit could be brought against the father of a child born within marriage. The Court was unanimous in striking down the law, and five Justices added their view that even a longer limitations period might be invalid. In *Pickett v. Brown* (1983) the Court was again unanimous; a two-year limitation imposed by Tennessee was held invalid. These two opinions did little to clear up the confusion in the Court's earlier discussions of the appropriate STANDARD OF REVIEW in cases involving nonmarital children.

In *Clark v. Jeter* (1988), however, the Court—again unanimously—held invalid Pennsylvania's six-year limitation period for such a lawsuit. Now Justice SANDRA DAY O'CONNOR wrote for the Court, explicitly holding that discrimination based on "ILLEGITIMACY" must survive the intermediate scrutiny that the Court had been using in cases of SEX DISCRIMINATION. Perhaps the most remarkable feature of this series of decisions is that Justice WILLIAM H. REHNQUIST (by 1988, Chief Justice) joined in the move to heighten judicial scrutiny, a step he had refused to take in earlier times. Some commentators have detected a move to the center of the Court on the part of the Chief Justice in these cases. His concurrence in the result of the sex discrimination case of UNITED STATES V. VIRGINIA (1996) similarly embraces the intermediate scrutiny standard he had resisted during its formative years.

KENNETH L. KARST
(2000)

## NONTESTIMONIAL COMPULSION

See: Testimonial and Nontestimonial Compulsion

## *NORMAN v. BALTIMORE & OHIO RAILROAD COMPANY*

See: Gold Clause Cases

## NORRIS, GEORGE W.
(1861–1944)

George William Norris, a progressive Republican from Nebraska, served in the HOUSE OF REPRESENTATIVES from 1903 to 1913. He led the revolt against Speaker Joseph Cannon that, in 1910, broke the power of the speaker to control virtually all legislation in the house. As a United States senator (1913–1943) Norris was the author of the TWENTIETH AMENDMENT, which ended the "lame duck" sessions of Congress, and co-author of the NORRIS-LAGUARDIA ACT (1932), which outlawed YELLOW DOG CONTRACTS and restricted use of federal court INJUNCTIONS against labor strikes, and of the TENNESSEE VALLEY AUTHORITY ACT (1933). Norris supported most of President FRANKLIN D. ROOSEVELT's "NEW DEAL" and criticized Supreme Court decisions that held such legislation unconstitutional. Although he favored a constitutional amendment to restrict national JUDICIAL REVIEW, he opposed Roosevelt's plan to pack the Court with pro-administration justices.

DENNIS J. MAHONEY
(1986)

Bibliography

LOWITT, RICHARD 1963–1978 *George W. Norris.* 3 Vols. Syracuse, N.Y.: Syracuse University Press; Urbana, Ill.: University of Illinois Press.

## *NORRIS v. ALABAMA*
294 U.S. 587 (1935)

Clarence Norris, one of the Scottsboro boys (see POWELL V. ALABAMA), on retrial moved to quash the INDICTMENT and trial venire (pool of potential jurors) on the ground that qualified black citizens were systematically excluded from jury service solely on the basis of race. On denial of his motion by the trial judge, Norris was retried and again found guilty. The state supreme court affirmed the JUDGMENT of the trial court that no JURY DISCRIMINATION existed. The Supreme Court, voting 8–0, reversed the judgment after reviewing the evidence for itself for the first time in such a case. The evidence showed that for a generation or more no black person had been called for jury service in the county and that a substantial number of black persons qualified under state law. In an opinion by Chief Justice CHARLES EVANS HUGHES, the Court ruled that the evidence of black exclusion made a *prima facie* case of denial of the EQUAL PROTECTION guaranteed by the FOURTEENTH AMENDMENT. *Norris* began a line of cases that led to the virtual extinction of RACIAL DISCRIMINATION in the composition of juries.

LEONARD W. LEVY
(1986)

## NORRIS-LAGUARDIA ACT
47 Stat. 70 (1932)

Reeling from a string of adverse court decisions, labor saw the Norris-LaGuardia Act of 1932 as Congress's long overdue remedy for Supreme Court antipathy. A panel of experts, including Professor FELIX FRANKFURTER, helped to draft a bill to end the abuse of labor INJUNCTIONS, and, as eventually passed by large majorities in Congress, the act greatly diminished the use of federal injunctions in labor disputes. The act recognized the need for COLLECTIVE BARGAINING and encouraged union formation, ending years of misinterpretation of the spirit, if not the letter, of the CLAYTON ACT. One of the key provisions of the new act (section 4) outlawed the issuance of federal injunctions against those who "whether acting singly or in concert" might strike, aid, or publicize strikes, join unions, or assemble peacefully. YELLOW DOG CONTRACTS, sustained in HITCHMAN COAL COKE COMPANY V. MITCHELL (1917), were also rendered unenforceable (section 3). In DUPLEX PRINTING PRESS COMPANY V. DEERING (1921) the Court had unjustifiably declared that the Clayton Act provision covering labor disputes applied only to related parties, employer and employee, not to those engaged in a secondary boycott. Section 13 rewrote that practice by redefining "labor dispute" so that the parties need no longer be in "proximate relation" to each other. Although the act divested federal courts of injunctive power, it provided exceptions where illegal acts or injury were likely. Moreover, the employers had to make "every reasonable effort" to negotiate a settlement before seeking an injunction (section 8).

The act's explicitly stated purpose was to foster labor's right to organize and act without federal judicial interference. The act created no new substantive rights but enlarged the area in which labor could operate. The act's procedures would be upheld in *Lauf v. E. G. Shinner*

*Company* (1938) and its substance upheld in *New Negro Alliance v. Sanitary Grocery Company* (1938).

DAVID GORDON
(1986)

# NORTH AMERICAN FREE TRADE AGREEMENT

## 32 I.L.M. 296 (Parts One Through Three) 32 I.L.M. 612 (Parts Four Through Eight) (1993)

The North American Free Trade Agreement between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States (NAFTA) was signed on December 17, 1992 by Canadian Prime Minister Brian Mulroney, Mexican President Carlos Salinas de Gortari, and U.S. President GEORGE H. W. BUSH. The U.S. government concluded NAFTA as a congressional–executive agreement, pursuant to a delegation of "fast track" negotiating authority set forth in section 1103 of the Omnibus Trade and Competitiveness Act of 1988 and section 151 of the Trade Act of 1974. The North American Free Trade Agreement Implementation Act—the vehicle for congressional approval and implementation of the Agreement—passed the U.S. HOUSE OF REPRESENTATIVES on November 17, 1993 by a 234–200 margin, and then passed the U.S. SENATE on November 20 by a 61–38 vote. President WILLIAM J. CLINTON signed the bill on December 8, enabling NAFTA to enter into force on January 1, 1994.

NAFTA consists of eight parts organized into twenty-two chapters (plus scores of annexes and schedules), which together liberalize North American trade in goods and services. Whether a good qualifies for the application of NAFTA's trade-liberalizing rules is determined by the Rules of Origin (chapter four). The principle of national treatment must be applied to all qualifying goods and services. Tariffs, quotas, and other trade restrictions on qualifying goods are eliminated over a ten-year period. By eliminating these barriers to "substantially all trade" between the constituent territories, NAFTA is a free trade agreement within the meaning of Article XXIV of the General Agreement on Tariffs and Trade. In addition, NAFTA liberalizes investment rules, requires protection of intellectual property, provides for temporary entry of business persons, and disciplines the parties' customs procedures, government procurement practices, administration of antidumping and countervailing duty laws, use of technical barriers to trade, and application of sanitary and phytosanitary measures. Several academic and government studies suggest that these NAFTA rules are causing a shift of some labor-intensive production to Mexico and some production requiring high-skilled labor to the United States and Canada.

While party governments may employ NAFTA's general dispute settlement procedures (chapter twenty), natural or legal PERSONS other than the party governments generally lack STANDING to participate in NAFTA dispute settlement. However, nationals of the parties may appeal party antidumping or countervailing duty determinations directly to a NAFTA dispute settlement panel (chapter nineteen), and certain disputes between a party and an investor of another party may be settled by binding arbitration (chapter eleven).

The Free Trade Commission, comprising cabinet-level representatives of the parties or their designees, carries out the agreement's implementation, elaboration, and supervision. Commission decisions must be taken by consensus. The commission is serviced by a secretariat that is often referred to as a "virtual secretariat," because each country houses in its capital its own "national Section" of the trinational secretariat.

Environmental and labor concerns associated with North American trade liberalization led to the conclusion of three supplementary international agreements: the North American Agreement on Environmental Cooperation, the Agreement Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, and the North American Agreement on Labor Cooperation.

Of several challenges to NAFTA's constitutionality, three have generated significant debate. First, since congressional debate began on approval and implementation of NAFTA, Laurence Tribe and others have asserted that NAFTA should not have been concluded as a congressional–executive agreement, a device that is nowhere contemplated in the Constitution and that Tribe argues is unconstitutional. Instead, they assert that NAFTA should have been concluded as a TREATY pursuant to Article II, subject to approval by two-thirds of the Senate present—a proportion of Senate support that NAFTA did not garner. Despite this challenge, the prevailing view set forth in the Restatement (Third) of Foreign Relations Law of the United States is that the congressional–executive agreement can be used as an alternative to the treaty method in every instance. Legal scholars Louis Henkin, Myres McDougal, and Detlev Vagts have advanced this latter view at various times in the last fifty years. And in the context of this NAFTA debate, Bruce Ackerman and David Golove offered a political–historical explanation for the development and legitimacy of congressional–executive agreements as interchangeable with treaties.

Second, some have argued that NAFTA's chapter nineteen provision for appeal of a party's antidumping or countervailing duty decision to NAFTA dispute settlement contravenes Article III, which vests "[t]he judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may establish." However, the prevailing view appears to be that chapter nineteen dispute settlement panels are legitimate "courts" because the governmental interest in establishing and maintaining NAFTA outweighs individual traders' interests in review by constitutional courts. Therefore, chapter nineteen would survive the BALANCING TEST set forth in *Commodity Futures Trading Commission v. Schor* (1986).

Finally, some have argued that chapter nineteen of NAFTA contravenes the APPOINTMENTS CLAUSE because chapter nineteen dispute settlement panelists are required to interpret and apply U.S. antidumping and countervailing duty law. Hence, the panelists appear to be "exercising significant authority pursuant to the laws of the United States," which would place them within the definition of "Officers of the United States" set forth in BUCKLEY V. VALEO (1976) and so require compliance with the appointments clause procedure. However, the prevailing view among commentators who advised Congress during the NAFTA debate is that the panels will in actuality be international bodies exercising their authority pursuant to an international agreement, thus rendering the clause inapplicable. Despite the view that chapter nineteen would survive constitutional scrutiny, the NAFTA implementing LEGISLATION did establish special procedures for constitutional challenges to the panel system.

RICHARD H. STEINBERG
(2000)

(SEE ALSO: *Executive Agreement.*)

Bibliography

ACKERMAN, BRUCE and GOLOVE, DAVID 1995 Is NAFTA Constitutional? *Harvard Law Review* 108:799–929.

BELLO, JUDITH H.; HOLMER, ALAN F.; and NORTON, JOSEPH J., eds. 1994 *The North American Free Trade Agreement: A New Frontier in International Trade and Investment in the Americas.* Washington, D.C.: American Bar Association.

BOYER, ETHAN 1996 Article III, the Foreign Relations Power, and the Binational Panel System of NAFTA. *International Tax and Business Lawyer* 13:101–142.

DAVEY, WILLIAM J. 1992 The Appointments Clause and International Dispute Settlement Mechanisms: A False Conflict. *Washington and Lee Law Review* 49:1315–1328.

TRIBE, LAURENCE H. 1995 Taking Text and Structure Seriously: Reflections on Free-Form Method In Constitutional Interpretation. *Harvard Law Review* 108:1221–1303.

## NORTH ATLANTIC TREATY
63 Stat. 2241 (1949)

Following WORLD WAR II, the Soviet Union rapidly expanded its influence in Eastern and Central Europe. Fearing a further "Communist offensive," the West, led initially by Belgium, Canada, France, Luxembourg, the Netherlands, the United Kingdom, and the United States, negotiated the North Atlantic Treaty which, it was hoped, would deter Soviet expansionism. The treaty was signed by twelve countries on April 4, 1949, and presently lists a total of sixteen countries among its signatories. The primary objectives of the treaty are as stated in its preamble: "to promote stability and well-being in the North Atlantic area" and "to unite . . . for collective defense and for the preservation of peace and security." The treaty stipulates that "an armed attack against one or more of the [State] Parties in Europe or North America shall be considered an attack against them all" and that, in the event of such an attack, each State Party shall take "such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area." Some commentators have suggested that this language may effect an unconstitutional delegation of United States authority to declare war. The argument is of minimal concern, however, inasmuch as Article 11 of the treaty provides that all of the treaty's provisions shall be "carried out by the Parties in accordance with their respective constitutional processes." The discretionary language of Article 5 ("such action as it deems necessary") reinforces this conclusion.

BURNS H. WESTON
(1986)

(SEE ALSO: *Status of Forces Agreement; Treaty Power.*)

Bibliography

FOX, WILLIAM T. and SCHILLING, WARNER R., eds. 1973 *European Security and the Atlantic System.* New York: Columbia University Press.

SAULLE, MARIA RITA 1979 *NATO and Its Activities.* Dobbs Ferry, N.Y.: Oceana Publications.

## *NORTHERN PIPELINE CONSTRUCTION COMPANY v. MARATHON PIPE LINE COMPANY*
458 U.S. 50 (1982)

If Congress were to make a wholesale transfer of JURISDICTION over matters within the JUDICIAL POWER of the United States to ADMINISTRATIVE AGENCIES or LEGISLATIVE

COURTS, the result would be a serious risk of undermining the independence of the judiciary. Then, under what circumstances can Congress make any such transfer? The question blurs constitutional doctrine with practical statecraft. In *Marathon* the Supreme Court had an opportunity to illuminate this subject, which has long seemed impervious to light.

In the BANKRUPTCY ACT (1978) Congress created a category of bankruptcy judges, who would hold office not during good behavior (as do judges of CONSTITUTIONAL COURTS) but for fourteen-year terms. The act authorized the bankruptcy judges to decide not only matters peculiar to bankruptcy, such as the marshaling and distribution of assets and the discharge of bankrupts from certain liabilities, but also "related" matters, including actions on behalf of bankrupts against other persons, based on state law. The Supreme Court, 6–3, held that the grant of jurisdiction over the "related" matters exceeded the limits of Article III.

Four Justices concluded that federal jurisdiction over matters not involving "public rights"—dealings between the national government and others, or subject to that government's regulation—must be vested in constitutional courts, with certain limited exceptions. Three Justices espoused balancing Article III's concerns for judicial independence against other practical needs of administering the governmental system. Neither view commanded a majority of the Court, and the doctrinal murk deepened.

KENNETH L. KARST
(1986)

(SEE ALSO: *Thomas v. Union Carbide Agricultural Products Co.*)

## *NORTHERN SECURITIES CO. v. UNITED STATES*
### 193 U.S. 197 (1904)

A bare majority of the Supreme Court, in a broad construction of congressional power under the COMMERCE CLAUSE, upheld the constitutionality of the SHERMAN ANTITRUST ACT as applied to holding companies. The Court thus extended the scope of the Sherman Act to companies not directly engaged in such commerce which nevertheless controlled INTERSTATE COMMERCE.

The formation in 1901 of the Northern Securities Company, a holding company comprising both the Hill-Morgan and the Harriman interests, united parallel competing lines. In March 1902, the government filed an EQUITY suit to dissolve the company. The question was clear: was a holding company, whose subsidiaries' operations were its only connection with interstate commerce, exempt from the Sherman Act? The Court split 5–4 but without a majority opinion.

Justice JOHN MARSHALL HARLAN, for the plurality, followed UNITED STATES V. TRANS-MISSOURI FREIGHT ASSOCIATION (1897) and other cases, arguing that the Sherman Act established competition as a test for interstate commerce. Harlan declared that a combination need not be directly in commerce to restrain it: intent to restrain or potential for restraint was all that was needed, and here potential restraint could be found in the reduction of competition resulting from the holding company's formation. Harlan refused to interpret the statute using the RULE OF REASON. He also broadly construed the commerce clause, curtly dismissing defense allegations that the INJUNCTION violated state sovereignty and the TENTH AMENDMENT. Justice DAVID J. BREWER concurred only in Harlan's result. Abandoning his earlier opinions, Brewer now embraced the rule of reason but concluded that even under that rule the Northern Securities Company clearly constituted an unlawful restraint of trade.

Justices EDWARD D. WHITE and OLIVER WENDELL HOLMES each wrote dissents. The former followed the definition of interstate commerce in UNITED STATES V. E. C. KNIGHT COMPANY (1895), stressing that stock ownership did not place the defendants within the scope of the Sherman Act. Holmes's first written dissent on the Supreme Court emphasized a COMMON LAW reading of the statute. He believed that the holding company device was neither a combination nor a contract in restraint of trade. Holmes asserted that this case so nearly resembled *Knight* as to require no deviation from that opinion.

Counted by THEODORE ROOSEVELT "one of the greatest achievements of my administration because it emphasized the fact that the most powerful men in this country were held to accountability before the law," this decision's importance lay both in Harlan's insistence on the supremacy of federal law and in the reinvigoration of a law that business had hoped the Court rendered ineffectual in *Knight*.

DAVID GORDON
(1986)

Bibliography

APPEL, R. W., JR. 1975 The Case of the Monopolistic Railroadman. In John A. Garraty, ed., *Quarrels That Have Shaped the Constitution.* New York: Harper & Row.

## *NORTHWESTERN FERTILIZER CO. v. HYDE PARK*
### 97 U.S. 659 (1878)

In 1867 the Illinois legislature chartered the company for a term of fifty years to manufacture fertilizer, from dead animals, outside the city limits of Chicago. The nearby village of Hyde Park regarded the company's factory as an

unendurable nuisance, injurious to the public health. Immediately before the legislature chartered the company it empowered the village to abate public nuisances excepting the company. The village passed an ordinance prohibiting the existence of any company engaged in any offensive or unwholesome business within a distance of one mile. The ordinance put the fertilizer company out of business. It invoked its chartered rights against the ordinance, which it claimed violated the CONTRACT CLAUSE.

On the basis of past decisions the Court should have accepted the company's argument, holding that the village had no authority to abate its factory. By a vote of 7–1, however, the Supreme Court ruled that the village had validly exercised its police power to protect the public health. Justice NOAH SWAYNE for the Court declared that the company's charter must be construed narrowly and held that it provided no exemption from liability or nuisances. Swayne quoted from the decision earlier that term in BOSTON BEER CO. V. MASSACHUSETTS in which the Court announced the DOCTRINE of INALIENABLE POLICE POWER. Both cases had the result of weakening the contract clause's traditional protection of chartered rights.

LEONARD W. LEVY
(1986)

## NORTHWEST ORDINANCE
(1787)

This congressional enactment, which applied to the territory northwest of the Ohio River, was the most significant accomplishment of the United States under the ARTICLES OF CONFEDERATION. In effect the ordinance provided for self-government under constitutional law in the TERRITORIES, thus "solving" a colonial problem by avoiding it. The pattern for government, which subsequently was extended to other western territories, allowed for growth from a system of congressional government to statehood and admission to the Union "on an equal footing with the original States, in all respects whatever. . . ." As soon as a district reached a population of 5,000 males of voting age, each one possessing a fifty-acre freehold was entitled to vote for representatives to a general assembly. The assembly had authority to elect a delegate to Congress with the right to debate but not to vote. When the population reached 60,000, the territory could apply for admission as a state, on condition that it had a REPUBLICAN FORM OF GOVERNMENT and a state constitution. Ohio, Illinois, Indiana, Michigan, and Wisconsin were formed out of the Northwest Territory; this ordinance established a model for territorial governance and the admission of other states in the American West.

The ordinance was the first federal document to contain a bill of rights. To extend "the fundamental principles of civil and RELIGIOUS LIBERTY," Congress provided articles that were to have constitutional status, remaining "forever . . . unalterable" except by common consent. These articles guaranteed that the inhabitants of a territory should always be entitled to the writ of HABEAS CORPUS, TRIAL BY JURY, representative government, and judicial proceedings "according to the course of the COMMON LAW" (in effect, a provision for DUE PROCESS OF LAW.) As an extra safeguard the articles encapsulated a provision from MAGNA CARTA by insuring that no person should be deprived of liberty or property "but by the judgment of his peers, or the LAW OF THE LAND." In addition, the articles protected the right to BAIL except in capital cases, enjoined that all fines should be "moderate," and prohibited CRUEL OR UNUSUAL PUNISHMENT. Another article that provided a federal precedent for a similar provision in the BILL OF RIGHTS of the Constitution of the United States dealt with EMINENT DOMAIN: no person's property could be taken except in a public exigency, when he must be fully compensated for its value. The CONTRACT CLAUSE of the Constitution also originated in this ordinance: one article declared that no law should ever be made or have force that in any manner interfered with or affected existing private contracts made in good faith and without fraud. Other articles encouraged "schools and the means of education" and protected Indian lands and liberties. One provision of the ordinance had the effect of reducing sex discrimination in land ownership and preventing the introduction of the law of primogeniture; it ordained that the property of anyone dying intestate (without a will) should be distributed in equal parts to all children or next of kin. The ordinance also protected the religious sentiments and modes of worship of all orderly persons, without exception, and in a precedent-making clause declared, "There shall be neither slavery nor involuntary servitude" in the Northwest Territory or states formed from it. The ordinance, which was probably drafted in the main by RUFUS KING and NATHAN DANE, remains one of the most constructive and influential legislative acts in American history.

LEONARD W. LEVY
(1986)

Bibliography

PHILBRICK, FRANCIS S. 1965 *The Rise of the New West, 1754–1830.* Pages 120–133. New York: Harper & Row.

## *NORTZ v. UNITED STATES*

See: Gold Clause Cases

## NOTICE

When unsure what is right, American society often falls back on a process in which people on all sides of a disputed question have their say before a decision is rendered. Moreover, even if one cannot participate in a governmental decision, our notions of the state require that one know in advance the standards by which officials will judge us. To have one's say or to conform one's behavior to a standard one must know of the proceeding or the standard. Because such knowledge is so essential to this scheme of things, the Constitution at numerous points requires that those affected by governmental actions receive notice.

Clauses as diverse and specific as the requirement that Congress publish a journal and the prohibitions against EX POST FACTO laws and BILLS OF ATTAINDER, as well as the more general requirements of the DUE PROCESS clauses require notice in various circumstances. Because of its generality the due process clause has generated most of the litigation about constitutionally required notice. In PROCEDURAL DUE PROCESS cases courts have struggled to distinguish two situations: those in which persons need have only the *opportunity* of finding out about contemplated government actions, and situations in which they must receive more individualized attention. The maxim that ignorance of the law is no excuse expresses the proposition that the legislature need not tell each of us that it has passed some law. We rely instead on the hope that our legislators represent us and on the opportunity we have to adjust our behavior after the law takes effect. The Supreme Court has, however, required that laws defining criminal acts be sufficiently specific to enable persons who *do* look at them to tell what acts are prohibited.

As the focus of government attention narrows from all citizens (the subject of statutes) to more specific contexts, the Constitution requires more elaborate and specific forms of notice, notice that is often linked with a subsequent hearing. Thus the Court has not required the Colorado legislature to notify all the citizens of Denver before altering their property assessments, but it has required notice (and a hearing) for individual property owners on a block to be assessed on the basis of frontage feet. Similarly with administrative or judicial adjudication: persons whose property or liberty stands in jeopardy must receive notice of the threatened governmental action.

Even in such individual adjudication, however, due process requires only that parties who will be bound by official decisions receive the best notice practicable given the circumstances. For example, in a suit to approve the trustee's stewardship of a common trust fund with more than a hundred beneficiaries, the Court required individual notice only to those beneficiaries who could easily be located; members of the group thus notified shared an interest with the unnotified and would represent them, the Court said in *Mullane v. Central Hanover Bank Trust* (1950).

Once it has notified them with appropriate specificity, government requires much of its citizens; until such notice, however, it can require little.

STEPHEN C. YEAZELL
(1986)

Bibliography

TRIBE, LAURENCE H. 1978 *American Constitutional Law*. Chap. 10. Mineola, N.Y.: Foundation Press.

## NOXIOUS PRODUCTS DOCTRINE

The first step in development of a NATIONAL POLICE POWER was the "noxious products doctrine," which Justice JOHN MARSHALL HARLAN propounded in CHAMPION V. AMES (1903). According to this doctrine, Congress has the power to prohibit INTERSTATE COMMERCE in any item that is so injurious to the public—in this case, lottery tickets—as to pollute the commerce of which it is a part. In HAMMER V. DAGENHART (1918), the doctrine became a limitation on the commerce power: because the products of child labor were not inherently more harmful than those of adult labor, Congress lacked power to forbid their interstate transportation. The doctrine was abandoned after UNITED STATES V. DARBY LUMBER (1941).

DENNIS J. MAHONEY
(1986)

## NUDE DANCING

Is a sexually titillating dance performed in a bar or in a booth at an "adult" bookstore by a totally nude woman speech protected by the FIRST AMENDMENT? Or is it conduct that can be banned by state or local regulation? For decades the Supreme Court avoided deciding this question. For instance, in SCHAD V. VILLAGE OF MT. EPHRAIM (1981) the Court invoked the OVERBREADTH DOCTRINE to invalidate a citywide ban on all live entertainment, including nude dancing in a booth in an adult bookstore. Earlier and more dubiously, the Court in *California v. La Rue* (1972) invoked the state's power under the TWENTY-FIRST AMENDMENT to regulate alcohol as a basis for upholding a ban on nude dancing in places where liquor was served—a rationale subsequently disavowed in *44 Liquormart v. Rhode Island* (1996). It was not until 1991, in *Barnes v. Glen Theatre, Inc.*, that the Court finally reached the merits of the FREEDOM OF SPEECH issues raised by the prohibition of nude dancing. The Court held that although totally nude dancing was expressive conduct entitled to

some First Amendment protection, it could nonetheless be banned. The Court in *Barnes* was sharply divided, both as to result and rationale. Five justices (Chief Justice WILLIAM H. REHNQUIST, and Justices SANDRA DAY O'CONNOR, ANTHONY M. KENNEDY, ANTONIN SALIA, and DAVID H. SOUTER) held that Indiana could constitutionally apply its general ban on public nudity to forbid totally nude dancing in bars and adult bookstores. Four Justices (BYRON R. WHITE, THURGOOD MARSHALL, HARRY A. BLACKMUN, and JOHN PAUL STEVENS) found that applying the ban on public nudity to nude dancing violated the First Amendment.

Although four opinions were issued in *Barnes*, no opinion spoke for a majority. Writing for a plurality consisting of himself, Kennedy, and O'Connor, Rehnquist grudgingly acknowledged that nude dancing was expressive conduct "within the outer perimeters of the First Amendment [although] only marginally so." As such it was entitled to the protection provided by the four-part test of UNITED STATES V. O'BRIEN (1968). Under *O'Brien*, regulation of expressive conduct will be upheld if "it is within the constitutional power of government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Applying *O'Brien*, the PLURALITY OPINION found Indiana's ban on public nudity constitutional "despite its incidental limitations on some expressive activity." The prohibition reflected "moral disapproval of people appearing nude among strangers in public places." The plurality found that the ban on public nudity was thus "clearly within the constitutional power of the state" and that it "furthers a substantial government interest in protecting order and morality." The plurality also concluded that this interest was "unrelated to the suppression of free expression." Rehnquist's opinion rejected the argument that the reason Indiana applied its ban on public nudity to nude dancing was to prevent its erotic message, emphasizing that the state equally prevents public nudity with little, if any, erotic message, such as nude sunbathing on public beaches. "Public nudity is the evil the State seeks to prevent," explained the Chief Justice, "whether or not it is combined with expressive activity." Finally, the plurality concluded that "the incidental restriction on First Amendment freedom [was] no greater than is essential to the furtherance of the governmental interest." The prohibition on public nudity, the plurality explained, "is not a means to some greater end, but an end in itself." Additionally, the restriction was in the plurality's view "narrowly tailored," since Indiana required only that the dancers wear "pasties and G-strings," the "bare minimum" (so to speak) "necessary to achieve the State's purpose."

The most controversial part of the plurality's analysis is the holding that the state's interest in promoting morality qualifies as a "substantial or important" justification for banning expressive activity protected by the First Amendment. In support of this holding the plurality relies on two cases, *Paris Adult Theater I v. Slaton* (1973) and BOWERS V. HARDWICK (1986). In both cases the Court held that the state may legitimately enact morals legislation. However, these cases found only that the state's interest in morality supplied a "legitimate" or a RATIONAL BASIS for legislation; neither suggested that this interest was sufficiently weighty to justify the prohibition of a constitutionally protected activity. Thus in *Bowers* it was only after finding that the DUE PROCESS clause of the FOURTEENTH AMENDMENT did not confer a FUNDAMENTAL RIGHT to engage in homosexual sodomy that the Court held that the state's interest in morality provided a rational basis for banning such conduct. Similarly, *Slaton* held only that the state had a "legitimate" interest in promoting morality, and therefore might invoke this interest to ban OBSCENITY, material long held to be without First Amendment protection.

Concurring in the JUDGMENT in *Barnes*, Scalia took a very different approach. Because Indiana's ban on public nudity was a general law regulating conduct and not specifically directed at expression, Scalia would have found the regulation "not subject to First Amendment scrutiny at all." In his view, where there is no constitutional protection of the activity at issue, the state's interest in promoting morality provides a constitutionally sufficient justification for banning the activity. Scalia thus would abandon the "intermediate" level of First Amendment protection extended to expressive conduct by the four-part *O'Brien* test. Such a development would not, he insisted, mean that expressive conduct would be bereft of all First Amendment protection. "Where the government prohibits conduct precisely because of its communicative attributes," Scalia explained, the regulation is unconstitutional. If, on the other hand, the government can adduce some speech-neutral justification for the regulation, such as promoting morality in the case of nude dancing, "that is the end of the matter so far as First Amendment guarantees are concerned." In essence, Scalia would adopt the third part of the *O'Brien* test as the sole criterion for measuring the First Amendment validity of state regulation of expressive conduct. Such limited scrutiny of laws of general applicability despite their impact on fundamental rights would mirror the Court's controversial approach to the First Amendment right of RELIGIOUS LIBERTY under the free exercise clause developed in Scalia's opinion for the Court in EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990).

Souter also concurred in the judgment upholding Indiana's ban on public nudity as applied to nude dancing in bars and adult bookstores. He agreed with the plurality

that nude dancing is entitled to "a degree of First Amendment protection" and that the appropriate level of protection is provided by the four-part *O'Brien* analysis. Unlike the plurality and Scalia, however, Souter did not invoke the state's interest in morality. Rather, he relied exclusively on the state's interest in combating the pernicious "secondary effects" said to be caused by this type of nude dancing, including prostitution and sexual assaults. In RENTON (CITY OF) V. PLAYTIME THEATRES, INC. (1986), the Court found that a city's interest in avoiding similar "secondary effects" provided a legitimate, speech-neutral justification for imposing onerous ZONING requirements on movie theaters showing sexually oriented films. In concluding that this "secondary effects" rationale supported a total ban on activity protected by the First Amendment, however, Souter significantly increased the speech restrictive impact of this rationale.

The four dissenting Justices, in an opinion by White, agreed with the plurality and Souter that the nude dancing at issue was expressive conduct protected by the First Amendment. The DISSENTING OPINION, however, took issue with the plurality's basic premise, shared by Scalia, that Indiana's regulation was a general prohibition of conduct. White pointed out that the ban on nudity did not apply in the home. This observation seems wide of the mark. As Scalia notes, the rationale for the ban was not that nudity was immoral but that *public* nudity was immoral. The dissent offered a stronger argument that the nudity ban was not truly general, claiming that the ban did not apply to nudity in theatrical productions such as "Hair" or to nudity in ballets or operas such as "Salome." The dissent also disagreed with the conclusion that the purpose of the ban was unrelated to the expressive aspect of nude dancing. In the dissent's view it was the "emotions and feelings of eroticism and sensuality" generated by nude dancing that the state sought to regulate, "apparently on the assumption that creating or emphasizing such thoughts and ideas in the minds of spectators may lead to increased prostitution and degradation of women." Consequently, the dissent found Indiana's ban on nude dancing to be an unconstitutional content-based regulation of protected expression.

To the extent that *Barnes* allows the state to ban totally nude dancing in bars and adult book stores, it represents a relatively constrained view of the scope of free speech protection. There are, nonetheless, several speech-protective aspects to this decision. Eight members of the Court found that nude dancing was "expressive conduct" entitled to some degree of First Amendment protection. A clear majority of the Court appeared to reject the plurality's view that the state's interest in promoting morality was sufficient justification for even incidental bans on constitutionally protected expression. Finally, *Barnes* strongly suggests that the state may not constitutionally ban nudity in theatrical productions. Souter, whose vote was necessary to uphold the ban, noted that it would be difficult to see how nudity in productions such as "Hair" and "Equus" could possibly cause harmful "secondary effects." On the other hand, this result can also be read as unjustifiably discriminating between "high brow" entertainment that appeals to the Justices and the "low brow" entertainment of the masses.

JAMES WEINSTEIN
(2000)

Bibliography

BLASI, VINCENT 1992 Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing. *William and Mary Law Review* 33:611–663.

# NULLIFICATION

THOMAS JEFFERSON first suggested the doctrine of nullification in the second Kentucky Resolutions (1799), where he asserted that the sovereign states are the only proper judges of whether the federal government has violated the Constitution and "that a nullification . . . [by] those sovereignties, of all unauthorized acts . . . is the rightful remedy." (See VIRGINIA AND KENTUCKY RESOLUTIONS.) In the 1820s, South Carolinians Robert J. Turnbull and Whitemarsh Seabrook laid the doctrinal foundations of an expanded nullification argument by denouncing the expansion of federal authority. In *Consolidation* (1824), THOMAS COOPER argued that the states remained independent sovereigns, having given only limited and express powers to Congress.

JOHN C. CALHOUN systematized and refined the Carolinians' constitutional arguments. He maintained that the people of the separate states never relinquished their SOVEREIGNTY, and that sovereignty was indivisible. In ratifying the Constitution, the states created a government of limited, specified, and delegated authority. Calhoun used the legal doctrine of agency to explain the federal relationship: "The States . . . formed the compact, acting as sovereign and independent communities. The General Government is but [their] creature . . . a government emanating from a compact between sovereigns . . . of the character of a joint commission . . . having, beyond its proper sphere, no more power than if it did not exist." ("Address on the Relation of the States and the Federal Government," 1831.) When the federal government (the agent) exceeded its authority, the states (the principals), in the exercise of their sovereign power, could "interpose" their authority by nullifying the federal statute or action, which would be void in the nullifying states. If three-fourths of the other

states adopted a constitutional amendment empowering the federal government to perform the nullified act, the state then had the choice of acquiescing or of withdrawing from the compact (the federal Constitution) by SECESSION. But Calhoun emphasized that nullification was a peaceable alternative, not a preliminary step, to secession.

Calhoun's theory found application in a dispute, ostensibly over protective tariffs, that produced the Nullification Crisis of 1832. For a decade, Carolinians had declared that their objections to specific federal programs such as INTERNAL IMPROVEMENTS or the national bank were merely specific parts of a larger objection to federal intrusion into the states' internal autonomy. The antitariff struggle was, in James Henry Hammond's metaphor, a "battle at the outposts" to prevent an assault on the real "citadel," slavery. When the Tariff of 1832 failed to meet Carolinian demands for an abrogation of the 1828 Tariff of Abominations, a South Carolina convention adopted an ordinance nullifying it and prohibiting its enforcement in the state.

President ANDREW JACKSON reacted forcefully. In his "Proclamation to the People of South Carolina" (1832), he denounced the theory of secession, insisting that the federal government was a true government to which the states had surrendered a part of their sovereignty. (See JACKSON'S PROCLAMATION.) "Disunion by armed force is treason," he warned. Congress enacted the FORCE ACT (1833), which provided for alternative means of collecting the tariff in South Carolina and enhanced the president's power to use militia and regular forces to suppress resistance to federal authority. Congress also began a downward revision of the tariff. With the crisis over the tariff assuaged, the South Carolina legislature denounced Jackson's "Proclamation" and a subsequent convention made the empty gesture of nullifying the Force Act.

In 1837, Calhoun offered six congressional resolutions that would have opened all federal TERRITORIES to slavery. Congress adopted four of these, including one declaring that the federal government was only a "common agent" of the states and possessed only "delegated" powers. But antislavery agitation in the North increased, and many Northerners endorsed the WILMOT PROVISO (1846), which would have excluded slavery from the territories acquired as a result of the Mexican War. To meet this threat, other southern radicals, including Robert Barnwell Rhett, Edmund Ruffin, and William Lowndes Yancey, turned to secession, which subsumed nullification.

Though the Union victory in the CIVIL WAR left the doctrines of state sovereignty, INTERPOSITION, nullification, and secession all defunct, southern political leaders briefly and ineffectually exhumed interposition theories during efforts in the late 1950s to thwart desegregation in southern universities and schools.

WILLIAM M. WIECEK
(1986)

Bibliography

CURRNET, RICHARD W. N. 1963 *John C. Calhoun.* New York: Washington Square Press.

FREEHLING, WILLIAM W. 1965 *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836.* New York: Harper & Row.

## NULLIFICATION CONTROVERSY

See: Constitutional History, 1829–1848

# O

## *OBITER DICTUM*

(Latin: "Said in passing.") In an opinion, a judge may make observations or incidental remarks. Because these comments are unnecessary to the DECISION, they are not a part of the HOLDING and thus do not bind the court in later cases. Such statements are often referred to by the plural, dicta.

DAVID GORDON
(1986)

## OBLIGATION OF CONTRACTS

The CONSTITUTIONAL CONVENTION OF 1787, engaged as it was in producing a frame of national government, provided in the Constitution for only a very few restrictions on the LEGISLATIVE POWER of the STATES. Among these was the proscription of any state law impairing the obligation of contracts; that the delegates omitted to include a similar prohibition as to Congress is attributable entirely to the fact that they did not contemplate the existence of national contract law. The phrase "obligation of contracts" did not exist as a term of art, but originated in the Constitution; its meaning is not as obvious as it may seem.

The moral obligation of contracts derives from the voluntary agreement of parties who promise to perform certain duties in exchange for some valuable consideration. In the NATURAL RIGHTS political philosophy of the Framers of the Constitution, the obligation to obey the law itself derives from a SOCIAL COMPACT, in which the individual obliges himself to obey in exchange for the state's guarantee of security for his life, liberty, and property. The moral obligation of contracts, of course, cannot be impaired by state law.

But contracts are also legally binding under the COMMON LAW (as modified from time to time by statute). One of the things that induces men to enter into contracts is the knowledge that the state, by its courts and officers, stands ready to enforce the contractual duties undertaken by the parties. This knowledge is especially important when, as in contracts for lending money, one party will have already performed his side of the bargain while the promise of the other party remains "executory," that is, to be performed in the future. The CONTRACT CLAUSE of the Constitution was intended to prevent state law from undermining the enforceability at law of obligations voluntarily entered into.

The Framers of the Constitution well knew the temptation to repudiate obligations improvidently undertaken. SHAYS' REBELLION, which had just been suppressed in Massachusetts, had been directed against judicial enforcement of farm mortgage loans. The CONTINENTAL CONGRESS, sitting at the same time as the Convention, recognized the same danger and wrote into the NORTHWEST ORDINANCE a provision that "no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed."

The history of the constitutional guarantee against impairment of contracts has been the story of slow, but steady, erosion. Much of the erosion has been effected by limiting the extent of the legal obligation or by discovering remedies that purport to leave the obligation intact while depriving the obligee of the benefit of his bargain. In STURGES V. CROWNINSHIELD (1819) Chief Justice JOHN MARSHALL defined

the obligation of a contract as "the law which binds the parties to perform their agreement." Subsequently, in OGDEN V. SAUNDERS (1827), over Marshall's vigorous dissent, the majority held that the "law" in Marshall's definition was the municipal law of contracts in force where and when the contract was entered into, which local law became part of the contract regardless of any contrary intent of the parties to it. The legislature (or courts) may alter the law of contracts so long as the alteration is prospective in effect. Even after *Ogden v. Saunders*, however, the Supreme Court continued to read the contract clause as proscribing retroactive state legislation affecting contracts.

In times of economic distress, when the number of debtors exceeds the number of creditors, the majority tends to use the political process to shield itself from the consequences of improvident engagements. When the economic hardship is prolonged, even constitutional barriers may be unable to withstand the pressure for relief. Under such pressure, courts have held debtors' relief legislation constitutional by distinguishing the obligation of the contract from the remedies available when the contract is breached. Thus, for example, in HOME BUILDING AND LOAN COMPANY V. BLAISDELL (1933) the HUGHES COURT held that a state law extending the contractual time for repayment of mortgage loans and precluding creditors from exercising their contractual right to sell the mortgaged property to satisfy the debt did not impair the obligation of the loan contract (because the debtor still owed the money) but merely altered the remedy. This sophistical holding permitted the form of the constitutional guarantee to endure even as its substance drained away.

In recent years the Court has partially repudiated the rationale of *Blaisdell* and has revived the contract clause as a check on state ECONOMIC REGULATION. In UNITED STATES TRUST CO. V. NEW JERSEY (1977) as regards public contracts, and in ALLIED STRUCTURAL STEEL CO. V. SPANNAUS (1978) as regards private contracts, the Court subjected statutes that apparently impaired the obligation of contracts to a higher STANDARD OF REVIEW than is commonly applied to economic legislation.

DENNIS J. MAHONEY
(1986)

Bibliography

FRIED, CHARLES 1981 *Contract as Promise: A Theory of Contractual Obligation.* Cambridge, Mass.: Harvard University Press.

## *O'BRIEN, UNITED STATES v.*
391 U.S. 367 (1968)

The *O'Brien* opinion is today widely cited in briefs and judicial opinions defending governmental action against claims of violation of the FREEDOM OF SPEECH. In 1965 Congress amended the SELECTIVE SERVICE ACT to make it a crime to destroy or mutilate a draft registration card. The amendment's legislative history made clear that it was aimed at antiwar protest, but the Supreme Court nonetheless upheld, 8–1, the conviction of a protester for DRAFT CARD BURNING, rejecting his FIRST AMENDMENT claims.

Writing for the Court, Chief Justice EARL WARREN assumed that SYMBOLIC SPEECH of this kind was entitled to First Amendment protection. However, he announced a doctrinal formula now dear to the hearts of government attorneys, a formula that seemed to apply generally to all First Amendment cases: "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

This very case seemed appropriate for application of the formula to overturn the protesters' conviction, but it was not to be. Here, Warren said, the power of the federal government to "conscript manpower" was clear; further, he placed great importance on the government's interests in keeping draft cards intact. As for the purpose to suppress expression, the Chief Justice took away what he had just given to First Amendment challengers: the Court should not inquire, he said, into possible improper congressional motivations for an otherwise valid law. (See LEGISLATION.) Finally, he said, the government's interests could not be served by any less restrictive means.

It is hard to avoid the conclusion that the Justices, embattled on political fronts ranging from SEGREGATION to school prayers, thought it prudent not to add to the Court's difficulties a confrontation with Congress and the President over the VIETNAM WAR. Justice WILLIAM O. DOUGLAS, however, dissented alone on the ground that the Court should consider the constitutionality of military CONSCRIPTION in the absence of a DECLARATION OF WAR by Congress.

KENNETH L. KARST
(1986)

Bibliography

ELY, JOHN HART 1975 Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis. *Harvard Law Review* 88:1482–1508.

NIMMER, MELVILLE B. 1973 The Meaning of Symbolic Speech under the First Amendment. *UCLA Law Review* 21: 29–62.

## *O'BRIEN v. BROWN*
409 U.S. 1 (1972)

This decision involved challenges to the unseating of delegates to the Democratic National Convention. The Supreme Court refused to decide the case and stayed the lower court's decision, since the full convention had not met on the question and little time was available to decide delicate, "essentially political" issues. Three Justices dissented.

WARD E. Y. ELLIOTT
(1986)

## O'BRIEN FORMULA

The Supreme Court has occasionally stated that the test set out in UNITED STATES V. O'BRIEN (1968) should be employed in cases involving the content-neutral regulation of speech. Under that test such a regulation is "sufficiently justified if it furthers an important or substantial government interest . . . and if the incidental restriction on alleged FIRST AMENDMENT freedoms is no greater than is essential to the furtherance of that interest."

Current doctrine is more complicated than such statements imply. First, the *O'Brien* test often is not employed in important cases involving content-neutral regulations. For example, when speakers seek access to government property, the Court turns to a body of tests and rules that fall under the heading of PUBLIC FORUM doctrine. The *O'Brien* test has been largely absent from the opinions in those cases.

Second, even when the *O'Brien* test is applied, the Court often deviates from the test's original language in ways that seem to make the test more speech-protective. For example, the *O'Brien* test implies that the furtherance of a substantial state interest by the appropriate means *always* outweighs the interest in FREEDOM OF SPEECH. But the Court will sometimes ask whether the government interest is *sufficiently* substantial to justify the effect of the ordinance on expression. In addition, the Court may consider factors not mentioned in the test—principally, the adequacy of alternative channels of communication.

Nonetheless, the Court's application of the test has been less rigorous than its wording might connote. Indeed, some commentators have been led to suggest that the *O'Brien* test really means that the government always wins. This is a plausible reading of the test's treatment in the Supreme Court, but not of its treatment in the lower courts. In fact, the *O'Brien* test is simply a mangled attempt to state that courts should consider competing interests and arrive at appropriate decisions.

STEVEN SHIFFRIN
(1992)

Bibliography

SHIFFRIN, STEVEN H. 1990 *The First Amendment, Democracy, and Romance.* Cambridge, Mass.: Harvard University Press.

## OBSCENITY

Obscenity laws embarrass ALEXIS DE TOCQUEVILLE's claim that there is "hardly a political question in the United States which does not sooner or later turn into a judicial one." It is not merely that the obscenity question became a serious judicial issue rather much later than sooner. It is that the richness of the questions involved have been lost in their translation to the judicial forum.

Obscenity laws implicate great questions of political theory including the characteristics of human nature, the relationship between law and morals, and the appropriate role of the state in a democratic society. But these questions were barely addressed when the Court first seriously considered a constitutional challenge to obscenity laws in the 1957 cases of ROTH V. UNITED STATES and *Alberts v. California.*

The briefs presented the Court with profoundly different visions of FIRST AMENDMENT law. Roth argued that no speech including obscenity could be prohibited without meeting the CLEAR AND PRESENT DANGER test, that a danger of lustful thoughts was not the type of evil with which a legislature could be legitimately concerned, and that no danger of antisocial conduct had been shown. On the other hand, the government urged the Court to adopt a balancing test that prominently featured a consideration of the value of the speech involved. The government tendered an illustrative hierarchy of nineteen speech categories with political, religious, economic, and scientific speech at the top; entertainment, music, and humor in the middle; and libel, obscenity, profanity, and commercial PORNOGRAPHY at the bottom. The government's position was that the strength of public interest needed to justify speech regulation diminished as one moved down the hierarchy and increased as one moved up.

In response to these opposing contentions, the Court took a middle course. Relying on cases like BEAUHARNAIS V. ILLINOIS (1952), the Court seemed to embrace what HARRY KALVEN, JR., later called the TWO-LEVEL THEORY of the First Amendment. Under this theory, some speech is beneath the protection of the First Amendment; only that speech within the amendment's protection is measured by the clear and present danger test. Thus some speech is at the bottom of a two-level hierarchy, and the *Roth* Court sought to explain why obscenity deserved basement-level nonprotection.

History, tradition, and consensus were the staple of the Court's argument. Justice WILLIAM J. BRENNAN explained

that all "ideas having even the slightest redeeming social importance" deserve full First Amendment protection. But, he said, "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." Then he pointed to the consensus of fifty nations, forty-eight states, and twenty obscenity laws passed by the Congress from 1842 to 1956. Finally, relying on an OBITER DICTUM from CHAPLINSKY V. NEW HAMPSHIRE (1942), the Court explained that obscene utterances "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

From the perspective of liberal, conservative, or feminist values, the Court's reliance on the *Chaplinsky* quotation amounts to a cryptic resolution of fundamental political questions. Liberals would advance several objections. Some would suggest that the Court underestimates the contribution to truth made by sexually oriented material. David Richards, for example, has suggested that

> pornography can be seen as the unique medium of a vision of sexuality . . . a view of sensual delight in the erotic celebration of the body, a concept of easy freedom without consequences, a fantasy of timelessly repetitive indulgence. In opposition to the Victorian view that narrowly defines proper sexual function in a rigid way that is analogous to ideas of excremental regularity and moderation, pornography builds a model of plastic variety and joyful excess in sexuality. In opposition to the sorrowing Catholic dismissal of sexuality as an unfortunate and spiritually superficial concomitant of propagation, pornography affords the alternative idea of the independent status of sexuality as a profound and shattering ecstasy [1974, p. 81].

Even some liberals might find these characterizations overwrought as applied to Samuel Roth's publications, such as *Wild Passion* and *Wanton by Night*. Nonetheless, many of them would argue that even if such publications have no merit in the MARKETPLACE OF IDEAS, individuals should be able to decide for themselves what they want to read. Many would argue along with JOHN STUART MILL that "[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." Such a principle is thought to advance the moral nature of humanity, for what distinguishes human beings from animals is the capacity to make autonomous moral judgments. From this perspective, the *Roth* opinion misunderstands the necessity for individual moral judgments and diminishes liberty in the name of order without a proper showing of harm.

Conservatives typically agree that humans are distinguished from animals by their capacity to make rational moral judgments. They believe, however, that liberals overestimate human rational capacity and underestimate the importance of the state in promoting a virtuous citizenry. Moreover, they insist that liberals do not sufficiently appreciate the morally corrosive effects of obscenity. From their perspective, obscenity emphasizes the base animality of our nature, reduces the spirituality of humanity to mere bodily functions, and debases civilization by transforming the private into the public. As Irving Kristol put it, "When sex is a public spectacle, a human relationship has been debased into a mere animal connection."

Feminists typically make no objection to erotic material and make no sharp separation between reason and passion. Their principal objection is to the kind of sexually oriented material that encourages male sexual excitement in the domination of women. From their perspective, a multibillion dollar industry promotes antifemale propaganda encouraging males to get, as Susan Brownmiller put it, a "sense of power from viewing females as anonymous, panting playthings, adult toys, dehumanized objects to be used, abused, broken and discarded." From the feminist perspective, the *Roth* opinion's reference to the interests in order and morality obscures the interest in equality for women. From the conservative perspective, the opinion is underdeveloped. From the liberal perspective, it is wrongheaded.

Liberals gained some post-*Roth* hope from the Court's treatment of the obscenity question in STANLEY V. GEORGIA (1969). In *Stanley* the Court held that the possession of obscenity in the home could not be made a criminal offense without violating the First Amendment. More interesting than the holding, which has since been confined to its facts, was the Court's rationale. The Court insisted that "our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." It denied the state any power "to control the moral content of a person's thoughts." It suggested that the only interests justifying obscenity laws were that obscene material might fall into the hands of children or that it might "intrude upon the sensibilities or privacy of the general public."

Many commentators thought that *Stanley* would be extended to protect obscene material where precautions had been taken to avoid exposure to children or nonconsenting adults. Indeed such precautions were taken by many theaters, but the Supreme Court (the composition of which had changed significantly since *Stanley*) reaffirmed *Roth* and expanded on its rationale in *Paris Adult Theatre I v. Slaton* (1973).

The Court professed to "hold that there are legislative interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to the juvenile and the passerby. These include the interest of the public in the qual-

ity of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." The Court did not suggest that the link between obscenity and sex crimes was anything other than arguable. It did insist that the "States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole . . . or to jeopardize, in Chief Justice Earl Warren's words, the State's "right . . . to maintain a decent society."

Several puzzles remain after the Court's explanation is dissected. First, "arguable" connections to crime do not ordinarily suffice to justify restrictions of First Amendment liberties. A merely arguable connection to crime supports restriction only if the speech involved is for some other reason outside FirstAmendment protection. Second, as the Court was later to recognize in YOUNG V. AMERICAN MINI THEATRES, INC. (1976), the reference to quality of life, the tone of commerce in the central cities, and the environment have force with respect to all sexually oriented bookstores and theaters whether or not they display obscene films or sell obscene books. The Court in MILLER V. CALIFORNIA (1973) limited the definition of obscenity to that material which the "average person, applying contemporary community standards" would find that "taken as a whole appeals to the prurient interest" and "depicts and describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and which, "taken as a whole, lacks serious literary, artistic, political, or scientific value." No one has suggested that these restrictions on the definition bear any relationship to the tone of commerce in the cities.

Moreover, if the intrusive character of public display were the issue, mail order sales of obscene material should pass muster under the First Amendment; yet there is no indication that the Court is prepared to protect such traffic. As interpreted in the *Paris Adult Theatre* opinion, *Stanley v. Georgia* appears to protect only those obscene books and films created and enjoyed in the home; the right to use in the home amounts to no more than that. There is no right to receive obscene material—even in plain brown wrappers.

Perhaps least convincing is the Court's attempt to harmonize its *Paris Adult Theatre* holding with liberal thought. It claims to have no quarrel with the court's insistence in *Stanley* that the state is without power "to control the moral content of a person's thoughts." Because obscene material by the Court's definition lacks any serious literary, artistic, political, or scientific value, control of it is said to be "distinct from a control of reason and the intellect." But this is doubletalk. The power to decide what has serious artistic value is the power to make moral decisions. To decide that material addressing "reason" or the "intellect" is all that is important to human beings is ultimately to make a moral decision about human beings. Implicit in the latter idea, of course, is the belief that the enjoyment of erotic material for its own sake is unworthy of protection. But the view is much more general. The Court supposes that human beings have a rational side and an emotional side, that the emotional side needs to be subordinated and controlled, and that such suppression or control is vital to the moral life. That is why the Court believes that the contribution of obscenity to truth is outweighed by the state's interest in morality. The Court's insistence on the right to maintain a decent society is in fact an insistence on the state's interest in the control of the "moral content of a person's thoughts."

Finally, it is simply dazzling for the Court to suggest that the states are engaged in a "morally neutral" judgment when they decide that obscene material jeopardizes the right to maintain a decent society. When states decide that "a sensitive key relationship of human existence, central to family life, community welfare, and the development of human personality can be debased and distorted by commercial exploitation of sex," they operate as moral guardians, not as moral neutrals. Nonetheless, the Courts' bows to liberal theory in *Paris Adult Theatre* are revealing, and so are the guarded compromises of the obscenity test adopted in *Miller v. California.* The bows and compromises reflect, as do the opinions of the four dissenting Justices in *Paris Adult Theatre*, that America is profoundly divided on the relationship of law to morality and on the meaning of free speech. Since *Paris Adult Theatre* and *Miller*, and despite those decisions, the quantity of erotic material has continued to grow. At the same time, feminist opposition to pornography has ripened into a powerful political movement. The Supreme Court's decisions have neither stemmed the tide of commercial pornography nor resolved the divisions of American society on the issue. These political questions will continue to be judicial questions.

STEVEN SHIFFRIN
(1986)

Bibliography

CLOR, HARRY M. 1969 *Obscenity and Public Morality.* Chicago: University of Chicago Press.

KALVEN, HARRY, JR. 1960 The Metaphysics of the Law of Obscenity. *Supreme Court Review* 1960:1–45.

LEDERER, LAURA, ed. 1980 *Take Back the Night: Women on Pornography.* New York: Bantam Books.

RICHARDS, DAVID A. J. 1974 Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment. *University of Pennsylvania Law Review* 123:45–99.

## OCEAN LAW AND THE CONSTITUTION

Constitutional adjudication in the field of admiralty law has always taken account of rules and principles accepted as "customary law" in the jurisprudence of INTERNATIONAL LAW. Outside the admiralty field, however, the Supreme Court has seldom been inclined to engage in any systematic engrafting of substantive doctrines from international law into the fabric of American law. Hence, it is remarkable to find that in cases requiring the Court to rule on the physical boundaries of individual states of the Union—that is to say, in performing one of its most basic functions, as "umpire" of the federal system—the Court has relied on evolving international law as the basis for such important decisions.

The cases in question include *United States v. California* (1965), the Texas and Louisiana Boundary Cases of 1969 (*United States v. Louisiana et al.*), and *United States v. Alaska* (1997). In each of them, the Court decided disputes between the federal government and state governments concerning the outermost seaward boundaries of those states' jurisdiction. At issue was the ownership of submerged land, beyond the physical limits of the coastline; the economic stakes were high, because of the value of offshore oil deposits in the beds of the offshore waters. In each instance, the state sought to validate a claim as proprietor of the submerged lands, hoping to gain the advantage of substantial potential oil revenues that would otherwise go to the federal government.

Specifically at issue in all four cases was interpretation of two 1953 statutes, the Submerged Lands Act and the Outer Continental Shelf Lands Act, by which Congress had ceded to the coastal states title to submerged lands (together with their oil deposits and other resources) out to a limit of three miles beyond the coastline. Congress's intent, in these statutes, was to "correct" the decision of the Court in *United States v. California* (1947), in which the Court had ruled that the national government had "paramount rights" in all offshore waters and their resources, out to whatever limit the President and Congress declared to be the outer seaward boundary of the nation's jurisdiction. What remained at issue, once Congress had thus granted to the states title to submerged land out to three miles, was the question of exactly how to define "coastline" for purposes of measuring to the mandated offshore boundary.

In each of the four cases, the Court relied on an international agreement, the 1958 Convention on the Territorial Sea and the Contiguous Zone, which had been ratified by the United States in 1964, as providing "the best and most workable definitions available." Over Justice HUGO L. BLACK's objections in dissent that Congress had intended to leave this delicate and (in his view) purely domestic question in the hands of a federal executive agency, the Court's majority in the 1969 cases declared that Congress had deliberately left to the judiciary final authority in the matter of defining offshore boundaries.

With regard to eroded shorelines, dredged channels into the sea, and elevations that emerged only during low tide, among other questions regarding physical features of the coast and offshore waters, the Court relied for its definitions not only on language in the 1958 convention itself but also—most extraordinarily—upon the "legislative history" behind that agreement; specifically, the 1958 report of the International Law Commission. This commission had been charged by the United Nations to develop a draft for the convention, together with scholarly commentary on customary law and general principles applicable to the definition of coastlines. Thus, the Court relied on technical discussion in the commission's report and its draft convention text as determinative evidence of the meaning of otherwise ambiguous or perplexing language in the convention as to the coastline boundary definition. Deciding in favor of the federal government in all four cases, the Court also relied on the convention and general principles of international ocean law to reassert the authority of the national government, as ultimate sovereign responsible for foreign policy, to exercise discretion in selecting from among the options available to it under the terms of the convention.

In 1994, the codification of ocean law as a distinctive branch of international law advanced dramatically with the entering into force of the United Nations Convention on the Law of the Sea (UNCLOS), first opened for signature in 1982. This convention specifies duties and responsibilities of signatory states across the entire spectrum of ocean uses (fisheries, navigation, naval power, scientific research, environmental protection), and also establishes the legitimacy of a 200-mile "exclusive economic zone" offshore of coastal and island states.

President RONALD REAGAN refused to sign the UNCLOS agreement, objecting to the convention's establishment of collective international management and revenue rights in high-seas ocean bed resources beyond the 200-mile limit; but he declared that the other terms of UNCLOS were already established as customary law and would be honored as such by the United States. Although President WILLIAM J. CLINTON did sign UNCLOS in 1994, the Republican majority in the U.S. SENATE declined to debate it, or even to hold committee hearings, because of the intransigent opposition of some key senators to the convention's terms as a potential threat to American SOVEREIGNTY in ocean affairs. Especially controversial was UNCLOS's establishment of a United Nations International Tribunal for the

Law of the Sea, with power to interpret the convention's terms and with jurisdiction in cases arising under the agreement. Hence, even after the convention was essentially amended by a new agreement in 1994, eliminating the collectivist terms that Reagan had found objectionable as to seabed resource exploitation, the United States remained in 1999 formally a nonparticipant standing outside the processes and framework of one of the most important and far-reaching innovations in international law in modern history.

HARRY N. SCHEIBER
(2000)

Bibliography

BRISCOE, JOHN 1995 The Division of America's Offshore Zones as Between Nation and States. In *Implications of Entry into Force of the Law of the Sea Convention for U.S. Ocean Governance.* Newark, Del.: Ocean Governance Study Group and the University of Delaware.

SCHEIBER, HARRY N. and CARR, CHRIS 1992 Constitutionalism and the Territorial Sea: An Historical Study. *Territorial Sea Journal* 2:67–90.

## O'CONNOR, SANDRA DAY
(1930– )

Sandra Day O'Connor, the first woman Justice to serve on the Supreme Court, was appointed by President RONALD REAGAN in 1981. She had served previously as the nation's first woman senate majority leader in her home state of Arizona and as a member of the Arizona Court of Appeals. In announcing her nomination the President extolled her as someone who would be a rigid adherent of constitutional principles, taking an exacting view of the SEPARATION OF POWERS as a limitation on JUDICIAL ACTIVISM, and respecting the role of FEDERALISM in the constitutional scheme. Although there is little doubt that one motivation in appointing O'Connor was to deprive the Democrats of the opportunity of appointing the first woman Justice, the President's expectations have, by and large, not been disappointed.

For O'Connor constitutional jurisprudence means, above all, an adherence to enduring constitutional principles, recognizing that, while the application of these principles may change, the principles themselves are rooted in the constitutional text and in the precepts that animate the Constitution. In her dissent in *Akron v. Akron Center for Reproductive Health* (1983), O'Connor complained that the majority's decision rested "neither [on] sound constitutional theory nor [on] our need to decide cases based on the application of neutral principles." It is not entirely clear yet whether the Justice mistakenly identifies constitutional principles with "neutral principles." Her opinions generally indicate an awareness that the Constitution is not neutral with respect to its ends and purposes. She has refused to accept the prevailing view that the Constitution is merely a procedural instrument that is informed by no purposes or principles beyond the procedures themselves.

In CRIMINAL PROCEDURE cases O'Connor has adhered to the principle she enunciated in KOLENDER V. LAWSON (1983): "Our Constitution is designed to maximize individual freedoms within a framework of ORDERED LIBERTY. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression." The Justice has used this rationale to resist unwarranted attempts to expand criminal DUE PROCESS rights beyond those clearly prescribed or fairly implied by the Constitution. For example, in OREGON V. ELSTAD (1985) O'Connor refused to extend the FRUIT OF THE POISONOUS TREE doctrine either to uncoerced inculpatory statements made after police violation of the MIRANDA RULES, or as in NEW YORK V. QUARLES (1984), to nontestimentary EVIDENCE produced as a result of a *Miranda* violation. In the latter case O'Connor concluded that Justice WILLIAM H. REHNQUIST's majority opinion had created "a finespun new DOCTRINE on public safety exigencies incident to custodial interrogation, complete with the hair-splitting distinctions that currently plague our FOURTH AMENDMENT jurisprudence." Moreover, dissenting in *Taylor v. Alabama* (1982), O'Connor would not have allowed an illegal ARREST to taint a confession that followed appropriate *Miranda* warnings; nor in *South Dakota v. Neville* (1983) would she allow the claim that the refusal to take a blood-alcohol test is protected by the RIGHT AGAINST SELF-INCRIMINATION.

O'Connor has been no less resolute in her efforts to protect the constitutional role of the states in the federal system. In her dissent in GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985) she remarked that the principle of "state autonomy . . . requires the Court to enforce affirmative limits on federal regulation of the states." The majority opinion, she continued, created the "real risk that Congress will gradually erase the diffusion of power between state and nation on which the Framers based their faith in the efficiency and vitality of our Republic." O'Connor has also staunchly supported the "exhaustion" doctrine of federal HABEAS CORPUS review as a means "to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." The rule that all federal claims must first be exhausted in state court proceedings is, as she wrote in *Engle v. Isaac* (1982), a recognition that "the State possesses primary authority for defining and enforcing the criminal law." She continued that "[f]ederal intrusions into State criminal tri-

als frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." And in HAWAII HOUSING AUTHORITY V. MIDKIFF (1984) O'Connor made clear that the Court would accord the utmost deference to state legislatures in matters of "social legislation."

O'Connor was less deferential, however, in the instance where a state maintained a women-only nursing school. Writing for the majority in MISSISSIPPI UNIVERSITY FOR WOMEN V. HOGAN (1982), O'Connor stated that in "limited circumstances a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." Here, the SEX DISCRIMINATION actually harmed the intended beneficiaries by perpetuating "stereotyped" and "archaic" notions about the role of women in society.

O'Connor has urged the Court to reexamine some important issues connected with the ESTABLISHMENT OF RELIGION clause of the FIRST AMENDMENT. Concurring in WALLACE V. JAFFREE (1985), O'Connor agreed that an Alabama law providing for a moment of silence was unconstitutional because it sought to sanction and promote prayer in public schools. She dissented, however, from the Court's decision in AGUILAR V. FELTON (1985) striking down the use of federal funds to provide remedial education by public school teachers for parochial school students. While agreeing in LYNCH V. DONNELLY (1983) that every governmental policy touching upon religion must have a secular purpose, O'Connor suggested that the entanglement test propounded in LEMON V. KURTZMAN (1971) should be reexamined.

In the area of EQUAL PROTECTION rights, O'Connor has taken the firm stance that rights belong to individuals. In *Ford Motor Company v. Equal Employment Opportunity Commission* (1982), and in her concurring opinion in FIREFIGHTERS LOCAL #1784 V. STOTTS (1984), O'Connor argued that remedies must be limited to those who can demonstrate actual injury and must be fashioned in a way that protects the settled expectations of innocent parties. She thus adheres to the original intention of the framers of the FOURTEENTH AMENDMENT and of the CIVIL RIGHTS ACT OF 1964, reaffirming the principle that lies at the heart of constitutional jurisprudence—that rights belong to individuals and not to the racial or gender group of which they are members. Employing narrowly construed and analytical opinions, O'Connor has begun to build a solid base for the Court's return to a jurisprudence that looks to the articulation of the Constitution's enduring principles.

EDWARD J. ERLER
(1986)

Bibliography

CORDRAY, RICHARD A. and VRADLIS, JAMES T. 1985 The Emerging Jurisprudence of Justice O'Connor. *University of Chicago Law Review* 52:389–459.

O'CONNOR, SANDRA DAY 1981 Trends in the Relationships between the Federal and State Courts from the Perspective of a State Court Judge. *William and Mary Law Review* 22:801–815.

## O'CONNOR, SANDRA DAY
(1930– )
(Update 1)

Sandra Day O'Connor was born in Arizona in 1930. After leaving high school at the age of sixteen, she completed both her undergraduate and law degrees at Stanford University in five years. She spent the next decade as a county attorney and in private practice in Arizona and elsewhere, and she became an Arizona assistant attorney general in 1965. She served in the Arizona state senate from 1969 until 1974, when she moved into the state judiciary—first as a trial judge and later on the state's intermediate court of appeals. President RONALD REAGAN nominated her as the first female Justice of the Supreme Court of the United States in 1981.

O'Connor took the oath of office on September 25, 1981, as the first Supreme Court appointee of the most conservative President since CALVIN COOLIDGE. Not surprisingly, she immediately became part of the conservative wing of the Court, voting with Justice WILLIAM H. REHNQUIST more than ninety percent of the time by 1984. She has continued to be a reliable conservative vote in CRIMINAL PROCEDURE and FEDERALISM cases. After 1984, however, she began striking out on her own in several areas. She became considerably less predictable in cases involving SUBSTANTIVE DUE PROCESS, discrimination, and complex jurisdictional or procedural questions.

By 1989 O'Connor had become a pivotal center vote on the Court. Although this change resulted in part from the appointment of two more conservative Justices, it was also the result of the changes in O'Connor's own views: by 1987 she was voting with Rehnquist only seventy-eight percent of the time. Moreover, during this period O'Connor often wrote separate concurrences and dissents, approaching cases from independent points of view; and by the end of the 1988 term, her originally solo viewpoints commanded majorities in several doctrinal areas. Three topics illustrate both her influence and her central position on the Court: the ESTABLISHMENT CLAUSE of the FIRST AMENDMENT, AFFIRMATIVE ACTION, and CAPITAL PUNISHMENT.

At the time O'Connor joined the Court, establishment clause challenges were virtually always governed by the test of LEMON V. KURTZMAN (1971): a statute violates the establishment clause if it has a primary purpose or a primary effect of advancing or inhibiting religion, or if it causes excessive government entanglement with religion. Beginning with LYNCH V. DONNELLY (1984), O'Connor pro-

posed a "refinement" of the LEMON TEST emphasizing the questions "whether the government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement." Unlike the standard view of the *Lemon* test, which centers on the practical effect of governmental action, O'Connor's test focuses on the communicative or symbolic aspects of that action. Thus, O'Connor would find a constitutional violation when "[e]ndorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

Between 1984 and 1989, O'Connor's application of this principle made her the swing vote in many establishment-clause cases. She provided the fifth vote to uphold a public Christmas display including a crèche in *Lynch v. Donnelly* and to uphold federal funding of religious family-planning organizations in BOWEN V. KENDRICK (1988). She also provided the fifth vote to invalidate a state-mandated moment of silence for meditation or prayer at the beginning of the public school day in WALLACE V. JAFFREE (1985) and to invalidate a public Christmas display of a crèche alone in COUNTY OF ALLEGHENY V. ACLU (1989). In *County of Allegheny*, moreover, she appeared to have converted a majority of the Court to her test, at least where the display of religious symbols is at issue.

O'Connor also fashioned what has become the majority test for constitutional challenges to affirmative action programs. For over a decade, the Court was unable to produce a majority opinion in any constitutional case involving affirmative action. Badly fragmented, the Court could not agree on either the level of scrutiny to be applied to such challenges or the factual prerequisites that might make an affirmative action program valid. Beginning with WYGANT V. JACKSON BOARD OF EDUCATION (1986), O'Connor wrote several separate opinions answering both questions with great specificity: affirmative action programs should be tested by STRICT SCRUTINY, and such scrutiny typically requires that there be a remedial need for the program, shown by some evidence—not necessarily contemporaneous—of prior government discrimination (remedying past societal discrimination is an insufficient governmental interest). In 1989, in RICHMOND (CITY OF) V. J. A. CROSON CO. (1989), O'Connor obtained majority support for her position.

O'Connor has also had a significant influence in cases dealing with the death penalty for juveniles. Although she has not generally been the swing vote in ordinary capital cases, her vote has been crucial in deciding whether the state may execute persons who committed crimes when they were under the age of majority. In THOMPSON V. OKLAHOMA (1988), she voted with the four liberal Justices to overturn a death sentence imposed on a girl who had committed murder at the age of fifteen. O'Connor did not join Justice JOHN PAUL STEVENS's plurality opinion, however, because it categorically denied the constitutionality of executing anyone who was under sixteen when the crime was committed. Instead, O'Connor concluded that the legislature, in failing to set any minimum age limit, did not give proper consideration to a question on which no national consensus existed and, thus, that the penalty was CRUEL AND UNUSUAL PUNISHMENT.

This distinctive approach allowed her to vote the very next year in STANFORD V. KENTUCKY (1989) to uphold death sentences imposed on two juveniles who had committed crimes at the ages of sixteen and seventeen. Again she was the fifth vote, this time combining with the conservative wing of the Court, and again she wrote a separate concurrence basing her decision on a "sufficiently clear . . . national consensus." In a case decided the same day as *Stanford*, PENRY V. LYNAUGH (1989), O'Connor provided the pivotal vote (and wrote the majority opinion) for two separate majorities: one concluding that the Eighth Amendment generally permits the execution of mentally retarded adults and the other reversing the death sentence of the particularly mentally retarded defendant on the ground that the jury instructions deprived the jury of any meaningful opportunity to take the defendant's handicap into account as a mitigating factor.

Finally, O'Connor may prove to be the crucial vote on ABORTION. From 1981 to 1989, O'Connor consistently voted to uphold all antiabortion laws; and in *Akron v. Akron Center for Reproductive Health* (1983), she even wrote that ROE V. WADE (1973) was "on a collision course with itself." In WEBSTER V. REPRODUCTIVE HEALTH SERVICES (1989), however, O'Connor declined to join with the four other Justices wishing to modify *Roe*. Instead, she wrote a separate concurrence upholding the challenged statute under *Roe* itself and explicitly refusing to reach the question of *Roe's* continued validity. Indeed, her earlier opinions had suggested that the Court abandon the trimester approach to abortion and instead ask whether a challenged statute "unduly burdens" a woman's right to an abortion. In *Webster*, Rehnquist's plurality opinion adopted this approach almost verbatim, but O'Connor nevertheless declined to join his opinion.

Two additional trends are evident in O'Connor's opinions. First, she frequently writes separately in order to "clarify" the majority's opinion. Her clarifying concurrences are often attempts to point out the limits of the Court's decision or to minimize the distance between the majority and dissent. In *Wygant*, for example, her concurrence stressed that there was little difference in application between a "compelling" governmental interest and an "important" one and that both majority and dissenting opinions agreed that remedying past discrimination constitutes such an interest. In other cases she has made

a great effort to specify what issues the Court has not decided.

The second common thread during O'Connor's tenure on the Court to date is her tendency to demand fact-specific decision making in a wide variety of contexts. For example, in *Lanier v. South Carolina* (1985), she wrote a separate concurrence to a per curiam opinion on the voluntariness of a confession, stressing that on remand the Court should look at the particular circumstances of the confession. In two cases involving the appropriate state statute of limitations to be borrowed in SECTION 1983 actions, she dissented from nearly unanimous Court decisions imposing a single standard, preferring instead to examine the circumstances of each section 1983 suit (*Wilson v. Garcia* and *Goodman v. Lukens Steel Co.*). In a series of HABEAS CORPUS cases, she wrote majority opinions fashioning a test whereby defendants who could produce evidence of "actual innocence" might avoid the newly strengthened strictures of the "cause and prejudice" test (*Smith v. Murray* and *Murray v. Carrier*). In COY V. IOWA (1988), she concurred in a decision invalidating on CONFRONTATION clause grounds a state statute permitting courts to place a screen between the accused and the accuser in child sexual abuse cases, but refused to join the majortity's conclusion that such screens *always* violate the right to confrontation. In ALLEN V. WRIGHT (1984), she demanded greater specificity by parents seeking STANDING to challenge Internal Revenue Service regulations that they alleged were inadequate to prevent discriminatory private schools from obtaining and keeping charitable exemption status. Finally, her position on affirmative action, noted above, makes clear the need for some factual predicate for the adoption of any affirmative-action plan.

When O'Connor joined the Court in 1981, it was expected that her votes would reflect three influences: her CONSERVATISM would align her with the right wing of the Court, her state legislative background would give her a strong STATES' RIGHTS tilt, and her gender would make her more receptive to claims of SEX DISCRIMINATION. Only the last of these expectations has proved both accurate and significant. Although as already indicated, she has voted conservatively on some issues, in other cases she has followed an independent path. Her deference to state legislatures is reasonably consistent, but she has virtually always been outvoted, as in GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITHY (1985) and *South Dakota v. Dole* (1987).

O'Connor has, however, been a consistent supporter of gender equality. During her tenure on the Court, she has joined the majority—and sometimes provided a crucial vote—in making partnership decisions subject to Title VII (*Hishon v. King Spalding*), declaring sexual harassment as actionable under the same statute (MERITOR SAVINGS BANK V. VINSON), rejecting a PREEMPTION challenge to a state law requiring employers to give pregnancy leave to employees who want one (*California Federal Savings Loan v. Guerra*), upholding discrimination claims based on sexual stereotyping (*Price Waterhouse v. Hopkins*), invalidating an all-female state nursing school (MISSISSIPPI UNIVERSITY FOR WOMEN V. HOGAN), and upholding an affirmative action program for women (JOHNSON V. TRANSPORTATION AGENCY). Only in the area of abortion has her support of women's rights been less consistent.

Thus, after eight years on the Court, O'Connor has proved herself an independent and sometimes unpredictable thinker. It is clear, however, that the first female Supreme Court Justice has already left her mark on the Court and will continue to do so.

SUZANNE SHERRY
(1992)

Bibliography

CORDRAY, RICHARD M. and VRADELIS, JAMES I. 1985 The Emerging Jurisprudence of Justice O'Connor. *University of Chicago Law Review* 52:389–459.

O'CONNOR, SANDRA DAY 1981 Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge. *William and Mary Law Review* 22:801–815.

SHEA, BARBARA C. S. 1986 Sandra Day O'Connor—Woman, Lawyer, Justice: Her First Four Terms on the Supreme Court. *University of Missouri, Kansas City Law Review* 55:1–32.

SHERRY, SUZANNA 1986 Civic Virtue and the Feminine Voice in Constitutional Adjudication. *Virginia Law Review* 72:543–616.

## O'CONNOR, SANDRA DAY
(1930– )
(Update 2)

Sandra Day O'Connor was appointed to the Supreme Court by President RONALD REAGAN in 1981. The first woman appointed to the Court, O'Connor brought to the Court a background in state law and politics. She had served on the Arizona state legislature, eventually ascending to senate majority leader, and had been a member of the Arizona Court of Appeals.

When O'Connor joined the Court in 1981, she and then-Justice WILLIAM H. REHNQUIST were its most conservative members. As the Court's composition has shifted over the intervening years and liberal Justices such as WILLIAM J. BRENNAN, JR., and THURGOOD MARSHALL have been replaced by those with other views, her jurisprudence increasingly has provided a middle ground around which other views can rally.

O'Connor is a strong and highly intelligent individual

with a judicial inclination toward PRAGMATISM. She is committed to applying the Constitution's complex requirements faithfully. She eschews the notion that there is a "Grand Unified Theory" that will cover all cases falling under a particular constitutional clause. On her reading, the Constitution is a practical weapon against tyranny, not the locus of a grand metaphysics. It is also a bulwark against the sacrifice of higher ideals to contemporary pressures. In her words, the Constitution "protects us from our own best intentions. It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."

In key constitutional areas—FEDERALISM, ABORTION regulation, AFFIRMATIVE ACTION, and SEPARATION OF CHURCH AND STATE—the Court's DOCTRINE has evolved toward O'Connor's views.

The Court's federalism jurisprudence has developed in fits and starts over the last twenty years. Influenced in no small part by her experiences as a state legislator and judge, O'Connor is a strong advocate of STATES' RIGHTS and the Constitution's limits on federal powers. The Court's trend toward placing more meaningful limits on Congress's power to regulate the states reflects O'Connor's allegiance to state autonomy in the Constitution's scheme of DUAL FEDERALISM. In NATIONAL LEAGUE OF CITIES V. USERY (1976), the Court, per Rehnquist, struck down the 1974 law that extended the Fair Labor Standards Act to cover employees of state and local governments, on the ground that it impaired the states' sovereign integrity. That decision was OVERRULED less than a decade later in GARCÍA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985), in which O'Connor joined the dissenters who predicted that such an assault on states' rights would not continue to command a majority of the Court. By 1992, O'Connor wrote the majority opinion in NEW YORK V. UNITED STATES (1992), which held that Congress does not have the power to compel states to provide for the disposal of radioactive WASTE within their borders. Her subsequent votes in the Court's leading federalism holdings—UNITED STATES V. LÓPEZ (1995), *Printz v. United States* (1997), *Seminole Tribe v. Florida* (1996), *Florida v. College Savings Bank* (1999), and *College Savings Bank v. Florida* (1999)—and her joinder in the reasoning of the majority in *Boerne (City of) v. Flores* (1997) confirm her allegiance to state autonomy.

From her earliest writings in the abortion cases, O'Connor has characterized the BALANCING TEST established in ROE V. WADE (1973), which weighed the states' legitimate interest in the life of a fetus against a pregnant woman's interest in autonomy, as a requirement that the state may regulate abortion but may not place "undue burdens" upon a woman's desire to obtain an abortion. Although various members of the Court have disagreed over whether *Roe* required STRICT SCRUTINY and whether *Roe* was legitimate, O'Connor has been persistent in her devotion to the undue burden standard as the proper constitutional guide for states attempting to regulate abortion. Consistent with her views on states' rights, the standard creates a great deal of latitude for states to regulate abortion, but does not give states *carte blanche.* She voted to invalidate a state law forcing minors to notify both parents before obtaining an abortion in HODGSON V. MINNESOTA (1990) and to invalidate a state law forcing married women to notify their husbands before obtaining an abortion in PLANNED PARENTHOOD V. CASEY (1992). When the discord at the Court over the validity of *Roe* reached its peak, O'Connor's undue burden test garnered the support of Justices ANTHONY M. KENNEDY and DAVID H. SOUTER. O'Connor, Kennedy, and Souter formed a plurality that voted to reaffirm the "core meaning" of *Roe* (along with liberal Justices Marshall, Brennan, and HARRY A. BLACKMUN). The plurality adopted O'Connor's "undue burden" approach, asserting that the test adhered to *Roe* by retaining its "essential holding."

In an area previously fraught with discord, O'Connor has led the Court to a more consistent position on the constitutionality of race-based affirmative action programs. In RICHMOND (CITY OF) V. J. A. CROSON CO. (1989), she wrote the majority opinion holding that affirmative action plans must be subjected to the strictest of scrutiny and that a city could not constitutionally create preferences for minorities in government contracting in the absence of evidence of a history of RACIAL DISCRIMINATION and proof that the plan was narrowly tailored to remedy the particular history of discrimination. The same reasoning was extended to the federal government in ADARAND CONSTRUCTORS, INC. V. PEÑA (1995) and now governs all affirmative action programs in government employment and in government contracting. The Court's establishment of a more certain test in this arena has prompted a serious reexamination of such programs by the federal and state governments.

Since joining the Court, O'Connor has been the crucial swing vote in the Court's cases addressing the separation of church and state. Three years after joining the Court, she began to advocate a modification of the previously applied LEMON TEST. In LEMON V. KURTZMAN (1971), the Court surveyed ESTABLISHMENT CLAUSE precedent and concluded that a statute violates that clause if it has a primary purpose or effect of advancing or inhibiting religion, or if it causes excessive entanglement between church and state. O'Connor suggested reading this test with an emphasis on "whether the government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement." Endorsement is a constitutional evil, as she explained in LYNCH V. DONNELLY (1984), because it "sends a message to non-adherents that they are outsiders, not

full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

The endorsement test has led O'Connor to draw fine distinctions in the Court's ESTABLISHMENT OF RELIGION cases. She voted to uphold a city's Christmas display that included a crèche in *Lynch* but to invalidate a public Christmas display of a crèche alone in COUNTY OF ALLEGHENY V. AMERICAN CIVIL LIBERTIES UNION (1989). The Court moved toward her endorsement test in LEE V. WEISMAN (1992), which held that a public school graduation prayer was unconstitutional, and followed her reasoning on state aid to church organizations in AGOSTINI V. FELTON (1997), which permitted public school teachers to teach secular subjects on parochial school grounds.

O'Connor also has had considerable influence in cases involving SEX DISCRIMINATION, ELECTORAL REDISTRICTING, HABEAS CORPUS, and CAPITAL PUNISHMENT.

O'Connor's contributions to the United States are not limited to her role as Associate Justice. She is also an ardent advocate of democratization in Eastern Europe. She has spent a great deal of time visiting and advising many of the world's emerging democracies, with special emphasis on the importance of the RULE OF LAW. O'Connor will have made her mark not simply by being the first woman Justice but rather by dint of her strength, intelligence, and contributions to jurisprudence around the world.

MARCI A. HAMILTON
(2000)

(SEE ALSO: *Constitutional History, 1980–1989; Constitutional History, 1989–1999; Rehnquist Court; Religious Liberty; Sovereign Immunity; Voting Rights.*)

Bibliography

COLLECTION 1996 Tribute to Justice Sandra Day O'Connor. *Annual Survey of American Law* 1996:i–1vii.

O'CONNOR, SANDRA DAY 1981 Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge. *William and Mary Law Review* 55:1–32.

SYMPOSIUM 1991 The Jurisprudence of Justice Sandra Day O'Connor. *Women's Rights Law Reporter* 13:53–170.

## *O'CONNOR v. DONALDSON*
### 422 U.S. 563 (1975)

*Donaldson* was initially billed as the case that would decide whether a mental patient held in custody had a constitutional "right to treatment." Ultimately the Court did not decide that issue, but it did make some important pronouncements on the relation between MENTAL ILLNESS AND THE CONSTITUTION.

Kenneth Donaldson was committed to a state hospital at the request of his father; the committing judge found that he suffered from "paranoid schizophrenia." Although the commitment order specified "care, maintenance, and treatment," for almost fifteen years Donaldson received nothing but "milieu therapy"—the hospital superintendent's imaginative name for involuntary confinement. Donaldson finally sued the superintendent and others for damages under SECTION 1983, TITLE 42, UNITED STATES CODE, claiming they had intentionally denied his constitutional rights. The federal district judge instructed the jury that Donaldson's rights had been denied if the defendants had confined him against his will, knowing that he was neither dangerous nor receiving treatment. The jury awarded damages, and the court of appeals affirmed, specifically endorsing the district court's theory of a mental patient's constitutional right to treatment.

The Supreme Court unanimously held that Donaldson had stated a valid claim, but remanded the case for reconsideration of the hospital superintendent's assertion of EXECUTIVE IMMUNITY. Justice POTTER STEWART, for the Court, said that a finding of mental illness alone could not justify a state's confining a person indefinitely "in simple custodial confinement." The Court did not reach the larger question of a "right to treatment"; it disclaimed any need to decide whether persons dangerous to themselves or others had a right to be treated during their involuntary confinement by the state, or whether a nondangerous person could be confined for purposes of treatment. But when the state lacked any of the usual grounds for confinement of the mentally ill—the safety of the person confined or others, or treatment for illness—involuntary confinement was a denial of liberty without DUE PROCESS OF LAW. Confinement was not justified, for example, in order to provide the mentally ill with superior living standards, or to shield the public from unpleasantness. To support the latter point, the Court cited FIRST AMENDMENT decisions including COHEN V. CALIFORNIA (1971). Chief Justice WARREN E. BURGER concurred in the Court's opinion, but wrote separately to express his opposition to any constitutional "right to treatment."

KENNETH L. KARST
(1986)

## OFFICE OF MANAGEMENT AND BUDGET

The rapid growth of the federal government in the twentieth century has created the need for an institution to coordinate both fiscal and substantive policy. In 1921, Congress empowered the President to prepare and submit a BUDGET for the government. Previously, the government

had had no central budgeting function: the various agencies had made funding requests directly to the appropriations committees in Congress. The President exercises the budgeting function through the Office of Management and Budget (OMB). Although OMB controls the requests that Congress receives, Congress is free to appropriate any amount that it considers appropriate.

The budgeting function accords the President an important opportunity to set the agenda for congressional deliberations over appropriations. Notwithstanding the modern presence of a budget process within Congress itself, Congress finds itself responding initially to the President's views of the best resource allocation for the government. And, of course, Congress is aware that its departure from the President's recommended budget may result in the presidential veto of an appropriations bill. In consequence, through OMB the President exercises great influence on actual appropriations. Moreover, appropriations usually confer discretion concerning the amounts to be spent and the precise uses to be made of the funds. The President supervises the agencies' actual spending through OMB.

OMB also exercises limited control over the substantive policies that the agencies follow. The Supreme Court, in MYERS V. UNITED STATES (1926), recognized presidential power to "supervise and guide" the executive agencies in their exercise of power that Congress has delegated to them. This does not extend to the independent regulatory commissions because, in HUMPHREY'S EXECUTOR V. UNITED STATES (1935), the Supreme Court declared those commissions to be independent of the President except for the constitutional power to appoint their members, and except for powers over them that Congress explicitly grants the President, such as budget review.

Policy supervision therefore concentrates on the executive agencies. In part because of doubts about the extent of the President's power to dictate policy even when it is formed in the executive agencies, OMB has usually limited its supervision to requiring agencies to comply with procedural directives imposed by Presidential EXECUTIVE ORDERS. These directives are thought to be less intrusive than outright commands setting substantive policy. Several Presidents have directed the agencies to prepare analyses of the costs and benefits of their regulations, and to submit them to OMB for review and comment. In view of the size of the executive establishment and the complexity of the issues it considers, this kind of procedural supervision and occasional ad hoc consultation on major policy decisions is the most that the relatively small bureaucracy that serves the President in OMB can hope to accomplish.

HAROLD H. BRUFF
(1986)

## "OFFICIAL ENGLISH" LAWS

Many Americans assume that English is already the official language of the United States. In fact, though, the Framers explicitly refrained from giving English any preferred constitutional status. In their view, the natural advantages of English would make it preeminent, while efforts to make it official would crystallize resistance among non-English-speakers and delay English acquisition. Despite the Framers' view, state and local officials have periodically decided to give English some kind of official endorsement. During the WORLD WAR I era, for example, some states tried to limit the use of languages other than English in private as well as public schools. Relying on the DUE PROCESS clause, the U.S. Supreme Court struck down these statutes as an unwarranted interference with both the right of parents to bring up children as they see fit and the right of foreign-language instructors to pursue their livelihood.

Since the 1980s, the status of English as an official language has garnered new attention. With rising levels of immigration, the proportion of non-English-speakers in the United States has grown steadily. In response, by 1996, a total of eighteen states had laws making English their official language, most of them passed in the last fifteen years. These laws vary widely. Some state legislatures have adopted purely symbolic measures, declaring English to be the state language in the same way that the robin might be declared the state bird or the bluebell the state flower. Other provisions have real teeth, allowing private citizens to sue for enforcement of English's official status. Stringent laws like these are often state constitutional amendments, many of which are enacted by popular INITIATIVE.

Despite a proliferation of state and local provisions, official English advocates have yet to enjoy much success in declaring English the official language at the federal level. As a result, federal protections for linguistic minorities have limited the impact of state and local measures. For example, federal law now requires schools to provide some special assistance to children with limited English skills, and federal statutes also mandate that some political jurisdictions offer bilingual ballots and election materials upon request. Under the Sixth Amendment and FOURTEENTH AMENDMENT, non-English-speaking defendants in criminal cases are entitled to interpreters at their trials so that they can confront witnesses and consult with counsel.

In the area of social services, however, relatively few federal protections apply. To the extent that official English provisions threaten bilingual assistance provided by these agencies, constitutional challenges have resulted. In Arizona, voters used the popular initiative to amend the state constitution to make English the official language. The amendment provided that "the State and all political subdivisions of [the] State shall act in English and in no

other language." A bilingual government worker, who assisted Spanish-speaking clients with medical malpractice claims against the state, sued to block enforcement of the provision. She contended that the policy violated her FIRST AMENDMENT right to FREEDOM OF SPEECH. Because she feared that she would be fired for speaking Spanish on the job, the official English provision had a CHILLING EFFECT on her ability to communicate. The Ninth Circuit Court of Appeals agreed, but the U.S. Supreme Court vacated the judgment on the ground of MOOTNESS in ARIZONANS FOR OFFICIAL ENGLISH V. ARIZONA (1997). Because the employee had already left her position, there was no live controversy for the federal courts to consider.

Subsequently, however, the Arizona courts passed on the constitutionality of the amendment. The state litigation involved claims by four elected officials, five state employees, and one public school teacher, all of whom were bilingual and who asserted that the official English provision denied them freedom of speech and EQUAL PROTECTION OF THE LAWS while they performed government business. The Arizona superior court rejected the First Amendment free speech claim because the official English requirement was content-neutral; that is, it did not attempt to regulate what public officials and employees talked about but only the manner in which they communicated. The superior court found no equal protection violation under the Fourteenth Amendment, either, because there was no proof that Arizona voters acted with discriminatory intent or animus when they approved the official English requirement. The Arizona court of appeals, relying on judicial comity, adopted the views of the Ninth Circuit Court of Appeals, even though that court's opinion had been vacated by the U.S. Supreme Court.

On appeal, the Arizona Supreme Court ultimately concluded that the official English measure "violates the First Amendment by depriving elected officials and public employees of the ability to communicate with their constituents and with the public." In the court's view, the provision went "too far" by "effectively cut[ting] off governmental communication with thousands of limited-English-proficient and non-English-speaking persons in Arizona, even when the officials and employees have the ability and desire to communicate in a language understandable to them." In addition, the Arizona court found that the official English requirement infringed on the fundamental RIGHT TO PETITION the government for redress of grievances and correspondingly, to participate on an equal basis in the political process. As a result, the plaintiffs did not need to prove discriminatory intent; instead, discrimination was presumed, and the state's action therefore was subject to STRICT SCRUTINY under equal protection law. Assuming arguendo that the state had a compelling need to promote a uniform language, the Arizona court held that the official English requirement swept too broadly in prohibiting all non-English usage. Because such severe intrusions were not necessary to achieve Arizona's objective, the provision denied plaintiffs equal protection. The U.S. Supreme Court has yet to address the merits of the Arizona Supreme Court's conclusions.

Tensions surrounding the use of languages other than English are likely to persist. Formal measures to declare English the official language are not likely to solve the problem, so long as newcomers bring linguistic diversity with them. Recent immigrants will struggle to learn English to improve their social and economic opportunities, while English-speakers chafe at the sounds of foreign languages during the transition. The linguistic clashes associated with today's demographic changes are as unlikely to be legislated away as were the conflicts among colonial languages during the Framers' times. The role of English as the language of opportunity, rather than as the official language, will be decisive in resolving these differences.

RACHEL F. MORAN
(2000)

Bibliography

CRAWFORD, JAMES 1992 *Hold Your Tongue: Bilingualism and the Politics of "English Only."* Reading, Calif.: Addison-Wesley.

CRAWFORD, JAMES, ed. 1992 *Language Loyalties: A Source Book on the Official English Controversy.* Chicago: University of Chicago Press.

HEATH, SHIRLEY BRICE 1981 English in Our Language Heritage. Pages 6–20 in Charles A. Ferguson and Shirley Brice Heath, eds., *Language in the USA.* Cambridge, Eng.: Cambridge University Press.

PEREA, JUAN F. 1992 Demography and Distrust: An Essay on American Languages, Cultural Pluralism and Official English. *Minnesota Law Review* 77:269–373.

## OFFICIAL IMMUNITY

See: Executive Immunity; Immunity of Public Officials; Judicial Immunity; Legislative Immunity; Municipal Immunity; Presidential Immunity; Sovereign Immunity

## *OGDEN v. SAUNDERS*
12 Wheaton 213 (1827)

*Ogden* established the doctrine that a state bankruptcy act operating on contracts made after the passage of the act does not violate the OBLIGATION OF A CONTRACT. The majority reasoned that the obligation of a contract, deriving from positive law, is the creature of state laws applicable to contracts. A contract made after the enactment of a

bankruptcy statute is, therefore, subject to its provisions; in effect the statute enters into and becomes part of all contracts subsequently made, limiting their obligation but not impairing it.

For a minority of three, Chief Justice JOHN MARSHALL dissented, losing control of his Court in a constitutional case for the first and only time during his long tenure. He would have voided all state bankruptcy acts that affected the obligation of contracts even prospectively. Grounding his position in the immutable HIGHER LAW principles of morality and natural justice, he maintained that the right of contract is an inalienable right not subject to positive law. The parties to a contract, not society or government, create its obligation. Marshall believed that the majority's interpretation of the CONTRACT CLAUSE would render its constitutional prohibition on the states "inanimate, inoperative, and unmeaning." Had his opinion prevailed, contractual rights of property vested by contract would have been placed beyond government regulation, making the contract clause the instrument of protecting property that the Court later fashioned out of the DUE PROCESS clause substantively construed. Until then, despite Marshall's fears, the contract clause remained the principal bastion for the DOCTRINE of VESTED RIGHTS. This case, however, ended the Court's doctrinal expansion of that clause. *Ogden* prevented constitutional law from confronting the nation with a choice between unregulated capitalism and socialism.

LEONARD W. LEVY
(1986)

## *OHIO v. AKRON CENTER FOR REPRODUCTIVE HEALTH*

See: *Hodgson v. Minnesota*

## *OHIO LIFE INSURANCE AND TRUST CO. v. DE BOLT*

See: *Piqua Branch of the State Bank of Ohio v. Knoop*

## *OKANOGAN INDIANS v. UNITED STATES*

See: Pocket Veto Case

## *OLIVER, IN RE*
333 U.S. 257 (1948)

Since 1917 Michigan had maintained a unique GRAND JURY system, allowing a single judge to be a grand jury with all its inquisitorial powers as well as retain his judicial power to punish for contempt any witness whose testimony he believed to be false or evasive. In the course of a secret grand jury proceeding, a judge summarily sentenced Oliver for contempt. The Supreme Court held the Michigan procedure a violation of SIXTH AMENDMENT rights—denial of PUBLIC TRIAL and of an opportunity to defend himself—without DUE PROCESS OF LAW, contrary to the FOURTEENTH AMENDMENT. Justice HUGO L. BLACK spoke for a 7–2 majority.

LEONARD W. LEVY
(1986)

## *OLIVER v. UNITED STATES*
466 U.S. 170 (1984)

A 6–3 Supreme Court, speaking through Justice LEWIS F. POWELL, reinvigorated the sixty-year-old "OPEN FIELDS" DOCTRINE, according to which the FOURTH AMENDMENT, whose language protects "persons, houses, papers, and effects," does not extend to open fields. No one doubts that the police, or public, may view land from a plane. The question in *Oliver* was whether the police could ignore "No Trespassing" signs and make a warrantless investigation of fenced-in backlands used to grow marijuana, seize EVIDENCE, and introduce it in court despite a TRESPASS on private property. Powell declared that no one could reasonably have a constitutionally protected expectation of privacy in an open field, well away from the curtilage or land immediately surrounding a house (and therefore part of the area to which the Fourth Amendment's protection extends). The dissenters objected that the language of the amendment does not expressly include many areas which the Court has ruled to be within its protection, such as telephone booths, offices, curtilages, and other places which one may reasonably expect to be secure against warrantless police intrusion.

LEONARD W. LEVY
(1986)

## *OLMSTEAD v. UNITED STATES*
277 U.S. 438 (1928)

Federal agents installed WIRETAPS in the basement of a building where Roy Olmstead, a suspected bootlegger, had his office and in streets near his home. None of Olmstead's property was trespassed upon. A sharply divided Supreme Court admitted the wiretap EVIDENCE in an opinion that virtually exempted ELECTRONIC EAVESDROPPING from constitutional controls for forty years. The dissents by Justices OLIVER WENDELL HOLMES and LOUIS D. BRANDEIS

are classic statements of the government's obligation to obey the law.

Olmstead argued that because the prosecution's evidence came entirely from the wiretaps, it could not be used against him; wiretapping, he claimed, was a SEARCH AND SEIZURE under the FOURTH AMENDMENT, and because the amendment's warrant and other requirements had not been met, the wiretap evidence was illegally obtained. He also claimed that use of the wiretap evidence violated his RIGHT AGAINST SELF-INCRIMINATION under the Fifth Amendment; further, that because the agents had violated a state statute prohibiting wiretapping, the evidence was inadmissible, apart from the Fourth and Fifth Amendments.

Chief Justice WILLIAM HOWARD TAFT, writing for a five-Justice majority, rejected all Olmstead's contentions. The self-incrimination claim was dismissed first: the defendants had not been compelled to talk over the telephone but had done so voluntarily. This aspect of *Olmstead* has survived to be applied in cases such as HOFFA V. UNITED STATES (1966). As to the Fourth Amendment claims: first, the Court ruled that the amendment was violated only if officials trespassed onto the property of the person overheard, and no such trespass had taken place—the agents had tapped Olmstead's telephones without going onto his property. Second, the Court limited Fourth Amendment protection to "material things," not intangibles like conversations. Third, the Court seemed to deny any protection for the voice if projected outside the house. As to the claim that the agents' violation of the state statute required excluding the evidence, the Chief Justice found no authority for such exclusion.

Justice Holmes wrote a short dissent, condemning the agents' conduct as "dirty business." Justice Brandeis wrote the main dissent in which he disagreed with the majority's reading of the precedents, its very narrow view of the Fourth Amendment, and its willingness to countenance criminal activity by the government. For him, the Fourth Amendment was designed to protect individual privacy, and he warned that the "progress of science in furnishing the Government with means of espionage" called for a flexible reading of the amendment to "protect the right of personal security." He stressed that because a tap reaches all who use the telephone, including all those who either call the target or are called, "WRITS OF ASSISTANCE or GENERAL WARRANTS are but puny instruments of tyranny and oppression when compared with wiretapping." Responding to the argument that law enforcement justified both a narrow reading of the amendment and indifference to the agents' violation of state law, he wrote: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. . . . Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."

Although the decision was harshly criticized, it endured. In *Goldman v. United States* (1942), *Olmstead* was read to allow police to place a microphone against the outside of a wall, because no trespass onto the property was involved. Wiretapping itself remained outside constitutional controls, though section 605 of the COMMUNICATIONS ACT of 1934 was construed by the Supreme Court in NARDONE V. UNITED STATES (1937) to bar unauthorized interception and divulgence of telephone messages.

In 1954, however, *Olmstead* began to be undermined. In IRVINE V. CALIFORNIA (1954), the Court indicated that intangible conversations were protected by the Fourth Amendment. The Court found a trespass when the physical penetration was only a few inches into a party wall as in SILVERMAN V. UNITED STATES (1961) or by a thumbtack as in *Clinton v. Virginia* (1964). Finally, in KATZ V. UNITED STATES (1967), the Supreme Court overruled *Olmstead*, holding that a trespass was unnecessary for a violation of the Fourth Amendment and that the amendment protects intangibles, including conversations.

HERMAN SCHWARTZ
(1986)

Bibliography

MURPHY, WALTER F. 1966 *Wiretapping on Trial: A Case Study in the Judicial Process.* New York: Random House.

## OLNEY, RICHARD
(1835–1917)

In 1893 President GROVER CLEVELAND offered the post of ATTORNEY GENERAL to Richard Olney. A Massachusetts Democrat and highly successful railroad lawyer, Olney sought the advice of his major clients. All agreed he should accept the office and one even continued him on the payroll after he took the post, a conflict of interest that reflected the biases Olney allowed to influence his actions in office.

Olney was one of a few lawyers in the country who had litigated the recently passed SHERMAN ANTITRUST ACT; he had successfully defended the Whiskey Trust, and he believed that section 2 of the act was "void because of vagueness, indefiniteness, and ambiguity." While Olney served as attorney general, the Department of Justice initiated no new antitrust suits against business combinations.

Olney is most often remembered for his weak presentation of the government case in UNITED STATES V. E. C. KNIGHT COMPANY (1895). Although the prosecution had been begun under President BENJAMIN HARRISON, Olney

was responsible for choosing *Knight* to test the Sherman Act's constitutionality. Even as attorney general he specifically rejected the belief that "the aim and effect of this statute are to prohibit and prevent" trusts, and he contended that "literal interpretation" of the act was "out of the question" because of the act's overbroad terms. His ineffective prosecution contributed to a government loss, crippling enforcement of the Sherman Act for nearly a decade. Olney saw *Knight* as a vindication of his personal views and as an excuse to ignore the law; although he ought to have chosen a stronger case, the federal judges who so narrowly construed the act must share responsibility for the outcome.

Olney's antipathy to the Sherman Act ran deep. He was determined to break the Pullman strike in 1894, and although he had to rely on the Sherman Act to secure lower court INJUNCTIONS, he abandoned that successful tack in the Supreme Court. He convinced a unanimous Court in IN RE DEBS (1895) to rely instead upon the inherent power of the executive branch to protect the national interest in the flow of INTERSTATE COMMERCE.

Olney also argued POLLOCK V. FARMERS' LOAN TRUST COMPANY (1895) before the Supreme Court, although his actions resulted in insufficient time for government preparation and may have cost the government its case. The Court struck down the tax, a decision Olney considered "a great blow to the power of the Federal government . . . a national misfortune."

DAVID GORDON
(1986)

Bibliography

EGGERT, GERALD 1974 *Richard Olney: Evolution of a Statesman.* University Park: Pennsylvania State University Press.

## *O'LONE v. ESTATE OF SHABAZZ*
482 U.S. 342 (1987)

Regulations at a New Jersey prison forbade minimum-security inmates who worked outside the main prison building from reentering the building during the day, thus preventing certain Muslim PRISONERS from attending their weekly worship service held on Fridays. Required by the Koran to attend the service, the prisoners filed suit, claiming violation of their rights under the free exercise clause. Adopting what was essentially a COMPELLING STATE INTEREST test, the court of appeals held that the prison had to prove "that no reasonable method exists by which [the prisoners'] religious rights can be accommodated without creating bona fide security problems." In a 5–4 decision the Supreme Court reversed, ruling that the court of appeals paid insufficient deference to prison officials, who have authority to enact any prison regulations "reasonably related to legitimate penological interests."

Justice WILLIAM J. BRENNAN, writing for the dissenters, accused the majority of uncritically accepting the assertions of prison administrators. Brennan did not claim that the courts should never defer to the judgment of prison authorities; but when the prison completely deprives prisoners of a right and where the activity in question is not presumptively dangerous, Brennan maintained that prison officials should be required to show that the denial of the right is no greater than necessary to achieve the government's objective.

*Shabazz* foreshadowed the Court's eventual abolition of the compelling-state-interest test for all free-exercise cases in EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990).

JOHN G. WEST, JR.
(1992)

## *OLSEN v. NEBRASKA EX REL. REFERENCE & BOND ASSOCIATION*
313 U.S. 236 (1941)

Sustaining a Nebraska statute regulating fees charged by private employment agencies, the Supreme Court specifically reversed RIBNIK V. MCBRIDE (1928). Justice WILLIAM O. DOUGLAS reiterated earlier dissents of Justices OLIVER WENDELL HOLMES (see TYSON BROTHER V. BANTON, 1927) and LOUIS D. BRANDEIS (see NEW STATE ICE COMPANY V. LIEBMANN, 1932), declaring that the need and appropriateness of legislation concerning the public interest ought to be left to state legislatures.

DAVID GORDON
(1986)

## OMNIBUS ACT
15 Stat. 73 (1868)

The Omnibus Act readmitted six of the Confederate states to full congressional representation and terminated military governance in them.

After the process of restoration mandated by the MILITARY RECONSTRUCTION ACTS was largely completed, Congress readmitted Arkansas in June 1868 and, three days later, by the Omnibus Act readmitted Alabama, Florida, Georgia, Louisiana, North Carolina, and South Carolina. The Omnibus Act declared that each of the six states had complied with the conditions specified in the Military Reconstruction Acts, required each to ratify the FOURTEENTH AMENDMENT, and imposed the "fundamental condition" that the state constitutional provisions for black suffrage

be inviolate. All the congressmen and senators of these states were seated by late July 1868.

Georgia's full readmission was delayed for two years, however, because the state legislature excluded all black members and admitted several whites disfranchised by the Fourteenth Amendment or the Military Reconstruction Acts. Congress by special legislation forced a rescission of these actions, and Georgia once again underwent military supervision until its readmission. Virginia, Mississippi, and Texas were also readmitted in 1870, thus bringing the formal process of RECONSTRUCTION to a close.

WILLIAN M. WIECEK
(1986)

## OMNIBUS CRIME CONTROL AND SAFE STREETS ACT
92 Stat. 3795 (1968)

The most extensive anticrime legislation in the nation's history, this measure reflected the public's fear of rising crime and its demand for federal protection. Congress enacted a massive and restrictive piece of legislation, called by its critics an invasion of basic CIVIL LIBERTIES. Particularly distasteful to President LYNDON B. JOHNSON, who signed it with reluctance, were titles permitting broad use of WIRETAPPING in federal and state cases, and a section seeking to overturn controversial Supreme Court rulings on the rights of defendants.

The act authorized law enforcement grants to aid local police departments in planning, training, and research and a block grant procedure whereby funds were given to the states to be allocated to their communities under a statewide plan. It channeled funds to improve techniques for combating organized crime and for preventing and controlling riots. The most controversial provision of the act purported to overturn Supreme Court decisions in *Mallory v. United States* (1957), MIRANDA V. ARIZONA (1966), and UNITED STATES V. WADE (1967), authorizing greater freedom in POLICE INTERROGATION of suspects accused of crimes against the United States, and in the use of LINEUPS to identify criminals.

The measure specified permissive new conditions under which confessions could be introduced in federal courts. The trial judge was to determine the issue of voluntariness, out of the hearing of the jury, basing that determination on such criteria as time lapse between arrest and arraignment, whether the defendant knew the nature of the charged offense, when the defendant was advised of or knew of the right to remain silent and the RIGHT TO COUNSEL, and whether the defendant was without assistance of counsel when questioned and giving the confession.

The act's provisions on ELECTRONIC EAVESDROPPING permitted warrant-approved wiretapping and bugging in investigations of a wide variety of specified crimes, and authorized police to intercept communications for forty-eight hours without a warrant in an "emergency" where organized crime or NATIONAL SECURITY was involved. Further, it authorized any law officer or any other person obtaining information in conformity with such a process to disclose or use it as appropriate. The law forbade the interstate shipment to individuals of pistols and revolvers, and over-the-counter purchase of handguns by individuals who did not live in the dealer's state. But it specifically exempted rifles and shotguns from these controls.

Passed overwhelmingly a few hours after the assassination of ROBERT F. KENNEDY, the act still drew the opposition of liberals troubled by its criminal law sections and concerned that its permissive wiretap section did not contain proper constitutional safeguards. Constitutional issues aside, the act failed to achieve its objectives.

PAUL L. MURPHY
(1986)

Bibliography

NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 1970 *Law and Order Reconsidered.* Washington, D.C.: Government Printing Office.

## *O'NEIL v. VERMONT*

See: *Kemmler, In Re*

## ONE PERSON, ONE VOTE

The National Municipal League popularized the slogan "one man, one vote" from the 1920s to the 1960s to promote REAPPORTIONMENT to equalize political districts. Reapportionment had lagged far behind urban growth, leaving the largest urban districts by 1960 with only half the legislative representatives per capita of the smallest rural ones.

Urban spokesmen claimed that "malapportionment" produced stagnant "barnyard governments" indifferent to urban concerns and needs. They demanded one person, one vote to stop urban blight and revitalize state governments. These conjectural claims did not win reapportionment from legislators reluctant to tamper with their own districts, nor from voters, who repeatedly defeated reapportionment INITIATIVES. But they did persuade political and legal writers and study commissions, who called for courts or commissions to order reapportionment where legislators and voters would not.

The Supreme Court declined this invitation in COLE-

GROVE V. GREEN (1946) but accepted one person, one vote in REYNOLDS V. SIMS (1964) as the "fundamental principle" of the Constitution. Political scientists, black rights groups, the *New York Times*, and the DWIGHT D. EISENHOWER and JOHN F. KENNEDY administrations had endorsed that principle.

Some critics thought that the Court had confused individual suffrage with group REPRESENTATION, misconstrued the FOURTEENTH AMENDMENT, and ignored the "standards problem" of equalizing group representation, because gerrymandering could still deny equal weight to votes. Others saw little evidence of revitalization or greater equality in substance to match the greater equality in form, and they believed that by overriding legislative and popular majorities, the Court seemed to have devalued the very representative institutions to which it granted equal access in form.

The WARREN COURT's adoption of one person, one vote was a remarkable political success, affecting more people than school DESEGREGATION or criminal justice cases, with less help from Congress and less damaging backlash. But its practical contributions to equal representation and vital government remain a matter of dispute.

WARD E. Y. ELLIOTT
(1986)

Bibliography

ELLIOTT, WARD E. Y. 1975 *The Rise of Guardian Democracy: The Supreme Court's Role in Voting Rights Disputes, 1845–1969.* Cambridge, Mass.: Harvard University Press.

## *ON LEE v. UNITED STATES*
343 U.S. 737 (1952)

The Supreme Court held, 5–4, that government informers who deceptively interrogated criminal suspects and simultaneously transmitted the conversations to other government agents via electrical transmitters had not violated the FOURTH AMENDMENT or the antiwiretap provisions of section 605 of the COMMUNICATIONS ACT; the agents who listened might testify to the overheard conversations. Because entry had been consented to—although the consent was obtained deceptively—it was not a TRESPASS, and under OLMSTEAD V. UNITED STATES (1927) the intrusion did not violate the Fourth Amendment. It was also not WIRETAPPING, nor did it become illegal because it might be immoral. The Court reaffirmed *On Lee* in UNITED STATES V. WHITE (1971).

HERMAN SCHWARTZ
(1986)

## OPEN FIELDS DOCTRINE

The FOURTH AMENDMENT protects "persons, houses, papers, and effects against unreasonable searches and seizures." The amendment, held to embody a RIGHT OF PRIVACY, shelters certain enclaves from arbitrary government examination and interference. Within these enclaves, roughly defined as places where persons have a subjective expectation of privacy that society recognizes as reasonable—the paradigmatic case is the home—governmental SEARCHES AND SEIZURES are unreasonable unless authorized by a SEARCH WARRANT issued on PROBABLE CAUSE. There are some exceptions to this rule against WARRANTLESS SEARCHES, however, and the open fields doctrine presents one of them.

In applying the Fourth Amendment to detached dwellings the Supreme Court has held that persons have a REASONABLE EXPECTATION OF PRIVACY in the home and its "curtilage." Curtilage is the area immediately surrounding the home that harbors the intimate activities associated with domestic life and home privacies. Proximity to the home, containment within an enclosure surrounding the home, use for domestic and private purposes, and steps taken to protect the area from observation all help to define its ambit.

The open fields doctrine permits warrantless searches of private land outside the curtilage. The right of privacy that the Fourth Amendment protects is therefore not congruent with the right of property ownership, and exercise of the COMMON LAW right to exclude persons from land cannot make governmental searches of it unlawful. Further, under the doctrine open fields need be neither open nor fields, but only areas of land outside the curtilage. Fenced dense woods could therefore qualify as open fields. Consequently, neither the natural seclusion of property, which might be thought to make it private, nor efforts to keep trespassers out, such as posting with signs or surrounding with fences, secures it from governmental search.

GARY GOODPASTER
(1992)

(SEE ALSO: *Plain View Doctrine.*)

Bibliography

LAFAVE, WAYNE 1987 *Search and Seizure: A Treatise on the Fourth Amendment.* St. Paul, Minn.: West Publishing Co.

## OPEN HOUSING LAWS

Many believe housing, the last major area covered by Congress's 1960s CIVIL RIGHTS program, to be the key to at least

short-term progress in INTEGRATION. Despite numerous ANTIDISCRIMINATION LAWS, segregated housing patterns threaten much of the civil rights agenda, including integrated public education. Yet until the 1960s the federal government promoted segregated housing. Federal housing agencies, such as the Federal Housing Administration, required racially RESTRICTIVE COVENANTS in federally assisted projects. In Executive Order 11063 (1962), President JOHN F. KENNEDY prohibited housing discrimination in federal public housing and in housing covered by mortgages directly guaranteed by the federal government. Title VI of the CIVIL RIGHTS ACT OF 1964, which outlawed discrimination in programs receiving federal financial assistance, extended the ban to nearly all federally assisted housing.

Title VIII of the CIVIL RIGHTS ACT OF 1968 was the first comprehensive federal open housing law. Title VIII bans discrimination on the basis of race, color, religion, or national origin in the sale, lease, and financing of housing, and in the furnishing of real estate brokerage services. A 1974 amendment extends the ban to discrimination on the basis of sex. Title VIII exempts single-family houses sold or rented by owners and small, owner-occupied boarding houses. Congress's consideration of Title VIII was affected by the assassination of MARTIN LUTHER KING, JR. House opponents of the measure had tried to delay its consideration in the hope that intervening national events would sway Congress against it. But during the delay, Dr. King was assassinated and passage of the act followed swiftly.

Courts have construed Title VIII to cover activities other than the direct purchase, sale, or lease of a dwelling. For example, Title VIII prohibits discriminatory refusals to rezone for low-income housing. Most courts find that practices with greater adverse impact on minorities, even if undertaken without discriminatory purposes, impose some burden of justification. This view links Title VIII litigation to a similar line of EMPLOYMENT DISCRIMINATION cases decided under Title VII of the Civil Rights Act of 1964.

To enforce its provisions, Title VIII authorizes the secretary of housing and urban development to seek to conciliate disputes, but the Department of Housing and Urban Development (HUD) initially must defer to state or local housing agencies where state law provides relief substantially equivalent to Title VIII. In *Gladstone, Realtors v. Village of Bellwood* (1979) the Supreme Court held that Title VIII also authorized direct civil actions in federal court without prior resort to HUD or to state authorities. An ATTORNEY GENERAL finding a pattern or practice of housing discrimination is authorized to seek relief in federal court.

Two months after Title VIII's enactment the Supreme Court found Section 1982, Title 42, United States Code, a remnant of section 1 of the CIVIL RIGHTS ACT OF 1866, to be another federal open housing law. Section 1982 grants all citizens the same right "as is enjoyed by white citizens" to purchase and lease real property. In JONES V. ALFRED H. MAYER CO. (1968) the Court construed section 1982 to prohibit a racially motivated refusal to sell a home to a prospective black purchaser. In *Sullivan v. Little Hunting Park, Inc.* (1969) the Court found that violations of section 1982 may be remedied by damages awards or by injunctive relief. There are, therefore, two federal open housing laws, which, in the area of RACIAL DISCRIMINATION, overlap. But section 1982 contains none of Title VIII's exemptions, provides for none of its administrative machinery, and contains no express list of remedies.

THEODORE EISNENBERG
(1986)

Bibliography

BELL, DERRICK A., JR. 1980 *Race, Racism and American Law*, 2nd ed. Boston: Little, Brown.

DORSEN, NORMAN et al. 1976–1979 *Political and Civil Rights in the United States*, 4th ed. II:1063–1149. Boston: Little, Brown.

## OPERATION RESCUE

See: Anti-Abortion Movement

## OPINION OF THE COURT

An appellate court would give little guidance to inferior courts, the legal community, or the general public concerning the law if it merely rendered a DECISION and did not explain the RATIO DECIDENDI, or the grounds for its decision. It is the court's reading of the law and the application of legal principles to the facts that gives a reported case value as PRECEDENT and permits the judicial system to follow the doctrine of STARE DECISIS. By ancient custom, Anglo-American judges, at least at the appellate level, publish opinions along with their decisions.

The general practice of English courts at the time of the American Revolution, and the general practice today in most of the British Commonwealth, is for the members of multijudge courts to deliver their opinions SERIATIM, that is, severally and in sequence. This practice was followed by the United States SUPREME COURT during its early years. However, when JOHN MARSHALL became CHIEF JUSTICE in 1801 he instituted the practice of delivering a single "opinion of the court." The effect of this change was to put the weight of the whole Court behind a particular line of reasoning (usually Marshall's), and so to make that line of reasoning more authoritative. At the time, Mar-

shall's innovation was criticized by many, including President THOMAS JEFFERSON, either because it permitted lazy Justices to evade the responsibility of thinking through the cases on their own or because it fortified the Federalist majority in its conflicts with Republican legislators and state governments.

The opinion of the court is not necessarily unanimous. A majority of the Justices customarily endorses a single opinion, however, and that majority opinion is issued as the opinion of the court, with the Chief Justice—or the senior Justice, if the Chief Justice is not in the majority—assigning responsibility for writing the opinion. A Justice who disagrees with the decision of the case may file a DISSENTING OPINION; a Justice who agrees with the result, but disagrees with the rationale, or desires to supplement the majority opinion, may file a CONCURRING OPINION. When there is no majority opinion, the opinion signed by the largest number of Justices in support of the decisions is called the PLURALITY OPINION, and no opinion of the court is issued. In some important cases in the past, and increasingly during the BURGER COURT years, the number of separate opinions has presented an appearance resembling a return to seriatim opinions.

DENNIS J. MAHONEY
(1986)

## ORAL ARGUMENT

Lawyers argue points of law orally before courts at all levels. The Supreme Court regulates oral argument by court rule. Some cases are decided summarily, without full briefing and argument, on the papers filed by the parties seeking and opposing Supreme Court review. About 150 cases per TERM are decided with briefs and oral argument. The arguments begin in October, early in the term, and (absent extraordinary circumstances) end in the following April, so that all opinions can be finished by the end of the term.

In the Court's early years oral argument was a leisurely affair; argument in MCCULLOCH V. MARYLAND (1819) lasted nine days. Today, given the increase in the Court's business and increasing doubt that illumination is proportional to talk, argument is normally limited to one-half hour for each side. More time may be allocated to a case that is unusually complicated or important. Permission to argue is only rarely granted to an AMICUS CURIAE, except for the SOLICITOR GENERAL, who is often allowed to argue orally for the United States as amicus curiae.

The Justices have already read the briefs when they hear counsel. Accordingly, oral argument is no longer a place for oratory. Justices interrupt with their questions and even conduct debates with each other through rhetorical questions to counsel. Time limits on argument are strictly enforced; the red light flashes on the lectern, and counsel stops.

Normally within a few days after oral argument the Justices meet in CONFERENCE to discuss groups of cases and vote tentatively on their disposition. The Justices regularly say that oral argument, fresh in their minds, influences their thinking in "close" cases. Whether a case is close, however, is a characterization very likely formed before a Justice hears what counsel have to say.

KENNETH L. KARST
(1986)

Bibliography

STERN, ROBERT L. and GRESSMAN, EUGENE 1978 *Supreme Court Practice*, 5th ed. Chap. 14. Washington, D.C.: Bureau of National Affairs.

## ORDERED LIBERTY

A loosely used term, diversely applied in scholarly literature and judicial opinions, "ordered liberty" suggests that fundamental constitutional rights are not absolute but are determined by a balancing of the public (societal) welfare against individual (personal) rights. In this dialectical perspective, the thesis is "order," its antithesis "liberty"; the synthesis, "ordered liberty," describes a polity that has reconciled the conflicting demands of public order and personal freedom.

Justice BENJAMIN N. CARDOZO's majority opinion for the Court in PALKO V. CONNECTICUT (1937) provided what was probably the first judicial recognition of "ordered liberty." Acknowledging the difficulty of achieving "proper order and coherence," Cardozo identified some constitutionally enumerated rights that were *not* of the essence of a scheme of "ordered liberty," and thus not incorporated in the FOURTEENTH AMENDMENT and applied to the states: "to abolish [these rights] is not to violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." On the other hand, rights such as "freedom of thought and speech" were "of the very essence of a scheme of ordered liberty" because they constituted "the matrix, the indispensable condition, of nearly every other form of freedom."

HENRY J. ABRAHAM
(1986)

Bibliography

ABRAHAM, HENRY J. 1987 *Freedom and the Court: Civil Rights and Liberties in the United States*, 5th ed. New York: Oxford University Press.

## ORDINANCE OF 1784

One of the most important constitutional questions of the founding era was that of the status of the western TERRITORIES. In 1783, as a concession to secure ratification of the ARTICLES OF CONFEDERATION, states with claims to western lands ceded them to Congress. In April 1784 Congress adopted an ordinance of government for the ceded territory drafted by THOMAS JEFFERSON. That ordinance, although it never went into effect, embodied the principle that the territories were not to be mere colonies but would become states within the Union. The principle was fulfilled under the NORTHWEST ORDINANCE and the Constitution.

The Ordinance of 1784 created eight "states" in the West and prescribed for them three stages of evolution culminating in full equality with the original thirteen states. But, unlike the Northwest Ordinance, which provided for gradual advance toward self-government by the settlers, the Ordinance of 1784 conferred self-government immediately. Jefferson's proposal to ban SLAVERY from the territories was defeated in Congress by a vote of seven states to six.

Rather than allow squatters to benefit, Congress made the Ordinance effective only when the western lands were officially offered for sale, and that did not happen until after the Ordinance was superseded.

DENNIS J. MAHONEY
(1986)

## *OREGON v. BRADSHAW*

See: *Edwards v. Arizona*

## *OREGON v. ELSTAD*
470 U.S. 298 (1985)

The Supreme Court reaffirmed MIRANDA V. ARIZONA (1966) yet made another exception to it. For a 6–3 majority, Justice SANDRA DAY O'CONNOR held that initial failure to comply with the MIRANDA RULES does not taint a second confession made after a suspect has received the required warnings and has waived his rights. In this case the suspect had not blurted out an incriminating statement before police questioned him. They arrested him, with a warrant, at his home and began an interrogation without advising him of his rights. He confessed. They took him to the station and gave him the warnings, but they did not inform him that his prior confession could not be used against him as proof of his guilt. O'Connor, commenting that a contrary decision might "disable the police," ruled that the second confession need not be suppressed because of the illegality of the first. She treated the illegal confession as if it had been voluntarily made. Her focus on the voluntariness of that initial confession suggested that if coercion had then been present, it would have tainted a second confession made after the *Miranda* warnings. The Court, therefore, reaffirmed *Miranda.* Nevertheless, the case taught that the police may ignore *Miranda*, secure a confession, and then give the warnings in the hope of getting an admissible confession once the suspect thinks "the cat is out of the bag." Justice WILLIAM J. BRENNAN savaged the Court's opinion in a dissent that O'Connor claimed had an "apocalyptic tone" and distorted much of what she had said. She denied Brennan's accusation that the majority's opinion had a "crippling" effect on *Miranda.*

LEONARD W. LEVY
(1986)

## *OREGON v. HASS*

See: Police Interrogation and Confessions

## *OREGON v. MITCHELL*
400 U.S. 112 (1970)

This decision suggested some short-lived constitutional limits on Congress's power to regulate voting. The 1970 amendments to the VOTING RIGHTS ACT OF 1965 lowered from twenty-one to eighteen the minimum voting age for federal, state, and local elections, suspended LITERACY TESTS throughout the nation, prohibited states from imposing RESIDENCE REQUIREMENTS in presidential elections, and provided for uniform national rules for absentee registration and voting in presidential elections. (See VOTING RIGHTS AMENDMENTS.) The Supreme Court unanimously upheld the suspension of literacy tests and over Justice JOHN MARSHALL HARLAN'S dissent, found the residency and absentee voting provisions valid. Four Justices found the age limit reduction constitutional for all elections and four Justices found it unconstitutional for all elections. Because Justice HUGO T. BLACK found the age limit reduction constitutional only for federal elections, the case's formal HOLDING, though reflecting only Justice Black's view, was to sustain the age reduction only in federal elections. The many separate opinions in *Mitchell* also reviewed the question, first addressed in KATZENBACH V. MORGAN (1966), of Congress's power to interpret and alter the scope of the FOURTEENTH AMENDMENT. In 1971, in reponse to *Mitchell,* the TWENTY-SIXTH AMENDMENT lowered the voting age to eighteen in all elections.

THEODORE EISENBERG
(1986)

## ORGANIZED CRIME CONTROL ACT
84 Stat. 922 (1970)

Heralded as the most comprehensive federal law ever enacted to combat organized crime, this act was not limited to that use alone. Its provisions applied to a wide range of offenses, on the theory that the involvement of organized crime in a particular criminal act is not always clear. The detection of such involvement was one purpose of the law.

The LEGISLATION contained thirteen titles, a number of which aroused sharp criticism on constitutional grounds. One controversial title reinforced and expanded the investigatory power of GRAND JURIES by authorizing special grand juries to return INDICTMENTS and to report to UNITED STATES DISTRICT COURTS concerning criminal misconduct by appointive public officials involving organized criminal activity or concerning organized crime conditions in their areas. An individual named in such a report was entitled to a grand jury hearing, with the right to call witnesses and to file a rebuttal to the report. Another title replaced all previous laws governing witness IMMUNITY GRANTS; the title authorized federal legislative, administrative, and judicial bodies to grant witnesses immunity from prosecution using their testimony. The new section thus substituted "use immunity" for the "transaction immunity" that had previously protected such witnesses from prosecution for any events mentioned in or related to their testimony regardless of independent evidence against them.

Other provisions authorized detention of recalcitrant witnesses for CONTEMPT until they complied with court orders to testify, but for no longer than eighteen months, authorized convictions for perjury based on obviously contradictory statements made under oath (no longer requiring proof of the crime by any particular number of witnesses or by any particular type of EVIDENCE), and the use of depositions in criminal cases subject to constitutional guarantees and certification by the ATTORNEY GENERAL that the case involved organized crime. Still other sections limited to five years the period in which government action to obtain evidence could be challenged as illegal and limited the disclosure of government records previously required by ALDERMAN V. UNITED STATES (1969). Finally, the act authorized increased sentences up to twenty-five years for persons convicted of felonies, provided they were found to be dangerous and to be "habitual" offenders, "professional" criminals, or "organized crime figures."

Although the whole measure was denounced by the New York City Bar Association as containing "the seeds of official repression," only the narrowed witness immunity provisions were challenged. In KASTIGAR V. UNITED STATES (1972) the Supreme Court ruled that they did not violate the Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION.

PAUL L. MURPHY
(1986)

Bibliography

CONGRESSIONAL QUARTERLY 1973 *Congress and the Nation*, vol. 3. Washington, D.C.: Congressional Quarterly.

## ORIGINAL INTENT

"Original intent" is a shorthand term for both a familiar topic of CONSTITUTIONAL HISTORY and a problematic theory of CONSTITUTIONAL INTERPRETATION. As a historical problem, the quest for original intent seeks to discover what particular provisions of the Constitution meant at the moment of their adoption, whether to the Framers in the CONSTITUTIONAL CONVENTION OF 1787 (or Congress, in the case of subsequent amendments), the ratifiers in the state conventions and legislatures, or the citizenry in general. As a mode of constitutional interpretation, however, original intent suggests that the true meaning of these provisions was in some sense fixed at the point of their adoption and that later interpreters of the Constitution should adhere to that original meaning.

The earliest version of original intent can be traced as far back as the 1790s, when JAMES MADISON sought to develop a mode of interpretation that could counter the loose canon of Hamiltonian construction. More recently, the call for a return to a "jurisprudence of original intent" held a central place in the campaign by the administration of RONALD REAGAN to challenge controversial decisions taken by the Supreme Court under Chief Justices EARL WARREN and WARREN E. BURGER. In many areas of constitutional law, conservatives argued, the Court had freely ignored the original meaning of particular provisions of the Constitution in order to impose its own values on society. In so doing, conservatives further alleged, the Court had also usurped powers the Constitution vested in the political branches of government, thereby violating its original meaning in a second and more fundamental sense.

Yet the appeal of the theory of original intent has never been confined to conservatives alone. On many issues, liberals can invoke the authority of the Framers and ratifiers of the Constitution just as easily. In recent controversies over the conduct of FOREIGN AFFAIRS, for example, liberals have effectively argued that the Framers and ratifiers of the Constitution did not expect the executive to have unilateral initiative in making foreign policy or the power to commit American forces to combat without the active approval of Congress. Judged pragmatically, the theory of original intent is neither inherently conservative nor in-

herently liberal. It is, instead, a style of constitutional argument that particular parties can invoke whenever the available historical evidence promises to support their immediate cause.

Modern proponents of a jurisprudence of original intent rest their case on democratic norms. The Constitution is the supreme law of the land not merely because Article VI says so but because its authority can be traced to extraordinary acts of POPULAR SOVEREIGNTY, whether in the state ratification conventions of 1787–1790 or through the congressional and state legislative supermajorities required to secure amendments. By contrast, the Supreme Court Justices who ultimately interpret the Constitution are the least politically accountable officers in the entire system of governance. When judges abuse the power of JUDICIAL REVIEW to impose values not securely rooted in the constitutional text, originalists argue, they effectively nullify the sovereign will of the people as that will is expressed in the great acts of constitution-making or in the ordinary legislative decisions the Court chooses to overturn. If fundamental constitutional change is called for, originalists suggest, it should be achieved through the amendment procedures of Article V, not by judicial fiat.

Critics of this modern version of ORIGINALISM challenge this position on several grounds. They argue, first, that the unwieldy requirements of Article V render the Constitution so difficult to amend that it is far better to rely on constitutional evolution through judicial interpretation and political innovation than to insist that its original meaning be preserved inviolate until the necessary supermajoritarian consensus can be mobilized. Nor is it clear why decisions made by judges who are appointed by politically accountable Presidents and senators should be regarded as more arbitrary or less democratic than those earlier decisions imposed by generations dead and gone. Finally, the criticism that judges act undemocratically by extending the definition and protection of constitutional rights misses the obvious point that it has always been the duty of the judiciary to protect individual and minority rights against majority abuse.

These objections are, in a sense, normative: they ask whether a jurisprudence of original intent is desirable, not whether it is practicable. But other reservations about the merits of this theory of interpretation rest on narrower grounds of practicality. Some of these reservations concern the adequacy of the historical evidence on which all appeals to the original meaning rest; others reflect doubts about the capacity of judges or other officials to use this evidence intelligently and objectively. The idea that adherence to original intent would always work to constrain judges is itself questionable. A historical record that is ambiguous or murky may actually broaden the interpretive latitude within which a willful judge might choose to roam.

Perhaps the single most telling problem of evidence involves the difficult task of recovering what the ratifiers of the Constitution understood they were adopting when they expressed the sovereign will of the people. Under the strict theory of original intent, the understandings of the ratifiers command the greatest weight in interpretive efforts, because it was their actions—as opposed to the proceedings in the Federal Convention or Congress—that alone gave legal force to the constitutional text. Unfortunately, the records of the debates in the state ratification conventions of 1787–1788 (or in the state legislatures for the BILL OF RIGHTS and later amendments) seem less than adequate. Whole days of debate—and in some states, entire conventions—went unreported; numerous provisions of the Constitution went unexamined; and in the end, the delegates who passed judgment on the Constitution voted only on whether or not they wanted to accept the document as a whole. Thus, although the ratification records are rich enough to allow scholars to survey the general grounds on which the Constitution was supported or opposed, they cannot conclusively illuminate what its various provisions meant to the obscure state politicians who ratified it, much less the anonymous—though sovereign—people they represented.

James Madison was aware of this problem when, in the mid-1790s, he first argued that the understanding of the ratifiers could legitimately constrain the reach of interpretation. Although Madison never explained exactly how one could determine what the Constitution meant in a positive sense, he did believe that it was possible to challenge interpretations that either had not been offered at the time of adoption or would have been rejected out of hand if they had been candidly stated.

Regardless of the legal arguments that favor the authority of the ratifiers, in practice few interpreters of the Constitution are inclined to ignore evidence about the intentions of its actual Framers. Much of the debate about the original allocation of the WAR POWERS, for example, centers on the Federal Convention's decision to substitute the verb "declare" for "make" in the clause giving Congress the authority to declare war. Scholars have similarly canvassed the congressional debates about the FOURTEENTH AMENDMENT for clues about the original meaning of its frequently controverted clauses.

The great advantage that inquiries into the Framers' intentions enjoy over ratifiers' understandings is that the former may better help to explain how and why a particular provision acquired its precise textual form. Yet even then, there is no ready way to demonstrate how well any one comment or set of comments represented the range of intentions and expectations that typically inform any collective political decision. Many studies of legislative voting suggest that all exercises in collective decision making are inherently ambiguous.

Given all these difficulties, it is not surprising that most

judicial forays into originalist interpretation receive low marks from knowledgeable scholars. Judges and their law clerks are not trained historians, and they repeatedly err in their treatment of the historical evidence on which they necessarily rely. On this basis alone it can be strongly argued that originalism can never offer much more than a rhetorical strategy to justify decisions taken on more complex grounds.

That argument does not imply, however, that originalism has no role to play in modern CONSTITUTIONALISM. Even if it is impossible to ascertain fixed original meanings for the Constitution's most disputed and "open-textured" clauses, a sound historical approach can still reconstruct the general contours of the debates from which they emerged. Moreover, the fact that Americans repeatedly invoke the authority of Framers and ratifiers—especially "the founders" of 1787–1788—in their constitutional disputes may reveal something important about American political culture. Originalism can never be a dispositive theory of interpretation, but neither can it be entirely deposed from the place it has repeatedly claimed in American constitutional discourse.

JACK N. RAKOVE
(1992)

(SEE ALSO: *Conservatism; Deconstructionism; Incorporation Doctrine and Original Intent; Interpretivism; Liberalism; Noninterpretivism; Political Philosophy of the Constitution; Strict Construction.*)

Bibliography

LEVY, LEONARD W. 1988 *Original Intent and the Framers' Constitution.* New York: Macmillan.

LOFGREN, CHARLES 1986 *"Government from Reflection and Choice": Constitutional Essays on War, Foreign Relations, and Federalism.* New York: Oxford University Press.

RAKOVE, JACK N., ed. 1990 *Interpreting the Constitution: The Debate over Original Intent.* Boston: Northeastern University Press.

## ORIGINALISM

"Originalism" is a term used to describe the view that judicial decisions regarding the Constitution must be based on the ORIGINAL INTENT of those who participated in the framing and enactment of the original Constitution and later amendments. For example, originalists regard the issue of the constitutional validity of the death penalty as easily resolved by the explicit references in the Fifth and Fourteenth Amendments to the deliberate taking of life by government, indicating that the Constitution expressly contemplates the imposition of the death penalty. The Fifth Amendment states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, . . . put in jeopardy of life or limb; . . . be deprived of life, liberty, or property . . ." and the FOURTEENTH AMENDMENT, likewise guarantees that "[n]o state shall . . . deprive any person of life, liberty, or property. . . ."

Originalists justify their view on the grounds that focusing on original intent both limits the intrusion of the subjective political values of judges in constitutional decisions and gives due respect to democratic processes. Originalists argue that the intent of the Framers will sometimes accord with the personal views of judges and sometimes not. Application of this intent, therefore, will limit the ability of judges to impose their personal views on various issues upon the nation. Originalists also point out that the Constitution contains democratic amendment procedures and that the use of criteria other than original intent would enable judges to subvert both the democratic processes that led to the enactment of particular constitutional provisions and the democratic processes that provide for amendments. Finally, originalists argue that originalism is the only theory that can legitimate the institution of judicial review, which is a method of ensuring that the Constitution, as a superior law adopted by the people, constrains all organs of government, including the courts. MARBURY V. MADISON, 5 U.S. (1 Cranch) 137, 179–180 (1803).

Critics of originalism generally rely on two lines of attack. The first line is that the intent of the Framers is difficult and often impossible to determine. As Justice WILLIAM J. BRENNAN said: "It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions." Doubt as to our present ability to learn the intent of the Framers fuels the suspicion among observers more cynical than Justice Brennan that lip service to supposed evidence of original intent is actually a façade behind which judges weave their subjective political values into the fabric of constitutional law. Second, critics argue that our concepts of civilized rule constantly evolve and that originalism affords too niggardly a protection for profoundly important rights. Again, Justice Brennan put the matter succinctly in describing his position on the constitutionality of the death penalty: "Because we are the last word on the meaning of the Constitution, our views must be subject to revision over time, or the Constitution falls captive, again, to the anachronistic views of long-gone generations." He thus felt free to argue that the Eighth Amendment's prohibition on CRUEL AND UNUSUAL PUNISHMENT (applicable to the states through the Fourteenth Amendment) prohibits the death penalty notwithstanding the specific references to the death penalty in the Fifth Amendment, which was part of the BILL OF RIGHTS package that included the Eighth, and the more general reference to the death penalty in the Fourteenth Amendment itself.

In response to the first criticism—that the intent of the

Framers regarding contemporary constitutional litigation is not ascertainable—originalists divide into what might be called an "intentionalist" school of thought and an "interpretivist" school of thought.

Members of the intentionalist school search for the actual state of mind of the Framers at the pertinent time, based on the language of the constitutional text, preconstitutional precedents, sometimes involving British law, or explicit legislative history. In their view, a judicial decision that is not based on explicit constitutional language or direct evidence of an actual intent held by the Framers is an illegitimate decision. The intentionalist school is best illustrated by the work of Raoul Berger. Berger has thus concluded that BROWN V. BOARD OF EDUCATION OF TOPEKA (1954) was an illegitimate decision because of the lack of an explicit reference to DESEGREGATION in the Fourteenth Amendment and because of evidence that some of the Framers stated during the framing and ratification period that public, segregated, educational institutions would pass constitutional muster under the Fourteenth Amendment. He has also denied the existence of an EXECUTIVE PRIVILEGE because of the failure of the Constitution to mention such a privilege and the lack of precedent in colonial or preexisting law.

INTERPRETIVISM, on the other hand, insists only that constitutional decisions be, in Dean John Hart Ely's (not himself an originalist) words, "in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution. That the complete reference will not be found there—because the situation is not likely to have been foreseen—is generally common ground." For interpretivists, the name originalism is thus a bit of a misnomer, at least to the extent that it suggests that express language of the Constitution or evidence of the actual state of mind of the Framers are the sole legitimate criteria for constitutional adjudication.

Interpretivists take the view that CONSTITUTIONAL INTERPRETATION must apply the conventional legal criteria used by lawyers in interpreting other legal texts. As Judge Robert H. Bork, certainly the most noted originalist, has stated, the search for original intent is "the everyday procedure of lawyers and judges when they must apply a statute, a contract, a will, or the opinion of a court." These criteria, of course, are designed to determine the purposes of the text. Democratic processes demand that statutory interpretation be governed by LEGISLATIVE INTENT. Contract law stresses the purposes of the parties, estate law stresses the intent of the testator, and the doctrine of STARE DECISIS stresses the meaning of prior decisions. Drawing on an analogy between these fields of law and constitutional law, interpretivists believe that constitutional law must stress the meaning of the document, which for them, as Professor Henry Monaghan has stated, is not so much the state of mind of the Framers as the "*public* understanding" of what particular constitutional provisions were intended to achieve.

Constitutional adjudication is thus for interpretivists much more than a search for express language, colonial or English precedent, or direct evidence of intent (or lack thereof) that produces a mechanical result in each case. Language or other direct evidence of intent is of course important in their view and dispositive when, as in the case of the death penalty, explicit consideration was given to the particular issue. Certainly, they would argue, the fact that the Fifth and Fourteenth Amendments prohibit imposition of the death penalty without DUE PROCESS OF LAW is inconsistent with a judicial decision holding that the death penalty violates the Constitution in any and all circumstances.

Beyond such cases in which direct evidence of intent, such as language in the Constitution or legislative history, is dispositive, the interpretive view of originalism provides considerable scope for the exercise of judgment and for disagreement. This is not surprising because the conventional legal criteria applied by lawyers in interpreting statutes, contracts, or other legal documents extend well beyond language or express intent. Legal documents frequently provide evidence of only a very general purposebb that courts must adapt to the circumstances of each case. Courts legitimately, therefore, read into statutes commands or exceptions to commands that have no basis in the express statutory language, but are believed necessary to effectuate the overall legislative purpose. For example, in *Reves v. Ernst Young* (1990), the Supreme Court held that the phrase "any note" in the definitional section of the Securities Exchange Act of 1934 does not literally mean "any note," but must be understood in terms of what Congress sought to accomplish by enacting the statute; and in *Haggar Co. v. Helvering* (1940), the Court held in light of the statutory purpose that "[a] timely amended return is as much a "first return' . . . as is a single return filed by the taxpayer. . . ." Courts must do this because of the inability of drafters to anticipate the myriad circumstances in which the meaning of the statute must be divined, obvious drafting errors, or changes in the relevant industrial practice or technology. Similarly, courts may adapt contractual language to changed circumstances or impose duties, such as the duty to act in good faith where the contract accords considerable discretion to one party, notwithstanding the lack of express contractual language. Application of this mode of analysis to constitutional interpretation is essential because constitutional language is more general than most statutes and private contracts, and the interstices thus tend to be considerably wider.

Interpretivists believe that the Framers could not foresee all of the circumstances to which particular constitu-

tional provisions might be applied and that judges must attempt to adapt what evidence of purpose there is to changed circumstances. Many interpretivists thus believe that contrary to Raoul Berger's conclusion *Brown* was fully legitimate. The interpretivists argue that the specific expectations of those Framers who stated that segregated education would survive the enactment of the Fourteenth Amendment were not faced with direct evidence that segregated educational systems were palpably inconsistent with the amendment's core purpose of relieving blacks of obstacles imposed by law. The interpretivist school thus takes into account the very limited experience these Framers had with both segregated schools and public education itself and feels free to override their particularized expectations in order to satisfy the basic philosophy of the EQUAL PROTECTION clause.

Similarly, the interpretivist school is willing to adapt constitutional provisions to other changed circumstances. For example, in *Ollman v. Evans* (D.C. Circuit, 1984), Judge Bork wrote with regard to the interplay of the First Amendment and the law of LIBEL:

> We know very little of the precise intentions of the framers and ratifiers of the speech and press clauses of the first amendment. But we do know they gave into the judges' keeping the value of preserving free expression and, in particular, the preservation of political expression, which is commonly conceded to be the value at the core of these clauses. Perhaps the framers did not envision libel actions as a major threat to that freedom. . . . But if, over time, the libel action evolves so that it becomes a threat to the central meaning of the first amendment, why should not judges adapt their doctrines? . . . It is no different to refine and evolve doctrine here, so long as one is faithful to the basic meaning of the amendment, than it is to adapt the fourth amendment to take account of electronic means of surveillance, the commerce clause to adjust to interstate motor carriage, or the first amendment to encompass the electronic media. . . .

Moreover, interpretivists feel free to draw what Professor Charles L. Black has called inferences "from the structures and relationships created by the Constitution." Again, this interpretive method is commonly used by lawyers and judges to interpret legal texts. The Supreme Court's opinions regarding private actions under the securities laws brim with inferences as to the scope and content of one remedial provision drawn from the scope and content of other remedial provisions. Interpretation of contracts also often requires courts to infer obligations from the structure of the parties' relationship.

Because the Constitution established a nation to be governed by a designated governmental structure, this interpretive method is particularly suited to constitutional law. Black has thus argued that an inference from structure reconciles the Supreme Court's scrutiny of state regulation claimed to discriminate against INTERSTATE COMMERCE with the absence in the constitutional texts of any explicit prohibition of such state conduct; the freedom of commerce from local discrimination is implicit in the economic structure of nationhood and the fact that "we are one people, commercially as otherwise. . . ." One can similarly infer some form of executive, legislative, or judicial privilege from the Constitution's SEPARATION OF POWERS. Were one branch routinely to compel disclosure of the internal decisional consultations of another branch, the latter branch might find its decision making skewed and the exercise of its legitimate powers subject to substantial encroachment by the other branch. This result would be contrary to the Constitution's purpose of establishing separate and independent branches of government.

Drawing inferences from structure and relationships is thus a legitimate method of determining the intent of the Framers. This intent, of course, is not the Framers' conscious thoughts or expectations, but the adaptation of the general principle they sought to establish to particular factual situations. Indeed, unless a judge is willing to draw such inferences, the intent of the Framers may go unfulfilled. For example, as Black has argued, even if the First Amendment had not been adopted, a judge might legitimately conclude that the various provisions for free elections for federal office could not fulfill their purpose if either federal or state governments were free to prohibit speeches by candidates for federal office or their supporters. To effectuate the purposes of the electoral provisions—to effectuate original intent—some form of protection for political speech similar to First Amendment doctrine would have to be fashioned by courts.

Having concluded that neither the constitutional text, legislative history, nor inferences from structures and relationships address a claim of a right, originalists believe that courts should not recognize that right. Originalists thus typically argue that ROE V. WADE (1973) was incorrectly decided because there is no evidence that either the generalized RIGHT TO PRIVACY relied on in the decision's brief doctrinal discussion or the specific issue of ABORTION has even been addressed by any constitutional provision. This view is fortified in the minds of originalists by the seeming disarray among *Wade*'s defenders as to the doctrinal basis for the decision, which ranges from an implied right of privacy protecting individual autonomy in sexual or procreative matters to the First Amendment's religion clause, to the equal protection clause, and to the THIRTEENTH AMENDMENT's prohibition on involuntary servitude.

In some cases, evidence of purpose or inferences drawn from structures or relationships may yield no guidance for interpretation of a particular constitutional provision. In

such a case, originalists believe that judges should accord no judicially enforceable meaning to that provision because the only available criteria for establishing that meaning are the judiciary's subjective views of what is good constitutional policy. Originalists thus typically view the NINTH AMENDMENT ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people") or the PRIVILEGES AND IMMUNITIES clause of the Fourteenth Amendment ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States") as such clauses. The language of these provisions does not make any cogent choice between alternative legal rules, and their history appears to lack any evidence of judicially enforceable purpose. This being the case, originalist theory holds that judges should not undertake to attribute meaning to these provisions. To the argument that the Framers may have intended that courts undertake the task of giving meaning to such clauses, originalists generally answer that there is nothing in the constitutional record to suggest that such substantial power was to be accorded to the judiciary.

On one issue—adherence to PRECEDENT—originalist theory is unclear. As the preceding discussion has indicated, the interpretive school of originalism calls simply for the application of conventional legal criteria to constitutional interpretation. In nonconstitutional areas, such criteria certainly include judicial precedent. Thus, one does not infrequently encounter statutes whose interpretation over time seems to have departed rather far from their language or legislative purpose. The doctrine of stare decisis, however, generally precludes courts from undoing settled interpretations. Similarly, contractual clauses are used by lawyers to achieve particular purposes, even though the purposes and the particular language seem at best distantly related. Lawyers continue to use them, however, because courts have previously attributed to these clauses the purposes in question.

One would therefore expect interpretivists at least to put a heavy weight on precedent and to overrule precedent only infrequently. However, this expectation clashes with the argument that a reluctance to overrule precedent gives an advantage to those who would base constitutional decisions on criteria deemed by originalists to be invalid. Unless originalists are willing to overrule precedent, it can be argued, the Constitution will, over time, spawn a body of law considerably at odds with original intent. Indeed, Professor Monaghan has pointed out that much of present constitutional law "is at variance with what we know of the original understanding."

With regard to the criticism that originalism affords inadequate protection for profoundly important rights, originalists rarely answer with a denial. Originalism does not claim to offer a comprehensive formula for civilized rule or an optimal set of individual rights. Rather, it purports to offer the correct role for the judiciary in a democratic society. It posits that lodging the ultimate decision-making power of the state in a nonelected branch of government must ultimately subordinate the elected branches and subvert democratic rule itself. It denies the existence of a natural law that can be discovered and applied by judges in a manner consistent with democratic principles. Originalists see in the various attempts by scholars to fashion nonoriginalist criteria for constitutional decision making faintly disguised political movements seeking to achieve in court what they have been unable to secure in elections.

At bottom, then, originalism is based on the view that judges must confine their role to the application and enforcement of principles that have become constitutional law through the adoption of the Constitution or the amendment of the Constitution itself. Originalism is neutral with regard to particular rights in the sense that a persuasive argument that a right is necessary to civilized rule will not carry the day in court without an anchoring of that argument in the Constitution; nevertheless, originalism is not a nihilistic philosophy. Rather, it prizes democratic rule and demands that restrictions on this rule be the result of the adoption and amendment procedures set out in the Constitution. Originalists thus view the orderly democratic procedures of the Constitution as superior to claims of substantive rights that have not been adopted through such procedures. For originalists, rule by judiciary is not the road to civilized rule or optimal individual rights.

The future of originalism is unclear. The Senate's failure to confirm Judge Bork was based in part on the criticisms of originalism previously described. Many originalists are puzzled at the recent controversy over their view because many of their critics seem not to quarrel with the application of conventional legal criteria to other legal texts such as statutes or contracts. Moreover, originalists view their methodology as politically neutral. Nevertheless, the Bork controversy illustrated the difficulty of defending originalism in a political context. Because originalists do not believe that the Constitution enshrines every right necessary to avoid every wrong—including serious wrongs—originalists can be mistakenly perceived as favoring those wrongs. Judge Bork was thus depicted by some as favoring POLL TAXES because he had written that such taxes did not violate the equal protection clause.

Originalists fear that the difficulty of defending their position politically will fundamentally alter the American system of government. In their view, judicial nominations and Senate confirmation proceedings may, in the worst-case scenario, become highly politicized in the sense that nominees may be required to make commitments about

future decisions equivalent to political promises. These promises will be made to appease groups that seek to constitutionalize their claims and have sufficient political power to extract such promises. If so, originalists fear, constitutional law will become an incoherent body of rules having no connection with the document and resulting from random constellations of political forces and the idiosyncratic views of particular Supreme Court Justices.

RALPH K. WINTER
(1992)

Bibliography

BLACK, CHARLES L. 1969 *Structure and Relationship in Constitutional Law.* Baton Rouge, La.: Louisiana State University Press.

BORK, ROBERT H. 1990 *The Tempting of America: The Political Seduction of the Law.* New York: Free Press.

FEDERALIST SOCIETY 1986 *Interpreting Our Written Constitution* (Occasional Paper No. 2). Washington, D.C.: The Federalist Society.

MCDOWELL, GARY 1985 *The Constitution and Contemporary Constitutional Theory.* Cumberland, Va.: Center for Judicial Studies.

MONAGHAN, HENRY 1981 Our Perfect Constitution. *New York University Law Review* 56:353–376.

## ORIGINAL JURISDICTION

The original jurisdiction of a court (as distinguished from APPELLATE JURISDICTION) is its power to hear and decide a case from the beginning. In the federal court system, the district courts originally hear the overwhelming majority of cases. Most discussion and litigation concerning the JURISDICTION OF FEDERAL COURTS centers on the district courts' original JURISDICTION. Yet the term "original jurisdiction" is heard most frequently in discussion and litigation concerning the jurisdiction of the Supreme Court.

The Constitution itself establishes the Supreme Court's original jurisdiction. After setting out the types of cases subject to the JUDICIAL POWER OF THE UNITED STATES, Article III distributes the Supreme Court's jurisdiction over them: "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases mentioned, the Supreme Court shall have appellate jurisdiction. . . ."

From the beginning, Congress has given the district courts CONCURRENT JURISDICTION over some of the cases within the Supreme Court's original jurisdiction, offering plaintiffs the option of commencing suit in either court. The Supreme Court has given this practice its stamp of constitutional approval. Furthermore, because the Court is hard-pressed by a crowded docket, it has sought ways of shunting cases to other courts. Thus, even when a case does fall within the Court's original jurisdiction, the court has conferred on itself the discretion to deny the plaintiff leave to file an original action. Typically the Court decides only three or four original jurisdiction cases each year, conserving its institutional energies for its main task: guiding the development of federal law by exercising its appellate jurisdiction.

Congress, however, cannot constitutionally diminish the Court's original jurisdiction. Nor can Congress expand that jurisdiction; the dubious reading of Article III in MARBURY V. MADISON (1803) remains firmly entrenched. However, the Supreme Court does entertain some actions that have an "original" look to them, even though Article III does not list them as original jurisdiction cases: HABEAS CORPUS is an example; so are the common law WRITS OF MANDAMUS and PROHIBITION. The Court hears such cases only when they can be characterized as "appellate," calling for Supreme Court supervision of actions by lower courts.

Of the two types of original jurisdiction cases specified in Article III, the state-as-party case has produced all but a tiny handful of the cases originally decided by the Supreme Court. Officers of foreign governments enjoy a broad diplomatic immunity from suit in our courts, and, for motives no doubt similarly diplomatic, they have not brought suits in the Supreme Court. (The "ambassadors" and others mentioned in Article III, of course, are those of foreign governments, not our own.)

The state-as-party cases present obvious problems of SOVEREIGN IMMUNITY. The ELEVENTH AMENDMENT applies to original actions in the Supreme Court; indeed, the amendment was adopted in response to just such a case, CHISHOLM V. GEORGIA (1793). Thus a state can no more be sued by the citizen of another state in the Supreme Court than in a district court. However, when one state sues another, or when the United States or a foreign government sues a state, there is no bar to the Court's jurisdiction.

The spectacle of nine Justices of the Supreme Court jointly presiding over a trial has a certain Hollywood allure, but the Court consistently avoids such proceedings. The SEVENTH AMENDMENT commands TRIAL BY JURY in any common law action, and at first the Supreme Court did hold a few jury trials. The last one, however, took place in the 1790s. Since that time the Court has always managed to identify some feature of an original case that makes it a suit in EQUITY; thus jury trial is inappropriate, and findings of fact can be turned over to a SPECIAL MASTER, whose report is reviewed by the Court only as to questions of law.

The source of the substantive law applied in original actions between states is FEDERAL COMMON LAW, an amalgam of the Anglo-American common law, policies derived from congressional statutes, and international law principles. Thus far no state has defied the Supreme Court suf-

ficiently to test the Court's means of enforcing its decrees, but some states have dragged out their compliance for enough years to test the patience of the most saintly Justice.

KENNETH L. KARST
(1986)

Bibliography

NOTE 1959 The Original Jurisdiction of the United States Supreme Court. *Stanford Law Review* 11:665–719.

## ORIGINAL PACKAGE DOCTRINE

In BROWN V. MARYLAND (1827) the Supreme Court had before it a challenge to a state statute requiring all importers of goods from foreign countries to take out a $50 license. Instead of simply holding that such a license tax imposed only on importers from foreign countries violated the constitutional clause prohibiting states from laying "any IMPOSTS or duties on imports or exports," Chief Justice JOHN MARSHALL used the occasion to decide just when goods imported from abroad ceased being imports exempted from taxation by the states. He concluded that no tax could be imposed on the goods or their importer so long as the goods had not been sold and were held in the original packages in which they were imported. He also said the principles laid down "apply equally to importations from a sister state."

The original package DOCTRINE had a long career as applied to goods imported from abroad. In *Low v. Austin* (1872) the Court held that a state could not collect its uniform property tax on cases of wine which the importer held in their original package on tax day. Much later, in *Hooven Allison Co. v. Evatt* (1945), the Court applied the doctrine to immunize bales of hemp from state property taxation, so long as the importer held them in their original package—the bales. Along the way, not surprisingly, the Court struggled in many cases with such problems as what constitutes the original package, and when it is broken.

Finally, in MICHELIN TIRE CORP. V. WAGES (1976) the Court upheld the imposition of a nondiscriminatory property tax upon tires imported from abroad and held in their original packages. It discussed at length the decision in *Low v. Austin*, overruled it, and appeared to be saying that only taxes discriminating against FOREIGN COMMERCE will be held invalid. Hence, it appears that the rules governing taxation of imports will now be similar to those applied to taxing such goods from other states, with the original package doctrine playing no part in the decisions.

Marshall's suggestion in *Brown v. Maryland* that the original package doctrine applied to state *taxation* of goods imported from other states was early rejected. In WOODRUFF V. PARHAM (1869) the Court upheld a state sales tax applied to an auctioneer who brought goods from other states and sold them in the taxing state in the original and unbroken packages. The IMPORT-EXPORT CLAUSE was determined to apply only to traffic with foreign nations, not to interstate traffic. The Court indicated its feeling that it would be grossly unfair if a resident of a state could escape from state taxes on all merchandise that he was able to import from another state and keep in its original package.

In 1890, however, the Court held that the original package doctrine applied to invalidate state *regulations* of goods imported from other states until the goods were sold or the package broken. The decision, LEISY V. HARDIN (1890), invalidated a state prohibition law as applied to sales within the state by the importer of kegs and cases of beer. Federal statutes were then enacted permitting states to exclude alcohol even in original packages. But the original package doctrine persisted with reference to other state regulations for nearly half a century. The Court found reasons in many cases to avoid applying the doctrine but did not effectively repudiate it until 1935. In *Baldwin v. G. A. F. Seelig* (1935) the Court, after reviewing the cases applying the original package doctrine said:

> "In brief, the test of the original package is not an ultimate principle. . . . It makes a convenient boundary and one sufficiently precise save in exceptional conditions. What is ultimate is the principle that one state in its dealing with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement."

Today the original package doctrine is of interest only to historians.

EDWARD L. BARRETT, JR.
(1986)

(SEE ALSO: *State Regulation of Commerce; State Taxation of Commerce.*)

Bibliography

NOWAK, JOHN E.; ROTUNDA, RONALD D.; and YOUNG, NELSON J. 1979 *Handbook on Constitutional Law.* Pages 285–290. St. Paul, Minn.: West Publishing Co.

POWELL, THOMAS R. 1945 State Taxation of Imports: When Does an Import Cease to Be an Import? *Harvard Law Review* 58:858–876.

RIBBLE, F. D. G. 1937 *State and National Power over Commerce.* New York: Columbia University Press.

## *OROZCO v. TEXAS*
394 U.S. 324 (1969)

In an opinion by Justice HUGO L. BLACK, the Supreme Court held that a conviction based on incriminating admissions

obtained by police in the absence of notification of the MIRANDA RULES, even though the prisoner was at home, away from the coercive surroundings of a stationhouse, violated the RIGHT AGAINST SELF-INCRIMINATION.

LEONARD W. LEVY
(1986)

## *OSBORN v. BANK OF THE UNITED STATES*
9 Wheaton 738 (1824)

On its constitutional merits, *Osborn* was a replay of MCCULLOCH V. MARYLAND (1819). Ohio had sought to drive out the congressionally chartered bank by taxing its branches $50,000 each and by seizing money from its vaults. The bank sued the state auditor in a federal court for recovery of the money. The state argued that the ELEVENTH AMENDMENT barred the court from taking JURISDICTION, but, on APPEAL to the Supreme Court, Chief Justice JOHN MARSHALL concluded that the amendment applied only when the state was named as a party defendant—a position abandoned by the Court in later decisions. (See EX PARTE YOUNG.) On the principles of *McCulloch*, the auditor was liable for his TRESPASS.

*Osborn's* lasting doctrinal contribution was its sweeping definition of congressional power under Article III to confer FEDERAL QUESTION JURISDICTION on the federal courts. Marshall's view, which remains good law, was that cases "arising under" the Constitution, or federal laws, or treaties included—for purposes of defining congressional power to confer jurisdiction—any case in which federal law might *potentially* be dispositive. It made no difference that federal law was not implicated in the bank's complaint for trespass; the arguable invalidity of the bank's charter might possibly be raised as a defense to such an action. Although similar words ("arises under") are used in the statutes defining federal question jurisdiction, they have been interpreted more narrowly. *Osborn* thus defines congressional power, not its exercise.

The *Osborn* decision heightened the vehemence of state denunciations of the Court's judicial nationalism and even of its appellate jurisdiction. President ANDREW JACKSON's veto of the bank bill of 1832 probably reflected the prevailing belief—despite *McCulloch* and *Osborn*—that Congress had no constitutional authority to charter a corporation.

LEONARD W. LEVY
KENNETH L. KARST
(1986)

## *OSBORNE v. OHIO*

See: Child Pornography

## *O'SHEA v. LITTLETON*
414 U.S. 488 (1974)

Protesters against RACIAL DISCRIMINATION in Cairo, Illinois, obtained a federal court INJUNCTION against a state judge and magistrate, forbidding continuation of various discriminatory BAIL, sentencing, and jury-fee practices in criminal cases. The Supreme Court reversed, 6–3, on RIPENESS grounds. Although some plaintiffs had previously suffered such discrimination, none were now threatened with prosecution. Thus there was no live CASE OR CONTROVERSY.

Once a prosecution was commenced, YOUNGER V. HARRIS (1971) would forbid a federal injunction. (See ABSTENTION DOCTRINE.) Thus potential plaintiffs in such cases must file their complaints within a narrow time period.

KENNETH L. KARST
(1986)

## OTIS, JAMES, JR.
(1725–1783)

Massachusetts lawyer, Harvard graduate (1743), and ideologue of the AMERICAN REVOLUTION, James Otis, Jr., became constitutionally significant with PAXTON'S CASE (1761), which concerned the issuance of WRITS OF ASSISTANCE by the Superior Court of Massachusetts. Confronted with the reality that the writs, which empowered customs officers to search all suspected houses, typified many kinds of general SEARCH WARRANTS within British law, Otis resorted to the HIGHER LAW. Using sources from MAGNA CARTA to BONHAM'S CASE (1610), Otis argued not only that incompatibility with natural and COMMON LAW rendered general searches void but also that the court should proclaim that invalidity. Although he did not advocate outright JUDICIAL REVIEW of an act of Parliament by a colonial court, the interpretation of the writs that Otis urged on the court would have had that result.

Although Otis's present fame derives heavily from *Paxton's Case*, he gained little contemporary notice from his performance in it, for his brief was not published until 1773. Rather, the principal constitutional services of the case were that it resulted in Otis's election to the Massachusetts General Court (legislative), thereby giving him a forum for his views and enabling him to assemble and rehearse the constitutional arguments that he later applied to those issues that directly generated the American Revolution.

Limiting the power of Parliament was central to Otis's thought: "To say the Parliament is absolute and arbitrary is a contradiction. The parliament cannot make 2 and 2, 5; Omnipotency cannot do it; the supreme power in a state

is JUS DICERE [to announce the law] only;—JUS DARE [to construct the law] strictly speaking belongs only to God. . . . Should an act of Parliament be against any of his natural laws, which are immutably true, their declaration would be contrary to eternal truth, equity and justice, and consequently void." Otis's constitutional significance, however, does not emanate from this belief, which most contemporaries shared, but from the corollaries he extracted from it. Otis first transformed the British constitution into a fixed rather than a flexible barrier to Parliament, which he redefined as a subordinate creature of the constitution rather than one of its components. Of even greater import, Otis characterized the courts as umpires of Parliament's power. "The judges of England," he wrote, "have declared in favor of these sentiments when they expressly declare; that acts of Parliament against natural equity are void. That acts against the fundamental principles of the British Constitution are void." To assert that all earthly power, even that of Parliament, had limits was a ubiquitous platitude; to imply that agencies outside Parliament could calibrate and enforce these limits challenged the axiom of parliamentary supremacy that, for most Englishmen, lay at the foundation of their constitution.

A disembodied and didactic use of sources, ranging from Magna Carta to Hugo Grotius, provided Otis's intellectual ammunition. In *Bonham's Case*, for example, the *Reports* of Sir EDWARD COKE mentioned courts' controlling acts of Parliament and adjudging them void. Coke's meaning, however, was constructive rather than constitutional and involved no judicial effort to subjugate Parliament. The case pitted not the legislature against the courts but two clashing private parties and raised questions of which conflicting laws applied. Coke reasoned that the common law courts, acting with, rather than against, another court in the form of Parliament, should give the laws a reasonable construction that was jointly desired. Otis bloated the case, however, into precedent for constitutional regulation of Parliament under judicial aegis.

Otis repeatedly denied the revolutionary implications of his ideology, stressing that Parliament was the British Empire's supreme but not absolute legislature and could alone rescind its statutes. Despite these denials, however, Otis's assumptions intrinsically approached the threshold of the right to revolution against unconstitutional parliamentary acts.

Having asserted limits to Parliament's authority, Otis enumerated the colonial rights that lay beyond them. As a delegate to the STAMP ACT CONGRESS (1765) and in his *Rights of the British Colonies* (1764), written against the Sugar Act, Otis condemned taxation of the colonists by a Parliament to which they had directly elected no representatives. (See TAXATION WITHOUT REPRESENTATION.) As moderator of the Boston town meetings, he also opposed juryless trials under the TOWNSHEND ACTS of 1767.

Widely regarded as the premier theorist of the radical cause in the 1760s, Otis had great influence on the constitutional ideology of the developing revolution. He edited many of the *Farmer's Letters* (1767) by JOHN DICKINSON, while JOHN ADAMS adapted much of Otis's reasoning in *Paxton's Case* against juryless ADMIRALTY trials in *Sewall v. Hancock* (1768–1769).

WILLIAM J. CUDDIHY
(1986)

Bibliography

WATERS, JOHN 1968 *The Otis Family.* Chapel Hill: University of North Carolina Press.

## OVERBREADTH

Judges frequently encounter the claim that a law, as drafted or interpreted, should be invalidated as overbroad because its regulatory scope addresses not only behavior that constitutionally may be punished but also constitutionally protected behavior. The normal judicial response is confined to ruling on the law's constitutionality as applied to the litigant's behavior, leaving the validity of its application to other people and situations to subsequent adjudication. Since THORNHILL V. ALABAMA (1940), however, the Supreme Court has made an exception, most frequently in FIRST AMENDMENT cases but applicable to other precious freedoms, when it is convinced that the very existence of an overbroad law may cause knowledgeable people to refrain from freely exercising constitutional liberties because they fear punishment and are unwilling to litigate their rights. In such cases, the aggregate inhibition of guaranteed freedom in the regulated community is thought to justify both holding the overbroad law INVALID ON ITS FACE and allowing one to whom a narrower law could be applied constitutionally to assert the overbreadth claim. Unlike the alternative of narrowing the unconstitutional portions of an overbroad statute case by case, facial invalidation prevents delay in curing the improper deterrence. Moreover, courts most effectively can address the inhibition of those who neither act nor sue by allowing those who do to raise the overbreadth challenge.

Like a VAGUENESS challenge, an overbreadth challenge implicates judicial governance in two controversial ways. First, if successful, the challenge completely prohibits the law's enforcement, even its constitutional applications, until it is narrowed through reenactment or authoritative interpretation. Second, the challenge requires a court to gauge the law's applications to unidentified people in circumstances that must be imagined, often ignoring the

facts of the situation before them—a practice of hypothesizing that is at odds with the court's usual application of law to the facts of concrete CASES OR CONTROVERSIES.

Overbreadth differs from vagueness in that the constitutional defect is a law's excessive reach, not its lack of clarity; yet the defects are related. A law that punished "all speech that is not constitutionally protected" would, by definition, not be overbroad, but it would be unduly vague because people would have to speculate about what it outlawed. A law that prohibited "all speaking" would be unconstitutionally overbroad, but it also might be vague. Although clear enough if taken literally, it might be understood that the legislature did not intend the full reach of its broadly drafted law, and the public would have to speculate about what the contours of the intended lesser reach might be. A law that banned "all harmful speech" would be both overbroad and vague on its face. The key connection, however, is the improper inhibiting effect of the broad or vague law.

As with vagueness, the federal courts approach overbreadth challenges to state and federal laws differently. A federal court must interpret a federal law before judging its constitutionality. In doing so, the court may reduce the law's scope, if it can do so consistently with Congress's intent, a course that may minimize constitutional problems of overbreadth. Only state courts may authoritatively determine the reach of state laws, however. Consequently, when the Supreme Court reviews an overbreadth challenge to a state law on appeal from a state court—which review usually occurs because the challenger raised the claim in defense of state court proceedings against him—the Court must accept the state court's determination of the law's scope and apply its own constitutional judgment to the law as so construed. By contrast, if parties threatened with enforcement of a state statute sue in federal court to have the law declared unconstitutionally overbroad before they are prosecuted or sued in state court, the federal court faces the additional complication of determining the overbreadth question without the guidance of any state court interpretation of the law in this case. If past interpretations of the law's terms make its breadth clear, there is no more difficulty than in Supreme Court review of a state court case. But if there is some question whether a state court might have narrowed the state law, especially in light of constitutional doubts about it, the federal court faces the possibility of making its own incorrect interpretation and basing an overbreadth judgment on that unstable premise.

With other constitutional claims involving uncertain state laws, a federal court normally will abstain from deciding the constitutional question until clarification is sought in state court. However, because the prolongation of CHILLING EFFECTS on constitutionally protected conduct is the basis of the vagueness of overbreadth doctrines, the Supreme Court indicated in DOMBROWSKI V. PFISTER (1965) and *Baggett v. Bullitt* (1964) that abstention is generally inappropriate if the problem would take multiple instances of adjudication to cure. *Babbitt v. United Farm Workers* (1979) followed the implicit corollary, requiring abstention where a single state proceeding might have obviated the need to reach difficult constitutional issues. But BROCKETT V. SPOKANE ARCADES, INC. (1985) shunned abstention in a case where state court clarification was feasible in an expeditious single proceeding, but where the litigants objecting to overbreadth were not people to whom the law could be validly applied but people who desired to engage in constitutionally protected speech. In that circumstance, at least where the unconstitutional portion of the statute was readily identifiable and severable from the remainder, the Court chose to strike that portion rather than abstain to see if the state court would remove it by interpretation.

*Brockett* also expressed a preference for partial over facial invalidation whenever challengers assert that application of a statute to them would be unconstitutional. The Court's ultimate objective is to invalidate only a statute's overbroad features, not the parts that legitimately penalize undesirable behavior. It permits those who are properly subject to regulation to mount facial overbreadth attacks only to provide an opportunity for courts to eliminate the illegitimate deterrent impact on others. Partial invalidation would do such people no good, and those who are illegitimately deterred from speaking may never sue. In order to throw out the tainted bathwater, the baby temporarily must go too, until the statute is reenacted or reinterpreted with its flaws omitted. Where, as in *Brockett*, one asserts his own right to pursue protected activity, however, no special incentive to litigate is needed. The Court can limit a statute's improper reach through partial invalidation and still benefit the challenger. *Brockett*'s assumption that the tainted part of the statute does not spoil the whole also undercuts Henry Monaghan's important argument that allowing the unprotected to argue overbreadth does not depart from normal STANDING rules because they always assert their own right not to be judged under an invalid statute. The part applied to them is valid, and they are granted standing to attack the whole only to protect others from the invalid part. Finally, the claim that a law is invalid in all applications because based on an illegitimate premise has elements of both partial and facial invalidation. As the invalid premise affects the challenger as well as everyone else, there is no need to provide a special incentive to litigate, but because the whole law is defective, total invalidation is appropriate.

The seriousness of striking the whole of a partially invalid law at the urging of one to whom it validly applies,

together with doubts about standing and the reliability of constitutional adjudication in the context of imagined applications, renders overbreadth an exceptional and controversial DOCTRINE. The determination of what circumstances are sufficiently compelling to warrant the doctrine's use has varied from time to time and among judges. The WARREN COURT focused mainly on the scope of the laws' coverage, the chilling effect on protected expression, and the ability of the legislature to draw legitimate regulatory boundaries more narrowly. The Court seemed convinced that overbroad laws inhibited freedom substantially, and thus made that inhibition the basis of invalidation, especially when the laws were aimed at dissidents and the risk of deliberate deterrence was high, as in APTHEKER V. SECRETARY OF STATE (1964), *United States v. Robel* (1967), and *Dombrowski v. Pfister* (1965). The BURGER COURT has continued to employ the overbreadth doctrine when deterrence of valued expression seems likely, as in *Lewis v. New Orleans* (1974), which struck down a law penalizing abusive language directed at police, and in SCHAD V. MT. EPHRAIM (1981), which struck down an extremely broad law banning live entertainment.

Justice BYRON R. WHITE has led that Court, however, in curtailing overbreadth adjudication. As all laws occasionally may be applied unconstitutionally, there is always a quantitative dimension of overbreadth. White's majority opinion in BROADRICK V. OKLAHOMA (1973) held that the overbroad portion of a law must be "real and substantial" before it will be invalidated. That standard highlights the magnitude of deterrent impact, which depends as much on the motivations of those regulated as on the reach of the law. *Broadrick* also emphasized the need to compare and offset the ranges of a statute's valid and invalid applications, rather than simply assess the dimensions of the invalid range. This substituted a judgment balancing a statute's legitimate regulation against its illegitimate deterrence of protected conduct for a judgment focused predominantly on the improper inhibition.

*Broadrick* initially limited the "substantial overbreadth" approach to laws seemingly addressed to conduct, leaving laws explicitly regulating expression, especially those directed at particular viewpoints, to the more generous approach. In *Ferber v. New York* (1982) and *Brockett*, however, substantial overbreadth was extended to pure speech cases as well. That these cases involved laws regulating OBSCENITY might suggest that some Justices find the overbreadth doctrine an improper means to counter deterrence of marginally valued expression. More likely, however, the Court generally is abandoning its focus on the subject of a law's facial coverage in favor of a comparative judgment of the qualitative and quantitative dimensions of a law's legitimate and illegitimate scope, whatever speech or conduct be regulated.

Still, the reality of deterrence and the value of the liberty deterred probably remain major factors in overbreadth judgments, even if more must be considered. For example, the Court's pronouncement in *Bates v. State Bar of Arizona* (1977) that overbreadth analysis generally is inappropriate for profit-motivated advertising rested explicitly on a judgment that advertising is not easily inhibited and implicitly on the historic perception of COMMERCIAL SPEECH as less worthy of protection.

Overbreadth controversies nearly always reflect different sensitivities to the worth of lost expression and of lost regulation of unprotected behavior, or different perceptions of the legitimacy and reliability of judicial nullification of laws that are only partially unconstitutional, or different assessments of how much inhibition is really likely, how easy it would be to redraft a law to avoid overbreadth, and how important broad regulation is to the effective control of harmful behavior. Despite controversy and variations in zeal for application of the overbreadth doctrine, however, its utility in checking repression that too sweepingly inhibits guaranteed liberty should assure its preservation in some form.

JOHNATHAN D. VARAT
(1986)

Bibliography

ALEXANDER, LAWRENCE A. 1985 Is There an Overbreadth Doctrine? *San Diego Law Review* 22:541–554.

MONAGHAN, HENRY P. 1981 Overbreadth. *Supreme Court Review* 1981:1–39.

NOTE 1970 The First Amendment Overbreadth Doctrine. *Harvard Law Review* 83:844–927.

## OVERRULING

The authority of the Supreme Court to reconsider and overrule its previous DECISIONS is a necessary and accepted part of the Court's power to decide cases. By one estimate, the Supreme Court overruled itself on constitutional issues 159 times through 1976 and in each case departed from the DOCTRINE of STARE DECISIS.

The basic tenet of *stare decisis*, as set forth by WILLIAM BLACKSTONE, is that PRECEDENTS must generally be followed unless they are "flatly absurd" or "unjust." The doctrine promotes certainty in the law, judicial efficiency (by obviating the constant reexamination of previously settled questions), and uniformity in the treatment of litigants. The roots of the doctrine, which is fundamental in Anglo-American jurisprudence, have been traced to Roman civil law and the Code of Justinian.

Justices and commentators have disagreed about the proper application of *stare decisis* to constitutional deci-

sion making. Justice (later Chief Justice) EDWARD D. WHITE, in his dissenting opinion in POLLOCK V. FARMERS LOAN TRUST CO. (1895), observed:

> The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its precedessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of people.

Under this view, *stare decisis* should be applied with full force to constitutional issues.

The more commonly accepted view is that *stare decisis* has a more limited application in CONSTITUTIONAL INTERPRETATION than it does in the interpretation of statutes or in ordinary common law decision making. Although Congress, by a simple majority, can override the Supreme Court's erroneous interpretation of a congressional statute, errors in the interpretation of the Constitution are not easily corrected. The AMENDING PROCESS is by design difficult. In many instances only the Court can correct an erroneous constitutional decision.

Moreover, the Court will on occasion make decisions that later appear to be erroneous. As Chief Justice JOHN MARSHALL remarked in MCCULLOCH V. MARYLAND (1819), the Constitution requires deductions from its "great outlines" when a court decides specific cases. Because the modern Supreme Court generally accepts for review only cases in which principles of broad national importance are in competition, its decisions necessarily involve difficult questions of judgment. In view of the difficulties inherent in amending the Constitution, any errors made by the Court in the interpretation of constitutional principles must be subject to correction by the Court in later decisions.

The classic statement of this view was expressed by Justice LOUIS D. BRANDEIS in his dissenting opinion in *Burnet v. Coronado Oil Gas Co.* (1932): "[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." The Court has relied on Brandeis's reasoning in later decisions, such as EDELMAN V. JORDAN (1974), overruling previous constitutional precedents.

An additional reason for applying *stare decisis* less rigidly to constitutional decisions is that the judge's primary obligation is to the Constitution itself. In the words of Justice FELIX FRANKFURTER, concurring in *Graves v. New York* (1939), "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."

Some critics of *stare decisis* suggest that it has no place whatsoever in constitutional cases. For example, Chief Justice ROGER B. TANEY reasoned in the PASSENGER CASES (1849) that a constitutional question "is always open to discussion" because the judicial authority of the Court should "depend altogether on the force of the reasoning by which it is supported." The more generally accepted view, however, was stated by the Court in *Arizona v. Rumsey* (1984): "Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* requires special justification." Consistent with this view, the Supreme Court generally seeks to provide objective justification for the overruling of past precedents, apart from the fact that the Court's personnel may have changed.

One of the most commonly expressed reasons for overruling a previous decision is that it cannot be reconciled with other rulings. This rationale is in a sense consistent with *stare decisis* in that the justification for the overruling decision rests on competing but previously established judicial principles. In GIDEON V. WAINWRIGHT (1963), for example, which overruled BETTS V. BRADY (1942), the Court asserted not only that the rationale of *Betts* was erroneous but also that *Betts* had abruptly departed from well-established prior decisions. *Betts* had held that the DUE PROCESS clause of the FOURTEENTH AMENDMENT does not impose on the states, as the Sixth Amendment imposes on the federal government, the obligation to provide counsel in state criminal proceedings. *Gideon* expressly rejected this holding, thereby ruling that indigent defendants have the right to appointed counsel in such cases. Similarly, in WEST COAST HOTEL CO. V. PARRISH (1937) the Court concluded that it had no choice but to overrule its earlier decision in ADKINS V. CHILDREN'S HOSPITAL (1923), which had held a minimum wage statute for women unconstitutional under the due process clause. The Court reasoned that *Adkins* was irreconcilable with other decisions permitting the regulation of maximum hours and other working conditions for women.

The Court frequently argues, too, that the lessons of experience require the overruling of a previous decision. In ERIE RAILROAD CO. V. TOMPKINS (1938), for example, the Court reasoned that in nearly one hundred years the doctrine of SWIFT V. TYSON (1842) "had revealed its defects, political and social." And in MAPP V. OHIO (1961) the Court held the EXCLUSIONARY RULE applicable to the states, saying that the experience of various states had made clear that remedies other than the exclusionary rule could not effectively deter unreasonable searches and seizures. The

Court therefore overruled WOLF V. COLORADO (1949), which only two decades earlier had ruled that states were free to devise their own remedies for enforcing SEARCH AND SEIZURE requirements applicable to the states through the due process clause of the Fourteenth Amendment.

The Court also justifies overruling decisions on the basis of changed or unforeseen circumstances. In BROWN V. BOARD OF EDUCATION (1954), for example, the Court referred to the change in status of the public schools in rejecting the application of the SEPARATE BUT EQUAL DOCTRINE of PLESSY V. FERGUSON (1896). And in PROPELLER GENESEE CHIEF V. FITZHUGH (1851), one of the earliest overruling decisions, the Court stressed that when it had erroneously held in *The Thomas Jefferson* (1825) that the ADMIRALTY AND MARITIME JURISDICTION of the federal government was limited "to the ebb and flow of the tide," commerce on the rivers of the West and on the Great Lakes had been in its infancy and "the great national importance of the question . . . could not be foreseen."

Other considerations may also suggest a decision's susceptibility to being overruled. Thus a decision on an issue not fully briefed and argued may be entitled to less precedential weight than one in which the issue received full and deliberate consideration. Or, the fact that an issue was decided by a closely divided Court may suggest a higher probability of error and make later reconsideration more likely. By contrast, as the Court recognized in *Akron v. Akron Center for Reproductive Health* (1983), a carefully considered decision, repeatedly and consistently followed, may be entitled to more respect than other constitutional holdings under principles of *stare decisis.*

As the Court develops constitutional doctrine, it may limit or distinguish a previous decision, gradually eroding its authority without expressly overruling it. Such a doctrinal evolution may both portend an overruling decision and establish the groundwork for it.

The Court's willingness to reconsider its prior constitutional decisions and in some instances to overrule itself is implicit in the general understanding of the Constitution as a document of broad outlines intended to endure the ages. Yet it has been suggested that the Court risks a loss of confidence as a disinterested interpreter of the Constitution whenever it overrules itself. Because of its antimajoritarian character, the Court must be sensitive to the need for restraint in exercising its power of JUDICIAL REVIEW. If it overrules itself too frequently and without adequate justification, its reputation may suffer. The Constitution's general language, however, leaves wide room for honest differences as to its interpretation and application. An objective and detached overruling opinion, which faithfully seeks to apply constitutional principles on the basis of the constitutional text and history, is on occasion to be expected and need not jeopardize public confidence in the Court.

JAMES R. ASPERGER
(1986)

Bibliography

BERNHARDT, CHARLOTTE C. 1948 Supreme Court Reversals on Constitutional Issues. *Cornell Law Quarterly* 34:55–70.

BLAUSTEIN, ALBERT P. and FIELD, ANDREW H. 1958 "Overruling" Opinions in the Supreme Court. *Michigan Law Review* 57:151–194.

ISRAEL, JEROLD H. 1963 Gideon v. Wainwright: The "Art" of Overruling. *Supreme Court Review* 1963:211–272.

NOLAND, JON D. 1969 Stare Decisis and the Overruling of Constitutional Decisions in the Warren Years. *Valparaiso University Law Review* 4:101–135.

REED, STANLEY 1938 Stare Decisis and Constitutional Law. *Pennsylvania Bar Association Quarterly* 1938:131–150.

## OVERT ACTS TEST

The overt acts test originated in the seventeenth century in suggestive remarks by ROGER WILLIAMS, William Walwyn, and Baruch Spinoza, primarily to promote the cause of RELIGIOUS LIBERTY. To the same end, PHILLIP FURNEAUX, in the next century, developed the test and THOMAS JEFFERSON adopted it. Such libertarians advocated the test as an alternative to the prevailing BAD TENDENCY TEST, according to which the expression of an opinion was punishable if it tended to stir animosity to the established religion of a state or to the government or its officers or measures. Thus, the preamble to Jefferson's VIRGINIA STATUTE OF RELIGIOUS FREEDOM declared that allowing the civil magistrate to restrain the profession of opinions "on the supposition of their ill tendency . . . at once destroys all religious liberty." The government's rightful purposes, Jefferson continued, were served if its officers did not interfere until "principles break out into overt acts against peace and good order." The overt acts test, therefore, sharply distinguished words from deeds, and, in Furneaux's words, was based on the proposition that the "penal laws should be directed against overt acts only."

When the Sedition Act of 1798 incorporated the principles of ZENGER'S CASE (1735), libertarians who had advocated those principles finally abandoned them as inadequate protections of the FREEDOM OF THE PRESS and embraced the overt acts test. Only a radical minority ever advocated the test in cases of political expression, yet it survived down to the twentieth century. Justices HUGO L. BLACK and WILLIAM O. DOUGLAS found the test admirably suited to their ABSOLUTISM. Dissenting in YATES V. UNITED STATES (1957), Black said, "I believe that the FIRST AMEND-

MENT forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal."

The overt acts test would provide the utmost protection for words and make the principle of FREEDOM OF SPEECH immunize every kind of verbal crime. The test ignores the fact that in some instances words themselves can be crimes (contempt of court, perjury, OBSCENITY, the verbal agreement in a CRIMINAL CONSPIRACY) or can violate laws validly governing the time and place of assemblies, parades, PICKETING, and SOUNDTRUCKS AND AMPLIFIERS. Words can also cause severe injury, constitute INCITEMENT TO UNLAWFUL CONDUCT, or otherwise solicit crime. The overt acts test draws a bright but fake constitutional line between speech and action; an indistinct zone would be more appropriate. Nevertheless, the Supreme Court in BRANDENBURG V. OHIO (1969), a leading free speech case, almost flirted with the overt acts test when it held that a state may not constitutionally "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

The Constitution contains a different overt acts test in the TREASON clause (Article 3, section 3), which specifies that unless a person accused of treason confesses in open court, two witnesses to the same overt act must prove his guilt. The clause also defines the required overt act as making war against the United States or "adhering to their Enemies, giving them aid and comfort." The treason clause, therefore, prevents the punishment of "constructive" treason, which consists of any words or acts construed by the government or a court to be tantamount to treason. Thus, the overt acts provision of the treason clause helps guarantee CIVIL LIBERTY by preventing the crime of treason from being used expansively to silence opponents of the government.

LEONARD W. LEVY
(1986)

Bibliography

GREENAWALT, KENT 1980 Speech and Crime. *American Bar Foundation Research Journal* 1980:647–785.

## *OWEN v. CITY OF INDEPENDENCE*
445 U.S. 622 (1980)

In MONELL V. DEPARTMENT OF SOCIAL SERVICES (1978) the Supreme Court held that municipalities may be liable under SECTION 1983, TITLE 42, UNITED STATES CODE, for deprivations of constitutional rights if the deprivation results from official policy. In *Owen*, the Court held that municipalities may not avail themselves of the good-faith defense or qualified immunity enjoyed by individual defendants in section 1983 cases. Thus, a municipality may be liable for unconstitutional acts even if its officials reasonably believe in good faith that their acts are constitutional.

THEODORE EISENBERG
(1986)

## *OYAMA v. CALIFORNIA*
332 U.S. 633 (1948)

In *Terrace v. Thompson* (1923) the Supreme Court had upheld the power of a state to limit land ownership to U.S. citizens. *Oyama*, together with TAKAHASHI V. FISH AND GAME COMMISSION (1948), both undermined *Terrace* and signaled a changing judicial attitude toward RACIAL DISCRIMINATION.

California's Alien Land Law forbade land ownership by ALIENS ineligible for CITIZENSHIP; under existing federal law, that category was largely limited to persons of Asian ancestry. Invoking its law, California sought to take over title to land held in the name of a young U.S. citizen, on the ground that it was really owned by his father, an alien ineligible for citizenship. The father had paid for the land, and so under the law was presumed its owner. A similar presumption would not apply to ownership of land by citizens of other races. Without purporting to rule on the general validity of the Alien Land Law, the Supreme Court held, 7–2, that the presumption denied the EQUAL PROTECTION OF THE LAWS.

KENNETH L. KARST
(1986)

# P

## *PACE v. ALABAMA*
106 U.S. 583 (1883)

To white supremacists, the MISCEGENATION issue was crucially important. The often unexpressed fear of interracial sex involving white women underlay all sorts of RACIAL DISCRIMINATION. The states punished adultery and fornication much more severely when the parties were of different races than when both were of the same race. *Pace* challenged the constitutionality of Alabama's statute, but the Supreme Court unanimously held that the unequal punishment did not violate the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT because both the interracial fornicators were subject to the same punishment.

LEONARD W. LEVY
(1986)

(SEE ALSO: *Loving v. Virginia.*)

## PACIFISTS

See: Conscientious Objection

## PACKERS & STOCKYARDS ACT
42 Stat. 159 (1921)

After a Federal Trade Commission investigation damaging to the meat-packing industry in 1919–1920, popular sentiment demanded decisive action. Congress responded with this statute regulating both the packers and the stockyards. As one of its sponsors declared, the statute merely reenacted old principles in order to restore and maintain competition. Indeed, the clause banning "unfair" competition restated section 5 of the FEDERAL TRADE COMMISSION ACT. Other provisions forbade giving "undue or unreasonable advantage" (repeating section 3 of the INTERSTATE COMMERCE ACT) or apportioning items by geographic area (ICA, section 5; SHERMAN ANTITRUST ACT, section 1). Violators might be brought before the secretary of agriculture, who could issue CEASE-AND-DESIST ORDERS; APPEALS lay to federal CIRCUIT COURTS. Stockyards subject to the act were required to register and provide "reasonable" services and charges. The secretary could determine new rates and order compliance, although the act provided no standards for his guidance. Perhaps because of a CONSENT DECREE negotiated with the industry in 1920, the Department of Justice was reluctant to prosecute the packers. Their disinclination, and the packers' efforts to avoid the consent decree, materially contributed to the act's passage. In enacting this statute, Congress emphasized public concern over and commitment to strict accountability to the nation's antitrust laws. (See STAFFORD V. WALLACE.)

DAVID GORDON
(1986)

Bibliography

GORDON, DAVID 1983 The Beef Trust: Antitrust Law and the Meat Packing Industry, 1902–1922. Ph.D. diss., Claremont Graduate School.

## PAINE, THOMAS
(1737–1809)

Thomas Paine, the son of an English Quaker tradesman, became the great propagandist of the American and French revolutions. Before sailing to Philadelphia in 1774, with a letter of recommendation from BENJAMIN FRANKLIN, Paine had been a corsetmaker, a privateer, a tax assessor, a songwriter, and a tobacconist. In Philadelphia, he became editor of the *Pennsylvania Magazine*, crusading for abolition of slavery, proscription of dueling, greater rights for women, and easier availability of divorce.

Paine became the spokesman for the AMERICAN REVOLUTION when, in January 1776, he published a pamphlet called *Common Sense*. The pamphlet sharply attacked "the constitutional errors of the English form of government," including monarchy and CHECKS AND BALANCES. Paine declared that "the constitution of England is so complex, that the nation may suffer for years together without being able to discover in which part the fault lies." He argued for minimal government: "Society is in every state a blessing, but government even in its best state is but a necessary evil." Paine concluded *Common Sense* with a proposal for a "Continental Charter" of government based on large and equal REPRESENTATION and featuring a presidency rotated among the provincial delegations.

Between 1776 and 1783, Paine published a series of thirteen essays called *The Crisis*, chronicling "the times that try men's souls." Although in *Common Sense* he had denounced the English constitution, by the time he wrote *The Crisis* #7 in 1778, Paine had come to wonder "whether there is any such thing as the English constitution?" *The Crisis* #13, published in 1783, presented an argument for a strong and permanent national union, because "we have no other national SOVEREIGNTY than as the United States."

As the CONSTITUTIONAL CONVENTION OF 1787 met, however, Paine was en route to Europe to promote a scheme for building iron bridges. The outbreak of the French Revolution in 1789 found him in Paris. He became a French citizen and a member of the revolutionary Convention; he was the principal author of the Declaration of the Rights of Man and Citizen. When Edmund Burke denounced the French Revolution, Paine responded with *The Rights of Man*, the nearest thing he ever wrote to a systematic treatise on politics. Not an originator of ideas but a popularizer, Paine grounded his case for the revolution in the concepts of NATURAL RIGHTS and SOCIAL COMPACT. "Every civil right," he wrote, "has for its foundation some natural right pre-existing in the individual, but to the enjoyment of which his individual power is not, in all cases, sufficiently competent."

In 1792 the French revolutionary government fell into the hands of a radical faction; Paine was imprisoned and only narrowly escaped the guillotine. During his year in prison he wrote *The Age of Reason*, an apology for deism and religious rationalism with an anti-Christian tenor.

Paine's release from prison was arranged by the American ambassador, JAMES MONROE. For nearly a decade Paine remained in France as a journalist and political commentator. In 1802 he returned to America where he wrote polemical articles for the newspapers in support of THOMAS JEFFERSON's Republican party until his death in 1809.

DENNIS J. MAHONEY
(1986)

Bibliography

CANAVAN, FRANCIS 1972 Thomas Paine. Pages 652–658 in Leo Strauss and Joseph Cropsey, eds., *History of Political Philosophy*. Chicago: Rand McNally.

HAWKE, DAVID FREEMAN 1974 *Paine*. New York: Harper & Row.

## *PALKO v. CONNECTICUT*
302 U.S. 319 (1937)

*Palko*, decided in the sesquicentennial year of the Constitution, highlights the difference between the constitutional law of criminal justice then and now. The *Palko* Court, which was unanimous, included five of the greatest judges in our history—CHARLES EVANS HUGHES, LOUIS D. BRANDEIS, HARLAN FISKE STONE, HUGO L. BLACK, and the Court's spokesman, BENJAMIN N. CARDOZO. In one respect Cardozo's opinion is a historical relic, like HURTADO V. CALIFORNIA (1884), MAXWELL V. DOW (1900), and TWINING V. NEW JERSEY (1908), which he cited as governing precedents. In another respect, *Palko* rationalized the Court's INCORPORATION DOCTRINE of the FOURTEENTH AMENDMENT by which it selected FUNDAMENTAL RIGHTS to be safeguarded against state violation.

Palko was sentenced to life imprisonment after a jury found him guilty of murder in the second degree. The state sought and won a new trial on the ground that its case had been prejudiced by errors of the trial court. Palko objected that a new trial on the same INDICTMENT exposed him to DOUBLE JEOPARDY, but he was overruled. At the second trial the jury's verdict of murder in the first degree resulted in a sentence of death. Had the case been tried in a federal court, the double jeopardy claim would have been good. The question raised by Palko's case was whether a double standard prevailed—one for state courts and the other for federal—or whether the Fifth Amendment's guarantee against double jeopardy applied to the state through the DUE PROCESS clause of the Fourteenth Amendment.

Cardozo declared that Palko's contention was even broader: "Whatever would be a violation of the original BILL OF RIGHTS (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state." The Court answered, "There is no such general rule," thus rejecting the theory of total incorporation. Nevertheless, said Cardozo, by a "process of absorption"—now referred to as selective incorporation—the Court had extended the due process clause of the Fourteenth Amendment to include FIRST AMENDMENT freedoms and the RIGHT TO COUNSEL in certain cases, yet it had rejected the rights of the criminally accused, excepting representation by counsel for ignorant INDIGENTS in capital prosecutions. The rationalizing principle that gave coherence to the absorption process, Cardozo alleged, depended on a distinction among the various rights. Some were "fundamental" or "of the very essence of a scheme of ORDERED LIBERTY," like FREEDOM OF SPEECH or religion. By contrast, TRIAL BY JURY, indictment by GRAND JURY, and the RIGHT AGAINST SELF-INCRIMINATION were not: justice might be done without them. The right against double jeopardy, the Court ruled summarily, did not rank as fundamental and therefore received no protection against the states from the due process clause of the Fourteenth Amendment. BENTON V. MARYLAND (1969) overruled *Palko*, showing that even "fundamental" value judgments change with time. All that remains of *Palko* is the abstract principle of selective incorporation.

LEONARD W. LEVY
(1986)

Bibliography

ABRAHAM, HENRY J. 1977 *Freedom and the Court*, 3rd ed. Pages 64–70. New York: Oxford University Press.

## PALMER, ALEXANDER M.
(1872–1936)

Appointed attorney general in 1919, Alexander Mitchell Palmer soon faced violence stirred up by the extreme left. After a series of bombings, Palmer campaigned against CIVIL LIBERTIES and unsuccessfully urged adoption of a new SEDITION law. His overreaction to alleged domestic radicals, particularly his "Red Raids" into private homes, mass arrests, and deportations of aliens, earned him widespread censure. Palmer also used the emergency WAR POWERS to attempt an end to the coal strike in 1919, exciting further criticism. These circumstances all contributed to his losing the 1920 Democratic presidential nomination for which he had been a leading contender. He nevertheless remained a party regular and helped write the 1932 party platform.

DAVID GORDON
(1986)

Bibliography

COBEN, STANLEY (1963) 1972 *A. Mitchell Palmer: Politician.* New York: Da Capo Press.

## *PALMER v. THOMPSON*
402 U.S. 217 (1971)

Under a federal court order to integrate its public recreational facilities, Jackson, Mississippi, closed four of its five public swimming pools and surrendered the city's lease on the fifth pool. In a 5–4 decision, the Supreme Court sustained the closings, stating that a legislative act does not "violate EQUAL PROTECTION solely because of the motivations of the men who voted for it." *Palmer*'s statement that legislative motive is irrelevant was undermined in WASHINGTON V. DAVIS (1976) and ARLINGTON HEIGHTS V. METROPOLITAN HOUSING DEVELOPMENT CORPORATION (1977).

THEODORE EISENBERG
(1986)

## PALMER RAIDS
(1919–1920)

In the aftermath of WORLD WAR I and the Russian Revolution, waves of European IMMIGRATION aggravated domestic inflation and unemployment. LABOR strikes, often violent, were rampant, and the Communist party was organized.

Under pressure from the press and the public, WOODROW WILSON's attorney general, A. MITCHELL PALMER, conducted a series of raids between autumn 1919 and spring 1920 against the homes and offices of suspected ALIENS and radical leaders. The raids were conducted without ARREST WARRANTS or SEARCH WARRANTS, and those detained were denied the right to HABEAS CORPUS. Several thousand persons were detained, and over 500 alien radicals were deported.

DENNIS J. MAHONEY
(1986)

## *PALMORE v. SIDOTI*
466 U.S. 429 (1984)

When Linda Palmore was divorced from Anthony Sidoti, a Florida court awarded custody of their daughter to Pal-

more. Later, Sidoti sought custody on the ground that Palmore, a white woman, had been cohabiting with a black man, whom she shortly married. The state court changed the custody on the sole ground that the mother had "chosen for herself and her child, a life-style unacceptable to her father and to society." The child would, if she remained with her mother, be "more vulnerable to peer pressures" and would suffer from "social stigmatization." The Supreme Court unanimously reversed.

For the Court, Chief Justice WARREN E. BURGER reaffirmed the need for STRICT SCRUTINY of governmental action based on race. Racial prejudice indeed existed, but the potential injury from such private biases was not a constitutionally acceptable basis for the custody change. The decision has symbolic importance, but seems unlikely to make much difference in actual awards of child custody, which can be rested on a variety of grounds in the name of the "best interests of the child" without any explicit consideration of race.

KENNETH L. KARST
(1986)

## PANAMA CANAL TREATIES
33 Stat. 2234 (1903)
TIAS 10030 (1977)

At the turn of the twentieth century the United States emerged as a major power in world politics. Central to that major-power status were America's merchant shipping and the navy that protected it. The disadvantage of being a continental power with shores on two oceans became obvious during the Spanish American War when redeployment of warships from the Pacific to the Atlantic Ocean, by way of Cape Horn, took two months to complete. The United States government determined to construct a canal across Central America through the Isthmus of Panama. The United States negotiated a treaty with Colombia, in which the isthmus was located, but that treaty was rejected by the Colombian Senate in August 1903.

In November 1903, with American encouragement, Panama declared its independence from Colombia; two weeks later Panama signed a treaty (sometimes called the Hay-Bunau Treaty) permitting the United States to build the Panama Canal. The United States Senate gave its ADVICE AND CONSENT to ratification of the treaty the following February.

In the treaty the United States undertook to defend both the canal and the Republic of Panama and to make nominal annual payments to Panama from the revenue of the canal. The treaty gave the United States permanent control "as if it were sovereign" over the Panama Canal Zone, a strip of land ten miles wide dividing the republic—which retained nominal sovereignty over the zone—in two. For nearly three-quarters of a century the Canal Zone was governed as an American TERRITORY. When President LYNDON B. JOHNSON made (mostly symbolic) concessions to Panama following civil unrest there in the 1960s, members of Congress accused him of usurping Congress's exclusive power over the territories.

Negotiations between four successive administrations and the Panamanian government, conducted over more than thirteen years, resulted in two pacts signed in 1977, the Panama Canal Treaty and the Panama Canal Neutrality Treaty. Together, these agreements abolished the Canal Zone, returned the zone and the canal to Panamanian SOVEREIGNTY, and provided for the future operation of the waterway under joint, and ultimately under Panamanian, control. The campaign to win the advice and consent of the Senate to the treaties proved to be a major test of the constitutional roles of the executive and the Senate in the exercise of the TREATY POWER. The original Panama Canal Treaty had been approved after an unprecedentedly short debate; the length of the debate over the new treaties was exceeded in the twentieth century only by that over the Treaty of Versailles.

Ratification of the treaties in 1978, with numerous amendments and "conditions," proved to be only the beginning of a new struggle. The treaties were not self-executing but required implementing legislation; that gave members of the HOUSE OF REPRESENTATIVES, some of whom objected to the President and the SENATE giving away "American territory" without their participation, a chance to affect the terms of the transfer. Over the objections of both President JIMMY CARTER and the Panamanian government, Congress wrote into the implementing legislation provisions authorizing the President to intervene militarily to protect American interests in the former Canal Zone. The episode serves to illustrate the extent of congressional power, under the Constitution, to influence the conduct of FOREIGN AFFAIRS, over which the President is often assumed to have exclusive control.

DENNIS J. MAHONEY
(1986)

Bibliography

CRABB, CECIL V. and HOLT, PAT M. 1980 The Panama Canal Treaties. *Invitation to Struggle: Congress, the President and Foreign Policy.* Chap. 3. Washington, D.C.: Congressional Quarterly.

## *PANAMA REFINING CO. v. RYAN*
293 U.S. 388 (1935)

In 1933 the price of wholesale gasoline had fallen to two and a half cents a gallon, that of crude oil to ten cents a

barrel. The states, unable to cut production and push up prices, clamored for national controls. Congress responded with section 9(c) of the NATIONAL INDUSTRIAL RECOVERY ACT, authorizing the President to prohibit the shipment in INTERSTATE COMMERCE of petroleum produced in excess of quotas set by the states. By a vote of 8–1 the Supreme Court, in an opinion by Chief Justice CHARLES EVANS HUGHES, for the first time in history held an act of Congress unconstitutional because it improperly delegated legislative powers to the President without specifying adequate standards to guide his discretion. Moreover, the act did not require him to explain his orders. Vesting the President with "an uncontrolled legislative power," Hughes said, exceeded the limits of delegation; he did not explain how much delegation is valid and by what standards.

Justice BENJAMIN N. CARDOZO disagreed. He found adequate standards in section 1 of the statute: the elimination of unfair competitive practices and conservation of natural resources. These objectives guided the President's discretion, Cardozo explained. The principle of SEPARATION OF POWERS, which the majority used to underpin its opinion, should not be applied with doctrinaire rigor. Moreover, the statute, Cardozo observed, "was framed in the shadow of a national disaster" which raised unforeseen contingencies that only the President could face from day to day. The standards for his discretion had to be broad, and he need never give reasons for EXECUTIVE ORDERS. Cardozo's opinion notwithstanding, the Court in effect removed the oil industry from effective controls, to its detriment and that of the national economy. This case marked the NEW DEAL's debut before the Court.

LEONARD W. LEVY
(1986)

(SEE ALSO: *Delegation of Power.*)

## *PAPACHRISTOU v. JACKSONVILLE*

See: Vagrancy Laws

## *PARADISE, UNITED STATES v.*
480 U.S. 149 (1987)

For several decades, the Alabama Department of Public Safety excluded blacks from employment as state troopers. Only after a federal district court imposed a hiring quota in the early 1970s did the department finally change its ways. Even then, however, the department failed to promote the black officers it hired. Thereafter, the district court again intervened, this time requiring the department to institute promotion procedures without an adverse impact on black officers. When the department failed to institute such procedures within a timely period, the court imposed a promotion quota until the department developed acceptable promotion procedures of its own. Under the court's scheme, one black officer had to be promoted for every white officer promoted. The United States challenged the court's order, claiming that it violated the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT. The Supreme Court disagreed and upheld the order 5–4.

Writing for a plurality, Justice WILLIAM J. BRENNAN noted that members of the Court disagreed about what level of scrutiny to apply to discrimination remedy cases, but argued that this did not matter because the race-conscious remedy under review survived even the Court's highest standard of STRICT SCRUTINY because it was "narrowly tailored" to serve a COMPELLING STATE INTEREST.

Rejecting the strict scrutiny approach in discrimination-remedy cases, Justice JOHN PAUL STEVENS concurred in the judgment, but stressed that the federal judiciary has "broad and flexible authority" to fashion even race-conscious remedies once a violation of the Fourteenth Amendment has occurred.

Justice SANDRA DAY O'CONNOR vigorously disagreed. Writing for three of the dissenters, O'Connor not only insisted that all remedies be subjected to strict scrutiny but she also took the plurality to task for adopting "a standardless view" of strict scrutiny's requirement that a remedy be narrowly tailored to accomplish its purpose. Maintaining that "there is simply no justification for the use of racial preferences if the purpose of the order could be achieved without their use," O'Connor argued there was no evidence that the district court considered any alternatives to the RACIAL QUOTA, even though several alternatives in fact existed, including an invocation of the court's CONTEMPT POWER.

JOHN G. WEST, JR.
(1992)

## PARDEE, DON ALBERT
(1837–1919)

President JAMES A. GARFIELD on May 3, 1881, appointed Don Albert Pardee judge of the Fifth Circuit Court. From 1891 to his death Pardee presided as senior judge of the Fifth Circuit Court of Appeals.

Pardee's most significant constitutional opinions involved the STATE POLICE POWER and VESTED RIGHTS. In *New Orleans Water-Works Co. v. St. Tammany Water-Works Co.* (1882) the judge held that the Louisiana legislature had exceeded its powers by incorporating a new company to compete with an enterprise that had enjoyed a monopoly over the distribution of the water supply to the city of

New Orleans. "Arguments in cases like the one under consideration," Pardee observed, "are generally based on the assumption that the sovereign . . . is absolutely unfettered with regard to . . . all the rights of property. I am not prepared to take this advanced ground." He enjoined the new company from further construction and held that the legislature could not invoke its police power "without compensation of the vested rights of the New Orleans Water-Works Company."

Pardee did accept broader legislative discretion under the police power when moral objectives were involved. In *United States ex rel. Hoover v. Ronan, Sheriff* (1887) he rejected an argument that a Georgia statute violated the DUE PROCESS and EQUAL PROTECTION provisions of the FOURTEENTH AMENDMENT by requiring would-be saloonkeepers in unincorporated towns and cities to obtain signatures from residents in order to secure a retail license. In *Ex Parte Kinnerbrew* (1888), he found on moral benefit grounds that the Georgia local option liquor law was compatible with the federal COMMERCE CLAUSE.

Pardee insisted on the power of the federal judiciary to frame a constitutional jurisprudence that separated the state police power into public and private sector concerns. As a result, reverence for vested property rights and public morality gilded his judicial conservatism.

KERMIT L. HALL
(1986)

Bibliography

BRYAN, PAUL E. 1964 Don Albert Pardee. *Dictionary of American Biography*, Vol. 14:201–202. New York: Scribner's.

## PARDONING POWER

The power of pardon—the power to relieve a person of the legal sanctions imposed for illegal conduct—was reluctantly put in the hands of the President by the CONSTITUTIONAL CONVENTION OF 1787. The reluctance derived from the fact that it was too much akin to the royal prerogative to afford dispensation to favorites from obedience to the law, a prerogative supposedly eliminated by the English BILL OF RIGHTS in 1689. The Framers were concerned lest the power should be used to shelter the treasonous activities of a President and his henchmen. The most persuasive argument on behalf of a presidential pardoning power was its potential use to reconcile warring factions. Because it would, for this purpose, be an effective tool only if it were readily available to strike a deal at any time, and because Congress was not expected to be in session all, or even most, of the time, it properly devolved on the executive.

The power of pardoning for criminal activities is all but plenary. There is the constitutional limitation that pardon may not be used to relieve from impeachment or its sanctions. Otherwise, a pardon can be granted before conviction, indeed before indictment, and it can be conferred absolutely or conditionally, provided that the conditions themselves are not unconstitutional. However, whether a pardon can be conferred over the objection of the grantee is not clear, for acceptance of a pardon is generally thought to be an acknowledgment of commission of a crime.

On the whole, the pardon power has not been used for political ends as was anticipated. The partisan strife of the Old World did not, with rare exceptions, see its counterpart on the American scene. The political nature of the power can be seen in the pardons to the WHISKEY REBELS, to those convicted under the ALIEN AND SEDITION ACTS, and in the AMNESTY—granted by Congress—to the rebels of the CIVIL WAR. President GERALD R. FORD's pardon of ex-President RICHARD M. NIXON after the WATERGATE affair was, perhaps, the most blatant partisan use of the power.

The Supreme Court, in SCHICK V. REED (1974), has legitimated the almost unlimited power of executive pardon. Although the history of the origins as recounted in *Schick* is somewhat suspect, *Schick* remains the definitive statement, unless and until the Court revises it through later opinions.

PHILLIP B. KURLAND
(1986)

Bibliography

CORWIN, EDWARD S. 1957 *The President: Office and Powers 1787–1957*, 4th ed. New York: New York University Press.

## *PARHAM v. HUGHES*

See: Illegitimacy

## *PARHAM v. J. R.*
442 U.S. 584 (1979)

The notion of "voluntary" civil commitment of mental patients takes on a special meaning when the patients are children: under a typical state's law they can be committed by the joint decision of their parents and mental hospital authorities. This case, a CLASS ACTION on behalf of all children detained in Georgia mental hospitals, was brought in order to establish a child's PROCEDURAL DUE PROCESS right to an adversary hearing before being so committed. Although the lower federal court agreed with the plaintiff's theory, the Supreme Court reversed in an opinion by Chief Justice WARREN E. BURGER.

The Court was unanimous in rejecting the broadest due

process claim in behalf of the children. There were constitutionally protected "liberty" interests at stake in a commitment, both the freedom from bodily restraint and the freedom from being falsely labeled as mentally ill. However, applying the interest-balancing calculus suggested in MATHEWS V. ELDRIDGE (1976), the Court concluded that a child's due process rights did not extend to an adversary precommitment hearing. The majority concluded that due process required no more than informal "medical" inquiries, once near the time of commitment and periodically thereafter, by a "neutral fact-finder" who would determine whether the standards for commitment were satisfied. There need be no adversary proceeding, but this neutral decision maker should interview the child.

The Court's opinion emphasized the importance of maintaining parents' traditional role in decision making for their children. (See CHILDREN'S RIGHTS.) Although some parents might abuse their authority, the law had historically "recognized that natural bonds of affection lead parents to act in the best interests of their children." On the surface, *J. R.* is a "family autonomy" decision. Yet, as Robert Burt has shown, the Court's solicitude for parental authority was expressed in the context of parental decisions validated by state officials. Other decisions suggest that the Court's primary deference runs not to parents but to "state-employed behavioral professionals."

Justice WILLIAM J. BRENNAN, for three partially dissenting Justices, agreed that pre-confinement hearings were not constitutionally required in all cases where parents sought to have their children committed, but he argued that due process did require at least one postadmission hearing. The informal inquiries approved by the Court did not meet this standard.

KENNETH L. KARST
(1986)

(SEE ALSO: *Mental Illness and the Constitution.*)

Bibliography

BURT, ROBERT A. 1979 The Constitution of the Family. *Supreme Court Review* 1979:329–395.

## *PARIS ADULT THEATRE I v. SLATON*

See: *Miller v. California*

## *PARKER v. BROWN*
317 U.S. 341 (1943)

A California statute compelled raisin growers to comply with the orders of a state-sponsored marketing monopoly. Farmers could sell thirty percent of their crop on the open market; the remainder went to the state commission, which controlled the interstate supply and price. This law survived challenge when a unanimous bench followed reasoning laid out earlier by Justice HARLAN FISKE STONE in DISANTO V. PENNSYLVANIA (1927). Here Stone dismissed statutory objections: the SHERMAN ANTITRUST ACT applied only to individual, not state, action; neither did the COMMERCE CLAUSE forbid this state regulation. Most important, Congress, in the AGRICULTURAL MARKETING AGREEMENT ACT, did not preempt this state legislation but reflected a congressional policy to encourage it.

DAVID GORDON
(1986)

(SEE ALSO: *State Regulation of Commerce.*)

## *PARKER v. DAVIS*

See: Legal Tender Cases

## *PARKER v. LEVY*
417 U.S. 733 (1974)

In a celebrated trial of the VIETNAM WAR era, Captain Howard Levy, an Army physician, was convicted by COURT MARTIAL for violating provisions of the UNIFORM CODE OF MILITARY JUSTICE that penalized willful disobedience of the lawful command of a superior officer, "conduct unbecoming an officer and a gentleman," and conduct "to the prejudice of good order and discipline in the armed forces." The Third Circuit Court of Appeals had held that these provisions were unconstitutionally vague in violation of the DUE PROCESS clause of the Fifth Amendment and overbroad in violation of the FIRST AMENDMENT.

Justice WILLIAM H. REHNQUIST, for the Supreme Court, reversed and upheld Levy's conviction. Rehnquist's opinion rejected the contention that the provisions of the Uniform Code of Military Justice were too vague and overbroad. "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it," he wrote. Justices WILLIAM O. DOUGLAS, WILLIAM J. BRENNAN, THURGOOD MARSHALL, and POTTER STEWART dissented. The last wrote, "I cannot believe that such meaningless statutes as these can be used to send men to prison under a Constitution that guarantees due process of law."

MICHAEL E. PARRISH
(1986)

## PARLIAMENTARY PRIVILEGE

Parliamentary privilege, a term originating in England, refers to a bundle of rights that Parliament and every American legislature claimed and exercised. Article I of the Constitution safeguards several of these rights, including the right of the HOUSE OF REPRESENTATIVES to choose its speaker, the right of each house to judge the elections and qualifications of members, the right of the houses to determine their own rules of procedure, and the rights of members to be free from arrest while performing their duties and to enjoy FREEDOM OF SPEECH in carrying out their duties. (See SPEECH OR DEBATE CLAUSE.) In addition, parliamentary privilege included the right, which derived from the judicial authority of Parliament, to punish for contempt.

The power to punish for contempt in both England and America proved to be incompatible with freedom of speech for critics of government, especially of the legislature. In colonial America the most suppressive body was the popularly elected assembly, which in effect enforced the law of SEDITIOUS LIBEL by punishing contempts or breaches of parliamentary privilege. An assembly, needing no GRAND JURY to indict and no PETIT JURY to convict, could summon, interrogate, and fix criminal penalties against anyone who had written, spoken, or printed words tending to impeach the assembly's conduct, question its authority, derogate from its honor, affront its dignity, or defame its members.

The practice of punishing seditious scandals or contempts against the government began in America with the first assembly that met in Virginia and continued well after the adoption of the Constitution. In 1796, for example, the New York Assembly jailed a lawyer for his offensive publications, and in 1800 the United States SENATE found a Jeffersonian editor guilty of a "high breach of privileges" because of his seditious libels. As late as 1874 the Texas legislature, having expelled a hostile journalist, ordered his imprisonment for violating its order. The Supreme Court has held that the House of Representatives has the implied power to punish for contempt. Theoretically Congress still retains that power; in practice Congress refers its charges to a federal prosecutor who seeks a grand jury INDICTMENT. (See LEGISLATIVE CONTEMPT POWER.)

LEONARD W. LEVY
(1986)

Bibliography

CLARKE, MARY PATTERSON (1943) 1971 *Parliamentary Privilege in the American Colonies.* New York: Da Capo Press.

WITTKE, CARL (1921) 1970 *The History of English Parliamentary Privilege.* New York: Da Capo Press.

## PAROCHIAL SCHOOLS

See: Government Aid to Religious Institutions

## PARTIES, POLITICAL

See: Political Parties; Political Parties, Elections, and Constitutional Law; Political Parties in Constitutional Law

## PASSENGER CASES
7 Howard 283 (1849)

Two states imposed a tax on the masters of vessels for each ALIEN passenger they landed in the country. By a 5–4 vote, the Supreme Court held the state acts unconstitutional. Each of the Justices in the majority wrote an opinion, and none spoke for the Court. Three of the four dissenters wrote opinions. The report of the cases takes 290 pages and reflects chaos in judicial interpretation. The Justices squabbled about CONCURRENT POWERS, and the COMMERCE CLAUSE in relation to the POLICE POWER, but they settled nothing doctrinally.

LEONARD W. LEVY
(1986)

## PATENT

Article I grants to Congress the power to "promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This clause confers on the federal government authority to provide for both patents and COPYRIGHTS.

United States patent law derives from the English experience. During Tudor times, English monarchs granted various monopolies (such as ones over salt) to royal favorites. The populace arose against the high prices charged by such monopolies. In 1623, Parliament enacted the germinal Statute of Monopolies. The statute declared monopolies void but as an exception allowed letters patent for fourteen years to the "true and first inventors" of "new manufactures."

In America, some states prior to adoption of the Constitution granted patents to inventors. But in listing the limited and specific powers of the federal legislature, the drafters of the Constitution agreed that patents and copyrights should be among those powers. As JAMES MADISON argued in THE FEDERALIST #43, "the States cannot separately make effectual provision for either." The drafters perceived that the interests of both a unified national

economy and a strong system of incentives for invention required that a patent power lie in the federal government.

The constitutional power specifies both the *end* of the patent system (progress of the useful arts) and the *means* for achieving it (secure for a limited time to inventors the exclusive right to their discoveries). The power is only an enablement and does not of its own force create any patent rights. Nevertheless, the first Congress in 1790 enacted a patent statute. An 1836 statute revised the patent laws and created the Patent Office. A 1952 statute restated the patent laws in their current form. An inventor of a new and useful product or process may obtain from the Patent Office a patent granting for a number of years (currently seventeen) the right to exclude others from making, selling, or using the invention defined by the claims in the patent.

Although most questions concerning patentability are defined by statute, the Constitution limits Congress's power to authorize patent monopolies. In *Graham v. John Deere Co. of Kansas City* (1966), the Supreme Court stressed that Congress may not authorize patents that "remove existent knowledge from the public domain." Rejecting a NATURAL RIGHTS theory of patents for inventions, the Court emphasized the utilitarian function of patents: they stimulate innovation and the disclosure of new knowledge. Patents may issue only for inventions that advance the state of technology. This constitutional standard of innovation finds expression in the patent law DOCTRINE of "nonobviousness," which bars a patent for any discovery that would have been obvious at the time of invention to a person with ordinary skill in the pertinent art who had knowledge of all the prior art.

A patent may issue for virtually any type of useful product or process. In *Diamond v. Chakrabarty* (1980), the Supreme Court upheld the potential patentability of a live, genetically altered strain of microorganism.

DONALD S. CHISUM
(1986)

Bibliography

CHISUM, DONALD S. 1978 *Patents: A Treatise on the Law of Patentability, Validity and Infringement.* New York: Matthew Bender.

MACHLUP, FRITZ 1958 An Economic Review of the Patent System. Study No. 15, Subcommittee on Patents, Trademarks & Copyrights, Judiciary Committee, 85th Congress, 2d Session.

## PATENT
(Update)

A patent is a grant issued by the federal government that gives an inventor the right to exclude others from making, using, or selling his invention for a specific period of time. The historical purpose of granting these exclusive rights has not changed to this day: it is to encourage public disclosure of new scientific and technological developments that would have a favorable impact upon society and the ECONOMY.

The American patent system was largely based on early European concepts. As far back as 1440, English "letters patent" were issued for a method of processing salt. Often, however, such royal grants of monopolies were offered not to encourage invention or business development but to reward court favorites. They generated a great deal of controversy and ultimately led to passage of the Statute of Monopolies (1623), which, by making a patent an exceptional case in which exclusive rights could be granted, restricted the crown's power to confer a monopoly.

The Framers of the Constitution, realizing the importance of stimulating science and technology, authorized Congress to establish and control a patent system. In September 1787 the CONSTITUTIONAL CONVENTION adopted Article I, section 8: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Congress exercised this power by passing the Patent Act of 1790. The statute placed the burden of granting patents upon a committee made up of the secretary of state, the secretary of war, and the ATTORNEY GENERAL. Secretary of State THOMAS JEFFERSON, an early champion of the idea that "ingenuity should receive liberal encouragement," became the first patent examiner.

For several decades there was no requirement that an inventor demonstrate his invention's patentability (its novelty and usefulness) in order to obtain exclusive rights. As a result, a patent was issued almost immediately upon receipt of an application. The process was modified in 1836, when the commissioner of patents was charged with examining every proposal to determine that an invention was both new and useful in concept (though not necessarily that it worked well in practice). These criteria are still applied, together with a requirement that the invention must be "unobvious to one skilled in the art."

Patents are to be distinguished from trademarks and COPYRIGHTS; generally, the claiming of one does not preclude the claiming of any other, even though they may all apply to a single product. A copyright protects an author's original writing (the tangible expression of an idea). A trademark covers any words used to distinguish one product from another. For example, a computer's interior mechanism and software may be protected by a patent, its instruction manual by a copyright, and its market identification by a trademark. All three legal protections are now

considered part of a larger jurisprudential framework called "intellectual property."

A patent may be obtained by anyone who invents or discovers a new, useful, and "unobvious" device or process. If a patent is granted, the inventor gains exclusive rights for a period of seventeen years (fourteen years for the developer of a new design). Any unauthorized manufacture, use, or sale of a patented device or design (or their equivalents) constitutes an infringement.

Patent cases begin at the district court level, may be appealed to the UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, and can be reviewed by the Supreme Court. In *Graham v. John Deere Co. of Kansas City* (1968) the Court defined the three statutory conditions of patentability: novelty, usefulness, and nonobviousness. The classic modern doctrine of "equivalents" was described in *Graver Tank & Manufacturing Co. v. Linde Air Products Co.* (1950). One of the largest recent infringement cases was *Polaroid Corp. v. Eastman Kodak Co.* (1989).

KENNETH LASSON
(1992)

Bibliography

CHISUM, DONALD S. 1978 *Patents: A Treatise on the Law of Patentability, Validity and Infringement.* New York: Matthew Bender.

DELLER, ANTHONY W. 1964 *Walker on Patents.* New York: Lawyers Co-operative.

LASSON, KENNETH 1986 *Mousetraps and Muffling Cups: One Hundred Brilliant and Bizarre United States Patents.* New York: Arbor House.

# PATERSON, WILLIAM
## (1745–1806)

William Paterson played a major role in the framing of the United States Constitution. His stubborn advocacy of state equality influenced the kind of government that was formed. He also was an active member of the United States Supreme Court who served as an important link between the Framers of the Constitution and the Supreme Court of JOHN MARSHALL.

Born in Ireland, Paterson moved to New Jersey at an early age, graduated from the College of New Jersey (Princeton), studied law, and was admitted to the bar in 1768. Supporting the movement for independence, he soon became a prominent member of New Jersey's revolutionary generation and served in its provincial legislature. Paterson drafted the state's first constitution and became its first attorney general. During the 1780s he built up his legal practice by defending the interests of wealthy landowners and creditors. In the political battles of that decade he advocated the supremacy of the peace treaty of 1783 over state laws, opposed the emission of paper money, and supported the movement to create a strong central government.

In 1787 New Jersey selected Paterson as one of its delegates to the CONSTITUTIONAL CONVENTION. Although he favored increasing the power of the national government, Paterson vigorously opposed the proposal of the VIRGINIA PLAN, as drafted by JAMES MADISON and presented by EDMUND RANDOLPH, that REPRESENTATION in both houses of the national legislature be apportioned according to population. Paterson feared this provision would give too much power to the larger states and place smaller states like New Jersey, Connecticut, and Delaware at a disadvantage. As an alternative he proposed the NEW JERSEY PLAN of government. Its principal feature was the continuance of the unicameral legislature of the ARTICLES OF CONFEDERATION in which each state had only one vote. The plan also would have: provided the federal government with the power to levy imposts and regulate trade and collect funds from states that did not comply with federal requisitions; created a Supreme Court with broad powers; and made the laws and treaties of the United States the supreme law of the land, with the state judiciaries bound to obey them despite any contrary state laws. Should a state or individuals within a state refuse to obey the laws of Congress or its treaties, the federal government would have had the right to use force to compel obedience. In other words, the central issue separating the proponents of the New Jersey Plan from those who favored the Virginia Plan was representation, not nationalism. Although the convention rejected Paterson's proposal, the delegates from the small states remained strongly opposed to proportional representation in Congress. In fact, the convention almost foundered on this issue, but it finally resolved the matter by adopting the so-called GREAT COMPROMISE that provided for representation by population in the lower house of a bicameral Congress and equal representation of each state in the upper house. With this matter settled, Paterson threw his complete support behind the new Constitution.

In 1789 the New Jersey legislature elected Paterson to the first United States Senate where, along with OLIVER ELLSWORTH, he helped to write the JUDICIARY ACT OF 1789. This law created a system of lower federal courts, broadly defined their JURISDICTION, created the office of attorney general, and gave the Supreme Court APPELLATE JURISDICTION over the final decisions of state courts in all matters relating to the Constitution and federal laws and treaties. As a senator, Paterson also enthusiastically supported ALEXANDER HAMILTON's proposals to fund the national debt at face value with full interest, and for the federal government to assume all state debts. In November 1790 Paterson resigned his seat in the Senate to become governor

of New Jersey. In this capacity he undertook the task of codifying the state's laws, which were published in 1800. He also worked closely with Hamilton in 1791 to form the generally unsuccessful "Society for Establishing Useful Manufactures"; the society created a small industrial city on the banks of the Passaic River, which became known as Paterson.

Early in 1793 President GEORGE WASHINGTON appointed Paterson to the United States Supreme Court. For the next decade he had an active career on the bench participating in almost all the important decisions rendered by the high court. These decisions reveal Paterson to have been, above all else, a firm advocate of the supremacy of the federal over the state governments. In *Penhallow v. Doane's Administrators* (1795) he expounded an extremely nationalist interpretation of the origins and nature of the Union, arguing that even during the 1780s the Continental Congress represented the "supreme will" of the American people. In the important and controversial case of WARE V. HYLTON (1796) Paterson held that the treaty of peace with Great Britain (1783), which guaranteed that no legal obstacles would be placed in the way of the recovery of debts owed by Americans to British creditors, was part of the "supreme law of the land," rendering invalid a Virginia statute (1777) that allowed the sequestration of debts owed to British subjects before the Revolution.

Paterson also believed in a strong and independent judiciary. In 1795 while on circuit in Pennsylvania he delivered an opinion in VAN HORNE'S LESSEE V. DORRANCE that espoused the doctrine of VESTED RIGHTS and the right of the courts to void a statute repugnant to the Constitution. Although the case involved a state law that contradicted a state constitution, Paterson's argument had broader theoretical implications, and his remarks on the subject of JUDICIAL REVIEW are the fullest and most important statements by a Justice of the United States Supreme Court before John Marshall's opinion in MARBURY V. MADISON (1803). In HYLTON V. UNITED STATES (1796) Paterson agreed with the other Justices in upholding the constitutionality of a federal tax on carriages enacted in 1794. Because the key issue was whether the carriage tax was a DIRECT TAX or an excise tax, Paterson's opinion contained a long discussion of the intention of the Framers of the Constitution as to what kinds of taxes required apportionment among the states according to population. Paterson also expounded on the intention of the Framers in *Calder v. Bull* (1798) when he concurred with the rest of the Court in interpreting the provision of Article I, section 10, prohibiting state legislatures from enacting EX POST FACTO laws as extending only to criminal, not civil laws.

Like so many Federalists, Paterson refused to recognize the legitimacy of the Republican opposition during the 1790s. When Congress passed the ALIEN AND SEDITION ACTS, in 1798, he vigorously enforced them. While riding circuit in Vermont he urged a federal grand jury to indict Democratic-Republican Congressman Matthew Lyon for bringing the President and the federal government into disrepute with his various criticisms. "No government," Paterson observed, "can long subsist when offenders of this kind are suffered to spread their poison with impunity." In the trial that followed Paterson continued to pursue Lyon, emphasizing that the tendency of the Congressman's words be made the test of his intent. Paterson also made clear his belief that the Supreme Court alone had the final authority to determine the constitutionality of laws of Congress, a position the Republican defense had denied. After the jury convicted Lyon, Paterson imposed a harsh sentence of four months in jail and a $1,000 fine. In 1800 Paterson also presided over the trial of Anthony Haswell, a Bennington, Vermont, newspaperman who had rallied to Lyon's defense, and following Haswell's conviction sentenced him to two months in prison and fined him $200. Paterson's actions during the crisis of 1798, along with those of SAMUEL CHASE, are among the clearest examples of the partisan nature of the Federalist judiciary during the late 1790s. Many Jeffersonians were incensed by the proceedings, and had the attempt to remove Chase from the Supreme Court proven successful in 1805, they probably would have gone after Paterson next.

When Oliver Ellsworth resigned as Chief Justice in 1800, most Federalists in the Senate felt the post should go to Paterson. But by then President JOHN ADAMS had openly broken with the Hamiltonian wing of the party, and he appointed John Marshall instead. Paterson accepted this development graciously; in fact, he described the new Chief Justice as "a man of genius" whose "talents have at once the lustre and solidity of gold." When the Jeffersonians took political power in 1801, Paterson backed away from his earlier extremism and supported Marshall's strategy of avoiding direct political confrontations with the Republican majority in Congress. When the JUDICIARY ACT OF 1801 was repealed, some of the more belligerent Federalists, including Justice Chase, wanted the Supreme Court to declare the repeal act unconstitutional. Riding circuit in Virginia, Marshall opposed this strategy, and declared the law constitutional in STUART V. LAIRD. The decision was immediately appealed to the Supreme Court where Marshall would not be allowed to participate in the case because he had already ruled on it in the lower court. In early 1803 Paterson delivered the Supreme Court's decision on the question. Not only did he side with Marshall, he delivered a warning to the more combative Federalists that "the question is at rest and ought not now to be disturbed." Among other things, the decision clearly indicated that the Federalist-dominated Supreme Court was willing to acquiesce in the "Revolution of 1800." It also

went a long way toward reducing concerns, at least among moderates in THOMAS JEFFERSON's administration, about the high court's tendency to engage in partisan politics.

In the fall of 1803, Paterson was injured in a carriage accident. He missed the February 1804 term of the Supreme Court; and although he rode circuit the following year, he never fully recovered. He died in 1806.

RICHARD E. ELLIS
(1986)

Bibliography

GOEBEL, JULIUS, JR. 1971 *History of the Supreme Court of the United States, Vol. I: Antecedents and Beginnings to 1801.* New York: Macmillan.

O'CONNOR, JOHN E. 1979 *William Paterson: Lawyer and Statesman, 1745–1806.* New Brunswick, N.J.: Rutgers University Press.

## PATERSON PLAN

See: New Jersey Plan

## PATIENTS' RIGHTS

The constitutional status of patients' rights can be distilled into three general doctrinal propositions: First, there are constitutional constraints on state authority to force medical treatment on an unwilling person; second, when a person is in state custody (for whatever reason), the state is constitutionally obliged to provide at least minimally adequate health care; and third, the state is not otherwise constitutionally required to provide even a minimal level of health care to anyone. The Supreme Court has not been so solicitous, however, toward implementing the first and second propositions as it has been toward the third.

The Court long ago held, in JACOBSON V. MASSACHUSETTS (1905) regarding smallpox vaccination, that an individual may be constitutionally subjected to involuntary medical treatment to protect community health. Beginning in the 1970s, in cases involving MENTAL ILLNESS, the Court found that forced treatment implicated FOURTEENTH AMENDMENT "liberty" interests and, accordingly, required the state to demonstrate, by "clear and convincing evidence," both the existence of mental illness and some measure of harm either to the affected individual or others that would follow without treatment. The principal decisions in this area were O'CONNOR V. DONALDSON (1975) and *Addington v. Texas* (1979). The Court, however, has not been expansive in applying the "liberty" principle to require state respect for individuals' autonomous choice to refuse treatment even where the possibility of harm appears limited to themselves alone.

Two 1990 decisions exemplify this restrictive construction. In *Washington v. Harper* (1990) the Court ruled that a prisoner could be forced to take psychotropic medication without any judicial determination of his or her need for the medication or mental competency to refuse it. While the Court acknowledged the existence of a "significant liberty interest" and said that the state's purposes in forcibly administering the medication must be "therapeutic" rather than "punitive," the Court found that internal administrative determinations made by prison psychiatric professionals would be adequate to protect the PRISONER'S RIGHTS.

*Cruzan v. Missouri Department of Health* (1990) considered the rights of patients to refuse medical treatment in an apparently different context; and yet, the result, in the Court's restricted construction of the liberty interest at stake, seems strikingly similar. In *Cruzan*, the patient was in a state hospital, having been without cognitive function (in a "persistent vegetative state") since an automobile accident seven years earlier. Hospital staff refused to discontinue medical treatment without judicial authorization, notwithstanding the request of the patient's parents, and the state court found that there was no "clear and convincing evidence" that patient herself would have wanted termination of treatment. The Supreme Court ruled that a competent adult had a Fourteenth Amendment liberty interest against unconsented medical care, but that the state was free to erect stringent evidentiary standards in evaluating claims on behalf of incompetent patients.

There were special factors in these two cases that might have limited the Court's inclination to apply the liberty interest that it abstractly had endorsed. In *Harper*, the Court cited "legitimate needs of institutional confinement," including state "interests in prison safety and security," as a basis for withholding application of the prisoner's claimed right to refuse medication; there was, however, no specific factual finding that the prisoner's condition endangered prison safety or security. In *Cruzan*, the autonomy claim was advanced on behalf of an obviously incompetent patient; there was, however, evidence (which the state court refused to credit) that before her incapacitating accident, the patient had explicitly opposed such medical treatment. In accepting the restrictive evidentiary standard, the Supreme Court was apparently unconcerned with the practical likelihood that most people will not make clear prior indications of their wishes regarding medical treatment (notwithstanding the statutory recognition in many states of so-called "living wills"). The Court, moreover, referred favorably to the state's interest in prohibiting suicide, a reference that suggests that the state is free to impose stringent mental competency tests on individuals who, unlike Cruzan, have current capacity to articulate their resistance

to treatment—tests so stringent as to undermine in practice the liberty interest to refuse medical treatment that the Court abstractly endorsed.

The Court may, however, be more hospitable to the practical implementation of patients' right to refuse treatment in future cases than it was in *Harper* or *Cruzan*. Indeed, there were strong dissents in both cases (three in *Harper* and four in *Cruzan*) urging respect for the refusal rights and although Justice SANDRA DAY O'CONNOR concurred in the Court's opinion in *Cruzan*, she wrote separately to suggest that states may be constitutionally required to respect not only prior formal statements made by an individual, as in a "living will," but also the wishes of a surrogate decision maker who had been formally designated by the individual before incapacitating illness.

As in the current constitutional doctrine regarding a patient's right to refuse treatment, there is a disjunction in the Supreme Court's case law between the abstract formulation that the state must provide medical treatment to persons in its custody and the specific standards adopted to assure practical implementation of that right. The disjunction was visible on the face of the first opinion in which the Court announced that prisoners have a right to medical treatment: In *Estelle v. Gamble* (1976) the Court held that failure to provide necessary treatment could constitute CRUEL AND UNUSUAL PUNISHMENT in violation of the Eighth Amendment, but only if such failure amounted to a "deliberate indifference to serious medical needs." Similarly, in *Youngberg v. Romeo* (1982), the Court found that a resident of a state mental retardation institution had a constitutional right to receive "minimally adequate or reasonable training" programs; at the same time, however, the Court held that in determining the minimal standards for adequacy of reasonableness, judges must defer to medical and behavioral professionals. (Indeed, in Chief Justice WILLIAM H. REHNQUIST's opinion for the Court in *Cruzan*, the force even of this minimally bestowed treatment right was subtly undermined with the observation that "the liberty interest" in *Youngberg* addressed only "safety and freedom from bodily restraint [and] did not deal with decisions to administer or withhold medical treatment.")

Whatever the uncertainties of its acknowledgment of the right to refuse medical treatment or the right to receive treatment while in state custody, the Court has been quite clear in rejecting the existence of any generally applicable constitutional right for the provision of medical services. The Court explicitly stated in *Youngberg* that there was no such right to "substantive services." In MAHER V. ROE (1977) and HARRIS V. MCRAE (1980), moreover, the Court had held that neither state nor federal governments are constitutionally required to provide ABORTIONS for women who are INDIGENT; although these cases were colored by the surrounding public controversy about whether abortion should be considered an ordinary medical procedure, the decisions are nonetheless consistent with the Court's long-standing resistance to finding any constitutional ENTITLEMENTS not only for medical care but for WELFARE BENEFITS generally.

In *Cruzan* none of the other Court members joined with Justice ANTONIN SCALIA in his separate statement that "the Constitution has nothing to say" about the right to refuse medical treatment. Notwithstanding the pervasive role of state and federal governments in the provision and regulation of health care, however, the Constitution—as currently construed by the Supreme Court—says very little about patients' rights generally.

ROBERT A. BURT
(1992)

Bibliography

ANNAS, GEORGE J.; LAW, SYLVIA; ROSENBLATTE, RAND; and WING, KENNETH 1990 *American Health Law*. Chapter VI, pages 561–666. Boston: Little, Brown.

KATZ, JAY 1984 *The Silent World of Doctor and Patient*. New York: Free Press.

## PATRONAGE

Political patronage has had a long tradition in parts of the United States, particularly in cities dominated by so-called "machine politics." Patronage entails government officials' exchanging government jobs or other discretionary government benefits for political support. In the first Mayor Daley's Chicago, for example, city employees were expected to work for the election of Democratic Party candidates as well as to contribute 2 percent of their salary to the party if they wanted to keep their jobs.

Beginning with a PLURALITY OPINION in the 1976 case of *Elrod v. Burns*, the Supreme Court has made it increasingly difficult for government officials to take party affiliation into account in making employment or contracting decisions. In *Elrod*, the newly elected Democratic sheriff of Cook County, Illinois sought to fire Republican employees in the Sheriff's office. Justice WILLIAM J. BRENNAN, JR., in a three-Justice plurality opinion, held that firing a government employee based solely on the employee's party affiliation violated the employee's FIRST AMENDMENT right of FREEDOM OF ASSOCIATION. Two additional Justices concurred in the result that the sheriff's conduct violated the First Amendment.

The sheriff had argued that patronage practices could be justified on three grounds: (1) insuring effective government and the efficiency of public employees; (2) insuring employees' political loyalty so that employees

would not block implementation of a new administration's policies; and (3) preserving the democratic process through a strong party system. Applying STRICT SCRUTINY, the *Elrod* plurality rejected the first and third of these interests outright. It stated that the sheriff's interest in effective and efficient government could be protected through the less restrictive means of discharging employees for cause. It also disbelieved that the elimination of patronage practices would bring about the demise of party politics.

The plurality agreed that the sheriff's second asserted ground of insuring employees' political loyalty was valid insofar as it applied to employees in "policymaking positions," but it did not serve to "validate patronage wholesale." In the 1980 case of *Branti v. Finkel*, a majority further explained that a government official could take party affiliation into account in firing employees only when such affiliation is "an appropriate requirement for the effective performance of the public office involved." The *Branti* Court held that party affiliation was not an appropriate requirement for an assistant public defender.

Justice LEWIS F. POWELL, JR., dissented in both *Elrod* and *Branti*, arguing in both cases that political patronage strengthened POLITICAL PARTIES, and that strong political parties are required for effective democratic government. He also argued in *Branti* that the policymaking test articulated by the majority was uncertain and ill-advised.

In *Rutan v. Republican Party of Illinois* (1990), a 5–4 majority extended the *Elrod* rule to other employment decisions, including hiring, promotions, transfers, and recalls of employees after layoffs. Justice ANTONIN SCALIA wrote a scathing dissent, raising and elaborating on many of the points Powell had made in his earlier dissents. Besides arguing that the *Elrod* line should be overturned, Scalia contended that strict scrutiny should not be applied to cases in which the government acted as an employer.

Four of the five Justices in the *Rutan* majority left the Court before it decided its most recent pair of patronage cases in 1996, *O'Hare Truck Service v. City of Northlake* and *Umbehr v. Heiser*, leading commentators to predict that the Court would use these decisions to reverse the *Elrod* line. In the event, Chief Justice WILLIAM H. REHNQUIST, and Justices ANTHONY M. KENNEDY and SANDRA DAY O'CONNOR switched sides from their dissenting position in *Rutan*. Kennedy, writing for a 7–2 majority in *O'Hare*, held that the *Elrod* rule applied to independent contractors.

In an important development, the Court in *Umbehr* and *O'Hare* distinguished the *Elrod* line of cases, in which government based its employment decisions solely on the employee's party affiliation, from the *Pickering v. Board of Education* (1968) line of cases, in which government based its employment decisions on its employee's speech, such as employee speech criticizing the government. *Elrod* places the burden on the hiring authority to show that a political affiliation requirement is appropriate for the effective performance of the employee's office. In contrast, *Pickering* requires a balancing of the employee's rights with the government's legitimate interest as an employer in the latter.

After holding in *O'Hare* and *Umbehr* that independent contractors of the government must receive the same constitutional protection as government employees, the *O'Hare* Court explained that the initial question in future patronage cases must be whether the government's decision was based purely on the employee's or contractor's party affiliation or whether it also (or solely) involved the employee's or contractor's speech. Cases in the first category are governed by *Elrod*, but mixed cases of affiliation and speech (as well as pure speech cases) are governed by *Pickering*. Scalia in dissent believed this standard is unworkable, asking for example whether the statement "I am a Republican" moves a case from *Elrod* strict scrutiny to *Pickering* balancing. Most probably, the *Elrod* line henceforth will be reserved primarily for cases involving wholesale, nonindividualized decisions by the government to condition employment or contracting on the party affiliation of the employees or contractors.

Though the debate over the constitutionality of patronage turns in part on the Justices' varied beliefs about how coercive or unfair a party affiliation requirement is to government employees or contractors, the most contentious issue appears to be whether patronage practices support a strong democratic government. The majority in the *Elrod* line of cases characterizes patronage as inefficient and corrupt, and especially prone to entrenchment of one-party rule. The dissenters have a more benign view of patronage, noting its abuses but contending that states should have the right to find an optimal mix of patronage and merit that can strengthen the major political parties. Though a majority of the Court now appears to believe that the state has a strong interest in promoting the two-party system, TIMMONS V. TWIN CITIES AREA NEW PARTY (1997), no current majority believes that patronage practices promote the two-party system.

In part, the debate over the virtues of patronage comes too late. The replacement of party-centered, labor-intensive political campaigns with candidate-centered, capital-intensive ones has lessened politicians' demand for patronage employment. Politicians want money for media campaigns, not precinct workers. This increased demand for campaign contributions puts pressure on politicians to exchange government favors, including contracts, for such contributions. *O'Hare*, however, limits these exchanges, making it the patronage case most likely to have a strong effect on our political system.

RICHARD L. HASEN
(2000)

(SEE ALSO: *Employee Speech Rights (Public); Freedom of Speech.*)

Bibliography

BOWMAN, CYNTHIA GRANT 1991 "We Don't Want Anybody Anybody Sent": The Death of Patronage Hiring in Chicago. *Northwestern University Law Review* 86:57–95.

——— 1996 The Law of Patronage at a Crossroads. *Journal of Law and Politics* 12:341–363.

HASEN, RICHARD L. 1993 An Enriched Economic Model of Political Patronage and Campaign Contributions: Reformulating Supreme Court Jurisprudence. *Cardozo Law Review* 14:1311–1341.

JOHNSON, RONALD N. and LIBECAP, GARY D. 1994 *The Federal Civil Service System and the Problem of Bureaucracy: The Economics and Politics of Institutional Change.* Chicago: University of Chicago Press.

## *PATTERSON v. MCLEAN CREDIT UNION*
491 U.S. 164 (1989)

This decision's constitutional significance lies in what the Supreme Court did not do. The CIVIL RIGHTS ACT OF 1866 guarantees "all persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white persons." In RUNYON V. MCCRARY (1976) the Court had held that this provision not only required a state to give blacks and whites the same legal rights in contracting but also forbade private racial discrimination in the making of contracts. Later decisions had applied the same section to employment contracts. *Patterson* raised the issue of whether this section gave a black employee a right to damages against her employer for acts of racial harassment. In 1988, after oral argument on this issue and without any prompting from the parties, a 5–4 majority of the Court set the case down for reargument and asked the parties to consider whether *Runyon v. McCrary* should be overruled.

Four Justices bitterly dissented from this order, and outside the Court a clamor of protest rose. The majority that supported the order consisted of the two *Runyon* dissenters and the three Justices appointed by President RONALD REAGAN, and the order appeared to be the opening salvo in an assault on some of the major gains of the CIVIL RIGHTS MOVEMENT. If *Runyon* were overruled, why should the Court not overrule JONES V. ALFRED H. MAYER CO. (1968)? *Jones* was the landmark decision that (1) interpreted a parallel provision of the 1866 Act to forbid private racial discrimination in the disposition of property, and (2) upheld the law, as so interpreted, on the basis of Congress's power to enforce the THIRTEENTH AMENDMENT. The latter possibility seems, in retrospect, to have been unlikely, but the depth of concern is understandable. Sixty-six United States senators and 118 representatives filed a brief urging the Court not to overrule *Runyon*, and so did the attorneys general of forty-seven states.

In the event, the Court unanimously reaffirmed the *Runyon* PRECEDENT. The majority opinion (the same majority that had agreed on the reargument order) simply applied the doctrine of STARE DECISIS. The Court went on to read the 1866 act extremely narrowly, rejecting the conclusion of most lower federal courts that the law allowed damages for a private employer's racial harassment of an employee.

*Patterson's* narrow interpretation of the 1866 act is vulnerable to criticism, as the opinion of the four dissenters and Congress's recent effort to overturn it both attest. But the Court's reaffirmation of *Runyon* stants as the doctrinal consolidation of a broad political consensus on CIVIL RIGHTS that had seemed threatened in the 1980s.

KENNETH L. KARST
(1992)

Bibliography

KARST, KENNETH L. 1989 Private Discrimination and Public Responsibility: Patterson in Context. *Supreme Court Review* 1989:1–51.

## *PATTON v. UNITED STATES*
281 U.S. 276 (1930)

In this case a unanimous Supreme Court, speaking through Justice GEORGE SUTHERLAND, held that the constitutional right to a jury in a federal court included exactly twelve members who were to render a unanimous verdict. (See JURY SIZE; JURY UNANIMITY.) Sutherland also declared that a defendant might waive his right to a jury or consent to a jury of less than twelve. Forty years later, in WILLIAMS V. FLORIDA (1970), a case involving a state court, the Court held that fixing the number of required jurors at twelve was a "historical accident" and "cannot be regarded as an indispensable component of the Sixth Amendment."

DAVID GORDON
(1986)

(SEE ALSO: *Waiver of Constitutional Rights.*)

## *PAUL v. DAVIS*
424 U.S. 693 (1976)

Even before GOLDBERG V. KELLY (1970) the Supreme Court assumed that the guarantee of PROCEDURAL DUE PROCESS attached to state impairments of "liberty" or "property" interests—concepts that bore their own constitutional meanings as well as their traditional COMMON LAW mean-

ings. *Goldberg* and its successors added to those meanings a new category of protected "entitlements" established by statute or other state action. BISHOP V. WOOD (1976) and *Paul v. Davis* turned this development upside down, using the idea of "entitlements" under state law to *confine* the reach of due process.

In *Paul*, police officers circulated a flyer containing the names and photographs of persons described as "active shoplifters." Davis, one of those listed, had been arrested and charged with shoplifting, but the case had not been prosecuted and the charge had been dismissed. He sued a police officer in a federal district court, claiming damages for a violation of his federal constitutional rights. The Supreme Court held, 5–3, that the alleged harm to Davis's reputation did not, of itself, amount to impairment of a "liberty" interest protected by the due process guarantee. For the majority, Justice WILLIAM H. REHNQUIST manhandled precedents that had established reputation as a "core" constitutionally protected interest, asserting that the Court had previously offered protection to reputation only when it was harmed along with some other interest established by state law, such as a right to employment. Justice WILLIAM J. BRENNAN, for the dissenters, showed how disingenuous was this characterization of the precedents.

Probably the majority's main concern was to keep the federal CIVIL RIGHTS laws from becoming a generalized law of torts committed by state officers, with the federal courts as the primary forum. Yet the majority opinion cannot be taken at face value. Unquestionably the notion of "liberty" interests protected by due process still includes a great many interests not defined by state law, such as FIRST AMENDMENT liberties.

KENNETH L. KARST
(1986)

## *PAUL v. VIRGINIA*
8 Wallace 168 (1869)

In 1866, Virginia prohibited out-of-state insurance companies from doing business without a substantial deposit; domestic companies were not so required. Convicted of violating the 1866 act, Paul filed a WRIT OF ERROR and BENJAMIN R. CURTIS argued his case. Justice STEPHEN J. FIELD, for a unanimous Supreme Court, rejected Paul's Article IV PRIVILEGES AND IMMUNITIES argument, declaring that CITIZENSHIP could apply only to natural persons. Field further asserted that insurance contracts were not articles of commerce and that the issuance of a policy was not a transaction in INTERSTATE COMMERCE. *Paul* was often cited as a limitation on congressional power on the incorrect assumption that congressional and state regulatory power were mutually exclusive. *Paul* remained law until virtually overturned in UNITED STATES V. SOUTH-EASTERN UNDERWRITERS ASSOCIATION (1944), involving congressional power, after which Congress authorized state regulation.

DAVID GORDON
(1986)

## PAXTON'S CASE
Gray, *Mass. Repts.*, 51 469 (1761)

In *Paxton's Case*, the Massachusetts Superior Court considered whether to continue issuing WRITS OF ASSISTANCE, which, by a British statute of 1662, empowered customs officers to search all houses for contraband. Massachusetts opposed these writs; its legislation had repudiated the general SEARCH WARRANTS they resembled in favor of uniformly specific warrants. Other stimulants to the case were frequent searches under the writs, tense relations with local British customs officers, the belief that customs regulations had been enforced against local merchants with discriminatory rigor, and the thwarted ambitions of the powerful Otis family for appointment to the Superior Court.

The death of King George II terminated existing writs after six months, and local merchants asked the court not to replace them. In the initial hearing Josiah Gridley argued the positions of the customs establishment that the act of 1662 defined writs of assistance as general search warrants and that a local statute had empowered the court to issue them by giving it the same jurisdiction as the one that issued them in England. Oxenbridge Thacher and JAMES OTIS, JR., representing the merchants, inaccurately replied that the local court had not recently exercised the powers of the English tribunal, the Court of Exchequer.

Otis, son of the candidate for a seat on the Superior Court, cited a magazine article to prove that the writs did not currently operate as GENERAL WARRANTS in Britain and had not been so intended by the statute of 1662. Legions of British laws authorized general searches, however, and Otis relied primarily on the HIGHER LAW. Since general searches allegedly violated natural and COMMON LAW, Otis reasoned that writs of assistance were intrinsically void if worded as the statute prescribed and should be judicially construed as specific search warrants.

Otis's use of sources was heavily didactic. He cited Sir EDWARD COKE, whose *Institutes* exaggerated MAGNA CARTA into a prohibition of general search warrants, and he wrongly read into Coke a further requirement that all search warrants be specific. Otis also stretched BONHAM'S CASE (1610) to hold that common law courts could "control" unreasonable Parliamentary legislation and render it void. Only private interests had actually clashed in *Bon-*

*ham's Case*, not levels of law or government as Otis implied. Although Otis had not advised the court explicitly to disallow a Parliamentary statute, he misused *Bonham's Case* to advocate a judicial construction of the act that would have had the effect of disallowance.

Persuaded by Otis's eloquence, the court delayed its decision, found that the writs used in England were general, and approved their local issuance over Otis's continued objections. The Massachusetts legislature responded by reducing the salaries of the judges and passing a bill, vetoed by the governor, to define the writs as specific warrants. THOMAS HUTCHINSON, whose appointment as Chief Justice had blocked the judicial aspirations of the Otises, later traced his political demise to his courtroom support of writs of assistance. *Paxton's Case* is one of the leading precedents for the FOURTH AMENDMENT and probably inspired the rejection by later Massachusetts courts (1763–1766) of customary search warrants against felons in *Bassett v. Mayhew* and other cases.

WILLIAM J. CUDDIHY
(1986)

Bibliography

SMITH, M. H. 1978 *The Writs of Assistance Case*. Berkeley: University of California Press.

## *PAYNE v. TENNESSEE*
501 U.S. 808 (1991)

Writing for a 6–3 majority, Chief Justice WILLIAM H. REHNQUIST held that victim impact evidence in CAPITAL PUNISHMENT cases is not barred by the Eighth Amendment's CRUEL AND UNUSUAL PUNISHMENT clause. *Payne* OVERRULED a contrary decision, BOOTH V. MARYLAND (1987), handed down only four years earlier by a Court divided 5–4.

The drug-crazed and sexually driven Payne stabbed to death a young mother and her two-year-old daughter, and attacked and seriously injured her three-year-old son. At Payne's trial, the grandmother was allowed to testify that the boy cried for his lost relatives. The prosecutor, in closing argument, poignantly portrayed a child in mourning, who would never be kissed good-night by his mother or be able to play with his little sister.

In upholding the admission of testimony relating to the effect of the murders on the boy, the majority rejected *Booth*'s holding that victim impact evidence subverts the reasoned decisionmaking process required for the imposition of the death penalty. Rehnquist denied that victim impact evidence introduced factors irrelevant to proper sentencing goals (such as retribution and deterrence) or encouraged jurors to base sentences on the perceived moral or social worth of victims or their families (thereby creating an impermissible risk that the penalty would be determined arbitrarily). Rather, he opined, victim impact evidence is designed to show each victim's uniqueness as a human being and provides a needed counterweight to the virtually unlimited proof that the defendant is permitted to adduce concerning his circumstances, character, and record.

In dissent, Justice JOHN PAUL STEVENS echoed the arguments accepted in *Booth*, while Justice THURGOOD MARSHALL accused the majority of abandoning PRECEDENT solely because of a change in the personnel of the Court.

VIVIAN BERGER
(2000)

Bibliography

BERGER, VIVIAN 1992 *Payne* and Suffering—A Personal Reflection and a Victim-Centered Critique. *Florida State Law Review* 20:21–65.

COYNE, RANDALL 1992 Inflicting *Payne* on Oklahoma: The Use of Victim Impact Evidence During the Sentencing Phase of Capital Cases. *Oklahoma Law Review* 45:589–628.

## *PAYTON v. NEW YORK*
445 U.S. 573 (1980)

The FOURTH AMENDMENT, which the FOURTEENTH makes applicable to the states, says that the "right of people to be secure in their . . . houses . . . shall not be violated." *Payton* was the first case in which the Supreme Court confronted the issue whether police may enter a private home, without an ARREST WARRANT or consent, to make a FELONY arrest. New York, sustained by its courts, authorized warrantless ARRESTS, by forcible entry if necessary, in any premises, if the police had PROBABLE CAUSE to believe a person had committed a felony. In Payton's case the police seized EVIDENCE in PLAIN VIEW at the time of arrest and used it to convict him.

A 6–3 Supreme Court, in an opinion by Justice JOHN PAUL STEVENS, reversed and held the state statute unconstitutional. Absent EXIGENT CIRCUMSTANCES, "a man's house is his castle" and unlike a public place may not be invaded without a warrant. Stevens found slight guidance in history for his position on the special privacy of the home in the case of a felony arrest, but he insisted that the Fourth Amendment required a magistrate's warrant. Justice BYRON R. WHITE for the dissenters declared that the decision distorted history and severely hampered law enforcement; the amendment required only that a warrantless felony arrest be made on probable cause in daytime. (See STEAGALD V. UNITED STATES.)

LEONARD W. LEVY
(1986)

# PECKHAM, RUFUS W.
(1838–1909)

Rufus Wheeler Peckham, the last of President GROVER CLEVELAND's four appointees to the Supreme Court, was commissioned in 1896 following eight years of service on the New York Court of Appeals. His name is linked most often with one of the half dozen most fulsomely denounced Supreme Court decisions in American history. Speaking for a majority of five in LOCHNER V. NEW YORK (1905), Peckham invoked the SUBSTANTIVE DUE PROCESS doctrine of "liberty of contract," which he had established in an incipient form in ALLGEYER V. LOUISIANA (1897), and invalidated a statute regulating the hours worked by bakeshop employees. (See FREEDOM OF CONTRACT.) Peckham's opinion infuriated progressive reformers, evoked one of Justice OLIVER WENDELL HOLMES's most famous dissents, and ultimately contributed a new term to the lexicon of constitutional discourse in America. More than four generations later, "Lochnerism" is habitually used by commentators to describe the horrible consequences of interventionist JUDICIAL REVIEW in defense of doctrinally abstract constitutional rights.

Holmes once remarked that the "major premise" of Peckham's jurisprudence was "God damn it." It was an apt observation. Peckham was outraged by the increasing propensity of state legislatures and the Congress to transcend "the proper functions of government," and he not only conceptualized the judicial function in essentially negative terms but also regarded the Court as an appropriate forum for battling the ominous evils of centralization and socialism. For Peckham, the Court's role in constitutional adjudication was to police the boundaries separating the rights of the individual, the powers of the states, and the authority of the general government in such a way as to keep each within its proper sphere. Otherwise, he warned while still on the New York bench, "in addition to the ordinary competition that exists throughout all industries, a new competition will be introduced, that of competition for the possession of the government."

Peckham had boundless confidence in his capacity to draw objective lines between these mutually limiting spheres. He dissented in CHAMPION V. AMES (1903) on the ground that a federal statute prohibiting interstate distribution of lottery tickets was not a regulation of commerce at all but rather an attempt by Congress to usurp the reserved power of the states to regulate public morals. And in *Lochner* Peckham conceded that state governments might prevent individuals from making certain kinds of contracts, only to conclude that there was no "direct relation" between the hours worked by bakeshop employees and either the public health or the health, safety, and morals of the workers. Peckham, in short, knew a police regulation or an exercise of the commerce power when he saw one. Holmes may have been astonished when Peckham claimed that legitimate governmental interventions were readily distinguishable from those with only a "pretense" of legitimacy. But most Americans were accustomed to the claim. The spate of veto messages issued by President Cleveland were strikingly similar to Peckham's judicial opinions in both substance and style.

Peckham's voting record in cases involving race relations reflected another principal goal of the Cleveland Democracy—"home rule" for the South. The great spokesman for liberty of contract joined the majority in HODGES V. UNITED STATES (1906), which denied federal JURISDICTION over conspiracies to prevent blacks from making or carrying out labor contracts. He also concurred in BEREA COLLEGE V. KENTUCKY (1908), where the Court upheld a statute prohibiting even voluntary interracial education. If Peckham perceived a principled difference between the right of employers and employees to contract in *Lochner* and the right of individuals freely to associate in *Berea College*, he never described it. Yet it appears that Peckham rarely worried about such overarching conceptual problems. He not only managed to keep race relations and employment contract issues in separate analytical compartments but also voted to impose more stringent PUBLIC USE requirements on state governments when they regulated prices under the POLICE POWER than when they exercised the EMINENT DOMAIN power. Peckham stridently criticized the DOCTRINE of *Munn v. Illinois* (1877) throughout his career, arguing that storage rates charged by grain elevator firms were not subject to regulation because the owners had not devoted their property "to any public use, within the meaning of the law." (See GRANGER CASES.) In *Clark v. Nash* (1905), however, he sustained a law that permitted individuals to condemn rights-of-way across their neighbors' land for irrigation and mining purposes. "What is a public use," Peckham declared, "may frequently and largely depend upon the facts surrounding the subject, and . . . the people of a State . . . must in the nature of things be more familiar with such facts" than the federal judiciary.

Peckham wrote 448 opinions during his fourteen years on the Court, more than thirty percent of which were dissents. Very few of his majority opinions have stood the test of time. Modern commentators almost unanimously regard most of the results he reached to be insupportable and his mode of reasoning unfathomable. But it was Peckham himself who best summed up both the implications of his work for American public life and the internal contradictions that hastened its demise. "At times there seems to be a legal result which takes no account of the obviously practical result," he wrote in *Sauer v. City of New York*

(1907). "At times there seems to come an antithesis between legal science and common sense."

CHARLES W. MCCURDY
(1986)

Bibliography

SKOLNIK, RICHARD 1969 Rufus Peckham. Pages 1685–1703 in Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court, 1789–1967.* New York: Chelsea House.

## *PEIK v. CHICAGO & NORTHWESTERN RAILWAY CO.*

See: Granger Cases

## *PELL v. PROCUNIER* 417 U.S. 817 (1974)

In a case that helped delineate the boundaries between the traditional FIRST AMENDMENT freedoms and the expanding area of PRISONERS' RIGHTS, several prisoners and professional journalists challenged the constitutionality of a California prison regulation that forbade press interviews with particular inmates. The argument for the prisoners' rights was that this regulation abridged their FREEDOM OF SPEECH; the journalists claimed the rule inhibited their newsgathering capabilities, thus violating the FREEDOM OF PRESS. The Justices voted 6–3 against the inmates and 5–4 against the journalists. Because the prisoners had alternative means of communication (friends or family, for example) the California regulation did not violate their rights. The majority based its rejection of the journalists' position on the purpose of the regulation—to prevent particular individuals from gaining excessive influence through special attention—and the reporters' otherwise free access to prisoners. Furthermore, the regulation did not prohibit the press from publishing what it chose.

DAVID GORDON
(1986)

## PENDENT JURISDICTION

When a federal court has JURISDICTION over a case presenting a FEDERAL QUESTION, the court may also take jurisdiction over closely related claims based on state law. According to *Gibbs v. United Mine Workers of America* (1966), pendent jurisdiction over a state law claim is appropriate when the state and federal claims share "a common nucleus of operative fact." If the federal claim is itself insubstantial, or is dismissed before the case is tried, it will not serve as a basis for getting a state claim heard by the federal court; such a case should be dismissed. The federal court has discretion to decline pendent jurisdiction over a state claim when the state issues are apt to predominate in the case (making it more appropriate for hearing in a state court), or when the combination of federal and state claims is apt to produce jury confusion. (See ANCILLARY JURISDICTION.)

In PENNHURST STATE SCHOOL & HOSPITAL V. HALDERMAN (1984) the Supreme Court drastically curtailed use of pendent jurisdiction in CIVIL RIGHTS cases. The Court held that the ELEVENTH AMENDMENT bars a federal court from entertaining an action—whether for DAMAGES or for INJUNCTION—against a state officer, when the action is based on an alleged violation of state law.

KENNETH L. KARST
(1986)

Bibliography

WRIGHT, CHARLES ALAN 1983 *The Law of Federal Courts*, 4th ed. Pages 103–109. St. Paul, Minn.: West Publishing Co.

## PENDLETON, EDMUND (1721–1803)

Admitted to the bar in 1745, Edmund Pendleton became a justice of the peace in 1751 and a member of the Virginia House of Burgesses in 1752. He was a leader of the conservative patriot faction in Virginia and opposed PATRICK HENRY on many issues, including colonial reaction to the Stamp Act of 1765. Pendleton opposed the act and, as a justice of the peace, declared it unconstitutional, but he did not approve of Henry's famous resolutions against it. He became a member of the committee of correspondence in 1773 and a delegate to the FIRST CONTINENTAL CONGRESS in 1774. Between 1774 and 1776 he was president of both the Virginia convention (the provisional legislature) and the Committee of Safety (the de facto executive). He presided over the Virginia convention of 1776 which passed the resolution Pendleton had drafted instructing Virginia's delegates to the CONTINENTAL CONGRESS to seek a DECLARATION OF INDEPENDENCE, adopted the VIRGINIA DECLARATION OF RIGHTS AND CONSTITUTION, and appointed a committee, including Pendleton, GEORGE WYTHE, and THOMAS JEFFERSON, to revise the state's laws. He was elected speaker of the first House of Delegates under the new constitution (1776–1777) and then appointed first presiding judge of the court of chancery (1777–1779). In 1779 he became presiding judge of the court of appeals, the state's highest court, a position he held until his death. In COMMONWEALTH V. CATON (1782), he stated that laws re-

pugnant to the state constitution were void, but he reserved the question of whether his court could so declare them.

Pendleton was unanimously chosen president of the Virginia convention of 1788 at which he argued and voted for the RATIFICATION OF THE CONSTITUTION. He declined President GEORGE WASHINGTON's offer of a federal district judgeship in order to remain on the state court. As an indication of his virtues as a judge, it is said that only one of his judicial decisions was ever reversed, and in that case he reversed himself.

DENNIS J. MAHONEY
(1986)

## PENDLETON ACT
22 Stat. 403 (1883)

A fundamental change in the operation of American government began with the adoption of the Civil Service Act of 1883—known as the Pendleton Act, for its sponsor, Senator George H. Pendleton (Democrat of Ohio). The act created a merit system for selection of nonpolicymaking employees of the United States government to replace the "spoils" system which rewarded political supporters. Although the immediate stimulus for adoption of the act was the assassination of President JAMES GARFIELD by a disappointed office seeker, a politically independent civil service had been a major goal of reformers for many years.

The act based eligibility for affected federal employment on performance in competitive examinations, and it created a Civil Service Commission to supervise the examinations and handle personnel administration. Initially extending to less than ten percent of federal employees, the competitive civil service now includes over ninety percent. Much of this growth was a result of the Ramspeck Act (Civil Service Act of 1940) which authorized the President to place virtually all federal employment under the system by EXECUTIVE ORDER. The Civil Service Reform Act (1978) abolished the Civil Service Commission but retained the principle of political neutrality established by the Pendleton Act.

DENNIS J. MAHONEY
(1986)

Bibliography

ROSENBLOOM, DAVID H. 1971 *Federal Service and the Constitution.* Ithaca, N.Y.: Cornell University Press.

## PENN, WILLIAM
(1644–1718)

The scion of a wealthy English family, William Penn attended Oxford University, studied law, and managed the family's estates before becoming a Quaker in the mid-1660s. Throughout the rest of his life Penn engaged in Quaker preaching and propaganda. He was imprisoned on at least three occasions for publishing pamphlets about his religious beliefs. His acquittal in 1670 on a charge of unlawful preaching led to BUSHELL'S CASE, which ended the punishment of jurors who decided contrary to a judge's instructions. In the political campaigns of the late 1670s, Penn agitated for RELIGIOUS LIBERTY and frequent parliamentary elections.

Penn's involvement with America began in 1682, when he became a trustee of the colony of West Jersey, which he and eleven others had purchased for settlement by Quakers, and helped to frame its charter. King Charles II granted the proprietary colony of Pennsylvania to Penn in 1681 as settlement of a large debt that the king owed Penn's father; the following year Penn leased the area now known as Delaware and added it to the colony. Penn described his intentions for the colony as a "holy experiment" in religious and political liberty. In 1682, during a two-year sojourn in America, he wrote a Frame of Government (constitution) for the colony, granting the settlers freedom of religion, procedural guarantees in criminal cases, and limited self-government.

In 1697 Penn drafted, and submitted to the Board of Trade, the first proposal for a federal union of the English colonies in North America. His plan would have created a "congress," comprising two representatives from each colony, competent to legislate on any matter related to "the public tranquility and safety."

During a visit to Pennsylvania in 1701 Penn granted the residents a new charter, the Charter of Privileges, creating a unicameral legislature, greatly expanding the scope of colonial self-government, and providing for Delaware's establishment as a separate entity. Shortly thereafter, he returned to England, where he died.

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Pennsylvania Colonial Charters.*)

Bibliography

WILDES, HARRY E. 1974 *William Penn.* New York: Macmillan.

## *PENN CENTRAL TRANSPORTATION CO. v. NEW YORK CITY*
438 U.S. 104 (1978)

Some governmental regulations of the use of property are severe enough to be called TAKINGS OF PROPERTY, for which JUST COMPENSATION must be made under the explicit terms of the Fifth Amendment (governing federal government action) or interpretations of the FOURTEENTH AMENDMENT'S

DUE PROCESS clause (governing state action). This decision illustrates how difficult it is to persuade the Supreme Court that a regulation constitutes a "taking."

A New York City ordinance required city approval before a designated landmark's exterior could be altered. The owner of Grand Central Terminal sought to build a tall office building on top of the terminal, and was refused permission on aesthetic grounds. The Supreme Court held, 6–3, that this regulation did not constitute a "taking."

Justice WILLIAM J. BRENNAN, for the majority, conceded that the takingregulation distinction had defied clear formulation, producing a series of "ad hoc factual inquiries." This regulation, however, was analogous to ZONING under a comprehensive plan; over 400 landmarks had been designated. Further, the owner's loss was reduced by transferring its air-space development rights to other property in the city.

For the dissenters, Justice WILLIAM H. REHNQUIST argued that the law's severely destructive impact on property values was not justified by either of the usual "exceptions": the banning of "noxious uses," or the imposition of widely shared burdens to secure "an average reciprocity of advantage" (as in the case of zoning). Penn Central had suffered a huge loss of value, not offset by benefits under the landmark law.

KENNETH L. KARST
(1986)

## *PENNHURST STATE SCHOOL & HOSPITAL v. HALDERMAN*
451 U.S. 1 (1981)
457 U.S. 1131 (1984)

*Pennhurst* worked major changes in the interpretation of the ELEVENTH AMENDMENT and in the PENDENT JURISDICTION of federal courts over claims based on state law. These changes remove one important weapon from the arsenal of CIVIL RIGHTS plaintiffs.

Terri Lee Halderman, a resident of Pennhurst, a state institution for the mentally retarded, commenced a CLASS ACTION in federal district court against Pennhurst and a number of state and local officials. She alleged that squalor, abuse of residents, and other conditions at Pennhurst violated the federal DEVELOPMENTALLY DISABLED ASSISTANCE AND BILL OF RIGHTS ACT of 1975, the DUE PROCESS clause of the FOURTEENTH AMENDMENT, and Pennsylvania's statute governing mental retardation. After a long trial, the district court agreed with her on all counts, and held that mentally retarded people in the state's care had a due process right to live in "the least restrictive setting" that would serve their needs. The court's INJUNCTION ordered the defendants to close Pennhurst and place its residents in "suitable living arrangements." The court of appeals affirmed, but rested decision only on the federal statute. The Supreme Court reversed, instructing the lower courts to consider whether the district court's order was justified on the basis of the Constitution or state law. On REMAND, the court of appeals avoided the constitutional issue, holding that state law required reaffirmance of the "least restrictive setting" ruling. When the case returned to the Supreme Court, the Court held, 5–4, that the Eleventh Amendment barred the district court's injunction. (The case was then settled, with the state agreeing to close Pennhurst and to move its residents to their home communities, or to other institutions if they were aged or ill.)

Justice LEWIS F. POWELL'S OPINION OF THE COURT announced that the doctrine of SOVEREIGN IMMUNITY is a constitutional principle, based on the Eleventh Amendment, which gives a state immunity from suit in a federal court by an individual plaintiff. In Powell's novel reading, EX PARTE YOUNG (1908) stands for a narrow exception to this immunity, allowing a suit in federal court for an injunction against a state officer only when the plaintiff's claim is based on a violation of the federal Constitution. (Perhaps violations of federal statutes will fit within this category, because of the operation of the SUPREMACY CLAUSE.) Suits in federal court against state officers—even suits for injunctive relief—are thus barred by the Eleventh Amendment when they are based on claimed violations of state law.

Prior to *Pennhurst* an action in federal court founded on FEDERAL QUESTION JURISDICTION could include a claim for relief on state law grounds, when both the federal and state claims arose out of the same facts. However, Powell said, this doctrine of pendent jurisdiction rests only on concerns for efficiency and convenience, concerns that must give way to the force of the Eleventh Amendment.

For the dissenters, Justice JOHN PAUL STEVENS decried the Court's overruling of some two dozen precedents, and defended the long-established understanding of *Ex parte Young:* that when a state officer's conduct is illegal (under either federal or state law), the officer is "stripped" of the cloak of the sovereign's immunity. Here it was perverse to clothe Pennsylvania's officers with the state's Eleventh Amendment immunity when they were acting in violation of their sovereign's commands as embodied in state law. Justice WILLIAM J. BRENNAN, dissenting separately, argued that the amendment does not bar a suit by a citizen against the citizen's own state.

The *Pennhurst* majority opinion is vulnerable to criticism for its historical analysis of the Eleventh Amendment, for its casual dismissal of the importance of the federal courts' pendent jurisdiction, and for its choice to confer immunity on wrongdoing officials in the name of the sovereignty of the very state that had made the officials' conduct illegal. These criticisms seem minor, how-

ever, in the light of another one that is far more grave. The majority, in denying private citizens a vital judicial remedy against official lawlessness, weakened the rule of law.

KENNETH L. KARST
(1986)

Bibliography

SHAPIRO, DAVID L. 1984 Wrong Turns: The Eleventh Amendment and the Pennhurst Case. *Harvard Law Review* 98:61–85.

## *PENNSYLVANIA v. NELSON*
### 350 U.S. 497 (1956)

The Supreme Court banned outright state prosecutions for SEDITION against the United States by ruling, in *Pennsylvania v. Nelson*, that Congress had already preempted that field of SOVEREIGNTY. The decision had the effect of limiting the states to punishing sedition against state or local, but not federal, government.

Steve Nelson, an avowed communist, had been convicted for violating Pennsylvania's stringent sedition law by his words and actions concerning the federal government; he was sentenced to serve twenty years in prison and pay large fines. The state supreme court reversed, holding the state law had been superseded by the Smith Act. The Supreme Court upheld and extended this ruling. Chief Justice EARL WARREN used three criteria or a three-part criterion in ruling that there was no longer room for state action in this field. The scheme of federal regulation, he maintained, which included the Smith Act, the INTERNAL SECURITY ACT of 1950, and the COMMUNIST CONTROL ACT of 1954, was "so pervasive" as to leave no room for state regulation. Further, these federal statutes demonstrated a federal interest "so dominant" as to preclude state action on the same subject; and for the state to enforce its federal law presented a "serious danger of conflict" with the administration of the federal program. Three Justices dissented, arguing that Congress had not intended to preempt the internal security field.

Following the decision all pending proceedings under the state sedition laws were dismissed or abandoned. Congress considered a measure to set aside the decision but failed to enact it.

PAUL L. MURPHY
(1986)

## PENNSYLVANIA COLONIAL CHARTERS
### (April 25, 1682; October 28, 1701)

WILLIAM PENN, the proprietor of Pennsylvania, was a Quaker, a humanitarian, a champion of RELIGIOUS LIBERTY, and a stalwart advocate of CIVIL LIBERTIES. His two charters for his colony gave it representative institutions of government and bills of rights far in advance of the times. The 1682 Frame of Government called itself a "charter of liberties" that had the character of FUNDAMENTAL LAW. Any act of government that "infringed" on the designated liberties, said the Frame, "shall be held of no force or effect." Inhabitants possessing one hundred acres of land "at one penny an acre" were declared "freemen" capable of electing or being elected representatives, including members of the upper house—an innovation. The Frame separated church and state and guaranteed religious liberty by its provision that all persons professing God should be free to worship as they pleased and not be compelled to frequent or maintain any worship or ministry. FAIR TRIAL, which Penn and the Quakers had been denied in England, was here protected. At a time when defendants could not testify on their own behalf, the Frame allowed all persons to plead their own cases. Trial by a twelve-member jury of the VICINAGE, whose judgment was to be "final" (see BUSHELL'S CASE, 1670) and INDICTMENT by GRAND JURY in capital cases were guaranteed. The RIGHT TO BAIL was recognized and excessive fines were banned.

The 1701 Charter of Privileges, which replaced the Frame and remained the basis of government in Pennsylvania until 1776, also had the character of a CONSTITUTION to which ordinary legislation must conform or be of no effect. Its provisions for the "Enjoyment of Civil Liberties" and for religious liberty, and its ban against an ESTABLISHMENT OF RELIGION extended to all inhabitants "for ever." Among their innovations was a guarantee that "all criminals shall have the same Privileges of Witnesses and Council [sic] as their Prosecutors," the source of the comparable clauses in the SIXTH AMENDMENT. England did not allow counsel to all defendants until 1836. Pennsylvania's colonial charters had a marked influence on the development of the concept of a bill of rights in America.

LEONARD W. LEVY
(1986)

Bibliography

PERRY, RICHARD L., ed. 1959 *Sources of Our Liberties.* Pages 204–221, 251–260. New York: American Bar Foundation.

## PENNSYLVANIA CONSTITUTION OF 1776
### (August 16, 1776)

Pennsylvania's short-lived first CONSTITUTION, superseded in 1790, is notable because it was the most unorthodox and democratic of the constitutions of the original states. Although the extralegal "convention" that framed the doc-

ument exercised full powers of government and remained in session as the legislature, the constitution was FUNDAMENTAL LAW. Its preamble, stressing NATURAL RIGHTS theory, declared that it was "for ever" unalterable; its declaration of rights was made part of the constitution and inviolable; and its frame of government created a legislature without the power "to add to, alter, abolish, or infringe" any part of the constitution.

The declaration of rights was superior to the more famous VIRGINIA DECLARATION OF RIGHTS, Pennsylvania's model. Pennsylvania omitted the right to BAIL and the ban against excessive fines and CRUEL AND UNUSUAL PUNISHMENTS but added FREEDOM OF SPEECH, assembly, and petition; separated church and state; recognized the right of CONSCIENTIOUS OBJECTION; protected the RIGHT TO COUNSEL in all criminal cases; and provided for the right to bear arms and the RIGHT TO TRAVEL or emigrate—all constitutional "firsts" in the United States. To create a political democracy controlled by the people, the frame of government established a powerful unicameral legislature, with no upper house to check the lower and no governor to veto its legislation. The legislature's proceedings had to be made public and its doors were to be open to the public. In effect all males of voting age could vote, because the constitution enfranchised all taxpayers (all men had to pay a POLL TAX) and their sons, and anyone who could vote was eligible to hold office. Proportional representation, based on the number of taxable inhabitants, governed the apportionment of the legislature.

In place of a governor the constitution established a council, elected by the people, representing each county, with a president or chairman. The council had weak executive powers but for the power to make appointments, including all judges. The constitution instituted few checks and did recognize SEPARATION OF POWERS. Its strangest institution was the council of censors, a popularly elected body that met for one year in every seven and was charged with the responsibility of seeing that the constitution was preserved inviolate; it could review the performance of all public officers, order IMPEACHMENTS, recommend repeal of legislation, and call a convention to revise the constitution. That council met only once and was so politically divided that it did nothing. But the VERMONT CONSTITUTION OF 1777, based on Pennsylvania's, copied the council of censors and kept it until 1869. The Pennsylvania Constitution of 1790 followed the MASSACHUSETTS CONSTITUTION OF 1780.

LEONARD W. LEVY
(1986)

Bibliography

SELSON, J. PAUL (1936) 1971 *The Pennsylvania Constitution of 1776.* New York: Da Capo Press.

## *PENRY v. LYNAUGH*
492 U.S. 302 (1989)

In this case on the prohition against CRUEL AND UNUSUAL PUNISHMENT imposed by the Eighth Amendment and the FOURTEENTH AMENDMENT, the Court ruled that to inflict CAPITAL PUNISHMENT on a mentally retarded prisoner was not necessarily unconstitutional. The Court, speaking through Justice SANDRA DAY O'CONNOR, also held that the ban on cruel and unusual punishments would be violated in a capital case if the sentencing jury were not instructed to consider all circumstances mitigating against the imposition of the death penalty. In this case, the jury had not properly considered whether Penry's MENTAL RETARDATION and history of childhood abuse diminished his moral culpability and made capital punishment a disproportionate sentence. Because the Eighth Amendment mandates an individualized assessment of the appropriateness of the death penalty, no mitigating factor may be withheld from the jury. Punishment must be directly related to the personal culpability of the criminal. Accordingly, the Court vacated the death sentence and remanded the case for resentencing under proper jury instruction.

Nonetheless, Justice O'Connor, for the Court, rejected Penry's second claim, ruling that the Eighth Amendment does not categorically prohibit the execution of a criminal who is mentally retarded. One who is profoundly or severely retarded and wholly lacking in the capacity to understand the wrongfulness of his or her actions cannot, in the face of the amendment, be executed. But the degree of mental retardation must be considered. In Penry's case, that of an adult with the reasoning capacity of a child not more than seven years of age, there was some proof that his diminished abilities disabled him from controlling his impulses and learning from his mistakes; yet a jury could properly conclude that his disabilities did not substantially reduce his level of blameworthiness for a capital offense. The Court refused to accept mental age as a line-drawing principle in such cases.

Four dissenters argued that the execution of mentally retarded prisoners invariably violates the "cruel and unusual punishment" clause because such people lack the culpability that is prerequisite to the proportionate imposition of the death penalty.

The *Penry* decision also made law on the subject of HABEAS CORPUS relief in federal courts, extending the nonretroactivity principle of *Teague v. Lane* (1989) to capital cases.

LEONARD W. LEVY
(1992)

## *PENSACOLA TELEGRAPH CO. v. WESTERN UNION TELEGRAPH CO.*
96 U.S. 1 (1878)

This case is significant because the Supreme Court, following GIBBONS V. OGDEN (1824), declared that the congressional power to regulate INTERSTATE COMMERCE extends to newly invented instrumentalities of commerce, here the telegraph. In 1866 Congress had prohibited the states from granting telegraph monopolies. Florida, seeking to control telegraphic transmission within its JURISDICTION, conferred exclusive rights on the Pensacola company. A 7–2 Court, speaking through Chief Justice MORRISON R. WAITE, held the state act unconstitutional for conflict with the act of Congress. Accordingly, the company had no valid chartered right to exclude competitors.

LEONARD W. LEVY
(1986)

## PENUMBRA THEORY

Writing for the Supreme Court in GRISWOLD V. CONNECTICUT (1965), Justice WILLIAM O. DOUGLAS commented that "specific guarantees in the BILL OF RIGHTS have penumbras, formed by emanations from those guarantees that help give them life and substance." The occasion for this shadowy suggestion was the Court's decision holding unconstitutional the application to a BIRTH CONTROL clinic of a state law forbidding the use of contraceptive devices, even by the married couples whom the clinic had aided. Although nothing in the Constitution specifically forbade such a law, Justice Douglas rested decision on a RIGHT OF PRIVACY founded in this "penumbra" theory. A number of constitutional guarantees created "zones of privacy." One such zone included the "right of association contained in the FIRST AMENDMENT." Other protections of privacy were afforded by the THIRD AMENDMENT's limitations on the quartering of troops, the FOURTH AMENDMENT's protections against unreasonable SEARCHES AND SEIZURES, and the Fifth Amendment's RIGHT AGAINST SELF-INCRIMINATION. "The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."

This "penumbra" theory, which has had no generative power of its own, is best understood as a last-ditch effort by Justice Douglas to avoid a confrontation with Justice HUGO L. BLACK over a doctrinal issue dear to Black's heart. In his famous dissent in *Adamson v. California* (1947), Black had derided "the natural-law-due-process formula" that allowed judges, with no warrant in the constitutional text, "to trespass, all too freely, on the legislative domain of the States as well as the Federal Government." Douglas had joined Black's *Adamson* dissent, and perhaps hoped that his *Griswold* opinion, by maintaining a formal tie to the specifics of the Bill of Rights, might persuade Black to come along. Black, of course, would have none of it: "I get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."

The Court subsequently relocated its new right of privacy in the liberty protected by the DUE PROCESS clause of the FOURTEENTH AMENDMENT, and no further "penumbras" have been seen in the land. Nonetheless, the *Griswold* decision has been an unusually influential precedent, not only for the Supreme Court's abortion decisions but also for the development of a generalized FREEDOM OF INTIMATE ASSOCIATION. Not every penumbra darkens the road ahead.

KENNETH L. KARST
(1986)

Bibliography

KAUPER, PAUL G. 1965 Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case. *Michigan Law Review* 64:235–282.

## PEONAGE

Peonage is a system of debt bondage, in which a laborer is bound to personal service in order to work off an obligation to pay money. The system originated in the newly independent countries of Spanish America early in the nineteenth century, and in Hawaii and the Philippines later, as a substitute for various institutions used in the colonial era to marshal a labor force. In some of these countries the system continues to exist. In its classic form, peonage involves a trivial advance of money to a worker, in exchange for a contractual obligation to work for a term, or until the debt is repaid. From then on, the laborer is bound by law to serve the employer, and efforts to quit are met with the force of the state: arrest, imprisonment, return to the employer's service.

Peonage was also part of a larger system of involuntary servitude that emerged in the American South after the CIVIL WAR. As such, though whites have sometimes been its victims, peonage has served as a substitute for black SLAVERY. After the slave states were forced by emancipation to shift from a labor regime based on status and force to one of free labor based on contract and choice, peonage emerged as a system that hid the wolf of involuntary servitude in the sheep's clothing of contract.

Peonage as a customary system for coerced black labor had its origin in the contract-enforcement sections of the BLACK CODES (1865–1875) and other labor-related statutes of the era. These provided both civil and criminal penalties for breach of labor contracts, punished VAGRANCY, prohibited enticement of laborers from their jobs, and hampered or penalized agents inducing the emigration of laborers. Southern states also permitted the leasing of convict labor and adopted a criminal-surety system, whereby a person convicted of a MISDEMEANOR would have his fine and costs paid by a prospective employer and then be obliged to work for the surety. Though the Black Codes were soon repealed, the FREEDMEN'S BUREAU at the same time emphasized labor contracts as the nexus of the employer-employee relationship for former slaves, and this later encouraged the use of contracts as a device for forcing black labor.

In 1867, when Congress enacted the Peonage Act to abolish peonage in New Mexico Territory, it also made it applicable to "any other Territory or State of the United States." The act made it a FELONY to hold a person in a condition of peonage, or to arrest a person for that purpose. It voided statutes and "usages" enforcing the "voluntary or involuntary service or labor of any persons as peons in liquidation of a debt or obligation, or otherwise."

United States District Judge Thomas G. Jones began the legal struggle against peonage in a vigorous GRAND JURY charge, reported as *The Peonage Cases* (1903), defining peonage broadly as "the exercise of dominion over their persons and liberties by the master, or employer, or creditors, to compel the discharge of the obligation, by service or labor, against the will of the person performing the service." In *Clyatt v. United States* (1905), the Supreme Court upheld the use of the Peonage Act for the prosecution of a peon-master. Brushing aside both STATE ACTION and DUAL SOVEREIGNTY arguments, Justice DAVID J. BREWER found authorization for direct federal power over peonage in the enforcement clause (section 2) of the THIRTEENTH AMENDMENT. But he also held that debt was the "basal fact" of peonage, thus limiting federal action to cases where an actual debt could be shown.

After publication of the "Report on Peonage" (1908) by the United States Department of Justice, prompted by discovery of occasional instances of white peonage (usually of immigrants), the Supreme Court, in BAILEY V. ALABAMA (1911), used the Peonage Act to strike down Alabama contract-enforcement statutes that permitted quitting to be *prima facie* evidence of an intent to defraud the employer. The Court held that the Peonage Act voids "all legislation which seeks to compel the service or labor by making it a crime to refuse or fail to perform it." In *United States v. Reynolds* (1914), the Court invalidated Alabama criminal-surety statutes, describing the plight of a black peon caught in them as being "chained to an everturning wheel of servitude." But peonage has proved to be a remarkably tenacious form of servitude for blacks in the rural South, highlighted by the 1921 massacre of eleven black peons by their Georgia master, and by the establishment of peonage under federal and state auspices in refugee camps after the 1927 Mississippi River flood.

While physical force or threat of prosecution plainly constitute peonage, other forms of compulsion present interpretive problems. Thus subterfuges as well as outright violations of the Peonage Act persist into the present, despite the invalidation or repeal of the state labor-contract statutes that provided the original basis of peonage. The threat of deportation has proved an effective means of keeping alien migrant workers in a condition of involuntary or underpaid labor, and lower federal courts have divided as to whether this constitutes peonage.

WILLIAM M. WIECEK
(1986)

Bibliography

COHEN, WILLIAM 1976 Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis. *Journal of Southern History* 42:31–60.

DANIEL, PETE 1972 *The Shadow of Slavery: Peonage in the South, 1901–1969.* Urbana: University of Illinois Press.

NOVAK, DANIEL A. 1978 *The Wheel of Servitude: Black Forced Labor After Slavery.* Lexington: University Press of Kentucky.

## *PEOPLE v. CROSWELL*
### 3 Johnson's Cases (N.Y.) 336 (1804)

The state of New York, run by Jeffersonians, indicted Harry Croswell, a Federalist editor, for the crime of SEDITIOUS LIBEL, because he wrote that President THOMAS JEFFERSON had paid a scurrilous journalist to defame GEORGE WASHINGTON. Croswell was convicted at a trial presided over by the Jeffersonian chief justice of the state, Morgan Lewis, who embraced the position of the prosecution in ZENGER'S CASE (1735). Lewis ruled that truth was not a defense against a charge of seditious libel and that the jury's sole task was to decide whether the defendant had published the statements charged, leaving the court to decide their criminality as a matter of law.

ALEXANDER HAMILTON, representing Croswell on his appeal to the state's highest court, advocated the protections of the Sedition Act of 1798: truth as a defense and determination by the jury of the criminality of the publication. FREEDOM OF THE PRESS, declared Hamilton, was "the right to publish, with impunity, truth, with good motives for justifiable ends, though reflecting on government, the magistracy, or individuals." Spenser Ambrose, the Jeffer-

sonian prosecutor, defended the remote BAD TENDENCY TEST. By the time the court decided the case, Ambrose had become a member of it. Had he been eligible to vote, the court would have supported the suppressive views of Lewis and Ambrose. As it was, the court split 2–2. Judge BROCKHOLST LIVINGSTON joined Lewis, while Judge SMITH THOMPSON joined the opinion of JAMES KENT, a Federalist who adopted Hamilton's argument.

In 1805 the state legislature enacted a bill allowing the jury to decide the criminality of a publication and permitted truth as a defense if published "with good motives for justifiable ends." On the whole that was the standard that prevailed in the United States until NEW YORK TIMES V. SULLIVAN (1964).

LEONARD W. LEVY
(1986)

## *PER CURIAM*

(Latin: "By the court.") A *per curiam* opinion represents the views of the court and summarily disposes of the issue before the court by applying settled law. (See RES JUDICATA). Generally the opinion is short and it is always unsigned, although dissents will occasionally be filed.

DAVID GORDON
(1986)

## PEREMPTORY CHALLENGES

Peremptory challenges are challenges given to both parties to a litigation allowing them to dismiss prospective jurors during jury selection without having to give a reason. In recent years, the Supreme Court has recognized constitutional limits on peremptories; as a result, there are some circumstances in which a reason must be given for challenging a juror.

In both federal and states courts, prospective jurors are summoned from the community for JURY SERVICE. They are assigned to panels, known as venires, and from the venire a jury is selected. Before a prospective juror is seated on a jury, however, there is a process during which the judge and/or attorneys question the prospective juror; this questioning is known as VOIR DIRE. One purpose of voir dire, whether it is conducted by the judge or by the attorneys, is to ensure that the jurors selected to serve on the jury can be impartial; those who cannot be impartial will be removed.

There are two ways to remove a prospective juror from a jury. One way is for an attorney to raise a challenge "for cause." The attorney must give a reason for such a challenge. Among accepted reasons are that the prospective juror is related to one of the participants in the trial, or that the prospective juror has admitted that he or she cannot be impartial in the case. The decision whether to grant a for-cause challenge is up to the trial judge. Trial judges do not grant for-cause challenges readily, perhaps because there is another way for attorneys to remove a prospective juror from the jury.

The second way to remove a prospective juror is through the use of a peremptory challenge. In every trial, whether in state or federal court or whether the trial is for a civil or criminal matter, the parties are allotted a certain number of peremptory challenges. The number varies, depending on the type of case and whether it is in federal or state court. The number of peremptories is provided by statute and/or by court rules. For example, according to federal statute, in federal court in a civil trial each side is entitled to three peremptory challenges. According to a federal rule, in federal court in a criminal trial, the number of peremptories varies depending on the type of offense charged. For example, if the offense charged is punishable by imprisonment for more than one year, the prosecutor is entitled to six peremptories, whereas the defendant is entitled to ten.

The exercise of a peremptory challenge, unlike the exercise of a for-cause challenge, is ordinarily left to the attorney's discretion. Attorneys can use their allotted peremptories to remove prospective jurors with whom they feel uncomfortable or whom they believe might not be impartial. Usually the attorney does not have to give a reason to explain why he or she is using a peremptory challenge to dismiss a particular juror.

A recent line of Supreme Court cases, however, has identified a few circumstances in which attorneys must give reasons for their peremptories. In SWAIN V. ALABAMA (1965), the Court held that if an African American defendant could show that in case after case a prosecutor was exercising peremptory challenges to exclude prospective jurors who were of the defendant's race, then the defendant would have established that the prosecutor was violating the defendant's right to EQUAL PROTECTION OF THE LAWS under the FOURTEENTH AMENDMENT to the Constitution. In *Swain*, the Court set an evidentiary burden for the defendant so high that only the rare defendant could meet it. As a result, individual prosecutors who were of a mind to discriminate could continue to use peremptories to exclude jurors based on race.

Twenty years later, the Court revisited the issue in BATSON V. KENTUCKY (1986). The Court in *Batson* OVERRULED the evidentiary burden established in *Swain*, and held that a defendant could establish that the prosecutor violated his right to equal protection based on the prosecutor's use of peremptories in his case alone. In *Batson*, the Court tried to strike a balance between preserving the peremptory and preventing it from perpetuating RACIAL DISCRIM-

INATION. *Batson* requires a defendant to establish a prima facie case that the prosecutor used peremptories based on race. To establish this, the defendant must show that he or she is a member of a cognizable racial group; that the prosecutor had exercised peremptories to remove from the venire prospective jurors of the defendant's race; and that these and other circumstances raise an inference of discrimination. After defendant's prima facie showing, the burden shifts to the prosecution to offer a race-neutral reason for its challenges. The trial judge determines whether the prosecution's reason is race neutral; if it is, then the peremptory is permitted; if it is not, then the peremptory is prohibited.

This modification of the peremptory was clearly a compromise, and left critics on both sides dissatisfied. Justice THURGOOD MARSHALL, writing a concurrence in *Batson*, urged that peremptories be eliminated so that they could no longer be used in a discriminatory manner, whereas Chief Justice WARREN E. BURGER, writing in dissent, claimed that no reason should ever have to be given for the exercise of a peremptory and to the extent that *Batson* required a reason, it signaled the demise of the peremptory challenge.

In recent cases, the Court has extended the reach of *Batson*. In *Powers v. Ohio* (1991), the Court held that a defendant did not have to be of the same race as the excluded juror to raise a *Batson* challenge. In *Edmonson v. Leesville Concrete Co.* (1991), the Court extended *Batson* to civil cases, and in *Georgia v. McCollum* (1992), the Court held that the defense, just like the prosecution, could not exercise peremptories based on race. Most recently, in *J. E. B. v. Alabama* (1994), the Court held that peremptories could not be exercised based on gender.

NANCY S. MARDER
(2000)

Bibliography

ABRAMSON, JEFFREY 1995 *We, the Jury.* New York: Basic Books.

ALSCHULER, ALBERT W. 1989 The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts. *University of Chicago Law Review* 56:153–233.

HOFFMAN, MORRIS B. 1997 Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective. *University of Chicago Law Review* 64:809–871.

MARDER, NANCY S. 1995 Beyond Gender: Peremptory Challenges and the Roles of the Jury. *Texas Law Review* 73:1041–1138.

MONTOYA, JEAN 1996 The Future of the Post-*Batson* Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory. *University of Michigan Journal of Law Reform* 29:981–1030.

## *PEREZ v. BROWNELL*

See: *Trop v. Dulles*

## *PEREZ v. UNITED STATES*
402 U.S. 146 (1971)

In sustaining a conviction for the federal crime of "loansharking," the Supreme Court upheld Title II of the Consumer Credit Protection Act as valid under the COMMERCE CLAUSE. For an 8–1 Court, Justice WILLIAM O. DOUGLAS rehearsed a congressional committee's finding that extortionate credit practices were linked to organized, interstate crime and vitally affected INTERSTATE COMMERCE. He rejected petitioner's contention that the crime of loansharking was necessarily local in nature. Justice POTTER STEWART, in dissent, argued that there had been no showing of interstate movement or effect in Perez's case, and worried that Congress might preempt the whole field of criminal law.

DENNIS J. MAHONEY
(1986)

## *PERRY v. UNITED STATES*

See: Gold Clause Cases

## *PERRY EDUCATION ASSOCIATION v. PERRY LOCAL EDUCATORS' ASSOCIATION*
460 U.S. 37 (1983)

*Perry* provided the leading modern opinion setting guidelines governing FIRST AMENDMENT claims of access to the PUBLIC FORUM. A school district's collective bargaining agreement with a union (PEA) provided that PEA, but no other union, would have access to the interschool mails and to teacher mailboxes. A rival union (PLEA) sued in federal district court, challenging the constitutionality of its exclusion from the school mails. The district court denied relief, but the court of appeals held that the exclusion violated the EQUAL PROTECTION clause and the First Amendment. The Supreme Court reversed, 5–4, rejecting both claims.

Justice BYRON R. WHITE wrote for the Court, setting out a three-category analysis that set the pattern for later "public forum" cases such as CORNELIUS V. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. (1985). First, the streets and parks are "traditional" public forums, in which government cannot constitutionally forbid all communicative activity. Any exclusion of a speaker from such a traditional public forum based on the content of the speaker's message must be necessary to serve a COMPELLING STATE INTEREST. Content-neutral regulations of the "time, place, and manner" of expression in such places may be enforced

when they are narrowly tailored to serve significant state interests and they leave open "ample alternative channels" of communication.

Second, the state may open up other kinds of public property for use by the public for expressive activity. The state may close such a "designated" public forum, but so long as it remains open it must be made available to all speakers, under the same constitutional guidelines that govern traditional public forums.

Third, communicative uses of public property that is neither a traditional nor a designated public forum may be restricted to those forms of communication that serve the governmental operation to which the property is devoted. The only constitutional limits on such restrictions on speech are that they be reasonable, and that they not be imposed in order to suppress a particular point of view. The *Perry* case, said Justice White, fit this third category: the school mail system was neither a traditional public forum nor designated for public communicative use; rather it could be limited to school-related communications, including those from PEA, the teachers' elected bargaining agent. Such a limitation did not exclude PLEA because of its point of view.

Justice WILLIAM J. BRENNAN, for the four dissenters, argued that the exclusion of PLEA was "viewpoint discrimination," and thus that the case did not turn on the characterization of the school mails as a public forum.

The *Perry* formula capped a process of doctrinal development focused on what HARRY KALVEN, JR., named "the concept of the public forum." In its origin, the concept expanded the First Amendment's protections of speech. *Perry* marks the success of a campaign, highlighted by Justice WILLIAM H. REHNQUIST's opinion in *United States Postal Service v. Greenburgh Civic Association* (1981), to convert the public forum concept into a preliminary hurdle for would-be speakers to clear before they can establish their claims to the FREEDOM OF SPEECH on government property or in government-managed systems of communication.

KENNETH L. KARST
(1986)

## PERSON

The Constitution contains dozens of references to "persons" but nowhere defines the term. When the Framers of the original document identified persons who might hold federal office or be counted in determining a state's representation in Congress or the ELECTORAL COLLEGE, they used "persons" in its everyday sense—even when they provided that slaves should be counted as "three fifths of all other Persons." Focusing on the allocation of governmental powers, they had little occasion to ponder the philosopher's question: what does it mean to be a person? It was the addition to the Constitution of a body of constitutional rights against the government—first in the BILL OF RIGHTS and later in the FOURTEENTH AMENDMENT—that gave the philosopher's question constitutional significance.

In court, that question is never raised in wholesale terms but always in the context of particular issues. The Fourteenth Amendment's DUE PROCESS and EQUAL PROTECTION clauses, for example, offer their protections to "any person." Should those protections extend to a corporation? To a fetus? A philosopher, asked to say whether a corporation or a fetus more closely resembles some ideal model of a person, might be forgiven for failing to predict the Supreme Court's conclusions in *Santa Clara County v. Southern Pacific Railroad* (1886) and ROE V. WADE (1973) that corporations were included but fetuses were not. The Court, like many another human institution, defines its terms with substantive purposes in mind.

The notion that a corporation might be a "person" for some constitutional purposes had been suggested early in the nineteenth century. The point was not explicitly argued to the Supreme Court, however, until *San Mateo County v. Southern Pacific Railroad* (1882). In that case former Senator ROSCOE CONKLING, representing the railroad, made use of the journal of the joint congressional committee that had drafted the Fourteenth Amendment, a committee on which he had served. Conkling strongly intimated that the committee had used the word "person" for the specific purpose of including corporations. The case was dismissed for MOOTNESS, but in the *Santa Clara* case Chief Justice MORRISON R. WAITE interrupted ORAL ARGUMENT to say that the Court had concluded that the equal protection clause, in referring to a "person," extended its benefit to a corporation—a ruling that has since been followed consistently in both equal protection and due process decisions. Much of the later development of SUBSTANTIVE DUE PROCESS as a guarantee of FREEDOM OF CONTRACT and a protection against ECONOMIC REGULATION thus rested on a proposition of law whose basis was never articulated in an opinion of the Supreme Court.

To be a person, for constitutional purposes, is to be capable of holding constitutional rights. Our system of rights is premised on the idea that a right either "belongs" to someone—some person—or does not exist. The DOCTRINES of STANDING and mootness, as they govern our federal courts, reflect this assumption. We are accustomed to speak of "individual rights." Yet any claim to any right is an appeal to principle—and a principle is an abstraction that governs a great many "cases" not in court. Every claim of "individual" right, in other words, is a claim on behalf of a group composed of all those who fit the claim's un-

derlying principle. Only a person can claim a constitutional right, but every such claim is made by a person as an occupant of a role: a homeowner whose house has been searched by the police, a would-be soapbox orator, a natural father disqualified from having custody of his child.

Although corporations—or even whole states—are capable of asserting constitutional claims, and although every "individual" constitutional right is capable of being generalized to extend to a group, nonetheless there remains an important sense in which we hold constitutional rights as persons. Today's constitutional law recognizes a body of substantive rights founded on the essentials of being a person. Here the philosopher's question must be asked; some model of what it means to be a person is implicit in such developments as the emergence of a RIGHT OF PRIVACY or a FREEDOM OF INTIMATE ASSOCIATION.

These rights of "personhood" (to use the Supreme Court's expression in *Roe v. Wade*) attach to natural persons. They rest on the assumption, usually not articulated, that although each human being is unique, we all share certain elements of our common humanity. The assumption is that each of us is conscious of a continuing identity; has some conception of his or her own good; is capable of forming and changing purposes; has a sense of justice—is, in short a "moral person" and not just a biological organism. Of course, the biological person has received its own constitutional protections: the FOURTH AMENDMENT's guarantee against unreasonable searches and seizures runs in part to our "persons"; a woman's right to have an abortion is based on her right to control the use of her body. It is the moral person, however, who is the focus of the newer rights of "personhood."

The principal doctrinal foundation for these rights has been a renascent SUBSTANTIVE DUE PROCESS. Yet similar values form the substantive core of the Fourteenth Amendment's guarantee of the equal protection of the laws. That guarantee originated as part of the nation's response to slavery and to efforts in the postabolition South to create a system of serfdom to substitute for slavery. In law, of course, a slave was not a person; an item of property could claim no rights. Yet the original Constitution's two provisions recognizing slavery referred not to "slaves" but to "persons"—as if the draftsmen, resigned to the necessity of their unholy bargain with the southern states, nonetheless could not bring themselves to deny their common humanity with the men and women held as slaves. Seventy years later, in DRED SCOTT V. SANDFORD (1857), Chief Justice ROGER B. TANEY expressed quite another view of the Framers' understanding. At the nation's founding, Taney said, blacks had been considered "an inferior class of beings," incapable of CITIZENSHIP. The modern revival of the Fourteenth Amendment's principle of equal citizenship serves, above all, to protect the claim of each of us to be treated by the society as a person—one who has rights as a respected, responsible, participating member of our community.

KENNETH L. KARST
(1986)

Bibliography

GRAHAM, HOWARD JAY 1938 The "Conspiracy Theory" of the Fourteenth Amendment. *Yale Law Journal* 47:371–403; 48: 171–194.

HORWITZ, MORTON J. 1985–1986 *Santa Clara* Revisited: The Development of Corporate Theory. *West Virginia Law Review* 88:173–224.

NOONAN, JOHN T., JR. 1976 *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks.* New York: Farrar, Straus & Giroux.

TRIBE, LAURENCE H. 1978 *American Constitutional Law.* Chap. 15. Mineola, N.Y.: Foundation Press.

VINING, JOSEPH 1978 *Legal Identity: The Coming of Age of Public Law.* New Haven, Conn.: Yale University Press.

## PERSONAL LIBERTY LAWS

Between 1826 and 1858, all the free states east of Illinois enacted "personal liberty laws" providing one or more procedural remedies to persons seized as fugitive slaves. These included the writs of HABEAS CORPUS and personal replevin. Some personal liberty laws also provided jury trial to alleged fugitives; prohibited kidnaping or enticement of black persons out of state; imposed more stringent state procedures for recaptions; or provided the services of state's attorneys to alleged fugitives. The Vermont Freedom Act of 1858 declared every slave who came into the state free.

In PRIGG V. PENNSYLVANIA (1842), Justice JOSEPH STORY held that state statutes interfering with recaptures under the 1793 Fugitive Slave Act were unconstitutional. But in an OBITER DICTUM unique to him, Story stated that state officials need not participate in a recapture under federal authority. This spurred enactment of statutes prohibiting state officials such as judges and sheriffs from participating in fugitive recaptures and prohibiting the use of state facilities such as jails to slave-catchers trying to hold runaways. Proslavery spokesmen tirelessly denounced the personal liberty laws. In his last annual message, President JAMES BUCHANAN blamed the crisis of 1860 on them. South Carolina cited the laws as justification for its SECESSION.

WILLIAM M. WIECEK
(1986)

(SEE ALSO: *Fugitive Slavery.*)

Bibliography

MORRIS, THOMAS D. 1974 *Free Men All: The Personal Liberty Laws of the North, 1780–1861.* Baltimore: Johns Hopkins University Press.

## *PERSONNEL ADMINISTRATOR OF MASSACHUSETTS v. FEENEY*
442 U.S. 256 (1979)

In selecting applicants for state civil service positions, Massachusetts preferred all qualifying veterans of the armed forces over any qualifying nonveterans. Because fewer than two percent of Massachusetts veterans were women, the preference severely restricted women's public employment opportunities. A nonveteran woman applicant challenged the preference as a denial of the EQUAL PROTECTION OF THE LAWS; the Supreme Court, 7–2, upheld the preference's constitutionality.

The Court, speaking through Justice POTTER STEWART, followed WASHINGTON V. DAVIS (1976) and held that SEX DISCRIMINATION, like RACIAL DISCRIMINATION, is to be found only in purposeful official conduct. A discriminatory impact, of itself, is thus insufficient to establish the sex discrimination that demands the judicial scrutiny set out in CRAIG V. BOREN (1976). Here the veterans preference disadvantaged nonveteran men as well as women; there was no basis for assuming that the preference was "a pretext for preferring men over women." Rather it was aimed at rewarding the sacrifices of military service and easing the transition from military to civilian life.

Justice THURGOOD MARSHALL dissented, joined by Justice WILLIAM J. BRENNAN: legislators act for a variety of reasons; the question is whether an improper purpose was one motivating factor in the governmental action. Here the discriminatory impact of the law was not merely foreseeable but inevitable. The result was to relegate female civil servants to jobs traditionally filled by women. Other less discriminatory means were available for rewarding veterans (bonuses, for example); the state's choice of this preference strongly suggested intentional gender discrimination. A similar "foreseeability" argument was persuasive to a majority of the Court four weeks later, in the context of school segregation. (See COLUMBUS BOARD OF EDUCATION V. PENICK.)

KENNETH L. KARST
(1986)

## PETERS, RICHARD
(1744–1828)

President GEORGE WASHINGTON on April 11, 1792, commissioned Richard Peters judge of the United States District Court for Pennsylvania, a position he filled until his death. His duties included presiding with a Supreme Court Justice over the federal CIRCUIT COURT in the state.

Peters contributed significantly to the development of a distinctly American ADMIRALTY AND MARITIME LAW, including features borrowed from civil and COMMON LAW precedents. In cases like *Warder v. LaBelle Creole* (1792), he was among the first American judges to advance a risk-reward calculus intended to facilitate the expansion of commerce.

His constitutional opinions touched the civil and criminal JURISDICTIONS of the lower federal courts and the law of TREASON. Peters in 1792 joined his fellow circuit court judges in HAYBURN'S CASE in refusing to determine the qualifications of Revolutionary War pensioners under a congressional act. This task, the judges concluded, fell outside the JUDICIAL POWER OF THE UNITED STATES. Peters, however, had a broad view of federal judicial power. In *United States v. Worrall* (1798) he urged recognition of a FEDERAL COMMON LAW OF CRIMES, a position subsequently rejected by the Supreme Court.

Peters's nationalism also shaped his views of treason and the supremacy of the federal courts. In *United States v. John Fries* (1800) he charged the jury that "levying war against the United States" included armed opposition to the collection of taxes. (See FRIES' REBELLION.) During the famous *Olmstead* controversy in Pennsylvania, Peters ordered the governor and the General Assembly to pay a judgment outstanding against the state in the federal court. Peters withheld issuing compulsory process for fear of an armed clash, but Chief Justice JOHN MARSHALL in UNITED STATES V. JUDGE PETERS (1809) vindicated the judge's nationalism.

Peters's Federalist political principles flowed into his jurisprudence. He was a "Republican Schoolmaster," who exploited the lower federal bench to promote commercial development, federal judicial independence, and national authority.

KERMIT L. HALL
(1986)

Bibliography

PRESSER, STEPHEN B. 1978 A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence. *Northwestern University Law Review* 73:26–111.

## PETITION FOR REDRESS OF GRIEVANCES

See: Freedom of Petition

## PETITION OF RIGHT
(June 7, 1628)

This statute is among the foremost documents in Anglo-American constitutional history. The Petition of Right protected the liberty of the subject and contributed to the development of the RULE OF LAW and the concept of FUNDAMENTAL LAW. The Framers of the Constitution regarded the act of 1628 as part of their COMMON LAW inheritance establishing rights against government. In its time, however, the statute limited only the royal prerogative or executive authority.

In 1626 Charles I, exercising his prerogative, had exacted a "forced loan" from his subjects. The poor paid it by having to quarter soldiers in their homes and having to serve in the army or face trial by a military tribunal. Five knights refused to make a contribution of money to the crown on the grounds that it was an unconstitutional tax; they were imprisoned by order of the king's council. When they sought a writ of HABEAS CORPUS, the Court of King's Bench, in *Darnel's Case* (1627), ruled that because the return to the writ showed the prisoners to be held on executive authority, no specific cause of imprisonment had to be stated.

The forced loan and the resolution of *Darnel's Case* caused a furor. After the House of Commons adopted resolutions against arbitrary taxation and arbitrary imprisonment, Sir EDWARD COKE introduced a bill to bind the king. The House of Lords sought to "save" the SOVEREIGNTY of the king by allowing a denial of habeas corpus for reasons of state. Coke, opposing such an amendment to the bill, argued that it would weaken MAGNA CARTA, and he warned: "Take heed what we yield unto: Magna Charta [sic] is such a fellow that he will have no "sovereign." The Lords finally agreed and the king assented.

The Petition of Right reconfirmed Magna Carta's provision that no freeman could be imprisoned but by lawful judgment of his peers or "by the LAW OF THE LAND." The Petition also reconfirmed a 1354 reenactment of the great charter which first used the phrase "by DUE PROCESS OF LAW" instead of "by the law of the land." By condemning the military trial of civilians, the Petition invigorated due process and limited martial law. One section of the Petition provided that no one should be compelled to make any loan to the crown or pay any tax "without common consent by act of parliament." Americans later relied on this provision in their argument against TAXATION WITHOUT REPRESENTATION. Other sections of the act of 1628 provided that no one should be imprisoned or be forced to incriminate himself by having to answer for refusing an exaction not authorized by Parliament. Condemnation of imprisonment without cause or merely on executive authority strengthened the writ of habeas corpus. (See HABEAS CORPUS ACT OF 1679; BILL OF RIGHTS (ENGLISH).) The THIRD AMENDMENT of the Constitution derives in part from the Petition of Right.

LEONARD W. LEVY
(1986)

Bibliography

RELF, FRANCIS H. 1917 *The Petition of Right.* Minneapolis: University of Minnesota Press.

## PETIT JURY

The petit jury is the trial jury, as distinguished from the GRAND JURY. The petit jury decides questions of fact in cases at law, and renders the verdict, formally declaring its findings. Traditionally, in Anglo-American law, the jury decided by unanimous vote of twelve members, but this is not constitutionally required.

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Jury Discrimination; Jury Size; Jury Unanimity; Trial by Jury.*)

## PEYOTE, RELIGIOUS USE OF

See: *Employment Division, Department of Human Resources of Oregon v. Smith*

## PHELPS, EDWARD J.
(1822–1900)

Edward John Phelps was a Vermont Democrat who, in frequent appearances before the Supreme Court, championed the rights of private property. An outstanding orator—he was frequently likened to DANIEL WEBSTER or WILLIAM EVARTS—Phelps served as president of the American Bar Association (1880–1881) and as Kent Professor of Law at Yale (1881–1900). He declared that America's problems stemmed from "a vicious and altogether unnecessary enlargement of the electorate"; this attitude explained his belief that the Constitution was too hallowed to be "hawked about the country, debated in the newspapers . . . [and] elucidated by pot-house politicians, and dung-hill editors."

DAVID GORDON
(1986)

## *PHILADELPHIA v. NEW JERSEY*
437 U.S. 617 (1978)

In a 7–2 decision, the Supreme Court invalidated a New Jersey environmental protection law that prohibited the importation of solid waste originating or collected out of state. Justice POTTER STEWART, writing for the majority, concluded that the law unduly burdened INTERSTATE COMMERCE. The worthlessness of the regulated commodity did not exclude it from the operation of the COMMERCE CLAUSE; nor was the law permissible because its goals were environmental rather than economic. New Jersey could not require other states to bear the whole burden of conservation of its landfill sites. (See ENVIRONMENTAL REGULATION AND THE CONSTITUTION.)

DENNIS J. MAHONEY
(1986)

## *PHILADELPHIA & READING RAILROAD CO. v. PENNSYLVANIA*
(State Freight Tax Case)
Wallace 232 (1873)

Pennsylvania imposed a tonnage tax on all freight transported within the state, including freight shipped out of and into the state. The transportation of freight for exchange or sale, said Justice WILLIAM STRONG for a 7–2 Supreme Court, is commerce, and a clear tax on such commerce among states is an unconstitutional burden on INTERSTATE COMMERCE that might injure commercial intercourse in the country. Strong added that the transportation of persons or merchandise through a state or from one to another is a subject of national importance requiring, under the rule of COOLEY V. BOARD OF WARDENS (1852), uniform and exclusive regulation by Congress. This still is an important case on STATE TAXATION OF COMMERCE.

LEONARD W. LEVY
(1986)

## PHILOSOPHY AND THE CONSTITUTION

The Constitution is one of the great achievements of political philosophy; and it may be the only political achievement of philosophy in our society. The Framers of the Constitution and the leading participants in the debates on RATIFICATION shared a culture more thoroughly than did any later American political elite. They shared a knowledge (often distorted, but shared nevertheless) of ancient philosophy and history, of English COMMON LAW, of recent English political theory, and of the European Enlightenment. They were the American branch of the Enlightenment, and salient among their membership credentials was their belief that reasoned thought about politics could guide them to ideal political institutions for a free people. They argued passionately about the nature of SOVEREIGNTY, of political REPRESENTATION, of republicanism, of CONSTITUTIONALISM; and major decisions in the ferment of institution-building that culminated in 1787 were influenced, if never wholly determined, by such arguments. The final form of the new federal Constitution embodied radically new views about the location of sovereignty—now located "in the people" in a stronger sense than any philosopher except Jean-Jacques Rousseau would have recognized—and about the function of the SEPARATION OF POWERS and BICAMERALISM.

Philosophy has never again played the role it played at the founding of the Republic, except perhaps in inspiring some ABOLITIONIST CONSTITUTIONAL THEORY. To be sure, "philosophy" in a loose sense has always influenced politicians and judges, who are part of society. The Supreme Court in the late nineteenth and early twentieth centuries expressed in its decisions a laissez-faire "philosophy" compounded of Darwinism, a version of NATURAL RIGHTS theory, and conservative economic beliefs. When the Court abandoned that "philosophy," they adopted another, more progressivist and pragmatic, and more attuned to, though at most only loosely connected with, the renascent empiricism among academic philosophers. Occasionally, the Court has adverted to specific philosophical doctrines, from JOHN MARSHALL in FLETCHER V. PECK (1810) to GEORGE H. SUTHERLAND in UNITED STATES V. CURTISS-WRIGHT EXPORT CORP. (1936) (on the necessary existence of sovereign power). Individual Justices like OLIVER WENDELL HOLMES may have been influenced by philosophical reading and by contact with professional philosophers. But, on the whole, while "philosophy" has had an influence, philosophy has had little—except to the extent that the "philosophy" of the present is always shaped in part by the philosophy of the past. (The decreased influence of philosophy has not lessened the relevance of philosophical issues.)

There are a number of reasons for the decreased influence of philosophy. In the open society the Framers helped to create, their style of argument, dependent on a relatively homogeneous and classically educated elite, could not maintain its political importance. Also, political philosophy itself became less unified. Widely divergent views were united under the umbrella of the Enlightenment by common opposition to entrenched privilege and hieratic religion. Once common enemies were vanquished, philosophical comrades parted company.

Another reason for the decreased influence of philos-

ophy is that philosophy admits of no binding authorities, while law does, and does essentially. The Framers were creating a new political system. No one since then, except to some extent the RECONSTRUCTION Congresses, has had that luxury. Later contributors to our constitutional development have always had to interpret, and to attempt to maintain at least the appearance of continuity with, what has gone before.

Curiously, while recent philosophical thinking has had little discernible influence on constitutional law, the reverse is not true. The decisions of the WARREN COURT and the public discussion they generated certainly contributed, probably significantly, to the revival of interest among American philosophers in social and political questions, a revival that became apparent in the CIVIL RIGHTS era of the 1950s and 1960s and that is still in full flower.

Whatever the influence or lack of it of philosophy on constitutional law, philosophical discussion among academic constitutional lawyers may have reached greater intensity in the 1980s than at any time since the 1780s. Constitutional law, like law in general, raises deep and perplexing philosophical questions. The questions that arise most immediately are questions of political philosophy, and of these the one that has generated most discussion is what is known as the "antimajoritarian difficulty": how can it be appropriate for the enormously consequential power of JUDICIAL REVIEW to be vested ultimately in nine individuals who are not chosen by the people and who are not politically accountable to anyone at all? The problem is especially vexing when the Court, in the space of three decades, has outlawed SEGREGATION, forbidden religious activity in the public schools, required REAPPORTIONMENT of the state legislatures and local government, created a constitutional code of CRIMINAL PROCEDURE, established a right to abortion, and found in the EQUAL PROTECTION clause a command that government shall not engage in SEX DISCRIMINATION.

There are three principal types of answer to the question how a democratic society can countenance such judicial power. The first answer, and the natural answer for any lawyer, is the claim that the Supreme Court has this power because the Constitution says it does. But the Constitution does not say that, at least not explicitly. The power of judicial review is nowhere explicitly granted. Now, in a sense, the lawyer's answer is still right. The Constitution as it has been interpreted from 1803 to the present does create the power of judicial review. The propriety of some form of judicial review is disputed by no one. Even so, it is noteworthy that at the very foundation of American constitutional law we encounter the problem of CONSTITUTIONAL INTERPRETATION.

Given a document, and given agreement that its commands are to be put into practice by legal institutions, how do we decide what it commands? How do we decide what it means? Neither the words alone nor anything we know about the writers' intentions is likely to answer straightforwardly all the questions time will bring forth. For that matter, is it the document we are primarily concerned to interpret, or the political and doctrinal tradition proceeding from the document that we are concerned to interpret and to continue? And how are interpretation and continuation related?

It is important to distinguish between the document and the tradition and to ask how our commitments to each are interrelated. For example, we are firmly committed, by our allegiance to the tradition, to certain DOCTRINES, such as the effective application of the BILL OF RIGHTS to the states and of the equal protection clause to the federal government, which can be deduced from the document only by extremely generous canons of interpretation. Some argue that if we are committed to these doctrines, then we must accept and continue to apply those generous canons. But that conclusion does not follow at all. Law, like any tradition, can sanctify mistakes.

The problem of interpretation does not arise only at the stage of justifying judicial review. It arises also at every application of judicial review. What is the Court to do with this power? The lawyerly answer, and again clearly the right answer in some sense, is that the Court should enforce the Constitution. But once more, how do we decide what the Constitution means?

The lawyerly exponent of judicial review also invites, by appealing to the Constitution, the most fundamental question: why do we care about the document or the tradition at all? It may be that to ask this question is to go beyond the domain of the lawyer as lawyer; but lawyers and judges are people, and every person who bears allegiance to the document or the tradition must face this question. Note, however: even though all lawyers and judges must face this question of political philosophy in deciding whether to carry out their roles, it does not follow that they must also appeal to substantive political philosophy in the course of carrying out their roles. Whether they must do that, and whether they could avoid doing that if they tried, are further issues.

The difficulties with the lawyerly justification and exposition of judicial review have prompted two other main theories of judicial review. In one theory, judicial review is justified by the need to protect individual rights against infringement by majoritarian government. Exponents of this theory have drawn heavily on a neo-Kantian strain of contemporary American political philosophy in attempting to elucidate individual rights and the limits of the majority's legitimate power. In the other theory, judicial review does not purport to limit but merely to purify the democratic process. Judicial intervention is necessary to

protect political speech and participation and to prevent distortion of the process by majority prejudice, but all in the name of more perfect majoritarianism.

Opposed as they are on the significance of individual rights, these two theories share an ambivalent relationship to the Constitution and the interpretive tradition. Whence comes the notion that individual autonomy should be protected, or that majoritarian democracy should be purified but not otherwise limited? Is it just that the Constitution says so? The Constitution says neither of these things explicitly; and it says both too much and too little to make either of these views a completely satisfactory reading of the document as a whole.

On the other hand, if someone claims to read the Constitution as protecting individuality (or purified majoritarianism) because of the independent moral weight of those values, why does the historical document come into it at all? Is not every appeal to the Constitution by a proponent of independently grounded values of autonomy or purified majoritarianism in some sense mere manipulation of other people's allegiance to the Constitution for itself?

We see that the questions raised by the lawyerly approach to judicial review are not so easily avoided. Still, the competing approaches we have noted alert us to dimensions of the problem not previously apparent. First, if the justification for judicial review is to promote general values such as autonomy or purified majoritarianism, that may help us decide how specific bits of the Constitution should be interpreted. Second, the tradition may refer to certain goals—justice, autonomy, democracy—which the tradition itself views as having a value and grounding outside and independent of the tradition. If the tradition commands allegiance both to its own specific content and to external values, it contains within itself the seeds of possible contradiction. What does faithfulness to the tradition then require?

As of the 1980s, the newest philosophical interest of academic constitutional lawyers is in hermeneutics. Whether there are answers here, and whether any such answers will influence the course of constitutional law, remains to be seen. Hermeneutics may bring new insight into the various meanings of the idea of operating in a tradition. Barring some remarkable feat of philosophical bootstrapping, hermeneutics will not answer the most fundamental philosophical question about constitutional law: why care about the tradition at all? And there is a final irony. Because the political community is made up of individuals who must confront this fundamental question, the community must confront it also, even though from another perspective it is by shared allegiance to the tradition that the community is defined.

DONALD H. REGAN
(1986)

Bibliography

DWORKIN, RONALD (1977) 1978 *Taking Rights Seriously.* Cambridge, Mass.: Harvard University Press.

ELY, JOHN H. 1980 *Democracy and Distrust: A Theory of Judicial Review.* Cambridge, Mass.: Harvard University Press.

LAYCOCK, DOUGLAS 1981 Taking Constitutions Seriously: A Theory of Judicial Review. *Texas Law Review* 59:343–394.

TRIBE, LAURENCE H. 1978 *American Constitutional Law.* Mineola, N.Y.: Foundation Press.

WOOD, GORDON S. 1969 *The Creation of the American Republic, 1776–1787.* Chapel Hill: University of North Carolina Press for the Institute of Early American History and Culture at Williamsburg, Va.

## PHYSICIAN-ASSISTED SUICIDE

See: Right to Die

## PICKERING, JOHN
(1738?-1805)

In March 1803 the HOUSE OF REPRESENTATIVES impeached John Pickering, federal district judge for New Hampshire, of habitual drunkenness, uttering blasphemy and profanity from the bench, and making decisions contrary to law. During his SENATE trial Pickering introduced a defense of insanity; but the Senate, in a partisan vote, found him "guilty as charged" and removed him from office. The vote was a warning to other Federalist judges that Congress did not need to convict them of a specific crime in order to remove them. (See JUDICIAL IMPEACHMENT.)

DENNIS J. MAHONEY
(1986)

## PICKETING

Picketing typically consists of one or more persons patrolling or stationed at a particular site, carrying or wearing large signs with a clearly visible message addressed to individuals or groups approaching the site. Some form of confrontation between the pickets and their intended addressees appears an essential ingredient of picketing. Congress and the National Labor Relations Board have distinguished between picketing and handbilling, however, and merely passing out leaflets without carrying a placard does not usually constitute picketing. What stamps picketing as different from more conventional forms of communication, for constitutional and other legal purposes, ordinarily seems to be the combination of a sign big enough to be seen easily and a confrontation between picketer and viewer.

Constitutional determinations concerning picketing

have usually involved LABOR unions that are advertising a dispute with employers and appealing to the public or fellow employees for support. The assistance sought might be a refusal by customers to patronize the picketed business or a refusal by workers to perform services or make deliveries there. In addition, picketing has often been a weapon of CIVIL RIGHTS demonstrators, political and religious activists, environmentalists, and other interest groups.

The leading Supreme Court decision upholding picketing as an exercise of FREEDOM OF SPEECH protected by the FIRST AMENDMENT is THORNHILL V. ALABAMA (1940). In striking down a state antipicketing statute, Justice FRANK MURPHY declared that an abridgment of the right to publicize through picketing or similar activity "can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion." Despite this sweeping language, the actual holding in *Thornhill* was narrow. The Alabama courts were prepared to apply a criminal statute to prohibit a single individual from patrolling peacefully in front of an employer's establishment carrying a sign stating truthfully that the employer did not employ union labor.

Following *Thornhill* two principal themes have dominated the Supreme Court's analysis of the constitutional status of picketing. One is the "unlawful objectives" test and the other is the concept of picketing as "speech plus." Under the first approach, as illustrated by GIBONEY V. EMPIRE STORAGE & ICE CO. (1949), even peaceful picketing may be proscribed if its "sole, unlawful immediate objective" is the violation of a valid public policy or statutory mandate. Picketing is treated like any other type of communication, oral or written, which may also be forbidden if it produces a CLEAR AND PRESENT DANGER of, or a direct INCITEMENT to, substantive evils that government is entitled to prevent. A message delivered by pickets, however, might constitute a clearer and more present danger than the same message in a newspaper advertisement, for picketing physically confronts the addressee at the very moment of decision.

A conceptual weakness of the "unlawful objectives" test is that it can sustain almost any restriction on picketing by too loose a characterization of the pickets' purpose as illegal. In *Teamsters Local 695 v. Vogt, Inc.* (1957), a 5–3 Supreme Court upheld a state court INJUNCTION against peaceful organizational picketing on the ground that its purpose was to coerce the employer to force its employees to join the union. Even so, in *Amalgamated Food Employees Union v. Logan Valley Plaza* (1968) Justice THURGOOD MARSHALL could sum up the prior DOCTRINE by declaring that the cases in which picketing bans had been approved "involved picketing that was found either to have been directed at an illegal end . . . or to have been directed to coercing a decision by an employer which, although in itself legal, could validly be required by the State to be left to the employer's free choice."

Picketing as "speech plus" refers to two elements that arguably distinguish it from pure speech. First, it involves physical activity, usually the patrolling of a particular location. It is therefore subject to TRESPASS laws, and to other laws governing the time, place, and manner of expression, such as laws limiting sound levels, regulating parades, or forbidding the obstruction of public ways. Furthermore, picketing enmeshed with violence or threats of violence may be enjoined or prosecuted as assault and battery. Second, picketing may serve as a "signal" for action, especially by organized groups like labor unions, without regard to the ideas being disseminated. Some scholars have challenged the "pure speech/speech plus" dichotomy, contending that all speech, oral or written, has certain physical attributes, and can evoke stock responses from a preconditioned audience.

A further strand of Supreme Court free speech analysis is the notion that government may not engage in "content control." Thus, in POLICE DEPARTMENT OF CHICAGO V. MOSLEY (1972) the Court invalidated a city ordinance that forbade all picketing next to any school while it was in session, but exempted "peaceful picketing of any school involved in a labor dispute." That constituted "an impermissible distinction between labor and other peaceful picketing." The "no content control" doctrine obviously must be qualified by the "unlawful objectives" test.

In 1980 the Supreme Court extended the "unlawful objectives" test so far as to strip it of any practical limitations. A 6–3 majority held in *NLRB v. Retail Employees Local 1001* (*Safeco*) that picketing asking customers not to buy a nonunion product being distributed by a second party was an unlawful BOYCOTT of the distributor. Six Justices considered the prohibition justified constitutionally by Congress's purpose of blocking the "coercing" or "embroiling" of neutrals in another party's labor dispute. In *Safeco*, for the first time ever, the Supreme Court clearly sustained a ban on peaceful and orderly picketing addressed to, and calling for seemingly lawful responses by, individual consumers acting on their own.

*Safeco* might be explained on the basis that labor picketing is only "economic speech," like commercial advertising, and thus subject to lesser constitutional safeguards than political or ideological speech. Although such a distinction would contradict both established precedent and the traditional recognition of picketing as the working person's standard means of communication, at least it would preserve full-fledged free speech protections for picketing to promote political and ideological causes.

THEODORE J. ST. ANTOINE
(1986)

Bibliography

COX, ARCHIBALD 1951 Strikes, Picketing and the Constitution. *Vanderbilt Law Review* 4:574–602.

GREGORY, CHARLES O. and KATZ, HAROLD A. (1946) 1979 *Labor and the Law.* New York: Norton.

JONES, EDGAR A., JR. 1956 Free Speech: Pickets on the Grass, Alas!—Amidst Confusion, a Consistent Principle. *Southern California Law Review* 29:137–181.

## PIERCE, FRANKLIN
(1804–1869)

A New Hampshire attorney and politician, Pierce was nominated as a compromise presidential candidate by the Democrats in 1852. Pierce was a supporter of the COMPROMISE OF 1850 and a long-time opponent of abolitionists and antislavery Democrats. In 1854 he supported the KANSAS-NEBRASKA ACT, which led to a mini-civil war in "bleeding Kansas." Pierce's role in the passage of this act and his generally pro-southern positions undermined most of his other legislative proposals and his popularity in the North. During the CIVIL WAR Pierce's shrill attacks on ABRAHAM LINCOLN's administration made Pierce appear to be a full-fledged Copperhead.

PAUL FINKELMAN
(1986)

Bibliography

NICHOLS, ROY F. 1931 *Franklin Pierce: Young Hickory of the Granite State.* Philadelphia: University of Pennsylvania Press.

## PIERCE, WILLIAM
(1740?–1789)

William Pierce, a veteran of the Revolutionary War and a member of Congress, was a delegate from Georgia to the CONSTITUTIONAL CONVENTION OF 1787. He spoke only infrequently, and he left the Convention on July 1, under pressure of private business difficulties. Pierce did not sign the Constitution but wrote to ST. GEORGE TUCKER: "I approve of its principles and would have signed it with all my heart, had I been present."

Pierce kept fairly detailed notes of the debates while he was present. The notes were published in 1828 and include brief character sketches of each of the delegates.

DENNIS J. MAHONEY
(1986)

## *PIERCE v. SOCIETY OF SISTERS*
268 U.S. 510 (1925)

*Pierce* provided a doctrinal link between the SUBSTANTIVE DUE PROCESS of the era of LOCHNER V. NEW YORK (1905) and that of our own time. The Supreme Court unanimously invalidated an Oregon law requiring children to attend public schools. A church school and a military school, threatened with closure, sued to enjoin the law's enforcement. Although the law threatened injury to the schools, their challenge to it was based not on their own constitutional rights but on the rights of their pupils and the children's parents. By allowing the schools to make this challenge, the Court made a major exception to the usual rule denying a litigant's STANDING to assert the constitutional rights of others. Here there was a close relationship between the schools and their patrons, and failure to allow the schools to assert the patrons' rights might cause injury to the schools that no one would contest in court. Parents, fearing prosecution and unwilling to bear the expense of suit, might simply send their children to public schools.

In an opinion by Justice JAMES C. MCREYNOLDS, the Court held that the law unconstitutionally invaded the parents' liberty, guaranteed by the FOURTEENTH AMENDMENT's due process clause, to direct their children's education and upbringing. The decision rested squarely on the notion that important personal liberties could be seriously restricted by the state only upon a showing of great public need. Although *Pierce* thus traced its lineage to earlier decisions protecting economic liberty, it provided support for a later generation of decisions protecting marriage and family relationships against state intrusion. (See FREEDOM OF INTIMATE ASSOCIATION.)

*Pierce* is also cited regularly as a RELIGIOUS LIBERTY precedent, defending the right of parents to choose religious education for their children. (See WISCONSIN V. YODER.)

KENNETH L. KARST
(1986)

## *PIERSON v. RAY*
386 U.S. 547 (1967)

*Pierson* is an important case involving individual immunities from suits under SECTION 1983, TITLE 42, UNITED STATES CODE. Clergymen who violated an unlawful "whites only" waiting room policy in a Jackson, Mississippi, bus terminal were arrested and convicted. They brought an action under section 1983 against the arresting police officers and a state judge for depriving the clergymen of their constitutional rights. The Supreme Court both reaffirmed what it asserted to be the absolute immunity of judges from suit at COMMON LAW and refused to interpret section 1983 to abolish that traditional immunity. Although the police officer defendants were not granted absolute immunity, the Court did grant them a defense if the

otherwise unconstitutional arrests were made in good faith and with PROBABLE CAUSE.

THEODORE EISENBERG
(1986)

## PINCKNEY, CHARLES
(1757–1824)

Charles Pinckney, a wealthy and ambitious young lawyer from South Carolina, was one of the most active members of the CONSTITUTIONAL CONVENTION OF 1787. A supporter of strong national government, Pinckney had already proposed in Congress several amendments to strengthen the government under the ARTICLES OF CONFEDERATION. He had unsuccessfully urged Congress to call a convention to amend the Articles.

Selected as a delegate to the Federal Convention, Pinckney drafted a comprehensive plan for revising the articles which he introduced immediately after EDMUND RANDOLPH proposed the VIRGINIA PLAN. The PINCKNEY PLAN was never debated in the Convention or the Committee of the Whole, although the Committee of Detail may have drawn some ideas or phrases from it.

Pinckney was one of the most frequent speakers in the debates, but the Constitution, as written, reflected his influence only in minor points and details. In a speech before signing, Pinckney announced that he would support the Constitution despite "the contemptible weakness and dependence of the Executive."

In his later career, Pinckney was a delegate to the South Carolina ratifying convention and to the state CONSTITUTIONAL CONVENTION of 1790, three times governor, a member of the legislature and of both houses of Congress, and minister of the United States to Spain.

DENNIS J. MAHONEY
(1986)

## PINCKNEY, CHARLES COTESWORTH
(1746–1825)

A British-educated, slaveholding lawyer, General Charles Cotesworth Pinckney represented South Carolina at the CONSTITUTIONAL CONVENTION OF 1787 and signed the Constitution. In the convention he worked for a strong national government and for protection of the slaveholding interests. As a leading spokesman for RATIFICATION in South Carolina, he defended the compromises on SLAVERY and argued that a BILL OF RIGHTS was unnecessary.

In 1791, Pinckney declined President GEORGE WASHINGTON's offer of a seat on the Supreme Court. The chief leader of the southern FEDERALISTS, Pinckney was nominated for Vice-President in 1800, and for President in both 1804 and 1808.

DENNIS J. MAHONEY
(1986)

Bibliography

ZAHNISER, MARVIN R. 1967 *Charles Cotesworth Pinckney, Founding Father.* Chapel Hill: University of North Carolina Press.

## PINCKNEY PLAN
(1787)

The brash young South Carolinian CHARLES PINCKNEY arrived at the CONSTITUTIONAL CONVENTION OF 1787 bearing his own comprehensive draft of a new CONSTITUTION based on proposals he had made to amend the ARTICLES OF CONFEDERATION during his three years in Congress. He presented it to the convention immediately after EDMUND RANDOLPH presented the VIRGINIA PLAN. The Pinckney Plan was never debated, but it was referred to the Committee on Detail which may have drawn some ideas or phrases from it.

There was no copy of the Pinckney Plan among the papers of the convention. Pinckney himself later published what he claimed was his plan, but this was actually a fabrication closely resembling the finished Constitution. On the basis of this (fraudulent) published version and Pinckney's own extravagant claims about his influence, many historians and popular writers have attributed more significance to the Pinckney Plan and its author than either actually had.

In the twentieth century, historians J. Franklin Jameson and ANDREW C. MCLAUGHLIN reconstructed the details of the original Pinckney Plan. The proposal was certainly quite nationalistic, with no state role in the election of either house of Congress, an unconditional congressional veto over state laws, and a very powerful national executive.

DENNIS J. MAHONEY
(1986)

Bibliography

MCLAUGHIN, ANDREW C. 1904 The Pinckney Plan. *American Historical Review* 9:135–147.

## *PINK, UNITED STATES v.*
315 U.S. 203 (1942)

In *Pink*, the Supreme Court reaffirmed a DOCTRINE articulated five years earlier in UNITED STATES V. BELMONT

(1937): that the President has exclusive constitutional authority to recognize foreign governments and to take all steps necessary to effect such recognition. In *Belmont*, the Court recognized the federal government's STANDING to sue to enforce an EXECUTIVE AGREEMENT known as the "Litvinov Agreement." As part of the process of recognition of the Soviet Union by the United States in 1933, this agreement assigned to the United States nationalized Russian assets located within the United States.

In *Pink*, the Court was again confronted with the controversial Litvinov Assignment. In this case, while recognizing the federal government's rights under the Litvinov Assignment as required by *Belmont*, the New York courts rejected the government's claims of ownership of the assets in question, contending that to enforce the assignment would violate New York public policy against the confiscation of private property. The Supreme Court reversed, 5–2, emphasizing that an executive agreement, like a TREATY, is part of the "supreme law of the land" that no state may frustrate without interfering unconstitutionally with the federal government's exclusive competence in respect of FOREIGN AFFAIRS. In so doing, the Court reasserted the supremacy of an executive agreement over all inconsistent state law or policy.

BURNS H. WESTON
(1986)

Bibliography

CARDOZO, MICHAEL H. 1962 The Authority in Internal Law of International Treaties: The Pink Case. *Syracuse Law Review* 13:544–553.

FORKOSCH, MORRIS D. 1975 The Constitution and International Relations. *California Western International Law Journal* 5:219, 246–249.

HENKIN, LOUIS 1972 *Foreign Affairs and the Constitution.* Mineola, N.Y.: Foundation Press.

LEARY, M. A. 1979 International Executive Agreements: A Guide to the Legal Issues and Research Sources. *Law Library Journal* 72:1–11.

## PINKNEY, WILLIAM
(1764–1822)

William Pinkney studied law under SAMUEL CHASE and subsequently practiced in Baltimore. Although he opposed the RATIFICATION OF THE CONSTITUTION in the Maryland convention of 1788, he later became one of the nation's foremost constitutional lawyers. He held public office continuously from 1788 until his death, serving in the state legislature, in both houses of Congress, as a diplomat in important foreign capitals, and as ATTORNEY GENERAL of the United States under President JAMES MADISON. Although as a young man he favored gradual compensated emancipation in Maryland, Pinkney was a vigorous spokesman for the slave states in the Senate debates over the MISSOURI COMPROMISE (1820).

Between political and diplomatic assignments Pinkney conducted what was probably the most lucrative legal practice in the United States, arguing seventy-two cases before the Supreme Court. He was counsel for the New Hampshire state appointed board of trustees in DARTMOUTH COLLEGE V. WOODWARD (1819), unsuccessfully arguing that the college was a public CORPORATION whose charter could be altered by the state. In MCCULLOCH V. MARYLAND (1819), however, he won the day, contending for the constitutionality of a congressionally chartered bank and against the power of the state to tax it. And in COHENS V. VIRGINIA (1821) he successfully argued for the Supreme Court APPELLATE JURISDICTION over state criminal cases.

As an advocate, Pinkney won the praise of both judges and opposing counsel. Chief Justice JOHN MARSHALL called him "the greatest man I ever saw in a court of justice" and Marshall's successor, ROGER B. TANEY, said that in thirty years, "I have seen none to equal Pinkney." His enduring significance in American constitutional history derives from his incisive and original arguments in cases of first impression.

PAUL FINKELMAN
(1986)

Bibliography

PINKNEY, REV. WILLIAM 1853 *The Life of William Pinkney.* New York: D. Appleton & Co.

## *PIQUA BRANCH OF THE STATE BANK OF OHIO v. KNOOP*
16 Howard 369 (1854)

In NEW JERSEY V. WILSON (1812) the Supreme Court had held that a state grant of a tax immunity was a contract within the protection of the CONTRACT CLAUSE. In this case Ohio chartered a bank with the proviso that six percent of its net profits would be taxed in lieu of other taxation. The states competed with each other to entice private business to settle within their borders on the supposition that the more banks, railroads, and factories a state had, the greater would be its prosperity. Special privileges to CORPORATIONS were common, and they often wrote their own charters. Ohio, gripped by an anticorporate movement, reneged by passing an act to tax banks at the same rate as other properties. The bank refused to pay the new tax on the ground that its charter was a contract the obligation of which had been impaired by the tax. (See OBLIGATION OF CONTRACTS.) By a vote of 6–3 the Supreme Court invalidated the tax. To the contention that the power to tax

was an inalienable attribute of SOVEREIGNTY, which could not be contracted away, the Court replied that the making of a public contract is an exercise of sovereignty. To the argument that one legislature, by granting a charter of tax immunity, could not bind its successors, the Court replied that the contract clause made the charter binding. In effect the Court cautioned the states to govern wisely, because the Court would not shield them from their imprudence if it took the form of contracts. Corporations throughout the country profited enormously.

LEONARD W. LEVY
(1986)

## PITNEY, MAHLON
(1858–1924)

Mahlon Pitney was the last of President WILLIAM HOWARD TAFT's appointments to the Supreme Court. Organized labor and some progressives vigorously protested the nomination because of Pitney's antilabor opinions as a New Jersey state judge, but his views paralleled Taft's. During Pitney's decade on the bench (1912–1922), he made prophets of his critics, as his opinions reflected a consistent hostility to the claims of organized labor. Nevertheless, Taft, as Chief Justice, derided Pitney as a "weak" member of his Court.

In COPPAGE V. KANSAS (1915) Pitney concluded that a Kansas statute prohibiting YELLOW DOG CONTRACTS violated FREEDOM OF CONTRACT. The opinion largely followed doctrine laid down in LOCHNER V. NEW YORK (1905), and reinforced in ADAIR V. UNITED STATES (1908), when the Court nullified an 1898 congressional law prohibiting railroads from imposing yellow dog contracts. In *Coppage*, Pitney attacked the state law as a restraint on a worker's right to contract, a right he saw as essential to the laborer as to the capitalist, "for the vast majority of persons who have no other honest way to begin to acquire property, save by working for money." Rejecting the statute's avowed intent of enabling workers to organize and bargain collectively, Pitney held that its primary effect was to interfere with "the normal and essentially innocent exercise of personal liberty or of property rights."

Two years later, Pitney wrote the Supreme Court's opinion favoring labor INJUNCTION and again sustained the validity of yellow dog contracts. In HITCHMAN COAL AND COKE CO. V. MITCHELL (1917) he upheld an injunction forbidding the United Mine Workers from seeking to organize workers who had previously agreed not to join a union. Every miner who had affiliated with the union "was guilty of a breach of contract," he said; furthermore, Pitney found that the union knowingly had violated the employer's "legal and constitutional right to run its mine 'non-union.' " Pitney's implacable defense of yellow dog contracts and injunctions galvanized labor's growing antagonism to the federal judiciary and its demands for congressional relief. Eventually, in 1932, the NORRIS-LAGUARDIA ACT forbade federal courts to enforce yellow dog contracts or issue labor injunctions, thus severely limiting the effects of Pitney's COPPAGE and HITCHMAN opinions.

In DUPLEX PRINTING CO. V. DEERING (1921) Pitney reinfoced the judicial ban on secondary BOYCOTTS, thus frustrating organized labor's understanding that the CLAYTON ACT (1914) had legalized such practices. Pitney followed an earlier decision against secondary boycotts (LOEWE V. LAWLOR, 1908) and argued that a sympathetic strike supporting a secondary boycott could not be deemed "peaceful and lawful persuasion as allowed in the Clayton Act." Although Pitney regularly invoked judicial doctrines that inhibited labor's right to organize, he occasionally defied prediction. In *Mountain Timber Co. v. Washington* (1917) Pitney led a 5–4 majority that sustained a state WORKERS' COMPENSATION law requiring all employers to contribute to a general state fund, regardless of wheter their employees had been injured. He found that the statute did not deprive employers of their property without DUE PROCESS OF LAW, and furthermore, it had a reasonable relationship to the GENERAL WELFARE. Four years later, in TRUAX V. CORRIGAN (1921), he joined OLIVER WENDELL HOLMES, LOUIS D. BRANDEIS, and JOHN H. CLARKE in dissent against Chief Justice Taft's opinion invalidating an Arizona law modeled on the labor provisions of the Clayton Act. In another rare deviation from his norm, Pitney joined the dissenters who favored the dissolution of the United States Steel Corporation.

Typically, judges such as Pitney would presume that regulatory laws such as Kansas's prohibition of yellow dog contracts and the labor provisions of the Clayton Act violated liberty of contract or property rights. Yet Pitney made no such assumption when an individual confronted the criminal process. In the notorious case of FRANK V. MANGUM (1915), for example, Pitney maintained that the state of Georgia had "fairly and justly" done its duty. Pitney also vigorously supported the national government's prosecution of dissenters and radicals following WORLD WAR I. In *Pierce v. United States* (1920) he sustained the conviction of socialists who "knowingly" and "recklessly" distributed "highly colored and sensational" and "grossly false" statements about the government's conduct of the war. The *Pierce* decision solidified the Court's shift from Holmes's CLEAR AND PRESENT DANGER interpretation of the FIRST AMENDMENT to the less speech-protective BAD TENDENCY TEST.

Pitney approved the Court's invalidation of the child labor laws; he dissented from the majority's approval of widening the authority of the Interstate Commerce Com-

mission; and he dissented from Justice CHARLES EVANS HUGHES's expansive reading of the COMMERCE CLAUSE in the "Shreveport Case," *Houston, East and West Texas Railway Company v. United States* (1914). In short, Pitney's judicial career faithfully reflected the conservative reaction to much of the political and legal thrust of the Progressive movement.

STANLEY I. KUTLER
(1986)

Bibliography

LEVITAN, DAVID M. 1954 Mahlon Pitney—Labor Judge. *Virginia Law Review* 40:733–770.

## PITT, WILLIAM
(Lord Chatham)
(1708–1778)

William Pitt the elder was one of Britain's greatest statesmen and one of freedom's staunchest friends. He led Britain from near defeat in the Seven Years War to victory and worldwide empire.

In the WILKES CASES debates (1763–1770) Pitt denounced GENERAL WARRANTS as illegal and subversive of liberty and opposed any surrender of PARLIAMENTARY PRIVILEGE. During the 1766 debate over repeal of the Stamp Act, Pitt insisted that "the distinction between legislation and taxation is essentially necessary to liberty," and that while Britain was "sovereign and supreme, in every circumstance of government and legislation whatsoever," Parliament had no right to tax those not represented therein. "There is," he declared, "a plain distinction between taxes levied for purposes of raising a revenue, and duties imposed for the regulation of trade." Later that year, as earl of Chatham, Pitt was again called to head the government. During his administration (but while he was incapacitated by illness) his chancellor of the exchequer procured passage of the TOWNSHEND ACTS.

In the 1770s Chatham urged conciliation with the American colonies, but he opposed any measure tending toward dissolution of the empire. His final speech, delivered in 1778, was against a motion to withdraw British troops and recognize American independence.

DENNIS J. MAHONEY
(1986)

## PLAIN FEEL DOCTRINE

The FOURTH AMENDMENT prohibits the government from conducting unreasonable seizures of effects. This protection, however, does not require the government to obtain a warrant in every instance. In *Minnesota v. Dickerson* (1993), the Supreme Court established the plain feel or plain touch DOCTRINE, based on the premise that tactile information can justify a warrantless seizure. The plain feel doctrine extends the principle of the PLAIN VIEW DOCTRINE, which rests on the sense of sight, to the sense of touch. The doctrine permits a law enforcement officer to seize an object if its nature is immediately apparent during a touching permitted by the Fourth Amendment. Thus *Dickerson* held that an officer authorized to touch clothing or a container may acquire PROBABLE CAUSE to believe the felt object is contraband or evidence and thereby justify a further Fourth Amendment intrusion.

The plain feel doctrine does not provide authority to touch. It merely permits the officer to act on tactile information concerning a felt object. Authority to feel the object in the first instance must be found elsewhere. In many cases, the officer derives authority from the STOP-AND-FRISK principles of TERRY V. OHIO (1968) which allow a pat down for weapons. In others, the officer has consent for the touching. Authority to touch may also rest on the need to move an object or on other permitted conduct involving contact with the object.

In every case, however, the officer's authority to engage in tactile exploration is limited. When the prosecution relies on the plain feel doctrine, the court should determine not only whether the object could be recognized by touch as contraband or evidence, but also whether its tactile characteristics are so pronounced that it could be recognized within the scope of the permitted search. An officer may not extend the scope of a search in an attempt to obtain probable cause. The *Dickerson* Court recognized authority to seize items felt during a pat down but emphasized that a *Terry* frisk for weapons is strictly circumscribed and does not permit an officer to probe an object that does not feel like a weapon. The officer's continued manipulation in *Dickerson* went beyond the authorized intrusion and also belied any claim that it was immediately apparent that the lump was crack cocaine.

The prosecution needs to rely on the plain feel doctrine only when an officer without probable cause to arrest a defendant seizes a nonweapon-like item recognizable by feel. Because few seizable items other than weapons can be identified by feel, one might expect plain feel to be a tool of limited utility. On the contrary, prosecutors often rely on plain feel to justify seizures. Plain feel cases fall into a predictable pattern. The prosecution most often invokes the doctrine to uphold a seizure of drugs, drug paraphernalia, or evidence of drug trafficking from the defendant's person. The touching typically occurs during a *Terry* frisk or a consensual pat down following an authorized stop.

Determining whether the nature of the seized item was

immediately apparent to the officer is critical to justify a seizure based on plain feel. Although *Dickerson* used "immediately apparent" to describe the standard for seizure, it is clear from *Arizona v. Hicks* (1987) that plain feel, like plain view, requires probable cause.

The "immediately apparent" requirement for seizing items that do not feel weapon-like should be distinguished from the *Terry* basis for seizing items that feel like weapons. *Terry* allows the officer to frisk to detect and remove weapons. The *Terry* frisk is biased to protect the safety of the officer and public. Generally, any object of sufficient hardness and size can be explored, even though its shape does not advertise it as a gun or knife. If clothing obscures the contents from tactile detection, courts often approve investigation of the object.

By contrast, the plain feel doctrine is not biased to permit exploration of suspicious objects. The *Dickerson* Court emphasized that the tactile information obtained during the authorized touching must immediately raise probable cause to believe the object is seizable. Mere reasonable suspicion that an object is contraband does not support further intrusion.

ANNE BOWEN POULIN
(2000)

(SEE ALSO: *Search and Seizure; Unreasonable Search.*)

## PLAIN VIEW DOCTRINE

The FOURTH AMENDMENT protects persons and their effects against unreasonable SEARCHES AND SEIZURES. However, articles exposed to the plain view of others are subject to a warrantless seizure on PROBABLE CAUSE, for no search is involved and hence no invasion of privacy results. (Plain view differs from abandonment. Exposure of an article to plain view may result from carelessness; abandonment signifies a deliberate relinquishment of the right of ownership. In either case, there is no constitutionally protected interest in the privacy of the article.)

Three conditions must be met for a plain view seizure to be constitutional, according to the decision in COOLIDGE V. NEW HAMPSHIRE (1971). First, the officer who sees the article must have a legal right to be where he is. Second, discovery of the article by the police must be "inadvertent," not a result of prior information that would have enabled the police to obtain a warrant beforehand. (This requirement is relaxed in a SEARCH INCIDENT TO ARREST, where a seizure made within the limited scope of the authorized search is lawful even if the finding of the evidence was anticipated.) Finally, the incriminating nature of the evidence must be "immediately apparent," so that no additional intrusion on privacy is necessary in order to establish that fact. (The term "immediately apparent" was modified in *Brown v. Texas* (1983) to mean probable cause; certainty is not required.)

An emergency "hot pursuit" of a suspect into private premises, as in WARDEN V. HAYDEN (1967), provides the widest latitude for a plain view seizure; the search for the suspect and his weapons is permitted to extend throughout the entire place until he is apprehended. Barring emergencies, however, a plain view of the interior of a house, obtained through a window or open door, does not permit a warrantless entry of premises any more than does testimony of the senses (say, the odor of marijuana) that criminal activity is afoot. In searches of buildings, therefore, the plain view serves to authorize a seizure only when a lawful search is already in progress when the view is obtained. A different standard applies to automobiles: a plain view of evidence in an automobile on the road not only permits seizure of the evidence but also may provide probable cause for a WARRANTLESS SEARCH of the entire vehicle. Since *Brown*, even a closed container may be seized under the plain view doctrine if the contents can be reliably inferred from its outside appearance—for example, a tied balloon of a type commonly used to carry narcotics.

JACOB W. LANDYNSKI
(1986)

Bibliography

LAFAVE, WAYNE R. 1978 *Search and Seizure: A Treatise on the Fourth Amendment.* Vol. 2:589–595, 601–605. St. Paul, Minn.: West Publishing Co.

## PLAIN VIEW DOCTRINE
(Update)

Under the plain view doctrine of COOLIDGE V. NEW HAMPSHIRE (1971), certain items found in a lawful search may be seized without a SEARCH WARRANT though they were not among the items that were legitimate objectives of the search. Though this issue also arises in other contexts, it most frequently comes into play when police, executing a search warrant naming certain things to be seized, find and immediately seize other items unnamed in the warrant.

The Supreme Court in *Coolidge* declined to hold that in such circumstances the police must always seek another warrant, reasoning that such a procedure "would often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves." At the same time, the Court was not prepared to uphold warrantless seizures made either without PROBABLE CAUSE or as a consequence of an earlier circumvention of the warrant re-

quirement, as where the police intended from the very beginning to seize the unnamed objects. Consequently, the *Coolidge* plurality concluded that a warrantless seizure was permissible only if three requirements were met: (1) there must have been a prior valid intrusion into the place where the seized evidence was found; (2) the discovery of the seized items must have been "inadvertent"; and (3) it must have been "immediately apparent" that the seized items were evidence of crime.

The *Coolidge* plurality did not explain what it meant by "inadvertent." It did not state explicitly what degree of expectation would make the subsequent discovery of an item other than inadvertent. Most lower courts took the inadvertent-discovery limitation to mean that a discovery is inadvertent, without regard to the hopes or expectations of the police, if there were not sufficient grounds to get a search warrant for that item. Moreover, for probable cause to nullify an inadvertent claim those grounds must have been in the hands of the police at a time when it would have been feasible to obtain a warrant, for otherwise the police cannot be faulted for failing to obtain a warrant also naming the seized item.

Even so interpreted, the inadvertent-discovery limitation is unsound. It is a limitation on seizure, not search, and thus protects possessory interests only, not privacy interests. Yet, one consequence of the inadvertence requirement is that lawfully discovered items seized on probable cause may be excluded merely because the officer, out of an abundance of caution, failed to seek a magistrate's approval for a more intrusive search through the premises for those items. If, as the Court declared in HOFFA V. UNITED STATES (1966), "the police are not required to guess at their peril the precise moment at which they have probable cause," this result is not a desirable one. Such a result will no longer obtain, for in *Horton v. California* (1990) the Court rejected the inadvertent-discovery limitation on the plain view doctrine.

The "immediately apparent" limitation does not require the police to be certain of the incriminating character of the seized object; probable cause will suffice. But when must this probable cause become apparent? Assume a case in which police executing a search warrant for stolen stereo equipment see in the searched premises a television set. They turn the television set around to expose its serial number, and then determine that the number matches that of a set recently reported stolen. Many courts interpreted *Coolidge* to mean that such movement of the television set, though not authorized by the warrant, was nonetheless a lawful search if undertaken upon reasonable suspicion that the set was stolen. The appealing rationale of these cases was that the slight movement of the object to examine its exterior was such a minimal intrusion upon FOURTH AMENDMENT interests as to not require full probable cause.

Though these decisions arguably found support in the Supreme Court's decision in *United States v. Place* (1983), holding that personal effects in transit such as luggage could be briefly detained for investigation upon mere reasonable suspicion, the Court in *Arizona v. Hicks* (1987) held that *Coolidge*'s "immediately apparent" requirement means full probable cause must exist before the television set is even moved. The Court in *Hicks* reasoned that such movement was part of "a dwelling-place search," for which full probable cause had always been required, and distinguished such cases as *Place* on the ground that the "special operational necessities" existing there were not present. *Hicks* made the plain view doctrine of the *Coolidge* plurality a doctrine endorsed by a majority of the Justices, and *Hicks* held that the doctrine may not be invoked when the police have less than probable cause to believe that an item should be seized as evidence of crime.

WAYNE R. LAFAVE
(1992)

(SEE ALSO: *Search and Seizure; Unreasonable Search; Warrantless Searches.*)

Bibliography

LAFAVE, WAYNE R. 1987 *Search and Seizure: A Treatise on the Fourth Amendment*, 2nd ed. St. Paul, Minn.: West Publishing Co.

MOYLAN, CHARLES E. 1975 The Plain View Doctrine: Unexpected Child of the Great Search Incident Geography Battle. *Mercer Law Review* 26:1047–1101.

## *PLANNED PARENTHOOD v. ASHCROFT*

See: Reproductive Autonomy

## *PLANNED PARENTHOOD v. CASEY*
505 U.S. 833 (1992)

In *Planned Parenthood v Casey*, a slim majority of the Supreme Court, to the surprise of many, dramatically rejected the vigorous and caustic calls of four dissenting Justices to overrule ROE V. WADE (1973), decided nineteen years earlier. The majority instead reaffirmed *Roe*'s "core" as it struck down a spousal notice provision in a Pennsylvania ABORTION statute. A different majority, however, OVERRULED portions of two of *Roe*'s successor decisions, by upholding the statute's informed consent provisions for adult women, including a twenty-four–hour waiting pe-

riod and a prescribed set of oral and written disclosures by the physician of "objective, non-judgmental . . . accurate scientific information" about fetal development, social services, and adoption. This latter majority also upheld a parental consent provision (with a judicial bypass) for minors seeking abortion and a clinic data collection and reporting requirement.

Among the notable features of this case was the gravitas of the PLURALITY OPINION by the three Justices in the conservative middle of the Court. Justices ANTHONY M. KENNEDY, SANDRA DAY O'CONNOR, and DAVID H. SOUTER jointly authored and signed the opinion, an exceptional step reminiscent of the COOPER V. AARON (1958) opinion signed by each of the nine WARREN COURT Justices to emphasize their commitment to BROWN V. BOARD OF EDUCATION (1955). Drawing back from their expressions of hostility to *Roe* in prior opinions, Kennedy and O'Connor joined with Souter to reaffirm *Roe*'s "core" holdings that a woman has a FUNDAMENTAL RIGHT to terminate her pregnancy prior to fetal viability; after viability a state can ban abortion except where the woman's life or health are endangered; and from the start of a pregnancy the state has a legitimate interest in protecting the health of the woman and a growing interest in protecting the life of the fetus.

In contrast to Justices JOHN PAUL STEVENS and HARRY A. BLACKMUN, who in separate opinions adhered more fully to the Court's opinion in *Roe*, the joint plurality opinion rejected *Roe*'s "trimester structure" for evaluating state regulation of abortion in favor of an "undue burden" standard. By this, the plurality meant that a state cannot constitutionally impose a rule that leaves a woman with merely a formal right or that "has the purpose or effect of placing a substantial obstacle" to the effective exercise of the abortion right. Moreover, a burden that affects only a small fraction of women can nonetheless constitute an undue burden as to them. Thus, while the spousal notice provision may interfere with the choice of only some women, it was struck down as a substantial burden. By contrast, the plurality did not deem the impediments that a twenty-four–hour waiting period clearly impose to be a substantial obstacle, on the evidence offered in this facial challenge. It remains to be seen how courts will implement the "undue burden" standard in evaluating regulations that make abortion more difficult and more costly. Although the dissenters disparaged this standard as a newly minted DOCTRINE without content, some scholars have suggested that the undue burden standard accurately describes the Court's traditional approach, across a broad range of constitutional issues, to determining whether a right has been infringed.

In applying the undue burden standard, the Court notably did not apply the dicta in UNITED STATES V. SALERNO (1987) that, outside of FIRST AMENDMENT cases, a facial challenge can succeed only if there is "no set of circumstances" under which the statute is valid.

The joint opinion tied its application of the undue burden standard to the important question of the affirmative role of the state in creating a decisional framework for individuals to help secure to them conditions supporting the exercise of their autonomy; and this concern, in turn, implicitly implicates the related questions of GOVERNMENT SPEECH and the speech of professionals. The opinion indicated that the state may seek to further its interest in "potential life" prior to fetal viability only by means "calculated to inform the woman's free choice, not hinder it," and may require physicians to provide patients with certain information "to ensure that this choice is thoughtful and informed" and specifically informed of the philosophic and social arguments that favor a state's "preference" for childbirth.

In describing the woman's interest in reproductive autonomy, the joint opinion spoke more of liberty than the RIGHT OF PRIVACY; linked aspects of this liberty to the right of bodily integrity the Court has identified in, among other cases, *Cruzan v. Director, Missouri Department of Health* (1990); and sympathetically emphasized that reproduction and abortion are unique in that they touch upon the very core of personhood and conscience (as individuals seek to apprehend "the mystery of human life") and involve for women a unique intimacy, burden, and pain. Moreover, the opinion recognized the essential role of reproductive autonomy in affording women opportunities "to participate equally in the economic and social life of the Nation. . . ." Despite the views of some commentators, it would appear that the opinion necessarily, although implicitly, treated the woman's interest as fundamental. In so doing, the joint opinion forthrightly reaffirmed that the "liberty" the DUE PROCESS clause protects includes fundamental rights that are identified by a judicial exercise of "reasoned judgment" and not only by a search for the Framers' ORIGINAL INTENT or for America's specific historical traditions. Among those identified liberties endorsed by the joint opinion is the fundamental right to use contraceptives, including postconception contraceptives.

Despite its sympathetic elaboration of the woman's interests, the joint opinion intimated that some of its authors might not have joined *Roe* when originally decided, and that for them STARE DECISIS was determinative of their judgment. Because *Roe* was workable, had induced serious reliance by a generation of women, and was not an anachronism undermined by subsequent changes in either doctrine or facts, the plurality found no warrant to overturn *Roe* under traditional principles of stare decisis in constitutional matters. The plurality nonetheless acknowl-

edged that these factors would not preclude reexamination of even so repeatedly reaffirmed a case as *Roe*, given the depth of the constitutional and political controversy surrounding it. However, after reviewing more than a century of CONSTITUTIONAL HISTORY, the opinion concluded that *Roe* was one of those rare cases in which the Court "calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in" the Court's interpretation of the Constitution. Unless the circumstances facing the nation have fundamentally altered, the opinion asserts, later Justices must adhere to the judgment in such a case in order to maintain the Court's constitutional legitimacy and avoid appearing to "surrender to political pressure."

Perhaps the authors of the joint opinion understood that, had they joined in overruling *Roe*, they would have appeared to be doing exactly what the Republican Presidents RONALD REAGAN and GEORGE H. W. BUSH who nominated them wanted. For these Presidents had engaged in an unprecedented attempt to reshape the federal judiciary by ideologically screening judicial nominations, especially with respect to abortion, and by occasionally disregarding other traditional criteria of nomination, including professional and senatorial judgments. In declining to vote the party line, however, these Justices may have aided the REPUBLICAN PARTY electorally by continuing to place the abortion right beyond Republican political reach—at least until additional retirements from the Court lead some to try once again to place the issue of *Roe* before the electorate and the Court.

ROBERT D. GOLDSTEIN
(2000)

Bibliography

BROWNSTEIN, ALAN 1994 How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine. *Hastings Law Journal* 45:867–959.

GOLDSTEIN, ROBERT D. 1988 *Mother-Love and Abortion: A Legal Interpretation.* Berkeley, Calif.: University of California Press.

——— 1996 Reading *Casey:* Structuring the Woman's Decisionmaking Process. *William & Mary Bill of Rights Journal* 4:787–880.

## *PLANNED PARENTHOOD OF CENTRAL MISSOURI v. DANFORTH*
428 U.S. 52 (1976)

Following ROE V. WADE (1973), Missouri adopted a comprehensive law regulating ABORTION. Planned Parenthood, which operated an abortion clinic, and two eminent physicians sued in federal district court challenging the constitutionality of most of the law's provisions. On appeal, the Supreme Court unanimously upheld three of the state's requirements and by divided vote invalidated four others. Justice HARRY A. BLACKMUN wrote for the Court.

The Court sustained the law's definition of "viability" of a fetus: "when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." The state's failure to set a specific time period survived a challenge for VAGUENESS; the Court assumed that the physician retained the power to determine viability. The Court also upheld a requirement of written certification by a woman of her "informed" consent to an abortion, and certain record-keeping requirements.

The Court invalidated, 6–3, a requirement of consent to an abortion by the husband of the pregnant woman, and invalidated, 5–4, a parental consent requirement for unmarried women under age eighteen. Recognizing the husband's strong interest in the abortion decision, the Court concluded that when spouses disagreed, only one of them could prevail; that one must be the woman. As for parental consent, the opinion offered no broad charter of CHILDREN'S RIGHTS but concluded that a "mature" minor's right to have an abortion must prevail over a parent's contrary decision (*H. L. v. Matheson*, 1981). The state had little hope of restoring a family structure already "fractured" by such a conflict.

The Court invalidated, 6–3, a prohibition on saline amniocentesis as an abortion technique. The procedure was used in more than two-thirds of all abortions following the first trimester of pregnancy; its prohibition would undermine *Roe*. Finally, the state had required a physician performing an abortion to use professional skill and care to preserve the life and health of a fetus. The requirement was held invalid, 6–3, because it was not limited to the time following the stage of fetal viability.

The question of the doctor's role in determining viability and preserving fetal life returned to the Court in *Colautti v. Franklin* (1979). There the Court invalidated, 6–3, on vagueness grounds, a Pennsylvania law requiring a doctor to exercise care to protect a fetus when there was "sufficient reason to believe that the fetus may be viable." As in *Roe* and *Danforth*, the Court paid considerable deference to physicians, leaving undefined their control over their patients' constitutional rights.

KENNETH L. KARST
(1986)

(SEE ALSO: *Reproductive Autonomy.*)

Bibliography

COHEN, LESLIE ANN 1980 Fetal Viability and Individual Autonomy: Resolving Medical and Legal Standards for Abortion. *UCLA Law Review* 27:1340–1364.

# PLEA BARGAINING

The overwhelming majority of convictions in American criminal courts occur when the accused pleads guilty to a charge; few defendants receive a full judicial trial. "Plea bargaining" describes a variety of incentives and pressures that produce this result and that are commonly encountered in American criminal courts. Some plea bargaining is explicit: defendants are led by the prosecutor or the judge to plead guilty in return for the promise of some concession or in fear of harsh treatment meted out to those who insist on a trial. The reward for defendants may be release on bail before trial, the dropping or reduction of charges, or the lightening of punishment imposed after conviction. Some defendants may plead guilty out of a sense of contrition, but more probably acquiesce in conviction because they expect more lenient treatment if they do not insist on their right to trial.

Overt negotiation to induce a defendant to plead guilty is often not necessary. The incentive structure is built into the culture of the courthouse and into the substantive criminal code itself. Those accused of crime learn the culture from cellmates, friends, and lawyers. Under most modern American penal codes, the same criminal conduct typically permits the defendant to be charged with one or more of several distinct offenses, each carrying different levels of potential punishment. Some of the potential sentences are severe: not just CAPITAL PUNISHMENT but punishment for common offenses by prison terms that may exceed the length of a person's vigorous adulthood. It would be practically impossible and morally unthinkable to apply such severe sanctions in a substantial portion of the cases.

The system is thus dominated at every level by official discretion; police, prosecutors, judges, and correctional officials are expected to extend leniency to most offenders lest the system become brutal and the courthouses overloaded. The guilty plea thus provides incentives for the state as well as the defendant. The courts are prepared to try only about ten percent of the cases potentially before them, and prosecutors value convictions obtained without the effort and expense of trial.

The relationship of this system of official discretion, including plea bargaining, with constitutional norms is strained, to say the least. Enforcement of criminal laws in America is predominantly the responsibility of over 3,000 distinct and varying local systems for the administration of criminal justice. The system generally gives a central role to professional police and prosecutorial organizations rather than to the active supervising magistracy that the Fourth, Fifth, and Sixth Amendments apparently contemplated for federal prosecutions.

The dominance of plea bargaining and the discretionary power to bring and dismiss charges tend to reduce the likelihood of direct confrontation between constitutional doctrine and everyday law enforcement practice. Officials are motivated to settle cases in which the lawfulness of their behavior appears likely to be challenged. Moreover, the dominance of discretion permits some rationalization of enforcement policies, better managerial control of scarce resources, and reduction of the uncertainties of trial for both officials and defendants. The system also permits the public at large to avoid facing the contradictions inherent in the penal policies embodied in the criminal codes of most states.

The guilty plea system potentially conflicts with constitutional norms in three principal ways. First, the system is in some tension with DUE PROCESS standards. In America the guilty plea wholly substitutes for a judicial trial. In Europe, the judge typically must conduct an independent investigation of guilt, whether or not the accused confesses. Even before the modern constitutional revolution in criminal justice, the Supreme Court recognized the dangers inherent in convictions based solely upon guilty pleas, insisting in such cases that convictions be based on knowing and voluntary WAIVER OF RIGHTS. In a series of decisions between 1960 and 1970 the Court spelled out this requirement in specific terms: an admission of guilt in open court by an accused who is adequately counseled and informed by a neutral judge of his rights and of the possible consequences of waiving them by pleading guilty. This formula requires only a rather formalistic colloquy between defendant and judge in open court to ascertain the accused's knowledge and VOLUNTARINESS of the plea. It also precludes active participation by the judge in the negotiations that induce the plea, through promises of leniency or threats of severity. It is also understood that bargains, once struck, must be observed by the government. Beyond these requirements due process is satisfied so long as the bargaining is fair according to the standards of commercial bargaining. Thus a defendant may be held to his plea despite his insistence that he is innocent. Troubling issues arise when an accused pleads guilty, despite his belief in his own innocence, because he recognizes the long odds against acquittal and the high risk of a more severe penalty after conviction at trial. Although the Court has held such pleas to be voluntary and to satisfy due process standards, doubts continue regarding the voluntariness of many such pleas.

A second cluster of constitutional concerns about the guilty plea system centers on the question of equal treatment for all similarly situated defendants. The guarantees of due process and EQUAL PROTECTION somewhat limit the arbitrary and disparate imposition of punishment. Yet the plea bargaining system grants to some defendants concessions that are unlikely to be extended to all. Indeed, if the

concessions were equally available, they would lose much of their force in persuading defendants to plead guilty. Moreover, the process of negotiation operates outside the formal protections of the criminal process, within an area of official discretion that is seldom subjected to independent scrutiny. Opportunities abound for arbitrary discrimination.

The third and most pressing set of constitutional concerns about plea bargaining has received the least satisfactory treatment by the Supreme Court. When a defendant pleads guilty, he waives a host of constitutionally protected rights, including TRIAL BY JURY or by a judge, the RIGHT AGAINST SELF-INCRIMINATION, the right to CONFRONTATION and cross-examination of witnesses, and the right to challenge evidence against him. Government officials encourage the waiver of these rights by promising reduced punishment, and by threatening greater punishment for those who insist on their constitutionally guaranteed rights. This process appears to be an UNCONSTITUTIONAL CONDITION on the exercise of rights.

Despite these constitutional concerns, and despite widespread public dissatisfaction, plea bargaining seems to be a permanent feature of the American system of criminal justice. If the Supreme Court has thus far acquiesced in the system's constitutionality, perhaps the Court is not yet persuaded that a satisfactory alternative has been demonstrated.

ARTHUR ROSSETT
(1986)

Bibliography

ROSSETT, ARTHUR I. and CRESSY, DONALD 1976 *Justice by Consent: Plea Bargains in the American Courthouse.* Philadelphia: Lippincott.

SCHULHOFER, STEPHEN J. 1984 Is Plea Bargaining Inevitable? *Harvard Law Review* 97:1037–1107.

## *PLESSY v. FERGUSON*
163 U.S. 537 (1896)

Until BROWN V. BOARD OF EDUCATION (1954), *Plessy* was the constitutional linchpin for the entire structure of Jim Crow in America. Borrowed from LEMUEL SHAW in ROBERTS V. BOSTON (1851), the *Plessy* Court established the SEPARATE BUT EQUAL DOCTRINE: black persons were not denied the EQUAL PROTECTION OF THE LAWS safeguarded by the FOURTEENTH AMENDMENT when they were provided with facilities substantially equal to those available to white persons.

Florida enacted the first Jim Crow transportation law in 1887, and by the end of the century the other states of the old Confederacy had followed suit. Louisiana's act, which was challenged in *Plessy,* required railroad companies carrying passengers in the state to have "equal but separate accommodations" for white and colored persons by designating coaches racially or partitioning them. Black citizens, who denounced the innovation of Jim Crow in Louisiana as "unconstitutional, unamerican, unjust, dangerous and against sound public policy," complained that prejudiced whites would have a "license" to maltreat and humiliate inoffensive blacks. Plessy was a TEST CASE. Homer A. Plessy, an octoroon (one-eighth black), boarded the East Louisiana Railroad in New Orleans bound for Covington in the same state and sat in the white car; he was arrested when he refused to move to the black car. Convicted by the state he appealed on constitutional grounds, invoking the THIRTEENTH and FOURTEENTH AMENDMENTS. The Court had already decided in Louisville, New Orleans & *Texas Pacific Ry. v. Mississippi,* (1890) that Jim Crow cars in INTRASTATE COMMERCE did not violate the COMMERCE CLAUSE.

Justice JOHN MARSHALL HARLAN was the only dissenter from the opinion by Justice HENRY B. BROWN. That the state act did not infringe the Thirteenth Amendment, declared Brown, "is too clear for argument." The act implied "merely a legal distinction" between the two races and therefore had "no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude." Harlan, believing that STATE ACTION could have no regard to the race of citizens when their CIVIL RIGHTS were involved, would have ruled that compulsory racial SEGREGATION violated the Thirteenth Amendment by imposing a BADGE OF SERVITUDE.

The chief issue was whether the state act abridged the Fourteenth Amendment's equal protection clause. One reads Brown's opinion with an enormous sense of the feebleness of words as conveyors of thought, because he conceded that the object of the amendment "was undoubtedly to enforce the absolute equality of the two races before the law," yet he continued the same sentence by adding, "but in the nature of things it could not have been intended to abolish distinctions based on color. . . ." As a matter of historical fact the intention of the amendment was, generally, to abolish legal distinctions based on color. The Court pretended to rest on history without looking at the historical record; it did not claim the necessity of adapting the Constitution to changed conditions, making untenable the defense often heard in more recent years, that the decision fit the times. *Plessy* makes sense only if one understands that the Court believed that segregation was not discriminatory, indeed that it would violate the equal protection clause if it were discriminatory. Brown conceded that a statute implying a legal inferiority in civil society, lessening "the security of the right of the colored race," would be discriminatory, but he insisted that state-imposed segregation did not "necessarily imply the inferiority of either race to the other. . . ." There was abundant

evidence to the contrary, none of it understandable to a Court that found fallacious the contention that "the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction on it." That segregation stamped blacks with a badge of inferiority was not fallacious. The fallacy was that only they imputed inferiority to segregation. Jim Crow laws were central to white supremacist thought. That blacks were inherently inferior was a conviction being stridently trumpeted by white supremacists from the press, the pulpit, and the platform, as well as from the legislative halls, of the South. The label, "For Colored Only," was a public expression of disparagement amounting to officially sanctioned civil inequality. By the Court's own reasoning, state acts compelling racial segregation were unconstitutional if inferiority was implied or discrimination intended.

The separate but equal doctrine was fatally vulnerable for still other reasons given, ironically, by the Court in *Plessy*. It sustained the act as a valid exercise of the POLICE POWER yet stated that every exercise of that power "must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class." Jim Crow laws were not only annoying and oppressive to blacks; they were not reasonable or for the public good. The Court asserted that the question of reasonableness must be determined with reference "to the established usages, customs and traditions" of the people of the state. The proper standard of reasonableness ought to have been the equal protection clause of the Constitution, not new customs of the white supremacists of an ex-slave state. Even if the custom of segregation had been old, and it was not, the Court was making strange doctrine when implying that discrimination becomes vested with constitutionality if carried on long enough to become customary. Classifying people by race for the purpose of transportation was unreasonable because the classification was irrelevant to any legitimate purpose.

The only conceivable justification for the reasonableness of the racial classification was that it promoted the public good, which Brown alleged. The effects of segregation were inimical to the public good, because, as Harlan pointed out, it "permits the seeds of race hate to be planted under the sanction of law." It created and perpetuated interracial tensions. Oddly the Court made the public-good argument in the belief that the commingling of the races would threaten the public peace by triggering disorders. In line with that assumption Brown declared that legislation is powerless to eradicate prejudice based on hostile "racial instincts" and that equal rights cannot be gained by "enforced commingling." These contentions seem cynical when announced in an opinion sanctioning inequality by sustaining a statute compelling racial segregation. The argument that prejudice cannot be legislated away overlooked the extent to which prejudice had been legislated into existence and continued by Jim Crow statutes.

Harlan's imperishable dissent repeated the important Thirteenth Amendment argument that he had made in the CIVIL RIGHTS CASES (1883) on badges of servitude. That amendment, he declared, "decreed universal civil freedom in the country." Harlan reminded the Court that in STRAUDER V. WEST VIRGINIA (1880), it had construed the Fourteenth Amendment to mean that "the law in the States shall be the same for the black as for the white" and that the amendment contained "a necessary implication of a positive immunity, or right . . . the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of rights which others enjoy. . . ." To Harlan, segregation was discriminatory per se. The state act was unreasonable because segregation was not germane to a legitimate legislative end. He meant that the Fourteenth Amendment rendered the state powerless to make legal distinctions based on color in respect to public transportation. A railroad, he reminded the Court, was a public highway exercising public functions available on the same basis to all citizens. "Our Constitution," said Harlan, "is color-blind, and neither knows nor tolerates classes among citizens." He thought the majority's decision would prove in time to be as pernicious as DRED SCOTT V. SANDFORD (1857). As for the separate but equal doctrine, he remarked that the "thin disguise" of equality would mislead no one "nor atone for the wrong this day done."

*Plessy* cleared the constitutional way for legislation that forced the separation of the races in all places of public accommodation. Most of that legislation came after *Plessy*. In the CIVIL RIGHTS CASES, the Court had prevented Congress from abolishing segregation, and in *Plessy* the Court supported the states in compelling it. Not history and not the Fourteenth Amendment dictated the decision; it reflected its time, and its time was racist. As Justice Brown pointed out, even Congress in governing the DISTRICT OF COLUMBIA had required separate schools for the two races. The Court did not invent Jim Crow but adapted the Constitution to it.

LEONARD W. LEVY
(1986)

Bibliography

KLUGER, RICHARD 1973 *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality.* Pages 71–83. New York: Knopf.

OBERST, PAUL 1973 The Strange Career of *Plessy v. Ferguson*. *Arizona Law Review* 15:389–418.

OLSON, OTTO, ed. 1967 *The Thin Disguise: Turning Point in Negro History: Plessy v. Ferguson.* New York: Humanities Press.

WOODWARD, C. VANN 1971 The National Decision Against Equality. Pages 212–233 in Woodward, *American Counterpoint: Slavery and Racism in the North-South Dialogue.* Boston: Little, Brown.

## PLURALITY OPINION

In some cases the majority of Justices of the Supreme Court, although agreeing on the DECISION, do not agree on the reasoning behind the decision. In such cases, there is no OPINION OF THE COURT; instead there are two or more opinions purporting to explain the decision. If one opinion is signed by more Justices than any other, it is called the "plurality opinion." A plurality opinion may be cited as precedent in later cases, but, unlike a majority opinion, it is not an authoritative statement of the Court's position on the legal or constitutional issues involved.

DENNIS J. MAHONEY
(1986)

## *PLYLER v. DOE*
457 U.S. 202 (1982)

Experimenting with ignorance, the Texas legislature authorized local school boards to exclude the children of undocumented ALIENS from the public schools, and cut off state funds to subsidize those children's schooling. The Supreme Court, 5–4, held that this scheme denied the alien children the EQUAL PROTECTION OF THE LAWS. The OPINION OF THE COURT, by Justice WILLIAM J. BRENNAN, contains the potential for important future influence on equal protection DOCTRINE.

The Court was unanimous on one point: the Fourteenth Amendment's guarantee of equal protection for all PERSONS extends not only to aliens lawfully admitted for residence but also to undocumented aliens. The question that divided the Court was what that guarantee demanded—an issue that the Court's recent opinions had typically discussed in language about the appropriate STANDARD OF REVIEW. In SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ (1973) the Court had rejected the claim that EDUCATION was a FUNDAMENTAL INTEREST, and had subjected a state system for financing schools to a deferential RATIONAL BASIS standard. A significant OBITER DICTUM, however, had suggested that a total denial of education to a certain group of children would have to pass the test of STRICT SCRUTINY. (See GRIFFIN V. COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY.) Furthermore, although alienage was, for some purposes, a SUSPECT CLASSIFICATION, the Court had not extended that characterization to laws discriminating against aliens who were not lawfully admitted to the country.

Justice Brennan's analysis blurred the already indistinct lines dividing levels of judicial scrutiny in equal protection cases. He suggested that some form of "intermediate scrutiny" was appropriate, and even hinted at a preference for strict scrutiny. Eventually, though, he came to rest on rhetorical ground that could hold together a five-Justice majority. Because the Texas law imposed a severe penalty on children for their parents' misconduct, it was irrational unless the state could show that it furthered "some substantial goal of the State," and no such showing had been made. In a concurring opinion, Justice LEWIS F. POWELL remarked that heightened scrutiny was proper, on analogy to the Court's decisions about classifications based on ILLEGITIMACY. Justice THURGOOD MARSHALL, also concurring, repeated his argument for recognition of a "sliding scale" of standards of review, and accurately noted that this very decision illustrated that the Court was already employing such a system. No one should be surprised when the Court holds invalid a supremely stupid law that imposes great hardship on a group of innocent people.

Chief Justice WARREN E. BURGER, writing for the four dissenters, agreed that the Texas policy was "senseless." He argued nonetheless that the Court, by undertaking a "policymaking role," was "trespass[ing] on the assigned function of the political branches." In allocating scarce state resources, Texas could rationally choose to prefer citizens and lawfully admitted aliens over aliens who had entered the country without permission; for the dissenters, that was enough to validate the law.

The *Plyler* opinion was narrow, leaving open the question whether a similar burden of substantial justification would be imposed on a discrimination against undocumented aliens who were adults, or even against innocent children when the discrimination was something less than a total denial of education. Justice Brennan did suggest that judicial scrutiny might properly be heightened in cases of discrimination against aliens—even undocumented aliens—who had established "a permanent attachment to the nation." Although it is unlikely that this view could command a majority of the Court today, the remark may bear fruit in the future.

KENNETH L. KARST
(1986)

(SEE ALSO: *Immigration and Alienage.*)

## POCKET VETO

If Congress adjourns within ten days after passing a bill, the President can prevent the bill's enactment by merely

withholding his signature (Article I, section 7, clause 3, of the Constitution). By means of this extension of the VETO POWER, the President can kill legislation without giving any reason and without the possibility of being overridden.

DENNIS J. MAHONEY
(1986)

## POCKET VETO CASE
### Okanogan Indians v. United States
### 279 U.S. 655 (1929)

A unanimous Supreme Court, speaking through Justice EDWARD SANFORD, held that a bill passed by Congress, but not signed by the President, had died when the 69th Congress adjourned between its first and second sessions. The POCKET VETO may therefore be used during the adjournment between sessions, and not merely at the final adjournment, of a particular Congress.

In *Wright v. United States* (1938) and *Kennedy v. Sampson* (1965) federal courts established that the pocket veto could not be used during intrasession adjournments.

DENNIS J. MAHONEY
(1986)

## *POELKER v. DOE*

See: *Maher v. Roe*

## *POINTER v. TEXAS*
### 380 U.S. 400 (1965)

A state court had allowed the introduction in EVIDENCE of the transcript of an absent witness's testimony given at a preliminary hearing when the defendant, unrepresented by counsel, could not effectively cross-examine. The Supreme Court, disallowing an exception to the HEARSAY RULE, held that "the SIXTH AMENDMENT's right of an accused to confront the witnesses against him is a fundamental right and is made obligatory on the State by the FOURTEENTH AMENDMENT." The Court also held that the RIGHT OF CONFRONTATION is governed by the same standards in state and federal courts.

LEONARD W. LEVY
(1986)

## POLICE ACTION

The phrase "police action" is not a term of art, or one having any precise legal significance, but simply an expression or euphemism occasionally employed to describe the use of the armed forces of the United States and other nations to resist what is perceived as a violation of international law, a notable example being American use of the armed forces against the North Korean invasion of South Korea in 1950. (See KOREAN WAR.) President HARRY S. TRUMAN based his decision to use American forces to defend South Korea on the fact that the North Korean aggression constituted a violation of the UNITED NATIONS CHARTER, as declared in a resolution of the Security Council. (The Soviet Union, which of course treated the North Korean invasion as "self-defense," chose to absent itself from that meeting of the Council and thereby lost the opportunity to veto the resolution.) Subsequently, in 1957, Senator John Bricker and other conservative congressmen who were opposed to American intervention in Korea (not because they had any sympathy for communist imperialism but because they were isolationists) attempted to remove such justifications of presidential use of troops by unsuccessfully proposing that the Constitution be amended to require affirmative action by Congress before a treaty obligation could be implemented. (See STATE OF WAR; BRICKER AMENDMENT.)

The phrase has occasionally been employed, although not officially, in other situations in which the United States has used its armed forces without a DECLARATION OF WAR or other explicit sanction by Congress, such as President JOHN F. KENNEDY's 1962 blockade of Cuba. A pejorative variation of it was sometimes employed by opponents of American intervention in VIETNAM, who contended that the United States should not act as an "international policeman" or "international gendarme." Although it would have been appropriate, it seems to have been used by no one to describe President JIMMY CARTER's unsuccessful attempt, in April 1980, to mount a military raid to free American hostages in Iran.

The characterization has never been officially or generally applied to a declared war.

JOSEPH W. BISHOP, JR.
(1986)

Bibliography

SEARS, KENNETH C. 1956 Bricker-Dirksen Amendment. *Hastings Law Journal* 8:1–17.

## *POLICE DEPARTMENT OF CHICAGO v. MOSLEY*
### 408 U.S. 92 (1972)

*Mosley* is the leading modern decision linking EQUAL PROTECTION doctrine with the FIRST AMENDMENT. Chicago adopted an ordinance prohibiting PICKETING within 150 feet of a school during school hours, but excepting peace-

ful labor picketing. Earl Mosley had been picketing on the public sidewalk adjoining a high school, carrying a sign protesting "black discrimination," and after the ordinance was adopted he sought declaratory and injunctive relief, arguing that the ordinance was unconstitutional. The Supreme Court unanimously agreed with him.

Justice THURGOOD MARSHALL, for the Court, concluded that the exemption of labor picketing violated the equal protection clause of the FOURTEENTH AMENDMENT. This conclusion followed the lead of Justice HUGO L. BLACK, concurring in COX V. LOUISIANA (1965). Yet Justice Marshall's opinion speaks chiefly to First Amendment values and primarily cites First Amendment decisions. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." As Chief Justice WARREN E. BURGER noted in a brief concurrence, so broad a statement is not literally true; the Court has upheld regulations of speech content in areas ranging from DEFAMATION to OBSCENITY. Yet *Mosley* properly stakes out a presumption in favor of "equality of status in the field of ideas"—a phrase borrowed from ALEXANDER MEIKLEJOHN.

The *Mosley* opinion makes two main points. First, regulations of message content are presumptively unconstitutional, requiring justification by reference to state interests of compelling importance. Second, "time, place, and manner" regulations that selectively exclude speakers from a PUBLIC FORUM must survive careful judicial scrutiny to ensure that the exclusion is the minimum necessary to further a significant government interest. Together, these statements declare a principle of major importance: the principle of equal liberty of expression.

KENNETH L. KARST
(1986)

Bibliography

KARST, KENNETH L. 1976 Equality as a Central Principle of the First Amendment. *University of Chicago Law Review* 43:20–68.

## POLICE INTERROGATION AND CONFESSIONS

In the police interrogation room, where, until the second third of the century, police practices were unscrutinized and virtually unregulated, constitutional ideals collide with the grim realities of law enforcement. It is not easy to talk about the defendant's right to silence and his RIGHT TO COUNSEL when the defendant has confessed to a heinous crime—for example, the rape and murder of a small child as in BREWER V. WILLIAMS (1977) or the kidnapping, robbery, and murder of a cab driver, by a shotgun blast to the back of the head, as in RHODE ISLAND V. INNIS (1980)—and the confession seems quite credible. Thus, for many years few matters have split the Supreme Court, troubled the legal profession, and agitated the public as much as the confession cases.

Not surprisingly, the most famous confession case of all, MIRANDA V. ARIZONA (1966), is regarded as the high-water mark of the WARREN COURT's "DUE PROCESS revolution." Nor is it surprising that the decision became the prime target of those who attributed an increase of crime to the softness of judges. *Miranda*, which finally applied the RIGHT AGAINST SELF-INCRIMINATION to the informal proceedings in the interrogation room, emerged only after a long struggle, and increasing dissatisfaction, with the test for admitting confessions that preceded it—the "voluntariness" test based on the "totality of circumstances." *Miranda* can be understood only in light of the Court's prior efforts to deal with the intractable confession problem.

Until well into the eighteenth century, doctrines concerning confessions did not affect the admissibility of extrajudicial narrative statements of guilt offered as EVIDENCE, but dealt only with the conditions under which immediate conviction followed a confession as a plea of guilty. It was not until *The King v. Warickshall* (1783) that an English court clearly expressed the notion that confessions might be unworthy of credit because of the circumstances under which they were obtained. In that case the judges declared: "A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected."

Because a separate rule against coerced confessions emerged in eighteenth-century English cases nearly a century after the right against self-incrimination had become established, JOHN H. WIGMORE, the great master of the law of evidence, concluded that the two rules had no connection. But Leonard W. Levy, the leading student of the origins of the right against self-incrimination, strongly disagrees. He maintains that "[t]he relationship between torture, *compulsory* self-incrimination, and *coerced* confessions was an historical fact as well as a physical and psychological one" and that "in the 16th and 17th centuries, the argument against the three, resulting in the rules that Wigmore said had no connection, overlapped" (Levy 1968, pp. 265, 288–289 n.102).

Levy points out that Baron Geoffrey Gilbert, in his *Law*

*of Evidence*, "written before 1726 though not published until thirty years later, stated that though the best evidence of guilt was a confession, 'this confession must be voluntary and without compulsion; for our Law in this differs from the Civil Law, that it will not force any Man to accuse himself; and in this we do certainly follow the Law of Nature, which commands every Man to endeavor his own Preservation . . .' " (Levy 1968, p. 327). Baron Gilbert's phrasing, "our Law . . . will not force any Man to accuse himself," Levy says, "expressed the traditional English formulation of the right against self-incrimination, or rather against *compulsory* self-incrimination. The element of compulsion or involuntariness was always an essential ingredient of the right and, before the right existed, of protests against incriminating interrogations" (ibid., pp. 327–328).

Although Levy insists that this was a historical blunder, both in the United States and in England the confession rules and the right against self-incrimination were divorced and, with the one notable exception of *Bram v. United States* (1897), went their separate ways—until the two rules were intertwined in MALLOY V. HOGAN (1964) and fused in the famous *Miranda* case (1966). Moreover, for most of its life the voluntariness test was essentially an alternative statement of the rule that a confession was entitled to credit so long as it was free of influence that made it untrustworthy or "probably untrue." Wigmore reflected the law prevailing at the time when in 1940 he pointed out that a confession was not inadmissible because of "any *breach of confidence*" or "any *illegality* in the method of obtaining it," or "because of any connection with the *privilege against self-incrimination.*"

In *Bram v. United States* (1897) the Supreme Court did rely explicitly on the self-incrimination clause of the Fifth Amendment in holding a confession inadmissible. But the Court soon abandoned the *Bram* approach, perhaps stung by the criticism of Wigmore and others that it had misread history, and until the mid-1960s *Bram* amounted only to an early excursion from the prevailing due process-voluntariness test.

The right against self-incrimination was not deemed applicable to the states until 1964, and by that time the Supreme Court had decided more than thirty state confession cases. Moreover, even if the Fifth Amendment right against self-incrimination had been deemed applicable to the states much earlier, the law pertaining to "coerced" or "involuntary" confessions still would have developed without it. For until *Miranda* (1966), the prevailing view was that the suspect in the police interrogation room was not being compelled to be a witness against himself within the meaning of the privilege; he was threatened neither with perjury for testifying falsely nor contempt for refusing to testify at all. Because the police have no legal authority to compel statements, there is no legal obligation to answer, ran the argument, to which a privilege can apply.

So long as police interrogators were not required to advise suspects of their rights nor to permit them to consult with lawyers who would do so, there could be little doubt that many a suspect would assume that the police had a legal right to an answer. Still worse, there could be little doubt that many a suspect would assume, or be led to believe, that there were *extralegal* sanctions for refusing to cooperate. Small wonder that commentators decried the legal reasoning that excluded the privilege against self-incrimination from the stationhouse for so many years as "casuistic," "a quibble," and a triumph of logic over life.

Wigmore long condemned the statement of the confession rule in terms of voluntariness for the reason that "the fundamental question for confessions is whether there is any danger that they may be untrue . . . and that there is nothing in the mere circumstance of compulsion to speak in general . . . which creates any risk of untruth." But only two years after the Supreme Court handed down its first FOURTEENTH AMENDMENT due process cases, BROWN V. MISSISSIPPI (1936), Charles McCormick defended the voluntariness terminology on the ground that it might reflect a recognition that the confession rule not only protects against the danger of untrustworthiness but also protects an interest closely akin to that protected by the right against compulsory self-incrimination. Three decades later, the *Miranda* Court would agree. McCormick also suggested that the entire course of decisions in the confessions field could best be understood as "an application to confessions both of a privilege against evidence illegally obtained . . . and of an overlapping rule of incompetency which excludes the confessions when untrustworthy" (1954, p. 157). In the advanced stages of the voluntariness test, the Court would again make plain its agreement with McCormick.

Thus, in *Spano v. New York* (1959) the Court, speaking through Chief Justice EARL WARREN, pointed out that the ban against involuntary confessions turns not only on their unreliability but also on the notion that "the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." And the following year, in *Blackburn v. Alabama* (1960), the Court, again speaking through Chief Justice Warren, recognized that "a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary."

The "untrustworthiness" rationale, the view that the

rules governing the admissibility of confessions were merely a system of safeguards against false confessions, could explain the exclusion of the confession in *Brown v. Mississippi* (1936), where the deputy sheriff who had presided over the beatings of the defendants conceded that one had been whipped, "but not too much for a Negro." And the untrustworthiness rationale was also adequate to explain the exclusion of confessions in the cases that immediately followed the *Brown* case such as CHAMBERS V. FLORIDA (1940), *Canty v. Alabama* (1940), *White v. Texas* (1940), and *Ward v. Texas* (1942), for they, too, involved actual or threatened physical violence.

As the crude practices of the early cases became outmoded and cases involving more subtle pressures began to appear, however, it became more difficult to assume that the resulting confessions were untrustworthy. In *Ashcraft v. Tennessee* (1944), for example, although the confession was obtained after some thirty-six hours of almost continuous interrogation, there was good reason to think that the defendant had indeed been involved in the murder. The man whom the defendant named as his wife's killer readily admitted his involvement and accused the defendant of hiring him to do the job. Moreover, after the interrogation had ceased and the defendant had been examined by his family physician, he made what the doctor described as an "entirely voluntary" confession, in the course of which he explained why he wanted his wife killed. Nevertheless, calling the extended questioning "inherently coercive," a 6–3 majority, speaking through Justice HUGO L. BLACK, held that Ashcraft's confession should not have been allowed into evidence. Under the circumstances, the *Ashcraft* case seemed to reflect less concern with the reliability of the confession than disapproval of police methods which appeared to the Court to be dangerous and subject to serious abuse.

Although he dissented in *Ashcraft*, Justice FELIX FRANKFURTER soon became the leading exponent of the "police misconduct" or "police methods" rationale for barring the use of confessions. According to this rationale, in order to condemn and deter abusive, offensive, or otherwise objectionable police interrogation methods, it was necessary to exclude confessions produced by such methods regardless of how relevant and credible they might be, a point underscored in ROGERS V. RICHMOND (1961). After more conventional methods had failed to produce any incriminating statements, a police chief pretended to order petitioner's ailing wife brought down to headquarters for questioning. Petitioner promptly confessed to the murder for which he was later convicted. The trial judge found that the police chief's pretense had "no tendency to produce a confession that was not in accord with the truth" and in his charge to the jury he indicated that the admissibility of the confession should turn on its probable reliability. But the Court, speaking through Justice Frankfurter, held that convictions based on involuntary confessions must fall

> not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law; that ours is an accusatorial and not an inquisitorial system. . . . Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. . . . The attention of the trial judge should have been focused, for purpose of the Federal Constitution, on the question whether the [police behavior] was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.

The "voluntariness" test seemed to be at once too wide and too narrow. In the sense of wanting to confess, or doing so in a completely spontaneous manner, as one might confess to rid one's soul of guilt, no confession reviewed by the Court under the "voluntariness" test had been voluntary. On the other hand, in the sense that the situation always presented a choice between two alternatives, all confessions examined by the Court had been voluntary.

As the voluntariness test evolved, it became increasingly clear that terms such as "voluntariness" and "coercion" were not being used as tools of analysis, but as mere conclusions. When a court concluded that the police had resorted to unacceptable interrogation techniques, it called the resulting confession "involuntary" and talked of "overbearing the will." When, on the other hand, a court concluded that the methods the police had employed were permissible, it called the resulting confession "voluntary" and talked of "self-determination." Moreover, such terms as "voluntariness," "coercion," and "overbearing the will" focused directly on neither of the two underlying reasons that led the courts to bar the use of confessions—the offensiveness of police interrogation methods or the risk that these methods had produced an untrue confession.

Another problem with the due process "totality of the circumstances"—voluntariness test was that it was amorphous, elusive, and largely unmanageable. Almost everything was relevant—for example, whether the suspect was advised of his rights; whether he was held incommunicado; the suspect's age, intelligence, education, and prior criminal record; the conditions and duration of his deten-

tion—but almost nothing was decisive. Except for direct physical coercion no single factor or combination of them guaranteed exclusion of a confession as involuntary. Because there were so many variables in the voluntariness equation that one determination seldom served as a useful precedent for another, the test offered police interrogators and trial courts little guidance. Trial courts were encouraged to indulge their subjective preferences, and appellate courts were discouraged from active review.

In the thirty years between *Brown* (1936) and *Miranda* (1966) the Court had reviewed about one state confession case per year and two-thirds of these had been death penalty cases. Indeed, the Court's workload had been so great that it had even denied a hearing in most death penalty cases. Not surprisingly, Justice Black remarked in the course of the oral argument in *Miranda:* "If you are going to determine [the admissibility of the confession] each time on the circumstances, [if] this Court will take them one by one, [it] is more than we are capable of doing."

The Supreme Court's dissatisfaction with the elusive "voluntariness" test and its quest for a more concrete and manageable standard led to the decisions in MASSIAH V. UNITED STATES (1964) and ESCOBEDO V. ILLINOIS (1964) and culminated in the 1966 *Miranda* decision.

*Massiah* grew out of the following facts: After he had been indicted for various federal narcotics violations and retained a lawyer, and while he was out on bail, Massiah was invited by his codefendant, Colson, to discuss the pending case in Colson's car. Massiah assumed that he was talking to a partner in crime, but Colson had become a secret government agent. A radio transmitter had been concealed in Colson's car to enable a nearby federal agent to overhear the Massiah-Colson conversation. As expected, Massiah made incriminating statements.

Despite the fact that Massiah was neither in "custody" nor subjected to "police interrogation," as that term is normally used, the Supreme Court held that his damaging admissions should have been excluded from evidence. The decisive feature of the case was that after adversary criminal proceedings had been initiated against him—and Massiah's RIGHT TO COUNSEL had "attached"—government agents had deliberately elicited statements from him in the absence of counsel.

*Massiah* was soon overshadowed by *Escobedo*, decided a short five weeks later. When Danny Escobedo had been arrested for murder he had repeatedly but unsuccessfully asked to speak to his lawyer. Instead, the police induced Escobedo to implicate himself in the murder. Although Escobedo had incriminated himself before he had been indicted or adversary criminal proceedings had otherwise commenced against him, a 5–4 majority held that under the circumstances "it would exalt form over substance to make the right to counsel . . . depend on whether at the time of the interrogation, the authorities had secured a formal indictment." At the time the police had questioned him, Escobedo "had become the accused and the purpose of the investigation was to "get him' to confess his guilt despite his constitutional right not to do so."

Until *Miranda* moved the case off center-stage two years later, the meaning and scope of *Escobedo* was a matter of widespread disagreement. In large part this was due to the accordion-like quality of Justice ARTHUR J. GOLDBERG's majority opinion. At some places the opinion suggested that a suspect's right to counsel was triggered once the investigation ceased to be a general inquiry into an unsolved crime and began to "focus" on him, regardless of whether he was in "custody" or asked for a lawyer. Elsewhere, however, the opinion seemed to limit the holding to its special facts (Escobedo had specifically requested and been denied an opportunity to seek his lawyer's advice, the police had failed to warn him of his right to remain silent, and he was in police custody).

The *Escobedo* dissenters read the majority opinion broadly: "The right to counsel now not only entitles the accused the counsel's advice and aid in preparing for trial but stands as an impenetrable barrier to any interrogation once the accused has become suspect. From that very moment apparently his right to counsel attaches." The dissenters expressed a preference for a self-incrimination approach, rather than a right to counsel approach. The right against self-incrimination, after all, proscribed only compelled statements. "It is incongruous to assume," they argued, "that the provision for counsel in the Sixth Amendment was meant to amend or supersede the self-incrimination provision of the Fifth Amendment, which is now applicable to the States." Two years later, in *Miranda*, the Court would focus on the Fifth Amendment, but it would define "compulsion" within the meaning of the privilege in a way that displeased the four *Escobedo* dissenters (all of whom also dissented in *Miranda*).

Dissenting in *Ashcraft* in 1944, Justice ROBERT H. JACKSON agreed that custody and questioning of a suspect for thirty-six hours is "inherently coercive," but quickly added: "And so is custody and examination for one hour. Arrest itself is inherently coercive and so is detention. . . . But does the Constitution prohibit use of all confessions made after arrest because questioning, while one is deprived of freedom, is "inherently coercive'?" Both Jackson and Justice Black, who wrote the majority opinion in *Ashcraft*, knew that in 1944 the Court was not ready for an affirmative answer to Jackson's question. But by 1966 the Court had grown ready.

Ernesto Miranda had been arrested for rape and kidnapping, taken to a police station, and placed in an "interrogation room," where he was questioned about the crimes. Two hours later the police emerged from the room

with a signed confession. In the 1940s or 1950s Miranda's confession unquestionably would have been admissible under the voluntariness test; his questioning had been mild compared to the objectionable police methods that had rendered a resulting confession involuntary in past cases.

The Supreme Court, however, had become increasingly dissatisfied with the voluntariness test. Miranda's interrogators admitted that neither before nor during the questioning had they advised him of his right to remain silent or his right to consult with an attorney before answering questions or his right to have an attorney present during the interrogation. These failures were to prove fatal for the prosecution.

In *Miranda* a 5–4 majority, speaking through Chief Justice Warren, concluded at last that "all the principles embodied in the privilege [against self-incrimination] apply to informal compulsion exerted by law-enforcement officers during in-custody questioning." Observed the Court:

> An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the persuasions [described in various interrogation manuals, from which the Court quoted at length] cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery. . . . Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

The adequate protective devices necessary to neutralize the compulsion inherent in the interrogation environment are the now familiar "*Miranda* warnings." Although *Miranda* is grounded primarily in the right against self-incrimination, it also has a right to counsel component designed to protect and to reinforce the right to remain silent. Thus, prior to any questioning a person taken into custody or otherwise deprived of his freedom of action in any significant way must not only be warned that he has a right to remain silent and that "anything said can and will be used against [him]," but must also be told of his right to counsel, either retained or appointed. "[T]he need for counsel to protect the Fifth Amendment privilege," stated the Court, "comprehends not merely a right to consult with counsel prior to any questioning but also to have counsel present during any questioning if the defendant so desires."

A suspect, of course, may waive his rights, provided he does so voluntarily, knowingly, and intelligently. But no valid WAIVER OF CONSTITUTIONAL RIGHTS can be recognized unless specifically made after the warnings have been given. Moreover, "[t]he mere fact that [a person] may have answered some questions or volunteered some statements . . . does not deprive him of the right to refrain from answering any further inquiries until he had consulted with an attorney and thereafter consents to be questioned."

Although a great hue and cry greeted the case, *Miranda* may fairly be viewed as a compromise between the old voluntariness test (a standard so elusive and unmanageable that its safeguards were largely illusory) and extreme proposals (based on an expansive reading of *Escobedo*) that threatened to "kill" confessions.

*Miranda* allows the police to conduct general on-the-scene questioning even though the person arrested is both uninformed and unaware of his rights. It allows the police to question a person in his home or office, provided they do not restrict the person's freedom to terminate the meeting. (Indeed, the opinion seems to recommend that the police question a suspect in his home or place of business.) Moreover, "custody" alone does not call for the *Miranda* warnings. The Court might have held that the inherent pressures and anxieties produced by arrest and detention are substantial enough to require neutralizing warnings. But it did not. Thus, so long as the police do not question one who has been brought to the station house, *Miranda* leaves them free to hear and act upon volunteered statements, even though the volunteer neither knows nor is advised of his rights. (This point was recognized by dissenting Justice BYRON R. WHITE in *Miranda.*)

Surprisingly, *Miranda* does not strip police interrogation of its characteristic secrecy. To the extent that any lawyer worth his salt will tell a suspect to remain silent it is no less clear that any officer worth his salt will be sorely tempted to get the suspect to do just the opposite. But no stenographic transcript (let alone an electronic recording) of the waiver transaction, or the questioning that follows a waiver, need be made; no disinterested observer (let alone a judicial officer) need be present. There is language in *Miranda* suggesting that the police must make an objective record of the waiver transaction but this language has been largely overlooked or disregarded by the lower courts. And nowhere in the *Miranda* opinion does the court explicitly require the police to make either tape or verbatim stenographic recordings of the crucial events.

On the eve of *Miranda*, there were doubts that law enforcement could survive if the Court were to project defense counsel into the police station. But the *Miranda* Court did so only in a quite limited way. It never took the final step (and, as a practical matter, the most significant one) of requiring that the suspect first consult with a lawyer, or actually have a lawyer present, in order for his waiver of constitutional rights to be considered valid.

Whether suspects are continuing to confess because

they do not fully grasp the meaning of the *Miranda* warnings or because the police are mumbling, hedging, or undermining the warnings, or whether the promptings of conscience and the desire "to get it over with" are indeed overriding the impact of the warnings, or whether admissions of guilt are quid pro quos for reduced charges or lighter sentences, it is plain that in-custody suspects are continuing to confess with great frequency. This result would hardly have ensued if *Miranda* had fully projected counsel into the interrogation process, requiring the advice or presence of counsel before a suspect could waive his rights.

Because *Miranda* was the centerpiece of the Warren Court's revolution in CRIMINAL PROCEDURE, and one of the leading issues of the 1968 presidential campaign, almost everyone expected the BURGER COURT to treat *Miranda* unkindly. And it did, but only for a decade.

The first blow was struck in HARRIS V. NEW YORK (1971), which held that statements preceded by defective *Miranda* warnings, and thus inadmissible to establish the prosecution's initial case, could nevertheless be used to impeach the defendant's credibility if he took the stand. The Court noted, but seemed untroubled, that some comments in the landmark opinion seemed to bar the use of statements obtained in violation of *Miranda* for any purpose.

A second impeachment case, *Oregon v. Hass* (1975), seemed to inflict a deeper wound. In *Hass*, the police advised the suspect of his rights and he asserted them. Nevertheless, the police refused to honor the suspect's request for a lawyer and continued to question him. That such a flagrant violation of *Miranda* should produce evidence that may be used for impeachment purposes is especially troublesome; under these circumstances, unlike those in *Harris*, it is fair to assume that no hope of obtaining evidence usable for the government's case-in-chief operates to induce the police to comply with *Miranda*. *Hass*, then, was a more harmful blow to *Miranda* that was *Harris*.

Even more disturbing than the impeachment cases is their recent extension to permit the use of a defendant's prior silence to impeach his credibility if he chooses to testify at his trial. In JENKINS V. ANDERSON (1980) the Court held that a murder defendant's testimony that he had acted in self-defense could be impeached by showing that he did not go to the authorities and report his involvement in the stabbing. In *Fletcher v. Weir* (1982) the Court held that even a defendant's post-arrest silence—so long as he was not given and need not have been given the *Miranda* warnings—could be used to impeach him if he decided to testify at trial.

Still other blows were struck by *Michigan v. Mosley* (1975) and *Oregon v. Mathiason* (1977). Although language in *Miranda* can be read as establishing a per se rule against any further questioning of one who had asserted his right to silence, *Mosley* held that under certain circumstances, which the case left unclear, if the police cease questioning on the spot, they may try again and succeed at a later interrogation session. *Mathiason*, a formalistic, crabbed reading of *Miranda*, demonstrates that even police station interrogation is not necessarily "custodial." (The suspect had agreed to meet a police officer in the state patrol office and had come to the office alone.)

For supporters of *Miranda*, the most ominous note of all was struck by Justice WILLIAM H. REHNQUIST, speaking for the Court in *Michigan v. Tucker* (1974). The *Tucker* Court viewed the *Miranda* warnings as "not themselves rights protected by the Constitution" but only "prophylactic standards" designed to "safeguard" or to "provide practical reinforcement" for the right against self-incrimination. And it seemed to equate "compulsion" within the meaning of that right with "coercion" or "involuntariness" under the pre-*Miranda* due process test. It seemed to miss the point that much greater pressures were necessary to render a confession "involuntary" under the old test than are needed to make a statement "compelled" under the new. That was one of the principal reasons the old test was abandoned in favor of *Miranda*.

A lumping together of self-incrimination "compulsion" and pre-*Miranda* "involuntariness," which appears to be what the Court did in *Tucker*, seemed to approach a rejection of the central premises of *Miranda*. Moreover, the Supreme Court has no supervisory power over state criminal justice. By stripping *Miranda* of its most apparent constitutional basis without explaining what other bases for it there might be, the Court in the *Tucker* opinion seemed to be preparing the way for the eventual overruling of *Miranda*.

A decade later, in NEW YORK V. QUARLES (1984) and in OREGON V. ELSTAD (1985), a majority of the Court, relying heavily on language in the *Tucker* opinion, again drew a distinction between statements that are actually "coerced" or "compelled" and those that are obtained merely in violation of *Miranda*'s "procedural safeguards" or "prophylactic rules." *Quarles* admitted a statement a handcuffed rape suspect had made when questioned by police about the whereabouts of a gun he had earlier been reported to be carrying. The Court, speaking through Justice Rehnquist, "conclude[d] that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting [the] privilege against self-incrimination." *Elstad* held that the failure to give *Miranda* warnings to a suspect who made an incriminating statement when subjected to custodial interrogation in his own home did not bar the use of a subsequent station house confession by the suspect when the second confession was immediately preceded by *Miranda*

warnings. The court, speaking through Justice SANDRA DAY O'CONNOR, rejected the argument that a *Miranda* violation "necessarily breeds the same consequences as police infringement of a constitutional right, so that evidence uncovered following an unwarned statement must be suppressed as "fruit of the poisonous tree." Although *Quarles* and *Elstad* can be read very narrowly, and *Tucker*, too, can be limited to its special facts, the Court's language in these cases—language that "deconstitutionalizes" *Miranda*—may prove to be far more significant than the cases' specific holdings.

In light of the *Tucker* majority's undermining of the basis for *Miranda* and against the background of such cases as *Harris*, *Hass*, and *Mathiason*, a 1980 confession case, *Rhode Island v. Innis*, posed grave dangers for *Miranda*. The defendant had been convicted of heinous crimes: kidnapping, robbery, and murder. He had made incriminating statements while being driven to a nearby police station, only a few minutes after being placed in the police vehicle. Any interrogation that might have occurred in the vehicle was brief and mild—much more so than the direct, persistent police station interrogation in *Miranda* and its companion cases. Two police officers conversing with one another in the front of the car, but in Innis's presence, had expressed concern that because the murder occurred in the vicinity of a school for handicapped children, one of the children might find the missing shotgun and injure himself. At this point, Innis had interrupted the officers and offered to lead them where the shotgun was hidden.

The Court might have taken an approach suggested by earlier dissents and limited *Miranda* to custodial station house interrogation or its equivalent (for example, a five-hour trip in a police vehicle). It did not do so. The Court might have taken a mechanical approach to interrogation and limited it, as some lower courts had, to situations where the police directly address a suspect. Again, it did not do so. It might have limited interrogation to situations where the record establishes (as it did not in *Innis*) that the police intended to elicit an incriminating response, an obviously difficult test to administer. It did not do this either.

Instead, the Court, speaking through Justice POTTER STEWART (one of the *Miranda* dissenters), held that "*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." The term "interrogation" includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit as incriminating response from the suspect." Although the *Innis* case involved police "speech," the Court's definition embraces police tactics that do not. Thus, the Court seems to have repudiated the position taken by a number of lower courts that confronting a suspect with physical evidence or with an accomplice who has already confessed is not interrogation because it does entail verbal conduct on the part of the police.

One may quarrel, as the three dissenters did, with the Court's application of its definition of "interrogation" to the *Innis* facts (the Court concluded that the defendant had not been interrogated). But *Innis* ia a harder case than most because there was "a basis for concluding that the officer's remarks were for some purpose *other* than that of obtaining evidence from the suspect. An objective listener could plausibly conclude that the policeman's remarks . . . were made solely to express their genuine concern about the danger posed by the hidden shotgun" and thus not view their conversation "as a demand for information" (White 1980, pp. 1234–1235).

In any event, considering the various ways in which the *Innis* Court might have given *Miranda* a grudging interpretation, its generous definition of "interrogation" seems much more significant than its questionable application of the definition to the particular facts of the case. In *Innis* the process of qualifying, limiting, and shrinking *Miranda* came to a halt. Indeed, it seems fair to say that in *Miranda*'s hour of peril the *Innis* Court rose to its defense.

If *Innis* encouraged *Miranda*'s defenders, EDWARDS V. ARIZONA (1981) gladdened them even more. For *Edwards* was the first clear-cut victory for *Miranda* in the Burger Court. Sharply distinguishing the *Mosley* case, which had dealt with a suspect's assertion of his right to remain silent, the *Edwards* Court, speaking through Justice White (another of the *Miranda* dissenters), held that when a suspect invokes his right to counsel the police cannot try again. Under these circumstances, a valid waiver of the right to counsel cannot be established by showing "only that [the suspect] responded further to police-initiated custodial interrogation," even though he was again advised of his rights at a second interrogation session. He cannot be questioned anew "until counsel has been made available to him, unless [he] himself initiates further communication, exchanges or conversation with the police." Thus, *Edwards* reinvigorates *Miranda* in an important respect. (But a more recent case, *Oregon v. Bradshaw* (1983), interprets "initiation of further communication" so broadly that it seems to sap *Edwards* of much of its vitality.)

Although *Miranda* maintained the momentum generated by *Escobedo*, it represented a significantly different approach to the confession problem. Although the *Miranda* Court understandably tried to preserve some continuity with the loose, groping *Escobedo* opinion, it has become increasingly clear that, by shifting from a right to counsel base to a self-incrimination base, *Miranda* actually marked a fresh start in describing the circumstances under which Fifth and Sixth Amendment protections attach. *Escobedo* assigned primary significance to the amount of

guilt available to the police at the time of questioning; the opinion therefore contains much talk about "focal point" and the "accusatory stage." But *Miranda* attaches primary significance to the conditions surrounding or inherent in the interrogation setting; thus the opinion contains much discussion of the "interrogation environment" or the "police-dominated" atmosphere that "carries its own badge of intimidation."

If the requisite inherent pressures exist, *Miranda* applies whether or not the individual being questioned is a "prime suspect" or has become "the accused." On the other hand, if these pressures are not operating, an individual is not entitled to the *Miranda* warnings—no matter how sharply the police have focused on him or how much they consider him the "prime suspect" or "the accused." In short, *Miranda* did not enlarge *Escobedo* so much as displace it.

The same, however, cannot be said for *Massiah*. Although *Miranda* has dominated the confessions scene ever since it was handed down, *Massiah* has emerged as the other major Warren Court confession doctrine. As strengthened by two Burger Court decisions, *Brewer v. William* (1977) (often called "the Christian burial speech" case) and *United States v. Henry* (1980), the *Massiah* doctrine holds that once "adversary" or "judicial" proceedings have commenced against an individual (by way of INFORMATION, or initial appearance before a magistrate), deliberate government efforts to elicit incriminating statements from him, whether done openly by uniformed police officers (as in *Williams*) or surreptitiously by secret government agents (as in *Massiah* and *Henry*) violate the individual's right to counsel.

*Williams* revivified *Massiah*. Indeed, one might even say that *Williams* disinterred it. For until the decision in *Williams* there was good reason to think that *Massiah* had only been a steppingstone to *Escobedo* and that both cases had been largely displaced by *Miranda*.

But *Massiah* is alive and well. And the policies underlying the *Massiah* doctrine are quite distinct from those underlying *Miranda*. The *Massiah* doctrine represents a pure right to counsel approach. It comes into play regardless of whether a person is in custody or is being subjected to interrogation in the *Miranda* sense. There need not be any compelling influences at work, inherent, informal, or otherwise.

The most recent *Massiah* case, *United States v. Henry* (1980), applied *Massiah* to a situation where the Federal Bureau of Investigation (FBI) had instructed its secret agent, ostensibly a fellow prisoner, not to question the defendant about the crime and there was no showing that he had. Nevertheless, the defendant's incriminating statements were held inadmissible. It sufficed that the government had "intentionally create[d] a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel." The FBI created such a situation when it instructed its secret agent to be alert to any statements made by the defendant, who was housed in the same cellblock. Even if the agent's claim were accepted that he did not intend to take affirmative steps to obtain incriminating statements, the agent "must have known that such propinquity likely would lead to that result." *Henry* not only reaffirmed the *Massiah* doctrine but significantly expanded it. Thus, the *Massiah* doctrine has emerged as a much more potent force than it ever had been during the Warren Court era.

The Burger Court's generous reading of *Miranda* in *Innis* and *Edwards* and its even more generous reading of *Massiah* in the *Henry* case have reaffirmed the Court's commitment to control police efforts to obtain confessions by constitutional rules that transcend "untrustworthiness' and "voluntariness."

Regardless of its shortcomings and the hopes it never fulfilled (or the fears about the case that proved unfounded), *Miranda* was an understandable and long-overdue effort—and the Court's most ambitious effort ever—to solve the police interrogation-confession problem. At the very least it formally recognized an interrogated suspect's self-incrimination privilege, and a right to counsel for rich and poor alike designed to protect and effectuate that privilege; generated a much greater general awareness of procedural rights; and emphatically reminded the police that they neither create the rules of interrogation nor act free of JUDICIAL REVIEW.

*Miranda* was an attempt to do in the confessions area what the Warren Court had done elsewhere—take the nation's ideals down from the walls, where they had been kept framed to be pointed at with pride on ceremonial occasions, and live up to them. The degree to which *Miranda* actually succeeded is debatable, but the symbolic quality of the decision extends far beyond its actual impact upon police interrogation methods.

YALE KAMISAR
(1986)

Bibliography

BAKER, LIVA 1983 *Miranda: Crime, Law and Politics.* New York: Atheneum.

BERGER, MARK 1980 *Taking the Fifth: The Supreme Court and the Privilege against Self-Incrimination.* Lexington, Mass.: Lexington Books.

GRAHAM, FRED 1970 *The Self-Inflicted Wound.* New York: Macmillan.

KAMISAR, YALE 1980 *Police Interrogation and Confessions: Essays in Law and Policy.* Ann Arbor: University of Michigan Press.

LEVY, LEONARD W. 1968 *Origins of the Fifth Amendment.* New York: Oxford University Press.

McCormick, Charles T. 1954 *Evidence.* St. Paul, Minn. West Publishing Co.

Stephens, Otis 1973 *The Supreme Court and Confessions of Guilt.* Knoxville: University of Tennessee Press.

White, Welsh S. 1981 Interrogation without Questions. *Michigan Law Review* 78:1209–1251.

Wigmore, John Henry 1940 *Evidence,* 3rd ed. Boston: Little, Brown.

## POLICE INTERROGATION AND CONFESSIONS
(Update 1)

The government must comply with three constitutional requirements to use a confession against a defendant in a criminal case: a voluntariness requirement, a RIGHT TO COUNSEL requirement, and a warning requirement.

A court will refuse to admit into evidence a confession that was not voluntarily made by the defendant for two reasons. First, an involuntary confession may not be reliable. Second, the DUE PROCESS clauses of the Fifth Amendment and FOURTEENTH AMENDMENT and the Fifth Amendment's RIGHT AGAINST SELF-INCRIMINATION prevent the government from using unconscionable methods to induce a person to confess to criminal activity.

A confession is not "involuntary" unless the police obtained the confession through means that were unfair and coercive. Thus, if the police use physical force, or the threat of physical force, against the defendant or against the defendant's family or friends in order to make a defendant confess to a crime, the defendant's confession is involuntary. The police may use a confession that they gained by lying to, or tricking, the defendant so long as the lies or tricks were not both unfair and coercive. A judicial finding of coercive police activity is a prerequisite to finding that a confession should be excluded from evidence under the voluntariness test. In *Colorado v. Connelly* (1986) the Supreme Court ruled that the government could use a confession from a man who, according to psychiatric testimony offered at trial, suffered from a psychosis that reduced his ability to invoke his right to remain silent when he was asked a question by police officers. The Supreme Court held that the defendant's statements were voluntary because the police had not used any unfair and coercive tactics to obtain his statement.

The Sixth Amendment guarantees each defendant a right to counsel. It does not restrict government questioning of a suspect prior to the time that criminal proceedings have been initiated against that suspect. However, the right to counsel is violated when the government actively elicits information from a defendant outside the presence of his attorney after the beginning of criminal proceedings.

The Sixth Amendment does not protect a defendant who voluntarily gives information to a government employee who did not actively elicit that information but only listened to the defendant's statement. Thus, after a defendant has been charged with a crime and placed in a jail cell, the police may place a government informant disguised as a prisoner in the cell with the defendant. If the informant asks the defendant questions, the defendant's answers cannot be used against the defendant at trial. If the informant does not actively elicit information from the defendant, and the defendant makes incriminating statements to the informant, the defendant's incriminating statements may be used against him at his trial.

In *Patterson v. Illinois* (1988) the Supreme Court ruled that a defendant who agreed to waive his Sixth Amendment right to counsel after he was given the *Miranda* warnings had made a knowing and intelligent waiver of his right to counsel and that his subsequent confession could be used against him. All questions whether a defendant waived his constitutional rights prior to confessing to a crime are to be determined by reference to the MIRANDA RULES, which comprise the third limitation on confessions.

In MIRANDA V. ARIZONA (1966) the Supreme Court held that the police may not interrogate a person who is in police custody (or who has otherwise been deprived of his freedom by the police) unless the police clearly inform the person (1) that he has a right to remain silent; (2) that anything he says may be used against him in court; (3) that he has the right to an attorney and to have an attorney present during any questioning; and (4) that an attorney will be appointed for him if he is INDIGENT.

What happens after the suspect is given the *Miranda* warnings? If, following the *Miranda* warnings, the defendant "knowingly" and "intelligently" waives his right to remain silent and his right to an attorney, the police may interrogate him, and his subsequent confession may be used against him. If the person in custody indicates (either before or during the interrogation) that he does not want to talk to the police, the police must stop questioning the person. However, if the defendant has not requested an attorney, the police may at a later time give the defendant the *Miranda* warnings again and ask whether the defendant will waive his rights and talk with them. If the defendant says either before or during questioning that he wants to meet with an attorney, the police may not question the defendant at any later time, or ask the defendant at a later time to waive his rights, until the defendant has met with an attorney.

In the 1980s the Supreme Court ruled that a defendant's WAIVER OF CONSTITUTIONAL RIGHTS after the *Miranda* warnings would be effective unless the police had used unfair coercive methods to secure his waiver. In *Colorado v. Spring* (1987) the Court held that a defendant who had

waived his rights after receiving the Miranda warnings did not have a right to be informed as to the nature of the charges that might be brought against him or the nature of the crime that was being investigated. In *Moran v. Burbine* (1986) the Court held that a defendant made a "knowing and intelligent" waiver of his rights following *Miranda* warnings, so that his statements could be used against him at trial, even though the police who gave him the warnings failed to tell him that an attorney had attempted to contact him.

The police are not required to use any specific set of words to inform the defendant of his rights so long as the statements made by the police to the defendant encompass the substance of the *Miranda* warnings. For example, in *Duckworth v. Eagan* (1989) the police gave the defendant the *Miranda* warnings and then added, "We have no way of giving a lawyer, but one will be appointed for you, if you wish, if and when you go to court." The Supreme Court found that the statement did not undercut the substance of the *Miranda* warnings because it did not induce the defendant to waive his rights to forgo the presence of counsel at questioning. Therefore, the defendant's subsequent waiver of his rights was a valid waiver; his confession could be used against him.

In the 1980s confession cases, the Supreme Court was lenient in admitting into evidence incriminating statements made by defendants so long as the police did not engage in any coercive activity. However, the Court continues to protect the integrity of the adversary process by requiring police to honor a defendant's request for an attorney and to avoid any attempt at gaining information from a defendant outside of the presence of his counsel after judicial proceedings have been instituted against the defendant.

JOHN E. NOWAK
(1992)

Bibliography

KAMIZAR, YALE; LAFAVE, WAYNE R.; and ISRAEL, JEROLD H. 1990 *Modern Criminal Procedure: Cases, Comments, and Questions*, 7th ed. St. Paul, Minn.: West Publishing Co.

LAFAVE, WAYNE R. and ISRAEL, JEROLD H. 1985 *Criminal Procedure*. St. Paul, Minn.: West Publishing Co.

## POLICE INTERROGATION AND CONFESSIONS (Update 2)

Three constitutional law DOCTRINES may make a confession of a crime inadmissible in court. First, it may violate DUE PROCESS OF LAW for the prosecution to use a defendant's involuntary confession against him. In determining whether a confession is involuntary, a court ordinarily considers the totality of the circumstances, including the environment and techniques of police interrogation and the interrogee's special characteristics of strength or weakness. A court may also consider the need for interrogation in the particular case. If the suspect refuses to speak or demands to see a lawyer, the police need not stop the interrogation. Police persistence will be a relevant point against admissibility, but not necessarily a determinative one. The inherent vagueness of the involuntariness doctrine has made it hard for courts to be consistent. The vagueness of the involuntariness rule has also made it possible for courts to hold confessions admissible even though obtained by significant police pressure.

Second, admission of an incriminating statement into evidence may also violate the Sixth Amendment RIGHT TO COUNSEL if the prosecution uses a statement that the police or their agents have deliberately elicited from a suspect, after the onset of adversary judicial proceedings, without first obtaining a valid waiver of the right to counsel. This doctrine affords suspects no protection in the vast majority of cases since police interrogation ordinarily occurs before any judicial proceeding has taken place.

The third relevant doctrine is found in the MIRANDA RULES, which were developed to protect the Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION. These rules make inadmissible any incriminating statements obtained by police interrogation of a person in custody unless the police have first given a proper *Miranda* warning and obtained a valid waiver of both the right against self-incrimination and the right to counsel. If the suspect asserts the right against self-incrimination, the police must disengage from the interrogation. However, the police may later reengage the suspect for the purpose of soliciting a waiver. If the suspect asserts the right to counsel, the police must also disengage. However, the police may not later solicit a waiver unless the suspect has first initiated some case-related communication with the police. *Miranda* is thus more protective of the suspect than the involuntariness rule, which does not require the police to disengage or take no for an answer.

Must the police disengage if the suspect makes an ambiguous reference to counsel (e.g., "Maybe I should talk to a lawyer.")? In *Davis v. United States* (1994), the Supreme Court unanimously held that disengagement was not required. Five justices additionally held that the police were under no obligation to clarify the ambiguity and could immediately proceed with the interrogation. This holding continues the long-standing denigration of *Miranda*, weakens its protectiveness, and thus throws more cases into the uncertain coverage of the involuntariness rule.

LAWRENCE HERMAN
(2000)

Bibliography

HERMAN, LAWRENCE 1987 The Supreme Court, The Attorney General, and the Good Old Days of Police Interrogation. *Ohio State Law Journal* 48:733–755.

——— 1992 The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Parts I and II). *Ohio State Law Journal* 53:101–209, 497–553.

LEO, RICHARD A. and THOMAS, GEORGE C., III 1998 *The Miranda Debate: Law, Justice, and Policing.* Boston: Northeastern University Press.

## POLICE POWER

The police power is the general power of a government to legislate for the comfort, safety, health, morals, or welfare of the citizenry or the prosperity and good order of the community.

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Inalienable Police Power; National Police Power; Reserved Police Power; State Police Power.*)

## POLICE PURSUITS AND CONSTITUTIONAL RIGHTS

In *County of Sacramento v. Lewis* (1998), the Supreme Court sent an unfortunate message to innocent citizens trapped in the midst of vehicular police pursuits: they lack the constitutional protections afforded those injured by the unrestricted use of firearms by the police.

Although no single government agency maintains an exhaustive accounting of all pursuits in a given year, from 1980 to 1996, the National Highway Traffic Safety Administration reported 5,306 vehicular-pursuit deaths in the United States. Despite the staggering frequency of pursuits ending in tragedies, the Supreme Court declined to consider the police vehicle as a deadly weapon for which officers should train with the same attention as that afforded the use of firearms.

In *Tennessee v. Garner* (1985), the Supreme Court curtailed the unrestricted use of firearms against suspected criminals by stating: "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape."

The U.S. Court of Appeals for the Ninth Circuit relied upon *Tennessee v. Garner* and reversed a lower court's grant of summary judgment in favor of a police officer who engaged in a vehicular pursuit of two unarmed youths on a motorcycle who posed no threat of imminent harm to human life. The pursuit ended in the death of the minor passenger, Philip Lewis. In a lawsuit filed against the county and the pursuing officer, James Everet Smith, Lewis's parents asserted that the chase violated their son's FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS rights.

In reversing the Ninth Circuit, the Supreme Court ruled that rather than deliberate indifference to their son's constitutional rights, the Lewis's were required to establish that the pursuing officer's conduct was so egregious and outrageous that it "shocks the conscience." What is shocking is the Supreme Court's failure to recognize an officer's fundamental duty to weigh the risks of a vehicular pursuit against the need for immediate apprehension. If that analysis is constitutionally required when an officer reaches into his or her holster, then it must also extend when that officer decides to launch a two-ton vehicle through a community.

LYNNE A. DUNN
(2000)

Bibliography

ALPERT, GEOFFREY P. 1997 The Constitutional Implications of High Speed Police Pursuit Under A Substantive Due Process Analysis: Homeward Through The Haze. *University of Memphis Law Review* 27:599–662.

ALPERT, GEOFFREY P. and FRIDELL, LORIE A. 1992 *Police Vehicles and Firearms: Instruments of Deadly Force.* Prospect Heights, Ill.: Waverly Press.

FALCONE, DAVID 1992 *Police Pursuit in Pursuit of Policy: The Pursuit Issue, Legal and Literature Review and An Empirical Study.* Normal, Ill.: Illinois State University Press.

## POLITICAL ACTION COMMITTEES

For political action committees (PACs) and for all other contributors to campaigns for public office, the modern constitutional era began in 1976 with the Supreme Court's decision in BUCKLEY V. VALEO. In sorting out the constitutionality of the many parts of the FEDERAL ELECTION CAMPAIGN ACT (FECA) of 1971 and 1974, the Court reaffirmed the protections of the FIRST AMENDMENT'S FREEDOM OF ASSEMBLY AND ASSOCIATION for PACs, citing a long line of precedents that included NAACP V. ALABAMA (1958). The Court further held all campaign contributions and expenditures to be the expression of political views and thus protected by the First Amendment.

The protections of the First Amendment notwithstanding, the Court permitted much of the congressional regulation of PACs in the FECA to stand as a legitimate exercise of Congress's right to prevent "corruption or the appearance of corruption." All PAC contributions are lim-

ited to $5,000 per candidate per election. Moreover, in *California Medical Association v. FEC* (1981), Congress was within its constitutional powers in forbidding them to accept more than $5,000 per year from any group or individual. But because the Court in *Buckley* extended greater protections to campaign spending than to campaign contributions, PACs are free to pursue unregulated independent spending in campaigns—spending done, that is, without the cooperation or knowledge of the candidate being aided.

For a subset of PACs, those with sponsoring parent organizations, the burden of regulation is heavier. If a parent organization is a corporation or labor union, it is (and has long been) prohibited under federal law (and the laws of some states) from making direct political expenditures. The PAC, then, must be a "separate, segregated fund" that raises its own money for its political spending. The parent organization, however, is free under federal law to pay the overhead costs of the PAC and to direct its decisions. PACs with parent organizations are further restricted by law in their fund-raising: PACSs of membership organizations may solicit only their members; with a few rarely used exceptions, union PACs may solicit only their members; and corporate PACs may solicit only stockholders and nonunion employees. These limits were upheld in *FEC v. National Right to Work Committee* (1982).

Even though the major constitutional precedents in this area have arisen largely in cases under the FECA, they apply to state legislation as well—with one exception. In *Citizens Against Rent Control v. Berkeley* (1981) the Court ruled that those states with initiative and referendum elections are less free to limit PAC contributions in those elections. Because no potential officeholders receive campaign funds during such elections, there is no possibility of the campaign contributions eventually corrupting public officials.

By 1988 there were 4,268 PACs registered under federal law as against 608 in 1974; their contributions to congressional candidates had jumped from $12.5 million in 1974 to $148.1 million in 1988. That growth has given rise to proposals for new restrictions, proposals that have raised new constitutional questions. President GEORGE BUSH in 1989 proposed that PACs with parent organizations be banned. No details were forthcoming, but certainly an outright ban would raise serious constitutional issues, more than, say, a change in the law to prohibit parent organizations from paying PAC overhead costs. Other common proposals would cut the limit on PAC contributions to candidates from $5,000 to $3,500 or even lower. One must determine, however, at what point restrictions on contributions become an invasion of First Amendment rights. Still other proposals would limit the total receipts a candidate might accept from PACs. As limits on receipts appear to stand logically between limits on contributions and limits on spending, these, too, would appear to be in a zone of constitutional uncertainty.

Clearly, the Supreme Court has not moved very far into the balancing of the legitimate regulatory interests of Congress and the First Amendment rights of PACs. It has in fact dealt only with one extended piece of legislation at one point in time; Congress has passed no major regulation of PACs since 1976, and the states began to do so only in the late 1980s. New issues will reach the courts (e.g., state limits on candidates' receipts from PACs), forcing new constitutional interpretations. Moreover, the changing status quo in campaign finance, and especially the growth of PACs, put old rules and precedents in a new legislative context.

FRANK J. SORAUF
(1992)

(SEE ALSO: *Campaign Finance.*)

Bibliography

GOTTLIEB, STEPHEN E. 1985 Fleshing Out the Right of Association: The Problem of the Contribution Limits of the Federal Election Campaign Act. *Albany Law Review* 49:825–854.

SORAUF, FRANK J. 1986 Caught in a Political Thicket: The Supreme Court and Campaign Finance. *Constitutional Commentary* 3:97–121.

## POLITICAL PARTIES

The United States Constitution is virtually silent on politics. It touches upon elections, but even here the subject is treated in a most gingerly fashion by delegating the power to set the "Times, Places and Manner of holding Elections for Senators and Representatives" to the legislature of each state. Even the qualification for voting in national elections was left to the states, by the provision that whoever was qualified to vote for members of the "most numerous branch of the State Legislature" could also vote for members of the HOUSE OF REPRESENTATIVES.

The Founders saw peril in politics. The Constitution was an effort to provide a solution to politics. To JAMES MADISON in THE FEDERALIST #10, one of the greatest virtues of the Constitution was that it provided an antidote to the "mischiefs of faction." Because attempting to prevent the emergence of faction would be a cure worse than the disease, the only alternative was to provide a system of FEDERALISM on a continental scale so that no faction or conspiracy among factions could reach majority size, thereby becoming a party. Representative government

centered in a legislature became the superior form of government because the "temporary or partial considerations" of factions would be regulated by "passing them through the medium of a chosen body of citizens, whose wisdom . . . will be more consonant to the public good than if pronounced by the people themselves. . . ." GEORGE WASHINGTON in his Farewell Address (the drafting of which was shared by Madison and ALEXANDER HAMILTON) warned of "the danger of parties in the State [founded on] geographical discriminations [and] against the baneful effects of the spirit of party generally."

The Constitution was designed also to solve the political problems inherent in the presidency. In effect, Article II provided for a two-tiered presidential selection: *nomination* by the electors and *election* by the House of Representatives. Under the original Article II the process began with selection of electors in a manner provided by each state legislature. In the first election under the Constitution, in 1788–1789, the electors were chosen by legislature in seven states and by voters in six. Next, electors were to meet in their state capitals, never nationally. There is no ELECTORAL COLLEGE; that term is nowhere to be found in the Constitution or in *The Federalist*. At the prescribed meeting at the state capital each elector had the right and obligation to cast ballots for *two persons*—not two votes, but separate votes for two different people, one not from the same state as the elector. If a candidate received an absolute majority of all electoral votes, he was declared the President; the candidate with the second largest vote became vice-president. If no candidate received an absolute majority, the House of Representatives would choose from the top five names, with each state having one vote, regardless of the population of the state. If two candidates received an absolute majority in a tie vote (as happened between THOMAS JEFFERSON and AARON BURR in 1800), the House would choose between the top two.

This system was virtually designed to produce a *parliamentary* government—a strong executive elected by the lower house of the legislature. During the first two decades of the Republic, the primary functions of the national government were to implement the scheme of government contemplated by the Constitution, and that required one-time-only policies, such as the establishment of the major departments, the establishment of the judiciary, and the exercise of SOVEREIGNTY as a nation-state among nation-states, manifest in various kinds of treaties. Policies had to be adopted to assume all the debts previously incurred by the CONTINENTAL CONGRESS and the national government under the ARTICLES OF CONFEDERATION; laws were also adopted to assume all the debts incurred during the war by the thirteen states. All these policies and many others emanated from the executive branch. Congress looked to President Washington for leadership and accepted Secretary of the Treasury Alexander Hamilton as Washington's representative. Although consensus around Washington was replaced with polarization, even before JOHN ADAMS became President, the Federalists carried the necessary majorities through legislative meetings (caucuses) led mainly by Hamilton. But at the same time, all the power to enact the policies—all the power "expressly delegated" to the national government by Article I, section 8—was lodged in Congress. Inevitably, politics came out as a modified parliamentarism, with a strong executive elected by the lower house.

These arrangements seem to have been intentional on the part of the Framers of the Constitution. Without a national meeting, and with each elector having to cast ballots for two separate persons, it was to be expected that several candidates for President would be identified. The concept of the "favorite son" actually goes back to George Washington himself, and the expectation that there would be a large number of favorite sons is strongly implied by the provision that in the event of no absolute majority the top five names would be submitted to the House. Surely this means that more than five meaningful candidates would normally be produced and that final election in the House would be the norm also. With this modified parliamentary system, the Constitution and politics became synonymous. The politics of the two to three decades of the founding period followed the lines prescribed by the Constitution—or, to put it another way, flowed fairly strictly within channels established by the Constitution.

This original system was transformed within a generation following the founding. At some point during the Jefferson administration, the regime of the founding was replaced by a regime of ordinary government. One-time-only policies were replaced by routine and repeatable policies, such as INTERNAL IMPROVEMENTS, land grants, personal claims, tariffs, PATENTS, surveys, and other services. This type of national government is precisely what was intended by Article I, section 8. The TENTH AMENDMENT (1791) merely made more explicit what was already unmistakably clear in Article I, that the important powers of governing were to be reserved to the states. What was not intended, however, was that the political solution prevailing during the first generation would come unstuck. Political parties had already emerged despite Washington's warnings, and the discipline of their members virtually destroyed the so-called Electoral College by requiring that each elector be pledged to a presidential candidate "nominated" prior to their selection as electors. Political parties captured the *nominating* phase of presidential selection. For twenty years thereafter the method of nomination was by legislative caucus—derisively called King Caucus. As the two major parties spread their influence to districts where they had voters but no members

of Congress, the party leaders had to work out a method of nomination more representative than King Caucus. That solution, the presidential nominating convention, was adopted in 1832 and remained the institution of party government until 1952.

The national party system was by this time no longer working within prescribed constitutional channels but had created some new channels for itself. *More significantly, the party system in the 1820s and 1830s created a realm of politics independent of the Constitution.*

In another sense, however, the Constitution was having the last word. First, Congress had become the central power of the national government. There was no longer any development toward parliamentary government but clearly toward congressional government, as WOODROW WILSON put it in his important text later in the nineteenth century. Second, the nominating convention, in providing the President with a popular base independent of Congress, produced the SEPARATION OF POWERS that many feel the Constitution had intended—a system of coequal branches each with its own separate constituency.

Third, and most important, the functions of the national government had come more into proportion with the intent of Article I, section 8. That is to say, a politics independent of the Constitution came only at the expense of the kinds of functions the national government had been required to perform during the founding decades. In fact, the relationship ought to be put the other way around. The change of functions from the one-time-only policies of the founding to the ordinary policies of the rest of the nineteenth century had been responsible for the political changes, thus confirming a fundamental and well-nigh universal pattern: *every regime tends to create a politics consonant with itself.* Thus, when the regime (the Constitution and its government) of the founding shifted to a regime of policies arising literally under the provisions of Article I, section 8, politics changed accordingly. For more than a century after 1832 the national government was congressional government; the national politics during that epoch was a function of party government; and together, government and politics were consistent with, and reinforced, a strictly *federal* Constitution in which the national government had a highly limited and specialized role in the life of the country.

A third regime emerged out of the NEW DEAL, not from the increased size of the national government but from the addition to that government of significant new functions. The significant departure from tradition arose out of the enactment of a large number of policies that can be understood only as regulatory and redistributive policies. In effect, the national government acquired its own POLICE POWERS and added its own regulatory and redistributive policies to those of the states. These additions—which were validated by the Supreme Court—brought on a third regime.

Congress did more than enact the new policies that gave the national government its new functions and its directly coercive relationship to citizens. Congress also literally created a new form of government by delegating powers to the executive branch. Each of the new regulatory policies adopted by Congress identified broadly the contours of a problem and then delegated to the executive virtually all the discretion necessary to formulate the actual rules to be imposed on citizens. Technically, this is called the DELEGATION OF POWER, and the rationalization was that Congress had indeed passed the law and left to administrative agencies the power only to "fill in the details." But in fact the executive branch filled in more than details. Just as Woodrow Wilson called the national government of the nineteenth century congressional government, we can with no greater distortion entitle the regime following the New Deal as presidential government.

National politics began to change accordingly. Signs of the weakening of party democracy were already fairly clear during the New Deal. President FRANKLIN D. ROOSEVELT had tried to rebuild the Democratic party into a programmatic kind of presidential party. The most dramatic moment in that effort was the "purge of 1938," an unprecedented effort by a President to defeat or demote the opposition within his own party in order to make it into a modern instrument of program development and enactment. History records that Roosevelt failed, but the meaning of that failure was not lost on the Democrats or Republicans: the President can no longer depend on locally organized opportunistic parties and must develop his own, independent base of popular support. If this support could no longer be found through political parties, the President would have to do it directly, through the media of mass communication. The President's constituency became the public *en masse.*

The presidential conventions of 1952 were the last of the traditional conventions, where parties still controlled the nominations through the control that state party leaders had over the delegates. And if ANDREW JACKSON can be considered the revolutionary who gave birth to the national conventions, DWIGHT D. EISENHOWER was a revolutionary who turned them into vestigial organs. As the 1952 Republican Convention approached, the Eisenhower forces had to confront the fact that ROBERT A. TAFT was ahead. Their only available strategy was to question the credentials of several state delegations whose members, pledged to Taft, had been selected by the traditional method of virtual appointment by state leaders and were pledged to vote slavishly for the candidate designated by the state leadership. Failing to convince the credentials committee, the Eisenhower leaders took their objections

to the convention floor in the form of a "fair play" motion. The debate took place over national television—despite Taft's objections—and the Eisenhower motion swayed enough neutral delegations to gain the majority vote and the momentum sufficient to win the nomination. More important than the immediate victory was the long-range result, which was to weaken the foundations of the traditional party system itself. Progressively from that time, delegates came to be treated as factors in their own right, as individuals to be courted rather than as pawns within a state delegation controlled by state party leaders.

Once the delegates became meaningful individuals, the process of selection had to be democratized. Just as the nominating convention once was a means of democratizing the legislative caucus, the primaries became the means of democratizing conventions. But the primaries are as much a reflection as a cause of the decline of party government, including the decline of party control of the presidential selection process. Party government was already seriously undermined before the spread of selection of pledged delegates by primary elections. The transformed convention was, then, a reflection of the broader process of the decline of state and national political parties. The presidential nomination was becoming an open process by which presidential candidates amassed individual delegates, who had little in common with each other or with the candidate to whom they were pledged. The popular base of the presidency became a mass base. It was no longer the outcome of a process by which state party leaders and their delegations formed coalitions around the candidate most likely to win the nomination and election for President.

Serious students of American political parties have been arguing for more than a decade over the political reforms of the 1960s and 1970s associated with the loosening of the national parties and the virtual displacement of the national conventions. Some argue that the decline of political parties and of the convention as the institution of party government was unintentionally caused by the reforms. Others argue that parties had already declined and that the decline of conventions as the real decision-making body was already happening; therefore, the reforms were more a reflection of the decline than a cause of it. Most significant, however, is the emergence of the new regime: a new form of politics consonant with the regime of regulation and redistribution, with its presidential government.

Many of the current disagreements continue because we are still in the midst of the transformation and the ultimate form has not yet fully emerged. Two distinct scenarios or models can be drawn from the prevailing political analyses. One is "dealignment," tending toward mass democracy—that is, a direct relationship between the President and the masses of people unmediated by any representative institution at all, whether party or legislature. The second scenario is an alignment or realignment model anticipating the restoration of the two major parties. Such a development could require the abolition of some reforms instituted in the 1960s and 1970s that radically unhinged certain features of the traditional party system, and adoption of new measures aimed at restoring the power of party bosses in the presidential nominating process.

The resolution is likely to be a fusion of the two models. The entire functioning of the national government has come to rest upon the President; the expectations of all Americans focus there, and the relationship between the President and the people will continue to be direct. This is the essence of mass politics. At the same time, however, there is strong evidence of a resurgence in the headquarters of the national political parties. Yet there is no place for these parties in the direct line of communication between the President and his mass base. Thus, if these parties are to survive and prosper at the national level they will have to find functions other than the traditional ones of intervening between the masses and the President by controlling the nominating process and political campaigns. The creation of such new functions would require the national leadership to organize from the bottom up, district by district, but in fact the national headquarters are organizing from the top down. They are developing their base in the electorate by collecting data for the computerized analysis of categories of voters. These techniques permit efficient mass mailings to solicit voters and, more important, sponsors who will make millions of donations in units of less than $50 apiece. These are not electoral parties in the traditional sense. Nor are they European-style "mass parties" or social democratic parties. They are what, for lack of an established word, can be called "taxation parties," whose main function is to defray the tremendous cost of the capital necessary to maintain the computers, collect the data, analyze the data, write the letters and stuff the envelopes, and design and communicate the spot announcements and other commercial messages on extremely expensive network television.

American national politics has been in a state of transition for a long time. Professional students of elections, polling, and political parties have all been expecting some kind of "realignment" at least since 1964. Major reforms of the parties and of elections have followed each presidential election since that time; their main result has been to prevent forever the outcome of the previous convention and election. Although the Democrats have been the major reformers, mainly because they have been the major losers in national elections, the Republicans have followed them in these reforms almost immediately. The national

political process has not yet adjusted effectively to the regime of regulation and redistribution. In other words, although politics ultimately takes some form consonant with the regime, there is no guaranteeing that the adjustments will be successful and stable.

This fact points to the most important contrast between the present regime and the two previous ones: National politics is flowing through channels increasingly independent of the Constitution; that is, efforts to restore party government have been oblivious to the historic relationship between the Constitution and politics.

This is not to suggest that politics is operating unconstitutionally or outside the spirit of Supreme Court decisions. It means only that efforts to restore the parties, and to reform nominations and elections accordingly, have concentrated on the flow itself rather than on the constitutional structure that ultimately determines the flow. Having recognized the many problems with American politics since the New Deal, reformers have attempted to change the politics. They have persisted in this approach even while recognizing two grievous perils in it. First, because some interests inevitably gain or lose from any political reform, there is always a suspicion that these gains were known and sought in advance. The legitimacy of the system can be badly hurt by the more generalized suspicion that the established electoral process is being manipulated. Second, some reform efforts have come close to violating the FIRST AMENDMENT, and in fact the Supreme Court declared such a violation in BUCKLEY V. VALEO (1976), striking down a law attempting to set limits on the amounts individuals could spend in campaigns. That case is definitely not the end of litigation involving First Amendment rights involved in political reforms. (See POLITICAL PARTIES AND THE SUPREME COURT.)

Politics can be understood as the never-ending process of adjusting to a given structure of government, or regime, by seeking sufficient power and consensus to change the structure or influence its direction. If a change in the conduct of politics is sought, the appropriate route is the exercise of the historic right to change the Constitution and the structure of government. The forms of politics would change accordingly. We have constitutional rights to change our government. As Madison argued in *The Federalist* #10, the attempt to regulate politics is a cure worse than the disease. If there are problems with American national politics—and there appears to be wide agreement on this proposition throughout the political spectrum—then the time may have come to reexamine the structure of government, including the Constitution itself. An extensive revision of the Constitution is neither necessary nor appropriate. The last major constitutional change was triggered by the New Deal, without a single constitutional amendment. Once we recognize that politics is most stable and most respected when it is consonant with constitutional forms, reformers might be convinced to focus at least some of their energies away from political reform and toward constitutional reform.

THEODORE J. LOWI
(1986)

Bibliography

AGAR, HERBERT 1966 *The Price of Union.* Boston: Houghton Mifflin.

BINCKLEY, WILFRED 1947 *President and Congress.* New York: Knopf.

BURNHAM, WALTER DEAN 1970 *Critical Elections and the Mainsprings of American Politics.* New York: Norton.

CHARLES, JOSEPH 1961 *The Origins of the American Party System.* New York: Harper & Row.

GINSBER, BENJAMIN 1982 *The Consequences of Consent.* Reading, Mass.: Addison-Wesley.

LOWI, THEODORE J. (1967) 1975 Party, Policy and Constitution in America. In William N. Chambers and Walter Dean Burnham, eds., *The American Party System—Stages of Political Development.* New York: Oxford University Press.

POLSBY, NELSON 1983 *Consequences of Party Reform.* New York: Oxford University Press.

SHEFTER, MARTIN 1978 Party Bureaucracy and Political Change. In Louis Maisel and Joseph Cooper, eds., *Political Parties: Development and Decay.* Beverly Hills, Calif.: Sage Publications.

## POLITICAL PARTIES
(Update)

The judiciary has struggled to build a coherent jurisprudential approach to the constitutional handling of political parties. The difficulty of this task is due in large part to the absence of parties from the text of the Constitution itself. The Framers were indifferent, if not outright hostile, to political parties and made no provision for them in the constitutional scheme.

Indeed, the very structure of the Constitution makes it difficult for parties to flourish. The dispersal of power among branches and levels of government, the system of CHECKS AND BALANCES, the delegation of a large measure of the definition of party authority to state law, all combine to create a constitutional environment inhospitable to parties. Parties and the party system are always in some tension with the Constitution.

Yet FIRST AMENDMENT protections of FREEDOM OF SPEECH and the FREEDOM OF ASSOCIATION have been extended to include political parties. The Supreme Court has considered the constitutional status of parties in a variety of contexts, from the propriety of party PATRONAGE practices to the parties' role in BALLOT ACCESS. In the process, the

Court has been influential in determining how parties function. Yet, the parties' extraconstitutional nature has prevented the Court from treating them in a consistent or theoretically sound manner. The Court appears to lack a clear normative understanding of parties; it has often been indifferent to them as tools of representative democracy.

Constitutional disputes implicating political parties continue to find their way to the court. In *Colorado Republican Federal Campaign Committee v. FEC* (1996), the REHNQUIST COURT rendered a relatively party-friendly decision in the realm of CAMPAIGN FINANCE. Building on the leading decision of BUCKLEY V. VALEO (1976), the Court determined that party spending independent of a specific candidate's campaign was constitutionally protected and not subject to statutory limits. The consequences of the decision demonstrate in dramatic fashion the practical impact of the Court on the electoral process. The national parties responded by spending unprecedented amounts of so-called soft money—that is, money contributed to the parties rather than to specific candidates—bolstering financial support for candidates on all levels. The decision may, in the end, yield more integrated and cohesive parties. At the same time, recent developments have intensified the demands for reform of an electoral system considered already too expensive. Interestingly, four of the nine Justices in the case were prepared to cast aside as unconstitutional any restrictions on parties' role in financing electoral campaigns. That question may well come before the Court in the not-so-distant future.

The uniquely American two-party system itself came under scrutiny in TIMMONS V. TWIN CITIES AREA NEW PARTY (1996). The two major parties perpetuate their control of state legislatures by imposing ballot access and public financing laws disadvantageous to minor parties. In *Timmons*, the Court rejected a constitutional attack on this legal entrenchment of the two-party system. The Court upheld a state ban on fusion, a practice used by minor parties to gain exposure by nominating as their candidate someone who has also been endorsed or nominated by one of the major parties. The Court found a state interest in promoting political stability through a healthy two-party system; states are thus constitutionally free to maintain the substantial barriers facing third parties in the American political arena. This judicially sanctioned party duopoly further insulates the major parties from minor party challenges; in the process, the Court may become an obstacle to party reform. By diminishing the associational rights of minor parties, the Court may be complicit in propping up a party system that fails the test of representativeness.

The Rehnquist Court's decisions, however, have not been uniformly party friendly. In *Morse v. Republican Party of Virginia* (1996), the Court impaired the autonomy and associational rights of parties to define for themselves how they conduct their PRIMARY ELECTIONS.

Despite the short-term advantages the *Timmons* and *Colorado Republican Federal Campaign Committee* cases might confer upon the major parties, their ultimate impact depends on the extent to which the parties can use them to sharpen their traditional democratic functions, and demonstrate clearly that they are worthy of constitutionally protected freedom.

DAVID K. RYDEN
(2000)

Bibliography

EPSTEIN, LEON 1986 *Political Parties in the American Mold.* Madison: University of Wisconsin Press.

ISSACHAROFF, SAMUEL; KARLAN, PAMELA S.; and PILDES, RICHARD H. 1998 *The Law of Democracy: Legal Structures of the Political Process.* New York: Foundation Press.

LOWENSTEIN, DANIEL H. 1995 *Election Law: Cases and Materials.* Durham, N.C.: Carolina Academic Press.

RYDEN, DAVID K. 1996 *Representation in Crisis: The Constitution, Interest Groups, and Political Parties.* New York: State University of New York Press.

——— 1999 'The Good, The Bad, and The Ugly': The Judicial Shaping of Party Activities. Pages 50–65 in John Green and Daniel Shea, eds., *The State of the Parties*, 3rd ed. Boulder, Colo.: Roman & Littlefield.

## POLITICAL PARTIES, ELECTIONS, AND CONSTITUTIONAL LAW

Since the mid-1980s the Supreme Court has decided three significant FIRST AMENDMENT cases affecting POLITICAL PARTIES and one that will hamper states' efforts to reform the INITIATIVE process.

In *Tashjian v. Republican Party of Connecticut* (1986), the REPUBLICAN PARTY sought to "open" its PRIMARY ELECTION for high-level offices by permitting independent voters to participate, but the Democratic legislature refused to modify statutes limiting participation to party registrants. The Supreme Court held that the First Amendment FREEDOM OF ASSOCIATION guarantees a party the right to control its own nomination process; it therefore ruled that state law could not prohibit the Republicans from opening their primary.

*Tashjian* was a mixed blessing for adherents of the party-renewal movement, who were pleased by the extension of association rights to parties but who tend to favor a closed primary as more conducive to strong political parties with relatively sharp ideological focus. The party renewalists welcomed more uniformly the Court's unanimous decision in *Eu v. San Francisco County Democratic Central Committee* (1989), which relied on the parties' right of association to rule that state legislation can neither prevent party committees from endorsing candidates in

primary elections nor require a particular governing structure for party organizations.

In *Tashjian* and *Eu*, the Court ignored a point that has been made by numerous commentators, that the extension of rights of association to parties is in tension with *Smith v. Allwright* (1944) and other cases, which treated parties, at least when they are conducting primary elections, as instrumentalities of the state for purposes of the doctrine of STATE ACTION. Within the logic of the state action doctrine, it may be anomalous for the same entity to be treated as part of the state and yet to enjoy constitutional rights against the state. Nevertheless, the conclusion that parties should be protected by the First Amendment and at the same time barred from denying EQUAL PROTECTION and other constitutional rights to citizens is not likely to offend many people.

A more serious deficiency in the Court's approach is its failure to recognize that party associational claims may reflect intraparty disputes rather than the typical CIVIL LIBERTIES claim by a private person against the state. This was not the case in *Tashjian*, where, as Justice THURGOOD MARSHALL noted in his majority opinion, a united Republican party was prevented from opening its primary by Democratic legislators. But in *Eu* the statutes governing each major party reflected the wishes of that party's delegation in the state legislature.

*Eu* establishes that over some range of decision making affecting parties, the wishes of state party committees or other extragovernmental party structures will prevail when they conflict with the wishes of the party's elected officials as reflected in state legislation. Mere invocation of the concept of freedom of association cannot establish that this result will strengthen parties in the long run or have other desirable consequences.

In RUTAN V. REPUBLICAN PARTY OF ILLINOIS (1990), the Court significantly extended the range of its antipatronage doctrine. In *Elrod v. Burns* (1976) and BRANTI V. FINKEL (1980), the Court had held that to fire nonpolicymaking PUBLIC EMPLOYEES because of nonaffiliation with the party in power violated the employees' First Amendment rights of speech and association. In *Rutan* this principle was extended to transfers, promotions, and even hiring of public employees based on party affiliation.

Whereas *Tashjian* and *Eu* have been welcomed by many as empowering parties, *Rutan* has been criticized as weakening them. As Justice LEWIS F. POWELL argued in dissent in *Elrod*, the prospect of reward often has been a stronger inducement to party activism than ideological conviction, and at many times and in many places, the main reward for party service has been public employment.

It may be doubted whether any of the recent party decisions actually will have the pro- or antiparty effects that have been ascribed to them. The actual points at issue in *Tashjian* and *Eu*—open or closed primaries, party endorsements in primary elections, details of party governance—are not likely to have more than marginal consequences for the American party system. For example, some have hoped that the availability of party endorsements in primaries would permit party organizations to impose party discipline on public officials. But in the first primary held in California after the *Eu* decision, the Republican party opted not to make endorsements and the two statewide candidates in competitive races who were endorsed by the Democratic party were losers in the primary.

If *Tashjian* and *Eu* were extended to the point that parties could not be required by state law to use primaries at all to select their candidates, the effect on the American system could be considerable. Though Justice ANTONIN SCALIA argued in dissent that just such a result was implied by *Tashjian*, there is no reason to expect the majority to press its reasoning that far. Even if it does, perhaps few, if any, party organizations would opt for nomination processes that could be perceived as less democratic than primaries.

The patronage cases, if enforced in a different era, might have had major effects. Even by the time of *Elrod*, patronage practices had declined sharply in most parts of the United States. *Rutan* may deliver a deathblow to patronage more surely than *Elrod* did, but even so, its effects on the political system should be limited to relatively few localities.

*Meyer v. Grant* (1988), though not affecting political parties, will be a significant restraint in those states whose STATE CONSITITUTIONS provide for the initiative process. *Meyer* struck down a Colorado statute that prohibited the use of paid circulators to qualify initiative measures for the ballot.

*Meyer* came just as the "initiative industry" was exploding in California and beginning to spread to other initiative states. This industry assures a ballot position for proponents with deep pockets while rendering volunteer petition drives virtually obsolete.

As popular resistance grows to increased numbers of initiative measures proposed by well-funded but sometimes narrowly based groups, state legislatures are likely to look for ways of evading *Meyers v. Grant* or, if no such ways can be found, to increase the signature requirements as a means of cutting the number of proposals that qualify for the ballot.

DANIEL H. LOWENSTEIN
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Bibliography

EPSTEIN, LEON D. 1986 *Political Parties in the American Mold.* Madison: University of Wisconsin Press.

LOWENSTEIN, DANIEL HAYS and STERN, ROBERT M. 1989 The

First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal. *Hastings Constitutional Law Quarterly* 17:175–224.

# POLITICAL PARTIES IN CONSTITUTIONAL LAW

"No America without democracy, no democracy without politics, no politics without parties. . . ." So begins Clinton Rossiter's commentary on American political parties. Nonetheless, the Supreme Court has said in *Elrod v. Burns* (1976) that "partisan politics bears the imprimatur only of tradition, not the Constitution." Despite the absence of constitutional reference to political parties, the Constitution has had substantial influence in shaping the two-party system and in defining the contested boundary between governmental authority and political party autonomy.

Frank Sorauf has observed that "[t]he major American political parties are in truth three-headed political giants, tripartite systems of interactions. . . . As a political structure they include a party organization, a party in office, and a party in the electorate. . . ." All three branches of political parties are defined, limited, and authorized, at least in part, by constitutional DOCTRINE. All three are shaped in part by specific constitutional arrangements.

Two-party politics, which has persisted throughout the nation's history, began in the struggle between FEDERALISTS and ANTI-FEDERALISTS over the RATIFICATION OF THE CONSTITUTION. Provisions of the Constitution have reinforced the two-party system, especially Article II, section 1, empowering each state to select presidential electors, and the TWELFTH AMENDMENT, requiring an absolute majority of the ELECTORAL COLLEGE or, failing that, of state delegations in the House of Representatives for election of the President. The majority rule tends to compel the coalition of disparate factions into two parties, because only the establishment of broad coalitions offers any prospect of securing the majority necessary for election of the President.

Although no constitutional rule requires that members of the House of Representatives be elected by plurality vote or from single-member districts, these understandings soon took root after ratification of the Constitution. The popular election of the United States senators mandated by the SEVENTEENTH AMENDMENT has the effect of creating single-member districts for the selection of members of that house. These constitutional practices strengthen the two-party system, requiring broad coalitions to secure a majority, the only guarantee of electoral victory under these rules.

The Constitution's provision for a federal structure of government also shapes the party system. Unlike the majority rule's incentive for factions to consolidate into two parties, the federal structure encourages wide dispersion of influence within the party ranks. Because offices and powers at the state and local levels are more accessible and often more important than those in the national government, party organizations in each state and locale grow independent of one another and are largely free from sanctions imposed by any national party organization. This dispersion of party organization is heightened by the mandate of Article I, section 1, and the Twelfth Amendment for state-by-state selection of the electors who choose the President.

States began to regulate political parties in the late eighteenth century, and these regulations became commonplace during the Progressive era. The STATE POLICE POWER was regarded as a sufficient basis for the imposition of governmental authority upon the parties. The state-prescribed Australian ballot, antifusion legislation, and state-operated primaries were introduced at the same time as laws regulating the structure and activities of political parties. All of these were intended to curb political "bosses" and "machines."

By the beginning of WORLD WAR II, the constitutions of seventeen states and the statutes in virtually all states referred to political parties—conferring rights on them, regulating their activities, or both. State regulatory schemes went beyond prescribing the methods by which parties would select nominees for office and the qualifications of parties for places on the ballot. Many states also regulated the selection and composition of district, county, and state political party committees, the authority and duties of those committees, and the rules for their operation.

Whether the national government has similar authority to regulate political parties has seldom been tested, for Congress has not chosen to enact legislation recognizing party associations or regulating their structure and activities. Any such federal power could, however, be thought to derive from several constitutional sources.

Article IV, section 1, of the Constitution grants Congress a broad power to regulate the time, place, and manner of electing senators and representatives. In UNITED STATES V. CLASSIC (1941) the Supreme Court construed this provision to allow Congress to regulate individual conduct and also to modify those state regulations of federal elections that the Constitution authorizes. The Court has also cited the NECESSARY AND PROPER CLAUSE as an additional source of congressional authority over federal elections, and in EX PARTE YARBROUGH (1884) it declared that Congress has the power, as an attribute of republican government, to pass laws governing federal elections, especially to protect them against fraud, violence, and other practices that undermine their integrity. And, although no constitutional provision explicitly extends the authority of

Congress to regulate presidential elections, the Court affirmed this power in *Burroughs v. United States* (1934), OREGON V. MITCHELL (1970), and BUCKLEY V. VALEO (1976).

Congressional power to regulate elections does not necessarily imply power to regulate political parties. But the Supreme Court has taken a major step in that direction by bringing federal PRIMARY ELECTIONS, which are principally a party process for selecting candidates, within the ambit of Article I. In *United States v. Classic* the Justices held that: "Where state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is . . . included in the right [to vote in congressional elections] protected by Article I, sec. 2." This right to vote in congressional elections may be protected by Congress under Article I, section 4. Subsequently, the Court has treated *Classic* as recognizing a general congressional power to regulate primary elections for federal offices.

A wholly distinct doctrinal technique for imposing judicial limits upon party affairs, which may extend congressional legislative authority to party activities, grew out of the White Primary Cases. In NIXON V. HERNDON (1927) the Supreme Court held that because the sponsorship of a primary election by a state was STATE ACTION subject to the FOURTEENTH AMENDMENT, the exclusion of black voters from such a primary was unconstitutional. Even when the state authorized the party executive committee to determine party membership, NIXON V. CONDON (1932) held the ensuing primary to constitute state action. State authorization of a ballot position for candidates selected in party-sponsored primaries, without any state-prescribed primary rules or state operation of the primary, was held in SMITH V. ALLWRIGHT (1944) to be state action in violation of the FIFTEENTH AMENDMENT.

Many commentators and judges regard TERRY V. ADAMS (1953)—the last of the White Primary Cases—as extending constitutional limitation to party activities beyond primary elections. In *Terry* the Supreme Court held that the Fifteenth Amendment prohibited a local group, the Jaybird Democratic Association, from excluding blacks from a preprimary straw vote, paid for and operated exclusively by the association, to endorse candidates to run in the statutorily recognized Democratic party primary. The four-member plurality of the *Terry* Court concluded that the Jaybirds were part of the Democratic party. Only three Justices said that the Jaybird straw vote was limited by the Fifteenth Amendment because it was "an integral part, indeed the only effective part, of the electoral process."

Nonetheless, most judicial decisions now treat party organizations as state-affiliated agencies. State laws often closely prescribe the structure, organization, and duties of local, district, and state party units. Hence, the lower federal court cases have held that the EQUAL PROTECTION CLAUSE governs the selection and apportionment of members of local, district, and state party committees and conventions. Several decisions of the Court of Appeals for the District of Columbia have also applied the Fourteenth Amendment to national party conventions, because those conventions are integral parts of the process of selecting the President. But in at least one case that court suggested that the developing law of "state action," as defined by the Supreme Court, had excluded party conventions from the scope of the Fourteenth Amendment.

In defining the scope of the Fourteenth and Fifteenth Amendments, and thus the scope of congressional power to enforce those amendments, several appellate courts have distinguished between parties' candidate selection activities and their management of "internal affairs." Ronald Rotunda has suggested "a functional standard" in which "all integral steps in an election for public office are public functions and therefore state action subject to some judicial scrutiny." The functional distinction, though plausible and attractive, is difficult to apply in practice. Party activists often seek to influence the selection of party candidates, presumably to assure that party nominees reflect the policies of the party organization. Working through party organizations, they endorse candidates in the primary, expend money on their behalf, and mobilize primary voters for them. These activities could easily be construed as part of the selection of candidates; yet it seems unlikely that they fall within the reach of the prohibitions of the Fourteenth and Fifteenth Amendments—and thus the reach of Congress's power to enforce those amendments.

One further source of governmental authority to regulate political parties is the power to attach restrictions to special statuses or benefits accorded to candidates and parties under federal and state laws. Generally, the Supreme Court has rejected legislation that requires the surrender of constitutional rights as a condition for attaining a governmental benefit. (See UNCONSTITUTIONAL CONDITIONS.) Although it recognized in *Buckley v. Valeo* (1976) that political expenditures constitute protected speech under the FIRST AMENDMENT, the Supreme Court nonetheless upheld the PRESIDENTIAL ELECTION CAMPAIGN FUND ACT's limits on political party expenditures for nomination conventions and on candidate spending in presidential nomination and general election campaigns subsidized by federal money. This decision has broad implications for state regulatory authority in the thirteen states that provide public grants to candidates and political parties.

In virtually all states political parties receive automatic access to the ballot if they obtain a certain percentage of votes cast in a prior election. And in every state the ballot carries the party label to identify the candidates nominated by qualified political parties. These state benefits to

political parties may justify state regulation of the structure, organization, and operation of political parties. Moreover, these benefits may strengthen claims that party activities constitute state action, thus bringing them within the ambit of both judicial and congressional authority under the Civil War amendments.

Although the Constitution has been interpreted to allow government to extend special recognition to political parties, especially major parties, governmental assistance to parties is circumscribed by constitutional limits. In *Buckley v. Valeo* the Supreme Court not only held that financial subventions were within congressional authority under the GENERAL WELFARE CLAUSE; it also sustained definitions of eligibility that tended to reinforce the position of the major parties. Full public financing is available only to a party whose presidential candidate in the previous election received at least 25 percent of the popular vote. Some minor parties and candidates are eligible for lesser funding; others are not.

The party, seen as part of the electorate, is recognized by state eligibility requirements for voter participation in primary elections. Connecticut's closed party primary survived the challenge that it abridged independent voters' right to vote and freedom of association. A lower federal court held that the state law validly served "to protect party members from 'intrusion by those with adverse political principles,' and to preserve the integrity of the electoral process," and the Supreme Court affirmed in *Nader v. Schaffer* (1976). The courts have not decided whether political parties' freedom of association protects them from intrusion into the nominating process by persons who are not party members.

State authority to protect the integrity of party membership rolls is limited by the Fourteenth Amendment. A voter's freedom to associate with a party is apparently abridged if state-mandated enrollment rules unduly delay participation in a party primary. In *Kusper v. Pontikes* (1973) the Supreme Court invalidated a law requiring party enrollment twenty-three months in advance of a primary in which the voter wished to participate.

States also have power to protect the integrity of party nominating procedures by limiting independent or third-party candidacies by those who have been affiliated with another party. Hence, in *Storer v. Brown* (1974) the Supreme Court sustained a state law requiring an independent or new-party candidate to disaffiliate from his prior party at least a year in advance of his new party's primary. And in *American Party of Texas v. White* (1974) the Justices upheld a state law prohibiting persons who had voted in a party's most recent primary from signing petitions to qualify another party's candidate or an independent candidate for the ballot. The Court has also intimated that it would sustain "sore loser" statutes which prohibit a candidate who has participated in a party's nominating contest from subsequently qualifying as an independent candidate or opposition party aspirant in the same election. But in the same case, *Anderson v. Celebrezze* (1983), the Court held that states may not protect established parties by setting early filing deadlines that bar independent candidates arising from opposition to the platforms or candidates of major parties, when those become known.

The Constitution has been interpreted to allow preferred ballot access to established parties. Hence, in *Jennes v. Fortson* (1971) the Court sustained a statute giving automatic ballot access to parties that had obtained twenty percent or more of the vote in the prior election, while requiring others to gain ballot placement by obtaining petition signatures equivalent to five percent of those eligible to vote in the prior election. Nonetheless, in *Williams v. Rhodes* (1968) the Court rejected statutory schemes so complex or burdensome as to make it virtually impossible for any but the Democratic and Republican parties to obtain ballot access.

Promotion of political parties through minimal restrictions on the First Amendment right to associate and on the right to vote are justified by a wide array of governmental interests. The Supreme Court has said that states may protect political parties in order to assure "stability of the political system," to avoid confusion or deception, to "avoid frivolous or fraudulent candidacies prompted by short-range political goals, pique, or personal quarrel." Congress, in providing public financing of parties and candidates, can seek to avoid funding hopeless candidacies with large sums of public money or fostering proliferation of splinter parties. In the aggregate these justifications represent a constitutional hospitality toward political parties, at least when legislators grant them special statuses.

Several developments in constitutional doctrine suggest that long-established governmental regulation of political parties may now stand on treacherous ground. The 1950s saw the emergence of an independent First Amendment freedom of association, principally in cases involving dissident or oppressed groups, especially the Communist party. As early as 1952, in *Ray v. Blair*, the Supreme Court sustained a Democratic party requirement that candidates for presidential elector swear to vote for the presidential and vice-presidential candidates selected by the national Democratic party. Such an oath "protects a party from intrusion by those with adverse political principles." But until the 1970s there was little other judicial recognition that the freedom of association might secure rights of major political parties against governmental regulation.

In *Cousins v. Wigoda* (1975) and *Democratic Party v. LaFollette* (1981) the Supreme Court specifically an-

nounced that the First Amendment protected national party conventions in their establishment of rules for the selection of delegates, even in the face of contrary state laws or local party practices. In both cases, the Supreme Court announced that "the National Democratic party and its adherents enjoy a constitutionally protected right of political association." Both cases also applied the traditional standard in First Amendment cases; only a COMPELLING STATE INTEREST warranted abridgment of the "rights of association" of the national Democratic party.

In *LaFollette* the Court concluded that Article II, section 1, of the Constitution, which empowers each state to "appoint" presidential electors in the manner directed by the legislature, bears such a "remote and tenuous" connection to "the means by which political party members in a State associate to elect delegates to party nominating conventions . . . as to be wholly without constitutional significance." This conclusion sets aside one possible constitutional basis for state power to regulate party activities in selecting presidential nominees. Together, *Cousins* and *LaFollette* signal judicial reluctance to sweep every stage in the candidate selection process, especially those conducted by the parties themselves, within the scope of governmental regulation.

Indeed, in *Cousins* the Supreme Court specifically declined to "decide" or to "intimate" decisions on several critical issues of governmental authority to regulate parties, thus suggesting that large areas of the law remain open despite the assumption of past practices and of lower court decisions that party affairs are subject to extensive regulation. First, the Court did not decide "whether the decisions of a National Political Party in the area of selection constitute state or governmental action" limited by the Fourteenth and Fifteenth Amendments, and thus subject to congressional regulation. Second, the Justices left open the question "whether national political parties are subject to the principles of the REAPPORTIONMENT decisions, or other constitutional restraints, in their methods of delegate selection or allocation." Third, the Court did not decide "whether or to what extent national political parties and their nominating conventions are regulable by, or only by, Congress."

Although the sweeping associational rights of political parties recognized in *Cousins* and *LaFollette* have sometimes been regarded as limited by the Supreme Court's reference to the special "national interest" in presidential nominating conventions, the Court has relied on those decisions to protect party autonomy below the national level. In *Rivera-Rodriguez v. Popular Democratic Party* (1982) the Court cited *Cousins* and *LaFollette* in holding that a territorial political party, empowered by law to select a replacement for a deceased territorial legislator originally elected on the party ticket, was "entitled to adopt its own procedures to select . . . [a] replacement" and "was not required to include nonmembers in what can be analogized to a party primary election."

These developments suggest that the emerging First Amendment rights of parties may give them broad autonomy to order their affairs. At a minimum, party organizations can make a strong claim to order the selection, structure, and operation of party committees and conventions free from state regulation, even if those committees and conventions participate actively in candidate selection primaries. The federal courts have held that a state law prohibiting party committees from endorsing candidates in primaries violated First Amendment speech and associational rights; they avoided deciding, however, whether party campaign activities such as contributing money were similarly protected in those primary contests. If party assemblies actually select candidates, they may claim autonomy under *Cousins* and *LaFollette*, which held that party rules overrode contrary state laws in prescribing the selection of delegates to national party nominating conventions.

At the farthest reaches, the First Amendment might be construed to allow parties a substantial role in prescribing party membership and qualifying candidates for participation in party primaries established by the states. A state has a legitimate interest in an orderly election process that encourages qualified persons to participate in elections free of fraud, intimidation, and corruption; but its interests do not warrant limitations on the First Amendment associational rights of political parties. Parties may therefore establish voter enrollment and candidate eligibility rules to prevent the intrusion into party primaries of candidates and voters who do not share the party's goals. These party rules would, of course, be subject to the limits that the Supreme Court has already imposed to protect the constitutional rights to vote and associate. Such a theory of party autonomy is consistent with the modern understanding of the First Amendment and with contemporary Supreme Court declarations of party associational rights. It is a theory awaiting full explication and recognition.

DAVID ADAMANY
(1986)

Bibliography

GEYH, CHARLES 1983 "It's My Party and I'll Cry If I Want To": State Intrusions upon the Associational Freedoms of Political Parties. *Wisconsin Law Review* 1983:211–240.

GOTTLIEB, STEPHEN E. 1982 Rebuilding the Right of Association: The Right to Hold a Convention as a Test Case. *Hofstra Law Review* 11:191–247.

KESTER, JOHN G. 1974 Constitutional Restrictions on Political Parties. *Virginia Law Review* 60:735–784.

NOTE 1978 Equal Representation of Party Members on Political Party Central Committees. *Yale Law Journal* 88:167–185.

ROSSITER, CLINTON L. 1960 *Parties and Politics in America.* Ithaca, N.Y.: Cornell University Press.

ROTUNDA, RONALD D. 1975 Constitutional and Statutory Restrictions on Political Parties in the Wake of *Cousins v. Wigoda. Texas Law Review* 53:935–963.

SORAUF, FRANK J. 1980 *Party Politics in America.* Boston: Little, Brown.

## POLITICAL PHILOSOPHY OF THE CONSTITUTION

It is a commonplace that the Constitution provides for a LIMITED GOVERNMENT, one that depends upon a system of CHECKS AND BALANCES. And this in turn is said to reflect a realistic opinion both about the nature of man and about the purposes and risks of government. The general government is limited in that much is left to the states to do, to the extent and in the ways the states choose to act. The very existence of the states and many of the things they do are taken for granted; they do not depend upon the Constitution. Even the states formed pursuant to the Constitution automatically assumed, upon admission to the Union, virtually all of the prerogatives (or STATES' RIGHTS) of the original thirteen, including the status of being largely independent of the other states and in many respects independent of the general government.

The states play vital parts in the periodic choices of United States senators, representatives, and presidential electors. Otherwise, the Constitution, once ratified, depends upon the states for relatively few things in order to permit the general government to function within its appointed sphere. Various restrictions are placed upon the states, primarily with a view to preventing interferences by them with the proper activities of the general government. In addition, the states are obliged by the Constitution to respect various legal determinations in other states. But, by and large, the states are left fairly autonomous, however republican they are required and helped to be under the Constitution. (Although the CIVIL WAR and its RECONSTRUCTION amendments had effects upon the original constitutional dispensation, these amendments are consistent with, if not the natural culmination of, the initial dedication of the Constitution to liberty and equality.)

The general government is limited in still another critical respect by the SEPARATION OF POWERS, which makes the Constitution seem far less simple than it really is. Virtually everything that may be done by any branch of that government must take account, if it does not require the immediate cooperation, of the other two branches. Thus, Congress can enact laws alone, but it is easier to do so in collaboration with the President; how the judges will understand and how the President will execute these laws must be anticipated. The President alone commands the armed forces, but what those forces consist of and how they are equipped depends on congressional provisions, as does the very declaration of the wars in which such forces may be used. The judges interpret and apply laws, but, apart from the Supreme Court, all courts of the general government depend for their JURISDICTION and for their very existence upon the Congress, and for the execution of their decrees upon the President. Many other such interdependencies are evident.

We can even see in the references to divinity in the DECLARATION OF INDEPENDENCE an oblique anticipation of the qualified separation of powers found in the Constitution itself. There are four references of this kind in the Declaration. The first reference to God, and perhaps the second as well, regarded God as legislator; it is He that orders things, ordaining what is to be. That is, He first comes to sight as lawgiver or lawmaker. Next, God is seen as judge. Finally, He is revealed as executive, as One Who extends protection, enforcing the laws that have been laid down (with a suggestion as well of the dispensing power of the executive). Thus, the authors of the Declaration portrayed even the government of the world in the light of their political principles.

The constitutional dispersal of powers (between state and general governments, among branches of the general government, and between congressional houses with quite different constituencies) testifies to the recognition that those who wield power have to be watched, and perhaps shackled or at least hobbled. This understanding may be seen also in the ways the people discipline themselves, agreeing to proceed in accordance with constitutional forms. Such precautions make sense, however, only if there is indeed a considerable power to be exercised.

Preeminent among the powers of the general government are those that must be exercised countrywide if they are to be used effectively. These include the plenary (but not necessarily exclusive) powers of the general government with respect to commerce "among the several States," taxes, "the common defense," and international relations, all of which are reinforced by the NECESSARY AND PROPER CLAUSE. And so there has been no need for a "living" Constitution to "grow," except perhaps to grow out of the artificial limitations imposed by those periodic misinterpretations of the Constitution that have failed to appreciate the full extent of the powers intended to be vested in the general government.

Here and there the Constitution restricts the exercise of the plenary powers conferred upon the general govern-

ment—but those restraints tend to be "procedural." "Substantive" restraints upon such powers would be unreasonable should they have to be employed in unpredictable but grave circumstances. The Constitution assumes the prudence of those who wield power. Thus, for example, no matter how the tax power is hedged in, Congress can still so use its discretion here as to ruin the country.

The prudence relied upon is to be directed to the advancement of the goals enumerated in the Preamble. There are elsewhere in the Constitution further indications of what is taken for granted as legitimate ends of government, such as in references to "the Progress of Science and useful Arts," to "public safety," to the control of "disorderly Behaviour," to a "Republican Form of Government," and to "the Law of Nations." And, of course, the Declaration of Independence states in an authoritative manner the enduring ends of American government rooted in the inalienable rights of men.

That the Declaration of Independence is taken for granted is evident even in the way the Constitution is dated: "in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth." It seems to be taken for granted as well that the prudence relied upon both in the Declaration and in the Constitution is generally to be promoted by free discussion of public issues, however salutary a temporary secrecy may be on occasion. Such discussion is presupposed by the relations of the various branches of government to one another and by what they say to each other. Thus, judges deliberate and set forth their conclusions in published opinions; the President, in exercising his VETO POWER, is to give "his Objections," which objections are to be considered by Congress; the members of Congress are protected in their exercise of freedom of speech as legislators. A continental FREEDOM OF SPEECH and FREEDOM OF THE PRESS were presupposed as well, even before the ratification of the FIRST AMENDMENT, by the repeated indications in the Constitution of 1787 that it is an ultimately sovereign people who establish and continually assess the government.

The SOVEREIGNTY of the people is central to the constitutional system, moderated though the people's control may be by the use of representatives and by indirect selections of various officers of government. Each of the seven articles of the original Constitution, including the judiciary article, testifies to the understanding that the people are ultimately to have their way, however carefully they have disciplined themselves in restricting the manner in which they insist upon having their way. The people are sovereign, and for good reasons: it is a government designed for their happiness; they themselves have ordained it and are to support it. Besides, no one else is obviously better qualified to decide what is in the best interests of the country.

An essential equality among people is indicated in various ways, including in the equal status of the states and in the freedom of citizens to move among the states. Majority rule is taken for granted again and again. No male-female or rich-poor distinction is recognized. The Constitution does not even recognize an intrinsic difference among the races, however much grudging accommodation there may have had to be to existing slavery institutions. And, of course, no government in the United States may grant TITLES OF NOBILITY.

To defer to the genuine sovereignty of the people is to submit, in effect, to that rule of law contemplated by MAGNA CARTA. It is only through law that a people, in their political capacity, can truly speak or be spoken to. Dependence upon the RULE OF LAW points to LEGISLATIVE SUPREMACY, which is indicated again and again in the Constitution, not least in its IMPEACHMENT provisions. It is peculiar, then, that we rely as much as we now do on JUDICIAL REVIEW—that is, on the duty of courts to assess congressional enactments for their constitutionality. Of course, this duty, too, can be put in terms of respect for the rule of law. But it is difficult to find in the text of the Constitution any provision for judicial review or even any indication that it was ever anticipated by the Framers. In fact, the care with which the President's veto (the executive counterpart to judicial review) is established argues against the opinion that judges are intended by the Constitution to examine formally sufficient acts of Congress for their constitutionality, except perhaps whenever the prerogatives of the courts themselves are immediately threatened. What does seem to be anticipated by the Constitution is an even more considerable power for judges than judicial review seems to offer, but one which the appellate courts of the general government have largely surrendered. This is their indirect but nevertheless critical power of supervising the COMMON LAW (and hence the moral sensibilities) of the country, subject to whatever regulations legislatures may choose to provide. In any event, these courts are entitled, perhaps even obliged, to interpret acts of Congress in accordance with the Constitution, proceeding in each case before them on the reasonable assumption (until Congress clearly indicates otherwise) that nothing unconstitutional or unjust is intended.

In the American constitutional system, both the rule of law and an ultimate dependence upon the sovereignty of the people mean that property is to be respected. (And this respect probably implies, considering the evident commercial presuppositions of the Constitution, that economic interests are to be advanced.) Respect for property is the private counterpart to that political deference to the public seen in genuine republican government. The pro-

tections of property in the THIRD, FOURTH, FIFTH, SEVENTH, and EIGTH AMENDMENTS draw upon a principle that is already evident in the original Constitution.

Deference to the public, and to republicanism, also takes the form of a concern for "the Blessings of Liberty." That a considerable liberty is taken for granted by the Constitution may be seen in its assurances with respect to HABEAS CORPUS, to BILLS OF ATTAINDER, to the crime of TREASON, to RELIGIOUS TESTS, and to " Indictment, Trial, Judgment and Punishment, according to Law." It may be seen as well in the spirit of liberty which pervades the governmental system, making much of a people's freely choosing what they will have done for them, by whom, and upon what terms.

But however much liberty, property, and equality are to be respected, there is no question under the Constitution but that there should be effective governance, and governance with respect to the most important matters facing the country as a whole. However "limited" the exercise of power may be, primarily because of the different parts played by the three branches of the general government and by the states, great powers do exist for the general government to exercise. In any extended contest, the Constitution assumes that a determined Congress can have its way both with the President and with the courts. The Constitution was itself fashioned by a deliberative body which resembles much more the Congress than it does either the presidency or the judiciary. In the very nature of things, lawmaking (whether entrusted to one hand or to many) is at the heart of sovereignty, providing the necessary mandates for those who either interpret or execute the laws.

Lawmaking may be seen as well in what the people at large in their sovereign capacity have done in "ordain[ing] and establish[ing] this Constitution." Thus, the preeminence of lawmaking may be seen not only in what the CONSTITUTIONAL CONVENTION did in drafting the Constitution but even more in what the people did in the RATIFICATION OF THE CONSTITUTION. The provision of a workable AMENDING PROCESS also presupposes that the people retain their ultimate authority—and that standards exist by which they may examine and modify constitutional arrangements from time to time.

The Framers of the Constitution applied those standards, set forth in the Declaration of Independence, to the needs and opportunities of their day. Such standards were understood to be rooted in nature. The American people considered themselves sanctified by Providence, or at least peculiarly fitted because of their experiences and circumstances, to discern and to follow the guidance of nature. Americans looked to political philosophers and other students of law and government for help in their recourse to nature—and they invoked with confidence writers from Plato and Aristotle to John Locke and Adam Smith. But none of these writers was authoritative; all of them could be exploited, along with the considerable historical record (sacred and profane, ancient and modern) repeatedly drawn upon in debate. The diversity of the many sources casually, if not cavalierly, put to use by the Framers suggests that the astute political thought of eighteenth-century Americans was, in certain respects, distinctive to them. They were eminently practical and yet high-minded constitutionalists who seemed willing to leave many private concerns, and vital personal virtues, to the ministrations of local government and of common-law judges (as well as to church and family), while they entrusted the government of the United States both with the GENERAL WELFARE (including the economy of the country) and with external affairs (including the common defense).

However extensive and even awesome those governmental powers may be, the powers retained by the people to revise whatever is done by government in their name remain even greater. The ultimate sovereignty of the people may be seen not only in the constitutional provision for amendments but also in that natural RIGHT OF REVOLUTION vigorously relied upon in the Declaration of Independence.

Intrinsic to the political philosophy of the Constitution is the recognition that a bad law may still be constitutional, and hence that the political must be distinguished from the legal (or judicial). This understanding means that in order for the constitutional government empowered by the people (as well as for the all-powerful people themselves) to contribute to the common good in a regular and enduring manner, there must be constant and informed recourse by Americans (citizens and public servants alike) to the instructive dictates of prudence.

GEORGE ANASTAPLO
(1986)

Bibliography

ALVAREZ, LEO PAUL DE, ed. 1976 *Abraham Lincoln, the Gettysburg Address and American Constitutionalism.* Irving, Texas: University of Dallas Press.

ANASTAPLO, GEORGE 1965 The Declaration of Independence. *St. Louis University Law Journal* 9:390–415.

——— 1971 *The Constitutionalist: Notes on the First Amendment.* Dallas, Texas: Southern Methodist University Press.

——— 1984 Mr. Crosskey, the American Constitution, and the Natures of Things. *Loyola University of Chicago Law Journal* 15:181–260.

——— 1987 *The Constitution of 1787: A Commentary.* Athens, Ohio: Swallow Press/Ohio University Press. (Reprinted from *Loyola University of Chicago Law Journal* [1986] 18:1.)

CROSSKEY, WILLIAM W. 1953 *Politics and the Constitution in the History of the United States.* Chicago: University of Chicago Press.

EIDELBERG, PAUL 1968 *The Philosophy of the American Constitution: A Reinterpretation of the Intentions of the Founding Fathers.* New York: Free Press.

SHARP, MALCOLM P. 1973 Crosskey, Anastaplo and Meiklejohn on the United States Constitution. *University of Chicago Law School Record* 20:3–18.

STORY, JOSEPH 1833 *Commentaries on the Constitution of the United States.* Boston: Hilliard, Gray & Co.

## POLITICAL PHILOSOPHY OF THE CONSTITUTION (Update)

To speak of the political philosophy of the Constitution is to invite immediate controversy. Many allege that the Constitution has no coherent political philosophy; and those who maintain otherwise often regard its political philosophy as far from commendable.

Those who contend that the Constitution is theoretically incoherent point to its various inconsistences and the many provisions that were the products of compromise. The more charitable of such analysts try to make a virtue of the Constitution's supposed lack of an overarching political theory, arguing that this demonstrates the Framers' laudable ability to ignore their own prejudices. In the words of law professor Donald Horowitz: "What we ought to revere is the spirit of compromise the Framers brought to Philadelphia—compromise that accommodated large states and small, north and south, numbers and wealth, legislative supremacists and proponents of a strong executive."

Probably the most significant obstacle to this view is presented by THE FEDERALIST, the contemporaneous exposition of the Constitution by ALEXANDER HAMILTON, JAMES MADISON, and JOHN JAY. Written during the turmoil of the battle for RATIFICATION, *The Federalist* presents a remarkably comprehensive and coherent exposition of the constitutional system, fleshing out its fundamental principles of NATURAL RIGHTS, CHECKS AND BALANCES, BICAMERALISM, SEPARATION OF POWERS, and FEDERALISM. *The Federalist,* which was utilized extensively by ratification proponents, goes a long way toward explaining the shared principles that underlay the compromises of the CONSTITUTIONAL CONVENTION OF 1787.

Perhaps a more challenging attack on the coherence of the Constitution comes from those who juxtapose its REPUBLICANISM with its sanction of SLAVERY. Article IV, section 2, effectively compelled northern states to return fugitive slaves to their southern masters; and Article I, section 9, protected the importation of slaves until 1808. Many of those who criticize the Constitution on this account accuse the Founders of having a contradictory understanding of inalienable rights, claiming that the Founders did not think such rights applied to black Americans. These critics often cite as evidence for this proposition Justice ROGER BROOKE TANEY'S assertion in DRED SCOTT V. SANDFORD (1857) that the Founders regarded black Americans "as beings . . . so inferior, that they had no rights the white man was bound to respect."

Yet Taney's claim in *Dred Scott* was a palpable fiction, one that Taney himself had rejected as defense counsel for an abolitionist preacher earlier in his career. In reality, the Founders were not inconsistent in understanding the principle of inalienable rights; but they were inconsistent in applying it, as they themselves recognized. Slaveholders such as GEORGE WASHINGTON and THOMAS JEFFERSON knew that slavery abrogated the natural rights on which the Constitution was premised and therefore had to be abolished. The question was how to abolish slavery. Although it is easy to condemn the Framers for their compromise on this issue, one may legitimately wonder how much longer the horrible oppression of slavery would have lasted if the bargain had not been struck and the South had stayed out of the Union.

Incoherency, however, is not the only charge leveled against the political philosophy of the Constitution. Other critics chide the Founders for creating a constitutional system that cannot sustain itself because it is based almost entirely on self-interest. They claim that the philosophy of the Constitution is best summarized by the statement in *The Federalist* #51 that one must supply "by opposite and rival interests, the defect of better motives." According to these observers, the two pillars of the constitutional system are the extended republic, which fosters such a multiplicity of factions that it will be difficult for any one of them to dominate the rest, and the separation of powers, which similarly aims at preventing any single faction from controlling the government by dividing and arranging "the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights."

According to this view, the Founders thought that if the Constitution was properly structured to rely on self-interest, good character on the part of citizens would become expendable. This thesis has been maintained, more or less vigorously, by a variety of scholars from across the political spectrum, including Richard Hofstadter, Benjamin Barber, and Martin Diamond. Yet there are grave difficulties with this interpretation, not the least of which is its negative formulation of the Constitution's principles. According to these critics, devices such as bicameralism, checks and balances, and separation of powers use self-interest to prevent a tyrannical concentration of authority. But this is only part of the story. The Framers also believed that these devices would promote good government by

attracting virtuous leaders to federal office and by supplying those leaders with the tools needed to perform their governmental duties properly.

Nowhere can this be seen more clearly than in the separation of powers. The Framers believed that powers should be separated not only to prevent tyranny, but also because the executive, legislative, and judicial powers require by their very natures different talents in order to be exercised well. The executive power requires the capacity for energy, secrecy, and quick and decisive action; the legislative power demands deliberation, or the free and full consideration of diverging points of view; and the judicial power calls for a cool and dispassionate application of the laws. The Framers of the Constitution subsequently structured each of the three branches of government in such a way as to encourage these characteristics. The Framers provided for a unitary executive, believing that this would facilitate quick and decisive action. They created a bicameral legislature to promote the best kind of deliberation. Finally, they provided that federal judges would hold their posts during GOOD BEHAVIOR, thus insulating them from the partisan battles of the moment and promoting the impartial and dispassionate application of the laws.

In sum, the Framers sought to supply each branch of government with the tools necessary to carry out its assigned tasks in the best manner possible. Of course, this was not the same as assuring each branch *would* carry out its duties in the best manner possible. A despot elected President, for example, might use the power to pardon to shield the criminal activities of his or her subordinates; unscrupulous senators might hold presidential appointments hostage to extract special favors from the executive branch; and corrupt judges might use their lifetime tenure as a shield for their corruption. Thus, the structure of the various offices ensures that good people, if elected, can more easily fulfill the functions of their offices; but it does not guarantee that good and virtuous people will actually fill those offices.

The Framers of the Constitution were well aware of this, however, and they carefully crafted the selection procedures for the various offices to encourage the choice of persons eminent in both ability and virtue. For example, the Framers believed that the election process for the presidency would tend to elect outstanding individuals because it required a candidate to achieve a national consensus in order to win in the ELECTORAL COLLEGE; no candidate who pandered to narrow or local interests would be likely to obtain such a national majority. Similarly, the selection of senators by their state legislatures would likely encourage the selection of distinguished statesmen because the legislatures would want to choose representatives that might bring luster and distinction to their respective states. More generally, higher age requirements for the offices of senator and President made it more probable that candidates for these offices would have the wisdom and stature that comes from experience.

The Constitution also fosters virtuous leadership in yet another manner: it encourages persons of eminent ability to *seek* federal office by assuring them that they will have enough time to prosecute their projects for the public good. This is why the Constitution contains no provision for the rotation of offices; the Framers thought that renewability of terms would help attract the best people to federal office. In the case of the presidency, wrote Alexander Hamilton, a great man will be more likely to consider running for President if he knows that he will have the time to complete as well as to undertake "extensive and arduous enterprises for the public benefit. . . ."

In many different ways, then, the very structure of the Constitution aspires to cultivate virtue in government. One may readily question, of course, whether the Constitution's structural mechanisms are *sufficient* to bring about good government. To point to only one example: the Founders were certainly correct that the national consensus needed for the election of the President ensures that a candidate of merely local interests will likely fail in his or her bid for office, but this does not necessarily mean that the person chosen will be someone preeminent in ability and virtue. If the citizenry were consumed by self-interest, they might instead elect the most pliable candidate—the one they think can be bullied into supporting their interests by their representatives in Congress. In other words, even the electoral college cannot produce a good President in and of itself. The presidential electors—and ultimately, those who select those electors—must still be good enough to care about justice and virtue.

In the end then, the Constitution can only do so much. It is not a cure-all. But contrary to the claims of some critics, the Founders themselves recognized this. They did not believe that the Constitution was a machine that would run itself. They knew that its perpetuation ultimately depended on the character of the nation's citizens. Hence, even in *The Federalist*, "a dependence on the people" is acknowledged as the primary safeguard for republicanism, whereas the Constitution's various checks and balances are described as "auxilliary precautions."

Some may object that if the Founders truly considered the character of the citizenry important, they would have mentioned civic virtue in the Constitution explicitly. After all, certain early STATE CONSTITUTIONS contained appeals to both God and virtue. The PREAMBLE to the U.S. Constitution, in contrast, seems but a pale reflection of these earlier documents. It does speak of establishing justice, but instead of going on and listing the requisite civic virtues, it merely stresses the importance of "the blessings of Liberty." Some have interpreted the Founders' empha-

sis on liberty rather than virtue as proof that they envisioned a republic where self-interest, rather than self-sacrifice, was to be the guiding light. Yet those who interpret "liberty" in this manner are interpolating their own modern conceptions back into the founding.

It is not difficult to understand the reason for the confusion. Today, liberty is equated with the absence of all restraint. Indeed, people who call themselves "libertarians" argue against all government regulation of business and object to criminalizing PORNOGRAPHY, hallucinogenic drugs, and prostitution. Yet the Founders' conception of liberty was entirely different. Echoing the Aristotelian understanding of virtue, the Founding generation saw liberty as the golden mean between two extremes: it was the contrary of *both* slavery and anarchy. Liberty was freedom, but freedom within the confines of the laws of nature and of nature's God. It was the freedom to organize one's own affairs, live where one wanted, participate in politics, and buy and sell property, as long as a person did not violate the immutable moral law. In short, early Americans thoroughly agreed with JOHN MILTON's aphorism that "none can love freedom heartily, but good men; the rest love not freedom but license."

That this was the Founder's true conception of liberty should become self-evident to even the most cynical observers when they examine the public actions of the Founding Fathers. The same George Washington who presided over the Constitutional Convention of 1787 declared in his Farewell Address: "Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports." The same Congress that recommended the Constitution to the states enacted an ordinance for the Northwest Territories that announced: "Religion, morality and knowledge being necessary to good government . . . schools and the means of education shall forever be encouraged."

But perhaps it was Supreme Court Justice JAMES WILSON, arguably the most systematic political thinker during the founding, who best expressed the necessity of schooling Americans in their civil rights and civic responsibilities. In his inaugural law lecture at the College of Philadelphia, attended by such luminaries as Washington and Jefferson, Wilson declared:

> On the public mind, one great truth can never be too deeply impressed—that the weight of the government of the United States, and of each state composing the union, rests on the shoulders of the people.
>
> I express not this sentiment now, . . . with a view to flatter: I express it now, as I have always expressed it heretofore, with a far other and higher aim—with an aim to excite the people to acquire, by vigorous and manly exercise, a degree of strength sufficient to support the weighty burthen, which is laid upon them—with an aim to convince them, that their duties rise in strict proportion to their rights; and that few are able to trace or to estimate the great danger, in a free government, when the rights of the people are unexercised, and the still greater danger, when the rights of the people are ill exercised.

JOHN G. WEST, JR.
(1992)

(SEE ALSO: *Conservatism; Constitution and Civic Ideals; Constitutional History Before 1776; Constitutional History, 1776–1789; Liberalism.*)

Bibliography

BARLOW, J. JACKSON; LEVY, LEONARD W.; and MASUGI, KEN, eds. 1988 *The American Founding: Essays on the Formation of the Constitution.* New York: Greenwood Press.

HORWITZ, ROBERT H., ed. 1986 *The Moral Foundations of the Republic*, 3rd ed. Charlottesville: University Press of Virginia.

JAFFA, HARRY V. 1987 What Were the 'Original Intentions' of the Framers of the Constitution of the United States? *University of Puget Sound Law Review* 10:343–423.

KESLER, CHARLES R., ed. 1987 *Saving the Revolution: The Federalist Papers and the American Founding.* New York: Free Press.

# POLITICAL QUESTION DOCTRINE

As early as MARBURY V. MADISON (1803) the Supreme Court recognized that decisions on some governmental questions lie entirely within the discretion of the "political" branches of the national government—the President and Congress—and thus outside the proper scope of JUDICIAL REVIEW. Today such questions are called "political questions."

Among the clauses of the federal Constitution held to involve political questions, the one most frequently cited has been Article IV, section 4, under which the federal government "shall guarantee to every State in this Union a REPUBLICAN FORM OF GOVERNMENT." Federal courts, and particularly the Supreme Court, have argued that as the definition of "republican" is at the heart of the American political system, only the "political branches," which are accountable to the sovereign people, can make that definition. The electorate can ratify or reject the definition by reelecting or defeating their representatives at the next election. The choice of definition, Justice FELIX FRANKFURTER said, dissenting in BAKER V. CARR (1962), entails choosing "among competing theories of political philosophy," which is not a proper judicial function.

Thus the Supreme Court has refused to review political decisions in cases involving two governments, each claiming to be the legitimate one of a state (LUTHER V. BORDEN, 1849); the question whether the post-CIVIL WAR RECON-

STRUCTION governments in southern states were republican (*Georgia v. Stanton* and MISSISSIPPI V. JOHNSON, 1867); the "republican" nature of the INITIATIVE and REFERENDUM (*Pacific Telephone & Telegraph Co. v. Oregon*, 1912; *Hawke v. Smith*, 1920); lack of REAPPORTIONMENT by state legislatures (COLEGROVE V. GREEN, 1946); contested elections (*Taylor & Marshall v. Beckham*, 1900); certain presidential actions (*Mississippi v. Johnson*, 1867); certain cases arising in Indian territory (CHEROKEE INDIAN CASES, 1831–1832); and FOREIGN AFFAIRS (*Foster v. Neilson*, 1829; *Charlton v. Kelly*, 1913).

The Supreme Court has never successfully differentiated those questions proper for judicial interpretation from those that are reserved to the "political" branches. A plurality of the Justices having held in *Colegrove v. Green* (1946) that a state legislature's failure to reapportion itself after the decennial federal census was a political question, for example, the Court in *Baker v. Carr* decided that such inaction raised a question under the equal protection clause of the FOURTEENTH AMENDMENT rather than the guarantee clause, and therefore raised an issue proper for judicial decision. After having handed down a line of cases holding that contested elections were matters in which the final decision could come only from the relevant legislative body, the Court overturned the refusal by the HOUSE OF REPRESENTATIVES (POWELL V. MCCORMACK, 1969) to seat a member who, in the Court's view, had been excluded unconstitutionally.

The Court has been relatively consistent in holding various foreign relations issues to constitute political questions, because of the necessity for the country to speak with one voice, the inability of courts to develop a body of principles to govern such issues, and what Justice Frankfurter described in *Perez v. Brownell* (1958) as the "constitutional allocation of governmental function" concerning foreign affairs to the President and Congress. Matters such as the existence of a state of war, the relevance of a treaty, the boundaries of the nation, and the credentials of foreign diplomats have been left to congressional and presidential diplomats. But the Court stated in REID V. COVERT (1957) that even the provisions of a treaty or EXECUTIVE AGREEMENT are reviewable if citizens assert violations of their rights. And, in the face of government claims that the travel of Americans abroad raises diplomatic issues fit only for executive discretion, the Court has enunciated the RIGHT TO TRAVEL abroad and has made substantive rulings for and against claims of that right (KENT V. DULLES, 1958; APTHEKER V. SECRETARY OF STATE, 1964; ZEMEL V. RUSK, 1965).

The Supreme Court's variable commitment to the political question doctrine may be explained by reasons that are nondoctrinal. The Court appears to resort to the doctrine when only two substantive judgments are possible, the first being unacceptable to the Court because it would likely go unenforced and the second being equally unacceptable because it would violate a major tenet of American political ideology. In *Colegrove v. Green*, for example, the plurality suggested that the Illinois legislation might ignore a HOLDING that the legislature's refusal to redesign badly malapportioned congressional districts was unconstitutional—and the House of Representatives might take no action. Yet upholding such a malapportionment, which gave some citizens a vote of far greater weight than that of others, would have run contrary to the American belief that all citizens are equal in the electoral process. Similarly, the Court in *Mississippi v. Johnson* had the choice of deciding that the Reconstruction state governments were illegitimate, a ruling that the President and Congress surely would have ignored; or that the governments, which had been imposed by the federal government on citizens denied the right to participate in the election process, were legitimate—which would have offended the basic American idea of SOVEREIGNTY of the people. In both cases the Court invoked the political question doctrine and left decision in the hands of the "political branches."

The very notion of "political branches," however, is untenable. Article III of the Constitution makes the federal judiciary indirectly accountable insofar as it may enable the people's representatives in Congress to strip the courts of JURISDICTION over matters the people believe the courts to have mishandled. Federal judges, too, are liable to IMPEACHMENT—although this resource has never been taken for purely political purposes since the earliest days of the nineteenth century.

Court decisions necessarily affect power. The decision in PLESSY V. FERGUSON (1896) legitimizing SEPARATE BUT EQUAL railroad cars for black and white passengers encouraged southern states to establish racially segregated schools; the holding of BROWN V. BOARD OF EDUCATION (1954) that "separate but equal" schools violated the equal protection clause stripped the states of that power, transferring the power to define SEGREGATION and integration to the federal courts, the Congress, and, in some cases, to the President. The Court's upholding of ECONOMIC REGULATION affecting wages, hours, unionization, social security, job safety, and competition shifted power from employers to state and federal legislatures, executives, and REGULATORY AGENCIES, as well as to unions, and enabled the United States to consolidate a system of welfare capitalism under which privately owned property is systematically regulated by governmental bodies.

The Court nonetheless insists that the judicial branch is apolitical, because its own institutional power depends on the electorate's belief that the Court is above politics.

As JAMES MADISON pointed out in THE FEDERALIST #51, the Court possesses neither the power of the purse nor that of the sword. It is entirely dependent for the enforcement of its decisions on the willingness of the population and public officials to carry them out. Were the Court's decisions to be ignored, the Court's prestige would suffer; in a circular fashion, the loss of prestige would increase the possibility that subsequent decisions would go unheeded.

The Court's decisions find ready compliance when the decisions reflect a societal consensus. The difference between the Court's 1946 *Colegrove* decision that malapportionment was a political question and its contrary 1962 *Baker* decision can be linked to the large-scale movement of population to urban areas underrepresented in the legislatures. By 1962 a majority of the nation's population could be expected to concur in a decision that enhanced its political power. Promise of additional support from the President was implicit in the appearance of Attorney General ROBERT F. KENNEDY before the Court to argue as AMICUS CURIAE for reapportionment, for Kennedy was, of course, the brother of President JOHN F. KENNEDY, who owed his office to urban votes.

The political question device derives its legitimacy from the necessity to preserve an independent judiciary in the American political system. The device is justifiable because it enables the judiciary to maintain its independence by withdrawing from no-win situations. In addition, it prevents the courts from usurping the role of the ballot box. The Supreme Court, declaring the presence of a political question, tacitly admits that it cannot find and therefore cannot ratify a social consensus that does not violate basic American beliefs. The Court has no moral right to impose rules upon a country not yet ready for them. The political question doctrine, which permits the Court to restrain itself from precipitating impossible situations that might tear the social fabric, gives the electorate and its representatives time to work out their own rules, which can ultimately be translated into constitutional doctrine through judicial decision. The doctrine of political questions is more than a self-saving mechanism for the Court; it is also an affirmation of a governmental system based on popular sovereignty.

PHILIPPA STRUM
(1986)

Bibliography

BICKEL, ALEXANDER M. 1962 *The Least Dangerous Branch.* Indianapolis: Bobbs-Merrill.

SCHARPF, FRITZ W. 1966 Judicial Review and the Political Question: A Functional Analysis. *Yale Law Journal* 75:517–546.

STRUM, PHILIPPA 1974 *The Supreme Court and "Political Questions."* University: University of Alabama Press.

# POLITICAL QUESTION DOCTRINE
## (Update 1)

Is the constitutionality of clandestine American involvement in Nicaragua an issue that the federal judiciary may decide? If the legislatures of two-thirds of the states apply to Congress to call a convention for proposing amendments and Congress ignores their application, should a federal court entertain an action by the states against Congress? Should the decision of the Republican National Committee not to seat a group of delegates at the party's national convention be subjected to federal court challenges?

All of these questions, in one way or another, implicate the political question DOCTRINE. This doctrine counsels the judiciary to refrain from deciding constitutional questions involving subject matters or issues appropriate for resolution only by the national political branches—Congress and the executive. In effect, the doctrine aims to divide "politics" from the "law," which is the proper sphere of judicial interpretation.

The Supreme Court has long considered the identification of political questions necessary to national SEPARATION OF POWERS. As early as MARBURY V. MADISON (1803), the Court recognized that although federal courts are obliged to enforce the mandatory requirements of the Constitution, a life-tenured, unelected, and politically unaccountable judiciary must reserve discretionary policymaking for the elected representatives of the American people.

Not until BAKER V. CARR (1962), however, did the Court articulate doctrinal standards for distinguishing a political question. Several of the *Baker* criteria call directly for judicial interpretation of the meaning and force of the Constitution's language; for example, does the text commit an issue to determination by the national political branches, and does the text lend itself to judicially manageable standards for resolving the issue? Other criteria require judges to assess realistically and pragmatically the political effects of a decision, such as asking if there is a significant potential for embarrassing or showing disrespect for Congress or the executive or whether the finality of a prior political decision is more important than its legality. Applying these standards, the *Baker* Court held that the Tennessee state legislature's failure to reapportion electoral districts after substantial migration of rural populations to urban centers raised a question of unconstitutional vote dilution and that the federal judiciary was competent to develop manageable standards for the vote dilution issue; it further held that the text of the FOURTEENTH AMENDMENT did not commit an EQUAL PROTECTION claim to the Congress or executive for decision and that the federal political branches had taken no action that required finality and respect.

Judges and scholars have launched serious attacks on the *Baker* approach to the definition of political questions. As the Constitution does not even provide expressly for the federal judiciary's review powers, it is difficult to argue that the text discriminates between those provisions enforceable by the judiciary and those consigned to Congress or the executive for construction. In addition, the individual-rights doctrines most fully developed by the judiciary are based on language in the BILL OF RIGHTS and the Fourteenth Amendment that is cryptic and open-ended, embodying no apparent and manageable judicial standards. Moreover, the Court may undermine the legitimacy of its own constitutional decisions by relying on pragmatic claims of institutional incompetence to supervise the policy decision making of administrative experts.

Nevertheless, the Supreme Court has shown no inclination to rethink the political question doctrine. In the most controversial political question ruling over the past five years, a solid majority of the Court expressly declined an invitation to modify or abandon the *Baker* standards. When several Indiana Democrats sued to invalidate a state legislative REAPPORTIONMENT plan for gerrymandering election district lines so as to disadvantage Democratic candidates, the Court applied the *Baker* criteria point by point and concluded that a political group's claim to fair representation does not present a political question. The opinion of Justice BYRON R. WHITE in *Davis v. Bandemer* (1986) declared that the Constitution does not generally dedicate vote dilution issues to the Congress or President for resolution and that the courts are institutionally competent to formulate workable rules for deciding such claims, even though they had not yet devised a precise method for identifying an unconstitutional political GERRYMANDER.

Several reasons may explain the Court's reluctance to reexamine the functionality of the political question doctrine. First, the judiciary has relied increasingly on other devices to limit its intervention in federal administrative policymaking, including the Supreme Court's rulings on STANDING, STATE ACTION, SOVEREIGN IMMUNITY, and constraints on equitable remedies. These alternatives have certain tactical and ideological advantages over the traditional political question doctrine: they apply to constitutional challenges against state and municipal, as well as federal, government violations, and without overruling the political question standards established during the WARREN COURT's expansive enforcement of CIVIL RIGHTS, the BURGER COURT and REHNQUIST COURT have exploited these relatively fluid devices to impose more severe restrictions on judicial regulation of government operations.

A second reason the Court may be unwilling to reexamine the doctrine is that scholarly criticism has challenged the integrity of a conceptual division of politics and law. Surely there can be no definitive and principled distinction between a political decision and a legal one in terms of their real-world consequences. A legal decision will have political effects, just as any political decision might. For example, deciding whether federal minimum-wage standards for state employees unduly interfere with the sovereign authority of state government or whether federal restrictions on political campaign contributions violate a contributor's FREEDOM OF SPEECH rights requires the judiciary either to approve the current balance of powers and rights struck by Congress or to disapprove it and redistribute the balance by imposing constitutional restraints on Congress. In another and less obvious sense, many constitutional decisions will turn on questions that are not essentially legal. Thus, some questions—for example, whether the state's interest in the preservation of fetal life during a woman's pregnancy is any less compelling before the point of viability than after it and whether a political party has been disadvantaged enough by a political gerrymander to claim unconstitutional vote dilution—may be legal because they are framed in intellectual ways familiar to lawyers and the federal judiciary assumes power to decide them. But the same questions are political in the sense that they cannot be answered except by reference to some theory of value which is inherently political (in the examples, a theory underlying a right of reproductive choice or a right to an undiluted vote). The stronger the system of judicial supervision of governmental policymaking, the more likely it is that a legal question will implicate political considerations and consequences.

Reasonably, the Court may be loath to recognize a collapse of the formal distinction between politics and law, for the merger of political and legal questions muddles the role of the federal judiciary in the tripartite national governmental system. If the questions underlying most constitutional claims involve obvious political considerations, what justifies the federal judiciary in second-guessing the policy decisions of the political branches? Ultimately, the analytical flaws of the political question doctrine threaten to unseat the Court as the primary interpreter of the Constitution.

DAVID M. SKOVER
(1992)

(SEE ALSO: *Campaign Finance; Constitutional Interpretation; Equity; Judicial Policymaking.*)

Bibliography

BICKEL, ALEXANDER 1962 *The Least Dangerous Branch: The Supreme Court at the Bar of Politics.* Indianapolis, Ind.: Bobbs-Merrill.

KOMESAR, NEIL 1984 Taking Institutions Seriously: Introduc-

tion to a Strategy for Constitutional Analysis. *University of Chicago Law Review* 56:366–446.

NAGEL, ROBERT 1989 Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine. *University of Chicago Law Review* 56:643–669.

REDISH, MARTIN 1985 Judicial Review and the "Political Question." *Northwestern University Law Review* 79:1031–1061.

SCHARPF, FRITZ 1966 Judicial Review and the Political Question: A Functional Analysis. *Yale Law Journal* 75:517–597.

## POLITICAL QUESTION DOCTRINE
(Update 2)

Since its modern-era recognition of the political question DOCTRINE in BAKER V. CARR (1962), the Supreme Court has never signaled a weakening of its nominal commitment to the principle that some issues do not lend themselves to adjudication in a court of law. In an increasingly large majority of cases in which a party has argued that the doctrine bars adjudication, however, the Court has found it to be an insufficient justification for departure from the normal presumption of JUDICIAL REVIEW.

The scope of the political question doctrine has been shaped as much by cases in which the Court found it not to apply as by cases in which the Court applied the doctrine. Indeed, the Court has repeatedly refused to dismiss even cases falling within categories that many commentators had thought were defined as "political" in nature. These include cases involving FOREIGN AFFAIRS and TREATIES; political GERRYMANDERING; legislative apportionment; structural requirements on the internal workings of the legislative branch; and specific grants of power to Congress such as the power to control IMMIGRATION; and the authority over AMERICAN INDIAN affairs. From these decisions, it is clear that the Court does not avoid adjudication merely because of the topic involved in the litigation. Indeed, some commentators believe that to do so would be an abdication of the Court's responsibility to decide CASES AND CONTROVERSIES.

The key to the Court's recognition of a nonjusticiable issue is the nature of the legal wrong. If the plaintiff can allege a concrete injury caused by the defendant's violation of a legal provision, the Court will ordinarily consider that claim on the merits, unless the provision at stake does not specify enforceable limits on the defendant's behavior. Even if the law involves politically sensitive areas or matters over which the other branches may have wide latitude for discretion, the Court has been willing to adjudicate as long as it can identify those legal limits against which the defendant's conduct can be evaluated. In the rare case in which no limits are specified, such as in the clause guaranteeing a REPUBLICAN FORM OF GOVERNMENT, the Court will dismiss.

NIXON V. UNITED STATES (1993) is the first post-*Baker* case in which a majority of the Court dismissed a claim on political question grounds. The Court found that the alleged violation—the failure of the U.S. SENATE properly to "try" the IMPEACHMENT of a federal judge—rested on an unusual provision of the Constitution that by its terms excluded the Court by granting to the Senate the "sole power to try impeachments." Because no constitutional provision other than the impeachment clauses grants "sole" power, there is little to suggest that this holding will have an impact outside the impeachment context. Thus, developments in the political question doctrine appear to confirm the view of those who have argued that the doctrine does not provide license for the Court to avoid decisions on the merits.

REBECCA L. BROWN
(2000)

Bibliography

BROWN, REBECCA L. 1993 When Political Questions Affect Individual Rights: The Other *Nixon v. United States*. *Supreme Court Review* 1993:125–155.

HENKIN, LOUIS 1976 Is There a "Political Question" Doctrine? *Yale Law Journal* 85:597–625.

MULHERN, J. PETER 1998 In Defense of The Political Question Doctrine. *University of Pennsylvania Law Review* 137:97–176.

## POLITICAL SPEECH

See: Anonymous Political Speech; Campaign Finance; Electoral Process and the First Amendment; First Amendment; Freedom of Speech

## POLITICAL TRIALS

Among Chief Justice JOHN MARSHALL's better-known observations is his declaration in MARBURY V. MADISON (1803) that the United States has "a government of laws and not of men." The assertion calls forth visions of a politically neutral legal system, dispensing evenhanded justice without regard to partisan concerns or to the identities of the parties. Yet, much in American legal history belies Marshall's aphorism. This country's past is replete with political trials, and they have done more than a little to shape its constitutional law.

In a sense, of course, all trials are political. Courts, judges, and the other institutions and individuals involved in the administration of justice are part of a system of government; even when they do no more than punish an ordinary crime or resolve a private dispute, they help to demonstrate the utility of that system and to maintain its

authority. To most people, though, the term "political trial" connotes something more; it designates a type of legal proceeding having peculiar properties that distinguish it from ordinary civil and criminal litigation. There is much disagreement about what those defining attributes are, but a political trial is probably best defined as any civil or criminal trial or IMPEACHMENT proceeding that immediately affects, or is intended to affect, the structure, personnel, or policies of government; that is the product of political controversy; or that results when those in control of the machinery of government seek to use the courts to disadvantage their rivals or preserve their own economic or social position. Some commentators would dispute the inclusion of civil proceedings within this definition, but from the earliest days of the Republic, suits seeking damages, injunctions, and various special writs have been used to mobilize judicial machinery in support of political causes and to suppress critics of the government.

Most political trials are criminal, however. In some, the defendants are charged with offenses that are political in nature, involving direct challenges to governmental authority. TREASON is the most serious crime of this type. Others include SEDITIOUS LIBEL, subversion, sabotage, and espionage. Prosecutions for bribery, corruption, abuse of official power, and vote fraud also belong in this category.

A trial can be political even if the defendant is not charged with one of these political offenses, for sometimes political issues pervade trials for ordinary crimes. As Otto Kirchheimer has pointed out, "political coloring [can] be imported to such a garden-variety criminal trial by the motives or objectives of the prosecution or by the political background, affiliation, or standing of the defendant." The 1886 Haymarket case, in which defendants were prosecuted and convicted on charges of CONSPIRACY to commit murder and being accessories after the fact in a fatal bombing only because they were anarchists, is an example of the kind of proceeding to which he refers.

Like many political trials, the Haymarket case was a product of political persecution. Sometimes, though, the defendant imports the political coloring to a criminal case. A courtroom provides the accused with a public forum and an audience for his political message. Thus, during the 1920s, General Billy Mitchell deliberately provoked his superiors into court-martialing him for conduct prejudicial to the discipline and good order of the army so that he could gain a hearing for his views on air power and publicize what he regarded as the military's misuse of aviation.

Not all political trials involve such deliberate exploitation of judicial machinery for political purposes. Some earn this designation simply because political considerations determined their outcome. An example is the WORLD WAR I trial of Joe Hill. Hill's affiliation with a radical labor organization, the Industrial Workers of the World (IWW), was unknown when he was arrested for a murder, but it was the reason for his ultimate unfair conviction on that charge.

A trial should also be considered political if the ordinary crime of which the defendant was accused was a product of political controversy or committed for political reasons. The WATERGATE burglary and coverup conspiracy trials exemplify this type of proceeding. The offenses with which the government charged the defendants were not inherently political, but the fact that the defendants were alleged to have committed them to advance RICHARD M. NIXON's reelection campaign and to protect the reputation of his administration gave their trials a clearly political character.

Legal proceedings can sometimes take on that coloration simply because they happen to affect substantially the politics of their time. During the VIETNAM WAR, Lieutenant William Calley was court-martialed for his role in the massacre of more than one hundred civilians at My Lai. Because it symbolized for hawks and doves alike all that they believed was wrong with the American military effort in Southeast Asia, the Calley case became one of the major political issues of the early 1970s.

Many of America's best-known political trials have arisen against the backdrop of military conflict. Both the AMERICAN REVOLUTION and the CIVIL WAR generated prosecutions for treason and other explicitly political offenses. During and just after World War I the federal government and numerous states launched legal assaults on radicals and dissenters. WORLD WAR II produced a circuslike sedition trial of some of the most vitriolic right-wing critics of President FRANKLIN D. ROOSEVELT, as well as postwar prosecutions of U.S. citizens alleged to have collaborated with the enemy and of leaders of the defeated Axis powers. Scores of American communists found themselves on trial during the KOREAN WAR. The Vietnam War also unleashed a torrent of political trials, produced by the efforts of the administrations of LYNDON B. JOHNSON and Richard Nixon to repress dissent and the determination of antiwar activists to obtain a judicial declaration of the war's illegality. International tensions falling short of shooting wars have also given rise to numerous political trials, such as those of Jeffersonian politicians and editors during the Quasi-War between the United States and France in the 1790s and, more recently, the trials of domestic communists during the early days of the Cold War.

Second only to military confrontations as a cause of political trials are conflicts between labor and capital. Indeed, during the period 1870–1930 they were more important. During that era big business exercised a growing influence over all levels and branches of government, and it could generally count on the assistance of prose-

cutors and judges in putting down challenges to its economic power. Prominent union leaders, such as EUGENE V. DEBS of the American Railway Union and "Big Bill" Haywood of the IWW, found themselves cast as defendants in highly politicized legal proceedings, as did numerous other labor activists. During World War I federal criminal prosecutions devastated the IWW.

After the rise of organized labor to political power during the 1930s, labor-management conflict ceased to generate a significant number of political trials. Racial problems continued to do so, as they had since antebellum days when white southerners sometimes tried rebellious slaves, and numerous northern abolitionists suffered prosecution for interfering with enforcement of the FUGITIVE SLAVE Law of 1850. The most spectacular political trial of the antebellum era was the 1859 state treason prosecution of abolitionist firebrand John Brown for his raid on Harpers Ferry, Virginia (now West Virginia). Although the Civil War destroyed SLAVERY, it did not put an end to political trials whose root cause was race. From West Point Cadet Johnson Whitaker in the 1880s to members of the Black Panther party in the late 1960s and early 1970s, African Americans who challenged white supremacy, whether violently or peacefully, found themselves defendants in political trials. The peak period for such prosecutions was the decade around 1970, which produced the highly publicized LeRoi Jones, Angela Davis, Bobby Seale, and Panther Twenty-one cases.

All of these black militants had positioned themselves well outside the political mainstream. Like the defendants in most American political trials, they were essentially scapegoats who lacked real power and posed threats to the system that were more symbolic than real. Seldom have those in authority hauled serious rivals into court. Early American history does offer some examples of legal attacks on potent challengers to incumbent regimes, such as the SEDITION ACT prosecutions of the Republican opposition in the late 1790s. But most such trials occurred before the concept of a legitimate political opposition had fully established itself, and most triggered a popular reaction against those who had initiated them. There have been few prosecutions of mainstream opposition groups since the Civil War.

Nor has the United States produced many examples of that staple of political justice elsewhere, the "successor regime trial," a criminal prosecution brought by those who have recently captured control of the government to discredit their predecessors in power. The principal reason for this is no doubt the constitutional stability that has kept America under the same system of government for over two hundred years. But even after the North forcefully displaced the state and national governments of the South during the Civil War, it tried few leaders of the defeated Confederate regime. In the United States, political trials have usually occurred, not after wrenching transfers of power, but at times when the status quo was under challenge because of social and political ferment unleashed by war, economic conflict, or racial discord.

Although not associated with cataclysmic constitutional change, such legal proceedings have helped to shape the Constitution. In some doctrinal areas the precedents that supplement the language of the document itself are entirely the products of political trials. This is most obviously true of the procedures worked out by the House and Senate to supplement the purely political process of impeachment. The law of treason is also a product of political trials.

So are some FREEDOM OF SPEECH doctrines. Justices OLIVER WENDELL HOLMES, JR., and LOUIS D. BRANDEIS worked out their CLEAR AND PRESENT DANGER test in response to appeals by radicals prosecuted during World War I and the postwar Red Scare. That test gained the endorsement of a majority of the Supreme Court in HERNDON V. LOWRY (1937), only to be restrictively reinterpreted in DENNIS V. UNITED STATES (1951). Both cases arose out of political trials of communists. In BRANDENBURG V. OHIO (1969) the Court, in the process of overturning a conviction of a Ku Klux Klansman for the political offense of CRIMINAL SYNDICALISM, articulated a new principle even more protective of expression than the original clear and present danger test had been.

Political trials have affected other facets of constitutional law as well. For example, UNITED STATES V. NIXON (1973), which recognized but limited the doctrine of EXECUTIVE PRIVILEGE, arose out of the efforts of SPECIAL PROSECUTOR Leon Jaworski to obtain White House tapes for use in the Watergate conspiracy trial. The ringing declaration in EX PARTE MILLIGAN (1866) that the Constitution "covers with the shield of its protection all classes of men, at all times, and under all circumstances" and cannot be "suspended during any of the great exigencies of government" represents a doctrinal response to the ABRAHAM LINCOLN administration's efforts to use military commissions to punish civilian dissidents. Even *Marbury v. Madison*, the case in which the Supreme Court first applied the doctrine of JUDICIAL REVIEW, was a product of efforts to use judicial machinery to achieve political objectives.

The Court has, to be sure, exhibited some reluctance to decide issues thrust before it in this way. The POLITICAL QUESTION doctrine is evidence of that attitude, as is the Court's refusal during the Vietnam conflict to hear appeals pressed upon it by litigants hoping to get the war declared unconstitutional. Nevertheless, political trials have led to rulings that have created precedents and shaped doctrine in important areas of the law. As ALEXIS DE TOQUEVILLE wrote in *Democracy in America*, "Scarcely any political question arises in the United States that is not resolved,

sooner or later, into a judicial question." Often that resolution has begun in the context of a political trial. Although often condemned, such proceedings are an integral part of the American constitutional tradition.

MICHAEL R. BELKNAP
(1992)

(SEE ALSO: *Iran-Contra Affair; Military Justice; Politics; Special Prosecutor.*)

Bibliography

BECKER, THEODORE L., ed. 1971 *Political Trials.* Indianapolis, Ind.: Bobbs-Merrill.

BELKNAP, MICHAEL R., ed. 1981 *American Political Trials.* Westport, Conn.: Greenwood Press.

HACKMAN, NATHAN 1972 Political Trials in the Legal Order: A Political Scientist's Perspective. *Journal of Public Law* 21:73–126.

KIRCHHEIMER, OTTO 1961 *Political Justice: The Use of Legal Procedure for Political Ends.* Princeton, N.J.: Princeton University Press.

## POLITICS

Constitutions are fundamentally linked to the character of politics. At the most obvious level constitutions structure the political process. The United States Constitution defines who may serve in various elected offices, the terms of office (the frequency of election), the number of representatives, and the manner of their election. But, as important if not as obvious, constitutions in general and the United States Constitution in particular are also shaped by basic concerns about the character of politics and its malfunctions or evils. These concerns are reflected in the structures of politics established in the Constitution, the debates about the Constitution, and the evolution of constitutional law over the last two hundred years.

Two basic visions of political malfunction—one that stresses fear of the many (majoritarian bias) and one that stresses fear of the few (minoritarian bias)—coexist in traditional American views of government and constitutional history. Minoritarian bias supposes an inordinate power in the few at the expense of the many. Political power and influence, whether gained by graft, propaganda, or campaign support, often require organization and resources. Here a majority, each of whose members suffers only small loss from a government action, can be at a significant disadvantage to a minority with large per capita gains. The total loss to the majority may far outweigh the gains to the minority, but if the per capita loss is small enough, members of the majority may not even recognize that loss. Even if a member of the majority knows of the proposed legislation and recognizes its dangers, each individual has small incentive to spend time or money in organizing others. These efforts are further frustrated by the likelihood that other members of the majority will be inclined to "free ride" (i.e., refuse to participate or assume that others will carry the load).

Majoritarian bias is a completely opposite response to the same skewed distribution of impacts that characterizes minoritarian bias. Here the numerical majority, with its small per capita interests, imposes disproportionate losses on an intense, concentrated minority. The difference between majoritarian and minoritarian bias lies in suppositions about the political process. If we suppose that everyone understands and votes his interests and if we assume a political process that counts votes for or against but does not consider the severity of impact or the intensity of feeling about the issue, a low-impact majority can prevail over a high-impact minority, even though the majority gains little and the minority is harmed greatly. The power of the many lies simply in numbers, and malfunctions arise because the few are disproportionately harmed.

Concerns about both majoritarian and minoritarian bias have been with Americans throughout their constitutional history, from the framing of the original Constitution to the modern era. The period of the framing and RATIFICATION OF THE CONSTITUTION shows clear concern about these forms of bias. Indeed, the two opposing constitutional positions of the time FEDERALISM and ANTI-FEDERALISM—can be defined by differences in their concern about majoritarian and minoritarian bias.

The authors of THE FEDERALIST recognized the existence of both forms of bias, expressed concern about both, but seemed to worry more about majorities. JAMES MADISON, in particular, placed great emphasis on the dangers of the majority in *Federalist* #10:

> If a faction consists of less than a majority, relief is applied by the republican principle, which enables the majority to defeat its sinister views by regular vote: It may clog the administration, it may convulse the society; but it will be unable to execute or mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government on the other hand enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. . . .
>
> The majority . . . must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. . . .
>
> A pure Democracy, by which I mean, a Society, consisting of a small number of citizens, who assemble and administer the Government in person, can admit of no cure for the mischiefs of faction.

Madison's comments reveal the major Federalist response to the perceived danger: the removal or insulation of federal government decision makers from local popu-

lations. They sought this insulation in several ways. First, the decision makers were physically distanced. The national capital was generally much farther from most citizens than was the seat of state or LOCAL GOVERNMENT; physical distance was no small factor at a time when travel was so difficult. Second, each of the decision makers was to represent a large number of constituents, thereby making organization of a majority more difficult. Third, they served for relatively long terms, ranging from two to six years, so that their constituents had infrequent access through the ballot box and a complex record to decipher and judge. Fourth, the Senate and President were indirectly elected—the Senate by state legislatures and the President by the ELECTORAL COLLEGE.

The opponents of the Federalists, the more heterogeneous Antifederalists, appeared far more concerned about minoritarian bias. The Antifederalists feared that indirectly elected senators serving long terms would devolve into an aristocracy and combine with the indirectly elected President to allow an easy conduit for "the advantage of the few over the many." In response, they sought rotation in office, shorter terms, the possibility of recall, and easier IMPEACHMENT. They also feared that the House of Representatives was insufficiently numerous to enable it "to resemble the people" and therefore would be subject to influence and corruption. They feared "the superior opportunities for organized voting which they felt to be inherent in the more thickly populated areas." They feared that a Supreme Court not subject to popular control would favor the rich. These fears were all signs of concern about minoritarian bias.

The tension between the Federalist and Antifederalist positions centered significantly on the controversy over the relative roles of large and small jurisdictions—in particular, the role of the states in relation to the national government. The Federalists, who feared the power of the majority more than that of the minority, believed in a strong national government and the indirect election of government officials. The Antifederalists believed in small jurisdictions and feared that as government grew larger and more remote, the concentrated few would subvert the process.

The Federalist and Antifederalist positions both possess inadequacies and inconsistencies. Antifederalists can be seen as heirs to the tradition of classical republicanism. They envisioned a republic small in size, with a small and homogeneous population. The great problem for the Antifederalists was the extrapolation of republican ideals to a large, dispersed, and heterogeneous population. They did not have an alternative for a national government.

For the Federalists, whose vision of government was more directly embodied in the Constitution, the problems were both more subtle and more important. Madison and the Federalists stressed government on a relatively large scale, with political decision makers (legislators and executives) removed from the mass of the populace both by distance and by mode of selection. The analysis of political malfunction employed here suggests that to the extent that the Federalist structure achieved the insulation of officials from the general populace, it traded one bias for another.

Greater distance, more complex modes of selection, and larger, more diverse constituencies provide protection from the masses but not complete isolation. Other paths of influence—and therefore sources of bias—remain and in fact flourish. The more complex setting enhances the power of organization and the accumulation of funds and helps cover underhanded dealings. Isolation provides respite from the masses but far easier access to concentrated minorities. In other words, greater insulation of public officials may purchase protection from majoritarian bias by increasing the potential for minoritarian bias.

Madison and the Federalists were not necessarily wrong to emphasize majoritarian over minoritarian bias. The correct choice depends on a number of factors (such as size of the jurisdiction or complexity of the issues) that may make one or the other bias more likely. It is intriguing to wonder whether the correct choice might be different if one were writing a constitution on a clean slate for the larger, more complex United States of the late twentieth century than it was for the United States of Madison and the Federalists.

The tradeoffs and tensions between majoritarian and minoritarian bias have surfaced elsewhere in American constitutional history. The famous footnote four from UNITED STATES V. CAROLENE PRODUCTS CO. (1938), where the Supreme Court set out the general outlines of modern constitutional law, is a microcosm of these tradeoffs and tensions. Footnote four reads:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the FOURTEENTH AMENDMENT than are most other types of legislation. On restrictions upon the right to vote; on restraints upon the dissemination of information . . . ; on interferences with political organizations . . . ; as to prohibition of peaceable assembly. . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular re-

> ligious, or national, or racial minorities; or whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Examined from the perspective of the tension between majoritarian and minoritarian bias, the various components of *Carolene Products*—the holding of the case and the principle concerns expressed in the footnote—are very much interrelated.

In *Carolene Products* the Court applied minimal scrutiny to uphold the economic regulation before it. The legislation at issue in *Carolene Products* banned the interstate sale of "filled milk," skim milk supplemented with nonmilk fats such as coconut oil. It does not take much scrutiny to see the dairy lobby at work behind the passage and enforcement of the Filled Milk Act. Indeed, the dairy industry's efforts to employ legislation to keep "adulterated" products from grocery shelves and vending booths have a long history. It is perhaps not too uncharitable to suggest that concern for the dairies' pocketbooks rather than for the consumer's health best explains the dairy lobby's efforts: the dairy industry benefited from reduced competition and the resultant higher prices paid by consumers.

The holding of the case abandons serious judicial review of ECONOMIC REGULATION, thereby leaving dispersed majorities like consumers without direct judicial protection from the minoritarian bias that can characterize governmental decisions about economic regulation like that in *Carolene Products* itself. Seemingly in response to these concerns, paragraph two of the *Carolene Products* footnote promises indirect aid to dispersed majorities by strengthening their access to and participation in the political process. By protecting access to information, organization, and the vote, the Court focused on activities that would decrease the relative advantage of concentrated interests that trade upon their superiority in gathering information, organizing, and gaining access to power through nonvoting channels.

Yet, although these protections reduce minoritarian bias, they may do little for, and in fact aggravate, majoritarian bias. Government officials whose manipulations of programs reflect the will of a majority have little to fear from public exposure or an expanded franchise. Majoritarian bias is generated when simple democracy works too well. The majority knows its interest and votes it. Because that interest is unweighted, however, a minority suffers substantial losses for disproportionately small gains to the majority. From this vantage, judicial responses like the basic rule of American VOTING RIGHTS—ONE PERSON, ONE VOTE—are well suited to the dissipation of minoritarian bias, but can reinforce majoritarian bias. In the extreme, if it were possible to fully perfect the process by making every citizen totally aware of his or her own interest and able immediately to translate that interest into an effective vote, minoritarian bias would disappear, but majoritarian bias would be worse.

Paragraph three of the *Carolene Products* footnote responds to the need to protect against this danger of majoritarian bias by promising special judicial examination of those actions most likely infected by majoritarian bias. Subsequent equal protection law decisions made these concerns a central feature of modern constitutional law.

These important historical episodes indicate that the character of constitutions and the character of politics are tightly interwoven. Constitutions determine, and are determined by, the character of politics.

NEIL K. KOMESAR
(1992)

(SEE ALSO: *Conservatism; Federalists; Jacksonianism; Jeffersonianism; Liberalism; Populism; Pragmatism; Progressivism; Republican Party.*)

Bibliography

KOMESAR, NEIL K. 1984 Taking Institutions Seriously. *University of Chicago Law Review* 51:366–446.

——— 1987 Back to the Future—An Institutional View of Making and Interpreting Constitutions. *Northwestern Law Review* 81:191–219.

——— 1987 Paths of Influence—Beard Revisited. *George Washington Law Review* 56:124–135.

——— 1988 A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society. *Michigan Law Review* 86:657–721.

## POLK, JAMES KNOX
(1795–1849)

The eleventh President's constitutional beliefs blended STRICT CONSTRUCTION, expediency, and continental vision. He returned to a central theme of Jacksonian constitutionalism to harmonize these divergent interests: the President was the tribune of the people, the only nationally elected federal official.

Polk stressed the SEPARATION OF POWERS in order to legitimate the popularly based presidential power he exercised. He recognized that congressional committees had legitimate claims to information held by the executive branch, but he spurned congressional requests that intruded upon areas of constitutional responsibility he believed assigned to the President, most notably FOREIGN AFFAIRS. He rebuffed, in 1848, SENATE advice to negotiate a treaty of extradition with Prussia and to secure the

purchase rights of the Hudson's Bay Company on the Columbia River. Yet Polk acknowledged that Congress commanded a broad sphere of constitutional responsibility; he vetoed only three legislative acts.

Polk contributed significantly to the constitutional development of the COMMANDER-IN-CHIEF clause. Unlike ABRAHAM LINCOLN, he believed that the clause granted only military leadership to the President. Yet Polk made use of this power to implement his policy of continentalism. He ordered General ZACHARY TAYLOR into disputed territory between the United States and Mexico knowing that such actions were likely to precipitate hostilities. When the Mexicans responded with force, Congress was left to ratify a war rather than to fulfill its constitutional mandate to declare it. Throughout the ensuing conflict Polk established the precedent that a vigorous conception of the commander-in-chief clause meant control over military affairs.

Tough and efficient, Polk was a transitional figure in the constitutional evolution toward the modern presidency. Unlike his twentieth-century counterparts, Polk, with his strict constructionist beliefs, did not think that the right of self-defense or the inherent authority of the commander-in-chief bestowed on him the power to wage war against another country without congressional authorization.

KERMIT L. HALL
(1986)

Bibliography

MCCOY, CHARLES A. 1960 *Polk and the Presidency.* Austin: University of Texas Press.

## POLLAK, WALTER H.
(1887–1940)

Walter H. Pollak, an active supporter of CIVIL LIBERTIES, argued a number of important cases before the Supreme Court. He represented the defendant in GITLOW V. NEW YORK (1925) and, although he lost that case, succeeded in convincing the Court that the FOURTEENTH AMENDMENT incorporates the FIRST AMENDMENT guarantees of FREEDOM OF THE PRESS and FREEDOM OF SPEECH against the states. With ZECHARIAH CHAFEE, Pollak served on the Wickersham Committee and investigated "lawlessness in law enforcement." He also took part in WHITNEY V. CALIFORNIA (1927) and successfully defended the "Scottsboro boys" in POWELL V. ALABAMA (1932) and NORRIS V. ALABAMA (1935).

DAVID GORDON
(1986)

## *POLLOCK v. FARMERS' LOAN & TRUST CO.*
157 U.S. 429 and 158 U.S. 601 (1895)

CHARLES EVANS HUGHES called these decisions a "self-inflicted wound" comparable to the decision in DRED SCOTT V. SANDFORD (1857). Here the Supreme Court held unconstitutional an 1894 act of Congress that fixed a flat tax of two percent on all annual incomes over $4,000. Pollock filed a STOCKHOLDER'S SUIT against the trust company to prevent it from complying with the statute which, he claimed, imposed a DIRECT TAX without apportioning it among the states on the basis of population. The trust company, the party of record on the side of the tax, avoided the appearance of collusion by hiring the president of the American Bar Association, James Coolidge Carter; Richard Olney, attorney general of the United States, was on the same side as AMICUS CURIAE. Theirs was the easy task because history and all the precedents proved that the clause of Article 1, section 9, referring to direct taxes, meant only taxes on people or on land. The Court had so declared in HYLTON V. UNITED STATES (1796) and in several other cases, especially SPRINGER V. UNITED STATES (1881), a direct precedent; the Court there had unanimously sustained an earlier income tax as imposing an indirect tax and therefore not subject to the requirement of apportionment.

Counsel for Pollock, led by JOSEPH H. CHOATE, buttressed a weak case with an impassioned argument intended to provoke judicial fear and reflecting the panic felt by many conservatives. Choate warned that the Court had to choose between "the beginning of socialism and communism" and the preservation of private property, civilization, and the Constitution. He appealed to the Court to substitute its discretion for that of Congress.

Justice HOWELL E. JACKSON not having participated, an eight-member Court decided the case. All agreed that the federal tax on municipal bonds was unconstitutional, because government instrumentalities were exempt from taxation (see INTERGOVERNMENTAL IMMUNITIES). On the question of the validity of the tax on income from personal property, the Court divided evenly. But on the question of the validity of the tax on income from real estate, the Court voted 6–2 that it was a direct tax unconstitutionally assessed. Nothing favorable can be said about Chief Justice MELVILLE W. FULLER's opinion for the majority. He took for granted the very proposition he should have proved, asserting that a tax on the income from land was indistinguishable from a tax on the land itself. Clearly, however, the income that may derive from rents, timber, oil, minerals, or agriculture is distinguishable from a tax on acreage or on the assessed value of the land itself.

Fuller distinguished away the precedents: *Hylton* had decided only that a tax on carriages was not a direct tax, and *Springer* had decided only the narrow point that a tax on a lawyer's fees was not a direct one. Neither case, Fuller declared, dealt with a tax on the income from land, and he made much of the point that such a tax is unique because of the undisputed fact that a tax on the land itself is undoubtedly a direct tax. Justices EDWARD D. WHITE and JOHN MARSHALL HARLAN, dissenting, concluded that history and STARE DECISIS demanded a different ruling, and they warned that when the Court virtually annulled its previous decisions on the basis of the policy preferences of a majority that happened to dominate the bench, the Constitution was in jeopardy.

The tie vote of the Court on all other issues meant that the decision of the CIRCUIT COURT prevailed, leaving in force the taxes on corporate income, wages and salaries, and returns from investments. Accordingly, Choate moved for a rehearing, which was granted, and Justice Jackson attended. The trust company, which was supposed to defend the income tax act, did not retain Carter or replace him, thus leaving Olney to defend it. He took half the time permitted by the Court for his presentation.

The arguments the second time focused on the validity of the tax on the income from personal property, mainly interest and dividends. Fuller, speaking for a bare majority, again read the Court's opinion. Six weeks earlier he had based his position on the uniqueness of a tax on the income from land; now he took the opposite view, reasoning that if a tax on the income from land is a direct tax, so is a tax on the income from personal property. Having found the statute void in significant respects, he reasoned next that the invalidity of some sections contaminated the rest: since the sections were inseparable, all were void because some were.

When Fuller finished his opinion, Harlan began to read his dissent; it sizzled in its language and delivery. He ended a systematic refutation by pounding his desk, shaking his finger in the face of the Chief Justice, and shouting, "On my conscience I regard this decision as a disaster!" (*The Nation* magazine described Harlan as an "agitator" who expounded "the Marx gospel from the bench.") He accused the majority of an unprecedented use of judicial power on behalf of private wealth by striking down a statute whose policy they disliked and by doing it against all law and history. He also pointed out, as did the other dissenters, Justices White, Jackson, and HENRY B. BROWN, that the parts of the statute that were not unconstitutional per se, and might be reenacted if Congress chose, taxed the income of people who earned their money from wages and salaries but who derived no income from land or invested personal property. The decision, said Brown, is "nothing less than a surrender of the taxing power to the moneyed class" making for "a sordid despotism of wealth." It "takes invested wealth," said White, and "reads it into the Constitution as a favored and protected class of property. . . ." It was, said Jackson, "the most disastrous blow ever struck at the constitutional power of congress" and made the tax burden fall "most heavily and oppressively upon those having the least ability" to pay.

Public opinion was opposed to the Court, though it had vigorous supporters especially among the Republican newspapers in the East. The *New York Sun* exclaimed in delight, "Five to Four, the Court Stands Like a Rock." The *New York Herald Tribune* hailed the Court for halting a "communist revolution." The Democratic party, however, recommended an amendment to the Constitution vesting Congress with the power denied by the Court. The SIXTEENTH AMENDMENT was not ratified, though, until 1913, by which time the nation's maldistribution of wealth had intensified. For eighteen years, as EDWARD S. CORWIN wrote, "the veto of the Court held the sun and moon at pause," while the great fortunes went untaxed. The government during that time raised almost all of its revenues from EXCISE TAXES and tariffs, whose burden fell mainly on consumers. In 1913 the average annual income in the United States was $375 per capita.

LEONARD W. LEVY
(1986)

Bibliography

CORWIN, EDWARD S. 1932 *Court over Constitution.* Pages 177–209. Princeton, N.J.: Princeton University Press.

KING, WILLARD L. 1950 *Melville Weston Fuller.* Pages 193–221. New York: Macmillan.

PAUL, ARNOLD M. 1960 *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887–1895.* Pages 159–220. Ithaca, N.Y.: Cornell University Press.

SHIRAS, GEORGE, 3RD, and SHIRAS, WINFIELD 1953 *Justice George Shiras Jr. of Pittsburgh.* Pages 160–183. Pittsburgh: University of Pittsburgh Press.

## *POLLOCK v. WILLIAMS*
322 U.S. 4 (1944)

A Florida statute made the failure to perform services according to an agreement (for which an advance had been made) *prima facie* evidence of an intent to defraud. The Supreme Court, in an opinion by Justice ROBERT H. JACKSON, voided the statute, 7–2, as a violation of the THIRTEENTH AMENDMENT and of the Anti-Peonage Act of 1867. At issue before the Court was a HABEAS CORPUS petition for "an illiterate Negro laborer in the toils of law for the want of $5." His failure to perform agreed-upon labor for that advance resulted in a $100 fine, in default of which he was

sentenced to sixty days' imprisonment. Jackson held that the Thirteenth Amendment and the Anti-Peonage Act "raised both a shield and a sword against forced labor because of debt."

DAVID GORDON
(1986)

## POLL TAX

A poll tax (CAPITATION TAX, head tax) is typically levied on every adult (or adult male) within the taxing JURISDICTION. An old technique for raising revenue, the tax in its compulsory form raises no important constitutional questions. (Under Article I, section 9, Congress can levy a poll tax only by apportionment to the national census. Congress has not in fact raised revenue this way.)

Serious constitutional issues have been raised in this century by poll taxes whose payment is "voluntary," enforced only by conditioning voter registration on their payment. Early in the nation's history, payment of such taxes came to replace property ownership as a qualification for voting. By the CIVIL WAR, however, widespread acceptance of universal suffrage had virtually eliminated the poll tax as a condition on voting.

In a number of southern states, the poll tax returned in the 1890s along with SEGREGATION as a means of maintaining white supremacy. In theory and in early practice, poor whites as well as blacks were kept from voting by this means. Later, however, some registrars learned to use the device mainly for purposes of RACIAL DISCRIMINATION, requiring only black would-be voters to produce their receipts for poll tax payments—in some states for payments going back to the voter's twenty-first year. The poll tax gradually fell from favor as a means of keeping blacks from voting; "good character" requirements and LITERACY TESTS, for example, were more readily adapted to this purpose. By 1940 only seven states retained the poll tax as a voting condition.

In BREEDLOVE V. SUTTLES (1937), a case involving a white applicant for registration, the Supreme Court upheld Georgia's use of the poll tax as a condition on voting. The poll tax remained a CIVIL RIGHTS issue, kept alive in Congress by the regular introduction of bills to abolish its use. Southern committee chairmanships and senatorial filibusters succeeded in sidetracking this legislation. When the TWENTY-FOURTH AMENDMENT was finally submitted to the states in 1962, it forbade the use of poll taxes as a condition on voting only in federal, not state, elections. The Amendment was ratified in 1964.

Two years later, the Supreme Court held, in HARPER V. VIRGINIA BOARD OF ELECTIONS (1966), that conditioning voting in state elections on poll tax payments denied the EQUAL PROTECTION OF THE LAWS. Only four states still retained the device, but its elimination eloquently symbolized the relation between VOTING RIGHTS and the equal CITIZENSHIP of all Americans.

KENNETH L. KARST
(1986)

Bibliography

MYRDAL, GUNNAR 1944 *An American Dilemma: The Negro Problem and Modern Democracy.* Chaps. 22–23. New York: Harper & Brothers.

## POLLUTION

See: Environmental Regulation and the Constitution; Federalism and Environmental Law; Waste, Pollution, and the Constitution

## POLYGAMY

Because polygamy was one of the early tenets of the Mormon Church, the movement to eradicate plural MARRIAGE became bound up with religious persecution. The Supreme Court has consistently held that the FIRST AMENDMENT's protections of RELIGIOUS LIBERTY do not protect the practice of plural marriage. Thus REYNOLDS V. UNITED STATES (1879) upheld a criminal conviction for polygamy in the Territory of Utah, and DAVIS V. BEASON (1880) upheld a conviction for voting in the Territory of Idaho in violation of an oath required of all registrants forswearing belief in polygamy. The corporate charter of the Mormon Church in the Territory of Utah was revoked, and its property forfeited to the government, in CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS V. UNITED STATES (1890). The church's First Amendment claim was waved away with the statement that belief in polygamy was not a religious tenet but a "pretense" that was "contrary to the spirit of Christianity."

It would be comforting if this judicial record were confined to the nineteenth century, but it was not. In *Cleveland v. United States* (1946), the Court upheld a conviction of Mormons under the MANN ACT for transporting women across state lines for the purpose of "debauchery" that took the form of living with them in polygamous marriage. The Court's opinion, citing the nineteenth-century cases and even quoting the "spirit of Christianity" language with approval, was written by none other than Justice WILLIAM O. DOUGLAS.

More recently, the Court has recognized a constitutional right to marry, and in a number of contexts has afforded protection for a FREEDOM OF INTIMATE ASSOCIATION. With or without the ingredient of religious freedom, SUB-

STANTIVE DUE PROCESS doctrine seems amply to justify an extension of these rights to plural marriage among competent consenting adults. Yet the force of conventional morality in constitutional adjudication should not be underestimated; the Supreme Court is not just the architect of principle but an institution of government. Polygamy is not on the verge of becoming a constitutional right.

KENNETH L. KARST
(1986)

Bibliography

LARSON, GUSTAVE O. 1971 *The "Americanization" of Utah for Statehood.* San Marino, Calif.: Huntington Library.

## POMEROY, JOHN NORTON

See: Commentators on the Constitution

## POPULAR SOVEREIGNTY

"Popular sovereignty" was a solution proposed by some northern Democrats to the problem of slavery's access to the TERRITORIES. As an alternative to the WILMOT PROVISO, Michigan Senator Lewis Cass proposed in 1847 that slavery be left "to the people inhabiting [the territories] to regulate their internal concerns their own way." He later concluded that congressional prohibition of SLAVERY IN THE TERRITORIES was unconstitutional. Popular sovereignty was a radical innovation: never before had residents of the territories been thought to be invested with SOVEREIGNTY, let alone a territorial sovereignty implying that the federal government lacked substantive regulatory power over the territories.

Illinois Senator STEPHEN A. DOUGLAS took up popular sovereignty in 1854, recommending that the MISSOURI COMPROMISE be jettisoned in order to get the slavery question out of Congress and leave it to the settlers of the territories. Though adopted in the KANSAS-NEBRASKA ACT, popular sovereignty soon fell into disfavor in both the North and the South. Douglas and other northern Democrats rejected the travesty made of it by President JAMES BUCHANAN in his attempt to force slavery into Kansas, while southern leaders abandoned it in favor of a constitutional program that would have forced slavery into all the territories.

WILLIAM M. WIECEK
(1986)

Bibliography

JOHANNSEN, ROBERT W. 1973 *Stephen A. Douglas.* New York: Oxford University Press.

## POPULAR SOVEREIGNTY IN DEMOCRATIC POLITICAL THEORY

The Constitution's first words bespeak its derivation from popular authority: "We the people of the United States . . . do ordain and establish this Constitution." The DECLARATION OF INDEPENDENCE expresses the principle of this act: "to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." The specific doctrine of popular sovereignty behind these familiar phrases still needs to be clarified and distinguished from related but distinct doctrines.

This doctrine of popular SOVEREIGNTY relates primarily not to the Constitution's operation but to its source of authority and supremacy, ratification, amendment, and possible abolition. When JAMES MADISON wrote in THE FEDERALIST #49 that "the people are the only legitimate fountain of power," he referred to what he had called in *The Federalist* #40 (paraphrasing the Declaration) "the transcendent and precious right of the people to "abolish or alter their governments." Legitimate power derives primarily from the people's original consent to their form of government, not from their continuing role in it. Because popular consent is the "pure, original fountain of all legitimate authority," ALEXANDER HAMILTON, in *The Federalist* #22, presents the RATIFICATION OF THE CONSTITUTION by conventions specially elected by the people, a mode recently pioneered by the states, as crucial to its legitimacy. *The Federalist* both opens and closes remarking that for a whole people so to choose their constitution by voluntary consent, far from being typical, is an unprecedented prodigy.

This American mode of popular consent to the institution of government formalized the notion in JOHN LOCKE's *Second Treatise* of "the Constitution of the Legislative being the original and supreme act of the Society, antecedent to all positive Laws in it, and depending wholly on the People." It provides a peaceful, certain, and solemn alternative to violent and irregular acts but remains ultimately an expression of the right to revolution; Madison almost admits in *The Federalist* #40 that adoption of the Constitution was authorized not under the ARTICLES OF CONFEDERATION but only by popular consent as an exercise of revolutionary right. Such popular sovereignty could always be exercised again not only by regular amendment but by revolution.

For the Founders, legitimate government not only had to derive its powers originally from the consent of the people but also had to gain the consent of their regularly elected representatives to legislate for them and tax them. The revolutionary controversy was fundamentally waged,

first, over the American invocation of Locke's position that government "must *not raise Taxes* on the Property of the People, *without the Consent of the People*, given by themselves, or their Deputies," and then over its extension to no legislation without REPRESENTATION.

Such popular sovereignty still is not identical with popular government. The Founders generally regarded the British constitution, for example, with its hereditary king and lords, as a legitimate and even free government because the British (unlike the American) people were represented (albeit imperfectly) in the House of Commons. Republican government, although the form of government best exhibiting the capacity of mankind for self-government, was not the only form compatible with popular consent as the basis of legitimate power. Because Madison correctly believed that the character of the American people makes them unlikely to exercise their sovereign right to replace their republican government with one of another form, this point is relevant less to our domestic than to our foreign policy, which in principle should recognize the right of other sovereign peoples to consent to other forms of government.

Republican government itself differs for the Founders from the populism some later doctrines equate with popular sovereignty. *The Federalist* treats republican government as a species of popular government in that it is administered by officials appointed directly or indirectly by the people and holding office for limited periods or during GOOD BEHAVIOR. It differs from the other species, which they called "democracy" and by which they meant direct democracy, by its reliance on representation. *The Federalist* regards this difference not as an evil necessitated by size (as some Anti-Federalists did) but as a superiority making possible both size, with all its advantages, and government by "men who possess most wisdom to discern, and most virtue to pursue, the common good of the society." (THOMAS JEFFERSON in a letter to JOHN ADAMS called such republican officials "the natural aristocracy.") Republican representatives should refine and enlarge the public views because the reason, not the passion, the cool and deliberate sense, not the temporary errors and delusions, of the public should prevail. The Founders regarded the American republic as embodying the sovereignty of the public reason because it was so constructed as to encourage representatives, especially the Senate, President, and courts, to withstand popular error and passion until popular good sense could respond to argument and events. Their opinion that such an outcome would generally emerge in the few years allowed by the Constitution reveals confidence in both representatives and constituents as well as distrust.

The supremacy of the Constitution and JUDICIAL REVIEW, distinctive features of American CONSTITUTIONALISM, are paradoxical results of this doctrine of popular sovereignty. Hamilton in *The Federalist* #78, like JOHN MARSHALL in MARBURY V. MADISON (1803), based them on the Constitution's being the special act of the sovereign people: "the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." The equation of popular sovereignty with the supremacy of the Constitution, let alone with judicial review, may become problematic once the people who ordained and established the Constitution are long dead. Jefferson suggested in a letter to an unpersuaded Madison that all constitutions naturally expire every generation. Madison in reply adduced the danger of faction and the need of even the most rational government for the prejudice that results from stability, but Jefferson continued to believe in the right of each generation to choose its own form of government. The jural argument for constitutional supremacy was stated by Hamilton in *Phocion* #2 (and echoed in *The Federalist* #78): "The constitution is the compact made between the society at large and each individual. The society therefore, cannot without breach of faith and injustice, refuse to any individual, a single advantage which he derives under that compact . . . until the compact is dissolved with the same solemnity and certainty with which it was made." Ultimately the identity of popular sovereignty with constitutional supremacy depends on an enlightened public opinion animated by the spirit of the Constitution.

That the Founders tended not to call the doctrine expounded here "popular sovereignty" reflects their being republicans and constitutionalists rather than populists. Not the people simply but their reason especially as solemnly embodied in their Constitution is sovereign. More fundamentally, since governments are instituted by consent "to secure these rights," their legitimacy depends not only on consent but on the security of individual rights. Debates such as that over "popular sovereignty" between ABRAHAM LINCOLN and STEPHEN DOUGLAS reveal the potential tension between popular consent and equal rights.

NATHAN TARCOV
(1986)

Bibliography

EPSTEIN, DAVID F. 1984 *The Political Theory of the Federalist.* Chicago: University of Chicago Press.

JAFFA, HARRY V. (1959) 1982 *Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates.* Chicago: University of Chicago Press.

TARCOV, NATHAN 1985 American Constitutionalism and Individual Rights. Pages 101–125 in Robert Goldwin and William

Schambra, eds., *How Does the Constitution Secure Rights?* Washington, D.C.: American Enterprise Institute.

## POPULISM

The industrialization of the United States in the late nineteenth century caused enormous social, economic, and political upheavals in nearly every sector of the nation. Perhaps no group suffered greater dislocations than the farmers, whose livelihood and prosperity were now subject to forces over which they had no direct control. In a series of movements, farmers joined together seeking remedies to their ills. Agrarian protest reached its peak in the Populist movement in the early 1890s, when farmers took to politics in an effort to implement specific economic and political programs.

One will find little evidence of a direct impact of populism on American constitutional development. Rather, the Populists, as part of their larger reform agenda, did make particular proposals that eventually found fruition in the Progressive era. The clearest statement of these demands can be found in the People's party platform of 1896.

The platform is notable for several reasons. First, it summed up two decades of resentment by the farmers against a system they believed ignored their needs and exploited them mercilessly. Several of the complaints directly addressed the structure and operation of government. To begin with, the Populists denounced the recent Supreme Court decision in POLLOCK V. FARMERS' LOAN TRUST CO. (1895) that had invalidated the 1894 income tax rider to the tariff. To the Populists, this decision represented another example of the government's siding with the rich, and the platform demanded "a graduated income tax, to the end that aggregated wealth shall bear its proportion of taxation." In *Pollock*, they argued, the Supreme Court had misinterpreted the Constitution and invaded "the rightful powers of Congress" over taxation.

The Populists were not the first to denounce the *Pollock* decision, but they did add a strong voice to the chorus demanding an income tax. The proposal for a constitutional amendment gradually gained support throughout the country, culminating in ratification of the SIXTEENTH AMENDMENT in 1913.

The platform also called for the election of the President, Vice-President, and the Senate by "a direct vote of the people." Under the Constitution, an ELECTORAL COLLEGE selected the two executive officers, with each state's electors equal to the sum of its senators and representatives. Originally each state could chose its electors as it saw fit, but within a relatively short period of time all states adopted a system in which the popular vote determined which candidate received each state's electoral college ballots—typically in a winner-take-all system. This arrangement emphasized the importance of the larger states and created the possibility that a candidate with a majority of the popular vote could lose in the electoral college. The system has been criticized for decades, and constitutional amendments to abolish the electoral college are periodically introduced in Congress. So far, however, there has been no popular groundswell to carry through a change.

Initially, state legislatures also chose United States senators. In the Gilded Age, bribery and influence peddling often led to the selection of rich industrialists, so that by the 1890s the Senate had come to be known as a "millionaires' club." A few states had preferential primary elections to allow voters to indicate their choice for senator, but the Populists wanted direct election to eliminate what they saw as the corrupting influence of great wealth.

Any change in the election method would require a constitutional amendment, and the House of Representatives passed such an amendment in 1894, 1898, 1900, and 1902; in each session the Senate turned it down. By 1912, thirty states had preferential primaries, and the Senate finally bowed to the inevitable. It passed the SEVENTEENTH AMENDMENT, authorizing the direct election of senators, and the states ratified it the following year.

The 1896 Populist platform also called for other political reforms, some of which could be achieved without constitutional amendment. This list included the adoption of a secret ballot, limiting the use of the injunction in labor disputes, and public ownership of the railroad and telegraph. The Populists also proposed "a system of direct legislation through the initiative and referendum, under proper Constitutional safeguards."

The Populists saw many of their platform items enacted within a relative short period of time. They did not cause the adoption of the Sixteenth and Seventeenth Amendments, but certainly by adding their voices to the demand they helped to achieve these reforms. Except in wartime, we have never had government ownership or control of railroads and telegraph, but the regulatory powers finally given to the Interstate Commerce Commission in the first decade of the twentieth century provided an equivalent to the Populist demands—that public welfare take precedence over private interests.

The states did adopt secret ballots, and many of them also enacted initiative and referendum measures. Although the secret ballot proved effective in buttressing democratic elections, the other two proposals never proved as effective or easy to use as the Populists had anticipated. The elimination of the injunction as a judicial weapon against labor unions, however, had to wait until the New Deal era.

In sum, the Populist demand for political change itself

had relatively little effect on American constitutional development. By adding their voices to the demand for change, however, they reinforced reform currents already underway.

MELVIN I. UROFSKY
(1992)

Bibliography

POLLACK, NORMAN 1987 *The Just Polity: Populism, Law, and Human Welfare.* Urbana: University of Illinois Press.

## POPULIST CONSTITUTIONAL INTERPRETATION

See: Nonjudicial Interpretation of the Constitution; Radical Populist Constitutional Interpretation

## PORNOGRAPHY

The Supreme Court's OBSCENITY decisions define the forms of pornography that are protected from censorship by the FIRST AMENDMENT. As a practical matter, this protection is quite broad. Most pornography is also a unique kind of speech: about women, for men. In an era when sexual equality is a social ideal, the constitutional protection of pornography is a vexing political issue. Should pornographic imagery of male dominance and female subordination be repudiated through censorship, or will censorship inevitably destroy our commitment to free speech?

In ROTH V. UNITED STATES (1957) the Court found obscene speech to be unworthy of First Amendment protection because it forms "no essential part of any exposition of ideas." Yet precisely because of pornography's ideational content, some of it was deemed harmful and made criminal. The Court could avoid examining the specific nature of this harm, once it had located obscenity conveniently outside the constitutional pale. But it could not avoid defining obscenity, and thereby identifying the justification for its censorship.

The essential characteristic of "obscene" pornography is its appeal to one's "prurient interest," which is a genteel reference to its capacity to stimulate physical arousal and carnal desire. But such pornography must also be "offensive," and so, to be censored, sex-stimulant speech must be both arousing and disgusting. The meaning of offensiveness depends upon the subjective judgment of the observer, and is best captured by Justice POTTER STEWART's famous aphorism in JACOBELLIS V. OHIO (1964): "I know it when I see it."

Given the limitations of the criminal process, obscenity laws did not make offensive pornography unavailable in the marketplace. As HARRY KALVEN, JR., pointed out, few judges took the evils of obscenity very seriously, although constitutional rhetoric made the law appear to be "solemnly concerned with the sexual fantasies of the adult population." The Court's chief goal was the protection of admired works of art and literature, not the elimination of pornographic magazines at the corner drug store. Sporadic obscenity prosecutions may occur in jurisdictions where the "contemporary community standard" of offensiveness allows convictions under MILLER V. CALIFORNIA (1973). But the constitutional validity of a legal taboo on "hard-core" pornography became largely irrelevant to its suppliers and consumers, even as that material became sexually explicit and more violent in its imagery during the 1970s.

That same decade saw a legal revolution in equality between the sexes, embodied in judicial decisions based on the guarantees of EQUAL PROTECTION and DUE PROCESS. Women won legal rights to control and define their own sexuality, through litigation establishing rights to contraception and abortion, and through legislative reforms easing restrictions on prosecutions for sexual assault. Pornography also became a women's issue, as feminists such as Catharine MacKinnon attacked it as "a form of forced sex, a practice of sexual politics, an institution of gender inequality." Women marched and demonstrated against films and magazines portraying them as beaten, chained, or mutilated objects of sexual pleasure for men. In 1984, their protests took a legal form when MacKinnon and Andrea Dworkin drafted an ordinance adopted by the Indianapolis City Council, outlawing some types of pornography as acts of SEX DISCRIMINATION.

By using the concept of equal protection as a basis to attack pornographic speech, the council set up a dramatic assault upon First Amendment doctrine, making embarrassed enemies out of old constitutional friends. As a strategic matter, however, the council needed a COMPELLING STATE INTEREST to justify censorship of speech that did not fall into the obscenity category. The ordinance defined offensive pornography more broadly than *Miller*'s standards allow, because it went beyond a ban on displays of specific human body parts or sexual acts. Instead, it prohibited the "graphic sexually explicit subordination of women" through their portrayals as, for example, "sexual objects who enjoy pain or humiliation," or "sexual objects for domination, conquest, violation, exploitation, possession or use."

As a philosophical matter, sex discrimination is a good constitutional metaphor for the harms attributed to pornography, namely, the loss of equal CITIZENSHIP status for women through the "bigotry and contempt" promoted by the imagery of subordination. But as a matter of DOCTRINE, the causal link between the social presence of pornography and the harms of discrimination is fatally remote. Free

speech gospel dictates that "offensive speech" may be censored only upon proof of imminent, tangible harm to individuals, such as violent insurrection (BRANDENBURG V. OHIO, 1969), a physical assault (COHEN V. CALIFORNIA, 1971), or reckless tortious injury to reputation (NEW YORK TIMES V. SULLIVAN, 1964). The closest historical analogue to the creation of a cause of action for classwide harm from speech is the criminal GROUP LIBEL statute upheld by a 5–4 Supreme Court in BEAUHARNAIS V. ILLINOIS (1952). But this remedy has been implicitly discredited by *New York Times* and *Brandenburg*, given its CHILLING EFFECT upon uninhibited criticism of political policies and officials.

It came as no surprise when early court decisions struck down Indianapolis-type ordinances as void for vagueness, as an unlawful PRIOR RESTRAINT on speech, and as an unjustified restriction of protected speech as defined by the earlier obscenity decisions. The courts could accept neither the equal protection rationale nor the breadth of the ordinances' scope, as both would permit too great an encroachment upon the freedoms of expression and consumption of art, literature, and political messages. Ironically, it is the potentially endemic quality of the imagery of women's subordination that defeats any attempt to place a broad taboo upon it.

Eva Feder Kittay has posed the question, "How is it that within our society, men can derive a sexual charge out of seeing a woman brutalized?" Her answer to that loaded question is that our conceptions of sexuality are permeated with conceptions of domination, because we have eroticized the relations of power: men eroticize sexual conquering, and women eroticize being possessed. Pornography becomes more than a harmless outlet for erotic fantasies when it makes violence appear to be intrinsically erotic, rather than something that is eroticized. The social harm of such pornography is that it brutalizes our moral imagination, "the source of that imaginative possibility by which we can identify with others and hence form maxims having a universal validity."

The constitutional source for an analysis of brutalizing pornography lies in the richly generative symbols of First Amendment law itself. That law already contains the tolerance for insistence "on observance of the civic culture's norms of social equality," in the words of Kenneth L. Karst. Any acceptable future taboo would be likely to take the form of a ban on public display of a narrowly defined class of pictorial imagery, simply because that would be a traditional, readily enforceable compromise between free speech and equality. Any taboo would be mostly symbolic, but it would matter. Only by limiting the taboo can we avoid descending into the Orwellian hell where censorship is billed as freedom.

CATHERINE HANCOCK
(1986)

(SEE ALSO: *Child Pornography; Dial-a-Porn.*)

Bibliography

BRYDEN, DAVID 1985 Between Two Constitutions: Feminism and Pornography. *Constitutional Commentary* 2:147–189.

KALVEN, HARRY, JR. 1960 The Metaphysics of Obscenity. *Supreme Court Review* 1960:1–45.

KITTAY, EVA FEDER 1983 Pornography and the Erotics of Domination. Pages 145–174 in Carol C. Gould, ed., *Beyond Domination: New Perspectives on Women and Philosophy.* Totowa, N.J.: Rowman & Allanheld.

MACKINNON, CATHARINE A. 1984 Not a Moral Issue. *Yale Law & Policy Review* 2:321–345.

NOTE 1984 Anti-Pornography Laws and First Amendment Values. *Harvard Law Review* 98:460–481.

## PORNOGRAPHY AND CHILDREN

See: Child Pornography; *New York v. Ferber*

## PORNOGRAPHY AND FEMINISM

In 1984 Indianapolis passed an "antipornography civil rights ordinance." PORNOGRAPHY was defined thus:

> the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following: (1) Women who are presented as sexual objects who enjoy pain or humiliation; or (2) Women [who] are presented as sexual objects who experience sexual pleasure in being raped; or (3) Women [who] are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or (4) Women [who] are presented as being penetrated by objects or animals; or (5) Women [who] are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or (6) Women [who] are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

The ordinance afforded civil, but not criminal, remedies for trafficking in pornography (i.e., sales, exhibitions, or distribution with exceptions for libraries), forcing pornography on a person, coercing a person into pornography, attacking a person because of pornography, or causing such attacks. To some extent, the functional definition of pornography depends on the particular offense under the ordinance. For example, isolated parts of a book would not support a trafficking claim, but they could support a claim against an individual for forcing pornography on someone. Although the ordinance was crafted to protect

women against SEX DISCRIMINATION, it is provided that if men, children, or transsexuals were treated in the same manner, they, too, could be afforded protection.

Although there is substantial overlap, Indianapolis's "pornography" is not the Supreme Court's "obscenity." MILLER V. CALIFORNIA (1973) defined OBSCENITY to include material that the "average person, applying contemporary community standards," would find when "taken as a whole appeals to the prurient interest" and "depicts and describes in a patently offensive way, sexual conduct specifically defined by the applicable state law," and that "taken as a whole, lacks serious literary, artistic, political, or scientific value."

Some of the material falling under the sixth category of the Indianapolis ordinance (e.g., women presented as sexual objects through postures or display) might not be ruled offensive under contemporary community standards, though probably most graphic, sexually explicit material that subordinates women and that also falls within the six specified categories would meet the *Miller* standard for obscenity. Such material would in the general run of cases be thought to appeal to prurient interests and to be patently offensive under contemporary community standards. The only substantial question would be whether particular material had the serious value specified in the *Miller* test, and it is doubtful that much of it would.

The ordinance's proponents argue, however, that obscenity law is theoretically and functionally bankrupt. As Catharine MacKinnon writes, they doubt "whether the average person, gender neutral exists; [they have] more questions about the content and process of definition of community standards than deviations from them; [they wonder] why prurience counts but powerlessness does not; why sensibilities are better protected than are women from exploitation." They ask, "If a woman is subjected, why should it matter that the work has other value? Perhaps what redeems a work's value among men *enhances* its injury to women." They contend that the ordinance focuses on the real problem (harm to women rather than offense to the community), provides for more effective enforcement (by allowing women to bring civil actions), and is more precise in its definition of the material to be sanctioned than obscenity law has ever been.

Ironically, despite its efforts at precision, the ordinance has frequently been misread. For example, one respected commentator states that the "sweep of the Indianapolis ordinance is breathtaking. It would subject to governmental ban virtually all depictions of rape, verbal or pictorial. . . . The ban would extend from Greek mythology and Shakespeare to . . . much of the world's art, from ancient carvings to Picasso . . . and a large amount of commercial advertising."

It is not the case that virtually all depictions of rape are sexually explicit—let alone Shakespeare or commercial advertising in any large amount. Some ancient carvings and works of Picasso involve nudity, but how many of them are graphic? Do they involve the subordination of women? Where do they fall under the six categories? Do *any* of them fall under the first five categories? Could any breathtaking possibilities be cured by editing the sixth category? Is one person's breathtaking possibility another person's exercise of male domination? One suspects in any event that if an ordinance of this character were upheld, its opponents would find creative possibilities for limiting its scope and its proponents would be stressing the breadth of its reach.

Were the ordinance construed narrowly, what would be the case for its constitutionality? Many categories of speech are deemed beneath the protection of the FIRST AMENDMENT, including FIGHTING WORDS, some forms of advocacy of illegal action, some forms of defamation, and obscenity. The argument for the ordinance is not that it fits within such categories. Rather, proponents argue that a new category of nonprotection is justified. If defamation causes harm to specific individuals, the proponents argue, pornography causes even more:

> The harm of pornography includes dehumanization, sexual exploitation, forced sex, forced prostitution, physical injury, and social and sexual terrorism, and inferiority presented as entertainment. The bigotry and contempt pornography promotes, with the acts of aggression it fosters, diminish opportunity for equality of rights in employment, education, property, public accommodations and public services; create public and private harassment . . . ; promote injury and degradation such as rape, battery, child abuse, and prostitution and inhibit just enforcement of laws against these acts; contribute significantly to restricting women in particular from full exercise of citizenship and participation in public life, including in neighborhoods; damage relationships between the sexes; and undermine women's equal exercise of rights to speech.

Without questioning these harms, the UNITED STATES COURT OF APPEALS for the Seventh Circuit declared the Indianapolis ordinance unconstitutional on its face in *American Booksellers Association v. Hudnut* (1985), and the Supreme Court affirmed without opinion. *Hudnut* is now the principal case in the pornography area.

Speaking for the Seventh Circuit, Judge Frank Easterbrook accepted the premise that "pornography is central in creating and maintaining sex as a basis of discrimination." Nonetheless, he maintained, the entire ordinance was premised on an unacceptable form of content discrimination: "The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way . . . is lawful no matter how sexually explicit. Speech treating women in the disapproved way . . . is un-

lawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents." Proceeding from this reading of the First Amendment, the court stated, "We do not try to balance the arguments for and against an ordinance such as this." The case was over.

From the court's perspective, the amount of harm to women caused by pornography was quite beside the First Amendment point and not to be weighed in the balance. But this reading of current doctrine is idiosyncratic. The categorical exceptions to First Amendment protection already involve discrimination on the basis of point of view.

The treatment of legislation involving advocacy of the overthrow of the government by force and violence is one obvious example. Obscenity is another. For example, appeals to prurient interests are defined as appeals to a "shameful or morbid interest in sex." The Court ruled in BROCKETT V. SPOKANE ARCADES (1985) that appeals to prurient interests cannot be taken to include appeals to "normal" interests in sex, that is, appeals to an interest in "good, old fashioned, healthy" sex are constitutionally protected, even if they are patently offensive to contemporary standards and lack serious literary, artistic, political, or scientific value. Appeals to an "abnormal" interest in sex are treated differently. For them, when the other requirements are satisfied, it is permissible to bring down the full weight of the law. In short, appeal to one perspective is declared right and appeal to another is declared wrong.

The *Hudnut* court's unwillingness to balance the arguments was thus supported only by misreading the treatment of content discrimination in First Amendment law. Content discrimination in general and point-of-view discrimination are disfavored in First Amendment law, but they are not absolutely disfavored. The *Hudnut* court had no difficulty showing that pornography did not fall within any of the existing categorical exceptions to First Amendment protection. But the issue presented by pornography legislation is whether pornography's harm justifies the creation of a new categorical exception to First Amendment protection. That was the issue sidestepped by the court's decision of content discrimination.

One approach to the question is by analogy. The *Hudnut* court did consider that possibility. Obscenity, it observed, has been deemed by the Supreme Court to be LOW-VALUE SPEECH, and "pornography is not low value speech within the meaning of these cases" because pornography "is thought to influence social relations and politics on a grand scale, that it controls attitudes at home and in the legislature. This precludes a characterization of the speech as low value."

If analogy were the mode of argument, the issue would not be whether pornography falls into a category denominated as low value. The Supreme Court did not use the term "low value" in creating the obscenity exception. The Court maintained in ROTH V. UNITED STATES (1957) that obscenity made such a slight contribution to truth that its possible benefits were categorically outweighed by the interests in order and morality. The proponents of pornography prohibitions insist that the same or something even stronger can be said of pornography. In addition, nothing in *Roth* speaks to the magnitude of the scale upon which obscenity was thought to influence order and morality (let alone in the home or the legislature). Certainly nothing in *Roth* or any subsequent decision supposes that if obscenity were demonstrated to have profound effects on order or morality, it would then emerge as protected speech.

The real animus of the *Hudnut* analysis is a deep hostility to the obscenity exception, a hostility that is tempered only by the view that obscenity does not matter much anyway. Thus, when Indianapolis says "pornography matters," the *Hudnut* court says, "all the more reason to protect it." But this response begs the question. First Amendment values are important; so are those of gender equality. As MacKinnon has observed, a victory for FREEDOM OF SPEECH anywhere may be a victory for freedom of speech everywhere, but a victory for sexism anywhere may be a victory for sexism everywhere.

The case for or against pornography legislation cannot be decided in the abstract. Attention must be paid to the character and amount of the harm caused (e.g., whether pornography is cathartic, stimulates aggressive and discriminatory behavior, or both, and to what extent; the extent to which the ordinance would combat that harm (e.g., whether black markets would arise, to what extent the ordinance and its application would legitimize nonpornographic but equally harmful speech, and whether the absence of pornography would cause aggressive behavior); the possibility of less restrictive alternatives (e.g., what the impact of adding a serious-value test would be) and the impact on free speech (e.g., how serious the chilling effect on speech that ought to matter would be and whether the addition of a new category based on content discrimination and the raising of questions about the particular value of speech would require quite heavy justification).

Serious arguments can be made for and against the constitutionality of legislation like the Indianapolis antipornography ordinance. The scandal is that those arguments have yet to receive serious judicial consideration and expression.

STEVEN SHIFFRIN
(1992)

(SEE ALSO: *Child Pornography; Dial-a-Porn; Feminist Theory; Meese Commission.*)

Bibliography

EMERSON, THOMAS I. 1985 Pornography and the First Amendment: A Reply to Professor MacKinnon. *Yale Law and Policy Review* 3:130–143.

MACKINNON, CATHARINE 1987 *Feminism Unmodified.* Cambridge, Mass.: Harvard University Press.

STONE, GEOFFREY R. 1986 Anti-Pornography Legislation as Viewpoint Discrimination. *Harvard Journal of Law and Public Policy* 9:461–480.

SUSTEIN, CASS R. 1986 Pornography and the First Amendment. *Duke Law Journal* 1986:589–627.

## PORNOGRAPHY AND THE MEESE COMMISSION

See: Meese Commission

## PORNOGRAPHY OVER THE TELEPHONE

See: Dial-a-Porn

## *POSADAS DE PUERTO RICO ASSOCIATES v. TOURISM COMPANY OF PUERTO RICO*

478 U.S. 328 (1986)

In *Posadas* the Supreme Court upheld, 5–4, a Puerto Rico statute that authorized casino gambling but forbade advertising of casino gambling when the advertising was aimed at Puerto Rican residents. The majority, in an opinion by Justice WILLIAM H. REHNQUIST, followed the doctrinal formula in CENTRAL HUDSON GAS AND ELECTRIC CORP. V. PUBLIC SERVICE COMMISSION (1980) for testing the constitutionality of regulations of COMMERCIAL SPEECH. The advertising concerned a lawful activity and was not misleading or fraudulent. Thus, the Court proceeded to the interest-balancing part of the formula. The governmental interest was the reduction of demand for casino gambling; Puerto Rico's concerns for its residents' health, safety, and welfare was obvious, considering that a majority of the states prohibit such gambling altogether. The restrictions on advertising, said the Court, directly advanced that interest. Furthermore, the Commonwealth of Puerto Rico was not required to resort to advertising of its own as a LEAST RESTRICTIVE MEANS for discouraging casino gambling. In support of the latter point Justice Rehnquist cited lower court decisions approving restrictions on advertising of cigarettes and alcohol. Puerto Rico could have banned casino gambling altogether; this greater power included the lesser power to regulate advertising.

Justice WILLIAM J. BRENNAN, writing for three Justices, dissented, arguing the the Commonwealth had not met its burden of substantial justification for regulating commercial speech. In particular, the Commonwealth had not shown that less restrictive means would suffice. Justice JOHN PAUL STEVENS focused his dissent on the law's discrimination based on the advertising's intended audience.

There is little doubt that Congress or a state legislature could constitutionally ban the sale or use of cigarettes. Commentators have suggested that *Posadas* implies that, even if such a prohibition law were not adopted, a ban on cigarette advertising would be constitutional.

KENNETH L. KARST
(1992)

## POSSE COMITATUS ACT

20 Stat. 145 (1878)

Representative James P. Knott (Democrat of Kentucky) introduced this act as an amendment to the Army Appropriation Act of 1878. It provides that "it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws" except as specifically authorized by Congress. The act has applied to the Air Force since 1947; it has been extended to the Navy and Marine Corps by administrative regulations. Originally enacted as a step in the dismantling of RECONSTRUCTION, this provision banned the practice implicitly authorized by the JUDICIARY ACT OF 1789, and used before the CIVIL WAR to enforce the Fugitive Slave Act, of including military forces in the federal marshal's posse. The act remains on the books (section 1835, Title 18, United States Code) as an expression of the fundamental division between the military and civilian realms: the armed forces are not a LAW ENFORCEMENT agency.

Congress has authorized the use of the armed forces to suppress insurrection, domestic violence, unlawful combination, or conspiracy that obstructs the execution of federal law or impedes the course of justice, or that deprives any class of people of constitutional rights that the state authorities cannot or will not protect. That provision of the Force Act of 1871 (now section 333, Title 10, United States Code) was invoked by President DWIGHT D. EISENHOWER in 1958 when he used Army units to disperse the mob in Little Rock, Arkansas, that resisted a federal court's school DESEGREGATION order (see COOPER V. AARON), and by President RICHARD M. NIXON, in 1970, when he ordered federal troops to assist in quelling a riot in Detroit, Michigan.

DENNIS J. MAHONEY
(1986)

# POSTAL POWER

Seven words of Article I, section 8, of the Constitution grant the postal power to Congress. Under the power "To Establish Post Offices and Post Roads" liberally construed, Congress has built offices and constructed roads for handling the mails and maintained an extensive nationwide delivery service. Congress has vested in the Postal Service, now in corporate form, monopoly powers over the delivery of letters and extensive, though often untested, POLICE POWERS over the mails.

The postal system in the United States traces its roots to a 1692 crown patent to Thomas Neale by William and Mary, granting a monopoly of the colonial posts, including all profits therefrom. The Post Office was established on July 26, 1775, by the CONTINENTAL CONGRESS to assure effective communications and to eliminate what was viewed as a tax by the British Post Office. The ARTICLES OF CONFEDERATION granted exclusive postal power to Congress, and the Constitution carried forward the congressional power over the mails.

At the time of the CONSTITUTIONAL CONVENTION the activities of the Post Office were widely accepted, and there was little sentiment for change or elaboration. Indeed, the postal power was virtually undebated, and only one reference to it is to be found in THE FEDERALIST. The breadth of the congressional interpretation of the postal power, therefore, finds neither support nor contradiction in the Constitution or the debates concerning its adoption.

The postal monopoly, contained in the so-called private express statutes, generally makes it unlawful for private carriers to carry letters and packets, unless postage has been paid thereon and canceled. This provision is, in effect, a 100 percent tax on the carrying of letters outside the Postal Service. The monopoly dates from colonial days, and it was and is justified on the economic grounds that it is necessary to retain monopoly power over profitable routes and services so that the Postal Service can provide uniform and inexpensive service nationwide, even along uneconomic and remote routes. The Articles of Confederation specifically granted the monopoly, giving the Congress "sole and exclusive power." The absence of these words in Article I, section 8, leaves the constitutionality of the monopoly unclear, but the few courts that have considered the question have held in its favor. Historically, monopoly had been an integral feature of the British and colonial postal systems, as well as those of many other Western nations.

The extent of the postal power has been the subject of debate in the Congress and of occasional litigation. The earliest questions concerned post roads: did Congress have authority to construct new roads, or only to designate existing state roads as postal routes? The issue had not been discussed by the Framers or, with one exception (New York), at the state conventions. Congress determined that it had power to appropriate funds to construct post roads, but not to construct them directly. The Supreme Court had never decided the question, although Chief Justice JOHN MARSHALL in OBITER DICTUM in MCCULLOCH V. MARYLAND (1819) suggested that the power included construction. In the construction of the first of these roads, the Cumberland Road, Congress and the President adopted a working compromise by seeking the consent of the affected states prior to approval of the bill. Many other post roads were constructed following similar procedures. The Supreme Court ultimately put the question of construction authority to rest in *Kohl v. United States* (1876) by holding that the federal government may condemn land, by analogy to EMINENT DOMAIN, for a post office site.

Postal statutes and regulations grant police powers to the Postal Service, imposing rules designed to protect the public welfare and limiting mailability. Safety regulations (for example, mailability of poisons and explosives) and mechanical rules (size and packaging standard), have not been the subject of serious challenge. The statute imposing fines and imprisonment for mail fraud was held constitutional in *Public Clearing House v. Coyne* (1904) and several later cases. Other statutory determinations of nonmailability have similarly been upheld. *Ex parte Jackson* (1878) upheld a criminal conviction under a federal statute prohibiting mailing of newspapers containing advertisements for lotteries. In the late eighteenth and early nineteenth centuries, relying on *Jackson* and other holdings, Congress greatly expanded the exclusionary power to cover libelous matter, OBSCENITY, and the like, and these provisions remain a part of present law. The Supreme Court has repeatedly upheld the constitutionality of the congressional power to exclude obscene materials from the mails.

From 1872 until 1970, the Post Office was an executive department and the postmaster general had CABINET status. Prompted by heavy economic losses from Post Office operations, problems with postal deliveries, and charges of political inefficiency, Congress in 1970 created the United States Postal Service to take over the functions of the Post Office Department. Removing the operations of the Post Office (including appointment of the postmaster general) from direct political influence and granting to the Post Office a substantial degree of fiscal autonomy were among the major objects of the reorganization. The new Postal System is organized as a public CORPORATION, owned entirely by the federal government, under the management of a board of governors. The board appoints the postmaster general, who is the chief executive officer of the Postal Service, but is no longer a cabinet member. The board and the officers have wide discretion with re-

spect to management, services, and expenditures, subject to congressional oversight. Postal rates, formerly established directly by Congress, are now determined by a presidentially appointed Postal Rate Commission on the basis of recommendations made by the board of governors.

STANLEY SIEGEL
(1986)

Bibliography

JOHNSTON, JOSEPH F., JR. 1968 The United States Postal Monopoly. *Business Lawyer* 23:379–405.

PAUL, JAMES C. and SCHWARTZ, MURRAY L. 1961 *Federal Censorship: Obscenity in the Mail.* New York: Free Press.

PROJECT: POST OFFICE 1968 *Southern California Law Review* 41:643–727.

ROGERS, LINDSAY 1916 *The Postal Power of Congress.* Baltimore: Johns Hopkins University Press.

# POSTMODERNISM AND CONSTITUTIONAL INTERPRETATION

It has been said that postmodernism is a victim of its own diagnosis. Postmodern thought defies systematic accounts in part because it announces an intellectual and cultural condition in which such systematic accounts have become unbelievable. Postmodern thought announces the dissolution of the grand metanarratives of the Enlightenment. It presents a view of language and thought as incapable of stabilizing meaning. It holds the possibility of establishing first premises, origins, and foundations to be a kind of illusion. It reacquaints linear thought, conceptual hierarchies, and rationalism with their status as narratives. In such cultural and intellectual circumstances, the very identity of postmodernism becomes itself mysterious, mutable, and contestable. Anyone seeking to conceptualize postmodernism must thus confront the possibility that postmodernism itself announces the impossibility of such conceptualization. One practical effect is that the meaning of postmodernism is very much in the eye of the beholder.

The possible relations of postmodernism to CONSTITUTIONAL INTERPRETATION are themselves multiple and contestable. From the perspective of the American constitutional tradition, however, it is possible to distinguish two very different kinds of postmodernism with very different implications.

Consider that the American constitutional tradition boasts a generous variety of interpretive techniques and approaches. Jurists, academics, politicians, and citizens have offered and invoked a multitude of interpretive techniques. Some believe that constitutional interpretation must focus exclusively or primarily on the words of the text. Others argue that the ORIGINAL INTENT of the Framers must be consulted. Still others believe that what matters is the linguistic usage at the time the Constitution or its amendments were adopted. Some have argued that the problem of constitutional interpretation must be understood in light of the conundrums of JUDICIAL REVIEW. More modestly, others have viewed the problem of interpretation in terms of the authority and competencies of the various constitutional actors—the various federal branches, the states, groups, and individuals. Then too, there are those who hold that constitutional interpretation must follow popular consensus. Another view holds that the Constitution must be interpreted in light of fundamental political values such as justice or equality. Yet another approach lies in recognizing that all or some of these approaches are appropriate.

For most of the second half of the twentieth century, this eclectic mix of interpretive approaches has been viewed in terms of a characteristically modernist anxiety: The primary question for jurists, academics, politicians, and citizens alike has been which is the correct mode of interpretation? This question has featured prominently in the courts, in scholarship, in judicial confirmation hearings before the U.S. SENATE, and in the editorial pages.

One postmodern perspective—call this "weak postmodernism"—displaces this question to affirm that constitutional interpretation encompasses all of these modes. On this view, to do constitutional interpretation is nothing more than to engage in one or more of these modes of interpretation. The question, "which is the right mode of interpretation?" becomes itself another interpretive approach—no more privileged, no less legitimate than the others. It becomes one more "move" among others.

This weak postmodernism would view the eclectic mix of interpretive approaches as a function of different perspectives. The different approaches differ because the Constitution is seen in terms of different interests, concerns, hopes, and fears. This kind of postmodern thought is congenial to the practice of constitutional interpretation. It does not threaten the authority of the Constitution nor the possibility of arriving at coherent and shared meanings. To the contrary, the American tradition of constitutional interpretation is arguably already postmodern and has been so for a long time—long before "postmodernism" became a fashionable term.

There is, however, a "strong postmodernism" much more disturbing to the enterprise of constitutional interpretation and constitutional law. This strong postmodernism puts in question the identity of what it is that is being interpreted. Just about any jurist, academic, politician, or citizen would answer that it is "the Constitution" that is being interpreted. But a strong postmodernism would ask, What is the identity of this "Constitution"? Is it a text, a political instrument, an institutional organization, a site of

political contestation, an expression of cultural mythology—all or some of these things and perhaps many more?

This strong postmodernism effectively transposes the entire question of how to interpret (a question of methodology) into a question about what is being interpreted (a question of identity). This strong postmodernism leads to the view that the Constitution is not a thing that is there independently of or prior to the action of interpretation. Rather, this strong postmodernism reveals "the Constitution" as a kind of cultural–intellectual artifact that is itself a construct, a creation, of the various interpretive approaches. On this view, the Constitution is not so much interpreted, as it is continuously created and re-created by those who claim to be interpreting it.

This kind of postmodernism is much more difficult, perhaps even impossible, to reconcile with American notions of constitutionalism and the rule of law. This strong postmodernism denies that the Constitution is a source of authority and meaning that exists independently of present acts of interpretation. Instead, this strong postmodernism affirms that present acts of interpretation are effectively a kind of cultural and intellectual authorship.

In terms of this strong postmodernism, the very idea of a postmodern constitutional interpretation is an oxymoron—akin to an atheistic religion. To the extent that this is right, the attempt to integrate postmodernism and constitutional interpretations would lead to a serious deformation of one or the other, and perhaps both.

PIERRE SCHLAG
(2000)

Bibliography

BALKIN, J. M. 1992 What Is a Postmodern Constitutionalism? *Michigan Law Review* 90:1966–1990.

BOBBITT, PHILIP 1991 *Conscience and the Constitution: Constitutional Interpretation.* Cambridge, Mass.: Basil Blackwell, Inc.

KAHN, PAUL 1992 *Legitimacy and History: Self-Government in American Constitutional Theory.* New Haven, Conn.: Yale University Press.

PATTERSON, DENNIS 1996 *Law and Truth.* New York: Oxford University Press.

SCHLAG, PIERRE 1996 Hiding the Ball. *New York University Law Review* 71:1681–1718.

WINTER, STEVEN L. 1990 Indeterminacy and Incommensurability in Constitutional Law. *California Law Review* 78:1441–1541.

## POUND, ROSCOE
(1870–1964)

Roscoe Pound was a prominent legal educator, a distinguished philosopher of law, and a prolific writer. His major contribution to American law was his formative role in the development of SOCIOLOGICAL JURISPRUDENCE. He elaborated this instrumentalist approach during the Progressive era, the spirit of which pervaded his writings. His thought had a conservative side to it, however, which became more influential in the latter stages of his life. He expressed this conservatism not only in his eulogies of the COMMON LAW but also in his criticism of the NEW DEAL and the "service state," his indictment of administrative tribunals, and his fulminations against LEGAL REALISM.

Although Pound did not specialize in constitutional law, he promoted better understanding of the realities of the judicial process in this field through his critique of MECHANICAL JURISPRUDENCE, his explanation of the broad scope of judicial discretion and JUDICIAL POLICYMAKING, and his contrast between the "law in the books and the law in action." He was also a trenchant critic of the extreme individualism underlying numerous decisions of the Supreme Court well into the twentieth century.

The quality of Pound's voluminous writings, which spanned almost the entire *corpus juris*, varied substantially. His best scholarship consisted, in the main, of his influential articles on legal thought and reform published from 1905 to 1916. These works included "Liberty of Contract" (1909), which was one of his few publications to focus on constitutional questions. *The Spirit of the Common Law* (1921), *The Formative Era of American Law* (1938), and *The Development of Constitutional Guarantees of Liberty* (1957) are today his most useful books for students of constitutional law and history. His *Jurisprudence* (1959) was the most comprehensive statement of his legal philosophy.

WILFRID E. RUMBLE
(1986)

Bibliography

WIGDOR, DAVID 1974 *Roscoe Pound.* Westport, Conn.: Greenwood Press.

## POVERTY

See: Indigent; Wealth Discrimination

## POVERTY LAW

In a nineteenth-century COMMERCE CLAUSE case, the Supreme Court characterized "paupers" and "vagabonds" as a "moral pestilence" against which the state could protect itself in the exercise of its POLICE POWERS. Although we can still hear echoes of these sentiments in laws and practices segregating the poor and the institutions that serve them, the Supreme Court has now made clear that bare hostility

to, or suspicion of, the poor is not a constitutionally permissible basis for STATE ACTION.

The decisive break came in the 1941 decision in EDWARDS V. CALIFORNIA, where the Court struck down as a violation of the DORMANT COMMERCE CLAUSE a state law making it a crime knowingly to aid an indigent in coming into the state. The Court said in *Edwards* that "it will not now be seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence.' Poverty and immorality are not synonymous." In a much cited concurrence, Justice ROBERT JACKSON went further, insisting that "indigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color."

Since *Edwards*, indigence as such cannot be the basis for the imposition of governmental burdens. For indigence, as for race, however, the ideal of constitutional irrelevance has proved elusive. In dealing with issues of poverty since *Edwards*, the Court has found itself repeatedly confronting questions of what it might mean for the state to treat something as irrelevant that matters terribly in the society of which the state is a part. It is now settled that both state and federal legislatures can take action to alleviate poverty and its effects. The difficult problems that remain revolve around whether, and when, the Constitution may require relief for the poor from some of the burdens of indigence.

Constitutional solicitude for the poor emerged first in the context of CRIMINAL PROCEDURE, with the Supreme Court holding that indigent criminal defendants were entitled to state-appointed counsel, to trial transcripts on appeal, and, more recently, to limited forms of other important assistance in resisting prosecution. The first RIGHT TO COUNSEL holding came in 1932, and the Court gradually developed a constitutional law of procedural rights for indigent criminal defendants in federal and then in state courts. These rights for the indigent accused developed without any overt prod from external influences. Expansion of the rights of the poor beyond the criminal procedure context had to await the development of larger social movements.

By the mid-1960s, problems of poverty were commanding political attention. Congress responded to President LYNDON B. JOHNSON's call for a "war on poverty" with a variety of new programs designed to deal with the symptoms and the causes of poverty in America. One of the early poverty programs was federal subsidization of civil legal aid for the poor. Charitable legal aid programs had a long history in the United States, but the new federal subsidy helped channel the reformist zeal of large numbers of new lawyers acting on behalf of poor people. Their activities left a mark on many areas of the law, including much of constitutional law beyond the criminal procedure beginnings.

For a time it even appeared that litigation on behalf of welfare recipients might yield a constitutional right to subsistence support. In 1969 the Supreme Court held in SHAPIRO V. THOMPSON that states could not impose durational RESIDENCE REQUIREMENTS for the receipt of public assistance. The decision was based on the EQUAL PROTECTION clause; the residence requirements impinged on the RIGHT TO TRAVEL interstate, a right the Court characterized as "fundamental" and hence enjoying heightened constitutional protection. But the Court also suggested that the fact that WELFARE BENEFITS were at issue was important to its decision. In the Court's words, the case involved "the very means to subsist—food, shelter, and other necessities of life." And the next year, the Court held in GOLDBERG V. KELLY (1970) that a welfare recipient had a right to an administrative hearing before her welfare benefits could be withdrawn. Again the Court emphasized the nature of the benefits at stake—"the means to obtain essential food, clothing, housing, and medical care." This and other language helped stimulate a secondary literature advocating a constitutional right to what Frank Michelman called "minimum protection" of each individual's "just wants."

No such right ever gained much of a foothold in the courts, however, for reasons that came into focus early. In DANDRIDGE V. WILLIAMS (1970), decided just one year after *Shapiro*, the Court rejected a claim that a family maximum on the size of the welfare grant deprived members of large welfare families of equal protection. The claim was plausible enough after *Shapiro*, but the prospect of continued expansion of the eligible population by virtue of equal protection decisions gave the Court pause, for it suggested that the legislative reaction might simply be to divide the same total public assistance resources among a larger eligible population. The Court's response to this tradeoff of equity and adequacy in welfare programs was to back off, saying in *Dandridge* that "conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social and even philosophical problems presented by public welfare programs are not the business of this Court. . . . The Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." The Court did not abandon equal protection review of discrimination within welfare programs after *Dandridge*, but that review became much more subdued than the rhetoric of *Shapiro* had suggested.

The problem to which the Court referred in *Dandridge* is real enough in the equal protection context, where the claimant typically seeks to have a group to which he be-

longs made eligible for assistance according to standards of need the state has already defined. Indeed, each time the Court extends eligibility, it causes a realignment of political forces that might force legislative tradeoffs with nonwelfare programs such as defense, foreign aid, and the fight against pollution. In such a case, however, the legislature does retain the option to eliminate or scale back the amount of the welfare benefits. A claim for minimum subsistence, on the other hand, would require of the Court decisions not only about those entitled to the assistance but also about the appropriate level of assistance—what, in Michelman's terms, are "just wants" and how much is "minimum protection." The Court would be requiring the expenditure of funds absolutely rather than conditionally, thus necessitating, rather than just giving a nudge to, legislative tradeoffs between welfare programs and others competing for public support. The prospect would be daunting, and the Court never did more than flirt lightly with it.

The welfare cases did somewhat alleviate recurrent confusion in constitutional law with regard to the RIGHT/PRIVILEGE DISTINCTION. Prior to those cases, when an interest characterized as a right was jeopardized by some legislative or executive action, constitutional protections were applicable; when privileges were at issue, it was sometimes said that no constitutional protections attached. This doctrine was never well developed, but it kept reappearing and posed a serious obstacle to constitutional succor for recipients under a growing array of government benefit programs, for those programs surely would fall on the privilege side of any such line. In both *Shapiro* and *Goldberg*, however, the Court rejected the distinction as constitutionally irrelevant. In subsequent cases, the notion behind the distinction has occasionally resurfaced (without the language of rights and privileges), but only as a consideration in defining the strength of constitutional protection, and not as a reason for denying protection altogether. Thus, the Supreme Court has repeatedly held that state and local governments need not subsidize ABORTION, even though a pregnant woman has a constitutionally protected interest in seeking out an abortion if she chooses. These decisions suggest that the state retains a higher degree of discretion over the dispensation of benefits than over the imposition of burdens, but they do not resurrect the sort of absolute discretion with which the rightprivilege distinction was associated.

Lawyers for the indigent did have important constitutional triumphs, but usually by joining problems of the poor to some other theme with which the Court could feel more comfortable. Expansion of the franchise and perfection of the electoral system, for instance, have been important contemporary themes in constitutional law, and the Court has been responsive to the handicaps placed on the poor in participating in democratic institutions. In 1966 the Court struck down a state POLL TAX as a condition on voting, and in subsequent cases, the Court limited property qualifications for voting in some specialized contexts. It has also restricted the filing fees that can be charged indigent candidates for public office.

The emphasis on fair process for indigents in the criminal cases and in *Goldberg* has been extended to certain civil proceedings. The movement, however, has been cautious as the Court undoubtedly keeps a wary eye on the costs involved. Thus, the state cannot require an indigent to pay court costs or filing fees as a condition to filing a divorce action. The state must pay for blood testing in a state-initiated paternity proceeding. And in compelling circumstances the state must provide counsel in an action to terminate parental rights. On the other hand, the state is not required to waive filing fees for a bankruptcy proceeding for an indigent or for an appeal of an adverse decision in a welfare hearing.

Some of the early opinions extending procedural protection to indigents in criminal cases used the language of equal protection, but the equal protection clause is not apt as a basis for procedural protections, because there is no obvious reference group with which the indigent defendent is to be compared. The more recent opinions have thus recurred to PROCEDURAL DUE PROCESS notions of fundamental fairness as the standard against which arguments for subsidy are to be judged.

This attraction to themes that do not explicitly draw on the fact of poverty means that many of the advances in constitutional poverty law have resulted from litigation on behalf of groups whose members are mostly poor but not necessarily so. The Court has, for instance, established substantial constitutional protections for ALIENS within the jurisdiction of the United States, for illegitimate children, for the mentally retarded, and for youngsters subjected to JUVENILE PROCEEDINGS. The opinions in these cases often draw on the impecuniousness of the protected group, but seldom in a way that makes the doctrines announced depend on that fact.

One important extension of constitutional rights of the poor has been snatched by state courts and state constitutional law out of the mouth of federal defeat. Primary and secondary education in the United States has been financed in large part through local property taxes, with the result that property-rich districts have been able to sustain much higher per-pupil expenditures for education than have property-poor districts. Drawing on the FUNDAMENTAL RIGHTS branch of equal protection doctrine developed in *Shapiro* and other cases, students in property-poor districts challenged these financing schemes. The Supreme Court rejected the claim in its 1973 decision SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ, holding that

there was no fundamental right to a particular level of education and that the students in property-poor districts, who need not necessarily be poor, were entitled to no heightened constitutional protection. *Rodriguez*, like the welfare cases, suggests judicial disinclination to become involved in financing decisions for major public programs.

Faced with a reluctant federal court system, however, poverty lawyers and their clients increasingly have turned to state courts and state constitutional claims. In the case of educational financing, they could draw on equal protection provisions in state constitutions or on provisions assuming state responsibility for public education. The result has been court-ordered reform of educational financing in a substantial number of states.

Twenty-five years after the war on poverty began, there is no constitutional law of the poor in the way that there is a constitutional law of race relations or INTERSTATE COMMERCE. But constitutional law has changed over that time in ways that have been important for the legal status of many people who are poor. It has changed mostly in small ways and in many different contexts, but those small and diverse changes add up to an altered landscape in which constitutional law is one tool among many in addressing the myriad legal problems that beset the poor.

ROBERT W. BENNETT
(1992)

(SEE ALSO: *Illegitimacy; Mental Retardation and the Constitution; Rights of the Criminally Accused; State Constitutions.*)

Bibliography

BENNETT, ROBERT W. 1983 The Burger Court and the Poor. Pages 46–61 in Vincent Blasi, ed., *The Burger Court.* New Haven, Conn.: Yale University Press.

LAFRANCE, ARTHUR B. et al. 1973 *Law of the Poor.* St. Paul, Minn.: West Publishing Co.

MICHELMAN, FRANK I. 1969 Foreword: On Protecting the Poor Through the Fourteenth Amendment. *Harvard Law Review* 83:7–59.

WINTER, RALPH K. 1972 Poverty, Economic Equality, and the Equal Protection Clause. *Supreme Court Review* 1972:41–102.

## POWELL, LEWIS F., JR.
(1907– )

Lewis Franklin Powell, Jr., has always eluded conventional portraiture. In broad brush, Powell appears the archetypal conservative: a successful corporate lawyer, a director of eleven major companies, a pillar of Richmond, Virginia's civic and social life. The roll call of legal honors—president of the American Bar Association, the American College of Trial Lawyers, and the American Bar Foundation—does little to dispel the impression.

The portrait, however, needs serious refinement. During Virginia's "massive resistance," when the Byrd organization chose to close public schools rather than accept racial integration, Powell, as chairman of the Richmond Public School Board, fought successfully to keep Richmond's open. As vice-president of the National Legal Aid and Defender Society, he helped persuade the organized bar to support publicly financed legal services for the poor. Jean Camper Cahn, a black leader with whom he worked in that endeavor, found Powell "so curiously shy, so deeply sensitive to the hurt or embarrassment of another, so self-effacing that it is difficult to reconcile the public and private man—the honors and the acclaim with the gentle, courteous, sensitive spirit that one senses in every conversation, no matter how casual. . . ."

The portrait of the private practitioner parallels that of the Supreme Court Justice. The broad picture is again one of orthodox adherence to the canons of restraint. Powell labored diligently to limit the powers of the federal courts. He sought to narrow the STANDING of litigants invoking federal JURISDICTION to instances of actual injury in WARTH V. SELDIN (1975). He dissented when the Court in *Cannon v. University of Chicago* (1979) inferred from federal statutes a private cause of action. He greatly restricted the power of federal judges to review claims of unlawful SEARCH AND SEIZURE raised by state defendants in STONE V. POWELL (1976). And he urged the sharp curtailment of federal equitable remedies such as student BUSING for racial balance, in cases like KEYES V. DENVER SCHOOL DISTRICT #1 (1973).

While working to limit federal judicial power, Powell championed the power of others to operate free of constitutional strictures. Thus prosecutors should enjoy discretion in initiating prosecution, police and GRAND JURIES in pursuing EVIDENCE, trial judges in questioning jurors, welfare workers in terminating assistance, and military officers in conducting training. The "hands-off" view applied especially to public education. Powell, a former member of the Virginia Board of Education, wrote the Court opinion preserving the rights of states to devise their own systems of public school finance in SAN ANTONIO SCHOOL DISTRICT V. RODRIGUEZ (1973). And the former chairman of the Richmond School Board spoke for the broad discretion of school authorities to administer student suspensions and corporal punishment, dissenting in GOSS V. LOPEZ (1975) and writing for the Court in INGRAHAM V. WRIGHT (1977).

Even so, a corner of the jurist's nature has been reserved for personal circumstances of particular poignancy. An early opinion afforded a black construction worker in Mississippi, father of nine, the opportunity to confront his

accusers and establish his innocence in *Chambers v. Mississippi* (1973). Another Powell opinion, in MOORE V. EAST CLEVELAND (1977), voided a municipal housing ordinance that prevented an elderly woman from living with her adult sons and grandchildren. Another, SOLEM V. HELM (1983), held unconstitutional a life sentence without parole imposed by state courts on the perpetrator of seven nonviolent felonies. Even in the sacrosanct area of education, the Justice concurred in PLYLER V. DOE (1982) rather than leave children of illegal aliens "on the streets uneducated."

The cases of compassion are remarkable in one respect. Vindication of the individual claims meant overriding the most cherished of Powell's conservative tenets: the protection of state criminal judgments from meddlesome review on petition for federal writs of HABEAS CORPUS, and the recognition of only those rights tied closely to the constitutional text. Powell, plainly nervous about damaging these principles, narrowed the rulings almost to their actual facts. The cases thus testify both to a strength and a weakness in the jurist, the strength being that of an open mind and heart, the weakness being that of cautious case-by-case adjudication that leaves law bereft of general guidance and sure content.

The dichotomy between the cases of compassion and the towering doctrinal efforts of the school finance case (*Rodriguez*) and the search and seizure case (*Stone*) illustrates the different dimensions of the man himself. Powell, for example, privately deplored the arrogance of the national communications media and the maleficence of the criminal element. But he was, by nature, reserved, considerate, as eager to listen as to talk. Thus, even on subjects of strong feeling, the tempered judgment often triumphed. This quality marked his opinions dealing with the press. In a concurrence more libertarian than the Court opinion he joined in BRANZBURG V. HAYES (1972), Powell urged that "a proper balance" be struck on a "case-by-case basis" between the claims of newsmen to protect the confidentiality of sources and the need of grand juries for information relevant to criminal conduct. In GERTZ V. ROBERT WELSH INC. (1974), perhaps his most important opinion on the FIRST AMENDMENT, Powell balanced a plaintiff's interest in his good reputation against press freedoms, permitting private citizens to recover in libel on a standard less than "knowing or reckless falsehood" but greater than liability without fault. Balancing of individual and societal claims characterized Powell's opinions involving the rights of radical campus organizations, the unconventional use of national symbols, and even many criminal cases, where fact-specific rulings on the admissibility of suspect LINEUPS, for example, began to replace the per se EXCLUSIONARY RULES of the WARREN COURT.

Balancing does not permit confident forecasting of appellate outcomes. Case-by-case weighing of facts and circumstances can constitute a dangerous delegation of the Supreme Court's own authority on constitutional matters to trial judges, police and prosecutors, and potential litigants, all of whom capitalize on the uncertainty of law to work their own wills. But balancing suited Powell's preference for a devolution of authority and, in cases like Gertz, achieved a thoughtful accommodation of competing interests.

In his most famous opinion, UNIVERSITY OF CALIFORNIA REGENTS V. BAKKE (1978), Powell, the balancer, struck a middle course on the flammable question of benign preferences based on race. The immediate question in *Bakke* was whether the medical school of the University of California at Davis could set aside sixteen of one hundred places in its entering class for preferred minorities. Eight Justices took polar positions. Four argued that Title VI of the CIVIL RIGHTS ACT OF 1964 prohibited any preference based on race. Four others contended that both the act and the constitution permitted the Davis program. Powell, the ninth and deciding Justice, alone sought to accommodate both the American belief in the primacy of the individual and the need to heal a history of oppression based on race.

It has become common to note that the Supreme Court under WARREN E. BURGER did not, as some feared, dismantle the activist legacy of the Warren Court. Many of the influential Justices, Powell, POTTER STEWART, and BYRON R. WHITE among them, were more pragmatic than ideological. Thus the Court trimmed here, expanded there, and approached complex questions cautiously. Powell's opinions exhibit, as much as those of any Justice, this Court's composite frame of mind. Like him, the Court he served has eluded conventional description.

J. HARVIE WILKINSON III
(1986)

Bibliography

GUNTHER, GERALD 1972 In Search of Judicial Quality in a Changing Court: The Case of Justice Powell. *Stanford Law Review* 24:1001–1035.

HOWARD, A. E. DICK 1972 Mr. Justice Powell and the Emerging Nixon Majority. *Michigan Law Review* 70:445–468.

SYMPOSIUM 1977 [Justice Lewis F. Powell] *University of Richmond Law Review* 11:259–445.

——— 1982 [Justice Lewis F. Powell] *Virginia Law Review* 68:161–458.

## POWELL, LEWIS F., JR.
## (1907–1998)
## (Update)

From his appointment in 1971 until his resignation in 1987, Lewis F. Powell, Jr. was widely known as the "swing

Justice" on a closely divided Supreme Court. As the term "swing Justice" implies, Powell's position on the Court was one of both loneliness and influence. The loneliness resulted because Powell lacked a stable set of allies on many of the most contentious issues that came before the Court. The influence stemmed largely from his capacity to make 5–4 majorities. In cases involving AFFIRMATIVE ACTION, ABORTION, CAPITAL PUNISHMENT, and the FIRST AMENDMENT, Powell's finely nuanced positions caused him to move back and forth between coalitions of Justices whose decisions depended less on the peculiar facts of individual controversies.

After a Justice has retired from the Court, his influence, if any, must depend on the power of his written opinions and his judicial philosophy to command respect. The question of Powell's long-term influence remains unsettled. With regard to the resolution of specific cases, Powell's successor, ANTHONY M. KENNEDY, has contributed to a perceptible conservative drift by the REHNQUIST COURT, including erosion of some of the doctrines to which Powell was committed. In addition, Powell's characteristic "balancing" philosophy, which emerged as perhaps the Court's predominant methodology during his tenure, has recently attracted sharp criticism.

Lewis F. Powell joined the Supreme Court at the age of sixty-four after thirty-five years of successful private practice in the state of Virginia. The son of well-to-do parents, Powell graduated from Washington and Lee College in 1929 and, just two years later, finished first in his class at Washington and Lee Law School. After a year of graduate study at Harvard Law School, Powell returned to Richmond and joined the prestigious firm of Hunton, Williams, Gay, Powell, and Gibson, where, with time out for military service during World War II, he remained until 1971.

Powell achieved unusual eminence as a private lawyer. Besides winning the trust and respect of clients and serving on the boards of directors of eleven major corporations, Powell became active in a variety of lawyers' groups, including the American Bar Association, which he served as president in 1964–1965. Powell also took a leading role in a number of civic and cultural organizations. He was chairman of the Richmond school board from 1952 to 1961.

The Lewis Powell who took his seat on the Supreme Court in 1971 very much reflected his background and his experiences. In addition to possessing an acute analytical intelligence, he had a business lawyer's disposition to resolve disputes pragmatically, preferably in a way that would accommodate the reasonable interests of all parties. He also had a conservative respect for established institutions. Yet Powell was more than the archetype of the successful conservative lawyer. As chairman of the Richmond school board, he had resisted efforts by the Virginia political establishment to close public schools rather than accept racial DESEGREGATION. And as vice-president of the National Legal Aid and Defender Society, he had worked to support publicly financed legal services for the poor.

Not surprisingly in light of his background, a respect for institutions of local government and especially for local school administration represented a consistent theme in Powell's Supreme Court opinions. Although cautious and nonideological in some areas, he consistently and even aggressively sought to protect state sovereignty interests under both the TENTH AMENDMENT and the ELEVENTH AMENDMENT. As a matter of "equitable restraint," he held that federal courts should virtually never interfere with proceedings before state courts and administrative agencies. And he favored the recognition of protective "immunities" for government officials whose official conduct entangled them in suits for money damages. Without such immunity, Powell reasoned in *Harlow v. Fitzgerald* (1982), able men and women would hesitate to accept positions of public responsibility. Powell also wrote germinal opinions in the field of STANDING that had as their effect, if not their explicit purpose, the preclusion of lawsuits challenging the constitutionality of programs and policies—including those of LOCAL GOVERNMENTS—whose effects were widely dispersed across large numbers of citizens. "Generalized grievances," he argued in an influential CONCURRING OPINION in *Schlesinger v. Reservists* (1974) and later for a majority of the Court in *Warth v. Seldin* (1975), should generally be resolved in the legislature and at the ballot box, rather than by the nondemocratic federal courts.

The theme of deference to local political decision makers sounded particularly loudly in one of the earliest of Powell's major opinions, SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ (1973). At issue in *Rodriguez* was the constitutionality of Texas's system of school funding, which relied heavily on local property taxes to finance public EDUCATION and, as administered, created a large disparity between the per-pupil expenditures in rich and poor school districts. The plaintiffs claimed that the disparate allocations offended the EQUAL PROTECTION clause. Justice Powell, who wrote for a five-member majority, disagreed. Education was not a FUNDAMENTAL RIGHT in the constitutional sense, he ruled, nor did a law disadvantaging students in impecunious school districts constitute a SUSPECT CLASSIFICATION that would trigger close judicial scrutiny. Especially because the plaintiffs' argument called into question the educational financing system of "virtually every State," Powell found judicial restraint to be appropriate. "It would be difficult to imagine a case having a greater impact on our federal system than the one now before us," he wrote. "The ultimate solutions must come from the lawmakers and from the democratic pressures of

those who elect them." Powell took a similarly deferential stand in cases challenging the infliction of various kinds of punishment in the public schools and the removal of books from a school library.

While Powell was a fairly traditional conservative on questions of federal jurisdiction and of federalism, his accommodationist impulses and penchant for balancing often asserted themselves in cases under the FIRST AMENDMENT, the EIGHTH AMENDMENT, and the FOURTEENTH AMENDMENT. It was in these areas that he acquired his reputation as a swing Justice.

Powell's most famous opinion, in REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978), epitomizes both Powell's judicial style and his role on an ideologically fractured Supreme Court. The case arose when Alan Bakke, a white male who was denied admission to the medical school of the University of California at Davis, challenged the school's practice of setting aside sixteen of one hundred places in its entering class for members of disadvantaged minorities. Four Justices of the Court would have upheld affirmative action programs under considerably looser constitutional standards than applied to INVIDIOUS DISCRIMINATION. Four other Justices found all acts of RACIAL PREFERENCE, even those that favor discrete and insular minorities, to be absolutely prohibited by an applicable federal statute. That left Justice Powell, alone in the middle, to formulate the constitutional principles that would define the law of the case.

Upholding the ideal that race is irrelevant to moral worth, Powell argued that even discrimination in favor of minority persons must be subject to STRICT SCRUTINY by the courts. But, carefully parsing the state's reasons for pursuing affirmative action, he also identified an interest in student diversity that was sufficiently "compelling" to justify attaching affirmative weight to prospective students' minority backgrounds as one of many factors relevant to admissions decisions. The end result was that RACIAL QUOTAS were forbidden, but individualized "pluses" permitted. Steps could thus be taken to make amends for the legacy of past invidious racialism, but a narrow tailoring of program to rationale was required.

Although no other Justice joined Powell's opinion in *Bakke*, Powell generally succeeded in establishing both the framework and the tone for the Supreme Court's affirmative action JURISPRUDENCE over the next ten years. The legal framework, subject to possible exception only in cases of congressional action, required compelling justifications, even for noninvidious or compensatory racial preferences. The tone reflected Powell's sense that the underlying issues were too hard, both morally and legally, to be settled other than on a case-by-case basis that would permit some accommodation, however crude, of the competing values at stake. In a series of cases involving employment and promotions, Powell's vote made the majority for the proposition that racial preferences would be allowed under the Constitution when reasonably necessary to correct for past discrimination by the institution implementing an affirmative action program or subject to a remedial judicial order. But he also insisted that racial classifications should be disfavored and, writing for a plurality of the Court in WYGANT V. JACKSON BOARD OF EDUCATION (1986), held that dispreferred whites may not be required to carry too heavy a burden in order to compensate for wrongs of which they personally are likely innocent. The resulting balance was not always neat, but it reflected Powell's sense that some sort of accommodation was needed.

Careful balancing and accommodation of competing interests also marked Powell's approach to the First Amendment. Perhaps his most important opinion on this subject came in GERTZ V. ROBERT WELCH, INC. (1974), which raised an issue about the scope of constitutional protection enjoyed by the press in suits for LIBEL. The common law generally had presumed liability for all defamatory speech, with the burden resting on the defendant to prove truth as a defense. In the landmark case of NEW YORK TIMES V. SULLIVAN (1964), however, the Supreme Court had recognized a constitutional privilege in cases involving speech about public officials in the performance of their official duties. Because of the public interest in promoting free and robust debate about governmental affairs, defamations of public officials were held to be constitutionally protected unless published "with actual malice," which the Court defined to mean with knowledge of their falsity or with reckless disregard for whether they were true or false. But the Court, following *New York Times*, had not reached a consensus on the scope of constitutional protection that should be accorded to other defamatory speech.

Carefully balancing the competing interests in FREEDOM OF SPEECH, FREEDOM OF THE PRESS, and the protection of individual reputation, Powell's *Gertz* opinion sought a middle ground. In order to avoid unwarranted "chilling" of the press as a result of threats of liability, Powell held that the states may not impose liability for libel in the absence of some showing of "fault." But neither, he concluded, did the First Amendment require that the state's interest in protecting its citizens' good names and reputations be sacrificed entirely. Where "private figures" are defamed, *Gertz* permits liability based on a showing that the press was negligent in publishing a false report. In actions brought by "public figures," whose stature or notoriety allows them greater opportunity to counter false allegations in the MARKETPLACE OF IDEAS, the balance

shifts, and liability requires a demonstration of actual malice.

In addition to its balancing methodology, Powell's First Amendment jurisprudence was notable for its sensitivity to the role of a free press in making democracy work. In GANNETT CO., INC. V. DEPASQUALE (1979) Powell argued in a concurring opinion that the First Amendment required at least a presumptive right of the press to attend and report on criminal trials. His views about rights of access to judicial proceedings were substantially adopted by the Court a year later in RICHMOND NEWSPAPERS V. VIRGINIA (1980). But Powell would have gone further. In provocative dissenting opinions in *Saxbe v. Washington Post Co.* (1974) and *Houchins v. KQED* (1978), he argued that the press, as a representative of the public, should have limited right of access to report on conditions inside prisons and presumably on the management of other governmental operations. From one perspective, Powell's views in these cases seem in tension with his generally respectful and deferential stance toward local government and political authority. From another, his position reflects a powerful inner logic. Local government deserves deference only insofar as it represents the informed judgments of its citizens. When government conducts its affairs in unnecessary secrecy, Powell believed, the moral foundations of democracy erode.

The need to strike a balance between deference to democratically accountable decision makers and the protection of competing constitutional values was also a main theme in Powell's opinions involving PROCEDURAL DUE PROCESS. In this area, too, he emerged as one of the Court's intellectual leaders. Writing in MATHEWS V. ELDRIDGE. (1976), Powell developed a three-part BALANCING TEST that has since become ubiquitous in the Supreme Court's procedural due process cases. To determine whether the government has provided adequate procedural safeguards against the erroneous deprivation of a citizen's liberty or PROPERTY RIGHTS, Powell held, the Court must weigh and balance the magnitude of the individual interests at stake; the government's interests, including those in cheap and efficient administration; and the reduction in the risk of error that more-extensive procedures might yield.

Powell was also an important figure in cases involving SUBSTANTIVE DUE PROCESS issues. He joined the initial 7–2 majority recognizing constitutional abortion rights in ROE V. WADE (1973) and remained committed to *Roe*'s analytical framework throughout his tenure on the Court. As the Court later grew more polarized on abortion issues, Powell's centrist line-drawing often proved decisive in making 5–4 majorities. Powell also cast the swing vote in BOWERS V. HARDWICK. (1986), holding that the Constitution's protection of the right of PRIVACY and the right of procreation does not extend to homosexual sodomy. In a characteristically accommodationist gesture, however, he suggested that a severe criminal penalty might offend the constitutional prohibition against CRUEL AND UNUSUAL PUNISHMENT.

Early in his career on the Supreme Court, Justice Powell won high praisse from influential commentators for his skillful and judicious use of a balancing approach to constitutional questions. Although never defined with great precision, balancing—as practiced in *Matthew v. Eldridge*, for example—calls for the identification of all relevant and competing interests, and the striking of a balance for the case at hand; slight changes in the catalogue of affected interests, or the degree of their implication, could alter the result in the next case. Partly because of the looseness with which definitions of balancing are formulated, it is difficult to say how sharply balancing differs from other approaches to CONSTITUTIONAL INTERPRETATION. Much depends on how the specification of relevant interests fit into, or competes with, judicial reliance on such factors as the constitutional text, constitutional history, precedent, constitutional structure, and traditional or consensus values.

Nevertheless, the view seems to be gaining currency that balancing is the currently predominant approach to constitutional interpretation and that Justice Powell was a leading figure in popularizing this methodology. Some commentators have offered the further argument that balancing is a deficient or even a bankrupt method of constitutional analysis. And at least one, Professor Paul Kahn, has argued that its deficiencies are damningly exhibited in Justice Powell's opinions. Powell's balancing, according to this criticism, was ad hoc, unpredictable, and subjective. Moreover, his approach to judging misconceived the JUDICIAL FUNCTION, which is to identify and hierarchically array constitutional principles of sufficient clarity and generality to offer clear guidance both to lower courts and to political decision makers.

These criticisms are at best overstated. Powell's case-by-case balancing approach located him in a time-honored tradition of practical thinking in which principles—whether legal or moral—represent the distilled wisdom of carefully individualized judgments. Adherents of this approach, which has found its way into the traditions of common law adjudication and of constitutional interpretation as well, argue forcefully that it is a practical and intellectual mistake to rest on rules that are too broad for their correctness to be rationally vindicated in advance. And Powell, when he thought rational vindication possible, did not hesitate to paint with a broad brush. He did so, for example, in establishing First Amendment lines and categories in *Gertz v. Robert Welch, Inc.*

It is a seperate charge that Powell's mode of balanc-

ing—in the affirmative action cases, for example—represented JUDICIAL POLICYMAKING that was insufficiently rooted in traditional sources of legal authority to qualify as anything more than judicial second-guessing of a political judgment. Powell, his critics argue, located himself too much "inside" the political community and wrongly tried to bring the community's values to bear on constitutional questions; instead, a Justice should locate himself outside the community in the lofty and frequently astringent principles of the Constitution. The fallacy in this criticism is that there is ultimately no helpful interpretive position "outside" the constitutional community. A Supreme Court Justice, like anyone, must read the Constitution from inside the society to which its lofty generalities must be applied. And it would be folly to think that a constitutional interpreter should try to ignore the society's needs and values. For Powell, traditional sources of legal authority retained their force. But Powell looked at them, and appropriately so, from a point of view that sought to reach sound, practical solutions to constitutional problems.

It is a somewhat more telling argument against the characteristic jurisprudence of Justice Powell that, in the search for a pragmatic balance—in the effort to keep competitive values in a position approaching equipoise or to achieve what he thought was a sensible result in a particular case—he sometimes drew lines that were too fine or too ad hoc to withstand critical scrutiny. Certainly Powell's humanitarian instincts sometimes caused him to distinguish relevant "conservative" precedents, including those that he had authored, by force of little more than ipse dixit. His concurring opinion in PLYLER V. DOE (1982), distinguishing SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ and holding that Texas could not withhold free public education from illegal-alien children, falls into this category. Some have argued that the *Bakke* line between forbidden racial quotas and permissible individual preferences is intellectually untenable.

Finally, Powell's sense of what was prudent or practically necessary sometimes overrode both the force of contending arguments and considerations of fairness. In MCCLESKY V. KEMP (1987), for example, the petitioner introduced statistical evidence establishing that blacks are more likely to be sentenced to death than are whites and that the killers of whites are more than four times more likely to be executed than are killers of blacks. This evidence, McClesky argued, required reversal of his death sentence under both the constitutional prohibition against cruel and unusual punishment and the equal protection clause. Justice Powell disagreed. In an opinion of unusual candor, he argued that the Court must reject the plaintiff's argument partly because of the far-reaching implications of its underlying premise. "McClesky's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire CRIMINAL JUSTICE SYSTEM," Powell wrote. If statistical demonstrations of systemic disparities could establish individual unfairness, the Court "could soon be faced with similar claims [against] other types of penalty" from members of other disadvantaged groups. Powell plainly regarded this prospect as practically intolerable.

Although happily atypical in some respects, *McClesky* was, in fact, a characteristic Powell decision. Exemplifying the role of Justice as statesman, Powell repeatedly experienced conflicts of competing values about how a Supreme Court Justice, with his mission conceived to include a component of prudent statesmanship, ought to act. In cases in which competing values conflict, it is always easy to criticize any particular decision as striking the wrong balance. The harder and more interesting question is whether Powell, in embracing the obligations of prudent statesmanship, conceived his judicial role correctly. Although retirement encomiums are perhaps not the strongest evidence, Powell, upon stepping down from the Supreme Court, was widely hailed as a model Supreme Court Justice of the modern age.

RICHARD FALLON
(1992)

Bibliography

ALEINIKOFF, T. ALEXANDER 1987 Constitutional Law in the Age of Balancing. *Yale Law Journal* 96:943–1005.

FREEMAN, GEORGE CLEMON 1988 Justice Powell's Constitutional Opinions. *Washington and Lee Law Review* 45:411–465.

GUNTHER, GERALD 1972 In Search of Judicial Quality on a Changing Court: The Case of Justice Powell. *Stanford Law Review* 24:1001–1035.

KAHN, PAUL W. 1987 The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell. *Yale Law Journal* 97:1–60.

MALTZ, EARL M. 1979 Portrait of a Man in the Middle—Mr. Justice Powell, Equal Protection, and the Pure Classification Problem. *Ohio State Law Journal* 40:941–964.

SYNPOSIUM 1982 In Honor of Justice Lewis F. Powell, Jr. *Virginia Law Review* 68:161–458.

TRIBUTE 1987 Tribute to Justice Lewis F. Powell, Jr. *Harvard Law Review* 101:395–420.

UROFSKY, MELVIN I. 1984 Mr. Justice Powell and Education: The Balancing of Competing Values. *Journal of Law and Education* 13:581–627.

## POWELL, THOMAS REED
(1880–1955)

Constitutional lawyer and political scientist Thomas Reed Powell taught for twenty-five years at Harvard Law

School. He was a prolific writer of articles on constitutional law and especially on the issues of STATE TAXATION OF COMMERCE and INTERGOVERNMENTAL IMMUNITIES from taxation. His published analyses of constitutional DOCTRINES and Supreme Court decisions frequently influenced the future course of constitutional law, as, for example, in reducing the protection from taxation afforded by the ORIGINAL PACKAGE DOCTRINE. He was also a commentator on the activities of the Supreme Court: he was critical of its anti-NEW DEAL decisions in the 1930s, of the proliferation of separate opinions in the 1940s, and of the prevalence of rhetorical excess over rigorous logic at all times. His last public lectures were published in 1956 as *Vagaries and Varieties in Constitutional Law.*

DENNIS J. MAHONEY
(1986)

## *POWELL v. ALABAMA*
287 U.S. 45 (1932)

*Powell* was the famous "Scottsboro boys" case in which "young, ignorant, illiterate blacks were convicted and sentenced to death without the effective appointment of counsel to aid them. The trials were in a hostile community, far from the defendants' homes; the accusation was rape of two white women, a crime "regarded with especial horror in the community."

In an early major use of the DUE PROCESS clause to regulate the administration of criminal justice by the states, the Supreme Court held that the trials were fundamentally unfair. The facts of the case made this portentous holding an easy one: the defendants were tried in one day, the defense was entirely pro forma, and the death sentence was immediately imposed on all seven defendants without regard to individual culpability or circumstance. *Powell* was not a Sixth Amendment RIGHT TO COUNSEL case; three decades would pass before that guarantee was imported into due process in GIDEON V. WAINWRIGHT (1963). But the language of the Court in expounding the importance of counsel to a fair trial was repeatedly quoted as the Sixth Amendment right developed: "[the layman] lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Although *Powell* is usually cited as a case in which defendants had no counsel at all, there was actually a lawyer at their side, but he came late into the case and was unfamiliar with Alabama law. In discussing the failure of due process, the Court referred to the lack of investigation and consultation by this last-minute volunteer. Thus, *Powell* has implications for the developing doctrine of ineffective assistance of counsel.

BARBARA ALLEN BABCOCK
(1986)

## *POWELL v. MCCORMACK*
395 U.S. 486 (1969)

Adam Clayton Powell, Jr., a flamboyant clergyman of indifferent ethics, for many years represented a New York City district in Congress. In 1967, after Powell won reelection despite a conviction for criminal contempt of court and a record of misappropriation of public funds, the HOUSE OF REPRESENTATIVES denied him a seat. In a special election, he received eighty-six percent of the votes and again appeared to take his seat. The House then passed a resolution "excluding" Powell.

Powell and thirteen of his constituents then sued Speaker John McCormack and several other officers of the House of Representatives. Powell lost in both the District Court and the Court of Appeals, and his case was not heard by the Supreme Court until after the Ninetieth Congress had adjourned. Powell had, in the meanwhile, been reelected, and was seated as a member of the Ninety-First Congress.

The Supreme Court, in an 8–1 decision, declined to hold the case moot, finding that Powell's claim for back pay was sufficient for a justiciable controversy. In an opinion by Chief Justice EARL WARREN, the Court proceeded to overturn some long-standing assumptions about the constitutional status of CONGRESSIONAL MEMBERSHIP.

The Court held that the houses of Congress, although they are the judges of the qualifications provided in the Constitution itself (Article I, section 5) may not add to the qualifications provided in the Constitution (Article I, section 2). If a person elected to the House is qualified by age, CITIZENSHIP, and residence, he may not be excluded. Of course, once a member has been seated, he may be expelled by a two-thirds vote for any offense the House believes is "inconsistent with the trust and duty of a member" (*In re Chapman*, 1897). But, in Powell's case the Court held that exclusion was not equivalent to expulsion. (See POLITICAL QUESTIONS.)

DENNIS J. MAHONEY
(1986)

## *POWELL v. PENNSYLVANIA*

See: Waite Court

# PRAGMATISM

Pragmatism, generally considered to be our only indigenous school of philosophic thought, has profoundly influenced the development of American jurisprudence in the twentieth century. This influence is evident in a variety of legal settings, including the field of constitutional law, where debates over the proper interpretive role of the courts continue to focus upon issues first raised in a systematic way by the early philosophers of pragmatism, notably John Dewey.

The school of philosophical pragmatism emerged only in the late nineteenth century, but it is more deeply rooted in the American past than that date implies. Thus, we see in ALEXIS DE TOCQUEVILLE's description of the American philosophical method a preview of what later became, in the works of Charles Peirce, William James, Dewey, and others, a schematically developed general theory: "To evade the bondage of system and habit, of family-maxims, class opinions, and, in some degree, of national prejudices; to accept tradition only as a means of information, and existing facts only as a lesson to be used in doing otherwise and doing better; to seek the reason of things for oneself, and in oneself alone; to tend to results without being bound to means, and to strike through the form to the substance—such are the principal characteristics of what I shall call the philosophical method of the Americans." In this account of philosophical temperament are the core elements of the reconstruction in philosophy that came to dominate constitutional discourse in the twentieth century: an instrumental approach to knowledge based upon a rigorous empiricism, a demystification of the past as a predicate for facilitating change, and an ethical orientation that finds in the application of a norm or concept the criterion of its value.

The emergence of the pragmatic movement in philosophy occurred at a critical juncture in American constitutional history. At a time when constitutional orthodoxy was embodied in the person of Justice STEPHEN J. FIELD, the appeal of pragmatic ideas to critics of the dominant view lay in the promise it held for achieving a congruence between law and the needs of a society undergoing rapid flux and transition. In place of a formalistic approach characterized by the derivation of absolute principles that are grounded in nature and from which constitutional conclusions can be deduced with certainty in support of social inequality, the pragmatists offered the prospect of deriving relative principles that are grounded in experience and from which constitutional conclusions of a tentative nature can be inductively assembled in support of a more egalitarian society. The application of pragmatism to constitutional reasoning supported the claim that law should not be an impediment to progress, that the Constitution was not a document embodying immutable principles but one whose meaning depended upon the circumstances of time and place.

In developing their legal theory, the pragmatists both drew on and rejected existing jurisprudential schools of thought. They were critical of the syllogistic process of legal reasoning that they found common to both the philosophical and analytical schools. In the application of ethical considerations by the NATURAL RIGHTS theorists and in the abandonment of such considerations by the analytical positivists, they also found a similar detachment from the realities of the social situation. In the first case ethics was not grounded in experience, and in the second, reality was disorted by the failure to understand the ethical imperitives implied in experience. The object of the pragmatists was thus to establish an empirical jurisprudence that included a consciousness of the moral basis of law. The attraction of pragmatic philosophy was its potential for steering a middle course between the positivistic seperation of law and morality, on the one hand, and, on the other, the natural-rights fusion law and morality according to the standards derived outside of experience. Both extremes led to judicial potection of the status quo, the first by accepting the legitimacy of any existing legal arrangments and the second by freezing the law into a mold formed by metaphysical abstractions. Justice, for the pragmatists, was not to be defined a priori; nor was it identifiable with the will of the sovereign. Rather, it was to be defined "transactionally," emerging out of social experience as an end to be juridically achieved. Acceptance of this view by jurists would make it unnecessary to appeal to noncontextual sources, such as an absolute standard of right conduct embodied in the text of the Constitution.

The principal theorists of legal pragmatism, BENJAMIN N. CARDOZO and ROSCOE POUND, wrote most often about private law, but both maintained that their prescriptions applied equally well to constitutional law. Cardozo's "method of sociology" and Pound's "theory of social interests" were intended in part to translate the precepts of Dewey and James into jurisprudential terms of potentially transformative significance for the Constitution. In the case of Dewey, who had addressed himself to legal questions, the translation was fairly straightforward. In his account of the law, legal rules and principles were viewed pragmatically as "working hypotheses" whose validity was to be ascertained by their application in concrete situations. Dewey also held the work of the Founding Fathers to be much less the object of reverence than had traditionally been the case: "The belief in political fixity, of the sanctity of some form of state consecrated by the efforts of our fathers and hallowed by tradition, is one of the stumbling-blocks in the way of orderly and directed change; it is an invitation to revolt and revolution." Just as

the antifoundationalist emphasis in contemporary philosophy—the denial that knowledge must be based upon certain objective truths—owes much to the work of the early pragmatists, so too does the currently popular disparagement of the doctrine of ORIGINAL INTENT in CONSTITUTIONAL INTERPRETATION. Therefore, the contention that the Constitution embodies foundational principles of justice that reflect the original intentions of its Framers, is doubly problematic, and it carries minimal weight in the pragmatic account of constitutional interpretation.

The judge most often associated with philosophical pragmatism is OLIVER WENDELL HOLMES. JR. Although he occasionally criticized some of the formulations of pragmatists, his work as a Supreme Court Justice (as well as his extrajudicial writings) often manifested a pragmatic approach to the Constitution. More important, his opinions inspired many others whose interest in pragmatism had less to do with the philosophical skepticism that appealed to Holmes than with the social reform possibilities implicit in its method. For example, Holmes's opinion in MISSOURI V. HOLLAND (1920) suggested that the needs of the twentieth century need not be held hostage to the assumptions of the eighteenth or nineteenth centuries: "The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." His famous dissenting opinion in ABRAMS V. UNITED STATES (1919) expressed in one short sentence the essence of the pragmatic conception of the Constitution. The theory of the Constitution, Holmes said, was that truth would emerge in the marketplace of ideas; the document "is an experiment, as all life is an experiment." This view often led Holmes to advocate judicial self-restraint; but in time it came to express a sentiment that provided jurisprudential support for a more activist, socially engaged judiciary. The work of the WARREN COURT exemplified an important legacy of the pragmatists (especially Dewey): the increasing reliance by the judiciary upon social science evidence. Holmes's role in this development is suggested in an observation of his that Dewey, in the elaboration of his pragmatic philosophy, saw fit to quote: "I have had in mind an ultimate dependence of law [upon science] because it is ultimately for science to determine, as far as it can, the relative worth of our different social ends."

The pragmatic conception of the Constitution has generated considerable controversy. Criticism centers on two distinct but related problems. The first is that the importation of pragmatic ideas into the arena of constitutional interpretation inevitably leads to the abandonment of any meaningful distinction between judicial and legislative modes of decision making. This has the effect, it is claimed, of undermining the legitimacy of the Supreme Court, an unfortunate outcome rendered no less unfortunate by assertions about the enhanced quality of the Court's output. The second is that a pragmatic jurisprudence provides inadequate protection for constitutional rights. By effectively reducing self-evident and immutable truths to the level of tentative rules, pragmatic judges risk sacrificing FUNDAMENTAL RIGHTS on the altar of social expedience. If the Constitution is a document lacking fixed points of reference and thus deprived of meanings that are not simply contextual (that is, situated in the experience of changing historical moments), can it serve as guarantor of rights that are in their ultimate sense expressive of an unchanging human nature?

GARY J. JACOBSOHN
(1992)

(SEE ALSO: *Conservatism; Judicial Activism and Judicial Restraint; Liberalism; Political Philosophy of the Constitution.*)

Bibliography

GREY, THOMAS C. 1989 Holmes and Legal Pragmatism. *Stanford Law Review* 41:787–870.

JACOBSOHN, GARY J. 1977 *Pragmatism, Statesmanship, and the Supreme Court.* Ithaca, N.Y.: Cornell University Press.

SUMMERS, ROBERT SAMUEL 1982 *Instrumentalism and American Legal Theory.* Ithaca, N.Y.: Cornell University Press.

## PRAGMATISM
## (Update)

In recent years the school of philosophy known as pragmatism has enjoyed a renaissance in legal thought. This renewal of interest can be traced to several factors, including the CRITICAL LEGAL STUDIES movement's radical critique of the notion that legal rules are neutral and apolitical; the work of feminists and postmodernists who stress the importance of situated experience in influencing our perceptions of reality; and interdisciplinary approaches to law such as LAW AND ECONOMICS THEORY, which contest the traditional view of law as an autonomous discipline. Though they differ in many particulars, these various movements within contemporary JURISPRUDENCE lead to an important question: If law does not consist of a set of immutable principles waiting to be discovered, and if our notions of truth are (to some degree) socially constructed, then how should judges and other decisionmakers choose among various competing alternatives? In the view of some scholars, pragmatism provides a coherent response to this question, as well as a method for charting a middle course between the traditional model of law as a neutral, self-contained enterprise and the nihilistic view of law as nothing more than politics by other means.

Although contemporary legal pragmatists comprise a

diverse group of scholars, falling along all segments of the political spectrum, most share a few core beliefs. First, most pragmatists agree that human knowledge is contextual, meaning that each of us views the world in light of the constraints imposed upon us by such factors as prior experience, culture, and language. The premise that knowledge is contextual in turn suggests, as Richard Warner writes in his description of legal pragmatism, that there is no external standard for evaluating our norms, but rather that "our norms of justification neither have nor need a ground outside themselves." Pragmatists therefore reject the concept known as "foundationalism," what Thomas Grey refers to as "the age-old philosopher's dream that knowledge might be grounded in a set of fundamental and indubitable beliefs." Viewing knowledge as antifoundational suggests, as Richard Rorty notes in discussing the thought of John Dewey, that law and other human institutions are best viewed not as "attempts to embody or formulate truth or goodness or beauty, but rather as instruments for solving problems." Thoughtful pragmatists, however, are careful to avoid equating pragmatic instrumentalism with utilitarianism. As Grey observes, pragmatists in the tradition of Dewey reject a sharp distinction between ends and means, claiming instead that the means we choose to implement our goals are never completely instrumental, but rather must be judged "by their intrinsic satisfactions or frustrations as well as by their consequences."

Adherence to these principles compels most legal pragmatists to reject attempts to ground the law in comprehensive "grand theories" and to reject the formalist ideal that correct outcomes can always be logically deduced from some overarching set of principles. Many pragmatists instead advocate the use of "practical reason," which Richard Bernstein describes as a way of mediating "between general principles and a concrete particular situation" through choice and deliberation. The term "practical reason" is not easily defined but, according to various formulations, denotes methods for reaching decisions based on, inter alia, an appreciation of consequences; a commitment to dialogue among competing views; and a grudging respect for "common sense" coupled with skepticism over what Joseph William Singer refers to as "unreflective reliance on commonsense intuitions."

The specific policy recommendations of legal pragmatists vary depending on their perception of the outcomes suggested by practical reason. More conservative pragmatists tend to stress the instrumental value of adherence to such socially constructed norms as fidelity to text, history, and judicial deference to other branches of government. Others take a more radical approach, arguing that a commitment to human flourishing (itself a norm that we are free to accept or reject) counsels in favor of paying closer attention to the voices of the marginalized and oppressed, whose perspectives often go unnoticed by more traditional approaches. Some pragmatists argue in favor of a greater reliance on the insights provided by the sciences, including the SOCIAL SCIENCES, while others remain skeptical.

Critiques of legal pragmatism come from many quarters. Those who find natural law or rights-based approaches to jurisprudence compelling take issue with the pragmatists' view of rights as a contingent (albeit useful) human construct. Stanley Fish argues that once pragmatists claim that specific policies "[follow] from the pragmatist account" they betray their "own first principle (which is to have none)." Still others argue that, at a general level, pragmatism consists of nothing but platitudes; and that, at the particular level, the wide divergence of opinion among pragmatist scholars suggests that pragmatism ultimately has nothing distinctive to say about law. From the pragmatic perspective, the response to these critiques is that the proof is in the pudding. If, as William James observed, the truth of a proposition resides in its consequences, then the "truth" of the pragmatic approach to law depends on its effects. Put another way, pragmatists ask that their methodology be judged by this simple standard: Does it work?

THOMAS F. COTTER
(2000)

(SEE ALSO: *Feminist Theory; Postmodernism and Constitutional Theory.*)

Bibliography

BERNSTEIN, RICHARD 1983 *Beyond Objectivism and Relativism.* Philadelphia: University of Pennsylvania Press.

COTTER, THOMAS F. 1996 Legal Pragmatism and the Law and Economics Movement. *Georgetown Law Journal* 84:2071–2141.

FARBER, DANIEL 1988 Legal Pragmatism and the Constitution. *Minnesota Law Review* 72:1331–1378.

FISH, STANLEY 1991 Almost Pragmatism. In Michael Brint and William Weaver, eds., *Pragmatism in Law & Society.* Boulder, Colo.: Westview Press.

GREY, THOMAS C. 1989 Holmes and Legal Pragmatism. *Stanford Law Review* 41:787–870.

POSNER, RICHARD A. 1988 *The Problems of Jurisprudence.* Cambridge, Mass.: Harvard University Press.

RORTY, RICHARD 1982 *Consequences of Pragmatism.* Minneapolis, Minn.: University of Minnesota Press.

SINGER, JOSEPH WILLIAM 1990 Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism. *Southern California Law Review* 63:1821–1837.

SMITH, STEVEN D. 1990 The Pursuit of Pragmatism. *Yale Law Journal* 100:409–449.

WARNER, RICHARD 1993 Why Pragmatism? The Puzzling Place

of Pragmatism in Critical Theory. *University of Illinois Law Review* 1993:535–563.

## PRATT, CHARLES
(Lord Camden)
(1714–1794)

The leading WHIG constitutionalist of eighteenth-century England, Charles Pratt was appointed a judge after a career as a barrister and parliamentarian and service as attorney general. Arguing SEDITIOUS LIBEL cases, he had maintained that the jury was competent to decide the questions both of law and of fact. He was Chief Justice of the Court of Common Pleas from 1762 until 1766. In the WILKES CASES he declared GENERAL WARRANTS contrary to the principles of the constitution and held their issuance by secretaries of state illegal. He also discouraged prosecution of Roman Catholic recusants. As Baron (later Earl) Camden, he made his first speech in the House of Lords in 1765 supporting the American position on the Stamp Act. In the debates on the Declaratory Act he called TAXATION WITHOUT REPRESENTATION "sheer robbery" and denounced the fiction of virtual representation. He became Lord Chancellor in 1766 but resigned in 1770 after disagreeing with the cabinet about several matters, including policy toward America. He continued to support the American position in the House of Lords and, with Lord Chatham, favored reconciliation with the colonies. He returned to the cabinet in 1782 and was Lord President of the Council from 1784 until his death.

DENNIS J. MAHONEY
(1986)

## PRAYERS IN SCHOOL

See: Religion in Public Schools; School Prayers

## PREAMBLE

The part of the Constitution that we read first is the part of the original Constitution that was written last. The Preamble, which sets forth the noble purposes for which the Constitution is "ordained and established," was composed by the CONSTITUTIONAL CONVENTION's Committee of Style. The committee sat between September 8 and September 11, 1787, after the Convention had debated and voted on all of the substantive provisions of the Constitution; its mandate was to arrange and harmonize the wording of the resolutions adopted by the delegates during the preceding four months. The task of actually drafting the document fell to GOUVERNEUR MORRIS of New York, and so the authorship of the Preamble must be ascribed to him.

Morris made two major changes in the Preamble as it was reported by the Committee of Detail and referred to the Committee of Style. The earlier version had begun, "We, the people of the states of . . ." and then had listed the thirteen states in order, from north to south; Morris changed this to the now familiar "We, the people of the United States. . . ." And the earlier version had merely stated that the people ordained and established the Constitution; Morris added the list of purposes for which they did so. Each of these changes has been the occasion of some controversy.

The reference to the "people of the United States" was a source of irritation to the Anti-Federalists. PATRICK HENRY, for example, in the Virginia ratifying convention, denounced the use of the phrase as a harbinger of a national despotism. The Convention, he said, should have written instead, "We, the States. . . ." In ANTI-FEDERALIST CONSTITUTIONAL THOUGHT, only the states, as the existing political units, to which the people had already delegated all the powers of government, could constitute a federal union and redelegate some of their powers to the national government. Reference to the constituent authority of "the people of the United States" seemed to imply consolidation, not confederation.

It is unlikely that Morris, the Committee of Style, or the Convention had any such implication in mind. The Convention had approved a preamble that referred to the people of all thirteen states. The committee had to "harmonize" that with the provision that the Constitution would become effective when it was ratified by any nine states. There would likely be a time, therefore, when there would be nine states in the Union and four outside of it; but no one could predict which would be the nine and which the four. So long as the Constitution would become effective with less than thirteen states in the Union, listing the thirteen states in the Preamble would be misleading and inaccurate. Whichever states did ratify the Constitution would be the "United States," and it would be the people of those "United States" that had ordained the Constitution. Moreover, the Constitution provided for the future admission of additional states, and the people of those states, too, would ordain and establish the Constitution.

But Henry's objection was ill-founded for another reason. The DECLARATION OF INDEPENDENCE had pronounced the Americans "one people" and had given to their political Union the name of the "United States of America." The states and the Union had been born together on July 4, 1776, when a new nation was brought forth upon this continent. The one people certainly possessed the right to alter or abolish their former government and to establish

a new government more conducive to their future safety and happiness. "We, the people of the United States," are identical to the "one people" that in the Declaration of Independence dissolved the political bonds that formerly connected us to Great Britain.

The list of purposes for ordaining and establishing the Constitution is perhaps more perplexing. The Convention had never debated or voted on such a list; and yet each delegate must have had some such purposes in mind throughout the deliberations. How else could he have gauged or judged the propriety of the measures upon which he did debate and vote? Morris and the Committee of Style must have thought it fitting to provide this terse apologia for their summer's deliberations; and the delegates apparently agreed, for there is no record of any objection to the Preamble as it was reported by the committee.

The Preamble lists the purposes for which the Constitution was created: to form a more perfect Union, to establish justice, to insure domestic tranquillity, to provide for the common defense, to promote the general welfare, and to secure the blessings of liberty, not only for the founding generation but also for "posterity." It, in effect, declares to a candid world the causes for which the people have chosen to replace the ARTICLES OF CONFEDERATION with a new Constitution. The purposes listed in the Preamble are consistent with what the Declaration of Independence asserts to be the end of all governments instituted among men, namely to secure the equal and inalienable natural rights of all to life, liberty, and the pursuit of happiness.

The Preamble does not purport to create any offices or to confer any powers; as JOSEPH STORY later wrote, "Its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantially to create them." Although COMMENTATORS ON THE CONSTITUTION have, over the years, purported to find in the Preamble justification for the exercise of INHERENT POWERS of government, no court has ever held that the Preamble independently grants power to the government or to any of its officers or agencies. In fact, in *Jacobson v. Massachusetts* (1905), the Supreme Court specifically rejected that interpretation.

The Preamble concludes by proclaiming that the people "do ordain and establish this Constitution." EDWARD S. CORWIN correctly pointed to the active voice and present tense of this phrase. The act of constituting a government occurs at a particular moment in time; but the authority of the Constitution depends on the continuous consent of the governed. The people, as Corwin wrote, " 'do ordain and establish,' *not* did ordain and establish." Thus does the Preamble play its role in the preservation of constitutional government. An afterthought of the Constitutional Convention, a rhetorical flourish by the Committee of Style, the Preamble has been memorized by schoolchildren and declaimed by orators and statesmen on public occasions for two centuries. And every time it is recited it calls to mind the purposes of our federal Union and unites the people more firmly to the cause of republican liberty.

DENNIS J. MAHONEY
(1986)

Bibliography

CORWIN, EDWARD S. 1920 *The Constitution and What It Means Today.* Princeton, N.J.: Princeton University Press.

EIDELBERG, PAUL 1968 *The Political Philosophy of the Constitution.* New York: Free Press.

ROSSITER, CLINTON 1966 *1787: The Grand Convention.* New York: Macmillan.

## PRECEDENT

In MARBURY V. MADISON (1803) Chief Justice JOHN MARSHALL rested the legitimacy of JUDICIAL REVIEW of the constitutionality of legislation on the necessity for courts to "state what the law is" in particular cases. The implicit assumption is that the Constitution is law, and that the content of constitutional law is determinate—that it can be known and applied by judges. From the time of the nation's founding, lawyers and judges trained in the processes of the COMMON LAW have assumed that the law of the Constitution is to be found not only in the text of the document and the expectations of the Framers but also in judicial precedent: the opinions of judges on "what the law is," written in the course of deciding earlier cases. (See STARE DECISIS.)

Inevitably, issues that burned brightly for the Framers of the Constitution and of its various amendments have receded from politics into history. The broad language of much of the Constitution's text leaves open a wide range of choices concerning interpretation. As the body of judicial precedent has grown, it has taken on a life of its own; the very term "constitutional law," for most lawyers today, primarily calls to mind the interpretations of the Constitution contained in the Supreme Court's opinions. For a lawyer writing a brief, or a judge writing an opinion, the natural style of argumentation is the common law style, with appeals to one or another "authority" among the competing analogies offered by a large and still growing body of precedent.

The same considerations that support reliance on precedent in common law decisions apply in constitutional adjudications: the need for stability in the law and for evenhanded treatment of litigants. Yet adherence to pre-

cedent has also been called the control of the living by the dead. Earlier interpretations of the Constitution, when they seem to have little relevance to the conditions of society and government here and now, do give way. As Chief Justice EARL WARREN wrote in BROWN V. BOARD OF EDUCATION (1954), "In approaching [the problem of school SEGREGATION, we cannot turn the clock back to 1868 when the [FOURTEENTH] AMENDMENT was adopted, or even to 1896 when PLESSY [V. FERGUSON] was written. We must consider public education in the light of its full development and its present place in American life. . . ." Justice OLIVER WENDELL HOLMES put the matter more pungently: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."

Although the Supreme Court decides only those issues that come to it in the ordinary course of litigation, the Court has a large measure of control over its own doctrinal agenda. The selection of about 150 cases for review each year (out of more than 4,000 cases brought to the Court) is influenced most of all by the Justices' views of the importance of the issues presented. (See CERTIORARI, WRIT OF.) And when the Court does break new doctrinal ground, it invites further litigation to explore the area thus opened. For example, scores of lawsuits were filed all over the country once the Court had established the precedent, in BAKER V. CARR (1962), that the problem of legislative REAPPORTIONMENT was one that the courts could properly address. The Justices see themselves, and are seen by the Court's commentators, as being in the business of developing constitutional DOCTRINE through the system of precedent. The decision of particular litigants' cases today appears to be important mainly as an instrument to those lawmaking ends. The theory of *Marbury v. Madison*, in other words, has been turned upside down.

Lower court judges pay meticulous attention to Supreme Court opinions as their main source of guidance for decision in constitutional cases. Supreme Court Justices themselves, however, give precedent a force that is weaker in constitutional cases than in other areas of the law. In a famous expression of this view, Justice LOUIS D. BRANDEIS, dissenting in *Burnet v. Coronado Oil & Gas Co.* (1932), said, "in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."

Although this sentiment is widely shared, Justices often are prepared to defer to their reading of precedent even when they disagree with the conclusions that produced the earlier decisions. Justice JOHN MARSHALL HARLAN, for example, regularly accepted the authoritative force of WARREN COURT opinions from which he had dissented vigorously. The Court as an institution occasionally takes the same course, making clear that it is following the specific dictates of an earlier decision because of the interest in stability of the law, even though that decision may be out of line with more recent doctrinal developments.

The Supreme Court is regularly criticized, both from within the Court and from the outside, for failing to follow precedent. But a thoroughgoing consistency of decision cannot be expected, given the combination of three characteristics of the Court's decisional process. First, the Court is a collegiate body, with the nine Justices exercising individual judgment on each case. Second, the body of precedent is now enormous, with the result that in most cases decided by the Court there are arguable precedents for several alternative doctrinal approaches, and even for reaching opposing results. Indeed, the system for selecting cases for review guarantees that the court will regularly face hard cases—cases that are difficult because they can plausibly be decided in more than one way. Finally, deference to precedent itself may mean that issues will be decided differently, depending on the order in which they come before the Court. The Court's decision in *In re Griffiths* (1973), that a state cannot constitutionally limit the practice of law to United States citizens, is still a good precedent; yet, if the case had come up in 1983, almost certainly it would have been decided differently. (See ALIENS.)

The result of this process is an increasingly fragmented Supreme Court, with more PLURALITY OPINIONS and more statements by individual Justices of their own separate views in CONCURRING OPINIONS and dissents—thus presenting an even greater range of materials on which Justices can draw in deciding the next case. In these circumstances, it is not surprising that some plurality opinions, such as that in MOORE V. CITY OF EAST CLEVELAND (1977), are regularly cited as if they had a precedent value equal to that of OPINIONS OF THE COURT.

The range of decisional choice offered to a Supreme Court Justice by this process is so wide as to call into the question the idea of principled decision on which the legitimacy of judicial review is commonly assumed to rest. Yet the hard cases that fill the Supreme Court's docket—the very cases that make constitutional law and thus fill the casebooks that law students study—do not typify the functioning of constitutional law. A great many controversies of constitutional dimension never get to court, because the law seems clear, on the basis of precedent; similarly, many cases that do get to court are easily decided in the lower courts. Although we celebrate the memory of our creative Justices—Justices who are remembered for setting precedent, not following it—the body of constitutional law remains remarkably stable. In a stable society

it could not be otherwise. As Holmes himself said in another context, "historic continuity with the past is not a duty, it is only a necessity."

KENNETH L. KARST
(1986)

Bibliography

EASTERBROOK, FRANK H. 1982 Ways of Criticizing the Court. *Harvard Law Review* 95:802–832.

LEVI, EDWARD H. 1949 *An Introduction to Legal Reasoning.* Chicago: University of Chicago Press.

LLEWELLYN, KARL N. 1960 *The Common Law Tradition.* Boston: Little, Brown.

MONAGHAN, HENRY P. 1979 Taking Supreme Court Opinions Seriously. *Maryland Law Review* 39:1–26.

## PREEMPTION

The SUPREMACY CLAUSE of the Constitution (Article VI, clause 2) requires that inconsistent state laws yield to valid federal laws. Preemption is the term applied to describe invalidation of state laws by superior federal law.

Strictly speaking, the issue of preemption is not one of constitutional law. The issue is not what Congress has the power to do, but what Congress has done. Where Congress has made an articulate decision whether particular state laws should survive a new scheme of federal regulation, the issue is settled. For example, in enacting minimum federal standards for automobile pollution control equipment in 1967, Congress prohibited states from enforcing more restrictive standards but made an exception for the State of California. There has been no need for litigation to mark the contours of preemption in that context. Insofar as there is a "doctrine" of preemption, it concerns the treatment of preemption by federal laws where Congress has ignored the issue.

Since preemption cases theoretically turn on construction of federal statutes to determine whether Congress intended to preempt state laws, there are limits to generalizations that can be drawn from the decisions. Each case construes a federal statute with a distinct regulatory structure and legislative history. It is particularly difficult to classify the simplest form of preemption cases—those where the claim is made that the terms of federal and state law are flatly inconsistent. Federal law may, for example, give express permission to engage in conduct prohibited by state law. An early famous case of this type was GIBBONS V. OGDEN (1824).

The most complex issues of preemption arise where it is concededly possible to comply with mandates of both state and federal law. The question then arises whether Congress intended to "occupy the field," or whether the challenged state law's enforcement would interfere inordinately with the policies of the federal law. State law may provide additional sanctions for conduct prohibited by federal law. (In *California v. Zook*, 1949, the Court sustained a state law that punished interstate motor transport operating without a federal permit.) State law may impose more stringent regulations than federal law. (In *Napier v. Atlantic Coast Line R.R.*, 1926, the Court held that a state law requiring railroad safety equipment was preempted by a federal law that required less equipment.) Finally, it may be argued that state law is, in some general way, inconsistent with the purposes of federal law. (In *New York Telephone Co. v. New York State Department of Labor*, 1979, the Court sustained state payment of unemployment compensation benefits to strikers as not inconsistent with the policy of free COLLECTIVE BARGAINING under federal labor law.)

The Court has announced general tests for determining whether Congress has "occupied the field." An often-quoted summary of the standards for finding congressional intent to preempt state law is contained in *Rice v. Santa Fe Elevator Corp.* (1947). "The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Or the state policy may produce a result inconsistent with the objective of the federal statute." These standards are peculiarly devoid of content, as the Court admitted in the sentence following those just quoted: "It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the POLICE POWER of the States undisturbed except as the state and federal regulations collide."

The lack of any pattern to the preemption cases can be explained in that each case seeks to ascertain congressional intent in a unique context. Since, however, contentious preemption questions arise precisely because Congress has ignored the existence of related state laws, the "intent of Congress" is a fiction that fails to describe the Court's decision process. The controlling factors in judicial decision are similar to those that would have confronted the intelligent legislator who had grappled with them. The judges' social values, views as to the legislative wisdom of the federal and state laws, and general views of the federal system may be as decisive as technical consideration of how well the federal and state schemes would mesh.

In many cases, there are potential issues of constitutional validity of the challenged state law in addition to the preemption question. Some preemption decisions can be explained as a part of the Court's general practice of

avoiding unnecessary constitutional questions. Often, the preemption question is decided, articulately or *sub silentio*, by the same criteria that would have governed the avoided constitutional question. The preemption doctrine may be preferred by the Court because the judicial decision striking down a state law is tentative, and congressional attention is invited to the issue. If Congress does nothing, the issue is avoided. If Congress makes an articulate choice to withdraw the preemption barrier, the inescapable constitutional question benefits from the additional data supplied by congressional decision. A final attraction of the preemption rationale, beyond the tentativeness of a preemption decision, may be that each decision can be truly ad hoc, resting on a fictional finding of congressional intent to preempt that governs only the particular federal statutory scheme before the Court.

WILLIAM COHEN
(1986)

Bibliography

COHEN, WILLIAM 1982 Congressional Power to Define State Power to Regulate Commerce: Consent and Pre-emption. Pages 523–547 in Terrance Sandalow and Eric Stein, eds., *Courts and Free Markets: Perspectives from the United States and Europe*. Oxford: Clarendon Press.

CRAMTOM, ROGER 1956 Pennsylvania v. Nelson: A Case Study in Federal Preemption. *University of Chicago Law Review* 26:85–108.

## PREEMPTION
(Update)

Preemption means that, as a result of the exercise of federal authority in a given regulatory area, preexisting concurrent state authority to regulate that same area comes to an end. Although earlier in this century, the Supreme Court viewed preemption as an automatic consequence of federal entry into a regulatory field, the modern view understands preemption as a discretionary constitutional power of Congress (and, by delegation, of federal ADMINISTRATIVE AGENCIES), the exercise of which requires manifestation of an intent to preempt the states. This change is reflected in the modern presumption against preemption, a presumption that concurrent state authority survives the exercise of federal regulatory power.

Congress has the power to rebut this presumption and preempt state authority regardless of the content of any state law—even if, for example, existing state law is substantively identical to the federal scheme of regulation or there is no state law at all in the relevant area. By exercising its power of preemption, the federal authority elects to monopolize a regulatory field, in whole or in part.

The fact that conflict between the contents of state and federal law is not necessary for preemption to occur distinguishes preemption from the related but separate principle of the supremacy of federal law enshrined in the SUPREMACY CLAUSE of the Constitution. This principle means that a valid federal law trumps an otherwise valid state law if (and only if) the two conflict with each other. Unlike preemption, the operation of the supremacy clause does not end general state authority in an area, but results in the trumping of a particular state law by a particular federal law where the two conflict. So, for example, a new state law passed to avoid the conflict would not be prevented from taking full legal effect. Moreover, once Congress has exercised its power of preemption, no state authority survives in the preempted field so that there can no longer be a valid state law in conflict with the federal one to trigger operation of the supremacy clause. The latter operates only where concurrent state authority exists and has not already been preempted.

Preemption thus not only differs from the principle of supremacy but also constitutes a broader inroad on state authority than the latter. One important implication of this point is that the (greater) federal power to preempt state authority cannot derive from the (lesser) principle of supremacy contained in the supremacy clause—as is widely assumed—but must have some other source in the Constitution.

The Court's "preemption doctrine" holds that Congress can exercise its preemption power either expressly—by clearly stating in the legislative text whether, and to what extent, state authority survives its new regulatory scheme—or impliedly. Notwithstanding the absence of any explicit statement on the issue, Congress's intent to preempt may be implicitly contained in a statute's structure and purpose.

The Court has recognized two types of such implied preemption. The first, termed "field preemption," is, according to *Rice v. Santa Fe Elevator Corp.* (1947), where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." The second, known as "conflict preemption," is, according to *Hines v. Davidowitz* (1941), where compliance with both federal and state regulation is a physical impossibility or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

There is obviously significant tension between the general notion of implied preemption and the modern presumption against preemption. Because the presumption means the states are not preempted unless that is "the clear and manifest purpose of Congress," it might well be thought that such purpose can, or at least should, only be expressly manifested. Even assuming the general legiti-

macy of inferring preemptive intent, however, there are specific problems with both types of implied preemption. First, the doctrine of field preemption is arguably too blunt an interpretive instrument and ignores alternative readings of congressional intent that might be reached by an unmediated interpretation of the relevant statute. The proposition that in itself the pervasiveness or comprehensiveness of a scheme of federal regulation makes reasonable an inference of preemptive intent may be both overinclusive and underinclusive with respect to any particular scheme. Overinclusive because, notwithstanding its comprehensiveness, Congress may (1) intend that the states be permitted to supplement it, (2) not have considered the issue, or (3) have considered it but not reached agreement. Underinclusive because Congress may intend to preempt state law while leaving the field relatively, or even entirely, unregulated by any level of government.

Second, the DOCTRINE of conflict preemption is either a contradiction in terms or it similarly imputes to Congress an intent that may be highly questionable in practice. On its face, the proposition that state law is preempted if it conflicts with federal law appears to express the most basic confusion between the distinct principles of preemption and supremacy. The trumping of an otherwise valid state law by supreme federal law is not an instance of preemption at all but a straightforward operation of the principle of supremacy. It neither ends concurrent state authority nor turns on congressional purpose. If, however, the claim is the more subtle one that such a conflict provides the necessary evidence for implying congressional intent to preempt, this generally appears to be an unlikely piece of STATUTORY INTERPRETATION. Where preexisting state regulation is followed by a conflicting federal statute that neither "occupies the field" nor contains an express preemption provision, it seems more reasonable to infer that Congress only intended to trump the relevant state statutes without divesting the states of their concurrent legislative authority in that field.

STEPHEN GARDBAUM
(2000)

Bibliography

ENGDAHL, DAVID 1987 *Constitutional Federalism in a Nutshell*, 2nd ed. St. Paul, Minn.: West.

GARDBAUM, STEPHEN 1994 The Nature of Preemption. *Cornell Law Review* 79:767–815.

## PREFERRED FREEDOMS

Because FIRST AMENDMENT freedoms rank at the top of the hierarchy of constitutional values, any legislation that explicitly limits those freedoms must be denied the usual presumption of constitutionality and be subjected to STRICT SCRUTINY by the judiciary. So went the earliest version of the preferred freedoms doctrine, sometimes called the preferred position or preferred status doctrine. It probably originated in the opinions of Justice OLIVER WENDELL HOLMES, at least implicitly. He believed that a presumption of constitutionality attached to ECONOMIC REGULATION, which needed to meet merely a RATIONAL BASIS test, as he explained dissenting in LOCHNER V. NEW YORK (1905). By contrast, in ABRAMS V. UNITED STATES (1919) he adopted the CLEAR AND PRESENT DANGER test as a constitutional yardstick for legislation such as the ESPIONAGE ACT OF 1917 or state CRIMINAL SYNDICALISM statutes, which limited FREEDOM OF SPEECH.

Justice BENJAMIN N. CARDOZO first suggested a more general hierarchy of constitutional rights in PALKO V. CONNECTICUT (1937), in a major opinion on the INCORPORATION DOCTRINE. He ranked at the top those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." He tried to distinguish rights that might be lost without risking the essentials of liberty and justice from rights which he called "the matrix, the indispensable condition, of nearly every other form of freedom." These FUNDAMENTAL RIGHTS came to be regarded as the preferred freedoms. A year later Justice HARLAN F. STONE, in footnote four of his opinion in UNITED STATES V. CAROLENE PRODUCTS (1938), observed that "legislation which restricts the political processes" might "be subjected to more exacting judicial scrutiny" than other legislation. He suggested, too, that the judiciary might accord particularly searching examination of statutes reflecting "prejudice against DISCRETE AND INSULAR MINORITIES."

The First Amendment freedoms initially enjoyed a primacy above all others. Justice WILLIAM O. DOUGLAS for the Court in MURDOCK V. PENNSYLVANIA (1943) expressly stated: "FREEDOM OF THE PRESS, freedom of speech, FREEDOM OF RELIGION are in a preferred position." In the 1940s, despite bitter divisions on the Court over the question whether constitutional rights should be ranked, as well as the question whether the Court should ever deny the presumption of constitutionality, a majority of Justices continued to endorse the doctrine. Justice WILEY B. RUTLEDGE for the Court gave it its fullest exposition in *Thomas v. Collins* (1945). Justice FELIX FRANKFURTER, who led the opposition to the doctrine, called it "mischievous" in KOVACS V. COOPER (1949); he especially disliked the implication that "any law touching communication" might be "infected with presumptive invalidity." Yet even Frankfurter, in his *Kovacs* opinion, acknowledged that "those liberties . . . which history has established as the indispensable conditions of an open as against a closed society come to the Court with a

momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."

The deaths of Murphy and Rutledge in 1949 and their replacement by TOM C. CLARK and SHERMAN MINTON shifted the balance of judicial power to the Frankfurter viewpoint. Thereafter little was heard about the doctrine. The WARREN COURT vigorously defended not only CIVIL LIBERTIES but CIVIL RIGHTS and the rights of the criminally accused. The expansion of the incorporation doctrine and of the concept of EQUAL PROTECTION OF THE LAWS in the 1960s produced a new spectrum of FUNDAMENTAL INTERESTS demanding special judicial protection. Free speech, press, and religion continued, nevertheless, to be ranked, at least implicitly, as very special in character and possessing a symbolic "firstness," to use EDMOND CAHN's apt term. Although the Court rarely speaks of a preferred freedoms doctrine today, the substance of the doctrine has been absorbed in the concepts of strict scrutiny, fundamental rights, and selective incorporation.

LEONARD W. LEVY
(1986)

Bibliography

MCKAY, ROBERT B. 1959 The Preference for Freedom. *New York University Law Review* 34:1184–1227.

## PRESENTMENT

A presentment is a written accusation of criminal offense prepared, signed, and presented to the prosecutor by the members of a GRAND JURY, acting on their own initiative rather than in response to a bill of INDICTMENT brought before them by the government. By returning a presentment, the grand jury forces the prosecutor to indict. The presentment procedure permits the grand jury to circumvent prosecutorial inertia or recalcitrance to initiate criminal proceedings. The grand jury's presentment power originated long before there were government prosecutors. The presentment is a descendant of the grand jury's original function: to initiate criminal proceedings by accusing those whom the grand jurors knew to have reputedly committed offenses.

CHARLES H. WHITEBREAD
(1986)

Bibliography

TESLIK, W. RANDOLPH 1975 *Prosecutorial Discretion: The Decision to Charge*. Washington, D.C.: National Criminal Justice Reference Service.

## PRESIDENT AND THE TREATY POWER

Article II of the Constitution authorizes the President to "make" treaties with the ADVICE AND CONSENT of the SENATE, provided two-thirds of the senators concur. An "Article II" treaty may be a bilateral or multilateral international agreement and is brought into force as an international obligation of the United States by the formal act of ratification or accession. This formal act (hereinafter called "ratification") is separate from the act of signing the treaty and is accomplished pursuant to an instrument executed by the President. Accordingly, the TREATY POWER is a presidential power that requires Senate participation before its exercise.

The decision to open a treaty negotiation, like the process of negotiation itself, is an exclusive EXECUTIVE PREROGATIVE. The Senate or individual senators may influence the course of a negotiation, but the Senate has no constitutionally recognized role before the submission of a treaty for advice and consent to ratification. The original understanding of the treaty power envisioned Senate participation before the negotiation and conclusion of treaties. However, this understanding was quickly reinterpreted in an informal manner. In 1789, in connection with an upcoming negotiation, President GEORGE WASHINGTON personally appeared before the Senate and asked its advice on a series of specific negotiating questions. The Senate postponed consideration of all but one such question to a second session. This procedure was unsatisfactory to both the President and the Senate and was abandoned. Even the practice initiated by Washington of seeking written advice on particular negotiating questions was abandoned by him before the end of his first administration. A congressional study reported that "[b]y 1816 the practice had become established that the Senate's formal participation in treaty-making was to approve, approve with conditions, or disapprove treaties after they had been negotiated by the President or his representative." An attempt in 1973 to affirm the "historic" role of the Senate in treaty making by constituting it as a council of advice for that purpose came to naught in the face of executive branch, constitutional objections. The Senate and individual senators may nevertheless informally influence the course of negotiations through expressions of views at hearings, participation as advisors to the U.S. delegation to a negotiation, and other informal methods.

If a negotiation produces an international agreement, the president must choose the most appropriate basis in domestic constitutional law for bringing the agreement into force. There are four distinct sources of authority for

presidential conclusion of an international agreement on behalf of the United States. The President may submit the agreement as an Article II treaty to the Senate for its advice and consent to ratificaiton. Alternatively, the President may seek congressional authorization of an international agreement by JOINT RESOLUTION or act of Congress or may use existing legislation as a basis for ratification of the agreement. These agreements are called congressional-executive agreements. This alternative procedure has become accepted as constitutionally equivalent to the Article II procedure. Any international agreement so authorized is binding on the United States as a matter of international law, and both congressional-executive agreements and "self-executing" Article II treaties supercede earlier inconsistent federal statutes as a matter of domestic law. In general, a self executing treaty is one that is intended by the United States to take effect as domestic law upon ratification.

Third, an international agreement may be contemplated by an earlier Article II treaty and may derive its authority from the earlier treaty. Such an agreement has the same legal force internationally and domestically as an Article II treaty. Fourth, an international agreement may be concluded on the basis of the President's power in FOREIGN AFFAIRS. An international agreement concluded pursuant to the President's foreign-affairs power has the same effect internationally as an Article II treaty, but the President does not normally use a presidential EXECUTIVE AGREEMENT if it would be inconsistent with domestic law (for an exception see DAMES & MOORE V. REGAN, 1981). Any international agreement, including an Article II treaty, supersedes inconsistent state law.

The President's choice as to whether to submit an international agreement to the Senate as an Article II treaty is guided by the State Department's Circular 175 Procedure. This State Department regulation reqnuires that due consideration be given to such factors as the formality, importance and duration of the agreement, the preference of Congress, the need for implementing LEGISLATION by Congress, the effect on state law, and past U.S. and international practice. Under Circular 175, officials of the executive branch may consult with the Senate Foreign Relations Committee as to the choice of constitutional procedure. Although the "Circular 175" factors are rather general and may sometimes suggest alternative inconsistent choices and although the choice of constitutional procedure is in part a political choice, historical factors are often decisive. Thus, international agreements dealing with boundaries, arms control, military alliances, extradition, and investment are normally submitted to the Senate as Article II treaties. In contrast, international agreements dealing with trade, finance, energy, fisheries, and aviation are normally concluded as congressional-executive agreements. Sometimes an agreement may be concluded as an Article II treaty that is non-self-executing and is therefore subject to the enactment of implementing legislation by Congress before its ratification. This procedure may be preferable if the treaty requires regular appropriation of funds.

If the President chooses to submit an international agreement to the Senate as an Article II treaty, the Senate may consent to its ratification subject to conditions that bind the President if the President chooses to ratify the treaty. These conditions may require the President to attach a reservation to United Sates adherence to the treaty or to amend the treaty by agreement with the other treaty party or parties. Senate-imposed conditions may also require the President to make a specified declaration to the other treaty party or parties in connection with ratification, or a Senate-imposed condition may state an understanding that the Senate seeks to impose on the President or the U.S. Courts—for example, an understanding regarding a particular interpretation or the treaty's domestic effect. The President normally included Senate-imposed conditions requiring agreement by, or communication to, the other treaty party or parties in an instrument exchanged with the treaty partner or deposited specifically in connection with ratification. However, the President has claimed the constitutional power to comply with Senate-imposed conditions outside the formal ratification proces. A Senate-imposed condition must relate to the subject matter of the treaty and may not infringe on other provisions of the Constitution, such as the BILL OF RIGHTS or the President's foreign-affairs power. In MISSOURI V. HOLLAND (1920), the Supreme Court upheld the validity of a treaty-related act of Congress that, absent the treaty, arguably contravened the TENTH AMENDMENT. This decision caused considerable concern that a treaty might supersede other constitutional provisions, including the Bill of Rights. However, in REID V. COVERT (1957), a plurality of justices opined that a treaty may not contravene individual liberty specifically protected by the Bill of Rights. Of course, the content of such a right may be altered by the existence of a treaty and the foreign location of the governmental activity.

Following the Senate's advice and consent, the President makes an independent decision as to whether to ratify the treaty, thereby bringing it into force as an international obligation of the United States subject to the conditions imposed by the Senate. Until 1950, ratified treaties were published in the *Statutes at Large.* Now they are published separately by the Department of State as part of the series entitled *United States Treaties and Other International Agreements.* The President has also exer-

cised the power to accept or reject proposed reservations by other parties to a treaty without the participation of the Senate.

Once a treaty has been ratified, the President has the power to interpret it, unilaterally or in agreement with treaty partners, pursuant to the President's foreign-affairs power. However, the President normally does not commit the interpretation of treaties to third-party dispute resolution, such as arbitration or adjudication by the International Court of Justice, without Senate or congressional acquiescence or approval. Moreover, if the President changes an earlier, commonly held interpretation, Congress may use its legislative and appropriations powers to force the President to reconsider. The reinterpretation controversy involving the 1972 U.S.-U.S.S.R. Treaty on the Limitation of Anti-Ballistic Missile Systems (hereinafter called the "ABM Treaty") is a good example of this phenomenon. When the President sent the ABM Treaty to the Senate for its advice and consent to ratification, executive branch officials told the Senate that the treaty prohibited the development and testing of space-based ABM systems based on "other physical principles" than those existing in 1972, such as lasers. Thirteen years later the administration of RONALD REAGAN "reinterpreted" the treaty to permit the development and testing of those space-based ABM systems. However, several senators, former officials who negotiated the treaty, and academic commentators vigorously disputed the administration's case. Congress used its legislative and appropriations powers to force the executive branch to limit development and testing of ABM systems to activities permitted under the original interpretation.

In addition to the controversy over the substantive question of how the ABM Treaty should be interpreted, the reinterpretation attempt of the ABM Treaty sparked a dispute over the constitutional limits on presidential interpretation power. In 1987, the Senate considered, but declined to adopt, Senate Resolution 167, a general resolution stating that the meaning of a treaty cannot be unilaterally changed by the President from "what the Senate understands the treaty to mean when it gives its advice and consent to ratification." After another round of debate of the constitutional issue, the Senate attached a similar condition in its consent to ratification of the 1987 U.S.-U.S.S.R. Treaty on the Elimination of Intermediate-range and Shorter-range Missiles (hereinafter called the "INF Treaty") applicable only to that treaty. The President questioned the constitutionality of that condition, but only after he had ratified the INF Treaty.

After all the controversy, little is settled. Most commentators probably would agree that the President may not reinterpret fundamental treaty provisions in major respects, even with the agreement of a treaty partner, without seeking Senate or congressional approval. Such a change would probably be classified as a "major amendment" to the treaty and, as such, would require that consent. It would also seem that other reinterpretations could be made by the President with Senate or congressional acquiescence. If Congress disagrees with a presidential interpretation, it may reflect its nonacquiescence through its legislative or appropriations power. Finally, conditions formally adopted, like that to the INF Treaty, should bind the President if the President chooses to ratify the treaty.

Another area of recent controversy concerns the termination of treaties. President JIMMY CARTER terminated an Article II defense treaty in accordance with its terms, despite a "sense of the Congress" expression that he should consult with Congress before any such change in policy. In GOLDWATER V. CARTER (1979) the Supreme Court dismissed a complaint filed by some members of Congress to enjoin the presidential action. The PLURALITY OPINION invoked the POLITICAL QUESTION doctrine. Since that time, the President has claimed the right to terminate Article II treaties in accordance with their terms. Congress has acquiesced. The President has also successfully asserted the right to declare a treaty partner to be in "material breach" of its terms so the United States may withdraw from the treaty. Finally, the President has successfully asserted the right to violate the terms of a treaty or other norms of international law in the course of conducting the nation's foreign relations, at least in the absence of congressional action prohibiting such a violation. Those rights are based on the President's foreign-affairs power.

Because the judiciary rarely adjudicates SEPARATION OF POWERS issues on the merits in foreign-affairs cases, the best guide to constitutional law defining presidential power in this area is recent historical practice; it constitutes a common law reflecting the pattern of accommodations reached by the President, the Senate, and the Congress in allocating responsibilities under the treaty power.

PHILLIP R. TRIMBLE
(1992)

(SEE ALSO: *Congress and Foreign Policy; Congressional War Powers; Presidential War Powers; Senate and Foreign Policy.*)

Bibliography

BESTOR, ARTHUR 1989 "Advice" from the Very Beginning, "Consent" When the End Is Achieved. *American Journal of International Law* 83:718–727.

CONGRESSIONAL RESEARCH SERVICE 1984 *Treaties and Other International Agreements: The Role of the United States Senate.* S-Print 98–205, 98th Congress, Second Session.

GLENNON, MICHAEL J. 1990 *Constitutional Diplomacy.* Princeton, N.J.: Princeton University Press.
HENKIN, LOUIS 1972 *Foreign Affairs and the Constitution.* Mineola, N.Y.: Foundation Press.
KOH, HAROLD HONGJU 1990 *The National Security Constitution.* New Haven, Conn.: Yale University Press.
SYMPOSIUM 1989 Arms Control Treaty Interpretation. *University of Pennsylvania Law Review* 137:1351–1557.

## PRESIDENTIAL ELECTION CAMPAIGN FUND ACT

See: Federal Election Campaign Acts

## PRESIDENTIAL IMMUNITY

The Constitution has no provision regarding presidential immunity akin to the SPEECH OR DEBATE CLAUSE that protects members of Congress in performing their official duties. Nevertheless, most Presidents have claimed the constitutional structure implicitly protects their ability to execute their constitutional obligations.

The Supreme Court first recognized presidential immunity formally in UNITED STATES V. NIXON (1973). The Court concluded the privilege was not absolute but presumptive and ordered President RICHARD M. NIXON to comply with a SUBPOENA requesting some tapes of his conversations with his aides. The Court determined that Nixon's "generalized" need for "confidential communications" with staff was outweighed by the need for the materials sought in a pending criminal prosecution against members of his staff.

In NIXON V. FITZGERALD (1982), the Court held 5–4 the President—but not his staff—was absolutely immune from civil actions based on his official actions. The Court explained the "President occupies a unique position in the constitutional scheme. [Because] of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government."

In CLINTON V. JONES (1997), a unanimous Court acknowledged the President's "unique" constitutional status but held he was not immune from civil actions based on his unofficial conduct. The Court left unaddressed whether a President may be criminally prosecuted or imprisoned before IMPEACHMENT and removal from office, though it suggested for official actions a President "may be disciplined principally by impeachment, not by private lawsuits for damages." Although Justice JOSEPH STORY maintained a President was immune from criminal prosecution and imprisonment while discharging his duties, it is arguable that *Clinton v. Jones* sanctions any lawsuits, even criminal ones, based on a President's unofficial conduct. Moreover, no other federal officials, not even Vice Presidents, are immune while in office from criminal prosecution or imprisonment.

MICHAEL J. GERHARDT
(2000)

## PRESIDENTIAL ORDINANCE-MAKING POWER

As a means of carrying out constitutional and statutory duties, Presidents issue regulations, proclamations, and EXECUTIVE ORDERS. Although this exercise of legislative power by the President appears to contradict the doctrine of SEPARATION OF POWERS, the scope of administrative legislation has remained broad. Rules and regulations, as the Supreme Court noted in *United States v. Eliason* (1842), "must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority."

It is established DOCTRINE that "the authority to prescribe rules and regulations is not the power to make laws, for no such power can be delegated by the Congress," as a federal court of appeals declared in *Lincoln Electric Co. v. Commissioner of Internal Revenue* (1951). Nevertheless, vague grants of delegated authority by Congress give administrators substantial discretion to make federal policy. Over a twelve-month period from 1933 to 1934 the National Recovery Administration issued 2,998 orders. This flood of rule-making activity was not collected and published in one place, leaving even executive officials in doubt about applicable regulations.

Legislation in 1935 provided for the custody of federal documents and their publication in a "Federal Register." The Administrative Procedure Act of 1946 established uniform standards for rule-making, including notice to the parties concerned and an opportunity for public participation. Recent Presidents, especially GERALD FORD, JIMMY CARTER, and RONALD REAGAN, have attempted to monitor and control the impact of agency regulations on the private sector.

Proclamations are a second instrument of administrative legislation. Sometimes they are hortatory in character, without legislative effect, such as proclamations for Law Day. Other proclamations have substantive effects, especially when used to regulate international trade on the basis of broad grants of statutory authority. Still other proclamations have been issued solely on the President's constitutional authority, as with pardons and AMNESTIES and ABRAHAM LINCOLN's proclamations in April 1861. When a statute prescribes a specific procedure in an area re-

served to Congress and the President follows a different course, proclamations are illegal and void.

From ancient times a proclamation was literally a public notice, whether by trumpet, voice, print, or posting. Yet in 1873 the Supreme Court in *Lapeyre v. United States* declared that a proclamation by the President became a valid instrument of federal law from the moment it was signed and deposited in the office of the secretary of state, even though not published. These early proclamations eventually found their way into the *Statutes at Large*, but not until the Federal Register Act of 1935 did Congress require the prompt publication of all proclamations and executive orders that have general applicability and legal effect.

Executive orders are a third source of ordinance-making power. They draw upon the constitutional power of the President or powers expressly delegated by Congress. Especially bold were the orders of President FRANKLIN D. ROOSEVELT from 1941 to 1943; without any statutory authority he seized plants, mines, and companies. Actions that exceed legal bounds have been struck down by the courts, a major example being the Steel Seizure Case (YOUNGSTOWN SHEET AND TUBE CO. V. SAWYER, 1952). Executive orders cannot supersede a statute or override contradictory congressional expressions.

Congress has used its power of the purse to circumscribe executive orders. After President RICHARD M. NIXON issued executive order 11605 in 1971, rejuvenating the SUBVERSIVE ACTIVITIES CONTROL BOARD, Congress reduced the agency's budget and expressly prohibited it from using any of the funds to implement the President's order. Congress has also prevented the President from using appropriated funds to finance agencies created solely by executive order.

LOIS FISHER
(1986)

Bibliography

FLEISHMAN, JOEL L. and AUFSES, ARTHUR H. 1976 Law and Orders: The Problem of Presidential Legislation. *Law and Contemporary Problems* 40:1–45.

HART, JAMES 1925 *The Ordinance Making Powers of the President of the United States.* Baltimore: Johns Hopkins University Press. [Reprinted in 1970 by Da Capo Press.]

## PRESIDENTIAL POWERS

The powers of the American presidency are amorphous and enormous. Perhaps they can be defined only by saying that they are made adequate to the problems to which the power is addressed. Although these powers purportedly derive from the specifications of the Constitution itself, in fact their definition is to be found in the behavior of the American Presidents since 1789. During this time the executive branch, largely with the acquiescence of Congress and the encouragement of the Supreme Court, has come to resemble the monolithic authority to be found in governments that have succeeded to the authority of czars and emperors. LIMITED GOVERNMENT is now constitutionally limited only by the first eight Amendments and Article I, section 9, and even then only at the discretion of the Supreme Court.

The reason for the accumulation of power in the presidency is not hard to find. Power goes to the official who can use it. It is easy for the President to be that official because, as Justice ROBERT H. JACKSON wrote in YOUNGSTOWN SHEET & TUBE CO. V. SAWYER (1952):

> Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.

The doctrine of SEPARATION OF POWERS, not to be found in terms in the Constitution, has receded to the vanishing point so far as the presidency is concerned. And the principle of CHECKS AND BALANCES, intrinsic in the Constitution as a whole, has also been diminished when it comes to putting restraints on the President.

Essentially there are two conflicting theses on the powers of American Presidents, depending in large part on whether it is believed that the opening words of the Second Article: "The Executive power shall be vested in a President of the United States," is itself a grant of power or, as was the case with Articles I and III, is simply a designation of the office with the powers of that official to be found in the provisions that followed. In sum, the question is whether everything that comes after the first sentence in Article II is a redundancy so far as presidential powers are concerned. A reading of the origins of the article would clearly deflate the concept of a presidency replete with the royal prerogatives that the nation had so roundly condemned in the DECLARATION OF INDEPENDENCE itself.

Even the view taken by THEODORE ROOSEVELT, however, is not so broad as to leave no need for separation of powers. Roosevelt asserted "that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its Constitutional powers." Roosevelt's immediate suc-

cessor in office, WILLIAM HOWARD TAFT, had espoused a different reading: "The true view of the executive function is . . . that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such grant as proper and necessary." Taft's was the better reading of the origins of the constitutional provisions, although even he later turned to the Roosevelt reading when he was on the Supreme Court. But Roosevelt's was the better reading of the history of the presidency and a better prediction of what the presidency was to become.

The last important Supreme Court opinion on presidential powers, perhaps because it was one of the few outside the area of CIVIL LIBERTIES that rejected a presidential reach for power beyond his grasp, came in 1952 in the Steel Seizure Case. There the Court was thoroughly divided. The dissenters, led by Chief Justice FRED M. VINSON, read the INHERENT POWERS of the presidency as all but limitless, in keeping with the construction given by most political scientists. Justice HUGO L. BLACK went to the other extreme in his opinion for the Court. For him the chief magistrate had only those powers specifically provided by the terms of the Constitution and those powers properly conferred upon him by Congress. But of all the opinions in *Youngstown*, the one most often looked to by constitutional lawyers, including those sitting on the Court, has been that of Justice Robert H. Jackson, for whom there was no plain rule but rather a sliding scale:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures of independent presidential responsibility. In this area, any test of power is likely to depend on the imperative of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon its constitutional powers minus any constitutional powers of Congress over the matter. . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Jackson concluded his opinion, saying: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be the last, not first, to give them up."

The concept of the RULE OF LAW continues to diminish as the nation embraces first the description in CLINTON ROSSITER's *Constitutional Dictatorship*, and then that of Arthur Schlesinger in his *Imperial Presidency*. We continue, however, to parse the sentences of the Constitution in order to justify or oppose presidential authority. But there is less reality in this exercise as each day succeeds the next.

The catalogue of presidential powers specifically stated in the Constitution is neither long nor extensive. He is given a conditional power of veto of all legislation, subject to being overridden by a two-thirds vote of each house. The remainder of his powers are specified in Article II, section 7: he is to be COMMANDER-IN-CHIEF of the armed forces, including the militia when in the service of the United States; he may require opinions from his principal cabinet officers; he may grant pardons and reprieves for offenders against the national laws; he may enter into TREATIES with foreign nations with the ADVICE AND CONSENT of two-thirds of the Senate; he is to nominate ambassadors, ministers, and consuls, members of the Supreme Court, and such other officers as are not otherwise provided for by the Constitution, plus such other officers as Congress shall provide; he may fill vacancies while the Senate is not in session; he shall address Congress on the state of the union and recommend the passage of measures he deems necessary and expedient; he may convene Congress and adjourn it when the two houses do not agree on adjournment; he shall receive ambassadors and other public ministers from foreign countries; "he shall take Care that the Laws be faithfully executed"; and he shall commission all officers of the United States. In fact, however, these bare bones of presidential authority have had much meat placed on them by presidential practices, by legislative delegation, and by judicial approval. It can hardly be gainsaid that the authors of the constitutional language would be much surprised were they to return to the scene to see what it is said that they have wrought.

The slivers of presidential power specifically authorized by the Constitution have been bundled like fasces to create huge authority in the President under the banners of FOREIGN AFFAIRS powers; WAR POWERS; fiscal powers; legislative powers and administrative powers. None of these rests exclusively on any specific authority granted by the Constitution but rather on combinations and permutations of them combined with "intrinsic" or "necessary and proper" powers, although the NECESSARY AND PROPER CLAUSE itself was a grant only to the legislative branch.

Probably the most extensive, and perhaps the most im-

portant, of the modern President's powers is to be found in his hegemony over the nation's foreign relations. As Archibald Cox has written: "The United States' assumption of a leading role in world affairs built up the presidency by focussing world attention upon the president. The constitution, combined with necessity, gives the president greater personal authority in foreign affairs than domestic matters. A succession of presidents pushed these powers to, and sometimes beyond, their limits. The personal manner in which they conducted international relations doubtless influenced their style in dealing with domestic matters." But it has been "necessity," not the Constitution, that vested this great personal power in the President. There are only two plausible grounds in the Constitution for great presidential authority in the area of foreign relations. It is he who names and receives ambassadors, which was early construed to mean that he was the sole spokesman of the nation with regard to foreign nations. It is he who is charged with the negotiation of treaties. But both in the appointment of ambassadors and in the making of treaties, the Founders required the collaboration of the Senate: a majority vote of acquiescence in the case of ambassadors and a two-thirds vote of the Senate to validate a treaty.

What the Constitution did not give the President by way of powers in this area, he has been given by Congress or he has taken for himself, and what he has taken for himself has generally been legitimated by Supreme Court decision. Much of relations with foreign nations that was committed to Congress—for example, the power over FOREIGN COMMERCE, the war-making authority—has become irrelevant to the modern Constitution. For the Supreme Court has declared that the powers over foreign affairs that are the President's do not derive from the Constitution but rather are a direct inheritance from the Crown of England. In UNITED STATES V. CURTISS-WRIGHT EXPORT CORP. (1936) the Court said: "As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external SOVEREIGNTY passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States. . . . Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect to the colonies ceased, it immediately passed to the Union." Not only did this power inhere in the Union; it belonged directly to the President, although where it was before there was a President is not made clear. But, said the Court, it did not come through the Constitution or the Congress. It is a "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress." It is somewhat strange, if the foreign relations power never belonged to the states, that the Founders thought it necessary to take it from them in the specific words of Article I, section 10: "No state shall enter into any treaty, alliance, or confederation; grant LETTERS OF MARQUE AND REPRISAL, . . . No state shall, without the consent of Congress . . . keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded. . . ." It is strange, too, that Congress can consent to the exercise of foreign affairs powers by the states, if that power properly belongs exclusively to the President.

The coalescence of this power over foreign relations solely in the President has also had the effect of eliminating specific checks on him by the Senate. The Constitution clearly gives the power to negotiate treaties to the President, but it requires the consent of two-thirds of the Senate to validate a treaty. The requirement of Senate approval has often proved a stumbling block, as it was when the Senate refused to consent to the United States' entry into the League of Nations and when the Senate imposed qualifications on the treaty ceding the Panama Canal Zone back to Panama. But the President and the Supreme Court have found a way out of some of these restraints. An agreement with a foreign nation may be called an EXECUTIVE AGREEMENT rather than a "treaty," and an "executive agreement" does not require Senate approval, according to the decisions in UNITED STATES V. BELMONT (1937) and UNITED STATES V. PINK (1942). There is no guide, however, to say what the province of a treaty may be to distinguish it from that of an executive agreement. The justification for evading presidential responsibility to the Senate is, however, often founded on the ground that effectuation of such agreements usually requires congressional legislation, and a majority of both houses is said to be as good as or better than two-thirds of the Senate in ratifying the presidential action and easier to secure.

It has been argued, but not very cogently, that the foreign affairs powers of the President somehow derive from the Commander-in-Chief Clause of Article II. ALEXANDER HAMILTON's explanation of that provision in THE FEDERALIST #69 as to the limited authority of the commander-in-chief still seems to be the better understanding of it: "It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy."

The foreign affairs powers of the President are as broad as they have become not because of constitutional delegation but because of the exigencies that have caused the Presidents to seize the power to meet the problems. Neither the public nor the Congress has shown much aversion to this presidential usurpation.

PRESIDENTIAL WAR POWERS, like presidential foreign af-

fairs powers, rest on practice and precedent rather than on constitutional authorization. Thus, despite the provision of Article 1, section 8, giving Congress the power to declare war, wars have tended to be a consequence of executive action, sometimes confirmed by a congressional DECLARATION OF WAR and sometimes carried on without one. Five times in American history, Congress has declared war: the War of 1812, the Mexican War of 1848, the Spanish American War of 1898, WORLD WAR I (1917), and WORLD WAR II (1941). Each time American military and naval forces had been committed to action before the actual declaration took place. In most instances when military forces have been engaged against foreign powers there has been no declaration of war even when the conflict reached such vast scales as the country's commitments to the KOREAN WAR and VIETNAM WAR. It has been argued that there were de facto declarations in such instances as Korea and Vietnam by congressional silence or appropriations for the military, but that was not what the Founders had in mind. For them war was thought too serious a matter to be left to generals and Presidents.

Congress has come up with a statute attempting to resolve the problem of presidential usurpation of the war power. The WAR POWERS RESOLUTION OF1973 provides that a President can order military action without a declaration of war by Congress, but he must inform Congress within forty-eight hours of doing so. Troops cannot be committed for more than sixty days except when Congress so authorizes, and Congress is empowered to order an immediate withdrawal of American forces by CONCURRENT RESOLUTION not subject to presidential veto. The statute is of dubious constitutional validity, giving presidential powers to Congress and congressional powers to the President. It is not likely to be the subject of a successful court test, for courts cannot act expeditiously enough nor can they effectuate a decree against the will of either of the other branches.

The essential fact is that the Constitution gives to Congress the power to declare war, to raise and support the armed forces, to make rules for the governance of the armed forces, to call up the militia, and to regulate it. It gives to the President the powers of commander-in-chief, which is only an authority to act in command of the military services so that no mere military officer shall be without civilian oversight.

The greater problem with presidential war powers is whether they enhance his authority over domestic civilian affairs. The Court has tended to sustain extraordinarily broad powers for the executive during the course of a war, as in the JAPANESE AMERICAN CASES (1943–1944), allowing relocation of native and foreign-born Japanese from the West Coast into concentration camps. When war has ended, the Court tends to look more dubiously on executive war powers, holding in DUNCAN V. KAHANOMOKU (1946), for example, that it was an abuse of authority to declare martial law in Hawaii on the day after the Japanese bombed Pearl Harbor. So far as civilian activities are concerned, it is said that war does not give the executive any new powers but simply justifies the use of granted powers reserved for emergencies. The fact is that, in contemporary times, Congress has provided the President with more EMERGENCY POWERS than he ever has occasion to use, generally leaving to him the discretion to determine whether an emergency warrants calling such powers into play. The concept of emergency powers, itself nowhere to be found in the Constitution, has long since expanded beyond the realms of war powers to justify presidential action in the economic and social realm as well as in the areas of military combat and foreign affairs. The confiscation of Iranian assets in the United States to ransom American captives from the Iranians in 1980 affords an example of the extension of presidential authority far beyond what the Constitution provided; but in DAMES & MOORE V. REGAN (1981) the flimsiest statutory delegation was held sufficient to justify the President's actions.

The Constitution gave the President no powers over the national fisc. It was very clear at the CONSTITUTIONAL CONVENTION OF 1787 that the authority over national finance—what went into the national purse and what came out of it—belonged to Congress and Congress alone, subject, of course, to the presidential power of veto. Article 1, section 7, commands that the House of Representatives alone shall originate revenue measures. Article 1, section 8, gives to the Congress the "power to lay and collect taxes," "to pay the debts," "to borrow money," "to coin money," and to punish counterfeiting. And Article 1, section 9, clause 7, provides that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law." If any principle of responsible government can be said to have been derived from the Glorious Revolution of 1688 in England and the American Revolution, it is that a popularly elected legislature is the only safe place in which to place the power of the purse.

This is not to deny that at all times in our history the executive branch has played a more or less important role in the creation and effectuation of fiscal policy, from the roles of Secretaries of the Treasury Hamilton and ALBERT GALLATIN and ANDREW JACKSON's war on the BANK OF THE UNITED STATES to contemporary times when it would appear that the executive is dominant and Congress subordinate with regard to all the fiscal powers that the Constitution gave to the Congress. But the role of the executive branch has essentially been defined by the Congress. If the executive power is now so great in fiscal matters, the reason is not that the Constitution has conferred the power on the President but that Congress has done so. Thus, one frustrating restraint on presidential

fiscal policy derives from the autonomy over the money supply granted by Congress to the Federal Reserve Board, an agency independent of the President.

The nation has evolved from one in which the national government's principal role was that of the protector of the lives and property of the citizenry against encroachment by foreign governments and other citizens to one in which the government manages the economy, for better or worse, in a state where the government has assumed responsibility for the social welfare as well as the physical protection of the citizenry. And as the progression has gone on, so too has Congress relinquished more and more authority to the President. But the President can be said to have these powers only at the will of Congress and to exercise them only in order to enforce the laws faithfully. Indeed, the DELEGATION OF POWER has gone so far as for Congress to have provided by law that the President may refuse to enforce its legislation by IMPOUNDMENT of appropriated funds, provided notice is given to Congress and Congress acquiesces.

Although Congress now has its own budget-making procedures, the dominant BUDGET, derived from the President's Office of Management and Budget, is submitted to Congress more by way of command than suggestion. The concept of an executive budget derives from the 1920s when Congress first enacted a demand that the President supply one. Since then, however, the Office of Management and Budget has grown from a simple accounting agency into a fiscal ombudsman for the entire government. It is a force second only to that of the President himself within the executive branch and it has not been bashful about exercising its powers. But if the beast is a presidential pet, it is nonetheless a creature of a Congress dedicated to transferring to the President the powers that the Constitution gave to Congress.

In constitutional terms, the President's role in the legislative process was originally to be very small. Most important, of course, was the power to veto the acts passed by Congress. And even here, unlike the power of the Crown to forestall parliamentary will as expressed in legislation, the President was given only a conditional veto, subject to being overridden by two-thirds of each house of Congress. The VETO POWER is, however, fully effective only for a President who prefers a limited role for government. Obviously, his veto cannot create legislation but only prevent it. A forceful President seeking to impose his will by way of persuading Congress to action rather than inaction can, however, use the veto as a bargaining tool, a threat to cancel what Congress wants unless it gives the President what he wants. Stalemate is a frequent consequence of a profligate use of the veto power.

The President also has the power by constitutional provision to adjourn Congress, when the two houses are unable to agree on adjournment, and to convene Congress. The power to prorogue Parliament was a sore point with the colonists and they had no intention of conferring such authority on any executive of their own.

There was an imitation of the royal prerogative that was to come into existence even though it was not planned by the Founders. The Constitution provides that the President "shall from time to time give the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient." Like the Queen's message to the opening of Parliament, this device has been used by the executive administration to offer a legislative program to Congress. Indeed, most legislation of importance that comes to enactment in Congress tends to be that which the President has recommended to it or which the President supports by lobbying in Congress. Legislation that does not bear the imprimatur of the President seldom makes its way to enactment, although presidential recommendations are frequently amended in the process of legislative consideration and sometimes are unrecognizable by the time they emerge from both houses. But the influence of the President, utilizing the Office of Management and Budget for details, on the making of the laws is extraordinarily strong. And while there is no provision for presidential budget making in the Constitution, the fact is that the budget that he submits is the foundation on which the congressional budget-making process depends.

In fact, the President indulges in a great deal of lawmaking himself. With the demise of the ban on the delegation of legislative power, which occurred when the Supreme Court was reconstituted by FRANKLIN D. ROOSEVELT, most of the rules governing American society are made by the executive branch. Legislation has tended to take the form of generalized programs whose details are to be filled by agencies of the executive branch. Indeed, some legislation is created by the President even in the absence of authorization for it by the Congress. This takes the form of so-called EXECUTIVE ORDERS theoretically directed to the enforcement of the laws by persons in the executive branch, but usually with the same effect as rules directed to the governed rather than the governors. Very rare indeed is the instance, like the steel seizure case, when the Court has throttled an executive order. Thus, most of the rules governing the lives of Americans are to be sought not in the statutes-at-large but rather in the Federal Register where are to be found the results of the exercise of delegated legislative authority as well as executive orders that do not rest on any actual delegation.

It would seem that the originators of the departments of government thought of them as semiautonomous, with their functions defined by Congress and their secretaries responsible to either the President or the Congress, or

both, as prescribed by the legislation creating those offices. The provision for a power in the President to call on the principal officers of government for their opinions would have been redundant if in fact it had been anticipated that all executive officials were directly subordinate to the President. It was probably GEORGE WASHINGTON's organization of his department chiefs into a cabinet rather than the words of the Constitution that made for the hierarchical system headed by the President that has been taken for granted since early in the nineteenth century. The cabinet is not a constitutional body and has no constitutional powers. The powers of the department heads are dependent on legislative rather than constitutional provision, except for their duties to give opinions to the President on demand. Thus by custom and by legislation, and perhaps through the charge of the Constitution to the President faithfully to execute the laws, it has come to be accepted that the executive branch, for all its multitude of offices, is an entity for which the President is responsible both to Congress through the legislature's oversight function, and to the voting public. Surely this notion of the unitary nature of the executive branch and the exceptions thereto—independent administrative agencies—underlies the judgment of the Supreme Court in MYERS V. UNITED STATES (1926) establishing the right of the President to remove officials at his will. This accepted principle is not contradicted by the obligation of the President or other executive officials to abide by their own regulations, which are created by him or them and which are subject to change by him or them. (See APPOINTMENT AND REMOVAL POWER.)

The whole of the executive branch acts subordinately to the command of the President in the administration of federal laws, so long as they act within the terms of those laws. Their offices confer no right to violate the laws, whether they take the form of constitution, statute, or treaty.

The United States does have in the presidency a "constitutional dictatorship" or a "plebiscitary President." The "benevolent monarch" of contemporary times, however, is still subject to the force of public opinion, sometimes expressed through representatives, sometimes expressed through the print and electronic media, sometimes expressed in the streets, and every four years expressed through the ballot boxes. One-term Presidents may become the rule. Despite all the centralization of authority, however, the greatest power of the presidency in this democracy is not the power of command. It is the power to lead a nation by moral suasion. It takes a great President to do that well, and that is why history records so few great Presidents.

PHILIP B. KURLAND
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Bibliography

CORWIN, EDWARD S. 1957 *The President: Office and Powers 1787–1957.* 4th rev. ed. New York: New York University Press.

COX, ARCHIBALD 1976 Watergate and the Constitution of the United States. *University of Toronto Law Journal* 26:125–139.

KOENIG, LOIS W. 1975 *The Chief Executive.* 3d ed. New York: Harcourt, Brace, Jovanovich.

KURLAND, PHILIP B. 1978 *Watergate and the Constitution.* Chicago: University of Chicago Press.

NEUSTADT, RICHARD E. 1960 *Presidential Power.* New York: John Wiley & Sons.

PIOUS, RICHARD M. 1979 *The American Presidency.* New York: Basic Books.

ROSSITER, CLINTON 1948 *Constitutional Dictatorship.* Princeton, N.J.: Princeton University Press.

SCHLESINGER, ARTHUR M., JR. 1973 *The Imperial Presidency.* Boston: Houghton Mifflin Co.

## PRESIDENTIAL SPENDING POWER

The Constitution assigns to Congress the exclusive power to authorize spending. Article I, section 9, prohibits money being drawn from the Treasury "but in Consequence of Appropriations made by law." Nevertheless, the power of the purse is shared with the President because Congress has found it necessary to delegate substantial discretion over the expenditure and allocation of funds.

In his first message to Congress, President THOMAS JEFFERSON recommended that Congress appropriate "specific sums to every specific purpose susceptible of definition." He quickly recognized the impracticability of this principle, later admitting that "too minute a specification has its evil as well as a too general one." Lump-sum appropriations are routinely passed by Congress, especially during emergency periods. The magnitude of these lump sums, frequently in the billions of dollars, overstates the amount of flexibility available to administrators. Their scope of discretion is narrowed by general statutory controls, nonstatutory controls embedded in committee reports and other parts of the legislative history, and agreements and understandings entered into by Congress and the agencies.

The conflicting needs of administrative flexibility and congressional control are often reconciled by "reprogramming" agreements. An agency is given some latitude to shift funds *within* an appropriation account, moving them from one program to another. Legislative controls have gradually tightened. Initially the appropriation committees required regular reporting by the agencies, but reprogrammings over a designated dollar threshold must now be approved by appropriations subcommittees and, in some cases, by authorizing committees that have JURISDICTION over the program. Although these reprogramming

procedures are largely nonstatutory and therefore fall short of legally binding requirements, they have become highly formalized and structured. They are incorporated not only in congressional documents but also in agency directives, instructions, and financial management manuals.

Another form of executive spending discretion results from transfer authority. A transfer involves the shifting of funds from one appropriation account to another (in contrast to reprogramming, where funds remain within an account). Moreover, the authority to transfer funds must be explicitly granted by statute. Transfer authority is usually accompanied by limitations, such as allowing a five percent leeway, that help preserve the general budgetary priorities of Congress. When agencies use transfer or reprogramming authority to spend funds on programs that had been previously rejected by Congress, or to enter into long-term financial commitments, Congress responds by adopting additional statutory and nonstatutory restrictions.

Agencies have access to billions of dollars that are hidden from public and congressional view. Confidential and secret funding collides with the requirement of Article I, section 9, of the Constitution: "A regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." Confidential funds appeared as early as 1790, when Congress appropriated $40,000 to the President to pay for special diplomatic agents. Congress let the President decide the degree to which these expenditures would be made public. Since that time confidential (unvouchered) funds have been made available to many agencies that have domestic as well as foreign responsibilities.

Confidential funding is overt at least in the sense that the amounts are identified in appropriation or authorization bills. Secret funding is covert at every stage, from appropriation straight through to expenditure and auditing. Appropriations, ostensibly for the Defense Department or other agencies, are later siphoned off and allocated to the Central Intelligence Agency and other parts of the intelligence community. Absent congressional authorization, a federal taxpayer lacks STANDING to challenge the constitutionality of confidential or secret funding. The establishment of intelligence committees in the 1970s restored some semblance of congressional control. Legislation for the White House and the General Accounting Office has also tightened legislative control over unvouchered funds. With each increase in the scope of executive spending discretion, Congress participates ever more closely in administrative matters.

LOUIS FISHER
(1986)

(SEE ALSO: *Impoundment of Funds.*)

Bibliography

FISHER, LOUIS 1975 *Presidential Spending Power.* Princeton, N.J.: Princeton University Press.

WILMERDING, LUCIUS, JR. 1943 *The Spending Power: A History of the Efforts of Congress to Control Expenditures.* New Haven, Conn.: Yale University Press.

# PRESIDENTIAL SUCCESSION

The framework for electing a President and Vice-President every four years is spelled out in the Constitution. As originally adopted, the Constitution was not clear about certain aspects of succession to the Presidency in the event something happened to the elected President. The Framers were content to establish the office of Vice-President and to add the general provisions of Article II, section 1, clause 6: "In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice-President and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice-President, declaring what Officer shall then act as President, and such officer shall act accordingly, until the Disability be removed, or a President shall be elected."

The Framers left unanswered questions concerning the status of a Vice-President in cases of removal, death, resignation, and inability, the meaning of the term "inability," and the means by which the beginning and ending of an inability should be determined. Because no event occurred to trigger the succession provision, these ambiguities were of no consequence during the first half century of our nation's existence. Although three Vice-Presidents died in office and another resigned, the presidency and VICE-PRESIDENCY never became vacant at the same time. If that eventuality had come to pass, the president pro tempore of the SENATE would have served as President under the provisions of a 1792 statute on presidential succession.

The ambiguities inherent in the succession provision surfaced in 1841 when President William Henry Harrison died in office. Despite protests that he had become only the "acting president," Vice-President JOHN TYLER assumed the office and title of President for the balance of Harrison's term. Tyler's claiming of the presidency, said JOHN QUINCY ADAMS, was "a construction in direct violation both of the grammar and context of the Constitution. . . ."

The precedent established by Tyler was followed twice within the next twenty-five years when Vice-Presidents MILLARD FILLMORE and ANDREW JOHNSON became President upon the deaths in office of Presidents ZACHARY TAYLOR and ABRAHAM LINCOLN. In 1881 the precedent became an obstacle to Vice-President CHESTER A. ARTHUR's acting as Pres-

ident during the eighty days that President JAMES A. GARFIELD hovered between life and death after being shot by an assassin. The view was strongly expressed at the time that if Arthur were to succeed to the presidency, then according to the Tyler precedent he would be President for the remainder of the presidential term regardless of whether Garfield recovered. Arthur made clear that he would not assume presidential responsibility lest he be labeled a usurper.

In the twentieth century the Tyler precedent was followed on the four occasions when Presidents died in office (WILLIAM MCKINLEY, WARREN G. HARDING, FRANKLIN D. ROOSEVELT, and JOHN F. KENNEDY.) Once again, however, it became an obstacle to a Vice-President's acting as President during the lengthy period WOODROW WILSON lay ill, unable to discharge the powers and duties of office. For the most part, presidential responsibility was assumed by the President's wife, doctor, and secretary.

Between 1955 and 1957 the lack of clarity in the succession provision was highlighted when President DWIGHT D. EISENHOWER sustained a heart attack, an attack of ileitis, and a stroke. Efforts to have Congress address the question were unsuccessful, but important groundwork for reform was established. President Kennedy's assassination in 1963 became the catalyst for implementing that reform. Congress proposed and the states ratified the TWENTY-FIFTH AMENDMENT to the Constitution to resolve the major issues surrounding the subject of presidential succession. The amendment confirmed that the Vice-President becomes President for the remainder of the term in the case of death, removal, or resignation. In the case of an inability, the amendment provided that the Vice-President serves as acting President only for the duration of the inability. The amendment provided for two methods of establishing the existence of an inability. The President was authorized to declare his own inability and, in such event, its termination. For the case where the President does not or cannot declare his own inability, it empowered the Vice-President and a majority of the Cabinet to make the decision. If the President should dispute their determination, Congress decides the issue.

The amendment also established a mechanism for filling a vice-presidential vacancy: presidential nomination and confirmation by a majority of both houses of Congress. The Twenty-Fifth Amendment is supplemented by a statute on presidential succession adopted in 1947 which provided for the Speaker of the HOUSE OF REPRESENTATIVES to serve as President in the event of a double vacancy in the offices of President and Vice-President.

The Twenty-Fifth Amendment served the nation well in the 1970s when both a President and Vice-President resigned from office during the same presidential term. Twice Vice-Presidents were nominated by the President and confirmed by Congress. The first of those Vice-Presidents, GERALD R. FORD, became President of the United States upon the resignation of RICHARD M. NIXON on August 9, 1974. Ford's succession, as did the eight preceding successions of Vice-Presidents, took place in a manner that demonstrated the stability and continuity of government in the United States.

JOHN D. FEERICK
(1986)

Bibliography

BAYH, BIRCH 1968 *One Heartbeat Away.* Indianapolis: Bobbs-Merrill.

FEERICK, JOHN D. 1965 *From Failing Hands.* New York: Fordham University Press.

——— 1976 *The Twenty-Fifth Amendment.* New York: Fordham University Press.

SILVA, RUTH 1951 *Presidential Succession.* Ann Arbor: University of Michigan Press.

## PRESIDENTIAL WAR POWERS

The power of the President to initiate unilaterally military operations widened substantially under Presidents GEORGE H. W. BUSH and WILLIAM J. CLINTON. In December 1989, with Congress out of session, Bush ordered 11,000 troops into Panama to join up with 13,000 American troops already in the Canal Zone. He cited a number of justifications: protecting Americans in Panama who were in "imminent danger," bringing Panamanian General Manuel Noriega to justice in the United States, defending democracy, combating drug trafficking, and protecting the integrity of the Panama Canal treaty. Scholars of INTERNATIONAL LAW generally dismissed those arguments, but Bush on his own had used military force to invade another country without ever seeking authorization from Congress.

After Iraq, under the leadership of Saddam Hussein, invaded Kuwait on August 2, 1990, Bush began deploying U.S. forces to Saudi Arabia and elsewhere in the Middle East. At that point the operation was purely defensive—to deter further Iraqi aggression—but the doubling of U.S. forces by November gave Bush the capacity to wage offensive war. He made no effort to seek authority from Congress. Instead, he sought support from other nations and encouraged the UNITED NATIONS Security Council to authorize the use of force, which it did on November 29. Only at the eleventh hour, in January 1991, did Bush seek support (but not authority) from Congress. A legal crisis was avoided on January 12 when Congress authorized offensive action against Iraq.

In his first six years in office, Clinton repeatedly used military force without ever coming to Congress for authority. On June 26, 1993, he ordered air strikes against

Iraq as a response to the attempted assassination of former President Bush during a visit to Kuwait. Sixteen suspects, including two Iraqi nationals, had been arrested but the trial had not been completed. Clinton justified the attack as one of self-defense, but constitutional lawyers found that quite a stretch.

In September 1996, Clinton ordered the launching of cruise missiles against Iraq in response to an attack by Iraqi forces against the Kurdish-controlled city of Irbil in northern Iraq. Cruise missiles also struck air defense capabilities in southern Iraq. There was no claim here of self-defense or the need to protect the lives of Americans. Toward the end of January 1998, Clinton threatened once again to bomb Iraq, this time because Hussein had refused to give UN inspectors full access to examine Iraqi sites. The attack was postponed when UN Secretary General Kofi Annan visited Baghdad in February and negotiated a settlement with Iraq. In that same month, U.S. Secretary of State Madeleine Albright was asked how Clinton could order military action against Iraq after opposing American policy in Vietnam. Her response: "We are talking about using military force, but we are not talking about a war. That is an important distinction." How many people in the country, or in the administration, understood such distinctions? Did the President's need to obtain prior congressional authority arise only in "time of war" but not with military force? In December 1998, Clinton ordered four days of heavy bombing in Iraq and continued in 1999 with repeated air strikes.

Further military action occurred in Somalia, where an initial humanitarian effort turned bloody in June 1993 when twenty-three Pakistani peacekeepers were killed. U.S. warplanes launched a retaliatory attack. In August, four U.S. soldiers were killed when a land mine blasted apart their Humvee vehicle. As the situation deteriorated, Congress passed LEGISLATION to remove U.S. ARMED FORCES from Somalia by March 31, 1994.

On September 15, 1994, Clinton told the American public that he was prepared to invade Haiti to reinstate Jean-Bertrand Aristide as President. The UN Security Council had passed a resolution "inviting" the use of force to remove the military leaders from that island. An invasion became unnecessary when former President JIMMY CARTER negotiated an agreement in which the military leaders agreed to step down to permit Aristide's return.

Clinton ordered air strikes in Bosnia beginning in 1994. At the end of 1995 he dispatched 20,000 U.S. troops to that region for peace-keeping purposes. For authority, he cited a number of North Atlantic Treaty Organization (NATO) decisions and UN resolutions. Beginning on March 24, 1999, and operating solely through NATO, Clinton began bombing in Serbia and Kosovo. He also considered sending in U.S. armed forces as part of a multinational effort to protect refugees returning to Kosovo. At no time did Congress authorize his actions, although Clinton sent American troops into Kosovo as part of a NATO peace-keeping force upon cessation of the bombing compaign.

In August 1998, Clinton sent cruise missiles into Afghanistan to attack paramilitary camps and into Sudan to destroy a pharmaceutical factory. He justified the use of military force as a retaliation for bombings earlier in the month against U.S. embassies in Nairobi and Dar es Salaam. The administration claimed Osama bin Laden was behind the embassy attacks, that he used the training complex in Afghanistan, and that he was somehow related to the pharmaceutical plant. Questions were raised as to whether the plant was producing a precursor chemical for a nerve gas, as the administration alleged, or an agricultural pesticide. A Saudi businessman who owned the plant went to court to force the administration to release millions of dollars in assets frozen by U.S. officials on the ground that he was linked to bin Laden. The administration released $24 million of his assets but refused to clear his name.

The pattern during the Bush and Clinton years was clear: Presidents would seek authority to use military force not from Congress but from international and regional institutions. Members of Congress voted repeatedly on amendments to restrict the President's capacity to make war. With the exception of the funding restriction on Somalia, these amendments were never enacted into law.

LOUIS FISHER
(2000)

Bibliography

ADLER, DAVID GRAY and GEORGE, LARRY N. 1996 *The Constitution and the Conduct of American Foreign Policy.* Lawrence: University Press of Kansas.

ELY, JOHN HART 1993 *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath.* Princeton, N.J.: Princeton University Press.

FISHER, LOUIS 1995 *Presidential War Power.* Lawrence: University Press of Kansas.

STERN, GARY M. and HALPERIN, MORTON H. 1994 *The U.S. Constitution and the Power to Go to War: Historical and Current Perspectives.* Westport, Conn.: Greenwood Press.

## PRESUMPTION OF CONSTITUTIONALITY

See: Rational Basis; Standard of Review

## PRETRIAL DISCLOSURE

The rules and practices governing pretrial disclosure to the opposing party differ dramatically in criminal and civil

litigation. In civil disputes, each side has access to virtually all relevant information possessed by the other. In criminal cases, however, there has been a continuing debate which has focused on how much disclosure the prosecutor, with his superior investigative resources, should be required to make. The argument against wide-ranging disclosure is that it will result in witness intimidation and perjury. The arguments for disclosure are that a criminal trial should not be a "sporting event" in which one side tries to surprise the other, and that disclosure of the prosecution's EVIDENCE would aid the effective assistance of counsel to the accused guaranteed by the Sixth Amendment. (See RIGHT TO COUNSEL.)

Proponents of greater disclosure in criminal cases have made some gains in recent years through the expansion of DISCOVERY statutes. Rule 16 of the FEDERAL RULES OF CRIMINAL PROCEDURE is typical. The rule currently provides that, absent special circumstances, the government must disclose upon request: the defendant's own statements; his record of prior convictions; and documents, tangible evidence, or reports of examinations of the defendant or scientific tests the government intends to introduce at trial. The most striking difference between this rule and civil practice is that the criminal rule does not give the defense the power either to discover the identity of government witnesses or to compel them to testify under oath prior to trial. Several states provide for disclosure of prosecution witness lists, but Congress in 1974 rejected such a provision in the federal rules on the usual argument that disclosure of the identity of witnesses would possibly subject them to intimidation.

In addition to the slow but steady statutory expansion of pretrial disclosure by the government to the defense, there has been a reciprocal movement to entitle the prosecution to learn more about the defense case before trial. The argument that the policies underlying the Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION shield the defense from any disclosure has largely been unsuccessful. Under the federal and many state rules, the defense can be requested to disclose any tangible evidence or results of physical or mental examinations it intends to introduce at trial, and to give notice of an alibi or insanity defense. The Supreme Court has upheld the constitutionality of compelling defense disclosure, provided that discovery is a two-way street; if the defendant is required to disclose alibi witnesses, for example, the government must also disclose any evidence that refutes the alibi.

Against the background of limited formal discovery rules, prosecutors frequently open files to the defense in an attempt to induce guilty pleas. Sometimes, also, judges exert informal pressure toward open discovery in order to avoid trial delays that might be caused by surprise evidence.

The Supreme Court has repeatedly held that a defendant has no general constitutional right to discovery, but it has required that the prosecution sometimes reveal "favorable" evidence. In *Brady v. Maryland* (1963) the government failed to disclose to a murder defendant that his companion had once admitted to a government agent that he had done the actual killing. The Court held that such a failure to disclose violates DUE PROCESS where the evidence is "material to guilt or punishment," irrespective of the good faith of the prosecution.

The lower courts generally gave an expansive reading to the *Brady* decision, but the Supreme Court curbed this development in *United States v. Agurs* (1976). The *Agurs* Court held that if the defense has not requested favorable evidence, or has made only a general request, a failure to disclose gives the defendant no constitutional right to a new trial unless there is a strong probability that the result of the first trial would not have been different had the favorable evidence been disclosed. Moreover, an appellate court should not grant a new trial so long as the trial judge remains reasonably convinced of the defendant's guilt. The *Agurs* Court also said that the failure to disclose evidence that reveals that the prosecution's case includes perjured testimony or the failure to disclose favorable evidence after it has been specifically requested by the defense, is "rarely excusable." In these two situations, the Constitution requires that the defendant be given a new trial if there is any reasonable possibility that the verdict would have been different had the undisclosed evidence been admitted.

Thus, *Agurs* provided some ammunition to both sides of the debate over criminal discovery: it limited the general due process right but also created a category for all but automatic reversal when the prosecution fails to respond to a defense request for specific information or when the prosecution case includes the knowing use of perjury.

BARBARA ALLEN BABCOCK
(1986)

Bibliography

BABCOCK, BARBARA 1982 Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel. *Stanford Law Review* 34:1133–1182.

## PREVENTIVE DETENTION

Preventive detention is the jailing of an accused not to prevent bail-skipping but to protect public safety pending trial. Although pretrial incarceration of criminal defendants has long been condoned when necessary to assure their appearance in court, the constitutional status of pre-

ventive detention is far less certain. The Supreme Court has never directly addressed the issue, in part because until quite recently it was rendered largely academic by a federal statutory right to BAIL in noncapital cases and by similar rights granted in most state constitutions. Since 1970, however, District of Columbia courts have been authorized to deny pretrial release in certain cases to suspects charged with "dangerous" crimes, and several states have recently amended their constitutions to allow detention under similar circumstances. Following this activity, Congress in 1984 passed a nationwide program of preventive detention, substantially curtailing the federal statutory right to bail for the first time since the right was enacted in 1789.

The constitutionality of these programs is not altogether free from doubt. To begin with, the Eighth Amendment bars the federal government from requiring "excessive bail." Commentators have waged a spirited debate over whether that prohibition implies that some bail must be set. Many constitutional scholars have argued that the Framers intended to provide an affirmative right to bail to all defendants who do not pose an unacceptable risk of flight, and that without such a right the "excessive bail" clause would be a senseless bar against the government's doing indirectly what it remained free to do directly. Others have contended that the clause is aimed at the courts, not at Congress, and that a restriction on judicial discretion in setting bail is fully consistent with legislative authority to determine the circumstances under which bail should be granted at all.

The Supreme Court's decisions and opinions on the issue have been inconclusive. In *Stack v. Boyle* (1951) the Court held that bail was "excessive" when set higher than necessary to assure the accused's presence at trial. Strictly speaking, the ruling concerned only the level at which bail may be set if it is set, but the Court also hinted that the right to bail in the first place, long accorded by federal statute, might have a constitutional dimension: "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."

The rule of *Stack v. Boyle* regarding bail amounts has remained undisturbed, despite general recognition that in practice bail is frequently set with a covert eye to whether the defendant seems likely to commit crimes before trial. The Supreme Court quickly backed away, however, from its strong if cryptic endorsement of the "right to bail." In *Carlson v. Landon* (1952) the Court approved the denial of bail, for reasons of public safety, to alien communists held pending deportation hearings. The Eighth Amendment, the Court explained, does not grant "a right to bail in all cases," but only provides "that bail shall not be excessive in those cases where it is proper to grant bail." The Court noted in particular that the amendment "has not prevented Congress from determining the classes of cases in which bail should be allowed."

Despite these seemingly categorical remarks, the effect of *Carlson* on the legacy of *Stack v. Boyle* remains unclear. The *Carlson* decision seems to have been based primarily on the differences between a criminal prosecution against a citizen and a deportation proceeding against an alien; the Court concluded only that "the Eighth Amendment does not require that bail be allowed under the circumstances of these cases."

Whether or not the Eighth Amendment provides a right to bail, preventive detention may raise questions of constitutionality under the DUE PROCESS clauses of the Fifth and FOURTEENTH AMENDMENTS. In *Bell v. Wolfish* (1979) the Supreme Court rejected a related argument, suggested in part by its own opinion in *Stack v. Boyle*, that the "presumption of innocence" limits what the government may do to a criminal defendant before conviction. The Court explained in *Wolfish* that the presumption of innocence is nothing but an evidentiary rule to be applied at trial; "it has no application to a determination of the rights of a pretrial detainee." The due process clauses, however, do apply before the commencement of trial, and *Wolfish* and later decisions have made clear that those clauses, in addition to constraining the permissible forms of detention and setting minimum procedural safeguards, also bar absolutely the "punishment" of an accused before conviction.

In testing for punishment in this context, the Supreme Court has considered, among other things, the government's reasons for imposing a given measure. The highest local court in the District of Columbia concluded in 1981 that incarceration for preventive purposes is nonpunitive and hence may be imposed before trial. The Supreme Court reasoned differently in BROWN V. UNITED STATES (1965), concluding that a preventive rationale should not stop confinement from being punishment for purposes of the BILL OF ATTAINDER clauses, but it has made no similar determination under the due process clauses.

The question whether the Constitution permits pretrial detention for purposes other than assuring a defendant's appearance in court thus remains open. A small part of the question was answered in SCHALL V. MARTIN (1984), where the Court upheld a state program of preventive detention for accused juvenile delinquents, but *Schall* relied heavily on the special prerogatives which the Constitution allows the state with respect to juveniles. Whether unconvicted adults may be jailed to keep them from committing future crimes remains a question to be decided.

The difficulty of the question reflects the strain placed on constitutional norms by the exigencies of the pretrial period. Preventive detention is difficult to reconcile with

the ideal of due process, but many people are understandably made uneasy by the thought of defendants "walking the streets" while awaiting trial for serious crimes. A partial solution to the dilemma may be found in the Sixth Amendment's guarantee of a speedy trial: greater fidelity to that provision would alleviate to some extent both the risks associated with pretrial release and the inherent tension between due process and any restraint on the liberty of unconvicted defendants.

ABNER J. MIKVA
(1986)

Bibliography

VERRILLI, DONALD B., JR. 1982 The Eighth Amendment and the Right to Bail: Historical Perspectives. *Columbia Law Review* 82:328–362.

## *PRICE, UNITED STATES v.*
383 U.S. 787 (1966)

Eighteen defendants implicated in the murder of three CIVIL RIGHTS workers in Mississippi challenged the INDICTMENTS against them under the federal CIVIL RIGHTS ACT OF 1866 and that of 1870. One act applied only to persons conspiring to violate any federally protected right, the other only to persons acting "under COLOR OF LAW" who willfully violated such rights. Previous decisions of the Supreme Court had limited the two statutes. "Under color of law" covered only officers and in effect meant STATE ACTION, thus excluding private persons from prosecution. The language of the conspiracy statute notwithstanding, the Court had previously applied it to protect only the narrow class of rights that Congress could, apart from the FOURTEENTH AMENDMENT, protect against private individuals' interference, thus excluding the bulk of civil rights. Justice ABE FORTAS for a unanimous Court ruled that when private persons act in concert with state officials they all act under color of law, because they willfully participate in the prohibited activity (deprivation of life without DUE PROCESS OF LAW) with the state or its agents. Fortas also ruled that the 1870 act meant what it said: it safeguarded *all* federally protected rights secured by the supreme law of the land. By remanding the cases for trial, the Court made possible the first conviction in a federal prosecution for a civil rights murder in the South since RECONSTRUCTION.

LEONARD W. LEVY
(1986)

# PRICE-FIXING

See: Antitrust Law; Economic Regulation

## *PRIGG v. PENNSYLVANIA*
16 Peters 539 (1842)

In 1839 Edward Prigg was convicted of kidnapping for removing an alleged fugitive slave from Pennsylvania without obtaining a warrant from a state judge as required by a Pennsylvania act of 1826. Prigg eventually appealed to the United States Supreme Court. Justice JOSEPH STORY, speaking for the Court, overturned his conviction. Story determined: (1) The federal Fugitive Slave Law of 1793 was constitutional. This was the first Supreme Court decision on that issue. (2) All state laws interfering with the rendition of fugitive slaves were unconstitutional. (3) The Fugitive Slave clause of the United States Constitution (Article IV, section 2, clause 3) was in part self-executing, and a slaveowner or his agent could capture and return a runaway slave under a right of self-help, without relying on any statute or judicial procedure, as long as the capture did not breach the peace. (4) State jurists and officials ought to help enforce the federal act of 1793, but Congress could not compel them to do so. Chief Justice ROGER B. TANEY concurred in Story's decision, but not his reasoning. Taney distorted Story's opinion by erroneously asserting that Story had declared it was illegal for state officials to aid in the rendition of fugitive slaves. In fact, Story encouraged the states to aid in the rendition process, but he believed Congress could not compel state assistance. After the decision many free states enacted PERSONAL LIBERTY LAWS which removed state support for the federal act of 1793. With few federal officials to help masters, the law went unenforced in much of the North. This situation helped lead to the passage of a new and harsher fugitive slave law in 1850.

PAUL FINKELMAN
(1986)

Bibliography

FINKELMAN, PAUL 1979 *Prigg v. Pennsylvania* and Northern State Courts: Antislavery Use of a Proslavery Decision. *Civil War History* 25:5–35.

# PRIMARY ELECTION

The primary election for selecting candidates is a uniquely American innovation. First adopted in Wisconsin in 1905, it has since spread to every other state. Generally it is the required method for selecting major POLITICAL PARTIES' nominees, whose names are automatically placed on the general election ballot, and for narrowing the field in nonpartisan elections.

The Supreme Court has not heard a modern constitutional challenge to state authority to compel political par-

ties to select their candidates at primaries or to define party membership for these purposes. In *Cousins v. Wigoda* (1975), however, the Supreme Court held that Illinois could not require the Democratic National Convention to seat delegates selected in the state's primary; and in *Democratic Party v. LaFollette* (1981) the Court held that Wisconsin's delegates could not be bound by state law to follow candidate preferences expressed by voters in the state's presidential primary. In both cases, the Justices declared that the "party and its adherents enjoy a constitutionally protected right of political association." And in *Democratic Party* the Court said that "the freedom to associate . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit association to those people only." The Justices recognized state interests in the conduct of primary elections, however, and their decisions specifically addressed attempts to regulate the conduct of national party conventions and delegates. States might be able to limit the privilege of automatic access to the ballot to those parties conforming with state primary laws.

The Supreme Court has upheld state primary laws that protect the interests of political parties. In 1976 it affirmed a lower court judgment upholding a state's closed primary against a challenge that it abridged the right to vote and violated the RIGHT OF PRIVACY in political affiliation and belief. Similarly, the Court upheld, in *Rosario v. Rockefeller* (1973), an extended waiting period for voters wishing to change party registration, thus protecting party primaries from invasion by opposition party adherents and from casual participation by independent voters. But in *Kusper v. Pontikes* (1973), the Court acknowledged a competing interest in voter participation by rejecting a waiting period so long that the voter wishing to change party affiliation was excluded entirely from at least one primary election.

The Supreme Court has concluded that Congress has authority to regulate primary elections to nominate candidates for federal office, including prohibition of fraud, bribery, and other practices that deprive voters of rights, in UNITED STATES V. CLASSIC (1941) and *Burroughs v. United States* (1934), and regulation of political finance practices, in BUCKLEY V. VALEO (1976). Additional authority to regulate primaries is encompassed within the enforcement clauses of the FOURTEENTH and FIFTEENTH AMENDMENTS.

The principal clauses of these amendments also have independent application to primary elections, apart from any regulatory legislation Congress may enact. Once a state has established the primary for nominating candidates, the ONE PERSON, ONE VOTE principle of the apportionment cases applies. RACIAL DISCRIMINATION in primaries has been held unconstitutional, whether these barriers are established by the state, as in NIXON V. HERNDON (1927), or by political parties pursuant to state authorization to define party membership, as in NIXON V. CONDON (1932) and SMITH V. ALLWRIGHT (1944). Racial discrimination has also been held unconstitutional in a primary operated exclusively by a political party following the state's repeal of its primary election system. The most far-reaching application of the Fifteenth Amendment, in TERRY V. ADAMS (1953), prohibited racial discrimination in a "pre-primary" straw vote conducted by an all-white political club, when such "pre-primaries" had regularly proved determinative of elections.

In *Cousins v. Wigoda* the Supreme Court held that state primary laws do not supersede the authority of national party conventions over the selection and seating of delegates, but it did not choose to make a broad decision between competing claims of FREEDOM OF ASSOCIATION of political parties and governmental authority to regulate nomination activities. On one side of this continuing constitutional controversy lie assertions of FIRST AMENDMENT rights of parties to define their own membership, to control the composition and operation of party bodies, and to nominate candidates. On the other side lie assertions of state and congressional authority to regulate elections, of congressional power specifically granted in the enforcement clauses of the Fourteenth and Fifteenth Amendments, and of the independent operation of the principal clauses of those amendments. Notwithstanding the Supreme Court's reluctance to decide this question broadly, the Court's decisions have increasingly recognized the freedom of association of political parties.

DAVID ADAMANY
(1986)

## PRIMARY ELECTION
### (Update)

As constitutional custodians of the electoral process, states have the power to regulate both voters' access to the polls and the conduct of the POLITICAL PARTIES. Constitutional questions pertaining to primary elections mainly stem from the tension between the state's interest in open, participatory politics and the party's interest in controlling the nominating process and voters' participation in primaries. The FIRST AMENDMENT guarantee of FREEDOM OF ASSOCIATION suggests that parties ought to be free to control participation in their primaries as they please. In contrast, the inexorable push toward broad participatory rights of individuals in all stages of the electoral process necessitates limits on the power of parties to include or exclude persons from voting in primaries. Greater individual participatory rights come at the expense of the parties' ability to

select and elect candidates who embrace the party label and its programs.

The Supreme Court has repeatedly addressed the propriety of state restrictions on access to the voting booth in primary elections. These decisions have required the Court to rank the competing constitutional VOTING RIGHTS of individuals and associational rights of parties.

The Court's efforts to alleviate these tensions grew out of the discriminatory practices of the Democratic Party in the Deep South. The Court firmly established the quasi-public nature of party primary activity in the White Primary cases—notably, SMITH V. ALLWRIGHT (1944) and TERRY V. ADAMS (1953)—when it overturned the discriminatory rules of southern Democratic state parties that sought to limit participation in their primaries to white voters only. Regarding primaries, the Court viewed parties as functionally equivalent to the state, and therefore ruled that such discriminatory practices violated the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT. In *Kusper v. Pontikes* (1973), the Court again sided with individual voting rights over party associational rights, rejecting an Illinois state statute that limited primary participation based on prior party affiliation.

More recent cases have presented conflicts between party rules and state laws regulating who can participate in party primaries, conventions, or other party activities. The Court has generally deferred to party rules on these questions. Several key decisions rendered the party determinative in controlling access to the nomination process, either through open primaries or through the establishment of convention delegate selection procedures. The crux of the constitutional right of association, as the Court explained in *Tashjian v. Republican Party of Connecticut* (1986) was the party's "determination of the boundaries of its own association and the structure which best allows it to pursue its political goals." In *Eu v. San Francisco Democratic Committee* (1989), the Court unanimously invalidated a California statute that, among other things, stripped parties of the ability to endorse candidates in primary elections. These decisions gave solid constitutional protection to the parties' right of self-determination, even if the decisions watered down formal party affiliation. They ensure that parties retain control of access to primary and candidate selection processes. Some commentators have heralded these decisions as marking the reassertion of political parties over the nominating process.

This optimism received a setback in *Morse v. Republican Party of Virginia* (1996), which involved a conflict between a state party rule and a federal statute. The Court in *Morse* narrowed parties' associational right by subordinating it to the VOTING RIGHTS ACT OF 1965, striking down a party's attempt to impose a fee on those attending its state convention. By restricting participation at the convention, the fee unconstitutionally undercut individual voting rights. *Morse* suggests that federal statutes and constitutional voting rights trump the associational rights of state parties to define themselves in an exclusionary fashion. In the name of nondiscriminatory political participation, the Court subordinated the association of the party faithful to the right of peripheral "members" to take part in integral party decisionmaking. The party's freedom to identify its members yielded to the dominant impulse for more-inclusive rules and individual participation. By equating parties with the state and treating party action as STATE ACTION, *Morse* may lead to broader state intrusion into future party activity.

DAVID K. RYDEN
(2000)

Bibliography

EPSTEIN, LEON 1986 *Political Parties in the American Mold.* Madison: University of Wisconsin Press.

LOWENSTEIN, DANIEL H. 1995 *Election Law: Cases and Materials.* Durham, N.C.: Carolina Academic Press.

MAVEETY, NANCY 1991 *Representation Rights and the Burger Years.* Ann Arbor: University of Michigan Press.

RYDEN, DAVID K. 1996 *Representation in Crisis: The Constitution, Interest Groups, and Political Parties.* New York: State University of New York Press.

——— 1999 'The Good, The Bad, and The Ugly': The Judicial Shaping of Party Activities. Pages 50–65 in John Green and Daniel Shea, eds., *The State of the Parties,* 3rd ed. Boulder, Colo.: Roman & Littlefield.

## *PRINCE v. MASSACHUSETTS*
### 321 U.S. 158 (1944)

Massachusetts law provided that no boy under twelve or girl under eighteen could engage in street sale of any merchandise. Prince was the guardian of a nine-year-old girl. Both were Jehovah's Witnesses and sold Witness literature. The question was whether the statute impermissibly infringed on the free exercise of religion.

Writing for the Court, Justice WILEY B. RUTLEDGE balanced the broad powers of the state to protect the health and welfare of minors against the FIRST AMENDMENT claims and held that the state's power prevailed. Justices FRANK MURPHY and ROBERT H. JACKSON dissented.

*Prince* follows the "secular regulation" approach to RELIGIOUS LIBERTY introduced by UNITED STATES V. REYNOLDS (1879).

RICHARD E. MORGAN
(1986)

## *PRINTZ v. UNITED STATES*

See: Federalism; *New York v. United States*; State Immunity from Federal Law

## PRIOR RESTRAINT AND CENSORSHIP

History has rooted in our constitutional tradition of freedom of expression the strongest aversion to official censorship. We have learned from the English rejection of press licensing and from our own experiences that the psychology of censors tends to drive them to excess, that censors have a stake in finding things to suppress, and that—in systems of wholesale review before publication—doubt tends to produce suppression. American law tolerated motion picture censorship for a time, but only because movies were not thought to be "the press" in FIRST AMENDMENT terms. Censorship of the movies is now virtually dead, smothered by stringent procedural requirements imposed by unsympathetic courts, by the voluntary rating system, and, most of all, by public distaste for the absurdities of censorship in operation.

American law has tolerated requirements of prior official approval of expression in several important areas, however. No one may broadcast without a license, and the government issues licenses without charge to those it believes will serve the "public interest." Licensing is also grudgingly tolerated—because of the desirability of giving notice and of avoiding conflicts or other disruptions of the normal functions of public places—in the regulation of parades, demonstrations, leafleting, and other expressive activities in public places. But the courts have taken pains to eliminate administrative discretion that would allow officials to censor PUBLIC FORUM expression because they do not approve its message.

Notwithstanding these areas where censorship has been permitted, the clearest principle of First Amendment law is that the least tolerable form of official regulation of expression is a requirement of prior official approval for publication. It is easy to see the suffocating tendency of prior restraints where all expression—whether or not ultimately deemed protected by the First Amendment for publication—must be submitted for clearance before it may be disseminated. The harder question of First Amendment theory has been whether advance prohibitions on expression in specific cases should be discredited by our historical aversion to censorship. The question has arisen most frequently in the context of judicial INJUNCTIONS against publication. Even though injunctions do not involve many of the worst vices of wholesale licensing and censorship, the Supreme court has tarred them with the brush of "prior restraint."

The seminal case was NEAR V. MINNESOTA (1931), handed down by a closely divided Court but never questioned since. A state statute provided for injunctions against any "malicious, scandalous, and defamatory newspaper," and a state judge had enjoined a scandal sheet from publishing anything scandalous in the future. The Minnesota scheme did not require advance approval of all publications, but came into play only after a publication had been found scandalous, and then only to prevent further similar publications. Nevertheless, the majority of the Justices concluded that to enjoin future editions under such vague standards in effect put the newspaper under judicial censorship. Chief Justice CHARLES EVANS HUGHES's historic opinion made clear, however, that the First Amendment's bar against prior restraint was not absolute. Various exceptional instances would justify prior restraints, including this pregnant one: "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."

It was forty years before the scope of the troop ship exception was tested. The *Pentagon Papers* decision of 1971, NEW YORK TIMES CO. V. UNITED STATES, reaffirmed that judicial injunctions are considered prior restraints and are tolerated only in the most compelling circumstances. This principle barred an injunction against publication of a classified history of the government's decisions in the Vietnam war, although—unlike *Near*—the government had sought to enjoin only readily identifiable material, not unidentified similar publications in the future. Ten different opinions discussed the problem of injunctions in national security cases, and the only proposition commanding a majority was the unexplained conclusion that the government had not justified injunctive relief.

The central theme sounded in the opinions of the six majority Justices was reluctance to act in such difficult circumstances without guidance from Congress. Accepting the premise that there was no statutory authority for an injunction, several considerations support the Court's refusal to forge new rules concerning the disclosure of national secrets. First, the Court's tools are inadequate for the task; ad hoc evaluations of executive claims of risk are not easily balanced against the First Amendment's language and judicial interpretation. Second, dissemination of secret information often arises in the context of heated disagreements about the proper direction of national policy. One's assessment of the disclosure's impact on security will depend on one's reaction to the policy. Third, it would be particularly unsatisfactory to build a judge-made system of rules in an area where much litigation must be done *in camera*. Thus, general rules about specific categories of

defense-related information cannot be fashioned by courts. The best hope in a nuclear age for accommodating the needs of secrecy and the public's RIGHT TO KNOW lies in the legislative process where, removed from pressures of adjudicting particular cases, general rules can be fashioned. The courts' proper role in this area is to review legislation, not try to devise rules of secrecy case by case.

Chilling this victory for freedom of the press were admonitions, loosely endorsed by four Justices, that the espionage statutes might support criminal sanctions against the *New York Times* and its reporters. No journalists were indicted, but the prosecutions of Daniel Ellsberg and Anthony Russo rested on a view of several statutes that would reach the press by punishing news-gathering activities necessarily incident to publication. Since the dismissal of these cases for reasons irrelevant to these issues, the extent of possible criminal liability for publishing national security secrets remains unclear.

The *Pentagon Papers* case underlines how little the United States has relied on law to control press coverage of national defense and foreign policy matters. For most of our history the press has rarely tested the limits of its rights to publish. Secrets were kept because people in and out of government with access to military and diplomatic secrets shared basic assumptions about national aims. The Vietnam war changed all that. The *Pentagon Papers* dispute marked the passing of an era in which journalists could be counted on to work within understood limits of discretion in handling secret information.

The third major decision striking down a judicial order not to publish involved neither national security nor scandal but the right of a criminal defendant to a fair trial. A state court enjoined publication of an accused's confession and some other incriminating material on the ground that if prospective jurors learned about it they might be incapable of impartiality. In NEBRASKA PRESS ASSOCIATION V. STUART (1976) the Supreme Court decided that the potential prejudice was speculative, and it rejected enjoining publication on speculation. The majority opinion examined the evidence to determine the nature and extent of pretrial publicity, the effectiveness of other measures in mitigating prejudice, and the effectiveness of a prior restraint in reducing the dangers. This opinion determined that the impact of pretrial publicity was necessarily speculative, that alternative measures short of prior restraint had not been considered by the lower courts, and that prior restraint would not significantly reduce the dangers presented.

On one issue of considerable importance, the Court seemed to be in full agreement. The opinions endorsed controls on parties, lawyers, witnesses, and law enforcement personnel as sources of information for journalists. These GAG ORDERS have been controversial among many journalists and publishers who think the First Amendment should guarantee the right to gather news. Although freeing the press from direct control by limiting prior restraint, the Court approved an indirect method of reaching the same result, guaranteeing that the press print no prejudicial publicity, by approving direct controls on sources of prejudicial information. The Court has subsequently held that pretrial motions may be closed to the public and the press with the consent of the prosecutor and the accused but over the objection of the press, in GANNETT CO. V. DEPASQUALE (1979). This case involved access to judicial proceedings, not prior restraints on the press, and was decided largely on Sixth Amendment grounds. The Court reached the opposite result with respect to trials in RICHMOND NEWSPAPERS V. VIRGINIA (1980), but acknowledged that the right of access to trials is not absolute.

These decisions and others have firmly established that the First Amendment tolerates virtually no prior restraints. This DOCTRINE is one of the central principles of our law of FREEDOM OF THE PRESS. On the surface, the doctrine concerns only the form of controls on expression. It bars controls prior to publication, even if imposition of criminal or civil liability following publication would be constitutional. But, as with most limitations of form, the prior restraint doctrine has important substantive consequences. Perhaps the most important of these consequences is that the doctrine is presumably an absolute bar to any wholesale system of administrative licensing or censorship of the press, which is the most repellent form of government suppression of expression. Second, the prior restraint doctrine removes most of the opportunities for official control of those types of expression for which general rules of control are difficult to formulate. The message of the prior restraint doctrine is that if you cannot control expression pursuant to general legislative standards, you cannot control it at all—or nearly at all, as the *Pentagon Papers* decision suggests, by suggesting an exception allowing an injunction in a truly compelling case of national security. A third effect of the doctrine is that by transferring questions of control over expression from the judiciary to the legislatures, it provides an enormously beneficial protection for the politically powerful mass media, if not for other elements of society with strong First Amendment interests but weaker influence in the legislative process.

Although the Supreme Court has exceeded its historical warrant in subjecting judicial injunctions to the full burden of our law's traditional aversion to prior restraints, there are sound reasons for viewing all prior controls—not only wholesale licensing and censorship—as dangerous to free expression. Generally it is administratively easier to prevent expression in advance than to punish it

after the fact. The inertia of public officials in responding to a *fait accompli*, the chance to look at whether expression has actually caused harm rather than speculate about the matter, public support for the speaker, and the interposition of juries and other procedural safeguards of the usual criminal or civil process all tend to reinforce tolerance when expression can only be dealt with by subsequent punishment. Moreover, all prior restraint systems, including injunctions, tend to divert attention from the central question of whether expression is protected to the subsidiary problem of promoting the effectiveness of the prior restraint system. Once a prior restraint is issued, the authority and prestige of the restraining agent are at stake. If it is disobeyed, the legality of the expression takes a back seat to the enforcement of obedience to the prior restraint process. Moreover, the time it takes a prior restraint process to decide produces a systematic delay of expression. On the other hand, where law must wait to move against expression after it has been published, time is on the side of freedom. All in all, even such prior restraints as judicial injunctions—which are more discriminating than wholesale censorship—tend toward irresponsible administration and an exaggerated assessment of the dangers of free expression.

BENNO C. SCHMIDT, JR.
(1986)

Bibliography

BLASI, VINCENT 1981 Toward a Theory of Prior Restraint: The Central Linkage. *Minnesota Law Review* 66:11.

EMERSON, THOMAS 1955 The Doctrine of Prior Restraint *Law and Contemporary Problems* 20:648.

SCHMIDT, BENNO C., JR. 1977 Nebraska Press Association: An Expansion of Freedom and Contraction of Theory. *Stanford Law Review* 29:431.

## PRIOR TESTIMONY

See: Confrontation, Right of

## PRISONERS' RIGHTS

Some might think that the very term "prisoners' rights" is an oxymoron, because the essence of being imprisoned is the reduction or elimination of rights. Prisoners have traditionally been deprived of VOTING RIGHTS and, obviously, of the right to travel outside the prison confines, often of the right to communicate freely with the outside world and of the right of conjugal relationships, and, at times, of the right of ACCESS TO COURTS to complain about even those rights that they retain.

There is a tension in constitutional doctrine between the need to enforce discipline in the difficult circumstances of the prison and the necessity of recognizing that in a society of law, even prisoners ought to have remedies for violation of whatever constitutional rights they possess and also to have the right to be immune from arbitrary and capricious actions of the prison hierarchy. This tension has expressed itself in judicial opinions in two major ways: first, the enunciation of a "hands-off doctrine" that precludes JURISDICTION to review complaints of inmates; and second, the determination, either broadly or narrowly, of the nature of the rights that a prisoner might have. In times when the cluster of rights is extremely narrow, the distinction between the first mode of analysis and the second is not great.

As late as 1963 a commentator could write that there is a "conviction held with virtual unanimity by the courts that it is beyond their power to review the internal management of the prison system." Much of this changed, however, when the Supreme Court held in *Wolff v. McDonnell* (1974), as part of its expansion of PROCEDURAL DUE PROCESS to the decision making of many institutions, that "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country."

Still, the definition of rights for prisoners is almost always husbanded with conditions and recognition of concerns for the difficulties the warden faces. Where the FIRST AMENDMENT is concerned, RELIGIOUS LIBERTY is guaranteed but only to the extent that the opportunities to exercise that freedom must be "reasonable." Similarly, when the right to speak and communicate is concerned, the Court limited it in PELL V. PROCUNIER (1974) to the kind of expression that is "not inconsistent with [their] status as . . . prisoner[s] or with the legitimate penological objectives of the corrections system." In *Lee v. Washington* (1968) the Court implied that even racial SEGREGATION may be tolerated when it is essential to "prison security and discipline." And the Court held in *Hudson v. Palmer* (1984), a departure from previous expansion of privacy rights, that "the FOURTH AMENDMENT had no applicability to a prison cell."

With the wonderful perversity that makes legal development fascinating, the Supreme Court, in the late 1970s, expanded prisoners' rights of access to courts, while almost simultaneously narrowing the grounds for constitutional challenge.

Litigation concerning prisoners' rights is an indicator of concern about individual rights generally. As the Court changes its views of the breadth and definition of such rights, the treatment of alleged institutional wrongs in a correctional setting is like the canary a miner takes along down the shaft. Constitutional litigation during the 1960s

and 1970s created massive exposure of the internal workings of correctional institutions and pressure for change. In many instances, wholesale reforms were imposed upon these institutions as a consequence of the litigation. But the canary is weakening. (See INSTITUTIONAL LITIGATION.)

MONROE E. PRICE
(1986)

Bibliography

NOTE 1963 Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts. *Yale Law Journal* 72:506.

## PRISONERS' RIGHTS
(Update 1)

Upon conviction and imprisonment, a profound change occurs in a person's legal status. Duly convicted prisoners lose entirely many freedoms enjoyed by free persons; however, they do not relinquish all rights. As the Supreme Court noted in *Wolff v. McDonnell* (1974), "though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country."

Prisoners always retain the right to the minimal conditions necessary for human survival (i.e., the right to food, clothing, shelter, and medical care). The right of the prisoners to a non-life-threatening environment goes beyond the provision of life's necessities; it includes their right to be protected from each other and from themselves. On this last point, lower courts have been more responsive to prisoners' claim than Supreme Court and have found that prison crowding is unconstitutional. As a federal district court in Florida asserted in *Costello v. Wainwright* (1975), prison crowding "endangers the very lives of the inmates" and therefore violates the Eighth Amendment's guarantee against CRUEL AND UNUSUAL PUNISHMENT. The Supreme Court's reluctance to follow the lower courts is understandable, for emperical studies flatly contradict the assertion that crowding is life-threatening. Not only are the overall death rates, accidental death rates, and homicide and suicide rates of inmates two or three times lower than for comparable groups of parolees (controlling for age, race, and sex), but no statistically significant correlations exist between measures of crowding (density and occupancy) and inmate death rates.

Beyond agreement that inmates have the minimal right to a non-life-threatening environment, legal debate rages. Some courts and legal scholars have taken their cues from the Sixth Circuit Court of Appeals in *Coffin v. Reichard* (1944) and have declared that prisoners retain all the rights of ordinary citizens except those expressly or by necessary implication taken by law. The Supreme Court's decision in PROCUNIER V. MARTINEZ (1974) followed this line of reasoning when it held that it would employ a STRICT SCRUTINY standard of review to evaluate claims that the rights of prisoners were being denied. It declared that it would sustain limitations of prisoners' rights only if they furthered an important or substantial governmental interest and if they were no greater than necessary to protect that interest.

Fundamentally opposed to *Coffin* and *Procunier* is the view, now dominant on the Supreme Court, that inmates are without rights except for those conferred by law or necessarily implied and that, as a consequence, courts should employ the reasonableness test to assess the legitimacy of restrictions on what prisoners assert to be their rights. In *Turner v. Safley* (1987) the Supreme Court articulated this position and rejected the use of strict scrutiny in prisoners' rights cases. Writing for a five-member majority, Justice SANDRA DAY O'CONNOR declared that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." O'Connor announced a four-prong test for measuring reasonableness: (1) Is there "a "valid, rational connection' between the prison regulation and the legitimate government interest put forward to justify it?" (2) "Are alternative means of exercising the right . . . open to prison inmates?" (3) What is "the impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"? (4) Is "the absence of ready alternatives . . . evidence of reasonableness of the prison regulation"? Employing this four-prong test, Justice O'Connor rejected a FIRST AMENDMENT challenge to a Missouri ban on inmate-to-inmate correspondence because the prohibition on correspondence was "logically connected" to legitimate security concerns. In O'LONE V. ESTATE OF SHABAZZ (1987), the Court applied the same reasonableness test to sustain New Jersey prison policies that resulted in Muslim inmates' inability to attend weekly congregational services.

Security concerns generally trump the claims of prisoners' rights; the Court is hesitant to recognize inmate claims that have the potential of putting at risk the prison itself, the guards, other inmates, or the petitioner. Justice WILLIAM H. REHNQUIST, in *Jones v. North Carolina Prisoners' Union* (1977), summarized well the Court's deferential approach to these issues: "It is enough to say that they [prison officials] have not been conclusively shown to be wrong in this view. The interest in preserving order and authority in prisons is self-evident."

Applying this reasoning, the Court has denied inmates'

claims to a First Amendment right to organize as a prisoners' labor union, rejected the contention that an inmate's RIGHT OF PRIVACY protects against routine strip and body-cavity searches, and refused to recognize any inmate legal rights in the ordinary classification process or interprison transfer. As the Court said in *Moody v. Daggett* (1976), no DUE PROCESS issues are implicated by "the discretionary transfer of state prisoners to a substantially less agreeable prison, even where the transfer visit[s] a 'grievous loss' upon the inmate. The same is true of prisoner classification and eligibility for rehabilitative programs."

Beyond assuring life's necessities for inmates, the Court has consistently recognized inmates' claims in only two areas: their due process right of ACCESS TO THE COURTS and PROCEDURAL DUE PROCESS protection of their liberty interest in retaining "good time" and avoiding solitary confinement. Concerning the former, the Court has repeatedly insisted that inmates have the right to access to legal redress and that this right of access to the courts requires either an adequate law library or assistance from persons trained in law (although not necessarily lawyers). Concerning the latter, the Court held in *Wolff v. McDonnell* that inmates have a liberty interest in the good-time credit they have acquired and that they may not be stripped of these credits without a hearing before an impartial tribunal. The Court has not considered either of these rights to jeopardize prison security. Access to the courts poses no problems at all, and, as the Court made explicit in *Hewitt v. Helms* (1978) and *Superintendent v. Hill* (1985), prison disciplinary proceedings can follow (and need not precede) solitary confinement and can impose sanctions based on the lax evidentiary standard of "some evidence."

RALPH A. ROSSUM
(1992)

(SEE ALSO: *Body Search.*)

Bibliography

COHEN, FRED 1988 The Law of Prisoner's Rights: An Overview. *Criminal Law Bulletin* 24:321–349.

ROSSUM, RALPH A. 1984 The Problem of Prison Crowding: On the Limits of Prison Capacity and Judicial Capacity. *Benchmark* 1, no. 6:22–30.

## PRISONERS' RIGHTS
(Update 2)

During the 1990s, the Supreme Court, with a few exceptions, continued to narrowly construe the scope of prisoners' constitutional rights. In 1974, the Court had held that a disciplinary hearing that may result in the revocation of good-time credits must be accompanied by certain procedural safeguards, such as notice of the disciplinary charge before the hearing. But in *Sandin v. Conner* (1995), the Court concluded that DUE PROCESS OF LAW affords no procedural protection to a prisoner sentenced to a disciplinary-segregation unit for thirty days for a disciplinary infraction.

In *Lewis v. Casey* (1996), the Court held that prisoners' right of access to the courts does not include the right to litigate a claim effectively. Prison officials may have to make some limited assistance available to inmates to ensure that they have a "reasonably adequate opportunity" to file nonfrivolous claims challenging their convictions, sentences, or conditions of confinement. But once their claims have been filed in court, prisoners are, as a constitutional matter, on their own.

Some of the most significant restrictions on prisoners' rights have emanated not from the Supreme Court but from Congress. Under the Prison Litigation Reform Act, for example, prisoners who have obtained injunctive relief can be required to reestablish periodically that they are entitled to the court-ordered relief. These and other restrictions to which prisoners, but not nonprisoners, are subject under the statute have provoked controversy, litigation, and debate.

LYNN S. BRANHAM
(2000)

Bibliography

BOSTON, JOHN and MANVILLE, DANIEL E. 1995 *Prisoners' Self-Help Litigation Manual*, 3rd ed. New York: Oceana Publications.

BRANHAM, LYNN S. 1998 *The Law of Sentencing, Corrections, and Prisoners' Rights in a Nutshell.* St. Paul, Minn.: West Group.

## PRIVACY

See: Right of Privacy

## PRIVACY ACT
88 Stat. 1896 (1974)

The Privacy Act was passed in response to public concern about "data banks" maintained by United States government agencies. Often, a person did not know what agencies held files on him or what such files contained. In addition, information provided to one government agency—often under a promise of confidentiality—was passed on to a second agency to be used for a different purpose, and that without the knowledge or consent of the individual concerned.

The act was passed by Congress and signed by Presi-

dent GERALD R. FORD in December 1974. According to its provisions: an individual is to have access to any files concerning him maintained by a government agency (except law-enforcement and national security files); an individual who believes that information about him in a government file is inaccurate or incomplete may seek injunctive relief to correct the file; no agency is to use information provided by an individual for other than the original purpose, or to provide the information to another agency, without the individual's consent; no agency may deny benefits to individuals who refuse to disclose their social security numbers; and no agency may maintain records describing the exercise of rights protected by the FIRST AMENDMENT.

DENNIS J. MAHONEY
(1986)

Bibliography

O'BRIEN, DAVID M. 1979 *Privacy, Law, and Public Policy.* New York: Praeger.

## PRIVACY AND THE FIRST AMENDMENT

William L. Prosser has listed four categories of invasion of privacy: intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; public disclosure of embarrassing private facts about the plaintiff; publicity which places the plaintiff in a false light in the public eye; and appropriation, for the defendant's advantage, of the plaintiff's name or likeness. Absent the communication of information disclosed by the intrusion, the first category of invasion raises no FIRST AMENDMENT issue.

The second category, the public disclosure of embarrassing private facts, clearly does raise a First Amendment issue. When does the FREEDOM OF THE PRESS to report "news" outbalance the individual's RIGHT TO PRIVACY, even if the disclosure is of embarrassing private facts? Thus far, the Supreme Court has only partially answered that question. In COX BROADCASTING CORPORATION V. COHN (1975) the Court held that the state could not impose liability for invasion of privacy by reason of the defendant's television news disclosure of the name of a rape victim. The Court held that the First Amendment immunized the press from such liability where the information disclosed was truthful and had already been publicly disclosed in court records. Subsequent decisions have indicated that such a First Amendment privilege applies as well to the publication of material in at least some official records designated confidential—for example, information about a criminal proceeding involving a juvenile, even though it was obtained from sources other than the public record. But what of intimate private fact disclosures that do not involve criminal proceedings, or other official action? Or suppose the disclosure of private facts is embarrassing to the subject, but does not injure reputation. Which prevails, the plaintiff's right of privacy or the defendant's FREEDOM OF SPEECH? The Supreme Court thus far has been silent on these issues, and the lower courts have offered no satisfactory answers.

The third category, known as "false light" privacy, was the subject of the Supreme Court's decision in *Time, Inc. v. Hill* (1967). Defendant's report in *Life* magazine of plaintiffs' encounter with gangsters was in part false, though not reputation injuring. The Supreme Court held that the defendant was entitled to a First Amendment defense in a false-light privacy action unless the defendant knew the matter reported was false or published with reckless disregard of the truth. The Court acknowledged that this standard was borrowed from the First Amendment defense to DEFAMATION which it had fashioned in NEW YORK TIMES V. SULLIVAN (1964). Where *Sullivan* had involved statements about a public official, *Hill* seemingly extended the First Amendment privilege to statements about "a matter of public interest." The First Amendment defamation defense was later expanded in GERTZ V. ROBERT WELCH, INC. (1974) to apply to reports involving "public figures" as well as "public officials," and to require at least a negligence standard of liability as regards defamation of nonpublic figures. The Supreme Court has not had occasion to reconsider the impact of the First Amendment upon "false light" privacy cases since its decision in *Gertz.*

The fourth category is more generally referred to as the "right of publicity." It differs fundamentally from the other categories in that the injury does not consist of embarrassment and humiliation. It is based rather upon the wrongful appropriation of a person's (usually a celebrity's) name or likeness for commercial purposes. The measure of recovery is based upon the value of the use, not the injury suffered from mental distress. The only Supreme Court decision to consider the impact of the First Amendment upon the right of publicity has been *Zacchini v. Scripps-Howard Broadcasting Co.* (1977). The plaintiff performed a "human cannonball" act at a county fair. The defendant photographed his entire act and broadcast it in a local television news program. Plaintiff sued for infringement of his right of publicity. The Supreme Court held that the defendant was not entitled to a First Amendment defense. The Court regarded this as "the strongest case" for the right of publicity because it involved "the appropriation of the very activity by which the entertainer acquired his reputation in the first place." Even in the usual case, where a celebrity's name or likeness is used in order to sell a product, the lower courts have not found the First Amendment to constitute a defense, and it seems unlikely that the Supreme Court would take a contrary view. On

the other hand, where the name or likeness is used as a part of an informational work, such as a biography or a biographical motion picture, in most cases the First Amendment would appear to constitute a valid defense.

MELVILLE B. NIMMER
(1986)

Bibliography

NIMMER, MELVILLE B. 1968 The Right to Speak from *Times* to *Time:* First Amendment Theory Applied to Libel and Misapplied to Privacy. *California Law Review* 56:935–967.

PROSSER, WILLIAM L. 1971 *Torts,* 4th ed. St. Paul, Minn.: West Publishing Co.

## PRIVATE DISCRIMINATION

The Constitution is a document filled with restraints upon the actions of government, but for the most part it has not been interpreted to extend its reach into the private sector. The FOURTEENTH AMENDMENT to the Constitution, for example, guarantees the EQUAL PROTECTION OF THE LAWS, a command against discrimination that the Supreme Court has long read as applying only to the actions of states. The Supreme Court in BOLLING V. SHARPE (1954) applied the antidiscrimination principle to the federal government, holding that the DUE PROCESS clause of the Fifth Amendment contains within it an equal protection component. No provision of the Constitution, however, has ever been interpreted to apply rules of equal protection directly to private entities, prohibiting a private citizen or corporation from discriminating against others on the basis of race, sex, or religion.

Acts of private discrimination, nevertheless, do raise a number of significant constitutional issues. First, to what extent does the THIRTEENTH AMENDMENT's abolition of SLAVERY serve as a constitutional restraint on private acts of discrimination less severe than actual slavery? Second, when are the actions of private entities sufficiently intertwined with government to be brought within the coverage of the Fourteenth Amendment's equal protection clause under the rubric of the STATE ACTION doctrine? Third, when the United States Congress forbids private discrimination, as in CIVIL RIGHTS laws prohibiting racial bias in employment or housing, from where in the Constitution does Congress derive its affirmative authority to pass such legislation? Finally, when laws are passed at the federal, state, or local level banning discrimination by private individuals, businesses, or organizations, do such laws violate the FREEDOM OF ASSEMBLY AND ASSOCIATION embodied in the FIRST AMENDMENT?

The Thirteenth Amendment is one of the few constitutional provisions that directly implicates private conduct. That amendment, the first of the three "CIVIL WAR amendments," flatly bans slavery and involuntary servitude. It acts directly upon private entities; slaves were owned by private businesses and individuals. The Thirteenth Amendment, however, has not been interpreted to provide a significant source of constitutional proscription against acts of private discrimination. While the Amendment has been construed by the Supreme Court to protect individuals from the "badges and incidents" of slavery as well as actual slavery itself, the Supreme Court held in the CIVIL RIGHTS CASES in 1883 that the Amendment does not restrict "mere discriminations on account of race or color." The Thirteenth is thus too narrow a prohibition to be of practical use as a restraint against the types of private discrimination prevalent in modern society. In 1968, however, the Supreme Court did hold that the Thirteenth Amendment serves as an important source of congressional power to pass legislation banning private acts of discrimination.

While the equal protection clause of the Fourteenth Amendment prohibits only governmental discrimination, under the so-called state action requirement many Supreme Court decisions have recognized that ostensibly private discrimination should be treated as state action because of some connection between the private actor and the government. When the private actor is performing a "public function," for example, its activities are treated as state action, and subject to the equal protection clause. The Supreme Court has thus held that segregated primary elections conducted by political parties in Texas involved public functions and violated the Fourteenth Amendment. In MARSH V. ALABAMA (1946) the Court held that a "company town," a privately owned area encompassing both residential and business districts that looked exactly like any other town and in which the private company had assumed all the normal functions of running a city, was subject to the limitations of the First and Fourteenth Amendments. The Court has also held that apparently private activity will be treated as state action when the state and private entities have a "symbiotic relationship," as where a private restaurant leases space in a public parking garage, or when the state has commanded or encouraged acts of private discrimination.

When neither the Thirteenth Amendment nor the "state action" doctrine under the Fourteenth Amendment can be stretched to embrace a particular type of private discrimination, then the Constitution of its own force does not render the private discrimination illegal. Federal, state, and local governments may then choose to pass legislation filling this vacuum, banning discrimination through statutes and ordinances. Modern American law is pervaded with restrictions directed against private entities forbidding discrimination of all kinds, including discrimi-

nation on the basis of race, ethnic origin, sex, sexual orientation, religion, age, and physical or mental disabilities. Many of these laws are acts of Congress. When Congress attempts to outlaw private discrimination, the first constitutional question to be addressed is whether Congress has affirmative constitutional power to enact the law.

Two principal constitutional sources have been advanced to support congressional legislation banning private discrimination: the COMMERCE CLAUSE, and Congress's powers under the enforcement clauses of the Thirteenth Amendment, Fourteenth Amendment, and FIFTEENTH AMENDMENT. In the debates leading to the passage of the CIVIL RIGHTS ACT OF 1964, one of the most important modern acts of legislation dealing with private discrimination, members of Congress debated whether the act should be grounded in Congress's power to regulate INTERSTATE COMMERCE or in its power under section 5 of the Fourteenth Amendment to enforce the Amendment by "appropriate legislation." Similar enforcement clauses exist under the Thirteenth Amendment, which abolished slavery; under the Fifteenth Amendment, which granted emancipated blacks the right to vote; and under several later amendments, including the NINETEENTH AMENDMENT (WOMAN SUFFRAGE), the TWENTY-THIRD AMENDMENT (voting in the DISTRICT OF COLUMBIA), the TWENTY-FOURTH AMENDMENT (abolition of POLL TAXES), and the TWENTY-SIXTH AMENDMENT, (establishing eighteen as voting age).

The Civil Rights Act of 1964 banned most significant acts of discrimination in the private sector, including such areas as employment transportation, restaurants, and hotel accommodations. Some members of Congress argued that the act should be rooted in the enforcement clause of the Fourteenth Amendment, because it was in reality an exercise in social legislation aimed at attacking racial bias. Other members, doubtful that the Fourteenth Amendment could be used to reach private discrimination, argued for buttressing the act under the well-established powers of Congress to regulate interstate commerce. In two significant 1964 decisions shortly following passage of the act, HEART OF ATLANTA MOTEL V. UNITED STATES and *Katzenbach v. McClung*, the Supreme Court upheld the Civil Rights Act on the basis of the commerce clause, and thus did not reach the question of congressional power under the Fourteenth Amendment.

As a practical matter, virtually any enactment of Congress aimed at private discrimination would be sustained under modern commerce clause analysis. Even localized acts of discrimination may, when considered cumulatively with other such acts around the nation, have a substantial impact on interstate commerce when aggregated. Under contemporary commerce clause theory, that potential aggregate impact would be enough to uphold the legislation. Because Congress's power under the commerce clause is so sweeping, there has been little cause for the Court to determine precisely how far congressional enforcement powers under the post-Civil War amendments may be extended to reach private-sector discrimination.

The few decisions that have dealt with congressional enforcement power under the Civil War amendments, however, indicate that Congress's power does include an ability to proscribe private activity that would not be directly prohibited by the substantive reach of the amendment itself. In an important decision involving the Thirteenth Amendment, JONES V. ALFRED H. MAYER CO. (1968), the Court upheld an application of the Civil Rights Act of 1866 to forbid private discrimination in property dealings. The Court held that Congress's power to enforce the Thirteenth Amendment included the power to identify "badges or incidents of slavery" and to pass laws NECESSARY AND PROPER to combat them.

In sum, there are ample sources of support in the Constitution for acts of Congress banning private discrimination. Congress has passed a considerable body of laws attacking such discrimination, often including in the legislation enforcement mechanisms or procedural advantages that actually make it easier to prove and obtain legal relief from acts of private discrimination than for claims based directly on the Constitution for discrimination by the government. Modern civil rights litigation frequently involves interpretation of such legislation, in which the courts are asked to determine just how far Congress has gone in a particular statute to ban discrimination in the private sector.

The final area of modern constitutional debate concerning discrimination in the private sector involves attempts by organizations engaged in discrimination to resist the application of laws banning such discrimination on the grounds that the laws infringe on the constitutional right of free association. The Civil Rights Act of 1964, and the many state and local civil rights laws passed in the 1960s and early 1970s modeled after that act, tended to reach only commercial private activity, such as employers, or stores, restaurants, and places of lodging generally "open for business to the public." A second generation of civil rights acts began to be passed by cities and states around the country, however, seeking to forbid discrimination by "private" clubs and organizations. Several of these groups claimed that these regulations violated their constitutional rights of free association.

These claims have, thus far, proved unsuccessful. In *Roberts v. United States Jaycees* (1984), the Supreme Court faced a Minnesota law that prohibited SEX DISCRIMINATION in groups such as the Jaycees. The Supreme Court established two types of FREEDOM OF ASSOCIATION: FREEDOM OF INTIMATE ASSOCIATION and "freedom of expressive association." Groups with strong claims to freedom of in-

timate association tend to be relatively small, exercise a high degree of selectivity, and maintain seclusion from others as critical aspects of the relationship. The Jaycees, the Court held, were basically unselective, and lacked the attributes that would qualify for recognition of intimate associational claims. The second freedom of expressive association is an incident of the FREEDOM OF SPEECH and assembly. The Court in *Roberts* held that application of state sex discrimination laws to the Jaycees would not impermissibly interfere with their freedom of expressive association, and it upheld the Minnesota law.

The Court next visited the freedom of association problem in *Board of Directors of Rotary International v. Rotary Club of Duarte* (1987). In characterizing the Rotary Club, the Court noted that although Rotary Clubs take no positions on "public questions," they do "engage in a variety of commendable service activities" protected by the First Amendment. These sorts of activities, however, posed no serious implications for infringement of the members' rights of expressive association. The lessons of these cases appear to be that attempts by private groups to resist imposition of antidiscrimination laws on free association grounds will probably fail, unless the groups possess genuinely impressive credentials as truly private organizations, with characteristics of exclusion or intimacy bordering on those of family or religious groups.

A related problem involves private religious schools that discriminate on the basis of race. The Supreme Court in *Norwood v. Harrison* (1973) held that a state could not lend textbooks to schools that practice racial SEGREGATION, even though such aid to a religious school would not be illegal under the ESTABLISHMENT CLAUSE. Notwithstanding the lack of any violation of the principle of SEPARATION OF CHURCH AND STATE, the Court held that there is no constitutional protection for state aid to RACIAL DISCRIMINATION. In BOB JONES UNIVERSITY V. UNITED STATES (1983), the Court held that the Internal Revenue Service had been authorized by Congress to deny tax-exempt status to private schools that discriminate on a racial basis, and that this denial did not prohibit the free exercise of religion.

Modern constitutional law, in conclusion, generally does not impose restraints on private discrimination through direct application of the Constitution itself. On the other hand, by refusing to recognize any significant constitutional barriers to antidiscrimination legislation, modern constitutional law facilitates efforts on the part of federal, state, and local governments to eradicate such discrimination.

RODNEY A. SMOLLA
(1992)

(SEE ALSO: *Affirmative Action; Badges of Servitude; Employment Discrimination; Fourteenth Amendment and Section 5 (Framing); Fourteenth Amendment and Section 5 (Judicial Construction); Racial Quotas; Racial Preference.*)

## PRIVATIZATION AND THE CONSTITUTION

Budget pressures and concerns for efficient administration have led governments increasingly to consider privatizing functions that have traditionally been conducted by public agencies. Many correctional facilities are now operated by private CORPORATIONS, for example, and private police often supplement and sometimes replace public police. Privatization raises interesting constitutional issues, only a few of which the Supreme Court has addressed.

The government's power to privatize even the most traditional public functions is probably unlimited by the federal Constitution. (Privatization may be limited by state constitutions, but those limitations are not considered here.) One might think that public security was an essentially government function, but there is a long tradition of private policing and private provision of fire protection services, sometimes in places where there were no public police or fire services. Similarly, there seems little reason to think that the federal Constitution bars a state government from eliminating its public school system. The Court has sometimes referred to "core government functions" of the states when discussing Congress's power to regulate state governments, but those references probably have no implications for governments' decisions to eliminate even core functions.

The Constitution may not limit the government's power to privatize, but it might limit the actions of the entities conducting the activities that previously were done by the government. The STATE ACTION doctrine holds that only government action is subject to the limitations expressed in the Constitution. Privatization places pressure on the state action doctrine: If a state contracts with a private operator of correctional facilities, may the prison guards beat prisoners without violating the Eighth Amendment's prohibition of CRUEL AND UNUSUAL PUNISHMENT because the guards are employed by a private company, not the state? The Court has not yet comprehensively confronted the question of privatization.

Privatization of public functions occurs in two forms: through quasi-public corporations and through contracting-out. The government may set up a corporation to conduct some activity that previously had been done by the government itself. The United States Postal Service and Amtrak are good examples. These quasi-public corporations typically have boards of directors appointed by public authorities, but they operate without substantial direct pub-

lic supervision. Their operations are financed not by appropriations in the government budget but by fees they charge the public and funds they borrow in the general market. Further, no legislative committee regularly conducts oversight hearings on their operations.

The Court initially addressed the legal status of quasi-public corporations in a series of cases involving the use of such corporations to build warships, but those cases did not raise questions about whether such corporations had to comply with the Constitution's individual rights provisions. In 1995 the Court in LEBRON V. NATIONAL RAILROAD PASSENGER CORP. held that Amtrak had to comply with constitutional requirements. The case involved a decision to exclude a political advertisement criticizing the Coors beer company for its alleged support of conservative causes. Amtrak took the position that, like any owner of private property, it could exclude the advertisement without considering any possible constitutional concerns. The Court said that Amtrak was "not a private entity but the Government itself," in large part because the President appointed a majority of Amtrak's board of directors. The decision's scope is unclear because the degree of public control over Amtrak remained unusually substantial. The result might differ if the quasi-public corporation's board of directors had only minority representation from public appointees. (The President has the power to appoint a minority of the board of directors of Comsat, the corporation that operates communications satellites.) Yet political constraints may limit extensive privatization without public control. Legislators may be unwilling to privatize unless they are assured that public appointees will have a substantial role in the quasi-public corporation's decisions. When they do have such a role, *Lebron* suggests that constitutional restraints will apply.

The Court has discussed contracting-out extensively in two cases. *Rendell-Baker v. Kohn* (1982), the more important, involved a privately owned and operated school that contracted with the state to instruct "problem" students. The school received over 90 percent of its budget from public funds, and nearly all its students were referred to it by public institutions. Rendell-Baker, a teacher, was fired by the school for disagreeing with school policies. The Court held that the school was not a "state actor," and that the FIRST AMENDMENT therefore did not restrict the school's ability to discharge its employers, as it would in the public school system. According to the Court, the school's decision to fire Rendell-Baker was not "compelled or even influenced by any state regulation."

*West v. Atkins* (1988) involved a private doctor who contracted to provide medical services to prisoners. The Court held that the state was subject to liability based on the doctor's failure to provide medical care that satisfied constitutional requirements. Contracting out the state's constitutional obligation to provide adequate medical care to those whose lives it controlled in its prisons did not relieve the state of responsibility. The difference from *Rendell-Baker* was apparently that the state had no federal constitutional duty to provide an education to problem students.

*Rendell-Baker*'s approach, emphasizing whether the state directed the action in question, suggests the importance of political constraints on privatization. Those conducting activities formerly performed by the government are limited by the provisions of their contracts with the government, and by whatever other regulations the government chooses to enact. The Constitution comes into play only when the action in question is not prohibited either by the contract or by other regulations. In many circumstances, however, public officials have political reasons to include restrictive provisions in their contracts. For example, state teachers' unions may insist that schools receiving vouchers provide protections to their employees roughly equivalent to the protections public school teachers receive from the Constitution. In other circumstances, however, these political restraints may be less important. For example, legislators may face few political pressures when they contract out correctional services.

Privatization of public functions seems likely to increase, and the Court will be asked to clarify its constitutional implications. At this point, however, one can say only that privatization has constitutional implications, but not what those implications are.

MARK TUSHNET
(2000)

Bibliography

FROOMKIN, A. MICHAEL 1995 Reinventing the Government Corporation. *University of Illinois Law Review* 1995:543–634.

## PRIVILEGE, EVIDENTIARY

See: Evidentiary Privileges

## PRIVILEGE AGAINST SELF-INCRIMINATION

See: Right Against Self-Incrimination

## PRIVILEGED COMMENT

See: Libel and the First Amendment

## PRIVILEGE FROM ARREST

That legislators should be free from the threat of arrest except for notorious crimes while attending legislative sessions or en route to or from them has been recognized in English law for at least 1300 years. After the AMERICAN REVOLUTION that privilege was inserted into several state constitutions and the ARTICLES OF CONFEDERATION.

Because the privilege does not extend to "FELONY, or BREACH OF THE PEACE," it amounts in practice to immunity from arrest in civil matters, such as nonpayment of debts. The privilege is less a guarantee of legislative independence from executive abuse than a protection of public business from interference growing out of private disputes.

DENNIS J. MAHONEY
(1986)

## PRIVILEGES AND IMMUNITIES

The Constitution's two privileges and immunities clauses were born of different historical circumstances and inspired by different purposes. Yet they are bound together by more than their textual similarity. Both clauses look to the formation of "a more perfect Union," both sound the theme of equality, and both have raised questions about the role of the federal judiciary in protecting NATURAL RIGHTS.

The original Constitution's Article IV set out several principles to govern relations among the states. The FULL FAITH AND CREDIT CLAUSE established one such principle, and so did the clauses providing for interstate rendition of fugitive felons and fugitive slaves. (See SLAVERY AND THE CONSTITUTION; FUGITIVE SLAVERY; FUGITIVE FROM JUSTICE.) Along with these "interstate comity" provisions was included this guarantee: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Called "the basis of the Union" by ALEXANDER HAMILTON in THE FEDERALIST #80, the first privileges and immunities clause aimed at preventing a state from subjecting another state's citizens to discriminatory treatment of the kind customarily given to ALIENS. The framers saw the clause as embodying the principles of a much longer provision in the ARTICLES OF CONFEDERATION, which had begun with this statement of objective: "The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union. . . ."

From the beginning everyone understood that Article IV's privileges and immunities clause could not mean exactly what it said. A Virginian who came to Boston surely had a right to engage in trade, but just as surely could not expect to be a candidate for governor of Massachusetts. What principle distinguished these two activities? Early in the nineteenth century, Justice BUSHROD WASHINGTON, sitting on circuit in CORFIELD V. CORYELL (1823), read the clause to guarantee equality for out-of-state citizens only as to "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which comprise this Union. . . ." Washington went on to list "some" of those "fundamental" privileges, in language broadly inclusive of nearly every sort of right imaginable. Not only did a citizen of one state have a right "to pass through, or to reside in any other state for purposes of trade, agriculture, professional pursuits, or otherwise"; he also had the right, said Washington, to "enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole." Other rights were listed, such as a right of access to a state's courts and a right to nondiscriminatory taxation. Portentously, the passage ended by mentioning "the elective franchise" as a fundamental right.

No one, not even Washington, thought a state had a constitutional duty to let out-of-staters vote in state elections. The inference arises that in offering his list of "fundamental" privileges and immunities Washington had in mind something beyond a catalogue of rights of interstate equality. That broader objective may have been to make Article IV's privileges and immunities clause into a generalized federal constitutional guarantee of liberty, available to local citizens and out-of-staters alike—with identification and enforcement of "fundamental" liberties in the hands of the federal judiciary.

This "natural rights" vision of the privileges and immunities clause of Article IV has never found favor in the Supreme Court. The Court has not interpreted the clause as a source of substantive rights, apart from the right to some measure of equality in a state's treatment of citizens of other states. The term "citizens" has been consistently limited, in this context, to natural persons who are citizens of the United States, thus excluding both corporations and aliens from the clause's protection. The substantive reach of the clause, too, was narrow in the Court's early interpretations: the right to pursue a common calling, the right to own and deal with property, the right of access to state courts.

Even in this restrictive interpretation, the interstate equality demanded by the clause overlaps with the antidiscrimination principle that restricts STATE REGULATIONS OF COMMERCE. The same law, in other words, might violate both the implied limitations of the COMMERCE CLAUSE and

the privileges and immunities clause of Article IV. Yet the commerce clause has been a more significant guarantee against interstate discrimination. The commerce clause presumptively forbids a state to discriminate against INTERSTATE (or FOREIGN) COMMERCE, even when the persons engaging in that commerce are the state's own citizens. And the commerce clause, unlike the privileges and immunities clause, protects both corporations and aliens from discrimination against their activities in commerce.

A major shift in judicial attitude toward the privileges and immunities clause was signaled by TOOMER V. WITSELL (1948). South Carolina licensed shrimp boats in coastal waters, demanding license fees of $25 per boat from residents and $2,500 from nonresidents. (Since the adoption of the FOURTEENTH AMENDMENT, state residence and state citizenship have been treated as virtually equivalent.) The Supreme Court held this discrimination a violation of both the commerce clause and the privileges and immunities clause, and in its opinion reformulated the latter clause's governing doctrine. Henceforth any state discrimination against citizens of other states would be held invalid unless the state demonstrated a "substantial reason for the discrimination" apart from their out-of-state citizenship. In *Doe v. Bolton* (1973), a companion case to ROE V. WADE (1973), the Court applied the *Toomer* formula to strike down a Georgia law allowing only state residents to obtain abortions in Georgia.

*Toomer* seemed to have dispatched the "fundamental" privileges limitation in favor of a straightforward requirement of substantial justification for discrimination against out-of-staters. But here as elsewhere in constitutional law the idea of FUNDAMENTAL INTERESTS has had remarkable recuperative power. BALDWIN V. FISH & GAME COMMISSION (1978) revived the doctrine to uphold a Montana law that charged a state resident $9 for an elk hunting license and a nonresident $225. (The nonresident might also use the license to kill one bear and one deer, to shoot game birds, and to fish. The same package of sanguinary privileges would cost a resident $30.) Elk hunting, said the Court, was a sport, not a means to livelihood; equal access for out-of-staters to Montana elk was "not basic to the maintenance of well-being of the Union," and thus not a "fundamental" privilege protected by Article IV against interstate discrimination. Only four weeks later, in HICKLIN V. ORBECK (1978), the Court returned to the *Toomer* approach to invalidate an Alaska law giving preference to state residents in employment in jobs related to construction of the Alaska pipeline. The state had not offered substantial justification for the discrimination, the Court said, and therefore it was invalid. *Baldwin* was not cited.

The cleanest way to resolve the tension between these two decisions would have been to abandon *Baldwin* as a doctrinal sport. Instead, the Supreme Court combined both lines of decision in a new formula. In *United Building & Construction Trades Council v. Mayor and Council of Camden* (1984) and SUPREME COURT OF NEW HAMPSHIRE V. PIPER (1985) the Court established a two-part test for determining the validity of a state law challenged under Article IV's privileges and immunities clause. The first inquiry follows *Baldwin:* the law is limited by the clause only when its discrimination against out-of-staters touches a privilege that is "fundamental" to interstate harmony. The Court made clear in *Piper* that access to a means of livelihood is such a privilege. The second inquiry follows *Toomer* and *Hicklin:* if the privilege in question is "fundamental," the discrimination is invalid unless there is a "substantial" reason for treating out-of-staters differently, and the law's discrimination bears a "substantial relationship" to that objective. The second requirement states an intermediate STANDARD OF REVIEW for judicial scrutiny of both the state's purposes and its discriminatory means.

Special problems have plagued the Supreme Court's efforts to apply the privileges and immunities clause of Article IV to cases in which the discriminating states have acted as purchasers of goods and services, or owners of property, or proprietors of enterprises. In the *Camden* case, the Court refused to recognize a general exemption of such activities from the strictures of the clause; if the activities affected a "fundamental" interest, the clause would be implicated. In the same breath, however, the Court suggested that the state's interests as a market participant might be relevant to the second part of the new two-part inquiry: the question of justification for discriminating against out-of-staters. Justification for some state preferences for local citizens may be found in the citizens' obligations to support local government. *Toomer*'s teaching is that the justification must be substantial.

Thus far the privileges and immunities clause of Article IV has been applied only to state laws discriminating against out-of-staters. Concurring in *Zobel v. Williams* (1982), Justice SANDRA DAY O'CONNOR argued for a broader application of the clause that would place constitutional limits on any state law—even a law discriminating between different groups of the state's own citizens—when the law disadvantages persons who have only recently arrived in the state. Justice O'Connor would have found a violation of the clause in Alaska's law distributing the state's oil revenues to Alaska citizens in proportion to the length of their residence; she argued that the law imposed "disabilities of alienage"—a result the clause was designed to forbid. The majority, holding the law invalid on equal protection grounds, rejected this novel interpretation in favor of the conventional view: the privileges and immunities clause of Article IV is inapplicable to such a case, for the clause speaks only to discrimination against citizens of other states.

A second privileges and immunities clause was added to the Constitution in 1868 as part of the Fourteenth

Amendment: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Justice ROBERT H. JACKSON, concurring in EDWARDS V. CALIFORNIA (1941), said expansively that "[t]his clause was adopted to make United States citizenship the dominant and paramount allegiance among us." The fact is that the amendment's framers did not sharply differentiate the functions of the various clauses of the amendment's first section and did not speak with one voice concerning the purposes of the privileges and immunities clause. Undoubtedly, however, the clause was meant to have some effect as a limitation on the states. The amendment's opening sentence "overruled" DRED SCOTT V. SANDFORD (1857) by conferring United States citizenship and state citizenship on "all persons born or naturalized in the United States and subject to the jurisdiction thereof." The privileges and immunities clause, following immediately in the amendment's text, surely was intended to give some substantive content to the rights of citizenship, and particularly to the equal citizenship of blacks. (See EQUAL PROTECTION OF THE LAWS.) Yet the Supreme Court, in its first encounter with the clause, read it, as Justice STEPHEN J. FIELD aptly said in dissent, to be "a vain and idle enactment, which accomplished nothing." In the SLAUGHTERHOUSE CASES (1873) a 5–4 majority, distinguishing the privileges and immunities of national citizenship from those of state citizenship, confined the former to rights established elsewhere in the Constitution and federal laws and to rights that were already fairly inferable from the relation of a citizen to the national government. (Examples of the latter would be the right to United States protection in other countries, the right to enter public lands, or the right to inform federal authorities of violations of federal law.) The majority described *Corfield*'s list of "fundamental" rights as privileges of state citizenship, subject to Article IV's guarantee of interstate equality but untouched by the new privileges and immunities clause of the Fourteenth Amendment.

The Court feared that a contrary reading of the privileges and immunities clause, coupled with the power of Congress to enforce the Fourteenth Amendment, would not only "constitute this court a perpetual censor upon all legislation of the states" but also "bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states." Such a result, the Court accurately said, would radically restructure the federal union, centralizing power in the national government. No doubt some congressional proponents of the Fourteenth Amendment had hoped for precisely that result. The *Slaughterhouse Cases* dissenters viewed the prospect with equanimity and even sought to revive the natural rights philosophy of *Corfield* in the name of the Fourteenth Amendment. In doctrinal terms, however, they lost the battle decisively. The Court has never given the Fourteenth Amendment's privileges and immunities clause any significant content that is distinctively its own.

Occasional flurries of activity have suggested impending revitalization of the clause. Justice HUGO L. BLACK made the clause a centerpiece in his effort to persuade the Court to recognize the total incorporation of the Bill of Rights into the Fourteenth Amendment. (See INCORPORATION DOCTRINE.) And for a season the clause came to life as a limitation on state taxing power, until MADDEN V. KENTUCKY (1940) overruled COLGATE V. HARVEY (1935). Individual Justices have promoted the clause in concurring opinions, such as that of Justice Jackson in *Edwards v. California* (1941) (right to move freely from state to state) and that of Justice OWEN ROBERTS in HAGUE V. COMMITTEE FOR INDUSTRIAL ORGANIZATION (1939) (right to assemble to discuss national legislation), but these ventures have been largely superseded by the development of other constitutional limitations on the states.

In the modern era, Justice Jackson's *Edwards* argument has borne fruit in the development of a constitutional RIGHT TO TRAVEL. The right is now well established as a limitation on state power, but the right's source in the Constitution remains unspecified. The commerce clause is one obvious candidate, and not just one but both privileges and immunities clauses have also been nominated. (Congressional interferences with the freedom of foreign travel have been tested against the Fifth Amendment's DUE PROCESS clause.) Plainly, the Supreme Court has no need to rely on either privileges and immunities clause as an independent source for the right to travel.

Although the natural rights approach to constitutional adjudication failed to make headway in the name of either of the privileges and immunities clauses, in the field of ECONOMIC REGULATION the views of the *Slaughterhouse Cases* dissenters came to prevail for almost half a century under the banner of SUBSTANTIVE DUE PROCESS. (See FREEDOM OF CONTRACT.)That experiment in JUDICIAL ACTIVISM was closed in the 1930s, but a similar philosophy has informed the revival of substantive due process as a protection of personal freedoms. Some commentators have suggested that the Fourteenth Amendment's privileges and immunities clause may be an apt vessel for these newer constitutional liberties, or even for yet-to-be-discovered affirmative constitutional obligations of government. After a century and more on the constitutional shelf, all the vessel needs is a little polishing.

KENNETH L. KARST
(1986)

Bibliography

ELY, JOHN HART 1980 *Democracy and Distrust: A Theory of Judicial Review*. Pages 22–30. Cambridge, Mass.: Harvard University Press.

FAIRMAN, CHARLES 1971 *Reconstruction and Reunion, 1864–-*

88, *Part One*. Chap. 20. (Volume VI, History of the Supreme Court of the United States.) New York: Macmillan.

KURLAND, PHILIP B. 1972 The Privileges and Immunities Clause: "Its Hour Come Round at Last?" *Washington University Law Quarterly* 1972:405–420.

SIMSON, GARY J. 1979 Discrimination against Nonresidents and the Privileges and Immunities Clause of Article IV. *University of Pennsylvania Law Review* 128:379–401.

VARAT, JONATHAN D. 1981 State "Citizenship" and Interstate Equality. *University of Chicago Law Review* 48:487–572.

## PRIVY COUNCIL

The Privy Council together with the monarch constitutes "the Crown," which is, in theory, the executive branch of the British government. Association of the council in the exercise of executive power was a check against the abuse of that power. The council is appointed for life and comprises members of the royal family, ministers and former ministers of state, judges, and distinguished subjects. In practice, the cabinet has become, through an evolutionary process, the executive committee of the Privy Council.

In the seventeenth and eighteenth centuries the Privy Council exercised the royal prerogative of disallowing acts of the colonial legislatures. At the same time the council was the highest court of appeal from the colonial courts (a function now exercised by the judicial committee of the Privy Council). The role of the Privy Council in the political order of the British Empire was thus suggestive of both the VETO POWER and JUDICIAL REVIEW.

Some of the early state constitutions provided for a council to share the executive power or to review acts of the legislature. At the CONSTITUTIONAL CONVENTION OF 1787 various unsuccessful proposals for a plural executive reflected the British notion of the Privy Council as a check against royal tyranny.

DENNIS J. MAHONEY
(1986)

## PRIZE CASES
### 2 Black (67 U.S.) 635 (1863)

In the *Prize Cases*, a 5–4 majority of the Supreme Court sustained the validity of President ABRAHAM LINCOLN'S blockade proclamations of April 1861, refusing to declare unconstitutional his unilateral actions in meeting the Confederacy's military initiatives.

Lincoln proclaimed a blockade of southern ports on April 19 and 27, 1861. Congress authorized him to declare a state of insurrection by the Act of July 13, 1861, thereby, at least in the view of the dissenters, giving formal legislative recognition to the existence of civil war. By the Act of August 6, 1861, Congress retroactively ratified all Lincoln's military actions. The *Prize Cases* involved seizures of vessels bound for Confederate ports prior to July 13, 1861.

For the majority, Justice ROBERT C. GRIER held that a state of CIVIL WAR existed DE FACTO after the firing on Fort Sumter (April 12, 1861) and that the Supreme Court would take judicial notice of its existence. Though neither Congress nor President can declare war against a state of the Union, Grier conceded, when states waged war against the United States government, the President was "bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name." Whether the insurgents were to be accorded belligerent status, and hence be subject to blockade, was a POLITICAL QUESTION to be decided by the President, whose decision was conclusive on the courts. Grier reproved the dissenters by reminding them that the court should not "cripple the arm of the government and paralyze its power by subtle definitions and ingenious sophisms."

Justice SAMUEL NELSON for the dissenters (Chief Justice ROGER B. TANEY, and Justices JOHN CATRON and NATHAN CLIFFORD) argued that only Congress can declare a war and that consequently the President can neither declare nor recognize it. A civil war's "existence in a material sense . . . has no relevancy or weight when the question is what constitutes war in a legal sense." Lincoln's acts before 13 July 1861 constituted merely his "personal war against those in rebellion." Therefore seizures under the blockade proclamations were illegal.

The *Prize Cases* permitted the federal government the convenient ambiguity of treating the Confederacy as an organized insurgency and as a conventional belligerent. The opinions also had an implicit relevance to other disputed exercises of presidential authority. Defenders of a broad executive power could argue that the majority opinion's reasoning supported the constitutionality of Lincoln's call for volunteers, of his suspension of the writ of HABEAS CORPUS, and perhaps also of the EMANCIPATION PROCLAMATION.

WILLIAM M. WIECEK
(1986)

## PROBABLE CAUSE

The FOURTH AMENDMENT guarantees in part that "The right of the people to be secure in their persons, houses, papers and effects, against UNREASONABLE SEARCHES and seizures shall not be violated, and no warrants shall issue but upon probable cause. . . ." The determination of probable cause necessarily turns on specific facts and often requires the courts and the police to make most difficult decisions. The

need for probable cause in American CRIMINAL PROCEDURE arises in three instances: probable cause to ARREST or detain, probable cause to search, and probable cause to prosecute. The first two derive constitutional status directly from the Fourth Amendment and govern the conduct of the police. An inquiry by a judge or GRAND JURY into probable cause for prosecution is not constitutionally required in state cases; however, this check on the exercise of prosecutorial discretion is prescribed by statute or state constitutional mandate in most states and is constitutionally required by the Fifth Amendment in federal cases.

As to arrest and search, the language of the Fourth Amendment does not distinguish between SEARCHES AND SEIZURES of objects, and arrests—"seizures" of the person. While one might assume that the term would have equivalent meanings in both the search and arrest contexts, the differences between arrests of suspects and searches for evidence or contraband require the probable cause standard to be applied to different types of data for the two procedures. Probable cause for a search does not automatically support an arrest, nor does a valid ARREST WARRANT necessarily support a search.

Probable cause in the arrest context was defined by the United States Supreme Court in *Beck v. Ohio* (1964) as turning on "whether at that moment [of arrest] the facts and circumstances within [the officers'] knowledge and of which they [have] reasonably trustworthy information [are] sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense. There are two potential sources of information—personal knowledge and "trustworthy" secondary data. The Supreme Court has clearly established that secondary data—information not within the officer's personal knowledge—can supply sufficient grounds for an arrest. Thus, the police may rely on reports from other cities or states to support valid arrests, as in *Whitely v. Warden* (1971). Credible information supplied by an informant may also be used.

The officer's specific knowledge derived from direct contact with the arrestee is usually the primary support for a finding of probable cause. It is clear such information must be specific. Mere knowledge that, for example, a suspect has been convicted in the past coupled with an unidentified INFORMANT'S TIP alleging current criminal activity has been held to be insufficient.

Even specific EVIDENCE linking an individual to a crime will not justify an arrest if the evidence has been discovered unconstitutionally. An arrest cannot be justified by evidence seized pursuant to the arrest; as the Court said in *Sibron v. New York* (1968): "An incident search may not precede an arrest and serve as part of its justification."

Evidence discovered in an on-street investigative encounter that has not yet reached the level of an arrest may be properly used to create probable cause. For example, if as a result of a STOP-AND-FRISK encounter on the street, authorized by TERRY V. OHIO (1968), an officer feels a weapon, he has probable cause to arrest for carrying a concealed weapon. Similarly, if in the course of a temporary detention the suspect fails adequately to account for his suspicious actions or if he affirmatively discloses incriminating evidence, probable cause to arrest may be established. The same is true if the suspect runs away. While flight alone does not create probable cause to arrest, it is a significant factor to be considered in the overall assessment.

By contrast, however, as the Court held in *Brown v. Texas* (1979), the mere failure of a suspect to identify himself, without more, does not supply probable cause. Nor may a valid arrest rely on an individual's failure to protect his innocence when found with suspects for whom probable cause exists, as in *United States v. Di Re* (1948).

*Di Re* also stands for the proposition that mere presence of an individual in the company of others who are properly suspected of criminal activity does not constitute probable cause. Subsequent cases, however, have made clear that there are limits to this principle. The difficulties here have largely come with possessory offenses. On the one hand, the Court in *Johnson v. United States* (1947) held that a tip that opium was being smoked coupled with the smell of opium outside a hotel room did not give rise to probable cause to arrest everyone in the room. Although there was probable cause to believe a crime was being committed, there was insufficient information to determine who was committing it. Yet in KER V. CALIFORNIA (1963) the Court upheld the arrest of a married couple found in their kitchen with a brick of marijuana, even though the tip leading them there had linked only the husband to the contraband. The Court reasoned that the combination of the wife's presence in a small kitchen with obvious contraband, coupled with information that the husband had been using the apartment as a base for his drug activities, gave sufficient grounds for a reasonable belief that they were both in possession of marijuana.

This requirement of linking probable cause specifically to the arrestee was again mentioned by the Court in YBARRA V. ILLINOIS (1979). There the police procured a valid warrant to search a tavern believed to be the center of drug activity. In executing the warrant, the police searched about a dozen of the tavern's patrons, including Ybarra. While the case thus actually dealt with the legitimacy of the search rather than an arrest, the Court stated: "[W]here the standard is probable cause, a search or *seizure of a person* must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause

to search or seize another or to search the premises where the person may happen to be." (Emphasis added.) *Ybarra* thus reinforces the requirement that probable cause be particularized to the person arrested; mere presence at a place connected with criminal activity, or in the company of suspected criminals, without more, is inadequate.

Finally, the Court held in *Gerstein v. Pugh* (1975) that whenever a suspect has been arrested without a warrant and with no prior INDICTMENT, he is entitled to a quick judicial check on the police conclusion that there is probable cause to detain him if he will undergo a "significant pretrial restraint on liberty"—more than the mere condition that he return for trial. This hearing, while constitutionally required if these conditions are met, need not be adversary and does not give rise to a RIGHT TO COUNSEL. As with the hearing to obtain an arrest warrant, this proceeding does not even require the accused's presence. The standard of proof is simply whether there is probable cause to believe the suspect has committed a crime.

The search context is the second major area in which the issue of probable cause arises. Most courts hold that probable cause for a search exists when the facts and circumstances in a given situation are sufficient to warrant a man of reasonable caution to believe that seizable objects are located at the place to be searched. (See BRINEGAR V. UNITED STATES; CARROLL V. UNITED STATES.)

The probable cause determination is generally based on the information supplied to the magistrate in the application for a search warrant. An application must be sworn to and must allege the place to be searched, the property to be seized, the person having the property if it is to be taken from his control, and the underlying crime. There is no requirement that everything must be set out in the application itself; affidavits may be attached or sworn statements taken before the magistrate. Because applications are usually submitted by police officers who do not have legal training, the language of the application is to be construed in a nontechnical way. Nevertheless, if the application is all that is submitted, and it is expressed in "conclusory" terms only, it will be insufficient to establish probable cause. Sufficient data must be contained in either the application itself or the supporting affidavits to justify the magistrate in issuing the warrant.

Although no blanket assertion can explain all cases involving probable cause for the issuance of search warrants, one useful rule of thumb is that if the affidavit and supporting documents allege facts that can explain to the magistrate the basis for the probable cause determination, a warrant based on such an affidavit is likely to be good. On the other hand, when an affidavit asserts a mere conclusion such as "we have it on good information and do believe there are drugs at the suspect's home," there is no independent basis for the magistrate's determination. A warrant based on such a showing is likely to be invalid.

The hardest issue arises when the affiant police officer is not the source of the information but is relying on an informant. Most of the Supreme Court's decisions concerning the required credibility of informants have arisen in cases involving SEARCH WARRANTS rather than arrest warrants, but the standards for use of informants in both contexts are the same.

The Supreme Court first enunciated the requirements for a valid informant-based warrant in AGUILAR V. TEXAS (1964). According to this test, the affidavit must: (a) set forth sufficient underlying circumstances to demonstrate to a neutral and detached magistrate how the informant reached hisher conclusion; *and* (b) establish the reliability or credibility of the informant. In the subsequent case, SPINELLI V. UNITED STATES (1969), the Supreme Court explained that the absence of a statement detailing the manner in which the informant's data were gathered renders it especially important that "the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor . . . or an accusation based merely on an individual's general reputation."

The *Aguilar/Spinelli* test has, however, been rejected by ILLINOIS V. GATES (1983). The Court in *Gates* introduced a totality-of-the-circumstances test, stating that it was not necessary to establish the credibility of the informant as a separate element to a valid search warrant. Instead, reliability and credibility of the informer and his basis of knowledge are considered as intertwining considerations that may illuminate the probable cause issue. In *Gates* the police received an anonymous informant's letter containing details of the defendants' involvement in drug trafficking which were corroborated by police investigations. The Court held that this provided a sufficient basis for a finding of probable cause.

Finally, according to *Henry v. United States* (1959), if the police had probable cause to arrest or search, the fact that the information on which they relied turns out to be false does not invalidate the arrest or search. Sufficient probability is the touchstone of Fourth Amendment reasonableness. (See PRELIMINARY HEARING.)

CHARLES H. WHITEBREAD
(1986)

Bibliography

LAFAVE, WAYNE R. 1978 *Search and Seizure: A Treatise on the Fourth Amendment.* St. Paul, Minn.: West Publishing Co.

## PROCEDURAL DUE PROCESS OF LAW, CIVIL

The Fifth Amendment forbids the United States to "deprive" any person of "life, liberty, or property without DUE

PROCESS OF LAW." The FOURTEENTH AMENDMENT imposes an identical prohibition on the states.

Due process is the ancient core of CONSTITUTIONALISM. It is a traditional legal expression of concern for the fate of persons in the presence of organized social power. The question of according due process arises when governments assert themselves adversely to the interests of individuals.

In modern usage "due process" connotes a certain normative ideal for decisions about the exercise of power. Very broadly, it has come to mean decisions that are not arbitrary, but are aligned with publicly accepted aims and values; are not dictatorial, but allow affected persons a suitable part in their making; and are not oppressive, but treat those affected with the respect owed political associates and fellow human beings. It is from the liberal individualist tradition that these abstract due process standards—of reason, voice, and dignity—have drawn their more concrete content. That content includes the definition of proper aims for state activity, the canons of legitimating participation and consent, and the conceptions of human personality that set the threshold of respectful treatment.

The law distinguishes between "substantive" and "procedural" due process. An arbitrary or groundless decision may violate substantive due process regardless of how it came to be made. O'CONNOR V. DONALDSON (1975), for example, held that no antecedent procedure will justify incarceration of a harmless eccentric. Conversely, a peremptory decision may violate procedural due process regardless of purposive justification. Guilt in fact will not justify sudden, final dismissal of a faithless government employee without a hearing, as the Supreme Court stated in ARNETT V. KENNEDY (1974). The due process claim is "procedural" rather than "substantive" when it questions not the state's authority to impose the harm in question by an adequate decision process, but rather the adequacy of the process actually used.

Of course, procedural demands gain much of their power from their perceived contribution to substantive accuracy and enlightenment. Justice FELIX FRANKFURTER stated in JOINT ANTI-FASCIST COMMITTEE V. MCGRATH (1951): "No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done."

The focal concern of procedural due process is the set of procedures, epitomized by the judicial trial, whereby governing rules and standards are brought to bear on individuals in specific cases. The doctrine also has some further extension to the formation of the governing rules and standards. Due process can support a claim for direct voice in the formation process, for example, by industry members regarding regulatory standards under consideration by an administrative agency. It can also be the ground of an objection to the nonrepresentative character of the political process in which a standard originates, for example, a restriction on professional entry adopted by a board composed of self-interested professionals. There may also be a due process failure in the way a legal standard is formulated. The standard may be too vague and ill-defined to ensure even-handed application or allow for effective submission of proofs and arguments by someone contesting its application; or, conversely, it may be so narrowly drawn as to represent an arbitrary or vindictive discrimination against a disfavored few. Lawmaking defects of these various kinds are chiefly the concern of doctrines of SEPARATION OF POWERS, unconstitutional delegation, VAGUENESS, and prohibition of BILLS OF ATTAINDER, but they cannot in practice be held entirely separate from procedural due process claims.

In *Joint Anti-Fascist Refugee Committee v. McGrath* Justice Frankfurter invoked a history in which the adversary judicial trial has dominated our law's vision of procedural due process, as the model of a procedure designed to assure reason, voice, and dignity to individuals threatened with harm by the state. Criminal due process shows the fullest development of the adversarial model, just as criminal proceedings tend to maximize the conditions bespeaking the need for adversarial safeguards: charges specifically directed against the accused individual, by highly visible officers acting in the state's name, threatening not only tangible deprivation of liberty or wealth but also public degradation. Some state-initiated proceedings against individuals, such as those brought to establish paternity or terminate parental status, while nominally civil in character, resemble criminal prosecutions in their accusatory and stigmatic implications or in the gravity of their threatened sanctions, leaving little doubt about the need to grant respondents something approaching the full set of due process safeguards. Such safeguards were required by the Court in LASSITER V. DEPARTMENT OF SOCIAL SERVICES (1981). As cases of impending state-imposed harm depart further from the criminal prosecution paradigm, however, they reveal that puzzling issues of political and legal principle are latent in the general ideal of due process. Such cases pose two distinct questions for due process doctrine. First, does the occasion demand any kind of proceeding at all? Assuming an affirmative answer, the second question is, what process is due?

Events that from certain perspectives are describable as deprivations of life, liberty, or property in which the state is implicated—for example, a creditor acting under a legal privilege to repossess consumer goods from an assertedly defaulting debtor—may occur with no provision in the law for any process at all. The most theoretically

telling of recent judicial encounters with due process doctrine has been concerned with defining the occasions when some trial-type process is constitutionally required.

Due process further stands for a constitutionally mandated procedural code for the fair conduct of whatever trial-type proceedings are to occur. In this second aspect, due process doctrine is a compendium of answers to such varied questions as: May the hearing be postponed until after the onset of the deprivation (such as a summary suspension of a student from school) or must there be a predeprivation hearing? May the state depart from COMMON LAW rules regarding HEARSAY evidence, allow its judges to interrogate witnesses, use publication rather than personal contact as a means of notifying concerned parties of pending proceedings, or deny parties the assistance of counsel in small claims tribunals?

The answers found in due process doctrine to such questions will bind a government just insofar as it chooses, or is required by the first aspect of the doctrine, to use judicial-type forums or trial-type proceedings to carry out their pursuits. The chief problems posed by such questions are the recurrent ones of JUDICIAL REVIEW and CONSTITUTIONAL INTERPRETATION: from what sources, by what modes of reasoning, shall the answers be drawn, given the breadth and imprecision of constitutional text? Historically, the main methodological alternatives and debates have arisen in the context of criminal prosecutions and been thence carried over to the civil side.

Constitutional claims to trial-type proceedings are most obviously compelling when individuals stand to be harmed by actions of officials performing state functions or wielding state powers. Yet even in such cases the individual interests at stake may be found insufficient to call due process rights into play. On a textual level, the question plainly is whether the affected interest is identifiable as "life, liberty, or property." History, however, discloses contrasting approaches to that question. It was once commonly supposed that any serious imposition on an individual—any "grievous loss"—could qualify as a constitutionally significant deprivation. A chief feature of contemporary due process doctrine is that the potency of a harm as a due process trigger turns not on such an ordinary assessment of its weight or practical severity but rather on a technical, categorical judgment about its legal "nature." In adjudicating what categories of interests legally qualify as "life," "liberty," or "property" for due process analysis, the Court has drawn eclectically on sources both naturalistic and positivistic—on both a HIGHER LAW tradition and on currently enacted law.

This eclecticism, and indeed the entire complex practice of categorically excluding some concededly weighty interests from due process protection, has apparently evolved out of the Court's encounters with modern welfare state activism. Consider the case of a government worker unceremoniously fired, or of a disability pensioner whose monthly payments are cut off. In such cases the underlying due process values of reason, voice, and dignity may seem to call as strongly for a chance to be heard as in cases of revocation of a professional license or dispossession of land or goods. Yet neither a government job nor a disability benefit is "property" in the common speech of our own culture or that of the constitutional Framers; and although their loss might be called a loss of liberty, to speak so broadly would bring within the sweep of procedural due process many cases that evidently do not belong there, for example, denial of admission to a state university.

The Court's response, in cases like GOLDBERG V. KELLY (1970) and BISHOP V. WOOD (1976), has been to say that "property" may, indeed, include all manner of beneficial relations with the state or others, but only insofar as those relations are legal entitlements in the sense that explicit (or positive) law protects against their impairment. Thus a probationary employee lacking contractual term or statutory tenure may be peremptorily dismissed and the mere applicant peremptorily rejected; but the tenured employee has a right to be heard on the question of cause for dismissal, and the disability claimant under a statute containing definite eligibility rules may not be delisted—or even denied initial admission to benefits—without some opportunity to be heard on the issue of eligibility.

The method of equating due process protected "property" with positive legal entitlement—that is, by reference to clearly ordained, subconstitutional law—has several attractive features. It flows easily from the observation in BOARD OF REGENTS V. ROTH (1972) that a chief purpose of "the ancient institution of property" has been to "protect . . . expectations upon which people must rely in their daily lives" against being "arbitrarily undermined." Moreover, the positive-entitlement conception makes a neat fit with the idea that a fair hearing is the nub of due process. Entitlement makes directly clear what the hearing shall be about, for any law framing an entitlement must specify issues available for contest by anyone complaining of deprivation. Finally, entitlement analysis may seem to keep the judiciary clear of imposing on popularly accountable branches of government any political values or ends not accepted by those branches themselves. A judge enforcing due process rights appears to do little more than take seriously the decision of the lawmakers to create the entitlement in the first place.

The Court on some occasions has gone so far as to say that no interest qualifies as due process protected property except insofar as a legal rule safeguards its continued enjoyment. It seems clear that such statements cannot be taken literally. For example, the Court consistently refuses

to approve procedures involving state officers in the repossession of goods bought on credit, without affording a prompt hearing to the buyer, no matter how clearly the applicable state law states that the buyer's entitlement to continued possession is to lapse upon the creditor's filing of notice of default (as distinguished from a judicial finding of default). Here it must be the brute reality of the buyer's established possession of the goods that comprises the constitutionally protected property, regardless of the explicit legal rules concerning its protection or duration.

The possession cases illustrate the naturalistic or higher law side of the Court's eclectic method of interest characterization. Protection of established possession against disorderly or unjustified incursion is an ancient fixture in both the rhetoric and the practice of Anglo-American common law and liberty. There are other common liberties similarly, if not all quite so anciently, esteemed: personal mobility and bodily security; liberties of conscience, intellect, and expression; domestic sanctuary, marital intimacy, and family solidarity; occupational freedom and professional autonomy. Although some of these interests find mention in the Bill of Rights, they mostly lack specific constitutional recognition.

The Court has used the "liberty" branch of the due process guarantee as a warrant for procedural protection for such interests, quite apart from their status as entitlements under positive law—and without overprecious worry about their status at ancestral common law. Regardless of whether the state's law purports, or ever did purport, to make into legal rights a schoolchild's security against corporal punishment (INGRAHAM V. WRIGHT, 1977), a parent's retention of child custody (*Santosky v. Kramer*, 1982), or a parolee's preference for remaining at liberty (*Morrissey v. Brewer*, 1972), those interests have been held protected, by the due process clause itself, against peremptory impairment by STATE ACTION. They are treated as constitutional entitlements regardless of whether they are statutory ones. It is easy to imagine why naturalist as well as positivist elements thus enter into the Court's characterizations. Welfare state activism positively invites forms of reliance and dependence which, however historically novel, evoke the essential purposes of due process; but the activist state is also prone to tread insensitively on old but still vital concerns that courts recognize as traditional freedoms.

The conclusion that an interest jeopardized by government action does qualify as someone's "life, liberty, or property" does not end the due process inquiry, for the question then remains of how much "process" is "due." It has been said that due process entails, at a minimum, "some kind of hearing" for the exposed individual. Precisely what kind depends on a judicial assessment: one which, according to the formulation in MATHEWS V. ELDRIDGE (1976), is supposed to take account of the gravity of the individual interest at stake, the utility of the requested procedures in avoiding factually misinformed or legally erroneous decisions, and the cost of those procedures to the pursuit of legitimate state objectives. The results of such a calculus can range from the heavy procedural armor available to criminal defendants in capital cases to the simple "opportunity to present his side of the story" that, under GOSS V. LOPEZ (1975), is due a student facing a short disciplinary suspension from school.

An important and oft-contested feature of the constitutionally guaranteed process is its timing relative to the deprivation. The Court long stood by the general proposition that (apart from "emergency" situations, such as seizure of contraband) due process meant predeprivation process. The Court continues to insist on some opportunity for in-person hearing prior to "core" deprivations such as dispossession of tangible property. In several cases, such as *Arnett v. Kennedy* and *Mathews v. Eldridge*, involving government jobs and other "benefits," the Court has accepted postponement of a live hearing until after the fall of the axe, when there has been predeprivation notice and opportunity for written protest, as long as there is adequate assurance for reparation in case the deprivation is eventually found unjustified.

Under pressure of the "mass justice" conditions imposed by modern governmental benefit programs involving very large numbers of eligibility decisions, there has been indication in recent cases and commentaries of tolerance for an alternative due process model, one less concerned than the traditional trial-type model with participation values. In this alternative managerial model, the measure of due process is not the quality of the opportunity given affected individuals for a say in the resolution of their own cases but quality control in the production of decisions. The aim is not voice for the individual but accuracy in the aggregate of the resolutions reached over a period of program administration. As advocates of this alternative model recognize, two factors are required to justify the model's use in any given setting: first, the relative dominance of individuals' interests in receiving their entitlements over their dignitary interests in participation; and, second, the value of such a systems management approach in maximizing the receipt of entitlements.

When judges find constitutional protection, under the broad cover of "liberty," for selected interests not specified as rights by constitutional text or other clearly uttered law, and when they determine just what form and quantum of process is "due" in respect of particular kinds of deprivations, they have obviously entered on the work of ranking substantive ends and values. Yet courts doing this kind of due process adjudication have not evinced great worry about usurpation of the lawmaking function. One

reason may be that by merely requiring the state to provide some kind of hearing when it acts adversely to some individual's interests, a court does not consider itself ultimately to be preventing lawmakers from reaching whatever substantive results they choose.

However, the judicial act of fashioning procedural requirements, and attaching these to a select set of liberties, is not without substantive force. Procedural requirements can place serious practical obstacles in the way of legislative pursuits. They may be expensive. They may cause a formalization or distancing of some relations that lawmakers could reasonably prefer to leave more informal, close, or open, such as the relations among teachers and students in a school. They may deter valued candor—as from evaluators of candidates for jobs, promotions, university admissions, professional licenses—insofar as due process entitles the subjects of adverse reports to disclosure or CONFRONTATION. Procedural requirements may thus force lawmakers to weigh some programmatic objectives against others that would be jeopardized by pursuing the former within the procedural rules laid down by courts.

Due process protection for interests that are not entitlements established by positive law may have a subtler substantive import. If the jeopardized interest enjoys no specific protection under any law aside from the due process clause itself, there is no obvious focus for the required process. A hearing on the issue of whether the contested deprivation is "without due process" may seem pointless, lacking some legal restriction on the conditions in which the deprivation is authorized. This problem has arisen in a number of cases involving dispossession of public housing tenants, when neither the laws governing the housing programs not the leases issued to tenants purported to restrict in any way the power of administrators to evict tenants at any time, for any reason or no reason.

Courts in this situation may supply the missing substantive entitlement on their own, by finding in the due process guarantee a protection against deprivations not rationally related to the purposes of the governmental activity in question. Thus a court may bar a public housing administrator from evicting a tenant who has been cohabiting with a nonspouse, if the court concludes that excluding the cohabitation is not rationally related to the court's understanding of the purposes of public housing. In such a case, the crossover from procedural to substantive concerns is glaringly evident.

A similar crossover is less evident, but still detectible, when a court responds to the lack of a positive law entitlement by requiring the state itself to enunciate some restrictions of purpose or circumstance on lawful impairment of the protected interest, which can provide a basis for due process hearings when official deprivations impend. For the court must then stand ready to decide whether the state's restrictions measure up to constitutional standards of protectiveness. A statute solemnly declaring that tenants may not be evicted "except as the Administrator shall decide is required for the general good" could not satisfy a court determined to afford procedural due process protection to the tenant's possessory interest viewed as an entitlement.

The alternative possibility, of requiring procedural protection even in the absence of legal restrictions on official discretion, rarely seems to have caught the Supreme Court's attention. Responsible officials, even when legally free to act at will, can always try to explain their decisions to persons adversely affected, and give the latter a chance to respond. Such an interchange will sometimes make a practical difference, by changing the officials' perceptions of the relevant facts or values. But even when it does not it may well serve any or all of the elemental purposes of due process: ensuring a voice in decisions for affected individuals, securing their recognition as persons deserving respect, and promoting consistency of official actions with goals and values that responsible officials are prepared to state and defend publicly.

Why has such a view of procedural due process, as serving process values apart from the aim of ensuring that persons receive the treatment legally due them, failed to gain judicial support? Most obviously, such an approach would cast very widely the due process net. If we see due process as broadly concerned with the quality of interaction between official and citizen, rather than more narrowly with vindication of the citizen's legal rights, then any state-inflicted "grievous loss" will seem to bring into play the constitutional standards of decisional procedure—a perhaps daunting result in light of the ubiquity of the welfare state.

The Court's limited extension of procedural protection beyond positive legal entitlements to possessory interests and a select set of liberties seems to represent its aversion to three unpalatable alternatives: first, deformation of the constitutional due process mandate by restricting its reach to entitlements specifically found in subconstitutional positive law; second, intrusive overextension of the mandate to all cases of palpably harmful state action; and third, free-form judicial choice among substantive values and policy goals. The Court apparently cannot avoid all three dangers fully and simultaneously. It has needed supplementary techniques to make good the avoidance of both trivialization and globalization of the range of the due process mandate, and these techniques have put heavy pressure on both doctrinal shapeliness and judicial self-discipline.

For example, the danger of trivialization constantly lurks in a crucial indeterminacy in the concept of legally defined entitlement as the equivalent of due process pro-

tected property. The problem is that of distributing components of a positive legal regime between the categories of substance and procedure. Suppose, as in *Bishop v. Wood*, that police officers are dismissable whenever, but only when, a designated superior has given the employee a written notice of dismissal for malfeasance in the performance of duty. Straightforwardly read, the law means to make the legal condition of dismissability not actual malfeasance but delivered written notice of dismissal. An entitlement-based due process doctrine then would logically require a hearing but only on the bootless issue of delivery of the notice. A judge can logically avoid that result by reading the law to condition dismissability on actual malfeasance, although that reading will make the law unconstitutional if the law includes no adequate provision for hearing on the malfeasance question. Whether such a reading seems unacceptably self-destructive will depend on the primacy of due process values in the reader's constitutional understanding.

Similar puzzles affect questions about whose entitlement is established by a plain statutory restriction on official discretion. A striking example is *O'Bannon v. Town Court Nursing Center* (1980), where a statute provided for financial assistance to needy elderly persons in meeting their costs of residence in officially approved nursing homes, and also set conditions of approval for the homes. Thus it was apparently unlawful for officials either to deny certification to homes meeting the conditions or to deny benefits to eligible residents of certified homes. When officials proposed to decertify a certain home, its residents claimed a due process right to be heard on the issued of the home's certifiability. The Supreme Court concluded that the residents had no constitutional right to such a hearing because their entitlement was just to benefits while residing in a certified home; the entitlement to certification belonged strictly to the nursing home operators.

Given the close practical resemblance of the residents' interests to the strongly protected interests of tenants in uninterrupted possession, a court could reasonably have concluded that they, too, were entitled to certification of their home if in fact it met the legal standards, and therefore they had due process rights to be heard on that issue. The Court's contrary conclusion was obviously influenced by concerns about overextended application of the constitutional due process mandate.

Claims to due process are not confined to situations in which the claimant's legal posture is defensive or the adversaries are government officials. They may arise also where individuals are exposed to the state's judicial power by their involvement in private legal controversies; and even where (the due process claim aside) there impends no legal proceeding at all but just some harm at a fellow citizen's hands.

The defendant in a private civil lawsuit faces possible deprivation, by officers wielding state powers, of wealth through a money judgment or of personal liberty through an injunctive decree. The occasion is obviously one to activate due process concerns, and civil defendants are held entitled to such procedural due process essentials as a fair and orderly hearing before an unbiased judge.

For reasons not quite so obvious, so are civil plaintiffs. A tempting explanation is that having allowed its courts to take charge of a private dispute, the state is obliged to have them do so in a way that satisfies the due process demand for reason, voice, and dignity. Yet this explanation seems incomplete. Some assistance is better than none. The state does not injure or oppress claimants to whom it offers procedurally flawed assistance against violators of the kinds of interests typically at stake in civil cases, unless the state is affirmatively obligated to secure those interests against violations by private as well as governmental agents. Suppose, for example (as the Supreme Court apparently did in TRUAX V. CORRIGAN, 1921) that the state is constitutionally obligated to protect landowners against disturbance by PICKETING. On such a view, a disturbed landowner can cite a refusal of protection as a deprivation of property and demand a hearing on the question of the state's justification for refusal. In other words, the landowner can demand a hearing on whether the picketing is for some special reason legally privileged. The state can meet this demand by letting the landowner sue the picketers for injunctive relief, but only if the procedural conditions of the suit satisfy due process standards of fairness from the plaintiff's point of view.

Thus denial of fair procedure to a civil plaintiff comes within the traditional due process concern about injurious treatment of individuals by the state, just insofar as we see the state's failure to protect the plaintiff's interests against the defendant's encroachments as itself a form of injury. Such is the SOCIAL COMPACT view according to which persons entering political association surrender to the state the use of force, for the safer protection of their several "lives, liberties, and estates." The state's regime of law and order then overrides the natural liberty of self-help, but only by replacing it with the state's obligation to protect.

Some such account seems necessary to complete the explanation of the conceded due process rights of civil plaintiffs. Yet other current law ostensibly rejects this account. *United States v. Kras* (1973) and *Logan v. Zimmerman Brush Co.* (1982) together indicate that the state may usually condition a would-be civil plaintiff's ACCESS TO THE COURTS on payment of filing fees, thus effectively excluding whoever cannot pay. Such a doctrine is hard to square with the idea of a state's affirmative duty to protect the litigable interests of its citizens, arising out of the latter's relinquishment of self-help by private force.

When a government sues a citizen in an otherwise ordinary civil dispute, involving property or contract rights or tort claims, the citizen sued will of course have the due process rights normally enjoyed by privately sued civil defendants. The reverse case, of a civil dispute in which the citizen is the one seeking relief for a TRESPASS, breach of contract, or other civil wrong by a governmental defendant, is complicated by the doctrine of SOVEREIGN IMMUNITY. In general, that doctrine means that the governments of the states and the Union may not be sued without the consent of their respective legislatures. If the courts find that such consent has not been given, the citizen alleging deprivation by governmental action will lack recourse in the ordinary courts, a situation presenting an obvious and a serious due process concern. In many such cases, the constitutionally guaranteed right of due process must prevail over sovereign immunity and entitle the victimized citizen to relief in constitutional litigation. That would surely be the result, for example, if government officials sought to imprison someone, or seize privately held land or goods, without ever giving the victim a fair chance to contest the legal and factual basis for such action. The citizen would be able to gain preventive relief or compensation in a CIVIL RIGHTS action based on the due process clause of the Fifth or Fourteenth Amendment.

The question of due process rights is most puzzling when seizures of possessions, or other violations of core interests generally given legal protection, are carried out by private agents with no apparent state complicity—a finance company sending its own forces to repossess an automobile securing an overdue debt, or a repair shop collecting an unpaid bill by retaining and eventually selling the repaired article. People do not usually take such "self-help" actions, or think them prudent, unless the actions are in some sense authorized, if not positively enabled, by state law. Thus lawmakers may authorize and enable a creditor's private repossession of chattel security by exempting such activity from liability for crime (theft) or civil wrong (conversion of goods). Indeed, the law usually goes farther, making it wrongful for the debtor to resist the seizure by force. The law doubtless otherwise contributes to the ability of creditors to make their seizures effective, as by securing the wealth used to pay for the requisite services. The utility of the repair shop's liquidation-by-sale depends on law allowing extinction of the debtor's legal claim to the goods in favor of the person who buys them from the repair shop. In short, self-help creditor remedies are evidently deliberate creations of state law, particular components of the state's total scheme of legally recognized and sanctioned rights and liabilities. In that sense, at least, the self-helping creditor inflicts significant deprivations under cover of the state's power, while affording no opportunity for the deprivee to be heard on the matter.

Even so, the Supreme Court concluded in FLAGG BROTHERS V. BROOKS (1978) that laws authorizing creditor self-help do not in general violate due process. In defense of this result, it might have been urged that the due process requirement is satisfied by the debtor's opportunity to sue later for restorative or compensatory relief in case the creditor's seizure was in fact unjustified. Such a rationale would accord with the holding in *Ingraham v. Wright* that paddling a student without a hearing comports with due process so long as compensatory relief for an unjustified paddling can be obtained later in a lawsuit. Yet courts have not usually explained in this way their tolerance for unilateral, peremptory creditor self-help, apparently seeing the difficulty of reconciling such an account with prevailing due process doctrine for cases of seizure by state officers, which strictly requires the state to provide some kind of judicial supervision, and a hearing for the deprivee as promptly as the case permits.

Courts instead have seen the issue presented by private self-help activities as one of state action, and, as in the *Flagg Brothers* case, have concluded that the due process guarantee has no application to such activities however much they may practically depend on the support of law. The reason for this judicial diffidence, as important as it is simple, is the difficulty of distinguishing in principle between the due process claim raised by the case of the self-helping creditor and that raised by many, if not all, other cases of intentional or foreseeable infliction, by private agents, of civilly actionable harm, that is, of torts, breaches of contract, breaches of trust, and so forth. Often, if not always, it will be possible to show compellingly how the law has contributed directly to the occasion or motive for committing the injurious act or to the injurer's practical power to inflict it, or to the practical defenselessness of the victim. But the idea of a constitutional right to a predeprivation hearing, or even an accelerated postdeprivation hearing, in all cases of ordinary private legal wrongs stretches due process too far. Every ordinary contract dispute cannot be a constitutional case.

Thus courts have been led to conclude that the deprivations of property wrought by private creditor self-help are not violations of due process for the reason that they are not attributable to the state. The position is that due process generally is not concerned with exercises of power by persons not identified with the state or perceived as acting on its behalf, in forms not conventionally understood as distinctive to the state. This position is unfortunately at odds with the premise which apparently underlies recognition of the due process rights of civil plaintiffs—the premise, that is, of an affirmative state duty

to protect the persons and possessions of inhabitants against gross violation by private as well as public agents.

The difficulty is of a kind that logically must appear somewhere within any body of constitutional doctrine in which a first aim is that of securing spheres of individual liberty against social coercion, and a first institutional device is that of legal rights, themselves an obvious form of collective force. In the constitutionalist vision there is indissoluble tension between law's aim, personal liberty, and its instrument, state power. In this field of contradictory forces are situated all legal rights, including due process rights. Thus it happens that the same due process claims which from one viewpoint represent the state's liberating engagement to protect each person against incursion by others or by the social aggregate, from another perspective represent the state's oppressive oversight of affairs perhaps better and more properly left to the concerned individuals.

In no setting is the dilemma more evident than in that of the family, which in our culture has most strongly represented the value of social solidarity as opposed to that of individuals severally free to treat at arm's length in civil society. PARHAM V. J. R. (1979), a case in which due process claims were asserted on behalf of a minor child being committed by parents to a mental institution, illustrates the difficulty. The Court there assumed "that a [minor] child has a protectable interest . . . in not being . . . erroneously" committed; said that parents must be generally supposed to act in their children's best interests; said that "the risk of error inherent in the parental decision . . . [is] sufficiently great" that parental discretion cannot be "absolute and unreviewable"; and concluded, not resoundingly, that "some kind of inquiry should be made by a 'neutral fact finder' to determine whether . . . [the child] satisf[ies] the medical standards for admission."

Of the largest questions of current meaning and future role for due process in our civic culture, the Supreme Court's irresolute posture in the *Parham* case is emblematic. If due process is an epitome of libertarian law, it is also—by the same token, Max Weber would advise—an epitome of bureaucratic law. Due process as we know it is a hallmark of a formally rational law designed to liberate as it organizes and orders: to liberate energy and will by the promise of regularity, calculability, and impartiality, and by insistent strong demarcation of the private from the public sphere.

But our due process is a hallmark, too, of hierarchical formal ordering; that is, of ordering by preordained rules emanating from specialized governing authorities (representative or accountable as those authorities may be, of or to the governed). There are always spheres of life in which due process is problematic because those spheres want ordering that is more contextual and less abstract, more responsive and less prefigured, more empathic and less impersonal, more interactive and less distanced, more participatory and less authoritative, than what "due process" has traditionally signified. Conversely, "due process" invokes sensibilities resistant to a general movement toward a more thoroughly democratized polity, in which the personal and the political aspects of life would be much less sharply separated than we have tended to keep them. In any such movement due process would necessarily be transformed—transformed but not discarded, since we are unlikely to forsake the ideals of reason, voice, and dignity, or the conviction that individuals are not just parts of social wholes.

FRANK I. MICHELMAN
(1986)

Bibliography

BREST, PAUL 1982 State Action and Liberal Theory: A Casenote on *Flagg Brothers v. Brooks*. *University of Pennsylvania Law Review* 130:1296–1330.

FRIENDLY, HENRY J. 1975 Some Kind of Hearing. *University of Pennsylvania Law Review* 123:1267–1317.

KADISH, STANFORD 1957 Methodology and Criteria in Due Process Adjudication—A Survey and Criticism. *Yale Law Journal* 66:319–363.

MASHAW, JERRY L. 1983 *Bureaucratic Justice: Managing Social Security Disability Claims*. New Haven, Conn.: Yale University Press.

MICHELMAN, FRANK 1977 Formal and Associational Aims in Procedural Due Process. Pages 126–171 in J. Roland Pennock and John Chapman, eds., *Nomos XVIII: Due Process* New York: New York University Press.

MINOW, MARTHA 1985 Beyond State Intervention in the Family: For Baby Jane Doe. *Michigan Journal of Law Reform* 18: 933–1014.

MONOGHAN, HENRY 1977 Of "Liberty" and "Property." *Cornell Law Review* 62:405–444.

REICH, CHARLES 1964 The New Property. *Yale Law Journal* 73:733–787.

VAN ALSTYNE, WILLIAM 1977 Cracks in "The New Property": Adjudicative Due Process in the Administrative State. *Cornell Law Review* 62:445–493.

## PROCEDURAL DUE PROCESS OF LAW, CIVIL
(Update 1)

A claim for procedural due process is a claim that the government cannot undertake a particular act vis-à-vis an individual or set of individuals without according them an opportunity to be heard. Depending upon the situation, a consitutionally adequate opportunity to be heard may be

involve a "hearing" that is written or oral and may occur before or after the alleged "deprivation" has occurred. The contexts in which the issue of procedural due process arises vary; included among the litigants who have raised procedural due process challenges heard by the United States Supreme Court since the mid-1980s are PRISONERS, ALIENS, food stamp recipients, veterans, and college athletes.

A procedural due process claim is not a challenge that the government is absolutely forbidden to act in a particular way. Rather, a procedural due process challenge is that as a predicate to action, the government must accord the person(s) subject to the action with a set of procedural safeguards, designed to make the government's decision more accurate and to recognize the dignitary and participatory interests in process that both the person(s) and society have.

Making the distinction in practice between SUBSTANTIVE DUE PROCESS and procedural due process, however, is not always easy. For example, many due process opinions discuss whether or not a court in one jurisdiction can hale an outsider (a citizen of another state or country) before it and what jurisdiction's law may constitutionally be applied to that lawsuit. For more than a century, the Supreme Court has talked about these cases as raising due process problems, but has not always identified which kind of due process was at issue. Only relatively recently have commentators discussed such issues as substantive due process questions—despite the fact that the issue arises in the context of where and how to conduct a lawsuit. Another illustration is a group of due process cases that address access to EVIDENCE. In *Arizona v. Youngblood* (1988) the Supreme Court held that upon specific request of defendants, prosecutors have some obligation to disclose exculpatory information in their possession, but, absent bad faith on the part of police, "failure to preserve potentially useful evidence does not constitute denial of due process of law." Once again, although the rights involved related to litigation, the Court did not specify the kind of due process at issue but relied on a substantive due process analysis.

Supreme Court doctrine requires that for one to bring a procedural due process claim, two prefatory elements be established—STATE ACTION and intent. Knowing when the state is acting is not always easy. For example, the Supreme Court concluded in *National Collegiate Athletic Association v. Tarkanian* (1987) that the National Collegiate Athletic Association was not engaged in state action, despite the fact that its 960 members include "virtually all public and private universities and four-year colleges conducting major athletic programs in the United States." Second, the governmental action must be intentional. In *Daniels v. Williams* (1986) the Supreme Court held that "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty or property."

Once a claim has cleared the hurdles of intentional deprivations by government action, two more questions remain: (1) Does the governmental action threaten to deprive one of "life," "liberty," or "property"? (2) If so, how much process is due? The answers from the Supreme Court have limited both the instances when the clause applies and the quantum of process due.

"Property" continues to include both traditionally understood material possessions and state-created benefits, such as SOCIAL SECURITY, licenses, and other statutorily defined restrictions on governmental action. However, statutory ENTITLEMENTS (whether characterized as "property" or "liberty") are now read more restrictively. To show such entitlement, the legislative or regulatory statement has to be positivistic (i.e., X "shall" occur) and the limits on official discretion must be express (i.e., X shall occur unless the official finds A, B, or C).

The question of what process is due might have many answers. For example, one might transfer the CRIMINAL PROCEDURE requirements elaborated in the United States Constitution to the context of civil proceedings. (The line between "civil" and "criminal" is itself a complex one to draw; for example, the state may be a party, and seek penalties, in many civil contexts.) The Constitution is itself relatively silent about what procedures are to be provided in civil lawsuits. Article III sets forth the requirements for the federal judiciary, but its provisions are largely structural. The SEVENTH AMENDMENT "preserves" the right to a TRIAL BY JURY in federal court and places some limits on appellate review of jury verdicts. The FIRST AMENDMENT speaks of the right to petition for redress, and the Fifth Amendment and FOURTEENTH AMENDMENT, include "due process" clauses but do not specify what process is due.

The doctrinal answer to the question of the amount of process due—supplied by Supreme Court interpretations of the due process clauses—continues to rely upon the adversarial, judicial model as its touchstone, but increasingly the Court has accepted departures from that model as constitutionally sufficient. The Court's formula in MATHEWS V. ELDRIDGE (1976) remains a vital part of the analysis of how much process is due. A court asks about the private interest at stake, the government interest at stake (often assumed to be the conservation of resources by having inexpensive process), and the risk of error in the current procedure as compared to the risk of error if additional procedural safeguards were in place. Commentators have observed that this utilitarian approach assumes that accuracy is the only goal of the process accorded.

Moreover, none of the three prongs of the test can be measured; the Court's utilitarian cost-benefit analysis may mask the subjectivity of the measurements of the costs and benefits. To the extent courts attempt to ascertain both, it is difficult, if not impossible, to measure the harms of false positives (giving benefits when the state should withhold them) and false negatives (withholding benefits when the state should grant them).

As a result of this approach, the Court frequently approves of minimal procedural safeguards. One example comes from the context of prison litigation, in which the Court, in *Superintendent, Massachusetts Correctional Institution v. Hill* (1985), permitted a relatively low standard of evidentiary proof ("some evidence") when prisoners' good-time credits are revoked and they must remain incarcerated. Another illustration comes from *Brock v. Roadway Express, Inc.* (1987), in which a trucking company challenged the secretary of transportation's order to reinstate a trucker who allegedly had been a whistleblower and complained about the company's safety regulations. The Court concluded that although the company had the right to be informed of relevant evidence supporting the grievant, the company had no right to a "live" evidentiary hearing prior to being required to reinstate the trucker temporarily. Further, the Court, in *Walters v. National Association of Radiation Survivors* (1985), refused to hold that civil litigants have a procedural due process RIGHT TO COUNSEL whenever they contest government decisions.

One aspect of the entitlement- or process-due approach of the Supreme Court reveals the analytic limits of current doctrine. In ARNETT V. KENNEDY (1974) the Supreme Court faced a statute that both created (in the Court's terms) an entitlement to a job and also provided a specific and limited set of procedures to determine whether termination of employment was appropriate. A plurality of the Court upheld the package as having provided all the process due; Justice WILLIAM H. REHNQUIST remarked that the employee had to accept the "bitter with the sweet." When the Supreme Court faced the issue again in *Cleveland Board of Education v. Loudermill* (1985), a majority held that while the question of whether an entitlement (a "property" interest) existed was to be decided by reference to statutory statements, the question of what process is due was one reserved for the Court. The current state of the law as expressed in *Loudermill* has a conceptual flaw: why conclude that the question of interpreting "property" in the due process clauses is to be decided by deferring to the legislature but that the "process due" is to be determined solely by the Court?

Another aspect of the CONSTITUTIONAL INTERPRETATION problem remains unclear: How great a role should the legislature play in defining "liberty"? Some opinions suggest that deference to the legislature is appropriate to decide whether liberty rights or PROPERTY RIGHTS are at stake, while other opinions suggest that liberty is not, and can never be, dependent upon positive legislative enactment. The issue arose in *Kentucky Department of Corrections v. Thompson* (1989), in which a majority of the Court concluded that prisoners' interests in "unfettered visitation" by nonprisoners is not "guaranteed directly by the Due Process Clause," while Justices THURGOOD MARSHALL, WILLIAM J. BRENNAN, and JOHN PAUL STEVENS concluded that "the exercise of such unbridled governmental power over the basic human need to see family members and friends strikes at the heart of the liberty protected by the Due Process Clause." In contrast, the Supreme Court, in *Lassiter v. Department of Social Services* (1981), assumed without discussion the existence of a liberty interest in being provided a lawyer when a parent faced state termination of her right to parent.

Writing in this encyclopedia in 1986, Frank Michelman noted that the critique of the due process model frequently arose from challenges to decision making by agencies, in the "pressure of the "mass justice' conditions imposed by modern governmental benefit programs involving very large numbers of eligibility decisions." Since then, the same issue—pressures of "mass justice"—have moved from the context of agencies to the context of courts. Contemporary commentary focuses on the question of what process is due when considering the adequacy of procedure in the federal and state courts. Of late, judicial decision making has been much criticized as too slow, too expensive, too cumbersome, and too unresponsive to litigants' needs. Suggested alternatives, often labeled "alternative dispute resolution" (ADR), range from simplified trials and court-annexed arbitration to judicially conducted settlement programs and diversion to noncourt-based decision making assistance. Some of these programs are then challenged on various grounds, such as that they fail to accord procedural due process, they unduly burden state or federally based rights to a jury trial, and they exceed the powers authorized to courts or to judges.

The creation and growing popularity of ADR mechanisms and the criticism of court-based adjudicatory mechanisms lend further strength to the weakening of the procedural due process model, at least as exemplified by GOLDBERG V. KELLY (1970), in which the Court required an evidentiary hearing prior to the termination of WELFARE BENEFITS. Proponents of ADR argue that the formal, trial-like model embodied in *Goldberg* has proven inadequate and that other modes are to be preferred. These modes are generally less formal, lawyer-free, and conducted in

private; they may use arbitrators or mediators in lieu of judges. The claims (debated in the literature and by empirical studies) are that such modes are speedier and more economic and that they produce better outcomes than does trial.

The increased reliance on procedural requirements, the "due process model," has been criticized not only by those who seek to conserve the expenditure of private and government resources but also by those who challenge government action but question the utility of the means. Some argue that procedural requirements wrongly place the risk of error on the state; others, who are proponents of state aid, argue the procedural due process model implicit in *Goldberg* wrongly equates procedural regularity and adversarial modes with good outcomes. Commentators have wondered about the utility of providing procedural opportunities to individuals with few, if any, resources to exercise them. For example, of what value is the right of cross-examination if no provision is made for a state-paid attorney? Given the resource disparities between government and individuals, procedural due process may create a façade of legitimacy for decisions that are intrinsically unfair. At a more fundamental level, this critique questions the assumptions of procedural due process opinions that a conflict between the state and the individual is inevitable. The hope is that communitarian approaches may well hold more promise for giving indigent individuals access to the riches of society. Those who endorse the *Goldberg* paradigm have been criticized for their limited vision—premised upon a classic liberal assumption of autonomous individuals confronting the state and relying on legalistic solutions.

In response, proponents of the *Goldberg* paradigm, while sympathetic to communitarian goals, note that the state "as friend" almost never materializes. Further, the formality of the *Goldberg* procedures embodies hopes of empowering actors otherwise less powerful. Although not a comprehensive solution, the requirement of formal procedure may be better than its absence. Moreover, many within the legal services community who participated in the *Goldberg* litigation did not, at the time, see its goal as procedural reform. Claims around procedural rights were used as organizing tools; the hopes were that procedural reform, along with changes in other court-based rules, such as greater use of CLASS ACTIONS, the provision of free attorneys, and easier ACCESS TO THE COURTS, would all result in diminished social inequities. Yet another possibility is that the classic due process conception of the state versus an individual can be reenvisioned as an interaction of the state, an individual, and the community in which both litigants are situated. The debate about the utility of the procedural due process model is still alive in this decade, as conferences and law-review articles address the problems of what kinds of dispute resolution governments should be offering, funding, and encouraging.

One's view of procedure, of the aspirations of *Goldberg*, of the limits imposed under the *Mathews* approach, and of the critique from both the Right and the Left depends in large measure upon one's understanding of the proper role of the state and of the relationship between government and individuals. Procedure (procedural due process included) is a vehicle for the expression of political and social values—a vision of a state in need of restraint or not, a vision of human dignity as enhanced or not enhanced by formalized interaction between decision maker and individual.

JUDITH RESNIK
(1992)

Bibliography

COVER, ROBERT M. et al. 1988 *Procedure.* New York: Foundation Press.

DELGADO, RICHARD et al. 1985 Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution. *Wisconsin Law Review* 1985:1359–1404.

HANDLER, JOEL 1986 *The Conditions of Discretion: Autonomy, Community, Bureaucracy.* New York: Russell Sage Foundation.

LIND, E. ALLEN et al. 1989 *The Perception of Justice: Tort Litigants' Views of the Civil Justice System.* Santa Monica, Calif.: Rand Corporation, Institute for Civil Justice.

RESNIK, JUDITH 1986 Failing Faith: Adjudicatory Procedure in Decline. *University of Chicago Law Review* 53:494–560.

SPARER, EDWARD 1984 Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement. *Stanford Law Review* 36:509–574.

# PROCEDURAL DUE PROCESS OF LAW, CIVIL
## (Update 2)

Procedural DUE PROCESS presupposes that the state may take a "liberty or property interest" when it has a good reason, and addresses the procedures required when it does so. The constitutionally required procedures ensure that state decisions depriving individuals of protected interests are fairly made and reasonably correct, insofar as our decisional methods allow. The determinative test balances private against governmental interests and considers the risk of error inherent in particular procedures. In general, the more important the private interest, the more fair and accurate the procedures must be. As the government's interest becomes more significant, and as procedural costs increase, the state may seek to adopt more summary procedures, less protective of private interests.

The more important the interest the government seeks to take, the more the required procedures will approximate the adversary trial paradigm. When the state seeks to take any truly important interest, and where facts are in issue, procedural due process requires notice, an oral hearing, presentation of evidence before an impartial decisionmaker, an opportunity to confront and cross-examine witnesses, counsel, and a decision on the basis of the record. Where someone will suffer serious injury pending a hearing, such as a terminated employee with no possibility of reinstatement or back pay, there should be some predeprivation hearing. Where the private interest is less important, procedural requirements are less substantial, and other exceptions turn on the taking's redressability, seriousness, and the state's need for quick and economic action. A summary predeprivation hearing, with notice, opportunity to respond, and a decision whether there are grounds to act will often serve. If necessary, a more substantial postdeprivation hearing may then follow. In emergencies, such as the need to destroy diseased animals, or where the taking harm is negligible or readily redressable, a postdeprivation hearing satisfies.

An important line of procedural due process cases deals with the question of what process the state must give when private parties seek state aid in taking another's PROPERTY, as in cases involving ex parte prejudgment attachments or garnishments. Here the balancing is between competing private interests, but as there is state involvement, procedural due process requirements apply. The Court has consistently held, as in the most recent case, *Connecticut v. Doehr* (1991), that, extraordinary circumstances aside, there must be a preattachment hearing.

The state may also act ex parte, for example when seizing property through CIVIL FORFEITURE proceedings. Where the property is movable, an extraordinary circumstance, the government may seize it ex parte without notice and hearing. Where real property is involved, as in *United States v. James Daniel Good Real Property* (1993), notice and a hearing are required, even though the seizure is justified under the FOURTH AMENDMENT. Procedural due process is an independent constitutional requirement, and forfeiture proceedings seek to take property, not merely use it as evidence.

Because procedural due process is a federal constitutional guarantee, its violation creates a federal CIVIL RIGHTS action against state officials. It may also constitute a state cause of action, such as a conversion tort when a prison guard unlawfully takes a prisoner's property. This raises a FEDERALISM concern about constitutionalizing tort litigation involving state officials. Note also that if the state provides an action for the aggrieved party, it may thereby supply all the procedural due process required, at least where a postdeprivation hearing is adequate. The Supreme Court, therefore, held in *Daniels v. Williams* (1986) that procedural due process protects only against deliberate, not negligent, state deprivations of protected interests. Even a deliberate state deprivation, as where a state official, "unauthorized" to do so, intentionally violates rights, may not require special procedures where there is nothing the state could have done to prevent random and unpredictable deprivations. Where, however, as in *Zinermon v. Burch* (1990), the state can institute predeprivation procedural safeguards to address a risk of deprivation—in other words, when the risk is reasonably predictable—it must do so.

GARY GOODPASTER
(2000)

Bibliography

MASHAW, JERRY L. 1985 *Due Process in the Administrative State.* New Haven, Conn.: Yale University Press.

## PROCEDURAL DUE PROCESS OF LAW, CRIMINAL

The Barons at Runnymede did better than they knew. When they induced King John in 1215 to announce in MAGNA CARTA that no man should be imprisoned or dispossessed "except by the lawful judgment of his peers and by the LAW OF THE LAND," they laid the basis for a text that was to have greater significance in the development of American constitutional law than any other. In time "judgment of his peers" and "law of the land" came to be rendered alternatively as DUE PROCESS OF LAW and in that form were adopted in the Fifth Amendment to the United States Constitution as a restriction upon the federal government: "No person shall . . . be deprived of life, liberty or property, without due process of law." In 1868, substantially the same language was employed in the FOURTEENTH AMENDMENT as a restriction upon the states. Thus was embedded in the Constitution a phrase whose exegesis was to generate hundreds of decisions, libraries of commentary, and unending controversy, to this day. The Supreme Court has, over the years, used the due process clause to develop a variety of substantive restraints upon the power of government. This article, however, will deal only with the sense of due process closest to its original conception, namely, as the source of restrictions on the procedures through which governmental authority may be exercised over the individual in criminal cases.

In determining the procedures the Constitution requires of the federal government in criminal cases, the due process clause of the Fifth Amendment has been of limited significance. The BILL OF RIGHTS contains a variety of provisions explicitly directed to CRIMINAL PROCEDURE,

and these rather than the due process clause have served as the principal vehicles for the development of a constitutional law of criminal procedure. So, for example, the Supreme Court has developed the constitutional law of permissible SEARCH AND SEIZURE through interpretations of the FOURTH AMENDMENT; the constitutional law with respect to DOUBLE JEOPARDY and the RIGHT AGAINST SELF-INCRIMINATION through interpretations of the Fifth Amendment; the constitutional law with respect to SPEEDY and PUBLIC TRIAL, TRIAL BY JURY, NOTICE, CONFRONTATION, of opposing witnesses, and the RIGHT TO COUNSEL through interpretations of the Sixth Amendment; and the constitutional law barring excessive BAIL, fines, and CRUEL AND UNUSUAL PUNISHMENT through interpretations of the Eighth Amendment. On the other hand, in determining the procedures the Constitution requires of state governments the due process clause of the Fourteenth Amendment has played the significant and decisive role.

What due process of law required and by what principles its meaning was to be ascertained were questions that were to preoccupy the Court for generations. They were raised early in MURRAY'S LESSEE V. HOBOKEN LAND IMPROVEMENT CO. (1856), a civil case involving the meaning of the Fifth Amendment's due process clause: "The Constitution contains no description of those procedures which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process that might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will." Nor, as the Court might have added, could the article be so construed as to leave the Court free to determine what is and what is not due process by *its* mere will. The effort of the Court to come to terms with this challenge is the central feature of the constitutional history of due process.

An early effort to state a principle for interpreting due process was the test of whether a procedure was in accord with settled practices in England before the Revolution and not rejected here after settlement. A practice that met this test accorded due process; a practice that did not failed to accord due process. The test served its purpose in some cases, but it soon proved insufficient, for whatever value it had as a fixed determinant of meaning was overbalanced by its inability to reflect changing times and needs and evolving perceptions of what fairness requires. For example, the settled English practice of initiating a prosecution, customarily continued in this country, was INDICTMENT by a GRAND JURY. Did this mean that due process fastened that procedure upon the states? This was the question at issue in HURTADO V. CALIFORNIA (1884), where the Court faced a California innovation permitting a prosecutor to initiate a prosecution by filing an INFORMATION on his own, after a preliminary hearing before a magistrate on whether there was sufficient cause. The Court upheld the procedure despite its deviance from settled practice because it could find in the new procedure no significant prejudice to the rights of the accused. More decisive than the state of English practice was whether the challenged procedure comported with "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." To regard established usage as "essential to due process of law would be to deny every quality of the law but its age, and to render it incapable of progress or improvement." Thus, the Court limited the traditional test: a practice sanctioned by immemorial usage necessarily accorded due process, but one not so sanctioned was not necessarily inconsistent with due process. In time, however, the Court rejected the remaining limb of the test as well. It had been well settled in England that a FELONY defendant had no right to be represented by counsel, and although that had been rejected in the United States Constitution and in the states, the change had not gone so far as to require appointment of counsel for INDIGENT defendants. In POWELL V. ALABAMA (1932) the Court held nevertheless that the failure to appoint counsel for uneducated and indigent defendants in a capital case in circumstances in which they had no real opportunity to present a defense denied due process of law. Of more significance to the Court was its judgment of the "fundamental nature" of the right to be represented by counsel, which in these circumstances was essential to the right to be heard at all.

The test, then, that came to prevail in judging the constitutionality of procedures in state criminal prosecutions was that of fundamental fairness in the circumstances of the particular case. Over the years a variety of formulations were used in an effort to give greater content to the test. Concerning each procedural safeguard that was being asserted, the Court would ask whether it was "of the very essence of a scheme of ORDERED LIBERTY," or whether a "fair and enlightened system of justice would be impossible without it," or whether "liberty and justice" would exist if it were sacrificed, or whether it was among those "immutable principles of justice, acknowledged . . . wherever the good life is a subject of concern." Concerning the procedure applied in the contested prosecution, the Court asked whether it violated a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or whether its use subjected a person to "a hardship so acute and shocking that our polity would not endure it," or whether it offended "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those

charged with the most heinous offenses," for due process "embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history."

Whether any or all of these phrases succeeded in accomplishing anything more than to remit the issue to the intuitive sense of fairness of each Justice; whether, as Justice HUGO L. BLACK asked in ROCHIN V. CALIFORNIA (1952), there could possibly be "avenues of investigation . . . open to discover 'canons' of conduct so universally favored that this Court should write them into the Constitution" were issues that troubled the Justices and commentators alike. These doubts led to the development of an alternative test to determine the meaning of due process; namely, that due process should be taken to mean no more and no less than the specific guarantees of the Bill of Rights. In short, the due process clause of the Fourteenth Amendment "incorporated" as restrictions upon the states the provisions of the first eight amendments originally written as restrictions upon the federal government. The first Justice JOHN MARSHALL HARLAN was the first to advance the argument in several of his dissenting opinions, including *Hurtado* and *O'Neil v. Vermont* (1892). The issue was revived in modern times when Justice Black took up the cudgels in *Adamson v. California* (1947).

The *Adamson* case involved the constitutionality of California law allowing adverse comment to the jury on a defendant's failure to explain or deny evidence against him. In a federal prosecution this practice would have violated the Fifth Amendment's right against self-incrimination. But, of course, under the settled doctrine this was not determinative. The Court had to find that this particular aspect of the self-incrimination privilege—that which disallowed comment on its exercise—was essential to fundamental fairness to the defendant, and this the majority declined to do. The majority could find nothing in the California practice that denied the defendant a FAIR TRIAL. He was not compelled to testify. True, if he did testify he would open the record to evidence of his prior convictions, but, "When evidence is before a jury that threatens conviction, it does not seem unfair to require him to choose between leaving the adverse evidence unexplained and subjecting himself to impeachment through disclosure of former crimes." Justice Black dissented, arguing that a violation of the Fifth Amendment right against self-incrimination was necessarily a denial of due process under the Fourteenth Amendment.

Justice Black's arguments in favor of the INCORPORATION DOCTRINE, as first announced in *Adamson* and developed in later opinions, notably in his concurrence in DUNCAN V. LOUISIANA (1968), were grounded in a study of the history of the adoption of the Fourteenth Amendment, which convinced him that it was the intent of the amendment's framers that it should incorporate the Bill of Rights as a restraint upon the states. For Black, the Constitution did not endow the Court with power to expand and contract the meaning of due process to accord with the Court's assessment of what fundamental fairness required at any particular time. The fundamental fairness test was a resort to "natural law," depending "entirely on the particular judge's idea of ethics and morals instead of requiring him to depend on the boundaries fixed by the written words of the Constitution." Such a test was inconsistent with "the great design of a written Constitution." The specific language of the Bill of Rights would confine the power of the Court to read its own predilections into the Constitution.

Moreover, Black believed that the Bill of Rights, more reliably than the fundamental fairness test, would guide the Court to outcomes consistent with the values of a democratic society. In Black's view the judgment of the Framers of the Constitution would serve better than each Justice's personal judgment in determining what fairness required in criminal prosecutions. Indeed, the record of the Court's administration of its fundamental fairness test was for Black the clearest demonstration of his argument. He was speaking hyperbolically when he said in *Rochin* that the traditional test had been used "to nullify the Bill of Rights," but the fact was that in most instances the Court, as in *Adamson*, had used the fairness standard to uphold state convictions that would have been reversible had the specific provisions of the Bill of Rights been applicable.

Black's primary antagonist on this use, as on many others, was Justice FELIX FRANKFURTER, in later years joined by the second Justice JOHN MARSHALL HARLAN. They rejected Black's interpretation of the history of the Fourteenth Amendment's adoption, finding no plausible evidence that it was intended to incorporate the Bill of Rights as a restraint upon the states. But, beyond that, they advanced a very different approach to CONSTITUTIONAL INTERPRETATION. According to Frankfurter and Harlan, the provisions of the first eight amendments were not equally fundamental. Some, like the guarantees of FREEDOM OF SPEECH and religion, stated enduring values and were, therefore, binding on the states through the "independent potency" of the Fourteenth Amendment. Others, such as those protecting the right against self-incrimination and jury trials, "express the restricted views of Eighteenth-Century England regarding the best methods for the ascertainment of facts." Not every procedure that was historically protected by these provisions was necessary for fundamental fairness, though some might be of this character. Still others, such as the requirement of a grand jury indictment and the right to a jury in civil cases where the amount in controversy exceeded twenty dollars,

were largely historical relics. The terms of the Bill of Rights, all of them and only them, were, therefore, an unsuitable text for carrying out the commands of fundamental justice embodied in the requirement of due process of law. Changing circumstances would create new and unforeseen problems, casting new light on the question whether a given procedural guarantee was "fundamental." Only an evolving and flexible due process could assure preservation of the procedural requirements of a free society without binding the criminal process unnecessarily to the forms of the past.

Justices Frankfurter and Harlan conceded that the Court had sustained state procedures whose use would have been forbidden under the Bill of Rights. What mattered, however, was that it had done so only after satisfying itself in each case that the defendant had not been denied fundamental fairness. For example, the Fifth Amendment might forbid a federal prosecutor to APPEAL a conviction of a lesser offense than that charged and to prosecute under the original indictment if the appeal succeeds, but, as the Court held in *Palko v. Connecticut* (1937), the requirements of civilized justice would not be compromised by permitting a state to continue a similar prosecution until it achieved a trial free of substantial error. A jury of twelve persons might be required of federal prosecutions by the Sixth Amendment, but, as the Court held in *Maxwell v. Dow* (1900), it did not follow that a person could not receive a fundamentally fair trial in a state court before a jury of fewer members. Where, on the other hand, state practices fatally infected the justice of the convictions—as in *Powell v. Alabama* (1932) where the accused was deprived of a fair opportunity to present a defense, or in BROWN V. MISSISSIPPI (1936), where torture was used to extract a confession, or in MOORE V. DEMPSEY (1923) where the trial itself was a sham and a pretense—the Court did not hesitate to employ the fundamental fairness standard of due process to strike down the convictions.

In addition, Justices Frankfurter and Harlan emphasized the importance of the Court's avoiding excessive intrusions into the autonomy of the states. The Framers had deliberately chosen to create a federal rather than a wholly centralized system, partly to assure the limitation of power through its dispersal but also to obtain the benefits of autonomy and diversity in state government. Total incorporation of the Bill of Rights into the Fourteenth Amendment would impose a constitutional straitjacket on the states, stifling experimentation by the states in the administration of justice in the name of an unneeded uniformity.

As for the peril of judges' confusing their purely personal preferences with the requirements of the Constitution, Frankfurter and Harlan argued that this risk was inherent in JUDICIAL REVIEW—no less under the incorporation doctrine than under the fundamental fairness test. Giving meaning to particular provisions of the Bill of Rights, whose major provisions were written in open and general terms, would require judicial inquiry equally broad and open. The peril of judgment on the basis of personal preferences, they argued, must be met by judicial deference to the judgment of state governments and by a rigorous search for the fundamentals of fairness required by the nature and commitments of our society.

Though Justice Black lost the debate in *Adamson*, he continued to advance the cause of total incorporation to his final days on the Court. He never succeeded in persuading a majority, but although he lost some battles he won the war. When the dust cleared two decades after *Adamson*, the fundamental fairness standard (though significantly modified) still reigned as the accepted test of due process, but every provision of the Bill of Rights bearing on criminal procedure, with the single exception of the requirement of grand jury indictments, had been held applicable to the states.

This development occurred through the increased use of the strategy of SELECTIVE INCORPORATION, under which selected clauses of the Bill of Rights were held to be binding on the states as such in the view that they were required by fundamental fairness. Consistency with prior decisions was grounded in the view that what the Court had repeatedly rejected was the theory of total incorporation, not the view that some provisions of the Bill of Rights could be binding on the states through the due process clause. As Justice BENJAMIN N. CARDOZO, an early opponent of the total incorporation doctrine, had observed in PALKO V. CONNECTICUT (1937): "In [certain] situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty and thus, through the Fourteenth Amendment, become valid as against the states." Yet it is important to note that this justification for the new doctrine blurred an important distinction in the traditional view, which was that some *rights* protected by the provisions of the Bill of Rights might prove so central to ordered liberty that they were also binding on the states through the due process clause. This was not to say, however, that certain *provisions* of the Bill of Rights, in their entirety with all their interpretations, were incorporated by the due process clause.

In the decade following *Adamson* the Court was apparently not yet ready to take this leap from the traditional view to the new doctrine of selective incorporation. Instead, the Court developed a number of significant expansions in its conception of what fundamental fairness required that prepared the ground for the flowering of the selective incorporation theory a decade later. An early important instance was WOLF V. COLORADO (1949), in which

the Court held, in an opinion by Justice Frankfurter, that "the security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—. . . is implicit in "the concept of ordered liberty" and hence enforceable against the states through the due process clause. Still, the opinion was careful not to say that the Fourth Amendment as such was applicable to the states, and the Court declined to apply the remedy it had developed for enforcing the Fourth Amendment in federal prosecutions—excluding the unlawfully seized evidence. Other cases carried the movement forward. The Court in *Rochin* found that pumping an accused's stomach to obtain incriminating evidence was so "shocking to the conscience" that due process required the conviction to be reversed. Increasingly the Court found the failure to appoint counsel for indigent defendants to violate due process under the "totality of circumstances" rule of BETTS V. BRADY (1942), which required specific prejudice to be identified in the record. The circumstances in which the Court held confessions involuntary and, therefore, barred by due process were extended in *Spano v. New York* (1959) beyond physical coercion to include situations in which the defendant's will had been overborne by more subtle means of influence, such as persistent interrogation and trickery.

In the 1960s, however, the traditional test of fundamental fairness yielded to selective incorporation as the Court's dominant approach in reviewing the constitutionality of state prosecutions. A change of mood had taken place. For a variety of reasons—change in the composition of the Court, the CIVIL RIGHTS movement, the "War against Poverty"—the consensus on the Supreme Court moved toward greater intervention on behalf of criminal defendants, the great majority of whom were poor and members of minority groups. The continued enlargement case by case of the requirements of "fundamental fairness" was one possible alternative. But if, as the Justices apparently increasingly believed, excesses in the states' administration of criminal justice required extensive judicial correction, then something more was needed than the power to intervene in occasional cases of gross injustice. As a consequence the 1960s saw one of the remarkable accomplishments of the Warren Court—the federalization of state criminal procedure through the selective incorporation of the Bill of Rights.

*Mapp v. Ohio* (1961) marked the beginning. Effective control of state law enforcement required a constitutional remedy for law enforcement excesses. The EXCLUSIONARY RULE, which barred admission of unconstitutionally obtained evidence, had been developed decades earlier as a remedy in federal prosecutions. In *Wolf v. Colorado* the Court had declined to apply the exclusionary rule to the states, saying that a conviction based on reliable physical evidence was not fundamentally unfair just because the police had obtained the evidence by unconstitutional means. In *Mapp* the Court overruled that holding. The Court had, after all, already held in *Wolf* that the Fourth Amendment's RIGHT OF PRIVACY was enforceable against the states. It seemed natural to take the further step of holding that the remedy used to enforce Fourth Amendment privacy rights against federal violations was no less required to enforce "due process" privacy rights against state violations. If Fourth Amendment rights were basic to liberty, so must be the only practical means for their enforcement.

The next major case, GIDEON V. WAINWRIGHT (1963), also had features that made it a relatively easy case for extending selective incorporation. The Court had earlier held in *Betts* that appointment of counsel for indigents, though required by the Sixth Amendment for federal prosecutions, was not necessarily a fundamental right protected by due process. In the special circumstances of some particular prosecution, failure to appoint counsel might constitute a lack of fundamental fairness, but absence of counsel would not necessarily create this level of prejudice in every case. However, the "special circumstances" doctrine was gradually undermined in successive cases as the Court increasingly was able to find those circumstances in cases that were typical. As Justice Harlan observed, "The Court had come to realize . . . that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial." Against this background there was little resistance to overruling *Betts* and, in the process, holding that the Sixth Amendment's guarantee of counsel was one of those clauses which fundamental fairness required to be imposed upon the states by the Fourteenth Amendment.

From then on scarcely a TERM of Court in the 1960s went by without the Court's OVERRULING some prior case to hold that an additional provision of the Bill of Rights was necessary to fundamental fairness and was, therefore, incorporated in due process. In 1965, in *Griffin v. California*, the Court overruled *Adamson* and held that the Fifth Amendment right against self-incrimination was protected by due process. The Sixth Amendment right to confrontation of witnesses was held to be incorporated in *Pointer v. Texas* (1965), and the rights to a speedy and public trial and to compulsory process for obtaining witnesses were also held to be incorporated in KLOPFER V. NORTH CAROLINA and *Washington v. Texas* (1967). In DUNCAN V. LOUISIANA (1968), the Court overruled earlier decisions and held that the Sixth Amendment's right to a jury trial was incorporated in due process. In BENTON V. MARYLAND (1969), *Palko* was overruled and the double jeopardy provision was held applicable to the states. The job was done. To all intents and purposes, the contours of due process of law required of

the states by the Fourteenth Amendment had come to be defined by the specific guarantees of the Bill of Rights limiting the federal government.

One may fairly ask of this constitutional tour de force how well it was defended in doctrinal analysis. The position favoring total incorporation had a forceful logic: once the initial premise was accepted, it followed that every provision of the Bill of Rights and every interpretation of those provisions developed for federal prosecutions should apply equally to state prosecutions. But how was the theory of selective incorporation to be justified? Did the Court seriously mean that all the rights the Court had previously found in selected provisions of the Bill of Rights—such as the jury trial provision of the Sixth Amendment, the Fifth Amendment's protection against self-incrimination, the Fourth Amendment restraints upon search and seizure (including the right to have even reliable evidence excluded if it were unlawfully obtained)—all were so fundamental that "a fair and enlightened system of justice would be impossible" without them? This conclusion could scarcely stand scrutiny. As the Court had noted in earlier cases holding these guarantees unprotected by due process, a large portion of the democratic world, with claims to a civilized and enlightened system of justice no less strong than ours, offers no such guarantees.

Very little effort was made to address this challenge until Justice BYRON R. WHITE (in a footnote, ironically) did so in his opinion for the Court in *Duncan v. Louisiana* (1968), holding the jury trial guarantee of the Sixth Amendment incorporated by the due process clause. He ascribed the rejection of the earlier holdings to a new interpretation of what fundamental fairness meant. The Court had previously understood it to require those guarantees that a system of justice anywhere at any time would have to accord to be called civilized. In the newer cases, however, the Court proceeded on the view that fairness required those guarantees that are necessary to an "Anglo-American regime of ordered liberty." It is not required, White noted, that a procedural guarantee be "necessarily fundamental to fairness in every criminal system that might be imagined," but that it be fundamental "in the context of the criminal processes maintained by the American states."

Whether this revision of the fundamental fairness test suffices as a basis for selecting particular provisions of the Bill of Rights for incorporation is problematic. If the new test refers to practices that have so long been accorded in American systems of justice that they have come to be regarded as among the distinguishing characteristics of American justice, then "fundamental" becomes equivalent to "traditional," all the provisions of the Bill of Rights are fundamental, and the accepted test of selective incorporation becomes in fact the rejected test of total incorporation. It would appear, however, that something more was meant. Criminal justice systems, like other social institutions, are complex and comprise a variety of elements that function in a delicate ecological relationship. Given the particular functioning of some procedural protection in the American system, it may be that the protection is fundamental to fairness in that system, although it would not be in a system with a different assortment of procedural elements with differing functional relationships. So, in the *Duncan* case, Justice White noted that although it was easy to imagine a fair system that used no juries, in which alternative guarantees and protections would serve the purposes the jury serves in English and American systems, no American jurisdiction had undertaken to construct such a system.

If this latter interpretation of fundamental fairness were taken seriously, the Court would be obliged to undertake in each case a factual examination of the complex functioning of the state's criminal justice system, with particular attention to how the functioning of the system as a whole colors the significance of the practice at issue. But no such inquiry was made in the *Duncan* case. The opinion drew attention to the long-standing concern about overzealous prosecutors and biased judges. But it made no effort to examine such questions as whether the routine availability of appellate review in the state courts and COLLATERAL ATTACK in the federal courts rendered a jury trial less indispensable as a protection against such abuses; or why, if the use of a jury for this purpose made it a requirement of fundamental fairness in the American system, it was not required in all civilized systems; or whether a jury of randomly chosen citizens in fact served as a check against bias rather than as a source of bias. The Court also pointed generally to the traditional acceptance in America of a jury power of nullification in the application of the law. But the Court failed to consider why this power is significant, and why, in other systems, a comparable power of nullification is not seen to be required by fundamental fairness.

The point is not that the Court could not have made a case for the conclusion that fundamental fairness required the jury in the American system of justice, but that it did not try. Nor did the Court do better in the other cases applying the doctrine of selective incorporation. In the end, therefore, there is force in the conclusion that the Court's attempt to shore up the doctrinal case for selective incorporation was an illusory post hoc rationalization.

An additional consideration, strongly pressed by Justice Harlan in his dissenting opinions, lends further support to that conclusion. Even if it be granted that a guarantee to be found in a provision of the Bill of Rights is required by fundamental fairness in an American system of justice, it does not follow that each and every interpretation of that

provision developed in federal prosecutions is equally required for fundamental fairness. For example, the Fifth Amendment's privilege against self-incrimination has been held in federal prosecutions to preclude judicial or prosecutorial comment on the failure of the defendant to respond to the evidence against him. The Fifth Amendment's protection against double jeopardy has been interpreted to attach at the time the jury is first sworn. The Sixth Amendment's guarantee of a jury trial in criminal cases had once been held to require a unanimous verdict of the jury. But even if the core concept of the privilege against self-incrimination, the double jeopardy protection, and the jury trial guarantee were found to be necessary for fundamental fairness, it would scarcely follow that each and every one of these interpretations of the federal guarantees is also necessary. Yet, in sharp contrast to the requirements of the avowed theory of selective incorporation, this is what the Court had held in every instance: a conclusion that a clause of the Bill of Rights is applicable to the states necessarily entails that each and every interpretation of that clause developed in federal prosecutions, regardless of its rationale or significance, becomes fully applicable as well, as Harlan said, "jot-for-jot and case-for-case" and "freighted with [its] entire accompanying body of federal doctrine" (*Duncan v. Louisiana*, 1968; *Malloy v. Hogan*, 1964). This conclusion constitutes further evidence that the Court was not taking seriously the only theory it had advanced to support its doctrine of selective incorporation.

Putting aside the doctrinal warrant of the approach to procedural due process that has come to prevail, what has been its impact on the administration of criminal justice in the states and what is its likely bearing on the future of due process? It is clear that the values of federalism have been heavily overrun. Given the expansive, pervasive, and often highly detailed regulations the Court has imposed on the processes of criminal justice under warrant of the Bill of Rights, one has to conclude that the autonomy of state government has been drastically curtailed.

At the same time, it is almost certainly true that the procedural rights accorded the accused in state courts have been greatly expanded over what they would have been had this federalization not taken place. The expansion of constraints upon the administration of justice during the era of the Warren Court in the 1960s has been one of the notable characteristics of that Court. Few state courts and no state legislatures could have been expected on their own to have achieved anything like a comparable expansion. People will differ over whether the balance between effective law enforcement and the rights of the accused thereby achieved resulted in a preferable system of criminal justice than would have been obtained under the earlier doctrine. Most would agree, however, that the coalescing of the minimum constitutional rights of the accused in both state and federal prosecutions has tended to produce a constitutional jurisprudence more understandable to the citizen who does not typically distinguish between state and federal government in considering the rights of the accused.

On the other hand, the presumed advantage in using the Bill of Rights to measure what due process requires of the states—that it eliminates the uncertainty and the need for personal, subjective decision-making by judges imposed by the traditional view—has hardly been evident. In deciding what searches are "reasonable" within the Fourth Amendment, how far that Amendment protects a right of privacy against new forms of ELECTRONIC EAVESDROPPING, when noncoercive POLICE INTERROGATION becomes violative of the Fifth Amendment's right against self-incrimination, what punishment, including CAPITAL PUNISHMENT, is "cruel and unusual" within the Eighth Amendment (which the Court in TROP V. DULLES (1958) conceded had to be determined by "the dignity of man" and "evolving standards of decency"), it was readily apparent that the text of the Bill of Rights scarcely spoke for itself and in fact invited no less an assessment and choice among competing values on the basis of the Justice's sense of what justice and fairness required. Fixed meanings have not triumphed over flexible ones, and judicial subjectivity has not been contained. More seriously, insofar as the Court has proceeded on the false assumption that the need for judicial value choosing has been overcome, it has handicapped itself in the task of developing a well-considered method of decision-making that would discipline and make more rational the inevitable process of choosing among competing values.

This concern is particularly pressing because the Court has recognized that due process is still open-ended, that although due process includes the incorporated clauses of the Bill of Rights, those clauses do not exhaust the content of due process. The 1952 decision in *Rochin*, that a state denied due process by using evidence pumped from the accused's stomach against his will, was reaffirmed in SCHMERBER V. CALIFORNIA (1966) under the principle that due process precludes action against an accused that "shocks the conscience" and violates one's "sense of justice," notwithstanding the inapplicability of any other provision of the Bill of Rights. Similar evidence of the vitality of the older tests of due process where the Bill of Rights does not reach are the Court's decisions in IN RE WINSHIP (1970), holding that an essential requirement of due process in criminal cases is proof of guilt beyond a REASONABLE DOUBT, and in the CAPITAL PUNISHMENT CASES OF 1976, finding in due process a requirement of articulated criteria to guide the judge or jury in determining whether to impose capital punishment.

One may conclude that despite the victory of selective incorporation the task of developing a defensible method and set of criteria to govern the determination of those criminal procedures that are constitutionally permissible is very much before the Court. How it could best be met is uncertain. One proposed approach would entail a consideration of a number of issues. In this view the Court would begin by drawing out the implications of the basic values animating constitutional restraints on the criminal process: fairness to the accused, protection of personal dignity, and the reliability of the processes for determining guilt. Next, the Court would determine how gravely the controverted procedure impugned those values and how seriously certain restraints would prejudice the due administration of criminal justice. Finally, the Court would seek ways of rooting the inevitable final choices in ground more secure than the personal judgment of the majority of the Justices on the optimum operation of the system of criminal justice. Another approach, less oriented to consequentialist considerations, would have the Court determine the fundamental legal rights of persons, including the constitutional rights of the accused, in terms of the requirements of a general political theory that best account for the moral principles embedded in the Constitution, laws, and culture of our society. Whatever the answer, the task is a formidable one. Indeed, the effort may ultimately be futile, as those believe who view the Court as indistinguishable from any other political body in the exercise of its power. But to the extent that the Court accepts the claim that its exercise of political power is based on reason and disinterestedness—that is, on law—it can scarcely abandon the goal of writing opinions that give credence to the claim. However one may approve its results, the doctrine of selective incorporation, with its oversimplifications and misperceptions, and its dubious doctrinal underpinnings, has not served that goal well.

SANFORD H. KADISH
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Bibliography

ALLEN, FRANCIS A. 1953 Due Process and State Criminal Procedures: Another Look. *Northwestern University Law Review* 48:16–35.

DWORKIN, RONALD M. 1975 Hard Cases. *Harvard Law Review* 88:1057–1109.

FAIRMAN, CHARLES 1949 Does the Fourth Amendment Incorporate the Bill of Rights? The Original Understanding. *Stanford Law Review* 2:5–173.

FRIENDLY, HENRY 1965 The Bill of Rights as a Code of Criminal Procedure. *California Law Review* 53:929–956.

HENKIN, LOUIS 1963 "Selective Incorporation" in the Fourteenth Amendment. *Yale Law Journal* 73:74–88.

KADISH, SANFORD H. 1957 Methodology and Criteria in Due Process Adjudication—A Survey and Criticism. *Yale Law Journal* 66:319–363.

NOTE 1949 The Adamson Case: A Study in Constitutional Technique. *Yale Law Journal* 58:268–287.

NOWAK, JOHN E. 1979 Foreword: Due Process Methodology in a Post-Incorporation World. *Journal of Criminal Law and Criminology* 70:397–423.

# PROCEDURAL DUE PROCESS OF LAW, CRIMINAL
## (Update)

Integral to the law's aspirations is the set of variables differentiating law and politics: reason and passion, rationality and bias, free inquiry and ideology, fairness and self-interest. The law's ardent hope is that these variables permit distinctions between what will endure and what will pass, for it is the relative mix of the enduring and the ephemeral that determines whether a nation is one of disinterested laws or of self-interested individuals. Thus it is that the Supreme Court strives to justify its decisions through well-reasoned opinions. The task of the Court is to resist the allure of politics and rest judgment on principle.

But is this task possible? The difficulties are legion. Disagreements abound concerning the correct interpretative methodology, the data relevant to the various interpretive approaches, and the proper role of the judiciary in a democratic scheme. These disagreements are compounded because the Supreme Court often does not speak with one voice but instead is spoken for by each of the Justices in a setting that seriously complicates a consistent ordering of preferences in enduring legal doctine. Super-imposed over all these difficulties is the fact that the Supreme Court is essentially a reactive institution, responding to problems generated for it by social factors beyond its control. No matter how fervently the Justices may wish to promulgate a consistent and principled JURISPRUDENCE, the diversity and unpredictability of the grist for the Court's mill make the task formidable.

The more open-ended the interpretive problem, the more formidable the task, and among the most open-ended of the Supreme Court's tasks is the interpretation of the twin DUE PROCESS OF LAW clauses in the Fifth Amendment and FOURTEENTH AMENDMENT. The language of these clauses is not confining, their historical purposes are unclear, and to the extent there is agreement concerning those purposes, their implications for contemporary issues are not obvious. The due process clause of the Fifth Amendment, for example, was adopted as part of a set of guarantees that the newly created central government would respect its proper sphere, and the similar clause of the Fourteenth Amendment was adopted to recognize and

reflect the changes wrought in the country by the CIVIL WAR. Neither was adopted with the contemporary set of issues in mind to which these clauses have been asserted to be relevant by litigants and judges.

For all these reasons, the Supreme Court's interpretation of the due process clauses is consistently as much a reflection of the times as the product of timeless interpretive methodologies. The nation's first century was a time of territorial expansion and of the creation and consolidation of governmental institutions in which criminal due process adjudication played virtually no role, and there were virtually no criminal due process cases. The second century brought an increasing emphasis on the role of individual rights, which culminated in the remarkable creativity of the Supreme Court's procedural revolution in the mid-1960s. The question now is what the third century will bring.

Certain trends are already apparent. The procedural revolution is over and the resulting legal landscape is stable. Whatever its theoretical attraction, the theory of total INCORPORATION has substantially won, even though a majority of the Court has never adopted the theory. Most of the criminal provisions of the BILL OF RIGHTS have been found to be binding on the states through the due process clause of the Fourteenth Amendment. Furthermore, notwithstanding the dramatic reorientation of the Supreme Court owing to recent appointments, the Court has not overruled a single majority CRIMINAL PROCEDURE decision holding a Bill of Rights provision incorporated into the Fourteenth Amendment. The incorporationist controversy is so definitively over that the opinions of the Court addressing questions of state criminal procedure discuss directly the applicable Bill of Rights provision with at most a cursory reference to the due process clause of the Fourteenth Amendment. The casualness with which the distinction is drawn between Fourteenth Amendment due process and the specific provisions of the Bill of Rights is exemplified by the opinion for a unanimous court in *Crane v. Kentucky* (1986). In holding that due process was violated by the exclusion of testimony concerning the circumstances of a defendant's confession, the Court said that "whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the compulsory process or confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."

Justices also appear to have little interest in giving either due process clause much independent significance. In those few instances in recent years in which the Court has discussed either clause directly rather than as a surrogate for some other constitutional provision, it typically has done so to deny that due process has any meaning independent of the specific provisions of the Bill of Rights. In *Moran v. Burbine* (1986) the Court held that there was no violation of due process when the police failed to inform a criminal suspect subjected to custodial interrogation of the efforts of an attorney to reach him. Due process also does not require appointed counsel for collateral review of a conviction (*Pennsylvania v. Finley*, 1987), not even for collateral review of capital convictions (*Murray v. Giarratano*, 1989). Similarly, in *Strickland v. Washington* (1984) the Court commented that although "the Constitution guarantees a fair trial through the Due Process Clauses, it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment." The Court applied this approach in *Caplin & Drysdale, Chartered v. United States* (1989) to find that the Fifth Amendment due process clause adds little or nothing to the Sixth Amendment RIGHT TO COUNSEL clause and in UNITED STATES V. SALERNO (1987) to reach a similar conclusion concerning the relationship between Fifth Amendment due process and the requirement of BAIL in the Eighth Amendment.

The failure of the Court to overrule prior criminal decisions and to give independent force to the due process clauses does not mean that the creative energies of the Court are quiescent. Rather, they are finding outlets in different directions. Through the mid-1960s the Court's agenda was to tame the unruly manner in which the criminal justice process operated, particularly in the states. Employing the due process clause of the Fourteenth Amendment as its primary weapon, the Court succeeded in subjecting the state criminal justice process to the formal limits on governmental power in the Bill of Rights and in breaking down resistance to its innovations in the lower state and federal courts. One measure of this success is the increasingly common phenomenon of state supreme courts using state law to impose greater constraints on state officials than the federal constitution requires.

Because its previous messages have been largely absorbed by the lower courts and perhaps in response to increasingly conservative politics in the country, the Court has refocused the target of criminal procedural due process analysis from the specific provisions of the Bill of Rights to the question of the appropriate remedy. There are three interrelated variables driving the refocusing: first, a concern that exclusion of evidence premised upon the policy of deterring undesirable state action has a reasonable chance of advancing that goal; second, an increasingly intense belief that finality is an important value in adjudication; and third, an emphasis on accuracy in outcome.

The primary remedies that the Court has employed to effect its revisions of criminal procedure were the exclusionary rule and the threat of reversing convictions. Cases such as GIDEON V. WAINWRIGHT (1963), MAPP V. OHIO (1961),

and MIRANDA V. ARIZONA (1966) fit a general pattern of announcements of new rules to be enforced by the threat of excluding EVIDENCE seized in violation of those rules or the reversals of convictions if the rules are not followed. The theory was that law enforcement officials would not jeopardize convictions by ignoring the new rules and that the threats of exclusion and reversal would thus deter unwanted behavior.

The present Court perceives two difficulties with this theory. First, as the new rules became accepted, and thus became the norm, the power of exclusion or the threat of reversal to affect law enforcement behavior diminished. It is one thing to exclude evidence or reverse a conviction because the police broke into a person's house, in the process apparently lying about whether they possessed a SEARCH WARRANT, as occurred in *Mapp*, but it is another to exclude evidence where the police made every effort to comply with the Court's pronouncements, as the Court refused to do in *United States v. Leon* (1984). Second, the nature of Supreme Court innovation is that it begins with the core problem an area poses and then expands into peripheral areas. As the cases press the logic of the original innovations further, the relationship between the cases and the policies underlying the original innovations becomes increasingly attenuated. It is one thing to sanction state officials for extensively interrogating an individual without warning him of his rights or allowing him to consult counsel, as occurred in *Miranda*, but it is another to do so because the state official gave a set of *Miranda* warnings differing somewhat from the language specifically approved in *Miranda*, as the Court refused to do in *California v. Prysock* (1981).

The Supreme Court has fashioned a number of principles to limit the EXCLUSIONARY RULE to situations in which there are reasonable prospects that deterrence will operate. Chief among these limiting principles is the GOOD FAITH EXCEPTION to the exclusionary rule fashioned in *Leon*. Exclusion of evidence is not likely to deter behavior if the law enforcement personnel had a good-faith belief in the correctness of their conduct. Similarly, the Court has refused to extend the exclusionary rule into peripheral areas where deterrence is unlikely to result, such as the GRAND JURY setting (UNITED STATES V. CALANDRA, 1974) and civil matters such as forfeiture proceedings (*United States v. Janis*, 1976) and DEPORTATION proceedings (*Immigration and Naturalization Service v. Lopez-Mendoza*, 1984).

The Court has also limited those who may litigate the legality of state action to restrict exclusion of evidence to cases where a deterrent effect is likely. Because law enforcement officials will not typically know in advance who the culprit is or who will be permitted to litigate the legality of their behavior, they will not jeopardize an investigation through illegal action so long as someone affected by their behavior may be in a position to complain. Thus, in *Rakas v. Illinois* (1987), the Court held that the passengers of a car could not contest the legality of a search of the car that included a search of the glove compartment, which had been used with the owner's apparent knowledge. In *Rawlings v. Kentucky* (1980) the Court held that the defendant could not contest the validity of the search of an acquaintance's purse where, again, the defendant had placed items with the knowledge of the purse's owner.

Intimately related to the Court's concern about the deterrent efficacy of its remedies is its growing emphasis on finality of decision. As the time increases between alleged state misbehavior and judicial intervention, the likelihood that reversals will affect behavior decreases. In addition, permitting federal relitigation of issues is an intelligent tactic if the work product of the state courts is not trusted, as was the case three decades ago; but as greater confidence in that work product is achieved, departures from finality are less desirable. A system that allows multiple attacks on the legitimacy of its work product undermines itself in various ways. Allowing repetitive relitigation of issues increases the probability of aberrational results simply because a litigant will eventually come before a court that for whatever reason—randomness, bias, or simple lack of attention—will act aberrationally. Reversals in such cases are not likely to advance deterrence of undesirable behavior or any other significant value. Allowing relitigation may also detract from the primary values of the penal system by encouraging individuals to deny responsibility for their acts. Regardless of whether confession is good for the soul, it is less likely to occur while avenues of appeal remain open.

Finality has been advanced in various ways. In particular, the scope of HABEAS CORPUS has been reduced. In STONE V. POWELL (1976) the Court held that FOURTH AMENDMENT issues could not be relitigated on habeas corpus if the defendant had been provided an adequate opportunity to litigate the issue at trial. In *Teague v. Lane* (1989) the Court held that the retroactivity of new constitutional rulings is limited to cases still pending on direct appeal at the time the new decision is handed down. In a series of cases, the Court has also developed a strict "waiver" rule to the effect that failure to raise an issue in a timely manner in state court precludes litigating it in federal habeas corpus unless failure to raise it amounted to ineffective assistance of counsel or unless a miscarriage of justice would result.

The third variable informing the Court's recent due process jurispurdence is a heightened focus on accuracy in adjudication. As the Court has become convinced that little remains of the disrespect for individual rights that it believed previously characterized the criminal justice process, it has become increasingly concerned with encour-

aging accurate outcomes. On the one hand, this has resulted in a further tightening of the avenues on appeal for a convicted defendant. In a series of cases beginning with *Chapman v. California* (1967), the Court has held that HARMLESS ERROR—error that does not cast doubt on the outcome of the trial—does not justify reversing a conviction. In NIX V. WILLIAMS (1984) the Court held that a conviction would not be reversed as a result of the admission of evidence illegally seized that would have been inevitably discovered by legitimate means. On the other hand, the Court has extended rights integral to the accuracy of convictions. For example, the Court has continued in its broad reading of the right to counsel, holding in EVITTS V. LUCEY (1985) that a defendant convicted of a crime is guaranteed effective assistance of counsel on a first appeal as a matter of right, even though a state is not required to provide for an appeal, and in AKE V. OKLAHOMA (1985) that a state must guarantee a criminal defendant access to a competent psychiatrist to assist in evaluation, preparation, and presentation of the defense.

The present state of due process adjudication is accurately captured by the holding in *James v. Illinois* (1990). In *James* the Court held that the principle that illegally obtained evidence can be used to impeach defendants' testimony so that exclusionary rules do not encourage perjury—first fashioned in *Walder v. United States* (1954)—did not extend to defense witnesses other than the defendant. Allowing the state to impeach witnesses other than the defendant would increase significantly the value of illegally obtained evidence, thus substantially impairing the efficacy of the exclusionary rule. Increasing the incentive of law enforcement officials to obtain evidence illegally would in turn put core constitutional values at risk. As significant as finality and accuracy are, they remain less significant than the core values of the various provisions of the Bill of Rights.

The implication of decisions like *James* is that criminal due process has evolved from a club to beat recalcitrant officials into line with the Court's innovations into a more subtle tool for adjusting the margins of the various doctrines. This use of procedural due process will surely continue for the foreseeable future. The next stage in the development of due process is presently unknowable, but its origins are predictable. The nation is in the midst of a subtle devolution of political authority from the central government to the states. Due process jurisprudence has mirrored this trend, as the Court has shown an increasing reluctance to intervene in the criminal justice process. As state officials become aware of their increasing autonomy, they will take advantage of it to rework state criminal processes. As innovations are implemented over the next decades, they will be subjected to constitutional challenges, and out of that process will come the next stage in the continuing evolution of the meaning of the due process clauses for criminal procedure.

RONALD J. ALLEN
(1992)

(SEE ALSO: *Automobile Search; Criminal Justice System.*)

Bibliography

AMSTERDAM, ANTHONY G. 1970 The Supreme Court and the Rights of Suspects in Criminal Cases. *New York University Law Review* 45:785–815.

BLASI, VINCENT A., ed. 1983 *The Burger Court: The Counter-Revolution That Wasn't.* New Haven, Conn.: Yale University Press.

NOWAK, JOHN E. 1979 Due Process Methodology in the Postincorporation World. *Journal of Criminal Law and Criminology* 70:397–493.

WILKES, DONALD E., JR. 1985 The New Federalism in Criminal Procedure: Death of the Phoenix? Pages 166–200 in Bradley D. McGraw, ed., *Developments in State Constitutional Law.* St. Paul, Minn.: West Publishing Co.

## PROCHOICE MOVEMENT

See: Abortion and the Constitution; Reproductive Autonomy

## PROCLAMATION OF NEUTRALITY (1793)

The Proclamation of Neutrality (April 22, 1793) was issued by President GEORGE WASHINGTON upon notification that France and Britain were at war. It pledged the United States to "pursue a course friendly and impartial" toward the belligerents and enjoined observance on all citizens upon pain of prosecution. Neutrality was bound to be difficult because of intense partisan feelings about the war, the privileges and obligations of the French alliance, and British rejection of American claims of neutral rights on the seas.

The importance of the proclamation for the Constitution was twofold. First, as a unilateral declaration by the President it seemed to preempt the power of Congress to decide questions of war and peace. Secretary of State THOMAS JEFFERSON, although he acquiesced in the proclamation, had made this objection in the cabinet, and it was taken up by the Republicans. In a notable series of articles under the signature Pacificus, Secretary of the Treasury ALEXANDER HAMILTON defended the proclamation. His claim of independent executive authority in FOREIGN AFFAIRS was opposed by JAMES MADISON as Helvidius, who compared it to the royal prerogative of the English con-

stitution. (Hamilton's argument prevailed in history, though Madison's antipathy to overriding executive power has not lacked supporters.) Second, as the conduct of neutrality was executive altogether, it afforded the first instance of government by administrative lawmaking. Decisions were made in the cabinet, without statutory authority, with the guidance only of the customary law of nations. Divided and uncomfortable in this work, the cabinet officers submitted twenty-nine questions to the ruling of the Supreme Court. The court declined to rule, however, and thus established the precedent against ADVISORY OPINIONS. Meanwhile, the government's attempt to prosecute violators of the proclamation was defeated by unsympathetic juries. Not until June 1794 did Congress enact a neutrality law, which codified the rules developed in the cabinet during the preceding year.

MERRILL D. PETERSON
(1986)

Bibliography

THOMAS, CHARLES M. 1931 *American Neutrality in 1793: A Study in Cabinet Government.* New York: Columbia University Press.

## *PROCUNIER v. MARTINEZ*
416 U.S. 396 (1974)

Speaking through Justice LEWIS F. POWELL, the Supreme Court invalidated California prison regulations censoring inmates' correspondence and prohibiting attorney-client interviews conducted by law students and legal paraprofessionals. The censorship provisions had permitted prison officials to ban correspondence in which inmates "unduly complain," "magnify grievances," or expressed "inflammatory political, racial, religious or other views or beliefs." These vague standards, the Court held, violated the FIRST AMENDMENT rights of prisoners and those with whom they corresponded. The prohibition on the use of law students and paralegals was held to be an unjustified restriction on prisoners' ACCESS TO THE COURTS.

MICHAEL E. PARRISH
(1986)

## PRODUCTION

Until the transformation of the constitutional law of ECONOMIC REGULATION, beginning in 1937, "production" described economic activities that the Supreme Court regarded as local or intrastate in character and therefore beyond Congress's power to regulate under the COMMERCE CLAUSE. In 1895 the Court ruled in UNITED STATES V. E. C. KNIGHT CO. that every form of production and matters related to it were stages of economic activity that preceded the buying, selling, and transportation of goods among the states. Manufacturing, mining, agriculture, domestic fisheries, stock raising, and labor had only an "indirect" effect upon commerce, by judicial definition. Because commerce came after production the United States had no constitutional authority to extend the SHERMAN ANTITRUST ACT to monopolies in production, nor could it control the trade practices of poultry dealers, or regulate agricultural production, or fix the MAXIMUM HOURS AND MINIMUM WAGES of miners. In UNITED STATES V. DARBY (1941) the Court sustained the constitutionality of the FAIR LABOR STANDARDS ACT, which applied to workers engaged in production of goods for sale in INTERSTATE COMMERCE, in the next year the Court in WICKARD V. FILBURN (1942) ended any remaining vestiges of the doctrine that Congress could not regulate production. The Court ruled that, although certain economic activities are local or intrastate, the commerce clause extends Congress's power to them if they affect commerce, making their regulation an appropriate way of governing commerce among the states.

LEONARD W. LEVY
(1986)

## *PROFFITT v. FLORIDA*

See: Capital Punishment Cases of 1976

## PROGRESSIVE CONSTITUTIONAL THOUGHT

During the Progressive era, roughly from 1900 to 1920, the Constitution and the SUPREME COURT came in for considerable criticism on the part of historians, political theorists, statesmen, intellectuals, and journalists. The criticisms involved five issues: the origins of the Constitution's authority; claims that the Constitution, and the system of government it supported, were antiquated and needed to be modified in light of developments in modern science; protests that the Supreme Court functioned as an instrument of business interests; demands that the Constitution be reinterpreted to allow for federal regulation of industry; and similar demands that it become the agency of social reform.

Prior to the Progressive era the Constitution's authority rested on the assumption that it was a neutral document capable of rendering objective judgments based on either transcendent religious principles or secular doctrines like natural law. The first challenge to that assumption came from J. ALLEN SMITH'S *The Spirit of American Government*

(1907), in which the Constitution was alleged to be a "reactionary" document designed to thwart the democratic principles of the DECLARATION OF INDEPENDENCE by means of CHECKS AND BALANCES and JUDICIAL REVIEW of legislative actions of popular majorities. But the most thorough critique of the Constitution's presumed disinterested authority fell like a blockbuster with the publication of CHARLES A. BEARD's *An Economic Interpretation of the Constitution* (1913). Here readers discovered that the movement toward RATIFICATION OF THE CONSTITUTION in 1787–1789 was led by merchants, manufacturers, creditors, and land speculators whose primary concern was to protect their own interests from what JAMES MADISON called "overbearing factions." THE FEDERALIST's authors, Beard was aware, hardly concealed the fact that they regarded protection of property as the essence of liberty. But Beard's exposure of the economic motives of the Framers did much to demystify the moral character of the Constitution by disclosing the "interests" behind it.

While the historian Beard tried to unmask the sacred image of the Constitution, political theorists tried to reestablish it on a more scientific foundation. In *The Process of Government* (1908) Arthur Bentley suggested that the scholar must penetrate beyond the formal structure of the Constitution to appreciate the forces and pressures that act upon it through interest group demands. But the dynamic of amoral interest politics was precisely what troubled WOODROW WILSON and other Progressive idealists. First in *Congressional Government* (1884), then in *Constitutional Government in the United States* (1908), and finally in a series of campaign speeches published as *The New Freedom* (1912), Wilson indicted the Constitution for weakening the executive branch of government, allowing interests and power to prevail in the legislature's standing committees, accepting as inevitable factional antagonisms detrimental to the public good, and upholding the letter of the law rather than the life of the state. Criticizing *The Federalist* for bequeathing a static, mechanist concept of government, Wilson wanted a Constitution "accountable to Darwin, not to Newton," a Constitution as "a living organism" capable of growth and adaption, one that would coordinate the branches of government so that liberty could be preserved not on the basis of diversity—Madison's premise—but of unity forged by presidential leadership.

Critical of the Constitution, Progressives also became disillusioned with a Supreme Court as an obstacle in the path of social reform. THEODORE ROOSEVELT exploded in anger when the Court invalidated state LEGISLATION involving child labor, tenement house reform, and other goals of PROGRESSIVISM. Yet, curiously, Progressives disagreed whether the Court had a right to do so. In *The Supreme Court and the Constitution* (1912), Beard argued that the right of judicial review was the clear intent of *The Federalist.* In *Our Judicial Oligarchy* (1912) Gilbert E. Roe expounded the opposing case, arguing that the courts had usurped authority in reviewing legislative acts. While both authors scorned judges disposed to preserving property rights at the cost of social justice, they continued to differ as to whether the Supreme Court could hold unconstitutional laws void or whether it should defer to the legislative process and exercise what the followers of OLIVER WENDELL HOLMES called "judicial restraint."

Progressives were far more unified in advocating regulation. All the writers associated with the liberal *New Republic*—HERBERT CROLY, Walter Weyl, Walter Lippmann, John Dewey, and LOUIS D. BRANDEIS—wanted to see corporate enterprise subordinated to the public good by means of industrial commissions, surveillance of trusts and monopolies, banking and railroad legislation, and the like. All also agreed that standing in the way of federal regulatory policies was a debilitating Jeffersonian heritage that made private rights anterior to public responsibilities, a destructive individualism that frustrated the ideals of political authority and civic duty. "Only by violating the spirit of the Constitution," Lippmann boldly declared, "have we been able to preserve the letter of it." Many of the Progressives were Hamiltonian nationalists convinced that both the Constitution and the Republic could be preserved from the corruptions of business interests only by augmenting the authority of an efficient and enlightened state. Many were also pragmatists who believed that the Constitution should be interpreted not from within but from without, not in terms of its inherent logic or precedent but in light of its consequences as society experiences the Court's rulings.

Progressives succeeded in realizing a number of reforms through the AMENDING PROCESS, specifically the income tax, women's suffrage, and the DIRECT ELECTION of senators. As with the RECALL, and REFERENDUM in state governments, and direct PRIMARY ELECTIONS in national politics, the constitutional amendments aimed to allow people to participate more directly in the decisions affecting their lives. Whereas *The Federalist*'s authors believed that liberty could best be preserved by distancing the people from the immediate operations of government, the Progressives saw no conflict between republican liberty and participatory democracy.

JOHN PATRICK DIGGINS
(1986)

Bibliography

COMMAGER, HENRY STEELE 1950 *The American Mind: An Interpretation of American Thought and Character Since the 1890s.* New Haven, Conn.: Yale University Press.

ROSTOW, EUGENE V. 1970 The Realist Tradition in Law. Pages

203–218 in Arthur M. Schlesinger, Jr., and Morton White, eds., *Paths of American Thought.* Boston: Beacon Press.

## PROGRESSIVISM

In the decades after the CIVIL WAR, American law was forced to accommodate to the increasing pace of economic change as the United States was transformed from an agrarian, rural nation of small operatives into an urban, industrial nation characterized by huge transportation, manufacturing, extractive, and financial corporations that served national rather than local or regional markets. The Standard Oil trust, formed in 1882, consisted of thirty-nine different companies that pumped oil in eight states, refined it in six, and sold it everywhere. Railroad mileage increased from 36,801 miles in 1866 to 193,346 in 1900, and the gross national product increased by a factor of twelve. By 1900, the United States was producing more steel than Great Britain and Germany combined. Nevertheless, the devastating depression of 1893–1897 underscored the pain, human suffering, and dislocation caused by industrialization—ranging from child labor to burgeoning farm tenancy, strikes, and massive unemployment (which ran as high as twenty percent during the darkest months of the depression). It also underscored the lack of rationality and order in the marketplace. The century ended with a flurry of mergers as 2,274 firms disappeared during the years 1898–1910.

Historians have questioned whether there was a "Progressive movement," disagreed about who were its leaders and followers, and argued about its dates. Around the beginning of the twentieth century, institutional reform occurred at many levels of government, but Progressives were not unified by party, class, or objectives. For example, those who favored economic efficiency, such as the conservationists, seldom showed much sympathy for those who championed social issues. Not surprisingly, the Progressives never decided how the business corporation could be made more accountable to public opinion or what role it should play in American society. Since the colonial period, American law has attempted to blend promotional and regulatory elements, though the former prevailed for most of the nineteenth century. It has proved far easier to promote economic growth—through such legal mechanisms as EMINENT DOMAIN, the power of incorporation, tax policy, and limits on liability for personal injury—than to regulate it.

For constitutional and legal scholars, it is appropriate to define the Progressive era as the years from about 1886 to 1917. Some recent historians look more charitably on the Supreme Court during this era than did scholars who wrote before the 1970s. They argue that many Justices were by training and inclination classical liberals who saw the Constitution as the embodiment of natural law. These judges wanted to preserve higher law rights and individual liberty, limit monopoly and government "paternalism," and protect the central government from expanding STATE POLICE POWER. They rejected "special privilege" in all forms. Earlier historians had charged that most members of the Court regarded the Constitution as primarily designed to protect property, that they knew little about American history and institutions, that they stubbornly clung to an organic, almost feudal view of society, and that they contributed to the growth of vast economic oligarchies. The critics insisted that state courts—particularly in their reliance on liberty of contract and in their use of injunctions to break strikes—were no less activistic, regressive, or anachronistic than the High Court.

It is not clear that the Supreme Court was out of step with public opinion or that its members held substantially more "conservative" values than did the mass of Americans. (Even in the midst of the depression, the Republicans won in a landslide in 1894 and WILLIAM MCKINLEY beat William Jennings Bryan easily in 1896.) Nevertheless, no charge was more popular during the Progressive era than that the courts had systematically violated the basic structural principle of the Constitution—the independence of the three branches of government. In 1895 the High Court rendered two decisions that struck at the heart of national LEGISLATIVE POWER. In UNITED STATES V. KNIGHT CO. the Court, which traditionally had defined the COMMERCE CLAUSE very broadly, emasculated the SHERMAN ANTITRUST ACT (1890) by ruling that the American Sugar Company, which refined more than 90 percent of the nation's supply, monopolized manufacturing but only indirectly commerce. (The Court drew the same kind of fine distinction when it refused to accept use of the commerce clause as a limit on child labor because only the products of labor, not the labor itself, was involved in INTERSTATE COMMERCE.) In the same year, the second POLLOCK V. FARMERS' LOAN AND TRUST CO. decision ignored well-settled precedent by invalidating the national income tax of 1894. And in 1896 INTERSTATE COMMERCE COMMISSION V. CINCINNATI, NEW ORLEANS, TEXAS PACIFIC RAILWAY denied that Congress had granted the Interstate Commerce Commission power to set rates.

Simultaneously, the Court, led by Justice STEPHEN J. FIELD, reinterpreted the DUE PROCESS clause of the FOURTEENTH AMENDMENT, making it a substantive protection of property against "arbitrary" and "confiscatory" state and federal regulations, not just the constitutional guarantee of a fair trial. *Munn v. Illinois* (1877) had clearly upheld the power of individual states to regulate the use of private property in the public interest; it had rejected SUBSTANTIVE DUE PROCESS as the Court had done earlier in the SLAUGH-

TERHOUSE CASES (1873). But substantive due process—which won its first great victory in STONE V. FARMERS' LOAN AND TRUST COMPANY (1886)—added new power to JUDICIAL REVIEW. A similar spirit permeated the Court's statutory interpretations, as in the RULE OF REASON articulated in STANDARD OIL COMPANY V. UNITED STATES (1911), which suggested that monopoly in and of itself was not illegal and that only the courts could define what charges, rates, or business practices were "reasonable." In LOCHNER V. NEW YORK (1905) it relied on the liberty and contract doctrine, which was based on substantive due process of law, to argue that the state could not use its police powers to regulate maximum work hours, except in dangerous jobs or jobs that immediately affected the public health; the Court held that bakers, unlike miners, did not do dangerous work. The right of workers to sell their labor at the highest price and of employers to buy it at the cheapest price took precedence. And in HAMMER V. DAGENHART (1918) the Court went against well-established precedent in declaring that the first federal child labor law went beyond Congress' commerce power, threatening the police power of the states and the balance between federal and state authority.

Many jurists and politicians fought against the conservative drift of the courts during the Progressive era, proposing reforms that included the recall of judges, the standardization of state incorporation laws, and the use of SOCIOLOGICAL JURISPRUDENCE to expand the vision and accountability of courts. But these proposals had little impact on the new industrial order. Far more important was the RULE OF LAW itself, for Progressivism was shaped by American values and faith in the American legal process. Most Americans preferred reform through law, a process of constitutional change, rather than revolution. The Progressives' faith in the rationality of man, progress, and the curative powers of law prompted such reforms as the initiative, referendum, recall, and direct elections of United States senators. They did not attack such underlying problems as poverty, racism, discrimination, and the insecurity of labor. Nor was there any major revamping of the legal system itself. Many Progressives argued that judicial review threatened the doctrine of SEPARATION OF POWERS, that it was inherently undemocratic, that it might as logically have been exercised by Congress or the President as by the Supreme Court, that most rulings of unconstitutionality had little to do with the language of the Constitution, that the frequency of 5–4 decisions violated the principle that only laws clearly unconstitutional should be invalidated, that split decisions threatened to undermine public faith in the entire justice system, and that judges had little understanding of American society. Yet Congress was unable to adopt major reforms, and most Americans remained wary of tampering with the judicial system.

Although by the 1920s the Interstate Commerce Commission, Federal Trade Commission, and the Federal Reserve Board were the only important national REGULATORY AGENCIES, by that time the commission had won out over other options (including antitrust prosecutions, which met with little enthusiasm after the Progressive era, save for a few years at the end of the 1930s). The commissions served many purposes, including fact-gathering, education, disclosure of illegal practices, encouragement of innovation, the cartelization of industries, and restrictions on monopoly and oligopoly. They combined legislative and judicial functions, or adjudication and planning, and, even more important, they maintained respect for property by following elaborate administrative hearings and procedures similar to regular courts. They built on the assumption that by removing issues from the courts and legislatures, public servants could decide the proper shape and conduct of American business. In short, the commissions fitted comfortably with American views of the legal process.

The regulation of business was one thing; basic reform of the economic system, however, was uncongenial to most Americans. The Progressives agreed that the new industrial order had to be made more predictable, accountable, and responsible; that much was obvious. They also recognized the limits of judicial regulation of business, the judges' lack of knowledge of the economic system, the inability of courts to act unless a complaint was brought to them, and the courts' inability to engage in long-range policy-making. However, while many Progressives feared bigness per se, others looked forward to a new society built on organization, cooperation, and specialization; the competition that had been so valued in the nineteenth century appeared to them as anachronistic and dangerous. The Progressives no less than those who supported the NEW DEAL could not agree on what the structure of business should be, nor could they agree on the form or forms regulation should take. Therefore, many regulatory tools—such as selective corporate taxes (as on companies that used child labor or had interlocking directorates), national incorporation, and an expansion of the NATIONAL POLICE POWER—did not receive the attention they deserved. American values were ambivalent. Most Progressives regarded laissez-faire with disdain, yet they also believed in the sanctity of private property, economic individualism, and a society driven by the harmony of self-interest rather than by the clash of classes.

DONALD J. PISANI
(1992)

(SEE ALSO: *Child Labor Amendment; Child Labor Tax Act; Conservatism; Federal Trade Commission Act; Liberalism; Progressive Constitutional Thought.*)

Bibliography

BETH, LOREN P. 1971 *The Development of the American Constitution, 1877–1917.* New York: Harper & Row.

SKLAR, MARTIN J. 1988 *The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, The Law, and Politics.* Cambridge: Cambridge University Press.

SWINDLER, WILLIAM F. 1969 *Court and Constitution in the Twentieth Century: The Old Legality, 1889–1932.* Indianapolis and New York: Bobbs-Merrill Co.

## PROHIBITION

A recurring theme in American constitutional history is the attempt of a majority to impose its moral standards on society by legislation. The nineteenth-century temperance movement, along with its close ally, the ABOLITIONIST movement, constituted such a moral majority. That movement sought the legal prohibition of alcoholic beverages.

State and local prohibition statutes were accepted by the Supreme Court in MUGLER V. KANSAS (1887) as valid applications of the STATE POLICE POWER. That such laws deprived citizens of their liberty and property without DUE PROCESS OF LAW had been asserted, before the CIVIL WAR, only in the state court case of WYNEHAMER V. NEW YORK (1856).

In the early twentieth century the prohibition movement acquired a new ally in the Progressive movement, and, after nineteen states adopted prohibition laws, agitation shifted to the national level. In 1917 Congress enacted prohibition as a wartime austerity measure. The same year Congress proposed the EIGHTEENTH AMENDMENT, which, when ratified in 1919, raised prohibition to constitutional status. Repeal came fourteen years later with adoption of the TWENTY-FIRST AMENDMENT.

The failure of the "noble experiment" of national prohibition is frequently cited by opponents of other types of majoritarian legislation on moral issues, such as laws against SEGREGATION, handguns, ABORTION, and drugs.

DENNIS J. MAHONEY
(1986)

## PROHIBITION, WRIT OF

To lawyers as well as others, the term PROHIBITION calls to mind a law forbidding the making, distribution, or possession of intoxicating liquors. In law, however, the term has an ancient COMMON LAW meaning that retains vitality today. The writ of prohibition is an order from a higher court commanding a lower court to stop hearing a matter outside the lower court's JURISDICTION. From the beginning prohibition has been considered an extraordinary writ, one that the higher court may or may not grant, in its discretion. It is not normally to be used as a substitute for an APPEAL or a petition for a WRIT OF CERTIORARI.

A statute dating from the JUDICIARY ACT OF 1789 is interpreted to empower the UNITED STATES COURTS OF APPEALS and the Supreme Court to issue writs of prohibition to lower federal courts. Under this law, the Supreme Court can also issue writs of prohibition to state courts.

KENNETH L. KARST
(1986)

## PROHIBITION OF SLAVE TRADE ACT
### 2 Stat. 426 (1807)

Colonial legislatures had often tried to restrict the importation of slaves for economic reasons, and THOMAS JEFFERSON's famous deleted passage in the DECLARATION OF INDEPENDENCE denounced the royal disallowance of these bills. After Independence, all the states (except Georgia until 1798) prohibited the importation of slaves from abroad. The CONSTITUTIONAL CONVENTION OF 1787 permitted Congress to legislate against the international trade but at the insistence of the South Carolina delegates prohibited it from exercising that power for twenty years (Article I, section 9). After 1790, the Pennsylvania Abolition Society and the American Convention of Abolition Societies demanded interim legislation against the trade. Their lobbying produced the Act of March 22, 1794, prohibiting Americans from fitting out in American ports for the international trade. But South Carolina shocked the nation's conscience by reopening the trade in 1803.

President Jefferson urged Congress to ban the international trade at the earliest possible moment, and Congress responded with the Act of March 2, 1807, which prohibited the importation of slaves from foreign nations and dependencies, penalized persons engaging in the trade and purchasers from them, and provided for forfeiture of slaving vessels. The Act of May 15, 1820, declared slaving to be piracy, punishable by death. But enforcement of the ban was deliberately half-hearted, and the illegal trade brought in approximately a thousand blacks a year from Africa and the Caribbean. Though some southern spokesman in the late 1850s demanded a reopening of the trade, the CONFEDERATE CONSTITUTION also prohibited it.

WILLIAM M. WIECEK
(1986)

(SEE ALSO: *Slavery and the Constitution.*)

Bibliography

WIECEK, WILLIAM M. 1977 *The Sources of Antislavery Constitutionalism in America, 1760–1848.* Ithaca, N.Y.: Cornell University Press.

## PROLIFE MOVEMENT

See: Abortion and the Constitution; Anti-Abortion Movement

## *PROPELLER GENESEE CHIEF v. FITZHUGH*

12 Howard 443 (1851)

An act of Congress extended the ADMIRALTY AND MARITIME JURISDICTION of the United States Courts in matters of contract and tort arising upon the Great Lakes and connecting navigable rivers. In the case of *The Thomas Jefferson* (1825), the Court had confined federal admiralty and maritime jurisdiction to tide waters. Here, the Supreme Court, by a vote of 8–1, sustained the constitutionality of the act of Congress by ruling that JURISDICTION should not depend on the ebb and flow of the tide as in England but on the fact that the United States has "thousands of miles" of public navigable waters in which there is no tide. The TANEY COURT thus considerably expanded federal jurisdiction.

LEONARD W. LEVY
(1986)

## PROPERTY

The Constitution explicitly protects the ownership of private property, not only by the Fifth and FOURTEENTH AMENDMENTS but also through the FOURTH AMENDMENT and SEVENTH AMENDMENT as well as by the CONTRACT CLAUSE and other provisions of Article I, section 10. The Supreme Court has always regarded property as a material possession having a cash value, but the founding generation possessed a far broader view. Even JOHN LOCKE in his second treatise on government believed that the ownership of property included a right to pursue happiness; he did not restrict his understanding of property to the possession of physical assets with a cash value. A writer in the *Boston Gazette* in 1768 voiced the prevailing American opinion when he said, "Liberty and Property are not only joined in common discourse, but are in their own natures so nearly ally'd that we cannot be said to possess the one without the other." The VIRGINIA DECLARATION OF RIGHTS OF 1776, framed by GEORGE MASON, guaranteed, in part, "the enjoyment of life and liberty, with the means of acquiring and possessing property," a provision accepted by THOMAS JEFFERSON and many of the Framers, who believed that liberty and property were indissolubly linked. Many states copied this language in their constitutions.

In 1789 in the first amendment that JAMES MADISON proposed for a national BILL OF RIGHTS, he appropriated Mason's language and the Lockean meaning of property. He regarded property as a basic human right essential to one's existence, to one's independence, and to one's dignity as a person. Without property, real and personal, one could not enjoy life or liberty, or be free and independent. Only the property holder could make independent decisions and choices because he was not beholden to anyone; he had no need to be subservient. Americans cared about property not just because they were materialistic but because they cared about political freedom and personal independence. They cherished the ownership of property as a prerequisite for the pursuit of happiness, and property opened up a world of intangible values—human dignity, self-regard, and personal fulfillment.

In 1792, Madison wrote an essay entitled "Property," in which he described its "larger and juster meaning." It "embraces," he declared, "every thing to which a man may attach a value and have a right." In a narrow sense it meant one's land, merchandise, or money, but in a broader sense, "a man has property in his opinions and the free communication of them," including his religious opinions, and he has "an equal property" in the full use of his faculties or "a property in his rights" as well as a right to his property. In 1795, however, the Supreme Court endorsed the narrower meaning of property as the ownership of physical assets having financial value, and the Court added that property once vested is inviolable. "The Constitution encircles and renders it an holy thing. . . . It is sacred," said Justice WILLIAM PATERSON, who had been a member of the CONSTITUTIONAL CONVENTION. His view of the matter prevailed, and the Court showed itself as marvelously imaginative in the invention of judicial DOCTRINES of property that served to promote and protect corporate interests.

LEONARD W. LEVY
(2000)

## PROPERTY RIGHTS

In the discourse of American CONSTITUTIONALISM, the idea of PROPERTY has been both primal and protean.

First, there is the text. The DUE PROCESS OF LAW clauses of both the Fifth Amendment and FOURTEENTH AMENDMENT, rank property by name with life and liberty as a chief human interest to be secured against arbitrary and excessive interference from government. The Fifth Amendment's EMINENT DOMAIN, or "taking," clause even adds a special restriction against uncompensated TAKING OF PROPERTY for public benefit. Constitutional law perceives various high aims in these general protections for property. Courts dealing with claims of taking without compensation find in property an antiredistributive prin-

ciple, opposed to imposition on a select few of the costs and burdens of government operations. When the claim is one of deprivation without PROCEDURAL DUE PROCESS, modern doctrine treats property as primarily a legalistic (or bureaucratic) principle, opposed to subversion of legally warranted expectations by faithless or irregular administration of standing law. Of course, expectations build on constancy in the law itself, as well as on reliable administration. The doctrine of SUBSTANTIVE DUE PROCESS arose, in part, out of concern for protecting legally VESTED RIGHTS against retrospective disturbance by changes in law. In a more dramatic form of substantive due process, property has figured as a libertarian principle of independence from state regulation: the right of an owner, as Justice JOHN PAUL STEVENS recently wrote in MOORE V. CITY OF EAST CLEVELAND (1977), "to use her own property as she sees fit."

Second, proprietary norms and notions have inspired and organized constitutional-legal doctrine apparently far removed from the immediate scope of the property-specific clauses. Both the THIRD AMENDMENT and FOURTH AMENDMENT obviously tap special values of domestic sanctuary—refuge and privacy—from one prototypical image of property, the home or house. In GRISWOLD V. CONNECTICUT (1965) the Supreme Court marshaled these provisions with others in the BILL OF RIGHTS to construct a constitutional RIGHT OF PRIVACY in the conduct of marital intimacies at home. By the time of ROE V. WADE (1973), the Court had reconceived this as a right to choose for oneself "whether to bear or beget a child." In BUCKLEY V. VALEO (1976) the Court treated deployments of private wealth in electoral politics as exercises of the FREEDOM OF SPEECH and the FREEDOM OF ASSEMBLY AND ASSOCIATION protected by the FIRST AMENDMENT. In PERRY EDUCATION ASSOCATION V. PERRY LOCAL EDUCATORS ASSOCATION (1983), the Court confirmed an old idea that a government acting as a proprietor (rather than as a lawmaker) is unusually free to restrict freedom of speech. In a series of cases including *Reeves, Inc. v. Stake* (1980), the Court similarly relieved states acting as owners from normal duties under the COMMERCE CLAUSE to refrain from commercial discrimination against out-of-state competitors. In contrast, courts adjudicating under the rubric of substantive due process currently treat ECONOMIC LIBERTIES (aspects of self-direction concerned with acquisition, exchanges, and deployment of property) as categorically less resistant to state regulation than more "fundamental" or "personal" aspects, such as control over family formations.

Third, on a broadly ideological level, legal depictions of property have figured strongly in imaginative conceptions of the American constitutional system. Property held a glorified place in the common lawyer's Whig history imbibed by early Americans from WILLIAM BLACKSTONE. With its naturalistic imagery of clearly demarcated "closes," property offered a paradigm of legally sanctioned authority that was supreme within its limits yet firmly delimited by law. Such an image of legal property apparently helped later generations of Americans to represent and confirm to themselves the workings of check-and-balance institutional schemes—FEDERALISM and SEPARATION OF POWERS—that depend on jurisdictional boundaries judicially patrolled. More fundamentally, the image has from the beginning helped inspire and sustain a core idea of constitutionalism: a legally LIMITED GOVERNMENT based on a secure bounding of the state's domain from those of the market and private life.

Finally, at the level of practical debate over institutions, the question of property's relation to POLITICS has always been foundational for American constitutionalism. In the strongly influential NATURAL RIGHTS philosophy traced to JOHN LOCKE, the relation is oppositional. Property—here meaning acquisition of goods by effort and exchange and retention against force and fraud—is considered a native attribute of humankind, not an artificial contingency of state power and political choice. Accordingly, the state's business is to secure natural property against breakdowns of mutual forbearance that only a supreme civil authority can prevent. For Lockeans, then, the relation of property to politics is that of an a priori external limit and a test of legitimacy.

Yet in an older tradition of civic REPUBLICANISM, to which the Founders were also heir, questions of property entitlement and distribution are inseparable from constitutional design and political ministration. By the traditional republican understanding, property, or wealth, is power in politics. Undue concentration of wealth portends either oligarchy or revolution, and warding off those contingencies is very much the business of republican government. Morevoer, in civic republican thought, "corruption" of political motives by preoccupation with private need or advantage (as opposed to public honor and common good) is a chief internal threat to the stability and success of popular governments. Elements of this traditional view, modernized and coupled with Lockean liberal ideas, plainly appear throughout THE FEDERALIST (saliently in JAMES MADISON's famous essay on "faction") and in THOMAS JEFFERSON's political writings. They appear in the Constitution, as well, and in early American constitutional practice. By such devices as indirect election and large constituencies, the Framers avowedly designed the Constitution to ensure that only men of means and repute would attain national legislative or executive office.

Moreover, it was normal in the early United States for states, which under the Constitution set electoral qualifications even for congressional and presidential elections, to restrict VOTING RIGHTS to persons of independent social

status (free adult males) who also held a substantial property endowment or income of a kind not too dependent on governmental machination. In the more egalitarian democratic ethos tracing to the Jacksonian period, RECONSTRUCTION, and the CIVIL WAR amendments, WEALTH DISCRIMINATION in the field of voting rights has become constitutionally intolerable. Rather, debate has inevitably arisen over the converse claim that a democratic-republican constitution requires assurance to all, at public expense if necessary, of the material prerequisites of political independence and competence.

In summary, the American constitutional rhetoric of property and property rights is a congested manifold of cross-cutting and contested doctrinal and normative evocations. As might be expected of such an overloaded vocabulary, ambiguity and conflict affect not just normative emanations and doctrinal derivations, but the direct reference of the central terms themselves. In constitutional disputation, "property" and "property right" variously signify holdings, entitlements, and institutions. At one moment, "property" (or "property right") may refer to specific holdings of social wealth that various persons currently claim or practically enjoy; at another, to a set of legal or moral rules and principles supposed to define and condition entitlements to possession and enjoyment of parcels of social wealth; and at still another, to institutional regimes of privatization (the "free market").

This variability of reference would little surprise the generations of Anglo-American theorists—the line runs from David Hume and Jeremy Bentham to Wesley N. Hohfeld, MORRIS R. COHEN, Felix S. Cohen, Robert L. Hale, and beyond—who have attempted conceptual analyses and critiques of legal "property." Vagaries in constitutional-legal usage of "property" echo the academic discussions, which have themselves obviously been sensitive to partisan political and constitutional debates. In some respects, however, constitutional-legal usage strays from established jurisprudential positions.

It is common ground, at least, that legal "property" is a relation, not a substance. Property does not consist in parcels of wealth or "stuff." Academic sophisticates have long agreed that it also does not consist in any relation between a person and "his" stuff; neither possessory acts, proprietary intentions, nor both together constitute property. Rather, property is a matter of relations among persons: the social relations and practices that accord to bare, empirical, person-to-parcel connections a measure of public recognition, normative legitimacy, and practical reliability. But that is not all property is, either. Also indispensable to property, say the theorists, is the element of entitlement or legal sanction: there is no true "property" in a casual neighborhood practice of allowing me to farm a field and reap the fruit when we all also know that others may stop me at any time without running afoul any law. The question then becomes whether the law that constitutes property entitlements consists strictly of the "positive" human inventions of legislatures and of courts filling gaps in the common law or, rather, is found in some method of reason or traditional understanding that composes a prelegislative "higher" or "Natural" Law. On this question, JURISPRUDENCE remains deeply divided.

It is easy to find constitutional-legal doctrine officially accepting each step of the jurisprudential consensus so far as it goes. Yet constitutional law seems also often driven to resist the abstract logic of the consensus. According to the theorists, a legal regime that secures the exclusive possession of landowners against unauthorized entry certainly constitutes a property entitlement, but so, by the same reasoning, does a legal regime that permits (and protects against interference) a particular mode of using a parcel—for example, an owner's strip mining of land. Constitutional law, by contrast, differentiates sharply between legal restrictions on use that leave possession undisturbed and laws subjecting owners to "permanent physical occupations" of land. As the Supreme Court recently confirmed in *Keystone Bituminous Coal Association v. DeBenedictis* (1987) and *Nollan v. California Coastal Commission* (1987), new use restrictions, however severe, rarely amount to constitutionally challengeable takings or deprivations of property, but state-sponsored dispossession, however trivial, almost always does. Or consider a law plainly stating that a sheriff may seize goods from a person who bought them on credit whenever the creditor tells the sheriff that the loan is in default. In the sophisticated view, such a law simply defines the extent of the installment buyer's property right and so cannot itself be a constitutionally questionable deprivation of property. Constitutional law on procedural due process officially adopted that view in BOARD OF REGENTS V. ROTH (1972), a case of peremptory unexplained dismissal from a government job expressly held at the supervisor's discretion. Yet at about the same time, in *Fuentes v. Shevin* (1972), the Court found an unconstitutional deprivation of property without procedural due process in the law authorizing unceremonious seizure of goods from an installment buyer's possession. Unlike academic jurisprudence, constitutional law has to mediate practically among demands for proprietary security, sound policy, and popular acceptance, along with the demand for consistent theory. Operating within this field of forces, courts evidently find that governmentally engineered trespasses on extant private possessions are uniquely and unacceptably insulting to property's ideological function as a paradigm of limited government, that is, as private domains secured against governmental intrusion.

A like irresolution appears in constitutional law's re-

sponse to the theorists' requirement of legal entitlement as essential to property. The Court both expressly avows this requirement and rejects its full implications. Faced in *United States v. Willow River Power Co.* (1945) with a hydroelectric company's claim that the government took its property by damming a river and thereby flooding the tail end of its generating plant, Justice ROBERT H. JACKSON memorably declared that judicial delineation of property rights turns not on any intelligible essence of "property," but on discovery and construal of prior and contemporaneous law: "We cannot start the process of decision by calling [every existing economic interest or advantage] a 'property right' . . . Such economic uses are property rights only when they are legally protected interests." In short, discoverable legal entitlement is required to qualify an "economic interest" as the "property" mentioned by the Fifth and Fourteenth Amendments. The Court has further perceived that those constitutional mentionings cannot themselves be read (without apparent circularity) to confer the legal status of property on any disputed "interest or advantage." Rather, according to *Regents v. Roth*, the entitlement must be grounded in "an independent source such as state law." The Court has even hitched such a "positivist" approach to the theory of federalism, declaring in PRUNEYARD SHOPPING CENTER V. ROBINS (1980) that "the United States, as opposed to the several states [is not] possessed of . . . authority . . . to define 'property' in the first instance."

Repeatedly, however, the Court has defied this logic and found that the Constitution's property clauses directly demand protection for interests plainly not treated as property by standing subconstitutional law. DRED SCOTT V. SANDFORD (1857) is the earliest instance. The MISSOURI COMPROMISE of 1820 established the northern portion of the Louisiana Territory as "free soil." According to the law of many jurisdictions, a slave taken by a master onto free soil was thereby emancipated. Given that as the standing legal rule, a master's legally grounded entitlement in a slave simply would not extend to retention of title after the master had taken the slave into free territory. At a time when this plainly appeared to be the applicable, governing rule, Scott's "owner" took him from Missouri to north Louisiana Territory. The Supreme Court held that to grant Scott his freedom on that basis would be to deprive Sandford of constitutionally protected property without due process of law.

Although a deservedly infamous decision, *Dred Scott* is not aberrational in its refusal to allow subconstitutional congressional and state lawmaking to dictate the limits of constitutionally protected property. In *Pennsylvania Coal Company v. Mahon* (1922) the Court granted *arguendo* the public safety justifications for a law forbidding coalmine owners to remove coal in such a way as to cause the collapse of surface structures, but still found that the law unconstitutionally took the property of mining firms on which it had confiscatory retrospective impact. Justice OLIVER WENDELL HOLMES, JR. wrote that, despite the long-established rule subordinating all property to public-safety regulation, "if regulation goes too far it will be recognized as a taking." The rule's "implied limitation" of property rights "must have its limits, or the contract and due process clauses are gone." In *Kaiser Aetna v. United States* (1979) the Court dealt similarly with the standing rule subordinating all shoreline property holdings to public rights of access to navigable waters. It refused to apply the rule strictly when doing so would have subjected the complaining owners not only to unwelcome "physical invasions," but to loss of their "distinct investment backed expectations" of privacy. Most recently, the Court's opinion in *Nollan v. California Coastal Commission* (1987) strongly implied that a state legal regime expressly subjecting all shoreline land titles to public rights of pedestrian passage would violate a baseline normative standard for property institutions contained in the Fourteenth Amendment.

The Court has thus refused to read the Constitution's property clauses as completely delegating to legislative politics the definition of legal regimes of property rights. It has refused to reduce the judiciary to the ancillary role of protecting persons against retroactive alteration and capricious administration of these subconstitutional legislative regimes. It has done so when the alternative struck it as betrayal of substantive constitutional values linked to property, notably, private sanctuary and limited government. Such cases lie along that contested boundary of JUDICIAL ACTIVISM AND JUDICIAL RESTRAINT where the demand for constitutional vindication confronts the demand for contemporary democratic accountability.

In such cases, the Court is not, however, necessarily rejecting jurisprudential insistence on legal entitlement as a prerequisite to property. It may rather be denying that property-constitutive law can be found only in the "positive" lawmaking acts of legislatures and common-law adjudicators. Not surprisingly (considering the conflicting normative pressures for both a rule of law and government of the people by the people), this choice between an exclusively "positive" and a "natural" provenance for property-constitutive law is just where the jurisprudential consensus on legal property falls apart. We can see the Court in these cases as allying the Framers with those theorists who appeal to "natural" criteria of reason or tradition for a higher-law conception of property entitlement. The Court, in effect, conceives the Framers to have been referring to such criteria when they prescribed constitutional protection for "property."

Thereby, the Court also, and to a like extent, apparently aligns itself (or the Framers) with the Lockean liberal (as

opposed to civic republican) antecedents of American constitutionalism. Rather than treat the design and adjustment of property regimes as a central legitimate concern of republican government, the Court to this extent treats property rights as prior and external to state and politics. But the civic heritage may not yet be entirely expunged from American constitutional doctrine or disputation. This heritage may help explain the Court's unshakable tolerance for legislative schemes of property-use regulation that plainly and grossly exceed the bounds of any plausibly Lockean notion of POLICE POWER. More pointedly, it may help explain the settled acceptance of statutory income transfer schemes that appear to "take property from A and give it to B" in defiance of an oft-cited first principle of Lockean higher law. Commentators have argued vigorously, and vainly, that such schemes are both constitutionally obligatory and constitutionally forbidden. The modern Court's refusal of commitment to either view may be its mediation between the civic and the libertarian underpinnings of American constitutionalism.

FRANK I. MICHELMAN
(1992)

(SEE ALSO: *Economic Due Process; Economic Equal Protection; Economy; Property Rights and the Human Body.*)

Bibliography

ACKERMAN, BRUCE A. 1975 *Private Property and the Constitution.* Cambridge, Mass.: Harvard University Press.

COHEN, FELIX S. 1954 Dialogue on Private Property. *Rutgers Law Review* 9:357–387.

EPSTEIN, DAVID F. 1984 *The Political Theory of the Federalist.* Chicago: University of Chicago Press.

EPSTEIN, RICHARD 1985 *Takings: Private Property and the Law of Eminent Domain.* Cambridge, Mass.: Harvard University Press.

KENNEDY, DUNCAN 1980 Toward a Historical Understanding of Classical Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940. *Research in Law & Society* 3:3–24.

MICHELMAN, FRANK I. 1987 Possession vs. Distribution in the Constitutional Idea of Property. *Iowa Law Review* 72:1319–1350.

NEDELSKY, JENNIFER 1989 *Private Property and the Limits of American Constitutionalism: A View from the Formation.* Chicago: University of Chicago Press.

SINGER, JOSEPH WILLIAM 1982 The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld. *Wisconsin Law Review* 1982:975–1059.

SYMPOSIUM 1988 The Jurisprudence of Takings. *Columbia Law Review* 88:1581–1794.

TREANOR, WILLIAM 1985 The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment. *Yale Law Journal* 94:694–716.

# PROPERTY RIGHTS
## (Update)

The REHNQUIST COURT has shown an interest in property rights not seen since the 1930s, and has mounted a number of rhetorical challenges to the sixty-year-long tradition of affording economic liberties less protection than "personal" rights, most notably the statement of Chief Justice WILLIAM H. REHNQUIST in DOLAN V. CITY OF TIGARD (1994) that "the Takings Clause of the Fifth Amendment is as much a part of the Bill of Rights as the First Amendment of Fourth Amendment, [and] should [not] be relegated to the status of a poor relation." Yet the Supreme Court has fallen short of renewing the constitutional protections enjoyed by PROPERTY in the heyday of ECONOMIC DUE PROCESS, and some of its recent expansions highlight unorthodox connections between property and defendants' rights.

The Court's most prominent demonstration of its renewed interest in property has been its increased willingness to hear cases concerning alleged violations of the EMINENT DOMAIN, or TAKING OF PROPERTY clause, and to hold that government action not involving direct physical appropriation triggers the obligation to pay JUST COMPENSATION under that clause. In LUCAS V. SOUTH CAROLINA COASTAL COUNCIL (1992), for example, the Court held that a land use restriction that left property without "economically beneficial use" was a per se taking, regardless of how weighty a PUBLIC PURPOSE it served. Perhaps more than any other single recent case, *Lucas* has led property owners to pursue REGULATORY TAKINGS claims, often trying to convince courts to treat separately a particular part of their property or a particular strand in their bundle of property rights to determine that the part was deprived of all economically beneficial use. In two other widely publicized cases, *Nollan v. California Coastal Commission* (1987) and *Dolan*, the Court decided that a government could condition a land use permit on donation of an interest in land to the public only if the donation mitigated some impact of the permitted use, and only if the donation were "roughly proportional" to that impact.

The DUE PROCESS OF LAW clauses of both the Fifth Amendment and the FOURTEENTH AMENDMENT have also continued to be a textual basis for Rehnquist Court decisions protective of property rights. In *BMW of North America v. Gore* (1996), the Court held that "grossly excessive" awards of PUNITIVE DAMAGES violated the doctrine of SUBSTANTIVE DUE PROCESS. In *Eastern Enterprises v. Apfel* (1998), the decisive CONCURRING OPINION of Justice ANTHONY M. KENNEDY also relied on substantive due process in striking down a statute that required companies to contribute to a health benefits fund because they had employed beneficiaries as coal miners over thirty years before

the statute's passage. Some of the Court's most ardent defenders of property rights, however, did not join in these invocations of due process, no doubt in part due to antipathy toward the doctrine's use to support a right to ABORTION in ROE V. WADE (1973), and, with regard to *BMW of North America,* in part due to the view that limiting punitive damages protects "defendants rights" rather than "property rights," while curtailing the states' traditional power to punish reprehensible behavior.

The view that forfeiture cases concern "defendants' rights" rather than "property rights" may help to explain the voting lineups in a number of other closely decided recent cases that nonetheless define and protect property rights. In *United States v. James Daniel Good Real Property* (1993), for example, a bare majority of the Court held that the seizure of real property subject to CIVIL FORFEITURE without prior notice and opportunity to be heard was a violation of PROCEDURAL DUE PROCESS. In *Bennis v. Michigan* (1996), a bare majority rejected the claim that forfeiture of a woman's interest in a car in which her husband had, unbeknownst to her, engaged in illegal sexual activity with a prostitute violated the due process of law and takings clauses. And in *United States v. Bajakajian* (1998), a bare majority held for the first time that a punitive forfeiture grossly disproportional to the defendant's offense violated the excessive fines clause. The four Justices most sympathetic to takings clause claims—William H. Rehnquist, SANDRA DAY O'CONNOR, ANTONIN SCALIA, and CLARENCE THOMAS— rejected the constitutional claims in the first two of these cases, and only Thomas, in a pivotal vote that may begin to define him as the Court's most consistent libertarian, recognized the constitutional claim in *Bajakajian.*

On the issue whether the "property" protected by the federal Constitution is defined by positive subconstitutional law or by some independent method of reasoning or traditional understanding, the Court's position remains ambivalent—an ambivalence that can be found within the writings of individual Justices. Scalia, for example, seemed to draw on a nonpositivist definition when he wrote in *Nollan* that "the right to build on one's own property—even though its exercise can be subject to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.' " Yet he appealed explicitly to a positivist definition in *Lucas* where he wrote that "the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by 'existing rules or understandings' " about property.

Ultimately, the Court is unlikely to strike down, on a nonpositivist theory of the substantive protection of property, a legal rule of long standing in a particular jurisdiction. That unlikeliness may be seen as a result either of an inability to construct a sufficiently strong nonpositivist theory, or of a faith that long-standing Anglo-American legal rules in fact substantially embody the correct theory. This latter resolution may be suggested by Scalia's comment in *Lucas* that state COMMON LAW principles "rarely support prohibition of the 'essential use' of land"—as presumably they should not under the correct nonpositivist theory.

When the constitutional challenge is to a recent change in law, the positivist approach reveals itself as incomplete. For if the Court is unlikely to strike down rules of long standing, it is equally unlikely to strike down all recent changes in law. Yet the positivist approach, while reframing the question of property protection in terms of legal change, does not identify which changes concern "property" in the constitutional sense, nor which of that set of property-related changes are constitutional or unconstitutional. The issue of defining which changes in law concerned "property" within the meaning of the takings and due process clauses recently split the Court in *Eastern Enterprises v. Apfel* (1998). Five members of the Court concluded that the "property" protected by the takings clause is restricted to specific, identified property interests, and does not extend to general liabilities to pay money. Those same five, however, concluded that the creation of a general liability could deprive a person of property without due process within the meaning of the due process clause (an issue pointedly avoided by the four Justices who relied on the takings clause). They then split on the issue whether the challenged law actually did violate substantive due process, reflecting continuing disagreement over the process of winnowing constitutional from unconstitutional changes in law. This disagreement surely will persist as the Court faces the next wave of constitutional property litigation over so-called deregulatory takings.

ROBERT BRAUNEIS
(2000)

Bibliography

BRAUNEIS, ROBERT 1996 "The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in *Pennsylvania Coal v. Mahon. Yale Law Journal* 106:613–702.

ELY, JAMES W., JR. 1992 *The Guardian of Every Other Right: A Constitutional History of Property Rights.* Oxford, England: Oxford University Press.

FISCHEL, WILLIAM A. 1995 *Regulatory Takings: Law, Economics, and Politics.* Cambridge, Mass.: Harvard University Press.

LEVY, LEONARD W. 1996 *A License to Steal: The Forfeiture of Property.* Chapel Hill: University of North Carolina Press.

PAUL, ELLEN FRANKEL and DICKMAN, HOWARD, eds. 1990 *Liberty, Property and the Future of Constitutional Development.* Albany: State University of New York Press.

RADIN, MARGARET JANE 1993 *Reinterpreting Property.* Chicago: University of Chicago Press.

ROSE, CAROL 1994 *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership.* Boulder, Colo.: Westview Press.

SIDAK, J. GREGORY and SPULBER, DANIEL F. 1997 *Deregulatory Takings: The Competitive Transformation of Network Industries in the United States.* Cambridge, England: Cambridge University Press.

# PROPERTY RIGHTS AND THE HUMAN BODY

PROPERTY has been described as a "bundle of rights" consisting of the right to possess, to use, to exclude, to enjoy profits, and to dispose. When it comes to property in the human body, one sees various collections of some component rights in this bundle, though never the whole bundle. Moreover, the precise contours of these component rights are often unclear, and depend on the perspective from which one approaches the body.

The perspectives available are two: from inside the body and from outside the body. That is, one can ask: what property rights do I have in my own body, or what property rights do I have in the body of another? With respect to one's own body, the COMMON LAW, which has been the primary source of property rights, has provided a set of protections that have the effect of granting certain property rights in one's own body, though the law never speaks of these rights as property. Tort law protects us from nonconsensual physical contact and physical invasions. If A punches B in the nose, A is liable for battery. A doctor who fails to get the informed consent of a patient before performing surgery commits a battery. This doctrine implies that the law gives us the right to possess our own bodies and to exclude others from using our bodies. Tort law also prohibits others from unreasonably confining us, through the tort of false imprisonment; giving us the right to direct our own bodies as we see fit. However, the common law has not articulated a clear general position on our rights to profit from our bodies or to dispose of our bodies.

With respect to the bodies of others, our property rights are considerably narrower. The common law gives to the next of kin a "quasi-property" right in the body of the decedent, which consists of the right to possess the body for purposes of burial, to recover damages for the mutilation of the body, and the right to prescribe the manner and place of burial—but not the right to sell the whole or parts of the decedent's body. This is the extent of our common law property rights in the bodies of others, at least as far as these rights have been articulated by American courts. From an early time, English courts apparently have gone further in limiting these rights; WILLIAM BLACKSTONE, in his *Commentaries on the Laws of England*, asserts that English common law gave no legal validity whatsoever to the master–slave relationship, and thus refused to recognize the claim of an absolute property right in the body of another.

Somewhere between the question of rights in one's own body and that of rights in another falls the issue of ABORTION. The early common law applied the "quickening" rule, which held the killing of an unborn infant unlawful from the moment it is able to stir in its mother's womb.

The Constitution has played a role in defining the limitations on property rights in the body. Most importantly, the THIRTEENTH AMENDMENT prohibits SLAVERY and involuntary servitude, and thus nullifies an individual's claim to have an absolute property right in the body of another or to have given such a right in his own body. The Supreme Court's ROE V. WADE (1973) decision held that state laws prohibiting abortion may violate the DUE PROCESS clause of the FOURTEENTH AMENDMENT, and articulated a rule governing the constitutionality of abortion restrictions that is analogous to the common law quickening rule in that it gives states the greatest freedom to regulate abortion in the final trimester of pregnancy. In *Washington v. Glucksberg* (1997), the Court held that the Fourteenth Amendment does not imply a protected RIGHT TO DIE with the assistance of a physician.

Today, new constitutional issues are being generated by statutes that limit the scope of property rights in the body, usually with the aim of facilitating the procurement and transplantation of human organs. Several states have enacted laws permitting coroners to remove body parts (typically corneas) from a cadaver without the consent of either the deceased or the next of kin. Pursuant to these statutes, several coroners have removed body parts without seeking consent. These removal statutes, and concomitant policies, are inconsistent with common-law quasi-property rights. Several courts have held that these policies violate the due process clause of the Fourteenth Amendment, and Erik Jaffe has suggested that the Fifth Amendment's TAKINGS clause should also apply.

Other statutes limiting property rights in the body are those prohibiting the purchase or sale of organs. The National Organ Transplant Act, a federal law, prohibits the purchase and sale of organs for transplantation. Several states have enacted similar statutes, some of them banning purchase and sale for any purpose. Although these laws were enacted on the basis of noble motives (perhaps reflecting the quality-deterioration concerns initially raised, in the context of the blood market, by Richard Titmuss), their ultimate impact is probably harmful. As transplant technology proceeds apace, and the number of suitable organ recipients increases accordingly, the shortage of human organs available for transplantation worsens every

year. Allowing certain limited purchase and sale agreements, such as the postmortem transfers proposed by Lloyd Cohen, could alleviate the shortage of transplantable organs without generating the negative consequences envisioned by proponents of the sale bans.

Can or should the Constitution play a role in resolving this growing problem? If the courts were to take a broad view of our property rights in our own bodies, they might hold that statutes banning all contracts for the purchase and sale of body parts constitute takings of private property, just as a statute prohibiting individuals from selling their homes would be a taking. Or a court might find that a sweeping ban cannot survive RATIONAL BASIS review under the due process clause. The question has been unimportant until very recently, because our body parts had little value to others before the advent of transplantation. But we are approaching the day when nearly every one of our organs will have a substantial market value. As this value increases, the deprivations imposed by the sale bans may reach a level comparable to those that have been deemed unconstitutional in earlier cases.

KEITH N. HYLTON
(2000)

Bibliography

COHEN, LLOYD R. 1990 Increasing the Supply of Transplantable Organs: The Virtues of a Futures Market. *George Washington Law Review* 58:1–51.

HYLTON, KEITH N. 1990 The Law and Economics of Organ Procurement. *Law & Policy* 12:197–224.

——— 1996 The Law and Ethics of Organ Sales. *Annual Review of Law and Ethics* 4:115–136.

JAFFE, ERIK S. 1990 "She's Got Bette Davis['s] Eyes": Assessing the Nonconsensual Removal of Cadaver Organs under the Takings and Due Process Clauses. *Columbia Law Review* 90: 528–574.

MUNZER, STEPHEN R. 1994 An Uneasy Case Against Property Rights in Body Parts. Pages 259–286 in Ellen Frankel Paul, Fred D. Miller Jr., and Jeffrey Paul, eds., *Property Rights.* Cambridge, England: Cambridge University Press.

SCOTT, RUSSELL 1981 *The Body as Property.* New York: Viking Press.

TITMUSS, RICHARD 1971 *The Gift Relationship: From Human Blood to Social Policy.* New York: Pantheon Books.

# PROSECUTORIAL DISCRETION AND ITS CONSTITUTIONAL LIMITS

In 1992, several black men charged with federal crack-cocaine offenses alleged in defense that they were selected for prosecution because of their race. They offered affidavits stating that, of twenty-four cases closed by a federal public defender's office in 1991, all of those charged with similar crack offenses had been black; that there are an equal number of white and nonminority crack users and dealers; and that whites are more likely to be prosecuted in more lenient state courts. The Supreme Court, in *United States v. Armstrong* (1996), held that these defendants were not entitled to access to the government's records to perfect their challenge to the prosecutor's discretion because they had not made a sufficient threshold showing that the prosecution acted on the basis of race.

The Court's decision in *Armstrong* illustrates the judiciary's general deference to the prosecutor's discretion. The prosecutor may choose which crimes and which persons to prosecute. She is entitled to prosecute whenever she has PROBABLE CAUSE to believe a certain person committed a certain crime. She need not be certain that she can prove guilt beyond a reasonable doubt. In the twentieth century, there have always been many more legitimately prosecutable people than resources allow for prosecution, in addition to laws that the public has not wanted prosecutors to rigorously enforce.

In the United States, the exercise of these kinds of discretion is part of EXECUTIVE POWER, rather than LEGISLATIVE POWER or JUDICIAL POWER. Article II of the Constitution mandates the executive branch and its agents to "take Care that the Laws be faithfully executed. . . ." Prosecutorial discretion encompasses all aspects of a case; the prosecutor may decide whether to investigate, grant immunity, or allow a plea. Since the Constitution leaves these decisions in the hands of the executive, the policy of SEPARATION OF POWERS weighs against too much judicial oversight of the prosecutor's discretion.

It would be difficult for judges to correct prosecutors even if there were no doctrine of separation of powers. To know whether a prosecutor has appropriately levied a charge, a judge would have to know about the prosecutor's entire docket of similar kinds of cases. This would consume more time than most courts have. Besides, there is no good reason to believe a judge would be more competent than the prosecutor to decide whether the seriousness of the crime and the weight of the evidence justifies going forward with the case. If the judge errs, she will not be subject to the judgment of the voters. If the judiciary must pause to consider the wisdom of a prosecution, even valued prosecutions that should go forth will be delayed. Under the Anglo-American system, the judge can only control the prosecutor by dismissing a case but cannot require her to go forward. Finally, a prosecutor whose discretion will be second-guessed may refuse to exercise discretion at all by routinely filing charges on everything she sees and letting the judges go to the effort of sorting it

out. For these reasons courts leave the prosecutorial decision in the hands of the prosecutors and presume that discretion has been properly exercised.

Despite this broad rule, the Constitution does not confer unfettered discretion. Under the EQUAL PROTECTION clause, courts may review a prosecutor's decision for unconstitutional motive such as race or religion. To succeed in a defense of selective prosecution, the accused must prove that prosecutorial policy had both a discriminatory effect and purpose. The Court first recognized this defense in YICK WO V. HOPKINS (1886), where a Chinese laundryman in San Francisco had been prosecuted for violating a city laundry ordinance because of his race. The Court held that "though the law be fair on its face and impartial in appearance" when "applied with an evil eye and an unequal hand" it violated the defendant's constitutional right to equal protection.

Historically, the defense of selective prosecution has rarely succeeded. To prove it is expensive. The accused must examine walls of court files to show a pattern of RACIAL DISCRIMINATION. One way to transfer some (but not all) of these costs would be to require the prosecutor to gather her own files of all the relevant cases and turn them over to the defendant for examination. In *Armstrong*, the Court held that before the defendants could look at the government's files, they must provide "clear evidence" that the government failed to prosecute other similarly situated white defendants.

Critics of *Armstrong* argue that it renders selective prosecution largely impotent as a defense; they argue that *Armstrong*'s increased hostility toward statistical evidence and the defense's increased evidentiary burden immunize prosecutors from constitutional scrutiny. Although this criticism may be true, it does not mean that *Armstrong* is improvident. The judiciary accepts as a maxim that one should not prosecute red-haired people because they are red-haired. Yet, absent a rigorous standard of proof, selective prosecution is easy for a defendant to assert and hard for a prosecutor to disprove. Even a good faith but wrongful assertion imposes costs on the government and the defendant and delays decision on the truth of the charge. Moreover, the accused says only that the prosecutor was wrong because she chose to prosecute based on an unconstitutional motive like race or creed. To claim selective prosecution is not to claim innocence: the red-haired thief hasn't claimed he didn't steal, and the Zoroastrian murderer hasn't claimed that he didn't murder.

There are two more subtle yet important reasons why *Armstrong*'s heightened burden in proving selective prosection may make sense. First, when a court rules on a selective prosecution claim it must judge the validity of the prosecutor's defense: Had the defendants in *Armstrong* proffered clear evidence that white individuals were not similarly prosecuted, the Court would have had to evaluate whether Jamaican, Haitian, and black street gangs really did predominate crack distribution as the U.S. Attorney's office claimed. Today's judiciary is generally reluctant to involve itself in these complex and politically charged judgments and leaves it to the legislative branch to deal with them. Second, successful use of a selective prosecution defense was extremely rare even before *Armstrong* raised the bar. Most judges do not see a prosecutor's abuse of her discretion as a real problem, and little evidence supports a contrary conclusion. After all, in *Armstrong* it was Congress, not prosecutors, that imposed stiff mandatory sentencing guidelines on crack-cocaine dealers creating the disparity between powdered cocaine and crack-cocaine offenses.

JAMES B. ZAGEL
(2000)

Bibliography

HELLER, ROBERT 1998 Selective Prosecution and Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion. *University of Pennsylvania Law Review* 145:1309–1358.

JAMPOL, MELISSA L. 1997 Goodbye to the Defense of Selective Prosecution. *Journal of Criminal Law and Criminology* 87: 932–966.

LOVE, MARCI A. 1997 *United States v. Armstrong:* The Supreme Court Formulates a Discovery Standard for Selective Prosecution. *Temple Political Civil Rights Law Review* 7:191–219.

## *PROVIDENCE BANK v. BILLINGS*
4 Peters 514 (1830)

This case anticipated the DOCTRINE of the CHARLES RIVER BRIDGE CO. V. WARREN BRIDGE CO. (1837) case and limited the doctrine of tax immunity established by NEW JERSEY V. WILSON (1812). The Court here, through Chief Justice JOHN MARSHALL, established the principle that a corporate charter should not be construed to vest more rights than are found in its express provisions. A state taxed a bank for the first time long after chartering it. The bank contended that its charter implied a tax immunity, because a state power to tax the bank could destroy it, contrary to its charter. The Court sustained the tax against the CONTRACT CLAUSE argument, reasoning that the state had made no express contract to relinquish its power to tax and that the relinquishment of that power "is never to be as-

sumed." Chartered privileges "must be expressed . . . or they do not exist."

LEONARD W. LEVY
(1986)

## *PRUDENTIAL INSURANCE COMPANY v. BENJAMIN*
328 U.S. 408 (1946)

The dissenters in UNITED STATES V. SOUTH-EASTERN UNDERWRITERS (1944) feared that declaring insurance to be INTERSTATE COMMERCE, subject to congressional regulation, would create chaos by rendering state regulation of that industry void. An act of Congress, however, left most such regulation standing and Justice WILEY RUTLEDGE headed a unanimous Court sustaining a state tax that discriminated against interstate commerce. Assuming that such a tax would be invalid in the absence of congressional action, here Congress had decided that uniformity of regulation and taxation was necessary and had authorized even discriminatory state regulation and taxation of the insurance business.

DAVID GORDON
(1986)

(SEE ALSO: *State Regulation of Commerce.*)

## *PRUNEYARD SHOPPING CENTER v. ROBBINS*
447 U.S. 74 (1980)

HUDGENS V. NLRB (1976) had held that the FIRST AMENDMENT did not compel private owners of SHOPPING CENTERS to permit their property to be used for expressive activity. In *PruneYard*, California's supreme court held that the state constitution required a shopping center owner to permit the collection of signatures on a petition. The Supreme Court unanimously affirmed. Justice WILLIAM H. REHNQUIST, for the Court, concluded that the state law did not work an uncompensated TAKING OF PROPERTY. Nor did it violate the owner's First Amendment rights by compelling it to convey a message. Justice LEWIS F. POWELL, concurring, argued that under other circumstances an owner might have such a First Amendment right.

KENNETH L. KARST
(1986)

# PSYCHIATRY AND CONSTITUTIONAL LAW

New impositions of legal control in the last generation have transformed traditional relationships between providers and consumers of mental health services, cabining the power physicians historically exercised over the insane. Paradoxically, the new legal limits on psychiatrists developed in a period when novel psychotropic medication—veritable wonder drugs—at last provided bases for medical paternalistic authority. Psychiatrists complained that patients would miss out on needed treatment and "rot with their rights on."

The legal developments involve processes for civilly protecting or subduing the mentally impaired, processing them through the CRIMINAL JUSTICE SYSTEM, recognizing their rights as psychiatric inpatients, and establishing for them programs of patient advocacy. Patient claims include rights to treatment; to refuse treatment; to the least intrusive alternative form of treatment; and to privacy, autonomy, liberty, information, communication, and protection while undergoing treatment. Mental health lawyers have elevated these claims to new constitutional doctrine, conveniently overlooking that many decisions recognizing them came from lower courts.

The constitutional values underlying these decisions have also found expression in other legal forms: legislative law reform, judicial interpretation of unresisting common law and statutes, and unfolding of state constitutional doctrine. Although not necessarily flying the U.S. constitutional flag, these legal developments are nevertheless based on constitutional values, such as liberty, privacy, due process, equality, and free speech. The principles invoked are not specific to mental health, but common to the modern judicial approach to protecting the vulnerable.

The Supreme Court has been slow to join these trends. In contrast to its behavior in the field of criminal justice, here the Supreme Court has followed reluctantly rather than lead. As with the rights of the criminally accused, the Court has recently retreated, leading to a development of state constitutional law.

A legislative revolution in civil commitment procedures received constitutional underpinnings in *Addington v. Texas* (1979), which mandated a standard of "clear and convincing" evidence for the fact-finding on which commitment is based. Commitment through the criminal process was limited constitutionally by the holding that incompetency to stand trial can justify incarceration only for a reasonable period during which restoration of trial capacity is foreseeable.

The Constitution seems to impose little constraint on

changes in the best-known rule in the field of psychiatry and law: the insanity defense to criminal prosecution. The state may redefine the defense and even require the defendant, rather than the prosecution, to bear the burden of proof beyond a reasonable doubt. The "least restrictive alternative" criterion for involuntary treatment, proclaimed by many lower courts, has not been adopted by the Supreme Court.

The Court has also been hesitant about a right to refuse treatment, although recognizing in theory a liberty interest in avoiding unwanted administration of antipsychotic drugs. In WASHINGTON V. HARPER (1990), it refused to hold that a prisoner had the right to refuse such treatment, taking into account that he was confined and determined to be dangerous to himself or others and that the treatment was in his medical interest. Nor was a prior judicial hearing required because the Court believed his interests would be better served by allowing medication decisions to be made by doctors rather than judges. A number of state courts have nevertheless recognized a right to refuse treatment based on common law protection of bodily integrity or state constitutional guarantees of privacy.

The right to treatment and inpatient rights have fared no better in the Supreme Court than has the right to refuse treatment. Ruling on an involuntarily committed, developmentally disabled person, *Youngberg v. Romeo* (1982) held his constitutionally protected liberty interests included minimally adequate training, as well as reasonable safety and freedom from undue bodily restraints. Presumably, the involuntarily committed mentally ill possess similar rights. But the Court eviscerated such rights by declaring that the Constitution requires only that "professional judgment" be exercised, with the courts to show deference to that judgment. "Deliberate indifference" to an inpatient's serious psychiatric needs might perhaps violate the Eighth Amendment by analogy to a holding on prisoners' medical needs.

The new legal limitations on psychiatric power seem confining only by contrast to the vast authority traditionally exercised. The mentally ill are still subject to governmental power not exercised over the healthy, on rationales of paternalism as well as protection of others. The patients' rights movement points out the hypocrisy of claims that governmental power is exercised for the patient's own good if adequate treatment is not guaranteed and if "acquittal" on the ground of insanity can result in loss of liberty for a longer period than conviction. And psychiatrists still are permitted to testify as experts, giving opinions on matters beyond their actual scientific competence, such as predicting dangerousness on the basis of clinical interviews.

The psychiatrist-patient relationship, a central focus for therapists, has been largely overlooked in constitutional case law. When the doctor is double agent for both patient and prosecutor, a *Miranda*-like warning is required before a psychiatrist examines a convicted defendant for a death penalty hearing. Psychiatric assistance itself can be a constitutional right: an indigent defendant must have access to a psychiatrist on a showing of need to prepare his or her insanity defense.

Psychiatric condition is generally not central to an individual's constitutional status. Neither psychiatric patients as a group nor MENTAL ILLNESS as a trait has yet been held to invoke specially solicitous judicial protection from elected legislatures, which is labeled heightened scrutiny under the equal protection clause. In CLEBURNE V. CLEBURNE LIVING CENTER, INC. (1985) the Supreme Court explicitly said it would not extend heightened scrutiny to the developmentally disabled. The Court nevertheless did just what it said it was not doing, on reasoning equally valid for the mentally ill. (Indeed, five Justices repudiated the whole theory of three "tiers" of equal protection scrutiny.) Psychiatric condition nevertheless has some irreducible effect on legal status: the Eighth Amendment prohibits the execution of the mentally incompetent. A finding of initial mental illness is insufficient to justify indefinite confinement; O'CONNOR V. DONALDSON (1975) requires findings of both current mental illness and dangerousness.

Constitutional law has been little affected by psychodynamic perspectives, even though twentieth-century American culture has been heavily influenced by psychoanalysis, whose models of the mind differ significantly from the law's traditions. Some cases contrast "the law's" model of the mind, involving free will and choice, with psychiatry's model, supposedly deterministic; these courts conclude that judges must disregard such psychiatric ideas. A handful of judges openly ask whether a model of the mind must be assumed for constitutional purposes. One of the law's most-cited "unreported" cases, *Kaimowitz v. Dept. of Mental Health* (1973), said that the FIRST AMENDMENT, must protect the individual's right to generate ideas if it is going to protect the right to communicate those ideas. But in *Mills v. Rogers*, although the Supreme Court cited Michael Shapiro's germinal work on the topic, it declined to rule on this point. Freedom of thought (and implicitly of emotion) was recognized in STANLEY V. GEORGIA (1969), which declared a First Amendment right to personal possession of obscene materials in the home. *Washington v. Harper* (1990) recognized that it is a substantial interference with a person's liberty interest to alter his brain's chemical balance to affect his cognitive process. And Justice LOUIS D. BRANDEIS's famous dissent in OLMSTEAD V. UNITED STATES (1928) had spoken of protecting throughts and emotions as well as beliefs.

In criminal law, the Court early had relied implicitly on a free-will model of the mind to hold a confession involuntary, based on the defendant's insanity at the time he or she confessed rather than on police coercion. This focus on the suspect's state of mind suggested that free will is a constitutional prerequisite for voluntariness. But the Court subsequently retreated from that approach.

A central lesson of psychoanalysis is that much of our mental functioning is largely inaccessible to consciousness, while nevertheless affecting our conscious thoughts, feelings, and behavior. Psychiatrists are therefore used to looking for unconscious intents and unconscious, often symbolic, meanings. The Supreme Court has recognized that actions and institutions can have not only intended but unintended psychological effects with constitutional significance, as in the famous footnote 11 of BROWN V. BOARD OF EDUCATION (1954). But the Court has not yet recognized the argument by scholars that government officials can violate the Constitution by unconscious discrimination, reflecting not overt hatred or contempt but unconscious conflict and ambivalence, aimed not only at ethnic groups and women but also at the poor and the elderly.

Lawyers' theories for interpreting the constitutional text and the motives of constitutional actors are perhaps starting to be more influenced by the experience of that other profession of interpreters, the psychotherapists. The psychoanalytic perspective assumes that multilayered contradictory intentions and symbolic meanings abound; we live lives of poetry, not prose. Speakers do not generally fully comprehend their own purposes, and the intellectual baggage we carry with us distorts our perceptions of current realities. Emotions permeate all that we do, and our rational goals are regularly compromised with dictates of conscience and defense against anxieties. Context, slips, and redundancy are important clues to meaning; useful interpretation requires an ongoing dialogue. By calling our attention to such concepts, psychiatry's chief contribution to constitutional law can be not in dealing with the abnormal but in helping us to understand one another and ourselves.

MARTIN LYON LEVINE
(1992)

Bibliography

KATZ, JAY et al. 1967 *Psychoanalysis, Psychiatry, and Law.* New York: Free Press.

LEVINE, MARTIN LYON 1988 *Age Discrimination and the Mandatory Retirement Controversy.* Baltimore: Johns Hopkins University Press.

SHAPIRO, MICHAEL H. and SPECE, ROY G., JR. 1981, 1991 *Bioethics and Law: Cases, Materials and Problems.* St. Paul, Minn.: West Publishing Co.

## PUBLIC ACCOMMODATIONS

The refusal of hotels, restaurants, theaters, and other public accommodations to serve blacks was not exclusively a southern phenomenon. In the South, however, the practice was an essential part of a system of racial dominance and dependency, long after the THIRTEENTH AMENDMENT abolished slavery and the FOURTEENTH AMENDMENT recognized the CITIZENSHIP of the freed slaves. Aware of the role played by this form of RACIAL DISCRIMINATION in the system of white supremacy, Congress adopted the CIVIL RIGHTS ACT OF 1875, the last major CIVIL RIGHTS act of the Reconstruction era. The law prohibited public accommodations, including railroads along with the types already mentioned, from denying access to any person on account of race. The Supreme Court held this law unconstitutional, saying that when Congress enforced the Fourteenth Amendment it had no power to reach private action. (See CIVIL RIGHTS CASES; STATE ACTION.)

Later came the Jim Crow laws—state laws requiring racial SEGREGATION in all manner of public places, including public accommodations. This practice received the Court's blessing in PLESSY V. FERGUSON (1896), a case involving the segregation of seating in railroad cars. (See SEPARATE BUT EQUAL DOCTRINE.) By the end of the nineteenth century, the denial of access for blacks to public accommodations in the South was firmly rooted in both law and custom.

Soon after the Supreme Court decided BROWN V. BOARD OF EDUCATION (1954), the modern civil rights movement turned to the problem of access to public accommodations. The reason for direct action such as freedom rides and SIT-INS was not that seats in the front of the bus arrive at a destination before back seats do, or that black college students yearn to perch on lunch counter stools. Public accommodations became a target for civil rights demonstrators for exactly the same reason that they had been made the vehicles for racial discrimination in the first place: segregation and the refusal of service to blacks were powerful symbols of racial inferiority, highly visible denials of the entitlement of blacks to be treated as persons and citizens. Employment discrimination and housing discrimination might touch material interests of great importance, but no interest is more important than self-respect. The primary target of the civil rights movement was the stigma of caste.

Within a few years after the *Brown* decision, the Supreme Court had held unconstitutional nearly the whole range of Jim Crow laws. Racial segregation practiced by state institutions, or commanded or authorized by state laws, failed the test of the Fourteenth Amendment even before Congress reentered the public accommodations field. In most of the states of the North and West, civil

rights laws commanded equal access not only to public accommodations—such laws merely reinforced the common law duties of innkeepers and common carriers—but also to other businesses. In the South, however, private discrimination continued in most hotels, restaurants, and barber shops. The Supreme Court was repeatedly invited to decide whether the Fourteenth Amendment established a right of access to such places, free of racial bias, but the Court repeatedly declined the invitation. (See BELL V. MARYLAND.)

As part of the CIVIL RIGHTS ACT OF 1964, Congress adopted a comprehensive public accommodations law, forbidding discrimination in the same types of places that had been covered by the 1875 act. (Railroads were forbidden to discriminate by modern interpretations of the Interstate Commerce Act of 1887.) Before the year was out, the Supreme Court had upheld the public accommodations portion of the 1964 act, on the basis of the power of Congress to regulate interstate commerce. (See HEART OF ATLANTA MOTEL V. UNITED STATES.)

The 1964 act is limited in its coverage, reaching an establishment only if it "affects commerce" or if its discrimination is "supported by STATE ACTION." The act exempts both private clubs and small rooming houses lived in by their proprietors. Now that the Supreme Court has interpreted the CIVIL RIGHTS ACT OF 1866 as a broad guarantee against private racial discrimination in the sale of property and other contracting, and validated the law as a congressional enforcement of the Thirteenth Amendment, at least some of the limitations of the 1964 act have been made irrelevant. For example, a barber shop is covered by the 1964 act if it is located in a covered hotel, but not if it is independent. Under recent interpretations of the 1866 act, any barber shop would violate the law by refusing service on the basis of the customer's race. (See JONES V. ALFRED H. MAYER CO.; RUNYON V. MCCRARY.)

The substantive core of the Fourteenth Amendment is a principle of equal citizenship. (See EQUAL PROTECTION OF THE LAWS.) Even in the absence of civil rights legislation, that principle demands that the organized community treat each of us, irrespective of race, as a respected, participating member. Racially based denial of access or segregation in places of public accommodations—even those privately owned—is a deliberate denial of the status of equal citizenship, as the sit-in demonstrators knew and helped the rest of us to understand.

KENNETH L. KARST
(1986)

Bibliography

LEWIS, THOMAS P. 1963 The Sit-in Cases: Great Expectations. *Supreme Court Review* 1963:101–151.

POLLITT, DANIEL H. 1960 Dime Store Demonstrations: Events and Legal Problems of the First Sixty Days. *Duke Law Journal* 1960:315–365.

WOODWARD, C. VANN 1966 *The Strange Career of Jim Crow*, 2d (rev.) ed. New York: Oxford University Press.

# PUBLIC CHOICE THEORY AND CONSTITUTIONAL JURISPRUDENCE

Inasmuch as the public is often adversely affected by special interest LEGISLATION, it has a strong incentive to devise institutional mechanisms—like constitutions— that make passage of such legislation more difficult. Before one can gauge whether a constitution is designed to promote the general welfare of the public by impeding the efficacy of INTEREST GROUPS or to advance the interests of particular groups within society, it is necessary to establish guidelines by which the "public-regardingness" of a constitution can be evaluated.

The most objective means of evaluating a constitution is to examine the actual effects of the document on interest group behavior. If the constitution establishes mechanisms that facilitate rent-seeking, it is reasonable to infer that the Framers intended to encourage this result. If, on the other hand, the constitution establishes mechanisms that retard such activity by making it more costly, one can also infer that these costs were intended.

JAMES MADISON's formal, publicly articulated pronouncements indicate that controlling the ability of interest groups to achieve antimajoritarian outcomes in the legislature was a primary goal of the U.S. Constitution. As we see from examining "hidden-implicit" legislation, however, it is often impossible to draw conclusions about the intentions of those who make law simply by evaluating their public pronouncements. Thus while the Framers stated publicly that reducing the political power of factions was a central feature of their constitutional design, an even more convincing indication that the Constitution was intended to promote the public interest is found by examining the results of the Framers' work.

One who observes the impressive success of interest groups in obtaining favorable legislation might conclude either that the Constitution has failed in its attempt to impede interest groups or that it was not designed to impede their activities in the first place. Such a conclusion would be erroneous.

The formation of a representative democracy establishes what economists refer to as an "agency relationship." An agency relationship calls for one person or group of people (the principal) to hire another person or group of people (the agent) to perform services and make decisions on the principal's behalf. The contract is successful

for the contracting parties if it accurately anticipates postcontractual problems and deals with these problems in cost-effective ways.

In a representative democracy, the contract that initiates this agency relationship is its constitution. The principals are the citizens, and the agents are the officials they elect. Elected officials, like all agents, are inevitably more concerned with maximizing their own utility than with maximizing the utility of their principals. This divergence of interests (called "agency costs") is an inevitable feature inherent in any principal-agent relationship—including, perhaps especially, the one that exists between voters and their elected representatives. The agency costs inherent in representative democracy manifest themselves in side bargains between interest groups and legislators.

Because of the high cost of monitoring the behavior of elected officials, the expected costs to the officials of such behavior is low, and the benefits are high. The goal of a public-regarding constitution, then, is to establish mechanisms (such as the SEPARATION OF POWERS) and institutions (such as the independent judiciary) that make rent-seeking by interest groups more costly by reducing the benefits that legislators can realize. However, there are inevitable costs associated with establishing the very mechanisms and institutions that retard rent-seeking.

Because rent-seeking cannot be eliminated without cost, one cannot conclude that a constitution seeks to facilitate rent-seeking merely because it fails to eliminate it entirely. In fact, rational principals will expend resources to control the behavior of their agents only up to the point at which the marginal costs of such expenditures equals the marginal benefit in terms of reduced rent-seeking. The test of whether the Framers intended to eliminate rent-seeking, then, should not be whether the Constitution eliminates all rent-seeking, but how effectively it provides mechanisms that align the interest of elected representatives with those of the public generally. Under this test, the mechanisms and institutions established in the Constitution indicate a purpose to minimize special interest bargains.

Public choice theorists have suggested economic reasons why constitutions are likely to be more public-regarding than other forms of law. One is that special interest groups are unlikely to agree to constitutional rules that make life easier for other special interest groups. Rules that facilitate rent-seeking generally are likely to cost each separate special interest group more in the way of wealth transfers to other groups than the group itself can expect to receive from the transfers it obtains. Thus, even special interest groups that might benefit from some specific, discrete legislative wealth transfers are likely to object to general constitutional provisions that facilitate rent-seeking.

Finally, since the life of a constitutional rule is much longer than the effective life of a statute, the present value of the cost to the public of a constitutional rule that is not public-regarding will be much greater than the cost of an identical statutory rule. This greater cost will tend to mitigate the free-rider problem that plagues the public in the normal legislative arena.

Support for the hypothesis that the American Constitution is a public-regarding document, structured to favor the general polity over special interest groups can be derived from Article I, which sets forth the size and composition of the legislature. Building on the theoretical work of James Buchanan and Gordon Tullock, Robert McCormick and Robert Tollison have demonstrated empirically that for a fixed number of total legislators, interest groups fare better in the market for legislation where the legislators are distributed equally between the two houses of a bicameral legislature. Therefore, if the Constitution was designed to make interest group bargains less costly, we would expect Article I to require the U.S. HOUSE OF REPRESENTATIVES and U.S. SENATE to be of equal size. Yet, consistent with a public-regarding view of the Constitution, Article I plainly envisions a wide disparity in membership size between the House and the Senate.

In addition, where the members of each house of a bicameral legislature represent different constituencies, and where the two houses must concur to pass a law, it is more difficult for discrete factions to ensure the passage of legislation that furthers their interests. Thus the Constitution has imposed what is, in effect, a SUPERMAJORITY RULE of voting, which raises decision costs and makes favorable treatment less likely for special interest groups. The same analysis applies to the executive VETO POWER, which enables the executive branch to act as a third house of the legislature, thus further raising the costs to interest groups.

The FIRST AMENDMENT guarantees of FREEDOM OF SPEECH and FREEDOM OF THE PRESS, the COMMERCE CLAUSE, the PRIVILEGES AND IMMUNITIES clause, the EQUAL PROTECTION clause, the DUE PROCESS clause, the CONTRACT CLAUSE, and the EMINENT DOMAIN clause also support the hypothesis that the Constitution was designed to impede rather than advance rent-seeking. The fact that the Constitution establishes a multitude of mechanisms to deter the efficacy of interest groups is strong evidence that the Framers intended this deterrence. Even the direct democratic process by which the Constitution was enacted ensured that it would be a public-regarding document. Thus, it is likely that the influence of interest groups on the content of the Constitution was less than the influence of such groups on the content of ordinary, day-to-day legislation.

JONATHAN R. MACEY
(2000)

## PUBLIC EMPLOYEES

The government may regulate public employees more extensively than citizens at large because legitimate employer interests in controlling job-related behavior supplement the government's general constitutional power to control the behavior of private citizens. Government employers constitutionally are less free than private employers to control their employees, however, for the simple reason that the Constitution primarily limits government, not private, power. Eligibility criteria, work rules, and myriad personnel decisions take on constitutional dimensions in public sector employment that are absent from the private sector.

The competing analogies of government as citizen-regulator and government as private employer raise related questions. How much more power may the government exercise over its employees than over citizens at large? What constitutional limits bind public employers that do not bind private employers? The two questions tend to converge because, inevitably, the government affects its employees as regulator and employer simultaneously.

The constitutional issues comprise both substance and process. What substantive freedoms may the government require its employees to forgo as a condition of employment and what are the permissible and impermissible bases for disadvantaging public employees? Procedurally, when, how, and with what opportunity to respond, must government employers inform their employees of the reasons for adverse personnel actions?

The constitutional values at stake clash and mesh in complex ways. Government workers have individual rights to exercise substantive freedoms without improper penalty and to be treated fairly by the government. These often vie with government interests in effective, honest, efficient, and democratic management of the public's business. The government also has interests in employee loyalty and in the confidential execution of public policy. These may war with the value of freedom for dissident employees to bring important information to public attention and to check abuse of government power by other officials. Inevitably, public employees have greater opportunities than ordinary citizens both to impede legitimate government action and to prevent government abuse.

Public employees' own rights and the implication of their activities for public governance make the constitutional balance important and intricate, especially given this century's extensive increase in public employment. The existence of 3 million federal employees and 13 million more state and local government workers makes sacrifices of their constitutional freedoms of considerable consequence, both personal and societal. Yet their numbers create a potent political force able to secure statutory job protection and to fend off arbitrary treatment as a group, diminishing the need for constitutional protection. In addition, the size of the public work force increases legitimate government claims to constitutional flexibility in employee management.

Speaking in broad historical terms, Supreme Court decisions on the constitutional status of public employees reflect varying sensitivity to one or a combination of these competing considerations at different periods. Three major themes are discernible, however. The earliest, simplest, and perhaps most powerful is broad deference to government employment prerogatives. This deference rests on the common understanding that the Constitution creates no constitutional right to government employment. The frequently invoked corollary is that those who want the privilege of government work may be compelled to forgo exercising constitutional rights that the government cannot deny private citizens. Justice OLIVER WENDELL HOLMES, then still a state court judge, succinctly expressed this RIGHT-PRIVILEGE DISTINCTION theme in *McAuliffe v. Mayor of New Bedford* (1892). Holmes rejected a policeman's claim that his discharge for political activity violated his right of free expression, commenting that the officer "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

The Supreme Court invoked this theme before and after *McAuliffe.* At very different stages of constitutional development over the past century, the Court has consistently upheld government power to foster a nonpartisan civil service by requiring vast numbers of public employees to refrain from active participation in politics, a cherished right of the citizenry at large. The Court has also upheld government requirements that public employees vow to uphold and defend the federal and state constitutions and not attempt their unlawful overthrow, that they live in the employing JURISDICTION, and that national security employees not publish writings about their work until the intended publication is screened to cull out classified information. In the early 1950s, moreover, the Court tolerated government efforts to disqualify from public jobs people who had advocated the forceful overthrow of the government, or who belonged to groups that did, or who refused to reveal their association with such groups, even in circumstances in which private citizens could not be punished for saying or doing the same things.

The right-privilege distinction remains a powerful influence, but Cold War hysteria and McCarthy-era purges of government employees suspected of subversive beliefs provoked the realization that adverse personnel decisions may involve more than legitimate government interests in employee relations, worker loyalty, bureaucratic neutrality, and government efficiency. The Court began to impose

constitutional limits narrowly designed to protect public employees from invidiously selective maltreatment. This second theme protects against improper government motivation, but not against broad impact. Restrictions on the political freedom of numerous public employees are tolerated for the legitimate advantages of having a nonpartisan bureaucracy, but government may not penalize even a few for constitutionally unacceptable reasons, such as dislike of their beliefs. In UNITED STATES V. LOVETT (1946), for example, the Court struck down as a BILL OF ATTAINDER a provision of an appropriations law prohibiting payment of the salaries of three named government employees declared guilty of SUBVERSIVE ACTIVITY not by a court but by a House of Representatives subcommittee. Similarly, WIEMANN V. UPDEGRAFF (1952) took a stand against GUILT BY ASSOCIATION and held that government employment could not be denied for membership in a group advocating unlawful overthrow of the government if the member lacked knowledge of the group's unlawful aim.

With the advent of the WARREN COURT, constitutional protection for public employees expanded with the gradual adoption of a third, more complex approach that perceived several values at risk in government treatment of public employees. Increased solicitude for the employees' personal freedom, heightened awareness that jobs often carry some sense of entitlement, and growing appreciation of the part that government workers play in citizen self-government, intensified objections to blatant instances of ideologically discriminatory treatment. Reports of the death of the right-privilege distinction may have been exaggerated, but its hold weakened considerably. Various methods used to weed out allegedly subversive public employees, especially LOYALTY OATHS and compelled disclosure of an individual's associations, were invalidated on VAGUENESS and OVERBREADTH grounds, because the Court thought those methods of employment disqualification would excessively inhibit freedom of expression and association. Those developments paralleled the Warren Court's general expansion of citizen immunity from regulation affecting individual liberty and culminated in a series of decisions between 1966 and 1968, including ELFBRANDT V. RUSSELL (1966) and KEYISHIAN V. BOARD OF REGENTS (1967), that forbade public employers from requiring their employees as a condition of employment to relinquish the expanded constitutional freedoms they enjoyed as citizens. *Pickering v. Board of Education* (1968) appeared to complete the rejection of Holmes's view in *McAuliffe* by holding that a teacher could not be dismissed for speaking on issues of public concern involving her employer.

After the Warren Court era ended, the broadest implications of the demise of the right-privilege distinction were curtailed when the Court reaffirmed the constitutionality of government efforts to keep the civil service broadly—and neutrally—apolitical. The opposition to narrower but selective disadvantaging based on ideological viewpoint remained, however. The Court has disallowed the firing of public employees for belonging to the wrong political party, except where party affiliation is a legitimate qualification for the particular job. The political patronage practice may distort the political beliefs of public employees, but because it represents discrimination against ideologically disfavored viewpoints, it also elicits the narrower concern for preventing selective arbitrariness. In 1983 the Court drew an uncertain line between a worker grievance and a citizen complaint, allowing dismissal of public employees without constitutional restraint for employee speech on matters of personal interest, but retaining *Pickering*'s FIRST AMENDMENT protection against dismissal for speech as a citizen on matters of public concern. It endorsed neither government's right to impose any conditions on public employment it chooses, nor the employees' personal rights of self-expression. Rather, the Court stressed the government's need for flexibility in employee discipline and the public, not personal, value of employee freedoms.

Protection against employment sanctions imposed for constitutionally unacceptable reasons also underlies the Court's public employees PROCEDURAL DUE PROCESS decisions. Significantly, these protections developed after, not before, the Court established substantive limits on the reasons the government legitimately could invoke to disadvantage its employees. The possibility of intentional government arbitrariness, rather than government indifference to valuable employment opportunities, seems to have prompted the development of procedural protections surrounding the loss of government employment benefits.

The development was part of the procedural due process revolution of the Warren Court. Government benefits that did not have to be granted at all, including employment, could not be taken away once awarded without providing certain constitutionally imposed minimum procedures. Rejecting both extremes, the Court never recognized a right to government work but also denied the government the unrestricted freedom to withhold it. Nor has the Court required that reasons and a fair process always be provided before an individual loses an employment opportunity. Instead, the Court has let the government decide whether to hold out a job as offering some job protection or security of employment. If the government bestows no entitlement by statute or practice, several rules apply. No reason is needed to discharge or refuse to hire. If defamatory reasons nonetheless are given for an adverse personnel action, the employee must have an opportunity to defend against the charge. In any event, con-

stitutionally illegitimate reasons may not form the public basis of the adverse action. If the government does hold out a job as offering employment security of any sort, moreover, the Court disallows deprivation of the secured position until constitutionally adequate notice, reasons, and other procedures are followed. The government worker may not be deprived of employment prospects either for illegitimate reasons or for legitimate reasons that do not apply to his circumstances.

The constitutional law of public employee regulation inevitably affects the efficiency of government operations, the personal freedoms of the workers, and the public interest in checking government abuse and being apprised of how public policy is being enforced. Accommodating these interests is, and will remain, an important and complex constitutional problem.

JONATHAN D. VARAT
(1986)

Bibliography

NOTE 1984 Developments in the Law—Public Employment. *Harvard Law Review* 97:1611, 1738–1800.

VAN ALSTYNE, WILLIAM W. 1969 The Constitutional Rights of Public Employees. *UCLA Law Review* 16:751–772.

## PUBLIC FIGURE

The concept of a public figure features prominently in modern FIRST AMENDMENT law involving libel suits. NEW YORK TIMES V. SULLIVAN (1964) prevented public officials (officeholders and candidates for office) from recovering damages for defamation without proof of actual malice, that is, proof that the statement was made with the knowledge that it was false or with reckless disregard whether it was or not. In *Curtis Publishing Company v. Butts* (1967) the Supreme Court extended the actual malice rule to public figures, described by the Court as private persons in positions of considerable influence or able to attract attention because they had thrust themselves into public controversies. A public figure commands public interest and therefore has sufficient access to the mass media to be able, like an officeholder, to publicize his response to falsehoods about him. He invites comment and his remarks make news. The Justices unanimously agreed that for the sake of a robust FREEDOM OF THE PRESS, the actual malice rule applies to public figures, but they disagreed in specific cases on the question whether a particular person, such as the former wife of the scion of a famous family is a public figure, the question before the court in *Time Incorporated v. Firestone* (1976). The Court has tended to deny the press's claim that the party suing for damages is a public figure.

LEONARD W. LEVY
(1986)

## PUBLIC FORUM

Laws that regulate the time, place, and manner of speech are not considered inherently problematic under the FIRST AMENDMENT, in contrast to laws that regulate the content of speech. As a general matter, would-be speakers can be denied the use of a particular public space for their expressive activities if other proper uses of that space would be unduly disturbed and if different speakers with different messages also would be denied use of the space.

The "public forum" DOCTRINE represents an important gloss on the general doctrine that accords government fairly wide authority to regulate speech in public places. For spaces that are designated public forums—streets, parks, and sidewalks, for example—the regulatory authority of government is subject to careful scrutiny under the First Amendment. Public forums, unlike other public spaces, cannot be devoted entirely to nonexpressive uses; some accommodation of the claims of would-be speakers must be made. In addition, when the content of the speech is taken into account in governing the use of a public forum, as when political criticism or commercial advertising but not expression of a labor grievance is disallowed on a public sidewalk, an especially strong presumption of invalidity stalks the regulation. Even content-neutral regulations regarding the time and manner of speech in a public forum pass muster under the First Amendment only if they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."

The historical derivation of the public forum doctrine can be traced to an oft-quoted OBITER DICTUM by Justice OWEN J. ROBERTS in HAGUE V. CIO (1939):

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

The dictum repudiated the doctrine, endorsed by the Supreme Court forty years earlier, that government's own-

ership of the land on which streets and parks are situated gave officials the nearly plenary authority of a private landlord to regulate access to those spaces. The phrase "public forum" was first employed as a legal term of art by HARRY KALVEN, JR., in an influential article on the topic of speech in public places. The Supreme Court's most comprehensive discussion of the public forum doctrine is in PERRY EDUCATION ASSOCIATION V. PERRY LOCAL EDUCATORS' ASSOCIATION (1983).

Public streets, parks, state capitol grounds, and sidewalks have been held by the Court to be "quintessential" public forums. Public auditoriums and meeting rooms, state fair grounds, and public school classrooms have also been held to be public forums, although the tenor of judicial opinions suggests that officials may have somewhat more regulatory authority to preserve the special character of such places than may be exercised over open spaces such as streets and parks. The Court has denied public forum status to a jailyard, a military base portions of which were open to the public, residential mailboxes, and an internal communications system used for delivering messages and posting notices within a school district. The most important criterion for deciding whether a space constitutes a public forum is the traditional use of that type of space, not necessarily in the particular locale but rather as a general practice nationwide. Some Justices have contended that the dominant consideration should be whether the use of the space for expressive purposes is basically incompatible with other legitimate uses, but that position has not won acceptance by a majority of the Court.

The public forum doctrine has been criticized, primarily on two counts. First, it is claimed that the analytical device of categorizing public places on the basis of their general characteristics fails to give sufficient weight to considerations peculiar to each particular dispute over the use of public property for expressive purposes. Case-by-case variations in the degree to which expressive and regulatory values are implicated tend, so this criticism goes, to be overshadowed by the characterization of a place in gross as either a public forum or not. Particularly as applied to places that do not qualify as public forums, the categorization approach of the public forum doctrine permits government to regulate speech that may be highly appropriate in the particular circumstances and that may not impose serious burdens on other uses of the public space.

Second, and somewhat in tension with the first criticism, it is sometimes maintained that the public forum doctrine is misleading in that the designation of a place as a public forum or not has little resolving power in actual cases. Thus, the regulation of speech based on its content is highly disfavored, even as applied to places that are not public forums. It is not clear what the public forum doctrine adds to the presumption against regulation based on content. In addition, because a COMPELLING STATE INTEREST can justify the regulation of speech in a public forum and because places that are not public forums typically are devoted to activities that conflict somewhat with the use of such places for expressive purposes, it is not obvious that the public forum designation alters dramatically the balancing of conflicting uses that must take place in all disputes over access to public land.

Probably the most important aspect of the public forum doctrine is the principle that public forums cannot be closed off entirely to marches, DEMONSTRATIONS, rallies, and individual acts of expression. In contrast, uniformly enforced blanket prohibitions on expressive activities in places that are not public forums are permissible as a general matter under the First Amendment. Apart from this issue of blanket prohibitions, the significance of the public forum doctrine lies mainly in the tendency of courts to weigh competing particularistic considerations more favorably to speakers when the situs in dispute is a public forum.

VINCENT BLASI
(1986)

Bibliography

KALVEN, HARRY, JR. 1965 The Concept of the Public Forum. *Supreme Court Review* 1965:1–32.

STONE, GEOFFREY 1974 Fora Americana: Speech in Public Places. *The Supreme Court Review* 1974:233–280.

## PUBLIC FORUM
## (Update 1)

In recent years the Supreme Court has elevated the distinction between public and nonpublic forums into "a fundamental principle of First Amendment doctrine." Apart from rules of time, place, and manner, government regulation of speech within a public forum is usually subject to the STRICT SCRUTINY ordinarily required by First Amendment jurisprudence. Government regulation of speech within a nonpublic forum, however, is accorded wide latitude and presumptive constitutionality. The Court has increasingly relied upon public forum doctrine to insulate from JUDICIAL REVIEW restrictions on speech in such settings as schools, prisons, military establishments, and state bureaucracies.

Given the dramatic constitutional difference in the government's power to regulate speech within public and nonpublic forums, the distinction between the two is a matter of some importance. The Court has offered two criteria for this distinction. The first distinguishes public

from nonpublic forums on the basis of whether the government property at issue has "traditionally served as a place for free public assembly and communication of thoughts by private citizens." The second turns on whether government has deliberately opened the property at issue for indiscriminate use by the general public. The Court has never explained, however, why the exercise of ordinary First Amendment rights on government property should depend either upon tradition or upon the permission of the government. As a consequence, modern public forum doctrine has justly received nearly universal scholarly condemnation.

The explosive growth of the doctrine is nevertheless undeniable. The underlying cause of this growth appears to be that the Court is using public forum doctrine to distinguish two different kinds of government authority: management and governance. The government exercises managerial authority when it acts through institutions to achieve explicit and fixed ends. The purpose of schools is to educate the young; the goal of prisons is to punish and reform convicted criminals; the objective of the military is to safeguard the nation; and so forth. In each of these settings, the Court has used public forum doctrine to enable government to regulate speech to achieve these institutional ends. Thus, for example, the Court has classified schools as nonpublic forums to permit them to censor student speech inconsistent with the achievement of their educational mission.

Outside these narrow institutional settings, however, governmental objectives in a democracy are not fixed and given, but rather are determined by a process of public deliberation. For this reason, public speech cannot be instrumentally regulated in a managerial fashion. In public forums, therefore, the First Amendment requires that the state exercise the authority of governance, in which the regulation of speech is presumptively unconstitutional unless justified according to strict constitutional tests. These tests are designed to ensure that governmental goals and policies be perpetually subject to the evaluation of democratic deliberation.

Although the Court's doctrine has not explicitly recognized this distinction between management and governance, the pattern of its decisions has served to define the boundary between these two different forms of authority. Public forum doctrine has thus achieved important prominence in this age of the activist state, in which the rapid proliferation of government institutions has both created a legitimate need for expansive new forms of regulating speech and yet has simultaneously threatened to strangle public deliberation.

The most controversial aspect of contemporary public forum doctrine has been the Court's tendency to defer to institutional authorities on the question of whether the regulation of speech is truly necessary to achieve institutional objectives. In the 1988 decision HAZELWOOD SCHOOL DISTRICT V. KUHLMEIER, for example, the Court concluded that determinations of the educational propriety of speech should properly rest "with the school board . . . rather than with the federal courts" and that therefore judges should defer to the decisions of school officials. But such deference in effect cedes to the states enormous discretion to regulate speech and sharply raises the question of the circumstances under which courts ought to relinquish careful supervision of governmental curtailments of speech.

ROBERT C. POST
(1992)

Bibliography

FARBER, DANIEL A. and NOWAK, JOHN E. 1984 The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication. *Virginia Law Review* 70: 1219–1266.

POST, ROBERT C. 1987 Between Governance and Management: The History and Theory of the Public Forum. *Ucla Law Review* 34:1713–1835.

# PUBLIC FORUM
## (Update 2)

Public forum DOCTRINE initially arose out of the question whether individuals have a FIRST AMENDMENT FREEDOM OF SPEECH in such government-owned properties as streets, parks, and sidewalks. Finding that such properties have been dedicated "time out of mind" to expressive purposes, the Supreme Court has generally held that speech can be regulated, but not prohibited, in such "traditional" public forums. Thus, although government can adopt reasonable time, place, and manner regulations that channel speech in such forums, it must permit a significant opportunity for individuals to speak in public parks, march on public streets, and distribute leaflets on public sidewalks.

The question then arose, however, whether individuals have a similar right to speak in other forms of government-owned property, such as military bases, the grounds surrounding a jail, and airports. Because such properties have not been dedicated "time out of mind" to speech purposes, the Court has generally held that speech can be prohibited in such places, so long as the government acts in a content-neutral manner and there is at least a reasonable basis for the restriction. Thus, as the Court held in *Greer v. Spock* (1976), although the government must allow individuals to make speeches in public parks, it need not permit speeches on the grounds of a military base, even though the base is generally open to the public. The Court explained that "it is the business of a military in-

stallation . . . to train soldiers, not to provide a public forum."

Governmental allowance of some, but not all, speech in a nonpublic forum raised more difficult issues. In LAMB'S CHAPEL V. CENTER MORICHES UNION FREE SCHOOL DISTRICT (1993), for example, a public school district permitted student groups to meet after-hours in the school's classrooms, but prohibited use of the classrooms for religious purposes. Because the classrooms were a nonpublic forum, the school district presumably could have prohibited all after-hours use of its own buildings. But once it chose to permit some student organizations to use the classrooms after-hours, could it constitutionally exclude religiously oriented organizations from using them as well?

In POLICE DEPARTMENT OF CHICAGO V. MOSLEY (1972), the Court had held that such "selective exclusions" from traditional public forums are presumptively unconstitutional and will be upheld only if they are necessary to serve a "compelling" governmental interest. The Court has applied a different approach, however, to "selective exclusions" from nonpublic forums. In this context, the Court has held that the government can constitutionally restrict access based on the "subject matter" of the speech so long as the exclusion is "reasonable and viewpoint-neutral." Applying this standard in *Lamb's Chapel*, the Court held that the restriction was unconstitutional because even though the classrooms were only a "limited" public forum, the denial of access to speakers who wanted to address issues from a religious perspective violated the requirement of "viewpoint-neutrality."

The most recent extension of this doctrine involves the problem of government subsidies. In ROSENBERGER V. RECTOR AND VISITORS OF UNIVERSITY OF VIRGINIA (1995), for example, the Court, following *Lamb's Chapel*, invalidated a University of Virginia policy authorizing payment from the Student Activities Fund for the printing costs of a variety of student publications, but prohibiting payment for any student publication that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." In extending public forum analysis to cases like *Rosenberger*, which involves government PROPERTY in the form of benefits rather than a physical locale, the Court has run into particular difficulty with the concept of "viewpoint-neutrality."

In RUST V. SULLIVAN (1991), for example, the Court, in a 5–4 decision, upheld the constitutionality of federal regulations providing that federal funds appropriated to support family planning services might not be used to provide referrals for ABORTION as a method of family planning. The dissenters, in an opinion by Justice HARRY A. BLACKMUN, argued that, "until today, the Court has never upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds." The Court, however, in an opinion by Chief Justice WILLIAM H. REHNQUIST, responded that "we have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." This line of reasoning has proved highly controversial. Critics have asked why, for example, the same argument wouldn't also hold true in cases like *Lamb's Chapel* and *Rosenberger*.

More recently, in *National Endowment for the Arts v. Finley* (1998), the Court upheld a federal statute that directs the NEA, in establishing procedures to judge the artistic merit of grant applications, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." For several reasons, the Court rejected the argument that "the provision is a paradigmatic example of viewpoint discrimination." First, the Court argued that the provision merely "adds 'considerations' to the grant-making process; it does not preclude awards to projects that might be deemed 'indecent' or 'disrespectful.' " Second, the Court observed that terms like "indecency" and "respect for diverse beliefs and values" are "susceptible to multiple interpretations" and do not necessarily "introduce considerations that, in practice, would effectively preclude or punish the expression of particular views."

The Court distinguished *Rosenberger* on the ground that, in "the context of arts funding, in contrast to many other subsidies, the government does not indiscriminately 'encourage a diversity of views from private speakers.' The NEA's mandate is to make aesthetic judgments, and the inherently content-based 'excellence' threshold for NEA support sets it apart from the subsidy issue in *Rosenberger*—which was available to all student organizations that were 'related to the educational purpose of the University.' " Finally, the Court emphasized that "we have no occasion here to address an as-applied challenge in a situation where the denial of a grant may be shown to be the product of invidious viewpoint discrimination. If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case." Although cases like *Rust* and *Finley* may seem a far cry from the earlier era's disputes about leafleting on public sidewalks, the common theme of access to government "property," which underlies the public forum problem, unites these decisions.

GEOFFREY R. STONE
(2000)

Bibliography

KAGAN, ELENA 1996 Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine. *The University of Chicago Law Review* 63:415–463.

POST, ROBERT 1996 Subsidized Speech. *Yale Law Journal* 106: 151–174.

REDISH, MARTIN 1996 Government Subsidies and Free Expression. *University of Minnesota Law Review* 80:543–577.

## PUBLIC INTEREST LAW

Public interest law is the work done by lawyers on behalf of poor individuals, unrepresented interests, and the general good. Public interest law services are usually provided at no cost to the beneficiaries, who are either too poor to pay or are not organized in ways that would allow them to retain lawyers. Public interest lawyers work in the courts, agencies, legislatures, and also through the media and community organizations. Although only a small number of American lawyers participate in these activities, public interest law reflects the American legal profession's commitment to values not fully served by the normal fee-for-service system of legal practice.

There is an intimate relationship between public interest law and the Constitution. First, the governmental structure created by the Constitution makes public interest law both necessary and possible. Second, without public interest law, many constitutional protections might be ineffective. Finally, the broader American tradition of CONSTITUTIONALISM depends on institutions like public interest law.

The governmental structure created by the Constitution makes legal advocacy important for the pursuit of many individual and collective interests. United States government is one by representation, not by direct participation. Although, in theory, citizens are supposed to be knowledgeable about public issues and elected representatives are supposed to take account of the interests of all constituents, in fact, most decisions are made in remote arenas and officials often are not aware of all affected interests. As a result, direct advocacy by professionals will make a difference in outcomes. If all such advocacy must be purchased in the marketplace, the system will be skewed toward the interests of the "haves." The presence of public interest advocates, at least to some degree, offsets marketplace bias.

The special role our written Constitution plays in American political life makes subsidized advocacy all the more important. Americans resolve many fundamental issues—from SLAVERY to reproductive freedom—through consitutional litigation. If free legal services are not sometimes available in these struggles, the results can be seriously skewed.

Although the constitutional structure thus makes public interest law necessary, it also helps make it possible. Of course, there is a constitutional RIGHT TO COUNSEL in criminal cases. In addition, several constitutional protections have been given to public interest lawyers. In NAACP V. BUTTON (1963) the Supreme Court ruled that litigation on behalf of a disadvantaged group was constitutionally protected speech and overturned Virginia's efforts to penalize NAACP lawyers. This ruling was extended by *In re Primus* (1978), where the Court made clear that nonprofit groups representing protected interests were exempt from normal bans on solicitation by lawyers.

The rights granted by the Constitution usually are not self-enforcing. Without legal representation, many would remain a dead letter. Protections for criminal defendants remain mere paper promises unless the accused are represented by competent lawyers. Because of the serious consequences of a deprivation of these rights, the Constitution itself guarantees counsel. But there are many other areas in which public interest law, although not constitutionally guaranteed, is equally essential. Many efforts to curb free speech, for example, would have gone unchallenged if public interest groups like the AMERICAN CIVIL LIBERTIES UNION were not available to defend this interest. The guarantee of EQUAL PROTECTION OF THE LAW might still sound completely hollow to African Americans if the subsidized services of NAACP lawyers and other public interest advocates were not available.

Public interest law spans the political spectrum. Some of the more notable liberal public interest law groups include the ACLU, the NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, and the Commission on Law and Social Action of the AMERICAN JEWISH CONGRESS. Public interest law groups of a conservative persuasion include the Pacific Legal Foundation, which brings suits against governmental regulation; the Rutherford Institute, which litigates cases involving EQUAL ACCESS for religious groups and defends nonviolent protestors in the ANTIABORTION MOVEMENT; and the Washington Legal Foundation, which pursues a grab bag of causes, including JUDICIAL REVIEW of redistricting and lawsuits by crime victims.

A major aspect of American political culture is our "constitutionalism": the belief in higher values protected by the Constitution. Often, marginal and subordinated groups have looked to higher law and constitutional values as guides and inspiration for their struggle for inclusion in the American commonwealth. Women, blacks, and other groups have looked beyond existing law and institutions to a penumbra of constitutional values that, they believed, entitled them to fuller participation in economic, social, and political life. Public interest law, as idea and institution, is a reflection of this faith in the redemptive power of law and legal institutions. To be sure, law does not always fulfill the promises Americans put in it. Public interest law is often weak and ineffective; legal solutions may not lead to real gains. But public interest lawyers have won real victories and made some difference for subordinated groups. As long as America's basic political institutions remain unchanged, public interest law will be essential: it

ensures that forces of the market and status quo do not overshadow democracy and constitutional values and helps preserve constitutionalism as a real force in our political life.

LOUISE G. TRUBEK
(1992)

Bibliography

ARON, NAN 1988 *Liberty and Justice for All: Public Interest Law in the 1980s and Beyond.* Boulder, Colo.: Westview Press.

CHAVKIN, DAVID F. 1987 Public Interest Advocacy. In R. Janoskik, ed., *Encyclopedia of the American Judicial System: Studies of the Principle Institutions and Processes of Law*, Vol. 2. New York: Scribners.

## PUBLIC LAW LITIGATION

The WARREN COURT initiated wholesale changes in American constitutional law. Legal apartheid was dismantled. The bulk of the BILL OF RIGHTS was decreed enforceable against the states. Orchestrated public SCHOOL PRAYER was ended. Legislatures were forced to undergo REAPPORTIONMENT. Prison conditions were scrutinized. FREEDOM OF SPEECH was bolstered and made meaningful. ADMINISTRATIVE AGENCY action was rendered more easily reviewable. Access to the judicial process was expanded. And constitutionalism gained an enhanced role in the political life of the nation.

At the same time, although relatively few people noticed it, the nature of the federal litigation process began to change. Private rights were no longer the sole currency of the JUDICIAL SYSTEM. The cascade of newly recognized constitutional interests and the expanded review of administrative decisionmaking allowed by the courts opened the door to much litigation based on widely shared public values and interests. No doubt, most lawsuits continued to turn exclusively upon the competing claims of private interests. But the dramatic new acceptance of what scholars came to characterize as "public law litigation" worked to alter substantially the operation of American courts. That change will very likely remain with us, even as the Supreme Court turns in different ideological directions to reformulate substantive constitutional principles and to match its decisionmaking with the demands of the day.

Consider the contrasts. The COMMON LAW system of litigation is dominantly tied to the protection of private rights and interests. Disputes typically arise between private parties and are circumscribed by their competing claims. The litigants initiate and control its boundaries. The contested terrain concerns the rights and duties that these parties may be said to owe to each other. Courts function principally to resolve the proffered dispute, and judges act as neutral arbiters in weighing the claims. Litigation is accurately described as "bipolar"—with the parties engaged in a confrontational, winner-take-all contest. The process is, generally speaking, retrospective, designed to determine the legal significance of a fairly discrete set of past events. The remedy is intricately linked to the measurement and the determination of the legal right that provides the basis for the claim. The lawsuit is largely self-contained, its impact intended to be limited to the parties before the tribunal. Most often, judicial involvement ends with the issuance of the decree.

Public law litigation takes a decidedly different cast. The subject matter of the litigation typically concerns a dispute about the conduct of government policy—policy that likely affects not only the plaintiffs, but many others as well. The party structure is apt to be broader, and possibly more amorphous. The basis for the claim, of course, remains the assertion of deprivation of a legal right. But the focus of the attention, and of the remedy, is more likely prospective than compensatory. Litigants attempt to force the government to change its behavior, and the claims are designed to have impact well beyond the parties to the litigation. The demand for prospective, curative relief also typically entails continuing involvement or monitoring by the court. The role of the judge is altered accordingly. Public law litigation requires an active, initiating trial judge, organizing the litigation and supervising the effectiveness of the relief ordered.

Not surprisingly, perhaps, public law litigation has presented its own challenges.

First, since public claims are based on interests that are typically not the exclusive province of any one person, determining who will be allowed to bring such suits is, at the least, complex. Common law disputes typically explore whether the plaintiff is entitled to compensatory relief from a particular defendant. Lawsuits involving the validity of government policies, however, have more often involved diffuse and intangible interests: Should a legislature be apportioned more fairly? Should an environmental practice be changed to afford greater protection to natural resources? The license to bring such actions triggers an exercise of judicial authority that may well work to refashion government policy. Determining, therefore, who has STANDING to employ the judicial process has proved to be a thorny problem.

Similarly, public law litigation implicates substantial questions concerning the ability of the plaintiff appropriately to represent the interests inevitably affected by the litigation. A relatively small stake in a larger dispute may be enough to call into play an overarching use of the judicial power. As a result, traditional notions of client control and the demand that a class of litigants be tied to the

fortunes of a particular member seem less relevant in a multifaceted public policy dispute in which the actual named plaintiff may have relatively little role in the proceedings. Here, to many, the courts' responses have proven unsatisfactory.

Even more starkly, public law litigation has pushed traditional notions of the federal courts' remedial powers. Declaring that the SEPARATE BUT EQUAL DOCTRINE had no place in public education proved to be only a first step in the process of DESEGREGATION. Innovative and hugely controversial remedies became necessary, however, if the asserted rights were to be meaningful protected. Reapportionment and prison cases similarly broke with traditional remedial patterns. Federal judges became managers, supervisors, magistrates, special masters, and overburdened administrators—frequently against their apparent preferences. The common law notion of the judge as passive referee seemed to become a quaint and distant memory.

Surely, the greatest question presented by the growth of public law litigation has been the most basic one—is it consistent with the limited role for the judiciary in a system marked by SEPARATION OF POWERS? To the extent that such cases are seen to vindicate the public interest rather than settle circumscribed private claims, they pose tensions not only with tradition but with perceived bases of judicial authority and legitimacy as well. Because judges are neither elected nor directly accountable to the people, extensive judicial policymaking powers present tough questions of CONSTITUTIONAL THEORY. Nor is it clear that courts are well equipped to deal with such complex and value-laden controversies. There seems little doubt, however, that judges, especially federal judges, will continue to be seen as essential partners with the other branches of government in enforcing our public values. As ALEXIS DE TOCQUEVILLE observed, "There is hardly a political question in the United States which does not sooner or later turn into a judicial one."

GENE R. NICHOL
(2000)

(SEE ALSO: *Constitutional History, 1950–1959; Constitutional History, 1960–1969; Courts and Social Change; Institutional Litigation.*)

Bibliography

CHAYES, ABRAM 1976 The Role of the Judge in Public Law Litigation. *Harvard Law Review* 89:1281–1316.

——— 1982 The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court. *Harvard Law Review* 96:4–60.

EISENBERG, THEODORE and YEAZELL, STEPHEN C. 1980 The Ordinary and the Extraordinary in Institutional Litigation. *Harvard Law Review* 93:465–517.

NICHOL, GENE R., JR. 1984 Rethinking Standing. *California Law Review* 72:68–102.

——— 1986 Injury and the Disintegration of Article III. *California Law Review* 74:1915–1950.

SCALIA, ANTONIN 1983 The Doctrine of Standing as an Essential Part of Separation of Powers. *Suffolk University Law Review* 17:881–899.

SCOTT, KENNETH E. 1975 Two Models of the Civil Process. *Stanford Law Review* 27:937–950.

# PUBLIC PURPOSE DOCTRINE

The DOCTRINE of public purpose has been used, in the course of American constitutional history, as a standard by which courts have determined the legitimacy of state EMINENT DOMAIN and taxation legislation. In different periods the doctrine has been mobilized to advance divergent ideological causes and varying constitutional interpretations.

The first distinct phase in the doctrine's history ran from the early nineteenth century to the 1870s, when it was prominent as a justification for new and often far-reaching uses of eminent domain and taxation. During that period the doctrine was a bulwark of positive government. From the 1870s to the WORLD WAR I period, the doctrine became something quite different in the hands of conservatives who sought to enshrine laissez-faire policy as constitutional law. Arguments treating the public purpose doctrine as a limitation on government action were often prominent, in the new constitutional view of VESTED RIGHTS, as arguments based on FREEDOM OF CONTRACT. A third phase began in the 1930s, when state and federal courts were confronted with challenges to urban slum clearances and redevelopment projects that involved new uses of both eminent domain and taxation powers. Again the doctrine of public purpose found a prominent place in constitutional law, with legal opinion and judicial rulings seriously divided for a time as to what view of public purpose ought to prevail.

Formulation of a "public purpose" standard as a canon for testing the legitimacy of governmental action first became prominent in American decisions when states began to expand the reach of their transportation policies in the early nineteenth century. Projects such as the great Erie Canal enterprise in New York, and similar public works in other states, required powers of eminent domain for the agencies responsible for construction. When legislatures devolved the eminent domain power upon private chartered corporations that built bridges, roads, canals, and railroads, there was widespread agreement that some constitutional limitation should be formulated to prevent indiscriminate delegation of such high sovereign powers. Legal commentators and judges often invoked the Fifth

Amendment's reference to PUBLIC USE as a limitation upon eminent domain TAKINGS OF PROPERTY by state authority; many state constitutions used the same phrase in their takings clauses, and even when no express constitutional limitation referred to public use the state courts read it into their law as a fundamental principle of justice. Was a privately owned turnpike corporation engaged in a "public" activity, however? How was the distinction between "public" activities and those merely "private" to be drawn?

Gradually the phrase "public purpose" assumed nearly the same standing, as a measure of legitimacy, as "public use." One of the early decisions on turnpikes, for example, acknowledged the uniquely "public" character of such roads. They were, a New York judge declared in 1823, "the most public roads or highways that are known to exist, and in point of law, they are made entirely for public use, and the community has a deep interest in their construction and preservation." A few years later, New York's chancery court upheld the exercise of eminent domain powers by a privately owned railroad corporation. It was legitimate for the state to devolve the power to expropriate, on payment of compensation, the court declared, "not only where the safety but also where the interest or even the expediency of the state is concerned." In WEST RIVER BRIDGE V. DIX (1848), the earliest Supreme Court case during the first sixty years of the Republic's history where the eminent domain power was ruled upon directly, it was a direct taking by a state—not devolution of the power on a corporation—that was challenged; but the opinions in the case left no doubt that states enjoyed wide discretion in deciding what activities should qualify as "public" in use or purpose, hence were eligible to exercise the eminent domain power if vested in them by the legislatures.

A parallel development in legal doctrine reinforced the impact of the foregoing line of decisions. This other development was in riparian law and its relationship, which changed over time, to public law in the states. As the state legislatures enacted a growing body of law regulating interests in streams—fisheries, navigation, shoreline development, damming of waters for millpower—the courts were called upon to rule on the legitimate reach of the regulatory power. The courts derived from English COMMON LAW distinctions between streams owned by the sovereign; streams "private in ownership but public in use" and so subject to broad regulatory control; and streams strictly private in ownership and in use, whose private character immunized owners against loss from regulation or taking without compensation. Repeatedly, lawyers and judges drew the analogy between waterways in public use and the chartered railroad, canal, bridge, and road companies that were private in ownership, yet "public" in purpose and use. The analogy lent additional legitimacy to "public purpose" as a doctrine which supported state action that forced private rights to yield to communal needs. Private companies were given special privileges in promotion of drainage, wharf facilities, supply of water to urban centers, and transportation facilities, as the Ohio Supreme Court declared in 1836, "because the public has an interest in them." Hence it was consistent to force private owners to yield to takings, for purposes of such enterprises, under eminent domain.

Although the doctrine had been used initially to support a large view of eminent domain power, it was soon employed also in support of tax-financed subsidies to private business firms. As enthusiasm for railroad construction swept the country in the middle decades of the nineteenth century, voters in hundreds of local communities and many state legislatures proved willing to extend cash subsidies—money raised through taxation—to private railroads, to guarantee railroad bonds, or to purchase stock in such railroads. Again, "public purpose" proved to be the vehicle for legitimation of such use of public funds. The Michigan high court, for example, in 1852 turned back a challenge to the constitutionality of such tax-supported aid on the ground that railroad corporations were "created for public benefit" and so were distinguishable from "strictly private corporations . . . [in which] private advantage is the ultimate as well as the immediate object of their creation." The landmark state case, widely followed, was *Sharpless v. Philadelphia*, decided by the Pennsylvania court in 1853. Termed in the court's decision "beyond all comparison, the most important cause that has ever been in this Court," the case was decided in favor of the constitutionality of state subsidies. Taxation must be for a public purpose, the court emphasized, and despite private ownership the railroad companies receiving aid represented such a purpose.

The spreading practice of extending public aid to corporations alarmed many jurists, however; and by the late 1860s, opposition to such a broad reading of "public purpose" and "public use" concepts had grown strong. Emblematic of the issue was the policy of Wisconsin, where the legislature by 1874 had authorized public, tax-supported aid to telegraph, steamship, hotel, waterworks, gas, construction, bridge, canal, river improvement, and dry-dock corporations. The constitutions of the newly admitted western states commonly designated as "public purpose" enterprises firms engaged in logging, road building, irrigation and reclamation, railroads, river improvement, and drainage for mining or agriculture. Such enterprises were routinely granted eminent domain power, and many of them received subsidies. In the East and Midwest, several states allowed manufacturing corporations of all kinds to condemn and flood lands for power sites. Such laws were defended as aid to companies with an important public purpose, comparable to the

grants of similar eminent domain powers to gristmills in colonial Massachusetts. In a few states—among them Georgia, New York, Alabama, and Vermont—the courts invalidated such grants of power. In most state tribunals, however, the broad view of "public purpose" continued to prevail.

Indicative of the emerging conservative jurisprudence on the issue were decisions of Judge THOMAS M. COOLEY's Michigan court in 1870 against public aid to railroads and in 1877 against a milldam flooding act. In Cooley's view, set forth more systematically in his treatise, *Constitutional Limitations* (1868), "Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government." Further distinguished authority for the same view came from the Iowa Supreme Court. Chief Justice JOHN F. DILLON—like Cooley, a treatise writer who pressed his concern for vested rights on the legal profession and the courts in the late nineteenth century—wrote an opinion for the Iowa court in 1862 that struck down railroad bond aid as a confiscation of citizens' property without compensation and a violation of DUE PROCESS.

The conservative assault led by Dillon and Cooley soon enlisted the aid of the Supreme Court. In LOAN ASSOCIATION V. TOPEKA (1874) the Court declared unconstitutional a Kansas municipal bond issue in aid of a bridge-manufacturing company. Justice SAMUEL F. MILLER'S opinion for the majority denounced the use of tax funds for a "private interest instead of a public use"; and he termed it robbery to exercise the taxing power in this way. It was a sudden and surprising use of the public purpose doctrine to limit state legislative power—in contrast with its earlier use to enlarge state power and legitimate new activities.

The conservative version of public purpose did not carry the day altogether, even as the jurisprudence of vested rights was gaining ascendancy. Thus the Supreme Court repeatedly turned back assaults on state aid to railroads, with a solid majority maintaining that transportation had always been considered a "public purpose" activity and so eligible for eminent domain power and aid with tax funds. *Olcott v. The Supervisors* (1873) upheld the validity of local bonds issued to aid railroads in a Wisconsin municipality, in the face of efforts to repudiate them. In language squarely in the line of doctrine that had come down from JAMES KENT's views on turnpikes half a century earlier, the Court asserted that railroads had a "public highway character. . . . Though the ownership is private, the use is public." Use of tax funds to subsidize manufacturing companies suffered a different fate, however, in light of the *Loan Association* decision. Thus Clyde Jacobs calculated that from 1870 to 1910 some forty public purpose cases challenging tax aid to businesses came before the federal courts and state high courts. In thirty-nine of the forty, public aid was found invalid on the ground that it was not for a public purpose. Moreover, numerous state courts interpreted the "public purpose" provisions in state constitutions to forbid subsidies or relief payments to the blind, for example, or to farmers who had suffered from weather or crop failure.

In the Supreme Court, however, a manifest softening of the commitment to public purpose as a limiting doctrine became evident in decisions on the constitutionality of grants of taxing and eminent domain power to special-purpose irrigation districts. The Court ruled in *Fallbrook Irrigation District v. Bradley* (1896) that local geographical and climatic conditions required a considerable legislative discretion as to what constituted public purpose. In other cases that tested the constitutionality of using tax revenues to finance state enterprises such as public utilities and even grain warehouses, the Court moved still further toward allowing legislatures to do so. By the early 1920s public purpose as a national constitutional doctrine was no longer a major support for vested property rights or limitation upon governmental power, even though the Court, beginning with *Fallbrook,* explicitly treated public purpose as a FOURTEENTH AMENDMENT issue.

The Supreme Court also abandoned in 1916 a residual doctrine that had enjoyed considerable judicial respect in many jurisdictions since the 1850s, the doctrine that "public use" (justifying takings by the state) should be interpreted as "use by the public" and not in broad "public purpose" terms. In *Mt. Vernon-Woodberry Company v. Alabama Power Company* (1916), Justice OLIVER WENDELL HOLMES, writing for the Court, declared flatly that "the inadequacy of the use by the general public as a universal test is established."

The deep economic crisis in the 1930s and the social dislocations it generated led to the third distinct phase of the public purpose doctrine's history. The application, throughout the nation, of federal aid to urban slum clearance and housing development produced challenges in both federal and state courts to the constitutionality of using eminent domain and taxation powers for such purposes. Especially where private real-estate and financial interests were given a key role in housing, the public purpose of takings and public expenditures for such programs was questioned. By 1940 such objections had been rejected, and the public programs upheld, in the courts of twenty-eight states. Many of these opinions concluded that where "public welfare" was served the public purpose test was met—a broad concept of legitimacy for eminent domain (and taxation) that found expression also in *United States ex rel. Tennessee Valley Authority v. Welch* (1946),

a leading Supreme Court decision validating takings by a federal agency for purposes of regional development. It was for Congress to decide what was a public use, the Court declared; no "departure . . . [from] judicial restraint," with deference to the legislative branch, was warranted.

The language of the *Welch* decision was imported into state and federal courts' review of another wave of urban slum clearance programs in the 1940s and 1950s, following WORLD WAR II. In this later period, more than mere slum clearance was at issue; the urban programs often embraced comprehensive "urban redevelopment" objectives, typically employed private financial and entrepreneurial interests in the projects, and often involved sweeping condemnation programs that took land and buildings that did not fit the "slum" classification. Rejecting a public purpose challenge to comprehensive redevelopment, in which some of the property taken ended up in the hands of private developers, not government itself, a federal district court in a landmark 1953 ruling, *Schneider v. District of Columbia*, declared: "the term 'public use' has progressed as economic facts have progressed, and so projects such as railroads, public power plants, the operation of mines under some conditions, and, more recently, low-cost housing have been held to be public uses for which private property may be seized. Moreover, . . . the variation in the term from '[public] use' to '[public] purpose' indicates a progression in thought." So long as the taking is necessary to the public purpose that the legislature has determined and defined, the court concluded, eminent domain powers necessary to accomplishment of that purpose must be deemed legitimate.

The valedictory came in *Berman v. Parker* (1954), when the Supreme Court affirmed that public purpose was a concept coterminous with "public welfare," hence embraced objectives across a broad spectrum that included "public safety, public health, morality, peace and quiet, law and order," to list only "some of the more conspicuous examples." Once pursuit of public purpose in these terms was accepted, then eminent domain, taxation, or the STATE POLICE POWER might be used to accomplish the goals set forth. Judicial review under the Fifth and Fourteenth Amendments was not out of the question, at least in some jurists' views. Justice FELIX FRANKFURTER, for example, in a concurring opinion in *Welch*, wrote: "But the fact that the nature of the subject matter gives the legislative determination nearly immunity from judicial review does not mean that the power to review is wanting." In the subsequent history of taking, however, it was the eminent domainpolice power distinction, and not the public purpose doctrine, on which constitutional challenges to regulation would turn. The purposes for which eminent domain or taxation could be used did seem "nearly immune," in light of modern constitutional interpretation of the GENERAL WELFARE CLAUSE.

HARRY N. SCHEIBER
(1986)

Bibliography

JACOBS, CLYDE E. 1954 Law Writers and the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedman, and John F. Dillon upon American Constitutional Law. Berkeley and Los Angeles: University of California Press.

NICHOLS, PHILIP, JR. 1940 The Meaning of Public Use in the Law of Eminent Domain. *Boston University Law Review* 20: 615–624.

SCHEIBER, HARRY N. 1971 The Road to *Munn:* Eminent Domain and the Concept of the Public Purpose in the State Courts. *Perspectives in American History* 5:327–402.

WOODBURY, COLEMAN, ed. 1953 *Urban Redevelopment: Problems and Practices.* Chicago: University of Chicago Press.

## PUBLIC TRIAL

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." The language of the Sixth Amendment appears to assure that criminal courtrooms in the United States will be open—that there will be no secret trials. But the issue of openness in the process of criminal justice has only recently reached a point of consensus in the Supreme Court after nearly forty years of experimentation with successive constitutional tests.

Conflicting values underlay the debate. One was that of the open society, with the public free to observe and criticize the activities of government, including the courts. The other was fairness to someone accused of a crime: his or her right to a trial uninfluenced by public passion or prejudice. The two values do not usually conflict, but it hardly needs to be said that they may clash in a country that has known mob-dominated courtrooms and lynchings.

The constitutional conflict first surfaced in a series of cases starting with BRIDGES V. CALIFORNIA (1941). The issue was whether American, like British, judges could punish as a contempt of court any comment on a pending criminal case that had a tendency to interfere with the administration of justice. In *Bridges* two persons had been held in contempt: a labor leader for a telegram criticizing a judicial decision against his union, and a newspaper editor for an editorial admonishing a judge not to grant probation to two convicted union members. By a 5–4 vote the Supreme Court reversed both contempt convictions. The Court's opinion, by Justice HUGO L. BLACK, said the FIRST AMENDMENT barred punishment for such comments unless they presented a CLEAR AND PRESENT DANGER—the test framed by Justice OLIVER WENDELL HOLMES in the early sedition

cases such as ABRAMS V. UNITED STATES (1919)—of causing "disorderly and unfair administration of justice." Later decisions made plain that it would be extremely difficult for authorities to meet that test. Justice WILLIAM O. DOUGLAS said in *Craig v. Harney* (1947): "A trial is a public event. What transpires in the courtroom is public property. . . . There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."

Nevertheless, concern remained about the possible effect of outside comment on the criminal justice process, especially on the impartiality of jurors. Justice FELIX FRANKFURTER felt so strongly about the matter that he wrote an impassioned opinion in *Maryland v. Baltimore Radio Show* (1950), when the Supreme Court refused to review a state appellate court decision reversing on First Amendment grounds the contempt conviction of a radio broadcaster who had broadcast, before a murder trial, the record of the defendant and alleged evidence of his guilt.

The Supreme Court dealt with the problem of prejudicial press comment on criminal cases another way: by reversing convictions when there was reason to think the jury might have been improperly influenced by the outside comment. The Court first found that prejudicial comment had violated a defendant's constitutional right to fair trial in IRVIN V. DOWD (1961). Justice Frankfurter, still preferring to proceed against the press itself, wrote bitterly in a concurring opinion: "The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade." But the device of contempt to prevent prejudicial comment never found favor with a majority. In *Sheppard v. Maxwell* (1966) the Court outlined other measures to prevent the prejudicing of juries in notorious cases: delaying or moving the trial, for example, or sequestering the jury once it had been selected.

Then a new prophylactic device was taken up by some trial courts around the country: INJUNCTIONS against press institutions and representatives forbidding reports, before trial, of evidence and other material that might prejudice potential jurors. These gag orders, as the press angrily called them, followed the approach adopted by Britain in the Criminal Justice Act of 1967. That act allowed the press to attend pretrial committal proceedings, thereby assuring scrutiny of the process, but forebade reporting on them until after the trial itself was completed—unless the defendant waived the restriction. But in 1976 the Supreme Court held that the First Amendment stood in the way of this approach, too. In NEBRASKA PRESS ASSOCIATION V. STUART the press had been enjoined from reporting, before trial, the alleged confession and other especially prejudicial matters about the defendant in a gruesome multiple murder case in a small Nebraska town. The Court's opinion, by Chief Justice WARREN E. BURGER, declined to adopt an absolute rule against such restraints. But the decision against them, on the extreme facts of that case, made it most unlikely that gag orders would ever be permissible; and trial courts stopped issuing them.

A last round of the constitutional debate about fair trial and free speech tested still another prophylactic device: closing the courtroom to the public and the press during sensitive phases of pretrial or trial proceedings. In GANNETT V. DEPASQUALE (1979) counsel for the defendants moved to close a pretrial hearing on motions to suppress confessions and other EVIDENCE, arguing that reports of the hearing would prejudice future jurors if the evidence were in fact suppressed. The prosecutor did not object, and the trial judge closed the courtroom. A newspaper then challenged the order. The Supreme Court decided that the "public trial" clause of the Sixth Amendment was for the benefit of the defendant alone, who could waive it, and that outsiders had no STANDING to insist on an open courtroom. The majority put aside First Amendment considerations.

A year later the Court did consider the First Amendment and decided that it limited the closing of courtrooms. In RICHMOND NEWSPAPERS V. VIRGINIA a 7–1 majority found unconstitutional the exclusion of the public (and with it the press) from a criminal trial. There was no opinion of the Court, but various Justices shared the view expressed by Chief Justice Burger that the First Amendment assures the public a "right of access" to criminal trials that can be denied only for strong and articulated reasons. Indications are that the right extends also to civil cases, and to pretrial proceedings as well as trials.

The decision was an extraordinary doctrinal conclusion to the long cycle of constitutional litigation. For the Supreme Court had for the first time said that the First Amendment was not only a shield protecting the right to speak or publish but also a sword helping the public to gain access to information about government institutions. How far that new doctrine would be taken was uncertain. But in American courtrooms, at least, a constitutional presumption favors openness.

ANTHONY LEWIS
(1986)

Bibliography

LEWIS, ANTHONY 1980 A Public Right to Know about Public Institutions: The First Amendment as Sword. *The Supreme Court Review* 1980:1–25.

SCHMIDT, BENNO C. 1977 Nebraska Press Association: An Expansion of Freedom and Contraction of Theory. *Stanford Law Review* 29:431–476.

# PUBLIC UNDERSTANDING OF SUPREME COURT OPINIONS

When interpreting the Constitution, Justices of the Supreme Court—whether writing a majority, CONCURRING, or DISSENTING OPINION—should seek to reach the American people as their primary audience. They should explain with candor, in accessible and comprehensible language, what they decided, and why they decided it in that way.

That the Constitution be intelligible to the American people is essential to a government based on informed consent and open to informed dissent. The PREAMBLE to the Constitution proclaims that "We the People [not only "We Constitutional Lawyers and Teachers of Constitutional Law"], in Order to . . . establish Justice, . . . and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

In 1819, Chief Justice JOHN MARSHALL wrote for and to a unanimous Supreme Court in MCCULLOCH V. MARYLAND (1819) that, individually and collectively, "we must never forget that it is a *Constitution* that we are expounding"; that the Constitution derives its whole authority from the people of the nation; and that, in form and language, it is an instrument designed to be accessible and comprehensible to the public. The Constitution ought not to be converted by Court interpretations into, or be treated like, an intricate legal code detailing all of its great powers and all of the means by which they may be carried out. A Constitution, so converted, could "scarcely be embraced by the human mind" and, Marshall added, "probably would never be understood by the public."

Marshall stressed that "[s]uch is the character of human language that no word conveys to the mind, in all situations, one single definite idea." The burden of an opinion is to remove obstacles to understanding when a controversy arises between or among the governors and the governed about the Constitution's meaning. To say that is not meant to obscure the fact that the language of opinions may be no more free from ambiguity than the language of the constitutional provision being interpreted. Nevertheless, the Court's task is to clarify—to make something about the Constitution more fully understood than it was before the opinion was rendered—by explaining and giving reasons for its judgment in a concrete case.

Yet conscious ambiguity, confusion, and alteration of apparently critical facts have characterized opinions in many of the Court's most important decisions, such as those in BROWN V. BOARD OF EDUCATION (1954), COOPER V. AARON (1958), REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978), and WEBSTER V. REPRODUCTIVE HEALTH SERVICES (1989). Some Justices have been candid about the intentional muddling or misstatement of opinions.

Justice ROBERT H. JACKSON once observed that "[t]he technique of the dissenter often is to exaggerate the holding of the Court beyond the meaning of the majority and then to blast away at the excess," leaving a reader in doubt about "whether the majority opinion meant what it seemed to say or what the minority said it meant."

Chief Justice CHARLES EVANS HUGHES is reported to have admitted that "he tried to write his opinions clearly and logically, but if he needed the fifth vote of a colleague who insisted on putting in a paragraph that did not 'belong,' in it went, and let the law reviews figure out what it meant."

An opposing view, explained by Professor Burke Marshall, is that the Court has left to the legal profession and to legal scholars the task of "explain[ing] the obscure, . . . [of] construct[ing] for our students and for the people generally what it is that the Court surely meant, when the Court itself does not say what it meant." Those who hold this belief tend not to address whether this reality should be the goal of opinion writing, or whether it is simply the inevitable, albeit regrettable, product of the Court's work.

According to Professor Marshall, "Familiarity with the Court's work overwhelmingly demonstrates at a minimum that the members of the Court view their work as directed at the elite, and not to the people." But this should not lead anyone to conclude that the Justices should leave to the "experts" the task of instructing "We the People," effectively drawing a line—whether consciously or unconsciously—between the elite, those who are "in," and the rest of the people, those who are "out." Even the professional interpreters to whom the people must turn for understanding may not be able to unravel what the Court has to say, often in heavily footnoted, multiple opinions. The "experts" and even the Justices themselves, for example, may not be able to identify the constitutional principles underlying the decision in *Webster*. Its confusing, seventy-four-page set of opinions, which left unresolved the meaning of the trimester framework fashioned in ROE V. WADE (1973) for determining the constitutionality of laws permitting ABORTION, is introduced by this mind-boggling headnote:

> REHNQUIST, C.J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Part II-C, the opinion of the Court with respect to Parts I, II-A, and II-B, in which WHITE, O'CONNOR, SCALIA and KENNEDY, J.J., joined, and an opinion with respect to Parts II-D and III, in which WHITE and KENNEDY, J.J., joined. O'CONNOR, J., . . . and SCALIA, J., . . . filed opinions concurring in part and concurring in the judgment. BLACKMUN, J., filed an opinion concurring in part and dissenting in part.

JOSEPH GOLDSTEIN
(2000)

Bibliography

GOLDSTEIN, JOSEPH 1992 *The Intelligible Constitution: The Supreme Court's Obligation to Maintain the Constitution as Something We The People Can Understand.* New York: Oxford University Press.

JACKSON, ROBERT H. 1955 *The Supreme Court in the American System of Government.* Cambridge, Mass.: Harvard University Press.

REHNQUIST, WILLIAM H. 1987 *The Supreme Court: How It Was, How It Is.* New York: Morrow.

VINING, JOSEPH 1986 *The Authoritative and the Authoritarian.* Chicago: University of Chicago Press.

WHITE, JAMES BOYD 1984 *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community.* Chicago: University of Chicago Press.

## PUBLIC USE

The "taking" clause of the Fifth Amendment limits the power of EMINENT DOMAIN by demanding that governmental taking of private property be for a public use. The Supreme Court held in *Burlington Quincy Railroad Co. v. Chicago,* (1897) that the same requirement applies to the states through the FOURTEENTH AMENDMENT.

Although some early decisions defined the public use standard to include a right of "use by the public," that approach was repudiated by the Court. As early as 1905 in *Clark v. Nash,* the Court held that a state could authorize a private person to condemn an easement for irrigation across a neighbor's land. "What is a public use," said the Court, "may frequently and largely depend upon the facts surrounding the subject." In the arid environment of Utah, the taking of a private irrigation easement could properly be deemed a public use, because it was "absolutely necessary" to agricultural development. On similar grounds, the Court's decision in *Strickley v. Highland Boy Gold Mining Co.* (1906) sustained the statutory authority of a mining company to condemn a private easement for transporting ore to a railroad loading site. These decisions were followed by many others intimating that any use conducive to the public benefit was a public use for which eminent domain could be invoked, including reclamation of swamp lands, establishment of water and electrical power systems, development of transportation facilities, and creation of public parks.

The broad public benefit test has, in recent years, been assimilated with the RATIONAL BASIS approach invoked by the Supreme Court in reviewing regulations of economic interests under the DUE PROCESS clause. In the leading case, *Berman v. Parker* (1954), the court sustained the use of eminent domain to acquire various separate parcels of private property in blighted areas in furtherance of a community redevelopment project. The fact that the property to be condemned would be resold or leased to private persons for redevelopment purposes did not transgress the public use limitation, for "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served. . . . The concept of the public welfare is broad and inclusive."

Under this expansive and deferential approach, eminent domain may be exercised as a means for achieving practically any use or objective within the power of the legislative body.

ARVO VAN ALSTYNE
(1986)

Bibliography

NICHOLS, PERRY 1983 *The Law of Eminent Domain,* Vol. 2a. New York: Matthew Bender & Co.

## PUBLIC UTILITIES REGULATION

See: Economic Regulation

## PUBLIC UTILITY HOLDING COMPANY ACT
49 Stat. 803 (1935)

This measure was an important part of the legislative program of President FRANKLIN D. ROOSEVELT. Two leading supporters of the bill were Senators GEORGE NORRIS and HUGO L. BLACK. The act's objective was to disperse ownership and control of the nation's gas and electric utilities, then highly concentrated in pyramids of corporations with holding companies at the top. The act required holding companies to register with the Securities and Exchange Commission and authorized the SEC to limit a company's operations to a single region. A "death sentence" provision authorized dissolution of a company that did not show, within five years, that it was serving an efficient local function.

The great holding companies sought to challenge the constitutionality of the entire act in an early TEST CASE, but government lawyers managed to persuade the Supreme Court to defer the omnibus attack and consider the act's registration requirement separately. The Court upheld that requirement in *Electric Bond & Share Co. v. SEC* (1938). The other provisions of the law came before the Court after Roosevelt had appointed seven Justices. Those provisions were sustained, with broad readings of Congress's power under the COMMERCE CLAUSE, in *North American Co. v. SEC* (1946) and *American Power & Light Co.*

*v. SEC* (1946). By 1952, more than 750 holding companies had been dissolved.

KENNETH L. KARST
(1986)

Bibliography

FREUND, PAUL A. 1951 *On Understanding the Supreme Court.* Pages 99–110. Boston: Little, Brown.

## PUERTO RICO

Puerto Rico is the largest of the United States insular areas, both as to land area and population. It is also one of the oldest in terms of being part of the United States, having been acquired along with Guam in 1899 as a result of the Spanish American War.

The Foraker Act of 1900 established a civil government for Puerto Rico. Therefore, Puerto Rico has been an "organized" TERRITORY almost from the beginning of its affiliation with the United States. However, in *Downes v. Bidwell* (1901) the Supreme Court held that Puerto Rico had not been incorporated into the United States. Thus, Puerto Rico was deemed to be an "unincorporated" territory. Consequently, not all portions of the U.S. Constitution were applicable there. The Jones Act of 1917 granted even more autonomy to Puerto Rico and, importantly, granted all persons born there United States CITIZENSHIP. Nonetheless, in the 1922 case of *Balzac v. Porto Rico* (1922), the Court held that Puerto Rico was still an unincorporated territory. (For unknown reasons, Puerto Rico was spelled "Porto Rico" in the English language version of the Treaty of Paris of 1899, the treaty that ended the Spanish American War. "Porto Rico" remained the official spelling until 1932.)

In 1950, Congress passed Public Law 600, the effect of which was to repeal portions of the Jones Act, and to rename the remainder the "Federal Relations Act." Public Law 600 authorized the people of Puerto Rico to adopt a constitution and, significantly, contained language stating that the law was "adopted in the nature of a compact." Thereafter, Puerto Rico was deemed to be in a unique relationship with the United States, known in English as a "commonwealth."

An early case, *Mora v. Mejias* (1953), held that the compact is inalterable without the consent of the people of Puerto Rico and that the U.S. Constitution does not apply to Puerto Rico because Puerto Rico is sovereign. Subsequently, the Court held on more than one occasion— including *Harris v. Rosario* (1980) and *Califano v. Gautier Torres* (1978)—that Congress has plenary power to legislate for Puerto Rico under the territorial clause and that at least portions of the U.S. Constitution are binding on Puerto Rico.

Unlike other insular areas that have Article IV courts, Puerto Rico since 1966 has had an Article III District Court, with judges who have life tenure. Puerto Rico has only a nonvoting delegate in the U.S. Congress, and it would probably take either statehood or a constitutional amendment to give them voting REPRESENTATION. Recent REFERENDA have indicated that the people of Puerto Rico are almost evenly split over whether to seek statehood or remain a commonwealth, although an overwhelming majority favor remaining a part of the United States.

STANLEY K. LAUGHLIN, JR.
(2000)

Bibliography

LAUGHLIN, STANLEY K. 1995 *The Law of United States Territories and Affiliated Jurisdictions* (with 1997 supplement). New York: Lawyers Cooperative-West Group.

TORRUELLA, JUAN R. 1985 *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal.* Rio Piedras, Puerto Rico: University of Puerto Rico Press.

## PUERTO RICO, CONSTITUTIONAL STATUS OF

No clear definition exists of how and to what extent the Commonwealth of PUERTO RICO fits within the federal constitutional system. Undoubtedly, the *Puerto Rican Federal Relations Act*, enacted by Congress in 1950 "in the nature of a compact" between Congress and the people of Puerto Rico, and the adoption by Puerto Ricans of their own constitution in 1952 were intended to work a significant change in the previous colonial relationship between the island and the United States. The nature and scope of this change, however, have not been conclusively ascertained by federal courts ruling on the matter.

Puerto Rico, which had become a self-governing overseas province of the Kingdom of Spain under the Royal Decree of 1897, was ceded to the United States in 1898 under the Treaty of Paris which ended the Spanish American War. It became an unincorporated TERRITORY of the United States, subject to the plenary command of Congress. Under various Supreme Court decisions it is clear that, until 1952, Puerto Rico was a domestic possession of the United States, neither a foreign country nor an integral part of the nation, merely belonging to it. Congressional authority over the island and its people encompassed the entire domain of SOVEREIGNTY, both national and local, and was completely unconstrained by the federal Constitution, except as regards those basic prohibitions which go "to the very root of the power of Congress to act at all" and "which the Constitution has established in favor of human liberty and are applicable to every condition or status." (See IN-

SULAR CASES.) Wielding its plenary powers, the United States established a military government in Puerto Rico from 1898 to 1900, when a civil regime was installed under the Foraker Act, providing a meager participation of Puerto Ricans in the island's government. In 1917 Congress enacted a second Organic Act (Jones Act) providing a measure of self-government and granting United States CITIZENSHIP collectively to the people of Puerto Rico, while retaining all major elements of sovereignty.

In 1950 a bill to provide for the organization of a constitutional government by the people of Puerto Rico was introduced in Congress. Its provisions were not to be effective until accepted in a REFERENDUM by Puerto Rican voters. After a favorable vote on the new federal act by the island electorate, a CONSTITUTIONAL CONVENTION was held in Puerto Rico and the fundamental law drafted there was adopted by the majority of the islanders in 1952. In transmitting the newly adopted Puerto Rican Constitution to Congress, President HARRY S. TRUMAN recognized that with such approval "full authority and responsibility for local self-government [would] be vested in the people of Puerto Rico." In 1953 the United Nations recognized that Puerto Ricans, exercising the right of self-determination, had achieved a new constitutional status, and had "been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity."

It is generally accepted by federal courts that after 1952 "Puerto Rico's status changed from that of a mere territory to the unique status of COMMONWEALTH." The Supreme Court itself stated in *Examining Board v. Flores* (1976) that "the purpose of Congress in its 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with a State of the Union." However, the precise extent of the referred "autonomy" and the constitutional basis for statelike status are very much in doubt. Thus, while the Supreme Court has now accepted that "Puerto Rico is to be deemed sovereign over matters not ruled by the federal Constitution" and that Puerto Rican legislation and court decisions deserve the same regard in federal courts as those of a state, it has also ruled in *Harris v. Rosario* (1980) that Congress under the territorial clause may still "treat Puerto Rico differently from States so long as there is a rational basis for its actions." Likewise, the Court, after acknowledging that Puerto Rico is subject to federal constitutional requirements regarding FREEDOM OF SPEECH, DUE PROCESS, EQUAL PROTECTION, and reasonable SEARCH AND SEIZURE, has indicated that such guarantees are binding either directly under the Bill of Rights or indirectly by operation of the FOURTEENTH AMENDMENT, expressly refusing to fix one or the other as the source or basis of their applicability. The Court has yet to write on a clean slate in dealing with the new constitutional status of Puerto Rico.

JAIME B. FUSTER
(1986)

Bibliography

FUSTER, JAIME B. 1974 Origin of the Doctrine of Territorial Incorporation and Its Implications for the Power of the Commonwealth of Puerto Rico. *University of Puerto Rico Law Review* 43:259–294.

## PUNISHMENT

See: Sentencing

## PUNITIVE DAMAGES

The plaintiff who prevails in a tort case is entitled to compensatory DAMAGES, including damages for pain and suffering. In a limited number of cases involving aggravated wrongdoing, the plaintiff can recover punitive damages as well. Sometimes the understanding is that these damages are indeed punitive: that their intent is to punish defendants for their wrongdoing. At other times, punitive damages seem designed to provide a higher level of deterrence than would be occasioned by the mere threat of compensatory damages; at this juncture, the language of "exemplary damages" becomes apt.

Although scholars have long expressed uneasiness with punitive damages, until recently their constitutionality has been taken for granted. In recent years, however, the number of punitive-damage awards has increased, and the size of the average punitive-damage verdict has soared. These changes have encouraged the posing of new questions as to their constitutionality. In *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.* (1989), the defendant committed a business tort against the plaintiff that resulted in $51,146 in actual damages. A jury awarded the plaintiff these damages—and six million dollars in punitive damages as well. An argument advanced by the defendant was that this award constituted an "excessive fine," forbidden by the Eighth Amendment. Amazingly, *Browning-Ferris* was the first case involving the excessive-fines clause that the Supreme Court had ever considered. The Court, divided 7–2, finally decided that punitive damages awarded in private civil actions are not "fines" and are hence unregulated by the clause. The majority opinion, authored by Justice HARRY A. BLACKMUN, left open the question as to whether the clause pertains only to proceedings that are officially criminal: rather, the rationale adopted by Blackmun was that the clause has no application to a legal proceeding in which the government is no

way a party. The dissent, authored by Justice SANDRA DAY O'CONNOR, would have found the clause applicable to punitive-damage awards and, hence, would have subjected such awards to a "proportionality" analysis that O'Connor drew from the case law under the Eighth Amendment's CRUEL AND UNUSUAL PUNISHMENT clause.

Although denying the relevance of the Eighth Amendment, the *Browning-Ferris* majority acknowledged that large punitive-damage awards might raise a problem of DUE PROCESS. A concurring opinion signed by Justices WILLIAM J. BRENNAN and THURGOOD MARSHALL emphasized the likely relevance of due process. Indeed, the majority and concurring opinions together suggest two different kinds of due process issues. One is an issue of SUBSTANTIVE DUE PROCESS: that due process might be violated by punitive-damage awards that are substantively excessive. The other issue relates to PROCEDURAL DUE PROCESS; here the concern is for the lack of clarity in the standards that the jury relies on in calculating the amount of punitive damages.

If the vagueness in the standards for calculating punitive damages raise a due process problem, a related problem concerns the amorphousness in the standards relied on in determining whether or not to award punitive damages. Moreover, there are further constitutional issues that punitive-damage practices might be thought to entail. If punitive damages are regarded as sufficiently penal to render at least somewhat relevant the BILL OF RIGHTS, then the "preponderance of the evidence" standard of proof that states have traditionally relied on in punitive-damage cases might be inadequate. (Indeed, as part of the tort-reform movement of the late 1980s, several states have raised the punitive-damage standard of proof to clear and convincing evidence.) In so-called "mass-tort" situations involving such products as asbestos and the Dalkon Shield, a large number of punitive-damage verdicts can be entered against a particular defendant on account of a single (although continuing) course of harm-causing conduct. At some point, the cumulation of these awards might suggest an issue of due process or DOUBLE JEOPARDY. Indeed, in early 1989, one federal district court judge did find a constitutional violation, although a lack of adequate precedent later persuaded him to withdraw most of his holding.

The Supreme Court further considered the procedural due process issues in *Pacific Mutual Life Insurance Co. v. Haslip* (1991). This case involved an $840,000 punitive damage verdict against an insurance company for the bad faith of its agent. The majority's opinion strongly suggested that a punitive damage award resulting from "unlimited jury discretion" would offend due process. The *Haslip* jury, however, had been given at least minimal standards; and its award had then been reviewed by both the trial judge and the Alabama Supreme Court, under rather elaborate procedures. This combination of protections enabled the *Haslip* majority to conclude that the "punitive damages award in this case" did not violate due process. The majority's case-specific reasoning effectively leaves open the due process status of a large intermediate range of punitive damage practices. Although the Court affirmed Alabama's "preponderance" standard of proof, even this affirmance was tied to Alabama's special set of procedures. And since evidence of defendant's wealth is inadmissible in Alabama punitive damage actions, the Court was in a position to conclude that Alabama procedures are not biased against "a defendant with a deep pocket."

Justices Anthony Kennedy and Antonin Scalia each wrote separate opinions in *Haslip*, concurring only in the majority's result. In their view, the long-standing historical acceptance of punitive damage practices all but eliminates the due process question. Justice Sandra Day O'Connor dissented, arguing that the limited standards applied by the Alabama jury were void for vagueness and also that the Alabama trial procedures entailed a due process violation. In her view, Alabama could satisfy constitutional requirements by allowing the jury to consider the seven substantive factors that the Alabama Supreme Court itself takes into account in the course of appellate review.

GARY T. SCHWARTZ
(1992)

Bibliography

SYMPOSIUM: PUNITIVE DAMAGES 1982 *USC Law Review* 56:1–203.

——— 1989 *Alabama Law Review* 40:687–1261.

## PUNITIVE DAMAGES
### (Update)

After flirting with the possibility for several years, the Supreme Court has finally identified particular punitive DAMAGE awards that violate the DUE PROCESS clause of the FOURTEENTH AMENDMENT. In *Honda Motor Company v. Oberg* (1994), an alleged defect in an all-terrain vehicle injured the plaintiff. At trial, the plaintiff secured a verdict of about $920,000 in compensatory damages and $5,000,000 in punitive damages. Oregon law prohibited any review, by either the trial judge or an appellate court, of the amount of civil-action verdicts (including punitive damage verdicts), except when the record contained "no evidence" to support the verdict. The Court— emphasizing the way in which the COMMON LAW tradition has consistently recognized the need for judicial review of the level of punitive damage awards—found that the Oregon law violated due process. While the Court's opinion highlighted PROCEDURAL DUE PROCESS, the opinion also reasoned that procedure is related to substance: better

procedure—such as judicial review—helps assure that punitive damage awards are not substantively excessive. The breadth of the *Oberg* holding is uncertain: It is unclear, for example, whether the Court's opinion means that the Oregon system is unconstitutional insofar as it bars judicial review of jury verdicts for compensatory damages. In any event, the *Oberg* holding may well be of limited import, for Oregon is apparently unique among American states in denying judicial review of the amount of damage awards.

Two years after *Oberg*, the Court, in *BMW of North America, Inc. v. Gore* (1996), invalidated a punitive damage judgment of $2,000,000 imposed on a car manufacturer that failed to disclose that a particular car had been damaged in transit and repainted (at a cost of $600) prior to its original sale. The purchaser of the car, eventually learning of the damage and the repainting, persuaded a jury that these events reduced the resale value of his car by $4,000. Accordingly, the jury granted him $4,000 in compensatory damages. In addition, the jury awarded $4 million in punitive damages. On appeal, the Alabama Supreme Court reduced this award to $2 million. The U.S. Supreme Court, by a 5–4 vote, then concluded that even this lower award was constitutionally excessive.

The MAJORITY OPINION focused primarily on SUBSTANTIVE DUE PROCESS. In determining whether a punitive damage award is excessive, the Court reasoned, three guidelines should be taken primarily into account: how reprehensible is the defendant's conduct, what is the ratio between compensatory damages and punitive damages, and what civil damages are provided by public law for comparable offenses. With respect to each of the three criteria, the Court concluded that the $2 million award was troublesome. As for reprehensibility, BMW's conduct posed no threat to health or safety, the relevant harm being solely economic; and while the company's nondisclosure was in a sense deliberate, its decision not to disclose its limited repainting effort was, in fact, quite legal under the regulatory schemes in effect in many other states. As for ratio, 500-to-1 raises a "suspicious judicial eyebrow." As for sanctions for comparable misconduct, in no state were they more than $10,000. Taking everything into the balance, the Court reached the conclusion that the punitive damage award was constitutionally excessive.

Given the Court's guidelines, the Court's conclusion—even if somewhat ad hoc—follows rather easily. The important question concerns the justifiability of the guidelines themselves. In explaining those guidelines, the Court reasoned that they bear on the ultimate question of whether BMW had been given "fair notice" of the likely award. This "fair notice" criterion introduces a significant element of procedural due process into the case. Moreover, it interestingly suggests that had there been prior verdicts in Alabama for comparable amounts for comparable misconduct, the award in *Gore*—however offensive in its magnitude—might well have been sustained.

A CONCURRING OPINION by Justice STEPHEN G. BREYER, speaking for three Justices, focused primarily on procedural due process. Breyer's concern was less with the excessiveness of the award and more with its possible arbitrariness. He focused on the question whether there were legal standards that adequately controlled the jury's discretion. Here Breyer noted that prior Alabama opinions had identified seven factors to take into account in considering the appropriate size of a punitive damage award. In the abstract, Breyer suggested, these standards appear sufficient. Still, insofar as they had been applied by the Alabama Supreme Court in the immediate case so as to justify an award of $2 million, that application revealed to Breyer that the standards do an inadequate job in constraining the jury's discretion.

One feature in Breyer's concurrence can be considered here—in combination with a conspicuous omission in the majority's analysis. In punitive damage cases, courts commonly say that juries can, and should, take the wealth of the defendant into account in determining the amount of a punitive damage award. Indeed, the wealth of the defendant was one of the seven factors that had been specifically endorsed in Alabama. But Breyer found this standard objectionable (at least in part) because of the way in which it "provides an open-ended basis for inflating awards when the defendant is wealthy." Furthermore, defendant wealth is conspicuously absent among the guidelines endorsed by the Court's majority. Accordingly, the constitutional status of defendant wealth as a factor that can justify large punitive damage awards is now subject to some doubt.

GARY T. SCHWARTZ
(2000)

## PURE FOOD AND DRUG ACT
34 Stat. 768 (1906)

Typical of the progressive legislation passed after the turn of the century, this act extended the NATIONAL POLICE POWER to regulate the quality of food and drugs in INTERSTATE COMMERCE. A personal crusade by the chief chemist of the Department of Agriculture together with the muckrakers' stomach-churning exposés fanned public opinion. President THEODORE ROOSEVELT's backstage maneuvering also helped secure passage of this federal inspection act on June 30, 1906.

The act outlawed the manufacture of "adulterated or

misbranded" food or drugs and prohibited their introduction into interstate or FOREIGN COMMERCE. Congress gave the secretaries of agriculture, treasury, and commerce and labor authority to issue regulations enforcing the act and specifically provided PROCEDURAL DUE PROCESS for violators. The act forbade: misbranding of food; the use of imitations, substitutes, harmful additives, rotten ingredients; and concealment of "damage or inferiority." Drugs were required to meet federal standards of quality, purity, and strength or clearly label their departures from the standards.

The Supreme Court sustained this act in HIPOLITE EGG COMPANY V. UNITED STATES (1911) as a legitimate exercise of congressional power over commerce. Congress substantially tightened and extended it in the FOOD, DRUG, AND COSMETIC ACT of 1938.

DAVID GORDON
(1986)

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# Q

## *QUERN v. JORDAN*
440 U.S. 332 (1979)

This case held that SECTION 1983, TITLE 42, UNITED STATES CODE, does not abrogate the states' ELEVENTH AMENDMENT immunity from suit in federal court. The amendment therefore precludes retroactive damage awards against states. States, however, may be forced to bear the costs of future compliance with the Constitution and state officials may be enjoined to comply with the Constitution.

THEODORE EISENBERG
(1986)

## *QUIRIN, EX PARTE*
317 U.S. 1 (1942)

In 1942 President FRANKLIN D. ROOSEVELT issued a proclamation subjecting enemies entering the United States through the coastal defense zones to trial by military tribunal and denying them access to the civil courts. Seven German saboteurs, who had been set ashore in the United States from submarines and who had subsequently been captured, were tried under the terms of the proclamation. The saboteurs petitioned for a writ of HABEAS CORPUS, arguing that, so long as the regular courts were open and operating, they were entitled to TRIAL BY JURY, and citing as PRECEDENT the CIVIL WAR case EX PARTE MILLIGAN.

The Supreme Court, then in summer recess, met in extraordinary session to hear the petition. An 8–0 Court, speaking through Chief Justice HARLAN F. STONE, upheld the constitutionality of military trial for offenses against the law of war. But the Court also insisted upon the right of the civil courts to review the constitutionality or applicability of Roosevelt's proclamation in individual cases.

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Cramer v. United States; Haupt v. United States.*)

Bibliography

BELKNAP, MICHAL R. 1980 The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case. *Military Law Review* 89:59–95.

## QUOCK WALKER CASES

See: *Commonwealth v. Jennison*

## QUOTAS, RACIAL

See: Racial Quotas

# R

## *RABINOWITZ, UNITED STATES v.*

See: Search Incident to Arrest

## RACE AND CRIMINAL JUSTICE

Racial minorities have long sought equal application of the rights the Constitution provides to people accused of crimes. They have needed the protection of these rights because the CRIMINAL JUSTICE SYSTEM has at times seemed vehemently biased against them. The result of this quest for justice is that the Supreme Court has often addressed whether particular law enforcement practices are unconstitutional because of racial concerns. The Court has interpreted the Constitution as prohibiting the most obvious and blatant forms of RACIAL DISCRIMINATION, such as excluding racial minorities from juries. There are, however, some practices such as racially skewed application of the CAPITAL PUNISHMENT and race-based assessments of suspicion, where thus far the Court has declined to order constitutional relief.

Historically, the Constitution has had a limited role in regulating the criminal justice system. Most criminal law originates with, and is enforced by, the states. The principle of FEDERALISM has limited the ability of the federal government to intervene, even in cases in which states have applied, or not applied, the criminal law in egregiously unfair ways. The FOURTEENTH AMENDMENT promises the "EQUAL PROTECTION OF THE LAWS" to all persons, but infamous cases like HODGES V. UNITED STATES (1906) and SCREWS V. UNITED STATES (1945) demonstrated the tenuous nature of this protection. In *Hodges*, whites were prosecuted by the federal government for vicious physical attacks against African Americans. The Court overturned the convictions, on the ground that the federal government exceeded its authority by making a federal case out of what should have been, in the Court's view, state charges. Thus, in the same manner that federalism provided constitutional justification for Southern states to establish de jure SEGREGATION, the Court allowed the principle to foster separate and unequal application of the criminal law to minority and white accused persons. *Hodges*, in which the Court held that the THIRTEENTH AMENDMENT gave Congress the power to reach only acts that closely resembled enslavement, was later OVERRULED by JONES V. ALFRED H. MAYER CO. (1968).

In other cases, however, the Court has been less reticent about insuring a strong role for the federal government in protecting the criminal justice rights of people of color. In fact, many of the best known decisions of constitutional CRIMINAL PROCEDURE involved African American or Hispanic litigants. These cases include POWELL V. ALABAMA (1932), which established the RIGHT TO COUNSEL in capital cases; BROWN V. MISSISSIPPI (1936), which held that coerced confessions violate DUE PROCESS; and MIRANDA V. ARIZONA (1966), which established the right of defendants to be informed about their Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION. In its opinions, the Court referred to race tangentially, if at all, but the facts of the cases often arose in a context in which it was clear that racial bias infected the state's criminal justice process, and would not be remedied by the state itself. In these cases, accused persons of color vindicated rights that are now enjoyed by all Americans.

The Court has also confronted the issue of explicit bias

against racial minorities in the criminal justice system. It has been most protective of minority rights in cases in which the law has permitted discrimination on the basis of race. These cases have often arisen in the context of the right to trial by an impartial jury. Even after the Fourteenth Amendment affirmed their CITIZENSHIP, African Americans were often routinely excluded from juries. In STRAUDER V. WEST VIRGINIA (1879), the Supreme Court reversed the conviction of a black man who had been found guilty of murder by a jury from which blacks were legally excluded. The Court ruled that the Fourteenth Amendment provides "a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation [and] exemption from legal discriminations." *Strauder* represents the first time that the Fourteenth Amendment was interpreted to apply to government racism.

Even though *Strauder* guaranteed African Americans the legal right to serve on juries, they still often were excluded through the practice of PEREMPTORY CHALLENGES. In a criminal trial each side may exclude a limited number of jurors even if there is no reason to think that jurors are biased. In SWAIN V. ALABAMA (1965), the prosecution peremptorily challenged all the African Americans in the jury pool. After the defendent was convicted he charged that the government's race-based exclusion of potential jurors violated the equal protection clause. The Court disagreed, upholding the conviction. The Court emphasized the historic importance of peremptory challenges, and ruled that race-based selection of jurors, absent a pattern of discrimination, was permissible in a particular case if it was part of the government's strategy to win the case. Twenty-one years later this aspect of *Swain* was overruled by the Court in BATSON V. KENTUCKY (1986), where the Court ruled that the equal protection clause prohibits the government from using race as a consideration in jury composition, even in a single case. In GEORGIA V. MCCOLLUM (1992), the Court prohibited defendants from using race-based challenges as well.

The Court has been more reticent in finding equal protection violations when the discrimination is not admitted by the government. In MCCLESKEY V. KEMP (1987), the Court considered statistical evidence that the Georgia death penalty was applied in a race-conscious manner (a sophisticated study found that race of the victim was a significant factor in jurors' determination whether convicted killers should be sentenced to death). The Court declined to invalidate the death penalty under the Fourteenth Amendment because it believed that the statistics did not demonstrate purposeful discrimination in the particular case. Under equal protection jurisprudence an intent to discriminate must be proven. In *McCleskey*, the Court emphasized the importance of discretion in the criminal justice system and stated that "exceptionally clear proof" was required before it would find an abuse of discretion. The Court also noted that "because of the risk that the factor of race may enter the criminal justice process, [it has] engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." Since it found that because the statistical evidence showed at most "a discrepancy that appears to correlate with race," the requisite showing had not been advanced.

The requirement of purposeful discrimination has also confounded constitutional challenges to racially selective prosecution and punishment for noncapital offenses. In *Ah Sin v. Wittman* (1905), the defendant complained that the government's prosecution of gambling offenses was limited to Chinese people. The Court refused to reverse the conviction, establishing a standard of "certainty to every intent" before it would invalidate a conviction on grounds of selective prosecution. Likewise, in *United States v. Armstrong* (1996), the Court declined even to allow discovery in a case in which there was a claim of selective prosecution of African Americans for offenses involving crack cocaine. The Court required the defendant to show that similarly situated individuals of a different race were not prosecuted, but did not explain how this showing could be made in the absence of court-ordered discovery of prosecutors' files.

Despite constitutional challenges, the Court continues to permit law enforcement officers to consider race when determining suspicion of criminal activity. In *United States v. Martínez-Fuerte* (1976), the Court found no constitutional violation in Border Patrol officers' using Mexican ancestry as part of their determination of whom to stop for investigation of violation of IMMIGRATION laws. The Court's analysis was that the FOURTH AMENDMENT requires government SEARCHES AND SEIZURES to be reasonable, and that it was reasonable to think that people of Mexican ancestry were more likely to have violated the immigration laws. Some commentators have argued that race-based assessments of suspicion violate the Fourteenth Amendment's equal protection clause, but the Court has not so ruled. The use of racial profiles remains one of the most controversial practices by police departments, and one of the few instances in which the Court has approved official race-consciousness by government actors.

PAUL BUTLER
(2000)

Bibliography

ARMOUR, JODY DAVID 1997 *Negrophobia and Reasonable Racism: The Hidden Costs of Being Black in America.* New York: New York University Press.

BRIGHT, STEPHEN B. 1995 Discrimination, Death, and Denial:

The Tolerance of Racial Discrimination in the Infliction of the Death Penalty. *Santa Clara Law Review* 35:433, 453–454.

BUTLER, PAUL 1995 Racially Based Jury Nullification: Black Power in the Criminal Justice System. *Yale Law Journal* 105: 677–725.

COLE, DAVID 1999 *No Equal Justice: Race and Class in the American Criminal Justice System.* New York: New Press.

DAVIS, ANGELA J. 1996 Benign Neglect of Racism in the Criminal Justice System. *Michigan Law Review* 94:1660–1686.

DEVELOPMENTS IN THE LAW 1988 Race and the Criminal Process. *Harvard Law Review* 101:1472–1641.

JOHNSON, SHERRI LYNN 1983 Race and the Decision to Detain a Suspect. *Yale Law Journal* 93:214–258.

——— 1985 Black Innocence and the White Jury. *Michigan Law Review* 83:1611–1708.

KENNEDY, RANDALL 1997 *Race, Crime, and the Law.* New York: Pantheon Books.

MILLER, JEROME G. 1996 *Search and Destroy: African-American Males in the Criminal Justice System.* New York: Cambridge University Press.

SKLANSKY, DAVID A. 1995 Cocaine, Race, and Equal Protection. *Stanford Law Review* 47:1283–1322.

TONRY, MICHAEL H. 1995 *Malign Neglect: Race, Crime, and Punishment in America.* New York: Oxford University Press.

## RACE AND SEX IN ANTIDISCRIMINATION LAW

Over the past few decades, federal courts have developed fairly well-defined legal frameworks for the adjudication of RACIAL DISCRIMINATION claims and SEX DISCRIMINATION claims. But what if a plaintiff asserts that her employer discriminated against her based on both her race and her sex? What constitutional framework applies: a race discrimination framework, a sex discrimination framework, or something else? Are discrimination claims combining race and sex even constitutionally cognizable? Consider the following hypothetical case.

Mary Lo, a single mother, is an Asian American female employee of the California Department of Water Resources (CDWR), an entity of the state of California. Mary has a master's degree in civil engineering, and she has been employed as a CDWR engineer for eight years. Within the past three years, Mary has applied for promotions to supervisory positions three times. Each time Mary responded to a notice listing the opening after determining that she met the stated qualifications for the job.

After interviewing for the position, Mary was denied the promotion on each occasion. The first time, an Asian American man was promoted. The two subsequent openings were filled by white women. All three had either less work experience or fewer certifications than Mary. In addition to not receiving these promotions, Mary has been disciplined on several occasions for arriving at work late and for taking unauthorized sick days when her children were ill. The only other employee to suffer such reproach is another Asian American female. However, there is no evidence of explicit animus against Mary or other Asian American females.

According to Mary, CDWR's denial of her promotion was discriminatorily motivated. More specifically, Mary's contention is that CDWR did not promote her because she is an Asian American woman. As a general matter, the law requires a plaintiff like Mary to think about her discrimination as arising from her (perceived) national origin, her status as a woman, or her race as an Asian American. However, Mary wants to argue that CDWR does not view her as either a female or as an Asian American or as a foreigner. She is convinced that all three of these aspects of her identity (her race, her gender, and her perceived national origin) shape CDWR's interaction with her.

Broadly speaking, there are two legal routes Mary can take to challenge her employer's decision to deny her promotion—one statutory, the other constitutional. First, she can claim EMPLOYMENT DISCRIMINATION under Title VII, a federal statute prohibiting private and public employment discrimination. Second, Mary can claim that the state has denied her EQUAL PROTECTION OF THE LAWS in violation of the FOURTEENTH AMENDMENT. This second option is available to Mary because her employer is a governmental entity. Let us first examine Mary's claim under Title VII; Title VII jurisprudence includes a small body of opinions that directly address the question of whether a plaintiff like Mary may bring a combined race-and-sex employment discrimination claim.

Courts initially viewed claims alleging race-and-sex discrimination brought under Title VII as distinct and independent claims. For example, in *Degraffenreid v. General Motors Assembly Division* (1976), the U.S. District Court for the Eastern District of Missouri held that plaintiffs may argue race discrimination and sex discrimination separately or in the alternative, but they may not argue race-and-sex discrimination as one claim. In *Degraffenreid*, a group of black female employees invoked Title VII to advance a disparate impact theory of discrimination. They alleged that General Motors's seniority system disproportionately affected black women. Prior to 1964, General Motors did not hire any black women at all. Those who were hired after 1964 all lost their jobs as part of a workforce reduction by General Motors. Because black women were the last to be hired, they were the first to be fired.

The *Degraffenreid* court granted summary judgment for the defendants. It explained that although the black female plaintiffs could argue that General Motors discriminated against them based on their race (i.e., the fact that they are black) or based on their sex (i.e., the fact that they are women), they were not permitted to argue that Gen-

eral Motors discriminated against them based on their race *and* sex (i.e., the fact that they are black women). The court reasoned that

> The legislative history surrounding Title VII does not indicate that the goal of the statute was to create a new classification of "black women" who would have greater standing than, for example, a black male. The prospect of the creation of new classes of protected minorities, governed only by mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's box.

There are at least two ways to understand the court's analysis here. The court might be suggesting that Congress did not contemplate that black women could be discriminated against as black women. Alternatively, the court could be saying that even to the extent that black women experience discrimination that neither black men nor nonblack women experience, Congress did not intend to protect them. Either way, the court's conclusion is that plaintiffs may not aggregate their race and sex discrimination claims. Having reframed the plaintiffs' case as alleging separate claims of race discrimination and sex discrimination, the court found evidence of neither. Black men were not discriminated against, which undermined the notion that there was race discrimination, and white women were not discriminated against, which undermined the notion that there was sex discrimination.

Unlike the plaintiffs in *Degraffenreid*, Mary, our hypothetical plaintiff, would be asserting a disparate treatment, as opposed to a disparate impact, theory of discrimination. Her argument is not that CDWR employs neutral employment criteria that disproportionately burden Asian American women. Rather, her contention is that she is being treated differently (hence the term "disparate treatment") because she is an Asian American female. Under the *Degraffenreid* standard, Mary's claim would not survive the defendant's motion for summary judgment. To establish a prima facie case of discrimination under a disparate treatment theory, Mary would have to establish that (1) she belongs to a group protected by Title VII, (2) she applied and was qualified for a job for which the employer was seeking applicants, (3) despite her qualifications, she was rejected, and (4) after her rejection the position remained open and the employer continued to seek applicants among persons having the plaintiff's qualifications. Should Mary succeed in establishing a prima facie case, the burden would shift to her employer to set forth a legitimate, nondiscriminatory reason for not promoting her. If CDWR makes this showing, the burden shifts back to Mary to prove that CDWR's articulated reason was a pretext for discrimination.

Mary would likely succeed in establishing a prima facie case of discrimination. Both race and gender are protected categories under Title VII, and Mary was more than qualified for the position she applied for. However, it is generally not very difficult for employers to articulate a "legitimate" reason for not promoting particular employees. In Mary's case, CDWR might point to Mary's tardiness and her unauthorized sick days. Mary will have a hard time proving that these justifications are a pretext for discrimination. Why? Because CDWR promoted white women and an Asian American man.

One of the problems with *Degraffenreid*'s antidiscrimination framework is that it fails to address what might be referred to as compound discrimination. All of us have "compounded identities" comprised of our race, our gender, our SEXUAL ORIENTATION, and so on. How we experience discrimination is shaped by the way in which our identities are compounded. Black men and black women do not experience race discrimination in the same way, because of their gender difference. White women and black women do not experience sex discrimination in the same way, because of their racial difference. Yet, under *Degraffenreid*, black women are entitled to Title VII protection only to the extent that their discriminatory experiences comport with the discriminatory experiences of either white women or black men. The court's failure in *Degraffenreid* to acknowledge that black women experience compound discrimination based on their race and sex together results in an antidiscrimination framework that privileges the experiences of white women and black men.

In some sense, the employment of the concept "compound discrimination" is problematic. It suggests that our identities and the discrimination we experience are additive. This is not exactly true. Think again of our hypothetical plaintiff, Mary Lo. She is subject to discrimination based on stereotypes that attach to Asian American women. These stereotypes are different from those that attach to Asian men and different from those that attach to white women. Nor are the stereotypes that Asian American women face the sum of Asian American male and white female stereotypes. The "compound discrimination" metaphor is employed here to convey the idea that the discriminatory experiences of women of color— including Asian American women—are shaped by the interaction (not addition) of racism and sexism and that the *Degraffenreid* antidiscrimination framework fails to take this into account.

The *Degraffenreid* approach to antidiscrimination has not gone unchallenged, however. One of the first decisions to the contrary was *Jefferies v. Harris County Community Action Association* (1980). In *Jefferies*, a black woman made claims of race-and-sex discrimination arising out of the defendant's failure to promote her and its decision to terminate her. The positions for which she applied were

filled by black men and nonblack women. When the trial court dismissed her claims, she appealed, arguing that the court had erred in refusing to consider her claim of compound discrimination based on race *and* sex. The U.S. Court of Appeals for the Fifth Circuit agreed. In accepting Jefferies's compound discrimination claim, the Fifth Circuit adopted the "sex-plus" analysis established by the Supreme Court in *Phillips v. Martin Marietta Corporation* (1971). In *Phillips*, the Court held that the disparate treatment of a subclass of one sex can violate Title VII. The term "sex-plus" refers to situations in which employers discriminate by coupling a nonprotected factor (in the *Phillips* case, having preschool-age children) with a protected one (sex). The Court held that this type of discrimination was actionable under Title VII even if women in general and men with preschool-age children were not discriminated against.

The *Jefferies* court analyzed the plaintiff's "sex-plus-race" claim by characterizing her as a woman who, because of a secondary consideration, race, was treated differently. The court recognized that "discrimination against black females can exist even in the absence of discrimination against black men or white women." Title VII provides a remedy for such discrimination, the *Jefferies* court reasoned, because of the wording of the statute and its legislative history. Title VII forbids discrimination on the basis of an employee's "race, color, religion, sex, or national origin." Because Congress used the word "or," the court reasoned that it intended to include discrimination based on any or all of the listed characteristics. Moreover, Congress explicitly rejected a revision to the statute which would have added the word "solely" before the word "sex." The court viewed this rejection as signifying an intention to allow plaintiffs to aggregate their claims.

Although the sex-plus framework improves on the *Degraffenreid* race or sex framework, it nevertheless presents several important problems. First, it requires plaintiffs to argue that their race is a subordinate reason for discrimination based on gender. The sex-plus analysis treats discrimination as being drawn purely on gender lines but operating to discriminate against a certain subset of women.

Second, the sex-plus analysis equates race discrimination with other "pluses" such as marital or familial status. Equating race with other pluses ignores the fact that race itself, unlike marital or familial status, is a classification explicitly protected under Title VII.

Third, the sex-plus framework limits the number of characteristics a plaintiff can allege as contributing to her employer's discrimination. Specifically, plaintiffs are permitted to add only one "plus" to their sex discrimination claim. Thus, in Mary's case, if she alleges discrimination based on her race as a "plus" to discrimination based on her sex, she cannot add factors such as (perceived) national origin, single motherhood, or both.

A recent decision of the U.S. Court of Appeals for the Ninth Circuit takes a small step toward eliminating some of these difficulties. In *Lam v. University of Hawai'i* (1994), the plaintiff, an Asian American woman, invoked Title VII to allege race, sex, and national origin discrimination after she was turned down twice for a job as a law professor at the University of Hawaii. The Ninth Circuit explicitly rejected the district court's separate treatment of race and sex, arguing that an antidiscrimination framework that examines racism "alone" or sexism "alone" is impoverished. Significantly, the Ninth Circuit's compound discrimination approach is not based on *Jefferies*'s sex-plus analysis. *Lam*'s move away from (or noninvocation of) the sex-plus framework creates a jurisprudential window for plaintiffs to base their discrimination claims on the aggregation of several aspects of their identity. Still, it remains to be seen what impact *Lam* will have on future Title VII litigation.

Having looked at how Mary's sex-and-race compound discrimination claim would be adjudicated under Title VII, let us now turn to the Constitution. Mary would base her constitutional claim on the equal protection clause of the Fourteenth Amendment. Unlike plaintiffs claiming discrimination under Title VII, plaintiffs asserting an equal protection violation have only one path available to them; they must prove that the government is engaged in intentional discrimination. Intentional sex-based discrimination by the government is unconstitutional unless it passes what is referred to as "intermediate scrutiny." Sex-based discrimination survives intermediate scrutiny if it is substantially related to an important governmental objective. The government is not absolutely barred from discriminating against individuals based on sex, then, but it must justify that discrimination by reference to an important objective.

The Constitution regulates racial discrimination in a similar, though stricter, way. Intentional race-based governmental discrimination is unconstitutional unless it passes what is referred to as STRICT SCRUTINY. Race-based discrimination passes strict scrutiny if it serves a COMPELLING STATE INTEREST and is narrowly tailored to meet that interest.

This is the constitutional framework Mary would face should she decide to bring an equal protection discrimination claim against CDWR. This framework invites us to think about at least the following three questions: (1) Would Mary succeed in establishing a case of intentional discrimination based either on race or sex? (2) Would Mary's race-and-sex compound discrimination be constitutionally cognizable? (3) If Mary were permitted to assert

a race-and-sex compound discrimination claim and she ultimately established the claim, what level of judicial scrutiny would apply: intermediate scrutiny (which applies to sex discrimination), strict scrutiny (which applies to race discrimination), or something else?

With respect to the first question, it is unlikely that Mary has enough evidence to prove intentional discrimination based either on sex or race alone. The CDWR was not overtly racist or sexist in denying Mary the promotion. Nor does CDWR have an express policy of sex or race discrimination. In the absence of such "smoking gun" evidence, it would be very difficult for Mary to convince a court that CDWR intentionally discriminated against her. The case would come down to circumstantial evidence. At this point, the court is likely to look at the people who were promoted. And if Asian American men fared well and white women fared well, the court may decide that there is no triable issue of fact—that is to say, grant summary judgment for the defendant.

But what if Mary asserted a race-and-sex compound discrimination claim? First, would such a claim be constitutionally cognizable? And second, would she be able to prove it? The answer to the first question is unclear. The issue has arisen—at least implicitly—in context of section 1983 litigation. SECTION 1983, TITLE 42, U.S. CODE is a federal statute that provides civil and criminal remedies for violations of constitutional and certain federal statutory rights. Plaintiffs bringing a section 1983 claim must demonstrate that (1) a person acting under the COLOR OF LAW (2) committed an act that deprived her of some right, privilege, or immunity protected by the Constitution or federal law. Since Mary is arguing that her constitutional rights were violated, she may invoke section 1983. Significantly, Mary still has the burden of establishing the underlying constitutional deprivation; namely, that CDWR violated her right to equal protection.

There are few judicial opinions adjudicating compound discrimination claims under section 1983. One reason is that redress under section 1983 for equal protection violations is limited to plaintiffs whose employers are state agencies (or, can show STATE ACTION) and those who can meet the burden of proving intentional discrimination.

Despite the dearth of published opinions analyzing compound discrimination claims under section 1983, two district court opinions offer plaintiffs some hope. In *Anthony v. County of Sacramento* (1995), a federal trial court, relying on *Lam*, implicitly suggested that plaintiffs advancing an equal protection argument under section 1983 may combine their race and sex discrimination claims. And in *Tennie v. City of New York Department of Social Services of the New York City Human Resources Administration* (1987), a federal trial court refused to certify a class that included whites, blacks, and hispanics of both sexes. The court reasoned that female minority women—when compared to white women and men of color—had different discrimination claims under both Title VII and the equal protection clause because of their vulnerability to racism and sexism.

*Tennie* and *Anthony* notwithstanding, the ability of plaintiffs to bring constitutional race-and-sex compound discrimination claims under the equal protection clause remains unclear. The Supreme Court has not spoken definitively on this issue. Moreover, at least one federal appeals court opinion, *Lowe v. City of Monrovia* (1985), decided before *Tennie* and *Anthony*, suggested that in order to prevail under a section 1983 claim alleging race and sex discrimination, the plaintiff "must first prove that the defendants purposefully discriminated against her either because of her race or her sex."

Assuming that compound race-and-sex discrimination claims are constitutionally cognizable, does Mary have a viable claim? Probably not. She would not be able to point to sufficient evidence to demonstrate that CDWR intentionally discriminated against her because she is an Asian American woman. Is there any evidence that CDWR might have discriminated against Mary? Recall that Mary was reprimanded for taking sick days and for tardiness, and that the only other employee to suffer such reproach is another Asian American female. These facts are certainly probative of discriminatory intent, but, without more, they do not demonstrate that CDWR denied Mary the promotion because she is an Asian American woman.

A final equal protection issue raised by compound race-and-sex discrimination claims is the applicable level of scrutiny. Some commentators have suggested that the Supreme Court's decision in UNITED STATES V. VIRGINIA (1996) has effectively nudged the STANDARD OF REVIEW for sex discrimination toward strict scrutiny. Irrespective of this consideration, however, a strong argument can be made that at least strict scrutiny should apply. In other words, should the government engage in compound race-and-sex discrimination against, for example, black women, such discrimination would be deemed unconstitutional unless it served a compelling state interest and was narrowly tailored to meet that interest. At least two theories could be advanced to support this argument: (1) a "double bind" theory of discrimination—that black women, because they occupy at least two subordinate identities (women and blacks), experience a double-discrimination (sexism and racism), and (2) a "DISCRETE AND INSULAR MINORITY" theory—that black women have historically been discriminated against, subject to pervasive stereotypes, and denied meaningful access to the political process.

Of course, neither of these theories renders uncontroversial the notion that black women should be treated as a distinct class in equal protection analysis. There are

"slippery slope" concerns: If black women are deemed a cognizable class for equal protection purposes and are entitled to strict scrutiny protection, there may be no stopping point. As it turns out, however, the slope is not nearly so slippery as it might appear to be. There is a limiting principle: a group seeking strict scrutiny protection based on a compound theory of discrimination could be required to demonstrate historical discrimination, discreteness and insularity, and political powerlessness. This limiting principle is already a part of our equal protection jurisprudence. To the extent that other compound identities, for example, Mexican American women, are able to satisfy this test, there is no good reason to deny them strict scrutiny protection.

DEVON W. CARBADO
(2000)

Bibliography

CARBADO, DEVON W. 1999 Introduction. *Black Men on Race, Gender, & Sexuality: A Critical Reader.* New York: New York University Press.

CRENSHAW, KIMBERLÉ 1989 Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics. *University of Chicago Legal Forum* 1989:139–142.

TRENT, JUDY SCALES 1989 Black Women and the Constitution: Finding Our Place, Asserting Our Rights (Voices of Experience: New Responses to Gender Discourse). *Harvard Civil Rights–Civil Liberties Law Review* 9:23–27.

## RACE AND VOTING

Controversies over race and voting stem from the fact that citizens belong to racial and ethnic groups with different and often conflicting interests, and as group members they tend to vote for candidates representing those interests. What should be done when their group's preferred candidates are consistently prevented from winning election?

The question became urgent after passage of the VOTING RIGHTS ACT OF 1965. In the South, most newly enfranchised blacks were unable to elect black candidates. Racially polarized voting was the main culprit: In electoral venues where whites outnumbered blacks—and in the 1960s this was almost always the case—white votes overwhelmed black ones.

The paucity of majority-black venues resulted primarily from racial GERRYMANDERING; white legislators refused to draw majority-black districts in single-member-district systems or adopted majority-white multimember-district ("at-large") systems. Suits by black and other minority voters—particularly Hispanics—attacked racial gerrymandering as illegal efforts to dilute minority voting strength. On this theory, the FOURTEENTH AMENDMENT guarantees racial minorities the opportunity to participate equally in the political process by electing candidates of their choice, and the guarantee is abridged by ELECTORAL DISTRICTING that denies minorities this opportunity. The Supreme Court adopted the theory in *White v. Regester* (1973), and Congress in 1982 then added vote-dilution protection to groups covered by the Voting Rights Act. *Thornburg v. Gingles* (1986) simplified the criteria for proving dilution, and the U.S. Department of Justice, charged with administering the Voting Rights Act, required states redistricting after the 1990 Census to draw majority-minority districts whenever feasible. Consequently, from the middle 1970s to the early 1990s the number of black and Hispanic officials in the South and Southwest, respectively, increased sharply.

This trend was reversed in the mid-1990s. In SHAW V. RENO (1993), white plaintiffs in North Carolina, a state that is 22 percent black, challenged aspects of the 1990s REAPPORTIONMENT, which had resulted in the election of the first two African American members of Congress from that state since RECONSTRUCTION. The plaintiffs claimed that the shape of one of the safe black districts was "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification." The Court majority agreed that such a claim was justiciable. In MILLER V. JOHNSON (1995) the Court emphasized that the harm to voters was not determined by the shape of the district, but by whether the district had been created predominantly for racial purposes. This new cause of action is said to derive from a theory of "expressive harms," as distinct from either vote denial or vote dilution.

*Shaw* caused various safe black and Hispanic congressional districts to be replaced with majority-white ones. Vote-dilution challenges by minority plaintiffs diminished, and suits were filed challenging safe minority districts below the congressional level.

Critics of vote-dilution litigation welcomed these developments. Among their reasons, all arguable, are that racial gerrymanders as remedies for vote dilution violate the principle of "the colorblind Constitution"; that creating safe minority districts both cuts the Democratic margins among elected officials and diminishes the substantive REPRESENTATION of minority voters; and that the probable decline in the number of minority elected officials resulting from *Shaw* encourages consideration of proportional representation schemes that are allegedly superior to winner-take-all, single-member-district plans.

In response, those who favor the theory of minority vote dilution argue that, whatever the trade-offs between electing minority officeholders and furthering the substantive representation of minorities, minority voters lose

an important kind of access to the polity when white bloc voting constrains (and in some locales prohibits altogether) minority officeholding. This argument, in turn, raises the issue of how intense racially polarized voting is today, particularly in the South and Southwest. Systematic research suggests that it is still quite intense there, although the degree of intensity is disputed among political scientists.

In the nation's polity as on the Court, three views on race and voting presently vie for supremacy: race neutrality in districting, which rejects the theory of minority vote dilution altogether; racial pluralism, which advocates protecting the right of minority groups to elect their candidates of preference using race-based districting; and proportional representation, through the replacement of district systems with such plans as limited or cumulative voting. None of these views has yet gained ascendancy.

CHANDLER DAVIDSON
(2000)

Bibliography

DAVIDSON, CHANDLER and GROFMAN, BERNARD, eds. 1994 *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965–1990.* Princeton, N.J.: Princeton University Press.

GUINIER, LANI 1994 *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy.* New York: Free Press.

ISSACHAROFF, SAMUEL; KARLAN, PAMELA S.; and PILDES, RICHARD H. 1998 *The Law of Democracy: Legal Structure of the Political Process.* Westbury, N.Y.: Foundation Press.

KOUSSER, J. MORGAN 1999 *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction.* Chapel Hill: University of North Carolina Press.

LUBLIN, DAVID 1997 *The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress.* Princeton, N.J.: Princeton University Press.

SWAIN, CAROL M. 1993 *Black Faces, Black Interests: The Representation of African Americans in Congress.* Cambridge, Mass.: Harvard University Press.

THERNSTROM, ABIGAIL 1987 *Whose Votes Count? Affirmative Action and Minority Voting Rights.* Cambridge, Mass.: Harvard Univesity Press.

## RACE-CONSCIOUSNESS

It was once widely believed that BROWN V. BOARD OF EDUCATION (1954, 1955) had removed the last vestiges of race-consciousness from the Constitution. Many observers saw the *Brown* decision as a vindication of Justice JOHN MARSHALL HARLAN's lone dissent in PLESSY V. FERGUSON (1896). Harlan's critique of the majority's SEPARATE BUT EQUAL DOCTRINE was summarized in these famous words: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." In the years between *Plessy* and *Brown*, the ideal of a "color-blind" Constitution served as one of the central tenets of liberal CONSTITUTIONALISM.

Today, however, some leading liberal constitutionalists argue that adherence to the ideal of a color-blind Constitution was a mistake. It has been only recently discovered that "color-blindness" was all along a "myth" or, at best, a "misleading metaphor." The principal reason for the volte-face on the part of liberal activists is summarized by Laurence H. Tribe, who writes that "judicial rejection of the "separate but equal' talisman seems to have been accompanied by a potentially troublesome lack of sympathy for racial separateness as a possible expression of group solidarity." Indeed, it seems to be true that the expression of racial or ethnic group solidarity does require something like the old—and once justly decried—"separate but equal doctrine." Tribe's tergiversations indicate, however, that it is not yet entirely fashionable to speak openly about the desirability of returning to separate but equal. Attacks on the idea of a color-blind Constitution, on the other hand, are legion.

A curious feature of the *Brown* decision is that it did not make a comprehensive condemnation of racial classifications or entirely overrule the *Plessy* decision. Only racial classifications that were said to produce "feelings of inferiority" were deemed to violate EQUAL PROTECTION, and from the psychological evidence adduced by the Court, this was "proven" to be the case only in the context of grammar school education. Presumably, racial SEGREGATION that did not stigmatize one race or ethnic group as inferior would survive the test adumbrated in *Brown.* Thus, *Brown* did not overrule all racial classifications—or treat them as SUSPECT CLASSIFICATIONS—but left open the possibility that under certain circumstances racial classifications could be "benign" if the classification were designed to produce racial class remedies rather than racial class injuries. Resort to the doctrine of STRICT SCRUTINY in the *Brown* case would probably have effectively foreclosed the future use of race as a legitimate classification.

Perhaps the best expression of the new understanding of "separate but equal" was made by Justice HARRY A. BLACKMUN in his separate opinion in REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1977): "I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. . . . In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently." Justice Blackmun could have used the word "separately" in lieu of "differently" without changing his meaning in the slightest. Indeed, it has been the advent of affirmative action that has generated the greatest controversy about race-conscious-

ness and the Constitution. At its inception, the proponents of affirmative action assured a skeptical world that it was only a temporary measure to be employed in the service of equality of opportunity. But now, some twenty-odd years after its appearance, affirmative action is looked upon unabashedly by its supporters as a means of securing racial class entitlements.

Inevitably, the test of racial class entitlements—and RACIAL DISCRIMINATION—is the concept of racial proportionality. This idea assumes that, absent discrimination, the races will freely arrange themselves in the various aspects of political and private life in exact racial proportionality and that when they do not, there is a prima facie evidence of discrimination (or underrepresentation) that eventually must be rectified by any number of coercive remedies. This situtaion, of course, presents the alarming spectacle of a nation one day looking upon all civil rights as nothing more than racial class entitlements. But any nation with the slightest concern for the lessons of history would never self-consciously allow itself to regard the rights of individuals as nothing more that the by-product of racial class interests. Even though we may be assured that the ultimate ends of such programs as affirmative action are "to get beyond racism," those who advocate such policies simply have not thought out the likely consequences, believing, no doubt, that a means can never become the end itself.

The constitutional doctrine that most contributes to race-consciousness is that of DISCRETE AND INSULAR MINORITY. The underlying premise of this doctrine is that there are certain racial and ethnic minorities that are permanently isolated from the majoritarian political process and therefore cannot vindicate their racial class interests by merely exercising the vote. The concept of the discrete and insular minority assumes that American politics has always been dominated by a monolithic majority that seeks only to aggrandize its own racial class interests at the expense of the various discrete and insular minorities. Thus, the moral authority of the majority—indeed, of majoritarian politics itself—must be questioned, if not undermined. In fact, some legal scholars argue that the only way that the rights of discrete and insular minorities can be absolutely guaranteed is in those instances where legislation disadvantages or injures the majority. Thus, one could argue that the Constitution not only permits affirmative action but requires it. It is only where the majority suffers a positive disadvantage that one can be certain that discrete and insular minorities are not harmed by the operation of the majoritarian political process. Fortunately, the Supreme Court has never accepted this negative version of the categorical imperative.

A bare acquaintance with history shows the impossibility of such a simplistic view of American politics. Could such a monolithic majority bent on the exclusive aggrandizement of its own racial class interests approve the Declaration of Independence and the Constitution? Ratify the Bill of Rights? Fight the Civil War to overturn the DRED SCOTT V. SANDFORD (1857) decision? Ratify the THIRTEENTH AMENDMENT, FOURTEENTH AMENDMENT, and FIFTEENTH AMENDMENT? Pass the CIVIL RIGHTS ACT OF 1964 and the VOTING RIGHTS ACT OF 1965? These great events (and a host of others) in American constitutional history make it incredible that learned people—including the Justices of the Supreme Court—could believe that the concept of discrete and insular minorities was in any way an accurate reflection of American political life. American life is too subtle and complex to be understood exclusively in terms of racial class interests.

The Framers of the Constitution knew that class politics, in whatever guise it appeared, was incompatible with constitutional democracy. The whole thrust of JAMES MADISON's belief in the "capacity of mankind for self-government" was his conviction that under a properly constructed constitution, majorities could be rendered capable of ruling in the interest of the whole of society rather than in the interest of the part (i.e., in the interest of the majority). The structure of society itself, with its multiplicity of interests and accompanied by a constitutional structure informed by the SEPARATION OF POWERS, held the prospect that majorities could act in a manner consistent "with the rules of justice and the rights of the minor party." Madison called these majorities *constitutional* majorities as distinguished from *numerical* majorities. Many legal scholars today, however, simply proclaim that every majority is ipso facto a special-interest group and that majorities cannot therefore be trusted to rule in the interest of the whole. Some even conclude that courts should be cast in the role of virtual representatives of discrete and insular minorities, because judges are isolated from the majoritarian political process and can therefore "rule" in the interest of the whole of society. Others, however, have not forgotten such infamous decisions as *Dred Scott*, *Plessy v. Ferguson*, LOCHNER V. NEW YORK (1905), and *Korematsu v. United States* (1944) and are quick to recognize this scheme as a form of judicial oligarchy. Virtual representation is an idea that is incompatible with republican government.

It has become something of an orthodoxy among legal scholars to ridicule the moral imperative of racial neutrality as the driving force of the Constitution. They retort that race has always been a factor in American political life and it is simply unrealistic to think that it will not be so for the foreseeable future. Because race-consciousness will inevitably be part and parcel of constitutional calculations, it is more honest to advocate them openly than to seek a deceptive refuge in the ideal of a color-blind Con-

stitution. It is true that America's constitutional past is all too replete with race-consciousness. After all, the Constitution itself gave support to SLAVERY. The toleration of slavery in the Constitution was a product of political necessity. The Constitution itself—and thereby any prospects of ending slavery—would never have been accepted without compromise on the issue of slavery. But most of the Framers of the Constitution looked upon that compromise as a necessary (but temporary) departure from the principles of the regime that had been enunciated in the Declaration of Independence. The best they could do under the circumstances was to fix those principles in the Constitution so that the Constitution could one day provide the basis for emancipation. The American founding was incomplete, but the Constitution looked forward to its completion by putting, in ABRAHAM LINCOLN's words, "slavery on the ultimate road to extinction." Lincoln always interpreted the Constitution in light of the principles of the Declaration. In doing this, he was following the lead of the Framers themselves.

In 1857, Lincoln gave an account of the aspirations of the American polity and the role the Declaration played in fixing constitutional aspirations. He noted that the authors of the Declaration "did not mean to assert the obvious untruth, that all were then actually enjoying equality, nor yet, that they were about to confer it immediately upon them." In fact, Lincoln noted, they had no power to "confer such a boon," had they been inclined to do so. Rather, "they meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all, constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere." With the Constitution viewed as the means of implementing the "standard maxims" of the Declaration, the nation has made tremendous progress since the Civil War and Reconstruction.

Yet, at almost the eleventh hour, liberal constitutionalists want to abandon those principles that have been the source of progress. Surely the progress came too slowly and advanced by fits and starts, according to the political circumstances of the day. But no one can deny that progress occurred and that it resulted directly from our "ancient faith" that the Constitution should be race-neutral. Now we are told that progress in race relations has not gone far enough or fast enough and it is time to return to a race-conscious Constitution to implement a newer, more certain view of racial progress. The return to race-consciousness also means that sooner or later we will have to pronounce the principle of equality "an empty idea." The reason is simple: equality is a principle that is incompatible with group rights and preferential treatment. One prominent author has argued that because it cannot comprehend the "rights of race," "equality is an idea that should be banished from moral and legal discourse." Indeed, group claims—including racial group claims—are not claims of equality, but claims of inequality, and they necessarily rest upon some notion of "separate but equal." Class claims deny the principle of equality because they ascribe to individuals class characteristics that are different—and necessarily unequal—from those of individuals occupying other classes. If there were no inequalities implicit in class distinctions, such distinctions would be superfluous and there would be no need to substitute group rights for individual rights.

Almost the whole of American constitutional history has been a history of the nation's attempt to confine the genie of race by powerful constitutional bonds; yet the most sophisticated constitutional scholars today advocate the release of the racial genie once again, this time to act as a benign, rather than destructive, force. This is dangerous advice because this time the genie will not be restrained by the moral principle that "all men are created equal."

EDWARD J. ERLER
(1992)

Bibliography

ERLER, EDWARD J. 1989 Equal Protection and Regime Principles, Pages 243–283 in Robert L. Utley, Jr., ed., *The Promise of American Politics.* Lanham, Md.: University Press of America.

STRAUSS, DAVID A. 1986 The Myth of Colorblindness. *Supreme Court Review* 1986:99–134.

TRIBE, LAURENCE H. 1988 *American Constitutional Law*, 2nd ed. Pages 1474–1480. Mineola, N.Y.: Foundation Press.

WESTEN, PETER 1982 The Empty Idea of Equality. *Harvard Law Review* 95:537–596.

## RACE, REPRODUCTION, AND CONSTITUTIONAL LAW

Race has always influenced the meaning of reproductive freedom in America. Scientific racism explained the domination of whites over blacks as the natural social order: blacks were biologically destined to be slaves and whites to be their masters. For three centuries, courts and legislatures carefully defined race according to amount of black ancestry and enforced the rule of white racial purity. One of America's earliest laws was a 1662 Virginia SLAVERY

statute that gave the children born to slave mothers and fathered by white men the status of slaves. Laws against MISCEGENATION, designed to keep the races from intermingling, were not declared unconstitutional by the U.S. Supreme Court until 1967. Even today, Americans' continued understanding of race as an inherited trait profoundly connects reproductive policy to racial politics.

Regulating black women's reproductive decisions has been a central aspect of racial oppression in America. Slavemasters had a financial incentive to exploit slave women's reproductive capacity to replenish the enslaved labor force. During the Depression, the alliance between the emerging BIRTH CONTROL movement and eugenicists paved the way for public birth control clinics aimed at reducing the birthrates of poor blacks in the South. It was discovered in the 1970s that thousands of black women had been coercively sterilized annually under government welfare programs. Federally funded programs had similarly sterilized more than one-third of women of childbearing age in PUERTO RICO and one-fourth of Native American women.

Although contemporary reproductive health policies are not so blatantly racist, many coercive policies have a disparate effect on minority women and are arguably designed to curb the birthrates of minority mothers on welfare in particular. Many states have enacted child exclusion policies, or "family caps," that deny additional benefits for children born to women already receiving public assistance. Politicians have proposed even more coercive measures, such as mandating that mothers on welfare be implanted with the long-acting contraceptive Norplant. In the 1980s prosecutors across the country initiated a punitive response to the problem of drug use during pregnancy. Although the problem cuts across racial and economic lines, the vast majority of more than two hundred women prosecuted for prenatal crimes were poor black mothers who smoked crack cocaine. Recently the Supreme Court of South Carolina upheld the conviction of a black woman whose fetus was exposed to crack, ruling that a fetus is a child for purposes of the state's child abuse statute.

There are two types of constitutional challenges to reproductive health policies that threaten RACIAL DISCRIMINATION. First, the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT prohibits any law regulating reproduction that explicitly classifies citizens on the basis of race or that disproportionately affects a racial or ethnic minority where invidious purpose can be shown. Such claims are rarely successful, for government officials today are unlikely either to make explicit racial distinctions or to express racial motivation in enacting reproductive policies. The U.S. Supreme Court has upheld reproductive health laws that disproportionately burden minority women. Federal and state laws denying Medicaid reimbursement for ABORTIONS and other regulations that make it difficult for poor women to obtain abortion services, for example, disproportionately affect minority women, but were held constitutional in cases such as HARRIS V. MCCRAE (1980) and PLANNED PARENTHOOD V. CASEY (1992).

A second constitutional challenge combines the equal protection mandate with the protection of reproductive decisionmaking under the DUE PROCESS clause. These two provisions support a constitutional prohibition of invidious government standards for childbearing that reinforce white supremacy. SKINNER V. OKLAHOMA (1942) acknowledged the threat to racial equality posed by government interference in the right to procreate. *Skinner* invalidated the Oklahoma Habitual Criminal Sterilization Act authorizing the sterilization of persons convicted two or more times for "felonies involving moral turpitude." The Court found that the statute treated unequally criminals who had committed similarly culpable offenses: chicken thieves like Mr. Skinner were sterilized while embezzlers were not. Applying STRICT SCRUTINY under the equal protection clause, the Court concluded that the government failed to demonstrate that the statute's classification was justified by eugenics or the inheritability of criminal traits.

The *Skinner* Court's reason for choosing strict scrutiny is especially pertinent to the constitutionality of racial discrimination in reproductive health laws. Declaring the right to bear children to be "one of the basic civil rights of man," the Court recognized the significant risk of racial discrimination inherent in state intervention in reproduction. "In evil or reckless hands," Justice WILLIAM O. DOUGLAS wrote, "[the government's power to sterilize] can cause races or types that are inimical to the dominant group to wither and disappear." The state's discriminatory imposition of sterilization against certain types of criminals was as invidious "as if it had selected a particular race or nationality for oppressive treatment." Thus, the Court acknowledged the potential for racist governmental regulation of procreation even in the absence of explicit racial classifications.

LOVING V. VIRGINIA (1967) also deployed the constitutional guarantee to strike down a discriminatory law involving reproduction. *Loving* invalidated a Virginia statute that banned interracial marriage, resting the decision on both the equal protection and the due process clauses of the Fourteenth Amendment. The Virginia federal judge who convicted Mr. and Mrs. Loving explicitly endorsed scientific racism as an explanation for antimiscegenation laws, reasoning that "[t]he fact that [Almighty God] separated the races shows that he did not intend for the races to mix." The Court held that, "as measures designed to maintain White Supremacy," the laws had no legitimate

purpose independent of invidious racial discrimination. Citing *Skinner*, the Court further concluded that the antimiscegenation statute unjustifiably deprived the Lovings of their freedom to marry guaranteed by the due process clause.

Would the current Supreme Court invalidate, as "measures designed to maintain White Supremacy," reproductive regulations that disproportionately penalize minority women's childbearing, or whose popularity hinges on a widespread perception that they have such an effect? Probably not. Present equal protection doctrine requires a stronger showing of discriminatory purpose. Nonetheless, *Skinner*'s warning about the dangers of racist restrictions on procreation and *Loving*'s condemnation of laws that protect racial purity emphasize the constitutional importance of equality in reproductive decisionmaking. Laws that effectively single out black mothers to deter or punish their decision to have children impose a racist government standard for procreation. They function to preserve a racial hierarchy that essentially disregards black humanity. They evoke the specter of racial eugenics, especially in light of the history of sterilization abuse of women of color. Government policies that perpetuate racial subordination through the denial of reproductive rights, thereby threatening both racial equality and SUBSTANTIVE DUE PROCESS should be subject to the most exacting judicial scrutiny.

DOROTHY ROBERTS
(2000)

Bibliography

DAVIS, ANGELA Y. 1983 *Women, Race, and Class.* New York: Vintage.

DAVIS, PEGGY COOPER 1997 *Neglected Stories: The Constitution and Family Values.* New York: Hill and Wang.

FRIED, MARLENE GERBER, ed. 1990 *From Abortion to Reproductive Freedom: Transforming a Movement.* Boston: South End Press.

GORDON, LINDA 1976 *Woman's Body, Woman's Right: A Social History of Birth Control in America.* New York: Grossman.

ROBERTS, DOROTHY 1997 *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty.* New York: Pantheon.

## RACIAL BALANCE

The idea of racial balance is a product of the DESEGREGATION of public schools in the years since BROWN V. BOARD OF EDUCATION (1954–1955). The term refers to the racial distribution of students in particular schools in relation to the racial distribution of school children in an entire district. If a district's children are seventy percent white and thirty percent black, then a hypothetically perfect balance would produce these same percentages in each school. By extension, the notion of racial balance may be used in discussing other institutions: a housing project, a factory's work force, a state university's medical school. (See AFFIRMATIVE ACTION; RACIAL QUOTAS.)

In the school cases, the Supreme Court has held that racial balance is an appropriate "starting point" for a lower court to use in fashioning a remedy for de jure SEGREGATION. (See DE FACTO/DE JURE; SWANN V. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION.) However, even where segregation has been deliberately caused by school board actions, there is no constitutional requirement of racial balance throughout the district's schools. Although one-race schools are presumptively to be eliminated, the school board will be allowed to prove that the racial distribution in those schools results from something other than the board's deliberate policy. SCHOOL BUSING over very long distances, for example, would not be required under this approach; distance alone would be a racially neutral explanation for the board's failure to remedy racial imbalance.

In the absence of previous legislation commanding or authorizing school segregation, or school board actions with segregative intent, the fact of racial imbalance in a district's schools, standing alone, does not amount to a constitutional violation. However, intentional acts of segregation by the board in the remote past, coupled with current racial imbalance, will place on the board an almost impossible burden of proving that it has dismantled its "dual" (segregated) system. (See COLUMBUS BOARD OF EDUCATION V. PENICK.)

The term racial balance is sometimes used in a different sense. Some discussions of school segregation use the term to describe a school that includes a "critical mass" of students from each race. Social scientists disagree over the educational value to minority students of having a significant number of white students in the classroom. The suggestion that minority students learn better in the company of whites has roots in the Supreme Court's pre-*Brown* decisions on graduate education. (See SWEATT V. PAINTER.) And where segregation is imposed by official action, *Brown* itself takes the view that the resulting stigma impairs minority students' ability to learn. But the abstract proposition that minority students cannot learn effectively outside the presence of whites is more than a little patronizing. And the notion of racial balance in this sense is immensely complicated in a multiethnic community: is a school integrated if it contains significant numbers of both white and minority students, or should the category of minority students be broken down into its black, Hispanic, and other components? Merely to ask this question is to understand why the Supreme Court has avoided speaking

of racial balance in this latter sense and has used the idea in its mechanical racial-percentages sense only as a "starting point."

KENNETH L. KARST
(1986)

Bibliography

FISS, OWEN M. 1975 The Jurisprudence of Busing. *Law and Contemporary Problems* 1975:194–216.

## RACIAL CLASSIFICATION

See: Benign Racial Classification; Invidious Discrimination; Racial Discrimination; Suspect Classification

## RACIAL DISCRIMINATION

The nation was founded with the enslavement of blacks as an established and ongoing institution, and though we were not particularly proud of the institution, we were prepared to live with it. The Constitution did not mention the word "slave," and contemplated the eventual closing of the slave trade (referred to simply as the "importation of persons"), but, through similar circumlocutions, also created obligations to return fugitive slaves, and included a proportion of the slaves within the population base to be used for the apportionment of representatives and taxes. In DRED SCOTT V. SANDFORD (1857) the Supreme Court viewed slaves as property and declared that the right of slaveholders to take their slaves to the territories was protected by the DUE PROCESS CLAUSE of the Fifth Amendment.

The CIVIL WAR brought SLAVERY to an end and reversed the basic commitment of the Constitution toward blacks. The law sought equality rather than enslavement, and it was through the elaboration of this egalitarian commitment that the concept of racial discrimination emerged. Prohibiting racial discrimination became the principal strategy of the American legal system for achieving equality for blacks. The laws against racial discrimination typically protect all racial minorities, not just blacks, and yet, for purely historical reasons, the development of those laws would be unimaginable apart from the struggle of blacks for equality in America. That struggle has been the source both of the achievements of antidiscrimination law and of its recurrent dilemmas.

The three amendments adopted following the CIVIL WAR constitute the groundwork of this branch of the law, although only one—the FIFTEENTH AMENDMENT—actually speaks of racial discrimination. It provides that "the right. . . to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude." The other Civil War amendments are not cast in terms of racial discrimination. The THIRTEENTH AMENDMENT prohibits slavery and involuntary servitude, and the FOURTEENTH AMENDMENT, in relevant aspect, prohibits states from denying "the EQUAL PROTECTION OF THE LAWS." But the Supreme Court has interpreted both these amendments to prohibit racial discrimination. With respect to the Thirteenth Amendment, the Court reasoned in JONES V. ALFRED H. MAYER CO. (1968) that racial discrimination is a badge or incident of slavery. (See BADGES OF SERVITUDE.) Similarly, in interpreting the Fourteenth Amendment, the Court, as early as STRAUDER V. WEST VIRGINIA (1880), declared racial discrimination to be the kind of unequal treatment that constitutes a denial of equal protection of the laws. Indeed, over the years, racial discrimination came to be seen as the paradigmatic denial of equal protection, and supplied the standard against which all other equal protection claims came to be measured, even when pressed by nonracial groups such as the poor or women. They too had to show that they were discriminated against on the basis of some impermissible criterion such as their wealth or sex. The promise of equal protection was thus transformed into a promise not to discriminate.

It was, moreover, through the enforcement of the Fourteenth Amendment that the prohibition against racial discrimination achieved its greatest prominence. Antidiscrimination was the instrument that finally put to an end the system of white supremacy that emerged in the late nineteenth and early twentieth centuries and that worked by separating whites and blacks—Jim Crow. The discrimination appeared on the very face of Jim Crow laws and a principle that condemned racial discrimination easily brought those laws within the sweep of the Fourteenth Amendment. All that was needed was an understanding of how the separatism of Jim Crow worked to the disadvantage of blacks; that was the burden of BROWN V. BOARD OF EDUCATION (1954) and the cases that followed. As the principle controlling the interpretation of the Fourteenth Amendment, antidiscrimination was a limitation only upon the actions of states, but once the step entailed in *Brown* was taken, the federal government was, in BOLLING V. SHARPE (1954), made subject to an identical prohibition by a construction of the due process clause of the Fifth Amendment. Racial discrimination was deemed as inconsistent with the constitutional guarantee of liberty as it was with equal protection.

Statutes, too, have been concerned with racial equality. In the years immediately following the Civil War, Congress passed a comprehensive program to protect the newly freed slaves, and defined the conduct it sought to

prohibit in a variety of ways. In the CIVIL RIGHTS ACT OF 1866 Congress promised that blacks would enjoy the same rights as whites; in the FORCE ACTS (1870, 1871) it guaranteed all citizens the rights and privileges arising from the Constitution or laws of the United States. In the decades following *Brown v. Board of Education*, however, when the antidiscrimination principle of the Fourteenth Amendment received its most strenuous affirmation and the nation embarked on its Second Reconstruction, Congress cast the substantive standard in terms of a single idiom—do not discriminate. (See CIVIL RIGHTS ACT OF 1964; CIVIL RIGHTS ACT OF 1968; VOTING RIGHTS ACT OF 1965.)

During this period, Congress introduced new mechanisms to enforce the equal protection clause; for example, it authorized the attorney general to bring injunctive school desegregation suits, required federal administrative agencies to terminate financial assistance to segregated school systems, and provided for criminal prosecutions against those who forcibly interfered with desegregation. Congress also broadened the reach of federal antidiscrimination law beyond the scope of the Fourteenth Amendment by regulating, in the name of racial equality, activities of private agencies (for example, restaurants, employers, or landlords), which otherwise would not have been covered by that amendment because of its "state action" requirement. In each of these measures, Congress used the language of antidiscrimination. So did the President in promulgating EXECUTIVE ORDER 11246 (1965), which regulates government contractors. Many state legislatures also intervened on behalf of racial equality during the Second Reconstruction, and these enactments were also couched in terms of prohibiting discrimination.

Sometimes Congress and the state legislatures exempted certain discriminatory practices from the laws they enacted. One instance is the federal open housing law, which exempts discrimination by small residences ("Mrs. Murphy's roominghouse"); another is the federal fair employment statute, which exempts from its coverage small businesses (at first businesses with fewer than twenty-five employees, later reduced to fifteen). Apparently Congress viewed the interest in associational liberty present in these settings as sufficiently strong to justify limited exemptions to the ban on racial discrimination. Yet, putting these exemptions and a handful of others to one side, it is fair to say that today, primarily as a result of the Second Reconstruction, the prohibition against racial discrimination is all-encompassing. It has both constitutional and statutory bases and is the subject of an executive order. It is a pervasive feature of both federal and state law and calls forth a broad array of civil and criminal remedies. It almost has the status of a moral imperative, like the norm against theft or killing. The issue that divides Americans today is thus not whether the law should prohibit racial discrimination but what, precisely, doing so entails.

The antidiscrimination norm, as already noted, was largely fashioned at a time when the nation was swept by the SEPARATE BUT EQUAL DOCTRINE of Jim Crow and when blacks were disadvantaged in a rather open and crude manner. In such a context, the principle of antidiscrimination invites a color blindness: When allocating a scarce opportunity, such as a job or a place in a professional school, the decision maker should not prefer a white candidate over a black one on the basis of the individual's color or race. Here antidiscrimination requires that individuals be judged independently of race. This much is settled. Interpretive problems arise, however, when the social context changes—when we have moved beyond Jim Crow and blacks have come to be disadvantaged primarily in ways that are hidden and systematically entrenched. Then we confront two issues. One arises from the exclusion of blacks on the basis of a seemingly innocent criterion such as performance on a standardized test; the other from the preference given to blacks to correct for longstanding unequal distributional patterns.

To clarify the first issue, it should be understood that the appearance of innocence might be misleading. Although a black scores higher than a white on a test, the employer might manipulate or falsify the scores so that the white is given the job. In this case, the apparent use of an innocent criterion is simply a mask for racial discrimination. The decision is still directly based on race and would be deemed unlawful. The most straightforward remedy would be to set aside the decision and allow an honest application of the test.

There are, moreover, situations when a test is honestly administered and yet the very decision to use the test in the first place is based on an illegitimate concern, namely, a desire to exclude blacks. A highly sophisticated verbal aptitude test might be used, for example, to select employees for manual work because the employer, wanting to maintain a predominantly white work force, assumes that fewer whites than blacks will be screened out by the test. Here again, the "real" criterion of selection is race; a court would disallow the use of the irrelevant test, and require the employer to choose a criterion that serves a legitimate end. In both of these cases—the dishonest application of legitimate criteria and the honest application of illegitimate criteria—the appearance of color blindness is a sham and a court could use the simple, colorblind form of the antidiscrimination norm to void the results.

The more troublesome variant of the first issue arises when (1) the facially innocent criterion is adopted in order to serve a legitimate interest; (2) the criterion in fact furthers that interest; and (3) the application of the criterion

disadvantages the racial minority in much the same way as would the use of race as the criterion of selection. The job may in fact require sophisticated verbal skills and the test that measures these skills may screen out more blacks than whites. The test is job-related but has a disparate adverse impact on blacks. The question then is whether an employment decision based on the test violates the antidiscrimination prohibition. This is a question of considerable difficulty because while the law, strictly speaking, prohibits distinctions based on race, this particular decision is based on a criterion other than race.

One school of thought answers this question in the negative. This view stresses process, and interprets antidiscrimination in terms of the integrity of the selection process: A selection process based on race is corrupt and cannot be allowed. A selection process free of racial influence might redound to the benefit of the racial minority, since it would allow them to compete on equal footing with other groups and thus give them a chance to alter the distributional inequalities that occurred under a regime such as Jim Crow, where they were penalized because of their race. Any actual effect on their material status as a group, however, would represent just an agreeable by-product, or a background assumption, not the purpose of antidiscrimination law. According to this school, the aims of antidiscrimination law are fulfilled when the process of selection is purified of all racial criteria or motivations.

Another viewpoint stresses results or effects, not process; it would find the use of the innocent criterion unlawful even if it serves legitimate ends. What is decisive, according to this school of thought, is the actual disadvantaging of blacks, not the way the disadvantage comes about. If the application of a criterion has a disproportionately adverse impact on the racial minority, in the sense that it excludes substantially more blacks than whites, the criterion should be treated as the functional equivalent of race.

At the heart of this interpretation of antidiscrimination is a concern for the social status of blacks. It is motivated by a desire to end all practices that would tend to perpetuate or aggravate their subordinate position. Admittedly, the costs of this program are real, for it is stipulated that the contested criterion serves some legitimate end; the test is job-related. But these costs are seen as a necessary price of justice. Only when the costs become extraordinarily large or achieve a special level of urgency, as when the criterion serves some "compelling" (and not just a "legitimate") interest, will the use of the criterion be allowed.

The theorist who so emphasizes effects rests his argument principally on the Fourteenth Amendment and ascribes to it the grandest and noblest of purposes—the elimination of caste structure. He insists that antidiscrimination, as the principle that controls the application of that amendment, be construed with this broad purpose in mind and if need be, that a new principle—the group-disadvantaging principle—be articulated in order to make this purpose even more explicit. He also insists that the various statutes that prohibit discrimination—the principal argumentative props of the process school—should be construed derivatively. These statutes, unlike the Fourteenth Amendment, may contain in so many words a specific ban on "discrimination based on race," but, so the effects theorist argues, these statutes should be seen as a legislative adoption of the prevailing constitutional principle. When that principle is interpreted to forbid the use of criteria that effectively disadvantage blacks, the statutes should be interpreted in a similar fashion.

The process school emphasizes not only the precise language in which the statutory norm is cast but also the traditional rule that conditions judicial intervention on a finding that the defendant is at fault. This fault exists when a white is given a job over a black even though the black scored higher on a test; the employer is said to be acting wrongfully because race is unrelated to any legitimate purpose and is a factor over which individuals have no control. But the requisite fault is said to be lacking when the selection is made on the basis of the individual's performance under some nonracial standard, such as a job-related test. On the other hand, those who subscribe to an effects test emphasize the prospective nature of the remedy typically sought in these cases (an injunction to forbid the use of the criterion in the future) and deny the need for a finding of fault. Such a finding may be necessary to justify damages or the criminal sanction, because these remedies require the defendant to pay for what he did in the past, and presumably such a burden can be placed only on someone who acted wrongfully. But an injunction simply directs that the defendant do what is just and does not presuppose that the defendant has acted wrongfully. Alternatively, the effects theorist might contend that if fault is necessary, it can be found in the defendant's willingness to persist in the use of the contested criterion with full knowledge of its consequences for the racial minority. Such persistence connotes a certain moral indifference.

The disadvantaging that the effects test seeks to avoid is usually defined in terms of the status of a group (for example, the criterion has a greater adverse impact on blacks than on whites and thus tends to perpetuate their subordinate position). Some see this group orientation as alien to our jurisprudence, and thus find a further reason for turning away from an effects test. Borrowing the Court's language in SHELLEY V. KRAEMER (1948), they insist that "[t]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual" and that "[t]he rights established are personal rights." But those who subscribe to the effects test see the

well-being of individuals and of groups as inextricably linked: They believe that the status of an individual is determined in large part by the status of the group with which he is identified. Slavery itself was a group phenomenon, and any corrective strategy must be structured in group terms. Effects theorists also point to practices outside the racial context that display a concern for the welfare of groups such as religious minorities, women, the handicapped, labor, and consumers, and for that reason insist that a group orientation is thoroughly compatible with American legal principles.

In the late 1960s and early 1970s, the Supreme Court responded to these arguments and moved toward adopting an effects test in cases such as *Gaston County v. United States* (1969), GRIGGS V. DUKE POWER CO. (1971), and SWANN V. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION (1971). There was, however, an element of ambiguity or hesitation in the Court's response. The Court prohibited the use of seemingly innocent criteria that disadvantaged blacks, even when their use served some legitimate interests, but the Court did not justify its decisions solely in terms of the adverse effects of the criteria. In addition, the Court characterized the adverse effect as a vestige of an earlier use of race. For example, a literacy test was disallowed as a qualification for voting not simply because it disqualified more blacks than whites but also because it perpetuated the disadvantages previously imposed on blacks in segregated schools. This insistence on analyzing the disadvantage as a vestige of past discrimination may have reflected a commitment to the process test insofar as the Court treated the earlier procedural imperfection (the assignment to schools on the basis of race) as the legally cognizable wrong and the present practice (the literacy test) as merely a device that perpetuates that wrong. But at the same time, the concern with past discrimination surely reflected some commitment to the effects test, for it resulted in the invalidation of facially innocent criteria that in fact served legitimate ends. Disallowing today's literacy test would avoid perpetuating yesterday's discrimination in the educational system, but only by compromising an interest the Court had previously deemed legitimate, namely, that of having a literate electorate. In fact, an interpretation of antidiscrimination law to forbid practices that perpetuate past discrimination could become functionally coextensive with an interpretation that makes effects decisive if some global practice such as slavery is taken as the relevant past discrimination, if the victims of past discrimination are identified in group terms, and if the remedial burden is placed on parties who had no direct role in the earlier discrimination. All disparate effects can be seen as a vestige of the special and unfortunate history of blacks in America.

By the mid-1970s, however, it became clear that the Court was not inclined to broaden its concern with past discrimination so as to make it the functional equivalent of the effects test. In fact, the Court turned in the opposite direction—away from effects and toward process. As Justice POTTER STEWART announced, "Reconstruction is over." The Court did not flatly repudiate its earlier decisions, but instead tried to limit them by confining the effects test to those antidiscrimination norms that were embodied in statutes. For constitutional claims of discrimination, the Court in cases such as WASHINGTON V. DAVIS (1976) and MOBILE V. BOLDEN (1980) required a showing that the process was flawed, or more precisely, that the defendant "intended to discriminate." The plaintiff had to show that the defendant's decision was based on race, or that he chose the seemingly innocent criterion not to further legitimate ends but to exclude or disadvantage blacks. The Court continued to honor claims of past discrimination, but by and large insisted that those claims be advanced by individually identifiable victims of the earlier discrimination, that past acts of discrimination be defined with a great deal of specificity, and that the causal links of those acts to the present racially disparate effects be manifest. No global claims of past discrimination have been allowed.

There is a certain irony in this distinction between statutory and constitutional claims, and in the Supreme Court's decision to confine the effects test to the statutory domain, for the statutes are couched in terms less congenial to such a test. The statutes speak specifically in terms of decisions based on race, while the Fourteenth Amendment speaks of equal protection. (Antidiscrimination is but the judicially constructed principle that is to guide the application of that provision.) Arguably, the distinction between statute and Constitution might reflect the Court's desire to find some way of limiting the practical impact of the effects test, for under the Fourteenth Amendment an effects test would have the widest scope and present the greatest possibilities of judicial intervention. The Fourteenth Amendment extends to all state practices and, because of its universality (it protects every "person"), could be used to protect even those groups that are not defined in racial terms. Indeed, in *Washington v. Davis* the Court expressed the fear that under the effects test the Fourteenth Amendment might even invalidate a sales tax because of its disproportionately adverse impact on the poor (never for a moment pausing to consider whether suitable limiting principles could be developed for avoiding such a result). The Court's distinction between statutory and constitutional claims might also stem from a desire to devise a means for sharing with other political institutions responsibility for the sacrifice of legitimate interests entailed in the application of an effects test. When attached to the statute, the effects test and its

disruptive impact become the responsibility of both Court and Congress, since Congress remains free to repeal the statute or otherwise disavow the test.

In the mid-1970s, at the very moment the Court was struggling to identify the circumstances in which the use of a seemingly innocent criterion could be deemed a form of racial discrimination and was moving away from an effects test, it also had to confront the other major interpretive issue posed by antidiscrimination law, the issue of AFFIRMATIVE ACTION. The Court had to decide whether the norm against racial discrimination prohibits giving preference to blacks.

For much of our history, it was assumed that race-based action would be hostile to blacks and that therefore colorblindness would work to the advantage of blacks or at least shield them from hostile action. During the Second Reconstruction, however, as the drive for racial equality grew stronger, an assertedly "benign" use of race became more common. Many believed that even the honest application of legitimate criteria would not significantly alter the unequal distributional patterns that were produced among the races first under slavery and then under Jim Crow, and that it would be necessary, at least for the immediate or foreseeable future, to give blacks a preference in order to improve their status relative to other groups.

These affirmative action programs typically included other minorities, such as Hispanics, as beneficiaries, but were primarily seen as addressed to blacks and did not extend to all disadvantaged groups, such as the poor or white ethnic minorities. They had a distinctive racial cast and were sometimes described as a form of "reverse discrimination." These programs were also typically structured so as to require the decision maker to achieve a certain number of blacks or other minorities within the institution, say, as employees or students. Often that number equaled the percentage of blacks or other minorities in the general population, and was variously described as a goal or quota, depending on which side of the issue one was on. A "goal" was said to establish the minimum rather than the maximum and to be more flexible than a "quota." But more significantly, the term "goal" did not have the odious connotations of the term "quota," which had been used in the past to describe numerical limits on the admission of minorities, limits that were designed to preserve rather than eradicate the caste structure.

For the most part, these affirmative action programs were not treated as a constitutional or statutory requirement. Some of those who subscribed to an effects test argued that the failure to institute preferential programs would constitute a practice that perpetuated the subordinate position of blacks and thus would be itself a form of racial discrimination. But this argument equated inaction with action, and either for that reason or because the effects test was having difficulties of its own, this argument never established a toehold in the law. Equally unsuccessful were the arguments that emphasized those antidiscrimination laws, such as the federal fair employment statute or the executive order governing government contractors, that not only prohibited discrimination but also commanded in so many terms "affirmative action"; the inclusion of these two words were deemed insufficient to alter or add to the basic obligations of the law. The issue posed by affirmative action programs was therefore one of permissibility, rather than obligation: Were these programs consistent with the prohibition against racial discrimination?

Sometimes the purported beneficiaries of the programs (or people speaking on their behalf ) objected to them on the theory that the use of race was not wholly benign. Affirmative action was premised on the view that the racial minorities would not fare well under a colorblind policy, thus implying that these minorities are not as well equipped as whites to compete under traditional meritocratic criteria. They are being told, as they were under Jim Crow, that they are inferior—nothing "reverse" about this distinction. This complaint forced those who ran affirmative action programs to be secretive or discreet about what they were doing, but it did not bring those programs to an end or even present an especially formidable obstacle. The proponents of affirmative action explained that the race-based preference was premised on an assessment of the group's history in America, on the wrongs it suffered, not on a belief about innate ability, and as such could not justifiably be seen as giving rise to a slight. The use of race is benign, they insisted, because it improves the status of blacks and other racial minorities by giving them positions, jobs, or other concrete material advantages that they otherwise would not enjoy, at least not in the foreseeable future.

Affirmative action programs have also been attacked by whites, especially when there are discernible differences in the applicants under standard nonracial criteria and when scarce goods, such as highly desired jobs or places in professional schools, are being allocated. In such circumstances favoring a black because of his race necessarily means disfavoring a white because of his race; a job given to one is necessarily denied another. The rejected white applicant cannot truly claim that he is stigmatized even in these circumstances; no one is suggesting he is inferior. His exclusion comes as the by-product or consequence of a program founded on other principles—not to hurt him or the members of his group, but to help the disadvantaged. On the other hand, the rejected white applicant does not rest his complaint solely on the fortuity of the general, racially unspecific language of the antidiscrimination norm, the fact that discrimination based on

*any* race is prohibited. The white applicant can also claim that he is being treated unfairly, since he is being judged on the basis of a criterion over which he has no control and which is unrelated to any conception of merit. The rejected white applicant might not be stigmatized, but he can insist that he is being treated unfairly.

This claim of individual unfairness finds support in the process theory of antidiscrimination: If the purpose of antidiscrimination law is to preserve the integrity of a process, to insure that individuals are treated fairly and to prevent them from being judged on the basis of irrelevant criteria, then it would not seem to matter whether the color used in the process were white or black. In either instance, the selection process would be unfair. The program may be well-intentioned, but the intention is of little solace to the rejected white applicants who, as Justice LEWIS F. POWELL put it, are being forced "to bear the burdens of redressing grievances not of their making."

Some of the proponents of affirmative action deny that there is any unfairness to the rejected white applicant. They argue that the claim of unfairness presupposes a special moral status for certain nonracial or meritocratic standards of evaluation, such as grades or performance on a standardized test, and that the requisite moral status is in fact lacking. The white has no "right" to be judged on the meritocratic standard. The more widely shared view among the proponents of affirmative action, however, acknowledges the unfairness caused to individual whites by the preference for blacks but treats it as a necessary, yet regrettable cost of eliminating caste structure. As Justice HARRY A. BLACKMUN put it, "In order to get beyond race, we must first take account of race. There is no other way." Those who take this position, like those who support an effects test, argue that the purpose of antidiscrimination law is to guard against those practices that would perpetuate or aggravate the subordinate position of blacks and other racial minorities and that it would be a perversion of history now to use that law to stop programs designed to improve the status of these groups.

The Supreme Court confronted the issue of affirmative action and weighed these arguments in two different settings. In one, affirmative action was undertaken at the behest of a court order. The theory underlying such orders is not that affirmative action is directly required by an antidiscrimination statute or by the Constitution but rather that it is needed to remedy a pattern or practice of discrimination. Affirmative action is part of the court's corrective plan. A court might, for example, require a company to grant a preference in the seniority system to blacks who were previously excluded from the company and thus unable to earn seniority rights equal to those of whites. The Supreme Court has accepted such remedial uses of race, although it has insisted that this kind of preference be limited to identifiable victims of past discrimination and that some regard be given to the interests of the innocent whites who might be adversely affected by the preferences. For example, blacks might be preferred for vacancies, but will not necessarily be allowed to force the layoff of whites.

The second setting consists of the so-called voluntary affirmative action programs, which are adopted not under orders from a court but out of a sense of moral duty or a belief that the eradication of caste structure is a desirable social policy. These voluntary affirmative action programs have proved more troublesome than the remedial ones, in part because they are not limited to individually identifiable victims of past discriminations (they are truly group oriented), but also because they are not preceded by a judicial finding that the institution has previously discriminated and they are not carried out under the close supervision of a court. The Supreme Court approved these affirmative action programs, but its approval has not been a blanket one. By the mid-1980s, it was established that under certain circumstances color consciousness is permissible, but the Court has been divided in its effort to define or limit these circumstances.

These divisions have been especially pronounced when the voluntary programs were used in higher education. In the first case, DEFUNIS V. ODEGAARD (1974), involving admissions to a state law school, the Court heard arguments and then dismissed the case on grounds of MOOTNESS because the rejected white applicant had graduated by the time the Court came to decide the case—a disposition that underscored the difficulty of the issue and the internal divisions on the Court. A few years later, the Court took up the issue again, in REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978), this time at the insistence of a rejected white applicant to a state medical school. In this case the Court reached the merits, but the divisions were even more apparent. No single opinion commanded a majority.

Four Justices thought the preferential program in *Bakke* unlawful. They stressed an antidiscrimination statute, which prohibited, in so many terms, discrimination based on race. These Justices reasoned that a preference for blacks is as much a discrimination based on race as one for whites. No discrimination means no discrimination. Another Justice thought preferential programs could be justified as a means of diversifying the student body, but he objected to the manner in which the particular program before the Court had been implemented. He would allow race to be considered in the admissions process, but would not permit separate tracks for applicants according to race. The remaining four Justices joined in an opinion that would sustain the program as it was in fact implemented, but two of these Justices also wrote separate opinions.

These deep-seated divisions did not resolve themselves substantially in the years following *Bakke*. One voluntary program received a slightly more resolute acceptance by the Court, however, in FULLILOVE V. KLUTZNICK (1980). This program was established by Congress and required a preference for minority-owned businesses in awarding contracts for federally funded public works projects. Although, once again, no single opinion commanded a majority of the Court, the vote of the Justices shifted from 1–4–4 to 6–3, and Chief Justice WARREN E. BURGER, who had objected (without qualification) to the preferential program in *Bakke*, voted to uphold this one. He also wrote one of three opinions that supported the constitutionality of the program. The Chief Justice studiously avoided choosing among "the formulas of analysis" articulated in *Bakke;* that is, he refused to say whether the affirmative action program had to meet the "compelling" interest standard or whether it was sufficient if the corrective ends of the program were deemed "important" or just "legitimate" and the means substantially related to those ends. He simply said, whatever the standard, this program meets it. He did, however, specifically and repeatedly mention one factor that might be the key to the change in his position and the Court's attitude in general: "Here we pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President."

With this emphasis on the role played by the coordinate branches of government in the affirmative action program, the Chief Justice returned to an idea that emerged in the analysis of the Court's treatment of facially innocent criteria, and that might well explain the Court's determination to confine the effects test to statutes: The Court is more prepared to accept the costs and dislocations that are entailed in the eradication of caste structure when it can share the responsibility for this project with the other branches of government. The Court does not want to go it alone. This suggests that the fate of equality will depend not only on the substantive commitments of the Justices, on their determination to bring the subordination of blacks and other racial minorities to an end, but also on their views about the role of the Court. The content of antidiscrimination law will in good measure depend on the willingness of the Justices to use their power to lead the nation, or if that impulse is lacking, on the willingness of the other branches of government to participate aggressively in the reconstruction of a society disfigured by one century of slavery and another of Jim Crow.

OWEN M. FISS
(1986)

Bibliography

BELL, DERRICK 1980 *Race, Racism and American Law.* Boston: Little, Brown.

BREST, PAUL 1976 In Defense of the Antidiscrimination Principle. *Harvard Law Review* 90:1–54.

COHEN, MARSHALL; NAGEL, THOMAS; and SCANLON, THOMAS 1977 *Equality and Preferential Treatment.* Princeton, N.J.: Princeton University Press.

EISENBERG, THEODORE 1981 *Civil Rights Legislation.* Charlottesville, Va.: Michie Co.

FISHKIN, JAMES 1983 *Justice, Equal Opportunity and the Family.* New Haven, Conn.: Yale University Press.

FISS, OWEN 1971 A Theory of Fair Employment Laws. *University of Chicago Law Review* 38:235–314.

——— 1976 Groups and the Equal Protection Clause. *Philosophy and Public Affairs* 5:107–177.

FREEMAN, ALAN 1978 Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine. *Minnesota Law Review* 62:1049–1119.

GARET, RONALD 1983 Communality and Existence: The Rights of Groups. *Southern California Law Review* 56:1001–1075.

GUNTHER, GERALD 1972 In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection. *Harvard Law Review* 86:1–48.

KARST, KENNETH and HOROWITZ, HAROLD 1974 Affirmative Action and Equal Protection. *Virginia Law Review* 60:955–974.

RAE, DOUGLAS 1981 *Equalities.* Cambridge, Mass.: Harvard University Press.

TUSSMAN, JOSEPH and TEN BROEK, JACOBUS 1949 The Equal Protection of the Laws. *California Law Review* 37:341–381.

## RACIAL DISCRIMINATION
## (Update 1)

In the mid-1980s, most observers would have said that the Supreme Court's view of racial discrimination was in equipoise. Some of the Justices seemed sympathetic to the aggressive purposeful use of racial criteria to end the legacy of racial subordination; others were skeptical of "benign discrimination" and looked instead to a constitutional principle of colorblindness as the cornerstone of a society free of discrimination. The last several terms have made plain the ascendancy of the latter view. It is now evident that a majority of the Justices are prepared to view with suspicion and hold to the highest standard of constitutional scrutiny governmental efforts to use racial classifications even to assist members of racial minorities. At the same time, governmental actions that disadvantage racial minorities will be sustained absent clear and unambiguous evidence of impermissible racial animus.

AFFIRMATIVE ACTION advocates are particularly concerned about the Court's recent willingness to view benign racial classifications with the same suspicion with which it has traditionally treated classifications intended to oppress. Where this leaves racially conscious programs is unclear, except that as before the stronger the showing that

a RACIAL PREFERENCE is related to a bona fide remedial goal, the greater the likelihood the Court will sustain it.

Thus in WYGANT V. JACKSON BOARD OF EDUCATION (1986), the Justices overturned a plan under which a school board extended to minority teachers what a plurality of the Court called "preferential protection against layoffs." The plan was part of the collective-bargaining agreement between the board and the union representing school teachers and was defended before the Court as an effort to alleviate "social discrimination" by providing a diverse set of role models in public schoolrooms. A three-Justice plurality declared that the proper test was STRICT SCRUTINY and held the plan invalid because more specific findings of prior discrimination were necessary before the layoff protection could be said to serve a COMPELLING STATE INTEREST.

In contrast, in UNITED STATES V. PARADISE (1987), the Justices voted 5–4 to sustain a federal district court's imposition of a "one-for-one" hiring plan, pursuant to which the Alabama Department of Public Safety was obliged to remedy its past failure to hire black troopers by hiring one black trooper for each white trooper hired. The SOLICITOR GENERAL argued that even when a racially conscious remedial program was ordered by a court, strict scrutiny was the proper test, and the program could survive only on a showing of a compelling state interest. Four Justices, in an opinion by Justice WILLIAM J. BRENNAN, refused to decide this question, ruling that the program could meet any level of scrutiny because it was "justified by a compelling interest in remedying the discrimination that permeated entry-level practices and the promotional process alike." The plurality further noted that the district court had imposed the one-for-one plan only after the department had repeatedly failed to comply with earlier decrees.

Probably the most controversial benign discrimination decision—and the one with the most far-reaching implications—was RICHMOND (CITY OF) V. J. A. CROSON CO. (1989), in which the Justices struck down a program under which the City of Richmond required its prime contractors to subcontract thirty percent of the dollar amount of each contract to minority-owned firms. In *Croson*, a majority of the Justices ruled explicitly that strict scrutiny was the proper level of review for benign discrimination cases. Although there was no majority opinion on the point, six Justices repudiated as insufficiently narrow the city council's defense that the program was needed to eliminate the effects of societal discrimination.

Although it is true that the Justices have always taken the position that even benign classifications are subject to the highest level of constitutional scrutiny, they have not previously applied the rule with quite the strictness used in *Croson.* Indeed, FULLILOVE V. KLUTZNICK (1980), which sustained a federally mandated set-aside program for certain construction projects, is in one sense indistinguishable: in *Fullilove* and in *Croson*, the relevant body (in the first case the Congress, in the other the city council) had before it no record of past discrimination. This aspect of *Fullilove* can be preserved by reference to the special fact-finding competence of the Congress, although this reed is a thin one because the Congress found no facts; in any case, the Justices are noticeably less hospitable to *Fullilove*-style set-asides by state or local governments than they were to Congress's set-asides a decade ago. But at least six Justices seem prepared to pay strong deference to the power of Congress to adopt programs of affirmative action in enforcing the FOURTEENTH AMENDMENT.

At the same time, the Court has arguably shown increasing sensitivity to certain claims of racial discrimination in the CRIMINAL JUSTICE SYSTEM. Thus in *Hunter v. Underwood* (1985), a unanimous Court struck down a neutrally applied disenfranchisement of persons convicted of misdemeanors involving "moral turpitude" on the ground that it was originally enacted decades earlier for the purpose of discriminating against black citizens. The following term, in BATSON V. KENTUCKY (1986), the Justices eased the burden of a defendant seeking to prove that the prosecution had used its peremptory challenges to exclude jurors on the basis of race. On the same day, the Justices decided in *Turner v. Murray* that a defendant in a capital case has the right to examine prospective jurors about racial bias.

But the trend has gone only so far. In the following term, the Justices made plain their resistance to inferring impermissible discriminatory motivation from circumstantial evidence, especially statistical evidence. In MCCLESKEY V. KEMP (1987), a black convicted of murder argued that Georgia's decision to sentence him to death violated the Eighth and Fourteenth Amendments because statistics demonstrated that black defendants, especially black defendants whose victims were white, were far more likely than white defendants to receive CAPITAL PUNISHMENT. The statistics (generally referred to as the Baldus study, after the principal author of the underlying work) were stark indeed; they indicated, among other disparities, that capital juries in Georgia handed down death sentences to black defendants whose victims were white twenty-two times more frequently than they did to black defendants whose victims were black.

The *McCleskey* majority, however, was unimpressed, responding tersely, "We refuse to assume that what is unexplained is invidious." This answer in a sense eluded McCleskey's point, which was that the disparity was great enough to place the burden of explanation on the state. The Court replied that other explanations were plausible, adding that juror discretion should not be condemned or

disturbed simply because of an "inherent lack of predictability." As long as forbidden racial animus was not the only possible explanation, the Court would not assume that animus was at work.

As the dissenters pointed out, the result in *McCleskey* seemed to stand as a departure from the BURGER COURT decision in *Arlington Heights v. Metropolitan Housing Development Corp.* (1977). In *Arlington Heights*, the Justices suggested that racial animus might be inferred from "a clear pattern" of official behavior, "unexplainable on grounds other than race." The *McCleskey* majority was correct that other explanations for the Baldus data are conceivable, and some critics have offered them. But in *McCleskey*, the Justices declined even to speculate.

Nevertheless, in important respects, *McCleskey* differed from other racial-discrimination cases. First, as several observers have noted, the Baldus study most strongly supports an argument that the murderers of black people are systematically treated with greater leniency than the murderers of white people. If one believes that the death penalty deters the crime of murder, then the implication is that the state is doing less to protect the lives of black people than to protect the lives of white people. Warren McCleskey, convicted of killing a police officer while committing another felony, was not a particularly attractive candidate to raise this issue. The better case (unfortunately for the Supreme Court's paradoxical ruling in *Linda R.S. v. Richard D.*, which denied standing to raise a claim that the law is inadequately enforced) would be one brought by law-abiding black citizens seeking to protect their lives and property.

A second distinction between *McCleskey* and other cases is that, had it gone the other way, *McCleskey* might have opened up a Pandora's box of claims that blacks in the criminal process—from arrests to sentencing—are treated more harshly than whites, claims that are supported by considerable empirical literature. Even if the literature is accurate (again, there are critics), it is difficult to imagine what practical relief might be fashioned in such cases. For those who are convicted, mandatory resentencing is one possibility, although the continued judicial monitoring of sentencing disparities could produce a procedural nightmare. The fear that this slippery slope lay ahead might well have been a part of the majority's calculus.

The Justices have also worked important changes in the interpretation of one of the keystones of the "Second Reconstruction," Title VII of the CIVIL RIGHTS ACT OF 1964. In *Ward's Cove v. Antonio* (1989), the Justices reexamined the burden of proof of a plaintiff relying on the Court's decision in GRIGGS V. DUKE POWER CO. (1971). *Griggs* had read Title VII to prohibit an employment practice with racially identifiable disparate impacts unless the employer was able to show a business necessity for the test. In *Ward's Cove*, the Court ruled 5–4 that the plaintiff must carry the burden of demonstrating the causal link to the composition of the market of people qualified to do the job in question. Critics of *Ward's Cove* argued that the decision had shifted the burden from the employer to the employees and would make employment-discrimination cases more difficult to prove; defenders responded that Title VII plaintiffs should be required to prove all elements of their claims.

Depending on one's point of view, then, the recent work of the Supreme Court in the area of racial-discrimination law has represented either a tragic abandonment of the judiciary's traditional role as protector of the racially oppressed or a return to the shining principles of color-blindness as the fundamental rule for government action. But not all significant changes in the area of racial discrimination require judicial action. In fact, one of the most important developments of recent years involved an attempted legislative correction of a judicial wrong. The WORLD WAR II decisions sustaining the internment of Japanese Americans are widely regarded as among the most horrific judicial decisions of the twentieth century (although it must be said that the programs could never have been approved had the President and Congress not imposed them in the first place). In the mid-1980s, federal courts vacated the convictions of Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu for evading registration for internment. A DAMAGES claim by former detainees was rejected by the Federal Circuit in 1988 on statute of limitations grounds, but in August of that year, the Congress adopted legislation apologizing for the internment program and granting to each surviving internee compensation of roughly $20,000—not perhaps the same as justice, but at least an acknowledgment that justice was due.

STEPHEN L. CARTER
(1992)

(SEE ALSO: *Constitutional Remedies; Capital Punishment and Race; Japanese American Cases; Race-Consciousness; Sentencing.*)

Bibliography

AREEN, JUDITH et al. 1989 Constitutional Scholars' Statement on Affirmative Action After *City of Richmond v. J. A. Croson Co. Yale Law Journal* 98:1711–1716.

FRIED, CHARLES 1989 Affirmative Action After *City of Richmond v. J. A. Croson Co.:* A Response to the Scholars' Statement. *Yale Law Journal* 99:155–161.

KENNEDY, RANDALL L. 1988 *McCleskey v. Kemp:* Race, Capital Punishment, and the Supreme Court. *Harvard Law Review* 101:1388–1443.

# RACIAL DISCRIMINATION
## (Update 2)

Supreme Court decisions at the end of the 1980s heralded the ascendancy of colorblind constitutionalism. Decisions in the 1990s confirmed the preeminence of that vision.

In SHAW V. RENO (1993), the Court ruled in favor of a FOURTEENTH AMENDMENT challenge to North Carolina's enactment of a majority-black ELECTORAL DISTRICT, created pursuant to an agreement with the U.S. Department of Justice under the terms of the VOTING RIGHTS ACT OF 1965. MOBILE V. BOLDEN (1980) requires that one show both an intent to discriminate and discriminatory effect to prevail on an EQUAL PROTECTION challenge to electoral districting. The challengers of the North Carolina plan, which resulted in the election of the first African American member of Congress from that state since RECONSTRUCTION, alleged neither, claiming instead a violation of their right to "participate in a 'color-blind' electoral process." Despite the novelty of this claim, the Court held that they had stated an adequate claim for relief. Focusing on the "extreme irregularity" in the shape of the district, *Shaw* suggested that the districting legislation "was unexplainable on grounds other than race," and so, prohibited under the Fourteenth Amendment absent a showing of a COMPELLING STATE INTEREST. *Shaw* worked a substantial revision of equal protection doctrine in this area, although it did so on the highly context-specific basis of district shape.

*Shaw* says less about the majority's general concern for quashing racial discrimination than about its concern that government not consider race in efforts to remedy past discrimination. Consider ADARAND CONSTRUCTORS, INC. V. PEÑA (1995). At issue was the STANDARD OF REVIEW to apply when the federal government relies on a racial classification in an AFFIRMATIVE ACTION program: the STRICT SCRUTINY necessary where the government harms a racial group; or, in recognition of the benign purpose of the classification, a less onerous intermediate standard. Because strict scrutiny is nearly always fatal to the law under review, the answer to this question goes directly to the viability of government-sponsored affirmative action programs. A plurality in FULLILOVE V. KLUTZNICK (1980) upheld a federal program similar to the one at issue in *Adarand* along lines approximating an intermediate standard of review. The Court in RICHMOND (CITY OF) V. J. A. CROSON CO. (1989), however, ruled that where a municipality attempted a similar program, it would have to meet the higher level of justification. *Croson* distinguished the reach of the federal government in the area of race relations, stressing the power to remedy racism vested in Congress by the FOURTEENTH AMENDMENT, SECTION 5. Only the federal government would be allowed leeway in designing race-based remedies; other governmental actors would be held to a stricter standard regardless of whether they sought to harm or help minorities. Relying on *Fullilove* and *Croson*, the Court in METRO BROADCASTING, INC. V. FCC (1990) used an intermediate standard to uphold a federal affirmative action program. Nevertheless, *Adarand* sidestepped *Fullilove* and OVERRULED *Metro Broadcasting*, imposing a heightened level of justification on the federal government. Congress, like the states, now faces strict scrutiny in relying on racial classifications, irrespective of whether for harmful or remedial purposes. (Note, though, that *Adarand* held off on whether strict scrutiny means the same thing for Congress as for others, leaving open the future possibility of relatively more though still limited deference to the former.)

The MAJORITY OPINIONS in *Croson*, *Shaw*, and *Adarand*, all by Justice SANDRA DAY O'CONNOR, stop just short of announcing that government may never rely on race in the effort to remedy social inequality. Meanwhile, Justices ANTONIN SCALIA and CLARENCE THOMAS strongly urge the Court to move to full colorblindness. In his concurrence in *Adarand*, Scalia suggests that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction." Thomas expounds "a 'moral and constitutional equivalence' between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality." Whether the Court will complete or retreat from its attack on affirmative action remains to be seen. For now, however, the Court seems far more concerned with limiting race discrimination of the remedial than of the invidious sort. In this context, one cannot help but recall Charles L. Black, Jr.'s injunction, in responding to criticism of BROWN V. BOARD OF EDUCATION (1954), that we laugh when confronted with the argument that SEGREGATION amounted to "equal treatment." Such laughter might be appropriate here, too, in response to the suggestion that affirmative action and Jim Crow be morally and legally equated, were it not for the fact that it is a majority of Supreme Court Justices who insist on the equation.

IAN F. HANEY LÓPEZ
(2000)

Bibliography

FREEMAN, ALAN 1978 Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine. *Minnestota Law Review* 62:1049–1119.

GOTANDA, NEIL 1991 A Critique of "Our Constitution is Colorblind." *Stanford Law Review* 44:1–68.

SYMPOSIUM 1996 Race-Based Remedy. *California Law Review* 84:875–1232.

# RACIAL PREFERENCE

Debate about racial-preference policies stirs particularly strong passions because it evokes one of the central animating concerns of liberal constitutionalism—its opposition to any system of hereditary castes. But there is little agreement today about what the constitutional principle of equality actually requires.

Some version of racial equality has always been insisted on, at least since the ratification of the FOURTEENTH AMENDMENT. Even in the 1890s, when the Supreme Court acquiesced to racial SEGREGATION in the South, it insisted that the separation of the races should not be understood to "imply the inferiority of either race" or be taken as a sign of governmental preference for one race over another. At the same time, however, the Court observed in PLESSY V. FERGUSON (1896) that "in the nature of things," the Fourteenth Amendment "could not have been intended to . . . enforce social as distinguished from political equality. . . ." The Court treated racial bias and inequality among private citizens as equivalent to class antagonisms between rich and poor or to sectarian tensions between rival religious faiths—facts of life that a constitutional government could not expect to suppress.

For a brief period following the modern Supreme Court's ruling against school separation in BROWN V. BOARD OF EDUCATION (1954), there seemed to be an emerging consensus that equality would, after all, be best served by dismantling all racial distinctions in public law. Thus, the historic CIVIL RIGHTS ACT OF 1964 prohibited, in general terms, "discrimination on the basis of race," rather than discrimination against blacks or other racial minorities in particular. But, among other things, the 1964 legislation sought for the first time to prohibit EMPLOYMENT DISCRIMINATION throughout the American economy. Was this done to enforce a new ideal of social indifference to race or to improve the economic condition of depressed minorities?

Legislative history might be cited to support either view, but the latter view largely prevailed in federal enforcement policy. By the early 1970s, federal officials had come to define RACIAL DISCRIMINATION as any employment standard that disproportionately excluded minority applicants, regardless of the employer's intent; in this and other ways, government policy, with approval from the courts, pressed employers to redefine their hiring and promotion policies to secure "appropriate" percentages of employees from specified minority groups, even if this required passing over better-qualified whites. (See, for example, GRIGGS V. DUKE POWER (1971) and UNITED STEELWORKERS OF AMERICA V. WEBER (1979).) With federal encouragement, state programs also offered preferences to minority students in admissions to professional schools (REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE, 1978); other programs began to offer preferences to minority businessmen, as, for example, to minority-owned firms bidding for federal construction grants (FULLILOVE V. KLUTZNICK, 1980).

Court decisions upholding such practices generally invoked the need to "remedy" past discrimination, implying that localized preferences were acceptable only as temporary correctives to offset the effects of particular past abuses. In 1990, however, a five-Justice majority of the Supreme Court upheld a minority-preference policy in the award of broadcast licenses by the Federal Communications Commission (FCC). Noting the small number of minority-owned stations, the Court, in METRO BROADCASTING, INC. V. FCC (1990), endorsed an explicit preference policy as a permissible device for ensuring broadcasting "diversity," disclaiming any need to consider whether there had actually been a history of past discrimination in this particular field.

Critics of such preference policies—including dissenting Justices—have protested that they violate the spirit of constitutional guarantees and the letter of the CIVIL RIGHTS laws by prescribing different standards for whites and minorities. Worse, the critics argue, such policies treat minority individuals, not as actual individuals with their own personal merits, but as mere representatives of their racial groups. Defenders of preferential policies insist that civil-rights legislation and constitutional guarantees have been established to help minorities overcome the effects of discrimination and that such help should not be denied for the sake of an entirely abstract and unrealistic doctrine of equal treatment. They argue that guarantees of equality or nondiscrimination should be seen as bulwarks against policies that "stigmatize" or "subjugate" people because of their race, and no AFFIRMATIVE ACTION program, they say, can seriously be regarded as "stigmatizing" or "subjugating" whites as a whole. The critics of preference policies respond that, insofar as preference policies assume that whites would still exclude others without such mandatory preferences, the policies do stigmatize whites—as racist; insofar as preference policies assume that blacks and other minorities could not compete in American society without such governmental preferences, they stigmatize minorities as incapable.

Not surprisingly, critics of preference policies, emphasizing the potential for manipulation and abuse in governmental controls, would place more reliance on the working of private-market decision making; those who defend preference policies tend to take a much more sanguine view of governmental intervention and to regard racially unequal outcomes in the market as inherently suspect. But the debate about racial preference is not simply a special case of a larger argument about the proper scope of government. Neither liberals nor conservatives on the Supreme Court would be likely, for example, to tolerate a

policy that sought to enhance broadcasting "diversity" by providing preference to non-Jewish or non-Protestant firms in the award of broadcasting licenses by the FCC.

In fact, the Court has repeatedly struck down governmental financial aid to religious schools, even though such programs might well be seen as efforts to equalize educational opportunity for religious minorities. Such programs, the Court insisted in LEMON V. KURTZMAN (1973), carry too much potential for political divisiveness, setting religious school constituencies against public school constituencies. Yet many of the same Justices and commentators who have most insistently opposed such aid to religious minorities have been quite sympathetic to government preference policies based on race. The difference is not plausibly explained on the grounds that religion is more divisive than race in contemporary American society. If anything, it seems to be the severity of racial divisions in American society that makes proponents of racial-preference policies regard them as necessary.

Recent studies suggest that despite two decades of racial preference policies the gap between whites and blacks in earnings and in educational attainments is scarcely diminished since the 1960s and in some areas is greater than it was. Some critics of racial preference see this as an additional reason for abandoning such programs. Many supporters of these programs regard this fact instead as an additional reason for redoubling the scale and intensity of preference. This may prove an area of constitutional dispute that is too large to be solved by mere judicial pronouncements.

JEREMY RABKIN
(1992)

Bibliography

ABRAM, MORRIS B. 1986 Affirmative Action: Fair Shakers and Social Engineers. *Harvard Law Review* 99:1312–1326.

STRAUSS, DAVID A. 1986 The Myth of Colorblindness. *Supreme Court Review* 1986:99–134.

## RACIAL QUOTAS

Programs of AFFIRMATIVE ACTION, aimed at increasing opportunities for women and members of racial and ethnic minorities in employment and higher education, have sometimes taken the form of numerical quotas. In REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978) sixteen places in a state university medical school's entering class were reserved for minority applicants; in FULLILOVE V. KLUTZNICK (1980) ten percent of funds in a federal public works program were reserved for minority-owned businesses. Such quotas have been challenged as denials of the EQUAL PROTECTION OF THE LAWS, with mixed doctrinal results.

Opponents of racial quotas maintain that it is offensive to penalize or reward people on the basis of race—in short, that the Constitution is, or ought to be, colorblind. Opponents discern in quotas a subtle but pervasive racism, in the patronizing assumption that persons of particular colors or ethnic backgrounds cannot be expected to meet the standards that apply to others. This assumption, the opponents argue, is, in its own way, a BADGE OF SERVITUDE, stigmatizing the quotas' supposed beneficiaries. Some opponents see quotas as part of a general trend toward dehumanization, robbing individuals of both personal identity and human dignity, lumping them together in a collectivity based on other people's assumptions about racially defined traits.

Unfortunately for today's America, race has never been a neutral fact in this country. Those who defend affirmative action generally admit to some uneasiness about the potential abuse of racial distinctions. They argue, however, that there is no real neutrality in a system that first imposes on a racial group harsh disadvantages, readily transmitted through the generations, and then tells today's inheritors of disadvantages that from now on the rules prohibit playing favorites. If either compensation for past RACIAL DISCRIMINATION or the integration of American institutions is a legitimate social objective, the proponents argue, a government in pursuit of those objectives can hardly avoid taking race into account.

The recent attack on racial quotas draws fuel from an emotional reservoir filled two generations ago by universities that limited admission of racial and religious minorities—most notably Jews—to specified small quotas. This ugly form of discrimination was part of a systematic stigmatization and subordination of minority groups by the dominant majority. The recent quotas are designed to remedy the effects of past discrimination, and—when they serve the objective of compensation or integration—are not stigmatizing. They do, however, use race or ethnic status as a means of classifying persons, and thus come under fire for emphasizing group membership rather than "individual merit."

The right to equal protection is, indeed, an individual right. Yet the term "individual merit" misleads in two ways. The word "individual" misleads by obscuring the fact that every claim to equality is a claim made on behalf of the group of persons identified by some set of characteristics: race, for example, or high college grades and test scores. To argue against a racial preference is not to support individual merit as against a group claim, but to argue that some other group, defined by other attributes, is entitled to preference.

"Merit" misleads by conveying the idea of something wholly intrinsic to an individual, apart from some definition of community needs or purposes. When we reward

achievement, we are not merely rewarding effort, but are also giving out prizes for native talents and environmental advantages. Mainly, we reward achievement because society wants the goods produced by the combination of talents, environment, and effort. But it is also reasonable to look to past harms and potential contributions to society in defining the characteristics that deserve reward. We admit college achievers to law schools not to reward winners but to serve society with good lawyers. If it be legitimate to seek to end a system of racial caste by integrating American society, nothing in the idea of individual merit stands in the way of treating race as one aspect of "merit."

Race-conscious remedies for past governmental discrimination were approved in decisions as early as SWANN V. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION (1971). Affirmative action quotas pose another question: can government itself employ race-conscious remedies for the effects of past societal discrimination? In *Fullilove*, six Justices agreed on an affirmative answer to that question, at least when Congress prescribes the remedy. *Bakke* was complicated by a statutory claim; its result—and its practical effect in professional school admissions—was a distinction between racial or ethnic quotas, which are unlawful, and the use of racial or ethnic status as "one factor" in admission, which is lawful.

The distinction was a political success; it drew the fangs from a controversy that had turned venomous. But the distinction between a quota and a racial factor is more symbol than substance. If race is a factor, it will decide some cases. How many cases? The weight assigned to race surely will be determined by reference to the approximate number of minority admittees necessary to achieve the admitting university's goals of educational "diversity." The difference between saying "sixteen out of a hundred" and "around sixteen percent" is an exercise in constitutional cosmetics—but it seems to have saved affirmative action during a critical season.

KENNETH L. KARST
(1986)

Bibliography

KARST, KENNETH L. and HOROWITZ, HAROLD W. 1974 Affirmative Action and Equal Protection. *Virginia Law Review* 60:955–974.

VAN ALSTYNE, WILLIAM W. 1979 Rites of Passage: Race, the Supreme Court, and the Constitution. *University of Chicago Law Review* 46:775–810.

## RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

The Racketeer Influenced and Corrupt Organizations Act (RICO) was enacted by Congress in 1970 to provide federal prosecutors with a powerful tool against organized crime. RICO has been used against the ruling commission of the Mafia in New York City, against corrupt politicians running local government agencies, against Croatian terrorists, against political demonstrators, against the Sicilian Mafia for importing billions of dollars of heroin into the United States in the pizza connection case (the longest criminal trial in federal history), in the largest criminal tax-fraud prosecution in history, and against massive insider-trading securities fraud.

RICO is a complex statute that creates both criminal sanctions and civil remedies, enforceable by the government or by injured private parties. The heart of the statute defines four crimes. First, it is illegal to establish, operate, or acquire an interest in any enterprise affecting either INTERSTATE COMMERCE or FOREIGN COMMERCE with income from a pattern of racketeering activity or collection of an unlawful debt. Second, the act prohibits acquiring or maintaining an interest in any such enterprise through a pattern of racketeering activity or collection of an unlawful debt. Third, it is a crime for any employee or associate of any such enterprise to participate in the enterprise through a pattern of racketeering activity or collection of an unlawful debt. And fourth, it is illegal to conspire to violate any of the first three provisions. A "pattern" of racketeering requires the commission of two or more "predicate offenses" within a ten-year period. These offenses include nine categories of state crimes and twenty-six federal crimes, including murder; drug trafficking; bribery; and mail, wire, and securities fraud. As discussed in *United States v. Turkette* (1981), an "enterprise" includes any individual, partnership, corporation, association, union, or group of individuals associated in fact, whether legitimate or illegitimate. Conviction under RICO carries severe criminal penalties and forfeiture of ill-gotten gains. A person may be liable for triple damages, costs, and attorneys' fees in a private civil RICO action. RICO is unique in its complexity among criminal statutes because of the sheer number of potential predicate offenses and because of the indefinite terms used in defining a violation.

In *H.J. Inc. v. Northwestern Bell Telephone Co.* (1989) the Supreme Court interpreted a "pattern of racketeering activity" to require both "continuity" and "relationship": two or more predicate offenses that are somehow related and that pose a threat of continued criminal activity must be committed within a ten-year period. Four of the more conservative Justices, although concurring in the JUDGMENT, suggested that the pattern requirement may be unconstitutionally void for vagueness in both criminal and civil cases. Because it is not clear what RICO requires beyond two predicate offenses, a potential defendant may not know whether his or her conduct is covered by RICO.

Lower courts, however, have uniformly held that the pattern requirement is not unconstitutionally vague because the underlying predicate offenses are clearly defined crimes. People of common intelligence, therefore, do not have to guess at what is forbidden, and the discretion of police, prosecutors, juries, and courts in enforcing RICO is constrained. Gerard Lynch has argued that unexpectedly draconian penalties nevertheless may be imposed based on a prosecutor's unrestricted discretion to transform ordinary offenses into a RICO prosecution. This may implicate the principle of legality (penal legislation must describe with precision the conduct it prohibits and the potential punishment) and the related constitutional prohibitions against VAGUENESS and EX POST FACTO LAWS.

Among the most powerful applications of RICO has been its use to seek pretrial restraint and forfeiture of illegal proceeds, including assets that a defendant would otherwise use to hire a defense attorney at the very criminal trial where guilt and thus forfeitability will be determined. In *Caplin Drysdale, Chartered v. United States* (1989) and *United States v. Monsanto* (1989) (construing parallel forfeiture provisions under the continuing criminal-enterprise statute), the Court held, 5–4, that such restraint and forfeiture do not violate the Sixth Amendment RIGHT TO COUNSEL or the Fifth Amendment DUE PROCESS right to a FAIR TRIAL. A defendant who is thus left INDIGENT, the majority said, can obtain appointed counsel. The Court left open whether due process requires a fair hearing before a pretrial restraint may be imposed. The Court also construed the forfeiture provisions broadly in *Russello v. United States* (1983) to serve the congressional purpose of creating a potent weapon to attack the economic roots of organized crime. Lower courts have held that forfeiture may be cruel and unusual, in violation of the Eighth Amendment, if the interest forfeited is grossly disproportionate to the offense committed.

Although the Supreme Court has not yet addressed most constitutional attacks on RICO, in *Sedima, S.P.R.L. v. Imrex Co.* (1985), the Court rejected the circuit court's suggestion that a private civil RICO action in the absence of a prior criminal conviction impermissibly imposes punishment while avoiding the protections of constitutional CRIMINAL PROCEDURE.

Lower courts have held that various applications of RICO do not violate the DOUBLE JEOPARDY clause. Dual prosecutions—by the state for the predicate offenses and by the federal government for racketeering based on those offenses—are permitted because different sovereigns and separate offenses are involved. Double jeopardy does not bar federal prosecutions for both the underlying federal predicate offenses and RICO offenses based on those predicates, prosecutions for both a RICO conspiracy and substantive RICO offenses, separate sentences for predicate and RICO offenses, or separate sentences for RICO conspiracy and RICO substantive offenses. In *Grady v. Corbin* (1990) the Court held that double jeopardy bars a subsequent prosecution if, to establish an essential element of an offense, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted. The impact of *Grady* remains to be seen.

Even though a predicate act committed before the statute went into effect may be used to establish a pattern of racketeering, RICO requires that at least one act be committed after its effective date. A person who has committed a prior act is therefore on notice that a subsequent act will subject him or her to liability. Thus, RICO is not unconstitutional as an ex post facto law or BILL OF ATTAINDER.

Private civil plaintiffs have expanded civil RICO in dramatic ways against traditional businesses with no ties to organized crime. RICO civil suits have also been employed by both private and government entities in efforts to suppress unpopular political groups, including antinuclear demonstrators in Georgia, an antipornography group in Florida, and anti-abortion protestors across the country. In West Hartford, Connecticut, the city government even sued a local newspaper for covering anti-abortion protests. Such suits raise significant free-speech problems. Many of these expansive uses of RICO were not anticipated by Congress, but nevertheless fall within the plain language of the statute. Claims of abuse have produced repeated efforts with little success to reform RICO through judicial interpretations, legislation, or Justice Department guidelines. It is unlikely that the Courts will reform RICO by applying the BILL OF RIGHTS. The concurring opinion in *H. J. Inc.* notwithstanding, the Supreme Court has not been inclined to find new constitutional protections for the accused. However, at least some federal courts may be unwilling to hear certain kinds of RICO suits. In *Town of West Hartford v. Operation Rescue* (2nd circuit, 1990), the federal appeals court dismissed a civil RICO suit against anti-abortion protestors engaged in CIVIL DISOBEDIENCE. The court labeled the suit's RICO allegations "blatantly implausible" and indicated that the court had no willingness "to countenance fanciful invocations of the draconian RICO weapon in civil litigation."

ROBERT DIDEROT GARCIA
(1992)

Bibliography

LYNCH, GERARD E. 1987 RICO: The Crime of Being a Criminal (parts I-IV). *Columbia Law Review* 87:661–764, 920–984.

NOTE 1990 RICO's "Pattern" Requirement: Void for Vagueness? *Columbia Law Review* 90:489–527.

# RADICAL POPULIST CONSTITUTIONAL INTERPRETATION

Although the Supreme Court claims to have the final word in CONSTITUTIONAL INTERPRETATION, populist groups have often claimed to have rival interpretive authority. Sometimes these groups have offered interpretations in sharp disagreement with the Court's views. In contrast to the Court's fairly middle-of-the-road approach, many of these groups interpret the Constitution to reach radical conclusions.

Perhaps the clearest example of this phenomenon is the disjunction between judicial and radical populist interpretations of the SECOND AMENDMENT. On the one hand, the Court has given the amendment little attention. In *Presser v. Illinois* (1886), the Court held that the Second Amendment limits only the federal government, as the FOURTEENTH AMENDMENT does not incorporate it against the states. In the twentieth century, the Court has squarely addressed the meaning of the amendment only once, in the profoundly ambiguous *Miller v. United States* (1939). Some believe that *Miller* interprets the Second Amendment as a protection for individuals to own private arms. Others believe that it interprets the amendment as a protection only for state militias to own arms. In the years since *Miller*, federal appeals courts have generally interpreted the amendment in a narrow way, holding that the Fourteenth Amendment does not incorporate it against the states or that it protects arms-holding only within a state militia.

In sharp contrast, radical populist groups have generally interpreted the Second Amendment as a protection for the right of all individuals to own guns, for the purposes of hunting, self-defense, and, especially, resistance to government. These groups include some gun-rights groups, anti-environmentalist groups, income tax resisters, anti-abortion protesters, neo-Nazi and other hate groups, and most of the MODERN MILITIA movement. Some of these groups believe that much current government activity is unconstitutional, such as the income tax, land use regulation, and federal police activity. The Second Amendment, however, seems to be a common thread uniting otherwise different groups, for good reason. At the heart of American radical populism is distrust of government, and the Second Amendment, construed as a protection for the right of resistance to government, is the central constitutional provision supporting the idea that government may never be trusted with a monopoly of violence. For the same reason, the interpretation of the Second Amendment cannot belong exclusively to the Court: If the point in the amendment is to ensure the possibility of resistance to government, then it would be folly to entrust its interpretation to a government body.

In some ways, the methods of radical populist constitutional interpretation are similar to judicial constitutional interpretation, but in other ways they are quite different. Like many judges, radical populist groups rely heavily on the text of the Constitution and the writings of the Framers; indeed, radical populist constitutionalists may well be much more familiar with the works of the Framers than most Americans. Like some judges but unlike others, they maintain that the text and the Framers' ORIGINAL INTENT is clear and unambiguous; in particular, they hold that the Second Amendment will bear only one meaning, a protection for an individual right to bear arms. Unlike almost all judges, radical populist constitutionalists form a very closed community of interpretation. Counterarguments from outside their community—from scholars, politicians, or judges—rarely or never appear in their writings. In other words, radical populist constitutionalists typically talk only or overwhelmingly to one another. They are engaged, not in an interpretive dialogue, but in a process more akin to responsive chanting or preaching to the converted. This dimension of their method of interpretation emphatically distinguishes it from judicial and scholarly methods; radical populist constitutionalists exhibit nothing comparable to the adversary method, the writing of DISSENTING OPINIONS, the process of appellate review, or the vigorous disagreement in the law journals.

As these groups are sectarian in their interpretive method, many also give a sectarian substantive meaning to the Second Amendment. Many radical populist constitutionalists view the amendment as a path of empowerment for their particular identity group(s). They find in the amendment an alternative to, even a transcendence of, politics, with all of its messy give-and-take. When the government (meaning the political process) becomes too perfidious (meaning unsupportive of their identity group), then radical populists believe that they have the RIGHT OF REVOLUTION, including the right to take up arms to end oppression. In the process, some radical populists actually claim the right to oppress other groups; they argue that the right to bear arms is held only by the American people, which includes (in the radicals' view) only whites, or Christians, or those who agree with the radical populists. As a result, when the revolution comes, radical populists will enjoy supremacy, and other groups—who currently enjoy political power—will be forced into subordination. Other groups make an unoppressive but still sectarian claim:

Jews for the Preservation of Firearms Ownership and the Women and Guns movement, for example, maintain that the Second Amendment should be read to protect an individual right to bear arms, because Jews and women will then be able to protect themselves against violent anti-Semitism and misogyny.

In other words, these constitutional interpreters are radical in two ways: first, they distrust politics as a means of resolving difference; and second, they are deeply sectarian advocates for their particular identity groups, not proponents of society as a whole. Those two features, however, are shared—to a reduced degree—by much of the American population. If these groups are radical, then, it is only because they are different in degree, not kind, from the rest of America. As a result, they squarely raise the question whether the American citizenry could plausibly develop a populist constitutional interpretation that is not radical; that is, that affirms political compromise and seeks the good of the whole. If such a thing is not possible, the Court may have good reason to claim to be the final arbiter of the meaning of the Constitution.

DAVID C. WILLIAMS
(2000)

(SEE ALSO: *Gun Control; Incorporation Doctrine; Nonjudicial Interpretation of the Constitution.*)

Bibliography

AHO, JAMES A. 1990 *The Politics of Righteousness: Idaho Christian Patriotism.* Seattle: University of Washington Press.

BROWN, RICHARD MAXWELL 1975 *Strain of Violence: Historical Studies of American Violence and Vigilantism.* New York: Oxford University Press.

EHRMAN, KEITH A. and HENNIGAN, DENNIS A. 1989 The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately? *University of Dayton Law Review* 15:5–58.

KATES, DON B. 1983 Handgun Prohibition and the Original Meaning of the Second Amendment. *Michigan Law Review* 82:204–273.

QUIGLEY, PAXTON 1989 *Armed & Female.* New York: E. P. Dutton.

SIMKIN, JAY; ZELMAN, AARON; and RICE, ALAN M. 1994 *Lethal Laws.* Milwaukee, Wisc.: Jews for the Preservation of Firearms Ownership.

STOCK, CATHERINE MCNICOL 1996 *Rural Radicals: Righteous Rage in the American Grain.* Ithaca, N.Y.: Cornell University Press.

WILLIAMS, DAVID C. 1996 The Militia Movement and Second Amendment Revolution: Conjuring with the People. *Cornell Law Review* 81:879–952.

## RADIO

See: Broadcasting

## *RAILROAD COMMISSION OF TEXAS v. PULLMAN COMPANY*

See: Abstention Doctrine

## RAILROAD CONTROL ACT
40 Stat. 451 (1918)

Railroad service virtually ceased during the severe winter of 1917–1918. The extraordinary wartime volume of traffic and the railroads' fiscal and physical inability to meet its demands prompted President WOODROW WILSON to take control of all railway transport in the country on December 26, 1917. Congress ratified his proclamation in March 1918, by "emergency legislation enacted to meet conditions growing out of war."

The substance of the act concerned reimbursement of the owners for the use of their property while under government management. Congress set JUST COMPENSATION for this TAKING OF PROPERTY at the average operating income for the prior three years and also insured "adequate and appropriate [monies] for the maintenance, repair, renewals and depreciation of property." This legislation temporarily superseded much of the regulatory power of the Interstate Commerce Commission (ICC). It authorized the President to initiate "reasonable and just" rates which became effective without the ordinarily required wait and without ICC approval. That body could review the reasonableness of the rates but must give "due consideration" to the "unified and coordinated national control" and the stipulation that the roads "are not in competition." The constitutionality of the act as a whole was never challenged but separate sections were sustained under the WAR POWERS in a series of cases.

DAVID GORDON
(1986)

## RAILROAD REGULATION

See: Economic Regulation

## RAILROAD RETIREMENT ACT
48 Stat. 1283 (1934)

This act established a retirement and pension plan for railroad employees engaged in INTERSTATE COMMERCE. Congress specified "promoting efficiency and safety in interstate transportation" among the purposes of the act. Each employee, whose participation was mandatory, would be required to retire after thirty years service or at

sixty-five, receiving thereafter an annuity based upon his length of service. Contributions from both employee and the carrier would finance these payments. A Railroad Retirement Board would adjust the contributions, initially set at two percent of a worker's salary and doubled by the carrier, and would administer the act. Congress further authorized the board to make actuarial surveys and keep pertinent records and data. The act vested district courts with JURISDICTION to enforce board orders and to review administrative questions.

A 5–4 Supreme Court voided the law in RAILROAD RETIREMENT BOARD V. ALTON (1935) as a violation of DUE PROCESS OF LAW and outside the commerce power, a decision effectively nullified in STEWARD MACHINE CO. V. DAVIS (1937).

DAVID GORDON
(1986)

## *RAILROAD RETIREMENT BOARD v. ALTON RAILWAY COMPANY*
295 U.S. 330 (1935)

In the spring of 1935, as the FRANKLIN D. ROOSEVELT administration made plans for a general SOCIAL SECURITY ACT, the Supreme Court held unconstitutional the RAILROAD RETIREMENT ACT of 1934, which established a program of compulsory retirement and old age pensions for railroad workers engaged in INTERSTATE COMMERCE. Justice OWEN ROBERTS, for a five-member majority, found the act violative of DUE PROCESS OF LAW and unauthorized by the COMMERCE CLAUSE. By exacting a percentage of payrolls for a pension fund, the act, Roberts said, was a "naked appropriation of private property" for the benefit of workers. The act was also "bad" because no reasonable connection existed between the welfare of railroad workers and the efficiency or safety of interstate transportation.

Chief Justice CHARLES EVANS HUGHES, joined by Justice LOUIS D. BRANDEIS, BENJAMIN N. CARDOZO, and HARLAN FISKE STONE, dissented. The MAJORITY OPINION shocked Hughes because it went beyond the invalidation of this particular pension plan; the majority's "unwarranted limitation" on the commerce clause denied wholly and forever the power of Congress to enact any social welfare scheme. Relying on GIBBONS V. OGDEN (1824) for the scope of the commerce power, Hughes observed that its exercise had the widest range in dealing with interstate railroads. He accepted Congress's judgment that the plan enhanced efficiency and safety. Moreover, the precedents supported the constitutionality of the act, he argued; the act did not differ in principle from workmen's compensation acts for railroad employees, which the Court had sustained. It had also upheld a congressional enactment that empowered the Interstate Commerce Commission to take excess profits from some railroads for the benefit of others. (See DAYTON GOOSE CREEK RAILROAD CO. V. UNITED STATES.) The Court's opinion helped provoke the constitutional crisis of 1937.

LEONARD W. LEVY
(1986)

## *RAILWAY EXPRESS AGENCY v. NEW YORK*
336 U.S. 106 (1949)

*Railway Express* is a leading modern example of the Supreme Court's deference to legislative judgments in the field of ECONOMIC REGULATION. The Court unanimously upheld a New York City "traffic safety" ordinance forbidding advertisements on vehicles but exempting delivery vehicles advertising their owners' businesses. No one mentioned the FIRST AMENDMENT. (See COMMERCIAL SPEECH.) Justice WILLIAM O. DOUGLAS, for the Court, first waved away a DUE PROCESS attack on the ordinance. Turning to the companion EQUAL PROTECTION attack, Douglas said that the city "may well have concluded" that advertising vehicles presented a greater traffic hazard than did trucks carrying their owners' messages. "We cannot say that that judgment is not an allowable one." The opinion typifies the Court's use of the most deferential RATIONAL BASIS review of economic regulation.

Justice ROBERT H. JACKSON expressed some doubt as to the Court's reasoning but concurred, referring to the law's historic distinctions between "doing in self-interest and doing for hire." Along the way he uttered the decision's most memorable words: "there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose on a minority must be imposed generally."

KENNETH L. KARST
(1986)

## *RAINES v. BYRD*

See: Congressional Standing

# RANDOLPH, EDMUND
(1753–1813)

In 1776 Edmund Jenings Randolph, lawyer, mayor of Williamsburg, and aide to General GEORGE WASHINGTON, was the youngest delegate to the convention that adopted the

VIRGINIA DECLARATION OF RIGHTS AND CONSTITUTION. He became the state's first attorney general under the new constitution and was later a delegate to Congress, where he favored amending the ARTICLES OF CONFEDERATION to give Congress the power to levy import duties. He was a member of the Annapolis Convention of 1786 and later the same year defeated RICHARD HENRY LEE to become governor of Virginia.

Randolph led Virginia's delegation to the CONSTITUTIONAL CONVENTION OF 1787, where he introduced the VIRGINIA PLAN. He did not, however, sign the finished Constitution, which, he believed, gave too much power to the President and so tended toward monarchy. Nevertheless, in 1788 he argued and voted in the state convention for RATIFICATION OF THE CONSTITUTION. He argued that there was no alternative except disunion and that a second convention could be called to perfect the document.

President Washington appointed Randolph the first attorney general of the United States, making him a colleague of and mediator between THOMAS JEFFERSON and ALEXANDER HAMILTON. When Jefferson resigned in 1794, Randolph succeeded him as secretary of state, but he was himself forced to resign the next year when British publication of captured French dispatches led to charges of TREASON and bribery against Randolph. This disgrace ended his political career, but he remained an eminent lawyer. In 1807 he was chief defense counsel when AARON BURR was tried for and acquitted of treason.

DENNIS J. MAHONEY
(1986)

## RANDOLPH, JOHN
(1773–1833)

John Randolph of Roanoke, Virginia, congressman and sometime senator, advocated the constitutional doctrines of STATES' RIGHTS and STRICT CONSTRUCTION that became identified with southern opposition to the federal government and that eventuated in SECESSION. Excepting his support for the LOUISIANA PURCHASE, Randolph consistently preferred the claim of state to federal SOVEREIGNTY. A bitter critic of the Federalist federal judiciary, he managed or mismanaged the IMPEACHMENT of Justice SAMUEL CHASE in 1804.

Breaking with THOMAS JEFFERSON in 1806, Randolph commenced a career of opposition to almost every sitting President and to most national policies. His principles were straightforward. He believed that the Constitution was a compact among sovereign states. Sovereignty did not inhere in the federal government, and the admission of new states was a device to weaken the original, compacting states. He espoused the southern view that regarded every attempt to expand federal power as an attack on SLAVERY, and he regarded democracy and nationalism as leveling and centralizing invasions of ancient state privileges and mores. He viewed with especial bitterness the rulings of the MARSHALL COURT.

ROBERT DAWIDOFF
(1986)

Bibliography

DAWIDOFF, ROBERT 1979 *The Education of John Randolph.* New York: Norton.

## *RASMUSSEN v. UNITED STATES*

See: Insular Cases

## RATE REGULATION

See: Economic Regulation

## RATIFICATION OF CONSTITUTIONAL AMENDMENTS

The delegates to the CONSTITUTIONAL CONVENTION of 1789 decided upon the outlines of the AMENDING PROCESS after only a few hours of debate. The requirement that any proposed amendment be ratified by three-fourths of the states was adopted unanimously, but was, like so much of the Constitution, the result of a compromise. Initially the convention seems to have assumed that amendments to the federal charter would require ratification by all the states; but five state delegations were willing to set the requirement as low as two-thirds of the states. No form of ratification other than by the states as entities was proposed or discussed in the convention.

JAMES MADISON, writing in THE FEDERALIST #39, described the method of ratifying amendments to the new Constitution as "partly federal, partly national." The method is [con]federal in that ratification is accomplished by the states as states, and not by a referendum of the people or a national majority. At the same time, the method is national in that it does not require the assent of all the constituent states to alter the terms of the federal union. A pure theory of FEDERALISM, as it was understood by the founding generation, would not have sanctioned imposition of an amended compact upon unconsenting parties.

Our first constitution, the ARTICLES OF CONFEDERATION, had required the unanimous consent of the states to any

amendment. For that reason, during the "critical period" between 1781 and 1789 no amendments were adopted, even when decisive weaknesses in the confederal system were apparent. The requirement for unanimous ratification of amendments made the Constitutional Convention and the new Constitution necessary.

Article V in fact provides for state ratification of constitutional amendments in one or the other of two distinct modes, leaving the choice of mode to Congress. The first mode is ratification by state legislatures, the second is ratification by conventions. In two centuries of government under the Constitution Congress has proposed thirty-three constitutional amendments and in thirty-two cases has prescribed state legislatures as the agents of ratification. The single exception was ratification of the TWENTY-FIRST AMENDMENT, repealing PROHIBITION.

The constitutional provision relating to ratification is little more than an outline. The details have been filled in as the need has arisen. Although the state legislatures derive their authority to ratify amendments from the federal Constitution, the size of the majority required to effect ratification is determined by the constitution, statutes, or legislative rules of each state. Many, perhaps most, prescribe an extraordinary majority for that purpose.

An amendment automatically becomes part of the Constitution when it is ratified by the requisite number of states, but someone must be designated to receive the certificates of ratification, to count them, and to announce publicly that ratification is complete. Originally Congress delegated this task to the secretary of state, but it is now performed by a relatively minor official, the director of general services. Congress itself proclaimed the ratification of the FOURTEENTH AMENDMENT.

Article V sets no time limit within which the states must act on proposed amendments. The Framers supposed that the ratification process would occur at roughly the same time throughout the country. RATIFICATION OF THE CONSTITUTION itself took nine months; the BILL OF RIGHTS was ratified in just over two years. The convention provided no definite time period after which a proposal for amendment would lapse. Therefore, a recurring question has been how long the states have to ratify proposed amendments.

The principles of democracy and CONSTITUTIONALISM would be ill-served if ratification of constitutional amendments by the several states did not have to be accomplished roughly contemporaneously. This goal has been met in the case of every successful amendment. Although seven years has become the standard period for the states to consider ratification, no amendment has, in fact, required as long as four years for ratification. The TWENTY-SECOND AMENDMENT required the longest time, forty-seven and one-half months; the TWENTY-SIXTH AMENDMENT required the shortest period, four months. The average time for ratification of a constitutional amendment has been eighteen months.

As a legal matter, ratification must be accomplished within a "reasonable" time, but no statute or court decision has defined just how long a period that is. The CHILD LABOR AMENDMENT, proposed in 1924, was ratified by three state legislatures as late as 1937, and the Supreme Court declined to hold that those ratifications were ineffective. The Supreme Court, in *Dillon v. Gloss* (1920), upheld the power of Congress to set a seven-year limit on the ratification period; but in *Coleman v. Miller* (1939) the Court refused to set such a limit on its own account where Congress failed to exercise the power.

The EIGHTEENTH, TWENTIETH, Twenty-First, and Twenty-Second AMENDMENTS comprise the ratification time limit within their texts. In several other cases, Congress has prescribed the time limit (invariably seven years) in the JOINT RESOLUTION proposing the amendment. Only once did Congress attempt to extend the prescribed time limit: when the seven years allotted for ratification of the so-called EQUAL RIGHTS AMENDMENT (ERA) expired in 1979, Congress—by less than the two-thirds majority required for the original proposal—voted to extend the ratification period for an extra three and one-half years. The failure of the proposed amendment's supporters to garner sufficient ratifications even in the extended time period averted a constitutional crisis over the issue of time limits.

A matter frequently debated but never definitively resolved is whether the states, during the period for consideration of a proposed amendment, may alter a decision once one is taken. The question arose with regard to the Fourteenth Amendment and was revived during the controversy over the ERA. Indeed, there seems to be no doubt that a state, having declined to ratify a proposed amendment, may, within the allotted time, alter that decision and ratify the amendment. It is less certain whether a state that has voted to ratify a proposed amendment may subsequently rescind such a ratification. In 1868 Congress and Secretary of State WILLIAM H. SEWARD declared the Fourteenth Amendment ratified, apparently counting the ratifications of two states (New Jersey and Ohio) that had voted to rescind their ratifications. On the date of the declaration a sufficient number of states had ratified to render the disputed votes irrelevant. Expiration in 1983 of the extended time limit for ratification of the ERA made the question of rescinded ratifications of that proposal moot.

The requirement of state ratification presupposes that the state legislatures are free to choose whether or not to ratify a proposed amendment. But this is not always true. Ratification of the Fourteenth Amendment was secured,

in part, because Congress made such ratification a condition for readmission of the states of the former Confederacy. Clearly Congress, amidst the crisis of Civil War and Reconstruction, stretched the limits of its authority by imposing that condition.

Controversies concerning the ratification of constitutional amendments are almost prototypically POLITICAL QUESTIONS. Only rarely has the Supreme Court decided such controversies. In *Hawke v. Smith* (1920) and *Leser v. Garnett* (1922) the Court rejected attempts to submit the question of ratification to a popular vote or to condition ratification on approval in a REFERENDUM. In *United States v. Sprague* (1931) the Court refused to impose any limit on Congress's freedom to choose between the two constitutional modes of ratification. The effect of the few cases the Court has decided has been, as in *Dillon* and *Coleman*, to reserve the power of final determination to Congress.

DENNIS J. MAHONEY
(1986)

Bibliography

FREEDMAN, SAMUEL S. and NAUGHTON, PAMELA J. 1978 *ERA: May a State Change Its Vote?* Detroit, Mich.: Wayne State University Press.

ORFIELD, LESTER 1942 *The Amending of the Federal Constitution.* Ann Arbor: University of Michigan Press.

## RATIFICATION OF THE CONSTITUTION

Plans for a convention to revise the ARTICLES OF CONFEDERATION were in fact a subterfuge, because the delegates in Philadelphia convened in May 1787 with no serious thought whatever of an attempt to keep that instrument in force. But a legal problem had to be resolved, for the Articles were a fact and their revision was to be made only by unanimous agreement of the Continental Congress which "the legislatures of every state" would later confirm. Delegates to the CONSTITUTIONAL CONVENTION OF 1787, including several lawyers who later became Supreme Court Justices, wasted little time in disposing of such restrictions, but they were wary of the manner in which the Constitution could be made acceptable to the people. The solution hit upon by JAMES MADISON in his VIRGINIA PLAN was to circumvent the state legislatures and ask Congress to send whatever plan they adopted in Philadelphia to "assemblies of Representatives . . . expressly chosen by the people, to consider decide thereon." Frankly fearful of local officeholders who would see the new Constitution as a threat to "the importance they now hold," the Virginia delegates were united on this point. "Nine States had been required in all great cases under the Confederation that number was on that account preferable," GEORGE MASON suggested, and his logic prevailed.

After some maneuvering, the expiring Continental Congress by unanimous resolution forwarded the Constitution to the states for their approbation, thus placing an implicit seal of congressional approval on Article VII. The principle of a two-thirds majority rather than unanimity was crucial. Ominously, Rhode Island had sent no delegate to the convention. To avoid embarrassing obstructions, prudence dictated a fair trial for the Constitution, provided key state conventions ratified the document. Rarely in American history has such a sweeping change moved so rapidly through the cumbersome machinery of disparate state governments, and the phenomenon can be explained only in the adroit handling of GEORGE WASHINGTON's implied endorsement along with the urgency which supporters of the Constitution preached in pamphlets and newspapers or wherever influential citizens congregated.

Much of the credit for the Federalists' strategy must go to James Madison. As a central figure at the convention and in the Continental Congress he carefully brought forward the accompanying documents which gave an impression of unanimity by the framers and the forwarders. Using his franking privilege (as a congressman), Madison maintained a correspondence with colleagues in the principal state capitals and coordinated plans to hold conventions at the proper tactical time. Ratification by the conventions in Pennsylvania, Massachusetts, and Virginia was essential, for these three states contained most of the nation's people and much of its wealth. In New York a surly band controlled the state government and was in no hurry to surrender its profitable customs collecting to a national government, but these men could not withstand pressure from the commercial community if all the other large states ratified. Rhode Island was doubtful, and New Jersey and Georgia were unnecessary, owing to the smallness of their populations and their geographic positions.

The Federalists had powerful allies in the newspapers, some ninety-eight in number, most of which printed the Constitution *in toto* shortly after September 17. In Philadelphia, Boston, and New York the leading journals soon printed essays favoring the Constitution and denouncing the opposition Anti-Federalists as obstinate "placemen" (state officeholders) fearful of losing their jobs or "wrongheaded" on other grounds. Pennsylvania Federalists moved swiftly but could not outrace their friends in Delaware, who hurriedly called a three-county convention and became the first ratifying state on December 7 (30–0). In Philadelphia, the first stirrings of Anti-Federalist activity included publication of attacks on the Constitution's lack of a BILL OF RIGHTS, but as that argument was picked up elsewhere the high-handed legislature called a convention

that was heavily weighted with delegates from eastern counties favorable to the Federalist cause. Before farming communities in western counties could organize, the Pennsylvania convention ratified on December 12 (46–23). New Jersey fell in line on December 18 (38–0). Then word came that Georgia had also unanimously ratified on January 2, 1788 (26–0). After perfunctory debate, Connecticut ratified on January 9 (128–40).

Before they could enjoy these triumphs, the Federalists learned that the failure to include a bill of rights, the fears of an overbearing (and tax-hungry) "consolidated" government, and a variety of local circumstances would slow ratification and might jeopardize the whole process. Massachusetts became the focal point of Federalist efforts, for rumblings from town meetings indicated that opposition was greater than anticipated. A phalanx of Harvard-trained lawyers, supported by commercial and shipping interests, accepted a set of recommendatory amendments to weaken the major Anti-Federalist positions, and on February 6 the Federalists won, 187–168.

New York Anti-Federalists began to counterattack. They urged friends in New Hampshire to reject the Constitution, and there is some murky evidence that a quick vote would have gone against ratification. Both sides finally settled on a postponement until June. Madison helped ALEXANDER HAMILTON write the essays of "Publius" (these became a classic treatise titled THE FEDERALIST) for the New York newspapers and continued to send his morale-building, organizing letters to friends in the South. An unexpected stumbling block to ratification came from Baptist ministers and congregations, who voiced concern that freedom of conscience was not safeguarded by the Constitution.

Meanwhile, Maryland Federalists lost patience with their long-winded opponents in the Annapolis convention and ratified on April 28 (63–11). The recommended amendments from Massachusetts Anti-Federalists were used as a talking point, but when the argument came to whether amendments could be part of a conditional ratification, the Federalists lost their tempers. Madison hurried back to Virginia, aware that PATRICK HENRY and Mason would form the most powerful Anti-Federal combination possible. New York seemed safely Anti-Federalist, for Governor George Clinton and his friends talked and printed venomous attacks on the Constitution and its Federalist drafters. Hamilton counted heads and asked Madison if a conditional ratification would suffice. No, Madison replied, a ratification with any strings attached would leave New York out of the Union. After slight Anti-Federal resistance, South Carolina ratified on May 23 (149–73). In Rhode Island, the people rejected ratification directly, 237 yeas to 2,708 nays.

Ratification by Virginia on June 25 was uncertain until a crucial ballot was won by Federalists, who captured the eight doubtful votes from western areas. Madison, JOHN MARSHALL, and EDMUND RANDOLPH led the charge against Henry and Mason, but they agreed to recommend amendments adding a bill of rights to preserve some good will on the final roll call (89–79). The ninth state, New Hampshire, had already ratified on June 21, 1788 (57–46). The news from Virginia, however, sent a thrill through the North. Diarist JOHN QUINCY ADAMS noted that jubilant Federalists fired muskets far into the night when the tidings from Richmond reached Boston. With ten states now committed, the Constitution was sure of a trial. Even so, a powerful, entrenched Anti-Federal faction prevented action by the North Carolina convention, which adjourned to await future developments and a possible second convention that diehard Anti-Federalists thought might patch up another version of the Constitution (with a bill of rights among the additions). A test vote on ratification lost, 184–84, but New York fooled everybody by ratifying on July 26 (30–27).

Within four months, all the states except North Carolina and Rhode Island had set in motion machinery to elect the new federal Congress and a President. The knowledge that Washington supported the Constitution and would be the first President tipped the balance in crucial situations. Washington's stature, the concession by Madison and others that amendments adding a bill of rights would be proposed forthwith, and the overwhelming support of the press were the chief reasons that ratification proceeded with relative speed. The new government was operating, and Madison had introduced a bill of rights by the time North Carolina ratified on November 21, 1789 (197–99). Rhode Island narrowly ratified on May 29, 1790 (34–32), to become a fully participating member of the Union. Few scars remained. The hastily drawn lines of the ratification battle soon faded, and the divergent political philosophies that emerged in the next decade had little to do with the intense struggle of 1787–1788.

ROBERT A. RUTLAND
(1986)

Bibliography

FARRAND, MAX, ed. (1911) 1966 *The Records of the Federal Convention of 1787*, 4 vols. New Haven, Conn.: Yale University Press.

MAIN, JACKSON TURNER 1961 *The Antifederalists: Critics of the Constitution, 1781–1788.* Chapel Hill: University of North Carolina Press.

RUTLAND, ROBERT A. 1966 *The Ordeal of the Constitution: The Antifederalists and the Ratification Struggle of 1787–1788.* Norman: University of Oklahoma Press.

WOOD, GORDON S. 1969 *The Creation of the American Republic, 1776–1787.* Pages 306–344. Chapel Hill: University of North Carolina Press.

# RATIFIER INTENT

Ratifier intent is a form of ORIGINAL INTENT or ORIGINALISM that emphasizes the meanings and understandings of the Constitution possessed by those who ratified it. The ratifiers were the members of the state CONSTITUTIONAL CONVENTIONS that ratified the Constitution. The importance of ratifier intent derives from the widely held opinion that the consent of the governed, who alone were sovereign, legitimated the Constitution. The CONSTITUTIONAL CONVENTION OF 1787 had exceeded its instructions: to recommend revisions of the ARTICLES OF CONFEDERATION. Although the Confederation Congress transmitted the Constitution to the states for RATIFICATION, thereby implicitly agreeing to the scrapping of the Articles of Confederation, the fact remains that the Convention had violated its commission. Consequently, leading Framers of the Constitution insisted, as JAMES MADISON said, that "the legitimate meaning" of the Constitution should be sought "not in the opinions or intentions of the body which planned and proposed the Constitution, but in the sense attached to it by the people in their respective State Conventions, where it received all the authority which it possessed." Thus, as its ratification rather than its framing imbued the Constitution with its legitimacy, so ratifier intent rather than original intent (the understandings of the Framers) defined the text. This is the CONSTITUTIONAL THEORY of the matter as transmitted by the Framers.

One should not have to choose between the intent of the Framers and that of the ratifiers. All contemporary expositions should be considered if they illumine a constitutional issue. Moreover, from the broadest perspective, ratifier intent and original intent almost coincided: government by consent of the governed; majority rule under constitutional restraints that limit majorities; guarantees of rights that prevail against the legislative as well as executive branch; a federal system; three branches of government, including a single executive, a BICAMERAL legislature, and an independent judiciary; an elaborate system of CHECKS AND BALANCES; and representative government and elections at fixed intervals. The founding generation also believed in measuring the powers of government, rather than the rights of the people, and they assumed a NATURAL RIGHTS philosophy. They concurred on a great many fundamental matters. Without doubt, the Constitution reflects a coherent and principled POLITICAL PHILOSOPHY. All of this consensus bespeaks an enormously important and ascertainable set of original understandings shared by Framers and ratifiers, even by Federalists and ANTI-FEDERALISTS. But none of this history enables judges to reach decisions favoring one side of a constitutional issue rather than another in real cases that come before courts.

More perplexing still is the fact that ratifier intent with respect to the meanings of particular clauses of the Constitution is more often than not unascertainable. The main reason for this is that the historical record is too skimpy to sustain a constitutional JURISPRUDENCE of ratifier intent. In a 1954 report, the National Historical Publications Commission declared that the reporters of the ratification period took notes on the debates "and rephrased those notes for publication. The shorthand in use at that time was too slow to permit verbatim transcription of all speeches, with the result that a reporter, in preparing his copy for the press, frequently relied upon his memory as well as his notes and gave what seemed to him the substance, but not necessarily the actual phraseology, of speeches. Different reportings of the same speech exhibited at times only a general similarity, and details often recorded by one reporter were frequently omitted by another." Reporters used their notes to spur their memories, and their reports were no better than their understandings.

When Jonathan Elliot began publication of his *Debates* in 1827, he collected the previously published records of the state ratifying conventions. He misleadingly called his collection *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution.* In fact, Elliot unreliably reported the proceedings of only five states plus some fragments of others. He acknowledged that the debates may have been "inaccurately taken down" and "too faintly sketched." ELBRIDGE GERRY, a member of the Constitutional Convention who became an Anti-Federalist leader, complained that the "debates of the State Conventions, as published by the short-hand writers, were generally partial and mutilated."

For Pennsylvania, Elliot published only the speeches of two advocates of ratification. The editor of the debates for Massachusetts apologized for his inaccuracies and omissions deriving from his inexperience. He also doctored some speeches and provided a few spurious ones. The reporter for New York made similar remarks and recorded only the debates for the first half of convention's proceedings, reverting to a skeletal journal of motions for the remainder. In Virginia, where the debates were most fully reported and by a reporter sympathetic to ratification, James Madison and JOHN MARSHALL expressed dissatisfaction with the results. Madison informed Elliot that he found passages that were "defective," "obscure," "unintelligible," and "more or less erroneous." Marshall complained that if he had not seen his name prefixed to his speeches he would not have recognized them as his own. He further declared that the speeches of PATRICK HENRY, the leader of the opposition, were reported worst of all. Similar criticisms apply to the proceedings of North Carolina, whose first convention

rejected the Constitution and whose second was wholly unreported.

These are the five states (Pennsylvania, Massachusetts, New York, Virginia, and North Carolina) whose records provide a basis, however inadequate, for determining ratifier intent. We have only scraps of material for the other states, with the exception of Rhode Island, which ratified so late as to count for nearly nothing. Although the people acting through state ratifying conventions gave the Constitution its authority, the ratifiers' intent should not be confused or conflated with legitimacy. Ratification legitimated the text that the Constitutional Convention recommended; the Convention did not recommend its intention, only the text, and the ratifying conventions only ratified the text, without providing a basis for a constitutional jurisprudence based on ratifier intent or understanding.

Justice JOSEPH STORY made the definitive rejection of ratifier intent in his *Commentaries on the Constitution:* "In different states and in different conventions, different and very opposite objections are known to have prevailed. Opposite interpretations, and different explanations of different provisions, may well be presumed to have been presented in different bodies, to remove local objections, or to win local favor. And there can be no certainty, either that the different state conventions in ratifying the constitution, gave the same uniform interpretation to its language, or that even in a single state convention, the same reasoning prevailed with a majority" (1st ed. 1833, I, pp. 388–389).

Story continued by noting that the terms of the Constitution impressed different people differently. Some drew conclusions that others repudiated; some understood its provisions strictly, others broadly. Ratifiers in different conventions revealed a diversity of interpretations. To THOMAS JEFFERSON's demand that ratifier intent be honored as much as possible, Story retorted that it was not possible; he ridiculed "the utter looseness, and incoherence of this canon." No way existed to determine "what was thought of particular clauses" of the Constitution when it was ratified. "In many cases no printed debates give any account of any construction; and where any is given, different persons held different doctrines. Whose is to prevail?" Story concluded that determining ratifier intent is hopeless because "of all the state conventions, the debates of five only are preserved, and these very imperfectly. What is to be done, as to other eight states?" Ratifier intent, despite its present support by some constitutional scholars, including Robert Bork and Charles Lofgren, is as lacking in historical basis or practical application as it may be theoretically attractive.

LEONARD W. LEVY
(1992)

(SEE ALSO: *Bork Nomination; Constitutional Interpretation.*)

Bibliography

BORK, ROBERT H. 1989 *The Tempting of America: the Political Seduction of the Law.* New York: Free Press.

HUTSON, JAMES H. 1986 The Creation of the Constitution: The Integrity of the Documentary Record. *Texas Law Review* 65: 1–39.

LEVY, LEONARD W. 1988 *Original Intent and the Framers' Constitution.* New York: Macmillan.

LOFGREN, CHARLES A. 1988 The Original Understanding of Original Intent. *Constitutional Commentary* 5:77–113.

## *RATIO DECIDENDI*

(Latin: "Reason for being decided.") A statement made in an OPINION OF THE COURT is either *ratio decidendi* or OBITER DICTUM. *Ratio decidendi* refers to a statement that is a necessary part of the chain of reasoning leading to the DECISION of the case, while obiter dictum ("said by the way") refers to any other statement in the opinion. The distinction is clear in theory but, in practice, may be difficult to apply to any given case.

No federal court may properly pass on a legal or constitutional question that is not brought before it in a CASE OR CONTROVERSY, and a court properly resolves only those questions necessary to decide a case before it. The resolution of a particular question is the court's HOLDING on that question, and the reasoning necessary to the resolution of a question properly before the court is *ratio decidendi.* The *ratio decidendi* is thereafter binding as a rule of law when the case is cited as precedent. Although a judge may have a clear idea of what arguments were necessary to reach the decision in a case and may attempt to convey that idea in his opinion, it is the courts that apply the case as precedent in future decisions that finally establish which statements were obiter dicta and which *ratio decidendi.*

DENNIS J. MAHONEY
(1986)

## RATIONAL BASIS

The "rational basis" STANDARD OF REVIEW emerged in the late 1930s, as the Supreme Court retreated from its earlier activism in the defense of economic liberties. We owe the phrase to Justice HARLAN FISKE STONE, who used it in two 1938 opinions to signal a new judicial deference to legislative judgments. In UNITED STATES V. CAROLENE PRODUCTS CO. (1938), Stone said that an ECONOMIC REGULATION, challenged as a violation of SUBSTANTIVE DUE PROCESS or of EQUAL PROTECTION, would be upheld unless demonstrated

facts should "preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." In *South Carolina State Highway Department v. Barnwell Brothers, Inc.* (1938), Stone proposed "rational basis" as the standard for reviewing STATE REGULATIONS OF COMMERCE. (Later, Stone would accept the necessity for more exacting judicial scrutiny of such laws.) To complete the process, the Court adopted the same deferential posture toward congressional judgments that local activities substantially affected INTERSTATE COMMERCE and thus might be regulated by Congress under the COMMERCE POWER. In all its uses, "rational basis" represents a strong presumption of the constitutionality of legislation.

Yet even so minimal a standard of JUDICIAL REVIEW does, in theory, call for some judicial scrutiny of the rationality of the relationship between legislative means and ends. And that scrutiny of means makes sense only if we assume that the ends themselves are constitutionally required to serve general, public aims; otherwise, every law would be self-justifying, as precisely apt for achieving the advantages and disadvantages it achieves. Although the Court has sometimes suggested in economic regulation cases that even a search for legislative rationality lies beyond the scope of the judicial function, some such judicial scrutiny is required if our courts are to give effect to generalized constitutional guarantees of liberty and equality. Today's assumption, therefore, is that a law depriving a person of liberty or of equal treatment is invalid unless, at a minimum, it is a rational means for achieving a legitimate legislative purpose.

Even so relaxed a standard of review appears to call for a judicial inquiry always beset by uncertainties and often dominated by fictitious assumptions. Hans Linde has demonstrated the unreality attendant on judicial efforts to identify the "purposes" served by a law adopted by legislators with diverse objectives, or objectives only tenuously connected to the public good. Lacking sure guidance as to those "purposes"—which may have changed in the years since the law was adopted—a court must rely on counsel's assertions and its own assumptions. But in its inception the rational basis standard was not so much a mode of inquiry as a formula for validating legislation. Thus, in MCGOWAN V. MARYLAND (1961), the Supreme Court said, "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." Part of the reason why the rational basis standard survives in federal constitutional law is that it is normally taken seriously only in its permissive feature (*United States Railroad Retirement Board v. Fritz,* 1980). A number of state courts, interpreting STATE CONSTITUTIONAL LAW, do take the rational basis standard to require a serious judicial examination of the reasonableness of legislation. And the Supreme Court itself, in its late-1960s forays into the reaches of equal protection doctrine lying beyond racial equality, sometimes labeled legislative classifications as "irrational" even as it insisted that state-imposed inequalities be justified against more exacting standards of review. (See HARPER V. VIRGINIA STATE BOARD OF ELECTIONS; LEVY V. LOUISIANA; SHAPIRO V. THOMPSON.) Since that time, the explicit recognition of different levels of judicial scrutiny of legislation has allowed the Court to reserve the rhetoric of rational basis for occasions thought appropriate for judicial modesty, in particular its review of "economic and social regulation." Some substantive interests call for heightened judicial scrutiny of legislative incursions into them; absent such considerations, the starting point for constitutional analysis remains the rational basis standard.

KENNETH L. KARST
(1986)

Bibliography

LINDE, HANS A. 1976 Due Process of Lawmaking. *Nebraska Law Review* 55:197–255.

## RATIONAL BASIS
## (Update)

For decades, the rational basis test seemed so deferential that no law could flunk it. In the 1980s, however, the Supreme Court began to give teeth to the standard. For example, in CLEBURNE V. CLEBURNE LIVING CENTER, INC. (1985), the Court used the rational basis test to strike down a Texas municipality's ZONING law that had been used to impede the creation of a group home for persons suffering from MENTAL ILLNESS.

By the 1990s, the rational basis test was no longer meek. It was explicitly used to invalidate state laws in two of the Court's most important CIVIL RIGHTS cases, HODGSON V. MINNESOTA (1990) and ROMER V. EVANS (1996). *Hodgson* was the first case in which Justice SANDRA DAY O'CONNOR voted to hold an ABORTION law unconstitutional. It dealt with a Minnesota law regulating the circumstances under which minors could obtain abortions; Minnesota required minors to get consent from both parents, rather than only from one. O'Connor joined an opinion by Justice JOHN PAUL STEVENS in which he concluded that Minnesota's two-parent consent was "not reasonably related to any legitimate state interest." Stevens reasoned that the two-parent consent requirement was likely to be important only in those cases where the two parents were not communicating with one another, and that requiring the minor to inform both parents under such circumstances was likely to do more harm than good.

Later, in PLANNED PARENTHOOD V. CASEY (1992), O'Connor co-authored an opinion that reaffirmed the ex-

istence of a constitutional right to get an abortion, but formulated that right in terms of the "undue burden" standard. That standard is a kind of "reasonableness" test. It is arguably more akin to a strong rational basis standard than to STRICT SCRUTINY.

In *Romer*, the Court reviewed an amendment to the Colorado state constitution that prohibited the state or its local jurisdictions from protecting gay rights. Writing for himself and five others, Justice ANTHONY M. KENNEDY announced that Colorado's law failed to survive scrutiny under the rational basis test. Kennedy explained that "the amendment seems inexplicable by anything but animus toward the class that it affects" and hence "lacks a rational relationship to legitimate state interests."

This revival of the rational basis test may reflect profound changes in attitudes toward JUDICIAL REVIEW. The deferential version of rational basis scrutiny emerged in the wake of the NEW DEAL, when the Court had damaged its reputation by obstructing economic reform. Justices and scholars felt compelled to defend the legitimacy of judicial review; Justice FELIX FRANKFURTER, in particular, was an eloquent advocate for judicial restraint. Over the last three decades, however, the Court has become more secure about its power. It seems fair to say, as Professor Louis Michael Seidman did in his comment on *Romer*, that "[t]oday, no sitting Justice is a consistent advocate of judicial restraint." Under these changed circumstances, it is perhaps unsurprising that several of the Justices once again feel comfortable making naked judgments about the reasonableness of LEGISLATION.

CHRISTOPHER L. EISGRUBER
(2000)

Bibliography

SEIDMAN, LOUIS MICHAEL 1996 *Romer*'s Radicalism: The Unexpected Revival of Warren Court Activism. *Supreme Court Review* 1996:67–122.

## *R. A. V. v. CITY OF ST. PAUL*
505 U.S. 377 (1992)

In *R. A. V. v. City of St. Paul*, the Supreme Court struck down a St. Paul, Minnesota ordinance that proscribed cross-burning and other actions "which one knows or has reasonable grounds to know" will cause "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." The Court was unanimous that the law was unconstitutional, but agreed about little else. Four members of the Court—Justices BYRON R. WHITE, HARRY A. BLACKMUN, JOHN PAUL STEVENS, and SANDRA DAY O'CONNOR—concurred in the judgment, but solely on the ground that the ordinance was overly broad, sweeping within its proscription expression that should be protected. It is safe to assume that these Justices would have upheld a narrowly drawn statute that prohibited HATE CRIME. The other five members of the Court, in the MAJORITY OPINION of Justice ANTONIN SCALIA, reached further, characterizing the St. Paul ordinance—and presumably any content-discriminatory hate crime law—as an unconstitutional content-based regulation of speech in violation of the FIRST AMENDMENT.

In *R. A. V.*, the defendant Robert Viktora, then a minor, was accused of burning a cross on the lawn of Russell and Laura Jones and their children, an African American family that had recently moved into the neighborhood. In moving to dismiss the indictment, Viktora asserted both that the ordinance was overbroad and that it was an unconstitutional, content-based restriction on his FREEDOM OF SPEECH. The Minnesota Supreme Court rejected the OVERBREADTH challenge because that court construed the ordinance narrowly to apply only to FIGHTING WORDS, and therefore not to apply to any expression protected by the First Amendment. Although a minority of the U.S. Supreme Court concluded that this limiting construction by the Minnesota court did not save the ordinance from overbreadth, Scalia was prepared to accept that all of the expression reached by the ordinance was proscribable. He thus had to reach the content-based challenge.

Scalia's OPINION FOR THE COURT used a limited categorical approach to the First Amendment. Acknowledging that fighting words, along with other categories of expression such as OBSCENITY and defamation, are not entitled to full First Amendment protection, Scalia asserted that these forms of expression nevertheless enjoy some limited protection and are not "entirely invisible to the Constitution." Within any of these categories, expression may be proscribed only on the basis of its categorical nature and not on the basis of its content.

Scalia's approach to the content-neutrality DOCTRINE did not purport to require the state to proscribe either all forms of proscribable speech or none at all. Rather, he identified two exceptions to the general unacceptability of content-based restrictions on expression. First, choices may be made as to which forms of speech to proscribe so long as these choices do not address the content of the expression. For example, regulations restricting obscene communications when the medium of communication is the telephone, according to Scalia, permissibly regulate the medium but not the message. Second, Scalia would also exempt from the content-neutrality rule regulations that address content for the "very reason the entire class of speech at issue is proscribable" in the first place. For example, a regulation prohibiting only obscenity "which is the most patently offensive *in its prurience*" would be permissible.

Scalia concluded that the St. Paul ordinance fell within neither exception. Instead, when he applied his approach to the St. Paul ordinance, he concluded that the city had established a regulation aimed directly at racist speech and biased beliefs rather than at fighting words generally or at a subgroup of fighting words selected for reasons other than the content of those words. He thus held that the ordinance impermissibly chose sides in the debate over racial prejudice. In perhaps the most famous sentence in the Court's *R. A. V.* opinion, Scalia wrote: "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules."

The ultimate reach of *R. A. V.* was substantially limited by the Court's decision one year later in WISCONSIN V. MITCHELL (1993), which upheld a Wisconsin hate crime law providing enhanced penalties for crimes motivated by racial bias.

FREDERICK M. LAWRENCE
(2000)

Bibliography

LAWRENCE, FREDERICK M. 1993 Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech. *Notre Dame Law Review* 68:673–721.

SYMPOSIUM 1991 Free Speech and Religious, Racial and Sexual Harassment. *William and Mary Law Review* 32:207–351.

## RAWLE, WILLIAM
(1759–1836)

A Philadelphia lawyer and Federalist, Rawle declined GEORGE WASHINGTON's offer to become the first attorney general of the United States. As United States attorney for Pennsylvania, he was the government prosecutor in the cases arising from the WHISKEY REBELLION (1794) and FRIES' REBELLION (1798). Rawle also advocated the existence of a FEDERAL COMMON LAW OF CRIMES. He is best remembered as one of the earliest COMMENTATORS ON THE CONSTITUTION. His *New View of the Constitution* (1825) was widely used as a textbook. Although he was a nationalist, he was the first to advocate the right of state SECESSION.

LEONARD W. LEVY
(1986)

## *RAYMOND MOTOR TRANSPORTATION COMPANY v. RICE*
434 U.S. 429 (1978)

Continuing a line of decisions begun in SOUTHERN PACIFIC COMPANY V. ARIZONA (1945), an 8–0 Supreme Court struck down a state highway regulation as an unconstitutional burden on INTERSTATE COMMERCE. A Wisconsin statute barred trucks over fifty-five feet in length from state highways as a safety measure. Two trucking companies challenged the law under the COMMERCE CLAUSE. A strong demonstration that the law made, at best, a negligible contribution to highway safety combined with the state's failure to provide an adequate defense of the measure led the Court to override the strong presumption usually given such laws.

In *Kassel v. Consolidated Freightways Corp. of Delaware* (1981), Iowa made a "more serious effort to support the safety rationale of its [fifty-five foot limit] than did Wisconsin in *Raymond*," but a 6–3 Court, relying on *Raymond*, struck down the Iowa statute on the same grounds.

DAVID GORDON
(1986)

## READ, GEORGE
(1733–1798)

George Read of Delaware was a signer of both the DECLARATION OF INDEPENDENCE and the Constitution. A frequent speaker at the CONSTITUTIONAL CONVENTION OF 1787, he favored a consolidated national government and proposed abolition of state boundaries. He was a leader of the ratification movement in Delaware, and later he served as state chief justice and as a United States senator.

DENNIS J. MAHONEY
(1986)

## REAGAN, RONALD
(1911– )

Born in Tampico, Illinois, brought up in Dixon, Illinois, a graduate of Eureka College, Illinois, Ronald Reagan came from the American Midwest, while his adult life was largely spent in California, leading to a classic California combination of midwestern seriousness of purpose and California casualness of style. Coming to maturity in 1932, he was first a convinced follower of FRANKLIN D. ROOSEVELT, changing his political beliefs in response to his perceptions of communist infiltration in the late 1940s, and formally becoming a Republican only in 1962. A radio announcer as a young man, then an actor (playing in more than fifty motion pictures), then for three years an Army captain, then for five years president of the Screen Actors Guild, he became a spokesman for the General Electric Company, traveling nationally to speak to company employees and civic groups on domestic and patriotic themes. In 1966 he defeated five other candidates to win the Repub-

lican nomination for governor of California and was then elected over the incumbent Edmund Brown by a historic margin of nearly one million votes. He was easily reelected in 1970. His two terms as governor of the most populous state in the Union were marked by a dramatic reduction in the number of welfare recipients, a small increase in the number of state employees, and a large increase in the funding of higher education.

In 1976 he fell sixty votes short of defeating President GERALD R. FORD for the Republican nomination for the presidency. In 1980 he defeated five other candidates to capture the nomination, and he won the presidential election by a landslide of 489 electoral votes. In 1984 he was reelected, this time taking the votes of forty-nine of the fifty states and emerging in a position to put his stamp on the judiciary of the nation.

Three themes characterize President Reagan's approach to the Constitution. They are the necessity of moral virtue if American democracy is to work; the importance of FEDERALISM; and the guiding force of American practices approved by the Founding Fathers. These themes run through Reagan's public pronouncements on a variety of specific topics bearing on constitutional law. For example, he has seen the solution to the problem of curbing crime in America as first restoring a sense of moral seriousness to the criminal trial, so that it is not seen as a bureaucratized bargaining process. At the same time, he has criticized courts for taking on tasks for which they are unfitted and so slighting their essential role of determining guilt or innocence; and he has proposed legislation limiting the use of HABEAS CORPUS review of state courts by federal judges.

Traditional functions for the courts, less federal supervision, an infusion of moral purpose—these are remedies that Reagan sees as congruent with the Constitution even as interpreted by the Supreme Court. For another example, he has opposed the imposition of RACIAL QUOTAS in EDUCATION, hiring, or housing, even when the quotas are disguised as AFFIRMATIVE ACTION. Belief in equality under the law does not in his view require reverse discrimination. Nothing in a Constitution he sees as colorblind supports a contrary conclusion. In other areas his views require constitutional amendment.

Religion is the foundation of morality, and morality is inseparable from government—this note in American politics is as old as WASHINGTON'S FAREWELL ADDRESS, which Reagan has frequently invoked. In Reagan's own words, "We poison our society when we remove its theological underpinnings," and again, "Without God there is no virtue because there is no prompting of conscience."

From this perspective, the Court-compelled exclusion of religious exercises from the public schools is disastrous and is unwarranted by the Constitution, which, Reagan has repeatedly remarked, says nothing about public education or prayer. In Reagan's words, the FIRST AMENDMENT "was not meant to exclude religion from our schools." Reagan has affirmed his belief in a "wall of separation" between church and state. In an American tradition as old as ROGER WILLIAMS, he sees the primary function of that wall as protecting religion from governmental intrusion. The Supreme Court, in his view, has been guilty of such intrusion.

Federalism influences this approach. The Supreme Court, interpreting the Constitution, often conceives of itself as though it were a superior, benign, and neutral agency that is not part of the national government. Reagan has cut through this position and identified the Court as the champion of a particular ideology, imposing uniform requirements in disregard of local custom. Justified where there was a national mandate to eliminate RACIAL DISCRIMINATION, the Court has acted in this way even, he believes, where it has discovered no national mandate. Reagan's criticism of the Court on RELIGION IN THE PUBLIC SCHOOLS not only affirms earlier American traditions; it also reflects attachment to the local autonomy that federalism fosters.

The religion Reagan refers to is biblical religion, described by him as "our Judaeo-Christian heritage." He quotes both Old and New Testaments in his public addresses. The Ten Commandments, he has observed, have not been improved upon by the millions of laws enacted since their promulgation. He issued a proclamation of National Bible Week and rejoiced that twenty-five states followed suit. He sees no constitutional barrier to a believer, as President, acknowledging the God of the Bible, speaking of the moral values he derives from his belief in God, and taking seriously such slogans as "one nation under God" and "in God we trust."

Public testimony to moral values based on religion has been conjoined with insistent rejection of religious intolerance. Reagan has consistently denounced bigotry, but he contends that those who have excluded biblical religion from the schools are themselves "intolerant of religion." They have denied a freedom to exercise religion as old as the practice of prayers in legislatures, the employment of chaplains by the military, and the invocation of God before opening any court. Such American traditions are his guide to the meaning of the Constitution in an area crucial for him in the formation of morality.

Critical of the Supreme Court's individual decisions in a manner sanctioned by the example of THOMAS JEFFERSON, ABRAHAM LINCOLN, and FRANKLIN D. ROOSEVELT, Reagan has not denied the Court's authority. He has favored correction of the prayer decision by the adoption of a constitutional amendment permitting voluntary group prayer in the schools. The government in his view should tolerate and accommodate the religious beliefs, speech, and con-

duct of the people; it should not direct their religious beliefs, speech, or conduct. For that reason, Reagan's school prayer amendment expressly prohibits any governmental role in composing the words of prayers to be said in the public schools.

The constitutional right to abortion, announced by the Supreme Court in ROE V. WADE (1973), has been the object of repeated criticism by Reagan. He has taken the extraordinary step, for a sitting President, of publishing a book, *Abortion and the Conscience of a Nation* (1984), in which he declares that "there is no cause more important than affirming the transcendent right to life of all human beings, the right without which no other rights have any meaning." On January 22, 1985, the twelfth anniversary of *Roe v. Wade*, he addressed the prolife march in Washington as the marchers prepared once again to ask the Supreme Court to change its position, and told them that he was "proud to stand with you in the long march to protect life." No other constitutional decision of the Supreme Court has been so vigorously, persistently, and personally condemned by an American President.

Reagan has consciously used the presidency as "a bully pulpit" to proclaim that there is no proof that the child in the womb is *not* human; that the child in midterm and later abortion feels pain; and that over 4,000 such children are killed every day in America, 15,000,000 in the first decade since ROE V. WADE. Such facts alone, he believes, will make most people reconsider and seek reversal of *Roe*.

How the reversal is accomplished has not been a matter of great concern to Reagan. He endorsed reversal by amendment of the Constitution. He attempted to persuade the Senate to end a FILIBUSTER that killed the Helms Bill that would have used Congress's power under section 5 of the FOURTEENTH AMENDMENT to define life as including the unborn. Passage of the bill (itself without sanctions) would undoubtedly have led to state legislation on abortion that would have given the Supreme Court the opportunity of looking at abortion in the light of the congressional definition. It has been speculated that Reagan believes the most practical way of effecting the result he desires is by his appointments to the Supreme Court.

In the cases of abortion and of prayer, Reagan has sought amendments reversing Supreme Court decisions that upset traditional balances. In the case of the balanced BUDGET, he has asked for something new, a constitutional restraint that would prevent federal expenditures exceeding federal revenues. The desirability of such an amendment had, however, been voiced as early as 1798 by Thomas Jefferson. In Reagan's view, a balanced budget amendment could be a powerful tool for reducing the federal establishment and restoring economic power to the states. Federalism would be enhanced by its enactment. The traditional role of the states would very likely be increased. Reagan also perceives a moral element: habitual deficit spending by the federal government is an easy evasion of responsibility. In his second Inaugural Address, on January 21, 1985, Reagan called for passage of the Balanced Budget Amendment.

Citizens and Presidents must interpret the Constitution as well as lawyers and judges. President Reagan's approach to the Constitution is not dependent on the reasoning advanced by recent Justices of the Supreme Court to justify or rationalize their decisions. He has employed older and broader criteria. For him the Constitution does not mean the gloss put upon it by opinions of the Court but the original document illumined by tangible traditions and by reflection on its foundation in moral realities. He has evidenced a strong commitment to the essentials that the Constitution presupposes and at the same time preserves.

JOHN T. NOONAN, JR.
(1986)

Bibliography

REAGAN, RONALD 1984 *Abortion and the Conscience of a Nation.* New York: Thomas Nelson.

REAGAN, RONALD 1981–1985 *Presidential Papers.* Washington, D.C.: Government Printing Office.

SMITH, HEDRICK et al. 1980 *Reagan the Man, the President.* New York: Macmillan.

WHITE, F. CLIFTON 1980 *Why Reagan Won: A Narrative History of the Conservative Movement.* Chicago: Regnery Gateway.

## REAGAN, RONALD
(1911– )
(Update)

No President since FRANKLIN D. ROOSEVELT devoted as much of his administration's attention to the courts and the Constitution as did Ronald Reagan. After a career as an actor and spokesman for General Electric, Reagan was catapulted into politics by a famous televised speech on behalf of Barry Goldwater's presidential campaign. Twice elected governor of California, Reagan was hailed as the conservative standard-bearer in his unsuccessful race for the Republican presidential nomination in 1976. He came to office in 1980 pledging to reinvigorate the idea of LIMITED GOVERNMENT—to restore what he saw as the constitutional foundations of American politics. In part, this restoration would involve restricting the federal government's encroachments on individual freedom and on the prerogatives of state governments. But more important, it would require that the doctrines stimulating the federal government's inordinate growth be publicly discredited and supplanted.

Reagan won the 1980 presidential election by a large margin and set to work to lower federal tax rates and shore up America's defenses. These tasks absorbed most of his and his administration's attention even after his still more massive electoral victory in 1984; but Reagan wished always to make the "Reagan Revolution" something broader and deeper—what he called in his 1985 State of the Union Address "a Second American Revolution." The changes in economic and defense policy won in the great legislative battles of his first term had therefore to be parlayed into a general rethinking of the purposes of American politics and, especially, of the functions served by the courts.

Large changes in American electoral politics, particularly in the wake of so-called critical or realigning elections, do eventually register on the judiciary (as in 1937, with the "switch in time" that "saves nine") and sometimes on the Constitution itself (for example, the Civil War amendments). Indeed, in Reagan's view, the LIBERALISM that he attacked had always put a high premium on control of the judiciary, from FDR's COURT-PACKING PLAN to the activism of Chief Justice EARL WARREN to President JIMMY CARTER's efforts to apply strict AFFIRMATIVE ACTION standards to judicial appointments. But Reagan faced the novel circumstance of trying to undo a series of divisive liberal measures that the Supreme Court itself had directed—the legalization of ABORTION, the expulsion of prayer from the public schools, the promulgation of the EXCLUSIONARY RULE, and so forth.

These issues were particularly important to the social conservatives who had joined with traditional Republicans and anticommunists in the 1960s and 1970s to form the coalition that would eventually sweep Reagan into office. Although Reagan campaigned both in 1980 and 1984 for the overruling of such Supreme Court decisions, he himself did little to dislodge them, except to call for constitutional amendments to protect the life of the unborn and to allow voluntary SCHOOL PRAYER in public classrooms. To confront the Court more directly would have risked alienating the more libertarian members of his coalition, which was united more by its common enemies than by common principles. Instead, he concentrated his administration's energies on the selection of judges pledged to exercise "judicial restraint" and, therefore, more likely over time to modify or overturn their predecessors' activist decisions.

It is probably in this way that the Reagan administration will have its great effect on CONSTITUTIONAL INTERPRETATION. In the course of his presidency, Reagan appointed more than 400 federal judges, nearly half the federal bench, as well as three Supreme Court Justices; and he elevated WILLIAM H. REHNQUIST to CHIEF JUSTICE of the Supreme Court in 1986. All these appointments were vetted and approved by an elaborate machinery centered in the Justice Department's Office of Legal Policy and overseen by a newly created White House Judicial Selection Committee. Critics objected to the screening procedure, claiming that it politicized the judicial selection process by subjecting candidates to a "litmus test" on such issues as abortion and CRIMINAL PROCEDURE. But the Reagan administration denied the charge, arguing that the reviews focused not on specific issues, but on the candidates' general approach to legal and constitutional interpretation, which the President was entitled to consider, and that in any event the liberal critics were applying a double standard.

The issue was raised desultorily in some of Reagan's nominations to the Supreme Court—SANDRA DAY O'CONNOR in 1981, the first woman ever nominated (pursuant to a 1980 campaign promise by Reagan); ANTONIN SCALIA in 1986, who replaced Rehnquist when the latter was elevated to Chief Justice; and ANTHONY M. KENNEDY in 1988—but it was raised acutely in the confirmation hearings of Rehnquist and above all of Robert H. Bork. The latter was denied confirmation by the Senate after a long, bitter, and very public struggle over the meaning of "judicial restraint" and of what Attorney General Edwin Meese had called "a jurisprudence of original intention." After Bork's defeat, Reagan nominated Douglas H. Ginsburg, who was forced to withdraw on account of disclosures about his personal life and controversy over his conduct as Justice Department attorney. Shortly thereafter, Reagan nominated Kennedy, who finally assumed the seat vacated by Justice LEWIS F. POWELL half a year earlier.

The significant question concerned the meaning of "judicial restraint." Did it mean, as its liberal critics claimed, that judges would respect only those laws and PRECEDENTS approved by conservatives and restrain all the others? Or did it entail genuine respect for the language of the Constitution and a principled deference to the rights of legislative majorities, as its defenders maintained? The controversy over "restraint" therefore pointed to the larger question of the meaning of the Constitution itself. Did the Constitution embody an ORIGINAL INTENT that judges must regard as authoritative? Liberals such as Justice WILLIAM J. BRENNAN argued, somewhat contradictorily, that judges could not know what the Framers' intentions 200 years ago were; that even if they could, times have changed and interpretation of the Constitution could not be bound by the views of "a world that is dead and gone"; and that what the Framers actually intended was to leave the Constitution open-ended and alive, so that it might be adjusted to changing times and values. To this, conservatives such as Bork and Rehnquist replied that the Framers' intentions were either clearly spelled out in the Constitution or not, and if not, then it was up to Congress or the states to make law as they saw fit.

But this answer begged the question of whether in ascertaining the Framers' intentions a distinction did not

have to be made between the spirit and the letter of the Constitution; or, to put it differently, whether precisely in order to understand the Constitution as the Framers understood it, one did not have to distinguish between its principles and the application (or compromise) of those principles, for example, in the so-called three-fifths compromise. The alternative to seeking such principles as a ground of the Constitution's authority was to accept the letter of the law as itself the highest authority, or more exactly, to accept as just and lawful whatever the sovereign majority decreed in the Constitution or in statute law, no matter how irrational or unjust. That is to say, the alternative was a form of legal POSITIVISM or formalism. That Bork's position came close to this became painfully clear in the debate over the RIGHT OF PRIVACY during his confirmation hearings. In short, although his JURISPRUDENCE emphatically rejected judicial tyranny, it did not seem to afford a principled defense against majority tyranny. To that extent, it fell short of the NATURAL LAW principles that justified limited government and that had informed the "original intention" of the Constitution's Framers.

As President, Reagan relied on his Justice Department and SOLICITOR GENERAL to encourage the narrowing of the liberal precedents left over from the Warren and Burger courts. The administration succeeded in persuading the Supreme Court to enlarge existing exceptions to the exclusionary rule, to create new ones, and to narrow the acceptable occasions for court-ordered affirmative-action remedies. But Reagan refused to issue an EXECUTIVE ORDER forbidding set-asides and other forms of reverse discrimination in executive-branch contracts and was saddled with an amended Voting Rights Act (1982) that went far toward establishing proportional representation (i.e., quotas) for selected minorities as the paramount goal of legislative redistricting. The Reagan administration's reluctance to face a public debate on CIVIL RIGHTS and affirmative action left it vulnerable to attack by the advocates of racial and ethnic entitlements who insisted that anyone who was against the "empowerment" of favored minorities through RACIAL QUOTAS (although the dread word was seldom used) was against civil rights.

Although his administration did much to remind the American people that a strong, purposeful President could initiate profound political change, Reagan was often frustrated by Congress. In a remarkable victory that, along with Reagan's landslide electoral win, seemed to promise a fundamental shift in American politics, the Republicans gained control of the SENATE in 1980—only to lose it six years later; they never came close to taking control of the HOUSE OF REPRESENTATIVES. The result was divided government and a long running battle over foreign and domestic policy in which the administration had the upper hand only in its first two years. From these struggles arose at least two interesting lines of constitutional controversy.

The first concerned FOREIGN AFFAIRS, specifically, the scope of the President's discretion under statute law and the Constitution to order covert activities abroad. Stung by congressional opposition to its initial program of "covert" aid to the forces seeking to overthrow the Sandinista regime in Nicaragua, the administration turned to a more overt strategy of aid, appealing directly to the Congress and the people for support. Although sometimes endorsing Reagan's commitment to arm resistance fighters in communist-controlled countries (e.g., in Afghanistan), the Congress vacillated on aid to the Contras fighting in Nicaragua. During Reagan's presidency, at least two versions of the BOLAND AMENDMENT were passed, along with two or three later modifications of the amendment, each restricting Contra aid in different and conflicting ways.

Against the background of Reagan's desire to support the Nicaraguan resistance, and his need to exploit the ambiguities of the Boland Amendment in order to do so, arose the IRAN-CONTRA AFFAIR—a tangled enterprise run out of the National Security Council (NSC) and aimed at a deal involving the release of hostages held by pro-Iranian terrorists, arms sales to Iran, and the diversion of profits to the Contras in Nicaragua. Fearing another WATERGATE scandal, the administration discharged the accused parties, launched its own inside and outside investigations, called for an INDEPENDENT COUNSEL, and cooperated with two congressional committees appointed to investigate the affair. The larger legal questions turned on whether or not the NSC was covered by the Boland Amendment's ban on aiding the Contras; the constitutional question as to whether or not the President's authority as COMMANDER-IN-CHIEF (or his oath of office) enabled him to act, for the sake of *salus populi*, on the margins of or even against a congressional statute. In the event, the constitutional issue was quickly eclipsed by the debate over the statutory question and by the dramatic testimony and trial of Oliver North, a hitherto obscure NSC staffer.

In other foreign-policy matters, Reagan enjoyed a wide latitude. He committed U.S. forces to Lebanon, to the raid on Libya, to the liberation of Grenada, and to protection of Kuwaiti oil tankers in the Persian Gulf without invoking the War Powers Resolution and indeed with minimal congressional consultation.

The second interesting line of skirmishes between the Reagan administration and Congress concerned the executive's independence on the domestic front. Here, many administration officials were keen to reign in the authority of the SPECIAL PROSECUTORS created by the Ethics in Government Act for the specific purpose of investigating members of the executive branch, and to curtail the proliferating

means of congressional influence over the executive agencies. On the former topic, the Reagan administration argued that the law establishing special prosecutors violated the SEPARATION OF POWERS by impinging on the executive's right to initiate, conduct, and terminate criminal prosecutions and led, in many cases, to the criminalizing of policy differences. But the Supreme Court upheld the law by a 7–1 vote in *Morrison v. Olson* (1988).

On the latter question—the extension of congressional power over the executive and independent agencies—Reagan faced even greater opposition. Although the administration convinced the Supreme Court of the unconstitutionality of the LEGISLATIVE VETO in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983), Congress continued to pass (and Reagan continued to sign) laws containing such provisions, as well as the even more dubious "committee veto," whereby executive branch decisions may be disallowed by the vote of a single congressional committee.

But the legislative veto was only one of a multitude of ways by which the Congress and its swarm of subcommittees harassed the Reagan administration. In particular, Reagan's appointees complained of the "micromanagement" of the executive agencies by subcommittee chairs and individual members of Congress cajoling and threatening on behalf of their constituents and other friendly interest groups. By this tactic, members of Congress could pass broad, vaguely worded laws serving popular causes and then take credit for saving their constituents from the onerous consequences of the very same laws. The use of omnibus continuing resolutions in place of budget bills was yet another tactic to restrict the executive branch's freedom to veto specific budget bills and its right to decide how to execute the programs funded in the bills.

Reagan himself did not take a leading role in protesting what he regarded as these legislative encroachments on the executive, leaving his subordinates to do most of the disputing. He did vehemently object to being presented with the choice of either signing or vetoing at one stroke the entire BUDGET of the federal government, but nevertheless signed the mammoth Continuing Resolution and Fiscal Year 1988 Budget Reconciliation Act. Rather than precipitate a fiscal, political, and constitutional crisis, he chose to reemphasize his call for two constitutional amendments—one creating a LINE-ITEM VETO for the President and the other mandating a BALANCED BUDGET—to strengthen the hand of future Presidents.

For a conservative President, Reagan appealed for an unusual number of constitutional amendments. In part, this was a backhanded admission of his reluctance to engage in direct costly political combat over the budget, school prayer, abortion, and other controversial subjects. This reluctance was not so much temperamental as it was a reflection of a strategic political decision he had made before entering office in 1980, a decision to try to control the national political agenda by concentrating on two critical issues: reducing taxes and strengthening America's defenses. Of course, Reagan's decision was also shaped by the internal weaknesses of his own coalition, which he was never sufficiently able to overcome to bring about a thoroughgoing political realignment like the NEW DEAL.

Perhaps his greatest constitutional achievement did not have to do with the institutions of government at all. Reagan strove mightily to restore Americans' confidence in themselves as a fundamental force for good in the world, and in his speeches he seldom failed to remind his fellow citizens of a connection with the heroes and statesmen of the American past. In this way, he helped revive their faith in the goodness of the Constitution itself, a faith that had been sorely tried in the dark decades of the 1960s and 1970s.

CHARLES R. KESLER
(1992)

(SEE ALSO: *Bork Nomination; Budget Process; Congress and Foreign Policy; Congressional War Powers; Conservatism; Presidential War Powers; Race-Consciousness; Racial Discrimination; Racial Preference; Rehnquist Court; Senate and Foreign Policy; War Powers.*)

Bibliography

JONES, CHARLES O., ed. 1988 *The Reagan Legacy: Promise and Performance.* Chatham, N.J.: Chatham House.

JONES, GORDON S. and MARINI, JOHN, eds. 1988 *The Imperial Congress: Crisis in the Separation of Powers.* New York: Pharos Books.

MAHONEY, DENNIS J. and SCHRAMM, PETER W., eds. 1987 *The 1984 Election and the Future of American Politics.* Durham, N.C.: Carolina Academic Press.

REAGAN, RONALD 1980–1989 *Presidential Papers.* Washington, D.C.: U.S. Government Printing Office.

## *REAGAN v. FARMERS' LOAN & TRUST CO.*
### 154 U.S. 362 (1894)

In a grotesque opinion the Supreme Court unanimously held unconstitutional a rate schedule fixed by a state railroad commission. Justice DAVID BREWER for the Court had no doubt that the economic validity of rates was subject to JUDICIAL REVIEW, and he found that these rates were "unjust and unreasonable," meaning too low in the estimate of the Court. They resulted, he said with exaggeration, in "a practical destruction to rights of property." Four years later, in SMYTH V. AMES (1898), the Court finally

adopted SUBSTANTIVE DUE PROCESS as the basis for such a ruling, but in this case the Court seemed unready to embrace such an extravagant position, despite previous flirtations with it. Here the Court cast about for something more familiar and found it in the concepts of EQUAL PROTECTION and JUST COMPENSATION, which it united. The difficulty was that the just compensation clause of the Fifth Amendment bound only the national government, not the states, and it applied only in cases of EMINENT DOMAIN, when private property was taken for a PUBLIC PURPOSE. Nothing of that sort had happened here. Brewer, however, declared that the commission's rates denied "equal protection which is the constitutional right of all owners of other property," and then he ruled that the equal protection clause "forbids legislation . . . by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public." Thus the Court incorporated the substance of the just compensation clause of the Fifth Amendment into the Fourteenth for the benefit of railroads, though the Court refused in other cases of this period to incorporate into the FOURTEENTH AMENDMENT the rights that protected accused persons or victims of RACIAL DISCRIMINATION. (See INCORPORATION DOCTRINE.) Moreover, this was not a case of eminent domain and the property of the railroad was not "wrested" without compensation. More rationally, Brewer sought to devise an economic test for determining the reasonableness of a rate schedule: whether the rate was equivalent to the market value of the use of the property. That economists found such a test to be unsound was not so significant as the Court's arrogating to itself the power to determine reasonableness by economic criteria that thrust it into judgments better suited to legislative and administrative agencies. (See ECONOMIC REGULATION AND THE CONSTITUTION.)

LEONARD W. LEVY
(1986)

## REAL EVIDENCE

Real evidence is supplied by a thing that is inspected by the jury, or other trier of fact. (Statements by witnesses are called testimonial evidence.) The acquisition and use of real evidence in the criminal process intersects with constitutional doctrine in various ways. For example, the EXCLUSIONARY RULE may forbid the offering of evidence—such as a gun or a bag containing marijuana—that has been obtained in an unconstitutional SEARCH AND SEIZURE. Correspondingly, the probability that such real evidence will be found in a particular place may, under the doctrine of PROBABLE CAUSE, justify the issuance of a SEARCH WARRANT.

KENNETH L. KARST
(1986)

## REAPPORTIONMENT

Direct democracy is not possible in a nation as populous as the United States is now, or even as it was in 1787 when the Constitution of the United States was drafted. Accordingly, the objective was then, and is now, to devise and implement as fair and effective a plan of democratic REPRESENTATION as possible.

The idea of fair and effective representation at each level of government was not new in 1787. The search for such a formula lies at the center of Anglo-American political thought. In 1690 JOHN LOCKE sought to abolish England's rotten boroughs by urging that, "it being the interest as well as the intention of the people, to have a fair and equal representation, whoever brings it nearest to that is an undoubted friend to and establisher of the government, and cannot miss the consent and approbation of the community."

Although Britain did not put an end to its rotten boroughs until near the middle of the twentieth century, the issue of how best to structure a truly representative government was very much alive at the time the various proposals for the American Constitution were being debated. At last a compromise was struck in the CONSTITUTIONAL CONVENTION OF 1787, giving equal representation to each state in the Senate and representation based on population in the House of Representatives. Article I, section 2, of the Constitution provides that "Representatives . . . shall be apportioned among the several states . . . according to their respective numbers . . . ," with recomputation of the apportionment every ten years, and each state to have at least one representative regardless of population. But the task of fixing the formula for the apportioning process was left to Congress, and no directions at all were established to guide the states in the parallel function of allocating seats in the state legislature or in local governmental bodies. We are not, however, left entirely in doubt about what Congress thought appropriate for apportionment in the states. The NORTHWEST ORDINANCE of 1787 provided that representation in the territorial legislatures to be created in that area should be based on population. In general, the states accepted the principle of reasonably equal population among legislative districts, but the principle was often modified by assurances of at least one representative from each county or township or municipality. Departures from population equality may not have been

egregious in this time of mostly rural dispersal; but by the late nineteenth and early twentieth centuries what had once been minor deviations became major divergences.

JOHN QUINCY ADAMS observed in 1839 that the division of sovereign powers between the states and the nation, as set out in the Constitution, gave us "the most complicated government on the face of the globe." The twentieth century has proved how right he was. The interaction between increasingly potent national and state governments, frequently aggravated by friction arising out of competition for power, has produced a delicately balanced division of power and a complexity of relationships probably unsurpassed in the history of governmental institutions.

Yet it is the proud boast of FEDERALISM in the United States that the governments of the fifty states and that of the nation can work together in common purpose rather than in a relationship of competition and mistrust. Moreover, it is a basic premise of representative democracy in the United States that the people are entitled to representation somewhat in proportion to their numbers, at every level of government. The tradition of majority rule cannot otherwise be attained. Neither the division of sovereign powers prescribed in the federal system nor the fairness of legislative representation formulas can long be left unattended. Vigilant superintendence by an informed electorate is essential.

Even the wisest political scientists have difficulty in defining the precise meaning of representative democracy. There is, however, general agreement that representative democracy in the United States includes something of liberty, equality, and majority rule. Even though these qualities are scarcely less abstract, it can surely be said that representative democracy relates to the processes by which citizens exert control over their leaders. From the time of the Constitutional Convention debate has centered on the extent to which, and the ways in which, majority control over leaders should be exercised. Congress has wrestled with the issue, with inconclusive results. In 1842, for example, Congress required each state to establish compact, contiguous, single-member congressional districts as nearly equal in population as possible. These criteria, however, lapsed in 1911. In any event, no enforcement method had been established, and the courts considered the issue none of their business.

Not until more than a hundred years after the RATIFICATION OF THE CONSTITUTION in 1789 did such states as California, Illinois, Michigan, New York, Ohio, and Pennsylvania, responding to new pressures, abandon the equal-population principle in one or both houses. So widespread had been the original acceptance of the equality concept that no fewer than thirty-six of the original state constitutions provided that representation in both houses of the state legislature would be based completely, or predominantly, on population. Between 1790 and 1889 no state was admitted to the Union in which its original constitution did not provide for representation principally based on population in both houses of the state legislature.

To speak of the equal-population principle as the basis for apportionment of those nineteenth-century legislatures is not to say that there was mathematically precise equality among the districts at that time. The western states, for example, commonly relied on county lines in drawing their apportionment formulas. The distortions that resulted from assuring each county at least one representative, for example, or from grouping whole counties to form election districts, were much less pronounced in agricultural and rural America than in present-day industrial and urban America. The population of the United States, outside the few great commercial centers in the East, was spread thinly across the face of the country.

The drift from relative equality to substantial inequality would have moved at about the same pace as the shift in population from rural to urban America; and that would have been bad enough. But some states accelerated the trend away from the equality principle by other devices as well. As state legislatures were enlarged, additional seats were granted to the areas of new growth without diminishing representation of the declining population areas. As the population of rural areas declined, state legislatures abandoned even the formal acceptance of equal population as a controlling principle, typically guaranteeing each county (or township) one representative. Some states, unable or unwilling to change the constitutional requirement for equality among districts, simply ignored the mandate for decennial change. (Tennessee is a good example; the state constitutional requirement of reapportionment every ten years was ignored between 1901 and 1961, giving rise in 1962 to BAKER V. CARR.)

The consequence of these factors, singly or in combination, was by the middle of the twentieth century a remarkable skewing of voter impact, ordinarily giving the less populated areas of a state a disproportionate influence in legislative representation. The impact was most marked at the state and local legislative levels, but not without considerable influence on congressional districting as well.

By the middle of the twentieth century the disparities in legislative representation were marked. Thus, in the then ninety-nine state legislative chambers (forty-nine bicameral legislatures plus the Nebraska unicameral legislature), thirty-two relied in large part on population; eight used population, but with weighted ratios; forty-five combined population and area considerations; eight granted representation to each unit; five had fixed constitutional apportionments; and one (the New Hampshire Senate)

was based on state tax payments. These conclusions somewhat understate the actual disregard of population as the basis of representation because this summary is drawn exclusively from the state constitutional requirements, without adjustment for violation of those provisions.

The time has come to ask: what is (re)apportionment and what is (re)districting? The question is well put, for the terms are sometimes (confusingly) used interchangeably. But there is a difference. Apportionment is ordinarily described as the allocation of legislative seats by a legislative body to a subordinate unit of government, and districting as the process of drawing the final lines by which each legislative district is bounded. Thus, Congress apportions the number of congressional districts to which each state is entitled, based on population figures disclosed at each decennial census. Each state legislature then draws lines that divide the state into as many congressional districts as have been allocated to it by Congress.

State legislatures, on the other hand, both apportion the distribution of state legislative seats *and* draw the district lines that determine which voters will make each selection. Therein lies the problem, clearly rooted in the political ambition of each political group to overcome its opposition, before the voting begins, on the basis of the dispersion of voters eligible to vote for one candidate rather than another.

By the early 1960s the act and the impact of malapportionment were everywhere apparent, typically to the apparent disadvantage of individual voters in heavily populated districts and to the apparent advantage of voters in sparsely populated districts. Despite the fact that many state constitutions required reapportionment every ten years and included formulas requiring approximate population equality, no legislative chamber came closer to that goal than two to one, and the disparity between most populous to least populous district was in many states more than ten to one and in several more than one hundred to one. To put the matter another way, in twelve states fewer than twenty percent of the voters lived in districts that elected a majority of the state senators, and in seven states fewer than thirty percent of the voters lived in districts that elected a majority of the members of the lower house.

State courts occasionally acted to deal with the most egregious abuses, but the federal courts, until 1962, adamantly refused to intervene. Although the Supreme Court had long recognized the right of citizens to vote free of arbitrary impairment by STATE ACTION when such impairment resulted from dilution by false tally or by stuffing of the ballot box, the Court had declined to deal with apportionment and districting abuses on the grounds that the issue was not justiciable, that is, not appropriate for federal judicial intervention. As Justice FELIX FRANKFURTER said in COLEGROVE V. GREEN (1946), "Courts ought not to enter this political thicket."

Finally, the case of interference with the exercise of the franchise was made so clearly that a majority of the Court was persuaded that only federal judicial intervention could put an end to this denial of equality. The case that triggered this change in attitude provided a dramatic illustration of flagrant abuse of voter rights by a state legislature that had openly flouted its own state constitution for more than half a century.

The Tennessee Constitution had required, since 1870, that the number of senators and representatives in the general assembly "be apportioned among the several counties or districts, according to the number of qualified electors in each. . . ." Moreover, the state constitution required reapportionment in accordance with the equal-population standard every ten years. Between 1901 and 1961, however, the legislature had not acted on the matter. As a result, thirty-seven percent of the Tennessee voters lived in districts that elected twenty of the thirty-three senators, and forty percent of the voters lived in districts that elected sixty-three of the ninety-nine members of the lower house. The federal court challenge was brought by voters in urban areas of the state, who invoked the Constitution of the United States and claimed that they had been denied the EQUAL PROTECTION OF THE LAWS, "by virtue of the debasement of their votes."

The resulting Supreme Court decision, *Baker v. Carr*, did not rule on the substance of the equality claim, but did hold that the issue was properly within the JURISDICTION OF THE FEDERAL COURTS and was justiciable. Only Justices Frankfurter and JOHN MARSHALL HARLAN dissented.

Within two years the Supreme Court signaled how it would decide the equality issue. GRAY V. SANDERS (1963), while not strictly an apportionment case, involved the closely related issue of voter discrimination. The election practice there challenged was the Georgia "county-unit" system, as it applied to statewide primaries: a candidate for nomination who received the highest number of popular votes in a county was considered to have carried the county and to be entitled to two votes for each representative to which the county was entitled in the lower house of the general assembly. The majority of the county unit vote was required to nominate a candidate for United States senator or state governor, while a plurality was sufficient for nomination of candidates for other offices. Because the most populous county (Fulton, with a 1960 population of 556,326) had only six unit votes, while the least populous county (Echols, with a 1960 population of 1,876) had two unit votes, "one resident in Echols County had an influence in the nomination of candidates equivalent to 99 residents of Fulton County."

Georgia argued that, because the ELECTORAL COLLEGE

permitted substantial inequalities in voter representation in a "winner-take-all" system, parallel systems should be permitted to the states. Moreover, the state argued that because United States senators represent widely divergent numbers of voters, the same should be permitted in one house of a state legislature. But the Supreme Court rejected all such analogies as inapposite: "The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State in a statewide election. No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical equality ensued."

While conceding that states "can within limits specify the qualifications of voters both in state and federal elections," the Court denied that a state is entitled to weight the votes "once the geographical unit for which a representative is to be chosen is designated. . . ." Accordingly, the Court concluded: "The conception of political equality from the DECLARATION OF INDEPENDENCE, to Lincoln's Gettysburg Address to the FIFTEENTH, SEVENTEENTH, and NINETEENTH AMENDMENTS can mean only one thing—ONE PERSON, ONE VOTE." The fatal defect in the Georgia plan was that the votes were weighted on the basis of geography as an expression of legislative preference for rural over urban voters.

The next franchise case decided by the Supreme Court with full opinion, WESBERRY V. SANDERS (1964), was also not a state legislative apportionment case; it was a congressional districting case not very dissimilar from *Colegrove v. Green*—except in result. Plaintiffs were qualified voters of Fulton County, Georgia, entitled to vote in the state's fifth congressional district, which had a 1960 population of 823,680, as compared with the 272,154 residents of the ninth district.

After the decision in *Baker v. Carr*, the Court had little difficulty deciding that such issues were justiciable in federal courts. The substantive ruling, however, came as something of a surprise. Plaintiffs had argued principally that the gross population disparities violated the equal protection clause of the FOURTEENTH AMENDMENT. The Supreme Court, however, adopted what had been a subordinate contention, that the Georgia arrangement violated Article I, section 2, of the Constitution, which prescribed that representatives be chosen "by the People of the several States." Justice HUGO L. BLACK, writing for the majority of six, stated that this provision, when construed in its historical context, means "that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's. . . . To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the People,' a principle tenaciously fought for and established at the Constitutional Convention." That result, at first surprising in view of the nonspecific constitutional text, was well supported in the Court's review of the relevant history. For example, at the Constitutional Convention JAMES WILSON of Pennsylvania had said that "equal numbers of people ought to have an equal number of representatives," and representatives "of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other."

Reliance on section 2 of Article I rather than on the equal protection clause has had significant consequences. From that date forward the Court has been less tolerant of population variations among congressional districts than of those in state legislative districts, as to which the population-equality principle has, since REYNOLDS V. SIMS (1964), been based on the equal protection clause of the Fourteenth Amendment.

*Reynolds v. Sims* and its five companion cases completed the original round of apportionment and districting cases and constituted the foundation on which all subsequent litigation has built. On June 15, 1964, the Court invalidated the state legislative apportionment and districting structure in Alabama (the *Reynolds* case), Colorado, Delaware, Maryland, New York, and Virginia. One week later the Court struck down the formulas in nine additional states, foretelling a complete reapportionment revolution.

*Reynolds v. Sims* was illustrative. The complaint in that case alleged that the last legislative reapportionment in the state had been based on the 1900 federal census despite a state constitutional requirement for decennial reapportionment. Accordingly, because the population growth had been uneven, urban counties were severely disadvantaged by the state legislature's failure to reapportion every ten years and by the state constitution's provision requiring each of the sixty-seven counties to have at least one representative in the lower house with a membership of 106. The Supreme Court of the United States ruled unequivocally in favor of the equal-population principle: "We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the state."

The decisions in *Wesberry* and *Reynolds* required adjustment of congressional districting practices in all states (except the few states with only one representative each)

and of all state legislative districting practices. Despite considerable adverse reaction in the beginning and substantial litigation to determine the full significance of the decisions, by and large compliance was secured; and further adjustments were made after the results of the 1970 and 1980 censuses were determined.

Two principal types of questions remained to be worked out after the first decisions were announced: how equal is "equal" in congressional districting and in state legislative apportionment and districting? and to what extent does the equal-population principle apply to the thousands of local governmental units and the even larger number of special districts that serve multitudinous quasi-governmental purposes?

Despite criticism of the *Reynolds* decision based on an assumption that the Court had demanded mathematical exactness among election districts, the Court explicitly acknowledged the permissibility of some variation: "We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." The important obligation is for each state to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."

From the beginning the *Reynolds* Court acknowledged that states could continue to place some reliance on political subdivision lines, at least in drawing the lines for state legislative bodies. "Since almost invariably there is a significantly larger number of seats in state legislative bodies to be distributed within a state than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State." A further reason for at least limited adherence to local political subdivision lines is the highly pragmatic proposition that, to do otherwise, "[i]ndiscriminate districting, without any regard for political subdivisions, may be little more than an invitation to partisan gerrymandering."

Acknowledging the principle that population deviations are permissible in state districting implementation of rational state policy, the Supreme Court has recognized that de minimis numerical deviations are unavoidable. Maximum deviations in Connecticut of 7.83 percent among house districts and 1.81 percent among senate districts were upheld in *Gaffney v. Cummings* (1973). Texas deviations of 9.9 and 1.82 percent respectively among house and senate districts were similarly approved in *White v. Regester* (1973). In MAHAN V. HOWELL (1973) the Court upheld a Virginia plan despite a maximum deviation of 16.4 percent, on the grounds that the plan could "reasonably be said to advance the rational state policy of respecting the boundaries of political subdivisions," but cautioned that "this percentage may well approach tolerable limits."

The requirement of population equality is far more exacting in the drawing of congressional district lines. In *Kirkpatrick v. Preisler* (1969) the Court struck down Missouri's 1967 Redistricting Act despite the fact that the most populous district was 3.13 percent larger and the least populous 2.84 percent smaller than the average district. In explanation the Court stated, "Since 'equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives,' the 'as nearly as practicable' standard requires that the State make a good faith effort to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." In *Karcher v. Daggett* (1983) the Supreme Court invalidated a deviation of less than one percent among New Jersey congressional districts because the state had failed to make "a good-faith effort to achieve precise mathematical equality" in population among its congressional districts. In sum, because local units of government are less important as factors in the representation of relatively large numbers of persons in the Congress than for smaller numbers of persons in the state legislature, population deviations among congressional districts are strictly scrutinized, while a more tolerant review is accorded state districting. But even in state districting the excesses of the past are no longer tolerable; above the *de minimis* level deviations must be held within narrow limits and must be justified in terms of preservation of political subdivisions, compactness and contiguity of districts, and respect for natural or historical boundaries.

No matter how close the judicial superintendence of population equality, one problem remains. In congressional and state legislative districting alike, even the most exact adherence to the equal-population principle does not assure protection against legislative line-drawers who seek partisan advantage out of the process. "GERRYMANDER" is the term used to describe such efforts to preserve partisan power or to extend such power through manipulative use of the process. The term originated in 1812 in Massachusetts, where political maneuvering had produced a salamander-shaped district which was named after ELBRIDGE GERRY, then governor. From that time forward the gerrymander has been an altogether too-common fact of American political life. Nevertheless, despite repeated attempts to persuade the Supreme Court to enter this new "political thicket," the Court has denied that there is any constitutional ground for superintending the apportionment and districting process other than the equal-population principle. Accordingly, the states remain

free, so far as the United States Constitution is concerned, to construct congressional and state legislative districts that resemble salamanders or other equally peculiar creatures. And many state legislatures have done just that, particularly where one party is in secure control of the state legislative process. Where party control of the two houses of a bicameral legislature is divided, or where the governor is of a different party, the drawing of congressional and state legislative district lines is likely to be worked out by political compromise or, that failing, by the courts.

More seemly alternatives are possible, but they are not often adopted in the absence of JUDICIAL REVIEW over the process except as to population equality among districts. Congress has the authority to set standards of compactness and contiguity that would avoid the worst abuses and could be enforced in the courts. State legislatures could adopt similar standards to control the process within their own states, but few political leaders are willing to relinquish the prospect of present or future partisan advantage to be secured out of the districting process.

Like state legislative districting, the districting of counties, municipalities, or other local governmental units is constitutionally permitted to deviate to some extent from full equality if it can be demonstrated that the governmental unit has made "an honest and good faith effort" to construct districts "as nearly of equal population as practicable." Local governments may use MULTIMEMBER DISTRICTS if there is a history of such representation and if such plans are not part of a deliberate attempt to dilute or cancel the voting strength of racial or political elements in the governmental unit. Despite that limitation, local governments, like states, may use ethnic or minority population data in constructing districts designed to elect representatives of that minority or ethnic group. (See UNITED JEWISH ORGANIZATION V. CAREY.)

Supreme Court intervention in the apportionment and districting process has unquestionably restructured congressional and state legislative representation. Gross population disparities among election districts have been evened out so that the democratic promise of fair representation has been made possible of realization. But no court, even so powerful a body as the Supreme Court of the United States, can assure democratic representation. The ultimate test of the democratic process will depend upon the level of concern of the voters and their willingness to insist that their legislative representatives take whatever action is necessary to prevent excesses.

There are two principal types of gerrymandering, both of which should be controlled. The bipartisan or "incumbent survival" plan is designed to assure as far as possible the reelection of incumbents, sometimes regardless of party affiliation; the technique is to distribute party registration or proven party supporters to the legislators who will benefit most. The partisan plan is designed to maintain or increase the number of seats held by the majority party; the technique is to "waste" votes of the opposition party either by concentrating the voters loyal to that party in as few districts as possible, or by dispersing the opposition voting strength among a number of districts in which it cannot command majorities. Control of these abuses is not likely to come from party leadership. Voters concerned with the integrity of the process must demand an end to such practices, calling for state constitutional amendments or statutes requiring that districts be compact and contiguous.

Redistricting should be a matter of special concern for ethnic and racial minorities, many of whom are concentrated in urban centers. Typically, minority spokesmen claim that fair representation requires districts that will elect members of their own groups. When legislatures act to meet such demands, other groups are likely to feel disadvantaged. That issue was litigated to the Supreme Court in *United Jewish Organization v. Carey.* In that case a New York redistricting plan had been modified to bring it into compliance with the VOTING RIGHTS ACT OF 1965. In the process the act divided a community of Hasidic Jews in order to establish several substantially nonwhite districts. The Court upheld the plan, ruling that such a use of racial criteria was justified in fulfillment of congressional legislative policy in the Voting Rights Act.

Somewhat related to the issue just discussed is the question whether municipalities and other local legislative bodies should be permitted to require at-large elections for all the seats in the legislative unit. Such a practice may make it impossible for a minority group in the community to secure representation, even though one or more members of that minority might be elected if single-member districts were used. The Supreme Court held, in MOBILE V. BOLDEN (1980), that multimember district elections would be tolerated, even where the impact on minority groups was demonstrated, unless it could be shown that the plan was adopted with racially discriminatory intent. However, the Voting Rights Act of 1982 overturned that ruling; under the act, invidious intent need not be shown if impact disadvantageous to identifiable minorities can be established.

In the era before the application of computer technology to politics, it was common for politicians and their staffs to spread out maps on office floors, using adding machines for their arithmetic, slowly building new districts from census tracts and precinct figures. Because most redistricting decisions must be made sequentially—one boundary change requires another, which requires yet another—the computer is perfectly designed to speed the process and allow for more sophisticated analysis. The computer not only makes available numerical population

counts, voter history, and party registration, but also permits a graphic display of the areas represented.

These technical advances have resulted in what may be styled the second reapportionment revolution. They place in the hands of those responsible for redistricting a vast array of information for use in drawing district lines. It follows, for better or for worse, that the computer's twin features of speed and accuracy can advance the goal of "fair and effective representation" as well as engineer the nearly perfect gerrymander.

At the time of the reapportionment decisions of the early 1960s, commentators speculated about the decisions' likely impact on the representational process. The most common prediction was that the urban areas would dominate state legislatures, with a general tendency toward liberal legislative policies. It is by no means clear that this prediction has come true. Enlarged influence of the suburbs, often with a conservative representation and not infrequently allied with rural representatives, has been the more typical reality. The one thing that can be said with confidence is that adoption of the equal-population principle has ended the worst abuses and assured basic fairness in the most important features of the democratic process.

ROBERT B. MCKAY
(1986)

Bibliography

ADAMS, BRUCE 1977 A Model State Reapportionment Process: The Continuing Quest for "Fair and Effective Representation." *Harvard Journal on Legislation* 14:825–904.

COMMON CAUSE 1977 *Reapportionment: A Better Way.* Washington, D.C.: Common Cause.

DIXON, ROBERT G. 1968 *Democratic Representation: Reapportionment in Law and Politics.* New York: Oxford University Press.

GROFMAN, BERNARD et al., eds. 1981 *Representation and Redistricting Issues.* Lexington, Mass.: D. C. Heath.

MCKAY, ROBERT B. 1965 *Reapportionment: The Law and Politics of Equal Representation.* New York: Twentieth Century Fund.

POLSBY, NELSON, ed. 1971 *Reapportionment in the 1970s.* Berkeley: University of California Press.

## REAPPORTIONMENT
## (Update)

In 1991, reapportionment and redistricting were the most open, democratic, and racially egalitarian in American history. A series of Supreme Court decisions beginning with SHAW V. RENO in 1993, however, insured that the 2001 redistricting would be completely different.

The 1982 amendments to the VOTING RIGHTS ACT and the Court's interpretation of them guaranteed minority groups unprecedented influence over redistricting in the 1990s. When Congress in 1981–1982 considered requiring proof of only a racially discriminatory effect, rather than a racially discriminatory intent, to void state or local election laws, critics warned that this amendment would lead inexorably to racial GERRYMANDERING and drives for proportional representation for minority groups. Congress adopted it anyway, and in an authoritative 1982 U.S. SENATE report, it directed the U.S. Department of Justice not to allow states and localities in the Deep South and scattered areas throughout the country to put into force laws that had racially discriminatory effects. The Justice Department therefore became an active ally of minority voters during the 1990s redistricting.

In the most important VOTING RIGHTS decision of the 1980s, *Thornburg v. Gingles* (1986), Supreme Court Justice WILLIAM J. BRENNAN, JR., writing for the Court, sustained the new effect standard. Drawing on the 1982 Senate report and testimony from hearings on the Voting Rights Act, Brennan ruled that if a minority group was sufficiently large and geographically compact to dominate an electoral district, and if voting in the area was racially polarized, then states and localities had to draw districts that would enable minority voters to elect candidates of their choice. In 1991, however, redistricting planners largely disregarded the compactness requirement because "compactness" was notoriously difficult to define—Brennan had not even tried to define it, and Congress in 1989 had rejected a compactness standard for congressional districts.

To facilitate the 1991 redistricting, the U.S. Census Bureau rapidly made population and ethnic data, already keyed to voting precincts, widely available in machine-readable form. Ethnic and interest groups, as well as factions of the POLITICAL PARTIES, individual politicians, and members of the general public were given access to computers and software that made drawing districts for local, state, and congressional seats quick and easy. Many of them drafted competing redistricting plans and took vigorous parts in hearings and debates. Organizations representing African American and Latino voters, such as the National Association for the Advancement of Colored People, the Mexican American Legal Defense and Education Fund, and the AMERICAN CIVIL LIBERTIES UNION, were especially active.

Both Republicans and Democrats initially supported drawing more minority opportunity districts in 1991. Republicans sought to pack largely Democratic African Americans and Latinos into as few districts as possible, sacrificing those seats in order to maximize Republican

seats. Democrats, who had to draw minority opportunity districts to satisfy their core constituents, aimed to minimize their party's losses of seats by extracting minorities from predominantly Republican districts, often producing jagged district boundaries. The result was the largest gain in minority representation since the 1870s, modest losses in overall Democratic representation in Congress, and, in reaction to both of these, a radical shift in Supreme Court DOCTRINE by a five-person conservative Republican majority on the Court.

The Court had ruled in a series of cases in the 1970s and 1980s that, in order to have STANDING to sue under the FOURTEENTH and FIFTEENTH AMENDMENTS, plaintiffs had to prove injury—namely, vote dilution. In any event, a state's intent to comply with the Voting Rights Act, the Court decided in UNITED JEWISH ORGANIZATIONS V. CAREY (1977), justified race-conscious redistricting. Therefore, when five white North Carolinians challenged two 57-percent black congressional districts that had elected the state's first African American members of Congress in the twentieth century on the grounds that planners had taken race into account in drawing the districts, the majority of a three-judge federal DISTRICT COURT panel dismissed the case. In a bitterly contested 5–4 decision, the Supreme Court overturned the lower court in *Shaw*, granting the white plaintiffs standing on the grounds that the sprawling districts conveyed a symbolic message of racial difference to voters and public officials. It did not matter that whites were not discriminated against—their votes were not diluted—nor did it matter whether the message that whites and blacks differed politically was true. The Fourteenth Amendment, Justice SANDRA DAY O'CONNOR said, prohibited any intentional governmental distinctions between people on racial grounds.

After the *Shaw* decision, losing congressional candidates, along with advocates of what they called "color-blind" policies, joined by southern state Republican parties that began to treat redistricting as an AFFIRMATIVE ACTION issue, challenged all but one black- or Latino-majority congressional district in the South that had initially been drawn in the 1990s, and several majority–minority districts outside the South, as well. When a district court invalidated two majority-black Georgia districts that were much more compact than those in North Carolina, the *Shaw* majority of the Supreme Court affirmed, condemning every district drawn for "predominantly racial" reasons or in which race had been used "as a proxy" for Democratic voting. After this decision, MILLER V. JOHNSON, no longer was a *Shaw*-type claim restricted to majority–minority districts or those whose shape annoyed some Justices. *Miller* and two 1996 decisions dismissed compliance with the Voting Rights Act and attempts to overcome past discrimination or current racial-bloc voting as justifications for race-conscious districting. Attempts to make it possible for "DISCRETE AND INSULAR MINORITIES" to elect candidates of their choice, the majority ruled, were much less important than adherence to what it termed "traditional districting principles." These newly discovered "traditional" principles included not only compactness and protecting incumbents, but also, for instance, the much-broken habit of drawing separate districts in Georgia's four corners and, according to one district judge, preserving the power of various white ethnic "communities of interest." By contrast, Justice ANTHONY M. KENNEDY dismissed as "offensive and demeaning" the notion that African Americans might form a community of interest. And strikingly unlike its treatment of pro-Democratic race-conscious districting plans, the Supreme Court in *Voinovich v. Quilter* (1993 and 1996) sustained the deliberate, openly admitted packing of African Americans into state legislative districts by Ohio Republicans. Why *Miller*'s "predominant reason" or "race as a proxy" tests did not apply to Republicans, the Court did not explain.

In a biting dissent in *Bush v. Vera* (1996), Justice JOHN PAUL STEVENS accused the majority of using race as an indirect means of attacking political gerrymanders. After seeming to open the door to challenges to partisan gerrymanders by ruling them JUSTICIABLE in *Davis v. Bandemer* (1986), the Court had set the standard of proof so high as practically to foreclose such cases, and later it rejected without comment legal assaults on bipartisan gerrymanders and on the whole notion that legislators should influence the shape of their districts. It also allowed the Bush Administration to block efforts to use statistical sampling to insure that minority group members and other predominantly poor people were not undercounted by the CENSUS, a decision that skewed the allocation of congressional seats toward the predominantly white, Republican suburbs.

Thus, as always before in American history, party politics suffused the redistricting of the 1990s, but this time disguised behind the mask of race. Racial dividing lines, long the most deep and consistent in the country's politics, increasingly split Republicans from Democrats. Since any indication that race has been considered in the drawing of district lines can be used in the inevitable legal challenges to every major redistricting in 2001, there will be a strong incentive to conduct such discussions in secret or in coded language. Ironically, then, the REHNQUIST COURT has twisted the Fourteenth Amendment into a barrier to the equal participation of minorities in allocating political power, one which operates differentially against the political party to which they overwhelmingly adhere, and it has so judicialized the redistricting process as to hamper

popular participation and open, frank deliberations concerning the key cleavage in American politics. This is an outcome that the WARREN COURT hardly could have foreseen when it strode self-confidently into the political thicket in BAKER V. CARR (1962).

J. MORGAN KOUSSER
(2000)

(SEE ALSO: *Electoral Districting.*)

Bibliography

CONGRESSIONAL QUARTERLY 1993 *Congressional Districts in the 1990s.* Washington, D.C.: Congressional Quarterly, Inc.

GROFMAN, BERNARD; HANDLEY, LISA; and NIEMI, RICHARD G. 1992 *Minority Representation and the Quest for Voting Equality.* New York: Cambridge University Press.

KOUSSER, J. MORGAN 1999 *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction.* Chapel Hill, N.C.: University of North Carolina Press.

LUBLIN, DAVID 1997 *The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress.* Princeton, N.J.: Princeton University Press.

THERNSTROM, ABIGAIL M. and THERNSTROM, STEPHAN T. 1997 *America in Black and White: One Nation Indivisible.* New York: Simon & Schuster.

## REASONABLE DOUBT

Proof beyond a reasonable doubt is the highest level of proof demanded in American courts. It is the usual standard for criminal cases, and in criminal litigation it has constitutional grounding in decisions of the United States Supreme Court. Although the reasonable doubt standard is not often used in noncriminal settings, there are exceptional situations, usually where liberty is placed in jeopardy, when a JURISDICTION will borrow the criminal standard of proof for a civil case.

Any standard of proof chosen by an American court recognizes that in all litigation there is the chance of a mistake. If opposing litigants agree on the various matters that constitute their case, usually the case is settled. There is little for a judge or a jury to do. Once a dispute arises, however, adversaries offer conflicting EVIDENCE and conflicting interpretations of evidence to decision makers. Rarely, if ever, is there a dispute in which every witness and every aspect of physical and scientific evidence presented by opposing parties point with perfect certainty to one specific conclusion. Witnesses may suffer from ordinary human frailties—they have memory problems; they sometimes confuse facts; they see events differently from each other; they have biases and prejudices that call into question their judgment; and they may be frightened and have trouble communicating on the witness stand. Physical evidence might be damaged or destroyed and thus of minimal or no use at trial. Or, it might be difficult to connect physical evidence with the parties before the court. Even scientific tests often provide little more than probabilities concerning the relationship of evidence to the issues in a case.

Were judges and juries required to decide cases on the basis of absolute certainty about what occurred, it is doubtful that they ever would find the standard satisfied. Whoever was required to prove the case would always lose. Recognizing that absolute certainty is not reasonably possible, American courts have chosen to demand less. How much less determines the extent to which they are willing to accept the risk of error in the course of litigation.

In criminal cases the typical requirement is that the government must prove the essential elements of any offense it chooses to charge beyond a reasonable doubt. This means that, although the decision maker need not be certain that a defendant is guilty before convicting, any reasonable doubt requires that it find the defendant not guilty. Such a standard allocates most of the risk of error in criminal cases to the state. It cannot assure that no innocent person will ever be convicted, but the standard is demanding enough to make it most unlikely that someone who is actually innocent will be found guilty. It is more likely that truly guilty persons may go free, but that is the price American criminal justice pays to avoid mistakes that harm the innocent.

It is uncertain when this standard of proof was first used in criminal cases. In early England, whether or not a person would be convicted depended on his ability to produce compurgators or to avoid misfortune in an ordeal. Subsequently, success turned on whether or not a suspect could succeed in trial by combat. As trial by jury replaced other forms of proof, the jurors originally decided cases on the basis of their own knowledge, and even if they relied on informants, the jurors themselves were responsible for the accuracy of the facts. Not until the notion of an independent fact finder, typically a jury, developed was a standard of proof very meaningful. With the development of the independent and neutral fact finder, the "beyond a reasonable doubt" concept took on importance.

Although there is no mention of the proof beyond a reasonable doubt concept in the United States Constitution, trial by jury is in all but petty cases guaranteed by the Sixth Amendment, and with the Supreme Court's decision in DUNCAN V. LOUISIANA (1968), this right is now binding on the states. By the time the Sixth Amendment was adopted, proof beyond a reasonable doubt was closely associated with the right to an impartial jury guaranteed by the Constitution in criminal cases.

Thus, it is not surprising that the Supreme Court has found the proof beyond a reasonable doubt standard to be constitutionally required in criminal cases with respect to all essential elements of offenses charged, whether the criminal case is litigated in state or federal court (IN RE WINSHIP, 1970). The Court associated the high proof standard with the strong presumption of innocence in criminal cases and observed that before a defendant may be stigmatized by criminal conviction and punished for criminal wrongdoing, DUE PROCESS requires the state to prove guilt beyond a reasonable doubt. (See *Jackson v. Virginia*, 1979.)

There is little agreement on exactly what a reasonable doubt is. No single definition of reasonable doubt has ever gained acceptance in American courts. There does seem to be some consensus that a decision maker should understand that a reasonable doubt is one based in reason as applied to the proof offered in a case. This elaboration of the standard is consistent with the oath that judges administer to jurors who are called upon to decide a case. Beyond this, it is difficult to define the term. Any language that is used is likely to be challenged as being either too demanding or not demanding enough.

Judges and juries have come to know that the proof beyond a reasonable doubt standard represents American regard for liberty and the dignity of the individual who stands against the state and who seeks to preserve his freedom and independence. A reasonable doubt will protect him.

STEPHEN A. SALTZBURG
(1986)

(SEE ALSO: *Burden of Proof.*)

Bibliography

KALVEN, HARRY, JR. and ZEISEL, HANS 1966 *The American Jury.* Boston: Little, Brown.

TRIBE, LAURENCE H. 1971 Trial by Mathematics: Precision and Ritual in the Legal Process. *Harvard Law Review* 84:1329–1393.

## REASONABLE EXPECTATION OF PRIVACY

An issue of extraordinary importance in determining the scope of the protection of the FOURTH AMENDMENT is the interpretation of the word "searches" in that amendment's proscription of "unreasonable searches and seizures." If certain conduct of state or federal officials is deemed not to constitute either a search or seizure, then Fourth Amendment requirements need not be met. On the other hand, if that activity is a search or seizure, then it is unconstitutional unless those requirements—that the conduct be undertaken only upon a certain quantum of evidence (PROBABLE CAUSE), and in many instances that it be undertaken only upon prior judicial approval—have been met. How this issue comes out is a matter of considerable practical significance in criminal prosecutions, for the Fourth Amendment's EXCLUSIONARY RULE usually dictates suppression of evidence if the amendment's limitations were exceeded in acquiring it.

The Supreme Court has had difficulty in developing a workable definition of the word "searches." At an earlier time, as in *Hale v. Henkel* (1906), the Court was inclined to say that "a search ordinarily implies a quest by an officer of the law," yet it soon became clear that not every instance of seeking evidence was a search. In OLMSTEAD V. UNITED STATES (1928), for example, the Court held that the placing of a tap on telephone wires and thereby eavesdropping on the defendant's conversations was no search. As the Court later explained in SILVERMAN V. UNITED STATES (1961), there was no Fourth Amendment search unless the police had physically intruded into "a constitutionally protected area." These areas were enumerated in the Fourth Amendment itself: "persons," including the bodies and clothing of individuals; "houses," including apartments, hotel rooms, garages, business offices, stores, and warehouses; "papers," such as letters; and "effects," such as automobiles. But then came the landmark decision of KATZ V. UNITED STATES (1967), which overruled the *Silverman* standard and gave birth to the "reasonable expectation of privacy" test.

Katz was convicted in federal court on a charge of transmitting wagering information by telephone in violation of federal law. At trial the government was permitted to introduce, over defendant's objection, evidence of his end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the exterior of a public telephone booth from which Katz habitually placed long-distance calls. The court of appeals affirmed Katz's conviction, reasoning that the ELECTRONIC EAVESDROPPING did not amount to a Fourth Amendment search because the microphone had not penetrated the wall of the telephone booth. Before the Supreme Court, the parties disputed whether the booth was a "constitutionally protected area," but the Court declined to address that issue, noting that "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." The Court then held, "The Government's activities in elec-

tronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure' within the meaning of the Fourth Amendment."

In his concurring opinion in *Katz*, Justice JOHN M. HARLAN joined the opinion of the Court, but then explained what he took this opinion to mean. Lower courts and ultimately the Supreme Court itself came to rely upon the Harlan elaboration of the *Katz* test: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Courts and commentators thereafter attempted to ascertain the meaning of each of these two requirements.

The first part of the Harlan formulation arguably finds support in that part of the *Katz* majority opinion which declared that the government conduct directed at Katz "violated the privacy upon which he justifiably relied." However, an actual, subjective expectation of privacy deserves no place in a statement of what the Fourth Amendment protects. By use of a subjective test, it would be possible for the government by edict or known systematic practice to condition the expectations of the populace in such a way that no one would have any real hope of privacy. Harlan later appreciated this point, observing in his dissent in UNITED STATES V. WHITE (1971) that analysis under *Katz* must "transcend the search for subjective expectations," for "our expectations, and the risks we assume, are in large part reflections of laws that translate into rules, the customs and values of the past and present."

Although a majority of the Court acknowledged in *Smith v. Maryland* (1979) that in some situations the subjective expectation of privacy test "would provide an inadequate index of Fourth Amendment protection," the Court sometimes appears to rely on it nevertheless. Illustrative is *California v. Ciraolo* (1986), holding that the Fourth Amendment was not violated by warrantless aerial observation of marijuana plants inside a fenced backyard of a home. Though the state conceded the defendant had a subjective privacy expectation, the Court offered the gratuitous observation that because "a 10-foot fence might not shield these plants from the eyes of a citizen or a policeman perched on the top of a truck or a 2-level bus," it was "not entirely clear" whether the defendant "therefore maintained a subjective expectation of privacy from *all* observations of his backyard, or whether instead he manifested merely a hope that no one would observe his unlawful gardening pursuits." The unfortunate implication of this comment is that a defendant cannot even get by the first *Katz* hurdle unless he has taken steps to ensure against all conceivable efforts at scrutiny.

The second branch of the Harlan elaboration in *Katz*, apparently an attempt to give content to the word "justifiably" in the majority's formation, prompted the Court on later occasions, as in TERRY V. OHIO (1968), to refer to the *Katz* rule as the "reasonable 'expectation of privacy' test." This language is perhaps unfortunate, for it might be read to mean that police activity constitutes a search whenever it uncovers incriminating actions or objects which the law's hypothetical reasonable man would expect to be private—that is, which as a matter of statistical probability were not likely to be discovered. Though the Court has wisely rejected such an interpretation, as in OLIVER V. UNITED STATES (1984), it still leaves the question of precisely what makes a reliance on privacy "justified" in the *Katz* sense.

In his *White* dissent, Harlan asserted that this question must "be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of a conduct as a technique of law enforcement." Thus, he added, "those more extensive intrusions that significantly jeopardize the sense of security which is the paramount concern of Fourth Amendment liberties" are searches. Anthony Amsterdam has similarly asserted that the "ultimate question" posed by *Katz* "is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."

But this is unfortunately not how the Court has subsequently interpreted *Katz*, as is apparent from a sampling of more recent cases. In *United States v. Miller* (1976) the Court held that a person has no justified expectation of privacy in the records of his banking transactions kept at financial institutions with which he has done business, because the documents "contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." This conclusion overlooks the fact that bank employees examine checks briefly and one at a time, and thus do not construct conclusions about the customer's lifestyle, while police who study the totality of one's banking records can acquire a virtual current biography. The Court's error in *Miller* was compounded in *Smith v. Maryland*, holding that one has no legitimate expectation of privacy in the numbers he dials on his telephone because those numbers are conveyed to the telephone company's switching equipment and, in the case of long-distance calls, end up on the customer's bill. Thus, the defendant in *Smith* could not object to police use of a pen register to determine all numbers he dialed,

though once again the more focused police examination of the information revealed much more than the limited and episodic scrutiny that the phone company employees might give the same numbers.

In *United States v. Knotts* (1983) the Court similarly held that it was no search for police to keep track of a person's travels by using a "beeper" because "anyone who wanted to look" could have learned, without such assistance, of the defendant's 100-mile journey from Minneapolis into rural northern Wisconsin. But to learn what the beeper revealed—that the beeper-laden container of chemicals purchased in Minneapolis was now in a particular secluded cabin 100 miles away—would have taken an army of bystanders in ready and willing communication with one another. And then there is *Ciraolo*, holding that it is no search for police to look down from an airplane into one's solid-fenced backyard because "any member of the public flying over this airspace who glanced down could have seen everything that these officers observed." This ignores the fact, as the four dissenters put it, that "the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent."

In each of these cases, a majority of the Court failed to appreciate that "privacy is not a discrete commodity, possessed absolutely or not at all" (as Justice THURGOOD MARSHALL put it in his *Smith* dissent) and that there is a dramatic difference, in privacy terms, between the sporadic disclosure of bits and pieces of information to a small and often select group for a limited purpose and a focused police examination of the totality of that information regarding a particular individual. Such decisions leave the promise of *Katz* unrealized and ignore the teachings of the Supreme Court's germinal search and seizure decision, BOYD V. UNITED STATES (1886). There, Justice JOSEPH P. BRADLEY wrote that "constitutional provisions for the security of person and property should be liberally construed" in order to forestall even "the obnoxious thing in its mildest and least repulsive form," as "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."

Some hope—modest, given the outcome of the case—is to be found in *Florida v. Riley* (1989), holding that an officer's naked-eye observation into the defendant's residential greenhouse from a helicopter 400 feet off the ground was no search. Significant for present purposes is the observation of Justice HARRY A. BLACKMUN, dissenting, that a "majority of the Court" (the four dissenters and one concurring Justice) believe that the reasonableness of the defendant's expectations "depends, in large measure, on the frequency of nonpolice helicopter flights at an altitude of 400 feet." This means, Justice WILLIAM J. BRENNAN concluded in his dissent, that a majority of the Court does not accept "the plurality's exceedingly grudging Fourth Amendment theory, [whereunder] the expectation of privacy is defeated if a single member of the public could conceivably position herself to see into the area in question without doing anything illegal." *Riley* thus may signal a rejection of the all-or-nothing approach to privacy, thereby giving the *Katz* reasonable expectation of privacy test new meaning.

WAYNE R. LAFAVE
(1992)

(SEE ALSO: *Open Fields Doctrine; Plain View Doctrine; Right of Privacy; Search and Seizure; Unreasonable Search; Warrantless Searches; Wiretapping.*)

Bibliography

AMSTERDAM, ANTHONY G. 1974 Perspectives on the Fourth Amendment. *Minnesota Law Review* 58:349–477.

GUTTERMAN, MELVIN 1988 A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance. *Syracuse Law Review* 39: 647–735.

JUNKER, JOHN M. 1989 The Structure of the Fourth Amendment: The Scope of the Protection. *Journal of Criminal Law and Criminology* 79:1105–1184.

## REASONABLE SEARCH

See: Unreasonable Search

## RECALL

Among the reforms introduced during the Progressive era was the recall, a device by which the people, at an election, can remove an official from office before his term expires. Unlike IMPEACHMENT, recall does not involve an accusation of criminality or misconduct, and it is commonly used when the official decides or acts contrary to the opinion of a significant segment of his constituency.

Although recall is widely used at the state and local levels, there is no provision for recall of national officials. Moreover, because senators and representatives hold office under the United States Constitution, they are not subject to recall under state law.

DENNIS J. MAHONEY
(1986)

## RECIPROCAL TAX IMMUNITIES

See: Intergovernmental Immunity

# RECONSTRUCTION

The Framers of the Constitution did not anticipate a civil war or contemplate the constitutional problems in rebuilding the Union after such a conflict. From ABRAHAM LINCOLN's first proposal for restoring the Union in 1863 to the withdrawal of the last federal troops from the South in 1877, Reconstruction was at heart a series of constitutional questions involving the power of the federal government vis-à-vis the states and the relations among the various branches of the national government.

The key issue from the very beginning centered on the nature of the Union. The South claimed that as a compact of states, the Union could be dissolved by the single expedient of the sovereign states choosing to withdraw. The North saw the Union as indissoluble. As Chief Justice SALMON P. CHASE later wrote in TEXAS V. WHITE (1869), "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." The northern view had prevailed by force of arms, and the Union had been preserved. But if the states had never left the Union, as Lincoln had claimed throughout the CIVIL WAR, then why would a reconstruction be necessary to put them back in a status they had never left?

Lincoln approached this question in the same commonsense manner he had approached the war. The Constitution did not specifically authorize the federal government to deal with a civil war, but it was inconceivable that the Framers had not intended for the government to have all the adequate powers to preserve and defend itself. Throughout the war, Lincoln relied on the "adequacy of the Constitution" theory to justify actions that could not be grounded on a specific constitutional clause.

Common sense told him that if theoretically the states could not leave the Union, in initiating the war they had at least left their proper role in that Union, and some actions would have to be taken to make theory and reality whole again. The Ten-Percent Plan, whereby one-tenth of a state's 1860 voters would swear support of the Constitution and "reestablish" state government in return for presidential recognition, must be seen not as Lincoln's final word on the subject but as a wartime measure designed to draw the southern states back with the promise of leniency. Moreover, Lincoln wanted to retain his flexibility; if the Ten-Percent Plan worked, well and good, but if not, then he would try something else. The President vetoed the WADE-DAVIS BILL not because he disagreed with its provisions but because it left him too little room for maneuver. The three state governments set up under Lincoln's plan proved failures, and there is evidence that the President and Congress were moving toward agreement on a new plan at the time of his assassination.

Where Lincoln had shown flexibility and open-mindedness in approaching the problem, his successor took a rigid and uncompromising position: the States had never left the Union, and therefore the federal government had no business telling them what they had to do in order to return to the Union. In ANDREW JOHNSON's mind, Reconstruction amounted to little more than a brief period of readjustment, with oversight over this readjustment completely a presidential function. Just as Lincoln, as COMMANDER-IN-CHIEF, had the constitutional authority for directing the war, so now he, as commander-in-chief, would have similar power in tidying up the last few problems of that war. In taking this view, Johnson completely misunderstood how Lincoln had worked closely with congressional leaders to have Congress support his policies.

Over the summer of 1865 the southern states, at Johnson's direction, held conventions to revise their constitutions (primarily to abolish SLAVERY) and to elect representatives to Congress. In the President's mind, when these representatives joined the Thirty-ninth Congress in December 1865, the Union would be whole and the readjustment process at an end. He did not believe then or later that Congress had any power to force the southern states to do anything they did not freely choose to do themselves. The former Tennessee senator, unlike many of his southern colleagues, had been a strong defender of the Union, but like them he shared a strong commitment to STATES' RIGHTS.

Congress obviously did not share Johnson's view and recognized that if it seated the southern representatives, Reconstruction would be at an end before the legislators could examine the situation or frame their own plan. Moreover, they believed that the people of the North wanted assurances that the fruits of their victory—the preservation of the Union and the abolition of slavery—would be protected in the peace to follow. With congressional refusal to seat the southerners, two conflicts began, one between the national government and the former Confederate states and the other between Congress and the President, both revolving around the question of what powers the national government had over the states.

Congress passed several bills in early 1866 to assist the newly freed blacks and to create legal protections for their rights. Supporters of these measures relied on what they considered the broad mandate of the THIRTEENTH AMENDMENT, ratified in December 1865, which included the first enforcement clause in any amendment. Some scholars have suggested that it is the Thirteenth, and not the Fourteenth, Amendment that recast relations between the states and the national government by giving Congress power over what had hitherto been an internal state matter.

When Congress discussed Reconstruction in early

1866, many Republicans believed that the Thirteenth Amendment by itself gave Congress sufficient power to carry out the broad aims of giving the former slaves full rights as citizens of the United States. Freedom, as they saw it, involved not just the formal abolition of slavery but also the eradication of any signs of inferior status. According to this view, Congress had all necessary power to enact whatever LEGISLATION it thought necessary and proper to secure these goals.

Andrew Johnson, however, claimed that the amendment did little more than formally abolish slavery, and although the evidence is strong that its framers meant more than that, the Republican leadership in Congress worried that the Supreme Court might adopt his view. One can therefore see the FOURTEENTH AMENDMENT as an effort to clarify the ORIGINAL INTENT of the Thirteenth and as Congress's Reconstruction plan. By making its goals explicit through a constitutional amendment, Congress intended to quiet all concerns about the legitimacy of its plan.

One should also note that aside from invalidation of the Confederate debt and restrictions on some leaders of the rebellion, the Fourteenth Amendment was not punitive. Congress, as well as Johnson, wanted to see the southern states back in their proper role as quickly as possible. This is clear in the June 1866 report of the JOINT COMMITTEE ON RECONSTRUCTION, which, while documenting southern intransigence and oppression of the freedom, is moderate in tone. Ratify the Fourteenth Amendment, the report implies, and welcome back. In fact, Tennessee, which had always had a large Unionist faction, promptly ratified and Congress admitted it back into the Union in 1866.

The committee report is also noteworthy for its discussion of the constitutional issues involved in Reconstruction. Aside from repudiating Johnson's view of Reconstruction as solely a presidential function, it examined the constitutional status of the former Confederate states. In talking about "forfeited rights," it struck a position halfway between those who claimed that the states had never left the Union and therefore had retained all their rights and the radical view of "state suicide," in which the states had ceased to exist as legal entities. Rather, the states had as a result of their rebellion forfeited basic political rights as members of the Union and, until restored fully to the Union, could enjoy only those rights granted to them by the Congress. The report relied on the fact that the Constitution assigned the power for creating new states to Congress, not the President; by implication the task of refixing the states in the Union also belonged to Congress.

The report is a commonsensical effort to deal with practical problems, but its theoretical basis is inconsistent. The states had forfeited all rights and existed as states only at the sufferance of Congress, yet they were being asked to exercise one of the most important political powers under the Constitution—changing the organic framework of government through amendment.

At Johnson's urging, the other southern states refused to follow Tennessee's example, and this refusal raised the question of whether ratification of the amendment required three-fourths of those states still in the Union or three-fourths of all the states—including the southern states now in a constitutional limbo. Here again one can only contrast Johnson's rigid adherence to a theoretical premise that flew in the face of the reality and Congress's efforts to reach a workable solution of a problem fraught with constitutional bombshells.

The election of 1866 ought to have made clear to Johnson that the North overwhelmingly favored the congressional Republican position, but he continued his efforts to thwart Congress. The events of 1867, with continuing tensions between President and legislature, led to a political impasse unforeseen by the Framers—a chief executive who, repudiated at the polls, refused to accept that judgment and who did his best, not to execute duly passed laws of Congress, but to thwart their implementation. There is an ongoing debate over what the Framers intended as grounds for IMPEACHMENT, but a number of scholars believe that the device serves as an instrument of last resort for resolving a political deadlock that would otherwise paralyze the government. Although the Senate failed to convict by a single vote, the impeachment proceeding had the desired effect: while Johnson still refused to cooperate with Congress, he no longer attempted to obstruct its will. By then, however, the damage had been done; the intransigence of the southern states, encouraged by Johnson, led to a prolonged Reconstruction and a legacy of bitterness.

Hovering in back of much of the congressional debate in 1866 and 1867 was a concern over what the Supreme Court would say in regard to the Reconstruction statutes. By then, no one questioned the power of the Court to declare acts of Congress unconstitutional, and if the Justices should adhere to the traditional view of limiting federal interference in state affairs, then the entire congressional program might be voided. The Court's decision in EX PARTE MILLIGAN (1866) and in two cases striking down LOYALTY OATHS alarmed Congress, which quickly passed a law narrowing the Court's jurisdiction in certain areas. But in the only case in which the Court directly addressed the constitutional question of Reconstruction, *Texas v. White* (1869), the Court confirmed the congressional view that whatever the theoretical relationship of the states to the Union, the war had at least temporarily suspended that relationship and its associated rights.

While Reconstruction was no doubt a political disaster for all concerned, constitutionally it has confirmed the approach taken initially by Lincoln and later by the Congress that in extreme situations one has to interpret the docu-

ment not in a narrow theoretical light but in a commonsense reponse to real problems. The intransigence of Johnson and the South required Congress to go beyond the Thirteenth Amendment, but one can argue that at least in terms of the freedmen, a liberal reading of the Thirteenth Amendment would have been sufficient to achieve the goals of full equality before the law. The Fourteenth Amendment and FIFTEENTH AMENDMENT, passed in response to unnecessary objections, had their greatest constitutional impact not during Reconstruction but in later years.

MELVIN I. UROFSKY
(1992)

Bibliography

HYMAN, HAROLD M. and WIECEK, WILLIAM M. 1982 *Equal Justice Under Law: Constitutional Development, 1835–1875.* New York: Harper & Row.

KUTLER, STANLEY I. 1968 *Judicial Power and Reconstruction Politics.* Chicago: University of Chicago.

NELSON, WILLIAM E. 1988 *The Fourteenth Amendment: From Political Principle to Judicial Doctrine.* Cambridge, Mass.: Harvard University Press.

## RECONSTRUCTION AMENDMENTS

See: Fifteenth Amendment; Fourteenth Amendment; Thirteenth Amendment

## *RED LION BROADCASTING CO. v. FEDERAL COMMUNICATIONS COMMISSION*
395 U.S. 367 (1969)

The Federal Communications Commission promulgated fairness rules requiring balanced BROADCASTING on public issues. The Court answered FIRST AMENDMENT challenges by arguing that different media required different constitutional standards, and that the scarcity of frequencies both necessitated government allocation and justified requirements that allocatees insure balanced programming. Comparing *Red Lion* to MIAMI HERALD PUBLISHING CO. V. TORNILLO (1974) indicates that electronic media enjoy less editorial freedom than do the print media. As technological developments undercut the scarcity rationale, the Court shifted toward an intrusiveness-into-the-home rationale for greater regulation of broadcasters.

MARTIN SHAPIRO
(1986)

(SEE ALSO: *Fairness Doctrine.*)

## REED, STANLEY F.
(1884–1980)

Stanley Forman Reed, a descendant of Kentucky gentry, was educated at Kentucky Wesleyan College, Yale, Columbia, the University of Virginia, and the Sorbonne. He then returned to Maysville, Kentucky, where he entered private law practice and Democratic party politics. After serving two terms in the Kentucky General Assembly, he was called to Washington as counsel to the Federal Farm Board during HERBERT C. HOOVER's administration. His competence as a legal technician led to his promotion to general counsel to the Reconstruction Finance Corporation (RFC) and his retention at that post when FRANKLIN D. ROOSEVELT came to power. During the early years of the NEW DEAL, Reed played an important role in the attempts at economic revival through the RFC and in the framing of new legislation by the Brain Trust. He defended New Deal measures before an unreconstructed Supreme Court, first as special counsel arguing the GOLD CLAUSE CASES and then as solicitor general from 1935 to 1938. Reed was Roosevelt's second appointee to the Supreme Court, taking office January 15, 1938, and replacing Justice GEORGE H. SUTHERLAND.

Reed was a moderate man in both personal style and constitutional views. He occupied a position of influence between the Court's liberal and conservative wings, between activists and advocates of judicial self-restraint. He was most comfortable with the majority and was willing to modify his views as the Court majority shifted. In a Court marked by strong personalities, Reed was able to maintain cordial relations with colleagues of different ideological persuasions.

Reed's opinions are not noted for ringing phrases or rigid insistence on principled positions. The discussion places great weight on the specifics of factual circumstances and often takes on a dialectic quality, a paragraph-by-paragraph dialogue between the Justice and a holder of divergent views whom Reed is trying to accommodate and coopt. The other voice may be internal; perhaps, if it is not that of the Justice himself it may belong to a defeated law clerk, echoing the heated in-chambers arguments Reed relished.

A central theme that runs through Reed's views on many constitutional issues is his willingness to uphold the exercise of governmental power by both the federal government and the states. He had faith in the good intentions of government officials, and was rarely willing to infer impermissible motives behind their actions. These attitudes are consistent with Reed's experience as the architect and legal manager of New Deal programs and as the advocate who defended these laws before a hostile

Supreme Court. Justice Reed was a key part of the new majority of the Court that upheld federal regulation in the face of challenges under the DUE PROCESS clause. In dissent with Chief Justice FRED M. VINSON he was a staunch defender of presidential power in YOUNGSTOWN SHEET TUBE COMPANY V. SAWYER (1952). Similarly, he was notably willing to defer to administrative fact-finding and interpretation of statutes.

These same attitudes can be seen in Reed's approach to CRIMINAL PROCEDURE, particularly in cases presenting claims of abusive police behavior. His deference to what he saw as another administrative agency was reinforced by the attitudes of a Mason County, Kentucky, landowner, whose experience led him to think of the police as a benevolent small-town constabulary. Beginning with his lone dissent in *United States v. McNabb* (1943), Reed deferred to the police and to state procedural rules in ways that led him to accept behavior that a majority of his colleagues found unacceptable. "I am opposed to broadening the possibilities of defendants escaping punishment by these more rigorous technical requirements on the administration of justice," he wrote in *McNabb*.

Reed occupied a pivotal position on the Court in CIVIL RIGHTS cases. He joined with and frequently wrote for the majority in vindication of the rights of blacks, including MORGAN V. VIRGINIA (1945), SMITH V. ALLWRIGHT (1943), and BROWN V. BOARD OF EDUCATION (1954). However, like a majority of his colleagues, he saw the treatment of Japanese Americans during World War II in a different light. (See JAPANESE AMERICAN CASES.)

Reed was slow to join the emerging majority during the 1940s that protected Jehovah's Witnesses in the exercise of their religion; his view on RELEASED TIME for religious instruction of public school pupils, expressed originally in his sole dissent in MCCOLLUM V. BOARD OF EDUCATION (1948), became substantially the majority position in ZORACH V. CLAUSEN (1952). He was relatively permissive of local time, place, and manner regulations of SOUNDTRUCKS in KOVACS V. COOPER (1948), but often voted with the absolutist position of Justices HUGO L. BLACK and WILLIAM O. DOUGLAS regarding other public speech issues, as he did in BEAUHARNAIS V. ILLINOIS (1952) and TERMINIELLO V. CHICAGO (1947). Nonetheless, Reed sided with the finding of necessity of police action against a public speaker in FEINER V. NEW YORK (1951).

A more consistent theme in Reed's positions was his opposition to what he saw as political radicalism. He upheld federal and state statutes as well as legislative and grand jury investigative powers and deportation aimed at the removal of "security risks." Writing for the Court majority, he also upheld the power of the federal government to limit the political activities of its employees in *United Public Workers v. Mitchell* (1947).

Justice Reed retired from active service on the Supreme Court in 1957, but continued to sit on the Court of Claims and Court of Appeals for the District of Columbia, as special master for the Supreme Court in original jurisdiction cases, and briefly as chairman of the CIVIL RIGHTS COMMISSION. He died in 1980 at the age of ninety-five, having lived longer than any other Justice in history.

ARTHUR ROSETT
(1986)

Bibliography

PRITCHETT, C. HERMAN 1969 Stanley Reed. In Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court: 1789–1969*, Vol. 3:2373–2389. New York: Chelsea House.

## *REESE v. UNITED STATES*
92 U.S. 214 (1876)

*Reese* was the first VOTING RIGHTS case under the FIFTEENTH AMENDMENT and, among the early decisions, the most consequential. The Supreme Court crippled the attempt of the federal government to protect the right to vote and made constitutionally possible the circumvention of the Fifteenth Amendment by formally nonracial state qualifications on the right to vote. Congress had made election officials subject to federal prosecution for refusing to qualify eligible voters or not allowing them to vote. Part of the statute specified denial on account of race, part did not. One section, for example, provided for the punishment of any person who prevented any citizen from voting or qualifying to vote. A black citizen offered to pay his POLL TAX to vote in a municipal election, but the election officials refused to receive his tax or to let him vote. The United States prosecuted the officials.

The Court, by an 8–1 vote, in an opinion by Chief Justice MORRISON R. WAITE, held the act of Congress unconstitutional because it swept too broadly: two sections did not "confine their operation to unlawful discriminations on account of race, etc." The Fifteenth Amendment provided that the right to vote should not be denied because of race, but Congress had overreached its powers by seeking to punish the denial on any ground. The Court voided the whole act because its sections were inseparable, yet refused to construe the broadly stated sections in terms of those sections that did refer to race. By its pinched interpretation of the amendment, the Court made it constitutionally possible for the states to deny the right to vote on any ground except race, thus allowing the use of poll taxes, LITERACY TESTS, good character tests, un-

derstanding clauses, and other devices to achieve black disfranchisement.

LEONARD W. LEVY
(1986)

## REFERENDUM

Among the political reforms introduced during the Progressive era was the referendum, by which acts of the legislature are referred to the people for their approval or rejection at an election. Referenda may be initiated by the legislature itself or by petition of the people. The referendum is a check on such abuses as corrupt legislation or blatantly partisan gerrymandering of legislative districts (see GERRYMANDER) but it also provides a way for politicians to avoid responsibility for controversial measures.

Reformers have frequently advocated a national referendum procedure. However, legislation authorizing a national referendum would probably be unconstitutional, and an amendment authorizing it would almost certainly fail to receive congressional approval.

DENNIS J. MAHONEY
(1986)

## *REGAN v. WALD*
468 U.S. 222 (1984)

A 1982 Treasury Department regulation prohibited travel-related business transactions with Cuba. Persons who wished to travel to Cuba, but were inhibited from doing so by the regulation, sued to enjoin its enforcement. The Supreme Court, 5–4, followed ZEMEL V. RUSK (1965) and HAIG V. AGEE (1981) in rejecting claims based on the RIGHT TO TRAVEL protected by the Fifth Amendment's DUE PROCESS clause. The dissenters argued that Congress had not authorized the regulation.

KENNETH L. KARST
(1986)

## *REGENTS OF UNIVERSITY OF CALIFORNIA v. BAKKE*
438 U.S. 265 (1978)

Perhaps the Supreme Court's majority in DEFUNIS V. ODEGAARD (1974) thought a delay in deciding on the constitutionality of racial preferences in state university admissions would give time for development of a political consensus on the issue. The result was just the opposite; by the time *Bakke* was decided, the question of RACIAL QUOTAS and preferences had become bitterly divisive. Bakke, a nonminority applicant, had been denied admission to the university's medical school at Davis. His state court suit had challenged the school's program setting aside for minority applicants sixteen places in an entering class of 100. Bakke's test scores and grades exceeded those of most minority admittees. The California Supreme Court held that the racial preference denied Bakke the EQUAL PROTECTION OF THE LAWS guaranteed by the FOURTEENTH AMENDMENT.

A fragmented United States Supreme Court agreed, 5–4, that Bakke was entitled to admission, but concluded, in a different 5–4 alignment, that race could be taken into account in a state university's admissions. Four Justices thought the Davis quota violated Title VI of the CIVIL RIGHTS ACT OF 1964, which forbids the exclusion of anyone on account of race from any program aided by federal funds. This position was rejected, 5–4. Four other Justices argued that the Davis quota was constitutionally valid as a reasonable, nonstigmatizing remedy for past societal discrimination against racial and ethnic minorities. This view was rejected by Justice LEWIS F. POWELL, who concluded that the Davis quota was a denial of equal protection. His vote, along with the votes of the four Justices who found a Title VI violation, placed Bakke in Davis's 1978 entering class.

Justice Powell's opinion on the constitutional question began by rejecting the notion of a "BENIGN" RACIAL CLASSIFICATION. He concluded that the burden of remedying past societal discrimination could not constitutionally be placed on individuals who had no part in that discrimination—absent the sort of constitutional violation that had been found in school DESEGREGATION cases such as SWANN V. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION (1971), where color-conscious remedies had been approved. While rejecting quotas, Justice Powell approved the use of race as one factor in a state university's admissions policy for the purpose of promoting diversity in its student body.

Race is relevant to "diversity," of course, mainly because past societal discrimination has made race relevant to a student's attitudes and experiences. And if one's membership in a racial group may be a factor in the admissions process, it may be the decisive factor in a particular case. The Powell opinion thus anticipates a preference for minority applicants; how much of a preference will depend, as he says, on "some attention to numbers"—that is, the number of minority students already admitted. The difference between such a system and a racial quota is mostly symbolic.

The press hailed Justice Powell's opinion as a judgment of Solomon. As a contribution to principled argument about equal protection doctrine, it failed. As a political solution, however, it was a triumph. The borders of pref-

erence became blurred, so that no future applicant could blame her rejection on the preference. At the same time, a university following a "diversity" approach to admissions was made safe from constitutional attack. AFFIRMATIVE ACTION was thus saved, even as Bakke was ushered into medical school and racial quotas ringingly denounced. Almost miraculously, the issue of racial preferences in higher education virtually disappeared from the political scene, and legislative proposals to abolish affirmative action were shelved. Solomon, it will be recalled, succeeded in saving the baby.

KENNETH L. KARST
(1986)

Bibliography

BLASI, VINCENT 1979 Bakke as Precedent: Does Mr. Justice Powell Have a Theory? *California Law Review* 67:21–68.

KARST, KENNETH L. and HOROWITZ, HAROLD W. 1979 The Bakke Opinions and Equal Protection Doctrine. *Harvard Civil Rights-Civil Liberties Law Review* 14:7–29.

WILKINSON, J. HARVIE, III 1979 *From Brown to Bakke.* New York: Oxford University Press.

## REGULATORY AGENCIES

Regulatory agencies are governmental bodies created by legislatures to carry out specified state or national policies. Such an agency is typically responsible for regulating one particular area of social or economic life; it is staffed by specialists who develop the knowledge and experience necessary to enforce complex regulatory laws. Regulatory agencies normally combine the powers to make rules, to adjudicate controversies, and to provide ordinary administrative services, functions corresponding to the legislative, judicial, and executive powers of the separate branches of government. They fill in the gaps of general policy by bringing order, method, and uniformity to the process of modern government.

Although administrative agencies are as old as the federal government, the national regulatory process as we know it today began with the creation of the Interstate Commerce Commission in 1887. Granted extensive authority over the booming railroad industry, the commission received broad rule-making and adjudicatory powers, broader than those of any previous agency. It set the trend, and the goal, for future agencies by being the first governmental unit "whose single concern was the well-being," as James Landis said, "in a broad public sense, of a vital and national industry."

Since the NEW DEAL, regulatory agencies have become the most visible tool for the achievement of national policy. They provide a form of centralized supervision which in earlier periods of American history was deemed neither necessary nor desirable. Their proliferation paralleled the development of national industries and the emergence of Congress as a policymaking body unable to supervise the details of administration. At the same time, a growing welfare state has recognized new interests such as welfare entitlements and equal employment opportunity. New regulatory agencies have been created to provide sympathetic administration of the new national policy goals, and to resolve conflicts by procedures less formalized and adversarial—and far less costly—than those prevailing in courts of law.

The character and origin of a regulatory agency depend on the nature of its tasks. Generally, such agencies fall into three main categories: independent regulatory commissions; executive agencies; and government corporations. The independent commissions, so called because of their relative freedom from executive control, are the most important, and include such agencies as the Interstate Commerce Commission (ICC), Securities and Exchange Commission (SEC), Federal Trade Commission (FTC), National Labor Relations Board (NLRB), and Nuclear Regulatory Commission (NRC). Each independent commission is headed by a multimember board appointed by the President with the ADVICE AND CONSENT of the Senate. Congress has sought to guarantee the commissions' independence by establishing their governing boards on a bipartisan basis, providing fixed terms of office for board members, and authorizing the President to remove them only for reasons specified by statute.

The executive agency, an example of which is the Environmental Protection Agency, is one whose administrator and top assistants are appointed by the President, to whom they report directly and who may remove them freely. The executive agency lies squarely within the executive branch; its position within the constitutional framework of SEPARATION OF POWERS is thus more clearly defined than that of the independent regulatory agencies. The government corporation, an example of which is the Tennessee Valley Authority, is created by statute for a stated purpose and is wholly owned by the government. This model has been used when a project, because of its duration or its required investment, cannot easily be achieved through private development.

Regulatory agencies differ significantly in the range of their powers and their modes of operation. For example, the work of the NLRB is almost exclusively judicial in character. Although it has broad authority under the WAGNER ACT and TAFT-HARTLEY ACT, the NLRB has chosen to exercise only adjudicatory powers. The Equal Employment Opportunity Commission, on the other hand, has no formal power to adjudicate claims or impose administrative sanctions. The sensitive and highly controversial char-

acter of its mission—to carry out the antidiscrimination provisions of Title VII of the CIVIL RIGHTS ACT OF 1964—prompted Congress to limit EEOC's authority to "informal methods of conference, conciliation, and persuasion." If these methods fail the alleged victim of discrimination may sue in federal court. Even though EEOC itself may not issue final orders, its guidelines for dealing with patterns of discrimination in employment, together with its field investigations in particular cases, often induce compliance. The result is a significant regulatory effect.

An immense body of administrative law, found in the voluminous *Code of Federal Regulations* and in a multitude of specialized publications, has been created by these and other administrative agencies.

The development and structure of regulatory agencies have strained the constitutional theory of separation of powers, for the agencies typically blend functions of all three branches of government. Yet the Supreme Court has sought to accommodate the constitutional theory with the needs of effective government, and thus to preserve the constitutional balance underscored by the principle of separation of powers. The constitutional basis for Congress's power to create regulatory agencies is derived from Article I. Section 1 grants "[a]ll legislative powers" to Congress; section 8 enumerates these powers and vests Congress with the additional power to make laws NECESSARY AND PROPER for carrying them into effect. Regulatory agencies have always been regarded as necessary and proper means of achieving the ends of national policy.

Implicit in the theory of separation of powers is the doctrine that delegated authority cannot be redelegated. Under this principle Congress cannot constitutionally invest the executive (or, for that matter, the judiciary) with the power of legislation. How then is it possible to justify the rule-making power conferred on agencies? The Supreme Court's answer is that such authority is permissible if the authorizing statute embodies a policy and provides guidelines to channel administrative action. Of course, within these guidelines agencies exercise considerable discretion. In theory, however, they are not legislating in a constitutional sense when exercising their discretion; they are simply carrying out legislative policies established by Congress.

Reality, however, had not easily converged with theory. Despite its reiteration of the doctrine forbidding delegation, the Supreme Court has consistently allowed "directionless" delegations of legislative authority. Not until the 1930s did the Court actually invalidate congressional statutes for excessive delegation of legislative power. But these precedents soon fell from favor as the Court proceeded to uphold subsequent legislative mandates as vague as those previously nullified. Some delegations have been disturbingly broad. For example, the Federal Communications Commission is to use its licensing power in the "public convenience, interest, or necessity." The Court upheld this "supple instrument" of delegation as being "as concrete as the complicated factors for judgement in such a field" permit. Nevertheless, the doctrine forbidding delegation still lives in theory. As recently as 1974, in *National Cable Television v. United States*, the Supreme Court construed a federal statute narrowly so as to avoid the implication from a literal reading of the statute that taxing power—clearly a legislative function—had been conferred on the Federal Communications Commission.

The doctrine forbidding legislative delegation has had its corollary in challenges to the constitutionality of regulatory agencies' exercise of judicial functions. The contention is that these functions are inconsistent with Article III's grant of the JUDICIAL POWER to courts. Yet the Supreme Court has upheld the delegation of adjudicatory functions to regulatory agencies, so long as the courts retain power to determine whether the agencies have acted within their legislative mandates.

The obverse of the delegation issue concerns strategies by which Congress may take back authority it has granted. Despite congressional efforts to ensure their independence, regulatory agencies came under criticism of liberals who complained that, instead of regulating in the public interest, the agencies had become the clients of the special interest they were supposed to regulate. More recently, conservatives have attacked regulatory agencies for pervasive bureaucratization, for growing unaccountability, and for disregard of their legislative mandates. The congressional response to these criticisms has taken a number of forms, including attempts to deregulate certain industries and the effort to reserve a power of LEGISLATIVE VETO of agency actions.

The legislative veto, adopted by Congress with increasing frequency in the 1970s, when public criticism of regulatory agencies was at its zenith, poses serious constitutional issues. Congress required various executive agencies to report to it in advance of specified kinds of proposed action. Then, if Congress (or, in some cases, one house of Congress) should adopt a resolution of disapproval within a certain time, the proposed action was effectively "vetoed." The Supreme Court held this mechanism unconstitutional in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983), as applied to the one-house veto of a deportation order. First, the Court held, the congressional veto was a legislative act requiring passage by both houses of Congress. Second, and more serious, the congressional veto offended Article II, which requires any legislative act to be presented to the President for his approval before it takes effect.

The President as chief executive is commanded by Article II of the Constitution to "take care that the Laws be

faithfully executed." From an early time, Presidents claimed an inherent constitutional power to remove any executive official whom they or their predecessors had appointed. This claim was vindicated in MYERS V. UNITED STATES (1926). But in HUMPHREY'S EXECUTOR V. UNITED STATES (1935) the Supreme Court refused to apply this theory of inherent power to the removal of a member of an independent agency exercising quasi-legislative and quasi-judicial powers. Distinguishing between a "purely executive" officer and an officer of an independent agency, the Court sustained Congress's authority, when creating regulatory agencies, to fix the terms of commissioners and specify the exclusive grounds for their removal. In *Weiner v. United States* (1958) this principle was applied to the removal of a member of the War Claims Commission, whose organizing statute specified no grounds for removal. The Court noted the adjudicatory nature of the agency's work, and thus concluded that Congress had not made it part of the executive establishment under the political control of the President. The Supreme Court has recognized that independent agencies cannot exercise their statutory duties fairly or impartially, as Congress intended, unless they are free from executive control.

The combination of investigatory, prosecutorial, and adjudicatory functions within the same regulatory agency has also been the subject of constitutional litigation. In *Winthrop v. Larkin* (1975), however, the Supreme Court reaffirmed its long-standing view that the mixture of these functions within a single agency or person does not violate DUE PROCESS unless the presumption of honesty and integrity of officers exercising these functions is overcome by evidence of actual bias or prejudgment in a particular case. Even though the separation of these functions within the regulatory context is not constitutionally commanded, legislators have often concluded that the best mix of efficiency and impartiality is maintained when prosecutorial and judicial functions are performed by different officers within an agency.

All regulatory agencies are subject to the constitutional requirement of PROCEDURAL DUE PROCESS. The right to a hearing must be granted when an agency takes action directly affecting rights and obligations: those affected must be given NOTICE and an opportunity to present their case in a FAIR HEARING. The process due in any particular case depends on the nature of the liberty or property interest involved. If these interests are constitutionally recognized then notice and even a prior hearing may be required before agency action can be taken. Whether the RIGHT TO COUNSEL, cross-examination, and other trial-type procedures will be required depends on the importance of the private interest at stake when balanced against the government's interest and the risk of erroneous deprivation under an agency's normal operating procedures.

The extent to which agency determinations are subject to judicial review is governed by the Administrative Procedure Act. Generally, administrative action is unreviewable if committed by statute to agency discretion. Courts may, however, set aside even discretionary action when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Under the act, the courts are to sustain agency findings of fact if they are supported by substantial evidence. Although the definition of "substantial" may differ from court to court, the Supreme Court retains the final say on whether the rule has been properly applied in a given case.

DONALD P. KOMMERS
(1986)

Bibliography

DAVIS, KENNETH C. 1969 *Discretionary Justice.* Baton Rouge: Louisiana State University Press.

FREEDMAN, JAMES O. 1978 *Crisis and Legitimacy.* Cambridge: At the University Press.

KOHLMEIER, LOUIS M. 1969 *The Regulators.* New York: Harper & Row.

LANDIS, JAMES 1938 *The Administrative Process.* New Haven, Conn.: Yale University Press.

REDORD, EMMETT S. 1969 *The Regulatory Process.* Austin: University of Texas Press.

## REGULATORY TAKINGS

The central disputes of modern takings law revolve around the legal rules governing the dispossession and regulation of private PROPERTY under the takings clause of the Fifth Amendment, which states: "nor shall private property be taken for public use, without just compensation." The point of departure for this analysis is the Supreme Court's critical decision in LUCAS V. SOUTH CAROLINA COASTAL COUNCIL (1992).

The expression "regulatory taking" is a relatively recent addition to the Court's lexicon, having been formally introduced in the dissent of Justice WILLIAM J. BRENNAN, JR., in *San Diego Gas & Electric Co. v. City of San Diego* (1981). Even before the terminology took hold, however, the Court had struggled over the classification of various government actions that in some fashion denied or restricted the use that a private owner could make of his own land. The "easy" cases have long involved the physical TAKING OF PROPERTY; that is, cases in which the government has forced a private party to part with permanent possession of all or part (even a very small part) of private property, which is then occupied or used by the government itself or by some private individual under government authorization. In these cases, the Court has gravitated toward a rule of virtual per se compensability on the ground

that the exclusive right to possession is the cardinal element of a system of private property. Denial of that FUNDAMENTAL RIGHT to JUST COMPENSATION is not justified or excused by any gain that the state realizes from the occupation or use of the property in question. The public benefit may justify the government taking, but it does not excuse government from its obligation to pay for damages. It is hard to see how the rule could be otherwise without gutting the just compensation requirement of the takings clause.

The hard question asks what, if anything, should be done with those government regulations that allow a landowner to retain exclusive possession of his land, but restrict the way in which he may use it. The types of restrictions in question include the traditional setbacks for building, or density requirements for planned-unit development. More recently, these restrictions have expanded to embrace total or partial moratoria on private development imposed for environmental objectives: lands are designated as wetlands, sensitive dunes, coastal lands, or habitat for an endangered species. The restrictions on use could be total or partial, and they could have a large or small impact on the value of the regulated land. The burning question is which, if any, of these restrictions require the state to compensate the owner of the property, and how much.

These questions have provoked a heated judicial debate, but the outlines of the current position have been clarified to some degree by Justice ANTONIN SCALIA's 1992 opinion in *Lucas*. That opinion uses two tests to determine whether the state owed compensation when it imposed land use restrictions. The first asks whether the property continues to have any viable economic use after the restrictions are imposed. The second asks whether, if no viable economic use survives, the state can advance some legitimate interest to justify the restriction in question. If, however, the land use restriction does not wholly destroy the land's entire economic value, then the state prevails without having to show the justifications demanded in cases of total economic loss. As applied to the *Lucas* case itself, the Court tests required the South Carolina Coastal Council to pay Lucas full value for two plots of land on which it prevented him from building any houses. The promotion of tourism within the region and the possible prevention of the further deterioration of public beachfront property did not fall within the nuisance-prevention rationales needed to justify the regulation.

The first question posed by *Lucas* asks why total and partial land use restrictions are treated differently. One explanation is that the test was designed to reaffirm the soundness of earlier cases that had held that government restrictions on new uses of currently productive property withstand taking challenges. For example, in PENN CENTRAL TRANSPORTATION CO. V. NEW YORK CITY (1978), the owner of the profitable Penn Central terminal did not receive compensation, solely because it was prohibited from building a new addition in the upper airspace. The test does not, however, answer the question of whether an owner is deprived of all economic use when the prohibition against further development is applied to buildings that cannot turn a profit under current use. Under current law, the owner is likely to face an uphill battle to gain further rights of development, except in the so-called exaction cases in which the state seeks to condition the grant of a building permit on the surrender of some possessory interest in land, such as a public easement across the property. In these cases the strict compensation requirement of the physical cases is applied, notwithstanding the owner's consent to the bundled transaction that contains both the permit approval and the surrender of the possessory interest.

The economic viability test poses greater problems in evaluating land use restrictions on vacant property slated for private development. *Lucas* was the easy case for compensation because the state's total prohibition rendered the property worthless. But state and local governments have learned that partial restrictions on land use can slow down and perhaps block development without running afoul of the takings clause. Determined local governments frequently shower individual landowners with boundless DUE PROCESS, which allows (and requires) repeated submissions of new development plans for detailed public examination. The chance that development will be approved allows the state to take advantage of the well-established Court rule that bars a landowner from court until a final adverse judgment has been made on its permit applications. But this tactic raises delicate factual disputes over whether the restrictions imposed are so severe that all economic value has been drained out of the project even if formal permission to build has been or may be granted. The upshot is that expert witnesses must often speculate as to whether any rational builder could turn a profit within established conditions.

Unfortunately, the Court has left it unclear how the cutoff line for viability should be determined. Suppose land costs $100 to acquire and new construction for the best project allowed by the government costs $200. If that project is worth only $150 on completion, then the landowner makes a compelling case that he has lost all economic viability of the land. The owner loses in both respects: the cost of the improvement exceeds its benefit, and nothing is recouped for the cost of the land. Next suppose that the best possible project is worth $250 on completion. Now economic viability is highly contested, because the allowable project permits the landowner to recover his variable costs but requires him to lose some

portion of the initial investment in the land. Here it is better to classify the project as nonviable because its total costs exceed total benefits once the regulation is put into place. No one would purchase land unless the initial costs were protected against subsequent state regulation. But the sharp reduction in the capital value of land is a common feature of ZONING restrictions, and so it is still unclear as to how a landowner with undeveloped property would fare with this type of claim. It may well be that he has greater chances of success in attacking a denial of a specific permit than a general zoning ordinance, because the individualized determination in the permit case opens up greater avenues of abuse. But the outcome is unclear today.

Nonetheless, it appears that the project is economically viable if an especially advantageous new project—total cost $300—could generate $500 before regulation but only $400 after regulation. In this case, the losses from regulation reduce anticipated profits but do not impose out-of-pocket costs. In effect, the superior opportunities of the astute owner are put at risk under regulation. The same result appears to hold if raw land originally costs $100 but appreciates to $500 before regulation reduces its value back to $100. Now state regulation that reduces its value to its original cost will probably survive constitutional challenge. In effect, the takings clause is read to protect only the original cost, but not the value of property. That result introduces a troublesome asymmetry by allowing the state to capture land appreciation while saddling the owner with its depreciation. Thus if the land had been sold to a new owner for $500 before the regulation was imposed, then value has been converted into cost, increasing the likelihood that compensation must be paid. But why encourage individuals to make useless sales of property in order to insulate themselves from the adverse effects of regulation? In principle, the strongest line is to insist that any reduction in value attributable to land use restrictions be compensable unless it has been justified in light of some legitimate PUBLIC PURPOSE.

What purposes will justify the state's total destruction of the value in land? Scalia's answer turned to the state law of nuisance (as represented by the Restatement of Torts), which generally allows either the state or private owners to enjoin various forms of discharges (such as pollution) that enter either public lands and waters, or the land or water of other private individuals. This antinuisance limitation is held to be "inherent in the fee simple title," which means in effect that the state has done little more than enforce long-standing limitations on land use that private landowners could enforce in disputes with each other. The great advantage of this test is that it prevents neighbors from resorting to the political process to take interests in land that they (collectively) would have to purchase if acting in their individual capacities. So understood, the legitimate public purpose test failed in *Lucas* because no one could claim that the construction of a single-family home in keeping with neighboring lots could rise to the level of a COMMON LAW nuisance.

A broad gap exists, however, between the ordinary single-family home and garden-variety nuisances. It is unclear in individual cases whether state restrictions could be justified on the belief that the public is entitled to a viewing easement over private land; or whether the federal and state governments may refuse to grant dredging and filling permits; or whether habitat preservation of endangered species falls under the Endangered Species Act. Classically, these cases involved government restrictions that provide unquestioned public benefits, many of which extend not only to local landowners, but (as with the preservation of endangered species) to the public at large. At present, some lower courts have shown an erratic willingness to hew to the narrower common law definition of nuisance in these regulatory takings cases. Substantial monetary judgments for individualized burdens have become more common in recent years.

Most recently, the Supreme Court affirmed, in *City of Monterey v. Del Monte Dunes* (1999), an award of substantial damages to a landowner who had received an endless run-around from local land use regulators about the possible development of its thirty-eight-acre beachfront property site. The case upheld the right of landowners to have jury trials on both key issues in a modern regulatory takings case—did the regulation deprive the landowner of all viable economic use, and was there a state justification for the restrictions it imposed. *Monterey* also held that the "substantial proportionality" test of DOLAN V. CITY OF TIGARD (1994) did not apply to ordinary land use cases. But overall it gave little guidance as to what principles governed or why. The full issue will doubtless return to the Supreme Court for further clarification.

The issue of takings has transmuted itself into the familiar question of what level of scrutiny should be applied to evaluate the state interest in imposing its land use restrictions. The traditional view since the court's decision in EUCLID V. AMBLER REALTY (1926) has used general deference to justify the low RATIONAL BASIS standard of review. The large battle in takings is whether the Court's renewed interest in the area will lead to movement away from deference and toward higher scrutiny of land use decisions.

RICHARD A. EPSTEIN
(2000)

Bibliography

COYLE, DENNIS 1993 *Property Rights and the Constitution: Shaping Society Through Land Use Regulation.* Albany: State of New York Press.

EPSTEIN, RICHARD A. 1993 *Lucas v. South Carolina Coastal Council:* A Tangled Web of Expectations. *Stanford Law Review* 45:1369–1392.

——— 1997 *Babbitt v. Sweet Home Chapters of Oregon:* The Law and Economics of Habitat Preservation. *Supreme Court Economic Review* 5:1–57.

FARBER, DANIEL A. 1992 Economic Analysis and Just Compensation: An Anti-Discrimination Theory of Takings. *International Review of Law and Economics* 12:125–138.

FISCHEL, WILLIAM A. 1995 *Regulatory Takings: Law, Economics, and Politics.* Cambridge, Mass.: Harvard University Press.

TREANOR, WILLIAM MICHAEL 1995 The Original Understanding of the Takings Clause and the Political Process. *Columbia Law Review* 95:782–887.

## REHABILITATION ACT
87 Stat. 355 (1973)

In addition to providing funding and research incentives for various programs to aid the handicapped, Congress incorporated antidiscrimination provisions into the Rehabilitation Act. In federally assisted programs, the act prohibits discrimination solely by reason of handicap against an "otherwise qualified handicapped individual." In addition, the act requires federal executive agencies to take AFFIRMATIVE ACTION to employ handicapped individuals. In *Southeastern Community College v. Davis* (1979) the Supreme Court held that the Rehabilitation Act does not forbid a nursing school from imposing relevant physical qualifications upon participants in its training programs.

THEODORE EISENBERG
(1986)

(SEE ALSO: *Disabilities, Rights of Persons With; Disability Discrimination.*)

Bibliography

BURGDORF, ROBERT L., JR. 1980 *The Legal Rights of Handicapped Persons.* Baltimore: Paul H. Brookes Publishing Co.

## REHEARING

A party who is dissatisfied with the court's decision or opinion in a case may request the court to reconsider. The term "rehearing" refers to such a reconsideration, usually by an appellate court.

By statute, the Supreme Court's APPELLATE JURISDICTION over cases coming from the state courts is limited to questions of federal law that have been properly drawn in question in the lower courts. This requirement normally is not satisfied by a litigant who raises a federal question for the first time in a petition for rehearing after a state supreme court has decided the case. However, if the state court entertains the petition and actually considers the federal question, the question can be brought to the Supreme Court.

The Supreme Court itself receives between 100 and 200 petitions for rehearing each year, seeking reconsideration of its own decisions or opinions. Fewer than one percent of these petitions are granted. By rule, the Court has provided that a petition for rehearing will be granted only by the vote of a majority of the Justices, including at least one Justice who concurred in the decision. By custom, a Justice who did not participate in that decision does not vote on the petition for rehearing.

One occasion for granting a petition for rehearing is the case in which the Supreme Court has affirmed the lower court's decision by a 4–4 vote. If the missing Justice was ill and has recovered, or if a ninth Justice has been appointed to fill a vacancy, it may seem likely that a majority will be mustered once the Court returns to full strength. Absent such a circumstance, the typical petition for rehearing achieves little but delay and the chance for a parting shot.

KENNETH L. KARST
(1986)

Bibliography

STERN, ROBERT L. and GRESSMAN, EUGENE 1978 *Supreme Court Practice*, 5th ed. Chap. 15. Washington, D.C.: Bureau of National Affairs.

## REHNQUIST, WILLIAM H.
(1924– )

William Rehnquist joined the Supreme Court in 1971 at age forty-seven. He had been a clerk to Justice ROBERT H. JACKSON and a practitioner in Arizona. At the time of his appointment, he was the assistant attorney general for legal counsel—as President RICHARD M. NIXON described the post on appointing him, "the President's lawyer's lawyer."

Brilliant, charming, and deeply conservative, he has become the intellectual leader of the court—a fact that is not obvious from the statistics. Many terms he has dissented more than any other Justice, often alone. Rehnquist's influence lies in setting the terms of the debate. His dissents mark the path for future developments. His MAJORITY OPINIONS have been unusually influential, in part because Chief Justice WARREN E. BURGER regularly assigns him the most difficult and interesting cases, and in part because the opinions articulate approaches that have substantial general importance.

Rehnquist follows a structural approach in which the original understanding and the text of the Constitution

assume great importance. The states play a substantial role in this structure, and a vision of an allocation of functions between state and federal governments lies at the center of Rehnquist's thought. He takes seriously the proposition that the federal government has limited powers and that the states hold sway over substantial fields. The Justice also has a view of the allocation of powers within the federal government in which judges play only a limited role. Judges may enforce some explicit guarantees, such as the right to FREEDOM OF SPEECH, but Rehnquist sees their more important function as enforcing the decisions of the political branches rather than questioning them. Judges must patrol the allocation of powers among other contending claimants, but once a political branch acts within its capacity, the decision, no matter how unwise, binds the courts.

This highly deferential approach follows from a belief that the Framers of the Constitution settled little but governmental structure, leaving the rest to future generations. Judges have no authority to restrict the powers of the political branches. They cannot invoke a decision by the Framers or political branches allocating power to the courts, and they cannot point to any other source of authority. Rehnquist is a moral skeptic and so rejects arguments that the Constitution authorizes judges to insist that other branches keep up with evolving notions of decent conduct; he believes that only the political process can define decency.

Justice Rehnquist outlined his approach in a solitary dissent to TRIMBLE V. GORDON (1977). The majority held that a statute discriminating against illegitimate children violated the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT. Calling that clause a "classic paradox" that "makes sense only in the context of a recently fought Civil War," Rehnquist continued:

> In the case of equality and equal protection, the constitutional principle—the thing to be protected to a greater or lesser degree—is not even identifiable from within the four corners of the Constitution. For equal protection does not mean that all persons must be treated alike. Rather, its general principle is that persons similarly situated should be treated similarly. But that statement of the rule does little to determine whether or not a question of equality is even involved in a given case. For the crux of the problem is *whether persons are similarly situated* for purposes of the STATE ACTION in issue.

Rehnquist therefore finds the constitutional guarantee of equality empty and thus vulnerable to being made a mere vessel for the beliefs of modern judges about what things *should* count as the pertinent similarities and differences. In his view, however, the Constitution does not resolve that question, which is at root political, to be resolved by political processes. The equal protection clause is limited to the CIVIL WAR concern, race. Within that field the prohibition is absolute, and race is a forbidden classification. Rehnquist has opposed governmental racial distinctions of all sorts, preferential "set-asides" for construction work, which the majority approved in FULLILOVE V. KLUTZNICK (1980), and preferences for private employment, which were sustained in UNITED STEELWORKERS V. WEBER (1979), as well as those stigmatizing blacks.

He applies the same approach to almost every other aspect of the Constitution. The FIRST AMENDMENT disables government from stopping speech—the subject debated by the Framers—but does not require government to facilitate speech, for example, by creating rights of access to information. Judicial expansion of the amendment's core meaning is unauthorized. A judge may not properly pursue the principles or values that underlie the document, because every principle has its limit, and the Constitution left adjustments to the political branches. As Rehnquist wrote in an article published in 1976: "Even in the face of a conceded social evil, a reasonably competent and reasonably representative legislature may decide to do nothing. It may decide that the evil is not of sufficient magnitude to warrant any governmental intervention. It may decide that the financial cost of eliminating the evil is not worth the benefit which would result from its elimination. It may decide that the evils which might ensue from the proposed solution are worse than the evils which the solution would eliminate." The judge must accept the political answers to these problems.

This limitation does not imply judicial passivity. The judge must rigorously enforce any actual constitutional decisions to remove issues from the political process. The BILL OF RIGHTS contains some of these decisions, but the most important are those concerning the structure of government. Rehnquist is perhaps best known for his enforcement of principles of FEDERALISM that cannot be found in the constitutional text. Writing for a bare majority in NATIONAL LEAGUE OF CITIES V. USERY (1976), he concluded that the structure of the Constitution withheld from Congress any power to regulate the operation of "states as states." As a result, the Court held, Congress could not require state and local governments to pay the minimum wages applicable to private parties. The Justice also has read into many statutes limits founded on a perceived need to maintain the role of states as coordinate centers of power.

But decisions based on the structure of the Constitution do not always favor the states. Often Rehnquist has joined holdings under the COMMERCE CLAUSE restricting the powers of states to levy discriminatory taxes or otherwise hinder INTERSTATE COMMERCE, even though neither legislation not any clear textual command prohibits this discrimination. He wrote the court's opinion in FITZPATRICK V. BITZER (1976), holding that in the exercise of its

power under the Fourteenth Amendment, Congress may authorize suits against the states, even though the ELEVENTH AMENDMENT appears to deprive federal courts of JURISDICTION to entertain such suits.

The allocation of powers within the federal government also has been a theme of Rehnquist's work. He has attempted to revive the "antidelegation" doctrine, arguing that Congress may not grant uncertain decision-making powers to the executive branch. He joined the Court's opinion in BUCKLEY V. VALEO (1976), invalidating Congress's effort to appoint officers to administer the election laws, characterizing that effort as an intrusion on the executive power. And he supplied the theory and vote necessary to strike down in NORTHERN PIPELINE CONSTRUCTION CORP. V. MARATHON PIPE LINE CO. (1982) a grant of judicial power to BANKRUPTCY judges who lacked life tenure of office.

Part of Rehnquist's influence among the Justices comes from his distinctive style. Most judicial opinions come in shades of gray, following a dull formula notable only for turgid prose and abundant footnotes. Justice Rehnquist's opinions come closer to lavender than gray. They are relatively short and lively. One began with a limerick. Rehnquist often uses colorful (if strained) metaphors. The opinions are less copiously documented than those of his colleagues, but not because he does not know the references—they appear in the appropriate quantities in his articles. The Justice has simply chosen to write in an entertaining style. His opinions are read, and being read is the first step in being influential.

Some critics, including David L. Shapiro, have accused Rehnquist of intellectual dishonesty, because he is willing to distinguish a case on a marginally relevant basis, or to purport to honor PRECEDENT while disavowing the earlier case's rationale. Timid or weak Justices routinely treat precedents so, but Rehnquist is neither timid nor weak. That is why his nimble treatment of precedent is troubling. No one can attribute his conduct to inadvertence or to the work of a law clerk.

Justice Rehnquist is not always cavalier in distinguishing or narrowing unpleasant precedents. He will attack earlier cases openly in separate or DISSENTING OPINIONS, only to distinguish them in opinions for the Court. His opinion in *National League of Cities* purported to preserve some cases he had attacked, in solitary dissent, a year before, in *Fry v. United States* (1975). Part of his approach to precedent arises from his understanding that the author of a majority opinion speaks not for himself but for the Court as institution. He therefore tries to preserve precedents with which he does not agree, by flimsy distinctions if necessary. The result may seem contrived, but it is often essential to the functioning of the Court.

The ultimate test of honesty is whether a Justice faithfully distinguishes his constitutional views from his personal ones. Most Justices see little difference, leading to the conclusion that the Constitution follows the personal view rather than the reverse. Yet Rehnquist, who generally opposes governmental control of economic affairs, believes that the Constitution allows the political branches to establish and maintain a welfare state with extensive ECONOMIC REGULATION. He follows his jurisprudence to its logical conclusions. Though he supports property rights, he wrote an opinion in PRUNEYARD SHOPPING CENTER V. ROBINS (1980) sustaining the authority of a state to restrict those rights in the interest of fostering political speech with which the property owner disagreed.

In 1986 President RONALD REAGAN nominated Rehnquist to succeed Warren Burger as Chief Justice of the United States. One may expect Chief Justice Rehnquist to retain the same coherent picture of a government in which judges police structure rather than substance.

FRANK H. EASTERBROOK
(1986)

Bibliography

POWELL, JEFF 1982 The Compleat Jeffersonian: Justice Rehnquist and Federalism. *Yale Law Journal* 91:1317–1370.

REHNQUIST, WILLIAM H. 1976 The Notion of a Living Constitution. *Texas Law Review* 54:693–706.

SHAPIRO, DAVID L. 1976 Mr. Justice Rehnquist: A Preliminary View. *Harvard Law Review* 90:293–357.

## REHNQUIST, WILLIAM H.
(1924– )
(Update 1)

William H. Rehnquist grew up in Milwaukee and was educated at Stanford, Harvard, and Stanford Law School. He served as a law clerk to Supreme Court Justice ROBERT H. JACKSON and then entered into private practice in Phoenix. In 1969, through his association with Deputy Attorney General Richard Kleindienst and work as a Republican party official in Phoenix, he went to Washington as Assistant Attorney General for the Office of Legal Counsel. On January 7, 1972, he, along with LEWIS F. POWELL, was sworn in as an Associate Justice of the Supreme Court. On September 26, 1986, he was sworn in as CHIEF JUSTICE of the United States, only the third sitting Justice to be so elevated. Despite widespread disagreement with Rehnquist's views among legal academics, there is little dispute that he is among the ablest Justices who have ever served on the Court.

Justice Rehnquist's vision of the nation's constitutional structure, emphasizing the words and history of that document, is expressed in three doctrines: STRICT CONSTRUCTION (of both the Constitution and of statutes), judicial

restraint, and FEDERALISM. He summarized this vision in a 1976 speech at the University of Texas:

> It is almost impossible . . . to conclude that the [Founding Fathers] intended the Constitution itself to suggest answers to the manifold problems that they knew would confront succeeding generations. The Constitution that they drafted was intended to endure indefinitely, but the reason for this well-founded hope was the general language by which national authority was granted to Congress and the Presidency. These two branches were to furnish the motive power within the federal system, which was in turn to coexist with the state governments; the elements of government having a popular constituency were looked to for the solution of the numerous and varied problems that the future would bring.

In other words, as he stated, dissenting, in TRIMBLE V. GORDON (1977), neither the original Constitution nor the CIVIL WAR amendments made "this Court (or the federal courts generally) into a council of revision, and they did not confer on this Court any authority to nullify state laws which were merely felt to be inimical to the Court's notion of the public interest."

During his early years on the Court, despite the presence of three other Republican appointees, Justice Rehnquist was often in lone dissent, espousing a view of STATES' RIGHTS and limited federal judicial power that many regarded as anachronistic. For example, in *Weber v. Aetna Casualty and Surety Company* (1972), SUGARMAN V. DOUGALL (1973), and FRONTIERO V. RICHARDSON (1973), he resisted the view of the other eight members of the Court that the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT applied to, and required heightened scrutiny of, state-sponsored discrimination against illegitimate children, resident aliens, and women, respectively. Indeed, he insisted that the equal protection clause had only marginal application beyond cases of RACIAL DISCRIMINATION. In the area of CRIMINAL PROCEDURE Rehnquist urged that the Court overrule MAPP V. OHIO (1961), which applied the EXCLUSIONARY RULE to the states. Rehnquist also seemed hostile to MIRANDA V. ARIZONA (1966), though he never directly argued that it should be reversed. Still, even in his early years on the Court, Justice Rehnquist was less likely to be in dissent than the liberal Justices WILLIAM O. DOUGLAS, WILLIAM J. BRENNAN, and THURGOOD MARSHALL; and the ideas expressed in some of Rehnquist's early dissents, such as in CLEVELAND BOARD OF EDUCATION V. LAFLEUR (1974) and *Fry v. United States* (1975) were influential in majority opinions in the years to come.

The 1975 term saw Justice Rehnquist come into his own as the leader of the (ever-shifting) conservative wing of the Court. In that term he wrote for the Court in PAUL V. DAVIS (1976), holding that reputation, standing alone, was not a constitutionally protected "liberty" interest subject to vindication under the guarantee of PROCEDURAL DUE PROCESS OF LAW; in NATIONAL LEAGUE OF CITIES V. USERY (1976), holding that the TENTH AMENDMENT limited Congress's power under the COMMERCE CLAUSE to regulate the states; and in RIZZO V. GOODE (1976), holding that "principles of federalism" forbade federal courts from ordering a restructuring of a city police force in response to constitutional violations. In *National League of Cities*, Rehnquist used an expansive reading of the Tenth Amendment to strike down a federal statute that regulated the wages and hours of state government employees, although such regulation was otherwise concededly within Congress's commerce power. The opinion showed that when faced with a choice between judicial restraintstrict constructionism and states' rights, Justice Rehnquist was prepared to defend the latter aggressively. However, the potential significance of the first decision limiting Congress's use of the commerce power since 1936 was eroded by subsequent Court majorities, first refusing to follow, and then overruling, *National League of Cities* in GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985). Despite Justice Rehnquist's prediction in dissent that this issue would return to haunt the Court, it seems unlikely that the Court will really disable Congress from establishing national control of virtually any area in which Congress chooses to assert itself. Whatever the political leanings of the other Justices, a majority generally seems to believe that the strong national-weak state governmental system is the proper direction for the country.

When dissenting, Rehnquist makes his most telling points in opposing the majority's efforts to enact "desirable" social policy with little support from the constitutional or statutory provisions that they purport to be interpreting. An example is UNITED STEEL WORKERS OF AMERICA V. WEBER (1979). In that case, Kaiser Aluminum Company and the United Steelworkers had devised a "voluntary" affirmative action plan under which half of available positions in an on-the-job training plan would be reserved for blacks. Weber, excluded solely because he was white, filed suit based on Title VII of the CIVIL RIGHTS ACT OF 1964. The statute provides that "it shall be unlawful for an employer . . . to fail or refuse to hire . . . any individual . . . because of such individual's race." The statute goes on to say that its provisions are not to be interpreted "to require any employer . . . to grant preferential treatment to any individual or group." Moreover, as a unanimous Court had recognized only three years before in *McDonald v. Santa Fe Trail Transportation Co.* (1976), the "uncontradicted legislative history" showed that Title VII "prohibited racial discrimination against the white petitioners . . . upon the same standards as would be applicable were they Negroes." Nevertheless, in *Weber*, a 5–2 majority, reversing the lower courts, found that discrimi-

nation against whites was not within the "spirit" of Title VII and consequently not prohibited. In a bitter dissent, Justice Rehnquist accused the majority of Orwellian "newspeak" and concluded that "close examination of what the Court proffers as the spirit of the Act reveals it as the spirit of the present majority, not the 88th Congress." Similarly in ROE V. WADE (1973), where the majority based a woman's right to an ABORTION on a constitutional RIGHT OF PRIVACY that arose not from the terms but from the "penumbras" of the BILL OF RIGHTS, Rehnquist wrote, "To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment." Whatever the wisdom of the policies announced in these cases, it is difficult to disagree that Rehnquist's reading of the textual material in question was the more accurate one.

It is ironic that Rehnquist, often condemned as a right-wing ideologue was, in *Weber* and *Roe*, as in many other cases, advocating a view of the Court's role that had previously been vigorously advanced by the progressive members of the Court. In MOREHEAD V. NEW YORK EX REL. TIPALDO (1936), for example, the dissenting opinion of Justice HARLAN F. STONE, joined by Justices LOUIS BRANDEIS and BENJAMIN CARDOZO, declared: "It is not for the Court to resolve doubts whether the remedy by regulation is as efficacious as many believe, or better than some other, or is better even than blind operation of uncontrolled economic forces. The legislature must be free to choose unless government is rendered impotent. The Fourteenth Amendment has no more imbedded in the Constitution our preference for some particular set of economic beliefs, than it has adopted in the name of liberty the system of theology which we happen to approve."

In criminal procedure, Rehnquist's views are driven by the same narrow view of the role of courts in a tripartite federal system, and he frankly admits that his goal when he came on the Court was to "call a halt to a number of sweeping rulings of the Warren Court in this area." In this objective he generally was joined by the other appointees of RICHARD M. NIXON and by Justice BYRON WHITE. Consequently, the 1970s and 1980s saw a series of decisions aimed at making it easier for the police to investigate crimes and harder for defendants to upset their convictions because of police investigatory errors. For example, in *Rakas v. Illinois* (1978) the Court, per Rehnquist, made it more difficult for a defendant to establish STANDING to litigate SEARCH AND SEIZURE violations; in UNITED STATES V. ROBINSON (1973) the scope of police SEARCHES INCIDENT TO ARREST was expanded; and in *United States v. Leon* (1984) the Court, per Justice White, established a GOOD FAITH EXCEPTION to the exclusionary rule in search warrant cases. However, neither Rehnquist nor any of his fellow conservatives sought to undercut the FUNDAMENTAL RIGHTS to counsel, appeal, and TRIAL BY JURY that had been applied to the states by the Warren Court. In a 1985 interview, despite the feeling of most Court watchers that the BURGER COURT had not dismantled the major criminal procedure protections of the Warren Court, including the MIRANDA RULES and the exclusionary rule, Justice Rehnquist pronounced himself satisfied that the law was "more even-handed now than when I came on the Court."

If Rehnquist has not been successful in exempting states from congressional control, he has frequently prevailed in his efforts to exempt state courts from federal court interference. To do this, he has taken the 1971 decision in YOUNGER V. HARRIS, which counseled restraint by federal courts in enjoining ongoing state criminal proceedings, and extended it greatly. In *Rizzo* and in *Real Estate Association v. McNary* (1981) he held that "principles of federalism" limited a federal court's ability to enjoin not just the judicial branch but the executive branch of state governments as well and that this comity limitation was not confined to criminal proceedings. Nor, as he held in *Doran v. Salem Inn, Inc.* (1975), was it necessary that a state criminal proceeding predate a federal action for the federal action to be barred by principles of comity.

Similarly, in the area of federal HABEAS CORPUS for state prisoners, Rehnquist and his conservative colleagues have advanced the dual goals of limiting federal court interference with state court adjudications and enhancing the finality of criminal convictions. The most significant holding in this line of cases is the decision in WAINWRIGHT V. SYKES (1977). In this case, Rehnquist, writing for a six-Justice majority, held that a defendant's failure to raise an issue at the appropriate stage of a state criminal proceeding barred the federal courts from considering that issue later under habeas corpus, absent a showing by the defendant of good cause for the failure and prejudice to his case. *Sykes* thus largely overruled FAY V. NOIA (1963), which had allowed new issues to be raised on federal habeas corpus unless they had been deliberately bypassed by the defendant in state proceedings. *Sykes* represented a significant diminution of the power of federal courts to interfere with state convictions. The trend continued in 1989 in the significant case of *Teague v. Lane*, authored by Justice SANDRA DAY O'CONNOR, where the Court held that "new" rules of criminal procedure generally should not apply retroactively on habeas corpus to defendants whose state convictions had become final before the new law was established. In *Butler v. McKellar* (1990), Justice Rehnquist defined "new" broadly so as to make it very difficult for state prisoners to obtain federal habeas relief.

Consistent with his stance on federalism and judicial restraint, Rehnquist is the Court's leading advocate of a restrictive interpretation of the ESTABLISHMENT CLAUSE of

the FIRST AMENDMENT. He set forth his view in detail in a DISSENTING OPINION in WALLACE V. JAFFREE (1985), where the majority struck down Alabama's statutorily required moment of silence for "meditation or voluntary prayer" in public schools. Rehnquist rejected the "wall of separation between church and state" principle of EVERSON V. BOARD OF EDUCATION (1947), arguing that history did not support this rigid interpretation of the First Amendment. According to Rehnquist, JAMES MADISON viewed the purpose of the establishment clause as simply "to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of the government between religion and irreligion." Consequently, Rehnquist would have found no defect in a state statute that openly endorsed prayer, much less a "moment of silence."

In a similar vein, in FIRST NATIONAL BANK V. BELLOTTI (1978), Rehnquist, in a sole dissent, refused to recognize a First Amendment COMMERCIAL SPEECH right for corporations, and in VIRGINIA STATE BOARD OF PHARMACY V. VIRGINIA CONSUMER COUNCIL (1976) he refused to recognize a First Amendment right of consumers to receive commercial information. In short, in the First Amendment area, as in all others, he would generally give the legislative branch, whether state or federal, greater freedom to plot its own course than his colleagues would.

When, in June of 1986, WARREN BURGER announced his resignation as Chief Justice and President RONALD REAGAN nominated Rehnquist as his replacement, there was a firestorm of protest among liberals. Senator Edward Kennedy denounced Justice Rehnquist as having an "appalling record on race" and liberal columnists branded him a right-wing extremist. A concerted effort was undertaken to find something in his past that might provide a basis for defeating the nomination. Assorted allegations were raised concerning contacts with black voters when he was a Republican party official in Phoenix, the handling of a family trust, a memo he had written to Justice Jackson as a law clerk urging that the SEPARATE BUT EQUAL DOCTRINE not be overruled in BROWN V. BOARD OF EDUCATION OF TOPEKA (1954,1955), and a racially restrictive covenant in the deed to his Phoenix house. The Senate perceived that these allegations were either unproven or, if true, were "ancient history" and irrelevant to his fitness for the post of Chief Justice. Significantly, no serious charge of misconduct was shown as to Rehnquist's fourteen and a half years as an Associate Justice on the Supreme Court. In the end, after much sound and fury, he was confirmed by a vote of 65–13.

If the 1975 term saw Rehnquist "arrive" as a major force on the Court, it was the 1987 term, his second year in the post, that saw him mature as Chief Justice. In a speech given in 1976 he had discussed the role of Chief Justice, citing CHARLES EVANS HUGHES as his model: "Hughes believed that unanimity of decision contributed to public confidence in the Court. . . . Except in cases involving matters of high principle he willingly acquiesced in silence rather than expose his dissenting views. . . . Hughes was also willing to modify his own opinions to hold or increase his majority and if that meant he had to put in disconnected thoughts or sentences, in they went."

Following his own advice, in the 1987 term he achieved a high level of agreement with his fellow Justices (ranging from 57.6 percent with Justice Thurgood Marshall to 83.1 percent with Justice ANTHONY KENNEDY). His administrative abilities in the 1987 term won the praise of Justice HARRY BLACKMUN, who deemed him a "splendid administrator in conference." For the first time in years, the Court concluded its work prior to July 1. During that term, Rehnquist showed that he could be flexible, joining with the more liberal Justices to subject the dismissal of a homosexual CIA agent to judicial review and to support the First Amendment claims of *Hustler* magazine to direct off-color ridicule at a public figure. Most significantly, in *Morrison v. Olson* (1988) Rehnquist wrote for a 7–1 majority upholding the office of INDEPENDENT COUNSEL against a challenge by the Reagan administration. In a decision termed an "exercise in folly" by the lone dissenter, Justice ANTONIN SCALIA, Rehnquist held that the appointments clause was not violated by Congress's vesting the power to appoint a SPECIAL PROSECUTOR in a "Special Division" of three United States Court of Appeals judges. Nor did the act violate SEPARATION OF POWERS principles by impermissibly interfering with the functions of the executive branch. While the act can be shown to have theoretical flaws, Rehnquist could not be faulted if he perceived that a truly independent prosecutor was a necessary check on the many abuses of executive power, including criminal violations, that were occurring during the latter years of the Reagan administration and in upholding a check on those abuses in an opinion that gained the concurrence of a substantial majority of his colleagues. Rehnquist's performance during the 1988 term led the *New York Times*, which had vigorously opposed his elevation to Chief Justice, to praise him with faint damnation. "While he is certainly no liberal, or even a moderate, his positions are not always responsive to the tides of fashionable opinion among his fellow political conservatives."

Indeed, while Rehnquist's judicial philosophy is undoubtedly born of a staunch political conservatism, the principles of federalism and strict construction will frequently prevail even when they lead to a "liberal" result. For example, in PRUNEYARD SHOPPING CENTER V. ROBINS (1980) he wrote the opinion upholding state constitutional provisions that allowed political demonstrators to solicit signatures for a petition in a shopping center. He recog-

nized "the authority of the state to exercise its POLICE POWER or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." Similarly, in *Hughes v. Oklahoma* (1979) he dissented when the Court invalidated a state's attempt to preserve its wildlife. And, in *Pennell v. City of San Jose* (1988), he upheld the city's rent control ordinance in the face of a due process challenge by landlords. In numerous criminal cases, such as *United States v. Maze* (1974) and *Ball v. United States* (1985), he has voted to reverse criminal convictions on the ground that the government had failed to prove that the defendant's conduct had violated the terms of the (strictly construed) statute.

But if the 1987 term showed that Rehnquist could be flexible as Chief Justice, that term and the 1988 term also had him, in most cases, leading the Court in a conservative direction. In a series of close cases decided in the 1987 term, ranging across the landscape of the BILL OF RIGHTS, the Court denied an equal protection challenge to user fees for bus transportation to school, denied a claim by Indians that a Forest Service logging road through a national forest would interfere with their free exercise of religion, denied food stamps to striking workers, allowed censorship of a school newspaper, upheld federal tort immunity for defense contractors, and allowed illegally discovered evidence to be used against a criminal defendant under the "independent source" exception to the exclusionary rule.

The 1988 term demonstrated that Rehnquist was still prepared to be flexible. For example, in *City of Canton v. Harris* he joined an opinion by Justice White that held that a city could be liable for damages under SECTION 1983, TITLE 42, U.S. CODE for poor training of police officers and that a new trial was not barred; Justices O'Connor, Kennedy, and Scalia, on the other hand, wanted to dismiss the plaintiff's case because the plaintiff could not have met the "deliberate indifference" standard of proof. Such flexibility was rarely called for during the 1988 term, however, and the conservatives stayed together most of the time. The leading case of the term was WEBSTER V. REPRODUCTIVE HEALTH SERVICES (1988). Here Chief Justice Rehnquist and four others upheld a Missouri statute that forbade public funding and the use of public hospitals for abortions. The decision was consistent with Rehnquist's views of state's rights and strict construction of the federal Bill of Rights. Rehnquist observed that "our cases have recognized that the due process clauses generally confer no affirmative right to government aid, even where such aid may be necessary to some life, liberty or property interests of which the government itself may not deprive the individual." Because a state is under no constitutional obligation to provide public hospitals at all, it is free to condition their use however it wishes. This notion, that beneficiaries of public largess must accept the "bitter [restrictions] with the sweet" has been a hallmark of Rehnquist's jurisprudence since he first expressed it in ARNETT V. KENNEDY in 1974. However, Rehnquist (at least temporarily) was unable to convince Justice O'Connor that it was time to abandon the "rigid" framework of *Roe v. Wade* that gave a woman an absolute right to an abortion during the first trimester of pregnancy. This failure resulted even though he had drafted a compromise that continued to recognize a limited constitutional right to abortion.

Despite the current national debate on abortion, it seems unlikely that the country in the foreseeable future will be confronted with a constitutional problem of the magnitude of the legal discrimination against blacks (and the closely related problem of police abuse of the rights of criminal suspects) that faced the Warren Court. Consequently, it is also unlikely that the judicial activism displayed by the Warren Court to deal with these problems will seem as morally necessary or politically desirable in the future. Thus, while Justice Rehnquist's vision of a vigorous Tenth Amendment checking Congress's power vis-à-vis the states seems unlikely to prevail in the long term, his view of a more limited role for the federal Constitution, and hence for the federal courts, probably will be the wave of the future. Having reached its highest point in the 1960s, the "Rights Revolution"—already dying during the Burger Court years—terminated with the appointment of William Rehnquist as Chief Justice of the United States; it probably will not recur after he steps down.

CRAIG M. BRADLEY
(1992)

(SEE ALSO: *Conservatism; Rehnquist Court.*)

Bibliography

BRADLEY, CRAIG M. 1987 Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun? *Indiana Law Journal* 62:273–294.

DAVIS, SUE 1989 *Justice Rehnquist and the Constitution.* Princeton, N.J.: Princeton University Press.

POWELL, H. JEFFERSON 1982 The Compleat Jeffersonian: Justice Rehnquist and Federalism. *Yale Law Journal* 91: 1317–1370.

REHNQUIST, WILLIAM H. 1976 Chief Justices I Never Knew. *Hastings Constitutional Law Quarterly* 3:637.

——— 1976 The Notion of a Living Constitution. *Texas Law Review* 54:693–706.

——— 1987 *The Supreme Court: How It Was, How It Is.* New York: Morrow.

SHAPIRO, DAVID L. 1976 Mr. Justice Rehnquist: A Preliminary View. *Harvard Law Review* 90:293–357.

# REHNQUIST, WILLIAM H.
(1924– )
(Update 2)

William Hobbes Rehnquist served as an Associate Justice of the Supreme Court and later ascended to the position of CHIEF JUSTICE of the United States. Rehnquist was born in 1924 outside of Milwaukee, Wisconsin. After initially attending Kenyon College and serving in the U.S. Army for three years during WORLD WAR II, he received his undergraduate degree from Stanford University in 1948. Prior to attending law school, Rehnquist then received an M.A. in political science from Stanford in 1949, followed by an M.A. in government from Harvard in 1950. In December, 1951, he was graduated first in his class from Stanford Law School. Rehnquist then served as a law clerk to Justice ROBERT H. JACKSON, thereafter entering private practice in Phoenix, Arizona. During his years in Phoenix, Rehnquist was an outspoken, politically active conservative, criticizing the WARREN COURT for "extreme solicitude for the claims of Communists and other criminal defendants" and at one point opposing OPEN HOUSING LAWS as an unjustifiable infringement on private PROPERTY RIGHTS. When RICHARD M. NIXON was elected President, he chose Rehnquist to head the Office of Legal Counsel in the U.S. Department of Justice. In that position, Rehnquist often served as the administration's spokesman on controversial legal issues.

After the resignation of the second JOHN MARSHALL HARLAN and HUGO L. BLACK in 1971, Nixon nominated Rehnquist and LEWIS F. POWELL to serve as Associate Justices. Rehnquist's nomination was by far the more controversial of the two; indeed, it set off a bitter struggle over confirmation in the U.S. SENATE. No one questioned Rehnquist's intellectual capacity; however, Senate liberals were disturbed by his record on CIVIL RIGHTS. In particular, they focused on two points. The first was a memorandum that Rehnquist had written for Justice Jackson in connection with BROWN V. BOARD OF EDUCATION (1954) which argued that PLESSY V. FERGUSON (1896) "was right and should be reaffirmed." The second was Rehnquist's participation in a Republican poll-watching project that challenged voting credentials in predominantly African American and Hispanic neighborhoods in Phoenix. Rehnquist responded that Jackson himself had requested a defense of *Plessy*, and that he had engaged in no wrongdoing during the poll-watching project. Ultimately, Rehnquist was confirmed on a 68–26 vote.

In personal terms, Rehnquist soon became known on the Court for his friendliness, informality, and irreverent sense of humor. From a jurisprudential perspective, it quickly became clear that he would vindicate the fears of his liberal detractors and the hopes of his conservative supporters. During the BURGER COURT era, Rehnquist was the most conservative Justice on the Court, and also the most able of the four Nixon appointees. His opinions reflect a technical mastery of the law, and are marked by a forceful writing style that at times employs colorful, emotionally charged imagery to underscore distaste for the positions of his more liberal colleagues.

Because of these qualities, Rehnquist was chosen by President RONALD REAGAN to succeed WARREN E. BURGER as Chief Justice in 1986. The CONFIRMATION PROCESS reprised the political struggle that had taken place in 1971. Once again, liberal senators opposed the nomination, harshly criticizing Rehnquist's record on civil rights; once again, their effort to derail the nomination was unsuccessful. Rehnquist was confirmed by a vote of 65– 32, and assumed the office of Chief Justice on September 26, 1986.

Ironically, Rehnquist's elevation to the Chief Justiceship coincided with the appointment of Justice ANTONIN SCALIA, who displaced Rehnquist as the intellectual leader of the conservative wing of the Court. During his tenure as Chief Justice, Rehnquist has been as likely to vote with SANDRA DAY O'CONNOR and ANTHONY M. KENNEDY as with Scalia and CLARENCE THOMAS, both of whom were more firmly committed to conservative ideology. *Bush v. Vera* (1996) exemplifies this point. There, rather than joining Scalia and Thomas in arguing that all consideration of race in ELECTORAL DISTRICTING was unconstitutional, Rehnquist agreed with O'Connor and Kennedy in concluding that the Constitution requires only that "legitimate districting principles [not be] 'subordinated' to race."

The significance of cases such as *Vera* should not be overstated in evaluating Rehnquist's judicial philosophy. He remains a staunch conservative, fiercely opposed to the basic principles of liberal constitutionalism. For example, in PLANNED PARENTHOOD V. CASEY (1992), Rehnquist voted to overturn ROE V. WADE (1973) and deconstitutionalize the law of ABORTION, rather than simply to modify *Roe* and its progeny as successfully advocated by O'Connor and Kennedy.

Rehnquist's opposition to *Roe* reflects his basic approach to CONSTITUTIONAL INTERPRETATION, which in turn embodies the standard conservative political ideology of the late 1960s and early 1970s. Stung by the liberal activism of the Warren Court, conservatives had generally become vociferous advocates of the concept of judicial restraint generally, and a commitment to a jurisprudence based on the ORIGINAL INTENT of the Framers of the Constitution in particular. Not surprisingly, Rehnquist became the foremost defender of ORIGINALISM on the Court. He expressed this philosophy in "The Notion of a Living Constitution":

> [T]o the extent that it makes possible an individual's persuading one or more appointed federal judges to impose on other individuals a rule of conduct that the popularly elected branches of government would not have enacted and the voters have not and would not have embodied in the Constitution, . . . [nonoriginalist review] is genuinely corrosive of the fundamental values of our democratic society.

Among the best-known examples of the application of these principles are Rehnquist's DISSENTING OPINIONS in cases such as SUGARMAN V. DOUGALL (1973) and TRIMBLE V. GORDON (1977), where he argued that enhanced scrutiny under the EQUAL PROTECTION clause should be limited to cases involving race-based classifications. The same jurisprudential philosophy has served Rehnquist well in cases where liberals have sought to deploy the Constitution in support of their values on issues ranging from school DESEGREGATION to CRIMINAL PROCEDURE, RELIGIOUS LIBERTY, and gay rights. In dealing with these cases, he was the most consistent and effective advocate of judicial restraint on the Burger Court. Rehnquist has been equally effective in articulating conservative positions on issues of STATUTORY INTERPRETATION involving matters such as HABEAS CORPUS, civil rights, and business regulation generally. As Chief Justice, he has continued to be a strong advocate for these positions.

By contrast, in cases where litigants have attempted to deploy the Constitution *against* liberal government programs, Rehnquist's voting pattern clearly reflects the tensions inherent in much of the conservative political–judicial theory of the late-twentieth century. Rehnquist was the Burger Court Justice who was most likely to uphold constitutional challenges raised by conservatives against liberal political programs, including cases involving FEDERALISM, property rights, and AFFIRMATIVE ACTION. He has continued to support conservative activism on a variety of issues during his Chief Justiceship. Moreover, in some of these cases, Rehnquist's positions are hard to explain in terms other than pure politics; for example, his categorical rejection of race-based affirmative action plans in cases such as FULLILOVE V. KLUTZNICK (1980) is inexplicable in any other terms. In other cases, however, Rehnquist has emphasized the principle of judicial restraint in rejecting constitutional challenges raised by conservatives. For example, following his general theory that CORPORATIONS are creatures of the state and thus constitutionally subject to whatever restraints the state government wishes to impose, Rehnquist voted to uphold restraints on corporate political activities in cases such as FIRST NATIONAL BANK OF BOSTON V. BELLOTTI (1978)—hardly a policy that most conservative politicians would embrace. In short, despite his obvious gifts, Rehnquist has never fully resolved the potential conflicts between "judicial conservatism" and the political conservatism with which it has become associated. Nonetheless, he remains one of the most important and influential justices of the post-Warren era.

EARL M. MALTZ
(2000)

Bibliography

BOLES, DONALD E. 1987 *William Rehnquist: Judicial Activist.* Ames, Iowa: Iowa State University Press.

DAVIS, SUE 1988 *Justice Rehnquist and the Constitution.* Princeton, N.J.: Princeton University Press.

POWELL, JEFF 1982 The Compleat Jeffersonian: Justice Rehnquist and Federalism. *Yale Law Journal* 91:1317–1370.

REHNQUIST, WILLIAM H. 1976 The Notion of a Living Constitution. *Texas Law Review* 54:693–706.

SHAPIRO, DAVID L. 1976 Mr. Justice Rehnquist: A Preliminary View. *Harvard Law Review* 90:293–357.

## REHNQUIST COURT

The Rehnquist Court began its reign in September of 1986 when President RONALD REAGAN appointed WILLIAM H. REHNQUIST Chief Justice to replace retiring Chief Justice WARREN E. BURGER. This article reviews the first four years of the Rehnquist Court. Before his appointment as Chief Justice, however, Rehnquist had served as an Associate Justice on the BURGER COURT for almost fifteen years. Like Burger, he was originally appointed by President RICHARD M. NIXON to redeem a specific campaign promise to promote law and order through Court appointments that would stem the tide of WARREN COURT decisions protecting the rights of the criminally accused and to pursue his more general philosophical commitment to appoint "strict constructionists . . . to interpret the law, not to make law."

The Burger Court itself made a fairly quick start in redeeming Mr. Nixon's law-and-order pledge, although the Rehnquist Court has continued and in some ways even accelerated this redemption. It seems highly likely that the elevation of Rehnquist, in conjunction with two subsequent appointments by President Reagan and one by President GEORGE BUSH, will complete the more general transformation of the Court contemplated by President Nixon's commitment to STRICT CONSTRUCTION.

This broader transformation has been steady but slow. It has been steady because Republican Presidents holding the conservative values associated with "strict construction" have controlled the White House continuously since Nixon's election, except for the four-year interlude of President JIMMY CARTER, who did not have the opportunity to appoint a single Justice. It has been slow partly because some of the appointees did not turn out as conservative as expected and partly because some of the conservatives replaced other conservatives rather than liberals. Of Presi-

dent Nixon's four appointments, only one, Chief Justice Burger, remained consistently faithful to the conservative cause, whereas Justice LEWIS F. POWELL proved to be a moderate and Justice HARRY A. BLACKMUN became increasingly liberal. Justice JOHN PAUL STEVENS, appointed by President GERALD FORD, has also proved to be a moderate; one of President Reagan's first two appointments replaced a moderate, Justice SANDRA DAY O'CONNOR replacing Justice POTTER J. STEWART, and the other, Justice ANTONIN SCALIA, replaced conservative Justice Burger.

The key appointment giving the conservatives on the Rehnquist Court a clear majority on most if not all issues did not come until President Reagan's 1988 appointment of Justice ANTHONY M. KENNEDY to replace retiring Justice Powell. Ironically, this appointment was made only after the Senate, following a historic controversy, had rejected Mr. Reagan's first candidate to replace Powell, Judge Robert Bork, on the ground that he was too conservative. Kennedy, during his first two terms in office, has proved to be as conservative as many expected Bork might have been, and the principal effect of the Senate's rejection of Bork appears to have been that President Bush in nominating his first Court appointee, DAVID H. SOUTER, to replace liberal stalwart WILLIAM J. BRENNAN searched for a conservative who, unlike Bork, had published nothing indicating his views on any important constitutional questions.

"Strict construction" is sometimes equated with a strategy of interpreting the Constitution according to the "plain meaning" of the text or the intention of its Framers. In fact, however, this interpretive strategy had not proved so far to be of great importance, except with regard to the methodology used by the Court to decide whether rights not expressly mentioned in the text are impliedly protected, where a variation of it has gained prominence. The form of strict construction, or CONSERVATISM, that has gradually come to dominate the Court, however, has been based more on institutional and political than on historical or textual commitments.

Institutionally, most of the Republican appointees have been inclined to resolve any doubts about how the Constitution should be interpreted by upholding actions of other agencies of government. This inclination probably rests mainly on three interconnected institutional commitments: a vision of democracy that pictures majoritarian-responsive institutions as its centerpiece and the life-tenured Court as antidemocratic; a vision of the management of society as a complex matter best delegated to various experts and professionals, like school boards and other ADMINISTRATIVE AGENCIES; and a vision of FEDERALISM that views with suspicion the intrusion of federal power including the JUDICIAL POWER, into areas of decision making traditionally left to state and local government.

Politically, most of the Republican appointees have been guided or at least disciplined by the values associated with the constituency of the Republican party in late twentieth-century America. The Burger Court sat and the Rehnquist Court is sitting in an era when the historically dispossessed are actively seeking possession: blacks and other racial minorities; the poor and the homeless; women; gays; and other groups, like the handicapped, who have in different ways been marginalized in our society.

The Republican party has sought in a variety of ways to accommodate the interests of these groups, but it has been the party of mainstream America, not the party of the dispossessed. While Republicans and Democrats have vied for the "law and order" vote, the Republican party has been the more consistently and vocally anticriminal. The party has sought a moderate, compromising posture on the matters touching the protection of minority groups, women, and the handicapped. It has generally aligned itself at least rhetorically with traditional and to some extent religiously inspired moral views on controversial social questions such as ABORTION and homosexuality. While it has often conformed to the realities of interest-group politics, it has tended to resist governmental redistributive programs that would tax or otherwise interfere with property interests, preferring to rely instead on a relatively unregulated market to provide full employment and thus help the poor.

The behavior of the Rehnquist Court has been quite consistent with these political commitments, although at the same time, it is worthy of emphasis that a consistent and cohesive "Rehnquist Court" does not yet exist in one important sense. Even the conservative Justices sometimes disagree over outcomes and often, in important ways, over the rationale for decisions. As a result, the Court is often at least doctrinally splintered.

The Supreme Court, like the Republican party, has often sought what might be characterized as compromises; but on the whole, it is the Court of mainstream America, not the dispossessed. In a high percentage of important constitutional cases, its institutional and political commitments have pointed in the same direction. When these commitments have conflicted, it has to this point usually refrained from imposing its values, instead deferring to the governmental agencies whose decisions are challenged. There are some important exceptions, most notably in its resistance to AFFIRMATIVE ACTION programs, but these have been few and on the whole restrained. For example, although it has sometimes protected PROPERTY RIGHTS against governmental regulation, its rulings to this point do not remotely promise a return to pre-NEW DEAL ideology. Occasionally, chiefly in FREEDOM OF SPEECH cases, it has acted in ways that might be interpreted as neither institutionally nor politically conservative, as in upholding against regulation the speech rights of flag

burners, but such cases are also rare. The Rehnquist Court has been, largely but not completely, a passively rather than an actively conservative court.

In one view the Court's overall performance shows only that the system is working as it is supposed to work: the presidential appointment power is the main effective check on these nine Justices who are accountable to no electorate, and twenty years of Republican Presidents has had an effect on the Supreme Court.

The Rehnquist Court has continued the Burger Court's contraction of the RIGHTS OF THE CRIMINALLY ACCUSED and convicted, in general subordinating these rights to law-and-order concerns, except in a subclass of cases in which the prosecution behaved outrageously in a way that might have tainted the guilt determination. Both courts have restricted the application of the FOURTH AMENDMENT's prohibition of unreasonable SEARCHES AND SEIZURES and the Fifth Amendment's prohibition of compulsory self-incrimination, limited the scope of the EXCLUSIONARY RULE, interpreted the Eighth Amendment so as to allow the states great discretion in reinstituting and administering CAPITAL PUNISHMENT, and virtually eliminated the possibility of HABEAS CORPUS and other postconviction challenges to final judgments of criminal conviction.

UNITED STATES V. SALERNO (1987), in which the Court upheld against Eighth Amendment attack the pretrial detention of dangerous defendants, exemplifies the Court's law-and-order commitment. *Maryland v. Buie* (1990) is an example of the priority the Court gives to law enforcement goals over Fourth Amendment rights claims. In this case, the Court sanctioned the use of evidence turned up after an arrest in a "protective sweep" of a house, on less than PROBABLE CAUSE, that someone dangerous might have been in the areas searched. The Court seems prepared in many contexts to abandon not only the probable cause requirement but any concept of individualized suspicion as a condition to search, as in *Michigan Department of State Police v. Sitz*, (1990) where it upheld highway-checkpoint sobriety testing. *Teague v. Lane* (1989) made it much more difficult for constitutional claims by prisoners to be heard in the federal courts, holding that federal habeas corpus is unavailable for the assertion of a right not clearly established by precedent unless the right would apply retroactively. For all practical purposes, this ruling requires a prisoner to show that fundamentally unfair governmental practices might have led to the conviction of someone innocent.

The seeds of the Rehnquist Court's more general conservative agenda, also sown during the Burger Court era, include both broad propositions of law that serve to eliminate whole categories of potential constitutional rights and smaller but continuous doctrinal innovations that cumulatively have made ever more difficult the establishment of a violation of rights. The most important developments of the former have been the following: (1) the Court's unwillingness to interpret the Constitution to protect "implied" rights not explicitly mentioned in the text; (2) its limitation of the concept of constitutional rights to negative private rights against governmental interference, rejecting claims of rights to affirmative governmental assistance or subsidy; and (3) its understanding that the government's fundamental constitutional obligation is to refrain from targeting racial, gender, or religious groups for relatively disadvantageous treatment. It rejects any obligation of government to make accommodations in order to protect or benefit any such groups, and to some extent restricts government from making such accommodations for racial (although not for religious) groups.

Illustrative of the Rehnquist Court's narrow approach to defining the rights protected by the Constitution are *Michael H. v. Gerald D.* (1989) and *Burnham v. Superior Court of California* (1990). The former case raised the question as to how the term "liberty" in the due process clause of the FOURTEENTH AMENDMENT should be interpreted; and the latter raised the question as to how the term "DUE PROCESS OF LAW" should be interpreted.

In *Michael H.*, state law conclusively presumed that a child born to a married woman living with her husband was a child of the marriage. A genetic father argued that this law infringed on his "liberty" interest in establishing his paternity. In many prior cases, the Court had held that "liberty," in the due process clause, included implied FUNDAMENTAL RIGHTS not expressly mentioned in the Constitution when they were "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." These formulations do not answer the questions of how and at what level of abstractness traditional values should be identified. The *Michael H.* plurality, following the Burger Court's lead in BOWERS V. HARDWICK (1986), chose to conceptualize this question very narrowly, asking not even whether our traditions recognize the rights of natural fathers, but rather whether they recognize those of adulterous natural fathers; on this basis the Court rejected the claim.

This historically concrete way of identifying constitutional rights does not necessarily eliminate implied constitutional rights, first, because the Court might (or might not) let stand previously announced implied rights, and second, because it is always possible that some small number of states might in the future restrict rights that have been traditionally and widely respected by all the other states. But it does very substantially limit the potential category of implied rights. Moreover, it does so in an odd way, given the traditional assumption that the main point of constitutional rights is to protect minorities: after *Bowers* and *Michael H.*, the stronger, more widespread, and

more historically entrenched a rights-restrictive majoritarian imposition, the less likely the Court will find a constitutional violation.

The *Bowers* approach was applied by four Justices in *Burnham*, with the concurrence of enough others to constitute a majority, to reject a claim that subjecting an individual to a state's JURISDICTION on the basis of his fleeting presence within the state amounted to a denial of liberty "without due process of law." The opinion of the four by Justice Scalia found that fleeting physical presence, which would have been thought a sufficient predicate for jurisdiction when the Fourteenth Amendment was adopted, had been assumed to be sufficient since then in many state decisions. This "continuing tradition" was sufficient to validate the practice of founding jurisdiction on a fleeting presence, whether or not it might otherwise be thought unfair.

*Cruzan v. Director of Missouri Department of Health* (1990) suggests that the Court is not prepared to scuttle the implied-rights doctrine completely, but is also not disposed to use it aggressively. The Court found a sufficiently concrete tradition recognizing the right of individuals to refuse medical treatment to imply that this choice was a protected liberty that included the RIGHT TO DIE under at least some circumstances. Nonetheless, it held that the state's interest in insisting that the choice be shown by clear and convincing evidence was sufficiently strong in the case at hand to justify disallowing a patient's parents from making the decision, even though the patient herself could not make it because she was in a vegetative state.

The best known and most practically important of the pre-Rehnquist Court's decisions protecting implied constitutional rights is ROE V. WADE (1973), where the Court ruled that the Constitution impliedly protects a woman's right to have an abortion. The Rehnquist Court's general unreceptiveness to implied-rights claims does not bode well for the future of this right, and some of the sitting Justices have already announced their willingness to overrule *Roe*. Whether or not the right to abort will survive may depend on the vote of newly appointed Justice Souter, but even if the right survives, smaller but incrementally important shifts in doctrine by the Rehnquist Court have already weakened it significantly.

These shifts had their genesis in Burger Court decisions protecting the implied "privacy" right of individuals to decide their own family living arrangements, but only if the challenged regulation "substantially interfered" with the right. This substantial-interference concept has so far been important mainly in privacy right cases, although it is theoretically transplantable to other areas of constitutional law. Its patent importance at this point is in the abortion rights controversy where, in one or another formulation, it has appeared from time to time in majority and concurring opinions, including those of the Rehnquist Court, and it might prove important if five Justices are not able to agree that *Roe v. Wade* should be overruled. Use of the substantial-interference requirement, which has been endorsed most consistently by Justice O'Connor, would enable the majority even if it is unable to overrule *Roe*, to allow much greater state regulation of abortion than prior decisions have allowed.

For example, although it is not entirely clear what the criteria are for deciding when a regulation substantially interferes with the right to abort, some opinions suggest that only a regulation making abortions illegal qualifies. If so, waiting periods, mandatory antiabortion counseling, spousal and parental consent requirements, and other forms of regulation previously held unconstitutional would become permissible in the future. Even if the requirement were construed to have a lesser meaning, such as "making abortions very much more difficult to obtain," greater regulatory discretion would be available in the future than it has been in the past.

The ancestry of the Court's refusal to recognize positive constitutional rights to governmental assistance are decisions of the Burger Court that effectively terminated enlargement of the "fundamental interest" branch of EQUAL PROTECTION jurisprudence bequeathed to it by the Warren Court, along with decisions that rejected the claim that liberties protected against governmental interference are also entitled to affirmative governmental protection.

The Warren Court has held that individuals had an equality-based right to the subsidized provision of "fundamental" services or rights they were too poor to afford, such as counsel and other important defense services in criminal cases. Warren Court decisions had suggested that which rights were "fundamental" for these purposes would depend on the degree to which they were of practical importance to people. The Burger Court did not overturn the particular rulings of the Warren Court, but early in its tenure, did effectively undercut the equal-protection basis of the doctrine and consequently its future growth, ruling that henceforth rights would be regarded as fundamental only if they were constitutional rights, irrespective of their practical importance. These opinions, however, left open the possibility that such "real" constitutional rights might sometimes include subsidy rights.

Burger Court decisions eventually repudiated this suggestion in holding that the right to abort, although a constitutional right, did not include the right to governmental Medicaid payments for abortions for those too poor to afford them. According to these decisions, constitutional rights are negative entitlements available to individuals only to stop governmental interference with the use of private resources.

The Rehnquist Court has perpetuated this jurisprudence of negative rights, holding in the abortion context, for example, that the closing of state hospitals to abortions did not violate the right to abort because the state's action left women who wanted abortions exactly where they would have been had the state never operated public hospitals—that is, dependent on their private resources.

DESHANEY V. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES (1989) suggests, moreover, that the Rehnquist Court's commitment to the jurisprudence of negative rights is pervasive and extends beyond the abortion issue. In this case, the Court held that governmental social-service officials did not violate the rights of a boy by failing to remove him from a father whom they knew was continuously beating him and whose beatings eventually resulted in severe brain damage to the boy. The Court found no violation of the boy's right not to be deprived of liberty without due process. It ruled that due process protects individuals only against the government's interfering with their liberty and imposes no "affirmative obligation" on government to take action to protect that liberty. Just as the "culprit" in abortion-subsidy cases is not the government, but rather the pregnant woman's poverty, so (in this view) the boy's father, not the state, was the source of his problem.

The Rehnquist Court's pursuit of a "neutrality" concept of the government's basic constitutional obligation arguably has fairly deep roots in constitutional history, but is grounded most immediately in the Burger Court's WASHINGTON V. DAVIS (1976) decision, which held that unless the plaintiff is challenging a law that expressly classifies people on the basis of race, he or she can successfully challenge a governmental action as racially discriminatory only by proving that it was undertaken for a discriminatory purpose. The vision of racial justice that *Washington* has retrospectively been understood to endorse in subsequent Burger and Rehnquist Court decisions interpreting it is one of neutrality in a double sense: first because the Constitution requires governmental racial neutrality, *any* use by government of race as a classifying trait in law is suspect and likely to be struck down. And second, because the Constitution requires nothing more of government than racial neutrality, its actions are immune from attack so long as it does not act for a racially bad purpose.

This vision has substantially constrained attempts on behalf of minority groups to use law and legal institutions to better their lots in two distinct fashions, one by way of constitutional legitimation and the other by way of constitutional restriction. First, a governmental action that produces effects that disadvantage minority groups to a greater extent than other groups is constitutionally legitimate unless a plaintiff can meet the difficult burden of proving that this relative racial disadvantage was a purpose of the action. Second, voluntary attempts by government specifically and expressly to benefit racial minority groups—commonly called benign or reverse discrimination or affirmative action—are seriously vulnerable to constitutional invalidation.

The Rehnquist Court has vigorously confirmed and extended both the legitimation and restriction branches of the neutrality principle bequeathed to it. In MCCLESKEY V. KEMP (1987), for example, it rejected, on the ground of a failure of proof of discriminatory purpose, a claim by a black criminal defendant sentenced to death that the state's death penalty was administered in a racially discriminatory fashion. McCleskey's discrimination claim was based on a statistical study that, controlling for extraneous variables, found that a black defendant charged with killing a white in Georgia was four times more likely to be sentenced to death than someone charged with killing a black. The Court conceded, arguendo, the statistical reliability of the evidence, but found that even this statistical pattern would not prove that McCleskey himself was sentenced to death because of racial considerations. The case evidently shows the depth of the Rehnquist Court's commitment to its neutrality principle. Even conceding the correctness of the Court's criticism of the proof as to this individual defendant, the statistical evidence showed systematic RACIAL DISCRIMINATION and therefore proved that *some* (even if nonidentifiable) individual black murderers of whites were being sentenced to death for racial reasons. Even proof of a pattern of purposeful racial discrimination that might well have infected McCleskey's sentence was not sufficient to establish constitutional illegitimacy without evidence linking this nonneutrality to McCleskey himself.

The depth of the Rehnquist Court's commitment to its neutrality principle is also illustrated by its interpretation of the CIVIL RIGHTS ACT OF 1964, which prohibits among other things racial discrimination by employers. Burger Court decisions had held that proof that an employment practice disadvantaged minority group members to a greater extent than others, although insufficient to establish a presumptive constitutional violation by government, *was* sufficient to establish a presumptive violation of the statute by either governmental or private employers. On such a showing, the burden shifted to the employer to establish the business necessity of the challenged practice, failing which the practice would be found illegal.

In *Wards Cove Packing Co., Inc. v. Antonio* (1989), the Rehnquist Court changed this evidentiary framework in a way that requires the plaintiff to prove almost as much as he or she would need to establish intentional discrimination. After *Wards Cove*, the employer, in response to a showing that the challenged practice disproportionately disadvantages minority group members, need only come

forward with some evidence of a business justification, after which the plaintiff must prove that the practice does not serve "in a significant way, the legitimate employment goals of the employer." A plaintiff who can meet this difficult burden will have come very close to proving that the discrimination was intentional because he or she would have shown that the putatively innocent purpose for the racial injury was a bogus explanation.

The restrictive branch of the neutrality principle arises in cases involving benign or reverse discrimination, a practice whose constitutionality was left extremely uncertain by a series of Burger Court decisions. The Rehnquist Court's decision in RICHMOND (CITY OF) V. J. A. CROSON CO. (1989) communicates at a minimum that a majority of the Justices (1) see governmental actions that allocate benefits to minority races on the express basis of race as equally or almost as constitutionally troublesome as actions that expressly disadvantage them on the basis of race; (2) believe that few goals are adequate to justify such actions; and (3) will insist that these goals be pursued through race-neutral means whenever possible.

The "degree of troublesomeness" issue is important because it directly affects the "level of scrutiny" or burden of justification that reverse discrimination cases trigger. Under basic principles of constitutional law that have largely been settled for some time, most laws are constitutional so long as they rationally promote legitimate goals of government. One major historical exception to this rule is laws that expressly classify people for burdens or benefits on the basis of race, which are unconstitutional unless the government establishes that they are necessary to serve goals of compelling importance, a justification burden that is very difficult to satisfy.

The special rule for race cases, however, developed in a line of cases involving governments' acting out of racial hostility or prejudice to the detriment of minority groups. Some have argued and some Justices have agreed that reverse discrimination, which does not share this characteristic, is not so constitutionally troublesome and therefore should be judged under a less demanding justification standard. *Croson* is the first reverse-discrimination case in which a majority of Justices were able to agree on the burden of justification applicable in reverse-discrimination cases. They found such cases sufficiently troublesome to invoke the demanding justification standard historically applied in hostile-discrimination cases, effectively adopting a broad rule requiring governmental neutrality with regard to race.

The remaining important question in *Croson* was under what conditions, if any, this demanding justification standard might be met. A variety of claims have been historically made in an attempt to justify governmental programs that expressly allocate benefits like admission to state medical or law schools or governmental contracts to minority racial groups. Some, for example, see such programs as justified by the goal of preventing the perpetuation of racial underclasses or castes, promoting racial integration in the professions or work force, or creating role models for minority youth. Although *Croson* is not the first and will not be the last Supreme Court decision to consider this question, a majority of the Court indicates that such goals will be treated skeptically. The majority apparently endorsed the view that only one goal was of sufficiently "compelling" importance to justify reverse discrimination, namely, remedying the effects of past discrimination. Although the decision is less than clear on this point, it seems to imply that state and local government must meet a quite demanding standard in proving that the minority beneficiaries of reverse discrimination are in fact suffering present disadvantages by reason of former discrimination either against the particular individual beneficiaries themselves or other members of their race.

A year after *Croson*, the Rehnquist Court upheld reverse discrimination authorized by Congress with respect to broadcast-media licensing in METRO BROADCASTING, INC. V. FEDERAL COMMUNICATIONS COMMISSION (1990), applying a less demanding standard of review. Five Justices apparently believed that the Court owes greater deference to Congress in such cases than to state and local legislative bodies, for Congress is a coequal branch of government with a variety of constitutional powers that confer on it some degree of discretion in matters of national racial-commercial policy. One of the five, Justice Brennan, has since been replaced by Justice Souter, and it is therefore difficult to predict whether the *Metro* distinction between state-local and federal reverse discrimination or a uniform application of *Croson* will ultimately prevail.

The neutrality principle that has played such an important role in the development of race law has been equally important in SEX DISCRIMINATION cases, where the same basic rule applies: laws that expressly discriminate on gender grounds are suspect (although subject to a less demanding justification than racial classifications), and in the absence of express gender classification, a plaintiff must prove that a challenged action was taken for a gender-discriminatory purpose. The Rehnquist Court has decided no equal protection cases involving gender discrimination, but has given no reason to suspect that it will depart from its neutrality principle. In fact, its recent assimilation of the free exercise of religion clause to the neutrality principle indicates that its commitment to that principle is quite robust.

This assimilation occurred in EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990), which presented the question as to whether Oregon's penalization of the religious use of peyote violated Smith's

right to the free exercise of his religion. Before *Smith*, a law that had the effect of burdening a person's ability to follow a religion was unconstitutional unless shown necessary to the accomplishment of a goal of compelling importance. *Smith* holds that with certain very limited exceptions a "*neutral* law of general applicability" cannot be challenged as an interference with the free exercise of religion. The upshot is that, in the future, adjudication under the free exercise clause will parallel racial and gender equal protection adjudication. Laws that expressly require or prohibit religious practices are not religion neutral and will therefore trigger a heavy burden of justification. But laws that are of general applicability, like those prohibiting drug use, are religion neutral and are not subject to successful constitutional attack unless they were adopted or enforced for the purpose of discriminating against a religion, notwithstanding that their effect burdens certain religious practices. Thus, for example, a law prohibiting the serving of alcohol to minors could be enforced against the Catholic use of wine in communion, although the major religions probably have enough political influence to secure accommodating legislation, and the brunt of *Smith* will likely be borne, as in *Smith* itself, by minority religions.

To say that a principle of "neutrality" pervades the Rehnquist Court's jurisprudence of race, gender, and religion is not of course the same as saying that the Court is employing the only tenable, or the right, or even an internally consistent concept of neutrality, for neutrality is no more self-defining than "equality." With regard to race, for example, critics might argue that for the government to act in a truly neutral way its actions should not disproportionately disadvantage members of some racial groups relative to others, irrespective of its purpose, at least when the subject of the disadvantageous treatment is important. They might also say that even if purpose rather than effect is a proper measure of neutrality, the evidence system through which the Court determines purpose is nonneutral, for it rests implicitly on the assumption that government does not usually engage in racial discrimination, rather than the opposite assumption. Finally, these critics might say that the neutrality of current governmental actions cannot be fairly judged without regard to its past actions and, consequently, that what might appear to be a nonneutral conferral of governmental advantages to racial groups previously purposefully disadvantaged by government is better characterized as the pursuit of racial neutrality over time. The Rehnquist Court's neutrality concept might be seen as an attempt to compromise competing political interests, but the underlying questions of principle and policy certainly cannot be resolved by reference to the unadorned concept of neutrality.

No question in contemporary constitutional law better illustrates this proposition than what constitutes an unconstitutional ESTABLISHMENT OF RELIGION. The Rehnquist Court has addressed this question several times, but has not yet supplied a clear answer. All of the Justices who disagree with its answer appear to believe they are being religiously neutral, yet their answers differ significantly. Three answers have figured prominently: (1) the government may not take actions that in fact benefit religion (a major part of the pre-Rehnquist Court test and one favored by some current Justices); (2) it may not take actions that amount to active proselytizing for a religion (the test favored by four Justices); and (3) it may not take actions that create the appearance that it is endorsing religion (the test favored by two "swing" Justices and therefore likely in the short run to prove determinative of the outcome of many cases).

These competing visions of neutrality were all at work in COUNTY OF ALLEGHENY V. AMERICAN CIVIL LIBERTIES UNION (1989), where the Court was called on to decide whether either of two Christmas displays by the city of Pittsburgh violated the ESTABLISHMENT CLAUSE. One was a crèche in the county courthouse, and the other a side-by-side display of a Christmas tree and a menorah in front of a public building. A majority of the Court, apparently pursuing what appeared to five Justices a neutral principle that would simultaneously assure that government does not help or hurt religion too much, applied the "no appearance of endorsement" test, and held the crèche unconstitutional and the other display constitutional. The Court found that the factual context of the first display created the appearance of an endorsement of religion, whereas that of the second created the appearance of a celebration of a winter holiday season. Those Justices who applied the "no benefit in fact" test would have held both displays unconstitutional for their nonneutral favoring of the Christian and Jewish religions. Those who applied the "no proselytizing" test criticized the other opinions for their nonneutral hostility toward religion and would have upheld both because neither coerced anyone to support or participate in a religion.

The establishment clause cases illustrate not only the elusiveness of the "neutrality" concept but also, when read together with the free exercise cases, an asymmetry in Rehnquist Court jurisprudence between racial and religious neutrality apparently reflective of the Court's "mainstream America" predisposition.

With regard to its legitimation function, the neutrality concept operates similarly in race and religion cases: regulations are legitimate even if they produce nonneutral effects, so long as they are facially and purposively neutral. With regard to its restrictive function, however, Rehnquist Court neutrality presumptively prohibits regulations that specially benefit minority races, but permits those that

specially benefit religious groups, so long as they do not appear to endorse a religion (or, perhaps, so long as they do not actually proselytize).

The Rehnquist Court has also pursued its conservative agenda through numerous smaller but cumulatively important doctrinal avenues. One example is the privacy rights doctrine that interferences must be "substantial" before they will be regarded as constitutionally troublesome. Many other examples might be given, but one will suffice: the Court's use in free-speech cases of the threshold PUBLIC FORUM concept effectively to foreclose speech rights on most kinds of public property and its related apparent willingness to accept without serious scrutiny governmentally proffered justifications for regulating speech activities in the few public places where individuals do have the right to engage in expressive activities.

In free speech cases, the Rehnquist Court has been reasonable if sporadically protective of traditional constitutional rights. It has struck down many regulations restricting speech, not only in well-publicized cases, such as those involving FLAG DESECRATION, but in more mundane settings, such as newsrack placements and handbilling. One area in which it has been less protective, however, concerns the right to engage in expressive activities in public places, a right that has historically been particularly important to the dispossessed who lack the resources to project their views through other media.

The Court's tolerance toward restrictions of speech in public places derives from the Burger Court's legacy, but again, it seems fairly clear that the Rehnquist Court enthusiastically subscribes to the intuitions that informed that legacy. The questions as to whether and to what extent the free speech clause entitles individuals to engage in expressive activity on public property has been implicit in constitutional law for along time, but for a variety of reasons went largely unaddressed in early cases. The Court was not forced to confront it directly until the mid-1960s, when civil rights demonstrators began to use unconventional sites such as libraries and jails as demonstration locations. The early decisions often rested on unclear reasoning, although for at least a time, the dominant trend was to protect the demonstrators' rights unless the government could prove that the demonstration actually interfered with the normal use of the property.

The Burger Court eventually decided on a tripartite classification of public places and hence speech rights. Streets and parks were labeled "public forums," and speech regulation in these places was "sharply circumscribed." In particular, even so-called content-neutral or "time, place, and manner" restrictions were unconstitutional unless, among other things, they were "narrowly tailored to serve a significant government interest." A second type of public forum consisted of places the government had voluntarily opened for speech purposes, and regulations here were subject to the same constitutional limits. All other kinds of public property were not public forums, and speech activity in such places could be prohibited unless, in substance, the government was simply trying to suppress views it opposed.

Because relatively few places were true public forums and therefore available for speech activities as a matter of right, one important question that remained concerned the circumstances in which the Court would find that property had been voluntarily opened for speech. Additionally, because content-neutral regulation of true public forums is far more common than content-based regulation, the practical effect of these rules on access even to streets and parks depended largely on the circumstances in which the Court would find that "time, place, and manner" regulations were adequately "narrowly tailored."

The current answers to these questions come largely from Rehnquist Court decisions and are not very speech protective. With regard to voluntarily opened forums, the main case is HAZELWOOD SCHOOL DISTRICT V. KUHLMEIER (1988), where the Court upheld the authority of public school officials to censor from a student newspaper articles about student pregnancy and the effect of divorce on students. Although the Court might have decided the case as it did on alternative grounds, its decision suggests that the category of voluntarily opened forums is a very small if not an empty one. It held that the newspaper was not such a forum because school officials had retained curricularly based editorial rights; therefore, even though the paper had always been open to the student body at large to submit opinions and articles, it had not been opened for general student speech purposes. The same theory would seem available for a wide variety of public property. Managers of public auditoriums, for example, might make their facilities broadly available, but retain the right to exclude certain subject matters (although perhaps not viewpoints). After *Hazelwood*, the Court, in this same vein, held in *United States v. Kokinda* (1990) that handbilling and fund solicitation on the sidewalk leading from a parking lot to a post office could be banned because the sidewalk was neither a true nor opened public forum, having been built for post office business purposes.

The most important case on the related question of when a content-neutral regulation is sufficiently "narrowly tailored" to survive constitutional attack is *Ward v. Rock Against Racism* (1989), where the Court appeared to hold that this requirement is met so long as the government can accomplish its goal better with the regulation at issue than without it. The Court did say that a regulation may not burden speech more than is necessary to accomplish the government's legitimate goal, but it simultaneously rejected the view that the government must use the means

that would accomplish its goal with the least restriction of speech; it is unclear how these two propositions can coexist. For example, a ban on all picketing on a certain sidewalk would be more effective in accomplishing the goal of pedestrian free movement than no ban would. Thus, it would seem to be constitutional under *Ward*, unless it burdens speech more than is necessary; if it does so, it would seem that this is because pedestrian free movement could have been assured by means that are less restrictive of speech. How *Ward* will ultimately be interpreted is uncertain, but if one takes seriously the idea that any contribution toward a goal validates a content-neutral regulation—and related decisions of the Rehnquist Court suggest that it does take this idea seriously—the Court will have given speech rights so little weight in the balance that virtually all non-content-based restrictions on access, even to true public forums, will survive constitutional attack.

LARRY G. SIMON
(1992)

(SEE ALSO: *Capital Punishment and Race; Race-Consciousness; Religious Liberty; Right Against Self-Incrimination.*)

Bibliography

ABRAMS, J. MARC and GOODMAN, S. MARK 1988 End of an Era? The Decline of Student Press Rights in the Wake of *Hazelwood School District v. Kuhlmeier. Duke Law Journal* 1988: 706–732

Constitutional Scholars' Statement on Affirmative Action After *City of Richmond v. J. A. Croson Co.* 1988 *Yale Law Journal* 98:1711–1716.

ESTRICH, SUSAN R. and SULLIVAN, KATHLEEN M. 1989 Abortion Politics: Writing for an Audience of One. *University of Pennsylvania Law Review* 138:119–155.

FRIED, CHARLES 1989 Affirmative Action After *City of Richmond v. J. A. Croson Co.:* A Response to the Scholars' Statement. *Yale Law Journal* 99:155–161.

KARST, KENNETH L. 1989 Private Discrimation and Public Responsibility: *Patterson* in Context. *Supreme Court Review* 1989:1–51.

SOIFER, AVIAM 1989 Moral Ambition, Formalism, and the "Free World' of *DeShaney. George Washington Law Review* 57:1513–1532.

TUSHNET, MARK 1988 The Emerging Principle of Accommodation of Religion (Dubitante). *Georgetown Law Journal* 76: 1691–1714.

WERHAN, KEITH 1987 The O'Briening of Free Speech Methodology. *Arizona State Law Review* 19:635–679.

# REHNQUIST COURT
## (Update)

The Supreme Court moved in sharply conservative directions after WILLIAM H. REHNQUIST was elevated from associate to CHIEF JUSTICE, replacing retiring Chief Justice WARREN E. BURGER, and an even more conservative Justice, ANTONIN SCALIA, filled Rehnquist's seat in 1986. But its evolving DOCTRINES came in fits and spurts as the Court's center further shifted with subsequent changes in the composition of the high bench.

The balance on the Court changed dramatically in 1988 with President RONALD REAGAN's last appointee, Justice ANTHONY M. KENNEDY, replacing Justice LEWIS F. POWELL, JR. Powell had been the pivotal vote on major controversies over ABORTION, AFFIRMATIVE ACTION, and the rights of lesbian and gay citizens. The balance, then, again shifted in 1990 and 1991 with the arrival of President GEORGE H. W. BUSH's two appointees, Justices DAVID H. SOUTER and CLARENCE THOMAS. They replaced the two most liberal justices, respectively, WILLIAM J. BRENNAN, JR., and THURGOOD MARSHALL. After his initial two terms, however, Souter broke ranks, and on the most divisive issues he now generally votes with Justice JOHN PAUL STEVENS and President WILLIAM J. CLINTON's two appointees, RUTH BADER GINSBURG and STEPHEN G. BREYER. As a result, in the 1990s the Rehnquist Court often split 5–4 on its most controversial rulings. Kennedy and Justice SANDRA DAY O'CONNOR cast the controlling votes, forcing more conservative Justices to accommodate their views of the Court's role and of CONSTITUTIONAL INTERPRETATION.

The changing course of the Rehnquist Court is registered in its treatment of liberal PRECEDENTs laid down by the BURGER COURT and the WARREN COURT. Initially, a majority agreed with the Chief Justice's long-standing view of precedent; namely, that prior rulings dealing with CIVIL RIGHTS and CIVIL LIBERTIES decided by bare majorities always should be open for reconsideration and reversal. In the first four TERMS of the Rehnquist Court eleven precedents were OVERRULED along with twelve more in the 1990 and 1991 terms. Yet, overturning so many precedents in such a short period of time created a controversy that came to a head when the Justices considered whether to overrule the watershed abortion decision, ROE V. WADE (1973), in PLANNED PARENTHOOD V. CASEY (1992). In a bitterly divided 5–4 decision in *Casey*, the Court's plurality and joint opinion issued by Kennedy, O'Connor, and Souter upheld "the essence of *Roe*" partly on the institutional ground that its reversal would hurt the Court's prestige and legitimacy. The battle over that decision apparently curbed the Court's appetite for reaching out to overturn liberal precedents. Since the 1993 term only one or two precedents have been annually overruled, which is in line with the historical average.

Rehnquist, nonetheless, commands a majority for many of the positions he staked out as a dissenting Justice during the years of the Burger Court. Notably, the Court has moved in more conservative directions on issues involving

the RIGHTS OF THE CRIMINALLY ACCUSED, CAPITAL PUNISHMENT, FEDERALISM, and affirmative action. Kennedy, O'Connor, Scalia, and Thomas also share the Chief Justice's reluctance to approve lower federal court orders to achieve school DESEGREGATION, to expand SUBSTANTIVE DUE PROCESS, or to recognize unenumerated FUNDAMENTAL RIGHTS.

The trend toward contracting the rights of the criminally accused that emerged during the Burger Court not merely continued but became more far-reaching, as the Rehnquist Court reversed decisions of the Burger Court deemed too cumbersome and unworkable for law enforcement. In *California v. Acevedo* (1991), for example, two precedents were overruled in holding that police may search any container in any part of an automobile stopped on PROBABLE CAUSE. In general, the scope of the FOURTH AMENDMENT prohibition of unreasonable SEARCHES AND SEIZURES has been sharply restricted. The doctrine that the Fourth Amendment protects "reasonable expectations of privacy," proclaimed in KATZ V. UNITED STATES (1967), became in the hands of the Rehnquist Court the touchstone for limiting the Fourth Amendment's application to WARRANTLESS SEARCHES and seizures, as well as for upholding random DRUG TESTING of students and employees. While the Warren Court's controversial ruling in MAPP V. OHIO (1961) extending the EXCLUSIONARY RULE to the states was not overruled, the "good faith" exception to it created by the Burger Court was extended to include police reliance on mistaken computer records of outstanding arrest warrants in *Arizona v. Evans* (1995). Likewise, the landmark ruling in MIRANDA V. ARIZONA (1966) on the Fifth Amendment prohibition of compulsory self-incrimination has not been overruled, but the Court has approved numerous exceptions to the application of *Miranda.* In addition, the Rehnquist Court made it easier both to impose capital punishment and to expedite the execution of those on death row.

For the first time since the 1937 constitutional crisis over the invalidation of NEW DEAL LEGISLATION, a bare majority of the Rehnquist Court limited Congress's power under the COMMERCE CLAUSE. In a series of rulings, including NEW YORK V. UNITED STATES (1992), UNITED STATES V. LÓPEZ (1995), *Seminole Tribe of Florida v. Florida* (1996), *Printz v. United States* (1997), and *Mack v. United States* (1997), Congress was held to have exceeded its inherent powers under the commerce clause and to infringe on principles of federalism. Nevertheless, the TENTH AMENDMENT has not been resurrected as the strong barrier to congressional legislation that it once was. The Court declined invitations to overrule GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985), which reversed an opinion written by Rehnquist for a bare majority in NATIONAL LEAGUE OF CITIES V. USERY (1976) asserting the Tenth Amendment was a limitation on Congress. However, in *Printz* and *New York*, the Court held that Congress violated the Tenth Amendment when it sought to "commandeer" state legislatures or administrative offices to carry out federal programs. In other respects, too, the Rehnquist Court's lack of deference to Congress is striking. In *City of Boerne v. Flores* (1997), the Court struck down the RELIGIOUS FREEDOM RESTORATION ACT as exceeding Congress's enforcement power under the FOURTEENTH AMENDMENT, SECTION 5. Congress had sought to reestablish the standard set forth in SHERBERT V. VERNER (1963), effectively creating exceptions for religious minorities from otherwise generally applicable laws, that was jettisoned by the Rehnquist Court in EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990). In *City of Boerne*, the Justices also stressed that the Court alone defines the scope of constitutional rights. Furthermore, in *Alden v. Maine* (1999), the Court held that the Constitution's federal "structure and history" not only shields states from being sued in federal courts but also makes them immune from lawsuits filed in state courts that seek to enforce federal rights against them.

Somewhat ironically, since a majority of the Rehnquist Court was appointed by Republican Presidents who embraced a strong view of PRESIDENTIAL POWERS, the Court has not been deferential to claims of presidential authority, except with respect to the executive's ability to reinterpret statutory authorizations as in RUST V. SULLIVAN (1991). *Morrison v. Olson* (1988) upheld the appointment of INDEPENDENT COUNSELS to investigate the President and his subordinates. CLINTON V. JONES (1997) unanimously held that Presidents may be subject to civil lawsuits while in office. *Clinton v. City of New York* (1998) struck down Congress's grant of the LINE-ITEM VETO to the President.

As indicated by its reversal of precedents and rejection of assertions of congressional and presidential power, the Rehnquist Court is conservative but not restrained. The Court's JUDICIAL ACTIVISM is evident as well in its rulings invalidating state, local, and federal affirmative action programs, from RICHMOND (CITY OF) V. J. A. CROSON CO. (1989) to ADARAND CONSTRUCTORS, INC. V. PEÑA (1995), which overturned METRO BROADCASTING, INC. V. FCC (1990). So too, in a line of 5–4 rulings following SHAW V. RENO (1993), the Court struck down the creation of majority-minority ELECTORAL DISTRICTS under the VOTING RIGHTS ACT OF 1965. In these and other areas, the Rehnquist Court thwarted the democratic process and the authority of elected representatives at the national, state, and local levels.

Another major jurisprudential theme of the Rehnquist Court is its embrace of the liberal principle of governmental neutrality toward race, gender, and political expression. That principle of governmental nondiscrimination and freedom of expression is interwoven in rulings on the

FIRST AMENDMENT guarantees of FREEDOM OF SPEECH and FREEDOM OF THE PRESS, on the one hand, and the FOURTEENTH AMENDMENT guarantee of EQUAL PROTECTION OF THE LAWS, on the other.

The Rehnquist Court's commitment to the principle of equal treatment and nondiscrimination in enforcing the First Amendment is underlined by its invalidation of numerous laws aimed at punishing particular forms of speech, ranging from those outlawing FLAG DESECRATION and HATE SPEECH, to bans on "patently offensive" sex-related communications on cable television and on the INTERNET. At the same time, greater protection for COMMERCIAL SPEECH was given in *44 Liquormart, Inc. v. Rhode Island* (1996).

In invalidating affirmative action programs, a bare majority of the Court emphasized the idea that "the Constitution is colorblind" and applied the strict scrutiny test to judge race-conscious government action. The Court, over Rehnquist's objections, not only repeatedly rejected the use of racially based PEREMPTORY CHALLENGES in jury selection but also extended the ruling of BATSON V. KENTUCKY (1986) to sex-based peremptory challenges in *J. E. B. v. Alabama* (1994). In addition, a majority of the Court appears to agree that STRICT SCRUTINY should be reserved solely for RACIAL DISCRIMINATION cases. The majority has no interest in expanding the categories of suspect and "quasi-suspect" nonracial classifications, or of fundamental rights and interests, to which the Burger Court suggested that the strict scrutiny test or an intermediate test of heightened scrutiny might apply. When finding impermissible SEX DISCRIMINATION in UNITED STATES V. VIRGINIA (1996), for example, a majority could not be mustered for explicitly declaring gender, like race, to be a suspect category subject to the strict scrutiny test. Besides reserving strict scrutiny for cases of racial discrimination, the Rehnquist Court invalidated some forms of nonracial discrimination simply on the basis of the RATIONAL BASIS test. Thus, the Court found no rational basis for laws discriminating against people with MENTAL ILLNESS in *Heller v. Doe* (1993) or against gays and lesbians in ROMER V. EVANS (1996).

In all these areas, the Rehnquist Court has been activist, not passive, in asserting its power. In two respects, however, the Court has exercised self-restraint. First, as noted, the Court is decidedly reluctant to recognize unenumerated fundamental rights, as with claims to a RIGHT TO DIE with the assistance of a physician. Second, the Court has become increasingly restrained in exercising its traditional supervisory role over lower federal and state courts, even when they render conflicting rulings. Fewer and fewer cases have been annually granted review and, consequently, the plenary docket has declined sharply. In the 1998 term, for instance, only about 80 cases were granted review out of more than 8,000 petitions for CERTIORARI on the docket. In historical perspective, the Court had not handed down so few cases in a term since 1953. By comparison, the Burger Court faced dockets of around 5,000 cases and annually decided between 170 and 180 cases, or about three percent, whereas the Rehnquist Court hears less than one percent of its much larger docket. In sum, the Rehnquist Court is conservative and activist, but also less concerned about correcting errors in the lower courts and about ensuring the certain and stable application of the law.

DAVID M. O'BRIEN
(2000)

Bibliography

O'BRIEN, DAVID M. 1996 Charting the Rehnquist Court's Course: The Center Folds, Holds, and Shifts. *New York Law Review* 60:981–998.

——— 1997 The Rehnquist Court's Shrinking Plenary Docket. *Judicature* 81:58–65.

SAVAGE, DAVID G. 1992 *Turning Right: The Making of the Rehnquist Supreme Court.* New York: John Wiley & Sons.

SCHWARTZ, BERNARD 1996 *The Unpublished Opinions of the Rehnquist Court.* New York: Oxford University Press.

SIMON, JAMES F. 1995 *The Center Holds: The Power Struggle Inside the Rehnquist Court.* New York: Simon & Schuster.

## *REID v. COVERT*
## *KINSELLA v. KRUEGER*
354 U.S. 1 (1957)

In a 6–2 decision, the Supreme Court invalidated a provision making the Uniform Code of Military Justice applicable to civilians accompanying the armed forces abroad, and reversed the COURT-MARTIAL convictions of two women who had murdered their servicemen husbands on military bases overseas.

Justice HUGO L. BLACK, for a plurality, held that neither the power to make rules for governing the armed forces nor any international agreement could free the government from the procedural requirements of Article III, section 2, and the Fifth and Sixth Amendments.

DENNIS J. MAHONEY
(1986)

## *REITMAN v. MULKEY*
387 U.S. 369 (1967)

By an overwhelming majority, California's voters adopted an INITIATIVE measure ("Proposition 14") adding to the state constitution a provision repealing existing OPEN HOUSING LAWS and forbidding the enactment of new ones. Fol-

lowing the lead of the state supreme court, the Supreme Court held, 5–4, that the circumstances of Proposition 14's adoption demonstrated state encouragement of private RACIAL DISCRIMINATION in the sale and rental of housing. Justice BYRON R. WHITE, for the majority, said this encouragement amounted to STATE ACTION in violation of the FOURTEENTH AMENDMENT. Justice JOHN MARSHALL HARLAN, for the dissenters, argued that Proposition 14 merely withdrew the state from regulation of private conduct; the state court determinations of "encouragement" were not fact findings, but mistaken readings of the Supreme Court's own precedents.

Taken seriously, the *Reitman* decision implies an affirmative state obligation to protect against private racial discrimination in housing. The Supreme Court, far from reading the decision in this manner, has consistently rejected litigants' efforts even to invoke the "encouragement" doctrine there announced. *Reitman* thus lies in isolation, awaiting resurrection. But the trumpet call announcing the end of the world of state action doctrine, seemingly so close in the final years of the WARREN COURT, now seems far away.

KENNETH L. KARST
(1986)

## RELEASED TIME

Twice, in MCCOLLUM V. BOARD OF EDUCATION (1948) and again in ZORACH V. CLAUSEN (1952), the Supreme Court considered FIRST AMENDMENT challenges to the practice of releasing public school pupils from their regular studies so that they might participate in programs for religious instruction.

The first such program, in Gary, Indiana, in 1914, provided that, with parental consent and cooperation of church authorities, children could be released for one or more periods each week to go to churches of their own faith and there participate in religious instruction, returning to the public school at the end of the period, or if the period was the last of the day, going home.

The idea spread to other communities, but, for a variety of reasons, quite slowly. In rural and small urban communities, such as Champaign, Illinois, it was found more effective to have the religious instruction take place within the public schools rather than in the church schools.

In Champaign in 1940, an interfaith council with Protestant, Roman Catholic, and Jewish representatives was formed to offer religious instruction within the public schools during regular school hours. Instructors of religion were to be hired and paid by or through the interfaith council, subject to the approval and supervision of the public school superintendent. Each term the public school teachers distributed to the children cards on which parents could indicate their consent to the enrollment of their children in the religion classes. Children who obtained such consent were released by the school authorities from the secular work for a period of thirty minutes weekly in the elementary schools and forty-five minutes in the junior high school. Only Protestant instruction was conducted within the regular classroom; children released for Roman Catholic or Jewish instruction left their classroom for other parts of the building. Nonparticipants were also relocated, sometimes accompanied by their regular teachers and sometimes not. At the end of each session, children who had participated in any religious instruction returned to the regular classroom, and regular class work was resumed.

*McCollum v. Board of Education* (1948) was a suit, brought in a state court by the mother of a fifth grader, challenging the constitutionality of Champaign's program. In the Supreme Court, counsel for the school authorities argued that the establishment clause did not apply to the states, and that the contrary HOLDING in EVERSON V. BOARD OF EDUCATION (1947) should be overruled. This the Court refused to do, reasserting *Everson*'s conclusion about the scope of the establishment clause.

No more successful was the argument that historically the establishment clause had been intended to forbid only preferential treatment of one faith over others, whereas the Champaign program was open equally to Protestants, Roman Catholics, and Jews. Here, too, the Court found no reason to reconsider its statement in *Everson* that the clause barred aid not only to one religion but equally to all religions.

Where, the Court said, pupils compelled by law to go to school for secular education are released in part from their legal duty if they attend religious classes, the tax-supported public school system's use to aid religious groups to spread their faiths falls squarely under the ban of the First Amendment. Not only are the public school buildings used for the dissemination of religious doctrines, but the state also affords sectarian groups an invaluable aid, helping to provide pupils for their religious classes through the use of the state's compulsory public school machinery. This, the Court concluded, was not SEPARATION OF CHURCH AND STATE.

Although the Court's language appeared to encompass in its determination of unconstitutionality released time plans providing for off-school religious instruction (and Justice HUGO L. BLACK who wrote the opinion so interpreted it), the majority reached a contrary conclusion in *Zorach v. Clausen* (1952).

*Zorach* involved New York City's program, which restricted public school participation to releasing children whose parents had signed consent cards and specifically

forbade comment by any principal or teacher on the attendance or nonattendance of any pupil upon religious instruction. This situation, said the Court speaking through Justice WILLIAM O. DOUGLAS, differed from that presented in the *McCollum* case. There, the classrooms had been used for religious instruction and the influence of the public school used to promote that instruction. Here, the public schools did no more than accommodate their schedules to allow children, who so wished, to go elsewhere for religious instruction completely independent of public school operations. The situation, Douglas said, was not different from that presented when a Roman Catholic student asks his teacher to be excused to attend a mass on a Holy Day of Obligation or a Jewish student to attend synagogue on Yom Kippur.

Government, Justice Douglas said further, may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. Government, however, must be neutral in respect to religion, not hostile. "We are," he said, "a religious people whose institutions presuppose a Supreme Being. When the state encourages religious instruction or cooperates with religious authorities, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."

On the basis of *McCollum* and *Zorach*, the present law is that released time programs are constitutional so long as the religious instruction is given off the public school premises and the public school teachers and authorities are involved in it only by releasing uncoerced children who choose to participate in it.

LEO PFEFFER
(1986)

Bibliography

PFEFFER, LEO (1953) 1967 *Church, State and Freedom.* Boston: Beacon Press.

*Released Time for Religious Education in New York City Schools.* 1949 Public Education Association.

STOKES, A. P. and PFEFFER, LEO 1964 *Church and State in the United States.* New York: Harper & Row.

## RELIGION AND FRAUD

Few responsibilities are more sensitive and difficult to meet than drawing a line between punishable obtaining of property under false pretenses and constitutionally protected free exercise of religion. In the one major case to reach the Supreme Court, *United States v. Ballard* (1944), the Court split three ways in its decision.

*Ballard* involved the conviction of organizers of the "I Am" movement, indicted for using the mails to defraud because they falsely represented that they had supernatural powers to heal the incurably ill, and that as "Divine messengers" they had cured hundreds of afflicted persons through communication with Saint Germain, Jesus, and others. The trial court had instructed the jury that they should not decide whether these statements were literally true, but only whether the defendants honestly believed them to be true.

On appeal the majority of the Supreme Court agreed with the trial judge. Under the principles of SEPARATION OF CHURCH AND STATE and RELIGIOUS LIBERTY, it held, neither a jury nor any other organ of government had the competence to pass on whether certain religious experiences actually occurred. A jury could no more constitutionally decide that defendants had not shaken hands with Jesus, as they claimed, than they could determine that Jesus had not walked on the sea, as the Bible related. The limit of the jury's power was a determination whether defendants actually believed that what they recounted was true.

Chief Justice HARLAN FISKE STONE dissented on the ground that the prosecution should be allowed to prove that none of the alleged cures had been effected. On the other extreme Justice ROBERT H. JACKSON urged that the prosecution should not have been instituted in the first place, for few juries would find that the defendants honestly believed in something that was unbelievable. Nevertheless the majority decision remains the law, and is not likely to be OVERRULED after a half-century of acceptance.

LEO PFEFFER
(1986)

Bibliography

PFEFFER, LEO (1953) 1967 *Church, State and Freedom.* Boston: Beacon Press.

## RELIGION AND FREE SPEECH

Religious speech was at the heart of the historical development of FREEDOM OF SPEECH principles—as any student of JOHN MILTON or the Jehovah's Witnesses can attest. But in recent decades, concerns arising under the ESTABLISHMENT CLAUSE caused religious speech to receive significantly less protection than secular speech, whenever the speech occurred in a PUBLIC FORUM or involved public benefits. This disparity is now diminishing.

Under the separationist interpretation of the establishment clause that flourished roughly between WORLD WAR II and the 1980s, the FIRST AMENDMENT was thought to bar government "aid" to the propagation of religious ideas. At

the same time, with the rejection of the right–privilege distinction, the free speech clause came to be understood as barring the government from discriminating on the basis of viewpoint, and sometimes content, in the distribution of government benefits. These two principles were obviously in conflict. The free speech clause was thought to require viewpoint neutrality; the establishment clause was thought to require viewpoint exclusion from government benefit programs in many circumstances.

The conflict first came to the fore in WIDMAR V. VINCENT (1981). A public university extended the benefit of free access to meeting rooms to all student organizations, but out of concern for the SEPARATION OF CHURCH AND STATE, denied this benefit to groups who were engaged in religious speech or activity. Although the appellate court ruled against the religious students, the Supreme Court reversed, and established the principle that when the government has created a forum for free speech, religious speakers are entitled to take equal advantage of it.

In two cases in 1995, these principles were extended to more difficult and controversial contexts. In CAPITOL SQUARE REVIEW & ADVISORY BOARD V. PINETTE (1995), the Court faced the issue of whether a group (which happened to be the Ku Klux Klan, although it was treated as an ordinary religious speaker) could display a large cross in a municipal square, in a space that had been opened for display of symbols by private speakers. Four Justices, led by ANTONIN SCALIA, advocated a categorical principle that the establishment clause does not bar private religious expression on government PROPERTY, if a forum has been opened to the public for speech and permission to speak, if any, was granted on the same terms as other private groups. Three Justices, led by SANDRA DAY O'CONNOR, maintained that each case should be evaluated on its facts to determine whether a reasonable observer would perceive governmental endorsement.

In ROSENBERGER V. RECTOR & VISITORS OF THE UNIVERSITY OF VIRGINIA (1995), the equal access principle was extended to the "metaphorical" forum of student activities funding. The Court held that a student publication that was otherwise eligible for funding could not be excluded on the basis of its religious orientation.

In these cases, therefore, the Court resolved the apparent conflict between free speech and establishment clause principles by extending the principle of viewpoint neutrality (originally a free speech DOCTRINE) to the ESTABLISHMENT OF RELIGION, in place of the prior emphasis on no-aid separationism.

MICHAEL W. MCCONNELL
(2000)

(SEE ALSO: *Accommodation of Religion; Government Aid to Religious Institutions; Religious Symbols in Public Places.*)

# RELIGION AND SECULARISM IN CONSTITUTIONAL INTERPRETATION AND DEMOCRATIC DEBATE

Although the FIRST AMENDMENT forbids any law "respecting an establishment of religion, or prohibiting the free exercise thereof," the term "religion" is not defined. In its first efforts to define the term, the Supreme Court adopted a theistic approach: In DAVIS V. BEASON (1890), the Court described religion as "[having] reference to one's views of his relations to his Creator, and to the obligations they impose or reverence for his being and character, and of obedience to his will." Similarly, in 1931, Chief Justice CHARLES EVANS HUGHES wrote that "the essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."

Theistic definitions of religion most likely reflect the majority view of those who drafted and adopted the Constitution. The nineteenth and twentieth centuries, however, brought increasing numbers of nontheistic and pantheistic religious adherents to the United States. Responding to both the rise of religious pluralism and modern developments in systematic theology, in the 1960s and 1970s the Court experimented with broader definitions of religious belief. In UNITED STATES V. SEEGER (1965), the Court considered the conscientious-objector provisions of the Military Training and Service Act. After canvassing the works of modern theologians including Paul Tillich, the Court interpreted the act's accommodation for "beliefs in relation to a Supreme Being" to include objections based on what Tillich called one's "ultimate concern." Under this definition, any strongly held belief would qualify as religious. Expanding on this theme, in *Welsh v. United States* (1970), the Court held that "religious beliefs" protected by the act included any belief analogous or "parallel" to those of a religious person. Applying this definition, the *Welsh* Court rejected the defendant's own assertion that his beliefs were not religious. According to the Court, "very few registrants are fully aware of the broad scope of the word 'religious' as used in [the Act]."

Although the Court was interpreting a statute in the SELECTIVE SERVICE cases, its broad definition of religion was motivated by a concern that any narrower approach would violate the ESTABLISHMENT CLAUSE. Such a broad definition of religious belief, however, creates a host of conundrums: If any belief is at least potentially religious, how is the term "religion" meaningful as a class of beliefs and activities receiving unique protection under the free exercise clause? Moreover, expansive definitions of religion presumably apply equally to the free exercise and establishment clauses. Thus, if it is true, as some Justices

have suggested, that ethical systems like "secular humanism" are religions protected under the Constitution, then public school administrators arguably have "established religion" any time they attempt to inculcate secular values in their students.

In the decades following the selective service cases, in cases such as WISCONSIN V. YODER (1972) and THOMAS V. INDIANA REVIEW BOARD (1981), the Court occasionally suggested in dicta that the Constitution protects only religious belief, not secular philosophy. Nevertheless, the Court has never specifically defined the term "religion" under the Constitution, and has expressly stated that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." In practice, it is extremely rare for a court to dispose a RELIGIOUS LIBERTY claim on the ground that the belief at issue is "secular" and not "religious." Most free exercise opinions focus not on the religious nature of the individual's beliefs, but on whether the government was justified in its refusal to accommodate those beliefs.

Despite these difficulties in defining what is religious and what is secular, two recurrent themes of constitutional commentary raise the issue of religion and secularism in democratic debate. First, to what extent does the Constitution protect or permit religious arguments in the public square? Second, to what extent is it morally appropriate to use or rely on religious arguments in favor of particular laws?

Under current interpretations of the speech and establishment clauses, not only is it permissible for a private individual to deploy either religious or secular arguments in democratic debate, CANTWELL V. CONNECTICUT (1940) makes clear that it is unconstitutional to prohibit such expression. Similarly, private individuals may rely on religious arguments in deciding whether or not to vote in favor of a particular public policy. Indeed, such reliance probably could not be prevented.

A more difficult question is posed when legislators use or rely on religious rationales in their decisions to vote on proposed laws. Under the LEMON TEST for establishment clause violations, all laws must have a secular purpose. This rule does not invalidate laws that coincide with religious principles; that would require invalidating much of the civil and criminal code, including laws against murder. The Court requires only that laws have some secular purpose, even if the law simultaneously advances some religious principle or belief. In theory, this leaves both legislators and private citizens free to use or rely on religious rationales, as long as some secular rationale suffices to justify the law.

In practice, however, the Court has not always deferred to the secular rationales offered in support of laws that were vigorously promoted by religious groups. For example, in *Edwards v. Aguillard* (1987), the Court invalidated a "balanced treatment" statute that required the teaching of both evolution and creation science, or neither, in the public schools for lack of a secular purpose. WALLACE V. JAFFREE (1985) invalidated a state "moment of silence in public schools" law in part on the basis of legislative statements supporting prayer in public schools. To the extent that religious adherents or organizations publicly advance religious grounds for the adoption of particular laws, they increase the risk that courts will discount secular justifications for regulation and hold that the law was solely motivated by a religious rationale.

During the 1970s and 1980s, there was an additional link between private religious advocacy and the constitutionality of particular government programs. At that time, the Court interpreted the "entanglement" prong of the three-pronged *Lemon* test as discouraging religious-based political discourse or, as some Justices put it, "political division along religious lines." These Justices believed that religiously motivated political discourse was such a danger to democratic debate that it justified—and most often required—exclusion of religious organizations from general government funding programs. No outcome in any case turned expressly on the "political entanglement" analysis, and, since the 1980s, the Court has downplayed the idea that religious political discourse is disfavored under the Constitution.

Even if religious arguments in the public square are constitutionally protected, there remains the question of whether such arguments are morally justifiable. Political theorists like John Rawls and Bruce Ackerman argue that participants in a liberal democracy should argue in terms that are accessible to all citizens, regardless of religious belief. Because religious-based arguments are inaccessible to nonbelievers, these arguments either should be voluntarily removed from public political debate or only presented in tandem with accessible secular arguments.

If people believe that both religious and secular arguments support their position, arguably they have a moral obligation to present the secular as well as the religious argument in public debate. Morally (and strategically) it seems better to use reasons that unite rather than divide. The more difficult issue, however, involves the obligations of religious believers who are not convinced that any secular rationale supports their preferred policy. In this situation, the believers face a difficult choice: They must present solely the religious argument (which is inaccessible to nonbelievers), advance secular rationales that they themselves find unconvincing, or say nothing at all. Under theories advanced by Rawls and Ackerman, the first option is off-limits; therefore, the religious believer must either dissemble or remain silent.

Such constraints are unacceptable to scholars like Michael Perry and David Smolin, both of whom argue that religious arguments are valuable additions to public debate. Perry argues that, since it is inevitable that some people will rely on religious rationales, it is better to welcome religious arguments to the public square where they can be debated and tested. Smolin rejects the idea that religious arguments are necessarily inaccessible to nonbelievers: Major religions like Judaism, Islam, and Christianity are premised on the belief in a very public and accessible revelation of God. Moreover, instead of being inherently divisive, religious arguments often may constitute a kind of common ground between individuals with otherwise polarized cultural or political perspectives.

Voluntary restraint theories, whatever their form, are efforts to combat what many view as the tendency of religious belief to polarize public debate. Ironically, however, some of the most important advances in CIVIL RIGHTS have been accompanied by impassioned—and polarizing—religious rhetoric. The most obvious examples are the historic speeches of the religious ABOLITIONISTS and activists in the CIVIL RIGHTS MOVEMENT of the 1960s. In the end, whatever might be gained by secularizing public debate might come at the cost of religiously inspired moral urgency.

KURT T. LASH
(2000)

Bibliography

ACKERMAN, BRUCE A. 1980 *Social Justice in the Liberal State.* New Haven, Conn.: Yale University Press.

LASH, KURT T. 1997 Civilizing Religion. *George Washington Law Review* 65:1100–1119.

PERRY, MICHAEL J. 1997 *Religion in Politics: Constitutional and Moral Perspectives.* New York: Oxford University Press.

RAWLS, JOHN 1993 *Political Liberalism.* New York: Columbia University Press.

SMOLIN, DAVID M. 1996 Cracks in the Mirrored Prison: An Evangelical Critique of Secularist Academic and Judicial Myths Regarding the Relationship of Religion and American Politics. *Loyola of Los Angeles Law Review* 29:1487–1512.

## RELIGION CLAUSES IN INTERACTION

There has been a long-term tension between the FIRST AMENDMENT's two religion clauses, one forbidding government to promote or "establish" religion, the other forbidding government to abridge the "free exercise" of religion. On the one hand, under the much-criticized (but still formally governing) LEMON TEST, any government action whose purpose or primary effect is to aid religion violates the ESTABLISHMENT CLAUSE. On the other hand, under the *Sherbert–Yoder* test (the rule for a quarter century prior to 1990), the free exercise clause periodically required the state to accommodate religion.

Unfortunately, the Supreme Court's few direct confrontations with the problem before the mid-1980s had been unsatisfying. It was not until *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* (1987) that the Court addressed the issue at any length. In upholding Congress's exemption of religious groups from a general statutory ban on religious discrimination in employment, the Court simply announced that "under the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." This conclusory analysis prompted Justice SANDRA DAY O'CONNOR, who concurred separately, to accurately observe:

> On the one hand, a rigid application of the *Lemon* test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion. On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an "accommodation" of free exercise rights.

Several major developments during the past decade have produced some thoughtful approaches to resolving the conflict between the clauses. First, the highly controversial ruling in EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990) held that the free exercise clause affords no right to a religious exemption from a neutral law (i.e., one of general applicability) even though it imposes a substantial burden on religious practice. Abandoning the *Sherbert–Yoder* test— which had required exemptions from generally applicable regulations that substantially burdened religious exercise, unless there was a "compelling interest" for not doing so and the law was the "least restrictive means" for accomplishing that interest—the free exercise clause was reduced to prohibiting only those government actions that single out one or all religions for adverse treatment. By no longer demanding special treatment for religion, the free exercise clause's incompatibility with the establishment clause's "no aid" edict was largely eliminated. Still, the question remains: If government voluntarily exempts religion from generally burdensome regulations does this violate the establishment clause?

The other important efforts have involved the Court's implicit renunciation of the *Lemon* test under the establishment clause in favor of competing approaches, all of which speak to the interaction between the religion

clauses. Some Justices have emphasized neutrality (which prevailed for the free exercise clause in *Smith*), urging that general policies that happen to benefit religion should not violate the establishment clause. But a majority of the Court has not unqualifiedly accepted that result for all state programs, and even the neutrality advocates have been unwilling to completely adhere to this view, seemingly approving (in *Smith*) gratuitous state exceptions for religion from burdensome laws.

The test that appears to have the widest support (although not yet formally adopted as a replacement for *Lemon*) finds that establishment clause violations should depend on whether a "reasonable" (or "objective") observer would perceive the challenged government action as an endorsement of religion. This seeks to ensure equal standing within the political community for adherents of all (or no) religious faiths. Specifically on the question of the conflict between the religion clauses, O'Connor, the endorsement test's creator, has explained that in determining whether special government immunities for religion convey a message of endorsement, "courts should assume that the 'objective observer' is acquainted with the Free Exercise Clause and the values it promotes. Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption."

All church–state problems should be resolved by recourse to a broad principle that accounts for the major function of both religion clauses: protection of RELIGIOUS LIBERTY. The standard to replace the *Lemon* test that was most promising in achieving this goal was Justice ANTHONY M. KENNEDY's "coercion" test. Threats to religious freedom may arise in a number of ways—by coercing religious beliefs either directly or indirectly, or by strongly influencing religious choice—and an important illustration of coercion is government compelled financial support, that is, use of tax-raised funds for religious activities.

JESSE H. CHOPER
(2000)

(SEE ALSO: *Establishment of Religion; Sherbert v. Verner; Wisconsin v. Yoder.*)

Bibliography

CHOPER, JESSE H. 1995 *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses.* Chicago: University of Chicago Press.

LUPU, IRA C. 1991 Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion. *University of Pennsylvania Law Review* 140:555–612.

MCCONNELL, MICHAEL W. 1992 Accommodation of Religion: An Update and a Response to the Critics. *George Washington Law Review* 60:685–742.

## RELIGION IN PUBLIC SCHOOLS

For centuries in the Western world, organized education was church education; colonial schools established on the American shores therefore naturally reflected a religious orientation. Prior to the early nineteenth-century migration of Irish to this country, the orientation of these schools was Protestant—a fact that contributed to the establishment and growth of the Roman Catholic parochial school system. Nevertheless, when the RELEASED TIME plan for religious instruction was initiated in 1914, the majority of Roman Catholic children still attended public schools. The plan thus provided for separate religious instruction classes for Protestants, Roman Catholics, and Jews. Roman Catholic Church spokesmen condemned the Supreme Court's decision in MCCOLLUM V. BOARD OF EDUCATION (1948) invalidating the program. Previously, however, Roman Catholics had protested against public school religious instruction with a Protestant orientation, and had instituted lawsuits challenging such programs' constitutionality. Public school authorities in New York chose to formulate their own "non-sectarian" prayer, which was submitted to and received the approval of prominent religious spokesmen of the three major faiths. The twenty-two-word prayer read: "Almighty God, we acknowledge our dependence upon Thee, and beg Thy blessings upon us, our parents, our teachers and our country."

The denominational neutrality of the prayer, the Supreme Court held in ENGEL V. VITALE (1962), was immaterial. Nor was it relevant that observance on the part of students was voluntary (nonparticipating students were not even required to be in the classroom or assembly hall while the prayer was recited). Under the establishment clause, the Court said, aid to all religions was as impermissible as aid to one religion, even if the aid was noncoercive. The constitutional prohibition against laws respecting an ESTABLISHMENT OF RELIGION means at least that it is "no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government."

One year after *Engel*, the Court, in ABINGTON SCHOOL DISTRICT V. SCHEMPP, was called upon to rule on the constitutionality of two practices in the public schools common throughout the nation, prayer recitation and devotional Bible reading. In respect to the former it ruled immaterial the fact that, unlike *Engel*, the recited prayer had not been formulated by public school authorities, but was the Lord's Prayer taken from the Bible. The fatal flaw in the *Engel* regulation lay not in the authorship of the prayer but in the fact that its purpose and primary effect were the advancement of religion. This fact mandated in-

validation of both Lord's Prayer recitation and devotional Bible reading. The Court rejected the claim that the purposes of the challenged program were the secular ones of promoting moral values, contradicting the materialistic trends of our time, perpetuating our institutions, and teaching literature. None of these factors, the Court said, justified use of the Bible as an instrument of religion or resort to a ceremony of pervasive religious character. Nothing in its decision, it concluded, was intended to cast doubt on the study of comparative religion or the study of the Bible for its literary and historic qualities, so long as these were presented as part of a secular program of education.

*McCollum*, *Engel*, and *Schempp* involved efforts to introduce religious teachings or practices into the public schools. EPPERSON V. ARKANSAS (1968) presented the converse, that is, religiously motivated exclusion of secular instruction from the public school curriculum. A statute forbade teaching "the theory or doctrine that mankind ascended or descended from a lower order of animals." The Court held that the statute violated the establishment clause, because its purpose was to protect religious orthodoxy from inconsistent secular teaching of evolution.

In *Stone v. Graham* (1980) the Court struck down a Kentucky statute requiring the posting of copies of the Ten Commandments (purchased with private contributions) on the walls of all the public school classrooms in the state. The statute, it held, had no secular purpose; unlike the second part of the Commandments, the first (worshiping God, avoiding idolatry, not taking the Lord's name in vain, and observing the Sabbath) concerned religious rather than secular duties.

WIDMAR V. VINCENT (1981) manifests a more tolerant approach in respect to colleges than to elementary and secondary schools. With but one dissent, the Court held that where state university facilities were open to groups and speakers of all kinds, they must also be open for use by an organization of evangelical Christian students for prayer, hymns, Bible commentary, and discussion of religious views and experience. As construed by the Court, the establishment clause did not mandate such exclusion; on the contrary, the state's interest in enforcing its own constitution's church-state separation clause was not sufficiently "compelling" to justify content-barred discrimination forbidden by the FREEDOM OF SPEECH clause.

However, in *Jaffree v. Board of School Commissioners* (1984) the Court affirmed without opinion a Court of Appeals decision ruling unconstitutional an Alabama law authorizing voluntary participation in a prayer formulated by the legislators; and a year later, in WALLACE V. JAFFREE (1985) it invalidated another section of the statute that required a one-minute period of silence for "meditation or voluntary prayer." The provision, the Court said, did not have a valid secular purpose, but rather one that sought to return prayer to the public schools.

LEO PFEFFER
(1986)

Bibliography

PFEFFER, LEO (1953) 1967 *Church, State and Freedom.* Boston: Beacon Press.

STOKES, A. P. and PFEFFER, LEO 1964 *Church and State in the United States.* New York: Harper & Row.

TRIBE, LAURENCE H. 1984 *American Constitutional Law.* Chap. 14. Mineola, N.Y.: Foundation Press.

## RELIGION IN PUBLIC SCHOOLS (Update 1)

Despite several Supreme Court decisions on religion in public schools, conflict in this area has proliferated in recent years. One example is the discord that persists over the teaching of evolution. In EPPERSON V. ARKANSAS (1968) the Court struck down a statute prohibiting the teaching of evolution. In *Edwards v. Aguillard* (1987) the Court invalidated a Louisiana statute requiring that "creation science" be given equal exposure in public schools where evolution is taught. (Among other things, creation science teaches that plants and animals were created substantially as they now exist.) The majority reasoned that the statute was intended to promote the biblical version of creation or to hamper the teaching of evolution for religious reasons. However, the Court did not hold that teaching CREATIONISM is unconstitutional.

In several cases, religious parents have tried to turn the Court's expansive interpretation of the ESTABLISHMENT CLAUSE to their advantage by alleging that public schools were unconstitutionally establishing a religion of secular humanism. Although the Supreme Court has not tackled this issue, the lower federal courts have uniformly rejected these claims. These results seem appropriate. The Supreme Court has stated that nontheistic faiths, including secular humanism, can qualify as FIRST AMENDMENT religions. However, if secular humanism is defined narrowly enough to be a specific religion, the public schools are not establishing it, for they promote no particular dogma or rituals. In contrast, if secular humanism is defined broadly enough to include the education given in public schools, it ceases to be a religion for First Amendment purposes. A contrary conclusion would impel the untenable result that virtually any secular enthusiasm, such as music, art, or sports, would be considered a religion and thus barred from the public schools.

This conclusion does not end all controversy, however; parents often charge that teaching in public schools is in-

imical to their religious beliefs and therefore violates their right to free exercise of religion. The Supreme Court has not yet dealt with this issue, and its pronouncements elsewhere offer little guidance. The Court has often stated that a substantial burden of free exercise can be justified only by a COMPELLING STATE INTEREST pursued by the least restrictive means. Public schools have denied that their teaching burdens free exercise at all because their teaching is secular, not religious; children need not accept what is taught, and children are not compelled to attend public schools, but are free to attend private schools. Dissatisfied parents reply that free exercise is burdened if children are taught that their religion is wrong, although the children do not have to profess acceptance of the schools' teaching, and although others consider the issues in question secular. These parents stress that young impressionable children may not understand that they are free to reject the school's teaching or may be too intimidated to express their disagreement. They also argue that the option of attending private schools is too expensive to remove the burden on free exercise.

Even if the curriculum does burden free exercise, public schools claim a compelling state interest in giving all children this education. Most observers concede that states have an interest in teaching basic skills such as reading and writing. However, it is debatable how important the state's interest is in other areas, including moral values and sex education. If a public school does burden free exercise without compelling justification, some accommodation of the religious students may be necessary as a remedy. Many school systems excuse students from certain programs to which they have religious objections, and some schools provide students with alternative instruction. The latter approach can be expensive and administratively burdensome; the former may prevent the child from obtaining essential skills. Suggestions that children be given VOUCHERS to attend private schools, meanwhile, have been attacked as both violative of the establishment clause and destructive of the objectives of public education.

The legal need for accommodation may no longer be as pressing as it once was, however. The Supreme Court recently indicated in EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990) that it has abandoned the "compelling state interest" standard. If the Court adheres to this position, public schools would not be constitutionally required to show a compelling reason for subjecting children to teaching that is hostile to their religion.

In addition to controversies over school curriculum, disputes have also multiplied over the use of public school facilities by student religious groups. In WIDMAR V. VINCENT (1981), the Supreme Court insisted that public university facilities generally available to student groups and speakers also be open to student religious groups. In 1984, Congress tried to extend this principle to secondary schools by adopting the Equal Access Act, which forbids public secondary schools from discriminating on the basis of the content of speech when affording student groups access to school facilities outside school hours. However, the school may not sponsor, and school employees may not participate in, student religious groups.

Some critics believed that the act was unconstitutional because of the possibility that school employees would become involved and that students would perceive the provision of facilities to student religious groups as endorsing religion. The Court disagreed in BOARD OF EDUCATION OF WESTSIDE COMMUNITY SCHOOLS V. MERGENS (1990), holding that the act did not violate the establishment clause.

Although the Court has repeatedly struck down daily school prayers, many schools have included prayers or benedictions in special school events. The Supreme Court has upheld the opening of legislative sessions with prayers in MARSH V. CHAMBERS (1983), but the differences in the public school context have persuaded some lower courts that the practice cannot be permitted there.

The Supreme Court has said that public schools may study the Bible as literature and history, but not for devotional purposes. This has required lower courts to decide case by case whether particular programs meet this standard or improperly include religious indoctrination.

Public school teachers occasionally endorse or criticize religious beliefs in the classroom. Courts generally have tried to distinguish between teachers' statements of their own beliefs, which are permissible and protected by the rights of free speech and free exercise, and propagandizing, which infringes on both the students' right of free exercise and the establishment clause. Lower courts have also upheld regulations against teachers' regularly wearing distinctively religious garb.

GEORGE W. DENT
(1992)

(SEE ALSO: *Equal Access; Religious Fundamentalism; Religious Liberty; Separation of Church and State.*)

Bibliography

DENT, GEORGE W. 1988 Religious Children, Secular Schools. *Southern California Law Review* 61:863–941.

STROSSEN, NADINE 1986 "Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviving Curricular Decisions Affecting Students' Religious Freedom. *Ohio State Law Journal* 47:333–407.

# RELIGION IN PUBLIC SCHOOLS
## (Update 2)

The place of religion in public schools has been the subject of significant controversy in America for well over a century. A number of different issues related to this general subject have come to the fore in recent years. First, the question of publicly sponsored worship exercises in public schools has remained prominent. In 1998, the U.S. HOUSE OF REPRESENTATIVES defeated a proposed constitutional amendment that, if enacted, would have legalized state-sponsored worship in public facilities, including schools. In LEE V. WEISMAN (1992), the Supreme Court ruled that the ESTABLISHMENT CLAUSE prohibited officially sponsored prayer at public middle school commencement ceremonies. Although the ruling in *Lee* clearly extended to all public schools through and including high school, many state universities have continued to have prayer at commencements. For those who believe that the primary focus of the establishment clause is to forbid state coercion on matters of religion, the age and maturity difference between university graduates and younger students may be sufficient reason to permit state universities to do what lower schools may not. A broader view of nonestablishment, focusing on the dangers of government sponsorship of religious exercise, would suggest that state university commencement prayers are no less unconstitutional than their counterparts at high school or below.

Another issue that followed in the wake of *Lee* is whether schools may arrange to have students decide whether to have student-led prayers at commencement. Although lower courts have divided on this question, most have held that school officials are responsible for the content of graduation ceremonies, and that official initiation of student-led prayers at commencement is also unconstitutional. Whether student speakers acting entirely on their own at commencement may engage in worship is a more difficult question, although words of personal spiritual commitment would be a constitutionally safer course than a student-led prayer involving the entire class or audience.

The issue of student-initiated prayers is connected to a larger question about student religious expression at school. Although student worship as an official part of the program at school-sponsored public events (athletic events and assemblies as well as commencements) is constitutionally questionable, much student religious expression in public schools is private rather than government speech and is therefore perfectly permissible. So long as religious speech by students is not school-sponsored, and does not constitute harassment of others, there are no grounds to suppress the speech simply because it occurs on school property. Of course, what constitutes school sponsorship, and what amounts to harassment, are frequently open to debate and controversy. School sponsorship implies active support, rather than a passive refusal by school officials to censor the speech. Harassment, too, requires more than trivial annoyance or an atmosphere of discomfort for some caused by the religious practices of others; for student religious speech to constitute harassment, ordinarily it must be personally hostile toward a particular individual or group.

Constitutional tolerance for private religious speech on school property extends beyond students in the years of compulsory education. In LAMB'S CHAPEL V. CENTER MORICHES UNION FREE SCHOOL DISTRICT (1993), a unanimous Supreme Court held that school officials could not exclude a community-based religious group from access to school property for evening meeting space permitted to other community groups. In a more controversial decision, a closely divided Court in ROSENBERGER V. RECTOR & VISITORS OF THE UNIVERSITY OF VIRGINIA (1995) held that the university could not exclude a student-written journal of religious opinion from a program, financed by student fees, designed to subsidize the printing costs of student journals generally. Justice DAVID H. SOUTER'S DISSENTING OPINION in *Rosenberger* argued strenuously that the subsidy involved taxation to finance the publication of proselytizing religious messages, which he deemed forbidden by the establishment clause. Both *Lamb's Chapel* and *Rosenberger* represent the Court's continued rejection of government reliance on the establishment clause as a reason for permitting discrimination against private religious expression on government property, including schools.

In a different twist on religion in the public schools, the Court's decision in BOARD OF EDUCATION OF KIRYAS JOEL VILLAGE SCHOOL DISTRICT V. GRUMET (1994) invalidated the New York legislature's attempt to create a public school district in a community populated entirely by a group of Satmar Hasidic Jews, who live according to traditional European Orthodox Jewish folkways. The legislature had created the district so as to permit public financing of a school for learning-disabled children in the village; all other children in the village attended private Hebrew academies. Despite the attractiveness of this objective, the Court treated the law that set up the district as a form of sectarian religious favoritism, which the Constitution forbids. The need for the special district evaporated with the Court's decision in AGOSTINI V. FELTON (1997), which OVERRULED a prior decision that had forbidden publicly financed remedial teaching of religious school students on religious school premises. As a result of *Agostini*, the village of Kiryas Joel no longer needs a public school district within its borders; it may now obtain state support for

teaching learning disabled children at the sites of the religious academies in the village.

IRA C. LUPU
(2000)

(SEE ALSO: *Accommodation of Religion; Establishment of Religion; Government Aid to Religious Institutions; Religion and Free Speech; Religious Diversity and the Constitution; Religious Liberty; School Prayers.*)

Bibliography

LUPU, IRA C. 1996 Uncovering the Village of Kiryas Joel. *Columbia Law Review* 96:104–120.

PAULSEN, MICHAEL S. 1993 *Lemon* Is Dead. *Case Western Reserve Law Review* 43:795–863.

SHERRY, SUZANNA 1992 *Lee v. Weisman:* Paradox Redux. *Supreme Court Review* 1992:123–153.

## RELIGIOUS DIVERSITY AND THE CONSTITUTION

In their 1993 book *One Nation Under God: Religion in Contemporary American Society,* sociologists Barry A. Kosmin and Seymour P. Lachman analyze the most extensive survey of American religion ever conducted. More than 113,000 Americans answered questions about their religious identity; nearly 90 percent identified themselves as religious, the overwhelming number (86 percent) as Christian. The remaining 3.3 percent, representing about six million Americans, included not only Jews, Muslims, Buddhists, and Hindus, but also approximately 23,000 Taoists, 18,000 Rastafarians, and 6,000 Shintoists, not to mention 8,000 Wiccans. One ought not, of course, believe that "Christians" represent any kind of monolithic community: 46,000,000 Catholics (26.2 percent of the American population) and 34,000,000 Baptists (19.4 percent), the two largest denominations, are joined in the category "Christian" by no fewer than 40 other groups, none of them containing more than 8 percent of the population. These range from such well-known groups as the Methodists (8 percent) and Presbyterians (2.8 percent) to Mormons (1.4 percent), Jehovah's Witnesses (0.8 percent), Christian Scientists (about 0.15 percent), and even smaller groups such as the Quakers and component groups within the broad category of Christian evangelical or pentacostalist churches. And, of course, one could easily point to dramatic differences within the approximately 2 percent of Americans who are Jews, as one places members of the Reform and Conservative wings of Judaism next not only to the Modern Orthodox, but also to the various Hassidic sects.

There are at least two inferences that one can draw from this list: First, it assumes that we know exactly what we are talking about when we identify persons as "religious" rather than, presumably, "irreligious." But what is it, precisely, that joins together the Evangelical Protestant, Reformed Jew, Buddhist, Scientologist, and Wiccan? It surely is not, for example, belief in a supernatural divinity who commands various behaviors at threat of divine punishment. Perhaps all that unites them is that they ask their adherents to think deeply about the purpose of life.

Why do we care what, if anything, all of these groups have in common? One answer is simple: The FIRST AMENDMENT guarantees in its text only the "free exercise of religion," as against, say, a general right to follow one's own moral precepts derived from Kantian moral theory or Benthamite utilitarianism. Several classic Supreme Court cases, particularly from the Vietnam era dealing with conscientious objection, attempted, with notable lack of success, to wrestle with the problem of defining religion. Many other first-rate minds have subsequently confronted the issue, though the various definitions presented have proved satisfying primarily to their authors and, alas, to few other scholars or judges.

Second, even if we are confident we can tell the difference between religious and nonreligious groups, we must confront the fact that the various groups that we call religious differ in far more than belief. There would be relatively little interest in "religious diversity and the Constitution" if all that differentiated religions were theology. The free speech provisions of the First Amendment, at least as interpreted by the modern Court, would be enough to protect the most outrageous theological (or antireligious) opinions. However, what triggers constitutional litigation under the free exercise clause is, not surprisingly, "exercise"; that is, action. The actions in question are, to be sure, predicated on beliefs—slaughtering animals or drinking wine or smoking peyote is a way of showing devotion to one's gods; one is commanded to refrain from participating in immoral wars or simply to refuse to engage in any kind of work on sabbatical days; and so on. But the nub of the matter is the activity believed to follow from such beliefs.

It is a settled tenet of constitutional analysis that belief and action are separable. Or so the Court has consistently claimed at least since the seminal case of REYNOLDS V. UNITED STATES (1879), where the Court had no compunctions about jailing a Mormon leader for the behavior of bigamous marriage, whatever its linkage to then-central Mormon doctrine. During the 1960s and 1970s, however, the Court seemed to modify the belief-action distinction when, for example, it required state unemployment compensation to be given to Seventh Day Adventists who refused, in violation of state law, to be available for jobs that required working on Saturday, SHERBERT V. VERNER (1963), or exempted the Old Order Amish in Wisconsin from hav-

ing to comply with compulsory education laws that would have required Amish children to attend schools through age sixteen, WISCONSIN V. YODER (1972).

The belief-action distinction returned with a vengeance in EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990), where the Court overturned the Oregon Supreme Court's holding that the free exercise clause required an exemption from Oregon's law prohibiting the use of peyote for Native Americans who ingested the drug as part of religious ceremonies. Implausibly distinguishing the cases mentioned above, the Court held that otherwise neutral laws could be applied to bar religious practices, whatever their importance to the group in question. Whatever the free exercise clause meant, it was not, apparently, the right to engage in any behavior that offended general legal precepts.

The clause did prohibit the state from passing laws that were (or seemed) intended to limit only idiosyncratic religious practices. In CHURCH OF THE LUKUMI BABALU AYE, INC. V. HIALEAH (1993) the Court struck down an ordinance passed by Hialeah, Florida, that was clearly an effort to prohibit members of the Santería religion, a syncretic blend of traditional African and Roman Catholic views and practices, from slaughtering animals. Hialeah made no attempt to protect animals from being shot by hunters or slaughtered by butchers. A truly general protection of animal rights would have been a different case.

In *Smith,* the Court seemed to suggest that legislatures could in fact allow religious exemptions; such accommodations, however, were not constitutionally required. Congress accepted this apparent invitation in 1993, passing, almost unanimously, the RELIGIOUS FREEDOM RESTORATION ACT (RFRA), which would have put all governments, national, state, and local, to the test of demonstrating that a "compelling interest" justified "burden[ing]" one's religiously motivated behavior. (Congress claimed that this was the standard established in *Sherbert* and *Yoder.*) The Court, however, invalidated RFRA in 1997, holding that the law was beyond congressional power, at least when applied to state and local governments; it was deemed an unacceptable challenge to the Court's institutional monopoly over CONSTITUTIONAL INTERPRETATION. A number of states are passing their own quasi-RFRAs, however, and the general issues posed by the statute will certainly continue to be with us (and RFRA probably remains active as a limitation on the national government).

Even if there were only relatively few religious denominations, it might still be difficult to know in advance what sorts of accommodations a law like RFRA (or expansive reading of the free exercise clause, as in *Sherbert* and *Yoder*) might require. Can ZONING laws be applied to churches; do prisons have a duty to honor the dietary requirements of all (or any) religions; do Fundamentalist parents have a constitutional right to have their children excused, during the school day, from classes that are teaching "satanic" material; can bankruptcy law be applied to recapture religious tithes made within four months of the declaration of bankruptcy? All of these, and more, were the subject of live lawsuits following the passage of RFRA, and they serve to test any theory of the practical impact of religious diversity on constitutional interpretation.

SANFORD LEVINSON
(2000)

(SEE ALSO: *Nonjudicial Interpretation of the Constitution; Religious Liberty.*)

Bibliography

CHOPER, JESSE H. 1995 *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses.* Chicago: University of Chicago Press.

EISGRUBER, CHRISTOPHER L. and SAGER, LAWRENCE G. 1994 The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct. *University of Chicago Law Review* 61:1245–1315.

MCCONNELL, MICHAEL W. 1990 The Origins and Historical Understanding of Free Exercise of Religion. *Harvard Law Review* 103:1409–1517.

NOTE 1978 Toward a Constitutional Definition of Religion. *Harvard Law Review* 91:1056–1089.

SYMPOSIUM 1996 Religion and the Constitution. *Journal of Contemporary Legal Issues* 7:271–1516.

## RELIGIOUS FREEDOM

See: Religious Liberty

## RELIGIOUS FREEDOM RESTORATION ACT
107 Stat. 1488 (1993)

The FIRST AMENDMENT free exercise clause provides that "Congress shall make no law . . . prohibiting the free exercise" of religion, a limitation that today extends to all branches and levels of government, including states and localities. Until the 1960s, the clause had been narrowly interpreted: although religious belief was protected absolutely, religious conduct was protected only in limited circumstances, such as from intentionally discriminatory laws. Beginning with SHERBERT V. VERNER (1963), however, the Supreme Court broadened its interpretation, holding that the clause barred at least some unintentional, INCIDENTAL BURDENS resulting from the application of otherwise valid laws or policies. In WISCONSIN V. YODER (1972), for example, the Court held that the Old Order Amish

could not be required by state law to send their children to school beyond the eighth grade, even though the law applied uniformly to all Wisconsin citizens and did not intentionally discriminate against or burden religion.

In 1990, the Court again narrowed the scope of the clause. In EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990) the Court confined the *Sherbert–Yoder* standard to cases involving similar factual or legal claims and held that the clause normally does not prohibit laws that incidentally burden religious practices, as long as they are "neutral" (i.e., not aimed at religion) and "generally applicable" (i.e., applicable to a broad range of persons or activities).

*Smith* ignited a firestorm of criticism, eventually prompting Congress to enact the Religious Freedom Restoration Act (RFRA) of 1993. Initially cosponsored by Senators Orrin Hatch and Edward Kennedy, and supported by a diverse coalition of religious and other organizations, RFRA overwhelmingly passed the U.S. SENATE and the U.S. HOUSE OF REPRESENTATIVES, and was signed into law by President WILLIAM J. CLINTON on November 16, 1993.

RFRA's principal purpose was "to restore the compelling interest test as set forth in [*Sherbert* and *Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened. . . ." Specifically, RFRA provided that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." RFRA applied to all laws—federal, state, and local—"whether statutory or otherwise, and whether adopted before or after [its enactment]."

By requiring a COMPELLING STATE INTEREST and the LEAST RESTRICTIVE MEANS—the so-called STRICT SCRUTINY of *Sherbert* and *Yoder*—RFRA displaced *Smith* in cases where religion was substantially burdened, but the law was neutral and generally applicable. This stricter scrutiny proved beneficial for some, though certainly not all, RFRA claimants. The government often had little difficulty identifying a "compelling interest," such as public health or prison security, but periodically failed to demonstrate that it employed the "least restrictive means" (i.e., that the compelling interest could not have been achieved without burdening religious practice to a lesser degree). Accordingly, it was this latter requirement on which successful RFRA claimants tended to prevail.

RFRA's application, particularly to prisoners, grew somewhat controversial with time, and the broad consensus favoring the abstract concept of religious freedom dissipated in the actuality of genuine legal disputes. RFRA's most serious problem, however, had little to do with RELIGIOUS LIBERTY as such; rather, critics asserted that Congress altogether lacked the power to enact the statute. In *City of Boerne v. Flores* (1997), the Court agreed with the critics and invalidated the statute, at least as it applies to state and local law.

RFRA had been defended under Congress's FOURTEENTH AMENDMENT enforcement power. Section 1 of that amendment imposes several limitations on the states—among them the guarantee of DUE PROCESS, which the Court had previously held to include the free exercise of religion—and it empowers Congress, in section 5, "to enforce, by appropriate legislation," these limitations. In the Court's view, however, RFRA was not a valid attempt by Congress to "enforce" the Fourteenth Amendment because it prohibited many laws that were constitutional under *Smith*, and because Congress had not made factual findings demonstrating "a congruence and proportionality" between such prohibitions and the prevention or remediation of actual constitutional violations.

Buttressing its holding that Congress exceeded its section 5 power, the Court noted concerns regarding both the SEPARATION OF POWERS and FEDERALISM. First, by displacing the Court's 1990 interpretation of the free exercise clause in *Smith*, RFRA appeared to be a congressional usurpation of the JUDICIAL POWER to render authoritative CONSTITUTIONAL INTERPRETATIONS. Second, RFRA's application to all state and local laws appeared to be a congressional intrusion into certain legal domains reserved to the states. Although noting RFRA's incongruence with both DOCTRINES, the Court gave no clear indication of the independent significance of either doctrine.

The Court left open the question of RFRA's validity as applied to federal law, and the lower courts are presently divided on that issue. Although no Fourteenth Amendment or federalism problems exist, the separation of powers issue remains. Additionally, RFRA may violate the First Amendment prohibition on the ESTABLISHMENT OF RELIGION because it protects only religious conduct and thus appears to favor religion over nonreligion. This was the position of Justice JOHN PAUL STEVENS concurring in *City of Boerne* and remains an issue even if RFRA is otherwise valid as applied to federal law.

SCOTT C. IDLEMAN
(2000)

Bibliography

BERG, THOMAS C. 1994 What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act. *Villanova Law Review* 39:1–70.

CONKLE, DANIEL O. 1995 The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute. *Montana Law Review* 56:39–93.

GRESSMAN, EUGENE and CARMELLA, ANGELA C. 1996 The RFRA Revision of the Free Exercise Clause. *Ohio State Law Journal* 57:65–143.

HAMILTON, MARCI A. 1994 The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment. *Cardozo Law Review* 16:357–398.

LAYCOCK, DOUGLAS and THOMAS, OLIVER S. 1994 Interpreting the Religious Freedom Restoration Act. *Texas Law Review* 73:209–245.

VAN ALSTYNE, WILLIAM W. 1996 The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment. *Duke Law Journal* 46:291–325.

## RELIGIOUS FUNDAMENTALISM

Nathaniel Hawthorne perhaps best captured the paradox of religious fundamentalism in America in his stories about the Puritans. Repelled by the Puritans' intolerance, Hawthorne admired their realism and their unswerving devotion to principle. The latter trait he vividly depicted in his short story "The Gray Champion" (1835), where a first-generation Puritan mysteriously returns to Boston in 1689 to thwart the subjugation of the colonies by King James II. Like a fiery Old Testament prophet, the old Puritan—the "Gray Champion" of the story's title—denounces the usurpations of Royal Governor Sir Edmund Andros and urges the people to resistance.

The character of the Gray Champion symbolizes the Puritans' rigid idealism, an idealism that typifies religious fundamentalism in general. In Hawthorne's view, this idealism constituted both a threat and a promise to republican government. It constituted a threat because it fostered religious intolerance, which if enforced by the state, could destroy civil liberty. It represented a promise because it produced a firm commitment to moral principle, which if properly exercised, could help sustain republicanism. Hence the ultimate paradox of fundamentalism: Its intolerance may destroy republican government, but its rigorous attachment to moral principle may be needed to defend it.

One of the greatest achievements of American CONSITUTIONALISM was the manner in which it resolved this paradox by harnessing the moral idealism of fundamentalism while restraining its potential for bigotry. The Founders harnessed fundamentalism's moral idealism by stressing the importance of morality in civic life and by acknowledging the crucial role churches played in fostering this morality. At the same time, the Founders sought to temper fundamentalism's intolerance by ensuring that goverment power would never be used to resolve theological differences.

The Founders' arrangement produced an institutional separation between church and state even while forging a practical tie between religion and politics on the basis of morality. Religious fundamentalists were discouraged by the nature of the regime from using the government to promote their theological beliefs; but the door was left open for them to enter the political arena as citizens in order to promote government policies in accord with both the principles of the Constitution and the "laws of nature and nature's God" on which those principles are premised.

The political activities of religious fundamentalists in the new nation (primarily evangelical Christians) reflected the Founders' understanding of the role of religion in society. Many evangelicals opposed state funding of churches because they thought it corrupted religion, and gradually even the congregationalists who supported ESTABLISHMENTS OF RELIGION changed their minds. Hence, when evangelicals became involved in politics in the early nation, they generally sought to do so on the basis of principles of civic morality that were held in common by both reason and revelation. in the years before the CIVIL WAR, they entered the political arena by the thousands to spearhead crusades against dueling, lotteries, war, poverty, prostitution, alcoholism, and SLAVERY. These political activities on behalf of secular concerns proved that religious fundamentalism could fulfill a vital political function by serving as the political conscience of the nation.

Nowhere can this be seen more clearly than in the controversy over Cherokee removal from Georgia. Federal treaties had guaranteed the Cherokees their lands on the condition that they become both peaceful and "civilized." In 1828 and 1829, the Georgia legislature tried to legislate the Cherokee Nation out of existence, extending its laws over Cherokee lands and demanding that the federal government remove the Indians. The evangelical missionaries who had been working among the Cherokees rose to the Indians' defense. They based their arguments against removal not simply on biblical morality but on the natural right of property, the inviolability of contracts, and the God-given equality of all men proclaimed in the DECLARATION OF INDEPENDENCE, which they argued applied to Indians as well as white men.

Unfortunately, both Congress and the President rebuffed the evangelicals' efforts on behalf of the Cherokees, and the government eventually relocated the Indians further west by force. The controversy nevertheless demonstrated that religious fundamentalists could fulfill the role that the Founders had created for them: they could put their idealism to constructive use by intervening in politics on the basis of principles of natural justice rather than doctrines of sectarian theology.

None of this is to suggest that religious fundamentalists completely forswore introducing sectarian theology into politics in the early nation. Before the Civil War, numer-

ous evangelicals claimed that America had been founded as a "Christian nation," and many sought to introduce sectarian religion into public education. After the Civil War, some even wanted to amend the Constitution to recognize the authority of Jesus Christ and Christianity. In the twentieth century, widespread support persisted among evangelicals for state-sponsored prayer and Bible reading in the public schools. Nevertheless, these efforts were more the exception than the rule, and sometimes actions that seemed directed at obtaining state support for religion were actually much more complicated. For instance, evangelicals were vigorously criticized for trying to mix church and state in the early nineteenth century when they sought repeal of a law requiring many post offices to be open on Sunday. Yet one reason evangelicals found this law so offensive was that it compelled church members employed by the post office to break the sabbath in violation of their religious beliefs. Thus, evangelicals sought repeal of the law (at least in part) to protect a person's natural right to RELIGIOUS LIBERTY protected by the free exercise clause of the FIRST AMENDMENT.

The political significance of religious fundamentalism eventually diminished as the number of fundamentalists declined and as most remaining fundamentalists abandoned politics after the repeal of the EIGHTEENTH AMENDMENT. Yet the very forces of secularization that some had thought decimated religious fundamentalism may have spurred its resurgence in the late 1970s and 1980s. As social ills proliferated and many persons became disenchanted with both the political liberalism and the moral permissiveness of mainline Christian denominations, evangelicalism prospered and political action by evangelicals reemerged with a vengeance. Social issues such as ABORTION, PORNOGRAPHY, and EUTHANASIA attracted the new evangelicals' attention, much as dueling, slavery, and intemperance had sparked the actions of their forebears in the nineteenth century.

In one key respect, however, many of the new evangelical activists were different from those who came before. In the past, most conservative Christians had continued to lobby for at least a limited state power to sponsor religious exercises, such as devotional Bible reading and organized prayers in public schools. Although support for these activities did not disappear in the 1980s, it did become much less noticeable, as evangelicals focused more on eliminating the government's power to restrict individual religious expression than on promoting a state power to promote religion.

This new emphasis on individual religious freedom can be ascribed at least in part to the changing nature of church-state conflicts in the 1970s and 1980s. Whereas previous church-state battles had focused on how much the government could do to promote religion while staying within the confines of the ESTABLISHMENT CLAUSE, new controversies concerned how far the state could go in restricting individual religious expression. Public high school students were forbidden by school authorities from meeting on their own during lunch or before school for prayer and Bible study. Churches were prevented from utilizing public facilities readily available for use by other community groups, and zoning laws were invoked to curtail religious activities in private homes. In addition, many parents faced the choice of either removing their children from public schools or allowing their children to be taught the permissibility of behaviors they found morally unacceptable. Some religious parents who tried to teach their children at home were jailed. These new conflicts caused many evangelicals to see government as the problem rather than the solution, and they accordingly sought ways to curb what they regarded as state-sponsored persecution of their religious beliefs and practices.

One result was an attempt to apply the free exercise clause to curriculum objections in the public schools. In 1986, a group of fundamentalist parents in Tennessee petitioned to have their children exempted from a school reading program because they believed the content of the readers disparaged their religious beliefs. The Tennessee parents did not want to change school curriculum; they simply wanted to teach their children reading at home, while allowing the children to participate in the rest of the school's academic program. The district court granted this request, but a three-judge panel on the court of appeals unanimously reversed. However, the judges could not agree on the reasons for reversal. One judge argued that the reading program did not burden the children's free exercise rights because it did not tell them what to believe. A second judge maintained precisely the opposite, arguing that a broader purpose of the reading was to inculcate certain "values"; according to this judge, this purpose gave the school district a COMPELLING STATE INTEREST in not allowing exemptions to the program. The third judge, meanwhile, claimed that the reading program did burden free exercise, but he did not want to issue a new precedent in this area without express guidance from the Supreme Court. This the Supreme court declined to give, although it later made clear in EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990) that it had no intention of broadening free exercise rights. *Smith* suggests that further litigation using the free exercise approach is likely to fail.

In a related area, there have been efforts by evangelicals to have CREATIONISM taught in public schools. Unlike fundamentalists from an earlier era, the new creationists do not argue that evolution should not be taught; they only contend that whenever evolution is taught, "scientific creationism" must also be taught in order to protect the

students' right to study different points of view. Hence, they argue their case in terms of ACADEMIC FREEDOM. In *Edwards v. Aguillard* (1987), however, the Supreme Court struck down a Louisiana law that adopted this approach as violative of the establishment clause.

One new rationale that has not been invalidated by the Court is EQUAL ACCESS, which calls for religious expression to be protected as speech under the First Amendment. The primary idea behind equal access is that religious individuals and groups should be accorded the same access to public facilities as nonreligious individuals and groups. For example, if a public library rents rooms to community groups for meetings, it should not be able to forbid religious groups from renting the rooms for religious meetings because this would be discriminating against certain groups on the basis of the content of their speech. Similarly, if high school students have the right to pass out political leaflets to their classmates on school grounds, then they must also have the right to pass out religious leaflets. The equal access rationale has been applied by evangelicals with particular success in the public high school setting, where many schools previously had denied religious student groups the same right to meet on school grounds routinely afforded to other student groups. The Supreme Court sustained federal legislation providing a limited statutory right to equal access in public secondary schools in BOARD OF EDUCATION OF WESTSIDE COMMUNITY SCHOOLS V. MERGENS (1990).

The development of equal access is yet another indication of how successful the Founders were in setting up a system where the political demands of religious fundamentalism would be framed in terms of generally applicable moral principles rather than petitions based on divine right. In America, religious fundamentalists have increasingly recognized that the same laws that protect other citizens also protect them and that they do not need special privileges conferred by the government to prosper.

JOHN G. WEST, JR.
(1992)

(SEE ALSO: *Bender v. Williamsport; Cherokee Indian Cases; Government Aid to Religious Institutions; Religion in Public Schools; Separation of Church and State; School Prayers; Sunday Closing Laws.*)

Bibliography

HAWTHORNE, NATHANIEL 1970 "The Gray Champion," "The Man of Adamant," and "The Maypole of Merrymount." In *Hawthorne: Selected Tales and Sketches.* New York: Holt, Rinehart, and Winston.

JAFFA, HARRY V. 1990 *The American Founding as the Best Regime: The Bonding of Civil and Religious Liberty.* Mont clair, Calif.: Claremont Institute for the Study of Political Philosophy and Statesmanship.

STOKES, ANSON PHELPS 1950 Church and State in the United States, 3 vols. New York: Harper and Brothers.

WEST, JOHN G., JR. 1991 The Changing Battle over Religion in the Public Schools. *Wake Forest Law Review* 26:361–401.

## RELIGIOUS INSTITUTIONS AND GOVERNMENT AID

See: Government Aid to Religious Institutions

## RELIGIOUS LIBERTY

Although the FIRST AMENDMENT's mandate that "Congress shall make no law respecting an ESTABLISHMENT OF RELIGION, or prohibiting the free exercise thereof" is expressed in unconditional language, religious liberty, insofar as it extends beyond belief, is not an absolute right. The First Amendment, the Supreme Court said in CANTWELL V. CONNECTICUT (1940), "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation of society."

Although the Court has repeated this dualism many times, it does not explain what the free exercise clause means. There is no need for a constitutional guarantee protecting freedom to believe, for, as the COMMON LAW had it, "the devil himself knows not the thoughts of man." Even if freedom to believe encompasses freedom to express what one believes, the clause adds nothing, since FREEDOM OF SPEECH and FREEDOM OF THE PRESS are specifically guaranteed in the amendment. Indeed, before *Cantwell* was decided, the Court applied the free speech rather than free exercise guarantee to challenges against state laws allegedly impinging upon religious liberty. Moreover, the word "exercise" connotes action or conduct, thus indicating that the framers had in mind something beyond the mere expression of a belief even if uttered in missionary activities.

In America the roots of religious liberty can be traced to ROGER WILLIAMS, whose pamphlet, "The Bloudy Tenent of Persecution for cause of Conscience, discussed in a Conference between Truth and Peace," asserted that it was God's command that "a permission of the most Paganish, Jewish, Turkish, or Antichristian consciences and worships, be granted to all men in all Nations and Countries." Another source was THOMAS JEFFERSON'S VIRGINIA STATUTE OF RELIGIOUS LIBERTY, adopted in 1786, which declared that no person should be compelled to frequent or support any religious worship nor suffer on account of religious opinions and beliefs.

By the time the First Amendment became part of the Constitution in 1791, practically every state in the Union,

to a greater or lesser degree, had enacted constitutional or statutory provisions securing the free exercise of religion. Indeed, it was the absence of a BILL OF RIGHTS whose proponents invariably called for a guarantee of religious freedom, that was the most frequently asserted objection to the Constitution presented to the states for approval. The necessary approval was obtained only because the Constitution's advocates promised that such a bill would be added by amendment after the Constitution was adopted.

Although the First Amendment was framed as a limitation of congressional powers, Supreme Court decisions have made it clear that executive and judicial action were likewise restricted by the amendment. Thus in *Anderson v. Laird* (1971) the Supreme Court refused to review a decision that the secretary of defense violated the First Amendment in requiring cadets in governmental military academies to attend chapel. As to the judiciary, unquestionably a federal court could not constitutionally disqualify a person from testifying as a witness because he was an atheist. (See TORCASO V. WATKINS.)

Since the Court's decision in *Cantwell* the states are subject to the restrictions of the free exercise clause no less than the federal government. Because our federal system leaves to the states what is generally called the POLICE POWER, there were few occasions, prior to *Cantwell*, when the Supreme Court was called upon to define the meaning of the clause. The few that did arise involved actions in the TERRITORIES, which were subject to federal laws and thus to the First Amendment. Most significant of these was REYNOLDS V. UNITED STATES (1879), wherein the Supreme Court upheld the constitutionality of an act of Congress criminalizing POLYGAMY in any American territory. In rejecting the defense that polygamy was mandated by doctrines of the Holy Church of Latter-Day Saints (Mormons) and thus was protected by the free exercise clause, the Court stated what was later echoed in *Cantwell*, that although laws "cannot interfere with mere religious belief, they may with practice." It could hardly be contended, the Court continued, that the free exercise clause barred prosecution of persons who engaged in human sacrifice as a necessary part of their religious worship.

Since Reynolds was charged with practicing polygamy, the Court's decision did not pass upon the question whether teaching it as a God-mandated duty was "mere religious belief" and therefore beyond governmental interference. In DAVIS V. BEASON (1890) the Court decided that such teaching was "practice," and therefore constitutionally subject to governmental restrictions.

Teaching or preaching, even if deemed action, is however not beyond all First Amendment protection, which encompasses freedom of speech as well as religion. In GITLOW V. NEW YORK (1925) the Supreme Court declared for the first time that the free speech guarantee of the First Amendment was incorporated into the FOURTEENTH AMENDMENT by virtue of the DUE PROCESS clause in the latter and thus was applicable to the states. Accordingly, the Jehovah's Witnesses cases that first came to the Court in the 1930s were initially decided under the speech rather than the religion clause (LOVELL V. GRIFFIN, 1938; *Schneider v. Irvington*, 1939). It was, therefore, natural for the Court to decide the cases under the CLEAR AND PRESENT DANGER test that had first been announced in SCHENCK V. UNITED STATES (1919), a case involving prosecution for speaking against United States involvement in World War I.

In another sense, this too was quite natural since, like Schenck, the Witnesses were pacifists, at least in respect to wars in this world. (In *Sicurella v. United States*, the Court in 1955 ruled that a member of the sect was not disqualified from conscientious objector exemption because the sect's doctrines encompassed participation by believers in serving as soldiers in the Army of Christ Jesus at Armageddon.) Nevertheless, unlike Schenck and other opponents to American entry in World War I, the Witnesses (like the Friends) did not vocally oppose American entry into the war but limited themselves to claiming CONSCIENTIOUS OBJECTION status.

The Court did not apply the clear and present danger test in a case involving a member of the Jehovah's Witnesses whose child was expelled from public school for refusing to participate in the patriotic program of flag salute. In that case, *Minersville School District v. Gobitis* (1940), the Court, in an opinion by Justice FELIX FRANKFURTER, rejected the assertion as a defense of religious freedom. (See FLAG SALUTE CASES.) The antipolygamy law, he stated, was upheld in *Reynolds* not because it concerned action rather than belief, but because it was a valid general law, regulating the secular practice of marriage.

The majority of the Court, however, soon concluded that *Gobitis* had been incorrectly decided, and three years later the Court overruled it in *West Virginia State Board of Education v. Barnette* (1943). There the Court treated the Witnesses' refusal to salute the flag as a form of speech and therefore subject to the clear and present danger test. In later decisions, the Court returned to *Cantwell* and treated religious freedom cases under the free exercise rather than free speech clause, although it continued to apply the clear and present danger test.

Unsatisfied with that test, Justice Frankfurter prevailed upon his colleagues to accept a differently worded rule, that of BALANCING competing interests, also taken from Court decisions relating to other freedoms secured in the Bill of Rights. When a person complains that his constitutional rights have been infringed by some law or action of the state, it is the responsibility of the courts to weigh

the importance of the particular right in issue as against the state's interest upon which its law or action is based. For example, the right of an objector not to violate his religious conscience by engaging in war must be weighed against the nation's interest in defending itself against foreign enemies, and, in such weighing, the latter interest may be adjudged the weightier.

The majority of the Court accepted this rule, but in recent years it has added an element that has almost turned it around. Justice Frankfurter believed that a citizen who challenged the constitutionality of state action had the burden of convincing the court that his interest was more important than the state's and should therefore be adjudged paramount. Establishing an individual's right superior to the state's interest was a particularly heavy burden to carry, but it was made even heavier by Justice Frankfurter's insistence that any doubt as to relative weights must be resolved in favor of the state, which would prevail unless its action were patently unreasonable. Recently, however, the Court has taken a more libertarian approach, requiring the state to persuade the courts that the values it seeks to protect are weightier. In the language of the decisions, the state must establish that there is a COMPELLING STATE INTEREST that justifies infringement of the citizen's right to the free exercise of his religion. If it fails to do so, its law or action will be adjudged unconstitutional. (See THOMAS V. REVIEW BOARD OF INDIANA; UNITED STATES V. LEE.)

In accord with this rule, the Court, in the 1972 case of WISCONSIN V. YODER, expressly rejected the belief-action test, holding that Amish parents could not be prosecuted for refusing to send their children to school after they had reached the age of fourteen. "Only those interests of the highest order," the Court said, "and those not otherwise served can overbalance the legitimate claim to the free exercise of religion."

Religious liberty is protected not only by the free exercise clause but also by the clause against ESTABLISHMENTS OF RELIGION. In EVERSON V. BOARD OF EDUCATION (1947) and later cases, the Court has stated that under the establishment clause, government cannot force a person to go to church or profess a belief in any religion. In later decisions, the Court has applied a three-pronged purpose-effect-entanglement test as a standard of constitutionality under the establishment clause. The Court has held, in *Committee for Public Education and Religious Liberty v. Nyquist* (1973), for example, that a challenged statute must have a primary effect that neither advances nor inhibits religion, and must avoid government entanglement with religion. (See SEPARATION OF CHURCH AND STATE.)

The Supreme Court's decisions in the arena of conflict between governmental concerns and individuals' claims to religious liberty can be considered in relation to the four categories suggested by the Preamble to the Constitution: national defense, domestic tranquillity, the establishment of justice, and GENERAL WELFARE. In resolving the issues before it in these decisions the Court has spoken in terms of clear and present danger, balancing of competing interests, or determination of compelling governmental interests, depending upon the date of the decision rendered.

Probably no interest of the government is deemed more important than defense against a foreign enemy. Individual liberties secured by the Constitution must yield when the nation's safety is in peril. As the Court ruled in the SELECTIVE DRAFT LAW CASES (1918), the prohibition by the THIRTEENTH AMENDMENT of involuntary servitude was not intended to override the nation's power to conscript an army of—if necessary—unwilling soldiers, without which even the most just and defensive war cannot be waged.

By the same token, exemption of Quakers and others whose religious conscience forbids them to engage in military service cannot be deemed a constitutional right but only a privilege accorded by Congress and thus subject to revocation at any time Congress deems that to be necessary for national defense. However, even in such a case, Congress must exercise its power within the limitations prescribed by the First Amendment's mandate of neutrality among religions and by the EQUAL PROTECTION component of the Fifth Amendment's due process clause. Hence, in exercising its discretion, Congress could not constitutionally prefer some long-standing pacifist religions over others more recently established.

Exemption of specific classes—the newly betrothed, the newly married, the fainthearted, and others—goes back as far as Mosaic times (Deuteronomy 20:1–8). Since all biblical wars were theocratic, there was no such thing as religious exemption. In England, Oliver Cromwell believed that those whose religious doctrine forbade participation in armed conflict should constitute an exempt class. So too did the legislatures in some of the American colonies, the Continental Congress, and a number of the members of the Congress established under the Constitution. Madison's original draft of what became the SECOND AMENDMENT included a provision exempting religious objectors from compulsory militia duty; but that provision was deleted before Congress proposed the amendment to the states. The first national measure exempting conscientious objectors was adopted by Congress during the Civil War; like its colonial and state precedents, it was limited to members of well-recognized religious denominations whose articles of faith forbade the bearing of arms.

The SELECTIVE SERVICE ACT of 1917 exempted members of recognized denominations or sects, such as the Friends, Mennonites, and Seventh-Day Adventists, whose doctrine and discipline declared military service sinful. The 1940

act liberalized the requirements for exemption to encompass anyone who by "reason of religious training and belief" possessed conscientious scruples against "participation in war in any form." In 1948, however, the 1940 act was further amended, first, to exclude those whose objection to war was based on "essentially political, sociological or philosophical views or a mere personal code," and second, to define religion as a belief in a "Supreme Being."

In view of the Court's holding in *Torcaso v. Watkins* (1961) that the Constitution did not sanction preferential treatment of theistic religions over other faiths, limitation of exemption to persons who believe in a "Supreme Being" raised establishment clause issues. In UNITED STATES V. SEEGER (1965) the Court avoided these issues by interpreting the statute to encompass a person who possessed a sincere belief occupying a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualified for the exemption. Applying this definition to the three cases before it, the Court held that Selective Service boards had erroneously denied exemption: to one who expressed a "belief in and devotion to goodness and virtues for their own sakes, and a religious faith in a purely ethical creed"; to another who rejected a relationship "vertically towards Godness directly," but was committed to relationship "horizontally towards Godness through Mankind and the World"; and to a third who defined religion as "the supreme expression of human nature," encompassing "man thinking his highest, feeling his deepest, and living his best."

Because exemption of conscientious exemption is of legislative rather than constitutional origin, Congress may condition exemption on possession of belief forbidding participation in all wars, excluding those whose objection is selective and forbids participation only in what they personally deem unjust wars, such as that in Vietnam. The Court sustained such an act of Congress in *Gillette v. United States* (1971). However, independent of any statutory exemption, the Court held in *Thomas* that, at least in peacetime, disqualification of a person from unemployment insurance benefits for conscientious refusal to accept an offered job in a plant that manufactured arms violated the free exercise clause.

Closely related to military service as an aspect of national defense is national unity, cultural as well as political. The relevant constitutional issues reached the Supreme Court in 1923 in three cases involving Lutheran and Reformed schools, and, two years later, in two cases involving a Roman Catholic parochial and a nonsectarian private school. The former cases, reflecting post-World War I hostility to German-speaking Americans, were decided by the Court in MEYER V. NEBRASKA (1923) and two companion cases. These involved the conviction of teachers of German who violated statutes forbidding the teaching of a foreign language to pupils before they had completed eight grades of elementary schooling. The Court, in reversing the convictions, relied not only on the constitutional right of German teachers to pursue a gainful occupation not inherently evil or dangerous to the welfare of the community, but also the right of parents to have their children taught "Martin Luther's language" so that they might better understand "Martin Luther's dogma." The cases were decided long before the Court held that the free exercise clause was incorporated in the Fourteenth Amendment's due process clause and therefore were technically based upon the teachers' due process right to earn a livelihood and the parents' due process right to govern the upbringing of their children.

In PIERCE V. SOCIETY OF SISTERS and its companion case, *Pierce v. Hill Military Academy* (1925), the Court invalidated a compulsory education act that required all children, with limited exceptions, to attend only public schools. A single opinion, governing both cases, relied upon *Meyer v. Nebraska* and based the decision invalidating the law on the due process clause as it related to the school owners' contractual rights and the parents' right to control their children's education, rather than to the free exercise rights of teachers, parents, or pupils. Nevertheless, since the Court's ruling in *Cantwell* that the free exercise clause was applicable to the states, *Pierce* has often been cited by lawyers, scholars, and courts as a free exercise case, and particularly one establishing the constitutional rights of churches to operate parochial schools. Had *Pierce* been decided after *Cantwell* it is probable that free exercise would have been invoked as an additional ground in respect to the Society of Sisters' claim; the opinion as written did note that the child was not the mere creature of the state and that those who nurtured him and directed his destiny had the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Reference has already been made to the Supreme Court's decision in *West Virginia State Board of Education v. Barnette* upholding the First Amendment right of Jehovah's Witnesses public school pupils to refrain from participating in flag salute exercises, although there the Court predicated its decision on the free speech rather than the free exercise mandate of the Amendment.

Jehovah's Witnesses' creed and conduct affected not only national defense through pacifism and alleged failure to pay respect to the flag but also governmental concern with domestic tranquillity. What aggravated hostility to the sect beyond its supposed lack of patriotism were its militant proselytizing methods, encompassing verbal attacks on organized religion in general and Roman Catholicism in particular. In their 1931 convention the Witnesses declared their mission to be "to inform the rulers and the

people of and concerning Satan's cruel and oppressive organization, and particularly with reference to Christiandom, which is the most visible part of that visible organization." God's purpose was to destroy Satan's organization and bring quickly "to the obedient peoples of the earth peace and prosperity, liberty and health, happiness and life."

This is hardly new or surprising. Practically every new religion, from Judaism through Christianity and Islam to the present, has been predicated upon attacks against existing faiths; indeed, this is implied in the very term "Protestant." Clearly, those who wrote the First Amendment intended it to encompass attacks upon existing religions. (In BURSTYN V. WILSON, 1952, the Court invalidated a statute banning "sacrilegious" films.) Attacks on existing religions are almost invariably met with counterattacks, physical as well as verbal, by defenders of the accepted faiths.

The assaults upon the Jehovah's Witnesses were particularly widespread and intense for a number of reasons. Their conduct enraged many who felt that their refusal to salute the flag was unpatriotic, if not treasonous. Their attacks upon the Christian religion infuriated many others. The evidence in *Taylor v. Mississippi* (1943), for example, included a pamphlet suggesting that the Roman Catholic Church was responsible for flag saluting. The book *Religion*, by the Witnesses' first leader, Charles T. Russell, described their operations: "God's faithful servants go from house to house to bring the message of the kingdom to those who reside there, omitting none, not even the houses of the Roman Catholic hierarchy, and there they give witness to the kingdom because they are commanded by the Most High to do so. . . . They do not loot nor break into the houses, but they set up their phonographs before the doors and windows and send the message of the kingdom right into the ears of those who might wish to hear; and while those desiring to hear are hearing, some of the "sourpusses' are compelled to hear."

The predictably resulting resort to violence and to law for the suppression of the Witnesses' activities gave rise to a host of Supreme Court decisions defining for the first time both the breadth and the limitations of the free exercise clause (and also, to some extent, the free speech clause). Most of the Jehovah's Witnesses cases were argued before the Supreme Court by Hayden Covington; his perseverance, as well as that of his client, was manifested by the fact that before *Minersville School District v. Gobitis* was decided, the Court had rejected his appeals in flag salute cases four times. The Court had accepted JURISDICTION in *Gobitis*, as well as its successor, *Barnette*, because, notwithstanding these previous rejections, the lower courts had decided both cases in the Witnesses' favor.

The Witnesses were not the only persons whose aggressive missionary endeavors and verbal attacks upon other faiths led to governmental actions that were challenged as a violation of the free exercise clause and were defended as necessary to secure domestic tranquillity. In KUNZ V. NEW YORK (1951), the Court held that a Baptist preacher could not be denied renewal of a permit for evangelical street meetings because his preachings, scurrilously attacking Roman Catholicism and Judaism, had led to disorder in the streets. The Court said that appropriate public remedies existed to protect the peace and order of the communities if the sermons should result in violence, but it held that these remedies did not include prior restraint under an ordinance that provided no standards for the licensing official.

Jehovah's Witnesses were the major claimants to religious liberty in the two decades between 1935 and 1955. During that period they brought to the Supreme Court a large number of cases challenging the application to them of a variety of laws forbidding disturbing the peace, peddling, the use of SOUNDTRUCKS, as well as traffic regulations, child labor laws, and revenue laws.

In *Cantwell v. Connecticut* (1940) the Court held that the First Amendment guaranteed the right to teach and preach religion in the public streets and parks and to solicit contributions or purchases of religious materials. Although a prior municipal permit might be required, its grant or denial might not be based upon the substance of what is taught, preached, or distributed but only upon the need to regulate, in the interests of traffic control, the time, place, and manner of public meetings. In COX V. NEW HAMPSHIRE (1940) the Court ruled that religious liberty encompassed the right to engage in religious processions, although a fee might be imposed to cover the expenses of administration and maintenance of public order. The Constitution, however, does not immunize from prosecution persons who in their missionary efforts use expressions that are lewd, obscene, libelous, insulting, or that contain "fighting" words which by their very utterance, the Court declared in CHAPLINSKY V. NEW HAMPSHIRE (1942), inflict injury or tend to incite an immediate breach of the peace. The Constitution also secures the right to distribute religious handbills in streets and at publicly owned railroad or bus terminals, according to the decision in *Jamison v. Texas* (1943), and, according to *Martin v. City of Struthers* (1943), to ring doorbells in order to offer house occupants religious literature although, of course, not to force oneself into the house for that purpose.

Related to the domestic tranquillity aspects of Jehovah's Witnesses claims to use public streets and parks are the claims of other feared or unpopular minority religious groups (often referred to as "sects" or, more recently, "CULTS") to free exercise in publicly owned areas. In HEF-

FROM V. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS (ISKCON) (1981) the Court held that a state rule limiting to specific booths the sale or distribution of merchandise, including printed material, on public fair grounds did not violate the free exercise clause when applied to members of ISKCON whose ritual required its members to go into all public places to distribute or sell its religious literature and to solicit donations.

Discriminatory treatment, however, is not constitutionally permissible. Thus, in *Cruz v. Beto* (1972) the Supreme Court upheld the claim of a Buddhist prisoner in Texas that his constitutional rights were violated by denying him use of the prison chapel, punishing him for sharing his Buddhist religious materials with other prisoners, and denying him other privileges, such as receiving points for attendance at religious services, which enhanced a prisoner's eligibility for early parole consideration. While a prisoner obviously cannot enjoy the free exercise of religion to the same extent as nonprisoners, the Court said, he is protected by the free exercise clause subject only to the necessities of prison security and discipline, and he may not be discriminated against simply because his religious belief is unorthodox. This does not mean that every sect within a prison, no matter how few in number, must have identical facilities or personnel; but reasonable opportunities must be afforded to all persons to exercise their religion without penalty.

One of the most difficult problems facing a court arises when it is called upon to decide between free exercise and the state's interest in preventing fraud. The leading case on the subject is *United States v. Ballard* (1944), which involved a prosecution for mail fraud. The INDICTMENT charged that the defendants, organizers of the "I Am" cult, had mulcted money from elderly and ill people by falsely representing that they had supernatural powers to heal and that they themselves had communicated personally with Heaven and with Jesus Christ.

The Court held that the free exercise clause would be violated if the state were allowed to seek to prove to a jury that the defendants' representations were false. Neither a jury nor any other organ of government had power to decide whether asserted religious experiences actually occurred. Courts, however, could constitutionally determine whether the defendant himself believed that what he recounted was true, and if a jury determined that he did not, they could convict him of obtaining money under false pretenses. The difficulty with this test, as Justice ROBERT H. JACKSON noted in his dissenting opinion, is that prosecutions in cases such as *Ballard* could easily degenerate into religious persecution; juries would find it difficult to accept as believed that which, by reason of their own religious upbringing, they deemed unbelievable.

In providing for "affirmation" as an alternative to "oath" in Article II, section 1, and Article VI, section 3, the framers of the Constitution, recognizing that religious convictions might forbid some persons (specifically Quakers) to take oaths, manifested their intention that no person in the judicial system—judge, lawyer, court official, or juryman—should be disqualified from governmental service on the ground of religion. In *Torcaso v. Watkins* (1961) the Court reached the same conclusion under the First Amendment as to state officials (for example, notaries public), and in *In re Jenison* (1963), the Court refused to uphold a conviction for contempt of court of a woman who would not serve on a jury because of the biblical command "Judge not that ye not be judged."

Resort to secular courts for resolution of intrachurch disputes (generally involving ownership and control of church assets) raises free exercise as well as establishment problems. As early as 1872 the Court held in *Watson v. Jones* that judicial intervention in such controversies was narrowly limited: a court could do no more than determine and enforce the decision of that body within the church that was the highest judicatory body according to appropriate church law. If a religious group (such as Baptist and Jewish) were congregational in structure, that body would be the majority of the congregation; if it were hierarchical (such as Roman Catholic or Russian Orthodox), the authority would generally be the diocesan bishop.

That principle was applied by the Supreme Court consistently until *Jones v. Wolf* (1979). There the court held that "neutral principles of law developed for use in all property disputes" could constitutionally be applied in church schism litigation. This means that unless the corporate charter or deeds of title provide that the faction loyal to the hierarchical church will retain ownership of the property, such a controversy must be adjudicated in accordance with the laws applicable to corporations generally, so that if recorded title is in the name of the local church, the majority of that body is entitled to control its use and disposition. The Court rejected the assertion in the dissenting opinion that a rule of compulsory deference to the highest ecclesiastical tribunal is necessary in order to protect the free exercise of those who formed the association and submitted themselves to its authority.

Where a conflict exists between the health of the community and the religious conscience of an individual or group, there is little doubt that the free exercise clause does not mandate risk to the community. Thus, as the Court held in JACOBSON V. MASSACHUSETTS (1905), compulsory VACCINATION against communicable diseases is enforceable notwithstanding religious objections to the procedure. So, too, fluoridation of municipal water supplies to prevent tooth cavities cannot be enjoined because of objection by some that drinking fluoridated water is sinful.

Where the life, health, or safety of individuals, rather than communities at large, is involved the constitutional principles are also fairly clear. When the individuals are children, a court may authorize blood transfusions to save their lives notwithstanding objection by parents (such as Jehovah's Witnesses) who believe that the procedure violates the biblical command against the drinking of blood. The underlying principle was stated by the Court in PRINCE V. MASSACHUSETTS (1944) upholding the conviction of a Jehovah's Witness for violating the state's child labor law in allowing her nine-year-old niece to accompany and help her while she sold the sect's religious literature on the city's streets. "Parents," the Court said, "may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." It follows from this that unless mental incompetence is proved, a court may not authorize a blood transfusion upon an unconsenting adult.

The Court also balances competing interests in determining the constitutionality of enforcing compulsory Sunday laws against those whom religious conscience forbids labor or trade on the seventh rather than the first day of the week. In MCGOWAN V. MARYLAND and *Two Guys from Harrison-Allentown v. McGinley* (1961) the Court upheld the general validity of such laws against an establishment clause attack. Although their origin may have been religious, the Court said, the laws' present purpose was secular: to assure a weekly day for rest, relaxation, and family companionship.

Two other cases, *Gallagher v. Crown Kosher Super Market* (1961) and *Braunfeld v. Brown* (1961), decided at the same time, involved Orthodox Jews who observed Saturday as their day of rest and refrained from business on that day. In these cases the Court rejected the argument that requiring a Sabbatarian either to abstain from engaging in his trade or business two days weekly or to sacrifice his religious conscience, while requiring his Sunday-observing competitors to abstain only one day, imposed upon the Sabbatarian a competitive disadvantage, thereby penalizing him for his religious beliefs in violation of the free exercise clause. Exempting Sabbatarians, the Court held, might be administratively difficult, might benefit non-Sabbatarians motivated only by a desire for a competitive advantage over merchants closing on Sundays, and might frustrate the legitimate legislative goal of assuring a uniform day of rest. Although state legislatures could constitutionally elect to grant an exemption to Sabbatarians, the free exercise clause does not require them to do so.

In SHERBERT V. VERNER (1963), however, the Court reached a conclusion difficult to reconcile with that in *Gallagher* and *Braunfeld.* Denial of unemployment insurance benefits to a Seventh-Day Adventist who refused to accept tendered employment that required working on Saturday, the Court held, imposed an impermissible burden on the free exercise of religion. The First Amendment, it said, forbids forcing an applicant to choose between following religious precepts and forfeiting government benefits on the one hand, or, on the other, abandoning the precepts by accepting Sabbath work. Governmental imposition of such a choice, the Court said, puts the same kind of burden upon the free exercise of religion as would a fine imposed for Saturday worship.

The Court upheld statutory tax exemptions for church-owned real estate used exclusively for religious purposes in WALZ V. TAX COMMISSION (1970), rejecting an establishment clause attack. In *Murdock v. Pennsylvania* (1943) and *Follett v. Town of McCormack* (1944), however, the Court ruled that under the free exercise clause a revenue-raising tax on the privilege of canvassing or soliciting orders for articles could not be applied to Jehovah's Witnesses who sold their religious literature from door to door; in the same cases, the Court stated that an income tax statute could constitutionally be applied to clergymen's salaries for performing their clerical duties.

In *United States v. Lee* (1982) the Court upheld the exaction of social security and unemployment insurance contributions from Amish employers. The employers argued that their free exercise rights had been violated, citing 1 Timothy 5:8: "But if any provide not . . . for those of his own house, he hath denied the faith, and is worse than an infidel." Compulsory contribution, the Court said, was nonetheless justified; it was essential to accomplish the overriding governmental interest in the effective operation of the social security system.

To sum up, the Supreme Court's decisions in the arena of religious liberty manifest a number of approaches toward defining its meaning, specifically clear and present danger, the balancing of competing interests, and the establishment of a compelling state interest justifying intrusion on free exercise. On the whole, the Court has been loyal to the original intent of the generation that wrote the First Amendment to accord the greatest degree of liberty feasible in our society.

LEO PFEFFER
(1986)

(SEE ALSO: *Widmar v. Vincent.*)

Bibliography

GIANELLA, DONALD 1968 Religious Liberty: Non-Establishment and Doctrinal Development: Part I, The Religious Liberty Guarantee. *Harvard Law Review* 80:1381–1431.

HOWE, MARK DEWOLFE 1965 *The Garden and the Wilderness:*

*Religion and Government in American Constitutional History.* Chicago: University of Chicago Press.

KAUPER, PAUL G. 1964 *Religion and the Constitution.* Baton Rouge: Louisiana State University Press.

MANWARING, DAVID R. 1962 *Render unto Caesar: The Flag Salute Controversy.* Chicago: University of Chicago Press.

PFEFFER, LEO (1953) 1967 *Church, State and Freedom.* Boston: Beacon Press.

STOKES, AANSON P. 1950 *Church and State in the United States.* New York: Harper & Brothers.

——— and PFEFFER, LEO 1965 *Church and State in the United States.* New York: Harper & Row.

TRIBE, LAWRENCE H. 1978 *American Constitutional Law.* Mineola, N.Y.: Foundation Press.

# RELIGIOUS LIBERTY
## (Update 1)

Religious liberty finds its protection in three provisions of the Constitution: the prohibition of RELIGIOUS TESTS for office in Article IV and the FREE EXERCISE and ESTABLISHMENT CLAUSES of the FIRST AMENDMENT. Because the first is self-executing and the last is involved mostly with issues of government aid, endorsement, or sponsorship of religious activities, the bulk of constitutional litigation over religious liberty has taken place under the free-exercise clause.

In recent history, there have been two general conceptions of the protections afforded by the free-exercise clause. The broad conception, which prevailed in the Supreme Court from 1963 (and arguably earlier) until 1990, holds that no law or government practice can be allowed to burden the exercise of religion unless it is the least restrictive means of achieving a government purpose of the highest order—a "compelling" governmental purpose. The narrow conception, adopted by a 5–4 vote in 1990, holds that the free-exercise clause prohibits only those laws that are specifically directed to religious practice.

The classic statement of the broad conception is found in SHERBERT V. VERNER (1963). In this case, the Court required the state of South Carolina to pay unemployment compensation benefits to a Seventh-Day Adventist notwithstanding her refusal to accept available jobs that would have required her to work on Saturday, her Sabbath. According to the Court, denial of benefits was tantamount to a fine for following the tenets of her religion. Since *Sherbert*, the Court has required states to pay unemployment compensation to others whose religious tenets conflicted with the requirements of available employment: to a Jehovah's Witness who would not work on armaments, in THOMAS V. INDIANA REVIEW BOARD (1981); to a convert to the Seventh-Day Adventist Church, in *Hobbie v. Unemployment Appeals Commission* (1987); and to a Christian who would not work on Sunday, in FRAZEE V. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY (1989). In *Frazee*, the Court unanimously held that the claimant was entitled to benefits, even though his belief was not mandated by the particular religious denomination of which he was a member. The decision thus confirmed that the right of religious liberty extends to all sincerely held religious convictions and not just to those of established denominations.

In years immediately following *Sherbert*, the Court extended free-exercise protection to other conflicts between religious conscience and civil law, including compulsory education above the eighth grade, in WISCONSIN V. YODER (1972), and jury duty, in *In re Jennison* (1963). After 1972, however, the Court turned aside every claim for a free-exercise exemption from a facially neutral law, outside the narrow context of unemployment compensation. Particularly noteworthy examples included GOLDMAN V. WEINBERGER (1986), in which the Court upheld an Air Force uniform requirement that prevented an Orthodox Jew from wearing his skullcap (yarmulke) while on duty indoors; *Tony Susan Alamo Foundation v. Secretary of Labor* (1985), in which the Court upheld imposition of minimum-wage laws on a religious community in which the members worked for no pay; and LYNG V. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION (1988), in which the court allowed construction of a logging road through National Forest lands sacred to certain northern Californian Indian tribes, even though the road would "virtually destroy the Indians' ability to practice their religion."

In each of these cases, the Court either held that the "compelling interest" test of *Sherbert* had been satisfied or that there were special circumstances making that test inappropriate to the particular case. Thus, during this period, the formal legal doctrine sounded highly protective of the rights of religious conscience, but in practice, the government almost always prevailed.

In 1990, the Court abandoned the compelling-interest test in EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990), holding that "the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." The *Smith* case involved the sacramental use of peyote by members of the Native American Church. Although twenty-three states and the federal government specifically exempt Native American Church ceremonies from the drug laws, Oregon does not. The Supreme Court held that the free-exercise clause does not require an exemption.

After *Smith*, the only laws or governmental practices that can be challenged under the free-exercise clause are those in which this clause applies "in conjunction with other constitutional protections," such as cases involving free speech or childrearing, or those in which the law is "specifically directed at their religious practice." Thus, laws discriminating against religion as such would be subject to constitutional challenge. Such cases are unusual in the United States. The only example in recent decades was *McDaniel v. Paty* (1978), which involved a Tennessee law barring members of the clergy from service in the state legislature or a state CONSTITUTIONAL CONVENTION. Because Tennessee had singled out a religious class for a special civil disability, its statute was struck down. Another case of discrimination against religion was WIDMAR V. VINCENT (1981), in which a public university attempted to bar student religious groups from campus facilities. *Widmar*, however, was decided under the free-speech clause, not the free-exercise clause. Except for *McDaniel* and *Widmar*, almost every free-exercise case to come before the Supreme Court involved an ostensibly neutral law of general applicability, now resolved under *Smith* without inquiry into the strength of the governmental purpose.

The debate between the broad and narrow readings of the free-exercise clause goes back even before the proposal and ratification of the First Amendment from 1789 to 1791. JOHN LOCKE and THOMAS JEFFERSON both apparently opposed exemptions; JAMES MADISON favored them, at least in some circumstances. The same issue arose under several of the STATE CONSTITUTIONS, yielding conflicting results. The majority of the state constitutions adopted before the First Amendment contained language that suggests the broad reading. Georgia, for example, guaranteed that "[a]ll persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State" (Georgia Constitution of 1777, Article LVI). Although it is perilous to draw firm conclusions from abstract legal language, the "peace and safety" proviso would appear to be unnecessary unless the free-exercise guarantee were understood to entail some exceptions from otherwise valid laws. Moreover, in actual practice, conflicts between minority religious tenets and general law in colonial and preconstitutional America were not infrequently resolved by crafting exemptions. Examples included exemptions from oath requirements and from military conscription. The evidence, however, is thin because eighteenth-century America gave rise to few conflicts between religious and civil dictates.

If the narrow reading of the free-exercise clause announced in *Smith* remains in force, it will cause major changes in the constitutional rights both of religious individuals and of institutions. It is not uncommon for minority religious practices to conflict with "generally applicable" rules or regulations, and henceforth, any relief from such conflicts must come from the legislatures. Some religious groups—those more numerous or politically powerful—will be able to protect their interests in the political process; some will not. The Supreme Court commented in *Smith*, "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself."

For many years, some Justices maintained that laws or government policies that exempted religious organizations or religiously motivated individuals from laws applied to others were themselves suspect under the establishment clause. For example, Justice JOHN MARSHALL HARLAN, in the CONSCIENTIOUS OBJECTION cases during the VIETNAM WAR, concluded, in *Welsh v. United States* (1970), that it would be unconstitutional to recognize religious objections to military service without also recognizing nonreligious conscientious objection. More recently, the Court, in WALLACE V. JAFFREE (1985), struck down state efforts to accommodate the religious need of some school children for voluntary prayer through an officially declared moment of silence, and in THORNTON V. CALDOR, INC. (1985), the Court invalidated a statute that required private employers to honor the needs of Sabbath observers in determining days off.

In *Corporation of Presiding Bishop v. Amos* (1987), however, the Court unanimously upheld a federal statute exempting religious organizations from the prohibition on discrimination on the basis of religion in employment. The Court reasoned that it is permissible for the government to remove government-imposed obstacles to the free exercise of religion, even if, in some sense, this gives preferential treatment to religious organizations. And in TEXAS MONTHLY, INC. V. BULLOCK (1989), when a fragmented Court struck down a Texas law exempting religious magazines from sales tax, the plurality was careful to note that benefits conferred exclusively on religious organizations are constitutionally permissible if they "would not impose substantial burdens on nonbeneficiaries" or if they "were designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause."

Thus, although individuals or religious bodies can no longer challenge generally applicable government action under the free-exercise clause, the courts have also become more likely to uphold legislation designed to accommodate religious exercise.

MICHAEL W. MCCONNELL
(1992)

(SEE ALSO: *Board of Education of Westside Community Schools v. Mergens; Equal Access; Lemon Test; Religion in Public Schools; Religious Fundamentalism; Separation of Church and State.*)

Bibliography

LAYCOCK, DOUGLAS 1986 A Survey of Religious Liberty in the United States. *Ohio State Law Journal* 47:409–451.

LUPU, IRA C. 1989 Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion. *Harvard Law Review* 102:933–990.

MCCONNELL, MICHAEL W. 1990 The Origins and Historical Understanding of Free Exercise of Religion. *Harvard Law Review* 103:1409–1517.

## RELIGIOUS LIBERTY
### (Update 2)

Religious liberty in a broad sense—the liberty of persons to make decisions about religious matters—is central to both concepts in the FIRST AMENDMENT's religion provision, free exercise and nonestablishment. The ESTABLISHMENT CLAUSE secures a person's liberty to reject or refrain from religious activity. But religious liberty in a stricter, positive sense—the liberty to follow religion and engage in religious activity—is the particular concern of the free exercise clause and, where the religious activity involves expression, the FREEDOM OF SPEECH guarantee as well.

The Supreme Court has upheld strong free speech protection for citizens' religious expression. Several recent decisions forbid the government to exclude the speech of private individuals or groups from a public institution or PUBLIC FORUM solely because the speech is religious in content, including LAMB'S CHAPEL V. CENTER MORICHES SCHOOL DISTRICT (1993), CAPITOL SQUARE REVIEW AND ADVISORY BOARD V. PINETTE (1995), and ROSENBERGER V. RECTOR & VISITORS OF UNIVERSITY OF VIRGINIA (1995).

Sharp controversy continues, however, over the constitutional protection of religious activity that is primarily conduct rather than speech. One narrower view holds that government has power to punish or restrict religiously motivated conduct as long as it does not single it out; that is, the free exercise clause gives religious believers no protection from laws that apply generally to certain conduct. The Court adopted this view—with some potentially significant limits and exceptions—in EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990), holding that a state could apply its "generally applicable" criminal law against peyote use to Native American religious believers who used the drug in their worship services.

A broader view holds that the free exercise of religion requires government to have a strong reason for substantially restricting religious conduct, even when the restriction comes through a law that applies generally. This view, which held sway in the Court from 1963 into the late 1980s, would require the government to accommodate, or exempt, sincere religious practice unless the reason for restricting the practice was important or even "compelling" (the language of SHERBERT V. VERNER (1963) and WISCONSIN V. YODER (1972)).

According to the pro-accommodation view, the free exercise clause recognizes that religious believers claim a duty to a power outside (or above) the state—a belief prevalent at the time of the founding and enunciated, for example, in JAMES MADISON'S *Memorial and Remonstrance Against Religious Assessments* (1785)—and such a competing allegiance is infringed as much by a general law as by one aimed at religion. Moreover, with today's increase in both government regulation and RELIGIOUS DIVERSITY, most instances of government suppression of religious exercise will result from general laws rather than deliberate discrimination.

Opponents answer that ACCOMMODATION OF RELIGION in the form of exemptions from general laws wrongly favors religious motives over other motives for acting. They add that religious practice cannot be entirely unregulated (consider, for example, ritual human sacrifice), and say that there is no principled line for distinguishing laws that are sufficiently important to override religious freedom from laws that are not. Some opponents go so far as to claim that religious exemptions are constitutionally prohibited; others simply say they are not constitutionally required. *Smith* took the latter view, suggesting that legislatures could exempt religion but did not have to do so.

Since *Smith*, religious liberty issues have fallen into two categories. The first is how much protection for religious conduct remains under the free exercise clause as interpreted narrowly in *Smith*. The Court's standard left open the question of when a law is "generally applicable" and thus immune from challenge. Nearly every law contains some exception (for example, small-business exemptions from commercial regulations, or medicinal-use exceptions to drug laws). Exempting religious conduct whenever any secular exception exists would vindicate religious exercise as a PREFERRED FREEDOM, but it would also mean that *Smith* had little effect in expanding government's discretion. In CHURCH OF LUKUMI BABALU AYE, INC. V. CITY OF HIALEAH (1993), the Court applied *Smith* to invalidate laws that prohibited almost nothing but religiously motivated conduct—in that case, laws against animal killing that exempted numerous forms of killing (hunting, fishing, even kosher slaughter) but covered the ritual sacrifices of the Santería sect. But when a law contains some exceptions but still applies widely, the result under *Smith* is uncertain.

A related source of protection might be found in *Smith*'s suggestion that when a highly discretionary stan-

dard, leading to differing results in particular cases, is applied to restrict religion, there must be a compelling reason for the result. Finally, *Smith* indicated that when religious conduct implicates another constitutionally recognized interest (such as free speech or parents' control over their children's upbringing), the "hybrid" of the two rights should trigger strict JUDICIAL REVIEW. The scope of this argument is uncertain; but at the least, courts should give careful attention when religious persons or groups assert other constitutional rights such as speech or the FREEDOM OF ASSOCIATION (as is common, for example, in cases involving the selection and discipline of clergy).

The second major religious liberty question after *Smith* has been the authority of other actors, especially legislatures, to protect religious conduct from generally applicable laws where the federal courts under *Smith* would not. Many such accommodations appear in particular federal and state statutes, such as exemptions of religious entities from some ANTIDISCRIMINATION LEGISLATION and exemptions of faith-healing practices from some child-endangerment laws. Such exemptions have been challenged as establishments because they give religious conduct special protection. It is one thing to say (as *Smith* does) that legislatures are not required to accommodate religion; it is quite another, and far more restrictive of religious liberty, to say that legislatures are not even permitted to accommodate.

The Court has upheld statutory accommodations in principle, but has disapproved them in some instances. *Smith*, with its emphasis on legislative discretion, expressly invited statutory exemptions; and decisions such as *Corporation of Presiding Bishop of the Church of Latter-Day Saints v. Amos* (1987) state that leaving religion unregulated does not necessarily advance religion to an unconstitutional degree. But other decisions have struck down religious exemptions as excessive favoritism for religion, especially where the measure shifted significant burdens to nonbelievers—for example, a tax exemption in *Texas Monthly v. Bullock* (1989) and a blanket exemption from Sabbath work in *Estate of Thornton v. Caldor* (1985). No explicit majority standard has emerged for this question. The most recent decision, BOARD OF EDUCATION OF KIRYAS JOEL SCHOOL DISTRICT V. GRUMET (1994), invalidated a New York school district created to accommodate the religious needs of children in one insular Hasidic Jewish sect, but it suggested again that accommodations that did not explicitly single out one faith would (at least sometimes) be permissible.

Meanwhile, Congress and state legislatures pursued another response to *Smith:* LEGISLATION not to protect religion from a particular law, but to restore the pre-*Smith*, religion-protective general standard for all claims. Under the RELIGIOUS FREEDOM RESTORATION ACT (RFRA), passed by Congress in 1993, all federal and state laws that "substantially burden" religious exercise once again had to be justified by a "compelling governmental interest." Some states have also passed their own statutes ("mini-RFRAs") protecting religious conduct against all but compelling interests.

Both the congressional RFRA and the state statutes will probably be challenged as excessively favoring and thus establishing religion—although more likely in particular applications than on their face. But RFRA also faced questions whether it fell within Congress's ENUMERATED POWERS. The Court in *City of Boerne v. Flores* (1997) held that insofar as RFRA overrode state and local laws, it exceeded the power of Congress to enforce the provisions of the FOURTEENTH AMENDMENT against states. Congress, the Court said, was limited to enforcing free exercise as the Court had interpreted it (the *Smith* rule), not the more religion-protective standard of RFRA.

After *Boerne*, RFRA's more religion-protective standard still may apply to federal laws, where the statute can be seen as simply an exercise of the power of Congress to amend each law it has enacted. Opponents claim in response that even as to federal laws, RFRA unconstitutionally invades the province of the judicial branch to declare general standards for religious liberty. The tension between Court and Congress over the proper general scope of religious liberty may continue for some time. Meanwhile, some state constitutions and mini-RFRA statutes reflect the more protective standard of religious liberty.

THOMAS C. BERG
(2000)

Bibliography

BERG, THOMAS C. 1995 Slouching Toward Secularism: A Comment on *Kiryas Joel School District v. Grumet*. *Emory Law Journal* 44:433–499.

EISGRUBER, CHRISTOPHER L. and SAGER, LAWRENCE G. 1997 Congressional Power and Religious Liberty After *City of Boerne v. Flores*. *Supreme Court Review* 1997:79–139.

HAMBURGER, PHILIP A. 1992 A Constitutional Right of Religious Exemption: An Historical Perspective. *George Washington Law Review* 60:915–948.

LAYCOCK, DOUGLAS 1990 The Remnants of Free Exercise. *Supreme Court Review* 1990:1–68.

LUPU, IRA C. 1992 The Trouble With Accommodation. *George Washington Law Review* 60:743–781.

MCCONNELL, MICHAEL W. 1990 The Origins and Historical Understanding of Free Exercise of Religion. *Harvard Law Review* 103:1409–1517.

## RELIGIOUS SCHOOLS

See: Government Aid to Religious Institutions

# RELIGIOUS SYMBOLS IN PUBLIC PLACES

In 1984 the Supreme Court, in LYNCH V. DONNELLY, rejected a constitutional challenge to the display of a publicly financed nativity scene—a crèche—in a private park in Pawtucket, Rhode Island. Chief Justice WARREN E. BURGER's decision for a 5–4 majority evoked deep resentment in many quarters, particularly among non-Christians who opposed the use of public funds to depict an event—the birth of Jesus to the Virgin Mary—that is a central tenet of Christianity. Moreover, the decision appeared to be a sharp departure from the Court's establishment clause precedents, particularly LEMON V. KURTZMAN (1971), in which the Court set forth the three "tests" that the ESTABLISHMENT CLAUSE imposes on government actions involving religion: "The statute must have a secular legislative purpose . . . its principal or primary effect must be one that neither advances nor inhibits religion . . . [and] the statute must not foster "an excessive government entanglement with religion."

Conceding that the crèche was a religious symbol, the majority opinion nevertheless perceived the Pawtucket display as essentially a secular recognition of the historical origins of the Christmas season and therefore a permissible accommodation to religion. The Chief Justice's opinion observed that the display contained a Santa Claus, sleigh, candy-striped poles, and some reindeer. Critics chided the Court for creating a "two-reindeer" rule and, more seriously, for demonstrating extreme insensitivity to non-Christians.

As lower courts and local governments addressed the questions that *Lynch v. Donnelly* left unanswered, they were guided in large part by Justice SANDRA DAY O'CONNOR's concurring opinion in which she reformulated the three-part LEMON TEST by emphasizing that the "purpose" and "effect" prongs of the test are designed to prevent government practices that endorse or disapprove of religion. "Endorsement," she wrote, "sends a message to adherents that they are outsiders, not full members of the political community." Based on this interpretation of *Lemon*, Justice O'Connor concluded that the purpose of the crèche was not to endorse Christianity but to celebrate a public holiday of secular significance, notwithstanding its religious aspect. As for the effect of the crèche, its "overall holiday setting . . . negates any message of endorsement" of the religious aspect of the display. Justice O'Connor's "endorsement" test provided a more focused approach than the open-ended emphasis on "accommodation" in Chief Justice Burger's opinion and has been widely followed in subsequent cases even by Justices who disagreed with her conclusion that the Pawtucket crèche was constitutional.

After five years of extensive litigation and public controversy, the Supreme Court revisited the religious-display issue in 1989 when, in COUNTY OF ALLEGHENY V. AMERICAN CIVIL LIBERTIES UNION, it ruled that (1) a privately financed crèche, without holiday trappings and embellished with a banner proclaiming "Gloria in Excelsis Deo," was unconstitutional as displayed in the main staircase of a county courthouse; and (2) an eighteen-foot menorah situated outside a county office building was constitutional as part of a display that featured the menorah alongside a forty-five-foot Christmas tree and a "Salute to Liberty" sign reminding viewers that "We are the keepers of the flame of liberty and our legacy of freedom." In light of the retirement of Justice WILLIAM J. BRENNAN in July of 1990, the division on the Court in the *Allegheny* case was significant. Four Justices (WILLIAM H. REHNQUIST, BYRON R. WHITE, ANTONIN SCALIA, and ANTHONY M. KENNEDY) would have upheld both displays because there was no governmental effort to coerce or proselytize, and three Justices (Brennan, THURGOOD MARSHALL, and JOHN PAUL STEVENS) found both displays unconstitutional. Thus, the votes of Justices HARRY A. BLACKMUN and O'Connor produced majorities upholding one display (the menorah) and invalidating the other (the crèche).

The Pawtucket crèche posed a risk of government endorsement because it was publicly financed. The Allegheny County displays, although privately financed, posed a similar danger because they were located in or near government buildings. By eschewing a clear test that would bar all government-financed displays with religious messages, or privately financed displays adjacent to government buildings, certain Justices on the Court were compelled in both cases to emphasize the design of the display as the key element of constitutionality. It was predictable, therefore, that governments would almost certainly invite litigation if they paid for holiday displays containing religious symbols or placed them in front of or in government buildings. Such displays require a fact-specific evaluation to determine whether the religious message has been sufficiently mixed with the secular holiday observance to avoid the overall impression of governmental endorsement of religion. A subject as intensely personal as religion is likely to evoke strong reactions if religious displays are constructed with public funds or if they are placed in locations that give them some type of official status.

These disputes, and the attendant divisiveness, can be minimized, however, if private groups, rather than the government, pay for holiday displays that contain religious symbols and if such displays are placed in traditional forums, like parks and plazas, that are normally used for speeches, displays, or other expressions of opinion. Indeed, the free-speech provisions of the FIRST AMENDMENT

probably protect the right of a private group to display a crèche or menorah in a PUBLIC FORUM, even without holiday trappings, as the symbolic expression of the celebration of the holiday season.

Since the Supreme Court's decision in *Allegheny County*, there is evidence that local communities have indeed adopted policies that avoid the divisiveness that the establishment clause was intended to prevent. They have relied increasingly on private groups to sponsor religious holiday displays and have selected locations that are not adjacent to public buildings such as city halls and courthouses. This development has the salutary effect of compelling governments, private parties, and courts to consider the nature of the forum rather than the numbers of reindeer, the prominence of Santa Claus, or the relative sizes of a menorah and a Christmas tree.

If governments desire to participate more actively in celebrating the Christmas season, the traditional Christmas tree provides a constitutionally acceptable alternative. Christmas trees have acquired a sufficiently secular meaning as a symbol of the holiday season so that their display does not endorse Christianity regardless of who bears the cost or wherever the tree may be located. If communities display understanding and restraint, the Constitution need not prevent the Christmas holiday season from serving as an occasion for uniting Americans rather than dividing them along religious lines.

NORMAN REDLICH
(1992)

Bibliography

DORSEN, NORMAN and SIMS, CHARLES 1985 The Nativity Scene Case; An Error of Judgment. *University of Illinois Law Review* 1985:837–868.

REDLICH, NORMAN 1984 "Nativity Ruling Insults Jews." *New York Times*, March 26, 1984.

VAN ALSTYNE, WILLIAM 1984 Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on *Lynch v. Donnelly*. *Duke University Law Journal* 1984:770–787.

## RELIGIOUS TEST FOR PUBLIC OFFICE

As early as the seventeenth century ROGER WILLIAMS expressed his dissent from the common practice, inherited from England, of imposing a religious test for public office. However, by the beginning of the eighteenth century even Rhode Island had adopted the pattern prevailing among the other colonies and had enacted a law that limited CITIZENSHIP and eligibility for public office to Protestants.

Most liberal of these was Pennsylvania's law, which required a belief that God was "the rewarder of the good and punisher of the wicked." At the other extreme was that of North Carolina, which disqualified from office any one who denied "the being of God or the truth of the Protestant religion, or the divine authority of either the Old or New Testament."

After the Revolutionary War, however, the states began the process of disestablishment, including the elimination of religious tests. The 1786 VIRGINIA STATUTE OF RELIGIOUS LIBERTY, for example, asserted that "our CIVIL RIGHTS have no dependence on our religious opinions," and "the proscribing of any citizen as unworthy of being called to office of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a NATURAL RIGHT." The CONSTITUTIONAL CONVENTION OF 1787 unanimously adopted the clause of Article VI providing that "no religious Test shall ever be required as a qualification to any Office or public Trust under the United States."

The prohibition applies only to federal offices, and some states having religious tests in their constitutions or laws did not repeal them but contented themselves with limiting them to belief in the existence of God. One of these was Maryland, where an otherwise fully qualified appointee to the office of notary public was denied his commission for the office for refusing to sign the oath.

In TORCASO V. WATKINS (1961) the Supreme Court ruled the denial unconstitutional, relying upon both the no-establishment and the free exercise clauses of the FIRST AMENDMENT. As to the former, it asserted that the clause does not bar merely preferential treatment of one religion over others (although even such limited interpretation would require invalidation since the oath preferred theistic over nontheistic faiths such as "Buddhism, Taoism, Ethical Culture and Secular Humanism and others") but also preferential treatment of religion as against nonreligion. The opinion also invoked the free exercise clause in concluding that the provision invades "freedom of religion and belief."

The converse of religious tests for public office, reflecting a prevalent anticlericalism, was the disqualification of clergymen from serving in public office. A majority of the states had such provisions when the Constitution was written, but in *McDaniel v. Paty* (1978) the Supreme Court held such laws violative of the First Amendment's free exercise clause.

LEO PFEFFER
(1986)

Bibliography

PFEFFER, LEO (1953) 1967 *Church, State and Freedom*. Boston: Beacon Press.

——— 1975 *God, Caesar and the Constitution.* Boston: Beacon Press.

## RELIGIOUS USE OF STATE PROPERTY

In WIDMAR V. VINCENT (1981) the Supreme Court ruled that a state university's exclusionary policy in respect to students' use for prayer or religious instruction of premises generally available to students for nonreligious use violated the FIRST AMENDMENT's guarantee of FREEDOM OF SPEECH.

Earlier, relevant decisions, mostly involving Jehovah's Witnesses, were handed down before the Court ruled in CANTWELL V. CONNECTICUT (1940) that the free exercise of religion clause, like the free speech clause, was applicable to the states no less than to the federal government. Quite naturally, therefore, it applied to religious meetings and conversionary efforts the CLEAR AND PRESENT DANGER (later COMPELLING STATE INTEREST) test formulated in SCHENCK V. UNITED STATES (1919) in respect to political speech and meetings and continued to do so after *Cantwell.*

In *Jamison v. Texas* (1943) the Court rejected a contention that a city's power over streets and parks is not limited to making reasonable regulations for the control of traffic and maintenance of order, but encompasses power absolutely to prohibit use for communication of ideas, including religious ones. No doubt, it ruled in NIEMOTKO V. MARYLAND (1951), a municipality may require a permit to hold religious meetings or, as in *Cox v. New Hampshire* (1941), public parades or processions, in streets and parks, but only to regulate time and place, and it may not refuse a permit by reason of the meeting's content, even if it includes verbal attacks upon some religions. This is so, the Court ruled in KUNZ V. NEW YORK (1941), even where prior missionary meetings had resulted in disorder because of the minister's scurrilous attacks on Roman Catholicism and Judaism, because the added cost of providing police to prevent possible violence does not justify infringement upon First Amendment rights.

Nor, as the Court held in *Schneider v. Irvington* (1939), may a municipality prohibit distribution of leaflets, including religious ones, on public streets and parks in order to prevent littering; the constitutional way to avoid littering is by arresting litterers, rather than restricting rights secured by the amendment. For the same reason, it reversed the conviction of a Jehovah's Witness who rang door bells to distribute religious handbills, in violation of an ordinance (enacted in part to prevent criminal entry) prohibiting ringing of doorbells or knocking on doors to distribute handbills.

The Court, in *Widmar,* did not hold that a state university must provide premises for student prayer and religious instruction, but only that it may not exclude such use if premises are provided for other noncurricular purposes. It is hardly likely that it intended thereby to overrule MCCOLLUM V. BOARD OF EDUCATION (1948), wherein it outlawed religious instruction in public schools even where limited to pupils whose parents consent thereto. The distinction between the two situations lies in the fact that *McCollum* involved students of elementary and secondary school ages, whereas *Widmar* concerned students of college age who are generally less likely to be unduly influenced by on-premises prayer meetings.

In LYNCH V. DONNELLY (1984) the Court upheld the use of municipal funds to finance the cost of erecting and illuminating a life-size nativity scene in Pawtucket, Rhode Island, as part of an annual Christmas display. (Although the display was on private property, the Court made it clear that the result would have been the same had it been on town-owned property.) The Court based its decision on the recognition that Christmas had become a national secular holiday in American culture.

LEO PFEFFER
(1986)

Bibliography

PFEFFER, LEO 1985 *Religion, State and the Burger Court.* Buffalo, N.Y.: Prometheus.

## REMAND

A remand is an appellate court's act in returning a case to a lower court, usually unnecessary when the appellate court affirms the lower court's judgment. When the Supreme Court reverses or vacates a state court judgment, it customarily remands for "proceedings not inconsistent" with the Court's decision.

KENNETH L. KARST
(1986)

## REMEDIES

See: Constitutional Remedies; Exhaustion of Remedies

## REMOVAL OF CASES

When a civil or criminal case within CONCURRENT federal and state JURISDICTION is filed in state court, Congress may choose to offer the parties the right to remove it from state to federal court. Indeed, removal is the only way to provide for ORIGINAL federal JURISDICTION in some cases, such as those in which a FEDERAL QUESTION appears for the first

time in the defendant's answer to the complaint. Because federal removal jurisdiction is treated as derivative from state jurisdiction, a suit improperly filed in state court may not be removed.

Congress has employed removal ever since the JUDICIARY ACT OF 1789. The device serves two principal purposes. First, removal can equalize the position of plaintiffs and defendants with respect to choice of forum. For example, federal statutes allow defendants to remove most DIVERSITY JURISDICTION and federal question cases that the plaintiff could have brought initially in federal court. Second, removal can provide access to a more sympathetic federal forum for defendants who are asserting federal rights as defenses. For example, statutes permit federal officers and others acting under federal authority to remove suits brought against them for conduct within the scope of that authority. Another statute authorizes removal of suits by individuals whose rights under federal equal rights laws cannot be enforced in state court. (See CIVIL RIGHTS REMOVAL.)

Federal statutory law provides that if a removable claim is joined in the same suit with a nonremovable claim, the entire suit may be removed if the two claims are "separate and independent." If the nonremovable claim is sufficiently separate to satisfy the statutory requirement, however, it may not be within the federal court's PENDENT or ANCILLARY JURISDICTION. In such cases, the statute resolves the constitutional problem by granting the federal court discretion to remand the nonremovable claim to state court.

CAROLE E. GOLDBERG-AMBROSE
(1986)

Bibliography

COHEN, W. 1961 Problems in the Removal of a "Separate and Independent Claim or Cause of Action." *Minnesota Law Review* 46:1–41.

## REMOVAL POWER, PRESIDENTIAL

See: Appointing and Removal Power, Presidential

## *RENDELL-BAKER v. KOHN*

See: *Blum v. Yaretsky*

## RENDITION

See: Fugitive from Justice; Fugitive Slavery

## *RENTON (CITY OF) v. PLAYTIME THEATRES*
475 U.S. 41 (1986)

Renton, Washington, passed a ZONING ordinance that prohibited adult theaters from locating within 1,000 feet of any residence, church, park, or school. The owners of two adult theaters filed suit, claiming the ordinance violated the FIRST AMENDMENT. The Supreme Court disagreed, holding 7–2 that the ordinance was a constitutional response to the serious social problems created by adult theaters.

Writing for six members of the majority, Justice WILLIAM H. REHNQUIST argued that, even though the ordinance was clearly directed at theaters showing a certain kind of film, the law was properly analyzed as a "content neutral" regulation because it was "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theatres on the surrounding community." According to Rehnquist, because the ordinance left 520 acres of land on which adult theaters could still locate, it represented a valid time, place, and manner regulation of the type upheld by the Court in many other "content neutral" cases. Rehnquist did not dispute that the zoning restriction might impose financial hardship on adult theaters, but said the First Amendment does not compel the state "to ensure that adult theaters, or any other kinds of speech-related businesses . . . will be able to obtain sites at bargain prices."

In dissent, Justice WILLIAM J. BRENNAN objected to the majority's classification of the ordinance as "content neutral." But even under that standard, the ordinance was still unconstitutional according to Brennan because it was not narrowly tailored to fit a significant governmental interest.

JOHN G. WEST, JR.
(1992)

(SEE ALSO: *Young v. American Mini Theatres, Inc.*)

## REPEAL ACT

See: Civil Rights Repeal Act

## REPORTER'S PRIVILEGE

The reporter's privilege issue posed in BRANZBURG V. HAYES (1972) is a microcosm of the difficulties of both journalism and law in accommodating traditional procedures and principles to the development of widespread disenchantment and disobedience in American society. For knowledge about dissident groups we must depend on the

efforts of journalists, efforts that will be impeded if the subjects believe that reporters' information will become available to law enforcement agencies. Yet the legal system has important interests in prompt detection and prosecution of crimes. Anglo-American judges have long boasted that no person is too high to escape the obligation of testifying to a GRAND JURY. This obligation is an important guarantee of equality in the operation of criminal law. Thus, courts have historically been unsympathetic to claims that certain kinds of information should be privileged from disclosure before the grand jury. Only the RIGHT AGAINST SELF-INCRIMINATION and the attorney-client privilege have achieved general recognition from American courts.

In *Branzburg,* three cases joined for decision, three reporters had declined to provide requested information to a grand jury. The reporters argued for a special privilege, arguing that compulsory testimony would significantly diminish the flow of information from news sources.

The opinions of a closely divided Supreme Court spanned the spectrum of possible FIRST AMENDMENT responses. Justice BYRON R. WHITE's majority opinion rejected the notion of a journalist's claim of privilege, calling the journalists' fear speculative. Even assuming some constriction in the flow of news, White argued, the public interest in investigating and prosecuting crimes reported to the press outweighs that in the dissemination of news about those activities when the dissemination rests upon confidentiality.

After seemingly rejecting both the theoretical and the empirical arguments for a journalist's privilege, the majority opinion concluded with an enigmatic suggestion that the door to the privilege might not be completely closed. "Newsgathering," the majority noted obliquely, "is not without its First Amendment protection": "[G]rand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification."

Moreover, the majority opinion made clear that the subject of reporter's privilege is an appropriate one for legislative or executive consideration. It noted that several states already had passed SHIELD LAWS embodying a journalist's privilege of the kind sought.

In a brief but important concurring opinion, Justice LEWIS F. POWELL emphasized that "we do not hold that . . . state and federal authorities are free to 'annex' the news media as an investigative arm of government." No "harassment" of newsmen will be tolerated, Powell continued, if a reporter can show that the grand jury investigation is "not being conducted in good faith" or if he is called upon for information "bearing only a remote and tenuous relationship to the subject of the investigation." Lower courts have generally followed the Powell approach to claims of reporter's privilege.

Four Justices dissented. For Justice WILLIAM O. DOUGLAS, the First Amendment offered immunity from appearing or testifying before a grand jury unless the reporter were implicated in a crime. Justice POTTER J. STEWART, for himself and Justices WILLIAM J. BRENNAN and THURGOOD MARSHALL, wrote a careful but impassioned dissent. From the right to publish Stewart deduced corollary right to gather news. This right, in turn, required protection of confidential sources. Stewart recognized that the interest of the government in investigating crime could properly outweigh the journalist's privilege if the government could show that the information sought were "clearly relevant to a precisely defined subject of governmental inquiry"; that the reporter probably had the relevant information; and that there were no other available source for the information.

Later decisions have uniformly rejected claims of special privilege for reporters in other factual settings. In ZURCHER V. STANFORD DAILY (1978) the Supreme Court denied that the First Amendment gave any special protection to newsrooms against police searches and seizures. And in HERBERT V. LANDO (1979) the Court rejected a claim that journalists should be privileged not to respond to questions about the editorial processes or their subjective state of mind concerning stories involved in libel actions. Thus the Court has left the question of reporter's privilege to legislative treatment through shield laws and to prosecutorial discretion.

BENNO C. SCHMIDT, JR.
(1986)

Bibliography

BLASI, VINCENT 1971 The Newsman's Privilege: An Empirical Study. *Michigan Law Review* 70:229.

## REPORT OF THE CONFERENCE OF CHIEF JUSTICES ON FEDERAL-STATE RELATIONSHIPS
(August 23, 1958)

By the late 1950s resentment grew among many state officials over the Supreme Court's increasing monitoring of state policies and activities. The Conference of State Chief Justices, with Southerners among the prime movers, issued a long critique of the Supreme Court's rulings, condemning the body's activism, "policy making," and departures from STARE DECISIS. The report chiefly criti-

cized the Court for: increasing national power at the expense of the states through the use of the GENERAL WELFARE CLAUSE, FEDERAL GRANTS-IN-AID, and the doctrine of PREEMPTION; and curtailing state authority in state LEGISLATIVE INVESTIGATIONS, public employment, admission to the bar, and administration of the criminal law. The report called for rebuilding a strong FEDERALISM; the Court's curtailment of its own policymaking; and restoration of the "great principle of distribution of powers among the various branches of government and between levels of government—the crucial base of our democracy." Court defenders responded by pointing to the need for uniform national constitutional standards, particularly in THE CIVIL RIGHTS area, maintaining the "democracy" of JUDICIAL REVIEW.

PAUL L. MURPHY
(1986)

Bibliography

PRITCHETT, C. HERMAN 1961 *Congress versus the Supreme Court, 1957–1961.* Minneapolis: University of Minnesota Press.

## REPRESENTATION

Representation is standing or acting in the place of another, normally because a group is too large, dispersed, or uninformed for its members to act on their own. It is not necessarily democratic; nor is it necessarily connected to the idea of government by consent. Democratic representation, based on the concept that governmental legitimacy rests on the reasoned assent of individual citizens, dates from the seventeenth century.

This concept has long been taken seriously in the United States. Colonial assemblies won as much domestic legislative power in the fifty years before the AMERICAN REVOLUTION as Parliament had won in 500, with broader voting constituencies than Parliament's and more conviction that the representatives should speak for their local constituencies rather than for the nation at large. Both this "inner revolution" and the outward break with England asserted a NATURAL RIGHT to government by consent of the governed and treated consent as more than a legal fiction. "No TAXATION WITHOUT REPRESENTATION" was the slogan asserting this right. A guarded commitment to majority rule has helped put the right into practice. As THOMAS JEFFERSON declared in his first inaugural address, "though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable."

The Constitution put certain restraints on majority rule: it banned some acts outright; it divided its majorities by SEPARATION OF POWERS and FEDERALISM; and it permitted an electorate that was restricted mostly to white male landowners. Yet the Constitution was democratic for its day; it has since expanded both the number of elective offices and the franchise; and its very barriers to majority whim, requiring the creation of broad, stable coalitions to rule, have brought about a majority rule stronger and more reasonable than might have evolved from a less fettered regime. JAMES MADISON, explaining and defending the Constitution in THE FEDERALIST, extolled the principle of representation as the device that made majority rule compatible with good government. Representation made possible the extended republic, embracing a large enough territory and population to be safe from foreign aggression and a great enough diversity of economic and other interests to minimize the danger of majority faction. Indirect self-government through a limited number of representatives required coalition-building, with diverse factions compromising their antagonistic goals. Representation also facilitated deliberation: direct democracy (exemplified by the Athenian Assembly) smacked too much of mob rule.

But the Constitution left many questions of representation unsettled. Whom, exactly, do the representatives represent? Does the representative speak for his district, state, or nation? Does he speak only for his supporters and his party, or for opponents, nonvoters, and the unfranchised as well? Does he speak for the whole people or for a coalition of interests? Answers depend on what representation is expected to accomplish and how it is structured.

There has been little agreement in American history about the goals of representation. Some, such as Jefferson and ABRAHAM LINCOLN, have argued that the purpose of the regime is to protect individual rights of liberty and equality. Others, such as JOHN C. CALHOUN, with his doctrine of concurrent majorities, have argued that protection of STATES' RIGHTS or property rights is the basic goal. Still others, such as ALEXANDER HAMILTON and STEPHEN A. DOUGLAS, have emphasized institutional stability and regularity.

Structural variation can drastically affect the quality of representation. A representative can be a symbol, a sample, an agent, or a trustee, elected directly or through intermediaries, individually or jointly accountable to a territorial or an ideological constituency. The American system, with two-party competition for single-member districts, bicameral legislatures, and separate executive branch, has had accessible representatives who speak for their local constituencies (though they are more than agents and are not bound by detailed constituent "instruction") but may be hard to unite on national issues. The British system, combining legislative and executive powers, and with disciplined national parties, has produced representatives who speak for the nation and coalesce easily on national issues but are much less accessible and at-

tentive to district interests than American representatives. Proportional representation, used by several European governments since WORLD WAR I, usually has MULTIMEMBER DISTRICTS, with seats divided by proportion of vote for each party. Proportional representation reflects public ideological variety, often with a small party for every view. By focusing on ideological issues, it tends to discourage compromise and produce weak, volatile coalitions, such as those of Weimar Germany and the Fourth French Republic.

American reformers have greatly extended the franchise without greatly changing the structure or working of government. In the Progressive era, 1880–1920, they also sought to cleanse elections of control by party and financial bosses with "good government" reforms: Australian ballot; PRIMARY ELECTIONS, INITIATIVE, REFERENDUM, and RECALL; nonpartisan civil service; nonpartisan local elections, corrupt practices acts, and weakening of the speaker's control over the HOUSE OF REPRESENTATIVES. These reforms reduced corruption but also undermined party discipline and lowered voter turnout.

Academic reformers responded to these changes in three different ways. Some called for less separation of powers and more disciplined national parties on the British model. Others wanted to make every office elective, including party, cabinet, and corporate leaders, and to make elections more "representative" with public funding, REAPPORTIONMENT, proportional representation, or quotas. Yet others called for councils of experts to take over problems that elected representatives had failed to solve.

These prescriptions have been partially fulfilled in the adoption of structural change but less so in the delivery of promised results. National power has been enlarged over state, public over private, expert over amateur, and judicial over legislative. Blacks have the right to political equality; legislative districts are equalized; public funding of presidential campaigns has been increased; presidential nomination has been made almost plebiscitary. But these reforms did not still complaints that the system was producing unrepresentative leadership. Reformers deplored most of the candidates in the reformed presidential elections of the 1970s and public turnout sank to new lows. The winning candidate in 1980 and 1984 argued that private consumer sovereignty was the truest form of democracy.

Over the years the Supreme Court, though once reluctant to take sides on POLITICAL QUESTIONS, has become an important player in the game of reform. Chief Justice JOHN MARSHALL first laid down the political question doctrine in OBITER DICTUM in MARBURY V. MADISON (1803), forbearing to "intermeddle with the prerogatives of the executive." "Questions, in their nature political," he wrote, "can never be made in this court." Chief Justice ROGER B. TANEY, in LUTHER V. BORDEN (1849), declared that the republican or representative character of state domestic government was "political in its nature" and reserved by judicial prudence—and perhaps also by constitutional mandate under the GUARANTEE CLAUSE—for resolution by the "political branches, not the judiciary." The Dorr controversy in *Luther* involved many of the same issues as BAKER V. CARR (1962), but the Court lacked the political strength, the appearance of constitutional authority, and the enforcement technique to intervene effectively.

Against the disfranchisement of blacks, prohibited on paper after 1870 by the FIFTEENTH AMENDMENT, the Court provided no lasting protection until 1944, when it ended the white primary—although it had intervened against some administrative abuses and would later intervene aggressively against franchise restrictions under both the Fourteenth and Fifteenth Amendments. Almost all other state representation questions—validity of delegations of authority, of legislative enactments, of party nomination decisions, and of initiatives and referenda—the Court found nonjusticiable.

The Court's list of nonjusticiable political questions appeared to include unequal or "malapportioned" electoral districts, especially after COLEGROVE V. GREEN (1946). But in *Baker v. Carr*, over objections from Justices FELIX FRANKFURTER and JOHN MARSHALL HARLAN that the Court was entering a "quagmire" of insoluble questions, the majority held that apportionment was not a political question and was "within the reach of judicial protection under the FOURTEENTH AMENDMENT." In REYNOLDS V. SIMS (1964), the Court proclaimed that "ONE PERSON, ONE VOTE" is the "fundamental principle" of the Constitution, applicable to both houses of state legislatures and to local and special-purpose elections—even if most of the voters involved opposed it. The principle does not, however, apply to the United States SENATE, the ELECTORAL COLLEGE, or most aspects of party organization. Nor does it seem to apply to the manipulation of effective votes through gerrymandering (see Gerrymander) and multimember districting unless these are surgically exclusive of a protectable minority, as in GOMILLION V. LIGHTFOOT (1960). *Gomillion* invalidated a law excluding from the city limits of Tuskegee, Alabama, all but four or five black voters while keeping every white voter. In a series of cases beginning with *Wright v. Rockefeller* (1965) and highlighted by UNITED JEWISH ORGANIZATIONS V. CAREY (1977) and MOBILE V. BOLDEN (1980), the Court has repeatedly refused to interfere with nonsurgical districting to the obvious disadvantage of racial or religious minorities who as individuals would have been eminently protectable against franchise discrimination. The difference between districting discrimination against groups and franchise discrimination against

individuals is that franchise discrimination is easy to remedy, but districting discrimination is not. Courts have equalized nominal votes by equal apportionment but not effective votes—votes that actually elect the voter's candidate—because there is no way short of proportional representation to equalize every group's effective vote.

Besides holding apportionment justiciable, the reapportionment cases did something more radical: they treated districting discrimination and franchise discrimination as if they were virtually interchangeable, and they invoked the EQUAL PROTECTION clause of the Fourteenth Amendment to protect a "right to vote" against "dilution" by unequal districts. But the framers of the Fourteenth Amendment had insisted that it left suffrage "exclusively under the control of the states"; construing it to grant a federal right to vote would seem to render at least five subsequent voting rights amendments, including section 2 of the Fourteenth Amendment, superfluous. This "parthenogenesis of a VOTING RIGHT," combined with an aggressive application of STRICT SCRUTINY, led to the judicial abolition of POLL TAX, property, and taxpayer qualifications on voting, and all but the shortest RESIDENCY REQUIREMENTS. It also cleared the way for the passage of the VOTING RIGHTS ACT OF 1965 and, paradoxically, gave a boost to the TWENTY-SIXTH AMENDMENT (eighteen-year-old vote)—and, possibly, to the proposed DISTRICT OF COLUMBIA REPRESENTATION AMENDMENT.

These voting rights decisions substantially aided the "inclusion process" in a formal sense. Some critics feel that this aid was a desirable end in itself; others argue that, by overriding the choices of elected representatives and creating constitutional authority *ex nihilo*, the Court has debased the vote in substance more than it has enlarged it in form. As the nation enters its third century under the Constitution, the inclusion process has been judicialized but hardly completed—and the same may be said of the ancient debate over political representation.

WARD E. Y. ELLIOTT
(1986)

Bibliography

ELLIOTT, WARD E. Y. 1975 *The Rise of Guardian Democracy: The Supreme Court's Role in Voting Rights Disputes, 1845–1969.* Cambridge, Mass.: Harvard University Press.

## REPRODUCTION AND THE CONSTITUTION

See: Abortion and the Constitution; Race, Reproduction, and Constitutional Law

## REPRODUCTIVE AUTONOMY

Commencing in 1942 in SKINNER V. OKLAHOMA, and most intrepidly in 1973 in ROE V. WADE, the Supreme Court has secured against unwarranted governmental intrusion a decision fundamental to the course of an individual's life—the decision whether to beget or bear a child. Government action in this area bears significantly on the ability of women, particularly, to plan and control their lives. Official policy on reproductive choice may effectively facilitate or retard women's opportunities to participate in full partnership with men in the nation's social, political, and economic life. Supreme Court decisions concerning BIRTH CONTROL, however, have not yet adverted to evolving sex equality-equal protection doctrine. Instead, high court opinions rest dominantly on SUBSTANTIVE DUE PROCESS analysis; they invoke basic liberty-autonomy values difficult to tie directly to the Constitution's text, history, or structure.

*Skinner* marked the first occasion on which the Court referred to an individual's procreative choice as "a basic liberty." The Court invalidated a state statute providing for compulsory STERILIZATION of habitual offenders. The statute applied after a third conviction for a FELONY "involving moral turpitude," defined to include grand larceny but exclude embezzlement. The decision ultimately rested on an EQUAL PROTECTION ground: "Sterilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination." Justice WILLIAM O. DOUGLAS's opinion for the Court, however, is infused with substantive due process tones: "We are dealing here with legislation which involves one of the basic CIVIL RIGHTS of man. Marriage and procreation are fundamental to the very existence and survival of the race." Gerald Gunther has noted that, in a period marked by a judicial hands-off approach to economic and social legislation, *Skinner* stood virtually alone in applying a stringent review standard favoring a "basic liberty" unconnected to a particular constitutional guarantee.

Over two decades later, in GRISWOLD V. CONNECTICUT (1965), the Court grappled with a state law banning the use of contraceptives. The Court condemned the statute's application to married persons. Justice Douglas's opinion for the Court located protected "zones of privacy" in the penumbras of several specific BILL OF RIGHTS guarantees. The law in question impermissibly intruded on the marriage relationship, a privacy zone "older than the Bill of Rights" and "intimate to the degree of being sacred."

In EISENSTADT V. BAIRD (1972) the Court confronted a Massachusetts law prohibiting the distribution of contraceptives, except by a registered pharmacist on a doctor's prescription to a married person. The Court avoided ex-

plicitly extending the right announced in *Griswold* beyond use to distribution. Writing for the majority, Justice WILLIAM J. BRENNAN rested the decision on an equal protection ground: "whatever the rights of the individual to access to contraceptives may be," the Court said, "the right must be the same for the unmarried and the married alike." *Eisenstadt* thus carried constitutional doctrine a considerable distance from "the sacred precincts of marital bedrooms" featured in *Griswold.*

The Court's reasoning in *Eisenstadt* did not imply that laws prohibiting fornication, because they treat married and unmarried persons dissimilarly, were in immediate jeopardy. Rather, Justice Brennan declined to attribute to Massachusetts the base purpose of "prescrib[ing] pregnancy and the birth of an unwanted child as punishment for fornication."

In 1977, in CAREY V. POPULATION SERVICES INTERNATIONAL, the Court invalidated a New York law prohibiting the sale of contraceptives to minors under age sixteen and forbidding commercial distribution of even nonprescription contraceptives by anyone other than a licensed pharmacist. Justice Brennan reinterpreted the pathmarking precedent. *Griswold*, he noted, addressed a "particularly "repulsive" intrusion, but "subsequent decisions have made clear that the constitutional protection of individual autonomy in matters of childbearing is not dependent on [the marital privacy] element." Accordingly, "*Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of [*Eisenstadt* and *Roe v. Wade*], the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."

*Roe v. Wade* declared that a woman, guided by the medical judgment of her physician, has a FUNDAMENTAL RIGHT to abort her pregnancy, a right subject to state interference only upon demonstration of a COMPELLING STATE INTEREST. The right so recognized, Justice HARRY L. BLACKMUN wrote for the Court, falls within the sphere of personal privacy recognized or suggested in prior decisions relating to marriage, procreation, contraception, family relationships, child-rearing and education. The "privacy" or individual autonomy right advanced in *Roe v. Wade* is not explicit in our fundamental instrument of government, Justice Blackmun acknowledged; however, the Court viewed it as "founded in the FOURTEENTH AMENDMENT's [and presumably the FIFTH AMENDMENT's] concept of personal liberty and restrictions upon state action." Justice Blackmun mentioned, too, the district court's view, derived from Justice ARTHUR J. GOLDBERG's concurring opinion in *Griswold*, that the liberty at stake could be located in the NINTH AMENDMENT's reservation of rights to the people.

The Texas criminal abortion law at issue in ROE V. WADE was severely restrictive; it excepted from criminality "only a *lifesaving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved." In the several years immediately preceding the *Roe v. Wade* decision, the Court noted, the trend in the states had been "toward liberalization of abortion statutes." Nonetheless, the Court's rulings in *Roe v. Wade* and in a companion case decided the same day, *Doe v. Bolton* (1973), called into question the validity of the criminal abortion statutes of every state, even those with the least restrictive provisions.

The sweeping impact of the 1973 rulings on state laws resulted from the precision with which Justice Blackmun defined the state interests that the Court would recognize as compelling. In the first two trimesters of a pregnancy, the state's interest was confined to protecting the woman's health: during the first trimester, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician"; in the next three-month stage, the state may, if it chooses, require other measures protective of the woman's health. During "the stage subsequent to viability" (roughly, the third trimester), the state may protect the "potentiality of human life"; at that stage, the state "may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

Sylvia Law has commented that no Supreme Court decision has meant more to women. Wendy Williams has noted that a society intent on holding women in their traditional role would attempt to deny them reproductive autonomy. Justice Blackmun's opinion indicates sensitivity to the severe burdens, mental and physical, immediately carried by a woman unable to terminate an unwanted pregnancy, and the distressful life she and others in her household may suffer when she lacks the physical or psychological ability or financial resources necessary for child-rearing. But *Roe v. Wade* bypassed the equal protection argument presented for the female plaintiffs. Instead, the Court anchored stringent review to the personal autonomy concept found in *Griswold.* Moreover, *Roe v. Wade* did not declare an individual right; in the Court's words, the decision stated a joint right of "the woman and her responsible physician . . . in consultation."

The 1973 abortion rulings have been called aberrational, extraordinarily activist interventions by a Court reputedly deferential to STATES' RIGHTS and legislative judgments. John Hart Ely criticized *Roe v. Wade* as a decision the Court had no business making because freedom to have an abortion "lacks connection with any value the Constitution marks as special."

Archibald Cox described his own view of *Roe v. Wade*

as "less rigid" then Ely's. He said in a 1975 lecture: "The Court's persistent resort to notions of substantive due process for almost a century attests the strength of our natural law inheritance in constitutional adjudication." Cox considered it "unwise as well as hopeless to resist" that strong tradition. *Roe v. Wade* nevertheless foundered, in his judgment, because the Court did not (and, he believed, could not) articulate an acceptable "precept of sufficient abstractness." The critical parts of the opinion, he commented, "read like a set of hospital rules and regulations."

Paul Freund expressed a similar concern in 1982. He thought *Roe v. Wade* epitomized a tendency of the modern Supreme Court (under Chief Justice WARREN E. BURGER as well as Chief Justice EARL WARREN) "to specify by a kind of legislative code the one alternative pattern which will satisfy the Constitution, foreclosing further experimentation by Congress or the states." In his view, "a law which absolutely made criminal all kinds and forms of abortion could not stand up; it is not a reasonable accommodation of interests." But the Court "adopted what could be called the medical point of view—making distinctions that turn on trimesters." The Court might have drawn other lines, Freund suggested; it might have adopted an ethical rather than a medical approach, for example, by immunizing abortions, in a manner resembling the American Law Institute proposal, "where the pregnancy was the result of rape or incest, where the fetus was severely abnormal, or where the mother's health, physical or mental, would be seriously impaired by bringing the fetus to term." (The Georgia statutes struck down in *Doe v. Bolton*, companion case to *Roe v. Wade*, were patterned on the American Law Institute's model.) If the Court had proceeded that way, Freund commented, perhaps "some of the bitter debate on the issue might . . . have been averted; at any rate the animus against the Court might have been diverted to the legislative halls."

Animus there has been, in the form of anti-abortion constitutional amendments introduced in Congress in 1973 and each session thereafter; proposals for "human life" legislation, in which Congress, upon the vote of a simple majority, would declare that the Fourteenth Amendment protects the life of "persons" from the moment of conception; and bills to strip the Supreme Court of JURISDICTION to decide abortion cases. State legislatures reacted as well, adopting measures aimed at minimizing the impact of the 1973 ruling, including notice and consent requirements, prescriptions for the protection of fetal life, and bans on public expenditures or access to public facilities for abortion.

Some speculated that the 7–2 judgments in the 1973 cases (Justices BYRON R. WHITE and WILLIAM H. REHNQUIST dissented) were motivated in part by population concerns and the specter of unwanted children born to women living in grinding poverty. But in 1977, the Court voted 6–3 against pleas to extend the 1973 rulings to require public assistance for an indigent woman's elective (not medically necessary) abortion. First, in *Beal v. Doe*, the Court held that the federally established Medicaid program did not require Pennsylvania, as a condition of participation, to fund elective abortions. Second, in MAHER V. ROE the Court ruled that the equal protection clause did not command Connecticut, which furnished Medicaid funds for childbirth, to pay as well for elective abortions. Finally, *Poelker v. Doe* held that the city of St. Louis did not violate the equal protection clause by providing publicly financed hospital services for childbirth but not for elective abortions.

The impoverished Connecticut women who sought Medicaid assistance in *Maher* maintained that, so long as their state subsidized childbirth, it could not withhold subsidy for abortion, a far less expensive and, at least in the first trimester, less risky procedure. Stringent equal protection review was required, they urged, because the state had intruded on the "fundamental right" declared in *Roe v. Wade*. Justice LEWIS F. POWELL, writing for the Court, responded that the right recognized in *Roe* did not require government neutrality as to the abortion decision; it was not a right to make a choice unchecked by substantive government control. Rather, it was a right restraining government from obstructing a woman's access to private sources to effectuate her decision. Because the right *Roe v. Wade* secured, as explained in *Maher*, was not impinged upon (and because disadvantageous treatment of needy persons does not alone identify SUSPECT CLASSIFICATION requiring close scrutiny), Connecticut's funding refusal could be sustained if it related "rationally" to a "constitutionally permissible" purpose. The policies to encourage childbirth in preference to abortion and to protect potential life supported the *Maher* regulation. There was, in the Court's view, no issue here, as there had been in *Roe v. Wade*, of an attempt "to impose [the state's] will by force of law."

Although criticized as irrational in the reproductive choice context, the distinction Justice Powell drew between government carrot and government stick had been made previously in other settings. But in *Maher*, unlike other cases in which the carrotstick distinction had figured, the state could not justify its funding bar as an attempt to conserve public funds. In comparison to the medical costs of childbirth and the subsequent costs of child-rearing borne by public welfare programs, the costs of elective abortions are insubstantial.

The *Maher* logic was carried further in HARRIS V. MCRAE (1980). The federal law at issue, known as the HYDE AMENDMENT, excluded even therapeutic (medically needed) abortions from the Medicaid program. In holding, 5–4, that

the Hyde Amendment survived constitutional review, the Court reiterated the distinction drawn in *Maher*. Justice JOHN PAUL STEVENS, who had joined the majority in *Maher*, switched sides in *McRae* because he discerned a critical difference between elective and therapeutic abortions in the context of the Medicaid program. Congress had established two neutral criteria for Medicaid benefits—financial need and medical need. The pregnant women who challenged the Hyde Amendment met both criteria. By creating an exception to the medical need criterion for the sole purpose of deterring exercise of the right declared "fundamental" in *Roe v. Wade*, Justice Stevens reasoned, the sovereign had violated its "duty to govern impartially."

Following the bold step in the 1973 abortion rulings, the public funding rulings appear incongruous. The direct, practical effect of the funding rulings will not endure, however, if the legislative trend again turns in the direction discernible at the time of the *Roe v. Wade* decision. National and state legislators may come to question the wisdom of a childbirth-encouragement policy trained on Medicaid-eligible women, and to comprehend more completely the centrality of reproductive autonomy to a woman's control of her life's course.

May the state require spousal consent to the abortion decision of a woman and her physician when the state itself may not override that decision? In PLANNED PARENTHOOD V. DANFORTH (1976) the Court held unconstitutional Missouri's requirement of spousal consent to a first-trimester abortion. Justice Blackmun, for the six-member majority, declared that the state may not delegate authority to any person, even a spouse, to veto abortions which the state may not proscribe or regulate. A husband, of course, has a vital interest in his wife's pregnancy, Justice Blackmun acknowledged. But the woman's stake is more compelling; therefore the final decision must rest with her.

Although government may not remove the abortion decision from the woman and her physician unless its action demonstrably serves a compelling interest in the woman's health or in potential life, a state may act to ensure the quality of the decision. In *Danforth* the Court unanimously upheld Missouri's requirement that, prior to a first-trimester abortion, a woman certify that she has given her informed, uncoerced consent. The abortion decision is stressful, the Court observed; it should be made with "full knowledge of its nature and consequences." A state's authority in this regard, however, is limited. Regulations must be genuinely necessary to secure enlightened consent; they must be designed to inform rather than persuade; and they must not interfere with the physician's counseling discretion.

In *Akron v. Akron Center for Reproductive Health* (1983) the Court, 6–3, speaking through Justice Powell, struck down a series of regulations that exceeded these limits. One regulation required the physician to tell any woman contemplating an abortion that the unborn child is a human life from conception; to tell her the details of the anatomical characteristics of the fetus; and to enumerate the physical and psychological risks of abortion. The Court held this regulation invalid because it was designed to persuade women to forgo abortions, and because it encroached upon the physician's discretion to decide how best to advise the patient. The Court also invalidated as unnecessary to secure informed, uncoerced consent a twenty-four-hour waiting period between consent and abortion and a requirement that the physician personally convey information to the woman.

The Court has not yet had occasion to pass upon a regulation designed to render the birth-control-through-contraception decision an informed one. In *Bolger v. Youngs Drug Product Corporation* (1983), however, a majority held that government may not block dissemination of information relevant to that decision. At issue was a federal statute (the Comstock Act) prohibiting the mailing of contraceptive advertisements. All eight participating Justices held the statute unconstitutional as applied to the promotional and informational literature in question because the legislation impermissibly regulated COMMERCIAL SPEECH. (Earlier, in *Carey*, the Court had invalidated an analogous state regulation on the same ground.) Five Justices joined in a further ruling that the federal statute violated the right to reproductive autonomy because it denied adults truthful information relevant to informed contraception decisions.

The trimester scheme established in *Roe v. Wade* has guided the Court's ruling on state regulation of abortion procedures. Under that scheme, the state may not interfere with a physician's medical judgment concerning the place and manner of first-trimester abortions because abortions performed at that stage are less risky than childbirth. Thus in *Doe v. Bolton* (1973), the companion case to *Roe v. Wade*, the Court invalidated a Georgia requirement that even first-trimester abortions be performed in a full-service hospital. In *Connecticut v. Menillo* (1975), however, the Court, per curiam, explicitly relied upon one of the underpinnings of *Roe v. Wade*, the need for a physician's medical judgment, to uphold a state's conviction of a nonphysician for performing an abortion.

The ban on state regulation of a physician's performance of first-trimester abortions is not absolute; it does not exclude regulation serving an important state health interest without significantly affecting the abortion decision. A unanimous bench in *Danforth* so indicated in upholding a Missouri regulation requiring maintenance of records of all abortions, for disclosure only to public health officials, for seven years.

*Roe v. Wade* declared that after the first trimester, be-

cause an abortion entails greater risks, the state's interest in women's health could justify "place and manner" regulations even if the abortion decision itself might be affected. However, the Court has attentively scrutinized procedural regulations applicable after the first trimester to determine whether, in fact, they are reasonably related to the protection of the patient's health in light of current medical knowledge. Several regulations have failed to survive the court's scrutiny. In *Doe v. Bolton*, for example, the Court struck down Georgia's requirement that a hospital committee and two doctors, in addition to the woman's physician, concur in the abortion decision. And in *Danforth*, the Court struck down a Missouri ban on use, after the first trimester, of saline amniocentesis, then the most widely used second-trimester abortion procedure. Justice Blackmun, for the majority, observed that although safer procedures existed, they were not generally available. Consequently, the regulation in practice would either require the use of more dangerous techniques or compel women to forgo abortions.

The Court had three 1983 encounters with regulations alleged to connect sufficiently with a women's health: *Akron*, *Planned Parenthood Association v. Ashcroft*, and *Simopoulos v. Virginia*. In *Akron* and *Ashcroft*, the Court invalidated regulations requiring that abortions, after the first trimester, be performed in licensed acute-care hospitals. Justice Powell, for the majority, said that although current medical knowledge justified this requirement during much of the relevant period, it was unnecessary during the first four weeks of the second trimester; medical advances had rendered abortions safe at that stage even when performed in less elaborate facilities. The hospital requirement significantly burdened a woman's access to an abortion by raising costs substantially; therefore it must be tied more precisely to the period in which it was necessary. In *Simopoulos*, on the other hand, the Court upheld the limitation of second-trimester abortions to licensed facilities (including nonacute care facilities licensed to perform abortions during the first four to six weeks of the second trimester).

These three decisions indicate the Court's readiness to test specific second-trimester regulations that increase the cost of abortions against advances in medical technology. However, the majority in *Akron*, although aware that medical advances had rendered early second-trimester abortions safer than childbirth, explicitly refused to extend beyond the first trimester an across-the-board proscription of burdensome "place and manner" regulations.

Only in the last stage of pregnancy, after viability, does the state's interest in potential life become sufficiently compelling to allow the state to forbid all abortions except those necessary to preserve the woman's health. The point at which viability occurs is a medical judgment, the Court said in *Roe v. Wade*, *Danforth*, and *Colautti v. Franklin* (1979); the state may not establish a fixed measure of that point after which nontherapeutic abortions are illegal.

When postviability abortions occur, may the state impose manner requirements in the interest of preserving a viable fetus? The answer appears to be yes, if the regulations are not overbroad. In *Danforth* the Court invalidated a regulation requiring the physician to exercise due care to preserve the fetus; the regulation was not limited to postviability abortions. In *Ashcroft*, however, a 5–4 majority sustained a law requiring a second physician to attend a postviability abortion and attempt to preserve the life of the fetus. Even the dissenters agreed that such a regulation could stand if trimmed; they objected to Missouri's regulation because it required a second physician even at abortions using techniques that eliminated any possibility of fetal survival.

Dissenting in *Akron*, Justice SANDRA DAY O'CONNOR, joined by Justices White and Rehnquist, strongly criticized the Court's trimester approach to the regulation of abortion procedures. *Roe v. Wade's* medical model, she maintained, had been revealed as unworkable in subsequent cases. Advances in medical technology would continue to move forward the point during pregnancy when regulation could be justified as protective of a woman's health, and to move backward the point of viability, when the state could forbid abortions unless they were necessary to preserve the patient's life or health. The *Roe v. Wade* framework thus impelled legislatures to adjust their laws to changing medical practices, and called upon courts to examine legislative judgments, not as jurists applying "neutral principles" but as "science review boards."

More fundamentally, Justice O'Connor disapproved the interest balancing exhibited by the Court in the 1973 decisions. Throughout pregnancy, she said, the state has "compelling interests in the protection of potential human life and in maternal health." (In *Beal* the Court had said that the state does have an interest in potential life throughout a pregnancy, but that the interest becomes *compelling* only in the postviability stage.) Justice O'Connor's analysis, it appears, would permit from the beginning of pregnancy the regulation *Roe v. Wade* permits only in the final trimester: state proscription of abortion except to preserve a woman's health.

Vagueness doctrine has occasionally figured in the Court's review of state regulation of abortion procedures. In *Colautti*, the Court invalidated as too vague to supply adequate notice a statute attaching a criminal sanction to a physician's failure to exercise due care to preserve a fetus when there is "sufficient reason to believe that the fetus may be viable." And in *Akron*, a vagueness handle was employed to strike down a provision mandating the sanitary and "humane" disposal of aborted fetuses.

Minors have constitutional rights, but state authority over CHILDREN'S RIGHTS is greater than over adults'; the state may protect minors because of their immaturity and "peculiar vulnerability," and in recognition of "the importance of the parental role in child rearing." Justice Powell so observed in his plurality opinion in *Bellotti v. Baird* (1979), and no Justice has disagreed with these general statements. In concrete cases concerning the reproductive autonomy of minors, however, the Court has been splintered.

In *Danforth*, the Court invalidated, 5–4, a law requiring a parent's consent for most abortions performed on unmarried women under the age of eighteen. The majority did not foreclose a parental consent requirement for minors unable to make the abortion decision in an informed, mature manner.

The Court "continue[d] the inquiry" in *Bellotti*. Massachusetts required unmarried minors to obtain the consent of both parents or, failing that, the authorization of a state judge "for good cause shown." The Court voted 8–1 to invalidate the law, but split 4–4 on the rationale. Justice Stevens, writing for four Justices, thought the case governed by *Danforth*. Justice Powell, writing for four other Justices, attempted to provide guidance for state legislators. The abortion decision is unique among decisions facing a minor, he observed; it cannot be postponed until attainment of majority, and if the fetus is carried to term, the new mother will immediately face adult responsibilities. A blanket requirement of parental consent, using age as a proxy for maturity, was too sweeping. Yet the state's interest in ensuring the quality of a minor's abortion decision and in encouraging family participation in that decision would justify a law requiring either parental consent or the determination of an independent decision maker that abortion is in the minor's best interest, or that she is mature enough to decide for herself.

Justice Powell's *Bellotti* framework, although by 1983 only a two-member view, became, in *Akron* and *Ashcroft*, the de facto standard governing consent statutes. In *Ashcroft*, the Court upheld, 5–4, a statute conditioning a minor's abortion on either parental consent or a juvenile court order. Justice Powell and Chief Justice Burger voted to uphold the provision because, as indicated in *Bellotti*, the juvenile court must authorize an abortion upon finding that the abortion is in the minor's best interest or that the minor is mature enough to make her own decision. Three other Justices viewed the consent requirement as imposing "no undue burden on any right that a minor [arguably] may have to undergo an abortion." Four Justices dissented because the statute permitted an absolute veto, by parent or judge, "over the decision of the physician and his patient."

In *Akron*, however, the Court struck down, 6–3, an ordinance requiring all minors under age fifteen to have either parental or judicial consent. Because *Akron* failed to provide explicitly for a judicial determination of the minor's maturity, Justice Powell and the Chief Justice joined the four *Ashcroft* dissenters in condemning the consent provision.

With respect to contraception, no clear statement has emerged from the Court on the extent of state and parental authority over minors. In *Carey* the Court, 7–2, struck down a ban on the distribution of contraceptives to persons under age sixteen. The state sought to justify the measure as a means of deterring sexual activity by minors. There was no majority decision, but six Justices recognized that banning birth control would not in fact deter sexual activity.

May the state require parental consent to the minor's use of contraceptives? At least five Justices, it appears from the *Carey* decision, would state unequivocally that minors have no right to engage in sexual activity in face of disapproval of the state and of their parents. But it is hardly apparent that any minor-protective interest supports stopping the young from effectuating a decision to use nonhazardous contraceptives when, despite the views or commands of the state and their parents, they do engage in sexual activity.

Arguably, such a provision would serve to preserve parental authority over a decision many people consider a moral one. *Danforth* indicated that this end is insufficient to justify requiring parental consent for an abortion. Yet, as Justice Powell's *Bellotti* opinion illustrates, at least some Justices consider the abortion decision unique. Perhaps the issue will remain undecided. For practical reasons, lawmakers may be deterred from conditioning a minor's access to contraceptives on parental consent or notification. Many minors whose parents would wish them to use birth control if they engaged in sexual activity would nevertheless fail to seek parental consent for fear of disclosing their sexual activities. As five Justices indicated in *Carey*, deliberate state policy exposing minors to the risk of unwanted pregnancies is of questionable rationality.

In *Akron*, which came to the Court a decade after *Roe v. Wade*, Justice Powell acknowledged the continuing argument that the Court "erred in interpreting the Constitution." Nevertheless, *Akron* commenced with a reaffirmation of the 1973 precedent. As *Akron* itself illustrates, the Court typically has applied *Roe v. Wade* to restrict state efforts to impede privately financed access to contraceptives and abortions.

It appears safe to predict continued "adher[ence] to STARE DECISIS in applying the principles of *Roe v. Wade*." But other issues remain beyond the zone of secure prediction. Current opinions do not indicate whether the Court eventually will relate its reproductive autonomy

decisions to evolving law on the equal status of men and women. Nor can one forecast reliably how science and population will influence the next decades' legislative and judicial decisions in this area.

The development of a safe, efficient, inexpensive morning-after pill, for example, may alter the reproductive autonomy debate by further blurring distinctions between contraceptives and abortifacients, and by sharply reducing occasions for resort to clinical procedures. A development of this order may diminish in incidence and detail both legislative activity and constitutional review of the kind sparked in the decade following *Roe v. Wade*. Moreover, it is at least possible that a different question will confront the Court by the turn of the century: If population size becomes a larger governmental concern, legislators may change course, and measures designed to limit childbirth may become the focus of constitutional controversy.

RUTH BADER GINSBURG
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Bibliography


BREST, PAUL 1981 The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship. *Yale Law Journal* 90:1063–1112.

BYRN, ROBERT 1973 An American Tragedy: The Supreme Court on Abortion. *Fordham Law Review* 41:807–862.

COX, ARCHIBALD 1976 *The Role of the Supreme Court in American Government*. New York: Oxford University Press.

DEMBITZ, NANETTE 1980 The Supreme Court and a Minor's Abortion Decision. *Columbia Law Review* 80:1251–1263.

DESTRO, ROBERT 1975 Abortion and the Constitution: The Need for a Life Protective Amendment. *California Law Review* 63:1250–1351.

ELY, JOHN HART 1973 The Wages of Crying Wolf: A Comment on *Roe v. Wade*. *Yale Law Journal* 82:920–949.

ESTREICHER, SAMUEL 1982 Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation. *Virginia Law Review* 68:333–458.

FREUND, PAUL 1983 Storms over the Supreme Court. *American Bar Association Journal* 69:1474–1480.

HEYMANN, PHILIP and BARZELAY, DOUGLAS 1973 The Forest and the Trees: *Roe v. Wade* and its Critics. *Boston University Law Review* 53:765–784.

LAW, SYLVIA 1984 Rethinking Sex and the Constitution. *University of Pennsylvania Law Review* 132:955–1040.

PERRY, MICHAEL 1976 Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process. *UCLA Law Review* 23:689–736.

——— 1978 The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government. *Georgetown Law Journal* 66:1191–1245.

REGAN, DONALD 1979 Rewriting *Roe v. Wade*. *Michigan Law Review* 77:1569–1646.

TRIBE, LAURENCE H. 1978 *American Constitutional Law* Pages 921–934. Mineola, N.Y.: Foundation Press.


# REPUBLICAN FORM OF GOVERNMENT

The Constitution requires that "The United States shall guarantee to every State in this Union a Republican Form of Government" (Article IV, section 4). The ideal of republican government antedated the Constitution and supplied some substantive criteria for the guarantee. The concept of republican government has changed and expanded over time, but it has influenced constitutional development only indirectly.

THOMAS JEFFERSON's 1776 draft constitution for Virginia, various Revolutionary-era state constitutions, and the NORTHWEST ORDINANCE (1787) mandated republican government in the states or TERRITORIES. When the GUARANTEE CLAUSE was adopted at the CONSTITUTIONAL CONVENTION OF 1787, the concept of republican government had identifiable connotations to the Revolutionary generation. In a negative sense, it excluded monarchical government and the creation of nobility. Because the Framers believed that internal disorder threatened republican institutions, they fused the guarantee clause with the clause in Article IV authorizing the federal government to suppress domestic violence. But in its positive connotations, republican government implied popular SOVEREIGNTY, a balance and SEPARATION OF POWERS, and LIMITED GOVERNMENT.

The contributions of ALEXANDER HAMILTON and JAMES MADISON in THE FEDERALIST reflected these negative and positive emphases. In numbers 6, 21, 22, 25, 34, and 84, Hamilton stressed the nonmonarchical character of republican governments and the need for a central authority powerful enough to suppress insurrections so as to forestall republican degeneration into absolutism. Madison, however, in numbers 10, 14, 39, and 43, emphasized the representative and majoritarian nature of republican government, contrasting it with direct democracies. SHAYS' REBELLION in central Massachusetts (1786–1787), rumors of monarchical plots and overtures late in the Confederation period, and federal response to the WHISKEY REBELLION (western Pennsylvania, 1794) lent weight to the emphasis that Hamilton reflected.

Conservative judges in the antebellum period insisted that statutes must conform to "certain vital principles in our free republican governments," in the words of Justice SAMUEL CHASE in CALDER V. BULL (1798) (SERIATIM OPINION.) He claimed that "the genius, the nature, and the spirit of our state governments" voided unconstitutional legislation even without specific constraints in the state constitutions. Thus the concept of republican government became a fecund source of authority for judges seeking to restrain legislative innovation that affected property in such matters as liquor PROHIBITION and the Married Women's Property Acts.

In Rhode Island's Dorr Rebellion (1842), frustrated suffrage reformers abandoned hope that the state's conservative political leadership (called the "Freeholders' Government") would rectify the severe malapportionment and disfranchisement that existed under the royal charter of 1662, which still served as the state's constitution. They therefore applied the DECLARATION OF INDEPENDENCE literally to write a new constitution at a convention elected by the votes of all adult males, including those not entitled by existing law to vote. They then elected a government under the new constitution, including the "People's Governor," Thomas Wilson Dorr. The Freeholders, relying on Hamilton's nonmonarchic conception of republican government, insisted that a government was republican if it enjoyed the support of the enfranchised voters. By imposing martial law, the Freeholders crushed the Dorrite government. They then instituted suffrage reforms under a new state constitution.

The Dorr Rebellion was the matrix for LUTHER V. BORDEN (1849), where Chief Justice ROGER B. TANEY provided the first significant judicial hints about the meaning of republican government. Though Taney rebuffed Dorrite efforts to have the Court declare the Freeholder and subsequent regimes illegitimate, he conceded that "according to the institutions of this country, the sovereignty in every State resides in the people of the State, and . . . they may alter and change their form of government at their own pleasure." But he nullified this concession by applying the POLITICAL QUESTION doctrine: whether the people have altered their government is a question to be decided by the political branches of the national government (Congress and the President), whose determination is binding on the courts.

The constitutional controversy over SLAVERY turned partly on the nature of republican forms of government. In the debates over the admission of Missouri in 1819–1821, antislavery congressmen asserted that slavery was inconsistent with republican government. ABOLITIONISTS later maintained that slavery violated natural law by depriving slaves of the right to their liberty, their persons, and their labor. Southern spokesmen after 1835 developed the position that slavery was not only compatible with republicanism, but actually conducive to it, creating a leisured master class freed for the disinterested pursuit of civic responsibilities.

The slavery controversy echoed in debates on Reconstruction between 1862 and 1875. Many Republicans supported policies that would have given blacks the vote, assured equal rights for all, and excluded southern states from representation in Congress until they had eradicated the vestiges of slavery and secessionist sentiment. They demanded that Congress force these improvements on the southern state governments. Democrats and other conservatives, on the other hand, identified the essence of republicanism with self-government—for whites only. Though adoption of the MILITARY RECONSTRUCTION ACTS (1867–1868) evidenced a Republican willingness to exact certain minima from the southern states, such as the program reflected in sections 1 through 4 of the FOURTEENTH AMENDMENT, the party soon fell back to a more compromising position. Senator JACOB HOWARD of Michigan reflected a Republican consensus late in Reconstruction when he defined a republican form of government as one "in which the laws of the community are made by their representatives, freely chosen by the people. . . . [I]t is popular government; it is the voice of the people expressed through their representatives." He was echoed by Chief Justice MELVILLE W. FULLER in *In re Duncan* (1891): the "distinguishing feature of [the republican] form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies."

However, the Supreme Court has otherwise consistently declined to specify substantive characteristics of a republican form of government, sometimes using the political-question doctrine to avoid doing so. Chief Justice MORRISON R. WAITE observed in MINOR V. HAPPERSETT (1875) that "no particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated." In *Pacific States Telephone and Telegraph Co. v. Oregon* (1912) Chief Justice EDWARD D. WHITE refused to declare that direct-democracy innovations such as the REFERENDUM or the INITIATIVE fell afoul of the constitutional guarantee. In the previous year, though, President WILLIAM HOWARD TAFT vetoed the Arizona/New Mexico admissions bill because it provided for judicial RECALL. Taft condemned the "possible tyranny of a popular majority." In BAKER V. CARR (1962) Justice WILLIAM J. BRENNAN refused to use the guarantee clause as a basis for requiring REAPPORTIONMENT, relying instead on the EQUAL PROTECTION clause. But he trimmed back the breadth of the political question DOCTRINE, leaving open the remote possibility that the Supreme Court might someday take on a more active role in delineating the substantive content of republican forms of government.

Unless it does so, however, the nature of republican government will be determined largely outside judicial forums, and the constitutional guarantee of republican government in the states will be enforced, as it has been consistently since before the Civil War, by Congress and, derivatively, the President.

WILLIAM M. WIECEK
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Bibliography

BONFIELD, ARTHUR 1962 *Baker v. Carr*: New Light on the Constitutional Guarantee of Republican Government. *California Law Review* 1962:245–263.

——— 1962 The Guarantee Clause of Article IV Section 4: A Study in Constitutional Desuetude. *Minnesota Law Review* 46:513–572.

WIECEK, WILLIAM M. 1972 *The Guarantee Clause of the U.S. Constitution.* Ithaca, N.Y.: Cornell University Press.

WOOD, GORDON S. 1969 *The Creation of the American Republic, 1776–1787.* Chapel Hill: University of North Carolina Press.

## REPUBLICANISM

Republicanism was the ideology of the AMERICAN REVOLUTION, and as such, it still influences much of what Americans believe; in recent years it has had a renewed importance in American constitutional thought. It is difficult for us today to appreciate the revolutionary character of this republican ideology. We live in a world in which almost all nations purport to be republican; even those few countries that remain monarchies, such as Britain and Sweden, are more republican in fact than some others that claim to be republican in theory. But to the monarchy-dominated world of the eighteenth century, republicanism was a radical ideology; indeed, it was to the eighteenth century what Marxism was to be for the nineteenth century. Republicanism was a countercultural ideology of protest, an intellectual means by which dissatisfied people could criticize the luxury, selfishness, and corruption of eighteenth-century monarchical culture.

Yet it would be a mistake to think of republicanism, in the English-speaking world at least, as a distinct and coherent body of thought set in opposition to monarchy or to the English COMMON LAW tradition of rights and liberties. In the greater British world, republican thinking blended with monarchy to create the mixed and LIMITED GOVERNMENT of the English constitution that was celebrated everywhere by enlightened theorists like MONTESQUIEU. Britons regarded the republican part of their constitution, the House of Commons, as the principal bulwark protecting their individual rights and liberties from encroachment by monarchical power. Thus, the sharp distinction drawn by some historians and political theorists today between the civic tradition of republicanism, often identified with James Harrington, and the common law tradition of personal and property rights, often identified with JOHN LOCKE, would not have been clear to eighteenth-century Englishmen.

Republicanism, however, was more than a form of government; it was also a form of life—a set of beliefs that infused the cultures of the Atlantic world in the age of Enlightenment. Its deepest origins were in ancient Rome and the great era of the Roman republic. The enlightened world of the eighteenth century found most of what it wanted to know about the Roman republic from the writings of the golden age of Latin literature, between the breakdown of the republic in the middle of the first century B.C. to the establishment of the empire in the middle of the second century A.D. The celebrated Latin writers of this time—Cicero, Sallust, Tacitus, and Plutarch, among others—lived when the greatest days of the republic had passed, and thus, they contrasted the growing stratification, corruption, and disorder they saw around them with an imagined earlier world of rustic simplicity and pastoral virtue. Roman farmers had once been hardy soldiers devoted to their country. But they had become selfish, corrupted by luxury, torn by struggles between rich and poor, and devoid of their capacity to serve the public good. In their pessimistic explanations of the republic's decline, these Latin writers left a legacy of beliefs and ideals—about the good life, about citizenship, about political health, about social morality—that have had an enduring effect on Western culture.

This great body of classical literature was revived and updated during the Renaissance and blended into a tradition of what has been called "civic humanism." This classical republican tradition stressed the moral character of the independent citizen as the prerequisite of good politics and disinterested service to the country. To be good citizens, men had to be free of control by other men and free of the influence of selfish interests.

The classical republican tradition passed into the culture of northern Europe. In England it inspired the writings of the great seventeenth-century republicans JOHN MILTON, James Harrington, and Algernon Sidney. And it was carried into the eighteenth century by scores of popularizers and translators. By the late eighteenth century, being enlightened was nearly equivalent to believing in republican principles; many Englishmen even described the English monarchy as being a republic in fact. This republican tradition had a decisive effect on the thinking of the American revolutionary leaders.

Republicanism meant for the American revolutionaries in 1776 more than eliminating a king and instituting an elective system of government; it meant setting forth moral and social goals as well. Republics required a particular sort of independent, egalitarian, and virtuous people, a simple people who scorned luxury and superfluous private expenditure, who possessed sufficient property to be free from patronage and dependency on others, and who were willing to sacrifice many of their selfish interests for the res publica, the good of the whole community. Re-

publican equality meant a society whose distinctions were based only on merit. No longer would one's position rest on whom one knew or married or on who one's father was.

Such dependence on a relatively equal, uncorrupted, and virtuous populace that had a single perceived public good made republics very fragile and often short-lived. Monarchies were long-lasting; they could maintain order from the top down over large, diverse, and even corrupt populations through their use of patronage, hereditary privilege, executive authority, standing armies, and an ESTABLISHMENT OF RELIGION. But republics, such as the American states, had to be held together from below, from virtue, from the consent and sacrifice of the people themselves. Consequently, as Montesquieu and other theorists had warned, republics necessarily had to be small in territory and homogeneous and moral in character. The only republics existing in the eighteenth century—the Netherlands and the city-states of Italy and Switzerland—were small and compact. Large heterogeneous states that had tried to establish republics—as England had in the seventeenth century—were bound to end up in chaos, resulting in some sort of military dictatorship, like that of Oliver Cromwell. If it was too large and composed of too many diverse interests, a republic would fly apart.

It was little wonder, then, that the Americans in 1776 embarked on their experiment in republicanism in a spirit of great risk and high adventure. Nothing resembling their confederation of thirteen independent republican states had existed since the fall of Rome.

By 1787, however, American leaders had lost some of their earlier confidence in the American people's capacity for republicanism. Experience with popular government in the 1770s and 1780s, especially in the democratic state legislatures, had increasingly cast doubt on the people's virtue and disinterestedness. Selfish and local interests had captured majority control of the popularly elected legislatures and had used their lawmaking authority to promote their partial interests at the expense of the general good and minority rights. Such abuses of power by democratic state legislatures, wrote a concerned JAMES MADISON in 1787, had brought "into question the fundamental principle of republican government, that the majority who rule in such governments are the safest guardians both of public good and of private rights." Suddenly the people's civic liberty, their participation in government, which lay at the heart of republicanism, seemed incompatible with their personal rights and liberties.

Such a conflict between majoritarian republicanism and minority rights had not been anticipated by the revolutionaries. The Americans of 1776 had thought that the people's republican participation in government was the best guarantee of the people's personal rights. They had assumed, said Madison in a series of 1780s letters, speeches, and working papers, culminating in his essays in THE FEDERALIST, that the people composing a republic "enjoy not only an equality of political rights, but that they have all precisely the same interests and the same feelings in every respect," which was why republics were supposed to be small in size. They had thought that in such small republics "the interest of the majority would be that of the minority also; the decisions could only turn on mere opinion concerning the good of the whole of which the major voice would be the safest criterion; and within a small sphere, this voice could be most easily collected and the public affairs most accurately managed."

Now, however, to Madison and other national leaders, with a decade's experience behind them, these assumptions about republicanism seemed "altogether fictitious." No society, no matter how small, "ever did or can consist of so homogeneous a mass of citizens." All "civilized societies" were made up of "various and unavoidable" economic distinctions and marketplace interests: rich and poor, creditors and debtors, farmers and manufacturers, merchants and bankers, and so on.

In a small republic, such as each of the thirteen states, it was sometimes possible for one of these competing factions or partial interests to exploit the popular electoral process and gain majority control of the legislature and pass laws oppressive of other groups and interests and contrary to the common interest of the community. This problem of tyrannical and factious legislative majorities, the contradiction between public and private liberty, was precisely what had troubled most of the states since 1776, and it was the principal cause of the crisis that had led to the formation of the new national Constitution. "To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government," wrote Madison, was "the great object to which our inquiries are directed."

Madison and other Framers solved the problem in 1787 by standing the body of conventional assumptions about the size of the republics on its head. Instead of trying to keep the republic small and homogeneous, Madison seized on, and ingeniously developed, David Hume's radical suggestion that a republican government operated better in a large territory than in a small one. The republic, said Madison, had to be so enlarged, "without departing from the elective basis of it," that "the propensity in small republics to rash measures and the facility of forming and executing them" would be stifled. In a large republican society "the people are broken into so many interests and parties, that a common sentiment is less likely to be felt, and the requisite concert less likely to be formed, by a majority of the whole." Madison and the other Framers,

in other words, accepted the reality of diverse competing partial interests in American society and were quite willing to allow them free play in the society.

But not, it was hoped, in the new national government. Madison was not a modern-day pluralist. He did not expect the new federal government to be neutralized into inactivity by the competition of these numerous diverse interests. Nor did he see public policy or the common good emerging naturally from the give-and-take of these clashing interests. He did not expect the new national government to be an integrator and harmonizer of the different interests in the society; instead, he expected it to be a "disinterested and dispassionate umpire in disputes between different passions and interests in the State." And it would be able to play that role because the men holding office in the new central government would by their fewness of number and the largeness of the electoral districts most likely be "men who possess the most attractive merit, and the most diffusive and established characters." Thus, the Founding Fathers hoped that the new extended national republic would be led by enlightened men who were free of local constituent pressures and selfish marketplace concerns and who would deliberate in a disinterested manner and promote the general good. To this extent, the Framers clung to the tenets of classical republicanism.

But they clung even more firmly to the tenets of their belief in personal rights and liberties, whether defined as common law protections like HABEAS CORPUS and TRIAL BY JURY or as natural rights like a free conscience in matters of religion. Indeed, protecting these personal rights, including the individual's right to pursue happiness and property, was increasingly regarded as the principal end of government, to which republicanism was only a means, and not a very adequate one at that. Hence, SEPARATION OF POWER, CHECKS AND BALANCES, BILLS OF RIGHTS, the independent judiciary, and JUDICIAL REVIEW all worked to limit the power of government and to undermine the classical republican reliance on the general will of a united people.

The democratic revolution of the decades following the creation of the Constitution further transformed the tradition of classical republicanism. In the North at least, it virtually destroyed the classical republican dream of an enlightened aristocracy acting as disinterested umpires over the economic and political struggles of the society. POLITICAL PARTIES emerged to reestablish patronage and to promote the partisan local interests of people, and countless individuals took off in pursuit of their private happiness. By the middle of the nineteenth century, America gave as free a rein to commercial activity and the self-interestedness of people as any society in history.

But much of the republican tradition has remained alive, even to this day. Republicanism tempers the scramble for private wealth and happiness, and accounts for many of the Americans' ideals and aspirations: for their belief in equality and their dislike of pretension and privilege; for their relentless yearning for individual autonomy and freedom from all ties of dependency; for their periodic hopes that some political leaders might rise above parties and become truly disinterested umpires and deliberative representatives, hopes expressed, for example, in the election of military heroes and in the mugwump and Progressive movements; for their long-held conviction that farming is morally healthier and freer of selfish marketplace concerns than other activities; for their preoccupation with the fragility of the Republic and its liability to corruption; and, finally, for their remarkable obsession with their own national virtue—an obsession that still bewilders the rest of the world.

GORDON S. WOOD
(1992)

(SEE ALSO: *Constitutional History Before 1776; Constitutional History, 1776–1789; Natural Rights and the Constitution; Political Philosophy of the Constitution; Republican Form of Government; Social Compact Theory.*)

Bibliography

POCOCK, J. G. A. 1975 *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition.* Princeton, N.J.: Princeton University Press.

WOOD, GORDON S. 1969 *The Creation of the American Republic, 1776–1787.* Chapel Hill: University of North Carolina Press.

## REPUBLICANISM AND MODERN CONSTITUTIONAL THEORY

Recent historical scholarship has traced a linkage between the civic tradition of republicanism and the Constitution devised by the Framers. The histories have turned academic American constitutional thought toward a renewed interest in traditional republican ideas about politics. Neorepublican scholarship seeks to adapt such ideas to various contemporary issues of constitutional-legal doctrine and practice.

Characteristically figuring in this neorepublican "revival" is a cluster of normative notions. As construed by contemporary legal scholars, republicanism demands strong accountability of the government to "the people" considered as their own ultimate rulers. It promotes active citizenship—participation in politics—as partially constitutive of the good life for all. It aims at public re-

garding laws that define rights in accord with consensually accepted values and set policies in accord with the general good. It urges sincerely deliberative, multivocal, independent-minded political debate ("dialogue") as the way to identify such values, rights, policies, and goods. It demands unrestricted access to political debate and influence for people from all sectors of society regardless of private means; looks askance at social hierarchies, material deprivations, and conflicts of interests that may compromise independent-minded, energetic, or public-spirited citizenship and governance; and seeks protection of cultural diversity and personal self-formation against undue governmental and social encroachment.

In moments of detached contemplation, all these aims and impulses may perhaps cohere as aspects of one aspirational vision of CONSTITUTIONALISM or even as steps in an argument about how constitutionalism ought ideally to work. Set in the field of actual, contemporary American constitutional-legal disputation, however, republicanism figures not as a stock set of answers, but as an agenda of questions. In live contexts of dispute already framed by the past development of American constitutional-legal doctrine and practice, the various "republican" impulses have uncertain, controversial, and sometimes arguably inconsistent implications.

Consider how various "republican" aims have actually been invoked to generate positions in contemporary constitutional-legal debates. For example, republicanism insists strongly on the nonidentity of the sovereign people with the government and on the government's subservience to the people's will. From such insistence stems support for the idea judicially championed by Justice WILLIAM J. BRENNAN and credited by him to ALEXANDER MEIKLEJOHN: the "central meaning" of the FIRST AMENDMENT is to secure the public forum of debate among citizens against governmental machination and control. Another republican precept, however, is that opportunity for access to this forum and influence in it should be equal for all regardless of wealth and other forms of social power. These two republican antipathies—to government control over the public forum and to socially unequal access to the forum—have carried seemingly contradictory implications for constitutional-legal doctrine. In BUCKLEY V. VALEO, for example, the Supreme Court condemned legislative attempts to cap political campaign expenditures—professedly as a way of controlling domination of politics by the wealthy—as a departure from constitutionally required state neutrality.

Somewhat similarly, republican concern for the independent-minded public regarding quality of people's political motivations has produced diametrically opposed stances toward governmentally directed redistributions of wealth. From one side, it is argued that redistributions are required to assure the material prerequisites of political competence and independence to all who may participate, as voters or activists, in America's sweepingly democratic political system. From the other side, it is argued that by allowing governments to tamper with distribution we invite exactly the kind of self-serving political motivation that republicanism decries.

Out of regard for protecting cultural diversity and personal self-direction against potentially totalitarian control by the state, scholarship in the neorepublican vein has called for strong judicial enforcement of constitutional barriers (including UNENUMERATED RIGHTS) against governmental encroachments on conscience, privacy, and association. At the same time, however, republican-style regard for the polity's underlying sense of solidarity has been cited by scholars and judges as justification for government restraint of arguably self-formative expression or conduct—a Nazi street march, a sexually explicit publication, homosexual sex in private—when construed as offensive or destructive to an enveloping political "community" or "tradition."

Out of regard for the public directedness of laws and for the deliberative quality of law making, some neorepublican scholarship has drawn a broader defense of wide-ranging JUDICIAL ACTIVISM: Against partisan laws, such scholarship sets vigorous judicial scrutiny of the public justifications for statutes challenged under the equal protection and due process guaranties as "irrationally" discriminatory or injurious to liberty or property. Against narrowly strategic and self-serving legislative politics, such scholarship pictures appellate courts—actual or potential—as sites of open-minded deliberative dialogue. At the same time, however, republican encomia to active citizenship and popular self-government have put new energy into JAMES BRADLEY THAYER's old objection to the habitually court-privileging character of American constitutional practice: It saps the people's determination to govern themselves.

A number of difficulties confront transplantation of historical republican thought to the contemporary American constitutional scene. First, the normative elements in republican thought depend on descriptive ones that are not fully true to contemporary American experience. Second, republicanism's valorization of political activity for its own sake, as an aspect of the good life, does not match prevailing American understanding. Third, republican thought is not easily reconcilable with the fixture of JUDICIAL SUPREMACY in the American practice of constitutionalism.

When historians say the the Framers envisioned a constitutional scheme in which competent representatives

deliberate and act in the common interest, this means that the Framers not only desired such a competent deliberative institution, but supposed they had successfully designed one in the Congress their charter constituted. But then, presumably, this supposition would have governed the Framer's conception of the judiciary's role, leaving little room for censorious JUDICIAL REVIEW of the "rationality" of congressional action. Today, however, few Americans believe that Congress will or can be relied on to perform consistently up to the standard of the Madisonian deliberative model. How, in these circumstances, do we go about redeeming the Framer's design?

One answer offered by neorepublican scholarship is that reviewing courts should aggressively engage in "after the fact" evaluations of both the public merits of congressional enactments and the deliberative quality of congressional processes. The aim is to prevent, by deterrence and nullification, partisan or ill-conceived legislation that presumably would not have issued from a Congress actually functioning in accordance with Madisonian expectations. Leaving aside the difficulties of execution of this judicial commission, it is questionable republican doctrine. It does not speak to republicanism's attribution of value to direct personal engagement in the political process.

In the republican tradition, realization of the putative common good is not the whole point of broad-based political activity. A person's engagement, as an equal, in joint pursuit with others of the common good is republicanly valued as a vital aspect of personal freedom. It is far from clear how this personally emancipatory value of civic participation can at all be realized at two removes: first, from the people to the Congress and, then, from the Congress to the Court. It may be true that a person's ulterior interests can be represented in a functional sense, more or less accurately, by delegates. The experience of citizenship as public freedom, however, is a different matter. Freedom is representable, if at all, only pictorially, not functionally. Representation of interests may conceivably, if things go well, succeed in effectuating people's interests fairly. But representations—dramatizations—of freedom do not realize people's freedom.

Here, historical republicanism may seem to offer assistance. Traditional republican thought articulates political activity into distinct and complementary roles—including those of electors as well as of officials—and professes to see the juice of political freedom flowing through all the circuits. This idea occurs not only in canonical republican writings, such as those of James Harrington; it is apparent as well in the thought of American Framers such as JAMES WILSON. The idea supposes that everyone can be politically active, in the freedom-conferring way, in public encounters by which we elect, instruct, and evaluate political representatives. It depends, however, on what today seems an unacceptably inegalitarian assignment of a good—"positive" (participatory) political freedom—that by republicanism's own account is humanly fundamental. Moreover, it attributes to electoral politics a liveliness, immediacy, and accessibility that contemporary American experience cannot easily credit.

In view of contemporary realities in the political life of the continental republic, some observers conclude that the best that can now be done on behalf of the republican strain in constitutional thought is to protect and nurture civic dialogic engagement not within the national constitutional setup, but beyond it. Such observers see local associations, both governmental and nongovernmental, as the realms that in modern life remain for the "positive" freedom of political action. With varying emphases, they accordingly suggest that constitutional law best serves this freedom through judicial specification and enforcement of supportive legal rights respecting municipal and associational autonomy, political expression, cultural and ideological diversity, personal self-formation through associations both intimate and civic, and personal independence construed as "liberty" and "property." In effect, the suggestion is to pump content from civic-republican wellsprings into the liberal doctrine of LIMITED GOVERNMENT; it is to direct a participatory-communitarian ideology of politics to the purposes of a judicially administered, libertarian HIGHER LAW.

This makes for a troubled, diluted republicanism. In quintessential republican thought, a right against the government is strictly a matter of here-and-now popular political will. Such a right can exert no force against the political resolutions that alone confer its existence. In quintessential republican thought, if there are constitutional rights, this is only because and insofar as the people politically engaged have so resolved. This is rather a far cry from the judge-led constitutionalism on which Americans have come to rely for assurance of their liberties. The republican premise that the polity, with good fortune, can lead itself by unconstrained political deliberation to a duly libertarian general will is one for which modern political wisdom does not easily allow. Political modernism not only denies the existence of any publicly demonstrable and compelling moral reality; it further doubts the possibility on which quintessential republican thought is grounded: that political conversation, unconstrained by an externally enforced higher law of rights, can itself sustain the social conditions of a true dialogic concourse of free persons.

FRANK I. MICHELMAN
(1992)

(SEE ALSO: *Republicanism.*)

Bibliography

EPSTEIN, RICHARD A. 1987 Beyond the Rule of Law: Civic Virtue and Constitutional Structure. *George Washington Law Review* 56:149–171.

FALLON, RICHARD H., JR. 1981 What Is Republicanism, and Is It Worth Reviving? *Harvard Law Review* 102:1695–1735.

MICHELMAN, FRANK I. 1986 The Supreme Court, 1985 Term—Foreward: Traces of Self-Government. *Harvard Law Review* 100:4–77.

——— 1990 Tutelary Jurisprudence and Constitutional Property. In Ellen Paul and Howard Dickman, eds., *Liberty, Property, and the Future of Constitutional Development*, pages 127–171. Albany: State University of New York Press.

SYMPOSIUM 1987 Republicanism and Liberalism in American Constitutional Thought. *William and Mary Law Review* 29: 57–112.

——— 1989 The Civic Republican Tradition. *Yale Law Journal* 97:1493–1723.

## REPUBLICAN PARTY

The Republican party was organized in response to the KANSAS-NEBRASKA ACT (1854), which allowed SLAVERY in the Kansas and Nebraska territories. This was a repudiation of the MISSOURI COMPROMISE (1820), which had prohibited all SLAVERY IN THE TERRITORIES west and north of Missouri and for a generation had served as the basis of all sectional accommodation on slavery and territorial settlement. This new political organization was initially known as the Anti-Nebraska party.

As a coalition of former Whigs, antislavery Democrats, former Know-Nothings, and abolitionists who had been in the Liberty and Free-Soil parties, Republicans differed among themselves on such issues as currency, banking, and tariffs. But they all agreed on the need to stop the extension of slavery in the territories. In his "House Divided" speech of 1858 ABRAHAM LINCOLN expressed this view, noting that he wanted to "arrest the further spread of it [slavery], and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction." Republicans were also motivated by the fear that freedom was actually on the defensive and that a "slave-power conspiracy" threatened the liberty of all Americans.

Especially after the decision in DRED SCOTT V. SANDFORD (1857), Republicans feared a nationalization of slavery. Lincoln worried there might soon be "another Supreme Court decision, declaring that the Constitution of the United States does not permit a *state* to exclude slavery from its limits. . . . We shall lie down pleasantly dreaming that the people of Missouri are on the verge of making their State free; and we shall awake to the reality, instead, that the Supreme Court has made Illinois a slave state." The implications of *Dred Scott* were clear to Republican leaders. Lincoln argued that "the logical conclusion" from Chief Justice ROGER BROOKE TANEY's opinion was "that what Dred Scott's master might lawfully do with Dred Scott, in the free State of Illinois, every other master might lawfully do with any other one, or one thousand slaves, in Illinois, or in any other free State." In 1856, Senator Henry Wilson, a future vice-president, stated that the party's "object is to overthrow the Slave Power of the country."

This battle with the slave-power conspiracy did not mean an all-out assault on slavery wherever it existed. Most Republicans agreed, however reluctantly, that the Constitution did not permit the federal government to interfere with slavery in the states. Some Republicans, including Lincoln, even acknowledged the constitutional obligation to return fugitive slaves, although many other leading Republicans, including SALMON P. CHASE, WILLIAM SEWARD, and THADDEUS STEVENS, were active in defending fugitive slaves and their white allies.

Whatever their differences over the fugitive slave laws, Republicans agreed that the Constitution was fundamentally antislavery. This interpretation was at odds with both the southern view and the abolitionist view of WILLIAM LLOYD GARRISON that the Constitution was a proslavery compact and thus a "covenant with death." Republicans tied their CONSTITUTIONAL THEORY to the DECLARATION OF INDEPENDENCE to argue that the thrust of the Constitution—the intent of the Framers—was against slavery.

The constitutional principles of the antebellum Republican party can be organized around the party's election slogan—Free Soil, Free Labor, Free Speech, Free Men—and by the party's endorsement of the principles of the Declaration of Independence.

"Free Soil" had two meanings for the Republicans. First, it meant closing the territories to slave settlement. Until the CIVIL WAR mooted the issue, Republicans consistently opposed allowing any new slave states into the Union and fought against allowing masters to bring their slaves into any of the territories. They argued that Congress had full authority to prohibit all slavery in the territories. This left the party in a constitutional quandary after the ruling in *Dred Scott v. Sandford*. Republicans could not maintain their Free Soil position without opposing the Supreme Court. They tried to extricate themselves from this dilemma by asserting that Taney's rulings on the power of Congress over slavery in the territories and on the status of free blacks to sue in federal courts were OBITER DICTA that had no legitimate constitutional authority. The Republican editor Horace Greeley declared in the *New York Tribune* that Taney's opinion was "atrocious," "wicked," "abominable," and had no more constitutional authority than what might be heard in any "Washington bar-room."

Republicans also believed that "Free Soil" should dic-

tate national policy on western lands. Thus, the party supported the HOMESTEAD ACT and the MORRILL ACT as ways of stimulating western settlement.

The Republican commitment to "Free Labor" centered on the dignity of labor, the importance of individual enterprise in nineteenth-century northern society, and a middle class culture of hard work. One Iowa Republican proclaimed that America's greatness was based on the fact that "even the poorest and humblest in the land, may, by industry and application, attain a position which will entitle him to the respect and confidence of his fellowmen." Free labor was also the opposite of slave labor. Free labor meant "Free Men" to Republicans. While the party opposed the extension of slavery, Republicans acknowledged that the national government had no power to end slavery in the states. But, wherever the national government had power over slavery, Republicans wanted to exercise that power.

Tied to the free-labor and free-men beliefs of Republicans was strong support, at least for the era, for black rights. Republicans were horrified by Chief Justice Taney's assertion in *Dred Scott* that blacks could not be citizens of the United States or sue in federal courts. In states like Massachusetts, where blacks could vote, Republicans worked for full integration. In states like Iowa, Wisconsin, and Connecticut, where blacks could not vote, Republicans worked to remove race as a criterion for suffrage. Not all Republicans were racial egalitarians, but most believed in minimal equality for blacks, even if they opposed full social and political equality. The connection between some racial fairness and free labor was articulated by Lincoln in his debate with STEPHEN A. DOUGLAS at Quincy, Illinois: "There is no reason in the world why the negro is not entitled to all the rights enumerated in the Declaration of Independence—the right of life, liberty and the pursuit of happiness. I hold that he is as much entitled to these as the white man. I agree with Judge Douglas that he is not my equal in many respects, certainly not in color—perhaps not in intellectual and moral endowments; but in the right to eat the bread without leave of anybody else which his own hand earns, he is my equal and the equal of Judge Douglas, and the equal of every other man."

The party was also committed to "Free Speech" and other basic CIVIL LIBERTIES. Republicans believed that the South had violated the BILL OF RIGHTS by suppressing freedom of expression and that the South and slavery stood for the suppression of FREEDOM OF SPEECH and violence against any who dared to oppose slavery. This belief was given credence by the banning of *Uncle Tom's Cabin* in most of the South and such incidents as the caning of Senator CHARLES SUMNER by Congressman Preston Brooks of South Carolina and the expulsion from South Carolina and Louisiana of two Massachusetts commissioners who were attempting to negotiate an end to the arrest of free black sailors entering those states. Republicans believed that the Bill of Rights restricted the states, as well as the federal government, and that BARRON V. CITY OF BALTIMORE (1833), the leading precedent on this issue (which reached the opposite conclusion), had been wrongly decided.

The greatest test of Republican constitutional theory was SECESSION and the Civil War. Republicans firmly believed that the Union was "perpetual" and could not be broken by any state or group of states. Republicans rejected the radical Garrisonian view that there should be "no union with slaveholders." The Republicans rejected the southern notion that secession was permissable. Lincoln declared in his inaugural, "I hold that, in contemplation of universal law and the Constitution, the Union of the United States is perpetual."

In the Civil War era Republicans constitutionalized much of their thought and theory. The THIRTEENTH AMENDMENT ended slavery, the FOURTEENTH AMENDMENT overturned the doctrine of *Dred Scott* on black CITIZENSHIP, and the FIFTEENTH AMENDMENT enfranchised blacks on the same basis as whites. Through the PRIVILEGES AND IMMUNITIES and DUE PROCESS clauses of the Fourteenth Amendment, Republicans appeared to apply the Bill of Rights to the states, thus overturning *Barron v. Baltimore.* Finally, through the EQUAL PROTECTION and due process clauses of the Fourteenth Amendment, Republicans seemed to guarantee substantive equality to blacks all over the nation. Supreme Court decisions in the SLAUGHTERHOUSE CASES (1873), CIVIL RIGHTS CASES (1883), and PLESSY V. FERGUSON (1896) undermined the Republican goals of a nationalization of CIVIL RIGHTS and civil liberties. The late-nineteenth-century Supreme Court, although dominated by Republicans, failed to interpret the new amendments in light of the party's antebellum constitutional theory.

PAUL FINKELMAN
(1992)

Bibliography

FEHRENBACHER, DON E. 1978 *The Dred Scott Case.* New York: Oxford University Press.

FINKELMAN, PAUL 1981 *An Imperfect Union: Slavery, Federalism, and Comity.* Chapel Hill: University of North Carolina Press.

FONER, ERIC 1970 *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party.* New York: Oxford University Press.

HYMAN, HAROLD M. and WIECEK, WILLIAM M. 1982 *Equal Justice Under Law: Constitutional Developments, 1837–1877.* New York: Harper & Row.

## RESERVED POLICE POWER

If a state reserves a power to alter, amend, or repeal a charter of incorporation before or when granting that charter, the CONTRACT CLAUSE is not necessarily a bar to the exercise of the state police power. In HOME BUILDING AND LOAN ASSOCIATION V. BLAISDELL (1934), the Court ruled that a state may modify or abrogate contracts because existing laws, by becoming part of the contracts, limit their obligations and because "the reservation of essential attributes of sovereign power is also read into contracts." That principle had originated in the concurring opinion of Justice JOSEPH STORY in DARTMOUTH COLLEGE V. WOODWARD (1819), when he declared that a corporate charter could not be changed unless a power for that purpose were reserved in the charter itself. Thereafter the states began to reserve such a power not only in charters, but in general acts of incorporation and in state constitutions, which applied to all charters subsequently granted. In 1877, when the court sustained a rate-fixing statute enacted under the reserved police power, it declared that the power must be reasonably exercised, consistent with the objects of the charter, and must not violate VESTED RIGHTS. In a 1936 case in which the Court repeated that formulation, as it had many times before, it stated that the reserved power prevented reliance on the contract clause. Never has the Court clarified its standards to explain why it has struck down some regulations under the reserved power yet has sustained others.

The reserved power nevertheless weakened the contract clause's service as a bastion of inviolable corporate charters. In 1884, for example, the Court held that because a private water works company was a public utility, its rates could be fixed by government authority under a reservation clause enacted after the state granted a charter giving the company an equal voice in the fixing of rates. The rise of the DOCTRINE of the reserved police power and the related doctrine of the INALIENABLE POLICE POWER forced the defenders of property rights to seek a more secure constitutional base than the contract clause, thus contributing to the emergence of SUBSTANTIVE DUE PROCESS OF LAW in the 1890s. Dozens of cases involved the application of the reserved police power even after the FOURTEENTH AMENDMENT replaced the contract clause as the main basis for invalidating state regulations. These cases did not, however, produce consistent principles that fixed ascertainable limits on the reserved power. The Court reserved to itself the final power to decide when it will enforce constitutional limitations on the reserved police power. Today the Court speaks of "the reserved powers doctrine" without making the "formalistic distinction" between powers that are reserved and those that are inalienable. *Home Building and Loan Association v. Blaisdell* (1934) obliterated a distinction between the reserved police power and the inalienable police power.

LEONARD W. LEVY
(1986)

Bibliography

WRIGHT, BENJAMIN F. 1938 *The Contract Clause of the Constitution.* Pages 195–213. Cambridge, Mass.: Harvard University Press.

## RESERVED POWERS OF STATES AND PEOPLE

See: Tenth Amendment

## RESIDENCE REQUIREMENTS

Most states limit some benefits, such as welfare payments or free medical care for indigents, to state residents; all states limit voting to residents. Legislative classifications based on nonresidence or out-of-state CITIZENSHIP are not subjected to heightened judicial scrutiny under the EQUAL PROTECTION clause, and these residence requirements consistently pass the relaxed RATIONAL BASIS test.

Because state citizenship and residence are "essentially interchangeable" for purposes of the PRIVILEGES AND IMMUNITIES clause of Article IV, however, discriminations against nonresidents are scrutinized more carefully under that provision. The state must justify such discriminations by showing that they are substantially related to dealing with some special problem or condition caused by nonresidents. A state might constitutionally charge out-of-staters more than residents for a license to cut timber, if the increased charge bore some fair relation to increased costs of enforcing conservation laws against nonresidents. Similarly, nonresidents might constitutionally be denied WELFARE BENEFITS or charged higher tuition for attending a state university, because residents have supported the welfare system and the university out of general tax revenues. The notion of a "political community" justifies limiting the vote to residents.

Discriminations not so justified, however, violate Article IV's privileges and immunities clause when they touch privileges that are deemed "fundamental" to interstate harmony. (See TOOMER V. WITSELL, 1948, commercial shrimping; HICKLIN V. ORBECK, 1978, employment; DOE V. BOLTON, 1973, abortion; NEW HAMPSHIRE SUPREME COURT V. PIPER, 1985, practice of law.)

Requirements of residence for a specified period raise an additional constitutional problem. The Court has invalidated a number of these durational residence require-

ments on EQUAL PROTECTION grounds, also invoking the RIGHT TO TRAVEL or migrate interstate. (See SHAPIRO V. THOMPSON, 1969, welfare benefits; DUNN V. BLUMSTEIN, 1972, one-year requirement for voting invalid; later decisions allow fifty-day residence qualification; *Memorial Hospital v. Maricopa County*, 1974, nonemergency medical care for indigents; *Zobel v. Williams*, 1982, payment of bonuses apportioned to length of residence in the state. But see SOSNA V. IOWA, 1975, one year's residence a valid requirement for access to divorce court.) William Cohen has argued persuasively that these decisions are consistent with a theory that validates a state's durational residence requirement only when the requirement is a reasonable test of a newcomer's intent to remain a resident of the state. The Supreme Court has not yet embraced this theory—or, indeed, any coherent theory explaining its decisions concerning durational residence requirements.

KENNETH L. KARST
(1986)

Bibliography

COHEN, WILLIAM 1984 Equal Treatment for Newcomers: The Core Meaning of National and State Citizenship. *Constitutional Commentary* 1:9–19.

VARAT, JONATHAN D. 1984 "Citizenship" and Interstate Equality. *University of Chicago Law Review* 48:487–572.

## RESIDENTIAL SEGREGATION

Residential segregation refers to the physical or spatial separation of groups. While residential segregation along racial and ethnic lines affects various groups, its most persistent and pervasive manifestations primarily disadvantage African Americans. SEGREGATION is both a condition of life and a process of group differentiation and distinction. As condition and process, it is closely related to INVIDIOUS DISCRIMINATION. The condition of segregation is primarily that of social and territorial isolation and containment. Now, as in the past, the basis of segregation is the actual or perceived incompatibility of groups due to conflicts in values, interests, behavior, and associational preferences. As a legacy of SLAVERY, black-white racial segregation has served in significant part as a substitute for caste. Segregation continues today as a part of the ideology of the color line, implicitly defining the African American's place, role, and status.

Racial segregation in American cities and metropolitan areas is marked both by the large extent of racial separation of blacks from whites within and between given neighborhoods and by the pattern of blacks concentrated in central cities and whites dispersed throughout the suburbs. African Americans are now an urban people, with eighty percent of them residing in cities. The high degree of segregation tends to isolate African Americans—and, to a lesser degree, Hispanics and Asians—from amenities, opportunities, and resources that benefit social and economic well-being.

During the first half of this century, the "Great Migration" of the southern black population primarily to the urban North and Midwest was a significant factor in creating a national presence and elevating the so-called Negro problem into one of national dimensions. This change inspired blacks to press their unfulfilled claims not only on the nation's moral sense but also on its lawmaking institutions, including the courts. National principles, supported by constitutional law, became a principal means of attacking inequality of fact and opportunity.

Although the Supreme Court decision in BROWN V. BOARD OF EDUCATION (1954) is more celebrated, challenges to residential segregation preceded attacks on segregation in public schools. These residential segregation cases focused on two segregation props, racially zoned municipal areas and RESTRICTIVE COVENANTS related to transferring property. In BUCHANAN V. WARLEY (1917), fifty years after the FOURTEENTH AMENDMENT was ratified, the Supreme Court relied on the amendment's due process clause to invalidate a municipal ordinance that prohibited blacks from purchasing or occupying a dwelling located on any block where a majority of the dwellings were white-occupied. The Supreme Court struck down similar acts of de jure segregation in *Harmon v. Taylor* (1927) and in *City of Richmond v. Deans* (1930).

One white reaction to the *Buchanan* decision was the restrictive covenant, a contractual devise by which purchasers of real property assume an obligation not to dispose of the property to certain designated classes (i.e., blacks particularly and non-Caucasians generally). In 1948, as part of the black campaign against residential segregation, the Supreme Court held in SHELLEY V. KRAEMER (1948) that state court enforcement of the restrictive covenants was unconstitutional STATE ACTION that violated the Fourteenth Amendment's EQUAL PROTECTION clause.

During the 1950s the federal government began to take steps toward weakening the de jure basis of racial segregation. Simultaneously, however, across the land racial homogeneity was being established by white surburbanization. This movement solidified the de facto basis of racial segregation in housing and therefore in schools as well. As historian Richard Polenberg has observed, "Suburbanization encouraged the growth of a racially segmented society, offering a classic example of how demographic trends would work at cross purposes with constitutional, political, and social change." Suburbanization, however, was not simply a matter of demographics, family settlement, and economic opportunity. Political decisions at the

state, local, and federal levels not only contributed heavily to suburbanization but also to its virtually all-white nature.

The city-suburbs segregation has become a subject of special importance because arguably the exclusion of blacks from the suburbs denies them access to newer, better-quality housing, less crime-ridden neighborhoods, public schools with higher-achieving students, new and viable job opportunities, and local governments with adequate tax bases to support appropriate municipal services delivery. For many blacks, however, there are certain drawbacks to suburban integration, because it may dilute central-city black voting strength and rob central-city black communities of potential leadership and representation. Moreover, stable integration that depends on relatively low numbers of blacks to avoid neighborhood tipping, white flight, and resegregation preempts the potential for social cohesiveness and the maintenance of black identity.

Although the legacy of racism directed toward African Americans had virtually frozen in the effects of past residential discrimination and segregation by the 1960s, the modern era of OPEN HOUSING LAWS did not begin until 1968. Four significant events occurred that year within months of each other: first, on March 1, the Kerner Commission released the *Report of the National Advisory Commission on Civil Disorders;* second, on April 4, MARTIN LUTHER KING, JR., was assassinated; third, on April 11, President LYNDON B. JOHNSON signed into law Title VIII of the CIVIL RIGHTS ACT OF 1968 (the Fair Housing Act); and fourth, on June 17, the Supreme Court revitalized the CIVIL RIGHTS ACT OF 1866 when it decided JONES V. ALFRED H. MAYER CO. (1968), making it clear that this statute, enforcing the THIRTEENTH AMENDMENT, prohibited both public and private acts of RACIAL DISCRIMINATION in the sale or leasing of housing.

The Kerner Commission report recognized that the nation was rapidly moving toward two separate Americas and that within two decades, "this division could be so deep that it would be almost impossible to unite." The societies described were blacks concentrated within large central cities and whites located in the suburbs, in smaller cities, and on the periphery of large central cities. The report also recognized that community enrichment had to be an important adjunct to integration, "for no matter how ambitious or energetic the program, few Negroes now living in central cities can be quickly integrated. In the meantime, large-scale improvement in the quality of ghetto life is essential." Many commentators see the Kerner Commission report and Dr. King's assassination as precipitating passage of the Fair Housing Act, similar legislation having failed to pass in 1966 and 1967.

Title VIII, the nation's primary open housing law, contains broad prohibitions against public and private housing discrimination, including lending and brokering practices. The act prohibits discrimination on the basis of race, national origin, religion, or sex. As amended in 1988, the law now also includes as protected classes the handicapped and families with children. The act provides for independent enforcement by private lawsuits or Justice Department lawsuits, as well as enforcement through the administrative channels of the Department of Housing and Urban Development (HUD). Prior to the 1988 amendments, federal administrative enforcement power was largely ineffective, restricted to conciliation.

In the late 1960s and early 1970s, fair housing advocates focused heavily on integrating suburbs. A primary target was economic-racial exclusionary land use practices. Although exclusionary ZONING was seen as the principal device for maintaining the race- and class-based segregation of inner-city residents, other local government exclusionary devices often worked in combination with zoning. Those devices included voter initiatives and referenda, as in JAMES V. VALTIERRA (1971), HUNTER V. ERICKSON (1969), and REITMAN V. MULKEY (1967); withdrawal from, or nonparticipation in, housing and community development programs designed to benefit the poor; tactics of delay and obstruction of private efforts to develop lowincome housing; privately caused displacement; publicly supported urban revitalization or gentrification that displaced nonwhite residents; and HUD's sale of formerly subsidized properties acquired through foreclosure, without protecting the low-income character of those properties.

In the area of exclusionary zoning on the basis of race, two significant Supreme Court equal protection cases were decided in the 1970s, *Warth v. Seldin* (1975) and ARLINGTON HEIGHTS V. METROPOLITAN HOUSING DEVELOPMENT CORPORATION (1977). In *Warth* a 5–4 majority held that plaintiffs, who included low-income housing developers, prospective tenants, and local tax-paying residents, all lacked STANDING to challenge the town's zoning ordinance that prevented the construction of low- or moderate-income housing. According to the Court, plaintiffs' allegations were insufficient to demonstrate "an actionable causal relationship between Penfield's zoning practices and petitioners' asserted injury." The Court found, among other facts, that no specific project was ready for development and likely occupancy by the poor and nonwhite plaintiffs. Moreover, the townspeople's "right to live" in an integrated community was seen by the Court as an "indirect harm" that resulted from the exclusion of others and thus violated the prudential standing rule that prohibits the assertion of rights on behalf of third parties.

The *Arlington Heights* opinion reaffirmed the WASHINGTON V. DAVIS (1976) holding that violation of the equal protection clause required evidence of discriminatory

purpose, and held that even evidence of such a purpose would not necessarily invalidate state action; it would merely shift to defendant the burden of showing that "the same decision would have resulted even had the impermissible purpose not been considered."

Title VIII claims, on the other hand, aside from applying to PRIVATE DISCRIMINATION, revealed two clear advantages to claimants over equal protection claims: (1) standing was broadly defined, as even rights of third parties could be asserted (*Trafficante v. Metropolitan Life Insurance Company*, 1972 and *Havens Realty Corporation v. Coleman*, 1982), and (2) discriminatory effects would establish a claim for relief.

The protracted institutional litigation associated with the *Gautreaux* case—begun in 1967 and producing thirty-four opinions, including one Supreme Court opinion, HILLS V. GAUTREAUX (1976)—successfully challenged the Chicago Housing Authority's site selection and tenant assignment as violations of the equal protection clause and the Fair Housing Act. The Supreme Court opinion in *Gautreaux* distinguished the case from MILLIKEN V. BRADLEY (1974), which had overturned a lower court decision ordering interdistrict busing of public school children in Detroit and its suburbs as a desegregation remedy. In *Gautreaux* the Court granted such metropolitan relief, obligating HUD to act beyond Chicago's boundaries in effectuating desegregation of the housing authority buildings. The Court distinguished *Gautreaux* from *Milliken* by emphasizing that the federal government had violated its constitutional equal protection obligations; the interdistrict remedy was commensurate with the constitutional violation. Although *Gautreaux* was hailed as a doctrinal success, its remedial results were, at best, mixed. For many years no public housing was produced in Chicago or in the metropolitan areas, and many intended beneficiaries chose not to avail themselves of the limited access to housing beyond Chicago.

During the 1980s the Supreme Court diluted the effectiveness of the 1866 Civil Rights Act. In MEMPHIS V. GREENE (1981) the Supreme Court upheld a white neighborhood's street closure that blocked black access to the city through the white neighborhood. The Court held that this closure did not sufficiently implicate black property rights and therefore the act was not violated. Moreover, the Court concluded that the facts indicated an inconvenience to blacks, but not a BADGE OF SERVITUDE that could violate the Thirteenth Amendment.

A year after *Greene*, in *General Building Contractors Association v. Pennsylvania* (1982), the Supreme Court found that a related provision of the 1866 act required intentional discrimination to constitute a violation. In light of *General Building Contractors* most lower federal courts are requiring intent as part of all fair-housing claims under the 1866 act. Thus, Title VIII now virtually stands alone as a viable basis for challenging private action that causes racially discriminatory effects. In *Huntington Branch NAACP v. Town of Huntington* (1988) the Supreme Court endorsed the discriminatory-effect theory for Title VIII claims in a limited per curiam affirmance.

Housing segregation is often closely related to de facto public school segregation. In the highly publicized case of *United States v. Yonkers Board of Education* (1987), a Second Circuit opinion affirmed the trial court's finding that the city had confined its subsidized housing to areas of concentrated nonwhite population and that this action had contributed to the segregation of the city's public schools. As a remedy the district court ordered the city to permit construction of subsidized housing in white, nonpoor residential areas and to implement a magnet-school program. When the city council refused to implement the housing plan, the court held both the city and the council members in contempt, levying substantial fines. The Supreme Court in *Spallone v. United States* (1990) upheld the fines against the city, but disapproved the fines against individual council members.

There is growing black skepticism and loss of faith in integration, particularly in light of the disproportionately high poverty rate of blacks and the continuously high rates of housing segregation for blacks of all socioeconomic classes. At the time of Title VIII's enactment, its sponsors thought that the statute's emphasis on antidiscrimination would lead to residential integration. Congress perceived antisegregation and antidiscrimination as complementary remedies. Often, however, in the name of integration or desegregation, racial discrimination against individuals has occurred and housing opportunities actually have been decreased. In the principal "integration maintenance" decision, *United States v. Starret City Associates* (1988), the Supreme Court denied certiorari, leaving intact a Second Circuit decision holding that Title VIII was violated by a RACIAL QUOTA limiting black access to an apartment complex in order to maintain integration. Interestingly, the NAACP supported the Justice Department's challenge to the integration maintenance scheme at issue.

Housing persists as one of black America's most intractable social issues. For most of white America, on the other hand, home ownership in a supportive neighborhood of choice represents the highest achievement in terms of status and material acquisition, while simultaneously serving to validate the incentives associated with equality of opportunity. This vision of the American dream, however, is sullied and distorted by racism and economic subjugation. Even accepting the moral imperative and the practical necessity of integrated housing for the national commonwealth, it is difficult to escape the

conclusion of Derrick Bell: "Discrimination in housing, with its vices of segregated housing patterns and inadequate and overpriced housing for minorities, continues to be one of those areas where the law is unable or unwilling to keep up with conditions in the real world."

JOHN O. CALMORE
(1992)

Bibliography

CALMORE, JOHN O. 1989 To Make Wrong Right: The Necessary and Proper Aspirations of Fair Housing. Pages 77–110 in Janet Dewart, ed., *The State of Black America 1989.* New York: National Urban League.

GOERING, JOHN, ed. 1986 *Housing Desegregation and Federal Policy.* Chapel Hill: University of North Carolina Press.

KUSHNER, JAMES A. 1983 *Fair Housing: Discrimination in Real Estate, Community Development and Revitalization.* Colorado Springs, Colo.: ShepardsMcGraw-Hill.

SCHWEMM, ROBERT 1990 *Housing Discrimination Law and Litigation.* New York: Clark Boardman Company, Ltd.

## *RES JUDICATA*

(Latin: "The thing has been adjudicated.") The term is used broadly to refer to two kinds of effect given to a court's judgment: extinguishing claims and thus barring future litigation ("claim preclusion"), or conclusively determining certain issues that might arise in future litigation ("issue preclusion").

KENNETH L. KARST
(1986)

## RESOLUTIONS OF STAMP ACT CONGRESS

See: Stamp Act Congress, Resolutions of

## RESTRAINT OF TRADE

See: Antitrust Law

## RESTRICTIVE COVENANT

Until the Supreme Court ruled their judicial enforcement unconstitutional in SHELLEY V. KRAEMER (1948), restrictive covenants were widely employed to achieve the racial SEGREGATION of urban neighborhoods in America. A restrictive covenant is a contract among owners of land, mutually limiting the uses of land covered by the covenant. Many such covenants have benign purposes: all the owners on a residential block, for example, might agree that houses will be set back thirty feet from the street. Racial covenants, however, limited the occupancy of homes on the basis of the occupants' race. They rested on an ugly premise: excluding blacks or Asians would, as one Louisiana court put it, make a neighborhood "more attractive to white people."

Such covenants were commonly adopted by landowners, or written into deeds of newly developed land, beginning in the late nineteenth century. Under existing property law, they were enforceable not only against their signers, but against the signers' heirs, assignees, and purchasers—at least so long as "conditions" had not changed. The use of the covenants accelerated after the Supreme Court decided, in BUCHANAN V. WARLEY (1917), that municipal ZONING ordinances specifying where persons of one race or another might live were unconstitutional. The typical covenant ran for twenty-five years, but some ran for fifty years or even in perpetuity.

Restrictive covenants cannot be said to be the sole cause, or even the primary cause, of residential segregation before 1948. The poverty of most blacks was itself a severe restriction on the purchase of homes; and middle-class blacks who could afford to buy were steered to "colored sections" by real estate brokers and lenders. (The latter practices became violations of federal law only in 1968.) Yet the covenants surely played their part in the segregative process, a part they could play only because they were enforceable in court.

If an owner started to build a house too close to the street, in violation of a restrictive covenant, the neighbors would be entitled to an INJUNCTION ordering the owner to stop. They might also be entitled to damages, if they could demonstrate some loss. But, subject to the covenant's limitations, the owner would be entitled to occupy the property, or sell it to any purchaser. The owner of property subject to a racial covenant, however, could not—so long as the covenant was enforceable—sell it to blacks for their use as a residence. The racial covenants, then, not only restricted black would-be buyers but also restricted the owners' free alienation of property—an interest recognized in the COMMON LAW since the thirteenth century. Yet the state courts regularly enforced the covenants.

The Supreme Court lent its approval in 1926, in CORRIGAN V. BUCKLEY, holding that judicial enforcement of a racial covenant did not even raise a substantial federal question; any discrimination was private action, not STATE ACTION. (The case arose not in a state, covered by the FOURTEENTH AMENDMENT, but in the DISTRICT OF COLUMBIA. The Court correctly sensed, however, that a similar problem would arise if an EQUAL PROTECTION guarantee were found applicable to governmental action in the District.)

Over the next two decades, the NAACP searched for opportunities to bring to the Court new challenges to the

judicial enforcement of racially restrictive covenants. They finally succeeded in *Shelley,* where the Court did find state action in a state court's injunctive relief to enforce a covenant against black buyers of a home. On the same day, in *Hurd v. Hodge* (1948), the Court reached a comparable result in an attack on judicial enforcement of a covenant in the District of Columbia. No constitutional issue was decided in *Hurd;* the Court based its decision on "the public policy of the United States."

Five years later, the Court took away the last remaining weapon of persons who would seek to use racial covenants as a way of keeping their neighborhoods white. In BARROWS V. JACKSON (1953) the Court held that a state court violated the Fourteenth Amendment by using a covenant as a basis for awarding damages against persons who sold their house to black buyers.

One of the worst features of the racial covenants was their contribution to the symbolism of black inferiority. The removal of that symbolism, wherever it may be found, is necessary if the Fourteenth Amendment's promise of equal CITIZENSHIP is to be fulfilled. But ending the judicial enforcement of racial covenants did not end residential segregation, a phenomenon that has declined only slightly since 1940.

KENNETH L. KARST
(1986)

Bibliography

HENKIN, LOUIS 1962 *Shelley v. Kraemer:* Notes for a Revised Opinion. *University of Pennsylvania Law Review* 110:473–505.

VOSE, CLEMENT E. 1959 *Caucasians Only.* Berkeley: University of California Press.

## RETROACTIVITY OF JUDICIAL DECISIONS

LEGISLATION ordinarily does not apply retroactively to conduct occurring prior to its adoption but only to actions taking place after enactment. Indeed, the potential unfairness of some retroactive legislation is so great that certain forms of legislative retroactivity are specifically prohibited by the Constitution. The EX POST FACTO clauses of the Constitution prohibit retroactive criminal penalties, and the CONTRACT CLAUSE limits state legislation that would impair the obligation of pre-existing contracts. In addition, certain other fundamentally unfair forms of legislative retroactivity may violate constitutional due process guarantees.

Judicial decisions, on the other hand, ordinarily *are* retroactive in application. To some extent, such retroactivity is a consequence of the nature and function of the judicial decision-making process. Traditional lawsuits and criminal prosecutions concern the legal consequences of acts that have already taken place. If judicial decisions in such cases are to adjudicate the issues between the parties, those decisions necessarily must apply to prior events. The retroactive effect of judicial decisions, however, commonly extends beyond application to the particular parties involved in a case. To the extent that a judicial decision constitutes a new legal precedent, it will ordinarily be applied to all undecided cases that are subsequently litigated, regardless of whether the relevant events occurred before or after the new precedent was announced.

Although traditional judicial decisions are, in theory, completely retrospective in nature, two sets of legal doctrines place important practical limits on the actual breadth of decisional retroactivity. Statutes of limitations, which require suits to be brought within some specified period of time after the relevant events occur, limit the retrospective application of new precedents to the length of the prescribed limitations period; and the doctrines of RES JUDICATA and collateral estoppel prevent the relitigation of cases and issues that have been finally decided before the new precedent is announced. In addition, as in the case of retroactive legislation, there are some circumstances of fundamental unfairness in which constitutional principles may prevent the retroactive use of judicial decisions. By analogy to the constitutional prohibition of ex post facto laws, for example, the Supreme Court in *Bowie v. City of Columbia* (1964) held it unconstitutional to apply a new expansive judicial interpretation of a criminal statute to prior conduct.

The principal theoretical basis supporting the broad traditional retroactivity of judicial decisions is the abstract idea that courts (unlike legislatures) do not make, but merely find, the law. This theory in effect denies the existence of retroactivity; under the theory the events in question were always subject to the newly announced rule, although that rule had not been authoritatively articulated.

The theory that judicial decisions do not make law does not always reflect reality. Perhaps the clearest example of apparent judicial lawmaking is a court's overruling of an earlier judicial decision regarding the meaning of the COMMON LAW, a statute, or a constitutional provision. Even when no earlier decision is overruled, judicial decisions or interpretations may announce genuinely new principles. When judicial decisions thus create new law, it is plausible to argue that the new principles should not be given the retroactive effect normally accorded to judicial decisions, but should instead be treated more like new legislation and given prospective effect only. These arguments are strongest when individuals or governments have relied (perhaps irrevocably) upon earlier decisions in shaping

their conduct. In such circumstances, retroactive application may cause unanticipated and harmful results.

In response to these and similar considerations, some courts have used the practice of PROSPECTIVE OVERRULING of prior decisions. Such a court, in overruling a precedent upon which substantial reliance may have been placed, may announce in OBITER DICTUM its intention to reject the old doctrine for the future, but nevertheless apply the old rule to the case at hand and to other conduct prior to the new decision. Alternatively, the court may apply the new rule to the parties before it, thus making the announcement of the new rule HOLDING rather than "dictum," but may otherwise reserve the rule for future application. In *Great Northern Railway Company v. Sunburst Oil and Refining Company* (1932) the Supreme Court held that the Constitution permits either of these forms of prospective overruling. The *Sunburst* decision gave constitutional approval to prospective judicial overruling of common law precedents and of decisions interpreting statutes. Such prospective overruling has primarily been used in two kinds of cases: new interpretations of statutes relating to property and contract rights, and the overruling of doctrines of municipal and charitable immunity from tort liability.

The most prominent and controversial recent issue concerning prospective overruling, however, has involved the retroactivity of new Supreme Court decisions enlarging the constitutional rights of defendents in criminal proceedings. During the 1950s and 1960s, the Court significantly broadened the rights of criminal defendants with respect to unconstitutional SEARCHES AND SEIZURES, POLICE INTERROGATION AND CONFESSIONS, the scope of the RIGHT AGAINST SELF-INCRIMINATION, and the inadmissibility of unconstitutionally obtained evidence. The Court has ruled that some of these new constitutional interpretations should not be given general retrospective application.

The extent of the possible retroactive application of new doctrines affecting the constitutionality of criminal convictions is greater than in most other areas of law because of the potential availability of post-conviction relief to prisoners whose convictions might be effectively challenged if the newly announced rules were applicable to prior convictions. Petitions for HABEAS CORPUS are not subject to statutes of limitations or to the ordinary operation of the doctrine of *res judicata.* Thus, in 1961, when the Supreme Court decided in MAPP V. OHIO that the Constitution prohibits states from basing criminal convictions upon EVIDENCE obtained in violation of the FOURTH and FOURTEENTH AMENDMENTS, full retroactivity of that decision would have permitted a great many prisoners to challenge their convictions, no matter when their trials had occurred. Because the *Mapp* decision was based upon the interpretation of constitutional provisions dating from 1791 and 1868, the theoretical arguments for full retroactivity were strong. However, *Mapp* overruled the opinion of the Court in WOLF V. COLORADO (1949), which had held, directly contrary to *Mapp*, that the states were free to use unconstitutionally obtained evidence in most circumstances. Although police could hardly have legitimately relied upon *Wolf* in engaging in unconstitutional searches, state prosecutors and courts might have relied upon *Wolf* in using unconstitutionally obtained evidence. The primary reason given by the Court for the *Mapp* decision, moreover, was to deter police misconduct; the *Mapp* EXCLUSIONARY RULE is not a safeguard against conviction of the innocent. Retroactive application of *Mapp* to nullify pre-existing convictions would thus arguably contribute little to the main purpose of the *Mapp* rule while permitting guilty defendants to escape their just punishment. Similar issues have surrounded the potential retroactivity of other new Supreme Court decisions enlarging the constitutional rights of criminal defendants.

The Supreme Court has resolved these retroactivity issues by employing a test focusing on three main criteria: whether the purpose of the new rule would be furthered by its retroactive application; the extent of the reliance by law enforcement authorities and courts on prior decisions and understandings; and the likely effect of retroactive application on the administration of justice. Using this approach the Court held, in *Linkletter v. Walker* (1965), that the *Mapp* decision would be applied to trials and direct APPEALS pending at the time of the *Mapp* decision, but not to state court convictions where the appeal process had been completed prior to announcement of the *Mapp* opinion. The same rule of general nonretroactivity has been applied to new constitutional interpretations prohibiting comment on a defendant's failure to take the witness stand at trial; establishing the MIRANDA RULES for police warnings to persons interrogated; prohibiting WIRETAPPING without judicial SEARCH WARRANTS; and limiting the permissible scope of SEARCHES INCIDENT TO ARRESTS. On the other hand, full retroactivity has been accorded to new decisions requiring provision of free counsel for INDIGENTS in criminal trials; requiring proof beyond a REASONABLE DOUBT in state criminal proceedings; and broadening the definition of constitutionally prohibited DOUBLE JEOPARDY. In general, rules designed to protect innocent persons from conviction have been given full retroactive application, while rules primarily intended to correct police and prosecutorial abuses that do not implicate guilt have been given limited retroactivity. The practical significance of these retroactivity decisions has been diminished in recent years by Supreme Court decisions that limit the availability of post-conviction relief to incarcerated persons (for exam-

ple, STONE V. POWELL, 1976) and by the current Supreme Court's general opposition to continued expansion of defendants' constitutional rights in criminal proceedings.

PAUL BENDER
(1986)

Bibliography

FIELD, OLIVER P. 1935 *The Effect of an Unconstitutional Statute.* Minneapolis: University of Minnesota Press.

## RETROACTIVITY OF LEGISLATION

A characteristic of arbitrary government is that the state can alter retroactively the legal status of acts already done. Therefore, proposals to prohibit various types of retroactive LEGISLATION encountered the opposition of those delegates to the CONSTITUTIONAL CONVENTION OF 1787 who believed such laws were "void of themselves" and that a formal prohibition would "proclaim that we are ignorant of the first principles of legislation." There are, nevertheless, three such prohibitions in the Constitution: Congress may not pass EX POST FACTO laws and the states may not pass ex post facto laws or laws impairing the OBLIGATION OF CONTRACTS.

There are sound historical reasons for supposing that the Framers meant to proscribe both criminal and civil legislation with retrospective application. But JOHN DICKINSON had warned the convention that WILLIAM BLACKSTONE's commentaries treated "ex post facto" as a technical term applying only to criminal law. In CALDER V. BULL (1798), the Supreme Court relied on Blackstone's authority to confine the constitutional prohibition to criminal laws.

The CONTRACT CLAUSE ultimately proved a mere parchment barrier to retroactive legislation. It does not apply to the federal government and the courts have so interpreted it as to make it a weak defense against retroactive state laws.

DENNIS J. MAHONEY
(1986)

## RETROACTIVITY OF LEGISLATION (Update)

LEGISLATION is "retroactive" when it applies new legal consequences to conduct that occurred before the legislation took effect. Congress and state legislatures generally may enact legislation that has retroactive effects when their intent to do so is clear. In *Landgraf v. USI Film Products* (1993), the leading recent case on retroactivity of legislation, the Supreme Court held that the CIVIL RIGHTS ACT OF 1991, enacted to restore the scope of CIVIL RIGHTS laws the Court had narrowly interpreted in 1989, did not apply to claims arising before the act's effective date. The Court applied a presumption against statutory retroactivity and, the act's restorative purpose notwithstanding, held that Congress had not clearly indicated an intent that the provisions at issue apply retrospectively. (No similar clear-statement hurdle or presumption against retroactive application applies to judicial decisions, which are governed by a general rule in favor of retroactive application, except on HABEAS CORPUS review.)

There is no general constitutional prohibition against retroactive legislation; the Constitution does, however, prohibit certain types of retroactive legislation. The various constitutional anti-retroactivity provisions reflect fundamental considerations of fairness, including protection of reasonable reliance and settled expectations, and the RULE OF LAW principle that behavior should be governed by rules publicly fixed in advance. Retroactive laws can deprive persons of fair notice of the illegality of contemplated behavior, and create opportunities for legislative retribution or favoritism against identifiable groups.

Among the constitutional prohibitions on retroactive legislation are the EX POST FACTO clauses of the Constitution, which prohibit retroactive application of certain federal and state laws. The Supreme Court since CALDER V. BULL (1798) has construed those prohibitions to apply only to new penal laws that disadvantage the defendant. Laws violate the prohibition on ex post facto laws if they punish acts that were noncriminal when committed, increase the punishment for or aggravate an existing crime after it was committed, or deprive an individual of a defense that was available when the conduct occurred. Retroactive application of new SENTENCING guidelines or mandatory sentence provisions, and elimination of "good time" credits for time served in prison are examples of measures the Court has invalidated under the ex post facto clause, whereas the Court upheld a statute that decreased the frequency of routine parole suitability hearings to persons convicted before its enactment. Justice CLARENCE THOMAS in a recent CONCURRING OPINION suggested that *Calder* be reexamined and the ex post facto clauses be applied to civil legislation as well as criminal, but no other member of the Court joined in that suggestion.

With the ex post facto clause unavailable to address civil retroactive legislation, other constitutional provisions, including the guarantee of DUE PROCESS, the CONTRACT CLAUSE, and the TAKINGS clause, set the relevant limitations. The contract clause imposes constitutional constraints on the states' ability retroactively to impair "the Obligation of Contracts." The contract clause protects

against state laws that impair governmental or private contracts; by its terms the clause does not apply to federal laws. Its principal purpose was to prevent debtor relief laws, thereby ensuring that new legislation could not vitiate obligations previously incurred.

Until the nineteenth century, the contract clause was the principal ground for judicial invalidation of state legislation infringing on private business and PROPERTY interests. The Court has traditionally been most skeptical of states' efforts to relieve themselves of their own contractual obligations. By the close of the nineteenth century, however, the contract clause largely lost its practical importance as an impediment to retroactive legislation. States increasingly framed their own contractual obligations so as to preserve their latitude to modify contractual provisions, thereby avoiding contract clause problems. During the Great Depression, the Supreme Court in HOME BUILDING & LOAN ASSOCIATION V. BLAISDELL (1934) upheld even a retroactive debtor relief law as an economic emergency measure, concluding that such a public purpose justified the law, and characterizing it as preserving the value of creditors' accrued rights. Following *Blaisdell*, invalidations of legislation under the contract clause have been rare.

Although the contract clause does not apply to federal legislation, the due process clause of the Fifth Amendment has been interpreted to place similar limitations on federal government power to legislate to impair private or governmental contracts, or to impose retroactive civil liability. Under the due process clause, the Court asks whether the law in question is rationally related to a legitimate governmental purpose. During the *Lochner* era, the Court skeptically reviewed ECONOMIC REGULATION, and repeatedly relied on SUBSTANTIVE DUE PROCESS to invalidate economic legislation that interfered with settled economic expectations of CORPORATIONS and private property owners. The Court in RAILROAD RETIREMENT BOARD V. ALTON RAILWAY CO. (1935), for example, voided as a substantive due process violation a federal law that required the railroad to establish a pension fund retrospectively covering even some employees who no longer worked for the railroad. Since the 1930s, however, the Court has not invalidated any law as retroactive in violation of substantive due process. In one leading case, *Usery v. Turner Elkhorn Mining Co.* (1976), the Court upheld legislation requiring employers to provide benefits to coal miners who contract black lung disease, including miners who had stopped working long before the legislation was enacted, as a rational way to spread the costs of the disease, even though the law admittedly upset the employers' settled expectations.

A fractured majority in *Eastern Enterprises v. Apfel* (1998) signaled that the current Court's tolerance of retroactive legislation has its bounds. A four-member plurality, in an opinion by Justice SANDRA DAY O'CONNOR, held that a federal law requiring companies that had engaged in mining, even if they no longer did so, to fund lifetime health benefits for former miners was a REGULATORY TAKING of the employers' property in violation of the takings clause of the Fifth Amendment. Although the law did not involve the physical invasion of property that has traditionally been the focus of takings clause jurisprudence, the plurality believed that the employers' economic interests sufficed to trigger a takings analysis, and that the law fell short of the clause's requirement of "justice and fairness." Under a three-part analysis looking to the law's economic impact on employers, the degree to which it interfered with employers' investment-backed expectations, and the nature of the governmental action in singling out certain classes of employers to bear an unanticipated burden based on conduct long past, the plurality concluded that the law amounted to a taking. It imposed "a severe retroactive liability on a limited class of parties that could not have anticipated the liability"—a liability that the plurality viewed as "substantially disproportionate to the parties' experience."

The remaining five members of the Court in *Eastern Enterprises* believed that the statute was properly analyzed under the due process rather than the takings clause. Justice ANTHONY M. KENNEDY concurred in the judgment in part on the ground that the law violated substantive due process. Noting that "[s]tatutes may be invalidated on due process grounds only under the most egregious of circumstances," Kennedy nonetheless concluded that the law at issue was "far outside the bounds of retroactivity permissible under our law." Kennedy dissented, however, from the plurality's takings analysis on the ground that the law implicated no identified property interest, but merely monetary liability. The four remaining Justices would have upheld the law as fundamentally fair and therefore consistent with due process.

*Eastern Enterprises* demonstrates that there is current vitality to the non-retroactivity principle in the context of civil legislation. Both the plurality and Kennedy, however, emphasized the exceptional nature of the legislation at issue in that case, suggesting that they contemplate that most legislation may still apply retroactively consistent with the Constitution, provided that the intent of Congress or the state legislature in that regard is clear.

CORNELIA T. L. PILLARD
(2000)

## REVENUE SHARING

One consequence of the massive increase in the size and power of the federal government that began in the 1930s

was the preemption by the federal government of the sources of revenue that had previously supported the state and local governments. The inability of such governments to find adequate stable sources of income seemed to pose grave problems for American FEDERALISM.

Funds appropriated by the federal government already flowed to state and local governments in the form of FEDERAL GRANTS-IN-AID, often with the effect of coopting those governments as administrators of federally mandated programs. The federal grants brought with them various restrictions as well as burdensome paperwork requirements.

One solution was to return to the state and local governments a share of the tax revenues collected by the federal government, not in support of particular federal programs but as general revenue to be spent for local purposes, with a minimum of restrictions. In the late 1960s, the idea of general revenue sharing was adopted by the Republican party as part of its proposal for a "new federalism." In 1972, Congress, at the urging of President RICHARD M. NIXON, enacted the State and Local Fiscal Assistance Act. The act authorized the distribution of $30 billion to state and local governments over a five-year period. Of that sum, one-third was allocated to the states and two-thirds to counties, cities, and other local governments to be distributed according to a flexible formula taking into account population, locally generated revenues, and other factors. The major restriction was a ban on RACIAL DISCRIMINATION in funded activities.

The program was extended in 1976; in 1980, a revised version was enacted that eliminated the states from the distribution scheme. Any revitalization of federalism as a result of revenue sharing has been less than apparent.

DENNIS J. MAHONEY
(1986)

Bibliography

SCHEFFER, WALTER F., ed. 1976 *General Revenue Sharing and Decentralization.* Norman: University of Oklahoma Press.

## REVERSE DISCRIMINATION

See: Racial Preference; Racial Quotas

## REVISED STATUTES OF THE UNITED STATES
18 Stat. 1 (1875)

In 1866, Congress authorized the President to appoint a commission "to revise, simplify, arrange, and consolidate all statutes of the United States." The revision, completed in 1874 and modified in 1878, constituted the first official codification of the general and permanent laws of the United States. The revision supersedes the original public laws it consolidated. Except for those portions of the revision that have been repealed, amended, or superseded by subsequent compilations of federal statutes, the revision remains the authoritative statement of federal statutes enacted prior to 1874.

The revision was not supposed to work substantive changes in the code. But some relatively straightforward statutes became hopelessly confused as a result of the revision. Its most drastic effects may have been upon CIVIL RIGHTS statutes designed to enhance and protect constitutional rights. The revision's treatment of the JURISDICTION of the federal courts to hear civil rights cases brought under SECTION 1983, TITLE 42, UNITED STATES CODE, generated a century of confusion that was furthered by Justice HARLAN FISKE STONE'S opinion in HAGUE V. CIO (1939) and that culminated in *Lynch v. Household Finance Corporation* (1972), *Chapman v. Houston Welfare Rights Organization* (1979), and a 1980 amendment providing for jurisdiction in all such cases. The revision's scattering of the CIVIL RIGHTS ACT OF 1866 throughout the Code contributed to that provision's century of near dormancy, to the Court's questionable reading of the 1866 act's intended scope in JONES V. ALFRED H. MAYER CO. (1968) and RUNYON V. MCCRARY (1976), to a confusing of CIVIL RIGHTS REMOVAL statutes that the Court only slightly illuminated in *Georgia v. Rachel* (1966) and *City of Greenwood v. Peacock* (1966), and to a misunderstanding, manifested in *Robertson v. Wegmann* (1978) and *Board of Regents v. Tomanio* (1980), of Congress's intent with respect to the role of state law in federal civil rights cases.

THEODORE EISENBERG
(1986)

Bibliography

SUNSTEIN, CASS 1982 Section 1983 and the Private Enforcement of Federal Law. *University of Chicago Law Review* 49: 401–409.

## *REYNOLDS v. SIMS*
377 U.S. 533 (1964)

Once the Supreme Court declared in BAKER V. CARR (1962) that legislative districting presented a justiciable controversy, lawsuits were filed in more than thirty states challenging existing legislative apportionments. Six of these cases were decided by the Court on the same day, and the Court held all six states' apportionments unconstitutional. The main opinion was written in *Reynolds v. Sims*, the Alabama case; all six opinions of the Court were by Chief

Justice EARL WARREN, who believed until his death that *Reynolds* was the most important decision rendered by the Court during his tenure. The vote in four of the cases was 8–1, and in the other two, 6–3. Justice JOHN MARSHALL HARLAN dissented in all six cases, joined in two of them by Justices POTTER STEWART and TOM C. CLARK.

*Baker v. Carr* had been a response to decades of stalemate in the political process. Population shifts from rural areas to cities in the twentieth century had not been accompanied by changes in the electoral maps of most states. As a result, vast disparities in district populations permitted control of both houses of the typical state legislature to be dictated by rural voters. In Alabama, for example, Mobile County, with a population over 300,000, had three seats in the lower house, while Bullock County's two representatives served a population under 14,000. If JUDICIAL REVIEW normally defers to majoritarian democracy, here the premise for that deference was lacking; legislators favored by these apportionment inequalities were not apt to remedy them.

*Baker* had rested decision not on the GUARANTEE CLAUSE but on the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT. In the early 1960s, the Court had heightened the STANDARD OF REVIEW in equal protection cases only when RACIAL DISCRIMINATION was present; for other cases, the relaxed RATIONAL BASIS standard prevailed. Some Justices in the *Baker* majority had based their concurrence on the total arbitrariness of the Tennessee apportionment scheme there challenged. Justice WILLIAM O. DOUGLAS, concurring, had even said, "Universal equality is not the test; there is room for weighting." The *Baker* dissenters and academic critics had argued that the apportionment problem was unsuitable for judicial determination because courts would be unable to devise principled standards to test the reasonableness of the "weighting" Justice Douglas had anticipated; the problem belonged, they had said, in the category of POLITICAL QUESTIONS. The *Baker* majority had replied blandly: "Judicial standards under the Equal Protection Clause are well developed and familiar," and courts could determine that malapportionment represented "*no* policy, but simply arbitrary and capricious action." The suggestion was plain: departures from district population equality would be valid if they rested on legitimate policies.

*Reynolds* belied this suggestion. In a sweeping opinion that Archibald Cox called a *coup de main*, the Court discarded almost all possible justifications for departing from a strict principle of equal district populations and established for state legislative districts the ONE PERSON, ONE VOTE formula it had recently used in other electoral contexts. (See GRAY V. SANDERS; WESBERRY V. SANDERS.) The Court thus solved *Baker*'s problem of judicially manageable standards by resort to a mechanical test that left no "room for weighting"—and, not incidentally, no room for legislative evasion. The companion cases to *Reynolds* demonstrated the strength of the majority's conviction. *Maryland Committee for Fair Representation v. Tawes* (1964) rejected the "federal analogy" and imposed the population equality principle on both houses of a bicameral legislature, and LUCAS V. FORTY-FOURTH GENERAL ASSEMBLY OF STATE OF COLORADO (1964) insisted on the principle in the face of a popular REFERENDUM approving an apportionment that departed from it. In *Reynolds* itself the Court made clear that the states must keep their legislative apportionments abreast of population shifts as reported in the nation's decennial census.

In short, numbers were in, and a political theory of interest representation was out: "Citizens, not history or economic interests, cast votes." Justice Stewart, dissenting in two of the cases, took another view: "Representative government is a process of accommodating group interests through democratic institutional arrangements." Fairness in apportionment thus requires effective representation of the various interests in a state, a concern that the principle of district population equality either ignored or defeated. But Justice Stewart's premise—that equal protection required only an apportionment scheme that was rationally based and did not systematically frustrate majority rule—was rejected by the Court. Because voting "is a fundamental matter in a free society," the Chief Justice said, the dilution of the strength of a citizen's vote "must be carefully and meticulously scrutinized." *Reynolds* was the crucial decision in the line of equal protection cases developing the doctrine that voting is a FUNDAMENTAL INTEREST, whose impairment calls for STRICT SCRUTINY. (See HARPER V. VIRGINIA BOARD OF ELECTIONS; KRAMER V. UNION FREE SCHOOL DISTRICT NO. 15.)

The Court's disposition of the six REAPPORTIONMENT cases, and its memorandum orders in other cases in succeeding months, left little doubt that the Justices had learned a lesson from their experience in BROWN V. BOARD OF EDUCATION (1954–1955). Here there would be no ALL DELIBERATE SPEED formula to extend the time for compliance with the decision. Lower courts were expected to move quickly—and did move quickly—to implement the doctrine announced in *Reynolds*. Even so, politicians had some time to mount a counterattack. Thirty-two state legislatures requested the calling of a CONSTITUTIONAL CONVENTION to overturn *Reynolds*. Senator Everett Dirksen gained substantial support when he introduced a proposed constitutional amendment to the same end. Bills were offered in both houses of Congress to withdraw the federal courts' JURISDICTION over reapportionment cases. But all these efforts came to nothing. The jurisdictional bills failed; the Dirksen proposal did not pass either house; the constitutional convention proposal, which had been car-

ried forward with little publicity, withered in the remaining state legislatures when it was exposed to political sunlight.

The reason for the politicians' protest was obvious to all: many of them anticipated losing their own seats, and many others foresaw reduced influence for certain interests that rural representatives had favored. The public, however, overwhelmingly approved the principle of "one person, one vote" when the issue was tested in opinion polls; the politicians' counterattack failed because the people sided with the Court.

Academic criticism of the WARREN COURT has prominently featured *Reynolds* as a horrible example. The Court, the critics say, failed to write an opinion that reasoned from generally accepted premise to logically compelled conclusion. That is a telling criticism if, as HENRY HART was fond of saying, "reason is the life of the law." But reason is not the *life* of the law, or of anything else. It is a mental instrument to be used by judges and other humans along with their capacities for other ways of knowing: recognizing textures, patterns, analogies, relations that are not demonstrated by "if . . . then" syllogisms but grasped intuitively and at once. Perhaps the public was more ready to accept "one person, one vote" than were the Warren Court's critics because people who are not lawyers understand that the Supreme Court's most important product is justice. Surely they understood that the *Reynolds* formula, for all its inflexibility, more truly reflected our national sense of political justice than did the "cancer of malapportionment"—the term is Professor Cox's—that preceded it.

It is, by definition, hard to justify innovation by reference to the conventional wisdom. The beginnings of judicial DOCTRINE, like other beginnings, may be more easily felt than syllogized. Ultimately, if constitutional intuitions are to be translated into constitutional law, coherent explanation must come to replace the vague sense of doing the right thing; consolidation is an essential part of the Supreme Court's task. Yet to deny the legitimacy of a decision whose underlying value premises are clear, on the ground that the decision does not follow deductively from what has gone before, is to deny the legitimacy of judicial creativity—and it is our creative judges whom we honor most.

*Reynolds v. Sims* did not remake the political world; it mostly transferred power from rural areas to the conservative suburbs of large cities. But the decision touched a deep vein of American political egalitarianism and gave impetus to a doctrinal development as important as any in our time: recognition of the values of equal citizenship as the substantive core of the Fourteenth Amendment.

KENNETH L. KARST
(1986)

Bibliography

CASPER, GERHARD 1973 Apportionment and the Right to Vote: Standards of Judicial Scrutiny. *Supreme Court Review* 1973: 1–32.

DIXON, ROBERT G., JR. 1968 *Democratic Representation: Reapportionment in Law and Politics.* New York: Oxford University Press.

MCKAY, ROBERT B. 1965 *Reapportionment: The Law and Politics of Equal Representation.* New York: Twentieth Century Fund.

## *REYNOLDS v. UNITED STATES*
98 U.S. 145 (1879)

This case established the principle that under the guarantee of RELIGIOUS LIBERTY, government may not punish religious beliefs but may punish religiously motivated practices that injure the public interest. Reynolds violated a congressional prohibition on bigamy in the territories and appealed his conviction in Utah on FIRST AMENDMENT grounds, alleging that as a Mormon he had a religious duty to practice POLYGAMY. Chief Justice MORRISON R. WAITE for a unanimous Supreme Court ruled that although government might not reach opinions, it could constitutionally punish criminal activity. The question, Waite declared, was whether religious belief could be accepted as justification of an overt act made criminal by the law of the land. Every government, he answered, had the power to decide whether polygamy or monogamy should be the basis of social life. Those who made polygamy part of their religion could no more be exempt from the law than those who believe that human sacrifice was a necessary part of religious worship. Unless the law were superior to religious belief, Waite reasoned, every citizen might become a law unto himself and government would exist in name only. He did not explain why polygamy and human sacrifice were analogous, nor did he, in his simplified exposition, confront the problem whether an uncontrollable freedom of belief had much substance if the state could punish the dictates of conscience: belief without practice is an empty right. Moreover, Waite did not consider whether belief should be as absolutely free as he suggested; if polygamy was a crime, its advocacy had limits.

LEONARD W. LEVY
(1986)

## *RHODE ISLAND v. INNES*
446 U.S. 291 (1980)

*Innes* explained the meaning of "interrogation" under MIRANDA V. ARIZONA (1966). *Miranda* declared, "If the individual states that he wants an attorney, the interrogation

must cease until an attorney is present." Everyone agreed that the suspect in *Innes* had received his *Miranda* warnings and invoked his RIGHT TO COUNSEL, and that he was in custody. The question was whether he had been interrogated.

Police arrested a man suspected of a shotgun murder. Repeatedly they advised him of his *Miranda* rights, and a captain instructed officers about to transport him to the stationhouse not to question him in any way. During a brief automobile ride, one officer said to another, within the suspect's hearing, that they ought to try to find the shotgun because a child might discover it and kill herself. The suspect promptly volunteered to take the police to the shotgun. Again the police gave the *Miranda* warnings. The suspect replied that he understood his rights but wanted the gun removed from the reach of children. His statements and the gun were introduced in EVIDENCE at his trial, over his objection. The state supreme court reversed his conviction, finding a violation of *Miranda*.

A 6–3 Supreme Court decided that the police had not interrogated the suspect. Justice POTTER STEWART for the majority construed *Miranda* broadly to mean that interrogation includes questioning or a "functional equivalent"—any words or actions by the police reasonably likely to elicit any response from their suspect. Here there was no interrogation, only a spontaneous admission. The dissenters believed that an officer deliberately referred to the missing gun as a danger to innocent children in the hope of eliciting from the suspect an incriminating statement; whether that happened cannot be known. If the Court majority had believed that the officer making the remark had understood the suspect's psychological makeup and that an appeal to his conscience might have worked, that majority would have decided that the suspect had been interrogated. Contrary to the view of Justice JOHN PAUL STEVENS, dissenting, *Miranda* was not narrowed.

LEONARD W. LEVY
(1986)

(SEE ALSO: *Police Interrogations and Confessions.*)

## RHODE ISLAND AND PROVIDENCE PLANTATIONS, CHARTER OF
(July 8, 1663)

ROGER WILLIAMS founded Providence in 1636 as a shelter for anyone "distressed in conscience." His covenant was the first anywhere to exclude the civil government from religious matters. From the beginning the towns that became Rhode Island practiced RELIGIOUS LIBERTY, welcoming Quakers and Jews, and enjoyed SEPARATION OF CHURCH AND STATE. John Clarke, a Baptist minister who was Williams's friend and co-worker, was influential in the framing of the code of laws of 1647 establishing a "democratical" government. The restoration of the Stuarts in 1660 forced Rhode Island to secure a charter; Clarke was Williams's emissary to Charles II, who granted the first American charter guaranteeing religious liberty. The MARYLAND ACT OF TOLERATION (1649) was a statute; the charter of Rhode Island, which remained its constitution until 1842, made the guarantee a part of FUNDAMENTAL LAW. The language of the charter on this key provision was Clarke's. It referred to the colony's "livlie experiment" to show that a civil state could best be maintained if the inhabitants were secured "in the free exercise and enjoyment of all theire civill and religious rights." All peaceable persons might "freelye and fullye hav and enjoye his and theire owne judgments."

LEONARD W. LEVY
(1986)

Bibliography

PERRY, RICHARD L., ed. 1959 *Sources of Our Liberties.* Pages 162–179. New York: American Bar Foundation.

## *RIBNIK v. MCBRIDE*
277 U.S. 350 (1928)

Guided by TYSON AND BROTHER V. BANTON (1927), the Supreme Court voided a New Jersey statute regulating fees charged by employment agencies. The majority held that although widespread evils existed which were subject to regulation, the establishment of prices for a private business was outside legislative power. Justice HARLAN FISKE STONE's dissent, joined by Justices OLIVER WENDELL HOLMES and LOUIS D. BRANDEIS, denied any distinction between illegal price controls and other, acceptable regulations. (See ADAMS V. TANNER; OLSEN V. NEBRASKA EX REL. REFERENCE BOND ASSOCIATION.)

DAVID GORDON
(1986)

## *RICHMOND (CITY OF) v. J. A. CROSON CO.*
488 U.S. 469 (1989)

In FULLILOVE V. KLUTZNICK (1980) the Supreme Court upheld an act of Congress requiring that ten percent of certain federal subsidies to local governments be set aside for contractors that were minority-owned business enterprises (MBE). In *Croson* the Court invalidated a similar AFFIRMATIVE ACTION ordinance adopted by a city. The or-

dinance, adopted for a five-year term, required a prime contractor to allocate thirty percent of the dollar amount of the contract to MBE subcontractors. A waiver was authorized in the event that MBE were not available. The Court held, 6–3, that this scheme denied nonminority businesses the EQUAL PROTECTION OF THE LAWS.

Justice SANDRA DAY O'CONNOR wrote an opinion that was in part the OPINION OF THE COURT and in part a PLURALITY OPINION. A majority concurred in the opinion's basic building blocks: that the appropriate standard of review for a state and local affirmative action program was STRICT SCRUTINY; that the city had not offered sufficient evidence of "identified discrimination" that could justify a race-conscious remedy; and that the city's program, even if it were remedial, was not sufficiently narrowly tailored to such discrimination. In addition, she spoke for a plurality in concluding that Congress's remedial powers, unlike those of the states, could extend to remedying past societal discrimination. (See FOURTEENTH AMENDMENT, SECTION 5 (JUDICIAL CONSTRUCTION).) Justice ANTHONY M. KENNEDY, concurring, dissociated himself from the latter position, and Justice ANTONIN SCALIA, also concurring, argued that the city had power to use race-conscious remedies only for its own discrimination. Justice JOHN PAUL STEVENS concurred only in the view that Richmond's plan was not justified by sufficient evidence of past discrimination and was not narrowly tailored.

Justice O'Connor concluded that Richmond could constitutionally provide a race-conscious remedy not only for its own past discrimination but also for past discrimination by private contractors or trade associations in the Richmond area. She also concluded that such discrimination might be proved by statistics showing a serious disparity between the percentage of qualified MBE in the area and the percentage of contracts awarded to MBE. Here, however, the city had shown only that the MBE contracts were extremely low in comparison with the percentage of minorities in Richmond's general population. To achieve a "narrowly tailored" program, she said, Richmond would have to show that race-neutral alternatives were unworkable, and to peg its MBE set-aside percentage at a figure that bore a clearly stated relation to the percentage of qualified MBE.

Justice THURGOOD MARSHALL wrote a sharply worded opinion for the three dissenters. He argued that strict scrutiny was inappropriate and that Richmond's ordinance served the important purposes of remedying the effects of a pattern of past discrimination and keeping the city from reinforcing that pattern. He found the Richmond council's conclusions about past discrimination, both by the city and by private contractors, to be soundly based. Justice HARRY A. BLACKMUN also dissented.

Although many civil rights advocates regarded *Croson* as a serious setback for affirmative action, it may turn out, like REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978), to be a blessing in disguise for their cause. Certainly, *Croson*'s standards for affirmative action in state and local government contracting will, in some communities, prevent any effective affirmative action. One of the legacies of RACIAL DISCRIMINATION is the paucity of minority businesses in many of the fields in which governments offer contracts. However, Justice O'Connor's explicit approval of statistical proof of past discrimination offers considerable opportunity, particularly for states and for large cities, to satisfy the Court's requirements. More important, six Justices not only reaffirmed the *Fullilove* precedent, which had seemed vulnerable, but also issued to Congress a sweeping invitation to engage in broad-scale affirmative action of its own aimed at remedying the effects of past societal discrimination.

KENNETH L. KARST
(1992)

Bibliography

Constitutional Scholars' Statement on Affirmative Action After *City of Richmond v. J. A. Croson Co.* 1989 *Yale Law Journal* 98:1711–1716.

FRIED, CHARLES 1989 Affirmative Action After *City of Richmond v. J. A. Croson Co.*, A Response to the Scholars' Statement. *Yale Law Journal* 99:155–161.

Scholars' Reply to Professor Fried 1989 *Yale Law Journal* 99: 163–168.

## *RICHMOND NEWSPAPERS, INC. v. VIRGINIA*

448 U.S. 555 (1980)

*Richmond Newspapers* recognized a constitutional right of access to criminal trials. It marked the first time a majority embraced any such FIRST AMENDMENT claim. Yet division and bitterness obviously remained from the splintered decision a year earlier in GANNETT V. DEPASQUALE, which had held that the Sixth Amendment did not preclude closing a pretrial suppression hearing to the press and public.

In *Richmond Newspapers*, a 7–1 majority distinguished *Gannett* and held that the press and public share a right of access to actual criminal trials, though the press may enjoy some preference. In the PLURALITY OPINION, Chief Justice WARREN E. BURGER found a right to attend criminal trials within "unarticulated rights" implicit in the First Amendment rights of speech, press, and assembly, as well as within other constitutional language and the uninterrupted Anglo-American tradition of open trials. This right to an open trial prevailed over efforts by Virginia courts

to close a murder trial, premised on the defendant's request to do so. The trial judge had made no particularized finding that a FAIR TRIAL could not be guaranteed by means less drastic than total closure.

Justice WILLIAM H. REHNQUIST was alone in dissent, but only Justices BYRON R. WHITE and JOHN PAUL STEVENS concurred in Burger's opinion. Justice LEWIS F. POWELL took no part in the decision. Four Justices concurred separately in the JUDGMENT. They differed about whether *Gannett* actually was distinguishable, what weight to give history, and what particular constitutional basis mandated the result.

*Richmond Newspapers* decided only the UNCONSTITUTIONALITY of a total ban on public access to actual criminal trials when there is no demonstration that alternative means could not guarantee a fair trial. Yet the decision is significant for its recognition of a First Amendment right to gather newsworthy information; moreover, some Justices identified a broad right to receive information about government, including the activities of the judicial branch.

AVIAM SOIFER
(1986)

## RIGHT . . .

See also: Freedom of . . .

## RIGHT AGAINST SELF-INCRIMINATION

The Fifth Amendment is virtually synonymous with the right against self-incrimination. One who "pleads the Fifth" is not insisting on grand jury INDICTMENT, freedom from DOUBLE JEOPARDY, or JUST COMPENSATION for property taken by the government—all safeguarded in the same amendment. He is saying that he will not reply to an official query because his truthful answer might expose him to criminal jeopardy. He seems to be saying that he has something to hide, making the Fifth appear to be a protection of the guilty; it is, but probably no more so than other rights of the criminally accused. The right against self-incrimination is the most misunderstood, unrespected, and controversial of all constitutional rights.

Its very name is a problem. It is customarily referred to as "the privilege" against self-incrimination, following the usage of lawyers in discussing evidentiary privileges (for example, the husband-wife privilege, the attorney-client privilege). Popular usage, however, contrasts "privilege" with "rights," and the Fifth Amendment's clause on self-incrimination creates a constitutional right with the same status as other rights. Its "name" is unknown to the Constitution, whose words cover more than merely a right or privilege against self-incrimination: "no person . . . shall be compelled in any criminal case to be a witness against himself." What does the text mean?

The protection of the clause extends only to natural persons, not organizations like corporations or unions. A member of an organization cannot claim its benefits if the inquiry would incriminate the organization but not him personally. He can claim its benefits only for himself, not for others. The text also suggests that a prime purpose of the clause is to protect against government coercion; one may voluntarily answer any incriminating question or confess to any crime—subject to the requirements for WAIVER OF CONSTITUTIONAL RIGHTS. In some respects the text is broad, because a person can be a witness against himself in ways that do not incriminate him. He can, in a criminal case, injure his civil interests or disgrace himself in the public mind. Thus the Fifth can be construed on its face to protect against disclosures that expose one to either civil liability or INFAMY. The Fifth can also be construed to apply to an ordinary witness as well as the criminal defendant himself. In Virginia, where the right against self-incrimination first received constitutional status, it appeared in a paragraph relating to the accused only. The Fifth Amendment is not similarly restrictive, unlike the Sixth Amendment which explicitly refers to the accused, protecting him alone. The location of the clause in the Fifth, rather than in the Sixth, and its reference to "no person" makes it applicable to witnesses as well as to the accused.

On the other hand, the clause has a distinctively limiting factor: it is restricted on its face to criminal cases. The phrase "criminal case" seems to exclude civil cases. Some judges have argued that no criminal case exists until a formal charge has been made against the accused. Under such an interpretation the right would have no existence until the accused is put on trial; before that, when he is taken into custody, interrogated by the police, or examined by a GRAND JURY, he would not have the benefit of the right. Nor would he have its benefit in a nonjudicial proceeding such as a LEGISLATIVE INVESTIGATION or an administrative hearing. The Supreme Court has given the impression that the clause, if taken literally, would be so restricted; but the Court refuses to take the clause literally. Thus, in COUNSELMAN V. HITCHCOCK (1892), the Court held that the Fifth does protect ordinary witnesses, even in federal grand jury proceedings. Unanimously the Court declared, "It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself." Although the Court did not explain why it was "impossible," the Court was right. Had the framers

of the Fifth intended the literal, restrictive meaning, their constitutional provision would have been a meaningless gesture. There was no need to protect the accused at his trial; he was not permitted to give testimony, whether for or against himself, at the time of the framing of the Fifth. Making the criminal defendant competent to be a witness in his own case was a reform of the later nineteenth century, beginning in the state courts with Maine in 1864, in the federal courts by an act of Congress in 1878.

Illumination from the face of a text that does not mean what it says is necessarily faint. Occasionally the Court will display its wretched knowledge of history in an effort to explain the right against self incrimination. Justice FELIX FRANKFURTER for the Court, in ULLMANN V. UNITED STATES (1956), drew lessons from the "name" of "the privilege against self-incrimination," but conceded that it is a provision of the Constitution "of which it is peculiarly true that "a page of history is worth a volume of logic." TWINING V. NEW JERSEY (1908), the most historically minded opinion ever delivered for the Court on the right, was misleading and shallow when it was not inaccurate on the question whether the right was "a fundamental principle of liberty and justice which inheres in the very idea of free government."

The American origins of the right derive largely from the inherited English COMMON LAW system of criminal justice. But the English origins, so much more complex, spill over legal boundaries and reflect the many-sided religious, political, and constitutional issues that racked England during the sixteenth and seventeenth centuries: the struggles between Anglicanism and Puritanism, between Parliament and king, between limited government and arbitrary rule, and between freedom of conscience and suppression of heresy and SEDITION. Even within the more immediate confines of law, the history of the right against self-incrimination is enmeshed in broad issues: the contests for supremacy between the accusatory and the inquisitional systems of procedure, the common law and the royal prerogative, and the common law and its canon and civil law rivals. Against this broad background the origins of the concept that "no man is bound to accuse himself" (*nemo tenetur seipsum accusare*) must be understood and the concept's legal development traced.

The right against self-incrimination originated as an indirect product of the common law's accusatory system and of its opposition to rival systems which employed inquisitorial procedures. Toward the close of the sixteenth century, just before the concept first appeared in England on a sustained basis, all courts of criminal jurisdiction habitually sought to exact self-incriminatory admissions from persons suspected of or charged with crime. Although defendants in crown cases suffered from this and many other harsh procedures, even in common law courts, the accusatory system afforded a degree of fair play not available under the inquisitional system. Moreover, torture was never sanctioned by the common law, although it was employed as an instrument of royal prerogative until 1641.

By contrast, torture for the purpose of detecting crime and inducing confession was regularly authorized by the Roman codes of the canon and civil law. "Abandon all hope, ye who enter here" well describes the chances of an accused person under inquisitorial procedures characterized by PRESENTMENT based on mere rumor or suspicion, indefiniteness of accusation, the oath *ex officio*, secrecy, lack of CONFRONTATION, coerced confessions, and magistrates acting as accusers and prosecutors as well as "judges." This system of procedure, by which heresy was most efficiently combated, was introduced into England by ecclesiastical courts.

The use of the oath *ex officio* by prerogative courts, particularly by the ecclesiastical Court of High Commission, which Elizabeth I reconstituted, resulted in the defensive claim that "no man is bound to accuse himself." The High Commission, an instrument of the Crown for maintaining religious uniformity under the Anglican establishment, used the canon law inquisitorial process, but made the oath *ex officio*, rather than torture, the crux of its procedure. Men suspected of "heretical opinions," "seditious books," or "conspiracies" were summoned before the High Commission without being informed of the accusation against them or the identity of their accusers. Denied DUE PROCESS OF LAW by common law standards, suspects were required to take an oath to answer truthfully to interrogatories which sought to establish guilt for crimes neither charged nor disclosed.

A nonconformist victim of the High Commission found himself thrust between hammer and anvil: refusal to take the oath or, having taken it, refusal to answer the interrogatories meant a sentence for contempt and invited Star Chamber proceedings; to take the oath and respond truthfully to questioning often meant to convict oneself of religious or political crimes and, moreover, to supply evidence against nonconformist accomplices; to take the oath and then lie meant to sin against the Scriptures and risk conviction for perjury. Common lawyers of the Puritan party developed the daring argument that the oath, although sanctioned by the Crown, was unconstitutional because it violated MAGNA CARTA, which limited even the royal prerogative.

The argument had myth-making qualities, for it was one of the earliest to exalt Magna Carta as the symbol and source of English constitutional liberty. As yet there was no contention that one need not answer incriminating questions after accusation by due process according to common law. But a later generation would use substantially the same argument—"that by the Statutes of Magna

Charta . . . for a man to accuse himself was and is utterlie inhibited"—on behalf of the contention that one need not involuntarily answer questions even after one had been properly accused.

Under Chief Justice EDWARD COKE the common law courts, with the sympathy of Commons, vindicated the Puritan tactic of litigious opposition to the High Commission. The deep hostility between the canon and common law systems expressed itself in a series of writs of prohibition issued by Coke and his colleagues, staying the Commission's proceedings. Coke, adept at creating legal fictions which he clothed with the authority of resurrected "precedents" and inferences from Magna Carta, grounded twenty of these prohibitions on the allegedly ancient common law rule that no man is bound to accuse himself criminally.

In the 1630s the High Commission and the Star Chamber, which employed similar procedures, reached the zenith of their powers. But in 1637 a flinty Puritan agitator, JOHN LILBURNE, refused the oath. His well-publicized opposition to incriminatory questioning focused England's attention upon the injustice and illegality of such practices. In 1641 the Long Parliament, dominated by the Puritan party and common lawyers, condemned the sentences against Lilburne and others, abolished the Star Chamber and the High Commission, and prohibited ecclesiastical authorities from administering any oath obliging one "to confess or to accuse himself or herself of any crime."

Common law courts, however, continued to ask incriminating questions and to bully witnesses into answering them. The rudimentary idea of a right against self-incrimination was nevertheless lodged in the imperishable opinions of Coke, publicized by Lilburne and the Levellers, and firmly associated with Magna Carta. The idea was beginning to take hold of men's minds. Lilburne was again the catalytic agent. At his various trials for his life, in his testimony before investigating committees of Parliament, and in his ceaseless tracts, he dramatically popularized the demand that a right against self-incrimination be accorded general legal recognition. His career illustrates how the right against self-incrimination developed not only in conjunction with a whole gamut of fair procedures associated with "due process of law" but also with demands for freedom of conscience and expression. After Lilburne's time the right became entrenched in English jurisprudence, even under the judicial tyrants of the Restoration. As the state became more secure and as fairer treatment of the criminally accused became possible, the old practice of bullying the prisoner for answers gradually died out. By the early eighteenth century the accused was no longer put on the stand at all; he could not give evidence in his own behalf even if he wished to, although he was permitted to tell his story, unsworn. The prisoner was regarded as incompetent to be a witness for himself.

After the first quarter of the eighteenth century, the English history of the right centered primarily upon the preliminary examination of the suspect and the legality of placing in evidence various types of involuntary confessions. Incriminating statements made by suspects at the preliminary examination could be used against them at their trials; a confession, even though not made under oath, sufficed to convict. Yet suspects could not be interrogated under oath. One might be ensnared into a confession by the sharp and intimidating tactics of the examining magistrate; but there was no legal obligation to answer an incriminating question—nor, until 1848, to notify the suspect or prisoner of his right to refuse answer. One's answers, given in ignorance of his right, might be used against him. However, the courts excluded confessions that had been made under duress. Only involuntary confessions were seen as a violation of the right. Lord Chief Baron Geoffrey Gilbert in his *Law of Evidence* (1756) declared that although a confession was the best evidence of guilt, "this Confession must be voluntary and without compulsion; for our Law . . . will not force any Man to accuse himself; and in this we do certainly follow that Law of Nature" that commands self-preservation.

Thus, opposition to the oath *ex officio* ended in the common law right to refuse to furnish incriminating evidence against oneself even when all formalities of common law accusation had first been fulfilled. The prisoner demanded that the state prove its case against him, and he confronted the witnesses who testified against him. The Levellers, led by Lilburne, even claimed a right not to answer any questions concerning themselves, if life, liberty, or property might be jeopardized, regardless of the tribunal or government agency directing the examination, be it judicial, legislative, or executive. The Leveller claim to a right against self-incrimination raised the generic problem of the nature of SOVEREIGNTY in England and spurred the transmutation of Magna Carta from a feudal relic of baronial reaction into a modern bulwark of the RULE OF LAW and regularized restraints upon government power.

The claim to this right also emerged in the context of a cluster of criminal procedures whose object was to ensure fair play for the criminally accused. It harmonized with the principles that the accused was innocent until proved guilty and that the BURDEN OF PROOF was on the prosecution. It was related to the idea that a man's home should not be promiscuously broken into and rifled for evidence of his reading and writing. It was intimately connected to the belief that torture or any cruelty in forcing a man to expose his guilt was unfair and illegal. It was indirectly associated with the RIGHT TO COUNSEL and the

right to have witnesses on behalf of the defendant, so that his lips could remain sealed against the government's questions or accusations. It was at first a privilege of the guilty, given the nature of the substantive law of religious and political crimes. But the right became neither a privilege of the guilty nor a protection of the innocent. It became merely one of the ways of fairly determining guilt or innocence, like TRIAL BY JURY itself; it became part of due process of the law, a fundamental principle of the accusatorial system. It reflected the view that society benefited by seeking the defendant's conviction without the aid of his involuntary admissions. Forcing self-incrimination was thought to brutalize the system of criminal justice and to produce untrustworthy evidence.

Above all, the right was closely linked to FREEDOM OF SPEECH and RELIGIOUS LIBERTY. It was, in its origins, unquestionably the invention of those who were guilty of religious crimes such as heresy, schism, and nonconformity, and later, of political crimes such as TREASON, SEDITIOUS LIBEL, and breach of PARLIAMENTARY PRIVILEGE. More often than not, the offense was merely criticism of the government, its policies, or its officers. The right was associated, then, with guilt for crimes of conscience, of belief, and of association. In the broadest sense it was not so much a protection of the guilty, or even the innocent, but a protection of freedom of expression, of political liberty, and of the right to worship as one pleased. The symbolic importance and practical function of the right certainly settled matters, taken for granted, in the eighteenth century. And it was part of the heritage of liberty that the common law bequeathed to the English settlers in America.

Yet, the right had to be won in every colony, invariably under conditions similar to those that generated it in England. The first glimmer of the right in America was evident in the heresy case of John Wheelwright, tried in 1637 in Massachusetts. In colony after colony, people exposed to the inquisitorial tactics of the prerogative court of the governor and council refused to answer to incriminating interrogatories in cases heavy with political implications. By the end of the seventeenth century the right was unevenly recognized in the colonies. As the English common law increasingly became American law and the legal profession grew in size, competence, and influence, Americans developed a greater familiarity with the right. English law books and English criminal procedure provided a model. From Edmond Wingate's *Maxims of Reason* (1658), which included the earliest discussion of the maxim, "*Nemo tenetur accusare seipsum*," to Gilbert's *Evidence*, law books praised the right. It grew so in popularity that in 1735 BENJAMIN FRANKLIN, hearing that a church wanted to examine the sermons of an unorthodox minister, could declare: "It was contrary to the common Rights of Mankind, no Man being obliged to furnish Matter of Accusation against himself." In 1754 a witness parried a Massachusetts legislative investigation into seditious libel by quoting the well-known Latin maxim, which he freely translated as "A Right of Silence as the Priviledge of every Englishman." In 1770 the attorney general of Pennsylvania ruled that an admiralty court could not oblige people to answer interrogatories "which may have a tendency to criminate themselves, or subject them to a penalty, it being contrary to any principle of Reason and the Laws of England." When, in 1770, New York's legislature jailed Alexander McDougall, a popular patriot leader who refused answer to incriminating queries about a seditious broadside, the public associated the right with the patriot cause, and the press printed the toast, "No Answer to Interrogatories, when tending to accuse the Person interrogated." Thereafter the New York legislature granted absolute immunity to recalcitrant malefactors whose testimony was required in trials or investigations.

In 1776 the VIRGINIA CONSTITUTION AND DECLARATION OF RIGHTS provided that in criminal prosecutions the accused party cannot "be compelled to give evidence against himself." Every state (eight including Vermont) that prefaced its constitution with a bill of rights imitated Virginia's phrasing, although two, by placing the clause in a section apart from the rights of the accused, extended the right to third parties or witnesses. Whether the right was constitutionally secured or was protected by common law made little difference, because the early decisions, even in states that constitutionally secured the right, followed the common law rather than the narrower phrasing of their constitutions. For example, the PENNSYLVANIA CONSTITUTION of 1776 had a self-incrimination clause that referred to "no man," which the 1790 constitution narrowed to "the accused." Nevertheless, in the first case on this clause the state supreme court applied it to the production of papers in civil cases and to questions involving exposure to "shame or reproach."

During the controversy over the RATIFICATION OF THE CONSTITUTION of 1787, only four states recommended that a comprehensive bill of rights should be added to the new document, but those four demanded a self-incrimination clause modeled on the conventional phrasing that no person should be compelled to give evidence against himself. JAMES MADISON, in framing what became the Fifth Amendment, urged in sweeping language that no person should be "compelled to be a witness against himself." That phrasing was amended to apply only to criminal cases, thereby permitting courts to compel a civil defendant to produce documents against himself, injuring his civil interest without infringing his traditional rights not to produce them if they could harm him criminally. Whether the framers of the clause in the Fifth meant it to be fully coextensive with the still expanding common law principle

is unknown. The language of the clause and its framers' understanding may not have been synonymous, especially because a criminal defendant could not testify under oath even in the absence of the self-incrimination clause. It was intended as a ban on torture, but it also represented the opinion of the framers that the right against self-incrimination was a legitimate defense possessed by every individual against government. The framers were tough-minded revolutionaries who risked everything in support of their belief that legitimate government exercises its powers in subordination to personal rights. The framers were not soft, naive, or disregardful of the claims of law and order. They were mindful that the enduring interests of the community required justice to be done as fairly as possible: that no one should have to be a witness against himself in a criminal case was a central feature of the accusatory system of criminal justice, which the framers identified with fairness. Deeply committed to a system of criminal justice that minimized the possibilities of convicting the innocent, they were not less concerned about the humanity that the law should show even to the offender. The Fifth Amendment reflected their judgment that in a society based on respect for the individual, the government shouldered the entire burden of proving guilt and the accused need make no unwilling contribution to his conviction.

What is the present scope of the right and how have the Supreme Court's interpretations compared with the history of the right? Generally the Court has construed the clause of the Fifth as if the letter killeth. Seeking the spirit and policies of the clause, the Court has tended to give it an ever widening meaning, on the principle that "it is as broad as the mischief against which it seeks to guard," as the Court said in *Counselman.* In effect the Court has taken the position that the Fifth embodied the still evolving common law of the matter rather than a rule of fixed meaning. Often the Court has had history on its side without knowing it, with the result that many apparent innovations could have rested on old practices and precedents.

History supported the decision in BOYD V. UNITED STATES (1886) connecting the Fifth and FOURTH AMENDMENTS and holding that the seizure of one's records for use as evidence against him compels him to be a witness against himself. Beginning in the early eighteenth century the English courts had widened the right against self-incrimination to include protection against the compulsory production of books and papers that might incriminate the accused. In a 1744 case a rule emerged that to compel a defendant to turn over the records of his corporation would be forcing him to "furnish evidence against himself." In the 1760s in WILKES'S CASES, the English courts extended the right to prevent the use of GENERAL WARRANTS to seize private papers in seditious libel cases. Thus the right against self-incrimination and FREEDOM OF THE PRESS, closely allied in their origins, were linked to freedom from unreasonable SEARCHES AND SEIZURES. In *Entick v. Carrington* (1765), Lord Camden (CHARLES PRATT) declared that the law obliged no one to give evidence against himself "because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem that search for evidence is disallowed upon the same principle." American colonists made similar arguments against WRITS OF ASSISTANCE, linking the right against UNREASONABLE SEARCH to the right against self-incrimination. UNITED STATES V. WHITE (1944), which required the production of an organization's records even if they incriminated the witness who held them as custodian, was a departure from history.

That the right extends to witnesses as well as the accused is the command of the text of the Fifth. Protection of witnesses, which can be traced to English cases of the mid-seventeenth century, was invariably accepted in American manuals of practice as well as in leading English treatises throughout the eighteenth century. The Supreme Court's decision in *McCarthy v. Arndstein* (1924), extending the right to witnesses even in civil cases if a truthful answer might result in a forfeiture, penalty, or criminal prosecution, rested on dozens of English decisions going back to 1658 and to American precedents beginning in 1767. In a little known aspect of MARBURY V. MADISON (1803), Chief Justice JOHN MARSHALL asked Attorney General LEVI LINCOLN what he had done with Marbury's missing commission. Lincoln, who probably had burned the commission, refused to incriminate himself by answering, and Marshall conceded that he need not reply, though he was a witness in a civil suit.

Many early state decisions held that neither witnesses nor parties were required to answer against themselves if to do so would expose them to public disgrace or infamy. The origins of so broad a right of silence can be traced as far back as sixteenth-century claims by Protestant reformers such as William Tyndale and Thomas Cartwright in connection with their argument that no one should be compelled to accuse himself. The idea passed to the common lawyers and Coke, was completely accepted in English case law, and found expression in WILLIAM BLACKSTONE'S *Commentaries* as well as American manuals of practice. Yet the Supreme Court in BROWN V. WALKER (1896) restricted the scope of the historical right when ruling that the Fifth did not protect against compulsory self-infamy. Its decision was oblivious to history as was its reaffirmation of that decision in *Ullmann v. United States* (1956).

From the standpoint of history that 1896 holding and its 1956 reaffirmation correctly decided the main question

whether a grant of full immunity supersedes the witness's right to refuse answer on Fifth Amendment grounds. Colonial precedents support absolute or transactional immunity, as did the IMMUNITY GRANT decisions in 1896 and 1956. The Court departed from its own precedents and history when ruling in KASTIGAR V. UNITED STATES (1972) that limiting the right to use and derived-use immunity does not violate the right not to be a witness against oneself.

History supports the decisions made by the Court for the first time in *Quinn v. United States* (1955) and WATKINS V. UNITED STATES (1957) that the right extends to legislative investigations. As early as 1645 John Lilburne, relying on his own reading of Magna Carta and the PETITION OF RIGHT, claimed the right, unsuccessfully, before a parliamentary committee. In 1688 the Pennsylvania legislature recognized an uncooperative witness's right against self-incrimination. Other colonial assemblies followed suit though New York's did not do so until forced by public opinion after McDougall's case. That Parliament also altered its practice is clear from the debates in 1742 following the refusal of a witness to answer incriminatory questions before an investigating committee. The Commons immunized his testimony against prosecution, but the bill failed in the Lords in part because it violated one of the "first principles of English law," that no person is obliged to accuse himself or answer any questions that tend to reveal what the nature of his defense requires to be concealed. In 1778 the Continental Congress investigated the corrupt schemes of Silas Deane, who invoked his right against self-incrimination, and Congress, it seems, voted that it was lawful for him to do so.

History belies the TWO-SOVEREIGNTIES RULE, a stunting restriction upon the Fifth introduced by the Court in 1931 but abandoned in MURPHY V. WATERFRONT COMMISSION (1964). The rule was that a person could not refuse to testify on the grounds that his disclosures would expose him to prosecution in another jurisdiction. The Court mistakenly claimed that the rule had the support of historical precedents; history clearly contradicted that rule as the Court belatedly confessed in 1964.

History supports the rule of *Bram v. United States* (1897) that in criminal cases in the federal courts—this was extended by MALLOY V. HOGAN (1964) to the state courts, too—whenever a question arises whether a confession is incompetent because it is involuntary or coerced, the issue is controlled by the self-incrimination clause of the Fifth. Partly because of JOHN H. WIGMORE's intimidating influence and partly because of the rule of *Twining* denying that the FOURTEENTH AMENDMENT extended the Fifth to the states, the Court until 1964 held that the coercion of a confession by state or local authorities violated due process of law rather than the right against self-incrimination. Wigmore, the master of evidence, claimed that the rule against coerced confessions and the right against self-incrimination had "no connection," the two being different in history, time or origin, principle, and practice.

Wigmore was wrong. From the fact that a separate rule against coerced confessions emerged in English decisions of the eighteenth century, nearly a century after the right against self-incrimination had become established, he concluded that the two rules had *no* connection. That the two operated differently in some respects and had differing rationales in other respects led him to the same conclusion. But he focused on their differences only and so exaggerated those differences that he fell into numerous errors and inconsistencies of statement. The relationship of the two rules is apparent from the fact that the shadow of the rack was part of the background from which each rule emerged. The disappearance of torture and the recognition of the right against compulsory self-incrimination were victories in the same political struggle. The connections among torture, *compulsory* self-incrimination, and *coerced* confessions was a historical fact as well as a physical and psychological one. In the sixteenth and seventeenth centuries, the argument against the three, resulting in the rules that Wigmore said had no connection, overlapped. Compulsory self-incrimination was always regarded by its opponents as a species of torture. An act of 1696 regulating treason trials required that confessions be made willingly, without violence, and in open court. The quotation above from Geoffrey Gilbert disproves Wigmore's position. When the separate rule against coerced confessions emerged, its rationale was that a coerced confession is untrustworthy evidence. There remained, however, an indissoluble and crucial nexus with the right against self-incrimination because both rules involved coercion or the involuntary acknowledgment of guilt. Significantly the few references to the right against self-incrimination, in the debates on the ratification of the Constitution, identified the right with a protection against torture and inquisition, that is, against coerced confessions. Wigmore fell into error by assuming that the right against self-incrimination had a single rationale and a static meaning. In fact it always had several rationales, was an expanding principle of law, and spun off into different directions. One spin-off was the development of a separate rule against coerced confessions. If there was "an historical blunder," it was made by the English courts of the eighteenth century when they divorced the confessions rule from the self-incrimination rule.

History is not clear on the Court's distinction between TESTIMONIAL COMPULSION, which the Fifth prohibits, and nontestimonial compulsion, which it does not prohibit. Blood samples, photographs, fingerprints, voice exem-

plars, and most other forms of nontestimonial compulsion are of modern origin. The fact that the Fifth refers to the right not to be a witness against oneself seems to imply the giving of testimony rather than keeping records or revealing body characteristics for identification purposes. The distinction made by the Court in SCHMERBER V. CALIFORNIA (1966) was reasonable. Yet, limiting the Fifth to prohibit only testimonial compulsion poses problems. The accused originally could not testify at all, and the history of the right does not suggest the *Schmerber* limitations. The common law decisions and the wording of the first state bills of rights explicitly protected against compelling anyone to give or furnish "evidence" against himself, not just testimony.

The fact that history does not support some of the modern decisions limiting the scope of the right hardly means that history always substantiates decisions expanding it. Decisions like *Slochower v. Board of Education* (1956) and GARRITY V. NEW JERSEY (1967), which protect against penalizing the invocation of the right or chilling its use, draw no clear support from the past. Indeed, the decision in GRIFFIN V. CALIFORNIA (1965) which prohibited comment on the failure of a criminal defendant to testify on ground that such comment "is a remnant of the inquisitorial system" is historically farfetched.

Finally, history is ambiguous on the controversial issue whether the right against self-incrimination extends to the police station. When justices of the peace performed police functions and conducted the preliminary examination of suspects, their interrogation was inquisitorial in character (as it is in the interrogation rooms of modern police stations) and it usually had as its object the incrimination of the suspect. Yet he could not be examined under oath, and he did have a right to withhold the answer to incriminating questions. On the other hand, he had no right to be told that he need not answer or be cautioned that his answers could be used against him. However, the right against self-incrimination grew out of a protest against incriminating interrogation *prior to* formal accusation. That is, the maxim *nemo tenetur seipsum prodere* originally meant that no one was obligated to supply the evidence that could be used to indict him. Thus, from the very inception of the right, a suspect could invoke it at the earliest stages of his interrogation.

In MIRANDA V. ARIZONA (1966) the Supreme Court expanded the right beyond all precedent, yet not beyond its historical spirit. *Miranda's* purpose was to eliminate the inherently coercive and inquisitional atmosphere of the interrogation room and to guarantee that any incriminating admissions are made voluntarily. That purpose was, historically, the heart of the Fifth, the basis of its policy. Even the guarantee of counsel to effectuate that purpose has precedent in a historical analogy: the development of the right to counsel originally safeguarded the right against self-incrimination at the trial stage of prosecution. When the defendant lacked counsel, he had to conduct his own case, and although he was not put on the stand and did not have to answer incriminating questions, his failure to rebut accusations and insinuations by the prosecution prejudiced the jury, vitiating the right to silence. The right to counsel permitted the defendant's lips to remain sealed; his "mouthpiece" spoke for him. In *Miranda* the Court extended the protection of counsel to the earliest stage of a criminal action, when the need is the greatest because the suspect is most vulnerable.

Nevertheless, the *Miranda* warnings were an invention of the Court, devoid of historical support. Excepting rare occasions when judges intervened to protect a witness against incriminatory interrogatories, the right had to be claimed or invoked by the person seeking its protection. Historically it was a fighting right; unless invoked it offered no protection. It did not bar interrogation or taint an uncoerced confession as improper evidence. Incriminating statements made by a suspect could always be used at his trial. That a person might unwittingly incriminate himself when questioned in no way impaired his legal right to refuse answer. He lacked the right to be warned that he need not answer; he lacked the right to have a lawyer present at his interrogation; and he lacked the protection of the strict waiver requirements that now accompany the MIRANDA RULES. From a historical view, the decision in BREWER V. WILLIAMS (1977) and the limits on interrogation imposed by RHODE ISLAND V. INNES (1980) extraordinarily inflate the right. What was once a fighting right has become a pampered one. Law should encourage, not thwart, voluntary confessions. The Fifth should be liberally construed to serve as a check on modern versions of the "third degree" and the spirit of McCarthyism, but the Court should distinguish rapists and murderers from John Lilburne and realize that law enforcement agencies today are light years away from the behavior revealed in BROWN V. MISSISSIPPI (1936) and CHAMBERS V. FLORIDA (1940).

The Court said in PALKO V. CONNECTICUT (1937) that the right against compulsory self-incrimination was not a fundamental right; it might be lost, and justice might still be done if the accused "were subject to a duty to respond to orderly inquiry." Few would endorse that judgment today, but it is a yardstick for measuring how radically different the constitutional law of the Fifth became in half a century.

History surely exalts the right if precedence be our guide. It won acceptance earlier than did the freedoms of speech, press, and religion. It preceded a cluster of pro-

cedural rights such as benefit of counsel. It is older, too, than immunities against BILLS OF ATTAINDER, EX POST FACTO laws, and unreasonable searches and seizures. History also exalts the origins of the right against self-incrimination, for they are related to the development of the accusatorial system of criminal justice and the concept of FAIR TRIAL; to the principle that FUNDAMENTAL LAW limits government—the very foundation of CONSTITUTIONALISM; and to the heroic struggles for the freedoms of the FIRST AMENDMENT. History does not, however, exalt the right against the claims of justice.

LEONARD W. LEVY
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Bibliography

FRIENDLY, HENRY J. 1968 The Fifth Amendment Tomorrow: The Case for Constitutional Change. *University of Cincinnati Law Review* 37:671–726.

GRISWOLD, ERWIN 1955 *The 5th Amendment Today.* Cambridge, Mass.: Harvard University Press.

HOOK, SIDNEY 1957 *Common Sense and the Fifth Amendment.* New York: Criterion.

KAMISAR, YALE 1980 *Police Interrogation and Confessions: Essays in Law and Policy.* Ann Arbor: University of Michigan Press.

LEVY, LEONARD W. 1968 *Origins of the Fifth Amendment: The Right against Self-Incrimination.* New York: Oxford University Press.

MAYERS, LEWIS 1959 *Shall We Amend the Fifth Amendment?* New York: Harper & Row.

MORGAN, EDMUND M. 1949 The Privilege against Self-Incrimination. *Minnesota Law Review* 34:1–37.

WIGMORE, JOHN HENRY 1961 *Evidence in Trials at Common Law,* vol. 8, rev. by John T. McNaughton. Boston: Little, Brown.

## RIGHT AGAINST SELF-INCRIMINATION (Update)

In the original edition of this *Encyclopedia,* Leonard W. Levy characterized the right against self-incrimination as "the most misunderstood, unrespected, and controversial of all constitutional rights," yet stressed that the Supreme Court "has tended to give it an ever widening meaning" unconfined by textual literalism. Recent Fifth Amendment jurisprudence has brought an end to this expansion of scope without clarifying the theoretical underpinnings of the right. While scholars propose and criticize alternative conceptual foundations for this right, the Supreme Court has been content to point to a grab bag of motivations, including humaneness to suspects, commitment to "accusatorial" procedures and a fair state-individual balance, distrust of confessions, concern for privacy, and respect for the human personality. The Court has made little effort to assign different weights or distinct roles to these concerns or to link them explicitly to the outcomes of particular cases. Current law indeed suggests that the Court's primary aim is to prevent the right against self-incrimination from interfering unduly with the paramount truth-finding function of the CRIMINAL JUSTICE SYSTEM.

Achieving this aim is particularly difficult because the Fifth Amendment, unlike the FOURTH AMENDMENT, does not prohibit only "unreasonable" intrusions on the right that it protects; thus, the Court is at least officially reluctant to "balance" the Fifth Amendment right against competing government interests. Moreover, the Fifth Amendment appears on its face to forbid admission of EVIDENCE compelled from the defendant, leaving no room to argue—as with the Fourth Amendment—that exclusion of improperly obtained evidence is a judicially created remedy to which courts may freely create exceptions. The Fifth Amendment right must instead be limited by the manner in which it is defined and by the explanations given to the key terms in that definition.

The right against self-incrimination forbids the government to compel an individual to provide testimonial or communicative evidence that could be used to incriminate that individual. Only a natural person, not an organization, can claim this right, but with regard to items a person holds as custodian for an organization. However, it may be claimed in any forum in which government seeks to compel a response, whether by legal process or through the informal coercive pressures of police interrogation, and with regard to any item that could potentially furnish a link in a chain of incriminating evidence, even though not sufficient in itself to convict. In most contexts, this right is deemed waived unless actively claimed by the right holder, and it is inapplicable to evidence for whose disclosure the government grants the right holder IMMUNITY (against any use, direct or indirect, to convict the right holder of crime).

MIRANDA V. ARIZONA (1966), which extended the right against self-incrimination to the POLICE INTERROGATION context, established special rules for this setting, elaborated in subsequent opinions. Statements by a person interrogated while in custody are presumed compelled, and hence, are inadmissible at trial to prove guilt, unless the suspect is told before the interrogation that he or she has the right to remain silent, to consult a lawyer before any questioning, and to have the lawyer present during questioning; that a lawyer will be provided if the suspect wants but cannot afford one; and that anything the suspect says can be used against him or her in court. If the suspect

requests a lawyer, no questioning is permitted until one is provided, unless the suspect initiates further discussion with the police. If the suspect consents to questioning but subsequently indicates a desire to remain silent, the interrogation must cease.

The principal recent developments have arisen in two quite different contexts. One is the police-interrogation setting—unique because (as will be discussed) the detailed rules of *Miranda* and its progeny are only tenuously related to the constitutional ban on compelled self-incrimination. The other development, which unequivocally implicates the constitutional right itself, comprises efforts by investigatory targets to resist official demands for the production of evidence that could potentially lead to criminal charges. Opinions in both areas exhibit the Court's efforts to minimize interference with the truth-finding process.

The recent police-interrogation decisions preserve the *Miranda* doctrine while restricting its scope. The Court's reluctance to overrule *Miranda* outright is surprising in light of opinions strikingly eroding the doctrine's legitimacy. These opinions, culminating in OREGON V. ELSTAD (1985), view the *Miranda* doctrine not as commanded or entailed by the Fifth Amendment, but as a set of "prophylactic rules" devised by the Court to forestall genuine constitutional violations. Breach of *Miranda*'s requirements need not, therefore, violate the constitutional right against self-incrimination. This view leaves the Court free (as in *Elstad*) to hold certain evidence derived from such a breach admissible in circumstances in which the fruits of a constitutional violation must be suppressed. But it also undermines the very foundation of *Miranda:* why may the Court require police to obey rules that the Court itself concedes are neither required by the Constitution nor imposed to remedy constitutional violations? Both friends and critics of *Miranda* suggested that the Court was preparing to discard the doctrine altogether.

This has not happened, however, nor have opinions since *Elstad* crucially exploited the nonconstitutional status of *Miranda.* Rather, the Court has simply narrowed *Miranda*'s reach in various ways. "Interrogation," which triggers the warning requirement, includes conduct the police should know is likely to prompt incriminating admissions. Yet *Arizona v. Mauro* (1987) held that allowing (and recording) a meeting between an arrestee and his wife was not "interrogation," despite police awareness that such admissions might occur. Telling an unsophisticated suspect that a lawyer would be appointed "if and when you go to court" could cast doubt on the required notice that the lawyer would be provided "before any questioning." Yet *Duckworth v. Eagan* (1989) found no ambiguity, analyzing the amended warnings from a legally knowledgeable standpoint.

Most notably, the Court has repudiated suggestions—arguably latent in *Miranda* itself—that the *Miranda* doctrine guarantees a "rational," "responsible," or "fully informed" choice between silence and speech. Instead, the Court treats the doctrine solely as forestalling coercion and has found WAIVERS OF THE CONSTITUTIONAL RIGHT to silence valid in a variety of situations where the suspect's decision was less than "rational" or "fully informed." In *Moran v. Burbine* (1986), the police did not tell the suspect that a lawyer hired by his sister was trying to reach him. In *Colorado v. Barrett* (1987) the suspect apparently thought only written statements could be used against him. In *Colorado v. Spring* (1987) a suspect arrested for a firearms violation agreed to talk without knowing he would be questioned about an earlier murder in a different jurisdiction. Most strikingly, COLORADO V. CONNELLY (1986) found voluntary a *Miranda* waiver by a MENTALLY ILL suspect in the grip of paranoid delusions, reasoning that only official coercion would render a waiver "involuntary."

In its *Miranda* jurisprudence the Court is dealing with what it views as a judge-made supplement to the right against self-incrimination. Its desire to keep the doctrine within narrow bounds may thus say little about the Court's commitment to the core concerns animating this right. The recent decisions concerning production of evidence, however, evince a readiness to limit the Fifth Amendment right itself.

In *Fisher v. United States* (1976) the Court distinguished the contents of items sought by the government and the act of producing those items. Each requires separate analysis, and the Fifth Amendment is violated only if either the contents or act of production is, by itself, compelled, testimonial, and incriminating. (In effect, as Peter Arenella has observed, a Fifth Amendment violation occurs only when the government's compulsion creates incriminating testimonial evidence that did not previously exist.) One result was to make the self-incrimination right harder to invoke; documents whose contents were created voluntarily are shielded only if the compelled act of producing them is itself both testimonial and incriminating. In contrast, by acknowledging that production itself could implicitly communicate incriminating information, *Fisher* opened a novel route for Fifth Amendment arguments. The REHNQUIST COURT's decisions in this area narrow that route in three ways.

First, the criterion for "testimonial" or "communicative" evidence was tightened in *Doe v. United States* (1988) to permit compelling a suspect to sign a directive authorizing foreign banks to release information about any accounts he might have. Although executing the directive would communicate directions to the banks, the Court insisted that only the communication of factual assertions or

information counts as "testimonial." The Court left unexplained how informing a bank that it is authorized to make specified disclosures does not count as conveying "information."

More significantly, the "collective entity rule" precluding self-incrimination claims with respect to documents held as custodian for an organization was found applicable to the custodian's act of production, not merely the documents' contents. The collective-entity rule reflected the Court's view that the personal nature of the Fifth Amendment right was inconsistent with the impersonal representative capacity in which the custodian holds organizational records. After *Fisher*, the Court could have reinterpreted the rule as existing because the contents of such records were not created under compulsion—implying nothing about an act that was compelled. But BRASWELL V. UNITED STATES (1988) rejected this harmonization of the collective-entity and *Fisher* doctrines. The Court instead extended its pre-*Fisher* explanation of the collective entity rule by insisting that the representative capacity in which custodians hold documents makes even their individual acts of production not "personal." This strained "sleight of hand" insistence that a natural individual's overt behavior is somehow not that individual's "personal" act allowed the Court to escape an implication of its own act/content distinction that it feared would eviscerate the investigation of white-collar crimes.

Finally, in *Baltimore City Department of Social Services v. Bouknight* (1990), the Court combined *Braswell*'s custodial rationale with an amorphous expansive exception to the self-incrimination right for noncriminal regulatory schemes to reject the self-incrimination claim of a suspected child abuser ordered to produce her son in court. Although the mother's act of production would testify to her control over the child and could thereby assist her prosecution, the Court appealed to cases rejecting Fifth Amendment challenges to civil regulatory requirements not confined to groups inherently suspect of criminal activities. Reliance on this exception is troubling, however, because of its extraordinary manipulability. (Why, for example, regard as "civil" and "regulatory" a state juvenile-protection scheme intimately related to criminal laws against child abuse?) Doubts are scarcely dispelled by the Court's additional argument that Bouknight's status as custodian for her son under a prior court order was analogous to that of a custodian of corporate records. The "custodian" argument had never before extended beyond agents of collective entities, and it entailed ignoring this "custodian's" prior and continuing status as mother.

OBITER DICTUM in *Bouknight* suggests that if the state should later seek to prosecute the mother, it may be prohibited from using the testimonial aspects of her act of production. Similarly, *Braswell* stated that although the government could compel a custodian to produce organizational records, it could not in a subsequent prosecution of the custodian divulge that he or she produced those records. There is a tension between these obiter dicta and the HOLDING in each case that compelled production does not violate the Fifth Amendment. This tension suggests that the Court may be uneasy with the extent to which its decisions have in fact cut into the core area of the right against self-incrimination. In an unacknowledged fashion, the Court may be balancing the individual's self-incrimination right and the social goal of truth finding in an effort to accommodate both concerns.

DAVID DOLINKO
(1992)

Bibliography

ARENELLA, PETER 1982 Schmerber and the Privilege Against Self-Incrimination: A Reappraisal. *American Criminal Law Review* 20:31–61.

DOLINKO, DAVID 1986 Is There a Rationale for the Privilege Against Self-Incrimination? *UCLA Law Review* 33:1063–1148.

SCHULHOFER, STEPHEN 1987 Reconsidering *Miranda*. *University of Chicago Law Review* 54:435–461.

SEIDMAN, LOUIS MICHAEL 1990 Rubashov's Question: Self-Incrimination and the Problem of Coerced Preferences. *Yale Journal of Law and the Humanities* 2:149–180.

STUNTZ, WILLIAM 1988 Self-Incrimination and Excuse. *Columbia Law Review* 88:1227–1296.

WHITE, WELSH 1986 Defending Miranda: A Reply to Professor Caplan. *Vanderbilt Law Review* 39:1–22.

## RIGHT OF PRIVACY

Long before anyone spoke of privacy as a constitutional right, American law had developed a "right of privacy," invasion of which was a tort, justifying the award of money damages. One such invasion would be a newspaper's embarrassing publication of intimate facts about a person, or a statement placing someone in a "false light," when the story was not newsworthy. Other invasions of this right were found in various forms of physical intrusion, or surveillance, or interception of private communications. The Constitution, too, protected some interests in privacy: the FOURTH AMENDMENT forbade unreasonable SEARCHES AND SEIZURES; the Fifth Amendment offered a RIGHT AGAINST SELF-INCRIMINATION; the THIRD AMENDMENT, a relic of the Revolutionary War, forbade the government to quarter troops in a private house in peacetime without the owner's consent. Even so, despite Justice LOUIS D. BRANDEIS's famous statement in the WIRETAPPING case of OLMSTEAD V. UNITED STATES (1928), there was no general constitutional

"right to be let alone." Nor does any such sweeping constitutional right exist today. Beginning with GRISWOLD V. CONNECTICUT (1965), the Supreme Court has recognized a constitutional right of privacy, but the potentially broad scope of that right remains constricted by the Court's current interpretations of it.

*Griswold* held invalid a Connecticut law forbidding the use of contraceptives, in application to the operators of a BIRTH CONTROL clinic who were aiding married couples to violate the law, offering them advice and contraceptive devices. Justice WILLIAM O. DOUGLAS, writing for the Court, disavowed any reliance on SUBSTANTIVE DUE PROCESS to support the decision. Although the statute did not violate the terms of any specific guarantee of the BILL OF RIGHTS, said Douglas, the Court's decisions had recognized that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." The FREEDOM OF ASSOCIATION, although not mentioned in the FIRST AMENDMENT, had been protected against intrusions on the privacy of political association. The Third, Fourth, and Fifth Amendments also created "zones of privacy." The *Griswold* case concerned "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." Furthermore, the idea of allowing police to enforce a ban on contraceptives by searching the marital bedroom was "repulsive to the notions of privacy surrounding the marriage relationship."

Connecticut had not been enforcing its law even against drugstore sales of contraceptives; the governmental prying conjured up in the *Griswold* opinion was not really threatened. What *Griswold* was protecting was not so much the privacy of the marital bedroom as a married couple's control over the intimacies of their relationship. This point emerged clearly in EISENSTADT V. BAIRD (1972), which extended the right to practice contraception to unmarried persons, and in CAREY V. POPULATION SERVICES INTERNATIONAL (1977), which struck down three laws restricting the sale and advertisement of contraceptives.

In *Eisenstadt* the Court characterized the right of privacy as the right of an individual "to be free from unwarranted intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." The prophecy in those words came true the following year when the Court, in ROE V. WADE (1973), held that the constitutional right of privacy recognized in *Griswold* was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." This right to decide whether to have an abortion was qualified only in the later stages of pregnancy; during the first trimester of pregnancy it was absolute. Abandoning *Griswold*'s PENUMBRA THEORY, the Court placed the right of privacy within the liberty protected by the DUE PROCESS clause of the FOURTEENTH AMENDMENT. (See ABORTION AND THE CONSTITUTION.)

As the *Roe* dissenters pointed out, an abortion operation "is not "private' in the ordinary usage of that word." Liberty, not privacy, was the chief constitutional value at stake in *Roe.* In later years various Justices have echoed the words of Justice POTTER STEWART, concurring in *Roe*, that "freedom of personal choice in matters of marriage and family life" is a due process liberty. Indeed, Justice Stewart's formulation was too narrow; the Court's decisions have gone well beyond formal marriage and the traditional family to protect a much broader FREEDOM OF INTIMATE ASSOCIATION. Yet that freedom is often defended in the name of the constitutional right of privacy.

From the time of the *Griswold* decision forward, privacy became the subject of a body of legal and philosophical literature notable for both analytical quality and rapid growth. The term "privacy" cried out for definition—not merely as a feature of constitutional law, where the Supreme Court had offered no more than doctrinal impressionism, but more fundamentally as a category of thought. Is privacy a situation, or a value, or a claim of right? Is privacy itself the subject of our moral and legal claims, or is it a code word that always stands for some other interest? However these initial questions be answered, what are the functions of privacy in our society? These are not merely philosophers' inquiries; in deciding "right of privacy" cases judges also answer them, even if the answers are buried in assumptions never articulated.

Not until 1977 did the Supreme Court begin to map out the territory occupied by the constitutional right of privacy. In WHALEN V. ROE the Court upheld a state law requiring the maintenance of computerized records of persons who obtained various drugs by medical prescription. "The cases sometimes characterized as protecting "privacy," said the Court, "have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." This passage is noteworthy in two respects: first, its opening words suggest a new awareness that "privacy" may not be the most informative label for an interest in freedom of choice whether to marry, or procreate, or have an abortion, or send one's child to a private school. Second, the passage strongly hints that some interests in informational privacy—freedom from disclosure—are constitutionally protected not only by the First, Fourth, and Fifth Amendments but also by a more general right of privacy.

The *Whalen* opinion was written by Justice JOHN PAUL STEVENS, who has consistently urged an expansive reading of the "liberty" protected by the due process clauses. As if to emphasize that the right of privacy is merely one

aspect of a broadly defined right of substantive due process, Justice Stevens cited, to support his reference to the interest in independence in making important decisions, ALLGEYER V. LOUISIANA (1897), which established the FREEDOM OF CONTRACT as a due process right. If the "important decisions" part of the right of privacy is to be absorbed back into the body of substantive due process, and if informational privacy is to become part of a redefined constitutional right of privacy, the contours of this new right will for the first time approach the meanings of "privacy" in common speech. Before *Whalen*, it was possible to say that the one interest most conspicuously left unprotected by the constitutional right of privacy was privacy itself. In any event, even after *Whalen*'s suggestive analysis, the Supreme Court has continued to speak of "the" constitutional right of privacy.

There is a sense in which personal decisions about sex and marriage and procreation are private decisions. Indeed, the word "private" serves better than "privacy" to indicate the interests in personal autonomy at stake in such cases. Both words can refer to such forms of privacy as seclusion and secrecy; to do something in private is to do it free from public or general observance, and private information consists of facts not publicly or generally known. But "private" has another meaning that lacks any similar analogue in the idea of privacy. Private property, for example, is property that is one's own, subject to one's control, from which one has the right to exclude others if one chooses to do so. It makes perfect sense to speak of a power of decision as private in this sense. From this perspective the line of "privacy" opinions from *Griswold* to *Roe* and beyond can be seen as seeking to identify the circumstances in which the decision "to bear or beget a child" is one that "belongs" to the individual, one from which the public—even the state—can be excluded. Calling such an interest "privacy," however, is a play on words; any freedom from governmental regulation might just as easily be called "privacy." Perhaps Justice Stevens was making this point in his *Whalen* opinion when he cited *Allgeyer*, a case in which the liberty at stake was freedom to buy insurance from an out-of-state company.

Much of what government does in the way of regulating behavior intrudes on privacy in its commonly understood senses of solitude and nondisclosure. Yet even when these forms of privacy are assimilated to the constitutional right of privacy, the result is not wholesale invalidation of governmental action. The *Whalen* decision itself is illustrative. Recognizing that the drug records law threatened some impairment of both the interest in nondisclosure and the interest in making personal decisions, the Court nonetheless concluded that the law's informational security safeguards minimized the chances of serious harm to those interests and that the law was a reasonable means of minimizing drug abuse. More serious threats of disclosure of accumulated personal information, the Court said, might exceed constitutional limitations. The clear implication is that future claims to a constitutional right of privacy in the form of nondisclosure will be evaluated through a process of judicial interest balancing.

Even a judge who regards privacy as a constitutional value in itself, something more than a label for other interests, will be pressed to consider why privacy is important, in order to place the proper weights in a given case's decisional balance. The commentary on privacy regularly identifies several overlapping values. If governmental "brainwashing" would be unconstitutional, as all observers assume, the reason surely lies in the widely shared sense that the essentials of due process "liberty" include a healthy measure of control over the development of one's own individuality. That control undoubtedly requires some amount of privacy in the form of nondisclosure and seclusion. To have the sense of being a person, an individual needs some degree of control over the roles she may play in various social settings; control over the disclosure of personal information contributes to this process. Similarly, both learning and creative activity require a measure of relaxation and refuge from the world's intrusions.

A closely related function of informational privacy is its value as a foundation for friendship and intimacy. Although a cynic might say that the most effective way for an individual to preserve the privacy of his thoughts and feelings would be never to disclose them, that course would sacrifice the sort of sharing that constitutes a central value of intimate association—which, in turn, is crucial to the development of individuality. It is here that we can see clearly the overlap between privacy as selective nondisclosure and "privacy" as autonomy in intimate personal decisions. Justice Douglas's *Griswold* opinion spoke to both concerns: he sought to defend the privacy of the marital bedroom against hypothetical government snooping and to defend a married couple's autonomy over the intimacies of their relationship. The special constitutional status of the home, recognized in decisions ranging from search and seizure doctrines to the "private" possession of OBSCENITY protected in STANLEY V. ILLINOIS (1969), draws not only on the notion of the home as a sanctuary and place of repose but also on the home's status as the main locus of intimate associations.

Finally, privacy in the sense of seclusion or nondisclosure serves to encourage freedom, both in the sense of political liberty and in the sense of moral autonomy. The political privacy cases from NAACP V. ALABAMA (1958) to GIBSON V. FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE (1963) and beyond rest on the premise that disclosure of political associations is especially harmful to members of political groups that are unpopular or unorthodox. When

the Army engaged in the domestic political surveillance that produced the Supreme Court's 5–4 nondecision in LAIRD V. TATUM (1972), its files were filled with the names of those who "were thought to have at least some potential for civil disorder," not with the names of Rotarians and Job's Daughters. A similar threat is posed by disclosure of one's homosexual associations or other intimate associations outside the mainstream of conventional morality. Such a case, like *Griswold*, implicates both privacy as nondisclosure or seclusion and "privacy" as associational autonomy.

On the other side of the constitutional balance, opposed to the interest in informational privacy, may be ranged any of the interests commonly advanced to support the free exchange of information. To further many of those interests, the common law of defamation erected an elaborate structure of "privileges," designed to protect from liability persons who made defamatory statements in the course of exchanging information for legitimate purposes: a former employer might give a servant a bad reference; a newspaper might criticize the town mayor. As these examples show, informational privacy is by no means the only constitutional interest that may be raised in such cases. Not only has the law of defamation been hedged in with First Amendment limitations; liability for the tort of invasion of privacy must also pass judicial scrutiny aimed at avoiding violations of the FREEDOM OF THE PRESS. Although the Supreme Court has not ruled on the matter, undoubtedly the First Amendment will be read to include a "newsworthiness" defense to an action for damages for invasion of privacy by publication of intimate facts. Even where the First Amendment is not involved directly as a constitutional limit on the award of damages or the imposition of punishment under state law, that amendment's values must be taken into account in evaluating any claim that a state has violated an individual's constitutional right of informational privacy. (See GOVERNMENT SPEECH.) Perhaps for this reason, most lower federal courts have been reluctant to find in Justice Stevens's *Whalen* opinion a general invitation to expand the constitutional right of privacy's protections against disclosure of information.

Nor has the Supreme Court been ready, in the years since ROE V. WADE, to extend either branch of the constitutional right of privacy. The Court's best-known opportunities for widening the scope of the right have come in "important decisions" cases involving nonmarital intimate relationships (including homosexual ones; see SEXUAL PREFERENCE AND THE CONSTITUTION) and the asserted right to control one's own personal appearance (including dress and hair length). In some of these cases the Court has avoided deciding cases on their constitutional merits; in no case has the Court validated the claim of a right of privacy. On principle, the intimate association cases seem clearly enough to be governed by *Griswold* and its successor decisions. Yet the Court has temporized, displaying what ALEXANDER BICKEL once called "the passive virtues," evidently awaiting the formation of a sufficient political consensus before extending constitutional protection to unconventional intimate associations.

One factual context in which the Court seems likely to continue its hospitality to "privacy" claims touching intimate personal decisions is that of governmental intrusions into the body. The abortion decisions, of course, are the modern starting point. Compulsory smallpox VACCINATION, once upheld as a health measure, stands on shakier constitutional ground now that smallpox has been virtually eradicated. Compulsory STERILIZATION, too, is unconstitutional in the absence of justification by some COMPELLING STATE INTEREST. The Supreme Court has explicitly redescribed SKINNER V. OKLAHOMA (1942) as a "privacy" case. By analogy, the right of a competent adult to refuse medical treatment seems secure, even when that choice will probably lead to death. (See EUTHANASIA.)

If the Supreme Court comes to accept Justice Stevens's broad reading of due process "liberty," it makes little difference whether the bodily intrusion cases be seen as raising "privacy" issues. There are occasions, however, when governmental invasions of the body implicate not only the interest in autonomy over one's own body but also privacy in its true sense of nondisclosure and seclusion. An appalling case in point is *Bell v. Wolfish* (1979). Inmates of a federal detention center, held in custody before being tried on criminal charges, sued to challenge the constitutionality of various conditions of their confinement. One challenged practice was the systematic subjection of every inmate to visual inspection of his or her body cavities after every "contact visit" with a person from outside the center, whether or not anyone had any suspicion that contraband was being smuggled into the center. A 5–4 Supreme Court held that the searches were not unreasonable and thus presented no Fourth Amendment problem; the majority did not separately consider any constitutional right of privacy founded on due process. The two main dissenting opinions, emphasizing substantive due process, insisted that the government must offer substantial justification for such a degrading invasion of privacy. (See ROCHIN V. CALIFORNIA.) Justification was lacking: the lower court had found that the searches were ineffective in detecting smuggled goods, and the government's argument that the searches deterred smuggling was an obvious makeweight.

There was no significant physical invasion of the body in the *Wolfish* case. Yet the privacy interests of the individuals searched were not far removed from those involved in the abortion and sterilization cases. The detainees sought vindication of their right to be afforded the dignity of respect, not just for their bodies but for their persons. The

very pointlessness of the searches in cases where suspicion was lacking heightened the humiliation, to the point that many inmates had given up visits by family members. The case illustrates perfectly the convergence of the interests in personal autonomy and informational privacy in an individual's control over his own personality. When government seriously invades that sphere, due process demands important justification.

Several states guarantee a right of privacy in their state constitutions. The various state supreme courts have relied on these provisions to hold unconstitutional not only invasions of informational privacy, such as police surveillance, but also invasions of personal autonomy, such as laws limiting the occupancy of a house to members of a family, or forbidding the possession of marijuana for personal use. If the Supreme Court were to follow the doctrinal leadership of these courts, it would not be the first time. (See INCORPORATION DOCTRINE.)

Both types of interests protected by the federal constitutional right of privacy are susceptible to either broad or narrow interpretation. A generalized "privacy" right to make important decisions, like a generalized right of informational privacy, resists clear-cut definition. Every extension of a constitutional right of personal autonomy detracts from the power of government to regulate behavior in the public interest (as government defines that interest); and every extension of a constitutional right of informational privacy detracts from the free flow of communication. The problem for the courts, here as in EQUAL PROTECTION and other areas of constitutional growth, is the stopping-place problem. It is no accident that most discussions of the newer constitutional right of privacy turn to questions about the proper role of the judiciary—a theme that has dominated discussion of substantive due process since it appeared on the constitutional scene a century ago. The problem of defining a constitutional right and the problem of establishing the courts' proper constitutional role are two faces of the same inquiry. A constitutional right that defies description not only fails to protect its intended beneficiaries but also undermines the position of the courts in the governmental system.

Justice Stevens's opinion in WHALEN V. ROE begins to point the way toward the resolution of the uncertainties that have surrounded the constitutional right of privacy ever since the *Griswold* decision. It does aid constitutional analysis to separate the right into the two strands of personal autonomy and informational privacy. Yet it remains useful to recognize, as Justice Stevens has continued to remind us, that both strands remain part of a single substantive due process principle: significant governmental invasions of individual liberty require justification, scaled in importance according to the severity of the invasions. The right of privacy, then, is no more susceptible to precise definition than are such rights as due process or equal protection. What can be identified are the substantive values that inform the right of privacy. These values, as the Supreme Court's decisions show, are centered in the respect owed by the organized society to each individual as a person and as a member of a community. When governmental officers invade a person's control over her own body, or development of individual identity, or intimate associations—either by restricting decisional autonomy or by intruding on privacy in the sense of nondisclosure or solitude—then the Constitution demands that they be called to account and made to justify their actions.

For the future, the fate of the right of privacy, like that of all constitutional rights, will depend on the courts only secondarily. In the long run, the crucial questions will be how much privacy and what kinds of privacy we value. Total privacy—that is, isolation from others—is not merely unattainable; hardly anyone could stand it for long. In some societies people neither have nor want much of what we call privacy. Yet even among Australian aborigines who eke out their precarious living in a desert that often fails to provide walls, there are rules of restraint and social distance, and, when all else fails, the magic of secret names. Our own constitutional right of privacy will grow or wither as our own society's rules of restraint and social distance form and dissolve.

KENNETH L. KARST
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Bibliography

BOSTWICK, GARY L. 1976 A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision. *California Law Review* 64: 1447–83.

GAVISON, RUTH 1980 Privacy and the Limits of Law. *Yale Law Journal* 89:421–71.

GERETY, TOM 1977 Redefining Privacy. *Harvard Civil Rights-Civil Liberties Law Review* 12:233–96.

GREENAWALT, KENT 1974 Privacy and Its Legal Protections. *Hastings Center Studies* 2:45–68.

HENKIN, LOUIS 1974 Privacy and Autonomy. *Columbia Law Review* 74:1410–33.

Symposium on Privacy 1966 *Law and Contemporary Problems* 31:251–435.

TRIBE, LAURENCE H. 1978 *American Constitutional Law*. Chap. 15. Mineola, N.Y.: The Foundation Press.

WESTIN, ALAN F. 1967 *Privacy and Freedom*. New York: Atheneum.

## RIGHT OF PRIVACY
### (Update)

Despite extensive litigation and commentary, the right of privacy has remained uncertain in constitutional law since

it was first established in GRISWOLD V. CONNECTICUT (1965). The ABORTION decision in ROE V. WADE (1973] raised the level of controversy about the right of privacy without clarifying the scope or nature of the rights understood under this concept. Sharp criticism of the vagueness of the concept of privacy and persistent doubts about its supporting constitutional text and traditions have not hampered the vitality of the right of privacy. In some areas, such as the RIGHT TO DIE, privacy and related concepts have made notable advances in constitutional law. Senate hearings on recent Supreme Court nominees, notably those leading to the rejection of Robert H. Bork and the confirmation of DAVID H. SOUTER seem to confirm these advances as political achievements. We cannot be sure, however, whether or not particular rights (such as the right to abortion) will survive changes in the personnel of the Court.

Recent majorities on the Supreme Court have generally identified the FOURTEENTH AMENDMENT's guarantee of "liberty" as the source of privacy rights. This is a notable shift for two reasons. First, it signals the willingness on the part of recent Justices to accept SUBSTANTIVE DUE PROCESS as a legitimate concept in constitutional law, so long as it does not touch on economic or labor matters. To Justices of the generation of WILLIAM O. DOUGLAS and HUGO L. BLACK, adjudication under such a general rubric was perilous. It encouraged judicial excess. Douglas went to great, perhaps absurd, lengths in *Griswold* to find textual sources for a right to privacy in the First, Third, Fourth, Fifth and Eighth Amendments. ARTHUR GOLDBERG sought to find privacy in the NINTH AMENDMENT. This is now widely understood as a fool's errand.

Second, the preference for a more general source of rights reflects continuing uncertainty about definition of the right of privacy together with an unwillingness to surrender its advantages. Whatever its source, Justice HARRY A. BLACKMUN wrote in *Roe v. Wade*, "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Justices in more recent decisions have sometimes altogether avoided the term privacy, with conservatives often speaking of "liberty interests" and liberals of personal or "intimate" decisions. In *Cruzan v. Missouri Department of Health* (1990), the "right to die" case, Chief Justice WILLIAM H. REHNQUIST made this avoidance explicit: "Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held." The issue, he added, "is more properly analyzed in terms of a 14th Amendment liberty interest."

Outside of the law of SEARCH AND SEIZURE, privacy has proven extremely hard to define. Scholars have been unable to agree on the elements of ordinary usage, CONSTITUTIONAL HISTORY, or moral philosophy from which to construct a normative concept. The concept itself has been of little but rhetorical help in deciding particular cases in which, typically, regulation is seen to invade an individual's preference for seclusion or immunity. All this has made the precedents of *Griswold* and *Roe* hard to confine by ordinary arguments. The steps from privacy in marital sexuality to privacy in abortion and from heterosexuality to homosexuality have not been easy to resist when arguments are made in terms of a right to privacy possessed by all persons.

However disappointing to those awaiting clarification, the turn from privacy to liberty may nonetheless make good legal and political sense. Privacy as a term has no plain reference or meaning for most of us. "The right to be let alone," as EARL WARREN and LOUIS BRANDEIS called it, covered many situations and many abuses. In CRIMINAL PROCEDURE, the protection of "persons, papers, and effects" refers to those things (including one's own body) over which we normally exercise complete control. But the transportation from one context to another—search and seizure, for example, to sexuality—leaves much of the force of argument, as well as PRECEDENT and tradition, behind. We are left then with an argument for immunity unaided by the concept under which immunity is claimed. Obviously, private life—*la vie privée*—must shelter information, decisions, and behaviors of many different kinds. The question is, which ones are to be protected against regulation or governmental intrusion?

Liberty is not much more helpful in this regard than is privacy. Yet liberty offers a plainer inquiry with less confusion and less of a temptation to believe that we will find our rights by simply defining a concept. Moreover, liberty, unlike privacy, is a concept with a long constitutional history.

The inquiry that now seems to govern adjudication is whether or not fundamental liberties extend to certain aspects of private life, including sexuality, reproduction, and perhaps dying. Often, regulations have reached these matters in connection with medical treatment. Thus, the right to die is the right to refuse medical treatment where it might prolong life. The right to abortion is the right to choose whether or not to terminate a pregnancy before the fetus is viable outside the womb. We may generalize from these instances to a concept of privacy in intimate associations or intimate decisions, but the Supreme Court's response to this generalization remains equivocal: Sexuality between consenting adults of the opposite sexes seems at this point effectively protected. Although *Griswold* relied on the context of MARRIAGE for its extension of protection to information about the use of BIRTH CONTROL, EISENTADT V. BAIRD (1972) seemed to make clear that this context was unnecessary. We should note, however, that the effective protection for disapproved behavior lies in a

conjunction of privacy decisions from the Supreme Court and, of equal or greater importance, regulatory reforms from the various state legislatures that permit a greater range of behaviors than heretofore. Sodomy statutes remain on the books in many states, and it is not yet clear that unmarried heterosexual sodomy would be held to be protected by the Supreme Court.

In BOWERS V. HARDWICK (1986) the Court upheld a Georgia statute that made sodomy a felony in a case in which charges had been filed and then withdrawn against two consenting adult males. The 5–4 decision sharply divided the Court. "The issue presented," wrote Justice BYRON R. WHITE, for the majority, "is whether the Federal constitution confers a fundamental right upon homosexuals to engage in sodomy. . . ." Justices Blackmun, WILLIAM J. BRENNAN, THURGOOD MARSHALL, and JOHN PAUL STEVENS dissented. "This case is no more about a fundamental right to engage in homosexual sodomy," Justice Blackmun wrote, "than STANLEY V. GEORGIA (1969) was about a fundamental right to watch obscene movies, or KATZ V. UNITED STATES (1967) was about a fundamental right to place interstate bets from a telephone booth." For the dissenters, Brandeis's dissent in OLMSTEAD V. UNITED STATES (1928) provided the applicable concept, "the right to be let alone," as Warren and Brandeis had described it (without any reference to sexuality) in their famous *Harvard Law Review* article on the "Right to Privacy." Thus, Blackmun insisted on a certain understanding of the concept of privacy: "I believe we must analyze respondent's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an "abominable crime not fit to be named among Christians."

The incommensurability of these points of view may be understood from at least three angles. First, and most obvious to students of the concepts of privacy and liberty, there is a difference over the level of abstraction at which the argument will be joined. The majority refused to accept the claim that adult homosexuals might shelter their consensual sexual practices under the same general liberty as adult heterosexuals. To the majority, the assertion is of an immunity to engage in a homosexual act consistently condemned in our tradition. The dissenters argue that this act must be understood in relation to other sexual intimacies protected by the Fourteenth Amendment. It is, after all, an expression of sexuality between consenting adults in the bedroom of a private apartment. (A house-guest had admitted the policeman into the apartment and directed him to Hardwick's bedroom.) Neither position is refutable as illogical or inconsistent. The choice of a level of abstraction will often decide a dispute over rights; yet there seems to be no conclusive argument that one level of abstraction is the appropriate one for a given case. What makes one level preferable to another is the sense of coherence and completeness at that level of whatever issues are understood as pertinent. This is inevitably a circular process of reasoning. Intimacy and sexuality seem the relevant terms to the dissenters, but not to the majority, which focuses on homosexuality. A simpler way to understand this difference is to note that, as always, each side in legal argument denies the applicability of the other side's precedents. In this case, the majority will not accept the force and bearing of *Griswold*, *Eisenstadt*, and *Roe v. Wade*. For the dissenters, however, these are the relevant precedents, pointing the way to a different result.

Finally, there is an important line of argument, going back to the younger Justice JOHN MARSHALL HARLAN in *Poe v. Ullman* (1961), that tradition should inform our understanding of the concept of liberty. Constitutional traditions, like others, are notoriously inexact. Moreover, there are good traditions and bad ones. Yet it is undeniable that legal and institutional traditions give us a context in which to understand the terms and arrangements provided for in the Constitution. DUE PROCESS is one example, JUDICIAL REVIEW is another, and privacy may be a third.

Harlan, in *Poe* and *Griswold*, relied on a specific tradition, namely, marriage. The various measures of restriction and permission attached to it by law suggested to him that the concept of privacy had constitutional standing in protecting the uses of sexuality—including contraception—by husband and wife. He never went beyond this point, however, retiring from the Court in 1971, one year before the *Eisenstadt* decision and two years before *Roe v. Wade*.

*Eisenstadt*'s majority opinions had relied on an EQUAL PROTECTION argument that left the factual question of the marital status of the recipient of a contraceptive unresolved. Justice Brennan's language, however, was unambiguous: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." This language may be said either to disregard tradition or to generalize it, raising it to a more abstract level. Only in MOORE V. CITY OF EAST CLEVELAND (1977) has the Court openly pursued Harlan's approach. In this case, the Court invalidated a ZONING ordiance disallowing residence in the same house of a grandmother and two grandchildren who were cousins rather than siblings. Justice LEWIS F. POWELL cited Harlan's reasoning in *Poe* in a plurality opinion insisting on "the sanctity of the family." "Ours is by means a tradition limited to respect for the bonds uniting the members of the nuclear family," he wrote.

Predictions about the future of the right to privacy must rely in part on assumptions about appointments to the Court. The Bork hearings seemed to suggest that a consensus now exists—in the Senate and in public opinion—on the importance of the right to privacy in constitutional law. This consensus does not mean, however, that the right to an abortion is secure. With the departure of Justice Brennan, *Roe v. Wade* is vulnerable to reversal. Justices ANTHONY M. KENNEDY, ANTONIN SCALIA, and Byron White, along with the Chief Justice, have all suggested an eagerness to reverse. Justice SANDRA DAY O'CONNOR has also indicated her preference for a new and less restrictive standard of review in abortion cases, although without clarifying its implications. Regulation that does not "unduly" burden abortion will survive judicial scrutiny, she wrote in HODGSON V. MINNESOTA (1990). This may well be the last decision to leave *Roe*'s holding in place. What seems unlikely is that *Griswold* or *Eisenstadt* will be reversed. Indeed, many would foresee the likelihood of an extension of privacy protections to homosexuals as inescapable, however conservative the Court. If so, cultural acceptance may ultimately prove more crucial in constitutional debate than the conclusions of scholarship or formal argument.

Similarly, the right to die as an aspect of privacy, liberty, or both, seems at this point to have secured its toehold in constitutional law. Like sexual privacy at the time of *Griswold*, this right remains uncertain in scope and definition, and the concept at work—once we move beyond a narrow statement of the right to refuse treatment—is both elastic and ambiguous. But these are not fatal intellectual flaws in constitutional law. Privacy, like many legal concepts, is not so much a philosophical conception as a practical one, more readily identified by its messy precedents than by its tidy definition.

TOM GERETY
(1992)

Bibliography

BAKER, RICHARD ALLAN 1989 The Senate of the United States: "Supreme Executive Council of the Nation," 1787–1800. *Prologue* 21:299–313.

BICKFORD, CHARLENE BANGS and BOWLING, KENNETH R. 1989 *Birth of the Nation: The First Federal Congress 1789–1791.* Madison, Wis.: Madison House.

BOWLING, KENNETH R. 1968 Politics in the First Congress 1789–1791. Ph.D. diss., University of Wisconsin.

SILBEY, JOEL H. 1987 "Our Successors Will Have an Easier Task": The First Congress Under the Constitution, 1789–1791. *This Constitution* 17:4–10.

SMOCK, RAYMOND W. 1989 The House of Representatives: First Branch of the New Government. *Prologue* 21:287–297.

## RIGHT OF PROPERTY

See: Property Rights

## RIGHT OF REVOLUTION

The right of revolution is not a right that is defined and protected by the Constitution but a NATURAL RIGHT. It would be absurd for a constitution to authorize revolutionary challenges to its authority. However, it would not have been absurd for the preamble to the Constitution to have acknowledged the right of revolution, as, for example, the preamble to the PENNSYLVANIA CONSTITUTION of 1776 had done. It was unnecessary to include such an acknowledgment in the Constitution of 1787, for the Constitution did not supplant the DECLARATION OF INDEPENDENCE of 1776, which remained the first organic law of the United States. The "people" who "ordain and establish this Constitution" are the same "people" who in 1776 "assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them." The Declaration, borrowing the reasoning of JOHN LOCKE, succinctly states the American doctrine of the right of revolution:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

Recognition of the right of revolution is, in this view, implicit in the recognition of human equality. A people who recognize that they are equal members of the same species—that no human being is the natural ruler of another—accept that the inequalities necessarily involved in government are not natural but must be "instituted" and

operated by "consent"; and that the primary end of government is not the promotion of the interests of one allegedly superior class of human beings but the security of all citizens' equal rights to "life, liberty, and the pursuit of happiness." It follows that it is the right and the duty of such a people to change their government when it persistently fails to effect this end. This right and duty, the Declaration says, belongs not to all peoples but only to those enlightened peoples who recognize human equality and natural rights, and who will therefore exercise their revolutionary right to establish right-securing government by consent.

Not only the revolutionaries of 1776 but also the Framers of the Constitution of 1787 justified their actions on this basis. In THE FEDERALIST #40 and #43 JAMES MADISON cites the Declaration's right of revolution to explain and to support the revolutionary proposals of the CONSTITUTIONAL CONVENTION. Madison argues that political leadership (by patriots like those assembled in Philadelphia) is needed in a revolution because "it is impossible for the people spontaneously and universally to move in concert towards their object." Thus, while the right of revolution is justly exercised when an enlightened people feel and judge that their government threatens to lead them back into an anarchical state of nature by failing to fulfill the duties they have entrusted to it, a revolution need neither wait for nor involve an anarchical disruption of society. However, exercise of the right of revolution (in contrast to mere CIVIL DISOBEDIENCE) can well necessitate and justify war. Those who exercise the right of revolution must prudently measure their forces.

ALEXANDER HAMILTON, in *The Federalist* #16, acknowledged that no constitution can guarantee that a widespread revolutionary opposition to the government will never occur; such opposition might well proceed "from weighty causes of discontent given by the government" itself. In contrast to Marxist doctrines of revolution, the American doctrine does not anticipate a future in which the right of revolution can safely disappear. It is therefore a cause for concern that today the right of revolution is obscured not only because it is a natural rather than a constitutional right but also because natural rights are no longer generally recognized by political theorists and jurists.

JOHN ZVESPER
(1986)

Bibliography

MANSFIELD, HARVEY C., JR. 1978 *The Spirit of Liberalism.* Cambridge, Mass.: Harvard University Press.

STOURZH, GERALD 1970 *Alexander Hamilton and the Idea of Republican Government.* Stanford, Calif.: Stanford University Press.

## RIGHT OF REVOLUTION
(Update)

The original entry in this encyclopedia argues that, although the right of revolution may be a NATURAL RIGHT, it cannot be a constitutional right, because it would be illogical for a constitution to sanction a revolt against its own authority. This argument has been common in American history: among others, ABRAHAM LINCOLN (in his First Inaugural Address) and the Supreme Court, in DENNIS V. UNITED STATES (1951), both subscribed to it. Yet this argument rests on a quite narrow definition of revolution, as an insurrection against the fundamental legal order entrenched in the Constitution. A different, and perhaps more common, definition of revolution would refer to any armed uprising against a sitting government. So defined, a right of revolution could indeed be a constitutional right. Sitting governments sometimes defend the constitutional order, but sometimes they seek to subvert it. Under the latter circumstances, revolutionary movements may arise to conserve and protect the constitutional order against the assault of a lawless government. A constitution could—with perfect logical consistency— guarantee a right of revolution for such "conservative" movements. These revolutions seek to overthrow, not the Constitution, but a government that itself seeks to overthrow the constitutional order.

Throughout American history, revolutionary movements have sought to portray themselves as "conservative" constitutionalists. Many of the leaders of the American War for Independence maintained that they were merely protecting the ancient British constitution against parliamentary and monarchical innovation. In the late twentieth century, leaders of the MODERN MILITIA movement claim to be the intellectual heirs of PATRICK HENRY and THOMAS JEFFERSON, protecting the Constitution against a federal government run amok. Whatever their other weaknesses, these claims are not conceptually incoherent: the American constitution could guarantee a right of revolution without logical inconsistency.

Yet although the Constitution could protect such a right, it is a different, and very controversial, question whether it actually does so. The most obvious and popular possible location for a constitutional right of revolution is the SECOND AMENDMENT, which provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The meaning of this provision is today in-

tensely contested. One school of thought, the individual rights view, holds that the amendment protects the right of individuals to own private arms so as to, inter alia, resist a tyrannical government. The other main school of thought, the STATES' RIGHTS view, maintains that the amendment protects the right of the states to arm their militias (currently, the state National Guards) as a check on federal power; for some in this school, this checking function apparently includes the ability to resist federal tyranny by force of arms. The principal disagreement between these two schools, then, concerns who possesses the constitutional right to arms to resist government— individuals or collective organizations under state control.

This commentator takes an intermediate position: The amendment protects the right of the American people as an organic whole to own arms so as to make a revolution against tyrannical government. The possessors of Second Amendment rights thus have both individual and collective aspects: They are neither state militias nor disconnected individuals but individual members of a highly unified, revolutionary people. If such a people does not exist, neither can the right to arms for revolutionary purposes; under such circumstances, armed insurrection would constitute not a revolution but vicious civil war. The drafters of the Second Amendment realized that revolutions work as a check on government only when the citizenry is highly unified and homogeneous. When it is not, revolutions tend to become either authoritarian and oppressive or anarchical and oppressive. Under such circumstances, the normal processes of electoral politics and JUDICIAL REVIEW are better checks against tyranny; revolutions eliminate one form of tyranny merely to install another. Even under conditions of disunity, individuals may possess a natural right to arms so as to resist oppression, but the drafters of the Second Amendment sought to protect a constitutional right to arms only for a united people. Because the American citizenry may have since ceased to be such a people, the Second Amendment's revolutionary aspects may also have since ceased to have real meaning.

In short, then, there is fairly broad agreement that originally, one purpose of the Second Amendment was to guarantee a right of someone (individuals, militias, a people) to own arms so as to resist some level (state, federal) of government if it should become tyrannous. (This agreement is, however, not unanimous: A very few would read the amendment as an essentially symbolic statement without any substantive impact). Yet that agreement demonstrates only that the Constitution protects a right to own arms, not that the Constitution directly protects a right of revolution. That distinction, although subtle, is meaningful, for the following reason. It would be possible to read the Constitution's approach to the right of revolution in either of two ways. First, the Constitution might guarantee a right to arms for revolution, but might not protect the right of revolution itself, because once the revolution has commenced, the nation has been plunged into a state of nature and so the constitutional order has been suspended. In this view, although the right to arms may be constitutional, the right of revolution is only a natural right. Accordingly, once the revolution begins, it ceases to be governed by constitutional norms but instead must look to some extraconstitutional body of standards for its goals and methods. Even in this view, the Constitution indirectly or implicitly recognizes a right of revolution; it does not, however, supply the source of that right nor limit its goals or methods. Alternatively, the Constitution might protect both a right to arms and a right to revolution. Citizens own arms so that they might make a "conservative" revolution dedicated to preserving the fabric of the existing Constitution. Such revolutionary movements are therefore sharply limited by the Constitution itself: They must seek only to restore the Constitution, not some new system of government, and they must honor the Constitution's norms during the conduct of the revolution itself.

A constitutional revolution and a revolution based on natural right are therefore, conceptually, quite different. In practice, however, it is very difficult to determine which sort of revolution was contemplated by the drafters of the Second Amendment, because the drafters themselves failed to explore the distinction. In all likelihood, the reason for this failure lies in their immediate historical experience. The drafters of the amendment doubtless looked to the American Revolution as their paradigm of a legitimate revolution. The makers of the American Revolution themselves freely mixed constitutional and natural law defenses of resistance to Great Britain. Sometimes, especially early in the resistance, they claimed merely to be protecting the British constitution; at other times, as in the DECLARATION OF INDEPENDENCE itself, they claimed to be exercising their natural right of revolution to defend their other natural rights. In general, as time went on, the revolutionaries came to rely less on constitutional arguments and more on natural law arguments; over the years, their goals grew from the relatively modest desire of reinstating the ancient constitution as they understood it to completely remodeling their government according to principles of natural justice. Later American resistance movements have generally followed the same path of freely mixing constitutional and natural law defenses of the right of revolution.

In theory, then, the American Constitution could, without logical inconsistency, protect a right of revolution, but in practice, American revolutionaries have not sharply distinguished between constitutional and natural law rights of revolution. It is important to note that this failure to distinguish does not clearly indicate that there is no free-

standing constitutional right of revolution (nor does it clearly indicate that there is one); rather, it suggests merely that Americans have tended to draw simultaneously on both the Constitution and natural law in justifying their revolutions. This simultaneous reliance grows naturally from the fact that Americans have often claimed that the primary content of their Constitution is natural law itself. In short, then, American constitutional argumentation has not clearly resolved or even seriously addressed whether the right of revolution is a constitutional right or only a natural right. Instead, American revolutionaries have defended their revolutions as rooted in both natural and constitutional law, and opponents of those revolutions have denounced them as rooted in neither.

DAVID C. WILLIAMS
(2000)

Bibliography

EHRMAN, KEITH A. and HENNIGAN, DENNIS A. 1989 The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately? *University of Dayton Law Review* 15:5–58.

LEVINSON, SANFORD 1989 The Embarrassing Second Amendment. *Yale Law Journal* 99:637–659.

MAIER, PAULINE 1972 *From Resistance to Revolution.* New York: Random House.

WILLIAMS, DAVID C. 1997 The Constitutional Right to "Conservative" Revolution. *Harvard Civil Rights-Civil Liberties Law Review* 32:415–447.

——— 1991 Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment. *Yale Law Journal* 101:551–615.

WOOD, GORDON S. 1969 *The Creation of the American Republic, 1776–1787.* New York: W. W. Norton.

## RIGHT–PRIVILEGE DISTINCTION

There are at least two ways of distinguishing between "privileges" and "rights" in the context of American constitutional law and history, and careful analysis does not confound the two. The text of the Constitution refers to both privileges and rights, and uses "privileges" as a term of art denoting a class of rights that may be invoked defensively, to excuse one from a legal restraint or obligation. In another usage, privileges have both an inferior status to and a less permanent existence than rights, being subject to revocation by the government or to the imposition of conditions on their exercise. There is no foundation in the Constitution for the latter distinction.

In the Constitution, a privilege is one kind of right. The word privilege appears four times. The first appearance is in the PRIVILEGE FROM ARREST in civil cases enjoyed by members of Congress during congressional sessions. The second appearance is the guarantee of the "privilege of the writ of HABEAS CORPUS," yet that "privilege" has at least as great a degree of status and permanence as any right in the Constitution. The other appearances are in the PRIVILEGES AND IMMUNITIES clauses of Article IV and of the FOURTEENTH AMENDMENT: the citizens of each state are entitled to the privileges and immunities of citizens in the several states; and no state may abridge the privileges or immunities of citizens of the United States.

Privileges are associated with, but are distinct from, immunities. A privilege is an exemption from a legal restraint or duty (such as the duty to testify in court), while an immunity is an exemption from liability (usually civil liability). Thus members of Congress are privileged from arrest and immune from having to answer in another place for their SPEECH OR DEBATE. The way in which the word is used in the Constitution suggests that a privilege is a kind of right distinguished not by revocability or conditionability but by the fact that it cannot be asserted until some authority has taken action against one. One can exercise the right of RELIGIOUS LIBERTY or the right of peaceable assembly on one's own initiative; but one cannot demand that the state show cause for holding one in jail until one is actually held, and one cannot refuse to answer questions until questions are asked. A constitutional privilege is defensive, but it may be asserted as of right. Thus there is not necessarily a diminution of the RIGHT AGAINST SELF-INCRIMINATION when that right is called a privilege.

The word "right," standing alone, along with the word "freedom" and the phrase "right of the people," is used in the Constitution to designate a right that one may assert affirmatively and which the government is precluded from invading. Among these are NATURAL RIGHTS, which antedate the Constitution, such as the FREEDOM OF SPEECH, the right of the people to keep and bear arms, and the right of the people to be secure in their persons, houses, papers, and effects. Another category of constitutional rights comprises procedural rights, both civil and criminal.

Precise usage of constitutional terms is hampered by an unfortunate rhetorical use of the terms "right" and "privilege." Even JAMES MADISON seems, on occasion, to have used "privilege" to mean a special boon conferred by authority and subject to revocation at the pleasure of the grantor. Subsequently, because the power to revoke a right includes the power to impose conditions upon its exercise, "privilege" came, in certain rhetorical circumstances, to stand for rights that were conditionable.

This rhetorical use of "right" and "privilege" was introduced into American public law by OLIVER WENDELL HOLMES. Writing as a justice of the Massachusetts Supreme Judicial Court, Holmes commented in 1892 on the freedom of speech of PUBLIC EMPLOYEES: "The petitioner may have the constitutional right to talk politics, but he has no constitutional right to be a policeman." Public employ-

ment was, for Holmes, not a right but a privilege. In GOLDBERG V. KELLY (1970) the Supreme Court stated that it had abandoned the right-privilege distinction. WELFARE BENEFITS might be a privilege, in the sense that the state could constitutionally abolish a welfare program, but a particular beneficiary's benefits could not be terminated except by procedures that satisfied the requirements of PROCEDURAL DUE PROCESS.

Similarly, the federal courts today interpret the FIRST AMENDMENT to protect public employees against at least some restrictions on their constitutional freedoms. Government, the Court has said, "may not deny a benefit to a person because he exercises a Constitutional right." Yet rights—even First Amendment rights—are defined more narrowly for public employees than they are for others, as the validation of the HATCH ACT demonstrated. (See UNCONSTITUTIONAL CONDITIONS.)

In recent years the Court has erected new barriers to the invocation of the right to procedural due process, requiring that a claimant establish deprivation of a liberty or property interest before due process even becomes an issue and paying considerable deference to state law in defining both types of interest. In refusing to characterize some important interests as liberty or property, the Court has relegated those interests to an inferior status. Thus the Holmesian right-privilege distinction, once abandoned, has been welcomed home in new clothes.

DENNIS J. MAHONEY
KENNETH L. KARST
(1986)

Bibliography

HOHFELD, WESLEY N. 1923 *Fundamental Legal Conceptions.* New Haven, Conn.: Yale University Press.

MONAGHAN, HENRY P. 1977 Of "Liberty" and "Property." *Cornell Law Review* 62:401–444.

VAN ALSTYNE, WILLIAM W. 1968 The Demise of the Right-Privilege Distinction in Constitutional Law. *Harvard Law Review* 81:1439–1464.

——— 1977 Cracks in "The New Property." *Cornell Law Review* 62:445–493.

## RIGHTS ISSUES IN HISTORICAL PERSPECTIVE

Rights conflicts begin in legally constituted relationships that produce roles or identities. Typical relationships include ruler–ruled, husband–wife, master–servant, property owner–government, employer–employee, parent–child, and landlord–tenant. A claim to rights often requires a prior self-recognition of one's status, for example, as a wife, servant, property owner, or parent. Throughout American history, many rights claimants may simply have meant to secure from courts or other legal institutions what they were entitled to, within the received terms of traditional COMMON LAW relationships. But by the middle years of the nineteenth century, claimants also drew from the Constitution a variety of rhetorical tools that allowed them to claim "rights" to change or destroy established relationships, to free themselves.

Traditional relational identities developed on the terrain of legal DOCTRINES that extended back before American history, often to medieval English law. In legal relationships, rights were a resource over which combatants struggled. Sometimes a right asserted by the one meant the other possessed no right. If I owned land, you either were on my land by permission or you were a trespasser. As often, or as likely, a right asserted meant someone else had a corresponding duty. If I owned land, the government's agents, the police, had a duty to arrest trespassers. If I owned a factory, the government owed me an INJUNCTION to prevent the union from achieving its aims by interfering with what I regarded as my rights. A husband's rights, within a regime of common law coverture, implied a wife's duty to obey. A wife's rights, within the same regime, identified a husband's duty to support.

In order to assert a right, a claimant had to understand herself as within a relationship. But often the claimant's understanding of the relationship deviated from established legal identities. From the early years in the nineteenth century, for example, many mothers drew from the wider culture a sense of themselves as rightful caretakers of their children. But their understanding had no connection to the established law of child custody. Prior to the middle of the nineteenth century, mothers had no right to custody. Husband-fathers alone had that right, a right they could lose only by misconduct. Married mothers, by contrast, were, in WILLIAM BLACKSTONE's phrase, entitled only to "reverence and respect." And even when a father lost his right, there was no legal reason why a mother would necessarily gain it.

Litigants struggled over the terms of their relational identities on doctrinal terrain filled with contradictory understandings and incoherencies. Different judges emphasized different aspects of the same rules, interpreted them in widely differing ways, made the simple complex. Moreover, American history in all its cultural and economic and political dimensions constantly pulled at received legal expectations. A country founded on a revolt of sons against a parental nation would not look at parents and see absolute rights holders. Although the inherited law of MARRIAGE included a duty on the part of wives to live within their husband's household, no American court ever enforced a husband's right to "recapture" his wife. By the 1840s, mothers often triumphed over fathers in custody

disputes, even though mothers still had no legal "right" to custody.

Over a long period that began in the eighteenth century, contractually constituted identities replaced many received relational hierarchies founded in custom, established religion, common law, or statute. In nineteenth-century America, the diverse and manifold identities of servants, a few understood as "casual" laborers, far more as "domestic" servants located in household relationships, merged together into the new contractually constituted "worker" or "employee." In the late twentieth century, marital rights and identities that were once understood as fixed and noncontractual became contractualized and negotiable. The magic of contract law often re-created threatened hierarchies—famously so, in the workplace. But throughout American history, this shift from status to contract was usually understood by commentators and litigants alike as weakening established legal identities.

American FEDERALISM further weakened the capacity of law to enforce identities. Most identities were founded in laws and practices made in the states. But the states were part of a country where multiple jurisdictions made laws, but none of them had the capacity to compel loyalty and submission. Husbands may have owed a theoretically inescapable duty of support to their wives, but in America it was so very easy to leave and abandon, to go elsewhere. And the knowledge that exit was easy shaped the laws in the various states and shaped the conduct of many caught up in received identities. CORPORATIONS were always subject to the regulatory and POLICE POWER of the state. But in the real world of American capitalism, corporations could always leave, and take their wealth and jobs and taxes elsewhere.

By the middle years of the nineteenth century, many Americans imagined their core rights as rooted less in positive law and established relationships, and more in an identity freed from dyadic relationships. Freed slaves insisted on what one planter identified as their "wild notions of rights and freedom." The woman's rights activist ELIZABETH CADY STANTON wrote of "the inalienable right of all to be happy." Autonomy, the capacity of the free individual to imagine and realize a personal future not defined by prescriptive relationships, became a root value.

After the CIVIL WAR emancipatory visions of NATURAL RIGHTS came to be identified with a few phrases in the federal Constitution—primarily portions of the BILL OF RIGHTS and the RECONSTRUCTION amendments—and with the first two sentences of the DECLARATION OF INDEPENDENCE. Those phrases carried meanings that would have surprised their authors. Rights claimants read subversive and disruptive and utopian messages in the texts, drawing on diverse and contradictory sources, including English common law, liberal political thought, Enlightenment philosophy, post-Reformation theology, the medieval peasant's vision of self-ownership and freedom, and, above all else, the emergent understanding that a legitimate political order had to be one that destroyed the BADGES OF SERVITUDE. The identification of constitutional language with emancipatory aspirations apparently resulted from the happenstance that a moral critique of SLAVERY and a celebration of the virtues of free LABOR developed contemporaneously with American constitutionalism. The exaltation of freedom required the antithesis of enslavement. Nearly all of the varying meanings derived from the phrase "EQUAL PROTECTION OF THE LAWS" were rooted in contending visions of what was overthrown with the end of American chattel slavery, understood as a long-standing and established legally constituted relationship.

Rights litigants transformed core phrases of the federal Constitution into critical tools, ways to challenge vested and received relational identities. Long-standing legal powers were recast as violating constitutional rights. The police power—the state's capacity to protect the "health" of the community—had long justified laws against MISCEGENATION and other restrictions on marital capacity. But through the lens of constitutional rights consciousness, such powers became suspect, even if supported by political majorities. One should not have to understand oneself as guilty of "illicit intercourse" when one knew oneself as married. Nor should one who engaged in homosexual sexual practices have to know himself as a criminal sodomite. Federal judicial authority, within the limits of the STATE ACTION requirement of the FOURTEENTH AMENDMENT, became, at least potentially, a continuing challenge to relationships founded in state law.

Because constitutional texts had to be reinterpreted to do the work of divesting relational identities, and because that work had to be done by judges and other legal actors with differing capacities and agendas, meanings of rights always remained ambiguous. Litigants may have wanted to destroy vested structures that imposed and reinforced subordination. But often even the language of victory was muffled and confused. The idea of a "colorblind" Constitution that the NAACP LEGAL & EDUCATIONAL DEFENSE FUND drew out of the first Justice JOHN MARSHALL HARLAN'S DISSENTING OPINION in PLESSY V. FERGUSON (1896) and that triumphed in BROWN V. BOARD OF EDUCATION (1954) was intended as a constitutional challenge to racial subordination and white hegemony. Yet the demand for absolute government neutrality between the races became the foundation for "reverse discrimination" arguments made by white men who feared losses when African Americans and other persons of color gained from the destruction of previous hierarchies. Always there lurked a variety of rhetorical moves that allowed courts to re-create traditional relational identities. Homosexual sodomy remained sub-

ject to state proscription, not a constitutionally protected private right. Constitutional rights only occasionally triumphed over traditional state powers and practices; nor did they often destroy traditional VESTED RIGHTS and identities. There was always some plausibility to the claim that a commitment to change through constitutional rights assertions was a form of false consciousness, that faith in constitutional change was a diversion of human and moral capital away from serious political struggle.

The significance of rights disputes for American CONSTITUTIONAL HISTORY lay less in the victories than in the faith diverse Americans invested in constitutional language. For many, hopes became identified with constitutionalism: the hope of an end to ascribed identities, the hope of change to mere law and merely vested rights and to conventional practices, the hope for newly recognized rights. The power of the faith in emancipatory textual meanings sometimes survived a generation or several generations of contrary constitutional doctrine. Rights consciousness undercut and challenged the structures that created and reinforced vested rights and identities, including received constitutional doctrine. And out of faith and hope survived the promise of a democratic constitutionalism; of a society in which all participated as destroyers and creators of constitutional order.

HENDRIK HARTOG
(2000)

Bibliography

CLARK, ELIZABETH B. 1995 "The Sacred Rights of the Weak": Pain, Sympathy, and the Culture of Individual Rights in Antebellum America. *Journal of American History* 82:463–493.

SMITH, ROGERS M. 1997 *Civic Ideals: Conflicting Visions of Citizenship in U.S. History.* New Haven, Conn.: Yale University Press.

TEN BROEK, JACOBUS 1951 *The Antislavery Origins of the Fourteenth Amendment.* Berkeley: University of California Press.

THELEN, DAVID, ed. 1988 *The Constitution and American Life.* Ithaca, N.Y.: Cornell University Press.

TOMLINS, CHRISTOPHER L. 1993 *Law, Labor, and Ideology in the Early American Republic.* New York: Cambridge University Press.

## RIGHTS OF THE CRIMINALLY ACCUSED

In criminal prosecutions, the state can bring its authority, organizational power, and resources to bear against individuals. History, particularly precolonial and early colonial English history, demonstrated to the American Revolutionaries that governments could and did use their prosecution powers abusively—to imprison or destroy political enemies, tyrannize or cow populations, and preserve or advance unpopular regimes or policies. For such reasons, the Constitution and BILL OF RIGHTS included provisions restricting governmental use of prosecution powers and granting the criminally accused procedural protection.

Among these are specific denials of governmental authority to take certain kinds of actions, such as constitutional proscriptions on EX POST FACTO LAWS, BILLS OF ATTAINDER, and suspension of HABEAS CORPUS. The Fifth, Sixth, and Eighth Amendments accord the criminally accused specific criminal process rights. In addition, there are criminal process rights and protections mentioned neither in the Constitution nor the Bill of Rights, such as the right of proof of guilt beyond a REASONABLE DOUBT, which the Supreme Court has concluded are necessarily implied from the Constitution, history, and American practice. Finally, the FOURTH AMENDMENT right against unreasonable SEARCHES AND SEIZURES, a right accorded to all persons in the United States, has particular significance and impact in criminal proceedings.

Of principal importance are the criminal defendant's inferred and specifically listed constitutional trial rights. Although not expressly mentioned in the Constitution, first and foremost among these is the right of trial under an *adversary* system of trial. Adversary trial, as opposed to inquisitional trial, was the established form of trial at COMMON LAW, and has always been the American practice—so much so that it has been deemed an essential feature of the Sixth Amendment right to a fair trial. In an inquisitional system of trial, judicial officials take an active role in advancing a prosecution and eliciting facts, and lawyers, or party representatives, play a rather passive role. In contrast, in the adversarial system, the parties to a prosecution, through their attorneys, control the presentation of EVIDENCE, and the judge plays the more passive role of umpire, attempting to insure both a fair contest between the parties and a fair fact determination. Party control of the presentation of evidence significantly enhances its ability to shape evidence to its advantage or to influence the fact finder, particularly in jury trials, where laypersons determine facts and decide questions of criminal responsibility.

Although criminal adversary trial is grounded in a rhetoric of a fair contest between equals as a way to accord both fairness to defendants and to discover truth, adversary trial actually has an asymmetric structure in which the prosecution has greater burdens and obligations than the defense. In particular, the prosecution has the burden of presenting a prima facie case against a defendant—the burden of proving guilt beyond a reasonable doubt—and an obligation to disclose to the defense evidence favorable to the defendant and material relevant to issues of guilt or punishment.

Although rarely considered to be a right of the accused,

the government's burden of first presentation of evidence does confer potential strategic or tactical advantages on the defense in a criminal case. Knowing the specific nature of the prosecution's case, the defense can shape its own proofs for greatest benefit. Similarly, the prosecution's burden of proving guilt beyond a reasonable doubt, which the Supreme Court held in *In re Winship* (1970) to be a constitutional requirement, is, in effect, a defendant's right to require the government to prove guilt to a substantial certainty. This high burden inhibits the government from bringing or winning prosecutions based on weak evidence, and precludes the use of evidentiary presumptions that might favor it.

The prosecution also has a duty to disclose evidence. This requirement, which is derived from DUE PROCESS fairness considerations, insures there is no miscarriage of justice through failure to disclose evidence bearing on guilt. There is, however, no reciprocal, counterpart defense duty to disclose evidence favorable to the prosecution. With narrow exception, the Court has interpreted the requirements of adversary trial and the Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION to prohibit the government from requiring the defense to provide evidence to the prosecution or otherwise to assist it in its case.

Adversary trial, as now understood, also assumes attorney representatives for each party, and the Court has interpreted the Sixth Amendment RIGHT TO COUNSEL to guarantee criminal defendants the right to be represented by an attorney at all "critical stages" of a criminal proceeding. This right applies in any case, FELONY or MISDEMEANOR, in which an accused, if convicted, will suffer incarceration as a punishment. A "critical stage" is any occasion, once a criminal prosecution has been initiated, where the state takes action (usually in a proceeding where the defendant is present) that can be adverse to the defendant's interests in not being incarcerated or convicted. In addition, in the famous case of MIRANDA V. ARIZONA (1966), the Supreme Court held that criminal suspects in custody have a right to consult with counsel, if they wish, before speaking with police.

Criminal defendants have a right to representation by counsel of their choice if they can afford it or to appointed counsel if they cannot. The Sixth Amendment, however, also implies a right of self-representation, and the criminally accused may represent themselves if they knowingly and intelligently choose to do so.

The right to counsel when there is attorney representation also entails a right to "effective" assistance of counsel, that is, counsel generally competent to handle a criminal case, actually making decisions of a kind that competent criminal-trial attorneys would make, and not suffering from any conflict of interest that would impair or bias the representation. Finally, in the case of the INDIGENT, the right to effective assistance of counsel combined with the more general right to a FAIR TRIAL may also require some state financial assistance in investigating or presenting a case, for example, payment of expert-witness fees.

The Sixth Amendment also accords a criminally accused the right to an impartial jury. TRIAL BY JURY is of particular importance because jurors are laypersons from the community, not governmental functionaries, and independent jury decision making in criminal cases can provide further protection against possible governmental overreaching. The Court has interpreted the jury-trial right to apply in prosecutions for all crimes except petty offenses, the latter defined as those punishable by no more than six months in prison and a $500 fine. This right includes the right to a PETIT JURY selected from a larger group of persons, called the jury venire, which is cross-sectionally representative of the community.

Federal criminal juries must be composed of twelve persons and return unanimous verdicts. The Court has, however, interpreted the jury-trial requirement as applied to the states through FOURTEENTH AMENDMENT due process to permit state criminal trial juries with as few as six members, but no fewer, that number being thought sufficiently large to provide the benefits of representativeness and of group deliberation. Similarly, the Court has concluded that state criminal trial juries, at least where there is a twelve-person jury, require only a substantial majority, rather than unanimity, to convict.

Criminal defendants have Sixth Amendment rights to confront and cross-examine witnesses. The right to CONFRONTATION is essentially a right to have the witnesses against the accused to appear in open court to make a face-to-face accusation, a requirement thought to enhance the reliability of witness statements. The associated right of cross-examination is in effect the right to test both the witness and his or her testimony in open court before the fact finder. With few exceptions, these rights entail that where a witness against the defendant is available, the government must produce that witness in court, rather than use previously recorded statements of the witness. In addition, the state may not impose rules restricting the defense's relevant cross-examination of a testifying witness.

The Sixth Amendment also gives criminal defendants the right to COMPULSORY PROCESS to require the attendance at trial of witnesses in their behalf. This right is obviously important where a defendant has witnesses who could testify favorably, but are unwilling to appear in court. The right, however, is also read as a general right to present evidence in one's behalf and thus operates to prohibit states from restricting the defendant's presentation of relevant and generally reliable evidence. For example, when a state rule of HEARSAY evidence operates to exclude

from a criminal trial trustworthy evidence that may be favorable to the defendant, the right to present evidence would override this rule.

Finally, the Sixth Amendment confers on criminal defendants rights to a SPEEDY TRIAL and a PUBLIC TRIAL. Defendants may desire speedy trials so they do not languish in jail or to quickly resolve the criminal accusation. Yet criminal defendants often seek to delay a criminal trial, either because they are not prepared or because they perceive some advantage in delay, such as the fading of witnesses' memories. For such reasons, the Court has held that delay in coming to trial does not of itself violate the speedy-trial right. Instead, the Court uses a multifactor BALANCING TEST to determine when the right was violated. This test considers the length of delay, the government's reasons for it, the defendant's assertion or waiver of his or her speedy-trial right, and the actual prejudice to the defendant. This test obviously gives little guidance, and it is apparent that even quite long delays of years may not trigger the right. In contrast, it is necessary to note that the government also has an interest in speedy trials and that both state and federal governments have statutes regulating trial delay. Because of such statutes, the speedy-trial right as a control over the timing of trials has receded far into the background.

The public-trial right protects defendants from unfair or abusive trials by ensuring that trials are open to public scrutiny. However, although defendants may demand that their trial be open to the public, they do not have a right to close their trial without a showing of real necessity. The Court has concluded that the FIRST AMENDMENT free-speech and free-press guarantees entail public and press access to criminal trials so that the public can remain informed regarding the administration of criminal justice. Because criminal trials are presumptively open and only a weighty justification can justify closure, a defendant's public-trial right no longer retains much practical importance.

The Fifth Amendment provides three additional rights for the criminally accused: the right to INDICTMENT by GRAND JURY, the right against self-incrimination, and the protection against DOUBLE JEOPARDY. In theory, the grand jury acts as a check on governmental prosecution by committing the decision to indict a person of a crime to a group of ordinary citizens rather than vesting it in state officials. In practice, however, grand juries rarely operate independently of the prosecutors' offices providing them with information and guidance. Consequently, grand juries do not in fact constitute any significant check on criminal charging. Furthermore, the Supreme Court has not required the states to indict by grand jury. Although many states nonetheless use grand juries, state prosecutors generally are also free to charge persons by information, that is, a charging paper issuing solely from the prosecutor's office rather than from the grand jury.

The right against self-incrimination, which is the right to refuse to give evidence against oneself, however, does play an important role in criminal justice. The right protects a criminal defendant from governmental compulsion to speak, an abusive practice common in England in precolonial and early colonial history. In a criminal trial it amounts to a defendant's right to remain silent and not to take the stand to testify. Because comment by the prosecution on a defendant's refusal to testify—by claiming the refusal evidences guilt—might bring pressure on a defendant to testify, the Court has also held that prosecution comment on a defendant's silence violates the privilege.

More important, the right against self-incrimination now plays a critical role in analyzing and resolving issues regarding POLICE INTERROGATIONS of suspects, which results in confessions or inculpatory statements. Originally, the Court viewed Fifth and Fourteenth Amendment due process as requiring the state accord a suspect "fundamental fairness." The Court found police coercion of confessions or incriminating statements inhumane and unfair, forbade such practices, and barred the prosectution's use of such material in criminal trials whenever the defendant's statements were deemed involuntary. For various reasons, the voluntariness test proved unsatisfactory and unworkable. Police forces continued to use questionable techniques in seeking confessions and resorted to deceptive or progressively more subtle, yet nonetheless manipulative or abusive, interrogation practices. Finally, the Court took a major step to solve the general police-interrogation problem, and in *Miranda v. Arizona* held the right against self-incrimination applicable outside the context of a trial. Specifically, the Court held that when police conduct a custodial interrogation of a suspect they must respect the suspect's right to remain silent and cannot interrogate him or her if he or she does not knowingly, intelligently, and voluntarily agree to the interrogation. In *Miranda* the Court also concluded that the right of a criminal suspect to consult with counsel before speaking to police was essential to protect the suspect's right to remain silent if he or she chose to exercise it. Consequently, *Miranda* also held that when a suspect asks to speak with an attorney, all interrogation must cease until the suspect has consulted with an attorney or appropriately waived his or her right to do so. To insure that suspects understood their rights and could invoke them, *Miranda* further required police to give suspects they arrest or hold a set of "*Miranda*" warnings. These advise suspects of their right to silence, that their statements may be used against them, and that they have a right to an attorney appointed free of charge if necessary.

The Fifth Amendment further protects criminal defen-

dants from double jeopardy, that is, from multiple prosecutions for the same offense by the same jurisdiction or for reprosecutions for the same offense after acquittal or conviction. Disallowing multiple or successive prosecutions, this clause prevents the government from rehearsing its proofs to perfect them and from persecuting or exhausting individuals through repeated efforts to convict. The double-jeopardy clause applies once the state places the accused in "jeopardy," which occurs in a jury trial when the jury is empaneled and sworn and in a trial to a judge when the first witness is sworn. Before these events, although the state may be advancing a criminal case against an individual, jeopardy is not thought to "have attached," and dismissals during this period do not bar the refiling of charges or a subsequent prosecution. The clause also does not bar reprosecutions where a convicted person has had his or her conviction overturned on grounds other than the insufficiency of the evidence to convict.

The double-jeopardy clause does not prohibit different "sovereigns" from prosecuting for the same offense. As many criminal offenses violate both state and federal law—for example, bank robbery—multiple prosecutions for the same offense are possible. As a matter of policy, however, federal and state prosecutors usually decline to prosecute an individual for the same offense when the other sovereign has prosecuted.

The Fourth Amendment protects all persons, not just the criminally accused, from UNREASONABLE SEARCHES and seizures. As a practical matter, however, it has special application in criminal prosecutions because, when the government unlawfully searches or seizes from one whom it criminally charges, the remedy that the courts apply is the exclusion of the evidence unlawfully taken from that person's criminal trial.

In general, exclusion of evidence is the remedy courts apply to governmental violations of a defendant's Fourth, Fifth, or Sixth Amendment rights that result in evidence that the government seeks to use against the defendant at trial. This might occur when the government unlawfully searches and seizes, coerces a confession or statement from a person or obtains statements in violation of the MIRANDA RULES, or improperly obtains evidence through violation of a suspect's or accused's Sixth Amendment right to counsel. There has been considerable debate as to whether an accused in any of these situations has a *constitutional right* to have such evidence excluded or exclusion of evidence is simply a default remedy applied in the absence of any other effective sanction for the violation of constitutional rights. If there is no constitutional right to exclusion, the government could avoid the exclusion of evidence by providing other remedies for rights violations, at least where the remedies were thought to constitute sanctions as effective as exclusion. As a practical matter, however, neither the federal nor state governments have provided equally effective remedies, and courts and commentators continue to speak of an accused's "right" to have unlawfully obtained evidence excluded.

The Eighth Amendment proscribes excessive BAIL and CRUEL AND UNUSUAL PUNISHMENT. Under Supreme Court decisions applying the bail clause, an accused does not necessarily have the right to be released on bail. The Court has held that the excessive-bail provision prohibits bails set at a figure higher than an amount reasonably calculated to insure that the accused will make his or her necessary appearances in criminal proceedings and will submit to sentence if found guilty. However, the Court has also upheld PREVENTIVE DETENTION statutes under which persons shown to be dangerous to others if released may be denied bail.

The Eighth Amendment's cruel and unusual punishment clause applies both to capital and noncapital punishments. Strictly speaking, the clause protects the convicted, not the accused, but its importance to an accused's prospects of punishment warrants its inclusion here. The Court has held CAPITAL PUNISHMENT cruel and unusual when it is applied arbitrarily, irrationally, or discriminatorily or when it is seriously disproportionate to the offense committed. With regard to noncapital punishments, the Court has held that the clause prohibits punishments that involve torture or the unjustifiable infliction of involuntary pain. It has also applied the clause to strike down confinements whose length or conditions are disproportionate to the crime or that involve serious deprivations of a prisoner's basic human needs (such as failure to provide medical care) and punishments involving loss of CITIZENSHIP for status.

GARY GOODPASTER
(1992)

Bibliography

DAMASKA, MIRJAN 1975 Presentation of Evidence and Fact-finding Precision. *University of Pennsylvania Law Review* 123:1038–1106.

——— 1983 The Adversary System. In Kadish, Sanford, ed. *Encyclopedia of Crime and Justice.* Vol. 1, pages 24–29. New York: Macmillan and Free Press.

LAFAVE, WAYNE R. and ISRAEL, JEROLD H. 1984 *Criminal Procedure.* 4 Vols. St. Paul, Minn.: West Publishing Co.

## RIGHT TO BAIL

See: Bail

## RIGHT TO BEAR ARMS

See: Second Amendment

# RIGHT TO BE INFORMED OF ACCUSATION

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ." The right was recognized in English law prior to adoption of the Constitution and exists today in every state, under state law and through judicial interpretation of the DUE PROCESS clause of the FOURTEENTH AMENDMENT. The notice of accusation contemplated by the Sixth Amendment is the formal charge of crime to which the accused must respond by pleading guilty or not guilty; it does not include the notice issues that may arise in the investigative phase of a criminal proceeding.

The "notice clause" makes no reference to the institution that must produce the charge, the instrument through which notice must be given, or the precise function of the notice. But these details are supplied by other provisions of the Constitution, by history, and by judicial opinions. Where the accused is charged with an infamous federal crime, usually a FELONY, the Fifth Amendment requires that the accusation must be made by the INDICTMENT of a GRAND JURY. For lesser federal crimes, an INFORMATION drafted by a prosecutor or even a complaint will suffice. In the states, any of these processes may be used because indictment by grand jury is not required by the Fourteenth Amendment.

Over the years, the charging instrument has been assigned several roles by the courts. It provides the notice required by the Sixth Amendment, and it assists in enforcing the provisions of the Fifth Amendment dealing with the grand jury, DOUBLE JEOPARDY, and due process. For example, indictments and informations must demonstrate that the offense charged is not the same as one for which the accused has already been placed in jeopardy. And indictments must reflect the decisions of the grand juries that returned them.

The unique function of the Sixth Amendment's notice clause—as distinct from the facilitative role it plays for the Fifth Amendment—is to require advice to the accused of the charge against him so that he may decide whether to concede his guilt or, if he does not, so that he may prepare to defend himself at trial. The notice must also contain enough detail to enable the court to determine whether the charge is sufficient in law to support a conviction. To perform these functions, the notice must state the basic facts regarding each element of the offense with "reasonable particularity of time, place and circumstances." Such notice is especially important in an adversary system that contemplates a trial as a climactic event. Without notice, defendants would find it difficult to proceed expeditiously, and frequent continuances might be necessary; trial judges would have no manageable criterion for determining the relevance of EVIDENCE or the instructions to be given to juries; and appellate courts would have inadequate standards for review.

Few cases have tested the limits of the notice clause, for both the federal government and the states now have statutes or rules of court that define what must appear in the charging instrument and these requirements usually reflect the constitutional standard. For example, Rule 7 of the FEDERAL RULES OF CRIMINAL PROCEDURE requires a "plain, concise and definite written statement of the essential facts constituting the offense charged." There are state decisions, however, that suggest how little might now be constitutionally required of the initial charge in a criminal case. In these cases, state laws authorized indictments that informed defendants only of the names or citations of the statutes they were accused of violating. In *People v. Bogdanoff* (1930) New York's high court upheld the constitutionality of such a "short form indictment." Although the New York statute involved in that case has not survived, the opinion called attention in dramatic fashion to changes that may have made the law of "notice" partially obsolete. The routine maintenance of trial records was said to provide a basis for determining whether a prior proceeding involved the same offense as the one charged in the indictment. And the availability of grand jury minutes made it possible to determine whether the offense charged at trial was the same as the one contemplated by the grand jury. The only interest of the accused remaining to be protected by the charging instrument itself, said the court, was an adequate opportunity to prepare for trial; that interest could be served by a bill of particulars, continuances, and other measures. In sum, the notice clause—stripped of its relation to the jeopardy and grand jury provisions—may be satisfied not only by a single charging document but also by a process of notice that enables the defendant to understand the charge and defend against it.

The logic of a flexible conception of notice, rooted less in form than in concern for the defendant's need to prepare for trial, led inevitably to the position that many defects in the indictment or information—which might have led to dismissal in an earlier, more formalistic period—were now regarded as merely technical. For example, the doctrine of "fatal variance" had prohibited any departure in the course of trial from the offense charged. Such variances are now held to be HARMLESS ERROR so long as the defendant has not been materially prejudiced in making his defense and, if an indictment is involved, the trial falls fairly within the scope of the grand jury's charge.

As the specificity demanded of indictments and informations declined, defendants lost one of the principal

means for learning about the prosecution's case in advance of trial. Pleadings in criminal cases had been assimilated to an increasingly liberal law of civil procedure, but those changes had not been accompanied in CRIMINAL PROCEDURE by the pretrial DISCOVERY which had emerged to compensate for looser pleadings in civil cases. Beginning in the 1960s, however, pretrial disclosure of the prosecution's case has become more available to the defendant, some of it mandated by the due process clause. This expansion of the process of notice before and during trial has minimized the problems of law and policy which relatively spare charges might otherwise have presented under the notice clause of the Sixth Amendment.

ABRAHAM S. GOLDSTEIN
(1986)

Bibliography

GOLDSTEIN, ABRAHAM S. 1960 The State and the Accused: Balance of Advantage in Criminal Procedure. *Yale Law Journal* 69:1149, 1172–1180.

SCOTT, AUSTIN, JR. 1982 Fairness in Accusation of Crime. *Minnesota Law Review* 41:509–546.

WRIGHT, CHARLES ALAN 1982 *Federal Practice and Procedure, Criminal*, 2nd ed. Vol. 1, Sections 125–126. St. Paul, Minn.: West Publishing Co.

## RIGHT TO CONFRONT WITNESSES

See: Confrontation, Right of

## RIGHT TO COUNSEL

The constitutional right to counsel in American law encompasses two broad categories of rights: first, rights of persons to retain and employ counsel in official proceedings and, second, rights of persons who because of financial incapacity or other reasons are unable to procure the assistance of lawyers, to have counsel appointed in their behalf.

The modern rights to counsel are the product of a historical evolution extending over a half-millennium. English criminal procedure in the early modern era diverged sharply from today's institutions of adversary criminal justice. In the Tudor and Stuart regimes, legal proceedings in which the crown's interests were strongly implicated were heavily tilted in favor of the state and against the accused. Thus it was only in the least serious cases, those involving MISDEMEANORS, that the privilege of the accused to present his defense by counsel was recognized. Not until the end of the seventeenth century was a similar right granted defendants in TREASON trials (along with the right to have counsel appointed by the court when requested). Over 140 years were to elapse before Parliament recognized the right of the accused to retain and employ counsel in FELONY trials. The earlier recognition of the right to counsel in treason cases reflects the fact that members of Parliament were themselves frequent targets of treason prosecutions launched by the crown. Throughout the eighteenth century the incongruity of a system that recognized counsel rights in misdemeanor and treason cases but withheld them in felony cases at a time when as many as 150 felonies were punishable by death was widely perceived and sometimes protested.

In the American colonies there was great variation in practices and statutory provisions relating to rights of counsel in criminal cases. By 1776, however, the right of attorneys retained by the accused to perform defense functions in courts appears to have been widely conceded, and in several of the colonies practices were considerably in advance of those then prevailing in England. In Pennsylvania, for example, the appointment of counsel for impoverished defendants in capital cases was mandated by statute; and in Connecticut even more liberal practices of appointment were established in the quarter-century before the American revolution.

Rights to counsel entered American constitutional law through provisions included in the early state constitutions and with the ratification of the Sixth Amendment to the federal Constitution in 1791. Seven of the original states and Vermont adopted constitutional provisions relating to the rights to counsel, and the right so protected was that to retain and employ lawyers in criminal trials. By the beginning of the nineteenth century only two states, Connecticut and New Jersey, appear clearly to have recognized a right in the accused to request appointment of counsel in all serious cases; and in neither was the privilege created by a constitutional provision.

Included in the Sixth Amendment, upon which most of the modern law of counsel rights depends, is the following clause: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." There is no direct evidence of the framers' intentions in drafting the language or of the understanding of those who ratified the amendment. Yet the general assumption until well into the present century was that the right constitutionally protected was one to employ counsel, not to have counsel assigned.

One of the most remarkable features of Sixth Amendment history is the paucity of judicial authority on the counsel clause for nearly a century and a half after the amendment's ratification. There was no comprehensive exegesis in the Supreme Court, and only a scattering of holdings in the lower federal courts. The relative absence of authoritative interpretation may be explained in part by the long delay in establishing a system of federal criminal

APPEALS and the strict limitations applied to the HABEAS CORPUS remedy in the federal courts. The landmark decision in JOHNSON V. ZERBST was not handed down until 1938, six years after the Court had begun its delineation of the rights to counsel protected by the DUE PROCESS clause of the FOURTEENTH AMENDMENT in state criminal prosecutions. (See POWELL V. ALABAMA.) *Johnson* was comprehensive and far-reaching. The Court, through Justice HUGO L. BLACK, without pausing to canvass the historical understanding of the counsel clause, held that a federal trial court lacked power "to deprive an accused of his life and liberty unless he has or waives the assistance of counsel." Second, the assistance of counsel "is an essential jurisdictional prerequisite" to a federal court's power to try and sentence a criminal defendant. Hence the habeas corpus remedy may be invoked by a prisoner to set aside his conviction if the Sixth Amendment right to counsel was withheld at his trial. Third, although the right to have counsel assigned may be waived, allegations of waiver will be closely scrutinized. WAIVER OF CONSTITUTIONAL RIGHTS involves "an intentional relinquishment of a known right or privilege." The trial judge has a "protecting duty" to see that the accused understands his rights to legal assistance, and if the judge determines that the defendant has waived his rights, the record of the trial should clearly reveal the judge's determination and the basis for it.

In holding that the counsel clause not only creates a right to make use of a retained lawyer in federal criminal proceedings but also mandates the assignment of counsel for an accused otherwise unable to procure legal assistance, *Johnson v. Zerbst* upset the long-prevailing understanding to the contrary. Yet the decision did not immediately produce a major alteration in the actual practices of federal criminal justice. Many federal district courts before 1938, with the active encouragement of the Department of Justice, had been assigning counsel to indigent defendants in felony cases. The lawyers so appointed typically received no compensation for their services and were hampered in having no resources for pretrial investigations of their cases or for many other incidents of trial. *Johnson v. Zerbst* did little to improve this situation. It was not until a quarter-century later that Congress enacted the Criminal Justice Act of 1964 and for the first time provided, however inadequately, a system of compensated legal assistance in the federal courts.

In the celebrated case of *Powell v. Alabama*, decided in 1932, the Supreme Court made its first significant contribution to the constitutional law of counsel rights in Fourteenth Amendment cases. *Powell*, in addition, was one of the great seminal decisions in the Court's history and strongly influenced the development of the entire modern constitutional law of CRIMINAL PROCEDURE. The decision arose out of one of the most famous of twentieth-century criminal prosecutions, that of the Scottsboro defendants. Seven illiterate young blacks were arrested on the charge of raping two white women. After INDICTMENT the accused were divided into groups and tried in three separate trials. No lawyer having come forward to represent the defendants, the trial judge appointed "all the members of the bar" to assist in the arraignment, an act later described by the Supreme Court as merely "an expansive gesture." At the trial no lawyer was designated to assume personal responsibility for protecting the defendants' interests. Each trial was completed in a single day, and in each the jury convicted the accused and sentenced them to death. The convictions were affirmed in the Alabama Supreme Court, the chief justice vigorously dissenting.

At the time of the *Powell* decision, the Supreme Court had rarely employed the federal judicial power to upset state criminal prosecutions. (See MOORE V. DEMPSEY.) The determination of the Court that the procedures in the Alabama trial had violated the accused's rights to due process of law protected by the Fourteenth Amendment was, therefore, an event of portentous significance. The Court held that both the right of the defendants to retain counsel and the right to have counsel assigned in their behalf had been nullified. The speed with which the Scottsboro defendants had been rushed to trial and conviction deprived them of an opportunity to secure legal assistance, and the arrival of lawyers eager to provide representation for the defendants shortly thereafter indicated that the haste was seriously prejudicial. Beyond this, the Court found that the failure to make an effective appointment of counsel in behalf of the accused, given the circumstances of the case, constituted a denial of due process.

The constitutional theory of Justice GEORGE SUTHERLAND's opinion for the court is important, for it dominated thought about the rights of counsel for the next three decades. Whatever else the protean phrase "due process of law" contemplates, argued the Court, it encompasses the requirement of NOTICE and hearing in criminal cases. A FAIR HEARING, in turn, encompasses the right to counsel. In one of the Court's best-known OBITER DICTA, Justice Sutherland wrote: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. [Even the intelligent and educated layman] requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Although the *Powell* decision was placed on a broad constitutional base, one susceptible of future doctrinal development, the actual HOLDING of the case was narrowly drawn. Thus the right of the accused to receive an assignment of counsel in *Powell* was made to rest on such con-

siderations as that the charge was a capital offense, that the defendants were young, inexperienced, illiterate, and the like. The question that immediately became pressing was how far the *Powell* precedent would be extended when one or more of the circumstances in that case were absent. It was widely assumed that the Fourteenth Amendment might require the state to appoint counsel for an INDIGENT defendant in any capital case, even though a considerable interval elapsed before the proposition was authoritatively stated in *Bute v. Illinois* (1948). The more important question, however, was whether a "flat requirement" of counsel similar to the Sixth Amendment rule imposed on the federal courts in *Johnson v. Zerbst* would also be found applicable to state prosecutions by reason of the Fourteenth Amendment. A definitive negative answer came in BETTS V. BRADY (1942).

In *Betts* the defendant was convicted of robbery, a noncapital felony. At his trial in the state court, the accused, an unemployed farm hand said by the Supreme Court to be "of ordinary intelligence," requested the appointment of counsel to assist in his defense. The request was denied by the trial judge, and the accused participated in the defense by examining his own witnesses and cross-examining those of the prosecution. When, after conviction, defendant was denied *habeas corpus* relief in the state courts, he took his case to the Supreme Court alleging that the denial of counsel at his trial violated due process of law. Justice OWEN ROBERTS for the Court denied that due process required the assignment of counsel for indigent defendants in every state felony case. There was, in the view of the Court's majority, nothing in historical or contemporary practice to validate the claim. Rather, the question in each case was whether in the totality of circumstances presented, appointment of counsel was required to insure the accused a fair hearing. In the present case, the Court said, there was no such necessity. The issue upon which the defense rested, that of alibi, was simple and straightforward. There were no special circumstances of mental incapacity or inexperience that placed defendant at a serious disadvantage in maintaining his defense.

Criticism of the *Betts* decision began with Justice Black's vigorous dissent in that case and was promptly amplified in the press and the writings of legal commentators. Two principal reasons for the reluctance of the Court's majority to impose the obligation of assigning counsel in all state felony prosecutions can be identified. First, the prevailing opinion in *Betts* reflected the Court's deference to state autonomy, a deference widely believed at the time to be mandated by the nature of American FEDERALISM. The administration of criminal justice was an area in which state powers of self-determination were thought to be particularly broad. Second, there was the related concern that the states were poorly prepared suddenly to assume the obligation of providing legal aid for unrepresented defendants in all state felony cases. The problem was not only that lawyers and resources would have to be supplied in pending and future cases, but also that hundreds of state prisoners had been convicted in trials in which no assistance of counsel was received. The concern was freely articulated by Justice FELIX FRANKFURTER when in *Foster v. Illinois* (1947) he wrote: "Such an abrupt innovation . . . would furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land."

Nevertheless, with the passage of time opinion increasingly supported the overturning of *Betts* and recognition of a "flat requirement" of counsel in state as well as federal prosecutions. The *Betts* rule, far from strengthening federalism, exacerbated the relations of state and federal courts. Because under *Betts* the requirement of appointing counsel depended on the unique circumstances of the particular case, the resulting decision often provided little guidance to state judges dealing with cases in which the facts were significantly different. Many state judges came to favor the broader rule of *Johnson v. Zerbst* because of its greater certainty. It became apparent to many state officials that ultimately *Betts v. Brady* would be overruled, and in anticipation of the event they created systems of legal aid on their own initiative, supplying counsel for unrepresented defendants in all serious state cases. Meanwhile it had become increasingly difficult for the states to protect convictions in the Supreme Court when defendants argued that "special circumstances" had required appointment of counsel at the trial. In the thirteen years before *Betts* was overruled in GIDEON V. WAINWRIGHT (1963), no state conviction was upheld by the Court against a claim of special circumstances. It is significant also that when the *Gideon* case was pending before the Court, the attorneys general of twenty-two states filed AMICUS CURIAE briefs asking that *Betts* be overruled and the broader rule of appointment recognized.

Although the opinion of Justice Black for the court is unprepossessing, *Gideon v. Wainwright* marked a new era in the constitutional law of counsel rights. Portions of the opinion appear to pay deference to the older theories of fair hearing, and others seem to suggest that counsel must be assigned to unrepresented defendants on grounds of equality. Ultimately, however, *Gideon's* constitutional basis is the Sixth Amendment: the Sixth Amendment is "subsumed" in the provisions of the Fourteenth Amendment, and hence the same obligations relating to assignment of counsel for the indigent accused in federal courts are also owed in state prosecutions. Since the *Gideon* case there has been a flowering of constitutional doctrine relating to counsel rights in many important areas of the criminal process.

Although the prevailing opinion in the *Gideon* case did

not specifically limit its holding to felony trials, most observers believed that the right to counsel for indigent defendants would not apply in all misdemeanor cases. Following *Gideon*, state and lower federal courts devised various formulas for dealing with counsel rights in small-crime prosecutions. The state of Florida, borrowing from cases involving the constitutional right to jury trial, provided that counsel rights should not attach in prosecutions for "petty offenses," i.e., crimes punishable by not more than six months' imprisonment. (Cf. BALDWIN V. NEW YORK, 1970.) In ARGERSINGER V. HAMLIN (1972), nine years after *Gideon*, the Supreme Court rejected Florida's use of the petty-offense concept. In effect, the Court ruled that any deprivation of liberty, even for a few days, is a sanction of significant gravity. Accordingly, no unrepresented defendant may be jailed for any term unless he has waived counsel at the trial. The *Argersinger* holding dramatically expanded the legal aid obligations of state systems of criminal justice. Adequate practical implementation of counsel rights in small-crimes courts is yet to be fully attained in many jurisdictions.

The right recognized in *Argersinger* was defined further in *Scott v. Illinois* (1979). In the latter case an unrepresented defendant was sentenced for an offense which under state law was punishable by both fines and imprisonment. The sentence actually imposed, however, was a monetary fine. The Court, through Justice WILLIAM H. REHNQUIST, ruled that because the unrepresented accused was not actually sentenced to jail, his constitutional rights had not been denied. Ironically, Scott's rights were given less protection than he would have received if the Court had adopted the petty-offense formula in *Argersinger;* that formula would have looked to the penalties authorized by a statute, not solely to those actually imposed.

Because of the comparative modernity of criminal appeals in Anglo-American legal history, the Supreme Court's consideration of constitutional rights of representation in appellate proceedings was not preceded by extensive COMMON LAW experience. The first substantial discussion of constitutional rights to counsel on appeal occurred in DOUGLAS V. CALIFORNIA (1963) decided on the same day as the *Gideon* case. A California rule of court authorized the state intermediate appellate court to scrutinize the record in a pauper's appeal "to determine whether it would be of advantage to the defendant or helpful to the appellate court to have counsel appointed." Pursuant to this authority the court denied counsel to defendant, adjudicated his appeal, and affirmed his criminal conviction. In the Supreme Court the defendant successfully asserted that the California procedures violated his Fourteenth Amendment rights.

In reaching its result the Court relied primarily on an obligation in the state to accord equal treatment to rich and poor appellants and revived an earlier dictum of Justice Black in GRIFFIN V. ILLINOIS (1956): "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Here the obligation of equal treatment was not met. Had defendant been able to retain his own lawyer, his appeal, regardless of its merits, would have been presented by counsel. Because of his poverty and the decision of the appellate court not to assign a lawyer to him, he was unrepresented on appeal. Whatever the implications of the Court's theory, the obligation of the state to provide "equal treatment" to the poor does not necessarily mean that the treatment must be identical to that meted out to appellants able to hire their own lawyers. Thus, the opinion asserts, "absolute equality is not required." In illustrating this possibility, the Court strongly implied that the constitutional obligation to assign counsel involved in *Douglas* may apply only to the first appeal. If an indigent represented by an assigned counsel is unsuccessful in the intermediate appellate court and decides to seek further review in the state's highest court, he may submit to the latter the brief prepared by counsel in the intermediate court, but the highest court may not be under obligation to assign a lawyer to conduct the second appeal. A decade later the Court made explicit what had been suggested in the *Douglas* case. In ROSS V. MOFFITT (1974) the Court sustained the validity of North Carolina procedures that provided the indigent with counsel in the first appeal but denied his requests for representation when he sought a discretionary review in the state supreme court and later, when seeking a WRIT OF CERTIORARI in the United States Supreme Court.

The limitations recognized by the Court, however, do not appear to have seriously inhibited the availability of appellate remedies to indigent defendants. Arguably, this may be true in part because the Court was essentially correct in concluding that the decencies of fair hearing and reasonable equality of treatment can be accorded such appellants without offering counsel in all stages of the appellate procedure. Also, many jurisdictions have gone beyond the constitutional minima and supply counsel throughout the review process. Perhaps of equal importance is a series of cases that have overcome many of the difficulties that earlier confronted impoverished criminal litigants in the appellate courts. As early as 1956, the Court in *Griffin v. Illinois* held that a convicted defendant may not be denied access to an appellate remedy because of his poverty. Under state law the appellant could perfect his appeal only by use of a stenographic transcript of the trial proceedings, the latter being unavailable to him because he had no funds to purchase it. Under these circumstances, the Court ruled, the state must furnish the prisoner with a transcript. In the years following, the *Griffin* principle was broadly applied. (For example, *Burns v. Ohio,* 1950; see WEALTH DISCRIMINATION.)

Recognition of counsel rights and the removal of ob-

stacles to review for indigent prisoners have greatly widened opportunities for appellate regulation of the trial process. They have, at the same time, created substantial problems for the administration of justice in the appellate courts. Economic constraints may operate on appellants "paying their own way" so as to deter the filing of frivolous appeals. No such constraints influence the indigent prisoner. The resulting problems go beyond the swelling of the dockets of appellate courts and also include certain difficulties for lawyers assigned by the courts to represent indigent appellants. Many such attorneys believe, often rightly, that the appeals of their clients cannot be supported on any substantial legal grounds. Yet efforts by the lawyers to withdraw from representation may, on occasion, prejudice the interests of their clients and, in some instances, may be motivated by the lawyers' design to escape onerous and unprofitable obligations. Efforts to balance such considerations have not as yet resulted in a satisfactory resolution. The rule announced by the Supreme Court requires the appointed lawyer seeking to be relieved of the case to allege that it is "wholly frivolous." The motion must be accompanied by a brief referring to anything in the record that might arguably support the appeal. How matters may be both "arguable" and "wholly frivolous" is not explained, and the effect of the rule must be to induce the lawyer to remain in the case regardless of his professional judgment of frivolity. The Massachusetts Supreme Judicial Court, in *Commonwealth v. Moffett* (1981) recognizing this effect, simply refused to permit counsel to withdraw solely on grounds of absence of merit in the appeal.

Other questions relating to counsel rights have arisen in the postconviction criminal process. As early as *Mempa v. Ray* (1967) a unanimous Court held that an indigent defendant, who had been placed on probation after conviction and given a deferred sentence, was entitled to be represented by counsel when his probation was revoked and he was sentenced to imprisonment. In *Gagnon v. Scarpelli* (1973), however, the Court ruled that although due process requires a hearing whenever a probation or parole is revoked, counsel need not be appointed unless special circumstances dictate the need for legal representation. This dubious resurrection of the *Betts v. Brady* doctrine, long since rejected at the criminal trial, was justified in part by the need to preserve "flexibility" in procedures leading to revocation. The American Bar Association in its *Standards of Criminal Justice* repudiated the *Gagnon* rule and called for appointment of counsel in such cases.

One of the most striking characteristics of the WARREN COURT was its allegiance to the adversarial system of criminal justice. This dedication inevitably resulted in the expansion of constitutional rights to counsel. Thus, the adversary system was strengthened in areas where it already existed, such as the criminal trial, and also extended to other areas where it had had little or no operation, such as pretrial police interrogations. Clearly the Court's attitudes toward a rejuvenated adversarial process reflected some of its deepest convictions about the proper containment of state power in the administration of criminal justice. Introducing lawyers into the interrogation rooms of police stations, for example, was intended to achieve values going beyond those ordinarily associated with counsel rights. In addition to advising his client, the lawyer could serve as a witness to police interrogatory activity and a deterrent to police abuse. His presence might often be indispensable to the preservation of the suspect's RIGHT AGAINST SELF-INCRIMINATION and other constitutional rights.

Concern with proper representation of defendants' interests in the pretrial phases of the criminal process was expressed by the Supreme Court in its earliest cases involving rights to counsel. Even in *Powell v. Alabama* (1932) the Court had referred to the pretrial preparation of the defense as "the most critical" period in the criminal proceedings. Before the decision of *Gideon v. Wainwright* (1963) the Court had begun mandating the appointment of counsel for unrepresented accused persons at various "critical stages of the proceedings." Thus in *Hamilton v. Alabama* (1961) the murder conviction of the indigent accused was reversed because of the absence of defense counsel at the pretrial arraignment.

The more difficult problems, however, were those of the accused's rights after ARREST but before formal commencement of the judicial proceedings by bringing the accused into court for preliminary hearing or arraignment. The issues were squarely drawn in the companion cases of *Crooker v. California* and *Cicenia v. La Gay* (1958). In the former, petitioner, who was under sentence of death, complained that the confession introduced against him at his trial had been obtained in a period of incommunicado questioning during which time he was denied the opportunity to confer with his own attorney. A narrowly divided Court affirmed the conviction, Justice TOM C. CLARK emphasizing the "devastating effect" of the presence of counsel in the interrogation room on criminal law enforcement.

*Crooker* and *Cicenia* were overruled in ESCOBEDO V. ILLINOIS (1964) which represented the high-water mark of judicial protection of Sixth Amendment counsel rights in the pretrial interrogatory process. In a 5–4 decision the Court ruled that at the point in questioning when suspicions of the police have "focused" on the party being interrogated, even if this occurs before defendant is indicted for a criminal offense, the right of the party to consult with an attorney cannot constitutionally be denied. Two years later the Court decided the famous case of MIRANDA V. ARIZONA (1966), holding that whenever a suspect has been taken into custody he may not be interrogated until he has

been given the "fourfold" warning: the arrested party must be advised that he has a right to remain silent, that he is entitled to consult with a lawyer, that the lawyer may be present at the interrogation, and that if he is unable to hire an attorney, counsel will be supplied. (See MIRANDA RULES.)

Although the prevailing opinion in *Miranda* reaffirmed the holding of the *Escobedo* case, the impact of the latter was considerably modified. Thus, use of the "focus" concept, while not expressly rejected, was for practical purposes abandoned. Again, although the *Miranda* opinion reaffirmed the existence of Sixth Amendment counsel rights in pretrial interrogation, the emphasis of the opinion is significantly different. The dominant view regarded the right to counsel in the interrogation situation as an incident to and a necessary means for protection of the Fifth Amendment's right against self-incrimination. The emphasis on that right is so dominant that the rights to representation recognized in *Miranda* have sometimes been referred to as Fifth Amendment rights to counsel.

The *Miranda* case did not bring lawyers into interrogation rooms so frequently as was hoped or feared at the time the decision was handed down. One principal weakness of the prevailing opinion was its failure to insist that a suspect's decision to waive the presence of counsel must itself be made only with the advice of a lawyer. In consequence, rights to counsel are frequently waived by persons in police custody. One study published shortly after the *Miranda* ruling revealed as few as seven percent of the suspects requesting stationhouse counsel. The tendency toward widespread waiver of *Miranda* rights appears to have continued in the intervening years.

Even before *Escobedo*, the Court had contributed another important strand to counsel doctrine in MASSIAH V. UNITED STATES (1964). After the defendant in that case had been indicted for a narcotics offense, government agents induced an accomplice of Massiah to draw him into conversation in an electronically "bugged" automobile. Incriminating admissions made by the defendant were overheard by the agents and introduced against him at the trial. In reversing Massiah's conviction, the Court ruled that the ELECTRONIC EAVESDROPPING violated defendant's rights to counsel, which rights had "attached" when the INDICTMENT against him was returned. Contemporary reaction to the *Massiah* decision was generally critical. Many commentators believed that if a wrong had been done to Massiah it consisted not of a denial of counsel rights, but rather an invasion of his Fourth Amendment RIGHT TO PRIVACY, or perhaps of the introduction of an "involuntary" confession against him. Again, to conceive of the rights to counsel attaching only at the return of the indictment leaves open to police officials an opportunity of frustrating the rule by simply delaying the indictment or INFORMATION.

After the decision of *Escobedo* it was widely assumed that the *Massiah* precedent had been drained of vitality. Yet in the widely noted case of BREWER V. WILLIAMS (1977) *Massiah* was invested with renewed significance. Although *Brewer* might readily have been decided by an application of the *Miranda* rule, the Court chose instead to reverse the conviction on the grounds of denial of counsel, reliance being placed on the *Massiah* precedent. Later decisions, building on *Massiah*, appear to assert a right in the defendant not to be approached by the government for evidence of his own guilt in the absence of counsel, once judicial proceedings are initiated by return of an indictment or other in-court proceedings (*United States v. Henry*, 1980). In New York the state courts have transcended the *Massiah* precedent by interpreting state law to mean that whenever a lawyer enters a case in behalf of the defendant, even when this occurs before indictment, the accused in custody may not waive his right to counsel in the absence of his lawyer (*People v. Hobson*, 1976). Although the New York rule alleviates the restrictions imposed by the Supreme Court on the *Massiah* doctrine, it is of limited value to indigent defendants, who ordinarily do not acquire counsel before the commencement of judicial proceedings.

A final area of pretrial counsel rights involves LINEUPS. Misidentification of the accused by prosecution witnesses constitutes perhaps the most prolific source of erroneous convictions; police lineups and other identification procedures often spawn such errors. In UNITED STATES V. WADE (1967) the Court responded to these problems by designating the pretrial identification confrontation between witnesses and the accused as a "critical stage" of the proceedings and hence one requiring the presence of the accused's attorney. An identification made at a lineup in which the suspect's right to counsel was not honored may not be introduced at the criminal trial. An in-court identification is not summarily barred, but before it can be employed as evidence, the prosecution must establish by "clear and convincing evidence" that it was based on observations other than those made at the flawed lineup. After this promising beginning the Court backed away, and the view appears established that unless the identification evidence was obtained by methods so defective as to deny due process of law, an identification obtained in the absence of counsel may be introduced in court if the lineup occurred before return of an indictment. (See KIRBY V. ILLINOIS.) Limiting rights of counsel to the postindictment period is especially devastating in these areas because identification efforts are typically undertaken before formal charges are made. In UNITED STATES V. ASH (1973) the Court has also refused to supervise other identification procedures, such as those involving the use of photographic files. The problems of convicting the innocent through misidentification persist, and the Court has

relegated their solutions largely to administrative and legislative action.

Basic to the rights of counsel is the quality of the legal representation supplied the criminal accused. Yet growth of the law in this area is inhibited by the fear that close judicial scrutiny of the competency of such representation will provide numerous and unwarranted opportunities for disappointed criminal litigants to attack their convictions. Such administrative concerns resulted in the once widely recognized rule that convictions were not to be reversed on incompetency grounds unless the performance of defense counsel constituted a "mockery of justice." The formula employed in the Supreme Court today is considerably more demanding: counsel's advice must not fall "outside the range of competence demanded of attorneys in criminal cases" (*Tollet v. Henderson*, 1953). The application of the "ordinary competence" test, however, results in the reversal of comparatively few criminal convictions. Thus in *United States v. Decoster* (1979) the District of Columbia Court of Appeals refused to upset a conviction in which a court-appointed lawyer failed to interview his client's co-defendants or any other witnesses before trial. Failures to achieve the objective of adequate defense in criminal cases are often not the product of the professional incompetence of lawyers. In many cases the court-appointed lawyer is on the staff of an inadequately funded legal aid agency that must impose wholly unrealistic case loads on its attorneys. Similar problems also often affect the privately retained lawyer who because of the economics of criminal law practice may be under pressure to accept more cases than he can adequately handle. The courts alone cannot be expected to solve problems of this sort, but it is doubtful that instances of inadequate defense will be significantly abated until the courts articulate and apply specific minimum standards of counsel performance.

The right of an indigent litigant to demand appointment of counsel from the state in noncriminal proceedings has received comparatively little judicial consideration or development. In the famous case of IN RE GAULT (1967) the Court recognized a right to counsel in a state juvenile court delinquency proceeding. Some courts have held that, where necessary to a fair hearing, a similar right is possessed by an indigent petitioner in an habeas corpus action. Since juvenile court and habeas corpus proceedings, although "civil" in form, are analogous or intimately related to the criminal process, the precedents in neither category represent a significant expansion of counsel rights into noncriminal areas.

In *Lassiter v. Department of Social Services* (1981) the question was whether counsel must be appointed to represent an indigent mother in a proceeding brought by the state to terminate her parental rights. In such a proceeding the defendant faces a sanction often considered more severe than a sentence of imprisonment, and, given the nature of the issues, the defendant's need for professional assistance is at least as great as that of the accused in many criminal cases. Although recognizing these considerations, the Court's majority limited the right to counsel to the situation in which all the circumstances in a particular case make legal representation necessary for a fair hearing, and it concluded that such considerations were not shown to be present in the *Lassiter* case. This latter-day revival of the *Betts v. Brady* precedent is regrettable in view of the needs for counsel in these proceedings and the comparatively small social costs involved in making counsel available routinely in all such cases. Like *Betts*, however, the *Lassiter* holding may represent a step toward a more satisfactory ultimate result.

In the development of the modern constitutional law of criminal procedure, questions of the rights of counsel have held a central position. This centrality is not surprising; counsel rights are integral to an adversarial system of justice, and the expansion and refurbishing of that system have been a dominant objective of constitutional procedural law from the decision of *Powell v. Alabama* in 1932 to the present. In the intervening years, issues of counsel rights have continued to emerge in a variety of contexts. It may be anticipated that this course of constitutional events will continue so long as the Supreme Court places significant reliance on the adversarial system as the principal mechanism to control and order the applications of state power in the criminal process.

FRANCIS A. ALLEN
(1986)

(SEE ALSO: *Nix v. Williams.*)

Bibliography

ALLEN, FRANCIS A. 1975 The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases. *Illinois Law Forum* 1975:518–542.

ATTORNEY GENERAL'S COMMITTEE 1963 *Poverty and the Administration of Federal Criminal Justice.* Washington: Government Printing Office.

BEANEY, WILLIAM A. 1955 *The Right to Counsel in American Courts.* Ann Arbor: University of Michigan Press.

HOLTZOFF, A. 1944 Right to Counsel under the Sixth Amendment. *New York University Law Review* 20:1–22.

KAMISAR, YALE 1962 Betts v. Brady Twenty Years Later. *Michigan Law Review* 61:219–282.

——— 1978 Brewer v. Williams, Massiah and Miranda: What Is Interrogation? When Does It Matter? *Georgetown Law Journal* 67:1–101.

LEVINE, F. and TAPP, J. 1973 The Psychology of Criminal Identification: The Gap from Wade to Korley. *University of Pennsylvania Law Review* 121:1079–1131.

## RIGHT TO DIE

The "right to die" is an ambiguous, and therefore expansive, phrase. It can encompass the right to refuse life-sustaining medical treatment, the right to commit suicide, the right to have a doctor assist a person in suicide, and the right of third parties to kill legally incompetent patients by administering lethal doses of drugs or by removing food, water, respirators andor other medical care.

The constitutional arguments for the right to die are premised on either the RIGHT OF PRIVACY or on the right to liberty guaranteed by the DUE PROCESS clause of the FOURTEENTH AMENDMENT. Several lower federal courts, as well as state supreme courts, have held that the right of privacy includes at least a limited right to die. In *Cruzan v. Director, Missouri Department of Health* (1990), however, the Supreme Court suggested that right-to-die cases fit more appropriately within the due process framework.

*Cruzan* involved the tragic plight of Nancy Cruzan, who sustained severe head injuries in a car accident in 1983. After three weeks in a coma, she improved sufficiently that she could chew and swallow food. A feeding tube was nevertheless inserted into her stomach in order to make long-term care easier. Subsequent efforts to rehabilitate her failed.

In 1987 Nancy's parents sought to stop the food and hydration provided through the tube, arguing that their daughter was in a "persistent vegetative state," manifesting no awareness of herself or her environment. They further said that previous to her accident Nancy had indicated that she would not want to be kept alive in such a condition. The trial court granted the Cruzans' request, but the Missouri state supreme court reversed, ruling that not enough evidence had been presented to demonstrate that Ms. Cruzan would in fact choose to forgo food and liquids if she were competent to make the choice. The U.S. Supreme Court narrowly upheld the constitutionality of this determination by a vote of 5–4.

Writing for the majority, Chief Justice WILLIAM H. REHNQUIST said that according to previous decisions of the Court, "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment" based on the due process clause. This liberty interest is not inviolable, however. It must be weighed against various state interests, including the state's commitment to the preservation of human life. According to Rehnquist, this commitment justifies prohibitions against both homicide and assistance to commit suicide. It also justifies state measures to prevent suicide. In Rehnquist's words, "we do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically-able adult to starve to death."

Nancy Cruzan, of course, was not physically able; and for the purpose of this case, Rehnquist assumed that while competent able persons may not have the constitutional right to starve themselves to death, competent persons requiring artificially administered food and fluids do. The question was how this right could be applied to an incompetent individual like Nancy Cruzan. Concerned about the possible abuse of the power to remove life-sustaining treatment from others, Missouri had stipulated that food and hydration can be removed from an incompetent patient only when there is clear and convincing evidence that this is what the patient would have wanted under the circumstances. In the case of Nancy Cruzan, the Missouri supreme court held that insufficient evidence had been presented to make this determination. Rehnquist and the majority concluded that in this particular case this was a permissible way to safeguard the state's interest in protecting human life.

However, the Court also hinted that a different result might be required in a situation where a person had duly appointed a third party to make decisions in the case of the person's incompetency. In other words, had Nancy Cruzan made clear prior to her accident that she wanted her parents to make medical decisions for her if she ever became incompetent, the Court might have compelled the state to carry out the parents' wishes. Justice SANDRA DAY O'CONNOR emphasized this point in her concurring opinion.

Dissenting, Justice WILLIAM J.BRENNAN claimed that more than enough evidence existed to show that Nancy Cruzan did not want to be kept alive in her present condition. Even if there had not been sufficient evidence to determine Cruzan's wishes, however, the state still had no right to maintain her life according to Brennan. Instead, it was obligated by the due process clause to leave the decision over whether or not to remove medical treatment to "the person whom the patient himself would most likely have chosen as proxy or . . . to the patient's family."

Justice JOHN PAUL STEVENS, in a separate dissent, adopted a different approach. He articulated an objective "best interests" test whereby the courts would determine if it is in the best interests of the patient to continue to receive life support. Reviewing Nancy Cruzan's tragic condition, Stevens concluded that her "best interests" unquestionably dictated that food and fluids be shut off. Some might find chilling Stevens's expansive definition of "best interests," however, for it apparently included a patient's interest in not being a burden to others. At the end of his opinion, Stevens spoke of Nancy's "interest in minimizing the burden that her own illness imposes on others . . . [and] in having their memories of her filled predominantly with thoughts about her past vitality rather than her current condition."

Several aspects of the right to die raise difficult ques-

tions. Many oppose physician-assisted suicide, for example, because suicide wishes are often fleeting and irrational. They add that if society makes suicide too easy, efforts to prevent suicide may be undermined. Advocates for persons with disability claim this is already happening, pointing to a case in California where a court sanctioned the request of a disabled woman to starve herself to death in a hospital—despite clear evidence that the woman was severely depressed because of recent personal tragedies.

The power of third parties to deny life-sustaining measures to incompetent patients is equally problematic. Underlying much of the discussion over incompetent patients is the assumption that these persons are not fully human. This came out with force in the dissents in *Cruzan*, where Justices Brennan and Stevens both claimed that Nancy existed in a state "devoid of thought, emotion and sensation." This contention was fundamental to their arguments, because it allowed them to claim that the state could have no legitimate interest in preserving Nancy's life, because no human life in fact existed for the state to protect.

There are serious problems, however, with premising the right to die on judgments about someone else's humanity. Such judgments are not nearly so clear or so objective as many presume. Nancy Cruzan, for example, was supposed to be oblivious to her environment. Yet the trial court heard testimony from nurses who testified that Nancy tracked with her eyes, smiled after being told stories, and cried after family visits. Even in cases where a patient cannot respond at all, one may question whether this alone is a sufficient indicator of a person's loss of cognitive faculties. Research on coma victims who have recovered shows that the mere fact that they could not respond outwardly while comatose did not mean they had lost their humanity. They could hear what others said about them in their hospital room. They experienced emotions. They dreamt. But if persons in a persistent vegetative state retain their humanity in some fundamental sense, the assumption that the state has *no* interest in protecting their lives becomes much less persuasive.

The application of the right to die to incompetent patients other than those in persitent vegetative states is even more problematic. The right to die has been used to justify withholding food, fluids, and basic medical treatment from a wide array of incompetent individuals, from conscious stroke victims to infants with Down's Syndrome or treatable physical disabilities such as spina bifida. Disability groups complain that in these cases the right to die is nothing more that the right to discriminate against the physically and mentally hadicapped. They argue that not only is such discrimination not constiutionally protected, it is constitutionally proscribed by guarantees of due process and EQUAL PROTECTION.

Like ABORTION, the right to die implicates some of the most fundamental beliefs humans hold about the nature of human life. Right-to-die cases often require judges to be physicians and philosophers as well as jurists, and few would pretend that a judge's role in such cases is either enviable or easy.

JOHN G. WEST, JR.
(1992)

(SEE ALSO: *Euthanasia; Patient's Rights.*)

Bibliography

ARKES, HADLEY 1987 "Autonomy" and the "Quality of Life": The Dismantling of Moral Terms. *Issues in Law and Medicine* 2:421–433.

BARRY, ROBERT 1988 *Protecting the Medically Dependent: Social Challenge and Ethical Imperative.* Stafford, Va.: Castello Institute.

BOPP, JAMES JR. 1987 Is Assisted Suicide Constitutionally Protected? *Issues in Law and Medicine* 3:113–140.

LONGMORE, PAUL K. 1987 Elizabeth Bouvia, Assisted Suicide and Social Prejudice. *Issues in Law and Medicine* 3:141–168.

## RIGHT TO DIE
(Update)

The question posed by claims for a "right to die" is whether states may prohibit people from hastening their own death or obtaining the assistance of others for that purpose. Since the 1970s, many courts have recognized the existence of a constitutional right to refuse medical treatment even though this refusal would hasten death. These rulings do not, however, constitute a generalized "right to die" for individuals who do not need medical interventions to prolong life. In 1997, the U.S. Supreme Court directly addressed this issue regarding the constitutionality of state laws prohibiting physician-assisted suicide, and held that no such right existed.

State laws against homicide have traditionally been applied to forbid people from hastening either their own or others' deaths. Under English COMMON LAW, suicide was prohibited, though the state sanctions were necessarily indirect—through property inheritance forfeitures and burial degradations for the act of suicide and the imposition of criminal penalties for unsuccessful suicide attempts. During the course of the nineteenth century, American state legislatures abandoned these measures but at the same time enacted civil commitment laws phrased broadly enough to authorize psychiatric custodial confinement for suicide attempts. The abolition of English common law penalties thus did not clearly indicate that American legislators viewed suicide as a "right."

American law has also traditionally held that physicians

are obliged to obtain consent from mentally competent patients before embarking on any medical treatment. On its face, this requirement would imply that a mentally competent person had a right to refuse life-prolonging medical treatment notwithstanding that hastened death would result from this refusal. It was not until the 1970s, however, that American courts drew out this implication. The landmark ruling, *In re Quinlan* (1976), was rendered by the New Jersey Supreme Court in a case involving Karen Ann Quinlan, a twenty-one-year-old woman in a persistent vegetative state whose parents sought judicial approval to remove the mechanical ventilator that assisted her breathing. The court held that if Quinlan had been mentally competent, she would have had a right to discontinue this medical treatment. In reaching this conclusion the court relied not only on the common law rule requiring a patient's consent for medical treatment generally but also on the recent decision of the U.S. Supreme Court in ROE V. WADE (1973). The state court reasoned that if the constitutional RIGHT OF PRIVACY protected a woman's control over her bodily integrity regarding the choice to abort, it followed that all individuals had a constitutional right to control medical interventions into their bodies. The state court further concluded that although Quinlan was not mentally competent, she should not thereby lose this constitutional protection of her bodily integrity but that the right should be available to her through the exercise of "substituted judgment"; that is, through someone such as her parent or court-appointed guardian speaking for her.

Strictly speaking, the *Quinlan* case did not establish a "right to die." The state court's formulation of Quinlan's constitutional right was to protect her bodily integrity; from this perspective, the question whether these interventions were necessary for her continued life was incidental to her basic claim against any unconsented medical treatment. Nonetheless, the context of the case and the court's discussion of that context gave clear prominence to the proposition, as the court itself put it, that mechanical prolongation of her life "only to vegetate a few measurable months with no realistic possibility of returning to any semblance of cognitive or sapient life [would] compel Karen to endure the unendurable." Changes in medical technology and in population demographics during the preceding several decades, moreover, gave a new sense of urgency to this concern about "unendurable" prolongation of life. Advances in public health and individual medical treatments had led to increasing numbers of people surviving into old age but burdened with substantial, chronic disabilities. The intense media attention to Karen Ann Quinlan's case suggested that her plight symbolized a widespread public concern about excessive and inhumane applications of life-prolonging medical technologies.

Judicial decisions following *Quinlan*, however, highlighted opposite concerns—that withholding life-prolonging medical care could be excessive and inhumane. The New Jersey Supreme Court had assumed that, although Karen Ann was incompetent, her father could appropriately speak on her behalf; subsequent court cases that authorized withholding treatment from incompetent patients raised questions about the role of family or other substituted decisionmakers. In *Superintendent of Belchertown State School v. Saikewicz* (1977), decided immediately after *Quinlan*, the Supreme Judicial Court of Massachusetts ruled that medical treatment for leukemia, which most likely would have prolonged life for less than a year but with considerable physical discomfort, could be withheld from a profoundly retarded sixty-six-year-old man who had lived most of his life in a state retardation institution. The court came to this conclusion even though it conceded that the overwhelming majority of mentally "normal" people would have opted for the treatment; and critics charged accordingly that this ruling reflected an invidious discrimination against people with mental disabilities. In 1982, the Indiana Supreme Court affirmed that parents of a Down syndrome newborn could refuse lifesaving surgery to correct an esophageal obstruction. This ruling reflected devaluation of retarded people even more than in *Saikewicz*, for the surgery was entirely curative and universally performed for other newborns with this condition. Following considerable media coverage of this case, known only as *Baby Doe*, Congress adopted the Child Abuse Amendments of 1984, withholding federal funds from states unless they enacted laws requiring medical treatment for infants with virtually any likelihood of extended life. Within five years, such laws were adopted in every state, thus effectively repudiating the *Baby Doe* ruling.

The first case to come to the U.S. Supreme Court regarding refusal of life-prolonging medical treatment also involved a person who could not speak for herself. In *Cruzan v. Director, Missouri Department of Health* (1990), parents sought judicial permission to remove a feeding tube from their adult daughter who was in a persistent vegetative state from brain injury in a car accident seven years earlier. The Missouri Supreme Court had ruled that there was no "clear and convincing evidence," as required under state law, that the daughter herself, when mentally competent, had expressed unwillingness to accept medical treatment in these circumstances. The U.S. Supreme Court, by a 5–4 vote, held that this ruling did not violate the Constitution. Chief Justice WILLIAM H. REHNQUIST, writing for the Court, stated that "the principle that a com-

petent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." Nonetheless, Rehnquist held, states have constitutional authority to impose high evidentiary standards in determining the wishes of an incompetent person. In a CONCURRING OPINION, Justice SANDRA DAY O'CONNOR observed that the Court's ruling should encourage individuals to complete advance directives or appoint health-care proxies to implement their wishes if they subsequently became incompetent; she also suggested that states would be constitutionally obligated to give effect to these instruments. In 1990, Congress enacted the Patient Self-Determination Act requiring that medical institutions receiving federal funds inform all entering patients about their rights under state law to make advance directives or appoint health-care proxies. Subsequent studies have shown, however, that relatively few people—between 5 percent and 29 percent of the population—have in fact completed such instruments.

Controversy about discriminatory implications of a right to refuse medical treatment was, moreover, not restricted to its application to incompetent people. There were also concerns that some disabled people would devalue themselves, or act on the basis of social devaluation of them, in deciding to forego life-prolonging treatment. These concerns were exemplified for some critics in a ruling by a California appellate court in *Bouvia v. Superior Court* (1986) regarding a quadriplegic woman with severe cerebral palsy who sought a court order directing hospital authorities to remove a feeding tube. The court ruled that Elizabeth Bouvia had a constitutionally based privacy right to refuse this treatment. In describing Bouvia's circumstances, the court appeared to base its sympathy for her claim on the seeming "uselessness, unenjoyability and frustration" of her disabled state. Critics responded, however, that the court ignored aspects of Bouvia's life—such as her recent miscarriage and divorce, her brother's death, her job loss and homelessness— which might have been more powerful motivations for her wish to end her life and, if she had been able-bodied, would have led judges to question her mental competency rather than to insist on acquiescence to that wish. These critics alleged confirmation in their concerns about devaluation of disabled people in Rehnquist's dictum in *Cruzan*, "We do not think that a State is required to remain neutral in the face of an informed and voluntary decision by a physically-able adult to starve to death"—thus appearing to imply that a constitutional right to refuse feeding by medical means could be restricted to physically disabled adults.

Claims for a constitutional "right to die" thus implicate conflicting concerns. On one side, the principle demanding respect for autonomous personal choice (whether understood in constitutional terms as a privacy right or a liberty interest) clearly militates against any forced medical treatment. On the other, invidious social attitudes toward disabled people not only implies that others, even including family members, may not be trustworthy guardians for the interests of mentally incompetent people; these attitudes also suggest the existence of societal coercions toward mentally competent adults with physical disabilities that could lead them to devalue themselves and construe a "right to die" as an obligation to die.

These conflicting concerns were powerfully presented in constitutional challenges to state laws in Washington and New York imposing criminal penalties for assisting suicide. Plaintiffs alleged that states were constitutionally obliged to exempt from these laws physicians who assisted mentally competent, terminally ill patients requesting hastened death. In the Washington case, the U.S. Court of Appeals for the Ninth Circuit held that there was a FUNDAMENTAL RIGHT to control over one's bodily integrity, based on the privacy right or liberty interest established by *Roe*, that extended to individual control over the timing and manner of one's death and that, for mentally competent people who were already imminently dying of some terminal illness, the state had no adequately compelling interest in prohibiting physicians from assisting them toward hastened death. The U.S. Court of Appeals for the Second Circuit rejected this finding of a fundamental right but nevertheless held that New York's law drew irrational distinctions by obliging physicians to respect patients' refusals of life-prolonging treatment, thus hastening their deaths by acts such as removal of feeding tubes, while prohibiting physicians from respecting patients' requests for other physician actions to hasten death, such as prescriptions for lethal medications. The Second Circuit ruled that this irrational treatment violated the EQUAL PROTECTION guarantee of the FOURTEENTH AMENDMENT.

In *Washington v. Glucksberg* and *Vacco v. Quill* (1997), the U.S. Supreme Court unanimously reversed both appeals court rulings. In opinions joined by five Justices, Rehnquist held in the Washington case that neither the text of the Constitution nor the extensive historical existence of state law prohibitions supported the claim for a fundamental right to physician-assisted suicide; in the New York case, he held that the distinction between circumstances where physicians acted to hasten death, on the one hand, and withheld treatment but the patient's disease itself was the "active" cause of death, on the other hand, was well-accepted and plausible enough as to satisfy the constitutional standard of scrutiny for legislative rationality. Four Justices, though concurring in the result, were not so definitive in rejecting the constitutional claims against the assisted suicide prohibitions.

Justice JOHN PAUL STEVENS was most clearly inclined toward finding a constitutional right; he concurred only on the ground that the statutes were challenged facially rather than as applied and that, though he was unwilling to strike down the prohibitions in all circumstances, there were some limited circumstances where an adequate case could be made regarding terminally ill, mentally competent patients. In footnotes to his majority opinions, Rehnquist accepted Stevens's position that the Court's ruling did not "absolutely foreclose" such future constitutional claims, though his opinions read as a whole appeared strongly inhospitable to any such claims.

Justice DAVID H. SOUTER wrote an extensive concurring opinion that also appeared favorably disposed toward finding a constitutional right to assisted suicide for terminally ill patients. He expressed reluctance to endorse this conclusion, however, because of the concerns raised by states about whether this right could not be adequately confined to true volunteers and would instead have coercive force on vulnerable people such as the elderly, the poor, minority group members, or the chronically disabled. Because there was no practical experience in the implementation of this right in any U.S. jurisdiction and the empirical data from the Netherlands—the only country where physician-assisted suicide had been legally recognized—was limited and subject to conflicting interpretations, Souter found that state legislatures were better suited than courts to assess the gravity of these practical concerns. He stated, however, that if there were "legislative foot-dragging in ascertaining the facts" he would re-examine his position and seemed to imply that he would then be prepared to proceed toward an independent judicial finding of some constitutional protection for assisted suicide.

Justice STEPHEN G. BREYER also wrote a concurring opinion indicating his favorable disposition toward a constitutional right for terminally ill patients who requested hastened death to avoid intractable physical pain. Breyer observed, however, that the litigative record indicated that physical pain could already be adequately palliated by various means, including sedation that might itself hasten death, and that such effective palliation was not prohibited by state law. However, he continued, if "state law . . . prevent[ed] the provision of palliative care, including the administration of drugs as needed to avoid pain at the end of life," then the Court "might have to revisit its conclusion" rejecting a constitutional right to assisted suicide.

O'Connor made a similar observation in her separate opinion but she joined Rehnquist's opinions, thus providing the fifth vote to make them opinions for the Court. Accordingly, O'Connor's position was itself more favorably disposed toward a possible future judicial finding of a constitutional right than was explicitly acknowledged in the Rehnquist opinions whose majority status depended on O'Connor's concurrence. (Justice RUTH BADER GINSBURG also wrote a very brief concurrence, endorsing O'Connor's separate opinion but refusing to join the Court's opinions.)

Taken together, the separate opinions in the assisted suicide cases thus undermine the apparent force of the Court's unanimous rejection of a constitutional right. In fact, five of the Justices spoke with varying degrees of approbation about the prospect that some future litigation would present sufficiently compelling facts for judicial finding of such a right. For O'Connor, Breyer, and Ginsburg, the existence of a right to assisted suicide would depend on whether a terminally ill person could avert physical pain by any other state-sanctioned means. For Stevens, the existence of this right would be justified by claims for autonomous choice generally, not necessarily restricted to palliation of physical pain specifically; but the claim must be presented in a more narrowly focused context than a facial challenge to the prohibitory state laws. Souter similarly did not restrict his attention to claims for relief of physical pain, but he was not prepared to find a constitutional right to assisted suicide until state legislatures had sufficient time "to experiment" and engage in fact-finding about the possibility of confining the practice of assisted suicide to truly voluntary, mentally competent, terminally ill people.

If the U.S. Supreme Court were ultimately to hold that individuals had a constitutional right to a physician's assistance in hastening their death, this would clearly constitute a "right to die." This would be a much clearer acceptance of such a right than the numerous state rulings—implicitly endorsed by the Court's dicta in *Cruzan*—which have already found a constitutional right to refuse life-prolonging treatment because of the direct bodily intrusion represented by nonconsensual medical interventions. The Court's 1997 decisions in *Glucksberg* and *Vacco* do not definitively dispose of this more generalized claim, though it does seem unlikely that the Court would be prepared to revisit this question soon.

Deliberation about the legality of physician-assisted suicide is, however, likely to go forward in the immediate future in state legislatures and popular ballot INITIATIVES. In 1994, Oregon voters (by a 51 percent margin) approved legalization of physician prescriptions of lethal medication requested by mentally competent patients who were diagnosed with illnesses likely to be fatal within six months. The constitutionality of this law was challenged on equal protection grounds but this challenge was rejected by the Ninth Circuit Court of Appeals and CERTIORARI was denied by the U.S. Supreme Court in *Lee v. Oregon* (1997). States are thus free to authorize this practice; the Oregon voters reaffirmed their approval by a wider margin in 1996, making this state the first U.S. jurisdiction to endorse a "right to die," limited to mentally competent people already suf-

fering from a fatal illness. Whether other states will follow; whether this right will be extended to mentally incompetent people (as the constitutional right to refuse treatment has been applied); whether this right will be extended beyond terminally ill people to others whose physical or psychological suffering leads them to request assisted suicide (as the Netherlands Supreme Court has endorsed); whether the U.S. Supreme Court will ultimately re-examine its refusal to proclaim a generalized constitutional "right to die"—these are all questions that remain open and vexing.

ROBERT A. BURT
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Bibliography

COMMITTEE ON CARE AT THE END OF LIFE, INSTITUTE OF MEDICINE 1997 *Approaching Death: Improving Care at the End of Life*. Washington, D.C.: National Academy Press.

GERRY, MARTIN H. and NIMZ, MARY 1987 The Federal Role in Protecting Babies Doe. *Issues in Law and Medicine* 2:339–355.

LONGMORE, PAUL K. 1987 Elizabeth Bouvia, Assisted Suicide and Social Prejudice. *Issues in Law and Medicine* 3:141–168.

NEW YORK STATE TASK FORCE ON LIFE AND THE LAW 1994 *When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context*. New York: New York State Task Force on Life and the Law.

SYMPOSIUM 1998 Physician-Assisted Suicide: Facing Death after *Glucksberg* and *Quill*. *Minnesota Law Review* 82:885–1101.

WEIR, ROBERT F., ed. 1997 *Physician-Assisted Suicide*. Bloomington: Indiana University Press.

## RIGHT TO JURY TRIAL

See: Trial by Jury

## RIGHT TO KNOW

The phrase "right to know" does not appear in the text of the FIRST AMENDMENT, nor has it been used as an organizing category in Supreme Court opinions. Nonetheless, the phrase captures several major themes in First Amendment law, and its frequent appearance in editorials concerning FREEDOM OF THE PRESS attests to its rhetorical appeal. The phrase conjures up the citizen critic responsible for democratic decision making and a vigilant press acting as public trustee in gathering and disseminating vital information. It recalls the companion ideas of LISTENERS' RIGHTS and the MARKETPLACE OF IDEAS.

The "right to know" is a slogan, but it is not empty and its content is not exhausted by conceptions of self-government, the marketplace of ideas, or listeners' rights. To be sure, such conceptions provide rationales for a right to know. Most court decisions preventing government from interfering with speakers' liberty have the effect of protecting the right to know. Some decisions are explicitly founded upon theories of listeners' rights, and, indeed, listeners have occasionally been the plaintiffs challenging the offending government action. Not every decision protecting a speaker's liberty, however, is appropriately characterized as protecting a right to know. For example, opinions in which the court has used the OVERBREADTH DOCTRINE to invalidate convictions for using fighting words find little support in any claim of a right to know. A police officer may learn something by being exposed to insulting language, but protection of speech in such decisions rests on a defense of speaker liberty for its own sake, wholly apart from anything the audience may learn.

If decisions protecting speaker's liberty are not always premised upon a right to know, neither are claims of the right to know limited to assertions of speaker's liberty. Indeed, the most intriguing question begged by the expression "right to know" is the scope of such a right. Does the public have a constitutional right to know anything that speakers themselves are unwilling to provide? To date, there is no judicial authority for the proposition that the public or the press has any First Amendment right to information voluntarily withheld by private actors. Indeed, even though the press is sometimes said to act as trustee for the public in getting information, the public has no constitutional right to compel the press to disclose any information it may choose to withhold.

The fighting issue is the extent to which the public or press has a constitutional right to know information that government officials wish to withhold. For a long time it appeared there was no such right. By 1978, no Supreme Court holding contradicted Chief Justice WARREN E. BURGER's contention in *Houchins v. KOED* that "neither the First not Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." Or, as Justice POTTER STEWART put it in an often-quoted statement, "[T]he First Amendment is neither a Freedom of Information Act nor an Official Secrets Act."

RICHMOND NEWSPAPERS, INC. V. VIRGINIA (1980) constituted the Court's first break with its past denials of constitutional rights of access to information within government control. The Court held that in the absence of some overriding consideration requiring closure, the public possessed a First Amendment right to be present at a criminal trial. Some of the Justices in *Richmond Newspapers* would have opted for a general right of access to governmental information subject to a degree of restraint dictated by the nature of the information and the strength of the government's interests in nondisclosure. Other

Justices would have confined the right of access to places traditionally open to the public. What *Richmond Newspapers* makes clear, however, is that the First Amendment is a sword as well as a shield and that the right to know promises to be a developing area of First Amendment law.

STEVEN SHIFFRIN
(1986)

Bibliography

BEVIER, LILLIAN 1980 An Informed Public, an Informing Press: The Search for a Constitutional Principle. *Stanford Law Review* 68:482–517.

EMERSON, THOMAS I. 1976 Legal Foundations of the Right to Know. *Washington University Law Quarterly* 1976:1–24.

## RIGHT TO PETITION

The petition clause of the FIRST AMENDMENT is understood by the courts today to protect a broad range of communications with governmental bodies and governmental officials, including both legislators and members of the executive branch. It has also been held to protect activity related to creating the petition and obtaining signatures. In spite of this broad contemporary understanding, the petition clause receives little attention, in large measure because other clauses of the First Amendment, notably those guaranteeing FREEDOM OF SPEECH and FREEDOM OF THE PRESS, have been expanded so greatly that their protections have largely subsumed those protecting petitions. Protection of petitionary rights has not expanded in step with the protection accorded speech and press.

The modern jurisprudence inverts historical practice. Petitions were once the core mode of what we now call political speech. Moreover, the power accorded to such speech was, in many respects, effectively greater than political speech today. It embodied not just the persuasive and didactic elements of speech, but also a form of political practice, more akin to voting than to expression. Petitioning was born in and became a part of a political culture in many ways vastly different from that of a modern liberal polity. More organically conceived, more explicitly hierarchical, its organicism and hierarchy were reflected in mutual social and political obligations. It is telling that petitions not only embodied, but were sometimes even styled, prayers. By definition, then, they were a request from the subject to the sovereign, from the less powerful to the more. Both in style and substance, therefore, they legitimated the extant political hierarchy. Legitimation came at a price, however, paid by the powerful. In return for hierarchical deference subjects could insist that their prayers be heard and considered.

Both the English and American colonial practice bear out petition's role in such a political culture. While petitioning originated before MAGNA CARTA, it is in the Great Charter that reciprocity and hierarchy are first most clearly stated. In return for the allegiance of the barons the king pledged to respect certain of their rights. Were the king's officers to transgress those rights, the barons were to name four of their number who were to notify the sovereign and ask that the offense be redressed—in other words, they were to petition. Petition thus was understood as a communication that required consideration. Over the ensuing centuries the spectrum of English society that could take advantage of petitioning expanded beyond the barons to subjects more generally, becoming part of English constitutionalism. Moreover, those prayers also came to embody the legislative agenda as Parliament used petitions as the vehicle to express the LEGISLATIVE POWER to withhold taxes until the prayers of petitioners were considered.

English settlers brought petitioning to the colonies as part of the trans-Atlantic migration of political culture. In the many charters and similar constitutional documents of the colonies, the right to petition was protected, in increasingly explicit terms. Colonial practice reflected the expansion of the exercise of petitioning England had seen; indeed, the colonies picked up the pace. As petitioners in England had done, colonial petitioners expanded the notion of what the meaning of a grievance was, so that a petition seeking a redress of a grievance often became more than a request for an individual remedy or plea for assistance. They became, as they were in the nascent form envisioned by Magna Carta, vehicles for the expression—often the collective expression—of concern or outrage over matters of policy and administration. Not only did the subject matter expand, those seeking redress constituted a growing spectrum of colonial society, regularly including nonvoting and unpropertied white men and ultimately even including the occasional petition from women, free blacks, Native Americans, and slaves.

That petitions were not just speech, or the written evidence of speech, is evident not just from their powerful place in an older political culture. They could mandate attention, but they had to do so in a manner both formal and deferential. As the *Trial of the Seven Bishops* (1688) made explicit, not just any communication, nor even any written communication, created a petition. Rather, to be accorded the protection of petitions from, for example, a prosecution for SEDITION, the communication had to contain "petitionary parts." At a bare minimum, a petition had to be addressed to an authority such as the king. It had to state a grievance. It had to pray for relief. And the term "prayer" had meaning. Even a radical request had to be decorously stated or it could be rejected. This requirement was more than a formalism, more than an insistence

on civility in political discourse. Petitions were legitimate only insofar as they acknowledged constitutional authority and deferred to that authority.

As a matter of symbolic politics, therefore, when the rebellious colonies declared their independence, they did so only after listing in the DECLARATION OF INDEPENDENCE their many "Oppressions" for which they sought "Redress" in petitions stated "in the most humble terms." These petitions were "answered only by repeated injury." Thus, the sovereign had severed the bonds of mutual obligation, not they, and had become "unfit to be the ruler of a free people."

In the Confederation era, the expectation both of legislative supremacy and the congruency of the legislative and popular interests meant that explicit statements protecting the right to petition were largely absent from the ARTICLES OF CONFEDERATION, but were part of the newly minted state constitutions. The Revolution, however, wrought a theoretical difficulty for petitioning. If the people were sovereign, then petitions could not really be prayers. Instead, they became statements and the controversy became not whether they should embody deference, but whether they could embody commands, that is, instructions, to representatives. To be sure, in some colonies during the eighteenth century a practice of instruction had existed. The Revolution, however, with its theme of POPULAR SOVEREIGNTY, rendered what had previously been merely practical problems of enforcement of instructions into first-rank theoretical problems of REPRESENTATION and SOVEREIGNTY.

The FIRST CONGRESS evaded those problems in drafting what became the First Amendment. It deliberately retreated from suggestions that the right to petition be transformed into the power to instruct, believing no legislator would forego the wise counsel of the citizenry but refusing to turn the representatives into reflecting machines. Furthermore, while the members of Congress believed that citizens would show respect for elected officers, it was clear that deference was no longer required. Indeed, at least at the state level, "remonstrance" was sometimes constitutionally sanctioned.

If deference no longer defined petitionary power, what of the bonds of mutual obligation when the citizenry was sovereign? Despite the evasion embodied in the First Amendment, masked by a rhetoric that seemed merely to continue a protected right, much had changed. In place of allegiance exchanged for protection had come a democratic power, one which underlay the REPUBLICAN FORM OF GOVERNMENT created in the Constitution. Granted, democratic power was restrained by certain processes of election and contained by restrictions on the use of governmental power. Nonetheless, ultimate authority was popular. The most immediate expression of that power was the vote, which, unlike petition, depended for its power on being massed in numbers sufficient to win elections. Winners of elections owed their power to that mass of the electorate that created their victory. Although winning numbers might be built on ever-shifting bases, those bases consisted solely of voters. Thus, if nonvoters were not represented by those who voted, they had no theoretical way to compel attention toward their grievances. Bonds of reciprocity characteristic of a more organic society were minimized; electoral power was elevated. Thus, as the polity became ever more democratic, those without electoral power saw their most important vehicle for political expression and participation—petition—lose much of its value.

What became of petition in the United States? The answer comes in two forms, one federal and the other state. The fears expressed in the debate in the First Congress in which those who sought instruction, not petitioning, feared that Congress would ignore the wise counsel of the citizenry were soon apparently realized. At the federal level Congress at first attempted to deal with petitions as had colonial assemblies. Congress received petitions, engaged in readings, referrals, and committee consideration.

The procedures became ever more bureaucratic and perfunctory, however, as other means of influencing the federal legislature came to the fore. Some historians have suggested that Congress was overwhelmed by the number of petitions it received, others have suggested that petitions against SLAVERY brought forth a topic that was finally too controversial for actual consideration. Both factors came together in the famous antislavery petition drive that precipitated the congressional gag rule of the 1830s and 1840s, which barred reception of antislavery petitions. Closer examination of the evidence, however, reveals something quite different.

Despite growing importance of other methods of influencing Congress, petition continued to be a relatively effective vehicle for redress of what we today call private grievances, such as veterans' and widows' benefits, whether in the form of private bills or general legislative relief. While it is certainly true that the style of petitions and the quality of their reception changed for more public grievances, such as antislavery, the flow of petitions continued. Both the nineteenth and twentieth centuries have witnessed large-scale petition campaigns, such as those dealing with the WOMAN SUFFRAGE MOVEMENT, POLYGAMY and the admission of Utah to statehood, PROHIBITION, and calls to impeach Supreme Court Justices. None reached the size or sustained their energies for so long as antislavery, but they were significant nonetheless. The statements embodied in the petitions are also generally briefer, blunter, and more charged than in pre-Constitutional days. This change is not surprising. As petitions ceased to

be vehicles that actually required detailed consideration, neither comprehensiveness nor civility was necessary. Petitioners adapted petitions to mass democracy, making them vehicles of political drama in electoral politics. Brevity, blunt statement, and electricity were useful in that role. The petitioners also used petitions to bootstrap themselves, at least eventually, into power in the electorate. Women's involvement in mass politics, for example, had its origins in women's involvement in the antislavery campaign.

The states saw similar adaptation. Petition continued to be a vehicle to obtain private benefits, such as charters of incorporation. Political petitions continued at the state level, too, ultimately culminating in the movements embodied in such phenomena as ballot INITIATIVES, REFERENDA, and electoral recall, features of democratic mass electoral politics.

The protections for prosecution necessary for petitioners in the pre-Constitutional era have become less necessary as electoral politics itself makes it possible to remove oppressive legislators. More importantly, speech and press protections have expanded so greatly that they cover much of what was once protected by the right to petition—and they do so for a much wider range of communicative activities. Thus, the jurisprudence of petition is now somewhat obscure, relegated to interstices of the law and embodied in such specialized DOCTRINES as the Noerr-Pennington doctrine in ANTITRUST. Petition and its protections have not disappeared; they have adapted and become less important as the political culture that gave rise to them has itself been replaced.

GREGORY A. MARK
(2000)

Bibliography

BAILEY, RAYMOND C. 1979 *Popular Influence Upon Public Policy: Petitioning in Eighteenth-Century Virginia.* Westport, Conn.: Greenwood Press.

HIGGINSON, STEPHEN A. 1986 Note: A Short History of the Right to Petition Government for the Redress of Grievances. *Yale Law Journal* 96:142–166.

MARK, GREGORY A. 1998 The Vestigial Constitution: The History and Significance of the Right to Petition. *Fordham Law Review* 66: 2153–2231.

MILLER, WILLIAM LEE 1996 *Arguing About Slavery: The Great Battle in the United States Congress.* New York: Alfred A. Knopf.

SMITH, DON L. 1971 The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations. Unpublished Ph.D. Dissertation: Texas Tech University.

## RIGHT TO REMAIN SILENT

See: Right Against Self-Incrimination

## RIGHT TO TRAVEL

The right to travel is a doctrinal orphan grown to vigorous adulthood. As the ARTICLES OF CONFEDERATION (1781) recognized expressly, the freedom of interstate movement follows logically from the recognition of our nationhood. The Constitution contains no similarly explicit guarantee, but the logic of nationhood remains, reinforced by two centuries of nationlizing experience. The modern right to travel may still be searching for its doctrinal sources, but its historical base is secure.

Personal mobility is a value Americans have always prized. FRANKLIN D. ROOSEVELT brushed the edges of this idea when he greeted the Daughters of the American Revolution as fellow "immigrants." The nineteenth century, the formative era for our constitutional law, was also the century of the frontier. The twentieth century brought the automobile—and the moving van; each year nearly one family in five changes residence.

The power of Congress to protect the freedom of interstate movement is a theme both old and new. The great decision in GIBBONS V. OGDEN (1824) recognized that the COMMERCE CLAUSE authorized congressional regulation of the interstate transportation of persons as well as goods. The modern reach of congressional power is illustrated by the holding in *Griffin v. Breckinridge* (1971) that Congress can protect CIVIL RIGHTS by prohibiting private interferences with the right of black persons or civil rights workers to travel interstate.

The commerce power of Congress has long been held to imply limits on STATE REGULATION OF COMMERCE. When a state interferes with the interstate movement of persons, it must provide weighty justification for so burdening commerce. EDWARDS V. CALIFORNIA (1941) shows how difficult it is for a state to justify this sort of regulation.

The *Edwards* majority, resting decision on the commerce clause, said nothing about the right to travel. Four Justices, while not disputing the commerce ground, preferred to base decision on the PRIVILEGES AND IMMUNITIES clause of Article IV. This clause, which superseded the Articles of Confederation provision guaranteeing "free ingress and egress" from one state to another, had been interpreted early in the nineteenth century (in CORFIELD V. CORYELL, 1823) to include the "fundamental" right of a citizen of one state to travel through or migrate to another.

The Constitution's other privileges and immunities clause—that of the Fourteenth Amendment—is yet another potential source for a right of interstate travel. The concurring Justices in *Edwards* echoed the words of Chief Justice ROGER B. TANEY, dissenting in the PASSENGER CASES (1849), when they said that the freedom of interstate travel was one of the privileges of national citizenship. (See *Crandall v. Nevada,*1868; SLAUGHTERHOUSE CASES, 1873.)

This doctrinal untidiness has the blessing of the Supreme Court. Speaking for the Court in UNITED STATES V. GUEST (1966), Justice POTTER STEWART, who yielded to no one in expressing his affection for the right to travel, said: "The constitutional right to travel from one State to another . . . occupies a position so fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. . . . Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right to travel, there is no need to canvas those differences further. All have agreed that the right exists. . . . We reaffirm it now."

*Guest* involved the power of Congress to protect interstate travel, a power easily inferable from the commerce clause. When the WARREN COURT expanded the reach of the right to travel as a limit on the states, the Court selected still another constitutional weapon: the EQUAL PROTECTION clause. SHAPIRO V. THOMPSON (1969) established the modern pattern. The Court invalidated state laws limiting WELFARE BENEFITS to persons who had been residents for a year. Such a durational RESIDENCE REQUIREMENT impaired the right to travel, which was a FUNDAMENTAL INTEREST; accordingly, the states must justify the impairment by showing its necessity as a means for achieving a COMPELLING STATE INTEREST. The justifications offered in *Shapiro* failed this STRICT SCRUTINY standard of review.

In two decisions following *Shapiro*, the Court refined its analytical style for cases implicating the right to travel interstate. Both opinions were written by Justice THURGOOD MARSHALL. DUNN V. BLUMSTEIN (1972) held unconstitutional a state law limiting voting to persons with one year of residence in the state and three months in the county. Justice Marshall elaborated on *Shapiro:* That opinion had emphasized the illegitimacy of a state's purpose to deter interstate migration, but had not insisted on a showing that any welfare applicants had, in fact, been deterred from migrating. Strict judicial scrutiny was required, irrespective of any such showing, whenever a state law penalized interstate migration, and here the durational residence qualifications for voting amounted to a penalty. Failing the test of strict scrutiny, they must be invalidated. A year later, in *Marston v. Lewis* (1973) and *Burns v. Fortson* (1973), the Court upheld fifty-day residence qualifications for voting, remarking that "the 50-day registration period approaches the outer constitutional limits in this area."

The "penalty" analysis was fully developed in *Memorial Hospital v. Maricopa County* (1974), when the Court struck down a one-year county residence qualification for an indigent to receive free nonemergency hospital or health care. Denial to new residents of "a basic necessity of life" amounted to a "penalty" on interstate migration and medical care was as much a necessity as welfare subsistence. This analysis allowed Justice Marshall to distinguish *Starns v. Malkerson* (1971), in which the Court had summarily affirmed a lower court's decision upholding a one-year durational requirement for receiving state higher education at reduced tuition rates.

Beyond elucidating the sort of penalty on interstate travel that would require strict judicial scrutiny, the *Dunn* and *Memorial Hospital* opinions also emphasized the right to migrate to another state for the purpose of settling there, as differentiated from the right merely to travel. Commentators have made much of this distinction, but little turns on it in practice, and any serious effort to reduce the right to travel to a right of migration would turn away from the right's historical sources in national citizenship.

By 1975, the right to travel's doctrinal state was cluttered with furniture. The stage direction for the next event might read: "Enter Justice WILLIAM H. REHNQUIST, bearing an axe." SOSNA V. IOWA (1975) confronted the Court with a one-year residence qualification for access to the state's divorce court. Writing for the majority, Justice Rehnquist (the only dissenter in *Memorial Hospital*) not only concluded that the limitation was valid; he reached that conclusion without discussing "penalties" or even the equal protection clause. Indeed, the only doctrinal reference in his whole treatment of the merits of the case was a summary rejection of a marginal argument addressed to the short-lived doctrine of IRREBUTTABLE PRESUMPTIONS.

Doctrinal demolition seems to have been Justice Rehnquist's aim; throughout his opinion he referred abstractly to "the constitutional issue," without saying what the issue was, and he concluded by saying that the one-year qualification was "consistent with the provisions of the United States Constitution." Distinguishing *Shapiro* and the other recent precedents, he remarked that the states' interests in those cases had touched nothing more than budgetary or record-keeping considerations. In *Sosna*, the state was concerned to protect the interests of defendant spouses and possible minor children, and also to make its divorce decrees safe from COLLATERAL ATTACK. Thus the state might "quite reasonably" choose not to be a divorce mill. Predictably, the *Sosna* dissenters were led by Justice Marshall, who expressed his dismay over the dismantling of the only theory yet constructed to explain the modern right to travel decisions. What had happened to strict scrutiny, to the notion of penalties on interstate travel, to the link between the right to travel and the equal protection clause? The majority's silence on all these questions persisted for seven years.

In ZOBEL V. WILLIAMS (1982) an 8–1 Supreme Court struck down an Alaska law that would have distributed much of the state's vast oil revenues to its adult residents, apportioning distributions on the basis of length of resi-

dence in the state. For the Court, Chief Justice WARREN E. BURGER rested decision on the equal protection clause, remarking that "right to travel analysis" was "little more than a particular application of equal protection analysis." The state's purpose to reward citizens for past contributions was ruled out by SHAPIRO V. THOMPSON; to uphold Alaska's law would invite apportionment of all manner of taxes and benefits according to length of residence, a result that was "clearly impermissible." Concurring, Justice SANDRA DAY O'CONNOR rejected the equal protection ground, but argued that requiring nonresidents settling in the state "to accept a status inferior to that of old-timers" would impose one of the "disabilities of alienage" prohibited by the privileges and immunities clause of Article IV. In a separate concurrence, Justice WILLIAM J. BRENNAN returned to the origins of the right to travel; even if no specific provision of the Constitution were available, he found that right's "unmistakable essence in that document that transformed a loose confederation of States into one Nation."

William Cohen has suggested a sensible rule of thumb for the durational residence decisions: Equality of treatment for newcomers is required, but durational residence requirements are permitted as tests for residents' intention to remain in the state, that is, tests for state citizenship. Until the Court accepts this view, constitutional doctrine concerning the right to interstate travel remains where it was in the mid-1960s: "All are agreed that the right exists," but it has itself become a rootless wanderer.

The right to international travel is quite another matter. Its doctrinal location is clear: the Fifth Amendment's due process clause. Congressional power to regulate this liberty is wide-ranging. ZEMEL V. RUSK (1966) sustained the government's refusal to issue a passport valid for travel to Cuba, and CALIFANO V. AZNAVORIAN (1978) upheld the withholding of social security benefits during months when beneficiaries are out of the country. In the latter case, the Court remarked that "indirect" congressional burdens on the right of international travel should not be tested by the strictness attending penalties on interstate travel, but were valid unless they were "wholly irrational." Direct restrictions on travel, such as the denial of a passport, are undoubtedly to be tested against a somewhat higher—but as yet unspecified—level of judicial scrutiny. And when Congress regulates foreign travel in a way that discriminates against the exercise of FIRST AMENDMENT freedoms, strict scrutiny is called for. Thus APTHEKER V. SECRETARY OF STATE (1964) held unconstitutional the denial of passports to members of the Communist party.

The decisions recognizing a right to travel abroad have been concerned with travel itself, and not with a more limited right to migrate. The reasoning of those decisions is readily extended to congressional regulation of interstate travel. The commerce clause unquestionably empowers Congress to control the interstate movement of persons, but, like all the powers of Congress, that clause is subject to the provisions of the BILL OF RIGHTS. Congress obviously could not constitutionally forbid members of the Communist party to travel interstate. First Amendment considerations aside, the liberty protected by the Fifth Amendment's due process clause bars Congress from any arbitrary restrictions on interstate travel. The point has practical importance, for the broad sweep of the commerce power has made the prohibition of interstate movement one of the favorite regulatory techniques of Congress. Almost certainly the extremely permissive standard of the *Aznavorian* decision (upholding restrictions unless they are "wholly irrational") would apply to "indirect" congressional regulations of interstate travel. A direct prohibition, however, very likely would encounter a judiciary ready to insist on a more substantial justification.

The notion that the freedom to travel is a liberty protected by the guarantee of due process need not be limited to congressional restrictions on travel. The Fourteenth Amendment's due process clause surely is equally capable of absorbing the right to travel as a limitation on the states. The main barrier to recognizing the right to travel as an aspect of SUBSTANTIVE DUE PROCESS, no doubt, is the Supreme Court's reluctance to contribute further to the development of substantive due process as a vehicle for active judicial intervention in legislative policymaking.

For a season, then, the right of interstate travel is left without certain doctrinal underpinnings. Its capacity to survive on its own, cut off from the usual doctrinal supports, indicates that it draws nourishment from something else. The something else is our strong sense that we are not only a collection of states but a nation.

KENNETH L. KARST
(1986)

Bibliography

BAKER, STEWART A. 1975 A Strict Scrutiny of the Right to Travel. *UCLA Law Review* 22:1129–1160.

BARRETT, EDWARD L., JR. 1976 Judicial Supervision of Legislative Classification—A More Modest Role for Equal Protection? *Brigham Young University Law Review* 1976:89–130.

BLACK, CHARLES L., JR. 1969 *Structure and Relationship in Constitutional Law*. Pages 27–30. Baton Rouge: Louisiana State University Press.

COHEN, WILLIAM 1984 Equal Treatment for Newcomers: The Core Meaning of National and State Citizenship. *Constitutional Commentary* 1:9–19.

## RIGHT TO TRAVEL
## (Update)

The Supreme Court has invalidated, often by the narrowest of margins, laws that deny to new state citizens benefits

extended to long-term citizens. Until recently, the Court has applied puzzling and conflicting rationales for doing so.

Two cases dealt with veterans' preferences. *Hooper v. Bernalillo County Assessor* (1985) struck down a New Mexico law that granted a tax exemption to veterans of the VIETNAM WAR only if they resided in the state before May 8, 1976. Chief Justice WARREN E. BURGER's opinion followed the same path as his opinion in *Zobel v. Williams* (1982), concluding that the distinction between eligible and noneligible veterans violated EQUAL PROTECTION OF THE LAWS because "the statutory scheme cannot pass even the minimum rationality test." The dissent by Justice JOHN PAUL STEVENS argued that the state's need to budget for the future provided sufficient justification to pass the RATIONAL BASIS test. The same 6–3 division split the Justices in the other veterans' benefit case one year later, but ATTORNEY GENERAL OF NEW YORK V. SOTO-LÓPEZ (1986) produced different doctrinal arguments. The Court struck down a New York law that limited a veterans' civil service preference to veterans who resided in New York when they entered military service. Burger and Justice BYRON R. WHITE followed *Hooper*, arguing that the denial of the veterans' preference to new residents failed the equal protection rational basis standard. The PLURALITY OPINION of Justice WILLIAM J. BRENNAN, JR., however, relied on a "penalty" rationale, concluding that "even temporary deprivations of very important benefits and rights can operate to penalize migration."

Another case dealing with discrimination against new citizens involved a complicated Vermont statute providing an exemption from payment of use taxes for automobiles purchased in other states. The exemption was available only for persons who were Vermont residents when they purchased the automobiles. White's OPINION FOR THE COURT in WILLIAMS V. VERMONT (1985) held that the different treatment of new and old Vermont residents failed the rational basis standard.

The doctrinal confusion was tested, and resolved, in a case involving state limits on WELFARE BENEFITS awarded to new state citizens. SHAPIRO V. THOMPSON (1969) had established that states cannot deny all welfare benefits to recent arrivals. Instead, a number of states limited new citizens to the welfare benefits they would have received in their states of origin. The Court in SAENZ V. ROE (1999) rejected the argument that these limitations, unlike the total denial of welfare benefits, were reasonable and neither deterred nor penalized the right of interstate migration. Section 1 of the FOURTEENTH AMENDMENT provides that United States citizens become citizens of a state the moment they establish residence there. Whether travel was actually deterred was "beside the point" because the right to "travel" involved in this case was "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." Giving new citizens lesser benefits treated them as less than full state citizens.

In some cases, state laws imposing a waiting period might be justified as a reasonable test of bona fide residence. In SOSNA V. IOWA (1975), the Court sustained a requirement of one year's residence before filing for divorce. In VLANDIS V. KLINE (1973), the Court upheld a requirement that new residents pay out-of-state tuition in public universities during their first year. In *Saenz*, however, new arrivals were not awarded smaller benefits because there was doubt that they were bona fide residents.

The equal citizenship rationale of the *Saenz* case is new, but it is consistent with the outcome in all of the previous cases. It invalidates all laws giving new arrivals smaller state benefits, except those laws reasonably designed to assure bona fide state residence.

WILLIAM COHEN
(2000)

Bibliography

COHEN, WILLIAM 1994 Discrimination Against New State Citizens: An Update. *Constitutional Commentary* 11:73–79.

## RIGHT TO VOTE

See: Voting Rights

## RIGHT-TO-WORK LAWS

Union security provisions in LABOR contracts have required membership in, or financial support of, the signatory union by employees, as a condition of employment by the signatory employer. Concern that such provisions could be used to restrict employment unduly, to penalize dissent, and to infringe on employees' associational interests, stimulated the enactment of state right-to-work laws. Such laws, now operative in approximately twenty states, prohibit conditioning of employment on union membership or, generally, on financial support of a union.

The TAFT-HARTLEY ACT (1947) amended the National Labor Relations Act (NLRA) (1935) and imposed new restrictions on union security provisions, barring requirements of full-fledged union membership before or after employment and limiting compulsory membership to payment of uniform dues and initiation fees. Congress's approach appeared responsive to the argument that unions should be permitted, through collective bargaining, to secure financial support from all members of a bargaining unit, including those not members of the union, because the union's duty of fair representation encompasses all of them. Nonetheless, section 14(b), enacted by the Taft-

Hartley Act, permitted states to prohibit union security provisions otherwise legal under the NLRA. This extraordinary deference to state labor law contrasts sharply with the preemption of more restrictive state laws by the 1951 Railway Labor Act amendments (now applicable to both airline and railway employees).

The Supreme Court, in *Lincoln Federal Labor Union v. Northwestern Iron Metal Co.* (1949) and a companion case, *American Federation of Labor v. American Sash Co.*, upheld state right-to-work laws against challenges based on the CONTRACT CLAUSE and constitutional guarantees of FREEDOM OF SPEECH, FREEDOM OF PETITION and assembly, EQUAL PROTECTION, and DUE PROCESS OF LAW. The Court, moreover, negated any equal protection requirement that state remedies for discrimination against union members and nonmembers, respectively, be coextensive. The Court wryly observed that the unions' due process contentions were a reversion to the doctrines of LOCHNER V. NEW YORK (1905), ADAIR V. UNITED STATES (1908), and COPPAGE V. KANSAS (1915), which the Court had discarded—after having used them to invalidate prohibitions of YELLOW DOG CONTRACTS and other measures designed to protect workers' associational interests.

In *Retail Clerks v. Schermerhorn* (1963) the Supreme Court upheld state power "to enforce their laws restricting the execution and enforcement of union-security agreements." The Court, however, significantly limited state authority, stating that "[it] begins only with the actual negotiation and execution of the type of agreement described by §14(b)." Consequently, under section 14(b), a state could not properly enjoin PICKETING for an agreement proscribed by state law. The Court did not explain the reasoning behind the apparent anomaly of permitting a state to prohibit a completed agreement but not economic pressure to secure it. The Court may, however, have feared that state authority over such antecedent pressures would too often be used to restrict activity protected by the NLRA, such as peaceful picketing that publicizes substandard working conditions.

Otherwise valid union security agreements raise questions under the FIRST AMENDMENT when dissidents object to the use of compulsory financial exactions for political and other purposes not central to collective bargaining.

BERNARD D. MELTZER
(1986)

Bibliography

HAGGARD, T. 1977 Compulsory Unionism, the NLRB and the Courts: A Legal Analysis of Union Security Agreements. Philadelphia: Industrial Research Unit, Wharton School, University of Pennsylvania.

# RIPENESS

People who anticipate harm occasionally attack a law's constitutionality before it is applied to them, or even before the law takes effect. A federal court may decline to decide such a case for lack of ripeness if it is unclear that adjudication is needed to protect the challengers, or if information sufficient to permit intelligent resolution is not yet available. A matter of timing and degree, ripeness is grounded both in Article III's CASE OR CONTROVERSY requirement and the federal courts' reluctance to issue constitutional decisions needlessly or prematurely. Delaying decision may cause interim hardship and allow unconstitutional harm to occur, but further developments may narrow the issues, or produce important information, or even establish that no decision is needed.

The Supreme Court's ripeness decisions display varying sensitivity to these sometimes conflicting factors. Normally, a court is more likely to defer resolution of fact-dependent issues, like those based on a particular application of a law, than it is to defer adjudication of strictly legal issues. A single case may present some issues ripe for adjudication, but others not ripe. Ripeness decisions mainly respond, however, to the degree of contingency or uncertainty of the law's expected effect on the challenger.

Where leeway exists, the court may be influenced by determining whose interests a quicker decision would serve. Thus, when federal civil servants fearing dismissal for violation of the HATCH ACT asked that the political activities they were contemplating be declared constitutionally protected in *United Public Workers v. Mitchell* (1947), the Court found the case unripe absent enforcement of the act against some particular employee behavior. Similarly, a challenge to IMMIGRATION policy was held unripe in *International Longshoremen's Union v. Boyd* (1954) despite a strong indication that, without a ruling, resident ALIENS risked jeopardizing their right to return to the United States. With little doubt that the laws would be applied, the challengers nonetheless were forced to act at their peril. By contrast, when a delay in decision has threatened to frustrate government policy, the Court has resolved anticipatory challenges to laws whose future application appeared inevitable, including legislation restructuring some of the nation's railroads in the *Regional Rail Reorganization Act Cases* (1974) and the FEDERAL ELECTION CAMPAIGN ACTS in BUCKLEY V. VALEO (1976).

Sensitivity to the government's interest in quick resolution even led the Court to uphold a federal statute limiting aggregate operator liability for nuclear power plant explosions in *Duke Power Co. v. Carolina Environmental Study Group, Inc.* (1978), despite evidence that explosions

are unlikely and serious doubt that this statute would ever be applied. Because injury to the asserted right of unlimited recovery for nuclear disaster was unlikely to occur soon, if at all, the constitutional issues did not seem ripe; yet the Court concluded that the case was ripe, because the normal operation of nearby nuclear plants (whose development the statute had facilitated) threatened imminent pollution—even though the suit had not questioned the pollution's legality.

As the *Duke Power* case illustrates, the inherent policy choice in ripeness decisions—between finding constitutional adjudication premature and finding prevention of harm or validation of government policy timely—embodies important perceptions of judicial role in a regime characterized by the SEPARATION OF POWERS.

JONATHAN D. VARAT
(1986)

Bibliography

WRIGHT, CHARLES A.; MILLER, ARTHUR R.; and COOPER, EDWARD H. 1984 *Federal Practice and Procedure*. Vol. 13A:112–214. St. Paul, Minn.: West Publishing Co.

# RIPENESS
## (Update)

Like the STANDING and MOOTNESS DOCTRINES, the ripeness doctrine has been used to regulate the timing of federal courts' adjudication of challenges to government action. The principal purpose of all three doctrines is to verify that the plaintiff presently suffers the kind of concrete injury that has traditionally been the business of Anglo-American courts to remedy. In a moot case, the plaintiff has sued too late; in an unripe case, the plaintiff has sued too early.

Ripeness questions arise in at least three types of cases. In one group of cases, the plaintiff challenges the validity of ADMINISTRATIVE AGENCY regulations. In a second group, the plaintiff challenges the constitutionality of LEGISLATION. The third category consists of cases in which the plaintiff alleges a pattern and practice of unconstitutional law enforcement.

Frequently the plaintiff sues to have an administrative regulation declared invalid even before the administrative agency seeks to have it enforced. The agency typically argues that the case is unripe for adjudication. In *Abbott Laboratories v. Gardner* (1967), the Supreme Court set forth a two-part test to determine whether such cases are ripe. First, the court must determine whether the issues presented are "fit" for judicial resolution. That is, are the facts and procedural posture of the case sufficiently developed at this time to support a wise decision? Second, the court must consider how much hardship the parties would suffer if adjudication were deferred. In practice, the *Abbott Laboratories* test has contributed to the routine adjudication of regulations even before they are administratively enforced. The abundance of preenforcement review, in turn, may have impaired the quality and effectiveness of administrative rulemaking and adjudication.

The *Abbott Laboratories* test has sometimes been applied to cases posing constitutional challenges to legislation. The Court's record in this area is not a model of consistency. In general, however, the Court has tended to find such cases ripe when the plaintiff must either forgo what he believes is constitutionally protected conduct or engage in it and risk punishment. *Steffel v. Thompson* (1974) exemplifies the cruel dilemma. The plaintiff wished to distribute antiwar handbills at a private SHOPPING CENTER. He believed the activity was protected by the FIRST AMENDMENT. However, his handbilling companion had already been arrested and charged with criminal trespass. Unless the court were to resolve his claim for DECLARATORY JUDGMENT, he would be left with a choice between forgoing what he believed was protected conduct and the real possibility of punishment. The Court found the case ripe.

In a number of cases, plaintiffs have sought injunctions against police departments, prosecutors, or even judges who were allegedly engaged in patterns of racially discriminatory law enforcement. The Court has generally found such cases unripe. Individuals must wait until the allegedly discriminatory acts occur, then seek damages or criminal prosecution of the wrongdoers. These opinions manifest the protean quality of the ripeness doctrine. The Court's ripeness analysis in these cases relies heavily on conceptually unrelated notions about the proper relationship between federal courts and state SOVEREIGNTY. It remains to be seen whether the marriage of these unrelated ideas will form an important part of the genius of American constitutional government or whether it will subvert the very foundations of individual liberty under the RULE OF LAW.

EVAN TSEN LEE
(2000)

Bibliography

FALLON, RICHARD H., JR. 1984 Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of *Lyons*. *New York University Law Review* 59:1–75.

MASHAW, JERRY 1994 Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability. *Law and Contemporary Problems* 57:185–257.

NICHOL, GENE 1987 Ripeness and the Constitution. *University of Chicago Law Review* 54:153–183.

## *RIZZO v. GOODE*
423 U.S. 362 (1978)

*Rizzo* exemplifies the BURGER COURT's inhospitability to INSTITUTIONAL LITIGATION aimed at broad structural reform. Philadelphia citizens sued the mayor and other officials in federal court, alleging condonation of a pattern of police mistreatment of minority residents and others. The district court held long hearings, validated the plaintiffs' charges, and ordered the defendants to submit a comprehensive plan to improve complaint procedures and police discipline.

The Supreme Court, 5–3, held this order improper. The Court implied that the controversy lacked RIPENESS, and suggested that YOUNGER V. HARRIS (1971) might protect the action of state executives as well as state courts. The decision, however, rested on the ground that police supervisors had been insufficiently involved in the proved misconduct to justify the court's systemwide order.

KENNETH L. KASRT
(1986)

## ROANE, SPENCER
(1762–1822)

Spencer Roane, a Virginian, was the foremost judicial exponent of STATES' RIGHTS in the era of the MARSHALL COURT, and President THOMAS JEFFERSON would have made him Chief Justice of the United States had the opportunity arisen. Roane served for twenty-eight years (1794–1822) on Virginia's highest court. Before then he was a state legislator. He opposed RATIFICATION OF THE CONSTITUTION and never abandoned his belief that the national government possessed powers dangerous to the states.

Roane supported the authority of his court to hold unconstitutional a state act and even a congressional act, but he denied the authority of the Supreme Court to hold a state act unconstitutional. As leader of the nation's most influential state court he regarded the Supreme Court as a rival, and his words carried extrajudicial influence. He founded the Richmond *Enquirer* and ran Virginia politics. By the close of his life he headed an organization that controlled Virginia's press, its banks, its congressional delegation, and all three branches of its state government. He was JOHN MARSHALL's most formidable foe and outspoken opponent.

In the controversy leading to MARTIN V. HUNTER'S LESSEE (1816), Roane's court held unconstitutional section 25 of the JUDICIARY ACT OF 1789. In 1815 he described the United States as "a confederation of distinct sovereignties." His constitutional decisions differed from the Marshall Court's even on matters not involving the nature of the Union. He sustained the act later held void in TERRETT V. TAYLOR (1815) and supported the state in a case similar to DARTMOUTH COLLEGE V. WOODWARD (1819).

His vehement opposition to the nationalist doctrines of MCCULLOCH V. MARYLAND (1819) and COHENS V. VIRGINIA (1821) led him to denounce the Marshall Court in a series of essays in the Richmond *Enquirer*, which Jefferson warmly acclaimed and even JAMES MADISON tentatively endorsed. Roane's views on the Union were probably closer to those of 1787 than Marshall's. Doubtlessly Roane loved the "federal union" as he understood it, although Marshall called him "the champion of dismemberment." Roane was an able, orthodox judge who died a sectional advocate.

LEONARD W. LEVY
(1986)

Bibliography

MAYS, DAVID J. 1928 Judge Spencer Roane. *Proceedings of the Thirty-Ninth Annual Meeting of The Virginia State Bar Association* 39:446–464.

## *ROBBINS v. CALIFORNIA*

See: *Ross, United States v.*

## *ROBEL v. UNITED STATES*
389 U.S. 258 (1967)

Over two dissents, the WARREN COURT struck down on FIRST AMENDMENT grounds a section of the SUBVERSIVE ACTIVITIES CONTROL ACT of 1950 that prohibited the employment of members of the Communist party in "defense facilities" designated by the secretary of defense. Because the statute failed to distinguish between those who supported the unlawful goals of the party and those who did not, wrote Chief Justice EARL WARREN, its OVERBREADTH violated the right of association protected by the FIRST AMENDMENT. Warren rejected government arguments seeking to justify the provision by the WAR POWER and national security interests. "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile." Justices BYRON R. WHITE and JOHN MARSHALL HARLAN dissented, observing that the majority "arrogates to itself an inde-

pendent judgement of the requirements of national security."

MICHAEL E. PARRISH
(1986)

## ROBERTS, OWEN J.
(1875–1955)

Best known as an Associate Justice of the United States Supreme Court, Owen Josephus Roberts had a varied preliminary career—law practice and teaching, administration, and public service. In 1930, after the Senate Judiciary Committee rejected the nomination of Circuit Judge John J. Parker, President HERBERT C. HOOVER appointed Roberts, a Philadelphia Republican, who was approved without a dissenting vote. That same year, CHARLES EVANS HUGHES returned to the Court as Chief Justice of the United States.

Roberts and Hughes came to the Court in a period of sharp disagreement concerning not only the role of government in economic and social affairs but also the nature and scope of the judicial function itself. Both men were destined to play significant roles. Examples abound, and Hughes and Roberts were often joined. They agreed, for example, in sustaining Minnesota's moratorium on mortgage foreclosures in HOME BUILDING AND LOAN ASSOCIATION V. BLAISDELL (1934).

In NEBBIA V. NEW YORK (1934) Roberts, without using the word "emergency," upheld a New York statute regulating the price of milk. In WOLFF PACKING COMPANY V. COURT OF INDUSTRIAL RELATIONS (1923) Chief Justice WILLIAM HOWARD TAFT had invoked the concept of business AFFECTED WITH A PUBLIC INTEREST as a test of legitimate government power. Rejecting this test, Roberts observed: "The phrase can mean no more than that an industry for adequate reason is subject to control for the public good." Roberts also opposed the judicial notion that prices and wages were constitutionally immune from regulation. Thus the constitutional barriers Justice GEORGE H. SUTHERLAND had erected in ADKINS V. CHILDREN'S HOSPITAL (1923) against the District of Columbia minimum wage for women as the "heart of a contract" were weakened. Citing *Munn v. Illinois* (1877), Roberts recalled: "The DUE PROCESS clause makes no mention of sales or prices. . . . The thought seems, nevertheless, to have persisted that there is something peculiarly sacrosanct about prices and wages."

Roberts's *Nebbia* opinion also disavowed a broad scope of judicial power. Here, as in UNITED STATES V. BUTLER (1936), the judicial function involved "only one duty, to lay the article of the Constitution which is involved beside the statute which is challenged and to decide whether the latter squares with the former." The *Nebbia* opinion was thus hailed as indicating fair weather for FRANKLIN D. ROOSEVELT'S NEW DEAL legislation. Without specifying any particular level of government, Roberts declared: "This Court from the early days affirmed that the power to promote the general welfare is inherent in government." Yet, speaking for the Court in RAILROAD RETIREMENT BOARD V. ALTON RAILWAY COMPANY (1935), Roberts argued that Congress lacked power under the COMMERCE CLAUSE to pass any compulsory pension act for railroad workers. Hughes, LOUIS D. BRANDEIS, BENJAMIN N. CARDOZO, and HARLAN F. STONE dissented, the last rating this decision "the worst performance of the Court in my time."

UNITED STATES V. BUTLER apparently put the New Deal's legislative program beyond the scope of the TAXING AND SPENDING POWER. Roberts, invoking the TENTH AMENDMENT, argued that judicial endorsement of the AGRICULTURAL ADJUSTMENT ACT would "sanction legislative power without restriction or limitation" and convert Congress into a "parliament of the whole people, subject to no restrictions save such as are self-imposed." Roberts also voted with the conservatives in CARTER V. CARTER COAL COMPANY (1936), which set aside the Coal Conservation Act. Again the stumbling block was the Tenth Amendment. Coal mining, like agriculture, was local and therefore beyond the reach of national authority.

Meanwhile, overwhelming popular approval of the New Deal in the 1936 presidential election and the continuing high level of unemployment made it apparent that reliance on the states to cope with the economic emergency was misplaced. Blocking national action were four Supreme Court Justices, sometimes joined by Hughes and Roberts.

Roberts's judicial record appears inconsistent. Although the cases involved different issues, the shift between *Nebbia* on the one hand and *Alton* and *Butler* on the other is a clear instance of change. Some observers charged that Roberts, alarmed by Roosevelt's court-packing proposal of February 1937, shifted from a vote against the minimum wage in MOREHEAD V. NEW YORK EX REL. TIPALDO (1936) to one in favor of it in WEST COAST HOTEL COMPANY V. PARRISH (1937). Thus Roberts became famous as "a man of many minds."

In the personal rights area Roberts was, on occasion, conspicuously on the liberal side. Joined by Brandeis, Sutherland, and Butler, he dissented in *Snyder v. Massachusetts* (1934), insisting that when a jury visits the scene of a crime, the defendant and counsel must be present. In *Schneider v. Irvington* (1939) he voted to set aside a city ordinance restricting FREEDOM OF THE PRESS and distribution of nonadvertising circulars and pamphlets.

In HERNDON V. LOWRY (1937) Roberts wrote for the Court, which reversed the conviction of Angelo Herndon, a black organizer for the Communist party, who had been

found guilty of inciting insurrection by trying to enlist other blacks in that organization. The Georgia courts sentenced Herndon to eighteen years in prison. Said Roberts of the state act that penalized any attempt to incite an insurrection against the state: "The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the FREEDOM OF SPEECH and assembly that the law necessarily violates the guarantees of liberty embodied in the FOURTEENTH AMENDMENT." In BETTS V. BRADY (1942), however, Roberts for the Court held that the right to be represented by counsel in a noncapital felony case was not essential to due process of law (overruled in GIDEON V. WAINRIGHT, 1961).

During WORLD WAR II, when the Court, speaking through Justice HUGO L. BLACK in *Korematsu v. United States* (1944), upheld the compulsory transfer of Japanese American citizens to relocation centers, Roberts wrote an eloquent dissent. Joined by FRANK MURPHY and ROBERT H. JACKSON, he challenged Black's majority opinion, then the prevailing public view. He wrote: "[This] is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. . . . I need hardly labor the conclusion that constitutional rights have been violated."

Roberts and all his colleagues, including Stone, had held in GROVEY V. TOWNSEND (1935) that voting in PRIMARY ELECTIONS was not a constitutional prerogative but a privilege of party membership. In the famous case of UNITED STATES V. CLASSIC (1941) the Court, again speaking through Stone, without mentioning *Grovey*, ruled that participation in primaries was a right secured by the Constitution. Thus, with the adherence of Roberts, but without discussing *Grovey,* Stone brought traditional southern election customs to the brink of destruction. More alert than Roberts, commentators knew that another precedent had been broken. In 1944, when the Court overruled *Grovey,* Roberts exploded. "Not a fact differentiates that case (*Grovey*) from this, except the names of the parties. . . . If this Court's opinion in the *Classic* case discloses its method of overruling earlier decisions, I can protest that in "fairness,' it should rather have adopted the open and frank way of saying what it was doing. . . ." "The instant decision," Roberts fumed in SMITH V. ALLWRIGHT (1944), "tends to bring the adjudication of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."

New trends and new judicial personnel in a rapidly changing world disturbed Roberts. He asserted that law had become not a chart to govern but a game of chance. By 1941 the cordial relations he had previously enjoyed with his colleagues became strained. When Roberts retired in 1945, Chief Justice Stone drafted the customary letter to a departing colleague commenting: "You have made fidelity to principle your guide to decision." Black and WILLIAM O. DOUGLAS strongly objected, contending that this was precisely the quality Roberts lacked. Consequently no farewell letter was sent.

Roberts was a modest man, sensitive to his shortcomings. On leaving the bench he commented: "I have no illusion about my judicial career. . . . Who am I to revile the good God that did not make me a Marshall, a Taney, a Bradley, a Holmes, a Brandeis, or a Cardozo?"

ALPHEUS THOMAS MASON
(1986)

Bibliography

LEONARD, CHARLES A. 1971 *A Search for Judicial Philosophy: Mr. Justice Roberts.* Port Washington, N.Y.: Kennikat Press.

MASON, ALPHEUS T. 1956 *Harlan Fiske Stone: Pillar of the Law.* New York: Viking.

NOTE 1955 Owen J. Roberts—In Memoriam. *University of Pennsylvania Law Review* 104:311–317.

## *ROBERTS v. CITY OF BOSTON*
5 Cush. (Mass.) 198 (1850)

In BROWN V. BOARD OF EDUCATION (1954) the Court observed that the SEPARATE BUT EQUAL DOCTRINE "apparently originated in *Roberts v. City of Boston.*" Chief Justice LEMUEL SHAW's opinion in that case had an extraordinary influence. The courts of at least ten states relied on it as a precedent for upholding segregated education. In HALL V. DECUIR (1878) the Supreme Court cited it as an authority for the rule that "equality does not mean identity." In PLESSY V. FERGUSON (1896) the Court relied on it as the leading precedent for the validity of state legislation requiring racial SEGREGATION in places where whites and blacks "are liable to be brought in to contact," and in GONG LUM V. RICE (1927) the Court explained *Roberts* as having sustained "the separation of colored and white schools under a state constitutional injunction of EQUAL PROTECTION, the same as the FOURTEENTH AMENDMENT. . . ."

*Roberts* arose as a TEST CASE to determine the validity of Boston's requirement that black children attend segregated schools. CHARLES SUMNER, attacking that requirement, denied that a racially separate school could be equal, because it imposed a stigma of caste and fostered prejudice.

Shaw, for a unanimous Supreme Judicial Court, agreed that the case presented the question whether the separate schools for blacks violated their constitutional right to equality. But he reasoned that all rights must depend on laws adapted to the "respective relations and conditions" of individuals. He believed that the school committee had exercised "a discriminating and honest judgment" in deciding that the good of both races was best promoted by the separate education of their children. The law, Shaw said in reply to Sumner, did not create prejudice, probably could not change it, and might only foster it by "compelling" both races to attend "the same schools." Thus, by a singular absence of considered judgment, the court found no constitutional violation of equal protection in compulsory racial segregation as long as blacks had an equal right to attend public schools.

LEONARD W. LEVY
(1986)

## *ROBERTS v. LOUISIANA*

See: Capital Punishment Cases of 1976

## *ROBERTS v. UNITED STATES JAYCEES*

See: Freedom of Association

## *ROBINSON, UNITED STATES v.*
414 U.S. 218 (1973)

The Supreme Court here resolved the question whether the FOURTH AMENDMENT permits a full search of the person INCIDENT TO ARREST for a minor offense. This question is particularly acute in cases of traffic offenses, where police commonly make arrests in order to search drivers and their automobiles.

In *Robinson* the police stopped an automobile and arrested its driver for operating the vehicle without a license. A search of his clothing uncovered heroin. Because searches incident to arrest are allowed for the purpose of discovering concealed weapons and evidence, Robinson's counsel argued that such searches are unjustified in connection with routine traffic arrests: they will seldom yield evidence related to the traffic offense itself, and the chances of the driver's being armed are usually minimal.

The Supreme Court ruled, however, that a search incident to a custodial arrest requires no justification beyond the arrest; it is not an exception to the warrant requirement, but rather is itself a reasonable search. It was "speculative" to believe that those arrested for driving without a license "are less likely to be armed than those arrested for other crimes." Any lawful arrest justifies "a full search of the person."

JACOB W. LANDYNSKI
(1986)

## ROBINSON-PATMAN ACT
49 Stat. 1526 (1936)

The rapid growth of chain stores during the Depression effectively bypassed the price discrimination prohibitions of the CLAYTON ACT by altering the basic lines of competition which that act addressed. Shortly after the Supreme Court invalidated the NATIONAL INDUSTRIAL RECOVERY ACT's codes of fair competition (beginning in SCHECHTER POULTRY CORPORATION V. UNITED STATES, 1935), Representative Wright Patman introduced a corrective bill into the House designed to regulate chain stores' use of economies of scale. As finally passed, the act amended section 2 of the Clayton Act. Although one section of the new act allowed price discrimination made "in good faith" to match a competitor's price, the act generally outlawed discrimination that "substantially lessened" competition or tended to create a monopoly. Other provisions prohibited the taking or making of allowances or commissions to buyers if not made proportionally. Buyers were also forbidden from "knowingly receiving" or inducing any discrimination. Although the act provided for suits by the Department of Justice and private individuals, the burden of enforcement fell on the FEDERAL TRADE COMMISSION. By tightening and narrowing section 2 of the Clayton Act, this legislation protected smaller firms by reducing the competitive advantages of large chains.

DAVID GORDON
(1986)

Bibliography

HANSEN, HUGH C. 1983 Robinson Patman Law: A Review and Analysis. *Fordham Law Review* 51:1113.

## *ROCHIN v. CALIFORNIA*
342 U.S. 165 (1952)

To dispose of evidence, Rochin swallowed drug capsules. Officers pummeled his stomach and jumped on him in an effort to make him throw up the evidence. That failing, they rushed him to a hospital where a doctor, on police instructions, pumped an emetic solution through a tube into Rochin's stomach, forcing him to vomit the capsules. With that evidence the state convicted Rochin as a drug pusher. The Supreme Court unanimously reversed his

conviction. Justice FELIX FRANKFURTER, for the Court, held that the state had violated Rochin's right to DUE PROCESS OF LAW. Due process, said Frankfurter, however "indefinite and vague," outlawed "conduct that shocks the conscience." State prosecutions must not, at the risk of violating due process, offend the "sense of justice" or of "fair play." Due process enjoined a respect for the "decencies of civilized conduct."

Justices HUGO L. BLACK and WILLIAM O. DOUGLAS, concurring separately, repudiated Frankfurter's reasoning as excessively subjective. His "nebulous" standard of due process, they believed, allowed the Court to draw upon undefinable notions of justice or decency or fairness. They would have ruled that the state violated Rochin's Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION, which the FOURTEENTH AMENDMENT incorporated.

LEONARD W. LEVY
(1986)

## *ROCK ROYAL CO-OP, INC., UNITED STATES v.*

See: *Wrightwood Dairy Co., United States v.*

## RODNEY, CAESAR A.
(1772–1824)

Elected to the HOUSE OF REPRESENTATIVES in 1802, Jeffersonian Congressman Caesar Augustus Rodney became one of the managers of the IMPEACHMENT of Justice SAMUEL CHASE. In that capacity he argued that any deviation from GOOD BEHAVIOR on the part of a judge constituted a MISDEMEANOR in the constitutional sense and was, therefore, an impeachable offense even if not an indictable crime.

As attorney general of the United States (1807–1811), Rodney asserted President THOMAS JEFFERSON's right to overrule a federal court decision on enforcement of the EMBARGO ACTS and defended, in EX PARTE BOLLMAN AND SWARTWOUT (1807), prosecutions for constructive TREASON.

DENNIS J. MAHONEY
(1986)

## *ROE v. WADE*
410 U.S. 113 (1973)
## *DOE v. BOLTON*
410 U.S. 179 (1973)

In these cases the Supreme Court confronted the emotionally charged issue of abortion. The decisions invalidated two states' ABORTION laws—and, by inference, similar laws in a majority of states. As a result, the Court was plunged into prolonged and intense controversy, ranging from questions about the bearing of morality on constitutional law to questions about the proper role of the judiciary in the American system of government. The Court held unconstitutional a Texas law forbidding abortion except to save the pregnant woman's life and also invalidated several features of a Georgia law regulating abortion procedures and limiting abortion to Georgia residents.

The two women whose fictitious names grace the cases' titles were pregnant when they filed their actions in 1970, but not at the time of the Supreme Court's decision. The Court nonetheless held that their cases were not moot; rigid application of the MOOTNESS doctrine would prevent appellate review of an important issue that was capable of repetition. Nine doctors were also held to have STANDING to challenge the Georgia law; the intervention of a doctor under prosecution in Texas was held improper under the equitable ABSTENTION principle of YOUNGER V. HARRIS (1971); and a Texas married couple was denied standing because the woman had not been pregnant. The Court thus proceeded to the constitutional merits.

The *Roe* opinion, by Justice HARRY A. BLACKMUN, reviewed the history of abortion laws and the recent positions on abortion taken by medical groups and the American Bar Association, but the Court grounded its decision on neither history nor current professional opinion. Instead, the Court relied on a constitutional right of PRIVACY previously recognized in GRISWOLD V. CONNECTICUT (1965) and now relocated in the "liberty" protected by the DUE PROCESS clause of the FOURTEENTH AMENDMENT. This right included "a woman's decision whether or not to terminate her pregnancy," which decision was a FUNDAMENTAL INTEREST that could be restricted only on a showing of a COMPELLING STATE INTEREST.

The Court identified two state interests that would qualify as "compelling" at different stages in pregnancy: protection of maternal health and protection of potential life. Before discussing these interests, however, the Court dealt with a preliminary question: whether a fetus was a PERSON within the meaning of the Fourteenth Amendment. In an abortion, of course, it is not the state that denies life to a fetus; presumably the point of the Court's question was that if a fetus were a "person," the amendment should not be read to bar a state from protecting it against being aborted. The Court concluded, however, that a fetus was not a "person" in the amendment's contemplation. In reaching this conclusion, Justice Blackmun said: "We need not resolve the difficult question of when life begins." Absent a consensus among doctors, philosophers, or theologians on the issue, "the judiciary, at this point in the development of man's knowledge, is not in a

position to speculate as to the answer." In any event, the law had never recognized the unborn "as persons in the whole sense." That conclusion alone, however, could not dispose of the question of the state's power. A state can constitutionally protect beings (or even things) that are not persons—including fetuses, which surely can be protected by law against certain kinds of experimentation or disposal, even though the law may be motivated by a feeling that fetuses share our common humanity.

The Court did recognize the state's interests in protecting maternal health and potential life; each would become "compelling" at successive stages of pregnancy. During the first trimester of pregnancy, neither interest is compelling; the abortion decision and its implementation must be left to the woman and her doctor. During the second trimester, the interest in maternal health becomes sufficiently compelling to justify some state regulations of the abortion procedure. When the fetus becomes "viable"—capable of life outside the womb, around the beginning of the third trimester of pregnancy—the state's interest in potential life becomes sufficiently compelling to justify prohibiting abortion except to preserve the "life or health" of the mother.

This scheme of constitutional rights has the look of a statute and evidently was influenced by New York's liberal law and the American Bar Association's model abortion law. Investigative reporters tell us that the three-part scheme resulted from negotiation among the Justices, and it is hard to see it as anything but a compromise between banning abortion altogether and turning over the entire abortion decision to the pregnant woman.

Justice BYRON R. WHITE, dissenting, complained that the Court had permitted abortion to satisfy "the convenience, whim or caprice of the putative mother." Chief Justice WARREN E. BURGER, concurring, responded that the Court had rejected "any claim that the Constitution requires abortion on demand" in favor of a scheme relying on doctors' "medical judgments relating to life and health." The Court's opinion deals ambiguously with the doctor's decisional role. At one point it states that the abortion decision "must be left to the medical judgment of the pregnant woman's attending physician." Yet the Court's decision rests on the constitutional right to privacy, which includes "a woman's decision whether or not to terminate her pregnancy." Very likely Justice Blackmun, a former general counsel of the Mayo Clinic, was influenced by the medical authorities he cited. Indeed, the Blackmun and Burger opinions both convey an inclination to convert abortion issues into medical questions. Linking the state's power to forbid abortions with "viability" is one example—although it is unclear how the Court will respond when medical technology permits the preservation of very young fetuses outside the womb. Similarly, a supposed lack of medical consensus made the Court reluctant to decide when life begins.

The issues in *Roe*, however, were not medical issues. First, there is no medically correct decision concerning an abortion when the pregnant woman's health is not endangered. Second, there is no lack of medical consensus about what happens in the normal process of reproduction from insemination to birth. In some sense "life" begins at conception; to say otherwise is not to make a medical judgment but to decide a question of law or morality. The problem before the Court in *Roe* was to determine whether (or when) a state could constitutionally protect a fetus. The state's interest in potential life surely begins at the time of conception, and arguably before. Yet if *Griswold* and EISENSTADT V. BAIRD (1972) remained good law, the state could not constitutionally protect that interest by forbidding contraception. Most people do not equate the use of "morning after" pills or intrauterine devices with murder, although these forms of "contraception" are really ways of effecting abortion after conception. In 1973 no state was enforcing its abortion laws against such practices. Yet the argument that "life" begins at conception, for purposes of defining legal or moral rights, embraced the claims of both the newest embryo and the eight-month fetus. There was evident artificiality in the Court's selection of "viability" as the time when the state's concerns for potential life became "compelling," but there would have been artificiality in any resolution of the issue of state power other than an all-or-nothing decision.

In *Roe*'s companion case, *Doe v. Bolton*, the Court held invalid four provisions of Georgia law, requiring that abortions be: (1) performed in hospitals accredited by the Joint Commission on Accreditation of Hospitals; (2) approved by hospital staff committees; (3) approved in each case by two physicians other than the pregnant woman's doctor; and (4) limited to Georgia residents. The latter requirement was an obvious violation of Article IV's PRIVILEGES AND IMMUNITIES clause, and the other three were held to impose unreasonable restrictions on the constitutional right recognized in *Roe*.

The *Roe* opinion has found few defenders; even the decision's supporters are inclined to offer substitute justifications. *Roe*'s critics divide roughly into two groups: those who regard abortion as murder, and those who think the Supreme Court exceeded its proper institutional bounds, failing to ground its decision in the Constitution and merely substituting its own policy judgment for that of the people's elected representatives.

The latter criticism touched off an impressive succession of essays on JUDICIAL REVIEW. It was the former group of critics, however, who dominated the politics of abortion. The "right to life" movement was, for a time, one of the nation's most effective "single issue" groups, achieving

enough respect from legislators to permit the adoption of laws withdrawing governmental financial aid to poor women who seek abortions. (See MAHER V. ROE, 1977; HARRIS V. MCRAE, 1980.) Various constitutional amendments to overturn *Roe* were proposed in Congress, but none was submitted to the states for ratification. In the early 1980s Congress considered, but did not adopt, a bill declaring that "human life begins from the moment of conception." Congress also heard proposals to withdraw federal court jurisdiction over abortion cases. (See JUDICIAL SYSTEM.) Yet the *Roe* decision has weathered all these political storms.

*Roe*'s stability as a precedent is founded on the same social and political base that initially supported the decision. It was no accident that *Roe* was decided in the 1970s, when the movement against SEX DISCRIMINATION was winning its most important constitutional and political victories. The abortion question was not merely an issue between pregnant women and their unwanted fetuses; it was also a feminist issue, going to women's position in society in relation to men. Even today American society imposes a greater stigma on unmarried women who become pregnant than on the men who father their children, and society still expects women to take the major responsibility for contraception and child care. The implications of an unwanted pregnancy or parenthood for a woman's opportunities in education, employment, and personal association—indeed, for the woman's definition of self—are enormous. Justice White's dissenting remark, that abortion regulation is an issue about which "reasonable men may easily and heatedly differ," perhaps said more than he intended to say.

KENNETH L. KARST
(1986)

(SEE ALSO: *Reproductive Autonomy.*)

Bibliography

ELY, JOHN HART 1973 The Wages of Crying Wolf: A Comment on *Roe v. Wade*. *Yale Law Journal* 82:920–949.

HENKIN, LOUIS 1974 Privacy and Autonomy. *Columbia Law Review* 74:1410–1433.

Symposium on the Law and Politics of Abortion. 1979 *Michigan Law Review* 77:1569–1646.

TRIBE, LAURENCE H. 1978 *American Constitutional Law*. Pages 923–934. Mineola, N.Y.: Foundation Press.

WOODWARD, BOB and ARMSTRONG, SCOTT 1979 *The Brethren: Inside the Supreme Court*. Pages 165–189, 229–240. New York: Simon & Schuster.

## *ROGERS v. LODGE*
458 U.S. 613 (1982)

*Rogers v. Lodge* involved a successful challenge to an at-large electoral scheme for county commissioners in Burke County, Georgia. The Supreme Court noted that at-large systems are not unconstitutional per se and that a challenge could succeed only upon a showing that the system was established or maintained for a discriminatory purpose. All sides conceded that blacks in Burke County had free access to registration, voting, and candidacy for office. The issue was not, therefore, equal participation in the electoral process but "effective" participation. The Court held that where there was evidence of the lingering effects of past RACIAL DISCRIMINATION that had limited "the ability of blacks to participate effectively in the political process," the district court was justified in finding that an electoral scheme that did not hold at least the potential of electing minority members to office in proportion to their numbers was maintained for discriminatory purposes in violation of the EQUAL PROTECTION clause. Thus the Court, while not requiring proportional representation, nevertheless permitted it to be used as the test in determining whether an electoral system worked to "diminish or dilute the political efficacy" of minorities.

EDWARD J. ERLER
(1986)

## *ROGERS v. RICHMOND*
365 U.S. 534 (1961)

This is one of numerous cases prior to MALLOY V. HOGAN (1964) dealing with the question whether a confession was voluntary under a DUE PROCESS standard or coercive in violation of that standard. *Rogers* is significant because it was the first case in which the Court repudiated the test of trustworthiness as an element of the due process standard. Justice FELIX FRANKFURTER, for a 7–2 Court, declared that even if a confession were true or reliable, it should be excluded from admission in evidence if involuntary. Our system is accusatorial, not inquisitorial, Frankfurter said, and therefore the state must establish guilt by evidence not coerced from the accused.

LEONARD W. LEVY
(1986)

## *ROMER v. EVANS*
517 U.S. 620 (1996)

Adopted by REFERENDUM in 1992, Amendment 2 to the Colorado Constitution provided that no state entity could provide any protection against discrimination based on homosexuality. The scope of Amendment 2 was unclear. Certainly it partially repealed several gay-rights ordinances, invalidating their protections for homosexuals but not their protections for heterosexuals. Likely it also barred

state entities from telling their employees not to deny services to gay citizens. It could be repealed only by another amendment to the Colorado Constitution. In *Romer v. Evans* (1996), the Supreme Court invalidated Amendment 2 as a violation of the federal EQUAL PROTECTION clause.

*Romer* did not say that Amendment 2 unconstitutionally imposed electoral-process handicaps on a voting minority; or that SEXUAL ORIENTATION is a SUSPECT CLASSIFICATION; or that BOWERS V. HARDWICK (1986) is bad law.

Instead, the six-Justice majority held that Amendment 2 violated the Constitution's guarantee of equal protection of the laws "in the most literal sense" because it denied a designated group equality in seeking aid from the government. Furthermore, Amendment 2 failed RATIONAL BASIS review because it was so sweeping and yet so ill-fitted to the single trait it identified that the Court refused to credit its asserted justifications (FREEDOM OF ASSOCIATION and conservation of ANTIDISCRIMINATION resources). Amendment 2 showed "animus," a "bare . . . desire to harm an unpopular political group"—legislative purposes already ruled invalid in cases such as *Department of Agriculture v. Moreno* (1973) and CLEBURNE V. CLEBURNE LIVING CENTER, INC. (1985).

Justice ANTONIN SCALIA (with Chief Justice WILLIAM H. REHNQUIST and Justice CLARENCE THOMAS) vehemently disagreed. Far from denying equal protection of the laws, Scalia said, Amendment 2 only barred state subdivisions from giving special rights to an insistent minority. *Hardwick* had held that a popular majority rationally expresses its disapproval of homosexuality by criminalizing homosexual sodomy; surely voters can elect instead the more tolerant terms of Amendment 2. Indeed, the majority's silence about *Hardwick*, and the complete lack of PRECEDENT supporting its theory of "literal" violation, show indifference to the RULE OF LAW, judicial will to usurp democratic processes, and elite contempt for popular moral views.

*Romer* raises more questions than it answers. Is *Hardwick* OVERRULED? How far can government go in discriminating against homosexuals on the grounds of popular disapproval of them? When is antidiscrimination a "special right"? Does Amendment 2 exemplify the virtues or the dangers of DIRECT DEMOCRACY? Who decides on controversial social control measures promoting the good life: localities, state legislatures, state plebescites, or federal courts enforcing the Constitution?

JANET E. HALLEY
(2000)

Bibliography

FORD, RICHARD 1999 Law's Territory: A History of Jurisdiction. *Wisconsin Law Review* 97:843–930.

KARLAN, PAMELA S. 1997 Just Politics?: Five Not So Easy Pieces of the 1995 Term. *Houston Law Review* 34:289–313.

KEEN, LISA and GOLDBERG, SUZANNE 1998 *Strangers to the Law: Gay People on Trial.* Ann Arbor: University of Michigan Press.

SEIDMAN, LOUIS MICHAEL 1996 *Romer*'s Radicalism: The Unexpected Revival of Warren Court Activism. *Supreme Court Review* 1996:67–121.

SUNSTEIN, CASS R. 1996 Foreword: Leaving Things Undecided. *Harvard Law Review* 110:4–101.

SYMPOSIUM 1997 Gay Rights and the Courts: The Amendment 2 Controversy. *University of Colorado Law Review* 68:285–452.

## ROOSEVELT, FRANKLIN D.
(1882–1945)

Franklin Delano Roosevelt, four-time President of the United States, received his formal instruction in the constitutional system at Harvard College (1900–1904) and Columbia Law School (1904–1907). The mood of the Progressive period, however, was more potent than academic doctrine in shaping his understanding of the constitutional process.

His kinsman THEODORE ROOSEVELT, for whom he cast his first presidential vote in 1904, saw the Constitution "not as a straitjacket . . . but as an instrument designed for the life and healthy growth of the Nation." T. R. further saw the courts as "agents of reaction" and the President as the "steward of the people." If necessary, the President must be prepared to act as the savior of the Constitution against the courts, a role in which T. R. cast himself when he proposed the recall of judicial decisions in 1912. Service under WOODROW WILSON confirmed the young Franklin Roosevelt's belief in a spacious reading of executive authority, and experience as assistant secretary of the navy in wartime Washington showed him how emergency expanded presidential initiative.

After the Wilson administration, Roosevelt's return to legal practice was interrupted when he was crippled in 1921 by poliomyelitis. Elected governor of New York in 1928, he soon confronted the consequences of the Wall Street crash of 1929. He foresaw no constitutional objections to his state programs of unemployment relief, public power development, and land planning. "The United States Constitution," he said in a 1930 speech, "has proved itself the most marvelously elastic compilation of rules of government ever written." Though Roosevelt's purpose in that speech was to vindicate STATES' RIGHTS, he proved marvelously elastic himself when elected President in 1932. Favoring the concentration of power at whatever level of government he happened to be serving, he became thereafter a resolute champion of federal authority.

"Our Constitution," he said in his first inaugural address, "is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form." He hoped, he continued, to preserve the normal balance between executive and legislative authority. However, if the national emergency remained critical, "I shall ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage a war against the emergency." He thus combined optimism about the essential elasticity of the Constitution with an understanding that extraordinary executive initiative must rest, not on inherent presidential power, but on the delegation to the President of powers possessed by Congress. To this he added a certain pessimism about the federal courts, assuming, as he had said during the 1932 campaign, that the Republican party had been in "complete control of all branches of the Federal Government . . . the Supreme Court as well."

For this last reason he was in no hurry to send NEW DEAL legislation through the gantlet of the Supreme Court. The first major test came in February 1935 over the constitutionality of the congressional JOINT RESOLUTION of June 1933 abrogating the so-called gold clause in public and private contracts. If the Court invalidated the resolution, the result would increase the country's total debt by nearly $70 billion. Roosevelt prepared a radio speech attacking an adverse decision and planned to invoke EMERGENCY POWERS to mitigate the effects. But while the Court, in PERRY V. UNITED STATES (1935), held the repudiation of the gold clause unconstitutional with regard to government bonds (though not to private obligations), it also held that, because the plaintiff had suffered no losses, he was not entitled to compensation. The administration's monetary policy remained precariously intact. (See GOLD CLAUSE CASES.)

But three months later in a 5–4 decision the Court nullified the Railroad Retirement Act as an invalid use of the commerce power. Then on May 27, in SCHECHTER POULTRY CORP. V. UNITED STATES it struck down the NATIONAL INDUSTRIAL RECOVERY ACT on two grounds: that the act involved excessive DELEGATION OF POWER by Congress, and that it exceeded the reach of congressional power under the COMMERCE CLAUSE. The vote against the National Recovery Administration was unanimous, as were two other decisions the same day—"Black Monday" in the eyes of New Dealers—one holding the FRAZIER-LEMKE FARM BANKRUPTCY ACT unconstitutional, the other denying the President the power to remove a member of a regulatory commission without congressional consent. If the Court was warning Roosevelt not to go to extremes, Roosevelt responded by warning the Court not to go to extremes either. Calling the SCHECHTER decision "more important probably than any decision since [DRED SCOTT V. SANDFORD (1857)]," he said that it carried the Constitution back to "the horse-and-buggy definition of INTERSTATE COMMERCE."

Undeterred, the Court majority prosecuted its attack. In January 1936 six Justices in UNITED STATES V. BUTLER pronounced agriculture a "local" subject, beyond Congress's power, and set aside the AGRICULTURAL ADJUSTMENT ACT. Justice HARLAN F. STONE protested a "tortured construction of the Constitution" in an eloquent dissent. The Court majority, however, proceeded to strike down the Guffey Bituminous Coal Conservation Act, the Municipal Bankruptcy Act, and, finally, in MOREHEAD V. NEW YORK EX REL. TIPALDO (1936), a New York minimum wage law. The Court, Roosevelt now said, had thereby created a "no-man's-land' where no Government—State or Federal—can function." Between 1789 and 1865 the Court had declared only two acts of Congress unconstitutional; now, between 1934 and 1936, it invalidated thirteen. Doctrines propounded by the Court majority held out small hope for the SOCIAL SECURITY ACT, the WAGNER NATIONAL LABOR RELATIONS ACT, and other New Deal laws awaiting the judicial test. Roosevelt concluded that "[JOHN] MARSHALL's conception of our Constitution as a flexible instrument—adequate for all times, and, therefore, able to adjust itself as the new needs of new generations arose—had been repudiated."

By 1936 apprehension was spreading about the destruction of the New Deal by the unelected "Nine Old Men." Congress and the law schools were astir with proposals to rein in the Court. Roosevelt outlined three possibilities to his cabinet: limiting the power of the Court to invalidate congressional legislation; making an explicit grant to Congress of powers now in dispute; or ("a distasteful idea") packing the Court by appointing new judges. The first two courses required constitutional amendments. Roosevelt soon decided that an amendment would be difficult to frame, even more difficult to ratify, and in any event subject to judicial interpretation. The problem lay not in the Constitution but in the Court. In early 1936 he instructed Attorney General HOMER CUMMINGS to prepare in utmost secrecy a plan, short of amendment, that would overcome the Court's resistance.

Roosevelt did not make the Court an issue in the 1936 campaign. But his smashing victory in November convinced him that the moment had arrived. Cummings proposed legislation providing for the appointment of new Justices when sitting Justices failed to retire at the age of seventy. Roosevelt sprang the plan in a message to Congress on February 5, 1937. Claiming overcrowded dockets and overworked and overage judges, Roosevelt requested legislation that would enable him to appoint as many as six new Justices.

Postelection euphoria had evidently marred Roosevelt's

usually astute political judgment. Wider consultation might at least have persuaded him to make his case as an honest confrontation of power. The pretense that he was seeking merely to ease the burdens of the Court relied on arguments that Chief Justice CHARLES EVANS HUGHES soon demolished in a letter to the Senate Judiciary Committee. By the time Roosevelt began to present the true issue—"We must take action to save the Constitution from the Court and the Court from itself"—his initial trickiness had lost the court plan valuable momentum.

The Chief Justice had further resources. On March 29, in WEST COAST HOTEL V. PARRISH, a 5–4 Court upheld a Washington minimum wage law, thereby in effect overruling the *Tipaldo* decision taken the preceding term. The "switch in time" that "saved nine" was provided by Justice OWEN J. ROBERTS; because *Parrish* had been argued in December, Roberts's second thoughts, if affected by external circumstances, responded to the election, not to the Court plan. In March, the Court also upheld a slightly modified version of the Farm Bankruptcy Act rejected two years earlier. In April, in *National Labor Relations Board v. Jones Laughlin Steel Corporation*, the Court approved the National Labor Relations Act in a 5–4 decision in which, as Roberts later conceded, both he and Hughes reversed the position they had taken in condemning the Guffey Act the year before. In May the Court upheld the Social Security Act.

In two months, the Court, under the pressure of the election and the Roosevelt plan, wrought a constitutional revolution, recognizing in both federal and state governments powers it had solemnly denied them in the two previous years as contrary to the Constitution. It greatly enlarged the federal commerce power and the TAXING AND SPENDING POWER, gave new force to the GENERAL WELFARE CLAUSE, altered the application of the DUE PROCESS clause to the states, and abandoned the doctrine of excessive delegation as a means of invalidating federal legislation.

The Court's revisionism, by lessening the felt need for reform, strengthened opposition, already vehement, to the President's plan for the Court. Democrats joined Republicans in denouncing "court-packing." In May the decision of Justice WILLIS VAN DEVANTER to resign, opening the way for Roosevelt's first Supreme Court appointment, further weakened pressure for the plan. In the interests of Senate passage, Roosevelt promised the vacancy to the majority leader Senator Joseph T. Robinson. As Robinson was both old and conservative, he was an anomalous reform choice. By summer Roosevelt was belatedly ready to entertain compromise. But Robinson's death in July brought the bitter struggle to an end.

The insouciance with which Roosevelt presented the Court plan exacted heavy costs in the future of his domestic program, the unity of his party, the confidence of the electorate, and his own self-confidence. Still, the plan attained its objective. As ROBERT H. JACKSON summed it up, "The President's enemies defeated the court reform bill—the President achieved court reform." The plan forced the Court to abandon rigid and restrictive constitutional views; at the same time, the plan's rejection eliminated COURT PACKING as a precedent for the future. History may well conclude both that Roosevelt was right to propose the plan and that the opposition was right to beat it.

In the next half dozen years Roosevelt made the Court his own, appointing HUGO L. BLACK (1937), STANLEY F. REED (1938), FELIX FRANKFURTER (1939), WILLIAM O. DOUGLAS (1939), FRANK MURPHY (1940), JAMES F. BYRNES (1941), Robert H. Jackson (1941), and WILEY B. RUTLEDGE (1943) as Associate Justices and Harlan F. Stone as Chief Justice (1941). In time the Roosevelt Court itself split between the apostles of judicial restraint, who had objected to the methods of the "Nine Old Men," and the activists, who had objected only to their results. But the new Court was united in affirming the reach of the national government's constitutional power to meet the social and economic problems created by the Great Depression.

With the status of New Deal legislation thus assured, Roosevelt's next tangle with constitutional issues took place in FOREIGN AFFAIRS. The Court in UNITED STATES V. CURTISS-WRIGHT EXPORT CORPORATION (1936) had unanimously endorsed the propositions that "the powers of external SOVEREIGNTY did not depend upon the affirmative grants of the Constitution" and that the President had in foreign affairs "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." But Congress still had statutory control over vital areas of foreign policy. Neutrality, for example, had been a congressional prerogative since 1794. While Roosevelt requested discretionary neutrality legislation, he saw no practical choice but to accept mandatory laws passed by a stubbornly isolationist Congress. These laws placed the administration in a foreign policy straitjacket from which it sought to wriggle free to the very eve of Pearl Harbor.

Congress, too, retained the constitutional power to declare war. As Roosevelt reminded the French prime minister during the fall of France in 1940, assurance of aid did not imply military commitments; "only the Congress can make such commitments." And legislative power extended to a variety of defense questions. When Winston S. Churchill asked for the loan of old American destroyers, Roosevelt initially responded that "a step of that kind could not be taken except with the specific authorization of the Congress." Later Roosevelt was persuaded that he could make the transfer through executive action. Attorney General Robert H. Jackson's official opinion to this effect rested not on claims of inherent power as President

or COMMANDER-IN-CHIEF but on the construction of laws passed by Congress. Critics found the argument strained, but public opinion supported the action.

The decisive step marking the end of American neutrality was the Lend-Lease Act, passed after full and vigorous debate in March 1941. Once Congress had authorized the lending and leasing of goods to keep Britain in the war, did this authority not imply an effort to make sure that the goods arrived? So Roosevelt evidently assumed, trusting that a murky proclamation of "unlimited national emergency" in May 1941 and the impact of Nazi aggression on public opinion would justify his policy. When Grenville Clark urged a joint resolution by which Congress would explicitly approve measures necessary to assure the delivery of supplies, Roosevelt replied in July that the time was not "quite right." The renewal of the draft the next month by a single-vote majority in the House of Representatives showed the fragility of congressional support. By autumn the navy, on presidential orders and without congressional authorization (until Neutrality Act revision in November), was fighting an undeclared war against Germany to protect convoys in the North Atlantic.

Roosevelt's actions in the latter part of 1941, like ABRAHAM LINCOLN's after the fall of Fort Sumter, were arguably unconstitutional, though not without historical precedent. He did not seek to justify the commitment of American forces to combat by pleas of inherent power as President or as Commander in Chief, and thereby proposed no constitutional novelties. If pressed, he perhaps would have associated himself with JOHN LOCKE, THOMAS JEFFERSON, and Abraham Lincoln in asserting not continuing presidential power but emergency prerogative to be exercised only when the life of the nation was at stake.

Entry into war, as always, increased unilateral presidential authority. When under the New Deal Roosevelt had acted most of the time on the basis of specific statutes, as a war President he acted very often on the basis of general powers claimed as "Commander in Chief in wartime" and on emergency powers activated by proclamation and conferred on an all-purpose agency, the Office of Emergency Management. Of the agencies established in 1940–1943 to control the war economy, only one, the Office of Price Administration, rested on a specific statute.

This statute ironically provoked Roosevelt's most notorious assertion of unilateral authority. The Price Control Act contained a farm parity provision deemed threatening to the anti-inflation program. Roosevelt told Congress in September 1942 that, if it did not repeal the provision within three weeks, he would refuse to execute it. "The President has the powers, under the Constitution and under Congressional Acts," he declared, "to take measures necessary to avert a disaster which would interfere with the winning of the war." He added, "When the war is won, the powers under which I act automatically revert to the people—to whom they belong."

The international threat, as always, increased pressure on CIVIL LIBERTIES. In 1940, while protesting his sympathy with OLIVER WENDELL HOLMES's condemnation of wiretapping in OLMSTEAD V. UNITED STATES (1928), Roosevelt granted his attorney general qualified permission to wiretap "persons suspected of SUBVERSIVE ACTIVITIES against the United States." Given the conviction Roosevelt shared with most Americans that a Nazi victory in Europe would have endangered the United States, he would have been delinquent in his duty had he not taken precautionary measures. Though we know now that the internal menace was exaggerated, no one could be sure of that at the time.

Roosevelt, however, extended his concern to include Americans honestly opposed to intervention, directing the Federal Bureau of Investigation to investigate isolationists and their organizations. There was so little government follow-up of Roosevelt's prodding, however, that the prods were evidently taken by his subordinates as expressions of passing irritation rather than constant purpose. In 1941 Roosevelt appointed FRANCIS BIDDLE, a distinguished civil libertarian, as attorney general and kept him on the job throughout the war despite Biddle's repeated resistance to presidential requests that threatened the BILL OF RIGHTS.

Roosevelt's preoccupation with pro-Nazi agitation increased after Pearl Harbor. "He was not much interested in the theory of SEDITION," Biddle later recalled, "or in the constitutional right to criticize the government in wartime. He wanted this anti-war talk stopped." In time, his prods forced a reluctant Biddle to approve the indictment of twenty-six pro-Fascist Americans under a dubious application of the law of CRIMINAL CONSPIRACY. A chaotic trial ended with the death of the judge, and the case was dropped.

Biddle also resisted the most shameful abuse of power within the United States during the war—the relocation of Americans of Japanese descent. Here Roosevelt responded both to local pressure, including that of Attorney General EARL WARREN of California, and to the War Department, where such respected lawyers as Henry L. Stimson and John J. McCloy demanded action. Congress ratified Roosevelt's EXECUTIVE ORDER before it was put into effect, so the relocation did not represent a unilateral exercise of presidential power. The Supreme Court upheld the program in the JAPANESE AMERICAN CASES (1943–1944).

Still, despite Roosevelt's moments of impatience and exasperation, his administration's civil liberties record during WORLD WAR II was conspicuously better than that of the Lincoln administration during the CIVIL WAR or of the Wilson administration during WORLD WAR I. In 1944 the AMERICAN CIVIL LIBERTIES UNION saluted "the extraordinary and

unexpected record . . . in freedom of debate and dissent on all public issues and in the comparatively slight resort to war-time measures of control or repression of opinion."

Roosevelt's presidency vindicated his conviction that social reform and military victory could be achieved without breaching the Constitution. A believer in a strong presidency, he was himself a strong President within, on the whole, constitutional bounds. His deviations from strict constitutional propriety were mostly under impressions, sometimes mistaken, of clear and present international danger. Those of his successors who claimed inherent presidential WAR POWERS went further than he ever did.

Roosevelt was a political leader, not a constitutional lawyer, and he correctly saw that in its major phase constitutional law is often a question of political and economic philosophy. No doubt his understanding of the practical necessity of consent was more important than technical appreciation of constitutional limitations in keeping his actions within the frame of the basic charter. But his presidency justified his inaugural assertion that the Constitution could meet extraordinary needs by changes in emphasis and arrangement without loss of essential form. His legacy was a revivified faith in the adequacy of the Constitution as a progressive document, equal to domestic and foreign emergency and "capable of meeting evolution and change."

ARTHUR M. SCHLESINGER, JR.
(1986)

Bibliography

ALSOP, JOSPEH and CATLEDGE, TURNER 1938 *The 168 Days.* Garden City, N.Y.: Doubleday.

BIDDLE, FRANCIS 1962 *In Brief Authority.* Garden City, N.Y.: Doubleday.

FREEDMAN, MAX, ed. 1967 *Roosevelt and Frankfurter: Their Correspondence, 1928–1945.* Boston: Little, Brown.

JACKSON, ROBERT H. 1941 *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics.* New York: Knopf.

MASON, A. T. 1956 *Harlan Fiske Stone: Pillar of the Law.* New York: Viking.

SCHLESINGER, ARTHUR M., JR. 1957–1960 *The Age of Roosevelt*, vols. I-III. Boston: Houghton Mifflin.

## ROOSEVELT, THEODORE
(1858–1919)

The son of a New York City merchant and philanthropist and a descendant of the original Dutch settlers of New Amsterdam, Theodore Roosevelt was graduated magna cum laude from Harvard College in 1879. He studied law for one year at Columbia University, but never completed law school or practiced law. When he was twenty-three years old he published his first book (the influential *Naval War of 1812*) and was elected to the New York state legislature on the Republican ticket. In his second term, having successfully campaigned for a LEGISLATIVE INVESTIGATION of statewide corruption, he was chosen minority leader of the state Assembly, and from that position he engineered passage of the state civil service reform measures proposed by Democratic Governor GROVER CLEVELAND.

In 1886, after two years of ranching in the Dakota badlands, Roosevelt returned to New York City and attempted to resume his political career, but he was defeated in his race for mayor. He held no political office until 1889, when President BENJAMIN HARRISON appointed him to the United States Civil Service Commission, a post in which he was retained when Cleveland returned to the presidency. In 1895, Roosevelt became president of the New York City Police Commission; for more than two years he did public battle with police corruption and demon rum.

When WILLIAM MCKINLEY was elected President, Roosevelt went back to Washington as the vigorous assistant secretary of the Navy. At the beginning of the Spanish American War in 1898, Roosevelt resigned his office in the Navy Department and raised a regiment of volunteer cavalry, which he subsequently led in combat in Cuba. Riding the crest of fame from his wartime exploits, Roosevelt was elected governor of New York in 1898 and vice-president of the United States in 1900.

Roosevelt succeeded to the presidency when McKinley was assassinated in September 1901. He immediately pledged that his aim was "to continue, absolutely unbroken, the policy of President McKinley." But neither his love of fame nor his reformist impulses would permit him to redeem that pledge. Having reached the highest office in the land at a younger age than anyone before or since, he displayed a degree of vigor and impatience far greater than his predecessors had done. He also had a more expansive view of the powers and duties of the President than any of his predecessors since ABRAHAM LINCOLN. Not only did he think of the presidency as a "bully pulpit" from which one might lead, rather than follow, public opinion, but he also conceived of the office as having a roving commission to do anything the public weal might require so long as the Constitution did not by its terms prohibit the proposed course of action.

In FOREIGN AFFAIRS, Roosevelt acted with particular energy. On his own initiative he imposed a form of government in the Philippines (a commission headed by WILLIAM HOWARD TAFT) that Congress subsequently confirmed in the Philippine Organic Act (1902). He arranged by treaty for America to take over the British interest in construction of a canal across the Isthmus of Panama and subse-

quently fomented a revolt of Panamanians against the government of Colombia so that a favorable PANAMA CANAL TREATY could be negotiated (1903) and work on the canal begun. When the Latin American countries of Venezuela and Santo Domingo (now the Dominican Republic) defaulted on loans from European banks, Roosevelt put those countries under American occupation and receivership rather than risk military intervention by Europeans in the Western Hemisphere. This policy he called his "corollary" to the MONROE DOCTRINE. When an American citizen was kidnapped in 1904 by a band of Moroccan brigands, Roosevelt ordered a force of sailors and marines to invade a neutral and sovereign state to secure the citizen's release. Roosevelt also personally mediated the settlement of the Russo-Japanese War in 1905 (thereby earning the Nobel Peace Prize), and his administration was instrumental in achieving agreements to guarantee the independence of Morocco (1906) and to settle disputes among the Central American republics (1907). When Congress refused to appropriate funds so that the United States fleet could make a round-the-world show-the-flag cruise, Roosevelt used his power as COMMANDER-IN-CHIEF to order the ships to go as far as they could, confident that Congress would appropriate the funds to bring them home.

In domestic policy, Roosevelt's administration was both nationalist and interventionist. Roosevelt resumed prosecutions under the SHERMAN ANTITRUST ACT (albeit not so vigorously as his later critics would have liked) and proposed what became the HEPBURN ACT (1906), giving the Interstate Commerce Commission authority to set railroad rates nationwide. He put the federal government into the business of conserving America's wild places and natural resources, creating the Inland Waterways Commission (1907) and the National Conservation Commission (1908).

Roosevelt was generally critical of the constitutional jurisprudence of his day, and especially of the Supreme Court's protection of SUBSTANTIVE DUE PROCESS OF LAW in cases relating to ECONOMIC REGULATION. He emphatically rejected the contention that criticism of the judiciary weakens respect for law and undermines the independence of the judiciary. In his sixth state-of-the-Union message, he said: "The judge has a power over which no review can be exercised; he himself sits in review upon the acts of both the executive and legislative branches of the government; save in the most extraordinary cases he is amenable only at the bar of public opinion; and it is unwise to maintain that public opinion in reference to a man with such power shall neither be exprest nor led." Influenced by some of the more radical strains of PROGRESSIVE CONSTITUTIONAL THOUGHT, he favored a right of popular "recall" of state judicial decisions, that is, of allowing decisions to be overturned by a vote of the people. His first appointee to the Supreme Court, OLIVER WENDELL HOLMES of Massachusetts, initially so disappointed Roosevelt that the President remarked that he could "carve a judge with more backbone from a banana." Roosevelt's two other appointees, WILLIAM R. DAY and WILLIAM MOODY, both generally provided judicial support for state and federal regulation of business enterprise.

In 1908, Roosevelt did not seek reelection, but handpicked as his successor William Howard Taft. He then retired from politics to a life of writing and adventuring. But Roosevelt disapproved of the conservative tone assumed by the Taft administration and attempted to wrest the 1912 Republican nomination for himself. When Taft was renominated, Roosevelt formed his own party, the Progressive party, and ran for President anyway. Roosevelt's candidacy split the Republican vote and permitted the election of WOODROW WILSON.

Roosevelt was later reconciled to the Republican party and in 1916 campaigned for the Republican presidential candidate, CHARLES EVANS HUGHES. When the United States entered WORLD WAR I, Roosevelt asked President Wilson to authorize him to raise and command a volunteer division to serve in the expeditionary force; Wilson refused. After the war, Roosevelt opposed Wilson's plan for a League of Nations, preferring that the postwar world be dominated by an Anglo-American alliance. When he died, in 1919, Roosevelt was beginning to plan for yet another attempt at reelection to the presidency.

DENNIS J. MAHONEY
(1986)

Bibliography

BLUM, JOHN MORTON 1954 *The Republican Roosevelt.* Cambridge, Mass.: Harvard University Press.

MORRIS, EDMUND 1979 *The Rise of Theodore Roosevelt.* New York: Coward, McCann & Geohegan.

MOWRY, GEORGE E. 1958 *The Era of Theodore Roosevelt: 1900–1912.* New York: Harper & Brothers.

## ROOSEVELT COURT

Following the constitutional crisis of 1937, President FRANKLIN D. ROOSEVELT, who had made no appointments to the Supreme Court in his first term, eventually named eight men to the bench between 1937 and 1943: HUGO L. BLACK, STANLEY F. REED, FELIX FRANKFURTER, WILLIAM O. DOUGLAS, FRANK MURPHY, JAMES F. BYRNES, ROBERT H. JACKSON, and WILEY B. RUTLEDGE as associate justices, and he elevated HARLAN FISKE STONE to be CHIEF JUSTICE—more appointments than any President other than GEORGE WASHINGTON.

It was assumed that Roosevelt's appointees would share his philosophy of government and would interpret the Constitution broadly to give the President and Congress adequate power to meet the nation's needs. In this the President and his followers were not disappointed. The so-called Roosevelt Court took a very liberal approach in its interpretation of the commerce power, giving near *carte blanche* to the federal government in any matters affecting business and labor. It abandoned SUBSTANTIVE DUE PROCESS and FREEDOM OF CONTRACT, which had been the main bulwarks of conservative jurists against NEW DEAL reform LEGISLATION, and it set about revising the traditional relationships among the government, the private sector, and the individual.

Perhaps the best example of the Roosevelt Court's broad view of the commerce power is its sustaining part of the Second Agricultural Administration Act (1938). In his Court opinion upholding the wheat quota provisions of the law in WICKARD V. FILBURN (1942), Jackson abandoned the old distinction between production (essentially a local activity) and commerce, and gave the federal government the power to regulate even the wheat grown on a farm for the farmer's own use.

After having been stymied for so long by freedom of contract arguments, reformers could now look to a Court that agreed that the federal government had power to regulate the labor market, and the Roosevelt Court sustained the New Deal labor policy enunciated in the 1935 WAGNER (NATIONAL LABOR RELATIONS) ACT. By treating labor as one of the important factors affecting INTERSTATE COMMERCE, the Court in several cases involving the National Labor Relations Board upheld its power to impose collective bargaining and union recognition, even on plants operating within just one state. The Court also upheld the wages and hours provisions of the 1938 FAIR LABOR STANDARDS ACT in UNITED STATES V. DARBY LUMBER COMPANY (1941).

But critics who charged that Roosevelt had replaced an autonomous judiciary with a rubber-stamp court misunderstood the fiercely independent nature of men like Black, Douglas, and Frankfurter. While they shared the New Deal perspective on commerce and labor, the Court's agenda was already changing. During the first part of the century the Court had confronted primarily economic issues; starting in the late 1930s, more and more cases involving individual CIVIL LIBERTIES and CIVIL RIGHTS appeared on the docket. While in general the Roosevelt appointees favored such rights, they differed significantly over how the BILL OF RIGHTS should be interpreted, which provisions should be applied to the states, and how far the Court should be involved in the emerging civil rights struggle.

In 1938, in his famous footnote four in UNITED STATES V. CAROLENE PRODUCTS CO., Stone had suggested that the courts should defer to legislatures in economic matters, but that it should impose higher STANDARDS OF REVIEW in cases involving individual civil liberties and civil rights. The Court began to move in that direction during WORLD WAR II, when (with the exception of the JAPANESE AMERICAN CASES), it paid more attention to individual rights than had any other Court in history. But it got bogged down over the question of whether and how the DUE PROCESS clause of the FOURTEENTH AMENDMENT applied to the states.

Frankfurter, following the line set out by Justice BENJAMIN N. CARDOZO in PALKO V. CONNECTICUT (1937), argued that there should be only "selective" incorporation of the Bill of Rights, involving only those rights that could be ranked as "fundamental." Although Black had originally agreed with this view, during the war he came to espouse the notion of "total" incorporation of all the Bill of Rights in applying to the states. The clearest exposition of this division, which would occupy the Court through most of the 1940s and 1950s, can be found in the respective opinions of Black and Frankfurter in ADAMSON V. CALIFORNIA (1947). Although a majority of the Court adhered to Frankfurter's rationale, in the end they adopted Black's goal with a near total incorporation of all the Bill of Rights.

Although the four Justices appointed by HARRY S. TRUMAN diluted the "Roosevelt Court," it is important to keep in mind how long many of Roosevelt's appointees served on the bench. In 1954, the Court that handed down BROWN V. BOARD OF EDUCATION still had Black, Reed, Frankfurter, Douglas, and Jackson on it. Frankfurter served until 1962, Black until 1971, and Douglas until 1975. For more than three decades, all of the great decisions on REAPPORTIONMENT, civil rights, FREEDOM OF SPEECH, PROCEDURAL DUE PROCESS, and FEDERALISM bore the imprint of one or more members of the Roosevelt Court.

MELVIN I. UROFSKY
(2000)

(SEE ALSO: *Constitutional History, 1933–1945; Constitutional History, 1945–1961; Incorporation Doctrine.*)

Bibliography

CURRIE, DAVID P. 1990 *The Constitution in the Supreme Court: The Second Century, 1888–1986.* Chicago: University of Chicago Press.

CURTIS, MICHAEL KENT 1986 *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights.* Durham, N.C.: Duke University Press.

CUSHMAN, BARRY 1998 *Rethinking the New Deal Court: The Structure of a Constitutional Revolution.* New York: Oxford University Press.

LEUCHTENBURG, WILLIAM E. 1995 *The Supreme Court Reborn.* New York: Oxford University Press.

PRITCHETT, C. HERMAN 1954 *The Roosevelt Court: A Study in Judicial Politics and Values, 1937–1947.* New York: Macmillan.

UROFSKY, MELVIN I. 1997 *Division and Discord: The Supreme Court Under Stone and Vinson, 1941–1953.* Columbia: University of South Carolina Press.

## *ROSENBERG v. UNITED STATES*
346 U.S. 273 (1953)

Over the vehement protests of three of its members (HUGO BLACK, FELIX FRANKFURTER, and WILLIAM O. DOUGLAS), the VINSON COURT vacated a STAY OF EXECUTION issued by Douglas that had halted the scheduled electrocution of Julius and Ethel Rosenberg. The Rosenbergs had been convicted and sentenced to death in 1951 for allegedly violating the 1917 ESPIONAGE ACT by passing secret information about the atomic bomb to the Soviet Union. Douglas had refused to join Black, Frankfurter, and HAROLD BURTON in earlier efforts to review the case by means of CERTIORARI and HABEAS CORPUS, but on June 17, 1953, after the Court had recessed for the term, he stayed the Rosenbergs' execution on the ground that their lawyers had raised a new argument deserving judicial scrutiny—the couple should have been tried under the Atomic Energy Act of 1946 rather than the earlier statute.

Responding to intense pressure from the Eisenhower administration, Chief Justice FRED VINSON recalled the Justices to Washington for special session. On June 19, a 6–3 majority overturned the stay and rejected Douglas's interpretation of the Atomic Energy Act. The Rosenbergs were executed that same evening. Frankfurter, who, with Black, had urged a full review of the case since the earliest appeals, later wrote that this last act of the Vinson Court was "the most disturbing single experience I have had during my term of service on the Court."

MICHAEL E. PARRISH
(1986)

Bibliography

RADOSH, RONALD and MILTON, JOYCE 1983 *The Rosenberg File: A Search for the Truth.* New York: Holt, Rinehart & Winston.

## *ROSENBERGER v. RECTOR & VISITORS OF THE UNIVERSITY OF VIRGINIA*
515 U.S. 819 (1995)

Does the FIRST AMENDMENT ban on ESTABLISHMENT OF RELIGION mean that when a public university provides money for printing expenses for extracurricular student political, cultural, and ideological groups, that a nondenominational Christian student group must be excluded? The Supreme Court said "no" in *Rosenberger v. Rector & Visitors of the University of Virginia*, decided in 1995. The Christian group was not seeking special treatment: subsidies were going to a wide variety of student groups without regard to the opinions they were putting forth. By a 5–4 margin, the Court held that subsidizing the Christian newspaper along with all the others does not establish religion, and that it would violate the FREEDOM OF SPEECH for the university to discriminate against the Christians because of their religious message.

The case represents a clash between a "neutrality" view of the ESTABLISHMENT CLAUSE and a "separationist" view. Neutrality means that the government must not discriminate in favor of religion, but may provide benefits that are equally available to others. According to the separationist view—which first appeared in Supreme Court decisions in the late 1940s—government should be forbidden to give any "direct" support to religion, even on a nondiscriminatory basis.

Separationists try to distinguish between direct and indirect support in order to justify government services like police and fire protection for churches. But is nonprofit tax exemption direct or indirect aid? What about allowing a religious student group to meet on campus at the state university? Is there a relevant difference between providing the students a room and providing them a subsidy for printing costs?

The *Rosenberger* decision clearly leans toward the neutrality view of the First Amendment: that government programs should not discriminate for or against religion. But even the majority opinion was not unequivocal on this principle, and the four dissenters would have prohibited the printing subsidy as a violation of the establishment clause. *Rosenberger* is surely a step away from the idea that religious groups and institutions should be specially targeted for exclusion from public programs. But the argument for neutrality under the First Amendment has not— at least yet—conclusively been won.

MAIMON SCHWARZSCHILD
(2000)

(SEE ALSO: *Government Aid to Religious Institutions; Religious Liberty; Separation of Church and State.*)

## *ROSS, UNITED STATES v.*
456 U.S. 798 (1982)

*Ross* altered the constitutional law of AUTOMOBILE SEARCHES. A UNITED STATES COURT OF APPEALS, following Supreme Court PRECEDENTS, had held that although police had PROBABLE CAUSE to stop an automobile and make a WARRANTLESS SEARCH of its interior, including its closed areas, they should have had a SEARCH WARRANT before open-

ing closed containers that they had searched for evidence. And in *Robbins v. California* (1981) the Court had declared that unless a closed container, by its shape or transparency, revealed contraband, it might not be opened without a warrant. The rationale of requiring a warrant for such a search turned on the reasonable expectation of privacy protected by the FOURTH AMENDMENT. *Ross*, however, substantially expanded the automobile exception to the warrant requirement.

Justice JOHN PAUL STEVENS for a 6–3 Court declared that the question for decision was whether the police, making a warrantless search with probable cause, had a right to open containers found in a vehicle. A lawful search of any premises extended to the whole area where the object of the search might be found. Thus a warrant to search a vehicle authorizes the search of all closed areas within it, including containers. "The scope of a warrantless search based on probable cause," Stevens said, "is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause." Accordingly, the scope of the search depended on the EVIDENCE sought for, not on the objects containing that evidence. Having so reasoned, the Court necessarily overruled the *Robbins* holding.

Justices THURGOOD MARSHALL, WILLIAM J. BRENNAN, and BYRON R. WHITE, dissenting, lamented that "the majority today not only repeals all realistic limits on warrantless automobile searches, it repeals the Fourth Amendment warrant requirement itself"—patently an exaggeration. *Ross* did make a shambles of the reasoning in earlier cases on searching closed containers in automobiles, but the Court finally delivered an unambiguous opinion for the guidance of law enforcement officers. Whether or not the Court based the new rule on expediency for the purpose of assisting prosecutorial forces, it will likely have serious implications for the privacy of Americans using their vehicles.

LEONARD W. LEVY
(1986)

## *ROSS v. MOFFITT*
### 417 U.S. 600 (1974)

*Ross* sharply limited the requirement of DOUGLAS V. CALIFORNIA (1963) that counsel be provided, free of charge, to INDIGENTS seeking to appeal from state convictions. The *Douglas* opinion had referred only to the "first appeal as of right," and here the Supreme Court's 6–3 majority drew the line defining the state's constitutional responsibility at precisely that point. There was no obligation to furnish counsel to pursue discretionary appeals or applications for Supreme Court review. Justice WILLIAM H. REHNQUIST's majority opinion did distinguish *Douglas*, but its reasoning drew heavily on the *Douglas* dissent of Justice JOHN MARSHALL HARLAN.

KENNETH L. KARST
(1986)

## ROSSITER, CLINTON
### (1917–1970)

Clinton Lawrence Rossiter III was a political scientist, constitutional scholar, and historian. His fascination with the response of constitutional government to the exigencies of crisis and war led to his first two books, *Constitutional Dictatorship* (1948) and *The Supreme Court and the Commander in Chief* (1951). His most widely read work, *The American Presidency* (1956, rev. ed. 1960), a deft and approving account of the Presidency's growth in power, influence, and responsibility, was perhaps the most influential study of that institution before Watergate. *Seedtime of the Republic*, a monumental intellectual history of the AMERICAN REVOLUTION, traced the roots of the Revolutionary generation's political ideas to seventeenth-century English republican thought. Rossiter's other works include *Parties and Politics in America* (1960), *Conservatism in America* (1955, rev. ed. 1962), *Alexander Hamilton and the Constitution* (1964), *1787: The Grand Convention* (1966), and the posthumously published *The American Quest, 1790–1860* (1971).

RICHARD B. BERNSTEIN
(1986)

## *ROSTKER v. GOLDBERG*
### 453 U.S. 57 (1981)

Men subject to registration for possible military CONSCRIPTION challenged the exclusion of women from the registration requirement as a denial of EQUAL PROTECTION. The Supreme Court, 6–3, rejected this claim. Justice WILLIAM H. REHNQUIST, for the majority, paid great deference to Congress's authority over military affairs; with the most minimal judicial second-guessing of the congressional judgment, he concluded that men and women were "not similarly situated," because any draft would be designed to produce combat troops, and women were ineligible for combat. SEX DISCRIMINATION, in other words, was its own justification.

As the dissenters demonstrated, the exclusion of women from draft registration had resulted from no military judgment at all; the President and the Joint Chiefs of Staff had urged that women be registered. Rather, Congress had heard the voice of public opinion. It is not im-

possible that the Court itself heard that voice. Thus do sex-role stereotypes perpetuate themselves.

KENNETH L. KARST
(1986)

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

## *ALBERTS v. CALIFORNIA*
354 U.S. 476 (1957)

Until *Roth* and *Alberts*, argued and decided on the same days, the Supreme Court had assumed that the FIRST AMENDMENT did not protect OBSCENITY. Squarely confronted with the issue by appeals from convictions under the federal obscenity statute (in *Roth*) and a California law outlawing the sale and advertising of obscene books (in *Alberts*), the Court held that obscenity was not constitutionally protected speech.

Justice WILLIAM J. BRENNAN, for the majority, relied on historical evidence that the Framers of the First Amendment had not intended to protect all speech, but only speech with some redeeming social value. Thus, the First Amendment protected even hateful ideas that contributed toward the unfettered exchange of information that might result in desired political and social change. Obscenity, however, was utterly without redeeming social importance, and was not constitutionally protected.

Neither statute before the Court defined obscenity; nor did the Court examine the materials to determine whether they were obscene. The Court nevertheless rejected the appellants' due process objections on the grounds that the statutes had given sufficient warning as to the proscribed conduct and the trial courts had applied the proper standard for judging obscenity.

The Court rejected the widely used test based on *Queen v. Hicklin* (1868) which judged a work's obscenity by the effect of an isolated excerpt upon particularly susceptible persons. The proper standard was "whether to the average person, applying contemporary community standards, the dominant theme taken as a whole appeals to prurient interest," that is, has a tendency to excite lustful thoughts. Because the obscenity of the materials involved in *Roth* was not at issue, the Court escaped the task of applying its definition. Ironically, the definition of obscenity was to preoccupy the Court for the next sixteen years. The Court, having designated a category of speech that could be criminally proscribed, now confronted the critical task of delineating that category.

Chief Justice EARL WARREN and Justice JOHN MARSHALL HARLAN, separately concurring, sought to limit the scope of the majority opinion. Warren, concurring in the result, agreed that the defendants' conduct in commercially exploiting material for its appeal to prurient interest was constitutionally punishable. Harlan, concurring in *Alberts* and dissenting in *Roth*, believed the Court was required to examine each work individually to determine its obscene character, and argued that the Constitution restricted the federal government in this field more severely than it restricted the states. Justices WILLIAM O. DOUGLAS and HUGO L. BLACK, dissenting in both cases, enunciated the positions they were to take in the wave of obscenity cases soon to overwhelm the Court: obscenity, like every other form of speech, is absolutely protected by the First Amendment.

KIM MCLANE WARDLAW
(1986)

# RULE OF FOUR

Even before Congress expanded the Supreme Court's discretionary CERTIORARI jurisdiction in 1925, the Court had adopted the practice of granting certiorari whenever four of the nine Justices agreed that a case should be heard. This "rule of four" was first made public in testimony concerning the bill that became the 1925 act. Some commentators have seen the adoption of that act as a congressional ratification of the practice; in any case, the rule is well established. In *Rogers v. Missouri Pacific R.R.* (1957) a majority agreed that the rule required the Court to hear a petition granted on the vote of four Justices, even though the other five might still think the case unworthy of review, unless new considerations had come to light in the meanwhile. As *New York v. Uplinger* (1984) makes clear, however, the vote of four Justices to *hear* a case does not require the Court to *decide* it if the other five Judges think a decision inappropriate.

The Court follows a similar practice in APPEAL cases coming from the state courts. The Court has even dismissed such an appeal "for want of a substantial FEDERAL QUESTION" over the expressed dissent of three Justices. When three members of the Court argue that a question is a substantial one, it probably is. The dismissal of an appeal under these circumstances reinforces the view that appeal, despite its theoretically obligatory nature as defined by Congress, has taken on much of the discretionary quality of the Court's certiorari policy.

KENNETH L. KARST
(1986)

Bibliography

LEIMAN, JOAN MEISEL 1957 The Rule of Four. *Columbia Law Review* 57:975–992.

# RULE OF LAW

The rule of law is the general principle that government and the governed alike are subject to law, as regularly adopted and applied. The principle is nowhere express in the United States Constitution, but it is a concept of basic importance in Anglo-American constitutional law. In that context, it is not merely a positivist doctrine of legality, requiring obedience to any duly adopted doctrine, but a means to assure that the actions of all branches of government are measured against the fundamental values enshrined in the COMMON LAW and the Constitution.

The rule of law has its roots in classical antiquity, in the *Politics* of Aristotle and the works of Cicero. As an Anglo-American legal principle, the concept may be traced to MAGNA CARTA (1215). In the thirty-ninth clause of that instrument, King John promised the barons that "No free man shall be taken, imprisoned, disseized, outlawed, or banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and the LAW OF THE LAND." Four centuries later, with the principle well entrenched in the theory and practice of the English common law, EDWARD COKE challenged James I's assertion of the right to exercise an independent judicial power with the words of Henry Bracton: "Quod Rex non debet esse sub homine, sed sub Deo et lege" [The King ought not to be under man, but under God and the law.] After the chaos of revolution, commonwealth, and restoration, the Glorious Revolution of 1688 established the permanent subjection of the king to the law, both of the common law courts and of Parliament.

Coke's *Reports* and *Institutes*, JOHN LOCKE's *Second Treatise of Government* (1691), and the flood of English radical political writing that accompanied the events of the seventeenth and eighteenth centuries carried these ideas to the American colonies. They became a key element in the ideology of the American Revolution. THOMAS PAINE's *Common Sense* (1776) proclaimed, "that in America, *the law is king*. For as in absolute governments, the king is law, so in free countries the law ought to be king; and there ought to be no other." As the unprecedented era of constitution making that succeeded the American Revolution provoked more sophisticated analysis of the structure of government, it became clear that not only the executive but also the legislature must be subject to law. Thus, JOHN ADAMS more temperately but more tellingly expressed the principle of the rule of law in drafting the MASSACHUSETTS CONSTITUTION of 1780. The Declaration of Rights in that instrument called for the SEPARATION OF POWERS, "to the end it may be a government of laws and not of men." Chief Justice JOHN MARSHALL gave practical effect to Adams's words in the actual application of the new federal Constitution, using them in MARBURY V. MADISON (1803) to bolster his argument that William Marbury had a judicial remedy for the withholding of his commission by the secretary of state.

The principle was elaborated and definitively labeled "the Rule of Law" by the leading nineteenth-century English constitutional theorist Albert Venn Dicey (1835–1922). In his influential work, *Introduction to the Study of Law of the Constitution* (1885), Dicey ranked the rule of law with parliamentary SOVEREIGNTY and constitutional conventions as one of the three fundamental elements of the unwritten British constitution. He gave the term "rule of law" three meanings: a requirement that government act against the citizen only in accordance with "regular law" enforced in the "ordinary courts" and not arbitrarily or in the exercise of "wide discretionary authority"; a requirement that the government and all citizens be equal before the law and equally subject to the ordinary courts; and a formulation reflecting the fact that constitutional rights were grounded not in abstract principles but in "the ordinary law of the land" as enforced in the courts.

Dicey's views of the rule of law have been rigorously elaborated by later political theorists, notably Friedrich Hayek in his *Constitution of Liberty* (1960) and other works. The fundamental nature of the rule of law as the basis of a moral and just social order has been recognized in more general terms in works such as Lon Fuller's *The Morality of Law* (1964) and John Rawls's *A Theory of Justice* (1971). It is also seen in the efforts of internationalists in the 1960s to establish international doctrines of world peace and human rights through a "world rule of law." More recently, critics have challenged the legitimacy of the rule of law, characterizing it as simply a cover for the maintenance of power by privileged social classes. Roberto Unger, in *Law and Modern Society* (1976), questioned the viability of the rule of law in the modern welfarecorporate state as the liberal premises upon which it is based decline.

Dicey's elaboration of the rule of law has also been forcefully criticized in England and the United States because its prohibition of discretionary action is inconsistent with the widespread use of the administrative process that has become characteristic of modern democratic government. Kenneth Culp Davis, a leading American critic, attributed the virtual nonuse of the phrase in American judicial opinions to the unreality of Dicey's "extravagant version" of the doctrine. Its occasional appearance to highlight a discussion of fairness or legality reflects, according to Davis, only the tendency of some judges "to add the touch of poetry" to their work.

Nevertheless, the concept of the rule of law remains fundamental to Anglo-American constitutional jurisprudence. In Britain, it remains a device for calling upon the

protections of the common law against legislative and executive intrusion. In the United States, at the most general level, the rule of law is invoked by judges as they seek to assure compliance by the federal and state governments with the guarantees of the BILL OF RIGHTS. Those guarantees, as interpreted by the courts, are binding upon the governments and individuals to whom they are addressed. The Supreme Court made this point clear in COOPER V. AARON (1958), rejecting the position of defiance toward a federal court's school desegregation order taken by the governor and legislature of Arkansas.

More specifically, the concept of the rule of law embodies what Laurence H. Tribe has characterized as "the Model of Governmental Regularity." This model describes requirements of generality and prospectivity of legislation and procedural regularity in administration and adjudication that are articulated in and enforced through the EX POST FACTO and BILL OF ATTAINDER clauses of the Constitution and the DUE PROCESS clauses of the Fifth and FOURTEENTH AMENDMENTS. Finally, the element of equality in Dicey's rule of law has received fundamental expression in the development of the EQUAL PROTECTION clause of the Fourteenth Amendment. That clause, as interpreted and applied by the Supreme Court in the second half of the twentieth century, has provided constitutional support for the most profound changes that our society has seen, short of revolution or civil war.

L. KINVIN WROTH
(1986)

Bibliography

ALLAN, T. R. S. 1985 Legislative Supremacy and the Rule of Law. *Cambridge Law Journal* 44:111–143.

DICEY, ALBERT VENN 1885 *Introduction to the Study of the Law of the Constitution.* London: Macmillan.

TRIBE, LAURENCE H. 1978 *American Constitutional Law.* Mineola, N.Y.: Foundation Press.

## RULE OF REASON

The rule of reason was a statutory construction of the SHERMAN ANTITRUST ACT by the Supreme Court. Nothing better illustrated JUDICIAL POLICYMAKING than the rule of reason, which held that the Sherman Act excepted from its scope "good trusts" or "reasonable restraints of trade." The statute expressly declared illegal "every" contract, combination, and conspiracy in restraint of trade, and as a result the Court in several early cases rejected the argument that "every" did not mean what it said. The Court also denied that the statute should be construed in the light of the COMMON LAW, which had recognized the legality of certain ancillary restraints of trade on the ground that they were reasonable. For example, in UNITED STATES V. TRANS-MISSOURI FREIGHT ASSOCIATION (1897) the Court rejected the proposition that "Congress, notwithstanding the language of the [Sherman] act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade." Said Justice RUFUS PECKHAM for the Court: "[w]e are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade." To read that rule of reason into the statute, Peckham answered, would be an exercise of JUDICIAL LEGISLATION.

That remained the Court's view until 1911, when it ignored its PRECEDENTS, the text of the statute, and the views of the Senate and the President. In 1909 the Senate had rejected a bill that proposed to amend the Sherman Act by incorporating the rule of reason. "To amend the antitrust act, as suggested by this bill," declared a subcommittee of the Senate Judiciary Committee, "would be to entirely emasculate it, and for all practical purposes render it nugatory as a remedial statute." In 1910 President WILLIAM HOWARD TAFT in a message to Congress had argued that no need existed to amend the scope of the Sherman Act. Yet in 1911, in two major antitrust cases, UNITED STATES V. STANDARD OIL COMPANY OF NEW JERSEY and *United States v. American Tobacco Co.*, Chief Justice EDWARD D. WHITE, who had dissented from earlier opinions repudiating the rule of reason, explicitly adopted it for an 8–1 Court. The sole dissenter, Justice JOHN MARSHALL HARLAN, echoing the *Trans-Missouri Freight* case, assaulted "judicial legislation"—the usurpation by the Court of a congressional function. The Sherman Act, Harlan insisted, included "every" restraint of trade, even a reasonable one. But Congress, in its 1914 antitrust legislation of the CLAYTON ACT and the FEDERAL TRADE COMMISSION ACT, by failing to attack the rule of reason acquiesced in it.

As a result of its rule of reason, the Supreme Court prevented effective use of the Sherman Act to prevent industrial consolidations of a monopolistic character. Thus, in *United States v. United Shoe Machinery Company* (1918), the Court held that the antitrust act did not apply to the company even though its dominating position in the industry approached that of an absolute monopoly which had restrained trade by its use of exclusive PATENT rights. In UNITED STATES V. UNITED STATES STEEL CORPORATION (1920) the Court held that the nation's largest industrial enterprise had reasonably restrained trade despite its "attempt to monopolize" in violation of the act. Similarly, in *United States v. International Harvester Company* (1927) the rule of reason defeated the government's case once again even though the company controlled a big proportion of the market and used exclusive dealer contracts

to eliminate competition. Although the Court ruled that trade union activities came within the scope of the antitrust act, no union ever benefited from a Court finding that its restraint of trade was reasonable. The rule of reason, in short, proved to be of considerable importance in the history of JUDICIAL REVIEW, of the economy, and of government efforts to regulate monopolistic practices.

LEONARD W. LEVY
(1986)

(SEE ALSO: *Antitrust Law.*)

Bibliography

NEALE, A. D. 1970 *The Antitrust Laws of the United States of America.* Cambridge: At the University Press.

## *RUMMEL v. ESTELLE*
### 445 U.S. 263 (1980)

OLIVER WENDELL HOLMES once said that the Supreme Court sits to expound law, not do justice. This case is proof. On the premise that the length of a sentence is "purely a matter of legislative judgment," Justice WILLIAM H. REHNQUIST for a 5–4 Court found no CRUEL AND UNUSUAL PUNISHMENT in Rummel's mandatory life sentence after his third felony conviction for obtaining $120.75 by false pretenses. Rummel argued that his sentence was disproportionate to his crime. Rehnquist replied that the possibility of a parole in twelve years and the right of a state legislature to fix penalties against recidivists overcame Rummel's argument. Rehnquist declared that the state legislature was acting within its competence in prescribing punishment and that the state has a legitimate interest in requiring extended incarceration of habitual criminals. The Court would not substitute its judgment for the legislature's and overturn a sentence which was neither inherently barbarous nor grossly disproportionate to the offense.

Justice LEWIS F. POWELL for the dissenters believed that Rummel's life sentence "would be viewed as grossly unjust by virtually every layman and lawyer." The cruel and unusual punishment clause of the Eighth Amendment, extended by the FOURTEENTH AMENDMENT to the states, Powell argued, prohibited grossly disproportionate punishments as well as barbarous ones. Rummel's three felonies netted him about $230 in frauds. He never used violence, threatened anyone, or endangered the peace of society. Texas treated his crimes as no different from those of a three-time murderer. The Court's decision weakened the use of the cruel and unusual punishment clause in noncapital cases.

LEONARD W. LEVY
(1986)

## *RUNYON v. MCCRARY*
### 427 U.S. 160 (1976)

The CIVIL RIGHTS ACT OF 1866 gives all persons "the same right . . . to make and enforce contracts . . . as is enjoyed by white persons." In the *Runyon* case the Supreme Court, following its 1968 decision in JONES V. ALFRED H. MAYER CO., relied on the THIRTEENTH AMENDMENT as a source of congressional power and upheld the application of this provision to two private schools' exclusion of qualified black applicants.

Justice POTTER STEWART, writing for the Court, made clear that several issues concerning the act's coverage were being left open. The Court was not deciding whether the act forbade a private social organization to impose a racial limitation on its membership; nor was it deciding whether a private school might limit its students to boys or girls, or to members of some religious faith. *Runyon* itself involved "private, commercially operated, non-sectarian schools."

Although Congress is empowered to enforce the Thirteenth Amendment, the provisions of the BILL OF RIGHTS limit congressional power here as elsewhere. The school operators argued unsuccessfully that the application of the 1866 act to their admissions practices violated rights of association, parental rights, and the RIGHT OF PRIVACY.

In responding to the associational freedom claim, Justice Stewart came close to saying that the freedom to practice racial discrimination in the choice of one's associates is not entitled to constitutional protection—a view that surely would not survive in the context of marriage or other intimate association. Concurring specially, Justice LEWIS F. POWELL remarked on the strength of the associational freedoms that would be involved if the 1866 Act were applied to a racially discriminatory selection of a home tutor or babysitter.

The Court dismissed the parental rights claim with the comment that parents and school operators retained the right to use the schools to inculcate the values of their choice. The privacy claim was similarly rejected; parents had a right to send their children to private schools, but the schools remained subject to reasonable government regulation.

Justices BYRON R. WHITE and WILLIAM H. REHNQUIST dissented, arguing that *Jones* was wrongly decided and that the 1866 act had not been intended to forbid a private, racially motivated refusal to contract. Justice JOHN PAUL STEVENS, in a special concurrence, agreed with the dissenters' view of the 1866 act's purposes. However, he concluded, "for the Court now to overrule *Jones* would be a significant step backwards" in the process of eliminating RACIAL DISCRIMINATION; thus he joined the Court's opinion.

It was ever so; today's history almost always prevails in a contest with yesterday's.

KENNETH L. KARST
(1986)

## *RUST v. SULLIVAN*
500 U.S. 173 (1991)

Congress, by means of Title X of the Public Health Service Act, provides for federal funding for family planning services. In 1988, the U.S. Department of Health and Human Services (HHS) issued new regulations that required subsidized clinics to refrain from advising their patients with respect to ABORTION. Private clinics and doctors employed at these clinics brought actions claiming that this limitation to concededly important speech violated the FIRST AMENDMENT. To resolve a split among the federal appeals courts, the Supreme Court granted CERTIORARI. In a 5–4 decision, the Court held that the "no abortion counseling" condition did not violate the FREEDOM OF SPEECH.

The no-abortion-speech limitation was first challenged on grounds of STATUTORY INTERPRETATION. The plaintiffs, on the basis of considerable authority, argued that given the importance of the First Amendment an ADMINISTRATIVE AGENCY, such as HHS, could not be vested with a power to limit speech except by clear and explicit authorization by Congress and that no such "clear statement" had been made for HHS. A majority of the Court, however, applied a different rule of construction, that of a deference to an agency's own interpretation of its enabling act. While agreeing that the necessary statutory authorization was "ambiguous," the MAJORITY OPINION in *Rust v. Sullivan*, authored by Chief Justice WILLIAM H. REHNQUIST, nonetheless concluded that HHS's interpretation (that it had been delegated the power) was a "plausible" and thus "permissible" construction of the act.

The next issue was whether the statute so construed—as authorizing HHS to condition its subsidies on the recipients refraining from speech about abortion—was constitutional. The majority held that it was, for at least two reasons. One reason centered on choice. The clinics were not forced to refrain from speaking; they might simply refuse the federal funds and then speak of abortion as they wished. Therefore, the right of the clinics to speak had not been taken; rather, they had of their own free choice given it up.

Otherwise, the Court emphasized the restricted scope of the no-abortion-counseling provision. The provision applied only to the clinic (and to that part of it financed by Title X funds); it did not apply to individuals in their speech outside the Title X project. As said by the majority, "[clinic] employees remain free to pursue abortion-related activities when they are not acting under the auspices of the Title X project." Yet, for a number of women, the subsidized, low-cost Title X projects were likely the only viable and accessible forum for counseling with respect to their pregnancy. Therefore, any availability of clinic doctors outside these clinics was, to these people, not an effective source of information about abortion.

WILLIAM T. MAYTON
(2000)

## *RUTAN v. REPUBLICAN PARTY OF ILLINOIS*
497 U.S. 62 (1990)

The governor of Illinois prohibited state entities under his control from hiring any employees without his express consent. Because more than 5,000 state positions become vacant in Illinois each year, this policy allowed the governor to make several thousand additional appointments. Evidence suggested that the governor's hiring policy operated as a PATRONAGE system, with the governor restricting appointments to people who belonged to his political party. Persons alleging that they had been denied jobs, promotions, transfers, or recall after layoffs because of their party affiliation filed suit, claiming that these employment practices violated their rights of speech and association guaranteed by the FIRST AMENDMENT. The challenge was based on previous cases such as *Elrod v. Burns* (1976), where the Court had held that the First Amendment barred political affiliation from being used as a reason for dismissal from most governmental jobs. In *Rutan*, the Court ruled 5–4 to extend the doctrine of *Elrod v. Burns* to promotions, transfers, recall from layoffs, and hiring decisions.

Writing for the majority, Justice WILLIAM J. BRENNAN applied the COMPELLING STATE INTEREST test used by the Court in many other types of cases, arguing that patronage clearly violates the First Amendment unless it is "narrowly tailored to further vital government interests." In Brennan's view, a general patronage system manifestly fails this test because it is not necessary to maintain either strong political parties or employee loyalty; these goals can be achieved by other means, such as having a handful of senior positions filled by political appointees.

Justice ANTONIN SCALIA, writing for the dissenters, argued that the compelling-interest standard was inappropriate for this case because the government was acting in the role of employer. Numerous decisions have upheld the idea that the government has more leeway in regulating the conduct of its employees than it does in regulating the behavior of ordinary citizens. According to Scalia, as long as the benefits of an employment practice can "reasonably be deemed to outweigh its "coercive' effects," the practice should pass

constitutional muster. In this case, Scalia believed that the perceived benefits clearly outweighed the coercive effects, because patronage has long been regarded as a cornerstone of our party system, "promoting political stability and facilitating the social and political integration of previously powerless groups." Scalia disputed the majority's contention that "parties have already survived" the demise of patronage. Saying the Court's assessment had "a positively whistling-in-thegraveyard character to it," Scalia noted recent evidence of party decline, including the substantial decrease in party competition for congressional seats. Reasonable men and women can differ about the appropriateness of patronage in various contexts, said Scalia; but this is precisely why the Court should respect the federal system and not impose its own will in the matter.

JOHN G. WEST, JR.
(1992)

## *RUTGERS v. WADDINGTON*
(New York Mayor's Court, 1784)

Decided in 1784 by the Mayor's Court of New York City, this was an early state precedent for JUDICIAL REVIEW and the first reported case in which the constitutionality of a state act was attacked on the ground that it violated a treaty of the United States. The state's Trespass Act allowed Rutgers, who had fled New York when the British occupied the city, to sue for the value of rents lost while her property was held by British merchants under military authority. The statute barred defendants from pleading that military authority justified the "trespass" under acts of war and the law of nations. The Treaty of Peace, however, canceled claims for injuries to property during the war. ALEXANDER HAMILTON, representing the defendants, expressly argued that the court should hold the Trespass Act unconstitutional.

Chief Judge JAMES DUANE, for the court, declared that the state constitution embodied the COMMON LAW and that the common law recognized the law of nations. Duane also declared that the union of the states under the ARTICLES OF CONFEDERATION constituted "a FUNDAMENTAL LAW," according to which Congress had exclusive powers of making war and peace: "no state in this union can alter or abridge, in a single point, the federal articles or the treaty." His logic having led him to the brink of holding the Trespass Act void, Duane abruptly endorsed the prevailing Blackstonian theory of legislative supremacy. When the legislature enacted a law, "there is no power which can controul them . . . the Judges are not at liberty, altho' it appear to them to be unreasonable, to reject it: for this were to set the judicial above the legislative, which would be subversive of all government." Duane then declared that the legislature had not intended to revoke the law of nations and that the court had to expound the statute to give the legislature's intention its effect, whereupon the court emasculated the statute. The judgment was that for the time the property was held under military order, acts done according to the law of nations and "buried in oblivion" by the treaty could not be redressed by the statute; Rutgers could not recover for trespass.

Technically the court had construed the act to conform to the treaty and the law of nations, but the legislature angrily resolved that the adjudication was "subversive of all law and good order" and that if a court could "dispense with" state law, "Legislatures become useless." Although a motion to remove the judges failed, a public protest meeting adopted "An Address to the People," angrily accusing the court of having "assumed and exercised a power to set aside an Act of the State." The "Address," severely condemning judicial review, was widely circulated, as was the pamphlet report of the case.

LEONARD W. LEVY
(1986)

## RUTLEDGE, JOHN
(1739–1800)

John Rutledge, a wealthy lawyer, represented South Carolina in the STAMP ACT Congress (1765) and chaired that state's delegations to the First and Second Continental Congresses. He was a member of the committee that drafted the South Carolina Constitution (1776) and was elected the state's first president (1776–1778) and second governor (1779). He led his state's delegation to the CONSTITUTIONAL CONVENTION OF 1787, where he used his oratorical skill to advance a moderate STATES' RIGHTS position and to defend the interests of the southern slaveholding aristocracy. He opposed creation of a separate federal judiciary, but favored a provision making the federal Constitution and laws binding on state courts. After signing the Constitution, he served as a member of the South Carolina ratifying convention.

In 1789, President GEORGE WASHINGTON appointed Rutledge one of the original associate justices of the Supreme Court, but he resigned in 1791—having done only circuit duty—to become Chief Justice of South Carolina. In 1795, Washington appointed him Chief Justice of the United States, and he presided over the August 1795 term of the Court; but an intemperate speech against JAY'S TREATY alienated the Federalists, and the Senate refused to confirm his nomination. (See SUPREME COURT, 1789–1801.)

DENNIS J. MAHONEY
(1986)

# RUTLEDGE, WILEY B.
(1894–1949)

When Wiley B. Rutledge joined the Supreme Court in January 1943, succeeding JAMES F. BYRNES, he helped to forge a liberal coalition that substantially redirected constitutional developments for the next six years. His sudden death in the summer of 1949, two months after the passing of Justice FRANK MURPHY, ended a brief era of liberal activism and ushered in the bleakest period for CIVIL LIBERTIES in the Court's history. President FRANKLIN D. ROOSEVELT's eighth and last appointment to the high bench, Rutledge remained, with the exception of Murphy, the most consistently liberal member of the STONE and VINSON COURTS.

When dean of the law school of the University of Iowa, Rutledge's support for FDR's NEW DEAL, including the "court-packing" proposal, earned him an appointment to the Circuit Court of Appeals for the District of Columbia in 1939. There he consistently endorsed the social and economic reforms of the Roosevelt administration and also compiled a strong record on civil liberties. In one opinion Rutledge dissented on FIRST AMENDMENT grounds when the judges upheld a local license tax levied against itinerant religious preachers.

A year later, as the newest member of the Stone Court, Rutledge provided the fifth and crucial vote in a coalition including HUGO L. BLACK, WILLIAM O. DOUGLAS, Murphy, and Chief Justice HARLAN FISKE STONE that overturned the Supreme Court's own ruling in a similar case decided six months earlier (*Jones v. Opelika*, 1943; MURDOCK V. PENNSYLVANIA, 1943). He also joined Justice ROBERT H. JACKSON'S opinion in *West Virginia State Board of Education v. Barnette* (1943). (See FLAG SALUTE CASES.)

Rutledge's jurisprudence blended economic nationalism with compassion for the economically disadvantaged and extreme sensitivity to individual rights. He endorsed, for example, interpretation of the WAGNER ACT to cover local newspaper carriers and believed that the minimum wage provisions of the FAIR LABOR STANDARDS ACT benefited all employees "throughout the farthest reaches of the channels of INTERSTATE COMMERCE."

To protect workers from exploitation, Rutledge believed, the federal government could prohibit entirely homework in the embroidery industry. To protect consumers from abuses, the federal government could prosecute insurance companies under the SHERMAN ANTITRUST ACT, despite more than a half century of precedent to the contrary. (See UNITED STATES V. SOUTH-EASTERN UNDERWRITERS ASSOCIATION.) He consistently supported the constitutional and statutory rights of working-class Americans, even when the legislative history of the particular law under discussion appeared in doubt (UNITED STATES V. UNITED MINE WORKERS, 1947).

At the same time, Rutledge's concern for individual rights extended even to corporations and capitalists, two groups which often lay beyond the constitutional protection offered by other New Deal liberals on the Court. Unlike Justice FELIX FRANKFURTER, for example, he did not believe that Congress had intended in the pure FOOD AND DRUG LAWS to impose criminal liability upon corporate executives without a finding of personal culpability or negligence. Nor did he believe that Congress could punish violators of wartime price regulations without jury trials and without opportunity to contest the regulations' legality in enforcement proceedings. (See YAKUS V. UNITED STATES; JUDICIAL SYSTEM.)

Rutledge endorsed without hesitation the concept of PREFERRED FREEDOMS articulated by Justice Stone in UNITED STATES V. CAROLENE PRODUCTS CO. (1938). FREEDOM OF SPEECH and PRESS, RELIGIOUS LIBERTY, the right to vote, and judicial protection for "discrete and insular minorities" served as the cornerstones of his philosophy. Like Stone, he, too, failed to implement these ideals in the infamous JAPANESE AMERICAN CASES, but, those apart, his civil liberties record remained impeccable. His most memorable CIVIL LIBERTIES opinions came in *Thomas v. Collins* (1944), where he wrote for a five-man majority that reversed the conviction of a labor organizer who had been convicted of contempt for speaking at a union rally without a permit; in EVERSON V. BOARD OF EDUCATION (1947), where he dissented against an opinion that sustained the constitutionality of state aid to the parents of children in parochical schools for bus transportation; and IN RE YAMASHITA (1946), where he and Murphy alone dissented against the drumhead trial of a vanquished Japanese general before an American military commission. With eloquence, heat, and sarcasm, Rutledge denounced the proceedings as "the most flagrant . . . departure . . . from the whole British American tradition of the COMMON LAW and the Constitution."

He subscribed as well to Justice Black's notion that the DUE PROCESS clause of the FOURTEENTH AMENDMENT "incorporated" the specific protections of the BILL OF RIGHTS, but in the case of ADAMSON V. CALIFORNIA (1947), Rutledge and Murphy were also prepared to go far beyond Black's reasoning to hold that "occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights." (See INCORPORATION DOCTRINE.)

Had Rutledge and Murphy lived, the course of constitutional development in the McCarthy era of the early

1950s might have been healthier for both the Court and the country.

MICHAEL E. PARRISH
(1986)

Bibliography

HARPER, FOWLER 1965 *Justice Rutledge and the Bright Constellation*. Indianapolis: Bobbs-Merrill.

MANN, W. HOWARD 1950 Rutledge and Civil Liberties. *Indiana Law Journal* 25:532–558.

## RUTLEDGE COURT

See: Supreme Court, 1789–1801

# S

## *SABLE COMMUNICATIONS OF CALIFORNIA v. FCC*

See: Dial-a-Porn

## SACCO AND VANZETTI CASE

See: *Commonwealth v. Sacco and Vanzetti*

## *SAENZ v. ROE*
526 U.S. 489 (1999)

In *Saenz v. Roe*, the Supreme Court reinvigorated the constitutional RIGHT TO TRAVEL. California, concerned about becoming a "welfare magnet" because its generous WELFARE BENEFITS might entice indigent persons to immigrate from less-generous states, limited the maximum payment to a recipient during his or her first twelve months of residency to the amount he or she would have received in the prior state of residency. Congress expressly authorized states to discriminate between older and newer residents in this manner. The Court held 7–2, however, that the state statute violated the right to travel and that Congress could not authorize such a violation.

The Court had previously invalidated several state statutes discriminating between older and newer residents, but had failed to articulate a consistent constitutional theory or level of judicial scrutiny. In SHAPIRO V. THOMPSON (1969), the Court invalidated a state statute withholding all welfare from immigrants during their first year of state residency. The Court held that this welfare denial constituted a "penalty" on immigrants' right to travel to the state, and the statute could not survive STRICT SCRUTINY. The Court employed the same analysis to invalidate statutes withholding for one year the franchise in DUNN V. BLUMSTEIN (1972) and free medical care in *Memorial Hospital v. Maricopa County* (1974). More recent cases, however, such as *Zobel v. Williams* (1982) and ATTORNEY GENERAL OF NEW YORK V. SOTO-LÓPEZ (1986), produced no majority agreement on the level of scrutiny, with controlling factions subjecting residency distinctions merely to RATIONAL BASIS review under the EQUAL PROTECTION clause.

While many observers predicted that the Court in *Saenz* would retreat even further from *Shapiro*, the Court did precisely the opposite. The Court proclaimed that the "right to travel" embraces three different components: (1) the right of a citizen of one state to enter and to leave a second state, (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily visiting a second state, and (3) for those travelers who elect to become permanent residents of the second state, the right to be treated the same as other citizens of that state. This third component is grounded in both the CITIZENSHIP clause and the PRIVILEGES OR IMMUNITIES clause of the FOURTEENTH AMENDMENT, which together mean that "a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State" (quoting the SLAUGHTERHOUSE CASES (1873)). The Court's partial reliance on the privileges or immunities clause is intriguing, both because it has essentially lain dormant since its parsimonious interpretation in *Slaughterhouse*, and because it seems superfluous in this case, given the Court's reading of the citizenship clause. Per-

haps the Court means to signal some willingness to revisit the clause's historically cramped interpretation.

The Court declared that statutes violating this third component are subject to a STANDARD OF REVIEW that "may be more categorical than that articulated in *Shapiro*, but it is surely no less strict." The Court quickly dismissed the state's magnet-avoidance and fiscal justifications as insufficient to satisfy strict scrutiny's requirement of a COMPELLING STATE INTEREST. And the Court just as quickly, if somewhat mechanically, dismissed the relevance of Congress's authorization: the citizenship clause limits Congress as well as the states, and Congress cannot invoke its enforcement power under the FOURTEENTH AMENDMENT, SECTION 5 to restrict (as opposed to protect) individual rights.

Future battles over durational residency requirements will be fought over a new issue: whether the requirements are properly characterized as a test for bona fide citizenship, which requires an intention to settle in-state. The Court reaffirmed prior PRECEDENTS upholding one-year residency requirements for obtaining a divorce or college tuition subsidies. These cases were distinguishable, both because California did not dispute the bona fides of the welfare recipients' claim to state citizenship, and because welfare is not an easily portable benefit that can be taken back to the prior state. The portability distinction raises an interesting question: If a state may treat an immigrant college student as a noncitizen for a year with regard to tuition subsidies, may the state treat that same student as a noncitizen for all other purposes, including welfare? It is unclear why the intention to establish residency should be determined on a benefit-specific basis.

More than any of its doctrinal predecessors, *Saenz* issues an expressive proclamation about the nature of political identity in this country. Previous right to travel cases applied conventional SUBSTANTIVE DUE PROCESS and equal protection doctrinal constructs. In contrast, *Saenz* makes a statement about what belonging to America means. People enjoy both a state political affiliation, which does not admit of "degrees of citizenship"; and a national affiliation, which empowers people to choose a state affiliation for themselves. Durational residency requirements that discriminate among state citizens, even those that place no actual burdens on interstate migration, are incompatible with these axioms. Perhaps this determination best explains the Court's hint that this right to travel component might be "categorical" rather than "merely" requiring strict scrutiny; the right is not really centered in individual liberty (a concern generally subject to BALANCING against strong governmental interests), but rather expresses a commitment to a peculiarly American form of political identity, one that simply cannot be compromised.

EVAN H. CAMINKER
(2000)

## *SALERNO, UNITED STATES v.*
481 U.S. 739 (1987)

In many nations of the world, governments imprison people believed to be dangerous because of their opinions. This does not happen in a free society. However, since the Bail Reform Act, passed by Congress in 1984, persons arrested for a specific category of serious offenses, those violating the RACKETEER INFLUENCES AND CORRUPT ORGANIZATIONS ACT (RICO), may be imprisioned while awaiting trial. This is PREVENTIVE DETENTION, which is based on the supposition that the prisoner will likely commit other crimes if let out on BAIL. When the Court sustained the constitutionality of the 1984 statute, Justice THURGOOD MARSHALL, dissenting, joined only by Justice WILLIAM J. BRENNAN, made the following remarkable statement:

> This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution. Today a majority of this Court holds otherwise. Its decision disregards basic principles of justice established centuries ago and enshrined beyond the reach of governmental interference in the Bill of Rights.

Justice JOHN PAUL STEVENS, dissenting separately, agreed with Marshall that the statute violated both the presumption of innocence and the Eighth Amendment's excessive-bail clause.

Chief Justice WILLIAM H. REHNQUIST, for the majority, first rejected the contention that the statute conflicted with the Fifth Amendment's DUE PROCESS clause. No conflict existed, he held, because Congress's purpose in authorizing pretrial detention was not penal, but merely regulatory. So construed, the statute did not authorize impermissible punishment without trial; it merely employed pretrial detention to protect the community against danger. Not only was SUBSTANTIVE DUE PROCESS not violated; the statute conformed with PROCEDURAL DUE PROCESS as well, because it provided for a full adversary hearing before a judge. The government had the burden of proving that to offer bail to the prisoner endangered society and that the prisoner had the RIGHT TO COUNSEL and all other trial rights.

Rehnquist also rejected the argument based on the Eighth Amendment's excessive-bail clause. It did not guarantee a right to bail, only that, when available, bail should not be excessive. In murder cases, bail can be de-

nied. Moreover, in SCHALL V. MARTIN (1984), the Court had permitted pretrial detention of juveniles following a showing before a judge that the person might commit crimes if bailed. Finally, the bail clause bound courts, not Congress. Given the Court's extraordinary deference to Congress on an important Bill of Rights issue, *Salerno* may deserve a good part of Justice Marshall's denunciation and show the risks of judicial faineance. However, the risk comes from Congress, not an acquiescent Court, and Congress is controllable by the people.

LEONARD W. LEVY
(1992)

## SAME-SEX MARRIAGE, I

In the American legal order, religious institutions do not define MARRIAGE. Civil marriage is a contractually based legal status recognized by national, state, and local governments for many purposes, to which countless privileges attach. While this status has long been defined and restricted primarily at the state level, the Constitution limits state power over marriage and should invalidate one of the most obdurate of eligibility criteria: that a marriage must be mixed-sex.

With the possible exceptions of certain marriages in which one spouse has transitioned to another sex, every state requires that couples who would marry must be male–female. This materially and symbolically potent exclusion of lesbians and gay men and some bisexual persons from civil marriage violates established constitutional principles in multiple ways.

The refusal to allow same-sex couples to marry violates the DUE PROCESS clauses of the Fifth Amendment and the FOURTEENTH AMENDMENT, under which the Supreme Court has recognized that the right to marry may not be significantly burdened absent extraordinary justification. In LOVING V. VIRGINIA (1967) the Court held that the right to marry is a FUNDAMENTAL RIGHT, and ZABLOCKI V. REDHAIL (1978) made clear that it embraces both negative rights to freedom from government prosecution for cohabiting as married and affirmative rights to enter government-sanctioned civil marriage. The prohibition on two men or two women marrying thus should trigger STRICT SCRUTINY, provided the right is defined at a sufficiently high level of generality.

Defenders of the heterosexual status quo argue that civil marriage has always involved the union of one man with one woman, and thus that there is no SUBSTANTIVE DUE PROCESS right to same-sex marriage "deeply rooted" in American history or "essential" to our scheme of ordered liberty. Yet it is inappropriate to take enduring characteristics of a person claiming a right into account in defining the contours of that right. The Court rejected such an effort in *Loving*, where Virginia argued that its MISCEGENATION law prohibiting marriages between white and black persons violated no fundamental right because mixed-race marriages had long been prohibited by law. Despite the long history of monoracial statutory marriage definitions, the Court held that Virginia's law infringed the fundamental right to marry.

Similarly, the right to marry should not by fiat and history be deemed to exclude same-sex marriages a priori. Rather, the two-sex requirement should have to survive strict scrutiny to be consistent with the due process clauses. However, in the RIGHT TO DIE case *Washington v. Glucksberg* (1997), a majority of the Court took a restrictive view of the proper formulation of substantive rights claimed to be protected under the due process clause, and it is conceivable that the Court would do so in this context and find no fundamental right to same-sex marriage.

Nonetheless, excluding same-sex couples from civil marriage also violates the constitutional guarantee of EQUAL PROTECTION OF THE LAWS, which demands that governmental classifications must withstand the appropriate level of scrutiny. Under cases such as UNITED STATES V. VIRGINIA (1996), governmental SEX DISCRIMINATION must survive at least intermediate scrutiny.

Defenders of the mixed-sex requirement contend that it does not classify on the basis of sex, for it equally forbids men and women to marry a person of the same sex. Somewhat surprisingly, lower courts have generally accepted this argument—with the notable exception of the Hawai'i Supreme Court in BAEHR V. LEWIN (1993), a decision under the equal protection clause of the Hawai'i state constitution. *Baehr* correctly observed that the U.S. Supreme Court had faced a logically equivalent argument in *Loving*, rejecting Virginia's fallacious contention that its miscegenation law did not violate the Fourteenth Amendment because it applied equally to white and black people. In fact, under Virginia law, a *black* woman, for example, was not allowed to marry a white man—the very facts of *Loving*, where Mildred Jeter could not marry Richard Loving—even though a *white* woman could marry a white man.

Mixed-sex marriage requirements similarly grant men and women different rights. Under current marriage laws, no woman would have the right to marry Mildred Jeter, even though most adult men would. It begs the question to insist that marriage is by nature a mixed-sex institution. Our laws embody political choices, not Platonic essences, and the point of equal protection analysis is to determine whether certain political choices are constitutionally forbidden. Hence, mixed-sex marriage laws must survive at least intermediate scrutiny. (Because nonrecognition of same-sex marriages also constitutes SEXUAL ORIENTATION discrimination—since it is designed to keep marriage heterosexual or to prevent "gay marriage," and since its overwhelming immediate effect is to prevent lesbians and gay

men from marrying—the mixed-sex requirement should also be subject to strict scrutiny as a sexual orientation classification.)

Government refusal to recognize same-sex marriages is therefore unconstitutional, for it can survive neither strict nor intermediate scrutiny. The interests commonly invoked to defend the legal privileging of heterosexuality are procreation and child-rearing. Today, however, encouraging procreation ought not count as a "compelling" or even "important" governmental interest, for there is no evidence that the U.S. population is in any danger of harmful reduction. Moreover, the mixed-sex marriage requirement is neither "narrowly tailored" nor "substantially related" to promoting procreation or healthy child-rearing. Marriage law has not traditionally required that either potential spouse be capable of procreation—post-menopausal women and sterile persons are allowed to marry everywhere in the United States—and failure to "consummate" a marriage has rendered a marriage at most voidable but not necessarily void. There is no reliable social science evidence that most or all mixed-sex marriages provide a healthier child-rearing environment than same-sex marriages, and the Court has insisted in the racial context in PALMORE V. SIDOTI (1984) that government cannot shield children from the harms that may flow from being raised in a racially stigmatized family environment where parents' fundamental rights are at issue.

At base, the nationwide refusal to recognize same-sex marriages, the federal Defense of Marriage Act, its state-level copycat statutes, and arguments that recognizing same-sex marriages would somehow "undermine" the institution of marriage all reflect both a profound anxiety that heterosexual privilege may be eroding and an attempt to use the law to perpetuate the subordinate status of lesbian, gay, and bisexual persons. The Constitution, however, prohibits majorities from using the power of government to shore up such status hierarchies. As the first Justice JOHN MARSHALL HARLAN argued in his DISSENTING OPINION in PLESSY V. FERGUSON (1896), and as reaffirmed in the sexual orientation context in ROMER V. EVANS (1996), the Constitution "neither knows nor tolerates classes among citizens." It will be up to the courts and electorates throughout the nation to determine whether this noble principle will remain simply aspirational for gay, lesbian, and bisexual persons, or whether the nation will live up to its ideals of liberty and equality by eliminating the sex and sexual orientation discrimination of the current refusal to recognize civil same-sex marriages.

DAVID B. CRUZ
(2000)

Bibliography

BALKIN, J. M. 1997 The Constitution of Status. *Yale Law Journal* 106:2313–2374.

ESKRIDGE, WILLIAM N., JR. 1996 *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment.* New York: Free Press.

KOPPELMAN, ANDREW 1994 Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination. *New York University Law Review* 69:197–287.

SHERMAN, SUZANNE, ed. 1992 *Lesbian and Gay Marriage: Private Commitments, Public Ceremonies.* Philadelphia: Temple University Press.

STRASSER, MARK 1997 *Legally Wed: Same-Sex Marriage and the Constitution.* Ithaca, N.Y.: Cornell University Press.

SULLIVAN, ANDREW and LANDAU, JOSEPH, eds. 1997 *Same-Sex Marriage: Pro and Con, A Reader.* New York: Vintage Books.

## SAME-SEX MARRIAGE, II

Constitutional claims in support of same-sex MARRIAGE involve two dominant themes: (1) that the Constitution protects as a FUNDAMENTAL RIGHT the choice to marry another consenting adult of the same sex and (2) that refusal to permit same-sex couples to marry denies them the EQUAL PROTECTION OF THE LAWS. Both claims fail existing standards of federal constitutional analysis, but state constitutional provisions may be interpreted differently.

The fundamental right argument for same-sex marriage posits the existence of unwritten constitutional rights such as the RIGHT OF PRIVACY, or of FREEDOM OF ASSOCIATION, or a right to marry. Laws that impinge upon fundamental rights are subject to heightened judicial scrutiny, and may only be sustained if necessary and narrowly tailored to effectuate a COMPELLING STATE INTEREST. If same-sex marriage is not a fundamental right, the LEGISLATION will be reviewed (and presumably sustained) under a lower standard of analysis that is more deferential to legislative discretion. The test for whether a practice or relationship not specifically identified in the Constitution is protected as "fundamental" is whether it is "deeply rooted in this Nation's history and tradition," or "implicit in the concept of ordered liberty." Clearly, same-sex relations are not so rooted or so essential. Thus, same-sex marriage is not a fundamental right.

Although many decisions have recognized that the right to marry is a fundamental constitutional interest, all of them have involved traditional male–female marriage, which is deeply rooted in the traditions and history of our people. In BOWERS V. HARDWICK (1986), the Supreme Court emphasized that there is "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other. . . ." Marriage receives special protection because according to MEYER V. NEBRASKA (1923), it is the foundation of the traditional home and family, and because marriage is linked to procreation. Same-sex marriage is distinguishable in both respects.

From the perspective of the basic social purposes of legal marriage recognition, traditional male–female unions and same-sex unions are not equivalent. In terms of promoting safe sexual relations, procreation, child rearing, cross-gender integration, complementarity, and fostering public virtue, for example, same-sex unions do not contribute to the public interest in ways comparable to the tremendous contributions of male–female marriages. The union of two persons of different genders creates a unique relationship of unmatched potential strengths and inimitable potential value to society. The integration of the universe of gender differences associated with sexual identity constitutes the core and essence of marriage. The heterosexual dimensions of the relationship are at the very core of what makes "marriage" what it is, and why it is so valuable to individuals and to society.

The equality arguments for same-sex marriage are based on the Court's decision in LOVING V. VIRGINIA (1967), where the Court ruled that laws prohibiting MISCEGENATION were unconstitutional. However, laws forbidding same-sex marriage are not comparable to laws forbidding interracial marriage; race has nothing to do with any legitimate purpose of regulating marriage, but sexual relations go to the very heart of the compelling state interest in defining the marital relationship. Likewise, eradicating RACIAL DISCRIMINATION is the core concern of the FOURTEENTH AMENDMENT, but no constitutional provision purports to forbid discrimination on the basis of SEXUAL PREFERENCE or relations.

Denial of same-sex marriage is not improper SEX DISCRIMINATION. Heterosexual marriage is the oldest gender-equality institution in the law. The requirement that marriage consist of both a man and a woman emphasizes the absolute equality and equal necessity of both sexes for the most fundamental unit of society, and the indispensable, equal contribution of both genders to the basic institution of our society. Nor are same-sex unions functionally equivalent to heterosexual marriages any more than other prohibited relations, such as incest.

The Court has never addressed any constitutional claim for same-sex marriage. Lower federal courts and state appellate courts have unanimously rejected claims that the federal Constitution mandates the extension of marital status or benefits to same-sex couples, and most have rejected state constitutional claims also. However, by 1998, courts in two states had indicated that claims for same-sex marriage might be asserted under state constitutional provisions. In BAEHR V. LEWIN (1993) and *Baehr v. Miike* (1996), Hawaiian courts had ruled that the state's refusal to permit same-sex marriage violates equality guarantees in the state constitution of Hawai'i. And a trial court in Alaska ruled that denial of marriage licenses to same-sex couples violated state constitutional guarantees of privacy and equality. However, in November 1998, the people of both Hawai'i and Alaska ratified amendments to their state constitutions (2:1) to reject same-sex marriage. The equality argument seems to ignore the fact that heterosexual marriage laws treat men and women equally, requiring cross-gender marriage for both sexes. The privacy claim seems to confuse public toleration of private choices with private claims to public preferences; the right to privacy protects certain private conduct from public penalty, but does not compel the state to confer public benefits, privileges, and preferences on private choices. Nevertheless, these cases illustrate that state constitutions increasingly are the basis for constitutional claims for same-sex marriage.

LYNN D. WARDLE
(2000)

Bibliography

COOLIDGE, DAVID ORGON 1997 Same-Sex Marriage? *Baehr v. Miike* and the Meaning of Marriage. *South Texas Law Review* 38:1–119.

ESKRIDGE, WILLIAM 1995 *The Case for Same-Sex Marriage.* New York: Free Press.

WARDLE, LYNN D. 1996 A Critical Analysis of Constitutional Claims for Same-Sex Marriage. *Brigham Young University Law Review* 1996:1–101.

## *SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ*
411 U.S. 1 (1973)

*Rodriguez* was the BURGER COURT's definitive statement on the subject of EQUAL PROTECTION guarantees against WEALTH DISCRIMINATION—and the statement was that the Court wanted the subject to go away.

Under Texas law, the financing of local school districts relies heavily on local property taxes. Thus a district rich in taxable property can levy taxes at low rates and still spend almost twice as much per pupil as a poor district can spend, even when the poor district taxes its property at high rates. A federal district court, relying on WARREN COURT precedents, concluded that wealth was a SUSPECT CLASSIFICATION, that education was a FUNDAMENTAL INTEREST, and thus that strict judicial scrutiny of the state-imposed inequalities was required. The trial court also concluded that, even if the permissive RATIONAL BASIS standard of review were appropriate, the Texas school finance system lacked any reasonable basis. The Supreme Court reversed, 5–4, in an opinion by Justice LEWIS F. POWELL that was plainly designed as a comprehensive pronouncement about equal protection doctrine.

The opinion was definitive, as a coffin is definitive. Despite what the Court had said in BROWN V. BOARD OF EDU-

CATION (1954) about education as the key to effective citizenship, here it said that education was not a fundamental interest in the sense that triggered STRICT SCRUTINY—at least not when some minimal level of education was being provided. Indeed, said the majority, the courts lacked power to create new substantive rights by defining interests as "fundamental," unless those interests were already guaranteed elsewhere in the Constitution. Here was formal recognition of the Burger Court's zero-population-growth policy for fundamental interests.

Nor was wealth a suspect classification. Decisions such as GRIFFIN V. ILLINOIS (1956) and DOUGLAS V. CALIFORNIA (1963) had involved INDIGENTS "completely unable to pay" for the benefits at stake, who "sustained an absolute deprivation" of the benefits. Here, the deprivation was only relative; pupils in poor districts were receiving some education. Furthermore, although the trial court had found a significant correlation between district wealth and family wealth, the Supreme Court held the proof of that correlation insufficient; poor children, after all, might live in the shadows of a rich district's factories. In any case, Justice Powell concluded, the evidence was mixed on the question whether school spending affected the quality of education.

Because there was no occasion for strict scrutiny, the Court employed the rational basis standard of review. Contrary to the district court's conclusion, the Texas financing scheme was rationally designed to maintain local control over school spending and educational policy. Justice BYRON R. WHITE, dissenting, attacked this asserted rationality. If "local control" flowed from control over the spending of money, then Texas, by relying heavily on the property tax and by drawing its district lines, had parceled out that choice in an irrationally selective way, to rich districts and not to poor ones.

Justice THURGOOD MARSHALL's dissent was the most powerful equal protection opinion of the Burger Court era. He elaborated on his DANDRIDGE V. WILLIAMS (1970) dissent, rejecting a two-tier system of standards of review in favor of a "sliding-scale" approach tying the level of judicial scrutiny to the importance of the interests at stake and the degree to which the state's classification bore on the powerless. Here, on both counts, judicial scrutiny should be heightened well above the level of requiring only minimal rationality. In any case, the Court had not, in the *Griffin/Douglas* line of cases, insisted on a showing of absolute deprivation as a condition of strict scrutiny of wealth discrimination; the problem in those cases was the *adequacy* of an appeal, as affected by a discrimination between rich and poor. The Texas scheme could not survive any heightened judicial scrutiny—as the majority itself had virtually conceded.

Justice Powell, a former school board president, surely feared judicial intrusion into the decisions of local school officials. Beyond that narrow concern, the majority undoubtedly worried about judicial intrusion into the allocation of state resources. These are legitimate concerns. The question was, and remains, what kinds of economic inequality, *imposed by the state itself,* can be tolerated in the face of a constitutional guarantee of the equal protection of the laws.

KENNETH L. KARST
(1986)

(SEE ALSO: *Education and the Constitution; Plyler v. Doe.*)

Bibliography

MICHELMAN, FRANK I. 1969 The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment. *Harvard Law Review* 83:7–59.

## SANFORD, EDWARD T.
(1865–1930)

Edward Terry Sanford was the last of WARREN HARDING's four Supreme Court appointments. He had served fifteen years as a federal judge in Tennessee and, as with many of Harding's judicial appointments, he was chosen in large part because of Chief Justice WILLIAM HOWARD TAFT's lobbying activities.

For nearly seven years, Sanford loyally followed and served Taft. He began his tenure by joining a rare Taft dissent when the Court invalidated the DISTRICT OF COLUMBIA MINIMUM WAGE LAW in ADKINS V. CHILDREN'S HOSPITAL (1923). He was a regular member of the Chief Justice's Sunday afternoon extracurricular conferences, which excluded the Court's more liberal members such as OLIVER WENDELL HOLMES, LOUIS D. BRANDEIS, and HARLAN F. STONE. In a final coincidence, Sanford died on March 8, 1930, the same day as Taft.

Sanford's most important contribution to constitutional law during his brief tenure came in the area of CIVIL LIBERTIES. In GITLOW V. NEW YORK (1925) he led the Court in sustaining New York's criminal anarchy statute. Sanford's opinion largely reiterated the Court's BAD TENDENCY TEST regarding FREEDOM OF SPEECH, arguing that the state had a right to protect itself against speech that called for the overthrow of government. The state could not, he said, "reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale." But Sanford also acknowledged that the FOURTEENTH AMENDMENT incorporated the FIRST AMENDMENT's guarantees of free speech and FREEDOM OF THE PRESS against STATE ACTION. That INCORPORATION DOCTRINE had momen-

tous consequences for the Court's later views of CIVIL RIGHTS and LIBERTIES.

In WHITNEY V. CALIFORNIA (1927) Sanford again sustained a criminal anarchy conviction. But the same day, in *Fiske v. Kansas*, he spoke for the Court when for the first time the Justices overturned a state conviction on the ground that a criminal anarchy statute had been applied to deny the defendant his freedom of speech, as guaranteed by the First and Fourteenth Amendments. Sanford found that the state had failed to provide evidence of the organization's criminal or violent purposes. Shortly after Sanford's death, the Court nullified a state criminal anarchy statute and a state law sanctioning the suppression of certain newspapers, with both decisions (STROMBERG V. CALIFORNIA, 1931; NEAR V. MINNESOTA, 1931) implementing Sanford's *Gitlow* incorporation doctrine.

Sanford generally concurred with the Court's decisions involving national and state ECONOMIC REGULATION. For example, he joined in approving ZONING laws in EUCLID V. AMBLER REALTY CO. (1926), and he agreed that a Pennsylvania statute requiring drugstore owners to be registered pharmacists was unconstitutional in *Lambert v. Yellowley* (1926). But in *Maple Floor Association v. United States* (1925) Sanford joined Taft's dissent protesting the Court's holding that trade associations did not violate the SHERMAN ANTITRUST ACT. In *Tyson v. Banton* (1927) Sanford, dissenting from a ruling that invalidated regulations of theater ticket brokers, invoked the STATE POLICE POWER doctrine of the GRANGER CASES (1877); he argued that because the brokers' business was AFFECTED WITH A PUBLIC INTEREST, the legislature could protect "the public from extortion and exorbitant rates."

Sanford's Supreme Court tenure was, on the whole, unremarkable. There is irony in that his *Gitlow* opinion, despite its antilibertarian result, laid the foundation for the mid-twentieth-century libertarian revolution and the nationalization of American CIVIL RIGHTS and CIVIL LIBERTIES.

STANLEY I. KUTLER
(1986)

Bibliography

RAGAN, ALLEN E. 1943 Mr. Justice Sanford. *East Tennessee Historical Society Publications* 15:74–88.

## *SAN MATEO COUNTY v. SOUTHERN PACIFIC RAILROAD*

See: Person

## *SANTA CLARA COUNTY v. SOUTHERN PACIFIC RAILROAD*

See: Person

## SAWYER, LORENZO
(1820–1891)

In 1870 ULYSSES S. GRANT commissioned Lorenzo Sawyer of California judge of the Ninth Circuit Court, a position he filled until his death. Throughout these years, Sawyer shared circuit court duties with Supreme Court Justice STEPHEN J. FIELD.

Sawyer formulated a narrow interpretation of the PUBLIC PURPOSE DOCTRINE and STATE POLICE POWERS. He declared that a state could not, consistently with the FOURTEENTH AMENDMENT, define the public purpose to permit mining companies to cause flooding of private lands. Sawyer also resisted local efforts to discriminate against the Chinese under the guise of the POLICE POWER. In 1890 he struck down a San Francisco ordinance, which required Chinese to live and work in a designated area of the city, as an "arbitrary confiscation of property without DUE PROCESS or any process of law." Sawyer also invalidated other suspect uses of the police power that sought to harass the Chinese by outlawing the operation of laundries and opium parlors. Such measures, he ruled, placed "an unlawful inhibition upon the inalienable rights and liberties of [all] citizens. . . ."

Sawyer subscribed to the doctrine of DUAL FEDERALISM, but in *In Re Neagle* he forcefully recited the supremacy of the federal government. David Neagle, a United States marshal and bodyguard for Justice Field, had killed a man to protect Field. Sawyer issued a writ of HABEAS CORPUS releasing Neagle from custody by California officials on charges of murder. He held that the marshal had acted in pursuance of the laws of the United States and that "a state law, which contravenes a valid law of the United States, is, in the nature of things, necessarily void—a nullity."

Justice Field cast a large shadow over jurisprudence of the Ninth Circuit, but Sawyer also significantly shaped American constitutional law. His opinions were a major source of authority on the police powers of the states, the public purpose doctrine, and the Fourteenth Amendment.

KERMIT L. HALL
(1986)

Bibliography

SWISHER, CARL BRENT 1930 *Stephen J. Field, Craftsman of the Law.* Pages 325–326, 332, 337, 342, 352, 353, 355, 358–359. Washington, D.C.: Brookings Institution.

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

The Supreme Court, always careful to avoid declaring the Smith Act unconstitutional, instead employed statutory in-

terpretation to emasculate its provisions. Here the Court held that the act's clause banning "membership" in certain organizations applied only to members active in the organization's affairs, knowing that its purpose was to bring about the overthrow of the government by force and violence as speedily as circumstances would permit, and with the specific purpose to bring about that overthrow. In the *Scales* case itself, the Court affirmed a conviction under the membership clause. Since that time, however, the act's forbidding BURDEN OF PROOF has discouraged further prosecutions.

MARTIN SHAPIRO
(1986)

## SCALIA, ANTONIN
(1936– )

Associate Justice Antonin "Nino" Scalia became the 103rd Justice of the United States Supreme Court on September 27, 1986. Justice Scalia came to the Court after a distinguished career in law, teaching, government, and as a federal appellate judge. He is the first Italian American to be appointed to the Court and was second of three conservative Supreme Court Justices appointed by President RONALD REAGAN. Scalia has established himself as an outspoken proponent of a jurisprudence that is profoundly at odds with the jurisprudence of later twentieth century LIBERALISM (i.e., the liberalism of the WARREN COURT) and differs in significant detail from current judicial conservatism of the role it assigns the judiciary. Before analyzing this jurisprudence, it is important to place it in the context of Scalia's life and professional career, both of which had revealed him as an articulate exponent of political CONSERVATIVE opinions.

Scalia was born in Trenton, New Jersey, on March 11, 1936, the only child of Italian immigrant parents. The family moved later to Queens, New York, where Scalia's father, S. Eugene Scalia, was a college professor, and his mother, Catherine Louise Panaro Scalia, was an elementary school teacher. S. Eugene Scalia was a scholar of romance language and literature who wrote several monographs on Italian literary history and criticism and translated Italian works into English. Antonin Scalia was a brilliant student. He graduated first in his class at a Manhattan Jesuit military academy, Xavier High School, and then repeated that accomplishment at Georgetown University, from which he graduated in 1957. He attended Harvard Law School, where he again excelled scholastically and was elected Note Editor of the *Harvard Law Review*. After graduation he entered practice with Jones, Day, Cockley & Reavis in Cleveland. He practiced corporate law with the firm until 1967, when he declined a partnership offer. Instead, he accepted a position on the faculty of the University of Virginia Law School.

At Virginia, Scalia began, both through his teaching and research, to develop a specialty in ADMINISTRATIVE LAW. He published several articles critical of procedural aspects of federal agencies before leaving Virginia to work in Washington, D.C. Scalia's conservative political orientation, which friends and colleagues identify as having been held by him consistently since college, led him to leave teaching to accept several positions in the administration of President RICHARD M. NIXON. He first served as general counsel in the executive office of telecommunications policy and then was appointed chairman of the Administrative Conference of the United States. The conference is responsible for studying common legal and management issues affecting federal executive branch agencies and for recommending improvements in administrative procedures. Scalia next became embroiled in the political battles of WATERGATE when he moved to the Department of Justice in the summer of 1974 as assistant attorney general in charge of the Office of Legal Counsel, the office that provides legal advice to the President. Among Scalia's first duties was drafting a defense of the President's claim that the tapes and records that Congress sought were his property, not the government's, and that they were protected from congressional subpoena by EXECUTIVE PRIVILEGE. After Nixon's resignation, following the Supreme Court's rejection of his argument, Scalia remained at the Justice Department until January 1977 when President GERALD R. FORD left office. He subsequently spent six months at the American Enterprise Institute, a conservative research organization, and then accepted a position as a professor at the University of Chicago School of Law.

Scalia taught at Chicago until his appointment to the federal appellate court bench in 1982. (He served one year as a visiting professor at Stanford Law School.) During his time at Chicago, Scalia established himself as a leading voice among conservative academics. He continued to write and teach in the area of administrative law, and he edited the American Enterprise Institute's journal *Regulation*, which was largely devoted to attacking regulatory excesses and advocating deregulation. Scalia also attacked judicial inattention to the provisions of the Administrative Procedure Act—most notably, the U.S. Court of Appeals for the District of Columbia's review of the work of the Nuclear Regulatory Commission in the *Vermont Yankee Nuclear Power Corp.* case (1978). From 1981 to 1982 Scalia served as chair of the administrative law section of the American Bar Association, and he used his office to call for lawyers to become involved in reforming administrative procedure to make it fit the new environment of deregulation.

Scalia's writings addressed other items on the conser-

vative political agenda as well. He attacked AFFIRMATIVE ACTION in a 1979 article in the *Washington University Law Quarterly* both on principle and because he believed that it could not effectively overcome discrimination. He ridiculed white Anglo-Saxon judges such as Justice LEWIS F. POWELL and Judge JOHN MINOR WISDOM for justifying affirmative action as "restorative justice" when the members of white ethnic groups—such as Scalia's own Italian family—most often bore the cost of compensating blacks for the WASPs' prior treatment of blacks. Scalia further denounced the FREEDOM OF INFORMATION ACT for imposing prohibitive costs on the government and promoting openness at the cost of law enforcement, privacy, and national security, and at an American Enterprise Institute conference in 1978, he blasted the Supreme Court's 1973 ruling in ROE V. WADE for being an illegitimate exercise in judicial lawmaking.

Hence, by the early 1980s, when President Reagan was showing propensity to fill federal court positions with conservative legal academics, Nino Scalia was a prime candidate. He was first offered a position on the United States Court of Appeals for the Seventh Circuit in Chicago, but he turned it down, preferring instead the Court of Appeals for the District of Columbia. A vacancy on that court occurred in 1982, and he resigned his professorship at the University of Chicago to move his wife Maureen and their nine children to Washington, D.C.

Judge Scalia's tenure on the federal appellate bench was marked by the political conservatism of his opinions and by his ability to maintain strong personal working relationships on a court that had been politically and socially divided for many years. Among Scalia's notable opinions on the D.C. Circuit were those that supported the executive branch over both the legislative branch and independent federal agencies. For example, Scalia wrote an opinion striking down the GRAMM-RUDMAN-HOLLINGS ACT, on SEPARATION OF POWERS grounds. According to Scalia, the act impermissibly delegated executive branch functions to an official who was subject to removal by Congress. Scalia further gained attention by narrowing press protection from LIBEL suits in two opinions: one against the *Washington Post* and one in which his dissent would have allowed a suit against two political columnists. He also narrowly read Title VII contending in a dissent that sexual harassment on the job did not violate the provisions of the act.

Judge Scalia's conservative politics and his performance as a judge made him the choice of the Reagan administration in 1986 for the Supreme Court seat of Associate Justice WILLIAM H. REHNQUIST when the President elevated Rehnquist to the position of Chief Justice. The American Bar Association endorsed Scalia without qualification, and only a few feminist and civil rights groups opposed him at his confirmation hearings. He was subjected to far less criticism and hostile questioning than Rehnquist, and he avoided the political battle his fellow circuit judge, Robert Bork, experienced two years later when he was nominated to the court. The Senate approved Justice Scalia's nomination unanimously on September 16, 1986.

As a Supreme Court Justice, Scalia has received attention for the intellectual tenacity of his positions and for his jurisprudential methodology. Not unexpectedly, he voted most often with the Court's conservatives: Chief Justice Rehnquist, Justice ANTHONY M. KENNEDY, Justice SANDRA DAY O'CONNOR, and Justice BYRON R. WHITE. Over the years he has been on the Court, Scalia and the Chief Justice have agreed in about eighty-five percent of the Court's cases, which is similar to his rate of agreement with Justice Kennedy and only slightly higher than the rate with Justice O'Connor. He has agreed with Justice White at a slightly lower rate (seventy-five percent), whereas his agreement rates with Justices WILLIAM J. BRENNAN, THURGOOD MARSHALL, HARRY A. BLACKMUN, and JOHN PAUL STEVENS have been closer to fifty percent. That he has voted in support of conservative policies is not surprising. For example, Justice Scalia's dissent in WEBSTER V. REPRODUCTIVE HEALTH SERVICES (1989) argued that ROE V. WADE should be overturned. He joined the majority in striking down affirmative action plans in RICHMOND (CITY OF) V. J. A. CROSON CO. (1989), and he has rejected challenges to the constitutionality of CAPITAL PUNISHMENT.

What has been noted by commentators, however, is the jurisprudential vision that Justice Scalia has forcefully constructed through his opinions. The cornerstone of his jurisprudence is the limited role of the judge and the judiciary in the American constitutional system. In Scalia's understanding of American democracy, the Constitution granted the legislature and (by delegation) the executive the power to define rights and to determine the wisdom of specific policies designed or executed within their respective constitutional spheres. This may sound similar to the familiar criticism judicial conservatives have made to "judicial legislation" engaged in by liberal justices since the Warren Court. However, Scalia has taken the position further by advancing the argument for judicial restraint across all areas of judging, building on the critiques of JUDICIAL ACTIVISM offered by liberals such as Justices LOUIS D. BRANDEIS and FELIX FRANKFURTER and later elaborated by professors such as Harvard's HENRY HART and Herbert Wechsler. This position must be contrasted to the post-New Deal liberals as well as to many twentieth-century conservatives. Both have had at the core of their jurisprudence an active role for the judiciary as the balancers of society's interests. The liberals have envisioned the judge as the protector of individuals against majoritarian legislatures and thus have used concepts such as DUE PROCESS

and EQUAL PROTECTION to create rights and strike down both federal and state legislation. Conservatives, typified by Chief Justice WILLIAM HOWARD TAFT, have believed that judges should ensure that the majority's legislative actions (which generally have taken the form of increased regulation of social and economic activities) are gradual and that property interests are protected.

Justice Scalia's differences with such conservatives can be illustrated through both his writings and his opinions. Perhaps the most striking comparison that can be made is between his article "The Rule of Law as a Law of Rules" and the writings of Chief Justice Taft. Taft celebrated the creation of "the rule of reasonableness" in determining violations of the provisions of the SHERMAN ANTITRUST ACT precisely because it left the federal judiciary as the arbiter of which monopolies were unlawful. Also, for Taft the glory of the COMMON LAW process was that judges made law incrementally and directed change through their opinions by the elaboration of rules and the application of facts to those rules. Scalia's article directly challenges both these points. He argues that judges should attempt to formulate general rules rather than gradually developing standards through common law case-by-case determinations. He maintains that cases decided by such standards are determined by the weight individual judges place on particular facts, thus allowing the individual to decide outcomes by his or her individual preferences. An example of what Justice Scalia means, as well as how his approach differs from both liberals and conservatives on the Supreme Court, can be found in a recent PUNITIVE DAMAGES case decided by the Court, *Pacific Mutual Life Insurance Co. v. Haslip* (1991). In this opinion, the majority (Justices Blackmun, Rehnquist, White, Marshall, and Stevens) considered the constitutionality of an award of punitive damages by an Alabama jury. The Court held in an opinion by Blackmun that punitive damages were not per se unconstitutional but that due process considerations required that both the process for instructing the jury as well as the amount awarded must be "reasonable" in order to be constitutional. The majority then discussed the factors that should be considered in testing the reasonableness of the award. Justice O'Connor in dissent argued that the Alabama punitive-damages scheme did not meet due process standards as it was impermissibly vague. Justice Scalia concurred in the result reached by the majority, but rejected both its reasoning and that of Justice O'Connor. He rejected the inquiry into the reasonableness or fairness of the procedures because "this jury-like verdict provides no guidance as to whether any *other* procedures are sufficiently "reasonable,' and thus perpetuates the uncertainty that . . . this case was intended to resolve." Justice Scalia instead derived a per se rule that these damages were constitutional by broadly canvassing this history of their use and concluding that, since they had been "a part of our living tradition that dates back prior to 1868, I would end the suspense and categorically affirm their validity." He stated that "it is not for the Members of this Court to decide from time to time whether a process approved by the legal traditions of our people is "due' process, nor do I believe such a rootless analysis to be dictated by our precedents."

As this example reveals, Justice Scalia's attempt to implement judicial restraint requires an interpretive methodology that can derive categorical rules that are founded on something other than the judges' individual sense of what is right. He does not totally embrace ORIGINALISM as do other conservatives such as Robert Bork, although he acknowledges that the intent of the Framers is where analysis must begin. Instead, Justice Scalia has adopted a literalistic approach in which the plain and ordinary meaning of the language of texts—whether they be the U.S. Constitution, statutes, or regulations—must govern the judge's decision. For example, in *Morrison v. Olson* (1989), Justice Scalia issued the only dissent in the case that upheld the federal law governing the appointment of SPECIAL PROSECUTORS. His strongly worded attack on the majority's opinion centered on the wording of Article I. All EXECUTIVE POWER was vested in the President by the wording of Article I, and this law removed some of this power and thus was unconstitutional. He rejected any idea that the Court could balance the interests of the two branches to decide the reasonableness of this statutory scheme. Similarly, in *Cruzan v. Missouri Department of Health* (1990), Scalia concurred in the majority's decision to refuse to create a constitutional RIGHT TO DIE. He differed from the majority in that he would have forthrightly declared that no such right existed because to do so would be "to create out of nothing (for it exists neither in text nor tradition)."

This methodology requires several subsidiary rules. Because the ordinary meaning of the words are to govern, the intent of the drafters of legislation have no place in judicial analysis. Thus, Justice Scalia refused to resort to an inquiry into the legislative history of statutes. If the plain meaning of a law creates a hardship that was unintended or if enforcement of a law as written is unworkable, it is for the legislative branch to redraft the act rather than for judges to amend it through their interpretations. Scalia outlined this position in his first term on the Court in a concurrence in *Immigration & Naturalization Service v. Cardoza Fonseca* (1987). He stated that the Court's result was correct, but that it could reach the result through the plain meaning of the statute. Not only was the majority's inquiry into the legislative history unnecessary, it was also irrelevant. He thus rejected a technique not only used consistently by the Warren Court but also accepted by

conservative Justices. Second, when the ordinary meaning of a text is not determinative, the judge should look to "objective" standards, such as the history and tradition of a particular practice. These would require consultation of historical sources and monographs, as well as judicial PRECEDENTS. An example of this approach was *Pacific Mutual*, where Justice Scalia relied on American common law history of punitive damages to determine what due process meant in this context. Similarly, in STANFORD V. KENTUCKY (1989) Justice Scalia determined that executing a juvenile was not "cruel and unusual" under the Eighth Amendment because, in part, a canvass of state laws showed that a majority allowed execution of sixteen-year-olds. Thus, he reasoned, the practice could not be considered unusual.

Two points should be made in concluding a review of Justice Scalia's strikingly innovative jurisprudential methodology. As most of the examples reveal, his approach is most often made in concurrences or individual dissents. At the Supreme Court he has not played the role of a consensus builder, and in fact, his sharp attacks on other Justices in dissent (most notably against Justice O'Connor in *Webster*) have received critical comment. Although there is some evidence that the Court has moved toward him on some issues, such as ignoring legislative history, he has yet to emerge as the intellectual leader of the Court, as opposed to a single highly intelligent voice. Second, his jurisprudence has been developed at a time when political conservatives have enjoyed considerable success in both legislative and executive branches on the state and federal levels. Although there is certainly some evidence that he has followed his methodology even when it has surprisingly resulted in liberal outcomes (he voted to strike down the FLAG DESECRATION statute in *Johnson v. Texas* and has reached prodefendant positions in several CRIMINAL PROCEDURE cases, it remains to be seen what might happen if the future were to bring a strongly liberal executive and legislature intent on expanding federal social and economic reform.

RAYMAN L. SOLOMON
(1992)

(SEE ALSO: *Coy v. Iowa; Johnson v. Transportation Agency; Lemon Test; Rutan v. Republican Party of Illinois.*)

Bibliography

COMMENT 1987 The Appellate Jurisprudence of Justice Antonin Scalia. *University of Chicago Law Review* 54:705–739.

ESKRIDGE, WILLIAM N., JR. 1990 The New Textualism. *University of California at Los Angeles Law Review* 37:621–691.

KANNAR, GEORGE 1990 The Constitutional Catechism of Antonin Scalia. *The Yale Law Journal* 99:849–865.

SCALIA, ANTONIN 1989 Originalism; The Lesser Evil. *University of Cincinnati Law Review* 57:849–865.

——— 1989 The Rule of Law as a Law of Rules. *University of Chicago Law Review* 56:1175–1188.

# SCALIA, ANTONIN
(1936– )
(Update)

Antonin Scalia is an Associate Justice on the United States Supreme Court. A graduate of Harvard Law School, he taught law at the University of Virginia and at the University of Chicago. Between these academic appointments, Scalia held several legal positions, including head of the Justice Department's Office of Legal Counsel. In 1982, President RONALD REAGAN appointed Scalia to the United States Court of Appeals for the District of Columbia Circuit. In 1986, Reagan appointed Scalia the 103rd Justice of the United States Supreme Court.

Scalia is often viewed as a leader of the conservative backlash against the WARREN COURT. Notwithstanding his conservatism, his judicial philosophy is much more complex. Scalia differs in important respects from the other two Reagan appointees—SANDRA DAY O'CONNOR and ANTHONY M. KENNEDY—and even from WILLIAM H. REHNQUIST, whom Reagan elevated to Chief Justice. Of the conservative appointees, only CLARENCE THOMAS, appointed by President GEORGE H. W. BUSH, seems to share Scalia's philosophy (although Rehnquist may come close). That philosophy has been described by various labels, but TEXTUALISM or ORIGINALISM probably is most fitting.

Textualism is often confused with the philosophy of ORIGINAL INTENT. Thus, it is frequently said that courts should give effect to the intention of the legislators who enacted a law. But Scalia believes what the legislature actually enacted should control, rather than what it subjectively intended. Of course, the two may concur, but when they do not, courts must look to what the legislature promulgated, not what it intended to promulgate.

Scalia believes that a democratic society is bound by validly passed laws, not by the unexpressed intent of the lawgiver. Besides, judges are likely to conclude that the legislature intended what a reasonable and intelligent person ought to have intended, which means they are likely to decide the statute means what they think it should mean. Thus, we would have government by the unelected and politically unaccountable federal judiciary rather than by the politically responsible legislature.

Scalia distinguishes textualism from STRICT CONSTRUCTIONISM. A statute should not be construed strictly or leniently, he says; rather, it should be construed reasonably to stand for all that it fairly means. In *Smith v. United States* (1993), for example, the statute provided for an enhanced sentence if a person "uses" a gun in relation to a

drug crime. Scalia dissented from the Court's holding that a person who sought to exchange an unloaded gun for cocaine had used a firearm in relation to a drug crime. To "use" a gun, Scalia argued, fairly connotes using the gun as a weapon, not as an item of exchange.

Scalia's view that the objective indication of the statutory words, rather than the LEGISLATIVE INTENT, should control has led him to reject legislative history—statements made in floor debates, committee testimony, and committee reports—in STATUTORY INTERPRETATION. The majority of legislators voted for the language in the law, not for the legislative history. Moreover, knowing that courts rely on legislative history, statements are made deliberately to influence expected litigation. Besides, the Constitution requires both Houses of Congress to pass a law and the President to have a chance to veto it. Committee reports do not satisfy these requirements.

Scalia applies the same principles to CONSTITUTIONAL INTERPRETATION. That is, he looks for the original meaning of the text, not what the Framers intended. He will consult THE FEDERALIST papers, because these show how the original document was understood by intelligent people at the time. He does not look to them as evidence of the intent of the Framers.

As Scalia has observed, however, the great debate today is between those few who think the Constitution's meaning does not change (whether they are textualists or adherents to the intent of the Framers) and the many who want to keep the Constitution current with the times. But the Constitution is a democratically adopted text (like statutes are), designed to make change difficult. Only the people, through the AMENDING PROCESS, have the authority to change it. Politically unaccountable judges do not have the authority to do so.

Scalia is critical of judges who argue that CAPITAL PUNISHMENT IS CRUEL AND UNUSUAL PUNISHMENT in violation of the Eighth Amendment, even though the Constitution refers to the death penalty in three clauses. Under the notion of a LIVING CONSTITUTION, he says, each judge is free to decide if and when the death penalty became unconstitutional, with no guidance from the text. Harvard Law School Professor Laurence Tribe, however, says Scalia is not being faithful to his textualist approach. Scalia's position is sound, Tribe argues, only if the unexpressed intentions of the Framers control, but Scalia has argued against being bound by the intent of the Framers. Scalia would respond that the language of the Eighth Amendment, read in context, does not support finding the death penalty to be cruel and unusual.

Scalia has been most outspoken regarding the Court's interpretation of the Constitution's DUE PROCESS clauses, which prohibit any person from being deprived of life, liberty, or PROPERTY without due process of law. By their terms, these clauses are limited to process (the state can take life, liberty, or property if it provides due procedures), but departing from the text, the Court has used these clauses to protect certain substantive liberties, such as ABORTION and the right to terminate life support. Scalia has not attacked the very notion of SUBSTANTIVE DUE PROCESS but has said that due process only protects those liberties rooted in history and tradition, *Michael H. v. Gerald D.* (1989). In an abortion case, he also said that it does not follow that the Constitution does not protect childbirth simply because it does not protect abortion, PLANNED PARENTHOOD V. CASEY (1992). Scalia has also written that he would vote to strike down public flogging even if it could be demonstrated that such flogging was not cruel and unusual in 1791, when the Eighth Amendment was adopted. Each of the positions is a departure from pure textualism (or originalism).

MARYLAND V. CRAIG (1990) provides an example of how textualism differs from strict constructionism, and how it can produce results that are not conservative. The majority upheld a procedure that allowed a young sex-abuse victim to testify with the defendant being made to watch over closed-circuit television. Perhaps this was a reasonable procedure to save the victim psychic trauma, but Scalia nonetheless thought it violated the RIGHT OF CONFRONTATION guaranteed by the confrontation clause. When the Constitution was enacted, he argued in dissent, confrontation meant the right to meet face-to-face those who testify at trial. Judges do not have authority to balance a right the text explicitly provides against their view of the public interest.

JOSEPH D. GRANO
(2000)

Bibliography

DWORKIN, RONALD 1997 Fidelity as Integrity: The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve. *Fordham Law Review* 65:1249–1268.

FOX, AUTUMN and MCALLISTER, STEPHEN R. 1997 An Eagle Soaring: The Jurisprudence of Justice Antonin Scalia. *Campbell Law Review* 19:223–309.

GERHARDT, MICHAEL J. 1994 A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia. *Boston University Law Review* 74:25–66.

LIESS, ELIZABETH A. 1993 Comment: Censoring Legislative History: Justice Scalia on the Use of Legislative History in Statutory Interpretation. *Nebraska Law Review* 72:568–585.

SCALIA, ANTONIN 1989 Originalism: The Lesser Evil. *Cincinnati Law Review* 56:849–865.

——— 1997 *A Matter of Interpretation.* Princeton, N.J.: Princeton University Press.

SHATTUCK, TIMOTHY L. RASCHKE 1992 Justice Scalia's Due Process Methodology: Examining Specific Traditions. *Southern California Law Review* 65:2743–2791.

## SCHAD v. MOUNT EPHRAIM
452 U.S. 61 (1981)

The Supreme Court, 7–2, reversed the conviction of the operators of an "adult" bookstore for violating a ZONING ordinance of a residential town by presenting live entertainment in the form of nude dancing. The state courts had construed the ordinance to forbid all live entertainment; so read, it fell afoul of the FIRST AMENDMENT doctrine of OVERBREADTH. The Court concluded that the state's asserted justifications (limiting commerce to residents' "immediate needs," and avoiding problems with parking, trash, and the like) were unsupported by the record, which showed that live entertainment was offered in three other establishments. The dissenters argued that, although banning other entertainment might present First Amendment problems, banning nude dancing did not.

KENNETH L. KARST
(1986)

## SCHALL v. MARTIN
467 U.S. 253 (1984)

This is one of several cases showing that legal fictions infect JUVENILE PROCEEDINGS involving criminal conduct. *Schall* reflected the fictions that juveniles, unlike adults, "are always in some form of custody" and that PREVENTIVE DETENTION is not punitive and is designed to protect the youthful offender as well as society from the consequences of his uncommitted crimes. New York, without distinguishing first offenders from recidivists and without distinguishing trivial offenses from major crimes of violence, allowed juveniles, aged seven to sixteen, to be jailed for up to seventeen days pending adjudication of guilt. Justice WILLIAM H. REHNQUIST, for a 6–3 Supreme Court, ruled that preventive detention in the case of juveniles is compatible with the FUNDAMENTAL FAIRNESS required by the FOURTEENTH AMENDMENT's guarantee of DUE PROCESS OF LAW. Rehnquist found adequate procedural safeguards in the New York statute, noted that every state permitted preventive detention of juveniles accused of crime, and declared that the juveniles' best interests were served because preventive detention disabled them from committing other crimes prior to the date of court appearance. Justices THURGOOD MARSHALL, WILLIAM J. BRENNAN, and JOHN PAUL STEVENS, dissenting, insisted that the majority's factual argument did not survive critical scrutiny any more than did the statute provide due process.

LEONARD W. LEVY
(1986)

## SCHECHTER POULTRY CORP. v. UNITED STATES
295 U.S. 495 (1935)

After the decision in this case, striking down the NATIONAL INDUSTRIAL RECOVERY ACT, a conservative gave thanks that the Constitution still stood, while a liberal wondered whether it stood still. The Supreme Court's "horse and buggy" interpretation, as President FRANKLIN D. ROOSEVELT called it, imperiled the power of the United States to control any part of the economy that the Court regarded as subject to the exclusive control of the states. Chief Justice CHARLES EVANS HUGHES, for the Court, first held the statute void because it improperly delegated legislative powers. Private business groups might frame codes governing their industries as long as NRA officials approved and the president promulgated them. Hughes said the president's discretion was "unfettered," and even Justice BENJAMIN N. CARDOZO, who had dissented in PANAMA REFINING CO. V. RYAN (1935), separately concurred and spoke of "delegation running riot." Improper DELEGATION [of power] could have been rectified by new legislation, but the Court also held the act unauthorized by the COMMERCE CLAUSE, leaving the impression that labor matters and trade practices were beyond the scope of congressional power unless in INTERSTATE COMMERCE or directly affecting it.

The government argued that although Schechter sold only in the local market, its business was in the STREAM OF COMMERCE. Ninety-six percent of the poultry sold in New York City came from out of state. Hughes rejected that argument by ruling that the flow of interstate commerce had ceased, because the poultry had come to a permanent rest in the city: it was sold locally and did not again leave the state. The government also invoked the SHREVEPORT DOCTRINE, arguing that even if the commerce here were local, it had so close and substantial a relationship to interstate commerce that its federal regulation was necessary to protect interstate commerce. Schechter's preferential trade practices, low wages, and long hours, in violation of the poultry code, enabled it to undersell competitors, diverting the interstate flow of poultry to its own market, injuring interstate competitors, and triggering a cycle of wage and price cutting that threatened to extend beyond the confines of the local market. This entire line of reasoning, Hughes said, proved too much. It laid the basis for national regulation of the entire economy, overriding state authority. It also ignored the fundamental distinction between direct and indirect effects upon interstate commerce. What that distinction was Hughes did not explain, but he asserted that Schechter's violations of the code only indirectly affected interstate commerce and therefore stood beyond national reach. Even Cardozo,

joined by Justice HARLAN FISKE STONE, declared that "to find immediacy or directness here is to find it almost everywhere."

*Schechter* temporarily ended national regulation of industry and allowed Roosevelt to blame the Court, even though the NRA's code programs were cumbersome, unpopular, and scheduled for political extinction. The Court's views of the commerce clause made no substitute constitutionally feasible.

LEONARD W. LEVY
(1986)

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

The FREEDOM OF SPEECH provisions of the FIRST AMENDMENT played a singularly retiring role in American constitutional law until the time of WORLD WAR I or, more precisely, until the Russian Revolution and the Red Scare that it generated in the United States. The Sedition Act of 1798 (see ALIEN AND SEDITION ACTS) obviously posed serious First Amendment questions but was not tested in the Supreme Court and was soon repealed. A scattering of free speech claims and oblique pronouncements by the federal courts occurred after 1900, but speech issues, even when they did arise, typically appeared in state courts in the contexts of OBSCENITY prosecutions and labor disputes. The Court did not declare the First Amendment applicable to the states through the due process clause of the FOURTEENTH AMENDMENT (see INCORPORATION DOCTRINE) until GITLOW V. NEW YORK (1925). Furthermore, in its most direct pronouncement on the freedom of speech provision of the First Amendment, *Patterson v. Colorado* (1907), the Court, speaking through Justice OLIVER WENDELL HOLMES, had suggested that the provision barred only prior restraints, a position that Holmes abandoned in *Schenck.*

In 1917 Congress passed an ESPIONAGE ACT making it a crime to cause or attempt to cause insubordination in the armed forces, obstruct recruitment or enlistment, and otherwise urge, incite, or advocate obstruction or resistance to the war effort. Although there had been much bitter debate about U. S. entry into World War I, the speakers whose prosecutions raised First Amendment issues that ultimately reached the Supreme Court were not German sympathizers. They were left-wing sympathizers with the Russian Revolution who were provoked by the dispatch of Allied expeditionary forces to Russia. If the American war machine was to be turned on the Revolution, it must be stopped.

Prosecutions of such revolutionary sympathizers triggered three important federal court decisions that initiated the jurisprudence of the First Amendment: MASSES PUBLISHING COMPANY V. PATTEN (1917), *Schenck v. United States*, and ABRAMS V. UNITED STATES (1919). *Schenck* was the first major Supreme Court pronouncement on freedom of speech.

Schenck was general secretary of the Socialist Party which distributed to prospective draftees a leaflet denouncing CONSCRIPTION and urging recipients to assert their opposition to it. He was convicted of conspiracy to violate the Espionage Act by attempting to obstruct recruiting. Following his own earlier writing on attempts, Holmes, writing for a unanimous Court, said: It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 . . . punishes conspiracies to obstruct as well as actual obstruction. If the act (speaking, or circulating a paper), its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. In response to Schenck's First Amendment claims, Holmes said:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a CLEAR AND PRESENT DANGER that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

That the clear and present danger test was first announced in a context in which speech was treated as an attempt to commit an illegal act rather than in a situation in which the statute declared certain speech itself criminal was important for several reasons. First, the attempts context necessarily drew the judicial focus to the nexus between speech and criminal action and thus to the circumstances in which the speech was uttered rather than to the content of the speech itself. Questions of intent and circumstances, crucial to the law of attempts, thus became crucial to the danger test. Second, if the link between speech and illegal act was necessarily a question of degree, then much discretion was necessarily left to the judge. The clear and present danger test has often been criticized for leaving speakers at the mercy of judicial discretion. Having invoked the danger test, the Court affirmed Schenck's conviction. Third, supporters of judicial self-restraint subsequently sought to narrow the scope of the danger test by insisting that it was to be employed only in situations where the government sought to prosecute speech under a statute proscribing only action. In this view, the test was

inapplicable when the legislature itself had proscribed speech, having made its own independent, prior judgment that a certain class of speech created a danger warranting suppression.

Although Holmes wrote in Schenck for a unanimous court, he and Justice LOUIS D. BRANDEIS were the danger test's sole supporters in the other leading cases of the 1920s: *Abrams*, *Gitlow*, and WHITNEY V. CALIFORNIA (1927). A comparison of these cases indicates that Holmes's "tough guy" pose was deeply implicated in his clear and present danger decisions. In the later cases, Holmes seemed to be saying that a self-confident democracy ought not to descend to the prosecution of fringe-group rantings about socialist revolution. In *Schenck*, however, where the speech was concretely pointed at obstructing war time recruitment, Holmes said: "When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."

MARTIN SHAPIRO
(1986)

Bibliography

CHAFEE, ZECHARIAH 1941 *Free Speech in the United States.* Cambridge, Mass.: Harvard University Press.

## *SCHEUER v. RHODES*
416 U.S. 236 (1974)

This decision established that high state officers are not absolutely immune from suit for constitutional violations. Ohio National Guard troops shot and killed four students demonstrating against the VIETNAM WAR. The deceased students' representatives sued Governor James Rhodes and other state officials, alleging reckless deployment of the Guard and unlawful orders to the Guard which led to the shootings. The Supreme Court held Rhodes not to be absolutely immune from suit. The Court did indicate that officials with substantial discretionary responsibilities are to be given greater deference than officials with more limited tasks. *Rhodes* connects the first SECTION 1983 case on EXECUTIVE IMMUNITY, PIERSON V. RAY, (1967), with later decisions such as WOOD V. STRICKLAND (1975) and *Procunier v. Navarette* (1978).

THEODORE EISENBERG
(1986)

## *SCHICK v. REED*
419 U.S. 256 (1974)

In a 5–4 decision, the Supreme Court upheld the President's right to grant conditional clemency. Maurice Schick, convicted of murder in 1954 by a court-martial, was sentenced to death. In 1960, under Article II, section 2, clause 1, of the Constitution, President DWIGHT D. EISENHOWER commuted the sentence to life imprisonment without parole. Citing FURMAN V. GEORGIA (1972), Schick asked the Court to hold the no-parole condition unconstitutional. But the court held that the PARDONING POWER flows from the Constitution alone and may not be limited except by the Constitution itself.

DENNIS J. MAHONEY
(1986)

## *SCHMERBER v. CALIFORNIA*
384 U.S. 757 (1966)

Justice WILLIAM J. BRENNAN, for a 6–3 majority of the Supreme Court, ruled that the taking of a blood sample from the petitioner over his objections, to prove his guilt for driving under the influence of alcohol, did not constitute TESTIMONINAL COMPULSION and therefore did not violate the RIGHT AGAINST SELF-INCRIMINATION, nor did it constitute an invalid WARRANTLESS SEARCH under the EXIGENT CIRCUMSTANCES.

LEONARD W. LEVY
(1986)

## *SCHNECKLOTH v. BUSTAMONTE*
412 U.S. 218 (1973)

The police may conduct a search without a warrant when consent is freely given. Before *Schneckloth*, some lower courts had taken the position that consent was not voluntary unless the prosecution could demonstrate that the person was aware of his right to refuse consent. Others held that knowledge of the right to refuse was merely one element to be considered, and that consent was established by the totality of the circumstances. In *Schneckloth* the Supreme Court adopted the latter position.

The Court distinguished the FOURTH AMENDMENT from other constitutional guarantees (for example, the RIGHT TO COUNSEL) for which the Court had required an intentional relinquishment of the right. The other guarantees intend to promote the ascertainment of truth in a trial; the Fourth Amendment, on the other hand, does not promote pursuit of truth but secures PRIVACY. The requirement of MIRANDA RULE warnings prior to POLICE INTERROGATION was also an inapposite analogy, for the coercion inherent in a custodial environment is unlikely to be duplicated "on a person's own familiar territory."

Justice LEWIS POWELL, concurring, set forth views later adopted by the Court in STONE V. POWELL (1976), proposing

radical restrictions on the use of HABEAS CORPUS to review Fourth Amendment violations by state officers. Three dissenting Justices took the position that mere absence of coercion is not the equivalent of a meaningful choice; that "a decision made without actual knowledge of available alternatives" is not "a choice at all."

JACOB W. LANDYNSKI
(1986)

## *SCHNELL v. DAVIS*
336 U.S. 933 (1949)

In a PER CURIAM opinion, the Supreme Court affirmed a district court JUDGMENT. Davis had brought a CLASS ACTION, arguing that enforcement of Alabama's "Boswell Amendment" violated the VOTING RIGHTS of blacks. The amendment, adopted in 1946 to circumvent the decision in SMITH V. ALLWRIGHT (1944), made the ability to "understand and explain" the Constitution a requirement for voter registration. The record showed that this "understanding clause" was used exclusively to deny registration to blacks. The Court held that the requirement violated the FIFTEENTH AMENDMENT because it was used to deny the right to vote on account of race or color.

DENNIS J. MAHONEY
(1986)

# SCHOOL BUSING

Before BROWN V. BOARD OF EDUCATION (1954–1955) was decided, many a southern child rode the bus to school, passing on the way a bus headed in the other direction, loaded with children of another race. The busing of children was "one tool" used to maintain a system of school SEGREGATION. As late as 1970, before the Supreme Court had approved a single busing order, about forty percent of the nation's children rode buses to school. The school bus had permitted the replacement of rural one-room schoolhouses with consolidated schools; in the city, riding the bus had been thought safer than walking. School busing did not become the object of majoritarian anger until the 1970s, when the Supreme Court described it as "one tool" for dismantling a segregated system and affirmed its use not only in the South but also in the cities of the North and West.

In a rural southern county, the simplest form of DESEGREGATION might drastically reduce school busing; racial living patterns would permit integration of the schools through the discontinuation of racial assignments and assignment of children to the schools nearest their homes. In the cities, however, residential segregation had been so thorough that the abandonment of racial assignments and the substitution of a neighborhood school policy would not end the separation of school children by race. The question was asked: Would the Supreme Court insist on more than the end of racial assignments—on the actual mixing of black and white children in the schools—by way of dismantling segregation produced by deliberate official policy? In SWANN V. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION (1971), the Court answered that question affirmatively. Then, in KEYES V. SCHOOL DISTRICT NO. 1 (1973) and COLUMBUS BOARD OF EDUCATION V. PENICK (1979), the Court extended *Swann*'s commands to the North and West, in ways that blurred the DE FACTO/DE JURE distinction. Once a constitutional violation is found, even in remote acts of deliberate segregation by a school board, then as a practical matter the district court's remedial goal becomes "the greatest possible degree of actual desegregation"—and that, in a large city, means the busing of massive numbers of children for the purpose of achieving the maximum practicable RACIAL BALANCE.

Apart from the busing ordered by courts, some busing for integration purposes has resulted from voluntary programs, mostly involving the busing of minority children to schools formerly populated by non-Hispanic whites. Political resistance has been directed not to those programs but to busing ordered by a court over the opposition of the school board and of large numbers of parents and children. The most outspoken protest has come from white parents. The responses of school board majorities have varied, from political warfare in Boston and Los Angeles to the "let's-make-it-work" attitude in Columbus.

President RICHARD M. NIXON, whose first electoral campaign adopted a "Southern strategy" and whose campaign for reelection included an attack on school busing, proposed congressional legislation to restrict busing. In 1974 Congress purported to forbid a federal court to order a student's transportation to a school "other than the school closest or next closest to his place of residence." This statute's constitutionality would have been dubious but for a proviso that canceled its effect: the law was not to diminish the authority of federal courts to enforce the Constitution.

The school busing issue has forced a reevaluation of the goals of desegregation. In *Brown* the chief harm of school segregation imposed by law was said to be the stigma of inferiority, which impaired black children's motivation to learn. The fact of separation of the races in urban schools may or may not have the same stigmatic effect—even though deliberately segregative governmental actions have contributed to residential segregation in cities throughout the nation. Stigma aside, it is far from clear that racial isolation alone impairs minority children's learning. In communities with substantial Hispanic or Asian American populations, concerns about the mainte-

nance of cultural identity are apt to be expressed in opposition to taking children out of neighborhood schools and away from bilingual education programs. The call for "community control" of schools is heard less frequently in black communities today than it was around 1970, but some prominent black CIVIL RIGHTS leaders have placed increasing emphasis on improvement of the schools and decreasing emphasis on the busing of children.

Part of the reason for this shift in emphasis surely is a sense of despair over the prospects of busing as an effective means of achieving integration. Social scientists disagree on the amount of "white flight" that has resulted from court-ordered busing. Some demographic changes are merely extensions of a long-established pattern of middle-class migration to the suburbs. The Supreme Court in MILLIKEN V. BRADLEY (1974) made clear that metropolitan relief, combining city and suburban districts for purposes of school integration, was allowable only in rare circumstances. "White flight" can also take the form of withdrawal of children from public schools; recent estimates suggest that about one-fifth of the students in the nation's private schools have fled from desegregation orders. In this perspective, the neighborhood school is seen not only as a focus for community but also, less appetizingly, as a means for controlling children's associations and passing social advantage from one generation to the next. Either strategy of "white flight" costs money. It is no accident that the hottest opposition to court-ordered school busing has come from working-class neighborhoods, where people feel that they have been singled out to bear a burden in order to validate an ideal they have come to doubt.

School busing for integration purposes has come under strong political attack. Neither Congress nor a state can constitutionally prohibit busing designed to remedy *de jure* segregation. However, state measures limiting busing designed to remedy *de facto* segregation may or may not be upheld, depending on the legislation's purposes and effects. (See *Washington v. Seattle School District No. 1*, 1982; CRAWFORD V. LOS ANGELES BOARD OF EDUCATION, 1982.)

Sadly, it is realistic to assume the continuation of urban residential segregation, which has diminished only slightly since 1940, despite nearly half a century of civil rights litigation and legislation. (Even the migration of increasing numbers of middle-class black families to the suburbs has not significantly diminished residential segregation.) Given that assumption, the nation must choose between accepting racially separate schools and using school busing to achieve integration. The first choice will seem to many citizens a betrayal of the promise of *Brown*. The second choice faces opposition strong enough to threaten not only the nation's historic commitment to public education but also its commitment to obedience to law. The resolution of this dilemma is a challenge not only to courts but also to school board members and citizens, demanding imagination, patience, and good will in quantities far beyond their recent supply.

KENNETH L. KARST
(1986)

Bibliography

BELL, DERRICK A., JR. 1976 Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation. *Yale Law Journal* 85:470–516.

DIMOND, PAUL R. 1985 *Beyond Busing: Inside the Challenge to Urban Segregation*. Ann Arbor: University of Michigan Press.

FISS, OWEN M. 1975 The Jurisprudence of Busing. *Law and Contemporary Problems* 39:194–216.

WILKINSON, J. HARVIE, III 1979 *From Brown to Bakke*. New York: Oxford University Press.

## SCHOOL CHOICE

"School choice" programs offer parents the opportunity to apply government funds toward their child's tuition at a school of the parents' choice. Although some school choice programs involve only public educational institutions (giving parents, for example, a choice of magnet or charter schools), others offer to pay some or all of the child's tuition at a private religious or secular school. Although the Supreme Court in PIERCE V. SOCIETY OF SISTERS (1925) held that the Constitution protects the right of parents to choose to send their children to private schools, whether public funds may pay for the choice of a religious education has been the subject of a number of ESTABLISHMENT CLAUSE cases since the 1970s.

In LEMON V. KURTZMAN (1971), the Court struck down a program subsidizing the salaries of teachers of secular subjects in religious and secular schools. In holding that the program violated the FIRST AMENDMENT establishment clause, the Court articulated a three-part test in which GOVERNMENT AID TO RELIGIOUS INSTITUTIONS must: (1) have a secular purpose; (2) not have a primary effect of advancing or inhibiting religion; and (3) not result in undue entanglement of church and state. In COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY V. NYQUIST (1973), the Court applied the LEMON TEST to invalidate a tuition reimbursement and tax deduction program for parents who sent their children to private schools, including private religious schools. According to the *Nyquist* Court, direct funding of any aspect of a sectarian institution has the impermissible effect of advancing the institution's religious mission.

In the 1980s and 1990s, however, the Court moved

away from the "no aid" approach of *Lemon* and toward a private-choice model that occasionally permits religious institutions to participate in school choice programs. In MUELLER V. ALLEN (1983), the Court upheld a state law providing parents a tax deduction for expenses incurred in educating their children at either public or private schools. Even if the program had the incidental effect of aiding sectarian education, the aid arrived at the school by way of private choice, not government direction. Thus, it could not be said that the government had advanced religion in violation of the establishment clause. Applying the same "private choice" approach in WITTERS V. WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND (1986), the Supreme Court upheld a particular student's use of a general college tuition assistance program to pay tuition at a religious college.

The Court has not yet directly considered whether a state may include religious schools in government-funded school voucher programs. However, the private-choice model appears to permit such a program as long as the aid is granted on a religiously neutral basis, includes both public and private schools, and arrives at the school by way of private choice. Should the Court uphold such a program, it will then have to decide whether states may exclude religious schools from such programs if such exclusion is no longer required by the establishment clause. Permitting nonmandatory exclusion of religious schools from government funding programs seems in tension with the Court's holdings under the FREEDOM OF SPEECH clause that government funding of private expressive activity cannot be denied on the basis of religious viewpoint, such as ROSENBERGER V. RECTORS & VISITORS OF THE UNIVERSITY OF VIRGINIA (1995). Nonmandatory denial of equal funding for religious schools also arguably violates the free exercise clause's prohibition of intentional discrimination on the basis of religious belief under EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990).

KURT T. LASH
(2000)

(SEE ALSO: *Establishment of Religion; Religion in Public Schools; Religious Liberty; Separation of Church and State.*)

## SCHOOL DESEGREGATION

See: Desegregation; *Missouri v. Jenkins*; School Busing

## SCHOOL PRAYERS

Few constitutional issues have generated as much public controversy, and as much confusion, as the question of prayer in public schools. The Supreme Court's 1962 decision in ENGEL V. VITALE concerned an official prayer that had been composed by a group of politically appointed officials, the New York State Board of Regents. The defendant school district required every school principal to direct that the Regents' prayer be recited in unison in every classroom at the beginning of each school day. The Court held that even though individual students were permitted to abstain from participating in the recitation, the program violated the ESTABLISHMENT CLAUSE because it "officially establishe[d] the religious beliefs embodied in the Regents' prayer."

One year later the Court applied the principle of *Engel* to religious readings selected by public officials. Laws in Pennsylvania and Baltimore required every public school to begin each day with the reading of verses from the Holy Bible and group recital of the Lord's Prayer. Students were permitted to be excused from participation upon written request of a parent or guardian. In ABINGTON TOWNSHIP SCHOOL DISTRICT V. SCHEMPP, the Court held that these programs also violated the establishment clause, which the Court interpreted to preclude actions by state or federal governments that had the purpose or primary effect of either advancing or inhibiting religion. The Court noted that while the FIRST AMENDMENT permitted the study of the Bible or religion as part of its program of education, it did not permit government to organize devotional religious exercises. The fact that the particular devotionals had been selected by government officials, rather than composed by them as in *Engel*, was not a difference of constitutional import.

The school prayer and Bible reading decisions sparked a substantial public outcry, and repeated, unsuccessful efforts were made to overturn the decisions by amending the Constitution. The decisions were misinterpreted by some to mean that even the utterance of a private prayer by an individual student while at school was unconstitutional. What the establishment clause actually prohibited was action by government officials that endorsed or inhibited religion, and not religious activity initiated by students and not encouraged or promoted by school officials.

As subsequent decisions would make clear, the Court had never held that prayer itself was necessarily precluded in public schools or other public buildings, as long as the prayer resulted wholly from the private choice of individual citizens. Although the Court in WALLACE V. JAFFREE (1985) invalidated an Alabama law providing for a moment of silence "for meditation or voluntary prayer," a majority of the Court strongly suggested that some laws providing for a moment of silence would be constitutional. Alabama had previously enacted a statute, sustained by the lower court and not challenged before the Supreme Court, which authorized a one-minute period of silence for meditation. The new statute before the Court in *Jaffree* added

"prayer" as an expressly approved activity. Because students were provided an opportunity to pray under the earlier moment-of-silence statute, the new law's only additional purpose appeared to be "the State's endorsement and promotion of religion and a particular religious practice." This, the Court held, crossed the line into impermissible endorsement by the government. A majority of the Justices indicated, however, that they would sustain moment-of-silence laws that did not expressly single out prayer as one of the officially preferred activities.

When a statute creates an open, undesignated silent time, government itself has not undertaken to favor or disfavor religion. The seemingly trivial addition of the words "for prayer" to a moment-of-silence law crosses the line of constitutionality precisely because it is unnecessary to the goal of creating an opportunity for students to choose to pray. If a simple moment of silence is created at school, parents and religious leaders may, if they wish, suggest to their children or parishioners that they use the moment of silence for prayer. Expressly providing in the state's code of laws that "prayer" is a designated activity unnecessarily takes the state itself into the improper business of official endorsement and promotion of a religious exercise.

Ideally, a simple moment of silence is functionally a one-minute open forum which each student can fill as she chooses. Implementation of such a policy in a truly neutral fashion is, however, difficult in practice. The facts of some lower court cases suggest that teachers and school officials in some districts have encouraged or coerced students to pray during the silent moment. Teachers may appropriately ask students to remain quiet for the moment of silence; if teachers suggest or insist that students pray or adopt a prayerful attitude, they have invoked the authority of the state for an impermissible end.

The Court has also used the concept of the open forum to permit students at school to engage in spoken, group prayers as long as the religious activities are not encouraged, endorsed, or promoted by government or school officials. In WIDMAR V. VINCENT (1981), the Court held that a state university that allowed a wide range of voluntary student activity groups to meet in university facilities was not required by the establishment clause to deny access to student-initiated religious clubs whose meetings on school property included prayer and other devotionals. Indeed, such clubs had a free speech right of EQUAL ACCESS to the school's facilities on the same basis as volunteer student groups engaged in other speech activities. In BOARD OF EDUCATION OF WESTSIDE COMMUNITY SCHOOLS V. MERGENS (1990) the Court sustained the federal Equal Access Act that extended this principle to public secondary schools. The act provides that when a public school creates a "limited open forum" by allowing student-initiated, noncurriculum groups to meet at the school, it may not deny access to the school for meetings of other student-initiated groups on the basis of the "religious, political, philosophical, or other content of the speech at such meetings." One effect of the act is to give student religious clubs (whose meetings may include prayer) the same right to meet on campus as other noncurricular, student-initiated organizations like the chess club or the Young Democrats.

Even though many in the public remain unreconciled to the original school prayer and Bible reading decisions, and even though some recent decisions suggest that the Supreme Court is becoming more tolerant of some governmental promotion of religion, it seems unlikely that the Court's original decisions will soon be overturned either by the Court or by constitutional amendment. The constitutional principle remains for now, as it was when Justice HUGO BLACK wrote for the Court in *Engel*: "it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government."

WALTER DELLINGER
(1992)

(SEE ALSO: *Bender v. Williamsport; Lemon Test; Religion in Public Schools; Separation of Church and State.*)

Bibliography

DELLINGER, WALTER 1986 The Sound of Silence: An Epistle on Prayer and the Constitution. *Yale Law Journal* 95:1631–1646.

LAYCOCK, DOUGLAS 1986 Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers. *Northwestern University Law Review* 81:1–67.

## SCHOOL PRAYERS
## (Update)

Since the Supreme Court's decision in ENGEL V. VITALE (1962), the law has forbidden school officials from sponsoring worship exercises in public schools. Courts have given several reasons for this principle. First, pressure on students to conform to what is expected will lead some to engage in prayers in conflict with their own beliefs. Second, such exercises may be very divisive within a community; different religious groups may disagree concerning what prayers are appropriate, and they may engage in bitter disputes on the subject. At least one purpose of the ESTABLISHMENT CLAUSE was to minimize public conflict over matters of worship in public life. The Supreme Court applied the principle of *Engel* in WALLACE V. JAFFREE (1985) to an Alabama law requiring a moment of silence for meditation or prayer in public schools.

In recent years, the *Engel* principle has remained in active controversy. In 1998, the U.S. HOUSE OF REPRESENTATIVES defeated a proposed constitutional amendment which, if enacted, would have legalized state-sponsored worship in public facilities, including schools. Earlier in LEE V. WEISMAN (1992), the Court further extended the principle of *Engel* to prayers recited at a public middle school graduation ceremony by a member of the clergy invited to participate by school officials. The 5–4 majority Justices rested their judgment on a variety of grounds. The majority opinion, authored by Justice ANTHONY M. KENNEDY, asserted that attendance at graduation was, though not required by law, nevertheless obligatory as a matter of custom and community expectation. Moreover, he reasoned that peer pressure might well lead some students to acquiesce silently in graduation prayer, despite their disagreement with the content of the prayer. Thus, he concluded that graduation prayer was coercive and forbidden by the Constitution. Others in the Court majority agreed with that assessment, and went further to conclude that commencement prayer involved government endorsement and sponsorship of religion, both of which are independently forbidden by the establishment clause. The dissenters in *Lee*, led by Justice ANTONIN SCALIA, argued that commencement prayer was justified by a long-standing American tradition of using nondenominational prayer to mark public ceremonies. Although that historical assertion was correct, it was not responsive to the *Lee* majority's concern that public school commencement prayer involved both government sponsorship of religious exercise and coercive pressure on young people and their families.

After *Lee*, three kinds of questions have arisen. First, lower courts have held that state university commencements may include nondenominational, ceremonial benedictions. Because university graduates are adults, the coercive pressures on them are thought to be sufficiently less to justify the different outcome. This result rests on questionable reasoning; if government sponsorship of religious exercise is an independent vice, the age of the students should make no difference.

Second, some school districts responded to *Lee* by arranging commencements in ways that permitted the graduating seniors to choose student speakers and direct them to lead others in prayer at the ceremony. Although a few courts have upheld this practice, others have ruled that the school officials remain responsible for the content of commencement exercises; accordingly, school-sponsored, student-led prayer at commencement has been treated by most courts as equally unconstitutional as prayer led by officials or invited clergy.

Third, many school officials, teachers, and students have erroneously come to believe that purely private prayer by students on school PROPERTY is illegal. This is simply mistaken; so long as private prayers uttered by students—for example, saying Grace over lunch in the cafeteria—are neither sponsored by the school nor expressed in a way that harasses fellow students, such religious speech on school property is entirely within the students' rights of FREEDOM OF SPEECH and RELIGIOUS LIBERTY.

IRA C. LUPU
(2000)

(SEE ALSO: *Establishment of Religion; Religion and Free Speech; Religion in Public Schools.*)

Bibliography

PAULSEN, MICHAEL S. 1993 *Lemon* is Dead. *Case Western Reserve Law Review* 43:795–863.

SHERRY, SUZANNA 1992 *Lee v. Weisman:* Paradox Redux. *Supreme Court Review* 1992:123–153.

## SCHOULER, JAMES
(1839–1920)

Massachusetts-born James Schouler, while a Union officer in the CIVIL WAR, contracted a fever that left him nearly deaf. He nevertheless rose to national prominence as an attorney and historian. Although his law practice was successful—his first Supreme Court victory was *Hosmer v. United States*, 1872)—he gave it up (because of his disability) in favor of teaching. His main historical work was the nationalistic *History of the United States under the Constitution* (7 volumes, 1880–1913), which he conceived as the first comprehensive account of American political and legal history. He also wrote *Constitutional Studies: State and Federal* (1897) and biographies of THOMAS JEFFERSON and ALEXANDER HAMILTON.

DENNIS J. MAHONEY
(1986)

## SCHROEDER, THEODORE
(1864–1953)

Before WORLD WAR I, Theodore Schroeder, as FELIX FRANKFURTER said, was the foremost authority in the field of FIRST AMENDMENT rights. A prosperous lawyer, he could afford to be a full-time publicist in the cause of opposing all censorship and prosecutions for seditious, blasphemous, and obscene libels. In 1902 he founded the Free Speech League, the mainstay of CIVIL LIBERTIES until the founding of the American Civil Liberties Union. Roger Baldwin, one of the many civil libertarians whom Schroeder influenced, declared that Schroeder "was the Free Speech League." Schroeder was an uncompromising First

Amendment absolutist who defended anarchists, freethinkers, and pornographers. He also advocated equal rights for women and defended Emma Goldman and Margaret Sanger. His major works include *"Obscene" Literature and Constitutional Law* (1911), *Free Speech for Radicals* (1916), *Constitutional Free Speech Defined and Defended* (1919), and *Free Speech Bibliography* (1922).

LEONARD W. LEVY
(1986)

Bibliography

AUERBACH, JEROLD 1972 (1911) Introduction to Schroeder, Theodore, *"Obscene" Literature and Constitutional Law.* New York: Da Capo Press.

## *SCHWABE v. NEW MEXICO BOARD OF BAR EXAMINERS*
353 U.S. 232 (1957)

*Schware* was one of the early cases in which state bar examiners refused bar admission to persons suspected of communism. The Court overturned the refusal on DUE PROCESS grounds, holding that a finding that the applicant was a Communist party member before 1940 was constitutionally insufficient to overcome evidence of his later good moral character.

MARTIN SHAPIRO
(1986)

## SCHWARTZ, BERNARD
(1923–1997)

Bernard Schwartz, described by *New York Times* commentator Anthony Lewis as "the most committed, productive legal scholar of our times," was born in New York City. After being graduated Phi Beta Kappa from New York's City College, he received his law degree from New York University (NYU) with the highest grades in the school's history and later received doctorates in laws and letters from Cambridge University and the University of Paris.

Schwartz started his fifty-year law-teaching career at NYU and then assumed the Chapman Chair at the University of Tulsa in 1992. He wrote more than sixty-five books and hundreds of articles, but was most recognized for his scholarship on administrative and constitutional law; he co-authored casebooks and textbooks, and wrote annual summaries of decisions on these topics.

Schwartz saw his major role as a reporter, explaining and critiquing the Supreme Court, not just for colleagues but also for the general educated public. Unlike the authors of *The Brethren* (1979) and *Closed Chambers* (1998), he did not get into personality conflicts and clerk recollections, but instead focused on the process of decision-making in books such as *The Unpublished Opinions of the Warren Court* (1985), *The Unpublished Opinions of the Burger Court* (1985), *A History of the Supreme Court* (1993), and the popular American Bar Association award-winning book, *Decision: How the Supreme Court Decides Cases* (1996). He also explored individual cases and selected issues in numerous opinion articles for dozens of newspapers and organized conferences of scholars, practitioners, journalists, and political leaders on the jurisprudence of the WARREN COURT, the BURGER COURT, and the REHNQUIST COURT. Finally, he tried to involve the public in enjoying the criticism process by listing the best and worst Justices, best and worst decisions, and even the best and worst law-related movies in his *A Book of Legal Lists: The Best and Worst in American Law with 100 Court and Judge Trivia Questions* (1997).

Through intensive research of unpublished drafts, personal notes, internal memoranda, and other historical records, he sought "to tell what happened and not to shield the Court's inner processes from public view." Because of his candor backed up by scholarship, and obvious affection for the Court and all its members past and present, he received the continuing respect and recognition of even those he criticized. He was honored just prior to his death by being asked to present a talk, "Earl Warren: Super-Chief in Action," in the Chambers of the Supreme Court.

At the time of his death, Schwartz had indicated his annoyance with recent trends in the Court, such as hidden JUDICIAL ACTIVISM, where the Rehnquist Court majority was, in his opinion, dramatically changing constitutional principles "without acknowledging that they had done so." He also was concerned about the dramatic decrease in the number of cases the Court heard and about the possibility that the new highly political CONFIRMATION PROCESS might lead to mediocrity. An OLIVER WENDELL HOLMES, JR., a LOUIS D. BRANDEIS, or even a WILLIAM J. BRENNAN, JR., he thought, could not get through the White House review process or the U.S. SENATE confirmation process. He hoped to document these and other trends in a follow-up to his *Main Currents in American Legal Thought* (1993), which he had almost completed and had tentatively titled "A History of American Law and Legal Thought in the 20th Century."

MARTIN H. BELSKY
(2000)

## *SCHWIMMER, UNITED STATES v.*
279 U.S. 644 (1929)

When Rosiki Schwimmer applied for NATURALIZATION, officials questioned whether she could take the oath to "up-

hold and defend the Constitution against all enemies" without reservation. She opposed war in all forms.

The question before the Supreme Court was whether Congress had intended to require willingness to perform combatant military service as a condition of naturalization. Justice PIERCE BUTLER spoke for the Court and held that Congress had. Justice OLIVER WENDELL HOLMES dissented, joined by Justice LOUIS D. BRANDEIS. Holmes noted that Schwimmer, a woman of almost sixty years, would never actually be called upon to serve. Furthermore, taking a position against resort to armed forces was simply a reform objective no different from favoring a unicameral legislature. Justice EDWARD T. SANFORD also dissented.

*Schwimmer* was overruled by GIROUARD V. UNITED STATES (1946).

RICHARD E. MORGAN
(1986)

## SCIENCE, TECHNOLOGY, AND THE CONSTITUTION

The Constitution's only reference to science occurs in Article I, section 8, which grants, among other congresional powers, the authority to "promote Science and useful Arts" by establishing nationwide protection of PATENTS and COPYRIGHTS. Despite the document's otherwise silence on the subject, a constitutional law of science may be evolving—and inevitable and, to some extent, auspicious developement in our technological age. Indeed, cases involving some aspect of the constitutional status of science form a burgeoning part of constitutional law, principally, but not exclusively, under the FIRST AMENDMENT.

Perhaps the most obvious question about the status of science is whether scientific speech falls within the First Amendment's protection of FREEDOM OF SPEECH. Some critics, notably Robert Bork, have challenged the idea that scientific speech is fully protected, and no court has reached the question explicitly. The most likely answer, should a case arise, is that scientific communication is entitled to the same degree of First Amendment protection as other speech. A number of decided cases, including the Supreme Court's opinion in GRISWOLD V. CONNECTICUT (1965), contain OBITER DICTA referring to scientific speech as though it were in no way different from other First Amendment activity. If one sees the First Amendment's protection of speech as a means of enabling self-actualization or of discovering truth through the free interplay of ideas, the case for including scientific speech is straightforward. But even if one considers political debate as the core of the constitutional guarantee, in our society the use and regulation of technology form a central part of governmental activity. Debate concerning the scope and efficacy of these efforts will necessarily include a scientific component.

Scientific researchers insist that absolute freedom to communicate their ideas is neccessary to the scientific enterprise. Constitutional protection, however, is rarely absolute, and to say that scientific speech is protected is only a part of the answer. Like other speech, scientific speech may be subjected to regulation in certain circumstances. In particular, the federal government has increasingly sough to regulate the flow of scientific information in the name of NATIONAL SECURITY.

National security regulations on scientific speech fall into two broad categories. First, there are restrictions through which the government seeks ownership of the information in question. For example, under the "'born classified" provisions of the ATOMIC ENERGY ACT, inventions or discoveries that are "useful solely in the utilization of special nuclear material or atomic energy in an atomic weapon" are not patentable and, in many cases, are from their inception property of the federal government. The constitutionality of this restriction apparently has never been challenged, but given the plenary nature of congressional authority over the patent system, it is difficult to imagine that it would be struck down.

Second, there are restrictions through which the government, without regard to ownership, seeks to regulate the transmittal of the information in question. For example, a number of federal regulations seek to treat certain scientific information, especially information on "military critical technologies," as a commodity, subject to export restrictions. Another example is the consistent effort by the National Security Agency to discourage American researchers from publicly revealing (even in the United States) the fruits of any work with important implications for the field of encryption.

What the government must show to sustain its regulation is unclear because the constitutionality of national security restrictions on the communication of scientific information has been rarely tested. An exception is *United States v. The Progressive* (1979), in which the federal government sought to enjoin the publication of a magazine article that purportedly revealed how to construct a hydrogen bomb. A federal district court granted the INJUNCTION, holding that the publication of the article might do infinite damage to the nation's (and the world's) security, and therefore, the test of NEAR V. MINNESOTA EX. REL. OLSON (1931) and NEW YORK TIMES V. UNITED STATES (1971) was easily met. Before an APPEAL could be decided, however, the article was published elsewhere and the trial court's judgment was vacated as moot.

Critics mocked the court's reasoning, arguing that it would enable government to enjoin publication of many scientific ideas; all the court required was a showing of a

minuscule possibility of infinite harm. As has subsequently become clear, moreover, the article involved in *The Progressive*, although setting out some of the theory behind the hydrogen bomb, did not actually reveal the critical model necessary to make the bomb explode. The trial judge undertook no close scrutiny of the article, however, resting his decision on the government's affidavits. In so doing, the judge showed far greater deference to the government's assertion of harm to the nation's national security than have courts confronted with similar claims when the speech in question has lacked a scientific component. The one lesson of *The Progressive* is that courts may view an argument that scientific speech will harm the nation's security with considerably greater sympathy than they have displayed for the same argument concerning other kinds of speech.

Not all attempted restrictions on scientific speech rest on a national security foundation. Perhaps the most controversial attempt has been the effort by some believers in the Genesis account of creation to prohibit or limit the teaching of the theory of evolution in public school classrooms. *Scopes v. State* (1927), in which Clarence Darrow battled eloquently, but in vain to prevent the conviction of a teacher for violating a ban on teaching the Darwinian theory of evolution in the public schools, is a part of our popular legal mythology, but the *Scopes* case was the zenith of judicial deference to creationism. In recent decades, the federal courts have been unwavering in their refusal to allow restrictions on the teaching of evolution in public schools. Thus in EPPERSON V. ARKANSAS (1968), the Supreme Court struck down a state prohibition on teaching evolution. In *Daniel v. Waters* (1975), a federal appeals court overturned a state law requiring that students be told that evolution is a theory, not a fact. In *Edwards v. Aguillard* (1987) the Supreme Court held UNCONSTITUTIONAL "balanced treatment" legislation that mandated the teaching of CREATIONISM alongside the theory of evolution.

A chorus of critics has suggested that by striking down balanced-treatment statutes the courts are in effect granting science itself a special constitutional status. Justice ANTONIN SCALIA, in his dissent in *Edwards*, did not embrace this broad-scale criticism, but he did raise a related objection to the Court's decision. He argued that the Louisiana legislature had determined, on the advice of people they considered scientists, that creation science was not just religious dogma but a scientific theory founded on evidence and subjected to testing. As yet, the Court had before it no interpretation by the Louisiana Supreme Court of the law's meaning and no evidence of its actual application in the schools. Thus, he argued, it was premature for the Court to conclude that the legislature's purpose was merely to promote a religious belief.

The more far-reaching criticism, that the courts are giving science a special status under the Constitution, is met head on by some critics who assert that the courts should do precisely that. Proponents of this view typically point to the views of the Founders, many of whom accepted a contemporaneous, philosophical, commonplace holding of scientific progress to be an essential component of human happiness. A few scholars, perhaps stretching an otherwise interesting historical point, have even tried to demonstrate that the Founders intended to write this doctrine into the Constitution itself.

This is an argumentative turn that matters because the more important problem for scientific researchers may not be potential restrictions on communication, but the possibility of limits on experiments. In this situation, the difficulty is not religious belief but public fear and skepticism. The use of bona fide health and safety arguments to justify the regulation of the use of technology is nothing new and raises no significant constitutional questions. Scientific experiment, however, lies somewhere between pure scientific speech and pure application of technology, and recent efforts at its regulation have led to constitutional controversy.

A particular focus of debate is the effort in recent years to restrict experimentation on recombinant deoxyribonucleic acid (rDNA) techniques and other aspects of the "new biology" because of popular concern over the results and the implications. Several years ago, for example, Cambridge, Massachusetts, the home of two of the nation's leading research universities, was urged to adopt an ordinance banning rDNA experiments. Cambridge finally settled for requiring compliance with certain federal guidelines, but for a time, the matter seemed to hang in the balance. Experts argued that the techniques were relatively safe, but many members of the public simply disbelieved the experts' claims.

In response to the wave of public fear in the 1970s and 1980s, several commentators urged a form of First Amendment protection for scientific experiment. The difficulty these theorists have faced is overcoming the distinction between speech and conduct that has long governed First Amendment jurisprudence; scientific experiment would seem to fall plainly on the conduct side of the divide. But theorists have challenged the application of this neat dichotomy to the distinction between scientific speech and scientific experiment. Some supporters of protection for experiment have claimed to find support in the original understanding of free speech, others have contended that experiment is as important as communication for self-actualization, and still others have argued that experimentation is protected because it is a prerequisite to the protected activity of scientific speech. Critics have responded that the First Amendment argument for protec-

tion of experiments is clever, but far-fetched. As the critics note, the Supreme court rejected an analogous claim, in *Houchins v. KQED* (1978), that the activity of news gathering is protected as a prerequisite to the protected activity of news reporting. No court has yet accepted the claim of a constitutional right to experiment; on the contrary, courts have occasionally granted injunctions against controversial scientific experiments.

Although freedom of scientific speech has been a central part of the scholarly debate on the constitutional status of science, most Americans are more directly concerned with the technologies that scientific research makes possible, not science itself. This concern has generated arguments for two quite different rights: the right to use technology without governmental interference and the right to be free of governmental use of technology. As a practical matter, courts have dealt with claims of both these kinds in much the same way as they have treated the arguments of scientific creationists: they have tried to follow the experts.

The claim of a right to use technology has been most prominent in debates over medical treatment. For example, in *Andrews v. Ballard* (1980), a federal district court upheld a claim to a constitutional right to choose acupuncture therapy. To reach this result, the court was forced to reconceptualize the Supreme Court's decisions in *Griswold v. Connecticut* and ROE V. WADE (1973) as involving not the RIGHT OF PRIVACY *simpliciter*, but rather the right to make a private choice whether to use medically approved BIRTH CONTROL technologies. The requirement of medical approval enabled the court to distinguish acupuncture, which a considerable number of researchers believe to hold genuine benefits, from such exotic drugs as laetrile, which the medical profession generally rejects as a cancer treatment. (The courts have rejected arguments for a constitutional right to use laetrile.)

The idea of a constitutional right to be free from governmental use of technology was rejected at the turn of the century in JACOBSON V. MASSACHUSETTS (1904). In this case, the Supreme Court rejected a constitutional challenge to a mandatory vaccination against smallpox. The Court cited the right of the state to protect itself, and faced with the argument that vaccination was unnecessary or dangerous, or both, responded that it was the responsibility of the legislature, not the Court, to choose among competing medical theories. More recently, courts have employed similarly deferential reasoning to sustain such regulations as forced medical care for children whose parents raise religious objections and mandatory AIDS testing of some federal employees.

Perhaps the most controversial among recent governmental uses of technology, however, is mandatory DRUG TESTING of employees. In NATIONAL TREASURY EMPLOYEES UNION V. VON RAAB (1989) and SKINNER V. RAILWAY LABOR EXECUTIVES ASSOCIATION, (1989) the Supreme Court rejected FOURTH AMENDMENT privacy challenges to two very different programs of drug testing. In *Skinner*, the Justices voted 7–2 to sustain federal regulations allowing railroads to require breath and urine tests to determine whether employees committing safety infractions had used alcohol or drugs. In *National Treasury Employees Union*, the Court voted 5–4 to uphold a program mandating urine tests for employees seeking transfer or promotion to positions in drug-interdiction programs.

Both cases were decided on technical Fourth Amendment arguments not relevant to this discussion. In each case, however, the majority found it necessary to make reference to the accuracy of the tests. Thus in *Skinner*, the Court stated that the breath and urine tests, "if properly conducted, identify the presence of alcohol and drugs in the biological samples tested with great accuracy." In *National Treasury Employees Union*, the Court took care to note that the test "is highly accurate, assuming proper storage, handling, and measurement techniques." In neither opinion did the Justices explicitly hold that the accuracy of the tests was a factor in their decision. Nevertheless, the fact that they mentioned the point at all and with such confidence raises the possibility that they might have reached a different result had serious expert challenges to the tests been available.

None of this suggests that expert agreement on a sufficiently accurate result is itself a decisive argument in favor of constitutionality. But these and other opinions plainly raise the possibility that the Supreme Court will defer to scientific expertise in answering constitutional questions. This judicial deference, if it exists, might reflect a recognition by the courts of their limited capacity to decide scientific questions. The difficulties that courts and legislatures alike have with science have led a number of commentators, notably Arthur Kantrowitz, to suggest the creation of a special science Court to decide the scientific components of complex policy and legal questions. Critics of the Science Court proposal call it undemocratic. Defenders argue that democracy would be better served if courts and other decisionmakers made no pretense of scientific expertise.

STEVEN L. CARTER
(1992)

Bibliography

CARTER, STEPHEN L. 1987 Evolutionism, Creationism, and Treating Religion as a Hobby. *Duke Law Journal* 1987:977.

CARTER, STEPHEN L. 1985 The Bellman, the Snark, and the Biohazard Debate. *Yale Law and Policy Review* 3:358.

DELGADO, RICHARD 1978 God, Galileo, & Government: To-

ward Constitutional Protection for Scientific Inquiry. *Washington Law Review* 53:349–404.
FERGUSON, JAMES R. 1979 Scientific Inquiry and the First Amendment. *Cornell Law Review* 64:639–665.
GOLDBERG, STEVEN 1979 The Constitutional Status of American Science. *University of Illinois Law Forum* 1979:1–33.
REDISH, MARTIN H. 1985 Limits on Scientific Expression and the Scope of First Amendment Analysis. *William and Mary Law Review* 26:863–907.
ROBERTSON, JOHN A. 1978 The Scientist's Right to Research: A Constitutional Analysis. *Southern California Law Review* 51: 1203–1279.

## SCIENTIFIC CREATIONISM

See: Creationism

## *SCOPES v. TENNESSEE*

See: *Tennessee v. Scopes*

## *SCOTT v. ILLINOIS*

See: Right to Counsel

## SCOTTSBORO CASES

See: *Norris v. Alabama*; *Powell v. Alabama*

## *SCREWS v. UNITED STATES*
325 U.S. 91 (1945)

Southern law enforcement officers were prosecuted under section 242 of Title 18, United States Code, a federal CIVIL RIGHTS statute, for beating to death a black arrestee. Because section 242 proscribes only action "under COLOR OF LAW," and because congressional power to enforce the FOURTEENTH AMENDMENT was assumed to be limited to reaching STATE ACTION, the question arose whether behavior not authorized by state law could be either state action or action under color of law. The Court's affirmative answer, which relied in part on UNITED STATES V. CLASSIC (1941), both established section 242 as a weapon against police misconduct and nourished the post-1960 expansion of noncriminal civil rights litigation. MONROE V. PAPE (1961), relying on *Screws* and *Classic*, similarly interpreted the "under color of" law requirement for noncriminal civil rights actions brought under SECTION 1983, TITLE 42, UNITED STATES CODE. Exclusive reliance on state law to remedy police misconduct, a position advocated in dissent in *Screws* by Justices OWEN ROBERTS, FELIX FRANKFURTER, and ROBERT H. JACKSON, would never again be the rule.

*Screws* also raised the question whether federal criminal civil rights statutes are unconstitutionally vague. Section 242 outlaws willful deprivations of rights secured by the Constitution. Because constitutional standards change constantly, there was doubt that section 242 provided potential defendants with adequate warning of proscribed behavior. In *Screws*, the Court sought to avoid this difficulty by holding that the word "willfully" in section 242 connotes "a purpose to deprive a person of a specific constitutional right." The Court's remand of the case to reinstruct the jury on the meaning of "willful" prompted Justice FRANK MURPHY to dissent, pointing out that the officers had contrived to beat their victim for fifteen minutes after he lost consciousness and arguing that the right to "life" protected by the Fourteenth Amendment surely included a right not to be murdered by state officials. The specific intent requirement has generated confusion in subsequent interpretations of the criminal civil rights statutes.

THEODORE EISENBERG
(1986)

## SEARCH, UNREASONABLE

See: Unreasonable Search

## SEARCH AND SEIZURE

The FOURTH AMENDMENT has the virtue of brevity and the vice of ambiguity. It does not define the PROBABLE CAUSE required for warrants or indicate whether a WARRANTLESS SEARCH or seizure is inevitably "unreasonable" if made without probable cause, so that the factual basis required for a constitutional search or seizure is unclear. The amendment does not define the relationship of the word "unreasonable" to the clause setting forth the conditions under which warrants may issue; it is thus unclear when a judicial officer's approval must be obtained before an ARREST or search is made. There is also uncertainty as to what official conduct is subject to the amendment's restraints, that is, just what actions amount to "searches and seizures" and threaten the "right of the people to be secure." Finally, there is ambiguity concerning how that right is to be enforced; unlike the Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION, no mention is made of barring from EVIDENCE the fruits of a violation of the amendment. The Supreme Court has had to respond to each of these four fundamental questions. (See RIGHT-PRIVILEGE DISTINCTION.)

The warrant clause of the Fourth Amendment makes

it apparent that a valid ARREST WARRANT or SEARCH WARRANT may issue only upon a showing of probable cause to the issuing authority. This requirement is intended to prohibit resort to GENERAL WARRANTS and arrest and search on suspicion. As the Court noted in BRINEGAR V. UNITED STATES (1949), it is also intended "to give fair leeway for enforcing the law in the community's protection," and thus is best perceived as "a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests" of individual privacy and collective security.

Though a literal reading of the Fourth Amendment does not compel this result, the prohibition upon "UNREASONABLE" SEARCHES and seizures has been construed to mean that even searches and seizures conducted without a warrant require probable cause. As explained in WONG SUN V. UNITED STATES (1963), "the requirements of reliability and particularity of the information on which an officer may act . . . surely cannot be less stringent [when an arrest is made without a warrant] than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed." But the amount of probable cause required for with-warrant and without-warrant searches is not exactly the same; the Court stated in *United States v. Ventresca* (1965) that because of the preference accorded to warrants, "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail."

The same quantum of evidence is required whether one is concerned with probable cause to arrest or to search. Thus in SPINELLI V. UNITED STATES (1969), concerning probable cause for a search warrant, the Court found its earlier decision in DRAPER V. UNITED STATES (1959), concerning probable cause to arrest, to be a "suitable benchmark." But the arrest and search situations differ in important respects. For arrest, it must be sufficiently probable that an offense has been committed and that the particular individual to be arrested has committed it; for a search, it must be sufficiently probable that specified items are evidence of criminal activity and are to be found in the specified place. On a given set of facts one type of probable cause may be present but not the other.

The probable cause test is an objective rather than a subjective one. "If subjective good faith alone were the test," the Supreme Court said in *Beck v. Ohio* (1964), "the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their houses, papers, and effects,' only in the discretion of the police." The question, therefore, is not what the arresting or searching officer thought but rather what a reasonable person with the experience and expertise of the officer would have thought. That assessment is to be made on all available information regardless of its admissibility in a criminal trial because, as the Court said in *Brinegar*, the probable cause test is "not technical" and involves "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Thus credible HEARSAY may be considered, but a person's reputation, at least when stated in terms of unsubstantiated conclusions, cannot.

Although *Brinegar* declares that probable cause requires "less than evidence which would justify . . . conviction" but yet "more than bare suspicion" and also that the question is one of "probabilities," it gives no indication as to what degree of probability is required. Some of the Court's decisions—for example, *Johnson v. United States* (1948), holding that the smell of burning opium from within a hotel room did not amount to probable cause to arrest a particular occupant because until the subsequent entry she was not known to be the sole occupant of the room—suggest a more-probable-than-not standard. But the Supreme Court has never explicitly held that the Fourth Amendment requires this standard, and the lower courts have understandably found such an interpretation too stringent in at least some circumstances. Thus, it is not uncommon to find an appellate decision holding that an arrest near a crime scene was lawful even though the victim's description was not exact or detailed enough to single the arrested person out from all other persons in the vicinity, or that a search of a number of different places under a suspect's control is permissible even though no one of them is the more-probable-than-not location of the evidence sought.

Most of the Supreme Court's probable cause cases involve information from police informants, denizens of the criminal milieu who provide information in exchange for money or informal immunity regarding their own criminal conduct. In AGUILAR V. TEXAS (1964), where the search warrant affidavit merely recited that the affiants had "received reliable information from a credible person" that "narcotics and narcotics paraphernalia are being kept at the above described premises," the Court adopted a two-pronged test. This affidavit was held insufficient because, first, it did not disclose how the informant knew what he claimed to know concerning what was in the house; and second, it did not disclose how the affiants concluded that their informer was reliable. The first prong of this test has usually been met with details about how the informant acquired his knowledge (for instance, that he had just been inside the house and saw there a cache of narcotics from which the occupant made a sale), though it can be indirectly satisfied by self-verifying detail. As explained in *Spinelli*, if the informant gives a great many details about the criminal scheme (the precise amount of narcotics in the house, how it is wrapped, exactly where it is stored), then it may be

inferred "that the informant had gained his information in a reliable way."

The second or "veracity" prong of *Aguilar* has typically been met on the basis of past performance, that is, by a recitation that this same informant previously has given information that turned out to be correct. Alternatively, it has sufficed to show, as in UNITED STATES V. HARRIS (1971), that the informant's statement included an admission against penal interest ("I bought some narcotics while I was in that house"), as people "do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions." The Supreme Court sometimes stressed that the informer's tale was partly corroborated, but there was considerable uncertainty as to just what deficiencies under the *Aguilar* twopronged test this corroboration overcomes. (Because the use of informants raises special concerns not present in other situations, no comparable showing of veracity is needed when the information has been obtained from a police officer or a cooperative citizen.)

The *Aguilar* test was abandoned in ILLINOIS V. GATES (1983) in favor of a more general "totality of the circumstances" approach. The *Aguilar* factors of veracity and basis of knowledge remain as "relevant considerations," but are no longer two independent requirements; "a deficiency in one may be compensated for . . . by a strong showing as to the other." This is an unfortunate development, for the *Aguilar* rule provided a necessary structure and more precise guidance to police and judges. Moreover, the *Gates* approach is unsound, for surely—as the Court has often held—a conclusory allegation ("there are narcotics in that house") is insufficient even when it comes from a source of unquestioned reliability. *Gates* will doubtless make it easier to establish probable cause than it has been previously; the Court deemed it sufficient that the police had received an anonymous letter with a conclusory assertion of drug trafficking and then had corroborated the letter with certain predicted behavior that was not otherwise suspicious.

One extremely important question regarding the Fourth Amendment probable cause test is whether it is fixed or variable, that is, whether it always requires the same quantum of evidence or whether this compromise between privacy and law enforcement interests may be struck differently on a case-by-case basis. For example, may it be concluded that the solution of an unsolved murder is of greater public concern than the solution of an unsolved shoplifting, so that an arrest or search concerning the former would require less evidence than one respecting the latter offense? When confronted with that question in *Dunaway v. New York* (1979), the Court answered in the negative, saying such a variable standard would be impracticable: "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."

Another supposed variable in *Dunaway* was that the police action at issue was a brief detention of the suspect at the police station, not recorded as an arrest. Though the Court there found the detention "indistinguishable from a traditional arrest" and thus subject to the usual probable cause requirement, on other occasions the Supreme Court has used a BALANCING TEST: when the police action is significantly less intrusive than the usual arrest or search, there is a corresponding reduction in the required factual basis justifying that action. The leading decision is the STOP AND FRISK case, TERRY V. OHIO (1968), which with later decisions may be taken to mean, first, that a brief on-the-street detention of a suspect, a distinct police practice significantly less intrusive than a full-fledged arrest, is lawful upon a reasonable suspicion of criminality falling short of that needed to arrest; and second, that a frisk of that suspect for purposes of self-protection, a distinct police practice significantly less intrusive than a complete search of the person, is lawful upon a reasonable suspicion that the suspect is armed falling short of the probable cause required for a full search.

Although this balancing in *Terry* upheld a limited seizure and search on a watered-down version of probable cause, in other situations the Supreme Court has permitted very limited routine seizures or searches even absent any case-by-case showing of suspicion. Thus CAMARA V. MUNICIPAL COURT (1967) allowed a safety inspection of a dwelling, without any showing of the likelihood of code violations in that particular dwelling, where the inspection followed "reasonable legislative or administrative standards," such as those authorizing periodic inspection. And in *Delaware v. Prouse* (1979) the Court indicated its approval of stopping a vehicle for a driver's license and vehicle registration check, even absent suspicion that the driver was unlicensed or the car unregistered, as part of a roadblock conducted under standardized procedures.

Still another line of cases requires no factual basis for a particular seizure or search provided it is conducted in connection with some other search or seizure for which there is a sufficient basis. Where such relationships exist, the law would be very complex and difficult to apply if multiple factual bases were required, and thus sophistication has been rejected in favor of certain "bright lines" clearly marking the boundaries of permissible police conduct. Illustrative is UNITED STATES V. ROBINSON (1973), holding that a search of a person is permissible whenever that individual has just been subjected to a lawful custodial arrest. Though the Court in *Robinson* understood that search of the arrestee's person serves only to ensure that

he does not have a weapon by which to make an escape or evidence of the crime which he might try to destroy or dispose of, it was not thought realistic to require separate police determinations whether there were grounds for arrest and whether the arrestee might be armed or in possession of evidence. Rather, the right to search was "piggybacked" onto the authority to arrest. By like reasoning, the Court held in *New York v. Belton* (1981) that the search of an automobile's passenger compartment can be piggybacked onto the contemporaneous arrest of an occupant, and in MICHIGAN V. SUMMERS (1981) that the brief detention of an occupant of a house can be piggybacked onto the contemporaneous execution of a search warrant for contraband there.

The Supreme Court has often expressed a preference for searches and seizures made pursuant to a warrant, reasoning that the warrant process protects Fourth Amendment rights by ensuring that critical decisions are made by "a neutral and detached magistrate." Thus the warrant-issuing authority may not be given to a prosecutor (COOLIDGE V. NEW HAMPSHIRE, 1971), or to a justice of the peace who receives a fee for warrants issued (*Connally v. Georgia*, 1977), but at least as to minor offenses may be granted to a clerk of the court acting under the supervision of a judge (*Shadwick v. City of Tampa*, 1972). The magistrate's responsibility is to make the critical probable cause decision which otherwise would be left to the police, and to ensure, as the Fourth Amendment requires, that the warrant describes the place to be searched and the person or things to be seized with such specificity that an officer can, as the Court put it in *Steele v. United States* (1925), "with reasonable effort ascertain and identify" the place, person, or thing intended.

Despite this preference for warrants, in many circumstances a search or seizure may constitutionally be made without a warrant. For one thing, no warrant need be obtained when EXIGENT CIRCUMSTANCES make a detour to a magistrate impracticable. Illustrative is the seminal AUTOMOBILE SEARCH case of CARROLL V. UNITED STATES (1925), where it was stressed that "it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." However, the Court has not always dealt with the exigent circumstances issue in a consistent fashion. In CHAMBERS V. MARONEY (1970) the Court extended the *Carroll* rule to a vehicle that was in police custody and inaccessible to anyone else. On the other hand, in *Vale v. Louisiana* (1970) the Court chastised the police for not having obtained a search warrant a day earlier, though the probable cause needed for its issuance had unexpectedly come to the attention of the officer for the first time just minutes before the warrantless search of the arrestee's dwelling.

These different attitudes suggest that considerations other than "exigent circumstances" are at play. For example, the Court is less willing to recognize exceptions to the warrant requirement for dwelling searches than for vehicle searches. Apparently perceiving that its expanded vehicle search rule could not be explained in terms of exigent circumstances, the Court in *United States v. Chadwick* (1977) offered another explanation: vehicles have a "diminished expectation of privacy" which makes them unworthy of the usual Fourth Amendment warrant requirement. Yet in *Arkansas v. Sanders* (1979) the Court found no such diminished expectation in a suitcase, even when placed in a vehicle. It is not immediately apparent why placing one's personal items in the trunk of a car manifests less of a privacy expectation than placing those same items in some other type of container. Perhaps that is why the Court responded in *United States v. Ross* (1982) with this curious rule for the container-in-a-car cases: the *Chambers* no-warrant rule applies if there is probable cause to search the entire vehicle, but the *Sanders* warrant rule applies if there is probable cause to search only the container in the vehicle.

Some decisions reflect the Court's belief that certain police intrusions are more serious than others and that the warrant process is necessary only for the more serious ones. Intrusions upon a possessory interest are generally viewed as less serious than intrusions into a privacy interest; the former alone do not require warrants. *Coolidge v. New Hampshire* teaches that if the police are lawfully present in a place executing a search warrant and find items they believe are subject to seizure but which are not named in the warrant, they usually may make a warrantless seizure of them and need not return to the magistrate for another warrant. By contrast, when the police come into lawful possession of a closed container, for example, one which was turned over to them because misdelivered, as in *Walter v. United States* (1980), further intrusion into the privacy of the container ordinarily requires a warrant.

Similar analysis partly explains the rule of *United States v. Watson* (1976) that an arrest in a public place may be made without a warrant even if there was ample opportunity to obtain one. The Court did not consider such a siezure as great a threat to Fourth Amendment values as, say, the search of a dwelling. Thus the situation changes if the arrest can be made only by entering private premises; the Court held in PAYTON V. NEW YORK (1980) that a warrant is then required absent true exigent circumstances. The situation also changes if the seizure of the person becomes more intrusive. As the Court explained in *Gerstein v. Pugh* (1975), no warrant is needed merely for "a brief period of detention to take the administrative steps incident to arrest," but if the arrestee is not promptly released then "the Fourth Amendment requires a judicial

determination of probable cause as a prerequisite to extended restraint on liberty following arrest."

Yet another theme runs through the Court's decisions: no warrant is necessary when there is little for the magistrate to decide. The most obvious illustration is the rule that no search warrant is required for an inventory of an impounded vehicle because there are no special facts for the magistrate to evaluate. The point is also illustrated by comparing *Payton* with STEAGALD V. UNITED STATES (1981). Together the two cases stand for the proposition that an arrest warrant alone justifies entry into the intended arrestee's home to arrest him but not entry into a third party's home, which usually requires a search warrant. In the former situation, unlike the latter, there is no substantial need for a magistrate to determine on a case-by-case basis whether the suspect will probably be found in his own home. Sometimes, as in *Camara v. Municipal Court*, requiring warrants for housing inspections but permitting their issuance without a case-by-case probable cause showing, the Court has been sharply divided on the question of whether resort to the warrant process would be meaningful.

Still another consideration in the warrant cases of the Court is the need for "bright lines," the notion that case-by-case assessments simply are not feasible as to certain matters, so that a general rule applicable to all cases of a certain type is necessary. An example is *United States v. Watson*, holding that no warrant is required to arrest in a public place; a contrary holding, the Court said, would "encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like." But in CHIMEL V. CALIFORNIA (1969) the Court overruled cases permitting a warrantless search of premises contemporaneous with a lawful arrest therein, rejecting the dissenters' claim that the earlier "bright line" rule was necessary because there often is "a strong possibility that confederates of the arrested man will in the meanwhile remove the items for which the police have probable cause to search."

The probable cause and warrant requirements of the Fourth Amendment limit the government only. They have no application to private illegal searches and seizures, as where a private person breaks into premises, seizes evidence of crime found therein, and turns that evidence over to the authorities. But if a government official should instigate or participate in such an activity, that involvement would make the private person an agent of the government. Though most Fourth Amendment cases involve the actions of police officers, the amendment unquestionably applies to other government officials as well.

The limitations of the Fourth Amendment extend only to "searches" and "seizures." The term "seizure" is considerably broader than "arrest"; thus the fact that a particular detention is not called an arrest or is less intrusive than an arrest does not mean the amendment is inapplicable. As the Court put it in *Terry v. Ohio*, "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." That formulation leaves unresolved an issue of perspective: is the question whether the officer intended to restrain, or whether the suspect believed he was restrained? Either of these subjective states of mind would be difficult to prove apart from the self-serving statements of the officer and suspect, respectively, and thus an objective test is preferable. The courts, including the Supreme Court, have given insufficient attention to this matter. In *Florida v. Royer* (1983) a majority of the Court expressed the view "that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." But few people feel free to walk away during a police-citizen encounter, and thus a workable test may require consideration whether the officer added to the inherent pressures by engaging in menacing conduct significantly beyond that accepted in social intercourse. Some governmental pressure causing a person to be in a certain place at a certain time, such as the GRAND JURY subpoena upheld in UNITED STATES V. DIONISIO (1973), does not amount to a Fourth Amendment seizure.

More difficult is the definition of a "search" within the meaning of the Fourth Amendment. The view requiring a physical intrusion into "a constitutionally protected area" was finally abandoned in *Katz v. United States* (1967), which involved ELECTRONIC EAVESDROPPING upon one end of a telephone conversation with a device attached to the outside of a public telephone booth. The Court held that this conduct was a search because the government "violated the privacy upon which [Katz] justifiably relied while using the telephone booth." Justice JOHN MARSHALL HARLAN, concurring in *Katz* in an opinion often relied upon by lower courts, enunciated "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"

The first of these two requirements clearly deserves no place in a theory of what the Fourth Amendment protects. Were it otherwise, as Anthony Amsterdam aptly put it, "the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television . . . that we were all forthwith being placed under comprehensive electronic surveillance." Justice Harlan later came around to this position, counseling in his dissenting opinion in UNITED STATES V. WHITE (1971)

that analysis under *Katz* must "transcend the search for subjective ecpectations," because our ecpectations "are in large part reflections of laws that translate into rules that customs and values of the past and present." A majority of the Court continues to use the "actual (subjective) expectation of privacy" formulatin, but cautioned in *Smith v. Maryland* (1979) that in some situations it "would provide an inadequate index of Fourth Amendment protection."

The Court has sometimes referred to the second *Katz* requirement simply as the "reasonable "expectation of privacy" test. From this, it might be assumed that investigative activity constitutes a search whenever it uncovers incriminating actions or objects which the law's hypothetical reasonable man would have expected to remain private, that is, those which as a matter of statistical probability were not likely to be discovered. But such an approach is unsound. Rather, as Justice Harlan later explained in his *United States v. White* dissent, the question here must "be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement." In Amsterdam's words, at the heart of the matter is "a value judgment": "whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."

Although *Katz,* so viewed, offers a useful approach to the question of what the Fourth Amendment protects, the Court's application of the test has been neither consistent nor cautious, as can be seen by comparing MARSHALL V. BARLOW'S INC. (1978) with *Smith v. Maryland* (1979). In *Marshall,* holding unconstitutional the warrantless inspection of business premises, the Court expressly rejected the government's claim that a businessman lacked any privacy expectation vis-à-vis the government when there was no such expectation as to others (in this instance, his employees). Rather, the Court reached the sensible conclusion that an unconsented entry would be a Fourth Amendment search even though the area entered was regularly used by the company's employees. But a year later, in *Smith,* rejecting the claim that there was a "legitimate expectation of privacy" in the numbers one dials on his telephone, the Court, though asserting that "our lodestar is *Katz,*" concluded there was no such privacy expectation vis-à-vis the government because the telephone company's switching equipment had the capacity to record that information for certain limited business purposes. This unfortunate all-or-nothing view of privacy, as Justice THURGOOD MARSHALL noted in dissent, means that "unless a person is prepared to forego use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance."

In still another situation the Fourth Amendment's probable cause and warrant requirements are not applicable. This situation is most commonly called a CONSENT SEARCH, although when the facilitating party is active rather than passive it may be characterized as involving no search at all. At one time the consent doctrine was assumed to be grounded on the concept of waiver, but in SCHNECKLOTH V. BUSTAMONTE (1973) the Court, saying such an approach "would be thoroughly inconsistent with our decisions," held that the underlying issue was whether the person's consent was "voluntary." One reason the concept of waiver is inappropriate here is because it has long been recognized that sometimes one party may give a consent that will be effective against another. As the Court put it in *United States v. Matlock* (1974), where two or more persons have joint access to or control of premises "it is reasonable to recognize that any of the coinhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." The Court in *Matlock* found it unnecessary to pass upon the correctness of a position taken by several lower courts, namely, that the Fourth Amendment's reasonableness requirement is met if the police reasonably but mistakenly conclude that the consenting person has such authority.

The Fourth Amendment was a largely unexplored territory until BOYD V. UNITED STATES (1886), where the Supreme Court, weaving together the Fourth and Fifth Amendments, concluded that "the seizure of a man's private books and papers to be used in evidence against him" was not "substantially different from compelling him to be a witness against himself" and thus held that physical evidence the defendant was required to produce was inadmissible. *Boyd* was later confined by *Adams v. New York* (1904) to the situation in which a positive act was required of the defendant, but in WEEKS V. UNITED STATES (1914) the Court ruled that the "effect of the 4th Amendment" is to forbid federal courts to admit into evidence the fruits of Fourth Amendment violations. The same could not be said of the state courts, the Supreme Court decided in WOLF V. COLORADO (1949); whether exclusion of evidence was the best way to enforce the Fourth Amendment was "an issue as to which men with complete devotion to the protection of the RIGHT OF PRIVACY might give different answers." *Wolf* was overruled in MAPP V. OHIO (1961), where the majority concluded that other remedies for Fourth Amendment violations had proven worthless. Without an EXCLUSIONARY RULE operative at both the state and the federal level, the Constitution's assurance against unreasonable searches

and seizures "would be "a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties."

Over the years the Court has given various explanations of the rationale for this exclusionary rule. In ELKINS V. UNITED STATES (1960) the Court emphasized "the imperative of judicial integrity"—that the courts not become "accomplices in the willful disobedience of a Constitution they are sworn to uphold." A second purpose, articulated by Justice WILLIAM J. BRENNAN, dissenting in UNITED STATES V. CALANDRA (1974), is that "of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." This second purpose is reflected in opinions as early as *Weeks*. Yet a third purpose, not explicitly mentioned in the earlier cases, is that of deterring unreasonable searches and seizures. Thus, in *Elkins* the Court emphasized: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." In recent years the Court has relied almost exclusively upon this deterrence rationale.

Over the years the deterrence issue has occasioned intense debate; some claim the exclusionary rule does not deter and should be abandoned, and others claim that it does and should be retained. Hard evidence supporting either claim is unavailable, but some argue that a deterrent effect may be assumed because of such post-exclusionary-rule phenomena as the dramatic increase in the use of warrants and stepped-up efforts to educate the police on the law of search and seizure. The debate has recently centered on a proposed "good faith" exception to the Fourth Amendment exclusionary rule, allowing admission of illegally obtained evidence if the searching or seizing officer acted in a reasonable belief that his conduct was constitutionally permissible. A limited version of the exception was adopted by the Court in UNITED STATES V. LEON (1984), where the exclusionary rule was "modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." The majority reasoned that exclusion for purposes of deterrence was unnecessary in such circumstances, as exclusion would have no significant deterrent effect on the magistrate who issued the warrant, and there is no need to deter the policeman who justifiably relied upon the prior judgment of the magistrate. Whether *Leon* will be a stepping-stone to adoption of a broader (and, it would seem, less justifiable and more difficult to apply) "good faith" exception, applicable also in without-warrant cases, remains to be seen.

The current dimensions of the Fourth Amendment exclusionary rule are mostly tailored to the deterrence rationale. The rule is not used in certain settings on the assumption that the incremental gain in deterrence is not worth the cost. Illustrative are *United States v. Calandra*, refusing to compel exclusion at the behest of a grand jury witness because it "would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impending the role of the grand jury"; and *United States v. Janis* (1976), declining to require exclusion in federal tax litigation of evidence uncovered in a state criminal investigation of gambling because "common sense dictates that the deterrent effect of the exclusion of relevant evidence is highly attenuated when the "punishment' imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign." Even in the context of a criminal trial the deterrent objective of the exclusionary rule is sometimes perceived as outweighed by competing considerations. This explains the rule in *Walder v. United States* (1954) that the government may use illegally obtained evidence to impeach the defendant's testimony, so that the defendant cannot "turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths."

Who may invoke the exclusionary rule? The rule of STANDING generally is that a constitutional challenge may be raised only by those who have an interest in the outcome of the controversy, and who are objecting to a violation of their own rights. A defendant in a criminal case against whom illegally obtained evidence is being offered certainly meets the first requirement, but he does not necessarily meet the second. As to the latter, the fundamental question is whether the challenged conduct intruded upon his freedom or expectation of privacy or only that of someone else, as *Rakas v. Illinois* (1978) illustrates. The Court held that passengers in a car did not have standing to object to a search under the seats and in the glove compartment of that vehicle. Essential to the holding were the conclusions that these passengers were not claiming that the car had been illegally stopped, that they "asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized," and that the areas searched were ones "in which a passenger *qua* passenger simply would not have a legitimate expectation of privacy." The Supreme Court refused in ALDERMAN V. UNITED STATES (1969) to adopt a rule of "target standing" allowing a defendant to object to any Fourth Amendment

violation committed for the purpose of acquiring evidence for use against him. This refusal limits to some extent the deterrent effect of the exclusionary rule, for police sometimes deliberately direct an illegal search at one person because they are seeking evidence to use against another person they know will not be able to question their conduct.

What evidence is subject to challenge under the exclusionary rule? Under the FRUIT OF THE POISONOUS TREE doctrine, the exclusionary rule applies not only to the immediate and direct fruits of a Fourth Amendment violation (the physical evidence found in a search), but also to secondary or derivative evidence (a confession acquired by confronting a person with that physical evidence). Of course, in a criminal investigation the discovery of one fact often plays some part in the discovery of many others, and they in turn contribute to the uncovering of still others, and so on, but the fruits doctrine is not pushed this far. Even the fact first discovered by an illegal act does not become forever "inaccessible" for court use: it may still be proved "if knowledge of [the fact] is [also] gained from an independent source," as in SILVERTHORNE LUMBER CO. V. UNITED STATES (1920). The "inevitable discovery" doctrine accepted in *Nix v. Williams* (1984), whereunder illegally obtained evidence is admissible if "the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means," likewise serves to put the police in no worse position than they would have been if their misconduct had not occurred. Another limitation is provided by the test in *Wong Sun v. United States*: "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." In that case the taint of one defendant's illegal arrest was deemed dissipated by his release on his own recognizance, so that the taint did not reach a subsequently given confession. Considerations close to the deterrent function of the exclusionary rule also come into play here. Thus, suppression of derivative evidence is much more likely if it appears that the primary illegality was a clearly unconstitutional act or that it was undertaken for the purpose of acquiring that derivative evidence. For example, a confession will be deemed the fruit of an obviously illegal arrest made in the hope of acquiring a confession.

It cannot be denied that there is ample room for reasonable disagreement regarding the rationales and results of a number of the Supreme Court's Fourth Amendment decisions. In the main, however, the Court's response to the four fundamental questions just discussed has been indisputably appropriate and sound. The decisions on the requisite factual basis for a seizure or search have generally struck a fair balance between privacy and law enforcement interests. The Court's rulings regarding the warrant requirement have prevented the warrant process from becoming so overburdened as to become a mechanical and meaningless routine, yet have provided added protection to those Fourth Amendment interests that are valued most. The decisions defining the activities to which the amendment applies—especially *Katz* and its justified expectation of privacy test—provide an approach that should enable the Court to protect against new threats to the individual's right to be free of intrusive government surveillance. Finally, it is the Court's insistence upon an exclusionary rule as an enforcement mechanism that has kept the Fourth Amendment from being reduced to "a form of words."

WAYNE R. LAFAVE
(1986)

Bibliography

AMSTERDAM, ANTHONY G. 1974 Perspectives on the Fourth Amendment. *Minnesota Law Review* 58:349–477.

GRANO, JOSEPH D. 1978 Perplexing Questions about Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement. *Journal of Criminal Law and Criminology* 69:425–463.

KAMISAR, YALE 1983 Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"? *Creighton Law Review* 16:565–667.

LAFAVE, WAYNE R. 1978 *Search and Seizure: A Treatise on the Fourth Amendment*, 3 vols. St. Paul, Minn.: West Publishing Co.

LANDYNSKI, JACOB W. 1966 *Search and Seizure and the Supreme Court*. Baltimore, Md.: Johns Hopkins University Press.

OAKS, DALLIN H. 1970 Studying the Exclusionary Rule. *University of Chicago Law Review* 37:665–757.

UNITED STATES, CONGRESS, SENATE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON CRIMINAL LAW 1982 *The Exclusionary Rule Bills*, 97th Cong., 1st & 2d sess.

## SEARCH AND SEIZURE
### (Update 1)

Since 1985 the Supreme Court has refined and expanded upon previously articulated exceptions to the SEARCH WARRANT requirement, the PROBABLE CAUSE requirement, and the EXCLUSIONARY RULE. Few decisions have addressed novel issues or fashioned new approaches to the FOURTH AMENDMENT.

Earlier cases, beginning with CAMARA V. MUNICIPAL COURT, (1967) and TERRY V. OHIO (1968), established that a warrant and probable cause may not be needed when a search is undertaken primarily for noncriminal purposes

or is limited in scope. Rather, the essential criterion of the Fourth Amendment is "reasonableness," which requires balancing the intrusiveness of a particular category of search against the special law enforcement needs served by the search. In recent years, the Court has increasingly applied a BALANCING TEST to permit the government to conduct WARRANTLESS SEARCHES and searches with less than probable cause, in pursuit of special law enforcement interests aimed at particular groups, including government employees, schoolchildren, probationers, prisoners, and automobile owners.

Two recent decisions upholding government employee DRUG TESTING programs illustrate both the advantages and the difficulties of a balancing approach to the Fourth Amendment. Balancing is attractive because it permits the Court to give a full account of competing interests and to adjust constitutional limitations accordingly. In SKINNER V. RAILWAY LABOR EXECUTIVES ASSOCIATION (1989), which upheld mandatory blood and urine testing of all railroad workers involved in train accidents or certain safety violations, the Court engaged in a two-stage analysis. First, the pervasively regulated nature of the railroad industry and railroad employees' awareness of the testing regime lessened the employees' REASONABLE EXPECTATION OF PRIVACY concerning their bodily fluids. Second, the government's interest in deterrence and detection of drug use by railroad workers, in order to ensure safety on the railroads, was sufficiently compelling to outweigh any residue of legitimate privacy expectations with respect to testing of bodily fluids.

The limitations of balancing analysis become apparent in a companion case, NATIONAL TREASURY EMPLOYEES V. VON RAAB (1989). At issue in *Von Raab* was a more sweeping program that required drug testing of all Customs Service employees hired or promoted into positions in which they would carry guns or come into contact with drugs. Yet *Skinner*—which, like all balancing opinions, was inherently fact-specific and conclusory—shed little light on how *Von Raab* should be resolved. Ultimately, a bare majority upheld the Customs Service program, concluding that the government's special need for honest "frontline offices" in the midst of a national illicit drug crisis outweighed any individual Customs Service employee's expectation of privacy. For Justice ANTONIN SCALIA, in dissent, the balance came out differently in *Von Raab* because there was no record of a history of substance abuse in the Customs Service, as there had been in the railroad industry of *Skinner*. Yet others might strike the opposite balance, upholding the program in *Von Raab* but not that in *Skinner*, on the ground that the Customs Service program contained a significant internal limitation not present in the railroad program: that the government could not use drug test results in criminal prosecutions.

The Customs Service program is almost unique in actually prohibiting introduction of acquired evidence in criminal trials, but in several other recent search cases the Court has invoked government interests other than criminal prosecution. Noncriminal motivation was critical in the school search case NEW JERSEY V. T.L.O. (1984). In the Court's view, the special interest of school authorities in maintaining order permits them to search a student when there are "reasonable" grounds for believing the search will yield evidence of a violation of a law or a school rule and the search is not especially intrusive. *T.L.O.* expressly withheld judgment as to whether the police, as opposed to school officials, could likewise conduct school searches without a warrant and on less than probable cause. Yet, in *New York v. Burger* (1987), the Court permitted evidence seized from automobile junkyards in warrantless ADMINISTRATIVE SEARCHES conducted by police officers to be used for penal, as well as administrative, purposes because the two purposes were sufficiently related.

The government's interest in effective supervision of particular groups was also determinative in *Griffin v. Wisconsin* (1987), which held that probation officers may search probationers' homes if there are "reasonable grounds" to suspect a probation violation, and in *O'Connor v. Ortega* (1987), which held that government supervisors may search employee offices for "work-related purposes" (in this case, to investigate alleged misconduct). The Court has declined to establish an explicit middle-tier cause standard somewhere between probable cause and the *Terry* "reasonable suspicion" standard. Nevertheless, the "reasonable scope" test of *T.L.O.* may implicitly create such an intermediate standard governing focused searches for primarily noncriminal purposes.

In several other recent cases, the Court has refused to impose Fourth Amendment limitations on particular categories of investigative activity on the basis that the activities at issue were not "searches" at all under the Fourth Amendment. In *California v. Ciraolo* (1985) and *Florida v. Riley* (1989), the Court concluded that there are no Fourth Amendment restrictions on aerial surveillance from publicly navigable airspace (by plane and by helicopter, respectively). In CALIFORNIA V. GREENWOOD (1988) the Court agreed with the great majority of lower courts in holding that police need neither particularized suspicion nor a warrant to seize trash placed for roadside pickup. In each of these cases, the Court applied the two-pronged test set forth in KATZ V. UNITED STATES (1967) for determining when government action invades privacy protected by the Fourth Amendment: first, whether the individual has an actual expectation of privacy and, second, whether any such expectation of privacy is reasonable or legitimate. The majority in each case concluded that any expectation of privacy was not one "the society" at large was prepared

to accept as reasonable. The Court made clear that state law is not controlling either as to the creation of privacy expectations or as to their reasonableness, although FAA regulations apparently are highly relevant to both prongs of the test. Despite the invocation of *Katz*, each decision is more persuasive by analogy to the pre-*Katz* test for determining what constitutes a search under the Fourth Amendment: whether there has been a trespass upon traditionally recognized property interests.

The Supreme Court has continued to cast an unfavorable eye on the exclusionary rule, which precludes admission at trial of evidence obtained through an illegal search or seizure. Previously, in NIX V. WILLIAMS (1984), the Court had ruled that illegally seized evidence is admissible if it would have been "inevitably discovered" through an "independent source." In *Murray v. United States* (1988), a four-Justice majority (Justices WILLIAM J. BRENNAN and ANTHONY KENNEDY not participating) applied the logic of the INEVITABLE DISCOVERY and "independent source" exceptions to permit admission of evidence first viewed in an illegal search as long as the evidence was subsequently seized pursuant to an independently valid search warrant. The moral hazard of these two exceptions to the exclusionary rule is especially apparent in *Murray*, which may be read to provide an incentive to make an illegal search to determine whether obtaining a search warrant later would be worthwhile. Yet the Court is intent upon reminding us that there is also hazard—to society at large and to the integrity of criminal trials—in suppressing probative evidence, especially where probable cause existed apart from any illegal search.

The Court has also expanded the exclusionary rule's GOOD FAITH EXCEPTION, first developed in *United States v. Leon* (1984), to include warrantless administrative searches authorized by statutes later held to be unconstitutional; *Illinois v. Krull* (1987) held that the exception applies whenever the police officer acts "in good-faith reliance on an apparently valid statute." *Krull* thus signals a departure from *Leon*, which had given much weight to institutional considerations justifying reliance on search warrants issued by neutral, independent judicial officers. As Justice SANDRA DAY O'CONNOR indicated in dissent for herself and three others, legislative schemes authorizing warrantless searches do not invite such reliance, because legislators are not expected to operate as independent, politically detached interpreters of the Constitution.

Some recent cases have articulated the new Fourth Amendment standards. In *Winston v Lee* (1984) the Court recognized that the Fourth Amendment may prohibit as unreasonable certain forms of search and seizure (in this case extracting a bullet from the body) even when there is probable cause. Similarly, TENNESSEE V. GARNER (1984) held that the shooting death of a fleeing felon is an unreasonable form of seizure, even though there was probable cause to believe that the burglary invloved violence or that the felon otherwise presented a threat to someone's physical safety.

It was unclear after *Garner* whether successful termination of freedom of movement is a sine qua non for a "seizure" under the Fourth Amendment. The majority in *Michigan v. Chesternut* (1988) rejected both the state's argument that no seizure occurs "until an individual stops in response" to a show of authority and the defendant's contention that a seizure occurs as soon as the police "pursue" an individual; rather, the Court appeared to reaffirm the test of *Florida v. Royer* (1983) and *Immigration and Naturalization Service v. Delgado* (1984): there is a seizure when the police's actions would cause a reasonable person to believe she is not free to leave. During the term after *Chesternut*, however, in *Brower v. County of Inyo* (1989), a bare majority of the Court concluded that a seizure under the Fourth Amendment does not occur until there is an actual "termination of freedom through intentionally applied means."

In other cases, the Court has refused to develop new Fourth Amendment principles. *United States v. Sokolow* (1989) declined to hold a stop unconstitutional merely because it was based on a drug-courier profile; as long as there is *Terry*'s "reasonable suspicion" in the particular case, the police may stop the suspect. In *United States v. Verdugo-Urquidez* (1990), the Court refused to apply Fourth Amendment limitations to U.S. law enforcement agents operating against aliens in foreign jurisdictions.

KATE STITH
(1992)

(SEE ALSO: *Fourth Amendment.*)

Bibliography

GOLDSTEIN, ABRAHAM S. 1987 The Search Warrant, the Magistrate, and Judicial Review. *New York University Law Review* 62:1173–1217.

GRANO, JOSEPH 1984 Probable Cause and Common Sense: A Reply to the Critics of *Illinois v. Gates*. *University of Michigan Journal of Law Reform* 17:465–521.

KAMISAR, YALE 1987 Comparative Reprehensibility and the Fourth Amendment Exclusionary Rule. *University of Michigan Law Review* 86:1–50.

## SEARCH AND SEIZURE
## (Update 2)

The most important development in contemporary search and seizure law has been a fundamental change in the jurisprudential theories used to interpret this area of con-

stitutional law. For most of the twentieth century, rules adopted during the "formalist" *Lochner* era dominated search and seizure theory. During the past three decades, however, these formalist ideas have gradually been supplanted by PRAGMATIST theories that are consistent with views about the nature of law and its uses now widely held in our legal culture. This change in theory has had profound practical consequences. It has altered the definition of individual privacy, property, and liberty rights, has expanded the scope of government power, and has tended to shift power from the judicial branch to the executive branch of government. To understand the significance of this recent transformation, it is necessary to examine the theories that governed search and seizure law for most of the century.

At the turn of the twentieth century, the Supreme Court frequently employed formalist theories to define the constitutional limitations upon searches and seizures. The first of these opinions, BOYD V. UNITED STATES (1886) is the classic example of FOURTH AMENDMENT formalism. The *Boyd* Court ruled that the enforcement of a SUBPOENA ordering the production of private business records violated the Fourth and Fifth Amendments separately, and also adopted an expansive, structural theory in which the two amendments were linked by principles of privacy, property, and liberty. The two amendments ran together to create a zone of privacy into which the government could not intrude to compel production of some forms of private property for use against citizens in criminal or quasicriminal proceedings. These were indefeasible rights strong enough to defeat the government's policy arguments that subpoenas should be permitted because they were valuable tools for achieving important social interests, like effective law enforcement and the collection of import duties.

The *Boyd* opinion utilized the formalist legal theories dominant at that time. It identified NATURAL RIGHTS embodied in the Constitution and the COMMON LAW, then deduced rules governing searches and seizures from those foundational principles. It treated property rights as FUNDAMENTAL RIGHTS and defined some as essential attributes of liberty, striking down a statute authorizing the government to invade the realm of private rights, including rights based on property law.

A Fourth Amendment EXCLUSIONARY RULE was implicit in *Boyd*, which held that the government could only seize items in which it had an interest recognized under property law. In WEEKS V. UNITED STATES (1914), the Court deployed this same formalist reasoning to justify the adoption of an explicit exclusionary rule. The Court held that private papers seized in a WARRANTLESS SEARCH of Weeks's home could not be used to convict him of a crime because the government had failed to satisfy the procedural requirements set out in the warrant clause, and had violated the substantive restrictions that limited the government's power to seize private property. As it had in *Boyd*, the Court held that the seizure of private papers was unconstitutional.

At the beginning of the 1920s, the Court calcified its property-based theories by adopting the mere evidence rule, in which it reiterated its earlier decisions holding that the government could seize property only if it could demonstrate some legally cognizable property interest in the items. In *Gouled v. United States* (1921), OVERRULED by WARDEN V. HAYDEN (1967), the Court decreed that even a valid SEARCH WARRANT could not justify the search of a home or office unless the government or some private citizen had a recognized property interest in the item sought. Government actors could seize stolen or forfeited property, property concealed to avoid payment of duties, required records, counterfeit currency, and various criminal instrumentalities. Property was not seizable, however, if the government merely wanted to use it as evidence. The mere evidence rule survived for almost half a century despite its two fundamental defects. It obliterated the distinction between papers—property that can contain the expression of thoughts, ideas, and emotions— and all other forms of property, and it imposed excessive restrictions upon law enforcers.

*Boyd*'s interpretive linkage of the Fourth Amendment with the Fifth Amendment privilege against self-incrimination suggested that papers could be treated differently from other tangible personal property. Papers, after all, possess inherent testimonial attributes. Most property does not. *Gouled* rejected this distinction, declaring that for Fourth Amendment purposes papers possess "no special sanctity" when compared to other forms of property. This conclusion confirmed the power of government agents to seize private papers that could be classified as contraband or criminal instrumentalities. On the other hand, the rule imposed unjustifiable constraints on law enforcers by prohibiting the search for and seizure of *any property*, regardless of its probative value, which the government wanted for use solely as evidence.

In other opinions issued during the 1920s, including *Marron v. United States* (1927), the Court reaffirmed that even if the government could establish a property interest in the property it had seized, compliance with the requirements of the warrant clause was the procedural prerequisite of a constitutional search or seizure. Even when the Court upheld WARRANTLESS SEARCHES and seizures, it still required that the government possess PROBABLE CAUSE. For example, the warrantless search of an automobile traveling on an open highway for illegal liquor was permitted if the officers possessed probable cause, because the vehicle's inherent mobility created an exigency: the criminals

might escape along with their contraband, CARROLL V. UNITED STATES (1925).

In OLMSTEAD V. UNITED STATES (1928), overruled by KATZ V. UNITED STATES (1967), the Court employed a restrictive version of property-based formalism. The majority paid lip service to the linkage between private property and constitutional rights established in *Boyd*, *Weeks*, and *Gouled*, but abandoned the expansive vision of individual liberty that energized those earlier decisions. Although it was not the only opinion in which the Court employed formalist theories to uphold government searches and seizures, *Olmstead* sounded the deathknell for a critical part of the formalist construct—the integration of property law with an expansive interpretation of constitutional provisions designed to protect individual liberty. The Court held that the Fourth Amendment only regulated physical trespasses into constitutionally protected places, like homes and offices, and searches and seizures of people and tangible physical property. This property-based literalism led the Court to conclude that the installation and use of wiretaps on telephone poles did not constitute a search because there was no physical trespass into constitutionally protected areas, and no seizure occurred, because conversations were not tangible property protected by the Fourth Amendment.

During the forty years following *Olmstead*, *Lochner*-era theories continued to dominate the debate about the constitutional limitations upon searches and seizures. But in recent decades the Supreme Court has abandoned Fourth Amendment formalism. The emergence of pragmatist ideas in Fourth Amendment theory parallels changes in the broader legal culture. Pragmatism emerged as a coherent philosophy during the *Lochner* era, and it provided the theoretical foundations for the attack on legal formalism waged by scholars, judges, and lawyers during the early decades of the twentieth century. The pragmatist attack on legal formalism initially was energized by broader progressive social, political, economic, and intellectual movements.

The contemporary version of Fourth Amendment pragmatism rejects the formalist conception of strong individual rights, its linkage of liberty, privacy, and property rights, its value-based theory of CONSTITUTIONAL INTERPRETATION, and its emphasis upon formal reasoning. In their place the Justices have substituted pragmatist theories that do not treat privacy, liberty, and property as indefeasible rights, but rather as interests to be considered along with an expansive array of factors potentially relevant to deciding each case. Judges do not act as neutral interpreters of preexisting legal principles and rules, but instead act as social engineers utilizing various tools, including the SOCIAL SCIENCES, to help advance society's present goals. As a result, judicial analysis typically relies upon nonformal reasoning that emphasizes social goals and policies as reasons for decision, and that applies legal rules only to advance those purposes. Rules need not be followed if they conflict with "better" social policies.

The Court's reasoning in *United States v. Leon* (1984) exemplifies how pragmatist methods diminish the power of rules. The Fourth Amendment's most definite rule is that "no warrants shall issue, but upon probable cause." In *Leon*, searches and seizures that produced incriminating evidence were conducted pursuant to a warrant that had been issued despite the absence of probable cause. The exclusionary rule supplies the standard remedy for such unconstitutional searches and seizures. Had the Court's majority engaged in rule-based decisionmaking, it likely would have concluded that although the suppression of evidence produces unfortunate social costs, they are an unavoidable byproduct of judicial application of relevant legal rules.

Instead, the Court based its decision upon pragmatist reasoning. It examined a variety of nonlegal sources of information relevant to the dispute, including statistical analyses of the impact of the exclusionary rule on the prosecution and conviction of suspected criminals. The Court concluded that on the case's facts, the costs to society of suppressing evidence probative of the defendant's guilt outweighed any countervailing benefits. Rather than accept a suboptimal outcome dictated by application of the amendment's text and the exclusionary rule, the majority established a "good faith" exception to the exclusionary rule designed to achieve a socially desirable outcome.

Although pragmatist reasoning has come to dominate search and seizure law under the "conservative" BURGER and REHNQUIST COURTS, the "liberal" WARREN COURT introduced the most important of these methods to Fourth Amendment theory. Cases in which judges engage in interest balancing exemplify this transformation.

The emergence of interest balancing as a central method for resolving Fourth Amendment disputes can be traced to a series of opinions issued by the Warren Court in the years 1966 to 1968. In the first, SCHMERBER V. CALIFORNIA (1966), the Court approved a blood test used as evidence supporting criminal charges of driving under the influence of alcohol. This intrusion into Schmerber's body was a warrantless search, but it did not violate the Fourth Amendment. The majority emphasized that the police possessed probable cause; that obtaining a warrant was impracticable because the inevitable diminishing of Schmerber's blood alcohol level as time passed created an exigency; and that the physical intrusion was relatively minor. The opinion employed an analytical process the Court later would label the "*Schmerber* balancing test," and con-

cluded that the means used to obtain the blood sample satisfied the Fourth Amendment's standard of reasonableness.

The next significant Fourth Amendment balancing decision came a year later in CAMARA V. MUNICIPAL COURT (1967), which involved a resident's challenge to an ordinance that permitted housing inspectors to examine the interior of his home. The Court concluded that these inspections were searches, but authorized the issuance of warrants on the basis of information insufficient to provide probable cause to believe that any particular dwelling violated health and safety regulations. This weakening of the probable cause standard was coupled with an explicit turn to balancing. Although ostensibly adhering to the commands of the warrant clause, the Court stressed that "our holding emphasizes the controlling standard of reasonableness." The Court then made a critical assertion that ignored existing PRECEDENTS and laid the foundation for future balancing: "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."

The theoretical innovations adopted in *Camara* have provided the authority for many of the Court's subsequent opinions. None is more important than TERRY V. OHIO (1968), where the Court for the first time directly applied the Fourth Amendment to a common police activity, the "STOP AND FRISK" of a person whom the police suspect of criminal activity, but lack probable cause to arrest. Chief Justice EARL WARREN's opinion established for the first time that probable cause was not required to justify all searches and seizures.

The Court held that "stops and frisks" constituted an intermediate category of searches and seizures lying somewhere between consensual encounters ungoverned by the Fourth Amendment and intrusions amounting to arrests and full-blown searches. Because they were less intrusive than full-blown arrests and searches, the Court decided that stops and frisks could be justified by a degree of knowledge or certainty less than that required for greater intrusions. The opinion established an intermediate category of knowledge, labeled "reasonable suspicion," which was sufficient to justify these searches and seizures.

The reasonable suspicion standard requires that to justify "the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." This definition describes a quantum of information less than probable cause and more than a mere hunch, but it also incorporates a balancing methodology. The Court not only examined the nature and quality of the information possessed by the police—as it would in deciding whether probable cause existed—but also balanced the quality of that information against the nature and extent of the government intrusion upon privacy and liberty interests. Citing *Camara* as its only authority, the Court reasserted the debatable principle that balancing supplied the only "ready test" for measuring the reasonableness of the intrusion. When it balanced, the Court found that the search and seizure of Terry was reasonable because the government's interest in effective crime detection and in protecting the safety of the public and the investigating officer outweighed the individual's interest in "personal security."

Since 1980 the Supreme Court has employed both *Terry*'s three-tiered model of police–citizen encounters and interest balancing to determine whether a wide variety of government activities are reasonable within the meaning of the Fourth Amendment. Even a small sample of these decisions reveals the impact of balancing on search and seizure law. In cases involving investigations of suspected drug trafficking and other criminal behavior, the Court has upheld investigative detentions of travelers in airports, the seizure of air travelers' luggage, and the detention of automobile travelers. In other cases employing balancing methods, the Court has approved limited suspicionless seizures of all motorists at sobriety checkpoints, approved suspicionless DRUG TESTS of high school athletes and adult employees, and applied a "balancing test" to determine whether suspects in criminal cases can be forced to submit to surgery that may reveal evidence of their guilt.

The cumulative weight of these decisions has led the Court to a startling rejection of the rule-based model that once dominated Fourth Amendment theory. The warrant rule no longer is the central conceptual tool for determining whether government conduct is reasonable for Fourth Amendment purposes, but is now the exception, limited to *some* criminal investigations. Nonformal interest balancing has replaced the warrant model as the basic method for determining whether searches and seizures are unreasonable.

The implementation of nonformal decisionmaking has been facilitated by a related change in how the Court interprets the relationship between the Fourth Amendment's two clauses. For most of the twentieth century, the Supreme Court used a "conjunctive" theory of the amendment that referred to the specific requirements set forth in the amendment's warrant clause to define what conduct constituted the "unreasonable searches and seizures" prohibited by its opening clause. Until recently, the Court attempted to enforce the basic principle that searches and seizures were unreasonable unless conducted pursuant either to a valid warrant or one of a few "jealously and care-

fully drawn" judicially created exceptions to the warrant requirement. Whether authorized by a warrant or an exception, most searches and seizures had to be justified by the probable cause standard articulated in the warrant clause.

This warrant-based model tended to allocate power to the judicial branch by requiring prior judicial approval of searches and seizures. Even in the majority of cases, where searches and seizures are conducted without warrants, the requirements of probable cause and a warrant or exception provided objective tests against which judges could measure the police conduct in subsequent proceedings. As a result, the conjunctive theory augmented judicial authority to review police conduct.

For decades this conjunctive interpretive model served as a central part of Fourth Amendment theory. In the past decade it has been replaced by a "disjunctive" theory that treats the warrant requirement as nothing more than an example of balancing relevant to some—but not all—criminal cases. The rules found in the warrant clause—including the requirement of probable cause—are no longer benchmarks against which the constitutionality of all searches and seizures are judged. Instead, decisionmakers must decide only if government satisfies some malleable standard of reasonableness, frequently applied by judges in an ad hoc manner. This approach is consistent with pragmatism's antiformalism and with its emphasis upon consequences.

Balancing is the quintessential pragmatist method. When the Court balances, the government usually wins. This results in part from the way it defines competing interests. Typically the Court places the individual criminal defendant's privacy, property, or liberty interests on one side of its metaphorical scales, and balances those discrete and isolated interests against the government's broad interest in protecting all of society from the transgressions of individual lawbreakers. With the issues so characterized, it is hardly surprising that judges usually "discover" that the balance favors the government. The interest all members of society share in being protected from crimes easily outweighs any interest an individual or small class of individuals may have in engaging in illegal behaviors. Social interests usually prevail, as well, when the Court decides what privacy expectations are reasonable.

Until the 1960s the Court generally relied upon the residue of the formalist linkage between property and privacy rights to determine whether government conduct constituted a search regulated by the fourth amendment. After *Olmstead,* a search was an intrusion entailing a physical trespass upon a constitutionally protected area. This formulation's failure to regulate the use of new technologies allowing the government to achieve nontrespassory seizures of intangible evidence, including conversations, eventually drove the Warren Court to replace it with one grounded in legal pragmatism.

In *Katz v. United States* the Court held that FBI agents acting without a warrant violated the Fourth Amendment by attaching an electronic listening and recording device to the outside of a public telephone booth and monitoring Katz's conversations without first getting a search warrant. The Court explicitly overruled *Olmstead*'s property-based requirements of a trespass into a constitutionally protected area and the search and seizure of tangible property. Instead, the Court shifted the focus of the basic inquiry, concluding that the Fourth Amendment protects people and not places. As a result: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Perhaps because the standard described in this passage is so amorphous, the Court quickly came to rely upon a two-part test taken from the second Justice JOHN MARSHALL HARLAN'S CONCURRING OPINION. Under this test, a protected Fourth Amendment interest exists when a person exhibits a subjective expectation of privacy and the expectation is one that society recognizes as "reasonable."

This two-part "expectations" formula has become the linchpin of Fourth Amendment privacy analysis, and the Court's decisions applying it rest upon the kinds of legal pragmatist ideas discussed above. By asking whether the expectation in dispute is one society is willing to recognize as reasonable, the test's second prong implicitly encourages decisionmakers to define fundamental constitutional values by referring to contemporary social values, goals, and attitudes. The ultimate goal of this analysis is not to obey existing legal authorities, even if those rules represent value choices made by the Framers that are embodied in the Constitution's text. The language of the test instead emphasizes present realities, found in the existing social context. By making the ultimate standard "reasonableness" from a social perspective, the test implements the pragmatist rejection of fixed truths and adopts a flexible standard that can be manipulated to achieve present instrumental goals.

The pragmatist foundations of contemporary expectations analysis are illustrated by the Court's leading opinion involving aerial surveillance of private property. In *California v. Ciraolo* (1986), police officers lacking probable cause conducted a warrantless inspection of Ciraolo's backyard from a private airplane flying at an altitude of 1,000 feet. They identified marijuana growing in the fenced yard, photographed it, and used this information to obtain a search warrant. Police officers executing the warrant seized the marijuana plants.

The Court acknowledged that the backyard lay within

the curtilage of the home, a conclusion that seemingly required suppression of the fruits of the warrantless aerial surveillance because the Court had only recently confirmed, in *Oliver v. United States* (1984), that the heightened Fourth Amendment protections associated with the home applied within its curtilage. Instead, a bare majority applied the *Katz* expectations test, and determined that this surveillance was not a search. The Justices recognized that Ciraolo had manifested a subjective expectation of privacy (his yard was concealed by two fences), but held that Ciraolo had no reasonable expectation of privacy because the warrantless observations "took place within public navigable airspace in a physically nonintrusive manner." *Katz* had expressly overruled the trespass doctrine, but the majority did not base its decision on constitutional rules; indeed it gave only a cursory nod to its own precedents. Instead, it looked to other sources. Because Federal Aviation Administration regulations permitted airplanes to fly at this altitude, someone *could* be up there, therefore we cannot reasonably expect privacy from eyes spying from above.

The majority's reasoning confirms the pragmatist bases of the Court's analysis. It was not the law as a system of rules that the Court cited to justify its reasoning. The decision ultimately seems to rest upon the Justices' idiosyncratic views about the relevant social context, including the nature of contemporary social realities and goals, rather than upon any reasoning from relevant constitutional authorities.

Once again, the introduction of pragmatist ideas into Fourth Amendment theory has overwhelmed the rule-based warrant model. In a remarkably diverse array of settings, the Court has concluded that intrusive government conduct did not constitute a search because the people affected had no reasonable expectation of privacy. For example, the Fourth Amendment does not regulate nontrespassory surveillance of buildings within a home's curtilage from a helicopter, and a person has no reasonable expectation of privacy in the contents of closed, opaque garbage bags deposited on the curb outside his home. Extensive attempts to exclude trespassers, including erecting fences and posting "no trespassing" signs, do not create a reasonable expectation of privacy in open fields or buildings lying within them. Installing an electronic beeper to monitor a person's travels in public does not invade a reasonable privacy expectation, but tracking the beeper in a private home may. Utilizing trained drug detection dogs to sniff travelers' luggage is not a search. In other cases, the Court has approved warrantless intrusions because people have a lessened expectation of privacy in their automobiles and containers located in them.

This kind of judicial behavior is not an anomaly in contemporary legal culture. It represents not an aberration from the norm, but rather is consistent with the pragmatist concept of legal decisionmaking now dominant in our legal culture. The Court's efforts at balancing to determine whether government conduct is reasonable and its efforts to define what expectations are reasonable exemplify pragmatist decisionmaking based upon subjective ideas about social realities and goals that is relatively unconstrained by antecedent rules. Because many of those rules have protected individual privacy, property, and liberty rights, Fourth Amendment pragmatism has produced a body of case law that tends to expand government power, particularly as exercised by law enforcers and others working in the executive branches of state, local, and federal governments.

MORGAN CLOUD
(2000)

Bibliography

ALEINIKOFF, T. ALEXANDER 1991 Constitutional Law in an Age of Balancing. *Yale Law Journal* 96:943–1005.

CLOUD, MORGAN 1996 The Fourth Amendment During the Lochner Era: Privacy, Property and Liberty in Constitutional Theory. *Stanford Law Review* 48:555–631.

CLOUD, MORGAN 1993 Pragmatism, Positivism, and Principles in Fourth Amendment Theory. *UCLA Law Review* 41:199–302.

HOFSTADTER, RICHARD 1955 *The Age of Reform.* New York: Random House.

HOLMES, OLIVER WENDELL, JR. 1881 *The Common Law.* Boston: Little, Brown.

JAMES, WILLIAM 1963 *Pragmatism and Other Essays.* New York: Washington Square Press.

SUMMERS, ROBERT S. 1982 *Instrumentalism and American Legal Theory.* Ithaca, N.Y.: Cornell University Press.

WHITE, MORTON G. 1949 *Social Thought in America: The Revolt Against Formalism.* New York: Viking Press.

# SEARCH INCIDENT TO ARREST

WEEKS V. UNITED STATES (1914) recognized, as an exception to the FOURTH AMENDMENT's requirement of a SEARCH WARRANT, the authority of police to search a person incident to his arrest in order to discover concealed weapons or evidence. This principle has remained essentially unchallenged, although its application to a person arrested for a minor offense, such as a traffic violation, involving small likelihood of danger to the officer, was severly criticized by some Justices in UNITED STATES V. ROBINSON (1973). Extension of the allowable search from the person of the arrestee to include the area "in his control," in AGNELLO V. UNITED STATES (1925), planted the seed of conflict between those Justices who would allow a complete search of the premises and those who would limit the search to the area

from which the arrestee could conceivably reach for weapons to wield or evidence to destroy.

*Marron v. United States* (1927) allowed the search to cover "all parts of the premises," but in *Go Bart v. United States* (1931) and *United States v. Lefkowitz* (1932) the Court condemned wholesale "rummaging of the place." Again, *Harris v. United States* (1947) upheld the search of an entire apartment, but *Trupiano v. United States* (1948) forebade even the seizure of contraband in PLAIN VIEW of the arresting officers. The pendulum again swung in *United States v. Rabinowitz* (1950), which authorized search of the whole place. By now the field was "a quagmire," as Justice TOM C. CLARK exclaimed, dissenting in *Chapman v. United States* (1961). One group of Justices took the position, essentially, that once officers are legitimately on premises to make an arrest, the accompanying search, no matter how extensive, is only a minor additional invasion of privacy and therefore reasonable. They conceded that the arrest must not serve as a pretext for the search, and that the search must be limited to objects for which the arrest was made, but these limitations are easily evaded. Justice FELIX FRANKFURTER provided intellectual leadership for the opposing view, arguing that when a search incident to arrest is allowed to extend beyond the need that gave rise to it, the exception swallows up the rule that a warrant must be obtained save in EXIGENT CIRCUMSTANCES. Moreover, because a warrant often will strictly limit the area to be searched, to authorize search of the entire premises has the novel effect of allowing searches incident to arrest a broader scope than searches under warrant.

So the matter stood until CHIMEL V. CALIFORNIA (1969). There the Court restored the balance between theory and practice by overruling *Harris* and *Rabinowitz* and limiting the scope of incident searches to the person of the arrestee and his immediate environs. Still, the *Chimel* limitation may not always apply. Where the police have strong reason to believe that confederates of the arrestee are hidden on the premises, they are presumably entitled, under the "hot pursuit" doctrine of WARDEN V. HAYDEN (1967), to make a "sweep" of the place in order to minimize the danger. The reverse would also seem to follow: once the arrestee has been subdued (assuming there is no reason to suspect the presence of confederates), the police no longer have authority to search even a limited area.

An important legal difference between search of the person's clothing and search of property within the area of his reach should be noted. Property under the arrestee's control, which might have been searched without a warrant immediately following the arrest, may not be searched later; to be lawful under *United States v. Chadwick* (1977) the search must be substantially contemporaneous with the arrest. However, in a radical departure from the spirit, if not the letter, of the *Chimel* rule, the Court held in *United States v. Edwards* (1974) that authority to search the arrestee's clothing is not lost by the passage of time and may be exercised hours later, following his incarceration. The rationale for this difference appears to be that the arrestee's expectation of privacy in property not associated with his person remains undiminished. Absent a warrant, the property search must therefore be carried out promptly, as an exigency measure, or not at all.

Under *Illinois v. Lafayette* (1983), an arrestee's possessions may be inventoried in the police station prior to his incarceration so as to safeguard them against theft and protect the officers against spurious claims. Because it is considered a reasonable administrative procedure, "the inventory search constitutes a well-defined exception to the warrant requirement."

JACOB W. LANDYNSKI
(1986)

Bibliography

LAFAVE, WAYNE R. 1978 *Search and Seizure: A Treatise on the Fourth Amendment.* Vol. 2:406–466. St. Paul, Minn.: West Publishing Co.

LANDYNSKI, JACOB W. 1966 *Search and Seizure and the Supreme Court.* Pages 87, 98–117. Baltimore: Johns Hopkins University Press.

——— 1971 The Supreme Court's Search for Fourth Amendment Standards. *Connecticut Bar Journal* 45:2–30.

## SEARCH WARRANT

The FOURTH AMENDMENT to the Constitution prohibits unreasonable SEARCHES AND SEIZURES and provides that "No Warrants shall issue, but upon PROBABLE CAUSE, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Framers adopted the warrant clause in response to the use by British customs officers of GENERAL WARRANTS, known as WRITS OF ASSISTANCE, to enforce British trade laws.

A writ of assistance conveyed virtually unbridled discretion to search under the authority of the Crown. The writ was not required to be based on any facts giving reason to believe that a crime had been committed. Nor did it contain an inventory of things to be taken, the names of alleged offenders, or any limitation on the places to be searched. Once issued, a writ remained valid during the lifetime of the reigning sovereign.

Judicial interpretations of the warrant clause have expressed a strong preference for the use of a neutral and detached magistrate over the "hurried action" of a police officer engaged in the often competitive enterprise of fer-

reting out crime. Since COOLIDGE V. NEW HAMPSHIRE (1971) searches conducted outside the judicial process have been considered by the Supreme Court to be unreasonable per se unless they fall within one of the exceptions to the warrant requirement.

A magistrate who issues a search warrant may not occupy a dual role, both reviewing the facts presented to justify the warrant and actively participating in the criminal investigation or prosecution. Such a dual role creates a conflict of interest that is inimical to the objectives of the warrant clause. As the Supreme Court observed in UNITED STATES V. UNITED STATES DISTRICT COURT (1972), the Fourth Amendment protections cannot be properly guaranteed if searches "may be conducted solely within the discretion of the Executive Branch."

An important part of the Fourth Amendment's proscription against general warrants is that a warrant may be issued only upon probable cause. This requirement necessarily limits each warrant to a particular set of circumstances relating to a suspected criminal offense. The alleged facts must establish a reasonable basis to believe that the offense was committed and that contraband or EVIDENCE of the offense is located at the place to be searched. Although a finding of probable cause may rest upon HEARSAY or other evidence that would not be admissible at trial, the issuing magistrate must nonetheless carefully consider the reliability of such evidence. According to ILLINOIS V. GATES (1983), in assessing probable cause, a magistrate must make a "practical, commonsense" decision in view of all the circumstances set forth in the affidavit, including the "veracity" and "basis of knowledge" of the persons supplying the information.

The information that forms the basis for the search warrant must be sworn to by "oath and affirmation" at the time the warrant is issued. To ensure an independent review by the magistrate, the oath must attest to facts and circumstances, not merely to the affiant's conclusion that he believes he has probable cause for the search. Moreover, an insufficient affidavit cannot be rehabilitated later by testimony concerning facts known by the affiant or otherwise available, but not disclosed to the magistrate at the time of issuance of the warrant. A contrary rule, of course, would render the warrant requirement meaningless.

An important issue that remained unresolved until *Franks v. Delaware* (1978) was whether the accuracy of the information relied on to justify a search warrant may be challenged. In *Franks* the Supreme Court held that if it can be shown that the affiant intentionally or recklessly gave false or misleading information to the magistrate, a reviewing court may invalidate the warrant if the magistrate's finding of probable cause was based on the misinformation.

The warrant clause also precludes the issuance of general search warrants, for it commands that the warrant describe with particularity the place to be searched and the objects to be seized. In *Gouled v. United States* (1921) the Supreme Court held that law enforcement officers could not seize property, even though particularly described in a search warrant, when the property was merely of evidentiary value in a criminal proceeding. This MERE EVIDENCE RULE, which attempted to distinguish between mere evidence and contraband or other property that was a fruit or instrumentality of a crime, was both unsound and lacking in reason and historical support. The Court abandoned the rule in WARDEN V. HAYDEN (1967).

The purpose of the particularity requirement is to limit implicitly the scope of what the officer executing the warrant may do. As the Court stated in *Marron v. United States* (1927): "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." With respect to the place to be searched, the description must be such that the officer executing the warrant can, with reasonable effort, ascertain and identify the place intended.

As a practical matter, of course, law enforcement officers may not be completely divested of all discretion in executing search warrants. Moreover, notwithstanding the language in *Marron*, the Court has held that incriminating evidence not listed in a search warrant may be seized when observed in plain view by officers executing the warrant, provided that the officers inadvertently come upon the evidence. The particularity requirement, however, greatly circumscribes the officer's discretion and therefore plays an important role in minimizing the likelihood of police abuse.

JAMES R. ASPERGER
(1986)

Bibliography

LAFAVE, WAYNE R. 1978 *Search and Seizure: A Treatise on the Fourth Amendment.* Vol. 2:1–213. St. Paul, Minn.: West Publishing Co.

LASSON, NELSON B. 1937 *The History and Development of the Fourth Amendment to the United States Constitution.* Baltimore: Johns Hopkins University Press.

## SECESSION

Secession, the withdrawal of a state from the American Union, first appeared as an impulse rather than an articulated constitutional doctrine. Inchoate secessionist movements agitated the southwestern frontier after the

signing of JAY'S TREATY (1794). AARON BURR's alleged conspiracy was linked to them. Massachusetts Federalists who were disgruntled about the rising political power of the South and the western territories between 1803 and 1814 contemplated secession in correspondence among themselves. Before the CIVIL WAR, Garrisonian abolitionists developed doctrines of disunion, calling for both individual disallegiance and the withdrawal of the free states from a union with the slave states. Southern political leaders, uneasy about the spread of abolitionist and Free Soil sentiment in the north, occasionally voiced threats of secession.

JOHN C. CALHOUN developed the theoretical framework for secession, though ironically, he did so in order to avoid secession through the alternatives of INTERPOSITION and NULLIFICATION. Drawing on the thought of earlier STATES' RIGHTS ideologues such as JOHN TAYLOR of Caroline, JOHN RANDOLPH, and THOMAS COOPER, as well as the concepts of state sovereignty and the Union broached in the VIRGINIA AND KENTUCKY RESOLUTIONS of 1798–1799, Calhoun insisted that SOVEREIGNTY in America resided not in the nation but severally in the people of each of the states. The states created the national government, giving it only limited, specific, and delegated powers. The national government was thus the agent or the trustee for the people of the states, and the federal Constitution was merely a "compact" among sovereign states. If the national government abused its delegated powers by unconstitutional legislation or executive acts, the states could interpose their authority between the federal government and their people and could nullify federal legislation within their territory. But if enough other states ratified an amendment to the federal Constitution that authorized the nullified act, then the states had only the option of submitting to or withdrawing from the Union.

After the election of ABRAHAM LINCOLN in 1860, South Carolina radicals induced the legislature to call a convention to consider secession. The convention voted unanimously for secession, and in the "Declaration of the Immediate Causes [of] Secession" (1860) they asserted that the free states had violated the constitutional compact by failing to enforce the Fugitive Slave Acts vigorously and by enacting PERSONAL LIBERTY LAWS that impeded the recapture of fugitive slaves. The free states also had denied slaveholders' right of transit through their territory with their slaves, agitated against slavery, tolerated abolitionist societies, and permitted dissemination of abolitionist propaganda. They had permitted blacks to vote and had elected a sectional presidential candidate determined to effect the eventual abolition of slavery. Thus South Carolina, in order to protect its people and its peculiar institution, severed the union binding it to the other states and reassumed its status as "a separate and independent state."

Though all slave states were deeply divided over the wisdom and constitutionality of secession, Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas also seceded by February 1, 1861. These seven states formed the Confederate States of America in February. After the firing on Fort Sumter, Virginia, North Carolina, Tennessee, and Arkansas seceded. A proslavery rump session of the Missouri legislature and a convention of Kentucky Confederate soldiers declared their states seceded, but both states, as well as the other border slave states, remained in the Union. After the defeat of southern forces in 1865, most of the Confederate states repudiated secession, but diehards in South Carolina merely repealed their secession ordinance instead of nullifying it. Nonetheless, secession as a constitutional remedy was dead, and the United States was thenceforth "one nation, indivisible."

WILLIAM M. WIECEK
(1986)

## SECOND AMENDMENT

However controversial the meaning of the Second Amendment is today, it was clear enough to the generation of 1789. The amendment assured to the people "their private arms," said an article which received JAMES MADISON'S approval and was the only analysis available to Congress when it voted. Subsequent contemporaneous analysis is epitomized by the first American commentary on the writings of WILLIAM BLACKSTONE. Where Blackstone described arms for personal defense as among the "absolute rights of individuals" at COMMON LAW, his eighteenth-century American editor commented that this right had been constitutionalized by the Second Amendment. Early constitutional commentators, including JOSEPH STORY, William Rawle, and THOMAS M. COOLEY, described the amendment in terms of a republican philosophical tradition stemming from Aristotle's observation that basic to tyrants is a "mistrust of the people; hence they deprive them of arms." Political theorists from Cicero to JOHN LOCKE and Jean-Jacques Rousseau also held arms possession to be symbolic of personal freedom and vital to the virtuous, self-reliant citizenry (defending itself from encroachment by outlaws, tyrants, and foreign invaders alike) that they deemed indispensable to popular government.

These assumptions informed both sides of the debate over RATIFICATION OF THE CONSTITUTION. While Madison, in THE FEDERALIST #46 assured Americans that they need never fear the federal government because of "the advantage of being armed, which you possess over the people of almost every other nation," opponents of ratification such as PATRICK HENRY declaimed: "The great principle is that every man be armed. Everyone who is able may have

a gun." SAMUEL ADAMS proposed that "the Constitution never be construed . . . to prevent the people of the United States who are peaceable citizens from keeping their own arms." As much of this debate used the word "militia," it is necessary to remember that in the eighteenth century the militia was coextensive with the adult male citizenry. By colonial law every household was required to possess arms and every male of military age was required to muster during military emergencies, bearing his own arms. The amendment, in guaranteeing the arms of each citizen, simultaneously guaranteed arms for the militia.

In contrast to the original interpretation of the amendment as a personal right to arms is the twentieth-century view that it protects only the states' right to arm their own military forces, including their national guard units. This view stresses the Anti-Federalists' bitter opposition to the provisions of Article I, section 8, authorizing a standing army and granting the federal government various powers over state militias. Both textual and historical difficulties preclude acceptance of this exclusively STATES' RIGHTS view. For instance, Madison's proposed organization for the provisions of the BILL OF RIGHTS was not to append them, but to interpolate each amendment into the Constitution following the provision to which it pertained. Had he viewed the amendment as modifying the military-militia clauses of the Constitution (which he strongly defended against Anti-Federalist criticism), he would have appended it to those clauses in section 8. Instead, he planned to place what are now the First and Second Amendments in Article I, section 9, along with the original Constitution's guarantees against BILLS OF ATTAINDER and EX POST FACTO LAWS and against suspension of HABEAS CORPUS.

The states' rights interpretation simply cannot be squared with the amendment's words: "right of the people." It is impossible to believe that the First Congress used "right of the people" in the FIRST AMENDMENT to describe an individual right (FREEDOM OF ASSEMBLY,) but sixteen words later in the Second Amendment to describe a right vested exclusively in the states. Moreover, "right of the people" is used again to refer to personal rights in the FOURTH AMENDMENT and the NINTH AMENDMENT, and the TENTH AMENDMENT expressly distinguishes "the people" from "the states."

Interpreting the Second Amendment as a guarantee of an individual right does not foreclose all GUN CONTROLS. The ownership of firearms by minors, felons, and the mentally impaired—and the carrying of them outside the home by anyone—may be limited or banned. Moreover, the government may limit the types of arms that may be kept; there is no right, for example, to own artillery or automatic weapons, or the weapons of the footpad and gangster, such as sawed-off shotguns and blackjacks. Gun controls in the form of registration and licensing requirements are also permissible so long as the ordinary citizen's right to possess arms for home protection is respected.

DON B. KATES, JR.
(1986)

Bibliography

HALBROOK, STEVEN 1984 *That Every Man Be Armed: The Evolution of a Constitutional Right.* Albuquerque: University of New Mexico Press.

KATES, DON B., JR. 1983 Handgun Prohibition and the Original Meaning of the Second Amendment. *Michigan Law Review* 82:204–273.

MALCOLM, JOYCE 1983 The Right of the People to Keep and Bear Arms: The Common Law Tradition. *Hastings Constitutional Law Quarterly* 10:285–314.

SHALHOPE, ROBERT E. 1982 The Ideological Origins of the Second Amendment. *Journal of American History* 69:599–614.

## SECOND AMENDMENT
## (Update)

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Like the Roman god Janus, the Second Amendment appears to have two faces, each casting its gaze in a different direction. For others, it may call up the different image of an Escher print. What one sees in the Second Amendment seems to change before one's eyes. Nor has anything the Supreme Court yet said about the Second Amendment resolved its uncertainty. After two centuries of judicial opportunity for the Court to speak, to say something reasonably definitive, virtually nothing significant has been settled or laid to rest.

The right to keep and bear arms, confirmed in the amendment, was confirmed as a general right. That is, the Second Amendment declares the right to keep and bear arms belongs to "the people," and not to some more limited class. Early authorities expressed no confusion or disagreement on this point. As the leading nineteenth-century treatise writer on the Constitution, THOMAS M. COOLEY, observed in 1880:

> The [Second] [A]mendment, like most other provisions in the Constitution, has a history. It was adopted with some modification and enlargement from the English Bill of Rights of 1688. *The Right is General* [i.e., shared by all, rather than some particular class]. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose.

And as recently as 1994, after reviewing an even wider assortment of materials, historian Joyce Malcolm summarized her conclusions in agreement with Cooley's observations, further explaining the context and the manner in which the Second Amendment was framed:

> The Second Amendment was meant to accomplish two distinct goals, each perceived as crucial to the maintenance of liberty. First, it was meant to guarantee the individual's right to have arms for self-defence and self-preservation. Such an individual right was a legacy of the English Bill of Rights. The clause concerning the militia was not intended to limit ownership of arms to militia members, or return control of the militia to the states, but rather to express the preference for a militia over a standing army.

These views, shared by a majority of scholars, also accord with the views of Justice JOSEPH STORY. Indeed, in one respect, Story, who had been appointed to the Court by JAMES MADISON in 1811 and published his *Commentaries on the Constitution* in 1833, went further in emphasizing the foundational nature of the Second Amendment, with respect to the right of the people to have personal arms beyond reach of control by government, going so far as to declare:

> The right of the citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist, and triumph over them.

The Second Amendment, in Story's view, was thus not a mere restatement of the desirability of a well-regulated militia, followed by an uncertain vague reference. The Second Amendment, rather, while strongly endorsing a well-regulated militia (in preference to the maintenance of a standing army), was also emphatically a restraint on the reach of government, even as Story observed was true of other clauses in the BILL OF RIGHTS. Nor was there any suggestion, from any source, at the time the amendment was under discussion or review, of some more strained or compromised view. It was only in subsequent decades that a vastly more restricted version of the Second Amendment came to be advanced.

In *United States v. Miller* (1939), in the course of upholding a federal statute forbidding interstate transportation of an unregistered short barrel ("sawed-off") shotgun, the Court construed the Second Amendment as inapplicable to the case, declaring that there was no evidence in the record that this type of arm was "any part of ordinary military equipment" that could "contribute to the common defense."

To be sure, the Court has gone no further since that time, nor did it, in *Miller*, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment. It did, nevertheless, thus suggest that whatever the protection provided by the Second Amendment, it may apply only to such arms as could count as "ordinary military equipment," and, since *Miller*, it is widely assumed that this is so. Yet, it has been argued that there is no reason why the citizen's right to keep and bear arms should necessarily encompass all arms that might today be seen as a part of "ordinary military equipment," or why, in turn, the limited usefulness of a particular arm as part of ordinary military equipment should on that account strip it of all Second Amendment protection from government forfeiture or ban. But the subject has not been critically reexamined in the courts, and this holding in *Miller* currently stands.

Lower federal courts, however, have since 1939 gone far beyond anything suggested by the Court in *Miller*. They have seized upon the *Miller* case to reduce the amendment's scope nearly to the vanishing point. Indeed, an opinion as recent as July, 1997 from the United States Court of Appeals for the Eleventh Circuit illustrates the near collapse. In the view of the prevailing lower court judges, the Second Amendment is solely a restraint on Congress insofar as it might seek to forbid even those (few) persons in active training and service of an active state-regulated militia, to possess such military-style arms they are authorized to have as part of that training and service, but nothing more. These courts thus very narrowly construe the Second Amendment purely as a limited STATES' RIGHT amendment, claimable only by persons in active, controlled state guard or militia units, which units in fact are already under nearly complete federal control anyway, pursuant to powers vested in Congress in Article I, section 8 (clause 16 grants power to Congress to provide for "organizing, arming, and disciplining the Militia," and such "training" the states are authorized to provide, shall itself take place "according to the discipline prescribed by Congress").

The "reasoning" imputed to the Second Amendment by these courts is labored, but essentially this: That, without this amendment, Congress might have sought to justify the establishment of a permanent, large standing army, by prohibiting members of well-regulated state militias from possessing arms—albeit state militias already themselves heavily subject to national regulation and control. This is, of course, a possible "reading" of the Second Amendment, albeit a reading leaving it rather empty of substance, and giving it virtually no useful work to do. Still, it is a reading and source of real encouragement to growing numbers of citizens appalled by the high incidence of gun-related deaths in the United States. Whether it will be sustained by the Supreme Court remains to be seen.

WILLIAM W. VAN ALSTYNE
(2000)

## SECONDARY BOYCOTT

See: Boycott

## SECOND EMPLOYERS' LIABILITY CASES

See: Employers' Liability Cases

## SECOND WORLD WAR

See: World War II

## SECTION 1983, TITLE 42, UNITED STATES CODE
(Judicial Interpretation)

Few statutes have fluctuated in importance as wildly as section 1983. From near total disuse—twenty-one reported cases from 1871 to 1920—it became one of the most litigated provisions of federal law. This drastic change is attributable both to developments in constitutional law and to developments peculiar to section 1983.

Section 1983's ascension matches the twentieth-century expansion of constitutional rights. As originally enacted in the Civil Rights Act of 1871, section 1983 at most provided a cause of action for deprivations, under color of state law, of constitutional rights. Until relatively recently, citizens had few constitutional rights enforceable against the states. In section 1983's early years, the modern expansions of the EQUAL PROTECTION and DUE PROCESS clauses had not occurred, the STATE ACTION doctrine immunized a broad range of activity from constitutional scrutiny, and the FOURTH AMENDMENT was in the infancy of its constitutional development.

An ill-considered dichotomy between classes of constitutional rights also hindered section 1983's growth. In an influential separate opinion in HAGUE V. CIO (1939), Justice HARLAN FISKE STONE argued that section 1983's jurisdictional counterpart, section 1343(3), should be interpreted to authorize federal courts to hear cases involving personal rights but not to hear cases involving mere property rights. This view influenced many courts' interpretations of section 1983 itself, again with limiting effect. In *Lynch v. Household Finance Corporation* (1972) the Court rejected the personal rightsproperty rights distinction. Paradoxically, a similar dichotomy between personal interests and economic interests continues to shape, indeed govern, interpretation of the equal protection clause.

Section 1983's text generated interpretive problems that might have hindered its widespread use even if the Constitution had enjoyed a broader scope. As enacted, section 1983 protected "rights, privileges or immunities" secured by the Constitution. Its scope therefore depended upon what were viewed as rights, privileges, or immunities secured by the Constitution. Until the SLAUGHTERHOUSE CASES (1873), one might have thought the rights, privileges, or immunities so secured simply to be all constitutional rights. But the *Slaughterhouse Cases* narrowly interpreted the FOURTEENTH AMENDMENT's privileges or immunities clause to protect only a small subclass of constitutional rights. Some courts adopted a similar interpretation of section 1983. In addition, section 1983 reaches only deprivations "under color of" state law. Not until well into the twentieth century was it clearly recognized that behavior not authorized by state law might constitute action under COLOR OF LAW. A narrowly construed Constitution, the shadow cast by the *Slaughterhouse Cases*, the state action doctrine, and section 1983's text combined to minimize section 1983's importance.

In the 1920s, section 1983 provided actions for some deprivations of VOTING RIGHTS. Perhaps the Court relied on the section when, in NIXON V. HERNDON (1927), it allowed a damage action to go forward against state officials. In *Lane v. Wilson* (1939), another voting rights case, the Court expressly referred to section 1983 in approving a damage action. But these cases did not erode the important limitations on section 1983.

The erosion process commenced with early twentieth-century cases that construed state action to include some actions taken in violation of state law, and with EX PARTE YOUNG (1908), which held that the ELEVENTH AMENDMENT does not bar injunctive actions against state officials. In the 1940s, criminal CIVIL RIGHTS decisions also interpreted the phrase "under color of" law to include some unauthorized action. MONROE V. PAPE (1961) capped the process by interpreting section 1983 to protect at least all constitutional rights embodied in the Fourteenth Amendment and by holding the color of law requirement in section 1983 to be satisfied by the unauthorized action of police officers. *Monroe*, together with the wide expansion of constitutional rights of the 1950s and 1960s, assured section 1983's importance.

But section 1983's growth triggered a reaction, one that began with *Monroe* itself. If every constitutional violation generated a cause of action for damages there must be limits as to when defendants actually would be held liable. In *Monroe*, the Court, giving a questionable reading to section 1983's history, held that the section was not meant to render cities liable for constitutional violations. This limitation survived until MONELL V. DEPARTMENT OF SOCIAL SERVICES (1978), when the Court held that cities may be liable under section 1983 but that, in yet another ques-

tionable reading of the section's history, Congress did not intend cities to be liable for acts of city officials unless the acts constituted "official policy," a phrase destined to be the subject of much litigation. The reaction also includes some sentiment to impose an EXHAUSTION OF REMEDIES requirement in one or more classes of section 1983 cases.

With respect to individual defendants, the Court in a series of cases read into section 1983 an array of LEGISLATIVE, JUDICIAL, prosecutorial and EXECUTIVE IMMUNITIES. And in QUERN V. JORDAN (1979) the Court held that section 1983 was not meant to abrogate the Eleventh Amendment immunity of states. In OWEN V. CITY OF INDEPENDENCE (1980), however, the Court declined to extend to municipalities the good faith defense available to executive officials. The reaction to section 1983's expansion may also encompass a series of cases, including *Parratt v. Taylor* (1981), PAUL V. DAVIS (1976), INGRAHAM V. WRIGHT (1977), and *Estelle v. Gamble* (1976), narrowly interpreting constitutional rights. If a private cause of action accompanies every constitutional right, the Court may be hesitant to "constitutionalize" many rights. Finally, the Court held in *Carey v. Piphus* (1978) that a violation of PROCEDURAL DUE PROCESS, standing alone, will not support a substantial recovery of damages; to recover more than nominal damages a plaintiff in such a case must show actual harm. The Court left open the question whether this rule would apply to other types of constitutional violation.

For many years, courts disagreed over whether section 1983 provided a cause of action for violations of federal statutes by state officials. The REVISED STATUTES of 1874, which were not supposed to make substantive changes in the law, expanded section 1983's wording to include "laws." Over a century later, in *Maine v. Thiboutot* (1980), the Court interpreted section 1983 to provide a cause of action for at least some federal statutory claims.

THEODORE EISENBERG
(1986)

Bibliography

EISENBERG, THEODORE 1981 *Civil Rights Legislation.* Charlottesville, Va.: Michie Co.

——— 1982 Section 1983: Doctrinal Foundations and an Empirical Study. *Cornell Law Review* 67:482–556.

FRIENDLY, HENRY J. 1973 *Federal Jurisdiction: A General View* Pp. 87–107. New York: Columbia University Press.

NAMHOD, SHELDON H. 1979 *Civil Rights & Civil Liberties Litigation.* Colorado Springs, Colo.: Shepard's.

NOTE 1977 Developments in the Law: Section 1983 and Federalism. *Harvard Law Review* 90:1133–1361.

## SECURITIES LAW AND THE CONSTITUTION

Following the 1929 stockmarket crash and the ensuing economic depression, Congress enacted the Securities Act of 1933 and the Securities Exchange Act of 1934 to restore investor confidence and provide for more efficient securities markets. Although both disclosure and regulatory provisions of the two statutes were challenged during the 1930s on constitutional grounds, the lower federal courts consistently held that both statutes were within Congress's power to regulate INTERSTATE COMMERCE and did not violate any other constitutional guarantees. In *Electric Bond & Share Co. v. Securities and Exchange Commission* (1937) the Supreme Court rejected constitutional attacks on certain provisions of the PUBLIC UTILITY HOLDING COMPANY ACT similar to the disclosure and registration requirements of the 1933 and 1934 acts, although the Court did not discuss the general validity of federal securities regulation.

Because both the states and the federal government regulate the securities markets, the Supreme Court has periodically undertaken to define the relationship between federal and state regulatory schemes by interpreting federal securities statutes. The first such case to raise constitutional questions of FEDERALISM grew out of the dramatic increase in hostile corporate takeover attempts in the late 1960s. In 1968 and 1970 Congress amended the 1934 act by adding certain provisions, known as the Williams Act, to regulate tender offers. A number of states immediately adopted takeover statutes of their own, presumably in order to protect local businesses from hostile takeovers. Because the state statutes gave more protection to target companies than did the Williams Act, tender offerors immediately challenged the state statutes as either invalid under the COMMERCE CLAUSE or preempted by the Williams Act.

In *Edgar v. Mite Corporation* (1982) the Supreme Court held that the Illinois takeover statute impermissibly burdened interstate commerce because the statute's nationwide reach significantly interfered with the economic benefits of tender offers while providing few benefits to Illinois. The Court's opinion was limited to the commerce clause holding, although three Justices also argued that the Williams Act preempted the Illinois regulatory scheme. A number of similar state takeover laws have subsequently been invalidated by lower federal courts on either commerce clause or PREEMPTION grounds.

Recent constitutional developments have suggested the possibility of FIRST AMENDMENT restraints on the disclosure aspects of securities regulation. Both the 1933 and 1934 acts regulate extensively the speech of corporate issuers and securities professionals by mandating some disclosures, prohibiting others, and by policing the content of various disclosure documents, all in the interest of preventing securities fraud, facilitating corporate suffrage, and providing investors with full and accurate information about securities and the securities markets. In VIRGINIA STATE BOARD OF PHARMACY V. VIRGINIA CITIZENS CONSUMER

COUNCIL (1976) the Court extended First Amendment protection to COMMERCIAL SPEECH, and in FIRST NATIONAL BANK OF BOSTON V. BELLOTTI (1978) the Court confirmed that corporate speakers could claim the benefits of the First Amendment. In CENTRAL HUDSON GAS & ELECTRIC CORP. V. PUBLIC SERVICE COMMISSION (1980) the Court indicated that while misleading commercial speech may be regulated, remedies must be "no broader than reasonably necessary to prevent the deception."

In 1985, the Supreme Court confronted the question of First Amendment constraints on federal securities regulation. In *Lowe v. Securities and Exchange Commission* the petitioner argued that First Amendment notions of prior restraint barred the SEC from enjoining publication of petitioner's securities newsletter under the Investment Advisers Act of 1940 after petitioner's investment adviser registration was revoked because of his illegal conduct. The Court avoided the First Amendment issue by holding that the petitioner was the publisher of a "bona fide newspaper" and thus statutorily exempt from regulation under the 1940 act. Justices BYRON R. WHITE and WILLIAM H. REHNQUIST and Chief Justice WARREN E. BURGER concurred in the result but argued that the First Amendment question should have been reached and decided. They indicated that the total bar on publication required by the 1940 act was too drastic a remedy for possibly deceptive speech, whether that speech was fully protected or merely commercial speech.

Although many of the disclosure provisions of the 1933 and 1934 acts presumably satisfy the *Central Hudson* tests, those aspects of both statutes requiring prepublication clearance of disclosure by the SEC or limiting informational activities by securities professionals may be regarded as sweeping too broadly to meet First Amendment requirements. In some areas, moreover, as in the application of the proxy rules to corporate and shareholder speech concerning issues of social and political significance, corporate speech may be entitled to full First Amendment protection. All these issues remain to be raised in the courts.

ALISON GREY ANDERSON
(1986)

## SEDITION

Sedition is a comprehensive term for offenses against the authority of the government not amounting to TREASON. Such offenses might include the spreading of disaffection or disloyalty, conspiracy to commit insurrection, or any SUBVERSIVE ACTIVITY. Sedition tends toward treason, but does not reach the constitutionally defined offense of "levying war against the United States or adhering to their enemies, giving them aid and comfort."

Historically, the broad category of "sedition" has comprised several kinds of activity, although there has not always been consistency about which constituted criminal offenses. SEDITIOUS LIBEL, the uttering of words bringing the government or its officers into ridicule or disrepute, was an offense at COMMON LAW and under the ALIEN AND SEDITION ACTS of 1798. Seditious membership, that is, active, knowing, and purposeful membership in an organization committed to the overthrow of the government by unlawful means, is an offense under the Smith Act. Seditious advocacy, the public promotion of insurrection or rebellion, and seditious conspiracy, combining with others to subvert the government, violate several statutory provisions; but those offenses must be very carefully defined lest the statutes exert a CHILLING EFFECT on legitimate criticism of government.

The possibility of sedition poses a particular problem for constitutional democracy. Democratic governments, no less than any other kind, need to protect themselves against seditious activity. But measures taken in self-defense must not be so broad in their scope as themselves to become a threat to individual liberty. In the United States, the FIRST AMENDMENT to the Constitution protects FREEDOM OF THE PRESS, and FREEDOM OF ASSEMBLY AND ASSOCIATION; these specific constitutional guarantees limit the power of Congress and of the states to legislate against sedition.

For most of American history, the national and state governments exercised a CONCURRENT POWER to define and punish sedition. The power of Congress to legislate against sedition does not derive from any of the specific ENUMERATED POWERS, but is NECESSARY AND PROPER for the carrying out of several of them. In PENNSYLVANIA V. NELSON (1956) the Supreme Court held that Congress, by enacting a pervasive scheme of regulation, had preempted the field of legislation concerning sedition against the United States.

DENNIS J. MAHONEY
(1986)

## SEDITION ACT
### 40 Stat. 553 (1918)

As WORLD WAR I progressed, enthusiastic war supporters argued more and more that the ESPIONAGE ACT OF 1917 did not adequately restrict domestic critics of the war effort. Advocates of additional restriction argued that weakness of the existing loyalty legislation forced citizens to take the law into their own hands. If firmer federal policies could be established, such distasteful forms of repression might be averted. Thus a more restrictive amendment to the Espionage Act was proposed and, despite strong congressional protest that the measure virtually terminated freedom of expression, was signed into law on May 16,

1918. The amendment, called the Sedition Act, defined eight offenses punishable by $10,000 fine or more than twenty years in prison, or both. The new offenses included: uttering, printing, writing, or publishing any disloyal, profane, scurrilous, or abusive language intended to cause contempt, scorn, contumely or disrepute as regards the form of government of the United States, or the Constitution, or the flag, or the uniform or the Army or Navy, or any language intended to incite resistance to the United States or to promote the cause of its enemies; urging any curtailment of production or anything necessary to the prosecution of the war with intent to hinder its prosecution; advocating, teaching, defending, or suggesting the doing of any of these acts; and words or acts supporting or favoring the cause of any country at war with the United States, or opposing the cause of the United States therein.

The 1918 act also enlarged the censorship functions of the postmaster general, empowering him to refuse to deliver mail to any individual or business employing the mails in violation of the statute. He was to order a letter that he deemed undeliverable to be returned to the sender with the phrase "Mail to this address undeliverable under the Espionage Act" stamped on the envelope. Thus the postmaster general was empowered to damage or destroy the business or reputation of any American citizen.

Enforced extensively in the period from May to November 1918, the measure virtually terminated wartime criticism until the Armistice. While efforts were made to reenact its provisions in a peace-time sedition statute during the A. MITCHELL PALMER "red scare" period, Congress balked and ultimately took the act off the books in March 1921.

The extremely broad language of the act would today make it vulnerable to attack on the grounds of OVERBREADTH. In 1919, however, the Supreme Court upheld the conviction of five anarchists for circulating a leaflet urging curtailment of war production and encouraging resistance to the participation of U.S. forces in opposition to the Russian revolution. Justice OLIVER WENDELL HOLMES wrote a famous dissent, joined by Justice LOUIS D. BRANDEIS, in ABRAMS V. UNITED STATES (1919). (See CLEAR AND PRESENT DANGER.)

PAUL L. MURPHY
(1986)

Bibliography

MURPHY, PAUL L. 1979 *World War I and the Origin of Civil Liberties in the United States.* New York: Norton.

## SEDITIOUS LIBEL

Though its scope has varied greatly with time and place, the heart of the doctrine of seditious libel is the proposition that government may punish its critics for words it perceives as a threat to its survival. The offending words may be criticism of the government itself, or, more often, of its leaders. What constitutes seditious libel tends to be whatever the government fears most at the time. In fifteenth-century England, where reverence for the crown was considered essential to the safety of the realm, it was a crime to call the king a fool or to predict his death. In colonial America the most frequent offense was criticizing local representatives of the crown. In 1798, the Federalist party feared that Jeffersonian attacks would so undermine public confidence that the fledgling Republic would fall—or at least that the Federalists would lose the election of 1800. They therefore made it a crime to publish any false, scandalous, and malicious writing about either house of Congress or the President of the United States.

In England, seditious libels were once prosecuted as treason, punishable by death. Thus in 1663 William Twyn, who printed a book endorsing the right of revolution, was hanged, emasculated, disemboweled, quartered, and beheaded. Not until the eighteenth century did the law clearly distinguish seditious libel from treason; the latter then was confined to cases in which the seditious words were accompanied by some overt act. Seditious libel became a misdemeanor, punishable by fines, imprisonment, and the pillory. Prosecutions were common in England until the mid-nineteenth century.

Seditious libel was part of the received law in the American colonies, but it was received unenthusiastically. There probably were no more than a dozen seditious libel prosecutions in the entire colonial period, and few were successful. Although no one seems to have doubted that government should have some power to protect itself from verbal attacks, many complained that the doctrine as it had evolved in England allowed legitimate criticism to be swept within the ambit of the seditious libel proscription. The law allowed no defense of truth; the objective was to preserve respect for government, to which truthful criticism was an even greater threat than falsehood. And because the interests to be protected were the government's, it would hardly do to let a jury decide whether the words were actionable. The judges therefore kept for themselves the power to determine whether the speaker's intent was seditious; the jury was only allowed to decide whether he had uttered the words charged.

As ideas of POPULAR SOVEREIGNTY grew, critics on both sides of the Atlantic attacked these rules. In America the issue jelled in the 1735 trial of John Peter Zenger, a New York printer who had criticized the royal governor. Zenger's lawyer, Andrew Hamilton, argued that he should be allowed to defend Zenger by proving the truth of the publication, and that the jury should be allowed to decide whether the words were libelous. The judge rejected both

arguments, but the jury acquitted Zenger anyway, even though he had admitted publishing the words. (See ZENGER'S CASE.)

The case made popular heroes of Zenger and Hamilton and destroyed the effectiveness of seditious libel law as a tool for English control of American dissent. There were few, if any, successful common law prosecutions in the colonies after *Zenger.* Colonial legislatures sometimes punished their critics for breaches of "parliamentary privilege," but public resentment eventually made this device ineffective, too.

The intended effect of the FIRST AMENDMENT on the law of seditious libel is still in dispute. It is clear that seditious libel was still the law in 1789, and that the Framers expressed no intent to preclude prosecutions for seditious libel. They certainly did not intend to prevent the states from prosecuting seditious libels; all agreed that the First Amendment was a limitation on federal power only. And within a decade, Congress passed the Sedition Act of 1798, under which the Federalists prosecuted a number of prominent Republican editors. Several Justices of the Supreme Court, sitting as circuit judges, enforced the act. This evidence has persuaded some modern scholars that the Framers had no intention of abolishing seditious libel.

Others have argued that the Framers had at least a nascent understanding that some freedom to criticize government was a prerequisite to self-government, and that England's rigorous concept of seditious libel was inconsistent with that need. Their failure explicitly to condemn it might be explained by the fact that seditious libel prosecutions had not been a serious threat in their lifetimes. The Sedition Act may have been an unprincipled effort by desperate Federalist partisans to keep control of the government, rather than a considered affirmation of the constitutionality of seditious libel.

The Supreme Court has never squarely held that the First Amendment forbids punishment of seditious libels. From WORLD WAR I through the McCarthy era, state and federal governments prosecuted numerous anarchists, socialists, and communists for advocating draft resistance, mass strikes, or overthrow of the government. Although the statutes authorizing these prosecutions were not called seditious libel acts, they had much the same effect. The Court generally upheld these convictions (usually over the dissents of the more libertarian Justices) until the 1960s, when in BRANDENBURG V. OHIO (1969) it adopted the view that punishment of mere advocacy is unconstitutional unless it is intended to produce imminent lawless action and is likely to do so.

*Garrison v. Louisiana* (1964) closely resembled a traditional seditious libel prosecution. A district attorney had been convicted of criminal libel for accusing local judges of laziness and corruption. The Court reversed his conviction, but implied that the prosecution might have been permissible if the state had proved that the defendant spoke with reckless disregard of the truth or falsity of his statements.

Nevertheless, the judgment of history is that seditious libel laws are inconsistent with FREEDOM OF SPEECH and FREEDOM OF THE PRESS. JAMES MADISON and THOMAS JEFFERSON argued in 1799 that the Sedition Act was unconstitutional. Justice OLIVER WENDELL HOLMES, dissenting in ABRAMS V. UNITED STATES (1919), wrote, "I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. . . . I had conceived that the United States through many years had shown its repentance for the Sedition Act . . . by repaying the fines that it imposed." And in NEW YORK TIMES V. SULLIVAN (1964) the Court said, "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history."

DAVID A. ANDERSON
(1986)

(SEE ALSO: *Alien and Sedition Acts.*)

Bibliography

ANDERSON, DAVID A. 1983 The Origins of the Press Clause. *UCLA Law Review* 30:455–537.

LEVY, LEONARD W. 1984 *Emergence of a Free Press.* New York: Oxford University Press.

NELSON, HAROLD L. 1959 Seditious Libel in Colonial America. *American Journal of Legal History* 3:160–172.

## *SEEGER, UNITED STATES v.*
380 U.S. 163 (1965)

At issue in the *Seeger* case was Section 6(j) of the Universal Military Training and Service Act. Originally enacted in 1940, the act exempted those who, as a matter of "religious training and belief," were opposed to participation in a war. In 1948, Congress amended this provision and defined religious belief as "an individual's belief in a relation to a supreme being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views. . . ."

Despite the textual evidence of a congressional intent to condition exemption on the theistic belief, Justice TOM C. CLARK, for the Supreme Court, interpreted the provision as requiring only a sincere and meaningful belief occupying in the life of its possessor a place parallel to that filled by the belief in God of those admittedly qualified for the exemption. Seeger had argued that if section 6(j) granted exemptions only on the basis of conventional the-

istic belief, it amounted to an ESTABLISHMENT OF RELIGION. Facing the unattractive alternatives of finding section 6(j) unconstitutional or reading it in a sufficiently broad fashion so as to secularize the exemption, the majority chose the latter.

RICHARD E. MORGAN
(1986)

(SEE ALSO: *Conscientious Objection.*)

## SEGREGATION

From the beginning, RACIAL DISCRIMINATION in America has been a national phenomenon. Jim Crow was a southern name for the segregation of the races as part of a system of caste. But segregation antedated Jim Crow, and it began in the North and the West. The leading judicial decision upholding school segregation before the CIVIL WAR bears a name Northerners prefer to forget: ROBERTS V. BOSTON (1850). Blacks were either excluded entirely from PUBLIC ACCOMMODATIONS such as hotels, railroads, and theaters, or given separate accommodations. They were segregated in prisons and in churches. Several northern and western states even sought to bar the immigration of blacks; such a legal provision was adopted by Oregon voters by an eight-to-one margin.

Nor has this country's segregation been limited to blacks. As late as 1947, a federal court of appeals held that the segregation of Chicano children in a school district in California was invalid. The decision's ground was itself depressing: the state's statute authorized only the segregation of children whose ancestry was Indian, Chinese, Japanese, and Mongolian.

Still, it was the postabolition South that carried the segregation of the races to its fullest development, and blacks were the chief victims of the practice. Before slavery was abolished, of course, the dominance of whites was assured without any call for segregation. After abolition, the southern states adopted severe legal restrictions on blacks, which served to maintain white supremacy. (See BLACK CODES.) When the CIVIL RIGHTS ACT OF 1866 and the FOURTEENTH AMENDMENT not only ended these legal restrictions but also positively declared the CITIZENSHIP of the freed slaves, segregation was the southern response. By 1870, Tennessee had forbidden interracial marriages (see MISCEGENATION) and later came the "Jim Crow car" laws segregating railroad passenger seating.

Segregation was not, however, merely a creature of state legislation. It also resulted from private action: a hotel would refuse to take black guests; homeowners in a neighborhood would agree not to sell to black buyers. In such cases law played a role that was less obvious on the surface of events but was vital nonetheless. A black who sought the aid of the state courts in overcoming private discrimination would simply be turned away; state laws would deny any remedy.

Late in the nineteenth century, the Supreme Court gave its support to this system of interlocking discriminations. In the CIVIL RIGHTS CASES (1883), the Court held invalid a congressional statute forbidding racial discrimination by railroads, hotels, theaters, and restaurants. (See STATE ACTION.) And in PLESSY V. FERGUSON (1896) the Court upheld a Jim Crow car law against an EQUAL PROTECTION attack. (See SEPARATE BUT EQUAL DOCTRINE.) By the early twentieth century, the South was racially segregated to extremes that were at once tragic and ludicrous: separate telephone booths for blacks in Oklahoma; separate storage for textbooks used by black children in North Carolina and Florida schools; separate elevators for blacks in Atlanta; separate Bibles for swearing black witnesses in Georgia courts. The point of all this was nothing less than the denial to blacks of membership in a white-dominated society—the denial of citizenship itself, in defiance of the Fourteenth Amendment.

Some of the harms caused by racial segregation are harms to material interests: a black is denied accommodation at a hotel, or admission to a state university medical school (and thus to the medical profession), or the chance to live in a particular neighborhood or be a factory foreman. These material harms are serious, but the worst harms of segregation are psychic harms. The primary reason for segregating railroad passengers, of course, is to symbolize a caste system. The stigma of inferiority is a denial of a person's humanity, and the result is anguish and humiliation. The more the races are separated, the more natural it is for members of the dominant white race to see each black person not as an individual but simply as a black. Ralph Ellison, in his novel *Invisible Man* (1952), makes the point: "I am invisible, understand, simply because people refuse to see me. . . . When they approach me they see only my surroundings, themselves, or figments of their imagination—indeed, everything and anything except me. . . . You ache with the need to convince yourself that you do exist in the real world." To be a citizen, on the other hand, is to be respected as a person and recognized as a participating member in the society.

Jim Crow was a complex living system, and its dismantling would be no simple task. The field of segregation in housing exemplifies the difficulties. The NAACP's first major victory against segregation came in BUCHANAN V. WARLEY (1917), when the Supreme Court struck down a local ZONING ordinance aimed at maintaining segregated residential neighborhoods. But the decision by no means ended housing segregation, which continued as a result of private conduct. When the private discrimination was suf-

ficiently connected with state action, as in the case of racially RESTRICTIVE COVENANTS enforced by state courts, the Fourteenth Amendment was an effective weapon against residential segregation. (See SHELLEY V. KRAEMER.) But in the absence of such state support, a landowner might simply refuse to rent or sell to blacks, and the would-be buyers would be without remedy. Two events in 1968 altered this portion of the doctrinal landscape. In JONES V. ALFRED H. MAYER CO. the Supreme Court concluded that the Civil Rights Act of 1866 forbade private discrimination in the sale of property. In the same year, Congress adopted a comprehensive fair housing law as part of the CIVIL RIGHTS ACT OF 1968. The new law forbade various forms of racial discrimination by lenders and brokers as well as private landlords and sellers. The combination of constitutional litigation and legislation aimed at ending housing segregation had achieved a radical restructuring of the law.

The restructuring of racial patterns in the neighborhoods where people live, however, has proved to be quite another matter. Middle-class blacks have largely left the core cities to live in suburbs, but the degree of racial segregation in residences has changed only slightly since 1940. The term "white flight," coined in the context of school desegregation, seems even more clearly applicable to residential patterns. It is hard to find stable interracial neighborhoods in any large city in the country, at any income level. (For discussion of related questions concerning the public schools—where continued patterns of segregation are related directly to residential segregation—see DESEGREGATION.)

In contrast, racial segregation in transportation and other public accommodations has come to an end. (See SIT-IN; CIVIL RIGHTS ACT OF 1964.) And laws forbidding interracial marriage collapsed under the double weight of equal protection and DUE PROCESS in LOVING V. VIRGINIA (1967). (See FREEDOM OF INTIMATE ASSOCIATION.) Employment discrimination, too, is in retreat—including the segregation of job categories by race—as a result of enforcement of the fair employment portions of the 1964 Act.

The segregation that remains in American society, then, is chiefly residential segregation—with its concomitant, a substantial extent of separation of the races in the public schools. There is irony here: the decision in the school segregation case, BROWN V. BOARD OF EDUCATION (1954), was the critical event in the demise of Jim Crow, but our big city schools are the one set of public institutions in which the races remain largely separated. Yet *Brown*'s impact on American life was important. The decision began more than a doctrinal movement; its implicit affirmation of the equal citizenship of all our people accelerated forces that have markedly changed not only race relations but also a wide range of other relationships formerly characterized by dominance and dependency.

It is easy now to see the social and economic changes in the country that permitted the success of the movement to end officially sponsored segregation. WORLD WAR II was the great watershed. By the time the war began, there was a critical mass of educated blacks, enough to provide a national movement not only with its great chiefs but with local leadership as well—and with a trained cadre of lawyers. The war produced waves of migration of blacks out of the rural South and into the cities of the North and West, where they very soon found a political voice. In part, too, the war had been billed as a war against Nazi racism—whatever we might be doing on the home front. (See JAPANESE AMERICAN CASES.) The expected postwar depression failed to appear, and the 1950s and 1960s were a time of economic expansion, conducive to a sympathetic reception for egalitarian claims. All this is familiar learning. Yet in the early 1950s there was no sense of inevitability surrounding the assault on segregation. If the sudden collapse of Jim Crow now seems inevitable, that in itself is a measure of the distance we have come. And if the end of segregation did not end a system of racial caste, that is a measure of the distance we have yet to travel.

KENNETH L. KARST
(1986)

Bibliography

BELL, DERRICK 1980 *Brown v. Board of Education* and the Interest-Convergence Dilemma. *Harvard Law Review* 93: 518–533.

LEVY, LEONARD W. and JONES, DOUGLAS 1972 Jim Crow Education: Origins of the "Separate but Equal" Doctrine. In Leonard W. Levy, *Judgments: Essays on American Constitutional History.* Chicago: Quadrangle Books.

LITWACK, LEON F. 1961 *North of Slavery.* Chicago: University of Chicago Press.

MYRDAL, GUNNAR 1944 *An American Dilemma.* New York: Harper & Brothers.

WOODWARD, C. VANN 1966 *The Strange Career of Jim Crow,* 2nd rev. ed. New York: Oxford University Press.

## SEIZURE

See: Fourth Amendment; Search and Seizure

## SELDEN, JOHN
(1584–1654)

A jurist, antiquary, and occasional member of Parliament, John Selden wrote extensively on the history of English

law. With Sir EDWARD COKE he championed individual liberties and helped frame the PETITION OF RIGHT. He contended that Parliament's rights were secured by COMMON LAW and not enjoyed at the Crown's discretion.

DAVID GORDON
(1986)

## SELECTIVE CONSCIENTIOUS OBJECTION

See: Conscientious Objection

## SELECTIVE DRAFT LAW CASES

*Arver v. United States*
245 U.S. 366 (1918)

In 1917, Congress authorized CONSCRIPTION as a means of rapidly increasing the strength of the armed forces. All males between twenty-one and thirty were to register for the draft, and up to one million were selectively to be called up. The six petitioners were all convicted of failure to register.

A unanimous Supreme Court, speaking through Chief Justice EDWARD D. WHITE, rejected each of several constitutional arguments against the draft law. Since the power to raise armies is specifically granted, the Court held that Congress might adopt any means necessary to call the required number of men into service. Compulsion might be used since "a governmental power which has no sanction to it . . . is in no substantial sense a power." A number of ingenious arguments based on the historic nature and uses of the militia were rejected because the power to raise armies is distinct from the militia clause.

For the argument that conscription violated the THIRTEENTH AMENDMENT, White had only eloquent scorn: "We are unable to conceive upon what theory the exaction by the government from the citizen of his supreme and noble duty of contributing to the defense of the rights and honor of the nation . . . can be said to be the imposition of involuntary servitude."

DENNIS J. MAHONEY
(1986)

## SELECTIVE EXCLUSIVENESS

Selective exclusiveness, or the *Cooley* doctrine, derives from the opinion of Justice BENJAMIN R. CURTIS for the Supreme Court in COOLEY V. BOARD OF PORT WARDENS (1852). Before that case, conflict and confusion characterized the Court's decisions in COMMERCE CLAUSE cases. Some Justices believed that Congress's power to regulate interstate and FOREIGN COMMERCE was an EXCLUSIVE POWER and others that the states shared CONCURRENT POWER over commerce. Some believed that a distinction existed between the national power over commerce and the STATE POLICE POWER.

*Cooley* provided a compromise doctrine that transformed judicial thinking. The Court recognized that commerce embraces a vast field of diverse subjects, some demanding a single uniform rule that only Congress might make, and others best served by state regulations based on local needs and differences. Thus the doctrine treated congressional power as exclusive on a selective basis—in only those cases requiring uniform legislation; and the states shared a concurrent power in other cases. In cases of conflict, of course, congressional action would prevail.

The *Cooley* formulation necessarily failed to provide a means by which the Court could discern which subjects were national and which local. Accordingly the Justices were able to manipulate the doctrine to sustain or invalidate state legislation as they wished. In time, judicial analysis focused on the purposes of the legislation and the degree to which it adversely affected the flow of commerce, rather than on the nature of the subject regulated. No formulation could diminish the free play of judicial discretion.

LEONARD W. LEVY
(1986)

Bibliography

FRANKFURTER, FELIX 1937 *The Commerce Clause under Marshall, Taney, and Waite.* Chapel Hill: University of North Carolina Press.

## SELECTIVE INCORPORATION

See: Incorporation Doctrine

## SELECTIVE PROSECUTION

See: Prosecutorial Discretion and Its Constitutional Limits

## SELECTIVE SERVICE ACT

40 Stat. 76 (1917)

In the National Defense Act of 1916, the General Staff prepared a blueprint for increasing the military, but it failed to recruit adequate personnel through a voluntary system. With war declared, President WOODROW WILSON in April 1917 sent to Congress a bill to "Authorize the Pres-

ident to Increase Temporarily the Military Establishment." After a six-week debate, the Selective Service Act of 1917 was enacted. The measure vested the President with the power to raise an army by CONSCRIPTION. Enrollment and selection were to be carried out by 4,000 local civilian boards, appointed by the President and organized under federally appointed state directors. Although these boards operated under uniform federal regulations, they were given considerable discretion in meeting quotas and handling deferment applications. The manpower requirements for the war period were developed by the army General Staff and apportioned to the states. The order of induction was determined by lottery. Over twenty-four million American males were registered under the law. Nearly three million were selected and inducted.

The constitutionality of the law was early challenged by its opponents on the grounds of illegal DELEGATION OF POWER and a violation of the THIRTEENTH, Fifth, TENTH, and FIRST AMENDMENTS. The Supreme Court brushed aside such challenges in the SELECTIVE DRAFT LAW CASES (1918), determining that the powers of the central government to make war and support armies encompass the authority to impose compulsory military service.

PAUL M. MURPHY
(1986)

Bibliography

DUGGAN, JOSEPH S. 1946 *Legislative and Statutory Development of the Federal Concept of Conscription for Military Service.* Washington: Catholic University Press.

## SELECTIVE SERVICE ACTS

Conscription Act
12 Stat. 731 (1863)
Burke-Wadsworth Selective Training and Service Act
54 Stat. 885 (1940)
Universal Military Training and Service Act
62 Stat. 604 (1948)

The Constitution gives Congress the power to "raise and support armies" and to "provide and maintain a navy." The traditions of the American people have dictated that throughout most of our history peacetime military service has been voluntary and emergencies have been met, in the first instance, by activating the organized state militias. Conscription, drafting men for compulsory military duty, is available for the gravest emergencies. During the War of 1812, Congress considered, but did not adopt, a Draft Bill.

The first federal military draft in American history was authorized by the Conscription Act of 1863. That act required registration of all able-bodied male citizens eighteen to forty-five years old, and provided that whenever a congressional district failed to provide its quota of volunteers the deficiency should be made up by drawing from the pool of registrants. The act further provided that the draftee could avoid service by providing a substitute or by paying $300. The first draft under the act, in July 1863, was the occasion of a week-long riot in New York City, in which over one thousand people were killed and over one-and-a-half million dollars worth of property was destroyed.

The first peacetime selective service law was the Burke-Wadsworth Act of 1940, requiring registration in anticipation of American entry into WORLD WAR II. The act, also known as the Selective Training and Service Act, was patterned after the SELECTIVE SERVICE ACT OF 1917: universal registration and classification administered by local boards. The 1940 act expired in 1947 and was replaced by the Universal Military Training and Service Act of 1948, which continued the basic scheme of the 1917 and 1940 statutes. The first draft under this act was in 1950, and conscription for the KOREAN WAR and VIETNAM WAR was done under provisions of that act. Registration under the act (renamed the Military Selective Service Act in 1967) ceased in 1975.

President JIMMY CARTER in 1980 sought and received congressional authorization to reimplement peacetime draft registration, but the 1980 measure provided for registration only, not for classification or conscription. (See ROSTKER V. GOLDBERG.)

DENNIS J. MAHONEY
(1986)

## SELF-INCRIMINATION

See: Right Against Self-Incrimination

## *SEMINOLE TRIBE v. FLORIDA*

See: Eleventh Amendment; Federalism; Sovereign Immunity

## SENATE

The United States Senate resulted from the decision of the CONSTITUTIONAL CONVENTION OF 1787 to replace the unicameral legislature that had functioned under the ARTICLES OF CONFEDERATION with a bicameral Congress. BICAMERALISM reflected the existing structure of the British Parliament and most of the state legislatures. The VIRGINIA PLAN originally proposed that the larger, popularly elected

HOUSE OF REPRESENTATIVES elect the smaller "second house," but the convention ultimately assigned the election of senators to the state legislatures. On the issue of representation, the Convention reached an impasse between delegates from larger states, who wanted both houses of Congress apportioned according to population, and those from smaller states, who demanded equal status. The GREAT COMPROMISE satisfied these conflicting demands by giving each state two seats in the Senate and assigning seats in the House by population. Equality was so essential for the smaller states that the Constitution further specified that "no State without its Consent, shall be deprived of its equal Suffrage in the Senate" (Article V).

The Senate (from the Latin *senatus*, council of elders) was expected to provide a check on the popularly elected House. Envisioning an American House of Lords, some delegates to the Constitutional Convention proposed that senators serve for life, at no salary. The convention rejected these strictures, but the Constitution assigns senators six-year terms and requires them to be at least thirty years of age and citizens for nine years (compared with two-year terms, a twenty-five-year age minimum, and seven years of citizenship for representatives). Although the federal Constitution sets no property-holding qualifications for senators, delegates depicted a Senate that would represent landed and commercial interests. "This checking branch must have great personal property," GOUVERNEUR MORRIS, insisted, "it must have the aristocratic spirit; it must love to lord it through pride." "A good Senate," said EDMUND RANDOLPH, would serve as a cure for the "turbulence and follies of democracy" under which the Congress of the Articles of Confederation had labored. JAMES MADISON observed that while the House might err out of fickleness and passion, the Senate would provide "a necessary fence against this danger."

The delegates first considered assigning appointment of judges and making of treaties to the Senate, but eventually divided these powers between the chief executive and the Senate. The Senate would advise and consent—or withhold consent—on presidential nominations and treaties negotiated by the executive branch. The Senate would share all powers of Congress and participate in all legislative functions. Senators could introduce and amend bills and resolutions without restriction, except that revenue bills must originate in the House, because "the people should hold the purse strings."

Despite their shared legislative powers, the Senate and House from the beginning have acted independently. The Senate sets its own rules, elects its own officers, judges the credentials of its members, and decides any contested elections (first by state legislatures and later by direct election after ratification of the SEVENTEENTH AMENDMENT in 1913). The Senate may also discipline its members through censure and expulsion. During its first two centuries the Senate censured eight senators for conduct ranging from violating Senate secrecy to financial misconduct. Most notably, in 1954 the Senate censured Senator Joseph R. McCarthy of Wisconsin for conduct "contrary to senatorial traditions," relating to his treatment of committee witnesses and other senators. Censure has not led to expulsion, except by the voters in the next election. The Senate has expelled only WILLIAM BLOUNT, charged with treasonous conspiracy in 1797, and fourteen senators who supported the Confederacy during the CIVIL WAR. Every other expulsion proceeding has ended either with the senator's vindication or with his resignation to avoid an expulsion vote.

Unlike the House, whose membership stands for election every two years, senators are divided into three classes elected at two-year intervals. Because at least two-thirds of the Senate continues in office from one Congress to the next, the Senate has defined itself as a continuing body that does not need to reestablish its rules at the start of each Congress. Although the House elects its own presiding officer, the vice-president of the United States serves as the president of the Senate. To preside in the vice-president's absence, the Senate elects a president pro tempore, generally the most senior member of the majority party. As the presiding officer, the vice-president has to play an essentially neutral role, voting only to break ties, speaking only with the permission of the Senate, and having his rulings subject to reversal by vote of the Senate.

The Constitution requires each house of Congress to publish a journal of its proceedings. Since 1789, the Senate has produced legislative and executive journals, which consist of short minutes of official actions taken on all bills, resolutions, treaties, and nominations. Separately from these journals, the *Congressional Record* evolved from stenographic notes published in private newspapers. Prior to the *Congressional Record*, these notes were compiled in the *Annals of Congress* (1789–1824), the *Register of Debates in Congress* (1824–1837), and the *Congressional Globe* (1833–1873).

For its first years the Senate met entirely in secret session, while the House immediately opened its doors. Seeing their role as a council to revise LEGISLATION drafted in the House and to advise the President on nominations and treaties, and having no need to appeal to their constituents, senators believed they could debate more freely and productively without a public gallery. In 1795, after much criticism in the press, the Senate regularly admitted the public to view legislative sessions, but continued to conduct most executive business—treaties and nominations—in closed session until 1929. Persistent leaks of executive sessions to the press steadily diminished their "secret" nature, and the Senate abandoned closed ses-

sions, except for rare instances concerning highly classified information. Even after opening its doors, the Senate received minimal public attention. "Henceforth you will read little of me in the Gazettes," one representative notified his wife after his election to the Senate in 1804. "Senators are less exposed to public view than Representatives." House leadership in national affairs predominated through the War of 1812; but subsequently legislators of the stature of HENRY CLAY, DANIEL WEBSTER, and JOHN C. CALHOUN found the Senate a better forum for their sectional appeals and national aspirations. While Senate debate flourished, the House in 1847 established a "five-minute rule" for members' speeches. The smaller Senate clung to the tradition of unlimited debate, which took its most extreme form in the FILIBUSTER. This stalling devise gave the minority the opportunity to stop objectionable measures by occupying the floor with lengthy speeches and procedural delays. Not until 1917 did the Senate establish the first cloture rule, to provide a mechanism for cutting off debate.

Filibusters proved especially potent during the short second sessions of Congress. The Constitution originally set the opening date of Congress on the first Monday in December, more than a year after the elections. These first sessions generally met through the following spring. The second session again convened on the first Monday in December in the even-numbered years, but automatically expired on March 4. With the Senate facing an absolute deadline and with many of its members having retired or been defeated in the intervening election but not yet out of office, filibusters more easily prevailed. In 1933 the TWENTIETH AMENDMENT moved the opening of each session to January 3, which eliminated the long interregnum after elections and reduced the lame-duck filibusters. However, individual senators, no matter how junior, retain great capacity to defeat or delay legislation through amendments, objections to unanimous-consent requests, filibusters, and other parliamentary maneuvers generally not available to rank-and-file members of the House.

The Constitution grants members immunity from prosecution for their remarks in Congress. Judicial interpretations have extended the SPEECH OR DEBATE CLAUSE (Article I, Section 6) to cover a variety of congressional activity. In GRAVEL V. UNITED STATES (1972), the Supreme Court declared Senator Mike Gravel of Alaska and his staff immune from prosecution for making public classified portions of the *Pentagon Papers*. By contrast, the Court ruled in HUTCHINSON V. PROXMIRE (1979) that Senator William Proxmire of Wisconsin had immunity for statements made on the floor but not for information in his press releases and newsletters.

Exercising its ADVICE AND CONSENT power, the Senate in 1789 rejected President GEORGE WASHINGTON's nomination of Benjamin Fishbourn as naval officer of the port of Savannah, because of opposition from the senators from Georgia. Fishbourn's rejection was the first instance of "senatorial courtesy," by which the Senate deferred to the objections of senators from a nominee's home state. This practice has given senators great influence over the nominations of federal judges and attorneys from their states. In 1795 the Senate rejected Washington's nomination of JOHN RUTLEDGE as CHIEF JUSTICE of the United States, citing Rutledge's intemperate speeches on political issues. Over the next two centuries, the Senate rejected nearly twenty percent of all Supreme Court nominees, while it turned down only three percent of all Cabinet nominees. The disparity reflected senatorial attitudes that cabinet members should reflect the President's choices, but the Supreme Court is an independent branch not responsible to the President. The Senate has also tended to reject judicial appointments made during the President's last months in office.

Similarly, the Senate asserted its authority to advise and consent on the ratification of treaties. In 1789, at the urging of members, President Washington personally appeared in the Senate chamber to receive the Senate's advice on questions relating to the negotiation of treaties with several Indian nations. When the Senate deferred debate until the questions had been studied in committee, Washington determined not to repeat the experiment. Succeeding Presidents have generally limited themselves to seeking the Senate's consent rather than its advice.

In offering consent, the Senate has revised treaties through amendments, reservations, and understandings. In 1795 the Senate approved JAY'S TREATY with Great Britain only with the understanding that certain trade provisions would be renegotiated. In 1824 advocates of SLAVERY deliberately amended a treaty regarding suppression of the slave trade to cause Great Britain to reject the agreement. The following year, the Senate defeated a similar treaty with Colombia, marking its first formal rejection of a treaty. The Supreme Court consistently upheld the Senate's right to alter treaties, noting in *Haver v. Yaker* (1869) that "a treaty is more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become law, the Senate in whom rests authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it." Such revisions often provide the basis for consensus needed to achieve the constitutional two-thirds vote in favor of ratification. Most notably, the Senate's failure to agree on reservations to the Treaty of Versailles in 1919 and 1920 caused the treaty to fall short of a two-thirds vote of approval.

The division of power on foreign policy has been "an

invitation to struggle" between the President and Congress. Through its influence over treaties and diplomatic nominations, the Senate Foreign Relations Committee exerted considerable influence over foreign policy. By contrast, only through the passage of appropriations bills, largely dealing with foreign aid, has the House exerted comparable authority. Influential chairs of the Foreign Relations Committee, from CHARLES SUMNER and HENRY CABOT LODGE, SR., to J. William Fulbright, have strongly opposed and frustrated presidential policy. During the 1930s the Senate took the lead in enacting neutrality legislation. After American entry into World War II and particularly during the cold war that followed, the Senate adopted a generally bipartisan approach to foreign policy and accepted presidential leadership. Neither the KOREAN WAR nor the VIETNAM WAR was launched with a congressional DECLARATION OF WAR. Between 1955 and 1964, Congress enacted a series of resolutions to support presidential initiatives in Formosa (Taiwan), the Middle East, Berlin, Cuba, and the Tonkin Gulf. While often compared to blank checks, these resolutions were enacted to demonstrate national unity. Congressional consensus collapsed during the Vietnam War, with increasing numbers of senators protesting unilateral presidential actions. In 1973, Congress overturned a presidential veto and enacted the War Powers Resolution, requiring the President to report the use of American troops in combat and to withdraw troops unless authorized by Congress.

Exercising quasi-judicial powers, the Senate also sits as a court of IMPEACHMENT whenever the House of Representatives votes to impeach a federal official. Two-thirds of the senators must vote to convict. "Where else, than in the Senate should have been found a tribunal sufficiently dignified, or sufficiently independent?" asked ALEXANDER HAMILTON in *The Federalist* #65. Between 1789 and 1989 the House impeached sixteen federal officers—among them, a President, a senator, a cabinet member, and thirteen federal judges—on charges ranging from treason to intoxication. Three resigned voluntarily. The Senate found seven guilty and removed them from office. In 1868, by a single vote, the Senate declined to remove President ANDREW JOHNSON.

The Senate elects its own officers, sets its own rules, and appoints it own committees. Since 1789 the Senate has elected a secretary of the Senate, a sergeant at arms (originally called the doorkeeper), and a chaplain. Within its first week of business, a special committee proposed nineteen rules, which the Senate adopted with a single addition. There have been few general revisions of these rules. At first, the Senate operated chiefly as a committee of the whole, electing an array of ad hoc committees to deal with specific bills. In 1816, concerned with improving continuity and permitting more specialization, the Senate established sixteen standing committees. After the creation of standing committees, senators no longer needed to give a day's notice or receive permission from a majority of members to introduce bills and resolutions. They have since introduced legislation at will, to be referred to the appropriate committee for initial consideration. For a time, the presiding officer appointed committee membership. Throughout the nineteenth century senators could be appointed to chair committees on which they had never served, based upon their seniority in the Senate as a whole. After reforms established in 1921, members advanced solely on the basis of seniority within a committee.

The committee system came to dominate the legislative process. By 1885, WOODROW WILSON described the federal system as "a government by chairmen of the Standing Committees of Congress." From time to time, the proliferation of committees has stimulated reforms leading to reductions in the number of committees and subcommittees. Most significant among these was the Legislative Reorganization Act of 1946, which revised committee jurisdiction and permitted the hiring of professional staffs. A series of reforms in the 1970s opened executive sessions of the committees to public view, provided for hiring minority staff members, and gave senators staff on each of their committees.

Committees have been the prime shapers of legislation and the vehicles for senatorial oversight and investigation. In the twentieth century the Senate increasingly played the role of investigator. Beginning with the 1924 Teapot Dome investigation of corruption in the WARREN G. HARDING administration and continuing through the investigation of banking and stock exchange practices after the 1929 stock market crash, the investigation of the national defense program during World War II, the crime investigations and the anticommunist hearings of the 1950s, and the WATERGATE hearings of 1973, Senate investigations have focused national attention on malfeasance and laid the groundwork for reform legislation. In a few investigations—those on the conduct of the Civil War, the attack on Pearl Harbor, and the IRAN-CONTRA AFFAIR—joint Senate and House committees conducted the proceedings. Senate committees also maintain regular oversight of the executive agencies. Although witnesses have raised objections regarding their rights while testifying, the Supreme Court in MCGRAIN V. DAUGHERTY (1927) and *Sinclair v. United States* (1929) has upheld the Senate's ability to subpoena private citizens and to hold recalcitrant witnesses in CONTEMPT OF CONGRESS, citing investigations as legitimate means to remedy social, political, and economic defects or to expose corruption and waste.

An important twentieth-century innovation has been

the emergence of the majority and minority leaders and whips as party leaders, legislative floor managers, and presidential spokesmen. During the nineteenth century, Senate leadership divided among the chairmen of the party caucuses and influential committees. Not until the 1920s did the parties designate official floor leaders and station them prominently in the chamber, giving them responsibility to manage their party's agenda and the legislative schedule. Rarely able to rely on party discipline in voting, Senate leaders gained influence through their ability to make committee appointments and schedule floor business and through the "power to recognition," by which the presiding officer calls first upon the majority and minority leaders before recognizing other senators. The post of Senate majority leader evolved to equal stature with the Speaker of the House. "The minority leader speaks for his party," Senator Robert C. Byrd noted. "But the majority leader, whether he be a Democrat or Republican, is the leader of the Senate."

Just as the United States Senate has preserved the polite parliamentary language, snuffboxes, and spittoons from centuries past, it has retained its original constitutional shape and functions. Yet the Senate has grown from a small council meeting in secret to a powerful legislative body, with more authority, independence, and media attention than the upper house of any other national legislature. Senators have jealously guarded and exercised the powers that the Constitution assigned to them, while developing the modern leadership, staff support, and rule changes necessary to meet vastly expanded legislative demands.

DONALD A. RITCHIE
(1992)

(SEE ALSO: *Appointment of Supreme Court Justices; Appointments Clause; Congressional Membership; Congressional Powers; Congressional Privileges and Immunities; Gulf of Tonkin Resolution; Legislative Investigations; McCarthyism; Senate and Foreign Policy; Senate Judiciary Committee; Senate Subcommittee on Constitutional Rights; Treaty Power.*)

Bibliography

BAKER, RICHARD A. 1988 *The Senate of the United States: A Bicentennial History*. Malabar, Fla.: Robert E. Krieger.

BYRD, ROBERT C. 1989 *The Senate, 1789–1989: Addresses on the History of the United States Senate*. Washington, D.C.: Government Printing Office.

HAYNES, GEORGE H. 1938 *The Senate of the United States: Its History and Practice*, 2 vols. Boston: Houghton Mifflin.

ROTHMAN, DAVID J. 1966 *Politics and Power: The United States Senate, 1869–1901*. Cambridge, Mass.: Harvard University Press.

SWANSTROM, ROY 1988 *The United States Senate, 1787–1801: A Dissertation upon the First Fourteen Years of the Upper Legislative Body*, Senate Document 100–31. Washington, D.C.: Government Printing Office.

## SENATE AND FOREIGN POLICY

The text of the Constitution creates a special role for the United States SENATE in two key aspects of foreign policymaking, the approval of treaties and appointments. Article II, section 2, clause 2, provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors and other public ministers and consuls." In addition to these explicitly conferred powers, the Senate, by practice and tradition, participates in JOINT RESOLUTIONS dealing with foreign policy; it takes part informally in other foreign policy activities as well.

Although the Senate in early years exercised an "advice" role in connection with treaty-making, that function has atrophied. The Senate can, and occasionally does, express its opinion concerning the desirability of concluding a certain treaty or concerning what outcome negotiations should produce. But it is the President who determines whether to commence negotiations and what topics those negotiations comprise. The President's responsibility for the conduct of international negotiations is plenary, and he may decline to transmit to the Senate a treaty he has signed.

Strictly speaking, the Senate does not "ratify" a treaty: the President does so after the Senate gives its advice and consent by a two-thirds majority of Senators present. This may seem like a steep requirement, but the Senate from the outset has rejected only about a dozen treaties. More frequently it approves a treaty subject to conditions that the President opposes, in which case he may decline to proceed with ratification. These conditions have been called "amendments," "reservations," "understandings," "statements," "declarations," and a variety of other terms, but the terminology is secondary to their substance. All are conditions to the Senate's approval, and if the Senate does condition its consent, the President, in bringing the treaty into effect, is required to honor the Senate's intent and modify the treaty accordingly.

The role of the Senate ends after the treaty takes effect. The President is responsible for its implementation and interpretation. A treaty is a law, and under the Constitution the President is charged with its faithful execution. During a well-publicized dispute between the Senate and the administration of RONALD REAGAN over the proper con-

struction of the ABM Treaty, executive officials accused the Senate of meddling in the process of interpretation, while certain Senators charged that putative United States action based on the President's interpretation would have departed from the meaning of the treaty to the point of breaching the constitutional requirement that the law be faithfully executed.

The text of the Constitution makes no reference to the making of other international agreements on behalf of the United States, but Presidents have long concluded EXECUTIVE AGREEMENTS. These agreements have been concluded by Presidents with and without statutory authority. Either route obviates the requirement of two-thirds approval of the Senate—which explains both their popularity with Presidents and their unpopularity with some senators. The courts have provided no conclusive guidance as to when the treaty instrument is constitutionally required.

It has been argued that Senate participation also is required in ending a treaty. In GOLDWATER V. CARTER (1979), however, the Supreme Court declined to decide a challenge to the validity of the termination of the mutual security treaty with the Republic of China on Taiwan by President JIMMY CARTER. In light of the President's determinative role in initiating treaty relations and given past Senate acquiescence to presidential termination of several treaties in accordance with their terms, it is hard to see how a claim of Senate authority over treaty termination can be sustained. Treaty abrogation, however, is another matter. A president who ends a treaty in violation of its terms seemingly violates the presidential duty of faithful execution. Whether the Senate and President, acting together, can approve treaty abrogation and thereby end the treaty's status as the LAW OF THE LAND is an open question.

These constitutional matters are almost entirely a function of what the Senate Foreign Relations Committee has called "customary constitutional law"—practice acquiesced in by both political branches over many decades that has taken on the weight of a constitutional norm. Custom assumes particular significance in foreign affairs because so few judicial opinions mark the constitutional terrain. No court, for example, has upheld the power of the Senate to condition its consent to a treaty, but the practice has been unchallenged since the earliest days of the Republic and is now widely accepted as constitutionally permissible.

By contrast the Senate has not conditioned its consent to appointments, and it would be clearly impermissible today for the Senate to approve the appointment of a certain ambassador on the condition, say, that he resign and be reconfirmed after two years. Custom surrounding the APPOINTMENTS CLAUSE is different from that pertinent to the treaty clause.

In sheer numbers, the Senate's appointments work load is far heavier than its treaty work load. During the 96th Congress, for example, 2,728 nominations were referred to the Committee on Foreign Relations. By contrast, in a typical year no more than a dozen or so treaties are transmitted to the Senate for approval.

Many of these nominations are ambassadors, consuls, or other public ministers whose confirmation by the Senate is required by the Constitution. Others, however, are Foreign Service officers, whose appointment and promotion must be confirmed by the Senate under the Foreign Service Act of 1980. Other statutes require Senate confirmation of various United States representatives to international organizations and of executive-branch officials dealing with foreign affairs. These officials include the secretary of state and twenty-five other officials of the Department of State, as well as top appointees in the Arms Control and Disarmament Agency, the Peace Corps, and the United States Information Agency.

One notable exception to the requirement of Senate confirmation is the President's assistant for national security affairs, who heads the National Security Council. This exception has caused Senate critics concerned about "two secretaries of state" to argue for the enactment of a statute requiring Senate confirmation for this office. Executive officials have responded that such a requirement would impinge upon the President's constitutional foreign relations powers.

In fact, a variety of foreign affairs appointments have been made without Senate advice and consent. Delegates to international conferences and representatives in international negotiations often do not receive Senate approval. Presidents have on occasion given such persons the "personal rank" of ambassador or minister. But as the Foreign Relations Committee's onetime chairman Senator J. William Fulbright has pointed out, such designations are not appointments in the Article II sense and thus cannot confer additional legal powers or compensation upon the recipient.

On occasion, members of the Senate have themselves served as representatives to international negotiations. Some have not been appointed with the Senate's advice and consent; others have. The practice is in any event long-standing. In 1813, for example, Senator James A. Bayard of Delaware served as envoy extraordinary and minister plenipotentiary in negotiating and signing a commerce treaty with Russia. Bayard's appointment was accorded Senate advice and consent. Without Senate confirmation Senators Arthur Vandenberg and THOMAS T. CONNALLY served as members of the United States delegation to the San Francisco conference that drafted the UNITED NATIONS CHARTER. The United Nations Participation Act, enacted after the conference, expressly provides for the participation of members of Congress in the United States

delegation to the United Nations. They are subject to Senate confirmation, but Vandenberg himself expressed reservations about the constitutionality of the arrangement. "I am increasingly impressed," he said, "with the difficulties confronted by 'congressional' representatives because of their dual nature . . . it will always be true that a man cannot serve two masters. Yet that is precisely what I attempt to do . . . when I, as a Senator, sit in the United Nations as a delegate."

The mingling of executive and senatorial functions also occurs at less formal levels. During visits to the United States, foreign dignitaries often are invited for "tea" with the Foreign Relations Committee. The meetings are not open to the public, and although some time is consumed by social chitchat, it would be naive to think that substantive policy matters are not also reviewed. Ambassadors from foreign countries also meet on occasion with members of the Foreign Relations Committee and Senate leaders on legislative matters, as occurred in the 1970s during the normalization of relations with the People's Republic of China. And indirect contacts often occur during the consideration of treaties because the approval of conditions by the other signatory is required under international law and because Senate sponsors may not wish to render the treaty unacceptable by adding conditions that are unpalatable.

There is thus no airtight division between the foreign policy roles of the Senate and the executive. The Constitution, as reflected in custom deriving from two centuries of conflict and cooperation between Presidents and senators, reflects political accommodations reached by many different individuals representing many different philosophies over many different eras. It is not reducible to tidy "black-letter" formulas by which functions might be assigned neatly to one branch or the other. Yet it is perhaps the Constitution's very rejection of mechanical construction techniques that has given it the "play at the joints" necessary to adapt and survive.

MICHAEL J. GLENNON
(1992)

(SEE ALSO: *Congress and Foreign Policy; Congressional War Powers; Foreign Affairs; President and the Treaty Power; Presidential War Powers; Treaty Power; War Powers; War Powers Acts.*)

Bibliography

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FRANK, THOMAS M. and GLENNON, MICHAEL J. 1987 *Foreign Relations and National Security Law.* St. Paul, Minn.: West Publishing Co.

GLENNON, MICHAEL J. 1990 *Constitutional Diplomacy.* Princeton, N.J.: Princeton University Press.

# SENATE AND JUDICIAL APPOINTMENTS

The President nominates federal judges, but no person becomes a judge of a full-fledged federal court without first having been confirmed by the U.S. SENATE. Article II, section 2 of the Constitution stipulates that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."

This provision expressly mentions only the Supreme Court because the Constitution, in Article III, gives Congress discretion to "ordain and establish" inferior federal courts. The most important inferior courts created by Congress are the United States DISTRICT COURTS and the United States Courts of Appeals. Judges of these "Article III courts," which possess the JUDICIAL POWER of the United States described in Article III of the Constitution, are nominated by the President and take office when the Senate votes to confirm the nomination. There are a few federal courts that are not Article III courts. Judges of these specialized courts (e.g., Bankruptcy Courts) are considered "inferior officers" of the United States and may be appointed, as Congress directs, by "the President alone, . . . the Courts of Law, or . . . the Heads of Departments." The more important federal judges are, however, nominated by the President and confirmed by the Senate.

The Constitution does not prescribe any particular method by which the President shall decide upon nominations, nor does the Constitution prescribe any particular method by which the Senate's ADVICE AND CONSENT is to be delivered. In practice, District Court nominees are selected by senators who share the President's political affiliation and who represent the state in which the District Court is located. Of course, the President actually makes the nomination. Nominees for the Courts of Appeals or the Supreme Court are usually considered more carefully and personally by the President. The SENATE JUDICIARY COMMITTEE evaluates each nominee and holds public hearings to assess the nominee's suitability. The committee may reject a nominee by refusing to forward the nomination to the full Senate; may recommend confirmation; or may recommend rejection by the Senate. Though the Constitution does not so specify, when the entire Senate votes, a nominee who receives a favorable vote by a majority of senators present and voting is confirmed. Once confirmed, judges hold office "during good Behavior," which means until they die, resign, or are removed by IMPEACHMENT and conviction.

There are no constitutional limits on the factors that

the Senate may consider in rendering its advice and consent on judicial appointments. In practice, the Senate attempts to insure that judicial nominees are professionally and temperamentally qualified people of integrity but, as with any political process, questions of political ideology are often considered relevant. About one of every four nominees to the Supreme Court has failed to be confirmed. The most recent unsuccessful nominees were Robert Bork and Douglas Ginsburg, in 1987.

When the Senate is not in session the President may make a "recess appointment" to a judicial office. Such appointments, authorized under Article II, section 2 of the Constitution, expire at the end of the next session of the Senate unless the Senate confirms the nominee. The most recent recess appointee to the Supreme Court was WILLIAM J. BRENNAN, JR.; appointed in 1956 and confirmed during the Senate's next session. JOHN RUTLEDGE, who served as CHIEF JUSTICE in 1795 as a recess appointee by GEORGE WASHINGTON, was never confirmed and holds the dubious distinction of being the only member of the Supreme Court who served as an unconfirmed recess appointee.

CALVIN R. MASSEY
(2000)

(SEE ALSO: *Bork Nomination.*)

Bibliography

BLAUSTEIN, ALBERT P. and MERSKY, ROY M. 1978 *The First One Hundred Justices.* Hamden, Conn.: Archon Books.

MASSEY, CALVIN R. 1991 Getting There: A Brief History of the Politics of Supreme Court Appointments. *Hastings Constitutional Law Quarterly* 19:1–21.

TRIBE, LAURENCE H. 1985 *God Save This Honorable Court.* New York: Random House.

## SENATE JUDICIARY COMMITTEE

The Senate Judiciary Committee, created as a standing committee in 1816, is responsible for a vast array of constitutional and legislative issues. The subcommittee structure reveals the broad substantive areas covered by the committee.

The Subcommittee on Immigration and Refugee Affairs responds to illegal immigration, the admission and resettlement of refugees, NATURALIZATION, private relief bills, and international migration. The Simpson-Mazzoli Act in 1986 represented the first comprehensive overhaul of immigration laws since the McCarren-Walter Act of 1952. The Subcommittee on Antitrust, Monopolies, and Business Rights is responsible for such statutes as the SHERMAN ANTITRUST ACT of 1890 and the CLAYTON ACT, of 1914. The Subcommittee on Patents, Copyrights, and Trademarks monitors traditional statutes in its area and such emerging issues as home video recording and intellectual property rights. The Subcommittee on Technology and the Law oversees all laws relating to information policy, electronic privacy, and security of computer information. These issues frequently involve complex interpretations of SEARCH AND SEIZURE law.

The Subcommittee on Courts and Administrative Practice reports legislation dealing with new courts and judgeships, bankruptcy, court administration and management, judicial rules and procedures, administrative practices and procedures, tort reform and liability issues, and private relief bills other than immigration. One of the controversial bills to emerge from this subcommittee was the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, which created a procedure for disciplining federal judges in addition to the impeachment process. The constitutionality of this statute has been upheld by a number of appellate courts.

The Subcommittee on the Constitution has jurisdiction over all constitutional amendments. Amendments examined in recent years have dealt with ABORTION, a BALANCED BUDGET, EQUAL RIGHTS for women, SCHOOL BUSING, and SCHOOL PRAYER. The subcommittee is also responsible for legislation needed for CIVIL RIGHTS enforcement, including the VOTING RIGHTS ACT OF 1965, AFFIRMATIVE ACTION, and fair housing. Other duties involve CIVIL LIBERTIES, INTERSTATE COMPACTS, and criminal legislation related to constitutional issues, such as HABEAS CORPUS, CAPITAL PUNISHMENT, and the EXCLUSIONARY RULE.

The Senate Judiciary Committee reviews nominations for the Supreme Court, appellate courts, UNITED STATES DISTRICT COURTS, the ATTORNEY GENERAL, the SOLICITOR GENERAL, U.S. attorneys, marshals, and many other federal officials with duties to the courts. Some of the major controversies over Supreme Court appointments in recent years include the refusal in 1968 to advance Justice ABE FORTAS to the position of CHIEF JUSTICE, the rejection of Clement F. Haynsworth, Jr., and G. Harrold Carswell in 1969 and 1970, and the rejection of ROBERT H. BORK in 1987.

Hearings by the committee have helped clarify the boundaries of presidential powers in a number of areas, including the impoundment of appropriated funds, the use of EXECUTIVE PRIVILEGE to deny information to Congress, reliance on EXECUTIVE AGREEMENTS as a substitute for the treaty process, POCKET VETOES, and ELECTRONIC EAVESDROPPING conducted by administration officials without judicial warrant.

The committee has been tested under fire many times. A variety of court-stripping bills come before it for analysis, including such emotional subjects as abortion, school prayer, and school busing. Perhaps the committee's most enduring contribution to an independent judiciary came in 1937, when it voted against the Court-packing bill submitted by President FRANKLIN D. ROOSEVELT. In a report

that contained probably the most stinging repudiation ever of a presidential proposal, the committee shredded the bill's premises, structure, content, and motivation. The authors of the report, using language scathing in tone, hoped that their emphatic rejection would help guarantee that "its parallel will never again be presented to the free representatives of the free people of America."

Until 1981 the Senate Judiciary Committee consistently selected only lawyers to serve as members. That practice ceased in 1981 when the committee added two nonlawyers, Jeremiah Denton of Alabama and Charles E. Grassley of Iowa. Another nonlawyer, Paul Simon of Illinois, joined the committee in 1985.

LOUIS FISHER
(1992)

Bibliography

SCHUCK, PETER H. 1975 *The Judiciary Committees: A Study of the House and Senate Committees.* New York: Grossman.

UNITED STATES SENATE 1982 *History of the Committee on the Judiciary, United States Senate, 1816–1981.* 97th Cong., 1st Sess., Senate Document No. 97–18.

## SENATE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

In 1955 the Civil Rights Subcommittee of the SENATE JUDICIARY COMMITTEE became the Subcommittee on Constitutional Rights. Subcommittee chair Thomas Hennings, a Missouri Democrat, urged the change because of the exclusive identification of CIVIL RIGHTS with race relations. He wanted the subcommittee to assert jurisdiction over a wider range of issues, particularly in response to the anticommunist assault on CIVIL LIBERTIES.

The subcommittee's first hearings explored the denial of DUE PROCESS in the loyalty-security programs of the DWIGHT D. EISENHOWER administration. Members also investigated passport suspensions, WIRETAPPING, ELECTRONIC EAVESDROPPING, government secrecy, and EXECUTIVE PRIVILEGE. Senator Hennings sponsored the first "freedom of information act" in 1958, but otherwise the subcommittee produced little legislation during the 1950s. Its main contribution was the obstruction of bills threatening to infringe on civil liberties or restrict the Supreme Court.

The SENATE regularly referred civil rights bills to the subcommittee, which held hearings on the civil rights bill of 1957. When the southern-dominated Judiciary Committee, chaired by Mississippi Democrat James O. Eastland, refused to report the subcommittee's bill to the floor, the Senate bypassed the committee entirely and debated the House of Representatives' bill instead.

Following Hennings's death in 1960, North Carolina Democrat SAMUEL J. ERVIN became subcommittee chair. Because Ervin viewed civil rights legislation as an erosion of civil liberties, the subcommittee played no role in the enactment of the CIVIL RIGHTS ACT OF 1964 and helped to derail the omnibus civil rights bill of 1967. Yet under Ervin the subcommittee remained committed to civil liberties and reported out a "bill of rights" for mental patients in 1965, the Bail Reform Act of 1966, the Military Justice Act of 1968, and the Indian Bill of Rights in 1968. Over the chair's objections, the Senate ordered the subcommittee to report bills to extend the VOTING RIGHTS ACT in 1970 and the CIVIL RIGHTS COMMISSION in 1972.

Having consistently addressed matters of PROCEDURAL DUE PROCESS, privacy, FREEDOM OF SPEECH, FREEDOM OF THE PRESS, and SEARCH AND SEIZURE, subcommittee members became alarmed over alleged intrusions upon those rights by the administration of RICHARD M. NIXON. In 1971 the subcommittee focused attention on the violation of the RIGHT OF PRIVACY through government data banks and military spying. Senator Ervin strongly opposed administration proposals for PREVENTIVE DETENTION and fought for repeal of laws allowing NO-KNOCK ENTRY. The subcommittee proposed granting reporters protection against compulsory disclosure of sources, heard testimony relating to FBI surveillance of journalists, and conducted what Ervin called "a thorough and unprecedented series of hearings on the free press of America."

Given the conservatism of its parent committee, the subcommittee operated under considerable limitations. Not until Ervin became chair of the Government Operations Committee could he successfully guide to the floor the PRIVACY ACT of 1974. In part because of his long association with the subcommittee, Ervin became chair of the Select Committee on Presidential Campaign Activities that investigated the WATERGATE scandal.

Lacking Ervin's influence after his retirement, the Subcommittee of Constitutional Rights was abolished during a committee reorganization in 1977. For two decades, however, it had established a creditable record in defense of American rights and liberties.

DONALD A. RITCHIE
(1992)

(SEE ALSO: *Bail; Mental Illness and the Constitution; Military Justice.*)

Bibliography

KEMPER, DONALD J. 1965 *Decade of Fear: Senator Hennings and Civil Liberties.* Columbia: University of Missouri Press.

## SENECA FALLS CONVENTION

On July 19 and 20, 1848, in Seneca Falls, New York, the first public meeting on behalf of women's rights was con-

vened, thus inaugurating a movement that three-quarters of a century later resulted in the constitutional enfranchisement of women. The chief organizer was ELIZABETH CADY STANTON, then a mother of four living in this upstate industrial village. She was aided by Lucretia Mott, dean of American women abolitionists. The two had met in 1840 in London, and from then on Mott served as Stanton's mentor, sharing her radical Quaker convictions about the equality of the sexes with her apt pupil.

Around the world, 1848 was a year of international political upheaval and revolutionary inspiration. In Seneca Falls, Stanton, Mott, and three other women prepared a Declaration of Sentiments, Grievances and Resolutions. The preamble was modeled on the DECLARATION OF INDEPENDENCE, so as to endow women's discontent with political legitimacy. It claimed, "We hold these truths to be self-evident: that all men and women are created equal." A list of grievances indicted the long "history of repeated injuries and usurpations on the part of man toward woman," chief of which was the denial to women of "the inalienable right to the elective franchise." The Declaration also concentrated on the disabilities that law and custom imposed on wives by regarding them as the PROPERTY of their husbands. Women's exclusion from higher education, trades and professions, from church authority and moral responsibility, and from all that would build "faith in [their] own powers" was also protested.

The Declaration concluded with thirteen resolutions for future action, of which only the ninth, declaring that it is "the duty of the women of this country to secure to themselves their sacred right of the franchise," was controversial. Stanton's defense of the franchise demand was supported by Frederick Douglass, the only disfranchised man attending, and after debate the convention passed it. Two weeks later a second session of the convention was held in Rochester, which session focused on the grievances of working women. Newspaper coverage was widespread and uniformly disrespectful, but Stanton thought the former was well worth the latter. Beginning in 1850, national women's rights conventions were held annually, and a generation of female reformers began the complex task of undoing the deep legal bias against women's autonomy and establishing sexual equality.

ELLEN CAROL DUBOIS
(2000)

(SEE ALSO: *Woman Suffrage Movement.*)

Bibliography

DUBOIS, ELLEN CAROL 1978 *Feminism and Suffrage: The Emergence of an Independent Women's Movement in the U.S., 1848–1869.* Ithaca, N.Y.: Cornell University Press.

GORDON, ANN D., ed. 1997 *The Selected Papers of Elizabeth Cady Stanton and Susan B. Anthony.* Vol. 1. New Brunswick, N.J.: Rutgers University Press.

WELLMAN, JUDITH 1991 Seneca Falls Women's Rights Convention: A Study of Social Networks. *Journal of Women's History* 3:9–37.

# SENTENCING

Anomalously, the constitutional law of criminal sentencing is a thinly developed field. Detailed procedural protections and an elaborate body of constitutional doctrine govern the investigation and adjudication of guilt in the pretrial and trial phases of a criminal case. The sentencing phase is just as important; indeed, for most defendants (who plead guilty without trial), the sentencing phase is even more important. Yet, outside the area of CAPITAL PUNISHMENT, sentencing is characterized by the almost complete absence of governing standards of substantive law, an extreme informality in prevailing procedures, and few constitutional restraints.

Although we ordinarily think of sentencing as a decision made by the judge after trial, the judge in reality shares sentencing authority with the legislature, the prosecutor, the jury, and the parole board or correctional agency. The division of authority varies widely from one jurisdiction to another and can have great impact upon the questions of constitutionality and fairness that arise.

The most important alternatives for the organization of sentencing authority are the mandatory, discretionary, and indeterminate systems. In a mandatory sentencing system, the sentence to be served upon conviction for a given crime is specified in the penal statute as a fixed term of years. Although the legislature ostensibly controls the sentence by defining it in advance, sentencing authority in a mandatory system tends in practice to become centered in the hands of the prosecutor, who decides which charges to file and, in effect, which mandatory sentences to seek. This prosecutorial decision is regarded as a discretionary one and is made without any hearing or other procedural formalities, without any governing standards, and without any opportunities for independent judicial review.

In the indeterminate sentencing system, neither the statute nor the judge limits the term to be served. The offender is sent to prison, potentially for life, and the time actually served is determined by the parole board. Usually that decision is based primarily on a judgment about whether an offender's progress toward rehabilitation makes him a good prospect for release. The parole board's decision is subject to few constitutional restraints. *Connecticut Board of Pardons v. Dumschat* (1981) holds that when a state's statutory regime treats parole as a privilege and creates no expectation of a right to early release, PROCEDURAL DUE PROCESS requirements do not apply at all.

When statutes do create an expectation of release, procedural due process requirements apply, but in *Greenholtz v. Inmates* (1979) the Supreme Court held that DUE PROCESS was satisfied by an opportunity to be heard and some indication of the reasons for denying parole. There is no RIGHT TO COUNSEL or right to confront or cross-examine witnesses in this context.

In a discretionary sentencing system, the penal statute sets only the boundaries within which the sentence must fall—a maximum sentence and sometimes a minimum sentence. These legislative boundaries typically leave a broad range of choice to the judge, who can choose the time to be served (or the fine or terms of probation) within the applicable limits. In some jurisdictions the judge's discretionary sentencing authority is qualified by legislative or administrative guidelines that require the sentence to fall within a narrow range unless the judge identifies unusual aggravating or mitigating circumstances. But many jurisdictions permit the judge to select any sentence within the broad legislatively authorized range without giving reasons and without facing appellate review.

In both mandatory and discretionary systems, sentencing authority is qualified by PLEA BARGAINING. The prosecutor may agree either to recommend a sentence or to fix a sentence that the judge must impose if the plea is accepted. The Constitution places few limits on the boundaries of plea negotiation. For example, the Supreme Court held in *Brady v. United States* (1970) that a guilty plea remains valid even if induced by the defendant's fear of facing the death penalty if he stands trial. On the other hand, the Constitution requires that plea agreements be respected by the government and by the courts. The Supreme Court held in *Santobello v. New York* (1971) that if a plea agreement is not honored, then the defendant has a constitutional right to withdraw the plea. In many jurisdictions, plea bargaining (with few constitutional restrictions) is in practice the principal mechanism for the determination of sentence.

In noncapital cases the Eighth Amendment's prohibition against CRUEL AND UNUSUAL PUNISHMENT has not been vigorously enforced. A punishment must be proportionate to the severity of the offense, but normally courts hold that any sentence within statutory limits satisfies this requirement. In SOLEM V. HELM (1983) the Court held that a sentence of life imprisonment without possibility of parole was cruelly disproportionate to an offense of issuing a bad $100 check, committeed by an offender with a record of six prior nonviolent felonies. The Court said that disproportionality should be determined by considering the gravity of the offense and the harshness of the penalty, sentences imposed for other crimes within the same jurisdiction, and sentences imposed for the same crime in other jurisdictions. Although this analysis could cast doubt on the severity of many sentences imposed on nonviolent offenders, in practice courts seldom strike down sentences that are less severe than life without possibility of parole.

Procedural due process requirements in noncapital cases are also slender. Under *Mempa v. Rhay* (1976) the defendant must be afforded the right to be heard at sentencing and the assistance of counsel. But there are only limited contexts in which the courts will recognize other trial-type safeguards.

The starting point for analysis of the procedural due process questions is *Williams v. New York* (1949). In *Williams* the Court upheld a death sentence imposed by a judge who had relied on a confidential presentence report. Emphasizing that "most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination," the *Williams* Court held that the defendant had no right even to disclosure of the report.

Although courts continue to rely on *Williams* for the broad proposition that trial-type guarantees are inapplicable at the sentencing stage, subsequent decisions have qualified *Williams.* The case of *Garner v. Florida* (1977) makes clear that nondisclosure is impermissible in the capital sentencing context and suggests, though in general terms, a greater sensitivity to due process concerns even for noncapital sentencing. More important, *United States v. Tucker* (1972) invalidated a sentence based in part on prior convictions obtained without the assistance of counsel. The premise of *Tucker,* quite inconsistent with that of *Williams,* is that procedural due process is violated when a sentence is imposed on the basis of unreliable information.

Courts continue to have difficulty identifying the proper sphere of the *Tucker* principle. If given its full scope, it would swallow *Williams* and imply full rights to disclosure, confrontation, and cross-examination. Instead, most courts have limited *Tucker* narrowly. There is still no right to full disclosure of the presentence report, though the defense is normally made aware, at least in general terms, of its content. With respect to contested facts, there is no general right to cross-examination or to a formal evidentiary hearing. Instead, cases like *United States v. Weston* (1971) and *United States v. Fatico* (1978) hold that when factual claims are based on hearsay or other evidence that is difficult to challenge, reliability must be established either by cross-examination or by some form of sufficient corroboration. And there is no requirement that facts relevant to sentencing be proved beyond a REASONABLE DOUBT, even when such facts require that a substantially more severe punishment be imposed. Under *McMillan v. Pennsylvania* (1986) facts relied upon to sup-

port an aggravated sentence need be proved only by a preponderance of the evidence.

In capital cases, sentencing is governed by elaborate constitutional doctrines based primarily on the Eighth Amendment's prohibition against "cruel and unusual punishments." This prohibition has been held to embody both substantive and procedural requirements. In addition both the Eighth Amendment and the FOURTEENTH AMENDMENT EQUAL PROTECTION clause require evenhandedness in capital sentencing.

Sentencing proceedure in capital cases typicaly involves a TRIAL BY JURY on the question of guilt, followed by a seperate hearing (usually before the same jury) to determine sentence. The Supreme Court has not explicitly held that such a bifurcated trial is constitutionally mandated, but it has implied that bifurcation is neccessary when the death penalty is set by a jury. In some states, the jury's role is merely advisory and the judge may impose a death sentence, despite the jury's contrary recommendation.

*Furman v. Georgia* (1972), the first decision in the modern era of capital punishment precedent, held unconstitutional the then-common procedure of leaving the death penalty decision to the unguided discretion of the sentencing jury. The crucial opinions stressed that the pattern of death sentences imposed under such a system was so wanton and freakish as to violate the Eighth Amendment. *Furman* and its sequel, *Gregg v. Georgia* (1976), require guidance to the jury about aggravating and mitigating factors so that choice between life and death will not be made on a wholly arbitrary basis. Critics continue to wonder, however, whether jury instructions specifying standards in "boilerplate" terms will effect any real change in the rationality of the sentencing process.

Under *Furman* and *Gregg* the legislature must provide guidelines identifying relevant aggravating and mitigating circumstances. The guidelines may not be too rigid, however. The Court held in *Sumner v. Shuman* (1987) that the legislature may never make the death penalty mandatory, even for a narrowly specified class of offenses, such as murder by a prisoner already serving a life sentence without possibility of parole. Similarly, the Court held in *Lockett v. Ohio* (1976) and *Skipper v. South Carolina* (1986) that the states may not preclude the sentencing authority from considering as a mitigating factor any arguably extenuating aspect of the defendant's character or the offense.

There is a basic tension beneath these lines of authority. *Furman* requires guidelines to ensure that the death penalty is imposed predictably and uniformly, but *Sumner*, *Lockett*, and *Skipper* require that the sentencer retain discretion to respond to the circumstances of the individual case. In effect, the Supreme Court has interpreted the Eighth Amendment to require both evenhandedness through rules and individualization through case-by-case discretion. Recent emphasis on the latter consideration can leave the sentencing process open to the disparities and irrationalities that *Furman* intended to eliminate.

The dilemma may be inescapable so long as capital punishment is retained. The dramatic severity and finality of the ultimate penalty demand especially high degrees of both consistency and humanity. But human institutions are fallible. The conflicting dimensions of fairness are thus inherently difficult to realize in capital sentencing procedure.

The demand for evenhandedness should be heightened against the background of concern about racial bias in death penalty decisions. Many studies suggest that black defendants are more likely to suffer the death penalty than white defendants similarly situated and that the death penalty is more likely to be exacted for white than for black victims. For example, MCCLESKEY V. KEMP (1987) involved an empirical study showing that the death penalty is four times more likely in the case of defendants charged with killing whites than in the case of defendants charged with killing blacks. But the Court held that such a study, even if statistically valid, did not render the death penalty unconstitutional, in the absence of evidence that the jury in the particular case had been racially motivated. *McCleskey* is especially important to concerns about race bias because the evidence seemed to meet the usual burden of persuasion: the statistics showed that racial motivation was more likely than not. Yet, somewhat inconsistently with precedent in related areas, the Court held such a likelihood insufficient to "prove" RACIAL DISCRIMINATION.

In its substantive dimension the Eighth Amendment requires that the death penalty be proportional to culpability. Culpability has at least two aspects, one concerned with the nature of the crime and another concerned with the character of the offender. With respect to the former, the Supreme Court held in COKER V. GEORGIA (1977) that the death penalty may not be inflicted on a rapist who has neither taken nor endangered human life. Similarly, *Enmund v. Florida* (1982) and *Tison v. Arizona* (1987) held that an accomplice in murder may not be executed if he neither intended to kill nor acted with reckless indifference to life.

The Supreme Court has not yet decided whether the death penalty is permissible in the case of a person who kills unintentionally. In most states, a person who accidentally kills in the course of a robbery, burglary, or rape is guilty of first-degree murder, and in some states, such a person would be eligible for the death penalty. The Court's recent emphasis on the harm one causes suggests that the Court might view death as a proportionate penalty, despite the lack of intent to kill. Yet, viewed as a matter of cul-

pability, *Enmund* teaches that it is "fundamental that causing harm intentionally must be [punished] more severely than causing the same harm unintentionally."

The second dimension of culpability concerns the character of the offender. The Court held in THOMPSON V. OKLAHOMA (1988) that to execute an offender who was under the age of sixteen at the time of the offense is impermissible. But STANFORD V. KENTUCKY (1989) upheld the constitutionality of executing a minor who had turned sixteen at the time of the offense, so long as the jury was permitted to consider the offender's youth as a mitigating factor. Similarly, PENRY V. LYNAUGH (1989) holds that a retarded offender may be executed, even if his "mental age" is equivalent to that of a seven-year-old child, provided that the jury is permitted to consider the mental impairment as a mitigating factor.

As a corollary of the principle that capital punishment must be proportionate to culpability, the sentencer must not give weight to facts that are irrelevant to blameworthiness. For example, BOOTH V. MARYLAND (1987) holds that the sentencing jury may not consider a "victim impact statement" that details unforeseeable harms suffered by the family of a murder victim.

The *Booth* principle, which requires that culpability be assessed in terms of acts and circumstances within the offender's knowledge or control, has recently come under criticism from members of the Court who believe that criminal justice responds inadequately to the interests of the victims. *South Carolina v. Gathers* (1989) indicates that a substantial minority of the Justices is prepared to overrule *Booth*. That step would not only permit the use of victim impact statements in capital sentencing but would also cut the proportionality requirement loose from its anchor in moral culpability. In effect, it would hold the defendant "responsible" for unforeseeable harms and events over which he had no control.

STEPHEN J. SCHULHOFER
(1992)

(SEE ALSO: *Capital Punishment and Race; Capital Punishment Cases of 1972; Capital Punishment Cases of 1976.*)

Bibliography

AMERICAN BAR ASSOCIATION 1980 *Standards for Criminal Justice 18–5.1 et seq.*, 2nd ed. Boston: Little, Brown.

KADISH, SANFORD H. 1962 Legal Norm and Discretion in the Police and Sentencing Process. *Harvard Law Review* 75:904–931.

NOTE 1968 Procedural Due Process at Judicial Sentencing for Felony. *Harvard Law Review* 81:821–846.

——— 1978 A Hidden Issue of Sentencing: Burdens of Proof for Disputed Allegations in Presentence Reports. *Georgetown Law Journal* 66:1515–1535.

SCHULHOFER, STEPHEN J. 1980 Due Process of Sentencing. *University of Pennsylvania Law Review* 128:733–828.

WHITE, WELSH S. 1987 *The Death Penalty in the Eighties.* Ann Arbor: University of Michigan Press.

## SEPARATE BUT EQUAL DOCTRINE

The first type of racial SEGREGATION law to spread over the South was the "Jim Crow car" law, requiring blacks and whites to be seated separately in railroad passenger cars. When the Supreme Court held such a law valid in PLESSY V. FERGUSON (1896), the majority concluded that, so long as the facilities for each race were equal, the enforced separation of the races did not itself impose any inequality on black persons. In support of this separate but equal DOCTRINE, the Court drew on a pre-CIVIL WAR decision in Massachusetts, upholding racial segregation in the public schools. (See ROBERTS V. BOSTON.)

Although the doctrine originated in the context of state regulation of private conduct, it was soon extended to validate segregation in state-operated facilities. The races were separated by the law's command in courtrooms; in the public schools (see GONG LUM V. RICE); in state offices; in public parks, beaches, swimming pools, and golf courses; in prisons and jails. Some state institutions, such as universities, simply excluded blacks altogether; in most southern states there were separate state colleges for blacks. Throughout this system of segregation, the formal assumption was that facilities for blacks and whites might be separate, but they were equal.

Given the undoubted fact that segregation was imposed for the purpose of maintaining blacks in a condition of inferiority, the very term separate but equal is internally inconsistent. But the *Plessy* opinion had rejected the claim that racial separation itself imposed on blacks an inequality in the form of inferiority. (See BADGES OF SERVITUDE.) Yet *Plessy* set the terms of judicial inquiry in a way that ultimately undermined the separate but equal principle. The question of *justifications* for inequality was largely neglected; the Court focused on the question whether inequality *existed*.

In railroad cars, it was easy to achieve a rough equality of physical facilities. Similarly, a public swimming pool might be reserved for whites three days a week, reserved for blacks three days, and closed the other day. In education, however, inequalities of enormous proportion persisted up to the decision in BROWN V. BOARD OF EDUCATION (1954) and beyond. Black colleges lacked professional schools; black high schools emphasized vocational training and minimized preparation for college. In physical plants, teachers' salaries, levels of teacher training, counseling services, curricula—in every measurable aspect—the

separate education offered blacks was anything but the equal of the education offered whites.

One strategy devised by the NAACP for ending school segregation was thus the filing of lawsuits aimed at forcing school boards to equalize spending for black education—at crushing expense. At the same time, a direct assault was made on segregation in higher education, and especially graduate education, where it was easiest to prove the inequality of facilities. (See MISSOURI EX REL. GAINES V. CANADA; SWEATT V. PAINTER.) These decisions, following *Plessy*'s lead, focused on the bare question of inequality. Inevitably, these cases came to touch the question whether segregation itself implied unequal education. The *Brown* opinion pursued that inquiry, found educational inequality in the fact of enforced separation, and—without discussing any purported justifications for segregation—held school segregation unconstitutional.

Separate but equal thus ended its doctrinal sway in the field of education. Within a few years the Supreme Court, in a series of PER CURIAM opinions consisting entirely of citations to *Brown*, had invalidated all state-sponsored segregation. The separate but equal doctrine was laid to rest.

KENNETH L. KARST
(1986)

Bibliography

LEVY, LEONARD W. and JONES, DOUGLAS 1972 Jim Crow Education: Origins of the "Separate but Equal" Doctrine. In Levy, Leonard W., *Judgments: Essays on American Constitutional History.* Chicago: Quadrangle Books.

OBERST, PAUL 1973 The Strange Career of *Plessy v. Ferguson. Arizona Law Review* 15:389–418.

WOODWARD, C. VANN 1966 *The Strange Career of Jim Crow*, 2nd rev. ed. New York: Oxford University Press.

## SEPARATION OF CHURCH AND STATE

The first provision of the BILL OF RIGHTS—known as the establishment clause—states that "Congress shall make no law respecting an ESTABLISHMENT OF RELIGION. . . ." This constitutional mandate seeks to assure the separation of church and state in a nation characterized by religious pluralism.

Justice WILEY B. RUTLEDGE observed in EVERSON V. BOARD OF EDUCATION (1947) that "no provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the FIRST AMENDMENT." Justice HUGO L. BLACK recounted in *Everson* that in the old world, "with the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Baptists, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews." And, he added, "these practices of the old world were transplanted to and began to thrive in the soil of the new America." For example, in Massachusetts, Quakers, Baptists, and other religious minorities suffered harshly and were taxed for the established Congregational Church. In 1776, the Maryland "Declaration of Rights" stated that "only persons professing the Christian religion" were entitled to religious freedom, and not until 1826 were Jews permitted to hold public office. The South Carolina Constitution of 1778 stated that "the Christian Protestant religion shall be deemed . . . the established religion of this state."

The specific historical record, rather than disclosing a coherent "intent of the Framers," suggests that those who influenced the framing of the First Amendment were animated by several distinct and sometimes conflicting goals. Thus, THOMAS JEFFERSON believed that the integrity of government could be preserved only by erecting "a wall of separation" between church and state. A sharp division of authority was essential, in his view, to insulate the democratic process from ecclesiastical depradations and excursions. JAMES MADISON shared this view, but also perceived church-state separation as benefiting religious institutions. Even more strongly, ROGER WILLIAMS, one of the earliest colonial proponents of religious freedom, posited an evangelical theory of separation, believing it vital to protect the sanctity of the church's "garden" from the "wilderness" of the state. Finally, there is evidence that one purpose of the establishment clause was to protect the existing state-established churches from the newly ordained national government. (Indeed, although disestablishment was then well under way, the epoch of state-sponsored churches did not close until 1833 when Massachusetts separated church and state.)

Even if the Framers' intent were unanimous and unambiguous, it still could not provide ready answers for many contemporary problems. First, a number of present-day church-state issues were not foreseen by the founders. For example, public education was virtually unknown in the eighteenth century; the Framers could have no position on the matter of RELIGION IN PUBLIC SCHOOLS—one of the most frequently adjudicated modern establishment clause questions. Second, implementing the Framers' precise thinking, even if discernible, might jeopardize values now considered secured by the establishment clause. As Justice WILLIAM J. BRENNAN speculated in ABINGTON TOWNSHIP SCHOOL DISTRICT V. SCHEMPP (1963), perhaps because the nation has become more religiously heterogeneous, "practices which may have been objectionable to no one

in the time of Jefferson and Madison may today be highly offensive to . . . the deeply devout and the non-believers alike."

The varied ideologies that prompted the founders do, however, disclose a dominant theme: according constitutional status to RELIGIOUS LIBERTY and the integrity of individual conscience. Moreover, one of the main practices seen by many Framers as anathema to religious freedom was forcing the people to support religion through compulsory taxation. Jefferson viewed this as "sinful and tyrannical," and Madison found it abhorrent to compel "a citizen to contribute three pence only of his property" to a religious cause. The founders recognized that although government subsidy of religion may not directly influence people's beliefs, it coerces citizens either to contribute to their own religions or, worse, to support sectarian doctrines antithetical to their convictions.

By its terms, the ESTABLISHMENT CLAUSE applies only to the federal government ("*Congress* shall make no law. . . ."), but in *Everson* (1947) the Court ruled that the FOURTEENTH AMENDMENT made the clause applicable to the states. Before then, only two Supreme Court decisions had produced any significant consideration of the establishment clause. *Bradfield v. Roberts* (1899) had upheld federal appropriations to a Roman Catholic hospital for care of indigent patients. *Quick Bear v. Leupp* (1908) had sustained federal disbursement of funds, held in trust for the Sioux Indians, to Roman Catholic schools designated by the Sioux for payment of tuition. Neither opinion, however, attempted any comprehensive definition of the nonestablishment precept, an effort first undertaken in *Everson* where the Court stated:

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

Since then, there has been little agreement among the Justices, lower courts, and scholars as to what constitutes impermissible "aid" to, or "support" of, religion.

Beginning in the early 1960s and culminating in LEMON V. KURTZMAN (1971), the Court developed a three-part test for reviewing establishment clause challenges: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion." The *Lemon* test, despite its consistent invocation by the Court, has not been a model of coherence. Indeed, in an unusually candid OBITER DICTUM in COMMITTEE FOR PUBLIC EDUCATION V. REGAN (1980) the Court conceded that its approach "sacrifices clarity and predictability for flexibility," a state of affairs that "promises to be the case until the continuing interaction between the courts and the states . . . produces a single, more encompassing construction of the Establishment Clause." A better approach would read the establishment clause to forbid government action when its purpose is religious *and* it is likely to impair religious freedom by coercing, compromising, or influencing religious beliefs.

One of the nation's most politically divisive issues has been the proper place of religion in public schools. Decisions in the early 1960s, holding that prayer and Bible reading violate the establishment clause, precipitated serious efforts to reverse the Court by constitutional amendment. Later legislative proposals have sought to strip the federal courts of JURISDICTION over cases challenging voluntary school prayer.

The first cases concerning religion in public schools involved RELEASED TIME. In MCCOLLUM V. BOARD OF EDUCATION (1948) the Court invalidated an Illinois program of voluntary religious instruction in public school classrooms during school hours by privately employed teachers. Students whose parents signed "request cards" attended weekly classes in religion; others pursued secular studies elsewhere in the school during this period. The Court's opinion emphasized use of "the state's tax-supported public school buildings" and "the state's compulsory public school machinery." Four years later, in ZORACH V. CLAUSEN (1952), the Court upheld a New York City "off-premises" released time program. Released students attended classes at their respective religious centers; neither public funds nor public classrooms directly supported religion. In a much quoted and controversial passage, the Court observed: "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."

Neither *McCollum* nor *Zorach* propounded any specific

STANDARD OF REVIEW. A decade later, in ENGEL V. VITALE (1962), the Court invalidated a New York law providing for recitation of a state-composed prayer at the beginning of each public school day. Although the prayer was denominationally "neutral," and students could remain silent or leave the room, the Court declared that this "breaches the constitutional wall of separation between Church and State," because "it is no part of the business of government to compose official prayers."

The Court's approach soon underwent a dramatic revision. In *Abington Township v. Schempp* the Court held it unconstitutional for public schools to conduct daily exercises of reading student-selected passages from either the Old or New Testaments (without teacher comment) and recitation of the Lord's Prayer. Drawing on its rationale in the SUNDAY CLOSING CASES (1961), the Court articulated a "test" for government action challenged under the establishment clause: "[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." The Court ruled that the "opening exercise is a religious ceremony," emphasizing, however, that "objective" study of the Bible (presumably for its literary and historical value) was constitutionally permissible.

There are two difficulties with the Court's declared willingness—reaffirmed regularly since *Schempp*—to invalidate government action solely on the basis of a nonsecular "purpose." First, although *Schempp* emphasized the establishment clause's requirement of a "wholesome neutrality" by the state toward religion, the Court has also made clear that the Constitution does not mandate an "untutored devotion" to this precept. Indeed, it has sometimes held that the free exercise clause *obliges* government to act with a nonsecular purpose—actually, to give a preference to religion—when the action is necessary to permit the unburdened exercise of religion.

Second, despite the *Schempp* test's condemnation of laws whose purpose is to "advance religion," the Court in *Zorach* had previously conceded that the released time program upheld had a nonsecular purpose: facilitation of religious instruction. *Zorach* has been specifically reaffirmed since *Schempp* was decided. Thus, the Court itself is not fully committed to its articulated doctrine that a religious purpose alone is sufficient to invalidate government action.

Although both *Engel* and *Schempp* declared that religious coercion was irrelevant under the establishment clause, the Court has nevertheless often carefully analyzed the elements of coercion and influence in programs it has considered. For example, in *Engel* the Court remarked on "the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion." In *Zorach*, the Court emphasized its questionable conclusion that there was no "coercion to get public school students into religious classrooms." And in WIDMAR V. VINCENT (1981), in requiring a state university to provide student religious groups equal access to its facilities, the Court noted: "University students are . . . less impressionable than younger students and should be able to appreciate that the university's policy is one of neutrality towards religion."

The Court's sensitivity to religious coercion and influence in establishment clause challenges, its doctrinal pronouncements to the contrary notwithstanding, comports with an approach that recognizes that in accommodating the values underlying both the establishment and free exercise clauses, a nonsecular purpose cannot always be avoided, and that the primary offense to the establishment clause is some meaningful intrusion upon religious liberty.

Nearly two decades elapsed between *Schempp* and the BURGER COURT's first major decision on religion in public schools. In *Stone v. Graham* (1980) a Kentucky statute required posting a copy of the Ten Commandments (purchased with private funds) in all public school classrooms, with the notation: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the COMMON LAW of the United States." Although the state court found that the legislature's purpose was not religious and sustained the law, the Supreme Court reversed.

The *Stone* opinion is significant for several reasons. First, it sheds further light on how the Court decides whether a legislative purpose is secular or religious. In *Schempp*, when the school board contended that the Bible reading program was not instituted for religious reasons (but rather to promote moral values, teach literature, and inspire student discipline), the Court brusquely replied that "surely, the place of the Bible as an instrument of religion cannot be gainsaid." In *Stone*, the Court stated that the Ten Commandments were not confined to "arguably secular matters" such as prohibition of murder and adultery but also prescribed religious duties such as observing the Sabbath and avoiding idolatry—adding that the law did not integrate the Bible or the commandments into an ethics, history, or comparative religion course. It quite peremptorily concluded that the program "serves no . . . educational function" and that "the Ten Commandments is undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Stone* also reaffirms that a nonsecular purpose is itself enough to con-

demn a law under the establishment clause. Although the Court briefly considered the state program's potential for coercing or influencing children—observing that "if the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the school children to read, meditate upon, perhaps to venerate and obey, the Commandments"—it nevertheless held that the law lacked a secular purpose and was invalid on that basis alone. This doctrine was vigorously reinforced in WALLACE V. JAFFREE (1985), which invalidated an Alabama statute authorizing a period of silence in public schools "for meditation or voluntary prayer," because the law was "entirely motivated by a purpose to advance religion." (The Justices plainly indicated that only a slightly different statutory formulation "protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day" would pass constitutional muster.)

Although regulatory laws allegedly enacted to aid religion have generated only a few Supreme Court decisions, they have significantly affected establishment clause jurisprudence. In MCGOWAN V. MARYLAND (1961) the Court upheld prohibition of the sale of most merchandise on Sundays. The Court conceded that the original purpose of Sunday closing laws was to encourage observance of the Christian Sabbath. But it found that, as presently written and administered, most such laws "are of a secular rather than of a religious character," seeking "to set one day apart from all others as a day of rest, repose, recreation and tranquility." The choice of Sunday, "a day of particular significance for the dominant Christian sects," did not "bar the state from achieving its secular goals."

*McGowan* emphasized that a Sunday closing law might violate the establishment clause if its purpose were "to use the State's coercive power to aid religion." This warning was fulfilled in EPPERSON V. ARKANSAS (1968), when the Court invalidated a law that excised the theory of human biological evolution from public school curricula. Reviewing the circumstances of its adoption in 1928, the Court found that "fundamentalist sectarian conviction was and still is the law's reason for existence."

Although Arkansas probably exceeded what the free exercise clause required for "accommodation" of fundamentalist religious doctrine, there was no indication that its anti-evolution statute coerced, compromised, or influenced school children to embrace fundamentalist doctrine. The Arkansas statute thus satisfied religious needs with no meaningful threat to religious liberty—the chief danger the establishment clause was intended to avoid. Yet, as in the Ten Commandments and moment-of-silence cases, a religious purpose alone proved fatal.

The Court first gave plenary consideration to the problem of public aid to church-related schools in *Everson v. Board of Education* (1947). A New Jersey township reimbursed parents for the cost of sending their children on public buses to and from schools, including Roman Catholic parochial schools. Although the Court asserted that "no tax . . . can be levied to support any religious activity or institution," it upheld the New Jersey program by a 5–4 vote. The majority conceded that without the program's subsidy some children might not be sent to church schools. But it reasoned that funding bus transportation for all pupils in both public and sectarian schools accomplished the "public purpose" of aiding parents in getting their children "safely and expeditiously to and from accredited schools." In this respect, New Jersey's aid program was similar to providing all schools with basic municipal services, such as fire and police protection. Furthermore, the state could not constitutionally exclude persons from its aid "because of their faith, or lack of it." (The *Everson* majority indicated that bus transportation might be the limit of permissible assistance.) The dissenters protested that the program aided children "in a substantial way to get the very thing which they are sent to [parochial schools] to secure, namely, religious training and teaching."

The Court did not again confront the issue of aid to church-related schools until BOARD OF EDUCATION V. ALLEN (1968). During the intervening two decades, the Court had developed the "secular purpose-secular effect" standard. *Allen* held that New York's lending secular textbooks, approved by local school boards, to all secondary school students, including those in church-related schools, had the secular purpose of furthering education and a primary effect that benefited students and parents, not religious schools.

The "excessive entanglement" prong of the Court's establishment clause test emerged two years later. WALZ V. TAX COMMISSION (1970) rejected the claim that New York's tax exemption for "real or personal property used exclusively for religious, educational or charitable purposes" supported religion in violation of the establishment clause. After finding that the exemption had the nonreligious purpose of avoiding inhibition on the activities of charities and other community institutions, the Court continued: "We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree. Either course, taxation of churches or exemptions, occasions some degree of involvement with religion. . . . [The question is] whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." The Court conceded that tax exemption accorded an indirect economic benefit to religion, but concluded that it gave rise to less government involvement than nonexemption. Taxing the churches would occasion "tax valuation of church property, tax liens, tax foreclo-

sures, and the direct confrontations and conflicts that follow in the train of those legal processes."

In LEMON V. KURTZMAN (1971) the Court returned to the problem of church-related schools. Rhode Island subsidized public and private school teachers of secular subjects (not to exceed fifteen percent of their salaries); parochial school teachers agreed not to teach religion during the subsidy. The legislature had found that "the quality of education available in nonpublic elementary schools has been jeopardized [by] rapidly rising salaries." Pennsylvania reimbursed nonpublic schools for the salaries of teachers of "secular" subjects such as mathematics, physical science, physical education, and foreign languages. Church-related schools maintained accounts, subject to state audit, that segregated the costs of "secular educational service." Reimbursement for religiously oriented courses was prohibited.

The Court held that both programs violated the establishment clause. It acknowledged a secular purpose, but reasoned that the states' efforts to avoid a primary effect that advanced religion produced "excessive entanglement between government and religion." In the Court's view, church-related elementary and secondary schools had as their mission the inculcation of religious doctrine, especially among "impressionable" primary school pupils. Continuing state evaluation of school records "to establish the cost of secular as distinguished from religious instruction," and the state "surveillance necessary to ensure that teachers play a strictly nonideological role" were "pregnant with dangers of excessive government direction of Church schools and hence of Churches." Although this "administrative" entanglement was fatal, both laws risked another sort of entanglement: their "divisive political potential" along religious lines, given the likely demand for continuing and ever increasing annual appropriations.

The excessive entanglement criterion has been prominent in establishment clause adjudication since 1970; but it does not represent a value that either can or should be judicially secured by the establishment clause. The major fear of administrative entanglement between government and religion is that state regulation impairs the ability of religious groups to pursue their mission. This concern, however, is unfounded both doctrinally and empirically. At least since PIERCE V. SOCIETY OF SISTERS (1925) it has been understood that the Constitution permits the state to regulate church-related institutions whether or not it provides them financial assistance. Parochial school curricula, for example, have long been regulated without significant evidence of infringement of religious values. And if there were, the regulation would be invalid whether or not tied to monetary aid.

Another form of administrative entanglement regularly occurs when the state seeks to distinguish religion from nonreligion in order to grant an exemption from civil regulations. Although government scrutiny of religious beliefs is a sensitive task, the need for that scrutiny springs from the Constitution's explicit definition of religion as a subject for special treatment.

Similar objections can be raised to using "avoidance of political strife along religious lines" as a criterion for establishment clause adjudication. Indeed, if government were to ban religious conflict in the legislative process, serious questions of First Amendment political liberty would arise. But practical considerations, more than doctrinal ones, demonstrate the futility of making "political divisiveness" a constitutional determinant. Legislation does not violate the establishment clause simply because religious organizations support or oppose it. Religious groups have frequently differed on secular political issues—gambling, OBSCENITY, drug and GUN CONTROL, PROHIBITION, abolition of SLAVERY, racial integration, prostitution, sterilization, ABORTION, BIRTH CONTROL, divorce, the VIETNAM WAR, the EQUAL RIGHTS AMENDMENT, and CAPITAL PUNISHMENT, to name but a few. Churches and other religious groups have markedly influenced resolution of some of these matters. In the early 1980s, they actively debated the question of the nation's nuclear arms policy. Although a law may in fact promote a religious purpose, if the law serves genuinely secular ends—and impairs no one's religious liberty by coercing, compromising, or influencing religious beliefs—it should not be unconstitutional simply because its proponents and antagonists were divided along religious lines.

Moreover, even if government could or should eliminate religious fragmentation in the political arena, the establishment clause is an ineffective tool for the task. For example, forbidding aid to parochial schools does not effect a truce, but only moves the battleground; if children in parochial schools are excluded from school aid, their parents will tend to oppose increased funding of public schools.

The Court has viewed aid to church-related higher education more favorably than it has viewed aid to elementary and secondary schools. *Tilton v. Richardson* (1971), a companion case to *Lemon*, upheld federal construction grants to colleges for buildings and facilities that applicants agreed not to use for religious instruction. The government enforced this promise by on-site inspections. The Court easily found a secular purpose in the expansion of higher education opportunities. In reasoning that the subsidy's primary effect did not advance religion, it stated that, unlike elementary and secondary schools, church-related colleges were not "permeated" by religion. Their dominant motive is secular education; they normally afford a high degree of ACADEMIC FREEDOM for faculty and students; and their students are less susceptible to reli-

gious indoctrination than are school children. In sharp contrast to its generalized appraisal of parochial schools, the Court rejected a "composite profile" of a "typical sectarian" college. Instead, the Court found, on the record before it, that courses at the four recipient Roman Catholic institutions were taught according to professional academic standards. Moreover, the aid took the form of a one-time, single-purpose construction grant. Thus no appreciable governmental surveillance was required. Finally, the Court found the potential for "religious fragmentation in the political arena" lessened by the religious colleges' geographically diverse student bodies and the absence of religious affiliation of a majority of recipient colleges.

Decisions since *Tilton* have continued to sustain aid to religiously affiliated colleges. In *Hunt v. McNair* (1973) the Court upheld the use of South Carolina tax-exempt bonds to finance facilities for all colleges, so long as the facilities were limited to nonsectarian purposes. The Court placed the burden on those challenging the aid to establish that recipient colleges are "permeated" with religion. And in *Roemer v. Board of Public Works* (1976) the Court upheld Maryland grants of fifteen percent of the student cost in the state college system to all private colleges, if they certified that they used the funds for nonreligious purposes.

Subsequent decisions on aid to elementary and secondary schools have generally, but not unexceptionally, followed the path of *Lemon*. *Meek v. Pittenger* (1975) involved a program under which Pennsylvania lent instructional materials (such as maps, films, projectors, and laboratory equipment) to private schools, seventy-five percent of which were church-related. The Court agreed that the aid was ideologically neutral, but held that "when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission," it has the primary effect of advancing religion. The Court also invalidated "auxiliary services" (such as standardized testing, speech therapy, and psychological counseling) by public employees for private school children on their schools' premises: "To be certain that auxiliary teachers remain religiously neutral . . . the State would have to impose limitations . . . and then engage in some form of continuing surveillance to ensure that those restrictions were being followed." In addition to this "administrative entanglement," the Court observed that the program promised to generate "political entanglement" in the form of "continuing political strife." (The Court reaffirmed this holding as to auxiliary services in 1985 in the COMPANION CASES of *Grand Rapids School District v. Ball* and AGUILAR V. FELTON.)

Two years after *Meek*, *Wolman v. Walter* (1977) illustrated how constitutionality may turn on slight changes in form. The Court upheld Ohio's provision of (1) speech, hearing, and psychological diagnostic services by public employees on private school premises; (2) therapeutic and remedial services by public employees at a "neutral site off the premises" of the private school (even if in an adjacent mobile unit); and (3) payment for standardized tests used in private schools (the dispositive factor being that the tests were drafted and scored by public employees). The Court distinguished *Meek* on paperthin grounds relating to the closeness of the connection between the services provided and the religious school's educational mission and to the likelihood that public employees would "transmit ideological views" to children.

*Wolman* invalidated state payment for field trips of private school pupils, distinguishing *Everson* on the basis of the school's control over the expenditure of the funds and the close relation of the expenditure to the school's curriculum. The Court also invalidated a program for lending instructional materials to students, but, as in *Meek*, reaffirmed *Allen* and upheld lending students secular textbooks.

COMMITTEE FOR PUBLIC EDUCATION V. REGAN (1980) upheld New York's reimbursing private schools for performing testing and reporting services mandated by state law. The tests were prepared by the state, but, unlike those in *Wolman*, some were administered and scored by private school personnel. Nevertheless, because the tests were mostly objective, the Court concluded that there was little risk of their religious use. The Court distinguished *Levitt v. Committee for Public Education* (1973), which had invalidated a similar New York statute because it did not provide for state audits to ensure that the public funds did not exceed the nonpublic school's actual cost. In *Regan*, the occasional audits were found adequate to prevent a religious effect but not so intrusive as to produce excessive entanglement.

As of the mid-1980s, the most effective way for government to assist elementary and secondary parochial schools is through the tax system. In COMMITTEE FOR PUBLIC EDUCATION V. NYQUIST (1973) the Court invalidated a New York program, which the Court agreed had a "secular purpose," that gave tuition grants to low-income parents and tax relief to middle-income parents of children in private schools. The Court held that this had the effect of aiding the religious functions of sectarian schools. The Court distinguished *Walz* on several grounds. First, unlike the *Nyquist* programs, tax exemptions for church property had ample historical precedent, being "widespread during colonial days" and currently "in force in all 50 states." Second, although property tax exemption tended to lessen involvement between church and state, the programs in *Nyquist* tended to increase it. Finally, the tax exemption in *Walz* went to a broad class of charitable, religious, and educational institutions, but the record in *Nyquist* showed

that eighty-five percent of the children benefited attended sectarian schools, practically all run by the Roman Catholic Church.

A decade later, in MUELLER V. ALLEN (1983), the Court upheld a Minnesota program granting a state income tax deduction for parents with children in *any* nonprofit school, public or private. This deduction could be used for expenditures for tuition and transportation, as well as for textbooks and instructional materials and equipment (so long as they were not used to teach religion). The Court conceded that the "economic consequences" of the Minnesota program were "difficult to distinguish" from the New York program in *Nyquist*. But that it was difficult did not make it impossible. One difference the Court found was that *Mueller* involved "a genuine tax deduction," whereas the *Nyquist* tax credit was more like a direct grant than a tax benefit. The Court found most significant that the *Mueller* plan was available to all parents, not just those with children in private schools. Thus, the plan was "facially neutral" and its "primary effect" did not advance religion. The Court reached this conclusion even though ninety-six percent of the Minnesota deductions were taken by parents who sent their children to parochial schools—mainly Roman Catholic and Lutheran. As for the other four percent, there were only seventy-nine public school students who deducted tuition, which they paid because they attended public schools outside their districts for special reasons. Of course, children who attended public schools in their districts did get some deductions—for the cost of pencils, notebooks, and other incidentals not customarily provided.

The lesson to be drawn from all the elementary and secondary school decisions is that states wishing to provide significant financial assistance may do so simply by adopting the proper form. For example, New York could successfully revive its program invalidated in *Nyquist* by providing a tax benefit to all parents, including those whose children attend public schools, knowing that this would not appreciably increase the cost of the plan. But New York might be required to use the form of a tax deduction (rather than a tax credit or direct grant as in *Nyquist*), a difference of vital importance to parents with low incomes, who would obtain little benefit from a tax deduction.

Application of the Court's three-part test to the problem of GOVERNMENT AID TO RELIGIOUS INSTITUTIONS has generated ad hoc judgments incapable of being reconciled on a principled basis. The Court has assumed that the entire program of parochial schools is "permeated" with religion. But there is much dispute as to the facts. Some "secular" subjects in some parochial schools are unquestionably courses of religious indoctrination; other courses are truly secular; many probably fall between these polar characterizations. Thus, public aid incidentally benefits religion. But virtually all government services to church-related facilities—whether bus transportation, police and fire protection, sewage connections, sidewalks, tuition grants, or textbooks—incidentally benefit their sectarian functions by releasing church funds for religious purposes.

The critical inquiry should be whether direct or indirect government assistance to parochial schools exceeds the value of the secular educational service the schools render. If it does not, there is no use of tax-raised funds to aid religion, and thus no danger to religious liberty. This inquiry differs from the Court's approach, which has often invalidated laws with secular purposes because of their effects in advancing religion. A state program with both a secular purpose and a secular effect does not threaten values underlying the establishment clause. Furthermore, when the Court invalidates such a law simply because it incidentally furthers religious interests, the Justices assert the power to assess the multiple impacts of legislation, to separate religious from secular effects, and then to determine which are paramount. Ultimately the Justices must then rely on their own subjective notions of predominance.

In the mid-1980s, the Court was twice confronted with the problem of government practices that specifically acknowledge religion. MARSH V. CHAMBERS (1983) upheld Nebraska's paying a chaplain to open each legislative session with a prayer. Proceeding unusually, the Court did not apply its three-part test. Rather, it relied first on history and tradition—pointing out that paid legislative chaplains and opening prayers existed in the Continental Congress, the First Congress, and every Congress thereafter, as well as in most states today and in colonies such as Virginia and Rhode Island, both of which were bastions of religious liberty. Second, the Court rested on the intent of the Framers, noting that just three days after the First Congress had authorized paid chaplains it approved the Bill of Rights; this made it difficult to believe that the Framers could conceive of the establishment clause as prohibiting legislative chaplains. Thus, the practice survived challenge even though Nebraska's purpose was unquestionably religious and the Court's doctrine is that such purpose alone produces an establishment clause violation.

A year later, in LYNCH V. DONNELLY (1984), the Court sustained Pawtucket, Rhode Island's inclusion of a nativity scene in the city's annual Christmas season display. The cost was nominal, unlike the $320 expended monthly for Nebraska's chaplain in *Marsh*. The Court reasoned that the purpose and effect were not exclusively religious but, rather, that "the creche in the display depicts the historical origins of this traditional event long recognized as a National Holiday." The opinion also emphasized that our history was replete with government recognition of religion's

role in American life and with government expressions of religious belief. As examples, it pointed to presidential proclamations of national days of prayer and of Thanksgiving and Christmas as national holidays, public funding of a chapel in the Capitol and of chaplains in the legislature and in the military, "In God We Trust" as our statutorily prescribed national motto, the language "One Nation under God" as part of the Pledge of Allegiance, and the plethora of religious paintings in publicly supported galleries and in public buildings. Stating that "this history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause," the Court strongly suggested that all these deeply ingrained practices were constitutional.

The final important church-state separation issue concerns the tension between the First Amendment's two religion clauses, one forbidding government to promote or "establish" religion, the other forbidding government to abridge the "free exercise" of religion. As observed in *Walz,* both "are cast in absolute terms, and either . . . if expanded to a logical extreme, would tend to clash with the other." Charting a course that offends neither provision presents a continual challenge for the Court; yet its few direct confrontations with the problem have been unsatisfying.

The two most celebrated free exercise clause decisions illustrate the inherent conflict. In SHERBERT V. VERNER (1962) a Seventh-Day Adventist was discharged by her employer because she would not work on Saturday, her Sabbath. South Carolina denied her unemployment compensation for refusing "suitable work," that is, a job requiring Saturday labor. The Court held that this denial violated the free exercise clause by conditioning benefits on a violation of her religious faith. Although the Court's decision implements the free exercise clause, the purpose of its ruling—like the purpose of the released time program in *McCollum*—is clearly to facilitate religious practice. Thus, the exemption required by the Court in the name of the free exercise clause appears to violate the Court's establishment clause doctrine, which renders invalid any government action with a nonsecular purpose. The Court's conclusory response was that "plainly we are not fostering the "establishment' of the Seventh-day Adventist religion" but rather governmental "neutrality in the face of religious differences."

In WISCONSIN V. YODER (1971) the Court held that application of school attendance requirements to the Old Order Amish violated the free exercise clause. In characterizing this as an "accommodation" for the Amish, the Court rejected the contention that this religious exemption violated the establishment clause: "The purpose and effect of such an exemption are not to support, favor, advance or assist the Amish, but to allow their centuries-old religious society . . . to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose."

In THORNTON V. CALDOR, INC. (1985), however, the Court ruled that a state had gone too far in "accommodating" religion. It held that a Connecticut law that required employers to give a day off to employees on their Sabbath, "no matter what burden or inconvenience this imposes on the employer or fellow workers," had the "primary effect" of advancing "a particular religious practice" and thus violated the establishment clause. The Court emphasized the "absolute and unqualified right not to work" afforded the employees, although this appeared to be little different from the exemption that the Court itself had ordered in *Sherbert.*

Although there is considerable overlap in the purposes of the establishment and free exercise clauses—their central function being to secure religious liberty—the decisions disclose that each has an identifiable emphasis. In the main, the free exercise clause protects adherents of religious faiths from secularly motivated laws whose effect burdens them because of their particular beliefs. When the Court finds a violation of the free exercise clause, the law is normally held invalid as applied; all that is required is an exemption for the claimant from the law's otherwise proper operation. In contrast, the principal thrust of the establishment clause concerns religiously motivated laws that pose the danger to believers and nonbelievers of being required to support their own religious observance or that of others. When the Court finds a violation of the establishment clause, ordinarily the offensive provision is entirely invalid and may not be enforced at all.

A better approach would reconcile the conflict between the clauses by interpreting the establishment clause to forbid only those laws whose purpose is to favor religion, and then only if such laws tend to coerce, compromise, or influence religious beliefs. Under this standard, the religious exemption that the Court required in *Sherbert* would itself be unconstitutional because it impairs religious liberty by supporting religion with funds raised by taxation. Although the core value of religious liberty may forbid government to interfere with Sherbert's practice of Seventh-Day Adventism, it similarly forbids forcing other citizens to subsidize a religious practice. On the other hand, the proposed alternative approach probably would not change the result in *Yoder;* it is doubtful that exempting the Amish from the compulsory education law (or giving employees a day off on their Sabbath, as in *Thornton*) would tend to coerce, compromise, or influence religious choice. Finally, the alternative approach would distinguish *Yoder* from those decisions—such as *McCollum*, *Engel*, and *Schempp*—that have invalidated religious practices in public schools. Neither these programs nor the exemption

in *Yoder* had a "secular" purpose. But, unlike *Yoder* and *Thornton*, the public school programs threatened religious liberty and were thus properly held to abridge the constitutional separation of church and state.

JESSE H. CHOPER
(1986)

Bibliography

ANTINEAU, CHESTER J.; DOWNEY, ARTHUR T.; and ROBERTS, EDWARD C. 1964 *Freedom from Federal Establishment.* Milwaukee, Wisc.: Bruce Publishing Co.

CHOPER, JESSE H. 1963 Religion in the Public Schools: A Proposed Constitutional Standard. *University of Minnesota Law Review* 47:329–416.

——— 1968 The Establishment Clause and Aid to Parochial Schools. *California Law Review* 56:260–341.

——— 1980 The Religion Clauses of the First Amendment: Reconciling the Conflict. *University of Pittsburgh Law Review* 41:673–701.

CURRY, THOMAS 1986 *The First Freedoms.* New York: Oxford University Press.

HOWE, MARK D. 1965 *The Garden and the Wilderness.* Chicago: University of Chicago Press.

KURLAND, PHILLP B. 1962 *Religion and the Law.* Chicago: Aldine Publishing Co.

LEVY, LEONARD W. 1986 *An Establishment of Religion.* New York: Macmillan.

MURRAY, JOHN C. 1960 *We Hold These Truths.* Chap. 2. New York: Sheed & Ward.

NOWAK, JOHN E.; ROTUNDA, RONALD D.; and YOUNG, J. NELSON 1983 *Handbook on Constitutional Law*, 2nd ed. Pages 1229–1281. St. Paul, Minn.: West Publishing Co.

PFEFFER, LEO 1984 *Religion, State, and the Burger Court.* Buffalo, N.Y.: Prometheus Books.

SCHWARTZ, ALAN 1968 No Imposition of Religion: The Establishment Clause Value. *Yale Law Journal* 77:692–737.

STOKES, ANSON PHELPS 1950 *Church & State in the United States.* 3 Vols. New York: Harper.

TRIBE, LAURENCE H. 1978 *American Constitutional Law.* Chap. 14. Mineola, N.Y.: Foundation Press.

## SEPARATION OF CHURCH AND STATE
(Update)

In the law concerning religion and the Constitution, the period from the end of WORLD WAR II until the mid-1980s can be best characterized as the separationist period. Since 1985, however, two major developments have altered the face of the constitutional landscape. The first concerns interpretation of the ESTABLISHMENT CLAUSE of the FIRST AMENDMENT, upon which much separationist history and law is based. Although some establishment clause principles have been reaffirmed, others have been strongly questioned and several are in flux. Second, the free exercise clause of the First Amendment has become a significant springboard for litigation. Although the number of free exercise precedents has dramatically increased, the direction in which that body of law is heading remains difficult to discern.

Establishment clause problems generally fall into three categories—GOVERNMENT AID TO RELIGIOUS INSTITUTIONS, the role of RELIGION IN PUBLIC SCHOOLS, and government support of RELIGIOUS SYMBOLS IN PUBLIC PLACES or activities. In all three categories, a crucial and overarching question is whether the clause demands maximum separation of government and religious institutions (separationism) or, alternatively, whether government support of religion is acceptable so long as sectarian discrimination is avoided (accommodationism).

These competing themes remained submerged when an important principle related to the provision of aid to religious institutions was reinforced in the Supreme Court decision in WITTERS V. WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND (1986). In *Witters* the Court built upon MUELLER V. ALLEN (1983) in ruling that the establishment clause did not require a state to deny aid to a blind applicant who would use the grant to pay tuition in a program of preparation for the Christian ministry. Though the Justices differed among themselves on the rationale, all seemed to agree that the individual, not the state, was responsible for selecting the program in which the funds would be spent. Such a private choice creates no risk of forbidden church-state interaction and, when viewed in the aggregate with other individual choices of how to spend such grants, creates quantitatively little religious consequences.

This distinction between grants to individuals, which may be "spent" in religious institutions, and grants to the institutions themselves, which the state may not make, may be in danger of collapsing. Only a narrow and shaky majority on the Court reaffirmed the legal principles governing financial aid to religious institutions in the 1985 cases of *Grand Rapids School District v. Ball* and *Aguilar v. Felton.* Each case produced another in the line of dissents complaining of the "catch-22" of school aid law: categorical grants of benefits to parochial schools are impermissible aid to religion unless the benefits are monitored to eliminate the possibility of their use to promote religion, but the acts required to monitor restrictions on benefits produce forbidden interaction between church and state.

By 1988 these dissents had ripened into what may well signal a major change in the law governing aid programs. In BOWEN V. KENDRICK (1988) a 5–4 majority upheld portions of the Adolescent Family Life Act, which provides federal funds to religious as well as secular institutions for

counseling teenagers on matters of sexuality and pregnancy. Despite the obvious dangers of religious indoctrination built into any program that enlists religiously affiliated institutions in counseling on such theologically charged matters, the Court shifted the basic focus of establishment clause analysis by asking whether such indoctrination had occurred in fact. Under its prior cases, the risk of such indoctrination would have been enough to doom the program. Although it is possible that litigants can prove in an individual case that government money is subsidizing religious counsel, the process of judicial decision making in aid to religion cases will be profoundly altered if the *Bowen* approach is extended to aid to schools and other kinds of church-supported programs. Such proof may be difficult to obtain, and the consequences of such proof will be to condemn isolated instances of abuse rather than to invalidate entire programs of state assistance.

The establishment clause principle that has changed least and seems strongest is that which prohibits the introduction of religious worship or sectarian theology into the public schools. Such an effort was handed a ringing defeat in *Edwards v. Aguillard* (1987), which invalidated a Louisiana statute requiring public schools to teach "creation science" whenever they teach biological theories of evolution. Despite the state's defense of the requirement as a protection of the ACADEMIC FREEDOM of those interested in pursuing CREATIONISM, the Court found this scheme to be a deliberate attempt to introduce sectarian religious teachings (in particular, the teaching of the Book of Genesis that God created the universe and all its life forms in six days) into the public schools. As such, the law ran afoul of the principle enunciated in the various school prayer cases that the public school must remain free of efforts at religious indoctrination. While teaching about religion may be permissible, teaching designed to inculcate or reinforce religious beliefs is not.

A third context for establishment clause litigation—government involvement with the display or production of religious symbols—has been the most volatile over the past several years. LYNCH V. DONNELLY (1984), discussed briefly in the original Encyclopedia entry for this topic, upheld the validity of a city's sponsorship of a Christmas-time display that included a Nativity scene at its center. The uncertain scope of *Lynch* as authority for government support of displays with some religious significance led to a flurry of litigation in the lower courts involving both Christmas displays and other symbols with religious origins. One lower court, for example, found an establishment clause violation in the adornment of San Bernardino, California, police cars with a shield bearing a Latin cross and Spanish words translating to "With This We Conquer."

In 1989 the Supreme Court tried again to draw lines concerning government sponsorship of such symbols and displays. In COUNTY OF ALLEGHENY V. ACLU (1989), a case arising from the celebration of winter holidays in Pittsburgh, Pennsylvania, the Court reached mixed results: a Nativity scene displayed on the grand staircase of the Allegheny County Courthouse was held to constitute a violation of the establishment clause, while an eighteen-foot Hanukkah menorah displayed near a larger Christmas tree outside the city-county building was held not to violate the Constitution. This pair of results is explicable only by reference to the three main groupings on the Court that the *County of Allegheny* case produced. One group of four Justices—ANTHONY M. KENNEDY, WILLIAM H. REHNQUIST, ANTONIN SCALIA, and BYRON R. WHITE—would have upheld both displays on the ground that they were temporary and noncoercive, and therefore did not threaten to establish Christianity or Judaism or any combination of the two. Another group of three Justices—WILLIAM J. BRENNAN, THURGOOD MARSHALL, and JOHN PAUL STEVENS—would have invalidated both displays on the grounds that they included objects "which retain a specifically (religious) meaning" and therefore may not be supported by the government. The deciding votes in the cases were cast by Justices HARRY A. BLACKMUN and SANDRA DAY O'CONNOR, who adopted the view that government may display, but may not endorse, symbols that have religious meaning for some. Viewing both displays in their seasonal context, these two Justices found that the county had endorsed Christianity with its crèche display but was simply recognizing the secular aspects of the season's holidays with its Christmas tree and menorah combination.

These cases are troubling, and the problems they represent are difficult to solve. Atheists feel offended by any government acknowledgment of the existence of God; many religious people are deeply disturbed by the state's embrace or exploitation of religious symbols; and a line of cases that permits government to display menorahs and crèches next to Christmas trees, but not crèches standing alone, does not inspire confidence in the Court's judgment about law or religion. Solutions at the extreme—eliminating practices such as imprinting "In God We Trust" on coins and currency, on the one hand, or tolerating blatant endorsement by government of sectarian religious symbols, on the other—appear inconsistent with America's national traditions and values. A principled middle ground is hard to articulate and defend, however, as the *Allegheny County* case reveals.

The symbols cases may reflect a movement away from separationism and toward accommodationism. Though the latter takes many forms, the narrowest and most defensible version involves exemptions for religious activity from legislative burdens otherwise imposed on compara-

ble activity. In *Corporation of Presiding Bishop v. Amos* (1987), for example, the Supreme Court upheld as an accommodation the exemption for religious institutions from the federal statutory ban on religious discrimination in employment.

Yet not all legislative efforts at accommodation survive establishment clause attack. In TEXAS MONTHLY, INC. V. BULLOCK (1989) a closely divided Court held it impermissible for a state to exempt only religious publications from the state's sales tax. Such an exemption involves the state in distinguishing religious from nonreligious activity and preferring the former. Accommodationism permits such a preference; separationism does not.

The provision protecting the "free exercise of religion" provoked substantial litigation after 1985, but dominant themes are yet to emerge from this body of law. The 1980s were a time of revival among fundamentalist religions in the United States and a time of decline for mainstream religions. One consequence of this was an increase in constitutional attacks under the free exercise clause upon laws that were not intentionally hostile to religion but nevertheless interfered with its practice.

The recent free exercise cases have produced mixed results. The Court's earlier holdings that conditions on unemployment compensation benefits must not, absent an unusually strong reason, interfere with religious practice were reaffirmed and extended in *Hobbie v. Florida Unemployment Appeals Commission* (1987) and FRAZEE V. ILLINOIS DIVISION OF EMPLOYMENT SECURITY (1989). But in a number of other cases, the Supreme Court rejected free exercise claims. Some of these were relatively uncontroversial; for example, in *Hernandez v. Commissioner of Internal Revenue* and *Graham v. Commissioner of Internal Revenue* (1989) the Court ruled against a claim by members of the Church of Scientology that they were constitutionally entitled to income tax deductions, as charitable contributions, for payment they had made to the church in direct exchange for "auditing" or "training" sessions. Suspicion about whether Scientology was a bona fide religion or an elaborate money-making scheme for its founder may have influenced the outcome of those cases. In *Tony and Susan Alamo Foundation v. United States* (1985) a unanimous Court—perhaps operating on similar suspicions—rejected a religious foundation's claim to be constitutionally exempt from the wage and hour restrictions of the federal FAIR LABOR STANDARDS ACT with respect to employees engaged in commercial activities. And in JIMMY SWAGGART MINISTRIES V. BOARD OF EQUALIZATION OF CALIFORNIA (1990) the Court built logically upon *Texas Monthly* by holding that the free exercise clause did not compel what the establishment clause forbade—an exemption for the distribution of religious material from the state's generally applicable sales and use tax.

In other free exercise cases, however, claims that appeared meritorious under the Court's announced standards fared equally poorly. In GOLDMAN V. WEINBERGER (1986) the Court held that the air force need not accommodate the religious concern of an Orthodox Jewish captain to wear a skullcap while on duty. Deferring to what seemed decidedly trivial objectives on the part of the military to preserve uniformity of appearance, the Court's majority treated the free exercise claim as deserving little respect. O'LONE V. ESTATE OF SHABAZZ (1987) extended this approach by granting wide authority to prison officials to refuse to accommodate the religious concerns of prison inmates through any prison regulations that are "reasonably related to legitimate penological interests." And, in what may be the most disturbing of this trio of cases about government enclaves, LYNG V. NORTHWEST INDIAN CEMETERY, (1988), a 5–4 majority concluded that the free exercise clause was not even implicated, much less violated, when the United States government proposed to build in a national forest a road that would disturb, by sight and sound, places of religious significance to several Native American tribes. Despite the use of open lands by the tribes for spiritual purposes over many centuries, the *Lyng* result effectively forecloses any and all free exercise litigation by Indian tribes against government land-use decisions that may despoil Indian holy places. Earlier, in *Bowen v. Roy* (1986), the Court had also rejected a free exercise claim by a Native American concerning the use of SOCIAL SECURITY numbers on government files pertaining to his family.

Fundamentalist Christians have fared little better in free exercise cases than have the Native American tribes. State courts have been unreceptive to attempts by parents to educate their children at home without state approval. And in a celebrated 1987 case that reached the United States Court of Appeals for the Sixth Circuit, *Mozert v. Hawkins County School Board*, a group of fundamentalist parents unsuccessfully sought to have their children exempted from a reading program in the public schools that they found objectionable to their religious beliefs. In the battle over education generally, and the public schools in particular, the separationists continue to prevail.

Characterized most generally, the trend in the Supreme Court has been toward easing some of the restrictions imposed on government by the establishment clause while maintaining or increasing the hurdles for free exercise claims. In such a world of deference to legislative judgment, accommodation is far more likely to emerge from the legislative branch than from the judicial branch. Accommodationism, so practiced, presents a substantial risk of favoritism for majority religions—that is, of replicating the evils that the religion clauses of the First Amendment were intended to combat.

IRA C. LUPU
(1992)

Bibliography

LEVY, LEONARD W. 1986 *The Establishment Clause: Religion and the First Amendment.* New York: Macmillan.

LUPU, I. C. 1989 Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion. *Harvard Law Review* 102:933–989.

MCCONNELL, MICHAEL W. 1985 Accommodation of Religion. *Supreme Court Review* 1985:1–59.

## SEPARATION OF POWERS

Any system of constitutional government must have as one of its central principles some degree of separation of powers. A system of government in which all legal power and authority is exercised by one person or group of people must depend entirely upon their self-restraint in the exercise of that power. The history of government does not suggest that such self-restraint is likely this side of heaven or utopia, and efforts to prevent the abuse of the powers of government have therefore focused on constitutional arrangements that divide and limit the powers of government.

The doctrine of the separation of powers consists of a number of elements: the idea of three separate branches of government, the legislature, the executive, and the judiciary; the belief that there are unique functions appropriate to each branch; and the assertion that the personnel of the branches of government should be kept distinct, no one person being able to be a member of more than one branch of government at the same time. The more pure or extreme the form of the doctrine, the greater the extent to which all three of these elements are insisted upon without reservation or modification. In past centuries political writers have proposed such extreme solutions in France, Britain, and America, and attempts have been made, unsuccessfully, to approximate as closely as possible to this extreme in practice. The spirit of the doctrine was expressed clearly in the Constitution of Virginia in 1776: "The legislature, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them at the same time. . . ."

A further aspect of the doctrine is the concern with the method by which the members of the executive and judicial branches are selected, for this will have implications for the extent to which the members of one branch may be able to influence the behavior of members of another. The more extreme versions of the doctrine therefore demand the direct election of members of all three branches of government in order that they should be responsible directly to the people, and not dependent upon each other. In the words of Samuel Williams, historian of Vermont, in 1794, "the security of the people is derived not from the nice ideal application of checks, balances, and mechanical powers, among the different parts of the government, but from the responsibility, and dependence of each part of the government, on the people."

The doctrine of the separation of powers, standing alone, however, has never been able to provide the kind of safeguards against the abuse of governmental power which it claims to provide. In practice we find that CHECKS AND BALANCES are required to prevent one or another branch of government from becoming too dominant. The idea of internal checks, exercised by one branch of government over the others, is drawn from the ancient theory of mixed government, and from the eighteenth-century "mixed and balanced constitution" of Great Britain. Thus JAMES MADISON, in THE FEDERALIST #48, undertook to show that unless the branches of government "be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." All constitutional systems of government are therefore an amalgam of the separation of powers and checks and balances. The exact composition of this mixture was a central problem for the Framers of the federal Constitution, and their solution distinguished presidential-congressional government from parliamentary systems.

The emergence of a full-blown doctrine of the separation of powers was the result of a long process of development, involving the refinement of a set of concepts, including the idea of law itself, which today we largely take for granted. In early times the idea of law was very different from the modern concept of legislation or statute law. The latter view of law, consciously drafted and adopted by human rather than divine will, did not emerge clearly until the battle between king and parliament in seventeenth-century England sharpened the perception of law, lawyers, and politicians. The more radical opponents of royal power conceived of a parliament that was representative of the people, making laws which the king, or some other executive power, should put into effect. In the turmoil of civil war, this doctrine of the separation of powers was fashioned by a number of writers until it reached a recognizably modern form.

As the British constitutional crisis deepened, the doctrine was refined by those who, like JOHN MILTON, pointed to the arbitrary character of the Long Parliament, Henry Ireton in the Whitehall debates of 1649, and JOHN LILBURNE in *The Picture of the Councel of State* asserting that "the House itself was never (neither now, nor in any age before) betrusted with a Law executing power, but only with a Law making power." John Sadler in his *The Rights of the Kingdom* of 1649 asserted the basis of the separation of powers very clearly. The three powers of government, legislative, judicial, and executive, "should be in Distinct

Subjects; by the Law of Nature, for if Lawmakers be judges, of those that break their Laws; they seem to be judges in their own cause: which our Law, and Nature itself, so much avoideth and abhorreth, so it seemeth also to forbid, both the Lawmaker, and the Judge to Execute."

The execution of Charles I and the establishment of republican government stripped away the remaining vestiges of mixed government and left the separation of powers as the sole constitutional principle for the organization of the government of Great Britain. The Commonwealth produced the first written constitution of modern times, the Instrument of Government of 1653, and the doctrine of the separation of powers clearly inspired its authors. This document vested the supreme legislative authority in the lord protector and the people assembled in Parliament, but in effect the role of the protector in legislation was to be limited to a suspensive veto of twenty days. The Instrument also provided that "the exercise of the Chief Magistracy and the administration of the Government . . . shall be in the Lord Protector, assisted with a Council." Although the Instrument of Government was never an effective basis for government, from that time on the theory of the separation of powers emerged and reemerged whenever demands were made to limit the power of governments. The official defense of the Instrument, *A True State of the Case of the Commonwealth*, published in 1654, and probably written by Marchamont Nedham, expressed the theory behind the constitution when it criticized earlier institutional arrangements "which placing the legislative and executive powers in the same persons is a marvellous in-let of corruption and tyranny." At this point the idea of a judicial power distinct from the executive was still relatively undeveloped, to emerge more fully at the end of the seventeenth century, and then to blossom in the work of MONTESQUIEU and WILLIAM BLACKSTONE, and to be embodied in the Constitution of the United States.

With the restoration of Charles II in 1660 the basis of a new theory of the constitution was required. The principle of the separation of powers must be reasserted, as it was by JOHN LOCKE, but in the context of a "mixed and balanced" constitution, incorporating a role for the monarch and for the House of Lords. This amalgam of the separation of powers and checks and balances, the constitution of the Augustan Age of British politics, was lauded as the model of "a constitution of liberty." Montesquieu is popularly credited with a major role in the development of the separation of powers, but the theory was developed a hundred years before the publication of *The Spirit of the Laws* (1748). Indeed it is the influence of his work, particularly in the American colonies, rather than any intellectual contribution to the separation of powers, that gives such significance to the work of Montesquieu. Montesquieu's contribution to the separation of powers was essentially his modern emphasis upon the three powers of government and the clear recognition of the importance of the power to judge, a point driven home by Blackstone in his *Commentaries on the Laws of England* (1765–1769). Blackstone, whose work was known to every lawyer in the American colonies, took Montesquieu's rather feeble notion of the judicial power and clothed it with the majesty of the English judges.

From the time of the first English settlements in America there was a continual interplay between ideas and events in the home country and the developing politics of the colonies. Mixed government and the separation of powers were common subjects of discussion in Massachusetts in the seventeenth century, and the constitutional debates over the role of king and parliament in England had their repercussions in America. In 1644, the elders of the church described the government of Massachusetts Bay as not a "pure aristocracy, but mixt of an aristocracy and democracy" and defended the "negative voice" which the governor and assistants exercised over decisions of the legislature. In 1679 the elders affirmed that the government of Massachusetts consisted in the "distribution of differing interest of power and privilege between the magistrates and freemen, and the distinct exercise of legislative and executive power." This statement preceded by eleven years the publication of Locke's *Second Treatise.* In the eighteenth century American thought fell into the same mold as that of other eulogists of the English constitution, adapting the terminology where necessary to fit the circumstances of colonial governments, until the increasing conflict between the English Parliament and the colonists brought to the foreground those aspects of the English system that were attracting criticism both at home and abroad, the cabinet system and the corrupt and unrepresentative House of Commons. In the colonies, Americans saw the mixing of legislative, executive, and judicial functions in the governors' councils and in the abuse of power by royal governors. With the upsurge of revolutionary fervor the doctrine of the separation of powers lay ready to hand, both as a stick with which to beat the British and as the basis for a truly American system of government.

The American achievement was to transform the theory of the mixed constitution, in which the powers of government were distributed among monarchy, aristocracy, and democracy, into a functionally divided system in which king and peers had no part, turning a class-based structure into one in which all the different branches of government drew their authority from the people. The first step in this process was taken when the revolutionary state constitutions were established in 1776 and succeeding years. These constitutions contained broad affirmations of the separation of powers, but the checks and balances of the

British model were out of favor. Consequently, popularly elected legislatures became the dominant branch of government.

The state legislatures soon began to act in ways that raised fears that the separation of powers, if not buttressed in some other way, meant that in practice, in THOMAS JEFFERSON's words, "All the powers of government, legislative, executive, and judiciary, result to the legislative body." The need for positive checks to the exercise of power was increasingly apparent. The *Essex Result* of 1778, recommending the form which the new constitution for Massachusetts should take, noted that "Each branch is to be independent, and further, to be so balanced, and able to exert such checks upon the others, as will preserve it from dependance on, or a union with them." Madison summed up the situation in *The Federalist* #48: "The conclusion that I am warranted in drawing from these observations is, that a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."

It was necessary therefore that the departments of government should "be so far connected and blended as to give to each a constitutional control over the others": the President to have a qualified VETO POWER and the PARDONING POWER, the Senate to play a part in appointments and in the ratification of treaties, and the Supreme Court, by implication at least, to have the power to declare legislative acts to be unconstitutional. As Madison observed in *The Federalist* #48, the three branches of government, although separate, must be "connected and blended" to ensure that each has some "constitutional control over the others."

Thus the separation of powers was not destroyed but rather reinforced by the adoption in the Constitution of a number of checks and balances. Although in some degree this represented a reversion to the pattern of the English Constitution, there was one vital respect in which no one wished to see the English model adopted. The popular denigration of George III as a tyrant in the revolutionary situation was understandable, but the members of the CONSTITUTIONAL CONVENTION had a much deeper understanding of the British political system. They understood the nature of the "*Cabinet Council* composed entirely of the principal officers of the great departments," they understood the role of the king's ministers in the legislature, and they knew well the system of crown influence and the role of unqualified members of the House of Commons. Their rejection of the whole basis of linking the executive and legislative branches of government in this way was complete, and Article I, section 6, of the Constitution, which provided that "no Person holding any Office under the United States, shall be a Member of either House during his Continuence in Office," was adopted without hesitation.

What then have been the practical effects of the separation of powers on the legal and political system of the United States? These effects can be seen in two broad, related areas: the decisions of the Supreme Court relating to "the powers of government," and the political articulation of the American system.

The Supreme Court has faced a number of difficulties which arise from the confusions inherent in the way the "separation of powers" evolved. The term "separation of powers" is sometimes used, as here, to refer to the doctrine that the major branches of government should be kept separate and limited to their own functions, but quite often the term is also used to include the checks and balances in the Constitution, which derive their rationale from a different source. Second, the word "power" is used ambiguously to mean both "branch" and "function." Finally, most of the Court's problems arise from the need to define the functions of government when it is argued that a particular branch has engaged in an activity outside its "proper" function. When the Constitution itself makes what the Court in BAKER V. CARR (1962) called "a textually demonstrable commitment" of an issue to a coordinate branch of government, then the Court has only to determine that to be the case, but what does the text demonstrate when it refers to "the legislative power" or "the executive power"? Such terms are vague indeed. The nub of the problem is that the functions of government can be defined only in the broadest conceptual terms—making rules, carrying rules into effect, and settling disputes arising out of the application of rules—but few activities of government fall unambiguously into such categories. The difficulty is particularly acute in any effort to categorize the exercise of the discretionary powers of government which the traditional doctrine of the separation of powers did not encompass. Indeed, the doctrine had been developed largely to render ineffective the exercise of such discretion in the form of the prerogatives of the Crown in England, or in the exercise of the powers of the governors in the American colonies.

As a consequence of these difficulties the Court has generally followed a pragmatic course in its decisions on the separation of powers. In practice the Court has generally accepted that no precise "watertight definition of government powers is possible." The first major issue facing the Supreme Court was to define its own role in the system of separation of powers and checks and balances. The Anti-Federalist and Jeffersonian interpretations of the Constitution looked back to the strict view that each branch of government not only should be separate from the others but also should not be dependent upon them,

and therefore not subject to their control. Such an interpretation would rule out JUDICIAL REVIEW as it has come to be exercised in the United States, and faint echoes of this attempt to escape the JURISDICTION of the Court have been heard as recently as President RICHARD M. NIXON's claim to an absolute EXECUTIVE PRIVILEGE for tape recordings of his conversations with his aides. However, in MARBURY V. MADISON (1803) Chief Justice JOHN MARSHALL emphatically asserted that it was "the province and duty of the judicial department to say what the law is"—and, in the course of doing so, to rule upon the extent of the power and functions of the other branches of government. Respect is due to the interpretations put on the Constitution by other branches, but in the end, as the Court said in UNITED STATES V. NIXON (1974), "the 'JUDICIAL POWER OF THE UNITED STATES' vested in the federal courts by Art. III Sec. 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and checks and balances that flow from the scheme of a tripartite government." The Court has, of course, accepted that interference in the activities of the other branches of government, in particular the Congress, is a delicate and sensitive matter. The POLITICAL QUESTIONS doctrine protects the Court against becoming embroiled in matters that could drag it down into the morass of day-to-day politics, but the Court itself retains the right to determine what is, and what is not, a political question.

The Supreme Court has set limits to the exercise of the legislative powers of Congress either to interfere directly in litigation, to interpret earlier legislation, or to set aside decisions of courts already made. It has also ruled that, as in HAYBURN'S CASE (1792) and *United States v. Ferreira* (1853), Congress cannot impose upon the courts duties not considered to be judicial in character. In two major decisions the Supreme Court announced that the houses of Congress could not properly appropriate to themselves a judicial function. In KILBOURN V. THOMPSON (1881) the Court concluded that in committing a witness to prison for refusing to testify before a committee the House of Representatives had "not only exceeded the limit of its own authority, but assumed power which could only be properly exercised by another branch of the government, because the power was in its nature clearly judicial." And OBITER DICTUM in WATKINS V. UNITED STATES (1957), the Court said, "Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government."

The Supreme Court has also prevented Congress from trenching upon the powers of the executive branch. In MYERS V. UNITED STATES (1926) the Court held that Congress could not limit by statute the President's power to remove executive officers, although in HUMPHREY'S EXECUTOR V. UNITED STATES (1935) it upheld congressional restrictions on the President's power to dismiss officers of independent regulatory agencies; and in BUCKLEY V. VALEO (1976) the Court invalidated the attempt by Congress itself to make appointments to the Federal Elections Commission. The Court quoted with approval the decision in *Springer v. Philippine Islands* (1928): "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions."

In general the Supreme Court has been generous in its interpretation of the powers of the President. However, in two important instances the Court has checked presidential power. In YOUNGSTOWN SHEET AND TUBE COMPANY V. SAWYER (1951) the Court held unconstitutional President Harry S. Truman's attempt to take over steel mills by EXECUTIVE ORDER, on the ground that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." And in *United States v. Nixon* (1974) the Court rejected the President's claim of executive privilege against a court order to produce tapes and documents relating to the Watergate investigations.

The area in which the Supreme Court has been subjected to the greatest degree of criticism for failing to maintain the spirit and practice of the separation of powers has been the way in which it has handled the question of the DELEGATION OF POWER by Congress to the executive branch and to independent regulatory commissions. In the modern administrative state, complex regulatory activities on the part of government necessitate agencies that will make rules (subordinate to statute law), apply those rules, and decide disputes arising out of their actions. The United States Congress, in establishing a large number of such agencies, has created a "headless fourth branch" of government. These agencies, in the words of Justice ROBERT H. JACKSON in *Federal Trade Commission v. Ruberoid Company* (1952), "have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their function within the separation of powers scheme of the Constitution. The mere retreat to the qualifying "quasi' is implicit with confession that all recognized classifications have broken down, and "quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." Although the Court has said "that the legislative power of Congress cannot be delegated," in practice it has allowed very broad and ill-defined delegations of power to admin-

istrative agencies. In two instances such delegation of power has been disallowed: PANAMA REFINING CO. V. RYAN (1935) and SCHECHTER POULTRY CORP. V. UNITED STATES (1935). In the latter case the Court asserted that the proper delegation of power required Congress to establish "standards of legal obligation, thus performing its essential legislative function." Failure to enact such standards for the administrative agency to follow would be an attempt to transfer the legislative function of Congress to others. However, in numerous cases the Court has allowed delegation with little in the way of effective standards set by Congress, and giving to the administrative agency, as in the *Permian Basin Area Rate Cases* (1968), a wide and uncontrolled discretion. In the field of FOREIGN AFFAIRS the delegation of legislative power to the President and his ability to negotiate with foreign powers and make EXECUTIVE AGREEMENTS with them, are very wide indeed, as the Court recognized in UNITED STATES V. CURTISS-WRIGHT EXPORT CORP. (1936).

In all these areas of tension between the branches of government, therefore, the Supreme Court, despite the broad generalizations which appear from time to time in its opinions, has followed a pragmatic approach to the separation of power. However, in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983) the Court, in the opinion of some, adopted a more theoretical and formal line of argument. In *Chadha* the Court invalidated the use of the LEGISLATIVE VETO, the device by which Congress reserved to itself the right to review administrative regulations and decisions taken under some 200 different statutes. The opinion, written by Chief Justice WARREN E. BURGER, concentrated on the narrow constitutional issues of "presentment" of legislation and BICAMERALISM, but referred to the theory of the separation of powers in the Constitution as dividing the powers of government into "three defined categories, legislative, executive and judicial" which are "functionally identifiable." An alternative approach was put by Justice LEWIS F. POWELL in a CONCURRING OPINION. His objection to the use of the legislative veto in this particular instance was that the House of Representatives had improperly exercised a judicial power by ruling on the case of a particular individual rather than making a general rule. In taking this position Justice Powell was appealing to an element of the separation of powers of long standing and of great importance: the generality of law, restricting the legislative power to the general rather than the particular.

Some critics of the Supreme Court argue with PHILIP KURLAND that as a consequence of its decisions "the ancient concept of the separation of powers and checks and balances has been reduced to a slogan, to be trotted out by the Supreme Court from time to time as a substitute for reasoned judgment." Whether or not this assessment of the judicial history of the separation should be considered too harsh, the impact of the concept upon the day-to-day working of the American political system has undoubtedly been enormous in terms of the relationship between the administration and the Congress. The prohibition on simultaneous membership of the legislative and executive branches in Article I, section 6, of the Constitution distinguishes the American system from the vast majority of genuinely democratic regimes in the world, most of which follow the parliamentary model. The fact that the President and his administration must operate from outside the legislature, rather than from within it, makes a vast difference to the techniques that must be employed to gain the acquiescence of the legislature to policies proposed by the executive. Much more important than the distinction between legislative and executive functions is the fact of two distinct branches of government with no overlapping of personnel (the Vice-President of the United States excepted). This strict separation of the personnel of government is certainly not the only reason why American political parties are so decentralized, diffuse, and undisciplined, but it is certainly a very important factor. The consequences for the way in which government policies are formulated, evolved, enacted, and implemented are immeasurable.

M. J. C. VILE
(1986)

Bibliography

BARBER, SOTIRIOS A. 1975 *The Constitution and the Delegation of Congressional Power.* Chicago: University of Chicago Press.

ELLIOTT, E. DONALD 1984 *INS v. Chadha*: The Administrative Constitution, the Constitution, and the Legislative Veto. *Supreme Court Review* 1983:125–176.

GWYN, W. B. 1965 *The Meaning of the Separation of Powers.* New Orleans: Tulane University Press.

KURLAND, PHILLIP B. 1978 *Watergate and the Constitution.* Chicago: University of Chicago Press.

SCHWARTZ, BERNARD 1963 *A Commentary on the Constitution of the United States.* New York: Macmillan.

VILE, M. J. C. 1967 *Constitutionalism and the Separation of Powers.* Oxford: Oxford University Press.

## SEPARATION OF POWERS
(Update)

During the 1990s, the Supreme Court attempted, in an unusual number of separation of powers cases, to give concrete meaning to that time-honored but abstract DOCTRINE, only to retreat to other, more specific and definable constitutional provisions to resolve those cases.

The Court attempted a comprehensive definition of the

doctrine in *Morrison v. Olson* (1988), in which it upheld the law establishing the INDEPENDENT COUNSEL. A statute violates the doctrine, the Court said, in three circumstances: (1) if the statute involves an effort by Congress to increase its own powers at the expense of those of the executive branch, (2) if the law impermissibly undermines the EXECUTIVE POWER, and (3) if the law "disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions." Applying this standard, the Court found that the independent counsel law worked no impermissible interference with the President's authority in violation of the principle of separation of powers.

In MISTRETTA V. UNITED STATES (1989), the Court returned to the three principles in upholding the validity of the U.S. Sentencing Commission. In subsequent separation cases, the Court reiterated this three-part test but notably declined to use it as a basis for resolving the disputes at hand, looking instead to the Constitution's APPOINTMENTS CLAUSE.

Thus, in 1991 the Court held, in *Freytag v. Commissioner of Internal Revenue*, that the appointment of special trial judges by the chief judge of the Tax Court did not violate the appointments clause. In 1994 the Court held, similarly, in *Weiss v. United States*, that the clause was not violated by the appointment of military judges by the Judge Advocate General to serve on special and general courts martial. Finally, in *Edmond v. United States* (1997), the Court upheld the authority of the U.S. Secretary of Transportation to appoint civilian members of the U.S. Coast Guard Court of Appeals, again in the face of an appointments clause challenge.

Dissatisfaction with the independent counsel law resurfaced during the second term of President WILLIAM J. CLINTON, when Kenneth Starr, an independent counsel appointed to investigate various alleged improprieties on the part of the President, recommended Clinton's IMPEACHMENT. His report was referred under the law to the Committee on the Judiciary of the U.S. HOUSE OF REPRESENTATIVES. The document triggered substantial debate over the scope, expense, and politics of Independent Counsel Starr's investigation and, for only the third time in American history, presidential impeachment hearings.

One of the grounds claimed by Starr to represent an impeachable offense was that the President had allegedly committed perjury during a deposition in a civil sexual harassment case when he testified about his sexual conduct with White House intern Monica Lewinsky. In 1997, the President argued to the Supreme Court that the Constitution required that federal courts defer civil litigation arising out of pretenure conduct against a President until the end of his term. The ruling in CLINTON V. JONES (1997) went against the President. The Court reviewed other instances in which "[s]itting Presidents have responded to court orders to provide testimony or other information" and concluded that "such interactions between the Judicial and Executive Branches can scarcely be thought a novelty." Like "every other citizen who properly invokes" a federal court's JURISDICTION, the Court held that the sexual harassment plaintiff, Paula Jones, had a "right to an orderly disposition of her claims." Ultimately, after Jones continued to press the suit, the President settled out of court for $850,000. The Court in 1998 also rejected appeals by the Clinton administration directed at blocking the GRAND JURY testimony of U.S. Secret Service agents and lawyers in the White House Counsel's office in proceedings involving the Starr investigation.

The extent to which separation of powers principles control the activities of administrative officials caused the Court to revisit IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983) in 1991. In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise* (1991), the Court held unconstitutional a law that gave power to a "Board of Review" (consisting of members of Congress) to veto decisions of the Washington, D.C., airport authority, an entity created by the laws of Virginia and the District of Columbia. Whether the Board of Review exercised executive or LEGISLATIVE POWER was irrelevant, the Court found; if the power was executive, the Constitution "does not permit Congress to exercise it," and if the power was legislative, the BICAMERALISM and PRESENTMENT requirements explained in *Chadha* were breached by the law.

The *Chadha* Court had insisted that the power to enact statutes may be exercised only "in accord with a single, finely wrought and exhaustively considered, procedure." This observation was recalled in perhaps the most important separation of powers case to be decided in recent years, *Clinton v. City of New York* (1998), which involved the constitutionality of the LINE-ITEM VETO. In the Line Item Veto Act of 1996, Congress enacted a provision that gave the President the power to "cancel in whole" any items of new spending or any "limited tax benefit" in newly enacted LEGISLATION. The President was required to notify Congress in a special message of each cancellation; if Congress, by a majority vote of each house (subject to possible presidential veto) disapproved the cancellation, the cancellation was rendered void.

This scheme, the Court held, ran contrary to the "finely wrought" procedure commanded by the Constitution in Article I, section 7, the same provision relied on by the Court in *Chadha* in invalidating the LEGISLATIVE VETO. Whether the law in question "impermissibly disrupts the

balance of powers among the three branches of government," the Court concluded, it was unnecessary to decide. A DISSENTING OPINION by Justice STEPHEN G. BREYER, joined in part by Justices SANDRA DAY O'CONNOR and ANTONIN SCALIA, argued that "there is not a dime's worth of difference between Congress's authorizing the President to cancel a spending item, and Congress's authorizing money to be spent at the President's discretion. And the latter has been done since the founding of the nation."

As part of the litigation concerning the line-item veto, the Court had occasion to resolve a related separation of powers controversy that had divided lower courts since the 1970s—the issue of CONGRESSIONAL STANDING. *Raynes v. Baird* (1997) held that members of Congress did not have a sufficiently personal stake in the validity of the hitherto unused line-item veto to establish STANDING to challenge its constitutionality.

MICHAEL J. GLENNON
(2000)

Bibliography

CHEMERINSKY, ERWIN 1997 *Constitutional Law: Principles and Policies.* New York: Aspen Law and Business.

GLENNON, MICHAEL 1990 *Constitutional Diplomacy.* Princeton, N.J.: Princeton University Press.

RAVEN-HANSEN, PETER and BANKS, WILLIAM 1995 From Vietnam to Desert Shield: The Commander in Chief's Spending Power. *Iowa Law Review* 18:79–147.

SCHOENBROD, DAVID 1993 *Power Without Responsibility.* New Haven, Conn.: Yale University Press.

STONE, GEOFFREY R.; SEIDMAN, LOUIS M.; SUNSTEIN, CASS R.; and TUSHNET, MARK V. 1996 *Constitutional Law*, 3rd ed. New York: Aspen Law and Business.

## *SERIATIM*

(Latin: "Severally" or "in series.") Members of multijudge courts sometimes deliver individual opinions seriatim rather than joining in a single "OPINION OF THE COURT." Before JOHN MARSHALL became Chief Justice, the Supreme Court followed this practice, requiring each Justice to explain his DECISION. Opinions delivered seriatim are necessarily less authoritative than those that carry the weight of the full Court or a majority of the Justices. For that reason Marshall abandoned the established practice in favor of giving an opinion of the court. THOMAS JEFFERSON, both in 1787 and later as President, favored a constitutional requirement that Supreme Court opinions be rendered seriatim.

DENNIS J. MAHONEY
(1986)

## *SERRANO v. PRIEST*
### 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr 601 (1971)

This decision of the California Supreme Court produced a flurry of hope that the disgraceful inequalities in the financing of public schools might fall to an EQUAL PROTECTION attack. Two years after the *Serrano* decision, the Supreme Court of the United States dashed that hope in SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ (1973).

Public schools throughout the nation are financed in major part through reliance on the local property tax. School districts that are property-wealthy thus can levy relatively low taxes and support their schools at high levels of spending per pupil. Poor districts, however, must levy taxes at much higher rates in order to spend at much lower levels per pupil. The California court in *Serrano* held this system unconstitutional, 6–1, both under the equal protection clause of the FOURTEENTH AMENDMENT and under parallel provisions of the state constitution. Because the decision merely reversed a trial court's determination that the complaint had not stated a valid constitutional claim, and remanded the case for trial, it was not a FINAL JUDGMENT and was not reviewable by the United States Supreme Court. Similarly, the ruling on state constitutional law was an ADEQUATE STATE GROUND, insulating the case from Supreme Court review.

The California court's opinion was devoted mainly to a discussion of the equal protection clause. Two grounds were found for subjecting the school finance scheme to STRICT SCRUTINY: the interest in education was held to be a FUNDAMENTAL INTEREST, and WEALTH DISCRIMINATION was held to be a SUSPECT CLASSIFICATION. Absent a showing of a COMPELLING STATE INTEREST justifying the inequalities in the state's statutory scheme, that scheme must fall.

The Supreme Court's *Rodriguez* decision, rejecting both the California court's bases for strict scrutiny, ended *Serrano*'s brief influence on the course of federal constitutional DOCTRINE. But other state courts reached similar results on the basis of their own state constitutions, and in California itself *Serrano* produced significant efforts to restructure public school finance.

KENNETH L. KARST
(1986)

## SEVENTEENTH AMENDMENT

Proposed by Congress on May 16, 1912, the Seventeenth Amendment went into effect on May 31, 1913. The amendment provided for DIRECT ELECTION of United

States senators by the people of the states. Previously, under the first clause of Article I, section 3, senators had been chosen by the state legislatures.

Selection of United States senators by state legislatures had been an object of criticism for many years. Direct election of senators was first proposed in 1826; and after 1893 a constitutional amendment to establish direct election was proposed in Congress every year. Even without a constitutional amendment, popular choice of senators was becoming the rule. By 1912, twenty-nine of the forty-eight states had provided either for nomination by party primaries, with the individual legislators bound to vote for their party's nominee, or for a statewide general election, the result of which was binding on the legislature.

The objectives of direct election included reducing corruption in selection of senators, elimination of national-party domination of state legislatures, and immediate representation of the people in the SENATE. But there was actually little change in the characteristics of persons elected to the Senate or in the proceedings and activities either of the Senate or of the state legislatures as a result of the Seventeenth Amendment.

The amendment has not occasioned much litigation. In 1915, the Supreme Court held that the right to vote for United States senators was a privilege of United States CITIZENSHIP, protected by the PRIVILEGES AND IMMUNITIES clause; and in 1946 it held that that right could not be denied on account of race. The Court has also held that the Seventeenth Amendment does not require that a candidate receive a majority of the votes cast in order to be elected.

DENNIS J. MAHONEY
(1986)

## SEVENTH AMENDMENT

An unexpectedly controversial provision of the document that emerged from the CONSTITUTIONAL CONVENTION OF 1787 was that giving the Supreme Court APPELLATE JURISDICTION "both as to law and fact." Anti-Federalists argued that the provision worked to abridge or deny the COMMON LAW right of TRIAL BY JURY in civil cases. Some, including PATRICK HENRY, went so far as to contend that it introduced the continental European civil law into the American court system. Although the convention had considered a clause protecting the right to a jury trial in civil cases, the clause was omitted; because the jury system varied somewhat from state to state, the meaning of the clause would not be certain. In the course of the RATIFICATION OF THE CONSTITUTION, five state conventions recommended an amendment to give the right explicit constitutional status.

The Seventh Amendment was proposed by Congress in 1789 and was ratified in 1791, as part of the BILL OF RIGHTS. As originally introduced by JAMES MADISON, the restriction on review of a jury's findings would have been inserted in Article III immediately after the definition of the Supreme Court's appellate jurisdiction. When the Bill of Rights was reorganized into a series of new articles, the restriction was joined to the general guarantee of a jury trial in federal civil cases.

The purpose of the amendment was not to extend the right to a jury trial but to preserve it as it then existed. The phrase "common law" did not purport to exclude cases arising under federal statutes but rather those cognizable in EQUITY or under ADMIRALTY AND MARITIME JURISDICTION. The word "jury" originally meant the common law jury of twelve men; but the Supreme Court held in *Colegrove v. Battin* (1973) that a jury of six members satisfied the general intent of the amendment. The Seventh Amendment is one of the very few provisions of the Bill of Rights not made applicable to the states under the INCORPORATION DOCTRINE. State courts would thus be free, under federal constitutional law, to dispense with juries altogether in civil cases.

Since the FEDERAL RULES OF CIVIL PROCEDURE in 1934 united the formerly discrete procedures of law and equity, new questions have emerged under the Seventh Amendment. In BEACON THEATRES INC. V. WESTOVER (1959) and DAIRY QUEEN, INC. V. WOOD (1962) the Supreme Court held that the right to jury trial attached to all issues of law of the type formerly triable to a jury at common law, even when those issues were "incidental" to equitable issues. In *Ross v. Bernhard* (1970) this principle was extended to STOCKHOLDER'S SUITS, which previously had been heard only under the rules of equity.

DENNIS J. MAHONEY
(1986)

## SEVERABILITY

A court determines whether a statute is severable (or separable) in order to decide one of two different questions: When part of the law is unconstitutional, should the court hold the entire statute invalid, or merely the offending part? When the law can be applied validly to the litigant in court, should the court nonetheless hold the law invalid because it is capable of being applied unconstitutionally to others?

The first question was presented in CARTER V. CARTER COAL CO. (1936). Congress had regulated coal prices and the wages and hours of coal miners. After holding the wage and hour regulations invalid, the Supreme Court posed the severability issue in the usual way, as a question of LEGISLATIVE INTENT: if Congress had known the wage

and hour provisions would be held invalid, would it still have regulated prices? Congress had stated plainly that if any part of the coal act were held invalid, the rest of the law remained effective. Nonetheless, the Court said, the price controls were so closely related to the labor provisions that Congress would not have enacted them alone. The price controls were thus invalid, whether or not they would have been valid if considered by themselves. The issue of severability calls into play the same kind of judgment employed in JUDICIAL REVIEW of the constitutionality of LEGISLATION.

*Carter* involved a federal statute. When a state law presents a similar question of severability, the Supreme Court ordinarily leaves that question to the state courts. However, a state statute may present the Court with the second type of severability issue. When a state law is INVALID ON ITS FACE—for example, under the FIRST AMENDMENT doctrine of OVERBREADTH—the Court refuses to enforce the law because of its potential unconstitutional application to persons not in court. This practice moderates the effect of the rule denying a litigant STANDING to raise other persons' legal rights.

KENNETH L. KARST
(1986)

Bibliography

MONAGHAN, HENRY P. 1982 Overbreadth. *Supreme Court Review* 1982:1–39.

NOTE 1984 Severability of Legislative Veto Provisions: A Policy Analysis. *Harvard Law Review* 97:1182–1197.

STERN, ROBERT L. 1937 Separability and Separability Clauses in the Supreme Court. *Harvard Law Review* 51:76–128.

## SEWARD, WILLIAM H. (1801–1872)

William Henry Seward was a New York lawyer, governor (1838–1842), United States senator (1849–1861), and secretary of state (1861–1869). As governor he prevented the extradition to Virginia of three men accused of helping a slave escape, and thus set off a minor interstate squabble. In *Jones v. Van Zandt* (1847) Seward, as cocounsel with SALMON P. CHASE, unsuccessfully appealed the conviction of an Ohio Quaker accused of aiding fugitive slaves. In the Senate, Seward opposed the COMPROMISE OF 1850, asserting that on the issue of slavery there was "HIGHER LAW than the Constitution." He supported the admission of Kansas as a free state, attacked the Supreme Court's decision in DRED SCOTT V. SANDFORD (1857), and in 1858 declared that slavery had created "an irrepressible conflict" for the Union. During the SECESSION crisis Seward served on the Committee of Thirteen, and proposed that Congress guarantee to protect slavery wherever it existed. Seward thought secession was illegal, but he urged Lincoln to evacuate Fort Sumter and negotiate with Confederate officials. Seward initially opposed the EMANCIPATION PROCLAMATION and successfully urged Lincoln to delay it until after a Union military victory. In FOREIGN AFFAIRS he deftly negotiated to keep Britain and France out of the war, and avoided a conflict with Britain over the *Trent* affair. He also laid out the legal argument that led to a successful damage claim against Britain over the *Alabama*. During Reconstruction, Seward supported ANDREW JOHNSON's policies, and drafted many of his veto messages. He also negotiated the acquisition of Alaska (1867) from Russia.

PAUL FINKELMAN
(1986)

Bibliography

VAN DEUSON, GLYNDON G. 1967 *William Henry Seward*. New York: Oxford University Press.

## SEX AND ANTIDISCRIMINATION LEGISLATION

See: Race and Sex in Antidiscrimination Law

## SEX DISCRIMINATION

The application of constitutional principle to government action that distinguishes on the basis of sex is a late-twentieth-century development. From the 1860s until 1971, the record remained unbroken: the Supreme Court rejected every effort to overturn sex lines in the law. Equalizing the rights, responsibilities, and opportunities of men and women was not considered a judicial task; without offense to the Constitution, women could be kept off juries and barred from occupations ranging from law to bartending. Women could also be "protected" from long hours, night work, and hazardous jobs, as in MULLER V. OREGON (1908), but protection of this order limited women's opportunities and relied upon the notion that a woman "looks to her brother and depends upon him."

The Court explained its position in *Fay v. New York* (1947). The NINETEENTH AMENDMENT's ratification in 1920 gave women the vote, but only that; in other respects, the Constitution remained an empty cupboard for sex equality claims. Nearly a decade and a half later, in *Hoyt v. Florida* (1961), a unanimous bench reaffirmed the traditional view. The Court held that a volunteers-only system for females serving on juries encountered no constitutional shoal; it was rational to spare women from the obligation to serve

in recognition of their place at the "center of home and family life."

Pervasive social changes following WORLD WAR II undermined the *Hoyt* assumptions. That period saw unprecedented growth in women's employment outside the home, a revived feminist movement, changing marriage patterns, and a decline in necessary home-centered activity. Expansion of the economy's service sector opened places for women in traditional as well as new occupations. Curtailed population goals, facilitated by more effective means of controlling reproduction, and extended lifespans counted as well among important ingredients in this social dynamic. These last two developments created a setting in which the typical woman, for the first time, was experiencing most of her adult years in a household not dominated by child care requirements. Columbia economics professor Eli Ginzberg appraised the sum of these changes as "the single most outstanding phenomenon of our century." The BURGER COURT, not noted for its activism in other areas, responded.

Through the 1960s, the Supreme Court had explained its EQUAL PROTECTION rulings in terms of a two-tier model. Generally, challenged legislation was ranked at the lower tier and survived judicial inspection if rationally related to a permissible government objective. Exceptional cases, ranged on the upper tier, involved FUNDAMENTAL RIGHTS (voting is a prime example) or SUSPECT CLASSIFICATIONS (race is a paradigm). Review in these exceptional cases was rigorous. To survive inspection, the legislative objective had to be compelling, and the classification, necessary to its accomplishment. (See STRICT SCRUTINY; COMPELLING STATE INTEREST.)

Equal protection adjudication in gender discrimination cases prompted "in between" standards. As the 1970s wore on, the STANDARD OF REVIEW for sex-based classification inched up toward the higher tier. The process commenced with *Reed v. Reed* (1971). A unanimous Court held that an Idaho estate administration statute, giving men preference over similarly situated women, denied would-be administrator Sally Reed the equal protection of the laws. *Reed* attracted headlines; it marked the first solid break from the Supreme Court's consistent affirmation of government authority to classify by sex. The terse *Reed* opinion acknowledged no departure from precedent, but Court-watchers recognized something new was in the wind.

Less than a year and a half after the laconic *Reed* decision, the Court came within one vote of declaring sex a "suspect" category. In FRONTIERO V. RICHARDSON (1973) the Justices held 8–1 that married women in the uniformed services were entitled to the same fringe benefits as married men. Under the laws declared unconstitutional, men received a housing allowance and health care for their civilian wives automatically; women received these family benefits only if they supplied over three-fourths of the couple's support.

Four of the Justices ranked sex a suspect classification. Justice LEWIS F. POWELL, concurring, articulated a prime reservation of the remaining five Justices: our eighteenth- and nineteenth-century Constitution-makers had evidenced no concern at all about the equality of men and women before the law. The Court must tread lightly, Justice Powell cautioned, when it enters the gray zone between CONSTITUTIONAL INTERPRETATION, a proper judicial task, and constitutional amendment, a job for the people's elected representatives.

No fifth vote has emerged for explicit placement of sex at the top tier of equal protection analysis, although the Court has repeatedly acknowledged that it applies a standard considerably more exacting than the lower tier RATIONAL BASIS test. If a classification based upon gender is to withstand constitutional challenge, the defender of the sex criterion must establish what the Court in *Kirchberg v. Feenstra* (1981) called "exceedingly persuasive justification"; the sex-based distinction will be condemned unless it "substantially furthers an important government interest." In MISSISSIPPI UNIVERSITY FOR WOMEN V. HOGAN (1982) the Court noted that it was unnecessary to "decide whether classifications based upon gender are inherently suspect," for the classification challenged there could not survive even intermediate tier scrutiny. If the Court continues to review categorization by gender with the rigor displayed in many of its 1973–1982 decisions, however, the "suspect" seal may eventually be placed on accumulated precedent.

Despite the absence of a majority opinion, the 8–1 *Frontiero* JUDGMENT was a notable way-paver for challenges to statutes that openly disadvantage or denigrate women. First, the Court did not invalidate the flawed legislation; it repaired it. Congress provided benefits for the military man's family; the Court, in effect, extended the same benefits to families in which the service member was female. Second, in contrast to the statute that figured in *Reed*—a nineteenth-century hangover repealed prospectively months before the Court heard Sally Reed's appeal—post-World War II legislation was at issue in *Frontiero*. Most significantly, *Frontiero* invalidated the type of gender line found most frequently in federal and state legislation. Wives were deemed dependent regardless of their own economic circumstances. Husbands were ranked independent unless they contributed less than one-fourth of the couple's support. In disallowing resort to this particular stereotype the Court set the stage for its subsequent disallowance of similar stereotypes in other settings.

Since *Frontiero*, with few exceptions, the Court has

regularly overturned legislation explicitly invoking a male/female criterion and perceived by the Justices as denigrating women. A Utah statute that required a parent to support a son until age twenty-one but a daughter only until eighteen was struck down in *Stanton v. Stanton* (1975). Using DUE PROCESS analysis, the Court invalidated laws excluding all women from jury duty save those who volunteered (TAYLOR V. LOUISIANA, 1975) or chose not to opt out (*Duren v. Missouri*, 1979). In *Kirchberg v. Feenstra* (1981) a unanimous bench condemned Louisiana's "head and master" law, which gave the husband alone a unilateral right to dispose of property jointly owned with his wife.

Even a noncontributory welfare program—the type of governmental largess generally left untouched by the judiciary—has been revised by Court decree to eliminate the law's discrimination against women. Congress had provided for public assistance benefits to families where dependent children had been deprived of parental support because of the father's unemployment; no benefits were allowed when mother, rather than father, qualified as the unemployed parent. "Congress may not legislate "one step at a time' when that step is drawn along the line of gender, and the consequence is to exclude one group of families [those in which the female spouse is a wage earner] altogether from badly needed subsistence benefits," Justice HARRY BLACKMUN concluded for a Court unanimous on the constitutional issue in CALIFANO V. WESTCOTT (1979). Although the Justices divided 5–4 on the appropriate remedy (the majority extending the benefit to families of unemployed mothers, the dissenters preferring to invalidate the entire program), all subscribed solidly to the equal protection ruling.

In 1837 Sarah Grimke made this plea: "I ask no favors for my sex, I surrender not our claim to equality. All I ask of our brethren, is that they . . . take their feet . . . off our necks. . . ." Does the equal protection principle operate with the same bite when men rather than women are the victims of explicit gender-based discrimination? Constitutional doctrine after *Reed* has evolved, with some insecurity, through three stages. In the first, statutes ostensibly favoring women were upheld if they were seen as "compensatory," even if that rationalization was entirely post hoc. Then the Court recognized more consistently that gender-based classifications rooted in "romantic paternalism" reinforce stereotypes and perpetuate anachronistic social assumptions that confine women's opportunities. In the third stage, the Court attempted a reconciliation of these two strands of doctrine: a classification that favors women can survive an equal protection attack, but only if it reflects a conscious legislative choice to compensate for past, gender-based inequities.

In two first-stage decisions the Court upheld laws that appeared to favor women. *Kahn v. Shevin* (1974) involved a $15-per-year state property tax saving for widows (along with the blind and the totally disabled) but not widowers. The classification, as the Court appraised it, was genuinely "benign"—it helped some women and harmed none. Following on the heels of *Kahn*, the Court ruled, in *Schlesinger v. Ballard* (1975), that it was not a denial of equal protection to hold a male naval officer to a strict "up or out" (promotion or discharge) system, while guaranteeing a female officer thirteen years of duty before mandatory discharge for lack of promotion.

*Kahn* and *Ballard* were greeted by some in a Panglossian manner. The decisions could be viewed as offering women the best of both worlds—a High Court ready to strike down classifications that discriminate against females, yet vigilant to preserve laws that prefer or favor them. But this analysis was uncritically optimistic. The classification attacked in *Kahn* was barely distinguishable from other products of paternalistic legislators who had regarded the husband more as his wife's guardian than as her peer. And in *Ballard*, neither contender challenged the anterior discrimination that accounted, in large measure, for the navy's promoting men more rapidly than women—the drastically curtailed opportunities and assignments available to navy women.

Sex as a proxy for need, or as an indicator of past discrimination in the marital unit, is a criterion too gross to survive vigorous equal protection scrutiny. The Court eventually demonstrated its appreciation that discrimination by gender generally cuts with two edges, and is seldom, if ever, a pure favor to women. A young widower whose wage-earning wife had died giving birth to the couple's son brought suit in *Weinberger v. Wiesenfeld* (1975). The unanimous Court declared unconstitutional the SOCIAL SECURITY ACT's provision of a mother's benefit for the caretaker of a deceased wage-earner's child. As in *Frontiero*, the remedy was extension of the benefit in question to the entire class of similarly situated individuals, males as well as females. In effect, the *Wiesenfeld* judgment substitutes functional description (sole surviving parent) for the gender classification (widowed mother) employed in the statute.

The government had urged that the sex differential in *Wiesenfeld* operated "to offset the adverse economic situation of women." But the Court read the legislative history closely and rejected "the mere recitation of a benign, compensatory purpose" as a hindsight apology for laws in fact based on twin assumptions: that man's primary place is at work, woman's at home; and that a gainfully employed woman is a secondary breadwinner whose employment is less crucial to her family than her husband's.

*Wiesenfeld's* focus on actual legislative purpose set a penetrating standard for sex classifications defended as

"benign" or "compensatory." Gender classifications superficially favoring women and affecting interests ranging from the purchase of beer to attendance at a nursing school have accordingly been struck down.

CRAIG V. BOREN (1976) held unconstitutional an Oklahoma law allowing young women to purchase 3.2 percent beer at age eighteen, but requiring young men to wait until age twenty-one. *Orr v. Orr* (1979) declared violative of equal protection a statute that required husbands, but never wives, to pay alimony. CALIFANO V. GOLDFARB (1977) rejected social security classifications qualifying a widow for survivor's benefits automatically, a widower only upon proof that his wife supplied three-fourths of the couple's support.

The 4–1–4 judgment in *Goldfarb*, in contrast to the *Wiesenfeld* decision on which *Goldfarb* built, was a cliffhanger. The PLURALITY OPINION concentrated on discrimination against women as breadwinners. Justice JOHN PAUL STEVENS, who cast the swing vote in favor of widower Goldfarb, focused on the discrimination against the surviving male spouse. Why this discrimination against a class of men? Like the plurality, Justice Stevens refused to accept the government's hindsight compensatory justification for the scheme. Congress, the record suggested, had ordered different treatment for widows and widowers out of longstanding "habit"; the discrimination encountered by widower Goldfarb was "merely the accidental by-product of [the legislators'] traditional way of thinking about females." Four members of the Court, in dissent, repeated a long rehearsed argument: the sex-based classification accurately reflects the station in life of most women, it operates benignly in women's favor, and it is administratively convenient. In 1980, however, the Court adhered to *Goldfarb* with a clearer (8–1) majority, in WENGLER V. DRUGGISTS MUTUAL INSURANCE CO.

The most emphatic reaffirmation of *Wiesenfeld*'s skeptical view of benign gender-based classification came in 1982, one day after expiration of the extended deadline for ratification of the proposed EQUAL RIGHTS AMENDMENT. The Court decided, 5–4, in *Mississippi University for Women v. Hogan*, that Mississippi's single-sex admissions policy for a nursing school failed to meet the heightened standard of review. Justice SANDRA DAY O'CONNOR, who, a century earlier under BRADWELL V. ILLINOIS (1873), could have been barred from practicing law without offense to the Constitution, wrote the majority opinion.

Challengers in most of the cases just surveyed contended against gross assumptions that females are (and should be) concerned primarily with "the home and the rearing of the family," males with "the marketplace and the world of ideas" (*Stanton v. Stanton*, 1975). The complainants did not assail the accuracy of these assumptions as generalizations. Rather, they questioned each law's erroneous treatment of men and women who did not fit the stereotype, and the fairness of gender pigeonholing in lieu of neutral, functional description. The traditional legislative slotting, they argued, amounted to self-fulfilling prophecy. A Court that in 1948, in GOESAERT V. CLEARY, had declared "beyond question" the constitutionality of legislation "drawing a sharp line between the sexes," was receptive in the 1970s to argument to which it would not "give ear" a generation earlier.

The Court has left a narrow passage open, however, for compensatory legislation that does not rest on traditional role-typing. In *Califano v. Webster* (1977) the Court distinguished from habitual categorization by sex a law designed, at least in part, to ameliorate disadvantages women experienced. A social security benefit calculation, effective from 1956 to 1972, established a more favorable formula for retired female workers than for retired male workers. The legislative history indicated that this scheme, unlike those in *Wiesenfeld* and *Goldfarb*, had been conceived in light of the discrimination commonly encountered by gainfully employed women, specifically, depressed wages for "women's work" and the early retirement that employers routinely forced on women but not on men. While tilting toward a general rule of equal treatment, the *Webster* PER CURIAM opinion approves genuinely compensatory classifications that are adopted for remedial reasons rather than out of prejudice about "the way women are," and are trimly tailored in scope and time to match the remedial end.

Neutrally phrased laws that disproportionately affect one sex have not attracted the heightened scrutiny generally accorded explicit gender-based classifications that serve as a proxy for a characteristic or condition susceptible of individual testing. Citing RACIAL DISCRIMINATION precedent, the Court has held that facially neutral classifications that disproportionately affect members of one sex are not necessarily sex-based. The Court has not yet considered in a constitutional setting whether official lines may be drawn based on actuarial differences, but statutory precedent indicates the answer will be "no."

"[G]ood intent or absence of discriminatory intent" does not immunize an employment practice from the equal opportunity requirement of Title VII of the CIVIL RIGHTS ACT OF 1964, which now covers both public and private employment. GRIGGS V. DUKE POWER CO., a notable 1971 Title VII race discrimination decision, so held. But in WASHINGTON V. DAVIS (1976) the Court held the *Griggs* principle inapplicable to race discrimination claims invoking the Constitution rather than Title VII. PERSONNEL ADMINISTRATOR OF MASSACHUSETTS V. FEENEY (1979) expanded the *Washington v. Davis* reasoning. *Feeney* involved an assault on exorbitant veterans' preferences in civil service as impermissibly gender-biased. Helen Feeney challenged

the nation's most extreme veterans' preference—an absolute lifetime preference Massachusetts accorded veterans in a range of civil service positions. The preference had "a devastating impact upon the employment opportunities of women"; it operated to reserve top jobs for a class almost exclusively male. The purpose? Purely to aid veterans, surely not to harm women, Massachusetts (and the United States, AMICUS CURIAE) maintained. Of course, to become a veteran one must be allowed to serve her country, and the military had maintained highly restrictive quotas and more exacting qualification standards for females. When litigation in *Feeney* commenced, over ninety-eight percent of Massachusetts veterans were male.

Feeney sought accommodation of the conflicting interests—aiding veterans and opening to women civil service employment beyond the "pink-collar" ghetto. The typical "points-added" preference, she said, was not at issue, only the extreme arrangement Massachusetts had legislated, which placed a veteran with a minimum passing grade ahead of a woman with a perfect score, and did so for each promotion as well as for initial hiring. A preference so large, she argued, took too much from Pauline to pay Paul.

The Court rejected the proffered distinction between moderate and exorbitant preferences. The "discriminatory purpose" hurdle could not be surmounted absent proof that the Massachusetts preference "was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service." The lawmaker must *want*, not merely anticipate, the consequences. Alone, disparate impact on one sex, however "devastating" and "inevitable," does not violate equal protection.

The discriminatory purpose requirement, as elaborated in *Feeney*, leaves a slack rein for legislative choices with foreseeable but undesigned adverse effects on one of the sexes. Suppose, for example, that the social security payments at issue in *Wiesenfeld* or *Goldfarb* had turned not on sex but on the deceased wage-earner's status as the family's principal breadwinner. In most families, husbands would fit that neutrally phrased description, wives would not. May Congress, without violating equal protection, resort to a "principal breadwinner" standard in social welfare legislation in the interest of fiscal economy? Would use of a "principal breadwinner" criterion survive constitutional review as a measure enacted "in spite of," rather than "because of" its practical effect—its reduction of the value to the family of the wife's earnings? The only, uncertain, guide is an obiter dictum from *Feeney*, in which the Court accepted that "covert" sex classifications, ostensibly neutral but in fact a pretext for sex-based discrimination, are vulnerable to equal protection attack.

Can actuarial differences, for example, in life expectancies, health records, or accident experiences, provide constitutionally valid grounds in any context for gender-based categorizations? Sex averaging has not fared well in post-1970 constitutional litigation. Thus, *Reed v. Reed* and *Frontiero v. Richardson* rejected as a basis for government action the generalization that "men [are] as a rule more conversant with business affairs than women"; *Craig v. Boren*, the fact that more 18–20-year-old males than females drink and drive; *Orr v. Orr* (1979), the reality that wives far more often than husbands "need" alimony. Legislation resting on characteristics, attributes, habits, or proclivities of the "typical man" or "typical woman" have been rejected for two reasons: they reinforce traditional restrictive conceptions of the social roles of men and women; and they burden members of one sex by employing gender as a proxy for a characteristic susceptible to individual testing or at least capable of sex-neutral description. But actuarial tables, their defenders point out, are used in situations in which individual testing is not feasible. The Court has not yet explicitly confronted actuarial tables in a constitutional context, but a Title VII decision may indicate the position the Court will take in an equal protection challenge to government action.

*Los Angeles Department of Water and Power v. Manhart* (1978) raised the question whether women could be required to pay more currently in order to receive monthly benefits on retirement equal to those received by men. The majority held the two-tier charges inconsistent with Title VII's prohibition of sex-based classification. All recognized in *Manhart* that the statement, "on the average, women live longer than men," is accurate, and that an individual's lifespan generally cannot be forecast with precision. But the majority refused to countenance a break from the general Title VII rule against sex averaging. Unquestionably, for pension purposes, women destined to die young are burdened by placement in an all-female class, and men destined to live long are benefited by placement in an all-male class. Moreover, Justice Stevens suggested for the majority, the group insurance context may not be an ideal setting for urging a distinction other than age: "To insure the flabby and the fit as though they were equivalent risks may be more common than treating men and women alike; but nothing more than habit makes one 'subsidy' seem less fair than the other." The Court adhered to *Manhart*, when invited to reconsider, or contain the holding, in *Arizona Governing Committee v. Norris* (1983).

Are women to have the opportunity to participate in full partnership with men in the nation's social, political, and economic life? Kenneth L. Karst has identified this overarching question, in its constitutional dimension, as one ripe for synthesis in the final quarter of the twentieth century. The synthesis envisioned would place within an

encompassing sex equality framework cases involving explicit male/female classification as well as cases on REPRODUCTIVE AUTONOMY and pregnancy-linked regulation. That synthesis, however, may well depend on the clarity of directions from the political arena. The Court has treated reproductive choice cases under a "personal autonomy," not a "sex equality" rubric, and it has resisted argument that separate classification of pregnant women is sex-based.

In a bold 1973 ruling, ROE V. WADE, the Court struck down an anti-abortion law as unwarranted state intrusion into the decision of a woman and her doctor to terminate a pregnancy. *Roe v. Wade* has been typed aberrational—an extraordinarily activist decision issued from a bench reputedly deferential to legislative judgments. It bears emphasis, however, that the Court bypassed an equal protection argument presented for the female plaintiffs. Rather, the Court anchored stringent review to a concept of personal autonomy derived from the due process guarantee. Two decisions, particularly, had paved the way: GRISWOLD V. CONNECTICUT (1965), which held inconsistent with due process Connecticut's ban on use of contraceptives even by married couples, and EISENSTADT V. BAIRD (1972), which extended *Griswold* to strike down Massachusetts' prohibition on sales of contraceptives except to married persons by prescription.

Some speculated that *Roe v. Wade* and a companion 1973 decision, *Doe v. Bolton*, were motivated, at least in part, by concerns about unwanted children born into impoverished families. But in MAHER V. ROE (1977) the Court indicated that such speculations had been mistaken. The Court declined to extend the 1973 rulings to require state support for an indigent woman's elective abortion.

The impoverished women, on whose behalf constitutional claims to public assistance for abortion were pursued, relied primarily on the equal protection principle. They maintained that, so long as government subsidized childbirth, it could not withhold subsidy for abortion, a far less expensive, and, at least in the first trimester, less risky procedure. If government pays for childbirth but not abortion, then, the *Maher* plaintiffs argued, government intrudes upon a choice *Roe v. Wade* said the state must leave to doctor and patient. The Court, however, distinguished government prohibition from government support. Though the state could not bar access to a woman able to pay for an abortion, it was not required to buy an admission ticket for the poor woman. Rather, government could pursue a policy of encouraging childbirth (even if that policy would affect only the poor) by refusing Medicaid reimbursement for nontherapeutic abortions and by banning such abortions in public hospitals. Though widely criticized in the reproductive-choice context, the distinction between government stick and government carrot had been made in other settings to which the Court referred in its 1977 ruling.

The *Maher* logic was carried further in HARRIS V. MCRAE (1980). The federal law at issue excluded even medically needed abortions from a medical benefits program. In holding, 5–4, that this exclusion violated neither the due process nor the equal protection clause, the Court reiterated the distinction drawn in *Maher:* though the government may not proscribe abortion, it need not act affirmatively to assure a poor woman's access to the procedure.

Following after the intrepid 1973 abortion decisions, the later public-funding-of-abortion rulings appear incongruous. The *Roe v. Wade* decision was not easy to reach or explain. Social and economic conditions that seem irreversible, however, suggest that the ruling made by the Court in 1973 will remain with us in the long run, while the later dispositions may eventually succumb to a different legislative view of state and national policy, and of the centrality of choice with respect to childbearing to a woman's control of her life's course.

When does disadvantageous treatment of pregnant workers operate to discriminate on the basis of sex? High Court decisions on that question display less than perfect logic and consistency.

School teachers may not be dismissed or placed on forced leave arbitrarily at a fixed stage in pregnancy well in advance of term. Such a rule conflicts with due process, the Court ruled in CLEVELAND BOARD OF EDUCATION V. LAFLEUR (1974). Similarly invoking due process, the Court held in *Turner v. Department of Employment Security* (1975) that pregnant women willing and able to work may not be denied unemployment compensation when jobs are closed to them. It is unlawful under Title VII, as interpreted by the Court in *Nashville Gas Co. v. Satty* (1977), for an employer to deprive women disabled by pregnancy of accumulated job-bidding seniority when they return to work.

But *Geduldig v. Aiello* (1974) held that a state-operated disability income protection plan could exclude pregnancy without offense to the equal protection principle. And in an analogous Title VII case, *General Electric Company v. Gilbert* (1976), the Court held that a private employer's exclusion of pregnant women from disability coverage did not discriminate on the basis of sex because all "nonpregnant persons," women along with men, were treated alike.

Lawyers may attempt to square the apparently contradictory constitutional decisions by referring to the different principles employed in the Court's analyses—equal protection in *Aiello*, due process in both *LaFleur* and *Turner.* But the particular due process theory of IRREBUTTABLE PRESUMPTIONS the Court pressed into service in *LaFleur* has lost favor with the Justices in other contexts.

A factor not fully acknowledged in the written opinions, and based more on the Justices' experience than on legal analysis, may account for the divergent responses. Perhaps the able pregnant woman seeking only to do a day's work for a day's pay, or the woman seeking to return to her job relatively soon after childbirth, is a credible figure to the Court, while the woman who asserts she is disabled by pregnancy is viewed with suspicion. Is she really incapacitated physically or is she malingering so that she may stay "where she belongs"—at home tending baby?

With respect to Title VII, Congress in 1978 simplified the judicial task by prospectively overruling *General Electric.* It amended the statute to say explicitly that classification on the basis of sex includes classification on the basis of pregnancy. The Court gave the amended statute a cordial reception in *Newport News Shipbuilding of Drydock Co. v. EEOC* (1983). The congressional definition placed in Title VII is not controlling in constitutional adjudication, but the Court may be stimulated by the legislature's action to revise its view, expressed in *Aiello* and *General Electric*, that singling out "pregnant persons" is not a sex-based action. Coming full circle, there will be pressure on the Court not simply to check regulation disadvantageous to pregnant women but to uphold new-style protective legislation—for example, laws requiring employers to grant to pregnant women a voluntary leave period not accorded others with temporarily disabling physical conditions.

In what areas does the Constitution allow explicit male/female classification? A few idiosyncratic problems survive.

According to current doctrine, the Constitution affords some leeway for discrimination with respect to parental rights and relationships, at least when children are born out of wedlock. A unanimous Court held in *Quilloin v. Walcott* (1978) that an unwed father who "has never exercised actual or legal custody over his child" has no constitutional right to block adoption approved by the mother. (In contrast, the Court held in *Caban v. Mohammed* [1979] that a state statute discriminated on the basis of sex in violation of equal protection when it permitted adoption of a child born out of wedlock solely on the mother's consent, even when the father's parental relationship with the child was substantial.) And according to *Parham v. Hughes* (1979) a state may condition an unwed father's (but not an unwed mother's) right to recover for wrongful death upon his legitimation of his child by court order. The main theme of the *Parham* opinion had been sounded earlier: women and men were not similarly situated for the purpose at hand—maternity is rarely in doubt, but proof of paternity is often difficult. Hence, as the Court held in LALLI V. LALLI (1978), the state may erect safeguards against spurious filiation claims. Those safeguards may be applied even when, as in *Parham*, father and child had a close and constant relationship.

MICHAEL M. V. SUPERIOR COURT (1981) upheld, 5–4, California's "statutory rape" law, under which a male who engages in sexual intercourse with an underage female commits a crime; a female who engages in sexual intercourse with an underage male does not. Both participants in the act that precipitated the prosecution in *Michael M.* were underage.

There was no majority opinion in *Michael M.* Justice WILLIAM H. REHNQUIST wrote for the Court's plurality. He postulated as the statute's purpose, as California had argued, the prevention of teenage pregnancy, and reasoned that males and females were not similarly situated in this setting. Nature inhibited the female, for she would suffer the consequences. The law could legitimately take into account this fact of life by punishing the male, who lacked a biological deterrent. Moreover, the plurality found persuasive California's further contention that sparing the female from criminal liability might encourage her to report the unlawful activity.

Given the ancient roots of the California law, Justice WILLIAM J. BRENNAN pointed out in dissent, it was plain that the sex classification "was initially designed to further . . . outmoded sexual stereotypes" (young women are not capable of consenting to an act of sexual intercourse, young men can make such decisions for themselves). For Justice Stevens, who dissented separately, the critical question in *Michael M.* was whether "the sovereign . . . govern[s] impartially" under a statute that authorizes punishment of the male, but not the female, even "when they are equally responsible" for the disfavored conduct, indeed even "when the female is the more responsible of the two." The answer, it seemed to Justice Stevens, was clearly "no."

Although by 1980 many states had amended all of their sex crime laws to render them equally applicable to males and females, *Michael M.* touched a sensitive nerve. In view of the 4–1-4 division, the decision may well remain an isolated instance.

ROSTKER V. GOLDBERG (1981) presented the politically loaded question whether Congress could confine draft registration to males. Congress had thought about the matter and decided it in 1980. It considered, on the administration's recommendation, authorizing the President to require registration by both sexes. But it decided on registration for males only. The Court's 6–3 decision upheld the sex classification. The opinion, written by Justice Rehnquist, underlined the special deference due congressional judgments in the areas of national defense and military affairs.

The *Rostker* opinion asserted that men and women were not similarly situated for the purpose at hand because women were excluded from combat service, an exclusion

"Congress specifically recognized and endorsed . . . in exempting women from registration." Reminiscent of *Schlesinger v. Ballard*, where no party challenged the dissimilar promotion opportunities for male and female naval officers, no party challenged the combat exclusion in *Rostker.* Even so, the executive branch had estimated that in the event of a major mobilization there would be a substantial number of noncombat positions in the armed services that conscripted women could fill. Against this backdrop *Rostker* may be explained as a WAR POWERS case, unlikely to have a significant influence in future sex discrimination cases.

Constitutional doctrine relating to gender discrimination, although still evolving, and variously interpreted, is nonetheless a remarkable judicial development. In contrast to race discrimination, an area in which constitutional interpretation is tied to amendments drawn with a view to the eradication of the legacy of black slavery, gender discrimination was not a concern to which the Reconstruction Congress (or the Founding Fathers) adverted. Nonetheless, the Court, since 1970, has creatively interpreted clauses of the Constitution (equal protection and, less securely, due process) to accommodate a modern vision of sexual equality in employment, in access to social benefits, in most civic duties, in reproductive autonomy. Such interpretation has limits, but sensibly approached, it is consistent with the grand design of the Constitution-makers to write a charter that would endure as the nation's fundamental instrument of government.

RUTH BADER GINSBERG
(1986)

(SEE ALSO: *Gender Rights.*)

Bibliography


BABCOCK, BARBARA A.; FREEDMAN, ANN E.; NORTON, ELEANOR H.; and ROSS, SUSAN C. 1974 *Sex Discrimination: Causes and Remedies* (Wendy Williams, Supplement 1978). Boston: Little, Brown.

GINSBURG, RUTH BADER 1978 Sex Equality and the Constitution. *Tulane Law Review* 52:451–475.

——— 1979 Sexual Equality under the Fourteenth and the Equal Rights Amendments. *Washington University Law Quarterly* 1979:161–178.

——— 1983 The Burger Court's Grapplings with Sex Discrimination. In V. Blasi, ed. *The Burger Court: The Counter-Revolution That Wasn't.* Pages 132–156. New Haven, Conn.: Yale University Press.

GUNTHER, GERALD 1972 Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection. *Harvard Law Review* 86:1–48.

KANOWITZ, LEO 1969 *Women and the Law.* Albuquerque: University of New Mexico Press.

——— 1981 *Equal Rights: The Male Stake.* Albuquerque: University of New Mexico Press.

KARST, KENNETH L. 1976 Book Review. *Harvard Law Review* 89:1028–1036.

——— 1977 Foreword, Equal Citizenship under the Fourteenth Amendment. *Harvard Law Review* 91:1–68.

——— 1984 Woman's Constitution. *Duke Law Journal* 1984: 447–508.

KAY, HERMA H. (1974) 1981 *Sex-Based Discrimination,* 2nd ed. St. Paul: West Publishing Co.

——— 1985 Models of Equality. *University of Illinois Law Review* 1985:39–88.

LAW, SYLVIA 1984 Rethinking Sex and the Constitution. *University of Pennsylvania Law Review* 132:955–1040.

TRIBE, LAURENCE H. 1978 *American Constitutional Law.* Pages 1060–1077. Mineola, N.Y.: Foundation Press.

WASSERSTROM, RICHARD A. 1977 Racism, Sexism, and Preferential Treatment: An Approach to the Topics. *UCLA Law Review* 24:581–622.


## SEX DISCRIMINATION
## (Update 1)

During the 1980s and early 1990s intense disagreement has arisen over the appropriate strategy for eliminating sex discrimination. Some courts and commentators argue for gender-neutral rules that define categories in purely functional terms. Others, who point out that gender-neutral rules promise equality only for women who can meet a "male standard," think that legal distinctions between the sexes are not only appropriate but necessary, at least in cases involving perceived biological differences. Still others refuse to think in terms of sameness and difference. They analyze each issue by asking whether the disputed rule furthers the domination of men and the subordination of women.

Those who favor gender-neutral rules argue that the equality and liberty of women is best furthered by treating women, like men, as autonomous individuals capable of exercising free choice. Their opponents believe that legal rules ought to acknowledge the degree to which many women are actually constrained in ways men are not—by direct and indirect pressures to engage in intercourse, to become pregnant, and to assume parenting and nurturing responsibilities. The disagreement is most painfully joined over laws, such as those granting unique benefits to pregnant women or mothers, that seem intended to help women but resemble earlier, unconstitutional "protective" legislation in assuming difference and dependency between men and women.

In the latter half of the 1980s, the Supreme Court was not asked to resolve this dispute in constitutional terms. No case presented an EQUAL PROTECTION challenge to a governmental distinction based on sex. The basic structure of intermediate review of gender-based rules was reaf-

firmed in passing in nongender cases such as CITY OF CLEBURNE V. CLEBURNE LIVING CENTER (1985) and *Kadrmas v. Dickinson Public Schools* (1988). In OBITER DICTA in a race case, MCCLESKEY V. KEMP (1987), the Court reaffirmed its earlier ruling that unconstitutional discrimination could not be established by unexplained statistical disparities that correlate with sex. This latter principle effectively eliminated use of the Constitution in suits such as those arguing theories of COMPARABLE WORTH, which challenged structural and economic disparities between the sexes.

The equal protection cases that touched on family relationships and gender roles did not involve classifications between men and women and thus did not call for "heightened scrutiny." For example, in *Bowen v. Owens* (1986) the Court ruled on an equal protection challenge to a distinction drawn by the SOCIAL SECURITY ACT. For a four-year period widowed spouses of deceased wage earners who remarried after the age of sixty continued to receive survivor's benefits, while divorced widowed spouses who remarried were not so treated. In this context, where the distinction was drawn within, rather than between, gender groups, the Court held that Congress could make presumptions about dependence: "Because divorced widowed spouses did not enter into marriage with the same level of dependency on the wage earner's account as widows or widowers, it was rational for Congress to treat these groups differently after remarriage."

Although no case directly raised the constitutional question, several Title VII cases gave the Court an opportunity to respond to the debate among advocates of Women's rights. The question was posed most starkly by *California Federal Savings and Loan v. Guerra* (1987), a challenge to a California statuatory requirement that employers provide unpaid pregnancy disability leave. As amended by the Pregnancy Disability Act, Title VII of the CIVIL RIGHTS ACT OF 1964 specifies that discrimination on the basis of pregnancy is sex discrimination. Opponents of the California law argued that it was preempted by federal law because it required benefits for pregnant women that were not required for temporarily disabled men. The Court, in an opinion by Justice THURGOOD MARSHALL, found no conflict with the Title VII. Earlier protective legislation that had been held invalid under equal protection clause and Title VII was distinguished on the ground that it "reflected archaic or stereotypical notions about pregnancy and the abilities of pregnant workers." Justice Marshall found that Title VII and the state law shared a common goal of equal employment opportunity for women: "By taking pregnancy into account, California's . . . statue allows women, as well as men, to have families without losing their jobs."

Because the Court has not modified its holding in *Geduldig v. Aiello* (1974) that discrimination on the basis of pregnancy is not unconstitutional because it is not gender-based, *Guerra* raised no equal protection questions. But the decision indicates that the Court is willing to permit governmental distinctions between men and women when those distinctions appear to benefit women without perpetuating pernicious sex-role stereotypes. The decision leaves ambiguous exactly how the Court will determine whether such stereotyping exists. Justice Marshall described the statute as "narrowly drawn to cover only the period of *actual physical disability.*" Yet "disability" seems an odd description for a common human condition like reproduction. The term suggests that mandatory pregnancy leave is necessary only because of real biological differences between men and women, and not as a remedy for the problem of inequality caused by the allocation of child-rearing responsibilities to women. Some commentators fear that in the long run mandatory pregnancy leave, like earlier forms of protective legislation, will decrease the actual employment opportunities of women by increasing the cost of hiring them.

A related question is whether the law ought to recognize a practice as discriminatory when it is said to harm women though it presents no threat to men who seem, at least superficially, to be similarly situated. Just as it has been difficult for the court to see pregnancy discrimination as sex discrimination, some lower courts refused to characterize sexual harassment claims as sex discrimination claims, especially when both men and women worked in an environment that only women perceived as hostile. In another Title VII case, MERITOR SAVINGS BANK V. VINSON (1986), the Supreme Court emphatically affirmed that claims of a hostile work environment are actionable under the statute as sex discrimination. Again, the Court was willing to look beyond formal equality of treatment to determine whether practices have different social meanings for, and thus different impacts on, men and women.

Many of the earliest constitutional sex discrimination cases decided by the Court involved challenges by men to "benign" gender distinctions that could be eliminated by simply extending the challenged benefit to men as well as women. In this respect, sex discrimination law differed from cases involving race; few racial classifications benefited blacks at the expense of whites. However, in challenges brought by men to AFFIRMATIVE ACTION programs, the claim is the same as in race cases: the preference ought to be eliminated, not simply be available without reference to gender or race. This similarity may explain why the Court's approach to gender-based affirmative action has tended to merge with its approach to race-based affirmative action, even though racial classifications are theoretically subject to a stricter level of scrutiny. In JOHNSON V. TRANSPORTATION AGENCY (1987) the Court found no violation of Title VII in a public employer's voluntary affir-

mative action plan that permitted the sex of an employee to be considered as one factor in promotion decisions for jobs in which women historically had been underrepresented. The Court approved the plan as a "moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force." Title VII imposes identical restrictions on gender-based and race-based affirmative action plans, but the Court also cited WYGANT V. JACKSON BOARD OF EDUCATION (1986), a racial affirmative action case decided under the equal protection clause, as if it would provide the standards for evaluating a constitutional challenge to the *Johnson* plan. Thus, the Court, although reserving the question, suggested that the constitutional approach, like the Title VII approach, may be identical for both kinds of affirmative action.

Two years later, in RICHMOND V. J. A. CROSON CO. (1989), a constitutional case in which STRICT SCRUTINY, was applied to overturn a municipal set-aside plan for racial minorities, the Court signaled a new reluctance to approve government affirmative action plans that could not be justified by evidence of identified past discrimination. Whether the constitutional approach in *Richmond* will be applied to gender-based governmental affirmative action plans depends on whether gender classifications will be distinguished as calling for less searching scrutiny. Since intermediate review has been the standard in other gender-preference cases, governmental affirmative action designed to benefit women may, if the suggestion in *Johnson* is not followed, be found to raise no constitutional problems, even where identical plans benefiting racial minorities are unconstitutional.

Some efforts by LOCAL GOVERNMENTS to further sex equality have been challenged as unconstitutional under the FIRST AMENDMENT. Those that further women's claims for equal access to all-male institutions have proved most resistant to constitutional attack. In *Board of Directors of Rotary International v. Rotary Club* (1987) and NEW YORK STATE CLUB ASSOCIATION V. NEW YORK CITY (1988), the Supreme Court upheld state and local requirements that women not be excluded from membership in certain private organizations, despite the claim that the local laws infringed upon male members' First Amendment right to FREEDOM OF ASSEMBLY AND ASSOCIATION. The effort to impose local restrictions on PORNOGRAPHY as a step toward the elimination of the subordinate status of women has proved more vulnerable to constitutional challenge. In *Hudnut v. American Booksellers Association* (1986), a divided Supreme Court summarily affirmed a lower federal court's conclusion that a municipally created CIVIL RIGHTS action for women injured by pornography impermissibly burdened protected speech.

CHRISTINA BROOKS WHITMAN
(1992)

(SEE ALSO: *Feminist Theory and Constitutional Law; Gender Rights.*)

Bibliography

BECKER, MARY 1987 Prince Charming: Abstract Equality. *Supreme Court Review* 1987:201–247.

FINLEY, LUCINDA M. 1986 Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate. *Columbia Law Review* 86:1118–1182.

MACKINNON, CATHARINE A. 1987 *Feminism Unmodified: Discourses on Life and Law.* Cambridge, Mass.: Harvard University Press.

——— 1989 *Toward a Feminist Theory of the State.* Cambridge, Mass.: Harvard University Press.

OLSEN, FRANCES 1986 Statutory Rape: A Feminist Critique of Rights Analysis. *Texas Law Review* 63:387–432.

RHODE, DEBORAH 1989 *Justice and Gender.* Cambridge, Mass.: Harvard University Press.

WEST, ROBIN 1988 Jurisprudence and Gender. *University of Chicago Law Review* 55:1–72.

WILLIAMS, JOAN C. 1989 Deconstructing Gender. *Michigan Law Review* 1989:797–845.

## SEX DISCRIMINATION
### (Update 2)

While the NINETEENTH AMENDMENT gave women the right to vote, no provision of the Constitution explicitly prohibits sex discrimination. The Supreme Court has held, however, that EQUAL PROTECTION and DUE PROCESS protections of the Fifth Amendment and the FOURTEENTH AMENDMENT prohibit the federal and state governments from discriminating against either men or women because of sex.

In 1996, Justice RUTH BADER GINSBURG, the second woman ever appointed to the Court, wrote the majority opinion in UNITED STATES V. VIRGINIA, holding that Virginia could not exclude women from the Virginia Military Institute (VMI), the only single-sex state school in Virginia. That opinion departs substantially from sex discrimination cases decided before 1971 and appears to consolidate disparate decisions from 1971 until 1996. Before 1971, the Court had dismissed women's claims of unequal treatment on the ground that women are different from men. In *United States v. Virginia*, the Court explicitly disapproved one of those early opinions, GOESAERT V. CLEARY (1948), which had said that although the discrimination challenge was "beguiling," differences between men and women justified a state statute passed after WORLD WAR II prohibiting most women from working as bartenders.

In 1971, a legal sea change in gender equal-protection cases occurred. In *Reed v. Reed* (1971), with little explanation, a unanimous Supreme Court held that an Idaho statute preferring men over women in the administration of decedents' estates violated the Fourteenth Amend-

ment, choosing not to follow PRECEDENT or the Idaho Supreme Court's reasoning that men were more likely than women to have business experience. By 1976 the Court had articulated a mid-tier analysis, requiring that a state's use of gender classifications be substantially related to the achievement of important governmental objectives. The mid-tier analysis is stricter than RATIONAL BASIS analysis, and less so than STRICT SCRUTINY analysis. The first upholds classifications that rationally relate to a legitimate governmental purpose. The second, applied in race and FUNDAMENTAL RIGHTS cases, requires the government to show that the classification is necessary to achieve a compelling purpose, or, stated differently, that no less discriminatory means are available to achieve that purpose.

Starting in 1976, the Court used the mid-tier analysis to invalidate many state and federal policies that treated men and women differently, including the age for drinking beer, CRAIG V. BOREN (1976); eligibility for SOCIAL SECURITY benefits, CALIFANO V. GOLDFARB (1977); spousal property management rights, *Kirchberg v. Feenstra* (1981); a state nursing degree only for women, MISSISSIPPI UNIVERSITY FOR WOMEN V. HOGAN (1982); and a prosecutor's use of PEREMPTORY CHALLENGES, *J. E. B. v. Alabama* (1994). The Court occasionally upheld differential treatment to remedy past discrimination, but decisions involving physical differences between men and women continued to resemble the decisions before 1971. For example, the Court upheld a male-only draft registration system because men and women were not similarly situated, ROSTKER V. GOLDBERG (1981); a statutory rape law applicable to men because only women become pregnant, MICHAEL M. V. SUPERIOR COURT (1981); and differential adoption rules for unmarried mothers and fathers, *Lear v. Robertson* (1983).

In the VMI case the trial court had rejected the equal protection challenge to VMI's all-male admissions policy because the school offered diversity to Virginia's educational system. The Supreme Court held, however, that the provision of diversity only for Virginia's sons and not its daughters violated the Fourteenth Amendment. The trial court had also based its ruling on its finding that admission of women would alter VMI's strenuous, punishing, and privacy-free "adversative method." Instead of holding that VMI complied with the Constitution because women and men are not similarly situated, the Supreme Court held that exclusion of women "ready, willing and able to benefit from [VMI's] opportunities" violated the Constitution, and that Virginia's establishment of an inferior women's leadership program in a private women's college was an insufficient remedy. Applying the methodology from some prior mid-tier cases, but also articulating a "skeptical scrutiny" standard and reiterating that official discrimination requires an "exceedingly persuasive justification"—hallmarks of strict scrutiny—the Court held that Virginia had not met its burden of proving, without reliance on stereotypes, that no women could benefit from the program or that its interest in diversity was in fact the reason for the exclusion of women.

Rather than simply ordering women's admission to VMI, the Court required VMI to make "adjustments" and "alterations" in housing and skills training to "accommodate" the privacy and strength differences of female cadets. This remedy departed from remedies in past gender equal-protection cases, which merely eliminated gender requirements. This departure may signal an implicit raising of the level of scrutiny in gender equality cases from mid-tier to strict scrutiny. By ordering a remedy only for "capable" women, the Court apparently is using a "least-restrictive-means" analysis, holding that VMI can achieve its purpose in a manner less restrictive than excluding all women. By requiring VMI to alter housing and skill requirements, the Court apparently is saying that institutional alterations are less restrictive than exclusion of women. The Court relied on two RACIAL DISCRIMINATION cases, including MILLIKEN V. BRADLEY (1977), which had ordered institutional changes as part of a DESEGREGATION remedy.

By requiring VMI to admit only capable women, but also to make changes, Ginsburg apparently balanced two debated feminist viewpoints for achieving gender equality: whether governmental policies should provide equal treatment or, instead, equal results for men and women. In emphasizing that inherent differences between men and women are "cause for celebration, but not for denigration" of women, Ginsburg avoided the rationale of MULLER V. OREGON (1908) that women needed to be paternalistically protected.

Ginsburg cited two cases as examples of permissible sex classifications: *Califano v. Webster* (1977), which upheld computations of Social Security benefits to compensate women's economic disabilities; and *California Federal Savings & Loan Association v. Guerra* (1987), decided under Title VII of the CIVIL RIGHTS ACT OF 1964, an employment antidiscrimination statute. *Guerra* held that a state law requiring employers to provide pregnancy leaves did not violate Title VII. Because a prior constitutional pregnancy case, *Geduldig v. Aiello* (1974), had held that pregnancy discrimination is not sex discrimination, the citation of a Title VII pregnancy discrimination case in a constitutional sex discrimination opinion may cast doubt on the continuing validity of *Geduldig,* despite its citation in dicta in BRAY V. ALEXANDRIA WOMEN'S HEALTH CLINIC (1993), which held that a federal conspiracy statute cannot be used against people who obstruct access to abortion clinics. Because *Guerra* had described pregnancy leaves as allowing "women, as well as men, to have families without losing their jobs," its citation in a gender equality case requiring institutional alterations may imply that pregnancy leaves are constitutionally required for govern-

mental employers. Consistent with this implication is the purpose section of the Family and Medical Leave Act of 1993, which identifies one of its purposes as promotion of equal employment opportunity pursuant to the Fourteenth Amendment.

There was no majority opinion in the Court's next constitutional sex discrimination case, *Miller v. Albright* (1998), upholding CITIZENSHIP laws that classified children of unmarried parents differently according to the sex of the citizen parent, despite the agreement of five Justices that gender classifications based on stereotypes are unlikely to withstand heightened scrutiny. Two of them upheld the statute saying that the plaintiff daughter could not raise her father's claims. Two Justices said only Congress can remedy citizenship claims. Only two found the statute constitutional.

Sexual assault or harassment claims raise constitutional issues when brought under federal statutes that impose criminal or civil liability upon persons who, under COLOR OF LAW, deprive others of rights protected by the Constitution. Sexual assault may be a due process violation; sexual harassment, a sex discrimination equal protection violation.

In *United States v. Lanier* (1997) the Court affirmed the federal conviction of a state judge who sexually assaulted several women in his judicial chambers, holding that freedom from sexual abuse is a protected due process liberty interest. The trial judge had instructed the jury that 18 U.S.C. § 242, which prohibits someone acting under color of state law from depriving another of constitutional rights, forbids serious and substantial misconduct, but not every unjustified grabbing by a state official. This is similar to the Supreme Court's definition, summarized in *Faragher v. City of Boca Raton* (1998), of WORKPLACE HARASSMENT actionable under Title VII. The conduct must be objectively and subjectively serious or pervasive to alter employment conditions. It must be more than merely offensive but, as stated in *Harris v. Forklift Systems, Inc.* (1993), need not cause psychological injury. *Oncale v. Sundowner Offshore Services, Inc.* (1998) held that it may include same-sex harassment.

*Faragher,* above, and *Burlington Industries, Inc. v. Ellerth* (1998) held that employers would be liable to employees who suffered severe, tangible, employment retaliation by harassing supervisors but not liable if there were no retaliation and if the employers had a plan, unreasonably unused by the employee, to prevent or correct supervisory harassment. The Supreme Court articulated a different standard for vicarious liability under Title IX of the Education Amendments of 1972, which prohibits sex discrimination by educational institutions receiving federal funds. *Gebser v. Lago Vista Independent School District* (1998) and *Davis v. Board of Education* (1999) held that school districts would be liable for teacher or peer sexual harassment of students only if the districts were knowingly and deliberately indifferent to the harassment.

CANDACE SAARI KOVACIC-FLEISCHER
(2000)

Bibliography


BABCOCK, BARBARA ALLEN et al. 1996 *Sex Discrimination and the Law: History Practice and Theory,* 2nd ed. Boston: Little, Brown and Company.

BARTLETT, KATHARINE and HARRIS, ANGELA 1998 *Gender and Law: Theory, Doctrine, Commentary,* 2nd ed. New York: Aspen Law and Business.

BERRY, MARY FRANCES 1993 *The Politics of Parenthood.* New York: Viking Penguin.

GREENBERG, JUDITH F.; MINOW, MARTHA L.; and ROBERTS, DOROTHY E. 1998 *Mary Jo Frug's Women in the Law,* 2nd ed. New York: Foundation Press.

KAY, HERMA HILL and WEST, MARTHA 1996 *Sex-Based Discrimination: Text, Cases and Materials,* 4th ed. (with 1999 Supplement). St. Paul, Minn.: West Group.

KOVACIC-FLEISCHER, CANDACE SAARI 1986 Remedying Underinclusive Statutes. *Wayne State University Law Review* 33: 39–95.

——— 1997 *United States v. Virginia*'s New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII. *Vanderbilt Law Review* 50:845–915.

RHODE, DEBORAH 1997 *Speaking of Sex: The Denial of Gender Inequality.* Cambridge, Mass.: Harvard University Press.

UDELL, COLLIN O'CONNER 1996 Note: Signaling a New Direction in Gender Classification Scrutiny: *United States v. Virginia. Connecticut Law Review* 29:521–560.


## SEX OFFENDER NOTIFICATION LAWS

"Megan's Law" is the name commonly used to refer to statutes that require the registration of those convicted of certain sexual offenses, and in some cases require the notification to the public of the release of a sexual offender into the community. These statutes were enacted primarily to address the particular dangers of recidivism posed by offenders who commit predatory acts against children, but by their terms usually embrace all forms of sexual predation. By 1999, each of the fifty states had enacted some form of registration and community notification provision, and federal law now requires, as a condition of federal funding, that each state engage in some form of community notification when "necessary to protect the public concerning a specific person required to register."

New Jersey's law, which was enacted in 1994 in reaction to the public outcry over the murder of six-year-old Megan Kanka by a convicted sex offender living in the neighborhood, is typical. It requires those convicted of serious sex-related offenses to register with state authorities, and classifies those registrants into three tiers representing

low, moderate, or high risk of reoffense. Notification of low-risk registrants is made only to local law enforcement authorities, while notification of moderate-risk registrants is made to schools, women's shelters, or other institutions having custodial care of potential victims. High-risk registrants are the subject of widespread community notification of individual information, including photograph, place of residence, place of work or school, vehicle license plate number, and a general description of the victim of the registrant's prior sexual offense.

Various constitutional challenges have been brought against different aspects of Megan's Law. The most significant are challenges to the community notification provisions based on (1) DUE PROCESS OF LAW, where the tier classification process has not been subject to some form of judicial review; (2) the EX POST FACTO, DOUBLE JEOPARDY, and BILL OF ATTAINDER clauses, where community notification has been imposed upon those whose offenses predated the LEGISLATION; and (3) the RIGHT OF PRIVACY against government disclosure of individual information. Due process challenges have been the most successful, and most courts now require that some form of judicial review of the offender's classification in "moderate risk" or "high risk" categories be available before notification is made. At least one federal appellate court has also required that the state prove the elements necessary for notification by "clear and convincing evidence."

Challenges under the ex post facto and related clauses had some initial success in lower courts, based on the tentative conclusion that community notification constituted a form of "punishment." Absent a clear test for ascertaining what constitutes "punishment," those courts usually focused on the stigmatic and ostracizing effects of community notification, as well as the historical understanding of public humiliation as a punitive measure. Subsequent decisions, however, have upheld retroactive application of community notification provisions as remedial measures rather than punitive ones, and the Supreme Court recently suggested in *Hudson v. United States* (1997) that the test for punishment lies more in the subjective intent of the legislature than in the objective effects of the measure in question. As a practical matter, the doctrinal shift probably forecasts a limited likelihood of success for challenges to Megan's Law should the issue ever reach the Supreme Court, because legislatures will be able to shield laws that have harsh or punitive effects through outward manifestation of a subjective nonpunitive intent.

RONALD K. CHEN
(2000)

## SEXUAL HARASSMENT

See: Sex Discrimination; Workplace Harassment and the First Amendment

## SEXUAL ORIENTATION

Today government officially and systematically stigmatizes persons of homosexual orientation in two principal ways. The first is embodied in the sodomy laws that remain in about half of the states, and the second is embodied in laws and regulations restricting government employment to persons who are heterosexual. Most prominent among the employment restrictions are the federal government's regulations barring gay men and lesbians from serving in the ARMED FORCES.

In BOWERS V. HARDWICK (1986) the Supreme Court, 5–4, upheld the application to homosexual sex of a Georgia law making sodomy a crime punishable by imprisonment up to twenty years. The majority rejected a claim that the law violated the RIGHT OF PRIVACY that had been recognized within the doctrine of SUBSTANTIVE DUE PROCESS. Justice LEWIS F. POWELL, who provided the crucial fifth vote for the majority, originally voted with the dissenters, but after the Court's CONFERENCE switched his vote to uphold the law. In a CONCURRING OPINION, however, he noted that the case would be different for him if the state actually enforced the law by putting someone in prison.

Justice Powell's effort at accommodation leaves wholly untouched the most serious harm caused to gay and lesbian Americans by the sodomy laws. Although such a law played a role in the harassment of Michael Hardwick, the sodomy laws are rarely enforced by prosecution. Their mission today is to symbolize society's disapproval of persons who are gay or lesbian, legitimizing the identification of homosexuals as outsiders and thus encouraging not only police harassment but privately inflicted harm, from insults to trashing to violence. Stigma, in other words, is not just a by-product of the sodomy laws; it is their main function.

The *Hardwick* majority not only failed to deal with this problem of stigmatic harm but evaded the whole question of inequality. The Court noted that the Georgia law, despite its general language, was never applied to heterosexual sodomy; accordingly, the Court would not pronounce on the constitutionality of any such application. Having thus raised a serious issue of discrimination, the majority ignored the question whether the discrimination violated the guarantee of EQUAL PROTECTION OF THE LAWS.

A similar equal protection issue has been presented to a number of lower courts in the years since *Hardwick*, most frequently in contexts involving exclusion of persons identified as lesbians and gay men from government employment, notably service in the armed forces. Some judges have been sympathetic to these equal protection claims; but to date the prevailing view has rejected them, and thus far the Supreme Court has declined to review these decisions. The military exclusion policy, which seems likely to confront the Court with the equality issues

in antigay discrimination, illustrates those issues as they may arise in other contexts as well.

The judges who conclude that heightened judicial scrutiny is appropriate for discriminations based on the status of homosexual orientation make a number of persuasive arguments. Gay men and lesbians have historically suffered from pervasive discrimination, both governmental and private. Despite some recent improvement in the lot of persons of homosexual orientation, this historic pattern continues today, seriously impairing the ability of lesbians and gay men to end discrimination through the political process. Sexual orientation bears little relation to the capacity to perform military tasks or any other tasks. Although a person's behavior and self-identification are subject to his or her control, the sexual orientation of persons who are exclusively homosexual is immutable. The usual indicia of SUSPECT CLASSIFICATIONS, in other words, are present in these cases.

Furthermore, discriminations against lesbians and gay men reinforce traditional stereotypes of gender; indeed, this reinforcement appears to be the main point of the military services' policy of exclusion. Putting the preservation of military secrets to one side, the main arguments of the Department of Defense are that ending the policy of exclusion would harm discipline, morale, and mutual trust; would invade the privacy of servicemembers; and would prejudice recruiting and "the public acceptability of military service." These arguments rest on the assumption that the existence of discrimination justifies government's imposition of further discrimination—an argument soundly rejected by the Supreme Court in the context of RACIAL DISCRIMINATION, as PALMORE V. SIDOTI (1984) made clear. If the services' arguments supporting the exclusion policy seem familiar, the reason is that during WORLD WAR II the leaders of the armed forces offered the same arguments—all of them—as reasons why racial integration of the services would impede the military mission.

The proposition that gay orientation increases security risk has no factual support. The concern expressed by the military services rests on the idea that homosexual orientation implies susceptibility to blackmail. In considerable measure, any such risk to security would be created by the policy of exclusion itself, which punishes disclosure of homosexuality with discharge. In any case, the risk disappears in the case of servicemembers known to be homosexual—who are the only ones excluded by these policy directives. The circularity of reasoning here is so obvious that even the Department of Defense has stopped barring civilians who are openly homosexual from receiving security clearances.

During World War II the military induction system examined eighteen million men and women and routinely (but perfunctorily) inquired into their sexual orientation. Eventually, sixteen million of the examinees served in the armed forces. The number of gay and lesbian servicemembers during the war is estimated between 650,000 and 1,600,000; the induction examiners excluded between 4,000 and 5,000 persons on grounds of homosexual orientation, and the services discharged another 10,000 on these grounds. Today, too, scores, and perhaps hundreds, of thousands of gay and lesbian servicemembers are performing their jobs without incident. Despite several well-publicized group investigations of lesbians (called "witchhunts" by proponents and victims alike), the services generally deal with the exclusion policy in a reactive way, taking action in individual cases when they are directly confronted with the issue.

It was the military exclusion that introduced the American public, during World War II, to the idea that one's personal identity could focus on sexual orientation. Today, the service regulations require dismissal of a member who acknowledges being "a homosexual," provided that the relevant decision makers believe that statement. In such a case no conduct need be proved; the status of "homosexual" requires discharge even if the member is celibate. The regulations also require dismissal for a "homosexual act" (a category that includes not only sodomy but also touching and kissing), but make an exception for the case in which such an act is found to be out of line with the servicemember's general sexual behavior in the past and his or her desires or intentions for the future. If the decision makers conclude that the act is unlikely to recur, and the member declares his or her heterosexuality, then the member can be retained if his or her retention is for the good of the service. Thus, it is the member's public identity as "a homosexual" that requires discharge. The perceived harm in this situation is not that the member is unqualified to perform his or her assigned tasks—the records in these cases are replete with praise from commanders and other work associates—but that the image of the services will be tarnished. The focus of concern is the gender line, the maintenance of what a Marine general once called "the manliness of war."

The crucial question for the services in determining whether to exclude a member on this ground is the member's sexual identity. Although the regulations require a yes-or-no answer to the question of whether the member is "a homosexual," the question of identity is far more complex than can be comprehended in so simple a categorization. Humans are distributed over a considerable range of modes of sexual behavior and over an even greater range of thoughts and feelings about their sexual orientations. The result is that the exclusion regulations are a powerful inducement for servicemembers to resolve private ambivalence by suppressing the parts of themselves that are homosexual, or, even if they privately con-

sider themselves to be gay, to adopt public identities that are unambiguously heterosexual. Whatever degree of self-betrayal one might find in either of these responses, undeniably both kinds of behavior serve the regulations' main purpose of maintaining the armed forces' public image.

The centrality of questions about public identity—for individual servicemembers and for the services themselves—naturally suggests a role for the FIRST AMENDMENT in challenges to the military's exclusion policy. One of the values protected by the FREEDOM OF INTIMATE ASSOCIATION is the power to shape one's own public identity by reference to one's intimate associations. The experience of the "gay liberation" movement shows that an individual's public avowal of homosexual orientation is not merely a self-defining statement; it is also a political act. Several recently litigated cases have involved discharges of servicemembers with sterling records in direct response to their "coming out," that is, publicly expressing their homosexual identity. Although some judges have found merit in First Amendment attacks on these discharges, most lower courts have rejected these claims. Ultimately, First Amendment doctrine in this context will surely follow the Supreme Court's disposition of parallel equal protection claims. Just as *Bowers v. Hardwick* is this generation's version of PLESSY V. FERGUSON (1896), a generous protection of the freedom to express one's gay or lesbian identity probably must await another generation's version of BROWN V. BOARD OF EDUCATION (1954).

KENNETH L. KARST
(1992)

(SEE ALSO: *Sexual Preference and the Constitution; Sexual Orientation and the Armed Forces.*)

Bibliography

BENECKE, MICHELLE M. and DODGE, KIRSTIN S. 1990 Recent Developments—Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals. *Harvard Women's Law Journal* 13:215–250.

BÉRUBÉ, ALLAN 1990 *Coming Out Under Fire: The History of Gay Men and Women in World War Two.* New York: Free Press/Macmillan.

DEVELOPMENTS IN THE LAW—SEXUAL ORIENTATION AND THE LAW. 1989 *Harvard Law Review* 102:1508–1671.

HALLEY, JANET E. 1989 The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity. *UCLA Law Review* 36:915–976.

HARRIS, SETH 1989–1990 Permitting Prejudice to Govern: Equal Protection, Military Deference, and the Exclusion of Lesbians and Gay Men from the Military. *New York University Review of Law and Social Change* 17:171–223.

LAW, SYLVIA A. 1988 Homosexuality and the Social Meaning of Gender. *Wisconsin Law Review* 1988:187–235.

MOHR, RICHARD D. 1988 *Gays & Justice: A Study of Ethics, Society, and Law.* New York: Columbia University Press.

SUNSTEIN, CASS R. 1988 Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection. *University of Chicago Law Review* 55: 1161–1179.

## SEXUAL ORIENTATION
(Update)

Despite significant legal and social advances in the last half of the twentieth century, lesbian, gay, and bisexual people in the United States still suffer rampant discrimination on the basis of sexual orientation. Discrimination at the hands of private individuals and organizations because of sexual orientation ranges from refusals to employ to violent attacks. But government itself officially commits much sexual orientation discrimination. Lesbian, gay, and bisexual people have been fired from teaching positions, discriminated against in custody and adoption decisions, excluded from government employment, and denied the right to marry the persons they love—all because of their sexual orientation. This direct governmental participation in the maintenance of a symbolic yet tangible second-class status, an official stigma, calls into question the depth of our national commitment to the egalitarian ideal reflected in the DECLARATION OF INDEPENDENCE and in the Constitution's guarantee of EQUAL PROTECTION OF THE LAWS.

Perhaps the most commonly invoked legal justification for anti-homosexual discrimination and stigmatization are sodomy laws and the Supreme Court's decision in BOWERS V. HARDWICK (1986). In *Bowers*, a 5–4 Court upheld, insofar as two persons of the same sex were concerned, a Georgia law making oral and anal intercourse a FELONY punishable by imprisonment for up to twenty years. The MAJORITY OPINION cursorily dismissed the argument that the law violated the RIGHT OF PRIVACY that had been recognized within the doctrine of SUBSTANTIVE DUE PROCESS.

Despite the overwhelmingly negative academic evaluation of *Bowers* as a constitutional decision, lower courts in the years since have relied on it frequently to reject equal protection challenges to governmental discrimination based on sexual orientation, especially challenges to the exclusion from the ARMED FORCES. *Bowers*, however, explicitly addressed a substantive due process issue, and the majority opinion had expressly disclaimed considering whether Georgia's practice of applying its sodomy law (which, in terms, applied to people regardless of the parties' sexes) solely to same-sex couples, violated the equal protection clause. Numerous courts—although not all—have nonetheless concluded that *Bowers* all but forecloses successful equal protection challenges to governmental

antigay discrimination because it upheld criminal penalties for "the conduct" that is said to "define" the class of persons subject to discrimination.

Of course, oral and anal intercourse are just two of a myriad of ways in which two persons might express mutual affection or attraction, and heterosexual as well as lesbian, gay, and bisexual persons engage in such intercourse. Moreover, many commentators have argued that the history of criminal laws on which the *Bowers* majority relied for its DUE PROCESS HOLDING does not conclude all equal protection questions concerning sexual orientation discrimination. In particular, *Bowers* does not determine what level of scrutiny is warranted by governmental action on the basis of sexual orientation.

The Supreme Court has issued only one decision on the merits of a sexual orientation equal protection claim, and ROMER V. EVANS (1996) does not resolve the appropriate level of scrutiny. In concluding that a Colorado state constitutional amendment that made it more difficult for lesbian, gay, and bisexual persons to seek statutory protection from discrimination violated the equal protection clause, the Court held that the amendment did not even satisfy RATIONAL BASIS review, the lowest level of equal protection scrutiny. The Court thus had no need to determine whether discrimination on the basis of sexual orientation is properly subject to intermediate or STRICT SCRUTINY.

Even though they have not generally prevailed in the lower courts, judges and scholars who believe that governmental discrimination on the basis of sexual orientation warrants heightened judicial scrutiny make a number of persuasive arguments. Gay, lesbian, and bisexual individuals have historically suffered and still do suffer from pervasive discrimination, and thus the very costs of "coming out" seriously impair the prospects of achieving equality solely through the political process. People's sexual orientation is irrelevant to virtually any consitutionally significant capacities, such as the ability to be a loving parent or to follow a commander's orders. Moreover, to the extent that, however misguidedly, Supreme Court case law treats immutability of a personal characteristic as a relevant criterion in equal protection analysis, sexual orientation should count as immutable. Even if there are some people who might be able to change the direction of their emotions and attractions, a great many lesbian, gay, and bisexual persons experience their sexual orientation as beyond their control (some despite expensive and often painful efforts to become heterosexual). There is also both no way to know whether a given person might be that rare individual who could conceivably change orientations, and little or no justification for demanding that people try to so reconfigure their psyches. In short, the usual indicia of SUSPECT CLASSIFICATIONS are present in these cases.

In addition, some scholars and lower courts in state law cases have concluded that discrimination against lesbian, gay, and bisexual persons may constitute SEX DISCRIMINATION, subject to heightened equal protection scrutiny. The formal argument notes that sexual orientation is defined by the sex of the parties involved; the critical difference between, for example, a gay man and a heterosexual woman is their sex—for both are attracted to men. Thus, in this case, the same attractions and desires that are permissible or even celebrated when expressed by a woman become a basis for discrimination when expressed by a man. This is formal sex discrimination requiring "an exceedingly persuasive justification" under precedents such as UNITED STATES V. VIRGINIA (1996). A more functional argument contends that discrimination based on sexual orientation reinforces a patriarchal ideology in which women are deemed the only fit objects of sexual penetration, inferior to men and incomplete without them, and that such discrimination serves outmoded gender roles and hence is presumptively unconstitutional.

Despite the forceful equal protection arguments in favor of heightened scrutiny for sexual orientation classifications and governmental recognition of SAME-SEX MARRIAGE, it seems unlikely that courts will rush to insist that lesbian, gay, and bisexual people not be denied the full measure of equality. In time, however, it may well be, as one lower federal court confidently predicted in *Nabozny v. Podlesny* (1996), that "*Bowers* will soon be eclipsed in the area of equal protection by the Supreme Court's holding in *Romer v. Evans*" and that our governments will get out of the business of stigmatizing their citizens on the basis of sexual orientation.

DAVID B. CRUZ
(2000)

(SEE ALSO: *Marriage and the Constitution; Same-Sex Marriage; Sexual Orientation and the Armed Forces.*)

Bibliography

CRUZ, DAVID B. 1999 Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law. *Southern California Law Review* 72:1297–1400.

HALLEY, JANET E. 1989 The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity. *UCLA Law Review* 36:915–976.

——— 1994 The Politics of Biology: A Critique of the Argument from Immutability. *Stanford Law Review* 46: 503–568.

KARST, KENNETH L. 1995 Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation. *UCLA Law Review* 43:263–369.

KOPPELMAN, ANDREW 1994 Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination. *New York University Law Review* 69:197–287.

LAW, SYLVIA A. 1988 Homosexuality and the Social Meaning of Gender. *Wisconsin Law Review* 1988:187–235.

RICHARDS, DAVID A. J. 1998 *Women, Gays, and the Constitution: The Grounds for Feminism and Gay Rights in Culture and Law*. Chicago: University of Chicago Press.

RUBENSTEIN, WILLIAM B. 1997 *Cases and Materials on Sexual Orientation and the Law*, 2nd ed. St. Paul, Minn.: West Publishing Co.

SUNSTEIN, CASS R. 1988 Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection. *University of Chicago Law Review* 55: 1161–1179.

## SEXUAL ORIENTATION AND THE ARMED FORCES

In 1993, the antigay policy of the ARMED FORCES became the subject of LEGISLATION. Dubbed "Don't Ask, Don't Tell," these revised rules are widely understood to require military officials to refrain from asking about, and gay servicemembers to refrain from disclosing, their SEXUAL ORIENTATION. The statute includes "don't tell" but lacks "don't ask," however, and U.S. Department of Defense regulations, though they do include some limits on asking, expressly decline to provide servicemembers with any means of enforcing them. The statute's chief innovation is to require the discharge of any servicemember who engages in any physical contact that would manifest to a reasonable person that he or she has the intent or propensity to engage in homosexual acts. Department of Defense regulations go further, requiring discharge if the servicemember has engaged in any conduct that manifests an intent or propensity. Servicemembers can fend off discharge only by showing that they in fact have no propensity to engage in homosexual acts.

The most important idea of the 1993 statute is to put military antigay policy under the protection of the Supreme Court's holding in BOWERS V. HARDWICK (1986). *Hardwick* held that states could prohibit homosexual sodomy without violating the constitutional RIGHT OF PRIVACY. The military has a sodomy statute, and one federal court has held that the military has a compelling reason to enforce that statute selectively against homosexual (as opposed to heterosexual) acts of sodomy. But critics of the policy do not claim that servicemembers have a constitutional privacy right to come out, or to engage in conduct that indicates that they are gay; conversely, defenders of the policy do not claim that *all* gay servicemembers have engaged or will engage in sodomy. How could *Hardwick* matter?

The doctrinal logic works differently in the EQUAL PROTECTION and the FIRST AMENDMENT contexts. In equal protection, the key legal step is provided by the U.S. Court of Appeals for the District of Columbia Circuit's decision in *Padula v. Webster* (1987), which held that *Hardwick* forecloses heightened judicial scrutiny of state antigay discrimination because government can criminalize the "behavior that defines the class." The key factual step involves the propensity concept: On this theory, servicemembers who have shown that they are more likely than their peers to engage in same-sex sodomy are discharged on the basis of predicted bad conduct, and not discrimination against them or their social group. Similarly, the many First Amendment cases distinguishing speech from conduct, and permitting government to punish conduct the evidence for which is the perpetrator's speech about it, negate any First Amendment challenge to the discharge of a servicemember who has merely said "I'm gay." Courts construe that statement as an admission that the speaker has a propensity to commit same-sex sodomy, to which the First Amendment simply does not apply. Moreover, the rebuttable presumption device gives every servicemember being discharged a chance to demonstrate that he or she lacks a propensity. If the servicemember fails to do so, the law of evidence forces a formal conclusion that the servicemember does have a propensity, and that is not speech.

All of those steps are optional, however. Courts could say that *Hardwick* is bad law, or that it has been overturned sub silentio by the Supreme Court's decision in ROMER V. EVANS (1996), or that *Hardwick* is still good law but that sodomy is not a "behavior that defines the class." Courts could say that the words "I'm gay" are speech and warrant First Amendment protection. Courts could reject propensity as a proxy for conduct and find that Congress, when it refused every conduct-based idea proposed by President WILLIAM J. CLINTON (for instance, to require even-handed enforcement of the sodomy statute and to discharge, without regard to their sexual orientation, all servicemembers who engage in same-sex sex), showed an intent to disadvantage a social group (not its conduct) and to regulate speech (not conduct). They could say that the policy lends governmental support to private antigay prejudice and thus runs afoul of the decisions, from CLEBURNE V. CLEBURNE LIVING CENTER, INC. (1985) to *Romer*, holding that to be an illegal purpose. Finally, they could say that, by infiltrating the military with closeted homosexuals, the policy pursues its goals of unit cohesion, protection of troop privacy, and recruitment among youth who do not wish to associate with gay men and lesbians, irrationally.

One argument has consistently failed: The claim that the policy discriminates against servicemembers on the basis of their status and not their conduct. Every appellate court faced with a constitutional challenge has rejected that argument and upheld the statute. A Supreme Court decision about the constitutionality of the policy seems

unlikely; instead, we are more likely to see litigation on regulatory questions, and executive or legislative changes in the rules and patterns of enforcement.

JANET E. HALLEY
(2000)

Bibliography

BENECKE, MICHELLE M. and OSBURNE, C. DIXON Annual *Conduct Unbecoming: The Annual Report on "Don't Ask, Don't Tell, Don't Pursue" Violations.* Washington, D.C.: Servicemembers Legal Defense Network.

HALLEY, JANET E. 1999 *Don't: A Reader's Guide to the Military's Anti-Gay Policy.* Durham, N.C.: Duke University Press.

LEONARD, ARTHUR S., ed. 1997 *Homosexuality and the Constitution, Volume II: Homosexuals and the Military.* New York: Garland Publishing.

SYMPOSIUM 1995 "Don't Ask, Don't Tell": Gays in the Military. *UMKC Law Review* 64:1–236.

## SEXUAL PREDATOR LAWS

Perhaps the most vilified criminal in American society is the sex offender who preys on young children. To prevent convicted sex offenders from striking again, states have constructed a mosaic of laws. These laws include the registration of offenders, the notification of communities (together called "Megan's Laws," after a victim of a sex predator in New Jersey), and the newest state weapon, special involuntary commitment of sex offenders.

All fifty states now have some form of registration and notification laws, and a substantial number of states—among them, Washington, Kansas, Florida, and Wisconsin—have adopted and are considering special involuntary commitment statutes. The laws authorize the indefinite detention, possibly for life, of persons who have been previously convicted of a sex offense and are dangerous to society as a result of a mental abnormality or personality disorder. The mental abnormality or personality disorder requirement is lower than the general involuntary commitment statutes, which usually require a full-blown MENTAL ILLNESS, such as schizophrenia or bipolar (manic-depressive) disorder, coupled with dangerousness. Further, some laws, such as the one enacted in Kansas, appear to provide only minimal psychiatric treatment to those who are committed.

The Supreme Court considered the constitutionality of sexual predator involuntary commitment laws in *Kansas v. Hendricks* (1997). *Hendricks* involved a challenge to the Kansas sex predator involuntary commitment statute based on DUE PROCESS OF LAW, DOUBLE JEOPARDY, and the EX POST FACTO clause. All three constitutional claims were grounded on the premise that the involuntary commitment really constituted an unlawful extension of the previous conviction because it was effectively criminal punishment without the required proof beyond a reasonable doubt.

In a 5–4 decision, the Court upheld the Kansas statute. Justice CLARENCE THOMAS, writing for the majority, concluded that the law did not violate any provision of the Constitution because it was civil in nature and did not impose a second criminal punishment. Thomas offered several reasons for this conclusion, including that the Kansas legislature had placed the commitment law within a larger civil statute, called the law civil, and enacted the law to protect the public, not to further punish criminals.

Thomas was not troubled by the apparent lack of psychiatric treatment provided by the law. He noted that the law was new and, under certain circumstances, mere detention could be an appropriate goal of the state. In essence, Thomas took a very deferential posture towards the legislature's power to safeguard society from heinous individuals.

Thomas's conclusion, and even his rationale, are at first glance appealing. It is easy to observe that Leroy Hendricks, who had a long history of sexually abusing children and had admitted to being unable to control his urge to molest children at times, deserved to spend the rest of his life isolated from society because of what he had done.

Despite these considerations, however, the Kansas legislature's sexual offender commitment law is constitutionally infirm and economically shortsighted. The detention of offenders such as Leroy Hendricks is criminal in nature and unconstitutional for several reasons. The first and perhaps foremost reason is the state's hidden intent to punish. Many experts in the psychiatric community agree that sex offenders are not treatable and will not benefit from involuntary hospitalization. They will be kept there, nonetheless, perhaps for life. Also, treatment is not afforded in jail, but only after the incarceration period has run its course, indicating a less-than wholehearted concern by the legislature for "healing the sick." This form of indefinite warehousing of people without the provision of realistic treatment opportunities—and without the narrow tailoring that would promote as much liberty as possible—had never before been approved by the Court and appears to be a fancy substitute for imprisonment.

The Court's reduction in standards for involuntary commitment of sex predators also abuses the mental health system. The laws ignore the plain purpose of hospitalization, which is to treat and heal. As the 1996 *American Psychiatric Association Task Force's Report on Sexually Dangerous Offenders* noted, "The sexual predator statutes aim to achieve preventive detention of offenders who have completed their criminal sentences. The medical model

of long-term civil commitment is used as a pretext for extended confinement that would otherwise be constitutionally impermissible." Instead of psychiatrists and psychologists using their expertise to treat people who can be helped by their services, the law permits hospitals to be clogged with untreatable sex offenders.

In addition, the mental "abnormality" test is so lacking in definitional coherence that it cannot be administered properly in a court of law. The term "abnormal" is vague and devoid of a concrete definition—indeed, even the psychiatrists and psychologists do not agree on what it means—to the extent that the standard is simply not workable.

Perhaps the greatest danger of legitimizing such a law, however, is the possibility that other "dangerous" mentally abnormal recidivist groups, such as drug addicts, spouse abusers, and people who drive under the influence of alcohol or drugs, could be the next subjects of involuntary commitment laws. This slippery slope would be a powerful regulatory tool for the legislature.

While preventing sex offender recidivism is extremely important, constitutional shortcuts will not work in the long run. Using the civil system to do the work of the CRIMINAL JUSTICE SYSTEM is neither laudatory nor efficient—taxpayers will be paying a substantial and increased amount for wasted psychological care for "patients" housed in expensive psychiatric institutions, many if not all of whom are untreatable and taking the space of more deserving, innocent mentally ill persons. If the legislature deems it appropriate to protect society from sex predators, it ought to enact criminal laws with lengthy criminal sentences or civil laws with cognizable standards, safeguards promoting freedom, and real treatment opportunities. While a "round-them-up" statute may have valid ends, it must be written using valid means as well. Without those constitutional means, involuntary commitment statutes should fall.

STEVEN I. FRIEDLAND
(2000)

## SEXUAL PREFERENCE AND THE CONSTITUTION

Since the 1960s both legislation and judicial decisions have moved toward decriminalization of homosexual conduct and toward increased acceptance of homosexuals as parents, professionals, and public employees. A number of legal restrictions remain, however, mostly concerning employment and other material benefits. The Supreme Court has not fully considered the constitutional issues raised by these restrictions. In *Doe v. Commonwealth's Attorney* (1976) the Court summarily affirmed, 6–3 and without opinion, a federal district court's dismissal of a constitutional challenge to Virginia's sodomy law, brought by two adult males who lived in a stable homosexual relationship. The absence of any serious threat of prosecution suggests that the Court's decision may have rested on a RIPENESS ground. In any case, *Doe* surely is not the Court's last word on the subject—although it provides an object lesson for anyone who would ignore the influence of conventional morality on the development of coherent constitutional principle.

*Doe* had been argued on the theory of a RIGHT OF PRIVACY, by analogy to the Court's decisions on BIRTH CONTROL and ABORTION. But "privacy," in its ordinary usage, fails to capture the essence of the constitutional claim. A middle-class homosexual couple need fear no prosecution if they keep their relationship private. It is precisely the public expression of homosexuality that produces sanctions; the interest at stake is in some sense the opposite of privacy, more akin to a FIRST AMENDMENT freedom of expression. Similarly, the issue of homosexual marriage, which has been addressed by some commentators as an issue of SEX DISCRIMINATION, seems better approached as a problem in symbolic expression of a homosexual couple's identity.

Recognition of homosexual relationships within a FREEDOM OF INTIMATE ASSOCIATION would place on government the burden of justifying its interference with those relationships. If a state had to prove that homosexuality alone disqualified a person from child custody or employment as a school teacher, its efforts to do so would demonstrate that the operative factor in the law's disqualifications was not risk of harm but stigma. Commentators have suggested that homosexuality be added to the list of SUSPECT CLASSIFICATIONS calling for STRICT SCRUTINY under the EQUAL PROTECTION clause, and there is force to the argument. Whether the problem be seen as one of equality or as an aspect of SUBSTANTIVE DUE PROCESS, most laws regulating homosexual conduct seem unlikely to survive serious constitutional scrutiny. What remains in question is the willingness of a majority of Justices for the Supreme Court to engage in that scrutiny.

KENNETH L. KARST
(1986)

Bibliography

PROJECT 1966 The Consenting Adult Homosexual and the Law: Empirical Study of Enforcement and Administration in Los Angeles County. *UCLA Law Review* 13:643–832.

RIVERA, RHONDA R. 1979 Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States. *Hastings Law Journal* 30:799–955.

SYMPOSIUM 1985 The Legal System and Homosexuality—Ap-

probation, Accommodation, or Reprobation? *University of Dayton Law Review* 10:445–813.

## *SHAPIRO v. THOMPSON*
394 U.S. 618 (1969)

Two states and the DISTRICT OF COLUMBIA denied WELFARE BENEFITS to new residents during a one-year waiting period. The Supreme Court, 6–3, held that the state schemes denied the EQUAL PROTECTION OF THE LAWS and that the District's law violated the Fifth Amendment's equal protection component, as recognized in BOLLING V. SHARPE (1954).

Justice WILLIAM J. BRENNAN wrote for the Court. The RIGHT TO TRAVEL from one state to settle in another was a FUNDAMENTAL INTEREST, whose impairment was justified only on a showing of a COMPELLING STATE INTEREST. These statutes served to deter the entry of INDIGENTS and to discourage interstate travel for the purpose of obtaining increased welfare benefits, but those objectives were constitutionally illegitimate efforts to restrict the RIGHT TO TRAVEL. Equal protection considerations forbade a state to apportion its benefits and services on the basis of past tax contributions. The saving of welfare costs similarly could not "justify an otherwise invidious classification." Various arguments addressed to administrative convenience were also insufficiently compelling.

The Court also hinted that WEALTH DISCRIMINATION against the indigent might constitute a SUSPECT CLASSIFICATION, or, alternatively, that minimum subsistence might be a fundamental interest. Both these suggestions were sidetracked in later decisions such as SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ (1973).

Chief Justice EARL WARREN dissented, joined by Justice HUGO L. BLACK. Warren argued that Congress had approved the one-year waiting periods in the SOCIAL SECURITY ACT. The majority rejected this statutory interpretation but added that in any event "Congress may not authorize the States to violate the Equal Protection Clause."

Justice JOHN MARSHALL HARLAN, in a long dissent, mounted a frontal attack on the WARREN COURT's expansion of the judicial role in equal protection cases through its heightening of the STANDARDS OF REVIEW in cases involving fundamental interests and suspect classifications. Here, as in other decisions of the same period, the Harlan dissent illuminates the Court's doctrinal path more effectively than does the majority opinion. It has always been possible for a Justice to combine clarity of vision with the wrong conclusion.

KENNETH L. KARST
(1986)

(SEE ALSO: *Invidious Discrimination.*)

## *SHAUGHNESSY v. UNITED STATES EX REL. MEZEI*
345 U.S. 206 (1953)

Over the dissent of four Justices, the VINSON COURT upheld the authority of the ATTORNEY GENERAL to exclude and detain indefinitely an ALIEN without a hearing at Ellis Island solely on the basis of confidential information, "the disclosure of which would be prejudicial to the public interest." Justice ROBERT H. JACKSON, dissenting, wrote that he could not imagine how a hearing "would menace the security of this country."

MICHAEL E. PARRISH
(1986)

## SHAW, LEMUEL
(1781–1861)

Lemuel Shaw was chief justice of Massachusetts from 1830 to 1860, during which time he wrote a record number of opinions, over 2,200, only one in dissent. He dominated his court as no other judge has. His opinions were often comprehensive, ponderous, analytical treatises. He often explained guiding principles in terms of policy or social advantage, placing his decisions on the broadest grounds. Justice OLIVER WENDELL HOLMES, attributing Shaw's influence to his "accurate appreciation of the requirements of the community," declared that "few have lived who were his equals in their understanding of the grounds of public policy to which all laws must be ultimately referred. It was this which made him . . . the greatest magistrate which this country has produced."

Before his appointment to the Supreme Judicial Court, Shaw had been a Federalist lawyer, a member of both branches of the state legislature, and a bank director. Shaw did not, however, fit the stereotype of the conservative Whig judge seeking DOCTRINES of VESTED RIGHTS to ward off legislative controls over business enterprise. He was the foremost champion of the power of government to promote and regulate the economy in the public interest. To call the POLICE POWER Shaw's invention would be an exaggeration, but not a great one. Unlike JOHN MARSHALL and ROGER B. TANEY, who viewed the police power as the residual powers of the state, Shaw defined it as the power of government "to trench somewhat largely on the profitable use of individual property" for the public good, and he distinguished the police power from other state powers. Shaw laid the foundations for the legal character of power companies, railroads, and water suppliers as public utilities, privately owned but subject to regulation for the public benefit. He would even have included manufacturers and banks. He was the first to hold that the power of

EMINENT DOMAIN cannot be restrained by or contracted away under the CONTRACT CLAUSE. At a time when that clause had become a bulwark of vested rights, making it a link between capitalism and constitutionalism, Shaw voided legislative alterations of chartered rights in only three cases, and in each the essential regulatory powers of the state were undiminished. Shaw was profoundly committed to JUDICIAL RESTRAINT. He held statutes unconstitutional in only nine reported cases, most often to protect the rights of the criminally accused. In as many cases Shaw repudiated the doctrine of SUBSTANTIVE DUE PROCESS drawn from WYNEHAMER V. NEW YORK (1856). Community rights rather than vested ones were Shaw's foremost concern.

In his COMMERCE CLAUSE opinions, too, Shaw sustained state powers. The Supreme Court agreed with him in the LICENSE CASES (1847) but reversed him in the PASSENGER CASES (1849), despite the sagacity of his empirical test to determine whether state and federal laws actually conflicted in their operation. In the absence of a federal law, Shaw would have sustained state legislation. He handed down the leading opinion on the constitutionality of the Fugitive Slave Act of 1850 in SIMS' CASE (1851), though he freed every sojourner slave (not a runaway) who reached Massachusetts. (See COMMONWEALTH V. AVES.) He originated the SEPARATE BUT EQUAL DOCTRINE that became the legal linchpin of racial SEGREGATION, and he upheld a conviction for BLASPHEMY in an opinion that abridged RELIGIOUS LIBERTY. In such cases he carried his doctrine of judicial restraint too far, but he towered over class and party, and his name became a synonym for judicial integrity and impartiality.

LEONARD W. LEVY
(1986)

Bibliography

ADLOW, ELIJAH 1962 *The Genius of Lemuel Shaw.* Boston: Court Square Press.

LEVY, LEONARD W. 1957 *The Law of the Commonwealth and Chief Justice Shaw.* Cambridge, Mass.: Harvard University Press.

## *SHAW v. RENO* (1993) AND ITS PROGENY

North Carolina is subject to the preclearance provisions of section 5 of the VOTING RIGHT ACT OF 1965. The Voting Rights Section of the Civil Rights Division of the U.S. Department of Justice (DOJ) rejected a North Carolina congressional plan that provided for only a single black-majority congressional district, insisting that two such districts be drawn and suggesting several hypothetical configurations. A resubmitted plan with two majority–minority districts was given DOJ preclearance, but the new district in that plan looked nothing like any of the DOJ suggestions. The proposed North Carolina Twelfth Congressional District stretched 200 miles, included parts of numerous cities, and achieved contiguity of some of its parts only via connection along a single road, Interstate 85.

Because a majority of Supreme Court Justices, including SANDRA DAY O'CONNOR, had previously seemed willing to assent to race-conscious ELECTORAL DISTRICTING to safeguard the fundamental right to vote, the Court's 5–4 decision invalidating North Carolina's districting plan in *Shaw v. Reno* (*Shaw I*) came as a surprise to many experts. In a MAJORITY OPINION authored by O'Connor, and joined by WILLIAM H. REHNQUIST, ANTONIN SCALIA, ANTHONY M. KENNEDY, and CLARENCE THOMAS, the Court explained that it was troubled by the peculiar configuration of the Twelfth Congressional District, the least compact in the nation, and by the history that led to its creation, in which race appeared to play a major role. The majority also enunciated a new legal standard for legislative action on REPRESENTATION, in which an excessive reliance on race as a criterion in drawing electoral district was unconstitutional. In plans in which race was implicated, states were now required to prove that there was a COMPELLING STATE INTEREST in establishing the plan and that the districts were "narrowly tailored" to serve that interest.

While *Shaw I* merely remanded the North Carolina congressional plan to the district court for consideration under the new legal standard, *Shaw v. Hunt* (*Shaw II*) (1996), also decided 5–4 with the same lineup of Justices, declared North Carolina's congressional plan to be unconstitutional, rejecting claims that aspects of its peculiar configurations could better be assigned to political than to racial considerations. Even before *Shaw II*, however, *Shaw I* inspired similar challenges to race-based districting in other jurisdictions.

Most *Shaw*-type challenges came in jurisdictions that fell under the section 5 preclearance provisions (affecting sixteen states in whole or in part, including all states in the deep South). In covered jurisdictions, the failure to create as many majority–minority districts as the DOJ viewed as required by the act risked a preclearance denial and time-consuming litigation that was unattractive to politicians. By 1998, lower courts in states such as Louisiana, Georgia, South Carolina, and Texas had rejected plans precleared by DOJ; and when these cases were appealed to the Supreme Court the lower court decision was left standing, as in MILLER V. JOHNSON (1995). In these decisions the courts refused to excuse the majority– minority districts created to secure section 5 preclearance, and some of the opinions chastised the DOJ for its excessive zeal in pursuing race-conscious districting. Only in California

were plans sustained against a *Shaw*-type challenge, by a PER CURIAM decision upholding a lower court. But, in that state, the plans under challenge were drawn by former state judges and plausibly defended as fully meeting traditional districting criteria.

*Shaw I* and subsequent decisions met a mixed reaction among legal scholars. The most important legal criticisms of the opinions concerned the logic underlying the court's broadening of STANDING to sue to include voters outside the challenged district; the Court's failure to specify the exact nature of the constitutional harm to white voters whose votes were not diluted; the murkiness and inherent judicial unmanageability of discerning when race is a "predominant factor"; and the use of a sledgehammer (a new constitutional standard) to solve a problem that could have been dealt with merely by tightening the criteria for enforcement of the Voting Rights Act. Ironically, the black-majority districts in question were actually more racially integrated than the white-majority districts in their states. Reaction to *Shaw* in the CIVIL RIGHTS community was more visceral, as some saw the *Shaw* line of cases as a further retreat from the Second Civil Rights Reconstruction (that of the 1960s), paralleling the betrayal of the First Reconstruction in the COMPROMISE OF 1877.

BERNARD GROFMAN
(2000)

Bibliography

DAVIDSON, CHANDLER and GROFMAN, BERNARD 1994 *The Quiet Revolution in the South: The Impact of the Voting Right Act, 1965–1990.* Princeton, N.J.: Princeton University Press.

GROFMAN, BERNARD, ed. 1998 *Race and Redistricting in the 1990s.* New York: Agathon Press.

GROFMAN, BERNARD and DAVIDSON, CHANDLER 1992 *Controversies in Minority Voting: The Voting Right Act of 1965 in Perspective.* Washington, D.C.: The Brookings Institution.

ISSACHAROFF, SAMUEL and KARLAN, PAMELA S. 1998 Commentary: Standing and Misunderstanding in Voting Rights Law. *Harvard Law Review* 111:2276–2292.

LOWENSTEIN, DANIEL HAYS 1998 You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases. *Stanford Law Review* 50:779–835.

PILDES, RICHARD and NIEMI, RICHARD 1993 Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearance After *Shaw v. Reno. Michigan Law Review* 92:483–587.

## SHAYS' REBELLION
(1786–1787)

The economic depression following the Revolutionary War fell especially harshly upon small farmers who relied on borrowed money to finance their crops. Falling prices led to default and foreclosure. Seven states resorted to deliberate inflation (through large issues of unsecured paper currency), stay laws, and other forms of DEBTOR'S RELIEF LEGISLATION.

The Massachusetts legislature, however, defeated all such proposals. Beginning in August 1786, mobs of impoverished farmers in central and western Massachusetts prevented the courts from functioning and ordering foreclosures. In September an armed force assembled at Springfield under Daniel Shays, a farmer and one-time Revolutionary army captain. On January 25, 1787, Shays attempted to seize the federal arsenal at Springfield, but his men were repulsed by artillery. On February 4, the rebels were routed and the leaders captured by the state militia.

Meanwhile, Massachusetts had applied to Congress for assistance. Although Congress authorized raising a small force to protect the arsenal, no aid was actually sent.

The effect of the rebellion was to raise the specter of disintegration of civil government and so to hasten the process of constitutional reform. Less than three weeks after the collapse of Shays Rebellion, Congress passed a resolution giving official sanction to the Annapolis Convention's call for the CONSTITUTIONAL CONVENTION OF 1787.

DENNIS J. MAHONEY
(1986)

Bibliography

SZATMARY, DAVID P. 1980 *Shays' Rebellion: The Making of an Agrarian Insurrection.* Amherst: University of Massachusetts Press.

## *SHELLEY v. KRAEMER*
334 U.S. 1 (1948)

## *HURD v. HODGE*
334 U.S. 24 (1948)

In 1926, in CORRIGAN V. BUCKLEY, the Supreme Court rejected a constitutional attack on judicial enforcement of racially RESTRICTIVE COVENANTS—contractual agreements between neighboring residential landowners limiting the occupancy of their houses to white persons. From that time forward, the NAACP sought to persuade the Court to reconsider and find the covenants' enforcement to constitute STATE ACTION in violation of the FOURTEENTH AMENDMENT. Finally, in *Shelley,* the Court granted review in two such cases, one from Missouri and one from Michigan. In both, white neighbors obtained INJUNCTIONS forbidding black buyers to occupy houses subject to racial covenants. The decision was widely anticipated to be important, both doctrinally and practically. Eighteen AMICUS CURIAE briefs supported the NAACP's position, and on the other side three white "protective associations" filed briefs, as did

the National Association of Real Estate Boards. Counsel for the NAACP included CHARLES HOUSTON and THURGOOD MARSHALL.

The time was ripe for an overruling of *Corrigan*'s casual acceptance of racially restrictive covenants as a "private" means of imposing residential segregation. The armed forces had integrated at the end of the WORLD WAR II; in 1947 the President's Committee on Civil Rights had published a report calling attention to the importance of judicial enforcement to the effectiveness of the covenants; and President HARRY S. TRUMAN, a strong CIVIL RIGHTS advocate, had placed the weight of the executive branch on the NAACP's side by authorizing the SOLICITOR GENERAL to file an AMICUS CURIAE brief. The Supreme Court held, 6–0, that state courts could not constitutionally enjoin the sale to black buyers of property covered by restrictive covenants.

*Shelley*'s result seems inescapable. Yet hardly anyone has a kind word for the *Shelley* opinion, written by Chief Justice FRED VINSON. *Corrigan* was not overruled but was characterized as a case involving only the validity of restrictive covenants and not their enforcement in courts. Standing alone, said Vinson, the racial covenants violated no rights; their enforcement by state court injunctions, however, constituted state action in violation of the Fourteenth Amendment. Taken for all it is worth, this reasoning would spell the end of the state action limitation—a loss many could cheerfully bear. But it is plain the Court had no such heroics in mind. The Justices were not ready to find state action in any private conduct the state might fail to prohibit. Yet the opinion never quite explained why, given the *Shelley* result, those larger doctrinal consequences do not follow. The opinion's elusive quality led PHILIP KURLAND to call it "constitutional law's *Finnegans Wake.*"

Two decades later, in EVANS V. ABNEY (1970), the Court picked up the first shoe. *Shelley* was limited severely, and the power of a private owner to call on the courts to enforce his or her control over property was largely freed from constitutional limitations.

A companion case to *Shelley*, *Hurd v. Hodge* (1948), involved a racial covenant covering land in the DISTRICT OF COLUMBIA. Without reaching the question whether the Fifth Amendment guaranteed EQUAL PROTECTION (see BOLLING V. SHARPE), the Court held the judicial enforcement of the covenant to violate "the public policy of the United States."

KENNETH L. KARST
(1986)

Bibliography

HENKIN, LOUIS 1962 *Shelley v. Kraemer*: Notes for a Revised Opinion. *University of Pennsylvania Law Review* 110:473–505.

HOROWITZ, HAROLD W. 1957 The Misleading Search for "State Action." *Southern California Law Review* 30:208–221.

## *SHELTON v. TUCKER*

See: Least Restrictive Means Test

## SHEPPARD-TOWNER MATERNITY ACT

42 Stat. 224 (1921)

FEDERAL GRANTS-IN-AID to the states began in the mid-nineteenth century. As the federal government, in its new capacity as a welfare state, funded important social services, some congressmen and senators considered this form of federal spending socialistic and questioned its constitutionality.

In 1921, Congress passed the Maternity Act, a measure recommended by President WARREN G. HARDING, allocating funds to the states for health service for mothers and children, particularly in rural communities. This welfare measure sought to reduce maternal and infant mortality. Critics argued that federal funds could lawfully be spent only in connection with the ENUMERATED POWERS of Congress, and they asserted that the grant-in-aid was a subtle method of extending federal power and usurping functions properly belonging to the states. Further, since the formal acceptance of such grants by state legislatures brought federal supervision and approval of the funded state activities, the measure placed too much potentially coercive power in the hands of federal bureaucracies.

The Supreme Court was asked to rule on the act's constitutionality in separate suits brought by a taxpayer and the Commonwealth of Massachusetts. The Court did not rule on the merits in either case, holding that the state presented no justiciable controversy and that the taxpayer lacked STANDING to sue. (See TAXPAYER'S SUITS; FROTHINGHAM V. MELLON.) Still, many states refused to avail themselves of the provisions of the act, and Congress failed to renew it in 1929. Nonetheless, the projects of this period were a political precedent for much of the modern system of federally dispensed welfare.

PAUL L. MURPHY
(1986)

Bibliography

LEMONS, J. STANLEY 1960 The Sheppard-Towner Act: Progressivism in the 1920's. *Journal of American History* 55:776–786.

## *SHERBERT v. VERNER*
374 U.S. 398 (1963)

Sherbert, a Seventh-Day Adventist, lost her job after the mill at which she had been working went on a six-day work week and she refused Saturday work. She filed for unemployment compensation, was referred to a job, but declined it because it would have required Saturday work. By declining proffered employment she was no longer "available for work" under South Carolina's rules and hence no longer eligible for unemployment benefits.

Justice WILLIAM J. BRENNAN, speaking for the Supreme Court, concluded that the disqualification imposed a burden on Mrs. Sherbert's free exercise of religion. The FIRST AMENDMENT, he declared, protected not only belief but observance. Even an incidental burdening of religion could be justified only if the state could show a COMPELLING STATE INTEREST in not granting an exemption.

This decision was a significant departure from the secular regulation approach to free exercise claims which had been affirmed by the Court as recently as *Braunfeld v. Brown* (1961). Brennan made little attempt to distinguish *Sherbert* from *Braunfeld.* Justice WILLIAM O. DOUGLAS, concurring, rejected the secular regulation approach.

Justice POTTER STEWART concurred in the result, disassociating himself from Brennan's reasoning. Stewart saw tension developing between the Court's interpretation of the free exercise and establishment clauses. To grant free exercise exemptions from otherwise valid secular regulations preferred religious over nonreligious people. In establishment clause cases, however, any governmental action that had the effect of advancing religion was forbidden. Stewart would have relieved the tension by relaxing the establishment clause rule.

Justice JOHN MARSHALL HARLAN, joined by Justice BYRON R. WHITE, dissented. For Harlan, the notion of a constitutional compulsion to "carve out an exception" based on religious conviction was a singularly dangerous one.

RICHARD E. MORGAN
(1986)

## SHERMAN, ROGER
(1721–1793)

Roger Sherman was one of the leading members of the founding generation. For more than two decades he was simultaneously mayor of New Haven, Connecticut, a member of the state legislature, and a judge of the Superior Court. He was a delegate to the Continental Congress almost continuously from 1774 to 1784. He signed the DECLARATION OF INDEPENDENCE, the ARTICLES OF CONFEDERATION, and the Constitution, the only person to sign all these founding documents.

At the CONSTITUTIONAL CONVENTION OF 1787, Sherman was a respected elder statesman. He distrusted a large and ill-informed populace and wanted all elections to national office mediated by the state legislatures. He formally introduced the GREAT COMPROMISE and argued strongly for its passage. He wrote the contingency provision prescribing election of the President by the HOUSE OF REPRESENTATIVES if there was no majority in the ELECTORAL COLLEGE. He opposed giving the President an absolute VETO POWER and erecting a system of federal courts inferior to the Supreme Court. He originally favored, but later gave up, a unicameral national legislature chosen by the state legislatures. He strongly supported the prohibitions on export duties and BILLS OF CREDIT

After the Convention, Sherman worked hard for RATIFICATION OF THE CONSTITUTION, writing newspaper articles (as "A Countryman") and attending the state ratifying convention. He was a member of the first House of Representatives (1789–1791) and of the United States Senate (1791–1793). In Congress, as in the Convention, Sherman opposed as unnecessary and unwise the enactment of a federal BILL OF RIGHTS.

DENNIS J. MAHONEY
(1986)

Bibliography

BOARDMAN, ROGER SHERMAN 1938 (1971) *Roger Sherman: Signer and Statesman.* Philadelphia: University of Pennsylvania Press. (Reprint, New York: Da Capo).

## SHERMAN ANTITRUST ACT
26 Stat. 209 (1890)

This concisely worded law represented the first congressional attempt at ANTITRUST legislation. Neither the reasons for its approval nor its framers' intent are clear, but several circumstances ordained its passage. Individual state attempts to regulate monopoly were often unsuccessful; a federal statute would satisfy the need for uniform national policy as well as consistent practice. In addition, a heritage of antimonopoly sentiment and an economic depression combined to inflame public opinion against the industrial giants. Consequently, the platforms of both major parties contained antimonopoly planks in 1888, and, following his election, President BENJAMIN HARRISON asked Congress to redeem this pledge. Of sixteen bills introduced into the next Congress, one, sponsored by Senator John Sherman (Republican, Ohio), was briefly debated and then referred to the Judiciary Committee. Six days later the committee reported out a completely re-

written bill which received only cursory debate and passed 52–1 in the SENATE and 242–0 in the HOUSE. The lack of debate, particularly over such a potentially controversial bill, has never been satisfactorily explained. Often-cited possibilities include fierce interparty competition for support from the vigorously antimonopoly West and an underestimation of the act's importance. Contemporaries paid it little attention—the trusts and their congressional allies did not even bother to oppose the bill. Its proponents conceded that the act was an experimental entry into a new field of ECONOMIC REGULATION. In fact, it contained nothing new.

Although Senator Sherman was the moving force behind the bill, Senator George Edmunds (Republican, Vermont), chairman of the Senate Judiciary Committee, wrote most of it. Despite Edmunds's claim that it was "clear in its terms . . . [and] definite in its definitions," the act failed to define the two most important concepts in it: monopoly and restraint of trade. Although there is a debate over the (Anglo-American) COMMON LAW underpinnings of the act, most scholars agree that the common law forbade agreements in restraint of trade and CRIMINAL CONSPIRACY to monopolize. The controversy arises over these doctrines' application in America and the extent of their incorporation into the Sherman Act. The final bill also omitted any specific exemption for labor or farm organizations. Congress either meant to leave the issue to the courts (see LOEWE V. LAWLOR) or, more likely, believed an exemption was self-evident from the text.

The first section of the act outlawed "every contract, combination . . . or conspiracy, in restraint of trade" or INTERSTATE COMMERCE and was directed against joint action. Section 2—equally applicable to individuals—outlawed any means of achieving monopoly. Broader than section 1, this clause declared void any attempt, combination, or conspiracy to monopolize. It did not outlaw monopoly per se. Among the remaining provisions were those granting JURISDICTION to the CIRCUIT COURTS, providing for EQUITY proceedings, and authorizing treble damage suits.

Even with public support, the Sherman Act proved ineffective initially. The economic depression of the 1890s adversely affected business, and the general terms of the act required interpretation which could only come with time. The Court hamstrung the act in UNITED STATES V. E. C. KNIGHT (1895), holding that it did not apply to manufacturing. Even though a bare majority of the Court resuscitated the act against pooling arrangements in UNITED STATES V. TRANS-MISSOURI FREIGHT ASSOCIATION (1897), the government would not achieve any notable success until PHILANDER C. KNOX became ATTORNEY GENERAL under THEODORE ROOSEVELT. Then, in quick succession, the government won major victories in NORTHERN SECURITIES CO. V. UNITED STATES (1904) and SWIFT & CO. V. UNITED STATES (1905). The next decade saw a limitation on antitrust policy as the Court formulated the RULE OF REASON and additional implementation by Congress which passed the CLAYTON and FEDERAL TRADE COMMISSION ACTS.

DAVID GORDON
(1986)

Bibliography

NEALE, A. D. and GOYDER, D. G. 1980 *The Antitrust Laws of the United States of America*, 3rd ed. Cambridge: At the University Press.

THORELLI, HANS B. 1955 *The Federal Antitrust Policy*. Baltimore: Johns Hopkins University Press.

## SHIELD LAWS

In BRANZBURG V. HAYES (1972) and later decisions relating to an asserted REPORTER'S PRIVILEGE, the Supreme Court rejected the claim that the FIRST AMENDMENT should privilege reporters from having to respond to proper inquiries incident to legal proceedings. However, before and after *Branzburg*, more than half the states have passed legislation, called shield laws, that give reporters such a privilege. These laws vary considerably, as has their reception in the state courts. Some laws privilege reporters as to all information gathered in the course of their journalistic activities. Others privilege reporters only as to information gathered from confidential informants. Some laws make an exception to the privilege if a reporter has witnessed the commission of a crime.

A number of state courts have found state constitutional grounds for cutting back on shield laws. Thus one California decision held that a shield law could not immunize a reporter from having to answer a judge's questions about who had violated a judicial GAG ORDER against informing the press about evidence in a notorious criminal trial. And New Jersey's supreme court held that the state's law could not shield a reporter from inquiries by a defendant in a criminal case concerning information relevant to his defense.

BENNO C. SCHMIDT, JR.
(1986)

## SHIRAS, GEORGE, JR.
(1832–1924)

George Shiras, Jr., was appointed to the Supreme Court by BENJAMIN HARRISON in 1892 and served for slightly more than a decade. A native of Pittsburgh and a Yale graduate, Shiras had maintained an independent, yet prosperous and varied law practice for nearly forty years before his appointment. He came to the Court without previous ex-

perience in public life and charted an independent course. His voting record suggests that he remained aloof from the era's policy debates yet maintained a fundamental distrust of institutional change. His unadorned and cool style and his emphasis on precedent and conventional rules of interpretation reflected his personality as well as his conception of the judicial function.

The 1890s were a transitional period in American public life, and the questions that crowded the Court's docket indicated the increasing scope and intensity of governmental interventions in economy and society. Three major classes of constitutional issues came up during Shiras's tenure. The first involved petitioners who sought enlarged judicial protection under the FOURTEENTH AMENDMENT for FREEDOM OF CONTRACT in the face of state laws regulating labor relations and the price of essential services. They got no encouragement from Shiras. In *Brass v. North Dakota* (1894), a grain elevator case, he refused to restrict the range of "businesses AFFECTED WITH A PUBLIC INTEREST" to those with a "virtual monopoly" at a particular location; he also spoke for the Court in *Knoxville v. Harbison* (1901), sustaining a Tennessee statute that required employers to pay their workers in cash or company-store scrip redeemable in cash. Justices DAVID J. BREWER and RUFUS PECKHAM, the FULLER COURT's leading apostles of laissez-faire, dissented in each instance. Yet Shiras was consistently aligned with Brewer and Peckham in the second class of cases, including UNITED STATES V. E. C. KNIGHT CO. (1895) and CHAMPION V. AMES (1903), involving federal authority under the COMMERCE CLAUSE in policy domains traditionally reserved to the states. Congressional regulation of manufacturing CORPORATIONS and public morals, like federal JUDICIAL REVIEW of STATE POLICE POWER regulations under the Fourteenth Amendment, necessitated new and, in Shiras's view, illegitimate departures in the organization of constitutional power.

Shiras wrote his most powerful opinions in the third class of cases, involving petitioners whose liberty or property was jeopardized by intensified federal activity in areas of acknowledged federal competence. He complained repeatedly about the majority's penchant for narrow construction of the Fifth Amendment's JUST COMPENSATION clause when riparian land was damaged by federal construction of dams and other river improvements. He also dissented sharply in BROWN V. WALKER (1896), contending that a federal immunity statute for persons required to testify before the Interstate Commerce Commission was an inadequate substitute for the Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION. And in *Wong Wing v. United States* (1896) Shiras spoke for a unanimous Court that finally curbed Congress's draconian anti-Chinese program at the point where immigration officials were authorized to sentence illegal aliens to as much as one year of hard labor prior to deportation. The sentence of hard labor was an "infamous" one, Shiras explained. Consequently it could be invoked only after the Fifth and Sixth Amendment requirements of due process and TRIAL BY JURY had been met.

Shiras had determined at the time of his appointment to retire at seventy to avoid burdening his brethren because of age. He underscored his habitual divergence from conventional norms by carrying through his resolve. His retirement in 1903 attracted little notice, and his death more than twenty years later even less. Shiras's constitutional jurisprudence was simply too idiosyncratic to generate a significant following at the bar, in the law schools, or among the general public.

CHARLES W. MCCURDY
(1986)

Bibliography

PAUL, ARNOLD 1969 George Shiras, Jr. Pages 1577–1591 in Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court, 1789–1969: Their Lives and Major Opinions.* New York: Chelsea House.

SHIRAS, WINFIELD 1953 *Justice George Shiras, Jr. of Pittsburgh.* Pittsburgh: University of Pittsburgh Press.

## SHOPPING CENTERS

By the 1960s, shopping centers accounted for more than one-third of the nation's retail sales. Crowds of shoppers made the centers attractive places for the exercise of FIRST AMENDMENT rights such as PICKETING, leafleting, and the circulation of petitions. Two decades earlier, in MARSH V. ALABAMA (1946), the Supreme Court had assimilated the "company town" to the First Amendment DOCTRINE governing the use of an ordinary city street as a PUBLIC FORUM. When shopping center owners sought to prevent the use of their property for communications they had not approved, the question arose whether the centers, too, would be assimilated to the public forum doctrine.

The problem first came to the Supreme Court near the zenith of WARREN COURT activism in the defense of CIVIL LIBERTIES. In *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.* (1968), a bare majority held that union picketing of a store in a shopping center was protected by the First Amendment. Justice THURGOOD MARSHALL, for the Court, described the shopping center as the functional equivalent of the business district of the company town in *Marsh.* The author of the *Marsh* opinion, Justice HUGO L. BLACK, led the four dissenters.

When the issue returned to the Court, President

RICHARD M. NIXON's four appointees were sitting. A new 5–4 majority now held, in *Lloyd Corp v. Tanner* (1972), that the distribution of leaflets opposing the VIETNAM WAR could be forbidden by a shopping center's private owner. Justice LEWIS F. POWELL, for the majority, distinguished *Logan Valley:* the leafleting here had no relation to the center's activities, and here alternative means of communication were reasonably available on nearby streets. Justice Marshall led the dissenters.

The circle closed four years later, when a 7–2 majority, speaking through Justice POTTER STEWART (a *Lloyd Corp.* dissenter), said that *Lloyd Corp.* really had overruled *Logan Valley.* HUDGENS V. NLRB (1976), like *Logan Valley,* was a union picketing case. Justice Stewart pointed out that *Lloyd Corp.* had drawn an untenable distinction based on the content of messages being conveyed; because that distinction failed, it was necessary to make a yes-or-no decision on the assimilation of shopping centers to the doctrine governing company towns—and the majority's answer was "no."

Some passages in the *Lloyd Corp.* opinion had suggested that a shopping center owner had a constitutionally protected property right to exclude leafleters. That argument was flatly rejected by the Court in PRUNEYARD SHOPPING CENTER V. ROBBINS (1980). California's supreme court had ruled that the state constitution protected the right to collect signatures for a petition in a shopping center. The U.S. Supreme Court unanimously held that this principle of state constitutional law did not violate any federal constitutional rights.

KENNETH L. KARST
(1986)

Bibliography

TRIBE, LAURENCE H. 1978 *American Constitutional Law.* Pages 693–696, 1163–1167. Mineola, N.Y.: Foundation Press.

## SHREVEPORT DOCTRINE

In the early twentieth century, the Supreme Court employed several DOCTRINES to sustain federal regulation of INTRASTATE COMMERCE. Among these, the Shreveport doctrine enjoyed a long tenure in the service of the COMMERCE CLAUSE. Since its elaboration, the Court has approved its use as a means of reaching a variety of activities, including professional football, minimum wages, crop control, and RACIAL DISCRIMINATION.

First announced in HOUSTON, EAST WEST TEXAS RAILWAY V. UNITED STATES—the Shreveport Rate Case—(1914), the doctrine permitted congressional regulation of purely local freight rates when, unmodified, they would have impeded INTERSTATE COMMERCE. The doctrine drew sustenance from the Court's distinction between direct and indirect EFFECTS ON COMMERCE in UNITED STATES V. E. C. KNIGHT COMPANY (1895) but reflected a new economic pragmatism. The Court recognized the integrated nature of the railroad system before it in the Shreveport Rate Case. It asserted that the commerce power "necessarily embraces the right to control . . . [intrastate] operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate" to maintain a free flow of interstate commerce. The Court applied the doctrine throughout the 1920s in railroad cases such as DAYTON-GOOSE CREEK RAILWAY V. UNITED STATES (1924).

The judicial "revolution" of 1937 enhanced the use of the Shreveport doctrine. Earlier, the Court had struck down federal regulation in CARTER V. CARTER COAL COMPANY (1936) as an attempt to control activities only indirectly affecting interstate commerce, but it soon held that the WAGNER (NATIONAL LABOR RELATIONS) ACT legitimately regulated PRODUCTION (heretofore considered local), reiterating the "close and substantial relation" test of the Shreveport doctrine. (See NLRB V. JONES & LAUGHLIN STEEL CORP., 1937.)

The doctrine continued to grow in the 1940s. After several predictable decisions allowing federal regulation of intrastate milk prices (UNITED STATES V. WRIGHTWOOD DAIRY, 1942) by subjecting to federal control a local wheat crop "where no part of the product is intended for interstate commerce or intermingled with the subjects thereof." The Court declared that even local activity that "may not be regarded as commerce . . . may still . . . be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'." This interpretation invited increasing use of the doctrine in antitrust cases, particularly under the SHERMAN ANTITRUST ACT, where, along with the STREAM OF COMMERCE DOCTRINE, it became a test of the law's applicability.

Congress and the Supreme Court continued this expansion in the 1960s. The CIVIL RIGHTS ACT OF 1964, based on the commerce clause, prohibits racial discrimination in PUBLIC ACCOMMODATIONS. The Court sustained application of the act to a local restaurant because "the absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food . . . is not . . . a crucial matter." (See KATZENBACH V. MCCLUNG, 1964; *Daniel v. Paul,* 1969.) Criminal activity, too, fell within the doctrine's scope when the Court found ties between local loansharking and interstate commerce in PEREZ V. UNITED STATES (1971). The Court also included firearms in the

doctrine's reach, sustaining a conviction under the OMNIBUS CRIME CONTROL AND SAFE STREETS ACT for illegal possession, despite a minimal demonstration of the requisite connection with commerce (*Scarborough v. United States*, 1977).

The Shreveport doctrine helped bring about the demise of DUAL FEDERALISM. Because of the Justices' willingness to accede to congressional determinations, the Court's application of the doctrine has consistently followed its statement in *Board of Trade v. Olsen* (1923) that "this court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce, and its effect upon it, are clearly nonexistent."

DAVID GORDON
(1986)

## *SIBRON v. NEW YORK*

See: *Terry v. Ohio*

## *SIERRA CLUB v. MORTON*
405 U.S. 727 (1972)

Acting as a public defender of the environment, the Sierra Club sued the secretary of the interior to enjoin approval of a ski resort development at Mineral King Valley in Sequoia National Forest. The Supreme Court, 4–3, denied the Club's right to JUDICIAL REVIEW of claimed statutory violations, for failure to allege harm to its members in their personal use of Mineral King. Significantly, however, the Court declared aesthetic and environmental interests, though widely shared, to be as deserving of judicial protection as economic interests. Thus, persons whose individual enjoyment of the environment is impaired by government action have STANDING to contest the action's legality.

JOHNATHON D. VARAT
(1986)

## *SILVERMAN v. UNITED STATES*
365 U.S. 505 (1961)

To investigate gambling, DISTRICT OF COLUMBIA police officers inserted a microphone into a wall. The device touched a heating duct, enabling the police to overhear conversations throughout the house.

In *Goldman v. United States* (1942) the Court had afforded no constitutional protection against a microphone placed *against* a wall. By 1961 the Court, concerned about new methods of electronic surveillance, ruled that because there was a physical penetration, albeit only a few inches, the overhearing was subject to the FOURTH AMENDMENT with no need to reconsider *Goldman* or earlier cases; that reconsideration occurred in KATZ V. UNITED STATES (1967).

HERMAN SCHWARTZ
(1986)

(SEE ALSO: *Electronic Eavesdropping.*)

## SILVER PLATTER DOCTRINE

WEEKS V. UNITED STATES (1914), which formulated the EXCLUSIONARY RULE for federal prosecutions, made an exception for EVIDENCE seized by state officers in searches that did not meet FOURTH AMENDMENT standards. The evidence was usable in a federal trial when it was handed by the state to federal officers on "a silver platter" (Justice FELIX FRANKFURTER's phrase in *Lustig v. United States*, 1949). Participation by federal officers in the state search, no matter how minor, rendered the evidence inadmissible in federal cases under *Byars v. United States* (1927), as did even a search conducted by state officers alone if its purpose was the gathering of evidence for the federal government under *Gambino v. United States* (1927).

A combination of several factors led to the overruling of the silver platter doctrine in ELKINS V. UNITED STATES (1960). First, in WOLF V. COLORADO (1949), the Supreme Court had applied "the core" of the Fourth Amendment's standard (which did not, however, include the exclusionary rule) to the states. It therefore became incongruous to admit in federal court evidence which state officials had seized in violation of the Constitution. In addition, about half the states had adopted an exclusionary rule for unlawfully seized evidence; to allow federal authorities to use evidence which would have been excluded in the state courts served to frustrate the exclusionary policies of those states and to undermine the principle of FEDERALISM on which the silver platter doctrine was itself premised. The expansion of federal criminal law also undermined the vitality of the doctrine: a growing catalogue of crimes punishable by both federal and state governments evidently alerted the Court to the attendant possibilities of abuse by cooperative law enforcement.

Thus far the *Elkins* principle applies only to evidence in criminal cases. In *Janis v. United States* (1976), the Court held that evidence unlawfully seized by state officers can be used by the federal government (and vice versa) in civil proceedings (for instance, in a tax assessment case). The Court reasoned that the main purpose of the exclusionary rule is to deter unlawful searches, and that application of the rule should be tailored to this end.

When the officer is prevented from using the seized evidence to further a criminal prosecution, the principle of deterrence is amply served; exclusion of the evidence in a civil case would provide no significant reinforcement for Fourth Amendment values.

JACOB W. LANDYNSKI
(1986)

(SEE ALSO: *Two Sovereignties Rule.*)

Bibliography

LANDYNSKI, JACOB W. 1966 *Search and Seizure and the Supreme Court.* Pages 70–73, 149–158. Baltimore: Johns Hopkins University Press.

## *SILVERTHORNE LUMBER CO. v. UNITED STATES*
251 U.S. 385 (1920)

*Silverthorne* was the first case to test the scope of the EXCLUSIONARY RULE, formulated in WEEKS V. UNITED STATES (1914), requiring exclusion from a federal trial of EVIDENCE obtained in an unconstitutional search.

Federal officers searched the Silverthorne Company's office; "without a shadow of authority," in Justice OLIVER WENDELL HOLMES's words, they "made a clean sweep of all the books, papers, and documents found there." Compounding the "outrage," the records were copied and photographed, and an INDICTMENT was framed on the basis of the information uncovered. The district court ordered the return of the originals but allowed the copies to be retained by the government, which then subpoenaed the originals. The Supreme Court reversed.

Holmes asserted that to allow the government to use the derivatively acquired evidence would mean that "only two steps are required [to render the evidence admissible] instead of one. In our opinion such is not the law. It reduces the 4th Amendment to form of words." Holmes added: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used, but that it shall not be used at all." On this principle, an admission made by a suspect while he is under illegal arrest, as in WONG SUN V. UNITED STATES (1963), like a lead furnished by an illegally placed wiretap, as in NARDONE V. UNITED STATES (1939), may not be introduced into evidence because it is directly derived from an unlawful act. In *Nardone*, Justice FELIX FRANKFURTER dubbed the doctrine of the *Silverthorne* case as the FRUIT OF THE POISONOUS TREE.

JACOB W. LANDYNSKI
(1986)

## *SIMON v. EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION*
426 U.S. 26 (1976)

In 1969 the Internal Revenue Service (IRS) amended its regulations governing nonprofit hospitals' obligations to provide care for INDIGENTS. A number of individuals and service organizations sued to set aside the modifications, claiming they would cause the denial of services to indigents. Following WARTH V. SELDIN (1975), the Supreme Court held that the plaintiffs lacked standing. Justice LEWIS F. POWELL, for the Court, declared that it was "purely speculative" whether any denials of hospital service to the plaintiffs could be traced to the IRS changes, or whether judicial relief against the IRS would increase the availability of such services to them. The plaintiffs thus could not meet Article III's requirement of CASES OR CONTROVERSIES. Justice WILLIAM J. BRENNAN, joined by Justice THURGOOD MARSHALL, argued that the plaintiffs had alleged a cognizable injury, but concurred in the result on grounds of RIPENESS.

DAVID GORDON
(1986)

## *SIMOPOULOS v. VIRGINIA*

See: Reproductive Autonomy

## *SIMS' CASE*
7 Cushing (Mass.) 285 (1851)

Chief Justice LEMUEL SHAW of Massachusetts, denying a writ of HABEAS CORPUS for a fugitive slave, delivered the first and most influential opinion sustaining the constitutionality of the Fugitive Slave Act of 1850. The case, which riveted national attention, had political and moral as well as constitutional significance; it reproduced hateful scenes of slavery in the North. The capture and rendition of a black man provoked denunciations of the COMPROMISE OF 1850. Without military force to execute the rendition, Shaw's decision would have been a dead letter in Massachusetts.

LEONARD W. LEVY
(1986)

(SEE ALSO: *Fugitive Slavery.*)

# SINGLE-SEX EDUCATION

How does law construct distinctions based on gender? How does gender construct legal categories? The question

of whether state-funded (or subsidized) schools may constitutionally have single-sex admissions policies provides one template for considering the role of law in making gender and the role of gender in making law.

Historically, law has barred women from an array of educational, legal, and professional opportunities. Until well into the second half of the twentieth century, such barriers were justified as appropriate in light of women's distinctive nature, temperament, and role in society. Law thus ascribed certain traits to women and found, because of those ascriptions, women unsuitable for diverse roles in civil, economic, and political life.

But, in a series of opinions beginning in 1971, constitutional jurisprudence shifted from approval to skepticism of gender-based classifications. Through cases addressing gender-based rules about who can serve as an executor of an estate or as a juror and who can consume alcohol, claim dependents, or confer dependency benefits, the Supreme Court developed what it termed a "heightened scrutiny" test of gender-based classifications and invalidated many (but not all) as impermissible.

Some institutions have, however, been conceived to be specially situated vis-à-vis the EQUAL PROTECTION clause. The ARMED FORCES offer one such example; in ROSTKER V. GOLDBERG (1981), the Supreme Court upheld a male-only military draft because women and men were assumed not equal for combat and because of the special place of the military in United States legal life. Age-based rules of sexuality provide a second example. In MICHAEL M. V. SUPERIOR COURT (1981), the Court upheld the constitutionality of a California statutory rape statute that punished men engaging in sex with women under the age of eighteen but imposed no such penalty on women. Women's ability to become pregnant was used as a justification for special protections, while dissenters argued that such laws situated women as actors without agency, as victims beset upon by men.

Education is a third context sometimes conceived as requiring distinctive jurisprudential rules. During the 1970s, lower courts were faced with challenges to all-boy schools, and in 1982, Joe Hogan's objection to the women-only admissions policy of a state nursing school reached the Supreme Court. The state defended the policy as appropriate AFFIRMATIVE ACTION for women. The majority in MISSISSIPPI UNIVERSITY FOR WOMEN V. HOGAN (1982), disagreed; Justice SANDRA DAY O'CONNOR explained for the Court that nursing has not been a career closed to women and the options provided to Mr. Hogan were not equal to those available to women. Two Justices, WILLIAM H. REHNQUIST and LEWIS F. POWELL, JR., proposed in dissent that the diversity provided by colleges ranging from co-ed to single-sex provided distinctive benefits and served legitimate state policies. The Court expressly left open the question of whether "SEPARATE BUT EQUAL" undergraduate institutions could be single-sex institutions.

More than a decade later, the Court returned to the question. Women challenged the all-male admissions policy of the Virginia Military Institute (VMI), self-described as teaching its students to become "citizen-soldiers." VMI defended by arguing that, because women and men had different styles of learning, the "adversative" environment of VMI was not suitable for women, who were sent instead to a program in a neighboring all-women's school, Mary Baldwin College. In UNITED STATES V. VIRGINIA (1996), the Court (in an opinion written by the Court's second woman Justice, RUTH BADER GINSBURG) held that Virginia had failed to afford equal benefits to members of both genders; the Court thus required women's admission to VMI. That ruling also resulted in the admission of women to South Carolina's all-male military school, The Citadel, about which challenges were pending in the lower courts.

The words used and the meaning of the standard by which the Court has assessed gender-based classifications have varied over the decades. In the VMI case, the Court required defenders of "gender-based government action" to shoulder the complete burden of demonstrating that an "exceedingly persuasive justification" exists for that action. Judges receiving such justifications were instructed to adopt an attitude of skepticism, founded in decades of state-sanctioned discrimination against women, and to insist upon a substantial link between the government's objectives and the classification adopted.

Such heightened scrutiny does not, however, render all gender classifications "impermissible." Rather, "[p]hysical differences between men and women" permit some classifications, but those classifications cannot be used "to create or perpetuate the legal, social, and economic inferiority of women."

Again, questions remain. What if VMI had created a separate set of facilities within its own boundaries, called it "VMI" and yet segregated women from men? What about all-women's colleges, created during the decades when women were barred from men's institutions and dedicated to enabling women full participatory rights? What about lower schools for adolescents, who are described by some researchers as specially susceptible to conforming to social expectations of stereotypically gendered behavior? What about all-girl classes in mathematics or science, fields particularly identified as inhospitable to women as students and professionals? What about the intersections of gender, race, and class? In New York City in the 1990s, special funding enabled the creation of an "all girls" junior high school to which public school students had access; in Detroit, Michigan, in the 1980s, a school created an all-male African American academy described as attentive to the distinct issues facing that set of

children. And what about state subsidies, federal funds, and tax exemptions to private institutions? Should federal and state statutes maintain exceptions for single-sex organizations (like scouts), athletic programs, schools, any military programs, and prisons?

For some, the answer is that law should not sanction any gender distinctions unless absolutely necessary (and for some, virtually no distinctions are sustainable) and that to sanction such distinctions is to maintain and perpetuate them. For others, law must respond to the historically engendered understandings of the meaning of gender, race, SEXUAL ORIENTATION, and class and therefore can—selectively and self-consciously—provide remedial responses to those who are members of historically disfavored groups. For example, girls and women may be able to have all-female institutions not because they learn differently than do boys and men but because boys and men create hostile environments for females or because teachers may shift their attention away from females to males. For still others, law should not work to eradicate gender-based distinctions and, as long as diverse opportunities are provided, law should permit as much public and private choice as possible to let a variety of expressions of the meaning of gender co-exist.

While the VMI decision could be seen as ensconcing an exacting constitutional test for all gender-based classifications, a decision two years later in *Miller v. Albright* (1998) provides an apt reminder that many judges and commentators remain comfortable with gender-based distinctions, especially when traceable to either biological or parental roles. Federal law provided that CITIZENSHIP of children of citizen mothers was established at birth; confirmation of that citizenship, subject to proof of the mother's residence, was available at any time. A child of an alien mother and a citizen father, however, did not receive citizenship absent affirmative actions, within eighteen years of the birth, by the father or child to confirm their relationship. Justice JOHN PAUL STEVENS, announcing the Court's judgment and joined by Chief Justice Rehnquist, found that the classification was "supported by valid government interests" in fostering ties between the foreign-born child and the United States and that "biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands." Justices O'Connor and ANTHONY M. KENNEDY recorded their concern about the gendered distinction but found the petitioner lacked STANDING to press a claim for her father, the citizen, and therefore upheld the statute. Justice ANTONIN SCALIA (who had dissented in the VMI case) and Justice CLARENCE THOMAS (who had not participated in the VMI case) joined the judgment on the ground that only Congress has the power to decide citizenship rules. Justices Ginsburg, DAVID H. SOUTER, and STEPHEN G. BREYER objected on the merits to the classification and returned to the language of heightened scrutiny for gender-based classifications, the requirement of exceedingly persuasive justifications, and the insistence on a substantial relationship between the classification and the objectives stated.

In sum, biology remains—for Justices, judges, and commentators—a basis for line-drawing. Yet disagreements abound about when biology is relevant, when classifications create or perpetuate the legal, social, and economic inferiority of women, and when such categories are either appropriately compensatory, founded in "real differences," or creatively expressive of the richness of human life.

JUDITH RESNIK
(2000)

Bibliography

ALLEN BABCOCK, BARBARA; FREEDMAN, ANN E.; DELLER ROSS, SUSAN; WEBSTER WILLIAMS, WENDY; COPELON, RHONDA; RHODE, DEBORAH L.; and TAUB, NADINE 1996 *Sex Discrimination and the Law.* Boston: Little Brown.

BARTLETT, KATHARINE T. 1993 *Gender and Law: Theory, Doctrine, and Commentary.* Boston: Little Brown.

BECKER, MARY; GRANT BOWMAN, CYNTHIA; and TORREY, MORRISON 1994 *Cases and Materials on Feminist Jurisprudence: Taking Women Seriously.* St. Paul, Minn.: West Publishing Co.

ESKRIDGE, WILLIAM H., JR. and HUNTER, NAN D. 1997 *Sexuality, Gender and the Law.* Westbury, N.Y.: Foundation Press.

FRUG, MARY JOE 1992 *Women and the Law.* Westbury, N.Y.: Foundation Press.

HILL KAY, HERMA and WEST, MARTHA S. 1996 *Text, Cases, and Materials on Sex-Based Discrimination,* 4th ed. St. Paul, Minn.: West Publishing Co.

KARST, KENNETH L. 1991 The Pursuit of Manhood and the Desegregation of the Armed Forces. *UCLA Law Review* 38: 499–581.

THORNE, BARRIE 1993 *Gender Play: Girls and Boys in School.* New Brunswick, N.J.: Rutgers University Press.

## SINKING FUND CASES

*Union Pacific Railroad Co. v. United States*
99 U.S. 700 (1879)
*Central Pacific Railroad Co. v. Gallatin*
99 U.S. 727 (1879)

Congress authorized the construction of transcontinental railroads and made massive grants and loans to them. Following the exposure of enormous corruption in the management of the roads, Congress enacted a statute requiring that twenty-five percent of the annual net earnings

of the CORPORATIONS be paid into a sinking fund to guarantee payment of the debts owed to the federal treasury. The Supreme Court sustained the second statute on ground that Congress had reserved the power to alter or amend its original grant. However, Chief Justice MORRISON R. WAITE, for a 6–3 Court, said in an OBITER DICTUM that the United States binds itself by its contracts and that, although the CONTRACT CLAUSE applied only to the states, the Fifth Amendment's DUE PROCESS clause effectuated the binding by preventing the deprivation of property. Three Justices, WILLIAM STRONG, JOSEPH P. BRADLEY, and STEPHEN J. FIELD, wrote dissenting opinions based on Waite's dictum; they believed that the sinking-fund statute violated the Fifth Amendment. The decision is significant, therefore, because of the strong boost it gave to the emerging concept of SUBSTANTIVE DUE PROCESS. In effect, too, the Court incorporated contract clause reasoning into the due process clause as a means of protecting property when Congress "improperly interferes with VESTED RIGHTS." This strange doctrine operated, though infrequently, as late as 1936. (See LOUISVILLE JOINT STOCK LAND BANK V. RADFORD.)

LEONARD W. LEVY
(1986)

## *SIPUEL v. OKLAHOMA STATE BOARD OF REGENTS*
332 U.S. 631 (1948)

PER CURIAM, reaffirming MISSOURI EX REL. GAINES V. CANADA (1938), the Supreme Court ordered Oklahoma to provide a black applicant with legal education in a state law school. Rather than admit her to the state university, the state roped off part of the state capitol, called it a law school for blacks, and provided three instructors. The Supreme Court avoided ruling on this mockery, saying the case had not presented the issue whether separate law schools satisfied the Constitution.

KENNETH L. KARST
(1986)

(SEE ALSO: *Sweatt v. Painter.*)

## SIT-IN

The CIVIL RIGHTS MOVEMENT of the 1960s embraced more than lawsuits aimed at ending racial SEGREGATION in southern public institutions. It also included several forms of direct action, such as "freedom rides," in which blacks would ride on buses and trains, refusing to confine themselves to places set aside for black passengers. The quintessential form of direct action was the sit-in demonstration. The practice began in Greensboro, North Carolina, in 1960. Four black college freshmen went to a dime store lunch counter and ordered coffee. When they were told they would not be served, they sat at the counter, waiting, in silent protest against the indignity of RACIAL DISCRIMINATION. The next week they returned, joined by increasing numbers of students, white and black. Soon the sit-in technique spread to lunch counters throughout the South.

The impact of the sit-ins was enormous. Many stores and restaurants abandoned their discriminatory policies within a matter of weeks. Most, however, held out, and called the police. Sit-in demonstrators by the hundreds were arrested and charged with criminal TRESPASS. From 1960 to 1964, the problem of the sit-ins came to the Supreme Court over and over again.

When the segregating restaurant was a state operation (for example, a lunch counter in a courthouse), the Court could reverse the conviction by analogy to BROWN V. BOARD OF EDUCATION (1954). Even when the lunch counter was privately owned, the Court would reverse the conviction if it could find some public policy in the background, requiring or encouraging segregation. During the early 1960s the Court was pressed to abandon, or drastically alter, the STATE ACTION limitation, so as to create an equivalent FOURTEENTH AMENDMENT right to be free from racial discrimination in all privately owned PUBLIC ACCOMMODATIONS, irrespective of any state participation. The issue reached a climax—but not a resolution—in BELL V. MARYLAND (1964), when the Court again struck down a conviction on a narrow ground, without deciding the larger constitutional issue.

The Court was relieved of the need to face that issue when Congress adopted the CIVIL RIGHTS ACT OF 1964, which included a broad prohibition against racial discrimination in public accommodations. The Supreme Court quickly upheld the law's constitutionality in HEART OF ATLANTA MOTEL V. UNITED STATES (1964). Further, the Court held that the 1964 act applied with retroactive force, invalidating trespass convictions for sit-ins at public accommodations before the law's effective date (*Hamm v. City of Rock Hill*, 1964).

KENNETH L. KARST
(1986)

Bibliography

LEWIS, THOMAS P. 1963 The Sit-In Cases: Great Expectations. *Supreme Court Review* 1963:101–151.

PAULSEN, MONRAD G. 1964 The Sit-In Cases of 1964: But Answer Came There None. *Supreme Court Review* 1964:137–170.

## SIXTEENTH AMENDMENT

The Sixteenth Amendment was designed to circumvent POLLOCK V. FARMERS' LOAN AND TRUST CO. (1895), in which the Supreme Court had held that a federal tax on income from property was a DIRECT TAX on that property and therefore invalid for want of apportionment among the states on the basis of population (Article I, sections 2 and 9). Following *Pollock*, powerful political forces continued to press for an income tax to replace the regressive consumption taxes then employed to finance the federal government. Indeed, an amendment might have been unnecessary, given the Supreme Court's philosophical shift in *Flint v. Stone Tracy Co.* (1911), upholding a corporate income tax as an excise on doing business in corporate form, not a tax on property.

Although there was sentiment for challenging *Pollock* by reenacting a personal income tax, President WILLIAM HOWARD TAFT urged a constitutional amendment. The Sixteenth Amendment was speedily passed and ratified in 1913. It provides: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Since the enactment of a new income tax statute in 1913, only a single Supreme Court decision has held an income tax provision unconstitutional. EISNER V. MACOMBER (1920) ruled that a stock dividend of common stock on common stock was not "income" because the element of "realization" was lacking. *Macomber* has been greatly undermined by subsequent cases, such as *Helvering v. Bruun* (1940) which treated the return of a lessor's property to him at the termination of a lease as a realization of income. Indeed, the current Court would probably dispense entirely with any constitutional requirement of a realization (or alternatively view a stock dividend as a realization). In *Helvering v. Griffiths* (1943) three dissenters would have overruled *Macomber* but the majority held that the constitutional issue had not been presented by the statute.

*Eisner v. Macomber* also purported to define "income" for constitutional purposes as "the gain derived from capital, from labor, or from both combined." This definition proved far too narrow; in *Commissioner v. Glenshaw Glass Co.* (1955), the Court rejected all considerations of source, holding a windfall constitutionally taxable as income.

Unlike *Macomber*, modern decisions go to considerable lengths to uphold the constitutionality of income tax provisions. For example, the lower courts upheld an income tax provision that taxed mutual insurance companies on their gross receipts in *Penn Mutual Indemnity Co. v. Commissioner* (1976). Because no deductions were allowed, the tax might have been levied even though the taxpayer had no gain. Similarly, lower courts have upheld a Code section that values property received for services by ignoring value-depressing restrictions on the property (*Sakol v. Commissioner*, 1978). Although the Supreme Court has not had occasion to confirm these broad holdings, the modern approach to claims of constitutional invalidity of tax statutes is to uphold them as indirect taxes or alternatively to define "income" with sufficient breadth to accommodate the provision in issue within the Sixteenth Amendment.

MICHAEL ASIMOW
(1986)

Bibliography

PAUL, RANDOLPH 1954 *Taxation in the United States.* Boston: Little, Brown.

## SIXTH AMENDMENT

See: Compulsory Process, Right to; Confrontation, Right of; Right to Counsel; Speedy Trial; Trial by Jury

## *SKINNER v. OKLAHOMA*
315 U.S. 535 (1942)

In *Skinner* the Supreme Court laid a doctrinal foundation for two of the most important constitutional developments of the twentieth century: the expansion of the reach of the EQUAL PROTECTION clause and the reemergence of SUBSTANTIVE DUE PROCESS as a guarantee of personal freedoms. The case arose out of an Oklahoma law authorizing STERILIZATION of a person convicted three times of "felonies involving moral turpitude." Skinner, convicted first of chicken stealing and then twice of armed robbery, was ordered sterilized by the state courts. The Supreme Court unanimously reversed, holding the sterilization law unconstitutional. Surely the decision seemed easy; no doubt the only serious question was the appropriate ground for decision.

The opinion of the Court, by Justice WILLIAM O. DOUGLAS, rested on equal protection grounds. The sterilization law contained an exception for violations of "prohibitory [liquor] laws, revenue acts, embezzlement, or political offenses." Although the state might constitutionally impose different penalties on embezzlement and other forms of stealing, it could not use so artificial a distinction as the basis for depriving someone of the right of procreation, "one of the basic civil rights of man." Because sterilization permanently deprived a person of a "basic liberty," said

Justice Douglas, the judiciary must subject it to "STRICT SCRUTINY." Here the state had offered no justification for the belief that inheritability of criminal traits followed the line between embezzlement and chicken stealing.

Surely the Court also recognized that the sterilization law's exceptions were white collar crimes. Justice Douglas said, "In evil or reckless hands" sterilization could "cause races or types which [were] inimical to the dominant group to wither and disappear." (The year was 1942; the Nazi theory of a "master race" was a major ideological target in WORLD WAR II.) Sterilization of some but not all who commit "intrinsically the same quality of offense" was "INVIDIOUS" DISCRIMINATION in the same way that RACIAL DISCRIMINATION was.

Chief Justice HARLAN FISKE STONE, concurring, found the Court's equal protection rationale unpersuasive, but found a denial of PROCEDURAL DUE PROCESS in the sterilization law's failure to give a three-time felon like Skinner an opportunity to show that his criminal tendencies were not inheritable. Given the prevailing scientific opinion that criminal traits were not generally inheritable, an individual should have a chance to contest the law's assumption. (This style of reasoning was in vogue briefly during the 1970s under the name of IRREBUTTABLE PRESUMPTIONS.) Justice ROBERT H. JACKSON agreed with both the Douglas and the Stone approaches.

Close to the surface of both the Douglas and the Stone opinions was a strong skepticism that any criminal traits were inheritable. Such an objection would seem fatal to Oklahoma's law on substantive due process grounds. But the Court had very recently abandoned substantive due process as a limit on ECONOMIC REGULATION, and in doing so had used language suggesting the complete demise of substantive due process. Both Douglas and Stone seemed to be avoiding the obvious ground that the law arbitrarily deprived Skinner of liberty. But *Skinner* can be seen today as not only a forerunner of a later Court's strict scrutiny analysis of equal protection cases involving FUNDAMENTAL INTERESTS and SUSPECT CLASSIFICATIONS but also a major early precedent for the development of a constitutional RIGHT OF PRIVACY as a branch of substantive due process.

KENNETH L. KARST
(1986)

(SEE ALSO: *Freedom of Intimate Association; Reproductive Autonomy.*)

Bibliography

KARST, KENNETH L. 1969 Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula." *UCLA Law Review* 16:716–750.

## *SKINNER v. RAILWAY LABOR EXECUTIVES ASSOCIATION*
489 U.S. 602 (1989)

In this case, the Supreme Court significantly restricted the protections of the FOURTH AMENDMENT. The Court had never before sustained a BODY SEARCH apart from ARREST and without suspicion of individual wrongdoing, except with respect to prison inmates. In *Skinner* the Court sustained the constitutionality of government regulations requiring blood and urine tests by railroad employees involved in train accidents and by those who violated certain safety rules.

Employee abuse of alcohol and drugs resulting in jeopardy to the public explains the regulations and the decision. Drunken employees had caused accidents from the beginning of railroad history, and employees drugged by use of other substances were responsible for dozens of accidents killing and maiming passengers and inflicting damages amounting to millions of dollars.

A 7–2 Court, speaking through Justice ANTHONY M. KENNEDY, upheld both the compulsory and discretionary DRUG TESTING as well as the alcohol testing. Kennedy recognized that the urine and blood tests were searches within the meaning of the Fourth Amendment, but held that PROBABLE CAUSE was an irrelevant consideration. Searches had to be reasonable, but did not have to satisfy the SEARCH WARRANT requirement. Accordingly, the mandatory searches of employees involved in an accident did not violate the amendment because specificity individualized suspicion was not necessary. (Reasonable suspicion based on individual conduct was necessary, according to the federal regulations, when an employee had violated safety requirements but had not been involved in an accident.) Kennedy asserted, rather than explained, that the warrant requirement was irrelevant because it might stymie governmental objectives of promoting safety.

Similarly, he asserted that privacy interests implicated in the blood and urine testing were "minimal." Blood and breath tests were commonplace, safe, and painless. Urine testing, by contrast, was intrusive, but the expectations of privacy on the part of employees were diminished by their knowledge that their industry was severely regulated to promote safety and that their fitness was related to safety. The government interest in requiring the tests was simply compelling, overriding any privacy or Fourth Amendment rights that might prevail in a criminal case.

Justice THURGOOD MARSHALL, joined by Justice WILLIAM J. BRENNAN, shrilly dissented. The tests, which the majority thought to be minor invasions of privacy, were "draconian," exacted from employees who had personally given no basis for belief that they were guilty of working under

the influence of drugs or alcohol. "The majority's acceptance of dragnet blood and urine testing ensures that the first, and worst, casualty of war on drugs will be the precious liberties of our citizens." All PRECEDENTS required individualized suspicion before warrantless blood testing could be sustained. Privacy interests offended by compulsory and supervised urine testing could not be dismissed as "minimal." The chemical analysis of blood and urine specimens also conflicted with privacy interests. Such analysis could reveal a variety of medical disorders that were none of the government's business. Marshall believed that railroad workers did not relinquish their constitutional rights by taking employment in a regulated industry; furthering the public safety had to be subordinated to constitutional rights.

If the entire public, not just airline employees, must submit to WARRANTLESS SEARCH without probable cause or individual suspicion to enter passenger areas in airports, promoting public safety in railroads seem an adequate reason for the testing of railroad employees who break safety rules or are involved in an accident. A consideration of that sort did not, however, obtain in the companion case of NATIONAL TREASURY EMPLOYEES UNION V. VON RAAB (1989).

LEONARD W. LEVY
(1992)

## SLANDER

See: Libel and the First Amendment

## SLAPPS

See: Strategic Lawsuits Against Public Participation in Government

## SLAUGHTERHOUSE CASES
16 Wallace 36 (1873)

Most histories of the Constitution begin consideration of the judicial interpretation of the THIRTEENTH and FOURTEENTH AMENDMENTS with the *Slaughterhouse* decision of 1873. The decision is, to be sure, of vast significance. Justices JOSEPH P. BRADLEY and STEPHEN J. FIELD, dissenting, expressed embryonic DOCTRINES of FREEDOM OF CONTRACT and SUBSTANTIVE DUE PROCESS that were to dominate American jurisprudence for two generations.

In 1869, Louisiana, ostensibly as a public health measure, incorporated the Crescent City Stock Landing and Slaughterhouse Company and granted it a monopoly of licensed butchering in New Orleans. Butchers not parties to the lucrative arrangement, after failing to crack the monopoly in the state courts, employed as counsel, in an appeal to the federal courts, former Supreme Court Justice JOHN A. CAMPBELL, who more recently had been a Confederate assistant secretary of war. Campbell argued before the Supreme Court that the excluded butchers had been deprived of their livelihoods by the state's deliberate discrimination, although Louisiana had disguised the corrupt monopoly as a health measure. Therefore the disputed statute violated the Thirteenth Amendment's ban on involuntary servitude, the 1866 CIVIL RIGHTS ACT's enforcements of that ban, and the Fourteenth Amendment's guarantees of EQUAL PROTECTION OF THE LAWS, and due process.

Among prominent counsel for the state, Senator MATTHEW HALE CARPENTER responded to Campbell's innovative brief. Carpenter easily assembled case law that sustained state restrictions on private economic relationships. He insisted that the STATE POLICE POWER amply undergirded the Louisiana statute. No federal constitutional question existed, Carpenter asserted. Both the Thirteenth and the Fourteenth Amendments were irrelevant to the litigants' rights and remedies. And, he prophesied, the federal system would be virtually revolutionized if the Court accepted Campbell's notions and legitimized a federal interest in individuals' claims to be exempt from state regulation.

Speaking through Justice SAMUEL F. MILLER, a majority of the Court was unready to accept Campbell's view that federal guarantees to individuals extended to trades (although, in the TEST OATH CASES, 1867, the Court had extended other federal guarantees to lawyers, ministers, and teachers). Instead, having accepted Carpenter's arguments, Miller reviewed the tradition of judicial support for state determination of ways to meet POLICE POWER responsibilities. Miller denied that exclusion from butchering deprived the appellants of federally protected rights to freedom, privileges and immunities, equal protection, or due process; the "one pervading purpose" of the postwar amendments, he said, was to liberate black slaves, not to enlarge whites' rights. The monopoly created by the state law could not be perceived as imposing servitude; the Thirteenth Amendment was irrelevant as a protection for livelihoods.

Turning to the Fourteenth Amendment, Miller separated federal from state privileges and immunities. He assigned to the states the definition of ordinary marketplace relationships essential to the vast majority of people. More important, he assigned to state privileges and immunities all basic CIVIL LIBERTIES and rights, excluding them from federal protection. Miller's sweeping interpretation relegated everyone, including Negroes, who had assumed that the Fourteenth Amendment had assigned the federal gov-

ernment the role of "guardian democracy" over state-defined CIVIL RIGHTS, to the state governments for effective protection. The national government could protect only the few privileges and immunities of national citizenship: the RIGHT TO TRAVEL, access to Washington, D.C., FREEDOM OF ASSEMBLY and PETITION, and HABEAS CORPUS. Miller and the majority ignored contemporary evidence that many of the framers of both amendments and of the 1866 Civil Rights Act did perceive federally protectable privileges and immunities in broad terms; did assign to federal courts the duty to protect those rights; did envision national civil rights as the essential bridge connecting individuals and states to the nation in a more perfect union. And the majority overlooked earlier contrary case law that spoke directly to the point of the amendments as requirements for federal protection against both state and private discriminations: *In re Turner* (1867) and BLYEW V. UNITED STATES (1872).

Ignoring also prewar uses of due process in DRED SCOTT V. SANDFORD (1857) and in LAW OF THE LAND clauses in state constitutions, and shrugging off the equal protection argument Campbell had advanced for the appellants, Miller reiterated his position that the postwar amendments protected only blacks against STATE ACTION. The federal protection the Court allowed was minimal and virtually irrelevant to the needs of freedmen, and, for all Americans, left the protection of rights fundamentally unchanged from the prewar condition.

Dissenting, Justices Joseph P. Bradley and Stephen J. Field dredged up Justice SAMUEL CHASE's 1798 opinion in CALDER V. BULL and that of Justice BUSHROD WASHINGTON in his much-quoted 1823 circuit opinion in CORFIELD V. CORYELL, plus the augmented emphases on judicial discretion in a long line of decisions. Bradley emphasized the Fourteenth Amendment's due process clause. Advancing beyond the views of Chief Justice ROGER B. TANEY in *Dred Scott*, he justified judicial intervention to defend substantive due process rights and insisted that a right to choose a calling is a property, a FUNDAMENTAL RIGHT that no state might demean casually. That right was the base for all liberty. The federal courts must repel any state attack on that right, even though the attack might be disguised as a health measure under police powers.

Field argued that the butchering monopoly created servitudes forbidden by the Thirteenth Amendment, but he concentrated on the Fourteenth's privileges and immunities clause. It embraced all the fundamental rights belonging to free men. The national Constitution and laws affirmed those rights. Arbitrary state inhibitions on access to a trade or professions demeaned national rights. Field conceded that states were free to exercise their police powers, even to regulate occupations. But state regulations must apply equally to all citizens who met the standards of the state regulations.

Later, jurists less respectful than Field of state-based FEDERALISM were to cut his *Slaughterhouse* dissent free of its privileges and immunities moorings. Combining his views with Bradley's emphases on the broad effect of the Fourteenth Amendment, later jurists and legal commentators were to transform them into doctrines of freedom of contract and substantive due process. Those doctrines, which were to reign until the twentieth century was well advanced, constrained needful state actions in numerous areas of life and labor.

HAROLD M. HYMAN
(1986)

Bibliography

BETH, LOREN P. 1963 The Slaughter-House Cases—Revisited, *Louisiana Law Review* 23:487–505.

FAIRMAN, CHARLES 1971 Reconstruction and Reunion, 1864–1868. Chap. 21 in Vol. VI, part 1, of the *Oliver Wendell Holmes Devise History of the Supreme Court of the United States.* New York: Macmillan.

HAMILTON, WALTON H. 1938 The Path of Due Process of Law. Pages 167–179 in Conyers Read, ed., *The Constitution Reconsidered.* New York: Columbia University Press.

HYMAN, HAROLD M. and WIECEK, WILLIAM M. 1982 *Equal Justice under Law: Constitutional Development 1835–1875.* Pages 472–483. New York: Harper & Row.

## SLAVERY AND CIVIL LIBERTIES

In 1796 ST. GEORGE TUCKER, of Virginia, the law professor and judge, wrote *A Dissertation on Slavery.* Tucker noted that Americans had fought a revolution for liberty, swearing to "live free or die." At the same time, he said, "we were imposing upon our fellow men, who differ in complexion from us, a slavery, ten thousand times more cruel than the utmost extremity of those grievances and oppressions, of which we complained." Tucker lamented that a people who had declared "That *all men* are by nature *equally free* and *independent*" had "in defiance of so sacred a truth" tolerated SLAVERY. In the years that followed, it became clear that slavery would also threaten CIVIL LIBERTIES of white citizens, in the North as well as the South.

Slavery, Tucker said, totally abolished the slave's right to liberty and PROPERTY. After a "melancholy review" of brutal slave laws, Tucker concluded that the right to personal security had "at times been wholly annihilated or reduced to a shadow."

Slave codes typically denied slaves most basic rights: Slaves were required to obey their masters and to submit to whipping for actual or imagined infractions. They could

not own property; travel without a pass; bear arms without special permission; assemble in groups of more than five; preach except under the supervision of their masters; or be taught to read. Husbands and wives and parents and children might be separated by sale. State laws often punished slaves much more harshly than whites for the same offense. Blacks, slave or free, were not permitted to testify in cases where whites were a party. Of course, some masters allowed slaves greater freedom than the letter of the law provided, including having limited property and even being taught to read.

Southern laws denied slaves all but the most basic protection of the law. Murder of a slave and (by the late antebellum period) torture were prohibited; but since slaves could not testify against whites, these protections were often unenforceable. In 1829 in *State v. Mann*, a woman held as a slave had committed "some small offense" for which the man who had rented her for a year "had attempted to chastise her." When the woman fled and refused to stop, he shot her. The North Carolina Supreme Court said that the renter enjoyed the rights of the master, and announced "we cannot allow the right of the master to be brought into discussion in the Courts of Justice. The slave, to remain a slave, must be made sensible, that there is no appeal from his master. . . ."

Basic constitutional protections of liberty and equality did not extend to slaves. For example, Virginia's highest court held that the guarantees of the state's Bill of Rights did not protect them.

The Fugitive Slave Act of 1850 denied blacks claimed as slaves a right to testify or to a TRIAL BY JURY before being delivered to a state where their color gave rise to a legal presumption that they were slaves. Opponents of slavery unsuccessfully invoked the right to a civil jury trial under the SEVENTH AMENDMENT and other rights of DUE PROCESS under the federal BILL OF RIGHTS.

Nor were denials of basic rights limited to slaves. In DRED SCOTT V. SANDFORD (1857), Chief Justice ROGER B. TANEY said that all blacks, free as well as slave, including those who were recognized as citizens by Northern states, were entitled to no rights or privileges under the federal Constitution. They had, as far as the Constitution was concerned, no rights a white man was bound to respect.

Many states and territories denied free blacks basic rights. For example, the Oregon territory denied them the right to testify in cases in which a white man was a party; to own property; or to enter the state. JOHN A. BINGHAM was an antislavery congressman from Ohio who later drafted the basic guarantees in section 1 of the FOURTEENTH AMENDMENT. Bingham insisted that free blacks were American citizens and that the ban on their testimony where whites were parties to the litigation denied these citizens of the United States the national privilege not to be deprived of life, liberty, or property without due process of law.

Some abolitionists went further and insisted that the very institution of slavery, even in the states where it existed, violated the federal Bill of Rights—by denying people their liberty without due process of law. Since no legal process justified the denial of liberty to the slave and their descendants, slaves had, the argument insisted, been denied liberty without due process. While this view was not widely shared as to slaves in the Southern states, the REPUBLICAN PARTY platforms of 1856 and 1860 did announce that SLAVERY IN THE TERRITORIES violated the due process clause of the Fifth Amendment.

The denials of civil liberties discussed so far affected slaves and free blacks. But slavery had a more pervasive effect on liberty. In defense of slavery the South became a closed society in which discussion of one of the basic political and human rights issues of the day was forbidden.

With the rise of abolitionism in the 1830s, the Southern slave–owning elite began to demand that liberty in the North and South be restricted in order to protect the institution of slavery. Southern states demanded that abolition speech and press be silenced and abolition associations be prohibited.

The U.S. HOUSE OF REPRESENTATIVES passed a gag rule prohibiting reading or discussing antislavery petitions in Congress. Southern states passed laws making it criminal to publish items tending to cause slaves or free blacks to become discontent, a category that included most criticism of slavery. The Kansas Territory passed similar laws. What was not accomplished by law was enforced by mobs. As abolitionist evangelists attempted to convert Northern states to abolition in the mid-1830s, and after abolitionists sent their pamphlets to the Southern elite, Southerners exploded. A group of men seized sacks of mail from the Charleston post office and burned abolitionist publications. Southern slave holders and their allies demanded action against abolitionists, and many Northerners responded affirmatively.

Federal postmasters refused to mail abolitionist publications destined for the South. Northern mobs broke up abolition meetings and destroyed abolition presses. Elite Northerners, including prominent political leaders and "men of property and standing," cheered, justified, and often led the mobs. But these attacks on the FREEDOM OF SPEECH produced a backlash in the North.

By 1856 the newly formed Republican Party opposed expansion of slavery into new federal territories. Its slogan was "free speech, free soil, free territory, free men and Fremont." But the Southern quarantine against antislavery expression meant Republican candidates for President

were unable to campaign in most of the South. The Constitution apparently provided no protection. In 1833, in BARRON V. CITY OF BALTIMORE, the Supreme Court had ruled that the guarantees of the federal Bill of Rights did not bind the states. In 1860 the North Carolina Supreme Court upheld the conviction of a minister for circulating an antislavery book used as a campaign document by Republicans in the North.

In response to suppression of antislavery speech in the South and attempts to suppress it in the North, many Americans including leading Republicans began to insist that FREEDOM OF THE PRESS, free speech, and RELIGIOUS LIBERTY were basic rights or privileges belonging to all individuals throughout the nation and which the states should obey.

This ideal contributed to the ratification of the Fourteenth Amendment in 1868. The amendment provided that all persons born in the nation and subject to its jurisdiction were citizens and that no state could abridge the PRIVILEGES OR IMMUNITIES of citizens of the United States or deny to any person EQUAL PROTECTION OF THE LAWS or due process. Many read it as guaranteeing basic national liberties to all Americans against state denial and as a direct response to the suppression of civil liberty in the interest of slavery in the thirty years before the CIVIL WAR. But in the 1873 SLAUGHTERHOUSE CASES the Supreme Court emptied the privileges or immunities clause of any significant meaning. And for many years the Court continued to hold guarantees of the federal Bill of Rights inapplicable to the states. Only in 1925 did the Court suggest that freedom of speech was protected against state denial by the INCORPORATION DOCTRINE.

The legacy of slavery lingered long after the passage of the RECONSTRUCTION amendments. Americans of African descent were segregated in their housing, educated in segregated schools starved of funds, and in much of the South denied the VOTING RIGHTS they had been guaranteed by the FIFTEENTH AMENDMENT. During the CIVIL RIGHTS revolution of the 1960s the nation began to protect Americans of African descent from SEGREGATION and from denial of their right to vote. The nation also protected them in their FIRST AMENDMENT and Fourteenth Amendment right to protest. By this time the Court had held most of the guarantees of the federal Bill of Rights applicable to the states.

The institution of slavery denied basic rights to slaves and to free American citizens. The struggle to abolish slavery produced constitutional guarantees of liberty that promised protection for basic liberties to all Americans.

MICHAEL KENT CURTIS
(2000)

(SEE ALSO: *Abolitionist Constitutional Theory; Constitutional History, 1829–1848; Constitutional History, 1848–1861; Constitutional History, 1861–1865; Constitutional History, 1865–1871; Fugitive Slavery; Right of Petition.*)

Bibliography


BARNES, GILBERT H. 1933 *The Antislavery Impulse, 1830–1844.* New York: D. Appleton-Century Co.

CURTIS, MICHAEL KENT 1993 The 1859 Crisis Over Hinton Helper's Book. The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment. *Chicago-Kent Law Review* 68: 1113–1177.

——— 1995 The Curious History of Attempts to Suppress Anti-Slavery Speech, Press, and Petition in 1835– 37. *Northwestern University Law Review* 89:785–870.

——— 1997 The 1835 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens. *UCLA Law Review* 44:1109–1184.

DICKERSON, DONNA L. 1990 *The Course of Tolerance: Freedom of Press in Nineteenth-Century America.* New York: Greenwood Press.

EATON, CLEMENT 1964 *The Freedom-of-Thought Struggle in the Old South.* New York: Harper & Row.

MILLER, WILLIAM LEE 1996 *Arguing About Slavery: The Great Battle in the United States Congress.* New York: Knopf.

RICHARDS, LEONARD L. 1970 *Gentlemen of Property and Standing: Anti-Abolition Mobs in Jacksonian America.* New York: Oxford University Press.


## SLAVERY AND PROPERTY

Slaves were people who were PROPERTY. In 1860, the aggregate value of the nearly four million slaves was more than $3 billion—the equivalent of roughly $58 billion in 1998. Slaves constituted 44 percent of all the South's wealth, with real estate—land and buildings—amounting to only 25 percent. A single slave represented a tremendous capital investment; during the 1850s, a young male slave in his late teens or early twenties might sell for well over $1,000.

As the antebellum Southern economy's most important assets, slaves were enmeshed in varying legal forms of credit and property relationships. The property interests in slaves could be divided in many ways. In his will, a husband might bequeath a slave to his widow for her use during the remainder of her lifetime; on her death, someone else—perhaps one of their children—might become the slave's owner. Likewise, unborn children could be the objects of property interests. A slave woman might be owned by one owner while her children, as they were born, could become the property of a different owner. As well, slaves were often leased, which gave the lessor and the lessee different interests regarding how well to treat the slave. A slave purchaser might also buy slaves on credit

or might borrow using slaves as collateral. If the borrower failed to repay the debt, the sheriff might seize and sell the slaves on the courthouse steps. The creation and ownership of the different types of property interests spread quite widely Southerner's economic stake in SLAVERY as an institution.

When a slave succeeded in running away, whoever held a property interest in the escapee lost wealth. For anyone with even a fragment of a property interest in a runaway slave, the runaway's capture raised constitutional issues of financial importance. The original Constitution guaranteed the return of runaway slave property in Article IV, section 2, and Congress enacted a Fugitive Slave Law in 1793. With the passage of another law on FUGITIVE SLAVERY in 1850, Congress greatly strengthened the protection that Southerners enjoyed concerning the return of their runaway property. Among other things, the 1850 law obliged Northern officials *and* citizens to participate in the recapture of runaway slaves.

Slavery raised other property-related constitutional law issues. Slave owners who traveled could not take their slaves into free states or free territory. As the United States expanded westward, the question of whether new territory and newly admitted states would allow slavery became a divisive national political issue. The MISSOURI COMPROMISE in 1820 settled the issue for a time, designating certain areas as slave and others as free. With time, slaveowners wanted to expand into areas the Compromise had reserved for freedom. For slaveowners, the issue was their right to use their property as they chose. Opponents of slavery focused on the personal issue of the slave's freedom. The KANSAS–NEBRASKA ACT in 1854 let the voters decide whether a new state should permit slavery, which led to armed conflict in Kansas. In DRED SCOTT V. SANDFORD (1857), Scott claimed freedom because a former owner had taken him into free territory. The Supreme Court, with its infamous decision, declared the Missouri Compromise to have been an unconstitutional limitation of the PROPERTY RIGHTS of slave owners.

The constitutional issue of slave property was not settled until after the conclusion of the CIVIL WAR. During the course of the war, President ABRAHAM LINCOLN turned the conflict into a war against slavery with the EMANCIPATION PROCLAMATION. The ratification of the THIRTEENTH AMENDMENT in 1865 transformed those persons who were slave property into free people.

THOMAS D. RUSSELL
(2000)

Bibliography

FINKELMAN, PAUL 1981 *An Imperfect Union: Slavery, Federalism, and Comity.* Chapel Hill: University of North Carolina Press.

RANSOM, ROGER and SUTCH, RICHARD 1988 Capitalists Without Capital: The Burden of Slavery and the Impact of Emancipation. *Agricultural History* 62:133–160.

RUSSELL, THOMAS D. 1996 A New Image of the Slave Auction: An Empirical Look at the Role of Law in Slave Sales and a Conceptual Reevaluation of Slave Property. *Cardozo Law Review* 18:473–523.

## SLAVERY AND THE CONSTITUTION

Long before the CONSTITUTIONAL CONVENTION OF 1787 the question of slavery had become the prime concern of many Americans. In the first and second Continental Congresses, the matter arose when several groups of slaves petitioned for their manumission. Nothing came of their pleas, of course. In THOMAS JEFFERSON's draft of the DECLARATION OF INDEPENDENCE, he accused the king of waging cruel war against human nature itself, "violating its most sacred rights of life and liberty in the persons of a distant people . . . captivating and carrying them into slavery in another hemisphere. . . ." Although slavery existed throughout the English colonies in 1776, the southern slaveholders in Congress forced rejection of this indictment of the king. If they won their independence on the basis of such an argument, they feared that there would no longer be any justification for slavery.

In some colonies the sentiment against slavery grew during the war for Independence; and the eventual use of slaves as soldiers in the war contributed to the feeling that they should be free. As the states gained their independence some prohibited the slave trade. Some went beyond that enacting legislation looking to the abolition of slavery altogether. Pennsylvania and Massachusetts passed such laws in 1780, followed by Connecticut and Rhode Island in 1784, New York in 1785, and New Jersey in 1786. While no states south of Pennsylvania abolished slavery during this period, several enacted laws facilitating manumission by slaveholders.

Meanwhile, the CONTINENTAL CONGRESS began to look at the question of slavery as it undertook to develop a national land policy. When Thomas Jefferson framed the ORDINANCE OF 1784 for the organization of government in the western territory, he included a provision that after the year 1800 there should be no slavery or involuntary servitude in any of the states to be organized. That provision was rejected. The idea persisted, however, that slavery should not be extended indefinitely. In the NORTHWEST ORDINANCE of 1787 Jefferson's language of 1784 was adopted with the caveat that fugitive slaves escaping into the Northwest Territory from one of the original states "may be lawfully reclaimed and conveyed to the person claiming his or her labor or service. . . ." The Ordinance

did not apply south of the Ohio River, where slaveholders were more likely to settle than in the Northwest Territory.

It was inevitable that slavery should have been an important consideration at the Constitutional Convention. At a time when slavery was waning in the North, the southern states saw in slavery an increasing source of wealth both in the market value of slaves and in what slaves could produce. An economic interest so important could not be ignored by a convention one of whose major concerns was to protect property and to advance the economic interests of those who were to live within the new frame of government. Although there were numerous points at which the emerging document affected the institution of slavery, four were of prime significance to the future of slavery and, indeed, the fate of the Constitution.

One point had to do with the TAXING POWER of Congress. Southern delegates generally feared that in levying taxes, especially POLL TAXES, the federal government might discriminate against the South in the way it counted slaves. Closely connected with this was the perception that in apportioning representation, the South would suffer from any arrangement that did not recognize and count slaves as people. After considerable debate, some of it acrimonious, a compromise was reached. Direct taxes were to be apportioned among the several states according to population, thus making it impossible to raise a major portion of federal revenue by taxing property that existed only in one section of the country. In determining the basis of taxation *and* representation, five slaves were to be counted as equal to three free persons. The cryptic language in Article I, section 2, reads: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other persons."

The other two points regarding slavery were handled with some dispatch, not because they were unimportant but because they did not come up until late in the session, when the weary delegates were eager to return to their homes. On the slave trade, several southern delegates were uncompromising. While those from Virginia and Maryland appeared to favor a prohibition of the trade, those from South Carolina and Georgia were unalterably opposed to the prohibition. To avoid a rupture between the delegates of the upper South and the North, who favored prohibition, and those of the lower South, the compromise was reached that the slave trade could not be ended before twenty years had elapsed. This language was added in Article II, Section 9: "The Migration or Importation of such Persons as any of the States now shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."

Significantly, there was almost no opposition to the proposal that fugitive slaves be returned to their masters. The public obligation to return slaves, which had already been provided for in several Indian treaties between 1781 and 1786, was established in the Northwest Territory in 1787 along with the prohibition of slavery in that region. When the provision came before the Convention in late August, the delegates were in no mood for a protracted debate. The slaveholders had already won such sweeping constitutional recognition of slavery, moreover, that the question of fugitive slaves was something of an anticlimax. Without serious challenge, the provision was inserted in Article IV, Section 2: "No person, held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the party to whom such Service or Labour may be due."

In dealing with slavery the delegates to the Convention made certain, as if out of a sense of guilt or shame, never to use the word "slave" or any of its variations in the Constitution itself. "Three fifths of all other persons," "Persons held to Service or Labour," and "Migration or Importation of Such Persons," were all mere euphemisms. Everyone knew what they meant. They were meant to shield the consciences of the delegates just as the clauses themselves were meant to protect the institution of slavery. In none of the deliberations did the delegates give serious consideration to abolishing slavery, even though slavery made a mockery of freedom, equality, and the rights of man. It did not make a mockery, however, of the rights of property. American independence and the new Constitution had the effect of giving slavery a longer life than it was to have in the British Empire.

It was the business of the Congress to enact legislation to carry out the objectives set forth in the Constitution. As far as slaves were concerned, this meant the enactment of legislation to facilitate the recovery of runaway slaves by their masters. The impetus for legislation came, however, not from concerns about fugitive slaves but in the call for a statute to facilitate the surrender of FUGITIVES FROM JUSTICE. When the governor of Pennsylvania was unable to persuade the governor of Virginia to give up three white men accused of kidnapping a Pennsylvania free Negro, he presented the facts in the case to President GEORGE WASHINGTON. When the President transmitted the matter to Congress, it responded by passing the Fugitive Slave Act of 1793. After dealing with the matter of the surrender of fugitives from justice in the first two sections, the law turned to the rendition of fugitive slaves.

Under the law a slaveholder could apply to a federal district or circuit judge for a certificate authorizing him to return his slave to the state from which he had fled. This certificate was to be granted after the master had captured his slave, and there were few federal judges at the time; therefore, the master was compelled to go to considerable expense and travel before enjoying the protection of the federal courts. The law did not authorize judges to issue warrants for the arrest of slaves and it did not compel federal authorities to aid in the pursuit of fugitive slaves. The lack of such provisions generated criticism by slaveholders for years to come.

Although under the law of 1793 many fugitives were recaptured and returned to the places from which they had fled, masters continued to complain about the difficulties of reclaiming their human property. Meanwhile, as antislavery sentiment gained momentum in the first decade of the century, opponents of slavery placed additional obstacles in the way of slaveholders seeking the return of their runaways. They began actively to aid fugitives, to urge federal judges not to issue certificates for the return of runaways, and to persuade local officers not to cooperate in their rendition. Slavemasters soon called for a more effective law, and in 1818, a stronger bill was introduced in the HOUSE OF REPRESENTATIVES. As it made its way through Congress, it was burdened with amendments introduced by antislavery legislators requiring proof of ownership before a court of record and making masters criminally liable for false claims. Although a version of the proposed law passed both houses, it was tabled when the conference committee was unable to resolve the problem of amendments.

As the new century began, many Americans turned their thoughts to the provision of the Constitution prohibiting Congress from closing the slave trade before 1808. The slave trade was flourishing, and the slave interests faced a curious dilemma. If the trade continued they risked increasing the chances of violence as unruly blacks from Africa or revolutionary and resourceful blacks from the Caribbean were imported. On the other hand, they required a larger number of slaves to tend their burgeoning plantations. Hoping that the national and state governments would provide safeguards against uprisings and insurrections, they were tempted to favor the continued importation of slaves. At least, they wished to keep their options open.

Ending the slave trade under the provision set forth in the Constitution was not a foregone conclusion, and the antislavery forces knew it. All through the decade they pressed for stringent federal legislation to end the trade. In January 1800, a group of free Negroes in Philadelphia called on Congress to revise its laws on the slave trade and on fugitives. When South Carolina reopened its ports to the trade in 1803, antislavery groups began to press Congress to act. Several resolutions were introduced in Congress condemning the slave trade, but that body took no conclusive steps. The question was brought dramatically before the country in December 1805, when Senator Stephen R. Bradley of Vermont introduced a bill to prohibit the slave trade after January 1, 1808, but the bill was indefinitely tabled. This measure set the stage for President Jefferson to address the issue in his annual message to Congress in December 1806. He called attention to the approaching date when Congress could constitutionally prohibit "all further participation in those violations of human rights which have been so long continued on the unoffending inhabitants of Africa, and which the morality, the reputation, and the best interests of our country have long been eager to proscribe."

Pursuant to the President's eloquent call, which was reminiscent of his draft of the Declaration of Independence, Congress proceeded to consider legislation outlawing the trade. Every provision of the proposed law was debated vigorously. Slaveholders, fearing that Africans smuggled into the United States would not be under the control of the law, wanted them seized and sold into slavery. The antislavery members of Congress strongly objected. The PROHIBITION OF THE SLAVE TRADE ACT (1807) was a compromise. It directed federal officers to be "governed by the provisions of the laws, now existing, of the several states prohibiting the admission or importation . . . of any Negro, mulatto, or other person of color."

In 1818 in the first supplementary act to the law of 1807, Congress sought to make the trade less attractive by increasing the penalty for anyone engaged in it. For example, a fine of $20,000 was replaced by a lowered fine and imprisonment for three to seven years. There were stiffer penalties for persons who knowingly purchased illegally imported Negroes; one-half of all forfeitures and fines were to go to informers. In 1819 Congress directed the President to use armed cruisers on the coasts of the United States and Africa to suppress the trade. Half the proceeds of a condemned ship would go to the captor as bounty, and the captured slaver was to be returned to the port from which it sailed. In the following year Congress provided that direct participation in the slave trade was an act of piracy, punishable by death.

The slave trade was profitable, and it continued despite federal legislation. State laws on the disposition of illegally imported Africans varied. North Carolina directed that such Africans "be sold and disposed of for the state." Georgia directed that the Africans either be sold or given to the Colonization Society for transportation to Africa, with the Society bearing all expenses. Despite these laws, most imported slaves seem to have escaped capture. There were so few captures and the federal officials did

so little to enforce the statute of 1807 that it was nearly a dead letter. Slavers introduced their cargo into the United States from Galveston, then a part of Mexico, from Amelia Island in Florida, until 1819 a part of the Spanish Empire, and at various ports on the eastern and southern coasts of the United States. Secretary of the Treasury William H. Crawford confessed that the United States had failed to enforce the law.

Estimates regarding the numbers involved in the illicit slave trade varied. In the decades following passage of the supplementary acts, slavers easily evaded federal authorities, and enforcement received no more than lip service in Washington. In 1839 President MARTIN VAN BUREN called for revision of the laws covering the slave trade in order that "the integrity and honor of our flag may be carefully preserved." A decade later President Zachary Taylor invited the attention of Congress "to an amendment of our existing laws relating to the African slave trade, with a view to the effectual suppression of that barbarous traffic." Nothing happened, and the trade continued down through the Civil War. Because of its clandestine nature, precise figures are impossible; a recent student of the trade estimates that some 51,000 slaves were illegally imported by 1860.

Shortly after the United States purchased Louisiana in 1803, inhabitants from the older states began to settle in the newly acquired territory. When Louisiana entered the Union in 1812 as a slave state, eastern and northern interests began to appreciate the political and economic consequences of slave states entering the Union. They believed that under the Constitution the federal government could prevent the creation of slave states in the territories. They were determined, therefore, to prevent slave states from entering the Union, or, failing that, to limit the number of new slave states. When Missouri sought admission in 1818, northern members of Congress said that they would agree only on condition that the Missouri constitution forbid slavery. Southerners claimed that the restriction was discriminatory; some threatened disunion. After bitter debate, the impasse was resolved when Maine sought admission. Congress admitted Maine as a free state and Missouri as a slave state and declared that in the Louisiana territory slavery should not exist north of the southern boundary of Missouri.

The MISSOURI COMPROMISE stimulated the rivalry between the slave and free states, with each side searching for ways to enhance its advantage. While southern spokesmen insisted that the problems of slavery were local, they relied on the federal Constitution and laws to protect slavery in defiance of the FIRST AMENDMENT; they demanded that antislavery petitions to Congress be laid on the table without receiving notice. At the same time they demanded that Congress act to facilitate the return of fugitive slaves. As antislavery sentiment in the North increased and abolitionists became more active in obstructing the return of fugitives, the Southerners' demands for protection became more shrill. There were numerous dramatic moments between 1830 and 1860, when abolitionists seized fugitive slaves from their captors or interrupted court proceedings to give accused fugitives the opportunity to flee.

In some northern states residents feared that the Fugitive Slave Law of 1793 would operate to the disadvantage of kidnapped whites and free Negroes accused of being runaway slaves. Consequently, state legislatures empowered state courts to rule in matters arising out of the 1793 law. The Pennsylvania statute of 1826 required the master to present to a magistrate proof of his claim to the alleged fugitive. If the magistrate was convinced the claim was well founded, he was to issue a certificate authorizing the removal of the runaway from the state. If, on the other hand, anyone had seized a person suspected of being a runaway and wrongfully removed him, he would, upon conviction, be deemed guilty of a felony and suffer fine and imprisonment. In due course and by amicable arrangement the Supreme Court ruled on the constitutionality of the Pennsylvania statute in PRIGG V. PENNSYLVANIA (1842), thereby significantly affecting the slavery question for the next two decades.

Edward Prigg, a slave catcher, seized a Negro woman and her children in Pennsylvania with the intention of returning them to their alleged owner in Maryland. When Prigg sought a certificate authorizing their removal, the magistrate, dissatisfied with the proof of ownership, declined to issue the certificate. Prigg took them anyway and was subsequently convicted for violating the 1826 law. The Supreme Court reversed the state court in a decision that had far greater significance than merely exonerating Prigg. Speaking for the Court, Associate Justice JOSEPH STORY declared the Pennsylvania PERSONAL LIBERTY LAW unconstitutional, because it invaded a field placed within the exclusive domain of the federal government by the Fugitive Slave Act of 1793 and by the Constitution itself. "Under the Constitution," said Story, the right to seize a runaway and the duty to deliver him pervaded "the whole Union with an equal and supreme force, uncontrolled and uncontrollable by State SOVEREIGNTY or State legislation." States could enforce the law of 1793, if they wished; but they could not be required to do so, Story added. Further, if an owner recaptured his fugitive slave he did not need a state magistrate's permission to return him to his place of abode.

By placing the fugitive slave question within the exclusive JURISDICTION of the federal government, Justice Story implicitly encouraged northern states that did not wish to cooperate in the enforcement of federal legislation on the subject. The decision promoted the belief, moreover, that

antislavery forces could work through sympathetic state and local officials to prevent the recovery of fugitive slaves. Accordingly ten free states enacted personal liberty laws.

When slaveholders felt the impact of *Prigg* in relieving states of responsibility in enforcing the Fugitive Slave Law, they agitated for a more stringent federal law that neither abolitionists nor hostile state laws could nullify. Because the annual pecuniary loss in fugitive slaves was in the hundreds of thousands of dollars, slaveholders increased their pressure on Congress to act. Despite its validation in *Prigg*, the Act of 1793 was inadequate. State courts seemed to vie with abolitionists in their disregard for federal authority. What was needed was a new act of Congress providing effective federal machinery for its successful enforcement. Early in 1850, Senator James Mason of Virginia introduced a bill to that end. Thus began the long and tortuous route by which a new fugitive slave law made its way through Congress.

The debate on the bill was extensive and, at times, acrimonious, connected as it was with other matters that were to constitute the COMPROMISE OF 1850. In the Senate, WILLIAM H. SEWARD of New York wanted to guarantee to every alleged fugitive slave the right to TRIAL BY JURY. HENRY CLAY of Kentucky, on the other hand, wished to emphasize the right of the aggrieved master to recover his property from any place, including a free state, where the slave had fled. DANIEL WEBSTER of Massachusetts, to the surprise of many Northerners and Southerners, agreed with Clay and declared that "in regard to the return of persons bound to service, who have escaped into the free States . . . it is my judgment that the South is right, and the North is wrong." After the bill passed both houses, President Millard Fillmore signed it on September 18, 1850.

The new fugitive slave law undertook to establish adequate federal machinery for its enforcement. Circuit courts were to appoint commissioners who, concurrently with circuit and district judges, had authority to grant certificates for the return of fugitive slaves. United States marshals were to execute warrants issued under the act, and a failure of diligent execution was punishable by a $1,000 fine. If a fugitive should escape from a marshal's custody, the marshal was liable for the slave's full value. When the marshal or claimant brought the slave before the court to request a certificate for his return, the alleged fugitive was not permitted to testify in his own behalf. Court disturbances, aiding or abetting fugitives, and harboring or concealing fugitives were punishable by a $1,000 fine and six months imprisonment.

Abolitionists and others attacked the Fugitive Slave Law as unconstitutional. Horace Mann said that it made war on the fundamental principles of human liberty. CHARLES SUMNER called it a "flagrant violation of the Constitution, and of the most cherished rights—shocking to Christian sentiments, insulting to humanity, and impudent in all its pretensions." Others argued that the fugitive slave clause of the Constitution did not confer on Congress any power to enact laws for the recovery of fugitive slaves. They questioned the power of Congress, moreover, to give commissioners authority to render judgments that only United States judges could properly render under the Constitution. The denial to fugitives by the law of 1850 of the right to trial by jury and to CONFRONT and cross-examine witnesses was itself an unconstitutional denial of DUE PROCESS, its opponents argued. The fact that commissioners received fees instead of fixed salaries meant that they were themselves interested parties in fugitive slave cases. If the commissioner turned over the fugitive to his claimant, he received a ten dollar fee. If he freed the fugitive, the commissioner received only five dollars. What commissioner could be trusted to render impartial justice when his income depended on the kind of decision that he rendered?

The flight into Canada from northern cities of numerous free Negroes and fugitive slaves dramatized for many Northerners the new role of the federal government in obstructing the efforts of those who sought freedom. Many Northerners vowed to prevent enforcement of the new fugitive slave law. Fugitive slave cases increased, but so did rescues, accompanied by denunciations of federal officials. Friends of fugitives resorted to desperate measures such as kidnapping slave hunters and poisoning their bloodhounds. They organized vigilance committees not only to engage in action but also to express their moral revulsion to every effort to enforce the new law. In 1852 the Boston committee unsuccessfully attempted to prevent the rendition of Thomas Sims, an alleged fugitive from Georgia. Composed of such men as Theodore Parker, Wendell Phillips, Horace Mann, and Charles Sumner, the committee, on April 13 at 3 a.m., watched as the United States marshal walked Sims down State Street, past the spot where Crispus Attucks fell and to the wharf where the ship was waiting to take him back to Savannah. Six days later Sims was publicly whipped in Savannah, the first slave Massachusetts had returned.

Opponents of the Fugitive Slave Law of 1850 challenged it in the same way that opponents had challenged its predecessor. The Supreme Court ruling in STRADER V. GRAHAM (1851) could well have controlled the problem for years to come. After Jacob Strader, a citizen of Kentucky, helped several Negroes leave Kentucky, their alleged master sued Strader for damages. Strader claimed that the blacks were not slaves and that they made regular visits to Ohio where they worked as entertainers. These visits, Strader claimed, had caused them to become free even if they had previously been slaves because the Ordinance of 1787 forbade slavery in the Northwest Territory of which

Ohio had been a part. When the case reached the Supreme Court, Chief Justice ROGER B. TANEY, speaking for the entire bench, declared that whatever the status of the blacks while outside Kentucky, they were subject to Kentucky laws upon their return. Nothing in the Constitution, he insisted, could control the law of Kentucky on this subject.

Meanwhile, opposing forces in Kansas were attempting to settle the issue in their own way. The bill to organize Kansas and Nebraska as territories had repealed the Missouri Compromise and left to the inhabitants of the respective territories the decision whether the states-to-be would be slave or free. Abolitionists, believing there should be no more slave states under any circumstances, were determined to make Kansas as well as Nebraska free states. To that end, they undertook first to settle Kansas with persons who would vote for a free constitution and thus to discourage slaveholders from settling in Nebraska, which they were certain would become a free state. Proslavery forces were determined at least to make Kansas a slave state. Both sides were certain they had the Constitution on their side. After bitter arguments and bloody battles, Kansas voted for a free constitution. The South felt that its ambitions had been frustrated and its rights under the Constitution violated as well.

The antislavery forces would not let the decision in *Strader* stand without challenge. They hoped it might be modified, or even overruled, in another decision offering some protection to slaves who had been in free states. Soon another case, DRED SCOTT V. SANDFORD (1857), presented an ideal opportunity, they thought, to secure an unequivocal statement on the status of slaves in the free states and in the territories. Dred Scott, a Missouri slave, traveled with his master to the free state of Illinois, where they lived for a time, then to Minnesota, a free territory under the provisions of the Missouri Compromise. Upon their return to Missouri, his master sold Scott to a New York resident in a vain attempt to establish federal DIVERSITY JURISDICTION when Scott subsequently sued for his freedom. When the Supreme Court announced its decision on March 6, 1857, Chief Justice Taney was again the spokesman.

Taney declared that because Negroes had been viewed as belonging to an inferior order at the time that the Constitution was ratified, they were not citizens within the meaning of the Constitution's provision defining the permissible JURISDICTION of federal courts in cases between citizens of different states. Moreover Scott had not become free by virtue of the Missouri Compromise, because the Compromise was unconstitutional; Congress had no authority to prohibit slavery in the territories. In any case, Taney concluded, once Scott returned to Missouri his status was determined by Missouri law. In Missouri he was still a slave, and thus not a citizen of any state. The case was dismissed for want of jurisdiction.

The decision gave the proslavery forces more support than they could possibly have expected. Slavery's opponents called the decision wicked, atrocious, and abominable. Others hoped the decision would settle once and for all the grievous sectional issues that were about to destroy the Union. But the decision remained controversial. Its impact on events of the next few years is unclear. Perhaps it did not contribute significantly to the critical disputes and eventual divisions in the Democratic party. Perhaps the decision did not greatly stimulate the growth of the Republican party. Yet, as Don E. Fehrenbacher, the leading historian of the decision, has said, "it was a conspicuous and perhaps an integral part of a configuration of events and conditions that did produce enough changes of allegiance to make a political revolution and enough intensity of feeling to make that revolution violent."

The abolitionists, although embittered by the decision, did not relent in their effort to secure judicial support for their position. In a Wisconsin case, which came to the Supreme Court as ABLEMAN V. BOOTH (1859), they attempted once again to have the Fugitive Slave Law of 1850 declared unconstitutional. Sherman M. Booth, an abolitionist editor in Milwaukee, had been arrested for helping a Negro escape from a United States deputy marshal. The state courts pronounced the law unconstitutional and ordered Booth released. When the case reached the Supreme Court in 1859, Chief Justice Taney reversed the state courts, censured them for presuming to pass judgment on federal laws, and held that the Fugitive Slave Law was fully authorized by the Constitution.

*Booth* was the last opportunity the abolitionists would have to take their cause to the Supreme Court. They would win local victories, such as the denial of the right of transit by slaves through a free state, but the Fugitive Slave Law remained intact until the CIVIL WAR. It would take much more than court challenges or even local disturbances to dislodge the institution of slavery. The fact remained that slavery was so deeply imbedded in the Constitution itself and so firmly protected by it that both violent action and a constitutional amendment would be required to effect far-reaching and lasting change.

The violent action was not long in coming, but the outbreak of the Civil War did not put an end to slavery. President ABRAHAM LINCOLN insisted that the Confederate states were still in the Union and continued to enjoy the constitutional protection of slave property. Once the war began in earnest, however, there was no enforcement of the fugitive slave laws, and as slaves escaped to the Union lines, their emancipation became increasingly a part of the war's objectives. Congress early took steps to free certain slaves. The CONFISCATION ACT of August 6, 1861, declared

that owners forfeited slaves engaged in hostile military service. In July 1862 Congress took additional steps in the Second Confiscation Act by granting freedom to slaves of traitors. Furthermore, the slaves of all persons supporting the rebellion were "forever free of their servitude. . . ." Although Lincoln had serious doubts about the constitutionality of the act, he signed it.

Meanwhile, Congress was moving speedily to emancipate the slaves whom it constitutionally could. It could not pass a universal emancipation bill, but it could and did abolish slavery in the DISTRICT OF COLUMBIA and the TERRITORIES. The emancipation bill for the District of Columbia precipitated a lengthy debate, during which President Lincoln persuaded the lawmakers to include an appropriation of $1,000,000 for compensation to owners not exceeding $300 for each slave and for the removal and colonization of the freedmen. Even so, Lincoln was reluctant to sign the bill. He signed it after Senator CHARLES SUMNER of Massachusetts and Bishop Daniel A. Payne of the African Methodist Episcopal Church pleaded with him to approve it. On June 19, 1862, Congress passed and sent to the President a bill abolishing slavery in the territories, with no provision for the compensation of owners, and Lincoln signed it.

The President continued to argue that the federal government could not emancipate the slaves unless it also compensated the owners and colonized the freedmen. Unfortunately for him, his arguments convinced neither the representatives of the border slave states nor the Negro delegations that visited him. Consequently, he was compelled to face the mounting pressures to free the slaves without any apparent constitutional means of doing so. Even as he moved toward an emancipation policy, Lincoln kept his own counsel. He listened patiently to the constant stream of delegations, some urging him to free the slaves, others insisting that he do nothing. The only thing he revealed was that the matter was on his mind, day and night, "more than any other."

In the late spring of 1862 Lincoln decided that he would emancipate the slaves by proclamation. The bleak military outlook pressed the decision on Lincoln. In July he read to the Cabinet a recently completed draft and solicited suggestions regarding language and timing. The members confined their remarks to possible political and military consequences. Lincoln agreed that a propitious moment to issue it would be in the wake of a Union victory, lest some view it as an act of desperation.

Although the battle of Antietam, September 17, 1862, was not the clear-cut victory for which Lincoln had been waiting, he decided to act anyway. On September 22, 1862, he issued the Preliminary EMANCIPATION PROCLAMATION, to take effect on January 1, 1863. Abandoning the notion of colonization, the President, in the final Proclamation, declared free those slaves in states or parts of states under Confederate control. He further declared that the freedmen would be received into the armed service of the United States "to garrison forts, positions, stations, and other places, and to man vessels in said service." Even without a comprehensive emancipation policy, Lincoln is reported to have said as he signed the document, "I never, in my life, felt more certain that I was doing right than I do in signing this paper."

Lincoln realized, of course, that his proclamation, primarily a war measure, did not actually free the slaves. Although military action set many of them free, either state or federal action or both were needed to achieve real and permanent freedom in law and practice. By early 1865, Tennessee, West Virginia, Maryland, and Missouri had taken steps to free their slaves. Delaware and Kentucky, like the Confederate states, had taken no such action by the end of the war.

It early became clear that only national action, preferably through a constitutional amendment, could provide a uniform emancipation policy. Yet some doubted the wisdom or even the prudence of using the Constitution to reform a domestic institution such as slavery. Others questioned the legality of amending the Constitution while eleven states remained outside the Union. The latter circumstance was a major reason why the proposed amendment to forbid slavery throughout the nation initially failed to get the necessary two-thirds approval of the House after it had passed the SENATE in the spring of 1864. After the election of 1864 and with the war winding down, the House finally approved the amendment on January 31, 1865. The following day, Lincoln was pleased to sign the resolution submitting the amendment to the states for ratification.

By December 18, 1865, twenty-seven states, including eight former Confederate states, had ratified the THIRTEENTH AMENDMENT, and it became part of the Constitution. One of the ironies was that the amendment could not have been ratified without the concurrence of the slave states whose governments Congress did not recognize in 1865. This seemed an appropriate way to end slavery, which was itself the most remarkable anomaly in the history of the country.

JOHN HOPE FRANKLIN
(1986)

(SEE ALSO: *Fugitive Slavery.*)

Bibliography

BECKER, CARL (1942) 1953 *The Declaration of Independence: A Study in the History of Political Ideas.* New York: Knopf.
BOWEN, CATHERINE DRINKER 1966 *Miracle at Philadelphia: The*

*Story of the Constitutional Convention May to September 1787.* Boston: Little, Brown.

CURTIN, PHILLIP 1969 *The Atlantic Slave Trade: A Census.* Madison: University of Wisconsin Press.

DUBOIS, W. E. BURGHARDT (1896) 1954 *The Suppression of the African Slave Trade to the United States of America.* New York: Social Science Press.

FEHRENBACHER, DON E. 1978 *The Dred Scott Case: Its Significance in American Law and Politics.* New York: Oxford University Press.

FINKELMAN, PAUL 1981 *An Imperfect Union: Slavery, Federalism, and Comity.* Chapel Hill: University of North Carolina Press.

FRANKLIN, JOHN HOPE 1963 *The Emancipation Proclamation.* Garden City, N.Y.: Doubleday.

LEVY, LEONARD W. 1950 Sims' Case: The Fugitive Slave Law in Boston in 1851. *Journal of Negro History* 35:39–74.

ZILBERSMIT, ARTHUR 1967 *The First Emancipation: The Abolition of Slavery in the North.* Chicago: University of Chicago Press.

## SLAVERY IN THE TERRITORIES

Slavery was confirmed by statute or royal decree in all the English, Spanish, and French colonies of North America. After American Independence, slavery therefore enjoyed a legal existence in all the states. In the NORTHWEST ORDINANCE of 1787, the Confederation Congress prohibited slavery in the Northwest Territory, although it also provided for the recapture of slaves escaping there. The First Congress reenacted this ban, but in legislation for the area southwest of the Ohio River it omitted the exclusion of slavery, so that slavery was free to penetrate into the TERRITORIES ceded by Virginia, New York, North Carolina, South Carolina, and Georgia. Slavery also existed in the French settlements that were to become Louisiana, Missouri, Illinois, and Indiana. The treaty of cession with France (1803), by which the United States acquired the LOUISIANA PURCHASE, guaranteed extant property rights, thus assuring slavery's perpetuation in those territories.

Despite the ban of the Northwest Ordinance, settlers in Ohio (particularly in the Virginia Military Reserve in the southwest quadrant of the territory), Indiana, and Illinois tried to introduce slavery, with the connivance of Indiana territorial governor William Henry Harrison in the case of Ohio, and at least the tacit consent of President THOMAS JEFFERSON. They failed in Ohio and Indiana, but in Illinois slavery continued in subterfuge forms in the lead mines of Galena and the salt mines of Shawneetown, and only a vigorous abolitionist effort prevented its legalization throughout the state in 1822.

The Constitution contained no direct allusion to slavery in the territories; the new states and territories clauses did not refer to it, although the fugitive slave clause permitted recapture of fugitives only from the states, not the territories. Consequently, when Missouri sought admission as a slave state in 1819, Congress had no textual guidance, and for the first time it had to extrapolate from what it could determine of the Framers' intent concerning the territories. The result was a long and bitter debate in which restrictionists argued that slavery was hostile to the spirit of republican government and should not be extended to the new lands, while slavery's supporters insisted that Congress lacked power to exclude slavery from any territory. Jefferson at the time joined the antirestrictionists, arguing that as slavery spread it would diffuse to the point where the black population, relative to the white, would dwindle in both the old states and the new territories. The Missouri controversy was settled by admitting Missouri as a slave state and Maine as a free state, while prohibiting slavery in all the Louisiana Purchase territory north of Missouri's southern boundary (3630). (See MISSOURI COMPROMISE.) Jefferson likened the Missouri debates to a "firebell in the night," the "knell of the union."

As the confrontation over slavery intensified in the 1830s, abolitionists and defenders of slavery amplified their constitutional and policy arguments about slavery's future in the territories. Abolitionists found two sources of congressional power to exclude slavery. They saw the territories clause (Article IV, section 3) as a plenary grant of power to the national government to regulate all matters of property and personal status in the territories. Further, the new states clause (Article IV, section 3) implicitly permitted restriction because it gave Congress power to prohibit a state's admission if it recognized slavery. Abolitionists also maintained that slavery was contrary to the principles of a republican form of government, which the United States must guarantee to each of the states.

Alarmed by such doctrines, JOHN C. CALHOUN in the period 1837–1847 elaborated doctrines that denied any exclusionary power to Congress. He insisted that the territories were the common property of all the states, and that it would be unjust to the slave states to exclude one form of property and its owners (slaves) when all other forms of property were not similarly restricted. Calhoun regarded Congress as the agent of the states (they being the principals) or as their trustee (they being the beneficiaries). By either legal metaphor, Congress lacked power to exclude slavery because that would discriminate against one group of states. He maintained that slavery was not only a positive good but also an essential element in the domestic and political structure of the slave states. Efforts to impede its spread were therefore not only insulting but threatening to the security of the states themselves.

This debate remained academic until 1845. Arkansas had been admitted as a slave state in 1836, the unorganized Indian Territory (modern Oklahoma) was not then

targeted for white settlement, and many still considered the remainder of the Louisiana Purchase uninhabitable. But Texas's independence, followed by its request for admission, thrust the territorial debates to center stage, and for over a decade after the outbreak of the Mexican War the territorial issue eclipsed all other topics of the slavery controversy except the problem of fugitive slaves. Texas, a slaveholding Republic that had struck for Independence partly because the Mexican constitution had abolished slavery, presented the potential for more than one slave state; the JOINT RESOLUTION admitting it to statehood recognized its potential subdivision into five states.

When war with Mexico broke out in 1846, the future of the territories to be acquired from that country became a more urgent issue. A few persons suggested that the United States acquire no new territories, but that idea was lost in the tide of Manifest Destiny flooding the country in the 1840s. In 1846, Representative David Wilmot, a Pennsylvania Democrat, offered a proviso to an appropriations bill that used the language of the Northwest Ordinance to exclude slavery from all territories acquired as a result of the Mexican War. Democrats and other defenders of slavery were alarmed by the WILMOT PROVISO's popularity in the North (nearly all free state legislatures endorsed it), and especially by the Proviso's appeal to Northern Democrats, who resented Southern dictation of party policy on slavery-related subjects and wanted to preserve the new territories for free white settlement.

The Proviso's opponents introduced four alternative proposals. Many Southerners at first found the idea of extending the Missouri Compromise line attractive. The Polk administration, Justice JOHN CATRON of Tennessee, the NASHVILLE CONVENTION of 1850, and Senator JOHN J. CRITTENDEN of Kentucky in 1860 all suggested extrapolating the 3630 line as a simple and arbitrary solution to the Gordian knot of slavery in the territories. Despite its simplicity, the idea repeatedly failed. One of the reasons for its failure was that other Southern leaders, more determined to protect the South than to compromise the territorial issue, revised their 1820 position and insisted that any exclusion of slavery from the territories was unconstitutional. Their theories for a time were subsumed under the shorthand term "non-intervention," a name for a cluster of doctrines that adopted Calhoun's premises and went on to demand that the federal government protect slavery in all the territories and even establish it there by a federal territorial slave code if necessary.

Northern Democrats rejected this position, but they did not want to split the party by endorsing the Wilmot Proviso. Under the leadership of Lewis Cass of Michigan and STEPHEN A. DOUGLAS of Illinois, they proposed a third alternative: the doctrine of territorial sovereignty, more often but less accurately referred to as POPULAR SOVEREIGNTY or squatter sovereignty. Cass and Douglas insisted that the future of slavery in the territories be decided by the settlers of the territories themselves, not by Congress. After 1850, they also began to adopt the Southern position that slavery's exclusion was not only unnecessary and gratuitously offensive to the South but also unconstitutional. Territorial sovereignty contained a central ambiguity: when were the settlers to decide? If, as Southern spokesmen demanded, territorial settlers could not exercise this prerogative until the eve of statehood, then slavery would establish a foothold, as it had in Missouri, and be impossible to dislodge. Northern proponents of territorial sovereignty, on the other hand, insisted that the settlers had a right to exclude slavery at any point after the organization of the territory. This view, in turn, forced Southerners to another doctrinal redoubt, when they claimed that just as Congress could not exclude slavery, neither could its creature, the territorial legislature. In this view, slavery could establish itself anywhere in American territories.

The Free Soil coalition of 1848, made up of New York Democrats, antislavery Whigs, and former political abolitionists, adopted the Wilmot Proviso as a principal plank in their program. But the COMPROMISE OF 1850 decisively rejected the Wilmot Proviso. In admitting California as a free state and organizing New Mexico and Utah Territories without restrictions as to slavery, Congress also rejected the Missouri Compromise line. But it also adopted the fourth alternative to the Wilmot Proviso, the "Clayton Compromise." Senator John Clayton of Delaware had proposed that all questions arising in TERRITORIAL COURTS concerning title to slaves or a black's claim to freedom be appealable directly to the United States Supreme Court, in effect inviting the Justices of the high court to try their hand at resolving the seemingly insoluble territorial issue. By adopting the Clayton Compromise, Congress admitted its inability to deal with the most exigent political issue of the day. Its desperate grasp at nonpolitical solutions not only confessed its impotence but also assumed the finality of an unpredictable resolution of a question that was ultimately metajudicial.

The KANSAS-NEBRASKA ACT of 1854 adopted the principle of territorial sovereignty, along with some vague and ambiguous allusions to nonintervention. It declared the Missouri Compromise defunct and implied that it was unconstitutional, thus representing a victory for both northern Democrats and Southerners. But this accommodation did not last long, as Kansas filled with authentic settlers and Missouri sojourners. Because most of the former hoped to see Kansas free and because all the latter were determined to make it a slave state, political controversy erupted into guerrilla warfare in the period known as "Bleeding Kansas." President JAMES BUCHANAN tried to force the proslavery LECOMPTON CONSTITUTION on the ter-

ritory, over the wishes of a large majority of bona fide settlers, and thereby split the Democratic party into Southern-dominated and Douglas wings.

Meanwhile, Chief Justice ROGER B. TANEY and his colleagues took up the invitation tendered by Congress in DRED SCOTT V. SANDFORD (1857). Taney held, in the latter part of his opinion, that the Missouri Compromise was unconstitutional, and that Congress could not exclude slavery from a territory. He adopted three Calhounite positions in OBITER DICTA: the federal government had to protect slavery in the territories; territorial legislatures could not exclude slavery at any time before statehood; and the federal government was the trustee of the states or the territories. In passing, Taney suggested that congressional exclusion would deprive a slaveowner of rights to property protected by the DUE PROCESS clause of the Fifth Amendment. This adumbration of SUBSTANTIVE DUE PROCESS was merely a passing allusion, however, the emphasis of Taney's opinion lying instead in his interpretation of the new states clause.

In the LINCOLN-DOUGLAS DEBATES of 1858, ABRAHAM LINCOLN challenged Douglas to explain what was left of territorial sovereignty after *Dred Scott*. Douglas suggested the FREEPORT DOCTRINE: that Congress could for all practical purposes exclude slavery from a territory simply by not enacting a territorial slave code or extending any other protection for it there. Under one interpretation of SOMERSET V. STEWART (1772), there being no positive law to keep a person enslaved, slavery effectively could not establish itself. This led Mississippi Senator JEFFERSON DAVIS to demand that the federal courts protect slavery in the territories somehow, and, if this proved unavailing, that Congress enact a territorial slave code.

The Constitution of the Confederate States of America extended full federal protection to slavery in any territories the Confederacy might acquire. The Congress of the United States abolished slavery in all federal territories in 1862 (Act of June 19, 1862).

WILLIAM M. WIECEK
(1986)

(SEE ALSO: *Constitutional History, 1829–1848.*)

Bibliography

BESTOR, ARTHUR 1961 State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine, 1846–1860. *Journal of the Illinois State Historical Society* 54:117–180.

QUAIFE, MILO M. 1910 *The Doctrine of Non-Intervention with Slavery in the Territories.* Chicago: Chamberlin.

RUSSEL, ROBERT R. 1966 Constitutional Doctrines with Regard to Slavery in the Territories. *Journal of Southern History* 32: 466–486.

## *SLOAN v. LEMON*

See: *Committee for Public Education and Religious Liberty v. Nyquist*

## SMITH, J. ALLEN
(1860–1924)

Lawyer, economist, and political scientist James Allen Smith was an influential spokesman for PROGRESSIVE CONSTITUTIONAL THOUGHT. His most important book was *The Spirit of American Government* (1901), subtitled "A Study of the Constitution: Its Origins, Influence and Relation to Democracy." Smith contended that the Constitution represented a reactionary and undemocratic retreat from the revolutionary principles of the DECLARATION OF INDEPENDENCE. He proposed to make the Constitution more democratic by eliminating CHECKS AND BALANCES, curbing the SUPREME COURT, and introducing DIRECT ELECTIONS for the President and SENATE along with REFERENDUM, and RECALL.

DENNIS J. MAHONEY
(1986)

## *SMITH v. ALLWRIGHT*
321 U.S. 649 (1944)

In 1935 the Supreme Court had held in GROVEY V. TOWNSEND that the Texas Democratic party convention's rule excluding black voters from PRIMARY ELECTIONS was not STATE ACTION and thus violated no constitutional rights. *Allwright* involved the same question, raised in the same manner; Smith alleged that he was excluded from the Texas Democratic primary because of his race and sought damages from election officials under federal CIVIL RIGHTS laws. The case had become a plausible candidate for Supreme Court review because in UNITED STATES V. CLASSIC (1941) the Court had reconsidered the nature of a primary election by way of upholding Congress's power to forbid fraud in primary elections of nominees for federal offices. In *Classic*, the Court had concluded that Louisiana primary elections were, by law, an integral part of the machinery for electing officers.

Applying the *Classic* reasoning in *Allwright*, the Court overruled *Grovey v. Townsend* and held that the state's provision of machinery for primary elections was sufficiently connected with the party's conduct of those elections to satisfy the state action limitation of the FIFTEENTH AMENDMENT. Because that amendment forbade a state to deny or abridge the right to vote on account of race, Smith

was entitled to damages if he could prove his allegations. Justice STANLEY F. REED wrote for the Court.

Justice OWEN ROBERTS, who had written for a unanimous Court in *Grovey*, dissented, complaining that the OVERRULING of a DECISION after only nine years tended "to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good on this day and train only." The obvious question was: why had Roberts joined in the *Classic* decision? Contemporary accounts suggest that at least some of the other Justices thought Roberts had been "duped" into concurring in *Classic*, and that Roberts knew they thought so. In the years between *Grovey* and *Allwright*, President FRANKLIN D. ROOSEVELT had made seven appointments to the Court. Justice Roberts's lone companion from the earlier days was Chief Justice HARLAN FISKE STONE, who had written the *Classic* opinion.

KENNETH L. KARST
(1986)

## SMITH ACT

See: Alien Registration Act

## *SMYTH v. AMES*
169 U.S. 466 (1898)

A unanimous Supreme Court, in this arrogation of power, proclaimed its acceptance of SUBSTANTIVE DUE PROCESS in rate regulation. The Court refused to "shrink from the duty" of exercising its judgment in a highly technical area of ECONOMIC REGULATION best left to experts. For the next forty years, the Court would review the rate schedules of REGULATORY COMMISSIONS seeking to accommodate shifting and illusory judicial standards of fairness.

In 1893 a Nebraska statute prescribed maximum rail rates for intrastate transportation. William Jennings Bryan defended the state legislature's power to fix reasonable rates for intrastate commerce; James Coolidge Carter urged that the Court limit the power when unreasonable rates effectively divested a railroad of its property. The question presented by the three cases consolidated here was whether those rates amounted to a TAKING OF PROPERTY without JUST COMPENSATION, thereby depriving the railroads of their property without DUE PROCESS OF LAW. Justice DAVID J. BREWER, sitting as a circuit judge in one of the cases, invented a "FAIR RETURN ON FAIR VALUE" test. He struck down the rates because they failed to provide a fair return on a fair valuation of the railroad property and thereby they effectively destroyed property.

Accepting Brewer's opinion, Justice JOHN MARSHALL HARLAN, for the Court, asserted that REAGAN V. FARMERS' LOAN & TRUST COMPANY (1894) demonstrated the appropriateness of a judicial determination of the question. Courts, he said, must be free to inquire into the sufficiency of the rates set by the state legislature, even though the Nebraska constitution only granted the legislature the power to prescribe "reasonable' maximum rates." Admitting that the question could be "more easily determined by a commission" of experts, Harlan pursued the "considerations" which, "given such weight as may be just and right in each case," would allow a determination of reasonable rate. He declared that the "basis of all calculations . . . must be the fair value of the property being used." Then he listed a number of various aids to determine fair value: original construction costs, replacement or reproduction costs, stock values, the cost of permanent improvements, earning power under the prescribed rate structure, operating expenses, and other unspecified matters. The company, he concluded, was justified in asking a "fair return upon the value of that which it employs for the public convenience." The Nebraska statute had failed to provide that fair return and so deprived the railroad of its property without just compensation, thereby depriving it of due process of law under the FOURTEENTH AMENDMENT.

In *Smyth* the Court readily substituted its judgment on a question of policy for other branches of government. Regulatory commissions of all sorts would spend four decades attempting to second-guess the courts' efforts to determine what constituted a "fair return" on "fair value." Over those decades, the Court manipulated the fair value standards to the benefit of corporations. The Court relied primarily on two of Harlan's factors in assessing fair value. Until about 1918, high original costs governed the Court's determination of fair value. When the war ended and both costs and prices rose, the Court turned to replacement costs as a means of deciding fair value, again keeping rates high. The Court consistently avoided using earnings—perhaps the best economic measure—as a guide. Justices LOUIS D. BRANDEIS and OLIVER WENDELL HOLMES denounced the fair return rule throughout the 1920s and 1930s; their views gained adherents by the early 1940s. In *Federal Power Commission v. Natural Gas Company* (1942) the Court asserted that property value was not an essential factor in calculating a fair return, and the Supreme Court finally disavowed a judicial control of the question in FEDERAL POWER COMMISSION V. HOPE NATURAL GAS COMPANY (1944).

DAVID GORDON
(1986)

Bibliography

HALE, ROBERT LEE 1952 *Freedom through Law: Public Control of Private Governing Power.* Pages 461–500. New York: Columbia University Press.

## *SNEPP v. UNITED STATES*
444 U.S. 507 (1980)

A former Central Intelligence Agency (CIA) employee, Frank W. Snepp III, published a book containing unclassified information about CIA activities in South Vietnam. Snepp did not submit the book to the CIA for prepublication review, in breach of his express employment agreement not to publish any information without the agency's prior approval or to disclose any *classified* information. In a decision remarkable for its procedural setting and for its failure to meet head-on the FIRST AMENDMENT issues implicated by the prior restraint, the Supreme Court, PER CURIAM, sanctioned the imposition of a constructive trust on all proceeds from the book's sales.

The Court recognized, as the government conceded, that Snepp had a First Amendment right to publish unclassified information. The Court found, however, that by virtue of his employment as a CIA agent, Snepp had entered a fiduciary relationship with the agency. Snepp breached the special trust reposed in him by failing to submit *all* material, whether classified or not, for prepublication review. That breach posed irreparable harm to the CIA's relationships with foreign governments and its ability to perform its statutory duties. The constructive trust remedy was thereby warranted.

Justice JOHN PAUL STEVENS, joined by Justices WILLIAM J. BRENNAN and THURGOOD MARSHALL, dissented, arguing that the remedy was unsupported by statute, the contract, or case law. He urged that the contract be treated as an ordinary employment covenant. On this theory, its enforcement would be governed by a rule of reason that would require a balancing of interests, including Snepp's First Amendment rights, and might justify an equity court's refusal to enforce the prepublication review covenant. Further, the alleged harm suffered by the government did not warrant the Court's "draconian" remedy, especially because the government had never shown that other remedies were inadequate. Stevens noted that the Court seemed unaware that it had fashioned a drastic new remedy to enforce a species of prior restraint on a citizen's right to criticize the government.

KIM MCLANE WARDLAW
(1986)

(SEE ALSO: *Prior Restraint and Censorship.*)

## SOBELOFF, SIMON E.
(1894–1973)

Born in Baltimore, Maryland, to immigrant parents, Simon Sobeloff began his long and distinguished public career at the age of fourteen as a congressional page. After graduation from the University of Maryland School of Law in 1915, Sobeloff alternated private practice with public service, including a term as United States attorney for the District of Maryland, until 1952. In that year, he was appointed chief judge of the Maryland Court of Appeals, and in 1954 President DWIGHT D. EISENHOWER named him SOLICITOR GENERAL of the United States.

While solicitor general, Sobeloff argued the government's case in the implementation phase of BROWN V. BOARD OF EDUCATION (1955) and also declined as a matter of conscience to sign the government's BRIEF in *Peters v. Hobby* (1955), a LOYALTY OATH case.

In 1955, President Eisenhower nominated Sobeloff to the United States Court of Appeals for the Fourth Circuit, but his confirmation was delayed for a year by southern Democrats who distrusted his views on school DESEGREGATION. Sobeloff served on the Fourth Circuit from 1956 until his death and was chief judge from 1958 to 1964.

As chief judge, Sobeloff wrote numerous majority opinions affirming school board attempts to comply with *Brown v. Board of Education.* He grew increasingly impatient with school board progress, however, and after retiring as chief judge, he dissented frequently in the numerous school desegregation cases heard EN BANC by the Fourth Circuit. Several of his dissents led to Supreme Court review and reversal of Fourth Circuit HOLDINGS that approved school board actions, as Sobeloff consistently argued for the complete dismantling of the desegregated school systems in the face of continued school board recalcitrance and delay.

Other Sobeloff dissents led to Supreme Court majority opinions, including *Davis v. North Carolina* (1966), which invalidated a confession given in coercive circumstances. In other cases, Sobeloff went further than the Supreme Court was prepared to go, holding, for example, that a harsher sentence on retrial following reversal of a conviction unconstitutionally conditioned the right to a FAIR TRIAL.

Frequently described by Maryland Governor Theodore R. McKeldin as a "champion of the underdog," Sobeloff reflected in his judicial opinions a consistent concern both for meticulous DUE PROCESS and for the rights of minorities, the underprivileged, the dissenter, and the prisoner.

ALISON GREY ANDERSON
(1992)

Bibliography

TRIBUTE ISSUE 1974 *Maryland Law Review* 34, no. 4:483–540.

## SOCIAL COMPACT THEORY

An invention of political philosophers, the social contract or social compact theory was not meant as a historical ac-

count of the origin of government, but the theory was taken literally in America where governments were actually founded upon contract. The words "compact" and "contract" are synonymous and signify a voluntary agreement of the people to unite as a political community and to establish a government. The theory purports to explain why individuals should obey the law: each person, in a government that exists with the consent of the governed, freely and, in effect, continuously gives consent to the constitution of his community.

The theory hypothesizes a prepolitical state of nature in which people were governed only by the law of nature, free of human restraints. From the premise that man was born free, the deduction followed that he came into the world with God-given or NATURAL RIGHTS. Born without the restraint of human laws, he had a right to possess liberty and to work for his own property. Born naked and stationless, he had a right to equality. Born with certain instincts and needs, he had a right to satisfy them—a right to the pursuit of happiness. These natural rights, as JOHN DICKINSON declared in 1766, "are created in us by the decrees of Providence, which establish the laws of our nature. They are born with us; exist with us; and cannot be taken from us by any human power without taking our lives."

When people left the state of nature and compacted for government, the need to make their rights secure motivated them. ALEXANDER HAMILTON observed that "Civil liberty is only natural liberty modified and secured by the sanctions of civil society. . . . The origin of all civil government, justly established, must be a voluntary compact between the rulers and the ruled, and must be liable to such limitations as are necessary for the security of the absolute rights of the latter." The most detailed exposition of this theory was by JOHN LOCKE, the most brief and eloquent by THOMAS JEFFERSON in the preamble of the DECLARATION OF INDEPENDENCE. One of the self-evident truths in the latter is "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . . ."

The compact theory of government colored the thought and action of Americans during the colonial period and through the period of constitution making. The new world actually seemed like a state of nature, and Americans did in fact compact with each other; the theory seemed to fit the circumstances under which American political and constitutional institutions grew. Our system developed as a self-conscious working out of some of the implications of the compact theory.

The related but distinct idea, so important in Puritan thought, that people covenant with each other to make a church for their ecclesiastical polity, was extended to their secular polity. Even before the founding of Virginia a Separatist leader asked, "What agreement must there be of men? For church governors there must be an agreement of the people or commonwealth." A half century before Locke's *Second Treatise*, THOMAS HOOKER, a founder of Connecticut, explained that in any relationship that involved authority there must be free agreement or consent. "This," he said, "appears in all covenants betwixt Prince and People, Husband and Wife, Master and Servant, and most palpable is the expression of this in all confederations and corporations . . . They should first freely engage themselves in such covenants. . . ." The first concrete application of the covenant theory to civil government was the Mayflower Compact (1620). The Pilgrims, putting theory into practice, solemnly did "covenant and combine . . . into a civil body politick," an experience multiplied over and again with the founding of numerous settlements in New England. (See FUNDAMENTAL ORDERS OF CONNECTICUT.)

The colonists also regarded their charters as compacts. As Hamilton said later, George III was "King of America, by virtue of a compact between us and the Kings of Great Britain." These colonies, Hamilton explained, were settled under charters granted by kings who "entered into covenants with us. . . ." Over a period of a century and a half, Americans became accustomed to the idea that government existed by consent of the governed, that the people created government, that they did it by written compact, and that the compact constituted their FUNDAMENTAL LAW. From practical experience as well as from revolutionary propaganda, Americans believed in the compact theory and they acted it out.

It was a useful tool, immediately at hand and lending historical and philosophical credibility, for destroying the old order and creating a new one. William Drayton, the chief justice of South Carolina, echoed a commonplace idea when he said that George III had "unkinged" himself by subverting the "constitution of this country, by breaking the original contract. . . ." The compact theory legitimated the right of revolution, as the Declaration of Independence made clear. Even before that declaration, colonial radicals contended that the Coercive Acts (see FIRST CONTINENTAL CONGRESS) "have thrown us into a state of nature," and justified contracting for a new government. After Independence a town orator in Boston declared that the people had reclaimed the rights "attendant upon the original state of nature, with the opportunity of establishing a government for ourselves. . . ." The colonies became states by a practice that mirrored the theory; they drew up written constitutions, often phrased as compacts, and purposefully put formal statements of the compact theory into those documents. The MASSACHUSETTS CONSTITUTION OF 1780 (still operative) declares: "The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people. . . ." A minister, Jonas Clark, said in a sermon that just govern-

ment is founded in compact "and in compact alone." The new state constitution, he declared, was "a most sacred covenant or contract. . . ." The state CONSTITUTIONAL CONVENTION that framed that constitution was devised to institutionalize the compact theory.

Although the ARTICLES OF CONFEDERATION do not formally state that theory, letters of the members of the Continental Congress that framed the Articles show that they regarded themselves as making a compact for the union of states, and THE FEDERALIST #21 refers to "the social compact between the States. . . ." Similarly, at the Philadelphia CONSTITUTIONAL CONVENTION OF 1787, JAMES MADISON, declared that the delegates had assembled to frame "a compact by which an authority was created paramount to the parties, and making laws for the government of them." GEORGE WASHINGTON, on behalf of the "Federal Convention," when sending the new Constitution to the Congress of the Confederation for submission to the states, drew an analogy from compact theory: individuals left a state of nature by yielding up some liberty to preserve the rest, and the states surrendered some of their SOVEREIGNTY to consolidate the union. Some of the states, when formally ratifying the new Constitution, considered themselves to be "entering into an explicit and solemn compact," as New Hampshire declared. Chief Justice JOHN JAY observed, in CHISHOLM V. GEORGIA (1793), that every state constitution "is a compact . . . and the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves."

The compact theory answers one of the most profound questions of political philosophy: why do people submit to the compulsions of government? The answer is that when they established government they consented to its exercise of power and agreed to obey it if it secured their rights. The compact theory has been remarkably fecund. From government by consent it led to political democracy. It also led to CONSTITUTIONALISM as LIMITED GOVERNMENT, to a concept of a constitution as fundamental law, to constitutions as written documents, to the constitutional convention as a way of writing the document, to the right of revolution when the government is destructive of the ends of the compact, and to concepts of civil liberty and written BILLS OF RIGHTS.

LEONARD W. LEVY
(1986)

Bibliography

MCLAUGHLIN, ANDREW C. 1932 *The Foundations of American Constitutionalism.* New York: New York University Press.

ROSSITER, CLINTON 1953 *Seedtime of the Republic: The Origin of the American Tradition of Political Liberty.* New York: Harcourt, Brace.

TATE, THAD W. 1965 The Social Contract in America, 1774–1787: Revolutionary Theory as a Conservative Instrument. *William and Mary Quarterly* 22:375–391.

WOOD, GORDON S. 1969 *The Creation of the American Republic, 1776–1787.* Chapel Hill: University of North Carolina Press.

## SOCIAL PROGRAMS

See: Entitlement

## SOCIAL SCIENCE IN CONSTITUTIONAL LITIGATION

All litigation, including constitutional litigation, resolves issues of law and fact. SOCIAL SCIENCE RESEARCH can help to clarify the facts on which a case may turn; and it can help the resolution of legal issues by laying before the courts data and analyses that bear on the choice of an appropriate legal rule.

Legal lore has it that the rise of social science in the law began with the BRANDEIS BRIEF, in which LOUIS D. BRANDEIS, special counsel for the state of Oregon, successfully bolstered the state's claim in MULLER V. OREGON (1908) that its statute limiting the working hours for women was constitutional. Although in theory the state merely had to show that such a regulation was not unreasonable, previous decisions had struck down laws regulating working hours of other employees as unreasonable invasions of the liberty of contract. The brief supported the reasonableness of the law in part by showing that a great many American states and even more countries abroad had similar statutes. It was an effective if modest social science effort.

More sophisticated techniques are to be found in contemporary constitutional litigation. Sampling, the most powerful tool of social science research, is now firmly established as an appropriate means of gathering EVIDENCE. If the survey was conducted without bias and if the technical requirements are met, a sample may be accepted as a reasonably accurate representation of the sampled universe. For instance, in support of a motion for change of VENUE in a criminal case, a sample survey measures the extent and depth of pretrial prejudice in the community. If a voluminous body of communications is at issue, sampling may be combined with a technique called content analysis. Thus, when the constitutionality of the work of the House Committee on Un-American Activities was litigated, a sample of the committee's public hearings was examined. This approach yielded a numerical statement of the frequency with which the committee asked its witnesses questions that transcended its constitutional authority. Similar content analysis has sometimes been used in support of a motion for change of venue, documenting

the charge that a substantial part of the pretrial publicity originated in the prosecutor's office.

Proof of racial or other discrimination in jury selection, employment, and other contexts frequently employs sampling and subsequent statistical analysis. Such proof involves an analysis of the differences between the actual outcome of the selection process and the outcome that would have been expected if discrimination had no role in the process.

In *United States v. Hazelwood School District* (1977), for instance, the Supreme Court made its own probability computations to determine whether excluding the metropolitan area from the labor market in which a suburban school district hired its teachers would substantially weaken the government's statistical proof that the district had engaged in discrimination. Although the Court's statistical performance in *Hazelwood* was flawed in certain respects, similar methods in proving discrimination have become accepted in both federal and state courts.

Of particular interest are the cases in which the judicial system itself is charged with discrimination. The two main targets here are the administration of the death penalty and the selection of jurors. Evidence has been mounting, and finally has drawn the attention of the Supreme Court, that the death penalty is administered with bias, discriminating against black offenders who killed white victims. The major technical problem in distilling this evidence is to assure comparability of the homicides under analysis.

In the jury selection area, the statistical analysis of discrimination has had more impact. Despite substantial efforts in this direction, the lower courts have rejected these efforts. In *Castandeda v. Partida* (1977), for instance, the Court used a standard statistical formula to compute the probability that the disparity between the proportion of Mexican Americans serving on GRAND JURIES and their proportion in the county population could have arisen if grand jurors had been selected at random. The majority found the probability to be so minute (about one in a number with 140 zeros) that the discrepancy was sufficient to establish discrimination even though there were problems with the data used to estimate these proportions and even though the majority of jury commissioners were themselves Mexican Americans.

In the trial of Dr. Benjamin Spock and others accused of conspiring to obstruct the draft, the alleged discrimination involved female jurors. The allegation of bias in that case was directed not against the system but against the particular judge who consistently selected juries with significantly fewer women than those of his colleagues, although all drew from the same pool of potential jurors.

At times experimental social science research is offered to aid a court in assessing the consequences of its legal options or in ascertaining facts relevant to the choice of these options. When the Supreme Court in BROWN V. BOARD OF EDUCATION (1954) held that segregated education was inherently unequal, the Court quoted with approval a lower court's finding that school segregation with the sanction of law produced feelings of inferiority among black children, affecting their motivation to learn. The Court remarked that its conclusion was "amply supported by modern authority." That authority, cited in a footnote, consisted of seven items. Five, such as Gunnar Myrdal's *American Dilemma*, dealt generally with problems of black education. Two bore more directly on the issue: a statement by thirty-two leading social scientists and an experiment conducted by the psychologist Kenneth Clark. Clark had given sixteen black children in a South Carolina elementary school a sheet of paper on which two dolls were drawn, identical in every respect except that the one was black, the other white. The children were asked, "Which doll would you like to play with?" "Which is the nice and which the bad doll?" "Which doll looks like you yourself?" Ten of the children liked the white doll best; eleven called the black doll the "bad" one; seven of the black children, when asked which doll was like themselves, picked the white one. From these answers and earlier research, Clark concluded "that these children . . . like other human beings who are subjected to an obviously inferior status in the society in which they live, have been definitely harmed in the development of their personalities. . . ."

Later, scholars disputed both the evidentiary power of that study and the weight the Justices had attached to it. The study, obviously limited in size and structure, today would hardly survive cross-examination. Most likely its major function was to buttress a position the Justices had reached on their own.

Social science research has provided more solid evidence in litigation over the constitutionality of juries with fewer than twelve members. In the two decisions that affirmed the legality of such juries, the Court cited a number of empirical studies purporting to show that these modifications did not affect the quality of the verdicts rendered by the smaller juries. Subsequently these studies were severely criticized, and five years later BALLEW V. GEORGIA held five-member criminal juries unconstitutional. Justice HARRY A. BLACKMUN's opinion repeatedly cited these critical views.

Most social science operations suffer from some imperfection, partly because their subject matter is so complex, and partly because of methodological flaws. Even if such imperfections are minor, courts may hesitate to accept social science findings that threaten to dislodge established rules. One type of effort to compensate for imperfection is "triangulation"—the confluence of evidence from independent studies that approach the same

problem from different angles. An example is the series of studies of "death qualified" juries.

At one time, a New York statute allowed New York City to try murder and other crimes of public notoriety before specially selected BLUE RIBBON JURIES, whose members, among other qualifications, were required to have no objection to the death penalty. When the Court was asked to declare these juries unconstitutional because of alleged bias in favor of the prosecution, it declined by a bare majority on the ground that there was no proof of such bias. Speculation as to how such proof might be established led to the first study which found that jurors who were in favor of the death penalty were indeed more likely to convict, not only in capital trials, but generally. Six other studies followed, with different approaches; each replicated the result.

*Witherspoon v. Illinois* (1968), decided halfway through these studies, did not reach the issue. Although the Court agreed that merely having scruples about the death penalty was not sufficient cause for eliminating jurors, it dismissed the first few research findings, indicating that the exclusion of jurors with scruples against the death penalty would bias the jury in favor of conviction, as "too tentative and fragmentary." Subsequent efforts to convince other courts that the post-*Witherspoon* juries, too, were biased in favor of convicting defendants failed until 1983 and 1984 when two federal district courts in HABEAS CORPUS proceedings accepted the evidence provided in these studies and invalidated the convictions. Although the federal Courts of Appeals have divided on this issue and the Supreme Court has agreed to review one of these cases, these two decisions mark a preliminary acceptance of proof by triangulation.

The role of social science research in litigation is bound to grow in spite of deep-seated hesitancy on the part of the courts to look at statistical evidence. It is difficult to predict how fast and where the use of social science techniques will increase in constitutional litigation. Much will depend on the resourcefulness of social scientists in developing new research and the initiative of attorneys in presenting evidence that can sharpen the perception of litigated facts and aid courts in judging the consequences of their legal options.

HANS ZEISEL
DAVID KAYE
(1986)

Bibliography


BALDUS, D. and COLE, J. 1980 *Statistical Proof of Discrimination.* Colorado Springs, Colo.: Shepard's.

CAHN, EDMOND 1962 A Dangerous Myth in the School Segregation Cases. In Kenneth Clark, ed., *Confronting Injustice.* Pages 329–345. Boston: Little, Brown.

KAYE, DAVID 1980 And Then There Were Twelve: Statistical Reasoning, the Supreme Court, and the Size of the Jury. *California Law Review* 68:1004–1043.

——— 1982 Statistical Evidence of Discrimination. *Journal of the American Statistical Association* 77:773–783.

LEMPERT, RICHARD O. 1975 Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases. *Michigan Law Review* 73:643–708.

LOH, WALLACE D. 1984 *Social Research in the Judicial Process: Cases, Readings and Text.* New York: Russell Sage Foundation.

SAKS, MICHAEL J. 1974 Ignorance of Science Is No Excuse. *Trial* 10:18–20.

WALBERT, DAVID 1971 The Effect of Jury Size on the Probability of Conviction: An Evaluation of *Williams v. Florida. Case Western Law Review* 22:529–554.

ZEISEL, HANS 1968 *Some Data on Juror Attitudes Towards Capital Punishment.* Chicago: University of Chicago Center for Studies in Criminal Justice.

——— 1971 And Then There Were None: The Diminution of the Federal Jury. *University of Chicago Law Review* 38: 710–724.

——— 1980 Reflections on Experimental Techniques in the Law. *Journal of Legal Studies* 2:107–124.

——— 1985 *Say It with Figures*, 6th ed. Chap. 14. New York: Harper & Row.

——— and DIAMOND, SHARI 1974 "Convincing Empirical Evidence" on the Six-Member Jury. *University of Chicago Law Review* 41:281–295.


## SOCIAL SCIENCE RESEARCH AND CONSTITUTIONAL LAW

"Let us," ROSCOE POUND urged in 1910, "look the facts of human conduct in the face. Let us look to economics and sociology and philosophy, and cease to assume that jurisprudence is self-sufficient. It is the work of lawyers," he continued, "to make the law in action conform to the law in the books, not by futile thunderings against popular lawlessness, nor eloquent exhortations to obedience to the written law, but by making law in the books such that law in action can conform to it." Pound's exhortation is an early expression of the Legal Realist view of the role of social science in law, including constitutional law, a view that is still significant today.

LEGAL REALISM attacked the classical conception of law with its assumptions about the independent and objective movement from preexisting rights to decisions in specific cases. In so doing, Realists opened the way for a vision of law, including constitutional law, as policy informed by facts about the world. They saw the twentieth century as a period of knowledge explosion and in the emerging social sciences the triumph of rationality over tradition, inquiry over faith, and the human mind over its environ-

ment. By using the questions and methods of science to provide factual material and to assess the consequences of legal decisions, Realists such as KARL LLEWELLYN claimed that an understanding of what law could do would help in establishing what law should do. Legal Realism thus initiated a dialogue between law and social science by staking a claim for the importance of phenomenon beyond legal categories and by attacking what Realists saw as the self-centered arrogance of legal decision makers.

Yet the origins of SOCIAL SCIENCE IN CONSTITUTIONAL LITIGATION are often traced back, before the Realists, to the BRANDEIS BRIEF, submitted in 1907 as part of the litigation of MULLER V. OREGON (1908), a case involving the constitutionality of maximum-hours laws for women. LOUIS D. BRANDEIS provided factual evidence, culled from already existing materials, that women workers had special health needs such that legislating special protection might be deemed reasonable. Judged by today's standards his brief hardly qualifies as social science evidence. However, the Supreme Court's explicit citation of it suggested that there might be a receptive audience for systematic fact-gathering efforts in subsequent cases.

A close second to the Brandeis Brief as the best known example of the role of social science in constitutional law is the famous doll study by psychologist Kenneth Clark. Clark did an experiment with young black children in the South, giving them a drawing of two otherwise identical dolls, except that one of the dolls was white, the other black. The children were asked which dolls they would like to play with, which looked like themselves, and which were nice and which were bad. Most of the children liked the white doll best and called the black doll bad. This study, along with several others, was cited by the Court in BROWN V. BOARD OF EDUCATION (1954) in support of the proposition that " '[s]egregation of white and colored children in public schools has a detrimental effect upon colored children.' " The Court further observed that "whatever may have been the extent of psychological knowledge at the time of PLESSY V. FERGUSON [(1896), this finding is amply supported by modern authority."

Over the last several decades, research based on such techniques as experiments, public opinion surveys, and quantitative analysis of archival data has multiplied, such that today it is common to see citations to social science research decorating the footnotes of court opinions dealing with a wide variety of constitutional issues including those having to do with the FOURTEENTH AMENDMENT guarantee of EQUAL PROTECTION OF THE LAWS, *Morgan v. Kerrigan* (1976); the constitutionality of regulations of OBSCENITY, *Paris Adult Theatre I v. Slaton* (1973); whether the Sixth Amendment mandates JURY SIZE, *Williams v. Florida* (1970); and whether CAPITAL PUNISHMENT violates the Eighth Amendment prohibition of CRUEL AND UNUSUAL PUNISHMENT, *Gregg v. Georgia* (1976). While the increasingly prevalent citation of social science seems to be fulfilling the Realist aspiration to tether law more completely to the world through the work of social scientists, social science seldom compels particular factual conclusions or legal results. At best, social science identifies contingencies, establishes probabilities, or points out tendencies.

Moreover, courts rarely commission their own research. The work presented to them is sometimes sponsored directly by parties to constitutional litigation and, where it is not directly sponsored, it is always mobilized in the service of advocacy. For nearly every social science study establishing some probability or tendency, there are others qualifying, disputing, or contradicting its conclusions. The persuasiveness of social science research ultimately depends on the persuasiveness of the narratives in which they are embedded and their reception in the prevailing political climate. As a result, courts can easily quarrel with or ignore research with which they disagree.

A particularly powerful demonstration of the ability of courts to sidestep the results of even the best social science research is provided by the case of MCCLESKEY V. KEMP (1987). There the Court was presented with the Baldus study, a scientifically rigorous analysis based on advanced multiple regression techniques showing that, in death penalty cases, the best predictor of whether a murderer would receive a death rather than a life sentence was the race of his victim. This research showed that when all other factors were taken into account, murderers of white victims were four times more likely to receive a death sentence than murderers of black victims. The plaintiff contended that this finding raised serious equal protection and Eighth Amendment issues.

The Baldus study, while carried out with the encouragement of the NAACP LEGAL DEFENSE AND EDUCATION FUND, was directly responsive to the concerns of Justices in earlier death penalty cases who complained, as Chief Justice WARREN BURGER did in *Furman v. Georgia* (1972), that there was "no empirical basis for concluding that juries have generally failed to discharge the responsibilities . . . of choosing between life and death in individual cases according to the dictates of community values." In addition, the study was designed to address critiques made by Justices of earlier studies of racial disparities in death penalty cases involving rape, critiques calling them "interesting and provocative" but insufficiently comprehensive to serve as proof of RACIAL DISCRIMINATION. Yet even after these efforts the Baldus research did not persuade the Court. The Court assumed the validity of the Baldus research; nonetheless, it found that the study did not show that racial considerations "actually" enter into any particular sentencing decisions and that "At most, the Baldus

study indicates a discrepancy that appears to correlate with race. Apparent discrepancies in sentencing are an inevitable part of our criminal justice system."

Despite the Baldus study's fate, it marked the high point of one part of the Realist project of using social science to produce factual predicates for constitutional decisions. But there was, and remains, a second part of the Realist mandate for social science; namely, to measure or assess the impact of constitutional decisions once they are made in the hope of producing results that can be used to reassess or revise those decisions where necessary. Here social science identifies gaps, of the kind that Pound foresaw, between the law on the books and the law in action. There are now literally hundreds of social science studies that focus on Court decisions like *Brown* or MIRANDA V. ARIZONA (1966) and seek, in the words of Abraham Blumberg, "to ascertain the validity and viability of . . . (those) decisions which may rest on wholly erroneous assumptions about the contextual realities of social structure." Occasionally, though not very often, that work finds its way into cases in which courts are asked to expand, amend, revise, or reverse earlier decisions.

At the end of the twentieth century, the Realist vision of the roles of social science in constitutional law is as controversial as it has ever been. For some it continues to mark the path of an enlightened engagement between academic knowledge and legal policy. As Judge Richard Posner recently said, echoing the Legal Realist exhortation of more than a half-century ago, "I would like to see the legal professoriat redirect its research and teaching efforts toward fuller participation in the enterprise of social science, and by doing this make social science a better aid to judges' understanding of the social problems that get thrust at them in the form of constitutional issues." Others reject the hope of the Realists. They claim that it is wedded to an unduly positivist and narrow view of social science and that it limits social science to a politically reformist role. Additionally, what counts as social science knowledge is itself "up for grabs," with positivism under attack and with new epistemologies pressing themselves forward.

Many now seek a broader role for social knowledge. They believe that social research should be directed less toward charting the vicissitudes of particular constitutional decisions and more toward understanding the pervasive role of constitutional and other bodies of law in legitimating political power, maintaining social inequality, and constituting the taken-for-granted world. For them social science should do more than provide data for, or study the fate of, constitutional decisions by courts assumed to stand outside society. It should instead help us understand constitutional law not, as the Realists did, as something removed from social life, occasionally intervening to try to correct injustices, but as inseparable from and fused with all social relations and practices.

AUSTIN SARAT
(2000)

Bibliography


BALDUS, DAVID; WOODWORTH, GEORGE; and PULASKI, CHARLES 1989 Equal Justice and the Death Penalty: A Legal and Empirical Analysis. Boston, Mass.: Northeastern University Press.

BLUMBERG, ABRAHAM 1967 The Practice of Law as a Confidence Game. *Law and Society Review* 1:15–38.

CLARK, KENNETH and CLARK, MAMIE 1947 Racial Identification and Preference in Negro Children. Pages 169–178 in Theodore Newcomb and Eugene Hartley, eds., *Readings in Social Psychology.* New York: Henry Holt.

GORDON, ROBERT 1984 Critical Legal Histories. *Stanford Law Review* 36:57–126.

LLEWELLYN, KARL 1931 Some Realism About Realism. *Harvard Law Review* 44:1222–1264.

MONAHAN, JOHN and WALKER, LAURENS 1994 *Social Science in Law: Cases and Materials*, 3rd ed. Westbury, N.Y.: The Foundation Press.

POSNER, RICHARD 1998 Against Constitutional Theory. *New York University Law Review* 73:1–22.

POUND, ROSCOE 1910 Law In Books and Law In Action. *American Law Review* 44:12–38.

SARAT, AUSTIN 1990 Off to Meet the Wizard: Beyond Validity and Reliability in the Search for a Post-empiricist Sociology of Law. *Law and Social Inquiry* 15:155–170.

SARAT, AUSTIN and SILBEY, SUSAN 1988 The Pull of the Policy Audience. *Law and Policy* 10:98–166.

SARAT, AUSTIN and KEARNS, THOMAS R. 1993 Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life. Pages 21–62 in Austin Sarat and Thomas R. Kearns, eds., *Law in Everyday Life.* Ann Arbor: University of Michigan Press.

SCHLEGEL, JOHN 1980 American Legal Realism and Empirical Social Science–II. *Buffalo Law Review* 29:195–323.


# SOCIAL SECURITY ACT

## 49 Stat. 620 (1935)

The Social Security Act of 1935, as subsequently amended, is the primary source of federal and federal-state cooperative social welfare programs. In addition to the program popularly denominated "social security," which now includes old age, survivors, and disability insurance, and the fiscally related medical assistance program for the aged (Medicare), the current Social Security Act also provides grants to states for many federally regulated programs, such as unemployment compensation, services to poor families with children (Aid to Families with Dependent Children), services to the aged, blind, and disabled (Supplementary Security Income), health

care for the poor (Medicaid), and maternal and child welfare services.

The act has been a fertile source of constitutional litigation. The cooperative federal-state unemployment compensation scheme was narrowly sustained as a legitimate congressional exercise of the power "to lay and collect taxes . . . to . . . provide . . . for the GENERAL WELFARE of the United States" in STEWARD MACHINE CO. V. DAVIS (1937). In a companion case, HELVERING V. DAVIS (1937), seven Justices agreed that the federal social security old age retirement benefits program was well within the purview of Congress's TAXING AND SPENDING POWER.

The act has generated a number of important PROCEDURAL DUE PROCESS cases. GOLDBERG V. KELLY (1970) held that due process requires an evidentiary hearing *prior* to the termination of WELFARE BENEFITS. Justice WILLIAM J. BRENNAN, writing for a majority of six, reasoned that a subsequent hearing would be inadequate to protect the interests of the eligible recipient deprived of basic subsistence while she awaited her opportunity to challenge termination of benefits. *Goldberg v. Kelly* was narrowly construed in MATHEWS V. ELDRIDGE (1976), which held that due process does not require a prior evidentiary hearing when social security disability benefits are terminated after a Social Security Administration determination that the worker is no longer disabled. The Court distinguished *Goldberg* on two grounds: *Goldberg* involved public assistance for the INDIGENT while social security disability benefits are not based on financial need; and the opportunity for a prior hearing is less valuable to the recipient when the administrative conclusion is based on expert medical testimony, as in a disability termination case, rather than on a wide variety of facts and witness credibility, as in a public assistance case.

The social security program embodied a number of gender-based assumptions about economic dependence that were challenged as violative of the EQUAL PROTECTION guarantee in *Weinberger v. Wiesenfeld* (1975) and CALIFANO V. GOLDFARB (1977). In *Wiesenfeld*, the Court required that "mother's benefits," payable to an insured worker's widow who cares for the worker's child, be extended equally to similarly situated widowers. In *Goldfarb*, the Court held invalid a requirement that widowers but not widows prove actual dependency on the deceased insured worker.

In another group of cases prospective social welfare beneficiaries have constitutionally challenged the substantive conditions of individual grants. In *Flemming v. Nestor* (1960), *Weinberger v. Salfi* (1975), and *Mathews v. DeCastro* (1976), the Supreme Court rejected such challenges.

GRACE GANZ BLUMBERG
(1986)

Bibliography

ALTMEYER, ARTHUR 1968 *The Formative Years of Social Security.* Madison: University of Wisconsin Press.

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE 1960 *Basic Readings in Social Security: The 25th Anniversary of the Social Security Act.* Washington, D.C.: Government Printing Office.

WITTE, EDWIN 1962 *The Development of the Social Security Act.* Madison: University of Wisconsin Press.

# SOCIOLOGICAL JURISPRUDENCE

Sociological JURISPRUDENCE is one of the most important schools of legal thought in the twentieth century. Its major proponent in the United States was ROSCOE POUND (1870–1964), a prolific writer who was dean of the Harvard Law School from 1916 to 1936. A number of other legal educators and judges also contributed in varying degrees to the theory or practice of sociological jurisprudence. They included five former members of the Supreme Court—OLIVER WENDELL HOLMES, LOUIS D. BRANDEIS, Harlan Fiske Stone, BENJAMIN N. CARDOZO, and FELIX FRANKFURTER. Even though the doctrines of these jurists were anything but uniform, they shared a number of important attitudes and ideas.

The movement for a sociological jurisprudence emerged during the Progressive era. Pound interpreted it as the "movement for pragmatism as a philosophy of law," the purpose of which was to facilitate legal reform and social progress. Although legal change should take place under the leadership of lawyers, the agenda of sociological jurisprudence did not focus on changes in legal institutions. Rather, it stressed reform of prevailing conceptions of the study, interpretation, and application of law.

This emphasis reflected a particular diagnosis of the ills of the American legal system at the outset of the twentieth century. These problems included judicial hostility to laws designed to protect workers, which courts often construed narrowly or held unconstitutional. Decisions of the Supreme Court applying the doctrine of SUBSTANTIVE DUE PROCESS are a classic example of the tendency. The advocates of sociological jurisprudence assailed this judicial response to social legislation, which they attributed to several factors. One was the isolation of the study of law from the social sciences. This condition allegedly fostered an ignorance of social realities and needs that contributed to unjust decisions. "Unless we know the facts on which legislators may have acted," Justice Brandeis pointed out in BURNS BAKING CO. V. BRYAN (1924), "we cannot properly decide whether they were . . . unreasonable, arbitrary, or capricious. Knowledge is essential to understanding; and understanding should precede judging."

Pound maintained that another factor contributing to

judicial decisions that obstructed social progress was MECHANICAL JURISPRUDENCE, or the rigid deduction of decisions from established principles without regard to their practical effects. He argued that this kind of syllogistic reasoning not only obscured judges' wide range of choice in selecting premises but also contributed to their intolerance of laws limiting FREEDOM OF CONTRACT. The very different attitude of Justice Holmes was one reason why advocates of sociological jurisprudence held him in such high esteem.

These criticisms were the basis of the characteristic reform objectives of sociological jurisprudence. A fundamental goal was the development of a better factual understanding of the practical effects of legal precepts and institutions. Cardozo proposed a Ministry of Justice which would study and observe the "law in action." In "The Living Law" Brandeis recommended "broader education . . . continued by lawyer and judge throughout life: study of economics and sociology and politics which embody the facts and present the problems of today." This idea strongly conditioned the unorthodox BRANDEIS BRIEF in MULLER V. OREGON (1908), an approach that Brandeis and other lawyers such as Felix Frankfurter used in a number of subsequent cases. Only two of the 113 pages of this brief presented the traditional kind of legal argument, while the rest consisted largely of factual evidence of the bad effects on women of excessive hours of work. Brandeis argued that these data showed that the Oregon law, which limited women's working hours to ten per day, was a reasonable limitation of freedom of contract. His argument favorably impressed the Justices, who unanimously upheld the law.

The prescription for abandoning "mechanical jurisprudence" was a more pragmatic approach to judicial decision making. No one expressed this idea better than Cardozo, who insisted that law is a means to the end of "social welfare" or "social justice." He argued that judges should interpret general constitutional limitations to serve this end. The changing meaning of the word "liberty" in the due process clauses of the Fifth and FOURTEENTH AMENDMENTS is an example. (See INCORPORATION DOCTRINE.) Similar beliefs conditioned Frankfurter's suggestion that constitutional law "in its relation to social legislation, is . . . but applied politics, using the word in its noble sense."

These ideas reflected a justifiable dissatisfaction with the content of American constitutional law earlier in this century. The adequacy of the sociological jurists' diagnosis of and reforms for these evils is another matter. To begin with, they tended to exaggerate the causal significance of "mechanical jurisprudence" and judicial ignorance of social needs. Neither of these factors ordinarily influence the actual decisions of the Justices or their choice of premises as much as their policy preferences or attitudes. Furthermore, conservative Justices might (and did) use Cardozo's "method of sociology" for their own purposes. "Social welfare" and "social justice" are subject, after all, to a multitude of interpretations. In some cases a majority of the Justices invalidated laws defended by a "Brandeis brief." The extent to which that technique influenced them to uphold other laws is uncertain, but its impact may have been corroborative rather than decisive. The use of social science evidence in BROWN V. BOARD OF EDUCATION (1954) illustrates this tendency. Finally, social scientists often disagree about the interpretation of the facts or their implications for public policy.

To say this is not to imply that the value of sociological jurisprudence was negligible. Its greatest contribution to constitutional law was that it served as a positive force for upholding social legislation. If its efficacy in this regard was limited, at least it provided support for judges inclined to hold such legislation constitutional. Moreover, knowledge of the actual effects of legal precepts and institutions is essential for informed evaluations of them. The call of sociological jurisprudence for studies of these effects was, thus, a step in the right direction.

WILFRID E. RUMBLE
(1986)

Bibliography

BRANDEIS, LOUIS D. 1916 The Living Law. Address before the Chicago Bar Association, January 3, 1916.

CAHILL, FRED V. 1952 *Judicial Legislation.* New York: Ronald Press.

ROSEN, PAUL L. 1972 *The Supreme Court and Social Science.* Urbana: University of Illinois Press.

RUMBLE, WILFRID E. 1968 *American Legal Realism.* Ithaca, N.Y.: Cornell University Press.

WHITE, G. EDWARD 1978 *Patterns of American Legal Thought.* Indianapolis: Bobbs-Merrill.

## SODOMY

See: *Bowers v. Hardwick*; Sexual Orientation; Sexual Preference and the Constitution

## *SOLEM v. HELM*
463 U.S. 277 (1983)

Expanding the coverage of the Eighth Amendment's CRUEL AND UNUSUAL PUNISHMENT clause, the Supreme Court held that in addition to barbaric sentences it prohibits criminal sentences that are disproportionate to the crime for which a defendant is convicted. Jerry Helm, a habitual offender, passed a bad check and received the most severe punishment—life imprisonment without possibility of parole—that South Dakota could impose for any

crime. A 5–4 Court decided that because Helm's six prior FELONY convictions were for relatively minor nonviolent crimes against property and because he was treated more severely than other criminals who had committed more serious crimes, his sentence was significantly disproportionate to his crime. The dissenting Justices saw "judicial usurpation" of state sentencing discretion, especially in cases of incorrigible recidivists.

LEONARD W. LEVY
(1986)

## SOLICITOR GENERAL

The solicitor general is a senior officer of the United States Department of Justice with special responsibilities in the representation of the United States and its officers and agencies before the Supreme Court, and in the administration of justice in the federal appellate courts.

The title—solicitor general—like that of ATTORNEY GENERAL is derived from English usage, but the functions of the offices are quite different in the United States. In England, both offices are political in the sense that they are filled by members of Parliament. In the United States, neither the attorney general nor the solicitor general is a member of Congress. The attorney general is a member of the Cabinet. He advises the President, works with members of Congress on legislative matters and judicial appointments, holds press conferences and is otherwise responsible for governmental and public relations. He is also charged with administering a large department which includes the FEDERAL BUREAU OF INVESTIGATION, the Bureau of Prisons, the Immigration and Naturalization Service, and other important agencies. Though he has policy and administrative responsibilities of great importance, he has virtually no time to be a lawyer in the traditional sense.

Until 1870, the attorney general functioned alone with only a small staff, and in association with the United States attorneys in the various states, over whom he had little authority. In 1870, apparently as an economy device (to eliminate the cost of retaining private lawyers in the increasing number of cases), Congress established the Department of Justice, with the attorney general as its head. The statute provided that there should be in the Department "an officer learned in the law, to assist the Attorney-General in the performance of his duties, to be called the solicitor-general." Under the statute the solicitor general was authorized in the attorney general's discretion to argue "any case in which the government is interested" before the Supreme Court, or in any federal or state court." These statutory provisions remain to the present day, essentially unchanged.

In the years since 1870, the duties of the Department of Justice have greatly increased. Until 1953 the solicitor general was the second officer in the Department of Justice and served as acting attorney general in the attorney general's absence. The responsibilities of the attorney general have made it necessary to add a deputy attorney general and an associate attorney general, so that the solicitor general is now the fourth ranking officer in the department. But the solicitor general's responsibilities have remained essentially unchanged in substance—though greatly increased in volume—over the past sixty years. He remains the leading officer in the department functioning primarily as a lawyer.

As the pattern has developed, the solicitor general is not a politician, and he has only a minimum of political responsibility. His function is to be the government's top lawyer in the courts, particularly the Supreme Court, and by well-established tradition he is allowed considerable independence in carrying out this role. Bent and Schloss, describing the office as "the bridge between the Executive and the Judiciary," have said that "[t]he Solicitor General must often choose between incongruous roles and differing loyalties. He is still the government's lawyer, and he most frequently acts as an advocate. On the other hand, he also functions as a reviewer of government policies, an officer of the Court, and . . . a protector of the public interest."

In more specific terms, the organization of the Department of Justice assigns to the solicitor general four areas of responsibility. Two of these are of primary importance. First, the solicitor general is responsible for the representation of the United States and its officers and agencies in all cases before the Supreme Court of the United States. The BRIEFS which are filed on behalf of the government in the Supreme Court are prepared by him or under his direction. He argues the most important cases himself, and assigns the argument in other cases to members of his staff, to other lawyers in the Department of Justice or to lawyers for the agencies which may be involved in the cases before the Court. Second, the Solicitor General decides whether the United States will APPEAL in any case which it loses in any court, state or federal, or indeed in foreign courts. This function is not widely known, even in the legal profession. It is, however, a very important means of coordinating and controlling the government's litigation, so that cases of little importance are not taken to the appellate courts. It also serves to minimize the taking of inconsistent positions before the various appellate courts.

This function includes determining whether any case will be taken by the government to the Supreme Court. This is probably the most important responsibility assigned to the solicitor general. With few exceptions, no case can now be taken to the Supreme Court except on

application for review—called a petition for a WRIT OF CERTIORARI. In recent years, some four thousand such applications are made to the Court by all parties each year. Yet the Court can hear on the merits only about a hundred and fifty cases a year. This means that it is of great importance for the solicitor general to select with care the relatively small number of cases in which the government will file petitions. A high proportion of the solicitor general's petitions are in fact granted by the Court, which means that he has, as part of his responsibility, carried out an important part of the selection process necessarily confronting the Court.

In addition to the two functions just outlined, the solicitor general has two other responsibilities. These assist him in carrying out his role as overall controller of Government APPELLATE JURISDICTION. First his authorization must be obtained before the United States or one of its officers or agencies files a brief as friend of the court—AMICUS CURIAE—in any appellate court. Second his authorization must be obtained before a petition for REHEARING *en banc*—before the whole court—is filed in any UNITED STATES COURT OF APPEALS. The courts of appeals are overburdened, and hearings EN BANC present serious logistical problems. Requiring authority from the solicitor general means that such petitions are rarely filed, and only in the most important cases.

The solicitor general's office is a relatively small one, though it has grown slowly in recent years. At the present time it numbers about twenty lawyers in addition to the solicitor general himself; and, including secretaries and aides, the total number of personnel in the office is about fifty. Thus it can operate in much the same way as a moderate-sized law firm. There is considerable pressure in the office as the cases keep coming in, from all parts of the country, and almost all of them are subject to relatively short deadlines.

In the nature of things, the solicitor general cannot be a specialist. The cases coming to his desk involve every field of law—constitutional law, ADMINISTRATIVE LAW, criminal law, tax law, antitrust law, labor law, international law, ENVIRONMENTAL PROTECTION, energy, and every other field with which the government is concerned. Inevitably, the staff in the office specialize to some extent, and there are four deputy solicitors general, each of whom has special responsibilities for particular areas. But there are no rigid lines, and all lawyers in the office are available to handle the various types of cases as they come in.

The solicitor general's role in the Supreme Court is limited to the representation of the United States, its officers, and its agencies. Other cases which may be of great importance involve private parties, or states or their subsidiaries. Thus, the cases involving BIRTH CONTROL (GRISWOLD V. CONNECTICUT, 1965) and abortion (ROE V. WADE, 1973) were not handled by the solicitor general. But more than half of the cases before the Supreme Court (particularly those heard by the Court on the merits) are "government cases," that is, cases in which the United States, or its officers or agents, are parties. It is important to the Court to have these cases handled in competent fashion, and the research and ideas, and policy decisions, lying behind the solicitor general's advocacy before the Supreme Court can influence the decisions reached by the Court.

Much of the government's litigation before the Supreme Court, though important, does not attract wide public attention. From time to time, though, cases coming before the Court are rather spectacular in terms of public interest. Reference may be made, for example, to YOUNGSTOWN SHEET & TUBE CO. V. SAWYER (1952), where the Court invalidated the action of President HARRY S. TRUMAN in seizing the steel industry during the KOREAN WAR, the Pentagon Papers case (NEW YORK TIMES CO. V. UNITED STATES, 1971), and UNITED STATES V. NIXON (1974), where the Court held that the White House tapes made under the direction of President RICHARD M. NIXON must be turned over in response to a SUBPOENA from a GRAND JURY. For the most part, though, the work of the solicitor general and his staff is rather straightforward professional work.

It is important to recognize that in all cases the solicitor general is an advocate and not a judge. However, he is a very special sort of advocate. There are some positions which he will not support because he thinks the government's position is clearly wrong in law. On rare occasions, in such cases, he "confesses error" before the Court. The Court is not bound by such a confession, but it usually accepts the solicitor general's conclusion. There are other cases where the solicitor general will not himself defend the government's position, but he thinks a "respectable" defense can be made, and he assigns another government lawyer who is willing to do so to present that defense. Illustration of this may be found in *Peters v. Hobby* (1955), involving the LOYALTY-SECURITY PROGRAM during the 1950s, and in *Gutknecht v. United States* (1970), involving "delinquency reclassification" under the SELECTIVE SERVICE ACT. But the solicitor general will frequently advocate a position which he believes to be worthy of presentation to the Court even though he might not decide in favor of that position if he were a judge. Laymen sometimes have difficulty in accepting this, but, within limits, it is inherent in the role of a lawyer, and it is inherent in the position of the solicitor general. For he is the government's chief advocate. The function of deciding cases is assigned to others.

In this situation, the solicitor general's role is sometimes a difficult one. Whenever he decides not to take a case before the Supreme Court, he is in effect depriving the Court of the opportunity to decide it. This is, indeed,

an important part of his function, in view of the fact that many more applications come to the Court than it can possibly accept. The solicitor general's judgment that the chances of success in a particular case are slim is obviously a relevant consideration. Yet there are cases of such importance that he should take the case to the Court, in order to obtain a definitive decision, even though he has little faith in the government's position.

An illustration is found in *United States v. United States District Court* (1972). This involved the validity of so-called national security WIRETAPS, made on executive authority (the President or the attorney general) alone, without a judicial warrant. As the cases before the Supreme Court developed, it seemed unlikely that the Court would uphold such wiretaps, at least in cases of domestic security. Yet the attorney general needed to know. If he had such authority, cases might develop where he would need to use it. If he did not have the authority, he should have the definitive decision of the Supreme Court, by which he would, of course, abide. A petition was filed with the Court in order that the question might be definitively settled, and the Court granted the petition. In due course, the Court held that domestic "national security" wiretaps are illegal under the FOURTH AMENDMENT, when made without a court warrant. Thus the solicitor general, though himself dubious about the government's case, played his appropriate role in obtaining a definitive decision on an important public question.

In the daily routine of his office the solicitor general has many decisions to make. In making these decisions, he may be subject to various pressures. These pressures may be wholly legitimate professional pressures from other lawyers in the government seeking to persuade him to accept their view. He frequently gives hearings, too, to opposing lawyers. There may also be various forms of political pressure—rarely presented as such—from Capitol Hill, or from other officers of the government. The solicitor general should be able to receive such representations and come to his own conclusions. Attorneys general have usually been firm in their support of the solicitor general. And, indeed, the fact that the decision is assigned to the solicitor general may serve to protect the attorney general from such pressures. But the attorney general and the President are the solicitor general's superiors, and if he receives an order from above he must decide whether the matter is one of principle for him; if it is, he must resign. As far as is known, no solicitor general has ever resigned for such a reason. But this is what happened to Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus, when they refused to comply with President Nixon's order to discharge Archibald Cox as Special Prosecutor in 1973.

Special problems arise when officers or agencies differ from the position of the solicitor general, and especially when two or more agencies have different interests or points of view which they present vigorously to the solicitor general or his staff. A situation of this sort arose in the case of *Fortnightly Corp. v. United Artists Television, Inc.* (1968), involving cable television. The Copyright Office in the Library of Congress had one view about the case. The Federal Communications Commission had another. And the Antitrust Division in the Department of Justice had still a third. All views were strongly advocated. The solicitor general negotiated separately with the lawyers for each office concerned. None would yield. Then he held a meeting at which all interested lawyers were present, hoping that some sort of a consensus would emerge. Unfortunately, none did, and the solicitor general concluded that he had no alternative but to formulate his own view, which he submitted to the Court.

This case exemplifies one of the important roles of the solicitor general, in resolving differences within the government, so that a single position may be presented to the Court. When these differences arise within the Justice Department, or between the several executive departments, the solicitor general seeks to persuade but eventually may have to make his own decision. The situation is somewhat more difficult when the difference is with one of the "independent agencies," such as the Federal Trade Commission or the Securities and Exchange Commission.

For historical reasons, it has long been settled that the Interstate Commerce Commission and the Maritime Commission can appear before the Supreme Court through their own lawyers. With respect to the other agencies, however, the statutory provisions are not explicit. Though there is occasionally some tension, the solicitor general has been able to maintain effective control over agency cases in the Supreme Court. In this process, various devices are used. He sometimes advises the Court that the agency has a different view. He sometimes authorizes the agency to file a brief stating its view. By and large, the agencies believe that the solicitor general's support is important and helpful, and this belief is reinforced by the standing of the solicitor general before the Court. Cases of this sort are carefully considered in the solicitor general's office, and full hearings are given to the lawyers from the agencies involved. In this way problems of real difficulty have been resolved with substantial satisfaction on the part of all concerned.

There is a final role of the solicitor general which, though long an important one, has been of increasing significance in recent years. This is the preparation and filing of briefs in the Supreme Court as a friend of the Court—amicus curiae. Under the Rules of the Supreme Court, the solicitor general is authorized to file such a brief without consent of the parties or special leave of the Court.

Frequently a case between private parties, or a state criminal prosecution, may raise a question of great interest to the federal government, though the latter is not a party. An example is TERRY V. OHIO (1968), involving the validity of a STOP AND FRISK by local police. The solicitor general filed an amicus brief in that case because of the great interest of the federal government in law enforcement. Through such briefs, the solicitor general protects the interests of the federal government, aids the Court by furnishing information and relevant legal materials, facilitates the handling of difficult questions with the "independent agencies" of the government, and, on occasion, presents his own views on novel constitutional questions.

In this way, the solicitor general has participated in cases involving SCHOOL DESEGREGATION, legislative CIVIL RIGHTS, and many other important questions of developing constitutional and statutory law. Within wide limits, the solicitor general has freedom to develop his own position in such briefs. The solicitor general and his staff have great experience in Supreme Court cases, and well-considered and carefully prepared briefs can be of considerable assistance to the Court through impartial and informed analysis of novel questions.

Indeed, a high proportion of briefs amicus filed by the solicitor general are prepared because of direct invitation from the Court. Such invitations are always treated as commands, and great care is taken in determining the position to be taken and in developing the materials to be included in the brief. In many ways, such briefs are the purest expression of the relation of trust and confidence which has long been established between the solicitor general and the Court.

It is this trust and confidence on which the position of the solicitor general before the Court, and his effective representation of the United States, in the long run depend.

ERWIN N. GRISWOLD
(1986)

Bibliography

NOTE 1969 Government Litigation in the Supreme Court. *Yale Law Journal* 78:1442–1481.

## SOLICITOR GENERAL
## (Update)

The solicitor general is the chief advocate in the Supreme Court for the United States government, its officers, and its agencies, but he is also known as the Tenth Justice. By tradition rather than constitutional mandate, the solicitor has a "dual responsibility" to the judicial and the executive branches, as Justice LEWIS F. POWELL observed. For generations (the solicitor's post was established in 1870), Supreme Court Justices have counted on the solicitor to look beyond the government's narrow interests and help guide them to the "right" result in the case at hand; they also expect him to pay close attention to the case's impact on the law. The solicitor's reach extends to the lower federal courts, as well: although the executive branch is usually represented there by other lawyers from the Justice Department, the solicitor approves all appeals taken by the government. After the Supreme Court issued its landmark ONE PERSON, ONE VOTE ruling in BAKER V. CARR (1962), which Chief Justice EARL WARREN called the most important decision of his tenure, an AMICUS CURIAE brief filed by Solicitor General Archibald Cox was credited with having persuaded at least two members of the Court's majority to treat REAPPORTIONMENT of electoral districts as a justiciable issue. Without those votes, the Court would have reaffirmed a lower court decision to leave the issue to the legislature as a POLITICAL QUESTION.

The Court's explicit reliance on the solicitor in its interpretation of the Constitution and development of a new legal doctrine in the *Baker* case fits larger patterns. The solicitor general plays a major role in determining which cases the government will contest in the Supreme Court. As a result of this screening, in recent years the Supreme Court has granted approximately eighty percent of the petitions for a writ of CERTIORARI submitted by the solicitor, as opposed to only three percent of those submitted by other lawyers across the country. Furthermore, the solicitor has won approximately eighty percent of his cases. In cases dealing with the Constitution in particular, the Court has shown special interest in the views of the SG, as he is informally called. The Justices have regularly invited him to file amicus briefs even in cases to which the United States is not a party.

In 1977 an executive-branch controversy about the solititor general's amicus filings led to the first official statement about the solicitor's role in the century-old history of the office. Offering then-conventional wisdom among constitutional lawyers, a Justice Department memorandum stated that the solicitor general should be relatively "independent" within the department and the executive branch. The memorandum gave four reasons for this view: "The Solicitor General must coordinate conflicting views within the Executive Branch; he must protect the Court by presenting meritorious claims in a straightforward and professional manner and by screening out unmeritorious ones; he must assist in the orderly development of decisional law; and he must 'do justice'—that is, he must discharge his office in accordance with law and ensure that improper concerns do not influence the presentation of the Government's case in the Supreme Court."

The transformation of the Supreme Court's docket dur-

ing the years of both the WARREN COURT and the BURGER COURT led to a serious reconsideration of the solicitor general's role, however, and to a basic disagreement about the propriety of such "independence." The discussion was prompted by actions within, affecting, and officially taken by the solicitor's office during the administration of RONALD REAGAN, as the administration sought to enact a vision of the Constitution largely at odds with views that had evolved in the legal mainstream since midcentury. Within the solicitor's office, for the first time, a deputy was hired to ensure that the government's filings conformed to the ideological views of the administration. The administration tolerated scant dissent from those views, and during a period of turmoil, it drove away a notable share of the office's nonpartisan career lawyers: the office suffered a fifty percent turnover in one year, or twice the normal rate. The first Reagan solicitor general, REX E. LEE, a conservative whose advocacy was not aggressive enough to satisfy more influential administration officials, was forced out with this group. After leaving office, he said, "There has been this notion that my job is to press the Administration's policies at every turn and announce true conservative principles through the pages of my briefs. It is not. I'm the Solicitor General, not the Pamphleteer General."

In the Justice Department, in key cases like THORNBURGH V. AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (1986), dealing with the right to ABORTION, the solicitor general played only an academic role in determining whether the government would file a brief; the decision was essentially made by other officials in the department and the White House. Monitored by a Justice Department official who amounted to a "shadow solicitor" (William Bradford Reynolds, the assistant attorney general for civil rights as well as counselor to Attorney General Edwin Meese), the SG was changed from the legal conscience of the government into a partisan spokesman for the President.

At the height of this period, during the 1985 term of the Supreme Court, the solicitor general's advocacy drew explicit criticism in opinions written by Justices from across the legal spectrum on the moderately conservative Burger Court. In at least a dozen and a half cases, the Supreme Court cited instances of overstatements or inaccurate representations in SG briefs about legislative history, court holdings, and other basic tools of legal reasoning. In a televised interview not long after, Justice THURGOOD MARSHALL commented, "They can't separate the political from the legal. They write political speeches and put the word "brief" on them." He added, "The solicitor general is the government's spokesman in this Court. It's always been true until the past decade or so. Now it seems as though he speaks only for the President, and not for the rest of the government."

The Reagan administration's explanation of these shifts was that its approach to the solicitor general's role and his aggressive conservative advocacy were required in order to persuade the Court to overturn a range of flawed liberal precedents. Eventually it seemed that forces at large in the rest of the legal culture, which were later especially apparent on the REHNQUIST COURT at the close of the divisive 1988 term, had also affected the solicitor's approach.

In particular, a breakdown in consensus about constitutional law, represented by the high percentage of Supreme Court cases decided by a bare one-vote majority (in the 1988 term, twenty-four percent of the total cases decided), seemed to some to challenge the notion that any expert could have a "clear vision of what the law requires," as the 1977 Justice Department memorandum claimed for the solicitor. This breakdown seemed to reemphasize the solicitor's primary duty of advocacy for the executive branch and of carrying to the Court the positions of the administration he serves.

To observers of the solicitor general's office who hold to the belief that the law can have a reassuring sense of continuity despite its contradictions, a measure of stability that contributes to social order, and an integrity provided by, among other things, the careful practice of legal reasoning, a significant way to work toward maintaining those qualities is by preserving an appropriate measure of independence for the solicitor general. Such independence represents an expression of faith in the idealized political neutrality of his office.

Still, as controversy about the nature of law has played out most dramatically in disagreements over how to interpret the Constitution, even to scholars the solicitor general's role has recently become heavily layered with political choices.

LINCOLN CAPLAN
(1992)

(SEE ALSO: *Attorney General and Department of Justice.*)

Bibliography

CAPLAN, LINCOLN 1988 *The Tenth Justice: The Solicitor General and the Rule of Law.* New York: Vintage Books.

SYMPOSIUM 1988 The Role and Function of the United States Solicitor General. *Loyola Law Review* 21:1047–1271.

## SOMERSET'S CASE
### 98 Eng. Rep. 499 (K.B., 1772)

The case of *Somerset v. Stewart,* decided by King's Bench (the highest COMMON LAW court in England) in 1772, profoundly affected the constitutional status of slavery in England and in the United States after independence

(because the precedent had become part of American common law). In a brief opinion, Lord Mansfield, Chief Justice, held that slavery "must be recognized by the law of the country where it is used." He further declared that "the state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only [by] positive law." *Somerset's Case* did not abolish slavery in England or America, but until the 1850s it was interpreted to mean that slavery did not exist where it was not established by positive law (which, according to Chief Justice JOHN MARSHALL in *The Antelope* [1825], might include custom as well as statutory law). Abolitionists construed Mansfield's words to mean either that slavery was universally illegitimate or that it had a legal existence only where affirmatively established by a slave code. They denied that the federal government had power to establish slavery in any territory or district, or to protect it anywhere. (See ABOLITIONIST CONSTITUTIONAL THEORY.) This argument became the basis of the Republican "Freedom national, slavery local" slogan of the 1850s and was reflected in STEPHEN A. DOUGLAS'S FREEPORT DOCTRINE of 1858. *Somerset's Case* also complicated interstate relations in the matter of fugitive and sojourning slaves; some free states in the 1850s refused to recognize the continuation of an individual's slave status in a free JURISDICTION. (See FUGITIVE SLAVERY.) Southern jurists responded by repudiating the liberating potential of the *Somerset* doctrine after 1851, dismissing Mansfield's words as OBITER DICTA or error.

WILLIAM M. WIECEK
(1986)

## *SONZINSKY v. UNITED STATES*
300 U.S. 506 (1937)

The unanimous OPINION in this case indicated that the spirit animating the DECISION in BAILEY V. DREXEL FURNITURE CO. (1922) was dead: the Supreme Court would no longer inquire into Congress's motives in enacting a tax measure. The National Firearms Act of 1934 imposed an annual EXCISE TAX on manufacturers and dealers of firearms, excepting handguns. The Court refused to consider that the tax was not imposed to raise a revenue and was a penalty to suppress traffic in a commodity normally subject only to state regulation. Compulsory registration provisions of such statutes, however, were later held unconstitutional in MARCHETTI V. UNITED STATES (1968).

LEONARD W. LEVY
(1986)

## *SOSNA v. IOWA*
419 U.S. 393 (1975)

Iowa limited access to its DIVORCE court to persons who had resided in the state for one year. Sosna, denied a divorce under this law, brought suit in a federal court challenging the one-year limitation's constitutionality. By the time her case reached the Supreme Court, the year had passed. Because the case had been properly certified as a CLASS ACTION, however, the Court rejected the state's invitation to dismiss the action for MOOTNESS. On the merits, a six-Justice majority, speaking through Justice WILLIAM H. REHNQUIST, upheld the statute.

Justice Rehnquist breathed no word concerning "penalties" on the exercise of the RIGHT TO TRAVEL interstate. Instead, he merely noted that previous decisions had struck down durational RESIDENCE REQUIREMENTS only when they were justified entirely on the basis of budgetary or record-keeping considerations. Here, he said, the state had an interest in protecting the rights of defendant spouses and of any minor children. Further, the state might wish to avoid "officious intermeddling" in another state's primary concerns and to protect its own divorce decrees against COLLATERAL ATTACK. "A state such as Iowa may quite reasonably decide that it does not wish to become a divorce mill." In any event, an Iowa plaintiff was merely delayed in getting a divorce, not denied one altogether.

Justice BYRON R. WHITE dissented, arguing that the case was moot. Justice THURGOOD MARSHALL dissented on the merits, joined by Justice WILLIAM J. BRENNAN. The Court's analysis did not subject this penalty on exercise of the right to travel to the STRICT SCRUTINY it deserved but improperly employed a functional equivalent of the RATIONAL BASIS standard of review. Iowa's most important interest, protecting the integrity of its decrees, could be achieved by the less restrictive means of merely requiring a divorce plaintiff to be domiciled in the state. And the delaydenial distinction was false; a plaintiff would be denied marital freedom (and the freedom to remarry) during an entire year.

KENNETH L. KARST
(1986)

# SOUNDTRUCKS AND AMPLIFIERS

When the Framers of the FIRST AMENDMENT wrote a ban on laws "abridging" FREEDOM OF SPEECH into the Constitution, the range of the human voice was relatively limited. The invention of electronic sound amplification equipment in the twentieth century potentially extended that

range even into distant buildings and behind locked doors. Loudspeakers and bullhorns, whether stationary or mobile, present a particular problem of speech regulation: to what extent does the right to speak override the expectation of peace and privacy enjoyed by members of the public? Especially troubling are soundtrucks, amplifier-equipped motor vehicles that blare political slogans or advertising messages while roving the streets of residential neighborhoods.

The problem of soundtrucks and amplifiers was addressed by the Supreme Court in two famous cases. In *Saia v. New York* (1948) a 5–4 Court struck down a city ordinance requiring permission of the chief of police before a soundtruck could be used within the city limits. The ordinance provided no standard for the police chief to apply in granting or withholding permission. Eight months later, in KOVACS V. COOPER (1949), a five-Justice majority (including the *Saia* dissenters) upheld an ordinance prohibiting the operation within a city of soundtrucks that emitted "loud or raucous noises." The plurality thought the "loud and raucous" test an adequate standard of regulation, while two concurring Justices understood the ordinance as a ban on all soundtrucks.

The danger of public regulation of amplified speech is that restrictions ostensibly directed to the time, place, and manner of speaking will be used as a pretext for controlling the content of speech. But, as technology makes the outside world ever more intrusive into the realm of individual privacy, the right of the people to provide themselves freedom from loud and raucous utterance, whatever its content, can only become more valuable.

DENNIS J. MAHONEY
(1986)

## SOUTER, DAVID H.
(1939– )

David Hackett Souter, who became Associate Justice of the Supreme Court of the United States in 1990, was born on September 17, 1939, in Melrose, Massachusetts. He was graduated from Harvard College in 1961 and was awarded a Rhodes Scholarship. From 1961 to 1963 he studied at Oxford University. He then returned to Harvard for his legal education and graduated from Harvard Law School in 1966.

Following law school, Justice Souter practiced law at a private firm in Concord, New Hampshire, for two years. This is the only time that Justice Souter spent in the private sector. In 1968, he accepted a position as assistant attorney general for the State of New Hampshire. During the next ten years he rose to the top of the state attorney general's office, becoming deputy attorney general in 1971 and attorney general in 1976.

In 1978, Justice Souter was appointed to the Superior Court of New Hampshire. Five years later, he was elevated to the New Hampshire Supreme Court, where he served until 1990. In early 1990 he was appointed by president GEORGE BUSH to the United States Court of Appeals for the First Circuit. He served on that court for only five months, participating in only one week of oral arguments and writing no opinions.

On July 20, 1990, Justice WILLIAM J. BRENNAN, JR., resigned from the Supreme Court of the United States after thirty-four years of service. Five days later, President Bush nominated Justice Souter to be Associate Justice of the Supreme Court. Justice Souter's nomination was perceived by both supporters and opponents to be historically significant. This was true for several reasons, few of them related to Justice Souter himself.

First, during Justice Brennan's long and distinguished tenure, Brennan became the leading symbol of the "liberal" approach identified with the Supreme Court under Chief Justice EARL WARREN—an approach concerned with promoting equality and protecting individual rights against the government. Supporters of that approach viewed with alarm the prospect that Justice Brennan would be replaced by the appointee of a Republican President who had made a campaign issue of Supreme Court decisions supported by the liberal wing of the Court.

Second, Justice Souter was the ninth consecutive Justice to have been appointed by a Republican President; no Democratic President had made an appointment to the Supreme Court for twenty-three years, since President LYNDON B. JOHNSON appointed Justice THURGOOD MARSHALL in 1967. While there had been comparable periods in history—Democratic Presidents FRANKLIN D. ROOSEVELT and HARRY S. TRUMAN, for example, appointed thirteen consecutive Justices—those were periods in which one party thoroughly dominated national politics. By contrast, Justice Souter was appointed at a time when Democrats held a majority in the Senate, as they had for all but six of the previous thirty-two years. This long-standing division of power in Washington, combined with the perception among Democratic senators that President Bush and President RONALD REAGAN consciously sought to make judicial appointments that would change the political orientation of the federal courts, made partisan controversy over Justice Brennan's replacement almost inevitable no matter who the replacement was.

Third, both supporters and opponents perceived Justice Souter to be a crucial appointment in determining the direction of the Court. Senate Judiciary Committee Chair Joseph Biden, for example, asserted that no nomi-

nation had been so significant to the future of the Court since the 1930s. In particular, both supporters and opponents of the nomination expected that Justice Souter would cast the decisive vote on whether the Constitution permits the states to outlaw ABORTION. After the Supreme Court's 1989 decision in WEBSTER V. REPRODUCTIVE HEALTH SERVICES, which upheld significant state restrictions on abortion, supporters of the right to an abortion believed that four Justices were prepared to overrule ROE V. WADE (1973), the decision that first established that right. Partly in response to *Webster,* abortion was an important issue in several closely watched political campaigns in 1989. Justice Souter had made few significant public statements about *Roe v. Wade* or the constitutional right to an abortion, and his views on abortion were the subject of intense investigation, and speculation, in the period between his nomination and his eventual confirmation by the Senate in October 1990.

Finally, Souter's nomination to the Court occurred in the shadow of the rejection of President Ronald Reagan's nomination of Judge Robert Bork to the Supreme Court, in 1987. The nationally televised hearings on the BORK NOMINATION were the longest confirmation hearings on any Supreme Court nomination in history, and during the confirmation battle Bork's fate became a major national political issue. Bork had made extensive public statements on many issues of constitutional law and philosophy and was a nationally known, highly controversial figure in legal circles. Justice Souter, by contrast, had made virtually no public statements on broad issues of constitutional law and was unknown outside of New Hampshire. Those inclined to be suspicious of Justice Souter suggested that President Bush had deliberately sought out an unknown candidate who would pursue the President's agenda but who did not have the record that made Bork vulnerable. Others, including supporters of Bork, argued that the Souter nomination confirmed their fears that the treatment of Bork made it impossible for anyone except an undistinguished anonymity to be confirmed to the Supreme Court.

Souter's record was revealing in certain respects. Even among his opponents, few criticized the overall quality of the more than 100 opinions he wrote while a justice of the New Hampshire Supreme Court. Few questioned his general intellectual ability. His opinions as a state supreme court justice showed a tendency to favor the interests of the government over those of criminal suspects. Apart from that, however, his New Hampshire opinions revealed few clear patterns. Accordingly, reporters and investigators for concerned interest groups made extraordinary efforts to uncover information that might shed light on Souter's views, particularly on the abortion issue. Ultimately little such material was uncovered.

Souter's confirmation hearings were the third longest in history (after those of Bork and Justice LOUIS D. BRANDEIS). Justice Souter himself testified for almost twenty hours, the second longest time for any Supreme Court nominee (after Bork). The hearings were notable in several respects.

Perhaps most significant, senators asked, and Souter answered, numerous substantive questions about the nominee's views on specific issues of constitutional law. Justice Souter made specific statements about his views on RACIAL DISCRIMINATION; AFFIRMATIVE ACTION to aid racial minorities; SEX DISCRIMINATION; legislative REAPPORTIONMENT and the principle of ONE PERSON, ONE VOTE; congressional power to enforce the FOURTEENTH AMENDMENT's guarantees of DUE PROCESS and EQUAL PROTECTION against the states; the enforcement of the BILL OF RIGHTS against the states through the Fourteenth Amendment's due process clause; the free speech clause, free exercise clause, and ESTABLISHMENT CLAUSE of the FIRST AMENDMENT; and the decision in MIRANDA V. ARIZONA (1966), which required police officers to warn suspects in custody before interrogating them. Souter commented specifically on several Supreme Court decisions—endorsing, for example, the landmark expansions of free speech rights in NEW YORK TIMES V. SULLIVAN (1964) and BRANDENBURG V. OHIO (1969), but criticizing the standard for judging establishment clause issues specified in the LEMON TEST and the approach that Justice ANTONIN SCALIA took to the role of tradition in determining the rights protected by the due process clause. Justice Souter also engaged in broad-ranging discussions with members of the SENATE JUDICIARY COMMITTEE on the significance of the intentions of the Framers of the Constitution and on a Supreme Court Justice's obligation to follow precedent.

Souter's extensive substantive answers were significant principally because, before the Senate hearings, there had been considerable controversy over whether it was proper for Senators to ask Supreme Court nominees their views on specific issues, and whether it was obligatory, or even appropriate, for the nominee to answer. Some recent nominees (notably Justice Scalia) had refused to answer substantive questions about constitutional issues, and many thought that Bork's uninhibited willingness to answer contributed to his downfall. Souter's extensive answers buttressed the position of those who maintained that nominees should be expected to give their views on constitutional issues in detail to the Senate committee.

Souter's hearings were also significant for what he did not disclose. Despite repeated questioning, he declined to state his views on whether the Constitution protected the right to an abortion and on whether *Roe v. Wade* should be overruled. Ultimately, many senators who believed that

this issue was of the first importance, and that a Supreme Court nominee was obligated to disclose his views on it, voted to confirm Justice Souter despite his reticence.

Another conspicuous aspect of Souter's confirmation process was the role of groups of private citizens interested in specific issues. Those groups had played a significant role in mobilizing public opinion against the Bork nomination, and many—especially groups concerned about the possible overruling of *Roe v. Wade*—testified against Justice Souter and attempted, unsuccessfully, to rally public opinion against him. In this respect as well, the Souter nomination confirmed the trend toward the increased politicization of the Supreme Court nomination process.

Finally, Souter's confirmation hearings were significant because of the extraordinary degree of preparation that preceded them and the increasing tendency of confirmation hearings to take on the aspect of choreographed productions. The Bush administration assigned several officials to help Souter prepare for the Senate hearings, and Souter spent most of the period between his nomination and the hearings studying intensely and practicing his responses to anticipated questions from the senators. His preparation was manifestly successful: most observers considered his testimony at the hearings to be a virtuoso performance in which he demonstrated careful thought on a wide range of constitutional issues to which he had not been greatly exposed while on the New Hampshire Supreme Court. Justice Souter was confirmed by an overwhelming vote in the Senate despite the salience of the abortion issue and his refusal to indicate his views on that issue. This emphasis on careful preparation to defuse political difficulties is another respect in which it seems likely that Justice Souter's confirmation process established a lasting pattern.

The cases decided through April 1991 of Justice Souter's first Term on the Supreme Court revealed little about his orientation, and what they did reveal was not surprising. The most important cases during that period dealt with CRIMINAL PROCEDURE, and in each of them Justice Souter voted in favor of the government. Perhaps the most significant single vote was in *Arizona v. Fulminante* (1991), where a 5–4 majority of the Court (in an opinion by Chief Justice WILLIAM H. REHNQUIST) ruled that the admission of a coerced confession in a criminal trial can be harmless error. Observers speculated, plausibly, that Justice Brennan would have reached the opposite conclusion and that Justice Souter's appointment determined the result on this issue. In *McClesky v. Zant* (1991), Justice Souter joined a six-Justice majority (in an opinion by Justice Kennedy) in adopting a rule that sharply limited the ability of prisoners to bring successive federal habeas corpus petitions. The ruling was issued in a capital case, and its most marked effect will be to cut off the avenues of federal judicial review available to defendants who have been sentenced to death. Finally, in *California v. Hodari D.* (1991), Justice Souter, with six of his colleagues, joined an opinion (written by Justice Scalia) that adopted a narrow construction of the term "seizure" in the Fourth Amendment: The Court ruled that a suspect who ran away when a police officer ordered him to stop was seized not at the time the order was given but only when he was finally restrained. In all of these cases, Justice Souter's votes confirmed the strong tendency he had shown in his opinions on the New Hampshire Supreme Court to favor the government in criminal cases.

DAVID A. STRAUSS
(1992)

Bibliography

*Nomination of David H. Souter to Be an Associate Justice of the United States Supreme Court*, Senate Executive Report No. 101–32, 101st Cong., 2d Sess. (October 1, 1990).

## SOUTER, DAVID H.
(1939– )
(Update)

David Hackett Souter was nominated by President GEORGE H. W. BUSH and confirmed as the 105th Justice of the Supreme Court in 1990. At the time, he was portrayed as the "stealth candidate" because, even though previously serving on the New Hampshire Supreme Court, he was not widely known and did not have a record of publications like that of the 1987 unsuccessful nominee, Judge Robert H. Bork. At his confirmation hearings, though, he expressed respect for PRECEDENT, dissociated himself from a jurisprudence of ORIGINAL INTENT, and acknowledged the "majestic generality" of guarantees like the DUE PROCESS clause.

Although more conservative than the Justice he replaced on the bench, WILLIAM J. BRENNAN, JR., Souter does not share the conservative judicial philosophy of Bush's other appointee, Justice CLARENCE THOMAS. To be sure, in his first couple of years on the Court he voted with conservatives on the REHNQUIST COURT, casting the pivotal vote in controversial rulings like RUST V. SULLIVAN (1991), which upheld the government's denial of funding for family planning organizations that perform ABORTIONS. More recently, he has established a record of voting most frequently (over 80 percent of the time) with Justices JOHN PAUL STEVENS, RUTH BADER GINSBURG, and STEPHEN G. BREYER. Together, they are most often in dissent in 5–4

decisions. He votes next most often with Justices SANDRA DAY O'CONNOR and ANTHONY M. KENNEDY, and least often with Chief Justice WILLIAM H. REHNQUIST and Justices ANTONIN SCALIA and Thomas.

Souter is a conservative jurist but a conservative in the tradition of the second Justice JOHN MARSHALL HARLAN. Indeed, he frequently cites that Justice's celebrated DISSENTING OPINION from the dismissal of an APPEAL for lack of JUSTICIABILITY in POE V. ULLMAN (1961), urging the Court's recognition of a constitutional RIGHT OF PRIVACY and embracing the concept of SUBSTANTIVE DUE PROCESS. Souter thus joined Kennedy and O'Connor in a PLURALITY OPINION in PLANNED PARENTHOOD V. CASEY (1992) upholding "the core meaning" of the landmark ruling in ROE V. WADE (1973), and he wrote the portion of that opinion dealing with the DOCTRINE of STARE DECISIS. He also embraced Harlan's understanding of the protection of the due process clause in his CONCURRING OPINIONS in the 1997 RIGHT TO DIE cases, as well as in writing for the Court in *County of Sacramento v. Lewis* (1998).

Although Souter joined the majority in NEW YORK V. UNITED STATES (1992), he has otherwise dissented from the Rehnquist Court's bare majority rulings on FEDERALISM, limiting the LEGISLATIVE POWER of Congress, and defending STATES' RIGHTS in UNITED STATES V. LÓPEZ (1995), *Seminole Tribe of Florida v. Florida* (1996), *Printz v. United States* (1997), and *Mack v. United States* (1997). He also wrote for the dissenters from the Court's ruling in *City of Boerne v. Flores* (1997), striking down the RELIGIOUS FREEDOM RESTORATION ACT (1993).

Souter likewise joined Stevens, Ginsburg, and Breyer in ADARAND CONSTRUCTORS, INC. V. PEÑA (1995), dissenting from the Court's invalidation of a federal AFFIRMATIVE ACTION program and overturning of METRO BROADCASTING, INC. V. FCC (1990). So too, he dissented in SHAW V. RENO (1993) AND ITS PROGENY, which struck down the creation of majority-minority ELECTORAL DISTRICTS.

At the same time, Souter sided with majorities in extending the scope of the FOURTEENTH AMENDMENT EQUAL PROTECTION clause in the area of nonracial discrimination. He joined, for example, Ginsburg's OPINION FOR THE COURT in UNITED STATES V. VIRGINIA (1996) holding that a public, all-male military college ran afoul of the Fourteenth Amendment in refusing to admit females. He also joined Kennedy's opinion in ROMER V. EVANS (1996), striking down a state constitutional amendment that forbid localities from enacting ordinances outlawing SEXUAL ORIENTATION discrimination.

On the rights of the accused and matters of CRIMINAL PROCEDURE, however, Souter generally sides with conservatives. Still, he wrote an important opinion for a bare majority in *Withrow v. Williams* (1993), upholding inmates' right to HABEAS CORPUS on grounds that police violated their rights under MIRANDA V. ARIZONA (1966) and distinguishing STONE V. POWELL (1976). He also dissented from the Court's rejection of a FOURTH AMENDMENT challenge to random DRUG TESTING of student athletes in *Vernonia School District 47J v. Acton* (1995).

Besides championing the concept of substantive due process against criticisms advanced by Scalia and Thomas, Souter has written notable opinions staunchly defending RELIGIOUS LIBERTY on the one hand, and, on the other, a strict SEPARATION OF CHURCH AND STATE under the FIRST AMENDMENT. Besides joining the majority in striking down an ordinance banning "ritual animal sacrifice" in CHURCH OF THE LUKUMI BABALU AYE, INC. V. CITY OF HIALEAH (1993), his concurring opinion sharply disagreed with the Court's analysis of the free exercise clause in EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH (1990). With respect to the ESTABLISHMENT CLAUSE, he vigorously defends the theory of a "high wall of separation." Writing for the majority in BOARD OF EDUCATION OF KIRYAS JOEL VILLAGE SCHOOL DISTRICT V. GRUMET (1994), he struck down the creation of a special school district for a religious community. By contrast, he dissented from rulings permitting GOVERNMENT AID TO RELIGIOUS INSTITUTIONS in, for example, *Zobrest v. Catalina Foothills School District* (1993), ROSENBERGER V. RECTOR & VISITORS OF THE UNIVERSITY OF VIRGINIA (1995), and AGOSTINI V. FELTON (1997).

Souter has established a reputation for thoughtful, well-written opinions that often reexamine the historical basis for and development of constitutional guarantees. Actively engaging in oral arguments from the bench, he possesses the charm and wit of a New Englander. He considers himself "a conservative, from a conservative state" and yet jokes "that he makes his living writing liberal dissents."

DAVID M. O'BRIEN
(2000)

Bibliography

GARROW, DAVID J. 1994 Justice Souter Emerges. *The New York Times Magazine*, Sept. 25, pp. 36–43, 52–55, 64.

## *SOUTH CAROLINA v. KATZENBACH*
383 U.S. 301 (1966)

The decision upheld the constitutionality of portions of the VOTING RIGHTS ACT OF 1965. Southern states attacked, as an intrusion upon state SOVEREIGNTY and on other grounds, portions of the act suspending tests or devices used to measure voter qualifications, barring new voter qualifications pending approval by federal authorities, providing for the appointment of federal voting examiners to register voters, and determining which states and political subdivisions were subject to the act's coverage.

In sustaining the legislation under the FIFTEENTH AMENDMENT, the Supreme Court, in an opinion by Chief Justice EARL WARREN, rejected the argument that Congress could do no more than forbid violations of the Fifteenth Amendment and must leave the fashioning of remedies for violations to the courts. Congressional findings that case-by-case litigation was inaduquate to vindicate VOTING RIGHTS justified the decision "to shift the advantage of time and inerta from the perpetrators of the evil to its victims."

THEODORE EISENBERG
(1986)

## SOUTH CAROLINA EXPOSITION AND PROTEST

See: Exposition and Protest

## SOUTH CAROLINA ORDINANCE OF NULLIFICATION (1832)

South Carolinians' objections to the expansion of federal authority focused on protective tariffs enacted in 1828 and 1832. They were most concerned, however, about potential external threats to the security of slavery, including threats from the federal government. Inspired by constitutional theories of JOHN C. CALHOUN, the South Carolina legislature called a convention to nullify the tariff.

On November 24, 1832, the convention adopted the Ordinance of Nullification, which declared that Congress lacked power to adopt a protective tariff. The tariff measures were therefore "null, void, and no law, nor binding upon this State, its officers or citizens." The ordinance voided all contracts and judicial proceedings designed to collect the tariff, prohibited state officials from enforcing it, required the state legislature to enact legislation that would "prevent the enforcement and arrest the operation" of the tariffs, prohibited appeals of tariff-related cases to the Supreme Court, required all public officials and jurors to take an oath to support the ordinance and supportive legislation, and warned that any coercive federal act would trigger the state's SECESSION. South Carolina also subsequently nullified the federal FORCE ACT that empowered President ANDREW JACKSON to collect the tariff. Though the Nullification Ordinance produced a major constitutional crisis in 1832, it was a short-term failure. President Jackson and all the Southern states denounced it, and South Carolina never found occasion to put its requirements to the test. But the Ordinance was a major step in implementing the theory of NULLIFICATION and, as such, pointed to secession.

WILLIAM M. WIECEK
(1986)

Bibliography

CURRENT, RICHARD N. 1963 *John C. Calhoun.* New York: Washington Square Press.

## SOUTH CAROLINA ORDINANCE OF SECESSION (1860)

JOHN C. CALHOUN, the foremost theorist of SECESSION, had argued that the United States Constitution was a compact among sovereign states. When one of the parties to the compact (federal government or other state) had violated its terms by enacting or condoning unconstitutional acts, and other remedies such as INTERPOSITION and NULLIFICATION proved futile, an aggrieved party could withdraw from the compact and resume the independent status it enjoyed previously.

In response to ABRAHAM LINCOLN's election, the South Carolina legislature called a convention to consider secession. On December 20, 1860, the convention, meeting at Charleston, unanimously adopted the Ordinance of Secession, a brief statement declaring that "the union now subsisting . . . is hereby dissolved." Four days later, the Convention approved the "Declaration of the Causes of Secession," a brief exposition of secessionist and compact theory. In it, the Carolinians accused the free states of violation or half-hearted enforcement of the Fugitive Slave Acts, tolerating abolitionist agitation, and electing a presidential candidate pledged to the eventual abolition of slavery. Therefore South Carolina declared itself an "independent state, with full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do."

WILLIAM M. WIECEK
(1986)

Bibliography

POTTER, DAVID M. 1976 *The Impending Crisis,* 1848–1861. New York: Harper & Row.

## *SOUTH DAKOTA v. DOLE*

See: Conditional Spending

## *SOUTH DAKOTA v. NEVILLE*
459 U.S. 553 (1983)

In this case the Supreme Court answered a question left unresolved by earlier decisions: can a state use as evidence the fact that a person arrested for drunk driving refused to take a blood-alcohol test? GRIFFIN V. CALIFORNIA (1965) had held that adverse comment on a defendant's refusal to testify impermissibly burdened the RIGHT AGAINST SELF-INCRIMINATION, and SCHMERBER V. CALIFORNIA (1966) had held that a state could compel the taking of a blood-alcohol test without violating that right, which protected against testimonial compulsion only, not compulsion of physical evidence drawn from the body. In *Neville* the Court ruled that a state that authorized a driver to refuse a blood-alcohol test could introduce that refusal as evidence against him. The Court relied not on the earlier distinction between TESTIMONIAL AND NONTESTIMONIAL COMPULSION but on the fact that the element of compulsion was altogether absent here because the state did not require the test.

LEONARD W. LEVY
(1986)

## *SOUTH-EASTERN UNDERWRITERS ASSOCIATION v. UNITED STATES*
322 U.S. 533 (1944)

The statement in PAUL V. VIRGINIA (1869) that insurance did not constitute INTERSTATE COMMERCE underlay seventy-five years of acquiescence and spawned an intricate network of state regulation. The question of federal regulation did not come before the Court until this indictment of an underwriters' association for violating the SHERMAN ANTITRUST ACT. A 4–3 Court, led by Justice HUGO L. BLACK, declared that insurance was commerce subject to federal regulation. Moreover, the Sherman Act applied, and the underwriters could properly be convicted for its violation. Justice ROBERT H. JACKSON, dissenting in part, conceded the fact of interstate commerce but felt obliged to follow the well-established legal fiction to the contrary until Congress acted to regulate. Chief Justice HARLAN FISKE STONE dissented, predicting chaos when state regulation was discontinued because federal controls did not exist. Justice FELIX FRANKFURTER joined Stone, admitting the reach of federal power but denying that the Sherman Act was intended to extend to insurance.

DAVID GORDON
(1986)

(SEE ALSO: *Prudential Insurance Company v. Benjamin.*)

## SOUTHERN MANIFESTO
(March 11, 1956)

Southern politicians generally opposed the Supreme Court's ruling in BROWN V. BOARD OF EDUCATION (1954). Virginia and other states resurrected the doctrine of INTERPOSITION, and Georgia threatened NULLIFICATION. The most considered statement of segregationist constitutional theory was the declaration against INTEGRATION made by ninety-six southern congressmen and senators, in March 1956, led by Senator Harry F. Byrd of Virginia. The manifesto argued: *Brown* represented a clear abuse of judicial power; the FOURTEENTH AMENDMENT, which did not mention education, was not intended to affect state educational systems; PLESSY V. FERGUSON (1896) was still good law; DESEGREGATION would cause chaos and confusion in the states affected. The manifesto called upon the people of the states to "resist forced integration by any lawful means" and concluded with a pledge "to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution, and to prevent the use of force in its implementation." Federal response to such abstract defiance was notably lacking, although a group of distinguished leaders of the American bar denounced attacks on the Supreme Court as "reckless in their abuse, . . . heedless of the value of JUDICIAL REVIEW and . . . dangerous in fomenting disrespect for our highest law."

PAUL MURPHY
(1986)

Bibliography

MUSE, BENJAMIN 1964 *Ten Years of Prelude: The Story of Integration Since the Supreme Court's 1954 Decision.* New York: Viking.

## *SOUTHERN PACIFIC CO. v. ARIZONA*
325 U.S. 761 (1945)

Arizona prohibited operation of a railroad train more than fourteen passenger cars or seventy freight cars long. The Supreme Court, 7–2, held the law an unconstitutional burden on INTERSTATE COMMERCE. Chief Justice HARLAN FISKE STONE, for the Court, emphasized the magnitude of that burden; the law forced the railroad to operate thirty percent more trains in the state, and to break up and remake trains; its total yearly cost to both railroads operating in the state was a million dollars. Stone also noted that requiring more trains would produce more accidents; the state's safety argument was weak. This interest-balancing analysis was far more demanding than the "RATIONAL BA-

SIS" STANDARD OF REVIEW Stone had employed in *South Carolina State Highway Department v. Barnwell Bros., Inc.* (1938), upholding limits on truck widths and weights. *Southern Pacific* set the standard for future challenges to STATE REGULATIONS OF COMMERCE in the transportation field.

KENNETH L. KARST
(1986)

## SOVEREIGN IMMUNITY

At COMMON LAW the sovereign, although subject to the law, was immune from the JURISDICTION of its own courts. The English doctrine of sovereign immunity was established at an early time, probably in the thirteenth century; but long before the American Revolution the jurisdictional exemption of the sovereign, though remaining theoretically absolute, was riddled with exceptions. Judicial process against the sovereign was available through petition of right and other procedures resting upon waiver of immunity, and subordinate officers could be sued for damages attributable to official acts and were subject to process by prerogative writ.

Because sovereign immunity was part of the common law heritage existing when the Constitution was adopted, the courts later embraced the doctrine as an implicit limitation upon their jurisdiction. Hence, some provisions of Article III of the Constitution were interpreted as subject to this qualification. The immunity of the United States, first acknowledged by the Supreme Court in *United States v. McLemore* (1846), became a complete exemption, protecting the federal government and its agencies from unconsented suit in any court by any plaintiff. State immunity was initially rejected by the Court in CHISHOLM V. GEORGIA (1793), but that unpopular HOLDING was quickly reversed by the ELEVENTH AMENDMENT. The amendment, in juxtaposition with Article III, was subsequently construed to immunize the states from unconsented suits by private plaintiffs and by foreign governments in federal court.

The states, however, are not immune from suit by either the United States or other states. As a matter of state law, states commonly have claimed immunity from suit by private plaintiffs in state court. The power of Congress to lift the states' common law immunity seems restricted only by the limitations of the JUDICIAL POWER of the United States as defined in Article III, the general limitations of congressional power, and—arguably—some core notion of state sovereignty. (See NATIONAL LEAGUE OF CITIES V. USERY.)

The immunity doctrine is in tension with the RULE OF LAW, and pragmatic justifications for its perpetuation are unpersuasive. By means of statutes waiving immunity and through judicial interpretation, the ambit of the exemption has been drastically reduced. Congressional legislation creating the COURT OF CLAIMS in 1855 and later enactments, such as the Tucker Act (1887) and the FEDERAL TORT CLAIMS ACT (1946), subject the United States to suit on many kinds of claims. The states, by state constitutional provision or statute, have abolished completely or restricted their own immunity—often in state judicial proceedings only, less commonly in federal court actions. Moreover, as a practical matter, the impact of the doctrine is significantly restricted by differentiating suits against public officers for official acts done or threatened pursuant to unconstitutional or legally deficient authorization from suits against the government itself. Although the courts permit state and federal officers to assert sovereign immunity where the suit against them is adjudged to be substantially against the government itself, such cases are generally limited to suits seeking damages or restitution for past acts where judgment will expend itself upon the public treasury, those seeking to dispossess the government of property, and some suits seeking specific performance. As a consequence of these developments, sovereign immunity has become a narrow and ill-defined jurisdictional bar, whose contemporary legitimacy and utility are doubtful.

CLYDE E. JACOBS
(1986)

Bibliography

DAVIS, KENNETH C. 1970 Supp. *Administrative Law Treatise.* Pages 895–940. St. Paul, Minn.: West Publishing Co.

HOLDSWORTH, SIR WILLIAM S. 1944 *A History of English Law.* Vol. 9 of 15. London: Methuen.

## SOVEREIGN IMMUNITY
(Update)

The DOCTRINE of sovereign immunity holds that a sovereign cannot be sued without its consent. Although the Constitution nowhere refers to the sovereign immunity either of the states or the United States, the doctrine is well-entrenched for both levels of government and has even been applied to territories. For states sued in federal courts, the doctrine of sovereign immunity is treated as embodied in the ELEVENTH AMENDMENT, even though by terms that section speaks only of the scope of the judicial power. The Court has recently held, in *Alden v. Maine* (1999), that a state's constitutional immunity from suit exists not only in federal courts but also in the state's own courts. The sovereign immunity of the federal government has been established by judicial inference. The two lines of cases (state and federal sovereign immunity) frequently

borrow from one another, particularly on the question of whether a suit against a governmental officer should be treated as one against the sovereign.

Who is a "sovereign," what counts as consent, and whether the immunity applies in the courts of another sovereign, are issues that affect how broadly the doctrine prevents JUDICIAL REVIEW of (and remedies for) government wrongdoing. In the last century, the federal government has by LEGISLATION waived its sovereign immunity for contract and TAKINGS claims, for some COMMON LAW tort claims against the United States, and for most forms of injunctive or other nonmonetary relief against federal employees. Although a statutory clause giving an agency authority to "sue and be sued" is generally treated as waiving immunity, the Supreme Court has generally applied the "consent" requirement with rigor, construing claimed waivers of immunity narrowly. For example, interest on damage awards against the United States is not permitted unless explicitly authorized. Eleventh Amendment immunity for states sued in federal courts has also been broadly interpreted.

Apart from statutory waivers of immunity, a key to determining the effect of sovereign immunity is the availability or unavailability of other remedies to uphold the RULE OF LAW and provide individual justice. Generally a simple INJUNCTION against a government officer to refrain from future action that violates federal law will not be treated as barred by sovereign immunity. Sometimes referred to as the EX PARTE YOUNG principle, the availability of such relief against government officers mitigates the effects of sovereign immunity, and is of fundamental importance. An illustration of the importance of this principle is suggested by cases such as YOUNGSTOWN SHEET & TUBE V. SAWYER (1952), in which the Court, without referring to sovereign immunity, upheld a court order enjoining the U.S. Secretary of Commerce from carrying out the President's order to seize steel plants. Claims against officers that could result in government liability for accrued damages in contract or tort, and claims involving title to PROPERTY held by the sovereign, are more likely to result in rulings that the suits are "really" against the sovereign. Sovereign immunity is less likely to bar an action against an officer for a trespassory wrong, and does not bar either damage awards against officers individually or defenses in a government enforcement action.

Although some have attempted to ground sovereign immunity doctrine in SEPARATION OF POWERS concerns, it is as much history as logic that explains differences between those claims against officers that do not require the sovereign's consent and those that are treated as actions against the government requiring consent. In UNITED STATES V. LEE (1880), the Court, in a 5–4 decision, upheld federal JURISDICTION over a suit against federal officials to recover land wrongly held by U.S. Army officers. The majority questioned whether the sovereign immunity doctrine could be justified in the United States, given its origin with the personal immunity of the hereditary monarch; nonetheless, the Court did not regard itself as free simply to disavow the doctrine. The *Lee* dissenters invoked sovereign immunity as an "axio[m] of public law," not limited to monarchies, and made separation of powers arguments against permitting courts to enter judgments against officers that might interfere with important government functions by, for example, dispossessing the U.S. Army from occupying forts necessary for defense. While *Lee* permitted the suit against the officers notwithstanding the immunity of the United States, a similar effort was denied in *Malone v. Bowdoin* (1962), which followed the more restrictive view set forth in *Larson v. Domestic & Foreign Commerce* (1949) concerning when the government's consent is required for suit brought nominally against an officer. While a 1976 statute authorizing suits for nonmonetary relief against federal officers diminished the importance of *Larson* for review of federal action, *Larson* has continued to influence the scope of states' immunities in federal courts.

MARBURY V. MADISON (1803), which contemplated that MANDAMUS could issue to the U.S. Secretary of State, established for U.S. constitutionalism the importance of the principle that government itself be constrained by law, and further established a presumption that for every right, there be a remedy. Notwithstanding its long roots in U.S. constitutional cases (as well as in state law), sovereign immunity is in tension with both of these aspirations.

VICKI C. JACKSON
(2000)

Bibliography

CURRIE, DAVID P. 1984 State Sovereign Immunity and Suits Against Government Officers. *Supreme Court Review* 1984: 149–168.

ENGDAHL, DAVID E. 1972 Immunity and Accountability for Positive Government Wrongs. *University of Colorado Law Review* 44:1–79.

JAFFE, LOUIS L. 1963 Suits Against Governments and Officers: Sovereign Immunity. *Harvard Law Review* 77:1–39.

PFANDER, JAMES 1997 Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government. *Northwestern University Law Review* 91:899–1014.

WOOLHANDLER, ANN 1997 The Common Law Origins of Constitutionally Compelled Remedies. *Yale Law Journal* 107:77–164.

## SOVEREIGNTY

The single term "sovereignty" is used to denote two distinct (although related) concepts of constitutional signifi-

cance. It refers both to the autonomy of a state with respect to its legislative JURISDICTION and to the supreme authority within the state. There are historical reasons why the same term is used for both, but to confound them is a serious and all-too-common error. The term itself comes from the Latin *superans* (meaning "rising above" or "overcoming") through the French *souverain.*

Sovereignty, in the first sense, is a concept derived from international law. A state is sovereign if it is independent of other states and possesses the authority to determine its relationship to other states and to regulate its own internal affairs. Sovereignty, in this sense, is the essential condition required for membership in the family of nations. Sovereign states do not ordinarily make treaties or wage formal war except with other states recognized as sovereign. International law also recognizes some communities as semisovereign, that is, as possessing certain, but not all, of the attributes of sovereignty. The member states of a federal union are in this category.

Internally the several states of the United States are legally sovereign in this sense insofar as they possess jurisdiction, the legitimate authority to declare the law within their territory. But this sovereignty is not unlimited. As the Supreme Court said in PARKER V. BROWN (1943), "The governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers." The jurisdiction of the states is constitutionally limited by subject as well as by territory, but within their sphere the state governments are as supreme as the national government is within its sphere. This is the meaning of what JAMES MADISON in THE FEDERALIST #39 called the "compound republic."

The states enjoy some other attributes of sovereignty: they may not without their consent be sued in their own courts or in the courts of the United States (see SOVEREIGN IMMUNITY; ELEVENTH AMENDMENT) and they possess independent and plenary authority to lay and collect taxes on persons, things, or transactions within their jurisdiction. Among themselves, also, the states are sovereign. The jurisdiction of a state is exclusive of the other states. Disputes between or among states in cases not governed by the Constitution, an INTERSTATE COMPACT, or a federal statute are resolved according to the principles of international law. But the sovereignty of the states does not limit or diminish the sovereignty of the Union. In all international affairs and in domestic affairs properly subject to it, the government of the United States is sovereign. Without its consent, the United States may not be sued in the courts either of the United States or of the several states.

In political theory sovereignty is generally held to be indivisible; careful writers thus distinguish between the indivisible sovereignty of the people and the powers or attributes of sovereignty that are divided between the national and state governments. Hence ALEXANDER HAMILTON, in *The Federalist* #32, wrote of "the division of the sovereign power." But not all political actors are so careful; it is not uncommon for politicians, judges, or commentators to refer to a "division of sovereignty" in the federal system.

The second meaning of sovereignty as the single, supreme authority within a state, above the law and uncontrollable except by its own will, was introduced into political theory by Jean Bodin in his *Six Bookes of the Commonwealth* (1576). Its most extreme expression was given by Thomas Hobbes who, in *Leviathan* (1651), asserted that opposition to tyranny was identical with opposition to sovereignty, or, in other words, that there is no standard except its own will against which the actions of the sovereign can be judged. A democratic, but no less radical, form was given to this concept of sovereignty by Jean-Jacques Rousseau in *The Social Contract* (1762).

Originally an analytical or explanatory formulation, the notion of a single, indivisible power in the state became a prescriptive article of the Tory political creed. WILLIAM BLACKSTONE identified the King-in-Parliament as the sovereign in England. Governor THOMAS HUTCHINSON, in his famous dispute with the Massachusetts Assembly in 1773, ascribed that same status to Parliament within the British Empire—denying that the provincial legislatures of America had any power or authority except by Parliament's grace. To the Whigs of America the Hobbesian idea of sovereignty, as it was stated by Hutchinson, represented a threat to the liberty they had inherited and the self-government they had established. As an empirical assertion the indivisibility of sovereignty seemed to be disproved by the federal systems of Germany, Switzerland, and the Netherlands, as well as by the British imperial system as it existed in the mid-eighteenth century; and as a prescriptive formula it was all too clearly intended to subvert American home rule.

The social contract theory expressed in the DECLARATION OF INDEPENDENCE and the first state constitutions was a rejection of the Tory doctrine of sovereignty. Neither the government nor any branch or officer of the government justly exercises any power except by the consent of the governed. The doctrine of equality of rights means that no person or body of persons is above the law. The claim of the Declaration, our most fundamental constitutional document, is that there can be no sovereign but the people. This doctrine of POPULAR SOVEREIGNTY was identified by ALEXIS DE TOCQUEVILLE as the defining characteristic of American constitutionalism. Both the national and state governments derive their powers from the people through

the Constitution. Each exercises jurisdiction, but neither possesses sovereignty in the absolute, Hobbesian sense.

The Hobbesian notion of sovereignty was translated from a political to a legal concept in the nineteenth century by the British jurist John Austin, who argued that there was no HIGHER LAW against which the decrees of the state could be measured, and so the power of the legislature was absolute. In this revived form it was brought to America as part of the intellectual baggage of legal positivism.

Throughout American history a favorite rhetorical device has been to identify one level of government—usually the state—as sovereign. The success of this device depends upon the ambiguity of the term. That a political body exercises jurisdiction, is supreme within its sphere, and is autonomous in its internal affairs does not mean that it, its government, or its legislature is immune to the sanctions of the law or is free of the constraints of higher law. To speak of the "sovereign states" is not entirely inaccurate if the speaker refers to their autonomy within their own sphere, but it derives its force by evoking the notion of indivisibility and illimitability drawn from the other sense of the term. The rhetoric seemingly denies that the sovereign states are comprised within a sovereign Union.

Within the American regime the ultimate power and authority to alter or abolish the constitutions of government of state and Union resides only and inalienably with the people. If it be necessary or useful to use the term "sovereignty" in the sense of ultimate political power, then there is no sovereign in America but the people.

DENNIS J. MAHONEY
(1986)

Bibliography

DIAMOND, MARTIN (1970) 1981 *The Founding of the Democratic Republic.* Itasca, Ill.: F. E. Peacock.

JAFFA, HARRY V. 1965 *Equality and Liberty: Theory and Practice in American Politics.* New York: Oxford University Press.

LASKI, HAROLD J. 1921 The Foundations of Sovereignty. Pages 1–29 in *The Foundations of Sovereignty and Other Essays.* New Haven, Conn.: Yale University Press.

## SPAIGHT, RICHARD DOBBS (1758–1802)

Richard Dobbs Spaight represented North Carolina at the CONSTITUTIONAL CONVENTION OF 1787 and signed the Constitution. An infrequent speaker, Spaight favored strong national government. He was a leader of the RATIFICATION movement in North Carolina and was later elected governor and congressman. In a controversy with JAMES IREDELL over BAYARD V. SINGLETON (1787), he denounced JUDICIAL REVIEW as undemocratic.

DENNIS J. MAHONEY
(1986)

## SPECIAL INTEREST GROUPS

See: Interest Group Litigation; Interest Groups

## SPECIAL MASTER

A special master is an officer appointed by a court to assist it in a particular proceeding. When the Supreme Court exercises its ORIGINAL JURISDICTION, normally it appoints a special master to take EVIDENCE, make findings of fact, and submit a draft decree. The master's recommendations are advisory; decision rests with the Court. Many of the Supreme Court's special masters are former federal judges.

KENNETH L. KARST
(1986)

## SPECIAL PROSECUTOR

Special prosecutors, also known as INDEPENDENT COUNSEL, are private attorneys appointed to investigate and, if need be, to prosecute government officials accused of criminal wrongdoing. In 1978 Congress enacted a law providing for the appointment of special prosecutors investigating executive branch officials as part of the Ethics in Government Act. The law was revised and reenacted in 1983 and 1987. It has come under heavy attack by some as violative of the SEPARATION OF POWERS, but the Supreme Court sustained the law in *Morrison v. Olson* in 1988.

As currently codified in 28 U.S.C. §§ 591–599, the independent counsel statute provides that a majority of members of Congress of either party sitting on the judiciary committee of either house may request an independent counsel to investigate allegations against a wide array of executive branch officials. Once the members have requested a special prosecutor under the law, the ATTORNEY GENERAL must initiate a preliminary investigation into the allegations, and unless the attorney general can certify that "there are no reasonable grounds to believe that further investigation is warranted . . ." he or she must subsequently apply to a special panel of federal judges for appointment of a special prosecutor. The panel, rather than the attorney general, chooses the special prosecutor and determines the scope of the counsel's investigation. Once appointed, the counsel may be fired by the attorney general only for "good cause, physical disability, mental incapacity, or any other condition that substantially impairs

the performance of such independent counsel's duties"—determinations that are all subject to review by the federal courts.

Defenders of the law cite the WATERGATE scandal and argue that the law is necessary to curtail executive branch corruption in cases that the executive branch would rather not prosecute. Critics, however, claim that the statute violates the principle of equality because its provisions apply solely to the executive branch and not to Congress or the judiciary. They also charge that it places an unfair burden on those being investigated. The "no reasonable grounds" standard practically assures that the attorney general will appoint an independent counsel once requested by Congress; and unlike ordinary prosecutors, independent counsels command virtually unlimited financial resources and may extend their investigations for years.

Most important critics contend that the law undermines the separation of powers established by the Constitution. It does this most explicitly by appearing to violate the Constitution's appointments clause, which grants the President alone the power to nominate all executive branch officials except "inferior officers." More subtly, the law seems to shift the balance of power in political battles between the executive and legislative branches. According to the Constitution, the proper congressional remedy for executive branch wrongdoing is IMPEACHMENT by the House and trial by the Senate. This process safeguards the executive branch from unwarranted attacks by the legislature because it requires Congress to lay its own prestige on the line whenever it prosecutes executive officials. Congress is less likely to impeach executive officials on purely partisan grounds because in so doing it risks losing public support. The independent counsel law, however, insulates Congress from these political costs. Because an independent counsel is ostensibly separate from Congress, it allows members of Congress to cloak partisan attacks behind a façade of impartiality. In short, critics allege, the independent-counsel law almost invites use as a political weapon.

The law's potential for abuse is well illustrated by the case of Theodore Olson, an attorney who served in the Office of Legal Counsel in the Reagan Justice Department. Olson provided legal advice to the administration during its dispute with Congress over the release of documents held by the Environmental Protection Agency (EPA). The administration invoked EXECUTIVE PRIVILEGE and refused to hand over some of the documents requested by Congress; a rancorous political battle ensued. After it was over, Democratic staff members to the House Judiciary Committee produced a 3,000-page report critical of the Justice Department's role in advising the administration in the controversy. Republicans on the committee strenuously objected to the report as an exercise in partisanship, noting among other facts that no committee or subcommittee meetings were ever held to authorize the report. Nevertheless, House Democrats used the report as the basis for requesting an independent counsel investigation of Justice Department officials.

An independent counsel was subsequently appointed to determine whether Olson gave false and misleading testimony to Congress with regard to the executive privilege controversy. After a six-month investigation, independent counsel Alexia Morrison acknowledged that Olson's testimony "probably d[id] not constitute a prosecutable violation of any federal law." But instead of ending the investigation, Morrison sought permission to expand it. When both the attorney general and the judicial panel that appointed her rebuffed this request, Morrison nevertheless continued the inquiry. All told, Morrison investigated Olson for nearly three years, spending about a million dollars in the process—and forcing Olson to spend roughly the same amount of money defending himself. While still under investigation, Olson challenged the constitutionality of the independent counsel law, and in *Morrison v. Olson*, a federal appeals court struck down the statute, holding that it violated not only the appointments clause but also Article III of the Constitution and the principle of the separation of powers. The Supreme Court reversed by a vote of 7–1.

Writing for the majority, Chief Justice WILLIAM H. REHNQUIST maintained that the independent counsel law does not violate the appointments clause because the independent counsel is an "inferior officer" under the clause and hence requires no presidential nomination. Neither does the law violate Article III of the Constitution by giving the judiciary executive powers because the power to appoint the independent counsel derives from the appointments clause rather than Article III. Finally, the law does not violate the separation of powers because (according to Rehnquist) it does not compel the attorney general to ask for an independent counsel and because the executive branch retains some power to remove an independent counsel from office. Moreover, the law "does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch."

The lone dissenter, Justice ANTONIN SCALIA, scoffed at this last statement, accusing the majority of ignoring the political realities that clearly underlay the case. He further criticized the majority for its circumscribed reading of the separation of powers. According to Scalia, the question before the Court was simple and unambiguous. The Court had to determine whether the prosecutorial function is a purely executive power. If it is, then the independent counsel law had to be struck down unless it granted the executive branch complete control over the independent counsel. Because no one disputed the fact that the pros-

ecutorial function had always been considered the sole prerogative of the executive branch, the independent counsel provisions as currently constituted were clearly unconstitutional in Scalia's view. "It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are." The fact that the statute gave the executive branch *some* authority over an independent counsel (extremely limited authority in Scalia's view) did nothing to alter the significance of the constitutional violation.

*Morrison v. Olson* seems to foreclose future court challenges to the independent counsel law. Nevertheless, the majority in *Morrison* did indicate that it would give a narrow reading to certain of the act's provisions. For example, Rehnquist granted greater leeway to the executive branch when he stated that the decision of the attorney general not to appoint an independent counsel is unreviewable by the courts, even though this is nowhere stated in the statute.

JOHN G. WEST, JR.
(1992)

(SEE ALSO: *Constitutional History, 1980–1990.*)

Bibliography

CARTER, STEPHEN L. 1988 The Independent Counsel Mess. *Harvard Law Review* 102:105–141.

CROVITZ, GORDON 1988 The Criminalization of Politics. In Gordon S. Jones and John A. Marini, eds., *The Imperial Congress.* New York: Pharos Books.

EASTLAND, TERRY 1989 *Ethics, Politics and the Independent Counsel: Executive Power, Executive Vice, 1789–1989.* Washington, D.C.: National Legal Center for the Public Interest.

## SPEECH OR DEBATE CLAUSE

The Constitution's speech or debate clause provides that "for any Speech or Debate in either House, [members of Congress] shall not be questioned in any other Place." Despite its narrow phrasing, the clause was read in GRAVEL V. UNITED STATES (1972) and other cases as protecting all integral parts "of the deliberative and communicative process by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation." The clause also protects members' aides in performing tasks that would be protected if performed by members. An act protected by the clause may not be the basis of a civil or criminal judgment against a member of Congress. Under *Doe v. McMillan* (1973), actions by private citizens are barred even though the English PARLIAMENTARY PRIVILEGE from which the clause derives was concerned with executive encroachments on legislative prerogatives.

There are three inroads upon the speech or debate clause's protection. First, criminal prosecutions for corrupt behavior, such as accepting a bribe to influence legislation, may go forward, as in BREWSTER V. UNITED STATES (1972), on the theory that even if legislative acts were performed in exchange for payment, accepting a bribe is not a legislative act. But this area is not without difficulty, as was evidenced by the Court's refusal in *United States v. Johnson* (1966) and *United States v. Helstoski* (1979) to allow the use of legislative acts as evidence in corruption cases.

Second, in *Gravel v. United States* and HUTCHINSON V. PROXMIRE (1979), the Court implicitly held that communications with a member's constituents are not legislative functions and expressly held that members of Congress could be made to answer for words, written or spoken, or deeds done, outside formal congressional communications channels. Thus Senator Mike Gravel (or his aide) could be interrogated about republishing the Pentagon Papers with a private publisher, even though he could not be asked about reading the papers into the record of a committee hearing (see NEW YORK TIMES CO. V. UNITED STATES). And Senator William Proxmire could be held liable for defamatory communications.

Third, a citizen aggrieved by a subpoena to appear before, or furnish documentary evidence to, a congressional committee may challenge the subpoena by refusing to comply and defending any resulting contempt citation on the ground that the subpoena was unconstitutional or otherwise defective.

The speech or debate clause also plays a central but somewhat confusing role in delineating state legislators' immunity from suit under SECTION 1983, TITLE 42, UNITED STATES CODE. (See LEGISLATIVE IMMUNITY.) In TENNEY V. BRANDHOVE (1951) the Court relied in part on the speech or debate clause, which by its terms applies only to members of Congress, to find state legislators absolutely immune from damages actions under section 1983. In *United States v. Gillock* (1980), however, the Court held that in a federal criminal prosecution of a state legislator, the speech or debate privilege does not bar using legislative acts as evidence.

THEODORE EISENBERG
(1986)

Bibliography

REINSTEIN, ROBERT J. and SILVERGATE, HARVEY A. 1973 Legislative Privilege and the Separation of Powers. *Harvard Law Review* 86:1113–1182.

YANKWICH, LEON R. 1951 The Immunity of Congressional

Speech—Its Origin, Meaning and Scope. *University of Pennsylvania Law Review* 99:960–977.

## SPEEDY TRIAL

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." The Supreme Court in KLOPFER V. NORTH CAROLINA (1967) held that the guarantee is applicable to the states through the DUE PROCESS clause of the FOURTEENTH AMENDMENT. The origin of the right can be traced back at least to MAGNA CARTA (1215) and perhaps to the Assize of Clarendon (1166). On different occasions the Supreme Court has described it as "fundamental," "slippery," and "amorphous."

Denial of a speedy trial may result in prolonged incarceration prior to trial and exacerbation of the anxiety and concern that normally accompany public accusations of crime. Prolonged incarceration before trial inevitably involves a disruption of normal life and imposition of a substantial sanction at a time when innocence is still presumed. It causes loss of productive labor, normally without opportunity for training or rehabilitation, and frequently interferes with preparation of a defense.

Pretrial release can ameliorate these conditions, but a defendant who achieves pretrial release may be subject to significant restraints on his freedom of action, his job may be threatened, his resources may be dissipated, and he and his family may suffer from understandable concern about his future while his reputation in the community is impaired. For these reasons courts have enforced the right in a variety of contexts. Charges were dismissed in *Smith v. Hooly* (1969) when a state failed to bring a defendant to trial on state charges while he was serving a federal sentence despite demands for trial by the accused, and in *Klopfer* when a state suspended prosecution indefinitely although the defendant was not in custody.

Not all defendants want a speedy trial; many want no trial at all. Delay is a common defense tactic and in some cases an accused may benefit from prolonged delay, particularly when pretrial release has been achieved. In such cases, although only the defendant has a right to demand a speedy trial, the state may desire a speedy trial. Prolonged delay contributes to court backlog and places pressure on prosecutors to make concessions in PLEA BARGAINING. Defendants released pending trial may commit additional crimes. Witnesses may die. Memories fade. The risk of escape or bail-jumping cannot be ignored.

Not infrequently, delay may serve the interests of both an accused and a prosecutor for different reasons. Even if public interest would be better served by a prompt trial, there may be no effective way of expediting trial. Nor is the public interest served by dismissing charges if a trial is not held promptly.

One answer to the problem would be a requirement that trial take place within a specified time. The variety of factual situations confronting prosecutors and defense counsel has prevented agreement on an appropriate time interval between charge and trial that should govern all cases. The absence of such a litmus test has deterred the Court from proclaiming any single period of delay as the maximum permitted by the constitutional imperative.

There are good reasons for requiring a defendant to make an appropriate demand before he can complain of a denial of his right to speedy trial, but the Court has also declined to place such an obligation upon a defendant as an absolute requirement. Instead, in BARKER V. WINGO (1972), it chose to consider the facts of each case, examining the length of the delay, the prejudice it might cause, the presence or absence of a demand for trial by the defendant, and the justification asserted by the state for its failure to try the accused earlier.

Courts have been remarkably receptive to government justification for significant delays. For example, in *Barker* a delay of five and one half years and sixteen state-requested continuances was permitted because of the need to convict a co-defendant before proceeding against the accused, illness of the chief investigating officer, and acquiescence by the defendant during most of the period. The willingness of a court to accept government assertions of good cause may be influenced by recognition that a dismissal of pending charges is required by the Supreme Court holding in *Strunk v. United States* (1973) if it decides a speedy trial has been denied. Unlike the EXCLUSIONARY RULE or other sanctions for violation of rights, dismissal resulting from a finding of a deprivation of the right to speedy trial may fully immunize a defendant from prosecution.

According to the Court's holding in *United States v. Marion* (1971) only "an accused" may assert a right to speedy trial and a prosecution must have been initiated by arrest and filing of charges before the right attaches. The period between the charge and trial is crucial. Delay between commission of the crime and formal charge is not significant to a claim of a Sixth Amendment violation, although the identity of the accused was or might have been known and PROBABLE CAUSE for arrest or INDICTMENT may have existed. In UNITED STATES V. MACDONALD (1982) the Supreme Court held that prosecutorial delay between dismissal of initial charges by military authority and reassertion of the charges in a civilian forum at a later time was beyond the purview of the Sixth Amendment.

Many of the disadvantages caused an accused by unreasonable delay between charge and trial also ensue when there is an unreasonable delay before charges are

brought against him. In *United States v. Lovasco* (1977) the Supreme Court indicated that, in unusual cases, an accused may be able to establish a violation of the due process clause as a result of oppressive pretrial delay where actual prejudice can be demonstrated and inadequate justification exists. Government "bad faith," as when a charge is delayed, or dismissed and subsequently asserted at a later time in order to "forum shop," stockpile charges, or achieve some other tactical advantage, might also constitute a denial of due process. But the degree of protection afforded to an accused against unreasonable delay between commission of an offense and formal charges will depend on the applicable statute of limitations in most cases.

Statutory provisions implement the constitutional provision in many states and in federal prosecution. Encouraged by the *American Bar Association Standards for Criminal Justice, Speedy Trial* (1968), many jurisdictions have set specific legislative time limits within which a defendant must be brought to trial. Perhaps the most important of these statutes is the federal Speedy Trial Act of 1974, defining in detail permissible time periods in different types of cases and setting forth grounds for dismissal of charges with and without prejudice. Assertion of rights under these statutes is more likely to provide effective protection to an accused than reliance on the Constitution except in extraordinary cases.

A. KENNETH PYE
(1986)

Bibliography

AMSTERDAM, ANTHONY G. 1975 Speedy Criminal Trial: Rights and Remedies. *Stanford Law Review* 27:525–543.

GODBOLD, JOHN C. 1972 Speedy Trial—Major Surgery for a National Ill. *Alabama Law Review* 24:265–294.

LAFAVE, WAYNE R. and ISRAEL, JEROLD H. 1985 *Criminal Procedure.* St. Paul, Minn.: West Publishing Co.

WHITEBREAD, CHARLES H. 1980 *Criminal Procedure.* Mineola, N.Y.: Foundation Press.

## SPEEDY TRIAL
### (Update 1)

Since the original publication of this *Encyclopedia*, the Supreme Court has decided only one case of note regarding the constitutional right to a speedy trial. In *United States v. Loud Hawk* (1986) the Court concluded that a delay of ninety months did not entitle the defendant to relief. The Court analyzed the case under the four-factor analysis of BARKER V. WINGO (1972)—length of delay, reason for delay, defendant's assertion of the right, and prejudice to the defendant. The Court concentrated on the first two of these factors in concluding that the right to a speedy trial had not been violated.

Beginning with the length of delay, the Court concluded that a substantial period during which the INDICTMENT was dismissed should be excluded when considering the speedy trial claim. It followed the reasoning used in UNITED STATES V. MACDONALD (1982) that once an indictment has been dismissed the defendant is no longer subject to public accusation; thus, a major concern of the speedy trial right is eliminated. The government's publicly expressed desire to prosecute Loud Hawk if successful on its appeal of the dismissal did not constitute public accusation for purposes of triggering the protection of the right to a speedy trial. Additionally, Loud Hawk had been unconditionally released, and during the ninety-month period, he was without any restraint on his liberty.

The Court concluded that the reason for most of the delay—an interlocutory appeal by the government—contributed little weight to the defendant's claim. Given the important public interest in appellate review, delay for this purpose is generally justified. Moreover, both the strength of the government's legal position and the importance of the issue further justified the delay. Finally, the Court concluded that the portion of the delay caused by the defendant's own interlocutory appeals did not count toward substantiating a violation of the speedy trial right. Typically, the defense would be required to show either unreasonable or unjustifiable delay by the prosecution or appellate courts before delays occasioned by its own appeals would count in the balance. No reason existed to count such delay in Loud Hawk's case because his appeals were frivolous.

The scarcity of constitutional decisions on the right to speedy trial reflects the fact that the federal Speedy Trial Act of 1974 and similar legislation in many states provide far more protection than does the Constitution. Dismissals for violation of the Sixth Amendment right to a speedy trial are also rare. *Loud Hawk* illustrates the major reasons for this result. The test fashioned by the Supreme Court is entirely too indeterminate and manipulable. The four *Barker* factors will rarely cut in the same direction. Often the defendant cannot show that he sought a speedy trial; defendants, especially those at liberty pending trial, usually have an interest in delay. When the factors are mixed, the courts generally avoid the draconian result of dismissal of the prosecution with prejudice, which is the only permissible remedy under the Sixth Amendment. Probably for the same reason, courts have resolved many of the subsidiary issues under the four-part test in favor of the government, as the Court did in *Loud Hawk*, by concluding that lengthy delay during appellate review should not be given any effective weight.

Occasionally a case is dismissed where a defendant has

suffered substantial prejudice because of delay or where the government has acted in bad faith. However, for the vast bulk of the cases, the speedy trial statutes, despite their weaknesses, remain the primary guardians of the defendant's and the public's right to speedy justice.

ROBERT P. MOSTELLER
(1992)

(SEE ALSO: *Criminal Justice System; Criminal Procedure.*)

Bibliography

LAFAVE, WAYNE R. and ISRAEL, JEROLD H. 1985 *Criminal Procedure.* St. Paul, Minn.: West Publishing Co.

MISNER, ROBERT L. 1983 *Speedy Trial: Federal and State Practice.* Charlottesville, Va.: Michie.

## SPEEDY TRIAL
### (Update 2)

The Sixth Amendment right to a speedy trial continues not to be a subject of extensive litigation. Constitutional claims in most cases have been eclipsed by the Federal Speedy Trial Act and its state counterparts, which provide more detailed and demanding rules for prompt prosecution than the constitutional floor the Supreme Court has set in its interpretations of the Sixth Amendment right.

The four factors identified by the Court in BARKER V. WINGO (1972)—whether delay before trial was uncommonly long; whether the government or defendant is more to blame for the delay; whether defendant, in due course, asserted his right to a speedy trial; and whether defendant suffered prejudice—still govern analysis of constitutional speedy trial claims. The case of *Doggett v. United States* (1992) provided a rare but instructive Court application of this test. Doggett was indicted for his alleged role in a drug conspiracy in 1980 and an arrest warrant was issued. When agents went to arrest him, however, they learned that he had left the country, possibly unaware of the fact that he had been indicted. The government took some measures to apprehend Doggett—sending word of the arrest warrant to customs officials and entering his name, temporarily, in an international computer system—but did not take other measures that they might easily have employed if they had been anxious to catch him. Two years later, Doggett reentered the country under his own name, unhindered by customs officials, and resettled. It was not until 1988 that the U.S. Marshal's Service conducted a simple credit check on persons with outstanding arrest warrants and, in a few minutes, found Doggett's address. Doggett was arrested and, not surprisingly, raised a speedy trial challenge to his prosecution, brought eight and one-half years after his indictment.

Applying the *Barker v. Wingo* test, the Court ruled in his favor, holding that the extraordinarily long delay was due to the government's negligence, and that since the government stipulated that Doggett might have been unaware of the indictment, he could not be faulted for having failed to invoke his right to be tried promptly. The weakness in Doggett's case was that he could not show precisely how his ability to defend himself might have been prejudiced. The Court, however, held that so lengthy a delay was "presumptively prejudicial," an expansive approach that dismayed four dissenting Justices. This generosity was warranted for, as the majority pointed out, it may be virtually impossible in some cases for a defendant to establish, years after the relevant events, that the delay has caused any particular form of evidence to disappear.

Although prejudice is only one of four factors considered under the constitutional test, the Court in dicta in another case, *Reed v. Farley* (1994), made a surprising comment on this factor in the course of discussing whether speedy trial provisions of the Interstate Agreement on Detainers "effectuated" the constitutional right: "A showing of prejudice is required to establish a violation of the Sixth Amendment Speedy Trial Clause, and that necessary ingredient is missing here." Although this comment was in dicta and therefore does not change the previous law that a showing of prejudice would not necessarily be required if the defendant had a particularly strong case on the other factors, if a majority of the Court now believes that prejudice should be a threshold showing for a constitutional claim, future cases may call the long-settled law of *Barker v. Wingo* and even the newer presumptive prejudice holding of *Doggett* into question.

SUSAN N. HERMAN
(2000)

Bibliography

GUIDELINES FOR APPLICATION OF FEDERAL SPEEDY TRIAL ACT 1985 *Federal Rules Decisions* 106:271.

## *SPEISER v. RANDALL*
### 357 U.S. 513 (1958)

The Supreme Court invalidated on DUE PROCESS grounds a noncommunist oath required for a California property tax exemption. *Speiser* is a leading early case in the series breaking down the RIGHT-PRIVILEGE DISTINCTION and establishing that due process must be strictly observed where FUNDAMENTAL RIGHTS are infringed.

MARTIN SHAPIRO
(1986)

## SPENDING POWER

The power to spend public funds is so much a sine qua non of government that ordinarily it needs no express authorization in constitutions, including those of the several states. However, because the U.S. Constitution was designed to give the federal government specified powers, particularly the fiscal power lacking under the ARTICLES OF CONFEDERATION, Article I, section 8, begins its enumeration of powers of Congress with the power to "lay and collect taxes, duties, IMPOSTS, and excises, to pay the debts and provide for the common defense and general welfare of the United States." The list continues with specified objects of lawmaking, such as commerce, bankruptcy, coinage, war and military and naval forces, and (in Article IV, section 3) the territory or other property of the United States. From the start, there was controversy whether the implicit power to spend revenues for the "general welfare of the United States" extended beyond the enumerated objects of congressional law-making powers.

JAMES MADISON, in THE FEDERALIST #41 and later as President, maintained the restrictive view of the spending power. ALEXANDER HAMILTON, in his influential Report on Manufactures, argued for broad national power to appropriate funds in pursuit of whatever Congress determines to be in the "general welfare," such as subsidies for chosen forms of economic activity; and as President, GEORGE WASHINGTON took Hamilton's view. But the appropriation of national funds for purposes not otherwise within Congress's law-making powers, particularly for construction of INTERNAL IMPROVEMENTS, remained debatable; President JAMES MONROE, for instance, first maintained Madison's view, but later changed his position.

Congress, however, early induced the construction of state agricultural colleges and private railroads by subsidies other than tax revenues, such as grants of public lands, followed in 1900 by supplemental appropriations from general funds. In the 1923 cases of *Massachusetts v. Mellon* and FROTHINGHAM V. MELLON, the Supreme Court declined to review the constitutionality of federal funds for state maternity programs in suits by a state and a taxpayer. But in UNITED STATES V. BUTLER (1935), the Court adopted Hamilton's broad reading of the GENERAL WELFARE CLAUSE even while striking down a program that tied agricultural subsidies to crop reduction on grounds that it invaded regulatory powers reserved to the states.

A broader understanding of Congress's regulatory powers soon undermined concerns about state powers as a limitation on the spending power, and this understanding has persisted to this day. Thus, the Supreme Court has let Congress condition federal funds for state highways on a state's restructuring its highway commission (*Oklahoma v. Civil Service Commission*) or on raising the minimum age for purchasing alcoholic beverages, as long as such conditions are not unrelated to the federal interest in the funded program (*South Dakota v. Dole*). STATE CONSTITUTIONS, in contrast, commonly dedicate some tax revenues to specified purposes, such as roads, and entirely forbid spending for certain purposes, for instance, to invest in private enterprises. State constitutions also forbid deficit spending, and some have adopted spending ceilings. The FIRST AMENDMENT and many state constitutions forbid public spending for support of religion, with different results; purchasing secular textbooks for parochial school students, for instance, has been permitted under the First Amendment (BOARD OF EDUCATION V. ALLEN, 1968), but forbidden under some state constitutions.

The national and state executive and legislative branches often contend over control of spending. Article I, section 9, prohibits spending without a congressional appropriation and mandates an accounting to the public. Unlike many governors, the President cannot veto individual items in an appropriation bill, but some Presidents have asserted power not to spend—to "impound"—unwanted appropriations; Congress in turn has countered by steps such as creating enforceable contract claims to carry out its programs.

Difficult issues arise mainly in applying constitutional guarantees of individual rights to state and federal spending programs. For instance, a person facing potential loss of essential government benefits, such as welfare payments, is entitled to procedures satisfying DUE PROCESS OF LAW (GOLDBERG V. KELLY, 1971), but may have to submit to home visits for which officers otherwise would have to meet FOURTH AMENDMENT standards (WYMAN V. JAMES, 1971). The Supreme Court has found denials of EQUAL PROTECTION when states deny benefits to resident aliens (GRAHAM V. RICHARDSON, 1971) or to recent residents (SHAPIRO V. THOMPSON, 1969), but not when Congress does so (*Mathews v. Diaz*, 1976). As of 1989, the Court remained fragmented as to the effects of the equal-protection clause in limiting preferences in public contracting for members of racial or ethnic minorities (RICHMOND (CITY OF) V. J. A. CROSON CO., 1989). The Court's formula that Article IV's PRIVILEGES AND IMMUNITIES clause requires any state preference in favor of its own residents against those of other states to rest on nonresidency as a "peculiar source of [the] evil" may not govern most direct spending of state funds, but the Court has applied it to public contracting (*United Building & Construction Trades Council v. Camden*, 1984).

The First Amendment and its state equivalents are crucial but complex constraints on government programs pursued with public funds rather than regulatory sanctions. A national controversy in 1990 concerned standards for denying grants by the National Endowment for the Arts on

grounds of OBSCENITY, provisions ultimately repealed by Congress. In principle, government may not require otherwise qualified beneficiaries of spending programs to abandon constitutionally privileged views or conduct; the problem is what may legitimately constitute a qualification. The Court held in SHERBERT V. VERNER (1963) that a state could not constitutionally deny unemployment compensation to one who had religious scruples against working on Saturdays. However, in the central arena of political expression, which government may not restrict directly, the Court in BUCKLEY V. VALEO (1976) held not only that Congress could offer widely supported candidates public-election campaign funds and exclude others with less preexisting support but also that this public funding could be conditioned on limiting campaign expenditures from private funds. In *Federal Communications Commission v. League of Women Voters* (1984) a statutory ban on editorializing by noncommercial broadcasters receiving federal funds was found to exceed First Amendment bounds. Yet public libraries, public theaters, public museums, and public broadcasters necessarily must select on what to spend public funds, and selection is not always easily distinguishable from disqualification.

Denying the use of the spending power to "coerce" or to "penalize" what government could not directly command or forbid does not clearly distinguish UNCONSTITUTIONAL CONDITIONS from required performance or from valid preconditions and limits of a governmental program. A distinction between an impermissible sanction and a permissible refusal to subsidize depends on the choice of the assumed baseline, as does a distinction between denying support by public funds and by tax exemptions. Analysis also is colored by whether a constitutional claim starts from a vocabulary of rights, which focuses attention on the impact on individuals, or from a vocabulary of constitutional limitations, which focuses on forbidden governmental choices of ends or of means. In cases of the latter type, inquiry into the policy goals and motivations of governmental actors may be unavoidable.

HANS A. LINDE
(1992)

(SEE ALSO: *Taxing and Spending Powers.*)

Bibliography

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS 1987 *Fiscal Discipline in the Federal System: National Reform and the Experience of the States.* Washington, D.C.: U.S. Government Printing Office.

CORWIN, EDWARD S. 1923 The Spending Power of Congress Apropos the Maternity Act. *Harvard Law Review* 36:548–582.

KREIMER, SETH 1984 Allocational Sanctions: The Problem of Negative Rights in a Positive State. *University of Pennsylvania Law Review* 132:1293–1397.

LINDE, HANS A. 1965 Constitutional Rights in the Public Sector: Justice Douglas on Liberty in the Welfare State. *Washington Law Review* 39:4–46.

MCGUIRE, O. M. 1935 The New Deal and the Public Money. *Georgetown University Law Review* 23:155–195.

ROSENTHAL, ALBERT J. 1987 Conditional Federal Spending and the Constitution. *Stanford Law Review* 39:1103–1164.

## *SPINELLI v. UNITED STATES*
393 U.S. 410 (1969)

In *Spinelli* the Supreme Court explicated and expanded the PROBABLE CAUSE standards for SEARCH WARRANTS set forth in AGUILAR V. TEXAS (1964).

Spinelli was convicted under federal law of crossing state lines to conduct gambling operations. A detailed FBI affidavit, on which the search warrant was based, stated in part that Spinelli was "known" to law enforcement officers as a bookmaker, and that a confidential informant had established that Spinelli was operating as a bookmaker.

The Court ruled that the INFORMANT's testimony could not count toward the establishment of probable cause, because the affidavit failed to establish the informant's reliability or to clarify his relationship to Spinelli. The Court rejected the government's claim that the tip gave "suspicious color" to Spinelli's activities, and that, conversely, the surveillance helped corroborate the informant's tip (he had, for example, provided the correct numbers of two telephones listed in someone else's name in an apartment frequented by Spinelli). Such a "totality of the circumstances" approach, said the Court, painted "with too broad a brush." The *Spinelli* approach was abandoned in ILLINOIS V. GATES (1983).

JACOB W. LANDYNSKI
(1986)

## SPOT RESOLUTIONS
(1847)

Congressman ABRAHAM LINCOLN (Whig, Illinois) introduced a series of eight resolutions in the House of Representatives on December 22, 1847. Intended to show the illegality of the Mexican War, the resolutions were in the form of interrogatories, challenging President JAMES K. POLK to name the exact spot upon which American blood was first shed in the war and to concede that that spot was on soil rightfully claimed by Mexico. The contention of the northern Whigs, including Lincoln, was that Polk had used his power as COMMANDER-IN-CHIEF of the Army to

provoke the Mexicans into war in order to seize new territory into which SLAVERY could be extended.

In a brilliant speech in January 1848 Lincoln explained that accurate answers to his interrogatories would demonstrate that "the War with Mexico was unnecessarily and unconstitutionally commenced by the President." He claimed that the President had usurped Congress's constitutional power to declare war and disputed Polk's claim that Congress, by appropriating money for the conduct of the war, had sanctioned its commencement.

The Spot Resolutions, like the WILMOT PROVISO, were meant to embarrass the administration by linking the Mexican War with the slave power in the public mind. The House tabled Lincoln's resolutions but passed another resolution condemning Polk's conduct.

DENNIS J. MAHONEY
(1986)

Bibliography

JOSEPHY, ALVIN M., JR. 1975 *History of the Congress of the United States.* Pages 188–193. New York: American Heritage Publishing Co.

## *SPRINGER v. UNITED STATES*
102 U.S. 586 (1881)

Springer contested the constitutionality of a federal income tax statute on ground that it was a DIRECT TAX not apportioned on the basis of state population. The Supreme Court unanimously upheld the tax on ground that the only direct taxes are taxes on land and CAPITATION TAXES.

LEONARD W. LEVY
(1986)

(SEE ALSO: *Pollock v. Farmers' Loan & Trust Co.*)

## *STAFFORD v. WALLACE*
358 U.S. 495 (1922)

Seventeen years after SWIFT & COMPANY V. UNITED STATES (1905), the Supreme Court again approved the extension of federal authority to local activities. A nationalistic exposition of the COMMERCE CLAUSE ran through the opinion in which the Court not only reaffirmed but also extended the STREAM OF COMMERCE DOCTRINE. Commission men, who sold animals on consignment, sued to enjoin enforcement of the PACKERS & STOCKYARDS ACT. They asserted that because they provided only "personal services" and were not engaged in INTERSTATE COMMERCE, they were not subject to the act. For a 7–1 Court, Chief Justice WILLIAM HOWARD TAFT followed Justice OLIVER WENDELL HOLMES'S opinion in *Swift* and sustained the act. Congress had acted reasonably in securing an "unburdened flow" of interstate commerce. Moreover, the stockyards were "not a place of rest or final destination . . . but a throat through which the current [of commerce] flows." Because the commission men were essential to maintaining this flow, their activities were properly part of interstate commerce and subject to the act. Justice JAMES C. MCREYNOLDS dissented without opinion. By reviving and reapplying the stream of commerce DOCTRINE, the Court built a foundation on which the NEW DEAL would later support its ECONOMIC REGULATIONS.

DAVID GORDON
(1986)

## STAMP ACT CONGRESS, RESOLUTIONS OF
(October 19, 1765)

These resolutions, adopted by the delegates of nine American colonies meeting in an intercolonial congress, expressed the basis of the American constitutional position in the quarrel with Great Britain leading to the AMERICAN REVOLUTION. The mother country, financially exhausted by a great war from which the American colonies stood to gain the most, decided to retain an army in America and to require the colonists to pay a small fraction of the cost of their defense. Parliamentary legislation aimed at raising a revenue in America was, however, unprecedented before the Sugar Act of 1764. That act provoked the first constitutional protests from the colonies. In form the 1764 legislation had regulated their ocean trade, thus imposing an "external" tax. The Stamp Act of 1765 imposed "internal" taxes on every sort of legal document and most business documents; on college diplomas, liquor licences, and appointments to offices; and on playing cards, newspapers, advertisements, almanacs, books, and pamphlets. Admiralty courts, which operated without juries and used inquisitional procedures, had JURISDICTION over offenses against the act. American opposition was so vehement and widespread that the act proved to be unenforceable.

The Stamp Act Congress addressed itself to two constitutional issues raised by the act of Parliament. After asserting that the colonists were entitled to all the rights and liberties of Englishmen, the congress resolved that Parliament, a body in which the colonists were not represented and which could not represent them, had no constitutional authority to tax them. Several resolutions condemned TAXATION WITHOUT REPRESENTATION and endorsed the principle that only their own assemblies could constitutionally tax the American colonists. The congress also endorsed the right to TRIAL BY JURY and condemned the unprece-

dented extension of admiralty court jurisdiction as subversive of colonial liberties.

The Stamp Act was in force for only four months before Parliament repealed it, not because of the American constitutional protests but because of the protests of British merchants who suffered from a boycott of their goods by American importers. To save face, Parliament accompanied its repealer with the Declaratory Act of 1766, which insisted that Great Britain had full power to make laws for America "in all cases whatsoever." The American position, that "no taxes . . . can be constitutionally imposed . . . but by their respective legislatures," was founded on a different view of the British constitution, even a different understanding of the meaning of a CONSTITUTION and of the word "unconstitutional." A local court in Virginia gratuitously condemned the Stamp Act as unconstitutional and therefore not binding.

LEONARD W. LEVY
(1986)

Bibliography

MORGAN, EDMUND S. and HELEN M. 1953 *The Stamp Act Congress.* Chapel Hill: University of North Carolina Press.

## STANBERY, HENRY S.
(1803–1881)

An Ohio lawyer and United States attorney general (1866–1868), Henry Stanbery opposed congressional reconstruction and prepared many of President ANDREW JOHNSON's veto messages. Nevertheless, in MISSISSIPPI V. JOHNSON (1867) Stanbery successfully defended executive enforcement of congressional statutes by arguing that the SEPARATION OF POWERS barred the Supreme Court from issuing an INJUNCTION against the President. Similarly, in *Georgia v. Stanton* (1868) he successfully argued that the case involved POLITICAL QUESTIONS beyond the Court's JURISDICTION. In 1868 Stanbery resigned his office to defend Johnson at his IMPEACHMENT trial. Stanbery's insistence on DUE PROCESS slowed the trial and helped achieve Johnson's acquittal.

PAUL FINKELMAN
(1986)

Bibliography

MENEELY, A. HOWARD 1935 Henry Stanbery. In *Dictionary of American Biography*, Vol. 27:498–499. New York: Scribner's.

## STANDARD OF REVIEW

Some constitutional limitations on government are readily susceptible to "interpretation," in the sense of definition and categorization. Once a court categorizes a law as a BILL OF ATTAINDER, for example, it holds the law invalid. Other limitations, however, are expressed in terms that make this sort of interpretation awkward: the FREEDOM OF SPEECH, the EQUAL PROTECTION OF THE LAWS, DUE PROCESS OF LAW. The judicial task in enforcing these open-ended limitations implies an inquiry into the justifications asserted by government for restricting liberty or denying equal treatment. The term "standards of review," in common use since the late 1960s, denotes various degrees of judicial deference to legislative judgments concerning these justifications.

The idea that there might be more than one standard of review was explicitly suggested in Justice HARLAN FISKE STONE's opinion for the Supreme Court in UNITED STATES V. CAROLENE PRODUCTS CO. (1938). Confirming a retreat from the JUDICIAL ACTIVISM that had invalidated a significant number of ECONOMIC REGULATIONS over the preceding four decades, Stone concluded that such a law would be valid if the legislature's purpose were legitimate and if the law could rationally be seen as related to that purpose. Stone added, however, that this permissive RATIONAL BASIS standard might not be appropriate for reviewing laws challenged under certain specific prohibitions of the BILL OF RIGHTS, or laws restricting the political process, or laws directed at DISCRETE AND INSULAR MINORITIES. Such cases, Stone suggested, might call for a diminished presumption of constitutionality, a "more exacting judicial scrutiny."

The WARREN COURT embraced this double standard in several doctrinal areas, most notably in equal protection cases. The permissive rational basis standard continued to govern review of economic regulations, but STRICT SCRUTINY was given to laws discriminating against the exercise of FUNDAMENTAL INTERESTS such as voting or marriage and to laws employing SUSPECT CLASSIFICATIONS such as race. The strict scrutiny standard amounts to an inversion of the presumption of constitutionality: the state must justify its imposition of a racial inequality, for example, by showing that the law is necessary to achieve a COMPELLING STATE INTEREST. Today active judicial review of both the importance of legislative purposes and the necessity of legislative means is employed not only in some types of equal protection cases but also in fields such as the freedom of speech and RELIGIOUS LIBERTY. It has even attended the rebirth of SUBSTANTIVE DUE PROCESS.

Inevitably, however, cracks appeared in this two-tier system of standards of review. The Court used the language of "rational basis" to strike down some laws, and in cases involving SEX DISCRIMINATION it explicitly adopted an intermediate standard for reviewing both legislative ends and means: discrimination based on sex is invalid unless it serves an "important" governmental purpose and is "substantially related" to that purpose. A similar intermediate

standard is now part of the required analysis of governmental regulations of COMMERCIAL SPEECH. In practical effect, the Court has created a "sliding scale" of review, varying the intensity of judicial scrutiny of legislation in proportion to the importance of the interests invaded and the likelihood of legislative prejudice against the persons disadvantaged. The process, in other words, is interest-balancing, pure and simple. Justice WILLIAM H. REHNQUIST, writing for the Court in ROSTKER V. GOLDBERG (1981), remarked accurately that the Court's various levels of scrutiny "may all too readily become facile abstractions used to justify a result"—a proposition well illustrated by the *Rostker* opinion itself.

KENNETH L. KARST
(1986)

Bibliography

GUNTHER, GERALD 1972 The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection. *Harvard Law Review* 86:1–48.

## *STANDARD OIL COMPANY v. UNITED STATES*
221 U.S. 1 (1911)

## *UNITED STATES v. AMERICAN TOBACCO COMPANY*
211 U.S. 106 (1911)

John D. Rockefeller, owner of the nation's first, largest, and richest trust and controller of the nation's oil business, scorned his competitors and contemned the law. His disregard for the SHERMAN ANTITRUST ACT helped earn him, in 1909, a dissolution order which the trust appealed to the Supreme Court. Rockefeller thereby provided Chief Justice EDWARD D. WHITE with the occasion to celebrate the conversion of a majority of the Court to his viewpoint, enabling him to write the RULE OF REASON into antitrust law. After nearly fifteen years of effort, White had managed to enlarge judicial discretion in antitrust cases, even though the oil trust did not urge the doctrine upon the Court; indeed, it was unnecessary to the case's disposition.

Chief Justice White, leading an 8–1 Court, ruled that only an "unreasonable" contract or combination in restraint of trade would violate the law. White had effectively amended the law to insert his test: section 1 of the Sherman Act would henceforth be interpreted as if it said, "Every unreasonable contract, combination . . . or conspiracy in restraint of trade . . . is hereby declared to be illegal."

Standard Oil, however, lost the case. The record, said White, showed clearly and convincingly that this trust was unreasonable. Systematic attempts to exclude or crush rivals and the trust's astounding success demonstrated the violation beyond any doubt.

Justice JOHN MARSHALL HARLAN concurred in the result but dissented from the Court's announcement of the rule of reason. Harlan observed that Congress had refused to amend the act to incorporate the rule of reason, and he lashed out at the majority's "judicial legislation," predicting that the new policy would produce chaos. His call echoed in Congress where Democratic pressure grew to write the rule of reason out of the Sherman Act. That pressure would eventually find partial release in supplementary antitrust legislation, passage of the CLAYTON ACT in 1914. The rule of reason prevailed, however, although the Court applied a double standard. When massive business combinations such as United States Steel Corporation, United Shoe Machinery Company, and International Harvester came before the Court, they were found to have acted reasonably, restraints of trade notwithstanding. In antitrust action against labor unions, however, the Court ignored that rule.

In the companion *American Tobacco* case, Chief Justice White attempted to mitigate a too vigorous federal antitrust policy by ordering reorganization, not dissolution, of the Tobacco Trust. He thereby heartened business interests by showing solicitousness for property rights and a stable economy.

DAVID GORDON
(1986)

Bibliography

BRINGHURST, BRUCE 1979 *Antitrust and the Oil Monopoly: The Standard Oil Cases, 1890–1914.* Westport, Conn.: Greenwood Press.

# STANDING

In the United States, unelected, life-tenured federal judges may decide legal issues only when they are asked to do so by appropriate litigants. Such litigants are said to have standing to raise certain legal claims, including constitutional claims, in the federal courts.

A litigant's standing depends on two sets of criteria, one constitutionally required and one not, each ostensibly having three parts. The constitutional criteria derive from Article III's job description for federal judges, which permits them to declare law only when such a declaration is necessary to decide CASES AND CONTROVERSIES. These criteria center on the notion of an injured person's asking a court for a remedy against the responsible party, and each criterion corresponds to one of the three participants—to

the plaintiff, the defendant, and the court, respectively. The plaintiff must assert that he suffered a cognizable personal injury; that the defendant's conduct caused the injury; and that the court's judgment is substantially likely to relieve it. The three nonconstitutional criteria for standing are "prudential" rules, self-imposed by the courts for their own governance, rules which Congress can eliminate if it chooses. These criteria, too, serve to diminish the frequency of substantive pronouncements by federal judges, but they focus on the legal basis of the suit, not on the plaintiff's actual injury. The first nonconstitutional criterion concerns representation: to secure judicial relief, injured litigants normally must assert that the injurious conduct violated their own legal rights, not the rights of third parties. The second assumes that government violations of everyone's undifferentiated legal rights are best left to political, not judicial, response: no one has standing if his or her legal position asserts "only the generalized interest of all citizens in constitutional governance." The third "prudential" criterion for standing seeks assurance that the law invoked plausibly protects the legal interest allegedly invaded: whatever interest is asserted must be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

Standing issues rarely surface in traditional suits, but federal courts applying these guidelines frequently deny standing to "public interest" plaintiffs anxious to challenge the legality of government behavior. The aim is not only to prevent federal judges from proclaiming law unless such declarations are needed to resolve concrete disputes, but also to promote proper conditions for intelligent adjudication (including adversary presentation of the facts and legal arguments) and to foster adequate representation of affected interests. When litigants ask federal courts to restrict the constitutional authority of politically accountable public officials, moreover, apprehension about unwise or excessive judicial intervention heightens, and the standing limitations may be applied with particular force.

Collectively, the Supreme Court's standing criteria often overlap; they are applied flexibly—sometimes inconsistently—to give the Supreme Court considerable discretion to exercise or withhold its power to declare law. The way that discretion is exercised reflects any particular Court's ideology of JUDICIAL ACTIVISM AND RESTRAINT and the substantive, constitutional rights it is either eager or reluctant to enforce.

The refinements of standing doctrine illustrate this flexibility and discretion. The core requirement of cognizable personal injury, for example, demands that the plaintiff have suffered injury to an interest deemed deserving of judicial protection. Over time, the Court has expanded the category of judicially acknowledged injuries beyond economic harm to include reputational, environmental, aesthetic, associational, informational, organizational, and voter harms, among others. Because of its vision of constrained judicial power in a representative democracy, however, the Court steadfastly forbids TAXPAYERS' SUITS and citizens' suits asserting purely ideological harm, particularly the harms of frustration, distress, or apprehension born of unlawful government conduct. Resting on lack of cognizable injury, the ban on citizen standing thus appears constitutionally compelled, although it effectively duplicates the nonconstitutional barrier to asserting generalized grievances, which appears to rest on the absence of a cognizable legal interest. Less diffuse, but in ALLEN V. WRIGHT (1984) nonetheless held an insufficiently personal injury, is the feeling of stigma arising from discrimination directed, not personally, but against other members of the plaintiff's race. If the type of injury is judicially approved and the plaintiff personally suffered it, however, the fact that many others have suffered it will not negate standing. For example, in UNITED STATES V. SCRAP (1973) a student activist group was deemed to have standing based on widespread environmental injury.

Flexibility also characterizes the Court's degree of insistence on the remaining constitutional criteria. The closeness of the causal link between defendant's conduct and plaintiff's injury has varied from *United States v. SCRAP,* which accepted a loose connection between the Interstate Commerce Commission's approval of freight rate increases for scrap materials and increased trash problems in national parks, to *Allen v. Wright* (1984), which found too attenuated a seemingly closer link between the Internal Revenue Service's allegedly inadequate enforcement of the law requiring denial of tax exemptions to racially discriminatory private schools and "white flight" in public school districts undergoing DESEGREGATION. Similarly, insistence that judicial relief be substantially likely to redress plaintiff's injury has varied from *Linda R. S. v. Richard D.* (1973), where mothers of illegitimate children seeking to force prosecution of the fathers for nonsupport were denied standing because a court order supposedly would result only in jailing the fathers, not in increased support, to *Duke Power Co. v. Carolina Environmental Study Group* (1978), where neighbors of nuclear power plants, seeking relief from present injury caused by normal plant operation, were granted standing to contest (unsuccessfully) the constitutional validity of a federal statute limiting recovery of DAMAGES for potential nuclear disasters, despite considerable uncertainty that a legal victory for the plaintiffs would stop the plants' normal operations.

Of the nonconstitutional criteria, only the usual prohibition against representing third-party rights needs elab-

oration, primarily because of its different forms and its significant exceptions. When a personally injured plaintiff seeks to argue that the injurious conduct violated the legal rights of others, the prohibition, beyond serving the usual objectives of standing, serves also to protect nonlitigants who may not wish to assert their own rights or would do so differently (and perhaps more effectively) if they became litigants. Major exceptions to that prohibition respond to this policy by allowing representation, even of constitutional rights, when the Court concludes that the absent third parties would benefit rather than suffer from a substantive decision. One important example of this exception is the case in which third parties would have difficulty asserting their own rights, as in NAACP V. ALABAMA (1958), where the CIVIL RIGHTS group was permitted to assert its members' right to remain anonymous. Another example is the case in which the disputed conduct affects special plaintiff-third party relationships in ways suggesting that the plaintiff and third-party interests coincide. Under this exception doctors can represent patient rights to abortion, private schools can represent parent rights to choose private education, and sellers can represent the rights of young consumers to buy beer or contraceptives.

The Court generally denies standing when persons constitutionally subject to regulation urge that the regulation would be unconstitutional in application to others. This rule preserves legislative policy in cases where the law is applied constitutionally. Again, however, there is an exception, invoked most often in FIRST AMENDMENT challenges of VAGUENESS and OVERBREADTH, when the law's very existence would significantly inhibit others from exercising important constitutional rights and thus deter them from mounting their own challenge.

A final example is the case in which uninjured representatives seek to champion the legal rights of injured persons they represent outside of litigation. Thus, associations, not injured themselves, may sue on behalf of their members' injuries, provided that the members would have standing, the associations seek to protect interests germane to their purposes, and the claims and requested relief do not require individual member participation. And a state, which normally lacks standing as *parens patriae* to represent the claims of individual citizens, or even of all its citizens in opposition to the federal government, may represent its citizens when the injury alleged substantially affects the state's general population, especially if suit by individual citizens seems unlikely.

Like other JUSTICIABILITY doctrines, standing rules often thwart attempts to induce federal courts to make or reform constitutional or other law. How often the rules have that result will depend not only on the articulated criteria of standing but also on the Supreme Court's receptivity to the substance of the underlying claims and its judgment of the desirability and likelihood of political solutions.

JOHNATAN D. VARAT
(1986)

Bibliography

NICHOL, GENE R., JR. 1984 Rethinking Standing. *California Law Review* 72:68–102.

SCOTT, KENNETH E. 1973 Standing in the Supreme Court: A Functional Analysis. *Harvard Law Review* 86:645–692.

VINING, JOSEPH 1978 *Legal Identity: The Coming of Age of Public Law.* New Haven, Conn.: Yale University Press.

## STANDING
## (Update)

Standing law defines those who may obtain judicial redress in federal court. In suits between private individuals, there is usually little analytical difficulty in determining what constitutes judicial cognizable injury and thus who has standing to sue. But in suits by private individuals against the government, there can be considerable difficulty. In such cases, plaintiffs are sometimes not injured in a conventional sense, not suffering, for example, physical harm or monetary loss. Rather, plaintiffs sometimes sue as "private attorneys general," seeking judicial redress against allegedly illegal governmental conduct affecting the general population.

There are both constitutional and subconstitutional standing requirements. The constitutional requirement derives from Article III, which limits federal courts to deciding "cases" and "controversies." Under current law, a plaintiff may satisfy Article III by showing, first, that she has suffered "injury in fact," defined as a concrete and particularized invasion of a legally protected interest; second, that the injury is fairly traceable to defendant's conduct; and third, that the injury will likely be redressed by a favorable judicial decision.

A plaintiff may satisfy the subconstitutional standing requirement by showing that she has a cause of action under a statute, a COMMON LAW rule, or a constitutional provision. In borderline cases, the Supreme Court has developed two approaches. First, in a series of administrative law cases that includes *Association of Data Processing Service Organizations v. Camp* (1970) and *National Credit Union Administration v. First National Bank & Trust* (1998), the Court has required a plaintiff to be "arguably within the zone of interests" of a relevant statute or constitutional guarantee. This test is essentially an instruction to construe statutes generously in favor of standing. Second, in another series of cases that includes *Warth v.*

*Seldin* (1975), the Court has asked whether there is "prudential standing." A grant of prudential standing means that the Court, in the exercise of "prudence," has found a sufficiently clear indication of congressional intent to create a cause of action for plaintiff. In most prudential standing cases, the Court has declined to find standing.

Despite the Court's persistent efforts to fit standing decisions into the framework just described, the considerations involved are often too varied to be captured by general formulations. Cases applying the "injury in fact" criterion have been particularly unruly, producing decisions that are extremely difficult to reconcile. For example, in UNITED STATES V. STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURE (SCRAP) (1973), the Court found injury in fact for a group of law students seeking to compel the preparation of an Environmental Impact Statement analyzing possible environmental effects of a minuscule increase in railroad rates. The students alleged that the rate increase could cause environmental damage as a result of increased recycling costs. Further, in *Havens Realty Corp. v. Coleman* (1982), the Court found injury in fact for a professional black "tester" who had been told, falsely, that an apartment was not for rent, even though the tester had no actual desire to occupy the apartment. Yet, in LUJAN V. DEFENDERS OF WILDLIFE (1992), the Court refused to find injury in fact for wildlife enthusiasts who sought to compel agency consultation concerning federally funded projects that might adversely affect habitats for endangered species. The plaintiffs had previously visited the areas where the species lived but had no specific plans and no airplane tickets for return visits.

Among the many considerations involved in standing cases, perhaps the most important is SEPARATION OF POWERS. In most cases, standing restrictions confine the role of the judiciary by reducing and sometimes even eliminating certain kinds of litigation. But in some cases, standing restrictions expand the role of the judiciary, because a judicial decision that plaintiff lacks Article III standing means that Congress may not grant standing. This phenomenon may be seen in two recent cases. In *Lujan* Congress had granted standing to "any person" to enforce the Endangered Species Act. The Court held that plaintiffs satisfied the statute but lacked Article III standing because they had suffered no injury in fact. In *Raines v. Byrd* (1997), Congress had granted standing to "any Member of Congress" to challenge the constitutionality of the federal law providing the President with a limited LINE-ITEM VETO. The Court held that members of Congress lacked Article III standing because they had not suffered "sufficiently concrete injury" from the law's operation.

At this point in its development, standing doctrine frequently does not correspond to the Court's actual decisions. As the second Justice JOHN MARSHALL HARLAN complained more than thirty years ago in FLAST V. COHEN (1968), standing is a "word game played by secret rules." But given the importance of standing decisions, it is perhaps better for now to have the right results than the right DOCTRINE. One may hope that eventually, in the great tradition of common law courts, the Court will decide enough standing cases to understand what it has done, and from those cases to construct a coherent legal doctrine.

WILLIAM A. FLETCHER
(2000)

Bibliography

FLETCHER, WILLIAM A. 1988 The Structure of Standing. *Yale Law Journal* 98:221–291.

PUSHAW, ROBERT J. 1996 Justiciability and Separation of Powers: A Neo-Federalist Approach. *Cornell Law Review* 81: 394–512.

SUNSTEIN, CASS R. 1988 Standing and the Privatization of Public Law. *Columbia Law Review* 88:1432–1481.

## *STANFORD v. KENTUCKY*
492 U.S. 361 (1989)

By a 5–4 vote, the Court held that the infliction of CAPITAL PUNISHMENT on juveniles who committed their crimes at sixteen or seventeen years of age did not violate the CRUEL AND UNUSUAL PUNISHMENT clause of the Eighth Amendment, applied to the states by the FOURTEENTH AMENDMENT.

Justice ANTONIN SCALIA, for the majority, acknowledged that whether a punishment conflicts with evolving standards of decency depends on public opinion. But in examining the laws of the country, Scalia found that a majority of the states permit the execution of juvenile offenders. He refused to consider indicia of society's opinion other than by examination of jury verdicts and statutory law. Public opinion polls and the views of professional associations seemed to invite constitutional law to rest on "uncertain foundations." The Court also ruled that the imposition of death on juvenile offenders did not conflict with the legitimate goals of penology.

The four dissenters, led by Justice WILLIAM J. BRENNAN, argued that the Eighth Amendment prohibits the punishment of death for a person who committed a crime when under eighteen years of age. The dissenters relied on a far wider range of indicia of public opinion than did the majority to reach their conclusion that evolving standards of decency required a different holding. They argued too that the death penalty is disproportionate when applied to

young offenders and significantly fails to serve the goals of capital punishment.

LEONARD W. LEVY
(1992)

## *STANLEY v. GEORGIA*
394 U.S. 557 (1969)

Authorized by a SEARCH WARRANT, federal and state agents entered and searched Stanley's home for evidence of bookmaking activities. Instead they found film, which was used to convict him for possession of obscene material. The Supreme Court reversed, holding that mere possession of obscenity in one's home cannot constitutionally be made a crime.

Prior OBSCENITY decisions had recognized a legitimate state interest in regulating public dissemination of obscene materials. In *Stanley*, however, the Court recognized two fundamental constitutional rights that outweighed the state interest in regulating obscenity in a citizen's home: the FIRST AMENDMENT right to receive information and ideas, regardless of their social worth, and the constitutional right to be free from unwanted government intrusion into one's privacy.

As justification for interfering with these important individual rights, the state asserted the right to protect individuals from obscenity's effects. The Court rejected that argument, viewing such "protection" as an attempt to "control . . . a person's thoughts," a goal "wholly inconsistent with the philosophy of the First Amendment."

Justices POTTER J. STEWART, WILLIAM J. BRENNAN, and BYRON R. WHITE concurred in the result, on the ground that the SEARCH AND SEIZURE were outside the lawful scope of the officers' warrant, and thus violated Stanley's FOURTH AMENDMENT rights.

KIM MCLANE WARDLAW
(1986)

## STANTON, EDWIN M.
(1814–1869)

A prominent antebellum attorney, Edwin McMasters Stanton was an active member of the Supreme Court bar and was the chief government investigator and counsel in the California land claims cases. In 1859 he successfully defended Congressman Daniel Sickles in a murder trial with the then novel defense of temporary insanity.

In 1860 Stanton became JAMES BUCHANAN's lame duck ATTORNEY GENERAL. An ardent Unionist, Stanton urged support for the garrison at Fort Sumter and the arrest for TREASON of the South Carolina commissioners. During the interregnum Stanton secretly met with Republican senators informing them of the administration's complicity with secessionists. He also worked secretly with General Winfield Scott to move troops to protect Washington while preventing the shipment of arms to the South.

As secretary of war (1862–1868) Stanton vastly reduced corruption and political influence on promotions, while building a highly efficient military. Stanton was an early advocate of emancipation and the use of black troops. Zealous in supporting the Union, Stanton used the War Department to arrest civilians suspected of treason, disloyalty, or disrupting recruitment and rigorously enforced internal security. During the 1863 and 1864 elections Stanton furloughed troops so they could return home to vote, used the army to intimidate opponents, and allowed officers to campaign.

After ABRAHAM LINCOLN's assassination Stanton was ruthless in finding and prosecuting anyone connected with John Wilkes Booth's plot. Despite President ANDREW JOHNSON's opposition, Stanton supported the CIVIL RIGHTS ACT OF 1866 and the FREEDMAN'S BUREAU, while working closely with Congress to support MILITARY RECONSTRUCTION. Stanton's backing of generals sympathetic to congressional goals prevented Johnson from implementing his reconstruction program. Fear that Johnson would fire Stanton led to the TENURE OF OFFICE ACT and then to IMPEACHMENT proceedings when Johnson tried to replace Stanton. Stanton aided the impeachment managers by giving them war department documents and information, lobbying wavering senators, and writing "anonymous" editorials denouncing Johnson. After Johnson's acquittal Stanton resigned. In 1869 President ULYSSES S. GRANT nominated Stanton to the Supreme Court, but he died before confirmation.

PAUL FINKELMAN
(1986)

Bibliography

THOMAS, BENJAMIN P. and HYMAN, HAROLD M. 1962 *Stanton: The Life and Times of Lincoln's Secretary of War.* New York: Knopf.

## STANTON, ELIZABETH CADY
(1815–1902)

Elizabeth Cady was born in Johnstown, New York, to Daniel Cady, influential legal reformer, and Margaret Livingston Cady, from one of the state's oldest landed families. She received the best education available to young women, at Emma Willard's Troy Academy, but resented the fact that only men could attend college. At the age of twenty-five, she married Henry Brewster Stanton, noted abolitionist orator and organizer. Honeymooning with him in

London to attend an international antislavery convention, she met Lucretia Mott, dean of American female abolition, who served as her mentor in the ideas of women's rights.

Eight years later, in 1848, Stanton and Mott called the first American women's rights convention. Held in Stanton's home town in New York, the SENECA FALLS CONVENTION demanded a whole list of reforms, at the head of which was political rights. Three years later, Stanton met SUSAN B. ANTHONY, a temperance advocate from nearby Rochester, and they began a lifelong collaboration. Together they petitioned, lobbied, and addressed the New York legislature to pass a comprehensive Married Women's Property Act, which it did in 1860. During the CIVIL WAR, they agitated for constitutional abolition and emancipation, black and woman suffrage.

In the RECONSTRUCTION years, Stanton's woman suffrage leadership became highly contentious. She and Anthony pushed first to have the invidious references to a "male" electorate removed from the FOURTEENTH AMENDMENT and then to have "sex" included in the list of prohibited disfranchisements in the FIFTEENTH AMENDMENT. Once these amendments were ratified without including women's demands, they shifted their argument to an innovative constitutional construction in which woman suffrage was permitted by the Constitution as amended. In 1874, the Supreme Court struck down their argument, but for the rest of her life, Stanton insisted on the link between woman suffrage and the sovereignty and dignity of national CITIZENSHIP.

Stanton was identified with other reforms and aspects of women's emancipation. She called for reform in the laws and customs of MARRIAGE, to make it an egalitarian and more easily dissolvable pact. From there, she undertook a campaign for what she called "self-sovereignty," the establishment of an ethic of female sexual and reproductive self-determination. In this, she was closely allied with the free-love radical Victoria Woodhull in the early 1870s. The reform passion of Stanton's final years was freethought. She argued that notions of women's inferiority were, at their root, the product of a patriarchal Christianity, a belief that alienated her from the growing ranks of organized middle-class womanhood at century's end.

Stanton had seven children, of whom two, her daughter Harriot and her son Theodore, became important women's rights figures in their own right. She died in 1902.

ELLEN CAROL DUBOIS
(2000)

(SEE ALSO: *Woman Suffrage Movement.*)

Bibliography

BANNER, LOIS 1980 *Elizabeth Cady Stanton: A Radical for Women's Rights.* Boston: Little, Brown.

DUBOIS, ELLEN, ed. 1991 *Elizabeth Cady Stanton, Susan B. Anthony: A Reader.* Boston: Northeastern University Press.

GRIFFITH, ELISABETH 1984 *In Her Own Right: The Life of Elizabeth Cady Stanton.* New York: Oxford University Press.

STANTON, ELIZABETH 1898 *Eighty Years and More: Reminiscences, 1815–1897* (1991 reprint). Boston: Northeastern University Press.

## *STARE DECISIS*

(Latin: "to stand by decided [cases].") The DOCTRINE of *stare decisis*, one of the key elements of Anglo-American COMMON LAW, embodies the principle that PRECEDENTS are to be followed in the adjudication of cases. The substance of the law is revealed through the decisions of courts in cases between individuals or between an individual and the government, and adherence to precedent transforms the decisions in those cases into a settled body of public law. Once an issue of law has been resolved in a case by a court of competent JURISDICTION, the HOLDING in the case is determinative of the issue for that court and subordinate courts; and it offers guidance, as well, to courts of coordinate jurisdiction. Courts proceed, as a general rule, by following and applying precedents or else by distinguishing them (that is, by showing how the facts of the instant case render the precedent inapposite). Most frequently a court faces the question of which of two or more lines of precedent to follow. The doctrine of *stare decisis* lends stability and predictability to the legal order, but it is not absolute: courts may dispose of precedents that are outdated, or that have undesirable consequences, by OVERRULING them. The federal courts, and especially the Supreme Court, have tended in recent years to diminish the force of *stare decisis* in constitutional cases.

DENNIS J. MAHONEY
(1986)

## *STARE DECISIS*
(Update)

Stare decisis, or the principle of following PRECEDENT, is uncertain as to both its scope and its strength. With respect to its scope, there are three basic models of what it means to follow precedent.

Under the first model of stare decisis, a court follows precedent if it merely takes into account the present traces of what prior courts have done. Thus, under this model, a court is always free to decide the case before it as it believes best in terms of moral and policy considerations. To the extent that earlier decisions have induced reliance and created specific expectations, or to the extent that earlier decisions have created a claim of equal treatment of pres-

ent and past litigants, to that extent the present court's judgment about what is the right decision to reach may differ from what its judgment would have been in the absence of the earlier decisions. But the present court is never required by past decisions to depart from its judgment about what is morally optimal in the present.

Under the second model of stare decisis, the present court is more constrained by earlier decisions than it would be under the first model. Under this model, the present court must construct a principle that would produce the results (not necessarily the opinions) of the earlier decisions and then decide the present case under that principle. If the earlier decisions were, in the present court's view, incorrect, then the covering principle may require the present court to reach what it believes is a morally incorrect or suboptimal decision in the case before it. For this reason, the second model is more constraining than the first.

Under the third model of stare decisis, the constraint that earlier decisions exercise over present decisions is the product of the rules laid down by the earlier courts in their opinions. In other words, under this model, the earlier courts are like legislatures. In deciding cases, they lay down rules for later courts to follow.

Normally, when courts are required to interpret a text such as a statute or a constitution, they translate the vague textual rule into a clearer one. In a subsequent case involving the same provision, the principle of stare decisis requires the court to apply the earlier court's rule reformulation of the provision as if it were the correct meaning of the provision. Thus, in cases involving interpretation of nonjudicial texts, the third model is usually the model employed, even if it is not the model employed in purely COMMON LAW contexts. Sometimes, however, the courts do not translate a vague textual standard into a clear(er) rule but instead engage in common law decisionmaking under that textual standard. The Supreme Court has treated many of the individual rights provisions of the Constitution this way, a case in point being its elaboration of the term "liberty" under the DUE PROCESS clauses. Whenever the Court is elaborating the constitutional text in this common law manner, then the scope of precedential constraint on its decisions depends on which of the three models of stare decisis the Court adopts.

The second controversy over the principle of stare decisis concerns not its scope but its strength. When may a precedent case or cases be overruled? If the answer is that precedents may be overruled whenever the present court disagrees with them, then the second and third models of stare decisis collapse and we are left with only the first model, under which precedents need never be overruled because only their present effects must be taken into account. If, on the other hand, precedents may never be overruled, then the strength of the principle of stare decisis is infinite.

In constitutional law, proposals regarding the strength of the principle vary, from according the principle very little strength (so that the Court can always overrule its earlier decisions with which it now disagrees, and other courts and government officials may depart from Court precedents in anticipation of Court OVERRULINGS), to according the principle considerable strength, so the Court can overrule its precedents only if it believes them both wrong as interpretations and unjust or mischievous in application. On this latter view, other courts and officials cannot anticipate overrulings by the Court.

There are some proponents of the position that stare decisis should not apply at all to constitutional decisions, so that no one is bound by the Court's CONSTITUTIONAL INTERPRETATIONS except in the actual cases in which the interpretations are rendered. No one advocates the opposite extreme; namely, that not even the Court can overrule its precedents—though this position would settle constitutional controversies more than the other positions regarding the strength of precedent.

LARRY ALEXANDER
(2000)

(SEE ALSO: *Planned Parenthood v. Casey*.)

## STATE

The DECLARATION OF INDEPENDENCE declares that the "united colonies" are, as they ought MK MM to be, "free and independent states." The term "states" was chosen to indicate their status as autonomous political communities. The state was the result of the SOCIAL COMPACT, binding man to man and subjecting all to rule by some part of the community. The term also carried a connotation, already obsolescent in England, of a republican form of government; the seventeenth-century British political writers with whose works the Americans were familiar had generally contrasted "state" with "monarchy" or "principality."

But the Declaration of Independence was, after all, the unanimous declaration of the *united* states. Although the Declaration proclaims that the states are "free and independent," they were not thereby made independent of one another. By the Declaration, the one American people assumes among the powers of the earth the separate and equal station to which it is entitled by natural and divine law. Thus is the American people declared to possess SOVEREIGNTY, and not the several states, although in the common usage, of the eighteenth as well as of the twentieth century, the term "state" refers to a sovereign entity.

The central paradox of American politics has always been, from the time of the Declaration and of the Constitution, the existence of ineradicable states within an indissoluble Union. The sovereignty of the people, from whom both the national and the state governments derive their just powers, is the basis for the distinctively American form of FEDERALISM. Neither is the central government the creature of the states nor do the states exist at the mercy of the central government, but both exercise those limited and delegate powers that are assigned them by the sovereign people.

Each of the original thirteen states had been founded and administered as a British colony prior to 1776. They had, therefore, established forms of government under their COLONIAL CHARTERS. During the Revolution, most of them adopted CONSTITUTIONS providing for government of the same persons and territory as the colonies had comprised. The fourteenth and fifteenth states, Vermont and Kentucky, had experienced provisional self-government before they were admitted to the Union. Before the ANNEXATION OF TEXAS, that state had revolted against Mexico and governed itself as an independent republic. California's brief existence as the "Bear Flag Republic" (1846) scarcely qualifies as independence or self-government; but, when the controversy over slavery prevented Congress from organizing the lands won in the Mexican War, California proceeded to adopt a constitution (1849) and to govern its own affairs until its admission to the Union (1850). Hawaii was an independent kingdom for centuries before American immigrants revolted against the native monarchy and engineered the annexation of those islands by the United States.

All of the rest of the states—thirty-two to date—have been formed out of the national dominion of the United States and have been admitted to the Union as states following a probationary period as TERRITORIES. The process by which the national dominion was to be settled and transformed into states was devised by THOMAS JEFFERSON and adopted by the CONTINENTAL CONGRESS as the ORDINANCE OF 1784, although that ordinance was never actually enforced. Essentially the same scheme was enacted in the NORTHWEST ORDINANCE (1787), which was the model for all subsequent treatment of the territories of the United States. At the CONSTITUTIONAL CONVENTION OF 1787 the delegates rejected GOUVERNEUR MORRIS's proposal that states formed from the western territories should have a status inferior to the original states, and they provided instead that new states should be admitted to the Union on terms of full equality with the existing states.

Under the ARTICLES OF CONFEDERATION the national government was entirely the creature of the state governments. The confederation derived its formal existence from a compact among the states, and the members of Congress were chosen by the state legislatures. Most of the delegates to the Constitutional Convention were convinced of the necessity of creating a national government directly responsible to the people of the nation. JAMES MADISON, for one, arrived in Philadelphia prepared to argue for a pure separation of state from national government, according to which the two tiers of government would be separately elected and separately responsible to the people in their respective spheres. But the Convention chose instead to give the institutions of the states a share in the government of the nation, and to provide, in the national constitution, for certain guarantees to the people of the states, including guarantees against their state governments.

In the Constitution, representatives in Congress are allocated to the states on the basis of population, and the state governments are left free to apportion them among districts and to provide for their election. Each state is allotted two senators, and until adoption of the SEVENTEENTH AMENDMENT (1913) the senators were chosen by the state legislatures. The President and vice-president are chosen by an ELECTORAL COLLEGE whose members are apportioned to, chosen by, and convened in the several states. The Constitution became effective only upon ratification by conventions in the several states, and amendment of the Constitution is impossible without the concurrence of the legislatures of (or conventions in) three-fourths of the states. And the TENTH AMENDMENT, adopted in 1791 as part of the BILL OF RIGHTS, reserves all governmental power not delegated to the national government by the Constitution to the states or the people.

On the other hand, Article I, section 10, prohibits the states from entering into treaties or alliances or granting LETTERS OF MARQUE AND REPRISAL; coining money, issuing BILLS OF CREDIT to circulate as currency, or making anything but gold or silver legal tender for payment of obligations; enacting EX POST FACTO laws or BILLS OF ATTAINDER, legislating to impair the OBLIGATION OF CONTRACTS, or conferring TITLES OF NOBILITY. The exercise of certain other powers by the states is made contingent upon the consent of Congress: taxation of imports or exports, maintenance of armies or navies, entering into INTERSTATE COMPACTS, and making war (unless actually invaded or imminently threatened by a foreign power). Moreover, the SUPREMACY CLAUSE subordinates the enactments of the states to the Constitution and to laws and treaties of the national government, and all state officers and judges are bound by oath to follow these, as the supreme law, whenever there is a conflict with state enactments or decisions.

But a proposal that the national Congress should have the power to review and "negative" state legislation failed to win a majority at the Constitutional Convention; and more drastic proposals that the states be abolished, or re-

aligned, or reduced to the status of provinces or administrative districts were rejected almost without discussion. The Convention did not adopt the VIRGINIA PLAN's wording, granting the national Congress the power to legislate in any field wherein the states were "incompetent," which would effectively have made Congress the only judge of the limits of its own power, and instead listed the fields in which national legislation was, or might be, required.

The sphere of state authority that the Constitution left untouched was vast, and included almost every governmental function with which most citizens were likely to come into direct contact. The laws of property, of inheritance, of marriage, of contract, of debt, of liability for civil wrongs, of employer-employee (or master-servant) relations, of commercial transactions, of banking, of business incorporation, and of common police were left to the states. The law of crimes and punishments, except for crimes against the national government, on the high seas, or in the armed forces, was left to the states. The nineteenth-century French political scientist ALEXIS DE TOCQUEVILLE referred to these as functions of "administration," distinguishing them from such high political functions as national defense, foreign affairs, and acquisition and settlement of territory. But, precisely because the administrative functions of government are those with which the people are in daily contact, Tocqueville concluded that the affections and loyalties of the people would always be directed first to the states in preference to the national government.

The primary loyalty to the state, rather than to the Union, was one of the chief problems of American politics at least until the end of the Civil War. When regional interests, particularly regional economic interests, ran contrary to the course of national legislation, politicians at the state level frequently attempted to rally the people to the cause of disunion. There were many delegates to the HARTFORD CONVENTION (1814) who advocated the SECESSION of the New England states to protest the War of 1812, and the TARIFF ACT OF 1828 led to South Carolina's attempt at NULLIFICATION. Politicians attempted to justify such acts by resort to THEORIES OF THE UNION that regarded the national government as the product of a compact among the states, the breach of which freed the offended states from their obligations.

The great tragedy of American constitutional history was the coincidence of state loyalties with attachment to the peculiar institution of human SLAVERY. In 1861 eleven states attempted to secede from the federal union and to form a confederacy in which the existence of both slavery and state sovereignty would be permanently guaranteed. Some adherents of ABOLITIONIST CONSTITUTIONAL THOUGHT were content to permit the secession on the ground that the Union was better off without the slave states. Some national politicians, including President JAMES BUCHANAN, were willing to tolerate the secession on the ground that the national government lacked constitutional authority to coerce the states.

President ABRAHAM LINCOLN rejected Buchanan's position, arguing that the federal Union was the permanent creation of the whole American people and dating the creation of the Union from the Declaration of Independence. In this way, Lincoln tied the preservation of the Union to the antislavery cause, making the CIVIL WAR not a mere war between the states but a struggle to complete the constitution of the Republic upon the foundation of natural rights and the consent of all the governed, in accordance with the principles of the Declaration. The completion of the Constitution required the addition of the THIRTEENTH AMENDMENT (abolishing slavery), the FOURTEENTH AMENDMENT (guaranteeing individual rights against state interference), and the FIFTEENTH AMENDMENT (prohibiting RACIAL DISCRIMINATION as a limitation on VOTING RIGHTS). The settlement of the crisis that had caused the Civil War necessitated these additional constitutional guarantees to the people against abuses by the state governments.

However, neither the Civil War nor the constitutional amendments adopted in its aftermath transferred significant additional power to the national government. Although there were new constitutional restrictions on the states, and although the national Congress was given power to enforce those restrictions, the distribution of substantive powers within the federal system remained essentially unaltered. What did change was the attitude of the people toward the two levels of government: CITIZENSHIP of the United States became, in most of the country, the primary source of political allegiance, and state citizenship became secondary. Constitutional expression of this change was embodied in the SIXTEENTH AMENDMENT (authorizing an income tax as an independent source of revenue for the national government) and the SEVENTEENTH AMENDMENT (providing for DIRECT ELECTION of United States senators).

In PROGRESSIVE CONSTITUTIONAL THOUGHT it was fashionable to speak of the states as the "laboratories" of the federal system, where experiments in political reform could be carried out. Like the abolition of slavery, all of the important reform measures of the Progressive era began at the state level and were enacted at the national level, if at all, only after successful adoption in the states. Such measures included women's suffrage, direct elections, and the PROHIBITION of alcoholic beverages.

In the twentieth century the states suffered a radical change of relative status. That change had two aspects: the expansion of national power into fields previously regarded as belonging to the states, and the subordination

of the states in the administration of national programs. The change of relative status was probably an inevitable consequence of the shift of loyalties as well as of the increased mobility, communication, and interaction attendant upon industrialization.

WORLD WAR I and the Great Depression of the 1930s were great national emergencies, and the national government strained the limits of its power to effect national measures in response. Ultimately, the COMMERCE CLAUSE became the source of constitutional authority for comprehensive national regulation of the economy, and ECONOMIC REGULATION based on that authority received the approbation of the Supreme Court beginning with the WAGNER ACT CASES (1937). The last vestiges of limitation inherent in the concept of INTERSTATE COMMERCE were swept away in WICKARD V. FILBURN (1941). By the middle of the twentieth century it was no longer true that state law alone governed most ordinary economic relationships. In the 1960s the commerce power became the basis for national CIVIL RIGHTS legislation and had already become the basis for a NATIONAL POLICE POWER generally.

If there is any type of activity that could with certainty be distinguished from "commerce," that would be the activity of governing. Whether on the basis of that distinction, or on some more general basis in the idea of federalism, the state and local governments were long excluded from national regulation under the commerce clause. NATIONAL LEAGUE OF CITIES V. USERY (1976) made that exclusion a matter of constitutional law, at least insofar as the activity that the national government sought to regulate was traditionally or inherently a governmental function and not just a publicly operated business. However, over vigorous dissent, a narrow majority overruled *Usery* in GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1984), and the exclusion was thereby judicially abolished.

The TAXING AND SPENDING POWER and the GENERAL WELFARE CLAUSE form the constitutional basis for coopting the states as administrators of national programs. The Constitution gives Congress the power to lay and collect taxes for the purpose of providing for the general welfare of the United States. Under this authority, Congress may appropriate public monies, raised through taxation, for programs beyond the scope of the ordinary legislative power and may make the appropriation conditional on compliance with nationally established guidelines. Beginning with the SHEPPARD-TOWNER ACT (1921), Congress has appropriated money to the states to support programs conforming to national standards. Such appropriations, and the standards upon which they are conditioned, are virtually immune to constitutional challenge because of judicial rules of STANDING. Thus in cases like FROTHINGHAM V. MELLON (1923) and HELVERING V. DAVIS (1937) neither states nor taxpayers could state a case permitting review of FEDERAL GRANTS-IN-AID or the regulations accompanying them. One result of this is that by the mid-1980s federal grants made up a significant share of the revenues of the state governments and federal regulations dictated the operation of state programs in highway construction, traffic control, driver licensing health care, public relief, education, and most other areas.

Twentieth-century court decisions have also served to change the status of the states. The Fourteenth Amendment's guarantee that the states could not deprive persons of life, liberty, or property without due process of law has formed the basis for federal court intervention in many substantive areas. At the beginning of the century, state economic regulation was often held unconstitutional when it was found to conflict with the due process clause. Later in the century, through the INCORPORATION DOCTRINE, the Supreme Court extended SUBSTANTIVE DUE PROCESS protection to most of the rights that the first ten amendments protect against national government intrusion. In the 1950s and 1960s the Supreme Court used the concept of PROCEDURAL DUE PROCESS effectively to rewrite the state codes of criminal procedure, and in the 1970s and 1980s it expanded SUBSTANTIVE DUE PROCESS to preclude state interference with such RIGHTS OF PRIVACY as abortion and REPRODUCTIVE AUTONOMY.

Nevertheless, the twentieth century did not herald a radical reduction of state power and influence. Government power and government expenditure have grown continuously at all levels; but the states have been largely displaced or coopted in the exercise of some functions as they have expanded their reach into other areas previously left to private activity and enterprise. Although both President RICHARD M. NIXON and President RONALD REAGAN publicly advocated a "new federalism" in which the states and their governments would enjoy greater freedom of action, the tendency toward centralization has continued, and state governments have attempted to maintain their importance not by recovering autonomy in old areas but by expanding their activity into new areas.

DENNIS J. MAHONEY
(1986)

Bibliography

ELAZAR, DANIEL J. 1972 *American Federalism: A View from the States*, 2nd ed. New York: Thomas Y. Crowell Co.

GOLDWIN, ROBERT, ed. 1962 *A Nation of States*. Chicago: Rand-McNally.

GRODZINS, MORTON 1966 *The American System: A New View of Government in the United States*, ed. Daniel J. Elazar. Chicago: Rand-McNally.

HAWKINS, ROBERT B., ed. 1982 *American Federalism: A New*

*Partnership for the Republic.* San Francisco: Institute for Contemporary Studies.

MORLEY, FELIX 1959 *Freedom and Federalism.* Chicago: Henry Regnery Co.

SANFORD, TERRY 1967 *Storm over the States.* New York: McGraw-Hill.

VILE, M. J. C. 1961 *The Structure of American Federalism.* Oxford: Oxford University Press.

## STATE ACTION

The phrase "state action," a term of art in our constitutional law, symbolizes the rule—or supposed rule—that constitutional guarantees of human rights are effective only against *governmental* action impairing those rights. (The word "state," in the phrase, denotes any unit or element of government, and not simply one of the American states, though the "state action" concept has been at its most active, and most problematic, with respect to these.) The problems have been many and complex; the "state action" doctrine has not reached anything near a satisfactory condition of rationality.

A best first step toward exploring the problems hidden in the "state action" phrase may be a look at its development in constitutional history. The development has revolved around the first section of the FOURTEENTH AMENDMENT, wherein the problem is in effect put forward by the words here italicized:

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

An early "state action" case under this section, *Ex parte Virginia* (1880), raised an audacious claim as to the limiting effect of the words emphasized above. A Virginia judge had been charged under a federal statute forbidding racial exclusion from juries. He was not directed by a state statute to perform this racial exclusion. The judge argued that the action was not that of the state of Virginia, but rather the act of an official, proceeding wrongfully on his own. On this theory, a "state" had not denied EQUAL PROTECTION. The Fourteenth Amendment, the judge contended, did not therefore forbid the conduct charged, or authorize Congress to make it criminal. The Supreme Court, however, declined to take such high ground.

"The constitutional provision," it said, ". . . must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny . . . equal protection of the laws." But probably the only fully principled and maximally clear rule as to "state action" would have been that the "state," as a state, does not "act" except by its official enactments—and so does not "act" when one of its officers merely abuses his power. "Fully principled and maximally clear"—but, like so many such "rules," aridly formalistic, making practical nonsense of any constitutional rule it limits. There were gropings, around the year of this case, toward a "state action" requirement with bite, but the modern history of the concept starts with the CIVIL RIGHTS CASES of 1883, wherein many modern problems were foreshadowed. In the CIVIL RIGHTS ACT OF 1875, Congress had enacted "[t]hat all persons . . . shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement . . . [regardless of race]."

Persons were indicted for excluding blacks from hotels, theaters, and railroads. The Court considered that the only possible source of congressional power to make such a law was section 5 of the Fourteenth Amendment: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." This section the Court saw as authorizing only those laws which *directly* enforced the guarantees of the amendment's section 1 (quoted above), which in turn referred only to a *state.* The amendment therefore did not warrant, the Court held, any congressional dealing with racially discriminatory actions of individuals or CORPORATIONS.

Few judicial opinions seem to rest on such solid ground; at the end of Justice JOSEPH BRADLEY's performance, the reader is likely to feel, "Q.E.D." But this feeling of apparent demonstration is attained, as often it is, by the passing over in silence of disturbing facts and thoughts. Many of these were brought out in the powerful dissent of Justice JOHN MARSHALL HARLAN.

One of the cases involved racial discrimination by a railroad. The American railroads, while they were building, were generally given the power of EMINENT DOMAIN. Eminent domain is a sovereign power, enjoyed par excellence by the state, and given by the state to "private" persons for public purposes looked on as important to the state; the Fifth Amendment's language illustrates the firmness of the background assumption that "private property" shall be taken, even with JUST COMPENSATION, only for PUBLIC USE. The American railroads were, moreover, very heavily assisted by public subsidy from governmental units at all levels. Both these steps—the clothing of railroad corporations with eminent-domain power, and their subsidization out of public funds—were justified, both rhetorically and as a matter of law, on the grounds that the railroads were *public instrumentalities,* fulfilling the clas-

sic state function of furnishing a transportation system. Regulation of railroads was undertaken under the same theory.

Railroads and hotel-keepers, moreover, followed the so-called common callings, traditionally entailing an obligation to take and carry, or to accommodate, all well-behaved persons able to pay. The *withdrawal* of protection of such a right to equal treatment might be looked on as "state action," and Congress might well decide, as a practical matter, either that the right had been wholly withdrawn as to blacks (which was in many places the fact of the matter) or that the state action supporting these rights of access was insufficient and required supplementation; only the most purposefully narrow construction could deny to such supplementation the name of "enforcement."

Indeed, this line of thought, whether as to the *Civil Rights Cases* or as to all other "equal protection" cases, is fraught with trouble for the whole "state action" doctrine, in nature as in name. "Action" is an exceedingly inapt word for the "denial" of "protection." Protection against lynching was, for example, usually "denied" by "inaction." Inaction by the state is indeed the classic form of "denial of protection." The Civil Rights Cases majority did not read far enough, even for the relentless literalist; it read as far as "nor shall any Stat. . . ." but then hastily closed the book before reading what follows: ". . . *deny* to any person . . . the equal *protection* of the laws." Contrary to the majority's reading, the state's affirmative obligation of protection should have extended to the protection of the traditional rights of resort to public transport and common inns; it was notorious that the very people (blacks) whose "equal protection" was central to the Fourteenth Amendment were commonly the only victims of nominally "private" denial of these rights.

Justice Harlan pointed out that in its first sentence, conferring CITIZENSHIP on the newly emancipated slaves, the first section of the Fourteenth Amendment did not use any language in any way suggesting a "state action" requirement, so that there was not even the verbal support for the "state action" requirement that the Court had found in the other phrases of that section. The question then became, in Harlan's view, what the legal consequences of "citizenship" were; for purposes of the particular case at hand, he said:

> But what was secured to colored citizens of the United States—as between them and their respective States—by the national grant to them of State citizenship? With what rights, privileges, or immunities did this grant invest them? There is one, if there be no other—exemption from race discrimination in respect of any civil right belonging to citizens of the white race in the same State. . . . Citizenship in this country necessarily imports at least equality of civil rights among citizens of every race in the same State. It is fundamental in American citizenship that, in respect of such rights, there shall be no discrimination by the State, or its officers, or by individuals or corporations exercising public functions or authority, against any citizen because of his race or previous condition of servitude. . . .

There is a third, most interesting aspect to Harlan's dissent. The majority had summarily rejected the argument that under the THIRTEENTH AMENDMENT—forbidding SLAVERY and involuntary servitude and giving Congress enforcement power—racial exclusion from public places was one of the "badges and incidents" of slavery. Harlan argued that forced segregation in public accommodations was a BADGE OF SERVITUDE, and he pointed out that no "state action" requirement could be found in the words of the Thirteenth Amendment. This argument was plowed under and was heard from no more for many decades, but it is of great interest because it was revived and made the basis of decision in a leading case in the 1960s, JONES V. ALFRED H. MAYER CO. (1968).

The *Civil Rights Cases*, in the majority opinion, brushed past contentions that were in no way frivolous. Very many discriminatory actions of public scope are taken by persons or corporations enjoying special favor from government and heavily regulated by government; one cannot easily see their actions as isolated from public power. "Denial of equal protection," the central constitutional wrong in racial cases, seems to refer at least as naturally to inaction as it does to action. If any positive rights at all inhere in citizenship—and if there are no such rights, the citizenship clause is a mere matter of nomenclature—these rights are set up by the Fourteenth Amendment without limitation as to the source of their impairment. Nevertheless, the holdings and doctrine of the *Civil Rights Cases* fell on a thirstily receptive society. The "state action" doctrine became one of the principal reliances of a racist nation, North as well as South.

In a society where so much of access to goods and values is managed by nominally "private" persons and corporations—railroads, restaurants, streetcars, cinemas, even food and clothing—a protection that runs only against the government, strictly defined, can work out to very little effective protection. If the official justice system is hampered by inconvenient constitutional safeguards, the sheriff can play cards while the lynch mob forms, and there is "no state action." A nightclub may refuse to serve a black celebrity, and there is "no state action." The "state action" doctrine protected from constitutional scrutiny an enormous network of racial exclusion and humiliation, characterizing both North and South.

Paradoxically, the "state action" requirement may for a long time have been more important to the maintenance of northern racism than to that of the cruder racism of the South. The South developed SEGREGATION by law, in all

phases of public life, and this regime was broadly validated by the notorious 1896 decision in PLESSY V. FERGUSON. For complex political reasons—and perhaps because of a faintly lingering adherence to scraps of CIVIL WAR idealism—segregation by official law was not widely imposed in the North. But the practices of real-estate agents, mortgage lenders, restaurant keepers, and a myriad of other "private" people and corporations added up to a pervasive custom of racial segregation in many phases of life, a custom less perfectly kept than the official legal dictates of the southern regime, but effectively barring most blacks from much of the common life of the communities they lived in.

A striking case in point was *Dorsey v. Stuyvesant Town Corporation* (1949–1950). The Metropolitan Life Insurance Company, having much money to invest, struck a complicated deal with the State and the City of New York. The contemplated end-result was the conversion of a large section of New York City—from 14th to 23rd Streets, and from Avenue A to the East River—into a vast complex of apartments, to be owned and run by a Metropolitan subsidiary. By formal statute and ordinance, the State and City acquiesced in this scheme, agreeing to use (and later using) the sovereign "eminent domain" power to acquire title to all the needed land, which was, as prearranged, later transferred to Metropolitan. Again by formal arrangement, a quarter-century tax exemption was granted on "improvements"—that is to say, on the immensely valuable apartment buildings. The public easement on certain streets was extinguished, and control over them turned over to Stuyvesant Town Corporation, a Metropolitan subsidiary; various water, sewage, and fire-protection arrangements were altered to suit the needs of the project. And all this was done, visibly and pridefully, as a joint effort of public and "private" enterprise; politicians as well as insurance men took bows. Then, when the whole thing was built, with "title" safely vested in "private" hands, Stuyvesant Town Corporation announced that no blacks need apply for apartments. The suit of a black applicant reached the highest court of New York, and that court held, 4–3, that there was not enough "state action" in all this to make applicable the Fourteenth Amendment prohibition of racial discrimination. The Supreme Court of the United States denied CERTIORARI.

The *Stuyvesant Town* case illustrates very well what could be done with the "state action" formula. With the fullest cooperation from government at all levels, as much of any city as might be desired (strictly public buildings alone excepted) could be turned into a "whites only" preserve. With the necessary cooperation, the process could be extended to a whole county, or a whole state. If they were prudent, the political partners in such deals would not put anything in writing about the racial exclusion contemplated.

But the essentiality of the "state action" formula to the success of northern racism must not obscure its considerable strategic importance even in the South. Segregation by law had in the main been validated, and this was the South's main reliance, but there were gaps, and the "state action" formula filled them in.

First, there was the role of nominally "private" violence against blacks, as the ultimate weapon of the racist regime—with lynching at the top of the arsenal's inventory. At this point the disregard of the Fourteenth Amendment's words, "nor shall any State *deny* . . . equal *protection* of the laws," is most surprising. But for a long time a whole lot of seemingly serious people saw no "denial of protection" in the de facto denial of protection to blacks against a great deal of "private" violence.

Second, outright racial residential zoning by law—just one form of segregation—had been struck down by the Supreme Court, in the 1917 case of BUCHANAN V. WARLEY. The opinion in that case does not adequately distinguish *Plessy v. Ferguson*, but it was the law, and nominally "private" methods of racial zoning had often to be resorted to in the South—just as they were, pervasively, in the North. Real-estate agents and mortgage banks played their accustomed part; until astonishingly recent times, the actually published codes of "ethics" of "realtors" forbade (under some transparent euphemism) actions tending toward spoiling the racial homogeneity of any neighborhood. But more was needed, and that more was found—South and North—in the "racially RESTRICTIVE COVENANT." These "covenants" were neither necessarily nor commonly mere casual contractual arrangements between parties dickering at random. Very commonly, when an "addition" was "subdivided," all the first deeds restricted ownership or occupancy, or both, to whites only—or to white Gentiles only, or to white Gentiles of northern European extraction. These covenants, recorded at the courthouse in a registry furnished by the State for this purpose, were ordained by many states' laws to "run with the land"—that is, they had to be put in all subsequent deeds forever, and usually were binding whether so inserted or not, since any buyer, examining title, could find them in the title-chain. These "covenants"—often functionally equivalent to racial zoning by law, enforced by court orders, and kept on file at the courthouse—were for a long time looked on as "merely private" action, in no way traceable to the state, and so not amenable to constitutional command.

A third and even more important use of the "state action" doctrine (or a doctrine closely akin) was peculiar to the South, and was the rotting-out base of southern politics for generations. The FIFTEENTH AMENDMENT forbade racial exclusions from voting—but, like the Fourteenth, it directed its prohibition at governments: "The right of citizens of the United States to vote shall not be denied or

abridged by the United States or by any State on account of race, color, or previous condition of servitude."

The general response in the South to this politically inconvenient constitutional mandate was the all-white Democratic PRIMARY ELECTION. This primary was colloquially known as "the election"; its nominees virtually always won in the November balloting, when all the whites who had voted in the Democratic primary were expected to vote for its nominee, and enough did so to wipe out any scattered Republican votes, including the votes of those blacks who could surmount the other barriers to their voting—LITERACY TESTS, difficult registration procedures, and even more violent discouragements. This plain fraud on the Constitution did not rest wholly on the concept that the action of the Democratic party was not "state action," but the even bolder idea behind it—the idea, namely, that the practical substitution of a "party" election for the regular election could altogether escape the Fifteenth Amendment mandate, even when the State commanded the all-whiteness of the Party—was related in more than spirit to the "state action" doctrine as illustrated in the Stuyvesant Town case. Its basis was the thought that racial voting requirements were not "official" if a nominally "private" organization was put in as a buffer between the wrong done and state power. And the all-white primary in the end had to rely (vainly, as at last it turned out) on the "state action" requirement.

The "state action" doctrine is not a mere interesting footnote in constitutional law. It has served as an absolutely essential and broadly employed component in the means by which black equality, theoretically guaranteed by the post-Civil War amendments, was made to mean next to nothing. It could do this because of the fact that, in our society, vast powers over all of life are given to formally private organizations—the Democratic party, the realtors' association, the mortgage bank, the telephone company, and so on—and because, further and indispensably, the courts were (as is illustrated by a line of decisions from the *Civil Rights Cases* to the Stuyvesant Town case) willing in case after case to gloss over the fact that large organized enterprises can rarely if ever be successfully conducted without very considerable help from the government. Intermixed in these racial cases was, moreover, the disregard of the Fourteenth Amendment's textual condemnation of governmental *inaction*, where that inaction amounted to *denial of equal protection*, as inaction obviously may. And constitutional guarantees that were implicit rather than explicit as limits on government were mostly ignored. A doctrine that went to the length of seeming to make of lynching a thing untouched by the Constitution and (as in UNITED STATES V. CRUIKSHANK, 1875) untouchable by Congress was and could be again a powerful tool indeed for bringing national human rights, nationally enjoyed, to nothing, on the plane of life as lived.

The "state action" requirement thus served the major strategic goal of a nation to which racism, in practice, was utterly essential. But even outside the field of race, its incidence, though spotty, was wide-ranging. As late as 1951, in *Collins v. Hardyman*, the Supreme Court, obviously under the influence of the doctrine though not directly relying on it, forcibly construed a federal statute, in plain contradiction to the law's clear terms, as not to reach the "private" and violent breaking up of a political meeting of citizens.

But a strong countercurrent developed in the 1940s. Without entire consistency, the Supreme Court uttered a striking series of decisions that promised to clip the claws of the "state action" requirement. The Court declared the all-white Democratic primary unlawful in SMITH V. ALLWRIGHT (1944) and extended this ruling in TERRY V. ADAMS (1953) to a local primary serving the same function under another name and form. MARSH V. ALABAMA (1946) held that the FIRST AMENDMENT, as incorporated into the Fourteenth, forbade the barring of Jehovah's Witnesses from distributing leaflets in a company-owned town. And SHELLEY V. KRAEMER (1948) held that judicial enforcement of restrictive covenants was unlawful.

In the "white primary" cases the Court was doing no more than refusing to persevere in self-induced blindness to an obvious fraud on the Fifteenth Amendment. But *Marsh v. Alabama* suggested that the formality of "ownership" could not immunize from constitutional scrutiny the performance of a governmental function—an idea big with possibility. And the *Shelley* case even more profoundly stirred the foundations. Of course it was difficult to say that judicial enforcement of a racial-restrictive covenant, recorded at the courthouse, with the attendant implication that such covenants are not (as some others are) "against public policy," did not amount to "state action of some kind"—the requirement as worded in the fountainhead *Civil Rights Cases* of 1883. The difficulty in assimilation of *Shelley* arose from the fact that "state action of some kind" underpins and in one way or another enforces every nominally "private" action; the states had facilitated and lent their aid, indeed, to the very acts of discrimination considered in the 1883 cases. *Shelley*, therefore, forced a more searching analysis of the theory of "state action"; academic commentators became exceedingly eager and thorough, and in later decisions the Court became more willing to find "state action" and to move toward a fundamental doctrinal revision.

This process was accelerated by the civil rights movement that gained strength in the late 1950s, and grew to major force in the 1960s. In 1954, the famous case of BROWN V. BOARD OF EDUCATION had outlawed racial segregation in the public schools; a number of other decisions had extended this rule to all forms of segregation imposed by law or by uncontestable official action. Though enforce-

ment of these decisions was to be difficult, the first of two principal jural supports of American racism—legal prohibition of participation by blacks in the common society—had crumbled. Naturally attention turned—whether with the aim of continuing racism or of completing its demolition—to the second of the pillars of American racism, the "state action" requirement.

Segregation and state action were now clearly seen to have a close functional similarity. Before the decisions following *Brown*, the blacks in a typical southern town could not eat in the good restaurants because state law commanded their exclusion. After these decisions, the proprietors of the restaurants, by and large, went on excluding blacks. (In this they were simply following a practice widely followed in the North already). There was a difference in legal theory, but no difference to the black people. The city-owned bus system could not make black people sit in the back—but most bus companies were "private" in form; seating in the back was "privately" commanded.

The resistance to this widespread public segregation under "private" form was led (actively in part and symbolically throughout) by Dr. MARTIN LUTHER KING, JR. Thousands of black people—most, but not all, young—defied the system by "sitting-in"—insisting upon service at "private" establishments open to the general public. They were in great numbers convicted of "crimes" selected with careful attention to the appearance of neutrality, such as "trespass after warning" or BREACH OF THE PEACE, and their cases reached the Supreme Court in some number.

The net result up to about 1965 was a considerable practical loosening up of the "state action" requirement, but no satisfactory theoretical reworking of that doctrine. A very few examples must be selected from the abundant case law.

The 1961 case of BURTON V. WILMINGTON PARKING AUTHORITY is an interesting example. The parking authority, a state agency, leased space in its parking building to a restaurateur, who forthwith refused to serve blacks. One might have thought it all but frivolous to contend that "state action of some kind" was absent here. The state had gone with open eyes into a transaction that empowered the restaurateur to insult and inconvenience citizens, in a public building owned by itself, and its police stood ready to make his rule stick. The state had done this—in effect certainly, if not in intent—for rent money. It had had the easy recourse of inserting in the lease a provision against racial discrimination; one has to wonder how the omission of that provision, obviously available under "the laws," can be anything but a "denial" of "equal protection of the laws," on the part of government. Yet the Court majority, though striking down the discrimination in the very case, roamed back and forth amongst the minutiae of facts—gas, service for the boiler-room, responsibility for structural repairs—and carefully confined its ruling to a lease of public property "in the manner and for the purpose shown to have been the case here. . . ." Still, the Wilmington case might have contributed toward some generality of constitutional theory.

As the "SIT-IN" issue heated up, however, the Court became even more evasive of the central issues. As cases reached the Court in great numbers, no "sit-in" conviction was ever affirmed. But neither the whole Court nor any majority ever reached and decided the central issue—whether *Shelley v. Kraemer* fairly implied that the knowing state use of state power to enforce discrimination, in publicly open facilities, constituted such action of the state as "denied equal protection of the laws." Instead the cases were decided on collateral grounds peculiar to each of them.

The culminating case was BELL V. MARYLAND (1964). Trespass convictions of Maryland civil-rights "sitters-in" were reversed, on the grounds (available by chance) that a newly enacted Maryland antidiscrimination statute might be held, in the state courts, to "abate" prosecution for prior attempts to get the service now guaranteed; nothing was actually decided on the more fundamental issues. Six Justices reached the "state action" issue, but of those six, three would have found it and three would not.

At this dramatic moment, with indefinite postponement of a major doctrinal decision seemingly impossible, Congress stepped in and solved the immediate problem, by passing the CIVIL RIGHTS ACT OF 1964, Title 2 of which made unlawful nearly all the discriminatory exclusions that had generated the sit-in prosecutions, making future prosecutions of sit-ins impossible. Then, in 1964, in *Hamm v. City of Rock Hill*, the Court held that the act compelled dismissal of all such prosecutions begun before its passage. Thus vanished the immediate problem of the sit-ins, and of many other claims to nondiscrimination previously based purely on the Constitution. It is noteworthy that Congress chose to base this Title 2, dealing with PUBLIC ACCOMMODATIONS, mainly on the COMMERCE CLAUSE rather than on the Fourteenth Amendment. This legislative decision reflected uncertainty as to whether the Court could be persuaded to overrule the 1883 *Civil Rights Cases*, which had severely limited congressional power to enforce the Fourteenth Amendment. In HEART OF ATLANTA MOTEL V. UNITED STATES (1964) and KATZENBACH V. MCCLUNG (1964) the Court construed the 1964 provisions broadly, and upheld them under the commerce clause theory that Congress had emphasized. The public accommodations crisis was over, and with it the really agonizing social crisis as to "state action."

Nevertheless, important problems continued to present themselves after 1964. It seemed for a time that, though no longer under the intense pressure of the public accom-

modations issue, the Court might be moving along the road toward relaxation of the state action requirement—a road along which travel had begun at least as early as the cases of *Smith v. Allwright* (1944—knocking out the all-white Democratic primary), *Marsh v. Alabama* (1946—the "company-town" case), and *Shelley v. Kraemer* (1948—the case of the racial-restriction covenants). (Indeed, no case actually denying relief on the "no-state-action" ground was decided by the Supreme Court from 1906 to 1970, except the 1935 case upholding the white primary, overruled nine years later).

In 1966 the Court held, in *Evans v. Newton*, that a huge public park in the center of Macon, Georgia, could no longer be operated as a park "for whites only," pursuant to the directions in the 1911 will of the man who had given it to the city, even though the city, for the purpose of seeing this all-white status maintained, had resigned as trustee, and had acquiesced in the appointment of a set of "private" trustees. In *Amalgamated Food Employees v. Logan Valley Plaza* (1968) the Court applied *Marsh v. Alabama* to hold a large SHOPPING CENTER subject to the First Amendment, and REITMAN V. MULKEY (1967) struck down under the Fourteenth Amendment a California constitutional amendment that would have forbidden state or local "fair" (i.e., antiracist) housing ordinances until such time as the state constitution might be amended again—a process substantially more difficult than the enactment of ordinary legislation. This opinion, by Justice BYRON R. WHITE, encouraged much hope, because it explicitly undertook to judge this state constitutional amendment "in terms of its "immediate objective,' its "ultimate effect,' and its "historical context and the conditions existing prior to its enactment." This attitude, if adhered to, would in every case bring the "state action" question down to the earth of reality. The Court would recognize the impact of formal state "neutrality" on the actual patterns of American racism, and would ask in each case whether such seeming "neutrality" operated as a *denial of equal protection* to the group principally marked for protection. This hope was further encouraged in 1969 in *Hunter v. Erickson* wherein the Court struck down an Akron, Ohio, requirement that fair-housing ordinances run an especially difficult gauntlet before they became effective; it was especially striking that Justices JOHN MARSHALL HARLAN and POTTER STEWART, who had dissented in *Reitman*, found the Akron provision too much, because on its face it discriminated against antiracist laws.

But the current of doctrine changed after President RICHARD M. NIXON made the most of his chance to put his stamp on the Court. The change was signaled by the 1970 decision in EVANS V. ABNEY, a follow-up to the first Macon park case, *Evans v. Newton*, above. After the Newton decision, the heirs of the donor of the park applied for a reverter to them. The Court held this time that the state court's decision in their favor, in effect imposing a penalty on the citizens of Macon for their being unable under the Fourteenth Amendment to keep the park all-white, did not constitute "such state action" as to implicate the equal protection clause.

In 1971, in PALMER V. THOMPSON, the Court upheld the City of Jackson in its closing the city swimming pools and leasing one of them to the "private" YMCA, rather than having blacks swim in them. Here the Court found no state encouragement of discrimination, although the pools had been closed in response to a desegregation order. This was a total turn-about, in just four years, from the *Reitman v. Mulky* resolution to tie the operation of state-action law to the facts of life, and Justice White, the author of the *Reitman* opinion, dissented, with three other pre-Nixon Justices.

In 1974 the Court decided JACKSON V. METROPOLITAN EDISON COMPANY. A heavily regulated "private" electric company, enjoying a monopoly and a state-issued certificate of public convenience, terminated service to a customer without offering her any chance to be heard. This practice was allowed by a "tariff" on file with and at the least acquiesced in by the Public Utilities Commission. Justice WILLIAM H. REHNQUIST's opinion for the Court found insufficient "state action" in any of this to implicate the DUE PROCESS clause. This opinion and judgment, if adhered to in all their implications, would put us at least as far back as the 1883 Civil Rights Cases. Then, in 1976, HUDGENS V. NATIONAL LABOR RELATION BOARD explicitly overruled the *Logan Valley Shopping Center* case and made authoritative for the time being a very narrow view of *Marsh v. Alabama*.

Meanwhile, however, a new doctrinal thread had become visible. In the 1883 *Civil Rights Cases* the first Justice Harlan had argued that the Thirteenth Amendment, which contains no language to support a state-action requirement, proscribes all "badges and incidents" of slavery—which, historically, would mean a great many if not all racially discriminatory and degrading actions. This argument was a long time in coming into its own, but in 1968, in *Jones v. Alfred H. Mayer Co.*, the Court made it the ground of a decision upholding an old act of Congress which the Court interpreted to command nondiscrimination in the sale of housing. And in 1976, GRIFFIN V. BRECKENRIDGE, overruling *Collins v. Hardyman*, based decision solidly on the Thirteenth Amendment, holding that the amendment authorizes Congress to secure its beneficiaries against "racially discriminatory private action aimed at depriving them of . . . basic rights. . . ." Under the very formula of the 1883 *Civil Rights Cases* themselves—Congress may "enforce" only that which is substantively there—this should imply a large substantive content in

the Thirteenth Amendment, far beyond literal "slavery." In RUNYON V. MCCRARY (1976) the Court extended much the same rationale to the condemnation of racial exclusion from a "private, commercially operated, nonsectarian" school.

"State action" doctrine has remained intractable to being made rational. What is wanted is attention to these points:

1. In almost any impingement by one person or more on another person or more, there is some contribution by the state: empowerment, support, or threatened support. Thus the presence or absence of "state action" is not a "test" at all; this has led to the spinning out of enormous series of subtests, hard to express and even harder to comprehend, none of which has much if any warrant in law.

2. Concomitantly, "state action" may not legitimately be confined—as the Supreme Court's recent opinions have confined it—to one or more neatly defined categories such as "command," "encouragement," or "public function." One may identify ten ways in which so infinitely complicated and subtle a being as the "state" may act—and the "state" may then act in an eleventh and then in a twelfth way—*all* "state action."

3. There is no warrant whatever in law for the assumption that "state action," to be significant, must be at a *high level* of involvement, or that a *very close* "nexus" must be found between "state action" and the wrong complained of.

4. Many constitutional guarantees do not explicitly require "state action" as a component. The modern "state action" requirement purported to draw its life from the words of the Fourteenth Amendment. Many rights and relationships set up by the Constitution and enforceable by Congress do not refer to the state at all, for example, the prohibition of slavery (and, as now held, its badges and incidents), the right to vote for congressmen and senators, the RIGHT TO TRAVEL. It is only custom-thought, which usually means half-thought, that would think it obvious that an impediment to INTERSTATE COMMERCE would be unconstitutional only if it were state-created.

5. A citizen of the United States should be regarded as having *relational* rights—rights of membership in the organized community—which nobody, state or private person, may interfere with. This principle has some life in the cases; in *Bewer v. Hoxie School District* (8th Cir. 1956), for example, an INJUNCTION was upheld that restrained private persons from interfering with state officials' attempts to comply with the national Constitution. But the principle deserves a greater generality. Anybody who tries forcibly to keep another person from getting his mail is interfering with a legitimate relation between citizen and government, even though the wrongdoer's own actions may not be "state action" at all. (See also UNITED STATES V. GUEST, 1966.)

6. There is broad scope in the natural meaning of the Fourteenth Amendment's words: "deny to any person within its jurisdiction the equal protection of the laws." These words, even as a matter of "narrow verbal criticism," do not require "action."

7. Above all, while much of the defense of the "state action" requirement is conducted in the name of the private, personal lives of people whose conduct, it is said, ought not to be constitutionalized, it is very, very rare that any real "state action" case involves these values at all. The conduct of public transportation and restaurants, the operation of carnivals and parks, dealings with city swimming pools, the way the light company collects its bills, the character of a whole section of town—these are the usual stuff of "state action" problems in real life. If anybody ever files a lawsuit praying a mandatory injunction that he be included on somebody else's dinner list, that will be time enough to begin devising a well-founded "rule of reason" fencing constitutional prohibition out of the genuinely private life. This "genuinely private" life may be hard to define, but surely no harder to define than the "state action requirement" has turned out to be, and continues to be. And at least one would be trying to define the right thing.

CHARLES L. BLACK, JR.
(1986)

Bibliography

BLACK, CHARLES L., JR. 1962 The Constitution and Public Power. *Yale Review* 52:54–66.

——— 1967 "State Action," Equal Protection, and California's Proposition 14. *Harvard Law Review* 81:69–109.

HALE, ROBERT L. 1952 *Freedom through Law*. Chap. 11. New York: Columbia University Press.

HOROWITZ, HAROLD W. 1957 The Misleading Search for "State Action" under the Fourteenth Amendment. *Southern California Law Review* 30:208–221.

VAN ALSTYNE, WILLIAM W. 1965 Mr. Justice Black, Constitutional Review, and the Talisman of State Action. *Duke Law Journal* 1965:219–247.

## STATE ACTION
## (Update 1)

America's federal constitutional system generally protects individual rights only against violation by the national and state governments, their agencies, and officials. State action doctrine limits the scope of constitutional rights guarantees. If a state police officer arrests a criminal suspect without an ARREST WARRANT, for example, state action is

clearly present and the Constitution's Fourth Amendment and Fourteenth Amendment SEARCH AND SEIZURE prohibitions apply. By contrast, if a private individual or organization infringes on another private person's constitutional liberties, the courts may well not find state action, and the federal Constitution will not provide a remedy. The more controversial extensions of the state action doctrine involve cases where constitutional injuries are caused in part by ostensibly private actors. At its furthest reaches, then, the doctrine depends on workable and principled standards for attributing the constitutionally harmful conduct of a private person to the public sector.

*In Lugar v. Edmonson Oil Co.* (1982) Edmonson had obtained an invalid attachment order from a state court clerk to sequester Lugar's property. Lugar contended that Edmonson had acted jointly with the state to deprive him of property in an unconstitutional manner. Justice BYRON R. WHITE's opinion in *Lugar* explained that in order for any constitutional rights claimant to attribute a private defendant's wrongful conduct to the federal or state government, the claimant must satisfy two independent inquiries. First, the private defendant must be sufficiently identified with the government to be fairly labeled a state actor. This might be called the "identity" inquiry. Second, the defendant's wrongful conduct must have been the direct and affirmative cause of a constitutional injury; the government will not be held liable for an error of omission or a failure to prevent constitutional injury. This might be called the "causality" inquiry. Because the state court official had assisted Edmonson in using the state's constitutionally defective procedures to sequester Lugar's property, the Court held that the identity and causality requirements were met.

Two critical decisions in the 1970s, JACKSON V. METROPOLITAN EDISON COMPANY (1974) and FLAGG BROTHERS, INC. V. BROOKS (1978), set extremely narrow terms for the current identity and causality standards. Even if a government delegates general law enforcement powers to a private individual (as in state self-help repossession statutes) or heavily regulates a private industry (as in state utility rate regulation), the private party will be identified with the government only if these powers and operations had been exercised traditionally and exclusively by the government. Even if the government knew, or should have known, of the private party's wrongdoing, causality now requires evidence that the government affirmatively compelled or specifically approved the practice that harmed a constitutional liberty.

Today the Supreme Court guards these narrow boundaries of the state action doctrine with a rigorous and sterile formalism. In two unusual cases emerging from the arena of amateur sports, the Court recently shielded private organizations from constitutional liability by discounting their functional relationships with the government. After the United States Olympic Committee refused to license use of the name Gay Olympic Games for a homosexual international athletic event, a Fifth Amendment challenge for discrimination in *San Francisco Arts & Athletics v. United States Olympic Committee* (1987) failed on the basis that the committee was not a governmental actor to whom constitutional prohibitions apply. Because the committee coordinated activities that were not traditional government functions, even Congress's unprecedented grant to the committee of exclusive regulatory authority over American athletic organizations and of unlimited trademark rights in the name Olympic did not satisfy the identity tests. Furthermore, because the committee's trademark enforcement decisions went unsupervised by any federal official, causality could not be attributed to the national government.

*In National Collegiate Athletic Association v. Tarkanian* (1988) the Court insulated the NCAA from liability for violation of a state university basketball coach's CIVIL RIGHTS, ruling that the university's voluntary compliance with NCAA disciplinary recommendations did not transform the NCAA's private conduct into state action. Although the NCAA's findings made at NCAA hearings of NCAA rules violations had influenced the university's decision to suspend Tarkanian in accord with its NCAA membership agreement, the Court reasoned that NCAA had neither imposed the sanction directly nor compelled the university to act within the meaning of the causality standards.

Theoretically, the state action doctrine may serve two important purposes. Jurists defend the doctrine as a safeguard of FEDERALISM : by preventing the federal judiciary from enforcing constitutional rights guarantees against private violators, the doctrine preserves the traditional realm of STATE POLICE POWER to regulate private civil rights. Additionally, the doctrine may promote liberal legal values: to the extent that it limits the Constitution's interference with private exercise of federal and state statutory or COMMON LAW rights, the doctrine fosters a realm of individual freedom of action.

To serve federalism and liberalism meaningfully, however, state action requires a dichotomy between public and private action that is both definite and defensible. The current standards for identity and causality could be challenged on both accounts. Given the highly bureaucratic state of modern America, characterized by government penetration into most private economic and social dealings, the integrated public and private venture is a commonplace. Yet, identity and causality demand the conceptual division of integrated operations into discrete practices

that are traditionally governmental, governmentally compelled, and injury-causative. Practical rules for this division will be difficult for courts to formulate and apply; reliance on criteria such as tradition and government compulsion will result in line-drawing of the most arbitrary and unprincipled sort.

Moreover, the doctrine undermines its own raison d'être: with its narrow focus, it will not rip the veil away from nominally private actors who wield governmentally delegated powers to destroy individual rights. Although the Constitution permits government to "privatize" the functions that it otherwise would perform, the state action doctrine ought not to immunize the government from liability for private violations of its constitutional obligations.

However appropriate for federal constitutional purposes, the state action doctrine is often an anomaly in state constitutional law interpretation. The texts of many state bill of rights provisions do not explicitly target state action for their prohibitions; indeed, a number of state constitutions directly regulate specific transactions among private individuals and corporations. Because the states do not recognize county and municipal governments as coordinate sovereigns, state action need not reinforce federalism interests. State high courts might reject the conceptual limitations of the federal state action doctrine to provide stronger protection of CIVIL LIBERTIES under their state constitutions against private infringements.

DAVID M. SKOVER
(1992)

Bibliography

ALEXANDER, LARRY A. and HORTON, PAUL 1988 *Whom Does the Constitution Control?* Westport, Conn.: Greenwood Press.

CHEMERINSKY, ERWIN 1985 Rethinking State Action. *Northwestern University Law Review* 80:503–557.

SKOVER, DAVID M. 1992 State Action Doctrine. In Collins, Skover, Cogan, and Schuman, *State Constitutional Law and Individual Rights: Cases & Commentary.* Durham, N.C.: Carolina Academic Press.

SYMPOSIUM 1982 The Public/Private Distinction. *University of Pennsylvania Law Review* 130: 1289–1608

VAN ALSTYNE, WILLIAM and KARST, KENNETH L. 1961 State Action. *Stanford Law Review* 14: 3–58

## STATE ACTION
## (Update 2)

More than thirty years ago, legal scholar Charles L. Black, Jr., described the state action DOCTRINE as a "conceptual disaster area" and little has since changed. Indeed, surprisingly, the Supreme Court has paid little attention to state action issues in recent years. Major unresolved issues exist concerning when private action must comply with the Constitution. For example, when the government privatizes traditional government services, such as prisons or airports, does the action of the private operators constitute state action? In light of the tremendous growth in alternative dispute resolution, such as arbitration and mediation, should such private adjudication be regarded as state action, especially when required by law or court order? Thus far the Court has not confronted these issues. Rather, the Court's consideration of state action in recent years has been limited to two areas.

First, the Court has applied the state action doctrine to the exercise of PEREMPTORY JURY CHALLENGES by nongovernment litigants. Peremptory challenges allow litigants to excuse prospective jurors without showing cause. In BATSON V. KENTUCKY (1986), the Court held that EQUAL PROTECTION prohibits prosecutors from using peremptory challenges in a discriminatory fashion in criminal cases.

In *Edmonson v. Leesville Concrete Co.* (1991), the Court held that *Batson* applies in private civil litigation and found state action in private parties' exercise of peremptory challenges in a civil case in a manner reflective of RACIAL DISCRIMINATION. The Court explained that it is state and federal laws that authorize peremptory challenges in state and federal courts. Additionally, the Court emphasized the involvement of the government in jury selection, from subpoenaing individuals for JURY SERVICE to compelling completion of questionnaires to judicial supervision of the VOIR DIRE process. Moreover, juries function as a traditional and important government decisionmaking body. As a result, the Court found that discriminatory use of peremptory challenges denies equal protection, even if done by private litigants.

The Court took this reasoning a step further a year later in *Georgia v. McCollum* (1992), where the Court considered whether a criminal defendant's exercise of a peremptory challenge constitutes state action. If anyone is the antithesis of the government, it is a criminal defendant who is being prosecuted. Yet, for purposes of jury selection, the Court found that a criminal defendant is a state actor in exercising peremptory challenges. The Court followed exactly the same reasoning as in *Edmonson:* laws create peremptory challenges and jury selection is a government function accomplished through the power of the state and overseen by a judge.

The second major development concerning state action has been the Court's conclusion that CORPORATIONS created and managed by government must comply with the Constitution. In LEBRON V. NATIONAL RAILROAD PASSENGER CORP. (1995), the Supreme Court held that the National Railroad Passenger Corporation (Amtrak) must comply with the Constitution. Although the statute creating Amtrak declares that it "will not be an agency or establishment of

the United States government," it is a corporation created by federal law, with a board appointed by the President, and it receives substantial federal funding.

An artist sued Amtrak after it refused to comply with a contractual commitment to display his art on a large billboard. The Court ruled that Amtrak is the government for state action purposes. The Court explained that where "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Lebron* is significant in making it clear that such government-created corporations must comply with the Constitution.

ERWIN CHEMERINSKY
(2000)

(SEE ALSO: *Jury Discrimination; Privatization and the Constitution.*)

Bibliography

BLACK, CHARLES L., JR. 1967 State Action, Equal Protection, and California's Proposition 14. *Harvard Law Review* 81:69–109.

EULE, JULIAN N. and VARAT, JONATHAN D. 1998 Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse. *UCLA Law Review* 45:1537–1634.

REUBEN, RICHARD C. 1996 Public Justice: Towards a State Action Theory of Alternative Dispute Resolution. *California Law Review* 85:577–641.

## STATE ACTION—BEYOND RACE

For most of its century-long existence, the STATE ACTION limitation of the reach of the FOURTEENTH AMENDMENT and FIFTEENTH AMENDMENT has had its chief importance in cases involving RACIAL DISCRIMINATION. From the CIVIL RIGHTS CASES (1883) until the 1940s, the state action barrier impeded both judicial and congressional protection of CIVIL RIGHTS. As the civil rights movement gathered force in the years following WORLD WAR II, relaxation of the state action limitation was essential to the vindication of the rights of blacks and others who were making claims to constitutional equality. The WARREN COURT accelerated the erosion of the state action barrier, bringing more and more private conduct within the reach of the Fourteenth Amendment. ALEXANDER M. BICKEL accurately described the effects of the Court's decisions as "egalitarian, legalitarian, and centralizing." By the late 1960s some commentators were predicting the state action doctrine's early demise.

Those predictions missed the mark; today the state action limitation remains very much alive. Yet the doctrine's revival has not signaled a return to a restricted role for the national government in protecting rights of racial equality. By the time the BURGER COURT set about rebuilding the state action barrier, the Court had provided Congress with a firm basis for federal civil rights legislation in the THIRTEENTH AMENDMENT, which has never been interpreted to contain a state action limitation. Furthermore, the Court had generously interpreted various federal civil rights laws to forbid most types of private racial discrimination that had flourished behind the state action barrier in the prewar years.

Although the revival of the state action doctrine has offered little new support for private racial discrimination, that revival has diminished the "legalitarian" and "centralizing" effects of the Warren Court's decisions. Indeed, recent Supreme Court majorities have explicitly extolled the Court's use of the state action doctrine to promote the values of individual autonomy and FEDERALISM. The Warren Court had blurred the distinction between state and society, between what is "public" and what is "private." In so doing, the Court assumed that the force of law underlay all private dealings. It is only a short step from this assumption to the judicial creation of a great many constitutional rights of private individuals against other private individuals. Justice JOHN MARSHALL HARLAN, deploring the trend, argued in UNITED STATES V. GUEST (1966) that "[the] CONSTITUTIONAL CONVENTION was called to establish a nation, not to reform the COMMON LAW."

The Burger Court has viewed its revival of the state action barrier in precisely these terms, as a contraction of the reach of the Constitution—and especially the reach of the federal judiciary—with a corresponding expansion of both individual autonomy and state SOVEREIGNTY. The Court's recent majorities have drawn a sharp distinction between society's "public" and "private" spheres, and two implications have followed. First, the Constitution limits governmental, but not private, conduct. Second, if private conduct is to be regulated by government, the preferred regu-1737lator is the state government, and not Congress or the federal courts. The result has been a marked reduction in the Fourteenth Amendment's potential applications to private conduct, even when that conduct is carried on with what the Warren Court used to call "significant state involvement."

Indeed, the very search for "significant state involvement" has been replaced by a new analytical approach. Where the Warren Court determined the existence of state action by considering the totality of interconnections between government and private conduct, today's majority separately examines various arguments for finding state action underpinning private conduct—and typically, as in

JACKSON V. METROPOLITAN EDISON COMPANY (1974) and BLUM V. YARETSKY (1982), rejects those arguments one by one.

In doctrinal terms, the current majority of the Supreme Court has narrowed both of the principal avenues for finding state action in private conduct. First, the "public function" theory that informed the "white primary" cases from NIXON V. HERNDON (1927) to TERRY V. ADAMS (1953) and the "company town" decision in MARSH V. ALABAMA (1946) has been confined to cases in which the state has delegated to a private party a function traditionally performed exclusively by the state. In FLAGG BROTHERS, INC. V. BROOKS, (1978) the Court even tightened its rhetoric for such cases, referring to "the sovereign function doctrine."

Second, the various types of state support that previously contributed to findings of "significant state involvement" in private conduct, having been disaggregated in the Court's analysis, have been strictly limited in their separate meanings. Thus: heavy state financial aid to a private school was insufficient to establish state action in RENDELL-BAKER V. KOHN (1982); the theory of REITMAN V. MULKEY (1967) that the state had "encouraged" private racial discrimination has yet to be employed to find state action in another case; the state's licensing and comprehensive regulation of a public utility was insufficient to establish state action in *Jackson v. Metropolitan Edison Company;* the precedent of BURTON V. WILMINGTON PARKING AUTHORITY (1961) has been restricted to cases in which government and private actors are so intimately interconnected that their relationship can be called one of "symbiosis"—or, as in *Lugar v. Edmondson Oil Company* (1982), "joint participation"; and the RESTRICTIVE COVENANT precedent of SHELLEY V. KRAEMER (1948) has become a one-case category. Even a public defender, employed by the state to represent indigent defendants in criminal cases, was held in *Polk County v. Dodson* (1981) not to be acting under COLOR OF LAW as required by SECTION 1983, TITLE 42, U.S. CODE, statutory words that are interpreted to track the state action limitation.

The insight that law—and thus the coercive power of the state—provides the foundation for claims of right in human society is not new. Indeed, the proposition teeters on the edge of tautology. To say that a person owns land, for example, is mainly a shorthand statement about the readiness of state officials to employ force to protect that person's exercise of certain rights to control the use of that land. To speak of law itself is to speak of a power relationship. In a large and complex society the point may sometimes become diffused, but the potential application of coercive power, wielded by governmental officials, is one of the chief features differentiating interactions in nearly all human societies from those in a jungle. The publicprivate distinction may have its uses, but candid description is not one of them.

Nonetheless, Justice WILLIAM H. REHNQUIST, writing for the Supreme Court in the *Flagg Brothers* case, reaffirmed "the "essential dichotomy' between public and private acts" as a feature of American constitutional law. State action, for purposes of interpreting the Fourteenth Amendment, could not be found on the potential enforcement of law by state officials, but only on its actual enforcement. To rule otherwise, Rehnquist said, would "intolerably broaden" the notion of state action. Unquestionably, the publicprivate distinction is secure in American constitutional law.

The appeal of the public/private distinction for the judges and commentators who create constitutional DOCTRINE is readily identified. If any one value lies at the core of American CONSTITUTIONALISM, it is the protection of individual freedom against arbitrary exercises of governmental power. A central assumption in this value scheme is that a "neutral" body of law is no more than the playing field on which individuals autonomously pursue their own goals. The same assumption is also reassuring about autonomy itself—not just that autonomy is valuable, but that autonomy exists. It is hard to see how American constitutionalism could get along without some form of the publicprivate distinction, absent a fundamental transformation of the idea of constitutionalism.

Plainly, the publicprivate distinction would be compatible with a definition of state action much broader than the current one. The present restrictive interpretation of the state action limitation, in other words, serves purposes beyond the maintenance of a zone of individual freedom against arbitrary governmental interference. Those purposes are not far below the surface of the Supreme Court's recent state action opinions. The Supreme Court's current restrictive readings of the state action limitation are congenial to Justices who want to preserve state power against the intrusion of the federal government, and who want to restrict the role of the judiciary in second-guessing the political process. One's attitude toward the state action issue, as toward a great many constitutional issues in the last generation, will reflect one's general views about JUDICIAL ACTIVISM AND RESTRAINT. The consequences of these choices are not merely institutional; they affect substantive rights of liberty and equality. Every decision reinforcing the Fourteenth Amendment's state action barrier is a decision not to vindicate a claim of Fourteenth Amendment rights.

KENNETH L. KARST
(1986)

Bibliography

NOTE 1974 State Action: Theories for Applying Constitutional Restrictions to Private Activity. *Columbia Law Review* 74: 656–705.

SYMPOSIUM 1982 The Public/Private Distinction. *University of Pennsylvania Law Review* 130:1289–1608.
TRIBE, LAURENCE H. 1985 *Constitutional Choices.* Pages 246–268. Cambridge, Mass.: Harvard University Press.

## STATE AID TO PAROCHIAL SCHOOLS

See: Government Aid to Religious Institutions

## STATE AND LOCAL FISCAL ASSISTANCE ACT

See: Revenue Sharing

## STATE AND LOCAL GOVERNMENT TAXATION

The Constitution contains only one provision explicitly restricting the general scope of state and local tax power. The Import-Export Clause provides that "no State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws." For most of America's constitutional history, the Supreme Court construed this clause as forbidding any state tax on imports and exports, a question the Court resolved by asking whether the imported goods subject to tax were in their Original Package and whether the exported goods subject to tax were within the "stream" of exportation. In *Michelin Tire Company v. Administrator Of Wages* (1976), however, the Court dramatically revised its approach to import-export clause analysis by refocusing the constitutional inquiry on the question of whether the levy at issue was an "impost" or "duty," which the Court in essence defined as a tax discriminating against imports and exports. Hence, nondiscriminatory taxes, even though imposed on imports or exports, are constitutionally tolerable under contemporary doctrine.

Other restraints on state and local taxation derive from constitutional provisions directed at concerns much broader than the subject of taxation. The Court has construed the Commerce Clause as requiring that any tax affecting interstate commerce must satisfy four criteria: First, the tax must be applied to an activity that has a substantial nexus with the state. Second, the tax must be fairly apportioned to the activities carried on by the taxpayer in the taxing state. Third, the tax must not discriminate against Interstate Commerce. Fourth, the tax must be fairly related to services provided by the state. The commerce clause has been by far the most significant source for judicially developed restraints on state taxation of interstate business. The Court has decided hundreds of such cases delineating commerce clause restraints on state taxation.

The Court has interpreted the Due Process clause of the Fourteenth Amendment as restraining the territorial reach of the states' taxing powers. It has declared that there must be a minimum link between the state and the person, property, or transaction it seeks to tax. Furthermore, the due process clause requires a state, in taxing the property or income of an interstate enterprise, to include within the tax base only that portion of the taxpayer's property or income that is fairly apportioned to the taxpayer's activities in the state. Thus, there is considerable overlap between the restraints imposed by the commerce and due process clauses. However, the due process clause restrains state tax power under circumstances in which the commerce clause is inapplicable, either because the tax does not affect interstate commerce or because Congress has consented to state taxation under its power to regulate commerce.

The Court has interpreted the Equal Protection clause of the Fourteenth Amendment as prohibiting the states from making unreasonable classifications. The Court, however, has generally accorded the states considerable leeway in drawing classifications for tax purposes. Under current doctrine, a state tax classification will be sustained if the tax has a legitimate state purpose and if it was reasonable for state legislators to believe that the use of the challenged classification would promote that purpose.

The Supreme Court has relied on the Privileges And Immunities clause of Article IV to invalidate state taxes that discriminate against residents of other states. Thus, the Court has struck down license and other taxes that impose heavier burdens on nonresidents than on residents, and it has invalidated a taxing scheme that denied personal income tax exemptions to nonresidents. The scope of the privileges and immunities clause was significantly limited, however, by the Court's determination in the mid-nineteenth century that the clause, which technically protects only "citizens" of other states, did not apply to corporations.

In *Mcculloch v. Maryland* (1819) the Court held that the states are forbidden from taxing the federal government or its instrumentalities. Rooted in both the Supremacy Clause and the underlying structure of the federal system, this Intergovernmental Immunity doctrine was for many years interpreted broadly to exempt from state taxation not only the federal government itself but also private contractors who dealt with the government. Beginning in the late 1930s, however, the Court substantially cut back on the scope of the federal government's immunity from state taxation. Broadly speaking, modern

case law has narrowed the immunity to a proscription against taxes whose legal incidence falls on the United States and to levies that discriminate against the federal government.

WALTER HELLERSTEIN
(1992)

(SEE ALSO: *Economic Due Process; Economic Equal Protection; Intergovernmental Tax Immunities; State Regulation of Commerce.*)

Bibliography

HELLERSTEIN, JEROME R. 1983 *State Taxation, I: Corporate Franchise and Income Taxes.* Boston, Mass.: Warren, Gorham & Lamont.

——— and HELLERSTEIN, WALTER 1988 *State and Local Taxation,* 5th ed. St. Paul, Minn.: West Publishing Co.

——— 1989 Cumulative Supplement to State Taxation, I: Corporate Franchise and Income Taxes. Boston, Mass.: Warren, Gorham & Lamont.

## STATE AND LOCAL GOVERNMENT TAXATION (Update)

When a court is forced to draw a line between permissible and impermissible activities, one of its main goals should be to ensure that substantially identical activities do not fall on opposite sides of that line. In the area of constitutional limitations on state taxation, the Justice best known for promoting that goal was HARLAN FISKE STONE. In an era when the Supreme Court's COMMERCE CLAUSE jurisprudence was marked by a rigid formalism, Stone's opinions stood apart as a fresh departure from the norm. In a series of decisions, Stone broke new ground by abandoning formalism and embracing a more pragmatic, less absolutist approach.

It should come as no surprise, then, that references to Stone's opinions figure prominently in the modern Court's state tax opinions. Ever since the 1977 decision in *Complete Auto Transit, Inc. v. Brady,* the Court's state tax opinions typically begin with a discussion and rejection of the Court's "old formalism" and the endorsement of a new, realistic, pragmatic approach. Despite the Court's rejection of "latter-day formalism," it is questionable whether the Court is truly being faithful to the antiformalist underpinnings of Stone's state tax jurisprudence. In fact, in a number of recent cases, the Court seems to have embraced a "new formalism," under which substantively identical state tax statutes can be either constitutional or unconstitutional, depending on the form they take.

In *West Lynn Creamery, Inc. v. Healy* (1994), the Court rejected on commerce clause grounds a Massachusetts statutory scheme that combined an excise tax on milk dealers engaged in the sale of milk within Massachusetts and a subsidy—funded by the milk tax—to Massachusetts dairy farmers. The Court conceded that each of the two pieces of the statute would be constitutional if considered independently. Because the permissible tax was "conjoined" with a permissible subsidy, however, the Court held the statute to be unconstitutional. The Court's opinion seems to imply that the Massachusetts subsidy was unconstitutional because the source of funds was milk tax revenues. It did not take long for states to learn the lesson of *West Lynn Creamery* and, not surprisingly, Maine immediately amended its statute (which was identical to the Massachusetts statute) to incorporate the exact same features with two formal differences. First, the Maine statutes were enacted separately (one in January, one in February), so that the statute could not be considered to be "integrated" and thus subject to *West Lynn Creamery*–type analysis. Second, the subsidy was funded out of Maine's "general fund" (into which the milk tax revenues were paid), rather than out of a special milk tax fund. So, to avoid having a statute declared unconstitutional, it appears that a state need not change its policy, but merely reenact a "nonintegrated" statute in accordance with such formal requirements.

In *Oklahoma Tax Commission v. Jefferson Lines* (1995), the Court upheld an unapportioned Oklahoma tax on gross receipts derived from the sale of bus tickets for interstate travel. Nearly a half-century earlier, the Court had rejected a similar New York tax as violative of the commerce clause in *Central Greyhound Lines v. Mealey* (1948). The Oklahoma tax in *Jefferson Lines* had one important difference from the New York tax in *Central Greyhound*: Oklahoma called its tax a "sales tax" while New York called its tax a "gross receipts" tax. Under the Court's rationale in *Jefferson Lines*, this distinction was critical. While many states might justifiably assert jurisdiction to impose a tax upon a company's gross receipts, only one has the authority to impose a tax upon a sale. The detail that the Court seems to have neglected is that New York's tax, like Oklahoma's, extended only to gross receipts derived from sales within the state. So, in fact, there was no meaningful difference between the two taxes. The lesson from *Jefferson Lines* to state legislators seems to be that any tax based on a vendor's gross receipts derived from sales within a state must be labeled a "sales tax" and not a "gross receipts" tax in order to withstand constitutional scrutiny.

Finally, the Court's recent decision in *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine* (1997), is another example of the Court's "new formalism." In this case, the Court considered Maine's property tax exemption for charitable organizations. Under the Maine statute,

the exemption was not allowed for organizations serving principally nonresidents. The majority opinion suggests that there is nothing constitutionally impermissible about a town's favoring organizations that serve Maine residents over organizations that serve nonresidents, so long as the town does so through direct cash subsidies and not through discriminatory tax exemptions. Under the Court's approach, it would seem to be permissible for the town to disallow the exemption for all organizations (that is, impose the tax uniformly on all organizations) and then to enact a cash subsidy limited to charitable organizations that serve Maine residents. Once again, the Court appears to treat differently two statutes with little substantive difference.

Some commentators have suggested that the lines drawn in each of the cases described above are indeed meaningful, distinguishing between substantively different statutes. Thus, with regard to *West Lynn Creamery,* some have considered it constitutionally significant that the funds must be drawn from the general fund rather than a milk tax fund. Some have defended *Jefferson Lines,* noting the different legislative intent and design characteristics of sales taxes and gross receipts taxes and according these differences constitutional significance. And there is some scholarly support for a constitutional distinction between cash subsidies and "tax expenditures" of the sort at issue in *Camps Newfound/Owatonna.* Still, even if one concludes that the lines drawn by the Court in these cases make sense, it is ironic that the Court continues to praise Stone's rejection of the "old formalism" and then proceeds to articulate new formalistic requirements. The law concerning constitutional limitations on state taxing authority involves a delicate balancing of interests, including deference to state SOVEREIGNTY and some reasonable protection of INTERSTATE COMMERCE. Striking that balance may be impossible without resorting to some degree of formalism. Perhaps the Court could be more forthright in its articulation of new standards and confess that, in this complex area of law, maintaining formal distinctions is the best that the Court can do.

KIRK J. STARK
(2000)

## STATE CONSTITUTIONAL LAW

American constitutionalism is more than the United States Constitution as interpreted by the United States Supreme Court. Each of the fifty states has its own constitution, which is the chief charter of government and of limitations on government in that state. State constitutions offer contrasts to common assumptions, based only on the United States Constitution, concerning both government and constitutional law.

STATE CONSTITUTIONS preceded the Constitution of the United States. State governments had to be formed when colonial governments were displaced in the move to American independence. The CONTINENTAL CONGRESS called upon each colony to establish its own government, but the Congress decided not to propose a single model for all. Eleven of the original thirteen states adopted written constitutions between 1776 and 1780; Connecticut and Rhode Island established their governing institutions without adopting constitutions until well into the nineteenth century. The generation that drafted the United States Constitution and the BILL OF RIGHTS first applied many of its political theories to forming the state constitutions.

One tradition dating from the early state constitutions is to place the declaration of rights at the beginning of the document. The rights so declared differed among the states, but together they covered virtually all of the guarantees later added to the United States Constitution. As to the structure of government, all states except Pennsylvania adopted bicameral legislatures (today only Nebraska's is unicameral), but they diverged on how and by whom representatives were elected. The theory of a separation of legislative, executive, and judicial powers was widely approved and expressly incorporated in Virginia's and other constitutional texts, but the legislatures were dominant in most states, electing governors, other executive officers, and judges.

By 1800 most of the original state constitutions had been replaced by revised documents. Nineteenth-century constitutions reflected the changing political concerns of old and new states as the nation expanded westward. Jeffersonian and Jacksonian views of democracy and equality broadened political participation and extended popular election from legislative to virtually all executive, administrative, and judicial offices. By mid-century, legislative profligacy with public credit in pursuit of economic development led to constitutional restraints on taxing and borrowing, on "lending the state's credit" or granting special PRIVILEGES OR IMMUNITIES to private persons, and on individual incorporation acts or other special or local laws. New governmental programs such as public education and regulation of banks, railroads, and public utilities were not left to ordinary legislation but were added to state constitutions, often to be administered by separately elected officials. State constitutions address such social problems as alcoholic beverages, gambling, and lotteries. The movement toward populist government reached its climax at the beginning of the twentieth century when many states provided for referenda on legislation and constitutional amendments upon petition by the requisite numbers of

voters. Eventually many states had constitutions resembling haphazard legal codes.

After WORLD WAR II a number of states adopted substantially new or modernized constitutions, including Missouri (1945), New Jersey (1947), Hawaii and Alaska (1959), Michigan (1960), Connecticut (1965), Florida and Pennsylvania (1968), Illinois and Virginia (1970), Montana (1972), Louisiana (1974), California (1976), and Georgia (1982). Others retain their original constitutions as revised by individual amendments. Altogether the fifty states have had a total of nearly 150 constitutions, with corresponding diversity among the states.

Although guarantees of individual rights dominate judicial and public attention, the primary function of constitutions is the organization and allocation of governmental authority. When this is done in a written constitution, the legitimacy of actions even by the highest elected officials depends upon compliance with the constitution and can be challenged for failure to comply. A comparison shows that in a number of respects the constitutional law of state government is more complex than that of the United States, although in one respect it is not.

The authority of states as such is not derived from their constitutions, as the early examples of Connecticut and Rhode Island show; unless limited, state authority is as plenary as that of the British Parliament. State constitutions therefore have no need for lists of legislative "powers" like those granted Congress in the United States Constitution. The great residue of the COMMON LAW concerning private transactions and property is state law. Although elected officials of local governments exercise lawmaking, taxing, and executive powers, their relation to the state is the reverse of that between the state and the federal government insofar as local governments have only the powers defined in state law. The "home rule" provisions found in many state constitutions, however, introduce one complexity comparable to the constitutional problems of FEDERALISM.

There are other contrasts. Federal executive officers are appointed by the President and must trace their actions to some act of Congress except for those powers given the President directly by the Constitution. Although the typical state constitution refers to an executive department of government, many executive officials, such as state treasurers, attorneys general, superintendents of public instruction and prosecutors, are separately elected to carry out functions described in the constitution. In fiscal matters many state constitutions, unlike the United States Constitution, require a balanced budget and allow the governor an item veto. Constitutional issues arise from provisions governing uniformity and limits on taxes and procedures for issuing bonds. Others arise in the administration of the election laws, especially the popular initiative and referendum. They result in a body of constitutional law that has no federal parallel.

When parallels do exist, experience under state constitutional law often provides a test for conceptions assumed at the national level or accepted by the United States Supreme Court, for instance, in questions of executive power and privileges. The Alaska court in *State v. A.L.I.V.E.* (1980) invalidated the LEGISLATIVE VETO device before the United States Supreme Court did so in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983).

The role of state judges in reviewing acts of government developed early and was generally accepted. New York's first constitution included judges in a Council of Revision that exercised the power to veto legislation. Under seven state constitutions the judges of the highest courts may be called upon to render ADVISORY OPINIONS.

Constitutional entrenchment of individual rights began with the earliest state constitutions in 1776 and is universal throughout the states, though the statements of rights differ. The common tradition includes procedural guarantees such as speedy and public trial by jury upon known charges, the right to call and to confront witnesses, freedom from warrantless and unreasonable searches and seizures and from compelled self-incrimination, as well as guarantees of property rights and freedom of expression, assembly, and petition. Many constitutions prescribed the law governing libel actions. The equality posited in the DECLARATION OF INDEPENDENCE was not translated into general state constitutional doctrine, being denied to slaves, women, and unpropertied citizens. But hereditary inequality was proscribed, as were, in the words of the Virginia Bill of Rights (1776), "exclusive or separate emoluments or privileges from the community, but in consideration of public services."

Differences among state provisions were not accidental. The status of religion varied among the early states, some favoring Protestant denominations or Christianity generally. Different views of punishment resulted in different provisions on that subject. Some states limited the right to bear arms to public defense; others extended it to self-defense. Conventions debated such issues as the role of GRAND JURIES. New states adopting constitutions throughout the nineteenth century drew their models not from the United States Constitution but from earlier states.

In the catalogue of guaranteed rights, too, many state provisions have no federal parallel. They may command open court proceedings, a result that the United States Supreme Court has strained to develop indirectly from FREEDOM OF THE PRESS. Many guarantee legal remedies for private injuries, a subject not generally within the powers granted to Congress. Some prescribe humane treatment of prisoners. In modern times some states have added

guarantees of workers' rights, environmental values, rights of privacy, and equal rights of men and women. Constitutional rights, in the sense of rights guaranteed by constitutions rather than other law, are by no means identical throughout the United States.

State constitutions have provided almost the only guarantees against the states' laws through most of the nation's history. The United States Constitution denied the states authority to enact BILLS OF ATTAINDER, EX POST FACTO LAWS, and laws impairing the obligation of contracts, but the first ten amendments that are commonly called the Bill of Rights were addressed only to the federal government. When a Maryland property owner in 1833 sought to invoke the just compensation clause of the Fifth Amendment against the City of Baltimore, Chief Justice JOHN MARSHALL wrote in BARRON V. BALTIMORE (1833) that adoption of these amendments "could never have occurred to any human being, as a mode of doing that which might be effected by the state itself"; Congress would not engage in "the extraordinary occupation of improving the constitutions of the several states, by affording the people additional protection from the exercise of power by their own governments, in matters which concerned themselves alone."

After the CIVIL WAR, Congress began a process of constitutional amendments that did afford new protections to people who were excluded from political power in their own states. The THIRTEENTH AMENDMENT ended slavery, and the FOURTEENTH AMENDMENT defined CITIZENSHIP and restrained states from denying their own residents as well as other persons national privileges and immunities, DUE PROCESS, or the EQUAL PROTECTION OF THE LAWS. Thereafter, the FIFTEENTH, Nineteenth, Twenty-Fourth, and TWENTY-SIXTH AMENDMENTS, respectively, forbade all states to deny voting rights to any citizen by reason of race or color, or sex, or failure to pay a tax, or to eighteen-year-old citizens. Except for this progressive expansion of the franchise, the Thirteenth and Fourteenth Amendments are the only federal constitutional provisions since 1789 to guarantee individual rights against the states.

With the turn of the twentieth century, the United States Supreme Court began to construe the Fourteenth Amendment's guarantee of "due process" so as to strike down substantive state regulations, first of property and economic activities, and later of activities involving speech, press, assembly, and religion that the FIRST AMENDMENT would protect against federal infringement. Theoretically, each state's bill of rights remained the primary and independent guarantee against oppressive action by that state, but state courts had provided little protection in interpreting and enforcing these guarantees. In the thirty years after 1935, claims to rights equivalent to those under the First Amendment and federal restraints on the criminal law process were increasingly pressed upon and accepted by the United States Supreme Court under the Fourteenth Amendment, until practically all provisions of the federal Bill of Rights were incorporated into "due process" under that amendment. (See INCORPORATION DOCTRINE.)

Because most state constitutions are easily amended, they often reflect the shifting popular concerns of an era as the United States Constitution does not. Although a federal EQUAL RIGHTS AMENDMENT proposed in 1972 failed to win ratification, similar texts were adopted by twelve states. Eight states incorporated guarantees of "privacy" into their bills of rights, creating new conundrums about the intended meaning and scope of that term. Some states sought to halt or reverse the ending of racial SEGREGATION by constitutional amendments, futile in the face of the Fourteenth Amendment, to forbid the operation of integrated public schools or the enactment of OPEN HOUSING LAWS. Some sought to stem the costs of social programs by new limits on taxes and spending.

State constitutions also were amended in reaction to judicial decisions under state bills of rights. The record of state constitutional amendments must be considered in any theory that would locate changing social values in the changeless terms of the Fourteenth Amendment.

State courts have a mixed record in enforcing their states' guarantees of liberty, equality, and fair procedures. Defendants' procedural rights in principle were well protected at trial, but not in police investigations and prearraignment procedures. About half the states followed the federal rule to exclude illegally seized evidence before the United States Supreme Court mandated exclusion under the Fourteenth Amendment. State courts gave some force to constitutional clauses concerning the SEPARATION OF CHURCH AND STATE but practically none to FREEDOM OF SPEECH or of the press, the latter often being threatened as much by orders of the courts themselves as by legislation. Much of the United States Supreme Court's case law after 1930 responded to state court failures to protect individual rights. With the growth of this case law, lawyers began to argue only under the developing federal jurisprudence, and state courts gave no independent application to their states' own guarantees, with one exception: They continued to strike down state regulations of business and property under notions of SUBSTANTIVE DUE PROCESS long after the Supreme Court disavowed this practice under the Fourteenth Amendment.

Since the 1970s, however, there has been a dramatic revival of state court decisions under state constitutions. Some of these were independent of any decision of the United States Supreme Court; many others turned to state constitutions in reaction to Supreme Court holdings or doctrines denying claims under the United States Consti-

tution. The revival was encouraged in a 1977 speech by Justice WILLIAM J. BRENNAN, himself a former member of the New Jersey Supreme Court. The theme was taken up by other Justices and state judges.

The result is a rapidly growing diversity of constitutional decisions among state and federal courts. The California court in SERRANO V. PRIEST (1977) and the New Jersey court in *Robinson v. Cahill* (1973) held that equal rights under their states' constitutions required equalization of financial support to public schools after the Supreme Court denied this claim under the Fourteenth Amendment in SAN ANTONIO SCHOOL DISTRICT V. RODRIGUEZ (1972). Similar holdings followed when the Supreme Court allowed the exclusion of abortion from state-paid medical services. After the United States Supreme Court limited rights of access to shopping centers in *Lloyd Corp., Ltd. v. Tanner* (1972), several state courts found such rights in their state constitutions, some on the far-reaching premise that their state's speech guarantees did not run only against government. State decisions have invalidated services to parochial school students that pass muster under the First Amendment. The Oregon Supreme Court in *Wheeler v. Green* (1979) forbade punitive damages for defamation, though the United States Supreme Court has indicated that they are permissible.

The most numerous and most controversial constitutional guarantees apply to criminal law. Their protection is not so generally valued by twentieth-century citizens as it was by those who gave them constitutional stature. State supreme courts have struck down the death penalty as cruel or unusual punishment and have departed from federal holdings on such issues as DOUBLE JEOPARDY, right to jury trial and to counsel for petty offenses, and SEARCHES INCIDENT TO ARREST. The response has included constitutional amendments by INITIATIVES to reinstate CAPITAL PUNISHMENT and to tie state provisions relating to police seizures to FOURTH AMENDMENT holdings of the United States Supreme Court.

Before the United States Supreme Court bound the states to most federal constitutional rights through the Fourteenth Amendment, courts had to decide only whether and how to apply each state's bill of rights. After the Supreme Court's incorporation doctrine decisions, most courts again applied only a single body of law, the federal case law. The revival of state constitutional guarantees raised problems inherent in the dual legal system of federalism that had long been forgotten. Some of these are procedural problems; others concern the substance of constitutional interpretation.

When state law, including state constitutional law, protects whatever right a person claims, it cannot logically be said that the state violates any federal guarantee that the person otherwise might invoke. Logical procedure, therefore, requires that the state's ordinary law and thereafter its constitutional law be determined before reaching any claim that the state falls short of federally mandated standards. This principle has been recognized by some state courts, for example Oregon's in *Sterling v. Cupp* (1981), Maine's in *State v. Cadman* (1984), and New Hampshire's in *State v. Ball* (1983). Other courts, however, apply their own state constitutions selectively when they perceive a reason to differ from federal doctrine or to insulate a decision from review by the United States Supreme Court, or they cite both federal and state constitutions for the same holding. These hybrid practices have been criticized as unprincipled because state constitutions are invoked only when necessary to diverge from less protective decisions of the United States Supreme Court, or because citation of both constitutions simultaneously prevents further review by the United States Supreme Court and discourages amendment of the state constitution. In 1983 the United States Supreme Court and some state courts called for "clear statements" whether the claimed right was grounded in the state or the federal constitution.

Many lawyers and judges routinely use contemporary Supreme Court pronouncements on federal constitutional law as benchmarks also for interpretation of state constitutions, particularly when similar texts are involved. But state courts need not regard these pronouncements as authoritative in state constitutional interpretation, whether or not the texts are the same. The fact that state and federal texts were adopted with the same intent or purpose does not make the federal interpretation presumptively correct; a difference in texts only makes this point easier to see. The principle is true both for results and for methodology; many state decisions do not follow the mid-century Supreme Court's formulas for analyzing and resolving constitutional issues, while others do so.

Responsible interpretation of state constitutions often presents problems unique to the state. Historical records are not readily available to lawyers; sometimes none were preserved. When old texts are repeated in successive constitutions, it is debatable which generation's understanding should matter. The uneven quality of opinions requires reliance on precedents to be selective yet not capricious. The ever present temptation held out to courts is to act as pragmatic policymakers in the guise of constitutional interpreters, without excessive scruple whether anyone placed the supposed principle of decision into the constitution, or whether the principle as stated can be given consistent application.

For many reasons constitutional law has long been equated with the decisions of the Supreme Court of the United States. The Court as an institution is the subject of extensive and continuing writings by social scientists and journalists as well as by legal scholars. Only its deci-

sions apply throughout the nation. The Court's nationalization of individual rights in mid-twentieth century, coinciding with the development of dominant national news media and with the emphasis of professional education on national materials, obscures the fact that the federal system makes the states responsible for large and important areas of law over which the Supreme Court has no jurisdiction unless a state administers this responsibility in a manner contrary to the United States Constitution or laws.

The late-twentieth-century revival of state constitutions has served to remind the general public as well as legal professionals of the essentials of the federal system. Its importance is not measured by the instances in which state courts have enforced individual rights beyond decisions of the United States Supreme Court. Many important functions, problems, and innovations of state constitutions do not concern individual rights. Moreover, citizens sometimes were quick to repeal constitutional guarantees of rights when these were enforced by their courts. State constitutions provide no security for dispensing with the national guarantees of the Fourteenth Amendment.

Even debates over repealing guaranteed rights, however, brought citizen responsibility for these rights close to home as no United States Supreme Court decision could do. Although citizens in some states amended their constitutions to revive capital punishment and relinquish protections against police abuses, similar proposals were defeated in other states.

Experience in the states, in the conduct of state government as well as in state court decisions of constitutional issues, continues to offer alternative models and concepts by which to test, and sometimes to gain, ideas for the nation. After two centuries, independent constitutional thought and action in the states remains an essential strength of federalism as well as a guarantee of individual freedom.

HANS A. LINDE
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Bibliography

ABRAHAMSON, SHIRLEY S. 1982 Reincarnation of State Courts. *Southwestern Law Journal* 36:951–974.

BRENNAN, WILLIAM J. 1977 State Constitutions and the Protection of Individual Rights. *Harvard Law Review* 90:459–504.

DOUGLAS, CHARLES G. 1978 State Judicial Activism—The New Role for State Bills of Rights. *Suffolk University Law Review* 12:1123–1150.

ELAZAR, DANIEL J. and SCHECHTER, STEPHEN L., eds. 1982 State Constitutional Design in Federal Systems. *Publius* 12:1–185.

LINDE, HANS A. 1984 E Pluribus—Constitutional Theory and State Courts. *Georgia Law Review* 18:165–200.

MCGRAW, BRADLEY D. 1984 *Developments in State Constitutional Law.* St. Paul, Minn.: West Publishing Co.

POLLOCK, STEWARD G. 1983 State Constitutions as Separate Sources of Fundamental Rights. *Rutgers Law Review* 35:705–722.

PORTER, STEWARD C. and TARR, G. ALAN, eds. 1982 *State Supreme Courts.* Westport, Conn.: Greenwood Press.

UTER, ROBERT F. 1984 Freedom and Diversity in a Federal System. *University of Puget Sound Law Review* 7:491–525.

## STATE CONSTITUTIONS

When the American colonies broke with the mother country, several traditions led to the drafting of constitutions for the newly independent states. Steeped in the writings of JOHN LOCKE, Americans might have viewed themselves as being in a kind of state of nature; writing state constitutions would therefore be the adoption of social compacts. British constitutionalism offered a precedent; although Britain had, of course, no written constitution, the colonists, during the years up to the American Revolution, had become accustomed to relying upon "liberty documents" such as MAGNA CARTA. Americans could look as well to the example of their COLONIAL CHARTERS, whose guarantee of the "privileges, franchises, and immunities" of Englishmen they had invoked against British policies on revenue and other subjects during the 1760s and 1770s.

In 1775, Massachusetts proposed that Congress draft a model constitution for all the states. Congress chose not to take this step. In May 1776, Virginia's convention, meeting in Williamsburg, instructed its delegates in Congress to introduce a resolution declaring the colonies to be free and independent states. The Virginia resolves viewed the drafting of state constitutions as best left to the several states.

The drafting of a constitution was, in 1776, a new art, but drafters did not want for advice. As early as November 1775, JOHN ADAMS had offered his ideas on a constitution for Virginia in a letter to RICHARD HENRY LEE; Adams's plan was of a distinctly democratic flavor. Others, like Carter Braxton, looked to the British constitution, in the form it took after the Glorious Revolution of 1688–1689, as the best model for Americans. THOMAS JEFFERSON, then in Philadelphia, thought that the people ought to have a say if a state constitution was to be written. As early as 1776, work on, and thinking about, state constitutions foretold the emergence of comparative CONSTITUTIONALISM.

Virginia's convention set to work on two documents: a "declaration of rights" and a "plan of government." GEORGE MASON of Fairfax County had a central role in the drafting of both documents. The VIRGINIA DECLARATION OF RIGHTS became especially influential. It served as a model for the bill of rights subsequently adopted in other states,

and it foreshadowed the BILL OF RIGHTS added to the United States Constitution in 1791. Indeed, French scholars have traced the influence of Mason's draft on their declaration of Rights of Man and Citizen, adopted in 1789.

In the 1770s the distinction between a constitution and ordinary laws was still imperfectly perceived. One thinks of a constitution as the ultimate act of the people, yet the first state constitutions were commonly drafted by revolutionary conventions or legislative assemblies and then enacted by the same bodies, without referendum. This pattern of enactment presented something of the paradox found in British notions of Magna Carta as a superstatute, yet, like other acts of the realm, subject to alteration or repeal by Parliament. Both Thomas Jefferson and JAMES MADISON argued that Virginia's 1776 convention had no authority to enact anything but ordinary legislation; by such reasoning, the 1776 constitution was only an ordinance. Jefferson called for a constitution resting "on a bottom which none will dispute."

It fell to Massachusetts to perfect the idea of a constitution based upon popular consent. In western Massachusetts, the Berkshire constitutionalists called for a "social Compact" so that there would be a clear distinction between FUNDAMENTAL LAW and the acts of the legislature. There must be, as an address from Pittsfield to the General Court put it, a foundation "from which the Legislature derives its authority." When the Commonwealth's leaders sought in 1779 to produce a constitution without full popular participation, western Massachusetts resisted. In 1780 a CONSTITUTIONAL CONVENTION was elected specifically to draft a constitution, which was then submitted to the voters for their approval. The political theory underlying the MASSACHUSETTS CONSTITUTION of 1780 is explicit in the document's declaration that it is "a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."

The early state constitutions varied in important particulars. For example, in some states, legislatures were to be bicameral, and in others, unicameral. Notwithstanding such variations, however, the early state constitutions reflected certain shared assumptions. There was common ground, not simply in the tenets of political theory but more immediately in Americans' political and social experience during the colonial period, a gestation period for what became the framework of American constitutionalism. The first state constitutions bespoke a belief in LIMITED GOVERNMENT, the consent of the governed, and frequent elections. They were based, by and large, on a Whig tradition emphasizing direct, active, continuing popular control over the legislature in particular and of government in general.

In these constitutions, professions of theory sometimes conflicted with reality. A commitment to the SEPARATION OF POWERS was common, yet the early state constitutions in fact made the legislature the dominant branch of government. State governors were, by contrast, virtual ciphers. Only in New York and Massachusetts was the governor elected by the people. In the other states, he was elected by the legislature, lacked the power of veto, and executed the laws with the advice of a council of state chosen by the legislature. Jefferson criticized Virginia's 1776 constitution for disregarding its own proclamation of the separation of powers: "All the powers of government, legislative and judicial, result to the legislative body. The concentrating of these in the same hands is precisely the definition of despotic government."

State courts at the outset had little power or stature. The principle of JUDICIAL REVIEW—the power of a court to declare a legislative act unconstitutional—was not spelled out in the first state constitutions (just as it was not made explicit in the United States Constitution). After 1776, state judges gradually began to declare the power of judicial review. In a famous OBITER DICTUM in COMMONWEALTH V. CATON (1782), GEORGE WYTHE declared that should the legislature "attempt to overleap the bounds, prescribed to them by the people," he would be obliged to point to the Virginia constitution and say that "here is the limit of your authority; and hither, shall you go, but no further."

The states' experience with their constitutions between 1776 and 1787 was an important proving ground for constitutional principles and structure. The idea of a bill of rights proved especially powerful. The same George Mason who drafted Virginia's Declaration of Rights saw the CONSTITUTIONAL CONVENTION OF 1787 defeat his call for a bill of rights in the proposed federal Constitution. He and his fellow Anti-federalists came so close to thwarting ratification of the constitution, however, that the Federalists undertook to add a bill of rights as soon as the new federal government came into being—a pledge James Madison redeemed in drafting proposed amendments in 1789.

As to the frames of government created by the first state constituions, draftsmen of national constitutions were able to point to the states' documents as models to be imitated or avoided. The members of France's National Assembly, debating in 1789 what that nation's new constitution should look like, found the American precedents relevant. One faction, led by J. J. Mounier, argued for a bicameral legislature and an executive veto. The other faction, led by the Abbé Sieyès, saw such devices as being impediments to the popular will. The latter group, which ultimately prevailed, depended on POPULAR SOVEREIGNTY for a constitution's enforcement—rather like the path taken by the drafters of the first American state constitutions.

The delegates at the Convention of 1787 in Philadel-

phia read the state experience quite differently. Concerned that there were too few fetters on state legislative majorities, James Madison and others at Philadelphia looked to institutional safeguards to protect the constitutional order. Thus, the Madisonian constitution, relying on such devices as the separation of powers and CHECKS AND BALANCES, stands in striking contrast to the Whig constitutions found in the states.

In the two centuries since the founding era, the federal Constitution has only occasionally been amended (sixteen times since 1791). Most of what the Framers of 1787 wrote endures. State constitutions, by contrast, have seen frequent amendment and, in many states, periodic overhaul. Indeed, the people of most states seem to have honored Jefferson's advice that each generation ought to examine and revise the constitution so that laws and institutions will "go hand in hand with the progress of the human mind."

The evolution of the states' constitutions has mirrored the great movements and controversies of American history. The early years of the nineteenth century saw the rise of JEFFERSONIANISM and JACKSONIANISM. Growth and migration of population brought rising pressures to rewrite state constitutions that, in the older states, tended to insulate the existing order from change: reform brought the progressive abolition of property qualifications for voting, representation in state legislatures became more nearly equalized, governors gained power and status, limits began to be placed on LEGISLATIVE POWER (to protect against abuses by members of that branch), and explicit provisions were made for the revision and amendment of constitutions.

The era of CIVIL WAR and RECONSTRUCTION brought another period of great activity in the writing and rewriting of state constitutions. Between 1860 and 1875, eighteen states adopted new or revised constitutions. Reconstruction resulted in constitutions obliging the former Confederate states to respect the rights of the newly freed slaves. After federal troops left the South, Bourbon democracy emerged and southern states rewrote their constitutions yet again. This time the thrust was to institutionalize Jim Crow and to achieve widespread disenfranchisement of blacks through the POLL TAX, discriminatory registration requirements, and other devices.

The proponents of populism and progressivism used state constitutions to battle what they saw as the excessive power of corporations and other economic interests. Drafters sought to bypass legislatures by writing detailed provisions regarding the regulation of railroads and corporations. Oklahoma's 1907 constitution concerned itself with enumerating who would be permitted to ride on railroad passes and with legislating the eight-hour day in public employment. Opinions on such state constitutions varied. WILLIAM HOWARD TAFT called Oklahoma's constitution a blend of "Bourbonism and despotism, flavored with socialism." William Jennings Bryan declared that Oklahoma had "the best constitution today of any state in this Union, and a better constitution than the Constitution of the United States." The resemblance of such constitutions to codes of law struck JAMES BRYCE, who concluded, "We find a great deal of matter which is in no distinctive sense constitutional law . . . matter which seems out of place in a constitution because [it is] fit to deal with in ordinary statutes."

Progressives pressed for forms of direct government—the initiative, the referendum, and recall, with Oregon leading the way. By the mid-1920s, nineteen states had adopted constitutional provisions providing for initiatives to enact legislation, fourteen states had provided for initiatives to approve constitutional amendments, twenty-one states had adopted the use of the referendum, and ten states had provided for recall measures.

As notions of the role of government expanded, including the delivery of services, some observers sought to recast state constitutions in a managerial mode. "Good government" groups sought to streamline state government. Emphasizing efficiency and rational administration, they argued that state constitutions should be revised to give more power to the government, make fewer offices elective (by way of the "short ballot," thus concentrating more power in the executive branch), and create a civil service. The paradigm of this kind of state charter is the National Municipal League's Model State Constitution (first drafted in 1921 and periodically updated).

Much of the mid-twentieth century was marked by a decline of interest in state constitutions. Several factors were at work. Too often state courts showed little interest in enforcing their own state charters. Moreover, state constitutional law tended to be eclipsed by the activism of the WARREN COURT. During those years of JUDICIAL ACTIVISM on the High Court, state judges could do little more than try to keep pace with advances in federal constitutional law. There seemed little time or opportunity for state courts to develop doctrine under state constitutions.

The passage of time brought a renaissance of interest in state constitutions. The BURGER COURT continued to plough new ground, but in some areas—notably in CRIMINAL JUSTICE opinions—a more conservative note was sounded. As the Supreme Court trimmed back earlier efforts to impose national standards on state criminal proceedings, litigants began to turn to state courts, asking them to use state constitutions to impose higher standards than those required by federal decisions.

After RONALD REAGAN became President in 1981, his efforts to cut back the role of the federal government was paralleled by the states' acceptance of enhanced respon-

sibility. Indeed, partly because of federal mandates (ONE PERSON, ONE VOTE, decisions of the courts, and the operation of the VOTING RIGHTS ACT OF 1965), the states were healthier entities, better able to function as the social and political "laboratories" proclaimed by Justice LOUIS D. BRANDEIS.

There is ample evidence of state courts' taking state constitutions seriously. Leading state judges—Oregon's Hans Linde and New Jersey's Stewart Pollock, for example—have called for more reliance by lawyers and judges on state constitutions. Even Supreme Court Justice WILLIAM J. BRENNAN, a leading architect of the Warren Court's activism, joined the chorus of those urging greater use of state constitutions.

One key to understanding the independent role that state constitutions play in shaping American constitutional law is to recognize that the state and federal documents are separate documents, each to be enforced in its own right, independently of the other. A state judge is of course obliged to enforce the United States Constitution, just as is a federal judge. But, while a state court cannot do less than the federal Constitution requires, the court is free to look to the state constitution for imperatives quite beyond anything found in federal constitutional law. If a state court decides that a state law or other action violates the state constitution, the ruling in itself raises no FEDERAL QUESTION and the Supreme Court will decline review of the case (citing the "adequate and independent state ground" doctrine).

The Supreme Court has explicitly recognized the terrain thus left to state courts. The Supreme Court of California held that its state constitution gave right of access, for purposes of expression, to a privately owned shopping center, even though the United States Supreme Court had previously held that the FIRST AMENDMENT conferred no such right. Upholding California's action, Justice WILLIAM H. REHNQUIST saw nothing in the federal Supreme Court's prior rulings that would limit the state's authority "to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution."

State courts have sometimes used constitutions where the United States Constitution has little or nothing to say about the issue at hand. In other instances, a state court will use the state charter in areas in which federal doctrine exists but there is room for additional state interpretation. Examples include the following:

1. Economic regulation. Since the so-called constitutional revolution of 1937, the Supreme Court has abdicated the earlier practice of using the Fourteenth Amendment due process clause to second-guess state social or economic legislation. State courts, however, often use state constitutions to review economic measures. For example, a state court might invalidate a law restricting entry into a given trade (such as hairdressing) where it is evident that the purpose of the law is not to protect the public interest but to give special advantages to a favored group.

2. Environment. The federal courts have refused to recognize a federal constitutional right to a decent environment. State constitutions, however, often have provisions protecting the environment. State courts may, for example, give force to a "public trust" in state resources such as rivers and wetlands.

3. Education. The Supreme Court has refused to use the Fourteenth Amendment to require that states equalize expenditures for wealthy and poor school districts. Education is, however, dealt with at length in state constitutions. Courts in some states have used various state constitutional grounds to require more-equal funding of schools throughout the state.

4. Criminal justice. Through the INCORPORATION DOCTRINE, the Supreme Court has applied most of the provisions of the Bill of Rights to the states. Thus, federal constitutional standards regarding police practices (such as POLICE INTERROGATION AND CONFESSIONS and SEARCH AND SEIZURE) and criminal trials (such as the RIGHT TO COUNSEL) bind the states, as they do the federal government. Even in this highly federalized area of constitutional law, state constitutions play a role. For example, courts in some states have read the state constitutional ban on UNREASONABLE SEARCH and seizure as forbidding police actions that might be upheld under the Supreme Court's FOURTH AMENDMENT decisions.

If one were to review these and other uses state courts make of state constitutions, it would be difficult to label such decisions as being, in sum, liberal or conservative. Those who may benefit from a state court's decision may be as diverse as business enterprises, criminal defendants, or environmentalists.

State court interpretation of state constitutions raise questions about judicial role. The familiar debate over the legitimate bounds of judicial review by the federal courts applies in somewhat altered form to the state courts' displacement of judgments made by state legislatures or by other political forums.

State judges, no less than their federal counterparts, should be aware of the way that judicial review, state and federal, triggers a tension between two principles. One is the principle that in a democracy decisions are made by agents ultimately accountable to the people. The other principle, embodied in judicial review, is that the commands of the Constitution should be enforced, even in the face of a legislative or popular majority.

At the federal level, there are some potential checks on

judicial power, for example, the President's power to fill vacancies on the bench or Congress's Article III power to alter the Supreme Court's APPELLATE JURISDICTION. Practice among the states offers more opportunities for popular discontent with judicial decisions to be manifested. In particular, it is far easier to amend state constitutions than to amend the federal Constitution. Voters have used the amendment process to curb state courts' ability to decide when there had been illegal search and seizure (California and Florida) and to overturn court decisions invalidating CAPITAL PUNISHMENT on state constitutional grounds (Massachusetts and California).

No function of a constitution, state or federal, is more important than its use in defining a people's aspirations and fundamental values. The federal Constitution is, however, more concerned on its face with structure and process than with substantive outcomes. State constitutions, in the American tradition, tell us more of a people's values. It is in their state constitutions that the people of a state have recorded their definitions of justice, their moral values, and their hopes for the common good. A state constitution, in short, defines a way of life. In so doing, these state charters derive from the tradition given in George Mason's precept (in Virginia's Declaration of Rights) that "no free government, nor blessings of liberty, can be preserved to any people" but by a "frequent recurrence to fundamental principles."

A. E. DICK HOWARD
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Bibliography


ADAMS, WILLI PAUL 1980 *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era.* Chapel Hill: University of North Carolina Press.

HOWARD, A. E. DICK 1976 State Courts and Constitutional Rights in the Day of the Burger Court. *Virginia Law Review* 62:873–944.

MCGRAW, BRADLEY D., ed. 1985 *Developments in State Constitutional Law: The Williamsburg Conference.* St. Paul, Minn.: West Publishing Co.

PETERSON, MERRILL D. 1966 *Democracy, Liberty, and Property: The State Constitutional Conventions of the 1820s.* Indianapolis: Bobbs-Merrill.

SYMPOSIUM 1985 The Emergence of State Constitutional Law. *Texas Law Review* 63:959–976.

——— 1987 New Developments in State Constitutional Law. *Publius: The Journal of Federalism* 17:1–179.

——— 1988 State Constitutions in a Federal System. *Annals of the American Academy of Political and Social Science* 496: 1–191.

WILLIAMS, ROBERT F. 1988 *Understanding State Constitutional Law: Cases and Commentaries.* Washington, D.C.: United States Advisory Commission on Intergovernmental Relations.


## STATE FREIGHT TAX CASE

See: *Philadelphia & Reading Railroad Co. v. Pennsylvania*

## STATE IMMUNITY FROM FEDERAL LAW

By the end of the 1980s, Congress enjoyed virtually plenary power to create and enforce regulations of state governmental activities. The Supreme Court had interpreted the COMMERCE CLAUSE power of Congress quite expansively; had rejected claims that FEDERALISM principles (sometimes loosely but inaccurately labeled "TENTH AMENDMENT principles") prevent Congress from imposing generally applicable regulations on states; and had rejected claims that ELEVENTH AMENDMENT principles prevent Congress from enforcing those regulations by authorizing private suits against noncomplying states in federal court. In the 1990s, however, one of the hallmarks of the Court's jurisprudence has been a renewed commitment to securing states SOVEREIGN IMMUNITY from the application and federal court enforcement of certain forms of congressional dictates.

In addition to reminding Congress in UNITED STATES V. LÓPEZ (1995) that its commerce clause power is not plenary, the Court began to reimpose some limits on the regulatory authority of Congress over state activity. In the mid-1980s, the Court had declared in GARCÍA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985) that the proper forum in which states should seek protection from direct regulation is Congress and not the courts. But in GREGORY V. ASHCROFT (1991), the Court altered the existing federal–state balance of power by employing a "clear statement rule" of STATUTORY INTERPRETATION. The Court announced that it would interpret federal statutes not to apply to traditional government functions unless Congress made its intent to do so "unmistakably clear." The next year, in NEW YORK V. UNITED STATES (1992), the Court held that while Congress may wield various sticks and carrots to encourage states to enact federally desired regulations, Congress may not simply "commandeer" states to enact regulations designed to accomplish national objectives. The Court then extended this anticommandeering rule in *Printz v. United States* (1997), holding that Congress may not conscript state executive officials to implement federal regulatory programs. In each of these three cases, the Court invoked the concept of "dual sovereignty" in justifying some limit on the authority of Congress to regulate the states directly, rather than merely to regulate persons and entities within the territorial boundaries of states.

Even where *García* still affords Congress regulatory authority over state activities as part of more generally applicable statutes, the Court has further protected the principle of state SOVEREIGNTY during the 1990s by refortifying the Eleventh Amendment. Ever since *Hans v. Louisiana* (1890) more than a century ago, the Court has interpreted the Eleventh Amendment to preclude federal courts from entertaining private suits that assert claims arising under federal law against unconsenting states. By the end of the 1980s, the Court had conceded that Congress retained the authority to override this erstwhile Eleventh Amendment immunity pursuant either to its power under the FOURTEENTH AMENDMENT, SECTION 5 to enforce the guarantees of that amendment, FITZPATRICK V. BITZER (1976), or its power to regulate INTERSTATE COMMERCE, *Pennsylvania v. Union Gas* (1989). In *Seminole Tribe v. Florida* (1996), however, the Court overruled *Union Gas* and held that Congress could not authorize private enforcement actions against states in federal court pursuant to its Article I grants of power. The Court felt that such a broad congressional authority was incompatible with the *Hans*-based tradition of state sovereign immunity. Thus, even when Congress may impose generally applicable regulatory burdens pursuant to its Article I powers on both state and private actors alike, Congress must rely primarily on state courts to vindicate private federal causes of action against the state. And while the Court did not disturb its previous conclusion in *Bitzer* that Congress may override state sovereign immunity pursuant to its section 5 power to enforce the FOURTEENTH AMENDMENT, the Court subsequently narrowed the substantive scope of this power in *Boerne (City of) v. Flores* (1997), thus circumscribing the *Bitzer* exception. To be sure, since EX PARTE YOUNG (1908) the Court has qualified the scope of the Eleventh Amendment by allowing private plaintiffs to seek prospective relief against state officials to rectify ongoing violations of federal law. The fiction here is that such suits are really against the officials rather than "the state." But in *Seminole Tribe* as well as *Idaho v. Coeur d'Alene Tribe* (1997), the Court somewhat narrowed this exception as well.

The Court's justifications for its recently renewed commitment to protecting state autonomy from some forms of direct congressional regulation and most forms of federal judicial enforcement have been criticized as excessively formalistic. Neither the regulatory nor JUDICIAL IMMUNITY doctrines are persuasively grounded in constitutional text; the regulatory immunity does not even purport to be text-based, and the Court has all but admitted that its broad interpretation of Eleventh Amendment immunity runs counter to the plain meaning of the words. The Court's various claims of support from historical intentions and understandings fare better by comparison, but are far from conclusive.

At bottom, the Court grounds both doctrines in what it calls the structural principle of "dual sovereignty" asserted to underlie our constitutional framework. This principle suggests that states and the federal government are coequal sovereigns, implying that each sovereign should be immune from regulation by the other. But this claim of coequal status ignores the competing constitutional principle of federal supremacy. Neither principle can be considered in isolation: as Chief Justice JOHN MARSHALL put it long ago, states are "members of one great empire— for some purposes sovereign, for some purposes subordinate." And as the *García* Court more recently conceded, "to say that the Constitution assumes the continued role of the States is to say little about the nature of that role." Thus the Court's recent formalist efforts to derive its regulatory and judicial immunity doctrines from the principle of dual sovereignty obscure various normative judgments that necessarily guide its decisions. And yet the Court has failed to provide a careful discussion of the various federalism values either served or disserved by its immunity doctrines.

These doctrines might plausibly be viewed as second-best methods of policing the general boundaries of the Article I regulatory authority of Congress. The Court has lamented the tremendous post–NEW DEAL expansion of the power of Congress to regulate interstate commerce, but has simultaneously found it difficult to limit this power through defensible doctrinal lines. The immunity doctrines, while not directly tailored to the concerns about congressional omnicompetence, at least provide readily enforceable mediating principles that constrain Congress to some degree and proclaim a resounding symbolic victory for state sovereignty.

EVAN H. CAMINKER
(2000)

(SEE ALSO: *Constitutional History, 1989–1998; Dual Federalism.*)

Bibliography

CAMINKER, EVAN H. 1995 State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law? *Columbia Law Review* 95:1001–1089.

——— 1997 *Printz*, State Sovereignty, and the Limits of Formalism. *Supreme Court Review* 1997:199–248.

JACKSON, VICKI C. 1988 The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity. *Yale Law Journal* 88:1–126.

MELTZER, DANIEL J. 1996 The *Seminole* Decision and State Sovereign Immunity. *Supreme Court Review* 1996:1–65.

POWELL, H. JEFFERSON 1993 The Oldest Question of Constitutional Law. *Virginia Law Review* 79:633–689.

PRAKASH, SAIKRISHNA B. 1993 Field Office Federalism. *Virginia Law Review* 79:1957–2037.
VÁSQUEZ, CARLOS MANUEL 1997 What Is Eleventh Amendment Immunity? *Yale Law Journal* 106:1683–1806.

## STATE OF . . .

See entry under name of state

## STATE OF EMERGENCY

See: Emergency Powers

## STATE OF WAR

The existence of a "state of war" for various purposes of domestic and international law is not generally controlled by the existence or absence of a congressional DECLARATION OF WAR. The federal courts, including the Supreme Court, have often held that hostilities, not accompanied by any formal declaration of war (as has been the case in all but five of the approximately 160 occasions in which American armed forces have been committed to combat), were "war" and, conversely, that "peace" existed despite the fact that war had been declared and not terminated by a peace treaty or legislative action. Sometimes the same hostilities have been treated as "war" for one purpose and "peace" for another. Examples can describe the judicial approach better than generalities.

The undeclared naval combat with France in 1798–1799 was treated as war for the purpose of a statute rewarding those who recaptured American vessels "from the enemy" (*Bas v. Tingy*, 1800) but (many years later) as peace under the Franco American treaty of 1778 (*Gray v. United States*, 1884). The CIVIL WAR, though of course never declared by Congress, created a state of war under international law, so that neutral vessels running the Union blockade of Confederate ports could lawfully be captured and sold as prizes. (See PRIZE CASES.) American forces sent to China to help suppress the Boxer Uprising of 1900 were engaged in war under Article of War 58, which permitted courts-martial to try charges of murder only "in time of war" (*Hamilton v. McClaughry*, 1905). But although on June 10, 1949, a declared war still existed between the United States and Germany and Japan, the Supreme Court held that, since there were no hostilities, that date was "time of peace" under a similar Article of War (*Lee v. Madigan*, 1959; the decision effectively overruled *Kahn v. Anderson*, 1921). The COURT OF MILITARY APPEALS and at least one civilian court held that the Korean and Vietnam conflicts, though not declared wars, were nonetheless "war" under provisions of the Uniform Code of Military Justice, which suspended the statute of limitations and increased penalties for certain military offenses in wartime (*Broussard v. Patton*, 1972; *United States v. Bancroft*, 1953; *United States v. Anderson*, 1968). But the Court of Military Appeals and the COURT OF CLAIMS also held that only a declared war could trigger a provision of the Code which gives courts-martial JURISDICTION "in time of war [over] persons serving with or accompanying an armed force in the field." The principle that emerges from examination of these and many similar cases is that the existence of a "state of war" depends principally on the amount of violence, unless a holding that "war" existed would raise serious constitutional questions, as by giving courts-martial jurisdiction over civilians.

The question can, of course, be of profound importance, for war is chief among the great emergencies that may be held to justify actions of the executive and the legislature which would in normal times be plainly unconstitutional. The most extreme example is the Supreme Court's refusal to strike down the 1942 exclusion of American citizens of Japanese descent from the West Coast and their confinement in "relocation centers," under an EXECUTIVE ORDER of President FRANKLIN D. ROOSEVELT, which had been ratified by an act of Congress. (See Executive Order 9066; JAPANESE AMERICAN CASES.) As a general proposition it may be said that the Supreme Court's unwillingness to hold unconstitutional the actions of the President and Congress in such emergencies varies in inverse ratio to the size of the emergency and the decision's chronological closeness to it. It has been the practice of the Court to scrutinize emergency measures much more closely and to give the executive and legislature much less leeway if the case reaches the Court after the war is over. (See EX PARTE MILLIGAN; DUNCAN V. KAHANAMOKU.)

JOSEPH W. BISHOP, JR.
(1986)

Bibliography

BISHOP, JOSEPH W., JR. 1974 *Justice under Fire: A Study of Military Law*. Pages 178–180, 192–201. New York: Charterhouse.
RATNER, LEONARD G. 1971 The Coordinated Warmaking Power—Legislative, Executive and Judicial Roles. *Southern California Law Review* 44:461–489.

## STATE POLICE POWER

The POLICE POWER of the STATES is one of the most important concepts in American constitutional history; yet, like PRIVACY or FREEDOM OF CONTRACT, its historic significance

derives from usage and application, not from the language of the Constitution itself. Nowhere in the Constitution does the term appear.

In his *Commentaries on the Laws of England* (1769) WILLIAM BLACKSTONE provided a definition of public police as "the due regulation and domestic order of the kingdom, whereby the inhabitants of the State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." Some of the early American treatises quoted this definition, but in fact it serves badly as a guide to constitutional doctrine and governmental realities in the United States in the 1790s or the early nineteenth century. Nor was the Supreme Court much more effective in providing guidance as to the substance and limits of the police power. Chief Justice JOHN MARSHALL verged perilously near outright tautology in GIBBONS V. ODGEN (1824), when he referred to the police power of the states as "that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general [national] government," and as the "acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens." Left entirely open, of course, was the matter of what indeed had not been "surrendered" in the way of state powers as well as the matter of what was "acknowledged" as a legitimate part of residual state SOVEREIGNTY in light of the Constitution. The Court itself, clearly, would acknowledge positive powers and define the terms of "surrender." As late as 1847, in his opinion in the LICENSE CASES, Chief Justice ROGER B. TANEY was referring to the state police power in terms that hardly improved upon Marshall's, so far as specificity was concerned, but that at least had a more positive (if not to say sweeping) rhetorical thrust: that power was, Taney declared, "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions." Not until the post-CIVIL WAR years, when FOURTEENTH AMENDMENT litigation paraded state regulatory laws before the Supreme Court for review, did the Court begin to grapple more tellingly with the problem of definition. Even in contemporary times, however, fitting the police power into the constellation of constitutional ideas has remained one of the Court's most perplexing concerns. There was as much critical acumen as despair in Justice WILLIAM O. DOUGLAS's plaint, in *Berman v. Parker* (1954), that "an attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts." In the last analysis, Douglas contended, "the definition is essentially the product of legislative determinations. . . ."

The Marshall and Taney approach to definition of the police power was sufficient, in a sense, because it sought only to place some sort of label on the powers that remained with the states once the Court had determined the legitimate reach of the CONTRACT CLAUSE and of the COMMERCE CLAUSE; the police power was what the states had left when such determinations had been made. From the standpoint of state lawmakers, however, the approach of the two great Chief Justices was not at all sufficient. First, it did not make even the most basic conceptual distinctions among the fundamental types of governmental power; and so defining the police power as coextensive with sovereignty meant that police subsumed the powers of taxation and EMINENT DOMAIN. Second, the Marshall-Taney approach did not come to grips with power and its legitimate reach in a positive sense. What were the sources of state authority in its exercise of sovereign power? On what basis could a state court, for example, weigh the legitimacy of a regulatory law (even if clearly not beyond the bounds set by federal contract clause and commerce clause rules) against state constitutional limitations such as those prohibiting TAKINGS without JUST COMPENSATION?

It fell to one of the nation's greatest state judges, Chief Justice LEMUEL SHAW of Massachusetts, to produce a doctrinal exposition on the police power that would establish the framework for subsequent adjudication and debate. Shaw's formulation was set forth in *Commonwealth v. Alger* (1851), in which the Massachusetts high court upheld as a proper exercise of "the police power" (so explicitly called) a statute that forbade construction of any wharf in specified areas of Boston harbor. Shaw's great achievement was twofold. He broke out of the *cul de sac* to which Marshall and Taney had driven, addressing the legitimacy of the police power in terms liberated from boundaries set by commerce and contract clause doctrine; and he offered a jurisprudential foundation for positive governmental action.

Shaw conceded at the outset that the police power challenged head-on any efforts to tame it and bring it within bounds. Yet, while it was "not easy to mark its boundaries, or prescribe limits to its exercise," the police power must be acknowledged as superior in some reasoned way to private rights and claims. It was so, Shaw contended, as "a settled principle, growing out of the nature of well-ordered civil society." And so he turned to the task of giving substance to what the Supreme Court had lately termed "the police power belonging to the states, in virtue of their general sovereignty" (Justice JOSEPH STORY in PRIGG V. PENNSYLVANIA, 1842). One of the foundations of that power was the COMMON LAW rule *sic utere tuo ut alienum non laedas* (use your own property in such manner as not to injure that of another). Historically, the rule had been invoked to justify private nuisance and PUBLIC NUISANCE actions alike; in either way, however, it had been used in essentially defensive modes. Shaw linked the *sic utere* con-

cept with a positive obligation of government to impose a system of reasonable restraints on private property uses. "Rights of property," he contended, are properly subject "to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient." As Leonard W. Levy, the biographer of Shaw, has shown, Shaw thus advanced doctrine well beyond the old common law framework; although Shaw held out the possibility of judicial overturning of laws that were not "reasonable" and violated private VESTED RIGHTS, he stressed the propriety of the legislature's acting when necessary and expedient to impose restraints for the public good.

But Shaw also undertook to define a related, yet in some measure conceptually distinct, foundation for the police power: the concept of "rights of the public." Thus Shaw insisted on the "expediency and necessity of defining and securing the rights of the public," and elsewhere on "the acknowledged public right." Even acts not necessarily punishable by common law might properly be declared illegal by regulatory legislation, Shaw wrote, "for the sake of having a definitive, known and authoritative rule which all can understand and obey." Thus, from the Shaw court in 1851, American police power doctrine emerged in its essentials. As in an earlier decision in 1837 (*Commonwealth v. Blackington*), Shaw asserted the legislature's power to act for the public good to be "the general rule," whereas restraint of the legislature should be the "specific exception."

The next step in elaboration of police power doctrine was the specification of positive purposes, more detailed than the public good or "rights of the public" broadly stated, for which the power would justify regulatory legislation. Early efforts at specification along these lines, before Shaw reformulated the whole issue, had tended simply to codify the common law categories of behavior and property uses constituting nuisance. (Such, for example, is what one finds in Chancellor JAMES KENT's *Commentaries*.) Here again, the arsenal of the common law held an instrument potentially powerful—the principle *salus populi suprema lex* (the welfare of the people is the supreme law), which in the seventeenth and eighteenth centuries in England had often been invoked to assert the plenary powers of Parliament restricted only by accumulated constitutional liberties. In an influential Vermont decision, handed down three years after Shaw's great effort, Chief Justice Isaac Redfield declared that "the general comfort, health, and prosperity of the State" warranted state regulatory powers on the same basis of power as "resides in the British parliament, except where they are restrained by written constitutions" (*Thorpe v. Rutland Railroad*, 1855).

In some other state courts, judges proved reluctant to endorse wholly such broad definitions of legitimate intervention; yet even these more conservative jurists, while looking for principles on which to support JUDICIAL REVIEW, contributed to specification of the bases of positive authority. Thus one of the Michigan judges in *People v. Jackson & Co.* (1861) contended that powers "which can only be justified on [the] specific ground" of the police power or general legislative power must be "clearly necessary to the safety, comfort and well being of society." This line of reasoning was reflected in the 1877 decision of the Supreme Court in BOSTON BEER CO. V. MASSACHUSETTS, in which Justice JOSEPH P. BRADLEY stated for the Court that a PROHIBITION statute against sale of alcoholic beverages did not violate the rights of a brewery company, for clearly such legislation was warranted under the police power: "However difficult it may be to render a satisfactory definition of it," Bradley wrote, "there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals."

Two other doctrinal arguments found their way into antebellum state jurisprudence on the police power. The first, which was rooted in the notion that the power was part of the residuary sovereignty and of legislative authority comparable to that of Parliament, was that the police power was inalienable. That is, states could not bargain away their power—and obligation—to look after the public interest. (See INALIENABLE POLICE POWER.) The second, a pragmatic strain that would doubtless frighten those who believed that vested rights in property deserved more rigid protection, was the view that the police power needed to be consonant with the changing character and needs of the society. This latter, expansive view of the police power found vivid expression in decisions of the 1850s upholding new regulations which permitted railroads to use the public streets to gain access to urban centers. How the imperatives of material progress inspired this expansive doctrine was illustrated in the language of an Illinois decision in 1859 (*Moses v. Railroad*) declaring that to deny a railroad the use of public streets, "no matter how much the general good may require it, simply because streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present age."

Although the antebellum state courts had provided them with a doctrinal foundation for expanded regulatory initiatives, the state legislatures in fact were slow to extend the range or increase the intensity of regulation. Still, grist for judicial mills was provided by laws that were challenged in the long-established areas of state intervention—that is, in such matters as the regulation of streams to protect navigation and fisheries, marketing regulations

and standards, laws requiring the fencing-in of livestock, rudimentary safety legislation (especially against fire dangers), and the control of operations on public works such as bridges, highways, and canals. In the late 1840s and the 1850s, police-power measures proliferated as both the regulation of railroad operations and prohibition of alcoholic beverages became common. Astute lawyers were quick to resist expansive claims for the police power, especially when they limited the freedom that powerful economic interests enjoyed in the use of their property. Prior to 1833, challenges to the police power were often based on the Fifth Amendment as well as on comparable provisions of the state constitutions; but the decision of BARRON V. BALTIMORE cut off that line of defense for propertied interests. Still, lawyers continued to rely on the DUE PROCESS provisions of state constitutions; and they contended regularly that regulations took away the value of private property without just compensation—in other words, that the regulations effectively were "takings" and amounted to INVERSE CONDEMNATION. Despite the doctrinal contribution of Chief Justice Shaw and others in the 1850s, moreover, lawyers resorted commonly to the view that only uses of property that were actionable under the common law (as noxious uses, nuisances, or trespasses) could be reached by state regulations. In few cases did courts respond favorably to such arguments. Still, the intellectual and to some degree political groundwork was thereby laid for future attacks on the police power.

Adoption of the Fourteenth Amendment gave new impetus and hope to defenders of private property, who presented arguments in the courts that the PRIVILEGES AND IMMUNITIES clause and the due process clause alike afforded new protections against interventions under the police power. Simultaneously with adoption of the amendment, in 1868, came publication of THOMAS M. COOLEY's treatise, *Constitutional Limitations*, in its first edition. Of basic importance to Cooley's view of the limitations that ought to confine the power of state legislatures was his premise that the "due bounds of legislative power" were not set alone by "express constitutional provisions." The implied limitations that he believed ought to apply all hinged on a generalized "due process" concept. Due process, he contended, forbade enactment of what he termed "class legislation" (laws imposing burdens or granting privileges to specific groups or interests that were arbitrarily singled out instead of being "reasonably" classified). Moreover, his generous definition of due process would forbid laws that were "arbitrary and unusual [in] nature," and as such "unknown to the law of the land." The champions of laissez-faire, if given reason for optimism by the Fourteenth Amendment and the views in Cooley's treatise, were provided with a source of unbounded joy by publication in 1886 of CHRISTOPHER G. TIEDEMAN's *Limitations of the Police Power in the United States*. Tiedeman's great contribution was his attempt to turn the clock back altogether, to negate the principal contribution the Shaw Court had made in *Alger*, by resurrecting wholesale the doctrine that the old common law limits also constituted the proper limits of the positive police power. In effect, Tiedeman attempted to fuse the concept of due process, in the Constitution, with the traditional common law limits of *sic utere*. By the late 1870s, the Supreme Court itself had become divided on the crucial question: how far could state regulation go in limiting the actions of private persons and corporations in the marketplace?

The subsequent battle was not confined to the courts; it extended to the legislatures and the political hustings. Indeed, the question of regulatory power was at the very vortex of the storm in both national and state politics for three-quarters of a century. Three issues were involved in the debates. The first was whether specific types of regulatory actions by government abridged, unconstitutionally, what came to be called FREEDOM OF CONTRACT. The second was whether the courts or, instead, the legislatures were supreme in determining whether specific regulations were constitutionally permissible. Finally, there was the issue of what standards the courts should apply generally—if indeed the judicial branch had the power to review specific regulatory measures—to distinguish constitutional measures from those that were unconstitutional. All these issues centered on the rights of property.

Supreme Court doctrine continued to echo pre-Civil War formulations, even expanding them (rhetorically, at least) at the height of conservative, property-minded influence on the Court. Thus in *Barbier v. Connolly* (1884) Justice STEPHEN J. FIELD declared that neither the Fourteenth Amendment nor any other "was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and to add to its wealth and prosperity." Going as far, but in terms perhaps even more open-ended and expansive, Justice JOHN MARSHALL HARLAN asserted in *Chicago, Burlington & Quincy Railway v. Commissioners* (1906) that the legitimate police power of the state "embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety." Despite such assertions of legitimacy for regulatory power, virtually every new or proposed regulation threatening to impose costs or restraints on private interests met with resistance in the state legislatures and the courts. Regulation varied in scope and effectiveness, from one state to another. The latitude and potential for diversity within the legal system

offered by FEDERALISM was never more apparent. Nonetheless, the emergent industrial order, the rapid growth of population and absorption of millions of immigrants, urbanization, and the social dislocations that attended the acceleration of technological change and the growth of large-scale firms with enormous leverage over their employees and markets all served to focus political and legislative attention on expansion of the states' regulatory activities. Soon the courts were crowded with cases challenging regulative innovations.

The threshold question, of course, was whether legislative discretion should be permitted or whether the courts should impose constitutional standards that went to questions of substance such as "reasonableness." Before the Civil War, "due process" had been understood as referring to procedural requirements (right to a FAIR HEARING, specification of procedural steps and forms, NOTICE, and the like). In the 1870s, counsel in both the SLAUGHTERHOUSE CASES of 1873 and *Munn v. Illinois* and the other GRANGER CASES of 1877 argued that state regulatory legislation should be overturned on grounds of "due process" deprivation now defined as deprivation of substantive rights in violation of the Fourteenth Amendment. However, the right to regulate private interests, the Court declared in *Munn,* is one "which may be abused," to be sure; but "for protection against abuses by legislatures the people must resort to the polls, not to the courts."

Within a short time, though, the Court reversed itself and began to review state legislation under the police power with a view toward deciding whether "abuse" had occurred. Expansion of the concepts of SUBSTANTIVE DUE PROCESS and freedom of contract, in the hands of a Court whose personnel and social philosophy had changed radically by the 1890s, brought the Court into the business of acting regularly as censor of legislation on substantive grounds. Despite the continued ascendancy in national politics of Republican and conservative-Democratic regimes that resisted pressures for sweeping social-reform legislation, still a flood of new state legislation came forth in such areas as municipal public health, franchise law affecting public utilities, factory and mining safety, maximum hours, child labor, building codes, and railroad safety and operating practices. Neither the state courts nor the Supreme Court lacked for opportunities to play the role of censor and apply the new substantive due process reading of the Fourteenth Amendment.

Thus the courts turned to the last of the great questions regarding constitutional definition of the police power and its limits in the post-Civil War era: the question of standards or formulae for determining constitutionality. One of those standards emerged early in the period—ironically, in *Munn v. Illinois*, in which the new Fourteenth Amendment claims were decisively rejected by the Court. In deciding the case, however, the Court set forth the new principle of AFFECTATION WITH A PUBLIC INTEREST, asserting that warehouses and railroad companies were subject to regulation because they were virtual monopolies. They were comparable to bridges and ferries, long held by the common law to be a special category of business dedicated to service to the public, standing athwart essential lines of commerce and travel. Citizens were compelled, in effect, to resort to them; hence they were classified by the Court as being in the regulable category. The "affectation" doctrine was a Trojan horse. If there was a line to be drawn between businesses regulable because of their essential character—that is, because the public was compelled to use them for vital activities—then on the other side of that line were types of business immune from regulation. Such was the logic of *Munn.* In later years, the Court struck down a great variety of state regulatory laws on the grounds they were aimed at businesses not affected with a public interest. Indeed, not until 1934 in NEBBIA V. NEW YORK did the Court finally abandon the affectation distinction, ruling that a state could properly regulate any economic interest. "It is clear," the Court declared, "that there is no closed class or category of businesses affected with a public interest."

"Freedom of contract" similarly served as a standard for the Court to strike down regulatory legislation. Thus in LOCHNER V. NEW YORK (1905) and ADKINS V. CHILDREN'S HOSPITAL (1923), as well as in other decisions, the Court invalidated various state laws that regulated the terms of industrial employment. Like the "affectation" standard, however, the freedom of contract formulation as a restriction on the police power was destined to be discarded in the course of the New Deal period of the Court's history.

Other limitations on state exercise of the police power proved to be more enduring. They are, in part, the limitations rooted in the older, antebellum concept of due process as a procedural concept, reinforced by the terms of the EQUAL PROTECTION clause of the Fourteenth Amendment. Not only the Supreme Court but also the state courts—both in periods when many courts were inclined to invalidate social-reform legislation on the grounds of freedom of contract and in periods when they were more inclined to be deferential to legislatures—have contributed to the formulation of continuing restraints on the police power. Thoroughly accepted in American constitutional law, in recent decades, is Justice OLIVER WENDELL HOLMES's warning, in *Noble State Bank v. Haskell* (1911), that regulatory legislation by its definition will "more or less limit the liberty of the individual or . . . diminish property to a certain extent"—but government would be paralyzed if such limitations should regularly fall afoul of constitutional objections. Yet Holmes himself conceded in his opinion in the controversial case of *Pennsylvania Coal*

*Company v. Mahon* (1922) when the Court invalidated a Pennsylvania law curbing mining companies' property rights in an effort to save urban structures from collapsing, that there must be some definable "limits" to the police power: "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Thus a line must be drawn between the police power, which permits diminution of property or liberty, and the power of eminent domain, which authorizes a taking only for a public purpose and on payment of adequate compensation.

To this specific consideration of when regulation encroaches on the realm of eminent domain taking, the Supreme Court and state courts have welded the more traditional procedural concerns. Exemplary of the latter was the doctrine of the Tennessee high court in *Vanzant v. Waddel* (1829) to the effect that to be valid a regulation must be "a general public law, equally binding upon every member of the community . . . under similar circumstances." Chief Justice Shaw of Massachusetts elaborated the theme in decisions upholding forfeiture of property deemed unwholesome or a PUBLIC NUISANCE, but requiring TRIAL BY JURY and judicial process. So long as the legislature established a precise statutory rule, applied it evenhandedly, and provided traditional procedural safeguards, the Shaw court would uphold police power regulation. Later, from the Supreme Court opinion in MUGLER V. KANSAS (1887), came the formulation that to be valid a police power regulation must have a "real or substantial relation" to public health, morals, safety, and welfare; and in 1936 (*Treigle v. Homestead Association*) the Court also declared that a regulation must be enacted "for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end." These considerations of due process, too, have survived even though the restraining concepts to which they were once wedded—the "affectation" idea, and substantive due process concepts such as judicial determination of reasonableness—have largely been stripped from them.

In recent times, and particularly since the expansion of the positive state in the New Deal era, constitutional challenges to the police power have come to a focus on the question of how much administrative discretion ought to be allowed to state regulatory agencies. Agricultural marketing commissions, fish and game control agencies, mining-safety authorities, factory inspection boards, fire- and building-code enforcement agencies, air and water pollution control boards, and other regulatory agencies of government have been held to standards of administrative due process. Their substantive powers of regulation, however, have been generally upheld broadly by state and federal courts.

Emblematic of modern police power issues in the law is the history of land-use ZONING. Even prior to the decision in 1926 of EUCLID V. AMBLER REALTY, in which the Supreme Court upheld zoning that excluded industrial use, several of the states' appellate courts had validated such legislation. In each instance, they rejected claims that property owners had suffered from an effective "taking," hence ought to be compensated. As the Supreme Court itself noted in *Euclid*, such regulations a half century earlier "probably would have been rejected as arbitrary and oppressive"; now they were found necessary and valid because they were consonant with the magnitude of emergent industrial and urban problems. As the California Supreme Court declared in *Miller v. Board of Public Works* (1925), widely cited in other cases involving expansion of administrative discretion: "The police power, as such, is not confined within the narrow circumspection of precedents, resting upon past conditions which do not cover and control present-day conditions. . . . [It] is elastic and, in keeping with the growth of knowledge and the belief in the popular mind in the need for its application, capable of expansion. . . ."

The presumption of constitutionality against claims based on due process was explicitly stated in opinions of the Supreme Court again in the 1930s, echoing the majority's views in *Munn*. In *Nebbia*, for example, the Court not only laid to rest "affectation with a public interest" as a limitation on the police power; it also held that a regulation should be accorded "every possible presumption . . . in favor of its validity . . . unless palpably in excess of legislative power." When the Court upheld a statute regulating prices charged by employment agencies, in OLSEN V. NEBRASKA (1941), it couched its holding in terms that made its new posture unmistakable: "We are not concerned," wrote Justice William O. Douglas, "with the wisdom, need, or appropriateness of the legislation. . . . There is no necessity for the state to demonstrate before us that evils persist." In FERGUSON V. SKRUPA (1963) the Court refused to strike down a state law that prohibited anyone from engaging in the business of debt-adjusting except as incidental to the practice of law. Justice HUGO L. BLACK, writing for the Court, acknowledged that good arguments doubtless could be made for the social utility of the activity thus restricted. But he concluded that though the regulation might be "wise or unwise," this substantive issue was not the Court's concern; it belonged to the state legislature. In *Agins v. Tiburon* (1980) a municipal zoning ordinance severely limited development of open-space lands; the Court again upheld a sweeping use of the police power and turned away due process arguments against the ordinance. So long as even a greatly reduced use of the land was permitted, the Court ruled, claims that "justice and fairness" had been denied would not be upheld. Although the Court still imposed commerce power limitations on

the states' regulatory activities, by the 1980s it seemed that the presumption of constitutionality against due process, contract clause, and inverse condemnation claims was firmly entrenched.

A decision ostensibly on a narrow technical point yet vitally important for expansion of discretionary power's real-life effectiveness was *Morrissette v. United States* (1951). In this decision the Court reaffirmed state court rulings dating back to pre-Civil War years that when criminal penalties are used to enforce police power regulations regarding "public health, safety and welfare," the state is not constitutionally required to prove criminal intent, as in ordinary criminal cases.

In response to the emergence of the modern state police power, there has been abundant scholarly debate and legal controversy regarding its impact on private economic rights. Some have welcomed the enlarged regulatory power and administrative discretion, declaring them to be indispensable in the complex world of modern economic and social change. These same features of the modern police power have been condemned heatedly by others, however, as unfair in their application. That eminent domain takings, which do require compensation, and actions under the police power, which do not, are on a continuous spectrum of state power has long been recognized. Numerous scholarly formulations have been offered to distinguish the two powers. The classic distinction was given in ERNST FREUND's great treatise, *The Police Power: Public Policy and Constitutional Rights*, published in 1904. Freund contended that "the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful." Modern critics of the expanded police power and the positive state deplore restrictions upon uses of property that impose costs upon a private owner in order to benefit the public, rather than to prevent harm to the public; thus, the person prevented from building on his or her land where it stands in the flight path of an airport's runway is said by these critics to be harmed unfairly, forced in effect to bear alone the cost of a public benefit.

There are some, indeed, who take a hard-line position on the police power by arguing that virtually all restraints—but certainly those that deprive private property owners of what previously had been "reasonable expectations" of use and profit from regulated property—ought to be accompanied by reasonable compensation. Only the narrowest sort of regulation, based on common law nuisance and *sic utere* doctrine, would be exempt as these property-minded conservatives formulate their theory. The possibility that paralysis of the regulatory process might be caused by the sheer volume of government compensation payments required by this theory is a source of satisfaction rather than dismay to the most doctrinaire proponents of this view. Posed against it, and in favor of a definition of police power broad in its terms and consonant with recent decisions, is a theory that when government undertakes the role of "enterpriser" (creating parks, building highways, sponsoring urban renewal projects) it ought to compensate owners whose property is taken or damaged; but in its role as "arbiter" of contending social interests, as Joseph Sax has written, its actions for regulation of private uses of property should require no compensation. Other commentators, taking a middle position, urge that courts should give fresh recognition to considerations of "fairness" in these matters—for example, guarding against the possibility of a property owner's becoming the victim of more or less systematic deprivation, and also distinguishing degrees of harm and damage to the private owners affected by a STATE ACTION. These commentators also urge that administrators and legislators should be aware of "demoralization costs" when no effort is made to ameliorate the suffering of those hit hardest by regulatory activities.

The conflict between claims of the public under the police power and the claims of private property thus constitutes one major area of constitutional adjudication and current debate. Another area, no less turbulent and controversial, is the conflict between the police power and personal freedoms. Virtually all confrontations between persons and the state on matters of SEPARATION OF CHURCH AND STATE, or discrimination based on sex or religion or race are confrontations involving the police power. The whole corpus of constitutional doctrine based on the BILL OF RIGHTS and on the Fourteenth Amendment, in this area, together with such federal statutes as the various CIVIL RIGHTS acts, serve as a comprehensive set of limitations upon exercise of the state police power. The states remain free, however, to impose a higher standard in regard to constitutional liberties than is required by prevailing Supreme Court doctrine based on the federal Constitution.

As the uses of the federal regulatory powers have expanded, especially since 1933, there has been increasing need for the courts to examine the question of PREEMPTION—that is, the supersession of state laws when federal regulation has occupied a given policy area. In cases such as PARKER V. BROWN in 1943, and *Florida Avocado Growers v. Paul* twenty years later, the Supreme Court has upheld state marketing regulations affecting agricultural products even though both federal antitrust regulation and federal farm policies presented serious preemption questions. In the fields of labor law and transportation regulation, however, the Court has been more inclined to curb the scope of state activity in fields regulated by federal statutes and administrative regulations. Since the mid-1960s, a wave of consumer-oriented, industrial safety, and environmental legislation enacted by Congress has brought national

power into regulatory areas previously occupied largely by state law. These initiatives have occasioned considerable litigation centering on preemption and congressional intent. In a few instances, the new federal statutes specifically authorize imposition of higher regulatory standards by individual states; other statutes have provided for federal preemption after a specified period, in states that do not meet certain minimum standards of regulation and enforcement.

The complexities of the preemption issue in modern constitutional law concerning the state police power are emblematic of the differences between government intervention in the present day and intervention on the modest scale of the eighteenth and nineteenth centuries. In 1836 Justice Joseph Story summarized the limited functions of the state in his day: to protect the persons and property of citizens from harm, to guard personal rights; to establish courts of justice and enforce laws against crimes, to enforce contracts, and to encourage moral behavior. These functions, together with state promotion of economic development, were justified because they were "conducive to the strength and the happiness of the people." What Story could not anticipate—and what is at the core of the modern constitutional history of the state police power—is the enormous expansion of regulatory activity and the accompanying shift toward enlarged administrative discretion in the modern state. Recent decisions and treatises are no longer much concerned with issues concerning the legitimacy of the police power as such issues were defined in Field's and Cooley's day, or even in the early years of the New Deal. Nonetheless, changing values as to equality, fairness, and rights of the public—and, to an increasing degree in the 1980s, a revival of issues concerning efficiency criteria and the wisdom of regulatory policies—continue to be expressed both in policy debates and in scholarly dialogue on the place of the state police power in the constitutional system.

HARRY N. SCHEIBER
(1986)

Bibliography

FREUND, ERNST 1904 *The Police Power: Public Policy and Constitutional Rights.* Chicago: Callaghan.

HASTINGS, W. A. 1900 The Development of the Law as Illustrated by the Decisions Relating to the Police Power of the State. *Proceedings of the American Philosophical Society* 39: 359–554.

LEVY, LEONARD W. 1957 *The Law of the Commonwealth and Chief Justice Shaw.* Cambridge, Mass.: Harvard University Press.

REZNICK, SCOTT M. 1978 Empiricism and the Principle of Conditions in the Evolution of the Police Power: A Model for Definitional Scrutiny. *Washington University Law Quarterly* 1978:1–92.

SCHEIBER, HARRY N. 1982 Law and the Imperatives of Progress: Private Rights and Public Values in American Legal History, *Nomos: Yearbook of the American Society for Political and Legal Philosophy* 24:303–320.

SCHWARTZ, BERNARD 1965 *A Commentary on the Constitution of the United States, Part II: The Rights of Property.* New York and London: Macmillan.

STOEBUCK, WILLIAM V. 1980 Police Power, Takings, and Due Process. *Washington and Lee Law Review* 37:1057–1099.

## STATE REGULATION OF COMMERCE

When the Framers of the Constitution granted Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," they did not specify what regulatory powers were to be left to the states. Did they intend simply to grant a power to Congress which left the states free to regulate until such time as Congress acted? Were states restrained only from enacting statutes inconsistent with federal statutes? Or was the grant of power to Congress intended to be exclusive, forbidding the states to regulate commerce among the states even though Congress had not acted?

These questions troubled the Court several times during JOHN MARSHALL's tenure as Chief Justice. As a strong nationalist, he was attracted by the argument presented by DANIEL WEBSTER in GIBBONS V. OGDEN (1824) that the word "regulate" implied full power over the thing to be regulated and necessarily excluded the power of the states to regulate the same thing. But Congress could not be expected to regulate all commerce among the states. Most transportation was by water. Inland transportation was slow and difficult. It could take a week or ten days to travel from Boston to New York, and in practical effect Georgia was more remote from New York than from the ports of Europe.

Marshall's solution was to suggest that Congress had full power to regulate INTERSTATE COMMERCE but that in the absence of conflicting federal regulations, the states had power to enact local police laws—inspection laws, quarantine laws, health laws, laws respecting turnpike roads and ferries—even though such laws might affect commerce. After Marshall's death the Justices were sharply divided between those advocating the position that exclusive power to regulate interstate commerce was vested in Congress and those, led by the new Chief Justice, ROGER B. TANEY, advocating the position that states had full power to regulate interstate commerce so long as Congress had not acted.

In 1851, in COOLEY V. BOARD OF WARDENS OF PHILADELPHIA, the Court arrived at a compromise of the conflicting views. In upholding a state law requiring vessels in inter-

state and FOREIGN COMMERCE to accept local pilots, the Court said that when the subjects being regulated "are in their nature national, or admit only of one uniform system, or plan of regulation" they "require exclusive legislation by Congress." On the other hand, when the subjects were local, as in the case of pilotage regulations attuned to individual conditions of the various ports, the states could regulate until Congress might intervene.

During the next half century the Court struggled to limit the negative implications of its notion of broad federal powers to regulate during a time when the federal government regulated little outside of water transportation. Some theory was needed to support the necessary state regulation of commerce. One way to do this was to narrow the definition of interstate commerce. In PAUL V. VIRGINIA (1868) the Court held that the insurance business was not commerce among the states and so could be regulated by the states. In KIDD V. PEARSON (1888) it upheld an Iowa statute forbidding the manufacture of intoxicating beverages as applied to a manufacturer who sold all his output in other states. The Court said that manufacturing was not commerce. If it were commerce, the Court assumed, "Congress would be invested, to the exclusion of the States, with the power to regulate not only the manufacturers, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry." In other cases the Court decided when an interstate journey began (when the goods had been actually shipped, or delivered aboard a common carrier for shipment, across state borders) and when it ended (when it came to rest at the end of its journey available for final disposition or use).

Toward the end of the century the Court devised another method for enabling states to regulate in areas Congress had not chosen to regulate. In *Cooley* the Court had said that a federal statute consenting to all present and future state pilotage regulations was invalid insofar as it incorporated future regulations because the division of power between state and nation was fixed in the Constitution and Congress could not change it. In LEISY V. HARDIN (1890) the Court held that one state could not forbid the sale of liquor brought in from another state while still in its ORIGINAL PACKAGE, but added that "so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled." Congress took the hint and enacted a law permitting states to regulate such traffic in liquor, and the Court upheld the law in *In re Rahrer* (1891). Since then it has been settled that Congress may, if it wishes, permit states to regulate in areas otherwise reserved for Congress.

But even these rules did not result in agreement on the principles to be used in deciding individual cases. Despite the fact that *Cooley* appeared to have established that the states sometimes could regulate, the Court continued to refer from time to time to the "exclusive" power of Congress to regulate interstate commerce. In other cases the Court suggested that the test of validity of a state regulation of interstate commerce was whether it imposed a forbidden "direct" burden on commerce or a permitted "indirect" burden. By the beginning of the twentieth century there was clear agreement on only one principle: state regulations that clearly discriminated against interstate commerce by imposing burdens on such commerce beyond those imposed on comparable INTRASTATE COMMERCE were invalid.

During the first third of this century the Court dealt with a large mass of state regulations of transportation. A fair characterization of the cases would be one of doctrinal confusion. While the Court affirmed that states could not ban interstate transportation or discriminate against it for economic reasons, it had great difficulty in deciding when formally nondiscriminatory state regulations might be invalid because of the burdens they cast on commerce.

Today the Court does not get transportation cases involving state discrimination against interstate commerce. Instead, it is asked to determine that even nondiscriminatory regulations may be invalid if they impose substantial burdens on commerce without compensatory state advantages. *South Carolina State Highway Department v. Barnwell Bros.* (1938) involved a state statute prohibiting the use on state highways of any trucks wider than ninety inches. Although nondiscriminatory, the statute had a major impact on interstate commerce; all other states permitted a width of ninety-six inches, and thus most trucks engaged in interstate commerce would not be able to enter South Carolina. The Court said that few matters of state regulation were "so peculiarly of local concern" as was the use of state highways. The problem was one of determining whether local conditions demanded the regulation in the interests of safety. That determination was "a legislative, not a judicial choice," and the state's conclusion that the regulation was necessary was presumed correct unless "upon the whole record . . . it [was] without a RATIONAL BASIS."

But seven years later, in SOUTHERN PACIFIC V. ARIZONA EX REL. SULLIVAN (1945), the Court indicated that the courts rather than the state legislatures would have the final say in such commerce cases. A state statute limited the length of all trains in Arizona to fourteen passenger cars or seventy freight cars. The Court declared that Congress could "permit the states to regulate the commerce in a manner which would otherwise not be permissible . . . or exclude state regulations even of matters of peculiarly local concern which nevertheless affect interstate commerce." But when Congress had not acted, the final determination was

for the courts. The question was whether the state interest in preventing injuries to railroad employees due to the slack action of cars on longer trains was outweighed by the burden the statute would have upon interstate commerce. The Court concluded that the state justification was weak and the burden heavy and so invalidated the statute. *Barnwell* was said to be different because it had dealt with the peculiarly local nature of state highways.

In recent years the Court has struggled with the question whether the *Barnwell* or the *Southern Pacific* approach should be used to judge state regulations of highways. In BIBB V. NAVAJO FREIGHT LINES, INC. (1959) the Court held invalid an Illinois statute requiring trucks to use contour mudguards when all other states permitted, and Arkansas required, straight mudflaps. The Court reaffirmed *Barnwell*, saying that courts should not engage in rebalancing the interests which the state legislature had, but added that this was "one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce." The Court has also dealt with state laws forbidding the use of trucks pulling double trailers as applied to interstate carriers. In RAYMOND MOTOR TRANSPORTATION, INC. V. RICE, (1978) the Court unanimously invalidated a Wisconsin statute, noting that extensive evidence showed the law's heavy burden on interstate commerce and that the state had made no effort to demonstrate any safety interest. In *Kassel v. Consolidated Freightways Corp.* (1981) the Court invalidated a similar Iowa statute but was unable to agree upon an opinion or upon the way in which such regulations should be judged. Only four Justices clearly applied the *Southern Pacific* approach in highway regulation cases; the others were willing to leave the matter to the states when the safety interests at stake were substantial.

Cases involving regulation of production and trade also give the Court difficulty in arriving at consistent standards. Some governing rules are fairly straightforward. A state cannot ban the importation of goods, except in the rare case when goods must be excluded to avoid substantial damage to persons or property. So the Court in GREAT ATLANTIC & PACIFIC TEA CO. V. COTTRELL (1976) held that Mississippi could not forbid the importation of milk from Louisiana which had refused to sign a reciprocity agreement with Mississippi. In PHILADELPHIA V. NEW JERSEY (1978) the Court held invalid a state law banning importation of garbage destined for private landfills. The Court said: "[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. . . . The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders."

Nor can a state ban the exportation of goods, even for the purpose of conserving scarce goods for use by citizens of the state. Thus in *Hood & Sons v. Du Mond* (1949) the Court held that New York could not deny a milk dealer the right to purchase milk and ship it out of state, even though milk was short for a nearby city. In *Hughes v. Oklahoma* (1979) the Court said the commerce clause forbade the state from preventing the transportation or sale outside the state of minnows procured within the state. And an attempt by New Hampshire to make sure that electricity generated by water power served first the needs of local citizens, by forbidding the export of such power without permission of the state, was invalidated in *New England Power Co. v. New Hampshire* (1982). The Court said that the regulation was "precisely the sort of protectionist regulation that the COMMERCE CLAUSE declares off-limits to the States." However, *Sporhase v. Nebraska* (1982) suggests that a state restriction on the exportation of ground water may be upheld when done "to conserve and preserve for its own citizens this vital resource in times of severe shortage."

Regulations which discriminate against interstate commerce or otherwise operate to protect local commerce against competition are also invalidated. In *Baldwin v. G. A. F. Seelig, Inc.* (1935) the Court held unconstitutional a New York statute that made it unlawful to sell milk purchased from out-of-state producers at prices less than those paid local producers. The Court said: "If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." A Louisiana statute forbidding the export of shrimp unless the heads and hulls had been removed was held invalid in *Foster-Fountain Packing Co. v. Haydel* (1928) because the effect was to favor the canning of meat and the manufacture of bran in Louisiana.

Much more difficult for the Court have been cases that do not overtly discriminate against interstate commerce. In DEAN MILK CO. V. MADISON (1951) the Court invalidated a city ordinance forbidding the sale of milk as pasteurized unless it had been processed and bottled at an approved plant located within five miles of the center of Madison. Although the criterion excluded in-state as well as out-of-state milk, the Court said it discriminated against interstate commerce. The Court recognized that Madison had a legitimate interest in the purity of milk, but held it could not give an economic preference to local businesses if there were reasonable nondiscriminatory alternatives, such as inspection outside the state.

In *Pike v. Bruce Church, Inc.* (1970) the Court held unconstitutional, as applied to a grower with a substantial packing plant in California, an Arizona statute forbidding shipment of fruit out of the state unless it was packed in containers bearing the name of Arizona. The court set out

a series of tests which have been frequently referred to in later cases: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

The Court has difficulty in applying the *Pike* formula. The major problem comes in deciding whether a case presents a nondiscriminatory statute with an incidental EFFECT ON COMMERCE or one which can be characterized as discriminatory, hence requiring the higher STANDARD OF REVIEW. In *Hunt v. Washington State Apple Advertising Commission* (1977) a North Carolina statute requiring all closed containers of apples sold in the state to bear no grade other than the applicable U.S. grade or standard was challenged by Washington, which marketed under its own grades which were equivalent or superior to the U.S. grades. Even though the statute applied equally to local and out-of-state shippers of apples, the Justices found that the statute discriminated against the Washington apples and held it invalid. The principal difficulty appeared to be that the statute took from Washington the market advantages it had earned through its own grading system.

The next year, in *Exxon Corp. v. Maryland* (1978), however, the Court upheld a state law forbidding a producer or refiner of petroleum products to operate any retail service station within the states. Maryland had no in-state oil production or refining. The Court said that the act did not affect the interstate transportation of gasoline—presumably the same volume would come in after the statute as before—but merely the structure of retailing. Further, since owners of multi-state chains of retail stations who did not produce gas could continue to compete, there was not even a preference for locally owned stations. The Court said that *Hunt* was different because there the statute favored in-state operators over out-of-state ones.

More recently, in *Minnesota v. Clover Leaf Creamery Co.* (1981), the Court upheld a Minnesota statute banning the retail sale of milk in plastic nonreturnable, nonrefillable containers while permitting such sale in other nonreturnable, nonrefillable containers such as paperboard milk cartons. The Court noted that the statute did not discriminate. The burden imposed on commerce was very slight since most dairies packaged their milk in various kinds of containers, and the shifts in the business would not be distributed on in-state, out-of-state lines.

Finally, the Court has held that when the state itself is in the market producing or selling goods, the commerce clause does not restrict the state. Thus in *Reeves, Inc. v. Stake* (1980) the Court upheld, 5–4, a decision by South Dakota to cease selling cement which the state manufactured to out-of-state customers in order to supply the needs of South Dakota customers. The Court said that the state, as a market participant, was free to prefer its own citizens, even though it could not order private businesses to do the same. The Court distinguished the manufacture of cement from regulating private use of natural resources such as coal, timber, wild game, or minerals. The cement was the end product of a complex process in which a physical plant and human labor of the state had acted on raw materials. The dissenters said the policy upheld was "precisely the kind of economic protectionism that the Commerce Clause was intended to prevent."

Today, as in 1824, the Court has great difficulty in defining its place with reference to state regulation of interstate commerce. States can regulate commerce in the absence of conflicting federal regulation so long as they do not go too far. The Court will strike down clear discriminations or economic preferences for local economic interests. But, when confronted with a nondiscriminatory regulation that imposes an incidental burden on commerce, the Court will sometimes let the regulation stand until Congress acts and in other cases will intervene to protect commerce. This uncertainty is likely to persist.

EDWARD L. BARRETT, JR.
(1986)

Bibliography

DOWLING, NOEL T. 1940 Interstate Commerce and State Power—Revised Version. *Virginia Law Review* 27:1–28.

NOWAK, JOHN E.; ROTUNDA, RONALD D.; and YOUNG, NELSON J. 1978 *Handbook on Constitutional Law*. Pages 243–266. St. Paul, Minn.: West Publishing Co.

RIBBLE, F. D. G. 1937 *State and National Power over Commerce*. New York: Columbia University Press.

TRIBE, LAURENCE H. 1978 *American Constitutional Law*. Pages 319–344. Mineola, N.Y.: Foundation Press.

VARAT, JONATHAN D. 1981 State "Citizenship" and Interstate Equality. *University of Chicago Law Review* 48:487–572.

## STATE REGULATION OF COMMERCE
(Update 1)

In the period covered by this supplementary article, the Supreme Court has decided a case or two a year on state regulation of commerce. Considered individually, none of the cases through mid-1989 seeems destined to become a landmark in DORMANT COMMERCE CLAUSE doctrin. Collectively, however, the cases may indicate a decreasing emphasis on "balencing" and an increasing focus on pre-

venting states from intentionally discriminating against out-of-state interests.

As Edward Barrett pointed out in the original article on this topic for this Encyclopedia, the Court has always recognized that state regulations discriminating against INTERSTATE COMMERCE are unconstitutional. But in 1970, in *Pike v. Bruce Church, Inc.*, the Court stated a BALANCING TEST, under which even a nondiscriminatory state regulation is unconstitutional if it affects interstate commerce and if the burdens imposed on such commerce by the regulation outweigh the local benefits. For the next fifteen years, balancing was treated as the central element in dormant commerce clause analysis, both by the Court and by scholars, who had taken up the cause of balancing long before the Court endorsed it explicitly.

Similarly, the first expressions of disaffection with balancing appeared, not in judicial opinions, but in the scholarly literature. Starting around 1980, some scholars began to question whether there was any warrant in the Constitution for judicial balancing of economic interests and to suggest that such balancing was a task courts were not well qualified for. These commentators suggested that courts would be more faithful to the Constitution—and would be doing something they were better qualified for—if they concentrated on identifying and overturning state regulations that discriminated against out-of-state interests.

Unfortunately, discrimination is a chameleon among concepts. The first proponents of the new antidiscrimination theory tended to think that a regulation was discriminatory if it would not have been adopted had all affected out-of-state interests been represented in the state legislature equally with the affected in-state interests. In application, this test leads right back to balancing. Furthermore, the test is theoretically suspect because it presupposes that out-of-state interests are entitled to virtual representation in the state's legislature, a notion that seems at odds with the genius of a federal system.

If we look for a narrower definition of discrimination, we are naturally led to a choice between defining it in terms of the effects of a regulation and defining it in terms of the regulation's purpose. Both possibilities have their advocates. It may seem at first that discriminatory effects are easier to identify than discriminatory purpose, so we should focus on effects. But it is clear that we cannot hold unconstitutional every state regulation that has any effect, however unintended, of (for example) moving business from out-of-state companies to their in-state competitors. Such a rule would plainly invalidate too much regulation. Thus, if we set out to focus on discriminatory effect, treating it as significant in itself and not just as evidence of discriminatory purpose, then whenever we find such an effect, we are led back to a version of balancing, as we try to decide whether the benefits of the regulation justify the discriminatory effect we have found.

The only test that does not lead back to balancing is a test that focuses on discriminatory purpose, invalidating a regulation when the legislature's motive was to prefer in-state over out-of-state interests. There is, of course, a long-standing debate, not limited to the dormant commerce clause, about whether the courts should review legislative motivation. The Court has spoken out of both sides of its mouth on this issue for two hundred years: on many occasions, the Court has said it would not engage in motive review, but on many others, it has engaged in it, covertly or openly. Motive review is now firmly ensconced in the SUSPECT CLASSIFICATIONS branch of equal protection doctrine and in the doctrine of the ESTABLISHMENT CLAUSE, and almost as firmly in the law on FREEDOM OF SPEECH. With regard to the dormant commerce clause, the Court explicitly reaffirmed the propriety, if not yet the centrality, of motive review in *Amerada Hess Corp. v. New Jersey* (1989).

To illustrate that there may be a trend away from balancing in the Court's opinions, one can compare the two most widely discussed recent cases, both involving statutes regulating corporate takeovers. In *Edgar v. MITE Corp.* (1982) the Court struck down an Illinois antitakeover statue. The statute applied only to corporations with significant Illinois connections, but even so, it covered some corporations that were incorporated outside Illinois and had mostly non-Illinois shareholders. Six Justices voted to overturn the statute, relying on three different theories (most of them relying on more than one of these theories). The theories were (1) that the statute was preempted by federal statutory law; (2) that the statute amounted to constitutionally forbidden extraterritorial regulation; and (3) that the statute failed the balancing test of *Pike v. Bruce Church, Inc.* (1970). Technically, the only theory supported by a majority of the Justices, and therefore the theory of the Court, was the *Pike* balancing theory, and *MITE* was widely read as a balancing case. Close reading would have cast doubt on this interpretation (as indeed close reading of the Court's other decisions, including *Pike* itself, raises doubt about whether the Court, whatever it has said, has ever actually engaged in balancing, except in cases involving regulation of the transportation system). In *MITE* the fifth vote for balancing, which made balancing the official theory of the Court, came from a Justice who seemingly disagreed with the result in the case and was voting with the sole object of making the holding of the case as little restrictive of state power as possible.

Five years later, in *CTS Corp. v. Dynamics Corp. of America* (1987), the Court reviewed an Indiana antitakeover statute. The most significant difference between it and the Illinois statute was that the Indiana statute was limited to businesses incorporated in Indiana. This difference is highly relevant to the extraterritoriality issue and arguably relevant to the preemption issue, but it is essen-

tially irrelevant to the balancing approach. Therefore, the standard reading of *MITE* as a balancing case suggested the Indiana statute should be struck down. Instead, the Court upheld it. Writing for the Court, Justice LEWIS F. POWELL began his commerce clause analysis with the statement that "the principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." In his analysis of the case, Powell never cited *Pike*, the standard citation for the balancing approach since 1970. Justice ANTONIN SCALIA, concurring in the result in *CTS*, vehemently attacked balancing under the dormant commerce clause, as he has in many cases since.

Justice Scalia has not yet carried the day. He wrote for a unanimous Court in *New Energy Co. of Indiana v. Limbach* (1988) when he relied on "the cardinal requirement of nondiscrimination." But then, in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (1988), seven Justices reaffirmed the propriety of balancing and purported to invalidate the statute before them by balancing. The Court may have been right when it chose not to rely on a finding of discrimination in *Bendix Autolite*, but even so, it need not have claimed to balance. *Bendix Autolite* was one of those rare nontaxation cases like *Allenberg Cotton Co. v. Pittman* (1974), involving what we might categorize roughly as administrative requirements on businesses, that probably should be decided by a "multiple burdens" analysis similar to that used in state taxation cases.

As late as 1989, in *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, a unanimous Court cited *Pike* as authority for balancing. But many considerations suggest that this citation of *Pike* means little: the Court upheld the statute, the supposed balancing was a perfunctory coda to a long and complex discussion of statutory preemption, and even Justice Scalia did not bother to register disagreement. The Court as a body still seems much less confident about the role of balancing than it seemed ten years ago.

One other possible trend deserves mention. Since 1974, the Court has decided four cases under the dormant commerce clause that centrally involved EXTRATERRITORIALITY issues (the two cases on antitakeover statutes and two others on beer price-affirmation statutes). Extraterritoriality is a problem that has lurked in the background of many dormant commerce clause cases, but has rarely taken center stage. The Court has never produced anything like an adequate theory of when a regulation is impermissibly extraterritorial, and it is doubtful whether extraterritoriality should be viewed as a commerce clause problem at all. On the other hand, the Constitution undoubtedly prohibits extraterritorial state regulation, and this prohibition is not easily assignable to any particular clause of the Constitution. There is no harm in the Court's sometimes treating the prohibition as grounded in the commerce clause, provided the Court does not confuse extraterritoriality with other commerce clause issues. For the most part, the Court has treated extraterritoriality as a distinct issue, even when assigning it to the commerce clause.The Court may have taken a step down a dangerous path in *Healy v. The Beer Institute, Inc.* (1989), when it emphasized that the Connecticut price-affirmation statute would make it economically necessary for beer distributors setting a price for one state to consider market conditions in various states. In a multistate economy most state regulations have effects of this kind, and to treat such an effect as establishing a presumptive violation of the extraterritoriality prohibition would require some further step, presumably balancing, to decide when the presumptive violation was an actual violation. On the other hand, the Court also said in *Healy* that price-affirmation statutes "facially" violate the commerce clause, which means balancing is not required to identify the violation. There is work to be done here to develop a doctrine.

DONALD H. REGAN
(1992)

(SEE ALSO: *Economic Due Process; Economic Equal Protection; Economic Regulation; Legislative Intent; Legislative Purposes and Motives.*)

Bibliography

EULE, JULIAN N. 1982 Laying the Dormant Commerce Clause to Rest. *Yale Law Journal* 91:425–485.

REGAN, DONALD H. 1986 The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause. *Michigan Law Review* 84:1091–1287.

## STATE REGULATION OF COMMERCE (Update 2)

The Supreme Court has continued to decide cases involving challenges to state regulations of commerce at a rate of one or two each year. A few cases involve statutes that are clearly designed to promote local commerce at the expense of out-of-state commerce. A larger portion, however, seem to critics of the Court's work to involve statutes aimed at achieving socially beneficial goals without any design to harm out-of-state commerce. The decisions have increasingly focused on the presence of geographical terminology (local versus out-of-state) used to distinguish activities that are regulated from those that are not, even when it seems unlikely that the government used the terminology merely to disadvantage out-of-state commerce. There have been no significant majority opinions applying the BALANCING TEST in which the burdens on INTERSTATE COMMERCE are balanced against the benefits conferred by

the statute, although some separate opinions have applied the test.

*C & A Carbone, Inc. v. Clarkstown* (1994) invalidated an ordinance directing that all solid WASTE generated within the town be delivered to a privately owned local recycling plant, rather than shipped out of the town or out of the state. The town planned to take over the plant after the private operator recouped the construction costs, and it adopted the flow-control ordinance to ensure that the recycling plant would be financially viable until the town took over the plant. The Court held that the ordinance discriminated against out-of-state plants that stood ready to accept solid waste from Clarkstown. Justice DAVID H. SOUTER, writing for three dissenters, argued that the ordinance was clearly not protectionist in any traditional sense.

The Court confronted an issue that had lurked in earlier cases when it invalidated a subsidy to Massachusetts milk producers in *West Lynn Creamery, Inc. v. Healy* (1994). Subsidies can serve the same protectionist purposes as discriminatory regulations: Instead of raising the prices out-of-state producers must charge to offset the cost of complying with a discriminatory regulation, a subsidy permits local producers to reduce their charges. The subsidy in *Healy* was paid to local milk producers from a fund created by a tax imposed on all milk sales in the state. Every producer, local and out-of-state, paid the tax, but only local producers received the subsidy. The Court rejected the argument that the statute should be upheld because both of its components were permissible when taken separately: The tax was nondiscriminatory, and the subsidy was a typical payment of state funds to state residents. Justice ANTONIN SCALIA, concurring in the judgment, asserted that a subsidy from general tax revenues would be constitutional, but the more focused Massachusetts system was not.

*Carbone* has been particularly troubling to commentators, who see the ordinance as a sensible attempt to deal with the problem that consumers ordinarily do not have strong financial incentives to engage in environmentally beneficial recycling. Consumers who generate solid waste will send it to the cheapest disposal site, which may make it impossible to create a financially viable recycling industry. Also, once Clarkstown takes the recycling plant over, acting as a market participant, presumably it could charge lower fees to local consumers who send it their solid wastes for recycling than it charges people from other towns or from out-of-state.

The Court's insistence that states and localities avoid drafting statutes that use geographical terminology may be justified, but not on the ground that using such terms definitively establishes that the state is attempting to discriminate against out-of-state commerce in a classic protectionist sense, that is, attempting to direct business away from out-of-state businesses and toward local ones. The Court's approach may be justified in two ways. First, the use of geographical terminology characterizes most protectionist legislation, and it rarely is necessary for nonprotectionist legislation. The Court must design rules that give clear guidance to legislatures and lowers courts, and barring the use of geographical terminology does so. The rule also invalidates most protectionist statutes and only a few nonprotectionist ones. A balancing test would make it too easy for legislators to enact, and lower courts to uphold, statutes that were truly protectionist. Second, a rule against using geographical terminology discourages legislators from thinking about commercial regulation in ways that lead them to treat out-of-state interests as irrelevant to their concerns. It thereby reinforces the thought underlying the Court's COMMERCE CLAUSE doctrine that the relevant economic unit is the nation, not the state or city.

*Healy* is easier to understand, because the separate fund device made it transparent that the subsidy was a substitute for discriminatory regulation. State and local subsidies to local businesses are quite widespread—to encourage construction of a sports stadium or location of a new manufacturing plant. The entire point of such subsidies is to discriminate in favor of local activities and against out-of-state ones. Full-fledged judicial action against discriminatory subsidies would be an ambitious program. This may be a situation in which Congress's power to preempt local regulations, or to specify a national regime for local subsidies, might offer a better solution than any judicial effort to police the use of these subsidies.

MARK TUSHNET
(2000)

(SEE ALSO: *State Tax Incentives and Subsidies to Business.*)

Bibliography

COENEN, DAN T. and HELLERSTEIN, WALTER 1997 Suspect Linkage: The Interplay of State Taxing and Spending Measures in the Application of Constitutional Antidiscrimination Rules. *Michigan Law Review* 95:2167–2233.

HEINZERLING, LISA 1995 The Commercial Constitution. *Supreme Court Review* 1995:217–276.

## STATES' RIGHTS

"States' rights" is better understood not as a term of art denoting a constitutional principle but as a slogan with tactical value in political controversy. The slogan of states' rights has been raised at one time or another by advocates from every region of the country and by partisans of every political persuasion. The phrase emphasizes one element

of FEDERALISM, but it is a serious error to equate federalism with states' rights.

Although the states' rights are often asserted in terms of state SOVEREIGNTY, the claim of states' rights is really a claim on behalf of the sovereignty of the people. No government, national or state, properly exercises any power that has not been delegated to it by the people. The assertion of states' rights is most often made by those who oppose a policy of the national government and who claim that the people have not delegated to the national government the power to implement the policy. Less often the assertion is made by those who believe that the states, or at least their own states, are more likely than the federal government to implement a desired policy.

The idea of states' rights is as old as the Republic. The jealousy with which the colonial legislatures guarded their limited local powers against the British Parliament and the royal government was carried over into ANTI-FEDERALIST CONSTITUTIONAL THOUGHT. To the extent that the argument for states' rights is one of principle, it is based on the classical notion that public virtue flourishes only in relatively small political communities. The French political philosopher Montesquieu, whom JAMES MADISON called the "oracle" for American constitutionalists of the Founding era, restated the classical view in modern terms and maintained that the best practical regime was a small republic confederated for military and commercial purposes with similar small republics. Many Anti-Federalists opposed the Constitution from a genuine fear of consolidation into a continental empire that only a despot could govern effectively.

But there was also a practical factor in the Anti-Federalist opposition. In the years between 1776 and 1789, the state governments had assumed responsibility for their internal affairs to a far greater degree than the colonial governments had ever done. Individual leaders, parties, cliques, and factions had arisen and assumed their places in state politics; creation of a national political environment was bound to reduce the power of most of them. Familiar ways of dealing with problems would be replaced with strange ones.

After the RATIFICATION OF THE CONSTITUTION, the erstwhile opponents of the new frame of government, along with some of its defenders, sought to interpret it in Anti-Federalist, or Montesquian, terms. The Constitution, according to this interpretation, was a compact between the people of each state and the people of the other states. When the Federalist-dominated national government adopted the ALIEN AND SEDITION ACTS (1798), "states' rights" became the battle cry of the Republican party, whose leaders, JAMES MADISON and THOMAS JEFFERSON, gave the slogan substantive expression in the VIRGINIA AND KENTUCKY RESOLUTIONS (1799).

In the nineteenth century the growing sectional rivalry between the commercial, and increasingly industrial, North and the agrarian South was reflected in competing THEORIES OF THE UNION. The states' rights position came to be identified in public discourse with the interest of the slave power. It found its champion in JOHN C. CALHOUN, who, in the South Carolina EXPOSITION AND PROTEST (1828–1829), announced the doctrine of NULLIFICATION as a logical consequence of the state compact theory. Nullification, of course, was an empty threat unless it was backed up by the possibility of SECESSION.

One attempt was made to implement Calhoun's doctrine, the SOUTH CAROLINA ORDINANCE OF NULLIFICATION directed against the TARIFF ACT OF 1828, and that was a failure. In 1861, when the election of ABRAHAM LINCOLN as President clearly signaled that slavery had been belatedly set upon its course of ultimate extinction, eleven southern states withdrew from the Union. Lincoln denied not only the legitimacy but also the very possibility of secession, and the victory of the Union in the CIVIL WAR vindicated his position for all practical purposes. Whatever rights the states have they have as members of the Union.

The FOURTEENTH AMENDMENT, adopted after the Civil War, proved an obstacle to state regulation of economic activity begun under the influence of the Populist and Progressive movements. Because the BILL OF RIGHTS applied only to the federal government, individuals whose rights were infringed by actions of the state governments (unless they were the victims of BILLS OF ATTAINDER, EX POST FACTO LAWS, or laws impairing the OBLIGATION OF CONTRACTS) previously had been able to rely only on the state constitution, political system, or courts for redress. In the late nineteenth and early twentieth centuries, however, the Supreme Court held the substantive guarantees (life, liberty, and property) of the Fourteenth Amendment's due process clause to be effective limitations on state legislative power. In the rhetoric of the reformers, the federal government (or at least its judicial branch) had infringed on the states' right to regulate their internal affairs.

In the 1920s the cry of "states' rights" was raised both by those who opposed federal intrusions into areas of state legislative concern and by those states that were frustrated in the attempt to expand state regulatory power. It is instructive that states' rights claims were raised in both MASSACHUSETTS V. MELLON (1923) and PIERCE V. SOCIETY OF SISTERS (1925), the first in the interest of less and the second in the interest of more governmental regulation.

Between the late 1940s and the late 1960s, the cause of states' rights became virtually identified with the cause of southern opposition to CIVIL RIGHTS legislation. The national commitment to abolishing racial SEGREGATION, first in publicly owned facilities and then in private establishments dealing with the public, aroused fierce opposition

among those who were destined to lose their privileged position. Despite its long history of service to every shade of political opinion, the slogan of "states' rights" may have been permanently tarnished by its association with state-sponsored RACIAL DISCRIMINATION.

If the states, as states, have a valid claim of right to any particular field of legislation, that field would seem to be legislation concerning the internal workings of the governmental apparatus of the state. In the twentieth century the federal government undertook to regulate the compensation and working conditions of state employees, incidentally to its regulation of compensation and working conditions of private employees under the COMMERCE CLAUSE. In NATIONAL LEAGUE OF CITIES V. USERY (1976) the Supreme Court struck down such regulation insofar as the employees concerned were involved in the essential governmental operations of the states. The distinction was undermined in EQUAL EMPLOYMENT OPPORTUNITY COMMISSION V. WYOMING (1983), and discarded as unworkable in GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985). In *Garcia* a 5–4 Supreme Court explicitly overruled *Usery,* and—unless the dissenters were accurate in predicting that the *Usery* doctrine would one day be revived—effectively put an end to the last vestige of states' rights in constitutional law.

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Tenth Amendment.*)

Bibliography

ELAZAR, DANIEL J. 1972 *American Federalism: A View from the States,* 2nd ed. New York: Thomas Y. Crowell Co.

GRODZINS, MORTON 1966 *The American System: A New View of Government in the United States,* ed. Daniel J. Elazar. Chicago: Rand-McNally.

SANFORD, TERRY 1967 *Storm over the States.* New York: McGraw-Hill.

VILE, M. J. C. 1961 *The Structure of American Federalism.* Oxford: Oxford University Press.

## STATES' RIGHTS AMENDMENTS (1963–1967)

The decisions of the WARREN COURT radically altered the constitutional balance of power to the disadvantage of the several states. In 1963, the Council of State Governments recommended three constitutional amendments that would, respectively, have established a third variation of the AMENDING PROCESS by which the states could alter the Constitution without the participation of Congress; denied the Supreme Court JURISDICTION over apportionment of state legislatures; and created a Court of the Union, comprising all the state chief justices, with power to overrule the Supreme Court on questions of federal-state relations.

The amendments were introduced in Congress by Senator J. Strom Thurmond of South Carolina but were buried in committee. Supporters hoped to have two-thirds of the state legislatures petition Congress and thereby oblige Congress to call an amending convention. The first and third proposals encountered widespread opposition—including public denunciation by Chief Justice EARL WARREN. But the 1964 REAPPORTIONMENT decisions, REYNOLDS V. SIMS and *Lucas v. Forty-Fourth General Assembly,* spurred the legislatures to act on the remaining proposal. By the time the agitation ceased in 1967, thirty-three states (only one less than necessary) had petitioned for an amending convention on the apportionment issue.

DENNIS J. MAHONEY
(1986)

## STATE SUICIDE THEORY

Massachusetts Senator CHARLES SUMNER, like most abolitionists and all Republicans before the Civil War, believed that the federal government lacked constitutional power to abolish slavery in the states. By early 1862, however, he and some other Republicans sought a theoretical basis for the exercise of congressional authority to govern occupied areas of the Confederacy and to eliminate slavery there. While other Republicans flirted with theories of territorialization or the CONQUERED PROVINCES concept of Representative THADDEUS STEVENS, Sumner developed his own unique amalgam of constitutional ideas for RECONSTRUCTION, which came to be known as the state suicide theory.

Sumner believed that the Confederate states, by seceding, had committed a sort of constitutional suicide, dissolving their "peculiar local institutions" (that is, slavery) and leaving their territory and inhabitants to be governed by Congress. This conception derived from three constitutional sources. The idea that the seceded states had reverted to the condition of TERRITORIES was widely discussed among Republicans after the outbreak of war. The belief that slavery, because it required positive law for its existence, would expire when that law expired, was derived from implications of the doctrine of SOMERSET'S CASE (1772) and had appeared in abolitionists' constitutional arguments before the war. Abolitionists also found a basis of congressional power to govern the states (including the power to abolish slavery there) in the clause of Article IV, section 4, that requires the United States to guarantee a REPUBLICAN FORM OF GOVERNMENT to each of the states. (See ABOLITIONIST CONSTITUTIONAL THEORY.)

Democrats, conservatives, and even moderate Repub-

licans deplored the state suicide theory, regarding it as unconstitutional because it recognized the validity, or at least effectiveness, of SECESSION. Sumner abandoned his insistence on the constitutional death of the states but continued to maintain that Congress had plenary governmental power in the occupied states.

WILLIAM M. WIECEK
(1986)

Bibliography

DONALD, DAVID 1970 *Charles Sumner and the Rights of Man.* New York: Knopf.

## STATE TAXATION OF COMMERCE

Since BROWN V. MARYLAND in 1827 the Supreme Court has decided hundreds of cases determining the extent to which the COMMERCE CLAUSE immunizes from state taxation property moving in INTERSTATE COMMERCE or businesses engaged in such commerce. From the outset, agreement has existed on one principle—state taxes that discriminate against interstate commerce are invalid. In *Welton v. Missouri* (1876) the Court held invalid a state tax on local sales because it applied only to goods produced outside the state. Recently, in *Boston Stock Exchange v. State Tax Commission* (1977), the Court stated that the "fundamental principle" that no state may impose a tax that discriminates against interstate commerce "follows inexorably from the basic purpose of the [Commerce] Clause. Permitting individual states to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects."

The Supreme Court recognized early, however, that even formally nondiscriminatory taxes might put interstate commerce at a competitive disadvantage. In PHILADELPHIA & READING RAILROAD V. PENNSYLVANIA (1873) a tax on transportation companies measured by cents per ton of freight carried within the state (but not apportioned to distance) was held invalid as applied to goods in interstate commerce even though local commerce paid the same tax. The Court noted that if one state could impose this tax all states could and commercial intercourse between states remote from each other might be destroyed. Interstate commerce could bear the imposition of a single tax but "it would be crushed under the load of many." To avoid such burdens the Court formulated broad prophylactic rules. States were not permitted to tax interstate commerce by laying taxes on property in transit in interstate commerce, the business which constituted such commerce, the privilege of engaging in it, or the receipts derived from it.

The Supreme Court did not go so far, however, as to hold that states could never secure revenue from interstate businesses. An immunity that broad would have placed the states in the position of being required to provide governmental services to interstate property and businesses within their borders without being able to secure from them any contribution to the costs of such governmental services. Hence the Court came to recognize a variety of avenues through which states could derive revenue from interstate commerce.

The principal state revenue producer in the last century was the *ad valorem* property tax. Although property taxes on goods actually moving in interstate commerce were forbidden (because of the risk that they would be applied by more states than one), states were permitted to impose property taxes upon railroad cars and barges if they were apportioned (usually by mileage) so as to apply, in effect, only to the average number of cars present in the state on any one day. The Supreme Court even went so far as to permit states to levy property taxes on the intangible values of interstate transportation companies by permitting the imposition of taxes upon the proportion of the total going-concern value of the companies that track mileage within the state bore to total track mileage.

In other cases activities were characterized as intrastate in order to permit state taxation. Manufacturing, mining, and PRODUCTION were held to be INTRASTATE COMMERCE and taxes upon such activities were permitted even though substantially all of the goods produced were shipped in interstate commerce. Sales involving the transfer of goods from seller to buyer within the state were regarded as intrastate while sales involving no more than solicitation of orders within the state followed by delivery from without were interstate sales. Hence, states could impose nondiscriminatory license taxes on peddlers who carried with them the goods they sold but not on drummers who merely took orders. Later, when modern sales taxes came into existence, the Court applied the same principles. A sales tax could not be imposed when the seller outside the state shipped goods to the purchaser inside the state, but it could be imposed upon the local retailer who brought the goods from outside and then sold and delivered them to customers. In order to protect local merchants from competition by out-of-state sellers, states imposed on purchasers a tax on the "first use" within the state of goods purchased, with an exemption for goods on which the sales tax had been paid. The Supreme Court sustained such taxes on the theory that they were imposed on a local transaction—the use—rather than upon the interstate sale.

Another major boost to the power of states to secure revenues from interstate commerce came in *United States Glue Co. v. Town of Oak Creek* (1918). The Supreme

Court upheld the power of a state to impose taxes measured by net income derived within the state, including net income from interstate activities. The Court distinguished earlier decisions forbidding the imposition of taxes on gross income from commerce by saying that such taxes burdened commerce directly while net income taxes, applied only to the taxpayers' net profits, bore only indirectly upon commerce. The power of the states to impose net INCOME TAXES was initially limited only by two principles. First, a net income tax could not be collected if the taxpayer did only interstate commerce within the state, because it would constitute an imposition on the privilege of engaging in interstate commerce—a privilege that the state did not grant. Second, the tax could be imposed only upon that portion of the net income fairly attributable to activities within the taxing state. A rational apportionment formula was required.

In *Western Livestock v. Bureau of Revenue* (1938), Justice HARLAN FISKE STONE sought to derive from the cases a general principle that would abrogate the general rule that interstate commerce itself could not be taxed. He said that it was not the purpose of the commerce clause "to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." He noted that gross receipts taxes had often been held invalid. "The vice characteristic of those which have been held invalid is that they have placed on commerce burdens of such a nature as to be capable in point of substance, of being imposed . . . or added to . . . with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."

The decision in *Western Livestock* did not mark an end to the older idea that interstate commerce itself could not be directly taxed. As recently as 1946 in *Freeman v. Hewit*, Justice FELIX FRANKFURTER speaking for the Court said:

> Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single-tax-worth of direct interference with the free flow of commerce. An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce. . . . Trade being a sensitive plant, a direct tax upon it to some extent at least deters trade even if its effect is not precisely calculable.

For nearly three decades after *Western Livestock* the cases continued to reflect first one and then the other of these conflicting approaches.

Recently, however, the Supreme Court has cleared out most of the underbrush of the cases from the past and has established some relatively simple guidelines for the future. In *Complete Auto Transit, Inc. v. Brady* (1977) the Court said that it considers not the "formal language" of the tax statute but its "practical effect" and sustains "a tax against commerce clause challenge when the tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

With respect to *ad valorem* property taxation, the Court continues to forbid such taxes on goods moving in interstate commerce while reaffirming the rule that properly apportioned taxes may be imposed upon the instrumentalities of commerce such as railroad cars and airplanes. In *Japan Line, Ltd. v. County of Los Angeles* (1979), however, the Court limited this rule as applied to foreign-owned instrumentalities. It held that a country could not impose even an apportioned tax on the value of shipping containers owned by a Japanese shipping company because Japan was taxing the entire value of the containers. The Court said that its rule permitting apportioned property taxation was based on its ability to force apportionment on all potential taxing jurisdictions. Since Japan could not be required to apportion, the county could not tax at all even though it provided governmental services to the containers when they were in the state.

The distinction between taxes measured by gross income and those by net income has been abolished, along with the rule that states may not tax the privilege of engaging in interstate commerce. In the *Brady* case and in *Department of Revenue of Washington v. Association of Washington Stevedoring Companies* (1978) the Court upheld privilege taxes measured by gross receipts derived from exclusively interstate commerce within the taxing state. The Court indicated that the key is apportionment, which avoids multiple burdens. In *Washington Stevedoring*, for example, it upheld a tax on the gross receipts of a stevedoring company which had as its entire activity loading and unloading in Washington ships engaged in interstate and FOREIGN COMMERCE. It said that the state had "a significant interest in exacting from interstate commerce its fair share of the cost of state government. . . . The Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from interstate activity."

A 1959 federal statute (section 381, Title 18, United States Code) provides that a state may not impose a net income tax if the taxpayer does no more within the state than solicit orders. Beyond that limit the major, current problems relate to the apportionment of an interstate

business's income among the states having JURISDICTION TO TAX it. Nearly half of the states are adherents to the Multistate Tax Compact which calls for net income to be apportioned by a three-factor formula based on property, payroll, and sales. Most states, whether or not adherents to the Compact, utilize similar three-factor formulas. Iowa, however, applies a formula under which it taxes that proportion of net income that gross sales within the state bear to total gross sales. In *Moorman Manufacturing Co. v. Blair* (1978) a challenge to this formula was rejected. The taxpayer argued that to permit Iowa to use a single-factor formula when other states in which it did business used a three-factor formula would result in the taxation by Iowa of income that had been taxed in other states. The Supreme Court would go no further than to examine the particular formula to see that it is reasonable and does not allocate disproportionate amounts of income to the taxing state, leaving to Congress the question whether a uniform formula should be imposed on all states. The Court has also recently rejected challenges to the application of apportionment formulas to the entire net income of integrated companies engaged in production, refining, and distribution of petroleum products. In *Exxon Corporation v. Wisconsin Department of Revenue* (1980) the Court held that so long as the taxpayer is engaged in a "unitary business" any state in which it does business may apply its apportionment formula to the entire net income of the business without regard to how the taxpayer's own accounting system allocates profits and losses.

With respect to taxes on the sales transaction, existing doctrines permit the state in which goods are sold to tax through either a sales or a use tax. However, collection of the use tax is often impossible if the state cannot compel the seller to collect the tax from the purchaser and remit it to the state. Recent concern has been with the DUE PROCESS jurisdictional problem. The state must show some definite link, some minimum connection, between the seller and the state, before it can impose the duty of collection.

A century and a half after *Brown v. Maryland* the Supreme Court's approach to state taxation of interstate commerce is relatively simple: so long as the state taxes do not discriminate against such commerce or create a risk of multiplication of similar levies on the same property or activity, they will be upheld. States will be given wide latitude in devising formulas for apportioning income and allocating values. If more protection for commerce is desired, it will have to come from Congress.

EDWARD L. BARRETT, JR.
(1986)

(SEE ALSO: *Excise Tax; Import-Export Clause; Impost; Original Package Doctrine; State Regulation of Commerce.*)

Bibliography

BARRETT, EDWARD L., JR. 1953 "Substance" vs. "Form" in the Application of the Commerce Clause to State Taxation. *University of Pennsylvania Law Review* 101:740–791.

HARTMAN, PAUL J. 1953 *State Taxation of Interstate Commerce.* Buffalo, N.Y.: Dennis Co.

NOTE 1975 Developments in the Law: Federal Limitations on State Taxation of Interstate Business. *Harvard Law Review* 75:956–1036.

## STATE TAX INCENTIVES AND SUBSIDIES TO BUSINESS

One significant impetus behind the CONSTITUTIONAL CONVENTION OF 1787 was concern over what Justice BENJAMIN N. CARDOZO described in *Baldwin v. G. A. F. Seeling, Inc.* (1935) as "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." Among the weapons deployed by the Framers against this destructive economic rivalry was the COMMERCE CLAUSE, which the Supreme Court has consistently interpreted not only as a grant of power to Congress but also as a constraint on the authority of the states to interfere with the free flow of interstate economic activity.

In the latter part of the twentieth century, analogous interstate economic rivalry has resurfaced in the form of the proliferating use by states of tax incentives and subsidies to compete for business investment and jobs. This interstate competition has spawned a wide array of tools designed to attract businesses, ranging from property tax abatements to loan guarantees, and from investment tax credits to preferential methods of measuring taxable income. The competition has led to nationwide replication of many of these policies, and benefit packages offered to attract large new facilities often measure in the hundreds of millions of dollars. Business tax incentives have contributed substantially in many states to a sharp decline in business taxation's share of state revenues.

The question of whether state tax policies and incentives significantly influence business decisions about where to locate remains the subject of heated debate among the economists who study such issues. But there is little doubt that whatever influence these policies may exert affects only the location, and not the overall national magnitude, of business activity. The primary effects of the incentive competition are the depletion of state resources, the reduction of costs for mobile businesses, and the distortion of economic decisions away from the most efficient distribution of business investment. Nonetheless, no state can afford the political and economic risks of withdrawing from the competition while its neighbors continue.

The commerce clause offers a possible restraint on the

interstate competition over business tax incentives and subsidies. In a long line of cases, the Court has found that state policies, and especially state tax policies, which discriminate against out-of-state or interstate economic activity violate the commerce clause. In particular, the Court has repeatedly and consistently held that tax incentives that are restricted to transactions or businesses located in the granting state, and which thereby result in a comparatively heavier tax burden on interstate transactions or on interstate businesses, cannot survive the commerce clause's antidiscrimination standard.

While this case law has most commonly focused on protectionist measures that shelter local businesses from interstate competitors, many of the common types of location incentives provide precisely the same types of discriminatory advantages to those businesses that locate new economic activity within the state. Income tax credits or preferential deductions measured by, or conditioned upon, new investments or jobs located within the taxing jurisdiction appear particularly susceptible to the commerce clause's prohibition against discriminatory tax measures that give local commerce an advantage over out-of-state or interstate alternatives. Whether the Court will also extend the antidiscrimination standard to bar other forms of tax incentives, such as targeted property tax abatements or preferential rules for the apportionment of taxable income, raises more difficult questions of doctrinal evolution. Incentives provided by means of direct subsidies, rather than tax breaks, may be sheltered from commerce clause scrutiny by the market participant exception, although the Court's opinion in *Camps Newfound/Owatonna v. Town of Harrison* (1997) suggests that this "narrow exception" may be restricted to governmental involvement in a market in the role of buyer or seller, a characterization that does not naturally fit subsidy programs aimed generally at economic development.

PETER D. ENRICH
(2000)

(SEE ALSO: *Interstate Commerce; State Regulation of Commerce.*)

Bibliography

BARTIK, TIMOTHY J. 1991 *Who Benefits from State and Local Economic Development Policies?* Kalamazoo, Mich.: W. E. Upjohn Institute.

ENRICH, PETER D. 1996 Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business. *Harvard Law Review* 110:377–468.

HELLERSTEIN, WALTER and COENEN, DAN T. 1996 Commerce Clause Restraints on State Business Development Incentives. *Cornell Law Review* 81:789–878.

HERZOG, HENRY W., JR., and SCHLOTTMAN, ALAN M., eds. 1991 *Industry Location and Public Policy.* Knoxville: University of Tennessee Press.

## STATUS OF FORCES AGREEMENT

Following WORLD WAR II, as a consequence of entering into a series of mutual defense pacts, the United States established a continuing military presence in a number of foreign countries. To deal with the legal questions that inevitably arose because of this presence, the United States entered into a number of agreements—known as "status of forces agreements"—with the receiving (that is, host) countries involved.

Typically, status of forces agreements exempt visiting forces from the receiving state's passport and immigration regulations, and from its customs duties and taxes on personal property also. Further, the sending state is permitted to issue driving permits and licenses to members of its forces, to purchase goods locally for local consumption, and to employ indigenous civilian labor. In addition, provision usually is made for the settlement of claims for property damage allegedly caused by the visiting forces.

The heart of a status of forces agreement, however, is its allocation of JURISDICTION in respect of criminal offenses putatively committed by the members and accompanying civilians of the visiting forces. In general, the sending state and the receiving state retain exclusive jurisdiction over offenses not punishable by the laws of the other. Where an offense is punishable by the laws of both states, concurrent jurisdiction prevails, with either the sending state or the receiving state retaining the primary right to exercise criminal jurisdiction, depending on the nature of the offense and the circumstances of its occurrence. Where the receiving state exercises jurisdiction, it ordinarily guarantees a prompt and speedy trial, timely notice of charges, the right to confront hostile witnesses, satisfactory legal representation, and a competent interpreter. The accused is usually guaranteed the right to communicate with her or his governmental representatives and to have them present at trial, if possible.

BURNS H. WESTON
(1986)

(SEE ALSO: *North Atlantic Treaty; Treaty Power.*)

Bibliography

LAZAREFF, S. 1971 *Status of Military Forces under Current International Law.* Leyden, Netherlands: A. W. Sijthoff.

SNEE, J. and PYE, A. K. 1957 *Status of Forces Agreements and Criminal Jurisdiction.* Dobbs Ferry, N.Y.: Oceana Publications.

## STATUTORY CONSTRUCTION

See: Legislation

## STATUTORY INTERPRETATION

Much has been written of the circumstances under which courts should strike down LEGISLATION. The reluctance of Article III courts to strike down INTEREST GROUP legislation as unconstitutional finds its source in two seemingly irreconcilable components of American CONSTITUTIONAL THEORY, both derived from the SEPARATION OF POWERS embodied in Articles I, II, and III. The first is the system of CHECKS AND BALANCES, which is intended to raise the decision costs of government by requiring that the various branches share power. The second is the basic constitutional premise, embodied in Article I, that the legislature has the power to make law. These two constitutional principles, taken together, imply that judicial interpretation is consistent with the constitutional scheme only if two conditions are satisfied: the interpretive act (1) must result in making legislation more public-regarding by serving as a check on legislative excess and (2) must not intrude on the constitutional authority of the legislature to make law.

Condition 2 ensures that the Constitution's allocation of the lawmaking function to the legislature will remain intact, while Condition 1 reflects the constitutional premise that federal courts improve the operation of the democratic process by serving as a structural check on Congress's tendency to engage in factionalism. Condition 1 is justified by the need to mitigate the harmful effects of interest group domination of the political process. Condition 2 is justified by the basic principle of democratic theory that the power to make law ultimately should reside in representative institutions such as Congress.

While these conditions appear to be irreconcilable, they may be reconciled by recognizing that the constitutional requirement that the judiciary serve as a check on Congress's excesses often is fulfilled by the very act of statutory interpretation itself. The judiciary, using traditional methods of statutory interpretation, inevitably checks legislative excess by serving as a mechanism that encourages passage of public-regarding legislation and impedes passage of interest group bargains. In other words, there need not be overt confrontation between the judicial branch and the legislative branch in order for checking and balancing to take place. Checking legislative abuse is an institutional by-product of the judiciary's traditional role as interpreter of statutes in the resolution of specific legal disputes.

When called upon to interpret a statute, a court has three alternatives. First, it can look beyond the terms of the statute and seek to enforce the terms of the deal between the interest group and the legislature. This "legislation-as-contract" method of statutory interpretation is illegitimate because it violates Condition 1 described above. Specifically, it denies the federal judiciary its proper role in the constitutional scheme as a check on factionalism and legislative excess.

Conversely, a court can identify what it perceives to be a special interest group bargain and strike the deal down on constitutional grounds. While this approach satisfies the terms of Condition 1 by constraining the legislature, as ALEXANDER M. BICKEL observed, it violates Condition 2 by usurping the lawmaking prerogatives of Congress.

Finally, there is what is best called "the traditional approach" which, as the name implies, refers to the classic, time-honored methods of statutory interpretation that judges actually employ to decide cases. This method differs from the "legislation-as-contract" approach in that it counsels judges to interpret statutes based on what the statutes actually say, rather than on what the judges believe the bargain was between the interest group and the legislature. The traditional approach encourages more public-regarding legislation by frequently transforming statutes designed to benefit narrow interest groups into statues that in fact further the public's interests. Unlike the other two approaches, this one enables the judiciary to serve as a check on Congress without interfering with Congress's constitutionally granted authority to make law.

Important constraints on the legislature derive from aspects of the judicial process other than judicial nullification of legislative enactments on constitutional grounds. Although legislative acts are only infrequently declared unconstitutional, more subtle constraints are imposed upon the legislature by the judicial process itself. The very act of statutory construction often transforms statutes designed to benefit narrow interest groups into statutes that in fact further the public interest.

JONATHAN R. MACEY
(2000)

Bibliography

EASTERBROOK, FRANK H. 1983 Statutes' Domains. *University of Chicago Law Review* 50:533–552.

——— 1984 The Supreme Court, 1983 Term—Foreword: The Court and the Economic System. *Harvard Law Review* 98:4–60.

ESKRIDGE, WILLIAM N., JR. 1987 Dynamic Statutory Interpretation. *University of Pennsylvania Law Review* 135:1479–1555.

——— 1989 Public Values in Statutory Interpretation. *University of Pennsylvania Law Review* 137:1007–1095.

MACEY, JONATHAN R. 1986 Promoting Public-Regarding Leg-

islation Through Statutory Interpretation: An Interest Group Model. *Columbia Law Review* 86:223–268.

SUNSTEIN, CASS R. 1989 Interpreting Statutes in the Regulatory State. *Harvard Law Review* 103:405–505.

## STAY OF EXECUTION

A stay of execution is an order commanding that the enforcement (execution) of a lower court JUDGMENT be suspended (stayed) pending further proceedings before that court or an appeal of the judgment to a higher court. The entry of such an order is essentially a matter of judicial discretion, tempered by various principles developed in court rules and judicial precedents. In a civil case, a stay order may be conditioned on the posting of a bond to protect the interests of the prevailing party; in a criminal case a stay of a prison sentence raises the question of the defendant's entitlement to release or continued freedom, often conditioned on posting a BAIL bond.

In the federal court system, stays can be sought in district courts, courts of appeals, and ultimately in the Supreme Court. Generally speaking, a litigant must exhaust all possibilities of securing a stay from a lower court or courts before applying to a higher court. Stays are of two categories: a stay of a district court judgment pending an appeal to a court of appeals, and a stay of a court of appeals judgment or mandate pending application to the Supreme Court to review the judgment of the court of appeals. The Supreme Court or an individual Justice has statutory authority to grant both types of stays, provided that all efforts to secure a stay from the lower courts have failed.

Most stay applications in the Supreme Court are addressed to and resolved by individual Justices, acting in their capacity as circuit Justices "in chambers," although application can be made to the entire Court for reconsideration of an individual Justice's denial of a stay. Generally, a stay will be granted when there is a "reasonable probability" that four Justices, the minimum needed to grant review, will vote to review the case; that there is "a fair prospect" that the decision below will be reversed; that irreparable harm to the applicant will likely result if a stay is denied; and that the balance of equities, to the parties and to the public, favors a stay.

EUGENE GRESSMAN
(1986)

Bibliography

STERN, ROBERT L.; GRESSMAN, EUGENE; and SHAPIRO, STEPHEN M. 1986 *Supreme Court Practice*, 6th ed. Chap. 17. Washington, D.C.: Bureau of National Affairs.

## *STEAGALD v. UNITED STATES*
451 U.S. 204 (1981)

A 7–2 Supreme Court extended to third parties the rule of PAYTON V. NEW YORK (1980) that, absent consent or exigent circumstances, law enforcement officers may not enter a home to make an arrest without a SEARCH WARRANT. Here the officers sought to execute an ARREST WARRANT for one person by entering the home of another and found EVIDENCE that served to convict that other party. The Court supported his contention that the FOURTH AMENDMENT required a warrant for the search of his home, reasoning that privacy, especially in one's home, outweighed the inconvenience to the officers of having to obtain a search warrant.

LEONARD W. LEVY
(1986)

## STEEL SEIZURE CONTROVERSY

In the latter part of 1951, a dispute arose between the nation's steel companies and their employees over terms and conditions of employment. On December 18, the steelworkers union gave notice of intention to strike when existing agreements expired on December 31. On December 22, President HARRY S. TRUMAN referred the dispute to the federal Wage Stabilization Board and the strike was canceled. The Board's subsequent report produced no settlement. Early in April 1952, the United Steel Workers of America called a nationwide strike to begin April 9.

President Truman and his advisers feared that the interruption of production would jeopardize national defense, particularly in Korea. The President thus issued EXECUTIVE ORDER 10340 to Secretary of Commerce Charles Sawyer, instructing him to take possession and operate the steel mills in the name of the United States government. Truman's authority to take such action was not granted specifically by the statute, and he cited none, although the Selective Service Act of 1948 and the Defense Production Act of 1950 authorized the seizure of industrial plants failing to give priority to defense orders. Although the TAFT-HARTLEY ACT of 1947 had a procedure for injunctive relief in a strike situation affecting an entire industry, or imperiling the national health and safety, it did not contain seizure provisions. Truman preferred to act on the basis of what Department of Justice attorneys assured him was the INHERENT POWER in the office of the President, stemming from his authority as COMMANDER-IN-CHIEF and "in accordance with the Constitution and the laws of the United States."

The steel companies obeyed Secretary Sawyer's order

under protest but brought suit to enjoin the seizure in the District Court for the District of Columbia. There Judge David Pine granted a preliminary injunction restraining the secretary from continuing the seizure. Pine's ruling on the merits and the stay of the injunction by the United States Court of Appeals compelled the Supreme Court to face the constitutional issue also, on final appeal. (See YOUNGSTOWN STEEL AND TUBE V. SAWYER.)

PAUL L. MURPHY
(1986)

Bibliography

MARCUS, MAEVA 1977 *Truman and the Steel Seizure Case: The Limits of Presidential Power.* New York: Columbia University Press.

## STEPHENS, ALEXANDER H.
(1812–1883)

A successful self-taught Georgia lawyer, Alexander Hamilton Stephens was a congressman (1843–1859, 1873–1882), vice-president of the Confederacy (1861–1865), and a lifelong defender of STATES' RIGHTS. As a southern Whig, Stephens sought to protect state SOVEREIGNTY and preserve the Union. These objectives led to apparent inconsistencies. Thus, he opposed JOHN C. CALHOUN and NULLIFICATION while arguing for the abstract right of SECESSION. Similarly, Stephens was a slaveowner who declared that "I am no defender of slavery in the abstract." He supported ANNEXATION OF TEXAS to preserve the balance of free and slave states, but he did not support slave extension generally. He opposed the Mexican War because of his unrelenting hatred of President JAMES K. POLK, his honest belief that the war was unjust, and his fear that it would reopen the divisive issue of SLAVERY IN THE TERRITORIES. But once the war was over he advocated opening the Mexican Cession to slavery. Ironically, he successfully moved to table the Clayton Compromise (1848), even though he supported its purpose, because he believed the Supreme Court would declare that existing Mexican law prohibited SLAVERY in the new territories.

Stephens opposed the COMPROMISE OF 1850, warning: "Whenever this Government is brought in hostile array against me and mine, I am for disunion—openly, boldly and fearlessly for *revolution*." Nevertheless, once the compromise passed, Stephens supported it in Georgia, and at the state's secession convention of 1850 he helped write the Georgia Platform which denounced disunion. Stephens then joined ROBERT TOOMBS and Howell Cobb in organizing a Union Party in Georgia.

In 1854 Stephens became a Democrat. He was the floor manager for the KANSAS-NEBRASKA ACT (1854) and worked closely with STEPHEN A. DOUGLAS. As chairman of the House Committee on the Territories Stephens supported the LECOMPTON CONSTITUTION, unlike his Senate counterpart (Douglas). Despite Douglas's apostacy on this issue, Stephens supported his presidential nomination in 1860 and futilely campaigned for Douglas in Georgia.

In November 1860 Stephens opposed secession in Georgia, arguing that Southerners and northern Democrats could block any bill that threatened slavery or the South. His pro-Union speech, reprinted throughout the North, led to a brief correspondence with President-elect ABRAHAM LINCOLN. As a delegate to the Georgia secession convention (January 1861), Stephens supported the creation of a southern nation, provided that it adopted a CONSTITUTION similar to that of the United States. In the provisional Confederate Congress Stephens helped draft the CONFEDERATE CONSTITUTION, which owing in part to his influence resembled the Constitution of 1787. Stephens was then chosen vice-president of the Confederacy. As a moderate who had long opposed secession, Stephens gave the new government legitimacy. On slavery, Stephens was by this time quite "sound." As early as 1855 he had defended slavery on biological and biblical grounds, as well as its role in creating southern society, which Stephens believed was the greatest in history. By 1860 he owned more than thirty slaves. In March 1861 he told the South and the world, in his most famous speech, that slavery was the "cornerstone of the Confederacy."

Throughout the CIVIL WAR Stephens's relationship with JEFFERSON DAVIS was stormy. Stephens opposed CONSCRIPTION, martial law, and the suspension of the writ of HABEAS CORPUS. He accused Davis of becoming a dictator and advocated that Georgia seceded from the confederacy to seek peace and sovereignty on its own. Stephens urged that the Confederacy support George McClellan's presidential bid and then seek peace with the United States. He made numerous peace overtures, and in early 1865 met with Lincoln in an unrealistic attempt to negotiate a peace that would preserve a separate southern nation.

Arrested for TREASON in May 1865, Stephens was incarcerated at Fort Warren (Boston) until President ANDREW JOHNSON pardoned him in October. He then returned to Georgia where an unreconstructed state legislature elected him to the United States Senate. The Senate responded to this affront by denying Stephens his seat.

In a ponderous and tedious book, *A Constitutional View of the Late War Between the States* (2 vols., 1868, 1870), Stephens presented an elaborate and unconvincing defense of secession. He responded to his many hostile critics with an even duller book, *The Reviewers Reviewed* (1872). Reelected to Congress in 1873, Stephens re-

mained for nearly a decade as an ineffectual and somewhat scorned relic of the past. He continued to defend slavery and states' rights, while opposing reconstruction and black rights.

PAUL FINKELMAN
(1986)

Bibliography

VON ABELE, RUDOLPH 1946 *Alexander H. Stephens: A Biography.* New York: Knopf.

## STERILIZATION

Late in the nineteenth century, when simple and safe medical procedures for sterilization became available, the eugenics movement began to promote compulsory sterilization laws. A few laws were enacted specifying sterilization as punishment for sex crimes, but they were rarely enforced. In 1907 Indiana adopted a law authorizing sterilization of persons deemed "feebleminded," or, as one leading proponent put it, "socially defective." Other states soon followed. The Supreme Court lent both practical and moral support in its 1927 decision in BUCK V. BELL, upholding the constitutionality of Virginia's law. By 1935 more than thirty states had adopted forced sterilization laws, and 20,000 "eugenic" sterilizations had been performed. The victims of such laws tended to be poor; indeed, in the view of eugenics proponents, poverty and other forms of dependence were the marks of the "socially inadequate classes" that needed eradication.

Times have changed, and constitutional law has changed. Concurring in GRISWOLD V. CONNECTICUT (1965), Justice ARTHUR GOLDBERG said, "Surely the Government, absent a showing of a COMPELLING subordinating STATE INTEREST, could not decree that all husbands and wives must be sterilized after two children have been born to them." After SKINNER V. OKLAHOMA (1942) the point seems incontestable. Yet some state courts, following *Buck*, still uphold laws authorizing the involuntary sterilization of institutionalized mental patients. Although only fifteen years separated the *Buck* and *Skinner* decisions, their doctrinal foundations were worlds apart. *Skinner*, calling procreation "one of the basic civil rights of man," insisted on STRICT SCRUTINY by the Court of the justifications supporting a compulsory sterilization law. *Buck*, on the other hand, had employed a deferential form of RATIONAL BASIS review, analogizing forced sterilization to forced VACCINATION.

*Skinner's* crucial recognition was that sterilization was more than an invasion of the body; it was an irrevocable deprivation of the right to define one's life and one's identity as a biological parent. Vaccination implies no such consequences for one's self-identification and social role. The constitutional issues presented by sterilization thus bear a strong analogy to the issues raised by laws restricting other forms of BIRTH CONTROL and abortion. (See FREEDOM OF INTIMATE ASSOCIATION.) The Supreme Court has characterized all these forms of state interference with REPRODUCTIVE AUTONOMY as invasions of FUNDAMENTAL INTERESTS, and has subjected them to close scrutiny in the name of both EQUAL PROTECTION, as in *Skinner*, and that form of SUBSTANTIVE DUE PROCESS that goes by the alias of a RIGHT OF PRIVACY, as in *Griswold* and ROE V. WADE (1973).

The issue of *Buck* seems certain to return to the Supreme Court one day, to be decided on the basis of a much heightened STANDARD OF REVIEW. Similarly, a state law requiring consent of a spouse before a person could be sterilized would surely be held invalid, on analogy to PLANNED PARENTHOOD OF MISSOURI V. DANFORTH (1976). If a law calling for involuntary sterilization must pass the test of strict scrutiny, and if a competent adult has a corresponding right to choose to be sterilized, then the critical ingredient is choice. An "informed consent" requirement thus seems defensible against constitutional attack, provided that the required "informing" procedure does not unreasonably burden the decision to be sterilized. (An informed consent requirement for abortion was upheld by the Supreme Court in *Danforth*.)

As Justice WILLIAM O. DOUGLAS noted in his *Skinner* opinion, sterilization in "evil or reckless hands" can be an instrument of genocide. Even the most devoted partisan of reproductive choice cannot be entirely comfortable knowing that the percentage of sterilized nonwhite women in the United States is almost triple that for white women, or that among public assistance recipients blacks are twice as likely to "choose" sterilization as are whites. Under current interpretations the Constitution has nothing to say about the bare fact of this disparity; yet it reflects a condition of constitutional dimension that deserves to be addressed, at least in the domain of PROCEDURAL DUE PROCESS. And if nonwhite women are led by government officers to believe that sterilization is voluntary in theory but somehow compulsory in fact, that form of "engineering of consent" appears reachable in actions for damages under SECTION 1983, TITLE 42, UNITED STATES CODE, based on the deprivation of substantive due process.

KENNETH L. KARST
(1986)

Bibliography

KELLY, MARY E. 1979 Sterilization Abuse: A Proposed Regulatory Scheme. *DePaul Law Review* 28:731–768.

KEVLES, DANIEL J. J. 1985 *In the Name of Eugenics: Genetics and the Uses of Human Heredity.* New York: Knopf.

PILPEL, HARRIET F. 1969 Voluntary Sterilization: A Human Right. *Columbia Human Rights Law Review* 7:105–119.

## *STETTLER v. O'HARA*
243 U.S. 629 (1917)

An Oregon Supreme Court decision sustained that state's minimum wage law for women on the basis of the STATE POLICE POWER argument approved in MULLER V. OREGON (1908). A 4–4 Supreme Court affirmed that ruling in *Stettler.* Several state courts drew the inference that a properly drawn law regulating women's wages would be upheld and sustained such laws in reliance on *Stettler.* The DISTRICT OF COLUMBIA MINIMUM WAGE ACT nonetheless fell, 5–3, in ADKINS V. CHILDREN'S HOSPITAL (1923).

DAVID GORDON
(1986)

## STEVENS, JOHN PAUL
(1920– )

When President GERALD R. FORD named him to the Supreme Court in 1975, John Paul Stevens had all the conventional qualifications for the job. He had served for five years on the UNITED STATES COURT OF APPEALS for the Seventh Circuit, had been a distinguished antitrust law practitioner, a law school teacher, and a law clerk to Justice WILEY B. RUTLEDGE. But those who expected this conventional background to yield a conventional Justice soon learned better. Most new Justices write first for a unanimous Court; Justice Stevens's maiden effort, HAMPTON V. MOW SUN WONG (1976), included a combination of EQUAL PROTECTION and DELEGATION OF POWERS doctrine so novel that only four other Justices joined in it—and two of those added their own concurrence. In the terms that followed, Justice Stevens found it necessary to write separately far more often than any of his colleagues.

Many of his concurrences and dissents were sparked by disagreement with the substance of the BURGER COURT's decisions. He is the only Justice appointed since 1968 who does not regularly vote against criminal defendants, and his strong defense of PRISONERS' RIGHTS clearly runs counter to the majority's thinking. So too does his STRICT CONSTRUCTION of the ESTABLISHMENT OF RELIGION clause; and he is among the least receptive of the Justices when states assert local interests against the workings of a national economy, let alone the voice of Congress.

Overall, however, his moderate pragmatism puts him close to the center of the Court on most issues. What divides him from his colleagues is not so much substance as his fundamental dissatisfaction with the Court's judicial style. That style was summed up in UNITED STATES V. NIXON (1974), the year before Stevens's appointment. It is "emphatically the province and duty" of the judiciary, the Court quoted from MARBURY V. MADISON (1803), "to say what the law is." Left, right, and center, the Court he joined was nearly unanimous in wanting to say as much as possible about what the law is.

Stevens came from a different school. His first constitutional law professor, Nathaniel Nathanson, taught him that abstract talk about constitutional issues is usually misleading. In Nathanson's words, "we are the sworn enemies of the glittering half-truths, the over-simplified explanations. We are constantly at war with . . . the black-letter law, the restatements, the horn books." Another teacher soon reinforced the lesson; years after his clerkship, Stevens remembered: "Justice Rutledge exhibited great respect for experience and practical considerations. He was critical of broadly phrased rules which deceptively suggested that they would simplify the decision of difficult questions."

To a degree, this focus on the practical, the concrete, makes Stevens a spokesman for judicial restraint and narrow opinions. He can be relied upon, for example, to protest when the Court reaches out to decide constitutional issues on an insufficient record, as in *Globe Newspaper Co. v. Superior Court* (1982); when it leaps to interpret the Constitution despite a statute that would do the job, as in *Regents of the University of California v. Bakke* (1978); when it insists on reviewing for federal error a state court decision that will likely be restored on ADEQUATE STATE GROUNDS, as in *Michigan v. Long* (1983); or when it invokes the OVERBREADTH DOCTRINE to discuss facts not before the Court, as in *Metromedia, Inc. v. San Diego* (1981). And despite his reputation for unorthodox and strongly held views, some of Stevens's best work has been done in painstaking opinions such as *NAACP v. Claiborne Hardware Co.* (1982), where he held together a diverse group of Justices by saying no more than was necessary to resolve the case.

But Stevens's rejection of glittering half-truths and over-simplified explanations is no mere passive virtue. It has a radical side. In YOUNG V. AMERICAN MINI THEATRES, INC. (1976), for example, where Stevens defended the constitutionality of special ZONING for theaters showing sexually explicit movies, he did so by launching a frontal attack on that most glittering of half-truths—the assertion that government must ignore the content of the speech that it regulates. Only three other Justices joined him in *Mini Theatres,* but he persisted, pointing out in case after case that the principle of "content neutrality" was plainly too sweeping, that content-based distinctions had been employed for years in OBSCENITY, libel, and COMMERCIAL SPEECH cases. Ultimately he prevailed. In *New York v. Fer-*

*ber* (1982) the Court explicitly endorsed Stevens's *Mini Theatres* analysis in the course of making child PORNOGRAPHY a new class of unprotected speech. Perhaps characteristically, Stevens refused to join the Court's opinion; in his view, the *Ferber* Court had fallen victim to an equally egregious half-truth—the notion that some kinds of speech are wholly beyond the scope of the FIRST AMENDMENT's protection.

By stripping away the slogans that obscured the First Amendment, Justice Stevens left himself free to follow what he had so admired in Rutledge: he could seek "a practical solution to a practical problem," exercising "the faculty of judgment and not merely the logical application of unbending principles." Recognizing that even obscene speech is still speech, he looked at the practical effect of criminal obscenity prosecutions. In an analysis strikingly parallel to his CAPITAL PUNISHMENT opinions, he concluded that the Court's obscenity decisions had produced laws so vague that they supplied juries with little or no guidance. The result was that, for most pornography, criminal penalities were applied too arbitrarily to withstand scrutiny.

At the same time, it was plain to him that the reasons for restricting sexually offensive speech do not die at the indistinct boundary between the obscene and the merely indecent. Although speech bordering on obscenity cannot be wholly suppressed, Stevens concluded, the practical—and so the constitutionally permissible—solution was to confine such speech to contexts that minimize or even eliminate its offensiveness. Thus, in SCHAD V. VILLAGE OF MT. EPHRAIM (1981) he would have allowed the town to bar nude dancing from quiet shopping centers and neighborhoods—but apparently not from "a local replica of Place Pigalle." In FEDERAL COMMUNICATIONS COMMISSION V. PACIFICA FOUNDATION (1978) he would have let the government keep four-letter words off afternoon radio—but not out of the United States Reports.

This insistence that constitutional issues be examined context by context marks all of Stevens's campaigns against the artificiality of black-letter constitutional law. When he joined the Court, for example, EQUAL PROTECTION analysis had split into two tiers, each with its own set of incantations; the prevailing doctrinal dispute was whether and where to add yet a third, "intermediate" tier between STRICT SCRUTINY and RATIONAL BASIS review. Again Justice Stevens's solution was a striking doctrinal departure: not more tiers but fewer. "There is only one Equal Protection Clause," he wrote in CRAIG V. BOREN (1976), and so only one basic STANDARD OF REVIEW. By demanding that legislative classifications be genuinely relevant to a legitimate purpose, Justice Stevens produces results not unlike those that emerge from the clanking operation of two- or even three-tiered review. The difference is that Stevens candidly exercises judgment, taking account of the context, the offensiveness of the classification, and the credibility of the legislative purpose.

Though his approach pays dividends in candor and flexibility, it has its costs. Among the first casualties, ironically, are some of the pieties of judicial restraint. Stevens's equal protection analysis, for example, does not allow him to pretend that laws are invalidated by some brooding three-tiered omnipresence in the sky. Instead, it demands a far more skeptical and probing look at legislative politics than is usual for advocates of restraint. His First Amendment analysis, for example, would replace the discredited "content neutrality" standard with a narrower requirement that government not display bias against a particular viewpoint. This practical and pointed inquiry would save some laws that do not survive the Court's more abstract standard. But the price of this restraint is high. To uphold some lawmakers' actions, as in *FCC v. League of Women Voters* (1984), he must bluntly accuse others of actions "obviously directed at spokesmen for a particular point of view."

Perhaps it is a recognition of these costs that makes Stevens adroit at using such techniques as "legislative remand," particularly when federal policies are at stake. His opinion in *Hampton v. Mow Sun Wong* (1976), for example, struck down a civil service rule barring ALIENS from federal employment—not because the asserted federal purposes were insufficient but because they were none of the Civil Service Commission's business. If the President or Congress adopted the same rule, he suggested, it might well withstand review. Similarly, in FULLILOVE V. KLUTZNICK (1980) he would have invalidated a federal law reserving ten percent of certain construction grants for minority-owned businesses—not because such a set-aside was necessarily unconstitutional but because it raised profound constitutional questions that Congress had failed even to consider in its "slapdash" rush to enactment.

What does this unique mix of radicalism and restraint mean for Stevens's role on the Court? It seems clear, first, that his candor will always make him something of an outsider; it shows a glint of cheerful mischief too often for him to be a classic majority-building centrist. It may be true, as Stevens said in *Lakeside v. Oregon* (1978), that "most people formally charged with crime are guilty" or that "most people who remain silent in the face of serious accusations have something to hide and therefore are probably guilty." It may also be true, as Stevens wrote in *Fullilove*, that so-called benign racial preferences make it easier for "representatives of minority groups to disseminate patronage to their political backers." But as bracing as these unwelcome truths can be in the opinions of a single Justice, they will not, and probably should not, find their way soon into opinions of the Court.

More important over the long run is Stevens's campaign

to win back broad fields of constitutional judgment from the logicians and their half-truths. Here he has had occasional victories, but he is battling uphill. Justices write opinions that leave much unsaid only when they have faith in the wisdom of those who will finally fill the gaps—the lower courts, their colleagues, future Justices. So long as most members of the Court lack that faith, Stevens's campaign for institutional humility will face long odds. Even when the Court adopts his practical, contextual approach, as it essentially has in equal protection cases, its opinions are likely to cling to the words and forms of a more MECHANICAL JURISPRUDENCE.

Of course no Justice can expect to impose the full range of his or her views on the Supreme Court. It is when one looks at individual doctrines that the impact of Stevens's iconoclastic creativity becomes clear. At times the power of his attack has swept away entrenched dogma and cleared the way for new thinking, as it did in *Ferber.* More important still is his ability to come fresh to new constitutional problems and to tailor new solutions for them. This talent showed even on the Seventh Circuit, where, for example, he preceded the Court in declaring that the First Amendment is a safeguard against patronage dismissals and that state tort remedies are a way of providing due process to a prisoner deprived of his property. On the Court, by joining with other Justices in the center, Stevens has set new terms of constitutional debate in areas as diverse as the death penalty, SEARCH AND SEIZURE, and gerrymandering. As new Justices and new issues come to the Court, as the shock of his challenge to the old bromides fades, it is this practical creativity that will ultimately make his mark upon the law.

STEWART ABERCROMBIE BAKER
(1986)

Bibliography

STEVENS, J. P. 1956 Mr. Justice Rutledge. Pages 176–202 in Allison Dunham and Philip B. Kurland, eds., *Mr. Justice.* Chicago: University of Chicago Press.

——— 1985 Judicial Restraint. *San Diego Law Review* 22: 437–452.

## STEVENS, JOHN PAUL
(1920– )
(Update 1)

In 1975, President GERALD R. FORD sought a "moderate conservative" of unimpeachable professional qualifications to fill the Supreme Court seat vacated by WILLIAM O. DOUGLAS. John Paul Stevens of Chicago, an intellectually gifted antitrust lawyer, former law clerk to Justice WILEY B. RUTLEDGE, occasional law professor, and federal court of appeals judge for the preceding five years, seemed to fit the bill. Justice Stevens in fact has more often been described as a "moderate liberal" of sometimes unpredictable or even idiosyncratic bent or as a "moderate pragmatist." A prolific writer of separate opinions frequently offering a different perspective, he generally is not a coalition builder. Even the common term "moderate" reflects his agreement in result with sometimes one and sometimes another more readily identifiable group of Justices on the Court or his balanced accommodation of community rights to govern and individual freedoms rather than his judicial substance or style.

Such labels usually mislead more than instruct, and in Justice Stevens's case conservative, moderate, and liberal strands of constitutional thought blend in a singular combination. He shares the judicial conservatism of Douglas's (and thus his) predecessor, Justice LOUIS D. BRANDEIS, who frequently urged the Court to reach constitutional questions only when necessary and to resolve constitutional disputes as narrowly as possible. He shares the moderate rationalist's antipathy to excessive generalization that Nathaniel Nathanson, Brandeis's law clerk and Stevens's admired constitutional law teacher, abhorred. He also shares the liberal substantive vision of Justice Rutledge, whom Stevens once admiringly described as a Justice who "exhibited great respect for experience and practical considerations," whose "concern with the importance of procedural safeguards was frequently expressed in separate opinions," and most importantly, who believed that "the securing and maintaining of individual freedom is the main end of society." Each of these elements of his intellectual lineage appear centrally in Justice Stevens's own constitutional writings.

His particular mixture of judicial restraint and vigorous judicial enforcement of individual liberty, although akin to those of Brandeis and Rutledge, sets Stevens apart from his contemporaries on both the BURGER COURT and the REHNQUIST COURT. His is not the judicial restraint of extreme deference to government authority, but the judicial restraint of limiting the occasions and the breadth of Supreme Court rulings, particularly when he concludes that a ruling is unnecessary to protect liberty. His adjudicative approach is to balance all the relevant factors in a particular context with thorough reasoning whose ultimate aim is resolving the particular dispute, not declaring broad propositions of law. Yet, because Stevens sees protection of liberty as a peculiarly judicial obligation, there is no conflict for him between judicial restraint and liberty-protecting judicial intervention, however narrow the basis of that intervention might be. Thus, his frequent criticism of "unnecessary judicial lawmaking" by his colleagues, although it extends to reliance on any intermediate doctrinal standard of review that is a judicial gloss on constitutional

text, is most bitterly voiced when judge-made doctrines stand in the way of vindicating individual freedom. In *Rose v. Lundy* (1982), for example, his dissent objected to several judicially imposed procedural obstacles to federal HABEAS CORPUS review of claims of fundamental constitutional error in the conviction of state criminal defendants. In contrast, Stevens, always sensitive to matters of degree, expressed his inclination to address constitutional claims more readily the more fundamental they are and to husband scarce judicial resources for the occasions when judicial action is most acutely needed. Accordingly, he urged the Court to confine "habeas corpus relief to cases that truly involve fundamental fairness."

The same preference for employing JUDICIAL POWER to secure and maintain individual freedom, rather than to vindicate government authority, appears in other positions he has taken on the proper scope of the Court's institutional role. He has waged a lengthy, but largely unsuccessful, battle to convince the court to curtail its use of discretionary certiorari jurisdiction to review cases in which the claim of individual liberty prevailed in lower courts. In NEW JERSEY V. T.L.O. (1984) he inveighed against the Court's "voracious appetite for judicial activism in its Fourth Amendment jurisprudence, at least when it comes to restricting the constitutional rights of the citizen." To Stevens, the Court should not be concerned with legitimating prosecution practices or other governmental controls that lower courts have erroneously restricted through overly generous interpretations of federal law. In general, he sees dispersal of judicial power as a positive good, especially when state courts restrain state officials from interfering with individuals, even when those courts have applied the federal Constitution more stringently than the Supreme Court might. He has argued with respect to STARE DECISIS that the Court should adhere more readily to prior rulings that recognized a liberty claim than to those that rejected one. Similarly, he appears more likely to find a "case or controversy" calling for decision on the merits in an individual challenge to government action than in review of a claim that the government's prerogatives have been unreasonably limited. This distinction can be seen in a comparison of his dissents on the issue of standing in ALLEN V. WRIGHT (1984) and *Duke Power Co. v. Carolina Environmental Study Group* (1978). Similarly, he has argued for reduction in the Court's reliance on the doctrine of "HARMLESS ERROR," which allows convictions to be affirmed where arguably nonprejudicial error has occurred; in his view, saving convictions should have a low priority.

His substantive conception of the source and content of constitutional liberty is as distinctive as his view of the systemic judicial role in protecting it. Unlike protections for PROPERTY RIGHTS, which Stevens agrees originate in positive law, he believes liberty stems from NATURAL LAW. His dissents in *Hewitt v. Helms* (1983) and *Meachum v. Fano* (1976) illustrate his belief that even justifiably confined inmates retain claims to liberty, including the right to be treated with dignity and impartiality. The source of that liberty "is not state law, nor even the Constitution itself." Rather, drawing on the DECLARATION OF INDEPENDENCE, he found it "self-evident that all men were endowed by their Creator with liberty as one of the cardinal inalienable rights." Not surprisingly, given this view, he has embraced judicial recognition of a wide spectrum of textually unenumerated fundamental liberties that cannot be infringed without strong justification, including those implicated by criminal and civil commitment proceedings, termination of parental rights, loss of CITIZENSHIP, restrictions on ABORTION and consensual sex, and laws limiting prisoners' rights to refuse antipsychotic drugs and terminal patients' rights to refuse unwanted, life-prolonging medical intervention. As to the last, his dissent in *Cruzan v. Missouri Department of Health* (1990) opined that "choices about death touch the core of liberty" and are "essential incidents of the unalienable rights to life and liberty endowed us by our Creator" and that the "Constitution presupposes respect for the personhood of every individual, and nowhere is strict adherence to that principle more essential than in the Judicial Branch." Stevens has been particularly distressed by the Court's rejection of a wide liberty to retain counsel in government-benefit disputes and the right to government-provided counsel in proceedings to terminate parental status, because he thinks these rulings substantially undervalue the fundamental liberty of legal representation. Of his general approach, he has written that judges are to use the common-law method of adjudication to ascertain the content of liberty: "The task of giving concrete meaning to the term 'liberty,' like the task of defining other concepts such as 'commerce among the States,' 'due process of law,' and 'unreasonable searches and seizures,' was a part of the work assigned to future generations of judges."

Contained in his conception of liberty are government obligations of impartiality, rational decision making, and procedural fairness. These obligations are tempered, however, by two factors. First, Justice Stevens is willing to search broadly for acceptable regulatory justifications, especially the justification that a particular regulation enhances rather than diminishes liberty. Second, he is a candid, interest balancer, willing to distinguish among degrees of liberty and degrees of regulatory interference, as well as among degrees of strength of governmental interests to be served. The result is to give government at least some leeway. Moreover, he would hold judges to at least the same level of obligation, a fact that sometimes enlarges the regulatory freedom of political actors. Thus, although

Justice Stevens starts from the presumption that government must justify its interference with liberty, rather than a presumption of judicial deference to regulation, he can be quite generous in accepting certain forms of regulation.

For Stevens, government treatment of individuals as equals with dignity and respect is a portion of their liberty, not just a derivation of the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT. His particular brand of equality analysis would eschew judicial searching for biased subjective motivations of decision makers in favor of an inquiry into whether a law's objectively identifiable purposes are legitimate and sufficiently served. His aversion to motive inquiry is founded largely on two concerns: judges lack capacity to assess motivation accurately and reliance on motive might mean that identical laws would be valid in one JURISDICTION and invalid in another, depending on their sponsors' motives. Lack of nationwide uniformity of federal constitutional restraints on regulatory power is anathema to Stevens because it tends to undermine the judicial obligation of evenhandedness.

Justice Stevens opposes the Court's longstanding articulation of different tiers of equal-protection review depending on the nature of the group disadvantaged. He also opposes sharply differentiating between discriminatory intent and disproportionate impact as the dividing line between permissible and impermissible laws. Sacrificing guidance to others for sensitive analysis—an easy accommodation for one who sees the judicial role as dispute resolution, not pronouncement of law—he would consider such factors relevant, but not determinative. Instead of categories, he insisted in CRAIG V. BOREN (1976) that there is "only one Equal Protection Clause" and that its requirement is "to govern impartially." To be impartial, classifications may not be based on insulting assumptions or allow "punishment of only one of two equally guilty wrongdoers," as he wrote in dissent in MICHAEL M. V. SUPERIOR COURT (1981). His version of impartiality requires that people be treated as equals in dignity and moral respect, not that they necessarily receive equal treatment; so that unlike the "insulting" law held invalid in *Craig*, which forbade young men, but not young women, from buying beer, and the statutory rape law that he would have invalidated in *Michael M.*, which punished only males, he voted in ROSTKER V. GOLDBERG (1981) to uphold Congress's male-only draft law—a law that did not assume greater moral culpability of males than females.

When assessing impartiality, Justice Stevens would also consider whether persons other than the complainants are disadvantaged and whether members of the complaining group could rationally support the disadvantaging classification. Thus, he refused to invalidate a veterans' preference for jobs in PERSONNEL ADMINISTRATOR OF MASSACHUSETTS V. FEENEY (1979), despite its disproportionately disadvantageous effect on women, because the law also disadvantaged nonveteran men in large numbers. And in CLEBURNE V. CLEBURNE LIVING CENTER, INC. (1985) he left open the possibility that some restrictive regulations based on MENTAL RETARDATION might be permissible because a mentally retarded person, like an impartial lawmaker, could accept some regulation to protect himself or herself, or others.

Attention to the full composition of the disadvantaged group and to their views is related to political limits on discrimination and treatment with moral respect. In particular, adjusting judicial aggressiveness to the level of political protection that a constitutional challenger might otherwise have available pervades Justice Steven's jurisprudence. Most obviously, this view of the judicial function underlies his preference for reserving judicial power for vindicating the constitutional claims of individuals, not government. Less obviously, it is also reflected in his fervor for addressing the substence of unpopular claims, especially those raised by prisoners, to whose conditions politicians are seldom responsive. Conversely, Justice Steven is unlikely to overturn arrangements that disadvantage those with considerable political clout. His majority opinion in *Lying v. Catillo* (1986) upholding a food-stamp policy that disfavored close relatives in contrast to more distant relatives noted that families are hardly politically powerless. Outside the equal-protection arena, similar considerations explain his support of the current Court position that judicial enforcement of TENTH AMENDMENT limits on Congress's power to regulate the State is generally inappropriate given the states' ability to apply political pressure in Congress. On similar ground, he agreed in GOLDWATER V. CARTER (1979) that, given congressional power to protect its perogatives, whether the President may terminate a treaty with a foreign power without Senate consent is a nonjusticable "political question." Likewise in *United States v. Munoz-Flores* (1990) he argued unsuccessfully that the Court should not address a claimed violation of the constitutional provision requiring revenue bills to originate in the House of Representatives. It is the "weakest imaginable justification for judicial invaliadation of a statue" to contend "that the judiciary must intervene in order to protect a power of the most majoritarian body in the Federal Government, even though that body has absolute veto over any effort to unsurp that power." In yet another sphere he was the sole dissenter from the ruling in *Davis v. Michigan Department of Treasury* (1989) that a state may not extend a tax on employee retirement benefits to retired federal employees if the state and local retirees are exempt. So long as the state taxed retirement benefits of private sector employees—"the vast majority of the voters in the State"—he thought the tax on federal retirees was allowable.

The obligation of impartiality also embraces another theme that extends beyond the realm of equal protection: judges should not adopt constitutional standards that themselves risk arbitrary or uneven treatment. Evenhandedness does not mean equal concern for governmental power and individual liberty, but equal liberty for all. This is a judicial obligation that sometimes has led Justice Stevens to limit, and sometimes to approve, governmental regulation. For example, unlike his colleagues, who tend either to favor or disfavor *both* ESTABLISHMENT OF RELIGION and "free exercise of religion" arguments, he is simultaneously receptive to claims of strict SEPARATION OF CHURCH AND STATE, but unreceptive to claims that the free-exercise clause requires exemption from generally applicable laws for religiously motivated conduct. His singular stance appears grounded in an emphasis on evenhandedness. To Justice Stevens, preference for one religion over another or seeming endorsement of a limited set of religions that would offend others, violates the government's obligation of religious neutrality imposed by the ESTABLISHMENT CLAUSE. In contrast, neutral laws that apply generally do not impugn governmental evenhandedness, and religion-based claims to a selective exemption would reintroduce this problem. Accordingly, he concurred in decisions refusing to exempt the Amish from paying social-security taxes, an Orthodox Jew from an Air Force regulation barring headgear indoors, and members of the Native American Church from a ban on drug use, including peyote, which they smoked as part of a religious ceremony.

A similar emphasis on evenhandedness surfaces in his PUBLIC FORUM and other free-speech opinions, with alternately restrictive and permissive results. As with equal-protection standards of review, Justice Stevens doubts the value of public forum doctrine to resolve FIRST AMENDMENT issues of access to public property for free speech. But he is simultaneously intolerant of viewpoint discrimination and tolerant of broad but neutral exclusions of expression from public property. His majority opinion in *Los Angeles v. Taxpayers for Vincent* (1984) upheld an ordinance broadly banning posting of signs on public property after noting its viewpoint neutrality and its evenhanded enforcement. He rejected a claim for exemption of political signs because such an exemption "might create a risk of engaging in constitutionally forbidden content discrimination." Similarly, although he has adamantly opposed prohibitions on speech when the government's justification rests solely on the offensiveness of the message, he accepts restrictions designed to maintain government neutrality in the marketplace of ideas, even though the restrictions significantly lessen speech. This distinction is explained in *FCC v. League of Women Voters* (1984), where he dissented from the Court's invalidation of Congress's ban on all editorializing by publicly funded broadcasters. Finally, he is particularly critical of the Court's judge-made standards for defining OBSCENITY unprotected by the First Amendment. As he wrote in his separate opinion in *Marks v. United States* (1977), those standards "are so intolerably vague that evenhanded enforcement of the law is a virtual impossibility," and "grossly disparate treatment of similar offenders is a characteristic of the criminal enforcement of obscenity law."

Justice Stevens's evenhandedness standard does not completely reject qualitative assessments of the comparative value of different kinds of speech. In particular, if speech is of limited social value, and its form, rather than its viewpoint, is found offensive—a distinction he, but not others, can perceive as viable—he would acknowledge government's right to regulate its nuisance effects, although probably not to ban it altogether. In accepting ZONING laws restricting the location of businesses offering "almost but not quite obscene" materials, and in permitting the Federal Communications Commission to declare that a profane radio broadcast during the day might be disciplined, Justice Stevens took explicit account of the low value of the speech, as well as of the limited nature of the governmental restriction. He concluded that the justification for both restrictions was offensiveness of the form of communication, not the message. In the profanity case, FEDERAL COMMUNICATIONS COMMISSION V. PACIFICA FOUNDATION (1978), he reasoned that it is "a characteristic of speech such as this that both its capacity to offend and its 'social value' . . . vary with the circumstances."

The moderating tendency of accepting regulation of limited intrusiveness into liberty of lesser dimension so long as discernible, nonrepressive governmental puposes are present has often led Justice Stevens to emphasize the validity of civil nuisance-type regulations where he might find criminalization unacceptable. Indeed, there is evidence that he would uphold innovative moderate forms of regulation as a means of accommodating the tension between individual freedom and the right of communities to protect against the harm that exercising such freedom may do to others. There is much of JOHN STUART MILL in Justice Stevens's severely limited view of government power to restrain individual liberty that does no tangible harm to others, but his more generous view of government's power to protect against the nuisance effects of unrestrained freedom. This view is evident not only in his obscenity opinions and opinions regarding civil DAMAGES for recovery for LIBEL such as *Philadelphia Newspapers, Inc. v. Hepps* (1986), but also in opinions addressing whether regulation of private property constitutes a deprivation of property without DUE PROCESS or a "TAKING OF PROPERTY" requiring payment of JUST COMPENSATION. In MOORE V. EAST CLEVELAND (1977), for example, he separately concurred in the Court's judgment invalidating the city's single-

family zoning ordinance, which defined a family to exclude a grandmother and two grandsons who were cousins to each other. In that opinion he located the ordinance's constitutional defect in its interference with the grandmother's "right to use her own property as she sees fit" with respect to the "relationship of the occupants." He distinguished zoning ordinances forbidding unrelated individuals from living together as legitimately based on controlling transient living arrangements that arguably might impair a sense of permanence in the community. Stevens generously approaches zoning ordinances based on arguable external effects, but is unsympathetic to those that fail to accord the reciprocal advantages to all in the community that zoning regulations normally create. These views are reflected in his majority opinion allowing an uncompensated prohibition on coal mining that would cause subsidence of others' property in *Keystone Bituminous Coal Association v. DeBendictis* (1987), from which Chief Justice WILLIAM H. REHNQUIST dissented. The same views surely explain his joining of Rehnquist's dissent in PENN CENTRAL TRANSPORTATION CO. V. NEW YORK CITY (1978), which upheld a historic landmarks-preservation law as applied to prevent development in the airspace above Grand Central Terminal. Moreover, Stevens's tendency to allow moderate regulation of the use of property that affects others and his openness to a wide scope of legitimate, potentially innovative forms of regulation, underlies his dissenting view in *First English Evangelical Lutheran Church v. Los Angeles* (1987). He believed that the government should not be obligated to pay for the loss of property use during the temporary period that a land-use regulation is challenged as a compensable "taking." He was concerned that if government was required not only to lift its regulation, but also to pay for the loss during the period of the constitutional challenge, officials would be deterred from acting, and "the public interest in having important governmental decisions made in an orderly informed way" would be sacrificed.

A final distinctive theme of Justice Stevens—one he admired in Justice Rutledge—is that, even if government decision makers have broad latitude in choosing what goals to pursue and considerable discretion in choosing the means to achieve them, judges should carefully review the decision-making process to assure that the responsible officials sufficiently considered the rights of those whose constitutional interests are sacrificed. Moreover, his version of this "due process of lawmaking," which sometimes provides procedural safeguards in lieu of substantive limitations, tailors the intensity of the required process to the magnitude of the liberty and equality interests implicated by the decision or policy. His CAPITAL PUNISHMENT opinions illustrate this concern, as well as his reluctance to narrow government goals and his deep attachment to impartiality. He would not prohibit imposition of the death penalty altogether, but he supports a variety of significant limitations on the process of its administration to limit arbitrariness. He insists on narrowing the category of those eligible for capital punishment, policing against its racially disproportionate infliction, and limiting, through defined and acceptable criteria, discretion of the prosecution to seek death sentences and discretion of the jury to impose them. He would not permit any death sentence not approved by a jury—in his view, the only acceptable voice for so irrevocable an expression of the community's sense of moral outrage. Furthermore, although he finds individualized guided jury discretion essential in all cases, he would preserve the jury's absolute discretion to spare life, as his powerful dissents in *Spaziano v. Florida* (1984) and *Walton v. Arizona* (1990) demonstrate.

Justice Stevens has expressed this preference for a calibrated review of process in a variety of circumstances. He readily protects the foundational rights of free and equal political participation against governmental action that would distort a fair political regime, just as he would broadly uphold governmental efforts to protect the purity of the political process. Not only do his influential and forceful opinions favoring constitutional limits on partisan gerrymandering and political patronage in cases like *Karcher v. Daggett* (1983), *Davis v. Bandemer* (1986), and BRANTI V. FINKEL (1980) reflect this; so do his concurring opinion favorable to government-imposed anticorruption limits on corporate expenditures to support candidates in AUSTIN V. MICHIGAN CHAMBER OF COMMERCE (1990), his dissent from the Court's refusal to extend the federal mail-fraud statute to cover deprivation of rights to honest government in *McNally v. United States* (1987), and his unwillingness in dissent in BROWN V. SOCIALIST WORKERS '74 CAMPAIGN COMMITTEE (1982) to require a First Amendment exemption for the Socialist Workers Party from a law mandating that political parties disclose their contributors. Not consistent judicial deference, but an overriding concern for a properly functioning political system, underlies his alternately restrictive or generous view of political efforts at domination or reform.

As many of these opinions suggest, he would require fair process for application as well as formulation of law, process whose demands increase the more fundamental the interest at issue. His dissent in BETHEL SCHOOL DISTRICT V. FRASER (1986) acknowledged that school officials could consider the content of vulgar speech in setting rules of student conduct, but especially since speech was involved, he would not have allowed a student who made sexually suggestive remarks at a school assembly to be suspended without sufficient warning that his speech would provoke punishment. He would also distinguish between the process fit for legislation and that suited for adjudication. Dis-

senting in *City of Eastlake v. Forest City Enterprises* (1976), he would have found "manifestly unreasonable" a requirement that zoning changes be approved by fifty-five percent of the vote in a city-wide referendum. He insisted that "[t]he essence of fair procedure is that the interested parties be given a reasonable opportunity to have their dispute decided on the merits by reference to articulable rules." Although he had "no doubt about the validity of the initiative or the referendum as an appropriate method of deciding questions of community policy," he thought it "equally clear that the popular vote is not an acceptable method of adjudicating the rights of individual litigants."

A distinctive element of Stevens's expectation of a rational decision-making process is found in his oft-noted inventive opinion in HAMPTON V. MOW SUN WONG (1976), which insisted that if questionable policies are to be implemented, at least the appropriate authority must adopt them. His plurality opinion invalidated a rule barring employment of aliens in the federal civil service, not because it violated equal protection, but because it was adopted by the Civil Service Commission to serve governmental interests that only the President or Congress could assert. More generally, he adheres closely to a constitutional vision in which all government officials, including judges, carry out the responsibilities particularly assigned to them. Several opinions aim to prevent Congress from abdicating its policymaking responsibilities. One is his separate concurrence in BOWSHER V. SYNAR (1986), arguing that although "Congress may delegate legislative power to independent agencies or to the Executive," if it elects to exercise lawmaking power itself, it cannot "authorize a lesser representative of the Legislative Branch to act on its behalf," but must follow the normal process of enactment by both Houses of Congress and presentment to the President. In that case, Congress had inappropriately given power under the GRAMM-RUDMAN-HOLLINGS ACT to the comptroller general, one of its own agents, to make important economic policy that binds the nation. Similarly, in his plurality opinion in *Industrial Union Department v. American Petroleum Institute* (1980), Stevens interpreted the Occupational Health and Safety Act to prohibit the secretary of labor from adopting standards for controlling potentially hazardous substances unless reasonably necessary to prevent significant harm in the workplace, rather than to achieve absolute safety. Construing Congress's intent more broadly would assume a delegation of "unprecedented power over American industry" that might constitute an unconstitutional transfer of legislative power—a conclusion that Justice Rehnquist's concurrence embraced.

Finally, Justice Stevens's vision of the minimal elements of an acceptably rational decision-making process builds on his presumption that government must justify its actions and entails a realistic appraisal of whether an identifiable and legitimate public purpose supports the challenged act, even if that purpose is not identified by the decision maker itself. Although broadly defining the legitimate goals that government may pursue—particularly including latitudinous conceptions of environmental or aesthetic improvements in the quality of community life and programs providing veterans benefits—he will not strain his imagination to prop up conduct that realistically could not have been aimed at legitimate objectives. Thus, he is not loath to ferret out protectionist state purposes that are invalid under the DORMANT COMMERCE CLAUSE or the absence of secular purposes for religion-connected decisions that are invalid under the establishment clause. Moreover, he condemns harmful classifications adopted out of "habit, rather than analysis," as he shows in several of his opinions involving sex discrimination and distinctions based on legitimacy of birth. Although he will not impose on legislative bodies a duty to articulate their "actual purposes" for legislation, he will not accept, as a majority of the Court does, any "plausible" or "conceivable" purpose. Rather, as he wrote in his separate concurrence in *United States Railroad Retirement Board v. Fritz* (1980), he demands "a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature." As his lone dissenting opinion in *Delaware Tribal Business Committee v. Weeks* (1977) demonstrates, it is not enough for him that a disadvantaging classification is not invidious; it cannot be neglectful, purposeless, or unthinking.

Several of these themes coalesce in his otherwise seemingly inconsistent pattern of positions in the Court's AFFIRMATIVE ACTION cases. He dissented in FULLILOVE V. KLUTZNICK (1980) from the Court's sustaining of Congress's setting aside ten percent of public works employment funds for minority business enterprises, largely because Congress gave only "perfunctory consideration" to a racial classification of "profound constitutional importance." He detected a decision illegitimately based on pure racial politics, generally urged that "the procedural character of the decisionmaking process" should affect any constitutional assessment, and specifically insisted that "because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." He did not assume that all race classifications were impermissible, however, and in WYGANT V. JACKSON BOARD OF EDUCATION (1986) he dissented from the invalidation of a race-based preference for minority teachers contained in a lay-off provision of a COLLECTIVE BARGAINING agreement. Here he thought the interests of the disadvantaged white teachers were ade-

quately represented and considered in the collective-bargaining process. He also urged that the validity of racial classifications must not be evaluated solely in relation to the justification of compensating for past discrimination, but also by considering their relevance to any valid public purposes, including achievement of the benefits of future diversity—a position subsequently adopted by the Court in METRO BROADCASTING, INC. V. FEDERAL COMMUNICATIONS COMMISSION (1990). In fact, he suggested in his concurring opinion in RICHMOND (CITY OF) V. J. A. CROSON COMPANY (1989), where he voted to nullify the city's *Fullilove*-style set-aside program, that "identifying past wrongdoers" and fashioning remedies for past discrimination is better suited to judicial than to legislative bodies.

Matching purposes to appropriate decision makers and requiring deliberation adequate to the liberty affected, yet remaining open to a multiplicity of valid governmental objectives, are essential characteristics of this rational, liberty-devoted and open-minded judge.

JONATHON D. VARAT
(1992)

Bibliography

BURRIS, SCOTT 1987 Death and a Rational Justice: A Conversation on the Capital Jurisprudence of Justice John Paul Stevens. *Yale Law Journal* 96:521–546.

CARLSON, JONATHAN C. and SMITH, ALAN D. 1976 The One Hundred and First Justice: An Analysis of the Opinions of Justice John Paul Stevens, Sitting as a Judge on the Seventh Circuit Court of Appeals. *Vanderbilt Law Review* 29:125–209.

——— 1978 The Emerging Constitutional Jurisprudence of Justice Stevens. *University of Chicago Law Review* 46:155–213.

——— 1987 Justice Stevens' Equal Protection Jurisprudence. *Harvard Law Review* 100:1146–1165.

O'BRIEN, DAVID M. 1989 Filling Justice William O. Douglas's Seat: President Gerald R. Ford's Appointment of Justice John Paul Stevens. *Supreme Court Historical Society Yearbook* 1989:20–39.

SICKELS, ROBERT JUDD 1988 *John Paul Stevens and the Constitution: The Search for Balance.* University Park and London: The Pennsylvania State University Press.

STEVENS, JOHN PAUL 1983 The Life Span of a Judge-Made Rule. *New York University Law Review* 58:1–21.

## STEVENS, JOHN PAUL
(1920– )
(Update 2)

With Justice HARRY A. BLACKMUN's retirement in 1994, Justice John Paul Stevens became the Supreme Court's second-most senior Justice, having served longer than any active member except Chief Justice WILLIAM H. REHNQUIST. Stevens accordingly acquired the power to assign the Court's opinion or the principal dissent whenever he and Rehnquist were on opposite sides—which was not unusual in controversial cases.

Stevens soon made use of this prerogative. He wrote the majority opinion in *U.S. Term Limits v. Thorton* (1995). Stevens concluded that neither Congress nor the states could impose TERM LIMITS upon federal legislators. Much of his argument dwelled upon the ORIGINAL INTENT of the Framers. It is ironic that Stevens's first major statement as the Court's senior Associate Justice focused so heavily on the Framers. Originalist reasoning had not been especially prominent in Stevens's earlier opinions, and it seems an implausible foundation for his jurisprudence.

Yet, if Stevens's methodology in *U.S. Term Limits* was atypical, the principles he announced were paradigmatic of his approach. Stevens insisted on two points. First, he maintained that although "Members of Congress are chosen by separate consituencies, . . . they become, when elected, servants of the people of the United States." That position is consistent with Stevens's usual attitude toward FEDERALISM questions. He has never been especially friendly to claims of state SOVEREIGNTY.

Stevens's second key point in *U.S. Term Limits* provides a window on the foundations of his constitutional thought. He argued that the Constitution incorporates "an egalitarian ideal—that election to the National legislature should be open to all people of merit." Not everybody would describe this ideal as "egalitarian." Some popular conceptions of equality convert it into a leveling principle, under which all distinctions, including those supposedly based on "merit," are inherently suspect. For Stevens, though, equality presupposes neither sameness nor moral relativism. Equality entails instead the right to be held accountable as an individual for one's choices and actions. It is, in short, a right to be judged "on the merits," instead of on the basis of status, stereotypes, special privileges, or personal connections.

This idea reverberates through diverse branches of Stevens's jurisprudence. One can detect it in, for example, his views about the legal IMMUNITY OF PUBLIC OFFICIALS: he has looked skeptically on claims that public entities or persons should, by virtue of their status or importance, be exempt from the legal standards that govern everyone else. He has treated SOVEREIGN IMMUNITY as an anomalous ingredient in American law, and he has construed the ELEVENTH AMENDMENT narrowly. It is therefore fitting that Stevens spoke for the Court in CLINTON V. JONES (1997), which rejected the President's claim to immunity from private civil suits based on unofficial conduct.

Of course, the distinctive features of Stevens's conception of equality emerge most clearly in his decisions under

the EQUAL PROTECTION clause. His interpretation of the guarantee of equal protection of the laws defies conventional political categories. On the one hand, he favors aggressive constitutional measures against prejudice and stereotyping. He has accordingly voted with liberal majorities in cases like ROMER V. EVANS (1996), which struck down Colorado's law limiting gay rights, and MISSISSIPPI UNIVERSITY FOR WOMEN V. HOGAN (1982), which required Mississippi to admit men to its nursing school.

On the other hand, when he sees no evidence of stereotypes or prejudice, Stevens has been willing to permit distinctions that other liberal Justices have condemned. Thus, for example, in *Miller v. Albright* (1998), Stevens voted to sustain the constitutionality of a CITIZENSHIP law that treated the foreign-born NONMARITAL CHILDREN of American mothers differently from those of American fathers. Conversely, Stevens has been willing to find equal protection clause violations even when no SUSPECT CLASSIFICATION is at issue. For example, in a DISSENTING OPINION in *Kadrmas v. Dickinson* (1988), Stevens argued that North Dakota had violated the equal protection clause by making an irrational geographic distinction in a law about school bus fees.

Stevens's views about equality have especially complex implications for AFFIRMATIVE ACTION. Stevens has preferred to see the government combat racial prejudice by using fair, merit-based procedures, rather than through reverse discrimination. Thus, he has voted to hold affirmative action programs unconstitutional in FULLILOVE V. KLUTZNICK (1980) and RICHMOND (CITY OF) V. J. A. CROSON CO. (1989). Yet, Stevens was always sympathetic to the ends of affirmative action policies, if not the means. He has recognized the need for government to root out racial prejudice, and he has accordingly drawn distinctions among affirmative action programs. Stevens has been willing, for example, to uphold such programs if their purpose was to supply role models for students, WYGANT V. JACKSON BOARD OF EDUCATION (1986), rather than to redistribute jobs.

More recently, Stevens joined the dissenters in ADARAND CONSTRUCTORS, INC. V. PEÑA (1995). *Adarand*, like *Fullilove* and *Croson*, involved an affirmative action plan applicable to government construction projects. The *Adarand* majority purported to follow Stevens's own dissent in *Fullilove*, but Stevens distinguished the two cases. He said that the affirmative action plan in *Fullilove* employed rigid racial criteria, whereas the plan in *Adarand* used racial presumptions as indicia of social and economic disadvantage. Certainly one can draw such a distinction. On the other hand, Stevens's tone seems more favorable to affirmative action in *Adarand* than in *Fullilove*. A reader of the two cases might conclude that Stevens's concerns about affirmative action had softened.

Stevens's view of equality presupposes that it is possible and desirable for government to draw objective, merit-based distinctions through the use of impartial, dispassionate procedures. This conviction has methodological entailments as well as substantive ones. Stevens believes that judges can reliably determine what is reasonable; he has therefore resisted the modern Court's tendency to confine its own judgment with rigid tests and bright-line rules. Most notably, he has rejected the "tiers of scrutiny" that other Justices have used in equal protection clause cases. In CRAIG V. BOREN (1976), where the Court developed a new tier of scrutiny to deal with SEX DISCRIMINATION, Stevens protested that "[t]here is only one equal protection clause." For Stevens, the question is always the same: has the government behaved impartially? Racial and gender-based distinctions flunk more frequently than do other classifications not because they must meet a stiffer test, but because they are less often reasonable.

Stevens has therefore consistently applied a demanding form of the RATIONAL BASIS test in equal protection cases. He has employed the same method in DUE PROCESS cases to protect substantive liberty interests, and his approach in other constitutional domains is similar. In FREEDOM OF SPEECH cases, for example, he has repudiated the Court's efforts to establish rigid categories through such constructions as the PUBLIC FORUM doctrine and content-neutrality. Stevens made this point a central theme of his dissent in R. A. V. V. CITY OF ST. PAUL (1992), where he voted to uphold a criminal law against HATE SPEECH.

Some political liberals were happy with Stevens's position in *R. A. V.*, but liberals have sometimes been displeased by his flexible FIRST AMENDMENT doctrine. Especially notable are his dissents in the two flag-burning cases, *Texas v. Johnson* (1989) and *United States v. Eichmann* (1990). Stevens argued that the government could prohibit FLAG DESECRATION in order to preserve the flag's unique symbolic value. According to Stevens, that value was useful to the government's critics, as well as to its supporters. He predicted that, if flag-burning ceased to be illegal, it would become a less meaningful form of protest. In Stevens's view, the benefits of preserving the flag's symbolic value had to be balanced against the "admittedly important interest in allowing every speaker to choose the method of expressing his or her ideas that he or she deems most effective and appropriate."

Few commentators have agreed with the way that Stevens struck this balance. Some of the criticism was unduly harsh: if Stevens's dissents in *Johnson* and *Eichmann* were unpersuasive, they were not unreasonable. One suspects that some observers were unsympathetic with Stevens's patriotism, finding it jingoistic. That is unfortunate, for the passion that shone through in *Johnson* and *Eichmann* reflects not intolerance but a heartfelt pride in American

constitutional principles. If perhaps that passion colored Stevens's judgment in the flag-burning cases, it also inspired him to become one of the Court's most vigilant and independent defenders of liberty and equality.

CHRISTOPHER L. EISGRUBER
(2000)

Bibliography

STEVENS, JOHN PAUL 1986 The Third Branch of Liberty. *University of Miami Law Review* 41:277–93.

——— 1989 A Judge's Use of History. *Wisconsin Law Review* 1989:223–236.

——— 1992 The Bill of Rights: A Century of Progress. *University of Chicago Law Review* 59:13–38.

——— 1993 Is Justice Irrelevant? *Northwestern University Law Review* 87:1121–1130.

——— 1993 The Freedom of Speech. *Yale Law Journal* 102: 1293–1313.

## STEVENS, THADDEUS
## (1792–1868)

A Pennsylvania lawyer, state legislator (1833–1841), and congressman (1849–1853, 1859–1868), Thaddeus Stevens was the most powerful Republican congressman throughout the CIVIL WAR and beginning of RECONSTRUCTION. Stevens was the earliest and most consistent congressional supporter of black rights and opponent of slavery. Stevens initiated, sponsored, or helped pass all key Reconstruction acts from 1865 to 1868. More than any other individual, Stevens was responsible for making the ex-slaves citizens.

After reading law, Stevens began practicing in 1816. In 1817 his unsuccessful defense of an accused murderer with the then novel plea of insanity brought Stevens fame and clients. After an initial case in which he represented a master in regaining fugitive slaves, Stevens never again defended slavery. Throughout the rest of his career Stevens took numerous cases on behalf of fugitive slaves, free blacks, and abolitionists. As one congressman said after his death, Stevens "was an abolitionist before there was such a party name." By 1831 he was one of Pennsylvania's most successful lawyers and a national leader of the Anti-Masonic movement. In 1835 Stevens single-handedly convinced the legislature to create a system of free public education for Pennsylvania. His passionate defense of public education stemmed from his own poverty-stricken background.

In 1848 Stevens was elected to Congress as a Whig, campaigning against slavery in lands ceded by Mexico. In Congress he was an acerbic, sarcastic, unrelenting opponent of slavery. Opposing the COMPROMISE OF 1850, he predicted it would be "the fruitful mother of future rebellion, disunion, and civil war." One of the first bloody fruits of the Compromise was the Christiana Riot, in Stevens's own county; a slaveowner was killed attempting to seize his fugitive slaves. Stevens helped organize the successful defense of Caster Hanway who was indicted for TREASON for refusing to help the master. A backlash against the riot and abolition cost Stevens his congressional seat the following year. After a short time in the Know-Nothing Party, he became a Republican in early 1855. In 1858 he was again elected to Congress, as a staunch opponent of his fellow Pennsylvanian, President JAMES BUCHANAN.

At the beginning of the Civil War Stevens became a leader of congressional Republicans. As chairman of the House Ways and Means Committee he influenced all legislation requiring appropriation of funds. Stevens was largely responsible for the Internal Revenue Act of 1862 and the Legal Tender Acts which were necessary to finance the war. As a member of the Joint Committee on the Conduct of the War Stevens helped insure that civilian, and not military, authority would be pre-eminent during the war. Stevens used this position, as well as his Ways and Means chairmanship, to press ABRAHAM LINCOLN's administration to stop the military from returning fugitive slaves and to allow blacks to enlist.

In 1861 Stevens was one of the few men in Washington who publicly recognized that slavery was the root cause of SECESSION and that the war required its destruction. In July 1861 he was one of two House members to oppose the Crittenden resolution, which declared that the North had no interest in interfering with slavery. In December 1861 Stevens helped defeat a reaffirmation of that resolution. From the outbreak of hostilities Stevens argued that the seceding states should be dealt with according to the "laws of war." He asserted that constitutional obligations and protections—such as those involving fugitive slaves, the protection of private property, or the writ of HABEAS CORPUS—should not be "binding on one party while they are repudiated by the other." Thus, he supported the creation of the new state of West Virginia on the theory that Virginia had ceased to exist as a state when it left the Union, so that it was unnecessary for Virginia to agree to the division of the state. Stevens's theory of STATE SUICIDE was never fully adopted by the Congress or the courts, but it was influential in persuading many congressmen to support his legislation during both the war and Reconstruction.

As early as August 1861 Stevens urged the abolition of slavery as a war measure. In 1862 he tried to secure legislation that would lead to the confiscation of plantations in the rebel states. He believed that such land could be constitutionally seized, not because it was owned by men who could be convicted of treason, but because it was the fruit of war. He subsequently introduced legislation to end

slavery in the DISTRICT OF COLUMBIA, prevent the Army from returning fugitive slaves, and provide equal pay for black soldiers. He was a leader in securing other legislation that protected blacks and allowed them to serve in the military, even if they were owned by loyal masters.

During Reconstruction Stevens was the House Republican whip, a member of the Joint Committee on Reconstruction, and probably the most powerful politician in Washington. In early 1866 Stevens introduced legislation for the continuation of the FREEDMEN'S BUREAU, the adoption of the FOURTEENTH AMENDMENT to protect the freedmen, and the enfranchisement of blacks in Washington, D.C. President ANDREW JOHNSON's unexpected veto of the Freedmen's Bureau Bill, his subsequent attempts to prevent ratification of the Fourteenth Amendment, and his vehement opposition to voting by blacks led to congressional Reconstruction. Stevens sponsored legislation that prevented the former Confederate states from sending representatives to Congress without congressional approval. The legislation was specifically aimed at Johnson's home state of Tennessee, but applied to all the Confederate states.

During the election of 1866 Stevens openly argued for complete racial equality while campaigning for Republicans and against Andrew Johnson's administration. Johnson, meanwhile, publicly accused Stevens, CHARLES SUMNER, and the abolitionist Wendell Phillips of treason and suggested they ought to be hanged. The election gave the Republicans more than a two-thirds majority in both houses. Although ill through much of the Fortieth Congress, Stevens nevertheless sponsored the TENURE OF OFFICE ACT, which set the stage for Johnson's IMPEACHMENT, and the MILITARY RECONSTRUCTION ACT of 1867, which placed all former Confederate states, except Tennessee, under military rule. Stevens successfully backed many CIVIL RIGHTS measures introduced by others. He was the prime mover in requiring the former Confederate states to ratify the Fourteenth Amendment and enfranchise blacks. He supported legislation authorizing the army to protect the freedmen from white vigilantes. Virtually all this legislation was enacted over Johnson's veto, with Stevens, as majority whip, guiding it through Congress. Stevens failed, however, to persuade Congress to confiscate Southern plantations and provide land for the freedmen.

In 1866 and 1867 Stevens unsuccessfully supported Congressman James Ashley's motions for impeachment. In early 1868 Stevens himself sought Johnson's impeachment, but could not get committee support for it. However, after Johnson fired Secretary of War EDWIN M. STANTON, in violation of the Tenure of Office Act, an impeachment committee was quickly formed. Stevens, as a member of that committee, helped draft the ARTICLES OF IMPEACHMENT and later was a manager of the prosecution. However, he was quite ill by then and took little part in the trial. Ten weeks after the trial Stevens died.

PAUL FINKELMAN
(1986)

Bibliography

BRODIE, FAWN M. 1959 *Thaddeus Stevens: Scourge of the South.* New York: Norton.

KORNGOLD, RALPH 1955 *Thaddeus Stevens.* New York: Harcourt Brace & World.

## *STEWARD MACHINE COMPANY v. DAVIS*
### 301 U.S. 548 (1937)

Plaintiff, an employer, challenged the 1935 SOCIAL SECURITY ACT unemployment compensation provisions, which imposed a payroll tax on employers and directed that the tax receipts be paid to the general revenue. To offset part of this tax, the act granted employers a credit for taxes paid to a state unemployment fund conforming to federal benefit and solvency requirements. One such requirement was that state funds be held for safekeeping by the secretary of the treasury and invested in federal government securities. Plaintiff invoked UNITED STATES V. BUTLER (1936), which had invalidated AGRICULTURAL ADJUSTMENT ACT price support provisions that enabled the secretary of agriculture to contract with farmers to reduce agricultural production in exchange for payments funded by a federal tax levied on agricultural commodity processing. *Butler* had generally addressed the scope of Congress's power "to lay and collect taxes . . . to . . . provide . . . for the GENERAL WELFARE of the United States." While ostensibly rejecting the narrowest reading of the clause, originally proposed by JAMES MADISON, that the taxation power could be exercised only to carry out specifically ENUMERATED POWERS, and purporting to adopt a broader, though undefined, interpretation of the TAXING AND SPENDING POWER, *Butler* nevertheless had treated the TENTH AMENDMENT as a limitation on the federal taxation power. In *Steward Machine Co.*, plaintiff argued that the unemployment taxation scheme, like the agricultural price support provisions, exceeded congressional powers because it infringed the Tenth Amendment's reservation to the states of power not delegated by the Constitution to the United States.

The unemployment compensation scheme was sustained, 5–4. Justice BENJAMIN N. CARDOZO, writing for the majority, distinguished *United States v. Butler* on two grounds: the unemployment tax proceeds were to be used for the "general welfare" because they were not earmarked for any special group; and the unemployment compensation plan did not infringe state prerogatives be-

cause state participation in this cooperative federal-state program was entirely voluntary. The Court described unemployment as a "problem . . . national in area and dimensions." Many states wished to develop unemployment compensation programs but feared economic competition from those states without such plans. Hence a federal tax was necessary to enable states to accomplish their general welfare goals.

In its permissive, though vague, interpretation of the term "general welfare," *Steward Machine Co.* and its companion case, HELVERING V. DAVIS (1937), seem to repudiate the *United States v. Butler* view that Congress, in exercising its power to tax for the general welfare, is required by the Tenth Amendment to eschew regulation of matters historically controlled by the states. *Steward Machine Co.* is also noteworthy for its sympathetic appraisal of joint federal-state welfare ventures. Justice Cardozo amply demonstrated that the competitive pressures of a national economy make it increasingly difficult for the states to perform traditional welfare functions without the national uniformity made possible by federal assistance and regulation.

GRACE GANZ BLUMBERG
(1986)

## STEWART, POTTER J.
(1915–1985)

When DWIGHT D. EISENHOWER nominated Potter Stewart to the United States Supreme Court, the President was recognizing the perfect embodiment of Midwest Republican civic virtues. Born in Cincinnati, Stewart was the son of a popular reformist and Republican mayor who was later appointed to the Ohio Supreme Court. Stewart went from Cincinnati to Yale College where he was a class leader, then to Harvard for graduate study, and then back to Yale Law School. He returned to Cincinnati, after service in the Navy and on Wall Street to practice law and engage in civic affairs. In 1954, at the age of thirty-nine, he was named to the Court of Appeals for the Sixth Circuit. In October 1958, as a recess appointment, Stewart became an Associate Justice of the Supreme Court.

Stewart's tenure on the Court—more than twenty-three years—was atypically long. Only eighteen Justices have served a longer term. Yet Stewart did not seek to place a sharp imprint on the work of the Court, an imprint of the sort Justice HUGO L. BLACK or Justice FELIX FRANKFURTER had brought to their work. Nor did he seek to build a constituency within the Court or outside it. During two periods, at the outset of his tenure and shortly after the transition to the BURGER COURT, Stewart's vote was of great significance in determining the outcome of the Court's work. Because he was not a member of a dominant and consistent majority, it would not be the case, under the customs of the Court, that the most significant cases of the quarter-century were his to write.

Stewart was guided in his decisions and his actions as a judge by a sense of decency and proportion. He believed in a nation in which order, partially derived from privately inculcated values, offered the opportunity for advancement, creativity, and freedom. His sense of propriety led him to decline the possibility of becoming Chief Justice, according to then-President RICHARD M. NIXON, because Stewart thought it inappropriate for a sitting Justice to aspire to a presidential elevation. Even his resignation was characteristic. Stewart resigned not out of illness, nor out of ambition, nor for alternative appointment, but merely because he felt that limited service was correct.

These themes of propriety, of respect for structure and rules, permeate the jurisprudence of Justice Stewart. He was a firm adherent to the principles of STARE DECISIS, even when its application led to a result varying from his own previously expressed view. In a 1974 DISSENTING OPINION he wrote: "A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve."

An elegant and careful treatment of the facts was often at the core of a Stewart opinion because an understanding of the facts was central to the way he approached the issues in a case. Regularly, he would indulge his belief that a decision should be of appropriately narrow scope by stating what the case was not about. For him, a deep understanding of context was a prophylactic against undue haste in constitutional decision making. Dissenting in ESTES V. TEXAS (1965), for example, Stewart sought to demonstrate that the use of television cameras in the courtroom in that criminal case did not provide the factual predicate for the sweeping pronouncements in the Court's opinion concerning rights of defendants. Context yielded DOCTRINE, and not the reverse. If the result of an understanding of the facts was increased doctrinal complexity, then that could not be helped. "The time is long past when men believed that development of the law must always proceed by the smooth incorporation of new situations into a single coherent analytical framework," he wrote in COOLIDGE V. NEW HAMPSHIRE (1971). He thought it wrong that doctrine, sometime encapsulated in a "sterile metaphor" should seem to substitute for careful analysis, a point he made in his dissenting opinion in ABINGTON SCHOOL DISTRICT V. SCHEMPP (1963).

Much of Stewart's most significant work dealt with

defining those rules, especially the FIRST AMENDMENT and the FOURTH AMENDMENT, which constrain the activities of government. There was a sharp tinge of the radical in Stewart's protection of the individual from government intervention. He celebrated the Fourth Amendment's warrant clause as a carefully conceived limitation on precipitate government searches and persistently opposed a reading that cheapened the clause. According to his colleague Justice LEWIS F. POWELL, Stewart's opinion in KATZ V. UNITED STATES (1967) "revitalized the fourth amendment" by rejecting the notion first espoused in OLMSTEAD V. UNITED STATES (1928) that the amendment applied only to physical trespass by police officers. In *Katz*, the court held that private conversations even outside the home must be secure from unwarranted police interception. "The Fourth Amendment," Stewart declared in characteristically pithy style, "protects people not places." Thus a Federal Bureau of Investigation microphone placed against the wall of a telephone booth was held to be an invasion of the RIGHT OF PRIVACY. Similarly, Stewart led the Court in a series of opinions that valued the doctrinal purity of a judicially sanctioned warrant requirement for a valid police search. Stewart sought to place the doctrine and its numerous exceptions in proper balance. At the same time, Stewart strongly recognized that in the field of ECONOMIC REGULATION legislatures should not be subject to similar constraints. He especially admired Justice ROBERT H. JACKSON and was fond of quoting Jackson's aphorism that "[t]he view of JUDICIAL SUPREMACY . . . has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts."

Stewart's opinions gave important strength to the First Amendment guarantee of FREEDOM OF SPEECH and FREEDOM OF THE PRESS. He set as a task for himself a clearer and longer-lasting basis for the protection of the press so that it could monitor the government and inform the populace. In NEW YORK TIMES CO. V. UNITED STATES (1971) he wrote that only material that would cause "direct, immediate, and irreparable harm to the nation or its people" could be subject to prior restraint through court-ordered publication restrictions. In an early opinion for the Court, *Shelton v. Tucker* (1960), Stewart proclaimed that government cannot pursue even a legitimate end "by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

Stewart could be bold as well as forceful. It was his influence that led the Court to revitalize the THIRTEENTH AMENDMENT, validating Congress's power to establish a sweeping ban on RACIAL DISCRIMINATION in private housing. In JONES V. ALFRED H. MAYER CO. (1967) a land developer refused to sell a house to Joseph Lee Jones because Jones was black. By invoking the Thirteenth Amendment, Stewart's far-reaching opinion bypassed the limited and often confusing STATE ACTION requirement of the FOURTEENTH AMENDMENT and held that discrimination in private housing violated a previously dormant Reconstruction-era CIVIL RIGHTS statute, the CIVIL RIGHTS ACT OF 1866. In general, his civil rights opinions had a refreshing simplicity and directness that avoided temporizing and recognized statutory and constitutional imperatives.

Stewart was influential in other areas as well. For a time, his was one of the most original and radical views on the freakishness of the imposition of CAPITAL PUNISHMENT. It was his reconception of the criminal law in *Robinson v. California* (1962) that established new categories of thinking about sanctions and stigma. In *Carrington v. Rash* (1965) he broke new ground in his constitutional measure of state-imposed vote eligibility restrictions based on occupation, residency, and similar grounds.

Earlier than many of his colleagues Stewart brought to his analyses of the antitrust laws a keen sense of the economic impact of various approaches to the CLAYTON ACT and the SHERMAN ACT: his perceptions about the inappropriateness of a "per se" approach in vertical integration cases, stated in dissent in *United States v. Arnold, Schwinn & Co.* (1967), became the view of the Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977); his scorn for mechanical reliance on market shares as a test for invalidating mergers, articulated in dissent in *United States v. Von's Grocery Co.* (1966), became the text of his majority opinion in *United States v. General Dynamics Corp.* (1973).

Stewart was a bridge, a point of continuity from the Court of the late 1950s to the Court of the 1980s. Throughout, he prized what he viewed as the qualities of being a judge. In HARRIS V. MCRAE (1980) he wrote—upholding the constitutionality of a law restricting federal funding for abortions—that it was not the mission of the Court to decide whether "the balance of competing interests" in that legislation, or any other, "is wise social policy." Citing one of his favorite cases, WILLIAMSON V. LEE OPTICAL, INC. (1955), Stewart concluded that "we cannot, in the name of the Constitution, overturn duly enacted statutes simply "because they may be unwise, inprovident, or out of harmony with a particular school of thought." Stewart's philosophy of law, his jurisprudence of appropriateness, his respect for the role of the Court, transcend categories as his devoted service on the Court transcended categorization.

MONROE E. PRICE
(1986)

Bibliography

FRIEDMAN, LEON 1978 Potter Stewart. In Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court: Their Lives and Major Opinions,* 2nd ed. New York: Chelsea House.

MERESMAN, BARNETT, MERESMAN, GOLDMAN & MORRIS 1982 A Lawyer's Lawyer, A Judge's Judge: Justice Potter Stewart and the Fourth Amendment. *University of Chicago Law Review* 51:509–544.

STEWART, POTTER 1975 Or of the Press. *Hastings Law Journal* 26:631–637.

## STOCKHOLDER'S SUIT

Stockholders suing their CORPORATIONS rarely raise constitutional questions, although the Supreme Court accepted jurisdiction of a case involving such a suit as early as 1856. (See DODGE V. WOOLSEY.) Yet several celebrated constitutional decisions in review of acts of Congress have come in stockholder actions brought to prevent corporate compliance with tax or regulatory programs the stockholders deemed unconstitutional. Having failed to convince management to challenge the programs' constitutionality, dissenting stockholders have used the device of a stockholder's action to accomplish the same result. In most nonconstitutional cases, dissenting stockholders are not permitted to bypass the business judgment of corporate managers and sue on the corporation's behalf, but—ironically, and controversially—this rule has not always prevailed in constitutional cases. The device has not been used effectively since the New Deal era, but when it was used, the Supreme Court seemed eager to render major constitutional decisions, an orientation perennially opposed to the Court's professed practice.

Three celebrated examples tell the story. In POLLOCK V. FARMERS' LOAN & TRUST CO. (1895) the Supreme Court held a federal income tax law unconstitutional. The corporate taxpayer had planned to accept the tax obligation, and a federal statute prevented an INJUNCTION suit by the corporation, but the dissenting stockholders were permitted to seek an injunction preventing compliance. No one objected to the stockholders' right to sue; the plaintiff asserted that the suit was not a COLLUSIVE SUIT between the stockholder and the company; and the Court rendered its controversial decision on the merits—a decision subsequently overturned by the SIXTEENTH AMENDMENT (1913). In ASHWANDER V. TENNESSEE VALLEY AUTHORITY (1936) preferred stockholders of the Alabama Power Company sued to prevent their corporation from performing a contract with the TVA, claiming that Congress lacked constitutional power to authorize the TVA to develop and contract for the sale of electricity. The Supreme Court, over Justice LOUIS D. BRANDEIS's famous objection that the stockholders lacked STANDING to sue and that the Court generally should seek to avoid constitutional questions, permitted the suit. The Court held the TVA's action constitutional, thereby ending a major legal threat to an important New Deal program. A few months later, however, in CARTER V. CARTER COAL CO. (1936), another stockholder suit, the Court invalidated the Guffey Act of 1935, an important anti-Depression measure. The president of Carter Coal, whose parents were majority stockholders and who had set company policy in compliance with the act, initiated the suit as a dissenting stockholder the day after the law was enacted.

These stockholder actions raise several questions of JUSTICIABILITY. One is similar to that raised in taxpayers' and citizens' suits: are they suits to prevent individual injury, suits that incidentally necessitate constitutional interpretation, or are they public actions to assure constitutional governance for the whole citizenry? The allegation that corporate compliance with the questioned law will injure the corporation's (and therefore the stockholders') financial interests, may distinguish stockholder from taxpayer or citizen standing, despite a similar element of remoteness. A second question is raised by the possibility of a collusive suit, with both the dissenting stockholder and the corporate management desiring the same result. The possibility is real, but the drawbacks of collusive suits have not been a serious problem in stockholder suits. Despite the trumped-up appearance of *Carter v. Carter Coal Co.*, for example, the federal government vigorously opposed Carter. There was strongly adversary presentation, and, in a COMPANION CASE, another company directly challenged the government's enforcement of the new act. The most significant danger may be that the stockholder suit is really a request for a premature advisory opinion, because stockholder, corporation, and government all want a constitutional ruling when the corporation plans to comply with the law and no present controversy exists. The Court was eager to rule in *Pollock*, *Carter*, and *Ashwander*. The first two produced substantial interferences with congressional power, both subsequently overturned, and the last consciously legitimated government policy. Plainly, the stockholder suit has been used as an instrument of the Supreme Court's judicial activism in the exercise of JUDICIAL REVIEW.

JONATHAN D. VARAT
(1986)

## STONE, HARLAN F.
(1872–1946)

After finishing Amherst College and Columbia Law School (where in 1906 he became dean), Harlan F. Stone divided his time between teaching and practice in New York City. In 1923, President CALVIN COOLIDGE, a former college mate from Amherst, appointed him attorney general of the United States. Less than a year later he became Associate Justice of the United States Supreme Court. In

1941 President FRANKLIN D. ROOSEVELT, ignoring party labels, appointed him Chief Justice.

Experience gained as a teacher at the Columbia Law School had contributed directly to his preparation for the supreme bench. At the university, where he had time and opportunity for study and reflection, he developed ideas about the nature of law and the function of courts. Before donning judicial robes, Stone had argued only one case, *Ownbey v. Morgan* (1921), before the Supreme Court, adumbrating what was to become the major theme of his constitutional jurisprudence—judicial self-restraint. The correction of outmoded processes, he argued, ought to be left to legislatures rather than assumed by courts.

It seems ironical that Stone, a solid, peace-loving man, should have been in the crossfire of controversy throughout his judicial career. On the TAFT COURT, and also during a good part of Chief Justice CHARLES EVANS HUGHES's regime, he differed from colleagues on the right who interposed their economic and social predilections under the guise of interpreting the Constitution. During his own chief justiceship Stone was sometimes at odds with colleagues on the left who were equally intent on using their judicial offices to further particular preferences.

Stone's moderate approach is revealed in his consideration of INTERGOVERNMENTAL IMMUNITIES from taxation—a vexing problem throughout the chief justiceships of Taft and Hughes. Rejecting the facile reciprocal immunities doctrine established in MCCULLOCH V. MARYLAND (1819) and COLLECTOR V. DAY (1871), respectively, he held that the federal system does not establish a total want of power in one government to tax the instrumentalities of the other. For him, the extent and locus of the tax burden were the important considerations. No formula, no facile "black and white" distinctions sufficed to determine the line between governmental functions that were immune from taxation and those that were not. Stone elaborated these views in *Helvering v. Gerhardt* (1938) and GRAVES V. NEW YORK EX REL O'KEEFE (1939). Similarly, in cases concerning state regulations of economic affairs and STATE TAXATION OF COMMERCE, Stone rejected question-begging formulas such as "business AFFECTED WITH A PUBLIC INTEREST" or "direct and indirect effects."

Though habitually a Republican, Stone believed that increased use of governmental power was a necessary concomitant of twentieth-century conditions. "Law," he said, "functions best only when it is fitted into the life of a people." He made this point specific in his law lectures. This conviction sometimes aligned him with OLIVER WENDELL HOLMES and LOUIS D. BRANDEIS. Uniting the triumvirate was their view that a Justice's personal predilections must not thwart the realization of legislative objectives not clearly violative of the Constitution.

Stone's constitutional jurisprudence crystallized during 1936, the heyday of the Court's resistance to President Roosevelt's program of government control and regulation. In the leading case of UNITED STATES V. BUTLER (1936) the Court voted 6–3 to invalidate the AGRICULTURAL ADJUSTMENT ACT (AAA). Justice OWEN J. ROBERTS and dissenting Justice Stone were about equally skeptical of the wisdom of the AAA. Their differences concerned the scope of national power and the Court's role in the American system of government. Stone thought that the majority had come to believe that any legislation it considered "undesirable" was necessarily unconstitutional. The Court had come to think of itself, as Stone said, as "the only agency of government that must be assumed to have capacity to govern."

The majority was haunted by the possibility that Congress might become "a parliament of the whole people, subject to no restrictions save such as are self-imposed." But, Stone countered, "consider the status of our own power." The President and Congress are restrained by the "ballot box and the processes of democratic government," and "subject to judicial restraint. The only check on our own exercise of power is our own sense of self-restraint."

*Butler* was neither the first nor the last time a dissenter expressly accused the court of "torturing" the Constitution under the guise of interpreting it. But no other Justice had previously used such strong language in condemning the practice.

In ADKINS V. CHILDREN'S HOSPITAL (1923) the Court had declared unconstitutional the minimum wage for women. Justice GEORGE H. SUTHERLAND was the spokesman. Holmes dissented as did Chief Justice Taft. *Adkins* was still in good standing in MOREHEAD V. NEW YORK EX REL. TIPALDO (1936) when Stone repeated his indictment: "It is not for the Court to resolve doubts whether the remedy by regulation is as efficacious as many believe, or better than some other, or is better even than blind operation of uncontrolled economic forces. The legislature must be free to choose unless government is rendered impotent. The Fourteenth Amendment has no more imbedded in the Constitution our preference for some particular set of economic beliefs, than it has adopted in the name of liberty the system of theology which we happen to approve."

In his war on the recalcitrant four (Pierce Butler, James C. McReynolds, Sutherland, and WILLIS VAN DEVANTER) Stone was sometimes allied with Holmes and Brandeis. Chief among points of agreement was their recognition of the need for a living law. As Holmes put it: "A slumber when prolonged means death." The essence of their creed was judicial self-restraint, recognized as a desirable rather than a realizable role.

The bond uniting them strengthened as the majority's doctrinaire approach became increasingly reactionary. Differences were exposed when Holmes, Brandeis, and

Stone sometimes filed separate opinions in support of the same decision. In dissent Holmes, a gifted essayist addicted to generalization, often avoided the tough issues and "failed to meet the majority on its own ground." "This is a pretty good opinion," Stone remarked on one occasion, "but the old man leaves out all the troublesome facts and ignores all the tough points that worried the lower courts." "I wish," he once observed in grudging admiration, "I could make my cases sound as easy as Holmes makes his."

Stone's divergence from Brandeis was likewise most vividly portrayed in dissent. When the Court struck down legislation Brandeis favored in terms of policy, the erstwhile "People's Attorney" did not hesitate to use the Court as a forum to persuade others of its wisdom. "I told him [Brandeis] long ago," Holmes commented in 1930, "that he really was an advocate rather than a judge. He is affected by his interest in a cause, and if he feels it, he is not detached." Stone took specific exception to Brandeis's JUDICIAL ACTIVISM. In reply to a note in which Brandeis invited Stone to join his dissent in *Liggett Co. v. Lee* (1931), Stone said: "Your opinion is a very interesting and powerful document. But it goes further than I am inclined to go, because I do not think it necessary to go that far in order to deal with this case. . . . I think you are too much an advocate of this particular legislation. I have little enthusiasm for it, although I think it constitutional. In any case, I think our dissents are more effective if we take the attitude that we are concerned with power and not with the merit of its exercises. . . ."

Without minimizing the great contributions of Holmes and Brandeis, it seems fair to conclude that in a logical as well as a chronological sense Stone was the one who, in both the old and the new Court, carried their tradition to fulfillment. Perforce it fell to him, as his former law clerk, Herbert Wechsler, said, "to carry through to victory and consolidate the gain."

Chief Justice Taft paid high tribute to Stone's pioneering, even as he warned of the danger in the former law teacher's method. Said Taft: "He is a learned lawyer in many ways, but his judgement I do not altogether consider safe and the ease with which he expresses himself, and his interest in the whole branch of the law in which he is called upon to give an opinion on a single principle makes the rest of the Court impatient and doubtful. . . . Without impeaching at all his good faith in matters of that sort, we find we have to watch closely the language he uses."

Viewing Stone's dissent in *United States v. Butler* as a "lodestar for due regard between legislative and judicial power," some commentators interpreted the 1937 judicial about-face as signifying well-nigh complete withdrawal of the Court from the governing process.

After 1937, when the Court's Maginot Line crumbled, Justice Stone feared that the guarantees of CIVIL LIBERTIES might be wanting in effective safeguards. At first glance it does seem paradoxical that the leader of the campaign for judicial self-restraint in cases involving governmental ECONOMIC REGULATION should have articulated the PREFERRED FREEDOMS doctrine. In an otherwise obscure case, Stone suggested in the body of the opinion that he would not go so far as to say that no economic legislation would ever violate constitutional restraints, but he did indicate that in this area the Court's role would be strictly confined. Attached to this opinion is a famous footnote suggesting special judicial responsibility in the orbit of individual liberties. (See UNITED STATES V. CAROLENE PRODUCTS COMPANY.)

Two years later, in *Minersville School District v. Gobitis* (1940), the Court voted 8–1 to uphold Pennsylvania's compulsory flag salute as applied to Jehovah's Witnesses schoolchildren against their parents' religious beliefs. Justice FELIX FRANKFURTER, who spoke for the majority, wrote privately to Stone: "We are not the primary resolver of the clash. What weighs strongly on me in this case is my anxiety that while we lean in the direction of the libertarian aspect, we do not exercise our judicial power unduly, and as though we ourselves were legislators by holding too tight a rein on organs of popular government." (See FLAG SALUTE CASES.)

When Frankfurter learned that Stone was the lone dissenter, he was deeply disturbed. He pleaded: "That you should entertain doubts has naturally stirred me to an anxious re-examination of my own view. . . . I can assure you that nothing has weighed as much on my conscience since I came on this Court as has this case. . . . I'm aware of the important distinction which you so skillfully adumbrated in your footnote 4 in the *Carolene Products Co.* Case. I agree with that distinction: I regard it as basic. I have taken over that distinction in its central aspect."

Adolph Hitler had already unleashed his diabolical forces in Europe, and a widening conflict seemed inevitable. Frankfurter continued: "For time and circumstances are surely not irrelevant in resolving the conflict that we have to resolve in this particular case. . . . But certainly it is relevant to make the adjustment that we have to make within the framework of present circumstances and those that are clearly ahead of us."

Reflecting his New England heritage of RELIGIOUS LIBERTY, Stone was not convinced. He replied: "I am truly sorry not to go along with you. The case is peculiarly one of the relative weight of imponderables and I cannot overcome the feeling that the Constitution tips the scales in favor of religion."

Stone won this battle in a second case involving the compulsory flag salute, *West Virginia State School Board of Education v. Barnette* (1943). By 1943 three other justices, HUGO L. BLACK, WILLIAM O. DOUGLAS, and FRANK MUR-

PHY, who had joined Frankfurter in upholding the compulsory flag salute in *Gobitis*, changed their minds. Two new appointees, ROBERT H. JACKSON and WILEY B. RUTLEDGE, agreed with Stone's dissent in the earlier case, thus transforming a vote of 8–1 to uphold the compulsory salute to a vote of 6–3 striking it down. Speaking through Justice Jackson, the Court declared: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not occur to us."

Stone had initially expressed the "preferred freedoms" doctrine tentatively, merely raising the question whether in the case of legislation touching rights protected by the FIRST AMENDMENT there may be "narrower scope for the operation of the presumption of constitutionality" and whether such legislation might not be "subjected to more exacting judicial scrutiny." He first used the expression "preferred freedoms" in *Jones v. Opelika* (1942).

After Stone's death in 1946, the passing of Justices Murphy and Rutledge in 1949, and the intensification of the Cold War, the "preferred freedoms" doctrine fell into a constitutional limbo. Justice Frankfurter, still smarting from the second flag salute case, attacked the doctrine fiercely in KOVACS V. COOPER (1949) where, referring to "preferred freedoms," he wrote: "This is a phrase which has crept into some recent decisions of the Court. I deem it a mischievous phrase if it carries the thought, which it may subtly imply, that any law touching communication is infected with invalidity. . . . I say that the phrase is mischievous because it radiates a constitutional doctrine without avowing it."

DENNIS V. UNITED STATES (1951), a case involving the last stage of the 1949 trial of eleven leaders of the Communist party of the United States for violation of the Smith Act of 1940, dealt the doctrine a serious blow. Yet even after *Dennis* some substance of the doctrine remained. In dissent Justice Black expressed the hope "that in calmer times, when present pressure, passions, and fear subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."

Stone's guiding rule was judicial self-restraint, not self-abnegation. Before 1937 he criticized right-wing colleagues who equated what they considered economically undesirable legislation with unconstitutionality. After Roosevelt had reconstructed the Court, he was at loggerheads with judges on the left, equally intent, he thought, on reading their preferences into the constitution.

Repeated conflicts with Black and Douglas, who, he felt, were prone to resolve all doubt in labor's favor, alienated him. Stone's creativity was confined by the boundaries of the known. Any marked departure from existing principles left him "a little hurt, a little bewildered and sometimes even a little angry." When in 1945 he found himself pitted against judicial activists on the left, he dolefully reminisced: "My more conservative brethren in the old days enacted their own economic prejudices into law. What they did placed in jeopardy a great and useful institution of government. The pendulum has now swung to the other extreme, and history is repeating itself. The Court is now in as much danger of becoming a legislative Constitution making body, enacting into law its own predilections, as it was then. The only difference is that now the interpretation of statutes, whether "over-conservative' or "over-liberal' can be corrected by Congress."

Stone's conception of judicial conduct was almost monastic. He strove against almost insuperable odds to keep the Court within what he considered appropriate bounds. A judge should limit himself precisely to the issue at hand. Contradictory precedents should usually be specifically overruled. The Court ought "to correct its own errors, even if I help in making them." Stone's judicial technique recognized complexity. "The sober second thought of the community," he urged, "is the firm base on which all law must ultimately rest."

Stone advocated restraint, not because he believed a judge's preference should not enter law, but precisely because it inevitably did. The sharp barbs of his thought were intended for the flesh of judges, both right and left, who, without weighing social values, prematurely enforced private convictions as law. He strove not to eliminate subjectivity but to tame it.

As Chief Justice he was less impressive. In 1929, when it was rumored that President HERBERT C. HOOVER might elevate Stone as Taft's successor, the Chief Justice had opposed it, saying that the Associate Justice was "not a great leader and would have a great deal of trouble in massing the Court." Years later, Taft's assessment proved true. The bench Stone headed was the most frequently divided, the most quarrelsome in history. If success be measured by the Chief's ability to maintain harmony, he was a failure. Solid convictions handicapped him. Nor would he resort to the high-pressure tactics of Chief Justices Taft and Hughes. Believing profoundly in freedom of expression for others, no less than himself, he was slow to cut off debate.

Stone had an abiding faith in free government and in JUDICIAL REVIEW as an essential adjunct to its operation. He believed that radical change was neither necessary not generally desirable. Drastic change could be avoided "if fear of legislative action, which Courts distrust or think unwise, is not overemphasized in interpreting the document." A free society needed continuity, "not of rules but

of aims and ideals which will enable government in all the various crises of human affairs, to continue to function and to perform its appointed task within the bounds of reasonableness."

ALPHEUS THOMAS MASON
(1986)

Bibliography

DOUGLAS, WILLIAM O. 1946 Chief Justice Stone. *Columbia Law Review* 46:693–695.

DOWLING, NOEL T. 1941 The Methods of Mr. Justice Stone in Constitutional Cases. *Columbia Law Review* 41:1160–1181.

DOWLING, NOEL T. et al. 1936 Mr. Justice Stone and the Constitution. *Columbia Law Review* 36:351–381.

FRANK, JOHN P. 1957 Harlan Fiske Stone: An Estimate. *Stanford Law Review* 9:621–632.

HAND, LEARNED 1946 Chief Justice Stone's Conception of the Judicial Function. *Columbia Law Review* 46:696–699.

KONEFSKY, S. J. 1946 *Chief Justice Stone and the Supreme Court.* New York: Macmillan.

MASON, ALPHEUS THOMAS 1956 *Harlan Fiske Stone: Pillar of the Law.* New York: Viking.

WECHSLER, HERBERT 1946 Stone and the Constitution. *Columbia Law Review* 46:764–800.

## *STONE v. FARMERS' LOAN & TRUST CO.*
116 U.S. 307 (1886)

This case marks a transition in our constitutional law from the Supreme Court's use of the CONTRACT CLAUSE as a bastion of VESTED RIGHTS protected by corporate charter to its use of SUBSTANTIVE DUE PROCESS as a check on state regulation of business. Here, however, the Court sustained the regulation before it even as it laid the basis for the new DOCTRINE. The facts seemingly constituted an open-and-shut case for a victory of the contract clause. A railroad company's charter explicitly authorized the railroad to set rates for carrying passengers and freight. Thirty-eight years after granting the charter, the state of Mississippi empowered a railroad commission to revise rates. The trust company, a stockholder of the railroad, sued to enjoin Stone and other members of the commission from enforcing the state rate regulations. In past rate cases, whenever the contract clause argument had lost, the RESERVED POLICE POWER doctrine had prevailed; in this case the state had reserved no power to alter the company's charter. The INALIENABLE POLICE POWER doctrine had defeated the contract clause argument only in cases involving the public health, safety, or morals. Yet the Court, by a vote of 7–2, held that the state had not violated the company's charter.

Chief Justice MORRISON R. WAITE, in his opinion for the Court, reasoned that the explicit grant of rate-making powers to the railroad did not imply either a grant of exclusive powers or that the state had surrendered a power to revise rates set by the railroad. The state's power to regulate rates, Waite declared, cannot be "bargained away" except by a positive grant. Never before had the Court construed a contract so broadly in favor of the public and so strictly against a corporation.

Waite added, however, that the regulatory power was not unlimited: under pretense of regulating rates, the state could not require the railroad to carry persons or property free, and "neither can it do that which in law amounts to a taking of private property . . . without DUE PROCESS OF LAW. What would have this effect we need not now say, because no tariff has yet been fixed by the commission." Waite also declared that state rate-making does "not necessarily" deny due process. In effect he undercut his own proposition, asserted in *Munn v. Illinois* (1877), that the question of the reasonableness of rates is purely legislative in nature. (See GRANGER CASES.) In *Stone* the implied principle was that reasonableness was subject to JUDICIAL REVIEW. Moreover, the references to due process of law in effect reflected substantive due process, because a rate regulation could not violate due process except in a substantive sense. *Stone* heralded a new era in constitutional law, which the Court entered during the next decade.

LEONARD W. LEVY
(1986)

## *STONE v. GRAHAM*

See: Religious Liberty

## *STONE v. MISSISSIPPI*
101 U.S. 814 (1880)

Chief Justice MORRISON R. WAITE for a unanimous Supreme Court held that the state might revoke the chartered right of a lottery company to do business in the state, without violating the CONTRACT CLAUSE. Because the company was not subject to the state's reserved POLICE POWER to alter or repeal the contract, the Court relied on the doctrine of INALIENABLE POLICE POWER, here the power to protect the public morals by outlawing gambling.

LEONARD W. LEVY
(1986)

## *STONE v. POWELL*
428 U.S. 465 (1976)

By act of Congress, a state prisoner may petition a federal court for a writ of HABEAS CORPUS on a claim that he was

imprisoned in violation of his constitutional rights. In *Stone*, however, the Supreme Court ruled that federal courts should not entertain habeas corpus claims by prisoners who charge that they were convicted on unconstitutionally seized EVIDENCE, when the prisoner has had an opportunity for a full and fair hearing on the issue in the state courts.

The Court differentiated, for habeas corpus purposes, between the guarantees of the Fifth and Sixth Amendments, which are vital to the trustworthiness of the fact-finding process, and the FOURTH AMENDMENT, which is not. Exclusion of evidence is not a personal right of the defendant but a judicial remedy designed to deter the police from unlawful searches. Thus the EXCLUSIONARY RULE is not an "absolute" but must be balanced against competing policies. Indiscriminate application of the rule, far from fostering respect for constitutional values, might generate disrespect for the judicial system. On the other hand, denying the right to raise SEARCH AND SEIZURE claims in habeas corpus proceedings would not seriously diminish the educational effect of the rule; it was scarcely likely that police would be deterred by the possibility that the legality of the search would be challenged in habeas corpus proceedings after the state courts had upheld it.

Dissenting Justices WILLIAM J. BRENNAN and THURGOOD MARSHALL averred that the exclusionary rule is a right of the defendant and not a "mere utilitarian tool" which turns on its deterrent value.

JACOB W. LANDYNSKI
(1986)

## *STONE v. WISCONSIN*

See: Granger Cases

## STONE COURT
(1941–1946)

When Associate Justice HARLAN FISKE STONE moved over to the central seat of the Chief Justice in October 1941, he presided over a bench seven of whose nine members had been appointed to the Court by President FRANKLIN D. ROOSEVELT. All seven, who were sympathetic to the mass of new regulatory laws and welfare measures sponsored by the President, could be expected to develop approvingly the constitutional revolution of 1937. Surely they would sustain vast congressional expansion of federal power under the COMMERCE CLAUSE and drastically curtail the scope of JUDICIAL REVIEW. Stone himself had been appointed Associate Justice by President CALVIN COOLIDGE, but he had long advocated newly dominant constitutional principles in dissenting opinions. OWEN J. ROBERTS, now the senior Associate Justice, was a Republican appointed by President HERBERT C. HOOVER, but it was the shift of his vote, along with Chief Justice CHARLES EVANS HUGHES's, that had tipped the scales for change. Outside observers expected "a new unity in Supreme Court DOCTRINE, based upon a clearer philosophy of government than has yet been expressed in the swift succession of decisions rendered by a Court standing in the shadow of political changes."

But there was no unity. The new Chief Justice soon came to view his brethren as "a team of wild horses." DISSENTING OPINIONS and CONCURRING OPINIONS proliferated in numbers previously inconceivable. The controversies ranged from major jurisprudential differences to unworthy personal squabbles over such matters as the phrasing of the Court's letter to Justice Roberts upon his retirement.

The sources of disunity were both philosophical and temperamental. All but one or two of the Justices were highly individualistic, each was accustomed to speak his mind. All, with the possible exception of Justice Roberts, accepted the new regulatory and welfare state; but there were sharp differences over the proper pace and extent of change. The Chief Justice and Justices Roberts, STANLEY F. REED, JAMES F. BYRNES, and to a lesser degree Justices FELIX FRANKFURTER and ROBERT H. JACKSON, were more conservative in disposition than Justices HUGO L. BLACK, WILLIAM O. DOUGLAS, FRANK MURPHY, and Justice Byrnes's successor, WILEY B. RUTLEDGE. The temperamental differences were sometimes matched by differences in legal philosophy. The Chief Justice, Justice Frankfurter, and to a lesser degree Justice Jackson, were craftsmen of the law deeply influenced by a strong sense of the importance of the judge's loyalty to a growing, changing, but still coherent set of legal principles. For them, such institutional concerns were often more important than immediate, practical consequences. Justices Black, Douglas, and Murphy gave far more emphasis to the redistribution of social and economic power and to progressive reform. In conflicts between the individual and his government outside the economic area, the conservatives' instinct for order would often clash with the progressive liberals' enthusiasm for CIVIL LIBERTIES and CIVIL RIGHTS. The marked dissension indicates the difficulty any President of the United States faces in stamping one pattern upon the work of the Court.

Viewed in the sweep of constitutional history, the Stone years, 1941–1946, were the first part of a period of transition also encompassing the VINSON COURT, 1946–1953. By 1940 the main lines of CONSTITUTIONAL INTERPRETATION under the commerce clause and GENERAL WELFARE CLAUSE had been adapted to centralized ECONOMIC REGULATION

and the welfare state. After 1953, when EARL WARREN became Chief Justice of the United States, the driving force would be a new spirit of libertarianism, egalitarianism, and emancipation. It remained for the Stone Court to complete the reinterpretation of the commerce clause and to pursue the philosophy of judicial deference to legislative determinations, whether state or federal. But harbingers of the new age of reform by constitutional adjudication also began to appear. The first explicit challenges to an across-the-board philosophy of judicial self-restraint were raised in the Stone Court. From the seeds thus scattered would grow the doctrinal principles supporting the subsequent vast expansion of constitutionally protected civil liberties and civil rights.

In interpreting the commerce clause, the Stone Court, whenever faced with a clear assertion of congressional intent to exercise such wide authority, did not shrink from pressing to its logical extreme the doctrine that Congress may regulate any local activities that in fact affect INTERSTATE COMMERCE. For example, in WICKARD V. FILBURN (1942) the Court sustained the imposition of a federal penalty upon the owner of a small family farm for sowing 11.9 acres of wheat in excess of his 11.1 acre federal allotment, upon the ground that Congress could rationally conclude that small individual additions to the total supply, even for home consumption, would cumulatively affect the price of wheat in interstate markets. The reluctance of the more conservative Justices to sanction unlimited expansion of federal regulation into once local affairs took hold when federal legislation was couched in terms sufficiently ambiguous to permit limitation. Decisions putting marginal limits upon the coverage of the federal wage and hour law are the best examples. Only a bare majority of four of the seven Justices participating could be mustered in UNITED STATES V. SOUTHEASTERN UNDERWRITERS ASSOCIATION (1944) for holding the insurance industry subject to the SHERMAN ANTITRUST ACT. In PAUL V. VIRGINIA (1879) the Court had first ruled that writing an insurance policy on property in another state was not interstate commerce. Later decisions and an elaborate structure of regulation in every state were built upon that precedent. Congress had essayed no regulation of insurance. The executive branch had not previously sought to apply the Sherman Act. Justices Black, Douglas, Murphy, and Rutledge seemed not to hesitate in sustaining the Department of Justice's novel assertion of federal power, a position supportable by the literal words of the statute and the logic of the expansive view of the commerce power. Respect for precedent and a strong sense of the importance of institutional continuity led the Chief Justice and Justices Frankfurter and Jackson to protest so sharp a departure from the status quo in the absence of a specific congressional directive: "it is the part of wisdom and self-restraint and good government to leave the initiative to Congress. . . . To force the hand of Congress is no more the proper function of the judiciary than to tie the hands of Congress." Congress responded to the majority by limiting the application of the Sherman Act to the insurance business, and by confirming the states' powers of regulation and taxation.

New constitutional issues that would lead to the next major phase in the history of constitutional adjudication began to emerge as wartime restrictions and the multiplication of government activities stirred fears for personal liberties. The war against Nazi Germany reinvigorated ideals of human dignity, equality, and democracy. As more civil liberties and civil rights litigation came upon the docket, a number of Justices began to have second thoughts about the philosophy of judicial deference to legislative determinations. That philosophy had well fitted the prevailing desire for progressive social and economic reform so long as the states and the executive and legislative branches of the federal government were engaged in the redistribution of power and the protection of the disadvantaged and distressed. The recollection of past judicial mistakes and the need for consistency of institutional theory cautioned against activist judicial ventures even in so deserving an area as civil liberty. On the other hand, continued self-restraint would leave much civil liberty at the mercy of executive or legislative oppression. The libertarian judicial activist could achieve a measure of logical consistency by elevating civil liberties to a preferred position justifying stricter standards of judicial review than those used in judging economic measures. The older dissenting opinions by Justices OLIVER WENDELL HOLMES and LOUIS D. BRANDEIS pleading for greater constitutional protection for FREEDOM OF SPEECH pointed the way even though they had failed to rationalize a double standard.

Stone himself, as an Associate Justice, had suggested one rationale in a now famous footnote in UNITED STATES V. CAROLENE PRODUCTS CO. (1938). Holding that the Court should indulge a strong presumption of constitutionality whenever the political processes of representative government were open, he nonetheless suggested that stricter judicial review might be appropriate when the challenge was to a statute that interfered with the political process—for example, a law restricting freedom of speech—or that was a result of prejudice against a DISCRETE AND INSULAR MINORITY—for example, a law discriminating against black people.

The issue was first drawn sharply under the FIRST and FOURTEENTH AMENDMENTS in the FLAG SALUTE CASES (1940, 1943). The substantive question was whether the constitutional guarantees of the freedom of speech and free exercise of religion permitted a state to expel from school and treat as truants the children of Jehovah's Witnesses,

who refused to salute the United States flag. In the first case, the expulsions were sustained. Speaking for the Court, Justice Frankfurter invoked the then conventional rationale of judicial self-restraint. National unity and respect for national tradition, he reasoned, were permissible legislative goals. The compulsory flag salute could not be said to be an irrational means of seeking to secure those goals, even though the Court might be convinced that deeper patriotism would be engendered by refraining from coercing a symbolic gesture. To reject the legislative conclusion "would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence." The lone dissent came from Stone, who was still an Associate Justice.

Three years later the Court reversed itself. Justice Jackson, for the Court, summarized the core philosophy of the First Amendment: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." First Amendment freedoms, the Court reasoned, rejecting Justice Frankfurter's plea for consistent application of the principle of judicial self-restraint, might not be curtailed for "such slender reasons" as would constitutionally justify restrictions upon economic liberty. Freedom of speech, of assembly, and of religion were susceptible of restriction "only to prevent grave and immediate danger to interests that the State may lawfully protect. We cannot because of modest estimates of our competence in such specialities as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed."

Even in the 1980s, the deep and pervasive cleavage between the advocates of judicial self-restraint and the proponents of active judicial review in some categories of cases still divides both the Justices and constitutional scholars. It is now pretty clear, however, that judicial review will be stricter and there will be little deference to legislative judgments when restrictions upon freedom of expression, religion, or political association are at stake. (See JUDICIAL ACTIVISM AND RESTRAINT.)

In later years the Court would come also to scrutinize strictly, without deference to the political process, not only some laws challenged as denials of the EQUAL PROTECTION OF THE LAWS guaranteed by the Fourteenth Amendment but even statutes claimed to infringe FUNDAMENTAL RIGHTS in violation of the DUE PROCESS clauses of the Fifth and Fourteenth Amendments. The Stone Court broke the ground for STRICT SCRUTINY of statutory classifications prejudicing an "insular minority" in a opinion in one of the JAPANESE AMERICAN CASES declaring that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . the courts must subject them to the most rigid scrutiny." In later years the constitutional standard thus declared became the basis for many decisions invalidating hostile RACIAL DISCRIMINATION at the hands of government, segregation laws, and other "invidious" statutory classifications.

Earlier the Stone Court opened the door to strict review in a second and still highly controversial class of cases under the equal protection clause. An Oklahoma statute mandated the STERILIZATION of persons thrice convicted of specified crimes, including grand larceny, but not of persons convicted of other crimes of much the same order and magnitude, such as embezzlement. The somewhat obscure opinion by Justice Douglas in SKINNER V. OKLAHOMA (1942), holding the differential treatment to violate the equal protection clause, emphasized the need for "strict scrutiny" of classifications made in a sterilization law, and referred to procreation as "a basic liberty." Later reforms by constitutional adjudication in the area of VOTING RIGHTS and legislative REPRESENTATION would be based upon the proposition that a legislative classification is subject to strict scrutiny not only when it is invidious but also when it differentiates among individuals in their access to a basic liberty. The precedent would also be invoked to support still later controversial decisions upholding claims of individual liberty in matters of sexual activity, childbirth, and abortion.

The Stone Court also sharpened the weapons for challenging crucial discrimination in the processes of representative government. In most of the states of the Old South, nomination as the candidate of the Democratic party still assured election to office. A political party was regarded as a private organization not subject to the equal protection clause of the Fourteenth Amendment or to the FIFTEENTH AMENDMENT's prohibition against denial or abridgment of VOTING RIGHTS by reason of race or color. Even after PRIMARY ELECTIONS regulated by state law became the standard method for nominating party candidates, "white primaries" remained an accepted method of excluding black citizens from participation in self government.

The first step in upsetting this neat device was taken in an opinion by Justice Stone just before he became Chief Justice. Interference with the right to cast an effective ballot in a primary held to nominate a party's candidate for election as senator or representative was held in UNITED STATES V. CLASSIC (1938) to interfere with the election itself and thus to be punishable under legislation enacted by Congress pursuant to its power to regulate the time, place, and manner of holding elections under Article I, section 4. Next, in SMITH V. ALLWRIGHT (1944) the Stone Court ruled that if black citizens are excluded because of

race or color from a party primary prescribed and extensively regulated by state law, their "right . . . to vote" has been denied or abridged by the state in violation of the Fifteenth Amendment. Opening the polls to effective participation by racial minorities throughout the South, in accordance with the promise of the Fifteenth Amendment, would have to await the civil rights revolution and the enactment of the VOTING RIGHTS ACT OF 1965, but these decisions eliminating "white primaries" were the first major steps in that direction.

While marking its contributions to the mainstream of constitutional history, one should not forget that the Stone Court was a wartime court subject to wartime pressures as it faced dramatic cases posing the underlying and unanswerable question, "How much liberty and judicial protection for liberty may be sacrificed to ensure survival of the Nation?" Economic measures were uniformly upheld, even a scheme for concentrating the review of the legality of administrative price regulations in a special EMERGENCY COURT OF APPEALS, thus denying a defendant charged in an ordinary court with a criminal violation the right to assert the illegality of the regulation as a defense. Extraordinary deference to military commanders under wartime pressures alone can account for the Court's shameful decision sustaining the constitutionality of a military order excluding every person of Japanese descent, even American-born United States citizens, from most of the area along the Pacific Coast.

More often, the majority resisted the pressures when individual liberty was at stake. In DUNCAN V. KAHANAMOKU (1946), an opinion with constitutional overtones, the substitution of military tribunals for civilian courts in Hawaii was held beyond the statutory authority of Army commanders. Prosecution of a naturalized citizen of German descent who had befriended a German saboteur landed by German submarine and who took his funds for safekeeping was held in CRAMER V. UNITED STATES (1945) not to satisfy the constitutional definition of TREASON because the only overt acts proved by the testimony of two witnesses—meetings with the enemy saboteur in public places—were not shown to give aid and comfort to the enemy. In *Schneiderman v. United States* (1943) the Court held that proof that a naturalized citizen was an avowed Marxist and long-time active member, organizer, and officer of the Communist Party of the United States, both before and after his NATURALIZATION, was insufficient to warrant stripping him of CITIZENSHIP on the ground that, when naturalized, he had not been "attached to the principles of the Constitution . . . and well disposed to the good order and happiness of the United States."

The delicate balance that the Stone Court maintained between the effective prosecution of the war and the constitutional safeguards of liberty is perhaps best illustrated by the dramatic proceedings in EX PARTE QUIRIN (1942). In June 1942 eight trained Nazi saboteurs were put ashore in the United States by submarine, four on Long Island and four in Florida. They were quickly apprehended. President Roosevelt immediately appointed a military commission to try the saboteurs. The President was determined upon swift military justice. The proclamation declared the courts of the United States closed to subjects of any nation at war with the United States who might enter the United States and be charged with sabotage or attempt to commit sabotage. The trial was prosecuted with extraordinary speed and secrecy. Before the trial was complete, counsel for the saboteurs sought relief by petition for HABEAS CORPUS. By extraordinary procedure the case was rushed before the Supreme Court. The Justices broke their summer recess to hear oral argument. An order was promptly entered denying the petitions and promising a subsequent opinion. Within a few days the military tribunal passed sentence and six of the saboteurs were executed.

In the post-execution opinion the Court explained that the offense was triable by military commission; that the military commission was lawfully constituted; and that the proceedings were conducted without violation of any applicable provision of the Articles of War. The Justices were greatly troubled upon the last question. Some realized that in truth the swift and secret procedure ordained by the President left them with little ability to give meaningful protection to the saboteurs' legal rights in the military proceedings. Yet, even while recognizing that wartime pressures bent traditional legal safeguards in this as in other instances before the Stone Court, one should not conclude "inter arma silent leges." The hard core of the Court's decision was that judicial review of the saboteurs' constitutional contentions could not be barred even by the President as COMMANDER-IN-CHIEF. One may therefore hope that, if similar circumstances again arise, the Stone Court's basic defense of CONSTITUTIONALISM in time of war will prove more significant than its occasional yielding to the pressures of emergency.

ARCHIBALD COX
(1986)

Bibliography

MASON, ALPHEUS 1956 *Harlan Fiske Stone, Pillar of the Laws.* Chaps. 34–42. New York: Viking Press.

ROSTOW, EUGENE 1945 The Japanese American Cases: A Disaster. *Yale Law Journal* 54:489–533.

SWINDLER, WILLIAM F. 1970 *Court and Constitution in the Twentieth Century,* Vol. 2, chaps. 6–10. Indianapolis: Bobbs-Merrill.

WOODWARD, J. 1968 *Mr. Justice Murphy.* Chaps. 11–13. Princeton, N.J.: Princeton University Press.

## STOP AND FRISK

Most courts recognize that a police officer has the authority to detain a person briefly for questioning even without PROBABLE CAUSE to believe that the person is guilty of a crime. The Supreme Court first addressed the "stop and frisk" issue in TERRY V. OHIO (1968). In *Terry,* an experienced police officer observed three unknown men conducting themselves in a manner that suggested the planning of an imminent robbery. With his suspicion aroused—but clearly without probable cause to make an ARREST—the officer stopped and patted the men down, finding weapons on two of them. The holders of the two guns were arrested and convicted of possession of a concealed weapon. The Supreme Court ruled that the officer's actions in stopping the suspects were constitutional.

*Terry,* therefore, authorized law enforcement officials, on the grounds of reasonable suspicion, to stop briefly a suspicious person in order to determine his identity or to maintain the status quo while obtaining more information. Such a "stop" is proper when: the police observe unusual conduct; the conduct raises reasonable suspicion that criminal activity may be afoot; and the police can point to specific and articulable facts that warrant that suspicion. A "frisk" is proper when the following prerequisites are met: a "frisk" cannot be justified on "inchoate and unparticularized suspicion or 'hunch'," but must be grounded on facts which, in light of the officer's experience, support "specific reasonable inferences" that justify the intrusion; a "frisk" is proper only after "reasonable inquiries" have been made, although such inquiries need not be extensive; and a "frisk" is authorized where an officer reaches a reasonable conclusion that the person stopped for questioning may be armed and presently dangerous.

Further clarifying the test permitting a valid "stop and frisk," the Supreme Court has stated that the totality of the circumstances must be taken into account. Looking at the whole picture, the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. The Court has emphasized that the process of assessing all the circumstances often will not involve hard certainties but rather probabilities; the evidence to justify the stop must be weighed in accordance with the understanding and experience of law enforcement personnel.

Applying that standard in *United States v. Cortez* (1981), the Court upheld the propriety of stopping a defendant whose camper van was observed late at night near a suspected pick-up point for illegal ALIENS. The size of the vehicle, the lateness of the hour, and the remoteness of the spot all combined to make the stop reasonable.

Moreover, in *Adams v. Williams* (1972) the Supreme Court extended the *Terry* DOCTRINE in the following ways: (1) a "stop and frisk" is authorized for such offenses as possession of illegal drugs or a concealed weapon; (2) an informant's tip may provide reasonable cause for a "stop and frisk" even where no unusual conduct has been observed by an officer; and (3) the "identification" and "reasonable inquiries" requirements of the *Terry* decision are no longer absolute prerequisites. The *Terry* doctrine was again extended in *Michigan v. Long* (1983) where a "frisk" for weapons was not restricted to the person but was extended to any area that might contain a weapon posing danger to the police. A search of the passenger compartment of a car was held reasonable due to the observance of a hunting knife, the intoxicated state of the defendant, and the fact that the encounter took place at night in an isolated rural area.

In *Pennsylvania v. Mimms* (1977) the Court held that, whenever a vehicle is lawfully detained for a traffic violation, the police officer may order the driver out of the vehicle for questioning without violating the proscriptions of the FOURTH AMENDMENT.

In SIBRON V. NEW YORK (1968) a patrolman observed Sibron with a group of known drug addicts. The officer approached Sibron in a restaurant and ordered him outside. During a brief conversation with the officer, Sibron reached into his pocket. The patrolman promptly thrust his hand into the same pocket and found several glassine envelopes containing heroin.

The Supreme Court found the search to be unlawful on several grounds, including the fact that the "mere act of talking with a number of known addicts" was not enough to produce a reasonable inference that a person was armed and dangerous. The officer's motive, which was clearly to search for drugs, not for a weapon, invalidated the search as well. The *Sibron* decision is important because it made clear that *Terry* established only a narrow power to search on less than probable cause to arrest, and that the right to frisk is not an automatic concomitant to a lawful stop. *Sibron* also established proper motive as a prerequisite to a proper frisk.

In *Peters v. New York* (1968), *Sibron*'s companion case, an off-duty policeman saw through the peephole of his apartment door two strangers tiptoeing down the hallway. After calling the police station, dressing, and arming himself, the officer pursued the men and questioned Peters. Peters said he was visiting a married girlfriend but would not identify her. The officer then patted down Peters and felt in his pocket a hard, knife-like object. He removed the object, which turned out to be a plastic envelope containing burglar's tools. Peters was charged with unlawful possession of burglar's tools. The search was held proper as incident to a lawful arrest because the circumstantial EVIDENCE available to the officer reached the level of probable cause to arrest Peters for attempted burglary.

After *Sibron* and *Peters*, the issue arises as to the legal consequences when a police officer pats down a suspect, reaches into the suspect's pocket, and pulls out evidence of a crime but not a weapon. The questions are whether the officer could reasonably have believed the item was a weapon, and whether the item was visible even without removing it. Using *Sibron* and *Peters* as models, a box of burglar's tools would satisfy the test (*Peters*), while a soft bag of heroin would not be admissible (*Sibron*).

The lower courts have expanded the scope of a constitutionally permissible frisk beyond a limited pat-down of a suspect's outer clothing. Courts have included within the scope of a permissible frisk the area under a suspect's car seat, after the suspect appeared to hide something there, and a glove compartment within the reach of a suspect. In addition, the lower courts have relaxed their supervision over police judgments concerning objects that seem to be weapons when suspects are frisked, allowing officers to search after they have touched objects such as razor blades, cigarette lighters, and even lipstick containers.

The Supreme Court has declined to impose a rigid time limit for stop and frisk situations. In *United States v. Sharpe* (1985), where a pickup truck involved in drug trafficking was detained for twenty minutes, the Court determined that the length of the stop was reasonable by considering the purpose of the stop, the reasonableness of the time in effectuating the purpose, and the reasonableness of the means of investigation. In *United States v. Hensley* (1985) the Court widened the application of permissible investigative stops to include investigations of completed crimes. The Court also articulated that a police officer's reliance on a "wanted flyer" issued by another police department provided reasonable basis to conduct a stop if the flyer was based on "specific and articulable facts."

Finally, courts have handled the special case of airport "stop and frisk" situations in three ways. The first treats the problem through a straightforward application of the *Terry* test. The second method involves courts lowering the *Terry* level of "reasonable suspicion" to a less stringent standard. The third approach overtly abandons the *Terry* formula, opting for an ADMINISTRATIVE SEARCH consent rationale which does not even require reasonable suspicion. Today, the use of electronic scanning devices at most airports has diminished this area of "stop and frisk" concern.

CHARLES H. WHITEBREAD
(1986)

(SEE ALSO: *Body Search.*)

Bibliography

WHITEBREAD, CHARLES H. 1980 *Criminal Procedure.* Mineola, N.Y.: Foundation Press.

## STORING, HERBERT J.
(1928–1977)

Herbert Storing established the American Founding as a special field of study, both in his teaching at the University of Chicago and in his scholarship. Storing's monumental work, *The Complete Anti-Federalist*, contains introductions to and annotated, accurate texts of all substantial ANTI-FEDERALIST writings, along with the essay, "What the Anti-Federalists were *For.*" This material plus his essay on "The 'Other' Federalist Papers," facilitates a full study of the dialogue over RATIFICATION OF THE CONSTITUTION in 1787–1788. It also explains why the Constitution's opponents "must be seen as playing an indispensable, if subordinate, part in the founding process." Storing argued that the Anti-Federalists lost the debate, ultimately, because they could not reconcile the contradiction of supporting union while opposing adequate powers for the federal government, but he regarded as well taken their criticism of the Constitution as not providing for, and even undermining, republican virtue.

Elsewhere, in essays on slavery, CIVIL DISOBEDIENCE, the political thought of black Americans, and statesmanship, and in congressional testimony concerning the ELECTORAL COLLEGE, Storing demonstrated the continuing relevance of the founding dialogue for American politics.

MURRAY DAY
(1986)

Bibliography

STORING, HERBERT J. 1976 "The 'Other' Federalist Papers." *Political Science Reviewer* 6:215–247.

——— 1981 *The Complete Anti-Federalist.* 7 Vols. Chicago: University of Chicago Press. (Volume 1 was also published separately under the title, *What the Anti-Federalists were* For.)

## STORY, JOSEPH
(1779–1845)

Joseph Story's contributions to American nationalism were as great as those of any other figure in American judicial history. The record of his career—his thirty-four years as an associate Justice of the Supreme Court, his hundreds of opinions delivered from the First Circuit Court (of Appeals), his many influential *Commentaries*, his contributions to the creation of admiralty and commercial law and EQUITY jurisprudence, his re-creation of the Harvard Law School—is more abundant, more distinguished, and more fertile than that of any jurist of his generation. Imbued with a deep pride in the American nation, Story believed that nationalism should proclaim itself in the might of the

government and the majesty of the law, and in the expression of this philosophy he was articulate beyond any of his fellow jurists. Ceaselessly—in Congress, on the bench, from the professor's podium and the speaker's platform, in his study, and through his voluminous correspondence—he admonished the American people to exalt the nation and to preserve the Constitution and adapt it to the exigencies of history.

Born in Marblehead, Massachusetts, in 1779, Story graduated from Harvard College in 1798, read law, and began legal practice in Salem in 1801. In 1807 New England land speculators retained him to protect their interests in the notorious Yazoo lands controversy; his argument before the Supreme Court in their behalf was accepted by Chief Justice JOHN MARSHALL for the Court in FLETCHER V. PECK (1810).

A conservative Republican in a predominantly Federalist state, Story served for three years (1805–1808) in the Massachusetts legislature and then briefly (1808–1809) in the national House of Representatives. Though nominally a Republican, Story early displayed his independence by openly challenging President THOMAS JEFFERSON's policies on naval preparedness and on the Embargo; Jefferson blamed the "pseudo-Republican," Story, for the repeal of that Embargo, which he had hoped would be a substitute for war. On returning to Massachusetts, Story reentered the state legislature and in 1811 was elected its speaker. When Justice WILLIAM CUSHING of Massachusetts died in 1810, Story was one of four candidates proposed to President JAMES MADISON as Cushing's successor. Not having forgiven Story's opposition to the Embargo, Jefferson protested to Madison that Story was "unquestionably a tory . . . and too young." Only after three other prospective nominees—LEVI LINCOLN, Alexander Wolcott, and JOHN QUINCY ADAMS—had declined the nomination or were rejected by the Senate did Madison turn to Story. At thirty-two, he was—and remains—the youngest appointee in the history of the Court.

When Story took his seat on the Bench in 1812, he was already an ardent nationalist. From the beginning he endorsed that BROAD CONSTRUCTION of the Constitution that we associate with Marshall, and throughout Marshall's life he was not so much a disciple of as a collaborator with the Chief Justice. For the next quarter century, these two magisterial jurists presented a united front on most major constitutional issues; only on the issue of PRESIDENTIAL POWERS in wartime, raised in *Brown v. United States* (1814), and a few issues of admiralty, international, and prize law did they ever disagree. Yet throughout his judicial career, Story's was an independent and original mind different in style if not in philosophy from Marshall's. Story respected and even venerated the Chief Justice, and the respect was mutual. If Story looked to Marshall for authoritative exposition of the Constitution, Marshall looked to Story for the substantiation of his logic and for help in other areas of law—notably in admiralty, conflict of laws, and equity. And when Story spoke on constitutional issues, it was in no mere imitative tones; frequently he pointed the way that Marshall later followed, as when his great opinion in MARTIN V. HUNTER'S LESSEE (1816) anticipated Marshall's opinion in COHENS V. VIRGINIA (1821). Although in some areas—such as the interpretation of the COMMERCE, NECESSARY AND PROPER, and CONTRACT CLAUSES of the Constitution—Marshall blazed the way, in others—notably those concerning the proper realms of executive and judicial power, issues of concurrent state and national power, and the creation of a uniform national commercial law—Story's was the greater overall achievement.

What emerges most strikingly from a study of Story's constitutional opinions is his passionate commitment to the authority of the national government in the federal system. He was quick to counter any attack or limitation upon its powers; he was alert to the potentialities of the concept of IMPLIED POWERS; he was ambitious to extend federal JURISDICTION by judicial opinion, legislation, or doctrinal writing. His ambitions were chiefly for the judiciary, for whose authority he was acquisitive and even belligerent, but he made bold claims for the national executive and legislative powers as well.

Story's solicitude for national executive authority was early asserted in *Brown v. United States* (1814), one of the few constitutional cases where he and Marshall disagreed. The issue presented was the validity of the confiscation of enemy property during the War of 1812 by the local United States district attorney without express legislative authority. Marshall, speaking for the Court, held such seizures illegal absent express authority granted by Congress. Story claimed that under the WAR POWER, the executive had full authority to direct such seizures, for in the absence of legislation he was bound only by international law, which countenanced such action. Not content to vindicate the executive power merely under the rules of international law, Story rested his case upon the doctrine of implied powers in the Constitution, here anticipating Marshall's statement of that doctrine in MCCULLOCH V. MARYLAND (1819). Story later seized the opportunity to restate and expand on his views on the implied powers of the executive in national emergencies in MARTIN V. MOTT (1827), which established the constitutional authority of the President to use his discretion as to the exigency that justified calling out the militia.

Though Story was not as jealous for legislative as for executive authority, in cases where the distribution of powers in the federal system was at issue he ranged himself strongly on the nationalist side. Thus, in PRIGG V. PENNSYLVANIA (1842), which presented the grave question

whether authority to enforce the FUGITIVE SLAVE ACT of 1793 was vested exclusively in the national government or concurrently in the national and state governments, the Court held unconstitutional a Pennsylvania statute setting up parallel state enforcement machinery and imposing heavy penalties on any person who should seize or remove from the state anyone who had not been adjudged a fugitive from service. Story held for the Court that Congress had preempted the field by passing the 1793 act. This general argument was nothing new, being derived from Marshall's statement of the PREEMPTION doctrine in GIBBONS V. OGDEN (1824), but Story went further, arguing in dictum that the Constitution's fugitive slave clause did not impose upon the states any obligation to carry it into effect. Congressional authority was exclusive, so that the states not only could not cooperate with it through parallel legislation but might even prohibit their officials from acting under it. This was nationalism with a vengeance—as well as an escape hatch for northern states' PERSONAL LIBERTY LAWS. Only Justice JAMES M. WAYNE accepted Story's reasoning entirely; Chief Justice ROGER B. TANEY and Justices PETER V. DANIEL and HENRY BALDWIN agreed that the state statute was unconstitutional but denied that a state could release its officers from the obligation to enforce a federal law, while Justice JOHN MCLEAN dissented *in toto,* upholding the state statute's constitutionality.

Story's ambiguous views on slavery, exemplified by his opinion in *Prigg,* merit special discussion. Story detested slavery and denounced it in charges to federal GRAND JURIES, and it was the source of his sole extrajudicial public statement on political issues—his condemnation of the MISSOURI COMPROMISE. Yet he generally yielded to the countervailing pull of his belief in the necessity to support and sustain the authority of the legal system. Thus, his opinion in *The Amistad* (1841), while upholding the claims for freedom of Africans who had liberated themselves from captivity and seized control of the slave ship carrying them to Latin America, rested solidly upon principles of international law, not on the noble rhetoric of John Quincy Adams's argument in the Africans' behalf. And while his OBITER DICTUM in *Prigg* might be read as flowing from hostility to slavery, his appeals in his lectures at the Harvard Law School that all citizens faithfully obey the Fugitive Slave Act indicate that it was his zeal for the RULE OF LAW and for exclusive national authority rather than sympathy for the fugitive slave that dictated the ingenious reasoning in *Prigg.*

Story's support for exclusive congressional authority extended to other areas as well. In *Houston v. Moore* (1820) he argued (in dissent) that by providing for the trial and punishment of offenses against the federal militia act, Congress had preempted the field, thereby precluding the states from making similar provisions; it followed that the criminal jurisdiction of the United States in this area could not be delegated in whole or in part to state tribunals. In his dissent in MAYOR OF NEW YORK V. MILN (1837) Story asserted that congressional authority to regulate commerce was supreme and exclusive and that a state law requiring the master of a foreign vessel to supply elaborate information about his passengers was an unconstitutional regulation of commerce rather than a constitutional exercise of the STATE POLICE POWER. Similarly, in *United States v. Coombs* (1838), he expanded the reach of federal power under the commerce clause, holding for the Court that a federal statute prohibiting as a crime against the United States the theft of goods from wrecked or stranded ships was a constitutional regulation of commerce, even though it might not fall within federal admiralty jurisdiction.

Ready as Story was to vindicate national executive and legislative powers, it was the judicial prerogative that was closest to his heart. In his eyes the judiciary was the bulwark of the Constitution, and the courts' role in maintaining the balance of the departments and the federal system was of supreme importance.

Key to this balance was Section 25 of the JUDICIARY ACT OF 1789, which provided for APPEALS from state to federal courts, guaranteeing the harmonious interpretation of the Constitution throughout the United States. In *Martin v. Hunter's Lessee* (1816), Story upheld the constitutionality of Section 25. In one form or another, this case had dragged its tortuous way through the courts for almost a quarter of a century. While the legal issues were complicated, the constitutional question was comparatively simple: was the authoritative interpretation of the Constitution lodged finally in the Supreme Court or did it share this prerogative with the highest state courts? The Court had already decided the legal issues in *Fairfax v. Hunter's Lessee* (1813), but the Virginia courts refused to be bound by that decision. Marshall disqualified himself from the case for reasons of judicial propriety, so Story spoke for the Court in his first great opinion. To him the case presented the simple question of national versus state supremacy, and his answer was equally simple, in contrast to his opinion's verbosity: the national government was supreme. Appeals from state to national courts did not involve any infringement upon the SOVEREIGNTY of the state, for the people of the state, acting in their sovereign capacity, had already provided for such appeals through their ratification of the Constitution. Building on *Martin,* Marshall later seized his chance to vindicate Section 25 anew in *Cohens v. Virginia.*

Story's other efforts to expand federal judicial power were to prove no less significant than *Martin.* While early in his judicial career he had unsuccessfully advocated common-law jurisdiction for the federal courts, Story achieved that goal indirectly in SWIFT V. TYSON (1842). In *Swift,* Story held that Section 34 of the Judiciary Act of

1789, which provided that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States," did not always bind federal courts to follow the decisions of state courts. He contended rather that Section 34 required federal courts to follow state court decisions only in strictly state matters, and that federal courts were free in cases posing "questions of general commercial law" to follow "the general principles and doctrines of commercial jurisprudence."

*Swift* was the entering wedge for the gradual creation of a FEDERAL COMMON LAW, but the decision had a troubled history until, after repeated challenge and criticism, the Court overruled it in ERIE RAILROAD CO. V. TOMPKINS (1938). Despite *Erie*, the need for uniformity of interpretation in contracts, sales, commercial paper, secured transactions, and other branches of commercial law resulted in the gradual though somewhat disorderly creation of a common commercial law. Through federal legislation, uniform state laws (such as the Uniform Commercial Code), the American Law Institute's promulgation of Restatements of the various branches of the law, and the publication of authoritative treatises and reports of decisions, Story's dream of a national commercial law has been substantially vindicated.

Story helped to establish uniformity in many areas of commercial law. Almost single-handed, he shaped American admiralty law in his opinions on the First Circuit Court and the Supreme Court. More important, however, were his many authoritative *Commentaries*, which he composed as part of his responsibilities as Dane Professor of Law at Harvard, a position which he held from 1829 until his death. Story was "driven to accept" this post by his old friend Nathan Dane, who conditioned his gift to the near moribund Harvard Law School on Story's acceptance of the chair. His lectures gave rise to commentaries on *Bailments* (1832), the *Constitution* (3 vols., 1833), *Conflict of Laws* (1834), *Equity Jurisprudence* (1836), *Equity Pleading* (1838), *Agency* (1839), *Partnership* (1841), *Bill of Exchange* (1843), and *Promissory Notes* (1845), which together comprise the most impressive body of scholarship on commercial law ever to come from the pen of one scholar. These commentaries, together with his authority and prestige, made the Harvard Law School the largest and most distinguished in the nation.

To three fields particularly Story's contributions were of outstanding importance. His *Commentaries on the Constitution* molded constitutional law and history for half a century; in light of their influence on DANIEL WEBSTER and ABRAHAM LINCOLN, it might be said that it was Story who triumphed in the Civil War and the FOURTEENTH AMENDMENT. His works on equity established its popularity in the American legal system by giving equity (in the words of an English commentator) "a philosophical character with which it never had been invested by any preceding author." His *Conflict of Laws*, the most original and learned of all his books, opened up a relatively new subject and revealed the possibilities of Continental to American and—even more remarkable—of American to English and Continental law, as well as winning for Story a distinguished international reputation.

Equally characteristic of Story's zeal for national authority and uniformity was his legal and judicial conservatism. His belief in natural law—that laws are discovered rather than made—was part and parcel of the thinking of his generation, as of that earlier generation which had fought the American Revolution and framed state and national constitutions. Of the talismanic trio of life, liberty, and property, Story emphasized property—an emphasis peculiarly congenial to his temperament. The society in which Story lived was acquisitive and speculative—more fully so than the society that produced Marshall and Taney—and Story, along with JAMES KENT, came to be its most persuasive legal representative.

TERRETT V. TAYLOR (1816) gave Story his first opportunity to uphold property rights from the bench; writing for the Court, he struck down Virginia's attempt to revoke grants of glebe lands to the Episcopal Church, on the HIGHER LAW ground that legislative grants of land could not constitutionally be revoked by a subsequent legislative act. Similarly, Story's learned concurring opinion in DARTMOUTH COLLEGE V. WOODWARD (1819) supported Marshall's conclusion that the Constitution's contract clause forbade the revision or revocation by a state legislature of a college's charter. In the hands of Marshall and Story, the contract clause proved a powerful weapon for the maintenance of the status quo and the frustration of legislative experiments.

Marshall's death in 1835 and his replacement by Taney created a situation in which Story was increasingly uncomfortable. In three cases in the 1837 Term—*Mayor of New York v. Miln* (discussed above), CHARLES RIVER BRIDGE CO. V. WARREN BRIDGE, and BRISCOE V. BANK OF KENTUCKY—Story found himself in lonely and eloquent dissent, mourning the passing of the "old law." In *Charles River Bridge*, Story's most famous dissent, he bitterly countered the Court's decision upholding the Massachusetts legislature's grant of a permit to a new bridge company to build a bridge across the Charles River in competition with an existing bridge authorized by an earlier charter. Story's opinion ransacked the history of the COMMON LAW to establish that public grants were to be construed in the same manner as private grants—against the grantor; thus, the earlier grant of permission to build the first bridge should be read as granting an irrevocable monopoly. In *Briscoe*, Story dissented from a decision upholding Kentucky's creation of a state bank authorized to issue bank notes.

Invoking the departed Marshall, Story argued that because a state could not do through an agent what it was barred from doing directly, Kentucky had violated the constitutional prohibition against the issuing by a state of BILLS OF CREDIT. These three cases dramatized the contrast between the Story-Marshall interpretation of the Constitution and that advanced by Taney and his colleagues; they illustrate the TANEY COURT's modification of the MARSHALL COURT's earlier positions to favor the states' police powers and a greater exercise of judicial continence.

Although Story died suddenly in 1845, leaving unwritten his projected works on admiralty and insurance and his memoirs, he had in large part succeeded in his determination to create a rounded system of law not only through judicial opinions but also through systematic treatises and teaching. His judicial opinions helped to formulate our constitutional, equity, COPYRIGHT, admiralty, insurance, and commercial law. His *Commentaries* did more than those of any other expositor until our own day to mold popular ideas about the American constitutional system and to influence professional ideas about law, while they all but created the fields of commercial law and conflict of laws. And from the great law school which was so largely of his making and the extension of his shadow, he sent forth lawyers, judges, and teachers imbued with his nationalist philosophy of law and politics. Nor, indeed, did his influence end here; through such disciples as CHARLES SUMNER, TIMOTHY WALKER, and FRANCIS LIEBER, he handed on a vital and persistent tradition.

HENRY STEELE COMMAGER
RICHARD B. BERNSTEIN
(1986)

Bibliography

COMMANGER, HENRY STEELE 1953 Joseph Story. In *Gaspar G. Bacon Lectures on the Constitution of the United States, 1940–1950.* Boston: Boston University Press.

DUNNE, GERALD T. 1970 *Justice Joseph Story and the Rise of the Supreme Court.* New York: Simon & Schuster.

MCCLELLAN, JAMES 1971 *Joseph Story and the American Constitution: A Study in Political and Legal Thought.* Norman: University of Oklahoma Press.

NEWMYER, R. KENT 1985 *Supreme Court Justice Joseph Story: Statesman of the Old Republic.* Chapel Hill: University of North Carolina Press.

STORY, WILLIAM W. 1851 *Life and Letters of Joseph Story,* 2 vols. Boston: Little, Brown.

## *STRADER v. GRAHAM*
### 10 Howard (51 U.S.) 83 (1851)

In a suit under a Kentucky statute making an abettor of fugitive slaves liable to the master for their value, defendant attempted to evade liability by arguing that the slaves, who had previously been permitted by their master, the plaintiff, to sojourn in free states, became free there and retained that status upon their return to their slave-state domicile. Defendant sought a reversal of the Kentucky Court of Appeals' determination that their slave status reattached.

On the central question, Chief Justice ROGER B. TANEY held that a state court's determination of the status of blacks was conclusive on federal courts. But he went on to assert in dictum that every state had the right to determine the status of persons within its territory "except in so far as the powers of the states in this respect are restrained, or duties and obligations imposed on them" by the federal Constitution, thus suggesting that the Constitution might somehow invalidate northern abolition statutes or statutes regulating the permissible stay of sojourning slaves. He also insisted that the NORTHWEST ORDINANCE was defunct, its famous sixth article no longer a basis for the exclusion of slavery from the five states of the former Northwest Territory, thus suggesting that Congress might not be able to impose an enforceable antislavery condition on a territory's admission as a state.

Had the United States Supreme Court in 1857 wished to evade the controversial question raised in DRED SCOTT V. SANDFORD of the constitutionality of congressional prohibition of SLAVERY IN THE TERRITORIES, it might have used *Strader* to hold that the determination of Scott's status by the Missouri Supreme Court was binding on federal courts. Justice SAMUEL NELSON's concurrence in *Dred Scott,* originally intended to be the opinion for the Court, did in fact adopt this approach.

WILLIAM M. WIECEK
(1986)

## STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION IN GOVERNMENT

Citizen activism on public issues since the 1960s has been confronted by a new genre of civil litigation: lawsuits claiming injury from others' communications to government. A National Science Foundation–sponsored study at the University of Denver has found that citizens, nonprofit organizations, and businesses are being sued for exercising the basic FIRST AMENDMENT right to "petition the government for a redress of grievances." Lawsuits, typically with multimillion-dollar claims, have been filed against citizens and groups for testifying against real estate developments at city ZONING hearings; reporting public official and police misconduct; filing consumer or CIVIL RIGHTS complaints; writing letters to the President opposing political APPOINTMENTS; reporting violations of ENVIRONMENTAL REGULATION; complaining to school boards about incompetent teachers;

or testifying before Congress or state legislatures on pending bills.

Although the lawsuits make various claims—most typically defamation, business torts, process violations, and conspiracy—they have come to be collectively viewed by courts and commentators as "SLAPPs" for "strategic lawsuits against public participation" in government, an acronym that captures both their cause and their effect; namely, sanctioning political opponents' participation in government decisionmaking. SLAPPs are a classic example of "dispute transformation," a unilateral changing of the nature of the dispute, the forum, and the issues so that, for example, a public, political-forum, policy controversy over zoning is transformed into a private, judicial-forum, legalistic controversy over slander, to the perceived advantage of the lawsuit filer.

The University of Denver study found these attempts to "privatize" public debate typically arise when a party's civically or politically motivated communications to a government official, body, or the electorate threaten the private economic interests of another party, thus provoking a tension between the twin cultural values of democracy and capitalism. While the overwhelming majority of SLAPPs are eventually dismissed in court, the study found that they nevertheless have serious emotional, financial, and political consequences and have a CHILLING EFFECT on targets' and other observers' willingness to participate politically.

Because the American legal tradition encourages public participation as a cornerstone of representative democracy and recognizes, as NEW YORK TIMES V. SULLIVAN (1964) put it "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," SLAPPs have met with strong condemnation. "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined," one judge has inveighed, while another likened these suits to "the *auto da fe*" threatening "the most protected and encouraged form of expression known in this country."

The Supreme Court, state courts, legislatures, attorneys general, and government agencies have taken a dim view of this litigation tactic, favoring early dismissal. The Court's jurisprudence is muddled at the confluence of two different lines of authority, both creating a "qualified immunity" for government petitioning. On the one hand, in defamation-based SLAPPs, such as *McDonald v. Smith* (1985), the Court has applied the *New York Times v. Sullivan* LIBEL doctrine requiring dismissal unless "actual malice" (knowledge of falsity or reckless disregard of the truth) is shown. On the other hand, in SLAPPs alleging ANTITRUST or business torts, such as *City of Columbia v. Omni Outdoor Advertising, Inc.* (1991), it has applied the more protective *Noerr–Pennington* doctrine requiring dismissal unless it is shown that the petitioning was "not genuinely aimed at procuring favorable government action at all," regardless of the defendant's intent or purpose.

More than a dozen states, including New York, California, Massachusetts, Minnesota, and Georgia, have adopted "anti-SLAPP laws," generally based on the qualified immunity approach of one or the other of the two Supreme Court lines of authority. In the absence of LEGISLATION, a few state courts have gone further and applied state law "absolute immunity" doctrines to protect SLAPP defendants, but the weight of court opinions favors the qualified immunity approaches.

In a number of cases, countersuits have been filed against SLAPP filers and their attorneys, once the SLAPP is dismissed. Typically based on malicious prosecution, abuse of process, and civil rights claims, these "SLAPP-backs," as they have come to be called, have resulted in jury awards in the multimillions of dollars.

GEORGE W. PRING
PENELOPE CANAN
(2000)

(SEE ALSO: *Freedom of Petition.*)

Bibliography

PRING, GEORGE W. and CANAN, PENELOPE 1996 *SLAPPs: Getting Sued for Speaking Out.* Philadelphia: Temple University Press.

## *STRAUDER v. WEST VIRGINIA*
100 U.S. 303 (1880)

## *VIRGINIA v. RIVES*
100 U.S. 313 (1880)

## *EX PARTE VIRGINIA*
100 U.S. 339 (1880)

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On a day in 1880 the Supreme Court handed down three opinions that fixed the constitutional law of JURY DISCRIMINATION for over half a century. The effect of the three, taken collectively, barred overt state denial of the rights of blacks to serve on juries and effectively barred blacks from jury service in the South. Anything so crude as an announced and deliberate effort to exclude persons on ground of race was unconstitutional; but if official policy did not refer to race and yet blacks were systematically excluded by covert practices, the Constitution's integrity remained unimpaired. No estimate can be made of the miscarriages of justice that occurred in the South and border states where only whites sat in judgment in civil cases

involving the property of blacks or in criminal cases involving their life and liberty over a period of at least fifty-five years.

*Strauder* was a case in which official state policy was overtly discriminatory on racial grounds. West Virginia by statute declared that only whites might serve on juries. Justice WILLIAM STRONG, for the Court, holding the act to be a violation of the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT, declared that denying citizens the right to participate in the administration of justice solely for racial reasons "is practically a brand upon them, affixed by law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." The Court also sustained the constitutionality of a section of the CIVIL RIGHTS ACT OF 1866 by which Congress authorized the removal of a case from a state court to a federal court in order to prevent the denial of CIVIL RIGHTS by the state court. Justice STEPHEN J. FIELD and NATHAN CLIFFORD dissented without opinion.

In *Ex Parte Virginia and J. D. Coles*, the Court sustained the constitutionality of an act of Congress which provided that no qualified person should be disqualified because of race for service as a grand or petit juror in any court, state or federal. Coles, a county court judge of Virginia charged with selecting jurors, excluded from jury lists all black persons. He was indicted by the United States and was liable to be fined $5,000. On petition for a writ of HABEAS CORPUS, he alleged that the federal court had no JURISDICTION over him and that the act of Congress was unconstitutional. Strong declared that under the Fourteenth Amendment, Congress could reach any act of a state that violated the right of black citizens to serve on juries or their right to be tried by juries impartially selected without regard to race. The act of Judge Coles was the act of the state of Virginia, for a state acts through its officers and agents, none of whom may deny the equal protection of the laws. By so ruling, the Court prepared the ground for the doctrine of STATE ACTION. Field and Clifford, again dissenting, thought the act of Congress regulated purely local matters and destroyed state autonomy.

The effects of *Strauder* and *Ex Parte Virginia* were vitiated by the *Rives* decision. Two black men, indicted for the murder of a white man, sought to have their cases removed from a state court to a federal court on the ground that the GRAND JURY that indicted them and the PETIT JURY summoned to try them were composed entirely of whites. The prisoners claimed that the jury lists should include one third blacks, in proportion to the population, and, most important, that no blacks had ever been allowed to serve on juries in the county where they were to be tried. In this case the record did not show, as it did in the other two, overt and direct exclusion of blacks. Strong, for the Court, this time supported by Field and Clifford concurring separately, simply stated, without further ado, that the "assertions" that no blacks ever served on juries in the county "fall short" of showing the denial of a civil right or the existence of racial discrimination. The defendants might still be tried impartially. Similarly, they had no right to a jury composed in part of members of their race. A mixed jury, said the Court, is not essential to the equal protection of the laws. There was no "unfriendly legislation" in this case. In effect the Court placed upon black prisoners the burden of proving deliberate and systematic exclusion on ground of race. As a result, blacks quickly disappeared from jury service in the South.

LEONARD W. LEVY
(1986)

(SEE ALSO: *Neal v. Delaware; Norris v. Alabama.*)

Bibliography

SCHMIDT, BENNO C. 1983 Juries, Jurisdiction, and Race Discrimination: The Lost Promise of *Strauder v. West Virginia*. *Texas Law Review* 61:1401–1499.

## STREAM OF COMMERCE DOCTRINE

The Supreme Court introduced the "stream" or "current" metaphor in SWIFT & CO. V. UNITED STATES (1905) to represent the movement of goods in INTERSTATE COMMERCE. The DOCTRINE is significant because it marks the Court's first recognition that commercial markets ignored state lines; the Justices departed from decades of CONSTITUTIONAL INTERPRETATION in which economic reality had yielded to formal legal discrimination. The doctrine itself may be stated as follows: what appears, when out of context, to be INTRASTATE COMMERCE comes within the reach of the interstate commerce power if that commerce is but an incident related to an interstate continuum. Thus Congress can regulate the local aspects of commerce that are inseparably related to the current of interstate commerce, even though the flow has been temporarily interrupted by a kind of whirlpool or eddy while the product goes through some stage in the transformation of the raw material into the finished goods before being shipped again in the interstate stream to reach its final destination.

In *Swift* the government charged the nation's largest meat packers with conspiring to monopolize interstate commerce in violation of the SHERMAN ANTITRUST ACT. The packers asserted that their activities took place at the stockyards—solely within the boundaries of a single state—and thus involved only local or intrastate com-

merce. Justice OLIVER WENDELL HOLMES, for a unanimous Court, rejected the packers' contentions.

> [C]ommerce among the states is not a technical legal conception, but a practical one drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of cattle is a part and incident of such commerce.

The opinion struck hard at the rigid separation between PRODUCTION and commerce approved in UNITED STATES V. E. C. KNIGHT & CO. (1895). In recognizing that the United States no longer comprised a group of small, discrete markets, the Court began to confront the legal implications of the transportation and communications revolutions.

Although Holmes did not create the pithy metaphor, it stuck. In STAFFORD V. WALLACE (1922) Chief Justice WILLIAM HOWARD TAFT declared that the stockyards were "a throat through which the current flows, and the transactions which occur therein are only incident to this current." The doctrine marked the "inevitable recognition of the great central fact" that such streams of commerce are interstate "in their very essence."

By the 1930s, as the circumstances that had given rise to the doctrine disappeared, the doctrine's pragmatism became increasingly well-accepted. Though the stream of commerce terminology made frequent appearances, the Court began to ignore the doctrine itself. In SCHECHTER POULTRY CORP. V. UNITED STATES (1935) and CARTER V. CARTER COAL CO. (1936) the Court refused to apply it. When a 5–4 Court sustained government regulation of interstate commerce in NLRB V. JONES & LAUGHLIN STEEL CORP. (1937), the Justices still chose not to base their opinion merely on the stream of commerce doctrine. Drawing upon both *Stafford* and HOUSTON, EAST & WEST TEXAS RAILWAY CO. V. UNITED STATES (1914), Chief Justice CHARLES EVANS HUGHES declared that only those intrastate activities that had "such a close and substantial relation" to interstate commerce would be subject to congressional control.

The Supreme Court continued to use Holmes's language into the 1940s, but the doctrine almost disappeared. Indeed, although the phrase "stream of commerce" has enjoyed renewed use in the 1970s and 1980s, the Court almost never invokes the doctrine. Instead, the Justices have echoed Holmes's rejection of technical legal inquiries.

DAVID GORDON
(1986)

Bibliography

GORDON, DAVID 1984 Swift & Company v. United States: The Beef Trust and the Stream of Commerce Doctrine. *American Journal of Legal History* 28:244–279.

## STRICT CONSTRUCTION

This phrase purports to describe a method of CONSTITUTIONAL INTERPRETATION. Those using it, however, often are not referring to the same interpretive method. Classically, a strict construction is one that narrowly construes Congress's power under Article I, section 8. But some use strict construction to mean interpretations that limit the situations to which a constitutional provision applies, without regard to the interpretations' effect on the scope of federal power. Despite the existence of these and other definitions, one theme unites many uses of the phrase. Most users employ strict construction to support political positions by portraying them as the result of what at least sounds like a value-neutral interpretive technique. The phrase's political use now outweighs any technical legal significance it may have.

The term's greatest historical importance stems from its use to describe restrictive interpretations of the federal government's constitutional powers. Modern constitutional interpretations render strict construction of federal power a remnant of the past. In the nation's early years, however, the question of strict versus BROAD CONSTRUCTION of federal power was as critical as any question facing the country. The dispute over whether to establish a BANK OF THE UNITED STATES provided the setting for the first debate over the construction to be afforded Congress's powers. THOMAS JEFFERSON and JAMES MADISON, who both opposed the Bank, "strictly construed" the federal government's powers and concluded that Congress lacked power to create the Bank. ALEXANDER HAMILTON, who favored the Bank, advocated a more flexible view of federal power. In disputes over federal power, the phrase would continue to characterize these early Jeffersonian positions opposed by Federalists.

Chief Justice JOHN MARSHALL's reputation as a nonstrict-constructionist owes much to his opinion for the Court sustaining the validity of the act creating the second Bank of the United States. In MCCULLOCH V. MARYLAND (1819) Marshall endorsed Hamilton's view of Congress's powers in an opinion that included the oft-quoted passage, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." In GIBBONS V. OGDEN (1824), again speaking through Marshall, the Court expressly re-

jected strict construction of federal power as a proper method of interpretation. It found not "[o]ne sentence in the Constitution . . . that prescribes this rule."

Strict construction becomes a much more complex concept when offered, as it has been, as a method of interpreting the entire Constitution. Strict construction then means interpretations that restrict the situations in which constitutional grants of power, or limitations on them, are deemed applicable. A strict construction simply limits the cases in which the Constitution applies. In this sense, a strict construction need not correspond to a constitutional interpretation that limits federal power. This difference results from the variable structure of constitutional provisions.

Some constitutional provisions are phrased positively in the sense that they confer powers upon Congress, the President, or the courts. Other provisions, such as the FIRST AMENDMENT, are phrased negatively. A strict construction—in the sense of limiting the Constitution's applicability—of the positive powers limits federal authority, as Marshall did in MARBURY V. MADISON (1803), when he construed Article III not to authorize the Supreme Court to issue original writs of MANDAMUS. But strict (that is, narrow) construction of a negative provision such as the First Amendment expands governmental authority. Even if strict construction had become the accepted technique for interpreting grants of power to Congress, it is questionable whether, in a government of limited powers, strict construction would be an appropriate technique for interpreting express constitutional limitations on Congress's power.

When used to interpret the entire Constitution, strict construction fails as a guiding principle in the large class of cases in which one constitutional provision can be interpreted narrowly only by broadly interpreting another provision. DRED SCOTT V. SANDFORD (1857) highlights this problem. *Dred Scott*, which restricted Congress's power to regulate slavery in the territories and assured Chief Justice ROGER B. TANEY's reputation as a strict constructionist, is the Court's most famous strict construction of federal power. Yet, while Taney construed strictly Congress's power, he simultaneously construed broadly constitutional limitations on Congress's authority and the constitutional rights of slaveholders.

A similar problem undermines efforts to embrace strict construction as a politically conservative technique for judicial decision making. The conservative Supreme Court of the late nineteenth and early twentieth centuries did limit Congress's powers by, among other things, invalidating federal statutes as exceeding Congress's power under the commerce clause and by finding, in UNITED STATES V. BUTLER (1936), short-lived limitations on Congress's TAXING AND SPENDING POWER. But in relying on the due process clauses to invalidate many federal and state enactments, the same Court offered broad interpretations of those limitations on government power.

The ambiguity attending strict construction has not deterred many from trying to exploit the concept for political advantage. Even in the early disputes between Federalists and Jeffersonians, when strict construction may have had its clearest meaning, there is a hint of hypocrisy in the reliance placed on strict construction. It is unlikely that insufficient strictness is what really troubled early critics of Marshall's and other Federalists' loose constructions. When it suited their goals, Marshall's critics supported loose construction. For example, to justify an administrative and legislative program imposing an embargo on France and England, President Jefferson interpreted broadly presidential and congressional authority to terminate and influence commerce. And Marshall did not always generously interpret the federal government's powers. At AARON BURR's treason trial, Marshall strictly, that is to say, narrowly, construed Article III, section 3, the constitutional provision on treason.

Although many have tried to rely on strict constructionism to political advantage, this trend reached its modern peak under President RICHARD M. NIXON. He referred to strict construction as a characteristic he sought in a Supreme Court appointee. Nixon probably did not primarily mean one who narrowly construed the federal government's powers. He was most dissatisfied with the Supreme Court's CRIMINAL PROCEDURE decisions. In his 1968 campaign, Nixon announced his preference for Supreme Court appointees who would aid the society's peace forces in combating criminals. In this context strict construction was a double negative: limiting the situations in which the Constitution restricted states' criminal procedures. Only coincidentally would such constructions reduce the federal government's role.

Like previous users of the term, Nixon employed strict construction for political advantage, not to facilitate discussion of theories of CONSTITUTIONAL INTERPRETATION. He never articulated his understanding of the phrase, and Justice HARRY BLACKMUN, one of his Supreme Court appointees, disclaimed an understanding of it. Nixon once described Justice FELIX FRANKFURTER as exemplifying what he sought in a Justice, yet Frankfurter delivered nonstrict criminal procedure opinions. In ROCHIN V. CALIFORNIA (1952) he wrote that forcing an emetic into a suspect's stomach to gather recently swallowed evidence shocked the conscience and, therefore, violated the DUE PROCESS CLAUSE of the FOURTEENTH AMENDMENT. And Frankfurter dissented from the Court's decision upholding the admissibility of conversations overheard by means of ELECTRONIC EAVESDROPPING. In addition, in assessing a president's constitutional powers, Nixon was anything but a strict con-

structionist. The impoundment of funds appropriated by Congress, the invasion of Cambodia, the assertion of EXECUTIVE PRIVILEGE, and many of Nixon's domestic security measures all suggest an expansive, nonstrict view of a president's constitutional authority.

Finally, "strict construction" may have other sensible meanings that do not refer to narrow interpretations. Justice HUGO BLACK may have thought himself to be construing the Constitution strictly when he applied it literally, as in First Amendment cases. Another plausible meaning is strict adherence to the letter and spirit of the Constitution. Under this view, everyone can claim to be a strict constructionist, adhering to what he or she ascertains to be the principles embodied in the Constitution. Strict construction also may characterize a passive judiciary. For example, many believe legislative apportionment to be a POLITICAL QUESTION, a matter of concern only for the legislative and executive branches. A judge who invades the area is deemed active and, therefore, not a strict constructionist. Judge LEARNED HAND may have used strict construction in this sense when he stated that the Supreme Court's failure to define political questions is "a stench in the nostrils of strict constructionists."

THEODORE EISENBERG
(1986)

Bibliography

BLACK, CHARLES L., JR. 1960 *The People and the Court.* New York: Macmillan.

KELLY, ALFRED H.; HARBISON, WINFRED A.; and BELZ, HERMAN 1983 *The American Constitution*, 6th ed. New York: Norton.

KOHLMEIER, LOUIS M., JR. 1972 *God Save This Honorable Court.* New York: Scribner's.

MURPHY, WILLIAM P. 1967 *The Triumph of Nationalism.* Chicago: Quadrangle Books.

## STRICT SCRUTINY

In its modern use, "strict scrutiny" denotes JUDICIAL REVIEW that is active and intense. Although the "constitutional revolution" of the late 1930s aimed at replacing JUDICIAL ACTIVISM with a more restrained review using the RATIONAL BASIS formula, even that revolution's strongest partisans recognized that "a more exacting judicial scrutiny" might be appropriate in some cases. Specific prohibitions of the BILL OF RIGHTS, for example, might call for active judicial defense, and legislation might be entitled to a diminished presumption of validity when it interfered with the political process itself or was directed against DISCRETE AND INSULAR MINORITIES. (See UNITED STATES V. CAROLENE PRODUCTS CO.) The term "strict scrutiny" appears to have been used first by Justice WILLIAM O. DOUGLAS in his opinion for the Supreme Court in SKINNER V. OKLAHOMA (1942), in a context suggesting special judicial solicitude both for certain rights that were "basic" and for certain persons who seemed the likely victims of legislative prejudice.

Both these concerns informed the WARREN COURT's expansion of the reach of the EQUAL PROTECTION clause. "Strict scrutiny" was required for legislation that discriminated against the exercise of FUNDAMENTAL INTERESTS or employed SUSPECT CLASSIFICATIONS. In practice, as Gerald Gunther put it, the Court's heightened scrutiny was "'strict' in theory and fatal in fact." The Court took a hard look at both the purposes of the legislature and the means used for achieving them. To pass the test of strict scrutiny, a legislative classification must be "necessary to achieve a COMPELLING STATE INTEREST." Thus the state's objectives must be not merely legitimate but of compelling importance, and the means used must be not merely rationally related to those purposes but necessary to their attainment.

The same demanding standard of review has emerged in other areas of constitutional law. Thus even some "indirect" regulations of the FREEDOM OF SPEECH—that is, regulations that do not purport to regulate message content—must be strictly scrutinized. Similarly, strict scrutiny is appropriate for general legislation whose application is attacked as a violation of the right of free exercise of religion. (See RELIGIOUS LIBERTY.) And in those places where SUBSTANTIVE DUE PROCESS has made a comeback—notably in defense of liberties having to do with marriage and family relations, abortion and contraception, and more generally the FREEDOM OF INTIMATE ASSOCIATION—the same strict judicial scrutiny is the order of the day.

The Court has developed intermediate STANDARDS OF REVIEW falling between the rational basis and strict scrutiny standards. Not every heightening of the intensity of judicial review, in other words, implies strict scrutiny. Most critics of the Supreme Court's modern activism reject not only its employment of the strict scrutiny standard but also its use of any heightened standard of review. For these critics, there is little room in the Constitution for any judicial inquiry into the importance of governmental goals or the utility of governmental means. Some action by the state is forbidden by the Constitution, more or less explicitly. Beyond these prohibitions, say these critics, lie no principled guides to judicial behavior.

Yet strict judicial scrutiny of legislation is almost as old as the Constitution itself. From one season to another, the special objects of the judiciary's protection have varied, but from JOHN MARSHALL's day to our own the courts have always found *some* occasions for "a more exacting judicial

scrutiny" of the political branches' handiwork. It is hard to imagine what our country would be like if they had not done so.

KENNETH L. KARST
(1986)

Bibliography

GUNTHER, GERALD 1972 The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection. *Harvard Law Review* 86:1–48.

## *STROMBERG v. CALIFORNIA*
283 U.S. 359 (1931)

A California law made it a crime to display a red flag or banner "as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character. . . ." A member of the Young Communist League who ran a summer camp where the daily ritual included the raising of "the workers' red flag" was convicted for violating the statute, although a state appellate court noted that the prohibition contained in the first clause—"opposition to organized government"—was so vague as to be constitutionally questionable. That court nonetheless upheld the conviction on the grounds that the defendant had been found guilty of violating the entire statute and that the other two clauses relating to "anarchistic action" and "seditious character" were sufficiently definite.

Chief Justice CHARLES EVANS HUGHES and six other members of the Supreme Court reversed the conviction. In his opinion, Hughes pointed out that, the jury having rendered a general verdict, it was impossible to know under which clause or clauses the defendant had been convicted. If any of the three clauses were invalid, the conviction could not stand. The Court found the first clause "so vague and indefinite" that it violated the DUE PROCESS clause of the FOURTEENTH AMENDMENT because it prohibited not only violent, illegal opposition to organized government but also "peaceful and orderly opposition to government by legal means. . . ." Justices JAMES C. MCREYNOLDS and PIERCE BUTLER dissented.

MICHAEL E. PARRISH
(1986)

## STRONG, WILLIAM
(1808–1895)

Strong was a learned, able, hard-working Supreme Court Justice who competently handled the tedious routine of COMMON LAW, admiralty, PATENT, and revenue law cases. Except for sustaining legal tenders and invalidating state-authorized exclusion of blacks from jury service, he rarely spoke for the Court in constitutional matters during his ten-year career. Strong's appointment in 1870 was viewed as part of an alleged court-packing scheme to reverse a recent decision invalidating legal tender legislation. But President ULYSSES S. GRANT had decided to nominate Strong and JOSEPH P. BRADLEY in January 1870, a month before an eight-man court, including a Justice who already had resigned, narrowly decided *Hepburn v. Griswold*. Grant, meanwhile, was well aware that Strong had written an opinion for the Pennsylvania Supreme Court sustaining the laws.

Strong did not disappoint Grant. In May 1871, he wrote the majority opinion in *Knox v. Lee* and *Parker v. Davis*, reversing *Hepburn*. He largely based his argument on the NECESSARY AND PROPER clause, finding the legal tender legislation a necessary concomitant to the WAR POWER. He also refuted the *Hepburn* argument that the laws violated the "spirit of the Constitution" because they impaired the OBLIGATION OF CONTRACTS. All contracts, Strong contended, had to anticipate the rightful exercise of congressional power.

Strong generally defended vested contractual and property rights, the LEGAL TENDER CASES notwithstanding. He joined Justice STEPHEN J. FIELD's dissent in *Munn v. Illinois* (1877). In his own dissent in the SINKING FUND CASES (1879), he maintained that the government could not require railroads to divert part of their earnings into a special fund for payment of their federal debts. The original railroad grant contained no such provision, but Congress had reserved the right to alter, amend, or repeal the act. Strong nevertheless insisted that the new requirement was "plainly transgressive of legislative power" for it violated an implied contractual promise not to call for debt payment before 1897. Strong's dissent, along with those by JOSEPH BRADLEY and Field, heralded the procorporation, antistatist tendencies that dominated the Court for several decades.

The Court's concern with state economic regulation inevitably provoked operations of national authority. In the *State Freight Tax Case* (1873) (see PHILADELPHIA AND READING R.R. CO. V. PENNSYLVANIA) Strong offered a significant commentary on the scope of the COMMERCE CLAUSE when it conflicted with traditional state power. Pennsylvania had imposed a tonnage tax on railroad freight carried within and out of the state, but Strong held that the transportation of goods was a "constituent of commerce" and the tax's "effect" unduly burdened INTERSTATE COMMERCE. In a comparison case, Strong held valid a tax on corporate gross receipts irrespective of whether they came from in-

terstate or intrastate businesses (*State Tax on Railway Gross Receipts*, 1873). In effect, the commerce clause was not a shield for private enterprise against STATE TAXATION.

Strong's record on CIVIL RIGHTS was mixed. He joined the Court's majority in the SLAUGHTERHOUSE CASES (1873) to restrict the scope of the FOURTEENTH AMENDMENT. Similarly, he voted to limit federal guarantees for voting and civil rights. In BLYEW V. UNITED STATES (1872), he wrote the Court's first opinion restricting the CIVIL RIGHTS ACT OF 1866. The act authorized federal trials for crimes "affecting persons" denied rights secured by law. Strong held, however, that federal courts lacked JURISDICTION over a defendant accused of murdering three blacks on the ground that the dead persons could not be affected by any prosecution. Although Strong favored upholding a state statute requiring equal access in public transportation, he silently acquiesced when the Court held that the law unduly burdened interstate commerce (HALL V. DECUIR, 1878). But he spoke for the Court in a series of cases that marked some exceptional, however limited, victories for blacks.

In STRAUDER V. WEST VIRGINIA (1880) the Court invalidated a state statute excluding blacks from juries. Strong conceded that blacks were not entitled to have other blacks sit on their juries, but he held that they had a right to have juries selected impartially. The protection of one's life and liberty against racial prejudice was, Strong contended, a "legal right" under the Fourteenth Amendment and therefore the state's exclusion law constituted a denial of EQUAL PROTECTION OF THE LAWS. In a companion case, *Ex parte Virginia* (1880), Strong upheld a section of the 1875 CIVIL RIGHTS ACT which prohibited RACIAL DISCRIMINATION in jury selection. Although state law forbade such discrimination, a state judge had refused to call blacks as jurors. Strong brushed aside arguments that the judge's refusal was not the same as STATE ACTION, which Congress concededly could prohibit. The judge, he insisted, held state office and acted for the state; as such he was obligated to obey the federal constitution and law. But in a third case decided that day, *Virginia v. Rives* (1880), Strong denied a plea for removal of a cause to a federal court on the ground of JURY DISCRIMINATION. Here blacks had been excluded as a result of discretionary action by jury commissioners, not as a result of state law as in *Strauder.* The decision in effect condoned the practical exclusion of blacks from southern juries for the next seventy-five years. Nevertheless, Strong's opinion in *Ex Parte Virginia* preserved a vestige of federal power that was revived in the CIVIL RIGHTS ACT OF 1957, the first such legislation since Reconstruction.

Strong did not have the domineering intellectual force of a Bradley, Field, or Miller, but he performed capably during his career. He was admired and respected by his diverse colleagues, and he managed to avoid the intense personal and ideological conflicts that characterized the period. He abruptly resigned in 1880. Strong was in good health, but he supposedly stepped down as an example to NATHAN CLIFFORD, WARD HUNT, and NOAH SWAYNE who were ill and frequently absent from the bench. Within two years, the three resigned. In retirement, Strong publicized the Court's burdensome workload, and his efforts contributed to the creation of new courts of appeal in 1891. (See CIRCUIT COURTS OF APPEALS ACT.)

STANLEY I. KUTLER
(1986)

Bibliography

KUTLER, STANLEY I. 1969 William Strong. In Friedman, Leon, and Israel, Fred L., eds., *The Justices of the United States Supreme Court, 1789–1969: Their Lives and Major Opinions,* pages 1153–1178. New York: Chelsea House.

## *STUART v. LAIRD*
1 Cranch 299 (1803)

The JUDICIARY ACT OF 1802, having repealed the JUDICIARY ACT OF 1801 before it could go into operation, abolished the new CIRCUIT COURTS and returned the Justices of the Supreme Court to circuit duty under the JUDICIARY ACT OF 1789. The *Stuart* case raised the constitutionality of the repeal act of 1802. Although Chief Justice JOHN MARSHALL despised the repeal act and believed it to be unconstitutional, on circuit duty he sidestepped the constitutional issue. When the case came before the Court on a WRIT OF ERROR, Justice WILLIAM PATERSON for the Court, with Marshall abstaining, ruled that the practice of riding circuit had begun under the act of 1789 and that long acquiescence "has fixed the construction. It is a contemporary interpretation of the most forcible nature." Thus the Court avoided holding unconstitutional an act of THOMAS JEFFERSON's administration.

LEONARD W. LEVY
(1986)

(SEE ALSO: *Marbury v. Madison.*)

## *STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (SCRAP), UNITED STATES v.*
412 U.S. 669 (1973)

Environmentalists sued to force the Interstate Commerce Commission to suspend a freight rate surcharge an-

nounced by the nation's railroads. Plaintiffs claimed the surcharge would raise the cost of transporting recyclable materials and thus injure their recreational and aesthetic use of areas around Washington, D.C., by increasing pollution from waste disposal and causing greater consumption of natural resources.

In one of its most generous rulings on STANDING, the Court held that environmental advocates could raise a statutory claim that, according to three dissenters, was based on injuries that were too remote, speculative, and insubstantial to confer standing. Justice POTTER J. STEWART followed the implications of SIERRA CLUB V. MORTON (1972): environmental harm, however widespread, satisfies the "injury in fact" requirement of standing, and the case will be heard if those who complain allege harm to themselves. The harm need not be "substantial." Nor did it matter that the line of causation between the challenged government act and the asserted environmental harm was "attenuated." Several subsequent decisions, such as *Warth v. Seldin* (1975) and SIMON V. EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION (1976), differ from *SCRAP*, insisting that the causal link between act and harm be more clearly shown. *SCRAP*'s relaxed view of causal nexus in standing may reflect a special judicial receptivity to environmental litigation.

JONATHAN D. VARAT
(1986)

## *STUMP v. SPARKMAN*
435 U.S. 349 (1978)

This decision confirmed judges' absolute immunity from damage suits for alleged constitutional violations. At the request of a mother who was displeased with her "somewhat retarded" fifteen-year-old daughter's behavior, and in EX PARTE proceeding in which the child was not represented, Judge Stump ordered the child to be sterilized. The girl was told she was having an appendectomy, and she discovered some years later she had been sterilized. In an action brought by the sterilization victim and her husband, the Supreme Court held, 5–3, that the judge was immune from liability. Because signing the sterilization order was a judicial act, and because there was no express statement in state law that judges lacked JURISDICTION to entertain sterilization requests, the judge's behavior was covered by the doctrine of JUDICIAL IMMUNITY. In the name of judicial independence, the majority immunized conduct that the three dissenters aptly called "lawless," "beyond the pale of anything that could sensibly be called a judicial act."

THEODORE EISENBERG
(1986)

## *STURGES v. CROWNINSHIELD*
4 Wheaton 122 (1819)

This was the first of the very rare CONTRACT CLAUSE cases decided by the Supreme Court involving private executory contracts. The case arose during a depression, when many states had enacted bankruptcy or insolvency statutes. Chief Justice JOHN MARSHALL, for a unanimous Court, agreed that the states possessed a concurrent power to enact such statutes in the absence of the exercise by Congress of its power to establish uniform bankruptcy laws but held that New York's act violated the contract clause. Crowninshield had declared his bankruptcy under that state's act to protect himself from paying a debt contracted before its passing. The doctrine of the case is that a state act cannot operate retroactively on previously existing contracts; a statute that relieves the debtor from imprisonment is valid but not one that cancels the obligation of his contract. The case left uncertain the constitutionality of bankruptcy acts that operate prospectively on contracts formed after their enactment. (See OGDEN V. SAUNDERS.)

LEONARD W. LEVY
(1986)

# SUBJECTS OF COMMERCE

A chief purpose of the COMMERCE CLAUSE of the federal Constitution is to assure the free movement of the subjects of commerce among the several states. What are these subjects? Essentially, the term refers to things sold or transported in INTERSTATE COMMERCE. But they need not be articles of trade or even of value. Nor are they confined to objects as such. They may include PERSONS. All are included as subjects or articles of commerce when they begin to move from one state to another. They remain articles of commerce until they fall into the possession of the ultimate buyer or reach their final stage of repose within a given state. Thus, at any point between the beginning and the end of their journey among the states, they are legitimate candidates for congressional regulation. With respect to these subjects, as with interstate commerce generally, Congress may, in the words of GIBBONS V. OGDEN (1824), "prescribe the rule by which commerce is to be governed."

Congress ordinarily exerts its power over the subjects of commerce in order to protect their free movement across state borders. But this power has also been construed to permit Congress to divest some subjects of their interstate character. Divestment occurs when Congress prohibits the interstate transportation of certain goods or persons. Examples of such subjects are stolen automo-

biles, intoxicating beverages, forged checks, convict-made goods, explosives, prostitutes, firearms, lottery tickets, and kidnaped children. Federal laws prohibiting commerce in such subjects are usually designed to assist the states in fighting crime or protecting their citizens against social, moral, or economic harm. (See NATIONAL POLICE POWER.) But Congress has also banned the interstate shipment of ordinary objects of trade, like lumber, in opposition to state policy. Any such federal law must of course bear a reasonable relationship to interstate commerce. Thus, according to UNITED STATES V. DARBY (1941), Congress may validly bar the interstate shipment of goods produced in violation of a federal MAXIMUM HOUR AND MINIMUM WAGE law so that "interstate commerce [does not become] the instrument of competition in the distribution of goods produced under substandard labor conditions."

The commerce clause, however, is not merely an authorization to Congress to enact laws for the protection of the subjects of commerce. It serves also by its own force to prevent the states from erecting trade barriers or passing any legislation that would obstruct the movement of goods from state to state. As a practical matter the states, not Congress, regulate most subjects (and aspects) of commerce. They may do so out of a legitimate concern for the health, welfare, and safety of their own citizens. Yet, the exercise of this valid STATE POLICE POWER is often in tension with the value of free and open borders that informs the commerce clause. (See STATE REGULATION OF COMMERCE; STATE TAXATION OF COMMERCE.)

A central development in modern commerce clause jurisprudence is the Supreme Court's identification as legitimate articles of commerce many subjects historically regarded as the exclusive preserve of the states. Such subjects include insurance contracts, natural resources, fish and wild game, and even valueless material such as solid and liquid wastes. Prevailing DOCTRINE holds that the shipment in and out of the states of these subjects of commerce is protected by the commerce clause unless Congress ordains otherwise. Most recently, in *Sporkase v. Nebraska* (1982), the Supreme Court added ground water to its list of legitimate subjects of commerce. As the Court noted in PHILADELPHIA V. NEW JERSEY (1978), no object of interstate trade is excluded by definition from this list.

Still the tension between state power and the commerce clause remains. In the watershed case of COOLEY V. BOARD OF WARDENS (1851) the Court tried to resolve this tension by declaring that states may not regulate a subject of commerce the *nature* of which requires a single (national) uniform plan of regulation, even in the absence of any federal law. The *Cooley* rule has not yielded a long list of particular subjects requiring exclusive national regulation. It has been applied mainly to identify subjects whose number and diversity might require, when regulated, local knowledge and experience. State or local regulation of such subjects, whether justified to facilitate trade or to protect the public, is valid unless it conflicts with a law of Congress. *Cooley* itself upheld state regulation of harbor traffic, over commerce clause objections, because of the local peculiarities of port facilities.

Today, however, the Court rarely finds the *Cooley* rule applicable. The modern approach to commerce clause analysis applies a "balancing" test that weighs the interest served by a local regulation of a subject of commerce against the regulation's burden upon interstate commerce. If the burden substantially outweighs the local benefit, even if the legislation is nondiscriminatory, the regulation is unlikely to survive constitutional analysis. (If the *Cooley* rule forbids state regulation there is of course no balancing.) Generally, an article of commerce, although it may be taxed or regulated by the state, may not be so burdened as to prevent or seriously to obstruct its transportation in interstate commerce.

Yet the states do bar some "subjects of commerce" from entering their borders. Local inspection laws, for example, may exclude goods such as diseased cattle, adulterated food, and infectious plants. Such articles do not fall within the Court's classification of *legitimate* subjects of commerce. Correspondingly, the states may validly prevent some goods from leaving their borders. Certain natural resources, like rare birds and fish, may be withheld from commercial exploitation altogether. Such resources assume the character of subjects of commerce, however, when they are permitted legally to be sold or are reduced to personal possession. At that point, even though the private acquisition of such resources may be regulated by law in the interest of their preservation, the states are generally forbidden to restrict their use or sale to their own citizens.

DONALD P. KOMMERS
(1986)

Bibliography

BENSON, PAUL R., JR. 1970 *The Supreme Court and the Commerce Clause, 1937–1970.* Cambridge, Mass.: Dunnellen.

CORWIN, EDWARD S. 1936 *The Commerce Power Versus States Rights.* Princeton, N.J.: Princeton University Press.

SCHWARTZ, BERNARD 1979 Commerce, the States, and the Burger Court. *Northwestern University Law Review* 74:409–439.

## SUBPOENA

A subpoena is a court order that compels a person to appear for the purpose of giving testimony at a trial or a pretrial proceeding, such as a preliminary examination or

pretrial deposition. A court also can issue a subpoena for documents or other items of tangible EVIDENCE. Parties to civil suits, and the prosecution in criminal cases, had a COMMON LAW right to compel testimony before the creation of the Constitution. The Sixth Amendment provides defendants in criminal cases a basis for fairly presenting their defense by giving them the power to subpoena witnesses. The government in some circumstances may have an affirmative duty to help a defendant find a witness, such as a government informer, or to refrain from restricting the defendant's ability to locate a witness essential to the presentation of a defense.

The Sixth Amendment, in part, provides that accused persons have the right of witnesses and the right "to have compulsory process" for obtaining witnesses in their behalf. The confrontation and compulsory process clauses permit the defendant to use the power of the courts to obtain witnesses and they limit governmental interference with the defendant's ability to examine witnesses at trial. These clauses have been incorporated into the FOURTEENTH AMENDMENT by the Supreme Court; thus they govern both federal and state prosecutions.

A defendant may compel a person to testify in a court proceeding by applying to the court for a subpoena ordering the person to appear in court or at a pretrial hearing. However, the defendant's ability to use the court's subpoena power is not unlimited. A court can require a defendant to provide it with information that justifies the production of the witness.

When a defendant has a court issue a subpoena to a witness, the witness normally is entitled to a statutory fee to offset his expenses for attendance at the judicial proceeding. An INDIGENT defendant may use the court's subpoena power to compel witnesses to testify in his behalf even though he cannot pay the witness fee. In these circumstances, however, a court may require the indigent defendant to show that the persons whom he subpoenas are likely to give testimony relevant to the charge.

An indigent defendant may try to use the subpoena power to compel an expert (such as a psychiatrist or a ballistics expert) to attend court to testify on the defendant's behalf. Whether the government must pay the cost for providing the defendant with an expert witness is primarily a DUE PROCESS, rather than a subpoena power, issue. However the issue be phrased, courts must determine whether, under the circumstances of the case, a fair trial depends on government provision of the expert witness.

The Sixth Amendment's confrontation clause, together with the compulsory process clause, restricts the government's ability to limit the testimony of potential defense witnesses and the cross-examination of prosecution witnesses. If a person who has received a subpoena to give testimony believes that his testimony would not be relevant to the trial, or that his testimony is subject to an EVIDENTIARY PRIVILEGE, he may move to quash the subpoena. A witness may assert a constitutionally based privilege, such as the RIGHT AGAINST SELF-INCRIMINATION, or a common law or statutory privilege, such as a doctor-patient privilege. One who has no such privilege may not refuse to respond to the subpoena or refuse to give testimony.

JOHN E. NOWAK
(1986)

Bibliography

LAFAVE, WAYNE R. and ISRAEL, JEROLD H. 1984 *Criminal Procedure.* Section 23.3. St. Paul, Minn.: West Publishing.

WRIGHT, CHARLES ALAN and GRAHAM, K. 1980 *Federal Practice and Procedure: Evidence.* Section 5436. St. Paul, Minn.: West Publishing.

## SUBSIDIES TO BUSINESS

See: State Tax Incentives and Subsidies to Business

## SUBSIDIZED SPEECH

Americans customarily view FREEDOM OF SPEECH as a matter of personal right. A FIRST AMENDMENT thus conceived serves both the individual and the community—at least in the context of traditional command and control regulation. In this context, a person may wish to speak but the government commands him not to do so, on pain of punishment if that order is ignored. The person's right to speak, though, countermands the order. With this countermand, the individual gains as his or her will to speak is secured. As for the community, it gains as it receives the speech.

But consider personal rights in a context apart from that of traditional command and control regulation. This other context is that of our large public sector, wherein government-controlled wealth amounts to about one-third of the national economy. In this context, the government, instead of ordering a person not to speak, may "buy him off" by offering him some benefit for not speaking. Should a person accept the payment, and not speak, his "right" to speak will not have been taken, the reason being that personal rights are as a rule alienable. A person may transfer or forgo a personal right as he or she wishes, the object being, as Thomas Hobbes said, "some good to himself." To view a right as other than alienable would, as many have noted, be contrary to the principles of free choice and autonomy that underlie individual rights.

No personal right may be taken, but the community's interest is; as the speaker is bought off, the community is denied the speech. For instance, in RUST V. SULLIVAN (1991), federal funds were provided to family planning

and maternal health clinics, but only on the condition that these clinics and their doctors not provide counseling to their clients about ABORTION. To a claim that these conditions violated the free speech rights of the clinics and their private sponsors, the Court responded that the clinics were not forced to forgo abortion counseling; rather, they might refuse the federal aid and speak as they wished. No free speech rights were taken by the government "offering that choice." Still in all, speech for a particular community, that of the clientele of the family clinics, had surely diminished.

The predicament, then, is that subsidized speech breaks the tie between the rights of the speaker and the interests of the community. This disconnect is one of the greater problems of modern First Amendment jurisprudence, for which problem there is, unfortunately, presently no reliable solution. There are, however, various approaches that may be discerned in the case law. One such approach has been a formal observation of the relation of rights, wherein the courts characterize government attempts to buy up speech not as an inducement (which would leave choice and free will intact) but as an order (coercion) that binds the speaker and thus amounts to a taking of personal speech. In SPEISER V. RANDALL (1958), the Supreme Court reviewed a state law under which veterans might claim a tax exemption, but only on the condition that they forswear certain types of political association. The Court overturned that arrangement by characterizing the inducement respecting speech as a coercive taking of speech rather than as a matter of incentive and choice. As explained in the MAJORITY OPINION, "the denial of tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech." But at other times, as in *Grove City College v. Bell* (1984), the courts have instead characterized a benefit conditioned on forgoing speech as offering the speaker a choice that in no sense violates the right to speak. This rights-oriented approach to subsidized speech has not yielded consistent results for it has required the courts to engage in psychological speculation as to when inducement shades over into coercion. Indeed, as noted by Justice ANTONIN SCALIA, the decisions seem more the result of "idiosyncratic discretion."

Another, more promising approach, is that of rereading the First Amendment so that it does not establish free speech as solely a matter of personal right. Instead, the amendment impersonally provides that "Congress shall make no law . . . abridging the freedom of speech." In light of this text, we may plausibly view the First Amendment as establishing free speech as a common good, as a state of lively and unfettered discourse among the people that advances knowledge, politics, and culture to the benefit of all. The First Amendment simply precludes the government from "abridging" this good, whether by command or by purchase. The Supreme Court has approached this position in a number of cases by assessing whether a government benefit conditioned on speech might diminish speech as a common good. For instance, in ROSENBERGER V. RECTORS AND VISITORS OF THE UNIVERSITY OF VIRGINIA (1995), the Court held that an award of public funds could not be conditioned on the recipients' refraining from religiously oriented speech, because that condition "risks the suppression of free speech and inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses." When Congress conditioned subsidies to public broadcasters on the stations' agreement to refrain from editorials, the Court, in *Federal Communications Commission v. League of Women Voters* (1984), overturned that arrangement on the grounds that "debate on public issues should be uninhibited, robust, and wide-open."

A third approach has to do not with speech per se, but with FREEDOM OF THE PRESS. The First Amendment provides that Congress shall not abridge "the freedom of speech, or of the press." This specific reference to the press may plausibly be taken as marking the press as a constitutionally protected business, independent and free of the government by virtue of being a for-profit enterprise. Consistent with this view, several decisions of the Supreme Court (mostly involving the print media) have struck down government subsidies (often in the form of special tax exemptions or other tax breaks); such subsidies would have diminished the independence of the press by making it beholden to the government. In these opinions, there is no talk of speech as a personal right that might appropriately be bought by the government. Instead, the focus is elsewhere, to how a subsidy might amount to a governmental derangement of the free-market basis of a free press.

WILLIAM T. MAYTON
(2000)

Bibliography

KREIMER, SETH F. 1984 Allocational Sanctions: The Problem of Negative Rights in a Positive State. *University of Pennsylvania Law Review* 132:1293–1397.

MAYTON, WILLIAM T. 1994 "Buying-Up Speech": Active Government and the Terms of the First and Fourteenth Amendments. *William & Mary Bill of Rights Journal* 3:373–418.

POST, ROBERT C. 1996 Subsidized Speech. *Yale Law Journal* 106:151–195.

VAN ALSTYNE, WILLIAM W. 1968 The Demise of the Right-Privilege Doctrine in Constitutional Law. *Harvard Law Review* 81:1439–1464.

## SUBSTANTIVE DUE PROCESS

To say that governmental action violates "substantive due process" is to say that the action, while adhering to the forms of law, unjustifiably abridges the Constitution's fundamental constraints upon the content of what government may do to people in the name of "law." As the Supreme Court put the matter most succinctly in HURTADO V. CALIFORNIA (1884), "Law is something more than mere will exerted as an act of power. . . . [It] exclud[es], as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation . . . and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude."

Substantive due process thus restricts government power, requiring coercive actions of the state to have public as opposed to merely private ends, defining certain means that government may not employ absent the most compelling necessity, and identifying certain aspects of behavior which it may not regulate without a clear showing that no less intrusive means could achieve government's legitimate public aims.

The phrase DUE PROCESS OF LAW derives from King John's promise in MAGNA CARTA to abide "by the law of the land," as translated four centuries later by Sir EDWARD COKE. But the belief that even the sovereign must follow a HIGHER LAW can be traced further back still. Even before the Middle Ages, kings symbolically acknowledged their limitations when they accepted their crowns; royal coronations were religious rites in which the rulers supposedly received power directly from God. The medieval notion of a divine law that even the sovereign might not transgress lay at the heart of English COMMON LAW and of the barons' demands at Runnymede. By the eighteenth century, the idea was phrased in terms of a natural law philosophy of SOCIAL COMPACT between sovereign and citizen. Although individuals were thought to surrender certain freedoms to the state, other rights were considered so much a part of personhood that they lay outside the scope of the social compact. Indeed, protection of such rights had to be the aim of any valid government; a state would abrogate its essential function were it to deny its citizens these fundamental freedoms.

The most famous articulation of that social compact philosophy in American history is the statement in the DECLARATION OF INDEPENDENCE that "all men . . . are endowed by their Creator with certain unalienable Rights . . . among these are Life, Liberty and the Pursuit of Happiness . . . to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed." Although the Declaration of Independence does not, of course, use the words "due process," the notion that substantive limits may be implied from the character of our society and from our reasons for ceding coercive authority to the state underlies both that document and the system of law and politics structured by our Constitution. The Fifth and FOURTEENTH AMENDMENTS to the Constitution provide, respectively, that neither the federal government nor the states may deprive persons "of life, liberty, or property, without due process of law." The Supreme Court has long recognized that STATE ACTION that follows fair procedures and thus satisfies PROCEDURAL DUE PROCESS may nonetheless violate substantive due process by exceeding the limits of the proper sphere of government. In the name of substantive due process, the Supreme Court has accordingly struck down hundreds of statutes governing matters ranging from wages and hours to sexual conduct.

Some commentators have called "substantive due process" a contradiction in terms. But a dismissal on semantic grounds of the very notion of substantive due process is unwarranted. First, the very idea of "process" has often been taken to include concerns as to the nature of the body taking an action, and legislatures have at times been understood as structurally improper sources of particular kinds of public actions. Second, the Constitution guarantees "due process *of law*," and, as the passage quoted above from *Hurtado* suggests, the term "law" can itself be taken to imply various normative requirements. Third, even the purest "procedural" norms inevitably embody substantive choices. Finally, the choice of the constitutional phrase on which substantive review has been pinned is to a large degree accidental; the Fourteenth Amendment's "privileges or immunities" clause might have been a happier selection—but the real question is whether and how individual rights not explicitly guaranteed by the Constitution should be protected under that document taken as a whole, not whether courts have picked a felicitous phrase to describe that protective task.

The Constitution, however, does not specify the essential rights of personhood; the BILL OF RIGHTS lists only certain rights that particularly warranted articulation in 1791, and the NINTH AMENDMENT makes clear that the list is not to be taken as exhaustive. It is on a largely open landscape that courts, including the Supreme Court, have had to mark out our fundamental freedoms. The process has necessarily been one of continual redefinition, responding to the changing—one hopes evolving—values and concerns of the Justices and the nation. Due process, as FELIX FRANKFURTER noted, has a "blessed versatility."

Not until the adoption of the Fourteenth Amendment in 1868 did the Constitution explicitly require state deprivations of liberty or property to comply with "due pro-

cess of law"; BARRON V. BALTIMORE (1833) had interpreted the parallel Fifth Amendment bar to limit only the federal government. Well before 1868, however, both the Supreme Court and various state courts had begun to articulate inherent, judicially enforceable bounds on governmental interference with individual autonomy. Insofar as these limits were announced and enforced by federal judges, such holdings occurred in cases not involving specific provisions of the United States Constitution but falling within the DIVERSITY JURISDICTION of federal courts because the opposing parties were citizens of different states. The liberties the courts protected were almost exclusively economic: the ability to contract as one wished and to do as one pleased with one's own property.

Thus, as early as 1798, Justice SAMUEL CHASE wrote in CALDER V. BULL that any law that "takes property from A. and gives it to B." is invalid as contrary to "general principles of law and reason," even if it is not "expressly restrained" by the Constitution. Justice Chase reasoned that such a law would usurp judicial authority if intended to correct an injustice A had done to B, and, if intended simply to improve matters, would not be "law" at all but would instead transgress limitations implied by the very notion of representative government: "the nature, and ends of legislative power will limit the exercise of it."

From time to time throughout the nineteenth century, the Supreme Court struck down state statutes it judged to exceed these inherent limits on legislative power. Typically, however, the Court left unclear whether the limits derived from the purpose and character of legislatures, as Justice Chase had argued; or from an ahistorical body of natural law; or from specific, if unnamed, provisions of the Constitution. In FLETCHER V. PECK (1810), for example, the Supreme Court invalidated a Georgia statute that attempted to revoke state land grants. Writing for the Court, Chief Justice JOHN MARSHALL explained only that the statute was rendered invalid "either by general principles which are common to our free institutions, or by the particular provisions of the Constitution." Similarly, when the Supreme Court in TERRETT V. TAYLOR (1815) struck down Virginia's attempt to divest the Episcopal Church of its property, it rested its holding on "principles of natural justice" and "fundamental laws of every free government," as well as on the "spirit and letter" of the Constitution.

Within a decade or so after the Civil War, however, the Supreme Court more clearly embraced a theory of implied limitations. When, in LOAN ASSOCIATION V. TOPEKA (1875), the Court invalidated a tax designed to finance a bonus for local industry, it did not mention the Constitution at all; exercising the common law power of a federal court sitting in a diversity case, the Court simply found the tax "purely in aid of private or personal objects" and hence "beyond the legislative power and . . . an unauthorized invasion of private right." Echoing *Calder v. Bull*, the *Loan Association* Court declared that there are "rights in every free government beyond the control of the state" and that limitations on sovereign power "grow out of the essential nature of free governments."

Ironically, it was a notion of intrinsic limits on proper government action, including judicial action—a notion similar to that underlying the Court's invalidation of state and local laws in *Fletcher v. Peck*, *Terrett v. Taylor*, and *Loan Association v. Topeka*—that initially constrained substantive review of state legislation under the Fourteenth Amendment. By prohibiting state laws that "abridge the PRIVILEGES OR IMMUNITIES of citizens of the United States," the amendment's framers may have intended to provide federal protection against state encroachment of fundamental rights, but the Supreme Court in the SLAUGHTERHOUSE CASES (1873) construed the clause narrowly to safeguard only rights peculiarly associated with national CITIZENSHIP, such as the right to vote in national elections. In the Court's view, the clause did not protect the essential freedoms traditionally protected by the states themselves in intrastate disputes and protected by federal courts under Article IV, section 2, only from state laws unjustly discriminating against out-of-staters. Upholding the constitutionality of a state-granted monopoly on slaughterhouses around New Orleans, the *Slaughterhouse* Court held that the right to pursue one's trade was a right of state not national citizenship.

Writing for the Court in *Slaughterhouse*, Justice SAMUEL F. MILLER—who two years later penned the majority opinion in *Loan Association v. Topeka*—made clear that the main motivation for the *Slaughterhouse* decision lay in the Court's fear that a more expansive interpretation of the Fourteenth Amendment would allow the federal government to exceed the proper bounds of its authority and to intrude on the regulatory domain of the states. Construing the amendment's privileges or immunities clause or its due process clause to protect all fundamental rights, Miller explained, "would constitute this Court a perpetual censor upon all legislation of the states" and, by virtue of the affirmative enforcement power granted Congress in section 5 of the Fourteenth Amendment, would allow Congress to "pass laws in advance, limiting and restricting the exercise of legislative power by the states in their most ordinary and useful functions." In contrast, the largely nonconstitutional review carried out in *Fletcher*, *Terrett*, and *Loan* was seen by the Court as guided and constrained by well-developed common law notions of the inherent limits of legitimate state action, gave no affirmative power to Congress, and fell within one of the federal government's clearly proper roles: adjudicating cases in which diversity of citizenship cast doubt on the impartiality of state tribunals.

But the doctrinal distinction between constitutional and common law review of the substantive legitimacy of state legislation was internally unstable: if natural law limitations on government could guide and constrain the Court in diversity-of-citizenship cases, they could do the same in cases brought pursuant to the Fourteenth Amendment. Moreover, the Court could apply common law principles to invalidate any congressional attempt under the guise of the Fourteenth Amendment to prohibit perfectly legitimate state activity.

Partly because of this doctrinal instability, and partly because of strong pressure from the organized bar for a more expansive review of state ECONOMIC REGULATION, the Court moved rapidly in the years following *Loan Association* and *Slaughterhouse* toward substantive review of state legislation under the Fourteenth Amendment's due process clause. Throughout the last quarter of the nineteenth century, the Court often warned in OBITER DICTA that the due process clause prohibited states from transgressing common law limitations on legitimate governmental action. In particular, the Court gave notice that unreasonable state deprivations of property or of the FREEDOM OF CONTRACT would be struck down as unconstitutional. In ALLGEYER V. LOUISIANA (1897) this line of dicta finally ripened into a landmark HOLDING: the Court there invalidated a Louisiana restriction on insurance contracts as substantively incompatible with due process of law. By barring companies not licensed by the state from insuring Louisiana property, the Court held, Louisiana had exceeded its STATE POLICE POWER and had unconstitutionally impaired the freedom of contract.

In the four decades following *Allgeyer*, the Supreme Court scrutinized socioeconomic legislation more aggressively and persistently than ever before or since, striking down scores of federal and state statutes as violative of substantive due process. The period from 1897 to 1937 has come to be known as "the *Lochner* era," after its most infamous product, LOCHNER V. NEW YORK (1905). *Lochner* invalidated a New York law limiting the work week of bakery employees to sixty hours; the Court found the statute an unreasonable infringement of the freedom of contract. In dissent, Justice OLIVER WENDELL HOLMES protested that "[t]he fourteenth amendment does not enact Mr. Herbert Spencer's *Social Statics*."

Throughout the *Lochner* era, the Court closely examined both the means and the ends of socioeconomic legislation. The Court required that the relationship between a statute and its legitimate objectives be "real and substantial," and it repeatedly invalidated laws that it deemed to burden individual economic liberty more than strictly necessary to accomplish the goals of such laws. Thus, the majority in *Lochner* reasoned that regulation of bakery work hours exceeded the proper bounds of the police power in part because the state could protect the health of bakery employees without infringing so fundamentally on contractual freedom. Similarly, ADKINS V. CHILDREN'S HOSPITAL (1923) struck down minimum wage laws for women partly because the Court deemed narrower wage regulations sufficient to achieve the legislature's legitimate ends, and *Liggett Co. v. Baldridge* (1928), which invalidated Pennsylvania restrictions on corporate ownership of pharmacies, noted less objectionable regulatory means the state could employ to protect the same interests in public health.

In addition to demanding a tight fit between ends and means, the *Lochner* Court required that the statutory ends themselves fit its sense of the proper aims of lawmaking. Informed by earlier doctrines of implied limitations, as well as by the popular notions of social Darwinism and the writings of conservative legal COMMENTATORS ON THE CONSTITUTION such as THOMAS M. COOLEY and CHRISTOPHER G. TIEDEMAN, the Court viewed protection of individual common law rights and advancement of the general health, safety, and moral welfare to be the only valid objectives of government regulation. Laws aimed at redistributing economic and social power—giving A's property to B—by their very nature fell outside the realm of legitimate legislative action. Thus, for example, in *Adair v. United States* (1908) and COPPAGE V. KANSAS (1915), the Court invalidated prohibitions against YELLOW DOG CONTRACTS that conditioned employment on workers' promises not to join unions. Writing for the majority in *Coppage*, Justice MAHLON PITNEY rejected the argument that inequality of bargaining power could justify infringing contractual liberty: it is "impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights."

Although the Court in the *Lochner* era struck down close to 200 statutes under the due process clauses, it upheld even more. Many of the laws sustained were distinguished from invalidated statutes only by subtle factual differences supporting findings that they served the Court's narrow vision of the general welfare. After repeatedly striking down price controls, for example, the Court in NEBBIA V. NEW YORK (1934) upheld regulation of milk prices, concluding that the regulation was plausibly connected to public health on the theory that price competition encouraged suppliers to cut corners on sanitation. Other statutes, however, were sustained for a more specific reason: the Court exempted from its general liberty-of contract approach statutes designed to protect especially disadvantaged or vulnerable groups. Thus, in HOLDEN V. HARDY (1897), the Court upheld restrictions on the hours worked by coal miners; the Court stressed the ultrahazardous nature of coal mining and the ability of coal

companies in company-run towns virtually to dictate the terms of employment. Similarly, the Court in MULLER V. OREGON (1908), moved in part by the supposed physical vulnerability of women and by sexist notions of their maternal mission, permitted Oregon to limit women's hours of work outside the home.

Just as prior doctrinal instabilities had helped to usher in the *Lochner* era, so these exceptions to the regime of laissez-faire presaged the era's close. By acknowledging that a state could protect at least some groups at the expense of others, *Holden* and *Muller* made available in every substantive due process case the argument that the legislature might reasonably have determined that the class protected by the challenged statute was unable to, or should not be forced to, fend for itself. Indeed, *Lochner v. New York* was itself drastically limited *sub silentio* in 1917, when the Court in BUNTING V. OREGON (1917) relied on *Muller* in upholding a state law limiting to ten hours the work day of manufacturing employees.

With the onset of the Depression, moreover, it became progressively more difficult to view the relative wealth of A and B as a matter of purely private concern, outside the domain of proper governmental authority. Increasingly, economic transactions were seen as interrelated, and the general welfare was understood as intimately linked to the welfare of disadvantaged groups. The Supreme Court's persistent invalidation of redistributive legislation was sharply criticized by labor unions, the liberal press, and NEW DEAL politicians, all of whom argued that extensive economic regulation, both state and federal, was necessary to alleviate the Depression. The perceived legitimacy of such regulation was further bolstered by the work of "realist" legal scholars such as MORRIS R. COHEN and Robert Hale, who portrayed distributions of private wealth and power as the results of public choices expressed, for example, in the law of property and contract.

After much outcry, the Supreme Court parted dramatically with *Lochner* in WEST COAST HOTEL V. PARRISH (1937), which abandoned earlier precedent and upheld a statutory minimum wage for women as reasonable in light of women's vulnerability to economic exploitation and the public interest in minimizing the number of workers requiring government relief. In the years that followed, the Court confirmed its abandonment of *Lochner* by repeatedly rejecting challenges to expansive New Deal regulation of private economic arrangements, and in 1949 the Court unanimously and explicitly rejected the "*Allgeyer Lochner-Adair-Coppage* constitutional doctrine."

Never, however, did the Supreme Court explicitly abandon *Lochner*'s substantive theory of what constitutes legitimate legislation; it remains the official dogma to this day that regulatory power may not be exercised solely to transfer property from one private party to another. Instead, the Court relaxed the STANDARD OF REVIEW it applied to socioeconomic regulation: the close scrutiny of the *Lochner* era was replaced with extreme deference to legislative determinations. Thus, in UNITED STATES V. CAROLENE PRODUCTS CO. (1938) the Court promised to uphold socioeconomic legislation if any known or reasonably inferable state of facts supported the legislature's judgment.

In the intervening decades, this extreme deference has become virtually complete judicial abdication. Although substantive scrutiny has occasionally been smuggled in through the privileges or immunities clause of Article IV or the CONTRACT CLAUSE, in due process review the Court has required of economic regulation only "minimum rationality" and has shown itself willing to uphold laws on the basis of purely hypothetical facts or objectives, or on blind trust in legislative rationality. Justice WILLIAM H. REHNQUIST carried the Court's approach to its logical extreme in his opinion for the majority in *Railroad Retirement Board v. Fritz* (1980). Rejecting a due process challenge to legislation that phased out the eligibility of long-retired railroad employees to receive both social security and railroad retirement benefits, but preserved the similar eligibility of more recently retired employees of equally long (or longer) tenure, the majority reasoned that the statute was clearly a rational way to accomplish its precise result: cutting off the dual benefits of the very employees adversely affected by the law. "The plain language" of the statute, Justice Rehnquist wrote, "marks the beginning and end of our inquiry."

The Supreme Court has not been entirely without textual guidance in its post-1937 effort to define the fundamental freedoms protected by the Fourteenth Amendment's due process clause. Although the Bill of Rights formally applies only to the federal government, the Court has relied heavily on the first eight amendments in determining which rights—both procedural and substantive—are so essential that governmental action abrogating them violates due process of law. Most of the guarantees in the Bill of Rights have now been "selectively incorporated" into the Fourteenth Amendment, although the Court has decisively repudiated the view, espoused by Justice HUGO L. BLACK, that the Fourteenth Amendment applies the Bill of Rights to the states *in toto*.

At the close of the *Lochner* era, the Justices laid down a fairly restrictive rule for determining which provisions of the Bill of Rights were "incorporated." Writing for the Court in PALKO V. CONNECTICUT (1937), Justice BENJAMIN N. CARDOZO limited incorporation to those rights "implicit in the concept of ORDERED LIBERTY." Eventually recognizing the irrelevance of an inquiry into whether "a civilized system could be imagined that would not accord the particular protection," the Court in the late 1960s adopted a more contextual approach, asking whether a particular

right was essential to the American political order. Thus, in DUNCAN V. LOUISIANA (1968) the Court held that criminal trial safeguards provided by the Bill of Rights are absorbed by the Fourteenth Amendment if they are "fundamental in the context of the criminal processes maintained by the American states." Over time, *Duncan* has come to stand for the more general proposition that guarantees in the Bill of Rights should be incorporated—and guarantees not expressly mentioned should be added—if they are necessary to protect values basic to our society. (See INCORPORATION DOCTRINE.)

Although substantive due process protection of implied rights to contractual liberty virtually vanished with the close of the *Lochner* era, judicial solicitude has grown in the ensuing years for a different set of liberties not expressly protected by the Constitution—a diverse group of claims to personal autonomy that have been collectively labeled the RIGHT OF PRIVACY. In contrast to the narrow contractual liberty to which the *Lochner* Court devoted the bulk of its concern, the right of privacy has come to embrace a wide array of freedoms, including rights of association and reproduction as well as of seclusion and intellectual independence. Some of these freedoms have been derived by extrapolation (or, perhaps, excavation) from the Bill of Rights or other clauses of the Fifth and Fourteenth Amendments. Yet the stirring rhetoric that has typically accompanied the elaboration of these personal freedoms testifies to a judicial perception that they are in some way more fundamental than the textual provisions to which they are pegged.

The Supreme Court made clear the essential nature of these "privacy" or "personhood" rights when it gave them their earliest articulation during the *Lochner* era itself. Striking down a state law that forbade the teaching of foreign languages before the eighth grade, the Court in MEYER V. NEBRASKA (1923) stressed the importance of allowing teachers to pursue their calling and parents to raise their children as they saw fit. Justice JAMES C. MCREYNOLDS's majority opinion gave broad scope to the liberty protected by the due process clauses: "Without doubt, [it] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Two years later, in PIERCE V. SOCIETY OF SISTERS (1925), the Court marshaled similar rhetoric in invalidating a state requirement that all students attend public schools. Still more sweeping—and perhaps of more lasting influence—was Justice LOUIS D. BRANDEIS's formulation in his dissent in OLMSTEAD V. UNITED STATES (1928): "The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

Despite the broad language of these early opinions, *Meyer* and *Pierce* evinced special judicial solicitude primarily for family autonomy—freedom from government intrusion into the traditionally intimate realms of marriage, reproduction, and child-rearing. That emphasis, along with recognition of personal autonomy rights as fundamental, was furthered by the watershed case of SKINNER V. OKLAHOMA (1942), the Supreme Court's first important privacy decision following the demise of *Lochner.* Invalidating a state statute providing for the STERILIZATION of persons convicted two or more times of "felonies involving moral turpitude," the Court termed the right to reproduce "one of the basic civil rights of man." Part of the Court's concern stemmed from fear of the invidious and possibly genocidal ways in which government control over reproduction might be exercised: the Court observed that the "power to sterilize, . . . [i]n evil or reckless hands . . . can cause races or types which are inimical to the dominant group to wither and disappear."

The right to REPRODUCTIVE AUTONOMY recognized in *Skinner* has since been elaborated and considerably expanded. As recently as 1978, the Court in ZABLOCKI V. REDHAIL "reaffirm[ed] the fundamental character of the right to marry," holding that a state may not forbid marriage of parents unable to meet their child support obligations. More controversial has been the extension of *Skinner* to BIRTH CONTROL practices. In GRISWOLD V. CONNECTICUT (1965) the Supreme Court ruled that a married couple's decision to purchase and use contraceptives is a private matter beyond the proper reach of government authority. Perhaps not surprisingly, Justice WILLIAM O. DOUGLAS's majority opinion focused on the intimacy of marital choices, invoking "a right of privacy older than the Bill of Rights" and defending the "sacred precincts of marital bedrooms." The freedom to practice contraception was not freed of its familial trappings until 1972, when Justice WILLIAM J. BRENNAN wrote for the Court in EISENSTADT V. BAIRD that, if "the right of privacy means anything, it is the right of the *individual,* married or unmarried, to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child." That *Baird* singled out as decisive in *Griswold* the element of reproductive autonomy was made clear by CAREY V. POPULATION SERVICES INTERNATIONAL (1977), which invalidated a state statute allowing contraceptives to be sold only by licensed pharmacists and only to persons over sixteen.

When the Court assessed the constitutionality of ABOR-

TION laws in ROE V. WADE (1973), its commitment to reproductive autonomy collided with an equally basic concern for the sanctity of human life. Writing for the majority, Justice HARRY L. BLACKMUN reasoned that the liberty protected by the due process clauses includes a woman's fundamental right to decide, with her physician, whether to end or to continue a pregnancy, but that certain state interests are sufficiently compelling to override that right. During the final trimester of pregnancy, the state's interest in preserving the fetus, by then viable, justifies a ban on abortions; before the third trimester, however, abortions may not be prohibited and may be regulated only as necessary to protect the woman's health; and, before the second trimester, the state may require only that abortions be performed by licensed physicians.

As an element of substantive due process, the right to privacy has received its doctrinally purest exposition in reproductive autonomy cases. Equally important rights to personal autonomy, however, have been found in the "penumbras" of constitutional provisions less abstract than the requirement of "due process of law," most notably the FIRST AMENDMENT. In *West Virginia State Board of Education v. Barnette* (1943) the Court construed the First Amendment, along with the Fifth and the Fourteenth, to establish for each individual a sphere of intellectual and spiritual independence. Striking down a compulsory flag salute in public schools, Justice ROBERT H. JACKSON wrote for the Court that, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." The Court appealed to the same notion when it held, in *Wooley v. Maynard* (1977), that New Hampshire could not punish a person for obscuring the words "Live Free or Die" on his license plate because he found it religiously or philosophically repugnant to display the state's slogan on his car. The Court reasoned that the state had impermissibly invaded the private "sphere of intellect and spirit" by requiring individuals "to use their private property as a 'mobile billboard' for the State's ideological message."

In NAACP V. ALABAMA (1958) and *Talley v. California* (1960) the Court found in the First Amendment guarantees of associational and expressive freedom correlative rights to anonymity. And in MOORE V. CITY OF EAST CLEVELAND (1977) the Court protected a special right to familial association by invalidating a single-family zoning ordinance that prevented a woman from living with her son and two grandsons. Renewing its special commitment to traditional visions of family autonomy, the Court distinguished the zoning law upheld in *Village of Belle Terre v. Boraas* (1974) on the basis that "the ordinance there affected only *unrelated* individuals," whereas East Cleveland had "chosen to regulate the occupancy of its housing by slicing deeply into the family itself."

Other penumbral rights to personal autonomy have been found in the intersection of several textual provisions, or in the constitutional system taken as a whole. In SHAPIRO V. THOMPSON (1969), for example, the Court alluded to the COMMERCE CLAUSE, the privileges or immunities clause of the Fourteenth Amendment, and the similar language in Article IV, section 2, as well as to the Fifth Amendment's due process clause and "the nature of our Federal Union" in finding that "our constitutional concepts of personal liberty" imposed a general requirement that "all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." The newly vitalized RIGHT TO TRAVEL had earlier been recognized in the context of international mobility, at least when other First Amendment rights were also at stake: the Court in APTHEKER V. SECRETARY OF STATE (1964) had struck down a congressional denial of passports to members of the Communist party. In HAIG V. AGEE (1981) the Court sustained revocation of the passport of a former intelligence agent who was engaged in exposing undercover agents stationed abroad. In *Haig* the Court distinguished sharply between the "right" of inter*state* travel and the "freedom" of inter*national* travel, refusing to extend to congressional regulation of the latter the close scrutiny it had given state regulation of the former.

The Supreme Court attempted to unify some of these disparate doctrinal threads in WHALEN V. ROE (1976), its most comprehensive treatment thus far of the right of privacy. Writing for a unanimous Court, Justice JOHN PAUL STEVENS upheld a carefully crafted state scheme for maintaining computerized records of prescriptions for certain dangerous drugs, but only after examining the statute's implications for what he described as the two components of the right to privacy: an interest in confidentiality—"avoiding disclosure of personal matters"—and an interest in free choice—"independence in making certain kinds of important decisions."

Despite this seemingly broad formulation, the Court has resisted the creation of a generic right to choose how one lives. In *Kelley v. Johnson* (1976), for example, the Court upheld police department rules regulating officers' hair styles and prohibiting them from having beards. Writing for the majority, Justice Rehnquist argued that the rules did not violate the right of privacy recognized in *Roe*, *Baird*, and *Griswold;* he distinguished those cases as involving "substantial claims of infringement on the individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life." Nor is the Court apparently prepared to protect even all intimate decisions central to one's self-definition; the Justices have,

for example, passed up several opportunities to review statutes punishing or burdening private homosexual activity between consenting adults. (See FREEDOM OF INTIMATE ASSOCIATION.)

Some lower courts have been more willing to expand the protected sphere of personal autonomy, recognizing broad rights of lifestyle choice as well as, in some cases, freedom to decide how and when one will die. The Supreme Court, however, appears unlikely to follow very quickly. Not only are some Justices concerned about the open-ended and potentially radical nature of such decisions, but the Court has repeatedly dropped unsubtle hints that there are fairly sharp limits to its tolerance. The "blessed versatility" of substantive due process is limited by the Justices' awareness that the Supreme Court is an institution of government.

LAURENCE H. TRIBE
(1986)

Bibliography

BLACK, CHARLES L. 1969 *Structure and Relationship in Constitutional Law.* Baton Rouge: Louisiana State University Press.

BREST, PAUL and LEVINSON, SANFORD 1983 *Processes of Constitutional Decisionmaking: Cases and Materials.* Boston: Little, Brown.

CHOPER, JESSE H. 1980 *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court.* Chicago: University of Chicago Press.

ELY, JOHN HART 1980 *Democracy and Distrust: A Theory of Judicial Review.* Cambridge, Mass.: Harvard University Press.

GUNTHER, GERALD 1975 *Cases and Materials on Constitutional Law.* Mineola, N.Y.: Foundation Press.

KENNEDY, DUNCAN 1980 Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America 1850–1940. *Research in Law & Sociology* 3:3–57.

LOCKHART, WILLIAM B.; KAMISAR, YALE; and CHOPER, JESSE H. (1964) 1980 *Constitutional Law: Cases—Comments—Questions.* St. Paul, Minn.: West Publishing Co.

PENNOCK, ROLAND J. and CHAPMAN, JOHN W., eds. 1977 *Due Process.* New York: New York University Press.

TRIBE, LAURENCE H. 1978 *American Constitutional Law.* Mineola, N.Y.: Foundation Press.

——— 1985 *Constitutional Choices.* Cambridge, Mass.: Harvard University Press.

## SUBSTANTIVE DUE PROCESS
(Update 1)

In the period preceding the NEW DEAL, DUE PROCESS OF LAW meant more than a guaranty of procedural regularity; it also embodied a substantive dimension that curtailed the role of the state in altering the outcomes of private marketplace decisions. This was the era of LOCHNER V. NEW YORK (1905), in which the Supreme Court decreed that government could intervene only to aid parties deemed in special need of paternalistic measures, such as minors and women, or to address externalities (where private bargains impose uncompensated costs on third parties). During a time of considerable social unrest, Lochnerian jurisprudence imposed sharp limits on the domain of ordinary politics while, in many quarters, also placing in question the very legitimacy of JUDICIAL REVIEW.

With the onset of the Great Depression, the growing political demands on government to curb instability in markets, to reduce widespread unemployment, and to bolster consumer demand forced the Court to alter its conception of the role of the state. Thus, in NEBBIA V. NEW YORK (1934) and WEST COAST HOTEL CO. V. PARRISH (1937), the Court rejected *Lochner*'s narrow definition of permissible governmental goals. Legislative efforts to redistribute wealth through social programs or enhance the bargaining positions of weaker parties were now legitimate exercises of power. With the permissible ends of government thus broadened, the Court soon indicated in UNITED STATES V. CAROLENE PRODUCTS CO. (1938) that *Lochner*'s rigorous insistence on a close fit of "ends" and "means" in ECONOMIC REGULATION had to yield to a policy of judicial deference to reasonably debatable economic measures. The hands-off approach to economic regulations with a RATIONAL BASIS also extended to decisions narrowly construing the reach of the CONTRACT CLAUSE and the takings clause.

This policy of judicial deference would not necessarily extend beyond the economic sphere, however. Justice HARLAN FISKE STONE, in his famous footnote four to *Carolene Products,* explained that regulations interfering with fundamental personal liberties and burdening disadvantaged minority groups would be subjected to a more demanding level of scrutiny. This dual standard for review allowed the Court in a number of decisions that culminated in ROE V. WADE (1973) to apply STRICT SCRUTINY to government action interfering with private decisions within a "zone of privacy" that included the intimate realms of marriage, reproduction, and child rearing.

In the years since 1985, without rejecting this dual framework, the Court has confined the privacy interests protected by substantive due process to those that reflect deeply entrenched, widely held traditional values. In *Michael H. v. Gerald D.* (1989) the state's traditional interest in the "unitary family" prevailed over a natural father's paternity claim where the child was born into an extant marital family. Most prominently, in BOWERS V. HARDWICK (1986) the Court held that Georgia could criminalize the act of homosexual sodomy between consenting adults committed in the privacy of the home. Justice BYRON R. WHITE's opinion for the majority explained that the right

to engage in such conduct had no textual support in the constitutional language. Moreover, he said, the claimed right could not be deemed fundamental, given the long-standing proscription of such conduct in state law and the Court's policy of "great resistance to expand[ing] the substantive reach of [the due process clauses of the Fifth Amendment and FOURTEENTH AMENDMENT ], particularly if it requires redefining the category of rights deemed to be fundamental."

As critical commentators like Ronald Dworkin have shown, the Court's position in *Bowers* that prohibition of private sexual conduct may be based solely on the moral preferences of majorities is difficult to reconcile with the principle of cases like *Roe v. Wade* (1973). Indeed, in WEBSTER V. REPRODUCTIVE HEALTH SERVICES (1989), the PLURALITY OPINION of Chief Justice WILLIAM H. REHNQUIST openly stated that the Court was prepared "to revisit the holding of *Roe*" in an appropriate case. In the meantime, he suggested, the Court would sustain state laws barring the use of public facilities for the performance of ABORTIONS and requiring nonmedically indicated tests for the purpose of determining fetal viability. Proponents and opponents of abortion alike have viewed *Webster* as a remand of the abortion controversy to the political arena.

In *De Shaney v. Winnebago County Department of Social Services* (1989), the Court held that states were not constitutionally accountable for failure to intervene effectively to curb family domestic violence. "In the substantive due process analysis," Chief Justice Rehnquist wrote, "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf . . . which is the "deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means."

Along with this partial constriction of the "zone of privacy," there have been some stirrings toward greater judicial protection of ECONOMIC LIBERTIES. The Court's COMMERCIAL SPEECH decisions have extended FIRST AMENDMENT protections to individual professionals facing regulatory restrictions arguably put in place by professional associations to protect established interests from new forms of competition. The Court also has indicated a willingness to depart from traditional deferential review of land use regulation. In *Nollan v. California Coastal Commission* (1987), the Court used the doctrine of UNCONSTITUTIONAL CONDITIONS to find a regulatory TAKING OF PROPERTY under the Fifth Amendment. At issue was a zoning board's decision to permit construction of a larger house on a beachfront lot on condition that the owners allow the public an easement to pass across their beach. Some writers have argued that the unconstitutional conditions doctrine should be widely deployed to accomplish a resurrection of ECONOMIC DUE PROCESS protections.

As a general matter, the post-New Deal resistance to substantive due process now appears to be on the wane in the academy. Critics from both the Left and the Right have advocated theories of aggressive CONSTITUTIONALISM at variance with the judicial deference to economic regulations typified by *Carolene Products*. Richard Epstein, among others, has argued that the retreat from *Lochner* after the Great Depression was an unprincipled abandonment of economic liberties thought fundamental by the Constitution's Framers; in his view, the Court properly may confine government intervention to true instances of market failure, such as externalities. Such writers as Frank Michelman and Cass Sustein reject *Lochner*'s facile reliance on laissez-faire economic principles, but they nevertheless agree that the Court properly may, in the service of reconstructed "republican" values, proscribe the use of governmental power simply to further the self-interest of established economic groups.

These academic commentaries derive support in part from JUDICIAL ACTIVISM on behalf of racial equality and voting rights. Social acceptance of the Supreme Court's active role in the latter areas has diluted the concerns over "government by juiciary" that led Harlan Fiske Stone, FELIX FRANKFURTER, and others to seek to limit judicial interference with political outcomes. It remains to be seen, however, whether these new versions of substantive due process can be implemented free of a crisis of legitimacy similar to the one that marked the Court's handiwork during the *Lochner* era.

SAMUEL ESTREICHER
(1992)

(SEE ALSO: *Economic Equal Protection; Economy; Reproductive Autonomy.*)

Bibliography

EPSTEIN, RICHARD A. 1985 *Takings: Private Property and the Power of Eminent Domain.* Cambridge, Mass.: Harvard University Press.

ESTREICHER, SAMUEL 1981 Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture. *New York University Law Review* 56: 547–582.

MICHELMAN, FRANK 1986 The Supreme Court Term—Foreword: Traces of Self-Government. *Harvard Law Review* 100: 4–77.

POSNER, RICHARD A. 1987 The Constitution as an Economic Document. *George Washington Law Review* 59:4–38.

SUNSTEIN, CASS 1987 *Lochner's* Legacy. *Columbia Law Review* 87:873–919.

## SUBSTANTIVE DUE PROCESS
### (Update 2)

The Supreme Court has long construed the Constitution's DUE PROCESS clauses to have both procedural and substan-

tive components. PROCEDURAL DUE PROCESS guarantees against deprivation of life, liberty, or property without notice and an adequate hearing. Substantive due process, on the other hand, establishes substantive limits on the government's power to interfere with individual liberty. That is, even when no constitutional provision explicitly prohibits a particular governmental action, courts employing the DOCTRINE of substantive due process may invalidate that action as an undue infringement of individual liberty. The text of the Constitution provides little, if any, guidance in fleshing out the contours of substantive due process.

While substantive due process has nineteenth-century antecedents, the Court first regularly applied it early in the twentieth century. During the so-called *Lochner* era—named for LOCHNER V. NEW YORK (1905)—the Court invalidated maximum hour laws, minimum wage laws, union protective laws, and other economic LEGISLATION on the ground of undue interference with FREEDOM OF CONTRACT—a right that the Court protected under the rubric of substantive due process. In the 1930s, however, the Court repudiated these decisions and seemed to indicate the demise of substantive due process.

Over the next thirty years, the Court, reflecting widespread revulsion against what were perceived to have been *Lochner*-era abuses of JUDICIAL POWER, generally refrained from invoking substantive due process. Occasionally during this period, Justices would invoke the lessons of the *Lochner* era as justification for refusing to strike down a particular law on substantive due process grounds, but then proceed to invalidate it under a different constitutional provision. For example, in SKINNER V. OKLAHOMA (1942) the Court invalidated an Oklahoma statute authorizing sterilization of three-time recidivist criminals on the ground that the guarantee of EQUAL PROTECTION OF THE LAWS afforded a fundamental right to procreation. Later, the Court also found shelter under the equal protection clause for the RIGHT TO TRAVEL, the right not to be excluded because of indigency from appealing a criminal conviction, and VOTING RIGHTS. Some commentators have questioned the practical significance of deriving rights not explicitly enumerated in the Constitution from one clause rather than another. Nevertheless, much of the WARREN COURT activism of the 1960s assiduously avoided the due process clause, while significantly expanding protections under other open-ended constitutional provisions.

Most observers identify GRISWOLD V. CONNECTICUT (1965) as the font of modern substantive due process doctrine. Employing the same due process clause that during the *Lochner* period had been invoked to protect various ECONOMIC LIBERTIES, the Court now began invalidating laws interfering with various aspects of personal privacy and autonomy, most notably sexual freedom. In *Griswold* the Court struck down a criminal ban on the use of contraceptives, as applied to married couples. In ROE V. WADE (1973) the Court invalidated legislation restricting access to ABORTION. In MOORE V. CITY OF EAST CLEVELAND (1977) the Court nullified a local ordinance constraining the ability of blood relatives to live in the same household. The Court drew the line, however, in BOWERS V. HARDWICK (1986), narrowly rejecting the claimed right of adults to engage in private, consensual sexual activity with members of the same sex.

Modern substantive due process has been intensely controversial, both within the Court and among commentators. Critics of the doctrine accuse the Court of simply duplicating the abuses of the *Lochner* era, inventing rights without firm foundation in the Constitution. Such a practice is said to be antidemocratic, because it involves unelected, lifetime-tenured judges invalidating laws enacted by popularly elected legislatures on the basis of subjective value judgments not tethered to the constitutional text. Defenders of modern substantive due process respond in various ways. Some argue that the correct lesson to draw from the *Lochner* experience is not that the Court should refrain from identifying unenumerated constitutional rights, but simply that economic rights do not warrant such protection. These rights are said to be less important, or at least less appropriate for judicial protection, than the personal autonomy rights articulated under modern substantive due process. Other defenders contend that the judicial identification of unenumerated rights is plainly authorized by open-ended constitutional provisions such as the NINTH AMENDMENT or the PRIVILEGES AND IMMUNITIES clause of the FOURTEENTH AMENDMENT. It is said that the meaning of such provisions is difficult to discern if they were not intended to authorize judicial formulation of unenumerated rights. Finally, some proponents of modern substantive due process concede the antidemocratic implications of unenumerated rights adjudication but embrace those implications as a virtue rather than repudiate them as a vice. For these commentators, the legitimacy of the political regime depends on its affording protection to fundamental human liberties, whether or not they are inscribed in the constitutional text or endorsed by the more majoritarian political branches.

The Court's RIGHT-TO-DIE decisions of the 1990s illustrate both the Justices' unwillingness to repudiate substantive due process and their discomfort with the doctrine's antidemocratic implications. The Court's decisions in *Cruzan v. Director, Missouri Department of Health* (1990) and *Washington v. Glucksberg* (1997) share a common form. In both cases, a majority of the Court rejected the particular right-to-die claim at issue, while a different majority of five Justices stated or strongly implied that substantive due process guarantees some measure of individual control over the circumstances of one's death. In *Cruzan* the Court ruled that the Constitution permitted the state of Missouri to maintain a vegetative patient on extraordinary

life support, contrary to the wishes of her parents and a court-appointed guardian, in the absence of clear and convincing evidence of her own preferences expressed when competent. Yet five Justices plainly stated that the Constitution requires compliance with the terms of a "living will" executed by a competent adult. Similarly, in *Glucksberg*, while the Court unanimously rejected the argument that terminally ill patients possess a constitutional right to commit suicide with physician assistance, a majority of five Justices intimated that the Constitution would not permit a state to forbid physicians from prescribing drugs for terminally ill patients suffering great pain, even if those drugs were likely to induce death.

*Glucksberg* sheds light on the status of substantive due process in the late 1990s. The open-ended discretion to right perceived wrongs afforded by such a doctrine is too attractive for the Justices entirely to repudiate it. At the same time, however, the lesson that the Court seems to have derived from a quarter-century's worth of criticism in the face of *Roe v. Wade* is that it must be more cautious in applying the doctrine. *Roe* effectively nullified the abortion statutes of forty-six states. In *Glucksberg*, the Court was unwilling to invalidate the laws of the forty-nine states that, as of 1997, continued to criminalize physician-assisted suicide. How substantive due process doctrine evolves in the future with regard to the right to die will depend, as CONSTITUTIONAL INTERPRETATION generally does, on changes in social mores.

MICHAEL J. KLARMAN
(2000)

Bibliography

CORWIN, EDWARD S. 1911 The Doctrine of Due Process Before the Civil War. *Harvard Law Review* 24:366–385; 460–479.

ELY, JOHN HART 1973 The Wages of Crying Wolf: A Comment on *Roe v. Wade*. *Yale Law Journal* 82:920–949.

GILLMAN, HOWARD 1993 *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*. Durham, N.C.: Duke University Press.

GREY, THOMAS 1978 Origins of the Unwritten Constitution. *Stanford Law Review* 30:843–893.

PERRY, MICHAEL 1976 Abortion, the Public Morals and the Police Power: The Ethical Function of Substantive Due Process. *UCLA Law Review* 23:689–736.

SHERRY, SUZANNA 1987 The Founders' Unwritten Constitution. *University of Chicago Law Review* 54:1127–1177.

SUNSTEIN, CASS R. 1997 The Right to Die. *Yale Law Journal* 106:1123–1163.

## SUBVERSIVE ACTIVITIES CONTROL BOARD

The INTERNAL SECURITY ACT of 1950 created the Subversive Activities Control Board (SACB). This agency was to determine, on request of the ATTORNEY GENERAL, whether a particular organization was a communist-action, communist-front, or communist-infiltrated organization. After SACB had issued an order so designating an organization and after the order had been sustained by the courts, various disabilities and sanctions could be imposed on the group and its members. These included being barred from federal jobs, being denied employment in defense-related industries, and being prohibited from using United States passports.

Eleven years after SACB's creation, the Supreme Court sustained its findings that the Communist party was a communist-action organization as defined by the act and upheld an order requiring the party to register. (See COMMUNIST PARTY V. SACB, 1961.) The Court subsequently declared unconstitutional attempts to implement the sanctions of the act, and in 1965 (ALBERTSON V. SACB) it ruled that the forced registration of individual members of the party would violate the RIGHT AGAINST SELF-INCRIMINATION. By the late 1960s, SACB was moribund. Congress, attempting salvage, gave it authority to register with the attorney general the names of persons it had determined were members of communist organizations, and SACB eventually declared seven persons to be in this category. Such limited action, as well as a 1967 decision holding unconstitutional provisions barring members of registered organizations from jobs in defense-related industries, further limited SACB's utility. In 1974, the RICHARD M. NIXON administration, bowing to SACB's critics, requested no further funding, effectively ending its life.

PAUL L. MURPHY
(1986)

Bibliography

MURPHY, PAUL L. 1972 *The Constitution in Crisis Times, 1918–1969*. New York: Harper & Row.

## SUBVERSIVE ACTIVITY

Activity is "subversive" if it is directed toward the overthrow of the existing form of government by force or other unlawful means. Subversive activity comprises SEDITION, insurrection, and sabotage, as well as other unlawful acts committed with the requisite intent. Although individuals may engage in subversive activity, concerted or organized subversion is more common and excites more public concern. Active, purposive membership in subversive organizations—such as the Communist party, the American Nazi party, or the Ku Klux Klan—is a federal crime, and between 1950 and 1974 the ATTORNEY GENERAL'S LIST was maintained as an official catalog of such groups.

In twentieth-century America, the suppression of subversion has been controversial where the "activity" has seemed to consist primarily of SUBVERSIVE ADVOCACY. But the controversy should not obscure the fact that there is such a thing as subversive activity and that the survival of constitutional government requires that such activity be controlled.

The critical distinction is not between words and deeds, speech and action. Even the staunchest defenders of CIVIL LIBERTIES agree that INCITEMENT TO UNLAWFUL CONDUCT may be punished by law, at least when the speaker has the intention and capability of inducing his hearers to engage in insurrection, riot, or disobedience of law. Some forms of subversive activity—for example, the attack on the House of Representatives by Puerto Rican nationalists in 1954—are extreme forms of SYMBOLIC SPEECH, known in revolutionary jargon as "propaganda of the deed." The political goal toward which it is aimed is precisely what distinguishes subversive activity.

Because the government of the United States is one of limited and ENUMERATED POWERS, its authority to define and punish subversive activities as crimes is not entirely clear. Treason is defined in Article III, section 2, of the Constitution, and as the same section limits the range of punishment for treason, it implies the power of Congress to prescribe punishment within the permitted range. The Constitution does not define any lesser degree of subversive activity, nor does it expressly grant to Congress the power to define and punish such crimes. Instead, the power must be an IMPLIED POWER incidental to the power to punish treason or else NECESSARY AND PROPER for the carrying out of one or more of the enumerated powers.

In the absence of statutes against insurrection or rebellion, the perpetrators of FRIES' REBELLION and the WHISKEY REBELLION were tried for treason. The prosecutors argued that an armed rising to prevent the execution of federal law—the normal definition of insurrection—was at least a constructive treason as the COMMON LAW had understood the term. Similarly, when AARON BURR assembled an armed force in the Western territories, for purposes that are still not entirely clear, the only federal offense for which he could be tried was treason. But a charge of treason seems manifestly to have been inappropriate in each of these cases.

On the other hand, the ALIEN AND SEDITION ACTS, enacted when the country was on the brink of war with France, generously defined offenses against the United States. Although section 2, defining SEDITIOUS LIBEL, is more famous, section 1 of the Sedition Act proscribed certain subversive activities: combination or conspiracy to impede the operation of law or to intimidate government officials, procuring or counseling riot or insurrection—whether or not the activity was successful. The ESPIONAGE ACT OF 1917, enacted while the country was fighting World War I, treated as criminal any attempt to procure draft evasion or to interfere with military recruitment while the Sedition Act of 1918 proscribed all advocacy of revolution, however remote the prospect of success.

In the latter half of the twentieth century, the phenomenon of political terrorism raised new problems. Frequently directed from outside the United States, terrorist activity, like the extreme forms of subversive activity, employs politically motivated violence. Although the aim of terrorism may not be the overthrow of the American government, terrorism shares with the more extreme forms of subversive activity the substitution of violence for public deliberation and constitutional government.

DENNIS J. MAHONEY
(1986)

Bibliography

GRODZINS, MORTON 1956 *The Loyal and the Disloyal: Social Boundaries of Patriotism and Treason.* Chicago: University of Chicago Press.

HURST, JAMES WILLARD 1971 *The Law of Treason in the United States.* Westport, Conn.: Greenwood Press.

## SUBVERSIVE ADVOCACY

The quest for NATIONAL SECURITY has placed strains on the FIRST AMENDMENT when the country has been at war, or threatened by war, or torn by fear of an external enemy or domestic social unrest. Federal and state governments have sought to silence those regarded as "subversives" and internal enemies because they supported a foreign cause or advocated revolutionary change in American institutions.

The ALIEN AND SEDITION ACTS, passed only seven years after ratification of the First Amendment, were the most extreme of these measures in our history. President JOHN ADAMS and the Federalist Congress used them to stifle the opposition Republicans who were accused of being "servile minions" of France, with which war seemed imminent in early 1798. Seventeen prosecutions were instituted against Republican newspaper editors, officeholders, and adherents, with only one acquittal.

The constitutionality of the Sedition Act was never tested in the Supreme Court, which then had no JURISDICTION to review federal criminal convictions. But the act was sustained by the lower federal courts, including three Supreme Court Justices sitting as trial judges. The modern Supreme Court, in NEW YORK TIMES CO. V. SULLIVAN (1964), has stated that the First Amendment bars prosecution for SEDITIOUS LIBEL. Opposition to the government in power, accompanied by criticism of official policy and conduct,

cannot constitutionally be proscribed as "seditious" or "subversive."

During the nineteenth century there was no federal legislation limiting FREEDOM OF SPEECH or FREEDOM OF THE PRESS. No official efforts were made to silence the Federalist denunciation of the War of 1812. Abolitionist sentiment did not fare so well in the succeeding decades of bitter controversy over slavery. Southern states passed laws limiting the freedom to criticize slavery. During the CIVIL WAR no sedition act was passed to suppress the widespread opposition to the war in the North. But President ABRAHAM LINCOLN suspended the writ of HABEAS CORPUS, controlled the mails, telegraph, and passports, and approved military detention of thousands of persons accused of disloyalty.

The rapid industrialization and urbanization of the country after the Civil War was accompanied by social unrest. The Haymarket Square bombing in Chicago in 1886, the violent Homestead and Pullman strikes in the 1890s, the assassination of President WILLIAM MCKINLEY in 1901 by a presumed "anarchist," and the militant tactics of the Industrial Workers of the World led to the passage of the first state Criminal Anarchy Law in New York in 1902. By 1921, thirty-three states had enacted similar laws making it a crime to advocate the overthrow of existing government by force or violence. Unlike the Sedition Act of 1798, these laws forbade only the advocacy of illegal means to effect political change.

Together with the federal ESPIONAGE ACT of 1917, these state laws were used to suppress opposition to WORLD WAR I voiced by pacifists, sympathizers with Germany, and international socialists. The 1917 act made it criminal to obstruct recruiting, cause insubordination in the armed forces, or interfere with military operations. Amendments to the Espionage Act (the SEDITION ACT of 1918) made it an offense, among other things, to say or do anything that would favor any country at war with the United States, oppose the cause of the United States in the war, or incite contempt for the American form of government or the uniform of the Army or Navy. Under the Espionage Act 877 people were convicted, almost all for expressing opinions about the merits and conduct of the war. The Supreme Court sustained these convictions, rejecting the contention that they violated the First Amendment.

SCHENCK V. UNITED STATES (1919) was the first of the Espionage Act cases to reach the Supreme Court. Justice OLIVER WENDELL HOLMES wrote the Court opinion affirming the conviction and, for the first time, enunciated the CLEAR AND PRESENT DANGER test to determine when advocacy of unlawful conduct is protected by the First Amendment. Holmes also wrote the opinions of the Court in FROHWERK V. UNITED STATES (1919) and DEBS V. UNITED STATES (1919), sustaining the convictions of a newspaper editor for questioning the constitutionality of the draft and charging that Wall Street had dragged the country into the war, and of Eugene V. Debs, the railroad union and Socialist party leader, for denouncing the war as a capitalist plot. Just what the "clear and present danger" was in these cases was doubtful, and Holmes and Brandeis soon began to dissent from the way the majority used the test.

Their first great dissent came in ABRAMS V. UNITED STATES (1919). In his dissenting opinion, which Brandeis joined, Holmes gave new content to the clear and present danger test by emphasizing the immediacy of the danger that must exist. Although Holmes would have softened this requirement, permitting punishment of speech with the specific intent to bring about the danger even if the danger itself was not "immediate," he did not think the necessary intent had been shown in *Abrams*.

The Red Scare of 1919 and 1920 was induced not only by fear of the Bolshevik revolution and the Communist International but also by the economic and social insecurity that accompanied demobilization after World War I. The PALMER RAIDS expressed the federal government's fears and antiradical sentiments. The states resorted to their criminal anarchy laws and the Supreme Court sustained convictions under these laws in GITLOW V. NEW YORK (1925) and WHITNEY V. CALIFORNIA (1927).

In *Gitlow* the Court assumed that freedom of speech and press, protected by the First Amendment from abridgment by Congress, was a "liberty" protected by the DUE PROCESS clause of the FOURTEENTH AMENDMENT against state impairment. In both *Gitlow* and *Whitney* the Court refused to apply the clear and present danger test because the state legislatures had prohibited a particular class of speech—the advocacy of the doctrine that the government should be overthrown by violence. Gitlow's advocacy of violent revolution violated the law even if there were no clear and present danger of revolution. The legislature might reasonably seek "to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration."

Dissenting in *Gitlow*, Holmes argued for application of the clear and present danger test, but did not confront the majority's position. But Brandeis, concurring in *Whitney*, insisted that courts and juries must be free to decide whether, under the circumstances of each case, "the evil apprehended is [relatively serious and its incidence] so imminent that it may befall before there is opportunity for full discussion. . . . Only an emergency can justify repression."

From the end of the Red Scare to the outbreak of WORLD WAR II, federal action against alleged subversives was limited to deportation of alien communists. State

prosecutions under criminal anarchy laws were infrequent after the middle 1920s. The Sedition Act of 1918 was repealed in 1921 and has never been revived.

The Smith Act of 1940 was modeled on the New York Criminal Anarchy law. During World War II, twenty-eight pro-Nazi individuals were prosecuted under it for conspiring to cause insubordination in the armed forces, but the judge died and the prosecution was dropped. Eighteen members of the Trotskyist Socialist Workers party, which opposed the war, were convicted of conspiracy to cause insubordination in the armed forces and to advocate violent overthrow of the government.

On the whole, the country supported World War II. After the Nazi invasion of the Soviet Union, in June 1941, communists became the staunchest supporters of the war. But as soon as the war was won, the activities of the international communist movement resumed. In 1949 eleven leaders of the Communist party were convicted under the Smith Act for conspiring to advocate violent overthrow of the United States government and establishment of a dictatorship of the proletariat, and to organize the Communist party to advocate these goals. The Supreme Court affirmed the convictions, 6–2, in DENNIS V. UNITED STATES (1951).

In 1948 the Soviet Union had blockaded Berlin and engineered the communist coup that overthrew the parliamentary regime in Czechoslovakia. By the time the Supreme Court decided *Dennis*, several Soviet spy rings in the West had been exposed, the communists had taken control in China, and Americans were dying in the KOREAN WAR. The domestic and foreign policies of the American Communist party were consistent with Soviet policies and directives. In light of these events, a plurality of four Justices, speaking through Chief Justice FRED M. VINSON, reformulated the clear and present danger test into a BALANCING TEST that weighed the seriousness of the danger, discounted by its improbability, against the degree of invasion of freedom of speech.

Justice FELIX FRANKFURTER concurred, deferring to Congress's judgment regarding the extent of the danger posed by the Communist party and the world communist movement. With the experience of the Nuremberg war crimes trials still fresh in his memory, Justice ROBERT H. JACKSON also concurred, joining Frankfurter in rejecting the appropriateness of the clear and present danger test to the communist conspiracy.

Though not purporting to overrule *Dennis*, the Supreme Court, in YATES V. UNITED STATES (1957), reversed convictions of the officers of the Communist party in California. Justice JOHN MARSHALL HARLAN's plurality opinion read the Smith Act as requiring proof that the defendants had advocated "unlawful action" and not merely "abstract doctrine" that the United States government should be overthrown. *Yates* did not represent a return to the Holmes-Brandeis version of the clear and present danger test. It emphasized the content of the advocacy, not its consequences. On this view, advocacy of unlawful action was punishable, irrespective of the immediacy of the danger.

After *Yates* was decided, the government concluded that it could not satisfy the requirements of proof demanded by the Supreme Court and abandoned all prosecutions under the Smith Act. Altogether twenty-nine communists were convicted under that act, including the leaders involved in *Dennis* and the only person convicted under the provision proscribing membership in the Communist party. His conviction was upheld in SCALES V. UNITED STATES (1961) because he was an "active member" who knew of the Party's unlawful goals and had a "specific intent" to achieve them.

In 1950, shortly after the outbreak of the Korean War, Congress enacted the SUBVERSIVE ACTIVITIES CONTROL ACT, which required communist organizations to register with the ATTORNEY GENERAL. When the Communist party failed to register, the attorney general asked the Subversive Activities Control Board to order it to register and list its members. In COMMUNIST PARTY V. SUBVERSIVE ACTIVITIES CONTROL BOARD (1961) the Court upheld the board's finding that the party was a communist-action organization and its order requiring the party to register. Only Justice HUGO L. BLACK dissented from the majority view that the First Amendment did not prohibit Congress from removing the party's "mask of anonymity."

The Supreme Court in 1961 did not pass upon the contention that compulsory registration would violate the RIGHT AGAINST SELF-INCRIMINATION afforded by the Fifth Amendment because it would subject party members to prosecution under the Smith Act and the 1954 COMMUNIST CONTROL ACT. This contention was eventually sustained in ALBERTSON V. SUBVERSIVE ACTIVITIES CONTROL BOARD (1965). As a result, neither the Communist party nor any of its members ever registered under the act, and no organization ever registered as a communist front. In 1968, Congress removed the registration obligation. Instead, the Subversive Activities Control Board was authorized to keep records, open to public inspection, of the names and addresses of communist organizations and their members. But in 1969 and 1970 the courts held that mere membership in the party was protected by the First Amendment, and the board was disbanded in 1973.

The Communist Control Act of 1954 purported to deprive the Communist party of the "rights, privileges, and immunities attendant upon legal bodies." It was not clear whether Congress intended this provision to dissolve the

party as a legal organization or only to bar it from the ballot and benefits such as mailing privileges. Though the Supreme Court has not passed upon its constitutionality, the act has become a dead letter.

Although the Espionage Act and the Smith Act remained in force during the VIETNAM WAR, no prosecutions were brought under either measure. In *Bond v. Floyd* (1966) the Supreme Court assumed that opposition to the war and the draft was protected by the First Amendment.

In 1967 a Ku Klux Klan leader was convicted of violating the Ohio CRIMINAL SYNDICALISM LAW by making a speech at a Klan rally to which only television newsmen had been invited. The speech was derogatory of blacks and Jews and proclaimed that if the white race continued to be threatened, "it's possible that there might have to be some revengence [sic] taken." In a PER CURIAM opinion in BRANDENBURG V. OHIO (1969) the Supreme Court reversed the conviction and held the Ohio statute unconstitutional. In so doing, it overruled *Whitney v. California* and again reformulated the clear and present danger doctrine: "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing such action." Although the Court purported to follow *Dennis*, commentators generally conclude that *Brandenburg* overruled *Dennis*. In *Communist Party of Indiana v. Whitcomb* (1974) the Supreme Court held that it was unconstitutional for Indiana to refuse a place on the ballot to the Communist party of Indiana because its officers had refused to submit an oath that the party "does not advocate the overthrow of local, state or national government by force or violence."

The *Brandenburg* formula, the most speech-protective standard yet evolved by the Supreme Court, has been criticized from opposing sides. Concurring in *Brandenburg*, Justices WILLIAM O. DOUGLAS and Black would have abandoned the clear and present danger test in favor of a distinction between ideas and overt acts. Some critics reject even this concession on the ground that an incitement-of-overt-acts test can be manipulated by the courts to cut off speech just when it comes close to being effective.

Others argue that advocacy of the forcible overthrow of the government, or of any unlawful act, is not protected by the First Amendment. Such advocacy is not political speech because it is a call to revoke the results that political speech has produced; violent overthrow destroys the premises of our system. An organization that seeks power through illegal means refuses to abide by the legitimate conditions of party competition in a democracy.

Furthermore, in suppressing totalitarian movements, even if they purport to reject illegal means, a democratic society is not acting to protect the status quo but the very same interest which freedom of speech itself seeks to secure—the possibility of peaceful progress under freedom. In this view, the *Brandenburg* formula would deny our democracy the constitutional right to act until it might be too late to prevent a totalitarian victory.

Although one may disagree with the view that the problem of a totalitarian party's competing for political power in a democracy is solely one of "freedom of expression," the reasons for toleration—to keep even the freedom of expression open to challenge lest it become a "dead dogma," and to allow extremist groups to advocate revolution because they may represent real grievances that deserve to be heard—must be seriously considered by legislators in determining whether suppression is a wise policy. But if wisdom may sometimes dictate toleration, that conclusion does not imply that the Constitution gives the enemies of freedom the right to organize to crush it.

CARL A. AUERBACH
(1986)

Bibliography

GUNTHER, GERALD 1975 Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History. *Stanford Law Review* 27:719–773.

LEVY, LEONARD W. 1985 *Emergence of a Free Press*. New York: Oxford University Press.

LINDE, HANS A. 1970 "Clear and Present Danger" Reexamined: Dissonants in the Brandenburg Concerto. *Stanford Law Review* 22:1163–1186.

NATHANSON, NATANIEL L. 1950 The Communist Trial and the Clear-and-Present-Danger Test. *Harvard Law Review* 63: 1167–1175.

## SUFFRAGE

See: Alien Suffrage; Woman Suffrage; Woman Suffrage Movement

## *SUGARMAN v. DOUGALL*
413 U.S. 634 (1973)

## *GRIFFITHS, IN RE*
413 U.S. 717 (1973)

In *Sugarman*, the Supreme Court held, 8–1, that New York's law making ALIENS ineligible for civil service employment was unconstitutional. In *Griffiths*, the Court held, 7–2, that Connecticut could not constitutionally bar resident aliens from the practice of law. Both decisions rested on EQUAL PROTECTION grounds. Justice LEWIS F. POWELL, writing for the Court in *Griffiths*, concluded that the state had not shown that excluding aliens from law prac-

tice was necessary to serve an interest sufficiently substantial to justify the rule. In *Sugarman*, Justice HARRY A. BLACKMUN wrote for the Court, repeating what he had said in GRAHAM V. RICHARDSON (1971), that discrimination against aliens must survive STRICT SCRUTINY by the courts. Here the bar to aliens was not necessary to achieve any substantial interest. Justice Blackmun added that some discrimination against aliens would be justified in the name of "political community": the right to vote or to hold high public office, for example, might be limited to citizens. These OBITER DICTA assumed importance in the later cases of FOLEY V. CONNELIE (1978) and AMBACH V. NORWICK (1979).

KENNETH L. KARST
(1986)

## SUGAR TRUST CASE

See: *Knight Company, E. C., United States v.*

## *SULLIVAN, UNITED STATES v.*
332 U.S. 689 (1948)

In no other case has the Supreme Court more sweepingly construed the COMMERCE CLAUSE. To protect consumers the Federal Food, Drug, and Cosmetic Act of 1938, passed under the NATIONAL POLICE POWER, prohibited the misbranding of drugs "held for sale after interstate shipment." Nine months after a bottle of sulfathiazole tablets had been shipped from Chicago to Atlanta, a retail druggist in Columbus, Georgia, who had purchased the bottle, properly labeled with a warning that the drug could be toxic, sold twelve tablets in a box without the mandatory warning. The local druggist thereby committed a federal crime. A federal court of appeals reversed his conviction on the ground that the words "held for sale after interstate shipment" extended only to the first intrastate sale and could not apply to all subsequent local sales after any lapse of time.

The Supreme Court, in an opinion by Justice HUGO L. BLACK for a bare majority, reversed and sustained the constitutionality of the statute. Black declared that it prohibited misbranding no matter when the drug was sold and without regard to how many local sales intervened; the statute remained in force "to the moment of . . . delivery to the ultimate consumer" in an intrastate transaction. Sullivan, the druggist, had contended that the statute so construed exceeded the commerce power and invaded powers reserved to the states under the TENTH AMENDMENT. Black replied merely that a 1913 precedent, *McDermott v. Wisconsin*, which had sustained the misbranding provision of the PURE FOOD AND DRUG ACT of 1906, controlled the case. He thought that the "variants" between the two cases were "not sufficient" to distinguish *McDermott*, although he conceded that the retailer in *McDermott* had been the direct consignee of an interstate shipment. That fact should have made the precedent inapplicable. Black did not take notice that in *McDermott* the Court had reversed the state conviction of a grocer who misbranded under state law but complied with federal law. Black did not consider that under the ORIGINAL PACKAGE DOCTRINE the druggist sold local merchandise. Justice WILEY RUTLEGE concurred without reaching the constitutional issue and like the three dissenters wrote only on the construction of the statute.

After *Sullivan* the commerce power seemed to have no statable limits, though the rationale of the decision is unclear. The transaction involved in *Sullivan* was neither INTRASTATE COMMERCE that affected INTERSTATE COMMERCE, nor the PRODUCTION of goods for interstate commerce. The reach of the national police power, which began with CHAMPION V. AMES (1903), seems to have no end.

LEONARD W. LEVY
(1986)

## SUMNER, CHARLES
(1811–1874)

In 1833 Charles Sumner, a protege of JOSEPH STORY, graduated from Harvard Law School. Until 1851 he practiced law, taught at Harvard Law School, annotated Vesey's Chancery Reports, and became a well-known lecturer advocating, among other reforms, world peace and abolition of SLAVERY. In 1848 Sumner was an unsuccessful Free Soil candidate for Congress, campaigning against the "lords of the lash and the lords of the loom." In ROBERTS V. BOSTON (1849) Sumner unsuccessfully challenged government compulsion of SEGREGATION in Boston schools, arguing that racially separate schools denied equality. In upholding segregation, Massachusetts Chief Justice LEMUEL SHAW enunciated, for the first time, the doctrine of SEPARATE BUT EQUAL.

In 1851 Sumner won the SENATE seat once held by DANIEL WEBSTER. In his first speech, "Freedom National, Slavery Sectional," Sumner attacked the fugitive slave law and congressional support of slavery for nearly four hours. In an 1856 speech, "The Crime Against Kansas," Sumner vilified senators who had supported the KANSAS-NEBRASKA ACT. He described STEPHEN A. DOUGLAS as "the squire of slavery, its very Sancho Panza, ready to do all its humiliating offices." South Carolina's Andrew Butler was, in Sumner's view, the Don Quixote of slavery who had "chosen a mistress to whom he has made his vows, and who, though ugly

to others . . . is chaste in his sight; I mean the harlot slavery." Two days later Congressman Preston Brooks, a relative of Butler, repaid Sumner for these remarks by beating him insensible with a cane. Many Northerners viewed this incident as a symbol of a violent slavocracy which threatened the Constitution and the nation. After a three-and-a-half-year convalescence Sumner returned to the Senate in 1860, renewing his crusade against bondage with a four-hour oration, "The Barbarism of Slavery." This speech became a Republican campaign document in 1860.

From the beginning of the CIVIL WAR Sumner urged the abolition of slavery. He argued that secession was STATE SUICIDE, that the Confederate States had reverted to territorial status, and that, despite the decision in DRED SCOTT V. SANDFORD, Congress had the power to end slavery in these TERRITORIES. On a less theoretical level Sumner successfully sponsored legislation to repeal the fugitive slave laws and to allow black witnesses to testify in federal courts. Sumner was unsuccessful, however, in his attempts to gain congressional support for the integration of Washington's street railroads and other facilities. As chairman of the Senate Foreign Relations Committee, Sumner was constantly at odds with Secretary of State WILLIAM SEWARD, and often served as President ABRAHAM LINCOLN's unofficial adviser on foreign policy. Sumner exploited that position to gain diplomatic recognition for Haiti and Liberia and to secure a passport for a black constituent. As chairman of the Select Committee on Slavery and Freedmen, Sumner laid the groundwork for the FREEDMEN'S BUREAU.

During Reconstruction, Sumner was the Senate's most vociferous advocate of black rights and an early opponent of ANDREW JOHNSON. Sumner's increasingly moralistic and uncompromising posture undermined his legislative effectiveness during Reconstruction. Sumner initially opposed the THIRTEENTH and FOURTEENTH AMENDMENTS because they failed to give blacks enough rights. He gave little support to the FIFTEENTH AMENDMENT because he believed the Constitution embodied the highest moral principles and thus enabled Congress under existing constitutional powers to enfranchise blacks. After 1870 Sumner devoted himself to a comprehensive CIVIL RIGHTS bill, which would give the freedmen complete equality. Its passage, in a somewhat truncated form, as the CIVIL RIGHTS ACT OF 1875 was a posthumous tribute to Sumner's integrity and his passionate devotion to racial equality.

PAUL FINKELMAN
(1986)

Bibliography

DONALD, DAVID HERBERT 1960 *Charles Sumner and the Coming of the Civil War.* New York: Knopf.

——— 1970 *Charles Sumner and the Rights of Man.* New York: Knopf.

## SUNDAY CLOSING LAWS

The first compulsory Sunday observance law in what is now the United States was promulgated in Virginia in 1610. It made absence from church services punishable by death for the third offense. Although there is no record of any person suffering the death penalty, lesser penalties, including whipping, were in effect in all the colonies and were continued after independence. Implicit constitutional recognition of Sunday observance is found in Article I, section 7, which excepts Sundays from the ten days wherein the President is required to exercise his veto of bills adopted by Congress.

Before the Supreme Court ruled that the FIRST AMENDMENT was applicable to the states, it held, in *Hennington v. Georgia* (1896), that Georgia had not unconstitutionally burdened INTERSTATE COMMERCE by regulating the movement of freight trains on Sundays. Four years later, it held, in *Petit v. Minnesota* (1900), that the state had not denied DUE PROCESS in refusing to classify barbering as an act of necessity or charity that could legally be performed on Sundays.

In 1961, after the Court had ruled the First Amendment applicable to the states, it considered the constitutionality of three state Sunday closing laws under that Amendment in four cases, known collectively as the Sunday Closing Law Cases. Two, *McGowan v. Maryland* and *Two Guys from Harrison-Allentown, Inc. v. McGinley,* concerned owners of highway discount stores that were open for business seven days a week. The other two, *Gallagher v. Crown Kosher Super Market* and *Braunfeld v. Brown,* involved stores owned by Orthodox Jews, who, by reason of religious convictions, abstained from all business activities on Saturdays.

In these cases the statutes were challenged on three principal grounds: that the laws violated the ban on the ESTABLISHMENT OF RELIGION; that the statutes' crazy-quilt pattern of exemptions was arbitrary, constituting a denial of due process and the EQUAL PROTECTION OF THE LAWS (for example, in one of the states it was legal to sell fish and food stuffs wholesale, but not at retail; in another, merchandise customarily sold at beaches and amusement parks might be sold there, but not elsewhere); that, at least in respect to Jews, Seventh-Day Adventists, and others whose religions required rest on Saturday, the laws violated the constitutional protection of RELIGIOUS LIBERTY by making it economically difficult if not impossible for them to observe their own Sabbath when their competitors operated six days each week.

In all four cases the Court upheld the constitutionality of the challenged laws, with all the prevailing opinions written by Chief Justice EARL WARREN. He recognized that the laws challenged in these cases had been enacted in

colonial times with the purpose of ensuring observance of the majoritarian Christian Sabbath as a religious obligation. However, he said, the religious origin of these statutes did not require their invalidation if their present purpose was secular.

Warren said that the modern purpose of the challenged statutes was to set aside a day for "rest, repose, relaxation, tranquillity"; the purpose was therefore secular rather than religious. The Maryland statutes, for example, permitted such Sunday activities as the operation of bathing beaches, amusement parks, and even pinball and slot machines, as well as the sale of alcoholic beverages and the performance of professional sports. That such exemptions are directly contrary to the religiosity of the Sabbath indicated clearly that the Sunday laws' present purpose was not religious.

Viewed as welfare legislation, the Sunday laws presented little constitutional difficulty. The Chief Justice noted in *McGowan* that numerous federal and state laws affecting public health, safety, conditions of labor, weekend diversion at parks and beaches, and cultural activities of various kinds, had long been upheld. To forbid a state from prescribing Sunday as a day of rest solely because centuries ago such laws had their genesis in religion would be a CONSTITUTIONAL INTERPRETATION based on hostility to the public welfare rather than the SEPARATION OF CHURCH AND STATE.

The Court had more difficulty in sustaining laws applied against persons observing a day other than Sunday as their divinely ordained day of rest. Six Justices agreed that state legislatures, if they so elected, could constitutionally exempt Sabbatarians from complying with Sunday law restrictions, but the free exercise clause did not mandate that they do so. However, a majority of the Court could not agree upon one opinion to that effect. The Chief Justice, speaking for a plurality of four, noted that while the clause secured freedom to hold any belief, it did not forbid regulation of secular practices merely because some persons might suffer economically if they obeyed the dictates of their religion. Income tax laws, for example, did not violate the clause even though they limited the amount of deductions for religious contributions. If a state regulated conduct by a general law, the purpose and effect of which were to advance secular goals, its action was valid despite its indirect burden on the exercise of religion unless the purpose could practicably be otherwise accomplished. A sabbatarian exemption would be hard to enforce, and would interfere with the goal of providing a uniform day of rest that as far as possible eliminated the atmosphere of commercial activity. The laws thus did not violate the free exercise clause.

In THORNTON V. CALDOR, INC. (1985) the Court went even further. It ruled unconstitutional, under the effect aspect of the purpose-effect-entanglement test of constitutionality under the establishment clause, a Connecticut law that accorded employees an absolute right not to work on their chosen Sabbath.

LEO PFEFFER
(1986)

Bibliography

PFEFFER, LEO (1953) 1967 *Church, State and Freedom.* Boston: Beacon Press.

STOKES, ANSON PHELPS 1950 *Church and State in the United States.* New York: Harper & Brothers.

## SUPERMAJORITY RULES

A supermajority rule is a rule that requires a legislative body to pass a class of legislative enactments, such as treaties or bills of certain types, by more than a bare majority. Supermajority rules are created either by the legislature or by the Constitution. An example of a legislative supermajority rule is the requirement first adopted by the U.S. HOUSE OF REPRESENTATIVES in the 104th Congress that three-fifths of those voting are needed to pass an increase in income tax rates. Examples of constitutional supermajority rules include the clause requiring that two-thirds of the U.S. SENATE approve treaties and the provision allowing Congress to propose constitutional amendments only if two-thirds of the House and the Senate approve.

Supermajority rules have a number of justifications. Some matters such as constitutional amendments are thought to be so important that they require a greater-than-majority consensus. For other matters, supermajority rules are justified as necessary to offset what is thought to be the disproportionate power of special interests in a legislature governed by majority rule. For example, proposals to require supermajorities for tax increases has been based on the view that the power of special interests would otherwise lead to higher taxes than the majority of citizens actually prefers.

Controversy over federal legislative supermajority rules centers on whether Congress has the constitutional authority to enact them. Defenders of the constitutionality of such rules have argued (1) that the clause authorizing "each House [to] determine the Rules of its Proceedings" allows either house to pass whatever rules it chooses unless they violate a constitutional provision and (2) that no constitutional provision precludes supermajority rules. Those who attack the constitutionality of legislative supermajority rules argue that the constitutional clause allowing Congress to pass bills should be read to mean "pass by a majority." Defenders counter that neither constitu-

tional history nor structure support this reading. One proposition accepted by both sides of the debate is that neither house may prevent a majority from repealing supermajority rules. This proposition, however, raises questions about the utility of such rules. If simple legislative majorities can undo legislative supermajority rules, they may not greatly restrain such majorities.

Constitutional supermajority rules, however, are more entrenched political norms and cannot be so easily undone. Constitutional supermajority rules represent a compromise between the two other principal forms of constitutional governance: rule by legislative majority and absolute constitutional limitations, such as those contained in the BILL OF RIGHTS. Like rule by legislative majority, supermajority rules allow Congress to make the decision whether to pass a bill. Like absolute constitutional limitations, however, supermajority rules restrain a simple majority from passing certain types of laws.

Proponents of constitutional supermajority rules argue that, as a third distinct form of constitutional governance, such rules will under certain circumstances be preferable to both legislative majority rule and absolute limitations. Supermajority rules will be superior to legislative majority rule when special interests (or other defects) undermine the majoritarian process. In these circumstances, supermajority rules may act as a constitutional filter, blocking more undesirable LEGISLATION than desirable legislation. Supermajority rules will function better than absolute limitations in areas where there is no determinate principle for judges to enforce or where it is inappropriate to give judges the authority that absolute limitations generally provide.

Opponents of supermajority rules suggest that they are inconsistent with democracy because they detract from majority rule and the principle that citizens should have equal influence on legislation. Proponents of constitutional supermajority rules respond that all constitutional limitations constrain simple democracy, and say that the question is whether these limitations will work well. Moreover, if supermajority rules are employed to limit special interests, proponents argue that such rules will in fact advance the democratic goal of equal influence.

MICHAEL B. RAPPAPORT
JOHN O. MCGINNIS
(2000)

Bibliography

AMAR, AKHIL REED et al. 1995 An Open Letter to Congressman Gingrich. *Yale Law Journal* 104:1539–1544.

MCGINNIS, JOHN O. and RAPPAPORT, MICHAEL B. 1995 The Constitutionality of Supermajority Rules: A Defense. *Yale Law Journal* 105:470–483.

——— 1997 The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules. *Duke Law Journal* 47:327–349.

——— 1999 Supermajority Rules as a Constitutional Solution. *William and Mary Law Review* 40:365–470.

RUBENFELD, JED 1996 Rights of Passage: Majority Rule in Congress. *Duke Law Journal* 46:73–90.

## SUPREMACY CLAUSE

The supremacy clause of Article VI, clause 2, declares: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the Land." This principle of national supremacy was a radical departure from the constitutional order that prevailed under the ARTICLES OF CONFEDERATION. Whereas the Articles created a short-lived confederation of states—according to its terms a mere "league of friendship" founded on the good faith of sovereign states—the Constitution established a federal union designed to last in perpetuity. The distinguishing feature of the "more perfect union" created by the Constitution was a strong national government capable of dealing with the problems and complexities of a growing nation and strong state governments acting within their sphere of authority. The Constitution does not establish the supremacy of the national government in all things. National supremacy is limited to laws made Pursuant to the Constitution. What is not granted to the national government under its ENUMERATED POWERS is, as a general rule, reserved to the people or to the states under the TENTH AMENDMENT.

The supremacy clause may truly be regarded as the linchpin of American FEDERALISM. It holds the republic together by providing a principle for the resolution of conflicts between the states and the nation. Valid national law is clearly paramount in the face of conflicting state law. But whether a state law conflicts with federal law or a federal constitutional provision is not always clear. When doubts exist over the compatibility of federal and state law, and a real controversy arises from these doubts, the judiciary is usually called upon to work out the implications of the supremacy clause through interpretation. The outcome of such cases often depends on inferences drawn by the courts from the structure of the federal system and the values it represents.

The problems of interpretation generated by the supremacy clause have taken two forms epitomized by the celebrated cases of MCCULLOCH V. MARYLAND (1819) and GIBBONS V. OGDEN (1824). In the first Maryland taxed a national bank doing business within its borders; in the sec-

ond New York granted a monopoly over steamboat navigation on its internal waterways. The supremacy clause operated to invalidate both measures. *McCulloch* stands for the principle that even a power reserved to the states—here the ordinary and indispensable power of taxation—may not be exercised in such a way as to impede or unduly burden a federal agency or activity; *Gibbons* stands for the principle that the state's regulation of a subject matter within its territory, and normally under its control, must give way before a conflicting, and valid, federal statute. "It is of the very essence of [national] supremacy," wrote Chief Justice JOHN MARSHALL, "to remove all obstacles to its action within its own sphere, and to so modify every power vested in subordinate governments as to exempt its own operation from . . . their influence." In both cases, Marshall underscored the plenary nature of the enumerated powers of Congress; they admit of no limitations save those prescribed in the Constitution. When combined with *McCulloch*'s doctrine of IMPLIED POWERS, fortified by the NECESSARY AND PROPER CLAUSE, the reach of federal power cuts a potentially deep furrow into the field of state SOVEREIGNTY.

This expansive view of federal power was for almost a century strongly contested by the doctrine of DUAL FEDERALISM. It held that nation and states were essentially equal in their respective spheres of influence. The doctrine did not hold that the states could decide for themselves the extent of their sovereign powers. Once again this was a judicial task, for dual federalism was an axiom of CONSTITUTIONAL INTERPRETATION. Beginning roughly in 1835, shortly after ROGER B. TANEY replaced Marshall as Chief Justice, the Supreme Court deployed and developed the concept of STATE POLICE POWER—broadly characterized as the power of a state to provide for the general welfare of its people—to limit the reach of national law. This movement attained its apogee in the first third of the twentieth century when the Supreme Court used the Tenth Amendment to invalidate numerous federal laws, all of them regulating various aspects of the economy. Most of these decisions supported the ideology of individualism and capitalism. The national statutes struck down by the Court were deemed to interfere with state police power yet arguably enacted pursuant to the delegated powers of Congress and clearly not expressly forbidden by the Constitution.

The year 1937 marks the collapse of the doctrine that state sovereignty constitutes a limitation on the exercise of power delegated by the Constitution to Congress. Since then the Supreme Court has returned and held steadfastly to the spirit of *McCulloch* and *Gibbons*. Even activities sponsored or operated by the state are subject to federal regulation when imposed pursuant to a delegated power. NATIONAL LEAGUE OF CITIES V. USERY (1976) is the only exception to this principle: in striking down a federal wage and hour provision as applied to state and local public employees, a closely divided Supreme Court ruled that such power—in this instance the federal commerce power—may not be exercised to interfere with "functions essential to the separate and independent existence" of the "states as states." The ghost of dual federalism lurks in *Usery*. In 1985, however, a closely divided Court overruled *Usery* in GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY.

In interpreting the supremacy clause today, the Supreme Court has given up the search for bright lines separating federal and state authority. The two levels of government are no longer perceived as antagonistic rivals, whatever the tensions between them. The supremacy clause once operated to immunize persons closely related to the federal government from most forms of state taxation. The pre-1937 doctrine of federal tax immunity, based on the generalized notion of federal supremacy rooted in *McCulloch*, was construed to invalidate such levies as state or local taxes on the income of federal employees, on interest income from federal bonds, on income derived from property leased by the federal government, and on sales to the United States. Since 1937, however, the Supreme Court with the help of Congress has wiped out most of this RECIPROCAL TAX IMMUNITY. The prevailing doctrine today, particularly after *United States v. New Mexico* (1982), is that a nondiscriminatory state tax even upon private contractors with close and intricate relationships with the federal government will not violate the supremacy clause unless the tax is imposed *directly* upon the United States.

In the field of regulation, too, sharp lines between federal and state authority are often difficult to find. Modern government is complex, involving the entanglement of federal and state policy in fields once regarded as exclusively state concerns. Education, conservation, aid to the poor and the handicapped, and environmental protection are prominent examples of such fields. The relationship between levels of government in all these areas today is one of cooperation and reciprocity. By means of FEDERAL GRANTS-IN-AID and other funding programs the national government, pursuant to its power of taxing and spending for the GENERAL WELFARE, has actually encouraged the states to pass laws and adopt policies in response to local needs. This new context of COOPERATIVE FEDERALISM does not mean, however, that the supremacy clause has lost its bite. Indeed, it has operated to establish the primacy of the national government even in some of the aforementioned fields. An example is *Blum v. Bacon* (1982), where the Supreme Court invalidated a New York law excluding recipients of a federal program aiding poor families with dependent children from receiving aid under the state's federally funded emergency welfare program. (*Blum* in-

volved a state statutory policy that conflicted with a federal administrative regulation.)

As the preceding suggests, contemporary supremacy clause analysis is largely a matter of statutory interpretation. The supremacy clause has not been interpreted to prevent federal and state governments from regulating the same subject, partly out of the judiciary's recognition of the reality of cooperative federalism. The nature of some subjects (e.g., IMMIGRATION and NATURALIZATION, bankruptcy, PATENTS, and some articles of commerce) may require national uniform legislation. But most problems of American national life are valid topics of both national and state legislation (e.g., air and water pollution, motor carrier transportation, labor relations, consumer protection, and CIVIL RIGHTS). States and nation may legislate on these topics for similar or different reasons. The key to the validity of such concurrent or parallel legislation is whether both federal and state regulations can be enforced without impairing federal superintendence of the field. Even apparently conflicting state legislation may survive supremacy clause analysis if the state law deals with a field traditionally occupied by the state and the state's interest is substantial enough to offset any presumption that Congress may have intended to occupy the field all by itself. A principle of comity has thus replaced the earlier antagonism between nation and states characteristic of dual federalism. Today, as a general rule, unless Congress statutorily declares its intent to occupy a field, federal regulation preempts state law only where the latter seriously impedes the former.

*Jones v. Roth Packing Company* (1977) is a leading example of a case in which federal policy displaced state law notwithstanding the absence of explicit preemptive language in the congressional statute. Here the federal Fair Packaging and Labeling Act, enacted under the COMMERCE CLAUSE, was construed to conflict with a state consumer protection law dealing with the weight of certain goods packaged for sale. The Supreme Court read into the federal statute a congressional intent to supersede state law. Supersession was inferred from the supremacy clause because the enforcement of the state law was an obstacle to the full accomplishment and execution of the congressional purpose. In other cases federal PREEMPTION has been inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it" or because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." The supremacy clause thus remains a vital operative principle of American constitutional law even though the Supreme Court tends to presume the validity of concurrent state legislation, barring proof of its interference with federal policy.

DONALD P. KOMMERS
(1986)

Bibliography

CORWIN, EDWIN S. 1913 *National Supremacy: Treaty Power versus State Power.* New York: Holt.

SCHMIDHAUSER, JOHN R. 1958 *The Supreme Court as Final Arbiter of Federal-State Relations.* Chapel Hill: University of North Carolina Press.

## SUPREME COURT
### (History)

The only court whose existence is mandated by the Constitution is the Supreme Court. Article III states: "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." Besides its existence, a few attributes are constitutionally entrenched by Article III. The tenure of the judges is to be "during GOOD BEHAVIOR," and their compensation "shall not be diminished during their continuance in office." These provisions, modeled on English law and made applicable to all federal judges, were obviously intended to assure the independence of a judiciary appointed, pursuant to Article II, by the President with the ADVICE AND CONSENT of the SENATE.

Other features having a bearing on the character and independence of the Court were not addressed, presumably to be left at large or determined from time to time by Congress. Qualifications for membership on the Court were not specified; nor were the size of the Court, the period of its TERMS, or the level of the judges' compensation. The Court was to have both ORIGINAL JURISDICTION and APPELLATE JURISDICTION, but the latter was subject to "such exceptions, and under such regulations, as the Congress shall make." Nothing was said concerning the relation of the Supreme Court to the courts of the STATES.

Thus from the outset the Court was only partially sheltered from the politics of republican government. The status of the Court was one of those creative ambiguities that have marked the Constitution as no less an organism than a mechanism, Darwinian as well as Newtonian. The position of the Court may have been in the mind of an eminent modern foreign-born mathematician who, contemplating American CITIZENSHIP, regretted that he could not swear allegiance to the Constitution because "it is full of inconsistencies." In a self-governing nation, to be sure, the Court is detached but not disengaged, distant but not

remote. Therein lay its potential either for popular neglect and scorn or for power and prestige.

The need for a federal judiciary, and so for an ultimate tribunal, was felt by the Framers as part of the transition from a confederation to a federal union. The ARTICLES OF CONFEDERATION supplied no such institution, except a supreme tribunal for prize and admiralty cases. A system of federal courts, parallel to those of the states, was one of the innovative conceptions of 1787. Their function was to serve as impartial tribunals, free of local bias, in suits between states, or controversies involving citizens of different states or a foreign country; to establish a uniform interpretation of federal laws; and to maintain the supremacy of federal law in cases where a state law conflicted with the Constitution, federal statutes, or treaties of the United States. In sum, the JURISDICTION OF THE FEDERAL COURTS could rest on the nature of the parties or of the question presented. Only in cases where a state, or a foreign country or its diplomatic representative, was a party was the Supreme Court given original (nonappellate) jurisdiction.

These skeletal provisions of Article III were fleshed out by Congress in the JUDICIARY ACT OF 1789. That act set the number of Supreme Court Justices at five associate Justices and one CHIEF JUSTICE, with salaries of $3,500 and $4,000, respectively. (The monetary differential remained at $500 until 1969, when it was increased to $2,500.) Three provisions of the act led to developments that proved to be of seminal importance for the prestige and power of the Supreme Court: a requirement that the Justices serve on regional CIRCUIT COURTS ("circuit riding"); a provision in section 13 that seemed to grant original jurisdiction to the Court to issue WRITS OF MANDAMUS; and a grant of power in section 25 to review the decisions of state supreme courts in cases turning on the Constitution, laws, or treaties of the United States. Each of these merits attention.

The circuit duties meant sitting with a federal district judge to form a circuit court, which heard appeals from district courts and had original jurisdiction in diversity of citizenship cases. In the early years circuit riding consumed the greater part of a Justice's time and surely his energy; travel by carriage or horseback over rough roads and stopovers at uncomfortable inns resulted in a weariness of flesh and spirit, against which the Justices complained bitterly, but which they forbore to resist. Yet these excursions into the local courthouses brought them into touch with lawyers, journalists, and townspeople, and gave a reality to the Supreme Court that its functioning in the capital city could not match. Moreover, the assignment of each Justice to a particular circuit affected significantly the appointments to the Court, for a vacancy on the Court would normally be filled by an appointment from the same circuit, and so at any time the practical range of nominees was limited and the influence of a small group of senators was proportionately great. Not until 1891, with the passage of the CIRCUIT COURTS OF APPEALS ACT, were the Justices fully relieved of circuit-riding duties. Thereafter geography played a decreasing role in appointments. A striking instance was the widely acclaimed appointment by President HERBERT C. HOOVER in 1932 of Judge BENJAMIN N. CARDOZO of New York to succeed Justice OLIVER WENDELL HOLMES of Massachusetts, although two New Yorkers, Chief Justice CHARLES EVANS HUGHES and Justice HARLAN FISKE STONE, were already on the Court. A comparable instance was the appointment by President Reagan in 1981 of Judge SANDRA DAY O'CONNOR of Arizona to succeed Justice POTTER STEWART of Ohio even though another Arizonan, Justice WILLIAM H. REHNQUIST, was already serving.

As circuit riding was a cardinal factor in gaining popular recognition of the Court (at considerable cost to the Justices) and in determining appointments, so did the practice furnish an early opportunity for the Court to judge the validity of an act of Congress. In the waning days of the Federalist administration, Congress passed the JUDICIARY ACT OF 1801, compounded of partisanship and principle, which created new judgeships and abolished circuit riding. When the Jeffersonians took office, however, they countered with the Judiciary Act of 1802, which abolished the judgeships and restored circuit riding. Chief Justice JOHN MARSHALL, sensing a political crisis for the Court, solicited the opinions of his brethren on the question of complying with the law or treating it as beyond the authority of Congress. The Justices had serious doubts about the law's validity, and a strong distaste for the resumption of the burden it imposed, yet a majority counseled compliance, in accord with Marshall's own inclination. But a private litigant, defeated in a circuit court in Virginia at which Marshall himself presided, appealed to the Supreme Court, arguing the unconstitutionality of the 1802 act. The Congress, fearing a judgment voiding the act, had abolished the 1802 term of the Supreme Court. When the case, STUART V. LAIRD, was decided, in February of 1803, the Court, with Marshall not participating, surprised and gratified the Jeffersonians by upholding the act, in a brief opinion which simply declared that acquiescence by the Court in circuit duty for twelve years under the Judiciary Act of 1789 had given a practical construction of the Constitution that would not now be disturbed. That the Court would at least consider the validity of an act of Congress had been resolved just six days earlier in the landmark case of MARBURY V. MADISON (1803).

That case, establishing the power of JUDICAL REVIEW of acts of Congress, marked the second of the three germinal

developments from the Judiciary Act of 1789. Section 13, which gave the Court power to issue mandamus and other writs, might have been read simply as conferring the power where the jurisdiction of the Court rested on one of the grounds specified in Article III. But the Court was not of a mind for so narrow a reading. When William Marbury of Maryland invoked the original jurisdiction of the Court to enforce a right to an office of justice of the peace pursuant to an appointment by President JOHN ADAMS, and sought a mandamus to compel Secretary of State JAMES MADISON to deliver his commission, the Court regarded section 13 as conferring jurisdiction, and as so construed beyond the ambit of original jurisdiction defined in Article III. The suit for mandamus was therefore dismissed, again to the gratification of the Jeffersonians, but in the process the Court had declared the far more significant principle that in the decision of a case where a federal law was arguably incompatible with the Constitution, the Court, in deciding what "the law" was, must, if necessary, vindicate the HIGHER LAW and treat the legislative act as ineffectual.

Despite some provocative language in Marshall's opinion (the executive branch cannot "sport away" the rights of others), the Jeffersonians focused on the immediate result and regarded it as a victory at the hands of a still-Federalist Court. Indeed, judicial review was not then the divisive party issue; the Jeffersonians would have welcomed a Supreme Court decision holding the Sedition Act of 1798 unconstitutional. Whether Marshall's doctrine of judicial review was a usurpation later became a subject of heated debate, scholarly and unscholarly. Although the Constitution contains no specific mention of the power, and although Marshall's opinion, resting on the logic of the decisional process, can be said to beg the question of who is to decide, the debates in the CONSTITUTIONAL CONVENTION do indicate obliquely an acceptance of the power, in explaining the rejection of attempts to involve judges in an extrajudicial power of veto of legislation. But the debates were not cited in *Marbury;* MADISON'S NOTES, the most authoritative source, pursuant to the policy of secrecy, were not published until fifty years after the Convention.

The third of the salient projections from the Judiciary Act of 1789, involving section 25, produced more immediate partisan repercussions. Section 25 empowered the Court to review decisions of state courts that denied rights claimed under the federal Constitution, statutes, or treaties. Again, no constitutional provision explicitly conferred such power on the Supreme Court, although Article VI does declare the supremacy of federal law: "the judges in every state shall be bound thereby." By their silence, the Framers may have sought to avoid confrontations in the ratifying process, as in forbearing to be explicit about a national power to issue paper money or to establish a national bank.

The storm over the Court's power to review state court decisions was precipitated by its decision in MARTIN V. HUNTER'S LESSEE (1816) sustaining the validity of section 25. The case was a contest over title to the extensive Fairfax estate in the northern neck of Virginia, turning on the intricate interrelations of Virginia land law and treaties of the United States with Great Britain concerning ownership of land by British nationals. Holding that the Virginia court had misapplied both Virginia and federal law, the Supreme Court in 1813, through Justice JOSEPH STORY, reversed the state court's judgment and remanded the case to that court. A number of factors weakened the force of the decision. Story's opinion controverted the state court's even on points of the interpretation of state law, although section 25 itself limited review to federal questions. At a time when seven Justices constituted the Court, only four participated in the decision; the vote was 3–1, and the mandate to the Virginia court was unfortunately in the traditional form addressed to an inferior court, "you are hereby commanded, etc." The Virginia court was outraged and refused to obey the mandate. On a new WRIT OF ERROR to the Supreme Court, Story elaborated the justification of Supreme Court review in terms of the need for uniformity and supremacy of national law. The nature of the cause, not the court, was determinative of the Supreme Court's power to review (though critics wondered, no doubt unfairly, if the Supreme Court could then be given authority to review certain decisions of the House of Lords). John Marshall could not have uttered a pronouncement more nationalistic than that of the New England Republican appointed by President JAMES MADISON. (Marshall had excused himself because of his family's ownership of part of the land. Story, appointed in 1811 at the age of thirty-two, one of the most learned and powerful of Justices and a firm ally of Marshall, had been Madison's fourth choice to succeed WILLIAM CUSHING of Massachusetts: LEVI LINCOLN declined the nomination, Alexander Wolcott was rejected by the Senate, and JOHN QUINCY ADAMS also declined. Thus are the inevitabilities of history determined.)

In a sequel to the decision, the Court took the further step of sustaining its power to review even criminal judgments of state courts where a federal question, such as the interpretation of a federal law, was implicated. The opinion by Chief Justice Marshall in COHENS V. VIRGINIA (1821) was the climactic realization of the Court's vision of a uniform federal law and a Constitution that was supreme in reality as well as in principle.

Reaction to the *Cohens* decision by Jeffersonians, particularly in Virginia, was intense. Judge SPENCER ROANE,

who instead of Marshall would probably have become Chief Justice if OLIVER ELLSWORTH had not resigned before Jefferson took office, published a series of bitter letters under pseudonyms, paying his respects to "A most monstrous and unexampled decision. It can only be accounted for from that love of power which all history informs us infects and corrupts all who possess it, and from which even the upright and eminent Judges are not exempt." The Court's "extravagant pretension" reached "the zenith of despotic power." In the following years a series of bills were introduced in Congress to repeal, in whole or in part, the appellate jurisdiction of the Supreme Court. Under these genial auspices was thus established a particularly sensitive and probably the most crucial power of the highest court in our federal union: the review of decisions of state courts in the interest of vindicating rights secured by the Constitution.

Conflicts between the Supreme Court, on the one hand, and the executive or legislative branches, or both, on the other, have occurred continually. The other branches have utilized the full spectrum of measures made available by the constitution. The most drastic of these, IMPEACHMENT, was the first to be tried; indeed it was designed as a trial run by Jefferson to prepare the way for a similar attack on Chief Justice Marshall. The immediate target was Justice SAMUEL CHASE, ardent Federalist, whose partisan outbursts in charges to the grand jury in Maryland furnished the occasion. The attempt misfired, however; Chase was narrowly acquitted in the Senate, owing probably to comparable overreaching by the fiery JOHN RANDOLPH, who managed the case for the Jeffersonians.

A milder form of resistance to the Court was the doctrine of departmental independence, whereby the President was as free to act on his view of constitutional authority as the Court was to act on its own. Despite the prospect of endless oscillation that this theory implied, it was espoused in some form by Jefferson, ANDREW JACKSON, and ABRAHAM LINCOLN. President JACKSON'S VETO OF THE BANK BILL (1832) was based partly on grounds of unconstitutionality, although the earlier law creating the bank had been sustained by the Supreme Court. In his message justifying the veto, Jackson had the advice and aid of his attorney general, ROGER B. TANEY. By an irony of history, when President Lincoln in his first inaugural address dealt with Taney's opinion in DRED SCOTT V. SANDFORD (1857), he adopted something of the Jackson-Taney philosophy, maintaining that although he offered no resistance to the decision as a settlement of the lawsuit he could not regard it as binding on the political branches for the future.

The indeterminate size of the Court became a weapon in the contest between President ANDREW JOHNSON and Congress over RECONSTRUCTION. By successive statutory changes, following the admission of new states and the creation of new circuits, the authorized membership of the Court had been increased to ten. A radical Congress, distrustful of Johnson and wishing to deprive him of the power to make new appointments to the Court, reduced the number of seats prospectively to seven. (Contributing to the move was a plan of Chief Justice SALMON P. CHASE to induce a reluctant Congress to increase the Justices' salaries in return for a decrease in the number to be compensated. That plan failed, but Chase did succeed in having the title of his office changed from Chief Justice of the Supreme Court to Chief Justice of the United States.) The actual number of Justices did not fall below eight, and in 1869 the number was fixed at nine.

More famous is the action of the same Congress in withdrawing the appellate jurisdiction of the Supreme Court in cases under a HABEAS CORPUS act, giving rise to the decision in EX PARTE MCCARDLE in 1869. While the immediate issue in the case was whether a military commission in Mississippi could try a newspaper editor for inflammatory writings urging citizens not to cooperate with the military government, Congress was fearful that a politically minded majority on the Court would hold the entire plan of Reconstruction unconstitutional. The Court, which had already heard argument in the case, bowed to the withdrawal of jurisdiction, but carefully pointed out that another appellate route remained unaffected by the repealing statute. Consequently the value of *McCardle* as a PRECEDENT, which is the centerpiece of constitutional argument on the extent of congressional power to limit the Court's jurisdiction, is at best doubtful.

The post-Reconstruction Court alienated labor and progressives by decisions taking a narrow view of state power to regulate and tax business; the COMMERCE CLAUSE and FREEDOM OF CONTRACT protected by SUBSTANTIVE DUE PROCESS served as shields for industry. The Progressive party platform in 1912, under the aegis of THEODORE ROOSEVELT, advocated the RECALL of judges and judicial decisions by popular vote. Although this thrust was aimed at state courts rather than the Supreme Court, the latter had set a tone for judicial review in a triad of decisions in 1895. UNITED STATES V. E. C. KNIGHT CO. held that a combination of sugar refiners controlling ninety percent of sugar production in the nation was not subject to the SHERMAN ANTITRUST ACT because processing is not commerce. IN RE DEBS held that a labor leader could be imprisoned for violating a federal court's INJUNCTION in a railroad labor strike, without judicial reliance on any statutorily defined offense. POLLOCK V. FARMERS LOAN AND TRUST CO. held the federal income tax law unconstitutional as applied to income from real property, stocks, and bonds, though valid as applied to wages, because an income tax is tantamount to a tax on

its source, and where the source is property in some form the tax is a DIRECT TAX which under the constitution is forbidden to Congress unless apportioned according to population.

The most serious conflict with the Court, certainly since Marshall's time, culminated in President FRANKLIN D. ROOSEVELT's Court reorganization plan in early 1937. The Court had held unconstitutional a series of major NEW DEAL measures designed for economic recovery and reform: the NATIONAL INDUSTRIAL RECOVERY ACT; AGRICULTURAL ADJUSTMENT ACT; Railway Pension Act; Farm Mortgage Act; Guffey-Snyder Bituminous Coal Act; Municipal Bankruptcy Act; and a state minimum wage law for women. Still to be decided was the validity of the WAGNER NATIONAL LABOR RELATIONS ACT, the SOCIAL SECURITY ACT, the PUBLIC UTILITY HOLDING COMPANY ACT, and the TENNESSEE VALLEY AUTHORITY ACT in its full scope. The administration was persuaded that the barrier did not inhere in the Constitution but was the handiwork of Justices who were out of sympathy both with the New Deal and with the best traditions of constitutional decision. Apparently accepting the validity of this analysis, Chief Justice Hughes, appointed by President Hoover, though he greatly disliked 5–4 decisions, nevertheless joined Justices LOUIS D. BRANDEIS, Stone, and Cardozo as dissenters in the last five of the cases listed above as holding measures invalid. During his first term President Roosevelt had no opportunity to make an appointment to the Court.

The reorganization plan, which was formulated by Attorney General HOMER S. CUMMINGS, called for the appointment of an additional member of the Court for each Justice who did not retire at the age of seventy, up to a maximum membership of fifteen. Despite the President's sweeping electoral victory in 1936, and intensive political efforts by the administration for four months, the plan failed to pass the Senate. A number of factors contributed to the result. The argument based on age and inefficiency, stressed by proponents at the outset, was transparently disingenuous. A letter from Chief Justice Hughes, joined by Justices WILLIS VAN DEVANTER and Brandeis, to Senator Burton K. Wheeler, at the latter's request, effectively refuted the charge that the Court needed additional members to keep abreast of its docket. The Court itself, while the bill was pending, sustained a state minimum wage law, the National Labor Relations Act, an amended Farm Bankruptcy Act, and the Social Security Act. As one senator remarked, "Why keep on running for the bus after you've caught it?" Moreover, Congress enacted a new retirement act for Supreme Court Justices, which made retirement more acceptable. Since 1869 a full pension had been provided for, but as retirement was equivalent to resignation under the statute, the pension was subject to the will of Congress and in 1932, as an economy measure, it had been reduced by half and was later restored. The act of 1937, by enabling retired Justices to serve on the lower federal courts, placed their retirement compensation under constitutional protection against diminution. Justice Van Devanter availed himself of this new law, giving the President his first opportunity to make an appointment and lessening further the need for enactment of his plan. But perhaps the most powerful factor leading to its defeat was a pervasive feeling, even among groups holding grievances against particular decisions, that the independence of the judiciary was too important a principle to be sacrificed, even under the extreme provocation furnished by a majority of the Court itself.

The appellate jurisdiction of the Court became a target of attack in 1958, as it had been in the early nineteenth century. Senator William E. Jenner of Indiana, reacting against decisions curtailing governmental actions in the field of loyalty investigations, introduced a series of bills withdrawing Supreme Court jurisdiction in this and related classes of cases. Passage was narrowly averted by the efforts of the then majority leader, Senator LYNDON B. JOHNSON. Comparable bills were introduced in 1982 to preclude review of decisions concerning abortion and school prayers. Such efforts, if successful, would produce chaotic results. In the name of the federal Constitution, varying decisions, for and against local laws, would stand unreconciled; the Supreme Court would have no opportunity to reconsider or modify its precedents; state and federal judges would be left to take different positions on the binding effect of prior Supreme Court decisions.

It is apparent that in the recurrent clashes of party, section, and class that have marked American history, the Court, whose role, in principle, is that of an arbiter, has not escaped the role of participant. In these judicial involvements, extraordinary force on one side has induced similar force on the other. A dramatic example is the contest over the production of the White House tapes for use as evidence in the prosecutions growing out of the Watergate break-in. President RICHARD M. NIXON refused to comply with a subpoena issued by the district court, on the ground of EXECUTIVE PRIVILEGE. The tension between the rule of law and presidential immunity from suit had been resolved in part by bringing suit against a subordinate who was carrying out presidential orders, as in the steel seizure case, YOUNGSTOWN SHEET AND TUBE CO. V. SAWYER (1952), where the named defendant was the secretary of commerce. President Nixon, however, forced the issue by taking sole custody of the tapes. On appeal, the Supreme Court responded with the countervailing measure of holding the President amenable to the process of a court where the need of EVIDENCE in a criminal trial outweighs a gen-

eralized claim of privilege. The unanimity of the decision (with one abstention) was doubtless a factor impelling the President to yield, thus avoiding an ultimate confrontation.

That the supreme judicial tribunal, without the power of purse or sword, should have survived crises and vicissitudes and maintained its prestige can be ascribed partly to its own resourcefulness and partly to the recognition by a mature people of the Court's necessary functions in the American constitutional democracy. The Court's resourcefulness owes much to the central paradox of its work: it decides issues of great political moment, yet it does so in the context of a controversy between ordinary litigants in a conventional lawsuit. That setting provides a test of concreteness in the formulation of DOCTRINE, allows flexibility of development, and enables the Court to adapt and refine doctrine as new factual and procedural settings may suggest.

The Supreme Court's essential functions, performed within the framework of conventional lawsuits, are fourfold: to resolve controversies between states; to assure the uniform application of national law; to maintain a common market in a continental union; and to enforce the guarantees of liberty and equality embodied in the BILL OF RIGHTS, the post-CIVIL WAR amendments, and other provisions of the Constitution.

Although the Court's jurisdiction over suits between states is statistically insignificant, the function is of practical and symbolic importance, serving as a substitute for diplomacy and war in disputes over boundaries, allotment of waters, and the like. Because these cases originate in the Supreme Court, factual disputes are referred to a SPECIAL MASTER for hearings, findings, and recommendations, which are then presented to the Court for argument and decision.

The uniform interpretation and application of national law has become increasingly important with the proliferation of federal regulatory statutes and administrative rules. For almost a century, until 1938, the Supreme Court essayed a broader concept of uniformity in the COMMON LAW itself, in fields such as commercial law and torts, under the doctrine of SWIFT V. TYSON (1842), which empowered the federal courts to pronounce a FEDERAL COMMON LAW without regard to the common law of particular states. Sweeping as it was, the doctrine was truncated, for the federal common law could have no binding authority in state courts, and thus a bifurcated system of common law developed, along with a practice of forum shopping by lawyers as between federal and state courts. The doctrine was repudiated by the Court in ERIE RAILWAY V. TOMPKINS (1938) in an opinion by Justice Brandeis that branded as unconstitutional the course theretofore pursued by the federal courts. With the demise of *Swift v. Tyson* the rationale for retaining DIVERSITY OF CITIZENSHIP JURISDICTION in the federal courts, for the decision of matters of state law, was materially weakened.

The maintenance of a common market is a modern description of a historic function of the Court, exercised since Marshall and his colleagues decided in GIBBONS V. OGDEN (1824) that the constitutional power of Congress over commerce among the states implied a negative on state power, even when Congress has not acted, and that the Supreme Court would enforce that implied prohibition. For a generation these commerce clause cases elicited a series of decisions upholding or setting aside state regulations—of quarantine, pilotage, intoxicating liquors, entry fees—by classifying them as either regulations of commerce, and so invalid, or regulations of local health or safety, and so valid as POLICE POWER measures. This effort at classification obscured the process of judgment by treating a conclusory label as if it were a premise for reasoning. A pivotal change in methodology occurred in COOLEY V. BOARD OF WARDENS (1852), a pilotage case where the opinion by Justice BENJAMIN CURTIS recognized that commercial regulation and police power were not mutually exclusive categories, and that decision should turn on an empirical judgment, weighing the necessity of the local law, the seriousness of the impact on commerce, the need for uniformity of treatment, and the possible discriminatory impact on out-of-state enterprise. This kind of scrutiny, and comparable analysis of local taxation when challenged by multistate business, have been staples of Supreme Court adjudication and exemplars for other economic federations struggling to accommodate local interests and those of a union.

The most intensive, acclaimed, and in some quarters questioned, aspects of the Court's work has been the elaboration of fundamental human rights. While in England the great expressions of these rights are found in the writings of philosophers and poets—the secular trinity of JOHN MILTON, JOHN LOCKE, and JOHN STUART MILL—in America the pronouncements are embodied—Jefferson apart—in the judicial opinions of Holmes, Brandeis, Hughes, Stone, ROBERT H. JACKSON, HUGO L. BLACK, and other Justices. The development of a body of CIVIL LIBERTIES guarantees, mainly under the Bill of Rights and the FOURTEENTH AMENDMENT, reached its fullest flowering during the Chief Justiceship of EARL WARREN (1953–1969), though the seeds were planted in the HUGHES COURT.

During the 1930s, while public attention was focused on the Court's struggle with national power over the economy, path-breaking advances were made in a series of decisions applying federal constitutional guarantees against the states. It is more than coincidence that this develop-

ment occurred at a time of rising totalitarianism abroad. FREEDOM OF THE PRESS and FREEDOM OF ASSOCIATION AND ASSEMBLY were unmistakably put under the protection of the liberty secured by the Fourteenth Amendment in NEAR V. MINNESOTA (1931) and DEJONGE V. OREGON (1937), respectively. The principle that a conviction in a state court following the use of a coerced confession is a violation of DUE PROCESS OF LAW was announced for the first time BROWN V. MISSISSIPPI (1936). A state's duty to afford racial equality in education was sharpened in MISSOURI EX REL. GAINES V. CANADA (1938): it could not be satisfied by resort to a neighboring state. Mayors and governors were subjected to the reach of federal judicial process in HAGUE V. CIO (1939) and *Sterling v. Constantin* (1932), an accountability that came to be important in later contests over desegregation.

If the drama of these seminal developments was largely overlooked, the same cannot be said of the great expansion of civil liberties and CIVIL RIGHTS by the WARREN COURT. The leading decisions have become familiar landmarks. BAKER V. CARR (1962), requiring substantial equality of population in electoral districts within a state, asserted judicial power over what had previously been deemed a POLITICAL QUESTION; Chief Justice Warren regarded it as the most important decision of his tenure, because of its potential for redistributing basic political power. BROWN V. BOARD OF EDUCATION (1954, 1955) was both the culmination and the beginning in the long drive against RACIAL DISCRIMINATION: doctrinally a climax, practically a starting point in the devising of remedies. MIRANDA V. ARIZONA (1966), limiting POLICE INTERROGATION of suspects in custody and giving suspects the RIGHT TO COUNSEL during interrogation, has become a symbol of the Court's intense concern for standards of CRIMINAL PROCEDURE, a concern that has sometimes been viewed as an index to a society's civilization. The EQUAL PROTECTION guarantee, which Justice Holmes in 1927 could call the last refuge of a constitutional lawyer, was revitalized in the service not only of racial minorities but of other stereotyped groups: ALIENS, illegitimates, and women. Freedom of the press was extended well beyond freedom from restraint on publication: In actions for LIBEL brought by PUBLIC FIGURES following NEW YORK TIMES V. SULLIVAN (1964), the defendant publisher would be liable only if he acted with legal malice, that is, with knowledge of the publication's falsity or with reckless disregard for its truth or falsity.

A constitutional RIGHT OF PRIVACY, of uncertain scope, extending beyond the explicit SEARCH AND SEIZURE guarantee to encompass at least certain conjugal intimacies, was established in GRISWOLD V. CONNECTICUT (1965). The religion clauses of the FIRST AMENDMENT were given new vitality in decisions rejecting organized prayer in the public schools, such as ENGEL V. VITALE (1962).

On any measure, it is an impressive performance. The momentum was somewhat slackened during the first decade and a half of Chief Justice WARREN E. BURGER's tenure, particularly in the areas of criminal procedure and nonestablishment of religion; yet during this period the Court reached the high-water mark of constitutionally protected autonomy in ROE V. WADE (1973), upholding freedom of choice respecting abortion in the first two trimesters of pregnancy.

Criticism of the modern Court has taken diverse directions. Some critics have complained that the Court has been unfaithful to the historic meaning of constitutional provisions. But the argument begs the question of "meaning." If the term signifies denotative meaning, the particular instances that the Framers envisioned as comprehended in the text, the original meaning has indeed been departed from. If, however, the purposive meaning is accepted, and the application does not contradict the language of the text, there is no infidelity. Such an analysis will not disapprove, for example, the "meaning" ascribed to the freedom of the press in the First Amendment.

Another criticism charges defenders of the Court with a double standard: the modern Court is a mirror image of the pre-1937 Court, the judicial vetoes coming now from the left instead of the right. The asserted parallel, however, is inexact. The problem is to identify the appropriate role for judicial review in a representative democracy. The older Court set aside such products of the political process as minimum wage, price control, and tax legislation. The modern Court, by and large, has given its intensive scrutiny to two areas of law that are of peculiarly legitimate concern to the judiciary. One is the field of procedure, in a large sense, civil and criminal. The other is the set of issues concerning representation of interests in the formation of public opinion and lawmaking. This category would include FREEDOM OF SPEECH and press and association, VOTING RIGHTS, education, and the interests of groups underrepresented in the formulation of public policy. This approach gives a certain coherence to constitutional theory: as the commerce clause protects out-of-state enterprise against hostility, open or covert, the Bill of Rights and the Civil War amendments especially protect the political, social, or ethnic "outsider" against official neglect or ostracism.

A more qualified criticism is addressed to two tendencies of the modern Court. One is a perceived disposition to carry a constitutional safeguard to excessive lengths, as in BUCKLEY V. VALEO (1976), which held invalid, in the name of freedom of expression, statutory limits on expenditures by or on behalf of candidates for federal offices. The other, illustrated by the abortion and police interrogation cases, is an inclination, when holding a state law or practice in-

valid, to prescribe only a single form of corrective that will not offend constitutional standards.

A problem faced by the Court throughout much of its history, one that has again become acute, is the burden of an expanding caseload. In the last hundred years two statutory jurisdictional revisions brought temporary relief. The Circuit Courts of Appeals Act of 1891, by establishing a system of regional appellate courts, assured litigants of one opportunity for review without resort to the Supreme Court. The JUDICIARY ACT OF 1925, sponsored by the Justices themselves and promoted by Chief Justice WILLIAM HOWARD TAFT, made discretionary review by WRIT OF CERTIORARI, instead of APPEAL as of right, the normal mode of access to the Supreme Court.

Each solution, however, has in time become part of the problem. With thirteen courts of appeals, and the burgeoning of federal statutory law, there is a growing incidence of conflicting decisions calling for review. Moreover, the disposition of petitions for certiorari has occupied an increasing amount of the Justices' time, with more than 4,000 filed each term. Of these, approximately 175 are granted and the cases decided with full opinion after oral argument.

A study group appointed under the auspices of the Federal Judicial Center reported in 1972 that the caseload was reaching the saturation point. Certain ameliorative measures had already been taken. The normal time allowed for oral argument had been reduced from an hour to a half hour for each side. The number of law CLERKS had been increased in stages from one to four for each Justice. The study group expressed disquiet at what it viewed as a bureaucratic movement, and recommended the creation of a national court of appeals to review decisions that warranted review but not necessarily by the Supreme Court. Others proposed variations on this plan, notably one or more courts of appeals having specialized jurisdiction, in tax or criminal or regulatory cases. Sixty years after the 1925 act, the problem has not been resolved. And yet without adequate time for reflection, collegial discussion, critical scrutiny, mutual accommodation, and persuasive exposition, the Court cannot function at its best.

At its best, the Court can recall the legal profession and the people to an appreciation of their constitutional heritage, by translating the ideals and practices embodied in an eighteenth-century charter of the Enlightenment into the realities of a modern industrial democracy.

PAUL A. FREUND
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Bibliography

BICKEL, ALEXANDER M. 1962 *The Least Dangerous Branch.* Indianapolis: Bobbs-Merrill.

CONGRESSIONAL QUARTERLY 1981 *The Supreme Court and Its Work.* Washington, D.C.: Congressional Quarterly.

FREUND, PAUL A. 1961 *The Supreme Court of the United States.* Cleveland and New York: Meridian Books.

FREUND, PAUL A. and SCHMIDT, BENNO C., JR. 1984 *The Judiciary and Responsible Government, 1910–1921.*

FRIEDMAN, LEON and ISRAEL, FRED L., eds. 1969–1978 *The Justices of the United States Supreme Court, 1789–1969.* 5 Vols. New York: Chelsea House.

LEWIS, ANTHONY 1964 *Gideon's Trumpet.* New York: Random House.

POLLAK, LOUIS H., ed. 1966 *The Constitution and the Supreme Court: A Documentary History.* 2 Vols. Cleveland: World Publishing Co.

SWINDLER, WILLIAM F. 1970 *Court and Constitution in the Twentieth Century: The New Legality, 1932–1968.* Indianapolis: Bobbs-Merrill.

WARREN, CHARLES 1926 *The Supreme Court in United States History.* 2 Vols. Boston: Little, Brown.

WESTIN, ALAN, ed. 1961 *The Supreme Court: Views from Inside.* New York: Norton.

## SUPREME COURT
### (Role in American Government)

The Supreme Court is the only court in the United States whose existence is mandated by the Constitution, yet the Constitution designates no number of judges for the Supreme Court and sets no qualifications for judicial service. So far as the Constitution is concerned, the Supreme Court could as readily consist of two or of twenty-two judges, rather than of nine as has been the case since 1870. And so undemanding is the Constitution in setting qualifications for appointment to the Supreme Court that its members could consist entirely of persons not qualified to serve in either House of Congress, for which at least a few minimum standards of eligibility (of age and of CITIZENSHIP) are constitutionally prescribed. The Constitution speaks simply to the vesting of the JUDICIAL POWER OF THE UNITED STATES in "one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish," but it leaves much else to discretion and a great deal to chance.

The role of the Supreme Court in American government is much like this overall. Some impressions of what the Court's role was meant to be can be gained from what the Constitution says and from the immediate history of 1789, as well as from the categories of JURISDICTION assigned to the Court by Article III. But much of that role is also the product of custom and of practice about which the Constitution itself is silent.

The constitutional text itself suggests several ways of describing the Supreme Court's role, in conformity with Article III's prescriptions of the Court's jurisdiction. The

useful jurisdictional distinctions are of four principal kinds, each providing some insight into what the Court was originally expected to do.

First mentioned is the Supreme Court's jurisdiction as a trial court, an ORIGINAL JURISDICTION invocable by certain parties in particular (states and representatives of foreign states) but by no one else. Second is that branch of its appellate jurisdiction applicable also solely because of who the parties are, irrespective of the nature of the dispute between them. Third is the Court's appellate jurisdiction that attaches solely because the case involves a federal statute or treaty of the United States, or arises under ADMIRALTY AND MARITIME LAW, without regard to who the parties may be and whether or not any constitutional question may be involved. Finally, the Court may exercise an appellate jurisdiction over "all cases arising under [the] Constitution," a phrase construed broadly to include any case in which the outcome may be affected by a question of constitutional law. It is the application of this phrase, of course, that tends to fix the Supreme Court's most important role, but as can be seen from the foregoing larger enumeration, it is not by any means the sole business to which the Court was expected to attend.

The role of the Supreme Court as a court of original jurisdiction has been useful but minor. Ordinarily, the Court's small complement of original jurisdiction has merely expedited its speedy examination of certain legal issues raised by states against other states (typically involving boundary or interstate river claims) or against the national government, as in OREGON V. MITCHELL—a 1970 decision holding unconstitutional one portion of an act of Congress that sought to override state voting age restrictions. Because Congress can provide for expedited Supreme Court review of cases originating in other courts, however, it is doubtful whether this feature of Article III has been terribly vital. Its one theoretical importance may be that the original jurisdiction it provides to the states is guaranteed against elimination by Congress—for unlike the Court's appellate jurisdiction, its original jurisdiction is not subject to the "exceptions" clause of Article III.

Dwarfing the Court's role as a court of original jurisdiction is its much larger and more familiar role as the ultimate appellate court in the United States for a vastly greater number and variety of disputes, although the Court is not obliged to review all such cases and in fact hears but a small fraction of those eligible for review. The cases eligible for review, some on APPEAL and a larger number on petition for a WRIT OF CERTIORARI, are divisible into two principal categories: those in which the character of the contesting parties makes the case reviewable, and those in which the nature of the legal issue raised by the case makes the case reviewable.

In the first category of cases within the Court's appellate jurisdiction there are many that raise no constitutional questions and indeed need not raise any kind of federal question. As these cases are within the Court's power of review solely because of the parties, regardless of the subject in dispute between them, they may involve very ordinary legal issues (for example, of contract, tort, or property law) as to which there is no special expertise in the Supreme Court and no obvious reason why they need be considered there. And in practice, they are not reviewed.

Part of the original interest in providing the Supreme Court as the ultimate appellate tribunal in the United States reflected the Framers' desire to provide an appellate court for litigants likely to be sued in hostile jurisdictions—cases, for instance, arising in state courts which nonresident defendants might fear would be inclined to favor local parties as against outsiders. Since the furnishing of lower federal courts (to hear such cases) was left entirely optional with Congress to provide or not provide as it liked, the Supreme Court's appellate jurisdiction even from state court diversity cases was directly provided for in Article III. Nonetheless, in the course of 200 years the felt need for such cases to be heard in the Supreme Court has never materialized—although such cases remain a staple of lower federal court jurisdiction. (Efforts in Congress to repeal this entire category of lower federal court jurisdiction are more than a half-century old, but they have been only partly successful, largely in restricting such cases to those involving sums in excess of $10,000.) In the meantime, however, the Supreme Court does not review such cases and, by act of Congress, it is under no obligation to take them. This particular anticipated role of the Supreme Court, as an active court in hearing appeals in ordinary diversity cases presenting no federal question and implicating no general interest of the United States, has never been significant in fact.

In contrast, the second branch of the Supreme Court's appellate jurisdiction—identified not by the parties but by the nature of the legal questions—remains intensely active. Indeed, the principal role the Court plays today as an appellate court undoubtedly arises almost entirely from this subject matter assignment of appellate jurisdiction of cases involving disputes of national law. In these cases the Court interprets acts of Congress and treaties of the United States as well as the Constitution as the ultimate source of governing law in the United States.

Specifically, these cases may raise any of the following four kinds of basic conflicts: conflicts between claims relying upon mutually exclusive interpretations of concededly valid acts of Congress or treaties of the United States; between constitutional claims of state power and claims of federal power (FEDERALISM conflicts); between constitutional claims by Congress and claims by the President

or claims by the judiciary (SEPARATION OF POWERS conflicts); or between constitutional claims of personal right and claims of either state or of national power (personal rights conflicts). A principal function of Article III was to establish the Supreme Court as the ultimate national court of appeals to provide finality and consistency of result in the interpretation and application of all federal and constitutional law in the United States, within the full range of these four fundamental and enduring concerns.

For nearly the first hundred years (1789–1875), almost all appeals to the Supreme Court on such federal questions as these came from state courts rather than from lower federal courts. Not until 1875, in the aftermath of the CIVIL WAR, were lower federal courts given any significant original (trial) jurisdiction over private civil cases arising under acts of Congress or treaties of the United States. Since 1875, moreover, many federal question cases still proceed from state courts to the Supreme Court, because reliance on some federal law or on the Constitution often arises only in answer to some claim filed in a state court and thus emerges only by way of defense rather than as the basis of complaint.

The fact that this arrangement of the Court's appellate jurisdiction places the Supreme Court in appellate command over all other courts in the United States in all federal question cases is exactly what makes the Supreme Court supreme. In constitutional matters, for instance, this fact is the basis of Justice ROBERT H. JACKSON's observation, in speaking of the Court, that "[w]e are not final because we are infallible, but we are infallible only because we are final," that is, superior in constitutional authority to review the determinations of other courts and in turn unreviewable by any other court. It likewise animates the 1907 observation by CHARLES EVANS HUGHES (later Chief Justice of the United States). "We are under a Constitution," Hughes acknowledged, "but the Constitution is what the judges say it is," since it is their view and, most important, the Supreme Court's view, that ultimately controls in each case. And even when no constitutional issue is present, but the issue is how an act of Congress shall be interpreted and applied, the finality of the Supreme Court's appellate jurisdiction is equally pivotal; it is the Americanized version of Bishop Hoadley's observation in 1717, in reference to the power of the English courts in interpreting acts of Parliament. "Whoever hath an absolute authority to interpret any written or spoken laws," Hoadley observed, "it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them." From an early time Americans seem to have believed in the wisdom of reposing in the courts—and ultimately in the Supreme Court—the responsibility of substantive constitutional review, and it seems clear (despite some scholars' qualified doubts) that the Supreme Court was indeed meant to exercise that responsibility. (See JUDICIAL REVIEW.) It is unquestionably this role of substantive constitutional review that marks the special position of the Supreme Court.

The Supreme Court's decisions in constitutional cases may be roughly divided into three kinds, according to which its role in American government is occasionally assessed or described. The three kinds of decisions are these: legitimizing, braking, and catalytic.

A decision is said to be legitimizing whenever the Court examines any act of government on constitutional grounds and finds it not wanting. In holding that the act as applied is in fact authorized by the Constitution and not offensive to any of its provisions (for example, the BILL OF RIGHTS or the FOURTEENTH AMENDMENT), the Court thus vouches for its constitutional legitimacy. A decision may be called a braking decision whenever its immediate effect is necessarily to arrest the further application of an act of Congress because the Court holds the act either inapplicable or unconstitutional, or whenever OBITER DICTA accompanying the decision serve notice of constitutional barriers in the way of similar legislation. Finally, a decision may be called catalytic when its immediate practical effect is to compel highly significant action of a sort not previously forthcoming from national or state government.

A significant and controversial example of the legitimizing sort is PLESSY V. FERGUSON (1896), the case sustaining certain state racial SEGREGATION laws as not inconsistent with the Fourteenth Amendment, despite intense argument to the contrary. A modern example of the same sort may be FULLILOVE V. KLUTZNICK (1980), a case sustaining a limited form of RACIAL DISCRIMINATION in favor of certain minority contractors as not inconsistent with the Fifth Amendment, despite intense argument as well. In each case, the Court considered a previously untested kind of race-related law. In each, the Supreme Court's decision could be said effectively to have impressed the operative law with a judicial imprimatur of constitutional legitimacy, given that in each case the challenged statute was sustained.

Examples of the braking sort may be found in the Court's early NEW DEAL decisions holding Congress unauthorized by the COMMERCE CLAUSE to supplant state laws with its own much more sweeping and detailed ECONOMIC REGULATIONS. In this instance, the critical decisions of the Court forced a momentary pause in the onrush of legislation, compelling more deliberate attention to what the nation had been and what it meant to become. As it happened, the braking effect of these cases was eventually overcome, but it is nonetheless true that in the meantime the position taken by the Court played a sobering role. In a few other instances, the braking effect of equivalent cases was overcome by formal amendment of the Consti-

tution itself: the SIXTEENTH AMENDMENT, for instance, was adopted principally to overcome the effect of the Court's decision in POLLOCK V. FARMERS' LOAN & TRUST (1895); the Thirteenth Amendment and Fourteenth Amendment displaced the Court's decision in DRED SCOTT V. SANDFORD (1857); and the TWENTY-SIXTH AMENDMENT displaced the decision in *Oregon v. Mitchell.* These reactions are by themselves not an indication that the Court has erred, of course, since the Constitution itself separates the role of the Court from the formal processes of constitutional modification. (See AMENDING PROCESS.) Any decision in the Supreme Court holding a statute unconstitutional may provide occasion to activate the AMENDING PROCESS provided for in Article V. Amendments by themselves are not proof that the decisions they effectively overrule were necessarily poorly conceived. They may, rather, but mark new Cambrian rings in what is meant to be a living constitution.

An example of a catalytic decision would be one holding certain prison conditions to be so inadequate as to constitute a form of CRUEL AND UNUSUAL PUNISHMENT, such that either the prisoners must be released (which public authorities are loath to do), or large sums must be raised and less congested prisons must be built. The change-forcing nature of the Court's catalytic decision is but descriptive of its practical implications. By itself it thus carries no suggestion that the Court acted from impulse rather than from obligation, in ruling as it did. The same observation may apply equally to the other two categories of decisions.

Thus, in the "legitimizing" decision there is no necessary insinuation that the measure that has been sustained is on that account also necessarily desirable or well-taken legislation; such questions are ordinarily regarded as no proper part of the judicial business. Adjudicated constitutionality properly vouches solely for an act's consistency with the Constitution, which consistency may still leave much to be desired, depending upon one's own point of view and one's feeling of constitutional adequacy. Similarly, it does not follow that an act's adjudicated unconstitutionality necessarily implies its undesirability or, indeed, that there would be anything terribly wrong were the Constitution amended so that similar legislation might subsequently be reenacted and sustained. It means merely that the act does not pass muster under the Constitution as it is and as the judges are oath-bound to apply it until it is altered.

So also with catalytic decisions: such forced change as a particular decision may produce is required simply to bring the conduct of government back within constitutional lines as they are, and not as they need be. As conscientiously applied by the Court, the Constitution thus speaks to such constitutional boundaries as were put in place sometime in the past, from a considered political judgment of the time that such boundaries would be important. The judgment is wholly an inherited one, however, and contemplates the possibility of amendment to cast off such restraints as subsequent extraordinary majorities may find unendurable. Viewed in this way, the Constitution is a device by means of which past generations signal to subsequent generations their cumulative assessment of what sorts of restraints simple majoritarianism needs most. The Supreme Court is the ultimate judicial means by which the integrity of those restraints is secured against the common tendency to think them ill-conceived or obsolete, sustaining them when pressed by proper litigants with suitable standing, until instructed by amendment to acknowledge the change. It is a signal responsibility and an unusual power—one which few other national supreme courts have been given.

On the other hand, the phrases "legitimizing," "braking," and "catalytic" are not always used so descriptively, however well they capture the by-products of the Court's work. Rather, they are sometimes used prescriptively, and thus in an entirely different sense. In this different usage they presume to provide a more jurisprudential blueprint for the role of the Supreme Court: that it is appropriate for the Court actively to serve these three functions politically as it were, and to involve the Constitution only instrumentally in their service. Employed in this different locution, they are phrases used to express faith in a specific kind of judicial activism, according to which the right role of the Court is to identify the needs of efficient and humane government and to adjust its own adjudications accordingly.

In this view, it is in fact the proper role of the Supreme Court to legitimate (by holding constitutional) such laws as circumstances persuade it ought not be disapproved, to brake (by adverse construction or by holding unconstitutional) such developments as it determines to have been precipitously taken or otherwise to have been ill-advised, and to catalyze (by artful action) such changes it deems highly desirable but unlikely to be forthcoming from government unless the Court so requires. The persuasive justification for the Supreme Court lies in what it can do best as a distinct institution, in this view, and only secondarily in adhering to the Constitution. And what the Supreme Court can do better than others is to compensate for such gaps as it finds in the Constitution or in the political process, and to take such measured steps as it can to repair them. Accordingly, the more appropriate role of the Supreme Court is to conduct itself institutionally as best it can to contribute actively to a better political quality of life in the United States: in deciding which cases to hear, when to hear them, on what grounds to decide them, and how to make them come out in ways most in keeping with these three vital functions of granting legitimacy to the

good, putting brakes on the bad, and compelling such changes as are overdue.

As an original jurisprudence of proposed judicial role, this perspective on the Supreme Court has had considerable occasional support. In the concrete, moreover, there is good reason to believe that certain Justices—probably a nontrivial number—have embraced it in selected aspects of their own work. At the least, there are a large number of constitutional decisions that appear to reflect its view of what judges should seek to do, as indeed some Justices have virtually absorbed it as an articulate feature of proper judicial review; their decisions seem sometimes to be based on little else.

Still, and for obvious reasons, it remains deeply problematic, for at bottom it would have the judges struggle against the obligation of their oaths. Insofar as cases such as *Plessy* or *Fullilove* were to any extent self-conscious efforts by a Supreme Court majority simply to legitimate race-based arrangements it thought desirable, and not decisions reporting a difficult judicial conclusion respecting the lack of constitutional restrictions on the legislative acts at issue, for instance, it is doubtful whether the "legitimacy" thus established was appropriate or, indeed, constitutionally authorized. Likewise, insofar as the early New Deal cases were to any extent simply a deliberate institutional attempt by the majority Justices to arrest what they thought to be ill-advised varieties of market intervention, and not decisions reflecting an attentive interpretation respecting the limits of Congress's commerce power, it is debatable whether the "braking" thus applied was appropriate or authorized. So, too, with such decisions as may be catalytic, but which may be driven more by a judicial desire to see changes made than by a mere firm resolve that the Constitution shall be obeyed.

Without doubt, however, the tendency to urge the Supreme Court to compose its interpretations of the Constitution in subordination to allegedly significant social tasks remains widespread. Moreover, the malleability of many constitutional clauses invites it, and the political staffing mechanism (provided by Article III) for selecting the judges may appear obliquely to legitimate it. The tendency to rationalize its propriety is deeply entrenched.

Even so, the conscious treatment of constitutional clauses as but textual or pretextual occasions for judicial legitimation, braking, or social catalysis, does tend to pit the Court against itself in its disjunction of fundamentally incompatible roles. The resulting tension has split the Court virtually from the beginning. It divides it even now: between these two visions of the Court, as a professional court first of all or as a political court first of all, lie two centuries of unsteady swings of actual judicial review. The history of the Supreme Court in this respect but reiterates a classic antinomy in American constitutional law. It doubtless reflects the conflicts Americans tend to sense within themselves—as to what role they genuinely wish this Court to fulfill.

With certain highly notable exceptions (including West Germany, Japan, Australia, and most recently Canada), the written CONSTITUTIONS of most modern nation-states serve merely as each nation's explanation of itself as a government. Such a constitution typically presents a full plan of government, a statement of its purposes and powers, and an ample declaration of rights. Yet, unlike the Constitution of the United States, such a constitution cannot be invoked by litigants and does not require or even permit courts of law to use it as against which all other laws may be examined. It is, rather, a nonjusticiable document. It is intended to be taken seriously (at least this is the case generally), but only in the political sense that legislative and executive authorities are meant to reconcile their actions with the constitution at the risk of possible popular disaffection should they stray too far from what the constitution provides. Whether the authorities have thus strayed, however, and what consequences shall follow if they have, is not deemed to be the appropriate business of courts of law.

The enormous distinction of American constitutional law has thus rested in the very different and exceptional role of the judiciary, from the most unprepossessing county courts through the hierarchy of the entire federal court system. The unique role of the Supreme Court has been its own role as the ultimate appellate court in reference to that judiciary, most critically in all constitutional cases. The arrangement thus established does not lessen the original obligation of other government officials separately to take care that their own actions are consistent with the Constitution, but it is meant to provide—as effectively as human institutions can arrange—an additional and positive check. When official action is not consistent with the Constitution, as ultimately determined under the Supreme Court's authority, the courts are given both the power and the obligation to intercede: to interpose such authority as they have and to provide such redress as appears to be due. Judged even by international standards, this is an ample role. It is not this role that now appears fairly open to question, moreover, but rather the definition of role that would assume something more or accept something less.

WILLIAM W. VAN ALSTYNE
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Bibliography

ABRAHAM, HENRY J. 1986 *The Judicial Process*, 5th ed. New York: Oxford University Press.

AGRESTO, JOHN 1984 *The Supreme Court and Constitutional Democracy.* Ithaca, N.Y.: Cornell University Press.

BICKEL, ALEXANDER M. 1962 *The Least Dangerous Branch: The Supreme Court at the Bar of Politics.* Indianapolis, Ind.: Bobbs-Merrill.

COX, ARCHIBALD 1976 *The Role of the Supreme Court in American Government.* New York: Oxford University Press.

ELY, JOHN HART 1980 *Democracy and Distrust: A Theory of Judicial Review.* Cambridge, Mass.: Harvard University Press.

FREUND, PAUL 1961 *The Supreme Court of the United States.* Cleveland, Ohio: World Publishing Company.

HOROWITZ, DONALD L. 1977 *The Courts and Social Policy.* Washington, D.C.: The Brookings Institution.

JACKSON, ROBERT H. 1955 *The Supreme Court in the American System of Government.* New York: Harper & Row.

MASON, ALPHEUS THOMAS 1979 *The Supreme Court from Taft to Burger,* 3d ed. Baton Rouge: Louisiana State University Press.

MCCLOSKEY, ROBERT G. 1960 *The American Supreme Court.* Chicago: University of Chicago Press.

WOLFE, CHRISTOPHER 1986 *The Rise of Modern Judicial Review.* New York: Basic Books.

## SUPREME COURT, 1789–1801

On January 8, 1801, twelve days before President JOHN ADAMS appointed JOHN MARSHALL as Chief Justice, a Jeffersonian newspaper reported: "JOHN JAY, after having thru' decay of age become incompetent to discharge the duties of Governor, has been appointed to the sinecure of Chief Justice of the United States. That the Chief Justiceship is a sinecure needs no other evidence than that in one case the duties were discharged by one person who resided at the same time in England, and by another during a year's residence in France." The one in France was OLIVER ELLSWORTH, sent there by President Adams as a special ambassador to negotiate peace. Ellsworth had recently resigned, and Jay, whose appointment as Ellsworth's successor had been confirmed by the Senate, had himself been the first Chief Justice, whom President GEORGE WASHINGTON had sent to England to negotiate a treaty that bore Jay's name. The chief justiceship was no sinecure: although the Supreme Court then met for only two short terms a year, the Justices also served as circuit court judges, and riding circuit was extremely arduous. When Jay was offered the position again, he declined it because of the circuit responsibilities and because the Court had neither "the energy, weight and dignity" necessary for it to support the national government nor "the public confidence and respect."

Jay's judgment was harsh although the Court did have problems, some of its own making. All the Justices were Federalists; their decisions EN BANC or on circuit seemed partisan—pro-Administration, pro-English, or procreditor—and they presided at trials under the infamous Sedition Act, whose constitutionality they affirmed. But the Court was not responsible for most of its difficulties. It had no official reporter (ALEXANDER J. DALLAS's unofficial reports first appeared in 1798) and the press publicized only a few of the Court's decisions. The public knew little about the Court, and even members of its own bar were unfamiliar with its decisions. Nothing better symbolizes the nation's neglect of the Court than the fact that when the United States government moved to Washington, D.C., in late 1800, the Court had been forgotten. Not only did it lack a building; it had no courtroom. Congress hastily provided a small committee room in the basement of the Senate wing of the Capitol for the Court to meet.

The Court's beginnings were hardly more auspicious, however distinguished its membership. At its first term in February 1790 it had nothing to do except admit attorneys to its bar, and it shortly adjourned. It began as a court without a reporter, litigants, a docket, appeals, or decisions to make. It was chiefly an appellate court whose APPELLATE JURISDICTION scarcely matched the breadth of the JUDICIAL POWER OF THE UNITED STATES stated in Article III. Congress in the JUDICIARY ACT OF 1789 had authorized the Court to review state court decisions that denied claims based on federal law, including the Constitution. Review was not authorized when the state court upheld a claim of federal right. The system of appellate jurisdiction thus permitted the Supreme Court to maintain federal law's supremacy but not its uniform interpretation. The Court's review of civil decisions of the lower federal courts was limited to cases involving more than $2,000 in controversy, and it could not review criminal cases from those courts. Congress had stingily authorized the Court to hear cases in its appellate capacity in order to keep it weak, to prevent centralization of judicial powers, to preserve the relative importance of state courts, and to insulate the Court from many matters that concerned ordinary citizens. For its first two years it heard no cases, and it made no substantive decisions until 1793. Its docket never got crowded. Dallas reported less than seventy cases for the pre-Marshall Court, and fewer than ten percent of them involved constitutional law. The Court was then first a COMMON LAW court, second a court of ADMIRALTY AND MARITIME JURISDICTION.

Although its members were able, the pre-Marshall Court had difficulty attracting and keeping them. When Marshall became Chief Justice, only WILLIAM CUSHING of the original six Justices appointed by Washington remained. Robert H. Harrison, one of the original six, was confirmed but declined appointment, preferring instead the chancellorship of Maryland. JAMES IREDELL accepted Harrison's place, so that the first Court consisted of Chief Justice Jay and Justices Cushing, JOHN BLAIR, JOHN RUTLEDGE, JAMES WILSON, and Iredell. Rutledge performed his circuit duties but had never attended a session of the

Court when he resigned after two years to become chief justice of South Carolina. CHARLES C. PINCKNEY and Edward Rutledge declined appointment to John Rutledge's seat, preferring to serve in their state legislature. THOMAS JOHNSON accepted that seat but resigned it in less than two years because circuit riding was too strenuous. WILLIAM PATERSON succeeded him. The February 1794 term was Jay's last. That he reentered New York politics after negotiating JAY'S TREATY says something about the Court's prestige at the time. So too does the fact that ALEXANDER HAMILTON preferred private practice to the chief justiceship. At that point, John Rutledge, who had quit the Court, applied for the post vacated by Jay. Washington appointed Rutledge, who attended the August 1795 term of the Court when it decided only two cases. The Senate, having reconvened, rejected him because of his opposition to Jay's Treaty. Washington offered the chief justiceship to PATRICK HENRY who declined it. The President then named Justice Cushing, whom the Senate confirmed; but he too declined, preferring to remain Associate Justice. In 1796, Oliver Ellsworth became Chief Justice but quit after four years. John Blair retired early in 1796 and Washington again had to fill a vacancy on the Court. After EDMUND RANDOLPH refused the position, SAMUEL CHASE accepted. In 1798, Wilson became the first Justice to die in office. RICHARD PETERS refused to be considered for the position, and John Marshall also declined. Adams then appointed BUSHROD WASHINGTON, and after Iredell died in 1798, he appointed ALFRED MOORE, who resigned within five years. When Ellsworth resigned and Jay declined reappointment, even though the Senate confirmed him, Adams turned to Marshall. The rapid turnover in personnel during the Court's first decade did not ease its work or enhance its reputation.

Jeffersonians grumbled about the Court's Federalist constitutional theories, but Jay kept his Court out of politics and established its independence from the other branches of the government. That achievement and the Court's identification of its task as safeguarding the supreme law of the land kept the Court a viable institution, despite its many problems during the first decade, and laid the groundwork for the achievements of the MARSHALL COURT.

Late in 1790, Virginia's legislature denounced as unconstitutional the bill for national assumption of state debts. Washington allowed Hamilton to send a copy of the Virginia resolves to Jay and to inquire whether the various branches of the government should employ their "collective weight . . . in exploding [Virginia's STRICT CONSTRUCTION] principles." Hamilton warned that Virginia had shown "the first symptom of a spirit which must either be killed or it will kill the Constitution of the United States." However, Jay, who privately advised Washington and drafted his PROCLAMATION OF NEUTRALITY, recognized the difference between a judicial pronouncement and an extrajudicial one. The Court, strongly believing in the principle of SEPARATION OF POWERS, would not express ex officio opinions except in judicial cases before it. Jay calmly declined the executive's invitation.

Similar principles motivated the Justices when confronted by Congress's Invalid Pensioners' Act of 1792 which required the circuit courts to pass on the pension applications of disabled veterans, subject to review by the secretary of war and Congress. Justices Wilson and Blair together with Judge Peters on circuit in the district of Pennsylvania, having refused to pass on an application from one Hayburn, explained their conduct in a letter to the President. They could not proceed because first, the business directed by the statute was not judicial in nature, there being no constitutional authority for it, and second, because the possible revision of the Court's judgment by the other branches of government would be "radically inconsistent with the independence" of the judiciary. In their circuits, Jay, Cushing, and Iredell similarly explained that a judicial decision must be a final decision. HAYBURN'S CASE (1792), which was not really a "case" and in which nothing was judicially decided, was important because the Court, in Wilson's words, affirmed "a principle important to freedom," that the judicial branch must be independent of the other branches.

Similarly, Jay established another principle vital to the Court's independent, judicial, and nonpolitical character when he declined Washington's request for an ADVISORY OPINION. That request arose out of apparent conflicts between American treaty obligations to France and the Proclamation of Neutrality. The French commissioned privateers in American ports and established prize courts to condemn vessels captured by those privateers. Washington sought the Court's opinion on twenty-nine questions involving international law and treaty interpretation, in connection with the French practices. Jay, relying again on the principle of separation of powers, observed that the Court should not "extra-judicially" decide questions that might come before it in litigation. Thus, by preserving its purely judicial character, the Court was free to decide some of those questions when real cases posed them. From the beginning, the Court staked its power and prestige on its special relationship to the supreme law of the land, which it safeguarded, expounded, and symbolized.

The pre-Marshall Court also exercised the power of JUDICIAL REVIEW. The Justices on circuit quickly held state acts unconstitutional for violating the supreme law of the land. Jay and Cushing on circuit in the district of Connecticut held that that state, by adversely affecting debts owed to British creditors, had violated the treaty of peace with Britain; Iredell in Georgia and Paterson in South Carolina made similar decisions. The Justices held that

United States treaties were superior to state laws. The Supreme Court confronted the issue in WARE V. HYLTON (1796). With Iredell alone dissenting, the Court rejected the arguments of John Marshall, making his only appearance before the Justices, as counsel for the debtor interests of Virginia. He opposed "those who wish to impair the sovereignty of Virginia" and contended first that the Constitution had not authorized the Court to question the validity of state statutes and, second, that a treaty could not annul them. Seriatim opinions by Chase, Paterson, Wilson, and Cushing held otherwise.

In *Clarke v. Harwood* (1797) the Court ruled that *Ware* "settled" the question before it. *Clarke* was the Court's first decision against the validity of a state act in a case arising on a WRIT OF ERROR to a state court under section 25 of the Judiciary Act of 1789. Section 25 authorized the Court to reverse or affirm state decisions that denied rights claimed under United States treaties. Maryland's high court, relying on a state statute sequestering debts owed to British creditors, had barred a claim based on the treaty of peace with Britain. By reversing the Maryland court, the Supreme Court in effect voided the state act. However, the Court rarely heard cases on a writ of error to a state court. Indeed, it had not decided its first such case until shortly before *Clarke*. In *Olney v. Arnold* (1796) the Court had reversed a Rhode Island decision that misconstrued a revenue act of Congress. The Court's power of reviewing state decisions under Section 25 did not become controversial until 1814. (See MARTIN V. HUNTER'S LESSEE, 1816.) During the Court's first decade, judicial review of state legislation was uncontested, and it was exercised.

On circuit the Justices also struck down state acts as violating the CONTRACT CLAUSE of the Constitution. The first such decision occurred in 1792 in CHAMPION AND DICKASON V. CASEY, which voided a Rhode Island state law. Given the hullaballoo in that state when its own judiciary was suspected of having voided a state act in TREVETT V. WEEDEN (1787), the meek acceptance of the 1792 decision showed the legitimacy of judicial review over the states.

In HYLTON V. UNITED STATES (1796) the Court for the first time determined the constitutionality of an act of Congress, ruling that an EXCISE on carriages, not being a DIRECT TAX, was valid even if not apportioned among the states. Those hoping for the Court to hold the federal excise unconstitutional were Jeffersonians; they did not then or at any time during the Court's first decade challenge the legitimacy of the Court's power to refuse to enforce an unconstitutional statute. Until the debate on the repeal of the JUDICIARY ACT OF 1801 (see JUDICIARY ACTS OF 1802), scarcely anyone opposed judicial review, whether over state or over congressional legislation. *Hayburn's Case* in 1792 was misunderstood throughout the nation. Not only did Attorney General Randolph believe that the Court had annulled an act of Congress; so did Congress. The House established an investigating committee, "this being the first instance in which a Court of Justice had declared a law of Congress unconstitutional." Jeffersonians gleefully praised the Justices and hoped the Court would extend the precedent by holding unconstitutional other congressional legislation that promoted Hamilton's economic programs. Later, Jeffersonians in Sedition Act trials sought to persuade the Justices on circuit that they should declare the statute void. Repeatedly during the first decade, bills arose in Congress that provoked members in both houses to state that the Court should and would hold them unconstitutional. The way to the doctrine of judicial review announced in MARBURY V. MADISON (1803) was well paved, and the opposition to the Court's opinion did not derive from its assumption of a power to void an act of Congress.

Another major theme in the work of the Court during its first decade was nationalism. Once again, the Marshall Court built on what the Jay and Ellsworth Courts had first shaped. The early Courts helped vindicate the national character of the United States government, maintain the supremacy of the nation over the states, and keep the states from undermining the new constitutional system. On circuit duty the Justices frequently lectured federal GRAND JURIES, inculcating doctrines from THE FEDERALIST, and these grand jury charges were well publicized in the newspapers. In one of his charges, Jay, in 1790, having declared, "We had become a Nation," explained why national tribunals became necessary for the interpretation and execution of national law, especially in a nation accustomed only to state courts and state policies. Circuit court opinions striking down state laws in violation of the contract clause or federal treaties preached nationalism and national supremacy. Many of the criminal prosecutions before the federal circuit courts during the first decade were connected with national suppression of the WHISKEY REBELLION and the FRIES REBELLION. Similarly, prosecutions under the Sedition Act were intended to vindicate the reputations of Congress and the President.

The development of a FEDERAL COMMON LAW OF CRIMES, expanding the jurisdiction of the national courts, fit the nationalist pattern. Whether the courts could try nonstatutory offenses was a question that first arose in Henfield's case (1793). Wilson maintained that an American citizen serving on a French privateer commissioned in an American port and attacking ships of England, with whom the United States was at peace, had committed an indictable offense under the Proclamation of Neutrality, the law of nations, and the treaty with England, even though Congress had not made his act a crime.

The same nationalist pattern unified several of the Court's opinions in cases dealing with various issues. In

CHISHOLM V. GEORGIA (1793) the Court's holding, that its jurisdiction extended to suits against a state by citizens of another state, was founded on nationalist principles as well as on the text of Article III. Wilson, for example, began with the principles that the people of the United States form a nation, making ridiculous the "haughty notions of state independence, state SOVEREIGNTY, and state supremacy." "As to the purposes of the Union," he said, "therefore, Georgia is not a sovereign state." Jay's opinion also stressed "the national character" of the United States and the "inexpediency" of allowing state courts to decide questions that involved the performance of national treaties. The denunciation of the Court for its "consolidation of the Union" and its "annihilation of the sovereignty of the States" led to the ELEVENTH AMENDMENT, which was intended to nullify *Chisholm*.

In *Glass v. Sloop Betsy* (1794) the Court supported the government's neutrality policy by ruling that France, after capturing a neutral ship, could not hold or award her as a prize in an American port. Only the United States courts could determine the lawfulness of prizes brought into its ports, and no foreign nation controlled its admiralty law or could subvert American rights under international law. In *Penhallow v. Doane* (1795) the Court resolved an old dispute over the ownership of a prize. One party's claims relied on decisions of a New Hampshire court, the other's on a decision of a prize court established by the old Congress of the Confederation. Paterson, in the Supreme Court's principal opinion, upheld the lower federal courts, which had decided against the state court and claimed jurisdiction. No nation, he said, had recognized the states as sovereign for the purpose of awarding prizes. The old Congress had been the supreme council of the nation and center of the Union, he claimed, whose sovereignty was approved by the people of America and recognized by foreign nations. The federal courts succeeded to that sovereignty in prize matters. New Hampshire angrily remonstrated against the "destruction" of its sovereignty but the Court's ruling prevailed.

Its decision in *Hylton v. United States* gave life to the government's revenue powers. When the Court upheld federal treaties as paramount to state laws, in *Ware v. Hylton* (1796), Chase, in the principal opinion for the Court, indulged in fanciful nationalism when declaring, "There can be no limitation on the power of the people of the United States. By their authority the State Constitutions were made."

Other notable cases of the first decade were VAN HORNE'S LESSEE V. DORRANCE (1794) and CALDER V. BULL (1798), in which the Court laid the foundation for the judicial doctrine of VESTED RIGHTS, which it developed further in contract clause and HIGHER LAW decisions during Marshall's chief justiceship. Although the Court was left out of the planning for the new national capital, it had been enunciating doctrines—of judicial review, national supremacy, and vested rights—that helped shape the United States and would in time make the judicial branch of government impossible to ignore.

LEONARD W. LEVY
(1986)

Bibliography

CURRIE, DAVID P. 1981 The Constitution in the Supreme Court: 1789–1801. *University of Chicago Law Review* 48: 819–885.

GOEBEL, JULIUS 1971 *Antecedents and Beginnings.* Vol. I of the *Oliver Wendell Holmes Devise History of the Supreme Court*, ed. Paul Freund. New York: Macmillan.

HAINES, CHARLES GROVE 1944 *The Role of the Supreme Court in American Government and Politics, 1789–1835.* Berkeley: University of California Press.

HENDERSON, DWIGHT F. 1971 *Courts for a New Nation.* Washington, D.C.: Public Affairs Press.

WARREN, CHARLES 1923 *The Supreme Court in United States History.* Vol. I. Boston: Little, Brown.

## SUPREME COURT AT WORK

In its first decade, the Supreme Court had little business, frequent turnover in personnel, no chambers or staff, no fixed customs, and no institutional identity. When the Court initially convened on February 1, 1790, only Chief Justice JOHN JAY and two other Justices arrived at the Exchange Building in New York City. They adjourned until the next day, when Justice JOHN BLAIR arrived. With little to do other than admit attorneys to practice before its bar, the Court concluded its first sessions in less than two weeks. When the capital moved from New York City to Philadelphia in the winter of 1790, the Court met in Independence Hall and in the Old City Hall for ten years, until the capital again moved to Washington, D.C. Most of the first Justices' time, however, was spent riding circuit. Under the JUDICIARY ACT OF 1789, they were required twice a year to hold CIRCUIT COURT, in the company of district judges, to try some types of cases and to hear appeals from the federal district courts. Hence, the Justices resided primarily in their circuits rather than in Washington and often felt a greater allegiance to their circuits than to the Supreme Court.

When the capital moved to Washington, D.C., in 1800, no courtroom was provided. Between 1801 and 1809, the Justices convened in various rooms in the basement of the Capitol. In 1810, they shared a room in the capitol with the Orphans' Court of the DISTRICT OF COLUMBIA. This room was destroyed when the British burned the Capitol on August 24, 1814, and for two years, the Court met in

the Bell Tavern. In 1817, the Court moved back into the Capitol, holding sessions in a small dungeonlike room for two years. In 1819, it returned to its restored courtroom, where it met for almost half a century.

For most of the nineteenth century, the Justices resided in their circuits and stayed in boardinghouses during the Court's terms. Chief Justice ROGER BROOKE TANEY (1836–1864) was the first to reside in the Federal City, and as late as the 1880s most Justices did not maintain homes there. Lacking offices and sharing the law library of Congress, the Justices relied on a single clerk to answer correspondence, collect fees, and to locate boardinghouse rooms for them.

Coincident with the 1801 move into the Capitol, JOHN MARSHALL assumed the Chief Justiceship. During his thirty-four years on the Court, Marshall established regularized procedures and a tradition of collegiality. He saw to it that the Justices roomed in the same boardinghouse and, thereby, turned the disadvantage of transiency into strategic opportunity for achieving unanimity in decision making. After a day of hearing ORAL ARGUMENTS, the Justices would dine together, and around 7:00 p.m. they would discuss cases.

After 1860, the Court met upstairs in the old Senate Chamber, between the new chambers of the Senate and those of the House of Representatives. The Justices still had no offices or staff of their own. After the CIVIL WAR, however, the caseload steadily grew, the Court's terms lengthened, and the Justices deserted boardinghouses for fashionable hotels along Pennsylvania Avenue. Instead of dining together and discussing cases after dinner, they held CONFERENCES on Saturdays and announced decisions on Monday.

By the turn of the century, the Justices resided in the capitol and for the most part worked at home, where each had a library and employed a messenger and a secretary. The Court's collegial procedures had evolved into institutional norms based on majority rule. The CHIEF JUSTICE assumed a special role in scheduling and presiding over conferences and oral arguments. But the Court's deliberative process was firmly rooted in the Justices' interaction as equals. Each Justice was considered a sovereign in his or her own right, even though the Justices decided cases together and strove for institutional opinions.

After becoming Chief Justice in 1921, WILLIAM HOWARD TAFT persuaded four Justices to support his lobbying Congress for the construction of a building for the Court. Taft envisioned a marble temple symbolizing the modern Court's prestige and independence. Yet, when the building that houses the Court was completed in 1935, none of the sitting Justices moved in, although sessions and conferences were held there in the later years of the HUGHES COURT (1930–1941). Upon his appointment in 1937, HUGO L. BLACK was the first to move in, leading the way for President FRANKLIN D. ROOSEVELT's other appointees. Even when HARLAN FISKE STONE was elevated from Associate to Chief Justice, he still worked at home. The VINSON COURT (1946–1953) was the first to see all nine Justices regularly working in the Supreme Court building.

The marble temple stands for more than a symbol of the modern Court. Once again, the institutional life of the Court changed. As Taft hoped, the building buttressed the Court's prestige and reinforced the basic norms of secrecy, tradition, and collegiality that condition the Court's work. The Justices continued to function independently, but the work of the Court grew more bureaucratic. Along with the rising caseload in the decades following WORLD WAR II, the number of law clerks more than tripled and the number of other employees dramatically increased as well. The Justices in turn delegated more and incorporated modern office technology and managerial practices into their work. The WARREN COURT (1953–1969) started delivering opinions on any day of open session, and the BURGER COURT (1969–1986) moved conferences back to Fridays.

When POTTER STEWART joined the Court in 1958, he expected to find "one law firm with nine partners, if you will, the law clerks being the associates." But Justice JOHN MARSHALL HARLAN told him, "No, you will find here it is like nine firms, sometimes practicing law against one another." Even today, each Justice and his or her staff works in rather secluded chambers with little of the direct daily interaction that occurs in some appellate courts. Nor do recent Justices follow FELIX FRANKFURTER's practice of sending clerks ("Felix's happy hotdogs") scurrying around the building to lobby other clerks and Justices.

A number of factors isolate the Justices, but most important is the caseload. The Justices, in Justice BYRON R. WHITE's view, "stay at arm's length" and rely on formal printed communications because the workload discourages them "from going from chamber to chamber to work things out." Each chamber averages about seven: the Justice, three to four law clerks, two secretaries, and a messenger. As managing chambers and supervising paperwork consumes more time, the Justices talk less to each other and read and write more memoranda and opinions. Each chamber now has a photocopying machine and four to five terminals for word processing and legal research.

Law CLERKS became central to the work of the Court. In 1882, Justice HORACE GRAY initiated the practice of hiring a "secretary" or law clerk. When OLIVER WENDELL HOLMES, JR. succeeded Gray, he continued the practice, and other Justices gradually followed. By Chief Justice Stone's time it was well established for each Justice to have one clerk. During the chief justiceships of FRED M. VINSON and

EARL WARREN, the number increased to two. In the 1970s, the number grew to three and to four. The number of secretaries likewise increased—initially, in place of adding clerks and, later, to assist the growing number of clerks. A Legal Office, staffed by two attorneys, was created in 1975 to assist with cases in the Court's ORIGINAL JURISDICTION and with expedited appeals.

Although the duties and functions of clerks vary with each chamber, all share certain commonly assigned responsibilities. Most notably, Justices have delegated to them the task of initially screening all filings for writs of CERTIORARI. This practice originated with the handling of INDIGENTS' petitions by Chief Justice CHARLES EVANS HUGHES and his clerks. Unlike the "paid" petitions that are filed in multiple copies, an indigent's petition is typically a handwritten statement. Except when an unpaid petition raised important legal issues or involved a capital case, Hughes neither circulated the petitions to the other Justices nor discussed them at conference. Stone, Vinson, and Warren, however, circulated to the chambers their clerks' memoranda, which summarized the facts and questions presented, and recommended whether the case should be denied, dismissed, or granted a review. But Chief Justice WARREN E. BURGER refused to have his clerks shoulder the entire burden of screening these petitions. And in 1972, a majority of the Justices began to pool their clerks, dividing up all paid and unpaid filings and having a single clerk's certiorari memo circulate to those Justices participating in what is called "the cert. pool." With more than a hundred filings each week, even those Justices who objected to the "cert. pool" have found it necessary to give their clerks considerable responsibility for screening petitions. Justice JOHN PAUL STEVENS describes his practice: "[The clerks] examine them all and select a small minority that they believe I should read myself. As a result, I do not even look at the papers in over 80 percent of the cases that are filed."

Law clerks have also assumed responsibility for the preliminary drafting of the Justices' opinions. Chief Justice WILLIAM H. REHNQUIST's practice, for instance, is to have one of his clerks do a first draft, without bothering about style, in about ten days. Before beginning work on an opinion, Rehnquist goes over the conference discussion with the clerk and explains how he thinks "an opinion can be written supporting the result reached by the majority." Once the clerk finishes a draft and Rehnquist works the draft into his own opinion, it circulates three or four times among the other clerks in the chambers before it circulates to the other chambers.

In addition to law clerks, five officers and their staffs also assist the Justices. Central to the Court's work is the Office of the Clerk. For most of the Court's history, the clerk earned no salary, but this changed in 1921 when Taft lobbied for legislation making the clerk a salaried employee. The clerk's office collects filing and admission fees; receives and records all motions, petitions, BRIEFS, and other documents; and circulates those necessary items to each chamber. The clerk also establishes the oral-argument calendar and maintains the order list of cases granted or denied review and final judgments. In 1975, the office acquired a computer system that automatically notifies counsel in over ninety-five percent of all cases of the disposition of their filings.

There was no official reporter of decisions during the first quarter-century of the Court, and not until 1835 were the Justices' opinions given to the clerk. Early reporters worked at their own expense and for their own profit. In 1922, Congress established the present arrangement (at Chief Justice Taft's request): the reporter's salary is fixed by the Justices and paid by the government, and the Government Printing Office publishes the *United States Reports*. The reporter has primary responsibility for supervising the publication of the Court's opinions, writing headnotes or syllabi that accompany each opinion, and for making editorial suggestions subject to the Justices' approval.

Order in the courtroom was preserved by U.S. marshals until 1867, when Congress created the Office of Marshal of the Supreme Court. The Marshal not only maintains order in the courtroom and times oral arguments but also oversees building maintenance and serves as business manager for the more than two hundred Court employees, including messengers, carpenters, police and workmen, a nurse, physiotherapist, barber, seamstress, and cafeteria workers.

The Justices acquired their first small library in 1832. It was run by the clerk until the marshal's office took over in 1884. In 1948, Congress created the Office of the Librarian, which employs several research librarians to assist the Justice.

Unlike other members of the Court, the Chief Justice has special administrative duties. Over fifty statutes confer duties ranging from chairing the JUDICIAL CONFERENCE and the Federal Judicial Center to supervising the Administrative Office of the U.S. Courts and serving as chancellor of the Smithsonian Institution. Unlike Taft and Hughes, Stone felt overwhelmed by these duties. His successor, Vinson, appointed a special assistant to deal with administrative matters, whereas Warren delegated such matters to his secretary. By contrast, Burger became preoccupied with administrative matters and pushed for judicial reforms. In historical perspective, he brought Taft's marble temple into the world of modern technology and managerial practices. Burger also lobbied Congress to create a

fifth legal officer of the Court, the administrative assistant to the Chief Justice. While also employing an administrative assistant, Chief Justice Rehnquist has less interest in judicial administration, and his assistant is less occupied with liaison work with organizations outside the Court.

The caseload remains the driving force behind the Court's work; its increase has changed the Court's operations. After Taft campaigned for relief for the Court, Congress passed the JUDICIARY ACT OF 1925, which enlarged the Court's discretionary JURISDICTION and enabled it to deny cases review. Subsequently, on a piecemeal basis, the Court's discretion over its jurisdiction was further expanded, and in 1988, virtually all mandatory appeals were eliminated. As a result, the Court has the power to manage its docket and set its agenda for decision making.

The cornerstone of the modern Court's operation, in Justice John Harlan's words, "is the control it possesses over the amount and character of its business." The overwhelming majority of all cases are denied review; less than three percent of the more than 5,000 cases on the Court's annual docket are granted and decided by fully written opinion.

When a petition is filed at the Court, the clerk's staff determines whether it satisfies the rules as to form, length, and fees. After receiving opposing papers from respondents, the clerk circulates to the chambers a list of cases ready for consideration and a set of papers for each case. For much of the Court's history, every Justice reviewed every case, but this practice no longer prevails. Since the creation of the "cert. pool" in 1972, most of the Justices have delegated to their clerks much of this initial screening task. Moreover, the Court has found it necessary to hold its initial conference in the last week of September, before the formal opening of its term. At this conference, the Justices dispose of more than 1,000 cases, discussing less than two hundred. Before the start of the term, the Court has thus disposed of approximately one-fifth of its entire docket, with more than four-fifths of those cases effectively screened out by law clerks and never collectively considered by the Justices.

In conference, attended only by the Justices, the Court decides which cases to accept and discusses the merits of argued cases. During the weeks in which the Court hears oral arguments, conferences are held on Wednesday afternoons to take up the four cases argued on Monday, and then on Fridays to discuss new filings and the eight cases argued on Tuesday and Wednesday. In May and June, when oral arguments are not heard, conferences are held on Thursdays, from 10:00 a.m. to 4:00 p.m., with a forty-five-minute lunch break around 12:30 p.m.

Summoned by a buzzer five minutes before the hour, the Justices meet in their conference room, located directly behind the courtroom itself. Two conference lists circulate to each chamber by noon on the Wednesday before a conference. On the first list are those cases deemed worth discussing; typically, the discuss list includes about fifty cases. Attached is a second list, the "Dead List," containing those cases considered unworthy of discussion. Any Justice may request that a case be discussed, but over seventy percent of the cases on the conference lists are denied review without discussion.

For a case to be heard by the Court, at least four Justices must agree that it warrants consideration. This informal RULE OF FOUR was adopted when the Justices were trying to persuade Congress that important cases would still be decided after the Court was given discretionary controll over much of its jurisdiction under the Judiciary Act of 1925, Unanimity in case selection, nevertheless, remains remarkably high becaues the Justices agree that only a limited number of cases may be taked. "As a rule of thumb," Justice White explains, "the Court should not be expected to produce more than 150 opinions per term in argued cases." The rule of four, however, also permits an ideological bloc to grant review in cases it wants to hear and thus to influence the Court's agenda.

Since the Chief Justice presides over conferences, he has significant opportunities for structuring and influencing the Court's work. Chief Justices, however, vary widely in their skills, style, and ideological orientations. Hughes is widely considered to be the greatest Chief Justice in this century because of his photographic memory and ability to state concisely the relative importance of each case. "Warren was closer to Hughes than any others," in Justice WILLIAM O. DOUGLAS's view, and "Burger was closer to Vinson. Stone was somewhere in between." Rehnquist, by all accounts, is an effective Chief Justice because he moves conferences along quickly and has the intellectual and temperamental wherewithal to be a leader.

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Immediately after conference, the Chief Justice traditionally had the task of reporting to the clerk which cases were granted review, which were denied review, and which were ready to come down. Burger, however, dele-

gated this task to the junior Justice. The clerk then notifies both sides in a case granted review that they have thirty days to file briefs on merits and supporting documents. Once all briefs (forty copies of each) are submitted, cases are scheduled for oral argument.

The importance of oral argument, Chief Justice Charles Evans Hughes observed, lies in the fact that often "the impression that a judge has at the close of a full oral argument accords with the conviction which controls his final vote." Because the Justices vote in conference within a day or two of hearing arguments, oral arguments come at a crucial time. Still, oral arguments were more prominent in the work of the Court in the nineteenth century. Unlimited time was allowed, until the Court began cutting back on oral argument in 1848, allowing eight hours per case. The time has been reduced periodically, and since 1970, arguments have been limited to thirty minutes per side. The argument calendar permits hearing no more than 180 cases a year. For fourteen weeks each term, from the first Monday in October until the end of April, the Court hears arguments from 10:00 to 12:00 and 1:00 to 3:00 on Monday, Tuesday, and Wednesday about every two weeks.

Justices differ in their preparation for oral arguments. Douglas insisted that "oral arguments win or lose a case," but Chief Justice Earl Warren claimed that they were "not highly persuasive." Most Justices come prepared with "bench memos" drafted by their law clerks, identifying the central facts, issues, and possible questions. On the bench, they also vary in their style and approach toward questioning attorneys. Justices SANDRA DAY O'CONNOR and ANTONIN SCALIA, for example, are aggressive and relentless in the questioning of attorneys, while Justices WILLIAM J. BRENNAN and HARRY A. BLACKMUN tend to sit back and listen.

Conference discussions following oral arguments no longer play the role they once did. When the docket was smaller, conferences were integral to the Court's work. Cases were discussed in detail, differences hammered out, and the Justices strove to reach agreement on an institutional opinion for the Court. As the caseload grew, conferences became largely symbolic of past collective deliberations. They currently serve only to discover consensus. "In fact," Justice Scalia points out, "to call our discussion of a case a conference is really something of a misnomer. It's much more a statement of the views of each of the nine Justices."

Most of the time spent in conference is consumed by the Justices deciding which cases should be granted review. Moreover, less time is spent in conference (now about 108 hours) each term. The caseload and conference schedule permits on average only about six minutes for each case on the discuss list and about twenty-nine minutes for those granted full consideration. Perhaps as a result, the Justices agree less often on the opinion announcing the Court's decision and file a greater number of separate opinions. In short, the combination of more cases and less collective deliberation discourages the compromises necessary for institutional opinions and reinforces the tendency of the Justices to function independently.

All votes at conference are tentative until the final opinion comes down. Voting thus presents each Justice with opportunities to negotiate which issues are to be decided and how they are to be resolved. Before, during, and after conference, Justices may use their votes in strategic ways to influence the outcome of a case. At conference, a Justice may vote with others who appear to constitute a majority, even though the Justice may disagree with their reasoning. The Justice may then suggest changes in draft opinions to try to minimize the damage, from his or her perspective, of the Court's decision.

Because conference votes are tentative, the assignment, drafting, and circulation of opinions is crucial to the Court's work. Opinions justify or explain votes at conference. The OPINION OF THE COURT is the most important and most difficult to write because it represents a collective judgment. Writing the Court's opinion, as Justice Holmes put it, requires that a "judge can dance the sword dance; that is he can justify an obvious result without stepping on either blade of opposing fallacies." Because Justices remain free to switch votes and to write separate opinions, concurring in or dissenting from the Court's decision, they continue after conference to compete for influence on the final decision and opinion.

The power of opinion assignment is the Chief Justice's "single most influential function," observed Justice TOM C. CLARK, and an exercise in "judicial-political discretion." By tradition, when the Chief Justice votes with the majority, he assigns the Court's opinion. If the Chief Justice is not with the majority, then the senior Associate Justice in the majority either writes the opinion or assigns it to another Justice.

Chief Justices may keep the Court's opinion for themselves, especially when a case is unanimously decided. Since Vinson, however, Chief Justices have generally sought parity in their opinion assignments. Opinions may be assigned to pivotal Justices to ensure or expand the size of the majority joining the opinion for the Court. But the Chief Justice may also take other factors into account, such as a Justice's expertise or what kind of reaction a ruling may engender. Hughes, for example, was inclined to assign the opinions in "liberal" decisions to "conservative" Justices.

The circulation of draft opinions among the chambers has added to the Supreme Court's workload and changed its deliberative process. The practice of circulating draft

opinions began around 1900 and soon became pivotal in the Court's decision-making process, especially with the Justices spending less time in conference discussing and reconciling their differences. Occasionally, proposed changes in a draft opinion will lead to a complete recasting or to having the opinion reassigned to another Justice. To accommodate the views of others, the author of an opinion for the Court must negotiate language and bargain over substance. At times, however, Justices may not feel that a case is worth fighting over; as Justice GEORGE SUTHERLAND noted on the back of one of Stone's drafts, "probably bad—but only a small baby. Let it go."

Final published opinions for the Court are the residue of compromises among the Justices. But they also reflect changing norms in the work of the Court. Up until the 1930s, there were few concurring or dissenting OPINIONS. But individual opinions now predominate over opinions for the Court. When the Court's practice in the 1980s is compared with that of forty years ago, there are roughly ten times the number of CONCURRING OPINIONS, four times more DISSENTING OPINIONS, and seven times the number of separate opinions in which the Justices explain their views and why they concur and dissent from parts of the Court's opinion. Even though the business of the Court is to give institutional opinions, as Justice Stewart observed, "that view has come to be that of a minority of the Justices."

The Justices are more interested in merely the tally of votes at conference than in arriving at a consensus on an institutional decision and opinion. As a result, whereas unanimity remains high on case selection (around eighty percent), unanimous opinions for the Court count for only about thirty percent of the Court's written opinions. The number of cases decided by a bare majority also sharply grew in the 1970s and 1980s, and frequently, no majority could agree on an opinion announcing the Court's rulings.

A Justice writing separate concurring or dissenting opinions carries no burden of massing other Justices. Concurring opinions explain how the Court's decision could have been otherwise rationalized. A concurring opinion surely is defensible when a compromised opinion might be meaningless or impossible to achieve. The cost of concurring opinions is that they add to the workload and may create confusion over the Court's rulings.

A dissenting opinion, in the words of Chief Justice Hughes, appeals "to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the Court to have been betrayed." Even the threat of a dissent may be useful in persuading the majority to narrow its holding or tone down the language of its opinion.

The struggles over the work of the Court (and among the Justices) continue after the writing of opinions and final votes. Opinion days, when the Court announces its decisions, may reveal something of these struggles and mark the beginning of larger political struggles for influence within the country.

Decisions are announced in the courtroom, typically crowded with reporters, attorneys, and spectators. Before 1857, decisions came down on any day of the week, but thereafter they were announced only on Mondays. In 1965, the Court reverted to its earlier practice, and in 1971, the Justices further broke with the tradition of "Decision Mondays." On Mondays, the Court generally releases memorandum orders and admits new attorneys to its bar. In weeks when the Justices hear oral arguments, opinions are announced on Tuesdays and Wednesdays and then on any day of the week during the rest of the term. By tradition, there is no prior announcement of the decisions to be handed down. In 1971, the practice of reading full opinions was abandoned; typically, only the ruling and the line-up of the Justices is stated.

Media coverage of the Court's work has grown since the 1930s, when fewer than a half-dozen reporters covered the Court and shared six small cubicles on the ground floor, just below the courtroom, where they received copies of opinions sent down through pneumatic tube. In 1970, the Court established a Public Information Office, which provides space for a "press room" and makes available all filings and briefs for cases on the docket, as well as the Court's conference lists and final opinions. More than fifty reporters and all major television networks currently cover the Court, although cameras are still not allowed in the courtroom.

When deciding major issues of public law and policy, Justices may consider strategies for winning public acceptance of their rulings. When holding "separate but equal" schools unconstitutional in 1954 in BROWN V. BOARD OF EDUCATION, for instance, the Court waited a year before issuing its mandate for "all deliberate speed" in ending school SEGREGATION. Some of the Justices sacrificed their preference for a more precise guideline in order to achieve a unanimous ruling, and the Court tolerated lengthy delays in the implementation of *Brown*, in recognition of the likelihood of open defiance.

Although the Justices are less concerned about public opinion than are elected public officials, they are sensitive to the attitudes of their immediate "constituents": the SOLICITOR GENERAL, the ATTORNEY GENERAL AND DEPARTMENT OF JUSTICE, counsel for federal agencies, states' attorneys general, and the legal profession. These professionals' responses to the Court's rulings help determine the extent of compliance. With such concerns in mind, Chief Justice Warren sought to establish an objective bright-line rule

that police could not evade, when holding, in MIRANDA V. ARIZONA (1966), that police must inform criminal suspects of their Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION and their Sixth Amendment RIGHT TO COUNSEL, which included the right to consult and have the presence of an attorney during POLICE INTERROGATION. The potential costs of securing compliance may also convince the Justices to limit the scope or application of their decisions.

Compliance with the Court's decisions by lower courts is uneven. They may extend or limit decisions in anticipation of later rulings. Ambiguities created by PLURALITY OPINIONS, or 5–4 decisions invite lower courts to pursue their own policy goals. Differences between the facts on which the Court ruled and the circumstances of a case at hand may be emphasized so as to reach a different conclusion.

Major confrontations between Congress and the Court have occurred a number of times, and Congress has tried to pressure the Court in a variety of ways. The Senate may try to influence the APPOINTMENT OF SUPREME COURT JUSTICES, and Justices may be impeached. More frequently, Congress has tried to pressure the Court when setting its terms and size and when authorizing appropriations for salaries, law clerks, secretaries, and office technology. Only once, in 1802, when repealing the JUDICIARY ACT OF 1801 and abolishing a session for a year, did Congress actually set the Court's term in order to delay and influence a particular decision. The size of the Court is not preordained, and changes generally reflect attempts to control the Court. The Jeffersonian Republicans' quick repeal of the act passed by the FEDERALISTS in 1801, reducing the number of Justices, was the first of several attempts to influence the Court. Presidents JAMES MADISON, JAMES MONROE, and JOHN ADAMS all claimed that the country's geographical expansion warranted increasing the number of Justices. Congress, however, refused to do so until the last day of ANDREW JACKSON's term in 1837. During the Civil War, the number of Justices increased to ten. This was ostensibly due to the creation of a circuit in the West, but it also gave ABRAHAM LINCOLN his fourth appointment and a chance to secure a pro-Union majority on the bench. Antagonism toward ANDREW JOHNSON's RECONSTRUCTION policies, then, led to a reduction from ten to seven Justices. After General ULYSSES S. GRANT's election, Congress again authorized nine Justices. In the nineteenth century at least, Congress rather successfully denied Presidents additional appointments in order to preserve the Court's policies, and increased the number of Justices so as to change the ideological composition of the Court.

More direct attacks are possible. Under Article III, Congress is authorized "to make exceptions" to the Court's APELLATE JURISDICTION. This has been viewed as a way of denying the Court review of certain kinds of cases. But Congress succeeded only once in affecting the Court's work in this way; an 1868 repeal of jurisdiction over writs of HABEAS CORPUS was upheld in *Ex Parte McCardle* (1869).

Court-curbing legislation is not a very viable weapon. Congress has greater success in reversing the Court by constitutional amendment, which three-fourths of the states must ratify. The process is cumbersome, and thousands of amendments to overrule the Court have failed. But four rulings have been overturned by constitutional amendment. CHISHOLM V. GEORGIA (1793), holding that citizens of one state could sue another state in federal courts, was reversed by the ELEVENTH AMENDMENT, guaranteeing SOVEREIGN IMMUNITY for states from suits by citizens of other states. The THIRTEENTH AMENDMENT and FOURTEENTH AMENDMENT, abolishing SLAVERY and making blacks citizens of the United States, technically overturned DRED SCOTT V. SANDFORD (1857). With the ratification in 1913 of the SIXTEENTH AMENDMENT, Congress reversed POLLOCK V. FARMERS' LOAN AND TRUST COMPANY (1895), which had invalidated a federal income tax. In 1970, an amendment to the VOTING RIGHTS ACT OF 1965 lowered the voting age to eighteen years for all elections. Although signing the act into law, President RICHARD M. NIXON had his attorney general challenge the validity of lowering the voting age in state and local elections. Within six months, in OREGON V. MITCHELL (1970), a bare majority held that Congress had exceeded its power. Less than a year later, the TWENTY-SIXTH AMENDMENT was ratified, thereby overriding the Court's ruling and extending the franchise to eighteen-year-olds in all elections.

Even more successful are congressional enactments and rewriting of legislation in response to the Court's rulings. Congress, of course, cannot overturn the Court's interpretations of the Constitution by mere legislation. But Congress may enhance or thwart compliance with its rulings. After the landmark ruling in GIDEON V. WAINWRIGHT (1963) that indigents have a right to counsel, for instance, Congress provided attorneys for indigents charged with federal offenses. By contrast, in the Crime Control and Safe Streets Act of 1968, Congress permitted federal courts to use evidence obtained from suspects who had not been read their *Miranda* rights if their testimony appeared voluntary based on the "totality of the circumstances" surrounding their interrogation.

Congress may also openly defy the Court's rulings. When holding in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983) that Congress may not delegate decision-making authority to federal agencies and still retain the power of vetoing decisions with which it disagrees, the Court invalidated over two hundred provisions for congressional vetoes of administrative actions. Congress

largely responded by deleting or substituting joint resolutions for one-House veto provisions. However, in the year following *Chadha*, Congress passed no less than thirty new provisions for LEGISLATIVE VETOES.

Congress indubitably has the power to delay and undercut implementation of the Court's rulings. On major issues of public policy, Congress is likely to prevail or at least temper the impact of the Court's rulings.

The Court has often been the focus of presidential campaigns and power struggles as well. Presidents rarely openly defy particular decisions by the Court, and in major confrontations, they have tended to yield. Still, presidential reluctance to enforce rulings may thwart implementation of the Court's rulings. In the short and long run, Presidents may undercut the Court's work by issuing contradictory directives to federal agencies and assigning low priority for enforcement by the Department of Justice. Presidents may also make broad moral appeals in response to the Court's rulings, and those appeals may transcend their limited time in office. The Court put school DESEGREGATION and ABORTION on the national political agenda. Yet JOHN F. KENNEDY's appeal for CIVIL RIGHTS captivated a generation and encouraged public acceptance of the Court's ruling in *Brown v. Board of Education*. Similarly, RONALD REAGAN's opposition to abortion focused attention on "traditional family values" and served to legitimate resistance to the Court's decisions.

Presidential influence over the Court in the long run remains contingent on appointments to the Court. Vacancies occur on the average of one every twenty-two months, and there is no guarantee as to how a Justice will vote or whether that vote will prove the key to limiting or reversing past rulings with which a President disagrees. Yet through their appointments, Presidents leave their mark on the Court and possibly align it and the country or precipitate later confrontations.

The Supreme Court at work is unlike any other. It has virtually complete discretion to select which cases are reviewed, to control its work load, and to set its own substantive agenda. From the thousands of cases arriving each year, less than two hundred are accepted and decided. The Court thus functions like a superlegislature. But the Justices' chambers also work like nine separate law offices, competing for influence when selecting and deciding those cases. The Justices no longer spend time collectively deliberating cases at conference. Instead, they simply tally votes and then hammer out differences, negotiating and compromising on the language of their opinions during the postconference period when drafts are circulated among the chambers. When the final opinions come down, the Court remains dependent on the cooperation of other political branches and public acceptance for compliance with its rulings. The work of the Court, in Chief Justice EDWARD D. WHITE's words, "rests solely upon the approval of a free people."

DAVID M. O' BRIEN
(1992)

(SEE ALSO: *Jeffersonianism.*)

Bibliography

ABRAHAM, HENRY J. 1986 *The Judicial Process*, 5th ed. New York: Oxford University Press.

CHOPER, JESSE 1980 *Judicial Review and the National Democratic Process.* Chicago: University of Chicago Press.

CONGRESSIONAL QUARTERLY 1989 *Guide to the U.S. Supreme Court*, 2nd ed. Washington, D.C.: Congressional Quarterly Press.

DIAMOND, PAUL 1989 *The Supreme Court & Judicial Choice: The Role of Provisional Judicial Review.* Ann Arbor: University of Michigan Press.

FISHER, LOUIS 1988 *Constitutional Dialogues.* Princeton, N.J.: Princeton University Press.

JOHNSON, CHARLES and CANNON, BRADLEY 1984 *Judicial Policies: Implementation and Impact.* Washington, D.C.: Congressional Quarterly Press.

O'BRIEN, DAVID M. 1990 *Storm Center: The Supreme Court in American Politics*, 2nd ed. New York: W. W. Norton.

STERN, ROBERT and GRESSMAN, EUGENE 1987 *Supreme Court Practice*, 6th ed. Washington, D.C.: Bureau of National Affairs.

## SUPREME COURT BAR

The bar of the Supreme Court is not cohesive, and it is not active in any organizational sense. The number of lawyers admitted to practice before the Supreme Court is greatly in excess of the number who actually appear there.

The first rule of the Supreme Court with respect to admissions was adopted on February 5, 1790, three days after the Court opened in New York. The Court then made the provision, which continues to this day, that applicants for admission shall have been admitted "for three years past in the Supreme Courts of the State to which they respectively belong." The formula also provided, then and throughout the nineteenth century, that the private and professional character of the applicants "shall appear to be fair." As the American language evolved, the word "fair" acquired a dual meaning, and the use of the phrase in oral motions sometimes produced a laugh in the courtroom. So the wording was changed, and for most of the twentieth century the sponsor was required to say that he "vouched" for the applicant. Under the rule as it stands now, he affirms "that the applicant is of good moral and professional character." All motions for admissions were

made in open court until about 1970. Now the whole procedure can be done by mail.

Under the first rule for admission, the applicant was required to elect whether he would practice as an attorney (office lawyer) or as a counselor (appearing in court), and he could not practice as both. If this rule had remained in effect (it was eliminated in 1801), the long-established division in England between solicitors and barristers would have been perpetuated in the United States and the bar of the Supreme Court would have been drawn from a much narrower group.

There is no published list of the members of the bar of the Supreme Court. Indeed, no one knows how many members there are. The clerk of the Supreme Court maintains a list of those admitted since October 1925. In early 1990 the number of those who had been admitted was about 185,000. But there is no record of those who have died or retired from active practice (though the list does record 800 names of lawyers who have been disbarred). By an estimate there are now 75,000 lawyers in the United States who have been admitted to practice before the Supreme Court and thus are members of its bar. No more than 300 of these actually present arguments before the Supreme Court in any year, and there are probably fewer than 5,000 living lawyers in the country (out of a total of close to 700,000 lawyers altogether) who have ever made a personal appearance before the Court.

The first member of the bar of the Supreme Court was Elias Boudinot of New Jersey, who was admitted to practice in February 1790. There was, of course, no one to move his admission. No procedure had yet been established for the filing of credentials. After a short interval, the Court turned to the attorney general, EDMUND RANDOLPH. Though he was never admitted to practice before the Court, he was treated as an officer of the Court. Before long, the practice was established of admission to the bar on motions of persons already admitted.

During the first ten years of its existence, the Supreme Court heard very few cases. ALEXANDER HAMILTON made his sole appearance before the Court in the case of HYLTON V. UNITED STATES in 1796. JOHN MARSHALL made his sole appearance before the Court in WARE V. HYLTON (1796). This was the famous British debts case, and Marshall was unsuccessful.

As time passed, and the country developed, the number of cases before the Court steadily increased. Thomas A. Emmet arrived in New York from Ireland in 1804 and was soon established as a leading lawyer. He appeared before the Supreme Court for the first time in 1815. The culmination of his career was his argument in the famous steamboat case of GIBBONS V. OGDEN (1824). Another of the early leaders was Littleton W. Tazewell of Virginia, who specialized in criminal law and admiralty. DANIEL WEBSTER wrote of him, "He is a correct, fluent, easy & handsome speaker and a learned, ingenuous & *subtle* lawyer"—a standard to which any Supreme Court lawyer might aspire. Others who appeared during the early years of the nineteenth century were LUTHER MARTIN, WILLIAM PINKNEY, and Francis Scott Key of Maryland; Roger Griswold of Connecticut; Edmund J. Lee and WILLIAM WIRT of Virginia; JOHN QUINCY ADAMS, Samuel Dexter, LEVI LINCOLN, and Rufus G. Amory of Massachusetts; JARED INGERSOLL and HORACE BINNEY of Pennsylvania; and Edward Livingston of New York and Louisiana.

Daniel Webster made his first appearance in 1814. Early in his career he argued DARTMOUTH COLLEGE V. WOODWARD (1818). The decision of the Court in this case, announced in 1819, relied on the OBLIGATION OF CONTRACTS clause in the Constitution to uphold the charter of Dartmouth College against efforts of the legislature of New Hampshire to change it. The argument in *Dartmouth College* lasted for three days and was a great social event in Washington. Webster concluded with an emotional peroration that has become part of American folklore. He is supposed to have said, "It is . . . a small college. And yet *there are those who love it.*" But there is no contemporaneous record of this passage. It first appeared in a eulogy on Webster spoken by Rufus Choate in July 1853, thirty-five years after the argument. Choate's source was a letter written to him in 1852 by Chauncey Goodrich, a professor at Yale University, who attended the March 1818 argument.

Webster (perhaps aided by geography and travel limitations of the times) was for more than thirty years the acknowledged leader of the Supreme Court bar. Indeed, he still holds the record for arguing the most cases before the Court—more than three hundred of them. The second largest total of cases argued was also achieved at this time by a little-known figure, Walter Jones, a District of Columbia lawyer. He appeared in more than two hundred cases before the Court. The next highest total of arguments, and the highest total in the twentieth century, was made by JOHN W. DAVIS, who was active from about 1910 to 1954. He argued a total of 141 cases. Davis was SOLICITOR GENERAL of the United States from 1913 to 1918 and in 1924 was the Democratic presidential candidate. Today no one makes such a high number of arguments unless he is a solicitor general or a member of the staff of the solicitor general's office.

The first black lawyer to be admitted to the bar of the Supreme Court was Dr. John S. Rock, who was born of free parents in New Jersey in 1825. He was admitted on February 1, 1865, just short of his fortieth birthday. Before then, he had been a teacher, a dentist, and a doctor. He had moved to Boston in 1853 and was one of the founders of the Republican party in Massachusetts. In 1858 he

wanted to go to France for medical treatment, but he was refused a passport on the ground that he was not a citizen. The Massachusetts legislature then passed a law providing for state passports, and this was accepted in France.

A year or so later, Dr. Rock returned to Boston where he read law. He was admitted to practice in Massachusetts in September 1861 and in the Supreme Court in 1865, shortly after the appointment of SALMON P. CHASE as Chief Justice. It is interesting to note that this came before the termination of the CIVIL WAR and before the adoption of the Thirteenth, Fourteenth and Fifteenth amendments—and with DRED SCOTT V. SANDFORD (1857) still on the books. As the *New York Times* reported, "By Jupiter the sight was good." Rock's admission was moved by Senator CHARLES SUMNER. The newspaper reporter observed that the "assenting nod" of the Chief Justice "dug . . . the grave to bury the Dred Scott decision."

The next of these significant events was the admission of the first woman to the Supreme Court bar. In BRADWELL V. ILLINOIS (1873) the Supreme Court refused to interfere with the action of the supreme court of Illinois, which denied admission to Myra Bradwell, publisher of a successful legal newspaper in Chicago. Bradwell relied in the Supreme Court on the PRIVILEGES AND IMMUNITIES clause of the recently adopted Fourteenth Amendment, but persuaded only Chief Justice Chase.

Less than seven years later, however, Belva A. Lockwood became the first woman admitted to practice before the Supreme Court. This was on March 3, 1879. So quick was the change of view that this action evoked no opinion from any member of the Court. Indeed, Myra Bradwell herself, who had been denied admission in 1872, was finally admitted when she applied again in 1892.

Despite this opening of the door, it took fifty years, or until 1929, before the number of women admitted to the bar of the Supreme Court reached a total of one hundred. Some of the early admittees had distinguished careers in the law. These included Florence Allen, who became the first woman judge of a constitutional federal court; Mabel Walker Willebrandt, who was assistant attorney general under President HERBERT C. HOOVER; and Helen Carloss, who had a long and distinguished career in the Tax Division of the Department of Justice. The great increase in the number of women lawyers, however, has occurred in the past fifteen years. In another fifteen years, if present trends continue, they will constitute perhaps thirty percent of the members of the bar of the Supreme Court.

There have been periods when relatively few lawyers were widely recognized as leaders of the bar practicing before the Supreme Court. There were the orators of the nineteenth century, starting with Daniel Webster and continuing through John G. Johnson of Pennsylvania. There was such a bar in the 1920s and the 1930s, when CHARLES EVANS HUGHES, Owen D. Roberts, John W. Davis, George Wharton Pepper, and William D. Mitchell made frequent appearances before the Court. By this time, oratory had become passé. The presentations were less flowery, but they were mellifluous. Davis showed great skill in persuasion, though his record of wins over losses was not especially high, reflecting the fact that the cases in which he was retained were often especially difficult. There is one case that brought together three of these giants. In *United States v. George Otis Smith* (1932) the question was whether the Senate could reconsider its confirmation of a presidential nomination after the President had acted on it by making the appointment. The Senate retained Davis as its counsel. Attorney General William D. Mitchell appeared for the United States, essentially representing the President, and George Wharton Pepper represented Smith, the nominee. That argument was one of the high points of advocacy in this century.

One group has long provided the backbone of the Supreme Court bar: the solicitor general and his staff, and his associates in the Department of Justice. This office has long maintained a high standard and a great tradition. It appears, in one way or another, in nearly half the cases heard on the merits by the Court and in a high percentage of all applications for review.

A considerable number of cases are now brought to the Supreme Court by parties representing particular interests. The National Association for the Advancement of Colored People was first represented by one of the country's great lawyers, CHARLES H. HOUSTON—work carried on with great ability by THURGOOD MARSHALL. Other similar work has been done by lawyers representing groups interested in the rights of women, in other civil rights, in the environment, and in other causes.

The bar of the Supreme Court can never be assembled, nor is it possible to take a consensus of the bar. It is clear that it plays an important role in the work of the Court. Yet the demands on the Court are such that the bar has difficulty in making its full contribution. In 1935, arguments were heard five days a week for a total of about seventy-five days a year. Now the Court hears arguments on about forty-five days during the year. Fifty years ago, the time made available for oral argument was an hour on each side, and there were frequent substantial allowances of additional time. Now the time allotted is thirty minutes on a side, and additional time is rarely granted. This inevitably presents problems for oral arguments and requires a wholly different type of argument from that customary even fifty years ago. The advocate today can rarely present his case as a case. He has to pick out certain salient points and hope that with questioning by the justices he will still have time to deal with the matters he regards as vital. The printed briefs filed by counsel today

appear to be much better than they were fifty years ago, probably more greatly improved than is commonly recognized. But oral argument remains a difficult and tantalizing field.

The Supreme Court moved into its new building in 1935. According to newspaper articles, the first words spoken by Chief Justice Hughes in the new courtroom were "Are there any admissions?" Thus was the bar recognized, and thus has it been recognized at every session since.

The bar of the Supreme Court, diverse and divided as it is, plays an important part in the work of the third branch of American constitutional government. Though Alexander Hamilton called the judiciary "the least dangerous branch," its role is central to the effective operation of our federal system. If the work of the Court is central to American government, the efforts of the Supreme Court bar may well be regarded as an essential buttress to the Court.

ERWIN N. GRISWOLD
(1992)

(SEE ALSO: *Supreme Court's Work Load; Women in Constitutional History.*)

Bibliography

CONTEE, CLARENCE G. 1976 The Supreme Court Bar's First Black Member. Pages 82–85 in *Supreme Court Historical Society Year Book, 1976.* Washington, D.C.: Supreme Court Historical Society.

HARBAUGH, WILLIAM H. 1973 *Lawyer's Lawyer.* New York: Oxford University Press.

O'DONNELL, ALICE L. 1977 Women and Other Strangers Before the Bar. Pages 59–62 in *Supreme Court Historical Society Year Book, 1977.* Washington, D.C.: Supreme Court Historical Society.

WARREN, CHARLES (1908) 1970 *History of the Harvard Law School and of Early Legal Conditions in America.* New York: DaCapo.

——— (1911) 1980 *A History of the American Bar.* Boston: Longwood.

WHITE, EDWARD G. 1988 *The Marshall Court and Cultural Change, 1815–34.* New York: Macmillan.

## SUPREME COURT DECISIONS, IMPACT OF

The Supreme Court's DECISIONS have regularly embroiled it in controversy. Its rulings have considerable impact. In its early years, the Court, over strenuous objection from the states, shaped our federal system and helped establish the national government's supremacy. The Court also had substantial effects on the ECONOMY, aiding in the creation of an American economic common market and providing opportunities for the private sector to develop. The Court's major effects on FEDERALISM and the economy subsided after the 1930s. However, its effect on CIVIL RIGHTS, visible earlier with respect to SLAVERY and its emasculation of RECONSTRUCTION civil rights statutes, again became apparent as questions such as school DESEGREGATION came to the fore in the 1950s.

The Supreme Court's impact includes ways in which federal and state agencies and lower federal and state courts carry out the Court's decisions, but it also includes the ways in which the agencies and courts delay, circumvent, misunderstand, and erode them. It includes the response to decisions by different "populations"—those who explain or elaborate its rulings, those supposed to apply or implement them, those for whom the rulings are intended, and the general population. Because the Court, "the least dangerous branch," lacks the capacity to enforce its rulings directly, assistance from those at whom a ruling is directed or from others (legislatures, executive agencies, courts) is required. The Court is now recognized to be a political actor, but one must abandon the tacit assumption held by earlier scholars that Supreme Court decisions are self-executing and recognize that the law is what the judges say it is only after all others have had their say.

Impact and compliance are not identical but are related. Compliance, the process by which individuals accept a decision prior to its impact or effect, cannot occur unless a person knows of the ruling and is required to take or abstain from a certain action. Compliance means an individual's intentionally conforming behavior to the ruling's dictates, that is, doing what the decision commands because of the ruling. Because noncompliance, or refusal to obey, occurs relatively seldom despite the attention it receives, it is important to pay heed to implementation of decisions, the process by which they are put into effect. Short-run resistance may blend into longer-run obedience, as resulted in the aftermath of the REAPPORTIONMENT decisions.

Impact includes all effects, direct and indirect, resulting from a ruling of the Court, regardless of whether those affected knew about the decision; it includes the results of rulings permitting but not requiring the adoption of certain policies. When effects of a ruling indirectly induce behavior congruent with the ruling, that behavior is better viewed as impact than as compliance. Impact encompasses actions neither directly defiant nor clearly obedient, such as attempts at evasion coupled with technical obedience and efforts to anticipate the Court's decisions ("anticipatory compliance"). Impact also includes both short-term and long-run consequences of a decision, for example, massive resistance to school desegregation rulings and the rulings' arguable contribution to "white flight" to the sub-

urbs. There will also be situations in which no response occurs, that is, where there is an absence of obvious impact.

The Supreme Court's effect on the President has generally been one of support and reinforcement. The Court has been least willing to overturn his acts in time of war, when presidential resistance to Court decisions would be most likely. Although limiting somewhat the President's authority to remove certain government employees, the Court, since the NEW DEAL, has sustained DELEGATIONS OF POWER to the President and the executive branch and has generally been deferential to the REGULATORY COMMISSIONS since WORLD WAR II. Confrontations between Court and President have been relatively infrequent; when the Court invalidates policies the President had espoused, for example, WIRETAPPING, it is not attacking the presidency as an institution. Presidents may have been reluctant to assist in enforcing the Court's decisions, but direct defiance is rare indeed. Both President HARRY S. TRUMAN and President RICHARD M. NIXON complied with orders when their actions (seizure of the steel mills and withholding of tapes) were ruled improper. In those situations, as with IMPOUNDMENT of appropriated funds, the Court insisted that the President follow the law as interpreted by the courts rather than determine for himself whether he should be subject to it; in the case of the STEEL SEIZURE, the Court insisted that he follow a course of action legislated by Congress.

The Court has had considerable impact on Congress's internal processes—its authority to exclude members, LEGISLATIVE INVESTIGATIONS, and the CONTEMPT POWER. Congressional reaction to the Court's decisions has been manifested in a number of ways. After the Court has engaged in statutory interpretation or, less frequently, has invalidated statutes for VAGUENESS, Congress has often rewritten or reenacted the laws to reestablish its "legislative intent," in effect establishing a continuing dialogue between Court and Congress. Congress has also shown negative reaction to the Court's ruling through proposals to eliminate APPELLATE JURISDICTION in particular classes of cases, for example, internal security, abortions, and school prayer, but these attempts have been less frequent and far less successful than those to rewrite statutes. Efforts to overturn the Court's rulings have also resulted in introduction of numerous proposals to amend the Constitution, but most such proposals die. Only a few—the ELEVENTH AMENDMENT, CIVIL WAR amendments, SIXTEENTH AMENDMENT, and TWENTY-SIXTH AMENDMENT—have been both submitted and ratified.

The impact of the Supreme Court's decisions extends well beyond the other branches of the national government. Controversial Supreme Court rulings have affected public opinion and have produced divided editorial reaction on a wide range of decisions. Changes in the public's feelings of trust or confidence in the Court have paralleled changes in feeling about the presidency and Congress but generally have been somewhat more positive. Such ratings have changed rapidly, but shifts in the Court's doctrine on controversial topics (such as CRIMINAL PROCEDURE) in the direction of public opinion usually are not immediately reflected in changed public opinion ratings.

The public generally supports the Court's work. Those giving the Court general (or "diffuse") support, however, outnumber those giving the Court specific support (for particular rulings) by a large ratio. The proportion of the public that feels the Court may legitimately produce structural political change is quite small. Acquiescence in the Court's rulings, which helps produce compliance, has been more common than active approval of the decisions.

The public also has little information about the Court. Even many controversial decisions fail to penetrate the general public's consciousness. The greater the knowledge, however, the greater the *dis*approval, but those reporting negative views on specific cases outnumber those whose general view of the Court is negative. Those with negative views also tend to hold them more intensely, but seldom would most members of the public do more than write letters of protest; demonstrations and other overt protest are atypical. Negative views about the Court are usually accounted for by reactions to the few specific decisions that catch the attention of large proportions of the public. Those salient decisions change with considerable rapidity, shifting in the 1960s from civil rights and school prayer to criminal procedure.

The Supreme Court's impact on the states and local communities is varied. Effectuating many decisions involves little controversy, and implementation may be prompt and complete, particularly if actions of only a few public officials are necessary. Other rulings, such as those on school DESEGREGATION, school prayer, and criminal procedure, produce a disproportionate amount both of resistance or attempts to evade and of critical rhetoric—rhetoric at times not matched by reality. Despite claims that the warnings required by MIRANDA V. ARIZONA (1966) would have a negative impact on police work, suspects and defendants often talk to police after being "read their rights." However, even these criticized rulings have definite impacts, for example, more professional police work as a result of criminal procedure rulings. Although opponents of the rule that improperly seized evidence should be excluded (the EXCLUSIONARY RULE of MAPP V. OHIO, 1961) have claimed that the rule does not deter illegal seizures and is too costly because guilty defendants are set free, some studies have suggested that the rule might be having

some of its intended effect. At least in some cities, few cases were dropped after motions to suppress evidence and a higher proportion of searches conducted after the rule was promulgated were constitutional.

If people are to comply with Supreme Court rulings or if the rulings are to have an impact, they must be communicated to those expected to implement or adhere to them. One cannot, however, assume that effective communication takes place. A ruling may have to be transmitted through several levels, at each of which distortion can be introduced, before reaching its ultimate audience. Lawyers may be accustomed to easy access to the Court's published opinions, but many others, such as police or school officials, often do not receive the opinions or have such direct access to them and must therefore rely on other means of communication through which to learn of them.

The mass media, with the exception of a few newspapers, provide only sketchy information about the Court's decisions. Specialized media, for example, trade publications, provide only erratic coverage even of decisions relevant to the groups for which they are published. Most newspapers and radio and television stations must rely on the wire services for information about Supreme Court rulings. Disproportionate nationwide emphasis is given to decisions the wire services emphasize, with little or no coverage given to other rulings. The media also have different patterns of coverage ("profiles"). Newspapers, for example, give more attention to postdecision events, while the wire services and television pay more attention to cases before they are decided. All the media, however, generally convey much information about immediate reaction to, or impact of, decisions instead of emphasizing the content of, or rationale for, the Court's rulings.

The lower courts do not constitute a bureaucratic structure through which decisions are fully communicated downward. Lawyers thus become particularly important in transmitting the Court's rulings, as they are in transmitting any law. Lower court judges who do not routinely follow the Court's decisions may find out about them only if lawyers arguing cases cite the decisions, which they do not always do accurately. Lawyers, either individually or through their bar associations, do little to inform the general public about developments in the law. Some state attorneys general and local prosecutors undertake to inform state and local officials of recent rulings affecting their work. The failure of these officials to do so in most locations has led some local agencies, which can afford to do so, to hire their own lawyers, for example, police department "police legal advisers," to monitor the Court's rulings, provide appropriate information to the agency, and arrange for implementation.

Training programs—effective because they combine printed materials with oral presentation—can be particularly important in the transmission of rulings. They are especially necessary because the educational system has generally done little to educate students, later to be members of the general public, about the Court's functioning or its rulings. Training programs are, however, not available to all those expected to be cognizant or familiar with the Court's rulings. Many members of some important occupational groups such as the police do not receive adequate legal training about the Court's decisions. Even if initially well-trained, they are less likely to receive adequate follow-up through in-service training.

The impact of the Court's decisions is, of course, affected by far more than deficiencies and distortions in the lengthy, often convoluted process by which the decisions are communicated. Numerous other factors affect both the communication process, thus indirectly affecting impact, and impact itself. One is the legitimacy attributed to the Court and its work. If a particular audience, for example, the police during the WARREN COURT's "criminal procedure revolution," feels that the Court is not acting fairly or lacks appropriate information on which to base its decisions, that audience will heed the Court's word less carefully even when the opinions are fully communicated. Characteristics of the Court's rulings, such as their relative unanimity and relative clarity or ambiguity, are also important, as both unanimity and clarity are thought to produce greater compliance. In new and sensitive areas of policy such as civil rights and criminal procedure, the lower courts can exercise power over the Supreme Court by their resistance. Rulings by lower court judges applying and extending (or narrowing) the Court's decisions are particularly important in such situations and in those where gaps in doctrinal development—a result of case-by-case development of the law—leave unanswered questions. In many, perhaps most, areas of the law, however, lower court judges enforce Supreme Court rulings because those rulings are a matter of relative personal indifference for the judges, because they have been socialized to follow those rulings, and because they wish to avoid being reversed.

Whether someone follows up a decision, who that "someone" is, and how they act, also affect a decision's impact. Elites' support for a decision may be able to calm negative public reaction. The likelihood that desegregation would be accepted in either the short or long run was decreased because southern elites were not favorably disposed toward either the result of BROWN V. BOARD OF EDUCATION (1954) or the Court's opinion. Because most rulings of the Court are not self-enforcing, follow-up by government agencies is often crucial for effective implementa-

tion. Officials not committed to the values in the Court's rulings are less likely to be assiduous in their follow-up; thus the attitudes of individual decision makers, particularly those in key policymaking or enforcement positions, are of considerable importance.

The situation into which a Supreme Court ruling is "injected"—whether in a crisis or in normal times—also affects the ruling's impact. A local community's belief system and its past history both are part of that situation. So are community pressures on the individuals expected to carry out the Court's dictates. Often a wide variety of enforcement mechanisms must be used before compliance is achieved. Incentive systems in organizations can lead individuals either to follow the Court's rulings or to continue existing practices. Because organizations have considerable interest in maintaining such practices, externally imposed penalties may be insufficient to produce required change.

To overcome problems of communicating Supreme Court rulings so that they reach the appropriate audience might seem insuperable. The Court's rulings are, however, often complied with and do have widespread impact. Were it otherwise, we should not hear so much about the problems occurring in particularly sensitive areas of the law such as civil rights and CIVIL LIBERTIES. The difficulties in implementing the Court's decisions to achieve their greatest impact should remind us that, as an active policymaker, the Supreme Court faces many of the same problems faced by other policymaking institutions.

STEPHEN L. WASBY
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Bibliography

BECKER, THEODORE L. and FEELEY, MALCOLM, eds. 1973 *The Impact of Supreme Court Decisions: Empirical Studies*, 2nd ed. New York: Oxford University Press.

JOHNSON, CHARLES A. and CANON, BRADLEY C. 1984 *Judicial Policies: Implementation and Impact*. Washington D.C.: Congressional Quarterly Press.

KRISLOV, SAMUEL, ed. 1972 *Compliance and the Law: A Multidisciplinary Approach*. Beverly Hills, Calif.: Sage Publications.

WASBY, STEPHEN L. 1970 *The Impact of the United States Supreme Court: Some Perspectives*. Homewood, Ill.: Dorsey Press.

## SUPREME COURT OPINIONS

See: Advisory Opinion; Concurring Opinion; Dissenting Opinion; Grounds of Opinion; Opinion of the Court; Plurality Opinion; Public Understanding of Supreme Court Opinions

## SUPREME COURT PRACTICE

The SUPREME COURT is the only judicial body created by the Constitution. Article III, Section 1, specifies that "The JUDICIAL POWER OF THE UNITED STATES, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The judges of that "one supreme Court," like the judges of the inferior courts created by Congress, are to hold their offices "during GOOD BEHAVIOUR" and to suffer no diminution of compensation during their continuance in office. Supreme Court Justices can be impeached, however. And it is not constitutionally clear that their "good Behaviour" term of office is the equivalent of a life term, as generally thought.

In practice, this "one supreme Court" has always acted as a unitary body. That means that the Court never divides into panels or groups of Justices for purposes of resolving matters submitted to the Court. All petitions and briefs are circulated to, and considered by, all participating Justices; and all Court decisions are rendered on behalf of the Court as a unit of nine Justices.

Article III of the Constitution, in establishing the judicial institution known as the Supreme Court, vests in the Court two basic kinds of jurisdiction: ORIGINAL JURISDICTION and APPELLATE JURISDICTION. The Court's original jurisdiction is its power to decide certain cases and controversies in the first instance. Its appellate jurisdiction is its power to review certain cases and controversies decided in the first instance by lower courts.

In COHENS V. VIRGINIA (1821), Chief Justice JOHN MARSHALL stated that the Court "must decide" a case before it that is properly within one of these two areas of jurisdiction, and that the Court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given . . . [either of which] would be treason to the Constitution." But in the Court's judicial world, Marshall's proposition is no longer universally true, if it ever was. The modern need to control and limit the voluminous number of cases clamoring for review has forced the Court to resist demands that every facet of the Court's vested jurisdiction be exercised. Limitations of time and human energy simply do not permit the luxury of resolving every dispute that comes before the Court. Notions of judicial prudence and sound discretion, given these limitations, have thus become dominant in the Court's selection of those relatively few cases it feels it can afford to review in a plenary fashion and to resolve the merits. Such factors are evident in the Court's control of both its original docket and its appellate docket.

Section 2 of Article III specifies that the Supreme Court "shall have original jurisdiction" in all cases "affecting Ambassadors, other public Ministers and Consuls,

and those in which a State shall be Party." Compared with cases on the appellate docket, cases on the original docket are quite few in number. Indeed, cases involving ambassadors, ministers, and consuls have never been common and have virtually disappeared from the original docket. The typical original case has thus become that in which a state is the plaintiff or defendant; most frequent are suits between two or more states over boundaries and water rights, suits that cannot appropriately be handled by any other tribunal. States have also sued each other over state financial obligations, use of natural resources, multistate domiciliary and escheat problems, breaches of contracts between states, and various kinds of injuries to the public health and welfare of the complaining state.

States can also invoke the Court's original jurisdiction to sue private nonresident citizens, or ALIENS, for alleged injuries to the sovereign interests of the complaining state. And a state may bring such suits on behalf of all its citizens to protect the economy and natural resources of the state, as well as the health and welfare of the citizens. The ELEVENTH AMENDMENT bars an original action against a defendant state brought by a private plaintiff who is a citizen of another state; and the sovereign immunity principle recognized by that Amendment also bars such an action by a citizen of the defendant state. Because that amendment does not apply to the federal sovereign as plaintiff, the United States can bring an original action in the Supreme Court against a defendant state. All cases brought by a state against a private party defendant, however, fall within the nonexclusive category of the Court's original jurisdiction; such suits can alternatively be brought in some other federal or state court. The Court in recent years has sought to reduce its original docket workload by rejecting some nonexclusive causes of action and requiring the parties to proceed in an available alternative forum.

Original cases often involve factual disputes. In processing such cases, the Court considers itself the equivalent of a federal trial court, though with significant differences. The Court's rules and procedures in this respect are not very specific, and practices may vary from case to case. The case starts with a motion for leave to file a complaint, a requirement that permits the Court to consider and resolve jurisdictional and prudential objections. If the Court denies the motion for leave to file, the case terminates. If the motion is granted, the complaint is ordered filed, the defendant files an answer, and in most instances a trial ensues.

The Justices themselves do not conduct trials in original cases. Instead, they appoint a member of the bar or a retired lower court judge to serve as a special master. The special master then takes evidence, hears witnesses, makes fact-findings, and recommends legal conclusions. But all rulings, findings, and conclusions of the special master are subject to review by the Court. That review occurs after parties aggrieved by the special master's actions have filed exceptions thereto; all parties then brief and orally argue the exceptions before the entire Court, which decides the case by written opinion. A complicated case may require more than one hearing before the special master and more than one opinion by the Court, prolonging the case for years.

The Court itself has admitted that it is "ill-equipped for the task of factfinding and so forced, in original cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence." Original cases take away valuable time and attention from the Court's main mission, the exercise of its appellate jurisdiction, where the Court serves as the prime overseer of important matters of federal constitutional and statutory law. The Court is thus increasingly disposed to construe its original jurisdiction narrowly, exercising that jurisdiction only where the parties cannot secure an initial resolution of their controversy in another tribunal. If there is such an alternative proceeding, the Court prefers to REMAND the parties to the lower court and to deal with any important issues in the case on review of the lower court's determination.

The Court's appellate jurisdiction is also defined and vested by Article III, section 2. That jurisdiction extends to all categories of CASES AND CONTROVERSIES, decided in the first instance by lower federal courts or state courts, that fall within the JUDICIAL POWER OF THE UNITED STATES. Those categories include: cases arising under the Constitution, laws, and treaties of the United States; cases affecting ambassadors, ministers, and consuls; cases of ADMIRALTY AND MARITIME JURISDICTION; controversies to which the United States is a party; controversies between two or more states; and controversies between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, or between a state or its citizens and foreign states or citizens. The Court's appellate jurisdiction extends "both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The exceptions clause in section 2 contains within it a constitutional enigma, as yet unsolved. The problem is the extent of Congress's power to control and limit the Supreme Court's appellate jurisdiction. The Court has never held that its appellate jurisdiction is coterminous with the section 2 categories of judicial power. Consistently since *Wiscart v. Dauchy* (1796) the Court has said, albeit often by way of OBITER DICTUM, that it can exercise appellate jurisdiction only to the extent permitted by acts of Congress, and that a legislative denial of jurisdiction may be

implied from a failure by Congress to make an affirmative grant of jurisdiction. The Court, in other words, assumes that its appellate jurisdiction comes from statutes, not directly from section 2 of Article III. The assumption is that Congress cannot add to the constitutional definitions of appellate jurisdiction, but that Congress can subtract from or make exceptions to those definitions.

It is clear that Congress has made broad statutory grants of jurisdiction to the Court, though not to the full extent permitted by section 2. These affirmative grants have always been sufficient to permit the Court to fulfill its essential function of interpreting and applying the Constitution and of insuring the supremacy of federal law. So far, the statutory omissions and limitations have not hobbled the performance of that function.

At the same time, periodic proposals have been made in Congress to use the exceptions clause to legislate certain exclusions from the appellate jurisdiction previously granted by Congress. Such proposals usually spring from displeasure with Court decisions dealing with specific constitutional matters. The proponents would simply excise those areas of appellate jurisdiction that permit the Court to render the objectionable decisions. Many commentators contend that the exceptions clause was not designed to authorize Congress to strip the Court of power to perform its essential function of overseeing the development of constitutional doctrines and guarantees. Objections are also raised that such legislative excisions are mere subterfuges for overruling constitutional rights established by the Court, a most serious infringement of the separation of powers doctrine. Because no jurisdictional excisions of this broad nature have been enacted, the Court has yet to speak to this constitutional conundrum. (See JUDICIAL SYSTEM.)

Whatever the outer limits of the exceptions clause, Congress since 1789 has vested in the Court broad appellate power to review lower court decisions that fall within the constitutional "case or controversy" categories. Statutes permit the Court to review virtually all decisions of lower federal appellate courts, as well as a limited number of decisions of federal trial courts. And Congress has from the start given the Court jurisdiction to review decisions of the highest state courts that deal with federal constitutional, treaty, or statutory matters.

An ingredient of most jurisdictional statutes are legislative directions as to the mode by which the Court's appellate powers are to be invoked. In modern times, most lower court decisions are made reviewable by way of WRIT OF CERTIORARI or, in a declining number of specialized instances, by way of APPEAL. Congress permits the Court to issue its own extraordinary writs, such as HABEAS CORPUS or MANDAMUS, and to review certain matters not otherwise reviewable on certiorari or appeal; and there is a rarely used authorization for lower federal appellate court CERTIFICATION of difficult questions to be answered by the Supreme Court.

At COMMON LAW, the term "certiorari" means an original writ commanding lower court judges or officers to certify and transfer the record of the lower court proceedings in a case under review by a higher court. In the Supreme Court lexicon, the common law meaning of the term has been modified and expanded. Certiorari refers generally to the entire process of discretionary review by the Supreme Court of a lower court decision. Such review is sought by filing a petition for writ of certiorari. That document sets forth in short order the reasons why the questions presented by the decision below are so nationally important that the Court should review the case and resolve those questions on the merits. In most cases, the record in the court below is not routinely filed in the Court along with the petition.

Each Justice, after reviewing the petition for certiorari, the brief in opposition, and the opinion below, makes his or her own subjective assessment as to the appropriateness of plenary review by the entire Court. Such review is granted only if at least four Justices vote to grant the petition, a practice known as the RULE OF FOUR. If the petition is granted, a formal order to that effect is entered; copies of the order are sent to the parties and to the court below, which is then requested to transmit a certified copy of the record. But at no time does any writ of certiorari issue from the Court. The parties proceed thereafter to brief and argue orally the questions presented in the petition.

An appeal, on the other hand, refers to a theoretically obligatory type of review by the Supreme Court. That means that once the appeal is properly filed and docketed, the Court must somehow consider and dispose of the case on its merits. There is said to be no discretion to refuse to make such a decision on the merits of the appeal, which serves to distinguish an appeal from a certiorari case.

To invoke the Court's review powers by way of appeal, the aggrieved party first files a short notice of appeal in the lower court and then dockets the appeal in the Supreme Court by filing a document entitled "jurisdictional statement." Apart from the different title, a jurisdictional statement is remarkably like a petition for writ of certiorari. Like a petition, the jurisdictional statement sets forth briefly the reasons why the issues are so substantial, or important, "as to require plenary consideration, with briefs on the merits and oral argument, for their resolution." The Rule of Four is followed in considering whether to grant plenary consideration of an appeal. Such a grant takes the form of an order to the effect that "probable jurisdiction is noted," although if there remains any question as to whether the case complies with the technical jurisdictional requirements of an appeal, the order is

changed to read: "further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits." The appeal then follows the pattern of a certiorari case with respect to obtaining the record from the lower court(s), briefing the questions presented, and arguing orally before the Court.

As if to underscore the similarity between a jurisdictional statement and a petition for writ of certiorari, Congress has directed the Court, in situations where a party has "improvidently" taken an appeal "where the proper mode of review is by petition for certiorari," to consider and act on the jurisdictional statement as if it were a petition for writ of certiorari, and then either granting or denying certiorari. Thus a party cannot be prejudiced by seeking the wrong mode of Supreme Court review.

There is, however, one historical and confusing difference in the Court's summary disposition of certiorari cases and appeals, a difference springing from the notion that the Court is obliged to dispose of all appeals on their merits. When a petition for writ of certiorari is denied, the order denying the petition has no precedential value. It means only that fewer than four Justices, or perhaps none at all, want to hear and decide the merits of the questions presented. That is the end of the case.

But when fewer than four Justices wish to hear an appeal in a plenary manner, the long-held theory is that the Court is still compelled to dispose of the appeal on the merits of the questions presented. To comply with this theory, which is judge-made and not dictated by Congress, the Court has constructed a number of one-line orders, any one of which can be used to dismiss or dispose of the appeal without further briefing or oral argument. A typical order of this nature, used particularly in appeals from state court decisions, reads: "the appeal is dismissed for want of a substantial FEDERAL QUESTION." Such summary orders, which are devoid of explanation of the insubstantiality of the question involved, consistently have been held to be precedents. The Court has said that they must be understood and followed by state and lower federal courts.

In 1978, all nine Justices publicly conceded to the Congress that, while these summary dispositions of appeals are decisions on the merits, experience has shown that they "often are uncertain guides to the courts bound to follow them and not infrequently create more confusion than clarity." The Justices accordingly asked Congress to eliminate virtually all appeals, thereby recognizing formally that the Court's appellate jurisdiction is almost wholly discretionary. Congress has yet to respond.

At the start in 1789 and for a century thereafter, the Court was authorized to exercise only mandatory jurisdiction, either by way of appeal or a closely related process known as WRIT OF ERROR. But as the nation expanded and matured, litigation proliferated. It became evident toward the end of the nineteenth century that the Court could not keep up with its growing docket if it had to continue resolving the merits of every case that was filed. Gradually, Congress began to withdraw some of this mandatory jurisdiction from the Court, replacing it with discretionary jurisdiction by way of certiorari. But it was not until 1925 that Congress decreed a major shift toward discretionary review powers. At that time the dockets of the Court were so clogged with mandatory appeals and writs of error that litigants had to wait two and three years to have their cases decided. In the JUDICIARY ACT OF 1925, written largely at the suggestion of the Court, Congress transferred large segments of appellate jurisdiction from the obligatory to the discretionary category. Fully eighty percent of the Court's docket thereafter was of the certiorari variety.

But the 1925 transfer proved insufficient. During the 1970s, Congress eliminated many of the remaining appeals that could be taken from lower federal courts, leaving only a handful within the federal sector of Supreme Court jurisdiction. The largest pocket of mandatory appeals left untouched consists of appeals from state court decisions validating state statutes in the face of federal constitutional challenges. The caseload explosions in the 1970s and 1980s, which saw the Court's annual case filings rising near the 5,000 mark, created pressure to eliminate all significant remnants of mandatory appeal jurisdiction.

Nearly one-half of these filed cases are petitions and applications filed by prisoners, petitions that are often frivolous and thus quickly disposed of. But from the overall pool of some 5,000 cases the Justices select about 150 cases each term for plenary review and resolution. The Justices feel that time limitations do not permit them to dispose of many more than 150 important and complex controversies, although they do manage to dispose of another 200 or so cases in a summary fashion, without briefs or oral arguments. In any event, the number of cases granted full review has hovered around the 150 mark for many of the last fifty years. This constancy is largely the product of the discretion and the docket control inherent in the certiorari jurisdiction. Without discretion to deny review to more than ninety-five percent of the certiorari petitions filed each year, the Court's ability to function efficiently would soon cease.

The procedures by which the Court achieves this docket control and makes this vital selection of cases for plenary review are simple but not well understood by the public. And some of the processes change as workloads increase and issues tend to become more difficult of resolution. As of the 1980s, the procedures may be summarized as follows:

By law, the Supreme Court begins its annual TERM, or working session, on the first Monday in October. Known as the October Term, this session officially runs for a full

year, eliminating the prior practice of convening special sessions during the summer to hear urgent matters. But for most administrative purposes, each term continues for about nine months, October through June, or until all cases considered ready for disposition have been resolved. At that point, the Court normally recesses without formally adjourning until the following October.

The Court usually disposes of requests for review, hears oral arguments, and issues written opinions only during the nine-month working portion of the term. But the Court never closes for purposes of accepting new cases, as well as briefs and motions in pending cases. That means that filing time requirements are never waived during the summer recess; parties must respect those requirements in all seasons. In most civil cases, certiorari petitions and jurisdictional statements must be filed within ninety days from the entry of judgment, or from the denial of rehearing, in the court below. This filing period is only sixty days in criminal cases, federal or state.

As soon as opposing parties have filed briefs or motions in response to a certiorari petition or jurisdictional statement, these documents are circulated to all nine Justices. These circulations occur on a weekly basis all year round. The circulated cases are then scheduled by the Court's clerk for disposition by the Justices at the next appropriate CONFERENCE. Cases circulated during the summer recess accumulate for consideration at a lengthy conference held just before the opening of the new October term. Cases circulated during term time are considered at a conference held about two weeks after a given weekly circulation.

The massive numbers of case filings make it impossible for every Justice personally to examine these thousands of documents, although some may try. Most are aided in this task by law CLERKS, each Justice being entitled to employ four. The clerks often have the task of reading these documents and reducing them to short memoranda for the convenience of their respective Justices. In recent years, a number of Justices have used a "cert pool" system, whereby law clerk resources in several chambers are pooled to produce memoranda for the joint use of all the participating Justices. But whether a Justice reads all these matters or is assisted by law clerk memoranda, the ultimate discretionary judgments made respecting the grant or denial of review are necessarily those of each Justice. Law clerks simply do not make critical judgments or cast votes.

Law clerks are selected personally by each Justice, a practice dating back to 1882 when Justice HORACE GRAY first employed a top Harvard Law School graduate. In modern times, clerks are invariably selected from among recent law school graduates with superior academic records. And many Justices require that their clerks also have clerked for lower court judges. The clerks normally stay with their Justices for one term only, though some have served longer. Many law clerks have gone on to distinguished legal careers of their own. Three of them have become Supreme Court Justices: Justices BYRON R. WHITE, WILLIAM H. REHNQUIST, and JOHN PAUL STEVENS.

An important element of each Justice's workload is to act in the capacity of Circuit Justice, a vestigial remnant of the earlier circuit-riding tasks. For this purpose, each Justice is assigned one or more federal judicial circuits, which divide the nation into twelve geographical areas. The Justice assigned to a particular circuit handles a variety of preliminary motions and applications in cases originating in the area covered by the circuit. Included are such matters as applications for stays of lower court judgments pending action on a petition for certiorari, applications in criminal cases for bail or release pending such action, and applications to extend the time for filing certiorari or appeal cases. Law clerks frequently assist in processing these applications, and on occasion an application may be disposed of by a written "in chambers" opinion of the Circuit Justice.

The Court no longer discusses every certiorari petition at conference. The excessive number of petitions makes it necessary and appropriate to curtail collegial discussion of petitions at the formal conferences of the Justices. At present, the Chief Justice circulates a "discuss list," a list of cases in a given weekly circulation deemed worthy of discussion and formal voting at conference. All appeals are discussed at conference, but rarely more than thirty percent of the certiorari cases are listed for discussion. Any Justice may add an omitted case to the list, however. Review is then automatically denied to any unlisted case, without conference consideration.

Decisions whether to grant or deny review of cases on the "discuss list" are reached at one of the periodic secret conferences. During term time, conferences are normally held each Friday during the weeks when oral arguments are heard, and on the Friday just before the commencement of each two-week oral argument period. Conferences can be held on other days as well. Only the Justices are present at these conferences; no law clerks or secretaries are permitted to attend.

Conferences are held in a well-appointed room adjacent to the Chief Justice's chambers, which are to the rear of the courtroom. The conference begins with exchanges of handshakes among the Justices, a custom originating in 1888. Coffee is available from a silver urn. The typical conference begins with discussion and disposition of the "discuss list" cases, appeals being considered first. The Chief Justice leads the discussion of each case, followed

by each associate Justice in order of seniority. Any formal voting takes place in reverse order of seniority. Then, if there are argued cases to be decided, a similar order of discussion and voting is followed. Argued cases, however, may be discussed at other conferences scheduled immediately after a day or two of oral arguments, thus making the Friday conferences less lengthy.

Using the Rule of Four at these conferences, the Court selects from the pool of "discuss list" cases those that it will review and resolve on the merits, following full briefs and oral argument. A few cases, however, may be granted review and then resolved immediately in a summary manner without briefs or oral argument, by way of a PER CURIAM written opinion. Such summary disposition has been much criticized by those who lose their cases without being fully heard, but the practice has been codified in the Court's rules. The important point is that it is the cases that are selected at these conferences for plenary review that account for the 150 or so cases at the core of the Court's workload each term.

The cases thus selected for full review reflect issues that, in the Justices' view, are of national significance. It is not enough that the issues are important to the parties to the case; they must be generally important. But the Court rarely if ever explains why review is denied, or why the issues were not deemed important enough to warrant plenary attention. There are occasional written explanatory dissents from the denial of review, but these can only express the views of a minority. Review is granted only when four or more Justices are subjectively convinced that there are special and important reasons for reviewing the questions presented, which may or may not involve a conflict among lower courts as to how to resolve such questions. It bears emphasis that the exercise of this kind of discretionary judgment enables the Court to control its docket and to limit the extent of its plenary workload.

When a "discuss list" case is granted review, the petitioning party has forty-five days in which to file a brief on the merits, together with a printed record appendix. The opposing party then has thirty days to file a brief on the merits. Briefs of intervening parties and AMICI CURIAE, if there are any in a given case, are filed during these periods. When all briefs are in, the case is ready to be scheduled for oral argument.

Oral argument before the Justices occurs only on Monday, Tuesday, and Wednesday of a scheduled week of argument, leaving the other weekdays available for work and conferences. Usually, fourteen weeks of oral argument are scheduled, in two-week segments from October through April. One hour of argument is allowed in most cases, one-half hour for each side. Arguments start promptly at 10 a.m. and end at 3 p.m., with a lunch adjournment from noon to 1 p.m. The Justices are well prepared, having read the briefs. Some may also be aided by "bench memos" prepared by their law clerks, memoranda that outline the critical facts and the opposing arguments. Counsel arguing a case may thus expect sharp and penetrating questions from the bench; and counsel are warned by the Court's rules not to read arguments from a prepared text.

Sometime during the week in which a particular case has been argued, the Court meets in secret conference to decide the merits of that case. With the Chief Justice presiding and leading the discussion, the normal pattern of collegial discussion and voting takes place. But the vote reached at conference is necessarily tentative and subject to change as work begins on opinion writing. Shortly after the vote is taken, the case is assigned to one of the Justices to draft an opinion for the Court. The assignment is made by the senior Justice in the majority, if the vote is split. Normally, the assignment is made by the Chief Justice, unless he is in dissent.

The Justice assigned to write an opinion for the Court then begins work on a draft. This is essentially a lonely task. Following the conference discussion, there is little time for further collegial consultation among the Justices in the preparation of an opinion. Depending upon the work patterns of a particular Justice, the law clerks may engage in much of the research and analysis that underlie scholarly opinions; some clerks may be assigned the task of producing drafts of an opinion, while some Justices may do all the drafting themselves. Since 1981, drafting of opinions has been mechanically made easier by the installation of word processors in each Justice's chambers.

Once the draft of the majority opinion has been completed, it is circulated to all other members of the Court. The other Justices may suggest various changes or additions to the draft. To become an opinion of the Court, the draft opinion must attract the adherence and agreement of a majority of five Justices, which sometimes requires the author of the draft to accept modifications suggested by another Justice as the price of the latter's adherence. One or more of the Justices who cannot accept the reasoning or the result of the draft opinion then may produce their own drafts of CONCURRING or DISSENTING OPINIONS. The circulation of these separate opinion drafts may in turn cause the author of the majority draft to make further changes by way of answer to arguments made in a draft concurrence or dissent. Thus nothing is truly final until the collegial exchange of opinions is complete, the votes are set in concrete, and the result is considered ready for public announcement. Even then, there are cases in which the Court cannot reach a majority censensus, resulting in simply an announcement of the judgment of the Court accompanied by a number of PLURALITY, concurring, and

dissenting opinions. The difficulty sometimes encountered in reaching a clear-cut majority result, while distressing to the bar and the lower courts, is generally reflective of the difficulty and complexity of some of the momentous issues that reach the Court.

The opinions and judgments of the Court in argued cases are announced publicly in the courtroom. At one time, opinions were uniformly announced on what became known as Opinion Monday. But the Court found that too many opinions announced on a Monday, particularly toward the end of a term, made it difficult for the press to give adequate media coverage to important Court rulings. The Court now announces opinions on any day it sits, thereby spreading out opinion announcements. In weeks in which oral arguments are scheduled for three days, the practice is to announce opinions only on a Tuesday or Wednesday, leaving Monday for the announcement of summary orders. Opinions may still be announced on a Monday, particularly if no oral arguments are scheduled for that day. After all oral arguments have been heard, usually by the end of April, opinions can be announced on any given Monday, when the Court sits to announce summary orders, or on any other day of the week that the Court wishes to sit solely to announce opinions.

The practices regarding the announcement of opinions in open court change from time to time. At one time, many opinions were read by the authors in full or in substantial part. More recently the Justices have tended merely to give short summaries save in the most important cases; in some less important cases only the result is announced. All opinions and orders are made available to the public and the news media a few moments after the courtroom announcements. Eventually, opinions and orders appear in bound volumes known as the United States Reports.

When the Court first convened in February of 1790, one of its first actions was to prescribe qualifications for lawyers wishing to practice before the Court. The original rule, in language very like that of the present rule, established two requirements: the attorney must have been admitted to practice in a state supreme court "for three years past," and the attorney's "private and professional character" must appear to be good.

Nearly 200,000 attorneys have been admitted to the Supreme Court bar since the Court was established. In recent times, as many as 6,000 have been admitted in a year. Prior to 1970, an attorney could be admitted only on motion of a sponsor in open court, before all the Justices. But the Court found that so much time was taken in listening to these routine motions and admissions and that it was often so expensive for a lawyer to travel to Washington from afar just to engage in this briefest of ceremonies, that an alternative "mail-order" procedure should be made available. Most attorneys today are admitted by mail, although some prefer to follow the earlier practice of being admitted in open court.

The modern Supreme Court bar has no formal structure or leadership. It is largely a heterogeneous collection of individual lawyers located in all parts of the nation. Many members of the bar never practice before the Court, and even fewer ever have the opportunity to argue orally. Most private practitioners who do have occasion to argue orally do so on a "once-in-a-lifetime" basis. Those who appear with some regularity before the Court are usually connected with an organization or governmental group specializing in Supreme Court litigation, such as the office of the SOLICITOR GENERAL of the United States. Gone are the days when private legal giants, such as DANIEL WEBSTER, were repeatedly employed specially by litigants to present oral arguments before the Court.

While a lay litigant may prepare and file petitions and briefs on the litigant's own behalf, without the aid of a member of the bar, the complexities and subtleties of modern practice make such self-help increasingly inadvisable. Only in the rarest of circumstances will the Court permit a lay litigant to present oral argument. Those imprisoned have frequently filed their own petitions for certiorari, seeking some sort of review of their criminal convictions. Indeed, about half of the nearly 5,000 case filings per year can be ascribed to prisoner petitions. The Court catalogues these petitions on its IN FORMA PAUPERIS docket but gives them the same careful treatment it gives petitions filed on behalf of clients who can afford to pay filing and printing costs.

The Court will, on application by an impecunious litigant or prisoner, appoint a member of the Court's bar to prepare briefs on the merits and to present oral arguments, once review has been granted in the case. But the Court will not appoint a lawyer to aid in preparing and filing a petition for certiorari or jurisdictional statement. Legal aid programs operating in most lower courts usually insure that a lawyer appointed or volunteering to represent a prisoner in the lower courts will be available to file such documents in the Supreme Court.

Such are the basic processes and procedures that enable the Court to perform its historic missions. As the Court approaches its third century, the Justices are deeply concerned with the Court's growing workload and the resulting effect upon the quality of its decision making. The Court's internal and external procedures have been streamlined and perfected about as much as possible. Some restructuring of its jurisdiction and functions seems necessary. Yet despite these perceived shortcomings, the Court has managed to maintain its prime role in the evolving history of the American legal system. The Court's ef-

fective performance of that role is due in no small part to the procedures and rules established for those who practice before it.

EUGENE GRESSMAN
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Bibliography

STERN, ROBERT L.; GRESSMAN, EUGENE; and SHAPIRO, STEPHEN M. 1986 *Supreme Court Practice*, 6th ed. Washington, D.C.: Bureau of National Affairs.

## SUPREME COURT'S WORK LOAD

With the growth of population and the enormous expansion of federal law in the post-NEW DEAL period, the business of the federal courts has mushroomed. This increase is most striking in the first two tiers of the federal judicial pyramid. In the years 1960–1983, cases filed in UNITED STATES DISTRICT COURTS more than tripled, from 80,000 to 280,000, but cases docketed in the UNITED STATES COURTS OF APPEALS during the same period increased eightfold, from 3,765 to 25,580. To cope with this rise in appeals, Congress more than doubled the number of appellate judgeships. Not surprisingly, a similar growth can be found in Supreme Court filings: decade averages have increased in units of a thousand, from 1,516 per term in the 1950s to 2,639 in the 1960s, to 3,683 in the 1970s, to 4,422 in the 1981 term and 4,806 in the 1988 term.

The contrast between this explosion in federal judicial business and the fixed decisional capacity of the Supreme Court—the nine Justices sitting as a full bench hear an average of 150 argued cases per year—has led to persistent calls for enhancing the appellate capacity of the federal system. A number of proposals have emerged since 1970, none resulting in legislation. In 1971 the Study Commission on the Caseload of the Supreme Court, chaired by PAUL A. FREUND of the Harvard Law School, recommended creation of a National Court of Appeals (NCA) that would assume the Supreme Court's task of selecting cases for review. The Freund committee believed that the selection process consumed time and energy the Justices might better spend in deliberation and opinion writing. This proposal died at birth. In 1972, Congress created the Commission on Revision of the Federal Court Appellate System, chaired by Senator Roman Hruska. The Hruska commission envisioned a mechanism for national resolution of open intercircuit conflicts, recommending an NCA that would hear cases referred to it by the Supreme Court or the United States Courts of Appeals. This NCA was to be a permanent tribunal, with its own institutional identity and personnel. In 1983, Chief Justice WARREN E. BURGER publicly endorsed proposed legislation to create on an experimental basis an Intercircuit Tribunal of the United State Courts of Appeals (ICT), which would decide cases referred to it by the Supreme Court. The ICT would be comprised of judges drawn from the current courts of appeals who would sit for a specified number of years. This proposal drew faint support.

Other proposals have sought to enhance national appellate capacity without establishing new tribunals. The most recent recommendation of this type can be found in the 1990 report of the Federal Courts Study Committee, chaired by Judge Joseph F. Weis, Jr. The report urges Congress to give the Supreme Court authority, for an experimental period, to refer cases presenting unresolved intercircuit conflicts to a randomly selected court of appeals for a ruling by that court's full bench. These EN BANC determinations would be binding on all other courts, save the Supreme Court.

Many of these proposals are conceived as measures to alleviate the Supreme Court's work load. The work load problem is, however, not one of obligatory jurisdiction; the Court's APPELLATE JURISDICTION has been largely discretionary as far back as the JUDICIARY ACT OF 1925, but even more so after 1988 legislation repealing virtually all mandatory appeals. The Justices do have to screen all of the petitions filed. It is doubtful, though, that any of the recent proposals promise much relief on this score. The Freund committee's NCA did, but received widespread criticism for suggesting delegation of the selection function. It is hard to believe referral to an NCA or a randomly selected court of appeals would reduce the Court's screening burden, for the losing party would still be free to appeal to the High Court. Moreover, the Justices will not likely tolerate nationally binding resolutions with which they disagree. Indeed, the Court's case selection process may be significantly complicated by adoption of any of these proposals.

If the Court's overload is not a function of its mandatory jurisdiction and if its selection burden cannot be alleviated (under current proposals), what function is the Court failing to perform that it ought to perform?

Critics claim that the Court is unable to ensure uniformity in federal law, because 150 appeals a year must leave unresolved an intolerable number of intercircuit conflicts. The evidence for this contention is largely anecdotal, and what little empirical work exists is sharply contested in the literature. Significant disagreement exists as to what constitutes a "conflict." Are conflicts clear disagreements over a governing issue of law or simply different approaches to a legal issue that are capable ultimately of being reconciled? Much also depends on one's view of the costs and benefits of leaving particular conflicts unresolved for a

time. Does the absence of a rule of intercircuit STARE DECISIS in the federal system reflect a deliberate policy of allowing disagreements to percolate? The continuing conflicts may aid the Court's selection process by highlighting legal issues requiring national resolution. Through the process of multicourt consideration, the conflicts may improve the final decision of the Supreme Court when it does intervene. Moreover, some conflicts do not require immediate resolution, because they involve questions of local procedure, or do not frustrate planning concerns of multicircuit actors, or are not capable of being exploited by litigant forum shopping.

A broader claim, one not dependent upon the incidence of intercircuit conflict, is also made: that the problem is fundamentally one of insufficient supervision of the panel rulings of the courts of appeals. That conflicts are appropriately left unresolved does not matter, the argument goes. Given the sheer number of appeals, the practical inability of many of the circuits to engage in en banc review, and the infinitesimal probability of Supreme Court review, the panels operate as a law unto themselves. This version of the case for enhancing appellate capacity does have some force. It is undeniable that the Court can no longer engage in the kind of direct oversight of the courts of appeals that was possible in the 1920s, when it reviewed one in ten appellate rulings.

Whether this inability to supervise creates a problem requiring new institutional arrangements is, however, debatable. At present the Supreme Court appears not to have on its docket enough cases warranting plenary review to fill its argument calendar. Moreover, whether the panels operate as such wayward institutions is not clear. Many a circuit has, for example, adopted a "mini" en banc procedure to ensure uniformity of law within the circuit and to promote reconciliation of intercircuit splits. Even if one concedes that the Supreme Court has a work load problem (or that there is a need for additional appellate capacity), will the oversight benefits of an additional layer of review in, say, another 150 cases outweigh the attendant costs? Or will these otherwise nationally binding rulings be irresistible candidates for immediate plenary review by the Supreme Court—and hence a new category of practically mandatory jurisdiction?

The expansion of federal judicial business is the result of an explosion in federal law. Creating new layers of appeals creates more law, but not law enjoying the peculiar finality of a Supreme Court resolution. Improvements can be made. They are more likely to be found, however, in legislation reducing forum choice in federal statutes and imposing sanctions for unwarranted appeals; better management by the courts of appeals of panel disagreements and a greater willingness to reconsider circuit law in light of developments elsewhere; and strategic deployment by the High Court of its scarce decisional resources.

SAMUEL ESTREICHER
(1992)

Bibliography

BAKER, THOMAS E. and MCFARLAND, DOUGLAS D. 1987 The Need for a New National Court. *Harvard Law Review* 100: 1401–1416.

ESTREICHER, SAMUEL and SEXTON, JOHN E. 1986 *Redefining the Supreme Court's Role: A Theory of Managing the Federal Judicial Process.* New Haven, Conn.: Yale University Press.

GINSBURG, RUTH BADER and HUBER, PETER W. 1987 The Intercircuit Committee. *Harvard Law Review* 100:1417–1435.

POSNER, RICHARD 1985 *The Federal Courts: Crisis and Reform.* Cambridge, Mass.: Harvard University Press.

STRAUSS, PETER L. 1987 One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action. *Columbia Law Review* 87:1093–1136.

## SUSPECT CLASSIFICATION

Long before the term "suspect classification" gained currency, Justice HARLAN FISKE STONE captured the idea in his opinion for the Supreme Court in UNITED STATES V. CAROLENE PRODUCTS CO. (1938). While insisting on RATIONAL BASIS as the appropriate STANDARD OF REVIEW for cases involving ECONOMIC REGULATION, Stone suggested that "prejudice against DISCRETE AND INSULAR MINORITIES [that is, religious, or national, or racial minorities] may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." In modern idiom, to call a legislative classification "suspect" is to suggest the possibility that it resulted from prejudice against the group it burdens, a possibility that justifies strict judicial scrutiny to assure that it is necessary to achieve a COMPELLING STATE INTEREST. In practice, most laws subject to this exacting standard are held invalid.

Irony attends the origins of the expression. Justice HUGO L. BLACK, writing for a majority in *Korematsu v. United States* (1944), one of the JAPANESE AMERICAN CASES, found no denial of EQUAL PROTECTION in an EXECUTIVE ORDER excluding American citizens of Japanese ancestry from the West Coast. Along the way to this extraordinary conclusion, however, he said: "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." In *Korematsu* itself, the Court

did no such thing; it paid the greatest deference to a "military" judgment that was chiefly political and steeped in racial prejudice. Yet *Korematsu*'s main doctrinal legacy was that racial classifications were suspect.

In one view, this two-stage analysis, first identifying a classification as suspect and then subjecting it to STRICT SCRUTINY, is a roundabout way of addressing the issue of illicit legislative motives. (See LEGISLATION; WASHINGTON V. DAVIS.) Strict scrutiny is required in order to allay the suspicion that a law was designed to disadvantage a minority that lacked effective power in the legislature. That suspicion is laid to rest only by a showing that the law is well designed to achieve a legitimate purpose that has real importance. In another view, a classification based on race should be subjected to strict scrutiny because the immutable characteristic of race lends itself so well to a system thought dominated by stereotype, which automatically consigns a person to a general category, often implying inferiority. This concern for stigmatic harm is part of the substantive core of the equal protection clause, the principle of equal citizenship; the concern retains vitality even in an era when members of racial minorities have become electoral majorities in many of our major cities.

A number of egalitarian decisions in the later years of the WARREN COURT suggested a wide range of classifications that were candidates for inclusion by the Supreme Court in the "suspect" category: alienage, sex, ILLEGITIMACY, age, indigency. In the event, none of these candidates was accepted fully. Some classifications disadvantaging ALIENS were held "suspect," but many were not. The Court did significantly heighten the standard of review for most cases involving claimed denials of SEX DISCRIMINATION and gave some "bite" to the rational basis standard in cases involving illegitimacy. On the whole, however, the Court's behavior since the late 1970s suggests a determination to limit expansion of the list of suspect classifications, and thus to limit the occasions for active judicial supervision of legislation.

Some racial classifications are adopted as remedies for past societal discrimination based on race. Such an AFFIRMATIVE ACTION program presents neither of the principal dangers that have been said to require strict judicial scrutiny of racial classifications. There is less reason to suspect an illicit motive when a majoritarian body such as a legislature discriminates in favor of a historically disadvantaged minority, and the risk of stigmatic harm to a racial group is much reduced. Thus, varying majorities of the Supreme Court have consistently agreed that the appropriate standard of review for such remedial legislation, including RACIAL QUOTAS, is considerably less exacting than the strictest form of strict scrutiny.

The whole "suspect classifications" idea would seem to have outlived its usefulness. Surely the Supreme Court no longer needs the doctrine to justify its highest levels of intensity of judicial review. In race cases, for example, the Court needs no such locution in order to continue imposing on government a "heavy burden of justification" of laws imposing invidious racial discrimination. Abandonment of the rhetoric of suspect classifications would promote candor, by easing the way for open recognition of the sliding scale of standards of review now serving to cloak the Court's interest balancing. It would also remove a barrier, built into the very language of suspect "classifications," to doctrinal growth in the direction of affirmative governmental responsibility to alleviate those inequalities that prevent the realization of the principle of equal citizenship.

KENNETH L. KARST
(1986)

Bibliography

BREST, PAUL A. 1976 The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle. *Harvard Law Review* 90:1–54.

ELY, JOHN HART 1980 Democracy and Distrust: A Theory of Judicial Review. Cambridge, Mass.: Harvard University Press.

## SUTHERLAND, GEORGE
(1862–1942)

George Sutherland, Supreme Court Justice from 1922 to 1938, was born in England in 1862. A year thereafter, he was brought by his parents to Brigham Young's Utah. Although he himself was never a Mormon, Sutherland attended a Mormon academy; in 1882–1883, he studied at the law school at the University of Michigan. On leaving the university, Sutherland was admitted to the Utah bar. He attained immediate prominence, both professionally and politically. He was elected to the HOUSE OF REPRESENTATIVES as a Republican in 1900 and to the SENATE in 1905, where he remained until 1917.

Sutherland's tenure in Congress forced him to confront issues in a political context that he would later deal with as a Supreme Court Justice. Generally he supported a conservative position. Yet his most enduring legislative achievements centered on improving conditions for seamen; advancing a federal WORKER'S COMPENSATION program; and promoting woman suffrage. Sutherland's congressional tenure enabled him as early as 1910 to establish his credentials for appointment to the Supreme Court. The 1920 election of Warren Harding, attributed in considerable part to Sutherland in his role of principal confidential adviser to the candidate, virtually assured him the

nomination. The nomination was sent to an approving Senate on September 5, 1922.

Anyone interested in the new Justice's approach to legal and political problems had not far to look. In the five years since his retirement from the Senate, Sutherland had delivered major addresses setting forth his conservative philosophy. In his presidential address to the American Bar Association in 1917, he chose to speak on "Private Rights and Government Control." The message was clear. "Prying Commissions" and "governmental intermeddling" were unnecessary and at war with the "fundamental principle upon which our form of government depends, namely, that it is an empire of laws and not of men." Four years later Sutherland was telling the New York State Bar Association "that government should confine its activities, as a general rule, to preserving a free market and preventing fraud." He further explained that "fundamental social and economic laws" were beyond the "power of official control."

Once on the Court, Sutherland readily joined his conservative colleagues invoking SUBSTANTIVE DUE PROCESS to strike down exertions of governmental power. His first major opinion, in ADKINS V. CHILDREN'S HOSPITAL (1923), was directed at the minimum wage. Here, in the area of FREEDOM OF CONTRACT, no presumptive validity could be accorded to the exercise of legislative power. Rather, its legitimacy could be established only by "exceptional circumstances" and certainly not by considerations of a worker's needs or bargaining power. In short order, state attempts to regulate prices of gasoline, theater tickets, and employment agency services were similarly condemned. Other forms of state regulation fared no better. Nor was substantive due process the sole doctrinal reliance. In the Court's continuing battle with state legislatures, Sutherland led his colleagues in discovering hitherto unrealized prohibitions in the EQUAL PROTECTION, COMMERCE, and CONTRACT CLAUSES. And, under his hand, the PRIVILEGES AND IMMUNITIES clause of the FOURTEENTH AMENDMENT, neglected and forgotten for decades, sprang to life as a restraint on state power in COLGATE V. HARVEY (1935).

Eventually, of course, the Court repudiated the Sutherland approach to state legislative power and little of it remains. Yet, in at least two respects, his contribution in this area is of continuing significance. The first has to do with his seminal opinion in *Frost and Frost Trucking v. Railroad Commission* (1926) where he elaborated the theory of unconstitutional conditions. This theory destroyed the notion that a state's power to withhold a privilege somehow gives it authority to discriminate without check in granting the privilege. The second is his opinion for a divided court in EUCLID V. AMBLER REALTY (1926) which furnishes the constitutional foundation for the modern law of ZONING.

When Sutherland came to deal with the actions of Congress and the President, he exhibited the same jealousy of authority that characterized his response to state legislatures. Accordingly, he remained to the end unconvinced of the constitutionality of many of the New Deal enactments and in time was overwhelmed by the arrival of our modern-day Constitution of "powers." Even so, Sutherland's lasting impact will be found on close examination to have been highly significant. Particularly, he made highly personalized contributions to our *structural* Constitution; he had a distinctive role in shaping the Constitution as a guarantor of CIVIL RIGHTS; and he, more than anyone else, supplied the intellectual underpinnings for the FOREIGN AFFAIRS power.

As for the structural Constitution, Sutherland's opinion in *Massachusetts v. Mellon* (1923), and its companion case of FROTHINGHAM V. MELLON (1923), is still, despite scores of intervening qualifying decisions, the basic starting point in determining when a federal "taxpayer" has STANDING to raise a constitutional question in actions in the federal courts. Here plainly is one of the most telling limitations on federal judicial power. In a number of cases, Sutherland wrote opinions enforcing restraint on Supreme Court review of state decisions that were found to rest on independent and ADEQUATE STATE GROUNDS. In still others, he resisted effectively the pleas of reformers to whittle down guarantees of the right to TRIAL BY JURY, in civil as well as criminal cases. And in the highly technical matter of the relationship between state and federal courts, Sutherland's influence continues. Finally, Sutherland's views have been decisive in regard to the President's power to remove federal office holders. Early in his judicial career he concurred in Chief Justice WILLIAM HOWARD TAFT's unnecessarily wide-ranging opinion in MYERS V. UNITED STATES (1926), sanctioning a presidential power to remove without restraint. In HUMPHREY'S EXECUTOR V. UNITED STATES (1935) he started the Court on the way to new DOCTRINE. The removal power must take account of the nature of the office involved.

Sutherland's tenure on the Court spanned the years in which the Court began to take the BILL OF RIGHTS seriously as a check on STATE ACTION. His role in this development was not all of one piece. But he did write a leading opinion, in GROSJEAN V. AMERICAN PRESS COMPANY (1936), condemning a state tax on the press because of the levy's impermissible *motive* to make costly the criticism of public officials. And in POWELL V. ALABAMA (1932), he charted for the Court the first steps a state must take to assure counsel in legal proceedings. His problem there was counsel in a capital case. But Sutherland's opinion was not so confined in its implications and has proved influential even beyond the bounds of the criminal law.

Long before he went on the Court, Sutherland was

given to speculation about the foreign relations powers, producing in 1919 a book on the subject, *Constitutional Power and World Affairs.* In his book and elsewhere, Sutherland developed the theory that the powers of the United States in respect to foreign affairs were largely unrelated to any grant from the states and existed as an incident of SOVEREIGNTY devolved directly on the United States from Great Britain. Their employment and their distribution were to be governed by rules not applicable to the specific delegations of the Constitution. In 1936, in CURTISS-WRIGHT EXPORT CORP. V. UNITED STATES, Sutherland was able to incorporate these views in an opinion for a unanimous Court.

Sutherland retired from the Court in 1938. He died in 1942.

J. FRANCIS PASCHAL
(1986)

Bibliography

PASCHAL, JOEL FRANCIS 1951 *Mr. Justice Sutherland: A Man against the State.* Princeton, N.J.: Princeton University Press.

## *SWAIN v. ALABAMA*
380 U.S. 202 (1965)

A 6–3 Court, speaking through Justice BYRON R. WHITE, rejected the claim of a black defendant to proportional representation of his race on grand and petit juries. Although blacks were substantially underrepresented on the jury panel, and although the prosecutor had used his peremptory challenges to exclude blacks in this case (there had been eight blacks on the venire), the Court found no evidence on the record of purposeful discrimination. The Court hinted that systematic use of peremptory challenges to exclude blacks from all juries would be unconstitutional, but it said that the record in *Swain* failed to show such systematic discrimination. In BATSON V. KENTUCKY (1986) the Court partially overruled *Swain*, holding that a prosecutor cannot constitutionally use peremptory challenges to exclude potential jurors solely on account of their race.

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Jury Discrimination.*)

## *SWANN v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION*
402 U.S. 1 (1971)

Three years before *Swann* was decided, the Supreme Court had established a school board's affirmative duty to dismantle a school system that had been racially segregated by the command of law or by the board's deliberate actions. (See GREEN V. COUNTY SCHOOL BOARD.) In *Swann*, the Court was asked to apply this standard to a large metropolitan school district including the city of Charlotte, North Carolina, and its surrounding county. President RICHARD M. NIXON had made two appointments to the Court in the intervening years, and some observers expected the Justices' previous unanimity in school DESEGREGATION cases to be shattered in this case. In the event, no such thing happened; a unanimous Court affirmed a sweeping order by the federal district judge, James B. McMillan, calling for districtwide busing of children for the purpose of improving the schools' RACIAL BALANCE. (After issuing this order, Judge McMillan received death threats and was given police protection.) The *Swann* opinion was signed by Chief Justice WARREN E. BURGER. However, internal evidence strongly suggests that the opinion was a negotiated patchwork of drafts, and ivestigative journalists have asserted plausibly that Justice POTTER STEWART contributed its main substantive points.

Once a constitutional violation was found, the Court said, the school board had an obligation to take steps to remedy both present de jure segregation (see DE FACTO/DE JURE) and the present effects of past de jure segregation. These steps must achieve "the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." The Court thus approved Judge McMillan's use of districtwide racial percentages as "a starting point" in shaping a remedy and placed on the school board the very difficult burden of showing that the continued existence of one-race schools was not the result of present or past de jure segregation. Finally, the Court approved the busing of children to schools not in their own neighborhoods as one permissible remedy within a court's discretion. The matter of busing, however, was not left to lower court discretion. In a COMPANION CASE from Mobile, Alabama, *Davis v. Board of School Commissioners*, the Court *required* busing the lower courts had not ordered.

*Swann* set the pattern for school desegregation litigation not only in southern cities but in the North and West as well. Once a court finds deliberate acts of segregation, *Swann's* affirmative duties arise.

KENNETH L. KARST
(1986)

(SEE ALSO: *Columbus Board of Education v. Penick; Keyes v. School District No. 1; School Busing.*)

Bibliography

FISS, OWEN M. 1974 School Desegregation: The Uncertain Path of the Law. *Philosophy & Public Affairs* 4:3–39.
WOODWARD, BOB and ARMSTRONG, SCOTT 1979 *The Brethren:*

*Inside the Supreme Court.* Pages 96–112. New York: Simon & Schuster.

## SWAYNE, NOAH H.
(1804–1884)

Noah Haynes Swayne was the first of President ABRAHAM LINCOLN's five Supreme Court appointees. Geography, antislavery credentials, and support for the Union constituted Lincoln's chief criteria when he made his first appointments to the Court. Swayne fulfilled these qualifications.

Because of his hostility to SLAVERY, Swayne left his native Virginia and in 1823 moved to Ohio, where he served in the state legislature. In 1830 President ANDREW JACKSON named him United States Attorney. During the next several decades, he continued his active political career, and he appeared as counsel in a number of FUGITIVE SLAVERY cases. In 1855, he joined the fledgling Republican party and became a leading figure in the Ohio group. His close friend, Justice JOHN MCLEAN, had suggested Swayne as his successor. When McLean died early in 1861, Swayne quickly marshaled support from leading Ohio Republicans; Lincoln appointed him in January 1862.

On the Supreme Court, Swayne enthusiastically supported the administration, approving of Lincoln's blockade of southern ports in the PRIZE CASES (1862), upholding the Legal Tender Act of 1862 in *Roosevelt v. Meyer* (1863), and sustaining military trials in EX PARTE VALLANDIGHAM (1864). After the war, in EX PARTE MILLIGAN (1866), he joined the Court's minority faction which declined to discuss the question of congressionally authorized military tribunals.

During RECONSTRUCTION, Swayne again demonstrated consistent support for the congressional Republican program. For example, he dissented in the TEST OATH CASES (1867), and he voted to decline JURISDICTION in the unreported case of *Mississippi v. Stanton* (1868), when the Court divided evenly on whether to take another case that might have decided the fate of the Reconstruction program. Perhaps Swayne's clearest deference to congressional determination of Reconstruction was expressed in his dissent in TEXAS V. WHITE (1869). He rejected the majority fiction that Texas was not out of the Union and insisted that Texas's relationship to the Union must be determined by Congress. Swayne recognized that the FOURTEENTH AMENDMENT had been designed in part to benefit the freedmen, as evidenced by his vote in STRAUDER V. WEST VIRGINIA (1880), striking down RACIAL DISCRIMINATION in jury selection. Yet he repeatedly supported the Court's narrow construction of the FIFTEENTH AMENDMENT, thus limiting black VOTING RIGHTS.

After the CIVIL WAR, Swayne continued to back Republican programs. He dissented when the majority struck down the legal tender laws in 1870, but the next year he joined the new majority that reversed that decision. (See LEGAL TENDER CASES.) A decade later, just before his retirement, Swayne delivered the Court's opinion in SPRINGER V. UNITED STATES (1881) upholding the Civil War income tax. He impressively rejected arguments that the tax confiscated property without DUE PROCESS OF LAW and that it was a DIRECT TAX, and therefore need not be apportioned among the states according to population. That decision subsequently was temporarily overruled in POLLOCK V. FARMER'S LOAN AND TRUST (1895), but Swayne's opinion generally is regarded as the more historically valid.

In its time, Swayne's opinion in GELPCKE V. CITY OF DUBUQUE (1864) had enormous influence. Speaking for the Court, Swayne held that a state court could invalidate a lawfully controlled municipal bonding arrangement. The decision left countless municipalities responsible for maintaining railroad financing, despite popular protests against the practice as well as deceitful activities on the part of the railroads. Later, Swayne joined JOSEPH P. BRADLEY, STEPHEN J. FIELD, and SALMON P. CHASE in dissent in the SLAUGHTERHOUSE CASES (1873). Swayne's dissent lacked the elaborate rhetoric and logic of the Bradley and Field dissents, but he invoked the same mystical faith in the sanctity of property.

Swayne ranks as an ordinary Justice, not greatly appreciated even in his own time. His colleagues disapproved of his aggressive campaigning for the Chief Justiceship in 1864 and 1873, and he remained on the bench long after his physical and mental capacities had noticeably declined. He wrote few major opinions in his two decades on the bench.

STANLEY I. KUTLER
(1986)

Bibliography

FAIRMAN, CHARLES 1939 *Mr. Justice Miller and the Supreme Court, 1862–1890.* Cambridge, Mass.: Harvard University Press.

GILLETTE, WILLIAM 1969 Noah H. Swayne. In Leon Friedman and Fred L. Israel, eds., *The Justices of the Supreme Court,* Vol. 2:789–1010. New York: Chelsea House.

## *SWEATT v. PAINTER*
339 U.S. 629 (1950)
## *MCLAURIN v. OKLAHOMA STATE REGENTS*
339 U.S. 637 (1950)

Texas had established a separate law school for blacks; the state university law school thus rejected Sweatt, a black

applicant. In *McLaurin*, the state university admitted a black to graduate study in education but made him sit in segregated classroom alcoves and at separate tables in the library and cafeteria. In both cases, state courts upheld the challenged SEGREGATION. In *Sweatt* the NAACP recruited some law professors to file a brief AMICUS CURIAE urging the Supreme Court to abandon the SEPARATE BUT EQUAL DOCTRINE and hold that state-sponsored segregation was unconstitutional. Eleven states supported the Texas position.

The Court unanimously held the practices of segregation in these cases unconstitutional, but it did not reach the broader issue. Chief Justice FRED M. VINSON wrote both opinions. In *Sweatt* he emphasized the intangibles of legal education: faculty reputation, influential alumni, traditions, prestige, and—most significant for the doctrinal future—a student body including members of a race that would produce an overwhelming majority of the judges, lawyers, witnesses, and jury members Sweatt might face. Assuming the continued vitality of "separate but equal," the new law school for blacks was not equal to the state university law school, and Sweatt must be admitted to the latter.

The *McLaurin* opinion, too, avoided direct attack on the separate-but-equal principle, but it sapped that principle's foundations: segregation impaired McLaurin's ability to study and learn, to discuss questions with other students and be accepted by them on his merits; thus the state must lift its restrictions on him.

In neither case did the Court discuss segregation's stigmatizing effects. In neither did the Court consider any asserted justifications for segregation. The only question was whether segregation produced significant inequality; affirmative answers to that question ended the Court's inquiries. Taken seriously, these decisions must lead—as they did, four years later—to the conclusion that racial segregation in public education is unconstitutional. (See BROWN V. BOARD OF EDUCATION.)

KENNETH L. KARST
(1986)

## *SWEEZY v. NEW HAMPSHIRE*

See: *Watkins v. United States*

## *SWIFT v. TYSON*
41 U.S. (16 Peters) 1 (1842)

In *Swift v. Tyson* the Supreme Court gave to the Rules of Decision Act (JUDICIARY ACT OF 1789, section 34) a construction that was to stand until ERIE RAILROAD CO. V. TOMPKINS (1938), almost a century later. As a result of this construction, the federal courts came to exercise COMMON LAW authority over a wide variety of disputes, some of which involved matters outside the limits of federal legislative power. Because these federal court decisions did not purport to bind state courts, the result was often the parallel existence of two different rules of law applicable to the same controversy.

Proceeding on the basis of diversity of citizenship (see DIVERSITY JURISDICTION), Swift sued Tyson in a New York federal court on a bill of exchange. A critical question in the case was whether, in light of the particular facts, Swift was a "purchaser for value" of that bill. The Supreme Court, in an opinion by Justice JOSEPH STORY, held that he was, resolving the question on the basis of "general principles and doctrines of commercial jurisprudence," not on the basis of the decisional law of New York.

Tyson had argued that although there was no relevant state statute, the decisions of the New York state courts were controlling because the Rules of Decision Act provided that the "laws of the several states . . . shall be regarded as rules of decision . . . in cases where they apply." This provision, the Court replied, was limited in application to "the positive statutes of the state, and the construction thereof by the local tribunals, and to rights and titles to things having a permanent locality." It did not require adherence to state judicial decisions on such matters as "questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies . . . what is the just rule furnished by the principles of commercial law to govern the case."

Historians disagree on the justification and soundness of the *Swift* decision. But there is general agreement that in the years that followed, *Swift* was expanded well beyond its originally intended scope, and that its OVERRULING, in *Erie*, reflected a very different perception of the proper role of the federal courts.

DAVID L. SHAPIRO
(1986)

(SEE ALSO: *Federal Common Law, Civil.*)

## *SWIFT & COMPANY v. UNITED STATES*
196 U.S. 375 (1905)

Justice OLIVER WENDELL HOLMES's opinion for a unanimous Supreme Court in *Swift* announced the STREAM OF COMMERCE doctrine, fundamental to constitutional COMMERCE CLAUSE adjudication ever since.

In 1902 Attorney General PHILANDER C. KNOX ordered that an EQUITY complaint be filed against the Beef Trust, the five largest meat-packing concerns in the country. The

complaint alleged conspiracy and combination in restraint of interstate trade, suppression of competition, and price-fixing, all in violation of the SHERMAN ANTITRUST ACT. In 1903 federal district court judge PETER S. GROSSCUP issued a perpetual INJUNCTION against the packers. On appeal to the Supreme Court, the packers, though admitting the truth of the government allegations, contended that they were not involved in INTERSTATE COMMERCE. The entire transaction between the packers and those who purchased meat from them had occurred completely within the state where the packers slaughtered and prepared their meat. The sale had been consumated in-state and thus only INTRASTATE COMMERCE was involved. Knox's successor, WILLIAM H. MOODY, asserted that the restraint of trade directly affected interstate commerce even if no interstate acts were involved. Armed with the packers' admissions, Moody stressed the unity of the transactions, arguing that the operation had to be viewed as a whole.

The Court accepted Moody's view. The trust's "EFFECT UPON COMMERCE is not accidental, secondary, remote, or merely probable," Holmes declared, as he revised the Court's view of interstate commerce, affecting decisions for decades to come: "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of the business." Livestock moving from the range to the retailer, "with the only interruption necessary to find a purchaser at the stock yards," created "a current of commerce among the states, and the purchase of cattle is a part and incident of such commerce." Thus a local activity might be seen as part of interstate commerce. This stream of commerce doctrine fundamentally redirected the Court's examination of commerce clause questions and brought the Court face-to-face with economic reality, modifying the doctrinal effect of UNITED STATES V. E. C. KNIGHT COMPANY (1895).

DAVID GORDON
(1986)

Bibliography

GORDON, DAVID 1983 The Beef Trust: Antitrust Law and the Meat Packing Industry, 1902–1922. Ph.D. diss., Claremont Graduate School.

## SWISHER, CARL BRENT
(1897–1968)

Carl Brent Swisher taught constitutional history for many years at Johns Hopkins University. A pioneer in the field of judicial biography, Swisher published *Stephen J. Field: Craftsman of the Law* (1930), still highly regarded. His *Roger B. Taney* (1935), the leading biography, and his posthumously published *The Taney Period, 1836–1864* (1974; Vol. 5, Holmes Devise History of the Supreme Court) describe Taney's accomplishments as Chief Justice as well as his failures of judgment and proslavery bias, thereby rescuing Taney from the limbo to which most historians had consigned him in the wake of DRED SCOTT V. SANDFORD (1857). Swisher also published several general studies of constitutional law and the Supreme Court, including *American Constitutional Development* (1943; rev. ed. with E. M. Sait, 1954) and *The Supreme Court in Modern Role* (1958; rev. ed., 1965). In the most influential of these works, *The Growth of Constitutional Power in the United States* (1946; rev. ed., 1963), Swisher questioned the continuing usefulness of the doctrine of SEPARATION OF POWERS, fearing that it prevented government from achieving the ends which society increasingly expected government to achieve; he also urged government supervision of large corporations to check their political and economic power.

RICHARD B. BERNSTEIN
(1986)

## SYMBOLIC SPEECH

Does communication by conduct rather than by words constitute "speech" within the FIRST AMENDMENT's guarantee of FREEDOM OF SPEECH? The status of communicative conduct, as with most free speech questions, is usually presented in an emotion-laden context: does the burning of a flag, or of a draft card, constitute a First-Amendment-protected activity? Is the act of marching in a public DEMONSTRATION (as distinguished from the placards which the marchers carry) a form of protected "speech?" Are school or other governmental regulations of hair styles an abridgment of freedom of speech? Does nude dancing constitute a form of First Amendment "speech?" Although the lower federal and state courts frequently have wrestled with all of these questions, the United States Supreme Court has yet to articulate a theoretical base that explains the status of symbolic speech under the First Amendment.

At least since STROMBERG V. CALIFORNIA (1931), the Supreme Court has assumed that "speech" within the meaning of the First Amendment's guarantee of "freedom of speech" includes more than merely verbal communications. In *Stromberg* the Court declared invalid a California statute that prohibited the public display of "any flag, badge, banner or device . . . as a sign, symbol or emblem of opposition to organized government." Among other decisions applying the First Amendment to nonverbal conduct, perhaps the most striking was TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT (1969). The Court there upheld the right of high school students to wear black armbands as a protest against American par-

ticipation in the VIETNAM WAR, calling their conduct "the type of symbolic act that is within the Free Speech Clause of the First Amendment."

But if conduct sometimes constitutes protected "speech," sometimes it does not. UNITED STATES V. O'BRIEN (1968) affirmed a conviction for draft card burning. Chief Justice EARL WARREN, speaking for the Court, answered the defendant's symbolic speech defense by opining, "We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech' whenever the person engaging in the conduct intends thereby to express an idea."

Any attempt to disentangle "speech" from conduct that is itself communicative will not withstand analysis. The speech element in symbolic speech is entitled to no lesser (and also no greater) degree of protection than that accorded to so-called pure speech. Indeed, in one sense all speech is symbolic. At this moment the reader is observing black markings on paper which curl and point in various directions. We call such markings letters, and in groups they are referred to as words. What is being said in this sentence is meaningful only because the reader recognizes these markings as symbols for particular ideas. The same is true of oral speech which is simply the use of symbolic sounds. Outside the science fiction realm of mind-to-mind telepathic communication, all communications necessarily involve the use of symbols.

But because all expression necessarily requires the use of symbols, it does not necessarily follow as a matter of logic that First Amendment protection is or should be available for all symbolic expressions. The "speech" protected by the First Amendment might be limited to expressions in which the symbols employed consist of conventional words. The Supreme Court has found so restrictive a reading of the First Amendment to be unacceptable. Significantly, in First Amendment cases, the Court often refers to "freedom of expression" as the equivalent of freedom of speech. Justice OLIVER WENDELL HOLMES's "free trade in ideas" may not be reduced to mere trade in words. It is the freedom to express ideas and feelings, not merely the freedom to engage in verbal locutions, that must be protected if the First Amendment's central values are to be realized.

In COHEN V. CALIFORNIA (1971) the Supreme Court held that the emotive form of speech is as entitled to First Amendment protection as is its cognitive content. Emotive expression can be fully as important as intellectual, or cognitive, content in the competition of ideas for acceptance in the marketplace. Of course, most communications encompass both cognitive and emotive content. But even if a communication is substantially devoid of all cognitive content, its emotive content surely lies within the First Amendment scope. Symphonic compositions or nonrepresentational art are protected against governmental censorship, notwithstanding their lack of verbal or cognitive content.

Of course, not all conduct should be regarded as "speech" within the meaning of the First Amendment. Not even the most ardent free speech advocate would contend that all legislation regulating human conduct is subject to First Amendment restrictions. If, as the Court stated in the *O'Brien* opinion, the First Amendment is not to apply to a "limitless variety of conduct," what standards should be applied in determining whether given restrictions on conduct constitute First Amendment abridgment of symbolic speech?

If government's purpose in restricting is to suppress the message conveyed by the conduct, then the state should not be heard to deny the actor's claim that the conduct in question was intended to communicate a message. Such a message-restricting motivation by the state should also establish that the conduct in question constitutes symbolic speech. But such a conclusion does not necessarily imply that the speech is entitled to First Amendment protection. Even speech in words may in some circumstances be subordinated to a counter-speech interest. Likewise, no First Amendment ABSOLUTISM will protect communicative conduct. In some contexts symbolic speech may be overbalanced by counter-speech interests. If, however, the asserted or actual counter-speech interest is simply commitment to a particular view of the world—political, ethical, aesthetic, or otherwise—this interest will not justify abridgment of the right to express a contrary view, either by words or by conduct.

Just as First Amendment principles apply equally to expression in the symbols of the English or French languages, for example, the same principles govern when the symbols are of neither of these languages, nor of any conventional language. The crucial question under the First Amendment is whether meaningful symbols are being employed by one who wishes to communicate to others.

The courts have resisted equating symbolic speech with verbal speech because of a fear of immunizing all manner of conduct from the controls of the law. This fear is unjustifiable; it stems from a false premise as to the First Amendment protection accorded to verbal speech. In fact, speech in words is not immune from regulation. For example, an interest in excluding trespassers will justify abridging the verbal speech of those who wish to speak on property from which they may properly be excluded. Similarly, words that presage an imminent and likely BREACH OF THE PEACE will justify regulation just as much as if the idea be conveyed by nonverbal symbols. These are but two of many instances when verbal speech is subordinated to counter-speech interests.

According full and equal status to symbolic speech under the First Amendment will not open the floodgates to abuses, immunizing *O'Brien's* "apparently limitless variety of conduct" from legal regulation. Recognition of such equality of forms of expression would mean that no one will be penalized because he chooses to communicate—or is able to communicate—only in a language other than conventional words. We shall all be the richer for such recognition.

MELVILLE B. NIMMER
(1986)

Bibliography

NIMMER, MELVILLE B. 1973 The Meaning of Symbolic Speech to the First Amendment. *UCLA Law Review* 21:29–62.

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**Kenneth L. Karst**

**Adam Winkler**, Associate Editor for the Second Edition

**Dennis J. Mahoney**, Assistant Editor for the First Edition
**John G. West, Jr.**, Assistant Editor for Supplement I



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## TAFT, ROBERT A.
(1889–1953)

Senator Robert Alphonso Taft, the son of President and Chief Justice WILLIAM HOWARD TAFT, was a leader of Republican opposition to the NEW DEAL policies of FRANKLIN D. ROOSEVELT. A graduate of Yale University and Harvard Law School, Taft served in the Ohio legislature from 1921 to 1933. His public crusade against the Roosevelt revolution began in 1935; in 1938 he was elected to the United States SENATE, sworn to do battle against "the mistaken belief that government can remove all poverty, redistribute all wealth, and bestow happiness on every citizen."

An advocate of STRICT CONSTRUCTION of constitutional provisions that confer power on government, Taft severely criticized Roosevelt's appointees to the Supreme Court for acting as if "constitutional principles are weak as water" by abdicating their duty to keep the government within the limits set by the Constitution. He strongly urged that Congress become the locus of responsible CONSTITUTIONALISM, and he opposed, both in peacetime and wartime, DELEGATIONS OF POWER to the executive branch.

Taft continued to oppose expansion of the executive power after HARRY S. TRUMAN became President. During the STEEL SEIZURE CONTROVERSY Taft argued that if the President could increase his own powers by simply declaring a national emergency the Constitution would become a dead letter. Taft used his position as chairman of the Senate Labor Committee to sponsor a comprehensive reform of federal labor law, now known as the TAFT-HARTLEY ACT.

After a decade and a half of being "Mr. Republican," Taft felt entitled to his party's presidential nomination in 1952. However, the nomination, and election to the presidency, went to General DWIGHT D. EISENHOWER, hero of WORLD WAR II. Nevertheless, Taft had a major share in formulating the domestic policy of the new administration during its first year in office.

DENNIS J. MAHONEY
(1986)

Bibliography

KIRK, RUSSEL and MCCLELLAN, JAMES 1967 *The Political Principles of Robert A. Taft.* New York: Fleet Press Corporation.

## TAFT, WILLIAM HOWARD
(1857–1930)

William Howard Taft's life was amazing both for length of public service (1881–1930) and for the variety of his activities: prosecuting attorney in his native state of Ohio, superior court judge in Cincinnati, SOLICITOR GENERAL of the United States, federal circuit court judge, governor general of the Philippine Islands, cabinet member, President of the United States (1908–1912), professor of law at Yale, and CHIEF JUSTICE of the United States (1921–1930).

Taft appeared to be almost the prototype of a Chief Justice. Large of frame and good-natured, weighing well over 350 pounds, he filled out the popular image. His gallantry was famous. "I heard recently," Justice DAVID J. BREWER reported, "that he arose in a street car and gave his seat to three women."

Taft idolized Chief Justice JOHN MARSHALL. One day, passing by the west entrance to the Capitol, he paused in

front of the bronze statue of Marshall. "Would you rather have been Marshall than President?" a friend asked. "Of course," Taft answered, "I would rather have been Marshall than any other American unless it had been Washington, and I am inclined to think I would rather have been Marshall than Washington. He made this country." Taft himself became the only man in history to occupy both the White House and the Supreme Court's center chair.

During THEODORE ROOSEVELT's administration Taft rejected two opportunities to join the Supreme Court as associate justice. As successor to Roosevelt in the White House, Taft thought longingly about the future and pined to succeed aging Chief Justice MELVILLE W. FULLER. "If the Chief Justice would only retire," Taft lamented, "how simple everything would become!"

As President Taft signed Associate Justice EDWARD D. WHITE's commission as Chief Justice, he grieved: "There is nothing I would have liked more than being Chief Justice of the United States. I can't help seeing the irony in the fact that I, who desired that office so much, should now be signing the commission of another man." Rating Supreme Court appointments as among his most important presidential functions, Taft had the opportunity to appoint five associate Justices as well as the Chief—WILLIS VAN DEVANTER, HORACE H. LURTON, JOSEPH R. LAMAR, CHARLES EVANS HUGHES, and MAHLON PITNEY. Each appointment was a continuing source of pride to Taft, who at every opportunity underscored the importance of the judiciary.

Taft's cordial relations with Roosevelt did not last. Differences developed during Taft's presidency over questions of policy and administration. Finally the clash led to a split in the Republican Party. As a result, when Taft ran for reelection in 1912 Roosevelt ran as a Progressive. The upshot was a Democratic victory and the election of WOODROW WILSON as President.

After Justice Lamar died, rumor began to spread that the new President might, rising above party politics, follow the example of his predecessor's high-mindedness when in 1910 Taft had selected as Chief Justice a southern Democrat and Roman Catholic, Associate Justice Edward D. White. But Wilson appointed LOUIS D. BRANDEIS instead, and Taft, outraged by that appointment, declared that Brandeis was "not a fit person to be a member of the Court."

In 1919, Taft was off the public payroll for the first time. Soon he took a position at Yale, teaching constitutional law. Meanwhile, the chief justiceship seemed a remote possibility. Prospects brightened in 1920 with the smashing Republican victory of WARREN G. HARDING. Shortly after Harding's election the unblushing aspirant made the pilgrimage to Marion, Ohio. Taft was "nearly struck dumb" when the President-elect broached a Supreme Court appointment. Of course, the former President was available, but he made it clear that, having appointed three of the present bench and three others and, having vigorously opposed Brandeis's appointment in 1916, he would accept only the chief justiceship.

Taft's opportunity to achieve his ambition was not altogether accidental. During his presidency, when Chief Justice Fuller died, two choices loomed as possibilities—CHARLES EVANS HUGHES and Edward D. White. The latter, seventeen years Hughes's senior, received the nod. Had Taft chosen Hughes, instead of White, his lifelong ambition would not have been realized.

The office of Chief Justice carries scant inherent power. He manages the docket, presents the cases in conference, and guides discussion. When in the majority, he assigns the writing of opinions. In 1921 Taft remarked: "The Chief Justice goes into a monastery." Yet it is difficult to think of a Chief Justice who more frequently violated the American Bar Association's canons of judicial propriety on so many fronts. During the presidency of CALVIN COOLIDGE he was often a White House visitor. His political activities ranged widely over legislation and judicial appointments at all levels. In his choice of judges his alleged purpose was competence. But Taft even opposed selection of the eminent New York Judge BENJAMIN N. CARDOZO, fearful lest he "herd with [OLIVER WENDELL] HOLMES and Brandeis." At the outset, he had kind words for HARLAN F. STONE, indeed claimed credit for his appointment to the Court. But when Stone began to join Holmes and Brandeis, the Chief Justice became increasingly critical.

As institutional architect, Taft ranks second only to OLIVER ELLSWORTH, the third Chief Justice, who originally devised the judicial system. Taft's best known extrajudicial achievement, "The Judges' Bill" of 1925, giving the Supreme Court control over its docket, passed with only token opposition. Soon Congress authorized other procedural changes Taft had long advocated. To achieve these reforms Taft lobbied Presidents and members of Congress and sought press support. The most striking example of his effectiveness as a lobbyist was his campaign for the marble palace in which the Court now sits. At the cornerstone ceremony, in October 1932, Chief Justice Hughes declared: "For this enterprise progressing to completion we are indebted to the late Chief Justice William Howard Taft more than anyone else. The building is the result of his intelligent persistence."

Taft's goals as Chief Justice were efficiency, prompt dispatch of the Court's business, and harmonious relations among his colleagues. His overwhelming desire was to "mass" the Court. For the ex-President, Brandeis's appointment had been "one of the deepest wounds that I have had as an American and a lover of the constitution and a believer in progressive conservatism." Naturally Taft

anticipated strained relations with his new colleague. To smooth this possible difficulty he wrote Brandeis long letters on the desirability of taking prompt steps to make the Court more efficient. Such friendly appeals moved his brother Horace to predict: "I expect to see you and Brandeis hobnobbing together with the utmost good will." Taft's strategy worked. Soon he was able to write: "I've come to like Brandeis very much." The feeling was mutual. Brandeis thought of Taft as "a cultivated man" and enjoyed talking with him. The Chief Justice's brother thought Brandeis "had been taken into camp." Justice JOHN H. CLARKE resigned because he believed that Brandeis could no longer be counted on to uphold the liberal stance.

"Things go happily in the CONFERENCE room with Taft," Brandeis commented. "The judges go home less tired emotionally and less weary physically than in White's day. When we differ, we agree to differ without any ill feelings." It seems likely that certain of Brandeis's unpublished opinions reflect his high regard for the Chief Justice. In one decision in particular, the second child labor case, BAILEY V. DREXEL FURNITURE CO. (1922), Taft writing for the Court invoked the authority of HAMMER V. DAGENHART (1918), a singularly conservative ruling. Yet, Brandeis went along with the majority, explaining: "I can't always dissent. I sometimes endorse an opinion with which I do not agree. I acquiesce." Brandeis's silence may have been the measure of Taft's gift for leadership.

In ALEXANDER BICKEL's volume, *The Unpublished Opinions of Mr. Justice Brandeis* (1957), eight out of eleven were prepared during less than ten years of Taft's chief justiceship. Taft went to great pains to create esprit de corps. Seemingly trivial personal considerations—the sending of a salmon to Justice WILLIS VAN DEVANTER, the customary ride he gave Holmes and Brandeis after the Saturday conference, the Christmas card that always went out to Justice JOSEPH MCKENNA—all such thoughtful attention to highly dissimilar human beings contributed immeasurably to judicial teamwork.

Justice Van Devanter posed a unique problem. He was indispensable in conference where Taft was not always acquainted with judicial technicalities or even facts of the cases. But Van Devanter was "opinion shy." This, however, evoked no complaint from the Chief Justice, even if he wrote no opinions at all. Taft regarded him as "the mainstay of the Court" and dubbed him "my Lord Chancellor."

Taft was determined to make the Court's promptness "a model for the courts of the country." His colleagues, as Holmes said, approved the Chief's "way of conducting business . . . especially his disinclination to put cases over." To accelerate the Court's work, Taft urged cutting vacations from seventeen to twelve weeks and using various time-saving devices.

Taft's first major opinion, TRUAX V. CORRIGAN (1921), involved the constitutionality of an Arizona statute barring state courts from issuing injunctions in LABOR cases, except under special conditions. Owners of a restaurant sought an injunction against a BOYCOTT and PICKETING of their place of business. A majority of five Justices, concluding that the bar against injunctions denied DUE PROCESS OF LAW and EQUAL PROTECTION OF THE LAW, declared the act unconstitutional. "A law which operates to make lawful such a wrong as described in the plaintiff's complaint," the Chief Justice observed, "deprives the owner of the business and the premises of his property without due process of law and cannot be held valid under the FOURTEENTH AMENDMENT. . . . The Constitution was intended, its very purpose was to prevent experimentation with the fundamental rights of the individual."

Taft's next major opinion, STAFFORD V. WALLACE (1922), upheld broad federal power under the COMMERCE CLAUSE, announcing that Congress had a "wide area of discretion, free from judicial second guessing." At issue was the PACKERS AND STOCKYARD ACT of 1929, regulating the business of packers done in INTERSTATE COMMERCE. The "chief evil" Congress aimed at was the monopoly of packers, "enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys." In deciding *Stafford* Taft relied mainly on Holmes's majority opinion in SWIFT V. UNITED STATES (1905). "That case," wrote the Chief Justice, "was a milestone in the interpretation of the Commerce Clause of the Constitution. It recognized the great changes and development in the business of this vast country and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. It refused to permit local incidents of great interstate movements which, taken alone, were intrastate, to characterize the movement as such. The *Swift* case merely fitted the Commerce Clause to the real and practical essence of modern business growth."

Another example of Taft's effort to keep the Court "consistent with itself" was ADKINS V. CHILDREN'S HOSPITAL (1923) involving an act of Congress fixing the minimum wage for women and minors. Speaking for the Court, Justice Sutherland invalidated the act, relying primarily on Justice RUFUS PECKHAM's reactionary decision in LOCHNER V. NEW YORK (1905). Refusing to endorse *Lochner*, Taft and Holmes dissented: "It is impossible," the Chief Justice explained, "for me to reconcile the *Bunting* [*v. Oregon*] case of 1917 and the *Lochner* case and I have always supposed that the *Lochner* case was thus overruled *sub silentio*." Although Sutherland and Taft disagreed in *Adkins*, Taft could not bring himself to endorse Holmes's dissent because of its irreverent treatment of the FREEDOM OF CONTRACT doctrine. And in *Wolff Packing Co. v. Court of*

*Industrial Relations* (1923) Taft for the Court approvingly cited Sutherland's *Adkins* opinion on that doctrine.

The year 1926 witnessed a significant decision in American constitutional history: the 6–3 ruling in MYERS V. UNITED STATES upholding the President's power to remove a postmaster without the consent of the Senate. Said Taft: "I never wrote an opinion that I felt to be so important in its effect." The Chief Justice's unqualified appraisal reflects his White House experience. There were three dissenters—Holmes, JAMES C. MCREYNOLDS, and Brandeis. Brandeis wrote: "The separation of powers of government did not make each branch completely autonomous. It left each in some measure dependent on the other. . . . The doctrine of SEPARATION OF POWERS was adopted by the [CONSTITUTIONAL] CONVENTION OF 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but by means of the inevitable friction incident to the distribution of governmental powers among the departments, to save the people from autocracy."

Taft did not live to see the Court's later qualification of the President's power to remove executive officers. In HUMPHREY'S EXECUTOR V. UNITED STATES (1935) the President was denied executive power to remove a federal trade commissioner, appointed for seven years with the ADVICE AND CONSENT of the Senate, on the score of inefficiency or neglect of duty. Speaking for the Court in that later case, Justice Sutherland, who had enjoyed most cordial relations with Taft, went out of his way to say that the authority of the *Myers* case remained intact. The Court did not adopt the views of the *Myers* dissenters, but shifted emphasis from the "simple logic" of Article II of the Constitution—that the removal power is inherently "executive"—to the theory that a postmaster "is merely one of the units in the executive department and hence inherently subject to the exclusive and illimitable power of removal by the Chief Executive whose subordinate and aide he is."

As Taft's tenure drew to a close, dissents came more frequently and vehemently. Holmes and Brandeis, who had dissented from Taft's first major opinion in *Truax*, dissented from his last major opinion in OLMSTEAD V. UNITED STATES (1928). Justice Stone and even Justice PIERCE BUTLER joined the dissenters. Taft, a crusader for stricter enforcement of the criminal law, narrowly construed the FOURTH AMENDMENT's ban on unreasonable searches and seizures by ruling that evidence obtained by wiretapping could be introduced at a criminal trial. In the face of hostile criticism of his *Olmstead* opinion, Taft declared privately, "If they think we are going to be frightened in our effort to stand by the law and give the public a chance to punish criminals, they are mistaken, even though we are condemned for lack of high ideals." Taft thought that Holmes's dissent was sentimental in declaring that "it is a lesser evil that some criminals should escape than that the Government should play an ignoble part."

Near the end, Taft winced nervously whenever he contemplated his probable successor. Knowing that President HERBERT C. HOOVER's attachment to Stone was "very great," Taft feared the worst: "I have no doubt that if I were to retire or die, the President would appoint Stone head of the Court." Once in the Chief Justice's good graces, Stone had fallen into profound disfavor. "He definitely has ranged himself with Brandeis and with Holmes in a good many of our constitutional differences." Nor was Stone's "herding" with the Court's "kickers" his only shortcoming. He was "not a great leader and would have a great deal of trouble in massing the Court." The Chief was not entirely without hope: "With Van and Mac and Sutherland and you and Sanford," he wrote to Justice Butler in 1929, "there will be five to steady the boat. So there would be a great deal of difficulty in working through reversals of present positions, even if I either had to retire or were gathered to my fathers, so that we must not give up at once."

Taft's triumphant march continued to the end, but the future was clouded with uncertainty. By 1929 the world he had known and the people on whom he relied were in eclipse. As the economy slid rapidly toward the abyss, government intervention was openly advocated. To combat these forces, Taft's determination stiffened. "As long as things continue as they are and I am able to answer in my place," he resolved to "stay on the Court in order to prevent the Bolsheviki from getting control." President Hoover, Taft thought, "would put in some rather extreme destroyers of the Constitution. . . ."

None of Taft's predecessors, with the possible exception of Marshall, entertained so expansive a view of the chief justiceship, or used it so effectively on so many fronts. Taft was a great administrator, a great judicial architect, a skillful harmonizer of human relations. Yet he is not commonly considered a great Chief Justice.

ALPHEUS THOMAS MASON
(1986)

Bibliography

MASON, ALPHEUS THOMAS 1930 The Labor Decisions of Chief Justice Taft. *University of Pennsylvania Law Review* 78:585–625.

——— 1964 *William Howard Taft: Chief Justice.* New York: Simon & Schuster.

——— 1979 *The Supreme Court from Taft to Burger.* Baton Rouge: Louisiana State University Press.

MCHALE, FRANCIS 1931 *President and Chief Justice: The Life and Public Services of William Howard Taft.* Philadelphia: Dorrance.

MURPHY, W. F. 1961 In His Own Image: Mr. Justice Taft and

Supreme Court Appointments. *Supreme Court Review* 1961: 159–193.

——— 1962 Chief Justice Taft and the Lower Court Bureaucracy. *Journal of Politics* 24:453–476.

PRINGLE, H. F. 1939 *The Life and Times of William Howard Taft.* New York: Farrar & Rinehart.

# TAFT COURT
## (1921–1930)

WILLIAM HOWARD TAFT became Chief Justice of the United States on June 30, 1921. Never before or since has any person brought such a range of distinguished experience in public affairs and professional qualifications to the bench. Taft presided over a court that included Justices of highly varied abilities and achievements. In 1921, OLIVER WENDELL HOLMES, already a great figure of the law, had served nineteen years on the Supreme Court. He remained on the Court throughout Taft's tenure and beyond. Holmes's only equal on the Court was LOUIS D. BRANDEIS, who had been on the Court barely five years at Taft's accession. Taft, a private citizen in 1916, had vigorously opposed the appointment of Brandeis to the High Court. Although they remained ideological opponents and although some mistrust persisted on both sides, they maintained cordial relations, carrying on their opposition in a highly civil manner.

The rest of the Court that Taft inherited lacked the stature or ability of Holmes and Brandeis. Three Justices, JOHN H. CLARKE, MAHLON PITNEY, and WILLIAM R. DAY would retire within the first two years of Taft's tenure. Their retirements gave President WARREN C. HARDING a chance to reconstitute the Court. The President appointed his former Senate colleague GEORGE H. SUTHERLAND to one of the vacancies. The other two spots were filled by men strongly recommended by Taft: PIERCE BUTLER and EDWARD T. SANFORD.

The other Justices on the Court in 1921 were WILLIS VAN DEVANTER, JAMES C. MCREYNOLDS, and JOSEPH MCKENNA. Van Devanter had been appointed to the bench by Taft when he was President. He, like Butler and Sanford, continued to be strongly influenced by the Chief Justice. During the Taft years, he served the Chief Justice in the performance of many important institutional tasks outside the realm of decision making and opinion writing. For example, Van Devanter led the drive to revamp the JURISDICTION of the Supreme Court in the "Judges' Bill," the JUDICIARY ACT OF 1925. McReynolds, a Wilson appointee, was an iconoclastic conservative of well-defined prejudices.

Finally, Taft inherited Joseph McKenna, whose failing health impaired his judicial performance. In 1925, Taft, after consulting the other justices, urged McKenna to retire. McKenna was succeeded by HARLAN F. STONE. Though deferential to Taft at the outset, by the end of the decade Stone became increasingly identified with the dissenting positions of Holmes and Brandeis. From early 1923 through Taft's resignation only that one change took place.

Because of the substantial continuity of personnel the Taft Court can be thought of as an institution with a personality and with well-defined positions on most critical issues that came before it. Outcomes were as predictable as they ever can be, and the reasoning, persuasive or not, was consistent.

Taft was a strong Chief Justice. He lobbied powerfully for more federal judges, for a streamlined federal procedure, for reorganization of the federal judiciary, and for greater control by the Supreme Court over the cases it would decide. The most concrete of Taft's reforms was a new building for the Court itself, though the building was not completed until after his death.

A second major institutional change was completed during Taft's term. In 1925 Congress passed the "Judges' Bill." The Supreme Court's agenda is one of the most important factors in determining the evolution of constitutional law. Until 1891 that agenda had been determined largely at the initiative of litigants. In 1891 the Court received authority to review certain classes of cases by the discretionary WRIT OF CERTIORARI. However, many lower court decisions had continued to be reviewable as of right in the Supreme Court even after 1891. The 1925 act altered the balance by establishing the largely discretionary certiorari jurisdiction of the Supreme Court as it has remained for six decades. The act was one of Taft's major projects. It relieved the docket pressure occasioned by the press of obligatory jurisdiction, and placed agenda control at the very center of constitutional politics.

The successful initiatives of the Court in seizing control of its own constitutional agenda and constructing a new home should not obscure the fact that the Court's institutional position was, as always, under attack during the 1920s. A spate of what were perceived as antilabor decisions in 1921–1922 led to calls from the labor movement and congressional progressives to circumscribe the Court's powers. In the 1924 election ROBERT LA FOLLETTE, running as a third-party candidate on the Progressive ticket, called for a constitutional amendment to limit JUDICIAL REVIEW. Both the Republican incumbent, CALVIN COOLIDGE, and the 1924 Democratic candidate, JOHN W. DAVIS, defended the Court against La Follette. The upshot of the unsuccessful La Follette campaign was a heightened sensitivity to judicial review as an issue and a firm demonstration of the consensus as to its legitimacy and centrality in the American constitutional system.

Much of the labor movement had supported La Fol-

lette's initiatives against judicial review, but labor specifically sought limitations on federal court labor INJUNCTIONS. Labor's campaign against injunctions peaked in 1927 after the Supreme Court simultaneously declined to review a series of controversial injunctions in the West Virginia coal fields and approved an injunction in BEDFORD CUT STONE COMPANY V. JOURNEYMAN STONECUTTERS, holding that a union's nationwide refusal to handle nonunion stone should be enjoined as an agreement in RESTRAINT OF TRADE. Between 1928 and 1930 the shape of what was to become the NORRIS-LAGUARDIA ACT OF 1932 emerged in Congress. The impetus behind that law, the politics of it, indeed, the language and theory of the statute itself are rooted in the Taft years.

A description of the Court's institutional role must consider the relations between CONGRESS AND THE COURT in shaping constitutional law and constitutional politics. During the Taft years a dialogue between Court and Congress persisted on a variety of crucial constitutional issues. The decision of the Court striking down the first Child Labor Act in HAMMER V. DAGENHART (1918) led to congressional interest in using the taxing power to circumvent apparent limitations on the direct regulatory authority of Congress under the COMMERCE CLAUSE. The second Child Labor Act imposed an excise tax on the profits of firms employing child labor. That act was struck down as unconstitutional in 1922.

From 1922 on Congress had before it various versions of antilynching legislation—most notably the Dyer Bill, which had actually passed the House. Opponents of the antilynching legislation argued that it was an unconstitutional federal usurpation of state functions. In *Moore v. Dempsey* (1923), decided shortly after the Dyer Bill had nearly succeeded in passage, the Court held that a state criminal trial dominated by a mob constituted a denial of DUE PROCESS OF LAW, appropriately redressed in a federal HABEAS CORPUS proceeding. *Moore v. Dempsey* did not establish that an antilynching law would be constitutional. Yet a conclusion that mob domination of a criminal trial did *not* deny due process surely would have been a constitutional nail in the coffin of antilynching laws. And, prior to *Moore v. Dempsey* the relatively recent PRECEDENT of FRANK V. MANGUM (1915) had pointed toward just such a conclusion. Considerations concerning the response of Congress regularly influenced the constitutional decision making of the Taft Court. When Taft was appointed, three important labor cases were pending that had been argued but not decided by the WHITE COURT. The Court had reached an impasse. Two of the cases presented questions about the use of injunctions to restrain labor picketing. Section 20 of the Clayton Act appeared to deny the federal courts the power to issue such injunctions subject to certain exceptions, most notably the power to use the injunction to protect property from damage. *American Steel Foundries v. Tri-City Labor Council* presented questions of construction of this section, and TRUAX V. CORRIGAN, involving a state law, presented a constitutional variant of the Clayton Act problem.

In *American Steel Foundries,* Taft's first significant opinion as Chief Justice, the Court read section 20 to encompass protection of the property interest in an ongoing business from unreasonable or intimidating picketing or from illegal BOYCOTTS or strikes. Statutory construction thus preserved the injunction as a restraint on labor.

But not all state courts saw the issue as the Taft Court did. The Arizona Supreme Court read its statute to bar injunctions in labor disputes, at least where actual destruction of physical property was not threatened. In *Truax v. Corrigan*, decided a week after *American Steel Foundries*, Taft wrote for a majority of five, holding that Arizona had unconstitutionally denied employers the injunction in labor disputes. *Truax* in effect created a constitutional *right* to a labor injunction. It did so on two grounds. First, it held that employers were denied the EQUAL PROTECTION OF THE LAWS insofar as their particular type of property interest was denied the same protection afforded other property interests. Second, it held that the failure to protect the interest in the continued operation of a business deprived the business owner of property without due process of law. *Truax v. Corrigan* was the cornerstone of the Taft Court edifice of industrial relations. Not only did the decision suggest that Congress could not constitutionally prevent the federal courts from granting labor injunctions, but it also ushered in a decade of the most intensive use of the labor injunction the country had ever seen. A desperate battle was fought to save the unionized sector of coal from competition from the newer, largely nonunion, southern mines. That union campaign was broken by dozens of labor injunctions upheld by the Fourth Circuit in a consolidated appeal. The Supreme Court's refusal to review those decisions in 1927 attracted larger headlines than all but the most significant of Supreme Court opinions ever get. The Fourth Circuit opinion later cost Circuit Judge John J. H. Parker a seat on the Supreme Court. In fact, however, his conclusion was an all but inevitable consequence of the Supreme Court's position in *Truax v. Corrigan.*

The industrial order that the Taft Court sought to protect from labor insurgency was itself built upon uncertain constitutional foundations. The Taft Court was not committed, unambiguously, to a laissez-faire market. The Court distinguished sharply between legislation regulating the price (wage or rent) terms of a contract and laws regulating other terms. Thus, in the best known of its apparent inconsistencies, the Taft Court held void a District of Columbia law prescribing a minimum wage for women,

although only a year later it upheld a New York law establishing maximum hours for women. The Court also struck down a state statute regulating fees or commissions for employment brokers while intimating that other reasonable regulatory measures directed at employment brokerage would be upheld.

Sutherland, in his peculiar majority opinion in the minimum wage case—ADKINS V. CHILDREN'S HOSPITAL (1923)—seemed preoccupied with the redistributive aspects of the minimum wage law. There was nothing wrong with a legislative preference for a living (minimum) wage; the problem lay in imposing an obligation on the employer to pay it. One person's need, he argued, could not, in itself, justify another's obligation to satisfy it. The regulation of nonprice terms need not be redistributive in effect, for the costs of any such regulation could be recaptured by negotiated changes in price. If the Court was seeking to protect bargains against regulation with redistribution effect, then shielding price terms from governmental interference was the most visible and easily understood way to accomplish its purpose.

In general the Taft Court sought to maintain principled distinctions among three forms of economic activity. Government enterprise was subject to the usual constitutional constraints upon government. This form of economic activity was relatively unimportant in the 1920s, although in cases involving municipal utilities the Court had some opportunity to address such issues as contractual rate structure. The Court spoke more frequently to the problem of transition from private to public or from public to private enterprise. WORLD WAR I had seen government control of the railroads, shipping, coal, and, to a lesser degree, labor relations generally. The Court had to develop principles of compensation to govern the takeover and return of such large-scale enterprises.

More important than the dichotomy between governmental and private economic activity was the distinction drawn between private activity AFFECTED WITH A PUBLIC INTEREST and the more general run of private economic endeavor. Upon this distinction turned the constitutionality of public regulation—including price regulation in some circumstances—of various forms of economic activity. Although the category of business affected with a public interest had been part of the Court's rhetorical stock in trade for almost half a century when Taft took his seat, it assumed particular significance through the decade beginning with a case from Kansas. In 1920, having survived the effects of a bitter coal strike, Kansas passed its Industrial Court Act, declaring all production and distribution of food, clothing, shelter, and fuel for human consumption or use to be business affected with a public interest. Public transportation and public utilities were also so labeled. The act forbade strikes, lockouts, and plant closings in all such industries except by order of the Kansas Court of Industrial Relations. Moreover, that court upon its own motion or upon the petition of virtually any person could adjudicate the fitness or adequacy of wages and prices in any such business. The act contemplated a form of compulsory arbitration to replace labor bargaining against a background of strikes and lockouts.

In a series of unanimous opinions the Supreme Court struck down one after another of these innovative aspects of the Kansas act. Taft, in the leading opinion, WOLFF PACKING CORPORATION V. COURT OF INDUSTRIAL RELATIONS (1923) held that the state could not, by legislative fiat, declare businesses to be affected with a public interest for purposes so comprehensive as to include supervision of their wage and price structures. Taft's opinion wholly failed to state a principled distinction between those businesses traditionally subject to price regulation (such as grain elevators), on the one hand, and meat packing, on the other. In OBITER DICTUM he suggested that the competitive structure of the industry was not determinative of the legislature's power to regulate. But the opinion did acknowledge that long-established law permitted regulation of publicly conferred monopolies and of common carriers or inns even if not monopolies.

The Taft Court thus rejected a generalization, based on the war experience, that all basic economic activity could be defined as affected with a public interest. But the Court was not unmindful of the war's lessons. Unanimously it upheld the recapture provisions of the [Railroad] Transportation Act of 1920 despite the overt redistributive effect of the law. The act required the payment into a federal trust fund of half the profits earned by strong railroads, for redistribution to failing ones. The Chief Justice, at least, understood the recapture provisions as justified in part because the alternative to such a scheme might have to be nationalization. Furthermore, the Court had already gone to great lengths to uphold other, seemingly inevitable, characteristics of rate regulation in an integrated transportation system. The Interstate Commerce Commission (ICC), if it were to be effective at all, needed power to regulate joint rates over hauls using more than one line for a single journey. It was apparent that the apportionment of joint rates could be used to redistributive effect. In the *New England Divisions Case* (1923) the Court had already upheld the ICC's explicit consideration of the need to strengthen the weaker New England lines when it apportioned revenues from joint rates. It was a short step from such use of joint rates to the recapture provisions.

The Court's willingness to accept some qualifications of vested property rights in the interest of planning was not confined to such traditional areas of regulation as transportation and public utilities. The Court decided its first

cases challenging general ZONING ordinances in the 1920s and, on the whole, upheld the power, though not without significant dissent and important qualifications.

Despite the Court's upholding of zoning and of regulatory initiatives, the Taft Court has long been considered to have been ardent in imposing constitutional limits upon legislation that restricted vested property interests. That reputation is soundly based, although the extent to which the Taft Court differed from predecessor and successor Courts has been substantially exaggerated by FELIX FRANKFURTER and his followers.

Perhaps the best known of the Taft Court pronouncements on the constitutional protection of property is Justice Holmes's opinion for the Court in *Pennsylvania Coal Company v. Mahon* (1923). Pennsylvania's Kohler Act required anthracite coal mining to be done so as to avoid subsidence of surface areas at or near buildings, streets, and other structures used by human beings. The Court held unconstitutional the application of the law to mining in an area where the mining company had conveyed surface rights, expressly reserving to itself and to its successors the subsurface mining rights.

Despite Brandeis's dissenting opinion, Holmes's opinion was moderate in tone and antithetical to the sort of dogmatics that characterized Sutherland's opinions in the wage and price regulation area. Indeed, Holmes's methodology was explicitly one that reduced the takingsregulation distinction to a matter of degree—as Holmes himself once recognized in a flippant reference to "the petty larceny of the police power." Moreover, the Court that decided *Pennsylvania Coal* decided the case of *Miller v. Schoene* (1928) five years later, upholding a Virginia law providing for the uncompensated (or less than fully compensated) destruction of cedar trees infected with cedar rust, a condition harmful only to neighboring apple trees.

The Court also had to face the implications of the constitutional protection of property in considering the methodology of public utility rate regulation. In a series of cases beginning in 1923 and proceeding throughout the Taft period, Justice Brandeis posed a major challenge to the "fair value" methodology of SMYTH V. AMES (1895). Industry during the 1920s argued that the rate base—the "property" upon which the Constitution guaranteed a reasonable rate of permissible return—should be valued according to the replacement cost of capital items—despite a general inflationary trend, accelerated by World War I. Brandeis formulated a comprehensive critique both of this particular windfall calculation and of the rule that produced it. Brandeis first reformulated the problem in a characteristically daring way. The issue was not so much a vested right to a return on capital as it was the necessity for a level of profit that could attract the new capital required for effective operation of the public utility. Brandeis lost the battle for a new approach to rate-making. Yet here, no less than in other arenas for disputes over the constitutional protection of property, doctrinal lines had been drawn that anticipated the issues of the New Deal.

Traditional, genteel conservativism is neither overtly ideological in content nor strident in manner. In most respects the Taft Court was traditionally conservative. The Court was hostile to labor and to any insurgency from the left, but the hostility usually took the form of a neutral defense of civil order. That neutrality, though it almost always worked against the left, was not explicitly one-sided and was, in fact, applied occasionally against rightist militant politics and street activity as well.

The constitutional defense of civil order entailed a strong commitment to ratify the acts of local government and of the national political branches so long as their power and authority were used to put down militant politics and especially politics of the street. Thus, the Court consistently upheld CRIMINAL SYNDICALISM LAWS, even while recognizing, in GITLOW V. NEW YORK (1925), that the FIRST AMENDMENT limited state as well as federal legislative power. Moreover, in a theoretically interesting, though practically less significant case, the Court upheld a New York law requiring the registration and disclosure of names of members of certain secret societies—a measure directed against the Ku Klux Klan. Brandeis and Holmes repeatedly dissented in the criminal syndicalism cases, sketching an alternative version of the political process far more hospitable to insurgent initiatives for change.

A second pillar of the defense of civic order was the reliance upon independent courts as guarantors of vested property rights against street politics. To this end the injunction was elevated to a constitutional pedestal. *Truax v. Corrigan*, which constitutionalized capital's right to a labor injunction, must be seen not only as a part of a larger antilabor *corpus* but also as the link between that work and the principle of civic order.

For traditional conservatives the injunction had much to commend it. It was in the hands of politically independent judges, who were less susceptible than other officials to mass pressure. It was governed—or supposed to be governed—by neutral principles rather than special interests; it permitted the adaptation of principle to local needs and adjusted the level of intervention to that necessary to shore up appropriately sound local elites. No wonder, then, that the issue of the injunction pervaded the constitutional politics of the 1920s.

If Taft was committed to the courts' playing a dominant role in labor discipline and the guarantee of civic order, he was at the same time committed to an efficient, unintimidated, and uncorrupted judiciary to do the job. In *Tumey v. Ohio* (1927) he wrote for a unanimous Court striking down as a denial of due process an Ohio scheme

through which a public official judging traffic violations was paid a percentage of the fines collected. Of greater significance was MOORE V. DEMPSEY (1923), in which a divided Court upheld the power of a federal district court in federal HABEAS CORPUS proceedings to go behind the record of a state court murder conviction to determine whether the trial had been dominated by a mob.

Racist justice was a deeply rooted problem, not high on the conservative agenda for reform. Taft was, however, very concerned with the potential for corruption of the courts inherent in the great national experiment of the decade, prohibition. The Chief Justice realized that there were many opportunities for organized crime in the liquor business to buy friendly judges and other officials, especially in states where prohibition was unpopular. The Court refused to extend the protection of the DOUBLE JEOPARDY principle to cases of successive prosecutions under state and federal law for substantially the same conduct. Part of the reason for this limit upon the double jeopardy principle was the potential under any contrary rule of insulating conduct from federal prosecution by securing a state conviction and paying a small fine. The Court's interpretation of FEDERALISM to tolerate structural redundancy was thus a major prophylactic against the dangers of local corruption of courts.

Like all its predecessors, however conservative, the Taft Court paid lip service to the idea that the people are sovereign and, consequently, that popular government is a pervasive and overriding principle in constitutional interpretation. Even though dissenters within the court (Holmes and Brandeis) and critical commentators without (Frankfurter, EDWARD S. CORWIN, and THOMAS REED POWELL) claimed that the Justices ignored the presumption of constitutionality that ought to attach to the work of the popular branches, the simple fact is that no Justice denied, as an abstract principle, either the presumption of constitutionality or the deference that ought to be paid to legislative judgments. It was the application of the principle that divided the Court.

Most of the Justices were skeptical of the capacity of the masses intelligently to exercise the rights and discharge the obligations of participatory, popular government. Taft himself welcomed a leading role for elites in suppressing, or at least damping, the demands of the rabble and in representing the "better class" of citizens. But Taft's views in these matters were not very different from those of Holmes. Holmes doubted the capacity of the masses and considered a dominant role for elites in politics to be almost a natural law. Brandeis, the only real contrast, was considerably more committed to reform and to its promise. But he, in his own way, also distrusted the masses. He saw hope for change in a shift from a propertied oligarchy to a technically trained meritocracy. At the same time Brandeis understood the limits of this vision. His support of STATES' RIGHTS and localism in politics and his hostility to concentration in industry had common roots: the recognition of limits to techniques of effective organization; the affirmation of political principles limiting concentrations of power; and the affirmation of the principles of maximum participation in public affairs. Chiefly in this last respect, Brandeis stood committed to a principle that the other Justices ignored or rejected.

In what ways did the general attitudes of the Justices to popular government affect the work of the Court? Perhaps the most direct effect was visible in the great, perennial debate over the power of judicial review. The Justices appear to have been unanimous in their private opposition to schemes such as that of LaFollette to limit the power of judicial review by statute or constitutional amendment. Even Brandeis, who was personally close to LaFollette and who supported the Wisconsin senator's positions on many substantive issues, opposed initiatives to curb the Court.

In at least one important area the Taft Court initiated a significant reform in the mechanics of popular government itself. The Court struck down the first version of the Texas system of white primaries which, through official state action, denied blacks the right to vote in statewide PRIMARY ELECTIONS. NIXON V. HERNDON (1927) was the first in a line of cases that ultimately destroyed the white primary device.

The Court upheld the power of Congress to conduct LEGISLATIVE INVESTIGATIONS and to use COMPULSORY PROCESS to that end. The Court also appeared to uphold an enlarged vision of an exclusive PRESIDENTIAL POWER to remove executive officers. A special constitutional status for government of TERRITORIES was approved. Finally, the Court struggled mightily but produced no satisfactory or consistent principles in the area of STATE TAXATION OF COMMERCE and STATE REGULATION OF COMMERCE.

The 1920s saw a determined attack upon the ethnic pluralism, the cultural and ethical relativism, and the absence of traditional controls that characterized a newly emergent urban America. The prohibition movement, resurgent religious fundamentalism, virulent nativism, and racism gave rise to a reactionary program for legal reform. In the area of prohibition the Court did more than give full effect to a constitutional amendment and its implementing legislation. The Justices also decided a host of criminal procedure issues in such a way as to arm the enforcers against what was perceived as a concerted attack on law and order themselves.

But the Court was actively hostile to groups like the "new" Ku Klux Klan. It not only upheld a Klan registration statute but also, in PIERCE V. SOCIETY OF SISTERS (1925), held invalid an Oregon statute that had effectively outlawed

private schools. The law was the product of a popular initiative organized and vigorously supported by the Klan as part of its nativist and anti-Catholic crusade. The decision in MEYER V. NEBRASKA (1923) striking down laws forbidding the teaching of German in the schools also reflected the Justices' unwillingness to permit nativist sentiment to cut too deeply into the social fabric.

But the Court did uphold state ALIEN land ownership laws directed principally against Asian immigrants and upheld the disgraceful national discrimination against Asian immigration in the face of constitutional attack. The Court also permitted the continuation of restrictive covenants in housing (CORRIGAN V. BUCKLEY, 1926) and segregation in public schools (GONG LUM V. RICE, 1927), though in each instance it avoided an explicit articulation of constitutional approval for these practices.

The constitutional work of the Taft Court extended over the customary broad area of national life, but it was dominated by the motif of conflict between property and labor. Civil strife, policies toward insurgency, free or regulated markets, confiscation—all were issues that arose principally from the overarching conflict. It is a measure of the Taft Court's achievement that, through Brandeis on the one hand and Taft on the other, a measure of clarity was achieved in articulating the implications of this conflict for constitutional structure and doctrine over a wide range of subjects. It was Taft's vision alone, however, that dominated the Court's action—consistently hostile to labor and its interests. The traditional conservative structure of property and order was one legacy of Taft's Court to the era of the Great Depression; Brandeis's vision—as yet wholly unrealized—was the other.

ROBERT M. COVER
(1986)

Bibliography

BERNSTEIN, IRVING 1960 *The Lean Years: A History of the American Worker, 1920–1933.* Boston: Houghton Mifflin.

BICKEL, ALEXANDER M. 1957 *The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work.* Cambridge, Mass.: Belknap Press of Harvard University Press.

DANELSKI, DAVID J. 1964 *A Supreme Court Justice Is Appointed.* New York: Random House.

FRANKFURTER, FELIX and GREENE, NATHAN 1930 *The Labor Injunction.* New York: Macmillan.

MASON, ALPHEUS THOMAS 1946 *Brandeis: A Free Man's Life.* New York: Viking.

——— 1956 *Harlan Fiske Stone: Pillar of the Law.* New York: Viking.

——— 1964 *William Howard Taft: Chief Justice.* New York: Simon & Schuster.

MURPHY, WALTER F. 1964 *Elements of Judicial Strategy.* Chicago: University of Chicago Press.

PRINGLE, HENRY F. 1939 *The Life and Times of William Howard Taft.* New York: Farrar & Rinehart.

RABBAN, DAVID M. 1983 The Emergence of Modern First Amendment Doctrine. *University of Chicago Law Review* 50: 1205–1355.

## TAFT-HARTLEY LABOR RELATIONS ACT
61 Stat. 136 (1947)

Passed over President HARRY S. TRUMAN's veto, the Taft-Hartley Act represented Republican hostility to the power of labor unions and the National Labor Relations Board (NLRB); its provisions limit the authority and conduct of unions and their officials and curtail the Board's authority.

In amending the WAGNER (NATIONAL LABOR RELATIONS) ACT, the measure banned the CLOSED SHOP; permitted employers to sue unions for strike-incurred damages; forbade union contributions to political campaigns; required public disclosure of union finances; required unions to give sixty days notice before inaugurating strikes; and allowed the President to halt a major strike by seeking a court INJUNCTION for an eighty-day "cooling off" period. Although the right to COLLECTIVE BARGAINING was further guaranteed, section 14b permitted states to adopt RIGHT-TO-WORK LAWS, forbidding any requirement that workers join unions to hold jobs. Most constitutionally suspect were provisions requiring labor union officials, in order to use the facilities of the NLRB, to sign affidavits denying communist party membership or belief. These noncommunist oath provisions were unsuccessfully challenged in the courts in AMERICAN COMMUNICATIONS ASSOCIATION V. DOUDS (1950).

PAUL L. MURPHY
(1986)

Bibliography

SUTHERLAND, ARTHUR E. 1948 The Constitutionality of the Taft-Hartley Law. *Industrial and Labor Relations Review* 1: 177–205.

## *TAKAHASHI v. FISH AND GAME COMMISSION*
334 U.S. 410 (1948)

Under California law, ALIENS ineligible for CITIZENSHIP (mainly Asians) could not hold commercial fishing licenses. Citing the broad power of Congress to regulate aliens, the Supreme Court held, 7–2, that the PREEMPTION DOCTRINE barred the law. The CIVIL RIGHTS ACT OF 1866 was taken to protect the rights of aliens to pursue their liveli-

hoods under nondiscriminatory state laws. The OPINION also conveyed overtones of FOURTEENTH AMENDMENT reasoning.

KENNETH L. KARST
(1986)

## TAKING OF PROPERTY

The authority of government to acquire private PROPERTY from an involuntary owner (usually called the power of EMINENT DOMAIN) is recognized in the Fifth Amendment to the Constitution, which provides: "nor shall private property be taken for public use, without JUST COMPENSATION." The public use and compensation requirements of the Constitution apply not only to acquisitions by the federal government but—by INCORPORATION in the FOURTEENTH AMENDMENT—to acquisitions by the states as well. Similar provisions appear in the state constitutions, and the state and federal requirements are usually identically interpreted. It is, however, possible that a taking would pass muster under the federal Constitution and still be held to violate the state constitutional provision (or vice versa).

The requirement of PUBLIC USE has been liberally interpreted by the courts, which rarely find that a taking is not for a public use. For example, property may be taken for resale to private developers in an urban renewal project, or for the development of an industrial park. Indeed, the courts have permitted authority to take private property to be vested by LEGISLATION in privately owned public utilities, such as water companies. The test is not ultimate public ownership, or even direct public benefit, but rather the general benefit to the public from projects that are publicly sponsored or encouraged to promote the economy or the public welfare. The only clear limits on the broad interpretation of "public use" would be (1) the grant of the taking authority to a private company simply to improve its private economic position; or (2) the use of the taking power by the government if government itself were simply seeking to make money by engaging in strictly entrepreneurial activities.

The requirement of "just compensation" has been interpreted to mean the amount a willing seller would get from a willing buyer in the absence of the government's desire to acquire the property. The owner is not entitled to receive more for the property simply because the government has an urgent need for it—as for a military base. Neither may the owner receive less compensation because the government's plan for the area—to install a garbage dump, for example, has depressed neighborhood values. Nor is the owner entitled to increased compensation merely because the property has special value to him, such as sentimental or family value, or because he would not sell the property at any price. Compensation must be given in cash immediately upon the taking; government cannot oblige the owner to accept future promises of payment which may be unmarketable, or marketable only at a discount from the just compensation value.

Ordinarily there is no ambiguity about whether a property has been taken. Nor is there any ambiguity about the principle of takings law, stated at the most general level: if the public wants something, it should pay for it and not coerce private owners into contributing their property to the public. If government wants a site for a post office, for example, it is obliged to institute condemnation proceedings in court, leading to an involuntary transfer of title and possession, at which time it will pay the owner just compensation. But in many instances government legislates or behaves in a way that reduces or destroys the value of private property without formally taking title or possession and without instituting condemnation proceedings. If the owner complains, seeking just compensation for a taking, government may reply that it has simply regulated under the POLICE POWER, but has not "taken" the property and thus need not compensate. The great bulk of all legal controversies over the taking of property turn on the question whether there has been a "taking" at all.

Plainly government sometimes gets the benefits of a taking without any of the formal incidents of ownership. A celebrated case, *Causby v. United States* (1946), involved the flight of military planes just above the surface of privately owned farmland adjacent to a military airport. As a result of noise from the overflights the farm was made virtually worthless for agricultural purposes. The farmer claimed that his farm had in practical effect been taken, that government was using it as a sort of extension of the runway, and that government should have to pay for it as it had for the rest of the airport. The Supreme Court agreed that this use of the farmland was a taking in effect, if not in form, and that the farmer was entitled to just compensation for what is called INVERSE CONDEMNATION.

This ruling does not mean that the neighbors of a public airport or highway subjected to noise that reduces their property values will always be compensated. In general such disadvantaged neighbors are not viewed by the courts as having had their property taken in the constitutional sense. The reason is that although a nearly total loss (such as the farmer sustained) is judicially viewed as a taking, some modest diminution of value resulting from neighboring public activities is viewed as one of the disadvantages of modern life that must be accepted by property owners.

The judicial focus on the quantum of loss as a test of a taking is called the diminution of value theory and was put forward many years ago by Justice OLIVER WENDELL HOL-

MES in *Pennsylvania Coal Co. v. Mahon* (1922). There is no clear line, Holmes believed, between the formal taking of property by government (in which title and possession are acquired) and the various forms of government regulation (such as zoning and pollution control), which do not transfer ownership formally, but restrict private owners' uses and values for the benefit of the general public. In both cases, according to Holmes, the traditional rights of private owners are being restricted for the benefit of the public. If there were no legal limits on such restrictions, he said, private property would be worthless and wholly at the mercy of government. On the other hand, Holmes said, if every value-diminishing regulation were viewed as a compensable taking of property, government would be unable to function, for essentially all of its regulatory activities (speed limits, liquor control, safety standards, rent control) disadvantage property owners to some degree.

He thus devised a practical test. We must all accept some impairment of property values so that society can function in a civilized way, and government must be permitted to make regulations requiring such impairments. If, however, the losses from such regulations become extreme—nearing total destruction of the property's value for any owner—then the society should compensate the owner and bear the losses of the regulation commonly. Thus, under the Holmesian theory, the amount of the loss and the ability of the owner to continue to earn some return from his property after the regulation has been imposed become the critical determinants of the constitutional question: has there been a taking for which compensation must be paid?

Although Holmes's test continues to dominate taking cases, there are a number of other theories that are widely found in the literature and in judicial opinions. One theory holds that prohibitions of certain socially undesirable uses do not qualify as compensable takings despite considerable loss to the owners, because one cannot be viewed as having a property right to engage in "noxious" conduct, and losses flowing from prohibition of such conduct is not a taking away of property. The illegalization of manufacture and sale of a dangerous drug, or of polluting activity, has been so categorized.

Another theory sometimes advanced is that certain government restrictions imposed on property owners are not a taking of property from the owners by the government, but are the merely regulation by the government of activities by which it mediates between various private uses in conflict with each other. Under this theory compensation is required only when the government as an enterprise itself benefits directly from the regulation (it gets additional space for its military airport, for example). The enterpriseregulation theory has sometimes been used to justify ZONING and other LAND USE controls that restrict the amount or type of building permitted to a landowner on his land. Modern historic preservation ordinances as well as safety and environmental controls are sometimes justified on this theory.

Still another view suggests that government may, without compensation, impose much greater restrictions to prevent future additional exploitation of property, while leaving existing uses, than it may cut back on existing uses. Thus, in PENN CENTRAL TRANSPORTATION CO. V. NEW YORK (1978), an important case, the Supreme Court upheld a historic preservation ordinance prohibiting the owners of Grand Central Station in New York from building a high rise office tower above the railroad station, noting that the existing station did produce some economic return to the owners. The claimed "taking" of a property right to build a bigger building was rejected.

Although no single theory wholly dominates taking law, two guidelines permit safe prediction about the great majority of cases. Courts will find a taking and require just compensation if (1) the government acquires physical possession of the property; or if (2) regulation so reduces the owner's values that virtually no net economic return is left to the proprietor.

JOSEPH L. SAX
(1986)

(SEE ALSO: *Dames & Moore v. Regan; Hawaii Housing Authority v. Midkiff.*)

Bibliography

ACKERMAN, BRUCE A. 1977 *Private Property and the Constitution.* New Haven, Conn.: Yale University Press.

BOSSELMAN, FRED et al. 1973 *The Taking Issue.* Washington, D.C.: Council on Environmental Quality.

MICHELMAN, FRANK I. 1967 Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law. *Harvard Law Review* 80:1165–1258.

SAX, JOSEPH L. 1971 Taking and the Police Power. *Yale Law Journal* 74:36–76.

——— 1971 Takings, Private Property and Public Rights. *Yale Law Journal* 81:149–186.

## TAKING OF PROPERTY
## (Update 1)

Recent historical scholarship indicates that the taking clause was something of an innovation. Only two of the state constitutions adopted between 1776 and 1780 required the government to pay compensation when private PROPERTY was taken for a public use. The lack of constitutional protection for PROPERTY RIGHTS was consistent with the republican ethos of the period. BENJAMIN FRANKLIN, for example, once said that "Private Property . . . is a

Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing; its contributions therefore to the public Exigencies are . . . to be considered . . . the Return of an obligation previously received, or the Payment of a just Debt." The taking clause seems to represent a victory of Lockean liberalism over this earlier republican philosophy.

The Supreme Court has recently used the taking clause to strike down a variety of government regulations. In one case, the federal government claimed that the public had the right to use a marina that a private developer had connected with a public waterway. The Court held that giving the public access to the marina would be an unconstitutional taking of the developer's property. In another case, Congress was concerned because certain lands belonging to American Indians had so many owners that managing the lands had become impractical. As a way of consolidating landholdings, a federal statute mandated that some of the tiniest interests would revert to the tribe on the owners' deaths. This, too, was an unconstitutional taking. The Court also found a taking when New York required landlords to give their tenants access to cable television. The reason was that the cable box would "take" some of the space on the building's roof.

A 1987 case, *Nollan v. California Coastal Commission*, exemplifies the Court's revived interest in protecting property rights. The case involved a couple who wanted to build a larger beach house. As a condition for receiving a permit, the California Coastal Commission required them to allow the public to walk along the beach. The majority opinion was written by Justice ANTONIN SCALIA, who had quickly emerged as the strongest guardian of property rights on the REHNQUIST COURT. Scalia was willing to concede, at least for the purposes of argument, that California could have banned the construction entirely as a means of preserving the public's right to see the ocean from the street. Alternatively, he conceded, the Nollans could have been required to allow the public to walk from the street around to the back of their house. But because the government had chosen to give the public direct access laterally along the beach, rather than from the street, Justice Scalia held the permit condition unconstitutional.

The Court's rationale in *Nollan* was that lateral access was not closely enough related to the government's right to protect the view of the ocean. Justice Scalia seemed suspicious of the government's motives in imposing the permit condition, at one point referring to similar permit conditions as a form of "extortion."

In contrast to *Nollan*, another 1987 case rather surprisingly failed to find a taking. *Keystone Bituminous Coal Association v. DeBenedictus* was a replay of *Pennsylvania Coal Co. v. Mahon* (1922), the classic decision of Justice OLIVER WENDELL HOLMES, JR. Holmes had struck down a Pennsylvania statute that required underground coal mines to maintain adequate support for surface structures. The *DeBenedictus* Court, however, found a similar but more recently enacted Pennsylvania statute to be constitutional. The Court distinguished *Mahon* on the ground that the newer statute had a broader public purpose. No taking was found, because the statute required mining companies to leave only a small fraction of their coal in the ground.

It is often difficult to predict whether a given government regulation will be found to be a taking, but two factors seem particularly significant. First, if the regulation takes away the owner's right to control physical access to the property, it is much more likely to be found a taking—and almost sure to be found a taking if there is a permanent physical occupation of the property. Second, unless physical access is involved, the owner probably will not be able to claim a taking unless the regulation virtually destroys the value of the property.

At present, takings doctrine is in flux. Under Chief Justices HARLAN F. STONE and EARL WARREN, the Court took little interest in the taking clause. The BURGER COURT began to take a renewed interest in the area, but did not aggressively use the taking clause as a means of attacking important government regulations. It remains to be seen whether the Rehnquist Court will introduce a greater degree of activism.

Most of the current scholarship on the taking clause may be divided into three camps. One group argues for minimal judicial scrutiny of economic regulations, so that very few government actions would be held a taking. In contrast, a second group argues for vigorous scrutiny under the auspices of the taking clause—reminiscent of the era of LOCHNER V. NEW YORK (1905). A third group argues for renewed judicial protection, but limited to a particular category of property, that of peculiar personal significance to individuals, as opposed to ordinary business interests. It is uncertain whether any of these groups of scholars will succeed in influencing the Justices. At present, the Court seems content to muddle through taking cases without the benefit of a broad theoretical perspective.

DANIEL A. FARBER
(1992)

Bibliography

EPSTEIN, RICHARD A. 1985 *Takings: Private Property and the Power of Eminent Domain.* Cambridge, Mass.: Harvard University Press.

LEVY, LEONARD W. 1988 Property as a Human Right. *Constitutional Commentary* 5:169–184.

NOTE 1985 The Origins and Original Significance of the Just

Compensation Clause of the Fifth Amendment. *Yale Law Journal* 94:694–716.

## TAKING OF PROPERTY
(Update 2)

The Fifth Amendment includes the command, "nor shall private property be taken for public use, without just compensation."

Putting aside the perhaps puzzling fact that the PUBLIC USE limitation has been largely read out of existence— the government can take PROPERTY for almost any reason, including the improvement of "slums" or the conveyance of clear title to tenants—the so-called takings clause has been easy enough to apply in most cases. If the government wants property, it can assert its right of EMINENT DOMAIN and take it. But then it must pay JUST COMPENSATION. The hard cases arise when government has not simply appropriated property outright but instead has taken a legislative or regulatory action that lessens the value of private property.

The fountainhead for so-called REGULATORY TAKINGS cases is the Supreme Court's opinion in *Pennsylvania Coal Co. v. Mahon* (1922), credited as the first to apply the takings clause to government regulation short of complete appropriation. Pennsylvania law prohibited coal companies from mining subsurface coal "in such a way as to cause the subsidence of, among other things, any structure used as a human habitation." Justice OLIVER WENDELL HOLMES, JR., first held that the law was a proper exercise of the POLICE POWER. "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the law." But Holmes also found that such power "must have its limits." Therein lies the rub, for Holmes could not pin down what those limits were to be. "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." How far is too far? Four years later, the Court held that ZONING was not necessarily a taking in EUCLID V. AMBLER REALTY CO. (1926), even though the regulation caused the private owner to lose three-quarters of the property's value.

Holmes's majority opinion in *Mahon* is famous. Far less attention has been paid to the dissent of LOUIS D. BRANDEIS. Brandeis noted that every law affects private values. He would thus emphasize the nature of the government action more than the private party's loss. "[R]estriction imposed to protect the public health, safety or morals from dangers threatened is not a taking."

The Holmes–Brandeis fault line has played itself out over the ensuing decades. It is often hard to understand the law of regulatory takings except in fairly bald, political terms. Liberal advocates of the NEW DEAL, such as Brandeis and, later, WILLIAM J. BRENNAN, JR., have tended to find no government taking, a trend that reached its high point in PENN CENTRAL TRANSPORTATION CO. V. NEW YORK CITY (1978).

Conservative and libertarian commentators have long been critical of the takings jurisprudence of the WARREN COURT, as epitomized in *Penn Central*. If government has to pay in order to act, it often will not act. The BURGER COURT and REHNQUIST COURT have aimed to stem the tide of government expanse, in part by putting teeth in Holmes's takings test.

One front in the battle has been the articulation of per se rules to give greater clarity to the field. One such rule is that any regulation that effects a "permanent physical occupation" will be considered a compensable taking, regardless of how slight the physical intrusion may be. In LORETTO V. TELEPROMPTER, INC. (1982), New York City required landlords to install cable for tenants' televisions. The just compensation for the resulting "taking" of the air space occupied by the cable wires was held to be $1 per building. A second per se takings rule, formalized in LUCAS V. SOUTH CAROLINA COASTAL COUNCIL (1992), is triggered whenever a governmental act deprives a landowner of "all economically beneficial or productive use" of land.

The tightening of the takings clause has gone beyond per se rules. The Court in *Nollan v. California Coastal Commission* (1987) required an "essential nexus" between the harms associated with development and the conditions that government can place on granting a building permit. In DOLAN V. CITY OF TIGARD (1994), the Court added a prong to the *Nollan* test, ruling that such conditional exactions must also satisfy a "rough proportionality" test—the burden on the private party must be loosely in keeping with the impact of the proposed development.

Application of the takings clause has always depended on an understanding of what "property" is in the first place, a point noted by Brandeis in his *Mahon* dissent. In *Phillips v. Washington Legal Foundation* (1998), the Court, in a 5–4 decision with Chief Justice WILLIAM H. REHNQUIST writing for the majority, held that the interest accrued on lawyer trust-fund accounts was "property" of the client for purposes of the Fifth Amendment. As with *Loretto*, *Phillips* may foreshadow another move to tighten the takings clause by finding even relatively minor government actions to be covered in its sweep.

These recent cases have brought with them divided courts, vigorous DISSENTING OPINIONS, and a plethora of scholarly commentary. Critics charge the majorities of resurrecting *Lochner*-era SUBSTANTIVE DUE PROCESS to invalidate government regulations that are normally ac-

corded only RATIONAL BASIS review. Practical politicians have leapt in to fill what they perceive as a void, advancing legislative proposals to require the government to pay whenever a regulation diminishes private property values by more than a given, objective limit—say one-third. Such proposals have both practical and theoretical difficulties, of course, and have been criticized by legal scholars and others.

Paraphrasing Sigmund Freud, sometimes a question of degree is just a question of degree. Seven decades have not fleshed out Holmes's vague pronouncements in *Mahon.* Absent some major shift in the political landscape, we may just have to live with uncertainty in the contours of regulatory takings law.

EDWARD J. MCCAFFERY
(2000)

Bibliography

BEEN, VICKI 1991 "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine. *Columbia Law Review* 91:473–545.

FISCHEL, WILLIAM A. 1995 *Regulatory Takings.* Cambridge, Mass.: Harvard University Press.

MICHELMAN, FRANK I. 1995 A Skeptical View of "Property Rights" Legislation. *Fordham Environmental Law Journal* 6: 409–421.

RUBENFELD, JED 1993 Usings. *Yale Law Journal* 102:1077–1163.

TREANOR, WILLIAM MICHAEL 1995 The Original Understanding of the Takings Clause and the Political Process. *Columbia Law Review* 95:782–887.

## TANEY, ROGER BROOKE
## (1777–1864)

Roger B. Taney, CHIEF JUSTICE of the United States from 1836 until his death in 1864, profoundly shaped American constitutional development in cases dealing with states' regulatory powers, CORPORATIONS, SLAVERY, and the JURISDICTION of federal courts. His reputation long suffered from invidious and inappropriate comparisons with his predecessor Chief Justice JOHN MARSHALL and because of his disastrous opinion in DRED SCOTT V. SANDFORD (1857). But his influence has been enduring and, on balance, beneficial.

Taney was born in 1777 in Calvert County, Maryland. His father, a well-to-do planter, destined him for a career in law. After graduation from Dickinson College (Pennsylvania), he was admitted to the bar in 1799 and began a thirty-six-year career of politics and law practice in Maryland. He served intermittently in both houses of the state legislature until 1821, at first as a Federalist. But finding that affiliation intolerable because of the conduct of New England Federalists during the War of 1812, he assumed leadership of a local faction known as Coodies and then after 1825 supported ANDREW JACKSON. Practicing first in Frederick, where he maintained his lifelong residence, and then in Baltimore, he became a preeminent member of the Maryland bar, state attorney general from 1827 to 1831, and then attorney general of the United States, a position he held until 1833, when he served for a year as secretary of the treasury.

Taney urged President Jackson to veto the bill to recharter the Bank of the United States and contributed that part of JACKSON'S VETO OF THE BANK BILL in which the President denied that the Supreme Court's opinion on constitutional matters bound the President. As treasury secretary, Taney ordered removal of the federal deposits from the Bank and their distribution to certain "pet banks." In these bank matters, Taney was not the mere pliant tool of Jackson; rather, he acted in accord with his own deep suspicions of centralized and monopolistic economic power.

As attorney general, Taney also had occasion to explore issues involving slavery and free blacks. Upholding South Carolina's Negro Seamen's Act, which prohibited black seamen from disembarking from their vessels while in Carolina waters, Taney insisted that the state's sovereign right to control slaves and free blacks overrode any inconsistent exercise of federal treaty and commerce powers. Presaging his *Dred Scott* opinion, he maintained that blacks were "a separate and degraded people," incapable of being citizens. He also expressed doubt that a Supreme Court decision holding the statute unconstitutional would bind the states.

As Chief Justice of the United States after 1836, Taney left an enduring imprint on the American Constitution. Most of the landmark cases coming before the Court in the first decade of his tenure involved questions of the power of the states to regulate the economic behavior of persons or corporations within their jurisdictions. In CHARLES RIVER BRIDGE V. WARREN BRIDGE (1837) Taney employed a paradigmatic balance between investors' demands for autonomy and the states' insistence on public control of that new legal creature, the private corporation. Refusing to read into a bridge company's charter an implicit grant of a transportation monopoly, Taney held that "in charters, . . . no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey." (See RESERVED POLICE POWERS.)

Subsequent decisions of the Taney Court confirmed the *Charles River Bridge* DOCTRINE: where the state had explicitly conveyed monopoly rights or otherwise conferred valuable privileges, a majority of the Court honored the grant and held the state to it under CONTRACT CLAUSE doc-

trines deriving from FLETCHER V. PECK (1810). On the other hand, the Court refused to infer monopoly grants or other restrictions on state regulatory power if they were not explicitly conferred in a corporate charter. Thus in BANK OF AUGUSTA V. EARLE (1839) Taney held that states could regulate the activities of foreign corporations within their jurisdictions, or exclude them altogether, but that such regulations would have to be explicit. Absent express declarations of state policy, the TANEY COURT refused to hold that banking corporations could not enter into contracts outside the state that chartered them.

Yet Taney entertained an instinctive sympathy for states' efforts to control economic activity within their jurisdictions. In another case from his maiden term, BRISCOE V. BANK OF KENTUCKY (1837), Taney supported the majority's holding that a state was not precluded from creating a bank wholly owned by it and exercising note-issuing powers, so long as the state did not pledge its credit to back the notes. Such notes would have been a subterfuge form of the state BILLS OF CREDIT that had been struck down in CRAIG V. MISSOURI (1830). In BRONSON V. KINZIE (1843), however, Taney invalidated state statutes that restricted foreclosure sales and granted mortgagors rights to redeem foreclosed property. Even here, however, he emphasized that states could modify contractual remedies so long as they did not tamper with the substance of existing contracts.

Taney's opinions dealing with the jurisdiction of federal courts proved to be among his most significant. Some of these restricted the autonomy of the states in the interests of protecting the national market. Thus in SWIFT V. TYSON (1842) the Court unanimously supported an opinion by Justice JOSEPH STORY holding that in commercial law matters, federal courts need not look to the forum state's COMMON LAW for rules of decision, but instead might formulate commercial law doctrines out of "the general principles and doctrines of commercial jurisprudence," a principle that survived until *Swift* was overruled in ERIE RAILROAD V. TOMPKINS (1938). (See FEDERAL COMMON LAW.) In PROPELLER GENESEE CHIEF V. FITZHUGH (1851), Taney discarded the English tidewater rule of ADMIRALTY JURISDICTION that Story had imported into American law, and held instead that the inland jurisdiction of federal courts in admiralty matters extended to all navigable waters, tidal or not, thus expanding the reach of federal admiralty jurisdiction to the Great Lakes and the interior rivers. But in LUTHER V. BORDEN (1849), he reasserted the POLITICAL QUESTION doctrine, holding that a challenge to the legitimacy of Rhode Island's government after the Dorr Rebellion of 1842 was to be resolved only by the legislative and executive branches of the national government, not the judicial.

It might be expected that Taney would have been warmly sympathetic to the emerging doctrine of the POLICE POWER, first fully articulated by Massachusetts Chief Justice LEMUEL SHAW in *Commonwealth v. Alger* (1851). But Taney held unspoken reservations about the police power doctrine, fearing that if the states' regulatory powers were defined too explicitly or couched under a rubric, they might somehow be restricted by the federal Constitution. He thus preferred to avoid an explicit definition of the police power, and instead emphasized the states' inherent powers of SOVEREIGNTY over persons and things within their jurisdiction, believing that if the issue were framed in terms of sovereignty rather than regulatory power, the states' autonomy from external interference might be more secure.

This issue of state regulatory power remained sensitive throughout Taney's tenure and was prominent in cases arising out of the attempt of Democratic majorities in the Ohio legislature to levy taxes on banks that had been exempted from certain forms of taxation by their charters. In *Ohio Life Insurance & Trust Co. v. Debolt* (1854) Taney held, in accordance with the *Charles River Bridge* paradigm, that the Court would not read into bank charters an implicit exemption from taxes. But in DODGE V. WOOLSEY (1856), Taney joined a majority in defending an explicit charter exemption against a state constitutional amendment empowering the state to tax exempted banks. Taney was not hostile to banks and corporations as such; he had an alert appreciation of the role that they would play in developing the national market.

Another issue—indeed, the critical one—that kept Taney and his colleagues sensitized to issues of state regulatory power was the protean matter of slavery and black people. This issue, deep in the background, skewed all but one of the Taney Court's COMMERCE CLAUSE decisions. In his first term, the Court skirted slavery complications in a case, MAYOR OF NEW YORK V. MILN (1837), challenging the right of a state to impose some measure of control over the ingress of foreign passengers, by holding that the challenged authority was not a regulation of commerce but rather an exercise of the police power. But this evasion would not dispose of subsequent cases challenging the power of the state to control the importation of liquor or the immigration of persons. In the LICENSE CASES (1847), the Court rendered six opinions, including one by Taney who was with the majority for the result, sustaining the efforts of three New England states to prohibit the importation and sale of liquor. But in the PASSENGER CASES (1849), raising issues similar to *Miln*, the court produced eight opinions, this time with Taney in the minority, striking down state laws regulating or taxing the influx of ALIENS. Taney was consistent throughout, insisting that no federal constitutional restraints existed on the power of the states to control persons or objects coming into their borders. His brush with the controversy over the Negro

Seamen's Act as United States attorney general had left him hostile to any constitutional restraints that might inhibit the power of the slave states to control the ingress of free blacks, slaves, abolitionists, or antislavery propaganda.

The Taney Court did manage to filter slavery complications out of one major commerce clause case, thereby producing another paradigm of state regulatory power. In COOLEY V. BOARD OF WARDENS OF PHILADELPHIA (1851) the Court, with Taney in the majority, held that the commerce clause did not restrain the states from regulating matters essentially local in nature (such as, in this case, pilotage fees or harbor regulations) even if they had some impact on interstate or foreign commerce.

Curiously, the Court was more successful, in the short run, in disposing of cases where the question of slavery was overt rather than implicit. Taney, deeply dedicated to the welfare of his state and region, and anxious above all to protect the slave states from external meddling that would threaten their control of the black population, free or slave, or that would promote widespread emancipation, adopted passionate and extremist postures in slavery cases. In GROVES V. SLAUGHTER (1841), which involved the validity of a contract for sale of a slave under a state constitution that prohibited the commercial importation of slaves, Taney was provoked to a sharp reiteration of his attorney general's opinion, insisting that the power of a state to control blacks within its borders was exclusive of all federal power, including that under the commerce clause.

In PRIGG V. PENNSYLVANIA (1842) Taney was again prodded into another concurrence. Though he agreed with most of Justice Joseph Story's opinion for the majority holding unconstitutional a Pennsylvania PERSONAL LIBERTY LAW, he firmly disavowed Story's dic-1860tum that states need not participate in the recapture and rendition of fugitive slaves. Taney rejected Story's assertion that states could not enact legislation supplemental to the federal Fugitive Slave Act, and maintained that states must do so; his colleagues PETER V. DANIEL and SMITH THOMPSON merely asserted that a state could adopt such laws.

In STRADER V. GRAHAM (1851) Taney spoke for the Court in a case raising American variants of issues earlier canvassed in SOMERSET'S CASE (1772), a doctrinally seminal English decision that had passed into the mainstream of American constitutional thought. Appellant sought to have the Court overturn a Kentucky Court of Appeals decision that slaves permitted by their master to sojourn in a free state who then returned to their slave domicile did not become liberated because of their free-state sojourn. Taney held that the state court determination of the slaves' status was conclusive on federal courts (a point consistent with his emphasis on state control of blacks and a doctrinal opportunity for evading the issues of *Dred Scott* later). But Taney uttered OBITER DICTA disturbing to the free states. He suggested that the power of states over persons in their jurisdictions was unfettered "except in so far as the powers of the states in this respect are restrained . . . by the Constitution of the United States," thus hinting that there might be some federal constitutional impediment to the abolition statutes of the free states. He further insisted, needlessly, that the antislavery provisions of the NORTHWEST ORDINANCE were defunct, no longer an effective prohibition of the introduction of slavery in the states that had been carved out of the Northwest Territory.

*Dred Scott* (1857) was Taney's definitive utterance on the slavery question. His opinion, though one of nine, was taken by contemporaries to be for the Court, and Taney himself so considered it. Taney first excluded blacks descended from slaves from the status of "Citizens" as that term was used both in the Article III diversity clause and the Article IV PRIVILEGES AND IMMUNITIES clause. In order to support this conclusion, Taney asserted, incorrectly, that blacks in 1787 had been "considered as a subordinate and inferior class of beings, who . . . had no rights which the white man was bound to respect." Taney further insisted that the meaning of the Constitution does not change over time, so that the connotations of its words in 1787 remained rigid and static, unalterable except by formal amendment.

In the second half of his long opinion, Taney held that the federal government lacked power to exclude slavery from the territories, thus holding the MISSOURI COMPROMISE unconstitutional (even though it had already been declared void by the KANSAS-NEBRASKA ACT of 1854). He grounded this lack of federal power not in the territories clause of Article IV, but in its textual sibling, the new states clause, insisting that Congress could not impose conditions on the admission of new states that would put them in a position inferior to those already admitted. Taney also suggested in passing that the DUE PROCESS clause of the Fifth Amendment prohibited Congress from interfering with the property rights of slaveholders. But the significance of this utterance as a source of the later doctrine of SUBSTANTIVE DUE PROCESS has been overrated. Taney was not a devotee of HIGHER LAW doctrines, such as those enunciated by Justice SAMUEL CHASE in CALDER V. BULL (1798), by Justice Story in cases like TERRETT V. TAYLOR (1815) and *Wilkinson v. Leland* (1829), and by numerous state court judges, most recently in the landmark case of WYNEHAMER V. NEW YORK (1856).

In his *Dred Scott* opinion Taney also adopted three points of proslavery constitutional thought previously voiced in Southern legislatures and doctrinal writings: the federal government had no power over slavery except to protect the rights of slaveholders; the federal government

was the "trustee" of the states for the territories, and as such must protect the interests of all of them there; and the territorial legislature could not exclude slavery during the territorial period. His performance in the *Dred Scott* case was widely condemned. Justice BENJAMIN R. CURTIS effectively controverted it in his scholarly dissent in *Dred Scott;* northern legislators, political leaders, attorneys, and polemicists poured forth innumerable rebuttals; and the Vermont legislature and the Maine Supreme Judicial Court flatly rejected its doctrines. ABRAHAM LINCOLN insisted that *Dred Scott*'s doctrine must be overruled.

Taney remained unmoved by such criticism, insisting in private correspondence that his position would be validated in time. Though aged and in intermittent ill health, he continued his judicial labors unabated. In ABLEMAN V. BOOTH (1859), a magisterial treatise on the role of the federal judiciary in the American federal system, Taney held that state courts could not interfere with the judgment of a federal court through use of the writ of HABEAS CORPUS. He adumbrated the doctrine of dual sovereignty: the federal and state governments "are yet separate and distinct sovereignties, acting separately and independently of each other." (See DUAL FEDERALISM.) But he insisted on the unfettered independence of federal courts in their execution of federal laws. In *dictum,* he asserted that the Fugitive Slave Act of 1850 was constitutional.

Taney produced significant published and unpublished opinions during the CIVIL WAR. In private communications, he supported SECESSION and condemned Lincoln's resort to force to save the Union. In keeping with such views, he drafted opinions, probably to be incorporated into conventional judicial opinions when the opportunity arose, condemning the EMANCIPATION PROCLAMATION, CONSCRIPTION, and the Legal Tender Acts. He also extended the first half of his *Dred Scott* opinion to exclude all blacks, not just those descended from slaves, from CITIZENSHIP; and he reasserted the obligation of the free states to return fugitive slaves. In an official opinion on circuit he condemned Lincoln's suspension of the writ of *habeas corpus* in EX PARTE MERRYMAN (1861), an opinion Lincoln refused to honor. He also joined the dissenters in the PRIZE CASES (1863), who insisted that because only Congress can declare war, Lincoln's military response to secession and southern military actions was "private" and of no legal effect. His death in 1864 relieved him from the painful necessity of seeing his vision of the constitutional and social order destroyed by the victory of Union arms.

Taney's lasting contributions consisted of his reinforcement of the political question doctrine, his strong defense of the states' regulatory powers, and his vigorous aggrandizement of the jurisdiction of the federal courts. More than his colleagues, he keenly appreciated the role of technological change in American law, a sensitivity apparent in *Charles River Bridge* and *Genesee Chief.* His defense of regional autonomy and his hostility to the power of concentrated capital retain a perennial relevance. His instinct for dynamic balance in the formulation of enduring rules of law, as in the *Charles River Bridge* paradigm, evinced judicial statesmanship of the first rank.

Constitutional problems related to slavery combined with Taney's personal failings to blight his reputation and eclipse his real achievements. *Dred Scott* remains a monument to judicial hubris, and all the slavery cases that came before the Taney Court bear the impress of Taney's determination to bend the Constitution to the service of sectional interest. Though he manumitted nearly all his own slaves and was in his personal relations a kind and loving man, Taney as Chief Justice was immoderate and willful when the times called for judicial caution. His tolerance of multiple opinions permitted dissents and concurrences to proliferate, blurring the clarity of doctrine in commerce clause cases. In any case touched directly or indirectly by slavery, Taney's sure instincts for viable doctrine, as well as his nobler personal qualities, deserted him and gave way to a blind and vindictive sectionalism unworthy of the Chief Justice of the United States.

It is the tragic irony of Taney's career that his virtues were so closely linked to his faults, especially in their results. He fully merited FELIX FRANKFURTER's warm appreciation of his role in shaping the American federal system: "the intellectual power of his opinions and their enduring contribution to a workable adjustment of the theoretical distribution of authority between two governments for a single people, place Taney second only to Marshall in the constitutional history of our country." Yet no other Justices have so gravely damaged the federal system because of sectional bias, and the real merits of Taney's defense of localist values have been obscured by his racial antipathies and sectional dogmatism.

WILLIAM M. WIECEK
(1986)

Bibliography

FEHRENBACKER, DON E. 1979 *The Dred Scott Case: Its Significance in American Law and Politics.* New York: Oxford University Press.

HARRIS, ROBERT J. 1957 (1966) Chief Justice Taney: Prophet of Reform and Reaction. Pages 93–118 in Leonard W. Levy, ed., *American Constitutional Law: Historical Essays.* New York: Harper & Row.

LEWIS, WALKER 1965 *Without Fear or Favor: A Biography of Chief Justice Roger Brooke Taney.* Boston: Houghton Mifflin.

SWISHER, CARL B. 1935 *Roger B. Taney.* New York: Macmillan.

——— 1974 The Taney Period, 1835–64. Volume 5 of The Oliver Wendell Holmes Devise History of The Supreme Court of the United States. New York: Macmillan.

# TANEY COURT
## (1836–1864)

The Supreme Court under Chief Justice ROGER B. TANEY (1836–1864) has not been a favorite among historians, perhaps because it defies easy generalization. There were few great constitutional moments and no dramatic lawmaking DECISIONS comparable to those handed down by the MARSHALL COURT. The fifteen Justices who served with Taney (not counting ABRAHAM LINCOLN'S CIVIL WAR appointees) varied immensely in ability—from JOSEPH STORY of Massachusetts who was the leading scholar on the bench until his death in 1845 to JOHN MCKINLEY of Alabama whose twenty-five years on the Court left barely a trace. Institutional unity and efficiency were often disrupted by abrasive personalities like HENRY BALDWIN (who became mentally unstable shortly after his appointment in 1830) and PETER V. DANIEL (whose passion for STATES' RIGHTS drove him into chronic dissent). Division was constant and bitter as the Justices disagreed openly over corporation, banking, and slavery questions—all of which tended to be seen from a sectional point of view. Fortunately for the ongoing work of the Court, most of its members shared a respect for the Constitution and had a common commitment to economic progress and property rights that cut across ideological and sectional differences. All were Democrats, too, except Story, JOHN MCLEAN, and BENJAMIN R. CURTIS. Most of the Court respected the Chief Justice—whose legal mind was of a high order—and responded well to his patient, democratic style of leadership. Still the Court under Taney did not quite cohere. There was no "leading mind," as DANIEL WEBSTER complained, and no clear-cut doctrinal unity.

Clearly the Taney Court was not the Marshall Court—but then again it was not the age of Marshall. The society that conditioned the Taney Court and defined the perimeters within which it made law was democratic in its politics, pluralistic in social composition, divided in ideology, and shaped by capitalist forces which increasingly sought freedom from traditional governmental restraints. Most threatening to judicial unity, because it was directly reflected in the opinions of the Court, was the intensification of sectional rivalry. As northern states committed themselves to commerce and manufacturing, they came to see themselves—taking their cultural cues from the abolitionists—as a section united in defense of liberty and freedom. The South found ideological conservatism an ideal umbrella for an expansive social-economic system based on cotton and organized around plantation slavery. As the sections competed for political power and control of the new West, each came to think of itself as the last best hope of mankind. And each insisted that the Constitution accommodate its policy preferences—a demand that the Supreme Court could satisfy only by compromising doctrinal purity and finally could not satisfy at all.

In short, the political and economic problems of the new age became constitutional problems just as ALEXIS DE TOCQUEVILLE had said they would. Whether the Supreme Court would be the primary agency to resolve those problems was, of course, a matter of debate. ANDREW JACKSON, armed with a mandate from the people, did not believe that the Court had a monopoly of constitutional wisdom. Newly organized POLITICAL PARTIES stood ready to dispute judicial decisions that offended their constituencies. States armed with JOHN C. CALHOUN's theory of NULLIFICATION insisted that they, not the Court, had the final word on the Constitution. Accordingly, the margin of judicial error was drastically reduced. The Court was obliged to make the Constitution of 1787 work for a new age; the high nationalism of the Marshall Court, along with its Augustan style of judging, would have to be toned down. Changes would have to come. The question—and it was as yet a new one in American constitutional law—was whether they could be made without disrupting the continuity upon which the authority of the law and the prestige of the Court rested.

The moment of testing came quickly. Facing the Court in its 1837 term were three great constitutional questions dealing with state banking, the COMMERCE CLAUSE, and corporate contracts. Each had been argued before the Marshall Court and each involved a question of FEDERALISM which pitted new historical circumstances against a precedent from the Marshall period. The Court's decisions in these cases would set the constitutional tone for the new age.

In BRISCOE V. BANK OF KENTUCKY the challenge was simple and straightforward. The issue was whether notes issued by the state-owned Commonwealth Bank were prohibited by Article I, section 10, of the Constitution, which prevented states from issuing BILLS OF CREDIT. The Marshall Court had ruled broadly against state bills of credit in CRAIG V. MISSOURI (1830), but the new Jacksonian majority ruled for the state bank. Justice McLean's opinion paid deference to legal continuity by distinguishing *Briscoe* from *Craig*, but political and economic expediency controlled the decision as Story's bitter dissent made clear. The fact was that, after the demise of the second Bank of the United States, state bank notes were the main currency of the country. To rule against the bank would put such notes in jeopardy, a risk the new Court refused to take.

Policy considerations of a states' rights nature also overwhelmed doctrinal consistency in commerce clause litigation, the Court's primary means of drawing the line between national and state power. Marshall's opinion in

GIBBONS V. OGDEN (1824) had conceded vast power over INTERSTATE COMMERCE to Congress, although the Court had not gone so far as to rule that national power automatically excluded states from passing laws touching FOREIGN and INTERSTATE COMMERCE. The new age needed a flexible interpretation of the commerce clause that would please states' rights forces in both the North and the South and at the same time encourage the growth of a national market.

In MAYOR OF NEW YORK V. MILN, the second of the trio of great cases in 1837, the Court struggled toward such a reinterpretation. A New York law required masters of all vessels arriving at the port of New York to make bond that none of their passengers should become wards of the city. The practical need for such a law seemed clear enough; the question was whether it encroached unconstitutionally on federal power over interstate commerce as laid out in the *Gibbons* decision. The Chief Justice assigned the opinion to Justice SMITH THOMPSON who was prepared to justify the New York law as a police regulation and as a legitimate exercise of concurrent commerce power. His narrow definition of STATE POLICE POWER displeased some of his brethren, however, and even more so his position on CONCURRENT POWER. When he refused to compromise, the opinion was reassigned to PHILIP P. BARBOUR, who upheld the state regulation as a valid exercise of state police power. Barbour's contention that police power was "unqualified and exclusive" far exceeded anything that precedent could justify, however, as Story pointed out in his dissent. Indeed, Barbour's opinion, so far as it ruled that states could regulate interstate passengers, went beyond the position agreed upon in CONFERENCE and lacked the full concurrence of a majority.

The *Miln* case settled little except that the New York regulation was constitutional. The Court remained sharply divided over the basic questions: whether congressional power over foreign and interstate commerce was exclusive of the states or concurrent with them and, if it was concurrent, how much congressional action would be necessary to sustain national predominance. The doctrine of state police power had taken a tentative step toward maturity, but its relation to the commerce clause remained unsettled. That the states reserved some power to legislate for the health and welfare of their citizens seemed clear enough, but to establish an enclave of state power prior to, outside the scope of, and superior to powers delegated explicitly to Congress was to beg, not settle the crucial constitutional question.

The uncertainty regarding the questions generated by *Miln* continued throughout the 1840s in such cases as GROVES V. SLAUGHTER (1841) where the Court refused to rule on whether the provision of the Mississippi Constitution of 1832 touching the interstate slave trade was a violation of national commerce power. Confusion increased in the LICENSE CASES (1847) and the PASSENGER CASES (1849), which dealt with state regulation of alcohol and immigration respectively. The Justices upheld state authority in the first and denied it in the second, but in neither did they clarify the relation of state police power to federal authority over interstate commerce.

Not until COOLEY V. BOARD OF WARDENS (1852), which considered the constitutionality of a Pennsylvania law regulating pilotage in the port of Philadelphia, did the Court supply guidelines for commerce clause litigation. Congress had twice legislated on pilotage, but in neither case was there any conflict with the Pennsylvania law. The issue came, therefore, precisely and unavoidably to focus on EXCLUSIVE POWER versus concurrent power: whether the constitutional grant of commerce power to Congress automatically prohibited STATE REGULATION OF COMMERCE or whether the states could regulate commerce as long as such regulations did not actually conflict with congressional legislation.

Justice Curtis's majority opinion upheld the state law and in the process salvaged some doctrinal regularity. Starting from the undeniable premise that the commerce power granted to Congress did not expressly exclude the states from exercising authority over interstate commerce, he ruled that exclusive congressional JURISDICTION obtained only when the subject matter itself required it. The SUBJECTS OF COMMERCE, however, were vast and varied and did not require blanket exclusiveness. Some matters, he said, needed a "single uniform rule, operating equally on the commerce of the United States in every port." Some just as certainly admitted of local regulation. Power, in other words, followed function: if the subject matter required uniform regulation, the power belonged to Congress; if it did not, the states might regulate it. State police power remained to be settled, but the pressure to do so was lessened because the concurrent commerce power of the states was now clearly recognized.

SELECTIVE EXCLUSIVENESS, as the Court's approach in *Cooley* came to be called, was not a certain and final answer to the problem of allocating commerce power between the national government and the states, however. The rule was clear enough but how to apply it was not, which is to say that Curtis gave no guidelines for determining which aspects of commerce required uniform regulation or which permitted diversity. What was clear was that the Court had retreated from the constitutional formalism of the Marshall period. The opinion was short, only ten pages long; it made no reference to precedent, not even *Gibbons*. The Justices now willed to do what they had previously done unwillingly: they decided cases without a definitive pronouncement of DOCTRINE. The important difference in *Cooley* was that the Court devised a rule

of thumb recognizing the judicial interest-balancing that previously had been carried on covertly in the name of formal distinctions. Ordered process, not logical categories, would be the new order of the day.

The Court's flexibility also signaled a shift of power in the direction of the states. The constitutional legacy of the Marshall Court had been altered to fit Jacksonian priorities. Still, national authority had not been destroyed. The Taney Court had refused to extend the nationalist principles of MCCULLOCH V. MARYLAND (1819) and *Gibbons,* to be sure, but the principles stood. The Court's new federalism did not rest on new states' rights constitutional doctrine. Neither did the new federalism threaten economic growth, as conservatives had predicted. Agrarian capitalism, for example, fared as well under the Taney Court as it had under its predecessor. The Justices did sometimes resist the most exorbitant demands of land speculators, and occasionally a dissenting Justice spoke for the little man as did Daniel in *Arguello v. United States* (1855). But the majority took their cue from FLETCHER V. PECK (1810), which is to say that plungers in the land market mostly got free rein, as for example in *Cervantes v. United States* (1854) and *Fremont v. United States* (1855). That slaveholding agrarian capitalists were to benefit from this judicial largess was clear from the decision in DRED SCOTT V. SANDFORD (1857).

The Court's promotion of commercial-industrial-corporate capitalism proved more difficult because of the sectional disagreements among the Justices. But there is no doubt that the Taney Court served as a catalyst for the release of American entrepreneurial energies. Its plan for a democratic, nonmonopolistic capitalism, Jacksonian style, was unveiled in CHARLES RIVER BRIDGE V. WARREN BRIDGE, the last of the three landmark decisions of the 1837 term. Here the question was whether the toll-free Warren Bridge, chartered and built in 1828 a few hundred feet from the Charles River Bridge, destroyed the property rights of the old bridge, in violation of its charter as protected by DARTMOUTH COLLEGE V. WOODWARD (1819). The difficulty was that the charter of 1785, although granting the Charles River Bridge the right to collect tolls, had not explicitly granted a monopoly. The fate of the old bridge depended, therefore, on the willingness of the Taney Court to extend the principle of *Dartmouth College* by implication.

Taney, who spoke for the new Jacksonian majority on the Court, refused to do so. The Chief Justice agreed that "the rights of private property are sacredly guarded," but he insisted "that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation." The Court should not venture into the no-man's land of inference and construction when the public interest rested in the balance, Taney argued. He cleverly supported this position by citing Marshall's opinion in PROVIDENCE BANK V. BILLINGS (1830). And the public interest, as Taney saw it, lay in extending equality of economic opportunity. "Modern science," he said with an eye on new railroad corporations, would be throttled and transportation set back to the last century if turnpike and canal companies could turn charter rights into monopoly grants.

The *Bridge* decision, like the Court's decisions in banking and commerce, revealed a distinct instrumentalist tone as well as a new tolerance for state legislative discretion. The Court also showed its preference for dynamic over static capital. Still, property rights were not generally threatened. To be sure, in WEST RIVER BRIDGE COMPANY V. DIX (1848) the Court recognized the power of state legislatures to take property for public purposes with JUST COMPENSATION, but conservatives themselves were willing to recognize that power. The Court also took a liberal view of state debtor's relief legislation, especially laws applying to mortgages for land, but even here the Court could claim the Marshall Court's decision in OGDEN V. SAUNDERS (1827) as its guide. There was no doubt, on the other hand, as BRONSON V. KINZIE (1843) showed, that state relief laws that impaired substantial contractual rights would not be tolerated.

Corporate property also remained secure under the *Bridge* ruling. Indeed, corporate expansion was strongly encouraged by the Taney Court despite the resistance of some of the southern agrarian Justices. After 1837 the Court consistently refused to extend charter rights by implication, but it also upheld corporate charters that explicitly granted monopoly rights even though in some cases such rights appeared hostile to community interest. Corporations also greatly profited from BANK OF AUGUSTA V. EARLE (1839), which raised the question whether corporations chartered in one state could do business in another. Taney conceded that the legislature could prohibit foreign corporations from doing business in the state and some such laws were subsequently passed. But such prohibitions, he went on to say, had to be explicit; practically speaking, this limitation assured corporations the right to operate across state lines. Hardly less important to corporate expansion was *Louisville Railroad v. Letson* (1844) which held that corporations could be considered citizens of the states in which they were chartered for purposes of DIVERSITY JURISDICTION—Thus removing the increasingly unworkable fiction created in *Bank of United States v. Deveaux* (1809) and assuring corporate access to federal courts where the bias in favor of local interests would be minimized.

The Court's promotion of capitalism showed the basic continuity between the Marshall and Taney periods and the fact that antebellum law followed the contours of eco-

nomic development. Acknowledgment of this continuity, however, should not obscure the real changes in constitutional federalism as the Taney Court deferred more to state power and legislative discretion. Overall the Court spoke more modestly, too, readily acknowledging former errors and generally toning down its rhetoric. In LUTHER V. BORDEN (1849), it went so far as to promise judicial self-restraint regarding POLITICAL QUESTIONS, though that promise ought not to be confused with a hard-and-fast doctrine, which it clearly was not. Although the Court avoided stridency, it did not claim less power. The constitutional nationalism which the Taney Court reduced was not the same as the judicial nationalism which it actually extended. In short, the Court did things differently, but it did not surrender its power to do them. Although the *Bridge* case conceded new power to state legislatures and promised judicial restraint, the Court still monitored the federal system in corporate contract questions. The Court's commerce clause decisions worked to make the federal system more flexible. But in every case from *Miln* through *Cooley*, the Court retained the right to judge—and often, as in *Cooley*, by vague constitutional standards. This judicial authority, moreover, was used throughout the Taney period to expand the jurisdiction of the Court, often at the expense of state judiciaries which the Court claimed to respect.

Never was federal judicial expansion more striking than in SWIFT V. TYSON (1842), a commercial law case which arose under federal diversity jurisdiction. For a unanimous Court, Story held that, in matters of general commercial law, state "laws," which section 34 of the JUDICIARY ACT OF 1789 obliged the federal courts to follow in diversity cases, did not include state court decisions. In the absence of controlling state statutes, then, federal courts were free to apply general principles of commercial law, which they proceeded to do until *Swift* was overruled in 1938. Almost as expansive was Taney's opinion in PROPELLER GENESEE CHIEF V. FITZHUGH (1851), which bluntly overturned the tidewater limitation imposed by the Marshall Court and extended the admiralty jurisdiction of the federal courts over the vast network of inland lakes and rivers.

Both these decisions were part of the Court's consistent effort to establish a system of uniform commercial principles conducive to the interstate operation of business. Both paved the way for federal judicial intrusion into state judicial authority. When state courts objected to this judicial nationalism, as the Wisconsin Supreme Court did in the slave rendition case of ABLEMAN V. BOOTH (1859), Jacksonian Roger Taney put them in their place with a ringing defense of federal judicial authority that was every bit as unyielding as was Federalist John Marshall's in COHENS V. VIRGINIA (1821). *Ableman* was an assertion of power that would have astonished conservative critics in 1837 who predicted the imminent decline and fall of the Court. Instead, by 1850 the Taney Court was even more popular than the Marshall Court had been and the Chief Justice was praised by men of all political persuasions. All this would change when the Court confronted the issue of SLAVERY.

Adjudicating the constitutional position of slavery fell mainly to the Taney Court; there was no escape. Slavery was the foundation of the southern economy, a source of property worth billions, a social institution that shaped the cultural values of an entire section and the politics of the whole nation. Moreover, it was an integral part of the Constitution, which the Court had to interpret. At the same time, it was, of all the issues facing the antebellum Court, least amenable to a rational legal solution—and in this respect, it foreshadowed social issues like abortion and AFFIRMATIVE ACTION which have troubled the contemporary Court. No other single factor so much accounts for the divisions on the Taney Court or its inability to clearly demarcate power in the federal system.

Given the slavery question's explosive nature, the Justices not surprisingly tried to avoid confronting it directly. Thus the obfuscation in *Groves v. Slaughter* (1841), where the issue was whether a provision in the Mississippi Constitution prohibiting the importation of slaves for sale after 1833 illegally encroached upon federal power over interstate commerce. The Court circumvented this issue by ruling that the state constitutional clause in question was not self-activating—a position that, while avoiding trouble for the Court, also guaranteed the collection of millions of dollars of outstanding debts owed slave traders and in effect put the judicial seal of approval on the interstate slave trade. The Court also dodged the substantive issue in STRADER V. GRAHAM (1851), which raised the question whether slaves who resided in Kentucky had become free by virtue of their temporary residence in the free state of Ohio. The Court refused jurisdiction on the ground that Kentucky law reasserted itself over the slaves on their return, so that no federal question was involved.

Where the substantive question could not be sidestepped, the Court aimed to decide cases on narrow grounds and in such a way as to please both North and South. Thus in *The Amistad* (1841), Justice Story ruled that Africans on their way to enslavement who escaped their Spanish captors were free by virtue of principles of international law and a close reading of the Treaty of 1794 with Spain. Extremists in neither section were pleased. Even less were they content with Story's efforts to juggle sectional differences, morality, and objective adjudication in PRIGG V. PENNSYLVANIA (1842). There the question was whether and to what extent states were allowed to pass PERSONAL LIBERTY LAWS protecting the rights of free Negroes in rendition cases. The South was pleased when

Story declared the Pennsylvania liberty law of 1826 to be a violation of the constitutional and statutory obligation to return fugitive slaves. He went on to say, with his eye on northern opinion (and with doubtful support from a majority on the Court), that the power over fugitives belonged exclusively to the federal government and that states were not obliged to cooperate in their return. The decision encouraged northern states to pass personal liberty laws but also necessitated the more stringent federal fugitive slave law of 1850. Both developments fueled sectional conflict. (See FUGITIVE SLAVERY.)

The Court's strategy of avoidance aimed to keep slavery on the state level where the Constitution had put it, but the slavery question would not stay put. What brought it forth politically and legally as a national question was SLAVERY IN THE TERRITORIES, a problem which confronted the Court and the nation in *Dred Scott*. The nominal issue in that famous case was whether a Negro slave named Scott, who had resided in the free state of Illinois and the free territory of Minnesota (made free by the MISSOURI COMPROMISE of 1820) and who returned to the slave state of Missouri, could sue in the federal courts. Behind this jurisdictional issue lay the explosive political question of whether Congress could prohibit slavery in the territories, or to put it another way, whether the Constitution guaranteed it there. The future of slavery itself was on the line.

The first inclination of the Justices when they confronted the case early in 1856 was to continue the strategy of avoidance by applying *Strader v. Graham* (1851); by that precedent Scott would have become a slave on his return to Missouri with no right to sue in the federal courts. This compromise was abandoned: in part because of pressure from President JAMES BUCHANAN and Congress; in part because northern Justices McLean and Curtis planned to confront the whole issue in dissent; in part because the proslave, pro-South wing of the Court (led by Taney and Wayne) wanted to silence the abolitionists by putting the Constitution itself behind slavery in the territories; in part because the Justices pridefully believed they could put the troublesome question to rest and save the Union.

Taney's was the majority opinion so far as one could be gleaned from the cacophony of separate opinions and dissents. It was totally prosouthern and brutally racist: Scott could not sue in the federal courts because he was not a citizen of the United States. He was not a citizen because national CITIZENSHIP followed state citizenship, and in 1787 the states had looked upon blacks as racially inferior (which the states in fact did) and unqualified for citizenship (which several states did not). Scott's argument that he was free by virtue of residence in a free state was wrong, said Taney, because of *Strader* (which had been relied upon by the Supreme Court of Missouri); Scott's argument that residence in a free territory made him free carried no weight because Congress had no authority to prohibit slavery in the territories—an assertion that ignored seventy years of constitutional practice and permitted Taney to set forth the SUBSTANTIVE DUE PROCESS theory of the Fifth Amendment against the TAKING OF PROPERTY. Scott was still a slave. Congress could not prohibit slavery in the territories, because the Constitution guaranteed it there; neither, as the creatures of Congress, could territorial legislatures prohibit slavery as claimed by proponents of the doctrine of POPULAR SOVEREIGNTY. Taney's Constitution was for whites only.

Instead of saving the Union the decision brought it closer to civil war and put the Court itself in jeopardy. In effect, the decision outlawed the basic principle of the Republican party (opposition to the extension of slavery in the territories), forcing that party to denounce the Court. The Democratic party, the best hope for political compromise, was now split between a southern wing (which in 1860 chose the certainty of *Dred Scott* over the vagueness of popular sovereignty) and northern antislavery forces who, if they did not defect to the Republicans, went down to defeat with STEPHEN DOUGLAS and popular sovereignty. Sectional hatred intensified and the machinery of political compromise was seriously undercut—along with the prestige of the Court. From its peak of popularity in 1850 the Taney Court descended to an all-time low. After SECESSION it served only the section of the Union that ignored *Dred Scott* entirely, condemned the Court as a tool of southern expansionism, and looked upon the Chief Justice as an arch-traitor to liberty and national union.

Fortunately, these disabilities were not permanent. Northern hatred focused less on the Court as an institution and more on the particular decision of *Dred Scott*, which was obliterated by the THIRTEENTH and FOURTEENTH AMENDMENTS. *Dred Scott* seemed less important, too, after President Lincoln "Republicanized" the Court with new appointments (five, including a new Chief Justice who had been an abolitionist). More important, the Court brought itself into harmony with the northern war effort by doing what the Supreme Court has always done in wartime: deferring to the political branches of government and bending law to military necessity. Sometimes the Court deferred by acting (as in the PRIZE CASES of 1863 where it permitted the President to exercise WAR POWERS and still not recognize the belligerent status of the Confederacy) and sometimes it deferred by not acting (as when it refused to interfere with the broad use of martial law during the war).

The Taney Court not only survived but it also salvaged its essential powers—and with time even a grudging respect from historians. The memory of *Dred Scott* could

not be totally exorcised, of course, but it diminished along with the idealism of the war years and with the recognition that the racism of the opinion was shared by a majority of white Americans. In any case, the reform accomplishments of the Taney Court helped to balance the reactionary ones. Its modest style of judging fit the new democratic age. Through its decisions ran a new appreciation of the democratic nature and reform potential of state action and a tacit recognition as well of the growing maturity of legislative government. The Court's pragmatic federalism, while it could support the evil of slavery, also embodied a tradition of cultural pluralism, local responsibility, and suspicion of power. This it did without destroying the foundations of constitutional nationalism established by the Marshall Court. Change is the essence of American experience. The Taney Court accepted this irresistible premise and accommodated the Constitution to it. The adjustment was often untidy, but the Court's preference for process over substance looked to the modern age and prefigured the main direction of American constitutional law.

R. KENT NEWMYER
(1986)

Bibliography

COVER, ROBERT M. 1975 *Justice Accused: Antislavery and the Judicial Process.* New Haven: Yale University Press.

FEHRENBACHER, DON E. 1978 *The Dred Scott Case: Its Significance in American Law and Politics.* New York: Oxford University Press.

FRANKFURTER, FELIX 1937 *The Commerce Clause under Marshall, Taney and Waite.* Chapel Hill: University of North Carolina Press.

HARRIS, ROBERT J. 1957 Chief Justice Taney: Prophet of Reform and Reaction. *Vanderbilt Law Review* 10:227–257.

KUTLER, STANLEY 1971 *Privilege and Creative Destruction: The Charles River Bridge Case.* Philadelphia: J. B. Lippincott.

SWISHER, CARL B. 1974 *The Taney Period, 1836–1864.* Volume V of *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States.* New York: Macmillan.

WARREN, CHARLES 1926 *The Supreme Court in United States History,* Vol. 2. New and revised ed. Boston: Little, Brown.

## TARIFF ACT
### 4 Stat. 270 (1828)

Known as the "Tariff of Abominations," this act was designed to embarrass JOHN QUINCY ADAMS and help ANDREW JACKSON win the Presidency. Jacksonians controlling the House Committee on Manufactures wrote a tariff with excessively high duties for iron, hemp, flax, and numerous other raw materials. The bill's authors believed Adams's New England supporters would have to oppose the bill, and that the failure to pass a tariff would cost Adams the Middle States and the election. When New Englanders tried to amend the bill they were voted down by a coalition of southern and Middle State representatives organized by MARTIN VAN BUREN. The plan ultimately failed when representatives from everywhere but the South voted for the bill. Legislatures in South Carolina, Georgia, Mississippi, and Virginia denounced the act. JOHN C. CALHOUN anonymously wrote the South Carolina EXPOSITION AND PROTEST which laid out a theory of state NULLIFICATION of federal laws. While not adopting the Exposition, the South Carolina legislature printed 5,000 copies for distribution and declared the tariff unconstitutional. Although nullification was defeated at this juncture, and the tariff was amended in 1832, the 1828 act set the stage for the nullification crisis of 1832–1833.

PAUL FINKELMAN
(1986)

Bibliography

FREEHLING, WILLIAM W. 1965 *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836.* New York: Harper & Row.

## TAXATION

See: State and Local Government Taxation; State Taxation of Commerce; State Tax Incentives and Subsidies to Business; Taxing and Spending Powers

## TAXATION WITHOUT REPRESENTATION

Taxation without representation was the primary underlying cause of the AMERICAN REVOLUTION. Taxation by consent, through representatives chosen by local electors, is a fundamental principle of American CONSTITUTIONALISM. From the colonial period, REPRESENTATION had been actual: a legislator was the deputy of his local electors. He represented a particular geographic constituency, and like his electors he had to meet local residence requirements. Thus, representation of the body politic and government by consent of the governed were structurally connected in American thought.

Taxation without representation deprived one of his property contrary to the first principles of the SOCIAL COMPACT and of the British constitution. No Englishmen endorsed the constitutionality of taxation without representation; that it violated FUNDAMENTAL LAW was the teaching of the CONFIRMATIO CARTARUM, the PETITION OF RIGHT, and the BILL OF RIGHTS. Englishmen claimed, however, that

Parliament "virtually" represented the colonies—every member of Parliament represented the English nation, not a locality—and therefore could raise a revenue in America. Rejecting the concept of virtual representation, Americans insisted that they were not and could not be represented in Parliament. The argument of virtual representation implicitly conceded the American contention that taxation was the function of a representative body, not merely a legislative or sovereign body. American legislatures, facing parliamentary taxation for the first times in 1764 and 1765, resolved that Parliament had no constitutional authority to raise a revenue in America. Pennsylvania's assembly, for example, resolved "that the taxation of the people of this province, by any other . . . than . . . their representatives in assembly is unconstitutional." Similarly, the STAMP ACT CONGRESS resolved that the colonies could not be constitutionally taxed except by their own assemblies. The resolutions of the colonies, individually and collectively, claimed an exemption from all parliamentary taxation including customs duties and trade regulations whose purpose was to raise revenue.

The American claims were not simply concocted to meet the unprecedented taxation levied by Parliament in 1764 and after. The experience of Virginia, the first colony, was typical. Its charter guaranteed the rights of Englishmen, which Virginia assumed included the exclusive right of its own representative assembly to tax its inhabitants; the assembly so declared in a statute of 1624. In 1652 planters in a county not represented in the assembly protested the imposition of a tax. In 1674, when Virginia sought confirmation from the crown of its exclusive right to tax its inhabitants, the crown's attorney in England endorsed "the right of Virginians, as well as other Englishmen, not to be taxed but by their consent, expressed by their representatives." The Committee for Foreign Plantations and the Privy Council approved, too, but the king withheld approval because of Bacon's Rebellion. Virginia nevertheless persisted in its position. In 1717 the imposition of a royal postal fee produced, in the words of the colony's royal governor, "a great clamor. . . . The people were made to believe that Parliament could not levy any tax (for so they called the rates of postage) here without consent of the General Assembly." In 1753, when Virginia's governor imposed a trivial fee for the use of his seal on each land patent, the assembly lectured him on the theme that subjects cannot be "deprived of the least part of their property but by their own consent: Upon this excellent principle is our constitution funded." The history of any colony would yield similar incidents, showing how entrenched were the claims that Americans advanced when Parliament first sought to tax the colonies.

When the Declaratory Act of 1766 claimed for Parliament a power to "legislate" for America "in all cases whatsoever," some members of Parliament argued the American position that Parliament could tax only in its representative capacity and therefore could not tax America. WILLIAM PITT and Lord Camden (CHARLES PRATT) endorsed that position. Pitt denounced virtual representation as a contemptible idea and declared that taxation "is no part of the governing or legislative power"; he also distinguished taxes levied for revenue from trade regulations that incidentally but not deliberately produced some revenue. The dominant British position, however, assumed that because taxation was inseparable from SOVEREIGNTY, Parliament as the sovereign legislature in the empire had the power to tax in matters of imperial concern, even though the tax fell on unrepresented members of the empire. That position provoked Americans to distinguish the powers belonging to local governments (the idea of FEDERALISM); to develop the concepts of LIMITED GOVERNMENT, fundamental law, and a CONSTITUTION as supreme law over all government; and to frame written constitutions that enumerated the powers of government.

LEONARD W. LEVY
(1986)

Bibliography

BAILYN, BERNARD 1967 *The Ideological Origins of the American Revolution.* Cambridge, Mass.: Harvard University Press.

MORGAN, EDMUND S. 1976 *The Challenge of the American Revolution.* Chap. 1. New York: W. W. Norton.

MORTON, RICHARD L. 1960 *Colonial Virginia,* 2 vols. Chapel Hill: University of North Carolina Press.

## TAX COURT OF THE UNITED STATES

When the Internal Revenue Service determines a deficiency, a taxpayer who disagrees can either pay the additional tax and sue for a refund in a federal district court or withhold payment and petition the Tax Court to set aside the deficiency. Tax Court decisions are reviewed in the UNITED STATES COURTS OF APPEALS.

The Tax Court, until 1942 called the Board of Tax Appeals, was declared by Congress in 1970 to be a "court." It is not, however, a CONSTITUTIONAL COURT created under Article III, but a LEGISLATIVE COURT. Its members do not have life tenure but serve for fifteen-year terms.

KENNETH L. KARST
(1986)

## TAX CREDITS AND RELIGIOUS SCHOOLS

See: Government Aid to Religious Institutions

## TAXING AND SPENDING POWERS

A principal weakness of the ARTICLES OF CONFEDERATION was that Congress had no power of taxation. It could request the states to contribute their fair shares to the national treasury but it had no power to collect when, as often happened, the states did not pay. Hence, the first grant of power to Congress in the Constitution was to "have Power to Lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." The Constitution also imposed two other limitations. Congress could not tax exports nor lay a "Capitation, or other direct, Tax" unless "in Proportion to the Census or Enumeration herein before directed to be taken."

The direct limitations on taxing power pose few problems. Congress does not impose capitation or property taxes, which would be direct taxes and require apportionment among the states in accordance with population. Other taxes must be uniform—which means that the same subject or activity must be taxed at the same rate wherever it is found. Congress, like the states, cannot tax exports to foreign countries.

More difficult problems have risen because taxes not only raise revenue but also regulate. A tax on liquor may be designed to raise money but also to discourage consumption. A deduction for interest in computing income tax encourages home ownership. A tax may be high enough to virtually stop the production and sale of a particular product. Before the Civil War the federal government derived most of its revenue from the customs and in many years had no internal revenue beyond that. But beginning with the Civil War, Congress expanded the scope of federal taxation at a time when the Supreme Court had fairly restrictive views as to congressional powers to regulate local activities. The question became how far Congress could use taxation to achieve policies that were forbidden to it through direct regulation.

When Congress imposed a ten percent tax on local banknotes for the purpose of achieving a federal government monopoly in the issuing of currency, the Court in VEAZIE BANK V. FENNO (1869) indicated that the tax was constitutional but said that in any event no regulatory problem was presented; Congress did have an independent MONETARY POWER, and the tax was merely a means of implementing it. Thirty-five years later the Court faced the problem more directly. Congress had imposed a ten cents per pound tax on oleomargarine that was colored and only one-quarter cent per pound if it was white. The Court in MCCRAY V. UNITED STATES (1904) said that even though Congress did not have the power to pass a statute forbidding the sale of colored oleomargarine, it could still tax it and the courts would not interfere merely on the grounds that the tax was too high. And the Court also held that Congress could impose a tax on distributing narcotic drugs and include in the same statute regulations as to how such drugs were to be distributed. The Court in UNITED STATES V. DOREMUS (1919) said that a tax was not invalid just because it had regulatory as well as taxation purposes and that the regulations attached to the tax were constitutional as facilitating the collection of the tax.

But in the Child Labor Tax Case (1922) the Court concluded that a tax might really be a regulation and thus invalid. A federal statute prohibiting interstate transportation of goods made by child labor had been held to exceed Congress's power under the COMMERCE CLAUSE in HAMMER V. DAGENHART (1918). So Congress imposed a tax of ten percent of the net profits for the year for any manufacturing business that employed children within certain age limits. Here, the court said, the challenge was not merely that the tax was too high. Rather, Congress had imposed a regulation and used the tax as a penalty for violation. "[A] court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable." In *United States v. Constantine* (1935) the Court similarly held invalid a special tax of $1,000 upon anyone dealing in liquor in a state or locality where such dealing was illegal. The Court said that the law clearly was not a tax but rather a penalty for violating state law.

In a series of later cases, however, the Court upheld the taxes. A heavy tax on sale of special weapons such as sawed-off shotguns was upheld in SONZINSKY V. UNITED STATES (1937). In *United States v. Sanchez* (1950) and *United States v. Kahriger* (1953) the Court upheld taxes on narcotics and gambling in which taxpayers were required to register with the federal government, even though that registration would make it easier for the states to enforce their gambling and narcotics laws. In *Sanchez* the Court said: "It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. . . . The principle applies even though the revenue obtained is obviously negligible, . . . or the revenue purpose of the tax may be secondary. . . . Nor does a statute necessarily fall because it touches on activities which Congress might not otherwise regulate. . . . These principles are controlling here. The tax in question is a legitimate exercise of the taxing power despite its collateral regulatory purpose and effect." Later, in MARCHETTI V. UNITED STATES (1968), the Court eliminated the use of the taxing power tocompel violators of state laws to register with the federal government on the grounds that it violates the

RIGHT AGAINST SELF-INCRIMINATION. And since the power of the federal government to regulate has received such major expansion in modern times, there is little need to use the taxing power to expand federal powers. Even though the Child Labor Tax Case may still be good law in defining when a tax ceases to be a tax and becomes a regulation, it is of minor importance. Congress will almost always have power to regulate and can cast its regulation in the form of a tax.

The SPENDING POWER has also raised constitutional questions. Before the early 1900s, Congress spent money chiefly to defray its routine powers of government. It made a few grants to the states to encourage the construction of roads and universities, granting the money outright with no matching requirements or federal supervision. In 1902 the grants amounted to only seven million dollars per year. Soon, however, Congress began to see that grants could be used to encourage states to take action meeting federal standards even with respect to parts of the economy then thought to be outside congressional power.

The SHEPPARD-TOWNER MATERNITY ACT of 1921 provided for federal grants to states that would agree to spend the money for reducing maternal and infant mortality. Massachusetts, which had refused the grants, and Frothingham, a citizen and taxpayer, brought suits. The Supreme Court in *Massachusetts v. Mellon* and FROTHINGHAM V. MELLON (1923) held that neither had STANDING to litigate the issue. Massachusetts had no real interest at stake, for it had refused the grant. Frothingham had no standing as a taxpayer because her interest in the funds spent was miniscule and shared with all other federal taxpayers. The result of this suit was to make most government spending programs impossible to challenge in court.

As a result, it was not until 1936 that a major question as to the scope of the spending power was settled. Congress has power to levy taxes "to pay the Debts and provide for the common Defence and general Welfare of the United States." What does the GENERAL WELFARE CLAUSE mean? JAMES MADISON had argued that money could be spent only to carry out the other powers given to Congress—that there was not, in essence, any additional power granted by the general welfare language. ALEXANDER HAMILTON had said that the clause granted a substantive power to tax and spend so long as it was for the general welfare of the United States.

The Court finally had an opportunity to decide the issue in 1936 in UNITED STATES V. BUTLER. The AGRICULTURE ADJUSTMENT ACT OF 1933 had provided for agreements between the secretary of agriculture and farmers to reduce acreage in exchange for benefit payments. The money for the payments came from a tax levied on the processors of the commodity concerned with all of the tax proceeds directed to that purpose. The Court held first that the processors upon whom the tax was levied did have standing to challenge the expenditure, because they paid a substantial tax earmarked for that expenditure. Next, the Court adopted the Hamilton position that the power to spend might be exercised for the general welfare and was not limited to the other direct grants of legislative power. Finally, the Court said it did not have to decide whether the expenditure in this case was for the general welfare, because this law was a regulation, not an expenditure, and invalid as going beyond congressional regulatory power.

The *Butler* interpretation of the spending power, however, soon became the basis to uphold expenditures. In HELVERING V. DAVIS (1937) the Court upheld the SOCIAL SECURITY ACT, concluding that expenditures for old age pensions were expenditures for the general welfare. And in BUCKLEY V. VALEO (1976) the Court held that expenditures of funds to finance campaigns of presidential candidates was valid as an expenditure for the general welfare. (See CAMPAIGN FINANCING.) The Court said: "Congress was legislating for the "general welfare'—to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising. . . . Congress has concluded that the means are "necessary and proper' to promote the general welfare, and we thus decline to find this legislation without the grant of power in Art. I, § 8."

The use of grants to states as a means of federal regulation has proceeded apace, almost totally free of challenge by the courts. Only where the challenge is based on the ESTABLISHMENT OF RELIGION has the Court recognized standing to challenge by taxpayers. And that holding, in FLAST V. COHEN (1968), is not absolute, as was shown by VALLEY FORGE CHRISTIAN COLLEGE V. AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE (1982). The seven million dollars of such grants in 1902 had risen to seven billion in 1960 and to over one hundred billion in the early 1980s—about one-third percent of state and local receipts from their own sources. Again, however, the constitutional issues have lost their former importance. If the expenditure can be said to be for the general welfare, the intrusion of the federal government into a local area does not matter. Because congressional powers to spend for the general welfare and to regulate under the commerce clause are so broad, there is little prospect of a successful constitutional challenge to federal spending.

Both as to taxation and as to expenditure, no major constitutional problems remain. Congress has such broad regulatory powers that it no longer needs to attempt to get around power limitations by using taxation and expenditure. These methods of regulation are used today as convenient devices for accomplishing goals within congressional power. The major limitations on them are po-

litical. If the increase in federal grants to states appears to be slowing and if some recent Presidents have talked about a New Federalism policy to decrease such federal spending, the reasons lie not in constitutional limitations but in governmental policy.

EDWARD L. BARRETT, JR.
(1986)

(SEE ALSO: *Direct and Indirect Taxes; Economic Regulation; Import-Export Clause; Impoundment of Funds; National Police Power.*)

Bibliography

GRANT, J. A. C. 1936 Commerce, Production, and the Fiscal Powers of Congress. *Yale Law Journal* 45:751–778.

POWELL, THOMAS R. 1922 Child Labor, Congress and the Constitution. *North Carolina Law Review* 1:61–81.

TRIBE, LAURENCE H. 1978 *American Constitutional Law.* Pages 225–227, 244–250. Mineola, N.Y.: Foundation Press.

## TAXING AND SPENDING POWERS (Update)

The distinction between real and sham taxes (so-called taxes that, in substance, are really punishments) was used in BAILEY V. DREXEL FURNITURE CO. (1922) (also known as the Child Labor Tax Case) and *United States v. Constantine* (1935) to vindicate the principle of enumerated federal powers. The Supreme Court applied this distinction again in *Department of Revenue of Montana v. Kurth Ranch* (1994) to invalidate a state's assessment of a tax on possession of prohibited drugs after the possessor had been separately prosecuted for the crime of possession. Holding the "tax" really a penalty, the Court held that assessing it after the possession had already been the subject of criminal prosecution violated the guarantee against DOUBLE JEOPARDY.

To mark the always debatable boundary between real and sham taxes, the Court in *Kurth Ranch* employed some of the same factors used in *Constantine* and the Child Labor Tax Case. Montana's drug possession "tax" was extremely high in amount (a factor not determinative by itself), and the "tax" was conditioned on the possession's being a crime. This was different from "mixed-motive taxes," imposed not only to raise revenue but also to discourage the activity taxed. With cigarette taxes, for example, deterrence of smoking might be a goal, but that goal is moderated not only by the desire to raise revenue but also by other objectives, such as permitting satisfaction of consumer demand and avoiding severe detriment to tobacco industry employment. The Court said, however, that "when the taxed activity is completely forbidden" the evident motivation is not so mixed, and the so-called tax ceases to be justifiable as a revenue measure because "the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction." When a government "taxes" an activity that is completely unlawful, the "tax" is not a revenue device, but rather a penalty to enforce the prohibition.

The Court in *Kurth Ranch* also deemed it significant that the "tax" was for possessing property that could not be possessed lawfully and that had been confiscated and destroyed before the tax was assessed. "A tax on 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character," the Court said.

In the past, one could remark that this distinction between real taxes and "taxes" that amount to regulatory penalties is "of minor importance," given Congress's LEGISLATIVE POWER over INTERSTATE COMMERCE. However, the Court began reemphasizing the federal government's ENUMERATED POWERS limitations in UNITED STATES V. LÓPEZ (1995). If this emphasis continues, the distinction between real and sham taxes might become important for federal laws again. Even though *Kurth Ranch* involved only state LEGISLATION, it is notable for reinforcing the Justice ROBERT H. JACKSON description of a tax in *United States v. Kahriger* (1953) as a "good-faith revenue measure," in contrast to what Justice FELIX FRANKFURTER characterized in the same case as regulation "merely . . . wrapped . . . in the verbal celophane of a revenue measure."

Spending power DOCTRINE has continued to mature as the ramifications of ALEXANDER HAMILTON's classic view of that power have gradually been recognized. For example, in PENNHURST STATE SCHOOL V. HALDERMAN (1981) the Court observed that "legislation enacted pursuant to the spending power is much in the nature of a contract: as consideration for federal funds, the States [or other grantees] agree to comply with federally imposed conditions." Spending conditions thus are enforcible not as legislation (by virtue of some lawmaking power), but rather as contracts (by virtue of consideration and consent). Hamilton understood the very practical point that Congress may spend even for things beyond the scope of its powers to legislate: Because "money talks," federal payments (and promises made in exchange for federal payments) can strongly influence things that the federal government has no power to govern. JAMES MADISON's mistake was his failure to distinguish between governing behavior and inducing it by payment.

Even the 1937 decisions upholding the SOCIAL SECURITY ACT, including STEWARD MACHINE COMPANY V. DAVIS (1937) and HELVERING V. DAVIS (1937), repeated Madison's mistake by assuming that in order to uphold social welfare spend-

ing, relief of the elderly or unemployed (for example) must be considered an "end legitimately national," one "within the scope of national policy and power." Not until the following decade did the Court fully grasp the point of Hamilton's spending power thesis: The Justices held in *Oklahoma v. United States Civil Service Commission* (1947) that by grant condition Congress could influence something outside the scope of any national power, a grantee's policy regarding its own employees.

In the *Pennhurst* case, the contract character of spending conditions led the Court to conclude that in order to be enforcible, conditions must be clear enough in advance "that we can fairly say that the State [or other grantee] could make an informed choice." Where the condition is clear, however, the recipient's acceptance makes it contractually binding regardless of whether Congress would have constitutional power to impose it legislatively. Thus in *South Dakota v. Dole* (1987) the Supreme Court upheld a condition curtailing highway funds to states refusing to raise the drinking age, "[e]ven if Congress might lack the power to impose a national minimum drinking age directly." However, the Court has explained that because their force derives from contract rather than legislative competence, spending conditions are enforcible only against "those who are in a position to accept or reject those obligations as a part of the decision whether or not to 'receive' federal funds."

Persisting confusion about the spending power can produce anomalous results. For example, because they depend on contract rather than legislative power, spending conditions cannot evoke the SUPREMACY CLAUSE; yet as late as 1988 the Court was uncritically assuming that conditions in grants to individuals and local governments could trump laws of states that were not contracting parties.

Similarly, sometimes a "germaneness" restriction on spending conditions has been asserted. Following her DISSENTING OPINION in *South Dakota v. Dole*, Justice SANDRA DAY O'CONNOR wrote for six Justices in NEW YORK V. UNITED STATES (1992) that "conditions must . . . bear some relationship to the purpose of the federal spending." If this statement means that conditions must relate to some enumerated power, it reiterates Madison's error. On the other hand, if this germaneness rule means that every condition must pertain to an objective of the particular spending program involved (even though, as Hamilton understood, spending objectives need not pertain to any enumerated power), it is supported neither by constitutional text nor by logic or PRECEDENT, and it imperils conditions like those against RACIAL DISCRIMINATION and SEX DISCRIMINATION, which Congress has attached to all spending programs regardless of program objectives. Calls for germaneness disclose a spending power doctrine that is not fully coherent.

One perennial source of confusion is misattributing the spending power to the taxing clause (which contains the "GENERAL WELFARE" phrase). Congress may spend not only tax proceeds, but also the proceeds of fines, sales, gifts, and investments. Money is property, and power to dispose of federal property resides in the legislative branch by virtue of the Constitution's Article IV. This power, however, is a prerogative of ownership, not of SOVEREIGNTY; the history of land grants has much to contribute toward full understanding of the spending power.

DAVID E. ENGDAHL
(2000)

(SEE ALSO: *Child Labor Tax Act*.)

Bibliography

ENGDAHL, DAVID E. 1994 The Spending Power. *Duke Law Journal* 44:1–109.

MCCOY, THOMAS R. and FRIEDMAN, BARRY 1988 Conditional Spending: Federalism's Trojan Horse. *Supreme Court Review* 1988:85–127.

ROSENTHAL, ALBERT J. 1987 Conditional Federal Spending and the Constitution. *Stanford Law Review* 39:1103–1164.

## TAXPAYERS' AND CITIZENS' SUITS

Federal courts will rule on the merits of a legal claim only at the request of one with a "personal stake in the outcome of the controversy." As a corollary of this central, entrenched STANDING doctrine, the federal judiciary turns away attacks on the legality of government behavior by citizens suing only as such. The rule stems from a SEPARATION OF POWERS premise: that federal judges should not review conduct of Congress or the Executive absent the need to protect a plaintiff from distinct personal injury. The rule has been applied mostly to reject challenges by United States citizens to acts of the political branches of the federal government, although it also appears to bar federal court suits by state or local citizens against acts of their governments. In essence, the citizen interest in lawful governance is viewed as an ideological, not a personal, interest, an interest best left to political rather than judicial resolution. Nonetheless, if a plaintiff can show concrete individual injury, as in SIERRA CLUB V. MORTON (1972), the public interest may then be argued in behalf of the personal claim, even if the primary motive for suing is not the personal but the citizen interest.

The law of taxpayer standing is more elaborate, because taxpayers' suits are sometimes deemed sufficiently personal to permit standing and sometimes rejected as disguised citizens' suits. Taxpayers contesting their own tax liability have a "personal stake," of course, but such an individualized interest is less clear for taxpayers disputing how tax revenues are spent. In FROTHINGHAM V. MELLON

(1923) the Supreme Court found the pecuniary interest of a federal taxpayer in federal spending too remote to justify JUDICIAL REVIEW of congressional appropriations, but it reaffirmed its previous approval of federal court suits by local taxpayers attacking local spending programs. In FLAST V. COHEN (1968) the Court created an exception, allowing federal taxpayers to challenge congressional spending as an ESTABLISHMENT OF RELIGION because the establishment clause gives taxpayers a special interest in challenging the use of tax dollars to support religion. The dissent objected that the Court was recognizing standing to bring a "public action" having no effect on the suing taxpayer's financial interest.

Since *Flast*, the Court has denied standing to federal taxpayers who raised other constitutional objections in *United States v. Richardson* (1974) and *Schlesinger v. Reservists Committee* (1974). And in VALLEY FORGE CHRISTIAN COLLEGE V. AMERICANS UNITED (1982), a decision that substantially undermines the premise of *Flast*, the Court denied standing to taxpayers who raised establishment clause objections, but challenged federal distribution of surplus property rather than congressional appropriations of money. Even at the state taxpayer level, invoking the establishment clause will not suffice if the claim is not of government financial support of religion but of regulatory support, as in DOREMUS V. BOARD OF EDUCATION (1952). In short, a federal court will recognize taxpayer standing only when there is a tangible financial connection between a local or state taxpayer's interest and government spending, or when a local, state, or federal taxpayer challenges legislative appropriations on establishment clause grounds.

The federal judiciary's rejection of citizen suits and most taxpayer attacks on spending reflects a view that the power of judicial review is only a by-product of the need to apply law, including constitutional law, to decide the rights of those claiming injury. To entertain public actions would be to expand judicial scrutiny of acts of the elected branches of government—usurpation that might bring retaliation, in the eyes of those who take this view. For those who think judicial review is founded on a broader obligation to assure government adherence to the Constitution, such an expanded scrutiny would be desirable. If Congress were to authorize the federal courts to take jurisdiction over public actions, the Supreme Court probably would not find Article III's "case" or "controversy" requirement an insurmountable barrier. But the Court has always been reluctant to entertain public actions on its own authority.

JONATHAN D. VARAT
(1986)

Bibliography

WRIGHT, CHARLES A.; MILLER, ARTHUR R.; and COOPER, EDWARD H. 1984 *Federal Practice and Procedure.* Vol. 13:634–663. St. Paul, Minn.: West Publishing Co.

# TAYLOR, JOHN
(1753–1824)

John Taylor of Caroline read law in the office of his uncle, EDMUND PENDLETON. He became involved early in Virginia revolutionary politics and was a delegate to the FIRST CONTINENTAL CONGRESS. He served as an Army officer and almost continuously as a member of the House of Delegates (1779–1785). In the legislature he supported a measure to end ESTABLISHMENT OF RELIGION in Virginia.

As a delegate to the state convention in 1788 Taylor opposed RATIFICATION OF THE CONSTITUTION, which lacked a BILL OF RIGHTS, gave too much power to the general government, and was insufficiently republican. Even so, he involved himself immediately in the politics of the new government, becoming the foremost publicist of Jeffersonian democracy. Both in the SENATE (1792–1794) and in the public press he was a leading opponent of the economic policies of ALEXANDER HAMILTON. In the controversy over the ALIEN AND SEDITION ACTS, Taylor introduced the Virginia Resolutions (written by JAMES MADISON) in the state legislature. (See VIRGINIA AND KENTUCKY RESOLUTIONS.)

An ardent supporter of THOMAS JEFFERSON, Taylor returned briefly to the Senate in 1803. He supported the TWELFTH AMENDMENT and defended the constitutionality of the LOUISIANA PURCHASE when even the President doubted it. Taylor broke with the Republican party over the War of 1812 and the renomination of President Madison, but he did not deviate from its principles. In his final term in the Senate (1822–1824) and in his last books Taylor denounced the growing power of the federal judiciary, JOHN MARSHALL'S decision in MCCULLOCH V. MARYLAND (1819), and HENRY CLAY'S AMERICAN SYSTEM, with its INTERNAL IMPROVEMENTS and protective tariff. He advocated STRICT CONSTRUCTION of constitutional grants of power to the federal government.

Taylor saw himself as the defender of a liberty in constant danger and a republic in perpetual crisis. He thought that, in every generation, the American people were presented with a choice between the political principles and practice of Thomas Jefferson and those of JOHN ADAMS—the former conducive to, and the latter destructive of, self-government and public happiness. He believed that the civic virtue of farmers, tradesmen, and professional persons was the indispensable basis of free institutions; and for him banks and corporations raised the specter of economic oligarchy, undermining both that virtue and those institutions. Big government was the creature and ally of big business; and bigness was the enemy of liberty and equality. Incongruously, for all his concern with liberty and equality he unqualifiedly supported black slavery. Taylor is probably best known as a theorist of STATES' RIGHTS: his

ideas bridged the gap between the Virginia and Kentucky Resolutions and JOHN C. CALHOUN's doctrine of NULLIFICATION.

Taylor's most important books are *An Enquiry into the Principles and Policies of the Government of the United States* (1814), a comprehensive statement of the political theory of agrarian democracy, and *Construction Construed and Constitutions Vindicated* (1820), an attack on the expansion of federal court JURISDICTION and the use of JUDICIAL REVIEW to reduce the independence of the states.

DENNIS J. MAHONEY
(1986)

Bibliography

HILL, CHARLES W. 1977 *The Political Theory of John Taylor of Caroline.* Rutherford, N.J.: Fairleigh Dickinson University Press.

LLOYD, THOMAS GORDON 1973 *The Danger Not Yet Over: The Political Thought and Practice of John Taylor of Caroline.* Ph.D. dissertation, Claremont Graduate School.

## TAYLOR, ZACHARY
(1784–1850)

A professional soldier and hero of the Mexican War, Zachary Taylor was elected President as a WHIG in 1848. A moderate on most issues, Taylor was a Louisiana slaveholder who was politically close to New Yorkers Thurlow Weed and WILLIAM SEWARD. Taylor opposed any interference with slavery in the South but also opposed opening the Mexican Cession to slavery. Similarly, he opposed the WILMOT PROVISO but advocated immediate admission of California and New Mexico as free states. He opposed the COMPROMISE OF 1850 and would probably have vetoed most of its provisions, had he not died in July 1850.

PAUL FINKELMAN
(1986)

Bibliography

HAMILTON, HOLMAN 1941 *Zachary Taylor: Soldier of the Republic.* Indianapolis: Bobbs-Merrill.

## *TAYLOR v. LOUISIANA*
419 U.S. 522 (1975)

Under Louisiana law women were selected for jury service only when they explicitly volunteered for duty; men were selected irrespective of their desires. In *Hoyt v. Florida* (1961), the Supreme Court had employed a RATIONAL BASIS standard of review to uphold a similar law against DUE PROCESS and EQUAL PROTECTION attacks. In *Taylor,* however, the Court invalidated this jury selection system as a denial of the Sixth Amendment right of the accused to "a jury drawn from a fair cross section of the community." That the accused was male was irrelevant to this claim. The vote was 8–1; Justice WILLIAM H. REHNQUIST dissented, and Chief Justice WARREN E. BURGER concurred only in the result.

Writing for the other seven Justices, Justice BYRON R. WHITE declined to follow *Hoyt;* if the fair cross section requirement ever "permitted the almost total exclusion of women, this is not the case today." Women had entered the work force in large numbers, undermining their exemption "solely on their sex and the presumed role in the home." *Taylor* is not only an important JURY DISCRIMINATION precedent but also a strong judicial rejection of laws resting on stereotypical assumptions about "woman's role."

KENNETH L. KARST
(1986)

## TELEVISION

See: Broadcasting

## TEMPORAL LIMITS ON LAWMAKING POWERS

A republic derives its power from the people, and as JAMES MADISON declared in THE FEDERALIST #39 and #53, the persons elected to administer it hold office only "for a limited period" and enjoy no license to extend the length of their terms. Although in contemporary America such a concept seems almost beyond dispute, Madison's pronouncement marked a radical departure from English tradition.

By the Triennial Act of 1694 the English Parliament limited the term of Parliament to three years. In 1716, however, the members of Parliament, in their final year of service and concerned that elections might be perilous to the ruling party, repealed the Triennial Act. In its place they enacted the Septennial Act, by which the legal duration of the sitting Parliament was immediately extended to seven years. The powers of the incumbent members of the House of Commons were thus prolonged by four years. Although the English might have regarded this exercise of legislative authority as contemptuous or extravagant, they did not consider it ULTRA VIRES in a system constructed on the concept of parliamentary supremacy.

The United States Constitution rejects the cornerstone of legislative supremacy. The recognition of the citizenry as an external force from which all power originates severed the umbilical connection with English tradition. The Preamble's opening phrase, "We the people," is more than flashy prose. The legislators were transformed from the

masters of the electorate to their servants. The people are the source of all power; the legislators are merely designated agents.

There is, as ALEXANDER HAMILTON pronounced in *The Federalist* #78, "no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void." Agency may be limited in duration as well as scope. The Framers devoted considerable attention to the appropriate length of a representative's term of office. The decision to limit the terms of the members of the HOUSE OF REPRESENTATIVES to two years was prompted by a recognition that in order to ensure liberty, government must have an immediate dependence on, and intimate sympathy with, the people. Frequent elections, warned Madison in *The Federalist* #53, are "the only policy by which this dependence and sympathy can be effectively secured." Although the longer six-year term for senators was a concession to the need for some continuity and stability in government, the expiration of the terms of one-third of the body every two years provides a reminder of accountability (the dependence factor) and permits infusions of new directions from the electorate (the sympathy factor) at more frequent intervals.

Just as American legislatures lack the power to extend their terms beyond those set by their constitutive documents, they may not undermine the spirit of that document by "entrenching" their legislative efforts. Each election furnishes the electorate with an opportunity to provide new directions for its representatives. The process would be reduced to an exercise in futility were newly elected representatives bound by the policy choices of a prior generation of voters. The fundamental, although often debatable, assumption of American political life—that legislative action reflects current majoritarian preferences—could be finally laid to rest if shifting majorities were unable to alter prior majoritarian preferences.

Instances of legislative entrenchment rarely are the subjects of judicial decision. To begin with, most legislators share an understanding of the temporal limits of their authority. Of equal import, successor legislators usually find ways to outflank entrenched restrictions, but if they cannot, they may simply choose to ignore their predecessors' directives, safe in the knowledge that courts are unlikely to void their efforts. Nonetheless, the prohibition against entrenchment has been at the heart of numerous congressional debates.

The CLOTURE rule of the Senate requires the assent of a supermajority (sixty members) to terminate a filibuster. On more than eighty occasions since this rule's adoption, a majority of senators have unsuccessfully attempted to cut off debate and bring an issue to a vote. Such failures have often been followed by efforts to amend the cloture rule; but the supermajority requirement has been entrenched. Rule 32(2) of the Senate's Standing Rules explicitly mandates, "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed *as provided in these rules.*" Thus, any effort to change the cloture rule may itself be blocked by a filibuster. The defenders of this entrenchment argue that because each biennial election only affects one-third of the Senate's membership, the Senate is a continuing body capable of binding itself. Periodically, senators mount constitutional attacks against Rule 32(2) on the ground that no legislative body can so limit its successors. In 1957, Vice-President RICHARD M. NIXON, the Senate's presiding officer, announced his personal opinion that a rule limiting the right of the Senate's current majority to promulgate its own rules was unconstitutional. In the end, however, Nixon and his successors have left the ultimate issue of constitutionality with the membership of the Senate itself. Numerous votes of that body have rejected Nixon's constitutional assessment. Today an overwhelming majority of the senators are of the view that the "continuous" nature of the Senate permits this narrow exception to the rule against entrenchment.

Entrenchment issues also surround much of the constitutional AMENDING PROCESS. Thus, the binding power of legslative bodies has been at the heart of debates about (1) the power of Congress to extend time limits for RATIFICATION placed on a proposed constitutional amendment by a prior Congress; (2) the right of state legislature to rescind its predecessor's ratification vote; and (3) Congress's ability, by legislation, to establish the rules of operation for futrue constitutional conventions that might occur.

One of the few entrenchment issues to have received a judicial airing concerns the extent to which contractual commitments made by legislatures bind subsequent legislatures. The CONTRACT CLAUSE of the Constitution prohibits states from impairing the OBLIGATION OF CONTRACTS. There exists no evidence, however, that the Framers intended or expected the contract clause to be applied to obligations involving the state itself. In spite of this unequivocal history, Chief Justice JOHN MARSHALL, in FLETCHER V. PECK (1810), extended the reach of the contract clause to legislatively created obligations, finding it sufficient that the words of the Constitution drew no distinction between private and public contracts. The tension between *Fletcher's* extension of the contract clause and the temporal nature of lawmaking power was first clearly articulated by ROGER BROOKE TANEY during his tenure as ATTORNEY GENERAL. Legislatures, said Taney, "cannot bind the state by contract . . . beyond the scope of the authority granted them by their constituents." The power to limit contractually the legislative powers of successors, Taney

asserted, is one that the agent cannot enjoy consistent with "the principles upon which our political institutions are founded." Even Marshall was mindful of the entrenchment implications of his interpretation. Recognizing that his reading potentially allowed legislatures to limit the power of their successors, he endeavored to draw a distinction between "general legislation" (which could not bind successor legislators) and "contracts" (which could). Marshall therefore concluded that when a law is in its nature a contract, vesting absolute rights, "a repeal of the law cannot devest those rights."

The dichotomy Marshall posited between general legislation and contracts matured in later years into a judicial understanding that at least some state action was beyond the reach of the contracting power. No body of representatives can bargain away the so-called POLICE POWER of the state. Thus, in STONE V. MISSISSIPPI (1880), the Supreme Court sustained a legislative revocation of its predecessor's grant of a twenty-five-year charter to operate a lottery, noting that the police power must remain a continuing power to be exercised "as the special exigencies of the moment may require." This limitation ultimately proved the contract clause's undoing as the exception swallowed the rule, and the contract clause faded from the judicial scene following the 1930s.

In the 1970s the Supreme Court temporarily resurrected the specter of contractual entrenchment. New Jersey and New York issued bonds in 1962 to construct bridges and tunnels, and promised bondholders that none of the tolls pledged to secure such bonds would be used for "any railroad purpose." By 1974, the public call for increased mass transit made such a commitment unwieldy. Massive toll increases were announced. A reserve fund was established for the bondholders, but in 1974 the commitment not to spend any surplus toll money for mass transit was repealed. There was no evidence of a diminution in the value of the bonds as a result of this broken promise. Nonetheless, the Court, in UNITED STATES TRUST CO. OF NEW YORK V. NEW JERSEY (1977), ruled that the state legislature had impaired the bondholders' contractual rights. Justice WILLIAM J. BRENNAN, in dissent, reminded his colleagues that "one of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent." Nothing, he summed up, so jeopardized the "legitimacy of a system of government that relies on the ebbs and flow of politics to clean out the rascals than the possibility that those same rascals might perpetuate their polices simply by locking them into binding contracts." Justice Brennan may have struck a resonant chord. Since *United States Trust*, no legislative commitment has been enforced against a recalcitrant successor legislature. It is ordinarily in a legislature's best interest to maintain a reputation for honoring its word. On those occasions, however, when the public interest leads a legislature to abandon a prior commitment, it will be rare for courts to enforce the promise.

JULIAN N. EULE
(1992)

Bibliography

EULE, JULIAN N. 1987 Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity. *American Bar Foundation Research Journal* 1987:379–459.

HOCHMAN, CHARLES B. 1960 The Supreme Court and the Constitutionality of Retroactive Legislation. *Harvard Law Review* 73:692–727.

KAHN, PAUL W. 1987 Gramm-Rudman and the Capacity of Congress to Control the Future. *Hastings Constitutional Law Quarterly* 13:185–231.

## TEN BROEK, JACOBUS
(1911–1968)

The major contribution of Jacobus ten Broek to American constitutional scholarship was *The Antislavery Origins of the Fourteenth Amendment* (1951; rev. ed., *Equal under Law*, 1965), in which he described the influence of the abolitionist movement on the drafting and ratification of the FOURTEENTH AMENDMENT. Ten Broek argued that the abolitionists identified the NATURAL RIGHTS of human beings as constitutional rights requiring a national constitutional power of enforcement. He maintained that the PRIVILEGES AND IMMUNITIES clause of the amendment protected these natural rights and the auxiliary rights necessary to their enjoyment; that the EQUAL PROTECTION clause required the states to supply full legal protection to natural rights and authorized Congress to protect these rights if the states failed to do so; and that the amendment applied to the states those provisions of the federal Bill of Rights guaranteeing natural rights, as well as those natural rights not mentioned in the Bill of Rights. Ten Broek, a lawyer, was a political scientist at the University of California, Berkeley.

RICHARD B. BERNSTEIN
(1986)

## *TENNESSEE v. GARNER*
471 U.S. 1 (1985)

At the time of this case a majority of police departments in the nation prohibited the use of deadly force against nonviolent suspects, and the Supreme Court sought by its decision to stimulate a uniformity of that practice. Justice BYRON R. WHITE for a 6–3 majority held unconstitutional

on FOURTH AMENDMENT grounds a state act authorizing an officer to shoot to kill in order to prevent an escape after he gave notice of an intent to arrest. The DOCTRINE of the case is that to kill a fleeing, unarmed felon as a last resort in order to prevent his getaway constitutes an unreasonable seizure unless the officer believes that failure to use deadly force will result in serious harm to himself or others. Justice SANDRA DAY O'CONNOR, for the dissenters, would have permitted deadly force at least against residential burglars who resist arrest by attempting to flee the scene of the crime.

LEONARD W. LEVY
(1986)

(SEE ALSO: *Unreasonable Search.*)

## *TENNESSEE v. SCOPES*
289 SW 363 (1925)

In 1925 Dayton, Tennessee, authorities arrested a local high school teacher, John T. Scopes, for violating the state's Butler Act, which prohibited public school instructors from teaching "any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." Scopes admitted to teaching about evolution from George Hunter's *Civic Biology*, a book approved by Tennessee's textbook commission. The Scopes trial, soon known throughout the nation as "the monkey trial," came in the middle of a decade punctuated by the Red Scare, increased urban-rural tensions, and the resurgence of the Ku Klux Klan. The Dayton courtroom soon became an arena of cultural and political conflict between fundamentalist Christians and civil libertarians.

The former, led by William Jennings Bryan, a three-time presidential candidate and ardent prohibitionist who joined the prosecution staff, argued that the Butler Act was a traditional exercise of STATE POLICE POWER with respect to public education, little different from mandating other curricula and fixing the qualifications of teachers. They also saw the statute as a defense of traditional folk values against the moral relativism of modern science and other contemporary religious beliefs. Scopes's defenders, including the AMERICAN CIVIL LIBERTIES UNION (ACLU) and the celebrated criminal lawyer Clarence Darrow, saw in the Butler Act a palpable threat to several constitutional guarantees, including SEPARATION OF CHURCH AND STATE and FREEDOM OF SPEECH.

The trial judge, John T. Raulston, rejected all constitutional attacks against the statute; he also declined to permit testimony by scientific and religious experts, many of whom hoped to argue the compatibility between evolution and traditional religious values, including the belief in a supreme being. The only issue for the jury, Raulston noted, was the narrow one of whether or not John Scopes had taught his class that man had descended from a lower form of animals. Because Scopes has already admitted doing so, the jury's verdict was never in doubt. Darrow and the defense gained a public relations triumph by putting Bryan on the stand to testify as an expert about the Bible. The Great Commoner, who collapsed and died several days after the trial ended, affirmed his faith in biblical literalism, including the story of Jonah and the whale. The jury, however, found Scopes guilty and Raulston fined him the statutory minimum of $100.

Darrow and the ACLU encountered only frustration when they attempted to APPEAL the conviction. The state supreme court, with one judge dissenting, upheld the constitutionality of the Butler Act. However, they reversed Scopes's conviction on a technicality, holding that the Tennessee constitution prohibited trial judges from imposing fines in excess of $50 without a jury recommendation. The state supreme court also urged Tennessee officials to cease further prosecution of John Scopes—advice which the attorney general followed. The Butler Act remained on the Tennessee statute books but was not enforced against other educational heretics.

MICHAEL E. PARRISH
(1986)

(SEE ALSO: *Creationism.*)

Bibliography

GINGER, RAY 1958 *Six Days or Forever? Tennessee v. John Thomas Scopes.* New York: Oxford University Press.

## TENNESSEE VALLEY AUTHORITY ACT
48 Stat. 58 (1933)

A debate over the best use for an uncompleted defense plant site at Muscle Shoals—in the heart of a chronically depressed region—emerged after WORLD WAR I, ending with passage of the Tennessee Valley Authority Act. In 1933, President FRANKLIN D. ROOSEVELT urged creation of "a corporation clothed with the power of government but possessed of the flexibility and initiative of a private enterprise" to rehabilitate and develop the resources of the Tennessee River valley.

The resultant act, largely written by Senator GEORGE W. NORRIS, encompassed a variety of objectives including national defense; flood control and the improvement of navigation; the development of agriculture, industry, and electric power; and even reforestation. To accomplish

these goals, Congress created the Tennessee Valley Authority (TVA), granting it the power to construct dams and power works in the valley and to increase production of badly needed fertilizers. The act also authorized the TVA to sell any energy produced in excess of its needs, giving preference to publicly owned organizations; the TVA further received authority to build power lines to facilitate sales and transmission of power. A series of amendments in 1935 and 1939 sought to liquidate the system's costs by providing for sales of electric power, producing "gross revenues in excess of the costs of production," to acquire major utility properties, and even to issue credit to assist the distribution of its power.

Supporters of the act relied on arguments including the GENERAL WELFARE CLAUSE, the commerce power, and the WAR POWERS. The Supreme Court sustained a TVA contract for the sale of surplus power in ASHWANDER V. TENNESSEE VALLEY AUTHORITY (1936), thus effectively sustaining the act's constitutionality.

DAVID GORDON
(1986)

## *TENNEY v. BRANDHOVE*
341 U.S. 367 (1951)

This decision established the absolute immunity of state legislative officials from damages actions, brought under SECTION 1983, TITLE 42, UNITED STATES CODE, alleging violations of constitutional rights. William Brandhove claimed that Senator Jack B. Tenney and other members of a California state legislative committee had violated his constitutional rights by conducting hearings to intimidate and silence him. In an opinion by Justice FELIX FRANKFURTER, the Supreme Court noted the history of parliamentary immunity in England, and cited the SPEECH OR DEBATE CLAUSE as a recognition of the need for a fearless and independent legislature. It held that, despite the unequivocal language of section 1983, Congress had not meant to "impinge on a tradition so well grounded in history and reason." (See LEGISLATIVE IMMUNITY.)

THEODORE EISENBERG
(1986)

## TEN POUND ACT CASES
N.H. (1786–1787)

These cases, about which little is known (not even the names of the litigants are known), are notable as the first instances in our history of a state court's holding unconstitutional an act of a state legislature. The Inferior Court of Common Pleas of Rockingham County, sitting in Portsmouth, New Hampshire, in 1786 and 1787, voided the "Ten Pound Act," which had been passed in 1785 for the speedy recovery of small debts. Our scanty knowledge of the cases derives from newspaper reports and legislative records. The act of 1785 allowed justices of the peace to try certain civil cases, involving sums less than ten pounds, without juries. The state constitutional guarantee of TRIAL BY JURY extended to all civil cases except those which juries customarily did not try. New Hampshire practice had previously allowed a justice of the peace to try a case without a jury if the sum amounted to less than two pounds. After the court ruled that the act conflicted with the right to trial by jury, petitions to the state House of Representatives demanded IMPEACHMENT of the judges. The house, by a 3–1 majority, voted that the act was constitutional, but the judges stood by their initial decision or reaffirmed it in another case. Following the failure of a motion to impeach the judges, the house capitulated and repealed the Ten Pound Act.

LEONARD W. LEVY
(1986)

## TENTH AMENDMENT

Adopted in 1791 as part of the BILL OF RIGHTS, the Tenth Amendment declares that "powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people." This language was an attempt to satisfy the public that the new constitution would not make a reality of that most repeated of Anti-Federalist fears: a completely centralized or "consolidated" government. But while the Tenth Amendment reminded Congress that its concerns were limited, the Constitution envisioned the effective exercise of national power, as the NECESSARY AND PROPER CLAUSE and the SUPREMACY CLAUSE indicated. The inevitable question was to be: what happens when Congress's responsibilities require measures the states say are beyond Congress's powers? JOHN MARSHALL attempted the Supreme Court's first answer to this question in MCCULLOCH V. MARYLAND (1819). *McCulloch* is best interpreted as advancing the following propositions: by granting and enumerating powers, the Constitution envisions the pursuit of a limited number of ends (see ENUMERATED POWERS); the framers did not and could not have enumerated all the legislative means appropriate to achieving constitutional ends in changing historical circumstances; Congress can select appropriate means to authorized national ends without regard for state prerogatives; the states, by contrast, cannot enact measures conflicting with lawful congressional policies.

To reach these conclusions Marshall observed that in drafting the Tenth Amendment the First Congress had

refused to limit national powers to those "expressly granted," as the ARTICLES OF CONFEDERATION had done, and that a STRICT CONSTRUCTION of national powers would defeat the vital purposes for which the Constitution had been established. By rejecting a rigid line between state and national powers *McCulloch* opened the way to the future assumption of state responsibilities by the national government as needed to achieve national ends. Critics charged that Marshall would consolidate all power in the national government by permitting unlimited means to an ostensibly limited number of national ends. Marshall defended his theory by insisting that judges should invalidate pretextual congressional acts, that is, congressional acts cloaked in the commerce power and other national powers but actually aimed at state concerns, not at the free flow of commerce or other authorized national ends. The Court did not always conform to this view of *McCulloch* in upholding the expansions of national power in the twentieth century. The SOCIAL SECURITY ACT, the FAIR LABOR STANDARDS ACT, and the CIVIL RIGHTS ACT of 1964 were good faith exercises of national power because they were plausible as means to the nation's economic health or the ends of the Civil War amendments. The same cannot be said for the MANN ACT, the Little Lindbergh Act, and other uses of national power for POLICE POWER purposes. (See GENERAL WELFARE CLAUSE.)

From the late 1840s to the late 1930s judges unfriendly either to national power or to government generally lapsed into a static conception of state-federal powers that exempted "state instrumentalities" from federal taxation (see INTERGOVERNMENTAL IMMUNITIES) and removed aspects of the nation's economic life (such as labor relations and other incidents of manufacturing) from Congress's reach. (See COMMERCE CLAUSE.) Scholars have imputed a theory of DUAL FEDERALISM to many of the decisions of this period because the Court seemed to say that the RESERVED POWERS of the states constituted a line Congress could not cross in exercising its admitted powers. The most infamous of dual federalist decisions, HAMMER V. DAGENHART (1918), prevented Congress from using its power over INTERSTATE COMMERCE to combat child labor, a practice then considered reserved to state control. After the Depression changed attitudes toward federal power, the Court all but eliminated the tax immunity doctrine, leaving only hypothetical protection from federal taxes that might interfere with "essential state functions," as might a federal tax on a statehouse. And in the landmark case of UNITED STATES V. DARBY (1941) the Court overruled *Hammer*, holding that Congress, regardless of its underlying purposes, could stop any goods from moving in interstate commerce, even though they were produced in conformity to state policies toward child labor and other conditions of manufacturing. For the *Darby* majority Justice HARLAN FISKE STONE said that the Tenth Amendment declared the "truism" that Congress could only exercise granted powers but that it had no effect on the question of what powers had actually been granted. Stone thus returned the Court to Marshall's view that Congress could disregard state prerogatives in the pursuit of what it saw as the nation's economic health in changing circumstances. But by disavowing judicial inquiries into underlying legislative purposes, Stone rejected the view that judges should invalidate pretextual uses of power—the essence of Marshall's defense of *McCulloch* as a decision compatible with the concept of a national government with limited concerns. Time had run out on this concept by the mid-1940s as Congress had advanced far in the use of its commerce, taxing, and spending powers for purposes of admitted state concern. (See NATIONAL POLICE POWER.)

Such was the general picture in the postwar constitutional law of state-federal power until a surprise decision in 1976 invalidated federal wage and hour standards for state employees. A plurality opinion in NATIONAL LEAGUE OF CITIES V. USERY (1976) likened STATES' RIGHTS "regarding the conduct of integral governmental functions" to the rights of individuals protected by the Bill of Rights. Here was an even clearer statement of dual federalism than *Hammer*, and critics charged that this radical departure from *McCulloch* threatened federal standards in areas such as CIVIL RIGHTS and environmental protection. But after evading extension of *Usery* for a decade the Court overruled *Usery* in GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985), on the theory that representation of state governmental interests in Congress, as opposed to judicial vindication of states' rights, is the constitutionally preferred way to protect state prerogatives. *Garcia* thus abandoned *Usery* without returning to the theory of *McCulloch*.

Beyond fluctuations in judicial doctrine one can attribute the decline of the Tenth Amendment to the social and economic interdependencies of an industrial society and an enhanced public commitment to minority and other fundamental rights with which states' rights historically clashed.

SOTIRIOS A. BARBER
(1986)

Bibliography

CORWIN, EDWARD S. 1950 The Passing of Dual Federalism. *Virginia Law Review* 36:1–24.

FLAX, KAREN H. 1983 In the Wake of National League of Cities v. Usery: A "Derelict" Makes Waves. *South Carolina Law Review* 34:649–686.

WECHSLER, HERBERT 1954 The Political Safeguards of Federalism: The Role of the States in the Composition and Se-

lection of the National Government. *Columbia Law Review* 54:543–560.

## TENURE OF OFFICE ACT
14 Stat. 430 (1867)

After a complete political rupture between President ANDREW JOHNSON and congressional Republicans over RECONSTRUCTION policy, Congress enacted the Tenure of Office Act in March 1867, providing that all officials of the executive branch, except cabinet officers whose appointment had required Senate confirmation, would hold office until their successors had likewise been confirmed. Cabinet officers were to hold office only during the term of the president appointing them plus one month. The act also provided for interim appointments while the SENATE was not in session.

In February 1868, President Johnson removed Secretary of War EDWIN M. STANTON, who was hostile to his Reconstruction policies, and appointed General Lorenzo Thomas in his place. The House promptly voted to impeach Johnson. Though Republicans sought to remove him from office because of his stubborn obstruction of their Reconstruction program, debates in his Senate trial turned on the constitutionality of the statute. The President's counsel maintained that it was unconstitutional as an interference with the president's removal power, a prerogative distinct from the appointive power. The Senate could not muster the two-thirds vote necessary for conviction. Congress repealed the act in 1887.

WILLIAM M. WIECEK
(1986)

(SEE ALSO: *Appointing and Removal Power, Presidential.*)

Bibliography

BENEDICT, MICHAEL LES 1973 *The Impeachment and Trial of Andrew Johnson.* New York: Norton.

## TERM
(Supreme Court)

As prescribed by congressional statute, the Supreme Court holds a regular annual term of court, beginning on the first Monday in October. The term usually concludes in late June or early July of the following year. The Court is also authorized to hold special terms outside the normal October terms but does so only infrequently, in urgent circumstances (EX PARTE QUIRIN, 1942, German saboteurs convicted by military commission; O'BRIEN V. BROWN, 1972, seating of delegates to Democratic National Convention).

Although Congress manipulated the Court's terms to postpone decision of MARBURY V. MADISON (1803) for nearly a year, modern times have seen no similar stratagems.

KENNETH L. KARST
(1986)

## *TERMINIELLO v. CHICAGO*
337 U.S. 1 (1949)

Terminiello was convicted of disorderly conduct after a meeting in a private hall outside of which a thousand persons violently protested his anti-Semitic, antiblack, and anticommunist harangue. The Court reversed because the jury had been instructed that it might convict on a finding that Terminiello's speech "invite[d] dispute." This instruction failed to require a finding of CLEAR AND PRESENT DANGER of violence. *Terminiello* frequently is coupled with FEINER V. NEW YORK (1951) as illustrations of the HOSTILE AUDIENCE problem.

MARTIN SHAPIRO
(1986)

## TERM LIMITS

After the 1994 elections, twenty-two states had acted to limit the terms of office of their federal legislators. Term limits supporters hope to rid Congress of professional politicians because they believe that such lawmakers inevitably act in ways contrary to the public interest. They seek to replace the professionals with amateurs who have little experience in politics but a great deal of experience as ordinary citizens. The democratic theories prompting support for term limits are diverse. Some advocates argue that lawmakers will become more responsive to the demands of the electorate. Others contend that term limits will insulate lawmakers from reelection pressures and allow them to fulfill a Madisonian vision of representative democracy. All believe that this reform will eliminate unseemly close relationships between elected officials and special INTEREST GROUPS.

Some analysts are skeptical that term limits will result in positive change. For example, a study of the political opportunities that remain open to term-limited lawmakers suggests that political careers will remain possible, although a careerist will be forced to adopt a strategy of "progressive" political ambition by moving periodically to a new political job. Even those who enter the legislature intending to leave after a short time will often decide to pursue longer political careers so that they can continue to benefit from the skills they have developed as lawmakers. Once legislators have developed the human capital to perform

political functions, they may find the benefits of holding similar office are greater than the benefits of pursuing unrelated careers.

Some critics object to term limits because they will deprive legislatures of their most experienced members, thereby reducing Congress's ability to pass controversial or complex LEGISLATION. Reduced legislator effectiveness also may shift the balance of power between the branches of government. In the federal system, bureaucrats will represent a source of expertise for congressional amateurs, strengthening the executive branch relative to Congress. Similarly, term-limited politicians may rely more heavily on staff or on lobbyists. Finally, some opponents argue that interest groups will continue to influence representatives disproportionately by giving campaign money either to them or to POLITICAL PARTIES, and that term limits will provide special interests with an even more powerful tool for influence: post-service jobs for term-limited representatives.

At the same time that voters adopted term limits on federal legislators, they also voted in most cases to reelect incumbents. Einer Elhauge argues that this seeming inconsistency in voter behavior disappears when one understands the collective action problems facing voters. "Incumbents . . . have more seniority than challengers, and this seniority gives them more legislative clout. Any individual district that ousts its incumbent is thus penalized by a smaller share of legislative power and governmental benefits unless the other districts also oust their incumbents." Voters might prefer the ideological views of a challenger, but they will continue to vote for the incumbent who has more power in an institution like Congress that is organized according to seniority. On balance, voters will choose the more influential representative, who can send constituents a greater share of benefits. If, however, voters can be sure that no district can vote for incumbents because of term limits, the penalty of electing a challenger is greatly reduced.

As the debate about state-imposed term limits on federal lawmakers heated up, the Supreme Court declared them to be unconstitutional in *U.S. Term Limits, Inc. v. Thornton* (1995). The petitioner challenged a popularly enacted amendment to the Arkansas state constitution that prohibited the name of an otherwise eligible candidate for Congress from appearing on the ballot if the candidate had already served three terms in the U.S. HOUSE OF REPRESENTATIVES or two terms in the U.S. SENATE. The Court applied the reasoning of POWELL V. MCCORMACK (1969) where it had held that Congress lacked the power to impose qualifications for federal legislators other than those set forth in Article I, section 5. State-imposed qualifications similarly undermine the "fundamental principle of our representative democracy" identified in *Powell*—the idea that "the people should choose whom they please to govern them."

The dissent by Justice CLARENCE THOMAS found the Court's use of democratic principles "ironic" because the majority invalidated a provision that 60 percent of voters in a statewide election had supported. Moreover, he stated, "the authority to narrow the field of candidates . . . may be part and parcel of the right to elect Members of Congress. That is, the right to choose may include the right to winnow." The restriction on incumbents might actually increase the electorate's choices by leveling the political playing field and improving the chances that a challenger could mount a successful campaign for office. "The voters of Arkansas evidently believe that incumbents would not enjoy such overwhelming success if electoral contests were truly fair" and the advantages incumbents enjoy (such as greater name recognition) were balanced by the handicap of running as a write-in candidate.

The dissent contended that the Constitution's silence concerning the ability of states to add to the constitutional qualifications meant that the power was reserved to them under the TENTH AMENDMENT. The majority's notion of reserved powers was different. Relying on Justice JOSEPH STORY's treatise on constitutional law, the Court determined that the only powers reserved to the states under the Tenth Amendment were those that they had possessed before the Constitution was ratified and that they had retained. The states did not have an "original power" to appoint a national official; thus, the power to set qualifications for such offices cannot be a reserved power. Furthermore, the majority's reading of the history of the drafting and ratification of the Constitution as well as early congressional practice convinced it that "the Qualifications Clauses were intended to preclude the States from exercising [the power to adopt qualifications] and to fix as exclusive" the constitutional qualifications.

Importantly, the Arkansas amendment was phrased as a BALLOT ACCESS provision. Long-time incumbents could run for federal office but only as write-in candidates. The Court held that this phrasing was "an indirect attempt to accomplish what the Constitution prohibits [the state] from accomplishing directly." Because the state provision had the "avowed purpose and obvious effect" of evading the qualifications clauses, it was unconstitutional.

The majority acknowledged the intensity and importance of the debate concerning the merits of term limits, a debate that began at the time of ratification, when some argued in favor of a rotation requirement so that lawmakers would be forced to return to private life occasionally. Noting that a constitutional amendment had imposed term limits on the presidency, the Court concluded that such a "fundamental change in the constitutional framework" must come through Article V's AMENDING PROCE-

DURES. Interest groups supporting legislative term limits at the federal level have responded to that challenge. For example, some states have tried to increase the pressure on federal legislators to propose a constitutional amendment by requiring that the election ballot reflect a candidate's opposition to term limits through designations like "Disregarded Voters' Instructions on Term Limits." Challenges to these "scarlet letter" amendments have been successful, with courts holding that the designations interfere with the deliberative process or violate candidates' First Amendment rights.

Term limitations are common in state and local government. Nearly half of the states place limitations on state legislators; forty states limit the number of terms of their governors; and many local officials face term limits. State term limits on legislators have generally been upheld. In the leading case, *Legislature of the State of California v. Eu* (1991), the California Supreme Court balanced the interests of incumbents to stay in office and of voters to have the choice of reelecting them against the state's interest in ending the advantage of incumbency. The court found that voters have no FUNDAMENTAL RIGHT to vote for a particular candidate and that the state's interest in structuring its own government was considerable. In some states, term limits have very little effect on the political dynamics because legislators did not tend to serve for long periods of time before the limitations were imposed. In states like California, however, where legislatures were full of career politicians, term limits have caused significant, and sometimes complete, turnover, helped bring to power new leaders, and may have affected the ability of legislators to pass controversial or significant laws. Such states are just beginning to feel the impact of limitations; with more experience over the next few years, researchers will be able to draw firmer conclusions based on empirical evidence about the consequences of legislative term limitations.

ELIZABETH GARRETT
(2000)

(SEE ALSO: *Initiative; Referendum.*)

Bibliography

ELHAUGE, EINER 1997 Are Term Limits Undemocratic? *University of Chicago Law Review* 64:83–201.

GARRETT, ELIZABETH 1996 Term Limitations and the Myth of the Citizen-Legislator. *Cornell Law Review* 81:623–697.

GROFMAN, BERNARD, ed. 1996 *Legislative Term Limits: Public Choice Perspectives.* Boston: Kluwer Academic Publishers.

## *TERRETT v. TAYLOR*
### 9 Cranch 43 (1815)

This was the first case and one of the very few in which the Supreme Court relied exclusively upon the concept of a HIGHER LAW as the sole basis for holding a state act unconstitutional. After adopting THOMAS JEFFERSON's statute of religious liberty, which separated church and state in Virginia, the legislature confiscated certain Episcopal glebe lands and sold them, using the proceeds for charity. The lands in question having been donated to the church by private persons, no contract and therefore no CONTRACT CLAUSE issue existed. Justice JOSEPH STORY for the Court held the confiscation act void, offering as grounds: "we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the constitution. . . ." Story did not mention *which* letter. Usually the Court applied the DOCTRINE OF VESTED RIGHTS in a way that absorbed the higher law within express provisions of the Constitution.

LEONARD W. LEVY
(1986)

## TERRITORIAL COURT

From the beginning the United States has held TERRITORIES outside the existing states. Some territories have been destined for statehood, others for independence, and still others for "permanent" territorial status. (See COMMONWEALTH STATUS.) Early in our history Congress established courts to serve the territories, but it did not give their judges the life tenure and salary guarantees demanded by Article III for judges of CONSTITUTIONAL COURTS. The constitutional status of these territorial courts was thus uncertain.

Chief Justice John Marshall sought to resolve the uncertainty in AMERICAN INSURANCE CO. V. CANTER (1828) by inventing a new category called LEGISLATIVE COURTS. Such a court, Marshall said, is not created under Article III, which provides for the establishment of constitutional courts to exercise the JUDICIAL POWER of the United States. Rather it is created by Congress in carrying out its general legislative powers under Article I, including the power to provide for the government of the territories. Although the case at hand was one of ADMIRALTY AND MARITIME JURISDICTION, plainly within the federal judicial power, the fact that it arose in a territory made it appropriate for disposition by such a "legislative" territorial court. The result made good sense in a territory (Florida) that was to become a state; upon statehood, most of the work of the territorial courts would be taken over by the state courts, and there would be no place for a large body of life-tenured judges in the new federal courts. Furthermore, independence from the President and Congress receded in importance in a territorial government that had essentially the same power as a state to discard the principle of SEPARATION OF POWERS.

Today legislative courts continue to serve in territories such as Guam and the Virgin Islands. In the Commonwealth of PUERTO RICO, Congress has created a dual court system matching that of the DISTRICT OF COLUMBIA: one set of constitutional courts, operating wholly within the terms of Article III, and one set of commonwealth courts roughly equivalent to state courts.

KENNETH L. KARST
(1986)

Bibliography

WRIGHT, CHARLES ALAN 1983 *The Law of Federal Courts*, 4th ed. Pages 14–15, 40–42, 49, 139–140. St. Paul, Minn.: West Publishing Co.

## TERRITORIES OF THE UNITED STATES

The United States has five permanent territories. PUERTO RICO, in the Caribbean, and Guam, in the Western Pacific, were acquired as a result of the Spanish-American War in 1899. American Samoa, the only U.S. TERRITORY south of the equator, was ceded to the United States by the *matai* (the chiefs) of the islands in 1900 and 1904. The U.S. Virgin Islands, in the Caribbean east of Puerto Rico, were purchased from Denmark in 1917. The people of what is now the Commonwealth of the Northern Mariana Islands (CNMI), formerly a part of the Trust Territory of the Pacific Islands, voted in a 1976 plebiscite to become a part of the United States. Residents of each of the territories, except American Samoa, enjoy United States CITIZENSHIP at birth. Residents of American Samoa are United States nationals at birth, and may obtain immediate United States citizenship upon establishing a domicile in a U.S. state (which they, along with other territorials, have an absolute right to do). Official and unofficial REFERENDA indicate that large majorities in each of the territories favor continued affiliation with the United States.

The United States has had territories from its inception. The Northwest Territory was a part of the nation when the Constitution was ratified. That the Framers of the Constitution contemplated the existence of nonstate territories is demonstrated by Article IV, Section 3, Clause 2, commonly called the "territorial clause." It provides, "The Congress Shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

In 1826, Chief Justice JOHN MARSHALL held, in *American Insurance Co. v. 356 Bales of Cotton* (David Canter, claimant), that Congress, acting under this clause, could treat territories differently from states and could create courts in territories that combine the functions of Article III federal courts and state courts.

So far as the rest of the Constitution is concerned, early cases seemed to follow the "ex proprio vigore" (by its own force) DOCTRINE, which was summed up in the phrase "the Constitution follows the flag." In the INSULAR CASES (1901) (especially *Downes v. Bidwell*), the Supreme Court moved toward the "incorporation doctrine," which was clearly accepted law by the time of *Balzac v. Porto Rico* (1922). Under the incorporation doctrine, the Constitution is not fully applicable in a territory unless that territory has been "incorporated into and made a part of the United States." (Modern examples of incorporation are Alaska and Hawai'i.) Although Congress has granted U.S. citizenship to the residents of most of the territories, none of the current territories are deemed to be incorporated.

The Supreme Court has not OVERRULED the "incorporation" doctrine, but lower courts have considered it modified by decisions such as REID V. COVERT (1957), which held that the Sixth Amendment right to TRIAL BY JURY applied to a civilian on a U.S. Air Force base in Great Britain. At least two federal CIRCUIT COURTS—in *King v. Morton* (1975) and *Wabol v. Villacrusis* (1992)— have adopted a rule of construction which holds that in any given case there is a presumption that the Constitution applies. However, that presumption can be rebutted by proof that a particular application is "impractical" (i.e., that it would not work because of cultural differences) or that it would be "anomalous" (i.e., that it would be destructive of the indigenous culture).

In addition to the distinction between incorporated and unincorporated territories, there is a distinction between organized and unorganized territories. An organized territory has an organic act, an act of Congress that establishes its local government. An unorganized territory was traditionally governed under the authority of the President of the United States. Today, American Samoa is the only territory with a substantial indigenous population that is "unorganized." However, American Samoa has some protection for its local self-government in that federal law now provides that no changes can be made in the Samoan constitution without the approval of the U.S. Congress. Thus the distinction between organized and unorganized territories has become less significant.

Puerto Rico and the CNMI are designated "commonwealths." The principal identifying characteristic of a commonwealth is that the organic act is in the form of a covenant or compact between the U.S. government and the people of the territory. In general, Congress has respected these agreements. However, the courts have held that Congress, acting under the territorial clause, can enact valid LEGISLATION that is inconsistent with the covenants.

The United States is in a relationship of "free association" with the Federated States of Micronesia, the Re-

public of the Marshall Islands, and the Republic of Palau. These island nations, along with what is now the CNMI, were formerly the Trust Territory of the Pacific Islands, for which the United States was trustee. The relationship between the United States and these islands is close. The U.S. government is pledged to defend these nations as if they were part of the United States, and has a veto over any action of any of their governments if the United States considers such action inconsistent with its obligation to defend them. Nevertheless, the three are recognized as sovereign and independent nations by the UNITED NATIONS, and hence the U.S. Constitution has no application to them (except perhaps as to U.S. government officials acting in their official capacities there).

STANLEY K. LAUGHLIN, JR.
(2000)

Bibliography

LAUGHLIN, STANLEY K. 1995 *The Law of United States Territories and Affiliated Jurisdictions* (with 1997 supplement). New York: Lawyers Cooperative-West Group.

## TERRITORY

At the time of independence several states had extensive claims to territory on the western frontier. A dispute over whether such territories were to be administered by the claimant states or by and for the United States long delayed ratification of the ARTICLES OF CONFEDERATION. In 1780 Congress passed a resolution urging the states to cede their claims to the United States. The resolution contained three promises which became the basic principles of American CONSTITUTIONALISM as extended to the territories: that the territories would be "disposed of for the common benefit of the United States"; that they would be "settled and formed into distinct republican states"; and that they would eventually "become members of the federal union and have the same rights of SOVEREIGNTY, freedom, and independence as the other states." After the cession was complete and the western boundary was settled by the Treaty of Paris (1783), Congress embodied these three principles in measures for the temporary government of the territories: the ORDINANCE OF 1784 and the NORTHWEST ORDINANCE OF 1787. The same principles were reaffirmed by the CONSTITUTIONAL CONVENTION OF 1787. Although some delegates advocated maintaining the western lands as a federal colony to be exploited and governed permanently by the existing states, the Constitution provided for the admission of new states on an equal basis with the original states.

The first acquisition of territory beyond the original borders of the nation was the LOUISIANA PURCHASE. After brief debate about the constitutional propriety of such territorial expansion, Congress proceeded to organize the Louisiana Territory following the model of the Northwest Ordinance. Exploration, purchase, and cession, as well as the conquests of the Mexican War, resulted in further territorial expansion.

Congress's power to make rules and regulations for the territories derives from the second clause of Article IV, section 3. In the first important case on territories to be decided by the Supreme Court, AMERICAN INSURANCE COMPANY V. CANTER (1828), Chief Justice JOHN MARSHALL suggested that the power to govern the territories was also implied in the power to acquire them through the use of the TREATY POWER or the WAR POWERS. He added that, whatever its source, Congress's power over the territories was plenary, whether exercised directly or through a local legislature, and extended even to creation of TERRITORIAL COURTS with JURISDICTION beyond the JUDICIAL POWER of the United States.

In the early nineteenth century the question of SLAVERY IN THE TERRITORIES divided the country and sparked new controversy over the constitutional status of territories. Southerners maintained that the federal government held the territories in trust for the states and that Congress could not properly prohibit slavery in them, while northern Whigs such as ABRAHAM LINCOLN maintained that the territories were national possessions and failure to prohibit slavery in them would constitute a national endorsement of the institution. STEPHEN A. DOUGLAS proposed to avoid the issue by leaving it to a vote of the settlers in each territory. Congress sought to allay sectional contention in the MISSOURI COMPROMISE by permitting slavery in one part of the Louisiana Purchase while prohibiting it in the rest. In the COMPROMISE OF 1850, Douglas's formula (which he called POPULAR SOVEREIGNTY) was adopted for the territory acquired in the Mexican War (except California). In DRED SCOTT V. SANDFORD (1857) the Supreme Court held that Congress did not have the power to exclude slavery from the territories. The CIVIL WAR, by eliminating the slavery issue, ended the sectional dispute over the status of territories.

By 1869 American territorial acquisition on the mainland of North America was complete. A new debate about the status of territories began when, at the end of the nineteenth century, the United States started to acquire overseas possessions, not a part of the continent and apparently not destined for statehood. The place of this "colonial empire" in the constitutional system was a subject of political dispute in the 1900 elections; but it was not resolved until the Supreme Court decided the INSULAR CASES. In these cases the Court formulated the doctrine of INCORPORATION OF TERRITORIES, according to which territorial possessions do not become part of the United

States until Congress, by some positive action, makes them so.

Territories may be either incorporated or unincorporated, and either organized or unorganized. The former refers to the degree of constitutional protection enjoyed by inhabitants and to Congress's ultimate intention to confer statehood or not; the latter refers to the provision Congress has made for government of the territory. There are now no incorporated territories, but there are both organized and unorganized unincorporated territories. In 1934 the special status of "commonwealth" was created for the Philippines, which became independent after WORLD WAR II; PUERTO RICO and the Northern Marianas currently have COMMONWEALTH STATUS and enjoy virtually complete internal self-government. After World War II the United States accepted a mandate over the Trust Territory of the Pacific Islands. Authority over that territory was exercised by virtue of the UNITED NATIONS CHARTER until the trusteeship ended in 1981.

DENNIS J. MAHONEY
(1986)

Bibliography

BLOOM, JOHN PORTER, ed. 1973 *The American Territorial System.* Athens: Ohio University Press.

LIEBOWITZ, A. H. 1979 United States Federalism: States and Territories. *American University Law Review* 28:449–482.

PERKINS, WHITNEY T. 1962 *Denial of Empire.* Leyden, Netherlands: A. W. Sythoff.

## TERRORISM CONTROL AND THE CONSTITUTION

Terrorism inspires fear, politically charged rhetoric, and, too often, official overreaction. Much like Communism in the 1950s, terrorism today raises a number of constitutional issues. One reason it does so is that it is an inevitably politically loaded term of art, used more often to divide our enemies from our friends that to describe a particular form of conduct. Thus, in the 1980s the U.S. State Department routinely labeled the African National Congress and the Irish Republican Army as terrorist organizations, but did not assign that term to the Nicaraguan Contras or the Afghanistan Mujahedin, organizations that engaged in similar military tactics to further their insurrections, but whose battles the United States supported.

The most common definition of terrorism—the use of force against noncombatants in a manner designed to instill fear for political ends—would apply to virtually any bombing of an urban or residential area, and thus would cover the military activities of most nations that have been at war, including the United States. Under U.S. IMMIGRATION law, "terrorist activity" is defined even more broadly, to encompass any unlawful use of a firearm to endanger person or PROPERTY (except for personal monetary gain), a definition that would encompass injuries inflicted in a lovers' quarrel. Because of its almost limitless applicability, the term is almost always used selectively; when that selectivity is enacted into law, serious constitutional questions under the FIRST AMENDMENT are implicated.

Government responses to terrorism thus far have raised two principal constitutional issues: (1) the extent to which those who associate with or support terrorist organizations may be punished; and (2) the extent to which the threat of terrorism justifies departures from DUE PROCESS.

As with Communism, the fear associated with terrorism has induced governments to act not only against those who actually engage in terrorism, but also against those who are merely associated in some way with groups that engage in terrorism. For example, the U.S. government has sought to expel and deny visas to foreign citizens for associating with so-called terrorist organizations, and has criminalized the provision of material support to such organizations, even where the support is intended to further (and in fact furthers) only the groups' wholly nonviolent and lawful activities.

These efforts repeat the excesses of MCCARTHYISM. The anticommunist laws of the McCarthy Era presumed that anyone working with or assisting the Communists was guilty of the Communist Party's illegal ends, even if the individual cooperated only for legal purposes, such as LABOR organizing or CIVIL RIGHTS activism. The injustices of that experiment with guilt by association led the Supreme Court to rule that where the government seeks to hold someone accountable for her connection to a group, it must prove that the individual specifically intended to further the group's unlawful ends. The requirement of "specific intent" distinguishes individual culpability from associational guilt.

Under the ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, however, persons who support the wholly lawful ends of designated groups face prison sentences. Under the law, the U.S. Secretary of State may designate any foreign group that uses unlawful force as "terrorist," and it then becomes a crime, punishable by ten years in prison, to support that group's lawful activities. The Secretary's designation is for all practical purposes unreviewable. If this law had been in place in the 1980s, the thousands of Americans who supported the lawful anti-apartheid work of the African National Congress in South Africa would have faced ten-year prison sentences. Congress justified the law on the theory that any support for a terrorist organization will free up resources that the organization can use for terrorist ends, but if that argument were accepted, guilt by association would be permissible

wherever an organization had engaged in any unlawful activity, whether it be the African National Congress or the Democratic Party.

The terrorist threat has also induced the federal government to dispense with the most basic requisite of due process—the right to confront evidence against oneself. Citing NATIONAL SECURITY concerns, the 1996 antiterrorism law authorizes the government to expel immigrants accused of connections to terrorism on the basis of secret evidence that neither the immigrant nor his attorney would ever see. The government may submit evidence behind closed doors to a judge, and may make secret arguments and take secret appeals outside the immigrant's presence. The government has not yet invoked this particular provision, but in other immigration settings the government has increasingly used secret evidence against immigrants.

The only two federal courts to address the issue in the past decade have ruled that the use of secret evidence against immigrants residing here violates due process. As Justice FELIX FRANKFURTER said in a related setting, "Secrecy is not congenial to truth-seeking. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."

The government argues that secret evidence procedures are needed because it sometimes has classified information that it would like to use without having to reveal its source. But the government faces this situation every day in criminal courts across the country, where it must choose between revealing the source and not using the evidence. This rule applies in criminal court no matter how heinous the crime, no matter how sensitive the information, and no matter how serious the threat to national security. There simply is no other way in a fair system of justice, because it is impossible to defend oneself against secret evidence.

Proponents of the measures described above warn that America's open society makes it especially vulnerable to terrorist attack. But one of the principal benefits of an open society with substantial political freedoms is that it provides peaceful ways to express opposition and to work for political change. Repressive governments tend to breed rather than contain violence. Empowering government to blacklist disfavored groups and use secret evidence plays into the hands of zealots; it feeds their paranoia. At the same time, it is likely to drive extremists underground, where they will be more difficult to track. The United States has until now been relatively free of terrorism, and arguably that is because of, not in spite of, our political freedoms.

DAVID COLE
(2000)

Bibliography

DEMPSEY, JAMES X. and COLE, DAVID 1999 *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security.* Los Angeles: First Amendment Foundation.

HEYMANN, PHILIP B. 1998 *Terrorism and America: A Commonsense Strategy for a Democratic Society.* Cambridge, Mass.: MIT Press.

## *TERRY v. ADAMS*
345 U.S. 461 (1953)

With confidence, we can call *Terry* the last of the series of "Texas primary cases" beginning with NIXON V. HERNDON (1927). The decision is also a clear modern example of the "public function" strand of STATE ACTION doctrine. In a Texas county, a group called the Jaybird Democratic Association conducted pre-PRIMARY ELECTIONS, from which black voters were excluded. The winners of these elections consistently won both the Democratic primaries and the general elections. The Supreme Court held that black plaintiffs were entitled to a DECLARATORY JUDGMENT that their exclusion from the Jaybird election amounted to state action in violation of the FIFTEENTH AMENDMENT. There was no MAJORITY OPINION. Three Justices said that the state could not constitutionally permit a racial exclusion from the only election that mattered in the county. The electoral process was inescapably public, subject to the Fifteenth Amendment's commands. Four other Justices said the Jaybirds were an auxiliary of the local Democratic party organization, and thus included within the doctrine of SMITH V. ALLWRIGHT (1944). Justice FELIX FRANKFURTER found state action in the participation of state election officials as voters in the Jaybird election. Justice SHERMAN MINTON dissented, calling the Jaybirds nothing but a "pressure group."

KENNETH L. KARST
(1986)

## *TERRY v. OHIO*
392 U.S. 1 (1968)
## *SIBRON v. NEW YORK*
392 U.S. 40 (1968)

*Terry v. Ohio* marked the first attempt by the Supreme Court to deal with a pervasive type of police conduct known as STOP AND FRISK. Where an individual's suspicious conduct gives rise to an apprehension of danger, but PROBABLE CAUSE for an arrest does not exist, it is common police practice to stop the suspect for questioning and to pat down (frisk) his outer clothing in a search for concealed weapons. While this may be an effective way to deter

crime it is susceptible to abuse. Though far less intrusive on privacy and security than formal arrest and thorough search, a stop and, especially, a frisk can be a frightening and humiliating experience.

It was this consideration that led the Court in *Terry* to hold that stop and frisk is subject to limitations established by the FOURTH AMENDMENT. Chief Justice EARL WARREN declared that the forcible restraint of an individual, however temporary, is a "seizure," and a frisk, though limited in scope, is a "search," within the meaning of the Fourth Amendment. However, the imperative of sound law enforcement, as well as the need of the police to assure their own safety and that of the citizenry, requires that the amendment's reasonableness clause—rather than the probable cause standard of the warrant clause—should govern this type of police conduct. Balancing individual freedom against community needs, Warren concluded that if "a reasonably prudent [officer] in the circumstances [is] warranted in the belief that his safety or that of others [is] in danger," he is, under the reasonableness clause, entitled to stop and frisk the suspect in order to avoid the threatened harm. Any weapon thus seized is admissible at trial. However, in *Terry*'s companion case, *Sibron v. New York* the Court held that where the motivation for the frisk is the discovery of EVIDENCE rather than the confiscation of weapons, the evidence seized is inadmissible.

The officer's apprehension of danger must be based on articulable facts rather than mere hunch; the difference between probable cause and the less strict standard authorized in *Terry* is a difference between reasonable belief and reasonable suspicion. Paradoxically, the case both significantly limited and momentously expanded the police search power: it placed "on the street" police-citizen encounters under the protection of the Fourth Amendment even as it allowed, for the first time, a standard less exacting than probable cause to meet the requirement of reasonableness for searches made in EXIGENT CIRCUMSTANCES.

JACOB W. LANDYNSKI
(1986)

## TEST CASE

Whenever a unit of government, or an interest in the private sector, wants a favorable constitutional DECISION on a point in question, a test case is often organized to gain a ruling from the Supreme Court. The Court has not defined the term, and need not, as there is no judicial criterion for "test case" under the CASES AND CONTROVERSIES clause of Article III. Scholarship on the judicial process provides the best understanding of the term as a strategy employed by different interests, for differing ends. FLETCHER V. PECK (1810) showed that systematically plotting a test case, so framing it as to elicit particular answers based on prediction concerning how the Justices are likely to respond, and then using the judicial decision for political advantage is not a strategy unique to recent CIVIL RIGHTS cases but a durable aspect of constitutional litigation since the early years of the Republic.

Organizers of test cases sometimes look upon victory in the Supreme Court as a secondary goal. For example, the arguments of the National Woman Suffrage Association that women, as citizens, were already enfranchised by terms of the FOURTEENTH AMENDMENT breathed new life into the organization through publicity of test cases. MINOR V. HAPPERSETT (1875) and two other cases failed but they produced national news.

The Department of Justice took little initiative in enforcing new legislation in the nineteenth century, largely because Congress intended enforcement to come through complaints of individuals entitled to sue violators. An example of this is the CIVIL RIGHTS CASES (1883). Individuals challenged about a hundred violations of the CIVIL RIGHTS ACT OF 1875. Eventually, five came to the Supreme Court as test cases, where they were unsuccessfully argued by the SOLICITOR GENERAL. These test cases were not managed; they simply happened as individual blacks complained.

Business interests may bring test cases to prevent enforcement of new regulatory legislation, as in 1917 when David Clark for the Southern Cotton Manufacturers sought to invalidate the KEATING-OWEN ACT which prohibited shipment in INTERSTATE COMMERCE of designated products manufactured in plants employing children. Stephen Wood reports the advice of a Philadelphia lawyer to the manufacturers:

> No legal proceeding will lie until the [Keating-Owen] bill is in operation. Some action must be taken under some provision of the bill so that a real and not a moot question is raised. A court, in order to pass upon any phase of it, must have before it an actual case, and if the measure is to be contested, the case should not only be carefully selected in order that the constitutional principle desired to be raised may be clearly presented, but I believe then that when the issue is raised, if possible, a judicial district should be selected in which the judge is a man of known courage. This is no case to try before a weak character [1968: 87–88].

Clark proceeded to raise money, select suitable counsel, identify Judge James Edmund Boyd as courageous, and locate cotton companies in the western district of North Carolina ready to cooperate. After searching for the "perfect combination of factors," Clark worked up four possible test cases to submit to the attorneys in New York. There the *Dagenhart* case was selected as the best. The

Dagenharts, a father and two minor sons, and the company "were mere figureheads" whom Clark persuaded to set up the case. First, the company posted notices that under-age employees would be dismissed when the Keating-Owen law went into effect. The attorneys employed by Clark then prepared a complaint for Dagenhart asserting that this threat would deprive him of his VESTED RIGHTS, because he was entitled to the services of his minor sons and the compensation arising from their labors. By moving before the law became effective, the cotton manufacturers put the Department of Justice on the defensive, trapped within the confines of their test case. Judge Boyd, who ruled the Keating-Owen Act invalid under the FIFTH and TENTH AMENDMENTS, was upheld by the Supreme Court in 1918 in HAMMER V. DAGENHART.

Success in managing constitutional litigation requires understanding of both substantive law and litigation practice. Following enactment of the WAGNER ACT in 1935, lawyers for the National Labor Relations Board combined these talents in impressive fashion, gaining a stunning triumph from the Supreme Court in *NLRB v. Jones & Laughlin* in March 1937. (See WAGNER ACT CASES.) Against hostile attacks by the National Lawyers' Committee of the American Liberty League, NLRB lawyers carefully developed cases running the gamut of size and type to make the first tests establishing wide congressional power to regulate labor practices in businesses affecting interstate commerce.

NLRB lawyers, even before the Wagner Act was signed, had designed a "master plan" envisioning test cases built around COMMERCE CLAUSE issues stressing the type of industry, characteristics of individual businesses, the degree of actual or threatened obstruction of commerce, and the type of unfair labor practices charged. In Peter Irons's words, this "master plan" gave clear directions for "sifting through their massive case loads in search of ideal test cases, charting a clear path from the picket line to the Supreme Court." The NLRB staff functioned as legal craftsmen, "as much meticulous technicians as partisan advocates," who "winnowed and selected cases with care; scrutinized records with a fine-tooth comb; chose courts with a shopper's discriminating eye; wrote briefs to draw the issues narrowly and precisely."

Although numerous voluntary associations with litigation programs, such as the Anti-Saloon League of America, the National Consumers' League, and the AMERICAN JEWISH CONGRESS, have sponsored test cases as a way of influencing public policy, the organizations most noted for this practice have been the National Association for the Advancement of Colored People (NAACP), formed in 1909, and the NAACP LEGAL DEFENSE FUND, Inc., organized in 1939.

Modern test cases by associations, public interest law firms, or lawyers working *pro bono publico* are often cast as CLASS ACTIONS under the FEDERAL RULES OF CIVIL PROCEDURE. Although they may attack conditions that are widespread, these cases rest on particularized explorations of fact, often through discovery and expert testimony. In attacking school segregation in the five cases styled as BROWN V. BOARD OF EDUCATION, the NAACP sought to develop full factual records, building upon the experience of THURGOOD MARSHALL and others as counsel in the earlier white primary cases and racial RESTRICTIVE COVENANT cases. Widespread test cases will continue because both government and private counsel can approach the Supreme Court only by representing particular parties with particular concrete claims.

CLEMENT E. VOSE
(1986)

Bibliography

CORTNER, RICHARD C. 1964 *The Wagner Act Cases.* Pages 106–141. Knoxville: University of Tennessee Press.

FREUND, PAUL A. 1951 *On Understanding the Supreme Court.* Pages 77–116. Boston: Little, Brown.

IRONS, PETER 1982 *The New Deal Lawyers.* Pages 234–289. Princeton, N.J.: Princeton University Press.

KLUGER, RICHARD 1975 *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality.* Pages 256–540. New York: Vintage Books.

VOSE, CLEMENT E. 1959 Caucasians Only: The Supreme Court, the Naacp, and the Restrictive Covenant Cases. Pages 50–73, 151–176. Berkeley: University of California Press.

WOOD, STEPHEN B. 1968 *Constitutional Politics in the Progressive Era.* Pages 81–110. Chicago: University of Chicago Press.

## TESTIMONIAL AND NONTESTIMONIAL COMPULSION

In the 1960s the Supreme Court ruled that the RIGHT AGAINST SELF-INCRIMINATION was not infringed when police compelled the driver of an accident vehicle to give a blood sample for analysis of its alcoholic content, compelled a suspect in a LINEUP to utter before witnesses the words used by a bank robber, and compelled another suspected bank robber to submit a sample of his handwriting for comparison with a note given to a bankteller. In the 1970s the Court held that the right against self-incrimination did not protect a person from the compulsory production of business and tax records in the possession of his or her accountant or lawyer, and did not protect a person from a court order to make a voice recording for a federal GRAND JURY seeking to identify a criminal by the sound of a voice on a legally intercepted telephone conversation. All these decisions shared a thorny problem: if a person is com-

pelled to provide the state with evidence to incriminate him, is he necessarily a witness against himself in the Fifth Amendment sense?

The Court prefers a different formulation: does nontestimonial compulsion force a person to be a witness against himself criminally? The consistent answer has been "no," even if there was a testimonial dimension to the forced admissions. If that testimonial dimension loomed too large, the Court loosened its distinction between testimonial and nontestimonial compulsion and relied on some other distinction. Thus, when the driver of a vehicle involved in an accident was required by state law to stop and identify himself, though doing so subjected him to criminal penalties, the Court saw no Fifth Amendment issue, only a regulation promoting the satisfaction of civil liabilities. Similarly, when a lawyer or accountant was forced to turn over a client's incriminating records, the client had not been compelled at all, though he paid the criminal penalty and lost the chance to make a Fifth Amendment plea. And when the police during the course of a lawful search found incriminating business records, the records were introduced in evidence, although they could not have been subpoenaed directly from the businessman. In these cases, where the compulsion was communicative or testimonial in character, the Court inconsistently discoursed on the need to decide as it did in order to avoid a decision against the introduction of nontestimonial evidence that had been compelled.

More often the Court relied on a supposed distinction between forcing a person to furnish evidence against himself of a testimonial nature and forcing him to be the source of nontestimonial or physical evidence against himself, usually derived from his body. The word "witness" implies giving testimony based on one's knowledge, not displaying one's person. Compulsion to reveal information other than one's physical characteristics is generally unconstitutional, especially if the information is derived directly from the party himself, though not if the police lawfully find his records. The Court's distinction between testimonial and nontestimonial compulsion is obviously a bit porous. That distinction derived from the realistic need to prevent the Fifth Amendment from disabling police identifications based on fingerprints, handwriting, photographs, blood samples, voice exemplars, and lineups. The distinction had its origin in a passing remark by Justice OLIVER WENDELL HOLMES in 1910, when he dismissed as "an extravagant extension of the Fifth Amendment" the claim that requiring a defendant to model a shirt for identification purposes breached the right against self-incrimination.

The trouble with the distinction, apart from the Court's own inconsistency, is that physical or identifying evidence can be communicative in character, as when a laboratory report, the result of a drunken driver's blood sample, is introduced against him, or when a grand jury indicts one whose voice identifies him as the culprit. Whether by writing, speaking, or giving blood involuntarily, an individual has been compelled to furnish evidence against himself. That he has not been forced to "testify" is a distinction less persuasive than semantically catchy. However, some such distinction seems necessary. The fundamental meaning of the Fifth Amendment is that a person need not be the unwilling instrument of his own undoing and that the state must find its own evidence against him without his involuntary cooperation, and a literal reading of the amendment would prevent the police from fingerprinting a suspect or making him stand in a lineup for identification purposes. Thus the Court must find ways around the amendment.

A minority of Justices have sought a compromise by permitting as nontestimonial that evidence which does not require volition or affirmative cooperation; thus, the lineup and taking blood, photographs, and fingerprints require merely passive conduct. If, however, incriminating evidence can be secured only by the active volition of one asked to repeat certain words, model clothing, or give a handwriting sample, these minority Justices would sustain a Fifth Amendment plea. But their distinction between volitional and passive acts is as hairsplitting as the majority's between testimonial and nontestimonial compulsion. Anyone overpowered to give a sample of his blood would scarcely think he affirmatively cooperated.

The Justices in the majority also make unreal distinctions, as between the physical properties of one's voice and the testimonial content of what he says: "This is a stickup" communicates more than pitch and resonance. If the right against self-incrimination protects a defendant at his trial from having to speak up for the benefit of witnesses, why does it not protect him in the grand jury room, the interrogation room, or the lineup?

The distinction between testimonial and nontestimonial compulsion derives from the needs of law enforcement and seems to be a permanent addition to constitutional law. The Court, which can reach whatever results it desires, probably will add to the roster of nontestimonial evidence that can be compelled and will narrow the meaning of testimonial compulsion or find exceptions to it.

LEONARD W. LEVY
(1986)

Bibliography

BAUER, W. J. 1977 Formalism, Legal Realism, & Constitutionally Protected Privacy under the Fourth & Fifth Amendments. *Harvard Law Review* 90:945–991.

KOONTZ, HAL and STODEL, JEFFREY 1973 The Scope of Testimonial Immunity under the Fifth: *Kastigar v. United States. Loyola* (Los Angeles) *Law Review* 6:350–383.

## TESTIMONIAL IMMUNITY

See: Immunity Grant

## TEST OATH CASES

*Cummings v. Missouri*
4 Wallace 277 (1867)
*Ex Parte Garland*
4 Wallace 333 (1867)

Historically test oaths were weapons to inflict penalties and punishments on obnoxious minorities and were enemies of freedom of political and religious thought. A test or LOYALTY OATH should not be confused with an oath of allegiance, which is a promissory oath by which one swears to support the government and, if assuming office, to discharge its duties faithfully. An oath of allegiance concerns future conduct. A test oath is retroactive and purgative, because it is a disclaimer of specific beliefs, associations, and behavior deemed criminal or disloyal.

Missouri by its constitution prescribed a series of disavowals of belief and past conduct in the form of oaths to be taken by all voters, jurors, state officers, clergymen, lawyers, teachers, and corporation officers. All must swear as a condition of voting, holding office, teaching, and the like, that they had never been in armed hostility to the United States, had never by word or deed manifested adherence to the enemies of the country or desired their victory, had never been connected with any organization inimical to the United States, and had never been a Southern sympathizer. Anyone teaching, preaching, voting, or engaging in any of the specified activities without first taking the oaths was subject to fine and imprisonment. Cummings, a Roman Catholic priest, carried on his religious duties without taking the oath and was convicted.

The test oath prescribed by Congress was a disclaimer of having served the Confederacy and applied only to federal officials until extended in 1865 to members of the federal bar. It could be construed as a wartime qualification for office until it was extended to peacetime and to members of the federal bar. Until then it was not passed to inflict punishment for past offenses. The oath disqualified AUGUSTUS H. GARLAND, who had spent the war as a member of the Confederate Congress, from resuming his prewar practice before the Supreme Court, although he had been given a presidential pardon.

The Supreme Court, Justice STEPHEN J. FIELD writing for a bare majority, held unconstitutional both the Missouri requirement of a test oath and the federal requirement of 1865. Field reasoned that each violated the bans against EX POST FACTO laws and BILLS OF ATTAINDER. To conclude that they constituted ex post facto laws, Field had to demonstrate that they retroactively imposed punishment for acts not criminal when committed. Missouri's dragnet covered not only hostile acts against the government but "words, desires, and sympathies also," and some of the acts were not even blameworthy. The federal statute reached acts that under certain circumstances might not have been offenses, such as assisting persons in armed hostility to the United States, serving in innocuous positions in the South, or reluctantly obeying the existing order. Persons who were incapable of truthfully taking the oaths suffered disabilities that constituted punishment, such as the deprivation of civil and political rights, disqualifications from office and from the pursuit of lawful professions, and, in the case of Garland, disbarment. Justice SAMUEL F. MILLER for the dissenters replied that an ex post facto law punished only in a criminal sense by imposing fines and imprisonment, not civil disabilities.

Field described a bill of attainder as a legislative act that inflicts punishment without a judicial trial. Attainders, he insisted, could be directed against whole classes, not just named individuals, and might inflict punishments conditionally, as in these cases. Cummings the priest and Garland the lawyer were presumed guilty until they removed that presumption by their expurgatory oaths; if it was not removed, they faced the punishment of being deprived of their professions without trial and conviction. Miller could see no attainder because the required oaths designated no criminal by name or description, declared no guilt, and inflicted neither sentence nor punishment. He saw merely a qualification for office, a position that Field savaged. Miller accurately argued, however, that Field stretched the conventional meanings of ex post facto laws and bills of attainder to cover the cases before the Court. For that reason, these decisions are today considered triumphs for CIVIL LIBERTIES; in their time, however, they exposed the Court to accusations of sympathizing with the Confederate cause, opposing Reconstruction, and assisting enemies of the Union.

LEONARD W. LEVY
(1986)

Bibliography

FAIRMAN, CHARLES 1939 *Mr. Justice Miller and the Supreme Court.* Pages 129–136. Cambridge, Mass.: Harvard University Press.

SWISHER, CARL BRENT (1930) 1963 *Stephen J. Field: Craftsman of the Law.* Pages 138–154. Hamden, Conn.: Archon Books.

## *TEXAS v. BROWN*
460 U.S. 730 (1983)

This case is significant for Justice WILLIAM H. REHNQUIST'S exposition of the scope and applicability of the PLAIN VIEW DOCTRINE, which had emerged in COOLIDGE V. NEW HAMPSHIRE (1971) as an exception to the warrant requirement for a SEARCH AND SEIZURE. According to Rehnquist, the answer to the question whether property in plain view may be seized depends on the lawfulness of the intrusion that allows the police to see that property. Plain view therefore provides the basis for seizure if an officer's access to the object has a prior FOURTH AMENDMENT justification. The police may seize a suspicious object if they are engaged in a lawful activity; they do not have to know at once that the object inadvertently exposed to their sight is EVIDENCE of a crime. Reasonable suspicion on PROBABLE CAUSE is sufficient even if the property seized was not immediately apparent as evidence of crime. No Justice dissented in this case, but Rehnquist spoke for a mere plurality, and a mere plurality had announced the plain view doctrine in *Coolidge.* Accordingly, judicial controversy about the doctrine will continue, as will controversy about its application to particular facts.

LEONARD W. LEVY
(1986)

## *TEXAS v. JOHNSON*

See: Flag Desecration

## *TEXAS v. WHITE*
7 Wallace 700 (1869)

In 1867 the Court accepted ORIGINAL JURISDICTION of *Texas v. White* because one party was a state (Article III, section 2). So doing, the Court raised again, as in EX PARTE MILLIGAN (1866) and the TEST OATH cases, a possibility of judicial intervention into military reconstruction. Some decision on the state-status question was needed. Democrats insisted that the nation was not empowered to answer the state-status question and that the South's states, like bottom-weighted dolls, had sprung up, fully restored, with prevailing race hierarchies intact, in the wake of Union Army advances. Almost all Republicans assumed that the South's states, by attempting to secede, had twisted themselves out of their proper federal relations; that the Constitution (Article IV, section 4) imposed a duty on the nation to guarantee every state a REPUBLICAN FORM OF GOVERNMENT; and that the nation also possessed temporary "grasp of war" dominion over the defeated states.

Post-Appomattox Texas wished to recover possession of state bonds that secessionist Texas had sold. Counsel for bond buyers argued in 1869, when the Supreme Court heard *Texas v. White,* that Texas was always a state and the sales were valid. Special counsel for Texas, Unionist George Washington Paschal, author of a recent treatise on the Constitution, insisted that though Texas remained a state, its acts adverse to federal responsibilities invalidated the bond sales; the state should recover the bonds.

Chief Justice SALMON P. CHASE, for the majority of the Court, accepted and restated Paschal's position. The Constitution "looks to an indestructible Union composed of indestructible States." SECESSION was void. Texas's acts supportive of rebellion, performed while seceded, were unsupportable.

Justices ROBERT C. GRIER, SAMUEL F. MILLER, and NOAH SWAYNE insisted that Texas was as much out of the Union in 1869 as in 1861. Therefore the original jurisdiction clause of the Constitution did not apply.

Both the majority and the minority stressed Congress's primacy in defining a state's status. Chase, though insisting that he was not pronouncing upon military reconstruction, by implication approved its constitutional bases and reinforced Court pretensions to at least an equal share, if not more, in implementation of policy, through its review authority.

HAROLD M. HYMAN
(1986)

## TEXAS ANNEXATION

See: Annexation of Texas

## *TEXAS MONTHLY, INC. v. BULLOCK*
489 U.S. 1 (1989)

The decision in this case affected the fifteen states whose statutes on sales and use taxes exempted religious publications. Texas exempted periodicals that consisted entirely of writings promulgating a religious faith. Voting 6–3, the Court held the act unconstitutional. Justice BYRON R. WHITE believed that because the statute discriminated on the basis of the content of publication, it violated the free-press clause. A bare majority believed that the statute violated the ESTABLISHMENT CLAUSE. Justice WILLIAM J. BRENNAN, for the Court, concluded that the statute failed to serve the secular purpose of maintaining the SEPARATION OF CHURCH AND STATE, but rather, had the purpose of advancing the

religious mission of a particular faith. The exemption of the religious periodical in effect subsidized its teachings at the expense of taxpayers who were not exempt from the tax.

Brennan went further, thereby losing Justices HARRY A. BLACKMUN and SANDRA DAY O'CONNOR, when he also declared the statute violative of the free-exercise clause. Blackmun and O'Connor preferred to rest exclusively on the establishment clause, believing that Brennan's free-exercise argument subordinated RELIGIOUS LIBERTY to the establishment clause. In dissent, Justlices ANTONIN SCALIA, WILLIAM H. REHNQUIST, and ANTHONY M. KENNEDY protested that the Court had mangled its own PRECEDENTS and diminished the free-exercies clause. Their views, however would have altered the constitutional law of the subject.

LEONARD W. LEVY
(1992)

## TEXTUALISM

Textualism denotes the opinion that whenever possible, judges resolving questions of constitutional law should rely primarily on the language of the Constitution itself. The text should guide decision and the text itself, rather than other considerations such as ORIGINAL INTENT, ratifier intent, history, principles inferred from the text, altered circumstances, judicial readings of societal values, or even judicial precedents. Justice OWEN J. ROBERTS, for the Court in UNITED STATES V. BUTLER (1936), manifested an allegiance to textualism when he declared that the constitutionality of a contested statute should be squared against the appropriate language of the text to see if they match.

This view of the best way to determine constitutionality was the most prevalent one at the time of the making of the Constitution. THOMAS JEFFERSON and ALEXANDER HAMILTON differed on the question as to whether an act of Congress incorporating a bank was constitutional; but, as Hamilton said, Jefferson would agree "that whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual established rules of construction." Hamilton accurately stated the truth of the matter to the founding generation.

Despite near unanimity on the propriety of interpreting the Constitution according to established rules of construction, the Framers arrived at contradictory results when applying those rules to numerous important constitutional issues. Their belief in textualism did not prevent them from dividing on the removal power, the power to charter a corporation, the power to declare neutrality, the scope of executive powers, the power to enact excise and use taxes without apportioning them on population, the power of a treaty to obligate the House to appropriate money, the power of JUDICIAL REVIEW, the power to deport aliens, the power to pass an act against SEDITIOUS LIBEL, the power to abolish judicial offices of life tenure, and the jurisdiction of the Supreme Court to decide suits against states without their consent or to issue writs of MANDAMUS against executive officers.

Rules of constitutional construction by which to construe the text are comparable to those of statutory construction, which a current federal judge, Frank Easterbrook, called "a total jumble." For every rule, as Karl Llewellyn demonstrated in his *Common Law Tradition*, "there is an equal and opposite rule." A master commentator, Justice JOSEPH STORY, discoursed on the rules of construction for some sixty pages in his *Commentaries on the Constitution*, yet he failed completely to convince his Jacksonian colleagues on the bench. Rules of construction in effect free, rather than fetter, judicial discretion. The fact remains, however, that textualism should be the bedrock of judicial review; as Story said, "Nothing but the text itself was adopted by the whole people." Whenever the fair or plain meaning of the Constitution can be ascertained, it should guide judgment.

The problem is that the Constitution is a brief elliptical document framed by common lawyers trained to believe that a few comprehensive and expansive principles supplementing a structural description will be infinitely adaptable and will provide guides that can serve to answer virtually any question that might arise on a case-to-case basis. In some crucial respects, the Constitution resembles Martin Chuzzlewit's grandnephew, who, Dickens said, "had no more than the first idea and sketchy notion of a face." The Framers had a genius for studied imprecision and calculated ambiguity. They relied on many general terms because common lawyers expressed themselves that way out of conviction and because politics required compromise, and compromise required ambiguity and vagueness.

The text, even with twenty-six amendments that have been added in two centuries, is scarcely 7,000 words long, and only about two percent of the verbiage possesses any significance in constitutional law. Almost without exception, these are the purposefully or unavoidably general terms: commerce among the states, OBLIGATION OF CONTRACTS, NECESSARY AND PROPER, BILLS OF CREDIT, REPUBLICAN FORM OF GOVERNMENT, DUE PROCESS OF LAW, PRIVILEGES AND IMMUNITIES, direct taxes, GENERAL WELFARE, liberty, UNREASONABLE SEARCHES, EQUAL PROTECTION, and the like.

For the most part, the CONSTITUTIONAL CONVENTION OF 1787 designed the Constitution with the utmost diligence and attention to detail. The Convention usually chose words with craft and craftsmanship. This is the reason that constitutional law does not involve the bulk of the Con-

stitution. It does not have to be litigated because it is clear and understandable. Consequently, the vagueness and ambiguities found in the Constitution were probably deliberate. In THE FEDERALIST #37, JAMES MADISON replied to the Anti-Federalist criticism that the Constitution's lack of clarity on some matters threatened the states and liberty. Obscure and equivocal language was inevitable, he contended, but its meaning would be clarified in time by adjudications. ABRAHAM BALDWIN of Georgia, another Framer, declared that some subjects were left "a little ambiguous and uncertain" for political reasons and would be settled in time by practice or by amendments. Some textual language remained open-ended to avoid giving offense by explicitness. Treaty powers, judicial powers, and rival powers of legislation fell into these categories, according to Baldwin.

Ambiguity and vagueness arise in the nonstructural sections. Ambiguous words permit different understandings; vague words do not allow for much understanding. The exceptions clause of Article III is a good example of ambiguity. It might mean that Congress may switch APPELLATE JURISDICTION to ORIGINAL JURISDICTION, thereby adding to the Supreme Court's original jurisdiction, as counsel in MARBURY V. MADISON (1803) argued, or it might mean that the original jurisdiction of the Court is fixed, as JOHN MARSHALL held. If the exceptions clause means that Congress may make exceptions to the Court's jurisdiction by diminishing its appellate jurisdiction, how far can Congress go? And how can the Court exercise the jurisdiction specified in Article III as belonging to the JUDICIAL POWER OF THE UNITED STATES if it is dependent on Congress's will?

The text of Article I, section 8, poses problems too. Congress may pass no capitation or "other direct tax" unless apportioned among the states on the basis of population. Although the Framers probably regarded direct taxes as only taxes imposed on people per capita and on land, they did not say so. They left "other direct taxes" open to interpretation. Article I, section 8, on the tax power is all the more puzzling because it is not known whether the tax power connotes an equally expansive power to spend, and the meaning of the "general welfare" is equally mystifying. Constitutional government as the Framers understood it cannot survive a national power to legislate for the general welfare, nor can the federal system survive a national power authorized to spend for the general welfare, yet the text gives credibility to these views.

The term "in pursuance of" in Article VI (the SUPREMACY CLAUSE) is also ambiguous. Usually this term is taken to mean that in order for acts of Congress to be constitutional, they must be consistent with the Constitution. The "in pursuance of" clause is a mainstay of the argument that the Supreme Court may exercise judicial review over acts of Congress. Yet at the time of the framing, the text of the ARTICLES OF CONFEDERATION showed that "in pursuance of" meant "under authority of" or "done in prosecution of."

The EXECUTIVE POWER with which the President is endowed is ambiguous too. It is not known what is meant by the executive power, apart from an obligation to execute the laws faithfully. Moreover, the text indicates that the President can call on the armed forces to suppress rebellions or repel attacks, but not whether he can engage in military hostilities without either congressional support or a congressional DECLARATION OF WAR. In the case of EXECUTIVE AGREEMENTS, there is not even a vague provision of the Constitution to construe. Nothing in the document authorizes treaty-making by the President without the ADVICE AND CONSENT of the Senate. Nothing in the document authorizes the Congress to empower the President to make international agreements that have the force of the supreme law of the land or authorizes such agreements to have this force when both branches of Congress retroactively or subsequently approve of an international agreement made by the President on the President's own initiative. Nevertheless, Presidents have been making executive agreements with foreign nations throughout U.S. history and on major matters, without successful constitutional challenge. Moreover, the text of the Constitution does not provide for the device of the JOINT CONGRESSIONAL RESULTION. By this device, Congress has considerably augmented its powers in foreign affairs, as when it annexed Texas and then Hawaii to circumvent the requirement of a two-thirds vote of the Senate to approve treaties.

Three major provisions of the Constitution are among the vaguest: Congress has the power to regulate commerce among the states; neither the national government nor a state may take life, liberty, or property without due process of law; and no state may deny to any person the equal protection of the laws. These are the most litigated clauses in U.S. constitutional history because they are among the muddiest and most important.

Even the seemingly specific injunctions and provisions of the BILL OF RIGHTS are vague or ambiguous, offering little guidance for interpretation. A good example of such ambiguity is the term ESTABLISHMENT OF RELIGION in the FIRST AMENDMENT. James Madison, its author, mistakenly used the term interchangeably with "religious establishment," which denotes an institution of religion such as a church or sectarian school. "Religious establishment" carries no implication of government aid to religion or government involvement with it, as does "establishment of religion." When Madison misquoted the clause as if it outlawed religious establishment, he meant that the government had no authority to legislate on religion or its institutions. Nevertheless, the term itself has no self-

evident meaning. History supplies that meaning, and historians differ.

The term FREEDOM OF THE PRESS constitutes another ambiguity. In Anglo-American thought and law, it meant an exemption from PRIOR RESTRAINT; it did not exclude liability under the criminal law for seditious, obscene, or blasphemous LIBEL. In contrast, the Framers, who did not adopt or reject the definition of a free press under the COMMON LAW, knew only a rasping, corrosive, and licentious press. They did not likely use the term "freedom of the press" without intending to protect the freedom that in fact existed and that they knew. The text itself surely lacks clarity. It declares in absolute terms that Congress shall make no law abridging the freedom of speech or press, but the COPYRIGHT clause of the Constitution authorizes Congress to make laws that do abridge the freedom of speech and press of those who would infringe copyrights.

This same clause, in Article I, section 8, refers only to "authors and inventors," making a literal interpretation of it fail to protect artists, sculptors, composers, computer-software designers, television programmers, and many others who come under its protection. If only authors and inventors benefited from the clause, they could not even assign a copyright to others. The problem with the copyright clause is not that it is ambiguous or vague; it is utterly clear. But, it possesses inappropriate specificity and therefore cannot mean what it says.

The First Amendment exhibits the same problem. Assuming that its framers chose their language carefully, the fact that they failed to give adequate protection to the free exercise of religion must be confronted. The text declares that the freedom of the press may not be abridged, but by contrast, only says that freedom of religion may not be prohibited. This is a comparatively diminished protection because freedom of religion may be abridged in many ways without being prohibited. The same amendment also suffers from terminological exactitude: Congress shall make "no law" abridging freedom of the press. A reliance on textualism would mean that neither PORNOGRAPHY nor direct and successful verbal incitements to crime can be abridged. Yet the absolute of "no law" cannot apply to copyright laws, which can constitute abridgments.

The Fifth Amendment's self-incrimination clause cannot be taken literally either. If the text meant what it says, it meant little when framed because defendants then had no right to give sworn testimony for or against themselves. Moreover, the clause protected the right only in criminal cases, but the right existed in civil as well as criminal cases and in nonjudicial proceedings such as grand jury and legislative investigations. Finally, a person may be compelled to be a witness against himself or herself in noncriminal ways; at the time of the adoption of the Bill of Rights, the Fifth Amendment right protected persons from being forced to expose themselves to public infamy. In 1892, the Supreme Court acknowledged that the text does not mean what it says; the Court declared, "It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself."

Other examples of the text not meaning what it says appear in the Sixth Amendment, which enumerates a variety of RIGHTS OF THE CRIMINALLY ACCUSED available to them "in all criminal prosecutions." "All" is an absolute that admits of no exceptions. Yet the Framers did not intend to extend the right of TRIAL BY JURY to misdemeanants; persons accused of petty crimes were tried in a more summary manner than trial by jury. In this regard, the Sixth Amendment reinforced the provision in Article III, section 2: "The trial of all crimes, except in cases of impeachment, shall be by jury. . . ." "All crimes" here means merely all felonies; the exception for impeachments really extended to misdemeanors also. Misdemeanants are still not entitled to trial by jury unless they can be imprisoned for more than six months. The text misleads.

Similarly, the right to the assistance of counsel in all criminal prosecutions does not mean what it says: "In all criminal prosecutions, the accused . . . shall have the assistance of counsel." "Shall" conveys an imperative; but the amendment merely meant that one might have counsel if he or she could afford it. Not until 1932 did indigents receive the benefit of court-appointed counsel in capital cases in state courts; not until 1938 did all federal defendants receive the right to court-appointed counsel in any criminal prosecution. Juveniles have long been deprived of the right to trial by jury, and no one is entitled to be represented by counsel before a GRAND JURY, which initiates a criminal prosecution. Furthermore, the text does not mean what it says in the provision that in all criminal prosecutions the accused shall be confronted with the witnesses against them; the exceptions to this, in fact, are numerous.

The problem of inappropriate specificity appears in the DOUBLE JEOPARDY clause of the Fifth Amendment: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Here the Constitution neither means what it says, nor says what it means. It means "life or liberty," not "life or limb." The reference to "limb" is meaningless because we have long ceased to tear people apart or crop their ears. One cannot be put in jeopardy of loss of limb even if convicted by due process of law at a single trial. The double jeopardy clause implies, however, that a conviction can result in loss of limb. This would surely constitute a violation of the Eighth Amendment's guarantee against CRUEL AND UNUSUAL PUNISHMENT. The text also leads to a logical puzzle. Life may be taken

if one receives due process and is not exposed to double jeopardy. But if limb may not be taken, why may life be taken?

The SECOND AMENDMENT is both vague and ambiguous. Some think it upholds the collective right of state militias to bear arms, while others argue that it protects the right of individuals to bear arms. But this right existed only to maintain militias. If a standing army, even in peacetime, has succeeded militias, and if the armed forces provides weapons to those in the service, the reason for the right to bear arms may no longer be as apparent as it once was. "Arms" once meant a flintlock rifle. Does the right to bear arms include a right to bear a Saturday-night special, an assault rifle, or a bazooka?

Vagueness, not ambiguity, saturates the FOURTH AMENDMENT, which prohibits "unreasonable" SEARCH AND SEIZURE and provides that no warrants shall issue "but on probable cause." "Unreasonable" and "probable" rank high on any list of indefinite terms. It is possible, similarly, to parse every provision of the Bill of Rights and be bewildered by the meaning of the text. Terms such as SPEEDY TRIAL, JUST COMPENSATION, PUBLIC USE, "impartial jury," "excessive bail," "excessive fines," and "cruel and unusual" simply do not permit a constitutional jurisprudence to be based securely on textualism. To speak of STRICT CONSTRUCTION is faintly ridiculous given the imprecision of the provisions of the Bill of Rights and of the FOURTEENTH AMENDMENT. Ambiguity cannot be strictly construed. Strictly construing vagueness as well as inappropriately specific terms can equally lead to ludicrous, tragic, or unjust results.

The Constitution is, indeed, as Jefferson once said in exasperation, "a thing of wax that the Judiciary may twist and shape into any form they please." Unlike Humpty Dumpty, the Framers of the Constitution were unable to make words mean what they wanted them to mean. Perhaps they sensed that America would change beyond their grasp, and they did not think they could master the future. Perhaps they understood, with JAMES WILSON, that they were representatives "not merely of the present age, but of future times; not merely of the territory along the seacoast, but of regions immensely extended westward." This is the reason the Constitutional Convention accepted the advice of EDMUND RANDOLPH to keep the Constitution focused on "essential principles" so it can "be accomodated [*sic*] to times and events." The text is merely a point of departure; textualism as constitutional gospel is as impractical as original intent. Like original intent, however, textualism is entitled to serious attention, within its distinct limits, because Story was right: the people of the United States ratified the text, only the text, and it is the fundamental and supreme law of the land.

LEONARD W. LEVY
(1992)

Bibliography

LAYCOCK, DOUGLAS. 1984 Taking Constitutions Seriously: A Theory of Judicial Review. *Texas Law Review* 59:343–394.

LEVY, LEONARD W. 1988 *Original Intent and the Framers' Constitution.* New York: Macmillan.

SCHAUER, FREDERICK 1985 Easy Cases. *Southern California Law Review* 58:399–440.

TUSHNET, MARK V. 1985 A Note on the Revival of Textualism in Constitutional Theory. *Southern California Law Review* 58:683–700.

## THAYER, JAMES BRADLEY
(1831–1902)

American jurist, Harvard law professor, and author of a masterful treatise on EVIDENCE. Thayer is important in constitutional studies for his powerful advocacy of judicial self-restraint, or deference to legislation challenged as unconstitutional. He influenced Justices LOUIS D. BRANDEIS, FELIX FRANKFURTER, and OLIVER WENDELL HOLMES, and Judge LEARNED HAND.

Thayer invoked a supposedly established judicial rule which, recognizing that the Constitution admitted of different interpretations and allowed legislatures a vast range of permissible choice, required that all rational legislative choices be adjudged constitutional. Properly holding legislation unconstitutional only in cases clear beyond REASONABLE DOUBT, courts should not consider their own views on unconstitutionality, but should consider instead whether the legislature could reasonably have thought its actions constitutional. (See RATIONAL BASIS.)

Thayer regarded JUDICIAL REVIEW as a legitimate outgrowth of American experience and as a valuable conservative admixture in popular government. But he warned that this "outside" corrective threatened to curtail the people's political education. His strictures against JUDICIAL ACTIVISM were published just as the Supreme Court was embarking on a course of active defense of FREEDOM OF CONTRACT against ECONOMIC REGULATION. In a later era, when the Court's activism turned to personal liberties of another kind, Thayer's rule came under criticism: it was not an "established rule," but a policy preference; its reasonable doubt standard either would enfeeble judicial review or would be too flexible to restrain courts effectively; its applicability in Supreme Court review of state legislation was unclear; it was particularly inappropriate for legislation affecting specific BILL OF RIGHTS guarantees. Regrettably, Thayer himself had not adequately explored either the strengths and weaknesses of his rule or the broader underlying problem—how to square JUDICIAL REVIEW AND DEMOCRACY.

HOWARD E. DEAN
(1986)

Bibliography

THAYER, JAMES BRADLEY 1893 The Origin and Scope of the American Doctrine of Constitutional Law. *Harvard Law Review* 7:129–156.

## THEORIES OF THE UNION

Political unions are organizations of states possessing specific powers for carrying out purposes of mutual interest to constituent polities. Unions are formed by means of confederation or federation, and by definition are combinative or compound in nature rather than unitary or homogeneous. In American history the Union refers to the general structure of political authority created during the Revolution by the American people, acting through their colonial and state governments, for the pursuit of common purposes as an expression of their incipient nationality. Theories of the Union are explanations of the American state system, descriptive and normative in purpose, which have been formulated to guide political action and resolve controversies among the member states. Especially important in the period from 1789 to 1868, theories of the Union have been concerned with four principal issues: the origin and nature of statehood; the nature and extent of state powers; the origin, nature, and extent of the powers of the central government; and the manner of resolving conflicts between the states and the central authority.

Although intercolonial cooperation occurred intermittently before the Revolution, in an effective political sense the formation by the colonies in 1774 of an assembly to deal with imperial matters of common concern marked the beginning of the American Union. In 1776 this assembly, the CONTINENTAL CONGRESS, issued the DECLARATION OF INDEPENDENCE, proclaiming that the colonies "are, and of right ought to be, free and independent states." Yet the Declaration also referred to the people in the colonies as "one people," and to the colonies as "the United States of America." The practical effect was to announce the existence of a national Union comprising thirteen state governments and a central body, Congress, which, although not constituted as a government and incapable of legislating for individuals in the states, was more than merely the agent of the states. Although theory and principle to explain this new compound political organization were yet to be formulated, the fact of a division of SOVEREIGNTY characterized the American Union from the outset.

The Union thus existed as political reality before it was rationalized in a formal instrument of government, the ARTICLES OF CONFEDERATION (1781). Asserting that "[e]ach State retains its sovereignty, freedom and independence, and every Power, JURISDICTION, and right which is not by this confederation expressly delegated to the United States," the Articles conformed to the model of a league of autonomous states. However, the language of state sovereignty notwithstanding, the states were not perfect states. And Congress, although empowered only to make resolutions and recommendations rather than to make law, in matters submitted to its consideration acted as a real government. In practical effect the Union resembled the operation of the British empire, in which sovereignty had been divided between the colonial governments managing local affairs and the authority of Parliament regulating matters of general interest in the empire.

Theory of the Union was relevant to territorial problems of the 1780s, which raised the question of the origin and nature of statehood. The original colonies based their claim to statehood on their COLONIAL CHARTERS and the fact of succession to previously existing political establishments. This theory of the creation of states implied a fixed or determinate Union, and was useless to those people—either in existing states or outside them—who desired to form new states and join the Union. An alternative approach was to claim a revolutionary right of self-government; Vermont may be said to have employed this principle in its struggle to separate from New York and achieve statehood. A third method of state making was to form a political community and secure recognition from the other states. This technique was developed in the 1780s when Virginia and other states with extensive land claims, desiring to confirm their sovereignty, ceded some of their lands to Congress and secured in return approval of their claims and state boundaries. Implicit in these transactions was an expansive rather than static conception of the Union: although states might proclaim their sovereignty, the determination of statehood—the very existence of the states—depended on the sanction of the other states acting through Congress.

The CONSTITUTIONAL CONVENTION OF 1787 altered the nature and structure of the Union by creating a central government, capable of making law and regulating individuals, in place of the noncoercive authority of the Confederation. Precisely how much and in what ways the restructured Union differed from the Confederation was debated during the process of RATIFICATION OF THE CONSTITUTION. These debates gave rise to the classic theories of the Union expounded by statesmen of the early national period.

In providing for a government based on the SEPARATION OF POWERS and comprising a legislature elected in part by the people, the Framers of the Constitution applied republican principles to the problem of organizing the American Union. They did not, however, completely reject the essential principle of the Confederation, the idea that the states were the constituent power. This principle was retained in the provisions for equal state representation in

the Senate and for the contingency plan for electing the President in the House of Representatives, where each state was to have had one vote. The result, as JAMES MADISON wrote in THE FEDERALIST #39, was a government partly national and partly federal in respect of the source, operation, and extent of its powers; the constituent basis on which it was established; and the nature of the amending authority. Some of these functions embodied the idea that the American people as a single national community were the constituent power; others, the idea that the states as separate political communities were constituting the central government.

In contemporary usage the term "federal" referred to a confederation of sovereign states, and the word "national" to a unitary government operating directly on individuals. Accordingly, the Articles of Confederation were described as a federal government. But the supporters of the new government, combining elements of both a confederation and a unitary national government, called *it* a federal government. In doing so they gave a new definition to FEDERALISM as the division of sovereignty among a central government and separate state governments operating on the same population in the same area.

In the ratification controversy Federalists and Anti-Federalists combined arguments from history, the constitutional text, and political theory to fashion competing theories of the Union in pursuit of their divergent political goals. Denying that sovereignty could be divided, Anti-Federalists warned that the proposed central government would transform the Union into a consolidated state. The Federalists, in order to allay STATES' RIGHTS apprehensions, stressed the division of authority between the states and the central government and the ultimate sovereignty of the people. Although the Federalists glossed over conflicts that were bound to arise in a governmental system based on a division of sovereign authority, their constitutional theory confirmed the main tendencies in the operation of the American Union from its inception.

Perhaps the single most important formulation of Unionist theory was contained in the VIRGINIA AND KENTUCKY RESOLUTIONS of 1798–1799, written by JAMES MADISON and THOMAS JEFFERSON. Seeking a constitutionally legitimate way to prevent the enforcement of the ALIEN AND SEDITION ACTS, the Republican party leaders advanced the compact theory of the Union. On this theory were based all subsequent assertions of states' rights and state sovereignty, including those supporting SECESSION in 1861.

Jefferson and Madison argued that the Union was a compact made by the states, which as the constituent parties retained the right to judge whether the central government had violated the compact. Exercising this right by the accepted practices for implementing compacts, the states, according to Madison, could "interpose" their authority to stop unconstitutional acts of the central government. In the Kentucky Resolutions of 1799 Jefferson declared that a NULLIFICATION by the sovereign states of all unauthorized acts of the federal government was "the rightful remedy." The theory thus propounded held that the states created the Union; the federal government could exercise only delegated powers, not including regulation of speech and press, which were reserved to the states; and the states had authority to question the exercise of central authority and by implication to settle constitutional disputes over federal-state relations.

Whether Madison and Jefferson contemplated peaceful concerted action by the states, or single-state defiance of federal authority (possibly by force, as was later proposed in South Carolina), their action served as precedent and model for one of the basic strategies of constitutional politics throughout the antebellum period. From the standpoint of constitutional law the most significant feature of the compact theory was the proposition that the states had created the Constitution and the Union. The argument could mean any number of things depending on how a state was defined. A state could be considered to be the territory occupied by a political community, the governing institutions and officers of the community, or the people forming the community. In his report to the Virginia legislature in 1800, Madison used the third of these definitions to explain how the states, through the ratification process, had made the Constitution. On this theory, the TENTH AMENDMENT expressed the equivalence of state and people, reserving powers not delegated to the federal government "to the States respectively or to the people." A fixed feature of later states' rights and state sovereignty teaching, this popular conception of statehood enabled compact theorists to define the nation as self-governing political communities founded on common republican principles.

An alternative theory of the Union was propounded by the Federalist party. Federalists held that the Constitution and the Union had been made by the people of the United States, who as the constituent power had divided sovereignty between the states and the central government. The government of the United States possessed limited powers, but within its sphere of action it was supreme. Federalists, and their Whig political descendants in the 1830s, further reasoned that according to the original constitutional design conflicts in federal-state relations were to be resolved by the federal judiciary. In his debate with Robert Y. Hayne of South Carolina in 1830 on the nature of the Union, DANIEL WEBSTER said the judicial article and the SUPREMACY CLAUSE were the "key-stone of the arch" of Union. "With these," he declared, "it is a constitution; without them, it is a confederacy."

Distrusting localism, Federalists identified the nation with the central government, and theirs is often referred to as the nationalist theory of the Union. This reference is

misleading, however, insofar as it implies that the compact theory was not a valid expression of American nationality. Properly regarded, the Federalist-Whig doctrine is the central supremacy theory of the Union. Acknowledging divided sovereignty and the limited nature of federal authority, Federalists and Whigs recognized states' rights as essential to the Union. But, believing the nation could act only through the central government, they insisted on the supremacy of federal power when it conflicted with an otherwise legitimate state power. The supremacy clause of the Constitution was the positive expression of the principle of federal paramountcy that its proponents believed was intended to guide national development.

In refuting the compact theory, central supremacy theorists made the popular origins of the Union their most distinctive tenet. They insisted that the Constitution was not a compact made by the states but an instrument of government made by "the people of the United States." The meaning of this term is not self-evident. It might be taken to mean that the American people constituted and could act as a single political community. Webster seemed to have this conception in mind when in the debate with Hayne he argued that the Constitution "pronounces that it is established by the people of the United States in the aggregate," not by the states or even by the people of the several states. JOHN MARSHALL stated the popular-origins thesis more carefully in MCCULLOCH V. MARYLAND (1819). Marshall observed that the Constitution was "submitted to the people" for ratification, and they acted on it "by assembling in Convention." In a sense Marshall conceded the compact theorists' main point—that the Constitution had been ratified by the people acting as separate political communities. "It is true," he wrote, "they assembled in their several States." But he discounted the significance of this fact, adding: "and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act they act in their States." Thus the same facts on which the compact theorists based their conclusion that the Union was made by the states supported the central supremacy contention that the Union was made by the people of the United States.

From 1830 to 1860 theories of the Union continued to have political significance as Americans expanded territorially and struggled with the slavery question. Two variations of the compact theory were developed to protect slavery within the state system: DUAL FEDERALISM and the nullification theory of JOHN C. CALHOUN of South Carolina. Within the central supremacy theory, meanwhile, the idea of the Union as perpetual and indissoluble was elaborated.

Although formally accepting divided sovereignty, dual federalists in a practical sense sought to remove actual or potential central government restraints on state power, including the power to protect slavery. Insisting that the reserved powers of the states constituted a limitation on the federal government, they regarded the Tenth Amendment as a kind of supremacy clause for the states. Accordingly, in cases such as NEW YORK V. MILN (1837) the Supreme Court under Chief Justice ROGER B. TANEY, reversing the effect of Marshall's central supremacy unionism, held that state powers over matters of "police" had not been surrendered to federal authority.

Calhoun's doctrine of nullification, employed in South Carolina's fight against the tariff in 1832, was a more radical extension of the compact theory of the Union. Calhoun held that federal powers were granted in trust by the states, which he defined as the people exercising indivisible sovereignty in separate political communities. He thus rejected the principle of divided sovereignty. Picking up where Madison and Jefferson had left off, Calhoun sought to devise a constitutional means of obstructing unconstitutional acts of the central government. His ingenious, if ultimately perverse, solution was to transform the creative constituent power of the states, identified in the Article V amending power, into an instrument of negation. Calhoun reasoned that a state, acting in popular convention, might interpose its authority to nullify a federal measure. The states would then be consulted, and if three-fourths of them did not approve the objectionable measure it would be withdrawn. If, however, the states upheld the central government, the nullifying state could secede from the Union.

Placed on the defensive by the nullificationists, central supremacy advocates were moved to insist on the perpetuity of the Union. This idea was implicit in the very creation of the Constitution. The fact that the Articles of Confederation referred to the Union as "perpetual" did not prevent men from believing that a state might withdraw its membership; by the same token the omission from the Constitution of the language of perpetuity did not mean that the Framers considered the Union to be anything less than a permanent government. It is nevertheless significant that while the terms disunion and secession were employed in the early nineteenth century, not until the nullification crisis did central supremacy theorists like Webster and JOHN QUINCY ADAMS explicate the perpetuity idea. Their argument may be described as declaratory in nature. But it was not only Whig keepers of the central supremacy tradition but also Democrats who met the South Carolina challenge by asserting perpetual Unionism. In his Proclamation to South Carolina (1832) President ANDREW JACKSON condemned secession as unconstitutional and affirmed the Constitution as a binding obligation on the states.

Changing little as constitutional doctrine, the central supremacy theory of the Union formed part of a nationalist

ideology that emerged in the North in the pre-Civil War period. In contrast to the universalistic, democratic, and decentralized nationalism associated with the compact school, northern nationalism, based on New England Federalist sources and developed by Whig and Republican politicians, was historical, ethnic, cultural, and religious in nature. Whereas President GEORGE WASHINGTON in his Farewell Address had said it was the "unity of government which constitutes you one people," central supremacy theorists such as FRANCIS LIEBER turned the equation around by regarding the American people as forming a sovereign national community, from which emanated the Constitution and the Union. In this sectionally sponsored nationalism, the Union, without ceasing to be a means of securing liberty, became as well an end in itself: an organically rooted thing of absolute and intrinsic value.

Theories of the Union had a configurative as well as causative effect on the Civil War and Reconstruction. The existence of the compact theory—and the reiteration of this theory from 1798 to 1860 as the basis for states' rights, nullification, and disunionist demands—provided an arguably constitutional course of action for Southerners to follow in seceding from the Union in response to the antislavery threat. In the North the tradition of central supremacy constitutionalism was available to rationalize and sustain the Republican party's decision to resist secession. Pronouncing secession "the essence of anarchy," President ABRAHAM LINCOLN in 1861 affirmed the perpetuity of the Union, declared its primacy over the states, and asserted that "the States have their *status* in the Union, and they have no other *legal status.*" The war would be fought, Congress resolved in 1861, "to defend and maintain the supremacy of the Constitution and to preserve the Union, with all the dignity, equality, and rights of the several States unimpaired."

Applying central supremacy tenets, the United States government between 1861 and 1868 regarded the Union as unbroken in a constitutional sense. It denied any legal effect to secession, treated the rebellious states as disorganized communities, and adopted measures to form loyal state governments capable of resuming their place in the Union. Acknowledging at most that the seceded states were out of their proper practical relation with the Union, federal authorities were forced to consider the fundamental question in Unionist theory: the origin, nature, and meaning of statehood.

Was a state to be defined as territory, population, governmental institutions and officers, or political community? Federal reconstruction policy held that a state was a body of people constituting a political community whose existence was dependent on and qualified by the Union. Implicit in the history of the state system, this relationship was explicitly rationalized in Article IV, section 4, of the Constitution, which states: "The United States shall guarantee to every State in this Union a Republican Form of Government." In choosing the guarantee clause as a reconstruction basis, Congress rejected the idea that a state was mere territory, or population, or governmental institutions and officers whose acts of disloyalty could destroy the state and cause it to revert to a territorial condition, subject to the plenary power of Congress. The progression to statehood out of the territorial condition, if not a constitutional right enjoyed by the people as a political community, was at least irreversible.

Although compact theorists had long feared the transformation of the Union into a consolidated government, when political conditions in the 1860s were most favorable for this development, reconstruction policymakers evinced a concern for states' rights and divided sovereignty as essential to Unionism. The Supreme Court expressed this outlook in TEXAS V. WHITE (1869), confirming the congressional view of statehood as an irreversible condition. The Court declared that a "State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries." Without the states in the Union, the Court reasoned, there could be no such political body as the United States. The conclusion therefore followed that "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

The triumph of the central government in the Civil War signified the rejection of the compact theory of the Union as a framework for national development. Although aspects of the theory continued to be used in political and constitutional debate, it was repudiated in relation to the practical question that made it a vital element in antebellum politics: the mounting of single or concerted state resistance to central authority, including the possibility of secession. After the war secession was no longer a constitutionally conceivable or politically practical course of action. The central supremacy theory prevailed as the framework for constitutional development.

Although it is doubtful whether the American people, to use John Marshall's formulation, could in a constitutional sense be described as having been compounded into a single common mass as a result of the war, nevertheless in a political and ideological sense the idea of the people as a single national community, rather than as similar yet separate political communities, gained wider acceptance. Moreover, within the central supremacy theory the adoption of the THIRTEENTH, FOURTEENTH, and FIFTEENTH AMENDMENTS greatly altered federal-state relations. The

nature and extent of federal and state powers of course continued to be a major issue in constitutional law and politics. But the nature of statehood, the nature of the Union, and the propriety of federal resolution of conflicts in the operation of the state system were now settled issues. Theories of the Union, associated with fundamentally different conceptions of nationalism, ceased to be relevant to basic political choices as Americans entered the period of industrialization.

HERMAN BELZ
(1986)

Bibliography

ARIELI, YEHOSHUA 1966 *Individualism and Nationalism in American Ideology.* Baltimore: Penguin Books.

BENNETT, WALTER HARTWELL 1964 *American Theories of Federalism.* University: University of Alabama Press.

CARPENTER, JESSE T. 1930 *The South as a Conscious Minority 1789–1861: A Study in Political Thought.* New York: New York University Press.

DAVIS, S. RUFUS 1978 *The Federal Principle: A Journey through Time in Quest of Meaning.* Berkeley: University of California Press.

DIAMOND, MARTIN 1974 What the Framers Meant by Federalism. In R. A. Goldwin, ed., *A Nation of States: Essays on the American Federal System.* Chicago: Rand McNally.

ONUF, PETER S. 1983 *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775–1787.* Philadelphia: University of Pennsylvania Press.

STAMPP, KENNETH M. 1978 The Concept of a Perpetual Union. *Journal of American History* 65:5–33.

## THIRD AMENDMENT

Quartering of troops in private houses, except in cases of military necessity, has long been regarded as contrary to British political traditions. Illegal quartering figured in important controversies between the king and the people, and it was condemned in the PETITION OF RIGHT (1628) and the English BILL OF RIGHTS (1689).

The British government sent regular troops to America in 1765 to discourage resistance to parliamentary taxation. Parliament, in the Quartering Act, required that the soldiers be housed at the expense of the province to which they were sent, and provided that, if existing barracks were insufficient, private buildings would be commandeered for the purpose. This measure was one of the specific grievances cited in the DECLARATION OF INDEPENDENCE.

During the debates over RATIFICATION OF THE CONSTITUTION several state conventions suggested a prohibition against quartering of troops. It was among JAMES MADISON's original proposals for the BILL OF RIGHTS, and the First Congress approved it unanimously and virtually without change. The amendment affirms the sanctity of private property in our constitutional system: the refusal of an individual property owner is an absolute bar to quartering in peacetime. The amendment represents a principle so fundamental that no act of Congress has ever been seriously challenged under it.

DENNIS J. MAHONEY
(1986)

## THIRD-PARTY CONSENT

When someone invites the police into his or her home, the police need neither PROBABLE CAUSE nor a warrant to accept the invitation. Acting on one person's invitation or consent to search, however, the police may uncover evidence that incriminates some other person. For example, a spouse or child may consent to a search that uncovers evidence against another spouse or a parent; a landlord may permit a search that reveals evidence useful in prosecuting the landlord's tenant; a common carrier may authorize the police to open a package shipped by a suspected drug dealer; or a school principal may authorize the police to search a student's locker. In litigation under the FOURTH AMENDMENT, the issues raised by cases of this sort have been treated under the rubric "third-party consent." Courts have held that the consent of someone other than the person against whom evidence is offered can sometimes justify seizure of this evidence despite the lack of probable cause or a SEARCH WARRANT.

No unitary theory explains when third-party consent justifies a search under the Fourth Amendment. In some cases, courts have invoked concepts of agency. In an extreme and unlikely case, the agency might be express; a person might execute a document authorizing an agent to admit the police to his or her premises at the agent's unfettered discretion. In these circumstances, a court could easily conclude that the principal himself or herself had authorized the search. Agency principles appear to justify both holdings that a manager of business premises may consent to a search that uncovers evidence against the owner of the business and rulings that the consent of a secretary or maintenance worker to a search of areas not open to casual visitors is ordinarily insufficient.

Courts also have upheld third-party consent searches that could not have been justified on agency principles. For example, a husband may assault his wife, and the wife may admit the police to the home that she owns with her husband to reveal the location of the assault weapon. In this case, the husband may be present and may inform the police that his wife has no authority to waive his Fourth Amendment rights. When the wife admits the police, however, she does not act as the agent of her husband, and

she does not waive his rights. Instead, she exercises her own PROPERTY RIGHTS. As in other cases of third-party consent, the husband's Fourth Amendment rights are limited by the authority of others to control premises in which he otherwise would have a reasonable expectation of privacy. Whether the authority of others is grounded in agency, PROPERTY, license, contract, or something else does not matter.

The general rule articulated in *United States v. Matlock* (1974) is that when two or more people have joint access to or control over premises that the police wish to search, "any of the co-inhabitants has the right to permit inspection." The Supreme Court cautioned that "the authority which justifies third-party consent does not rest upon the law of property, with its attendant historical and legal refinements." In practice, the consenting party's authority is determined largely by general cultural understandings, and as in other situations in which courts consider expectations of privacy, these understandings may be ad hoc, changing, and difficult to assess.

For example, an inhabitant ordinarily may invite a guest to enter the house that he or she shares with another, but the inhabitant may not invite his or her guest surreptitiously to observe the inhabitant's housemate in the shower. Even sole ownership of a house does not confer a privilege to invade the privacy of a guest or to permit others to do so. Similarly, a lease may give a landlord authority to inspect the leased premises, but the landlord would exceed his or her authority if he or she invited the television crew of "Lifestyles of the Rich and Famous" to participate in the inspection. (Courts have in fact held the consent of a landlord insufficient to justify a police search of leased premises.) In *Stoner v. California* (1964), although a hotel clerk had authorized the search of a hotel room, the Supreme Court held the search invalid. Maids and other hotel employees might legitimately have entered the room, but they could not properly have brought along their friends, their relatives, or the police.

Whether a person should have greater or lesser authority to permit the police to search than he or she would have to authorize a search by someone other than a police officer may be a difficult question. A wife whose husband has permitted a police search might protest, "I have no reasonable expectation that my husband will not invite guests to our home; but in most situations I do expect that he will not invite the police to enter for reasons hostile to my interests." On this view, a person's consent to a search by a police officer might be invalid, although consent to a similar inspection by a nonpolice officer would be permissible.

A person is likely to have stronger legitimate reasons to cooperate with the police than to permit inspection by others, however, and courts have upheld police searches based on third-party consent when consent to inspection by anyone else—even by a close friend—probably would have been unauthorized. For example, a husband probably would violate customary norms of privacy by permitting a friend to rummage through a dresser used not only by him but by his wife. In *Matlock* and in *Frazier v. Cupp* (1969), however, the Supreme Court upheld searches in which the police had opened closets and luggage used in common by consenting and nonconsenting parties. To consider what authority a consenting party would have had to permit inspection by someone other than a police officer may be helpful as a starting point, but courts cannot avoid fact-specific assessments of expectations of privacy in particular situations. Because most police searches lack close analogues in everyday experience, this task is often difficult.

Under the Supreme Court's decision in *Illinois v. Rodriguez* (1990), courts judge the authority of a third party to consent to a search from the perspective of a reasonable police officer; they do not require that the consenting party have authority in fact. This approach may seem harsh when a thief who pretends to be the owner of luggage that he or she has stolen gives the police permission to open it—with the result that the police uncover evidence against the owner. This owner may be incriminated by evidence that the police obtained without his or her consent and without probable cause.

Nevertheless, the Constitution guards almost exclusively against governmental abuse, and the Fourth Amendment proscribes only UNREASONABLE SEARCHES and seizures. When the police act on the basis of reasonable appearances, the objectives of the amendment seem satisfied. These objections do not include protection against all unjustified invasions of privacy but only against improper invasions of privacy by the government. Permitting the police to rely on a consenting party's apparent authority seems especially appropriate when the police might have conducted their search with a warrant had a seemingly valid consent not been given.

The third party's consent must reasonably appear to the police to be voluntary. When the police coerce a person to consent to a search that reveals evidence against another, the incriminated person has the same power to object to the search that he or she would have had if the police had not obtained the third party's consent at all.

This principle applies to cases of ELECTRONIC EAVESDROPPING just as it does to cases in which the police have seized tangible evidence. Although state statutes sometimes forbid electronic monitoring even when one party to a conversation has consented to it, the Fourth Amendment as construed by the Supreme Court permits electronic monitoring so long as any party to a conversation has agreed to it. The Court has concluded that this moni-

toring is indistinguishable from the disclosure of a conversation by one of the participants after it has occurred.

If consensual electronic monitoring is indistinguishable from a participant's later disclosure of a conversation, however, any party who could assert that another's consent to electronic monitoring was involuntary also should be allowed to object to an informant's involuntary disclosure of a conversation after the fact. Yet he or she is not. Although the question has been litigated raely, no one other than the informant himself or herself has been permitted to challenge the voluntariness of the informant's disclosure. The rule that a person lacks STANDING to object to the violation of another person's rights has been thought to foreclose a challenge o the voluntariness of an informant's statements by a person othe than the informant.

The principles that courts have developed in cases of third-party consent thus have not been consistently applied, and these principles might work important changes in the police informant system. Permitting others to challenge the use of coercive tactics against informants would subject some common police practices to new judicial scrutiny (for example, the practice of threatening to charge potential informants with crimes and to hold them on high bond). The coercion of third-party informants may invade the reasonable expectations of privacy of people whom the informants incriminate. This coercion can violate the rights of these people along with the rights of the informants themselves.

ALBERT W. ALSCHULER
(1992)

Bibliography

ALSCHULER, ALBERT W. 1983 Interpersonal Privacy and the Fourth Amendment. *Northern Illinois University Law Review* 4:1–57.

LAFAVE, WAYNE R. 1987 *Search and Seizure: A Treatise on the Fourth Amendment*, 2nd ed, Vol. 3, pp. 235–331.

# THIRTEENTH AMENDMENT
## (Framing)

Scholars and jurists have virtually ignored the Thirteenth Amendment, the Constitution's first formal addition in sixty-one years. Reasons for this indifference seem, initially, to be both obvious and adequate. The Thirteenth Amendment, ratified in December 1865, appears to be a simple, brief statement of the noble, limited effect of the CIVIL WAR.

Its succinct text, written by Illinois Senator LYMAN TRUMBULL, echoed clauses of the NORTHWEST ORDINANCE. In the Civil War's last weeks, during the closing session of the 38th Congress, Senator CHARLES SUMNER tried to substitute for the proposed Amendment's second section one specifying that every person was equal before both national and state laws. Trumbull, a constitutional specialist, favored section 2 in its present form. Sumner and many other congressmen assumed that all parts of the Constitution, including amendments, implicitly authorized enforcement; Trumbull wished to have the amendment empower enforcement explicitly. There was almost no other discussion on the amendment. In a sense, abolition had been before the congressmen and the nation since 1861.

Persons who celebrated abolition's arrival in 1865 did not foresee that race problems and derivative strains in federal relations were to require a FOURTEENTH and a FIFTEENTH AMENDMENT plus enforcement legislation, and would lead to the first IMPEACHMENT of a President. Celebrants of 1865 stressed the "war-gulf" that separated the ratified Thirteenth Amendment from one in early 1861 that Congress had proposed and three states had ratified in a desperate effort to seduce the South from seceding. The aborted Thirteenth Amendment would have forbidden the nation perpetually from curtailing SLAVERY in states where it existed. Thereafter the nation steadily raised both its sense of self-interest and its moral sights. Union troops in the South reported that the only trustworthy residents were black. Though few Negroes lived outside the South, most Northern states had long been racist in laws and customs, if never so fiercely as in the slave states. During the war Northern racism softened, partially as a result of pro-Negro reports from Union soldiers and partly from the diffusion of ABOLITIONIST CONSTITUTIONAL THEORY. Before the war, abolitionists, long hard-pressed even in the North, had come to scorn the Constitution, for it did not protect them against unpunished harassments. But once the war started, Union and abolition became identified. Gradually, Congress and ABRAHAM LINCOLN caught up to Union soldiers' needs, constituents' altering race sentiments, and abolitionists' aspirations and perceptions.

In 1861 and 1862, CONFISCATION ACTS threatened disloyal individuals with the loss of their title to property, including slaves, after individual prosecutions in federal courts. In September 1862, Lincoln's EMANCIPATION PROCLAMATION, an executive, war-power order, offered slaveowners ninety days in which to give up the rebellion or lose their slaves. That grace period having expired, Lincoln in January 1863 ordered also the recruitment of Negroes, most of whom lived in the South, into the Union's armies. In December 1863 and July 1864 respectively, Reconstruction policies issued by the President and the Congress provided for emancipation as a prerequisite for state restorations. The fall 1864 election proved the growth of

a Northern consensus in favor of irreversible emancipation as a war result, though, save for abolitionists, it had not been an original war aim. Therefore the 38th Congress, with Lincoln's warm support, prepared the present Thirteenth Amendment, and when the war ended it sent it to the states for ratification.

Despite its simplicity, the Thirteenth Amendment was a momentous, perhaps revolutionary change in constitutional relationships. It prohibited not only the national or state governments or officials but every American institution and person from allowing slavery or involuntary servitude to exist, and it specifically authorized Congress to enforce the prohibition. If states, the traditional parents of slavery, did not comply with the prohibition and allowed individuals to hold other people in a slave status, the nation now had authority to punish directly either the oppressing persons or the states.

Democrats strongly opposed ratification. Even before the Civil War, most Democrats rejected a view of the Constitution as an adaptable, organic instrument. The amendment's enforcement clause allowed Congress to initiate changes in race relationships beyond abolition. Some Democrats insisted that abolition was illicit even by means of an amendment; that slave property remained totally a state's right to define; and that the unrepresented Southern states could not properly be asked to ratify the amendment.

Republicans argued for the amendment's ratification, in part because Lincoln's Emancipation Proclamation might have left slavery alive in the unseceded border states and in some Confederate areas earlier reconquered. It was clear also that individual confiscation trials could never reach the millions of slaveholders and slaves. Republicans also worried because the amendment voided the Constitution's THREE-FIFTHS CLAUSE. The South's Negroes were now to count as whole persons in determining the size of a state's congressional representation. Ironically, the South, after initiating and carrying on a civil war for four years, would substantially increase its strength in the House of Representatives. "Radical" Republicans looked at the Thirteenth Amendment as the culmination of abolitionist constitutional theory. Radicals asserted that the amendment, freeing slaves, also equalized all Americans in the protections due to them in their states for the exercise of both public and private rights. The DECLARATION OF INDEPENDENCE and the BILL OF RIGHTS defined the duties all states owed to every resident; the nation's duty was to see to state performance. State justice, down to the remotest hamlet, must protect every resident equally against hurtful positive acts or discriminatory nonacts by public officers and private persons, in both civil and criminal relationships.

No Republicans advocated centralization; all Republicans were STATES' RIGHTS nationalists. State sovereignty was dead but state rights flourished. State wrongs that diminished individuals' rights as defined by state laws, were, however, unacceptable; they again threatened the nation's stability. Republicans assumed that the ex-rebel states would emulate, in their formal law at least, the lessened racism of the rest of the nation, and afford Negroes the same protections that whites enjoyed. But it became apparent from evidence such as the BLACK CODES that the South would not behave as expected.

All through 1865, Democrats criticized the fact that President ANDREW JOHNSON required the reconstructing states to ratify the Thirteenth Amendment, and they insisted that those states were entitled to be represented in Congress. The Johnson provisional states, excepting Florida and Texas where reconstruction proceeded slowly, did ratify the Thirteenth Amendment, though reluctantly, with spokesmen expressing special distaste for the enforcement clause. Johnson pressured recalcitrant states with threats of indefinite military rule if ratification failed; Secretary of State WILLIAM SEWARD calmed Southerners by asserting that the amendment restricted Congress to enforcing only a prohibition of formal slavery, a dubious interpretation. On December 15, 1865, Seward proclaimed the amendment to be in effect. Were the southern states truly states for the purposes of ratification? The question asked in 1865 and again in 1868 and 1870 when the Fourteenth and Fifteenth Amendments were ratified, and repeated endlessly since, has a metaphysical quality. Ratification was a mandate to the nation by a clear majority of the American people, not an act of the national government. Lincoln's insight that the South's states were still states, although out of their proper relationship to the Union of states, neither supported immediate restorations of those states nor diminished their capacities to perform certain state functions including ratification of amendments. In 1865 the southern states ratified in number beyond the Constitution's requirement (Article V) that three-fourths of the states approve an amendment. Additional states ratified subsequently to end all doubts as to the amendment's validity. But in 1865, those doubts existed and enhanced the doubts that Democrats spread, and Republicans also felt, about President Johnson's unlimited authority over the South.

The 39th Congress assembled in December 1865 for its first postwar session. Its Republican members, upon examination of the Black Codes and other evidence from the South of lingering vestiges of servitude, resorted immediately to the just-ratified Thirteenth Amendment's enforcement clause. Sharing a mobile, organic view of the Constitution, Republicans were ready to confirm that the nation had an interest in and a duty to personal equality in states, as defined by state law and customs; their read-

iness is evident in the quick formulation of the CIVIL RIGHTS BILL (the world's first), the second FREEDMAN'S BUREAU BILL, and the Fourteenth Amendment. Republicans created these measures in light of the Thirteenth Amendment, a far more complex and inclusive statement than most accounts suggest.

HAROLD M. HYMAN
(1986)

Bibliography

BUCHANAN, SIDNEY G. 1976 *The Quest for Freedom: A Legal History of the Thirteenth Amendment.* Houston: Reprint from *Houston Law Review.*

HOWE, MARK A. DEWOLFE 1965 Federalism and Civil Rights. [Massachusetts Historical Society] *Proceedings* 77:15–67.

HYMAN, HAROLD M. and WIECEK, WILLIAM M. 1982 *Equal Justice under Law: Constitutional Development 1835–1875.* Chaps. 10–11. New York. Harper & Row.

TEN BROEK, JACOBUS 1951 *The Antislavery Origins of the Fourteenth Amendment.* Chap. 13. Berkeley: University of California Press.

## THIRTEENTH AMENDMENT
### (Judicial Interpretation)

Ratification of the Thirteenth Amendment in 1865 not only diminished the urgency of the debate over the constitutionality of the EMANCIPATION PROCLAMATION but also wrote a new substantive value into the Constitution. The amendent's first section abolished SLAVERY and involuntary servitude throughout the nation, and its second section empowered Congress to enforce abolition. If any of the amendment's framers expected it to end the system of racial dominance and dependence, they were soon divested of that illusion. The persistence of a plantation economy and the adoption in southern states of the BLACK CODES kept blacks in a position of subordination that was not only economic but political and social as well.

The question thus arose whether section 2 of the Thirteenth Amendment gave Congress the power to do more than provide sanctions against slavery or involuntary servitude, narrowly defined. Over a presidential veto, Congress adopted the CIVIL RIGHTS ACT OF 1866, which not only declared the CITIZENSHIP of the freed slaves but also protected them against the sort of RACIAL DISCRIMINATION that had been embodied in the Black Codes, such as disqualification to own property, to make contracts, or to serve on juries. President ANDREW JOHNSON had explained his veto of the bill partly on the ground that the Thirteenth Amendment had not empowered Congress to adopt legislation aimed at such purposes. Reacting to this argument, Congress proposed the FOURTEENTH AMENDMENT as a means of assuring the validity of the 1866 Act and placing beyond doubt the power of Congress to enforce the CIVIL RIGHTS of the freed slaves.

From the beginning it was arguable that the abolition of slavery implied that the persons so freed would take on the status of free citizens—that the amendment should be read broadly as a response to the whole social system of racial subordination associated with slavery. But in the early years, this view did not prosper in the Supreme Court; it was found mainly in OBITER DICTA and in dissenting opinions. All agreed that section 1 of the amendment was self-executing: slavery and involuntary servitude were abolished, whether or not Congress enacted civil or criminal sanctions to enforce the abolition. Because the amendment contained no STATE ACTION limitation, it operated directly, of its own force, against either public or private conduct that imposed slavery. But the Court limited the notion of "involuntary servitude" to personal servitude, refusing to extend it (by analogy to feudal servitudes) to cover the granting of monopolies or other similar privileges. (See SLAUGHTERHOUSE CASES). By the end of the nineteenth century, the Court was saying that slavery implied no more than "a state of bondage," and the lack of "a legal right to the disposal of [one's] own person, property, and services"; thus the Thirteenth Amendent standing alone did not even forbid a state to impose racial segregation on seating in railroad cars. (See PLESSY V. FERGUSON.)

This narrow view of the Thirteenth Amendment's self-executing reach was reflected in the Supreme Court's treatment of the power granted to Congress by section 2. In the CIVIL RIGHTS CASES (1883) the Court, in the face of a powerful dissenting opinion by Justice JOHN MARSHALL HARLAN, held invalid the CIVIL RIGHTS ACT OF 1875, a congressional statute forbidding racial discrimination in such PUBLIC ACCOMMODATIONS as hotels, theaters, and railroads. Both the majority and the dissent agreed that the Thirteenth Amendment was designed to put an end to the "incidents" of slavery as well as slavery itself. The question was whether racially based refusals of access to public accommodations amounted to "badges of slavery and servitude," and the majority held that they did not. This severely restrictive interpretation of the power of Congress to enforce the Thirteenth Amendment culminated in 1906, when the Court decided HODGES V. UNITED STATES. Congress could prohibit no more than the "entire subjection" of one person to another, as in laws forbidding PEONAGE; Congress was not empowered by section 2 to go further in erasing "badges" or "incidents" of slavery.

So matters stood for six decades. The Thirteenth Amendment, like the Fourteenth Amendment's guarantee of the EQUAL PROTECTION OF THE LAWS, lay dormant, offering no effective protection against racial discrimination. The judicial interpretation of the Thirteenth Amendment

mirrored the nation's political history; Congress adopted no civil rights legislation from the time of Reconstruction to the late 1950s. The first modern civil rights law of major importance was the CIVIL RIGHTS ACT OF 1964; its public accommodations provisions were upheld by the Supreme Court, but on the basis of the COMMERCE CLAUSE, not the Thirteenth or Fourteenth Amendments. (See HEART OF ATLANTA MOTEL V. UNITED STATES; KATZENBACH V. MCCLUNG.) The Court seemed determined to uphold congressional legislation aimed at establishing racial equality, and in UNITED STATES V. GUEST (1966) six Justices agreed in two separate opinions that Congress could reach even private conduct that interfered with the exercise of Fourteenth Amendment rights. The state action limitation, in other words, would not bar congressional enforcement of the equal protection clause of the Fourteenth Amendment's prohibition on private discrimination.

The reach of the equal protection clause, of course, is not limited to racial inequalities. Perhaps some of the Justices were reluctant to pursue the line of doctrinal development suggested by the separate opinions in *Guest,* for fear of giving Congress an invitation without apparent limitation. The solution to this puzzle—if it was a puzzle—came only two years after the *Guest* decision, in the form of a complete turnabout in the interpretation of the power of Congress to enforce the Thirteenth Amendment.

The turnabout came in JONES V. ALFRED H. MAYER CO. (1968), when the Court interpreted the 1866 Civil Rights Act to prohibit all racial discrimination in the sale of property and upheld the act as so construed. The Court overruled the *Hodges* decision and essentially adopted the dissenting views of Justice Harlan in the *Civil Rights Cases.* The Thirteenth Amendment was held to empower Congress not only to eliminate slavery but also to eliminate slavery's "badges and incidents." Furthermore, said the Court, it is for Congress itself "rationally to determine what are the badges and incidents of slavery," and to enact laws to eradicate any such "relic of slavery" it might find.

This broad language is not limited to racial discrimination. Commentators have asked whether the Court, in seeking to avoid an open-ended interpretation of congressional power under the Fourteenth Amendment, has offered Congress a different set of constitutional bootstraps. In the quoted passage from the *Jones* opinion, the Court appears to authorize Congress to define a given right—any right—as one that is essential to freedom, to define its impairment as an incident of slavery, and to enact a law protecting the right against both public and private interference.

When the right in question is a right to be free from racial discrimination, this line of reasoning accords not only with the language of the *Jones* opinion but also with the decision's place in the historical process of constitutional validation of modern civil rights legislation. Outside the racial context, however, the reasoning is unlikely to be adopted by the Supreme Court. Of course the Thirteenth Amendment prohibits the enslavement of anyone, of any race. And the Court has upheld an application of the 1866 act to a case of racial discrimination against whites, evidently (but without discussion) on the basis of Congress's power to enforce the Thirteenth Amendment, in *McDonald v. Santa Fe Trail Transportation Co.* (1976). The decision is defensible, despite the lack of historic links between slavery and discrimination against whites. There is a basis in experience for a congressional conclusion that discrimination against one racial group affects attitudes toward race generally and promotes discrimination against other races. It would be much harder to justify a similar conclusion about the effects of discrimination on the basis of gender, or sexual preference, or physical handicap. Even if the analogy were stronger, the doctrinal context of the *Jones* decision cautions against a prediction that its "badges and incidents" reasoning will be extended beyond cases of racial discrimination. The Thirteenth Amendment seems to have had its main appeal as a basis for congressional power precisely because that power could be contained within the confines of remedies for racial discrimination. The "badges and incidents of slavery" which justify congressional intervention are to be found in racial discrimination if they are to be found at all.

The power of Congress to enforce the Thirteenth Amendment, like any other congressional power, is subject to the limitations of the BILL OF RIGHTS. Without question, the amendment empowers Congress to prohibit racial discrimination in all the public areas of life, including commercial dealings. In RUNYON V. MCCRARY (1976), for example, the Supreme Court relied on the Thirteenth Amendment to uphold application of the 1866 act to a private school that accepted applicants from children in the public at large but excluded blacks. The potential limitations of the Bill of Rights found expression in that case. Justice LEWIS F. POWELL, concurring, cautioned that some hypothetical congressional enforcements of the Thirteenth Amendment might violate constitutional rights of PRIVACY or associational freedom, as when a litigant might seek application of the 1866 act to a case of racial discrimination in the selection of a home tutor or babysitter.

The expansion of the power of Congress to enforce the Thirteenth Amendment has not been accompanied by a corresponding expansion of the amendment's reach as a self-executing provision. The *Jones* opinion left open the question whether the amendment "by its own terms did anything more than abolish slavery," and although MEMPHIS V. GREENE (1981) raised the issue, the Court did not reach it. Thus, even though a great many forms of private racial discrimination may constitute "badges and incidents

of slavery" justifying congressional action to secure their elimination, if Congress has not acted, these same "badges and incidents" are insufficient to trigger the operation of the amendment's section 1. The practical significance of this difference, however, is slight. The Supreme Court has construed existing civil rights legislation broadly enough to prohibit a wide range of private acts of racial discrimination.

Even assuming that the Thirteenth Amendment's self-executing force is limited to cases of bondage to personal service, there is room for debate about the kinds of compulsion that constitute involuntary servitude. Debt bondage—the requirement that a person work in discharge of a debt—is a classic case of peonage and is plainly forbidden by the amendment. However, compulsory military service (or alternative service for CONSCIENTIOUS OBJECTORS), hard labor for persons imprisoned for crime, and restrictions on the right to strike all have been sustained against Thirteenth Amendment attacks.

KENNETH L. KARST
(1986)

Bibliography

CASPER, GERHARD 1968 Jones v. Mayer: Clio, Bemused and Confused Muse. *Supreme Court Review* 1968:89–132.

FAIRMAN, CHARLES 1971 *Reconstruction and Reunion: 1864–1888, Part One.* Chapter XIX. New York: Macmillan Company.

NOTE 1969 The "New" Thirteenth Amendment: A Preliminary Analysis. *Harvard Law Review* 82:1294–1321.

# THOMAS, CLARENCE
(1948– )

In 1991, President GEORGE H. W. BUSH nominated Clarence Thomas to fill the U.S. Supreme Court seat vacated in the retirement of Justice THURGOOD MARSHALL. Thomas's qualifications that appealed to Bush were not those of legal accomplishment and judicial experience. At the time of his nomination, Thomas was at forty-three a young man whose experience consisted largely of service in the administration of President RONALD REAGAN. By 1991, Thomas had served for little more than one year as a judge on the U.S. Court of Appeals for the District of Columbia Circuit. Because Marshall was the Supreme Court's first and only African American Justice, Bush apparently wanted to have an African American replacement to avoid being blamed for creating an all-white Supreme Court once again. With virtually no experienced federal African American judges whose decisions were sufficiently conservative to satisfy Bush, the President selected Thomas, who had expressed his commitment to conservative doctrines.

Thomas's confirmation hearings before the SENATE JUDICIARY COMMITTEE caught the nation's attention when Anita Hill, a law professor who had previously worked as Thomas's assistant in the Reagan administration, accused Thomas of sexual harassment. In the aftermath of the controversy, Thomas's nomination was confirmed by the narrowest of margins—fifty-two to forty-eight—in a nationally televised vote in the U.S. SENATE. During his confirmation testimony, Thomas consistently distanced himself from the many speeches he had made endorsing controversial conservative positions, such as opposition to ABORTION and AFFIRMATIVE ACTION, during his years as a Reagan administration official. Although Thomas portrayed himself to the Judiciary Committee as open-minded and moderate, his subsequent performance as a Justice casts him as a confident, doctrinaire jurist whose opinions seek to make significant changes in constitutional law.

Thomas aspires to follow a coherent theory of CONSTITUTIONAL INTERPRETATION. Rather than reacting to individual issues as they arise, Thomas consistently expresses a commitment to interpret the Constitution according to the ORIGINAL INTENT of the Framers who wrote the document. Thomas seeks to eliminate what he sees as JUDICIAL ACTIVISM, interfering in the policies established by legislators and other elected officials. Thomas claims that by following the intentions of the Framers he avoids the pitfall of applying his own values and policy preferences in judicial decisions. Nonetheless, the legal conclusions he designates as dictated by the Framers' intentions consistently produce conservative results that apparently fit his values and policy preferences. Unlike other scholars and jurists who debate whether the intentions of the Framers can be determined for each provision of the Constitution and whether original intent should be based on the understandings of the authors or the ratifiers of each provision, Thomas manifests confidence about the certainty of his historical knowledge. That confidence is often translated into strident opinions that show little respect for alternative interpretations. Thomas's tone may deter Chief Justice WILLIAM H. REHNQUIST, with whom Thomas agrees on the outcomes of nearly all cases, from giving Thomas the responsibility for writing important majority opinions. Although Thomas receives his fair share of majority opinion assignments, his assignments nearly always concern either taxation and other statutory issues, or unanimous constitutional decisions. Thomas's first assignment to write the majority opinion in a controversial constitutional-rights case came in *Kansas v. Hendricks* (1997), in which the Court rejected DUE PROCESS, EX POST FACTO, and DOUBLE JEOPARDY claims to permit states to detain sex offenders indefinitely after they have already served out their entire criminal sentences. Thomas's uncompromising po-

sitions may limit his potential for shaping constitutional law on behalf of the Supreme Court majority. Often he finds himself writing CONCURRING and DISSENTING OPINIONS to express views with which no Justice other than ANTONIN SCALIA agrees.

Thomas's views, if adopted by majority, would change constitutional law significantly. In a dissenting opinion in *Helling v. McKinney* (1993), joined only by Scalia, Thomas argued that the drafters of the Eighth Amendment never intended for the prohibition against "CRUEL AND UNUSUAL PUNISHMENTS" to protect convicted offenders inside prisons. Thomas concluded that the Eighth Amendment only prevents a judge from announcing a cruel and unusual punishment as a sentence for a crime. If Thomas's views had governed the Eighth Amendment, federal judges never would have been able to order correctional institutions to end the brutal practices and inhuman conditions that were characteristic of prisons in several states prior to the 1980s.

Thomas's concurring opinion in UNITED STATES V. LÓPEZ (1995) argued that the Framers' original intentions for the COMMERCE CLAUSE preclude congressional regulation of manufacturing, agriculture, and mining. This argument contradicted sixty years of development in constitutional law. Carried to its logical conclusion, it would require a return to nineteenth-century constitutional DOCTRINES that forbade the federal government from regulating most areas of business endeavor. However, Thomas recognized that adherence to PRECEDENT "may convince us that we cannot wipe the slate clean" of the Court's more recent decisions. Thus, he does not seem to anticipate that the Court will follow his preferred theory by invalidating a wide range of federal laws affecting minimum wages, EMPLOYMENT DISCRIMINATION, consumer protection, and a variety of other areas in which the federal government has actively regulated economic activities since the 1930s.

Because Thomas believes that his originalist theory of interpretation holds the answers to virtually all constitutional questions presented to courts, he is critical of courts' reliance on what he calls "the easy answers" of SOCIAL SCIENCE. But relying on formal legal theory rather than empirical evidence often leads to unrealistic assumptions about difficult constitutional problems. In a concurring opinion in *Graham v. Collins* (1993), for example, Thomas suggested that mandatory CAPITAL PUNISHMENT for all offenders convicted of first-degree murder would cure problems of RACIAL DISCRIMINATION in capital SENTENCING. Thomas has been criticized for not recognizing that mandatory sentences cannot eliminate the discriminatory impact of discretionary decisions occurring throughout the criminal process, such as decisions by prosecutors about which defendants to charge with first-degree murder and the discretion of juries in convicting offenders of lesser homicide offenses.

Drawing on his mistrust of social science, Thomas appears implicitly to criticize the Court's revered decision in BROWN V. BOARD OF EDUCATION (1954) for relying on social science evidence indicating that school SEGREGATION was harmful to African American children. In his concurring opinion in MISSOURI V. JENKINS (1995), Thomas suggested that such conclusions rest on "an assumption of black inferiority." In light of Thomas's belief in limiting the authority of judges to remedy social problems as well as historical evidence that the Framers of the EQUAL PROTECTION clause did not intend to end racial segregation, it is difficult to square Thomas's theory of constitutional interpretation with *Brown*.

Thomas's consistent adherence to his version of original intent jurisprudence has established him as the most conservative Justice of the REHNQUIST COURT. Although his colleagues Scalia and Rehnquist reject individuals' constitutional claims with similar frequency, Thomas's approach to constitutional interpretation has the most dramatic implications for changing constitutional law.

CHRISTOPHER E. SMITH
(2000)

(SEE ALSO: *Appointment of Supreme Court Justices; Confirmation Process.*)

Bibliography

BAUGH, JOYCE and SMITH, CHRISTOPHER E. 1996 Doubting Thomas: Confirmation Veracity Meets Performance Reality. *Seattle University Law Review* 19:455–496.

MAYER, JANE and ABRAMSON, JILL 1994 *Strange Justice: The Selling of Clarence Thomas.* Boston: Houghton Mifflin Co.

ROSEN, JEFFREY 1996 Moving On. *The New Yorker,* April 29 & May 6, pp. 66–73.

SMITH, CHRISTOPHER E. 1996 Bent on Original Intent. *American Bar Association Journal* 82(October):48–52.

——— 1997 Clarence Thomas: A Distinctive Justice. *Seton Hall Law Review* 28:1–28.

## *THOMAS v. REVIEW BOARD*
### 450 U.S. 707 (1981)

Reaffirming its decision in SHERBERT V. VERNER (1963), the Supreme Court, 8–1, invalidated Indiana's refusal of unemployment compensation to a Jehovah's Witness who, for religious reasons, had quit his job rather than work on weapons production. The state had not shown that denying benefits was the LEAST RESTRICTIVE MEANS of achieving a COMPELLING STATE INTEREST.

KENNETH L. KARST
(1986)

## *THOMAS v. UNION CARBIDE AGRICULTURAL PRODUCTS CO.*
473 U.S. 568 (1985)

The Supreme Court's decision in NORTHERN PIPELINE CONSTRUCTION CO. V. MARATHON PIPE LINE CO. (1982) left considerable confusion about the power of Congress to confer JURISDICTION on administrators or LEGISLATIVE COURTS over cases falling within the judicial power of the United States. *Thomas* provided some useful clarification.

The Federal Insecticide, Fungicide, and Rodentcide Act (FIFRA) requires a manufacturer, as a condition on registering a pesticide, to supply research data on the pesticide's health, safety, and environmental effects to the Environmental Protection Agency (EPA). These data may be used in evaluating a second manufacturer's registration of a similar product, provided that the second manufacturer offers to compensate the first. If the two manufacturers cannot agree on the compensation, FIFRA requires binding arbitration of the dispute. An arbitrator's decision is reviewable by a court only for "fraud, misrepresentation or other misconduct."

Various pesticide manufacturers sued the EPA administrator challenging the constitutionality of the scheme of binding arbitration with limited court review. The federal district court held that the scheme violated Article III of the Constitution; on direct APPEAL, the Supreme Court unanimously reversed, upholding the law.

Justice SANDRA DAY O'CONNOR, writing for the Court, recognized a broad policy in Article III "that federal judicial power shall be vested in courts whose judges enjoy life tenure and fixed compensation." *Marathon* effectuated a part of that policy but was distinguishable here. Considering the origin of the claims to compensation in federal law, along with the reasons of public policy that persuaded Congress to impose binding arbitration, the manufacturers' claimed rights were properly considered "public rights," the adjudication of which Congress could place in administrative hands. Cases involving "public rights" were not limited to those in which the government itself was a party. Nor, said the Court in an important OBITER DICTUM, is Article III's requirement of independent judges irrelevant merely because the government is a party. Here the assignment of decision to nonjudicial arbitrators was softened somewhat by FIFRA's provision of some minimal review by CONSTITUTIONAL COURTS of arbitrators' decisions. (In some cases, the Court noted, DUE PROCESS considerations might independently require further court review.)

*Thomas* thus adopted a flexible approach to Article III's limitations on Congress's employment of nonjudicial tribunals—the very approach urged by the *Marathon* dissenters. Justice WILLIAM J. BRENNAN, for three Justices, concurred separately on the basis of his PLURALITY OPINION in *Marathon*. Justice JOHN PAUL STEVENS concurred, saying the manufacturers lacked STANDING to challenge the law's validity.

KENNETH L. KARST
(1986)

## THOMPSON, SMITH
(1763–1843)

Smith Thompson was among the most experienced judges ever appointed to the Supreme Court, and his tenure on the bench (1823–1843) linked the constitutional doctrines of the MARSHALL COURT and the TANEY COURT. After sixteen years on the New York Supreme Court (1802–1818), four years as chief justice, Thompson had been secretary of the navy (1818–1823). His experience in JAMES MONROE's cabinet made Monroe feel so comfortable with Thompson, presumably including his constitutional views, that the President insisted that the New Yorker fill the seat vacated by the death of a fellow New Yorker, H. BROCKHOLST LIVINGSTON.

Thompson did not change his jurisprudence significantly during his twenty years on the Court. He remained a black-letter lawyer, whose most interesting contributions to constitutional jurisprudence can be traced to his New York judicial and cabinet experiences. Besides adhering to precedent, Thompson concerned himself with maintaining judicial independence while showing a willingness to let the legislature have free rein. Having served in an era when Congress was relatively inactive, Thompson appears today as a STATES' RIGHTS advocate, or more precisely an adherent to states' responsibilities. Yet his values did not differ greatly from those of his nationalistic brethren on the Marshall Court. He was, for example, aware of the business community's needs. Unlike Livingston, his predecessor on the Marshall Court, Thompson was more willing to express his differences with the rest of the Court.

He was absent when GIBBONS V. OGDEN (1824) was argued, but in *Livingston v. Van Ingen* (1812), decided by the New York court, he had resolved some of the questions involved in *Gibbons* in favor of the steamboat monopoly. Although Thompson's *Van Ingen* opinion did not consider the commerce clause question, that of his colleague, JAMES KENT, did and commerce clause cases subsequent to *Gibbons* show that Thompson subscribed to Kent's doctrine of concurrent powers to regulate commerce. JOHN MARSHALL's language in *Gibbons* was, moreover, sufficiently broad to allow Thompson to render lip service to *Gibbons* while taking a contrary position. In BROWN V. MARYLAND

(1827), Thompson dissented from Marshall's majority opinion holding that Maryland's law imposing license taxes on wholesalers of imported goods violated both the import and export and the COMMERCE CLAUSE. Like Kent, Thompson did not examine the nature of the power underlying state regulations. Whether the state regulated commerce or not was immaterial so long as the statute did not conflict with a congressional act. In rejecting Marshall's ORIGINAL PACKAGE DOCTRINE in *Brown*, Thompson set forth the position that goods became subject to a state's jurisdiction upon crossing its borders. Thompson continued his adherence to the doctrine of concurrent commerce powers in MAYOR OF NEW YORK V. MILN (1837), to the extent that he wrote separately rather than subscribe to the majority's reasoning that regulation of immigrant passengers was simply a valid exercise of the STATE POLICE POWER. Subsequently, the concurrent powers doctrine became an integral part of ROGER B. TANEY's constitutional thought. Taney had not advanced that doctrine while arguing for the state in *Brown*, and it is reasonable to assume that he borrowed it from Thompson.

On the slavery question, Thompson assumed the doughface position later followed by his replacement on the Court, SAMUEL NELSON, of providing support for the peculiar institution, while striving to confine the question at hand and giving the appearance of sticking rigidly to precedent. Typical, in this respect, was GROVES V. SLAUGHTER (1841), where Thompson, speaking for the Court's majority, was able to avoid the question whether Mississippi's constitutional ban on uncontrolled slave shipments from other states violated the commerce clause. In PRIGG V. PENNSYLVANIA (1842), Thompson differed from JOSEPH STORY's opinion that the fugitive slave clause did not prohibit state laws designed "faithfully" to enforce the clause. In contrast with Thompson's adherence to legal formalism in slavery cases was his activism in *Cherokee Nation v. Georgia* (1831). Dissenting, in the most elaborate opinion of his career, he asserted that regardless of their relative weakness to their white neighbors, the Cherokees constituted an independent, foreign, sovereign, nation. The following year, Thompson's dissent became the majority position in WORCESTER V. GEORGIA. (See CHEROKEE INDIAN CASES.)

Thompson's conservative attitude toward government and business sometimes put him at odds with both Marshall and Taney. Perhaps none of his contemporaries had more concern for protecting VESTED RIGHTS than did Thompson. He joined Story's CHARLES RIVER BRIDGE dissent (1837), and in his own *Wheaton v. Peters* (1834) dissent he said that as a matter of "sound reason and abstract morality" the COMMON LAW provided COPYRIGHT protection. It was his concern for vested rights alone with his administrative experience that caused Thompson to distinguish between cabinet officers' political and ministerial duties. Only the latter functions were "subject to the control of the law, and the direction of the president," he said in *United States ex rel. Stokes et al. v. Kendall* (1838). Thompson's conservatism meshed with his adherence to states' responsibilities in interpreting the CONTRACT CLAUSE. In his view contracts were subject to the existing law of a place, including insolvency laws. Such laws, like the long-standing New York system, were also good for business. These beliefs explain Thompson's opposition to Marshall in OGDEN V. SAUNDERS (1837), and partially explains his CRAIG V. MISSOURI dissent (1830). Thompson's impact on constitutional law was slight, and only a few Whig politicians lamented his death.

DONALD M. ROPER
(1986)

Bibliography

DUNNE, GERALD T. 1969 Smith Thompson. In Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court*. Pages 475–492. New York: Chelsea House.

## *THOMPSON v. OKLAHOMA*
487 U.S. 815 (1988)

The Court held that the CRUEL AND UNUSUAL PUNISHMENT clause of the Eighth Amendment, applicable to the states by the INCORPORATION DOCTRINE, prohibited the death sentence against a first-degree murderer who committed the offense at the age of fifteen. Justice JOHN PAUL STEVENS spoke for a four-member plurality in whose JUDGMENT Justice SANDRA DAY O'CONNOR joined. Stevens asserted that the execution of the juvenile would "offend civilized standards of decency" and be "abhorrent to the conscience of the community."

O'Connor discerned no such consensus from the EVIDENCE adduced by the plurality. Indeed, the Court divided 4–4 on the question as to whether such a consensus existed. O'Connor believed that the sentence must be set aside because of the risk that the state did not realize that its CAPITAL PUNISHMENT statute might apply to fifteen-year-olds.

Stevens had a second string to his bow. He declared that the execution of the minor did not contribute to the purposes underlying the death penalty. O'Connor and the dissenters believed that the plurality Justices failed to understand that some fifteen-year-olds were as blameworthy as adults.

Justice ANTONIN SCALIA, for the three dissenters (Justice ANTHONY M. KENNEDY did not participate), believed that a consensus existed showing that the execution of juveniles under fifteen years of age did not offend community stan-

dards and therefore did not violate the Eighth Amendment. In STANDFORD V. PENRY (1988) the Court ruled that the execution of juveniles who murdered at sixteen years of age was constitutional.

LEONARD W. LEVY
(1992)

## *THORNBURGH v. AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS*
476 U.S. 747 (1986)

Although this 5–4 decision struck down a series of Pennsylvania laws restricting ABORTION, it also showed that support within the Supreme Court for the principles of ROE V. WADE (1973) had eroded. The invalidated restrictions covered a wide range: (1) a twenty-four-hour waiting period; (2) a requirement that a doctor provide a woman seeking an abortion with literature and oral statements, including warnings about medical risks, an estimate of the fetus's gestational age, a description of the probable physical characteristics of the fetus at two-week gestational increments, information about possible medical benefits for childbirth, and a reminder of a father's responsibility for child support; (3) detailed reporting requirements for doctors, including a statement of the basis for the doctor's finding that the fetus was not viable; and (4) a second-physician requirement. Justice HARRY A. BLACKMUN wrote for the Court, reaffirming *Roe v. Wade* and concluding that all of the challenged requirements subordinated women's interest in privacy "in an effort to deter a woman from a decision that, along with her physician, is hers to make."

Chief Justice WARREN E. BURGER dissented, noting his willingness to "reexamine *Roe*." Justice BYRON R. WHITE, joined by Justice WILLIAM H. REHNQUIST, filed a lengthy and vigorous dissent that called for *Roe* to be overruled and specifically challenged the majority's rulings on each of the provisions invalidated here. Justice SANDRA DAY O'CONNOR, the fourth dissenter, reasserted what she had said in an earlier opinion, that was unworkable and should be replaced by a principle that would uphold a law unless it were "unduly burdensone" on a woman's decision to have an abortion. Justice JOHN PAUL STEVENS concurred in a long opinion, taking issue with Justice White's attack on *Roe*. The White-Stevens debate encapsulates many of the main points made in the debate over the proper role of the judiciary in the field of abortion.

KENNETH L. KARST
(1992)

## *THORNHILL v. ALABAMA*
310 U.S. 88 (1940)

This case involved a FIRST AMENDMENT challenge to convictions under an Alabama antipicketing statute. Normally one has STANDING only to plead one's own constitutional rights. In *Thornhill*, however, the Supreme Court did not ask whether the particular activity in which the pickets had engaged was constitutionally protected. Instead it asked whether the statute itself, rather than its application to these particular persons, violated the First Amendment. Because the statute was INVALID ON ITS FACE, it could be challenged, even by a union that itself might have engaged in violent picketing not protected by the First Amendment. The theory was that the statute's general ban on all labor dispute picketing would threaten peaceful picketers as well, even though no peaceful picketers had even been prosecuted.

Justice FRANK MURPHY acknowledged that the state legislature legitimately might have written a narrowly drawn statute that condemned only violent or mass picketing. Instead it wrote a general ban on all picketing in labor-management disputes. "The existence of such a statute . . . which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech . . . readily lends itself to . . . discriminatory enforcement by local prosecuting officials [and] results in a continuous and pervasive unconstitutional restraint on all freedom of discussion." Subsequently the Court was to speak of the unconstitutional CHILLING EFFECT of such "facially overbroad" statutes.

MARTIN SHAPIRO
(1986)

## *THORNTON v. CALDOR, INC.*
472 U.S. 703 (1985)

The Supreme Court held unconstitutional, on establishment clause grounds, a state act authorizing employees to designate a sabbath day and not work that day. Applying the three-part test of LEMON V. KURTZMAN (1971), Chief Justice WARREN E. BURGER found that by vesting in employees an "absolute and unqualified" right not to work on the sabbath of one's choice, and by forcing employers to adjust work schedules to the religious practices of employees, the act constituted a law respecting an ESTABLISHMENT OF RELIGION. In purpose and effect it advanced religion, preferring those who believe in not working on the sabbath to those who hold no such belief. By implication, a statute giving employers some leeway would

be constitutional. Only Justice WILLIAM H. REHNQUIST dissented, without opinion. No member of the Court defended the statute as a state effort to prevent discrimination against sabbath believers by preventing the imposition of employment penalties on those acting in obedience to conscience by refusing to work. (See SHERBERT V. VERNER.)

LEONARD W. LEVY
(1986)

## THORPE, FRANCIS N.
(1857–1926)

Francis Newton Thorpe, professor of history at the University of Pennsylvania, edited seven volumes of *American Charters and Constitutions.* He also wrote several books on political and constitutional history from a post-CIVIL WAR nationalist viewpoint. He emphasized the UNWRITTEN CONSTITUTION by which the written Constitution is continually extended and adapted.

DENNIS J. MAHONEY
(1986)

## THREE-FIFTHS CLAUSE

Article I, section 2, clause 3, of the United States Constitution originally provided that members of the HOUSE OF REPRESENTATIVES would be apportioned among the states on a formula that added to "free Persons" (including indentured servants but excluding untaxed Indians) "three fifths of all other Persons." The 1840 publication of JAMES MADISON's notes of debates in the CONSTITUTIONAL CONVENTION OF 1787 revealed that the euphemism "all other Persons" referred to slaves.

The clause originated in an unsuccessful 1783 proposal in the Confederation Congress to amend the ARTICLES OF CONFEDERATION by changing the method of apportioning taxes among the states to a per capita basis that would include all free persons and "three-fifths of all other persons." At the Philadelphia convention, JAMES WILSON, a Pennsylvania delegate, resurrected the three-fifths formula as an amendment to the VIRGINIA PLAN and thereby touched off heated debates on counting slaves for apportionment purposes. The underlying conflict of interests between slave and free states provoked a great crisis of the convention. The deadlock was resolved by a complex formula that was part of the GREAT COMPROMISE basing both representation and DIRECT TAXES on the three-fifths formula and, for good measure, making the direct-tax provisions of Article I, section 9, unamendable (Article V).

Madison in THE FEDERALIST #54 defended the clause as an arbitrary but reasonable compromise that roughly reflected the anomalous legal status of a slave, a human for certain purposes and a chattel for others. The slave was "debased by servitude below the equal level of free inhabitants, which regards the slave as divested of two-fifths of the man." NATHANIEL GORHAM of Massachusetts had earlier agreed, accepting the clause as "pretty near the just proportion."

The three-fifths formula gave the slave states an additional political weight in Congress quite close to what they would have enjoyed if they had counted all slaves for purposes of apportionment. In 1811 this produced eighteen slave-state representatives more than the southern states would have had if slaves had been excluded altogether from apportionment. The clause therefore rankled New England and middle-state Federalists, who used the clause as a vehicle to voice their resentment at the Virginia Dynasty and the rising political power of the west. Reviving arguments of 1787 that if Virginia counted its slaves Massachusetts should be able to count its cattle, New Englanders complained with JOHN QUINCY ADAMS that "slave representation has governed the union." The HARTFORD CONVENTION demanded in 1814 that the clause be abrogated.

Later debates during the abolition controversy renewed this dispute. Abolitionists either disingenuously tried to construe the clause as referring to persons other than slaves (indentured servants or ALIENS) or demanded that the clause be expunged. Defenders of SLAVERY and Garrisonian abolitionists both cited the clause as an explicit assurance of the privileged constitutional status of that unique form of property, human chattels.

Though the abolitionist debates proved inconclusive, the clause bedeviled Republicans during Reconstruction. After the abolition of slavery, all blacks became "free Persons" and thus the congressional representation of the former Confederate states would be augmented by perhaps a dozen congressmen, endangering the Republicans' objectives for the war and Reconstruction. To forestall this, Republicans first temporarily excluded ten of the former seceded states from representation in Congress, then forced ratification of the FOURTEENTH AMENDMENT, whose section 2 provides that representatives shall be apportioned simply on "the whole number of persons in each State," and that a state's representation should be reduced in proportion to its denial of the vote to male citizens over twenty-one years old, except for participation in rebellion or crime.

WILLIAM M. WIECEK
(1986)

Bibliography

OHLINE, HOWARD A. 1971 Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States Constitution. *William and Mary Quarterly* 28:563–594.

SIMPSON, ALBERT F. 1941 The Political Significance of Slave Representation, 1787–1821. *Journal of Southern History* 7: 315–342.

## THREE-JUDGE COURT

The Supreme Court's decision in EX PARTE YOUNG (1908) made it possible for one federal judge to tie up an entire state legislative program by granting preliminary injunctive relief. In 1910 Congress required certain applications for federal-court INTERLOCUTORY injunctions against state officers to be heard by three judges. Such a court's order was made directly appealable to the Supreme Court. A similar statutory scheme had been devised earlier for certain ANTITRUST and railroad regulation cases. The 1948 revision of the JUDICIAL CODE made clear that the three-judge requirement applied to all hearings on applications for interlocutory or permanent INJUNCTIONS against state officers.

A considerable body of law developed out of this statute. Applications for DECLARATORY JUDGMENTS were not subject to the requirement, although injunctive relief is authorized to enforce a declaratory judgment. Three-judge courts were required only for actions seeking to enjoin state officers in carrying out statutes of general and statewide application, not local ordinances. While three judges were ordinarily necessary to deny injunctive relief as well as grant it, a single judge could dismiss such an action when it was "insubstantial."

The system of three-judge courts was enormously burdensome, both on the lower federal courts and on the Supreme Court. In 1976, Congress drastically limited the three-judge requirement, retaining it only in certain cases involving legislative REAPPORTIONMENT or VOTING RIGHTS and some cases under the CIVIL RIGHTS ACT OF 1964.

KENNETH L. KARST
(1986)

Bibliography

WRIGHT, CHARLES ALAN 1983 *The Law of Federal Courts*, 4th ed. Pages 295–299, 728–729. St. Paul, Minn.: West Publishing Co.

## "THREE STRIKES" LAWS

See: Career Criminal Sentencing Laws

## TIEDEMAN, CHRISTOPHER G. (1857–1903)

Christopher G. Tiedeman, a professor of law, published *A Treatise on the Limitations of Police Power in the United States* (1886). Second only to THOMAS COOLEY's *Constitutional Limitations* in its influence on American constitutional law, Tiedeman's book spurred the conversion of the FOURTEENTH AMENDMENT into a bulwark of VESTED RIGHTS. He believed that liberty found its highest expression in laissez-faire economics and that the POLICE POWER, which he sought to reduce to the role of policeman, was making "socialism, communism, and anarchism . . . rampant in America." He found evidence for that claim in the advocacy of prolabor legislation and state protection of the weak against the strong. CONSERVATISM, he wrote, feared "the advent of an absolutism more tyrannical and more unreasoning than any before experienced by man, the absolutism of a democratic majority." JUDICIAL REVIEW in support of written constitutions that limited government provided the only hope, and Tiedeman's exposition of cases was calculated to assist courts in their task of thwarting invasions of private rights. In 1900, in the preface to a revised second edition, Tiedeman expressed gratification that "the first edition of this book has been quoted by the courts in hundreds of cases."

LEONARD W. LEVY
(1986)

## *TILTON v. RICHARDSON*

See: *Lemon v. Kurtzman*

## TIMBER CULTURE ACT

See: Environmental Regulation and the Constitution

## *TIMES-MIRROR CO. v. CALIFORNIA*

See: *Bridges v. California*

## *TIMMONS v. TWIN CITIES AREA NEW PARTY* 520 U.S. 351 (1997)

Beginning with *Williams v. Rhodes* (1968), the Supreme Court rebuffed attempts by state legislatures to justify BALLOT ACCESS restrictions or other election laws favoring the Democratic and Republican parties on grounds that such laws favored the "two-party system." Though the *Williams* Court did not reject the idea that a state in theory could defend an election law on these grounds, the Court struck down Ohio's ballot access law because it favored "two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly."

The 6–3 *Timmons* decision, in which the Court for the first time accepted the two-party rationale, suggests a ma-

jor shift in favor of allowing state legislatures to protect the Democratic and Republican parties. The Twin Cities Area New Party, a minor political party, wished to nominate Andy Dawkins as its candidate for state representative in the Minnesota legislature. Dawkins was already the candidate of the Democratic Party (known in Minnesota as the Democratic–Farmer–Labor Party, or DFL). Though neither Dawkins nor the DFL objected to this multiple-party or "fusion" candidacy, Minnesota officials refused to accept the New Party's nominating petitions because Minnesota law prohibits fusion. A majority of states similarly ban fusion, though a few states, most notably New York, allow the practice.

The New Party challenged Minnesota's antifusion law as unconstitutional under the FIRST and FOURTEENTH AMENDMENTS. The Court, in an opinion by Chief Justice WILLIAM H. REHNQUIST, upheld the law's constitutionality. In ballot access and similar election law cases, the Court does not use a single level of scrutiny (or "litmus-paper test") to judge a challenged law's constitutionality. Instead, the Court calibrates the scrutiny to the severity of the law's burden on First Amendment rights; the greater the burden, the higher the scrutiny. The *Timmons* majority first held that the burden on the New Party was not severe, though it recognized that the law slightly burdened the party by reducing the universe of potential party nominees and by limiting the ability of the party to send a message to voters and to its preferred candidates through its nomination process.

Nonetheless, the Court held that three "sufficiently weighty" state interests justified the burden. First, the fusion ban prevented parties from joining with sham parties with popular catch phrases, like the "No New Taxes" party. Second, the ban prevented a minor party from capitalizing on the popularity of another party's candidate, rather than its own appeal to the voters, in order to secure access to the ballot. Finally, the Court agreed that states "have a strong interest in the stability of their political systems" and therefore they may "enact reasonable regulations that may, in practice, favor the traditional two-party system."

The first two reasons hardly seem "sufficiently weighty" to overcome even a minor burden on the New Party's First Amendment rights. As for the first interest, reasonable ballot access laws can prevent the formation of sham parties, and the Court expressly denied it was concerned about voter confusion. The second argument ignores the ability of the state to list candidates on the ballots once under each party and then count only the votes cast for the candidate under the minor party label to meet that minor party's future ballot access requirements. This leaves the state's interest in promoting the two-party system, which the Court stated "temper[s] the destabilizing effects of party-splintering and excessive factionalism."

Unfortunately, the *Timmons* majority failed to examine with care the propositions that the two-party system deserves or needs the Court's protection. Proponents of a strong two-party system have argued that it promotes political stability, decreases interest-group politics, and provides a valuable voting cue to busy voters. But these proponents have not been able to demonstrate that the existence of only two major political parties actually promotes stability or decreases factionalism; and increasing the number of parties may enhance the voting cue by increasing the salience of differences among parties and candidates. Moreover, even if the two-party system is a valuable institution, the Court need not uphold antifusion and similar laws in order to preserve it; instead, the predominant first-past-the-post, single-member district voting mechanism appears to drive a political system with only two viable political parties.

Three Justices dissented in *Timmons*. Justice JOHN PAUL STEVENS, for himself and Justice RUTH BADER GINSBURG, found the risk to political stability engendered by fusion politics "speculative at best," but Justice DAVID H. SOUTER rejected the two-party system argument only on the ground that the state had failed to raise it.

Given the lack of evidence that the two-party system deserves or needs protection, and given the agency problem that stems from having these laws passed by legislatures made up almost exclusively of Democrats and Republicans, the Court should be wary of such flimsy justifications for infringing First Amendment rights.

RICHARD L. HASEN
(2000)

(SEE ALSO: *Political Parties and the Constitution.*)

Bibliography

ARGERSINGER, PETER H. 1980 "A Place on the Ballot": Fusion Politics and Antifusion Laws. *American Historical Review* 85: 287–306.

HASEN, RICHARD L. 1998 Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition. *Supreme Court Review* 1997:331–371.

ISSACHAROFF, SAMUEL and PILDES, RICHARD H. 1998 Politics as Markets: Partisan Lockups of the Democratic Process. *Stanford Law Review* 50:643–717.

## *TINKER v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT*
393 U.S. 503 (1969)

*Tinker* is a leading modern decision on the subjects of SYMBOLIC SPEECH and CHILDREN'S RIGHTS. A group of adults

and students in Des Moines planned to protest the VIETNAM WAR by wearing black armbands during the 1965 holiday season. On learning of this plan, the public school principals adopted a policy to forbid the wearing of armbands. Two high school students and one junior high school student wore armbands to school, refused to remove them, and were suspended until they might return without armbands. They sued in federal court to enjoin enforcement of the principals' policy and for nominal damages. The district court dismissed the complaint, and the court of appeals affirmed by an equally divided court. The Supreme Court reversed, 7–2, in an opinion by Justice ABE FORTAS.

The wearing of these armbands was "closely akin to "pure speech" and protected by the FIRST AMENDMENT. The school environment did imply limitations on the freedom of expression, but here the principals lacked justification for imposing any such limitations. The authorities' "undifferentiated fear" of disturbance was insufficient. While student expression could be forbidden when it materially disrupted school work or school discipline, these students had undertaken "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance." Furthermore, only this "particular symbol . . . was singled out for prohibition"; political campaign buttons had been allowed, and even "the Iron Cross, traditionally a symbol of Nazism." (Justice Fortas may have been unaware of the vogue among surfers and their inland imitators.)

Justice HUGO L. BLACK dissented, accusing the majority of encouraging students to defy their teachers and arguing that the wearing of the armbands had, in fact, diverted other students' minds from their schoolwork. He did not ask how much the principals' reaction to the planned protest might have contributed to that diversion.

KENNETH L. KARST
(1986)

## TITLES OF NOBILITY

In the twentieth century, the idea of a hereditary ruling elite using titles of nobility as a device for maintaining its authority seems a bit frivolous. To the founding generation, however, the threat was only too real. Moreover, the threat that a foreign potentate might suborn an American citizen or official by proffering such a title was also perceived as significant. The ARTICLES OF CONFEDERATION forbade the acceptance of foreign titles by any person holding federal or state office and forbade the granting of titles by the United States or by any state. The prohibitions were carried over into the Constitution, except that there is no longer a ban on state officers accepting foreign titles, and Congress may authorize acceptance of titles by federal officers. In both documents, titles of nobility are treated, along with gifts and offices, as items of value that foreign governments might offer in exchange for favors, and Governor EDMUND RANDOLPH, at the CONSTITUTIONAL CONVENTION, asserted that the provision was designed to guard against corruption.

As it appears in the Constitution, the prohibition against accepting foreign titles applies only to those holding a federal office of trust or profit. On the eve of the War of 1812, Congress proposed to the states a constitutional amendment extending the prohibition to every citizen of the United States. Under the proposed amendment, acceptance of a title of nobility would have caused automatic forfeiture of United States CITIZENSHIP and permanent disqualification from holding federal or state office. The titles-of-nobility amendment was one of only six constitutional amendments ever proposed by Congress to fall short of ratification by the states.

DENNIS J. MAHONEY
(1986)

## TOCQUEVILLE, ALEXIS DE
(1805–1859)

The French magistrate and political theorist Alexis Clerel de Tocqueville spent nine months of 1831 and 1832 in the United States. He believed that democracy was the inescapable destiny of all nations and that America, as the first avowedly democratic nation in the modern world, offered an opportunity for the student of politics to observe democracy in action. One product of Tocqueville's sojourn on our shores was *Democracy in America.*

Tocqueville thought that the main problem of democracy was a tendency toward radical equality of condition which was destructive of the liberty necessary for excellence in human endeavors. He perceived in America two undesirable developments: a pervasive tyranny of the majority and a centrifugal individualism. He proposed, as a solution to democracy's problems, a "new science of politics" based on enlightened self-interest. He emphasized the utility, rather than the beauty or nobility, of virtue and public-spiritedness.

A shrewd observer of political affairs, Tocqueville was one of the first to discern the American tendency toward JUDICIAL SUPREMACY. American judges, he noted, although confined to deciding particular cases, and only those presenting justiciable controversies, possess immense political power. This is possible because "scarcely any political question arises in the United States which is not resolved, sooner or later, into a judicial question," and because of the simple fact that the Americans have acknowledged the right of judges to found their decisions on the Constitution

rather than on the laws, or, in other words, they have permitted them not to apply such laws as may appear to them to be unconstitutional. The political power of the judges, arising out of the exercise of JUDICIAL REVIEW, appeared to Tocqueville a salutary check on potential legislative excess. Tocqueville's observation, made when the Supreme Court had voided only a single federal law as unconstitutional, seems all the more perceptive today.

Tocqueville also recognized the unique status of the Constitution in American political life. The English constitution was alterable by ordinary legislation and the constitutions of continental monarchies were immutable save by violent revolution; only in America was the Constitution regarded as an expression of the SOVEREIGNTY of the people, not subject to change at the whim of legislators, but amendable by the common consent of the citizens in accordance with established rules.

Not all of Tocqueville's observations remain valid. For example, he wrote that the states were more powerful than the national government and that Congress was more powerful than the President. In each case, however, he identified the factors that have caused those relationships to be reversed in our own day.

Tocqueville's purpose in writing *Democracy in America* was not merely to describe American institutions. He addressed himself to the universal problems of modern politics—economic and social, as well as governmental. America provided illustrations and examples, and from the American experience he made generalizations applicable to all modern nations. In America Tocqueville learned how to make democracy safe for the world.

DENNIS J. MAHONEY
(1986)

Bibliography

PIERSON, G. W. 1959 *Tocqueville in America.* New York: Basic Books.

ZETTERBAUM, MARVIN 1965 *Tocqueville and the Problem of Democracy.* New York: Basic Books.

## TODD, THOMAS
(1765–1826)

Thomas Todd served as a Justice of the United States Supreme Court for nearly nineteen years, but he had only a small impact on the Court's decisions. Born into a fairly prominent Virginia family, he was orphaned at an early age. Because the bulk of his father's estate went to his eldest brother, he was forced to fend for himself. Following a short enlistment in the army during the Revolutionary War he went to Liberty Hall in Lexington, Virginia (later Washington and Lee University), where he studied the classics and mathematics. Todd then entered the household of his cousin Harry Innes, an accomplished lawyer and respected member of the Virginia legislature, where he served as a tutor in return for room and board. In 1784 Innes and his family removed to Kentucky where he became a judge, and Todd accompanied them. Through his cousin's political connections Todd quickly became involved in the movement to make Kentucky a separate state, serving as secretary and clerk for the various conventions that were called, and helped to write Kentucky's first CONSTITUTION in 1792.

Admitted to the bar in 1788, Todd developed a lucrative law practice, with a specialty in land titles. During the 1790s he served as secretary to the Kentucky legislature and as clerk to the federal district court. In 1799 he was appointed judge of that court, and five years later he became chief judge. In 1807 Congress increased the number of United States Supreme Court Justices from five to six in order to accommodate the newly created western circuit (Ohio, Kentucky, and Tennessee) and to resolve the special problems in land law arising there. As this was Todd's area of expertise and because Todd was popular with the congressmen from the western states, President THOMAS JEFFERSON appointed him to the newly created post.

Although a Republican, Todd invariably supported the strongly nationalist and probusiness decisions of the MARSHALL COURT. Reportedly he was opposed to the Supreme Court's ruling in DARTMOUTH COLLEGE V. WOODWARD (1819), but he was absent when it was handed down. In fact, bad health combined with the difficulties of riding the western circuit forced him to miss many of the Supreme Court sessions. He wrote only fourteen decisions, eleven for the majority, two concurring, and one dissenting in the relatively unimportant case of *Finley v. Lynn* (1810). With the exception of his last opinion, *Riggs v. Taylor* (1824), which dealt with an evidentiary problem, all his opinions dealt with problems involving land titles. He remained active in various local and state civic affairs until his death.

RICHARD E. ELLIS
(1986)

Bibliography

ISRAEL, FRED L. 1969 Thomas Todd. Pages 407–412 in Leon Friedman and Fred L. Israel, eds., *Justices of the Supreme Court, 1789–1969. New York: Chelsea House.*

## TOLERATION ACT
1 William & Mary ch. 18 (1689)

The principle of RELIGIOUS LIBERTY denies that the state has any legitimate authority over the individual's religion

or irreligion; the principle of toleration insists that a state which maintains an ESTABLISHMENT OF RELIGION indulge the existence of nonconformist religious groups. Toleration is a step between persecution and liberty. The Toleration Act, which accompanied the Glorious Revolution of 1688–1689, was a political necessity that restored peace to a religiously pluralistic England and ended a period of persecution during which thousands of nonconformist Protestant ministers had died in jail.

The act, entitled "A Bill of Indulgence," exempted most nonconformists from the penalties of the persecutory laws of the Restoration, leaving those laws in force but inapplicable to persons qualifying for indulgence. Subjects who took the requisite oaths to support the new king and reject the authority of the pope might have the privilege of worshipping as they pleased, because they were exempted from the penalties that had suppressed them. Baptists and Quakers received special indulgences. Thus the act had the effect of permitting the existence of lawful nonconformity, though nonconformists still had to pay tithes to the established church and endure many civil disabilities. One section of the act excluded from its benefits Roman Catholic recusants and Protestant antitrinitarians. England still regarded the former as political subversives, the latter as virtual atheists. For all its faults the statute of 1689 ushered in an era of toleration under the established church and ultimately benefited dissenters in those American colonies that maintained establishments of religion.

LEONARD W. LEVY
(1986)

Bibliography

SEATON, A. (1911) 1972 *The Theory of Toleration under the Later Stuarts.* Pages 92–236. New York: Octagon Books.

## TONKIN GULF RESOLUTION

See: Gulf of Tonkin Resolution

## TOOMBS, ROBERT A.
(1810–1885)

A Georgia attorney educated at Schenectady's Union College, Robert Augustus Toombs was a congressman (1843–1853) and senator (1853–1861) before becoming a SECESSION leader. Initially a conservative WHIG and an ally of ALEXANDER STEPHENS, Toombs became a Democrat, but not a fire-eater, after the COMPROMISE OF 1850. In 1856 he supported the admission of Kansas without SLAVERY, if the settlers there voted for statehood on that basis. In 1860 Toombs worked for a united Democratic Party, but despite this goal and his previous support for STEPHEN A. DOUGLAS in the SENATE, Toombs opposed Douglas's presidential aspirations. After ABRAHAM LINCOLN's election Toombs supported the Crittenden Compromise, and he also offered his own. When compromise failed, he returned to Georgia as a secession leader, writing a report for the Georgia Secession Convention explaining why disunion was necessary. Appointed Confederate secretary of state, Toombs resigned after five months to accept a rebel army commission. When he was denied a promotion after Antietam, Toombs left the army and became a critic of JEFFERSON DAVIS's economic inefficiency, confederate violations of CIVIL LIBERTIES, and CONSCRIPTION. In 1865 he escaped to England; he returned in 1867 to lead Georgia's anti-RECONSTRUCTION forces. He dominated Georgia's 1877 CONSTITUTIONAL CONVENTION, which paved the way for black disfranchisement, and, at Toombs's insistence, severely limited corporate charters and railroad development. Toombs never petitioned for CITIZENSHIP, and although a successful attorney, never again held public office.

PAUL FINKELMAN
(1986)

Bibliography

THOMPSON, ROBERT Y. 1966 *Robert Toombs of Georgia.* Baton Rouge: Louisiana State University Press.

## *TOOMER v. WITSELL*
334 U.S. 385 (1948)

South Carolina required state residents to pay a $25-per-boat license fee to gather shrimp in state waters; for nonresidents, the fee was $2,500. The Supreme Court, speaking through Chief Justice FRED M. VINSON, held that this discrimination violated both the PRIVILEGES AND IMMUNITIES clause of Article IV and the COMMERCE CLAUSE. (See STATE REGULATION OF COMMERCE.) The commerce ground was easy and unanimously supported by the Justices. The decision's main importance lay in its approach to the privileges and immunities clause; on this issue the Court divided, 6–3. Earlier decisions had suggested that the clause protected only "fundamental rights." *Toomer* redirected the inquiry: discrimination against nonresidents was permissible only if it bore a substantial relation to solving a problem distinctively presented by nonresidents. South Carolina's discriminatory tax failed this test.

KENNETH L. KARST
(1986)

## *TORCASO v. WATKINS*
367 U.S. 488 (1961)

The Maryland Constitution provided: "No RELIGIOUS TEST ought ever to be required as a qualification to any office . . . other than a declaration of belief in the existence of God. . . ." For Justice HUGO L. BLACK, speaking for the Supreme Court, the Maryland requirement contravened the ESTABLISHMENT OF RELIGION clause of the FIRST AMENDMENT. Black, quoting his own opinion for the Court in EVERSON V. BOARD OF EDUCATION (1947), repeated that government may not "force a person to profess a belief . . . in any religion."

RICHARD E. MORGAN
(1986)

# TORT CLAIMS ACT

See: Federal Tort Claims Act

# TORT LIABILITY AND JOURNALISTIC PRACTICES

See: Journalistic Practices, Tort Liability, and Freedom of the Press

# TORTS

The Constitution intersects with tort law, broadly conceived, in various ways. Most basically, the DUE PROCESS clauses of the Fifth Amendment and FOURTEENTH AMENDMENT require that in any legal proceeding enforced by public authority in which a property interest is at stake, as it almost invariably is in a tort suit, the parties must be accorded PROCEDURAL DUE PROCESS and the EQUAL PROTECTION OF THE LAWS. These requirements, however, are not cumbersome. As the Supreme Court said in *Snyder v. Massachusetts* (1934), a state remains "free to regulate procedure of [its] courts in accordance with [its] own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our peoples as to be ranked as fundamental." Moreover, due process of law does not always require a proceeding in court. The states are free, for example, to replace the traditional COMMON LAW approach to employee injuries with an administrative workers' compensation system, as all states have now done.

Beyond these rudimentary requirements of procedural due process, which apply to all state-enforced proceedings, the interactions between the Constitution and tort law become considerably more complex. To begin with, the Constitution sometimes functions as a sword, that is, as a source of rights that may be protected by tortlike civil action and damage remedies, and sometimes functions as a shield, that is, as an obstacle to civil actions and remedies that would otherwise be available under state or federal law. Moreover, the Constitution interacts with tort law as a sword and as a shield both directly and obliquely. We begin with the Constitution's more indirect interactions.

By virtue of the SUPREMACY CLAUSE (Article VI, clause 2), the Constitution is the ultimate source of congressional authority. Thus, the Constitution is indirectly the source of all tortlike civil causes of action created by federal statutes. Where a statute explicitly creates a private cause of action, this area of law raises few problems. However, many federal regulatory and criminal statutes specify standards of conduct without expressly authorizing suits for money DAMAGES. Not surprisingly, individuals injured by violations of these laws often ask the federal courts to create private causes of action with damages as a remedy. All agree that the issue of whether the federal courts should infer such a cause of action is a matter of statutory construction and that what must ultimately be determined is whether Congress intended to create the private remedy asserted. Yet, the question of what constitutes sufficient evidence of congressional intent and how restrictive or liberal the Court should be in finding implied private causes of action is highly controversial and has sharply divided the Court. It is clear, however, that during the twenty-five years since its 1964 decision in *J. I. Case Co. v. Borak*, where the Court seemed willing to create a private right of action wherever doing so would help effectuate the purpose of the statute, the Court has generally grown increasingly hostile toward implied causes of action. The prevailing view on the Court now seems to be that first expressed by Justice LEWIS F. POWELL in his dissent in *Cannon v. University of Chicago* (1979): "absent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action."

The Constitution is also the ultimate source of authority for the FEDERAL TORT CLAIMS ACT, which provides that the "United States shall be liable . . . to tort claims in the same manner and to the same extent as a private individual under like circumstances" (28 U.S.C. 2674). The act does not create new causes of action. Rather, it constitutes a waiver of SOVEREIGN IMMUNITY by the United States for negligent acts by its employees that would constitute torts in states where the conduct occurs. The act has many important express exceptions (such as an exception for intentional acts and for "discretionary functions") and the Supreme Court has inferred additional exceptions (such as the bar to suits by members of the ARMED FORCES for injuries they incur while in the military). Nevertheless, the act, which

was not passed until 1946, remains the only basis for recovery of damages from the United States for the torts of its employees.

Not only is the Constitution the ultimate source of authority for federal statutes that create or permit tortlike causes of action, but it is also the ultimate source of authority for federal statutes that preclude state tort remedies that would otherwise be available. In this case, too, the issue is one of statutory interpretation (did Congress intend to displace state laws dealing with the same subject matter as the federal statute?), and here, also, the issue is easily resolved where Congress made it clear that the federal statute is intended to preempt the relevant state law. For example, in *Duke Power Co. v. Carolina Environmental Study Group*, the Court upheld the Price-Anderson Act, which expressly limited aggregate liability for a single nuclear power plant accident to $560 million, thereby limiting the tort remedies that might otherwise be available to plaintiffs in state courts. The Court rejected the claim that the statute resulted in an unconstitutional deprivation of the property rights of potential accident victims.

More difficult issues arise where Congress's intent with respect to state law is unclear. For example, the Federal Cigarette Label and Advertising Act requires that cigarette packages be marked with certain specified warning labels. Although the act forbids states to require additional warnings of any kind, the act does not make it clear whether, or to what extent, state courts are precluded from allowing tort actions by smokers who claim to have been harmed by smoking cigarettes sold with the requisite federal warnings. This issue is now being widely litigated in state and lower federal courts.

Although there are limits to generalizations that can be drawn, it seems that the Supreme Court has been unwilling to find PREEMPTION of state tort remedies in the absence of clear legislative intent to displace state law. For example, in *Silkwood v. Kerr-McGee Corp.* (1984), the Court held that state laws awarding punitive damages for injuries resulting from the escape of plutonium from a nuclear plant were not preempted by the extensive federal regulatory scheme governing the safety of nuclear plants.

Both the implied-cause-of-action cases and the preemption cases raise issues of statutory interpretation. Unquestionably, Congress has broad constitutional power to create new tortlike causes of action or, instead, to abolish or replace existing causes of action. In recent years, however, the Supreme Court has tended to construe federal statutes narrowly, leaving things as they are in the absence of a clear indication of an intent by Congress to change them. Thus, the Court has been reluctant either to infer private causes of action from federal statutes or to find that state law has been preempted by federal statutes.

The Constitution not only affects tort law indirectly through the commands of federal statutes, but bears directly on tort law as a source of tortlike causes of action against governmental officials and entities and as an obstacle to tort actions and remedies that would otherwise be available. We begin with the constitution as a sword.

The idea that compensatory and punitive-damage actions could be premised on the Constitution itself took some time to develop, particularly where the defendant was an official of the federal government. The common-law courts tended to treat an official who invaded the protected interests of another without legal authority simply as a private individual who had committed a tort. The BILL OF RIGHTS, which originally applied only to the federal government, incorporated some common-law norms against unjustified official invasions of person and property. For example, it forbids federal officials from making unreasonable SEARCHES AND SEIZURES, forbids issuance of SEARCH WARRANTS without probable cause, and forbids deprivations of life, liberty, or property without due process of law.

Until the CIVIL WAR, the Constitution played only an indirect role in tort actions against federal officials. A person who believed that his or her person or property had been wrongfully invaded by a federal officer would bring a common-law trespass action against him. The official pleaded justification—that he or she had been acting within his or her constitutional and statutory authority, so the action was not tortious. For example, an official might argue that a seizure of the plaintiff's property was reasonable. The issue of reasonableness could have been characterized as a question of whether the plaintiff's FOURTH AMENDMENT rights had been violated. But neither the parties, nor the courts it seems, perceived the action as different from an ordinary tort action because the constitutional and preexisting common-law standards were largely coextensive.

The constitutional amendments and legislation of the RECONSTRUCTION era increased the interplay of tort law and the Constitution, particularly in actions against state and local officials. With the Fourteenth Amendment, the common-law protections against unjustified invasions of liberty or property were now constitutionalized as against state and local officials rather than only against federal officials. And new rights that were not recognized at common law, such as the right to equal protection of the laws, were added to the Constitution.

In addition, the 1871 Civil Rights Act recognized under COLOR OF STATE LAW a cause of action for invasion of rights secured by the Constitution, and the JUDICIARY ACT OF 1875 extended FEDERAL COURT JURISDICTION to FEDERAL QUESTION cases generally. Before the Civil War, plaintiffs had brought suits against government officers as tort claims, and the constitutional issues arose by way of answer and

reply. The Reconstruction legislation, however, offered the plaintiffs a federal forum if they pleaded a constitutional violation in their complaints. Over time these "constitutional" torts came to be viewed as separate from the common-law tort actions from which they derived. This separation occurred in part because constitutional rights came to include some rights that had not received protection in common-law actions, such as rights to free speech. In addition, the demise of the concept of a general nationwide common law made lawyers look for federal or state positive-law sources for interests that the courts would protect and look to the source of constitutional tort actions as the Constitution rather than general tort law.

Today federal court actions against state and local officials for constitutional invasions are primarily brought under SECTION 1983 of the 1871 Civil Rights Act. Suits against LOCAL GOVERNMENT entities—although not states, which are usually shielded from federal court liability by the ELEVENTH AMENDMENT—can also be brought in federal courts under section 1983. (Local governments are liable, however, only for their own unconstitutional policies, not for the unauthorized tortious acts of their employees.) There is no counterpart to section 1983 for suits against federal officials. Therefore, a claim against a federal official, such as the claim that an FBI agent violated the plaintiff's Fourth Amendment rights, must be rooted in the Constitution itself. Although the general federal-question statute empowers federal courts to adjudicate cases arising under the Constitution, neither that statute nor the Constitution itself expressly creates a cause of action for money damages. It was not until 1971, in the landmark case of BIVENS V. SIX UNKNOWN NAMED AGENTS, that the Supreme Court ruled that a federal official can be sued for money damages as a cause of action implied from the Constitution itself—in this case, from the Fourth Amendment. *Bivens* made clear that the constitutional claim was not tied to the niceties of state tort law: "The federal question becomes not merely a possible defense to the State Law action, but an independent claim both necessary and sufficient to make out the . . . cause of action."

Since *Bivens*, the Court has recognized other constitutional provisions, such as the Eighth Amendment's proscription on CRUEL AND UNUSUAL PUNISHMENT, as bases for damage actions. *Bivens*, however, leaves many open questions, most crucially, whether the availability of a cause of action against federal officers for money damages is required by the Constitution itself or is federal common law that Congress could abolish by statute. In recent years the Court has rejected a variety of constitutional damage claims either because, in the Court's view, Congress had provided an alternative remedy or, more broadly, because the Court perceived "special factors" counseling caution in inferring a constitutional cause of action for damages. Moreover, the Supreme Court has ruled that both state officials sued under section 1983 and federal officials sued in a *Bivens* action possess some degree of immunity from liability (municipalities sued under section 1983 do not). Some officials, such as judges and prosecutors performing their official duties, enjoy absolute immunity from suit, but most officials are accorded only a "qualified," or "good faith," immunity. This form of immunity, which has little support in the common law and is not mentioned either in section 1983 or in the Constitution itself, must be claimed as an affirmative defense. Although this partial immunity is often called good-faith immunity, the Supreme Court's most recent formulation in *Harlan v. Fitzgerald* (1982) makes clear that the test is an objective one: "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

Although the rights litigated in these "section 1983" and *Bivens* suits are rights secured by the Constitution and the various immunity doctrines are peculiar to suits against governmental officials, these actions are still seen in some respects as in the nature of tort actions, as shown by the borrowing of state-tort statutes of limitation. In addition, many such constitutional actions, for example, those seeking damages for illegal searches or arrests, resemble common-law actions that may be brought under state tort law or, in limited cases, under the Federal Tort Claims Act if the violator is a federal law enforcement official. Other "constitutional tort" actions go beyond the common law—for example, an action under the 1871 Act claiming that one was dismissed from public employment for exercising one's FIRST AMENDMENT rights. Actions for official negligence typically are relegated to traditional tort remedies, as are some intentional torts, such as libel.

If it took a surprisingly long time for the Court to rule that the Constitution could itself be the source for tortlike causes of action for damages, it took almost as long for it to rule that the Constitution could be an obstacle to tort remedies otherwise available. The primary constitutional limit on common-law private tort actions is the First Amendment's prohibition against "law[s] . . . abridging the freedom of speech or of the press." Originally, this prohibition applied only to Congress, but with the INCORPORATION of the Bill of Rights into the Fourteenth Amendment, it became applicable to state governments as well. Nevertheless, it was not until NEW YORK TIMES V. SULLIVAN (1964) that the Supreme Court interpreted the First Amendment as a limitation on damage remedies in private suits brought under the states' common law of libel. Although it might seem anomalous that constitutional language securing rights against the government would also

come into play in legal actions between private parties, by the time of *Sullivan* it had become clear that a state could infringe constitutionally protected interests by enforcing a legal judgment as well as by enacting a statute.

In *Sullivan*, a city commissioner of Montgomery, Alabama, brought a libel action in state court against the *New York Times* and four black ministers who had advertised in the *Times*, appealing for contributions to a legal-defense fund for MARTIN LUTHER KING, JR., who had recently been arrested in Alabama on a perjury charge. The ad, which had not mentioned Sullivan, made several assertions about the conduct of the Montgomery police that were largely, though not entirely, accurate. Sullivan claimed that because his duties included supervision of the Montgomery police, the allegations against the police defamed him personally. An Alabama jury awarded him $500,000. By the time the case reached the Supreme Court, it was but one of eleven LIBEL claims totaling $5,600,000 pending against the *Times* in Alabama; it was obvious that the *Sullivan* litigation was part of a concerted effort to discourage the press from supporting the CIVIL RIGHTS MOVEMENT in the South and to silence the movement's leaders. This effort, moreover, seemed likely to succeed, for under the common law of Alabama and most other states it was difficult to defeat these libel claims. Under standard common-law rules governing libel actions, truth was an affirmative defense, but the evident inability of civil rights advocates to prove to hostile juries the "truth" of statements criticizing popularly elected officials posed the clear danger that speech would be stifled by the threat of crushing civil liability. And in most states the common-law rule of strict liability for defamation recognized no privilege of "fair comment" for statements of fact that were false. To combat this danger to First Amendment values, the Court in *Sullivan* ruled that a statement criticizing a public official and relating to matters of public concern could be actionable under state libel law only if the statement were defamatory, false, and made with actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

In subsequent years, the Court recognized that "the establishment" against which caustic political speech was often addressed encompassed more individuals than merely those who actually held public office. Indeed, there are many people, such as labor leaders or prominent business leaders, who may be so powerful or influential that their actions clearly affect the outcome of political controversies. Acknowledging this reality, the Court, in the cases of *Associated Press v. Walker* and *Curtis Publishing Company v. Butts* (1967), extended the *Sullivan* rules to libel actions brought by PUBLIC FIGURES. However, in GERTZ V. ROBERT WELCH, INC. (1974), the Court recognized that there are other people who, although perhaps well known, have not so injected themselves into public controversy as to become public figures for purposes of the First Amendment's limitations on libel actions. Where such a nonpublic figure brings a libel suit, there is much less likelihood that a libel action is a state-supported attempt to silence unpopular speech. Moreover, such private individuals have a correspondingly lesser opportunity than public figures or public officials to obtain access to the media to rebut the allegedly defamatory statements. Thus, the Court ruled in *Gertz* that private plaintiffs in such cases need only to show whatever standard of fault the state requires, although some level of fault (at the least negligence) is a constitutional requirement for recovery.

First Amendment concerns ebb as the public status of the plaintiff decreases, but the status of the plaintiff is not the only factor that determines whether the challenged speech is entitled to special constitutional protection. In DUN & BRADSTREET V. GREENMOSS BUILDERS, INC. (1985) the Supreme Court ruled that special First Amendment protection extends only to speech relating to matters of public concern. If the challenged statement touches only matters of private concern, there is little danger that state libel law is being used to silence unpopular political speech, and so the states are free to apply whatever libel law they choose. It is possible, in theory, that public officials or public figures might thus succeed in silencing the speech of unpopular critics. But it is clear that a given topic of interest may change categories as the social status of the plaintiff changes, so that matters that are "private" in the context of statements about private citizens may be of public concern in the context of statements about public officials or public figures.

The Court's First Amendment libel jurisprudence has become extremely—some would say unduly—complex and has required extensive revamping of not only substantive libel law, but procedural and remedial libel law as well. For example, in a "public concern" case the defendant no longer bears the burden of persuasion on the issue of the truth of the alleged defamation. Now, in a departure from the common law, it is the plaintiff who must prove that the challenged statement contains an untrue assertion before any liability will exist. And although falsehood may be established by the common-law standard of a preponderance of the evidence, "actual malice" (in the case of a "public official" or "public figure" plaintiff) or negligence (in the case of a "private individual" plaintiff) must now be established by clear and convincing evidence. In addition to these changes in trial procedure, the Court has effected a change in appellate procedure in libel actions, ruling in *Bose Corporation v. Consumers Union of United States, Inc.* (1984) that a reviewing court is not to accord trial court findings the normal "clearly erroneous" standard of deference. Instead, said the Court, the First

Amendment requires that an appellate court independently evaluate the evidence in the record to determine whether there is clear and convincing evidence of "actual malice" or the appropriate level of fault.

With respect to remedies for libel and defamation, the law is also complex and, perhaps, in a state of flux. But in essence, the current rule is the following: where the speech relates to matters of public concern, regardless of the social status of the target of the speech, presumed and punitive damages may be awarded only upon a showing of actual malice (of course, where the plaintiff is a public official or public figure, no damages at all will lie, absent a showing of actual malice); but where the subject matter of the speech is purely private, the First Amendment places no limitation on any type of damages.

Many libel plaintiffs also allege that they are entitled to recover on some other basis, such as invasion of privacy or intentional infliction of emotional distress. Like libel, these other causes of action also present the risk of state-supported attempts to silence controversial or unpopular speech. Not surprisingly, when the Court in HUSTLER MAGAZINE V. FALWELL (1988) considered whether the First Amendment places any limitations on actions for intentional infliction of emotional distress, it held that a public official or a public-figure plaintiff in such an action must prove that the statement at issue contains a false assertion made with actual malice. The Court did not discuss the public concern/private concern distinction of *Dun & Bradstreet*, but its reasoning suggests that emotional distress actions, as well as other tort actions based on defendant's speech, must be analyzed in light of the same First Amendment principles as libel actions.

Until now, the First Amendment has been by far the most important source of constitutionally based limitations on tort law. But the Court will soon consider whether the due-process clause of the Fourteenth Amendment places some limits on the award of punitive damages under state law, not only for speech related torts, such as libel and slander, but for all torts. As punitive-damage awards have skyrocketed in recent years, business interests have argued for some constitutionally based limits on the size of punitive awards. In *Browning-Ferris Industries of Vermont Inc. v. Kelco Disposal Inc.* (1989) the Court ruled that the Eighth Amendment's EXCESSIVE FINES clause applies only to criminal cases and not to awards of punitive damages in civil suits between private parties. However, the Court expressly left open the possibility that the due-process clause regulates in some way the imposition of punitive damages in such suits.

SILAS WASSERSTROM
ANNE WOOLHANDLER
(1992)

Bibliography

JEFFRIES, JOHN C. 1989 Compensation for Constitutional Torts: Reflections on the Significance of Fault. *Michigan Law Review* 88:82–103.

NICHOLS, GENE 1989 *Bivens*, *Chilicky*, and Constitutional Damages Claims. *Virginia Law Review* 75:1117–1154.

SMOLLA, RODNEY 1987 *Dun & Bradstreet*, *Hepps*, and *Liberty Lobby:* A New Analytic Primer on the Future Course` of Defamation. *Georgetown Law Journal* 75:1519–1573.

## *TOTH, UNITED STATES EX REL., v. QUARLES*
350 U.S. 11 (1955)

Five months after his honorable discharge from the Air Force, Toth was charged with committing murder while on active duty in Korea. Taken to Korea for trial by court martial, Toth sought HABEAS CORPUS in a DISTRICT OF COLUMBIA court. On APPEAL, the Supreme Court held, 6–3, that a civilian was entitled to TRIAL BY JURY in a civilian court established under Article III; court-martial JURISDICTION was constitutionally limited to actual members of the armed forces.

KENNETH L. KARST
(1986)

(SEE ALSO: *Judicial Power; Military Justice.*)

## *TOWNSEND v. SAIN*
372 U.S. 29 (1963)

When a state prisoner seeks federal HABEAS CORPUS review of a constitutional error in his or her case, the federal court must decide what weight to give the state court fact findings that are relevant to the prisoner's claim. The fairness and accuracy of such findings are crucial to the proper adjudication of federal constitutional rights, because most habeas corpus petitions raise mixed questions of law and fact, such as the VOLUNTARINESS of a WAIVER OF CONSTITUTIONAL RIGHTS, or the suggestiveness of a LINE-UP identification. In *Townsend*, a unanimous Supreme Court held that a federal court in a habeas corpus proceeding always has the power to try the facts anew, and that it must do so if the defendant did not receive a full and fair evidentiary hearing in any state court proceeding. The Court split 5–4 over the need for more specific directives concerning mandatory hearings, with Chief Justice EARL WARREN setting forth the majority's view that a hearing is required in six particular circumstances.

In 1966, Congress enacted a modified form of the

*Townsend* criteria in an amendment to the JUDICIAL CODE, specifying eight circumstances when the validity of state court findings may not be presumed. In other circumstances, the habeas corpus petitioner bears the burden of proving that the state fact findings were erroneous.

CATHERINE HANCOCK
(1986)

## TOWNSHEND ACTS
(1767)

The Townshend Acts imposed duties upon American imports of glass, lead, paint, paper, and tea and authorized WRITS OF ASSISTANCE as one means of enforcing payment. Although "external" in form, the duties were not levied to regulate trade but to raise revenue to help pay for maintaining British soldiers and officials in America. The colonists protested that the levies constituted TAXATION WITHOUT REPRESENTATION. The Townshend Act duties (except that on tea) were repealed in 1770.

DENNIS J. MAHONEY
(1986)

## TRADE UNIONS

See: Labor and the Constitution

## TRAFFIC STOPS

Although traffic stops are not the most burdensome seizures regulated by the FOURTH AMENDMENT, they have become among the most controversial—partly because they are so common. Most Americans have never been arrested, but the vast majority have been pulled over. More importantly, traffic enforcement is highly discretionary. Vehicle codes are so widely breached that the police can stop almost any car if they follow it with a modicum of patience. This discretion is a boon for law enforcement; police departments increasingly have found vehicle codes a useful tool for finding and apprehending violators of more serious laws.

But the discretionary nature of traffic enforcement also has a worrisome side. Because vehicle codes give police officers authority to stop practically any motorist, they present some of the same risks of arbitrariness posed in colonial America by GENERAL WARRANTS and WRITS OF ASSISTANCE, the very instruments against which the Fourth Amendment was most clearly aimed. And a growing body of evidence suggests that the police are far more likely to pull over cars driven by members of racial minorities, particularly African Americans, and that minority motorists stopped by the police are more likely to be verbally or physically abused.

Recent decisions by the Supreme Court have exacerbated these dangers. In the most important of these decisions, *Whren v. United States* (1996), the Court held unanimously that the police can stop a car whenever they have PROBABLE CAUSE to believe that the driver has violated traffic laws, regardless of the officers' true motivation, and regardless of whether the violation would prompt a reasonable officer to pull the car over. *Whren* put to rest a persistent ambiguity in constitutional CRIMINAL PROCEDURE, ruling that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." The decision also rejected the reasoning of some scholars and lower courts that a traffic stop should be deemed unconstitutionally pretextual if it departed so sharply from usual police practices that a reasonable officer would not have made the stop for the reasons given. Writing for the Court, Justice ANTONIN SCALIA saw this alternative approach as an unwieldy and unjustifiable attempt to bring subjective intentions back into the analysis through the back door.

In other recent cases the Court has broadened the power that the police can exercise once they pull over a car. Having held in *Pennsylvania v. Mimms* (1977) that during any lawful traffic stop the police can order the driver out of the car, the Court in *Maryland v. Wilson* (1997) extended the *Mimms* rule to passengers. In *Ohio v. Robinette* (1996), the Court ruled that the police can seek consent to search a car without first explaining that the traffic stop has ended; *Robinette* built on SCHNECKLOTH V. BUSTAMONTE (1973), which held that a suspect can validly consent to a search without knowing he or she has the right to refuse.

In all these cases the Court demonstrated a commendable regard for law enforcement necessities and the considerable hazards faced by officers carrying out traffic stops. What the decisions unfortunately lack is similar attention to ways in which traffic stops lend themselves to particularly troubling forms of police harassment.

DAVID A. SKLANSKY
(2000)

(SEE ALSO: *Search and Seizure.*)

Bibliography

DAVIS, ANGELA J. 1997 Race, Cops, and Traffic Stops. *University of Miami Law Review* 51:425–443.

SALKEN, BARBARA C. 1989 The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked

Discretion to Arrest for Traffic Offenses. *Temple Law Review* 62:221–275.

SKLANSKY, DAVID A. 1998 Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment. *Supreme Court Review* 1997:271–329.

## TRANSACTIONAL IMMUNITY

See: Immunity Grant

## TRANSFORMATION OF CONSTITUTIONAL LAW

Over the past two hundred years, American CONSTITUTIONAL INTERPRETATION has undergone a transformation from its early static and TEXTUALIST tradition to a modern, dynamic approach wherein a "LIVING CONSTITUTION" changes to accommodate the needs of the times. Two pivotal periods in constitutional thought have catalyzed this shift away from ORIGINALISM, initially starting with the Progressive reaction to the excesses of the *Lochner* Court, and later continuing with the WARREN COURT and its broad constitutional reforms.

For the first hundred years, American constitutional interpretation firmly adhered to what historian Michael Kammen describes as a Newtonian conception of the Constitution. Constitutional concepts and principles were static and unchanging, akin to the timeless scientific truths of Newtonian mechanics. Indeed, so firmly entrenched was this originalist approach to judicial thinking that the Supreme Court all but ignored Chief Justice JOHN MARSHALL's statement in MCCULLOCH V. MARYLAND (1819) that "[the] constitution was intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." The passage was cited only once in a Court opinion during the entire nineteenth century, and only a total of six times by 1945.

The dominance of literal constitutional interpretation was not entirely surprising given the strong influence of Protestant thought early in American history. Protestants rejected the priestly interpretations of the Bible espoused by Catholics, supporting instead textualist interpretations that were more freely available to laypersons. Indeed, at the time of the writing of the Constitution, the only established competitor to originalism was the COMMON LAW methodology, which by the early eighteenth century had been recognized as changing and evolutionary. Nonetheless, despite the Framers' acceptance of the dynamic nature of the common law, they largely held to the originalist view. For instance, when constructing the Virginia code, THOMAS JEFFERSON would entertain only ancient, "timeless" English common law rules, excluding the "uncertain" reforms proffered in the then-recent common law jurisprudence of Lord Mansfield.

The originalist approach had internal conflicts and difficulties. One problem was the degree of literalness to be applied. Were judges to interpret the Constitution on its face, considering only express terms, or were they to consider historical context and implied meaning as well? The former, the plain meaning approach, faced semiotic difficulties, since as JAMES MADISON suggested, "no language is so copious as to supply words and phrases for every complex idea. . . ." The preference for the letter of the Constitution over the spirit also clashed with early Christian foundations, which militated against extreme literalism. "[F]or the letter killeth, but the spirit giveth life" (2 *Corinthians* 3:6). The historical context approach suffered its own interpretative problems, for the Constitution and its amendments had been adopted through a process of debate, representing a multitude of often contradictory intentions. Intent was not just difficult to discover; oftentimes a unified intent did not even exist. These deficiencies led Justice WILLIAM J. BRENNAN, JR., later to criticize historical analysis as "arrogance cloaked as humility." It was plainly arrogant, if not unbelievable, to think that a court could accurately guess the intent of the Framers decades or centuries later.

The high-water mark for a static conception of constitutional meaning centered around LOCHNER V. NEW YORK (1905), where the Court struck down a maximum hour law for bakers as a violation of FREEDOM OF CONTRACT. *Lochner*'s holding, however, demonstrated the great deficiency of static, originalist constitutional interpretation; it was simply incapable of adapting to a changing world. Abstract legal concepts such as freedom of contract had grown out of touch with the practical realities of an increasingly exploitative industrial society, and originalist thinking provided no easy alternative. *Lochner* thus provoked a fervent reaction from the Progressives, who sought to transform the conception of constitutional law from static to dynamic to meet the rapidly changing needs of twentieth-century society.

The stage for a dynamic conception of constitutional law was set by Darwin's theory of evolution, which served to undermine the static Newtonian model of constitutionalism while concurrently suggesting that law, like science, might change over time. Progressives argued for an organic Constitution premised on Justice OLIVER WENDELL HOLMES, JR.'s, classic maxim from *The Common Law* (1881): "The life of the law has not been logic; it has been experience." Constitutional principles were not to be derived solely from the text, but rather were changed by customs and common experiences over time. Justice THOMAS M. COOLEY of the Michigan Supreme Court similarly supported this organic conception of constitutional inter-

pretation, suggesting that the Constitution's "peculiar excellence is that it is forever adapted to the people, and expands to accommodate new circumstances and new and higher conditions of society." By the turn of the century, then-Professor WOODROW WILSON summarized PROGRESSIVE CONSTITUTIONAL THOUGHT most markedly: "government is not a machine, but a living thing. . . . It is accountable to Darwin, not to Newton."

To introduce a dynamic, orgainc concept of a "living Constitution" into a still predominantly originalist legal community, the Progressives used the justification of "changed circumstances." This DOCTRINE, pioneered by future-Justice LOUIS D. BRANDEIS's brief to the Court in MULLER V. OREGON (1908), created a fiction by which the Court could maintain the aura of originalism. The Constitution remained static and unchanging; instead, the factual situation was the novelty, requiring a new, but still originalist interpretation of the Constitution. In *Muller*, despite the foreboding PRECEDENT of *Lochner*, the "BRANDEIS BRIEF", as it became commonly known, successfully argued the constitutionality of an Oregon maximum hour law for women by using the "changed circumstances" argument, daringly submitting 110 pages of sociological and economic data on the modern situation of working women.

The originalist underpinning of the changed circumstances doctrine was tenuous, and failed to confine the doctrine for very long. Quickly, the doctrine became a key point of departure from static originalism. Justice BENJAMIN N. CARDOZO soon expanded the doctrine to embrace the idea of a "living Constitution," advocating in *The Nature of the Judicial Process* (1921) that "[t]he great generalities of the constitution have a content and significance that vary from age to age." No longer was a court applying a previously fixed rule to new facts. Indeed, as Cardozo suggested, the meaning of the rule itself could not be determined independently of its times or its specific applications. Cardozo's theory of a dynamic Constitution was poignantly expressed in his unpublished CONCURRING OPINION in the *Minnesota Mortgage Moratorium Case* (1934):

> [The Framers] did not see the changes in the relation between states and nation or in the play of social forces that lay hidden in the womb of time. It may be inconsistent with things that they believed or took for granted. Their beliefs to be significant must be adjusted to the world they knew.

Cardozo withdrew his concurrence, however, when his charge was boldly echoed in the MAJORITY OPINION by Chief Justice CHARLES EVANS HUGHES:

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. . . . It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget, that it is *a constitution* we are expounding'—'a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.'

Among its multitude of reforms and constitutional reinterpretations, the Warren Court's treatment of the FOURTEENTH AMENDMENT, specifically the EQUAL PROTECTION clause, best evinced its commitment to a dynamic and changing Constitution. Shortly after the ratification of the Fourteenth Amendment, the RECONSTRUCTION Court had sought to limit and narrow the amendment's scope. In the twenty-eight years between the ratification of the Fourteenth Amendment and PLESSY V. FERGUSON (1896), which legalized "SEPARATE BUT EQUAL" SEGREGATION, the Court did not once rule in favor of blacks seeking protection against RACIAL DISCRIMINATION. The Court instead consistently struck down or narrowly construed CIVIL RIGHTS LEGISLATION. As Justice LEWIS F. POWELL, JR., suggested in REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978), the equal protection clause was "[v]irtually strangled in infancy by post-civil-war reactionism." The Warren Court endeavored to revisit and rewrite Fourteenth Amendment jurisprudence, notably in BROWN V. BOARD OF EDUCATION (1954), HARPER V. VIRGINIA STATE BOARD OF ELECTIONS (1966), and REYNOLDS V. SIMS (1964).

The theory under which the Court reached its decision in *Brown*, which held school segregation unconstitutional, remains ambiguous. Was *Plessy* incorrect from the day it was decided, or had *Plessy* been previously correct but changed circumstances mandated a reevaluation? Chief Justice EARL WARREN's opinion hinted at both theories. On one hand, it held that "[s]eparate educational facilities are inherently unequal," suggesting timeless, originalist principles. On the other hand, the Court also stated that it could not "turn the clock back to 1868 when the Amendment was adopted," but instead had to "consider public education in the light of its full development and its present place in American life," implying changed circumstances.

*Brown*'s theoretical basis proves particularly difficult to grasp because the Court desired unanimity due to legitimacy concerns. Consequently, Warren was forced to draft the opinion to avoid any specter of moral superiority that might alienate the Southern members of the Court. A suggestion that *Plessy* had always been incorrect would have disparaged "the Southern way of life" as it had been widely practiced for the previous fifty years.

Law clerk (and future professor) ALEXANDER M. BICKEL's memo to Justice FELIX FRANKFURTER on the eve of *Brown* offered an alternative theory of a changing Constitution.

Examining legislative history, Bickel concluded that the drafters of the Fourteenth Amendment had not intended to invalidate segregation at the time it was drafted. However, they had used broad language, anticipating and intending that the Court might adapt and change the interpretation in the future.

In *Harper*, the Court struck down a Virginia POLL TAX as violative of the equal protection clause, OVERRULING a PRECEDENT of thirty years. The ensuing exchange in *Harper* between Justices WILLIAM O. DOUGLAS and HUGO BLACK depicts the victory of the dynamic theory over the static. Douglas, writing for the majority, espoused a living Constitution, holding that "the Equal Protection Clause is not shackled to the political theory of a particular era." He further cited *Brown* for the proposition that the concept of equality changes with changed circumstances. This reasoning, however, provoked a bitter dissent from Black, who unequivocally denied "hold[ing] segregation in public schools unconstitutional on any such theory." For Black, who had grown increasingly disenchanted with dynamic constitutional theory, *Plessy* had been wrong the day it had been decided.

*Reynolds* further demonstrated the Court's shift to a living Constitution. In *Reynolds*, the Court held that the equal protection clause required equal ELECTORAL DISTRICTING for both houses of state legislatures, to which Warren applied the maxim "ONE PERSON, ONE VOTE". Given that the U.S. SENATE is comprised of two senators per state regardless of population, the *Reynolds* holding could scarcely have derived from an original understanding. Its only justification was that democratic principles had evolved to mandate the "one person, one vote" principle, irrespective of ORIGINAL INTENT. After the WORLD WAR II, democracy had become a desirable ideal, no longer confined and feared as leading to a "tyranny of the majority," but rather nurtured by JUDICIAL REVIEW to further inclusiveness in a pluralistic society.

The Warren Court's expansive view of judicial power and dynamic constitutional interpretation provoked a backlash from conservatives in the early 1980s. Focusing on judicial restraint and yearning for a truer and simpler past, Attorney General Edwin Meese proposed a return to originalism, a view often adopted by the REHNQUIST COURT.

A major departure from the Rehnquist Court's originalist tendencies, however, occurred in PLANNED PARENTHOOD V. CASEY (1992). In *Casey*, the Court considered whether to overrule the case that legalized abortion, ROE V. WADE (1973). Writing to reaffirm *Roe*, Justice DAVID H. SOUTER in his part of a joint plurality opinion suggested a standard under which the Court can overrule prior precedent and disregard the traditional, conservative doctrine of STARE DECISIS. Examining the cases overruling *Lochner* and *Plessy*, the plurality opinion concluded that overruling decisions are based primarily on changing circumstances. "[T]he decisions were . . . defensible, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before." Despite the recent emphasis on a static Constitution, the dynamic conception had resurfaced yet again.

MORTON J. HORWITZ
(2000)

Bibliography


BARRON, DAVID J. 1999 The Promise of Cooley's City: Traces of Local Constitutionalism. *University of Pennsylvania Law Review* 147:487–612.

BICKEL, ALEXANDER M. 1955 The Original Understanding and the Segregation Decision. *Harvard Law Review* 69:1–65.

CARDOZO, BENJAMIN N. 1921 *The Nature of the Judicial Process.* New Haven Conn.: Yale University Press.

FRIEDMAN, BARRY and SMITH, SCOTT B. 1998 The Sedimentary Constitution. *University of Pennsylvania Law Review* 147:1–90.

HOLMES, OLIVER W., JR. 1881 *The Common Law.* Boston: Little, Brown.

HORWITZ, MORTON J. 1993 The Constitution of Change: Legal Fundamentality Without Fundamentalism. *Harvard Law Review* 107:30–117.

——— 1998 *The Warren Court and the Pursuit of Justice.* New York: Hill and Wang.

KAMMEN, MICHAEL G. 1986 *A Machine That Would Go of Itself: The Constitution and American Culture.* New York: Knopf.

MEESE, EDWIN, III 1985 Address Before the D.C. Chapter of the Federalist Society Lawyers Division. *UC Davis Law Review.* 19:22–30.

RAKOVE, JACK N. 1996 *Original Meanings: Politics and Ideas in the Making of the Constitution.* New York: Knopf.


## *TRANS-MISSOURI FREIGHT ASSOCIATION v. UNITED STATES*
166 U.S. 290 (1897)

A 5–4 Supreme Court, holding that the SHERMAN ANTITRUST ACT extended to railroads, rejected the RULE OF REASON advanced by Justice EDWARD D. WHITE in dissent. In 1889, eighteen railroads had combined to form the Trans-Missouri Freight Association "for the purpose of mutual protection, by establishing and maintaining reasonable rates, rules and regulations [over their mutual] freight traffic." Any member's proposed rate reduction for a route shared with another member needed Association approval.

Justice RUFUS PECKHAM, the Court's spokesman, found

two questions: Did the Sherman Act apply to railroads and, if so, was the Freight Association agreement a violation of that act? He dismissed the railroads' claim of exemption on two grounds. Their business was commerce, and the lower courts and the dissenters had relied on a mistaken belief that the Sherman Act could not apply to railroads because the INTERSTATE COMMERCE ACT already regulated carriers. He refused "to read into the act by way of judicial legislation an exception that is not placed there [by Congress]." Policy matters were not questions for judicial determination; any alteration of the law was for Congress to undertake. Peckham concluded that the Sherman Act prohibited all restraints of INTERSTATE COMMERCE; adopting the rule of reason would "substantially . . . leave the question of reasonableness to the companies themselves." Endorsing free competition, the Court declared that intent need not be proved: the Association agreement clearly restrained commerce.

DAVID GORDON
(1986)

## TRAVEL

See: Right to Travel

## TREASON

Treason is the only crime defined in the United States Constitution. Article III, section 3, declares that

> Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. The Congress shall have power to declare the punishment of treason, but no ATTAINDER OF TREASON shall work corruption of blood, or forfeiture except during the life of the person attainted.

State constitutions contain similar limiting definitions of treason against a state. However, since national independence there has been little action or development of doctrine under the state provisions. The notable exceptions are the trials of Thomas Wilson Dorr (1844) and of John Brown (1859) which ended in convictions of treason by levying war against the states of Rhode Island and Virginia, respectively. State histories include a few abortive attempts to employ treason INDICTMENTS against people who incurred the wrath of powerful elements in the community. Thus indictments were brought against Mormon leaders in Missouri in 1838 and in Illinois in 1844; for political reasons the Missouri charge was not pressed and the defendants escaped jail; a mob murdered Joseph Smith shortly after his arrest on the Illinois indictment. Such isolated instances aside, the law of treason in the United States has been almost wholly the product of debates over making the national Constitution and decisions of federal courts under Article III, section 3.

As it has developed under the Constitution, the law regarding treason has strikingly mingled concern for the security of government and the legal order and concern for the freedom of private individuals and groups. The crime deals with the most serious threats to the existence of the state. In adopting the Constitution everyone took for granted that, since the people were creating a new SOVEREIGNTY, it must have authority to protect itself. Congress has reflected this judgment of the gravity of the matter by prescribing penalties that may extend to life imprisonment, or perhaps even to execution. Where charges have fallen fairly within the constitutional definition of the offense, judges have not hesitated to make firm application of the law. However, on its face the Constitution takes a limiting approach to the crime. Treason, says Article III, section 3, shall consist "only" in two named types of conduct; Congress is thus barred from adding new categories of treason, as it is also explicitly limited in fixing penalties. Moreover, the treason clause puts a stringent limit on the executive in prosecuting the crime; absent a confession in open court, by constitutional mandate the prosecution must muster testimony of two witnesses to the same overt act that the accused committed in seeking to carry out the treason. Federal judges in cases arising under the treason clause have followed a restrictive approach in marking the outer boundaries of the crime. Thus in one aspect the treason clause guards the security of the government. But in another dimension it sets limitations that make it functionally analogous to provisions of the BILL OF RIGHTS, protecting CIVIL LIBERTIES of private individuals and groups.

The constitutional emphasis on restricting the scope of the crime of treason is a marked departure from the main directions the law had taken in England and in this country before 1789. Before the eighteenth century, in practice, official policy had given clear primacy to the security of government, often more obviously to serve the interests of particular powerholders than to serve the common good.

From the fourteenth to the eighteenth century, English political history included aggressive use of charges of treason as weapons of partisan conflict; prosecution was usually vindictive and pressed with scant regard to fair procedure or careful insistence on clear proof or reliable evidence. The only counterweight to this abusive trend was the continuance of the statute of 25 Edward III (1350), stating seven categories of high treason—notably

those of levying war, adhering to enemies, or seeking "to compass or imagine the death of our lord the King"—and asserting that only Parliament might enlarge the definitions of treason, thus forbidding judges to extend the offense by interpretation. The restrictive emphasis of the statute of Edward III was stressed by the English treatise writers from whom lawmakers in the new United States got most of their knowledge of the course of English policy regarding treason. In particular, EDWARD COKE, Matthew Hale, and WILLIAM BLACKSTONE spoke of abuse of vague, extended definitions of the crime as instruments of partisan combat, imperiling the general liberty. Thus Hale warned, "How dangerous it is by construction and analogy to make treasons, where the letter of the law has not done it; for such a method admits of no limits or bounds, but runs as far as the wit and invention of accusers, and the odiousness and detestation of persons accused will carry men." Offsetting such warnings, however, the English treatises also brought to the knowledge of lawmakers in North America a considerable range of decisions in which English judges had, despite the limit declared in Edward III's statute, greatly enlarged the offense of treason by construction.

Security in the most elemental sense was at stake for the English colonies in North America under the threat of French and Indian wars and in the new states torn through the AMERICAN REVOLUTION by bitter divisions between those loyal to the Crown and those asserting independence. Thus in the colonies and in the new states during the years of the Revolutionary War, statute books included many broadly and sometimes vaguely defined offenses of subversion, in dramatic contrast to the limited definition of treason later written into the national Constitution and thereafter typically included in constitutions of the states. Though colonial and early state legislation sometimes borrowed the language of the act of Edward III, we must realize that at least by the late eighteenth century lawyers here would be familiar, through the standard English treatises, with the expansive readings which English courts had given the old statute.

With adoption of the national Constitution we encounter introduction of a restrictive emphasis to balance the security concerns previously dominant in the law of treason. There is not a great deal about the treason clause in the records of the framing and RATIFICATION OF THE CONSTITUTION. But what there is shows sensitivity to lessons that policymakers here felt they should draw from English experience of the dangers to individual and political liberty of loose resort to treason prosecutions. JAMES WILSON was probably the ablest lawyer on the CONSTITUTIONAL CONVENTION's Committee of Detail, which took the responsibility of adopting a restrictive rather than an extensive approach to defining treason. In the Pennsylvania ratifying convention, Wilson twice—on his own initiative and without any criticisms of the provision voiced by an alert and suspicious opposition—praised the treason clause as including protection of civil liberty along with protection of government. In his law lectures delivered at the College of Philadelphia in 1790 and 1791, Wilson emphasized the constitutional provision by devoting an entire lecture to it. He made the centerpoint of his analysis the importance of carefully bounding the crime: "It is the observation of the celebrated Montesquieu, that if the crime of treason be indeterminate, this alone is sufficient to make any government degenerate into arbitrary power." Two fears were prominent in the limited attention given the treason clause in adopting the Constitution: that holders of official power would use the treason charge to suppress legitimate, peaceful political opposition and to destroy those who were out of official favor, and that popular fear and emotion might be stirred under the dread charge to produce convictions without additional evidence. Subsequent federal court opinions recognized this restrictive background, in decisions limiting extension of the offense. Speaking for the Supreme Court in EX PARTE BOLLMAN AND SWARTWOUT (1807) in a matter indirectly involving a treason charge, Chief Justice JOHN MARSHALL declared that "to prevent the possibility of those calamities which result from the extension of treason to offences of minor importance, that great fundamental law which defines and limits the various departments of our government, has given a rule on the subject both to the legislature and the courts of America, which neither can be permitted to transcend." In the first treason case to reach the Supreme Court, CRAMER V. UNITED STATES (1945), the Court reaffirmed the propriety of this approach, quoting with approval Marshall's further admonition that "It is, therefore, more safe, as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide."

Three key elements enter into the crime of treason: an obligation of allegiance to the legal order, and intent and action to violate that obligation. First, treason is a breach of allegiance. A citizen owes loyal support to the sovereignty within which he lives or from which he derives his citizen's status. There are circumstances under which by the law of a foreign state an individual may owe it allegiance at the same time that he owes fealty to the United States; thus an individual may be a citizen of the United States because he was born here, and also be a citizen of another nation because he was born to nationals of that country. But dual nationality does not relieve an individual of obligation to refrain from volunteering aid or comfort to the foreign nation when it is at war with the United

States. The restrictive tone attending treatment of treason charges had an analogy in WORLD WAR II decisions which put on the government the burden of proving by clear and convincing evidence that citizens of the United States who had been lawfully present in an enemy country at the outbreak of war and were conscripted into enemy military service on the basis of their dual nationality had not complied under duress. However, in 1961 Congress amended the governing legislation to put the burden of proving duress on the individual claiming to hold United States CITIZENSHIP. The change from the court decisions to Congress's amendment revealed the persistence of tension between values placed on governmental security and on individual security, familiar in the treatment of the treason offense. One other facet of the allegiance element deserves note. Though the matter has not been presented to a court in this country, a resident alien enjoying the nation's protection owes it obedience to its laws while he is a resident. Such an individual is probably guilty of treason if he commits acts that would constitute the offense if done by a citizen.

To convict one of treason, the government must prove that the accused had a treasonable intent to levy war or to adhere to an enemy and to give aid and comfort to that enemy. Since betrayal of allegiance is at the heart of the offense, the requisite wrongful intent must be specific—a focused purpose to bring about a betrayal. In many crimes requiring proof of a guilty mind, the law holds an individual responsible as intending the reasonably foreseeable consequences of his conduct, even though he pleads that he did not intend to bring about the particular outcome for which he is charged. In *Cramer v. United States* the Supreme Court opinion included some incautious language which appeared to adopt that position. But the weight of authority in earlier federal court decisions and in rulings after *Cramer* indicates that the prosecution must prove that the defendant did intend to challenge the full authority of government at home (levy war) or to deliver aid to an enemy, as a substantial, independent element in his purpose, whatever other ends he may have had in mind. To this extent it appears that the prosecution must prove that the accused had a specific intent to levy war or to aid enemies. However, this requirement does not necessitate proof of guilty purpose by explicit statement or direct admission; the prosecution may prove the guilty intent by strong inference from the context of the accused's behavior.

The calculated limitations of the treason clause of the Constitution offer persuasive evidence that proof of the crime should require showing a specific intent. The Constitution obviously narrows the prior scope of treason by omitting any analogue to the offense of "compassing" or "imagining" the death of the king. Under that head, old English doctrine erected "constructive" treasons by inferring the wrongful intent from speech or writings that complaisant judges ruled might have the "natural consequences" of stirring popular discontent out of which violence might erupt to endanger the state. The weight of authority in federal court decisions has recognized that the policy of Article III, section 3, is to prevent expansion of the offense by building upon loose inferences of intention.

The character of the requisite wrongful intent varies according to which of the two heads of the offense is in issue. To be guilty of levying war against the United States, the individual must intend to use organized force to overthrow the government. Under the older English law treason existed if there was intent by collective force to prevent enforcement of a particular statute or other lawful order, or to obtain some particular benefit for a group, contrary to law. This English doctrine was followed in two early instances involving violent group resistance to enforcing particular federal laws—collection of a federal excise on whiskey (the WHISKEY REBELLION in western Pennsylvania in 1794) and collection of a federal property tax (the FRIES' REBELLION, also in Pennsylvania, 1799). However, the later weight of authority is that nothing short of intention to overthrow the government suffices to make out the offense. Significant of this trend was the disposition of a late nineteenth-century effort to revive the old English doctrine. Following the Homestead Riot of 1892, several strike leaders were indicted for levying war against the state of Pennsylvania. But the indictments were later quietly dropped, while use of the treason charge met with prompt criticism even from conservative legal commentators. Violent group actions short of challenge to the existence of the government are now treated under heads of INCITEMENT, riot, or unlawful assembly.

Adhering to an enemy requires intent to render the enemy tangible support ("aid and comfort"). Established doctrine has defined "enemies" as only those against whom a legally declared STATE OF WAR exists. However, in the twentieth century, experience of such undeclared shooting hostilities as the Korean POLICE ACTION has raised the question of the continued vitality of the older limitation. The accused does not rebut the existence of the requisite intent for treason by pleading that he acted for mixed purposes, as to make money by selling goods to an enemy, if one of his purposes was in fact to render performance useful to the enemy. However, the accused may seek to persuade the court that he acted solely for a nontreasonable purpose, as when out of parental affection a father gave shelter to his son who was present in the country in wartime as an enemy agent. So, too, one whom the outbreak of war finds in a hostile country probably will not be found to have had treasonable intent merely because he took a job there to meet the necessities of earning a

living, though the employment may have made some contributions to the enemy's strength.

In addition to proving wrongful intent, the government must prove that the accused committed some overt act to carry out his treasonable purpose. The calculated omission from the constitutional definition of treason of any counterpart of the English charge of compassing the death of the king underlines the requirement of proving overt action. The function of the overt act element, said the Supreme Court in *Cramer v. United States,* is to ensure "that mere mental attitudes or expression should not be treason." However, the Court's opinion in *Cramer* clouded definition of the requirement thus put on the prosecution; the Court seemed to say that the act must be of such character as itself to be evidence of the treasonable intent—a position apparently contrary to the emphasis common in other court rulings that the intent and the act elements are distinct. But in HAUPT V. UNITED STATES (1947) the Court somewhat clarified the matter: the behavior of the accused proved by the required testimony of two witnesses need not on its face evidence treasonable intent; an act apparently innocent, such as a transfer of money, might suffice if, in the light of other evidence of the context of the action, what the accused did could fairly be understood to aid an enemy. However, *Haupt* indicated that evidence of the context illuminating the significance of the overt act must also be supplied by two witnesses to the same circumstances. On the other hand, by the weight of authority, to prove the offense the prosecution need not establish that the accused succeeded in delivering aid to the enemy; it is enough that he took overt action to attempt delivery, though the *Cramer* opinion also contains language suggesting that effective delivery of aid should be shown. Mindful of abuses of charges of treason to suppress peaceful political opposition, English doctrine, adopted by judges in the United States, declares that a meeting to plan against the government is not a sufficient overt act to establish treason; conspiracy to levy war is not the levy of war, said Coke. But there is no comparable line of authority that a meeting to plan giving aid to an enemy is insufficient as an overt act of adherence to the enemy.

About the constitutional requirement of "testimony of two witnesses to the same overt act" hangs the uncertainty earlier noted, created by the Supreme Court opinion in *Cramer,* whether the act so proved must itself evidence treasonable intent or constitute actual delivery of aid to the enemy. Otherwise, rulings under the two-witness requirement have been straightforward. Courts have shown care to enforce the substance of the requirement, but not with doctrinaire rigidity. Two witnesses must testify directly to the act charged in the indictment; it will not suffice that there is two-witness evidence of a separate act from which it might be inferred that the charged act occurred. Two-witness testimony to the accused's admissions of an act does not meet the requirement of two-witness evidence to the act itself. However, the testimony of the two witnesses need not be identical or precise as to all aspects of the behavior cited as the overt act, nor need the testimony minutely cover every element into which an episode of behavior might be analyzed; the evidence is sufficient if it joins in identifying what reasonable jurors can regard as a connected transaction. Thus in *Haupt* the Supreme Court held that it was not fatal to the government's case that two-witness testimony did not show the enemy agent entering the accused's apartment, where it did show that he entered the building in which the accused had an apartment, and entered only as the accused's licensee, since the prosecution showed by other two-witness testimony that no other tenant in the building sheltered the agent.

This record suggests regard for the restrictive policy embodied in the constitutional history of treason. However, probably in large measure it also indicates that through most of its history the country has enjoyed substantial political stability. In any event the record shows little vindictive resort to the charge and few cases carrying politically controversial tones. Most actions taken against Loyalists in the American Revolution were to confiscate property. Because of the scale of the CIVIL WAR and the de facto belligerent status which events assigned the Confederacy, there was no material resort to treason prosecutions in that contest, though clearly those who took arms in behalf of the seceded states levied war against the United States. JEFFERSON DAVIS, President of the Confederacy, was indicted for treason. But the government faced strong arguments that it improperly charged treason against those conducting a rebel government which had achieved the status of a recognized belligerent. Though the government did not formally concede the point, neither did it bring Davis to trial on the indictment. Treason cases arising out of the Whiskey Rebellion (1795), the Fries disturbance (1799–1800), the Burr conspiracy (1807), THOMAS JEFFERSON's embargo (1808), and resistance to enforcement of the Fugitive Slave Law (1850), grew out of difficult domestic political issues but were of limited practical impact. Treason prosecutions by state authorities incident to the Dorr Rebellion in Rhode Island (1844) and John Brown's raid in Virginia (1859) were exceptional for their broad political bearing. Some cases carried tones of domestic ideological disputes over the country's entry into WORLD WAR I. But this cast was notably absent from treason prosecutions incident to World War II.

By its terms the constitutional definition of treason puts some limits on governmental agencies in dealing with subversion. Congress may not increase the categories of conduct which the government may prosecute under the

name of treason, nor may it extend the reach of the offense by including under the heads of adherence to enemies or levying war conduct lacking the historic elements of those crimes, or by mandating an extensive view of the evidence deemed relevant to establishing the elements of such treasons. The treason clause pointedly restricts Congress's authority to fixing penalties for the crime, and the position of the clause in Article III (establishing the JUDICIAL POWER of the United States) underlines the implication that problems of applying the law of treason are ultimately for the courts. In their turn, federal judges have generally found in the language and history of Article III, section 3, a mandate against extending the range of the offense in doubtful cases. The two-witness requirement implies a further limitation on Congress. In light of that strict limitation on the prosecution's case, Congress should not have authority to avoid the two-witness requirement simply by changing labels and legislating under other names against offenses that involve all the elements of treason within the constitutional definition. However, the Supreme Court's decision in EX PARTE QUIRIN (1942) cast doubt on the validity of this analysis. One of several Nazi agents landed secretly on the east coast of the United States to sabotage war production plants was an American citizen. The Court rejected the argument that he must be prosecuted for treason by adhering to the enemy, and not for an offense against the laws of war incorporated in an act of Congress. Clearly the accused had committed treason. But the Court focused on the fact that the offense under the laws of war included another element—that the accused, having the status of an enemy belligerent, had passed the country's defenses in civilian dress with a hostile purpose.

Though it approaches the borderline of propriety, the Court's decision in *Quirin* might find support in analogues that date from the First Congress. There is no evidence that those who adopted the limiting constitutional definition of "treason" meant thereby to bar legislators from creating other crimes of subversion, the elements of which did not turn on the distinctive character of levying war or adhering to enemies. Congress in fact has defined and provided for punishment of other offenses of subversive or hostile activity against the security of the government, and federal courts have sustained such statutes. *United States v. Rosenberg* (1953) presented charges of conspiracy to violate the Federal ESPIONAGE ACT, which provides penalties for "whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation," communicates or delivers to any foreign government or its agents information relating to the national defense. The federal court of appeals held that the treason clause did not bar creation of this offense, because "in the Rosenbergs' case, an essential element of treason, giving aid to an "enemy' is irrelevant to the espionage offense." In *United States v. Drummond* (1965) the same appeals court dealt with a charge of conspiracy to violate the same statute by a serviceman in the United States Navy who between 1957 and 1962 delivered classified military materials to Soviet agents. Reaffirming that the treason clause did not bar creation of the espionage offense, the court found it "unnecessary" to invoke the difference relied on in *Rosenberg*, because it found differences in the required mental element in the crimes of treason and espionage. It pointed out that the espionage act required a showing only (1) that the defendant transmitted information with intent "or reason to believe" that it would be used for a forbidden result; and (2) with intent or reason to believe that it would be used either "to the injury of the United States or to the advantage of a foreign nation." In contrast, the court implied, treason requires proof of a specific intent, and a specific intent both to aid an enemy and to injure the United States.

Though the constitutional definition of treason may do no more formally than limit the kinds of conduct that may be prosecuted under the name of treason, there are respects in which it may have broader practical effect in restricting action of official agencies. The Constitution abolished the barbarous or oppressive penalties that were once a distinguishing mark of the crime. But legislation still allows heavy penalties for the offense; in light of Supreme Court limitations put on resort to the death penalty in other crimes there may be doubt whether a court may order execution of a convicted traitor, but the law still permits imposing a life sentence. Thus it may be of consequence whether the prosecutor can make out a case of "treason" or is limited to another charge which may carry a lesser penalty. Political history teaches that the mere accusation of treason, rather than of another crime, carries peculiar intimidation and stigma. Federalist treason prosecutions arising out of the Whiskey Rebellion (1794) were designed to stain supporters of Jefferson and JAMES MADISON with the imputation of subversive intent. The Jefferson administration sought to use the charge of treason (1808) to make examples against widespread opposition to the Embargo imposed to press England to respect rights of neutral use of the high seas. Democratic accusations of treason against the HARTFORD CONVENTION protesting the conduct of war with England (1814–1815) helped that venture to weaken a tottering Federalist party structure. A prosecution for treason undertook to discredit opposition to enforcement of the Fugitive Slave Law (1850). To break rank-and-file morale, Pennsylvania authorities brought treason indictments against leaders of the Homestead Strike (1892). In the cold war emotions of the 1950s, epithets of "treason" were employed in reckless attacks on the record of Democratic administrations in conducting relations with communist Russia and China. Such epi-

sodes validate the cautions expressed among those who adopted the national Constitution, that the definition of treason be limited so that this country would not repeat the old English experience of using the charge to destroy legitimate, peaceful political competition. Adoption of the FIRST AMENDMENT guarantees of free speech, press, assembly, and petition provided more direct and comprehensive declarations of the values of free political processes, and eventually these guarantees found substantial enforcement in decisions of the Supreme Court. That the First Amendment tended to preempt the field was early indicated when it became the prime reliance of those who attacked the constitutionality of the Sedition Act of 1798. (See ALIEN AND SEDITION ACTS.) However, given the extent to which concern for safeguarding peaceful public policy debate and activity figured in adopting a restrictive definition of treason, constitutional history here offers as yet unrealized possibilities for safeguarding First Amendment values.

JAMES WILLARD HURST
(1986)

Bibliography

ABRAMS, STUART E. 1976 Threats to the President and the Constitutionality of Constructive Treason. *Columbia Journal of Law and Social Problems* 12:351–392.

CHAPIN, BRADLEY 1964 *The American Law of Treason: Revolutionary and Early National Origins.* Seattle: University of Washington Press.

HILL, L. M. 1968 The Two-Witness Rule in English Treason Trials. *American Journal of Legal History* 12:95–111.

HURST, JAMES WILLARD 1971 *The Law of Treason in the United States.* Westport, Conn.: Greenwood Press.

SIMON, WALTER G. 1961 The Evolution of Treason. *Tulane Law Review* 35:667–704.

STILLMAN, ARTHUR M. and ARNER, FREDERICK R. 1954 *Federal Case Law Concerning the Security of the United States.* 83rd Congress, 2d session. Printed for the use of the Senate Committee on Foreign Relations. Washington, D.C.: Government Printing Office.

WIENER, FREDERICK BERNAYS 1962 Uses and Abuses of Legal History. *The Law Society's Gazette* 59:311–315.

## TREATY OF GUADALUPE HIDALGO
9 Stat. 922 (1850)

In 1821 Mexico, having declared its independence from Spain, took control of the territory that now includes all of California, Arizona, New Mexico, and Texas, and parts of Nevada, Utah, and Colorado. But within twenty-five years, present-day Texas had been annexed by the United States, and at the end of the Mexican War the remaining areas were ceded to the United States under the Treaty of Guadalupe Hidalgo.

The treaty, signed in 1848, was not ratified by the Senate until 1850; the delay was caused by the unsuccessful efforts of Republicans to attach to the treaty the WILMOT PROVISO, banning SLAVERY in the newly acquired territory. For more than a decade an important constitutional issue was debated but not resolved: the question whether the treaty's provisions preserving Spanish or Mexican local law in the territory were themselves sufficient to abolish slavery.

The Treaty of Guadalupe Hidalgo gave all inhabitants of the affected territory the option of becoming United States citizens or of relocating within the new Mexican borders. Although some moved to Mexico, the overwhelming majority remained at home in what had become United States territory. As a result, for the first time in the nation's history United States CITIZENSHIP was conferred on people who were not citizens of any state. This action added fuel to a constitutional debate about the relation of national citizenship to state citizenship, a debate that continued until the FOURTEENTH AMENDMENT was ratified in 1868.

The international border remained unmarked and for most purposes unreal. Until 1894 there was no formal control over the border; United States IMMIGRATION statistics recorded the arrival of Mexicans only at seaports. Many border areas remained integrated economic regions, with workers traveling in both directions to fill fluctuating labor demands. Many Mexicans, especially those in direct conflict with Americans in the border region, continued to think of the southwest as "lost" territory that was rightfully Mexico's. These views, long expressed by the Mexican government, are echoed among today's Chicanos in support of diffuse if underdeveloped positions concerning the legal (including constitutional) effects of the Treaty of Guadalupe Hidalgo: for example, that the territory rightfully belongs to Mexicans or Chicanos, or that United States violations of the treaty have voided its effects. Whatever one may think of such claims, one should appreciate the collective sense of group identification reflected in their public assertion.

GERALD P. LÓPEZ
KENNETH L. KARST
(1986)

(SEE ALSO: *Compromise of 1850; Slavery in the Territories.*)

## TREATY ON THE EXECUTION OF PENAL SENTENCES
24 U.S.T. 7399 (1977)

The Mexican American Treaty on the Execution of Penal Sentences was signed on November 25, 1976. Legislation implementing the treaty became law on October 28, 1977.

Since that time, thousands of prisoners have been exchanged under its provisions.

The treaty, a model for later agreements with countries such as Canada, responded to concerns about the treatment of Americans imprisoned in Mexican jails, concerns that became increasingly acute as the two countries in the 1970s began a crackdown on drug traffic from Mexico to the United States. Preexisting procedures for monitoring and improving the conditions of Americans incarcerated in Mexico, mainly action taken by United States consular offices, had proven unsatisfactory.

Under the treaty, any American imprisoned in Mexico can, with his consent and the consent of Mexico and the United States, be sent to serve his sentence in the American prison system. Mexican prisoners can similarly be transferred from the United States to Mexico. Once transferred, the prisoner's sentence can be reduced by any procedures such as parole or conditional release applicable in the receiving country. The treaty covers only acts criminal in both countries, and does not extend to political crimes or to infractions of IMMIGRATION laws or "purely military" laws.

The attorney general administers the obligations of the United States under the treaty. The implementing legislation requires the attorney general to verify the prisoner's consent to transfer, and also provides a right to appointed counsel during the verification proceedings should the prisoner be unable to pay.

Lower federal courts have held that the treaty does not violate the Constitution despite the fact that under it the United States incarcerates United States citizens whose trials may not have complied with the BILL OF RIGHTS.

GERALD L. LÓPEZ
(1986)

(SEE ALSO: *Prisoners' Rights.*)

## TREATY POWER

To enhance the pledged word of the United States in foreign relations, the Framers of the Constitution granted to the President, in cooperation with the Senate, the power to make and enter into treaties. They also provided that this power should vest exclusively in the federal government. The Framers neglected to define the term "treaty," however, leaving its meaning to subsequent clarification. Today, under international law, the term is used for all manner of formal instruments of agreement between or among nations that, regardless of the titles used, create relationships of reciprocal rights and obligations. Under United States law, the term "treaty" usually denotes only those international agreements that are concluded by the federal government and ratified by the President upon receiving the ADVICE AND CONSENT of the SENATE. All other international agreements—EXECUTIVE AGREEMENTS, for example—are brought into force for the United States upon a constitutional basis other than senatorial advice and consent.

The process of treaty making involves negotiation, signature, ratification, exchange of instruments of ratification, publication, and proclamation; but, other than prescribing that two-thirds of the senators present must give their advice and consent to the ratification of a treaty, the Constitution is silent on the subject. In the early days of the Republic, it was thought that the Senate would participate with the President by giving its advice and consent at every negotiating juncture. Today, it is the accepted practice for the President to solicit the advice and consent of the Senate only after a treaty has been negotiated and signed, although in many—especially important—instances, Senate and even House committees play active roles in advance of the conclusion of a treaty, sometimes on their own initiative, sometimes at the behest of the executive branch.

Once the negotiation of a treaty is complete, the President decides whether to sign the treaty and, if so, whether to submit it to the Senate for advice and consent to ratification. If the Senate is perceived as hostile, the President may choose to let the treaty die rather than suffer defeat. If the Senate receives the treaty, it refers the treaty to the Committee on Foreign Relations, which may or may not report the treaty to the full Senate for its advice and consent. Committee inaction is the usual method for withholding consent to controversial treaties. Sometimes the executive branch will request that the committee withhold or suspend action. Few treaties are defeated by direct vote of the full Senate.

After the Senate gives its advice and consent to ratification, often subject to "reservations," "understandings," and "declarations" initiated by the Senate or the executive branch itself (to clarify, alter, or amend the treaty), the treaty is returned to the President for ratification. The President may choose to ratify the treaty or to return it to the Senate for further consideration. The President also may choose not to ratify the treaty at that time.

After a treaty is ratified, which is a national act, some international act—typically the exchange or deposit of instruments of ratification—usually is required to bring the treaty into force. Also upon ratification, the President issues a proclamation making the treaty officially public. There is disagreement over whether proclamation of a treaty is constitutionally required before the treaty takes effect domestically, but it is the norm to issue such a proclamation which, in any event, is useful in determining the date on which the treaty enters into force.

The Constitution does not limit the treaty power explicitly. Moreover, no treaty or treaty provision has ever

been held unconstitutional. Nevertheless, it is generally agreed that such limitations exist. For example, the Supreme Court held, in REID V. COVERT (1957), that treaties may not contravene any constitutional prohibition, such as those in the BILL OF RIGHTS or in the THIRTEENTH, FOURTEENTH, and FIFTEENTH AMENDMENTS. Further, although MISSOURI V. HOLLAND (1920) largely disposed of the argument that the subject matter of treaties is limited by the TENTH AMENDMENT, it remains possible, as the Court hinted in *DeGeofroy v. Riggs* (1890), that the treaty power may be limited by "restraints . . . arising from the nature . . . of the states."

Beyond these limitations, however, the treaty power is perceived as a broad power, extending to all matters of "international concern," a phrase that some claim limits the treaty power, but that the courts have used to illustrate the power's broad scope. Ordinarily it is difficult to show that a treaty matter is not of international concern even in the presence of domestic effects.

In addition to granting the power to make and enter into treaties, the Framers of the Constitution provided that resulting treaties, together with the duly enacted laws of the United States, should constitute part of the "supreme law of the land." Thus, as well as giving rise to international legal obligations, treaties have force as domestic law, to be applied as federal statutes and consequently to prevail at all times over inconsistent state laws (assuming no conflict with the Constitution).

Still, not all treaties are automatically binding on American courts. Aside from the general constitutionality requirement, two additional conditions must obtain for treaties to have domestic effect. First, a treaty must not conflict with a subsequent act of Congress. This is in keeping with the judiciary's interpretation of the SUPREMACY CLAUSE, ranking treaties and acts of Congress equally and therefore ruling that the law later in time prevails. With the sole exception of *Cook v. United States* (1933), cases in this area have involved conflicts between an earlier treaty and a later statute, with the latter prevailing. The courts presume, however, that Congress does not intend to supersede treaties, and consequently the courts are disposed toward interpretations that will achieve compatibility between treaties and federal statutes on the same subject.

Second, for a treaty to bind courts it must be "self-executing" or, alternatively, "non-self-executing" but supported by enabling legislation. Such was the holding in *Foster v. Neilson* (1829). Judicial decisions vary widely in their application of this requirement, however. The distinction between "self-executing" and "non-self-executing" treaties is more easily stated than applied. A determination that a treaty fits one category or the other often may be shown to depend on subjective, at times political, considerations.

Although the Constitution is silent on the question of who has the power to suspend or terminate treaties and under what circumstances, it is generally accepted that the President has such power, *without* the advice and consent of the Senate, based on the President's established constitutional authority to conduct the foreign affairs of the United States. A challenge to the President's authority in this connection has thus far arisen only in the one case of GOLDWATER V. CARTER (1979), and that case was decided, on purely jurisdictional grounds, against the challenge. Were the Senate to consent to a treaty on the condition that its advice and consent would be required for the treaty's suspension or termination, however, such a condition might be binding on the President. Also, based on the power of Congress to declare war, it is arguable that the entire Congress (not just the Senate) might legitimately claim a voice in the termination of a treaty where such termination might threaten war.

BURNS H. WESTON
(1986)

Bibliography

AMERICAN LAW INSTITUTE 1965 *Restatement of the Law, Second—Foreign Relations Law of the United States.* Pages 361–448. St. Paul, Minn.: American Law Institute.

——— 1980 *Restatement of the Law—Foreign Relations Law of the United States (Revised), Tentative Draft No. 1.* Pages 71–144. Philadelphia: American Law Institute.

FOSTER, J. 1901 The Treaty-Making Power under the Constitution. *Yale Law Journal* 11:69–79.

HENKIN, LOUIS 1972 *Foreign Affairs and the Constitution.* Mineola, N.Y.: Foundation Press.

MCLAUGHLIN, C. H. 1958 The Scope of the Treaty Power in the United States. *Minnesota Law Review* 42:709–771; 43: 651–725.

WRIGHT, QUINCY 1919 The Constitutionality of Treaties. *American Journal of International Law* 13:242–266.

## TRENCHARD, JOHN

See: Cato's Letters

## TRESPASS

A person commits trespass when he or she enters or remains on the property of another without the permission of the property owner. Violation of trespass laws may result in civil action by the property owner or criminal prosecution. Constitutional issues arise in civil or criminal trespass actions when a defendant claims that the basis for his or her exclusion from the property violates the Constitution. A defendant may assert that she was excluded from the property because she engaged in an activity protected by the Constitution (such as the FREEDOM OF SPEECH

protected by the FIRST AMENDMENT) or because she is a member of a constitutionally protected class (such as a racial group) disfavored by the property owner.

If a property owner uses the property to perform a public function or if the property owner has become associated with the government in the operation of a business located on the property, the owner may not exclude persons on a basis that is incompatible with constitutional values. A public function is an activity that traditionally has been within the exclusive province of government, such as the operation of a municipality. When a state allowed a private company to own and operate a company town, which included residential and business districts, the First Amendment protection for freedom of speech prohibited exclusion of a woman who wished to distribute religious literature within the town. Operation of a store or SHOPPING CENTER on privately owned property is not held to be a public function. Thus, the First Amendment is not violated when a shopping center owner relies on trespass laws to exclude persons from the shopping mall who wish to engage in speech, PICKETING, or distribution of leaflets.

The Supreme Court will not allow trespass laws to be used to exclude persons from private property because of their race or political activity if the property owner has been directed or encouraged by the government to use the trespass laws in such a discriminatory manner. The Court has held that statutes requiring or specifically allowing a restaurant owner to provide separate areas for customers of different races encouraged racial segregation so that the owner could not use the trespass laws to exclude persons seeking service on a race neutral, integrated basis. Similarly, the owner of a restaurant operated in a government building could not exclude persons from the premises because of their race.

Federal statutes or state law may also limit the use of trespass laws. The National Labor Relations Board, for example, may order store or shopping center owners to allow labor picketers to walk on privately owned sidewalks or parking lots adjacent to businesses involved in a labor dispute. A state supreme court may interpret its state constitution to prohibit shopping center owners from excluding persons who wish to engage in political speech. These state and federal limitations on property owners' use of the trespass laws to exclude persons from their property do not violate any right guaranteed the property owners by the United States Constitution.

JOHN E. NOWAK
(1986)

Bibliography

NOWAK, JOHN E.; ROTUNDA, RONALD D.; and YOUNG, J. NELSON 1983 *Constitutional Law.* Pages 497–525. St. Paul, Minn.: West Publishing Co.

VAN ALSTYNE, WILLIAM W. and KARST, KENNETH L. 1961 State Action. *Stanford Law Review* 14:3–58.

## *TREVETT v. WEEDEN*
(Rhode Island, 1786)

A Rhode Island case of 1786, this is the best known of the alleged state precedents for JUDICIAL REVIEW. The Superior Court of Judicature, the state's highest tribunal, did not hold a state act unconstitutional but it did construe it in a manner that left it inoperative. The case arose under a force act passed by the legislature to compel observance of the state paper-money laws; anyone refusing to accept paper money at par with specie was triable without a jury or right of appeal "according to the laws of the land" and on conviction was subject to a 100 pound fine and costs or be committed "till sentence be performed." Trevett filed an INFORMATION before the state chief justice charging that Weeden refused tender of paper money at face value. James Varnum, representing Weeden, argued that the force act violated the right to TRIAL BY JURY, guaranteed by the unwritten state constitution, which was FUNDAMENTAL LAW that limited legislative powers; the legislature could make law "not repugnant to the constitution" and the judiciary had "the sole power of judging those laws . . . but cannot admit any act of the legislative as law, which is against the constitution."

The court refused to decide the issue, ruling that it lacked JURISDICTION. Its JUDGMENT was simply that Trevett's complaint "does not come under the cognizance of the Justices . . . and it is hereby dismissed." Orally, however, some of the judges, according to the newspaper accounts, declared the force act "to be repugnant and unconstitutional," and one of them pointed out that its phrase, "without trial by jury, according to the laws of the land," was self-contradictory and thus unenforceable.

The governor called the legislature into special session, and the legislature summoned the high court judges to explain their reasons, the legislature said, for holding an act "unconstitutional, and so absolutely void," an "unprecedented" judgment that tended "to abolish the legislative authority." Judge David Howell, the court's main spokesman, defended judicial review and judicial independence. Although he summarized Varnum's argument that the act was unconstitutional, Howell insisted that the legislature had confused the argument, for the judgment was just that the complaint was "cognizable."

The legislature, unconvinced by the court's technical distinction, recognized that the judgment made the paper money laws unenforceable; in effect the court had exercised judicial review, which the legislature deemed subversive of its supremacy. Howell, by contrast, had claimed that if the legislature could pass on the court's judgment,

"the Legislature would become the supreme judiciary—a perversion of power totally subversive of civil liberty." Anticipating a motion to unseat them, the judges presented a memorial demanding DUE PROCESS OF LAW. Varnum and the attorney general supported them, arguing that they could not be removed except on a criminal charge. The motion to remove the judges failed, and the legislature even repealed the force act, but it revenged itself on the judges by failing to reelect four of the five members when their annual terms expired, and by ousting Congressman Varnum and the state attorney general. Varnum published a one-sided pamphlet on the case, giving it publicity even in Philadelphia while the CONSTITUTION CONVENTION OF 1787 met. Although the pamphlet popularized the doctrine of judicial review, in Rhode Island no judge endorsed it for seventy years after.

LEONARD W. LEVY
(1986)

## TRIAL BY JURY

The right to jury trial is provided in three clauses of the Constitution of the United States. Jury trial in federal criminal cases is required by Article III, which is otherwise given to defining the role of the federal judiciary: "The Trial of all Crimes, except in Cases of IMPEACHMENT, shall be by Jury." This provision is repeated in the Sixth Amendment, which is otherwise given to the rights of the accused: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and PUBLIC TRIAL, by an impartial jury. . . ." The BILL OF RIGHTS also included a provision for jury trial in civil matters; this right is embodied in the SEVENTH AMENDMENT: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."

The federal Constitution makes no explicit provision regarding the right to trial by jury in proceedings in state courts. State constitutions contain many similar provisions, although the interpretations of the right in state courts have varied significantly from the standards applied in federal courts. Substantial variation survived the enactment of the FOURTEENTH AMENDMENT, which for the first time subjected the state courts to the strictures of the DUE PROCESS clause. It was early held, and appears still to be the law, that the Fourteenth Amendment does not incorporate the Seventh, that there is no federal constitutional requirement of a right to jury trial in *civil* cases in state court. (See WALKER V. SAUVINET.) More recently, the Supreme Court has held that due process does require some form of access to a jury in major criminal prosecutions in state courts. (See DUNCAN V. LOUISIANA.)

Although the institution of jury trial has been known to American and English courts for a millennium, there have been significant changes in its form and nature over that period. Indeed, the origins of the institution are shrouded in the uncertainties of prehistory. Germanic tribes, like most stable societies, made early use of laymen in official resolution of disputes. Such practices were well known to Saxons and their neighbors at the time of the Norman Conquest in 1066. Nevertheless, at that time and place, more common resort was made to various ordeals, which were essentially religious services purporting to reveal the will of the deity. One variation on trial by ordeal was trial by battle, in which the Saxon disputants, or their champions, waged a ritual struggle to determine the side of the diety. Yet another variation was trial by wager of law, which engaged the services of the neighbors as oath helpers. By their willingness in numbers to risk salvation to stand up for a disputant, the oath helpers were perceived to express a divine will. In some sense witnesses and in some sense decision makers, these laymen can be viewed as early jurors. The nature, origin, and extent of the use of such institutions in the several shires of Saxon England doubtless varied and are the subject of some uncertainty.

The royal judges appointed by Norman kings embraced Saxon traditions, including trial by ordeal, oath helping, wager of law, and the use of laymen to share responsibility for official decisions. A papal decree in 1215, which withdrew the clergy from participation in trials by ordeal, had the effect of withdrawing the imprimatur of the deity from the decisions of the royal courts. This apparently stimulated interest in alternative methods of trial that might deflect some of the odium of decision from the royal surrogate. Thus, the PETIT JURY (to be distinguished from the GRAND JURY) emerged in more nearly contemporary form in the thirteenth century as a feature of the Norman royal courts.

Thirteenth-century jury trial emerged chiefly in proceedings of TRESPASS, a form of action in which the lash of royal power was applied to maintain the peace of the realm. As trespass and its derivative forms of action came to dominate the COMMON LAW, so trial by jury became the dominant method of trial in civil matters coming before the royal law courts. Thus, jury trial was associated with the various forms of trespass on the case (from which the modern law of torts emerged), of assumpsit (from which the modern law of contracts emerged), and of replevin, an action important to the development of personal property rights. Indeed, one reason for the demise of some of the earlier royal writs, such as the writ of right, or even the writ of debt, was dissatisfaction with the mode of trial that accompanied the use of such writs.

A concurrent evolution led to the emergence of the jury as an important element of criminal justice in the royal courts. The royal inquest was a feature of early Norman

royal governance; it was an important device for centralizing power in the royal government and was a proceeding for calling local institutions and affairs to account. The grand jury was a group of local subjects of the crown who were called upon to investigate, or answer from their own knowledge, regarding the observance by their neighbors of the obligations imposed upon them by royal command. By stages, the inquest came to be followed by a further proceeding to impose royal punishment on apparent wrongdoers. In the latter half of the twelfth century, the royal government was initiating such enforcement proceedings, thus supplementing the trespass proceedings which had earlier provided protection for the peace of the realm, but only on the initiative of a victim of wrongdoing. By 1164, there was a clear beginning of the use of petit juries in crown proceedings. By 1275, it was established that the petit jury of twelve neighbors would try the guilt of an accused, provided the accused consented to such a means of trial, which he was coerced to do.

One major theme in the evolution of the right to jury trial in royal courts was the development of a system of accountability to constrain lawlessness by juries. For some time, the only method available to royal courts to deal with such behavior was to prosecute (or, more precisely, to attaint) the jurors for rendering a false verdict. If a second jury so decided, a jury could be punished for this offense. The harshness of this remedy led to its demise, for the attaint jurors were reluctant to expose an earlier jury to disgrace and punishment. In the seventeenth century the writ of attaint was gradually replaced by the practice of granting a new trial when the first verdict was against the weight of the evidence. This practice came to be equally applicable to criminal as well as civil proceedings, except insofar as an accused could not twice be placed in jeopardy of conviction. (See DOUBLE JEOPARDY.)

A second major theme in the evolution of the right to jury trial in civil cases was its confinement to the common law courts when the Chancery emerged as an alternative system of adjudicating the use of the royal power. English chancellors were exercising a form of judicial power as early as the fifteenth century. An important feature of the Chancery (or proceedings in EQUITY as they came to be known) was the absence of the jury. Another important feature was the use by the chancellor of a broader range of judicial remedies, most prominently including the INJUNCTION, which were personal commands of the judge under threat of punishment for contumacy.

Nineteenth-century English law reform ultimately brought about the demise not only of equity as a separate judicial system, but also of the right to jury trial in civil cases. In a search for greater efficiency and dispatch, the jury system in the law courts was modified and limited, so that the jury trial is now seldom used in the United Kingdom, or in other parts of the Commonwealth, except in criminal cases.

The right to jury trial took quite a different turn in the United States. At the time of the Revolution, that right came to be celebrated as a means of nullifying the power of a mistrusted sovereign; hence the several constitutional provisions guaranteeing the continued exercise of the right. Moreover, there was a special mistrust of equity (where the English recognized no right to jury trial) in eighteenth-century America, based in large part on its close connection to the royal power. Accordingly, some of the states abolished it, others conferred its powers on their legislatures, while only some retained its colonial forms or created state chanceries to continue the English tradition.

In many parts of the early United States, there was a widely shared mistrust of professional lawyers and of judges drawn from that profession. Mistrust of officials in general and professional judges in particular was a feature of the Jacksonian politics of the first half of the nineteenth century, which was reflected in provisions for the election of judges and the reaffirmation of the importance of jury trial as a means of deprofessionalizing the exercise of judicial power. These political impulses were magnified in the populism of the late nineteenth century.

Indeed, the American legal profession came to be shaped in important degree around the institution of the jury; jury advocacy became in the popular mind the central activity of the American lawyer. During much of the nineteenth century, the most powerful intellectual force in American law was the work of WILLIAM BLACKSTONE, an English scholar of the previous century. Blackstone's *Commentaries* (1776) was the one book read by almost all American lawyers, and perhaps the only law book read by some. By no coincidence Blackstone was a staunch advocate of the right to jury trial in civil cases, an institution already in decline in his own country; his belief in the institution of the lay jury was one of his strongest links to the frontier society which he so significantly influenced.

Beginning as early as 1848 in New York, most American states adopted "merged" systems of procedure in civil cases. Merger united law and equity in a single judicial system; reformers were careful to retain the right to jury trial in actions "at law" and in some states even extended it to some matters properly described under the former system as "suits in equity." Through most of the nineteenth century, the federal courts played a secondary role in the American legal system, and Congress required their procedures to conform "as near as may be" to the procedural legislation of the states in which they sat. For the most part, this conformity seemed to apply to the forms of jury practice as well as to other details of procedure. It was not until 1938 that the FEDERAL RULES OF CIVIL PROCEDURE were promulgated for the federal courts, for the

first time formally merging law and equity in federal courts in accordance with national standards. The FEDERAL RULES OF CRIMINAL PROCEDURE soon followed. A national system or method of conducting jury trials in federal courts for defining the scope of the jury's power and the judge's responsibility and for prescribing the limits of the right to jury trial at last emerged.

For a period of several decades following the reform era of the 1930s, the Supreme Court made the protection of the right to jury trial in civil cases a major item on its agenda. A number of its decisions enlarged on previous expectations about the scope of the right and increased the authority of the jury, for example, *Beacon Theaters, Inc. v. Westover* (1959) and *Rogers v. Missouri Pacific Railroad Co.* (Justice FELIX FRANKFURTER's dissent, 1957). Interest in the right to jury trial became very intense in the mid-1960s as a result of widespread CIVIL RIGHTS litigation, preoccupation with EQUAL PROTECTION, and the possible NULLIFICATION or impairment of federal law by locally selected juries.

In the last decade, there may have been some growth in consciousness of the disadvantages of jury trial in civil cases. Increasing attention has focused on trial efficiency, the effectiveness of the law, and alternative methods of dispute resolution. But it is too early to say that we have entered a period in which the distinctly American institution of jury trial will be seriously reexamined.

As much as for any procedural right, the beauty of the right to jury trial is in the eye of the beholder. For as long as there have been lay decision makers, there have been strong-minded critics and devoted defenders who have disputed the wisdom of the system with equal vehemence. The practice rests on values so basic and so unsuitable to proof or disproof that the debate seems unlikely to terminate. It is at least in part for this reason that so many reforms, from the Seventh Amendment to the Rules Enabling Act, sought to evade debate on the fundamental issues by ostensibly preserving the status quo in regard to the right to jury trial, leaving the issues of the scope of jury trial to other times and other forums. Rarely has Congress or any state legislature been able to address the merit of the right to jury trial without having its deliberative processes impaled on the sharp point of the debate. For the same reason, decisions to expand or contract, preserve or alter, existing practices have been and will continue to be greatly influenced by the predominance of one view or the other of the merits of the institution.

Supporters of the right to jury trial regard it as a keystone of democratic government. It is, indeed, a method of sharing power with those who are governed. It deflects the hostility toward public institutions otherwise engendered by the lash of public power. It is a remedy for judicial megalomania, the occupational hazard of judging. Particularly in regard to criminal legislation, the right to jury trial provides a limit on the power of legislatures who eventually must countenance the nonenforceability of laws which citizens are unwilling to enforce. It is also a means of education: jurors learn about the law and share their learning with families and neighbors. In all these respects, it engenders trust. In general, supporters and critics alike agree that those benefits are more substantial in criminal than in civil litigation.

Critics observe, however, that juries are inefficient and may well be quite inaccurate in their perceptions and decisions. Involving many people in the making of a decision is inherently inefficient. It is necessary to invest time and expense in the selection of jurors. Trials proceed much more slowly because of the shorter attention span of lay persons in courtroom contexts and because additional participants entail additional interruptions and delays for personal reasons. Because of the inexperience of jurors, there has developed a substantial body of rules governing the admission of EVIDENCE which have as their purpose the protection of the jury from confusion and inflammation of prejudice. These strictures operate at times to increase the complexity of trials and to enlarge the possibility of mistrial or new trial, which is the result of error in the application of such rules of evidence. For these reasons, jury trials take substantially longer than nonjury trials and are substantially more expensive for the participants.

Moreover, as other critics emphasize, the deliberations of juries are undisciplined. Although jurors tend to be conscientious in the application of the governing law, the controlling rules are often dimly understood and not infrequently sacrificed in order to secure the requisite consensus. Whatever guidance or control the trial judge may supply, the chance of erratic decision is greater in jury than in nonjury trials.

Other adverse factors are less frequently mentioned. Jury service is in many cases a substantial burden to jurors; although they receive token payment, they are coerced to perform a duty that can sometimes be onerous. Particularly in communities characterized by disorder and social disintegration, jurors may even be frequent objects of intimidation and bribery; they are, in general, more difficult to protect from these vices than are judges, and they are perhaps also more vulnerable to such pernicious influences.

To a substantial degree, the perceived merits or demerits of the system will depend on particular features of the system which are designed to respond to the problems the system presents. Unfortunately, techniques for diminishing the demerits of jury trial often tend also to diminish its merits: the more control exercised over juries, the less advantage there is in assembling them. In the final analysis, almost every issue regarding the right to jury trial

turns on the degree to which power is to be confided in professional officers of the law. Consensus on that basic issue being so distant a prospect, the contours of the institution as described below must be regarded as an unstable compromise, quite subject to change.

Instability is nowhere more clearly exemplified than in regard to JURY SIZE. Perhaps as early as the thirteenth century, Englishmen understood that a jury is a group composed of twelve persons. The method of selecting the jury might have varied, the duties assigned to the group may have been altered, but the one element of stability was their number, twelve. Some states experimented with the use of smaller juries, particularly in the trial of lesser crimes, and the Supreme Court in WILLIAMS V. FLORIDA (1970) held that the use of such groups as six is not itself a deprivation of due process of law. It was, however, long presumed that a common law jury is twelve and that such a number was required in federal courts by the Sixth and Seventh Amendments, unless a smaller number be agreed to by the parties. This presumption is reflected in the language of Federal Rule of Civil Procedure 48, which authorizes parties to agree to smaller juries.

Nevertheless, most federal district courts have in the last decade adopted local rules of court designating civil juries to consist of six persons. The validity of these local rules was sustained by the Supreme Court in *Colegrove v. Battin* (1973). The Court rested its decision on the absence of any straightforward legislative prohibition on juries of less than twelve and on the dubious assumption that there were no solid data demonstrating that twelve-person juries reach substantially different verdicts from six-person juries. The Court also manifested a conviction that six-person juries are more efficient than those composed of larger numbers, a conviction which is itself not amenable to solid empirical proof. However, in BALLEW V. GEORGIA (1978) the Court held that a five-member group was too small to be properly deliberative, representative, and free from intimidation and therefore did not afford due process. The Court's decisions have stimulated increased interest in the scientific examination of judicial institutions; the decisions have also called into question other traditional presumptions about juries, none of which carries more historical weight than did the tradition of twelve.

A second traditional feature of the common law jury has been the requirement of JURY UNANIMITY in reaching a verdict. Some states have experimented with the acceptance of verdicts supported by juries that are less than unanimous. In general, such provisions have called for super-majorities, such as a vote of ten or twelve jurors. The Supreme Court held in *Minneapolis and St. Louis Railway Co. v. Bombolis* (1916) that such provisions were not denials of due process for state court proceedings involving issues of federal law, but later, in BURCH V. LOUISIANA (1979), it invalidated a Louisiana law that authorized verdicts of conviction on the basis of a five-to-one vote of a six-person jury. Despite these variations at the state level, however, the unanimity requirement remains a standard feature of federal jury practice, unless, as the Federal Rules authorize in civil cases, the parties agree on a lesser majority.

One effect of the unanimity requirement is to assure that the jury will deliberate on its decision rather than settle for a mere nose count. A secondary effect is to increase the likelihood that no decision will be reached, with the result that a new trial before a new jury will be required, unless the controversy is privately resolved without further litigation. A third effect is to enhance the role and responsibility of each individual juror, making each an important actor with power to control the ultimate outcome of the process. To the extent that the jury is intended to be a representative body, the unanimity requirement tends to protect litigants and interests that are associated with minority groups.

A third important feature of traditional common law jury practice was the mode of selecting the jury. Using the Norman nomenclature, the court administrative arm assembles a venire of citizens from whom the jury will be selected. Veniremen may be excused or disqualified by the judge and those remaining are then subject to a further process of selection by the parties. The latter process, known as VOIR DIRE examination, proceeds from a questioning of the jurors to their challenge by the parties on grounds of cause, or peremptorily if the parties would simply prefer other members of the venire. Peremptory challenges have perhaps always been limited in number, a somewhat larger number being allowed in criminal than in civil cases.

In recent decades, this traditional process has been subject to substantial criticism and pressure. Criticism proceeds from the premise that the jury should be in some degree representative of the community it helps to govern. Most of the criticism has been directed at the process of selecting veniremen, the usual earlier practice in this country having been to authorize a court administrator to select prospective jurors by methods that were usually elitist in premise and effect. In many communities, the usual method was the "key man" system, which invoked the assistance of community leaders to identify citizens of stature who would be deserving of the trust reposed in jurors. Such systems were common in federal courts. Indeed, it was not uncommon for a federal court to maintain a BLUE RIBBON list of veniremen of more than ordinary intelligence and experience who might be summoned to decide cases requiring more than ordinary skill on the part of the decision maker. Such methods produced juries that were

anything but representative, in the proportional sense, of the communities from which they were selected.

In a legal environment favoring egalitarianism, such practices were doomed. As early as 1945, in *Thiel v. Southern Pacific Co.*, the Supreme Court upheld a challenge by a federal litigant to a venire selection method that seemed likely to result in underrepresentation of the working class in local jurors. In *Carter v. Jury Commission of Greene County* (1970), the Supreme Court refused to declare a state key-man system invalid on its face absent a showing that the scheme was purposefully adopted as a means of preventing some group (usually blacks) from being represented. Nevertheless, when such a scheme underrepresents a group consistently, a prima facie case of JURY DISCRIMINATION is established and the scheme may then be found unconstitutional as applied, as in *Turner v. Fouche* (1970). Congress anticipated these holdings by enacting federal jury selection legislation in 1968. Current legislation does repose some authority in local federal courts to administer jury selection, on condition that their methods produce juries that bear proximate resemblances to randomness. Of course, individual litigants are not entitled under the statute or the Constitution to have a jury that actually reflects the demography of the community; all that is assured is that the method of selection be one that is reasonably likely to produce such a panel.

In recent years, mounting attention has been given to the process of peremptory challenge and the practice of some local prosecutors to use these challenges to prevent minority representation on particular juries, especially those called to try minority members on serious criminal charges. The Supreme Court has held that a prosecutor's use of peremptory challenges in any single case is immune from attack; the Court held in SWAIN V. ALABAMA (1965) that the very concept of peremptory challenges entailed the right to act without explanation. Still, the Court did leave open the possibility that systematic use of peremptories to exclude members of some group might be found to violate the equal protection guarantee of the Fourteenth Amendment. In subsequent cases, however, proving to the Court's satisfaction that systematic discrimination did exist has been virtually impossible. Some state courts have gone beyond the federal standards and ruled that peremptory challenge of veniremen on the basis of membership in any group violates provisions of their state constitutions, for example, California in *People v. Wheeler* (1978).

Partly as a result of the practice of making juries more representative, a new issue has arisen regarding the competence of juries to deal with intricate technical disputes beyond the ken of ordinary citizens. The Third Circuit Court of Appeals held in *Matsushita Electric Industrial Company v. Zenith Radio Corporation* (1980) that the Seventh Amendment is subject to the Fifth Amendment, that the use of juries in very complex civil cases may be a denial of due process of law. This question, also, has not reached the Supreme Court.

Litigants having a right to jury trial are entitled to a jury decision only on questions of fact, not on matters of law. The distinction between questions of fact and law can be stated clearly enough: the former pertain to the specific events in dispute; the latter to the legal principles to be applied. But the application of the distinction is often problematic. For this reason, juries often have to deal with issues containing substantial elements of legal interpretation. The classic example, which arises in both civil and criminal contexts, is a decision applying a general standard of negligence to the conduct of the accused or the defendant; the general standard takes more specific shape in the minds of jurors as they apply it to the events at hand.

Since the seventeenth century, it has been the responsibility of the trial judge to assure that the controlling law is obeyed by the jury; the trial judge is accountable to the appellate court for the effective performance of this duty. There are several steps in the usual common law jury trial at which the trial judge is obliged to perform this function.

A major function of the judge at a jury trial is to instruct the jury on the controlling law. This instruction is usually the last event before the jury retires to deliberate. If either party makes a timely objection to the judge's statement of law in his charge to the jury, any error in the instructions will be a solid ground for reversal.

In a civil trial, the judge should not instruct the jury at all unless there is a dispute in the evidence presented which might raise some doubt in a reasonable mind or about which jurors might reasonably differ. If the judge finds that there is no such dispute, he should direct the jury to find a verdict for the part entitled under the law to JUDGMENT. In cases of doubt about the application of this standard, the judge may prefer to reserve his ruling on a motion for directed verdict until after the jury has rendered a verdict. If the verdict is rendered contrary to the law, the judge may then enter a judgment notwithstanding the verdict in favor of the verdict loser. The Supreme Court has held in *Baltimore and Carolina Line v. Redman* (1935) that the judge may not take this latter step unless the motion for directed verdict was timely and the question properly reserved; otherwise, there is a violation of the Seventh Amendment because the judgment notwithstanding the verdict was unknown to English practice at the time of adoption of the Amendment.

In a criminal case the judge should direct a verdict for the accused when the prosecution has failed to offer proof of one or more elements of the offense charged. But the trial judge may not direct a verdict of guilty in a criminal case; to this extent, the Sixth Amendment assures the role of the jury as a bulwark against punishment deemed op-

pressive by the community, even if the punishment is required by the positive law. An element of natural justice is thereby introduced to the legal system.

In addition to his role as law officer, the trial judge also has some responsibility for the quality of fact-finding done by the jury. In either civil or criminal cases, he may set aside a verdict as contrary to the weight of the evidence. When exercising this prerogative, the trial judge is obliged to order a new trial before a second jury. In a criminal case, the power to order the new trial is confined by the constitutional constraint against double jeopardy. In a civil case, the power to grant a new trial may be exercised conditionally, but this power is subject to constitutional limitations. A conditional order of new trial is likely to occur where the trial judge regards a jury verdict as correct on the matter of liability but excessive in regard to the award of damages.

Some factual issues arising in jury-tried cases may be reserved for the judge. For example, in civil cases, issues of fact arising in a determination of the jurisdiction of the court must be decided by the judge. In criminal cases, sentencing is a function of the judge, not the jury, although the wisdom and propriety of the sentence often require factual determination.

With the exceptions noted, the division of function between judge and jury in federal courts has not been deemed a matter for constitutional adjudication. *A fortiori*, state practice in respect to these issues has not generally been regarded as presenting any constitutional problems of due process of law. The Supreme Court, however, has on occasion intervened to reverse state court judgments in actions arising under federal law on the ground that the federal law posed an issue for a jury which under the state practice was incorrectly left to the decision of a judge. Particularly in cases arising under the federal EMPLOYERS LIABILITY ACT, the Court was strict in limiting the role of the trial judge. Its decisions, based upon statutory grounds, may indicate that state jury practice must meet federal standards when state courts are called upon to enforce federal law. It is even possible that the Seventh Amendment will be found to be applicable to litigation of federal claims in state courts, not by reason of the Fourteenth Amendment, but by an inference of congressional intent.

The Sixth Amendment applies only to criminal proceedings that could have been tried by a jury at the time of its adoption in 1791. Even at that time, it was well understood that "petty" offenses might be tried without a jury. Federal legislation gives specific meaning to such offenses as those involving a punishment of imprisonment for six months or less and fines of $500 or less. In BALDWIN V. NEW YORK (1970) the Supreme Court held that due process requires jury trial in state court prosecutions for offenses involving imprisonment for more than six months. In *Bloom v. Illinois* (1968) the Court applied a similar standard to punishments imposed for contempt of court, although it conceded that there was some historical basis for treating contempt as a matter between litigant and judge, particularly where the contumacious act is committed in the presence of the court. In MCKEIVER V. PENNSYLVANIA (1971), however, the Court held that the right to jury trial is not applicable to a proceeding to determine the delinquency of a juvenile, even though a decision adverse to the juvenile might result in imprisonment for a period significantly in excess of six months; such proceedings, the Court said, are not strictly criminal because they involve less moral judgment about the conduct of the juvenile.

The Seventh Amendment has proved much more complex and troublesome. One major question has been the applicability of the amendment to claims brought under federal legislation enacted after the adoption of the amendment. A narrowly historical view would preclude the application of the right to such legislation-based claims, since they are not strictly actions "at common law." The Court has, however, generally extended the right to jury trial to statutory actions where the remedy pursued in the judicial proceeding was one that resembled a common law remedy. Thus, in *Pernell v. Southall Realty Co.* (1974) the Court held that there was a right to jury trial in a statutory action of eviction that was closely analogous to a common law action for ejectment. And in *Curtis v. Loether* (1974) the Court held that there was a right to jury trial in an action brought under the fair housing provisions of the CIVIL RIGHTS ACT OF 1964 because the remedy sought was compensatory damages of the sort that might have been recoverable in a common law action of trespass on the case.

In other cases, however, the Court has approved legislation creating administrative procedures and remedies that displace common law rights and thus eliminate jury-triable actions. In *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937), the Court upheld the award of back pay in proceedings before the board, despite the close analogy to common law contract actions. This decision was extended in *Atlas Roofing Co. v. Occupational Safety and Health Administration* (1977), in which the Court upheld legislation providing for the recovery by a government agency of a civil penalty in a court proceeding where there was no right to jury trial. The Court emphasized that the case involved a "public right," to be distinguished from common law rights of private parties. In *Lorillard v. Pons* (1978) the Court interpreted the legislature to intend a statutory right to jury trial in proceedings brought under the AGE DISCRIMINATION ACT. In that case, as in *Curtis*, the Court avoided any indication

of the applicability of the Seventh Amendment to the employment discrimination provisions of the Civil Rights Act, which, like the Age Discrimination Act, provides for back pay awards to be made by courts, not administrative agencies.

The most complex issues of the scope of the right to jury trial arise in complex litigation where matters that are within the compass of the Seventh Amendment coincide with other matters outside that compass. In general, the Supreme Court has tended to insist upon protection of the right to jury trial in such situations, even at the risk of submitting to a jury matters that would not be jury-triable if litigated alone. Illustrative is DAIRY QUEEN, INC. V. WOOD (1962) in which the plaintiff sought both an injunction and compensatory damages. Injunctive relief, unlike compensatory damages, is an equitable rather than a legal remedy and so is not subject to the right of trial by jury. The trial court deemed the injunction to be the primary relief sought and undertook to try the case without a jury, albeit with the intention of seating a jury to decide the measure of damages should it appear that a wrong had been committed. The Supreme Court reversed, holding that the jury-triable claim for damages must be tried first in order to protect the constitutional right to jury trial, leaving it for the judge later to decide on the availability of injunctive relief if the jury should determine that a wrong had been committed. Similarly, in BEACON THEATERS, INC. V. WESTOVER (1959) the Court held that a jury-triable counterclaim would have to be tried first, before a determination could be made on a related claim by the plaintiff that was not jury-triable.

These cases illustrate that the constitutional right to jury trial now tends to depend on the specific substantive right and remedy involved in the litigation, not on the general (common law or equity) context in which that right is disputed. This approach was illustrated in *Ross v. Bernhard* (1970), in which the Court held that a claim brought by a shareholder on behalf of the CORPORATION was jury-triable when the claim would have been triable by a jury had it been brought by the corporation itself; this decision would seem to be applicable as well to claims for damages brought by class representatives. This is so even though the procedures of STOCKHOLDER SUITS and CLASS ACTIONS are derived from the equity tradition, not from the practices of law courts. Thus, the increasingly widespread use of complex procedural devices that unite equitable and legal matters may in fact operate to enlarge the practical scope of the right to jury trial. This seems true despite the disclaimers set forth in such law reforms as the Federal Declaratory Judgment Act and the Federal Rules Enabling Act, which express the intent not to alter the existing scope of the right. That intent was not practicably attainable consistent with achieving the other aims of the procedural reforms, which include efficiency and dispatch.

On the other hand, a rule that the Seventh Amendment right to jury trial depends on the substantive right and remedy involved in the litigation is not always applied. Illustrative is *Katchen v. Landy* (1966), which upholds the power of the court to determine without a jury claims brought against a bankrupt estate, whether or not the claims might have been jury-triable if asserted directly against the bankrupt. The Court emphasized the practical needs of the bankruptcy system for dispatch in making such decisions; it was said that these considerations justified Congress in directing that they be made without juries. Thus, the scope of the constitutional right to jury trial in civil cases is a complex question, drawing heavily on historical analogues but also influenced by considerations of contemporary practicality. It is not a static right, but it is likely to take on new dimensions in the hands of future courts.

It may be concluded that the right of accused persons to a trial by jury has become a deeply entrenched feature of criminal litigation in the United States, broadly protected by the Sixth and Fourteenth Amendments, with the selection and role of the jury being aspects of the right that are themselves subject to constitutional control. The right to jury trial in civil cases, on the other hand, rests upon a different constitutional provision, which is inapplicable in state courts and may be somewhat less rigidly maintained even in federal courts, for the reason that it is less assuredly beneficial to the citizens to be protected.

PAUL D. CARRINGTON
(1986)

Bibliography

DAWSON, JOHN P. 1962 *A History of Lay Judges.* Cambridge, Mass.: Harvard University Press.

HELLER, FRANCIS H. 1951 *The Sixth Amendment to the Constitution of the United States.* Lawrence: University of Kansas Press.

JAMES, FLEMING 1963 Right to Jury Trial in Civil Cases. *Yale Law Journal* 72:655–693.

KALVEN, HARRY and ZEISEL, HANS 1966 *The American Jury.* Boston: Little, Brown.

MCCART, SAMUEL N. 1964 *Trial by Jury.* Philadelphia: Chilton Books.

SCHULTZ, MARJORIE S., ed. 1980 The American Jury. *Law and Contemporary Problems.* Durham, N.C.: Duke University.

SPOONER, LYSANDER 1852 *An Essay on the Trial by Jury.* Boston: John P. Jewett Co.

VAN DYKE, JON M. 1977 *Jury Selection Procedures.* Cambridge, Mass.: Ballinger.

WOLFRAM, CHARLES 1973 The Constitutional History of the Seventh Amendment. *Minnesota Law Review* 57:639–747.

# TRIBAL ECONOMIC DEVELOPMENT AND THE CONSTITUTION

Contact between non-Indians and Native American tribal nations largely destroyed the traditional economies of tribal nations, which included agriculture, hunting and fishing, and associated trade networks. Fish and game were slaughtered or depleted, tribal land bases and water resources were lost or placed under federal control, populations declined, and traditional sociopolitical organizations that structured economic activity were disrupted and replaced with an oppressive federal bureaucracy. Today, despite the presence of significant mineral, water, timber, and other assets on some reservations, most of the 554 Indian nations recognized by the United States experience severe poverty and related social consequences. Unemployment rates as high as 50 percent are common, with some tribes suffering 90 percent unemployment or higher.

The Constitution played a supporting role in the devastation of traditional tribal economies and the impoverishment of reservations. Although the Constitution makes few and cryptic references to tribes, the constitutional plan of federal supremacy over Indian affairs has emboldened the Supreme Court to develop a body of constitutional COMMON LAW in this area. The grant of federal power over "commerce . . . with the Indian Tribes" in Article I, section 8, for example, has been embellished with notions of a federal guardianship over tribes to allow Congress nearly unlimited authority over internal tribal matters. Since the last decades of the nineteenth century, Congress has invoked this authority, also known as "plenary power," to support LEGISLATION abrogating TREATY promises that set aside lands for the "perpetual" use of the tribes. For example, Congress constructed dams that flooded tribal lands, divided or allotted tribal lands for individual tribal members, and opened tribal lands for homesteading by non-Indians. Congress also used its broad power to impose bureaucratic restraints on tribal resource use, to open tribal timber and mineral resources for exploitation by non-Indians without market-rate compensation, and to dictate tribal constitutions that organize tribal governing institutions as well as the ordinances that tribal governments enact. Experts on tribal economic development, such as Joseph Kalt of Harvard's Kennedy School of Government, have shown that without tribal control over the management of tribal affairs and the use of tribal resources, sustained economic development does not occur on reservations.

Constitutional constraints on congressional action, such as the DUE PROCESS and JUST COMPENSATION clauses of the Fifth Amendment, have not provided substantial protection for tribal resources and rights of self-government against federal interference. A partial explanation for this failure is the fact that tribes do not fit comfortably into the philosophy of individual rights reflected in the Constitution. Tribes' important rights and resources are held communally, and social groups such as clans or religious societies, rather than individuals, are viewed as the constituent social and political units. In constitutional decisions of the Supreme Court, these differences have meant, for example, that aboriginal tribal lands are not viewed as "PROPERTY" subject to just compensation in the event of expropriation unless Congress has "recognized" the tribal property claims by treaty or statute. Furthermore, federal conversion of tribal lands into allotted, individually owned lands has not been treated as a TAKING of those lands or a deprivation of due process or EQUAL PROTECTION. Federal laws that single out tribes for restrictions on economic activities or that regulate tribal members directly do not fall under the weight of federal constitutional protections for racial or ethnic minorities because tribes are treated as political entities rather than racial or ethnic groups. At most, the Court has provided theoretical protection for tribes by fashioning a federal trust responsibility that is supposed to ground and color federal plenary power, and by insisting that Congress be explicit when it curtails tribal property and self-government rights.

Since the 1970s, the federal government has proclaimed policies encouraging tribal self-determination and economic development. Two DOCTRINES within the constitutional common law of Indian affairs have helped advance this policy agenda. Both of these doctrines affirm and support tribal SOVEREIGNTY. First, federal constitutional supremacy has precluded states from imposing many of their taxes and regulations within tribal territories unless Congress consents. The lucrative gaming enterprises found on some reservations stem from this limitation on state regulation. However, tribes are not wholly protected against state restrictions. Responding to states' concerns, Congress has chosen to exercise its plenary power with respect to gaming, and has afforded states authority to preclude or negotiate over certain forms of tribal gaming. Furthermore, the Court has said that states may tax reservation-based retail sales to nonmembers where products are merely imported onto the reservation to take advantage of tax exemptions. Second, tribes are recognized as governments that enjoy SOVEREIGN IMMUNITY, subject to congressional or tribal waiver. According to the chair of the Mississippi Choctaw Tribe, which has one of the most thriving economies of any Indian nation in the United States, tribal sovereign immunity has been essential in fostering economic development because it nourishes institutions of self-government and protects the tribe against costly litigation and potential BANKRUPTCY. Thus con-

temporary tribal economic development is partly a legal artifact, born of constitutionally based doctrines reflecting the special status of tribes as governments engaged in business enterprises. These doctrines have created economic opportunities for tribes by conferring monopoly status in states where certain activities, such as WASTE disposal or gaming, are outlawed or heavily regulated. The new economic possibilities must be understood, however, in relation to a long history of economic devastation.

CAROLE GOLDBERG
(2000)

(SEE ALSO: *American Indians and the Constitution.*)

Bibliography

CLINTON, ROBERT N. 1993 Redressing the Legacy of Conquest: A Vision Quest for A Decolonized Federal Indian Law. *Arkansas Law Review* 46:77–159.

CORNELL, STEPHEN and KALT, JOSEPH, eds. 1992 *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development.* Los Angeles: UCLA American Indian Studies Center.

DELORIA, VINE, JR. 1974 *Behind the Trail of Broken Treaties: An Indian Declaration of Independence.* Austin: University of Texas Press.

GOULD, SCOTT L. 1996 The Consent Paradigm: Tribal Sovereignty at the Millenium. *Columbia Law Review* 97:809–902.

MOHAWK, JOHN C. 1991 Indian Economic Development: An Evolving Concept of Sovereignty. *Buffalo Law Review* 39:495–503.

WORTHEN, KEVIN J. and FARNSWORTH, WAYNE R. 1996 Who Will Control the Future of Indian Gaming? "A Few Pages of History Are Worth a Volume of Logic." *Brigham Young University Law Review* 1996:407–448.

## TRIMBLE, ROBERT
(1776–1828)

Robert Trimble, appointed to the Supreme Court by JOHN QUINCY ADAMS on April 11, 1826, was born in Virginia and raised in Kentucky. He studied law, began practice in Paris, Kentucky, and became one of the leading lawyers of the state with a specialty in land litigation. To the Supreme Court he brought an independence of character, a respect for legality, and considerable judicial experience. From 1807 to 1808 he served on the Kentucky Court of Appeals and from 1817 to 1826 on the federal district court. His years on the district bench corresponded to a period of political-economic upheaval during which Kentucky openly resisted federal ADMIRALTY JURISDICTION and federal judicial interference with state relief measures. Both as district judge and as circuit partner with his friend Justice THOMAS TODD, Trimble held the line for federal judicial authority and objective legality as he saw it—so firmly in fact that he was threatened with IMPEACHMENT.

His integrity, ability, and nationalism won him an appointment to the Court on Todd's death. He served only twenty-seven months before his own death but long enough to have won the respect of JOHN MARSHALL and JOSEPH STORY; Story eulogized him as belonging "to that school, of which Mr. Chief Justice Marshall (himself a host) is the acknowledged head and expositor." Trimble spoke for the Court only fifteen times; ironically his lone constitutional opinion in OGDEN V. SAUNDERS (1827) called forth Marshall's only dissent in a constitutional case. The question was whether a state bankruptcy law applying to contracts made after the passage of the law was a violation of the CONTRACT CLAUSE. Trimble's clear-headed, practical opinion upholding state power remained controlling for most of the nineteenth century despite the dissents of Marshall and Story.

R. KENT NEWMYER
(1986)

Bibliography

STORY, JOSEPH 1829 Memoir of Judge Trimble. *American Jurist and Law Magazine* 1:149–157.

## *TRIMBLE v. GORDON*
430 U.S. 762 (1977)

A year before this decision, the Supreme Court had refused, in *Mathews v. Lucas* (1976), to hold that ILLEGITIMACY was a SUSPECT CLASSIFICATION requiring strict judicial scrutiny. In *Trimble*, a 5–4 majority invalidated an Illinois law that prevented illegitimate children from inheriting from their fathers who had not made wills. Discriminations based on illegitimacy, said Justice LEWIS F. POWELL for the majority, must be "carefully attuned to alternative considerations." Although paternity might be hard to prove in some cases, wholesale disinheritance of illegitimate children was unjustified. In this case a judicial paternity proceeding had determined the decedent to be the father.

Justice WILLIAM H. REHNQUIST dissented at length, criticizing the development of modern EQUAL PROTECTION doctrine. Except for classifications based on race or national origin, he would abandon all forms of STRICT SCRUTINY, requiring no more than a RATIONAL BASIS for legislative discrimination. Laws classifying according to legitimacy of parentage deserved no more heightened judicial scrutiny than did "other laws regulating economic and social conditions."

Only a year later, in LALLI V. LALLI (1978), a fragmented Court made *Trimble*'s precedential status uncertain.

KENNETH L. KARST
(1986)

## *TROP v. DULLES*
356 U.S. 86 (1958)

## *PEREZ v. BROWNELL*
356 U.S. 44 (1958)

In two cases decided the same day the Supreme Court ruled on the constitutionality of the EXPATRIATION provisions of the Nationality Act of 1940. In *Perez* the Court held (5–4) that revocation of CITIZENSHIP for voting in a foreign election was a valid exercise of governmental control over FOREIGN AFFAIRS.

In *Trop,* however, the Court held unconstitutional (5–4) the involuntary expatriation of a wartime deserter. Chief Justice EARL WARREN, for a plurality, contended that expatriation is CRUEL AND UNUSUAL PUNISHMENT; but WILLIAM J. BRENNAN, the one justice who changed sides, argued only that Congress's power over citizenship is less extensive when foreign affairs are not involved.

DENNIS J. MAHONEY
(1986)

## *TRUAX v. CORRIGAN*
257 U.S. 312 (1921)

A 1913 Arizona law, similar to the labor provisions of the CLAYTON ANTITRUST ACT, prohibited state court INJUNCTIONS against peaceful PICKETING. Following a dispute with restaurant proprietor William Truax, a local union peacefully picketed and distributed handbills calling for a BOYCOTT. Truax's business receipts dropped dramatically, and after the Arizona courts denied him relief, he appealed to the Supreme Court, contending that the state law deprived him of his property without DUE PROCESS OF LAW and violated the EQUAL PROTECTION clause of the FOURTEENTH AMENDMENT.

Chief Justice WILLIAM HOWARD TAFT, speaking for a 5–4 majority, held the state statute unconstitutional. He reasoned that Truax held a property right in his business; free access to it by employees and customers was incidental to that right. Concerted action that intentionally injured that right was a conspiracy and a tort. In this case, the union's activities constituted an "unlawful annoyance and hurtful nuisance." Such wrongs, Taft concluded, could not be remediless, and he declared that the anti-injunction law deprived Truax of due process. He also ruled that the law violated equal protection by limiting the application of an injunction to a particular class.

Justice LOUIS D. BRANDEIS, dissenting, maintained that even if the employer had a constitutional right to be free from boycotting and picketing, the state was not compelled to protect that right with an injunction, as states were free to expand or control their EQUITY jurisdiction. In a separate dissent, Justice OLIVER WENDELL HOLMES argued that the state law was a valid "social experiment," however "futile or even noxious." Beyond that, he challenged the assumption equating "business" with a property right. Business, he asserted, was "a course of conduct," and like any other was subject to modification regarding what would justify doing it a harm.

STANLEY I. KUTLER
(1986)

## TRUMAN, HARRY S.
(1884–1972)

The thirty-third President began his career in local Democratic politics in Missouri. Truman served in various capacities, including county judge and planning official, and helped coordinate employment and relief programs during the early 1930s. After his election to the United States SENATE in 1934, he supported the NEW DEAL programs and specialized in transportation policy. Declining President FRANKLIN D. ROOSEVELT's offer of an appointment to the Interstate Commerce Commission, he was reelected to the Senate in 1940. During the war years he attracted notice as the effective chairman of a Senate investigating committee established to oversee the efficiency and fairness of defense contracting. Elected vice-president in 1944, he succeeded to the presidency the next year when Roosevelt died. He returned to the White House in 1949 for a second term, following an unexpected election victory.

Truman believed in a strong and active presidency, operating within a Constitution sufficiently flexible to accommodate executive initiatives for the public good. The Framers of the Constitution, Truman said, had deliberately left vague the details of presidential power, allowing the "experience of the nation to fill in the outlines." He disagreed with scholars who claimed that history makes the man: "I think that it is the man who makes history." His roster of favorite Presidents included GEORGE WASHINGTON, THOMAS JEFFERSON, ANDREW JACKSON, ABRAHAM LINCOLN, GROVER CLEVELAND, THEODORE ROOSEVELT, WOODROW WILSON, and Franklin Roosevelt.

Although criticized at times by liberals for providing inadequate leadership and action on CIVIL RIGHTS, Truman's record is impressive. In 1946 he created the Presi-

dent's Committee on Civil Rights. A year later it issued an important document, *To Secure These Rights*, that took a firm stand against various forms of RACIAL DISCRIMINATION. In 1948 Truman issued EXECUTIVE ORDER 9981, ending discrimination in the armed services, and in that same year delivered a powerful civil rights message to Congress and supported the inclusion of a civil rights plank in the Democrats' platform.

Truman's commitment to the BILL OF RIGHTS was tested by the issue of subversion that overshadowed his administration. As a student of history he was keenly aware of the hysteria that had fanned repressive episodes, from the Salem witch trials to the Red Scare of 1919. He felt prepared to handle the new cycle that took the form of anticommunism and indiscriminate labeling of "subversives." (See SUBVERSIVE ACTIVITIES AND THE CONSTITUTION.)

EXECUTIVE ORDER 9835, issued by Truman in 1947, established procedures to control subversive infiltration of the federal government. The effect was to deprive agency employees of fundamental elements of DUE PROCESS, including the right to receive specific charges against them and to confront their accusers. Even when an accused received clearance from a loyalty board, the data remained in the files, forcing the employee to answer the same charges with each move to a new job. Truman later admitted that the program, which thrived on secret evidence and secret informers, was filled with defects and injustices.

Truman began to give closer attention to CIVIL LIBERTIES. In a message to Congress on August 8, 1950, he warned that pending legislation on internal security would forbid dissent. When the internal security bill reached his desk in the fall of 1950, he delivered a ringing denunciation, protesting in his veto message that the bill would put government in the "thought control business." Especially objectionable to him was a provision requiring "Communist-front" and "Communist-action" groups to register with the attorney general. This placed on the government the responsibility for probing the "attitudes and states of mind" of organization leaders. Groups could be linked to the Communist party whenever their positions failed to "deviate" from those of the Communist movement. Thus, any organization dedicated to low-cost housing or other humanitarian goals espoused by the party could be branded a communist front. Truman called this feature "the greatest danger to FREEDOM OF SPEECH, press and assembly, since the ALIEN AND SEDITION LAWS of 1798." The veto message, delivered in the midst of an election campaign that featured charges from some Republicans about Democrats being soft on communism, was courageous and principled. Within a day both Houses of Congress easily overrode the veto. (See INTERNAL SECURITY ACT.)

Following North Korea's invasion of the south in June 1950, Truman dispatched American soldiers to Korea without seeking congressional support or approval. A month later the State Department issued a belated memorandum defending the President's legal authority to repel the attack. The memo claimed that Truman's action was justified by international law, the UNITED NATIONS CHARTER, "and the resolution pursuant thereto." However, the United Nations issued *two* resolutions on Korea, one of June 25 calling for the cessation of hostilities and the withdrawal of North Korean forces to the 38th parallel, and a second resolution (adopted two days later) recommending armed force to repel the attack. Truman intervened militarily before passage of the second resolution. (See KOREAN WAR.)

Truman placed General Douglas MacArthur in command of American forces in Korea. MacArthur wanted to widen the military front, probing deeply into North Korea. He objected repeatedly, in public, to the limited war policy adopted by the administration. Eventually he alienated Truman, top cabinet officials, the Joint Chiefs of Staff, and the National Security Council. Over the course of almost a year, Truman became convinced that MacArthur was untrustworthy and insubordinate, but his abrupt dismissal of the general on April 11, 1951, triggered a storm of protest across the nation. In explaining his decision, Truman said it was fundamental that "military commanders must be governed by the policies and directives issued to them in the manner provided by our laws and Constitution."

Only a few members of Congress questioned Truman's authority to send troops to Korea, but as part of a "Great Debate" in 1951, legislators challenged his constitutional power to send ground forces to Europe. Resolutions were introduced in each house to require congressional authorization before military forces could be sent abroad. Although these measures were not enacted, uneasiness about the scope of presidential war-making power persisted. After President LYNDON B. JOHNSON's commitment of American troops to Southeast Asia and subsequent military actions there by President RICHARD M. NIXON, Congress passed the WAR POWERS RESOLUTION of 1973 to restrict the President's military powers. (See EMERGENCY POWER.)

Truman's attitude about presidential power and constitutional constraints is illuminated by his 1952 seizure of steel mills. He believed that a pending strike would prevent production of materials needed for the war in Korea. (See EXECUTIVE ORDER 10340; STEEL SEIZURE CONTROVERSY.) At a news conference on April 17 he was asked whether his INHERENT POWERS permitted seizure of newspapers and radio stations. To the consternation of the press he replied that the President could act "for whatever is for the best of the country." A week later, complaining that speculation about him seizing the press and the radio was "hooey," he stated that he had "difficulty imagining the Government

taking over and running those industries." Continuing to respond to concerns about his views of emergency power, on April 27 he wrote in a letter that presidential powers are "derived from the Constitution, and they are limited, of course, by the provisions of the Constitution, particularly those that protect the rights of individuals."

Meanwhile, the Justice Department was developing a different scenario for District Judge David Pine. Assistant Attorney General Homer Baldridge told Pine on April 24 that "there is not power in the Courts to restrain the President. . . ." After Pine had declared the seizure invalid, Truman claimed at a news conference on May 22 that "nobody" (including Congress and the Court) could take from the President his power to seize private property and to protect the welfare of the people. However, he said that he would abide by the Supreme Court's verdict, and when the decision fell on June 2 (see YOUNGSTOWN SHEET & TUBE CO. V. SAWYER), declaring the seizure invalid, he immediately ordered the government to relinquish possession of the mills.

Often careless with his remarks at press conference, for which he paid dearly, Truman came to the White House with a solid understanding of history and governmental institutions and processes. He maintained a deep respect for individual rights and civilian government. Through his personal integrity and honesty he helped moderate many of the repressive forces that operated during his years in office.

LOUIS FISHER
(1986)

Bibliography

HAMBY, ALONZO L. 1973 *Beyond the New Deal: Harry S. Truman and American Liberalism.* New York: Columbia University Press.

TRUMAN, HARRY S. 1955 *Year of Decisions.* Garden City, N.Y.: Doubleday.

——— 1956 *Years of Trial and Hope.* Garden City, N.Y.: Doubleday.

——— 1960 *Mr. Citizen.* New York: Bernard Geis.

## TRUMBULL, LYMAN
(1813–1896)

An Illinois state supreme court judge (1848–1853) and United States senator (1855–1873), Lyman Trumbull opposed all SLAVERY expansion before 1861, and during the SECESSION crisis he argued that the Constitution already adequately protected slavery and no amendments, concessions, or compromises were necessary. A strong supporter of the Union war effort, Trumbull nevertheless believed that the war should be fought within the framework of the Constitution. Thus, he opposed President ABRAHAM LINCOLN's unilateral suspension of HABEAS CORPUS, arbitrary arrests, and the closing of northern newspapers. Nonetheless, he supported legislation authorizing such actions. Trumbull gave mild support to the EMANCIPATION PROCLAMATION but doubted its constitutionality, and thus he introduced the resolution which led to the THIRTEENTH AMENDMENT. As chairman of the Senate Judiciary Committee during the war and Reconstruction, Trumbull initiated the first and second CONFISCATION ACTS, the CIVIL RIGHTS ACT OF 1866, the FREEDMEN'S BUREAU Extension Act (1866), and the first civil service reform legislation (1870). Despite his opposition to slavery and support of CIVIL RIGHTS, Trumbull was at heart a white supremacist and only reluctantly voted for the FIFTEENTH AMENDMENT. He opposed both punitive legislation for southern states that discriminated against blacks and the 1871 Ku Klux Klan Act, because of his lack of sympathy for blacks and his refusal to accept the fact that the CIVIL WAR had radically altered the nature of STATES' RIGHTS. He gave unenthusiastic support for ANDREW JOHNSON in 1865–1866, and, although disgusted with Johnson's vetos of his Civil Rights and Freedman's Bureau Bills, Trumbull voted against conviction of Johnson in the trial following IMPEACHMENT because he doubted Johnson had committed an impeachable act under the Constitution. A successful corporate lawyer, Trumbull argued EX PARTE MCCARDLE (1867) at the express request of General ULYSSES S. GRANT and was paid $10,000 for his services, even though he was a senator at the time. In 1876 Trumbull unsuccessfully argued the cause of Samuel Tilden before the Election Commission that considered the disputes over the Tilden-Hayes presidential election. (See COMPROMISE OF 1877.) Late in life he supported populism and the rights of workers, and in his last Supreme Court case he defended the labor organizer Eugene V. Debs in IN RE DEBS (1895).

PAUL FINKELMAN
(1986)

Bibliography

KRUG, MARK M. 1965 *Lyman Trumbull: Conservative Radical.* New York: A. S. Barnes & Co.

## *TRUPIANO v. UNITED STATES*

See: Search and Seizure; Search Incident to Arrest

## TRUTH, SOJOURNER
(c. 1799–1883)

Sojourner Truth (née Isabella Baumfree), nineteenth-century ABOLITIONIST and FEMINIST, was born a slave, was

not literate, and lived in poverty much of her life. Yet, in an age before mass media, she was a nationally renowned figure, known for her advocacy before, during, and after the CIVIL WAR.

Born in the Hudson River Valley in New York around 1799, she performed hard labor for a series of masters and was so renowned for her physical strength—she was nearly six feet tall—that her owner reneged on a promise to reward her exceptional hard work with her freedom. Refusing to rely anymore on a "slaveholders' promise," she freed herself by walking away from his farm in 1826, a year before the state's gradual manumission law freed her. Her five-year-old son was illegally sold in violation of the manumission law, and after a desperate search, she successfully sued to recover him.

In 1829, she left for New York City after experiencing a profound religious awakening. Her new life as preacher and advocate began on Pentecost, June 1, 1843, when she discarded her slave name and became Sojourner Truth. Leaving New York and joining the Northampton Association, an abolitionist community in Massachusetts, she became associated with important figures in the movement, such as WILLIAM LLOYD GARRISON and Frederick Douglass. In 1850, she authored her autobiography—an "as told to" account of her life story. By "selling the shadow to support the substance," as she often said, the book's sales proceeds became her primary and meager source of support.

Her lifelong work as a public speaker also began in earnest. By many accounts, she was a spellbinding speaker, often drawing on events from her difficult life to expose the evils of SLAVERY and reveal the interconnectedness between the abolitionist and feminist struggles. In 1851, Sojourner delivered a speech to an abolitionist convention in Akron, Ohio, where she made this linkage preeminent in what has become a piece of legendary oratory. As a formerly enslaved woman, Truth recalled that she had been worked "like a man," yet she was still a woman and like all women and black people was entitled to the rights due all human beings. This speech became well-known when, in 1863, Frances Gage, a prominent feminist, published a colorful rendition, using the phrase "And ar'n't I a woman?" Despite the fact that many historians consider it unlikely that this account is literally accurate, as other contemporaneous reports of the speech do not include the phrase, and Sojourner, whose first language was Dutch, did not speak in this dialect, "Ar'n't I a woman?" became her emblem, embodying her unrelenting focus on the relationship between the abolitionist and feminist causes.

Her insistence on this connection carried over into the RECONSTRUCTION era, where she strenuously argued that in the struggle for the FIFTEENTH AMENDMENT, suffrage for women should not be sacrificed in order to secure the vote for black men. Her refusal to compromise, as some prominent male abolitionists had, was grounded in her concern that the failure to secure women's suffrage in conjunction with black male suffrage would mean that the vote for women would be indefinitely deferred and the interests and voices of black women marginalized—a concern that proved prophetic. In the period following the Civil War, between 1864 and 1870, she devoted herself to addressing the often horrendous living conditions facing the formerly enslaved black population. Without jobs or land, freedom was severely undermined and it was Sojourner's view, expressed in a petition to President ULYSSES S. GRANT in 1870, that freed people should be resettled in the West on public lands. In 1875, she returned to Battle Creek, Michigan, following the death of a beloved grandson who had been her constant companion. She did not have many active public appearances from that time until her death in 1883. She remained a commanding presence however, and a living symbol that repudiated racialized conceptions of womanhood and affirmed the importance of resisting all forms of subordination.

CHERYL I. HARRIS
(2000)

Bibliography

HARRIS, CHERYL I. 1993 Whiteness as Property. *Harvard Law Review* 106:1707–1791.

——— 1996 Finding Sojourner's Truth: Race, Gender and the Institution of Property. *Cardozo Law Journal* 18:309–409.

PAINTER, NELL IRVIN 1996 *Sojourner Truth: A Life, a Symbol.* New York: W. W. Norton.

WASHINGTON, MARGARET, ed. 1993 *Narrative of Sojourner Truth.* New York: Vintage Books.

## TUCKER, HENRY ST. GEORGE
(1780–1848)

A political leader, scholar, and jurist, Henry St. George Tucker studied law under his father, ST. GEORGE TUCKER. He was a congressman (1815–1819), state judge (1824–1841), and professor of law at the University of Virginia (1841–1848). In his classroom lectures and in his textbook entitled *Lectures on Constitutional Law* (1843), he took a moderate STATES' RIGHTS position, steering, as he said, "a middle course between [the] dangerous extremes" of NULLIFICATION and centralization. His book is intended as a refutation of the nationalist position of JOSEPH STORY, but, although he regarded the Constitution as a compact among the states, he rejected nullification and SECESSION as remedies for violations by the federal government.

DENNIS J. MAHONEY
(1986)

Bibliography

BAUER, ELIZABETH KELLEY 1952 *Commentaries on the Constitution, 1790–1860.* New York: Columbia University Press.

## TUCKER, JOHN RANDOLPH
(1823–1897)

A political leader, scholar, and attorney, John Randolph Tucker was the son of HENRY ST. GEORGE TUCKER and the grandson of ST. GEORGE TUCKER. He was attorney general of Virginia (1857–1865), congressman (1875–1887), professor of law at Washington and Lee University (1870–1875, 1888–1897), and president of the American Bar Association (1894). From his retirement from Congress until his death he worked on his two-volume commentary, *The Constitution of the United States*, which was published posthumously in 1899. Tucker continued the family's tradition of STATES' RIGHTS constitutionalism, proposing that the TENTH AMENDMENT was the key to understanding the Constitution. He was strikingly influenced by European political theorists, including J. K. Bluntschli, and rejected the ideas of NATURAL RIGHTS, human equality, and SOCIAL COMPACT in favor of the concept of an organic state.

DENNIS J. MAHONEY
(1986)

## TUCKER, N. BEVERLEY
(1784–1851)

Jurist, scholar, and novelist Nathaniel Beverley Tucker developed his political views under the influence of his half-brother, JOHN RANDOLPH. As a judge and politician in Missouri (1815–1830) he fiercely resisted the MISSOURI COMPROMISE. Later, as a professor of law at William and Mary College (1834–1851) he was one of the most extreme advocates of a STATES' RIGHTS interpretation of the Constitution. He argued that SOVEREIGNTY resided in the several states and that the people of Virginia were obliged to obey federal law only because Virginia commanded them to do so. He defended SLAVERY and supported NULLIFICATION. His novel, *The Partisan Leader* (1836), advocated SECESSION and predicted a civil war.

DENNIS J. MAHONEY
(1986)

Bibliography

BAUER, ELIZABETH KELLEY 1952 *Commentaries on the Constitution, 1790–1860.* New York: Columbia University Press.

## TUCKER, ST. GEORGE
(1751–1827)

St. George Tucker, who became known as the "American Blackstone," wrote the first commentary on the Constitution since THE FEDERALIST, a book that he recommended as a "masterly discussion." After a dozen years as a judge in Virginia, Tucker succeeded GEORGE WYTHE, with whom he had studied law, as professor of law at the College of William and Mary. Using WILLIAM BLACKSTONE's *Commentaries on the Laws of England* as his text, Tucker updated and domesticated Blackstone in his lectures, showing how the English law had changed in the United States and in Virginia. His lectures led in 1803 to the publication in five volumes of an annotated edition of Blackstone. Notwithstanding Tucker's 1,400 notes, the most creative parts of his work are to be found in his appendices, which run to 425 pages in the first volume, mostly an analysis of the United States Constitution. Although Tucker preferred a "federal" to a "consolidated" Union, he was a moderate who defended the American constitutional system, championed democracy, opposed SLAVERY, and made constructive criticisms. The appendix argued against a FEDERAL COMMON LAW OF CRIMES. Volume two's appendices included an extended proposal for the gradual abolition of slavery and a libertarian essay on FIRST AMENDMENT freedoms, in which Tucker discoursed on the reasons that religion, speech, and press should be "absolute" and "unrestricted," except for laws against personal defamation. Tucker's edition of Blackstone led to his appointment to the highest court of Virginia, where he served with distinction, followed in 1813 by an appointment as a United States district judge. Tucker held that position until shortly before his death. He ranks with the best of Jeffersonian jurists and theorists.

LEONARD W. LEVY
(1986)

## TUCKER ACT
24 Stat. 505 (1887)

Thirty-two years after establishing the Court of Claims, Congress enacted the Tucker Act, expanding that court's JURISDICTION to decide claims against the United States. Henceforth, the court might decide not only contract claims but also claims against the government founded on the Constitution and other damage claims not based on tort. Today the act confers jurisdiction over such cases on the United States CLAIMS COURT, along with jurisdiction over claims founded on various federal statutes and regulations. If the amount in controversy in such a case is less than $10,000, the UNITED STATES DISTRICT COURT exercises

CONCURRENT JURISDICTION—thus allowing persons with small claims to bring suit in their home districts rather than in Washington, D.C. The act creates no substantive rights but merely provides jurisdiction in cases in which the government's liability is founded on other principles of law. In effect, however, the act amounts to a waiver of the federal government's SOVEREIGN IMMUNITY, in recognition of the vital principle that government should not be above the law.

KENNETH L. KARST
(1986)

(SEE ALSO: *Federal Tort Claims Act.*)

Bibliography

WRIGHT, CHARLES A.; MILLER, ARTHUR R.; and COOPER, EDWARD H. 1985 *Federal Practice and Procedure*, 2nd ed. Vol. 14:270–294. St. Paul, Minn.: West Publishing Co.

## TUGWELL, REXFORD G.
(1891–1979)

Economist Rexford Guy Tugwell was a member of President FRANKLIN D. ROOSEVELT's "brain trust" and an advocate of centralized economic planning by the federal government. After serving as undersecretary of agriculture and governor of Puerto Rico, he began a second career as a historian and constitutional theorist. His books on the Roosevelt years include *The Democratic Roosevelt* (1957, 1969) and *The Brains Trust* (1968). Tugwell's years as a government official convinced him that only a rewriting of the Constitution, emphasizing provisions for centralization, economic planning, and emergency powers, would produce an effective form of government. He denounced as undemocratic the accepted principles of FEDERALISM, and SEPARATION OF POWERS, and he stressed the need for total revision of the Constitution rather than gradual evolution through judicial interpretation. Tugwell frequently published his own proposals for a rewritten constitution. In *The Emerging Constitution* (1975) his proposals included: reduction of the states to administrative districts of a unitary national government; expansion of executive power, including EXECUTIVE PRIVILEGE; curtailment of the judiciary's power to pass judgment on actions of the national government to supervise the economy; and periodic revision of the Constitution through a simplified AMENDING PROCESS.

RICHARD B. BERNSTEIN
(1986)

## TUITION GRANTS

While parents have a constitutional right to send their children to private rather than public schools (see PIERCE V. SOCIETY OF SISTERS, 1925), the exercise of that right costs money. Such parents not only bear their share of the taxes that support public schools but also pay tuition to their children's schools. Not surprisingly, a regular item of business in Congress and the state legislatures is a proposal to relieve this "double burden" through some form of governmental relief. Two types of constitutional problems beset such proposals. Governmental aid to private schools may be attacked as STATE ACTION that promotes racial SEGREGATION or as an unconstitutional ESTABLISHMENT OF RELIGION.

Soon after the decision in BROWN V. BOARD OF EDUCATION (1954–1955), a number of southern states adopted a series of devices aimed at evading DESEGREGATION. One such device was the payment of state grants to private schools or to parents of private school children. The assumption was that when public schools were ordered to desegregate, white children would be withdrawn and placed in private schools. Some states went so far as to give local school boards the option of closing public schools and even selling those schools' physical plants to the operators of private schools which would be supported by tuition subsidized by the state. These private schools, it was expected, would be limited to white students. (More recently, federal CIVIL RIGHTS legislation has been applied to forbid that type of "segregation academy" to refuse black applicants. See RUNYON V. MCCRARY.) The Supreme Court held these tuition grant programs unconstitutional as evasions of *Brown* in cases such as GRIFFIN V. COUNTY SCHOOL BOARD (1964) and *Poindexter v. Louisiana Financial Assistance Commission* (PER CURIAM, 1968).

More recently, private schools in the North and West have acquired new white students following orders desegregating urban school systems. "White flight" means not only the departure of white families for the suburbs but also the transfer of white students from public to private schools. Estimates in the late 1970s suggested that as many as one-fifth of all enrollments in the nation's private schools were the result of "white flight." Proposals for governmental aid to private school children and their parents must therefore face a challenge based on the likely racially discriminatory impacts of various proposed forms of aid. Such impacts would not, of themselves, establish a constitutional violation; they would, however, be some evidence of an improper governmental purpose. (See LEGISLATION.)

Tuition grants limited to low-income parents of children enrolled in religious schools were held to violate the establishment clause in COMMITTEE FOR PUBLIC EDUCATION

V. NYQUIST (1973). That decision did not settle the question of the constitutionality of a hypothetical program in which the state gave *all* parents education vouchers, to be used to support schools of their choosing, public or private, religious or secular. (See GOVERNMENT AID TO RELIGIOUS INSTITUTIONS; MUELLER V. ALLEN.)

Proponents of voucher plans designed to aid private schools and their clienteles have gone to some lengths in an effort to tailor their proposals to meet these two types of constitutional objection. One proposal provides elaborate incentives for racial integration, such as bonuses for integrated schools. In the absence of strong incentives of some kind, it seems obvious that significant aid to private elementary and secondary education will have the effect of increasing racial segregation by increasing the educational mobility of middle class whites.

KENNETH L. KARST
(1986)

Bibliography

SUGARMAN, STEPHEN D. 1974 Family Choice: The Next Step in the Quest for Equal Educational Opportunity? *Law and Contemporary Problems* 38:513–565.

## *TURNER BROADCASTING SYSTEM, INC. v. FCC*
512 U.S. 622 (1994)

The development of the cable television industry has revolutionized the way most Americans watch television. Until the 1960s, television signals were broadcast through the air into people's homes and picked up by receivers in their television sets. Such signals used the electromagnetic spectrum, which has limited frequencies, and could only travel relatively short distances. Because of these technological limitations, Congress, through the Federal Communications Commission, claimed the power to regulate BROADCASTING in order to license and control the use of the limited number of frequencies or "channels" and to impose certain content restrictions and public interest obligations on the broadcasters given those licenses. In a 1969 case, RED LION BROADCASTING CO. V. FCC, the Supreme Court rejected a FIRST AMENDMENT challenge to those restrictions. The Court reasoned that the law was designed to expand, not restrict, the diversity of programming and was thus consistent with FREEDOM OF SPEECH principles.

Because of the short range of broadcast signals, however, viewers could only receive programs transmitted by local broadcasting "stations," and people in remote areas often received very poor signal reception. Cable television revolutionized this system. First, cable transmits video signals through fiberoptic cables, not electromagnetic frequencies, and thus has the capacity to carry or "broadcast" dozens, if not hundreds, of different channels at one time. Second, cable facilities can easily send their programs to distant places because they transmit their signals through cable wires, rather than through the air.

Initially, cable was primarily used to improve reception of broadcast stations in crowded urban or remote rural areas. But because of the large number of channels a cable system could transmit, the cable industry developed many new sources of programming. Because of better reception and broader programming, cable soon became the source of transmission of programming to approximately 60 percent of the households in America, although, unlike broadcasting, subscribers had to pay a monthly fee for the cable service.

Broadcasters felt threatened by this new source of programming and, more importantly, by the control that cable operators had over the broadcasters' ability to reach their audience. The broadcasters were dependent on cable operators to carry their programs, yet, they were in competition with the cable industry over channels and programming. Cable operators had a "chokehold" over broadcasters and television programming, threatening the future of "free T.V."

At the urging of the broadcast industry and others, Congress sought to address such concerns in the Cable Television Consumer Protection and Competition Act of 1992. That law mandated that all cable operators had to carry a reasonable number or percentage of "local commercial television stations" and local "noncommercial educational television stations" among the channels on their cable systems. The larger the number of channels, the more broadcast stations the system had to carry. Overall, the result was that approximately one-third of the channels on any cable system had to be made available for use by local commercial or noncommercial broadcast stations.

This "MUST CARRY" LAW was promptly challenged by cable system operators and cable channel programmers as violating their free speech rights. The cable operators claimed they were being forced by government to carry programming against their will. The programmers claimed that, as a consequence, there would be fewer cable channels available for their programming. In *Turner Broadcasting System v. FCC*, the Supreme Court held that those "must carry" rules passed constitutional muster. The Solomon-like decision contained something for both sides of the debate.

First, the Court gave the cable industry an important victory by clearly holding that the First Amendment broadly protects cable operators and programmers and affords them powerful rights of speech and press. In doing so, the Court rejected the government's contention that

the permissible regulation of cable should be measured by the same deferential approach that marked the *Red Lion* framework for assessing the rights of broadcasters. The Court reasoned that greater deference to governmental regulation is premised on the spectrum scarcity that uniquely affects broadcasting and which does not obtain in cable technology. Accordingly, normal First Amendment standards apply in deciding whether the restrictions and requirements of the "must carry" law are constitutional.

Nevertheless, under those standards, the strictest judicial scrutiny is reserved for those rules that are content-based, rather than content-neutral. Here, the regulation was premised on the medium, not the message. Congress required cable operators to carry commercial and noncommercial broadcast stations not because of any favored content communicated by those media, but to insure that those media remain healthy and diverse in order to serve the 40 percent of American households that, by necessity or choice, prefer to rely on free television as their source of programming. Nor did the Court find any persuasive evidence that Congress was trying to discriminate against the viewpoints allegedly associated with cable programming or in favor of the viewpoints purportedly associated with broadcasting. Rather, Congress was validly concerned with the "chokehold" capacity of cable operators to shut out broadcasters. (The dissenters, however, contended that Congress did see content differences between the two separate media and was impermissibly preferring one set of viewpoints over another.)

As a result, said the Court, the content-neutral, "must carry" rules would be judged by an intermediate standard of First Amendment review, with the critical question being whether those requirements were important to protecting broadcasting strength and diversity. On this point, the Justices concluded that more evidence was necessary on how vulnerable the broadcast industry really was and whether the special protections afforded it were justified. Accordingly, the Court sent the matter back to the lower courts for the development of a more complete record on those issues. In 1997, the case returned to the Court. The majority ruled that the justifications for the law were valid and survived the standard of intermediate scrutiny; the four dissenters, however, insisted that STRICT SCRUTINY was warranted by the law's content-based purposes and that, even under intermediate scrutiny, the government had failed to demonstrate threats to the broadcast industry that would be cured by the "must carry" rules.

JOEL M. GORA
(2000)

Bibliography

MASETH, MICHAEL W. 1995 Comment: The Erosion of First Amendment Protections of Speech and Press: The "Must Carry" Provisions of the 1992 Cable Act. *Capital University Law Review* 24:423–456.

MEYERSON, MICHAEL I. 1995 Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media. *Notre Dame Law Review* 71:79–125.

SYMPOSIUM 1997 Telecommunications Law: Unscrambling the Signals, Unbundling the Laws. *Columbia Law Review* 97:819–1201.

## TWELFTH AMENDMENT

The ELECTORAL COLLEGE, as contemplated in Article II of the Constitution, was to be a kind of "search committee," nominating outstanding men of various regions from among whom Congress would elect the President and Vice-President. The Framers expected each elector to cast his first vote for a candidate from his home state and his second for a national figure from another state. The delegates to the CONSTITUTIONAL CONVENTION assumed that the primary electoral divisions in the country were, and would remain, sectional.

The rise of POLITICAL PARTIES, which began almost immediately after the Constitution went into effect, belied that assumption. The parties nominated candidates, and the Electoral College had only to choose between the party slates; sectional loyalties were subordinated to ideological ones. In 1796, when party discipline was still developing, the Electoral College chose a Federalist President and a Republican Vice-President. In 1800 straight party voting produced a tie between THOMAS JEFFERSON and AARON BURR, the Republican nominees for President and Vice-President, respectively. The disgraceful performance of the HOUSE OF REPRESENTATIVES, which required thirty-five ballots to ratify the voters' choice, led directly to adoption of the Twelfth Amendment.

The amendment provided that the electors would vote for President and Vice-President in separate ballots; if no candidate obtained a majority of electoral votes, the House of Representatives (voting by states) would elect the President and the SENATE the Vice-President. Introduced by Senator DeWitt Clinton of New York, the amendment faced congressional opposition from Federalists and representatives of small states, each group fearing that its influence on presidential selection would be diminished. Once Congress proposed the Twelfth Amendment in 1804, the necessary thirteen states ratified it in less than six months—only the TWENTY-SIXTH AMENDMENT (1971) was ratified more quickly.

DENNIS J. MAHONEY
(1986)

## TWENTIETH AMENDMENT

Congress proposed the Twentieth Amendment, sponsored by Senator GEORGE W. NORRIS of Nebraska, on March 2,

1932; ratification was completed on January 23, 1933. The amendment provided that the President, Vice-President, and Congress begin their terms in the January following their election. Under the old scheme of Article I, section 4, congressmen had not taken their seats until thirteen months after their election, and a short "lame duck" session in election years included members who had already been defeated. The amendment also made provisions for PRESIDENTIAL SUCCESSION and authorized Congress to provide for a situation in which a President-elect or Vice-President-elect does not qualify by inauguration day.

DENNIS J. MAHONEY
(1986)

## TWENTY-FIFTH AMENDMENT

Congress proposed the Twenty-Fifth Amendment in July 1965, and ratification by the state legislatures was completed in February 1967. The amendment revised the constitutional provisions dealing with PRESIDENTIAL SUCCESSION, specifically providing that when a vacancy occurs in the office of President the Vice-President becomes (rather than "acts as") President. The amendment also provides for the orderly transfer of executive power in the event of a temporary presidential disability and for filling a vacancy in the office of Vice-President.

DENNIS J. MAHONEY
(1986)

Bibliography

FEERICK, JOHN D. 1976 *The Twenty-Fifth Amendment.* New York: Fordham University Press.

## TWENTY-FIRST AMENDMENT

The Twenty-First Amendment repealed the EIGHTEENTH AMENDMENT and rescinded the constitutional mandate for national PROHIBITION of alcoholic beverages. Congress proposed the amendment in February 1933; RATIFICATION was complete in December 1933. To the extent that the VOLSTEAD ACT depended upon the constitutional authority of the Eighteenth Amendment, that statute became inoperative upon the passage of the Twenty-First Amendment.

The second clause of the Twenty-First Amendment prohibits transportation or importation of intoxicating liquors into states or territories in contravention of local law. The clause apparently gives the states power to regulate interstate commerce in alcoholic beverages, including the authority to discriminate against out-of-state producers and distributors, thus freeing the states, as far as liquor is concerned, from COMMERCE CLAUSE restrictions. The Supreme Court has upheld that interpretation in several cases, notably *State Board v. Young's Market* (1936). The Court suggested an even broader scope for state regulatory power under the amendment in *California v. LaRue* (1972), when it upheld a regulation banning sexually explicit entertainment in licensed taverns, and in *Elks' Lodge v. Ingraham* (1973), when it upheld a statute denying liquor licenses to private clubs that practiced RACIAL DISCRIMINATION.

The Twenty-First Amendment is the only constitutional amendment to have been ratified by state conventions rather than by the state legislatures. Congress chose this variant of the AMENDING PROCESS because proponents of repeal feared that antiliquor sentiment was dominant in many state legislatures, because of the overrepresentation of rural areas.

DENNIS J. MAHONEY
(1986)

## TWENTY-FOURTH AMENDMENT

The Twenty-Fourth Amendment, written by Senator Spessard Holland of Florida, was proposed by Congress on August 27, 1962, and became part of the Constitution on February 4, 1964. The amendment provides that the right of United States citizens to vote for federal officers shall not be denied or abridged for nonpayment of a POLL TAX or other tax.

A poll tax is simply a per capita tax and has no necessary relationship to election polling. However, several southern states made payment of the poll tax an electoral qualification in order to diminish the VOTING RIGHTS of black citizens. Bills to abolish the practice were introduced every year from 1939 on, and Holland, who believed statutory abolition to be beyond Congress's power, introduced his amendment every year from 1949 on.

By 1964, only five states retained payment of the poll tax as a qualification for voting. Because the Twenty-Fourth Amendment governed only federal elections, four states divided their elections, continuing to require poll tax payment for voting in state elections; but the Supreme Court held, in HARPER V. VIRGINIA BOARD OF ELECTIONS (1966), that this practice violated the Constitution by denying EQUAL PROTECTION OF THE LAWS.

DENNIS J. MAHONEY
(1986)

## TWENTY-SECOND AMENDMENT

Although, as ALEXANDER HAMILTON explained in THE FEDERALIST #69, the President was "to be re-eligible as often as the people of the United States shall think him worthy of their confidence," a constitutional custom dating back to the administration of GEORGE WASHINGTON limited the President of the United States to two terms in office. In

1940, however, with the Great Depression finally coming to an end and with most of the world already engaged in WORLD WAR II, FRANKLIN D. ROOSEVELT sought and won election to a third term. He was subsequently elected to a fourth term, although he died sixty days after that term began.

The Twenty-Second Amendment makes the two-term limit a part of the formal Constitution. Congress proposed the amendment in March 1947 and RATIFICATION was complete four years later.

The effect of the amendment on the balance of power between the executive and the legislature is not clear. Hamilton, who personally had advocated a life term for the President, speculated in *The Federalist* #71 that Presidents would become more submissive to Congress as elections approached; and DWIGHT D. EISENHOWER argued during his second term that his ineligibility for reelection was a guarantee that he was more disinterestedly public-spirited than congressmen who opposed him. In the 1980s, on the other hand, journalists and political scientists who had come to see elections as retroactively legitimating, rather than prospectively legitimating, began referring to President RONALD REAGAN as a "lame duck" even before his second inauguration.

The two-term limit is no longer controversial. Ever since the Constitutional Convention of 1789 there have been proposals for limiting the President to a single term, generally longer than four years, but none of these has ever been seriously considered as a constitutional amendment.

DENNIS J. MAHONEY
(1986)

## TWENTY-SEVENTH AMENDMENT

The Twenty-Seventh Amendment provides: "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." It is rooted in a recurring issue in Anglo-American legislative design: Who should pay representatives? In England, at first, constituents paid members of the House of Commons; throughout the eighteenth century members and candidates promised to take ever-lower wages or no wages at all, and, to win voters' support, competed to assume costs for municipal improvements such as new public buildings or repaved streets. Guarding against real and perceived corruption, American colonial and (after 1776) state governments paid legislators' salaries. Similarly, colonial and state governments paid delegates to the confederation and CONTINENTAL CONGRESSES.

The CONSTITUTIONAL CONVENTION OF 1787 had to decide what compensation senators and representatives should receive and from whom. The delegates concluded that having each state pay its own senators and representatives would create inequities among states and might preclude the ablest candidates from seeking office. Therefore, they framed the Constitution's compensation clause of Article I to have the general government pay senators and representatives and to empower Congress to set its own rate of compensation. ANTI-FEDERALISTS criticized the provision for assigning Congress that power and for insulating senators and representatives from state control. The ratifying conventions of Virginia, New York, and North Carolina recommended amendments barring laws changing legislative compensation from taking effect until after an election of representatives.

Responding to the nationwide demands for amendments, Representative JAMES MADISON of Virginia sorted through the over two hundred proposals to devise those he offered to the HOUSE OF REPRESENTATIVES on June 8, 1789. He chose rights-protecting amendments and "structural amendments" that did not invade the general government's just powers, with the compensation amendment in the latter group. It was the second of twelve amendments proposed by Congress to the states on September 26, 1789. Amendments three through twelve were ratified, becoming known as the BILL OF RIGHTS.

From 1791 through 1982, the compensation amendment languished in limbo, with two exceptions. On May 6, 1873, protesting the Forty-Second Congress's "salary grab" (by which Congress retroactively increased its pay by half), Ohio's legislature ratified the compensation amendment. On March 3, 1978, Wyoming's legislature ratified the amendment, protesting congressional compensation.

In 1982, Gregory D. Watson, then a sophomore at the University of Texas, wrote a paper arguing that the compensation amendment could still be ratified by the states. He then launched a one-man campaign to persuade state legislatures to ratify the amendment.

Most constitutional scholars argued that an implied time-limit on unratified proposed amendments invalidated the 1789 REAPPORTIONMENT and compensation amendments, the 1810 TITLES OF NOBILITY amendment, the 1861 Corwin Amendment, and the 1924 child-labor amendment. Yet, from 1983 to 1992, a parade of states ratified the compensation amendment. By May 7, 1992, it had amassed thirty-eight ratifications (counting those in 1789–1791, 1873, and 1978), enough to meet the three-fourths requirement of the Article V AMENDING PROCESS.

Should all the state ratifications or only those from 1983 through 1992 be deemed valid? Who decides whether an amendment is validly ratified? This latter task was a ministerial one left (1789 to 1951) to the Secretary of State,

then (1951 to 1984) to the Administrator of General Services, and finally (since 1984) to the archivist of the United States. When, on May 18, 1992, Archivist Don W. Wilson accepted all the states' ratifications and certified the Amendment, House and SENATE leaders invoked the precedent of the FOURTEENTH AMENDMENT to establish Congress's final authority to confirm an amendment's ratification. On May 20, 1992, the House (414–3) and the Senate (99–0) confirmed the Twenty-Seventh Amendment.

Would the Twenty-Seventh Amendment invalidate the 1989 Ethics in Government Act, which established cost-of-living adjustments automatically keying congressional compensation to the cost-of-living index? In *Boehner v. Anderson* (1992), the U.S. District Court for the District of Columbia refused to decide the amendment's status but, assuming its validity, upheld the statute. On appeal, the U.S. Court of Appeals for the D.C. Circuit upheld the district court but also held the amendment a valid part of the Constitution.

The Twenty-Seventh Amendment's strange history continues to preoccupy constitutional scholars concerned with the theory and practice of constitutional change, but its uniqueness, the modest change it worked in the fabric of the constitutional system, and its pedigree as an amendment proposed by Madison will limit its significance to the abstract realm of CONSTITUTIONAL THEORY.

RICHARD B. BERNSTEIN
(2000)

Bibliography

ANASTAPLO, GEORGE 1995 *The Amendments to the Constitution: A Commentary.* Baltimore, Md.: Johns Hopkins University Press.

BERNSTEIN, RICHARD B. 1992 The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment. *Fordham Law Review* 61:497–557.

BERNSTEIN, RICHARD B. and AGEL, JEROME 1993 *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* New York: Times Books/Random House.

KYVIG, DAVID E. 1996 *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776–1995.* Lawrence: University of Kansas Press.

PORRITT, EDWARD and PORRITT, ANNIE G. 1909 *The Unreformed House of Commons: Parliamentary Representation Before 1832.* Cambridge, England: Cambridge University Press.

VILE, JOHN R. 1993 *Contemporary Questions Surrounding the Constitutional Amending Process.* Westport, Conn.: Praeger.

——— 1994 *Constitutional Change in the United States: A Comparative Study of the Role of Constitutional Amendments, Judicial Interpretations, and Legislative and Executive Actions.* Westport, Conn.: Praeger.

——— 1996 *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789–1995.* Santa Barbara, Calif.: ABC-CLIO.

## TWENTY-SIXTH AMENDMENT

Congress proposed the Twenty-Sixth Amendment on March 23, 1971. Ratification was completed in 107 days, the shortest time ever required to complete the AMENDING PROCESS. The amendment standardized the voting age in all federal, state, and local elections at eighteen.

Under the Constitution the power to establish qualifications for voting in all elections was left to the states, except that the qualifications to vote for representatives in Congress (and, after the SEVENTEENTH AMENDMENT, for senators) had to be the same as those to vote for members of the most numerous branch of the state legislature. Under various amendments, VOTING RIGHTS could not constitutionally be denied or abridged on account of race, color, previous servitude, sex, or failure to pay taxes; the FOURTEENTH AMENDMENT set twenty-one as the highest minimum age a state could require for voters. Before 1970 only four states had enacted a minimum voting age lower than twenty-one.

In the VOTING RIGHTS AMENDMENTS of 1970, Congress purported to lower the voting age to eighteen for all elections. The Supreme Court, in OREGON V. MITCHELL (1970), upheld the statute, insofar as it pertained to federal elections, under Article I, section 4, which authorizes Congress to regulate the time and manner of elections of its members; but the Court held the act unconstitutional insofar as it pertained to state elections. The decision threatened to throw the 1972 elections into chaos, because in most states the voting age for balloting for federal officials would have been different from the voting age for state races. The rapidity with which the amendment was ratified is attributable to a general desire to avoid such chaos.

Although Congress, in proposing the amendment, expressed confidence in the "idealism and concern and energy" the new voters would bring to the political system, the actual effect of the amendment has been less than revolutionary. Empirical studies have shown that eighteen-to-twenty-one-year-olds have the lowest voter turnout rate of any age group; and those who do vote do not differ markedly from the rest of the population concerning political parties or issues.

DENNIS J. MAHONEY
(1986)

## TWENTY-THIRD AMENDMENT

Proposed by Congress on June 17, 1960, the Twenty-Third Amendment became effective on March 29, 1961. The

amendment includes residents of the DISTRICT OF COLUMBIA in the process of electing the President and Vice-President by allowing them to choose members of the ELECTORAL COLLEGE. The influence of the district is limited by the proviso permitting it no more electoral votes than the least populous state—in practice fixing the district's electoral votes at three.

As the amendment was introduced by Senator Kenneth Keating, of New York, it would have allocated the District of Columbia as many electoral votes as a state with the same population and would have permitted the district to elect representatives to Congress on the same basis. Representative Emmanuel Celler, of New York, chairman of the House Judiciary Committee, reduced it to its final form in order to insure passage. Celler's committee also separated the District of Columbia suffrage amendment from two other amendments (on Congressional vacancies and POLL TAXES) to which the SENATE had linked it.

There was some opposition from Republicans, who predicted the district would inevitably support Democratic candidates, and Southerners, who feared the amendment would increase the political power of blacks.

DENNIS J. MAHONEY
(1986)

## *TWINING v. NEW JERSEY*
211 U.S. 78 (1908)

*Twining* formed part of the line of decisions, from HURTADO V. CALIFORNIA (1884) and MAXWELL V. DOW (1900) to PALKO V. CONNECTICUT (1937), in which the Supreme Court denied that the traditional Fifth and SIXTH AMENDMENT rights of accused persons were FUNDAMENTAL RIGHTS protected against state infringement by the FOURTEENTH AMENDMENT. In *Twining*, an eight-man majority, speaking through Justice WILLIAM H. MOODY, held that neither the PRIVILEGES AND IMMUNITIES clause nor the DUE PROCESS clause incorporated the RIGHT AGAINST SELF-INCRIMINATION. The Court also considered whether some of the personal rights safeguarded by the BILL OF RIGHTS might be safeguarded against the states because to deny those rights would be to deny due process of law. That is, apart from the question whether the Fourteenth Amendment's protection of immunities and liberty had the effect of incorporating the Fifth Amendment right, the Court also decided the question whether the concept of due process itself was of such a nature as to include the right against self-incrimination. Was a denial of that right a denial of due process?

Although Moody admitted that the Court would not allow history to "strait-jacket" constitutional law, he resorted to "every historical test" to determine how history "rated" the right in question. Moody was a pathetically poor historian; his mangling of the little evidence he knew led him wrongly to conclude that the right against self-incrimination was neither a fundamental right nor part of due process of law. On that reading of history he decided that the state had not violated the Constitution by permitting a trial court to instruct the jury that they might draw adverse inferences against a defendant because of his reliance on the right against self-incrimination or his failure to testify.

Justice JOHN MARSHALL HARLAN delivered another lone dissenting opinion, arguing that immunity against self-incrimination, like the right to INDICTMENT by GRAND JURY and the right to TRIAL BY JURY, should be deemed fundamental and applicable to the states. Whether he believed that the privileges and immunities clause or the due process clause, or both, incorporated the right is not clear; but he certainly believed it to be essential to due process.

At the time the Court held a narrower view of PROCEDURAL DUE PROCESS, it used an expanded SUBSTANTIVE DUE PROCESS to protect CORPORATIONS and prevent Congress from protecting trade unions (see *Adair v. United States*, 1908). *Adamson v. California* (1947) reaffirmed *Twining*, but the Court overruled both cases in MALLOY V. HOGAN (1964).

LEONARD W. LEVY
(1986)

(SEE ALSO: *Incorporation Doctrine.*)

## *TWO GUYS FROM HARRISON-ALLENTOWN v. MCGINLEY*

See: Sunday Closing Laws

## TWO-LEVEL THEORY

In an important 1960 article, Harry Kalven, Jr., coined the phrase "two-level theory." As he described it, FIRST AMENDMENT methodology classified speech at two levels. Some speech was so unworthy as to be beneath First Amendment protection: no First Amendment review was necessary. Thus the Court in CHAPLINSKY V. NEW HAMPSHIRE (1942) had referred to "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words." At the second level, speech of constitutional value was pro-

tected unless it presented a CLEAR AND PRESENT DANGER of a substantive evil.

In a subsequent article Kalven observed that in NEW YORK TIMES V. SULLIVAN (1964) neither the two-level approach nor the clear and present danger test was an organizing strategy or guiding methodology. He expressed the hope that the *Sullivan* Court's unwillingness to employ the two-level theory presaged the theory's demise along with the clear and present danger test. Kalven's hopes have been only partially realized. Perhaps partly as a result of his persuasive efforts, the Court has been willing to scrutinize state justifications for regulating some types of speech previously thought to raise no constitutional problem. *Chaplinsky*'s off-hand assumption that each class of speech in its litany raises no constitutional problem is no longer credible. Nonetheless, the Court continues to be impressed by *Chaplinsky*'s famous OBITER DICTUM that speech beneath the protection of the First Amendment occupies that status because its slight contribution to truth is outweighed by the state interests in order and morality.

Kalven's hope for the complete repudiation of the clear and present danger doctrine also remains unfulfilled. A variation of the doctrine occupies a secure doctrinal place in the context of INCITEMENT TO UNLAWFUL CONDUCT, and the DENNIS V. UNITED STATES (1951) version of the test has been employed by the Court in other contexts, as in *Landmark Communications, Inc. v. Virginia* (1978) and NEBRASKA PRESS ASSOCIATION V. STUART (1976).

If doctrine were described today in terms of levels, many levels would be necessary. At one level, there is the question whether a First Amendment problem is presented: an effort to communicate a message by assassination presumably raises no First Amendment problem. If cognizable First Amendment values are present, there remains the question whether any legal protection is appropriate: advocacy of illegal action often is unprotected despite the existence of cognizable First Amendment interests. If some protection is appropriate, further questions remain: what protection in what contexts, at what times, in what places, and concerning what modes of expression? A multitude of doctrinal tests now govern a multitude of contexts. Harry Kalven would appreciate the Court's sensitivity to the vicissitudes of human conduct, but likely would regret the absence of an overall vision.

STEVEN SHIFFRIN
(1986)

Bibliography

KALVEN, HARRY, JR. 1960 The Metaphysics of the Law of Obscenity. *Supreme Court Review* 1960:1–45.

——— 1964 The New York Times Case: A Note on "The Central Meaning of the First Amendment." *Supreme Court Review* 1964:191–221.

## TWO SOVEREIGNTIES RULE

This rule, which the Supreme Court repudiated in *Murphy v. Waterfront Commission* (1964), was a limitation on the RIGHT AGAINST SELF-INCRIMINATION. Based on the federal principle that one sovereignty has no interest in the law enforcement activities of another, the rule was that a person could not refuse to testify on the grounds that his disclosure would subject him to prosecution by another sovereignty or JURISDICTION. Thus he could be convicted of a federal crime on the basis of testimony compelled in a state proceeding or of a state crime on the basis of testimony compelled in a federal proceeding. In matters involving national supremacy, Congress can grant immunity against state prosecutions, but a state cannot immunize against a federal prosecution and one state cannot immunize against prosecution in another.

The rule entered American constitutional law in 1906 in *Hale v. Henkel* as a result of the Court's factual mistakes. In that case the appellant, who had received a grant of immunity against federal prosecution, sought reversal of his conviction for contempt by a federal court for refusing to answer questions that exposed him to state prosecution. The Court needlessly declared that English COMMON LAW had settled the question by a rule that "the only danger to be considered is one arising within the same jurisdiction and under that same sovereignty." The Court cited two English cases, one not in point and the other soon discredited by a decision unknown to the Court. In *United States v. Murdock* (1933), a unanimous Court "definitely settled that one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law," a proposition resting on *Hale* and the two English precedents. By 1944 the Court made the two sovereignties rule reciprocal, so that a suspect could be whipsawed into incriminating himself in one jurisdiction by receiving a grant of immunity from another. State and federal authorities sometimes assisted each other, one compelling disclosure, the other prosecuting. So matters stood until the *Murphy* case.

Although granted immunity by New York and New Jersey, Murphy remained silent because his answers might incriminate him under federal law. He won a reversal of his conviction when the Supreme Court, in an opinion by Justice ARTHUR J. GOLDBERG, exposed the erroneous basis of the precedents and concluded that the two sovereignties rule had no support in history or in the policies underlying the Fifth Amendment right. On the same day, in

MALLOY V. HOGAN (1964), the Court extended that right to the states. Given that extension and a broad view of the right, the Court held that a state witness is protected against incrimination under both federal and state law and a federal witness is similarly protected. Justices BYRON R. WHITE and POTTER STEWART concurred separately. *Murphy* also stands for the proposition that use immunity rather than TRANSACTIONAL IMMUNITY satisfies the demand of the Fifth Amendment at least in a two sovereignties case.

A two sovereignties rule still operates with respect to DOUBLE JEOPARDY: a person may be prosecuted for both state and federal crimes committed by the same act.

LEONARD W. LEVY
(1986)

## TYLER, JOHN
(1790–1862)

A Virginia lawyer, governor, and United States senator, John Tyler, a Democrat elected Vice-President as a Whig in 1840 became America's first accidential President upon the death of William Henry Harrison in 1841. This peaceful transition of leaders underscored the strength of the Constitution even though it frustrated the Whig politicians who had nominated Harrison. As President, Tyler was usually a constitutional strict constructionist, and many of his policies resembled those of ANDREW JACKSON. Tyler refused to interfere with the SOVEREIGNTY of Rhode Island during Dorr's Rebellion, but he was an early advocate of Texas annexation which was accomplished in the last months of his administration. In 1861 Tyler chaired the Washington Peace Conference, but after its failure he advocated SECESSION. The only former President to serve the Confederacy, Tyler was elected to the provisional Congress and the Confederate House of Representatives.

PAUL FINKELMAN
(1986)

Bibliography

MORGAN, ROBERT J. 1954 *A Whig Embattled: The Presidency of John Tyler.* Lincoln: University of Nebraska Press.

## *TYSON & BROTHER v. BANTON*
273 U.S. 418 (1927)

Citing Chief Justice WILLIAM HOWARD TAFT's opinion in WOLFF PACKING COMPANY V. COURT OF INDUSTRIAL RELATIONS (1923), Justice GEORGE SUTHERLAND found unconstitutional a New York statute regulating ticket "scalpers." The state based the law on a declaration that theater prices were AFFECTED WITH A PUBLIC INTEREST, but because the theater business did not fit Taft's categories, the law fell as a violation of FREEDOM OF CONTRACT and a denial of DUE PROCESS OF LAW.

Justice OLIVER WENDELL HOLMES dissented: "a state legislature may do whatever it sees fit to do unless it is restrained by some express prohibition in the [federal or state] constitution." Justice LOUIS D. BRANDEIS joined him and Justice HARLAN FISKE STONE wrote a separate dissent. All three urged rejection of the public interest concept—"a fiction intended to beautify what is disagreeable to the sufferers"—in favor of state regulation wherever the public welfare demanded it.

DAVID GORDON
(1986)

(SEE ALSO: *New State Ice Company v. Liebmann; Ribnik v. McBride.*)

# U

## *ULLMANN v. UNITED STATES*
350 U.S. 422 (1956)

Ullmann, relying on his right not to be a witness against himself, refused to testify before a federal GRAND JURY concerning his alleged communist activities. Though he received immunity against prosecution for any criminal transaction concerning which he was compelled to testify, he continued pertinacious. Ullmann argued against the constitutionality of the congressional Immunity Act of 1954 on the grounds that it did not immunize him from such disabilities as loss of job, expulsion from labor unions, compulsory registration as a subversive, passport ineligibility, and general public opprobrium. Thus he distinguished his case from BROWN V. WALKER (1896) on the theory that he had not received full transactional immunity. The Court rejected Ullmann's argument, 7–2. Justice FELIX FRANKFURTER for the majority reasoned that the Fifth Amendment's right to silence operated only to prevent the compulsion of testimony that might expose one to a criminal charge. The disabilities to which Ullmann claimed exposure were not criminal penalties. Justices WILLIAM O. DOUGLAS and HUGO L. BLACK, dissenting, would have held the immunity act unconstitutional on the ground that the right of silence created by the Fifth Amendment is beyond the reach of Congress. Douglas contended that the amendment was designed to protect against INFAMY, as well as prosecution, and against forfeitures—those disabilities of which Ullmann spoke—as well as criminal fines and imprisonment.

LEONARD W. LEVY
(1986)

## *ULTRA VIRES*

(Latin: "Beyond powers.") This term applies either to acts taken by a CORPORATION beyond the limits of its chartered (legally authorized) powers or to acts of a public official beyond his or her delegated authority.

DAVID GORDON
(1986)

## *"ULYSSES," ONE BOOK ENTITLED, UNITED STATES v.*
5F. Supp. 182 (1933)
72 F.2d 705 (1934)

Although it was not a decision of the Supreme Court, *Ulysses* was not merely a case involving a famous book and prominent judges but also a harbinger of modern decisions on OBSCENITY. Its standards for construing the COMMON LAW terms embodied in federal customs regulations were transmuted in UNITED STATES V. ROTH (1957) into constitutional principles for testing both federal and state legislation on the subject.

The handful of early obscenity cases that reached the Supreme Court mainly presented claims of technical error in the trials below. *Ulysses* presented clear questions of substantive standards for adjudging obscenity and lewdness. The established reputation of the book insured careful attention; Judge John M. Woolsey's lower court opinion was unmistakably written for the anthologies it ultimately

graced. Judge AUGUSTUS N. HAND's appellate majority opinion was straightforward, but Judge Martin T. Manton's dissent was somewhat verbose.

Woolsey declared that the book successfully showed "how the screen [sic] of consciousness with its ever-shifting kaleidoscopic impression carries, as it were on a plastic palimpsest, . . . a penumbral zone residual of past impressions . . . not unlike the result of a double or, if that is possible, a multiple exposure on a cinema film. . . ."

The relevant statute on importation of books prohibited not pandering but obscenity. Woolsey announced without discussion that the test for obscenity required examination of the whole work. The standard was the effect on "what the French would call *l'homme moyen sensuel*—who plays, in this branch of legal inquiry . . . the same role . . . as does the "reasonable man in the law of torts. . . ." With this standard he found the book "somewhat emetic, nowhere . . . an aphrodisiac." He also found Joyce to have been sincere and lacking pornographic intent or the "leer of the sensualist."

At the appellate level Augustus Hand for himself and LEARNED HAND managed to come to grips with the central legal issue—whether isolated passages could render a work of art obscene. This was the test derived from *Regina v. Hicklin* (1868), the classic British case, and, they conceded, followed in *United States v. Bennett* (1879), a CIRCUIT COURT decision by Justice SAMUEL BLATCHFORD. They discounted other alleged precedents and argued that the isolated passages concept was not followed for works of science or medicine and should not be followed for literature either. They cited state decisions embracing the "dominant effect" notion, and read that test (together with their definition of the relevant audience) into the statute, concluding that other readings would be impractical and overrestrictive.

Manton, dissenting, insisted that federal decisions in the past had accepted the "isolated passages" test. As literature was for amusement only, the community could reasonably demand that it meet moral standards—those of average, not exceptional, individuals.

SAMUEL KRISLOV
(1986)

Bibliography

LOCKHART, WILLIAM B. and MCCLURE, ROBERT C. 1954 Literature, the Law of Obscenity, and the Constitution. *Minnesota Law Review* 38:295–395.

## UNCONSTITUTIONAL CONDITIONS

Although government may not be obligated to provide its citizens with a certain benefit or privilege, it is not free to condition granting the benefit or privilege on the recipient's relinquishing a constitutional right. Likewise, the government may not withhold or cancel the benefit by way of penalizing the assertion of a constitutional right. For example, in SHERBERT V. VERNER (1963) the Supreme Court held South Carolina's unemployment compensation act unconstitutional as applied to exclude a Seventh Day Adventist from benefits when she would not find a job releasing her from work on Saturdays. Withholding the benefits effectively penalized exercise of the claimant's RELIGIOUS LIBERTY.

It has sometimes been argued that a legislature's greater power of withholding a benefit must necessarily include the lesser power of granting the benefit with restrictions. On this theory, the recipient of the benefit is deprived of no right, for the right can be retained simply by rejecting the proffered benefit. This logic leads to drastic consequences as government becomes increasingly involved in supplying such vital needs as jobs, housing, welfare, and EDUCATION.

As early as *Frost & Frost Trucking Company v. Railroad Commission* (1926) the Court recognized the potential for excess conditions on the exercise of constitutional rights: "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence."

Subsequent courts have rarely been persuaded by arguments claiming an absolute power of government to condition and limit the grant of general benefits. Rather, they have generally recognized that the revocation of benefits amounts to regulatory activity by government, for which sufficient justification must be established if constitutional rights are restricted. This doctrine of unconstitutional conditions has been successfully applied to restrain assertions of unlimited governmental power in four major substantial areas: the privilege of out-of-state corporations to engage in local business; the use of public property and facilities; the receipt of entitlements and social service benefits; and government employment.

As early as 1839, the Supreme Court announced that a state might exclude out-of-state corporations from conducting business within its borders. In early cases, this power to exclude was held sufficient to justify highly unreasonable conditions on entry and even the arbitrary revocation of a corporation's license. Subsequent Court decisions, however, have subjected such regulations to DUE PROCESS standards. Given the Court's increasing sensitivity to national interests in economic growth and the smooth functioning of the federal system, it is not surprising that the Court invoked the doctrine of unconsti-

tutional conditions to check a power previously thought to be virtually absolute.

In 1897 the Court upheld an ordinance that prohibited public speaking in a municipal park without a permit from the mayor. The Court reasoned that ownership of the land gave the city the right to withhold access completely; the city therefore could grant access on any conditions, including those restricting FIRST AMENDMENT freedoms. This logic has been invalidated by later decisions which have viewed the manipulation of access to streets and parks as regulatory activity subject to constitutional attack. (See PUBLIC FORUM.)

Given the large number of benefits now provided by government, the imposition of conditions on the recipients of such benefits raises a significant possibility of undermining individual liberties. The Supreme Court has used unconstitutional condition analysis to prevent such a result in cases involving unemployment compensation, WELFARE BENEFITS, public housing, tax exemptions, public education, and the mail services. One leading doctrinal basis for these decisions has been the guarantee of PROCEDURAL DUE PROCESS.

In *McAuliffe v. Mayor of New England* (1892) the Massachusetts Supreme Judicial Court denied the petition of a policeman who had been fined for violating a regulation restricting his political activity. Justice OLIVER WENDELL HOLMES, speaking for the state court, stated: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. . . . There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes his employment on the terms which are offered him." More recently, however, courts have found conditions on employees unconstitutional irrespective of any abstract right to public employment. The courts have asked whether the condition restricts employment in a "patently arbitrary and discriminatory manner" in violation of due process, as set forth in WIEMAN V. UPDEGRAFF (1952), and whether, in withholding or revoking employment under conditions capable of improper application, the state is penalizing specific constitutional freedoms.

Although claims of unconstitutional conditions in these four areas have become less common in recent years, the doctrine has recently emerged in the sphere of CRIMINAL PROCEDURE, particularly in cases involving the guilty plea. PLEA BARGAINING effectively penalizes the exercise of the right to trial by rewarding those who plead guilty. In addition, it denies the individual the RIGHT AGAINST SELF-INCRIMINATION and the right to confront and cross-examine witnesses against him. The Court, however, has endorsed the use of plea bargaining. Rather than address the challenges raised by the unconstitutional conditions doctrine, the Court has insisted only that guilty pleas be "voluntary and intelligent" and that the plea bargaining process conform to certain standards of fairness. The tension between the principle of unconstitutional conditions and the Court's endorsement of plea bargaining seems likely to produce future controversy.

ARTHUR ROSETT
(1986)

Bibliography

VAN ALSTYNE, WILLIAM W. 1968 The Demise of the Right-Privilege Distinction in Constitutional Law. *Harvard Law Review* 81:1439–1464.

## UNCONSTITUTIONAL CONDITIONS
(Update)

Unconstitutional conditions problems arise when government conditions allocation of a benefit such as public PROPERTY, jobs, or funds upon surrender of a constitutional right. Government's coercive deprivation of a right through the imposition of criminal or civil liability normally triggers a demand for strong justification. Government's mere exercise of budgetary discretion, however, normally triggers only deferential JUDICIAL REVIEW. The DOCTRINE of unconstitutional conditions holds that some selective allocations of benefits are equivalent to coercive deprivations of rights. The difficulty is in determining when this is so.

The Supreme Court has tended to steer between two polar positions. On the one hand, it has declined to hold that government has absolute allocative discretion when it acts in its capacity as property owner, employer, or patron. This view is epitomized by the famous epigram of Justice OLIVER WENDELL HOLMES, JR., in *McAuliffe v. Mayor of New England* (1892) that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." On the other hand, the Court has also declined to hold that constitutional limits extend to government in these proprietary capacities as completely as they do to government in its sovereign capacity. Instead, the Court has tended to draw a series of public/private distinctions among conditions on benefits, categorizing some as akin to the exercise of sovereign power subject to strong constitutional constraints and others as the mere exercise of managerial prerogative.

FREEDOM OF SPEECH claims provide the most abundant recent examples of such categorization, which may be considered separately with respect to conditions upon speech on public property, speech by PUBLIC EMPLOYEES, and

speech by recipients of public funds. Under a long line of decisions recognizing certain public property as PUBLIC FORUMS, government may not condition speakers' access to public streets or parks on submission to government content control or excessive time, place, or manner regulation. But a more recent line of decisions exempts a wide range of government property other than streets and parks from such constitutional limitations. For example, government may pick and choose which speakers may place circulars in public school teachers' mailboxes, solicit funds in charitable fund drives in public workplaces, demonstrate or petition on sidewalks abutting post offices, solicit donations in airport terminals, or participate in a candidate debate broadcast on public television—even though such discrimination would not be allowed among speakers in streets and parks. Each of these locations within the vast realm of government property has been deemed a "nonpublic forum," in which government may condition access as selectively as it likes so long as it acts reasonably and avoids discrimination on the basis of viewpoint.

The Court has divided claims against speech-restrictive conditions on public employment along similar lines. On the one hand, public employees do not shed their First Amendment rights at the workplace gate, and government may not without strong justification condition retention of their jobs on silence in their public capacities as citizens. A public school teacher may criticize a school board for spending too much on athletics, a clerical worker in a sheriff's office may express bantering disappointment that an attempted assassination of the President was unsuccessful, and civil servants may receive honoraria for their off-duty speeches or articles—all without job sanction unless the government can make a particularized showing that such speech will disrupt the workplace or impair government efficiency. On the other hand, public employees may be freely discharged or demoted for expressing mere LABOR grievances internal to their workplace, such as soliciting coworker expression of hostility toward the boss. Similarly, a government job or contract may not be conditioned upon PATRONAGE or the recipient's association with the incumbent POLITICAL PARTY, except in a narrow set of confidential or policymaking positions.

In challenges to the selective allocation of public funds to some speakers and not others, the Court has distinguished between the mere refusal to subsidize speech of particular content, which is constitutional unless aimed at the suppression of a particular viewpoint, and the impermissible use of the leverage of the government funding to alter what the speaker would otherwise say with private resources. For example, government may not condition a public BROADCASTING subsidy on a station's foregoing all editorializing even if funded with private contributions. But government may withhold a subsidy in the form of tax benefits from the lobbying efforts of a nonprofit organization when this nonsubsidy does not affect the nonlobbying speech or advocacy of the organization, and may limit family planning funds to those health care entities that agree not to advocate or counsel women about ABORTION. As the MAJORITY OPINION in RUST V. SULLIVAN (1991) stated, "when the government appropriates public funds to establish a program it is entitled to define the limits of that program."

The doctrine of unconstitutional conditions in the First Amendment area was largely the handiwork of the late Justice WILLIAM J. BRENNAN, JR., who wrote in SPEISER V. RANDALL (1958) and in SHERBERT V. VERNER (1963) that in an expanded WELFARE STATE, the deprivation of a government benefit might penalize or deter the exercise of constitutional rights to the same extent as a criminal fine. His assumption seemed to be that if government had enough market power, it could distort the interplay of ideas in society by wielding carrots as well as sticks. At the extreme, this is certainly true; if government were the sole provider of an opportunity, then a condition on government allocation of that opportunity would have the same effects as a coercive regulation, for there would be no escape from government monopoly. Brennan may also have assumed that, even if the public sector were more limited, rights-pressuring conditions on government benefits would create a caste system in which those who are dependent on government aid enjoy more constricted opportunity to exercise constitutional rights than those with private means.

The REHNQUIST COURT might well have been expected to be less receptive to the doctrine of unconstitutional conditions. Chief Justice WILLIAM H. REHNQUIST himself has been an ardent critic of the doctrine. For example, he criticized the majority's decision to give First Amendment scrutiny to public school library book removals in *Pico v. Board of Education* (1982), arguing that "the role of government as sovereign is subject to more stringent limitations than is the role of government as employer, property owner, or educator." He likewise criticized the majority in *Federal Communications Commission v. League of Women Voters* (1984), which invalidated anti-editorializing conditions on public broadcasting subsidies, for treating the government as "the 'Big Bad Wolf' " to the public broadcaster's " 'Little Red Riding Hood' " when in fact "some of the food in the basket was given to Little Red Riding Hood by the Big Bad Wolf himself."

This view, as opposed to Brennan's, appears to assume that for most purposes government is not a monopolist but rather just one speaker among many, and therefore is not able to repress dissent as effectively through conditions on benefits as it can through regulation. One who loses public funds may seek private patrons, and there are pri-

vate substitutes for public space or jobs. On this view, a condition on the allocation of public space, salary, or subsidy is not a coercive exercise of power so much as a contractual offer and acceptance. For example, Justice ANTONIN SCALIA, concurring in the Court's decision in *National Endowment for the Arts v. Finley* (1998), which upheld a condition that public arts grants meet general standards of "decency" and "respect" for public values, wrote that there is a fundamental difference "between 'abridging' speech and funding it," and that the First Amendment is simply inapplicable to the selective allocation of funds.

Nonetheless, the Holmesean views expressed in these examples by Rehnquist and Scalia have failed to garner a majority on the Court, leaving the doctrine of unconstitutional conditions intact if somewhat curtailed. The Court has continued to hold, moreover, that even when acting in its proprietary capacities, government, unlike a purely private landlord, employer, or patron, may not engage in viewpoint discrimination unless it is enlisting the sponsored person to express a message on the polity's behalf. For example, in ROSENBERGER V. RECTOR & VISITORS OF THE UNIVERSITY OF VIRGINIA (1995), a majority of the Court (joined among others by Rehnquist and Scalia) held that a public university that funds a range of student publications from a mandatory student activities fee may not decline to subsidize an avowedly Christian student magazine for reason of its religious perspective.

Nor are recent applications of the unconstitutional conditions principle limited to the First Amendment. In *South Dakota v. Dole* (1987), which upheld a requirement that states receiving federal highway funds raise their minimum drinking age, the Court suggested that there is some outer limit to how far the federal government may go in using regulatory conditions on federal funding to induce state adherence to federal policy. And in *Nollan v. California Coastal Commission* (1987) and DOLAN V. TIGARD (1994), the Court held that government may not use its power to withhold a ZONING variance as leverage to take access to property for reasons not closely related to the zoning law's purpose. In both the FEDERALISM and the TAKING OF PROPERTY areas, as in the free speech area, unconstitutional conditions doctrine helps limit the use of government economic leverage to influence the exercise of constitutional rights.

KATHLEEN M. SULLIVAN
(2000)

(SEE ALSO: *Government as Proprietor.*)

Bibliography

COLE, DAVID 1992 Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech. *New York University Law Review* 67:675–749.

EPSTEIN, RICHARD 1994 *Bargaining with the State.* Cambridge, Mass.: Harvard University Press.

POST, ROBERT C. 1996 Subsidized Speech. *Yale Law Journal* 106:151–195.

SULLIVAN, KATHLEEN M. 1989 Unconstitutional Conditions. *Harvard Law Review* 102:1413–1506.

# UNCONSTITUTIONALITY

The American concept of unconstitutionality was born before the Constitution was adopted. The STAMP ACT CONGRESS of 1765, for example, declared that acts of Parliament imposing TAXATION WITHOUT REPRESENTATION were unconstitutional and need not be obeyed. Then as now, of course, the British constitution was an unwritten collection of customs and usages, only partly reflected in statutes and COMMON LAW principles. Since the adoption of the earliest state constitutions, however, the statement that a governmental action is unconstitutional has been taken as an assertion that the action violates a written constitution. In common speech, "unconstitutional" normally refers to an action's invalidity under the United States Constitution, but in law the term also refers to invalidity under a state constitution. Legislation is not the only form of governmental action that may be unconstitutional. When police officers conduct unreasonable SEARCHES AND SEIZURES, for example, they act unconstitutionally. Similarly, a state court acts unconstitutionally when it enforces a racially RESTRICTIVE COVENANT.

An assertion of unconstitutionality can be made by anyone: a citizen making a complaint, a newspaper editorial writer, a lawyer arguing a case. The assertion may take on a more authoritative character when it is made by a public officer acting in a governmental capacity. Thus, the President might veto a bill passed by Congress on the ground that it is unconstitutional. (See CIVIL RIGHTS ACT OF 1866; JACKSON'S VETO OF THE BANK BILL.) Or, the President might refuse to enforce an act of Congress on similar grounds. Such a presidential refusal led the House of Representatives to adopt ARTICLES OF IMPEACHMENT against ANDREW JOHNSON, thus registering its view that Johnson's conduct was itself unconstitutional. An executive officer may decline to enforce a law for the purpose of allowing others to frame a TEST CASE, thus allowing the courts to rule on the law's validity. BOARD OF EDUCATION V. ALLEN (1968) resulted from one such refusal.

The official in *Allen* thought it important to get a judicial ruling on the constitutionality of the law in question. In fact, Americans have become accustomed to identifying the idea of unconstitutionality with a judicial declaration of unconstitutionality—and, in particular, with such a declaration by the Supreme Court. A lawyer, asked by a client

whether a law is or is not constitutional, ordinarily will respond with a prediction of what the courts will hold.

From MARBURY V. MADISON (1803) forward, American courts have assumed that they have the power to disregard a statute that violates a constitutional norm. When a court holds a statute unconstitutional it refuses to give effect to the law in the case before it. Indeed, the *Marbury* opinion grounded the principle of JUDICIAL REVIEW in the need for a court to decide the case before it according to law, including the Constitution as the supreme law. Federal courts are not permitted to give ADVISORY OPINIONS on the law but make their constitutional rulings only in the context of concrete CASES AND CONTROVERSIES. Yet there is a sense in which any opinion is, in part, advisory. The statement of a reason for decision requires a court to move from the particulars of the case before it to the more abstract level of a rule or principle which can be applied later as a precedent in deciding another appropriate case. Occasionally, particularly in the area of the FREEDOMS OF SPEECH and of the PRESS, a court may hold a law INVALID ON ITS FACE. But even if the court merely says it is holding the law "invalid as applied," the ruling becomes a precedent for other applications to similar facts.

In a statement now famous for its inaccuracy, the Supreme Court said in *Norton v. Shelby County* (1886) that an unconstitutional law "is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." The statement is misleading in two respects. First, courts are no better than anyone else at undoing the past. A great many actions may be taken on the basis of a statute in the time between its enactment and its judicial invalidation. Justice often requires that those actions be given effect: a corporation organized under an invalid statute will be bound under its contracts; an official who enforces a law in good faith before the law is held invalid will not be liable in damages for the action. In *Lemon v. Kurtzman II* (1973), the Supreme Court allowed Pennsylvania to reimburse church schools for educational services performed under a statute before the Court had held the law invalid in LEMON V. KURTZMAN I (1971).

Second, the *Norton* statement is misleading in the context of an OVERRULING of a previous decision that has held a statute invalid. In ADKINS V. CHILDREN'S HOSPITAL (1923) the Supreme Court had held the DISTRICT OF COLUMBIA MINIMUM WAGE LAW unconstitutional, but in WEST COAST HOTEL CO. V. PARRISH (1937), the Court overruled *Adkins*. Was it then necessary for Congress to reenact the law for it to be effective? The attorney general issued an opinion answering this question negatively, and no one now challenges that opinion's soundness.

Determining whether a court has actually held a law unconstitutional may prove more difficult than identifying the court's HOLDING on the underlying constitutional law. In dealing with a federal statute, for example, the Supreme Court may make clear its view of the Constitution's command, but it may not make clear whether it has held the statute invalid or construed the statute narrowly to avoid holding it unconstitutional. Such an ambiguity still bemuses collectors of antique trivia when they contemplate HODGSON V. BOWERBANK (1809).

Ultimately, the notion of unconstitutionality refers not so much to a fact—or even an opinion, judicial or otherwise—as to a decisional process. In that process courts play the most prominent role, but now and then they yield the center of the stage to other actors. (See ABRAHAM LINCOLN; THOMAS JEFFERSON; WATERGATE AND THE CONSTITUTION.)

KENNETH L. KARST
(1986)

Bibliography

BICKEL, ALEXANDER M. 1962 *The Least Dangerous Branch: The Supreme Court at the Bar of Politics.* Indianapolis: Bobbs-Merrill.

FIELD, OLIVER P. 1935 *The Effect of an Unconstitutional Statute.* Minneapolis: University of Minnesota Press.

## UNENUMERATED RIGHTS

The starting point for interpreting the NINTH AMENDMENT is its text: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The text and the rule of construction that requires plain meaning to be followed clearly establishes the existence of unenumerated rights. Why would the Framers have included an amendment that protects such rights in the midst of the BILL OF RIGHTS, which specifies rights in the first eight amendments?

The Framers scarcely had an alternative after they botched an explanation for their failure to have included a bill of rights as part of the original Constitution. They protected a few rights in it, but ignored most; and they subsequently made several frail and foolish explanations instead of confessing misjudgment and promising subsequent amendments. As a result they placed RATIFICATION in serious jeopardy. The Constitution was finally ratified only because crucial states, where ratification had been in doubt, accepted a pledge that a bill of rights would be added to the Constitution in the form of amendments.

THE FEDERALIST #84 presented a commonplace ratificationist argument that boomeranged and made necessary a provision safeguarding unspecified rights. According to ALEXANDER HAMILTON, a bill of rights was unnecessary and

even dangerous, because by containing exceptions to powers not granted, it would provide a basis for repressive LEGISLATION. For example, to say that liberty of the press ought not be restricted furnished "a plausible pretense" for the very power feared, a power to legislate on the press, because a provision "against restraining the liberty of the press afforded a clear implication that a power to prescribe proper regulations concerning it was intended to be vested in the national government." Equally dangerous, the omission of some right in a catalogue of rights allowed the assumption that it was meant to be unguarded. JAMES MADISON, OLIVER ELLSWORTH, and JAMES WILSON, among other leading Framers, made the same damaging argument.

Their logic, which nearly undid their cause, surely merited public rejection. They proved that the particular rights that the unamended Constitution protected—no RELIGIOUS TESTS, bans on BILLS OF ATTAINDER and EX POST FACTO LAWS, and TRIALS BY JURY in criminal cases, among other rights—stood in grave jeopardy because to specify a right implied a power to violate it. Moreover, the inclusion of some rights in the Constitution implied, contradictorily, that all unenumerated ones were relinquished. The unsatisfactory arguments by ratificationists imperiled their cause and obliged them to reconsider.

Madison switched to the cause of amending the Constitution with a bill of rights in order to appease the fears of the people. When he rose in Congress to propose constitutional amendments, he asserted that the Constitution must "expressly declare the great rights of mankind." He acknowledged that a major objection to a bill of rights consisted of the argument that "by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure." This claim had become a ratificationist cliché that self-destructed because the Constitution explicitly protected several rights exposing all those omitted, including "the great rights of mankind" to governmental violation. Madison's solution was the simple proposal that became the Ninth Amendment. It was, he said, meant to guard against the possibility that unenumerated rights might be at risk as a result of the enumeration of some. By excepting enumerated rights from the grant of powers, no implication was intended and no inference should be drawn that rights not excepted from the grant of powers were at risk. As Madison phrased his proposal, it read as follows: "The exceptions [to power] here or elsewhere in the constitution made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people. . . ."

What were the unenumerated rights retained by the people? They had to be either "natural rights" or "positive rights," to use Madison's own terms. He distinguished "the preexistent rights of nature" from those "resulting from a SOCIAL COMPACT." He mentioned freedom of "speach" (sic) as a natural right, but failed to include it in his recommendations. (A committee rectified this oversight.) His omission illustrates his acknowledgment of an important right that briefly fell within the unenumerated category. In Madison's thinking, this category also included the natural right of the people to govern themselves and to alter their government when it was inadequate to its purposes. Those purposes embodied another unenumerated natural right: governments are instituted to secure the people "in the enjoyment of life and liberty, with the right of acquiring and using property and generally of pursuing and obtaining happiness and safety." Madison had borrowed from the preamble of the DECLARATION OF INDEPENDENCE, which expressed opinions on natural rights that were shared by virtually all Americans and were central to the meaning of the Ninth Amendment.

Its text meant what it said; its context consists of the widespread endorsement of natural rights at the time of the framing of the Bill of Rights. STATE CONSTITUTIONS referred to natural rights. Virginia's 1788 recommendations for amendments to the Constitution did so also, as had New York's and North Carolina's. At the Pennsylvania ratifying convention, James Wilson, second only to Madison as an architect of the Constitution, quoted the preamble of the Declaration of Independence and added, "This is the broad basis on which our independence was placed; on the same certain and solid foundation this system [the Constitution] is erected."

The Framers also believed that all people had a right to equal justice and to equality of rights before the law. That slaveholders subscribed to such opinions proves the inconsistency of some of the Framers and their inability to transform their societies. But ABRAHAM LINCOLN understood when he described the creation of a new nation "conceived in liberty and dedicated to the proposition that all men are created equal." The Ninth Amendment embodied the principle of equality as well as that of liberty. Madison himself, when presenting his recommended amendments, spoke of "the perfect equality of mankind." Other natural rights that were unenumerated included the right, then important, to hunt and fish; the RIGHT TO TRAVEL; the right to associate freely with others; and the right to intimate association or privacy in matters concerning family and sex, at least within the bounds of marriage. Such rights were fundamental to the pursuit of happiness.

In addition to natural rights, the unenumerated rights included some that were positive, deriving not from "Na-

ture's God," but from social compacts that created governments. What positive rights were familiar when the Ninth Amendment became part of the Constitution, yet were not enumerated in the original text or the first eight amendments? The right to vote and hold office, the right of free elections, the right not to be taxed except by consent through representatives of one's choice, the right to be free from monopolies, the right to be free from standing armies in time of peace, the right to refuse military service on grounds of religious conscience, the right to choose a profession, and the right of an accused person to an initial presumption of innocence and to have the prosecution shoulder the responsibility of proving guilt beyond a REASONABLE DOUBT—all these were among existing positive rights protected by various state laws, state constitutions, and the COMMON LAW; and all were unenumerated. Any of these rights, among others, could legitimately be regarded as rights of the people before which the powers of government must be exercised in subordination.

In addition to rights then known, the Ninth Amendment probably had the purpose of providing the basis for unknown rights that time alone might disclose. Nothing in the thinking of the Framers foreclosed the possibility that new rights might claim the loyalties of succeeding generations. As EDMUND PENDLETON, Virginia's chief justice and a leading ratificationist, mused when the Bill of Rights was being framed, "May we not in the progress of things, discover some great and important [right], which we don't now think of?"

Without doubt, to read the Ninth Amendment as a cornucopia of unenumerated rights is an invitation to JUDICIAL ACTIVISM. As Professor John Hart Ely has written, if natural rights in particular are read into the amendment, it does not lend itself "to principled judicial enforcement." But neither do enumerated rights—natural or positive. FREEDOM OF SPEECH and DUE PROCESS OF LAW, to mention one of each kind of right, have resulted in some of the most subjective result-oriented constitutional JURISPRUDENCE in our history. The fact that judicial decisions can be unprincipled or biased does not detract from the principle expressed in a right, whether or not it is enumerated.

If the Ninth Amendment instructs us to look beyond its four corners for unenumerated rights of the people, as it does, it must have some content. To read it as if it is merely the converse side of the TENTH AMENDMENT is to confuse the two amendments, as did Professor Raoul Berger. He spoke of "the ninth's retention of rights by the states or the people." It is the Tenth Amendment that reserves powers, not rights, to the states or to the people. The Ninth Amendment, according to Berger, "was merely declaratory of a basic presupposition: all powers not "positively' granted are reserved to the people. It added no unspecified rights to the Bill of Rights." In fact, however, an explicit declaration of the existence of unenumerated rights is an addition of unspecified rights to the Bill of Rights. Confusion between the Ninth and Tenth amendments originated with proposals for amendments by Virginia in 1788. Moreover, Madison himself argued that the line between a power granted and a right retained by the people amounted to the same thing if a right were named. Unenumerated rights, however, are not named, and no affirmative power has been delegated to regulate or abridge them.

Without doubt, the Ninth Amendment and its problem of identifying unenumerated rights continue to bedevil interpreters, on and off the bench. Courts do continue to discover rights that have no textual existence and might be considered unenumerated, but for the judicial propensity to ignore the Ninth Amendment and make believe that some unspecified right under discussion derives from a right that is enumerated. Opponents of such rights howl their denunciation of judicial activism. Court-invented rights exceed in number the rights enumerated. Judges have composed rights great and small, including the MIRANDA RULES, the right to engage in nude dancing with pasties and G-string, the right to engage in FLAG DESECRATION, the right to secure an ABORTION, or the right against the invasion of an expectation of privacy.

So long as we continue to believe that government is instituted for the sake of securing the rights of the people and must exercise its powers in subordination to those rights, the Ninth Amendment should have the vitality intended for it. The problem is not so much whether the rights it guarantees are as worthy of enforcement as are the enumerated rights; the problem, rather, is whether our courts should read out of the amendment rights worthy of our respect, which the Framers might conceivably have meant to safeguard, at least in principle.

LEONARD W. LEVY
(1992)

(SEE ALSO: *Freedom of Assembly and Association; Freedom of Intimate Association; Right of Privacy.*)

Bibliography

BARNETT, RANDY E., ed. 1988 Symposium on Interpreting the Ninth Amendment. *Chicago-Kent Law Review* 64:37–268.

BERGER, RAOUL 1980 The Ninth Amendment. *Cornell Law Review* 61:1–26.

CAPLAN, RUSSELL L. 1983 The History and Meaning of the Ninth Amendment. *Virginia Law Review* 69:223–268.

REDLICH, NORMAN 1989 The Ninth Amendment as a Constitutional Prism. *Harvard Journal of Law and Public Policy* 12: 23–28.

## UNIFORM CODE OF MILITARY JUSTICE ACT

See: Military Justice

## *UNION PACIFIC RAILROAD CO. v. UNITED STATES*

See: Sinking Fund Cases

## UNITARY EXECUTIVE

The idea of a unitary executive is neither new nor radical. The Framers rejected several proposals to split the executive, and there have been adherents of a strong centralized executive ever since, from GEORGE WASHINGTON to WILLIAM HOWARD TAFT to RONALD REAGAN. The language of Article II of the Constitution seemingly embraces some form of unitary executive by vesting "the EXECUTIVE POWER" in a President; assigning the President the responsibility to "take Care that the Laws be faithfully executed"; and directing the President to appoint all principal officers of the United States. Arguments today for greater centralized control based on the unitary executive ideal coalesce around two virtues: accountability and effective leadership.

The constitutional structure stresses accountability in order to secure individual liberty. Articles I, II, and III delineate powers that the branches are to exercise, the better to clarify the lines of constitutional authority. The President stands responsible for all discharge of policy, and is judged by his or her performance on election day. To be sure, voters cannot always call the President to account with respect to one particular issue given that they vote for a candidate based on that candidate's entire record. Nonetheless, the political process remains open to air misgivings about presidential leadership, and as those concerns mount in importance, they may become determinative at election time.

This is not to suggest that the President must personally craft all foreign and domestic policy initiatives. Congress can create new offices pursuant to the NECESSARY AND PROPER CLAUSE and delegate responsibility to government officials. But the President must be able to superintend that policy in order not to fragment and dissipate accountability. As ALEXANDER HAMILTON noted in *Federalist* No. 70:

> [It] often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure . . . ought really to fall. . . . [The] circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that where there are a number of actors who may have had different degrees and kind of agency . . . it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.

Liberty is gained to the extent that one electorally accountable official stands responsible for such law implementation efforts. With a plural executive, responsibility may be shrouded, and the costs of determining who was responsible for what will increase.

Given the pervasive delegations by Congress, the President can maintain control for law administration principally through the APPOINTING AND REMOVAL POWER exercised over executive officials. Although there may be disagreement about the level of officer subject to the President's appointment power, those adhering to the unitary executive regard restrictions on the President's appointment authority with great suspicion. Congress's decision to reserve for its own officers implementation authority, as in the FEDERAL ELECTION CAMPAIGN ACT, or Congress's decision to vest appointment authority in the judiciary, as with the INDEPENDENT COUNSEL, undermine the accountability imperative.

Similarly, the power to remove officers represents the only formal means by which the President can control subordinates' ongoing exercise of power and ensure unified execution of the law. The power to remove an official is emblematic of a continuing relationship between the President and subordinate officials and, in the public eye, links those officials' conduct to the presidency itself. When Congress prevents the President from removing executive officers, as with the TENURE OF OFFICE ACT during RECONSTRUCTION, accountability is diminished.

Disagreement remains over the type of removal authority that must be wielded to ensure the rudiments of centralized control. The Supreme Court delphically stated in *Morrison v. Olson* (1988) that Presidents must retain control sufficient to discharge their "constitutionally appointed functions." *Morrison* apparently authorizes Congress to prevent the President from discharging most officials except upon a showing of "good cause," such as misconduct in office. Some would argue instead that the President must be able to discharge at will any senior executive official to preserve the close connection between the President and the exercise of administrative authority. A middle position is that the President should be able to remove any senior official for refusing to abide by lawful presidential policy. But, whatever the line drawn, those believing in the unitary executive insist that Congress not have the power to establish shadow executive departments.

At the same time, the idea of a unitary executive accords a single executive the responsibility to manifest "en-

ergy" in execution of the laws passed by Congress. Consolidating power in an energetic executive provides the best hope for protecting the public from external threats to the nation's SOVEREIGNTY as well as from internal threats of violence or anarchy. JAMES MADISON wrote in *Federalist* No. 37 that "[e]nergy in government is essential to . . . security against external and internal danger, and to prompt and salutary execution of the laws." A single executive can implement the laws with greater dispatch and efficiency.

The risks attendant upon conduct of FOREIGN AFFAIRS by a plural entity are perhaps most clear. A deliberative body cannot easily take the decisive measures, in diplomacy or in war, upon which our NATIONAL SECURITY depends. Disagreement may paralyze the governing body, preventing it from acting vigorously in response to foreign threats. These reasons presumably explain why Article II mandates that the President serve as COMMANDER-IN-CHIEF of the ARMED FORCES.

Similar arguments are valid on the domestic policy front. Congress sets the policy, but enormous influence can be wielded by those carrying out the legislative directives. Whether the issue be implementing health care reform initiatives or administering the grazing fee system, a unitary executive permits greater vigor in law administration. Consolidating control in the executive also permits flexibility in enforcement efforts as conditions change. In short, a unitary executive not only safeguards individual liberty by ensuring an avenue of political redress for all law administration but facilitates effective governance as well.

HAROLD J. KRENT
(2000)

Bibliography


CALABRESI, STEPHEN G. 1995 Some Normative Arguments for the Unitary Executive. *Arkansas Law Review* 48:23–104.

CALABRESI, STEPHEN G. and PRAKASH, SAIKRISHNA 1994 The President's Power to Execute the Laws. *Yale Law Journal* 104: 541–665.

CAMINKER, EVAN 1997 The Unitary Executive and State Administration of Federal Law. *Kansas Law Review* 45:1075–1112.

KRENT, HAROLD J. 1990 Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government. *Northwestern University Law Review* 85:62–112.

LESSIG, LAWRENCE and SUNSTEIN, CASS R. 1994 The President and the Administration. *Columbia Law Review* 94:1–119.

STRAUSS, PETER L. 1984 The Place of Agencies in Government: Separation of Powers and the Fourth Branch. *Columbia Law Review* 84:573–669.


## *UNITED BUILDING & CONSTRUCTION TRADES COUNCIL v. MAYOR AND COUNCIL OF CAMDEN*

See: Privileges and Immunities

## *UNITED JEWISH ORGANIZATIONS v. CAREY*

430 U.S. 144 (1977)

Under the VOTING RIGHTS ACT OF 1965 New York sought approval of the United States attorney general for its REAPPORTIONMENT of voters in state legislative districts in Greater New York City. To increase the nonwhite majorities in certain districts, and thus secure approval, the legislature divided a Hasidic Jewish community into two districts, each with a nonwhite majority. Petitioners claimed that assignment of voters solely on the basis of race violated the FOURTEENTH and FIFTEENTH AMENDMENTS.

By a 7–1 vote, the Supreme Court upheld the race-conscious reapportionment. There was no majority opinion but a series of overlapping alignments. Four Justices, noting that the percentage of nonwhite-majority districts was less than the percentage of nonwhites in the county in question, said that the use of racial criteria to comply with the act was not limited to compensating for past discrimination. Other Justices emphasized the lack of stigma or legislative purpose to disadvantage the Hasidim. Justice WILLIAM J. BRENNAN, in a comprehensive opinion on race-conscious remedies, appeared to look ahead to REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978). Chief Justice WARREN E. BURGER dissented.

KENNETH L. KARST
(1986)

## *UNITED MINE WORKERS v. CORONADO COAL COMPANY*

259 U.S. 344 (1922)

## *CORONADO COAL COMPANY v. UNITED MINE WORKERS*

268 U.S. 295 (1925)

In two nearly identical cases, the Supreme Court provided opposite answers to the same question: does the SHERMAN ANTITRUST ACT apply to local strikes that indirectly restrain commerce? The United Mine Workers (UMW) struck to prevent an employer from closing its mines despite valid

union contracts; violence and property damage resulted. The company sued the union claiming a Sherman Act conspiracy to restrain INTERSTATE COMMERCE. In its defense, the UMW claimed that it was exempt from suit because it was unincorporated and, because mining was local, that there had been no Sherman Act violation. On APPEAL to the Supreme Court, Chief Justice WILLIAM HOWARD TAFT declared for a unanimous bench that, although unions (even though unincorporated) could clearly be sued, the union had not violated the Sherman Act here. Mining was merely local; any interference concerned the PRODUCTION rather than the distribution of goods. Taft said no restraint of trade existed, absent an explicit showing of intent to restrain trade, unless the obstruction had "such a direct, material and substantial effect to restrain [commerce] that intent reasonably may be inferred." Taft thus introduced new tests of reasonableness (see RULE OF REASON) and intent.

The company soon appealed with new EVIDENCE. Again unanimous, the Supreme Court now said that when intent to restrain trade attended a decrease in production, a previously "indirect and remote obstruction" became a direct interference in violation of the law. The Court asserted that the evidence at the second trial demonstrated such intent. The Court's near reversal, a finding of intent where none had previously existed, probably resulted from a fear of the implications of the first decision. The effect of the later opinion was to hamper union organizing efforts and cast doubt on the legality of strikes generally; certainly intent could be found by Justices who were looking for it.

DAVID GORDON
(1986)

(SEE ALSO: *Labor and the Antitrust Laws.*)

## *UNITED MINE WORKERS v. UNITED STATES*
330 U.S. 258 (1947)

When John L. Lewis and the United Mine Workers went on strike in the spring of 1946 against coal operators throughout the country, President HARRY S. TRUMAN, acting as COMMANDER-IN-CHIEF, seized the mines by EXECUTIVE ORDER to protect the national interest during the emergency. The failure of subsequent negotiations prompted a call that autumn for a second strike, which the government forestalled by obtaining an INJUNCTION in federal district court. Lewis defied the injunction, incurring contempt citations, a personal fine of $10,000, and a fine against his union of $3,500,000.

Lewis appealed to the Supreme Court. Chief Justice FRED M. VINSON, for a 7–2 majority, held that neither the NORRIS-LAGUARDIA nor the CLAYTON ACT deprived the district court of JURISDICTION to issue the injunction pending judicial interpretation of the contract between the government and the miners. The majority denied the assertion that the "employer" referred to in the acts included the government; neither legislative history nor subsequent policy demonstrated any intent to make those acts applicable to government-employee disputes. Moreover, even if the Norris-LaGuardia Act applied, the Court could legitimately issue an injunction to maintain existing conditions pending the court's decision on its jurisdiction. The Court upheld the contempt findings—asserting that the same conduct might constitute both civil and criminal contempt for which both coercive and punitive measures might be imposed—and the fine against Lewis, but remanded the case for redetermination of the union fine.

DAVID GORDON
(1986)

## UNITED NATIONS CHARTER
59 Stat. 1031 (1945)

The United Nations Charter, a multilateral treaty which serves as the "constitution" of the United Nations Organization, was drafted in San Francisco at the United Nations Conference on International Organization in 1945 and ratified by fifty-one original member states. Like the Constitution of the United States, the charter has proved to be a flexible instrument subject to broad interpretation.

The charter was ratified by the United States Senate, 89–2, and it became law, binding both internally and externally, when it entered into force on October 24, 1945. Treaties, properly executed and ratified, are international law, at least formally, and in the United States they also are domestic law by virtue of the SUPREMACY CLAUSE of Article IV of the Constitution.

Despite the charter's nearly unanimous endorsement by the Senate, it was eagerly suggested that, in removing the right of the United States to go to war at will and in authorizing the Security Council to commit the member states to war in certain circumstances, the charter improperly delegated to the United Nations powers and functions belonging to the federal government, including the power to declare war, vested in Congress, and the power to conduct war, vested primarily in the President as commander-in-chief.

Congress and the President are not, however, deprived by the charter of the powers to declare and conduct war, only of the right to exercise these powers in contravention of international law (including the charter). All treaties,

the charter included, limit only the international legal right—not the constitutional authority—of states to do freely that which is within their power to do freely in the absence of a treaty. Moreover, as a sovereign nation, the United States has the final authority to decide how it will comply with the particular terms and requirements of a treaty; and as a permanent member of the Security Council, the United States retains, in any event, an absolute veto over any action that would commit the United States to unwelcome policy. When Congress and the President act to comply with their charter obligations, in accordance with the United Nations Participation Act of 1945, they do so pursuant to the TREATY POWER and to their more general FOREIGN AFFAIRS powers.

Another, more recent, matter of constitutional concern is the question of whether United States courts, state and federal, are bound by the human rights clauses of the charter and related instruments, such as the Universal Declaration of Human Rights. The United States Supreme Court has never addressed the question of whether the charter's human rights provisions are self-executing in the United States; lower courts have answered that question in the negative.

BURNS H. WESTON
(1986)

Bibliography

CAHILL, J. 1952 "The United Nations Charter as Law of the Land." *Albany Law Review* 15–16:51–57.

Charter of the United Nations and Statute of the International Court of Justice. Office of Public Information, United Nations, New York.

GOODRICH, M. and HAMBRO, E. 1949 *Charter of the United Nations: Commentary and Documents.* Boston: World Peace Foundation.

HENKIN, LOUIS 1972 *Foreign Affairs and the Constitution.* Mineola, N.Y.: Foundation Press.

## *UNITED RAILWAYS & ELECTRIC CO. OF BALTIMORE v. WEST*

280 U.S. 234 (1930)

This obscure case has no significance except to illustrate how the Supreme Court manipulated the FAIR RETURN rule of SMYTH V. AMES (1898) to prevent rate regulation, which the Court disapproved. A public service commission fixed rates that permitted the company to earn a profit of 6.26 percent. The company sought rates returning 7.44 percent. The Court used SUBSTANTIVE DUE PROCESS to void the commission's rates and decided that rates returning "7 percent, or even 8 percent, on the value of the property" might be "necessary to avoid confiscation." Justices LOUIS D. BRANDEIS, OLIVER W. HOLMES, and HARLAN FISKE STONE dissented.

LEONARD W. LEVY
(1986)

## *UNITED STATES v. . . .*

See entry under name of other party

## *UNITED STATES COIN & CURRENCY, UNITED STATES v.*

See: *Marchetti v. United States*

## UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

This court was created by the FEDERAL COURTS IMPROVEMENT ACT (1982), to take over the JURISDICTION of the COURT OF CUSTOMS AND PATENT APPEALS and the COURT OF CLAIMS. Its first judges were the judges of the superseded courts. It is a CONSTITUTIONAL COURT, whose twelve judges serve for life during good behavior.

The Federal Circuit, like the other UNITED STATES COURTS OF APPEALS, is an intermediate appellate court; its jurisdiction, however, is defined not by region but by subject matter. It has nationwide jurisdiction to hear APPEALS in cases chiefly of the types previously heard by the superseded courts: customs and patent matters, and claims against the United States. In the future, however, other types of cases may be added to the Federal Circuit's jurisdiction—tax appeals, for example. Such developments might relieve some of the pressure on the Supreme Court's docket, effectively removing certain technical and specialized areas from the Court's workload. Many proponents of the 1982 act regard the creation of this opportunity as the act's most important achievement.

KENNETH L. KARST
(1986)

## UNITED STATES COURTS OF APPEALS

The United States Courts of Appeals form the intermediate component of the three-tiered federal judiciary, lying between the UNITED STATES DISTRICT COURTS and the SUPREME COURT of the United States. As such, they nor-

mally serve as the first courts of review in the federal JUDICIAL SYSTEM. But because of the natural limitations upon the Supreme Court's capacity, the Courts of Appeals are often also the final courts of review.

Article III, section 1, of the Constitution provides: "The JUDICIAL POWER OF THE UNITED STATES, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Thus, in contrast to the Supreme Court, inferior federal courts were not required by the Constitution; rather, their creation was left to the discretion of Congress. Such treatment reflected a compromise between two views, one favoring the mandatory creation of inferior courts, and the other completely opposed to the existence of any such courts.

The Courts of Appeals are relative newcomers to the federal judicial system, having been born with the CIRCUIT COURTS OF APPEALS ACT (Evarts Act) of 1891. The Courts of Appeals were created to solve an acute crisis in the federal judiciary stemming from the limited capacity of the existing system, which had remained largely unchanged since the JUDICIARY ACT OF 1789. That act had established a bilevel system of inferior federal courts. There were, first of all, single-judge "district courts," generally one per state. The Union was also divided into several "circuits." CIRCUIT COURT was to be held twice a year in each of the districts encompassed by a given circuit. At these sittings, cases would be heard by a three-judge panel consisting of two Supreme Court Justices and the district judge for the district in which the circuit court was being held.

Having determined to avail itself of its constitutional prerogative to establish inferior federal courts, Congress faced the further issue of those courts' appropriate function and JURISDICTION. In the debates over Article III, there had been substantial support for giving Congress the power to create only admiralty courts, rather than inferior courts of general jurisdiction. No such limitation was adopted, however. It has therefore been generally assumed that Congress is constitutionally free to define the role of the inferior federal courts however it chooses.

The manner that Congress selected in the 1789 act is of some interest. The district courts were, and remain today, trial courts or courts of first instance. The circuit courts, in distinct contrast to today's middle-tier courts, also functioned primarily as trial courts. In the area of private civil law, the circuit courts' jurisdiction was largely concurrent with that of the district courts: it encompassed cases within the DIVERSITY JURISDICTION, but not FEDERAL QUESTION cases. (Original federal jurisdiction was not extended to federal question cases until 1875.) Similarly, with respect to civil suits by the United States, both circuit and district courts were given ORIGINAL JURISDICTION, the only difference being that the requisite amount in controversy was higher for circuit court jurisdiction.

The circuit courts even had certain original jurisdiction that the district courts lacked. The first removal jurisdiction was vested in the circuit courts alone. And the circuit courts had exclusive jurisdiction over most federal crimes.

Nonetheless, the seeds of the modern federal courts of appeals were planted by the first Judiciary Act. The early circuit courts had appellate jurisdiction in civil cases involving disputes over amounts exceeding $50, and in admiralty cases exceeding $300. (A district judge sitting as a circuit judge was not, however, permitted to vote on appeals from his own decisions.) Unlike the modern courts of appeals, however, the circuit courts were the final federal forum for many of these cases. In civil suits, circuit court judgments were reviewable only when the amount in dispute exceeded $2,000. Judgments in criminal cases were categorically unreviewable.

The early circuit courts proved problematic, in the main because of the burden that circuit riding placed on the Supreme Court Justices. Congress attempted to alleviate that hardship by reducing from two to one the number of Justices required to sit on a circuit court, but the benefit of the reduction was more than outweighed by several important augmentations of the High Court's jurisdiction that were enacted by Congress during the century following the 1789 Judiciary Act. Most notable of such legislation was the JUDICIARY ACT OF 1875, which granted the lower courts, as well as the Supreme Court, nearly the full scope of Article III jurisdiction, including original federal question jurisdiction in the district and circuit courts. The federal courts, already vastly overloaded with cases, were virtually submerged after this act. Reform was inevitable.

Indeed, attempts to improve the judicial system had more than once been made. In 1801 Congress had enacted the JUDICIARY ACT OF 1801 (the "Law of the Midnight Judges"), which among other things had established permanent circuit judgeships, three to a circuit. When political tides shifted the following year, however, the act was repealed, and the system reverted essentially to its original condition, except that Congress permitted circuit court to be held by a single judge, rather than three. Much later, in 1869, Congress partially restored the plan of 1801 by creating a single permanent circuit judgeship for each of the nine circuits then in existence. And in 1887 and 1888 Congress passed a series of measures aimed at pruning the expanded jurisdiction of the lower federal courts.

But it was not until the Evarts Act that Congress provided structural reforms adequate to the crisis of judicial overload. The act established three-judge courts of appeals for each of the nine circuits, and increased the num-

ber of permanent circuit judgeships to two per circuit. The third appeals judge would in most instances be a district judge (though Supreme Court Justices remained eligible), but the act, following the rule set down by the Act of 1789, barred district judges from reviewing their own decisions.

Curiously, the Evarts Act left the old circuit courts standing, although it did remove their APPELLATE JURISDICTION. Until these courts were abolished in 1911, there thus functioned two sets of federal trial courts.

The Evarts Act provided for direct review by the Supreme Court of the decisions of the district courts and the old circuit courts, in some important cases. The new circuit courts of appeals would review the remainder. Under the act, a circuit court's decision in an admiralty or diversity case would be final, unless that court certified a question to the Supreme Court or the Supreme Court granted a WRIT OF CERTIORARI in order to review the circuit court's decision. In most other cases, circuit court decisions were appealable as of right.

Since the Evarts Act, only a few significant alterations have been made to the federal judicial system in general, and the courts of appeals in particular. The rules governing Supreme Court review are perhaps the most important arena of change. In 1925, Congress replaced appeal as of right with discretionary review for all circuit court judgments except those holding a state statute unconstitutional. In 1937, Congress passed a law permitting appeal to the Supreme Court from any judgment by a federal court holding an act of Congress unconstitutional in any civil case to which the United States is a party.

In 1948 the circuit courts established by the Evarts Act were renamed; each court is now known as the United States Court of Appeals for theCircuit. The number of circuits has also been increased; and there is now a "Federal Circuit" court to hear appeals from the CLAIMS COURT and from district courts in patent cases or in cases arising under the TUCKER ACT. Finally, procedures in the various courts of appeals were standardized in 1968 in the Federal Rules of Appellate Procedure. Each circuit, however, retains its own rule-making power for matters not covered by the Federal Rules.

The chief work of the courts of appeals is the review of final judgments of the United States district courts. The courts, however, are also empowered to review certain orders that are not strictly final, essentially when the benefit of such review clearly outweighs any attendant disruption and delay of district court proceedings. In addition, Congress has enabled the appeals courts to issue the extraordinary WRIT OF MANDAMUS and WRIT OF PROHIBITION in cases in which district courts may abuse their constitutional powers. Finally, the statutes governing many of the various federal administrative agencies provide for direct review of agency adjudication and rule-making in the court of appeals for the circuit in which the party seeking review resides, or in the Court of Appeals for the District of Columbia Circuit. The latter circuit court has been a frequent forum for challenges, constitutional and otherwise, to federal agency action.

To understand the role of the courts of appeals in the development of constitutional law, it is necessary to understand the relationship between the appeals courts and the Supreme Court. As was noted above, since the JUDICIARY ACT OF 1925, the "Judges Bill," the Supreme Court has had a discretionary power of review of most circuit court decisions. Again, however, appeal as of right lies in cases in which the appeals court has held a state statute to be repugnant to the Constitution, laws, or treaties of the United States, and in civil cases in which either a court of appeals or a district court has held an act of Congress unconstitutional and the United States is a party. Nonetheless, neither type of case in which appeal is of right bulks very large in the overall volume of appeals from circuit courts, and of those, many are denied Supreme Court review for want of a substantial federal question.

Accordingly, the Supreme Court has the discretion to review or not to review the vast majority of decisions by the courts of appeals. Not surprisingly, because of the limited capacity of the High Court, its discretion is much more often exercised to deny review than to grant it. As a general rule, in fact, the Supreme Court tends not to review appeals court decisions unless the issues involved either have an urgent importance or have received conflicting treatment by different circuits, or both.

One might conclude that, because the Supreme Court does review important cases, the appeals courts have no significant role in the development of constitutional law. Constitutional law, however, is not the product solely of the Supreme Court.

To begin, the Supreme Court can only review a decision that a party seeks to have reviewed; not every losing party in the court of appeals may do so. For example, in *Kennedy v. Sampson* (1974) the District of Columbia Circuit construed the POCKET VETO clause of the Constitution (Article 1, section 7, clause 2) to bar the President from exercising the pocket veto power during brief, intrasession adjournments of Congress. The President then declined to seek review in the Supreme Court; he chose instead to acquiesce in the rule laid down by the appeals court. The court's decision thus became a cornerstone of the law respecting the presentation of laws for presidential approval.

Of course, as a glance at any constitutional law textbook or casebook reveals, the vast majority of important constitutional PRECEDENTS are produced not by the courts of appeals but by the Supreme Court. Decisions like *Ken-*

*nedy* are thus the exception, not the rule. Nonetheless, in several ways the appeals courts contribute significantly to the development of constitutional law.

Before a constitutional issue is decided by the Supreme Court, it will often have received a thorough ventilation by one or more circuit courts. The Supreme Court thus has the benefit of the circuit judges' consideration of difficult constitutional matters, and may sometimes explicitly adopt the reasoning of the court of appeals. For example, in *United States v. Dennis* (1950) the Second Circuit faced the difficult issue of whether, and if so, how, the CLEAR AND PRESENT DANGER test applied to a conspiracy to advocate the overthrow of the government by force and violence and to organize a political party for the purpose of such advocacy. The Court of Appeals, in an opinion by Judge LEARNED HAND, held that such advocacy was unprotected by the FIRST AMENDMENT even though the actual forceful overthrow of the government was not imminent. The Supreme Court affirmed the decision in DENNIS V. UNITED STATES (1951), and its opinion adopted much of Judge Hand's analysis, including Judge Hand's "clear and present danger" formula, namely, "whether the gravity of the "evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

The role of the courts of appeals in resolving novel issues of constitutional law, however, is only half of the picture. Equally important is the appeals courts' adjudication of cases raising issues on which the Supreme Court has already spoken. Because the High Court can only sketch the broad outlines of constitutional DOCTRINE, it remains for the lower courts to apply precedent, elaborate or clarify it, and extrapolate from it. Because appeal from the district courts to the appeals court is of right, and because most litigation never reaches the Supreme Court, it is in the courts of appeals that the Supreme Court's sketch is worked into a fully drawn landscape.

When the Supreme Court decides not to give plenary review to a case arising from an appeals court, what implication should be drawn concerning the value of the appeals court's opinion as a precedent? By denying a petition for certiorari or dismissing an appeal as of right for want of jurisdiction, the Court formally indicates no view of the merits or demerits of the appeals court's decision. Nonetheless, it is commonly thought that the Supreme Court generally does not decline to review an appeals court decision that it finds clearly incorrect. Similarly, when the Supreme Court summarily affirms an appeals court's decision, it is formally signaling its agreement with the result only, and not necessarily the reasoning of the lower court. Yet, such affirmances are popularly thought to indicate at least the Court's tentative agreement with the substance of the lower court's opinion.

Since the early 1960s, the federal courts at all three levels have experienced a dramatic and continuing increase in their workload. At the district and circuit levels, Congress has responded by adding judges to existing courts. When the number of judges in a circuit has become sufficiently great, Congress has divided the circuit into two. That course is not entirely satisfactory, however, because it tends to push the appeals courts in the direction of being regional, rather than national courts, and increases the likelihood of intercircuit conflict.

At the Supreme Court level, Congress has made no significant changes. Various proposals for reducing the Court's workload would also affect adjudication at the appeals court level. A frequent suggestion has been to establish a national court of appeals. In one version, the national court would sit only to resolve conflicts among the circuits, thereby eliminating a significant share of the Supreme Court's annual docket. In another version, the national court would screen cases to determine those worthy of Supreme Court review. Another proposal would reduce the Supreme Court's workload by eliminating appeal as of right. One effect of such a measure, of course, would be to increase the number of appeals court decisions that are effectively final.

CARL MCGOWAN
(1986)

Bibliography

BATOR, PAUL M. et al. 1973 *Hart and Wechsler's The Federal Courts and the Federal System*, 2nd ed. Mineola, N.Y.: Foundation Press.

WRIGHT, CHARLES A. 1983 *Handbook of the Law of Federal Courts.* St. Paul, Minn.: West Publishing Co.

## *UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, UNITED STATES v.*
407 U.S. 297 (1972)

Most Presidents have claimed inherent executive authority to use electronic surveillance for national security purposes without complying with conventional FOURTH AMENDMENT requirements such as prior court approval. In several earlier decisions, such as KATZ V. UNITED STATES (1967), and in the 1968 statute authorizing federal and state officials to use ELECTRONIC EAVESDROPPING, the issue had been left open.

During the VIETNAM WAR, Attorney General John N. Mitchell approved a wiretap "to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the

existing structure of the government." The Supreme Court unanimously ruled that where threats by *domestic* organizations were concerned, neither section 2511(3) of the 1968 act nor the Constitution gave the President authority to use electronic surveillance without first obtaining a warrant from a magistrate. The Court thus rejected the President's claim of INHERENT POWER. The Court did not decide whether the Fourth Amendment's warrant requirement applied to activities of foreign powers or their agents; a 1978 statute now governs this. The Court also suggested that Congress could authorize standards for intelligence gathering for domestic security purposes that are less stringent than for law enforcement; Congress has not done so.

HERMAN SCHWARTZ
(1986)

## UNITED STATES DISTRICT COURTS

In enacting Article III, the Framers of the Constitution authorized the establishment of a federal judicial system consisting of a SUPREME COURT and such inferior courts as Congress might decide to establish. In the JUDICIARY ACT OF 1789 Congress created a Supreme Court, divided the country into three circuits, authorized a CIRCUIT COURT to sit in each circuit, and established a federal district court in each of the states. The Supreme Court was the only truly appellate court in the system. Unlike the modern courts of appeal, the old circuit courts, while exercising some appellate jurisdiction, were intended to be the chief federal trial courts. A Supreme Court Justice riding the circuit and judges of the district courts in the circuit manned each of these circuit courts.

The federal district courts were empowered to sit at various times in specified locations within the states where they were located. They were tribunals of very limited JURISDICTION and originally had as their main function the adjudication of admiralty and maritime matters. It was anticipated that the state trial courts or federal circuit courts would handle, as trial courts, the most important legal issues facing the new nation. The federal district courts were empowered to try minor criminal cases. In addition, they had CONCURRENT JURISDICTION with the circuit courts over suits by ALIENS for tort violations of a treaty or the law of nations, suits against consuls, and disputes in which the federal government initiated the proceeding and the matter in controversy was $100 or less. However, district court jurisdiction was exclusive in admiralty, over seizures of land for violation of federal statutes, and over seizures under import, navigation, and trade statutes.

This limited and specialized jurisdiction has steadily expanded. Today the district court is the only federal nonspecialized court, handling both criminal and civil matters. Among the latter are admiralty cases, federal question cases, and cases within the DIVERSITY JURISDICTION (cases between different states). In a diversity case the matter in controversy must exceed $10,000. No jurisdictional amount is normally required for the other exercises of the district court's civil jurisdiction. Appeals from a district court go to the UNITED STATES COURT OF APPEALS.

The first district court to be organized was the district court of New York. That court began functioning on November 3, 1789, and was the predecessor to the current district court for the Southern District of New York. Even today judges of the Southern District refer to theirs as the "Mother Court."

As the system was originally conceived, each state was to contain at least one federal district and one federal court. There has been no deviation from this pattern as the country has expanded from thirteen to fifty states. In addition, the DISTRICT OF COLUMBIA and the federal TERRITORIES (the Virgin Islands, PUERTO RICO, and Guam) are each organized as a federal district with a district court. In over half the states, although there may be a number of federal district judges who sit in separate locations throughout the state, there is only one federal district. Twelve states are divided into two federal districts; some states have three federal districts; and California, New York, and Texas are subdivided into four federal districts.

As the country has expanded, the number of federal district judges has increased. Since 1954 the roster of federal judges has grown through enactment of legislation authorizing additional judgeships for federal district courts nationwide. The Omnibus Judgeship Act of 1978 raised the number of authorized district judges from 399 to 516. The Southern District of New York has twenty-seven authorized judgeships, the largest number of any district in the country.

Federal district judges are nominated by the President and appointed with the ADVICE AND CONSENT of the Senate. The prevailing practice is for the selection of the nominee to come to the President from the Department of Justice. If one or both of the senators from the state in question belong to the President's party, the candidate for nomination is proposed by one or both senators and submitted to the Department of Justice for approval and recommendation to the President for nomination. Today few candidates are nominated and sent to the Senate for confirmation without first being found qualified by the American Bar Association. When the President decides to nominate a candidate, the FEDERAL BUREAU OF INVESTIGATION undertakes a security check. If the candidate is cleared, the President announces the nomination and sends the name to the Senate. The SENATE JUDICIARY COMMITTEE

holds hearings, which are usually one-day affairs for candidates for federal district courts. If the Senate Judiciary Committee approves, the nomination is voted on by the full Senate.

An Article III judge has life tenure during GOOD BEHAVIOR, and his salary cannot be diminished while he is in office. The only way to remove a federal district judge from office is by IMPEACHMENT. Of course, a federal judge, like any other person, may be prosecuted for criminal law violations. Bribery has been the most frequent charge, but criminal prosecutions of federal judges are rare and attempts to remove them by impeachment have been infrequent.

When the first change of political power occurred in the United States at the national level, from the Federalist party to the Republican party of THOMAS JEFFERSON, the Jeffersonians commenced impeachment proceedings against two judges appointed by the Federalists and disliked by the Republicans: JOHN PICKERING, a judge of the district court in New Hampshire, and SAMUEL CHASE, an Associate Justice of the Supreme Court. Pickering was convicted by the Senate in 1803, but the requisite two-thirds Senate majority could not be mustered to convict Chase. Since that time impeachment to unseat a federal judge has not been a successful political weapon. Partisan politics has from time to time generated unsuccessful calls for impeachment of various judges.

A federal district court judgeship carries considerable prestige. It is a presidential appointment; it is a national rather than a local office; and federal district court judgeships are limited in number. District judges in the main have had prior careers as prominent or distinguished lawyers before going on the bench. They are drawn for the most part from the middle and upper strata of our society. They are generally alumni of the best known law schools of the nation or of the state in which they will serve. They have generally had successful careers in private practice, often with backgrounds as federal, state, or local prosecutors. A few are former academics, and some come to court from public service careers outside government.

Until the twentieth century, all federal district judges were white males. The first woman to be confirmed as a federal judge was Florence Allen, who was appointed to the Court of Appeals for the Sixth Circuit in 1934. The first woman appointed to the district court was Burneta Matthews, who was given an interim appointment to the District of Columbia bench in 1949. She was confirmed by the Senate in 1950 for a permanent appointment. Constance Baker Motley was the first black woman to be appointed to the federal bench. She was appointed to the District Court for the Southern District of New York in 1966, and in 1982 became chief judge of that court.

WILLIAM HASTIE was the first black to be made a federal judge. He was appointed to the District Court of the Virgin Islands in 1937 and in 1949 was named to the Court of Appeals for the Third Circuit. James Parsons, appointed judge of the Northern District of Illinois in 1961, was the first black named a district judge in the continental United States. Since these initial appointments the number of blacks, women, and members of other ethnic minorities has grown steadily.

The first Judiciary Act authorized each court to make rules for conducting its own business, and in 1842 the Supreme Court was empowered to regulate process, pleading, proof and DISCOVERY in EQUITY, admiralty, and law cases in the district and circuit courts. In 1938 uniform rules for conducting civil cases, entitled the FEDERAL RULES OF CIVIL PROCEDURE, were adopted for the federal system. In 1946 the FEDERAL RULES OF CRIMINAL PROCEDURE were enacted. These rules have achieved uniformity of procedure and practice in the federal district courts throughout the nation.

The typical calendar of civil cases in a federal district court contains a plethora of complex cases involving PATENT, trademark, and COPYRIGHT infringement claims; federal securities law violations; CIVIL RIGHTS infractions; private antitrust claims; shareholders' derivative suits; IMMIGRATION and NATURALIZATION cases; employment, age, and housing discrimination claims; and claims under a variety of other federal statutes, such as the FREEDOM OF INFORMATION ACT, Investment Advisers Act, Commodities Exchange Act, FAIR LABOR STANDARDS ACT, and Federal Employers' Liability Act. In addition, there are seamen's injury and cargo damage claims, HABEAS CORPUS petitions by both state and federal prisoners, and litigation based on diversity jurisdiction. The criminal case load involves a variety of infractions defined in the United States criminal code.

Among the primary functions of the federal district courts are the vindication of federal rights secured by the Constitution and laws of the United States. The federal district court is often called upon to hold a state law or act unconstitutional because it violates federal constitutional guarantees or has been preempted by federal legislation. Obviously, the exercise of this power by federal district courts has the potential for creating friction and disharmony between state and federal courts. A lower federal court's power to strike down a state law on federal constitutional grounds, in the face of a contrary ruling by the highest court of the state, is not an easy pill for state judges to swallow. Federal courts have devised doctrines of COMITY and ABSTENTION to ease the friction. A growing number of federal judges, recognizing that state judges, too, have a duty to protect and enforce federal rights, have been inclined to give increasing deference to state court determinations of federal constitutional questions.

A burgeoning federal caseload undoubtedly promotes this inclination toward accommodation and also promotes a tightening of limitations on federal habeas corpus review of state court criminal convictions. A habeas corpus petition enables a state prisoner, after unsuccessfully appealing his conviction through the state court system, to have the matter reviewed by the federal district court to determine whether the trial and conviction violated the defendant's federal constitutional rights. Not surprisingly, habeas corpus petitions have inundated the federal courts. While most are without merit, the few petitions of substance that succeed are another cause of federal-state court friction. Rules of limitations have been imposed requiring exhaustion of state remedies and forbidding review if the state court's denial of the appeal of the criminal conviction rests on the defendant's failure to conform to state governing procedure absent a showing of cause and prejudice. (See WAINWRIGHT V. SYKES.)

Diversity jurisdiction brings to the federal courts issues of state law that would ordinarily be tried in the state courts. The initial justification for giving federal courts jurisdiction over such cases was concern that parochialism would put the out-of-state complainant at a disadvantage in seeking redress in state court against a resident of the forum state.

Exercise of federal diversity jurisdiction was at one time a cause of federal-state confusion if not friction. The district courts in diversity cases have been required to follow applicable state statutes, but until 1938 they were free to disregard state decisional law and decide on the basis of their own notions of what the COMMON LAW was or should be. With the Supreme Court's decision in ERIE RAILROAD V. TOMPKINS (1938) federal courts were no longer free to disregard state court decisions. Federal courts may apply their own rules as to pleading and practice but on substantive issues must function as adjuncts of the state judiciary.

ERIE V. TOMPKINS has made clear that the diversity jurisdiction is a wasteful use of federal judicial resources. State court parochialism is no longer a justifiable basis for federal diversity jurisdiction. Because the federal court must apply state law, apart from federal procedural rules, the litigant is seldom better off in federal court than he would be if relegated to state courts, where increasing numbers of federal judges feel such cases belong. Congress, however, has shown little interest in divesting federal district courts of the diversity jurisdiction.

The federal district court is the place where litigation usually commences to test the constitutional validity of state or federal governmental action with national implication. These TEST CASES usually seek injunctive relief or DECLARATORY JUDGMENTS. These are suits in EQUITY; thus no jury is empaneled, and the district judge must determine both the facts and the law. The judge will articulate his or her findings of the facts and legal conclusions as to the constitutional validity of the governmental action being tested. The trial record and the district court's analysis are thus extremely important for appellate courts, particularly in cases of first impression.

It is the district court that decides in the first instance whether the government is violating a newspaper's FIRST AMENDMENT rights, an accused's RIGHT AGAINST SELF-INCRIMINATION, or a minority citizen's right to the equal protection of the laws. Organizations such as the AMERICAN CIVIL LIBERTIES UNION, the National Association for the Advancement of Colored People, Jehovah's Witnesses, environmental groups, corporations, and individuals initiate litigation in the district court to test the constitutionality of some federal, state, or local legislation or practice. (See TEST CASES.)

Such a case was *McLean v. Arkansas Board of Education* (D. Ark., 1982). The American Civil Liberties Union sought to challenge an Arkansas law requiring that creationism—a biblical story of man's and the world's creation, as opposed to Darwin's evolutionary theory for explaining the genesis of mankind—be taught in the public schools. The issue was tried first in the federal district court, which framed the issue in these terms: is creationism a religious doctrine or a valid scientific theory? The court heard and weighed testimony, chiefly from experts on both sides, and held that the Arkansas statute was an unconstitutional ESTABLISHMENT OF RELIGION.

Sometimes prior DOCTRINE has forecast the outcome. For instance, although the SEPARATE BUT EQUAL DOCTRINE on which school SEGREGATION had been founded was not overruled until BROWN V. BOARD OF EDUCATION (1954), earlier decisions such as SWEATT V. PAINTER (1950) and *McLaurin v. Oklahoma State Regents* (1950) pointed to that overruling. Nonetheless, the record amassed by several district courts, showing the psychological and education deprivation inflicted by segregation on black children, was crucial in enabling the Supreme Court to take the final step of overruling PLESSY V. FERGUSON (1896) and holding that segregated schools violated the right of minority school children to equal protection of the law.

Similarly, a federal district court facing a constitutional challenge to the HYDE AMENDMENT, a congressional provision largely denying Medicaid funds for the cost of abortions, held hearings for about a year. The trial record contained some 400 exhibits and 5,000 pages of testimony. The judge was required to digest this mountain of testimonial and documentary evidence and prepare cohesive findings of facts and conclusions of law. (See HARRIS V. MCRAE.)

The need for so long a trial and the condensation of so voluminous a record into a coherent decision is not com-

monplace. However, it is not unusual for a district judge to be required to master the facts in a complex trial lasting many months, and to set forth the facts found and legal conclusions in a comprehensive fashion.

In some cases the district court, as a supplement to its own adjudicative fact-finding, must make findings as to LEGISLATIVE FACTS as well. For instance, in FULLILOVE V. KLUTZNICK (1980) Congress had required at least ten percent of federal funds granted for local public works projects to be set aside for minority businesses. This legislation was attacked as unconstitutional racial discrimination. The district court framed the issue as the power of Congress to remedy past discrimination. The district judge relied on congressional findings that minorities had been denied access to entrepreneurial opportunities provided in building construction works financed by public funds. Based on this legislative finding and Congress's purpose to take remedial action, the district court found the set-aside to be a legitimate remedial act. The Supreme Court adopted this rationale, and upheld the quota.

At times, in a constitutional controversy, the district court, although adhering to judicial precedent requiring it to dismiss the constitutional challenge, may help to bring about a reversal of precedent by recognizing that a wrong exists which should be remedied. BAKER V. CARR (1962) was a challenge to Tennessee's malapportioned legislature. The district court, in its opinion, carefully and sympathetically tracked the contentions of the plaintiffs that the legislators had condoned gross inequality in legislative REPRESENTATION and debased the VOTING RIGHTS of a large number of citizens. The court, however, relied on COLEGROVE V. GREEN (1946) and dismissed the action. On review of this order, the Supreme Court ruled that the plaintiffs' allegations had stated a case within the district court's jurisdiction. Subsequently, REYNOLDS V. SIMS (1964) embodied the Supreme Court's famous ONE PERSON, ONE VOTE principle, requiring legislative districts to be constructed as nearly as possible of an equal number of voters. (See REAPPORTIONMENT.)

Issues of such magnitude are highly charged; it is not unusual, in these controversial circumstances, for the judge who decides a case contrary to the majority's view to face public criticism and in some cases even social ostracism.

Judge Waties Waring's unpopular decision in favor of blacks in voting and school cases led to his social ostracism in Charleston, South Carolina; Judge Skelly Wright became anathema to many whites in New Orleans for the same reason, and escaped that environment through appointment to the Court of Appeals of the District of Columbia Circuit. Similarly, Judge William Ray Overton, who decided the creationism case adversely to local sentiments, and Judge James B. MacMillan, who ordered a complex program of SCHOOL BUSING in Charlotte, North Carolina, were subjected to severe community criticism.

Although not so dramatic as the examples given, public criticism meets almost every district judge at one time or another for rendering an unpopular decision. Because most public controversies have a way of ending up in the federal courts, district judges must decide whether seniority systems must be modified to prevent the employment gains of minorities and women from being wiped out; whether regulations requiring physicians to report to parents abortions performed on teenagers are valid; whether the overcrowding and the rundown conditions of a prison require it to be closed; or whether permitting school authorities to provide for prayer or meditation violates the SEPARATION OF CHURCH AND STATE. The district judge normally sits alone, and does not share decision with others, as do federal appellate judges—and therefore is singularly exposed to abuse and pressure.

Life tenure helps secure the independence of the district judge in facing such issues. This independence is crucial, not only for the judge but also for a constitutional system that seeks to secure the rights of the unpopular and despised.

ROBERT L. CARTER
(1986)

Bibliography

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT. *Annual Report of the Director.* Washington, D.C.: Government Printing Office.

CLARK, D. S. 1981 Adjudication to Administration: A Statistical Analysis of Federal District Courts in the 20th Century. *Southern California Law Review* 55:65–152.

HALL, KERMIT 1976 The Antebellum Lower Federal Judiciary, 1829–1861. *Vanderbilt Law Review* 29:1089–1129.

——— 1981 California's Lower Federal First Judicial Appointments. *Hastings Law Journal* 32:819–837.

HENDERSON, DWIGHT F. 1971 *Courts for a New Nation.* Washington, D.C.: Public Affairs Press.

HOUGH, CHARLES M. 1934 *The U.S. District Court for the Southern District of New York.* New York: Maritime Law Association.

*Management Statistic for United States Courts.* 1981.

STECKLER, WILLIAM E. 1978 Future of the Federal District Courts. *Indiana Law Review* 11:601–620.

SURRENCY, ERWIN C. 1963 History of Federal Courts. *Missouri Law Review* 28:214–244.

THOMPSON, FRANK, JR. 1970 Impeachment of Federal Judges: A Historical Overview. *North Carolina Law Review* 49:87–121.

## UNITED STATES RAILROAD RETIREMENT BOARD v. FRITZ

See: Rational Basis; Substantive Due Process

## *UNITED STATES TRUST CO. v. NEW JERSEY*
431 U.S. 1 (1977)

This decision marked the beginning of the modern revitalization of the CONTRACT CLAUSE as a limitation on state legislative power. New York and New Jersey had promised, on issuing bonds to support their Port Authority, to limit severely their use of Authority revenues to subsidize rail passenger transportation. Twelve years later the states sought to divert commuters from automobiles to railroads; they raised bridge and tunnel tolls and, repealing their earlier promise, authorized use of the increased revenues to subsidize commuter railroads. The Supreme Court, 4–3, held the repeal unconstitutional as an impairment of the OBLIGATION OF CONTRACT.

The dissenters, led by Justice WILLIAM J. BRENNAN, accurately described the decision as the first in nearly forty years to invalidate economic legislation under the contract clause and argued vigorously for maintaining judicial deference to legislative power. For the majority, Justice HARRY A. BLACKMUN commented that the outright repeal had deprived bondholders of an important security interest and could be justified only if it were both "reasonable and necessary to serve an important public purpose." The repeal failed this heightened STANDARD OF REVIEW, because alternative means of diverting commuters to railroads were available: taxing parking or gasoline, for example.

KENNETH L. KARST
(1986)

(SEE ALSO: *Allied Structural Steel Company v. Spannaus.*)

## *UNITED STEELWORKERS OF AMERICA v. WEBER*
443 U.S. 193 (1979)

This was one of an important series of decisions upholding the legality of AFFIRMATIVE ACTION. In *Weber*, the Court held, 5–2, in an opinion by Justice WILLIAM J. BRENNAN, that a private affirmative action plan reserving for blacks fifty percent of the openings in a training program leading to plant employment did not violate Title VII of the CIVIL RIGHTS ACT OF 1964. *Weber* left open important questions about the permissible scope of affirmative action, including whether governments might resort to affirmative action without violating the Fifth or FOURTEENTH AMENDMENT, and the extent to which private affirmative action programs may "trammel the interests" of white employees.

THEODORE EISENBERG
(1986)

# UNIVERSAL MILITARY TRAINING AND SERVICE ACT

See: Selective Service Acts

# UNREASONABLE SEARCH

"Unreasonable" is the controlling word in the FOURTH AMENDMENT. In its first clause the amendment guarantees the right of the people to be free from unreasonable SEARCHES AND SEIZURES; its second clause stipulates the terms for issuance of a judicial warrant: probable cause, oath or affirmation, particularity of description. What is an unreasonable and therefore forbidden search? Conversely, what is a reasonable and permitted one? The amendment does not say. The answer, in large measure, depends on one's understanding of the relationship of the two clauses.

Two polar positions have dominated debate in the Supreme Court on this matter. The view that was in the ascendancy before 1946 and that has generally prevailed again since CHIMEL V. CALIFORNIA (1969), treats the two clauses in conjunction so that the unreasonable searches forbidden by the first clause are defined by the warrant requirements in the second clause: a reasonable search is one conducted subject to a proper warrant, an unreasonable search is one that is not. A second view, generally dominant between HARRIS V. UNITED STATES (1946) and 1969, holds that reasonableness is an autonomous principle, to be measured by all the circumstances rather than by the securing of a warrant (although this is one factor to be considered).

The conflict between the two readings of "unreasonable" essentially has centered on SEARCH INCIDENT TO ARREST, a recognized "emergency" exception to the warrant requirement since WEEKS V. UNITED STATES (1914). According to the second interpretation, once the privacy of the dwelling has legitimately been invaded to make a lawful arrest, it is reasonable to allow the search (for the purpose of disarming the arrestee and seizing EVIDENCE which he may seek to destroy) to blanket the entire premises in which the arrest was made. This is a matter of the greatest consequence, for the vast majority of searches are carried out incident to arrest. If, however, the warrant requirement is considered to be the core of the amendment, the search must be circumscribed to the extent required by the emergency and therefore confined to the person arrested and the area within his immediate reach.

To treat reasonableness as an independent standard is contrary to both history and logic. On logical grounds there seems little value to stringent warrant requirements that can be readily negated by "reasonable" WARRANTLESS

SEARCHES. History, too, sets its face against the notion. The Fourth Amendment's proscription of unreasonable searches, alone among the provisions of the BILL OF RIGHTS to set fair standards for the apprehension and trial of accused persons, has a rich historical background in American, as well as English, experience. The amendment is rooted in the restrictions which seventeenth- and eighteenth-century COMMON LAW judges in England placed on the search power (for example, WILKES CASES, 1763–1770). This power had been abused through the government's relentless hunt for political and religious dissidents during a phase of English history well understood in the colonies. The amendment stems more directly from the public outcry against indiscriminate searches for smuggled goods (authorized by GENERAL WARRANTS known as WRITS OF ASSISTANCE) during the last years of the colonial period in America, notably in Massachusetts. The main object of the Fourth Amendment, to prevent the recurrence of the detested general warrant, was to be accomplished by placing strict limits on the issuance of a warrant. The reasonableness clause, as seems clear from the historical record of the amendment's drafting in the first Congress, was meant to reemphasize, and perhaps strengthen, the warrant requirements in the second clause. To detach the reasonableness clause from the warrant clause by infusing it with independent potency serves to dilute the amendment's protection, exactly the opposite of the result its framers intended. It is insufficient to leave the initial determination of reasonableness to the police, with JUDICIAL REVIEW taking place retrospectively when the prosecutor seeks to introduce the fruits of the search in evidence. Many searches will produce no evidence, and even when evidence is found, the pressure on judges to rule against obviously guilty defendants will be great despite the illegality of the searches.

Consonant with the amendment's history, the Court at one time assigned an even broader meaning to "unreasonable" than is taken by the first view. In BOYD V. UNITED STATES (1886) the Court held that private papers are immune to seizure even under warrant—on the theory that one test of the reasonableness of a search is whether or not its purpose is to seize evidence that will force the person to incriminate himself. In contrast, contraband goods and fruits and instrumentalities of crime are deemed seizable because their possessor has no legal property right in them. In *Gouled v. United States* (1921) the Court logically extended the immunity granted private papers to all kinds of evidentiary materials (for example; clothing). However, this MERE EVIDENCE RULE, as it came to be known, was overturned as "wholly irrational" in WARDEN V. HAYDEN (1967), and probably little remains of the immunity granted to private papers (*Fisher v. United States*, 1976).

Other EXIGENT CIRCUMSTANCES, in addition to search incidental to arrest, which, in either view, permit the police to bypass the warrant requirement, include the rule of CARROLL V. UNITED STATES (1925), which permits the search of a moving vehicle on PROBABLE CAUSE to believe that it is transporting contraband; the ruling in *Schmerber v. California* (1966), which permits the compulsory taking of a blood sample from a driver to measure its alcoholic content where there is probable cause to believe he was intoxicated while driving; and the rule of *Warden v. Hayden* (1967), which permits the "hot pursuit" of a felon into a dwelling. Even in the absence of evidence that a crime has been committed, where the suspicious conduct of an individual leads an officer to believe that he or others are in danger and imminent action is imperative, he may stop the suspect and "frisk" the individual's outer clothing in order to disarm him of weapons he may be carrying. (See TERRY V. OHIO.)

In the case of search incidental to arrest, hot pursuit, or STOP AND FRISK, the emergency is self-evident, but it is no less genuine in the case of a moving vehicle or a blood test, for the delay involved in the obtaining of a warrant will usually defeat the object of the search. The automobile might by that time be far away, perhaps in another jurisdiction, and the percentage of alcohol in the blood gradually diminishes once intake ceases. These are only examples. Clearly any real emergency, as the sound of a shot or a cry for help coming from behind closed doors, would justify a warrantless search by the police.

The only kinds of searches known to the framers, and to which the Fourth Amendment was originally addressed, contained two elements: (1) entry into the dwelling (2) for the purpose of seizing evidence of crime. At first the Court considered the definition of search to be governed by this experience and maintained that warrants were not required for more modern types of searches that lacked one or the other of these elements. Thus searches for oral utterances conducted by WIRETAPPING which do not involve entry onto premises, as in OLMSTEAD V. UNITED STATES (1928), or inspection of dwellings to uncover nuisances to public health or safety, as in *Frank v. Maryland* (1959), were held not to be covered by the amendment. Subsequently, however, ELECTRONIC EAVESDROPPING (including wiretapping) and ADMINISTRATIVE SEARCHES were both brought under the amendment's protective umbrella in KATZ V. UNITED STATES (1967) and CAMARA V. MUNICIPAL COURT (1967), respectively. But a visit to the home by a caseworker for the purpose of determining whether a public assistance grant is being properly used does not amount to an unreasonable search and requires no warrant, as the Court held in WYMAN V. JAMES (1971).

A court order for the surgical removal of a bullet from the body of a suspect was ruled unreasonable in *Winston v. Lee* (1985)—at least when the need for the evidence is

not "compelling"—because of the serious intrusion on privacy and the medical risks entailed.

In order to prevent the Fourth Amendment from being reduced to a mere parchment guarantee, evidence obtained through unreasonable search has since 1914 been excluded from trials in the federal courts (*Weeks v. United States*), and in the state courts as well since MAPP V. OHIO (1961). (See EXCLUSIONARY RULE.) Although the amendment contains no express command of exclusion, it has been construed to authorize the judiciary to apply such sanctions as are necessary to ensure compliance with the standard of reasonableness.

Like the rest of the Bill of Rights, the ban on unreasonable searches was originally intended to place restrictions only on the federal government. That ban became applicable to the states, as an element of FOURTEENTH AMENDMENT due process, in 1961 (*Mapp v. Ohio*), and the same standard of reasonableness now governs searches made by federal and state authorities (KER V. CALIFORNIA, 1963). (See INCORPORATION DOCTRINE.)

JACOB W. LANDYNSKI
(1986)

Bibliography

FELLMAN, DAVID 1976 *The Defendant's Rights Today.* Pages 277–284. Madison: University of Wisconsin Press.

LAFAVE, WAYNE R. 1978 *Search and Seizure: A Treatise on the Fourth Amendment.* Vol. 2:406–476, 498–609; vol. 3:2–140. St. Paul, Minn.: West Publishing Co.

LANDYNSKI, JACOB W. 1966 *Search and Seizure and the Supreme Court.* Pp. 30–44, 387–417. Baltimore: Johns Hopkins University Press.

——— 1971 "The Supreme Court's Search for Fourth Amendment Standards: The Warrantless Search." *Connecticut Bar Journal* 45:2–39.

LEVY, LEONARD W. 1974 *Against the Law.* Pages 75–117. New York: Harper & Row.

## UNREASONABLE SEARCH
## (Update)

"Unreasonable search and seizure" is a technical phrase that refers to any governmental SEARCH AND SEIZURE deemed to violate the FOURTH AMENDMENT of the Constitution. In general, searches and seizures are unreasonable if the government undertakes them without properly authorizing SEARCH WARRANTS or, in exceptional circumstances not requiring warrants, in violation of the rules laid down for those exceptions. The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The amendment defines neither "unreasonable" nor "searches and seizures," and the judiciary has taken on the task of definition. The Supreme Court has concluded that particularized searches and seizures with a warrant, as called for by the amendment's warrant clause, establish the norm for reasonableness. It is the neutral, detached, judicial determination of good reason or "probable cause" to search foror seize particular persons or things in particular places that makes such acts presumptively "reasonable." Unauthorized searches and seizures, unless specially justified, are generally thought unreasonable.

Although searches and seizures based on proper warrants are the accepted constitutional norm, not all WARRANTLESS SEARCHES and seizures violate the Fourth Amendment. They do not if they are directed at objects or interests the amendment does not protect, if they do not constitute "searches" or "seizures" in the legal sense, or if they fall within one of the recognized exceptions to the warrant or probable cause requirements.

In KATZ V. UNITED STATES (1967), the Supreme Court stated that the Fourth Amendment, among other things, protected certain individual interests in privacy from unreasonable government search and seizure. Subsequent opinions have said the amendment protects an individual's REASONABLE EXPECTATION OF PRIVACY, a test involving both a subjective expectation of privacy and one that society is prepared to recognize as "reasonable." Where an individual has no reasonable expectation of privacy, the government may search and seize without a warrant and even without probable cause. Consequently, the government may search and seize things or matters that an individual of necessity or willingly exposes to the public. For example, the government may photograph one's features, lift one's fingerprints, tape public lectures, or place tracking devices on cars.

The second part of the *Katz* test requires that the expectation of privacy be one that society—here represented by the Supreme Court—is prepared to recognize as reasonable. One consequence of the Court's "reasonable expectation" definitions has been that police may freely examine some places where people might actually expect some privacy, at least in the sense of not contemplating that the government would seek evidence against them there. For example, the Court has held that persons have no reasonable expectation of privacy in trash placed out for collection. The Court has also held, in effect, that persons have no expectation that items hidden from ordinary view on real property will be free from aerial surveillance. Finally, it has held that an occupant of real

property has an expectation of privacy only with regard to his or her home and its "curtilage," or the area immediately surrounding it and associated with intimate home uses. Consequently, even were one to hide something in dense, secluded woods on one's private property, the government could legitimately search the woods without a warrant or probable cause.

There are a number of recognized exceptions to the warrant requirement and even some to the probable cause requirement. These exceptions are made in situations in which, while the police have probable cause to search for and seize particular evidence or persons in particular places, some other circumstance—usually referred to as an "exigent" or emergency circumstance—makes it impossible, impracticable, self-defeating, or unwise to obtain a warrant. In situations in which the government demonstrates a special and important need for a limited search, the reasonableness of the search depends upon a balancing of the need to search against the intrusion the search entails. For such reasons, the Court has held several kinds of warrantless searches reasonable: SEARCHES INCIDENT TO ARREST; investigative STOPS-AND-FRISKS; AUTOMOBILE SEARCHES and searches of other mobile vehicles; inspection and regulatory searches, including BORDER SEARCHES; some employer drug-testing searches; and CONSENT SEARCHES.

An ARREST is a seizure of a person. Under COMMON LAW and constitutional rule, when police see a crime being committed or have probable cause to think that a specific person has committed a FELONY and may escape unless arrested, they may arrest without a warrant. Arrest may place police officers at risk if the person arrested has a weapon, and one arrested may wish to dispose of incriminating evidence. To protect themselves and others and to prevent destruction of evidence, officers arresting on probable cause may conduct a full BODY SEARCH of the arrestee and the area within his or her ready reach.

In contrast, warrantless searches and seizures within a home are presumptively unreasonable. Consequently, when police have probable cause to arrest someone who is at home and unlikely to flee while a warrant is sought, they must obtain an ARREST WARRANT.

There are police-civilian encounters short of arrest, usually called "investigative detentions" or "stops-and-frisks." Police rightly investigate suspicious circumstances or characters, and good police work may entail stopping and questioning persons on some reasonable suspicion. If police do stop someone to investigate, however, they may place themselves at risk if the person carries a weapon. On the other hand, a general police authority to stop and question anyone for any reason opens possibilities of police harassment. The Court has held therefore that although the procedure entails a seizure and a search, it is reasonable for officers to stop persons they reasonably suspect of criminal activity and of being armed and dangerous, for the purpose of questioning them and searching for weapons. Under this authority, when police have reasonable suspicion to think that luggage, parcels, or other containers contain contraband or EVIDENCE of a crime, they may detain them for a limited, unintrusive inspection, such as sniffing by a trained narcotics-detection dog.

Mobile vehicles present a special problem. Were police to seek a warrant for a vehicle they have probable cause to suspect contains evidence of a crime, the vehicle might leave the JURISDICTION in the interim. In addition, as the Court has held, because of extensive regulation of vehicles and the character of their public uses, there is a lesser expectation of privacy in vehicles than there is in homes or offices. Consequently, the Court has laid down the rule that when police have probable cause regarding a mobile vehicle, they may undertake a warrantless search of it. The authority remains even if the vehicle is unlikely to be moved or the police have immobilized it.

Governments undertake inspection or regulatory searches for a variety of purposes. Fire inspection codes often require home and building safety inspection. Airline safety dictates some inspection of luggage and persons flying. Entry into an agricultural pest quarantine zone calls for inspection for designated pests. Crossing an international border calls for inspection to ensure right of entry and search to ensure against smuggling of contraband or dutiable goods. In these situations, the need to inspect or search is great, any inconvenience is small, and the scope and the extent of associated interrogation and search is limited. Similarly, public safety or security may require mandatory drug testing for railway or airline employees where their inattention or dereliction of duty would involve an immediate risk of serious harm. In general, the combination of an overriding public interest and the relatively limited character of the search are thought to make such searches reasonable.

Consent searches constitute the final major exception to the warrant and probable cause requirements. Individuals may voluntarily waive their constitutional rights. One can therefore give up the search and seizure protections the Fourth Amendment accords by agreeing to a search. The major questions in such a case are whether there was voluntary consent to the search and whether the party consenting had authority to do so. Whether consent was voluntary or coerced is a factual question, but the state need not show that the person who allegedly gave consent knew that he or she had a right to refuse to give consent. The Court has also indicated that anyone who has common authority over premises or effects can consent to a search of them and that such consent holds against an absent

nonconsenting person who shares the authority. In other words, third parties, who are not the targets of a search, can sometimes consent to searches aimed at securing evidence against a target.

GARY GOODPASTER
(1992)

(SEE ALSO: *Exigent Circumstances Search; Open Fields Doctrine; Plain View Doctrine.*)

Bibliography

AMSTERDAM, ANTHONY 1974 Perspectives on the Fourth Amendment. *Minnesota Law Review* 58:349–477.

LAFAVE, WAYNE 1987 *Search and Seizure: A Treatise on the Fourth Amendment*, 3 vols. St. Paul, Minn.: West Publishing Co.

LANDYNSKI, J. 1966 Search and Seizure and the Supreme Court. *Johns Hopkins University Studies in Historical and Political Science*, ser. 84, No. 1.

TAYLOR, TELFORD 1969 *Two Studies in Constitutional Interpretation.* Columbus: Ohio State University Press.

## UNWRITTEN CONSTITUTION

When the American colonists charged that some British colonial policies and practices were unconstitutional, they appealed to what was generally conceived as an unwritten constitutional tradition that combined the practical good sense of English experience with standards of conduct that were simply, or naturally, equitable and right. Though the principles of this constitutional tradition were scattered among state documents, reported cases of the COMMON LAW, treatises, and other writings, their status derived not from having been written or enacted but from their perceived origin in sources like custom, divine will, reason, and nature. These principles were thought superior to acts of Parliament, whose status did depend on their enactment.

While invoking unwritten HIGHER LAW, however, the colonists were implicitly challenging its efficacy. To the charge of TAXATION WITHOUT REPRESENTATION, Parliament responded with the theory of virtual representation. The colonists rejected this DOCTRINE and insisted that as a practical matter responsible government depended on the ballot, not on government's respect for natural justice. Belief in a higher law thus coexisted with a pessimistic view of human nature and a corresponding distrust of government.

Unlike Britain's constitution, the American Constitution was established through RATIFICATION, a form of enactment. As the supreme law of the land this enacted Constitution consigns appeals from its authority to the category of extralegal considerations. But foreclosing the constitutionality of appeals from the highest written law did not depreciate unwritten law as such, for the written or enacted law could still reflect unwritten standards of natural justice and reason whose status did not depend on enactment. This was the claim of those who campaigned for ratification, as was to be expected from the rhetoric typical of public attempts to persuade.

This is not to say that anyone saw the proposed constitution as entirely consistent with the dictates of reason and justice. SLAVERY and the equal REPRESENTATION in the SENATE of small and large states are examples of acknowledged compromises with contingencies that would not bend to principle. Nevertheless, the argument for ratification was full of references to higher norms as standards for evaluating constitutions, as principles behind its rules and institutions, and as objectives of the system as a whole. In THE FEDERALIST #9 and #10, ALEXANDER HAMILTON and JAMES MADISON not only presented the Constitution as an attempt to reconcile democracy with minority rights and the common good, but they also stated that the fate of democracy justly depended on that reconciliation. In *The Federalist* #78 Hamilton defended JUDICIAL REVIEW and recognized the role of judges in "mitigating the severity and confining the operations" of "unjust and partial" enactments. In *The Federalist* #51 Madison said, "Justice is the end of government" and that it "ever will be pursued until it is obtained, or until liberty be lost in the pursuit." And in the same number he described CHECKS AND BALANCES as a "policy of supplying, by opposite and rival interests, the defects of better motives." Taking this statement at face value would require as a prerequisite to a full understanding of the Constitution knowledge of the "better motives" that constituted part of the model for what the Framers wrote.

It is a matter of central importance that appeals to ideas like justice were not expressed as appeals to this or that particular version but to the general idea itself. Aware of the difference, Hamilton urged readers of *The Federalist* #1 to rise above "local prejudices little favorable to the discovery of truth." He recalled the frequent claim that Americans would decide the possibility of rational government for the whole of mankind, a claim that might redouble efforts to rise above parochialism by adding "the inducements of philanthropy to those of patriotism." Equally important, however, was his acknowledgment of the great number and power of "causes which . . . give a false bias to . . . judgement." And he urged "moderation" on those "ever so thoroughly persuaded of their being in the right." This appeal suggests the value of self-critical striving for truth, an attitude more of confidence in progress toward truth than in claims to possess it.

Further indication of the Constitution's dependence on

commitments that some theorists believe written constitutions can displace is the fact that properties of the Constitution as a whole influence the interpretation of its parts. In addition to the rhetoric of its PREAMBLE and of its draftsmen, the document reflects a concern for simple justice by virtue of its written character. As written communication to an audience of indefinite composition, size, and duration, the document presupposes that virtually anyone can come to understand what it means. Presupposing a large and lasting community of meaning, it anticipates a community of interests embracing all to whom it would potentially apply or who would accept it as a model.

Because of their content, provisions like the TENTH AMENDMENT and the old fugitive slave clause are at odds with the community of interests presupposed by the Constitution as a whole. They are at odds with themselves by virtue of their enunciation as parts of the whole. This tension justified JOHN MARSHALL's nationalist construction of the Tenth Amendment, ABRAHAM LINCOLN's view that the Constitution had put slavery on the path of ultimate extinction, and the Supreme Court's application of the BILL OF RIGHTS to the states through the INCORPORATION DOCTRINE. Observers have interpreted the acceptance of this kind of construction as a sign that the nation has an unwritten constitution. But therapeutic constructions might as easily indicate the power of a written constitution to undermine the parochial and particularistic aspects of its content, separable as the written word is from the physical presence of its authors and their particular needs and conceptions.

The implications of the Constitution's written character bear on a protracted debate among constitutional theorists over the possibility of limiting the discretion of judges in difficult constitutional cases involving human rights, especially rights to SUBSTANTIVE DUE PROCESS and EQUAL PROTECTION. Many participants in the debate share an academic moral skepticism that finds no meaning in general normative concepts beyond the particular conceptions of historical individuals or communities. They diminish simple justice with quotation marks, and they hold particular conceptions of justice interesting primarily as facts that influence other facts, not as beliefs that can be morally better or worse than other beliefs. Rejecting the object of its quest, they also reject traditional moral philosophy as a method of acquiring knowledge. They treat the beliefs of persons and communities as matters essentially of historical fact, to be established by empirical methods, with some room for conceptual analysis, but not for judgments of right and wrong.

To these commentators, talk of reason and justice is essentially rationalization of personal preference, class interest, community morality, and the like. And because they tend to believe that elected officials have a stronger claim to represent the community, they argue that judicial review often involves the imposition of minority preferences on the majority. In an effort to reconcile judicial review with majoritarianism these theorists have tried to link the meaning of general constitutional norms with the intentions of the Framers, tradition, existing and projected community morality, the institutional prerequisites of democratic decision, and other sources whose content they perceive essentially as matters of fact or uncontroversial inference. The effort has failed largely because each source yields conflicting options, not simple, consistent answers. And when the skeptics make their selections, they inevitably (if covertly and therefore irresponsibly) make normative judgments whose rationality their position would force them to deny.

The failure of these skeptical theorists to extirpate normative judgments from decisions about the meaning of constitutional provisions has strengthened the case for moral philosophy in constitutional inquiry, which, in turn, has exacerbated apprehension of unrestrained judicial power. But renewed concern for natural justice need not threaten hopes for limiting judicial discretion. Those who take seriously the idea of justice as something higher than their particular conceptions will value the self-critical striving for moral and political truth recommended in *The Federalist* #1. This attitude is itself a limitation on discretion of the most objectionable variety because it is the antithesis of willful assertiveness.

Arguments for taking natural justice seriously might begin by reflecting on the apparent power of ordinary political debate to change minds about justice and related ideas. This familiar fact shows that, as ordinary citizens understand it, political life presupposes simple justice. Moral skeptics err in supposing that continuing disagreement about justice proves that debate is pointless or that there is nothing to debate about. If there are moral truths to be known, as is ordinarily presupposed, agreement is not the test of what is right. Holding that agreement is the test may signal that one abandons ordinary presuppositions, but it is not an argument for doing so. Academic inquiry begins with ordinary presuppositions. And though constitutional theorists have not reached agreement (a good thing, for universal consensus would remove the impetus for reflection and improvement), they have been unable to avoid ordinary presuppositions about justice and the value of reasoning in deciding what the Constitution means. Perhaps this is a reason to value self-critical striving for the best constructions to which constitutional language, tradition, and opinion are open.

SOTIRIOS A BARBER
(1986)

(SEE ALSO: *Higher Law; Limited Government; Natural Rights and the Constitution.*)

Bibliography

BREST, PAUL 1981 The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship. *Yale Law Journal* 90:1063–1109.

GREY, THOMAS C. 1978 Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought. *Stanford Law Review* 30:843–893.

HARRIS, WILLIAM F., II 1982 Bonding Word and Polity: The Logic of American Constitutionalism. *American Political Science Review* 76:34–45.

MOORE, MICHAEL S. 1982 Moral Reality. *Wisconsin Law Review* 1982:1061–1156.

——— 1985 A Natural Law Theory of Interpretation. *Southern California Law Review* 58:277–398.

## *UPHAUS v. WYMAN*
360 U.S. 72 (1959)

In PENNSYLVANIA V. NELSON (1956) the Court appeared to hold that the Smith Act preempted state antisubversion laws. Here the Court held that state JURISDICTION over sedition against the state, as opposed to sedition against the federal government, was not preempted. In *Sweezy v. New Hampshire* (1956) the Court had invalidated a subversion investigation by the New Hampshire attorney general. Here, using the interest-balancing techniques of BARENBLATT V. UNITED STATES (1959), decided the same day, the Court upheld a similar investigation by him in his capacity as a one-man legislative investigating committee.

MARTIN SHAPIRO
(1986)

## *URSEY, UNITED STATES v.*

See: Civil Forfeiture

## USE IMMUNITY

See: Immunity Grant

## UTILITY REGULATION

See: Economic Regulation

# V

## VACCINATION

Vaccination is the introduction into the body of a vaccine to prevent disease. In the late nineteenth and early twentieth centuries a number of states made smallpox vaccination compulsory. The Supreme Court upheld the constitutionality of such a law in JACOBSON V. MASSACHUSETTS (1905), and *Jacobson*'s continuing vitality as a precedent is routinely assumed.

The *Jacobson* opinion was written by Justice OLIVER WENDELL HOLMES, who regarded the case as he regarded LOCHNER V. NEW YORK (1905), decided later the same year over his dissent. For Holmes, the question in both cases was whether the legislative judgment had passed the bounds of reason. For the majority who found a violation of SUBSTANTIVE DUE PROCESS in *Lochner's* sixty-hour limit on bakers' weekly work but validated compulsory vaccination, the difference surely was that they saw vaccination as a soundly based health requirement. Yet the subsequent collapse of substantive due process as a constitutional limit on ECONOMIC REGULATION should not be taken as a return to the Holmes view equating invasions of the body with the general run of restrictions on liberty. Undoubtedly the standard of judicial review in such cases today is far more demanding than it was for Holmes in *Jacobson.*

A patient who refuses medical treatment, for example, surely has a constitutional right to do so, founded on the liberty protected by the due process clauses, absent the most compelling justification for state-ordered intrusion into his or her body. The right may come to be described in the privacy language used to explain the abortion decisions, which really rest not so much on privacy in its ordinary sense as on a woman's control over her own body and her own life. Similarly, the decisions involving invasion of the body to extract blood or other EVIDENCE for use in detecting crime make clear that such invasions must pass the test of strict judicial scrutiny of their justifications. Claims of RELIGIOUS LIBERTY may be added to the constitutional mix, as when a Jehovah's Witness refuses a blood transfusion, but with or without that ingredient the constitutional claim to autonomy over the body is strong.

The strength of the countervailing governmental interest in compelling vaccination would, of course, depend on the degree of danger to the public posed by unvaccinated persons. Now that smallpox is approaching worldwide eradication, the constitutional claim of a latter-day Jacobson would be far more substantial. Many doctors now recommend against smallpox vaccination, because—as Jacobson himself argued—the procedure involves a risk of contracting the disease. Given the vastly reduced public health justification for the inoculation, it is by no means clear that a compulsory smallpox vaccination law would survive constitutional challenge today. Undoubtedly, however, a state could constitutionally require vaccination for other diseases that significantly endanger public health.

KENNETH L. KARST
(1986)

Bibliography

TRIBE, LAURENCE H. 1978 *American Constitutional Law.* Pages 913–921. Mineola, N.Y.: Foundation Press.

## *VACCO v. QUILL*

See: Right to Die

# VAGRANCY LAWS

Historically, society has used vagrancy laws to punish undesirable or immoral persons considered to be dangerous because of their potential for engaging in criminal conduct. Such laws differed significantly from traditional criminal statutes in that they made it a crime to be a person of a specified status or condition. In the United States, the types of persons punished as "vagrants" have included rogues, vagabonds, habitual loafers, and others considered to be of immoral character.

The first vagrancy laws, which originated in England, required workers to live in specified locations and proscribed giving assistance to able-bodied beggars who refused to work. Late-fifteenth-century vagrancy laws provided that beggars and idle persons, after punishment, were to be banished.

Vagrancy legislation in the United States began in colonial times and closely followed the English model. In the nineteenth century, the Supreme Court in MAYOR OF NEW YORK V. MILN (1837) implicitly recognized both the objectives and necessity of such laws, stating in OBITER DICTUM: "We think it as competent and as necessary for a state to provide precautionary measures against this moral pestilence of paupers, vagabonds, and possible convicts; as it is to guard against the physical pestilence. . . ." More recently, the Court in EDWARDS V. CALIFORNIA (1941) expressly rejected this notion, observing that "[w]hatever may have been the notion then prevailing, we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a "moral pestilence.' Poverty and immorality are not synonymous."

*Edwards*, however, was a narrow decision, which struck down under the COMMERCE CLAUSE a California statute making it a misdemeanor to bring an indigent, nonresident alien into the state. Thus, notwithstanding *Edwards*, vagrancy laws continued broadly to proscribe various types of status crimes until the Supreme Court's decision in *Papachristou v. City of Jacksonville* (1972).

In *Papachristou* the Court held under the VAGUENESS DOCTRINE that a vagrancy statute was unconstitutional on its face. The ordinance, a typical example of a traditional vagrancy law, subjected the following persons to criminal penalty because the city deemed them to be "vagrants":

> Rogues and vagabonds . . . dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, [and] persons able to work but habitually living upon the earnings of their wives or minor children.

Two fundamental constitutional defects arise from the vagueness inherent in traditional vagrancy laws. Initially, the definition of "vagrant" fails to give adequate notice of what criminal conduct is proscribed. As recognized in *Connally v. General Construction Co.* (1926), when a criminal statute "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," the DUE PROCESS CLAUSE requires its invalidation under the vagueness doctrine. This doctrine was first applied to a vagrancy-type statute in *Lanzetta v. New Jersey* (1939), which held unconstitutional for vagueness a New Jersey "gangster" statute punishing any "person not engaged in any lawful occupation, known to be a member of a gang consisting of two or more persons, who has been convicted [of a crime or at least three disorderly person offenses]." *Papachristou* applied this doctrine to traditional vagrancy laws, in which the generalized and all-inclusive definitions may encompass many types of innocent behavior.

The second aspect of the vagueness doctrine, even more important than the requirement of fair notice, is that a criminal statute must set forth minimal guidelines to govern law enforcement. Absent such guidelines, a criminal statute is subject to substantial abuse by police officers, prosecutors, and jurors on the basis of their own personal predilections. Imprecise definitions, like those contained in traditional vagrancy statutes, give law enforcement officers virtually unbridled discretion to make arrests on mere suspicion rather than on PROBABLE CAUSE, and to use such arrests as a law enforcement tool to gather information and to interview persons about unrelated crimes. Moreover, as suggested in Justice HUGO L. BLACK's dissenting opinion in *Edelman v. California* (1953), they are also easily susceptible of being used against persons expressing unpopular views, as well as against the poor and minorities.

Traditional vagrancy statutes may also suffer from other constitutional defects. For example, *Robinson v. California* (1962) struck down a provision of a California vagrancy statute that made it a crime to be a "narcotics addict," on the ground that the statute violated the CRUEL AND UNUSUAL PUNISHMENT clause of the Eighth Amendment. In *Powell v. Texas* (1968), by contrast, the Court upheld a state statute that proscribed public drunkenness, even though the person so charged might suffer from chronic alcoholism. The Court noted in *Powell* that such a pro-

scription differs from convicting someone for being an addict, a chronic alcoholic, mentally ill, or a leper. Rather than punishing mere status, the proscription focuses on the specific act of appearing drunk in public on a particular occasion—conduct that the state has an interest in prohibiting.

To the extent that vagrancy laws have been used to exclude undesirables from a state or otherwise to confine them geographically, *Edwards* recognizes that they may unreasonably burden INTERSTATE COMMERCE. Moreover, such restrictions also may unconstitutionally impair the RIGHT TO TRAVEL. And provisions of vagrancy laws that prohibit association with known thieves and other undesirables not only suffer from vagueness but also may violate an individual's right of association.

In view of the Supreme Court's decisions in the area of vagrancy laws, most of the antiquated provisions of such laws—which focus on controlling undesirables by proscribing various types of status or condition—no longer can withstand constitutional scrutiny.

JAMES R. ASPERGER
(1986)

(SEE ALSO: *Kolender v. Lawson.*)

Bibliography

AMSTERDAM, ANTHONY G. 1967 Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like. *Criminal Law Bulletin* 3:205–241.

FOOTE, CALEB 1956 Vagrancy-Type Law and Its Administration. *University of Pennsylvania Law Review* 104:603–650.

LACEY, FORREST W. 1953 Vagrancy and Other Crimes of Personal Condition. *Harvard Law Review* 66:1203–1226.

## VAGUENESS

The Fifth Amendment and FOURTEENTH AMENDMENT respectively prohibit the federal and state governments from taking life, liberty, or property without DUE PROCESS OF LAW. These provisions forbid the enforcement of any law that, in the classic words of *Connally v. General Construction Co.* (1926), "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Vagueness imperils the fair administration of legal sanctions in several ways. First, it threatens punishment of people who had no fair warning of what conduct to avoid. Second, by creating interpretive latitude for those who apply the law—police, prosecutors, judges, juries, and others—vagueness permits punishment to be inflicted selectively for arbitrary or improper reasons. Third, a law's vagueness hinders the efforts of reviewing courts to control such abuses in the law's enforcement; the less clear the law is, the less visible—and correspondingly more difficult to detect and correct—are irregular instances of its administration.

To minimize these dangers, the due process requirement of reasonable clarity forbids enforcement even if the legislature constitutionally could have prohibited, through a clearer law than it did enact, all the behavior its vague law might have been intended to reach. When the uncertain coverage of a vague law might extend into areas of behavior that are constitutionally protected from regulation, however, the ordinary dangers of arbitrary enforcement are heightened, and two additional concerns emerge: the risk that a vague law, which inevitably poses an uncertain risk of prosecution, will inhibit people from exercising precious liberties that the government has no right to outlaw, and the possibility that the legislature did not explicitly focus on the liberty interest and thus did not actually decide that there was compelling reason to regulate it.

The deterrence of constitutionally guaranteed activity that vagueness may produce is akin to the deterrence produced by overbroad laws that encompass both behavior that legitimately may be regulated and behavior that is constitutionally protected. Vagueness differs from overbreadth in that the source of potential inhibition is the law's lack of clarity, not its excessive reach. Yet in both cases the ultimate threat is that those who wish to exercise constitutional rights will refrain from doing so for fear of being penalized. That vagueness may have the practical effect of overbroad regulation explains the common doctrinal confusion between the two concepts. Vagueness also differs from OVERBREADTH in another way: an uncertain law that addresses, even in its most expansive interpretation, only behavior that constitutionally may be regulated may still be void for vagueness, but, by definition, cannot be void for overbreadth.

Two questions dominate the law of vagueness: how much vagueness is tolerable before the law violates due process, and who may raise the vagueness objection. The Supreme Court appears to give different answers to each question, depending on whether or not the vagueness implicates constitutionally protected activity. Still, the constitutional issue of vagueness is always a question of degree, of how much interpretive uncertainty is tolerable before the legitimate regulatory interests of government must yield to the perils of vagueness. If the constitutional definition of vagueness is itself uncertain, the reason is that language is inherently imprecise. The public interest in regulating antisocial behavior would be sacrificed if due process mandated impossible standards of clarity before laws validly could be enforced.

The starting point for vagueness analysis is to ascertain

the nature of the standard that the law sets. This inquiry requires judges to consider not only the statutory language but also all interpretive aids that may add to the law's precision, such as accepted meanings in the relevant community (or in other areas of law) for terms contained in the statute, implementing regulations, past judicial interpretations that have clarified uncertain terms, and even judicial clarification in the very case raising the vagueness objection—if this after-the-fact clarification does not disregard the legislature's intent and if the challenger reasonably could have anticipated that the law could be construed to cover his conduct. The interpretive option often allows the Supreme Court and lower federal courts to avoid invalidating vague federal laws. When federal courts confront state laws, however, they are limited to determining whether state court clarification has cured any constitutional problems of vagueness. This difference largely explains why state laws are stricken for vagueness more often than are federal laws.

Once a law has received the benefit of all available clarification, a wide range of factors affects a court's judgment whether the law's remaining vagueness renders it unconstitutional. In a case in which the vagueness does not bear on constitutionally shielded behavior, only two vagueness objections are permitted: that the law is vague as applied to the particular behavior of the individual challenger, or that the law is INVALID ON ITS FACE for being unduly vague as applied to anyone, including the challenger, because no one who consulted it could derive fair warning of what conduct was prohibited or could determine whether the legislature meant one thing rather than another. In *Hoffman Estates v. Flipside* (1982) the Supreme Court confirmed that in deciding cases in which the latter objection is raised, greater uncertainty is constitutionally permissible when the law regulates a relatively narrow subject matter; when the law regulates economic behavior (because businesses more reasonably can be expected to consult laws in advance of acting than can individuals); when the law imposes civil rather than criminal penalties (because the consequences of noncompliance are less severe); and when the law applies only to those who intentionally or knowingly violate it (because there is less risk of unfair surprise). Historically, once the Supreme Court determined that ECONOMIC REGULATION posed no significant threat to constitutional freedoms, it became more tolerant of the imprecision in laws banning "unreasonable," "unjust," or "unfair" prices or business practices, as *United States v. National Dairy Products Corp.* (1963) illustrates. Moreover, the Court permits more uncertainty when it perceives the government's regulatory objective to be especially important—as SCREWS V. UNITED STATES (1945) demonstrated in upholding a rather vague CIVIL RIGHTS law protecting individuals—and also when it would be difficult for the legislature to delineate more precisely the penalized behavior.

The Court is especially receptive to a challenge based on vagueness when a law's uncertain coverage risks inhibiting constitutionally safeguarded freedoms. In the last half-century this receptivity has been manifested primarily in FIRST AMENDMENT cases. One indicator of the Court's increased sensitivity is the wide range of people who may now raise the vagueness objection. In cases implicating constitutionally protected activity, the Court not only entertains complaints that a law is vague as applied to the individual litigant or vague in all applications, but it sometimes permits those to whom a law clearly applies to object that it is facially invalid because it is unduly vague as to others. Despite Supreme Court rulings to the contrary both in earlier periods and in cases as recent as PARKER V. LEVY (1974) and BROADRICK V. OKLAHOMA (1973), and despite continuing voices of dissent that this practice allows one as to whom enforcement is fair to assert the hypothetical rights of others and confuses vagueness and overbreadth, the Court currently maintains, in such cases as YOUNG V. AMERICAN MINI THEATRES (1976) and KOLENDER V. LAWSON (1983), that such a person may have the whole law invalidated if the deterrent effect of its vagueness on others is real and substantial.

All of the factors that bear on the acceptable degree of vagueness in laws encompassing only unprotected conduct still apply, some more heavily, to laws that potentially reach constitutionally protected conduct. In addition, the Supreme Court seems to be concerned with other factors: how much protected freedom the vagueness might deter; how important the asserted freedom is; the judges' capacity to preserve the freedom through case-by-case application; the legislature's ability to reformulate the law in less inhibiting fashion; and the extent and importance of legitimate regulation that must be foregone if the law is voided for vagueness.

Although the Court does not always articulate these considerations, they appear to underlie many decisions. In *Baggett v. Bullitt* (1964) and *Cramp v. Board of Public Instruction* (1961), for example, the invalidation of LOYALTY OATH requirements for undue vagueness arrayed important freedoms of association against dubious government needs for assurance. More generally, when the enactment's vagueness risks suppression of unpopular expression or criticism of government, the Court's tolerance level is low. Thus in *Coates v. Cincinnati* (1971) an ordinance barring assembly of three or more persons "annoying" passers-by was held void, as was a law prohibiting "contemptuous treatment" of the American flag in *Smith v. Goguen* (1974).

On the other hand, even vagueness that inhibits valued expression is sometimes indulged if regulatory interests are perceived as powerful. Good examples are the extreme

vagueness *Parker v. Levy* permitted the military in punishing "conduct unbecoming an officer and a gentleman" and the lesser, yet undoubted, uncertainty of laws prohibiting partisan political activity by PUBLIC EMPLOYEES that the Court upheld in *Broadrick v. Oklahoma.*

Similarly divergent assessments of the acceptable level of indefiniteness in statutes defining and proscribing OBSCENITY reflect conflict within the Court over the value of sexually explicit, but constitutionally protected, materials. The judgment that deterrence of some sexually explicit adult movies was no cause for alarm led a plurality in *Young v. American Mini Theatres* to uphold a ZONING ordinance restricting the concentration of adult theaters and bookstores in downtown Detroit. A similar judgment underlies the Court's willingness to permit inevitably vague definitions of obscenity to serve as the basis for criminal punishment. By contrast, Justice WILLIAM J. BRENNAN, who is more concerned about the potentially protected sexual expression that might be lost, declared in his important dissent in *Paris Adult Theatre I v. Slaton* (1973) his firm, if belated, conviction that vagueness in defining obscenity is virtually an insuperable problem. Even he, however, did not conclude that the distribution of obscene materials must consequently remain unregulated; rather, he suggested that the protection of juveniles and the privacy of unconsenting adults might render vagueness tolerable, though protection of consenting adults and community mores and aesthetics would not.

The complexity of the vagueness doctrine stems, then, from the dual nature of the constitutional protection that it offers. Individuals are protected in any case from arbitrary enforcement without a fair opportunity to conform their conduct to legitimate law, and the social interest in maximizing constitutional freedoms is central to judgments about vagueness when the law's indefiniteness threatens to inhibit those freedoms.

JONATHAN D. VARAT
(1986)

Bibliography

AMSTERDAM, ANTHONY B. 1960 The Void-for-Vagueness Doctrine in the Supreme Court. *University of Pennsylvania Law Review* 109:67–116.

BOGEN, DAVID S. 1978 First Amendment Ancillary Doctrines. *Maryland Law Review* 37:679, 714–726.

SCHAUER, FREDERICK 1978 Fear, Risk and the First Amendment: Unravelling the "Chilling Effect." *Boston University Law Review* 58:685.

## *VALENTINE v. CHRESTENSEN*

See: Commercial Speech

## *VALLANDIGHAM, EX PARTE*
1 Wallace 243 (1864)

In 1863, soldiers arrested, tried, and found guilty Negrophobic Democratic congressman Clement L. Vallandigham (Ohio) for violating Army orders against public expressions of Confederate sympathies. After returning to this country from banishment in rebel lines, which ABRAHAM LINCOLN had ordered, Vallandigham applied to the Supreme Court for a WRIT OF CERTIORARI to annul the military proceedings. The Court, accepting JURISDICTION, decided, without dissent, that it had no jurisdiction over appeals from military courts. The likelihood of direct clashes between the Court and the COMMANDER-IN-CHIEF thus receded to revive in EX PARTE MILLIGAN (1867).

HAROLD M. HYMAN
(1986)

## *VALLEY FORGE CHRISTIAN COLLEGE v. AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE*
454 U.S. 464 (1982)

Severely limiting the precedent of FLAST V. COHEN (1968), the Supreme Court here tightened the requirements for STANDING in a TAXPAYER'S SUIT against the federal government.

Under a general power from Congress to dispose of surplus federal property, the Department of Health, Education and Welfare (HEW) transferred land and buildings worth over $500,000 to a religious college that trained students for the ministry. Because HEW calculated that the government benefited from the transfer at a rate of 100 percent, the college paid nothing.

Federal taxpayers sued to set aside the transfer, contending that it amounted to an ESTABLISHMENT OF RELIGION. The Supreme Court held, 5–4, that the taxpayers lacked standing. The majority distinguished *Flast,* which had upheld taxpayer standing to challenge federal subsidies to church schools: *Flast* challenged an act of Congress; here plaintiffs challenged a decision by HEW. Furthermore, *Flast* involved injury to the plaintiffs as taxpayers: tax money was to be spent unconstitutionally. Here the Court dealt not with Congress's spending power but with the power to dispose of property.

The dissenters emphasized what everyone knew: absent taxpayer standing, no one has standing to challenge government donations of property to churches. In such

cases the establishment clause is enforceable in the consciences of government officials, but not in court.

KENNETH L. KARST
(1986)

## VALUE PLURALISM AND THE CONSTITUTION

Value pluralism is the idea that legitimate human values and goals are many, often incompatible, and not reducible to any single overarching principle or conception of the good. Individuals, and certainly societies, have aspirations that conflict and therefore cannot all be fully realized. A society cannot have perfect human equality and perfect liberty, for example, because people will often exercise freedom to differentiate themselves, and hence to make themselves unequal to their fellows. Equality or freedom may be at odds with other values as well, like tradition, or the desire for social unity, or for social tolerance; good government may be at odds with self-government; secularism with the desire for shared faith; and so forth. Value pluralism implies the need for compromise and conciliation, and an open MARKETPLACE OF IDEAS—many of which may be good, although conflicting. Value pluralism is a theme closely identified with the thought of Sir Isaiah Berlin, the English philosopher and historian of ideas. As Berlin pointed out, pluralism itself is at odds with the dream of philosophical harmony: the quest for a unified system of true values, and for consistent right answers about how we should live. Many systems of belief in human history have held out this hope of ultimate unity—Platonist, religious, rationalist, or Marxist. Such "monism" can smack of tyranny, however. The idea that any one ideal or system of values represents all that is good may imply enforcing the ideal "by whatever means necessary."

Value pluralism, on the other hand, is associated with LIBERALISM, for a defining element of liberalism is respect for human autonomy—freedom for people to make their own choices about what is good and worthy in life. (Free people inevitably make various and conflicting choices. This does not trouble the pluralist who sees the possibility of good in many of these choices. It is the believer in a single ideal who may be more troubled by people making "wrong" choices.) As an outlook, therefore, value pluralism is congenial to the U.S. Constitution, since the Constitution is a liberal charter.

FREEDOM OF SPEECH, for example, has obvious overtones of value pluralism: among conflicting ideas, many may be good. So likewise for RELIGIOUS LIBERTY. The detailed plan for elective office-holding, which occupies a large chunk of the Constitution, also implies value pluralism. Free elections mean that officials and parties with conflicting ideals will tend to alternate with each other. This might seem perverse to a believer in a single ideal or in a unified system of values who would question why falsehood and wrong should be allowed to alternate with truth and goodness. But popular elections make more sense if there might be good in many of the conflicting ideals, from Federalist to Whig, and Democratic to Republican.

Value pluralism has equivocal implications for JUDICIAL REVIEW, one of the most distinctive features of American constitutionalism. The courts' power to strike down the acts of other branches of government can sometimes promote plurality of values in American life. Judicial review of censorship, or of restrictions on religious freedom, for example, can protect pluralism of thought or of religion at times when there might be strong majority pressures for uniformity. By striking down acts of Congress as going beyond federal power under the Constitution's FEDERALISM provisions, judicial review can also be a counterweight against the tendency of the national government to impose national uniformity. The courts can ensure that state or local governments are free to adopt various values and policies, instead of a single policy or ideal that is enforced nationwide.

But on the whole, the implications of value pluralism are in the direction of judicial restraint. Judicial review tends to impose a single standard, and to preempt the coexistence of competing interpretations of the Constitution in different parts of the country and at different times. This is because courts are hierarchical. Appellate review, supervised ultimately by the Supreme Court, means that only one judicial interpretation can prevail, at least in principle, at any given time. Deference to PRECEDENT and STARE DECISIS tends to preserve such sole, exclusive interpretations even over time. Nonjudicial branches of government, by contrast, are more pluralist. There are more of them—federal and state—and they are more independent of one another. A policy decision (or an interpretation of the Constitution) by any of them is more easily changed or OVERRULED than are the constitutional doctrines of the courts.

The perennial debate in America about the courts and the Constitution is not whether there should be judicial review, but how aggressive it should be and how broadly public issues should be treated as questions of constitutional law. To what extent (if at all) should ABORTION be a constitutional question? What about routine police procedure and public aid to private (including parochial) schools or their students? What about CAMPAIGN FINANCE or laws that treat the sexes differently? Value pluralism weighs against JUDICIAL ACTIVISM, at least during times when there is little realistic threat that social pressures

would impose their own uniformity across the country in the absence of judicial intervention. With somewhat less constitutional law, there would be more scope for a plurality of policies, ideals, and values—many of which might conflict, but nonetheless (at least some of them) be good.

MAIMON SCHWARZSCHILD
(2000)

(SEE ALSO: *Nonjudicial Interpretation of the Constitution.*)

Bibliography

BERLIN, ISAIAH 1997 *The Proper Study of Mankind: An Anthology of Essays.* Henry Hardy and Roger Hausheer, eds. London: Chatto & Windus.

GRAY, JOHN 1996 Isaiah Berlin. Princeton, N.J.: Princeton University Press.

IGNATIEFF, MICHAEL 1998 Isaiah Berlin: A Life. New York: Metropolitan Books.

SCHWARZSCHILD, MAIMON 1988 Value Pluralism and the Constitution: In Defense of the State Action Doctrine. *Supreme Court Review* 1988:129–161.

——— 1996 Pluralist Interpretation: From Religion to the First Amendment. *Journal of Contemporary Legal Issues* 7: 447–472.

## VAN BUREN, MARTIN
## (1782–1862)

Martin Van Buren of Kinderhook, New York, was admitted to the bar in 1803 and quickly established himself as a successful lawyer and politician. While serving in the New York legislature, Van Buren and a group of close associates known as the Albany Regency constituted the first political machine with a modern cast in the nation. As such the Regency gave a new direction to American politics.

But Van Buren did not consider the political process an end in itself; he saw in it a mode for achieving his notion of a Jeffersonian republic, in which a judicious division of power and responsibility between the central government and the states turned on a STRICT CONSTRUCTION of the Constitution. Opposition was expressed in BROAD CONSTRUCTION, along Hamiltonian lines. Between these two positions, the one emphasizing state power, the other national, the very essence of SOVEREIGNTY would be in constant conflict over public questions, a conflict he thought essential to the democratic governance of the states and the nation. He carried his ideas of an adversarial party system to Washington when elected a United States senator in 1821, and over the two terms he served, developed, and promoted them. Van Buren bound together into a cohesive program the personal factions that constituted his party. As he had planned, his partisan coalition gave impetus to a specific political opposition. Thus, he played a significant role in the formation of the current two-party system.

Van Buren articulated a historical view of strict construction. He was a frequent critic of the centralizing doctrines of the MARSHALL COURT and supported measures to curb JUDICIAL REVIEW. He drafted ANDREW JACKSON's veto of the MAYSVILLE ROAD BILL, the first comprehensive treatment of the responsibility of the central government to fund INTERNAL IMPROVEMENTS in the various states. Van Buren distinguished projects that were clearly intrastate from those that were interstate in character. In withholding the support of the national government for the economic development of the individual states, he relied partly on JAMES MONROE's veto of the Cumberland Road Bill, but he took care to assert that many projects purely local in character and initiated by a state might deserve support under constitutional provisions that provided for the common defense and the GENERAL WELFARE. His distinction depended upon many variables which could change with time and with circumstance.

Van Buren's second expression of what might be properly called the New Jeffersonianism was in the financial policy he pursued as President (1837–1841): the subtreasury system, which looked to the separation of the federal government from the state deposit banks. The federal government held most of the nation's specie currency, the basis of the paper money supply; thus it would act as a restraint on state banks, curbing their tendencies to speculation and ensuring a more equitable distribution of credit. His means may have been orthodox and deflationary, but they acted as a restriction upon state power, contrary to THOMAS JEFFERSON's ideas on government.

Van Buren's stand on the powers of Congress over the TERRITORIES, however, was a restatement of Jeffersonian views expressed in the NORTHWEST ORDINANCE of 1787. Van Buren added his own interpretation of Article IV, section 3, of the Constitution, which delegates to the Congress the power "to make needful rules and regulations respecting the territory or other property of the United States." In doing so he went further than JOHN MARSHALL and agreed with JOSEPH STORY who asserted that the power was exclusive and that "rules and regulations" covered all possible contingencies. Van Buren had supported the MISSOURI COMPROMISE as a proper exercise of congressional power even though, as a matter of precedent, he thought the Ordinance of 1787 excluded slavery from all territories. In the United States SENATE he voted against the bill organizing a territorial government for Florida because it sustained slavery. The most complete exposition of his stand on the territorial question of the late 1840s and 1850s is expressed in an address he prepared for the New

York Democratic legislative caucus. It was the basis for the platform of the Free Soil party in the campaign of 1848 and the spirit and the substance of the Republican party platform in the campaigns of 1856 and 1860.

W. JOHN NIVEN
(1986)

Bibliography

NIVEN, W. JOHN 1983 *Martin Van Buren and the Romantic Age of American Politics.* New York: Oxford University Press.

## VAN DEVANTER, WILLIS
(1859–1941)

Colleagues and contemporary observers agreed that Willis Van Devanter was enormously influential during his twenty-six years on the Supreme Court. Chief Justice WILLIAM HOWARD TAFT, who as President appointed him in 1911, described his Wyoming associate as "my mainstay," "the most valuable man in our court," and the Justice who had "more influence" than any other. Justice LOUIS D. BRANDEIS, Van Devanter's ideological antipode, praised him as a "master of formulas that decided cases without creating precedents." Harvard's Professor FELIX FRANKFURTER aptly dubbed him Taft's "Lord Chancellor."

Van Devanter's backstage prominence contrasted vividly with his well-known "pen paralysis." He rarely spoke for the Court in major constitutional cases. During his tenure, Van Devanter averaged only fourteen written opinions each year; during the 1930s he averaged only three a year.

Van Devanter came to the Court after a career in Wyoming law and politics, followed by five years in the Interior Department. President THEODORE ROOSEVELT appointed him to the Eighth Circuit Court of Appeals in 1903; eight years later, President Taft elevated him to the Supreme Court. Taft, himself a former circuit judge, prized judicial experience as a criterion for appointment to the Supreme Court.

Although Van Devanter was one of the conservative "Four Horsemen" of the NEW DEAL era, two of his earlier opinions aligned him with the "liberal nationalistic" wing of the Court. In the second of the EMPLOYERS' LIABILITY CASES (1913) he upheld a federal statute holding railroads liable for injuries suffered by workers engaged in INTERSTATE COMMERCE. He boldly generalized about the sweep of the COMMERCE CLAUSE, describing the commerce power as "complete in itself," but he added that it did not extend to matters that had no "real or substantial relation to some part of such commerce." The previous year, in *Southern Railway Co. v. United States* (1911), he had written for the Court to sustain federal railroad safety legislation in a case involving an intrastate railroad which carried goods that had passed through interstate commerce. Again, Van Devanter found the commerce power plenary and operative if an intrastate matter affected interstate commerce. The decision anticipated Justice CHARLES EVANS HUGHES's consideration of intrastate effects on the commerce power in the *Shreveport Case* (*Houston, East and West Texas Railroad Company v. United States*, 1914), an opinion Van Devanter supported; yet, in the 1930s he consistently rejected similar arguments to expand the scope of federal ECONOMIC REGULATION.

Van Devanter's most important and enduring contribution to constitutional law came with his opinion broadly approving Congress's investigative powers. In *McGrain v. Daugherty* (1927) the plaintiffs had challenged a Senate committee's investigation of Harding administration scandals. Van Devanter recognized that historically "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function"; that the power might be abused, he added, was no argument against its existence.

Van Devanter usually supported governmental repression of political dissent in the WORLD WAR I era. In the early 1930s, however, he deviated from his ideological allies as he joined the majority in invalidating a section of California's criminal anarchy law in STROMBERG V. CALIFORNIA (1931). He also supported Justice GEORGE H. SUTHERLAND's pathbreaking opinion on Sixth Amendment rights in POWELL V. ALABAMA (1932). But a few years later, when the Court reverted to the CLEAR AND PRESENT DANGER doctrine for FIRST AMENDMENT cases, Van Devanter led the "Four Horsemen" in dissent. In HERNDON V. LOWRY (1937), which involved a black communist who had been convicted under Georgia state law, Van Devanter thought that Herndon's appeal to blacks was especially dangerous; Van Devanter's dissent reflected the suppressive BAD TENDENCY TEST and racist rhetoric, as well.

During the constitutional struggles over the New Deal, Van Devanter opposed the administration in every case except ASHWANDER V. TENNESSEE VALLEY AUTHORITY (1936). Even when his conservative colleagues resurrected the restrictive doctrines of UNITED STATES V. E. C. KNIGHT COMPANY (1895), a decision which he had circumvented in some of his early opinions, Van Devanter steadfastly opposed the expansion of national regulatory power. But he never spoke for that viewpoint, either in the majority or in dissent. Fittingly, however, he played a key role in what may have been FRANKLIN D. ROOSEVELT' s most significant political defeat. During the consideration of Roosevelt's court-packing proposal in April 1937, Van Devanter announced his intention to take advantage of a new law allowing Justices to retire at full pay. The impending vacancy offered promise of a shift in the Court's ideologi-

cal stance, and made the President's plan unnecessary for many administrative supporters. After his retirement from the Supreme Court, Van Devanter apparently was the first retired Justice who served regularly as a reserve judge.

STANLEY I. KUTLER
(1986)

Bibliography

PASCHAL, JOEL F. 1951 *Mr. Justice Sutherland: A Man Against the State.* Princeton, N.J.: Princeton University Press.

PRINGLE, HENRY F. 1939 *The Life and Times of William Howard Taft.* New York: Farrar & Rinehart.

## *VAN HORNE'S LESSEE v. DORRANCE*
2 Dallas 304 (1795)

*Van Horne's Lessee*, a circuit court case in the District of Pennsylvania, is memorable because of Justice WILLIAM PATERSON's charge to the jury, instructing them that a state act unconstitutionally violated property rights. His opinion can be read as a roadmap of the direction that constitutional law would take as a law of judicially implied limitations on legislation adversely affecting property rights. In lucid nonlegal language, Paterson spelled out judicial presuppositions and constitutional principles that were to become orthodox for well over a century. In discussing "What is a Constitution?" and analyzing the legislature's authority to pass its act divesting land titles, Paterson joined together the doctrines of JUDICIAL REVIEW and VESTED RIGHTS. Prefiguring FLETCHER V. PECK (1810) as well as the basic principle of MARBURY V. MADISON (1803), Paterson invoked the HIGHER LAW concept and the CONTRACT CLAUSE against the statute.

Having declared that "it will be the duty of the Court to adhere to the constitution, and to declare the act null and void" if it exceeds the legislature's authority, Paterson discoursed on the relationship between FUNDAMENTAL LAW and the rights of property. He found such rights inalienable, their preservation a primary object of "the social compact." Property, when vested, must be secure. For the government to take property without providing a recompense in value would be "an outrage," a "dangerous" display of unlimited authority, "a monster in legislation" that would "shock all mankind." To divest a citizen of his freehold even with compensation was a necessary "despotic" power to be exercised only in "cases of the first necessity." The reason was that the Constitution "encircles, and renders [a vested right] an holy thing. . . . It is a right not *ex gratia* from the legislature, but *ex debito* from the constitution. It is sacred. . . ."

Paterson informed the jury that courts must hold unconstitutional legislative encroachments on sacred property rights even in the absence of a written constitutional limitation on legislative powers. He relied on "reason, justice, and moral recitude," "the principles of social alliance in every free government," and the "letter and spirit of the constitution." The letter, in this instance, turned out to be the clause in Article I, section 10, of the Constitution, prohibiting a state law impairing the OBLIGATION OF A CONTRACT. Paterson assumed that the contract clause extended to contracts to which the state was a party; that a previous state act recognizing a property interest of the original claimant was a contract within the protection of the contract clause; and that the divestiture of the titles, even with compensation, violated the clause. Paterson's charge was a textbook exposition of CONSTITUTIONALISM, higher law limitations, judicial review, courts as bulwarks of property rights, and the contract clause.

LEONARD W. LEVY
(1986)

## VATTEL, EMERICH DE
(1714–1767)

Emerich de Vattel, the Swiss-born statesman and theorist of LIMITED GOVERNMENT, wrote his *Law of Nations* (1758) as an attempt to explain international law on the basis of NATURAL RIGHTS. He argued that men compacted to form sovereign states, and the state ordained a CONSTITUTION superior to any prince or legislature. Vattel reasoned that because the "legislature derives its power from the constitution, it cannot overleap the bounds of it without destroying its own foundation"—and this maxim was frequently cited by American revolutionary leaders including JAMES OTIS and SAMUEL ADAMS. Even more important for American constitutional thought was his assertion, often quoted by JAMES MADISON, that states joining a federal union retained their SOVEREIGNTY but were nevertheless bound by the terms of the union.

DENNIS J. MAHONEY
(1986)

## *VEAZIE BANK v. FENNO*
8 Wallace 533 (1869)

During the CIVIL WAR, Congress introduced national bank notes, secured by United States bonds, as one form of currency. Congress then decided to make its money supreme by driving out of circulation bank notes issued by state banks, and to that end it imposed a prohibitory ten percent tax on those notes. Veazie Bank objected on the grounds that the tax was not levied for revenue purposes

but to drive state notes out of existence by the device of a DIRECT TAX, which must be apportioned among the states on the basis of population. Chief Justice SALMON P. CHASE, for a seven-member majority, upheld the constitutionality of the congressional tax statute. Chase declared that only taxes on land and CAPITATION TAXES were direct taxes. He found the constitutional authority for the statute in Congress's power to control the currency of the nation and for that purpose to restrain "the circulation as money of any notes not issued under its own authority." Without such a restraining power the attempt by Congress to secure a "sound and uniform currency for the country must be futile."

LEONARD W. LEVY
(1986)

## VENUE

"Venue" refers to the location of a trial. Article III of the Constitution specifies that federal crimes be tried "in the State where the said Crimes shall have been committed." This provision is reinforced by the SIXTH AMENDMENT's guarantee of TRIAL BY JURY "of the State and district wherein the crime shall have been committed." Although the INCORPORATION DOCTRINE has made the Sixth Amendment's jury trial guarantee applicable to the states, the Supreme Court has not yet had occasion to decide whether that amendment's venue provision also limits the states. However, state law itself usually provides for trial in the locality where the crime is alleged to have been committed.

Both the FEDERAL RULES OF CRIMINAL PROCEDURE and a number of state laws contemplate a change of venue when trial in the district otherwise appropriate risks prejudicing the fairness of a criminal trial. The availability of a change of venue has been offered by the Supreme Court as one argument against GAG ORDERS forbidding the press to publish information about pending prosecutions. (See FREE PRESS/FAIR TRIAL.)

Some crimes are committed in more than one place: interstate transportation of a stolen automobile, for example, or certain criminal conspiracies. The Supreme Court has upheld congressional legislation allowing prosecution in any of the districts in which such a crime is committed.

Venue in civil actions is not limited by the Constitution. By statute, Congress has established an elaborate set of rules governing venue in federal civil cases. Because these rules are designed for the parties' convenience, the right to assert them can be waived. Thus a defendant in a federal court civil action must raise the objection of improper venue before trial, at the pleadings stage of the case.

KENNETH L. KARST
(1986)

Bibliography

WRIGHT, CHARLES ALAN 1983 *The Law of Federal Courts*, 4th ed. Chap. 7. St. Paul, Minn.: West Publishing Co.

## VERMONT CONSTITUTION OF 1777
(July 8, 1777)

In significant respects Vermont's early constitutional history was unique. It was never a colony, had no charter, and was not recognized as a separate government or state by the original thirteen, although it fully supported the American cause during the Revolution. Vermonters declared their independence not only from Great Britain but also from New York. A "convention" adopted a CONSTITUTION, prefaced by a declaration of rights, that was modeled after the extremely democratic PENNSYLVANIA CONSTITUTION OF 1776, but Vermont added three notable provisions. Its constitution was the first to outlaw slavery, the first to allow all male residents over twenty-one to vote even if they owned no property and paid no taxes, and the first to include a provision for JUST COMPENSATION in cases of EMINENT DOMAIN. Vermont joined the union as the fourteenth state in 1791.

LEONARD W. LEVY
(1986)

## VESTED RIGHTS

"Vested rights" are claims enforceable under law. Early in the history of the Republic, an assertive concept of vested rights became the core of a highly refined legal and constitutional doctrine that was invoked as a shield for private property against regulation by government. In EDWARD S. CORWIN's phrase, this became "the basic doctrine of American constitutional law."

An early expression of the doctrine was Justice WILLIAM PATERSON'S opinion in VAN HORNE'S LESSEE V. DORRANCE (1795), stating that preservation of private property is "a primary object of the SOCIAL COMPACT," so that any law taking one person's freehold and vesting it in another without compensation must be seen as "inconsistent with the principles of reason, justice and moral rectitude . . . [and] contrary to the principle of social alliance in every free government." In expounding this doctrine, judges and treatise writers cited general principles of justice from

natural law, civil law, and COMMON LAW. In pre-1860 contract and property law, the doctrine served in tandem with the CONTRACT CLAUSE and was regularly invoked by those opposing the expansion of state interventions under the taxation, EMINENT DOMAIN, and POLICE POWERS.

There is a difference between "vested interests" and "vested rights." The former are claims and expectations based on private contractual relationships and upon a property owner's understanding of the privileges, immunities, and responsibilities associated by law with the property in question. Interests become "rights" when courts agree to enforce such contractual relationships and understandings concerning property. This difference was recognized by Justice ROBERT H. JACKSON, in his opinion in *United States v. Willow Run Power Company* (1945), declaring: "Not all economic interests are "property rights'; only those economic advantages are "rights' which have the law back of them. . . ." A claim to a right (or "advantage"), Jackson stated, "is really a question to be answered" in judicial proceedings and decisions; it is not something to be taken a priori, even when ancient maxims and rules can be adduced in favor of the claim.

Justice Jackson's robust LEGAL REALISM was not the view that prevailed in legal and constitutional discourse during the nineteenth century. On occasion, individual judges or courts did defend legislative prerogatives against claims of vested rights in terms that foreshadowed Jackson's formulation. For example, a New York judge in 1835 denounced vested rights as an "indefinite" term that was "resorted to when no better argument exists." Any governmental action, he contended, imposed "burthens and duties" that redefined rights. Much more commonly found, however, were views founded on the notion that it was "manifest injustice by positive law" when legislation took away what Justice SAMUEL CHASE described in CALDER V. BULL (1798) as "that security for personal liberty, or private property, for the protection whereof the government was established."

State judges regularly invoked the vested rights doctrine, often explicitly merged with DUE PROCESS declarations, to review and sometimes invalidate legislation. Many judges applied natural-law principles associated with the Fifth Amendment, contending that they were a check upon the abuse of legislative power no less important than explicit state constitutional provisions or than the contract clause. Much relied upon, in such decisions, was Justice JOSEPH STORY's opinion in *Wilkinson v. Leland* (1829), contending that "the fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred."

During JOHN MARSHALL's tenure as Chief Justice, the court introduced "vested rights" doctrine into contract clause rulings, as in Marshall's opinions in FLETCHER V. PECK (1810) and DARTMOUTH COLLEGE V. WOODWARD (1819). When conservative, property-minded state and federal judges applied Marshall's doctrines in broad terms in the 1830s and 1840s, the debate over vested rights began to center on whether or not corporate privileges, broadly construed, should be given the same protection as property held by individuals and quasi-public institutions. To conservatives such as DANIEL WEBSTER and Justice Story, a corporation's privileges and property rights under a franchise were merely a variant of an individual's rights in fee simple to a house or a tract of farmland. Webster, for example, viewed the action of Massachusetts in CHARLES RIVER BRIDGE COMPANY V. WARREN BRIDGE COMPANY (1837) as part of a "revolution against the foundations on which property rests." He raised the alarm again in his argument in WEST RIVER BRIDGE V. DIX (1848), denouncing broad use of the power of eminent domain as a dangerous kind of agrarian radicalism. There was a pragmatic side, as well, to the arguments of conservatives; both Story and Webster warned on many occasions that to allow legislatures unrestrained use of the police power or eminent domain, in derogation of vested property rights whether personal or corporate, would risk bringing all new investment (and material progress) to a halt.

Beginning with the decision in the *Charles River Bridge* case, the antebellum Supreme Court softened its stand on vested rights; state judges, however, kept the doctrine before the bar and the public. The high-sounding rhetoric of vested rights doctrine can easily obscure one of the important facts of the pre-Civil War period—the irony that in practice the antebellum state courts, as James Willard Hurst has shown, "tended to uphold vested rights only so long as they were felt to yield substantial or present returns in social function." Seldom did the courts support claims of vested rights that were invoked to protect "static" economic interests, attempting to block technological innovation or new forms of investment. Judges favored instead claims of "dynamic" rights that could be seen as forces for change and growth.

The adoption of the FOURTEENTH AMENDMENT opened the way to revival of vested rights doctrine in federal constitutional law. If anything, "vested rights" were now championed in enlarged forms. Leading conservative lawyers such as WILLIAM M. EVARTS, former Justice JOHN A. CAMPBELL, and John N. Jewett seized on the Fourteenth Amendment to forge the new, broader doctrine. Citing the concept of property as an "established expectation," they denied that government could deprive property owners of any expectation unless it paid compensation. They expanded the notion of property to include the right to engage in occupations; and they contended broadly that the

rights of ownership included the right to compete freely in the quest for profits. Taking up arguments presented earlier by Campbell, Justice STEPHEN J. FIELD even attempted in his dissenting opinion in the SLAUGHTERHOUSE CASES (1873) to fuse the Fourteenth Amendment with the DECLARATION OF INDEPENDENCE—and thereby to throw the mantle of vested rights over economic interests and activities that he viewed as embraced by the phrase "pursuit of happiness." As he believed, such rights were beyond the legitimate reach of state regulation. Some conservative jurists and lawyers also found in the amendment's PRIVILEGES AND IMMUNITIES clause another prop for vested rights doctrine.

The newly expanded version of vested rights soon found its way into constitutional law, as Justice Field's views came to prevail with those of his colleagues. The traditional rhetoric of vested rights was harnessed to the FREEDOM OF CONTRACT doctrine, which became standard fare in the Court's decisions concerning the validity of laws regulating labor and business practices. In giving content to the doctrine of SUBSTANTIVE DUE PROCESS in the field of economic and social regulation, the Supreme Court marked out a meandering, uncertain, often absurd boundary between what it found to be legitimate police power and the "sacred" rights of property. The view, as Laurence Tribe has phrased it, "that certain settled expectations of a focused and crystallized sort should be secure against governmental disruption, at least without appropriate compensation" became a powerful weapon in the hands of the new industrial corporate interests—and at the same time became the center of political storms in the Populist and Progressive eras. Only with abandonment of economic due process in the late 1930s, together with the ascendancy of views such as Justice Jackson's harshly realist version of vested rights, did the concept recede in importance in constitutional law and in political strife.

In HOME BUILDING & LOAN ASSOCIATION V. BLAISDELL (1934), the Court gave notice that it was ready to uphold even so dramatic a state abridgment of private rights as a mortgage moratorium law. The Court would not, the majority declared, "throttle the capacity of the States to protect their fundamental interests." The common good, or the public interest, must also be honored in any system allocating constitutional powers and immunities. Thus the career of vested rights in the Webster-Story-Field tradition clearly had run its course. Nor for more than thirty years did debates in legislatures and courts return to the concerns of the conservative era; and even then the notion of "settled expectations" and related vested rights ideas were exhumed for application only in a fairly narrow context, relating to land use regulation and INVERSE CONDEMNATION. To that degree, at least, echoes of a doctrine rooted in natural law do continue to be heard in our own day.

HARRY N. SCHEIBER
(1986)

Bibliography

CORWIN, EDWARD S. 1914 The Basic Doctrine of American Constitutional Law. *Michigan Law Review* 12:247–276.

HURST, JAMES WILLARD 1956 *Law and the Conditions of Freedom in the Nineteenth Century United States.* Madison: University of Wisconsin Press.

MCCLELLAN, JAMES 1971 *Joseph Story and the American Constitution.* Norman: University of Oklahoma Press.

MCCURDY, CHARLES W. 1975 Justice Field and the Jurisprudence of Government-Business Relations. *Journal of American History* 61:970–1005.

TWISS, BENJAMIN R. 1942 *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court.* Princeton, N.J.: Princeton University Press.

## VETO POWER

After rejecting an absolute veto for the President, the delegates at the CONSTITUTIONAL CONVENTION OF 1787 granted the President a qualified power to veto congressional legislation, subject to an override by a two-thirds majority of each house of Congress. Some anti-Federalists objected to the veto as an encroachment upon the legislative power in violation of the SEPARATION OF POWERS doctrine, but ALEXANDER HAMILTON answered in THE FEDERALIST #73 that the President needed a veto to protect the executive branch from "depredations" by the legislature. The veto was also designed to be used against bills that were constitutionally defective, poorly drafted, or injurious to the community.

The Constitution provides that any bill not returned by the President "within ten Days (Sundays excepted)" shall become law "unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law." The latter procedure, known as the POCKET VETO, was first used by President JAMES MADISON in 1812. In the POCKET VETO CASE of 1929, the Supreme Court decided that "adjournment" did not refer merely to final adjournment at the end of a Congress. The pocket veto could be used during any adjournment, final or interim, that "prevented" a bill's return to Congress. However, in *Wright v. United States* (1938) the Court considered a three-day recess by the Senate too short a period to constitute adjournment.

Further clarification of the pocket veto resulted from an action by President RICHARD M. NIXON. In 1970, during an adjournment of Congress for less than a week, he pocket-vetoed the Family Practice of Medicine Bill. An appellate court, in *Kennedy v. Sampson* (1974), held that

an *intra*session adjournment of Congress does not prevent the President from returning a bill so long as Congress makes appropriate arrangements to receive presidential messages. The GERALD R. FORD and JIMMY CARTER administrations renounced pocket vetoes during *inter*session adjournments as well. This political accommodation restricted the pocket veto to the final adjournment at the end of the second session. President RONALD W. REAGAN, however, has used the pocket veto between the first and second sessions, provoking renewed litigation.

Other court decisions have clarified the boundaries of the veto power. In 1919, in *Missouri Pacific Railway Co. v. Kansas*, the Supreme Court announced that the Constitution required only two-thirds of a quorum in each House to override a veto, not two-thirds of the total membership. In 1899 the Court decided, in *La Abra Silver Mining Co. v. United States*, that the President could sign a bill after Congress recessed, and in *Edwards v. United States* (1932) the Court ruled that he could sign a bill after a final adjournment of Congress.

Statistics underscore the effectiveness of the President's veto. Of the 1,380 regular (return) vetoes from GEORGE WASHINGTON through Jimmy Carter, Congress overrode only ninety-four. There have also been 1,011 pocket vetoes, more than half of them directed by GROVER CLEVELAND and FRANKLIN D. ROOSEVELT against private relief bills.

Most of the governors of the states have been granted authority to veto individual items of a bill (the "item veto"). Congress has thus far resisted giving this power to the President, despite popular belief that such a power would increase "economy and efficiency" by combating "logrolling" and "pork-barrel" politics in Congress. Prominent among the arguments against the item veto is the danger that Presidents could use the authority to control the votes of individual members of Congress. A project in a member's district or state could be held hostage until he or she agreed to support a nominee or legislative proposal backed by the White House.

An informal type of item veto has evolved because Presidents selectively enforce the law. In signing a bill, Presidents have announced that they would refuse to carry out certain provisions which they considered unconstitutional or undesirable. The IMPOUNDMENT of funds has been a common example, but Presidents have also severed from authorization bills a number of sections they considered a "nullity," without binding force or effect.

LOUIS FISHER
(1986)

Bibliography

FISHER, LOUIS 1985 *Constitutional Conflicts between Congress and the President*. Princeton, N.J.: Princeton University Press.

JACKSON, CARLTON 1967 *Presidential Vetoes, 1792–1945*. Athens: University of Georgia Press.

MASON, EDWARD CAMPBELL 1890 *The Veto Power*. New York: Russell & Russell.

# VICE-PRESIDENCY

The American vice-presidency has historically occupied an ambiguous position. Although protocol ranks it the nation's second office, the duties assigned it have not been commensurate with that status. Pundits have frequently ridiculed the office and reformers have generously proposed modifying it. Yet for an institution that has engendered so much criticism the vice-presidency has undergone remarkably little constitutional change.

The office was conceived in the final days of the CONSTITUTIONAL CONVENTION OF 1787 for reasons that remain obscure. Some delegates suggested the need for an officer to preside over the SENATE and resolve tie votes. Others viewed the vice-presidency as a way to handle unexpected presidential vacancies. Finally, some saw the office as an expedient to ensure the election of a national President. They feared that presidential electors would invariably support their own state's favorite son, thereby frustrating efforts to select a chief executive. By creating a second office and by giving electors a second vote subject to the proviso that one of the votes must go to a person from a state other than the elector's these constitutional architects believed they would overcome provincial tendencies and provide the new nation with a consensus leader. The candidate with the most votes (provided that they constituted a majority) would be President, the runner-up Vice-President.

The system provided not only a national President but also vice-presidents of rare ability—JOHN ADAMS, THOMAS JEFFERSON, and AARON BURR. In 1800, however, the electoral votes for Jefferson and Burr deadlocked, although the Republican party had clearly intended Jefferson to be President. The constitutional crisis required thirty-six ballots of the House of Representatives before Jefferson prevailed. The initial system accordingly fell into disfavor, and in 1804 the states ratified the TWELFTH AMENDMENT which provided for separate election of President and Vice-President. Many legislators feared that the vice-presidency would attract only inferior candidates and accordingly proposed its abolition.

Although the office survived, the high caliber of its occupants did not. Most Vice-Presidents during the remainder of the nineteenth century were nonentities who brought few credentials to the office, did little while in it, and disappeared from public attention once their term ended. Presidents had little influence on the selection of their running mates. Party leaders typically chose the sec-

ond candidate from a different wing of the party in order to balance the ticket. Presidents and Vice-Presidents frequently feuded over policy and personal differences. The Vice-President presided over the Senate, but did little else. As WOODROW WILSON wrote, "The chief embarrassment in discussing his office is, that in explaining how little there is to be said about it one has evidently said all there is to say."

The nineteenth century did, however, provide four occasions for Vice-Presidents to succeed to the presidency on the death of the incumbent. JOHN TYLER, MILLARD FILLMORE, ANDREW JOHNSON, and CHESTER A. ARTHUR all became President when their predecessors died in office. None, however, won a term of his own.

The ambiguous constitutional status of the office was one source of its problem. The office was a hybrid between the legislative and executive branches; its occupant was selected with the President, and yet his only constitutional duty resided in the legislative branch. Neither the Senate not the President was disposed to give great power to an officer which neither had selected and neither could remove. Some Presidents have viewed the vice-presidency as a legislative office and argued that the principle of SEPARATION OF POWERS precludes delegation of duties. Some Vice-Presidents have advanced this reasoning (or rationalization) to resist executive assignments. Moreover, since the presidency itself was relatively inactive for much of the nineteenth century, the President typically had little need to delegate duties to a Vice-President, especially one not politically or personally compatible.

During the twentieth century, the vice-presidency achieved greater importance. The rise in status of the office occurred primarily because of political change rather than constitutional reform. The presidency became the main beneficiary of increased activity of the federal government, especially from the New Deal onward. The President became the distributor of increased patronage, and therefore other political actors responded more willingly to his influence. Accordingly, presidential candidates, rather than party leaders, began to assume a larger role in selecting the running mate. Presidents thus had a chance to select compatible Vice-Presidents and an incentive to provide them with some assignments. Moreover, increased demands on the presidency provided opportunities for vice-presidential activity. Presidents have tended to use their Vice-Presidents as foreign envoys, commission chairmen, party leaders, public spokesmen, legislative liaison, and advisers. Ratification in 1967 of the TWENTY-FIFTH AMENDMENT, which in part provided a means for filling unexpected vice-presidential vacancies, recognized the new significance of the office. With a few notable exceptions, twentieth-century Vice-Presidents have been men of some accomplishment. Many have been presidential candidates prior to accepting the second position: virtually all subsequently were considered for their party's presidential nomination or received it. Since 1900, five Vice-Presidents—THEODORE ROOSEVELT, CALVIN COOLIDGE, HARRY S. TRUMAN, LYNDON B. JOHNSON, and GERALD FORD—have succeeded to the presidency upon death or resignation of the incumbent. Each one except Ford subsequently won his own term—and Ford lost but narrowly. Presidents JIMMY CARTER and RONALD REAGAN have done much to enhance the office by granting Vice-Presidents Walter F. Mondale and GEORGE BUSH, respectively, broad access to, and influence in, decision making.

The vice-presidency's enlarged significance this century has not silenced its critics. Some prominent students of American government recommend abolishing the office: they would generally handle an unexpected presidential vacancy by designating an interim President and holding special elections. Others would retain the vice-presidency but would attempt to augment its powers either by requiring that the Vice-President hold a leading cabinet position or have a vote or significant powers in the Senate. Finally, a third group of reformers seeks to change the process of nominating or electing Vice-Presidents. Proposals range from having presidential and vice-presidential candidates run together during primaries to holding separate elections for President and Vice-President. Although these proposals stimulate interesting debates, the prospects of significant formal changes in the vice-presidency are slim. Constitutional change rarely, if ever, comes easily. Proposed reforms of the vice-presidency would tend to create as many problems as they would solve. Growth in the office will probably depend largely on further changes in American politics and on the relation between future Presidents and Vice-Presidents.

JOEL K. GOLDSMITH
(1986)

Bibliography

FEERICK, JOHN 1965 *From Failing Hands.* New York: Fordham University Press.

GOLDSTEIN, JOEL K. 1982 *The Modern American Vice Presidency: Transformation of a Political Institution.* Princeton, N.J.: Princeton University Press.

WILLIAMS, IRVING G. 1956 *The Rise of the Vice Presidency.* Washington, D.C.: Public Affairs Press.

## VICINAGE

Of all the features constituting a citizen's right to a TRIAL BY JURY, none is so outdated or less of service than the Sixth Amendment provision guaranteeing "an impartial jury of the State and district wherein the crime [charged] shall

have been committed." This specification of the geographic area from which jurors must be drawn should not be confused, however, with VENUE, which fixes the location of the trial itself.

The clause providing for a jury of the vicinage or neighborhood enjoys a time-worn heritage. In the thirteenth century jurors were usually witnesses or had personal knowledge of the event at issue. Although jurors eventually lost their character as witnesses, both EDWARD COKE and WILLIAM BLACKSTONE discussed the precise number of jurors who must come from the immediate locality. Vicinage became an issue in the colonial debate with England, and the Virginia Assembly, in 1769, asserted the colonists' right to "the inestimable Privilege of being tried by a Jury from the vicinage," a position echoed by the Continental Congress and listed as a grievance against the king in the DECLARATION OF INDEPENDENCE. The Sixth Amendment, framed shortly after the JUDICIARY ACT OF 1789, probably refers to the judicial districts established by that act.

Nevertheless, a federal defendant today "does not have a right under the Sixth Amendment to have jurors drawn from the entire district" (*Zicarelli v. Dietz*, 1980), and the Supreme Court has denied that trial juries "must mirror the community and reflect the various distinctive groups in the population" (*Taylor v. Louisiana*, 1975). State courts have generally been willing to narrow the vicinage requirement to a unit as small as an individual county, although federal courts have asserted that the Sixth Amendment clause applies "only to federal criminal trials, not to state criminal trials" (*Zicarelli*).

DAVID GORDON
(1986)

## VIETNAM WAR

Throughout American history, Presidents have dispatched armed forces abroad to protect the lives and property of United States citizens as well as American security interests. However, these military operations usually were limited in scope and duration, were conducted against relatively defenseless nations, and did not involve major powers. Thus, there was little opportunity to test the President's constitutional authority to send armed forces abroad without prior congressional authorization or a DECLARATION OF WAR. For various reasons, the KOREAN WAR did not furnish the occasion to test President HARRY S. TRUMAN's constitutional powers. The Vietnam War (1965–1973) was the first modern undeclared war that provided the opportunity to test the President's authority as COMMANDER-IN-CHIEF.

During the Vietnam War numerous litigants challenged the President's authority to initiate and conduct military hostilities without a congressional declaration of war or other explicit prior authorization. Such litigants denied that the GULF OF TONKIN RESOLUTION constituted authorization. Despite these challenges, the federal courts exhibited extreme caution in entering this twilight zone of concurrent power. The federal judiciary's reluctance to decide WAR POWERS controversies reveals a respect for the constitutional SEPARATION OF POWERS, an appreciation for the respective constitutional functions of Congress and the President in FOREIGN AFFAIRS, and a sense of judicial self-restraint. Nevertheless, toward the end of the Vietnam War, several lower federal courts entered the political thicket to restore the constitutional balance between Congress and the President.

Despite factual variations, the Vietnam War cases can be classified into four broad categories. One federal district court asserted categorically that the complaint raised a POLITICAL QUESTION beyond the court's JURISDICTION. A second agreed that the President's authority to conduct military activities without a declaration of war posed a nonjusticiable political question, but proceeded to determine whether the President had acted on his own authority, pursuant to, or in conflict with either the expressed or implied will of Congress. Courts in the third category concluded that the political question doctrine did not foreclose them from inquiring into the existence and constitutional sufficiency of joint congressional-presidential participation in prosecuting the war. Finally, some district courts decided cases on the substantive merits. Yet the Vietnam War ended without an authoritative Supreme Court decision.

At the war's end Congress enacted the War Powers Resolution (1973), which attempted to resolve the constitutional ambiguities posed by the separation of the congressional war powers from the President's office of commander-in-chief. Under the resolution, Congress can alternatively authorize continuation of military hostilities that the President has initiated or require him to disengage armed forces from foreign combat within sixty to ninety days. Practical problems aside, the resolution seems constitutionally flawed. The Supreme Court's decision in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983) cast doubt on the constitutionality of the resolution's LEGISLATIVE VETO provision, which states that Congress can direct the disengagement of troops by CONCURRENT RESOLUTION. Moreover, if the Constitution vests the authority to initiate military hostilities exclusively in the Congress, can Congress constitutionally delegate this authority to the President, even for a limited period? Is the War Powers Resolution an undated declaration of war that allows the President to choose the time, the place, and the enemy?

The Framers of the Constitution conferred only a lim-

ited set of defensive war powers on the President. As commander-in-chief he superintends the armed forces in war and peace, defending the nation, its armed forces, and its citizens and their property against attack, and directing military operations in wartime. The Framers did not authorize the President to initiate military hostilities, to transform defensive actions into aggressive wars, or to defend allies against attack.

In the Framers' view, only Congress could change the nation's condition from peace to war. Yet neither the constitutional text nor the records of the CONSTITUTIONAL CONVENTION conclusively draw the boundary between congressional power to initiate war and presidential power to defend against attack. In the twentieth century, international terrorism, the Vietnam War, guerrilla and insurgency warfare, wars of "national liberation," and the global conflict between the United States and the Soviet Union have virtually erased the Framers' distinction between defensive and offensive war.

A long history of undeclared war and military hostilities demonstrates that the constitutional questions raised during the Vietnam War are inherent in the American constitutional system. Presidents will be confronted with demands and opportunities to intervene militarily to protect American national security interests and the security interests of the nation's allies. Before yielding to this temptation, future Presidents should recall one of the Vietnam War's most important lessons: the nation should not wage a protracted undeclared war without a continuing agreement between Congress and the President that reflects broad, sustained public support.

EDWARD KEYNES
(1986)

Bibliography

KEYNES, EDWARD 1982 *Undeclared War.* University Park: Pennsylvania State University Press.

REVELY, W. TAYLOR, III 1981 *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?* Charlottesville: University Press of Virginia.

SOFAER, ABRAHAM D. 1976 *War, Foreign Affairs, and Constitutional Power.* Cambridge, Mass.: Ballinger Publishing Co.

## VIETNAM WAR
(Update)

The Vietnam War, more accurately labeled America's Indochina War, claimed 46,400 American lives. During its most active phase, from 1964 to 1973, it cost over $107 billion. American troop strength in the conflict reached a peak of 536,100 in March 1969. Yet the war was never formally declared.

Direct American involvement in Indochina began in 1949–1950 when Congress provided for financial and material assistance in "the general area of China" and for the use of noncombatant military advisers. Using this authority, President HARRY S. TRUMAN began sending aid to the associated states comprising French Indochina. When the KOREAN WAR heightened America's commitment in the Far East, Congress anticipated the pattern of coming years by approving additional aid. Following the end of France's military involvement in Indochina in 1954, the United States took the initiative in negotiating the Southeast Asia Collective Defense Treaty, which committed each of its adherents to meet "armed attack in the treaty area . . . in accordance with its constitutional processes." Prior to the treaty's approval by the Senate in 1955, Secretary of State John Foster Dulles interpreted this provision as meaning the President would seek congressional support before launching major military moves, but others hedged on whether such action was constitutionally required. Between 1954 and 1964, the United States provided more than $1 billion in military aid to South Vietnam and by late 1963 the American Military Assistance Advisory Group there had grown to 16,300.

In 1964 the war took on a new constitutional cast. South Vietnam's position having deteriorated, President LYNDON B. JOHNSON sought to continue a policy of measured firmness. In May and June he directed the State Department to begin drafting possible congressional resolutions to affirm the American commitment in Vietnam. This approach drew partly on the experience of the 1950s and early 1960s, when the United States response to crises involving the Formosa Straits, the Middle East, Berlin, and Cuba included congressional resolutions of support in 1955, 1957, 1961, and 1962. Although temporarily shelved, the project soon became urgent. On August 2, perhaps provoked by American-supported commando raids along the North Vietnamese coast, North Vietnam torpedo boats attacked an American destroyer on an intelligence mission in the Gulf of Tonkin. Two days later, another attack may have occurred. Johnson reported the attacks to the American people, but refrained from mentioning either the intelligence mission or doubts about whether the second attack had actually occurred. Congressional leaders received a fuller briefing but not a complete account. Giving them a draft resolution, Johnson asked for its prompt passage even as he ordered retaliatory air strikes against North Vietnam.

Following a perfunctory hearing and almost no floor debate, the House of Representatives passed the GULF OF TONKIN RESOLUTION by a vote of 416–0. In the Senate, owing especially to questions raised by Wayne Morse about the events in the Tonkin Gulf and about the problem of unconstitutionally delegating Congress's WAR POWERS, the hearing process and floor debate took slightly longer, but

the measure won approval by 88 to 2, and Johnson signed it into law on August 10. After stating Congress's support for the President's determination "to take all necessary measures to repel any armed attack against the armed forces of the United States and to prevent further aggression," the resolution declared that peace in Asia was a vital American interest and that "the United States is, therefore, prepared, as the President determines, to take all necessary steps, including use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom."

In February 1965 the United States escalated its air war in Vietnam and soon began sending ground combat troops (as opposed to "advisers"). When voting in 1964, most congressmen had not contemplated this turn of events, yet Senator J. William Fulbright, chairman of the Foreign Relations Committee, had admitted during debate that the resolution could undergird major military action. In 1967, Under Secretary of State (and former Attorney General) Nicholas Katzenbach explained that the Tonkin Gulf Resolution was "as broad an authorization for the use of armed forces . . . as any declaration of war so-called could be in terms of our internal constitutional process." Significantly, however, its State Department drafters had carefully avoided any language conceding that congressional authorization was a requirement for escalating the American presence in Vietnam. This allowed continuing reliance on the President's own authority, as illustrated in February 1966 when a State Department legal memorandum argued that the President's direct powers under Article II covered the commitment in Vietnam. That being the case, the Southeast Asia Collective Defense Treaty's provision for action in accordance with American "constitutional processes" further authorized the war in Vietnam. But, explained the memorandum, the existence of the Tonkin Gulf Resolution and congressional appropriations for the conflict obviated the need to delineate precise constitutional boundaries.

Despite growing public and congressional criticism of the war, Congress enacted at least twenty-four laws supporting it between 1964 and 1969. Senator Morse's 1966 call for repeal of the Tonkin Gulf Resolution met defeat, as, for example, did antibombing amendments to appropriations bills in 1968. In 1967 the Senate Foreign Relations Committee began to consider a "National Commitments Resolution," after Fulbright, its chairman, switched to an antiwar stance. But the resulting measure, as adopted in June 1969, merely expressed "the sense of the Senate" that the commitment of troops abroad should result only from affirmative and explicit joint action by the President and Congress. Finally, in December 1970, Congress included repeal of the Tonkin Gulf Resolution as a rider to the Foreign Military Sales Act, which President RICHARD M. NIXON signed in January 1971.

By this time, Nixon and his backers had accepted the argument of the Johnson administration that the resolution was constitutionally unnecessary—but with a twist. Whatever the constitutional basis for the war under Johnson, as Assistant Attorney General WILLIAM H. REHNQUIST explained after the Cambodian "incursion" in April 1970, Nixon inherited a conflict in progress and had "an obligation as commander-in-chief to take what steps he deems necessary to assure the safety of American forces in the field."

Such claims did not prevent senators of both parties and growing numbers of House Democrats from proposing limits on the war. Between late 1969 and mid-1973, ten restrictive measures became law. One barred use of combat troops in Thailand and Laos; another forbade further expenditures for ground operations in Cambodia. Still another, an amendment to a defense procurement act, stated that United States policy was to cease all military operations "at a date certain," but when Nixon signed the act, he denied that the policy declaration had "binding effect." In actuality, prior to the Vietnam cease-fire in January 1973, congressional "doves" were unable to pass ironclad restrictions.

Finally, after the Vietnam cease-fire, but while air attacks on Cambodia continued, Congress voted that no funds "may be expended to support directly or indirectly combat activities in, over, or from off the shores of Cambodia, or in or over Laos by United States forces." When Nixon vetoed the appropriations bill containing the cutoff and its supporters threatened to add similar language to all appropriations measures, a compromise emerged, signed by Nixon on July 1. The Second Supplemental Appropriations Act for 1973 forbade use of any funds in the act itself for military operations in Indochina and added that "after August 15, 1973, no other funds heretofore appropriated under any other Act may be expended for such purpose."

Doubtful of congressional action, opponents of the war had already turned to the judiciary in efforts to enjoin Johnson's warmaking and then Nixon's. Here the need for STANDING proved an initial barrier. At one time or another, federal district courts and courts of appeal held that taxpayers, citizens qua citizens, reservists, draft registrants, inductees, members of Congress, and probably states lacked the required immediate and concrete stake in the controversy. In some later cases, however, the barrier was relaxed, particularly for servicemen under orders to go to Vietnam, and in a few instances, courts finessed the problem of standing by first examining other issues.

Ultimately the POLITICAL QUESTION doctrine proved insuperable. In *Orlando v. Laird* (1971), for example, lower

federal courts held that once a conflict reached the magnitude and duration of the war in Vietnam, the Constitution imposed the duty of some joint action by the President and Congress. This requirement established a manageable test that allowed judicial determination without running up against the political questions doctrine. The courts found, however, that the Tonkin Gulf Resolution, wartime extension of the SELECTIVE SERVICE ACT, and continuing appropriations satisfied the joint-action requirement. The issue raised by the decision of Congress and the President to use these means for collaboration rather than a DECLARATION OF WAR *was* a nonjusticiable political question. In *Mitchell v. Laird* (1973), which arose after repeal of the Gulf of Tonkin Resolution, a court of appeals went further, declaring that it could "not be unmindful of what every schoolboy knows"—that appropriations and draft extensions did not necessarily indicate congressional approval of the war. Yet the court would not substitute its judgment for the President's regarding the appropriate military means for concluding the conflict.

The closest the federal judiciary came to blocking American involvement in Indochina occurred after the Vietnam cease-fire itself. In *Holtzman v. Schlesinger* (1973) a member of Congress and three Air Force officers sought to enjoin further bombing of Cambodia. Federal District Judge Orin Judd in New York found that all existing legislative authorization for operations anywhere in Indochina had ceased with the end of the war in Vietnam. Moreover, as Judd interpreted it, the compromise specifying a funding cutoff on August 15 conferred no new authority. Accordingly, on July 25, 1973, he ordered the secretary of defense to stop the bombing, but the United States Court of Appeals for the Second Circuit promptly stayed his order. Lawyers for the plaintiffs next asked THURGOOD MARSHALL, the circuit's Justice on the Supreme Court, to vacate the stay, and when he declined, they tracked down Justice WILLIAM O. DOUGLAS, then vacationing in Washington State. Douglas issued the necessary order, but at the request of the government, Marshall polled the full Court by telephone and proceeded to reinstitute the stay.

On August 8 the court of appeals reversed Judd, holding that the relation of the continued bombing to implementation of the peace agreement did constitute a political question. In OBITER DICTA, it opined further that Judd had incorrectly interpreted the compromise on the funding cutoff and had erred in granting standing to Congresswoman Elizabeth Holtzman and the Air Force officers. The court's reliance in *Holtzman* on the political questions doctrine was consistent with the sweeping recognition of the doctrine in *Atlee v. Laird* (1972), the only lower court decision involving the constitutionality of the war that the Supreme Court affirmed (although without opinion) rather than sidestep by denying CERTIORARI.

Three years earlier, Congress had begun to consider general war-powers legislation. By 1973 the House had passed a version imposing strict consulting and reporting requirements on the President, whereas the Senate's bill sought to define precisely the circumstances in which the President could use force without congressional authorization. In October 1973 both houses accepted a compromise measure. Its detailed mandatory sections stressed requirements for consultation and reporting and provided that if the President did not receive congressional approval within sixty days of committing forces to hostilities or situations of imminent hostilities, he had to withdraw them. (The President had another thirty days for withdrawal if he certified that the safety of the troops required the additional period.) Claiming the War Powers Resolution infringed on the constitutional authority of the President, Nixon vetoed it, but Congress overrode the veto. A clear legacy of the Indochina War, the law triggered ongoing debate in subsequent years regarding its constitutionality, wisdom, and effectiveness.

Throughout the war CIVIL LIBERTIES issues arose. Beginning in 1965–1966 growing numbers of opponents publicly demonstrated against American participation and its escalation and mounted focused protests against recruiting, the draft, and even military training. Ensuing criminal prosecutions (which war resisters often invited) included well-publicized and sometimes chaotic conspiracy trials that swept in prominent antiwar figures like pediatrician Benjamin Spock (of the "Boston Five") and social activist Tom Hayden (of the "Chicago Eight"). In addition, federal and some local agencies responded with domestic intelligence operations involving both surveillance and use of agents provocateurs. In part, the prosecutions and intelligence activities reflected the firm belief of both Johnson and Nixon that the domestic protest movement had connections to communism abroad.

In contrast to its largely hands-off approach to issues of external warmaking, the judiciary supported the antiwar position in key cases. Where juries convicted war resisters, appellate courts often proved receptive to FIRST AMENDMENT arguments and procedural challenges. In COHEN V. CALIFORNIA (1971), for example, the United States Supreme Court held that the words "Fuck the Draft" sewn on a jacket fell within the limits of protected expression. In UNITED STATES V. SEEGER (1965) and *Welsh v. United States* (1970) the Court in effect rewrote the Selective Service Act in order to broaden permissible grounds for conscientious objection. *Oestereich v. Selective Service Board* (1968) and *Breen v. Selective Service Board* (1970) disallowed use of selective service reclassification as a means

of punishing opposition to the draft. But UNITED STATES V. O'BRIEN (1968) upheld legislation outlawing draft card destruction. In NEW YORK TIMES V. UNITED STATES (1971), although the Court allowed publication of the so-called Pentagon Papers, a majority of Justices eschewed an absolutist position, revealing instead an openness to some forms of censorship. And in LAIRD V. TATUM (1972) an attempt to stop the United States Army's domestic surveillance program failed when the Court found that the plaintiffs had suffered no personal injury.

Overall, the Vietnam War significantly broadened the range of constitutional debate in America. Although hardly an unambiguous example of executive warmaking, the war helped stigmatize further accretions to an "imperial presidency." Although not blocked by the judiciary, it drew judges partway into defining the external warmaking authority. And although far from the only source of domestic unrest and reaction in the 1960s and early 1970s, the conflict triggered a wide enough spectrum of opposition to give renewed respectability to dissent.

CHARLES A. LOFGREN
(1992)

(SEE ALSO: *Congress and Foreign Policy; Congressional War Powers; Executive Power; Executive Prerogative; Foreign Affairs; Presidential War Powers; Senate and Foreign Policy; War, Foreign Affairs, and the Constitution.*)

Bibliography

BANNAN, JOHN F. and BANNAN, ROSEMARY S. 1974 *Law, Morality and Vietnam: The Peace Militants and the Courts.* Bloomington: Indiana University Press.

GIBBONS, WILLIAM C. 1986–1989 *The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships*, 3 vols., series in progress. Princeton: Princeton University Press.

KEYNES, EDWARD 1982 *Undeclared War: The Twilight Zone of Constitutional Power.* Chaps. 5–7. University Park: Pennsylvania State University Press.

STRUM, PHILIPPA 1976 The Supreme Court and the Vietnamese War. In Richard A. Falk, ed., *The Vietnam War and International Law: The Concluding Phase.* Vol. 4, pages 535–572. Princeton, N.J.: Princeton University Press.

## VILLAGE OF . . .

See entry under name of village

## VINSON, FRED M.
(1890–1953)

Fred M. Vinson was appointed thirteenth CHIEF JUSTICE of the United States by President HARRY S. TRUMAN in 1946 and served in that office until his death. His appointment followed a distinguished career in all three branches of the federal government. That career profoundly influenced his performance as Chief Justice.

Born and raised in the jail of Louisa, Kentucky—his father was the town jailer—he devoted almost his entire professional career to the public sector. Shortly after his admission to the bar, he served as city attorney and as Commonwealth attorney. Elected to Congress in 1928, he was an influential member of that legislative body during the NEW DEAL years. His judicial experience commenced with appointment as judge of the United States Court of Appeals for the District of Columbia in 1937, and was broadened in 1942 when Chief Justice HARLAN FISKE STONE named him Chief Judge of the EMERGENCY COURT OF APPEALS. His executive branch experience began with his 1943 appointment as director of Economic Stabilization, followed in 1945 by three posts in rapid succession: Federal Loan administrator, director of War Mobilization and Reconversion, and secretary of the Treasury.

He was appointed Chief Justice in 1946 to a Court widely regarded as ridden not only with the usual ideological disagreements but also with severe personal animosities. One successful aspect of his tenure as Chief Justice was the substantial reduction of public exposure of these conflicts.

In 1949, the deaths of Justices FRANK MURPHY and WILEY B. RUTLEDGE were followed by the appointments of TOM C. CLARK and SHERMAN MINTON. These changes, which occurred just short of the midpoint of his tenure, shifted the balance of the Court to a more conservative position, one more consonant with his own judicial and political philosophy.

That philosophy must be ascertained more by inference than through direct revelation. During his seven years as Chief Justice, the number of cases heard by the Court declined; as Chief Justice he assigned comparatively few opinions to himself. The evidence makes clear, however, that his philosophy reflected his public and political experience, acquired during the New Deal and WORLD WAR II years, when a strong national government was deemed a *sine qua non* and loyalty to one's party and political confreres was a necessary condition of the success of the political process.

For him, the governmental institutions were democratically based, sound, and trustworthy; they were entitled to the loyalty of those whom they served and to protection from those who would destroy them. The judgments of the President and Congress that communism threatened both from without and from within were entitled to respect. The nation and its people fared better with a stable regime than with one of disruption; govern-

ment was entitled at least to have time to respond to conflicts. The lowest person could rise to the highest office. Concomitantly—although the enactments of legislatures were normally to be respected—legal restrictions based upon race, disabling handicaps to the realization of the American dream, were disfavored. Even as his extensive federal governmental experience made him sympathetic to a strong central government, so his executive branch experience rendered him unafraid of strong executive power.

His tenure as Chief Justice spanned the Cold War era in which pro-Soviet attitudes that had developed during World War II became suspect. The rise of McCarthyism, the trial of Alger Hiss, the KOREAN WAR, the theft of atomic secrets, and like events dominated public discussion and government reaction.

These events pervaded the atmosphere in which major constitutional issues were presented. Thus, his views about loyalty are perhaps best represented in those cases that sustained noncriminal deprivations addressed to communists and those considered disloyal, for example, his opinion for the Court in AMERICAN COMMUNICATIONS ASSOCIATION V. DOUDS (1950); denial of TAFT-HARTLEY COLLECTIVE BARGAINING benefits); and his votes in *Bailey v. Richardson* (1951; denial of federal employment) and JOINT ANTI-FASCIST REFUGEE COMMITTEE V. MCGRATH (1951; blacklisting of suspected organizations).

His lack of sympathy for those whose purpose he viewed as destructive of the governmental institutions is evidenced in his PLURALITY OPINION in DENNIS V. UNITED STATES (1951), which sustained against a FIRST AMENDMENT claim the criminal convictions of communist leaders under the Smith Act, and his majority opinion in FEINER V. NEW YORK (1951), affirming the conviction of an antigovernment speaker who refused to stop speaking when ordered to do so by a police officer after members of the audience threatened to assault him.

His concern for institutional stability is reflected in his opinion in UNITED STATES V. UNITED MINE WORKERS (1947), sustaining the judiciary's use of the CONTEMPT POWER to halt a disruptive strike, and his dissenting opinion in YOUNGSTOWN SHEET & TUBE CO. V. SAWYER (1951), where he would have sustained the power of the President to seize steel mills to maintain steel production interrupted by a strike.

Overtaken by later cases, several of Vinson's most significant opinions advanced the elimination of RACIAL DISCRIMINATION and in theoretical terms expanded the interpretation of the EQUAL PROTECTION clause. Although the unanimous opinions he authored in SWEATT V. PAINTER (1950) and MCLAURIN V. BOARD OF REGENTS (1950) did not in terms overrule the SEPARATE BUT EQUAL DOCTRINE of PLESSY V. FERGUSON (1896), the rejection of the separate Texas law school in *Sweatt* and of the special treatment of *McLaurin* made the demise of that doctrine inevitable. His most interesting and venturesome equal protection opinion was SHELLEY V. KRAEMER (1948), the RESTRICTIVE COVENANT case, whose doctrinal implications have yet to be satisfactorily delineated.

Vinson accorded the federal government expansive legislative power under the COMMERCE CLAUSE. Perceived conflicts between the federal government and the states were resolved in favor of a strong central government. Where the federal government had not spoken, his concern focused on discrimination against INTERSTATE COMMERCE and the out-of-stater, a position most clearly seen in the STATE TAXATION OF COMMERCE cases and TOOMER V. WITSELL (1948), the path-breaking interpretation of the PRIVILEGES AND IMMUNITIES clause of Article IV, which in effect extended his commerce clause philosophy to areas he thought the clause did not reach.

His general judicial approach inclined Vinson to focus on the particular facts of the case and to eschew promulgation of sweeping legal principles. He was slow to overrule earlier opinions and DOCTRINES. The power of the Court to invalidate federal executive and legislative actions on constitutional grounds was to be used sparingly; he never voted to invalidate an act of Congress or a presidential action. He was as apt as any member of his Court, save perhaps Justice FELIX FRANKFURTER, to avoid constitutional questions and, when those issues were faced, to take an intermediate rather than ultimate constitutional position. Clearly, Fred M. Vinson belonged to the "judicial restraint" school of Supreme Court Justices.

MURRAY L. SCHWARTZ
(1986)

Bibliography

KIRKENDALL, K. 1969 Fred M. Vinson. In Leon Friedman and Fred L. Israel, *The Justices of the United States Supreme Court*. Vol. 4:2639–2649. New York: Chelsea House.

PRITCHETT, C. HERMAN 1954 *Civil Liberties and the Vinson Court*. Chicago: University of Chicago Press.

SYMPOSIUM 1954 *Northwestern University Law Review* 49:1–76.

## VINSON COURT
(1946–1953)

FRED M. VINSON was Chief Justice of the United States from June 24, 1946, until his death on September 8, 1953. During his seven-year period of service the Supreme Court was considerably less interesting, colorful, or originative of significant constitutional DOCTRINE than its predecessor, the STONE COURT, or its successor, the WARREN COURT. How-

ever, the Vinson Court did deal with serious and important issues, particularly Cold War challenges to CIVIL LIBERTIES and awakening concerns about RACIAL DISCRIMINATION.

Vinson was a close friend of President HARRY S. TRUMAN and an active Democrat who had had the unique experience of serving in all three branches of the federal government. Immediately preceding his appointment to the Court he had been secretary of the treasury. President Truman had made one previous appointment, naming HAROLD BURTON, a Republican and former SENATE colleague of Truman, to replace OWEN ROBERTS in 1945. The other seven justices were of course all holdovers from the Stone Court, which guaranteed a continuation of the judicial dialogue that had pitted the liberal activism of HUGO L. BLACK, WILLIAM O. DOUGLAS, FRANK MURPHY, and WILEY B. RUTLEDGE against the brilliant critiques of FELIX FRANKFURTER and ROBERT H. JACKSON, with the moderate STANLEY F. REED somewhere in the center.

The four-judge liberal bloc had within itself the votes required to grant CERTIORARI petitions, which ensured that civil liberties issues would continue to appear on the Court's agenda. When the liberals agreed, they needed only one additional vote to constitute a majority. But in the summer of 1949 Justices Murphy and Rutledge died, cutting the liberal bloc in half. President Truman filled these two vacancies by the appointment of TOM C. CLARK, his attorney general, and SHERMAN MINTON, who had been a New Deal senator from Indiana. The two new justices joined with Vinson, Reed, and Burton in a moderately conservative bloc which dominated the remaining four terms of the Vinson Court. An indication of the balance of power on the Court is provided by the number of dissents registered by each of the Justices during this four-year period: Clark 15, Vinson 40, Burton 44, Minton 47, Reed 59, Jackson 80, Frankfurter 101, Douglas 130, Black 148.

The most famous decision of the Vinson Court in terms of public reaction, and probably the most noteworthy as a contribution to constitutional theory, was YOUNGSTOWN SHEET TUBE CO. V. SAWYER (1952), generally known as the Steel Seizure Case. Here the Court by a vote of 6–3 held unconstitutional President Truman's seizure of the nation's steel mills in 1952, an action he justified as necessary to avert a nationwide strike that might have affected the flow of munitions to American troops in Korea. The President had no statutory authority for the seizure, which consequently had to be justified on a theory of inherent presidential power to meet emergencies.

Justice Black, supported by Douglas, flatly denied the existence of any inherent presidential powers. Justices Jackson and Frankfurter were less dogmatic, and the doctrine of the case is generally drawn from their opinions. As they saw it, the controlling factor was that Congress had considered granting the President seizure power to deal with nationwide strikes when adopting the TAFT-HARTLEY ACT in 1947 but had decided against it. In addition, Jackson contributed a situational scale for ruling on claims of executive emergency power. Vinson, in his most famous dissent, upheld the President as having moved in an emergency to maintain the status quo until Congress could act, and he rejected the majority's "messenger boy" concept of the presidential office.

The fact that the Court could have avoided the constitutional issue in the Steel Seizure Case by various alternatives suggested that most of the justices believed it important to announce a check on presidential power. The decision was enormously popular with the press and public and has subsequently been accepted as an authoritative statement on the SEPARATION OF POWERS, establishing that actions of the president are subject to JUDICIAL REVIEW. There had been some doubt on this point since the failure of the post-CIVIL WAR suit against the president in MISSISSIPPI V. JOHNSON (1867). It established also that executive claims of power for which statutory authority is lacking, and which must consequently rely on the President's general Article II authority, are subject to strict judicial scrutiny.

Less significant in its doctrine than the Steel Seizure Case but almost as controversial was the Court's contempt ruling against John L. Lewis, leader of the coal miners, in 1947 (UNITED STATES V. UNITED MINE WORKERS). The government had seized the nation's bituminous coal mines in 1946 to end a crippling strike and had entered into a contract with Lewis on wages and working conditions. When Lewis subsequently terminated the contract unilaterally and resumed the strike, the government secured a contempt JUDGMENT and heavy fine against Lewis and the union. In his first major opinion Vinson upheld the conviction for contempt, ruling that the NORRIS-LAGUARDIA ACT limiting the issuance of labor INJUNCTIONS was not binding on the government as an employer.

A significant difference between the Stone and Vinson Courts was that WORLD WAR II had ended and the Cold War against communism had begun. The hunt for subversives in which the nation was caught up soon after the shooting war was over tainted the entire period of the Vinson Court and created difficult civil liberties issues. The government's principal weapon against suspected subversion was the Smith Act of 1940, which made it unlawful to teach and advocate the overthrow of the United States government by force and violence, or to organize a group for such a purpose.

Convictions of eleven leaders of the American Communist party under the Smith Act were upheld by the Supreme Court in DENNIS V. UNITED STATES (1951). In the most memorable event of his judicial career, Chief Justice Vinson wrote the Court's majority opinion defending the

Smith Act against contentions that it violated the FIRST AMENDMENT. The defendants admittedly had taken no action with the immediate intention of initiating a revolution. But Vinson held that the CLEAR AND PRESENT DANGER TEST, developed by Justice OLIVER WENDELL HOLMES and LOUIS D. BRANDEIS, did not require the government to wait until a "putsch" was about to be executed before acting against a conspiracy. Vinson accepted the reformulation of the test developed by Judge LEARNED HAND: "Whether the gravity of the "evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." He considered the communist "evil" to be that grave. Justices Black and Douglas dissented; Douglas pointed out that the prosecution had introduced no evidence of Communist party action aimed at overthrow of the government.

Vinson also wrote the Court's opinion in AMERICAN COMMUNICATIONS ASSOCIATION V. DOUDS (1950), upholding the Taft-Hartley Act noncommunist oath. This statute denied the protections and services of the WAGNER (NATIONAL LABOR RELATIONS) ACT to any labor organization whose officers failed to file affidavits that they were not members of the Communist party. The Chief Justice held that Congress in adopting this statute was acting to prevent the obstruction of commerce by "political strikes." The law was not aimed at speech but rather at harmful conduct carried on by persons who could be identified by their political affiliations and beliefs.

The Vinson Court was caught up in the final moments of the Cold War's most spectacular event, the execution of Julius and Ethel Rosenberg, who were charged with passing atomic "secrets" to the Russians. Review of the lower court conviction and subsequent APPEALS was routinely denied by the Supreme Court in 1952 and early 1953, as were also the initial petitions for STAY OF EXECUTION. But Justice Douglas thought that one final petition filed the day before execution was scheduled raised a new legal issue deserving consideration. He consequently granted a stay which the full Court set aside the next day, and the executions were then carried out. Douglas's action caused a brief furor and a congressman demanded his IMPEACHMENT. In the last opinion before his death Vinson defended Douglas's action as a proper response to protect the Court's JURISDICTION over the case pending a consideration of the legal issue raised. Black and Frankfurter joined Douglas in asserting that the stay should have been granted.

During the era of the Vinson Court, congressional committee investigations of communism developed into major political and media events. Senator Joseph McCarthy's pursuit of "Fifth Amendment Communists" got under way in 1950, too late to create issues for the Vinson Court. But the HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES had begun operations in 1938, and by 1947 petitions for review of contempt citations against witnesses who had refused to reply to committee interrogation began to reach the Supreme Court. However, it declined review of all the cases that would have required a ruling on the constitutionality of the use of investigatory power, and it dealt only with certain less controversial issues of committee procedure and use of the Fifth Amendment privilege by witnesses.

A prominent feature of the Cold War period was concern about the loyalty of government employees. A LOYALTY OATH fad developed in nearly every state, which the Vinson Court legitimated in GERENDE V. BOARD OF SUPERVISORS OF ELECTIONS (1951) by upholding a Maryland law that required candidates for public office to file affidavits that they were not "subversive persons."

A loyalty program covering federal employees was set up by President Truman in 1947 and was continued by President DWIGHT D. EISENHOWER. It required checking the loyalty of all incumbent employees and all applicants for federal employment. A complex administrative organization of loyalty review boards was created, and to assist the boards the attorney general issued a list of organizations he found to be "totalitarian, fascist, communist, or subversive." Consideration of the constitutionality of this program split the Court 4–4 in *Bailey v. Richardson* (1951). But in JOINT ANTI-FASCIST REFUGEE COMMITTEE V. MCGRATH (1951), decided the same day, the Court by a vote of 5–3 challenged the attorney general's list as having been drawn up without appropriate investigation or DUE PROCESS. The dissenters were Reed, Vinson, and Minton. In spite of this opinion the list continued to be used for a number of years in government hiring and investigation.

At the state level a New York law providing for the removal of public school teachers on grounds of membership in listed subversive organizations was upheld in ADLER V. BOARD OF EDUCATION OF CITY OF NEW YORK (1952), Justice Minton reasoning that the purpose was constitutional and that procedural protections provided by the statute were adequate. Justices Black and Douglas dissented, and Frankfurter would have denied the appeal on technical grounds of STANDING and RIPENESS.

Apart from Cold War cases, FREEDOM OF SPEECH and FREEDOM OF THE PRESS did not suffer seriously at the hands of the Vinson Court. BURSTYN V. WILSON (1952) was in fact an advance in its holding that a motion picture could not be censored on the ground that it was "sacrilegious." A law censoring magazines featuring bloodshed and lust was struck down in *Winters v. New York* (1948) as void for vagueness. *Poulos v. New Hampshire* (1953) upheld licensing of meetings in public parks and streets, but only if the licenses were granted without discrimination, and the use of licensing ordinances to prevent unpopular re-

ligious groups or preachers from holding meetings in public parks was rebuffed in NIEMOTKO V. MARYLAND (1951) and KUNZ V. NEW YORK (1951).

In TERMINIELLO V. CHICAGO (1949) a divided Court reversed on rather technical grounds the conviction of a rabble-rouser for BREACH OF THE PEACE resulting from an incendiary speech. But FEINER V. NEW YORK (1951) upheld the conviction of a soap-box orator even though the situation was much less inflammatory than in *Terminiello*. Moreover, BEAUHARNAIS V. ILLINOIS (1952) approved a state law treating critical comments about racial groups as criminal and subjecting their authors to prosecution for GROUP LIBEL.

The Vinson Court dealt with a number of conflicts between freedom of expression and privacy but without producing any theories justifying or limiting privacy claims such as those subsequently developed in GRISWOLD V. CONNECTICUT (1965) by the Warren Court. Use of sound trucks in streets and parks was initially upheld in *Saia v. New York* (1948) against contentions of infringement on privacy, but in the following year the Court conceded that "loud and raucous" sound trucks could be forbidden (KOVACS V. COOPER). Radio broadcasts including commercial messages in DISTRICT OF COLUMBIA streetcars were permitted to continue by *Public Utilities Commission v. Pollak* (1952), even though CAPTIVE AUDIENCES might suffer, but *Breard v. City of Alexandria* (1951) protected householders by approving an ordinance forbidding door-to-door selling of magazine subscriptions. Justice Black charged that the latter decision violated the "preferred position" for First Amendment freedoms originated by the Roosevelt Court. The severest blow to that philosophy was *United Public Workers v. Mitchell* (1947) which upheld by a vote of 4–3 the HATCH ACT limits on political activity by public employees.

In a 1940 case, THORNHILL V. ALABAMA, the Court had strongly asserted that PICKETING in labor disputes was protected by the First Amendment. Almost immediately, however, the Court found it necessary to announce limits on this holding, a process the Vinson Court continued. The most significant case was GIBONEY V. EMPIRE STORAGE ICE CO. (1949), where the Court ruled unanimously against a union that was picketing to force an employer to enter into an illegal restrictive contract.

The issue of public financial aid to religious schools required the Vinson Court to make the first significant effort to interpret and apply the First Amendment ban on ESTABLISHMENT OF RELIGION. EVERSON V. BOARD OF EDUCATION (1947) involved a state arrangement under which parents could be reimbursed from public moneys for their children's bus fare to parochial schools. An unusual five-judge majority composed of three liberals (Black, Douglas, and Murphy) and two conservatives (Vinson and Reed) held that the subsidy was simply a social welfare measure and that the First Amendment did not require exclusion of persons of any faith from the benefits of "public welfare legislation." Rutledge's vigorous dissent regarded payment for transportation to church schools as a direct aid to religious education and so unconstitutional.

The following year MCCOLLUM V. BOARD OF EDUCATION presented another church-state issue. The case involved a RELEASED TIME program of religious education under which public school children attended classes in Protestant, Roman Catholic, or Jewish religious instruction during school hours and in the school building. The Court's almost unanimous verdict of UNCONSTITUTIONALITY aroused a storm of criticism in church circles, and within four years the Court substantially reversed this ruling, upholding a New York City released time program that differed from *McCollum* only in that the classes were held off the school grounds (ZORACH V. CLAUSEN, 1952.) A similar reluctance to disturb the religious community was seen as the Court avoided on technical grounds of standing a ruling on the constitutionality of Bible-reading in the public schools (DOREMUS V. BOARD OF EDUCATION, 1952).

The Vinson Court's civil liberties record was distinctly better than that of its predecessors in one area, protection of minorities from discrimination. The prevailing constitutional rule was that established by PLESSY V. FERGUSON in 1896—that SEGREGATION of the races was constitutional provided treatment or facilities were equal. In practice, they were never equal, but over the years the Court had consistently avoided the difficult task of enforcing the *Plessy* rule. In the field of education, none of the few efforts to challenge unequal facilities had been successful. But in 1938 the HUGHES COURT made a small beginning, ruling in MISSOURI EX REL. GAINES V. CANADA that Missouri, which denied blacks admission to state law schools, must do so or set up a separate law school for blacks. MORGAN V. VIRGINIA (1946) invalidated a state Jim Crow law requiring racial segregation of passengers on public motor carriers, but the constitutional ground given was burden on INTERSTATE COMMERCE rather than denial of EQUAL PROTECTION.

The Vinson Court undertook cautiously to build on these beginnings. The COMMERCE CLAUSE justification used in the Virginia bus case was likewise employed in BOB-LO EXCURSION CO. V. MICHIGAN (1948). But the Vinson Court's boldest action against segregation came shortly thereafter in SHELLEY V. KRAEMER (1948). With Vinson writing the opinion, the Court declared that RESTRICTIVE COVENANTS binding property owners not to sell to minorities, although within the legal rights of property owners, were unenforceable. For a court to give effect to such a discriminatory contract, Vinson held, would amount to STATE ACTION in violation of the FOURTEENTH AMENDMENT.

The separate law school for blacks that Texas had established was declared unequal in SWEATT V. PAINTER (1950). The University of Oklahoma, forced to admit a black graduate student, required him to sit in a separate row in class, at a separate desk in the library, and at a separate table in the cafeteria. MCLAURIN V. OKLAHOMA STATE REGENTS (1950), with Vinson again writing the opinion, held these practices to be an unconstitutional impairment of the student's ability to learn his profession.

Vinson's opinion, however, rejected the opportunity to consider the broader issue of the *Plessy* SEPARATE BUT EQUAL rule. So attacks on the segregation principle continued, and the TEST CASES moved from the universities and graduate schools to the primary and secondary schools. In December 1952 BROWN V. BOARD OF EDUCATION and four other school segregation cases were argued for three days before the Court. But instead of a decision in June, the Court set the cases for reargument in October. The Chief Justice died in September, and so the Vinson Court's most momentous issue was passed on to the Warren Court.

Although the Stone Court had broken some new ground in CRIMINAL PROCEDURE, its record was mixed, particularly in guaranteeing the RIGHT TO COUNSEL and protection against UNREASONABLE SEARCHES and seizures. This latter issue surfaced in the Vinson Court's first term. One of the oldest problems in American constitutional law is whether the due process clause of the Fourteenth Amendment "incorporated" and made effective in state criminal proceedings the protections of the Fourth through the Eighth Amendments. As recently as 1937 in PALKO V. CONNECTICUT the Court had reiterated the principle that all state procedures consistent with ORDERED LIBERTY are acceptable.

In *Adamson v. California* (1947) the *Palko* doctrine survived on the Vinson Court, but by only a 5–4 vote. Justice Black led the minority. He relied on legislative history to establish his version of the intention of the framers of the Fourteenth Amendment and attacked the ORDERED LIBERTY test as substituting natural law and the notions of individual Justices for the precise and protective language of the BILL OF RIGHTS.

Although Black lost in *Adamson*, "ordered liberty" was a standard powerful enough to bring state criminal processes within the ambit of the FOURTH AMENDMENT in WOLF V. COLORADO (1949). However, Justice Frankfurter for the six-judge majority held only that SEARCHES AND SEIZURES by state law officers are bound by the standard of reasonableness; he declined to go further and impose on state prosecutions the EXCLUSIONARY RULE which prevents EVIDENCE secured by unconstitutional means from being offered in federal prosecutions. Justices Murphy, Douglas, and Rutledge, dissenting, contended that the exclusionary rule provided the only effective protection against police violation of the Fourth Amendment, and their view was finally adopted on the Warren Court in MAPP V. OHIO (1961).

With respect to right to counsel, the Vinson Court accepted the rule announced by the Stone Court in BETTS V. BRADY (1942) that the necessity for counsel depended upon the circumstances, such as the seriousness of the crime, the age and mental capacity of the defendant, and the ability of the judge. Applying the "special circumstances" rule in twelve cases, the Vinson Court concluded that in six the absence of counsel had resulted in denial of a FAIR TRIAL. In only one of the twelve was the Court unanimous. This experience was a factor in the Warren Court's decision in GIDEON V. WAINWRIGHT (1963) to abolish the confusing special circumstances rule and make counsel mandatory in all state felony prosecutions.

What was potentially one of the Vinson Court's most significant decisions for the federal system was nullified by Congress. In 1947 the Court ruled that subsurface land and mineral rights in California's three-mile coastal area belonged to the federal government (*United States v. California*), and in 1950 the Court applied the same rule to Texas. Congress retaliated in 1953 by ceding to the states ownership of land and resources under adjoining seas up to a distance of three miles from shore or to the states' historic boundaries.

In summary, the tendency of the Vinson Court was to follow a policy of judicial restraint, rejecting innovation or activism. The number of cases decided by full opinion fell below one hundred during three of the last four years, far less than the number typically decided by earlier Courts. The five justices who dominated the Court in its latter period were capable but lacking in style or originality. The four Justices of intellectual distinction—Black, Douglas, Frankfurter, and Jackson—generally paired off and pulled in opposite directions.

The pall of the Cold War hung over the Court. Confronted with the scandal of MCCARTHYISM, it was quiescent. Facing Smith Act prosecutions, the loyalty inquisition of federal employees, lists of subversive organizations, scrutiny of school teachers' associates, loyalty oaths, and deportation of ex-communists, the Court's response was usually to legitimate the government's action.

But in one field, significantly, there was a different kind of response. The Vinson Court did not evade the issue of racial discrimination. Although moving cautiously, as was appropriate considering the enormity of the problem, the Court nevertheless proceeded to bring denial of equal protection out of the limbo of neglect and unconcern into the focus of national consciousness and thereby prepared the way for its successor's historic decision on May 17, 1954.

C. HERMAN PRITCHETT
(1986)

Bibliography

FRANK, JOHN P. 1954 Fred Vinson and the Chief Justiceship. *University of Chicago Law Review* 21:212–246.

MURPHY, PAUL L. 1972 *The Constitution in Crisis Times, 1919–1969.* New York: Harper & Row.

PRITCHETT, C. HERMAN (1954) 1966 *Civil Liberties and the Vinson Court.* Chicago: University of Chicago Press.

SWINDLER, WILLIAM F. 1970 *Court and Constitution in the Twentieth Century: The New Legality, 1932–1968.* Indianapolis: Bobbs-Merrill.

## VIOLENCE AGAINST WOMEN ACT
### 108 Stat. 1903 (1994)

The Violence Against Women Act (VAWA) is a federal law passed by Congress in 1994 that allows people who have been subjected to acts of violence because of their sex to sue their victimizers in federal court for SEX DISCRIMINATION. It provides that "a person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right [to be free from crimes of violence motivated by gender] shall be liable to the party injured [in a civil action for relief]."

The basic idea is to place the power to sue and hold perpetrators accountable for sex-discriminatory acts of violence, such as rape and battery, in the hands of the survivors. This CIVIL RIGHTS remedy, in addition to empowering survivors of these abuses concretely to act on their own behalf, exposes the commonness and pervasiveness of these acts, puts them in context by connecting them with discrimination across society, dignifies the survivors of violent sex discrimination as bearers of civil rights, and states authoritatively that perpetrators are bigots as well as criminals.

The VAWA raises some old constitutional debates that, once resolved, open new constitutional possibilities.

The VAWA was passed because states, which enforce most criminal laws, were documented to have failed in protecting women from sexual and other physical violence on a large scale. By declaring a policy of zero tolerance for such abuse, and by conceiving gender-based violence to be a civil rights violation, Congress raised a new constitutional question: Is freedom from sexual assault a sex equality right? If so, should it be guaranteed under the Constitution's FOURTEENTH AMENDMENT as well as by a statute? Have state instrumentalities that failed to give women equal protection of the criminal laws been violating the Constitution all this time in a way that needs new legal scrutiny? Cases permitting suit against officials for sexual harassment, of men by men as well as of women by men, provide supportive PRECEDENTS.

Congress predicated its power to pass the VAWA both on the COMMERCE CLAUSE and on the FOURTEENTH AMENDMENT, SECTION 5, rekindling the old legal debates about the proper constitutional foundation and reach of federal civil rights laws. Early legal challenges to the VAWA have argued that men's violence against women is private, not public; reserved for states, not the federal government; criminal, not civil; and that it does not implicate INTERSTATE COMMERCE. Responses to these arguments have documented the substantial impact of violence against women on women's participation in economic life. Advocates for the law have argued that sex-based violence is a form of sex discrimination against which Congress is permitted to legislate. The states' abdication of, and bias in, enforcing laws against violence against women is hardly a private act. It is hardly private in the sense of being unique, personal, protectable, or exclusively individual. Nothing in the Constitution says it cannot be addressed civilly as well as criminally. They have also argued that the remedy supplements, rather than supplants, state criminal laws.

Assuming the law is found constitutional, concerns for its effectiveness arising from its language, passed as a compromise to restrict the number of cases brought, may arise. For example, the definition of "gender-motivated" is "because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." One benefit of this language is that it clearly permits combined race-and-sex-based claims. One potential problem is that "animus," which requires some proof of perpetrator mental state, is often inaccessible to the victim other than through the act itself. Perpetrator mental state may also be beside the point of the injury to the victim. Future legislation and litigation under the VAWA will have to confront this and other barriers to effective recovery, and to the social change—equality of the sexes—that the VAWA was passed to promote.

CATHARINE A. MACKINNON
(2000)

Bibliography

FRAZEE, DAVID; NOEL, ANN M.; and BRENNEKE, ANDREA 1997 *Violence Against Women: Law and Litigation.* Deerfield, Ill.: Clark, Boardman, Callaghan.

NOURSE, VICTORIA F. 1996 Where Violence Relationship and Equality Meet: The Violence Against Women Act's Rights Remedy. *Wisconsin Women's Law Journal* 11:1–36.

SENATE JUDICIARY COMMITTEE 1992 *Violence Against Women: A Week in the Life of America: A Majority Staff Report.* Washington, D.C.: United States Government Printing Office.

## *VIRGINIA, EX PARTE*

See: *Strauder v. West Virginia*

## *VIRGINIA, UNITED STATES v.*
518 U.S. 515 (1996)

Virginia Military Institute (VMI) is a military-style school of higher education founded in 1839 with an all-male admissions policy. By the 1970s, VMI was the only single-sex public college in Virginia and had a record of producing leaders in government and business. At the request of a potential woman applicant, the United States brought suit in 1990 claiming that VMI's admissions policy violated the EQUAL PROTECTION guarantee of the FOURTEENTH AMENDMENT. After trial the district court rejected the claim, finding that VMI offered diversity to Virginia's higher educational system and that admission of women would alter VMI's distinctive adversative method, which involved barracks without privacy, strenuous exercise, and bonding through torment by upperclassmen.

The United States Court of Appeals for the Fourth Circuit reversed, holding that Virginia's provision of diversity for men only was unconstitutional. On remand the district court approved a "substantively comparable" program at a private women's college in Virginia. The Fourth Circuit affirmed.

The Supreme Court reversed, concluding that Virginia had relied on stereotypes about women and had not proved that the admission of women would destroy the adversative method. Justice RUTH BADER GINSBURG wrote the majority opinion for six Justices. Chief Justice WILLIAM H. REHNQUIST concurred, while Justice ANTONIN SCALIA dissented and Justice CLARENCE THOMAS did not participate. After applying "skeptical scrutiny" of official discrimination, detailing many inadequacies of the "comparable" program, and noting that there was no equivalent school for women, the Court held that Virginia had violated the equal protection clause; that women should be admitted to VMI; and that VMI should alter housing and skills requirements to accommodate "celebrated differences" of the female cadets. After the Supreme Court's decision, VMI considered abandoning state support and remaining all-male, but decided instead to admit women.

The VMI case footnoted, without comment, the argument that women's schools "dissipate" gender stereotypes. The constitutionality of all-women's schools or separate-but-equal SINGLE-SEX SCHOOLS was not before the court and, therefore, not decided.

CANDACE SAARI KOVACIC-FLEISCHER
(2000)

Bibliography

EPSTEIN, CYNTHIA FUCHS 1997 The Myths and Justifications of Sex Segregation in Higher Education: VMI and the Citadel. *Duke Journal of Gender Law & Policy* 4:101–118.

KOVACIC-FLEISCHER, CANDACE SAARI 1997 *United States v. Virginia*'s New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII. *Vanderbilt Law Review* 50:845–915.

NEMKO, AMY 1998 Single-Sex Public Education after VMI: The Case for Women's Schools. *Harvard Women's Law Journal* 21:19–77.

## *VIRGINIA v. RIVES*

See: *Strauder v. West Virginia*

## *VIRGINIA v. TENNESSEE*

See: Interstate Compact

## VIRGINIA AND KENTUCKY RESOLUTIONS
(1798–1799)

These resolutions declared the ALIEN AND SEDITION ACTS unconstitutional and sought to arouse political opposition by appealing to the legislatures of the several states. The strategy was devised by THOMAS JEFFERSON, the Vice-President, who secretly drafted the resolutions that were adopted by the Kentucky legislature. A similar but milder series was drafted by JAMES MADISON for the Virginia assembly. Both set forth the compact theory of the Constitution, holding that the general government was one of strictly delegated powers; that acts beyond its powers were void; and that, there being no ultimate arbiter of the Constitution, each state had "an equal right to judge for itself, as well of infractions as of the mode and measure of redress." (See THEORIES OF THE UNION.) Jefferson baptized the theory "NULLIFICATION," though the name was omitted by Kentucky; and Virginia spoke instead of the right of each state to "interpose" to arrest the evil.

Five of the nine Kentucky Resolutions were devoted to proving the unconstitutionality of the Alien and Sedition Laws. The Alien Law was attacked for want of power, for violation of a specific constitutional provision (Article I, section 9), and for denial of TRIAL BY JURY and other fair procedures. The Sedition Act was asserted to be outside the scope of the Constitution as well as a direct violation of the FIRST AMENDMENT. The resolutions offered no broadly philosophical plea for FREEDOM OF SPEECH and PRESS but met the threat of the Sedition Law at its most vulnerable point, as an invasion of rights reserved to the states. It belonged to each state, not the general government, to determine "how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom." Kentucky urged the other state legisla-

tures to concur in declaring the acts unconstitutional and void.

Replies to the resolutions, mostly from Northern legislatures under Federalist control, were uniformly unfavorable. Prodded by Jefferson, Kentucky adopted a second set of resolutions in November 1799, reaffirming the principles of the first and, incidentally, introducing the word "nullification." In January 1800 the Virginia assembly adopted Madison's Report, a masterly exposition of the dual sovereignty theory of the federal union and a powerful defense of CIVIL LIBERTIES.

The principal object of the resolutions was to secure the freedom of opposition, of debate, and of change through the political process. This object was secured by the Republican victory in the election of 1800. But in pursuing "a political resistance for political effect," in Jefferson's words, he and his associates were somewhat careless on points of constitutional theory. Whether the resolutions were meant as a declaration of opinion or as a "nullification" of federal law, whether the right claimed for the state was limited to "usurpations" of the compact or extended to "abuses" as well, whether the ultimate recourse was the natural right of revolution or a constitutional right of SECESSION, these points were left unclear. It mattered little in 1800, after the resolutions had done their work and then were forgotten; but it mattered a great deal a generation later when the "Resolutions of '98" were revived and tortured by JOHN C. CALHOUN into a defense, not of liberty, but of slavery.

MERRILL D. PETERSON
(1986)

Bibliography

KOCH, ADRIENNE and AMMON, HARRY 1948 The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties. *William and Mary Quarterly* (3rd. ser.) 5:145–176.

MALONE, DUMAS 1962 *Jefferson and the Ordeal of Liberty.* Boston: Little, Brown.

## VIRGINIA CHARTER OF 1606
### (April 10, 1606)

This was the first royal charter issued for the planting of a colony in America. Charters were usually issued to private trading companies, as in this case, or to proprietary lords. The charter laid out boundaries, defined the relationship of the colony to the crown, and provided for a government. In this first charter, the government consisted only of a council. Subsequent charters for Virginia in 1609 and 1612 established the office of the governor; by 1619, in accord with a document called the "Great Charter" of 1618, elections were held and the first representative legislature in American history met at Jamestown. The enduring significance of Virginia's first charter lies in its provision that the colonists and their descendants "shall have and enjoy all Liberties, Franchises, and Immunities . . . as if they had been abiding and born, within this our Realm of England. . . ." Later charters for Virginia contained similar clauses. Their meaning was doubtless restricted at the time to legal rights of land tenure and inheritance, trial by jury, and little else; but the vague language (repeated in numerous other charters for colonies from New England to the South) allowed American colonists to believe that they were entitled to all the rights of Englishmen—their constitutional system and common law. Charters could be revoked and some were, but the American experience eventually led to written constitutions of fundamental law that contained bills of rights.

LEONARD W. LEVY
(1986)

## VIRGINIA DECLARATION OF RIGHTS AND CONSTITUTION OF 1776
### (June 12 and 29, 1776)

Virginia, the oldest, largest, and most prestigious of the original states, adopted a Declaration of Rights on June 12, 1776, and two weeks later its "Constitution or Form of Government." Each document was the first of its kind and considerably influenced constitution-making in the other states. The primary draftsman of both documents was GEORGE MASON, although the self-styled "convention" that adopted them included many luminaries, among them JAMES MADISON. The convention was actually an extralegal or provisional legislature similar in membership to the last House of Burgesses under the royal charter before the Revolution. The same convention enacted ordinary legislation and elected a governor under the new CONSTITUTION.

THOMAS JEFFERSON in his *Notes on Virginia*, written in 1781, observed that "capital defects" marred the work of the constitution-makers of 1776 who were acting without precedent. Property qualifications on the right to vote disfranchised about half the men of the state who served in the militia or paid taxes, and gross malapportionment, which benefited the old tidewater counties, diminished the representative character of the new government. The governor was little more than a ceremonial figurehead. The assembly elected him and his councillors as well as the state judges, and the governor had no veto power. Jefferson believed that concentrating the powers of government in the legislature, notwithstanding recognition of the

principle of separation of powers, "is precisely the definition of despotic government. . . . An elective despotism was not the government we fought for." In fact, however, legislative supremacy characterized all the new state governments, excepting those of Massachusetts and New York.

The gravest deficiency of the Virginia system, according to Jefferson, was that the legislature, having framed the constitution and declaration of rights without having provided that they be perpetual and unalterable, could change them by ordinary legislation. That was true in theory, although the constitution lasted over half a century and rarely did the legislature enact measures inconsistent with it. In practice it was regarded a FUNDAMENTAL LAW, especially the declaration of rights.

That declaration was the most significant achievement of the convention. As the first such American document, it contained many constitutional "firsts," such as the statements that "all men" are equally free and have inherent rights which cannot be divested even by compact; that among these rights are the enjoyment of life, liberty, property, and the pursuit of happiness; and that all power derives from the people who retain a right to change the government if it fails to secure the people's objectives. The declaration recognized "the free exercise of religion and FREEDOM OF THE PRESS, and included clauses that were precursors, sometimes in rudimentary form, of the FOURTH through the Eighth AMENDMENTS of the Constitution of the United States. Inexplicably the convention voted down a ban on BILLS OF ATTAINDER and on EX POST FACTO LAWS and omitted the FREEDOMS OF SPEECH, assembly, and petition, the right to the writ of HABEAS CORPUS, GRAND JURY, proceedings, the right to compulsory process to secure EVIDENCE in one's own behalf, the RIGHT TO COUNSEL, and freedom from DOUBLE JEOPARDY. Although RELIGIOUS LIBERTY was guaranteed, the ban on an ESTABLISHMENT OF RELIGION awaited enactment of the VIRGINIA STATUTE OF RELIGIOUS FREEDOM in 1786. Madison's familiarity with his own state's bill of rights strongly influenced his draft of the amendments that became the BILL OF RIGHTS of the Constitution.

LEONARD W. LEVY
(1986)

Bibliography

LINGLEY, CHARLES R. 1910 *The Transition of Virginia from Colony to Commonwealth.* New York: Columbia University Press.

## VIRGINIA PLAN

At the CONSTITUTIONAL CONVENTION OF 1787, EDMUND RANDOLPH, arguing that the government of the union under the ARTICLES OF CONFEDERATION could not defend itself against state encroachments, introduced the alternative of a "national plan," probably the work of JAMES MADISON. In effect Virginia proposed to supersede the Articles by providing for a strong, central government of three branches, each with broad, undefined powers. The plan included a congress of two houses, the first elected by the people and the second by the first, both to be apportioned on the basis of a state's population of free inhabitants or its contributions to the national treasury. The most significant provision empowered congress to legislate in all cases of state incompetency or whenever state legislation might disrupt national harmony. Congress was also empowered to veto state laws. The sole check on congress was a qualified veto power vested in a council consisting of the executive and some judges. One provision required state officers to swear support of the new constitution, and another authorized the use of force against recalcitrant states. The Virginia Plan structured the deliberations of the Constitutional Convention and became the nucleus of the Constitution of the United States.

LEONARD W. LEVY
(1986)

Bibliography

BRANT, IRVING 1950 *James Madison: Father of the Constitution, 1787–1800.* Pages 23–54. Indianapolis: Bobbs-Merrill.

## VIRGINIA PRIVATE SCHOOL CASES

See: *Runyon v. McCrary*

## *VIRGINIA STATE BOARD OF PHARMACY v. VIRGINIA CITIZENS CONSUMER COUNCIL*
425 U.S. 748 (1976)

Traditionally COMMERCIAL SPEECH was assumed to lie outside the FIRST AMENDMENT's protection. This decision made clear that this assumption was obsolete. Virginia's rules governing professional pharmacists forbade the advertising of prices of prescription drugs. The Supreme Court, 7–1, held this rule invalid at the behest of a consumers' group, thus promoting the notion of a "right to receive" in the FREEDOM OF SPEECH. (See LISTENERS' RIGHTS.) The Court's opinion indicated that false or misleading commercial advertising might be regulated—a rule the Court would never apply to political speech. For a few years, this decision stood as the Court's principal commercial speech precedent, only to be assimilated in the comprehensive

opinion in CENTRAL HUDSON GAS V. PUBLIC SERVICE COMMISSION (1980).

MARTIN SHAPIRO
(1986)

## VIRGINIA STATUTE OF RELIGIOUS FREEDOM (1786)

This historic statute, one of the preeminent documents in the history of RELIGIOUS LIBERTY, climaxed a ten-year struggle for the SEPARATION OF CHURCH AND STATE in Virginia. On the eve of the Revolution Baptists were jailed for unlicensed preaching, and JAMES MADISON exclaimed that the "diabolical Hell conceived principle of persecution rages." The Church of England (Episcopal) was the established church of Virginia, supported by public taxes imposed on all. The state CONSTITUTION of 1776 guaranteed that everyone was "equally entitled to the free exercise of religion," but the convention defeated a proposal by Madison that would have ended any form of an ESTABLISHMENT OF RELIGION. By the close of 1776 the legislature, responding to dissenter petitions, repealed all laws punishing any religious opinions or modes of worship, exempted dissenters from compulsory support of the established church, and suspended state taxation on its behalf. But the legislature reserved for future decision the question whether religion ought to be supported by voluntary contributions or by a new establishment of all Christian churches.

In 1779 an indecisive legislature confronted two diametrically opposed bills. One was a general assessment bill, providing that the Christian religion should be "the established religion" supported by public taxation and allowing every taxpayer to designate the church that would receive his money. The other was THOMAS JEFFERSON's Bill for Religious Freedom, which later provided the philosophical basis for the religion clauses of the FIRST AMENDMENT. The preamble, a classic expression of the American creed on intellectual as well as religious liberty, stressed that everyone had a "natural right" to his opinions and that religion was a private, voluntary matter of individual conscience beyond the scope of the civil power to support or restrain. Jefferson rejected the BAD TENDENCY TEST for suppressing opinions and proposed "that it is time enough for the rightful purposes of the civil government for its officers to interfere when principles break out into overt acts against peace and good order. . . ." The bill, which protected even freedom of irreligion, provided that no one should be compelled to frequent or support any worship. Neither Jefferson's bill nor the other could muster a majority, and for several years the legislature deadlocked.

Each year, however, support for an establishment grew. When a liberalized general assessment bill was introduced in 1784, omitting subscription to articles of faith and giving secular reasons for the support of religion, the Presbyterian clergy backed it. Madison angrily declared that they were "as ready to set up an establishment which is to take them in as they were to pull down that which shut them out." Only Madison's shrewd politicking delayed passage of the general assessment bill until the legislature had time to evaluate the state of public opinion. MADISON'S MEMORIAL AND REMONSTRANCE turned public opinion against the assessment; even the Presbyterian clergy now endorsed Jefferson's bill. Madison reintroduced it in late 1785, and it became law in early 1786, completing the separation of church and state in Virginia and providing a model for a nation.

LEONARD W. LEVY
(1986)

Bibliography

STOKES, ANSON PHELPS 1950 *Church and State in the United States.* Vol. 1:366–394. New York: Harper & Row.

## VIRTUAL REPRESENTATION

See: Representation; Taxation without Representation

## VISAS

Although the Constitution does not directly mention the power to control and regulate IMMIGRATION, the Supreme Court, in CHAE CHAN PING V. UNITED STATES (1889), held that immigration control was an implied power inherent in national sovereignty. The Court has subsequently held that Congress has virtual plenary power to regulate or condition immigration and NATURALIZATION, and can admit noncitizens to the United States, regulate their presence within the country, and expel, deport, or exclude them. Congress may also accord resident ALIENS and citizens different treatment, but because aliens are persons within the meaning of the Fifth Amendment protection of persons, they are entitled to some PROCEDURAL DUE PROCESS rights. With that exception, the regulation of immigration and other admission of aliens to the United States is a matter of statutory law.

Congress, through various immigration and naturalization statutes, has created an elaborate system and set of rules and procedures governing the admission of foreigners to the United States and regulating their stay within the country. American law, like the law in other countries, requires most persons seeking to enter the United States to obtain visas from United States consular offices abroad. A visa is an official document indicating that the party to

whom it was issued appears to qualify for legal entry into the United States in accordance with the immigration laws. As aliens enter the United States for many varied reasons (e.g., to transit, to visit, to study, to work, to conduct business, to join a relative, to become a resident), the visa also designates the purpose or type of entry. The latter factor governs the length of stay and the alien's lawful activities while in the United States. A visa is consequently a preliminary determination of admissibility, a designation of entry category, and a permission to apply for admission at the border. The issuance of a visa, while necessary, does not guarantee admission into the United States, for immigration officers, disagreeing with a consul's determination, may refuse to admit persons with valid visas. Such refusals occur infrequently, however, and in most cases a visa is tantamount to a permission to enter.

There are two broad classes of visas: immigrant visas, issued to those seeking permanent admission into the United States, and nonimmigrant visas, issued to those seeking only temporary admission for business or pleasure. The United States limits the number of those who may seek permanent admission, with the exception of immediate relatives of citizens—defined as spouses, children under twenty-one, and parents of American citizens over twenty-one. A complicated system of seven preferences sets priorities among immigration seekers according to statutory criteria of desirability. For example, this scheme assigns the first preference among immigration applicants to adult unmarried sons and daughters of American citizens. The statute assigns twenty percent of the total number of available immigrant visas to this category. Consequently, in passing on immigrant visa applications, consular officers must prefer unmarried sons and daughters over other applicants for up to twenty percent of immigrant visas.

There are thirty-two statutory grounds for denying immigrant visa applications, including ill health, homosexuality, poverty, criminal convictions, insanity, narcotic addiction, entry for purposes of prostitution, subversive affiliations, and participation in Nazi persecution.

Many classes of persons are eligible for nonimmigrant visas, including visitors for business or pleasure, foreign officials and international representatives, intracompany transferees, exchange visitors, students, temporary workers and trainees, transit aliens, treaty traders and investors, foreign media representatives, fiancés or fiancées of U.S. citizens, and spouses and children of persons in some of these categories. Each class has its own type of visa, and entry periods and other restrictions depend on the type of visa issued.

As the consular decision whether to issue a visa depends on factual determinations and judgments, consuls exercise considerable discretion. Because the immigration statutes do not provide for JUDICIAL REVIEW of visa denials, the issue arises whether the Constitution, at least in some cases, requires such review. In *Kleindienst v. Mandel* (1972) the American government excluded a Belgian Marxist seeking to enter the United States to attend lectures. Asserting a FIRST AMENDMENT right to receive information and ideas, persons who wished to hear, speak, and debate with Mandel claimed that the Constitution required the government to waive his excludability—in effect to issue him a nonimmigrant visa. Relying on Congress's plenary power over the admission of aliens, the Supreme Court held that the First Amendment did not override the ostensibly legitimate exclusion. Lower courts have read *Mandel* to preclude judicial review of consular visa denials. Consequently, short of administrative relief or statutory change, applicants denied visas have no remedy and cannot gain admission to the United States.

GARY GOODPASTER
(1992)

Bibliography

GORDON, CHARLES and ROSENFIELD, HARRY 1959 *Immigration Law and Procedure.* Albany N.Y.: Banks Publishing Co.

## *VLANDIS v. KLINE*
412 U.S. 441 (1973)

A Connecticut statute gave resident students at a state university certain tuition preferences. A student who had entered the university as a nonresident was relegated to that status for his or her full student career. The Supreme Court, 6–3, held the latter provision unconstitutional. A majority of five Justices, speaking through Justice POTTER STEWART, held that the provision created "a permanent and IRREBUTTABLE PRESUMPTION of non-residence." Because this presumption was "not necessarily or universally true in fact," it denied a student PROCEDURAL DUE PROCESS by denying a hearing on the issue of residence. Justice BYRON R. WHITE concurred on EQUAL PROTECTION GROUNDS. The dissenters suggested that the Court had, in fact, drifted into an area of SUBSTANTIVE DUE PROCESS that the Court had abandoned in the 1930s. The irrebuttable presumptions DOCTRINE had a brief vogue, but *Weinberger v. Salfi* (1975) placed it in mothballs.

KENNETH L. KARST
(1986)

## VOICE SAMPLES

See: Testimonial and Nontestimonial Compulsion

## VOID FOR VAGUENESS

See: Vagueness

## VOIR DIRE

Voir dire (Old French: "to speak the truth") refers to the questioning by the court or counsel of prospective jurors to determine their qualification for jury service.

Two types of objections may be raised to disqualify prospective jurors: peremptory challenges and challenges for cause. A peremptory challenge allows dismissal of a juror without cause. Most states provide each side with twenty such challenges for a capital offense, and a lesser number for other felonies and misdemeanors.

A challenge for cause requires the challenging party to prove potential prejudice to the case if the challenged juror should be accepted. There is generally no limit to such challenges. The typical statute permits such an objection if the juror is of unsound mind, lacks the qualifications required by law, is related to a party in the litigation, has served in a related case or GRAND JURY investigation, or has a "state of mind" that will prevent him from acting with impartiality.

In *Wainwright v. Witt* (1985) the Supreme Court stated that the standard to determine when a prospective juror should be excluded for cause is whether the juror's views would prevent or substantially impair the juror's duties in accordance with hisher instructions and oath.

Commonly, a prosecutor calls and examines twelve veniremen, exercises his challenges for cause and peremptory challenges, replaces those excused with others, and then tenders a group of twelve to the defense. The defendant follows a similar procedure. This process continues until the parties have exhausted their challenges or expressed their satisfaction with the jury.

Voir dire proceedings are usually open to the public. In *Press-Enterprise v. Superior Court* (1984) the trial judge had ordered that all but three days of a six-week voir dire for a rape-murder trial of a teenage girl be closed to the public and press and had refused to grant the defendant's pretrial motion for release of the voir dire transcript. The Supreme Court unanimously reversed, holding that voir dire proceedings in criminal trials should be presumptively open to the public, unless fair trial interests would be better served by closure.

Voir dire vests broad authority in the trial judge. A judge may refuse to allow questions deemed irrelevant or inappropriate. The Constitution, however, requires certain inquiries. In *Ham v. South Carolina* (1973) the Supreme Court held that where racial issues permeate or are inextricably bound up in a trial, the defendant is entitled to questioning specifically directed at racial prejudice. In *Ristano v. Ross* (1976), however, the Court held that this right does not extend to all cases in which the victim and the defendant are of different races. Questioning about general bias or prejudice will normally suffice. The Court held in *Rosales-Lopez v. United States* (1981) that judges may decide on a case-by-case basis whether racial overtones justify such questioning.

Finally, voir dire violates DUE PROCESS if its exclusion of a particular group seriously detracts from the jury's impartiality and ability to reflect dominant community values. In *Witherspoon v. Illinois* (1968) the Supreme Court invalidated a statute that had the effect of screening out jurors not enthusiastic about CAPITAL PUNISHMENT, but accepting those who were. Jurors may constitutionally be disqualified, however, by expressing an absolute refusal to impose the death penalty.

CHARLES H. WHITEBREAD
(1986)

Bibliography

KALVEN, HARRY and ZEISEL, HANS 1966 *The American Jury.* Boston: Little, Brown.

## VOLSTEAD ACT
### 41 Stat. 305 (1919)

Congress passed the Volstead National Prohibition Act, sponsored by Representative Andrew J. Volstead (Republican, Minnesota), on October 28, 1919. The act provided both for the continuation of wartime PROHIBITION and for enforcement of the EIGHTEENTH AMENDMENT. It was enacted over the veto of President WOODROW WILSON, who objected to the linking of those "two distinct phases of prohibition legislation."

To enforce the Eighteenth Amendment against private conduct the Volstead Act defined "intoxicating beverages" as any beverages containing at least 0.5% alcohol by volume, and provided stringent penalties for their manufacture, importation, transportation, sale, possession, or use. The constitutionality of the act was upheld in the National Prohibition Cases (*Rhode Island v. Palmer,* 1920), in which the Supreme Court, speaking through Justice WILLIS VAN DEVANTER, held that Congress's power under the amendment was complete and extended to intrastate as well as interstate transactions.

The Beer-Wine Revenue Act of March 1933 amended the Volstead Act by permitting the manufacture and sale of beer and wine with an alcohol content of up to 3.2%.

Passage of the TWENTY-FIRST AMENDMENT later the same year rendered the Volstead Act void.

DENNIS J. MAHONEY
(1986)

## VOLUNTARINESS

See: Police Interrogation and Confessions

## VON HOLST, HERMANN EDUARD
(1841–1904)

A German immigrant who became chairman of the department of history at the University of Chicago, Hermann E. von Holst published a seven-volume *Constitutional and Political History of the United States* (1876–1892). The work is malproportioned; the last four volumes cover 1850–1861. Intent on condemning the "slavocracy," the author blamed the ANNEXATION OF TEXAS, the Mexican War, the KANSAS-NEBRASKA ACT, and the CIVIL WAR on a slaveholders' conspiracy. The decision in DRED SCOTT V. SANDFORD (1857), wrote von Holst, was "an unparalleled prostitution of the judicial ermine." Von Holst believed that centralized SOVEREIGNTY and a free society stood for morality and national salvation. Despite his valuable use of newspapers and public documents, his style is so turgid and his judgments are so biased that he is no longer read.

LEONARD W. LEVY
(1986)

## VOTING RIGHTS

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." So spoke Chief Justice EARL WARREN, on behalf of the Supreme Court, in REYNOLDS V. SIMS (1964).

The Chief Justice's words were in direct philosophic succession to principles of the primacy of representative political institutions announced by the FIRST CONTINENTAL CONGRESS 190 years before, in the Declaration and Resolves of October 14, 1774:

> [T]he foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal policy, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed.

The failure of King George III, through his ministers, to recognize the urgency of the colonists' demand for true representative institutions was one of the chief causes of revolution set forth in the DECLARATION OF INDEPENDENCE: "He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions in the rights of the people. He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise."

The severing of the ties with Britain required the establishment, at the state level and at the national level, of new and more representative institutions of government. American constitutional history is characterized in part by the continuing enlargement of the right to vote, the mechanism which, in the American political tradition, has become the *sine qua non* of a valid system of REPRESENTATION. An anomaly presents itself: The Constitution, as amended, addresses aspects of the right to vote with far greater frequency than any other topic. Nonetheless, it has never been the function of the Constitution affirmatively to define the universe of voters. The Constitution's function has been narrower—progressively to limit the permissible grounds of disenfranchisement.

Prior to the AMERICAN REVOLUTION, eligibility to vote was not uniform among the colonies, but the variations were relatively minor. Broadly speaking, voting for colonial (as distinct from township or borough) officials was reserved to adult (generally meaning twenty-one or older) "freeholders." In equating property ownership and suffrage, the colonies were following a familiar English model. But landowning was far more widely dispersed in the colonies than in the mother country, so the proportion of colonists eligible to vote was larger.

There were not more than a few black or women freeholders in any of the colonies, and pursuant either to convention or to formal legal specification those few did not vote. Religious restrictions were also commonplace but varied somewhat among the colonies and at different times. In general, the franchise was the prerogative of the propertied, Protestant, white male.

With the coming of independence, all of the newly sovereign states except Connecticut and Rhode Island adopted new charters of government—"constitutions." Impelled by the rhetoric of revolution and the eagerness of thousands of militiamen to participate in the processes of governance, the drafters of the new state constitutions relaxed but did not abandon the property and religious

qualifications for voting for state officials (and the correlative, and generally more stringent, qualifications for holding state office). As Max Farrand observed, Americans

> might declare that "all men are created equal," and bills of rights might assert that government rested upon the consent of the governed; but these constitutions carefully provided that such consent should come from property owners, and, in many of the States, from religious believers and even followers of the Christian faith. "The man of small means might vote, but none save well-to-do Christians could legislate, and in many states none but a rich Christian could be a governor." In South Carolina, for example, a freehold of 10,000 currency was required of the Governor, Lieutenant Governor, and members of the council; 2,000 of the members of the Senate; and, while every elector was eligible to the House of Representatives, he had to acknowledge the being of a God and to believe in a future state of rewards and punishments, as well as to hold "a freehold at least of fifty acres of land, or a town lot."

Under the ARTICLES OF CONFEDERATION, the state delegates in Congress constituted the nation's government. The Articles limited the numbers of delegates (no fewer than two and no more than seven per state) but left each state legislature free to determine the qualifications of those selected and the mode of their annual selection. The Articles did not preclude popular election of delegates, but the word "appointed," in the phrase "appointed in such manner as the legislature of each State shall direct," suggests that it was not anticipated that legislatures would remit to their constituents the power to choose those who would speak and vote for the states in Congress.

At the CONSTITUTIONAL CONVENTION OF 1787, the Framers divided on how the lower house was to be selected. JAMES MADISON told his fellow delegates that he "considered an election of one branch at least of the legislature by the people immediately, as a clear principle of true government." Madison's view carried the day. But then the Convention faced the question whether the Constitution should set the qualifications of those who were to elect representatives. GOUVERNEUR MORRIS of Pennsylvania proposed that only freeholders should vote. Colonel GEORGE MASON of Virginia found this proposal regressive: "Eight of nine States have extended the right of suffrage beyond the freeholders. What will the people there say, if they should be disfranchised." OLIVER ELLSWORTH of Connecticut also challenged Morris's proposal: "How shall the freehold be defined? Ought not every man who pays a tax to vote for the representative who is to levy and dispose of his money?" Morris was unpersuaded: "He had long learned not to be the dupe of words. . . . Give the votes to people who have no property, and they will sell them to the rich who will be able to buy them." But BENJAMIN FRANKLIN took decisive issue with his fellow Pennsylvanian: "It is of great consequence that we should not depress the virtue and public spirit of our common people; of which they displayed a great deal during the war, and which contributed principally to the favorable issue of it." Morris's proposal was decisively defeated. The Convention instead approved the provision that has endured ever since, under which eligibility to vote for representatives is keyed, in each state, to that state's rules of eligibility to vote for members of the most numerous house of the state legislature.

When it came to designing the method of selecting the President and vice-president, the Convention devised the indirect election system of the ELECTORAL COLLEGE. The expectation was that the electors—themselves chosen from among the leading citizens of their respective states—would, through disinterested deliberation, select as the nation's chief executive officials the two persons of highest civic virtue, wholly without regard for the vulgar demands of "politics." According to ALEXANDER HAMILTON in THE FEDERALIST #68, "[t]he mode of appointment of the Chief Magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents." But, measured against its intended purpose, no other structural aspect of the Constitution has wound up wider of the mark. The Framers of the Constitution wholly failed to anticipate the development of national political parties whose chief political goal would be the election of the party leader as President. That development has meant that since the fourth presidential election—that of 1800, in which THOMAS JEFFERSON defeated JOHN ADAMS—the electors in each state have themselves been selected as adherents of the political party prevailing in that state and thus have, with the rarest of exceptions, cast their electoral votes for the party's presidential and vice-presidential candidates. The system of electors remains to this day, but it has been entirely drained of its intended function.

Those who drafted the Constitution in 1787, and who saw it through ratification to the launching of the new ship of state in 1789, were America's aristocracy. The transformation of American politics from 1789 to the Civil War can be measured in the marked shift in class status of those who occupied the Presidency. The Presidents from GEORGE WASHINGTON to JOHN QUINCY ADAMS were all patricians. Most of the Presidents from ANDREW JACKSON to ABRAHAM LINCOLN were not. The growth of national parties, beginning with Jefferson and accelerating with Jackson, democratized politics by putting politicians in the business of seeking to enlarge their voting constituencies. Property

qualifications gave way, for the most part, to taxpayer qualifications. And, in many states, these in turn were soon largely abandoned.

The erosion of property tests for voting did not mean that anything approximating universal suffrage was at hand. As one political scientist has summarized the situation:

> Apart from a few midwestern states, hungry for settlers, no one was very warm to the prospect of aliens and immigrants at the polls; all the states but Maine, Massachusetts, Vermont, New Hampshire, Rhode Island, and New York explicitly barred free blacks from voting, and New York imposed special property requirements on blacks which, while repeatedly challenged, were repeatedly upheld in popular referenda. Even in the tiny handful of northern states that did not exclude blacks by law, social pressures tended to accomplish the same end. New Hampshire and Vermont in 1857 and 1858 had to pass special laws against excluding blacks from voting. Chancellor James Kent concluded that only in Maine could the black man participate equally with the white man in civil and political rights. Women were universally denied the vote [Elliott 1974, p. 40].

In 1848, a year of revolution in Europe, 300 people gathered in a church in the little upstate New York town of Seneca Falls to consider the status of women. The most revolutionary item on the agenda was voting. Half a century before there had been a small outcropping of female voting in New Jersey, whose 1776 constitution had, perhaps inadvertently, used the word "inhabitants" to describe those who, if they met the property qualifications, could vote. It appears that by 1807, respectable New Jersey opinion had reached the consensus that laxity was slipping into license (at a local election in Trenton even slaves and Philadelphians were said to have cast ballots). At this point, "reform" was clearly called for: the legislature promptly altered the electoral code to bring New Jersey's voting qualifications back into conformity with the white maleness that characterized the electorate in the rest of the country and remained the accepted order of things until Seneca Falls.

The chief driving energies behind the SENECA FALLS CONVENTION were ELIZABETH CADY STANTON and Lucretia Mott. Stanton drafted the "Declaration of Principles" and the several resolutions which the convention was asked to adopt. The only resolution to receive less-than-unanimous endorsement was the ninth: "Resolved, that it is the duty of the women of this country to secure to themselves their sacred right to the elective franchise." That the franchise was a far more chimerical goal than other concerns (for example, property rights for married women) was recognized by Mott. She had asked Stanton not to submit the ninth resolution for the reason that "Thou will make us ridiculous." The factor that may have tipped the balance in Stanton's decision not to subordinate her principle to Mott's pragmatism was the strong encouragement of Frederick Douglass. The great black leader supported the ninth resolution. He joined the cause of equal rights for women to the cause of abolition.

The women's movement maintained its close association with abolitionism through the CIVIL WAR. After the freeing of the slaves, the country's attention focused on the terms on which American blacks were to be brought into the mainstream of American life. The leaders of the women's movement hoped that the drive for women's suffrage would complement and be reinforced by the drive for black suffrage. But that was not to be. As the war neared its end, a number of Republican leaders began to recognize a strong partisan interest in creating black voters to counter the feared resurgence of the Democratic party; there were no comparable reasons for creating women voters. Many of the women leaders, recognizing the political realities, accepted—albeit with no enthusiasm—the priority given to the rights of blacks. But not Elizabeth Cady Stanton and SUSAN B. ANTHONY. Said Anthony: "I will cut off this right arm before I will ever work for or demand the ballot for the Negro and not the woman." (Anthony and Stanton then formed the National Woman Suffrage Association, while the other leaders worked through the American Woman Suffrage Association; the split was not to be healed for twenty-five years.)

In 1864 Abraham Lincoln appointed SALMON P. CHASE—Lincoln's former secretary of the treasure and one of his chief rivals for the Republican presidential nomination in 1860—to succeed ROGER B. TANEY as CHIEF JUSTICE of the United States. Chase's elevation to the Court did not abate his presidential ambitions and his attendant interest in promoting a favorable political environment. The new Chief Justice wrote to Lincoln, as he subsequently wrote to President ANDREW JOHNSON, urging that black suffrage be made a condition of the reconstruction of the rebel states. And by 1867 Chase had taken the position that Congress had constitutional authority to enfranchise blacks as a mode of enforcing the THIRTEENTH AMENDMENT: "Can anything be clearer than that the National Legislature charged with the duty of "enforcing by appropriate legislation' the condition of universal freedom, is authorized and bound to provide for universal suffrage? Is not *suffrage* the best security against *slavery* and *involuntary servitude*? Is not the legislation which provides the *best* security the most *appropriate*?" Chase lost interest in active promotion of black voting when it became apparent that his modest chances of being nominated for the presidency were more likely to be realized in the Democratic party than in the Republican party. In any event, the question whether the Thirteenth Amendment could have been

a platform for enlarging the franchise became moot upon the adoption of the two other post-Civil War amendments, both of which expressly addressed the franchise—for blacks, not for women.

The FOURTEENTH AMENDMENT, ratified in 1868, dealt with black voting by indirection. By declaring that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," the first sentence of the first section of the amendment overruled Roger B. Taney's pronouncement in DRED SCOTT V. SANDFORD (1857), that blacks, whether slave or free, could not be citizens within the contemplation of the Constitution. The second sentence of the first section sought to protect the CIVIL RIGHTS of blacks: First, it guaranteed "the privileges and immunities of citizens of the United States" against state abridgment and, second, it prohibited state denial to any person, whether citizen or not, of "life, liberty or property without DUE PROCESS OF LAW," or deprivation of the "EQUAL PROTECTION OF THE LAWS." The second section of the amendment spoke to the political rights of blacks. It provided that any state that denied participation in federal or state elections to "any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States . . . except for participation in rebellion, or other crime," should have its allocation of representatives and of presidential electors proportionately reduced. The framers of the amendment thus preserved the states' entitlement to discriminate but proposed a substantial penalty as the price of discrimination.

By 1869, after General ULYSSES S. GRANT's narrow victory in the 1868 presidential election, the Republican party recognized that black votes were essential to its survival. So the Republican leadership in Congress fashioned the FIFTEENTH AMENDMENT. That amendment, ratified in 1870, addressed the question of black voting directly. A citizen's entitlement to vote could not be "abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Notwithstanding that the express language of the Fourteenth Amendment addressed male voting, and that the express language of the Fifteenth Amendment addressed discriminations rooted in "race, color or previous condition of servitude," some leaders of the women's movement contended that women were constitutionally entitled to vote. Arguing that the right to vote in a federal election was a privilege of national citizenship protected by section 1 of the Fourteenth Amendment, Susan B. Anthony actually persuaded election officials in Rochester, New York, to let her vote in 1872 notwithstanding that the New York constitution limited the franchise to men. Anthony was promptly charged with the crime of casting a ballot in a federal election in which she was not an eligible voter. The presiding judge was Justice WARD HUNT of the Supreme Court. Justice Hunt rejected Anthony's constitutional claim in the following words:

> The right of voting, or the privilege of voting, is a right or privilege arising under the constitution of the state, and not under the Constitution of the United States. The qualifications are different in the different states. Citizenship, age, sex, residence, are variously required in the different states, or may be so. If the right belongs to any particular person, it is because such person is entitled to it by the laws of the state where he offers to exercise it, and not because of citizenship of the United States. If the state of New York should provide that no person should vote until he had reached the age of thirty years, or after he had reached the age of thirty years, or after he had reached the age of fifty, or that no person having grey hair, or who had not the use of all his limbs, should be entitled to vote, I do not see how it could be held to be a violation of any right derived or held under the Constitution of the United States. We might say that such regulations were unjust, tyrannical, unfit for the regulation of an intelligent state; but, if rights of a citizen are thereby violated they are of that fundamental class, derived from his position as a citizen of the state, and not those limited rights belonging to him as a citizen of the United States.

Read through the prism of a century of doctrinal hindsight, Justice Hunt's words seem—at least at first blush—somewhat surprising. The surprise is not occasioned by the fact that the Justice gave such short shrift to arguments based on the Fourteenth Amendment's PRIVILEGES AND IMMUNITIES CLAUSE, for we are accustomed to the fact that, ever since the SLAUGHTERHOUSE CASES (1873), the Supreme Court has read the grant of privileges and immunities flowing from national citizenship very restrictively. The surprise stems from Hunt's failure—which may also have been counsel's failure—to approach sex-based denial of the franchise (not to mention the assertedly analogous hypothetical denials based on age, physical handicap, or color of hair) in equal protection terms. The likely explanation is that in *Slaughterhouse* the Court doubted that "any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the" equal protection clause.

Justice Hunt directed the jury to return a verdict of guilty and imposed a fine of $100.

Justice Hunt's rejection of Anthony's privileges and immunities claim was vindicated two years later by Chief Justice MORRISON R. WAITE's opinion for the unanimous Court in MINOR V. HAPPERSETT (1875). This was a civil suit brought in a Missouri state court by Virginia L. Minor, and her lawyer husband Francis Minor, to challenge the refusal of a Missouri election official to register her as a voter. The Minors contended that the provision of the Mis-

souri constitution limiting the electorate to male citizens transgressed the privileges and immunities clause. In rejecting the Minors' contention, Chief Justice Waite demonstrated that limitation of the franchise to males had been the norm, despite the fact that women were citizens. Voting had not been a privilege of national citizenship prior to the Fourteenth Amendment. As the amendment "did not add to the privileges and immunities of a citizen," but merely "furnished an additional guaranty for the protection of such as he already had," Missouri's refusal to let Minor vote was not unconstitutional. *Minor v. Happersett* ended attempts to win the campaign for woman's suffrage by litigation. The road to the ballot box was to be political—persuading male legislators to pass laws giving women the vote.

It was to be a long road. In 1870 Wyoming's territorial legislature enacted a law entitling women to vote. Utah followed suit, but the victory there was temporary. An 1887 congressional statute forbidding Utah's Mormons from practicing polygamy also overrode the territorial legislature's grant of the franchise to women. Three years later Wyoming's first state constitution called for women's suffrage. Thereafter progress was slow. Many state campaigns were fought and most were lost. In the South, votes for women were seen as a harbinger of votes for blacks, and the states resisted accordingly; in the East, many industrialists mistrusted the links between some women's suffragists and trade union and other reform groups; in the Midwest, the women's suffrage movement was seen by the brewing interests as the advance guard of prohibition. By 1913 women could vote in only nine states; in that year Illinois admitted women to participation in presidential elections.

In 1912, THEODORE ROOSEVELT's Progressive party endorsed women's suffrage. This endorsement served as a reminder that Susan B. Anthony and her associates had sought to achieve women's suffrage not state-by-state but by amending the Constitution. Pressure for a women's suffrage amendment mounted during World War I when women entered the work force in record numbers. In 1918 WOODROW WILSON announced support for the proposed amendment, notwithstanding that women's suffrage was anathema to the white Democratic South. In 1919, with Democrats divided and Republicans strongly in favor, Congress submitted to the states a proposed amendment barring denial or abridgment of the right to vote in any election on grounds of sex. In 1920, the NINETEENTH AMENDMENT was ratified. In the 1920 elections one of the voters was Charlotte Woodward Pierce who, as a nineteen-year-old farm girl, had attended the Seneca Falls Convention in 1848.

Following the Civil War, the military occupation of the South ushered in a period in which blacks not only voted but were elected to office. With the adoption of the Fifteenth Amendment, there appeared to be some ground for supposing that black voting had achieved a legal infrastructure which might suffice even after the army departed. However, although the amendment bars race, color, and previous condition of servitude as criteria of eligibility to vote, it does not proscribe other criteria—such as literacy or taxpayer status—susceptible of adaptation as surrogates for racism. The lesson was that most blacks might be prevented from voting by educational or property qualifications.

Following the COMPROMISE OF 1877, which led to the withdrawal from the South of the last military units, the twilight of black participation in the southern political process began. Through the 1880s, some black voting continued—frequently in Populist alliance with poor whites. But in the 1890s, as a corollary of the spreading gospel of Jim Crow, the southern white political leadership forged a consensus to exclude blacks from the ballot box. Some of this was achieved by force, and some by skulduggery, but in large measure the forms of law were utilized. LITERACY TESTS and POLL TAXES were common exclusionary devices, as was closing Democratic primaries—the only real elections in most of the South—to blacks. The underlying rationale was that offered by Senator James Vardaman of Mississippi: "I am just as much opposed to Booker Washington as a voter, with all his Anglo-Saxon reinforcements, as I am to the cocoanut-headed, chocolate-covered, typical little coon, Andy Dottson, who blacks my shoes every morning. Neither is fit to perform the supreme function of citizenship."

By and large, the legal stratagems employed by the southern states to disenfranchise blacks succeeded. Poll taxes and literacy tests which did not on their face show a discriminatory purpose easily passed constitutional muster from BREEDLOVE V. SUTTLES (1937) to *Lassiter v. Northampton Election Board* (1959). To be sure, the Supreme Court did intervene in those rare instances in which the purpose to discriminate was evident on the face of the challenged restraint. A flagrant example was the so-called GRANDFATHER CLAUSE in Oklahoma's 1910 constitution, which exempted from the literacy requirement any would-be voter "who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and [any] lineal descendant thereof." In GUINN V. UNITED STATES (1915) the Supreme Court held this literacy test invalid.

Because during the first half of the twentieth century the decisive voting in the South took place in Democratic primaries, not in the general elections, the cases of greatest practical as well as doctrinal consequence were those that challenged devices to maintain the whiteness of the "white primary."

In NIXON V. HERNDON (1927) a unanimous Court, speaking through Justice OLIVER WENDELL HOLMES, sustained the complaint of L. A. Nixon, who contended that he had been unconstitutionally barred from voting in a Texas Democratic primary through enforcement of a Texas statute that recited that "in no event shall a negro be eligible to participate in a Democratic party primary election held in the state of Texas." The Court held that this statutory racial exclusion contravened the Fourteenth Amendment.

The consequence of this ruling was described by Justice BENJAMIN N. CARDOZO in his opinion in NIXON V. CONDON (1932): "Promptly after the announcement of [the Herndon] decision, the legislature of Texas enacted a new statute . . . repealing the article condemned by this court; declaring that the effect of the decision was to create an emergency with a need for immediate action; and substituting for the article so repealed another bearing the same number. By the article thus substituted, "every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party. . . ." Thereupon the executive committee of the Texas Democratic party voted to limit party membership and participation to whites, and L. A. Nixon was once again barred from voting in the Democratic primary. Once again Nixon brought a lawsuit, and once again he prevailed in the Supreme Court. Justice Cardozo, speaking for a majority of five, concluded that the new Texas statute delegated exercise of the state's power over primaries to party executive committees, with the result that the racial exclusion decided on by the executive committee was in effect the racially discriminatory act of the State of Texas and hence prohibited by the Fourteenth Amendment. Justice JAMES C. MCREYNOLDS, joined by three other Justices, dissented.

Three years later, in GROVEY V. TOWNSEND (1935), the Court considered the next refinement in the Texas Democratic primary—exclusion of blacks by vote of the party convention. Speaking through Justice OWEN J. ROBERTS, the Court this time unanimously concluded that the action taken by the Texas Democratic party was an entirely private decision for which the State of Texas was not accountable; accordingly, neither the Fourteenth nor the Fifteenth Amendment was transgressed.

Nine years later, toward the end of World War II, the Court, in SMITH V. ALLWRIGHT (1944), again considered the *Grovey v. Townsend* question. In the interval, seven of the Justices who had participated in *Grovey v. Townsend* had died or retired. Approaching the matter in a common sense way, the Court, with Justice Roberts dissenting, concluded that the role of the primary as a formal and vital predicate of the election made it an integral part of the state's voting processes and hence subject to the requirement of the Fifteenth Amendment. Accordingly, the Court in *Smith v. Allwright* overruled *Grovey v. Townsend.*

The resumption, after three-quarters of a century, of significant black participation in the southern political process dates from the decision in *Smith v. Allwright.* But the elimination of the most egregious legal barriers did not mean that all blacks were automatically free to vote. Hundreds of thousands of would-be black voters were still kept from the polls by fraud or force or both. In 1957, three years after the Court, in BROWN V. BOARD OF EDUCATION (1954), held that legally mandated racial SEGREGATION contravened the Fourteenth Amendment, Congress passed the first federal civil rights law enacted since the 1870s: a voting rights law which authorized modest federal supervision of the southern voting process. And the year 1964 witnessed ratification of the TWENTY-FOURTH AMENDMENT, barring exclusion of American citizens from voting in any federal election on grounds of failure to pay any poll tax or other tax. But as black demands for equal treatment multiplied, responsive abuses escalated.

In the spring of 1965, a Boston minister, one of scores of clergymen who had gone to Selma, Alabama, to help MARTIN LUTHER KING, JR., launch a voter registration drive, was murdered. A few days later, on March 15, 1965, President LYNDON B. JOHNSON addressed Congress:

> Many of the issues of civil rights are very complex and most difficult. But about this there can and should be no argument. Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to ensure that right.
>
> Yet the harsh fact is that in many places in this country men and women are kept from voting simply because they are Negroes.
>
> Every device of which human ingenuity is capable has been used to deny this right. The Negro citizen may go to register only to be told that the day is wrong, or the hour is late, or the official in charge is absent. And if he persists and if he manages to present himself to the registrar, he may be disqualified because he did not spell out his middle name or because he abbreviated a word on the application. And if he manages to fill out an application, he is given a test. The registrar is the sole judge of whether he passes this test. He may be asked to recite the entire constitution, or explain the most complex provisions of state laws. And even a college degree cannot be used to prove that he can read and write.
>
> For the fact is that the only way to pass these barriers is to show a white skin.
>
> Experience has clearly shown that the existing process of law cannot overcome systematic and ingenious discrimination. No law that we now have on the books—and I

have helped to put three of them there—can ensure the right to vote when local officials are determined to deny it. . . .

This time, on this issue, there must be no delay, or no hesitation or no compromise with our purpose.

We cannot, we must not refuse to protect the right of every American to vote in every election that he may desire to participate in. And we ought not, we must not wait another eight months before we get a bill. We have already waited a hundred years and more and the time for waiting is gone. . . .

But even if we pass this bill, the battle will not be over. What happened in Selma is part of a far larger movement which reaches into every section and state of America. It is the effort of American Negroes to secure for themselves the full blessings of American life.

Their cause must be our cause too. Because it is not just Negroes, but really it is all of us, who must overcome the crippling legacy of bigotry and injustice. And we shall overcome.

As a man whose roots go deeply into Southern soil I know how agonizing racial feelings are. I know how difficult it is to reshape the attitudes and the structure of our society.

But a century has passed, more than a hundred years, since the Negro was freed. And he is not fully free tonight.

It was more than a hundred years ago that Abraham Lincoln, the great President of the Northern party, signed the Emancipation Proclamation, but emancipation is a proclamation and not a fact.

A century has passed, more than a hundred years since equality was promised. And yet the Negro is not equal.

A century has passed since the day of promise. And the promise is unkept.

The time of justice has now come. I tell you that I believe sincerely that no force can hold it back. It is right in the eyes of man and God that it should come. And when it does, I think that day will brighten the lives of every American.

Congress enacted the VOTING RIGHTS ACT OF 1965. The act provided, among other things, for the suspension of literacy tests for five years in states or political subdivisions thereof in which fewer than "50 per cent of its voting-age residents were registered on November 1, 1964, or voted in the presidential election of November, 1964." This and other major provisions of the 1965 act were thereafter sustained in SOUTH CAROLINA V. KATZENBACH (1966), *Rome v. United States* (1980), and KATZENBACH V. MORGAN (1966), as appropriate ways of enforcing the Fifteenth and Fourteenth Amendments. Subsequent amendments to the 1965 act have broadened its coverage.

The 1944 decision in *Smith v. Allwright* was more than a new and hospitable judicial approach to the right of blacks to participate in the American political process. It was a major advance (as, four years later, was SHELLEY V. KRAEMER, 1948) toward the day—May 17, 1954—when a unanimous Court, speaking through Chief Justice Warren, was to hold, in *Brown v. Board of Education*, that the equal protection clause barred the legally mandated racial segregation of school children. Subsequent decisions, building on *Brown v. Board of Education*, soon made it plain that the equal protection clause barred all the legal trappings of Jim Crow. *Brown v. Board of Education* worked a fundamental change in the Court's and the nation's perception of the scope of judicial responsibility to vindicate those values.

In 1962, eight years after *Brown v. Board of Education*, the Court, in *Baker v. Carr*, held that allegations that a state legislature suffered from systematic malapportionment, under which districts of widely different populations were each represented by one legislator, stated a claim cognizable under the equal protection clause. The importance of *Baker v. Carr* cannot be overestimated. Chief Justice Warren thought it the most significant decision handed down by the Court during his sixteen years in the center chair. Even those who rank *Brown v. Board of Education* ahead of *Baker v. Carr* must nonetheless acknowledge that the latter decision set in motion a process that resulted in the redesign of numerous state legislatures and a myriad of local governing bodies, and, indeed, of the House of Representatives. That redesign has been required to meet the Court's pronouncement, in GRAY V. SANDERS (1963), that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." Long-standing patterns of malapportionment in which rural districts with relatively few inhabitants were represented on equal terms with heavily populated urban districts have become a thing of the past. (See REAPPORTIONMENT.)

Guaranteeing the voting rights of women and blacks and overcoming rampant malapportionment have cured the major inexcusable deficiencies of the American political process. In recent decades, certain lesser inequalities have also begun to be addressed.

From the beginning of the republic, Americans residing in the continental United States but not within any state—for example, those who lived in federal territories—had no way of voting in national elections. In the most egregious of anomalies, residents of the nation's capital were voiceless in the selection of the President who dwelt and governed in their own home town. So matters stood until 1964, when the TWENTY-THIRD AMENDMENT was added to the Constitution, giving the DISTRICT OF COLUMBIA a minimum of three electoral votes in presidential elections.

In the late 1960s, profound divisions in American opinion about America's military involvement in the VIETNAM WAR forced recognition of another anomaly—that tens of

thousands of young men were being drafted to fight in an unpopular foreign war although they were not old enough to vote in national elections choosing the officials responsible for making decisions for war or for peace. In 1970, Congress, in amending the Voting Rights Act, included a provision forbidding abridgment of the right of any citizen to vote "on account of age if such citizen is eighteen years or older." The statute was promptly challenged in OREGON V. MITCHELL (1970). Four Justices concluded that Congress had the power to lower the voting age to eighteen. Four Justices concluded that Congress had no such power. The casting vote was that of Justice Hugo L. Black, who held that Congress could regulate the voting age in national elections but not in state elections. Because Americans vote every two years for state and national officials at the same time, *Oregon v. Mitchell* was an invitation to chaos. Within six months, Congress proposed and the requisite three-fourths of the states ratified, the TWENTY-SIXTH AMENDMENT which accomplished by constitutional mandate what Congress had been unable to achieve by statute.

In the course of two centuries law and conscience have combined to make the American suffrage almost truly universal. One massive obstacle remains: apathy. In recent national elections in the European democracies, seventy-two percent of the eligible electorate voted in Great Britain, seventy-nine percent in Spain, eighty-five percent in France, and eighty-nine percent in Italy and West Germany. By contrast, in the American presidential election of 1980, only fifty-three percent of those eligible voted. In America's 1984 presidential election, after both major parties had made massive efforts to register new voters, not more than fifty-five percent of those who could have voted made their way to the ballot box. A fateful question confronting American democracy is whether tens of millions of self-disenfranchised Americans will in the years to come find the energy and good sense to exercise the precious right won at such great labor at the Constitutional Convention, in Congress and state legislatures and the Supreme Court, and at Selma and Seneca Falls.

LOUIS H. POLLAK
(1986)

(SEE ALSO: *Rogers v. Lodge*.)

Bibliography


CHUTE, MARCHETTE G. 1969 *First Liberty: A History of the Right to Vote in America, 1619–1850.* New York: Dutton.

DUBOIS, ELLEN CAROL, ed. 1981 *Elizabeth Cady Stanton, Susan B. Anthony: Correspondence, Writings, Speeches.* New York: Shocken.

ELLIOTT, WARD E. Y. 1974 *The Rise of Guardian Democracy: The Supreme Court's Role in Voting Rights Disputes, 1845–1969.* Cambridge, Mass.: Harvard University Press.

FAIRMAN, CHARLES 1971 *Reconstruction and Reunion, 1864–1888.* New York: Macmillan.

FARRAND, MAX, ed. 1911 *The Records of the Federal Convention of 1787.* New Haven, Conn.: Yale University Press.

———, ed. 1921 *The Fathers of the Constitution.* New Haven, Conn.: Yale University Press.

FLEXNER, ELEANOR 1975 *Century of Struggle: The Woman's Right to Vote Movement in the United States.* Rev. ed. Cambridge, Mass.: Harvard University Press.

HIGGINBOTHAM, A. L., JR. 1984 "States' 'Rights' and States' 'Wrongs': Apartheid, Virginia and South African Style." Dubois Lecture, Harvard University.

MCKAY, ROBERT B. 1965 *Reapportionment: The Law and Politics of Equal Representation.* New York: Twentieth Century Fund.

WILLIAMSON, CHILTON 1960 *American Suffrage from Property to Democracy, 1760–1860.* Princeton, N.J.: Princeton University Press.

WOODWARD, C. VANN 1951 *Origins of the New South, 1877–1913.* Baton Rouge: Louisiana State University Press.

——— 1957 *The Strange Career of Jim Crow.* New York: Oxford University Press.


## VOTING RIGHTS
### (Update)

The 1980s began inauspiciously for supporters of minority voting rights when a plurality of the Supreme Court ruled in MOBILE V. BOLDEN (1980) that the VOTING RIGHTS ACT prohibited only intentional RACIAL DISCRIMINATION. Yet two years later, CIVIL RIGHTS forces, over the objections of the administration of President RONALD REAGAN, amended the Act to make clear that it was meant to prohibit laws or practices that had either the intent or the effect of discriminating against people on the basis of race. The bipartisan consensus in favor of a strengthened Voting Rights Act, the explicit standards in the authoritative U.S. SENATE report on the act, and the attention and élan that the 1981–1982 struggle restored to voting rights carried the movement to successes through the rest of the 1980s. At-large elections like those at issue in *Bolden*, which tend to minimize minority voting power, were declared illegal in many areas in the South and some outside it.

Even though the Court sustained attacks on at-large elections in its most important interpretation of the 1982 amendments in *Thornburg v. Gingles* (1986), critics such as political scientist Abigail Thernstrom and Justice CLARENCE THOMAS harshly denounced the trend. Electoral structures, Thernstrom thought, should be overturned only in the most egregious cases of discrimination against African Americans. Latinos, she claimed, did not suffer from enough discrimination to deserve protection. The Voting Rights Act, she announced, should never have deviated from what she asserted was its sole original intent, to protect the right to cast a ballot. In a lengthy concurrence to *Holder v. Hall* (1994), Thomas not only agreed with Thernstrom, but also went on to argue that the

amended Voting Rights Act was never intended to apply to such electoral structures as at-large elections and redistricting, but only to guard an individual's right to register and vote, which he believed to be of merely symbolic importance anyway. Not only were Thernstrom's and Thomas's empirical assertions of racial electoral equality factually incorrect, but they also failed to apply their value judgments consistently when the Court vetoed prominority redistricting in SHAW V. RENO (1993) and its progeny, decisions that threatened to reverse many of the voting rights victories of the 1980s.

In the other major voting rights development of the 1990s, the Clinton Administration passed the National Voter Registration Act (NVRA), popularly known as "motor voter," which facilitated voter registration by requiring states to register voters for federal elections in offices that served the public, such as departments of motor vehicles and welfare and unemployment bureaus. Fearing a surge of new lower-class, pro-Democratic voters, several Republican governors refused to effectuate the law and unsuccessfully took it to court. By the time that the Court rejected the challenge, it had become clear that the large number of new registrants did not affiliate disproportionately with either major party. Estimates of additional registration produced by the NVRA ranged from 3.5 million to 9 million people in 1995–1996.

J. MORGAN KOUSSER
(2000)

(SEE ALSO: *Electoral Districting; Reapportionment.*)

Bibliography

CASPER, LYNNE M. and BASS, LORETTA E. 1998 Voting and Registration in the Election of November 1996. U.S. Bureau of the Census, *Current Population Reports: Population Characteristics.* Washington, D.C.: Government Printing Office.

DAVIDSON, CHANDLER and GROFMAN, BERNARD, eds. 1994 *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990.* Princeton, N.J.: Princeton University Press.

GROFMAN, BERNARD and DAVIDSON, CHANDLER, eds. 1992 *Controversies in Minority Voting: The Voting Rights Act in Perspective.* Washington, D.C.: The Brookings Institution.

THERNSTROM, ABIGAIL M. 1987 *Whose Votes Count? Affirmative Action and Minority Voting Rights.* Cambridge, Mass.: Harvard University Press.

## VOTING RIGHTS ACT OF 1965 AND ITS AMENDMENTS
### 79 Stat. 437 (1965)

Despite Congress's efforts in the CIVIL RIGHTS ACTS OF 1957, 1960, and 1964 to protect the right to vote, the case-by-case approach of these laws proved ineffective in dealing with denials of VOTING RIGHTS to millions of blacks. By 1965, only seventy-one voting rights cases had been filed by the Department of Justice. And in 1964 only 19.4, 6.4, and 31.8 percent of eligible blacks were registered to vote in Alabama, Mississippi, and Louisiana, respectively. In Louisiana, comparable white registration stood at 80.2 percent.

The Voting Rights Act of 1965, amended in 1970, 1975, and 1982, provided additional protection of the right to vote. The 1965 act's most extraordinary features, its preclearance requirements, applied only to states or political subdivisions with low voter registration or participation. In such jurisdictions, most of which were in the South, the act suspended literacy, educational, and character tests of voter qualifications used to deny the right to vote in any elections. In addition, with a view to New York's Puerto Rican population, the act prohibited conditioning the right to vote on any English comprehension requirement for anyone who had completed sixth grade in a school in which the predominant classroom language was other than English. States and political subdivisions subject to the suspension of voting tests were barred from implementing other voting practices that had the effect of denying or abridging the right to vote without obtaining preclearance from a federal court or the ATTORNEY GENERAL.

The Voting Rights Act Amendments of 1970 and 1975 enhanced the preclearance provisions. The 1965 act's coverage had been triggered by low electoral participation in the 1964 election. The 1970 amendments extended the preclearance requirement through 1975 and suspended voting qualification tests or devices until 1975 in all jurisdictions, not just in jurisdictions covered by other provisions of the original 1965 act. The 1975 amendments extended the preclearance requirement through 1982 and suspended tests or devices indefinitely. The 1970 and 1975 amendments also added 1968 and 1972 to 1964 as years in which low electoral participation would trigger the act's coverage. The 1982 amendments imposed new preclearance standards to be effective until 2007.

The Supreme Court has taken an expansive view of the procedures covered by the act's preclearance requirement. In *Allen v. State Board of Elections* (1969), *Dougherty County Board of Education v. White* (1978), and other cases, the Court applied the act to voting practices that might affect minority voter effectiveness, as well as to practices directly limiting voter registration. Under these rulings, the act's preclearance requirements would govern changes in voting districts, or a county board of education's requirement that employees seeking elective office take an unpaid leave of absence.

A change in voting procedure raises the question whether the change triggers the act's preclearance requirement by having the effect of denying or abridging

the right to vote. In deciding whether the requisite effect exists, the Supreme Court has held that the act covers effects even if they are not discriminatorily motivated. This standard, which is more stringent than the purposeful discrimination requirement the Court applies under the FOURTEENTH AMENDMENT and FIFTEENTH AMENDMENT, was upheld against constitutional attack in *Rome v. United States* (1980).

In addition to the preclearance requirements, the 1965 act included a nationwide prohibition upon voting qualifications or standards that deny or abridge voting rights on account of race. This prohibition applies whether the governmental unit is subject to the act's preclearance requirements or not. And, unlike the preclearance requirements, which apply only to changes in voting procedures, it applies to procedures that have long been in effect. A plurality opinion in MOBILE V. BOLDEN (1980) suggested that this provision only proscribed purposeful discrimination prohibited by the Constitution. In the 1982 amendments, however, Congress rejected a purposeful discrimination requirement and set forth standards governing findings of discriminatory effect.

In one of its remedies, the 1965 act continued and expanded a method of guaranteeing voting rights initiated in the FORCE ACT OF 1871. On a showing of widespread denials of voting rights, the act authorized a federal court to appoint federal voting examiners who themselves would examine and register voters for all elections, thereby superseding state election officials.

Addressing problems not covered by the 1965 act, the 1970 amendments lowered from twenty-one to eighteen the minimum voting age for all elections, prohibited states from imposing RESIDENCY REQUIREMENTS in presidential elections, and provided for uniform national rules for absentee voting in presidential elections. The 1975 amendments also sought to overcome linguistic barriers to political participation by requiring bilingual elections in certain political subdivisions. These language provisions brought Texas and Florida under the act's coverage. The 1982 amendments changed the expiration date of these provisions from 1985 to 1992, and added voter assistance provisions for the handicapped.

In general, the 1965 act and amendments have fared well in the Supreme Court. In SOUTH CAROLINA V. KATZENBACH (1966) and KATZENBACH V. MORGAN (1966) the Court upheld the constitutionality of the act. Following the Court's decision in NATIONAL LEAGUE OF CITIES V. USERY (1976) that certain integral state operations are beyond Congress's power to regulate under the COMMERCE CLAUSE, the constitutional attack was renewed. In *Rome v. United States* (1980) the Court held this argument inapplicable to cases involving Congress's power to enforce the Civil War amendments. In *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, (1977) the Court held that use of racial criteria to favor minority voters in an effort to comply with the Voting Rights Act did not violate the Fourteenth or Fifteenth Amendments. In OREGON V. MITCHELL (1970) the Supreme Court sustained most of the 1970 amendments but invalidated lowering the voting age in state and local elections. The latter ruling in *Mitchell*, however, soon was overturned by the TWENTY-SIXTH AMENDMENT.

The Voting Rights Act has been the most measurably successful CIVIL RIGHTS statute. In most southern states the gap between black and white voter registration shrank dramatically, and the number of elected black officials tripled between 1970 and 1975. Overt racial appeals no longer are a routinely successful part of southern political campaigns. The 1975 amendments confirmed a shift in attitude on civil rights matters. For the first time in the twentieth century, a majority of southern congressmen voted in favor of a federal civil rights statute.

THEODORE EISENBERG
(1986)

Bibliography

BELL, DERRICK A., JR. 1980 *Race, Racism and American Law*, 2nd ed. Boston: Little, Brown.

DORSEN, NORMAN et al. 1979 Emerson, Haber, and Dorsen's *Political and Civil Rights in the United States*, 4th ed. Vol. 2: 609–685. Boston: Little, Brown.

UNITED STATES SENATE, COMMITTEE ON THE JUDICIARY 1982 Senate Report No. 97–417, 97th Congress, 2d Session.

## VOTING RIGHTS ACT OF 1965 AND ITS AMENDMENTS

79 Stat. 437 (1965)

(Update)

The Voting Rights Act (VRA) has been used primarily for two purposes: to guarantee African American voters in the South equal access to the ballot; and to enable racial minorities—especially blacks and Hispanics—to achieve political REPRESENTATION through electing their preferred candidates. Because the first purpose was more quickly achieved, BALLOT ACCESS is called the act's first-generation effect, and representation, the second-generation effect.

First-generation results were most dramatic in Mississippi, where the percentage of blacks registered increased from 6.7 in 1964 to 59.4 in 1968. In seven Southern states covered entirely by the act's preclearance provision, the black/white registration gap decreased from 44.1 percentage points in 1965 to 5 points in 1988. Second-generation results are reflected in the increases in black officeholding in the eleven-state South, where approximately 20 percent

of the population is African American. In this region, between 1970 and 1985, the percentage of blacks in Congress increased from 0 to 1.7; in state senates, from 1.3 to 7.2; in state houses, from 1.9 to 10.8; and on city councils, from 1.2 to 5.6.

Increases in black and Hispanic officeholding in the South and Southwest, respectively, resulted largely from drawing majority–minority election districts. These were often created through legal challenges to racial GERRYMANDERING or to multimember or "at-large" election schemes, where plaintiffs invoked the FOURTEENTH AMENDMENT or sections 2 (as amended in 1982) and 5 of the VRA. Essential to this assault on the exclusion of minority-group members from government office was the concept of minority vote dilution which the Supreme Court endorsed in *White v. Regester* (1973) and later refined in *Thornburg v. Gingles* (1986).

The 1990s ELECTORAL DISTRICTING resulted in a sharp increase in Southern black members of Congress— from four in 1990 to seventeen in 1994. The U.S. Department of Justice under both Presidents GEORGE H.W. BUSH and WILLIAM J. CLINTON had required the creation of more "safe" black districts in the region to comply with the act. Several bizarrely shaped majority-black districts were crafted, and white voters challenged one in North Carolina. Consequently, the Court, most notably in SHAW V. RENO (1993) and its progeny, developed a theory under which the creation of districts whose predominant purpose is racial is unconstitutional. This controversial new cause of action threw into question the extent to which race-based redistricting, even as a remedy for minority vote dilution, is permissible. Courts have subsequently required that several majority–minority districts be redrawn.

The *Shaw* cases appear to respond to a growing chorus of criticism of the act's second-generation phase—criticism holding that federal intervention in redistricting to prevent minority vote dilution is either no longer needed or inevitably leads to proportional representation of minority groups, the right to which is expressly denied under section 2 of the VRA. Critics of *Shaw* fear that because of extensive racially polarized voting in the South and Southwest, the number of black and Hispanic officeholders there will decline.

CHANDLER DAVIDSON
(2000)

Bibliography

DAVIDSON, CHANDLER, and GROFMAN BERNARD, eds. 1994 *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965–1990.* Princeton, N.J.: Princeton University Press.

GUINIER, LANI 1994 *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy.* New York: Free Press.

ISSACHAROFF, SAMUEL; KARLAN, PAMELA S., and PILDES, RICHARD H. 1998 *The Law of Democracy: Legal Structure of the Political Process.* Westbury, N.Y.: Foundation Press.

KOUSSER, J. MORGAN 1999 *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction.* Chapel Hill: University of North Carolina Press.

LUBLIN, DAVID 1997 *The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress.* Princeton, N.J.: Princeton University Press.

PILDES, RICHARD H. 1995 The Politics of Race. *Harvard Law Review* 108:1359–1392.

THERNSTROM, ABIGAIL 1987 *Whose Votes Count? Affirmative Action and Minority Voting Rights.* Cambridge, Mass.: Harvard University Press.

## VOUCHERS

Widespread discontent with public schools has precipitated demands that parents be given some choice about which school their children will attend. Several states have adopted laws affording parents some choice among public schools in their area. These laws have attracted few constitutional attacks. Many people argue that choice plans should be broadened to offer parents government vouchers redeemable at any accredited school, public or private, including religious, or parochial, schools. Supporters of this approach cite as a model the GI Bill, under which the federal government pays certain expenses of military veterans to attend any accredited college.

Proponents contend that vouchers will produce better education, especially for poor and minority students who often fare poorly in public schools. They cite the superior performance of private-school students. They also believe that public schools would be shaken out of the complacency induced by their monopoly on state funding and prodded to do better by competition from private schools. Further, proponents want parents to be able to choose for their children an education consistent with their values, whether religiously based or not. Opponents of vouchers deny that private schools generally provide a better education; they ascribe any superior performance to private schools' "skimming the cream" by taking better students. They also question whether public schools would benefit from increased competition. They feel that vouchers would lead to further skimming of the cream, leaving public schools to handle the most difficult students.

Critics further assert that voucher plans would be unconstitutional. They fear that vouchers would exacerbate racial segregation in violation of EQUAL PROTECTION as interpreted in BROWN V. BOARD OF EDUCATION (1954, 1955). They also argue that vouchers redeemed at parochial schools would constitute GOVERNMENT AID TO RELIGIOUS IN-

STITUTIONS and an unconstitutional ESTABLISHMENT OF RELIGION.

Defenders respond that vouchers would not worsen school segregation, which is already widespread, but that if they did, this effect would result from individual choices, not from STATE ACTION, which is necessary to invoke the FOURTEENTH AMENDMENT. Moreover, segregative effects could be avoided by requiring participating schools to meet certain standards of racial composition in admissions procedures. Defenders also deny that vouchers would establish religion. Pointing again to the GI Bill, they see vouchers merely giving parents a choice in obtaining a service that the government subsidizes for secular reasons; any benefit to religious institutions is incidental and thus of no constitutional concern. Critics reply that even an indirect benefit is an unlawful establishment.

No state has yet adopted a true voucher program, although a few have proposed limited programs for low-income children. Confused and conflicting Supreme Court pronouncements on aid to religious schools preclude any prediction of how the Court would handle the issue. Quite possibly, vouchers could be upheld for the same reasons that the GI Bill is considered constitutional, especially if steps were taken to avoid racial segregation. Some kind of voucher program might even be necessary to accommodate children with religious objections to what is taught in public schools.

GEORGE W. DENT
(1992)

(SEE ALSO: *Establishment Clause; Religion in Public Schools; Religious Fundamentalism; School Choice.*)

Bibliography

NOWAK, JOHN E. 1976 The Supreme Court, the Religion Clauses, and the Nationalization of Education. *Northwestern University Law Review* 70:883–909.

# W

## *WABASH, ST. LOUIS & PACIFIC RAILWAY v. ILLINOIS*
118 U.S. 557 (1886)

Tremendous growth in a national railroad network after the CIVIL WAR led to increasingly scandalous and harmful abuses. State efforts to control the problems were generally ineffective until *Munn v. Illinois* (1877). In that case, Chief Justice MORRISON R. WAITE allowed state regulation of railroads where Congress had not yet acted, "even though it may indirectly affect" those outside the state. Illinois had attempted to curb one area of abuse by forbidding LONG HAUL-SHORT HAUL DISCRIMINATION. So pervasive was this evil that it would be outlawed later in the INTERSTATE COMMERCE and MANN-ELKINS ACTS. The state sued the Wabash company to prevent it from charging more for shorter hauls; because significant portions of most long hauls lay outside Illinois, the issue lay in the constitutionality of a state regulation of INTERSTATE COMMERCE.

A 6–3 Supreme Court struck down the Illinois statute, undercutting the decisions in the GRANGER CASES (1877) without impairing the DOCTRINE of AFFECTATION WITH A PUBLIC INTEREST. Justice SAMUEL F. MILLER looked to the COMMERCE CLAUSE as securing a "freedom of commerce" across the country. The imposition, by individual states, of varying patterns of rates and regulations on interstate commerce was "oppressive" and rendered the commerce clause a "very feeble and almost useless provision." Miller then relied on the decision in COOLEY V. BOARD OF WARDENS OF PHILADELPHIA (1851) to declare that such regulation was clearly national, not local, in character even though Congress had not yet acted. In so doing, he altered the thrust of the *Cooley* test by examining the impact of state regulation on the nation instead of on the subjects involved. Miller concluded that "it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a state which attempts to regulate the fare and charges by railroad companies [affecting interstate commerce] is a valid law."

Justices Horace Gray, Joseph P. Bradley, and Chief Justice Waite dissented, contending that the *Granger Cases* should have ruled the decision here. Citing WILLSON V. BLACK BIRD CREEK MARSH COMPANY (1829), Gray and his colleagues argued that "in the absence of congressional legislation to the contrary, [the railroads] are not only susceptible of state regulation, but properly amenable to it." They recited the litany of rights and powers granted the railroads by the state: "its being, its franchises, its powers, its road, its right to charge" all confirmed the state's right to regulate the road. The dissenters asserted that the Illinois statute affected interstate commerce only "incidentally" and not adversely. Subject to future congressional action, they would have affirmed the state action.

This decision effectively created a vacuum—Congress had not acted and the states were forbidden to act or even to control intrastate abuses. Together with an increasingly powerful reform movement, *Wabash* helped contribute to the passage of the Interstate Commerce Act in 1887, creating the first national regulatory body.

DAVID GORDON
(1986)

## WADE, UNITED STATES v.
388 U.S. 218 (1967)

Wade's conviction of bank robbery depended heavily on the identification of him as the robber by two bank employees. After he was indicted and counsel appointed for him, the FEDERAL BUREAU OF INVESTIGATION arranged a LINEUP, which included Wade and five or six other people. Wade's counsel was not notified of the procedure; neither he nor anyone else representing Wade's interests was present.

The Supreme Court held that the lineup was a "critical stage" of the proceedings; thus, the Sixth Amendment guarantees a right to the presence of counsel at the pretrial identification if evidence of the lineup were to be used at the trial. The Court reasoned that counsel was necessary at this early stage in order to assure the fairness of the trial itself. The two premises were that eyewitness identification is treacherously subject to mistake, and that police methods in obtaining identifications are often and easily unduly suggestive. If a lawyer has been present at the lineup, later, at the trial, by his questioning of the eyewitnesses he will be able to show how any irregularities have tainted the in-court identification of the defendant.

*Wade* established a per se rule: if counsel is absent at the pretrial confrontation, the government may not use EVIDENCE that such an event happened. Whether the witness can nevertheless make an in-court identification depends on whether the unfair procedure tainted his present ability to identify: if he had not seen the uncounseled lineup, would he still be able to pick out the defendant?

Finally, the Court suggested that the pretrial confrontation might not be a "critical stage" if other methods were developed to assure against the risk of irreparable mistaken identification. In KIRBY V. ILLINOIS (1972) the Court restricted the holding in *Wade* to lineups held after defendants have been formally charged with crime.

BARBARA ALLEN BABCOCK
(1986)

## WADE-DAVIS BILL
(July 2, 1864)

Republicans worried that under LINCOLN'S PLAN OF RECONSTRUCTION (December 8, 1863), the old state leadership might reverse emancipation. On July 2, 1864, Ohio's Senator Benjamin Wade and Maryland's Representative Henry Winter Davis passed a state-restoration bill that emphasized emancipation's permanence and equalized freedmen's CIVIL RIGHTS.

Their bill, implementing the Constitution's guarantee to each state of a REPUBLICAN FORM OF GOVERNMENT (Article IV, section 4), authorized the President to appoint a provisional governor for each conquered state. When a majority of white male citizens swore future loyalty to the Union, the governor was to initiate a CONSTITUTIONAL CONVENTION. Each new CONSTITUTION must incorporate emancipation, disfranchise high Confederates, and repudiate Confederate debts; then a majority of state voters, the President, and Congress must approve each constitution, and elections could proceed. State laws were to prevail excepting those on slavery. Criminal laws were to apply equally to whites and blacks.

ABRAHAM LINCOLN, unwilling to upset Arkansas's and Louisiana's progress under his 1863 policy, pocket-vetoed the bill. Advocating an abolition constitutional amendment to insure the legitimacy of emancipation, Lincoln suggested that Wade-Davis procedures, though vetoed, were satisfactory.

An election impended. If reelected, Lincoln would serve until 1869. His educability on race was outstanding. Almost all Republicans, including Wade and Davis, supported him. Had Lincoln signed their bill, it would have committed his successor to equal state justice for all residents.

HAROLD M. HYMAN
(1986)

Bibliography

HYMAN, HAROLD M. 1963 *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution.* Chap. 16. New York: Knopf.

## WAGNER ACT
49 Stat. 449 (1935)

Named after the New York senator who introduced and fought for it, the National Labor Relations Act (NLRA) extended the protection of the United States to organized labor. Robert Wagner framed the act to provide a constitutional basis for the protections given to labor by section 7(a) of the NATIONAL INDUSTRIAL RECOVERY ACT (NIRA) and by a National Labor Relations Board, which had been established and was operating under the sole authority of Public Resolution 44 and an EXECUTIVE ORDER. The Supreme Court confirmed the need for new legislation when, eleven days after the NLRA's enactment, it voided the NIRA in SCHECHTER POULTRY CORP. V. UNITED STATES (1935).

Congress based the Wagner Act on the COMMERCE CLAUSE: the denial by employers of employees' rights to organize and bargain collectively caused "strikes and other

forms of industrial strife or unrest, which have the intent or necessary effect of burdening or obstructing [interstate] commerce." Congress added that unequal bargaining positions had exacerbated national economic instability. One section of the act guaranteed employees the right to organize, "to bargain collectively through representatives of their own choosing," and to act together to further these ends. Another section reinforced these rights by delineating employers' obligations; it defined and prohibited "unfair labor practices," including interference with the exercise of the above-mentioned rights, or discrimination to encourage or discourage union formation, administration, or membership. This section also outlawed discrimination against an employee for filing a complaint against his employer under the act and made it illegal to refuse to bargain collectively with a union's legal representative.

The act also provided for a National Labor Relations Board with broad supervisory powers to administer its provisions. The Board could issue complaints, hear and determine charges, and issue CEASE-AND-DESIST ORDERS which were enforceable upon application to federal circuit courts. Congress further empowered the board to hold representation elections and to certify the winner.

Wagner drafted the act carefully so that it would withstand scrutiny by the Supreme Court. Section 1—outlining the NLRA's policy—was rewritten after the decision in *Schechter* to specify the burdens placed upon INTERSTATE COMMERCE by labor unrest. The act's policy statement attributed that discord to the denial of workers' rights which this act would secure. Wagner's diligence paid off. A 5–4 majority of the Court upheld the NLRA in *NLRB v. Jones & Laughlin Steel Corporation* (1937). (See WAGNER ACT CASES.) The Wagner Act provided for strong independent unions in an effort to promote COLLECTIVE BARGAINING. By thus indirectly stimulating higher wages and increased consumer demand, the act helped guarantee a stable national economy and social justice for American labor. The TAFT-HARTLEY LABOR MANAGEMENT RELATIONS ACT, passed in 1947 partly to plug loopholes in the NLRA, governed union conduct much as employers' actions had earlier been regulated.

DAVID GORDON
(1986)

Bibliography

MILLIS, HARRY A. and BROWN, EMILY C. 1950 *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy.* Chicago: University of Chicago Press.

TAYLOR, BENJAMIN J. and WITNEY, FRED (1970) 1975 *Labor Relations Law*, 2nd ed. Pages 134–199. Englewood Cliffs, N.J.: Prentice-Hall.

# WAGNER ACT CASES

*NLRB v. Jones & Laughlin Steel Corp.*
301 U.S. 1 (1937)
*NLRB v. Fruehauf Trailer Co.*
301 U.S. 49 (1937)
*NLRB v. Friedman-Harry Marks Clothing Co.*
301 U.S. 58 (1937)
*Associated Press Co. v. NLRB*
301 U.S. 103 (1937)

The reinvigoration of the COMMERCE CLAUSE as a source of congressional power began with the first cases to reach the Supreme Court under the WAGNER (NATIONAL LABOR RELATIONS) ACT. That statute had been passed in 1935 in an effort to preserve the rights of employees in interstate industries to choose their own representatives and to bargain collectively with their employers. In 1930 the Supreme Court had held that the Railway Labor Act gave such rights to railroad employees. The NATIONAL INDUSTRIAL RECOVERY ACT (NIRA) of 1933 sought to extend such rights to other employees by requiring all codes of fair competition for other industries to contain similar provisions. The code system collapsed when the NIRA was invalidated in SCHECHTER POULTRY CORP. V. UNITED STATES in May 1935. The President and Congress believed that the denial of COLLECTIVE BARGAINING rights would lead to industrial unrest and strikes, which would necessarily obstruct INTERSTATE COMMERCE, and would also aggravate the Great Depression by depressing wage rates and the purchasing power of wage earners. As a result the National Labor Relations Act became law less than six weeks after the *Schechter* decision.

The act authorized the newly created National Labor Relations Board (NLRB), which succeeded similar boards created under the NIRA, to prevent employers from engaging in unfair labor practices "affecting [interstate] commerce," which was defined to mean "in commerce, or burdening or obstructing commerce," or which had led or might lead to a labor dispute burdening or obstructing commerce. These definitions were designed to embody the decisional law upholding the authority of Congress to regulate acts that "directly" obstructed interstate commerce. Congress assumed, correctly as it turned out, that the courts would construe the statute as "contemplating the exercise of control within constitutional bounds."

The NLRB's first cases were brought against employers engaged in interstate transportation and communication (bus lines and the Associated Press) and manufacturers who purchased their supplies and sold their products across state lines. Before these cases were decided, the

Supreme Court, in CARTER V. CARTER COAL CO. (1936), held that the substantially identical provisions of the Guffey-Snyder (Bituminous Coal Conservation) Act, enacted shortly after the Labor Relations Act, did not fall within the commerce power of Congress. In the *Carter* case the government had proved that coal strikes would burden not merely the interstate commerce of the immediate employers but also the interstate rail system and many other industries dependent upon coal. No stronger showing could be made under the Wagner Act for employers engaged in mining or manufacturing. As was to be expected, the courts of appeals, though sustaining the act as to companies engaged in interstate transportation and communication, deemed themselves bound by *Carter*, as well as *Schechter* and UNITED STATES V. BUTLER (1936) to hold that the act did not extend to manufacturers.

The first five NLRB cases to reach the Supreme Court involved a bus line, the Associated Press, and three manufacturers. The cases were argued together, beginning on February 8, 1937. Three days before, President FRANKLIN D. ROOSEVELT had announced his plan to appoint up to six new Supreme Court Justices, one for each justice over 70 years of age. On April 12, the Court affirmed the NLRB's rulings in all five cases. The opinions on the commerce clause issue in the bus and press cases were unanimous, although in the press case, four Justices dissented on FIRST AMENDMENT grounds. The cases against manufacturers—the Jones & Laughlin Steel Corporation, the Fruehauf Trailer Co., and a medium-size men's clothing manufacturer—were decided by a 5–4 vote. The membership of the Court had not changed since *Schechter* and *Carter*. But Chief Justice CHARLES EVANS HUGHES and Justice OWEN ROBERTS, who had been part of the majority of six who had rejected the labor relations provisions of the Guffey Act in *Carter*, now joined with Justices LOUIS D. BRANDEIS, HARLAN FISKE STONE, and BENJAMIN N. CARDOZO. The Chief Justice wrote the opinions in the manufacturers' cases.

In the *Carter* case, the majority opinion of Justice GEORGE SUTHERLAND had not denied the magnitude of the effect of coal strikes upon interstate commerce. The question, he held, was whether the effect was "direct," and that did not turn upon the "extent of the effect" or its "magnitude," but "entirely upon the manner in which the effect has been brought about"; "it connotes the absence of an efficient intervening agency or condition." The effect must "operate proximately—not mediately, remotely, or collaterally." Why "direct" should be so defined was not otherwise explained, except by the need for preserving the power of the states over PRODUCTION, even in interstate industries in which interstate competition would preclude state regulation. (See EFFECTS ON COMMERCE.)

The opinion of Chief Justice Hughes in the *Jones & Laughlin* case flatly rejected the *Butler* approach:

> Giving full weight to respondent's contention with respect to a break in the complete continuity of the "STREAM OF COMMERCE" by reason of respondent's manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. . . . When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.

The Chief Justice also met head on the argument that the federal power did not extend to activities in the course of production or manufacturing. Citing many antitrust cases, he declared: "The close and intimate effect which brings the subject within the reach of Federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. . . . It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative."

"The fundamental principle," Hughes stated, "is that the power to regulate commerce is the power to enact 'all appropriate legislation' for "its protection and advancement'; to adopt measures "to promote its growth and insure its safety'; "to foster, protect, control and restrain.' That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threatened it." Hughes also invoked the SHREVEPORT DOCTRINE he had announced in HOUSTON EAST AND WEST TEXAS RAILWAY V. UNITED STATES (1914): "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."

In deference to his own opinion in *Schechter*, the Chief Justice declared that "undoubtedly the scope of this power must be considered in the light of our dual system of government" so as not to "obliterate the distinction between what is national and what is local." In *Schechter* the effect upon commerce had been too "remote"; "to find "imme-

diacy or directness' there was to find it "almost everywhere', a result inconsistent with the maintenance of our Federal system." With little explanation Hughes added that *Carter* was "not controlling."

Within a few weeks the Court sustained the constitutionality of the SOCIAL SECURITY ACT. Soon after Justices WILLIS VAN DEVANTER and Sutherland retired. And President Roosevelt's court-packing plan, not very surprisingly, got nowhere.

Subsequent Labor Board cases extended the application of the Labor Act far beyond the three manufacturers in the center of the interstate movement; it was sufficient that a strike would interfere with interstate movement of products (for example, *Santa Cruz Fruit Packing Co. v. NLRB*, 1938; *NLRB v. Fainblatt*, 1939; *Consolidated Edison Co. v. NLRB*, 1938). The unanimous opinion of the Court speaking through Justice Stone, with Hughes and Roberts still on the bench, in UNITED STATES V. DARBY (1941) explicitly rejected the concept that the Tenth Amendment limited the powers granted Congress by the Constitution. And other cases by now have extended the commerce power "almost everywhere." Nevertheless, the opinion in *Jones & Laughlin* remains a landmark in the interpretation of the commerce clause, as the definitive acceptance of the modern theories which recognize the power of Congress to control all aspects of the nation's integrated economic system.

ROBERT L. STERN
(1986)

Bibliography

CORTNER, RICHARD C. 1964 *The Wagner Act Cases.* Knoxville: University of Tennessee Press.

——— 1970 *The Jones & Laughlin Case.* New York: Knopf.

DODD, E. MERRICK 1945 The Supreme Court and Organized Labor, 1941–1945. *Harvard Law Review* 58:1018–1071.

GROSS, JAMES A. 1974 *The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law,* Vol. 1 (1933–1937). Albany: State University of New York Press.

STERN, ROBERT L. 1946 The Commerce Clause and the National Economy, 1933–1946. *Harvard Law Review* 59:645–693, 888–947.

## *WAINWRIGHT v. SYKES*
433 U.S. 72 (1977)

In *Sykes* the ADEQUATE STATE GROUND bar to federal HABEAS CORPUS, buried in FAY V. NOIA (1963), was unearthed and returned to service with little more than a coat of paint for disguise. *Noia* had held that a state prisoner was not barred from seeking federal habeas corpus relief merely because the applicant had failed to raise his or her federal constitutional claim in the earlier state proceeding as required by state law. *Noia* was attacked within the Supreme Court and by some scholars for sacrificing finality of decision. State judges trumpeted their resentment at giving federal district courts the last word in the state criminal process.

*Sykes* was the culmination of the attack on *Noia* from within the Court. A state prisoner sought federal habeas corpus, arguing that his rights to a warning under MIRANDA V. ARIZONA (1966) had been violated when his statement was admitted into EVIDENCE at his state trial. He had not objected when the evidence was offered, as state law required. The Supreme Court held, 7–2, that federal habeas corpus was barred.

Justice WILLIAM H. REHNQUIST, for the majority, announced that failure to raise a federal constitutional claim in the manner required by state law bars resort to federal habeas corpus unless the applicant shows "cause" for the procedural default and "prejudice" from the forfeiture of the federal claim. Defendant had asserted no cause for the absence of timely objection, and prejudice was negated by other evidence of his guilt, independent of his statement.

KENNETH L. KARST
(1986)

## WAITE, MORRISON R.
(1816–1888)

Morrison Remick Waite, sixth CHIEF JUSTICE of the United States, successfully led the Supreme Court in dealing with major constitutional problems concerning RECONSTRUCTION and business-government relations between 1874 and 1888.

Son of Henry Matson Waite, Chief Justice of the Connecticut Supreme Court of Errors, Morrison Waite read law after graduating from Yale College in 1837. In 1838 he removed to Ohio, where he built a flourishing legal practice specializing in commercial law, acquired substantial property interests, and joined the Whig party. Although prominent in the legal profession, Waite was virtually unknown in national affairs prior to his appointment as Chief Justice. He served one term in the Ohio legislature and a term on the Toledo city council, was appointed counsel to the Geneva Tribunal to negotiate the *Alabama* claims in 1872, and was elected president of the Ohio CONSTITUTIONAL CONVENTION of 1873.

The circumstances of Waite's appointment to the Court were remarkable, not so much because he lacked national political recognition as because he was the fifth person whom President ULYSSES S. GRANT nominated or asked to serve as Chief Justice. Yet Waite had early been touted for

the position by leading Ohio politicians, and Grant had considered him a possibility from the beginning. His effective service at the Geneva Arbitration, professional reputation, and unwavering Republican party loyalty recommended him, and in January 1874 the Senate confirmed him by a 63–0 vote.

Waite's significance in American constitutional history is threefold. He wrote the first Supreme Court opinions interpreting the FOURTEENTH and FIFTEENTH AMENDMENTS in cases involving Negroes' CIVIL RIGHTS. Second, his 1877 opinions in *Munn v. Illinois* and the other GRANGER CASES established the basic principles of constitutional law governing state governments as they attempted to deal with economic changes caused by the industrial revolution. Third, Waite expressed a conception of JUDICIAL REVIEW that summarized dominant nineteenth-century ideas about constitutional adjudication and provided a model for twentieth-century theorists of judicial restraint.

The northern retreat from RECONSTRUCTION was well underway when Waite became Chief Justice, and the WAITE COURT did not attempt to reverse this political development. Under the circumstances, and given the circumscribed role of the judiciary in nineteenth-century constitutional politics, it had little choice but to acquiesce. In determining the meaning of the Fourteenth and Fifteenth Amendments and in applying federal civil rights laws, however, the Court could choose among several possible conceptions of national legislative power and federal-state relations. Waite guided the Court toward a moderate position of STATES' RIGHTS nationalism which upheld national power to protect civil rights within the framework of traditional FEDERALISM.

To understand this development it is necessary to advert to the SLAUGHTERHOUSE CASES (1873) and to Justice JOSEPH P. BRADLEY's circuit court opinion in UNITED STATES V. CRUIKSHANK (1874). In the former, the Supreme Court confirmed the theory of dual American CITIZENSHIP, stated that the Fourteenth Amendment did not add to the rights of national citizenship, and concluded that ordinary civil rights were attributes of state citizenship, regulation of which was beyond the authority of the United States. In the *Cruikshank* case, involving prosecution of whites in Colfax, Louisiana, for violating the civil rights of Negro citizens, Justice Bradley held that although the Fourteenth Amendment prohibited state rather than private denial of civil rights, under certain conditions the federal government was authorized to guarantee civil rights against interference by private individuals. The relevant circumstance, according to Bradley, was state failure to fulfill its affirmative duty to protect citizens' rights.

Chief Justice Waite wrote the majority opinion when *United States v. Cruikshank* (1876) was decided in the Supreme Court. Defendants were indicted under a section of the Force Act of 1870 that declared it a federal crime for two or more persons to deprive any citizen of rights secured by the Constitution or laws of the United States. Like Bradley in the CIRCUIT COURT, Waite found numerous flaws in the INDICTMENTS and on that ground ordered the defendants to be discharged, thus frustrating the federal civil rights enforcement effort. Nevertheless, Waite asserted national authority to enforce civil rights.

The Chief Justice followed the *Slaughterhouse* opinion in positing separate federal and state citizenships and in stating that the federal government could protect only those rights placed within its JURISDICTION. He held further that the FREEDOM OF ASSEMBLY, which the defendants were charged with violating, was a right of state rather than federal citizenship. The indictment, however, had incorrectly stated that denial of freedom of assembly by private persons was a federal crime within the meaning of the Force Act; therefore the indictment was invalid. Yet federal authority was not nugatory in civil rights matters. Waite pointed out that if the indictment had charged a violation of the right to assemble in order to petition the national government, it would have been proper under the act. Thus in protecting a federal right national authority was putatively effective against private individuals as well as states. Waite furthermore asserted an indirect federal power to protect rights of state citizenship against both state and private interference. The ordinary right of assembly was a state right, said Waite, over which "no direct power" was granted to Congress. This appeared to mean that if states failed to uphold civil rights within their jurisdiction, the federal government could provide the needed protection. Finally Waite noted that the indictments did not allege that the full and equal benefit of laws for the protection of whites was denied to blacks on account of race; accordingly the CIVIL RIGHTS ACT OF 1866 was not in point. The implication was that if a racially discriminatory purpose had been alleged, federal authority under the 1866 law could have been employed against private as well as against state denial of rights.

Waite also gave the opinion in UNITED STATES V. REESE (1876), the first Supreme Court case involving Fifteenth Amendment VOTING RIGHTS. State officials in Kentucky were indicted for refusing to accept the vote of a Negro citizen. Again the Court ruled against the federal government. Waite declared two provisions of the Force Act of 1870 unconstitutional because they did not in express terms limit the offense of state officials to denial of the right to vote on account of color. Insisting on the need for STRICT CONSTRUCTION of criminal statutes, he interpreted the act in a strained and technical manner as preventing any wrongful interference with voting rights, rather than simply interferences that were racially motivated. The Fifteenth Amendment authorized the federal government to

deal only with the latter. It did not, said Waite, secure the right to vote, but only the right not to be discriminated against in voting on racial grounds. Observing that "Congress has not as yet provided by "appropriate legislation' for the punishment of the offense charged in the indictment," Waite in effect invited Republican lawmakers to enact a more tightly drawn enforcement act.

Waite's personal sympathies were enlisted in efforts to assist Negroes. As a trustee of the Peabody Fund in 1874 he signed a report endorsing a constitutional argument for federal aid to education, thus breaking the rule against extra-Court political involvement to which he scrupulously adhered throughout his judicial career. Although Waite accepted the abandonment of Reconstruction and held that Congress had no power "to do mere police duty in the States," his opinions nevertheless authorized federal interference against state and in some circumstances private denial of rights when racially motivated. In subsequent cases, most notably UNITED STATES V. HARRIS (1883), the CIVIL RIGHTS CASES (1883), and EX PARTE YARBROUGH (1884), the Waite Court amplified the principles set forth in the *Cruikshank* and *Reese* cases.

In the sphere of government-business relations, Waite was sympathetic to regulatory legislation within a political and legal framework that encouraged industrial expansion and a national free trade area. In the early 1870s, in response to farmers' and merchants' demands for relief from high shipping costs, several midwestern states adopted legislation setting maximum railroad rates. These laws appeared to discourage further railroad construction, and within a few years most of them were repealed or modified. Nevertheless, in the landmark *Granger Cases* the Supreme Court ruled on the constitutionality of these regulatory measures.

*Munn v. Illinois* (1877), Waite's most famous opinion, sustained an 1871 Illinois law that established maximum rates for grain elevators. Waite based his approval of the legislation on a broad conception of the STATE POLICE POWER, which he said authorized states to regulate the use of private property "when such regulation becomes necessary for the public good." He rejected the contention that state regulation of the rates charged by ferries, common carriers, or bakers was a deprivation of property without DUE PROCESS OF LAW in violation of the Fourteenth Amendment. Support for Waite's conclusion lay in numerous state COMMON LAW precedents asserting a public interest in certain kinds of property, such as lands bordering on watercourses, which were subject to government regulation. Like other judges in similar cases, and influenced by a memorandum prepared by Justice Bradley dealing with the instant case, Waite relied on a treatise of the seventeenth-century English judge Lord Chief Justice Sir Matthew Hale in asserting: "When property is "AFFECTED WITH A PUBLIC INTEREST, it ceases to be juris privati only." The grain elevator companies, Waite explained, exercised a virtual monopoly in the regional market structure; thus, they were affected with a public interest and subject to regulation by the state legislature. In the other *Granger Cases* Waite employed this principle to uphold state regulation of railroad rates.

Waite also approved state regulation of CORPORATIONS in a series of decisions that carried to a logical conclusion the principle by which the CONTRACT CLAUSE of the Constitution did not prevent state legislatures from reserving the power to alter charter grants. These cases included STONE V. MISSISSIPPI (1880), *Ruggles v. Illinois* (1883), and *Spring Valley Water Works v. Schotteler* (1883). This trend culminated in STONE V. FARMERS LOAN AND TRUST CO. (1886), known as the *Railroad Commission Cases*, in which Waite held that a state charter authorizing railroads to set reasonable rates did not divest a state of the power ultimately to determine what was a reasonable rate.

While generally approving regulatory legislation, Waite placed limitations on the POLICE POWER with a view toward protecting private property. In the *Railroad Commission Cases* he admonished: "This power to regulate is not a power to destroy; and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a TAKING of private property without due process of law." Rather than suggesting an irresistible tendency to accept the argument for SUBSTANTIVE DUE PROCESS that was later adopted by the Supreme Court, these and similar dicta indicate that Waite, like Justice STEPHEN J. FIELD who dissented in *Munn* and the other *Granger* cases, believed the essential constitutional problem in cases involving government-business relations was to determine the extent of the police power. Shortly after the *Munn* decision Waite wrote: "The great difficulty in the future will be to establish the boundary between that which is private, and that in which the public has an interest."

Waite epitomized nineteenth-century thinking about the nature of the judicial function and the power of judicial review. He believed the judiciary should play a subordinate role in public-policy making, and should especially defer to the political branches in questions concerning the reasonableness of legislation. His clearest and most forceful expression of this view appeared in *Munn v. Illinois* when he stated: "For us the question is one of power, not of expediency. If no state of circumstances could justify such a statute, then we may declare this one void, because in excess of the legislative power of the States. But if it could we must presume it did. Of the propriety of legislative interference within the scope of legislative power,

the legislature is the exclusive judge." Waite acknowledged that legislative power might be abused. But "[f]or protection against abuses by legislatures," he observed, "the people must resort to the polls, not to the courts."

Waite effectively balanced the competing demands of state and federal authority as constitutional equilibrium was restored after the end of Reconstruction. In addition to the decisions already noted, he wrote the opinions in *Louisiana v. Jumel* (1882) and *New Hampshire v. Louisiana* (1882), both of which held that the ELEVENTH AMENDMENT prevented suits by bondholders attempting to force a state government to redeem its bonds. These decisions expressed the political logic of the COMPROMISE OF 1877 and marked a significant broadening of states' SOVEREIGN IMMUNITY under the Eleventh Amendment. In another notable case involving state power and women's rights, MINOR V. HAPPERSETT (1875), Waite adhered to a narrow interpretation of the Fourteenth Amendment in deciding that the right to vote was not an attribute of federal citizenship and that states could regulate the suffrage as they saw fit.

On the other hand, Waite upheld federal authority in the controversial SINKING FUND CASES (1879) and in PENSACOLA TELEGRAPH CO. V. WESTERN UNION TELEGRAPH CO. (1878). In the former, the Court confirmed the constitutionality of an act of Congress requiring the Union Pacific and Central Pacific railroads to set aside money from current income for the subsequent payment of its mortgage debts. In the latter case the Court upheld the rights of an interstate telegraph company operating under authority of an act of Congress against the rights of a company acting under a state charter. Waite also voted to strike down state tax legislation when it interfered with INTERSTATE COMMERCE, although he was less inclined than his colleagues to regard STATE TAXATION OF COMMERCE in this light.

Overcoming the resentment of several Justices who had aspired to the Chief Justiceship, Waite performed the administrative and other tasks of his position with great skill. In a larger political sense he was also a successful judicial statesman. During his tenure, as at few times in American constitutional history, the Supreme Court was remarkably free of congressional criticism. Waite achieved this success by confining JUDICIAL POLICYMAKING within limits approved by the nation's representative political institutions and public opinion.

HERMAN BELZ
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Bibliography

BENEDICT, MICHAEL LES 1979 Preserving Federalism: Reconstruction and the Waite Court. *Supreme Court Review* 1978: 39–79.

FRANTZ, LAUREN B. 1964 Congressional Power to Enforce the Fourteenth Amendment Against Private Acts. *Yale Law Journal* 73:1352–1384.

MAGRATH, PETER C. 1963 *Morrison R. Waite: The Triumph of Character.* New York: Macmillan.

SCHEIBER, HARRY N. 1971 The Road to *Munn:* Eminent Domain and the Concept of Public Purpose in the State Courts. *Perspectives in American History* 5:329–402.

TRIMBLE, BRUCE R. 1938 *Chief Justice Waite: Defender of the Public Interest.* Princeton, N.J.: Princeton University Press.

# WAITE COURT
## (1874–1888)

A new age of American constitutional law was at hand when MORRISON R. WAITE became CHIEF JUSTICE of the United States in 1874. Not only had the CIVIL WAR discredited many antebellum glosses on the "old" Constitution, consisting of the venerable document framed in 1787 and the twelve amendments adopted during the early republic, but it had also generated a "new" Constitution consisting of the THIRTEENTH AMENDMENT, the FOURTEENTH AMENDMENT, and the FIFTEENTH AMENDMENT. The range of choices at the Court's disposal was virtually unlimited as it reconstituted the old organic law and integrated the new. CHARLES SUMNER said it best just four years before Waite took the Court's helm. The tumultuous events of 1861–1869, he exclaimed, had transformed the Constitution into "molten wax" ready for new impression. An extraordinarily homogeneous group of men made this impression. Of the fourteen associate Justices who sat with Waite between 1874 and his death in 1888, only NATHAN CLIFFORD had been appointed by a Democrat and all but two—SAMUEL F. MILLER and JOHN MARSHALL HARLAN, both of Kentucky—had been born in the free states. All of them were Protestants. Thus the Republican party, which had subdued the South and created the "new" Constitution, had also reconstructed the federal judiciary. As the Waite Court proceeded to refashion the structure of American constitutional law, its work ineluctably reflected the values, aspirations, and fears that had animated the Republican party's northern Protestant constituency since the 1850s.

Fierce opposition to state SOVEREIGNTY concepts was a core element of Republican belief from the party's very inception. Republicans asociated state sovereignty with proslavery constitutionalism in the 1850s, with SECESSION in 1861, and ultimately with the tragic war both engendered. Waite and his colleagues shared this aversion to state sovereignty dogma and repeatedly expressed it in controversies involving the IMPLIED POWERS of Congress under the "old" Constitution. In case after case the Court resisted limitations on federal power derived from state sovereignty premises and held, in effect, that Congress's

authority to enact statutes deemed NECESSARY AND PROPER for the ENUMERATED POWERS had the same scope under the Constitution as it would if the states did not exist. On several occasions the Court even revived the idea that Congress might exercise any power inherent in national sovereignty as long as it was not specifically prohibited by the Constitution. This doctrine, first expounded by Federalist congressmen during debate on the Sedition Act of 1798, had been regarded as "exploded" by most antebellum statesmen. But its revival after the Civil War did have a certain logic. If there was one impulse that every member of the Waite Court had in common, it was the urge to extirpate every corollary of "southern rights" theory from American constitutional law and to confirm the national government's authority to exercise every power necessary to maintain its existence.

The revival of the implied powers doctrine began in the often overlooked case of *Kohl v. United States* (1876). There counsel challenged Congress's authority to take private property in Cincinnati as a site for public buildings on the ground that the Constitution sanctioned federal exercise of the EMINENT DOMAIN power only in the DISTRICT OF COLUMBIA. Article I, section 8, vested Congress with authority to acquire land elsewhere "for the erection of forts . . . and other needful buildings" only "by the consent of the legislature of the State in which the same shall be." This was by no means a novel argument. JAMES MADISON and JAMES MONROE had pointed to the national government's lack of a general eminent domain power when vetoing INTERNAL IMPROVEMENT bills, and proslavery theorists had invoked the same principle as a bar to compensated emancipation and colonization schemes. In *Pollard's Lessee v. Hagan* (1845), moreover, the TANEY COURT had said that "the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a State or elsewhere, except in the cases in which it is expressly granted." But WILLIAM STRONG, speaking for the Court in *Kohl*, refused to take this doctrine "seriously." Congress's war, commerce, and postal powers necessarily included the right to acquire property for forts, lighthouses, and the like. "If the right to acquire property for such uses be made a barren right by the unwillingness of property holders to sell, or by the action of a State prohibiting a sale to the Federal Government," Strong explained, "the constitutional grants of power may be rendered nugatory. . . . This cannot be." Congress's eminent domain power must be implied, Strong concluded, for commentators on the law of nations had always regarded it as "the offspring of political necessity, and . . . inseparable from sovereignty."

HORACE GRAY sounded the same theme in the Legal Tender Cases (*Juilliard v. Greenman*, 1884), where the Court sustained Congress's authority to emit legal tender notes even in peacetime. With only STEPHEN J. FIELD dissenting, Gray asserted that because the power to make government paper a legal tender was "one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution," it was unquestionably "an appropriate means, conducive and plainly adapted" to the execution of Congress's power to borrow money. In EX PARTE YARBROUGH (1884), decided the same day, the Court spoke the language of national sovereignty in an especially significant case. At issue there was the criminal liability of a Georgia man who had savagely beaten a black voter en route to cast his ballot in a federal election. The Court unanimously sustained the petitioner's conviction under the 1870 CIVIL RIGHTS ACT, which made it a federal crime to "injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." It did so on the ground that Congress's duty "to provide in an ELECTION held under its authority, for security of life and limb to the voter" arose not from its interest in the victim's rights so much as "from the necessity of the government itself." Samuel F. Miller explained that Congress's power to regulate the time, place, and manner of holding federal elections, conferred in Article I, section 4, implied a "power to pass laws for the free, pure, and safe exercise" of the suffrage. "But it is a waste of time," he added, "to seek for specific sources to pass these laws. . . . If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption."

The Court's decisions in *Kohl*, *Juilliard*, and *Yarbrough* merely jettisoned antebellum canons of STRICT CONSTRUCTION. They did not impair the autonomy of state governments. The eminent domain power of the several states was not threatened by *Kohl*, the Constitution expressly prohibited the states from making anything but gold and silver a legal tender, and *Yarbrough* did not jeopardize Georgia's power to prosecute political assassins for assault or murder. Yet the Waite Court was as quick to defend exercises of Congress's powers in situations where counsel claimed that the states' autonomy was in jeopardy as in cases where their reserved powers remained unimpaired. *Ex parte Siebold* (1880) was the leading case in point. There the Court sustained a conviction for ballot stuffing under the 1871 ENFORCEMENT ACT, which made it a federal crime for any state official at a congressional election to neglect duties required of him by either state or federal law. Counsel for the petitioner argued that in PRIGG V. PENNSYLVANIA (1842) and *Kentucky v. Dennison* (1861) the Taney Court had held that the principle of divided sov-

ereignty precluded acts of Congress compelling the cooperation of state officials in the execution of national law. "We cannot yield to such a transcendental view of State sovereignty," JOSEPH BRADLEY proclaimed for the Court in *Siebold*. "As a general rule," he said, "it is no doubt expedient and wise that the operations of the State and National Governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars." But the Constitution neither mandated an immutable boundary between spheres of federal and state power nor restricted Congress's choice of means in implementing its enumerated authority to regulate federal elections.

The Court's constitutional nationalism did have limits. Like most Republicans of the age, Waite and his colleagues resisted the idea of centralization with as much ardor as the concept of state sovereignty. They regarded the national government's competence as deriving from the powers specified in the Constitution or fairly implied from it; the residual powers of government, usually called "internal police," belonged exclusively to the several states. Thus decisions like *Kohl* and *Siebold*, as Waite and his associates understood them, did not contract the ambit of state JURISDICTION. Rather the court simply refused to recognize implied limitations on the powers of Congress derived from state sovereignty premises. The *Trade-Mark Cases* (1879) underscored the Waite Court's allegiance to this view of the federal system. There a unanimous Court, speaking through Miller, held that Congress had no authority to enact a "universal system of trade-mark registration." Miller's method of analysis was more revealing than the result. His first impulse was to determine which sphere of government ordinarily had responsibility for such matters in the constitutional scheme. "As the property in trade-marks and the right to their exclusive use rest on the laws of the States, and like the great body of the rights of persons and of property, depend on them for security and protection," he explained, "the power of Congress to legislate on the subject . . . must be found in the Constitution of the United States, which is the source of all the powers the Congress can lawfully exercise." This two-tier method not only reified DUAL FEDERALISM but also put the burden of demonstrating Congress's authority to act on the government. In the *Trade-Mark Cases* it could not do so. Trade-marks lacked "the essential characteristics" of creative work in the arts and sciences, consequently the statute could not be sustained under the COPYRIGHT or PATENT powers. And the commerce power, though admittedly "broad," could not be construed as to permit federal regulation of commercial relations between persons residing in the same state.

When the Waite Court turned to cases involving the "new" Constitution, the instinct to conceptualize rights and powers in terms of dual federalism had fateful consequences. Beginning in UNITED STATES V. CRUIKSHANK (1876), the Court emasculated Congress's power "to enforce, by appropriate legislation," the rights guaranteed by the Fourteenth and Fifteenth Amendments. At issue was the validity of conspiracy convictions under the 1870 Civil Rights Act against a band of whites who had attacked a conclave of blacks in Grants Parish, Louisiana, killing from sixty to one hundred of them. The government claimed that the defendants had deprived the black citizens of their constitutional rights to hold a peaceful assembly, to bear arms, to vote, and to EQUAL PROTECTION OF THE LAWS safeguarding persons and property. The Court unanimously overturned the convictions. The CONSPIRACY law was not voided; indeed, the Court sustained a conviction under that very statute in *Yarbrough*. But Waite and his associates were determined to confine Congress's power to enact "appropriate legislation" in such a way to preserve what Miller called "the main features of the federal system." The Court had no choice in the matter, Joseph Bradley remarked on circuit in 1874, unless it was prepared "to clothe Congress with power to pass laws for the general preservation of social order in every State," or, in short, with a plenary power of "internal police."

Waite's opinion for the Court in *Cruikshank* contained two separate lines of argument. He began the first foray by pointing out that every American citizen "owes allegiance to two sovereigns, and claims protection from both." Because the two levels of government could protect the rights of citizens only "within their respective spheres," federal authorities could assert jurisdiction over perpetrators of violence only if the rights denied to victims were derived from the Constitution and laws of the United States. But in the SLAUGHTERHOUSE CASES (1873), decided ten months before Waite came to the Court, a majority of five had concluded that there were very few PRIVILEGES OR IMMUNITIES of national CITIZENSHIP and that the Fourteenth Amendment had not created any new ones. Fundamental rights of life, liberty, and property still rested upon the laws of the states, and citizens had to rely upon the states for the protection of those rights. Among the privileges of state citizenship, Waite explained in *Cruikshank*, were the rights to assemble, to bear arms, and to vote. Although guaranteed against infringement by Congress in the BILL OF RIGHTS, the rights to assemble and bear arms were not "granted by the Constitution" or "in any manner dependent upon that instrument for existence." The right to vote in state and local elections stood on the same footing because "the right to vote in the States comes from the States." The Fifteenth Amendment did give citizens a new right under the Constitution—exemption from RACIAL DISCRIMINATION when attempting to vote. Because the Grants Parish indictments did not aver that the

defendants had prevented their victims "from exercising the right to vote on account of race," however, that count was as defective as the rest.

Waite's second line of argument in *Cruikshank* was designed to hold the votes of Joseph Bradley, Stephen J. Field, and NOAH SWAYNE. They had dissented in the *Slaughterhouse Cases*, claiming that the Fourteenth Amendment had been designed to reconstruct the federal system by creating a third sphere in the constitutional scheme—that of the individual whose FUNDAMENTAL RIGHTS were now protected against unequal and discriminatory state laws. Waite satisfied them by stating what came to be known as the STATE ACTION doctrine. He not only conceded that "[t]he equality of the rights of citizens is a principle of republicanism" but strongly implied that the Fourteenth Amendment had nationalized this principle under the equal protection clause, if not the privileges or immunities clause. But the amendment, he added, "does not . . . add any thing to the rights which one citizen had under the Constitution against another." The very language of the amendment's first section—"No state shall . . ."—suggested that it must be read not as a grant of power to Congress but as a limitation on the states. It followed that the exercise of fundamental rights did not come under the Constitution's protection until jeopardized by the enactment or enforcement of a state law. "This the amendment guarantees, but no more," Waite declared. "The power of the national government is limited to the enforcement of this guaranty."

The principles announced in *Cruikshank* doomed the rest of Congress's CIVIL RIGHTS program, all of which had been based on the assumption that the "new" Constitution might be employed as a sword to protect any interference with fundamental rights. A voting rights statute went down in UNITED STATES V. REESE (1876) because Congress had failed to limit federal jurisdiction over state elections to the prevention of racially motivated fraud or dereliction; the antilynching provisions of the 1871 Civil Rights Act were invalidated for want of state action in UNITED STATES V. HARRIS (1883). One latent function of *Cruikshank*, however, was to draw renewed attention to the equal protection clause as a shield for blacks and other racial minorities whose civil rights were imperiled by discriminatory state laws. Soon the docket was crowded with such cases, and the Court was compelled to wrestle with longstanding ambiguities in the Republican party's commitment to racial equality.

Republicans had always been quick to defend equal rights in the market, for it was the rights to make contracts and own property that distinguished free people from slaves. But many Republicans regarded the idea of equality before the law as wholly compatible with legalized race prejudice in the social realm. Words like "nation" and "race" were not merely descriptive terms in the nineteenth century; they were widely understood as objective manifestations of natural communities, the integrity of which government had a duty to maintain. Thus most Republicans never accepted the proposition that blacks ought to be free to marry whites and many denied the right of blacks to associate with whites even in public places. The framers of the "new" Constitution had neither abjured this qualified view of equality not incorporated it into the Fourteenth Amendment. The discretion of Waite and his colleagues was virtually unfettered. They could weave prevailing prejudices into equal protection jurisprudence or they could interpret the equality concept broadly, declare that the "new" Constitution was color-blind, and put the Court's enormous prestige squarely behind the struggle for racial justice.

Exponents of racial equality were greatly encouraged by STRAUDER V. WEST VIRGINIA (1880), the case of first impression. There a divided Court reversed the murder conviction of a black defendant who had been tried under a statute that limited jury service to "white male persons." The Fourteenth Amendment, William Strong explained for the majority, "was designed to secure the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons." This formulation was acceptable even to the two dissenters. According to Stephen J. Field and Nathan Clifford, however, jury service was not a "civil right." It was a "political right." The only rights Congress intended to protect with the Fourteenth Amendment, they contended, were those enumerated in the Civil Rights Act of 1866—to own property, to make and enforce contracts, to sue and give evidence. The equal protection clause, Field said, "secures to all persons their civil rights upon the same terms; but it leaves political rights . . . and social rights . . . as they stood previous to its adoption." But the *Strauder* majority was unimpressed by Field's version of the "original understanding" and it set a face of flint against his typology of rights. "The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect," Strong declared. "It speaks in general terms, and those are as comprehensive as possible." The very term equal protection, he added, implied "that no discrimination shall be made against [blacks] by the law because of their color."

*Strauder* seemed to open the door for judicial proscription of all racial classifications in state laws. John R. Tompkins, counsel for an interracial couple that had been sentenced to two years in prison for violating Alabama's antimiscegenation law, certainly read the case that way. But the idea of distinct spheres of rights—"civil" and "social" if no longer "political"—furtively reentered the Waite Court's jurisprudence in PACE V. ALABAMA (1883). Field, speaking for a unanimous Court, held that antimis-

cegenation laws were not barred by the Fourteenth Amendment as long as both parties received the same punishment for the crime. Equal protection mandated equal treatment, not freedom of choice; antimiscegenation laws restricted the liberty of blacks and whites alike. Underlying this disingenuous view was an unarticulated premise of enormous importance. In settings involving the exercise of "social rights" the equal protection clause did not prohibit state legislatures from enacting statutes that used race as a basis for regulating the rights of persons. The legal category "Negro" was not suspect per se. (See SUSPECT CLASSIFICATION.)

The concept of "social rights" also figured prominently in the CIVIL RIGHTS CASES (1883), decided ten months after *Pace*. There the Court struck down the CIVIL RIGHTS ACT OF 1875, which forbade the owners of theaters, inns, and public conveyances to deny any citizen "the full and equal benefit" of their facilities. Joseph Bradley, speaking for the majority, rejected the claim that the businesses covered by the act were quasi-public agencies; consequently the state action doctrine barred federal intervention under the Fourteenth Amendment. But Bradley conceded that the state action doctrine was not applicable in Thirteenth Amendment contexts. It not only "nullif[ies] all state laws which establish or uphold slavery," he said, but also "clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." With the exception of John Marshall Harlan, however, every member of the Waite Court equated the "badges and incidents of slavery" with the denial of "civil rights" and concluded that Congress had nearly exhausted its authority to enact appropriate legislation under the Thirteenth Amendment with the CIVIL RIGHTS ACT OF 1866. "[A]t that time," Bradley explained, "Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of man and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery." Bradley's opinion was circumspect in only one respect. Whether denial of equal accommodation "might be a denial of a right which, if sanctioned by the state law, would be obnoxious to the [equal protection] prohibitions of the Fourteenth Amendment," he said, "is another question." But that was true only in the most formal sense. Once the Court had identified two distinct spheres of rights under the Thirteenth Amendment, one "civil" and another "social," it was difficult to resist the impulse to link that standard with the doctrine expounded in *Pace* when deciding equal protection cases. Stephen J. Field and Horace Gray, the only members of the *Civil Rights Cases* majority still alive when PLESSY V. FERGUSON (1896) was decided, had no qualms about state laws that required SEPARATE BUT EQUAL accommodations for blacks on public conveyances. Harlan was the sole dissenter on both occasions.

Equal opportunity in the market was one civil right that every member of the Waite Court assumed was guaranteed by the equal protection clause. Thus in YICK WO V. HOPKINS (1886) the Court invalidated the racially discriminatory application of a San Francisco ordinance that required all laundries, except those specifically exempted by the board of supervisors, to be built of brick or stone with walls one foot thick and metal roofs. No existing San Francisco laundry could meet such stringent building regulations, but the ordinance had the desired effect. The authorities promptly exempted the city's white operators and denied the petitions of their 240 Chinese competitors. "[T]he conclusion cannot be resisted," STANLEY MATTHEWS asserted for a unanimous Court, "that no reason for [this discrimination] exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified." Yet the type of right divested was at least as important in *Yick Wo* as the fact of discrimination. The Court described laws that arbitrarily impaired entrepreneurial freedom as "the essence of slavery" while laws that denied racial minorities free choice in the selection of marriage partners and theater seats were not. But that was not all. The court invoked the absence of standards for administering the laundry ordinance as an independent ground for its unconstitutionality. The boundless discretion, or, as Matthews put it, "the naked and arbitrary power" delegated to the authorities was as decisive for the Court as the fact that the ordinance had been applied with "an evil eye and an unequal hand." In the Waite Court's view, however, the same kind of concern about official discretion was neither possible nor desirable in jury-service cases. In *Strauder* Strong conceded that jury selection officials might constitutionally employ facially neutral yet impossibly vague tests of good character, sound judgment, and the like. The Court had no choice but to presume that the jury commissioners had acted properly, Harlan explained in *Bush v. Kentucky* (1883), in the absence of state laws expressly restricting participation to whites. As blacks began to disappear from jury boxes throughout the South, it became clear that although *Strauder* put jury service in the "civil rights" category, in practical application it stood on a far lower plane than the rights enumerated in the Civil Rights Act of 1866. When Booker T. Washington counseled blacks to place economic opportunities ahead of all others in 1895, he expressed priorities that the Waite Court had long since embroidered into equal protection jurisprudence.

The path of DUE PROCESS was at once more tortuous and less decisive than the development of equal protection

doctrine. In *Dent v. West Virginia* (1888), decided at the close of the Waite era, the Court conceded, as it had in the beginning, that "it may be difficult, if not impossible, to give to the terms 'due process of law' a definition which will embrace every permissible exertion of power affecting private rights and exclude such as are forbidden." Yet two generalizations about the Waite Court's understanding of due process can be advanced with confidence. First, the modern distinction between PROCEDURAL and SUBSTANTIVE DUE PROCESS had no meaning for Waite and his colleagues. In their view, the Fifth and Fourteenth Amendments furnished protection for fundamental rights against arbitrary action, regardless of the legal form in which the arbitrary act had been clothed. In HURTADO V. CALIFORNIA (1884), where the majority rejected counsel's claim that the Fourteenth Amendment INCORPORATED the Bill of Rights, Stanley Matthews explained that because the due process concept embraced "broad and general maxims of liberty and justice," it "must be held to guaranty not particular forms of procedure, but the very substance of individual rights to life, liberty, and property." Even Miller, the most circumspect member of the Court, agreed in 1878 that a law declaring the property of A to be vested in B, "without more," would "deprive A of his property without due process of law." It is equally clear that the Court assumed that CORPORATIONS were PERSONS within the meaning of the Fifth and Fourteenth Amendments long before Waite acknowledged as much during oral argument in *Santa Clara County v. Southern Pacific Railroad Co.* (1886). As early as the GRANGER CASES (1877) the Court decided controversies in which railroad corporations challenged state regulation on due process grounds, and neither the defendant states nor the Justices breathed a doubt about the Court's jurisdiction. In the SINKING FUND CASES (1879), moreover, Waite stated emphatically in obiter dictum that the Fifth Amendment had always barred Congress "from depriving persons or corporations of property without due process of law."

Although every member of the Court accepted the essential premises of substantive due process, no statute was voided on due process grounds during the Waite era. Conventional assumptions about the boundary between the legislative and judicial spheres were largely responsible for the Court's reticence. In due process cases, at least, most of the period's Justices meant it when they stated, as Waite did in the *Sinking Fund Cases*, that "[e]very possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt." The most disarming demonstration of that Court's adherence to this principle came in *Powell v. Pennsylvania* (1888). At issue was an act that prohibited the manufacture and sale of oleomargarine. The legislature had labeled the statute as a public health measure, but it was no secret that the law really had been designed to protect the dairy industry against a new competitor. Harlan, speaking for everyone but Field, conceded that counsel for the oleomargarine manufacturer had stated "a sound principle of constitutional law" when he argued that the Fourteenth Amendment guaranteed every person's right to pursue "an ordinary calling or trade" and to acquire and possess property. Indeed, the Court had furnished protection for those very rights in *Yick Wo*. "But we cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed," Harlan added, "without holding that, although it may have been enacted in good faith for the objects expressed in its title . . . it has, in fact, no real or substantial relation to those objects." And this the Court was not prepared to do. Defendant's offer of proof as to the wholesomeness of his product was insufficient, for it was the legislature's duty, not the judiciary's, "to conduct investigations of facts entering into questions of public policy." Nor could the Court consider the reasonableness of the means selected by the legislature: "Whether the manufacture of oleomargarine . . . is, or may be, conducted in such a way . . . as to baffle ordinary inspection, or whether it involves such danger to the public health as to require . . . the entire suppression of the business, rather than its regulation . . . are questions of fact and of public policy which belong to the legislative department to determine." Field, dissenting, claimed that the majority had not simply deferred to the legislature but had recognized it as "practically omnipotent."

Field overstated the predisposition of his colleagues, and he knew it. The Court seldom spoke with a luminous, confident voice in due process cases; majority opinions almost invariably revealed lingering second thoughts. Each time the Court said yes to legislatures, it reminded them that someday the Court might use the due process clause to say no. In *Powell*, for example, Harlan warned lawmakers that the Court was ready to intercede "if the state legislatures, under the pretence of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty, and property." Harlan did not explain how the Court might identify an act that had been passed "under the pretence" of exercising the police power, but he seemed to be confident that the Justices would be able to identify a tainted statute once they saw one. Waite's opinion in *Munn v. Illinois* (1877) was equally ambiguous. In one series of paragraphs he stated that the power to regulate prices was inherent in the police power; in another he suggested that price fixing was legitimate only if the regulated concern was a "business AFFECTED WITH A PUBLIC INTEREST." It followed from the latter proposition, though not from the former, that "under some circumstances" the Court might disallow regulation of prices charged by firms that were "purely and exclusively pri-

vate." In *Munn* Waite was more certain about the reasonableness of rates lawfully fixed. "We know that it is a power which may be abused," he said; "but . . . [f]or protection against abuses by the legislatures the people must resort to the polls, not the courts." By 1886, however, Waite and some of his colleagues were not so sure. "[U]nder the pretense of regulating fares and freights," Waite declared in the *Railroad Commission Cases* (1886), "the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without JUST COMPENSATION, or without due process of law." This statement, like Harlan's similar remark in *Powell*, warranted many conflicting inferences. At the close of the Waite era, then, the scope of the JUDICIAL POWER under the due process clause was as unsettled as the clause's meaning.

When Waite died in 1888, a St. Louis law journal observed that he had been "modest, conscientious, careful, conservative, and safe." It was a shrewd appraisal not only of the man but of his Court's work in constitutional law. The Court's unwillingness to use judicial power as an instrument of moral leadership evoked scattered protests from racial egalitarians, who accused Waite and his colleagues of energizing bigotry, and from exponents of laissez-faire who complained that the Court had failed to curb overweening regulatory impulses in the state legislatures. But no criticism was heard from the Republican party's moderate center, where the Court had looked for bearings as it reconstructed the "old" Constitution and integrated the "new." In retrospect, it was THOMAS M. COOLEY, not Charles Sumner, who supplied the Waite Court with an agenda and suggested an appropriate style for its jurisprudence. The Republican party had resorted to "desperate remedies" and had treated the Constitution as if it were "wax" during the Civil War, he said in 1867. Now it was time for the bench and bar to ensure that postwar institutions were "not mere heaps of materials from which to build something new, but the same good old ship of state, with some progress toward justice and freedom."

CHARLES W. MCCURDY
(1986)

Bibliography

BENEDICT, MICHAEL LES 1979 Preserving Federalism: Reconstruction and the Waite Court. *Supreme Court Review* 1978: 39–79.

CORWIN, EDWARD S. 1913 *National Supremacy: Treaty Power versus State Power.* New York: Henry Holt.

——— 1948 *Liberty against Government.* Baton Rouge: Louisiana State University Press.

MAGRATH, PETER C. 1963 *Morrison R. Waite: The Triumph of Character.* New York: Macmillan.

MCCURDY, CHARLES W. 1975 Justice Field and the Jurisprudence of Government-Business Relations. *Journal of American History* 61:970–1005.

SCHMIDT, BENNO C. 1983 Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia. *Texas Law Review* 61:1401–1499.

## WAIVER OF CONSTITUTIONAL RIGHTS

A potential beneficiary may waive almost any constitutional claim. Rights not of constitutional dimension also may be waived. The Supreme Court has struggled with the questions whether any special DOCTRINE governs waivers of constitutional rights and, if so, whether the special doctrine applies to all constitutional rights. These waiver issues, like much of the rest of constitutional law, took on massive new proportions with the rapid expansion of constitutional rights in the 1960s and 1970s. Prior to that era, there were relatively few rights eligible for waiver.

Distinctions between waivers of constitutional rights and waivers of other rights do not appear in very early cases. The most frequent waiver issue probably was whether a civil litigant had waived the SEVENTH AMENDMENT right to TRIAL BY JURY. *Hodges v. Easton* (1882), a case raising this issue, was the setting for one of the Supreme Court's important statements concerning waiver. In *Hodges* the Court acknowledged that litigants may waive the right but cautioned, in an oft-quoted statemt that seemed to contemplate special treatment for waivers of constitutional rights, that "every reasonable presumption shold be indulged against . . . waiver."

Then, as later would be true, there seemed to be a gap between the Court's statement of the waiver standard and its application of the standard in deciding cases. The Court's casual attitude toward waiver emerged in *Pierce v. Somerset Railway* (1898) and *Eustis v. Bolles* (1893), in which the Court found waivers of claims that state laws unconstitutionally impaired the OBLIGATION OF CONTRACT. In each case not only was "every reasonable presumption" against waiver not indulged; the Court went so far as to indicate that a state court's finding of waiver of constitutional rights did not even raise a federal issue reviewable by the Supreme Court. It may be, however, that the Court was insufficiently attentive to differences between the waiver issue and the existence of an independent and ADEQUATE STATE GROUND for decision, which would preclude Supreme Court review of the state court's judgment.

Although the Court had not become deeply involved in waiver issues, the legal community knew that waiver doctrine might have to be attuned to differences among con-

stitutional rights. Through eight editions from 1868 to 1927, THOMAS M. COOLEY's treatise on constitutional law acknowledged that litigants may waive constitutional rights but it stated that in criminal cases this "must be true to a very limited extent only." Subsequent Supreme Court waiver doctrine at first would adhere to, and later partially undermine, Cooley's suggested distinction. But in his time, Cooley, himself a state supreme court justice, was on safe ground. As long as there were few constitutional rights regulating CRIMINAL PROCEDURE, one easily could limit their waivability.

The Court became more involved with waivers of constitutional rights in the 1930s. In *Aetna Insurance Co. v. Kennedy* (1937) and JOHNSON V. ZERBST (1938), cases raising civil and criminal procedure waiver issues, the Court seemed to indulge presumptions against waiver. And *Johnson v. Zerbst* supplied a new guiding rhetoric. Waiver required "an intentional relinquishment or abandonment of a known right or privilege." Again, though, the Court's articulated waiver standard sometimes was difficult to reconcile with the standard it applied. In *Rogers v. United States* (1951) a GRAND JURY witness who answered many questions was held to have waived her Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION with respect to additional information.

The 1930s doctrinal seeds restricting waiver flowered in the 1960s. The most significant waiver developments concerned the question of a state criminal defendant's waiver of the right to assert a federal constitutional claim in a federal HABEAS CORPUS proceeding. A habeas corpus case, FAY V. NOIA (1963), became the touchstone for analysis of waiver of constitutional rights. *Fay* reaffirmed *Johnson v. Zerbst*'s waiver standard and required a conscious decision to forgo the privilege of seeking to vindicate federal rights. On the language of *Fay*, accidental waivers seemed impossible. The Court's reluctance to allow waivers of constitutional rights reached a high point in MIRANDA V. ARIZONA (1966), when the Court required that police inform suspects of their constitutional rights to assure that any waiver would be knowing.

The late WARREN COURT's reluctance to allow waivers of constitutional rights contrasts with the BURGER COURT's attitude. In one respect, a retreat from the 1960s standard seemed inevitable. For *Fay* and *Johnson* soon collided with the realities of the American criminal justice system. Through the PLEA BARGAINING process, the entire system depends upon widespread waivers of constitutional rights. In the trilogy of *McMann v. Richardson* (1970), *Parker v. North Carolina* (1970), and *Brady v. United States* (1970), holdings difficult to reconcile with the *Fay-Johnson* standard, this reality took hold. The trilogy effectively made a plea of guilty a waiver of nearly all constitutional procedure rights, known or unknown.

Another waiver issue, one with perhaps less of a foregone conclusion, further signaled the Court's shift in attitude. The FOURTH AMENDMENT guarantees the right to be free of UNREASONABLE SEARCHES and seizures and often requires police to obtain a warrant before conducting a search. For many years there was doubt about the relationship between searches conducted with consent, which need not comply with the Fourth Amendment's warrant requirement, and the concept of waiver. If consent were equated with a waiver of Fourth Amendment rights, then the *Johnson* standard seemed applicable. But since few who consent to searches are informed of their Fourth Amendment rights, it was difficult to characterize any waiver as knowing. The widespread practice of CONSENT SEARCHES seemed to hang in the balance.

A Court reluctant to allow waivers of constitutional rights might have adopted the *Miranda*-like solution of generally requiring the police to inform suspects of their Fourth Amendment rights before obtaining consent to a search. In SCHNECKLOTH V. BUSTAMONTE (1973) the Court, opting for a different extreme, preempted most Fourth Amendment waiver problems. It found that the *Johnson* standard had, almost without exception, "been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a FAIR TRIAL." Fourth Amendment claims were held not to be subject to the knowing and intelligent waiver requirement.

*Schneckloth*'s reasoning may have implications for other constitutional rights. It suggests that rights other than those relating to a fair trial are subject to a waiver standard more lenient than the *Johnson* test. But it did not signal a wholesale retreat from *Johnson*. After *Schneckloth*, in cases such as EDWARDS V. ARIZONA (1981), the Court reaffirmed that the *Johnson* standard governs waivers of the RIGHT TO COUNSEL.

In WAINWRIGHT V. SYKES (1977), where the Court squarely confronted *Fay*, it further limited 1960s waiver doctrine. Under *Wainwright*, failure to comply with state procedural rules effectively waives the right to raise a constitutional claim on federal habeas corpus. A habeas applicant must both explain his failure to comply with state procedures and show that his case was prejudiced by the constitutional flaw. The Court rejected *Fay*'s requirement of a knowing and deliberate waiver. In effect, the burden of proving nonwaiver had been placed on the defendant.

The waiver question also continued to arise in contexts not involving criminal procedure. In *D. H. Overmyer Co. v. Frick Company* (1972) and *Swarb v. Lennox* (1972) the Court reconfirmed earlier holdings that at least some civil litigants may contractually waive due process rights to NOTICE and hearing prior to a JUDGMENT and thereby effectively waive the opportunity to contest the validity of a debt. In *Parden v. Terminal Railway* (1964) states may

have been surprised to learn that certain activities effectively waived their constitutional immunity from suit in federal court. For many years prior to *Parden*, it appeared that only an express waiver by states would be effective. But the Court found that by operating a railroad in INTERSTATE COMMERCE, a state effectively waived its immunity from employees' suits in federal court under the federal EMPLOYERS LIABILITY ACT. *Parden*'s reach was limited by *Employees v. Department of Public Health and Welfare* (1973), which refused to rely on the FAIR LABOR STANDARDS ACT to subject states to federal damage suits by employees. More important, EDELMAN V. JORDAN (1974) held that state participation in a federal program did not amount to consent to suit in federal court on claims relating to the program.

THEODORE EISENBERG
(1986)

Bibliography

COVER, ROBERT M. and ALEINIKOFF, T. ALEXANDER 1977 Dialectical Federalism: Habeas Corpus and the Court. *Yale Law Journal* 86:1035–1102.

LAFAVE, WAYNE R. 1978 *Search and Seizure: A Treatise on the Fourth Amendment* 8.1, 8.2, 11.1, 11.7 (f). St. Paul, Minn.: West Publishing Co.

TIGAR, MICHAEL E. 1970 Foreword: Waiver of Constitutional Rights: A Disquiet in the Citadel. *Harvard Law Review* 84: 1–28.

TRIBE, LAURENCE H. 1978 *American Constitutional Law*. Pages 133–138. Mineola, N.Y.: Foundation Press.

## WALKER, TIMOTHY
(1802–1856)

Born in Massachusetts, Timothy Walker attended Harvard College and Harvard Law School where he studied with Justice JOSEPH STORY. He settled in Cincinnati in 1830 and opened a private law school, which eventually became part of the University of Cincinnati. He wrote on various legal subjects, but his primary contribution was his compilation of his lectures, *An Introduction to American Law* (1837), which he dedicated to Story, whose teachings and viewpoint he spread. A third of the work is on constitutional law, strongly nationalist in its orientation. By 1905 the book had gone through eleven editions.

LEONARD W. LEVY
(1986)

## *WALKER v. BIRMINGHAM*
388 U.S. 307 (1967)

The Supreme Court, 5–4, upheld criminal contempt convictions of eight black ministers, including MARTIN LUTHER KING, JR., for holding a CIVIL RIGHTS protest parade in violation of an INJUNCTION issued by an Alabama state court. The injunction, which forbade them from engaging in street parades without a permit, was issued EX PARTE, two days before the intended march. The order was based on a city ordinance that the Court later held unconstitutional for VAGUENESS in *Shuttlesworth v. Birmingham* (1969), a case arising out of the same events.

For the majority, Justice POTTER STEWART concluded that the ministers, once enjoined by a court order, were not entitled to disregard the injunction even if it had been granted unconstitutionally. Rather, they were obliged to ask the court to modify the order, or to seek relief from the injunction in another court.

Justice WILLIAM J. BRENNAN, for the four dissenters, pointed out that, in the absence of a court order, the FIRST AMENDMENT would have entitled the marchers to disregard the ordinance, which was INVALID ON ITS FACE. It was incongruous, he argued, to let the state alter this result simply by obtaining "the ex parte stamp of a judicial officer on a copy of the invalid ordinance." These views were echoed in separate dissents by Chief Justice EARL WARREN and Justice WILLIAM O. DOUGLAS. The *Walker* principle, though much criticized, remains the DOCTRINE of the Court.

KENNETH L. KARST
(1986)

(SEE ALSO: *Demonstration.*)

## *WALKER v. SAUVINET*
92 U.S. 90 (1876)

Walker lost a civil judgment in a trial decided by a judge, in conformance with state law, after the jury deadlocked and after Walker had demanded TRIAL BY JURY. The Court held, 7–2, that the SEVENTH AMENDMENT to the Constitution, guaranteeing trial by jury in civil actions at law, applied only in federal courts, and that the right to a jury trial in similar state cases was not a privilege of United States citizenship guaranteed by the PRIVILEGES AND IMMUNITIES clause of the FOURTEENTH AMENDMENT. This was the earliest rejection of the INCORPORATION DOCTRINE. Its result is still good law, long after the latter doctrine's triumph.

LEONARD W. LEVY
(1986)

## *WALLACE v. JAFFREE*
472 U.S. 38 (1985)

A 6–3 Supreme Court, in an opinion by Justice JOHN PAUL STEVENS, held UNCONSTITUTIONAL an Alabama statute that

required public school children to observe a period of silence "for meditation or voluntary prayer." No member of the Court contested the constitutionality of the period of silence for meditation. As Justice SANDRA DAY O'CONNOR said in her CONCURRING OPINION, no threat to RELIGIOUS LIBERTY could be discerned from a room of "silent, thoughtful school children." Chief Justice WARREN E. BURGER added that there was no threat "even if they chose to pray." Burger willfully misunderstood or missed the point. Any student in any public school may pray voluntarily and silently at almost any time of the school day, if so moved. The state, in this case, sought to orchestrate group prayer by capitalizing on the impressionability of youngsters. Compulsory attendance laws and the coercive setting of the school provided a CAPTIVE AUDIENCE for the state to promote religion. Justice JOHN PAUL STEVENS emphasized the fact that the state act was "entirely motivated by a purpose to advance religion" and had "*no* secular purpose." The evidence irrefutably showed that. Accordingly, the Alabama act failed to pass the test of LEMON V. KURTZMAN (1971) used by the Court to determine whether a state violated the FIRST AMENDMENT's prohibition against an ESTABLISHMENT OF RELIGION.

Justice O'Connor, observing that Alabama already had a moment of silence law on its books, noted that during the silence, no one need be religious, no one's religious beliefs could be compromised, and no state encouragement of religion existed. "The crucial question," she wrote, "is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer." The only possible answer was that the state, by endorsing the decision to pray during the moment of silence, sponsored a religious exercise, thereby breaching the First Amendment's principle of SEPARATION OF CHURCH AND STATE.

LEONARD W. LEVY
(1986)

## *WALZ v. TAX COMMISSION*
397 U.S. 664 (1970)

In this 8–1 decision, the Supreme Court added a new element to the test for the constitutionality of financial aid to religious institutions. Chief Justice WARREN E. BURGER rejected Walz's claim that a state's grant of tax exemption to property used only for religious purposes violated the ESTABLISHMENT OF RELIGION clause of the FIRST AMENDMENT. Adding to tests already elaborated in ABINGTON SCHOOL DISTRICT V. SCHEMPP (1963), Burger required assurance that "the end result—the effect—[of a grant of tax exemption] is not an excessive government entanglement with religion. The test is inescapably one of degree." Commenting that "the course of constitutional neutrality in this area cannot be an absolutely straight line," he said that taxing a church would have involved even more "entanglement" than exempting them. Justice WILLIAM O. DOUGLAS, dissenting, believed that TORCASO V. WATKINS (1961) governed. He concluded that "a tax exemption is a subsidy."

DAVID GORDON
(1986)

(SEE ALSO: *Government Aid to Religious Institutions.*)

## WAR, DECLARATION OF

See: Declaration of War

## WAR, STATE OF

See: State of War

## *WARD v. ILLINOIS*
431 U.S. 767 (1977)

The Supreme Court upheld, 5–4, a conviction for selling "sado-masochistic" materials. (See MISHKIN V. NEW YORK.) Justice BYRON R. WHITE, for the majority, said that a state law could pass the "patent offensiveness" part of the test of MILLER V. CALIFORNIA (1973) although it did not specifically define the proscribed materials; state court interpretations had followed *Miller*'s guidelines. The dissenters, led by Justice JOHN PAUL STEVENS, argued that the absence of the statutory definition specified by *Miller* left the law unconstitutionally vague.

KENNETH L. KARST
(1986)

## *WARDEN v. HAYDEN*
387 U.S. 294 (1976)

In *Gouled v. United States* (1921) the Court announced a rule that rings strange to the modern ear; when conducting an otherwise lawful search, police are authorized to search for contraband, fruits of crime, means and instrumentalities of crime, or weapons of escape, but they are not authorized to search for "mere evidence." The rationale for the MERE EVIDENCE RULE was never clear, but its main theme was that police could not take objects from an accused without asserting a superior property interest in the object seized. This requirement spurred judicial

creativity in recognizing property interests and in broadly defining their scope.

In *Warden v. Hayden* the Supreme Court rejected this property-centered conception of FOURTH AMENDMENT jurisprudence. Police could seize evidence after all. Questions remained concerning the scope of searches for items previously regarded as mere evidence (such as diaries) and concerning the applicable standards for SEARCHES AND SEIZURES of "mere evidence" belonging to innocent parties.

STEVEN SHIFFRIN
(1986)

## *WARE v. HYLTON*
3 Dallas 199 (1796)

*Ware* established the fundamental principle of constitutional law that a state act may not violate a national treaty. An act of Virginia during the Revolution sequestered sterling debts owed by Virginians to British subjects and provided that such debts be discharged on payment (in depreciated currency) to the state. The Treaty of Paris of 1783 provided that creditors should meet with no lawful impediments to the recovery of full value in sterling, and Article VI of the Constitution made treaties of the United States the supreme law of the land. Ware, a British subject, brought an action in a federal court seeking such a recovery from Hylton, a Virginian. The prewar debts of Virginians to British creditors exceeded $2,000,000. Justice JAMES IREDELL, on circuit, ruled that the treaty did not revive any debt that had been discharged, and on the WRIT OF ERROR from the circuit court, JOHN MARSHALL, for Hylton, argued that a United States treaty could not annul a statute passed when the state was sovereign. He also denied the authority of the Supreme Court to question the validity of a state law, arguing that the Constitution had not expressly granted such an authority.

Iredell persisted in his opinion expressed below, but Justice SAMUEL CHASE, supported by the concurring opinions of the remainder of the Justices, declared that the SUPREMACY CLAUSE (Article VI), operating retroactively, nullified the state act, thereby reviving the sterling debt. Chase cloaked his opinion in sweeping nationalist doctrine that twisted history: "There can be no limitations on the power of the people to change or abolish the state constitutions, or to make them yield to the general government, and to treaties made by their authority." A treaty, he ruled, could not be supreme law if any state act could stand in its way; state laws contrary to the treaty were prostrated before it and the Constitution, which was the "creator" of the states. The *Ware* decision intensified Jeffersonian hostility to the consolidating and procreditor opinions of the federal courts. The decision's imperishable principle of the supremacy of national treaties survived its origins—no doubt in part because JAY'S TREATY of 1794 had provided that the United States should assume the payment of the controversial debts.

LEONARD W. LEVY
(1986)

# WAR, FOREIGN AFFAIRS, AND THE CONSTITUTION

The United States became a nation among nations on July 4, 1776, fully endowed with SOVEREIGNTY, that is, the capacity to do whatever nations do in world politics. International law acknowledges that nations have the power to breach their international legal obligations and take the consequences so far as other nations are concerned. Constitutionally, breaches of international law by Congress or the President are binding on courts and citizens alike as official acts within the discretion of the political branches of the government. Thus the FOREIGN AFFAIRS powers, including the WAR POWERS, draw their substance from the matrix of public international law. In the language of PEREZ V. BROWNELL (1958), the Constitution recognizes in the national government "the powers indispensable to its functioning effectively in the company of sovereign nations."

In the CONSTITUTIONAL CONVENTION, a majority led by JAMES WILSON insisted that an "energetic" and independent President was needed to maintain the unity of a country that was already large and destined to become larger, and above all to help assure its safety in a turbulent and dangerous world. As EDWARD S. CORWIN wrote:

> [T]he fact is that what the Framers had in mind was not the cabinet system, as yet nonexistent even in Great Britain, but the "balanced constitution" of [JOHN] LOCKE, MONTESQUIEU, and [WILLIAM] BLACKSTONE, which carried with it the idea of a *divided initiative in the matter of legislation and a broad range of autonomous executive power or "prerogative."* Sir Henry Maine's dictum that "the American constitution is the British constitution with the monarchy left out," is, from the point of view of 1789, almost the exact reverse of the truth, for the presidency was designed in great measure to reproduce the monarchy of George III with the corruption left out, and also of course the hereditary feature [1957, pp. 14–15].

Actually, all comparisons of the British and American constitutions break down. The President is effectively both king and prime minister, but Congress is not Parliament, and its relation to the President is necessarily at arm's length.

The entire authority of the United States to act as a sovereign nation in world politics is confined by the Constitution to the national government and denied to the

states. It is divided by the Constitution between the President and Congress.

The President is head of state as well as head of government, and therefore the ultimate embodiment of the nation's sovereignty, especially in times of crisis. ABRAHAM LINCOLN turned to his prerogative and residual powers as the source of much of his authority during the CIVIL WAR. In addition, the Constitution endows the President with "the" executive power of the United States, including without limitation the power to conduct diplomacy; to make treaties, with the ADVICE AND CONSENT of the Senate; and to serve as COMMANDER-IN-CHIEF of the armed forces; moreover, he is enjoined to see to it that the laws are faithfully executed.

The constitutional definition of the role of Congress in foreign affairs is comparably broad. Article I provides that "all LEGISLATIVE POWERS herein granted shall be vested in a Congress of the United States." Among the powers expressly granted to Congress are the powers to lay and collect taxes and provide for the common defense; regulate foreign commerce; establish an uniform rule of NATURALIZATION; define and punish piracies and FELONIES committed on the high seas and offenses against the law of nations; declare war, grant LETTERS OF MARQUE AND REPRISAL, and make rules concerning captures on land and water; and raise and support the armed forces, make rules for their government and regulation, and provide for organizing, arming, and disciplining the militia and calling forth the armed forces and the militia to execute the laws of the Union, suppress insurrections, and repel invasions. The problems of CITIZENSHIP and of foreign affairs in their more general aspects are not mentioned, but Congress's authority to legislate on such issues has been readily inferred by the Supreme Court as inherent in national sovereignty.

In short, the Constitution prescribes that the foreign affairs powers of the nation—including the war power—be shared between Congress and the President in accordance with the overriding principle of functional necessity. All the powers the nation requires in the international environment exist. Those which are executive in character are to be exercised by the President. Those which are legislative in nature are reserved for Congress. When in recess, however, Congress can meet only at the President's call, and can act in all cases only subject to the President's VETO POWER. As Corwin concluded, the Constitution invites the President and Congress "to struggle for the privilege of directing American foreign policy."

Sooner or later, most aspects of the conduct of foreign affairs involve both legislative and executive decisions; they are therefore the proper business of both Congress and the President, in a pattern that reflects subtle political judgments about how their cooperation can best be organized under the circumstances. A few functions are unique to each branch. Only the President can command the armed forces, call a special session of Congress, or conduct the diplomacy of the nation; and only Congress can declare war, appropriate money, or make certain conduct criminal. On the other hand, the President sometimes asks members of Congress to serve on diplomatic delegations. And Congress sometimes attempts to restrict the President's power to deploy or use the armed forces, although many constitutional authorities have regarded such restrictions as invasions of the President's executive power.

The flexibility of the constitutional arrangements for making and carrying out foreign policy is not peculiar to the field of foreign affairs. As JAMES MADISON saw from the beginning, the principle of the SEPARATION OF POWERS does not mean that the three branches of the government are really separate. Most of their powers are commingled. The branches are not independent but interdependent, and the preservation of the functional boundaries between the legislative and the executive depends as much on the reflexes of the political system as on rulings of the Supreme Court.

It was realized from the beginning that rigid rules about how Congress and the President should work together in the field of foreign affairs would be undesirable and indeed dangerous. As ALEXANDER HAMILTON wrote in THE FEDERALIST #23, "the authorities essential to the common defense . . . ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies or the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed."

Diplomacy without force behind it has been and will remain a nullity. The use or the threat of armed force has been a normal instrument of American diplomacy, from secret warnings, "showing the flag," and conducting maneuvers, at one end of the spectrum, to programs of rearmament, partial mobilization, and the actual use of armed force—in times of "war" and of "peace," as international law defines those words—at the other. In the early days of the Republic, raids across the borders were commonplace. The problems of piracy and the slave trade required the frequent use of force, pursuant to treaty, statute, or the decisions of the President acting alone. Then and now, international law recognized the right of all states to use limited force in peacetime to cure forceful breaches of international law when no peaceful remedy was available. The United States has taken advantage of its rights in this regard to protect its borders, its ships, its citizens

in peril abroad, and indeed, the rights of citizens whose monetary claims had not been paid by foreign governments. Moreover, the United States and other Western nations have sometimes intervened abroad on humanitarian grounds where organized government has broken down. Such exercises by the United States of its "inherent" right of self-defense have been carried out mainly, but not exclusively, on the authority of the President.

The threat to use force and even the use of force have been familiar features of diplomacy from the opening of Japan to President RICHARD M. NIXON's secret nuclear warnings that induced the Soviet Union not to attack Chinese nuclear installations. At the end of the Civil War, we deployed 50,000 troops along the Mexican border. France heeded our suggestion, withdrew its troops from Mexico, and left Maximilian to his fate. Similarly, in 1962, President JOHN F. KENNEDY assembled some 250,000 troops in Florida, and halted a Soviet vessel carrying military supplies to Cuba; the Soviet Union withdrew its nuclear missiles from Cuba. A few years earlier, at a moment of severe Soviet pressure against Turkey, President HARRY S. TRUMAN ordered the battleship *Missouri* to carry the body of a deceased Turkish ambassador to Istanbul for burial—manifestly a journey intended to be more than a courteous gesture to the people of Turkey. Such threats of force have been almost entirely within the province of the President.

The list of such incidents is long enough to demonstrate that throughout its history the United States government has called upon its armed forces to perform a wide variety of functions in support of its foreign policy. There have been five DECLARATIONS OF WAR in our national experience, and more than 200 episodes in which the President ordered the armed forces into combat, sometimes with the support of a treaty or of legislation passed before or after the event, more often on his own authority. The number of occasions on which the President secretly threatened to use force in aid of his diplomacy cannot be counted accurately, but is surely considerable.

The pattern of cooperation between the President and Congress with respect to war and foreign affairs has been the same since the first administration of President GEORGE WASHINGTON. This continuity of practice arises from the nature of things. Congress could and did admonish the President to protect frontier settlements from Indian raids but could not meet and vote every time the risk arose. In any event, it was the President's duty to protect the settlements with or without the support of a statute. The circumstances which may require the use of or the threat to use armed force are too protean, and pervade the conduct of foreign affairs too completely, to be compressed within a single procedure.

From the beginning of our government under the Constitution, a great deal of energy has been absorbed by attempts to define the respective roles of the President and of Congress in carrying out these functions. The participants in the debate are divided into two camps.

Hamilton's view of the Presidency dominates the judicial opinions, the pattern of practice, the writings of scholars, and the pronouncements of senators and representatives. To Hamiltonians, all national powers not granted to Congress or the courts are "executive" and therefore presidential, especially if they concern relations with foreign powers or the duties of the nation under international law.

But a dissenting opinion has persisted, based on the fear of executive power as dictatorship in disguise. Corwin calls it the "ultra-Whig" view. It opposes almost all claims to presidential independence, and regards the executive as no more than an obstreperous but indispensable servant of a "sovereign" Congress. This conception of the Presidency has been a mainstay of political attacks on Presidents for unpopular wars.

The Hamiltonian position crystallized during the neutrality controversy of 1793, an episode of immense importance to the formation of the Constitution. France had declared war against Great Britain. The United States was bound to France by the 1778 treaties of perpetual alliance which seemed to require the infant Republic, in the event of war between France and Britain, to give various forms of belligerent aid to France. Any such assistance would have been an act of war against Great Britain, which could easily have snuffed out the new nation. Washington and his cabinet were determined to preserve neutrality despite the treaties with France and the strongly pro-French bias of public opinion. After the Supreme Court refused Washington's request for an ADVISORY OPINION determining whether the President could issue a proclamation of neutrality on his own authority, Washington did so, and took special precautions to assure Great Britain of America's pacific intentions.

The concurrent nature of the foreign relations power was soon demonstrated. Juries would not convict American seamen for violating the President's neutrality proclamation. Congress then grudgingly passed a Neutrality Act, supporting the President's interpretation of the treaties with France. In due course, the Neutrality Act was enforced. Congress had the last word, but acted under circumstances carefully arranged by the President, acting independently.

Hamilton's *Pacificus* papers, defending the President's right to issue the Proclamation of neutrality, are among the most cogent of all our state papers on the conduct of foreign affairs. The President, said Hamilton, has the foreign affairs and war powers of the British monarch minus the limitations on those powers mentioned in the Constitution. Those limitations, being exceptions to the President's executive powers, should be strictly construed.

The President is the sole officer of the government empowered to communicate with foreign nations. This is an executive power. It was therefore the President's role to inform the nations about the position of the United States with respect to the European war. Next, Hamilton argued, it is the President's duty to preserve peace until Congress declares war. In this case, the President's duty required him faithfully to execute the international law of neutrality, and thus avoid giving offense to foreign powers. To carry out that duty, the President had to determine for himself whether a status of neutrality conformed to our national interests and was compatible with our obligations under the French treaties, and then to announce his position diplomatically. Hamilton said that the President has the authority and the duty to determine the operation of treaties in the first instance, an important example of his right as President to decide upon the obligations of the country to foreign nations until Congress does so within its own sphere.

Hamilton's analysis would lead to the conclusion that while only Congress can move the nation into a state of general war, the President can authorize more limited uses of force in peacetime for purposes of self-defense, the protection of citizens abroad, the fulfillment of treaty obligations, and the support of diplomacy.

The Ultra-Whig dissenting view draws an altogether different boundary between the respective war powers of the President and Congress. For the dissenters, Congress's power to "declare" war gives Congress entire control over every aspect of the war power, including neutrality. It means, they contend, that the President can never employ the armed forces, save to repel a sudden attack, unless Congress has first passed a "declaration of war." Some dissenters agree that Congress may authorize limited war in the international law sense, but insist that the declaration of war clause requires congressional action before the President uses force at all, except in cases of sudden attack. A few concede that circumstances may justify congressional approval after the event—after Pearl Harbor, for example, or the firing on Fort Sumter. And some even accept the decision of the Supreme Court in THE PRIZE CASES (1863), which upheld acts of Congress ratifying President Lincoln's blockade of the Confederacy, enacted some months after the President had instituted the blockade. But all the dissenters are dubious about statutes, treaties, or joint resolutions—and many have been put on the books since 1792—that may be invoked to support presidential uses of force years later. The Ultra-Whigs admit that the United States may, like other nations, sign treaties that have military provisions, but they are uneasy about the propriety of such commitments unless they are reiterated by Congress when they become the basis for military action.

There is no reason for such confusion to persist. The "declaration of war" authorized in the Constitution is bracketed in Article I, section 8, with "letters of marque and reprisal" and "captures on land and sea." All are terms of specific meaning in international law. A declaration of war has far-reaching consequences, including: the authorization of unlimited hostilities, the possible internment of enemy ALIENS, the sequestration of enemy property, and the imposition of regulations, such as censorship, that would be unthinkable in peacetime. But many kinds of hostilities recognized as legitimate under international law do not constitute "general war," and can therefore be initiated by official action less sweeping than a declaration of war. Most familiar are exercises of the right of self-defense against certain breaches of international law. Many are short, quick responses to a sudden threat; others become more prolonged conflicts. International law limits all such defensive campaigns to the use of as much force as is reasonably necessary to eliminate the original breach.

Hamilton's theory of presidential power is clearly the operative model of American constitutional law with respect to the international use of force. But the practice has not been nearly so symmetrical as Hamilton's logic. Every American President who has felt obliged to use the armed forces has vividly remembered the political attacks on "JOHN ADAMS' Undeclared War," and therefore sought to obtain congressional support for his policies as soon as it was politically feasible to do so. But such prudence has never helped a President saddled with an unpopular war. John Adams was supported by four successive statutes; they had no effect on the political outcry against him, or the fate of the Federalist party. Presidents Truman and LYNDON B. JOHNSON endured similar trials. As Johnson commented: "I said early in my Presidency that if I wanted Congress with me on the landing of Vietnam, I'd have to have them on the take off. And I did just that. . . . But I failed to reckon with one thing: the parachute. I got them on the take off, but a lot of them bailed out before the end of the flight."

Between the Congress of Vienna and the turn of the twentieth century, the United States was not a major actor in world politics; the central features of American foreign policy were Manifest Destiny and the MONROE DOCTRINE. Nonetheless, there were periods of tension between Congress and the President with respect to the conduct of foreign relations. The most acute of these episodes concerned the expansion of the nation to the Pacific and controversies about problems in Latin America and Canada. Some of the controversies reflected deep divisions between the parties and among the people, others no more than normal rivalry between the political branches of the government.

But the collapse of the old state system in 1914 imposed

new burdens on the United States, which in turn gave rise to profound disquiet in American opinion, exacerbating the traditional tension between Congress and the President with respect to the war power, and reaching a climax during the early 1970s. The VIETNAM WAR dragged on, accompanied by antiwar rioting of a kind the nation had not experienced since the Civil War. At the same time, the controversy over President Nixon's behavior with respect to Watergate poisoned the political atmosphere, and produced so strong a movement for the President's impeachment that he resigned.

In this atmosphere of extreme political excitement, Congress passed the War Powers Resolution of 1973. Its political purpose was to assure the people that Congress could and would protect the nation against future Vietnams. For the first time in nearly two hundred years, the Hamiltonian view of the Presidency and the war power suffered at least a nominal defeat.

The Resolution asserts congressional supremacy with regard to the war power, but it does not adopt an extreme form of the Ultra-Whig view. It does not say, for example, that the President can use force only if Congress has first declared war. Not does it seek to confine the President's use of force without prior congressional approval to cases of "sudden attack."

The Resolution purports to fulfill the intent of the Framers of the Constitution, as summarized in three propositions. First, the armed forces should not be involved in hostilities without the collective judgment of Congress and the President. Second, Congress has the power to pass all laws NECESSARY AND PROPER for carrying into execution the powers of the President. Third, the constitutional powers of the President as Commander-in-Chief can be exercised by him to introduce the forces into hostile situations only pursuant to a declaration of war or a "specific" statute, or in a national emergency created by an attack upon the United States. Clearly, this attempt at restatement omits the nation's obligations under treaties.

The Resolution requires the President to consult with Congress "in every possible instance" before introducing the armed forces into situations where hostilities are an imminent risk, and also to "consult" regularly with Congress after hostilities have begun until they are terminated. The resolution makes no attempt to define the term "consult," which is a word of political but not of constitutional meaning.

The War Powers Resolution requires the President to report to Congress within forty-eight hours and regularly thereafter whenever he has introduced armed forces into situations risking hostilities without a declaration of war. It further requires the President to terminate such a use of the armed forces within sixty days unless Congress has declared war, authorized hostilities in another "specific" form, or extended the sixty-day period to not more than ninety days. Where hostilities are being conducted abroad without a declaration of war or "specific" authorization in another form, the resolution authorizes Congress, by CONCURRENT RESOLUTION, to require the President to terminate hostilities and remove the armed forces.

If the War Powers Resolution were carried out literally, it would constitute the most revolutionary change in the Constitution ever accomplished—far more drastic in its effects than the shift of authority from the states to the national government which began after Civil War. It would subject the President to the orders of an omnipotent Congress. No future President could do what Lincoln did during the Civil War, or rely on the behavior of every strong President between Washington and Lyndon Johnson as precedents. The deterrent influence of American military power and of American treaties, already weakened after Vietnam, would decline even further. The United States would be the only country in the world that lacked the capacity to enter into treaties or conduct secret negotiations contemplating the use of force, and it would be hampered in many other ways in the conduct of its foreign relations. Enforcing the resolution would produce paradoxes. Although no future President could do what President Kennedy did during the Cuban Missile Crisis in 1962, the highly "specific" legal arrangements for the Vietnam War would have satisfied the Resolution's requirements. That war was authorized not only by the United Nations Charter and the Southeast Asia Collective Defense Treaty of 1954, but by the GULF OF TONKIN RESOLUTION of 1963 and other explicit acts of Congress as well. On the other hand, the sponsors of the Resolution have said that it does not affect the President's unique responsibilities with regard to the nuclear weapon. Above all, as has been evident in the decade since it was passed, the Resolution would convert almost every serious foreign policy problem into a debate between Congress and the President about constitutional power, making the conduct of foreign relations even more cumbersome and contentious than is the case already.

The War Powers Resolution is in profound conflict with the necessities of governance in a turbulent world and with the concept of the Presidency that has evolved from the experience of the nation under the Constitution. We can therefore predict that the Hamiltonian conception of the war powers will prevail as the constitutional norm, and that the War Powers Resolution will become a footnote to history, either through repudiation or desuetude.

Institutional pride may keep Congress from repealing the resolution, although repeal disguised as revision is not unthinkable. The courts will almost surely declare the Resolution unconstitutional if an appropriate case should arise. The ruling of the Supreme Court in IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983) is applicable to the chief operative parts of the War Powers Res-

olution. *Chadha* ruled that congressional action can have legislative effect only through acts or joint resolutions fully subject to the President's veto. If Congress cannot constitutionally terminate a war by passing a concurrent resolution, it can hardly do so by failing to pass such a resolution within sixty or ninety days.

In holding the War Powers Resolution unconstitutional, the Supreme Court may well go beyond *Chadha* to deal with more fundamental aspects of the separation of powers principle: the resolution's effect, for example, on the President's hitherto unquestioned power to conduct secret negotiations, receive surrenders, or negotiate cease-fire agreements; and its attempt, recalling the proposed BRICKER AMENDMENT, to require legislation before treaties can become the supreme law of the land.

Even if the resolution is neither repealed nor declared unconstitutional by the courts, it is unlikely to be an important influence on Presidents. The resolution does not correspond to the nature of the problems of foreign policy and national security with which the government has to deal, and therefore cannot function as effective law. At least eleven episodes involving the use of force or the imminent risk of using force occurred during the first decade after the War Powers Resolution was passed. In each case the President, while protesting that the resolution was unconstitutional, consulted with congressional leaders and kept Congress informed about events. In no case did the procedure mandated by the resolution prove convenient or appropriate, and in no case was it followed. In each case there were some congressional protests that the War Powers Resolution was being violated, and even suggestions that the President be impeached.

The President and Congress, separately and together, have been entrusted by history with sovereign prerogatives in exercising the foreign affairs and war powers of the nation. Those prerogatives have been in uneasy balance for two hundred years, an instance of the friction between the branches of government on which the Founding Fathers relied to preserve the liberties of the people. Over a wide range, the President and Congress can exercise their joint and several political discretion in dealing quickly with complex and swiftly moving events, often on the basis of fragmentary information. Within that zone, the only constitutional restraints on which the people can rely to secure them from the abuse of such political discretion is the electoral process itself, as Chief Justice Marshall remarked in GIBBONS V. OGDEN (1824).

But the choices committed by the Constitution to the care of Congress and the President are not unlimited, even when one gives full weight to the view that the war power is the power to wage war successfully. The foreign affairs and war powers are aspects of a government organized under a written Constitution dominated by the principle of democratic responsibility. Although the Supreme Court has hesitated to pass on many conflicts between the President and Congress, it has intervened where exercises of the war power impinged upon CIVIL RIGHTS, or attempted radically to alter the equilibrium of the constitutional order.

Thus, certain constitutional limits on the President's war power emerged in its first major test—the neutrality crisis of 1793. President Washington could have used the armed forces or called up the militia to keep French privateers at the docks of Philadelphia or Charleston; in the event, he prudently refrained from such action. But he could not get American juries to convict American citizens indicted for violating a presidential proclamation. Similarly, YOUNGSTOWN SHEET & TUBE CO. V. SAWYER (1952) decided that the President had no INHERENT POWERS to seize steel mills as a step toward settling a strike during the Korean War when Congress had rejected such a procedure.

There are comparable constitutional limits on what Congress and the President acting together can do in the name of the war power. Congress can make it an offense to recruit soldiers within the United States for wars in which the United States is neutral, but it is doubtful whether it would be constitutional for Congress to forbid American citizens from going abroad to fight. In *Ex parte Merryman* (1861) and *Ex parte Milligan* (1867) the courts held that even in the midst of the Civil War, courts-martial could not try civilians while the ordinary courts were available. And in REID V. COVERT (1957) and *Kinsella v. United States* (1960) the Supreme Court struck down convictions imposed by courts-martial on the wives of military personnel living on American bases abroad.

The only exceptions to this line of cases are the JAPANESE AMERICAN CASES, decided during WORLD WAR II. These cases upheld the constitutionality of a statute authorizing the President to exclude citizens of Japanese descent from California, Oregon, and Washington, and requiring their internment in camps until they could be resettled in other parts of the country. These decisions have been severely criticized, and the Court's opinion in DUNCAN V. KAHANAMOKU (1946) can be interpreted as overruling them *sub silentio*. Until they are more decisively repudiated, however, they remain, as Justice Jackson said in KOREMATSU V. UNITED STATES (1944), "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."

EUGENE V. ROSTOW
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Bibliography

CORWIN, EDWARD S. (1940) 1957 *The President: Office and Powers, 1787–1957*. New York: New York University Press.

HENKIN, LOUIS 1972 *Foreign Affairs and the Constitution*. Mineola, N.Y.: Foundation Press.

RANDALL, JAMES G. (1926) 1951 *Constitutional Problems under Lincoln.* Urbana: University of Illinois Press.

REVELY, W. TAYLOR, III 1981 *The War Powers of the President and Congress.* Charlottesville: University Press of Virginia.

ROSTOW, EUGENE V. 1945 The Japanese American Cases: A Disaster. *Yale Law Journal* 54:489–533, reprinted in *The Sovereign Prerogative* (1962). New Haven: Yale University Press.

——— 1973 Statement, in Appendix to *War Powers,* Hearings before Subcommittee on National Security Policy and Scientific Developments, Committee on Foreign Affairs, House of Representatives, 93rd Congress, 1st Session, March 7–20, 1973, pp. 395–502; also in Rostow, Eugene v. 1972 Great Cases Make Bad Law: The War Powers Act. *Texas Law Review* 50:833–900.

SOFAER, ABRAHAM D. 1976 *War, Foreign Affairs, and Constitutional Power: The Origins.* Cambridge, Mass.: Ballinger Publishing Co.

TURNER, ROBERT F. 1983 *The War Powers Resolution: Its Implementation in Theory and Practice.* Philadelphia: Foreign Policy Research Institute.

## WAR POWERS

Not appearing in the Constitution, the phrase "war powers" nonetheless describes a cluster of powers exercised by the President or Congress, together or separately, to combat both domestic insurgency and foreign military enemies. They comprise those activities necessary "to wage war successfully," including the raising of troops, the provision of equipment and supplies, the mobilization of opinion, and the maintenance of security in loyal areas (during civil war or insurgency) or on the home front (during foreign war).

As with all governmental activity, the legitimacy of the war powers depends ultimately on explicit or implicit sources in the Constitution. Among these are the grants to Congress of authority "to declare War," to raise, maintain, and make rules for federal military forces, and "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Other sources include the Article I authorization to suspend the privilege of the writ of HABEAS CORPUS "when in Cases of Rebellion or Invasion the public Safety may require it," the Article II clauses making the President COMMANDER-IN-CHIEF, giving him power to make treaties subject to Senate consent, and charging him to "take Care that the Laws be faithfully executed," and the Article IV commitments guaranteeing "to every State . . . a REPUBLICAN FORM OF GOVERNMENT" and pledging protection against invasion and domestic violence. Magnifying all these grants is the NECESSARY AND PROPER CLAUSE.

Contrariwise, only in exceptional circumstances have officials instituted TREASON prosecutions, for in Article III the Framers laid out strict evidentiary requirements, owing to the crime's draconian connotations. But such seemingly plausible restrictions as the FIRST AMENDMENT and Fifth Amendment, the principle of SEPARATION OF POWERS, and the rule against delegation of power have seldom proved real barriers to effective wartime government; and generally JUDICIAL REVIEW has had little impact on the power to make war.

As early as 1792, Congress empowered the President to call forth state militias when "combinations too powerful to be suppressed by the ordinary course of judicial proceedings" prevented the execution of federal law. Used during the WHISKEY REBELLION (1794), and subsequently modified to include regular military forces and to clarify the President's authority to determine the existence of emergency, this provision later helped undergird President ABRAHAM LINCOLN's response to the siege of Fort Sumter. The ALIEN AND SEDITION ACTS of 1798 provide another early illustration of legislative-executive collaboration; adopted during the Quasi-War with France, they posed the enduring issue of reconciling CIVIL LIBERTIES with the perceived requirements of internal security.

Although Presidents THOMAS JEFFERSON and ANDREW JACKSON confronted serious opposition to enforcement of federal law during the Embargo and NULLIFICATION crises, the CIVIL WAR produced the first comprehensive test of the war powers' true potential. With only a slender statutory base—or none at all—for much of his action, Lincoln called out the militia, requested federal volunteer troops, increased the size of the regular army and navy, spent money from the treasury, established a naval blockade of the Confederacy, and suspended the privilege of the writ of habeas corpus. When Congress finally met at Lincoln's call, on July 4, 1861, it confronted not only a program already in place but also the President's explanation that his actions, "whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting . . . that Congress would readily ratify them."

Besides retroactively endorsing much of the Lincoln program, Congress voted appropriations and passed confiscation, legal tender, and draft legislation to support the defeat of the rebellion. It also authorized Lincoln's seizure of the Union's telegraphs and railways in January 1862. The general rule of the Civil War, however, was executive initiative under the theory that the Constitution had been intended to provide government adequate to all contingencies. This view built on THE FEDERALIST #23 and LUTHER V. BORDEN (1849) and gained important wartime endorsement in the PRIZE CASES (1863). Its fullest elaboration appeared in *War Powers under the Constitution of the United States,* a massive exposition and compilation by William Whiting, the War Department's solicitor.

Even Lincoln's internal security program, which em-

phasized military arrest without warrant, detention without trial, and release once danger had passed, escaped serious censure during the war itself, despite the short-term imprisonment of some 13,000 to 25,000 northern civilians. Typical of Court review of war powers disputes, Chief Justice ROGER B. TANEY's attack on the suspension of habeas corpus, in *Ex parte Merryman* (1861), was feeble and futile, while the more serious blow in EX PARTE MILLIGAN came in 1866, after the war had ended.

In WORLD WAR I, WOODROW WILSON by no means ignored the Lincoln model; such key agencies as the War Industries Board and the Committee on Public Information rested solely on executive authority. But the bulk of the internal effort during 1917–1918 relied on congressional delegation of power. Wilson in turn delegated authority to a host of administrative agencies that exercised direct control of the sinews of war.

The resulting intervention contrasted markedly with the Civil War experience. Bolstering prewar statutes that had given the President power to place mandatory defense contracts with private firms, the Lever Act (1917) constituted the war's largest delegation of power. It allowed sweeping regulation of priorities, production, and prices throughout the economy; yet in only a minor detail did the Supreme Court eventually rule the act unconstitutional, in *United States v. Cohen Grocery Company* (1921). The Trading with the Enemy Act (1917) permitted control of foreign commodity and currency transactions, encountered no significant judicial challenge, and later provided a statutory base for President FRANKLIN D. ROOSEVELT's "Bank Holiday" during the economic emergency of the Great Depression. (Not until 1977 did Congress limit the law's availability to periods of declared war—and then provided a slightly narrower set of financial powers for use in other crises.) The SELECTIVE SERVICE ACT (1917) gave free rein to Wilson in establishing draft machinery and received strong endorsement in the SELECTIVE DRAFT LAW CASES (1918), a decision supplying precedent for upholding selective service legislation in World War II and the Cold War. The ESPIONAGE ACT (1917) and SEDITION ACT (1918) enlisted the judicial system and were upheld in SCHENCK V. UNITED STATES (1919), ABRAMS V. UNITED STATES (1919), and *Pierce v. United States* (1920). Over 1,900 prosecutions took place under these two measures, with 930 convictions.

In WORLD WAR II, President Roosevelt effectively combined the Lincoln and Wilson approaches. He based many actions and agencies on his INHERENT POWERS as commander-in-chief, even when tackling problems of domestic mobilization. The National War Labor Board is an example. Created in January 1942 to insure against labor strife and work stoppages in war industries, its orders were in theory only "informatory," "at most advisory"; yet companies violating the orders were denied federal contracts and needed materials. Recalcitrant workers risked revocation of their draft exemptions and denial of other jobs within the jurisdiction of the United States Employment Service. Although avowedly established under authority vested in Roosevelt "by the Constitution and the statutes of the United States" (a commonly used formula for World War II agencies), until June 1943 the Board actually had no statutory base but rather fell under the Office of Emergency Management, itself a creation within the Executive Office of the President.

Other action rested on legislation. In September 1939, well before American entry into the war, Roosevelt's declaration of a national emergency activated laws, some dating to before World War I, that empowered him to increase the size of the army and navy, regulate banking and currency dealing, take over factories and power plants, reallocate appropriations among executive departments and agencies, and censor wire and radio communications. The Lend-Lease Act (1941) delegated the broadest procurement powers ever given to a President, yet it was never challenged judicially. The Office of Price Administration, established under the Emergency Price Control Act (1942), provided the major wartime inflation fighting program; like the nonstatutory agencies, it often employed indirect sanction that proved impossible to challenge judicially. Decisions validating the act included YAKUS V. UNITED STATES (1944), *Bowles v. Willingham* (1944), and *Steuart and Brothers v. Bowles* (1944). Not surprisingly, the war's proliferation of alphabetical agencies dwarfed the New Deal's.

In addition, the government had a sedition law available (the Smith Act of 1940), but widespread support for the war meant relatively few prosecutions. The Japanese American relocation program—the single most blatant obstruction of CIVIL LIBERTIES in the nation's history—instead had its own flimsy legislative base and for practical purposes received judicial sanction in the Japanese American Cases—*Hirabayashi v. United States* (1943) and *Korematsu v. United States* (1944).

The lesson of the two world wars, as Clinton Rossiter accurately summarized, is "that in time of war Congress can pass just about any law it wants as a "necessary and proper' accessory to the delegated war powers; that the President can make just about any use of such law he sees fit; and that the people with their overt or silent resistance, not the Court with its power of judicial review, will set the only practical limits to arrogance of abuse." Indeed, even popular resistance, real or imagined, generally has proved more of a challenge to be subdued than a restrictive hurdle.

Punctuated by limited wars in Korea and Vietnam, the period of Cold War since 1945 conveys a similar lesson: if

Congress and the President act together, little likelihood exists of judicial challenge. In this respect President HARRY S. TRUMAN erred during the KOREAN WAR, when a plant seizure triggered *Youngstown Sheet and Tube Co. v. Sawyer* (1952). As for the VIETNAM WAR, Presidents LYNDON B. JOHNSON and RICHARD M. NIXON found that despite flagging public support, Congress kept voting supplies until the main fighting was over. For its part, the judiciary moved only gingerly when limiting use of war-related powers, as in NEW YORK TIMES V. UNITED STATES (1971) (government secrecy), and UNITED STATES V. UNITED STATES DISTRICT COURT (1972) (national security electronic surveillance). Moreover, the Supreme Court in LAIRD V. TATUM (1972) held that the courts lacked jurisdiction over a challenge to the use of military personnel to gather domestic intelligence pertaining to potential public disorder; and other courts managed to discover executive-legislative *agreement* in Congress's decision finally to cut appropriations for operations in or over Cambodia.

Future Presidents may not benefit so readily from legislative acquiescence. Soon after enacting the War Powers Resolution (1973) to control external warmaking by the President, Congress passed the NATIONAL EMERGENCIES ACT (1976). Recent studies had disclosed that four declarations of national emergency were still in effect, one dating to 1933 and another to 1950; these proclamations activated 470 provisions of federal law, many of which lingered from the two world wars and Korea. The 1976 law ended these existing emergencies two years after its passage, mandated periodic six-month review of any future emergency declarations, and made them terminable by CONCURRENT RESOLUTION—a procedure of doubtful constitutionality under IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983). The act also required Presidents to inform Congress fully of the legislative basis for emergency actions. But subsequent response to President JIMMY CARTER's declaration of national emergency over the Iranian hostage crisis (1979) indicated little congressional desire to adhere rigorously to the new requirements.

Whenever a crisis plausibly justifies their exercise, the war powers seem likely to continue to generate government centered in the executive branch, emphasizing energetic administration that transcends normal restrictions, and on occasion sufficiently vigorous to warrant the label "constitutional dictatorship."

CHARLES A. LOFGREN
(1986)

(SEE ALSO: *Congressional War Powers; Presidential War Powers.*)

Bibliography

CORWIN, EDWARD S. (1957) 1984 *The President: Office and Powers, 1787–1984,* 5th ed., revised by Randall W. Bland, Theodore T. Hindson, and Jack W. Peltason. New York: New York University Press.

FISHER, LOUIS 1985 *Constitutional Conflicts between Congress and the President.* Princeton, N.J.: Princeton University Press.

ROSSITER, CLINTON (1948) 1963 *Constitutional Dictatorship: Crisis Government in the Modern Democracies.* New York: Harcourt, Brace.

——— (1951) 1976 *The Supreme Court and the Commander in Chief.* Expanded edition by Richard P. Longaker. Ithaca, N.Y.: Cornell University Press.

## WAR POWERS
### (Update 1)

The phrase "war powers" does not appear in the Constitution. By the mid-1980s a complex of specific grants in the document nonetheless provided the federal government broad authority to protect national security through military action abroad and domestic mobilization. Court decisions and practice had established that when Congress and the President acted in concert, hardly any barriers existed, except on those rare occasions involving violations of the BILL OF RIGHTS. Executive action lacking congressional endorsement had proved more debatable, although less litigated. Courts had not effectively challenged presidential ventures abroad, nor had Congress itself institutionally challenged the President, save when the VIETNAM WAR was nearly over.

In the late 1980s little changed. Because of the absence of foreign conflicts sufficient to require domestic mobilization and controls, existing case law pertaining to the home front in wartime remained undisturbed, encapsulated in an earlier era. Indeed, this situation seemed likely to continue, because by the end of the decade shifts within the former "Communist bloc" significantly lessened the chance that the nation would again see massive domestic build-ups like those of WORLD WAR I and WORLD WAR II. (Reserve call-ups during the American confrontation and war with Iraq in 1990–1991 proved, however, that lesser mobilizations could still occur.)

Even the JAPANESE AMERICAN CASES sat untouched. To be sure, Congress offered its tardy amends for the World War II relocation program, providing modest compensation for surviving internees; and with an assist from academic researchers who uncovered evidentiary deficiencies and procedural irregularities in the wartime prosecutions, the original federal trial courts used the old writ of error *coram nobis* to vacate the convictions of Gordon Hirabayashi, Fred Korematsu, and Minoru Yasui. But the major Supreme Court decisions from 1943 and 1944 now served amazingly as authority for viewing race as a SUSPECT CLASSIFICATION.

Abroad, presidential war making continued. Following his popular intervention in Grenada in 1983 and his more controversial use of marines in Lebanon during the same period (which Congress finally authorized), President RONALD REAGAN sent naval forces to the Persian Gulf in 1987–1988 to protect oil shipments during the Iran-Iraq War. In December 1989 his successor, GEORGE BUSH, committed troops to combat in Panama, after failing to dislodge Panamanian dictator Manuel Noriega by other means. Then, beginning in August 1990, Iraq's invasion and occupation of Kuwait triggered an escalating response by Bush that recalled memories of both the KOREAN WAR and the VIETNAM WAR. Both Presidents skirted the reporting requirements of the 1973 War Powers Resolution. By late 1990 some twenty-one instances of presidential war making had arguably fallen under the coverage of the law since its passage, but in only one (during GERALD R. FORD's tenure) had a President explicitly reported to Congress that he had sent forces into hostilities or situations of imminent hostility.

The Panamanian episode typified the practice. Bush informed Congress, but stated that his report was "consistent with" the War Powers Resolution, not pursuant to it. In particular, he carefully avoided mention of section 4(a)(1), the provision defining the commitment of forces that triggers the law's requirement for troop withdrawal after sixty days unless Congress authorizes continuation. The military operations, Bush said, "were ordered pursuant to my constitutional authority with respect to the conduct of foreign relations and as Commander in Chief."

Such actions did not go entirely unchallenged. After Reagan ordered naval forces to the Persian Gulf, just as in 1982 after he sent military advisers into El Salvador, individual members of Congress asked the federal District Court for the District of Columbia to enjoin the President to file the report required to start the War Powers Resolution's sixty-day "clock." In *Lowry v. Reagan* (D.D.C. 1987) the court declined, invoking the D.C. Circuit's doctrine of "remedial discretion" by finding that the members' dispute was not with the President, but with their legislative colleagues who refused to pass legislation starting the clock. The court added that the POLITICAL QUESTIONS doctrine also barred the suit in its present form, because a court injunction could endanger diplomatic initiatives through multiple pronouncements on a sensitive matter.

The demonstrated ineffectiveness of the War Powers Resolution in turn led to proposals to amend it. This step became more urgent because most authorities viewed IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983) as invalidating the law's provision for use of a CONCURRENT RESOLUTION to terminate a military action prior to the sixty-day deadline. Suggested changes included tightening key definitions within the law, substituting joint resolutions for concurrent resolutions as the disallowance mechanism, specifying which members of Congress the President was to consult under the act's consultation requirement, eliminating the sixty-day limit on the use of force without congressional approval, and granting individual members of Congress standing in court challenges under the War Powers Resolution. By mid-1991, none of the proposals had passed.

These disputes, along with covert arms-for-hostages deals in the Middle East and support for the Contra rebels in Nicaragua, produced renewed debate over the constitutional locus of the external war-making power. Defenders of presidential initiatives predictably trotted out arguments for inherent EXECUTIVE POWER that dated back to ALEXANDER HAMILTON's "Pacificus" essays in 1793 and had received apparent endorsement in UNITED STATES V. CURTISS-WRIGHT EXPORT CORP. (1936). Critics again quickly pointed out the egregious historical errors in such defenses. Talk of an "imperial Congress" also missed the point, they argued, because the constitutional framework contemplated congressional control of foreign commitments and policy decisions relating to military force. In December 1990, while the Iraqi crisis heightened, U.S. District Judge Harold H. Greene agreed in *Dellums v. Bush* (D.D.C. 1990) that the Constitution gives Congress authority over offensive warfare. At the same time, relying on the doctrine of RIPENESS, he declined to enjoin President Bush from acting without congressional authorization. Although denying he needed it before ordering an attack on Iraq, Bush requested congressional approval anyway in January 1991, and received it with votes of 52–47 in the Senate and 250–183 in the House of Representatives.

Overall, neither side clearly prevailed in the recurring constitutional disputes over warmaking. The subject remained largely within the "zone of twilight" identified during the Korean War by Justice ROBERT H. JACKSON in YOUNGSTOWN SHEET & TUBE CO. V. SAWYER (1952).

CHARLES A. LOFGREN
(1992)

(SEE ALSO: *Congress and Foreign Policy; Congressional War Powers; Foreign Affairs and the Constitution; Presidential War Powers; Senate and Foreign Policy; War, Foreign Affairs, and the Constitution.*)

Bibliography

ELY, JOHN HART 1988 Suppose Congress Wanted a War Powers Act That Worked. *Columbia Law Review* 88:1379–1431.

HENKIN, LOUIS et al. 1989 The Constitution in Its Third Century: Foreign Affairs. *American Journal of International Law* 83:713–900. Symposium Issue.

WORMUTH, FRANCIS D. and FIRMAGE, EDWIN B. 1989 *To Chain the Dog of War: The War Power of Congress in History and Law*, 2nd ed. Urbana: University of Illinois Press.

# WAR POWERS
## (Update 2)

The war powers have generated two principal constitutional issues. The first concerns the locus of power to initiate hostilities. The Constitution gives Congress the power to decide whether the nation should go to war while leaving the President authority to "repel sudden attacks." Since the 1950s, however, Presidents have repeatedly claimed that their FOREIGN AFFAIRS and COMMANDER-IN-CHIEF powers now permit them to initiate hostilities of any type, without Congress's approval.

This claimed presidential war power is defended on several grounds, none of which squares with ORGINAL INTENT. First, it is said that, given their "limited objectives," today's military conflicts are not "wars"; instead, they are labeled "peacekeeping" operations, "police actions," "humanitarian interventions," "offensive military attacks," or "nation building," for which congressional approval is allegedly unnecessary. Second, it is asserted that the power to "repel sudden attacks" permits the executive to initiate so-called "defensive wars" to protect U.S. interests throughout the world. Third, it is argued that because Presidents have previously used military force without Congress's approval, the power to declare war now belongs to the executive; this ignores YOUNGSTOWN SHEET AND TUBE CO. V. SAWYER (1952), IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983), and NEW YORK V. UNITED STATES (1992), which held that even long-standing practice cannot justify one branch's usurping the power of another. Finally, Presidents assert that they may use military force to implement the UNITED NATIONS CHARTER and mutual defense pacts such as the North Atlantic Treaty Organization (NATO) and the South East Asia Treaty Organization (SEATO) even though these treaties commit the U.S. to respond only in accord with its "constitutional processes."

President WILLIAM J. CLINTON has relied on these arguments in using military force without congressional approval. He unilaterally ordered missile strikes against Baghdad, Iraq, claiming this was an act of "self-defense" against an earlier attempt on the life of President GEORGE H. W. BUSH. Clinton used combat troops for "nation building" in Somalia without congressional sanction. He threatened to invade Haiti "to carry out the will of the United Nations," denying that Congress's permission was needed. He ordered air strikes in Bosnia and Kosovo as part of joint UN–NATO operations, without prior consent from Congress.

Lawsuits challenging presidential war-making have uniformly failed on JUSTICIABILITY grounds. *Raines v. Byrd* (1997) will make future challenges by members of Congress even more difficult. *Raines* suggested that as a matter of SEPARATION OF POWERS, Congress lacks STANDING to challenge actions of the President because the role of Article III courts is to protect the "rights and liberties of individual citizens," not redress "injury to official authority or power."

The second major question involving the war powers is the extent to which they may support domestic LEGISLATION. This became a critical issue after WORLD WAR I when Congress invoked its war powers to enact liquor PROHIBITION, operate the nation's rail and communications systems, outlaw profiteering, prosecute strikers, suppress radicals, and censor the leftist press. The Supreme Court, though upholding most of these laws, agreed that war powers legislation is subject to JUDICIAL REVIEW. Since the expansion of the COMMERCE CLAUSE in the late-1930s, Congress has had little need to use its war powers for domestic purposes. Yet to the extent UNITED STATES V. LÓPEZ (1995) signals a narrowing of the commerce power, Congress may again be tempted to invoke its war powers in the domestic sphere. Should this occur, questions concerning the scope of these powers may return to center stage.

CHRISTOPHER N. MAY
(2000)

(SEE ALSO: *Congress and Foreign Policy; Congressional Standing; Congressional War Powers; Presidential Powers; Senate and Foreign Policy; War, Foreign Affairs, and the Constitution.*)

Bibliography

ELY, JOHN HART 1993 *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath.* Princeton, N.J.: Princeton University Press.

FISHER, LOUIS 1995 *Presidential War Power.* Lawrence: University Press of Kansas.

MAY, CHRISTOPHER N. 1989 *In the Name of War: Judicial Review and the War Powers since 1918.* Cambridge, Mass.: Harvard University Press.

U.S. SENATE, COMMITTEE ON FOREIGN RELATIONS 1967 *National Commitments.* Senate Report No. 797, 90th Congress, 1st Session. Washington, D.C.: Government Printing Office.

# WAR POWERS ACTS
## First War Powers Act
## 55 Stat. 838 (1941)
## Second War Powers Act
## 56 Stat. 176 (1942)

Enacted less than two weeks after the bombing of Pearl Harbor (see WORLD WAR II), the First War Powers Act was

similar to the WORLD WAR I Overman Act (1917). It delegated to the President virtually complete authority to reorganize the executive branch, the independent government agencies, and government corporations in any manner he deemed appropriate to expedite prosecution of the war. That power, and reorganizations accomplished under it, were to remain in force until six months after the end of the war. The act also authorized the President to censor mail and other forms of communication between the United States and foreign countries.

The Second War Powers Act, passed three months after the first, further strengthened the executive branch for conduct of the war. It authorized acquisition of land for military or naval purposes, by condemnation if necessary. It also suspended some provisions of the HATCH ACT (1939), relaxed NATURALIZATION standards for ALIENS serving in the armed forces, established procedures for war production contracting, and authorized several other adjustments of governmental affairs.

The War Powers Acts, like their predecessors, represented an attempt to accommodate the concentration of power necessary for the prosecution of the war to the accustomed forms of constitutional government.

DENNIS J. MAHONEY
(1986)

## WARRANT

See: Arrest Warrant; General Warrant; Search Warrant

## WARRANTLESS SEARCH

The FOURTH AMENDMENT makes no explicit provision for warrantless searches. The first clause of the amendment provides simply that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable SEARCHES AND SEIZURES, shall not be violated." This general prohibition is followed by another clause that provides more particularly for the issuance of SEARCH WARRANTS. The amendment itself does not indicate what connection there is between the two clauses (which are separated only by a comma and the word "and"). Accordingly, its application to various kinds of warrantless searches has depended heavily on which clause the Supreme Court favors. On the one hand, the first clause might be regarded as the main provision, searches pursuant to a warrant being only one type of reasonable search that is authorized. Or, if the second clause be emphasized, the absence of a search warrant might be regarded ordinarily as itself making a search unreasonable, the requirement of a warrant being disregarded only in exceptional circumstances including particularly lack of an opportunity to obtain one.

Some kinds of warrantless search are obviously necessary to the performance of other official duties. A police officer who unexpectedly makes an ARREST of someone committing a violent crime may necessarily search him for weapons. If the Fourth Amendment were deemed to prohibit every search without a warrant, one would be driven to the conclusion that the arresting officer's conduct was not a search at all within its contemplation. Current interpretation of the Fourth Amendment has avoided such an all-or-nothing approach. The amendment is applicable to a very wide range of official conduct interfering with expectations of privacy; within that context, the prevailing rules have established a number of situations in which a warrant to search is unnecessary.

The first such situation is the SEARCH INCIDENT TO AN ARREST. The need for an arresting officer to ensure that the person whom he arrests does not have in his possession a weapon or means of escape is the basis for the most frequently applied exception to the requirement of a warrant. Because police actively engaged in crime prevention often come on circumstances calling for an arrest without advance notice, a search incident to the arrest must be made without a warrant. Although not strictly necessary to effectuate the arrest, another reason for allowing a search is to prevent the arrestee from destroying EVIDENCE in his possession. The Supreme Court said in CHIMEL V. CALIFORNIA (1969) that all three justifications are sufficient to authorize a search of the arrestee's person and the area "within his immediate control" from which he might grab something. That general rule defines an area that may be searched without a warrant following an arrest, whether or not there is particular reason to believe that anything subject to seizure is there to be grabbed and, indeed, whether or not there is reason to believe that the arrestee is likely to grab anything. In effect, the rule authorizes a not-too-intensive search of the arrestee, including small containers on his person like a wallet or purse, and a small area around the place of the arrest. If a person were arrested in his home, the rule would authorize a limited search of the table or desk at which he sat, but not all the contents of the room or the contents of other rooms.

The scope of this rule illustrates a general feature of the exceptions to the warrant requirement. Although from time to time the Court has intimated that such exceptions depend on an emergency that demands a search before a warrant could practicably be obtained, the rule does not depend on a particularized finding of that kind. In some cases, the rule has been applied to uphold a search even though the arresting officers could easily have (or even had) removed the person from the area searched or immobilized him. (One might note also that the rule applies

fully to arrests that are not unanticipated, even though in that case a warrant could presumably have been obtained.) The evident rationale is that a warrantless search incident to an arrest is so often necessary that it is impractical to require particular justification in each case.

Warrants are not required for AUTOMOBILE SEARCHES in various circumstances. Although automobiles (and other motor vehicles) as private places enjoy the protection of the Fourth Amendment, two distinct lines of analysis have markedly limited the application to them of the requirement of a search warrant. Automobiles, the Supreme Court has said, are subject to much greater regulation and inspection than dwellings; the expectation of privacy in them is much less. Having reached that judgment, the Court has not modified it to differentiate between areas like the back seat that are generally open to view and closed or concealed areas like the trunk or glove compartment that are not.

If police officers obtain lawful custody of an automobile which they have PROBABLE CAUSE to search for evidence of a crime, a warrantless search is allowed for some period, a few hours at least, after custody is obtained. This rule is based not only on the lesser expectation of privacy attached to an automobile but also on its mobility and the unpredictability with which custody often is obtained. The Supreme Court has not been persuaded that the immobilization of the car while it is in custody ordinarily makes it unnecessary to allow a search until a warrant has been obtained. Second, if officers have lawful custody of an automobile and routinely follow a regular custodial procedure, like an inventory of its contents, a search performed as part of the procedure is permitted. The routine nature of such practices, which are followed by many police departments, has persuaded the Supreme Court that they are reasonable. (Also, the arrest-incident exception authorizes a thorough search of the passenger compartment of an automobile, including all containers within it, as an incident of the arrest of an occupant.)

A search at the time and place of an arrest is likely to be limited by the circumstances to weapons or means of escape and only the most obvious evidentiary items. Later, when the person is about to be placed in detention or while he is in detention, there is opportunity for a more thorough search; sometimes, the evidentiary significance of an item is not plain at the time of the arrest and is revealed as the investigation proceeds. The police have authority to make a very thorough search without a warrant of items removed from the arrested person and held by them while he is lawfully detained temporarily in a jail or similar facility. The arrest, it has been said, being the more significant interference with liberty, includes the lesser intrusion on privacy occasioned by the search. Furthermore, a search is authorized at the time and place of the arrest and it is routine administrative procedure to impound and perhaps inventory a person's effects before he is placed in a cell; therefore, it is reasoned, the fact that some time elapses between the arrest and the search has no constitutional significance.

The most general exception to the requirement of a search warrant allows the police and other public officials to search without a warrant in EXIGENT CIRCUMSTANCES: an emergency furnishing adequate grounds for a search that has to be carried out before a warrant can be obtained. A search incident to the unanticipated arrest of a potentially dangerous person is an example of this more general category, although justified by a special rule. Another example is an entry and search of private premises while in "hot pursuit" of someone who has just committed a crime; police officers are not required to interrupt the chase until they have obtained a warrant. Similarly, officers responding to a cry for help or acting to avert a danger inside private premises need not wait to obtain a warrant. It has usually been held also that if officers have particular, reliable information that specific evidence of crime is about to be destroyed and there is not time to obtain a warrant, they can enter to prevent its destruction.

In such cases, authority to search without a warrant is tailored to the emergency. The officers claiming the authority must not themselves be responsible for the existence of the emergency; if, for example, they unreasonably delayed applying for a warrant until it was too late, they could not then assert their inability to obtain a warrant. Also, the authority extends only as far as the emergency requires. Entering in hot pursuit, officers could also search for weapons that the person whom they are pursuing might use against them; but once having him in custody, they could not continue to search solely for evidence.

The regulation of persons and goods entering or leaving the country has always been understood to provide a special basis for warrantless searches. Public officials who supervise traffic across the border are authorized to inspect goods and to require a person crossing the border to submit to a thorough search. (See BORDER SEARCHES.) Some comprehensive statutory programs for the regulation of industry and commerce have authorized warrantless entries and inspections. Such procedures have been upheld if a requirement of a warrant might be expected to frustrate the regulatory program and the business in question is generally subject to close governmental supervision: for example, gun and liquor dealerships, and mines. Similarly, the Supreme Court has held that inspection visits to the home by a welfare official can be made a condition of receipt of public welfare. In other cases, the Court has concluded that the regulatory purpose of a statute did not require that warrantless (unannounced) searches be allowed.

In some circumstances, a brief invasion of personal privacy less intrusive than a full search is allowed without a warrant. Most common is the protective "frisk" or patdown of a person whose conduct a police officer has reason to investigate and who he reasonably suspects may be armed. There being no opportunity to obtain a warrant, the safe performance of the officer's investigative duty justifies a limited search for weapons. Likewise, traffic officers are allowed to make routine checks for driver's licenses and automobile registrations, so long as the checks follow an established pattern or there are specific grounds for a departure from the pattern. Routine inspection of passengers and carry-on luggage has been upheld as a regulatory measure to prevent airplane hijacking. In these cases, not only is the procedure in question thought to be less objectionable than a full search; there is no way to accomplish the legitimate objective of the procedure consistently with a requirement of a warrant.

The Fourth Amendment does not insist that persons protect a privacy that they are willing to forego. Accordingly, a warrant to search is not required if a person having authority to do so voluntarily admits public officials and permits them to search. A consensual search that is successful often is challenged later on the grounds that consent was not given fully voluntarily or did not extend to the actual search; or, if the premises are shared by others, it may be claimed that the person who consented did not have the independent authority to do so. While a resolution of such issues may depend on difficult matters of fact, the basic principle that a search with consent does not require a warrant is unquestioned.

Those who believe that the requirement of a search warrant is a significant protection against UNREASONABLE SEARCHES may conclude that the Supreme Court has drawn the categories of lawful warrantless searches too broadly. Categories like the search incident to arrest, automobile search, and jail search appear to depend only on the premises that such searches often are fruitful and sometimes have to be made before a warrant can be obtained. But the categories are general and require neither premise to be fulfilled in the particular case; each of them encourages the police to make a large number of searches routinely, without particular justification. This approach, it can be argued, is inconsistent with the plain purpose of the Fourth Amendment to prohibit *general* searches: unfocused, unlimited rummaging in the privacy of individuals.

Critics of the Court have observed also that its analysis of warrantless searches is to a considerable degree incoherent. Why, for example, should an arrest justify the search of any area surrounding the arrestee, if he can be and often is removed from that place before the search is made? Why should automobiles, which often are used for the same private purposes as dwellings, be treated categorically as less private? Why should an arrest automatically defeat the person's separate interest in the privacy of items in his possession? The Court's failure to provide convincing answers to such questions has rendered this part of Fourth Amendment DOCTRINE only a set of rules without supporting rationale.

A defense of the rules for warrantless searches begins with the premise that warrants are peculiarly appropriate for planned investigative searches and have much less utility in the ordinary unplanned encounters between police or other public officials and private persons. If legitimate police duties justify an encounter, then a search related in purpose is also legitimate. This approach places a great deal of emphasis on the requirement that a search be "reasonable" and construes that term with attention to common police practices as well as the individual interest in privacy. To limit warrantless searches to cases of manifest necessity would blink the natural—and therefore reasonable—impulse of police officers to search whatever is legitimately in their custody and may furnish evidence of crime. Some explanation for the breadth of the exceptions to the requirement of a warrant may lie also in the fact that the issue is almost always tested in the context of a criminal prosecution, when the defendant seeks the protection of the EXCLUSIONARY RULE to avoid the admission of incriminating evidence that a search has uncovered.

LLOYD L. WEINREB
(1986)

Bibliography

AMERICAN LAW INSTITUTE 1975 *A Model Code of Pre-Arraignment Procedure.* Philadelphia: American Law Institute.

AMSTERDAM, ANTHONY G. 1974 Perspectives on the Fourth Amendment. *Minnesota Law Review* 58:349–477.

LAFAVE, WAYNE R. 1978 *Search and Seizure.* St. Paul, Minn.: West Publishing Co.

LANDYNSKI, JACOB W. 1966 *Search and Seizure and the Supreme Court.* Baltimore: Johns Hopkins University Press.

WEINREB, LLOYD L. 1974 Generalities of the Fourth Amendment. *University of Chicago Law Review* 42:47–85.

## WARREN, CHARLES
(1868–1954)

Charles Warren was a Boston lawyer who, as assistant attorney general of the United States, drafted the ESPIONAGE ACT and argued many cases before the Supreme Court. He became an expert on constitutional and legal history. He wrote excellent books in the tradition of the old school of high-minded conservative nationalists who rejected CHARLES BEARD's economic interpretation. Among his leading

books are *A History of the American Bar*, *A History of Harvard Law School*, *The Supreme Court in United States History*, which won the Pulitzer Prize, *Congress, the Constitution, and the Supreme Court*, and *The Making of the Constitution*. His works still merit reading and remain influential. His article on the JUDICIARY ACT OF 1789 helped lead the Supreme Court in ERIE RAILROAD V. TOMKINS (1938) to overrule almost a century of decisions based on SWIFT V. TYSON (1842).

LEONARD W. LEVY
(1986)

## WARREN, EARL
(1891–1974)

The fourteenth CHIEF JUSTICE of the United States, Earl Warren presided over the most sweeping judicial reinterpretation of the Constitution in generations. He served from October 1953 to June 1969. In that time the SUPREME COURT, overruling the doctrine that SEPARATE BUT EQUAL facilities for black persons satisfied the requirement of EQUAL PROTECTION, outlawed official racial SEGREGATION in every area of life. The Court ended the long-established rural bias of legislative representation by opening the question to judicial scrutiny and then ruling that citizens must be represented equally in state legislatures and the national House of Representatives. It imposed constitutional restraints for the first time on the law of LIBEL, hitherto a matter entirely of state concern. It applied to the states the standards set by the BILL OF RIGHTS for federal CRIMINAL PROCEDURE: the right of all poor defendants to free counsel, for example, and the prohibition of unreasonable SEARCHES AND SEIZURES, enforced by the EXCLUSIONARY RULE. It limited government power to punish unorthodox beliefs and enlarged the individual's freedom to express herself or himself in unconventional, even shocking ways.

The WARREN COURT, as it was generally called, had as profound an impact on American life as any Supreme Court since the time of JOHN MARSHALL. It was extraordinary not only in the scale but in the direction of its exercise of power. From Marshall's day to the Court's clash with President FRANKLIN D. ROOSEVELT in the 1930s judges had exercised a conservative influence in the American system. Shortly before his appointment to the Court in 1941 ROBERT H. JACKSON wrote that "never in its entire history can the Supreme Court be said to have for a single hour been representative of anything except the relatively conservative forces of its day." But the Warren Court in its time was perhaps *the* principal engine of American liberal reform.

Earl Warren seemed an unlikely figure to lead such a judicial revolution. He was a Republican politician, the elected attorney general of California and for three terms its phenomenally popular governor. In 1948 he was the Republican candidate for vice-president, on the ticket headed by Thomas E. Dewey. On naming him Chief Justice, President DWIGHT D. EISENHOWER emphasized his "middle-of-the-road philosophy." Yet within a few years billboards in the South demanded Warren's IMPEACHMENT, and the paranoid right charged that he was doing the work of communism. Putting aside the rantings of extremists, there was no doubt that as Chief Justice Warren consistently favored liberal values and unembarrassedly translated them into constitutional doctrine. Where did that commitment come from in a man whose appearance was that of a bland, hearty political figure?

There were in fact clues in his life and earlier career. He was born in Los Angeles in 1891, the son of a Norwegian immigrant who worked for the Southern Pacific Railroad. He knew poverty and personal tragedy. As a young man he was a railroad callboy, waking up the gangs, and he saw men with their legs cut off in accidents carried in on planks. His father was murdered, the murderer never found: a traumatic event that must have helped to point Warren in the direction of justice, legal and social. He put himself through college and law school at the University of California. After a brief try at private practice he spent all his life in public office, as a local prosecutor and crusading district attorney before winning statewide office.

In California politics he at first had the support of conservatives. As attorney general he blocked the nomination of Max Radin, a law professor known as a legal realist, to the state supreme court because Radin was a "radical." As attorney general and governor Warren was a leading proponent of the WORLD WAR II federal order removing all persons of Japanese ancestry from the West Coast and putting them in desolate camps; opposing their return in 1943, he said, "If the Japs are released, no one will be able to tell a saboteur from any other Jap." (In a memoir published after his death, Warren wrote: "I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens. . . .")

But in 1945 Warren astounded political California by proposing a state program of prepaid medical insurance. Characteristically, he did so not for ideological but for human, practical reasons: he had fallen ill and realized how catastrophic serious illness would be for a person without resources. Then, in his last two terms as governor, he became an apostle of liberal Republicanism. A later Democratic governor, Edmund G. Brown, said Warren "was the best governor California ever had. . . . He felt the people of California were in his care, and he cared for them."

Many Americans and other people around the world saw that same paternal image in Earl Warren the Chief Justice, for he became an international symbol. He represented the hope of authority bringing justice to the downtrodden, an American vision of change by law rather than by rebellion. A single case gave Warren that status: BROWN V. BOARD OF EDUCATION, the 1954 school segregation decision. In recent years the Supreme Court had chipped away at PLESSY V. FERGUSON, the 1896 decision allowing what were termed "separate but equal" facilities but what were almost always in fact grossly inferior schools and other public institutions for blacks. Yet in 1953 seventeen southern and border states, with forty percent of the national enrollment, still confined black children to separate public schools; moreover, there was involved here, unlike higher education, the compulsory daily association of children. The emotional content of the legal question was high. The Court had given the most gingerly handling to the question, restoring the issue to the calendar for reargument.

Warren became Chief Justice before the second argument. The following May he delivered the opinion for a unanimous Court holding public school segregation unconstitutional. The unanimity was itself a striking feature of the result, and a surprising one. Expected southern resistance made unanimity politically essential, but the known attitudes of some members of the Court had suggested the likelihood of dissents. Richard Kluger's exhaustive study has demonstrated that the new Chief Justice played a crucial part in his management of the process inside the Court. After argument he delayed formal discussion of the cases in conference to avoid the development of rigid positions among the nine Justices. Then he stated as his view that the separate-but-equal doctrine could not be maintained unless one thought blacks inherently inferior: an approach likely to induce shame in any judge prepared to argue for that outcome. He persuaded his colleagues even then to avoid a formal vote but to continue discussing the cases, in tight secrecy, among themselves. He wrote an opinion in simple terms. Finally, he persuaded reluctant members of the Court to join for the sake of unanimity. A law clerk present at a late meeting between the Chief Justice and the most reluctant, STANLEY F. REED, remembers him saying, "Stan, you're all by yourself in this now. You've got to decide whether it's really the best thing for the country."

What is known about the process of decision in the school cases throws lights on one question asked during his lifetime: did Chief Justice Warren exercise leadership or have influence in the Court beyond his own vote in conference? He shared that bench with men of strong personality and conviction: in particular HUGO L. BLACK, who said the judicial duty was to follow the literal language of the Constitution and found in it absolutes, and FELIX FRANKFURTER, who scorned absolutes and said the Court should defer to the political branches of government in applying the uncertain commands of the Constitution. Warren came to the Court utterly inexperienced in its work; how could he have effective influence? The school cases show that he did.

No Chief Justice can command his associates' beliefs. If Warren had served with different, more conservative colleagues, many of the views that made history might have been expressed by him in dissent. Changes while he was on the Court greatly affected the trend of doctrine, in particular the retirement of Justice Frankfurter in 1962 and his replacement by ARTHUR J. GOLDBERG, who was much readier to join Warren in intervening on behalf of liberal values. But the identification of that Court with its Chief Justice, for all its logical imperfection, has substantial basis in reality.

Warren wrote the opinions of the Court not only in *Brown* but in later cases that dramatically overturned expectations. The most important of these—Warren himself thought them the weightiest decisions of his years on the Court—were the REAPPORTIONMENT cases. A divided Supreme Court in COLEGROVE V. GREEN (1946) had refused to entertain an attack on numerical inequality in political districts, an opinion by Justice Frankfurter saying that courts must stay out of the "political thicket." In 1962 the Warren Court, in an opinion by Justice WILLIAM J. BRENNAN, overthrew that doctrine of reluctance and said that federal courts could consider issues of fairness in districting. The decision in BAKER V. CARR left open the substantive questions: must the population be the test of equality, or may states weigh geography or other factors in districting? Does the same standard apply to both houses of legislatures? The answers were given by Chief Justice Warren in 1964, in terms so firm that some who listened in the courtroom felt as if they were at a second American constitutional convention. In REYNOLDS V. SIMS Warren said for a 6–3 majority that every house of every state legislature must be apportioned on the basis of population alone, with the districts as nearly equal as practicable. Few cases in any court ever had so direct and immediate an impact on a nation's politics; reapportionment was required in most of the fifty states, ancient legislative expectations were upset, new suburban power vindicated. Justice JOHN MARSHALL HARLAN predicted in dissent, as had Justice Frankfurter in *Baker v. Carr*, that the courts would not be able to manage the apportionment litigation—or to enforce their decisions against political resistance. But the gloomy prediction was wrong. Resistance from political incumbents quickly collapsed; nothing like the emotional public opposition to the school segregation cases developed in any region.

Emotions were aroused by Warren's opinion in MIRANDA V. ARIZONA (1966), holding that before questioning an arrested person the police must warn him that he has a right to remain silent and a right to see a lawyer first—one provided by the state if he cannot afford one—and that a confession obtained in violation of that rule is inadmissible at trial. The decision touched a nerve among police, prosecutors, and others convinced that judges were impeding the fight against crime. *Miranda* climaxed a series of cases holding local police to the standards of the Bill of Rights: for example, MAPP V. OHIO (1961), exclusion of illegally obtained evidence; GIDEON V. WAINWRIGHT (1963), right to counsel; *Griffin v. California* (1965), right against self-incrimination;, each overruling an earlier decision. In *Spano v. New York* (1959) Warren commented: "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." Impatient with reviewing the facts in case after case of claimed coercion, the Court under Warren sought a general prophylactic rule—and wrote it in *Miranda.*

Objection to the *Miranda* decision came not only from the law enforcement community. More dispassionate critics saw it as an example of overreaching by the Warren Court. The opinion seemed more legislative in character than judicial, laying out what amounted to a code of police procedure with little basis in precedent. Moreover, the Court did not confront a situation in which reform by other means was blocked, as it had with school segregation and malapportioned legislatures; various reformers were working on the confession problem.

Freedom of expression was another subject of fundamental constitutional development during the Warren years. The most important single decision was probably NEW YORK TIMES V. SULLIVAN (1964), holding that a public official may not recover libel damages unless the statement was published with knowledge of its falsity or in reckless disregard of truth or falsity. That opinion was by Justice Brennan. Justice WILLIAM O. DOUGLAS wrote for the Court in LAMONT V. POSTMASTER GENERAL (1965), holding that a statute requiring the post office to detain "Communist political propaganda" from abroad unless the addressee requested its delivery violated the FIRST AMENDMENT—the first federal statute that the Supreme Court ever held invalid under that amendment. Warren joined in these and other expansive decisions. He wrote for a 5–4 majority in UNITED STATES V. ROBEL (1967), striking down a law that forbade the employment in defense plants of any member of an organization required to register under the Subversive Activities Control Act. Warren's opinion for a unanimous Court in *Bond v. Floyd* (1966) held that the Georgia legislature could not exclude a duly elected member because he had expressed admiration for draft resisters.

The one area of expression in which Warren departed from the majority of his colleagues was OBSCENITY. He thought that local and national authorities should have a relatively free hand to combat what he evidently regarded as a social evil. Thus, while in *Miranda* imposing a national standard for fair pretrial procedures in criminal cases, he argued in dissent in JACOBELLIS V. OHIO (1964) that each local community should be allowed to fix its own standard of obscenity, a view that became the law under Chief Justice WARREN E. BURGER in MILLER V. CALIFORNIA (1973). Another example of a departure from Warren's usual approach came when gambling was involved. He generally favored broad application of the right against self-incrimination; but when the rule was applied for the benefit of a gambler in MARCHETTI V. UNITED STATES (1968), he alone dissented. Once again he saw a social evil.

Scholarly critics of Chief Justice Warren saw the obscenity and gambling cases as illustrating a fundamental shortcoming in a judge: a concern to reach particular results rather than to work out principles applicable whoever the parties in a case might be. In Warren's view, it seemed, justice consisted not in providing a philosophically satisfactory process and basis of decision but in seeing that the right side, the good side, won in each case. Many of the commentators regretted the lack of a consistent doctrinal thread in his opinions. There was nothing like Justice Black's exaltation of the constitutional text, or Justice Frankfurter's institutional concern for self-restraint.

G. Edward White, in a full-length study of Warren's work, rejected the general scholarly view that Warren had no rudder as a judge and lacked craftsmanship. He was an ethicist, White concluded, who saw his craft as "discovering ethical imperatives in a maze of confusion"—and in the Constitution. Thus the prosecutor so hard on corruption that he was called a boy scout, the Californian politician who stood aloof from party machines lest he be sullied, became a judicial enforcer of ethical imperatives. In general his sympathy lay with the little person, with victims, with people excluded from the benefits of our democracy. But he also was in the tradition of the American Progressives, who thought that government could be made to work for the people. Those two themes came together in the reapportionment cases, decisions designed to make democracy work better by making the electoral process fairer. John Hart Ely, in an analysis of judicial review as practiced in the Warren years, suggested that many

of the pathbreaking decisions had a democratic structural purpose: to assure access for the powerless and thus make the system work.

There was a directness, a simplicity in Warren's opinions on the largest issues. "Legislators represent people," he wrote in the reapportionment cases, "not acres or trees. Legislators are elected by voters, not farms or cities or economic interests. . . . The weight of a citizen's vote cannot be made to depend on where he lives." When the Court held unconstitutional a statute depriving a native-born American of his citizenship for deserting the armed forces in time of war, TROP V. DULLES (1958), Warren for a plurality argued that EXPATRIATION was a CRUEL AND UNUSUAL PUNISHMENT in violation of the Eighth Amendment. The death penalty would not have been "cruel," he conceded, but the deprivation of citizenship was, for it caused "the total destruction of the individual's status in organized society" and cost him "the right to have rights."

Warren's whole career suggests that he was a person born not to muse but to act—and to govern. That view provides a connecting thread through all the offices he held. In each he exerted his powerful abilities in the ways open to him. As a prosecutor he fought crime. As wartime attorney general and governor he was a patriot, worrying about spies. In the postwar years, he turned to the social problems of an expanding California. As Chief Justice, too, he was committed to action, to using the opportunities available to make an impression on American life: to break the pattern of malapportionment, to attack local police abuses, to condemn racial discrimination. The instinct to govern did not leave Earl Warren when he put on a robe.

Many regarded him as a heroic figure because he put aside philosophical concerns and technical legal issues and dealt squarely with what he considered outrageous situations. And there were outrages in American life: official racism, political discrimination, abuse of police authority, suppression of free expression. Warren as Chief Justice had the conviction, the humanity, and the capacity for growth to deal effectively with those issues inside that prickly institution, the Supreme Court. But there were those who shared Justice LEARNED HAND's doubts about rule by judges, however beneficent. "For myself," Hand wrote in 1958, with the contemporary Supreme Court in mind, "it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." Earl Warren may have been the closest thing the United States has had to a constitutional Platonic Guardian, dispensing law without any sensed limit of authority except what he saw as the good of society. He was a decent, kindly law-giver. But the exercise of such power by other judges—before and after Warren—has not always had kindly or rational results. The questions about judicial power remain after its extraordinary uses in the Warren years.

ANTHONY LEWIS
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Bibliography

ELY, JOHN HART 1980 *Democracy and Distrust: A Theory of Judicial Review.* Cambridge, Mass.: Harvard University Press.

KLUGER, RICHARD 1975 *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality.* New York: Knopf.

SCHWARTZ, BERNARD 1983 *Superchief.* Garden City, N.Y.: Doubleday.

WHITE, G. EDWARD 1982 *Earl Warren: A Public Life.* New York: Oxford University Press.

## WARREN COURT

It was surely the best known Supreme Court in history, and probably the most controversial. Its grand themes—racial equality, REAPPORTIONMENT, the separation of religion and education, DUE PROCESS—became matters of public consciousness. Its leading judges—HUGO L. BLACK, WILLIAM O. DOUGLAS, FELIX FRANKFURTER, JOHN MARSHALL HARLAN, and EARL WARREN—became personages in whom the general public took an interest. When the Warren Court came into being in October 1953, the Supreme Court was the least known and least active of the major branches of government; by the retirement of Chief Justice Warren in June 1969, nearly everyone in American life had been affected by a Warren Court decision, and a great many Americans had firm opinions about the Supreme Court. When Warren was appointed Chief Justice, few commentators took note of the fact that he had had no previous judicial experience and had spent the last twelve years as a state politician. By the time WARREN E. BURGER succeeded Warren as Chief Justice the process of nominating a Justice to the Supreme Court had become an elaborate search for the "experienced," uncontroversial, and predictable nominee, and the Court was to lower its profile again.

The Warren Court years, then, were years in which the Supreme Court of the United States made itself a vital force in American culture. A striking pattern of interchange between the Court and the general public emerged in these years. As public issues, such as CIVIL RIGHTS or legislative malapportionment surfaced, these issues became translated into constitutional law cases. The Court, expanding the conventional ambit of its JURISDICTION, reached out to decide those cases, thereby making an authoritative contribution to the public debate. As the Court continued to reach out, the public came to rely on

its presence, and the American JUDICIAL SYSTEM came to be perceived as a forum for the resolution of contemporary social problems. The use of the Supreme Court as an institution for redressing grievances ignored by Congress or state legislatures became common with the Warren Court.

The origins of the Warren Court can officially be traced to September 8, 1953, when Chief Justice FRED M. VINSON died of a heart attack. By September 30, President DWIGHT D. EISENHOWER had named Warren, the governor of California who had been a rival candidate for the Republican presidential nomination in 1952, as Vinson's successor. This nominal creation of the Warren Court did not, however, hint at its character. Indeed that character was not immediately apparent. Even the Court's first momentous decision, BROWN V. BOARD OF EDUCATION (1954), announced in May of its first term, was in some respects a holdover from the Vinson Court. *Brown* had been argued before the Vinson Court, was based in part on Vinson Court precedents chipping away at RACIAL DISCRIMINATION in education, and was decided by a Court whose only new member was its Chief Justice. It was a cautious decision, apparently assuming that DESEGREGATION would be a long and slow process.

But *Brown* was also the Warren Court's baptism of fire. All the elements that were to mark subsequent major Warren Court decisions were present in *Brown*. *Brown* involved a major social problem, racial discrimination, translated into a legal question, the constitutionality of SEPARATE BUT EQUAL public schools. It posed an issue that no other branch of government was anxious to address. It raised questions that had distinctively moral implications: in invalidating racial SEGREGATION the Court was condemning the idea of racial supremacy. And it affected the lives of ordinary citizens, not merely in the South, not merely in public education, for the Court's series of PER CURIAM decisions after *Brown* revealed that it did not consider racial segregation any more valid in other public facilities than it had in schools. The Warren Court had significantly altered race relations in America.

The context of the Warren Court's first momentous decision was decisive in shaping the Court's character as a branch of government that was not disinclined to resolve difficult social issues, not hesitant to foster social change, not reluctant to involve itself in controversy. By contrast, the legislative and executive branches appeared as equivocators and fainthearts. The Warren Court was deluged with criticism for its decision in *Brown*, both from persons who resisted having to change habits of prejudice and from scholars who faulted the reasoning of the Court's opinion. This response only seemed to make the Court more resolute.

The deliberations of *Brown* also served to identify some of the Justices whose presence was to help shape the character of the Warren Court. Earl Warren transformed a closely divided Court, which had postponed a decision on *Brown* because it was uncertain and fragmented on the case's resolution, into a unanimous voice. That transformation was a testament to Warren's remarkable ability to relate to other people and to convince them of the rightness of his views. In *Brown* he had argued that those who would support the separate but equal doctrine should recognize that it was based on claims of racial superiority. That argument struck home to at least two Justices, TOM C. CLARK and STANLEY F. REED, who had grown up in the South. When Warren had finished his round of office visits and discussions, he had secured nine votes for his majority opinion and had suppressed the writing of separate concurrences. ROBERT H. JACKSON, a long holdout in *Brown* who was dubious about the possibility of finding a doctrinal rationale to invalidate the separate but equal principle, joined Warren's opinion and left a hospital bed to appear in court the day the decision was announced.

A silent partner in the *Brown* decision had been Felix Frankfurter. By the late 1950s Frankfurter's jurisprudence, which stressed a limited role for judges in reviewing the constitutionality of legislative decisions, had rigidified, isolating Frankfurter from many other justices and identifying him as one of the guardians of a theory of judicial self-restraint. Judicial self-restraint in *Brown* would have supported the separate but equal doctrine, since that doctrine itself signified a judicial reluctance to disturb legislative enactments forcibly separating persons on the basis of race. Frankfurter, however, could not abide the consequences of continued deference to the separate but equal doctrine, but he did not want to expose the lack of "restraint" that his position assumed. He accordingly confided his views on *Brown* only to Warren and worked toward fashioning a decree—containing the controversial phrase ALL DELIBERATE SPEED as a guideline for implementing desegregation—that would temper the shock of the *Brown* mandate. At the appropriate moment he joined Warren's opinion.

The partnership of Warren and Frankfurter in the segregation cases contrasted with the usual posture of both Justices on the Warren Court. Warren's approach to judging, with its relative indifference to doctrinal reasoning and to institutional considerations, its emphasis on the morally or ethically appropriate result, and its expansive interpretation of the Court's review powers, was the antithesis of Frankfurter's. For the most part the two men sharply disagreed over the results or the reasoning of major Warren Court decisions, with Frankfurter enlisting a stable of academic supporters in his behalf and Warren seeking to bypass doctrinal or institutional objections to make broad ethical appeals to the public at large.

The presence of two other significant Warren Court Justices, HUGO BLACK and WILLIAM O. DOUGLAS, was also felt in *Brown.* Black, a native of Clay County, Alabama, and fleetingly a member of the Ku Klux Klan, had been an opponent of racial discrimination since being elected to the Senate in 1926. He had supported the Vinson Court precedents crippling "separate but equal," for which he had received outspoken criticism in his home state. His position in *Brown* was well known early on: an uncompromising opposition to discriminatory practices. Such positions were characteristic of Black on the Warren Court. He staked out positions decisively, held them with tenacity, and constantly sought to convert others to his views. His theory of constitutional adjucation, which placed great emphasis on a "literal" but "liberal" construction of BILL OF RIGHTS protections, was a major contribution to Warren Court jurisprudence.

Equally outspoken and tenacious, and even more activist than Black, was William O. Douglas, whose academic experience, which paralleled Frankfurter's, had generated a strikingly different conception of judicial behavior. Douglas did not agonize over issues of institutional deference and doctrinal principle; he took his power to make law as a given and sought to use it to promote values in which he believed. The values were principally those associated with twentieth-century libertarianism and egalitarianism. Douglas spoke out for small business, organized labor, disadvantaged minorities, consumers, the poor, dissidents, and those who valued their privacy and their freedom from governmental restraint. Douglas's role on the Warren Court was that of an ideologue, anxious to secure results and confident that he could find doctrinal justifications. Together, Black and Douglas prodded the Court to vindicate even the most unpopular forms of free expression and minority rights.

While the Warren Court was generally regarded as an activist Court and a liberal Court, it was not exclusively so, and not all its members could be characterized as either activists or liberals. Until his retirement in 1962, at the midway point of Warren's tenure, Frankfurter had vociferously protested against an excessively broad interpretation of the Court's review powers, a position that resulted in his supporting the constitutionality of a number of "conservative" legislative policies. Other Justices on the Warren Court were either disinclined to exercise sweeping review powers or less enthusiastic than Warren, Black, or Douglas about the policies of twentieth-century liberalism. Most influential among those Justices was John Harlan, an Eisenhower appointee who joined the Court in 1955 and remained until 1971.

Harlan frequently and adroitly rejected the assumptions of Warren Court majorities that "every major social ill in this country can find its cure in some constitutional "principle" and that the Court could be "a general haven for reform movements." Moreover, in a group of Justices who were often impatient to reach results and not inclined to linger over the niceties of doctrinal analysis, Harlan distinguished himself by producing painstakingly crafted opinions. Often Harlan's quarrels with a majority would be over the method by which results were reached; his concurrences and dissents regularly demonstrated the complexities of constitutional adjudication.

The Warren Court will be best known for its identification with three themes: egalitarianism, liberalism, and activism. From *Brown* through POWELL V. MCCORMACK (1969), Earl Warren's last major opinion, the Court demonstrated a dedication to the principle of equality, a principle that, in Archibald Cox's felicitous phrase, "once loosed . . . is not easily cabined." Race relations were the initial context in which the Court attempted to refine the meaning of equal justice in America. Once the ordeal of *Brown* was concluded, that meaning seemed comparatively straightforward. In a series of *per curiam* opinions, the Court extended *Brown* to public beaches, parks, recreational facilities, housing developments, public buildings, eating facilities, and hospitals. The conception of equality embodied by these decisions was that of equality of opportunity: blacks could not be denied the opportunity of access to public places.

*Brown* had been rationalized by the Court on similar grounds: the gravamen of the injustice in a segregated school system was a denial of equal educational opportunities to blacks. But equality of opportunity became difficult to distinguish, in the race cases, from the conception of equality of condition. The Court presumed that classifications based on race were constitutionally suspect and seemed to suggest that equal justice in the race relations area required something like color-blindness. Classifications based on race or skin color not only denied black Americans equal opportunities, they also were not based on any rational judgment, since the human condition transcended superficial differences of race. After the *per curiams,* the massive resistance to *Brown,* and the civil rights movement of the 1960s, the Court gradually perceived that equality in race relations necessitated the eradication of stigmas based on skin color. This momentum of egalitarianism culminated in *Loving v. Virginia* (1967), in which the Court invalidated state prohibitions of miscegenous marriages, thereby affirming the absence of fundamental differences between blacks and whites.

Between the *per curiams* and *Loving* had come skirmishes between the Court and groups resisting its mandates for change in race relations. COOPER V. AARON (1963) involved a challenge by the governor of Arkansas to compulsory integration in the Little Rock school system. The Court, in an unprecedented opinion signed individually

by all nine Justices, reaffirmed the obligations of Southern schools to integrate. *Goss v. Board of Education* (1963) invalidated minority-to-majority transfer plans whose purpose was to allow students to attend schools outside their districts in which their race was in the majority. HEART OF ATLANTA MOTEL V. UNITED STATES (1964) and *Katzenbach v. McClung* (1964) used the Constitution's COMMERCE CLAUSE and the CIVIL RIGHTS ACT OF 1964 to prevent hotels and restaurants from refusing service to blacks. BURTON V. WILMINGTON PARKING AUTHORITY (1961) and *Evans v. Newton* (1966) showed the Court's willingness to use the DOCTRINE of "STATE ACTION" to compel ostensibly private establishments (restaurants and parks) to admit blacks.

After *Loving* the Court grew impatient with resistance to the implementation of its decrees in *Brown.* In GREEN V. NEW KENT COUNTY SCHOOL BOARD (1968) the Court scrutinized the actual effect of "freedom of choice" plans, where students attended schools of their own choice. The Court found that the system perpetuated segregation when eighty-five percent of the black children in a school district had remained in a previously all-black school and no white child had chosen to attend that school, and advised that "delays are no longer tolerable." Finally, in ALEXANDER V. HOLMES COUNTY BOARD OF EDUCATION (1969) the Court declared that the time for racial integration of previously segregated school systems was "at once." *Green* and *Alexander* compelled integration of schools and other public facilities. Equality of condition had become the dominant means to achieve the goal of equality.

One can see a similar trend in the area of reapportionment. For the first half of the twentieth century, including the early years of the Warren Court, state legislatures were not apportioned solely on the basis of population. Upper houses of legislatures had a variety of means for electing their members, some deliberately unresponsive to demographic concerns, and few states apportioned legislative seats on the basis of ONE PERSON, ONE VOTE. In *Baker v. Carr* (1962), however, the Court announced that it would scrutinize Tennessee's system of electing state legislators to see if it conformed to the population of districts in the state. Justice WILLIAM J. BRENNAN, a former student of Frankfurter's, rejected the POLITICAL QUESTION doctrine Frankfurter had consistently imposed as a barrier to Court determination of reapportionment cases. Frankfurter wrote an impassioned dissent in *Baker,* but the way was clear for constitutional challenges to malapportioned legislatures. By 1964 suits challenging legislative apportionment schemes had been filed in more than thirty states.

Chief Justice Warren's opinion for the Court in REYNOLDS V. SIMS (1964), a case testing Alabama's reapportionment system, demonstrated how the idea of equality had infused the reapportionment cases. "We are cautioned," he wrote, "about the dangers of entering into political thickets and mathematical quagmires. Our answer to this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us. . . . To the extent that a citizen's right to vote is debased, he is that much less a citizen." Equality did not mean merely an equal opportunity to have representatives from one's district in a state legislature, but that all votes of all citizens were to be treated equally: voting, like race relations, was to be an area in which equality of condition was to prevail.

The Court provided for such equality even where the state's citizens had indicated a preference for another scheme. In LUCAS V. FORTY-FOURTH GENERAL ASSEMBLY (1964), the Court invalidated Colorado's districting plan apportioning only one house of the legislature on a population basis. This plan had been adopted after a statewide referendum in which a majority rejected population-based apportionment for both houses. Warren found that the scheme did not satisfy the equal protection clause because it was not harmonious with the principle of one person, one vote. Voting was a condition of CITIZENSHIP, not just an opportunity to participate in government.

In free speech cases, the Warren Court struggled to move beyond a "marketplace" approach, in which majorities could perhaps suppress speech with distasteful content, to an approach where all speakers were presumed to have an equal right to express their thoughts. The approach was first developed in "communist sympathizer" cases, where a minority of the Court objected to laws making it a crime to be a member of the Communist party or to advocate Communist party doctrine. Eventually, in BRANDENBURG V. OHIO (1969), a unanimous Court distinguished between "mere advocacy" of views and "incitement to imminent lawless action." That case involved statements made by a member of the Ku Klux Klan at a rally that were derogatory of blacks and Jews. The fact that the speaker was known to belong to an organization historically linked to racism and violence was not enough to hinder expression of his views.

*Brandenburg* united, without entirely clarifying, a number of strands of Warren Court FIRST AMENDMENT doctrine. In the OVERBREADTH cases, such as *NAACP v. Alabama ex rel. Flowers* (1964), APTHEKER V. SECRETARY OF STATE (1964), KEYISHIAN V. BOARD OF REGENTS (1967), and UNITED STATES V. ROBEL (1967), the Court found that legitimate governmental prohibitions on speech that employed "means which sweep unnecessarily broadly" violated the First Amendment, because they might deter the behavior of others who could not legitimately be prohibited from speaking. In the SYMBOLIC SPEECH cases, the Court considered the permissibility of wearing black arm bands (TINKER V. DES MOINES COMMUNITY SCHOOL DISTRICT, 1969) or burning draft cards (UNITED STATES V. O'BRIEN, 1968) or muti-

lating flags (*Street v. New York*, 1969) as a means of protesting the Vietnam War. Finally, in the "sit-in" and "picketing" cases, such as COX V. LOUISIANA (1964), *Brown v. Louisiana* (1966), and ADDERLEY V. FLORIDA (1966), the Court sought to distinguish protected "expression" from unprotected but related "conduct." In none of these areas was the Court's doctrinal position clear—draft card burners and picketers were denied constitutional protection, although flag mutilators and "sit-in" demonstrators were granted it—but the decisions revealed the Warren Court's interest in carving out an area of First Amendment protection that was not dependent on public support for the speaker or his actions.

The Warren Court also attempted to extend the First Amendment's reach into other doctrinal areas, notably defamation and OBSCENITY. In NEW YORK TIMES V. SULLIVAN (1964) the Court concluded that common law libel actions could raise First Amendment issues. The Court's opinion, which found that the First Amendment gave rise to a constitutional privilege to make false and defamatory statements about public officials if the statements were not made with recklessness or malice, expressed concern that libel law could be used as a means of punishing "unpopular" speech. Justice Brennan's majority opinion referred to "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," and spoke of the "inhibiting" effects of civil damages on "those who would give voice to public criticism."

Once the First Amendment was seen as relevant to defamation cases, the future of common law principles in the area of libel and slander seemed precarious. *New York Times v. Sullivan* had established a constitutional privilege to publish information about "public officials." *Rosenblatt v. Baer* (1966) widened the meaning of "public official" to include a supervisor of a county-owned ski resort; *Curtis Publishing Co. v. Butts* (1967) and *Associated Press v. Walker* (1967) included "public figures" as well as public officials in the category of those in whose affairs the general public had a special interest; *Time, Inc. v. Hill* (1967) found a privilege to disclose "private" but newsworthy information.

The defamation cases showed the tendency of the equality principle to expand once set in motion: it seemed hard to distinguish different rules for public officials, public figures, and matters of public interest. Such was also true in the area of obscenity. Once the Court recognized, as it did in ROTH V. UNITED STATES (1957), that First Amendment concerns were relevant in obscenity cases, and yet a core of unprotected expression remained, it was forced to define obscenity. Thirteen obscenity cases between 1957 and 1968 produced fifty-five separate opinions from the Justices, but the meaning of "obscene" for constitutional purposes was not made much clearer. Some Justices, such as Black and Douglas, decided that obscene speech was entitled to as much constitutional protection as any other speech, but a shifting majority of the Court continued to deny protection for expressions that, by one standard or another, could be deemed "obscene." Among the criteria announced by Court majorities for labeling a work "obscene" was that it appeal to a "prurient interest," and that it be "patently offensive" and "utterly without redeeming social value." Justice Stewart, in JACOBELLIS V. OHIO (1964), announced a different criterion: "I know [obscenity] when I see it." Eventually, after *Redrup v. New York* (1967), the Court began to reverse summarily all obscenity convictions whenever five Justices, for whatever reason, adjudged a work not to be obscene.

A final area of unprotected expression involved the FIGHTING WORDS doctrine of CHAPLINSKY V. NEW HAMPSHIRE (1942). A series of Warren Court cases, including *Edwards v. South Carolina* (1963), *Gregory v. Chicago* (1969) and even *New York Times v. Sullivan*, with its language about "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," may have reduced *Chaplinsky* to insignificance.

The pattern of First Amendment decisions, taken with its opinions on race relations and reapportionment, not only demonstrated the Warren Court's shifting conceptions of equality but stamped it in the popular mind as a "liberal" Court. Liberalism has been identified, in the years after World War II, with support for affirmative government and protection of civil rights; the Warren Court was notable for its efforts to insure that interventionist government and civil libertarianism could coexist. But in so doing the Warren Court redefined the locus of interventionist government in America. *Brown v. Board of Education* was a classic example. Congress and the state legislatures were not taking sufficient action to preserve the rights of blacks, so the Court intervened to scrutinize their conduct and, where necessary, to compel them to act. This role for the Court was a major change from that performed by its predecessors. "Liberal" judging in the early twentieth century, according to such defenders of interventionist government as Felix Frankfurter and LOUIS D. BRANDEIS, meant judicial self-restraint: the Supreme Court was to *avoid* scrutiny of state and federal legislation whose purpose was to aid disadvantaged persons. The Warren Court eschewed that role to become the principal interventionist branch of government in the 1950s and 1960s.

In addition to its decisions in race relations and reapportionment, two other areas of Warren Court activity helped augment its public reputation as a "liberal" Court. The first area was CRIMINAL PROCEDURE: here the Court virtually rewrote the laws of the states to conform them

to its understanding of the Constitution's requirements. The most important series of its criminal procedure decisions, from a doctrinal perspective, were the INCORPORATION DOCTRINE cases, where the Court struggled with the question of whether, and to what extent, the due process clause of the FOURTEENTH AMENDMENT incorporates procedural protections in the Bill of Rights, making those protections applicable against the states. The Warren Court began a process of "selective incorporation" of Bill of Rights safeguards, applying particular protections in given cases but refusing to endorse the incorporation doctrine in its entirety. This process produced some landmark decisions, notably MAPP V. OHIO (1961), which applied FOURTH AMENDMENT protections against illegal SEARCHES AND SEIZURES to state trials, and BENTON V. MARYLAND (1969), which held that the Fifth Amendment's DOUBLE JEOPARDY guarantee applied to the states. Other important "incorporation" cases were GRIFFIN V. CALIFORNIA (1965), maintaining a RIGHT AGAINST SELF-INCRIMINATION; MALLOY V. HOGAN (1964), applying the Fifth Amendment's self-incrimination privilege to state proceedings; and DUNCAN V. LOUISIANA (1968), incorporating the Sixth Amendment's right to TRIAL BY JURY in criminal cases.

A major consequence of selective incorporation was that fewer criminal convictions were obtained in state trials. Particularly damaging to state prosecutors were the decisions in *Mapp* and *Mallory,* which eliminated from state court trials illegally secured evidence and coerced statements of incrimination. The Court also tightened the requirements for police conduct during the incarceration of criminal suspects. *Malloy v. United States* (1957) insisted that criminal defendants be brought before a magistrate prior to being interrogated. MIRANDA V. ARIZONA (1966) announced a series of constitutional "warnings" that the police were required to give persons whom they had taken into custody. *Miranda* had been preceded by another significant case, ESCOBEDO V. ILLINOIS (1964), which had required that a lawyer be present during police investigations if a suspect requested one. Further, the landmark case of GIDEON V. WAINWRIGHT (1963) had insured that all persons suspected of crimes could secure the services of a lawyer if they desired such, whether they could afford them or not.

The result of this activity by the Warren Court in the area of criminal procedure was that nearly every stage of a POLICE INTERROGATION was fraught with constitutional complexities. The decisions, taken as a whole, seemed to be an effort to buttress the position of persons suspected of crimes by checking the power of the police: some opinions, such as *Miranda,* were explicit in stating that goal. By intervening in law enforcement proceedings to protect the rights of allegedly disadvantaged persons—a high percentage of criminals in the 1960s were poor and black—the Warren Court Justices were acting as liberal policymakers.

Church and state cases were another area in which the Court demonstrated its liberal sensibility, to the concern of many observers. Affirmative state action to promote religious values in the public schools—heretofore an aspect of America's educational heritage—was likely to be struck down as a violation of the establishment clause. In ENGEL V. VITALE (1962) the Court struck down nondenominational prayer readings in New York public schools. A year after *Engel* the Court also invalidated a Pennsylvania law that required reading from the Bible in ABINGTON TOWNSHIP SCHOOL DISTRICT V. SCHEMPP (1963) and a Maryland law that required recitation of the Lord's Prayer in *Murrary v. Curlett* (1963). (See RELIGION IN PUBLIC SCHOOLS.) In *McGowan v. Maryland* (1961), however, the Court permitted the state to impose SUNDAY CLOSING LAWS. Chief Justice Warren, for the Court, distinguished between laws with a religious purpose and laws "whose present purpose and effect" was secular, even though they were originally "motivated by religious forces." The Court invoked *McGowan* in a subsequent case, BOARD OF EDUCATION V. ALLEN (1968), which sustained a New York law providing for the loaning of textbooks from public to parochial schools.

Liberalism, as practiced by the Warren Court, produced a different institutional posture from earlier "reformist" judicial perspectives. As noted, liberalism required that the Court be both an activist governmental institution and a defender of minority rights. This meant that unlike previously "activist" Courts, such as the Courts of the late nineteenth and early twentieth century, its beneficiaries would be nonelites, and unlike previously "reformist" Courts, such as the Court of the late 1930s and 1940s, it would assume a scrutinizing rather than a passive stance toward the actions of other branches of government. Had the Warren Court retained either of these former roles, *Brown, Baker v. Carr,* and *Miranda* would likely not have been decided as they were. These decisions all offended entrenched elites and required modifications of existing governmental practices. In so deciding these cases the Warren Court was assuming that activism by the judiciary was required in order to produce liberal results. With this assumption came a mid-twentieth-century fusion of affirmative governmental action and protection for CIVIL LIBERTIES.

Maintaining a commitment to liberal theory while at the same time modifying its precepts required some analytical refinements in order to reconcile the protection of civil liberties with claims based on affirmative governmental action. In *Brown* the desires of some whites and some blacks to have a racially integrated educational experience conflicted with the desires of some whites and

some blacks to limit their educational experiences to persons of their own race. The Court chose to prefer the former desire, basing its judgment on a theory of the educational process that minimized the relevance of race. That theory then became a guiding assumption for the Court's subsequent decisions in the race relations area.

Similar sets of intermediate distinctions between goals of liberal theory were made in other major cases. In the REAPPORTIONMENT cases the distinction was between REPRESENTATION based on population, a claim put forth by a disadvantaged minority, and other forms of proportional representation that had been endorsed by legislative majorities. The Court decided to prefer the former claim as more democratic and then made the one-person, one-vote principle the basis of its subsequent decisions. In the school prayer cases the distinction was between the choice of a majority to ritualize the recognition of a public deity in the public school and the choice of a minority to deny that recognition as out of place. The Court decided to prefer the latter choice as more libertarian. In the criminal procedure cases the distinction was between a majoritarian decision to protect the public against crime by advantaging law enforcement personnel in their encounters with persons suspected of committing crimes, and the claims of such persons that they were being unfairly disadvantaged. The Court chose to prefer the latter claims as being more consistent with principles of equal justice.

When the Warren Court reached the end of its tenure, liberalism clearly did not merely mean deference toward the decisions of democratic and representative bodies of government. It meant deference toward these decisions only if they promoted the goals of liberal policy: equality, fairness, protection of civil rights, support for disadvantaged persons. Under this model of liberal policymaking, the Supreme Court was more concerned with achieving enlightened results than it was with the constitutional process by which these results were reached. Liberalism and judicial activism went hand in hand.

As it became clear that the Court's activism was designed to promote a modified version of liberalism, the Court became vulnerable to public dissatisfaction with liberal policies. Such dissatisfaction emerged in the 1970s. The internal contradictions of liberalism became exposed in such areas as AFFIRMATIVE ACTION in higher education and forced busing in primary education, and the saving distinctions made by the Court in earlier cases appeared as naked policy choices whose legitimacy was debatable. If affirmative preference, based on race, for one class of applicants to an institution of higher learning results in disadvantage to other classes, equality of condition has not been achieved and equality of educational opportunity has been undermined. If some families are compelled to send their children to schools where they are racial minorities in order to achieve "racial balance" throughout the school system, the resulting "balance" may well disadvantage more people than it advantages. Equality and social justice have turned out to be more complicated concepts than mid-twentieth-century liberalism assumed.

The egalitarianism and the liberalism of the Warren Court paled in significance when compared to its activism. If contemporary America has become a "litigious society," as it is commonly portrayed, the Warren Court helped set in motion such trends. Social issues have habitually been transformed into legal questions in America, but the Warren Court seemed to welcome such a transformation, finding constitutional issues raised in contexts as diverse as reapportionment and prayers in the public schools. As the Court created new sources of constitutional protection, numerous persons sought to make themselves the beneficiaries. Sometimes the Court went out of its way to help the organizations litigating a case, as in the civil rights area. The result was that the lower courts and the Supreme Court became "activist" institutions—repositories of grievances, scrutinizers of the conduct of other branches of government, havens for the disadvantaged.

In the academic community, Warren Court activism was from the first regarded as more controversial than Warren Court egalitarianism. The reason was the prominence in academic circles of a two-pronged theory of JUDICIAL REVIEW, one prong of which stressed the necessity of grounding judicial decisions, in the area of constitutional law, in textually supportable principles of general applicability, and the other prong of which resurrected Frankfurter's conception of a limited, deferential role for the Court as a lawmaking institution. The Warren Court, according to academic critics, repeatedly violated the theory's dual standards. Decisions like *Brown v. Board*, *Baker v. Carr*, GRISWOLD V. CONNECTICUT (1965), a case discovering a RIGHT OF PRIVACY in the Constitution that was violated by statutes forbidding the use of BIRTH CONTROL pills, and HARPER V. VIRGINIA BOARD OF ELECTIONS (1966), a case invalidating POLL TAX requirements on voting as violating the EQUAL PROTECTION clause because such requirements conditioned VOTING RIGHTS on wealth, had not been sufficiently grounded in constitutional doctrine. There was no evidence that the Fourteenth Amendment was intended to reach segregated schools and there were no judicial decisions supporting that position. The Constitution did not single out for protection a right to vote, let alone a right to have one's vote weighed equally with the votes of others. "Privacy" was nowhere mentioned in the constitutional text. The framers of the Constitution had assumed a variety of suffrage restrictions, including ones based on wealth. In short, leading Warren Court decisions were not based on "neutral principles" of constitutional law.

Nor had the Court been mindful, critics felt, of its

proper lawmaking posture in a democratic society where it was a conspicuously nondemocratic institution. In *Brown* it had ostensibly substituted its wisdom for that of Congress and several Southern states. In *Baker* it had forced legislatures to reapportion themselves even when a majority of a state's voters had signified their intention to staff one house of the legislature on grounds other than one person, one vote. In *Engel v. Vitale* it had told the public schools that they could not have government-formulated compulsory prayers, even though the vast majority of school officials and parents desired them. It had fashioned codes of criminal procedure for the police, ignoring Congress's abortive efforts in that direction. It had decided, after more than 200 years of defamation law, that the entire area needed to be reconsidered in light of the First Amendment.

A role for the Court as a deferential, principled decision maker was, however, not sacrosanct. Few Supreme Courts had assumed such a role in the past. All of the "great cases" in American constitutional history could be said to have produced activist decisions: MARBURY V. MADISON (1803), establishing the power of judicial review; MCCULLOCH V. MARYLAND (1819) and GIBBONS V. OGDEN (1824), delineating the scope of the federal commerce power; DRED SCOTT V. SANDFORD (1857), legitimizing SLAVERY IN THE TERRITORIES; the LEGAL TENDER CASES, deciding the constitutionality of legal tender notes; POLLOCK V. FARMERS LOAN AND TRUST (1895), declaring an income tax unconstitutional; LOCHNER V. NEW YORK (1905), scuttling state hours and wages legislation; UNITED STATES V. BUTLER (1936), invalidating a major portion of the New Deal's administrative structure. Activism was an ancient judicial art.

The Warren Court's activism differed from other Courts' versions principally not because its reasoning was more specious or its grasp of power more presumptuous but because its beneficiaries were different. Previous activist decisions had largely benefited entrenched elites, whether slaveowners, entrepreneurs, "combinations of capital," or businesses that sought to avoid government regulation. The activist decisions of the Warren Court benefited blacks, disadvantaged suburban voters, atheists, criminals, pornographers, and the poor. The Warren Court's activism facilitated social change rather than preserving the status quo. The critics of the Court had forgotten that the role they espoused for the judiciary had been created in order to facilitate change and promote the interests of the disadvantaged. In the 1950s and 1960s the "democratic" institutions charged with that responsibility had become unresponsive, so the Warren Court had acted in their stead. It was ironic that the same critics who were shocked at the Court of the 1930s' resistance to the New Deal should protest against a Court that was reaching the results they had then sought.

Activism was the principal basis of the Court's controversiality; egalitarianism its dominant instinctual reaction; liberalism its guiding political philosophy. The combination of these ingredients, plus the presence of some judicial giants, gave the Warren Court a prominence and a visibility that are not likely to be surpassed for some time. But even though countless persons in the American legal profession today were shaped by Warren Court decisions, one can see the Warren Court receding into history. That Court seemed to have been led, in the final analysis, by a conception of American life that appeared vindicated by the first fifty years of twentieth-century experience. That conception held that American society was continually progressing toward a nobler and brighter and more enlightened future. As Earl Warren wrote in a passage that appears on his tombstone:

> Where there is injustice, we should correct it;
> where there is poverty, we should eliminate it;
> where there is corruption, we should stamp it out;
> where there is violence, we should punish it;
> where there is neglect, we should provide care;
> where there is war, we should restore peace;
> and wherever corrections are achieved we should add them permanently to our storehouse of treasures.

In that passage appears the Warren Court sensibility: a sensibility dedicated to the active pursuit of ideals that have seemed less tangible and achievable with the years.

G. EDWARD WHITE
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Bibliography


BICKEL, ALEXANDER 1970 *The Supreme Court and the Idea of Progress.* New York: Harper & Row.

BLACK, CHARLES 1970 The Unfinished Business of the Warren Court. *University of Washington Law Review* 46:3–45.

COX, ARCHIBALD 1968 *The Warren Court.* Cambridge, Mass.: Harvard University Press.

KURLAND, PHILLIP 1970 *Politics, the Constitution, and the Warren Court.* Chicago: University of Chicago Press.

LEVY, LEONARD W., ed. 1972 *The Supreme Court under Earl Warren.* New York: Quadrangle Books.

MCCLOSKEY, ROBERT 1960 *The American Supreme Court.* Chicago: University of Chicago Press.

WECHSLER, HERBERT 1959 Toward Neutral Principles of Constitutional Law. *Harvard Law Review* 73:1–23.

WHITE, G. ROBERT 1976 *The American Judicial Tradition.* New York: Oxford University Press.

——— 1982 *Earl Warren: A Public Life.* New York: Oxford University Press.


## *WARTH v. SELDIN*

See: *Simon v. Eastern Kentucky Welfare Rights Organization*

## WASHINGTON, BUSHROD
(1762–1829)

Bushrod Washington served on the United States Supreme Court for thirty-one years, but he did not hand down many important DECISIONS. Lacking the analytical sweep of JOHN MARSHALL and the erudition and energy of JOSEPH STORY, he invariably supported their opinions which strengthened the power of the central government and encouraged the development of the economy. In fact, he was so closely allied with Chief Justice Marshall that another Justice on that Court, WILLIAM JOHNSON of South Carolina, observed that the two "are commonly estimated as a single judge."

Washington was well connected by birth. His mother came from a prominent Virginia family and his father, John, was a particularly close brother of GEORGE WASHINGTON. He graduated from the College of William and Mary in 1778 and served in the Continental Army. After the war he studied law in Philadelphia under JAMES WILSON. Returning to Virginia in 1787, he was admitted to the bar and elected to the Virginia state ratifying convention, where he supported the adoption of the United States Constitution. Following this he practiced law in Richmond, where he developed a reputation for being diligent and extremely knowledgeable. Many young men, including HENRY CLAY, came to read law under his direction. During the 1790s he joined the Federalist Party, and in 1798 JOHN ADAMS appointed him to the Supreme Court. A short time later, as the "favorite nephew" of the former President, he became executor of Washington's will and inherited Mount Vernon and his uncle's public and private papers, which he made available to Marshall for his *Life of George Washington*.

Bushrod Washington was particularly effective and conscientious in the performance of his circuit-riding duties, especially when he presided over jury trials. His tact and sense of fair play allowed him to enforce the Sedition Act of 1798 in a number of cases without engaging in the partisan politics that made SAMUEL CHASE and WILLIAM PATERSON so controversial. His most famous circuit court decision came in the case *United States v. Bright* (1809). This was the TREASON trial of a general of the Pennsylvania state militia who had been formally authorized to resist the United States Supreme Court's decision in *United States v. Peters* (1809). Following a confrontation with a federal marshal, and after President JAMES MADISON threatened to use force, the state eventually backed down, whereupon Bright and several other officers were arrested, tried, and convicted. (Madison eventually pardoned them on humanitarian grounds.) Bushrod Washington handled the trial, which took place in Philadelphia amid a highly charged atmosphere, with great skill, maintaining both decorum and the authority of the federal government. Sentencing Bright, he declared, "A State has no constitutional power . . . to employ force to resist the execution of a decree of a federal court, though such decree is deemed to have been beyond the JURISDICTION of the Court to make. . . ."

Several other decisions rendered by Bushrod Washington are of interest. In a concurring opinion in DARTMOUTH COLLEGE V. WOODWARD (1819) he tried to reign in some of the implications of Marshall's more sweeping decision. In GREEN V. BIDDLE (1823) he handed down what proved to be an unenforceable decision invalidating various Kentucky statutes adopted to protect settlers from absentee landlords. Finally, in OGDEN V. SAUNDERS (1827), he openly broke with Marshall, abandoned his own earlier circuit court decision in *Golden v. Prince* (1814), and declared that a state BANKRUPTCY ACT that had a prospective application did not violate the CONTRACT CLAUSE.

Bushrod Washington died in Philadelphia on November 26, 1829.

RICHARD E. ELLIS
(1986)

Bibliography

BLAUSTEIN, ALBERT P. and MERSKY, ROY M. 1969 Bushrod Washington. Pages 243–257 in Leon Friedman and Fred L. Israel, eds., *Justices of the Supreme Court, 1789–1969.* New York: Chelsea House.

## WASHINGTON, GEORGE
(1732–1799)

The people of the United States are indebted to no man so much as they are to George Washington. And the debt extends to his role in the creation of the American Constitution. As the general who led the revolutionary armies to victory and so vindicated American independence, as one of the few men who had traveled in virtually every part of the United States, including the vast Western wilderness, and as a leading citizen of northern Virginia, Washington was actively involved in the movement of affairs that culminated in the CONSTITUTIONAL CONVENTION OF 1787. When the Convention met, he became its presiding officer. During the controversy over the RATIFICATION OF THE CONSTITUTION, the opposition to a strong executive was overcome by the universal assumption that Washington would be the first man to hold the office. When the Constitution was ratified and Washington did become President, he self-consciously seized the opportunity to set precedents for the conduct of governmental affairs. And when, after two terms in that office he handed

over the reins of executive authority, he did so in perfect constitutional order and retired to his country seat.

The third son of a prosperous planter, Washington learned the surveying trade in his teens, and as a surveyor he traveled widely in the area west of the Appalachian Mountains. At twenty-one he was appointed to major in the Virginia militia, and when the French and Indian War broke out in 1754 he was promoted to lieutenant colonel and placed second in command of a regiment dispatched to the Ohio Valley. On his colonel's death, Washington took command and managed, without supplies, funds, competent subordinates, or trained noncommissioned officers and troops, to achieve initial military success. He was subsequently made an aide to the British commanding general, and in 1755, at the age of twenty-three, was promoted to colonel and made commander-in-chief of all Virginia forces, the highest ranking American military officer.

In 1759, Washington married Martha Custis, the wealthiest widow in Virginia, and, adding her holdings to his own, achieved a financial independence that would subsequently permit him to engage in a career of uncompensated public service. For a decade and a half he lived the life of a gentleman planter, with the attendant civic duties of serving as a justice of the peace and as a member of the House of Burgesses.

In 1769 Washington introduced in the House of Burgesses a series of resolutions (drafted by his friend and neighbor GEORGE MASON) denying the right of the British Parliament to tax the colonies and initiating the first ASSOCIATION. After passage of the Intolerable Acts in 1774, Washington introduced in the house the Fairfax County Resolves closing Virginia's trade with Britain. He was also elected a delegate to the FIRST CONTINENTAL CONGRESS, which he attended in military uniform.

The Revolutionary War began in Spring 1775 when the Massachusetts militia forcibly resisted the attempt of British troops to seize its weapons and supplies. In June, on the motion of JOHN ADAMS, the CONTINENTAL CONGRESS adopted the Massachusetts militia as the Continental Army and appointed Washington commander-in-chief. The war lasted eight and one-half years, and Washington was the American commander for the whole period. The war was not an unrelieved military success on the American side, but the commander did learn to deal with Congress and with foreign allies, and he became, in his own person, the symbol of American national unity. Just before resigning his commission in 1783, he resisted the suggestion that the army, which had been shamefully left unpaid, should overthrow the Congress and establish its own government.

After his return to private life in 1784, Washington devoted his time to management of his property in Virginia and in the Ohio Valley. He became president of the Potomac Company, which had as its object the development of the Potomac River as a navigable waterway. And he engaged in a wide correspondence, always urging, in letters dealing with politics, the strengthening of the Union and an increase in the powers of Congress under the ARTICLES OF CONFEDERATION. In March 1785 he was host to a conference of commissioners from Maryland and Virginia that was supposed to discuss the navigation of the Potomac River but that, in the event, called for a broader conference—the Annapolis Convention—that ultimately led to the Constitutional Convention of 1787.

Pleading pressures of financial reverses and ill health, Washington was reluctant to accept election as a delegate to the Convention, but he did so at the repeated urging of JAMES MADISON and EDMUND RANDOLPH. At Philadelphia he was unanimously elected president of the Convention, although, as most of the debates were conducted in a committee of the whole house, he did not actually have to preside on most occasions. Although Washington did not take an active part in the recorded debates of the Convention, his attendance and his signature on the document as president of the Convention were offered as a guarantee of the result.

The first ELECTORAL COLLEGE under the new Constitution was elected in January 1789, and every member cast one of his two votes for George Washington. Washington learned of the result on April 14. His journey from Virginia to New York took a week, and involved parades and ceremonies in every town he passed through along the way; the affection and gratitude of the population were genuine, and Washington's task was to retain them while directing the executive affairs of the government.

Following his inauguration on April 30, Washington immediately began the business of running the executive branch of government. Everything he did set a precedent, not only for America but for the world, because his position as a republican chief executive was unique. Attention had to be given to such matters as the form of address and the conduct of social events so as to insure both the dignity of the federal executive and the republicanism of the country.

Every act in the process of governing had to be done a first time: the performance of each executive task, however routine, set the pattern for the permanent conduct of the presidency. The first bill to pass the new Congress was presented for Washington's signature on June 1: he affixed his signature, and the first statute under the Constitution became law. The first occasion for negotiating a treaty arose in August; in strict compliance with Article II, section 2, Washington appeared in person before the Senate to ask for ADVICE AND CONSENT and, when the Senate

referred the matter to committee he stalked out. Since that day, Presidents have submitted treaties to the Senate after they are negotiated, but no President has asked for the Senate's advice before negotiations begin.

Statutes creating the three executive departments of state, war, and treasury were enacted during the summer of 1789. Washington appointed his fellow Virginian THOMAS JEFFERSON to be the first secretary of state, his wartime chief of artillery, General Henry Knox, to be secretary of war, and his former aide, Colonel ALEXANDER HAMILTON, to be secretary of the treasury. Although the Constitution provides only that the President may require written opinions from the principal executive officers, and that only as to their peculiar duties, Washington began the practice of meeting regularly with the three secretaries and the attorney general, Edmund Randolph, to discuss affairs of state generally. From this practice has come the notion of the American CABINET, as well as the accepted opinion that the heads of the executive departments are responsible primarily to the President, and not to Congress, for their official conduct.

But Washington had to appoint not only his cabinet officers but also every official in the executive branch down to customs inspectors and lighthouse keepers. Although the Constitution permitted Congress to vest inferior appointments in the chiefs of the departments, Congress did not immediately do so. Washington was besieged with applications from would-be federal bureaucrats. Indeed, had Congress desired to hamstring the President it might have been enough just to leave all federal appointments in his hands.

Besides the cabinet officers, the most important appointees were the Justices of the Supreme Court. The JUDICIARY ACT OF 1789 provided for six Justices. Washington nominated his friend JOHN JAY, who had been secretary of foreign affairs in the old government, to be Chief Justice. The other five nominees were drawn from different states, both to facilitate their performance of circuit duty and to make the Court representative of the whole country. Among them were three men who had been Washington's fellow delegates to the Constitutional Convention, JAMES WILSON, JOHN RUTLEDGE, and JOHN BLAIR. (See SUPREME COURT, 1789–1801.)

Once the machinery was in place, the issue became what policy the new government would follow. Washington, who had relied on Congressman James Madison for the machinery, turned to Secretary of the Treasury Hamilton for the policy. Hamilton's program was set forth in a series of reports submitted over the next two years. The program called for an alliance between the federal government and the wealthier citizens to promote the unity and prosperity of the nation. The Hamiltonian program provoked a controversy over the proper interpretation of constitutional provisions conferring power on the national government. Hamilton argued for BROAD CONSTRUCTION; Jefferson, for STRICT CONSTRUCTION. The arguments were reduced to writing at Washington's request to help him to decide whether to sign or to veto the BANK OF THE UNITED STATES ACT (1790). Washington, convinced by Hamilton's doctrine of IMPLIED POWERS, signed the act.

The French Revolution of 1789 provoked a further division between Washington's chief advisers. Most Americans initially sympathized with the French overthrow of the monarchy and the attempt to establish a republican form of government. But as the French Revolution became more extreme and expansionary, and as the conservative states of Europe mobilized to resist it, opinion became divided. Jefferson and his supporters continued to sympathize with the revolution, while Hamilton and his allies were inclined to side with the embattled British.

By 1793, the Wars of the French Revolution had become global, and American interests, particularly American shipping, were suffering the effects. Washington, with the assent of his whole cabinet, issued a PROCLAMATION OF NEUTRALITY in April 1793, warning American citizens to refrain from becoming involved on either side. Hamilton published a series of newspaper articles asserting, among other things, that the proclamation had been necessary because of the active support of France on the part of the Jeffersonians. Madison, replying in his own newspaper essays, claimed that Washington, by his unilateral issuance of the proclamation, had usurped the power of Congress to declare war and of the Senate to share in treaty making.

The first party lines in American politics under the Constitution had been drawn, and drawn on constitutional grounds. Jefferson resigned from the cabinet at the end of 1793. Thereafter, Washington's was a "Federalist" administration, with Jefferson, Madison, and the "Republicans" in opposition.

The WHISKEY REBELLION of 1794 presented the first organized resistance to the national government. Western Pennsylvania farmers, upset by an excise on whiskey that seemed unduly to burden their section of the country, threatened to use force to impede collection of the tax. Washington called 15,000 militiamen into federal service and himself set out to command the expedition. The rebellion was ultimately put down without bloodshed, and when two rebel leaders were subsequently convicted of TREASON, Washington pardoned them.

The administration's foreign policy also led to controversy at about the same time. Chief Justice Jay had been sent to Britain to negotiate a settlement of certain continuing difficulties in relations between the two countries. JAY'S TREATY contained many provisions favorable to British

interests, and apparently detrimental to the economic interests of some regions of the United States, especially the South and West. The treaty also provoked constitutional controversy about the operation of the TREATY POWER. For example, would the Senate be required to advise and consent to the treaty as it was presented, or could the Senate amend a treaty? And could the President and the Senate enter into treaty commitments that would involve the expenditure of funds without the concurrence of the House of Representatives whose agreement was required for the appropriation of the funds? The treaty was approved in a partisan vote, but with a reservation suspending operation of certain objectionable provisions.

Washington chose not to seek a third term as President in the election of 1796. He was dismayed and distressed by the bitterness of the partisan rivalries that had grown up among men who had once been close colleagues, and he himself attempted always to remain above the partisan fray. WASHINGTON'S FAREWELL ADDRESS to his countrymen contained his strictures against the spirit of party, as well as his advice on foreign affairs and on public morality.

Even after his retirement to his estate at Mount Vernon, Washington could not escape either public service or partisan intrigue. When war with France seemed inevitable in 1798, President JOHN ADAMS nominated and the Senate unanimously confirmed Washington as COMMANDER-IN-CHIEF. There immediately followed a scramble among Federalist military men for the subordinate general officer positions. Washington supported Hamilton, who ultimately became second in command. Under the circumstances it is not surprising that Washington thought of the Republicans, who had been pro-French, as dangerous men and that he supported the ALIEN AND SEDITION ACTS.

Nevertheless, when Washington died in 1799 he was eulogized by Federalists and Republicans alike. More than any other individual, Washington was responsible for America's being independent, adopting the Constitution, and having a functioning republican government.

DENNIS J. MAHONEY
(1986)

Bibliography

COOKE, JACOB E. 1987 Organizing the National Government. In Levy, Leonard W., and Mahoney, Dennis J., eds., *The Constitution: A History of Its Framing and Ratification.* New York: Macmillan.

FLEXNER, JAMES THOMAS 1965–1972 *George Washington.* 4 Vols. Boston: Little, Brown.

FREEMAN, DOUGLAS SOUTHALL 1948–1957 *George Washington.* 7 Vols. New York: Scribner's.

MARSHALL, JOHN (1804–1807) 1925 *The Life of George Washington.* 5 Vols. New York: Wm. H. Wise & Co.

MATTESON, DAVID M. 1970 *The Organization of the Government under the Constitution.* New York: Da Capo Press.

## *WASHINGTON v. DAVIS*
### 426 U.S. 229 (1976)

This landmark decision concerns the relevance of a decision maker's motives in EQUAL PROTECTION cases. Black candidates for the Washington, D.C., police force alleged that the District's selection criteria had an adverse discriminatory effect upon the employment prospects of minorities and that the effect violated the FOURTEENTH AMENDMENT's equal protection clause and ANTIDISCRIMINATION LEGISLATION. In an opinion by Justice BYRON R. WHITE, the Supreme Court held that discriminatory effects, standing alone, are insufficient to establish an equal protection violation. Proof of purposeful discrimination is necessary. The Court also rejected the candidates' statutory claim. In an opinion that did not address the constitutional question, Justice WILLIAM J. BRENNAN, joined by Justice THURGOOD MARSHALL, dissented from the Court's disposition of the statutory issue. In a concurring opinion, Justice JOHN PAUL STEVENS discussed the relationship between discriminatory effects and proof of discriminatory intent and articulated his reasons for rejecting the statutory claim.

In settling a long-standing controversy over whether a decision maker's motives may constitute the basis for an equal protection claim, the Court climbed two interesting doctrinal hills. Prior to *Davis*, cases such as *Whitcomb v. Chavis* (1971) and *White v. Regester* (1973) expressly had suggested that unintentional disproportionate effects on a minority may constitute the basis for an equal protection claim. Justice White's opinion ignores these precedents but warns against the broad consequences of such a HOLDING. Such a rule "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."

In addition, contrary to *Davis*'s holding, a line of opinions dating back to FLETCHER V. PECK (1810) and reaffirmed in UNITED STATES V. O'BRIEN (1968) and PALMER V. THOMPSON (1971), clearly had stated that legislators' motives may not form the basis of constitutional attacks on statutes. Without alluding to all of the relevant precedents, the Court reinterpreted *Palmer* and suggested that some of its language had constituted mere OBITER DICTA.

As a practical matter, *Davis*, when combined with subsequent similar cases such as ARLINGTON HEIGHTS V. METROPOLITAN HOUSING DEVELOPMENT CORP. (1977) and MOBILE V. BOLDEN (1980), curtailed litigants' ability to bring successful equal protection claims. Proof of intentional discrimination is difficult to obtain and judges are reluctant to deem officials intentional wrongdoers. Indeed, it was

six years after *Davis* before the Court, in *Rogers v. Lodge* (1982), sustained a finding of intentional discrimination in a racial equal protection case.

THEODORE EISENBERG
(1986)

## *WASHINGTON v. GLUCKSBERG*

See: Right to Die

## *WASHINGTON v. HARPER*
494 U.S. 1028 (1990)

A Washington state prison policy authorized the treatment of a prisoner with antipsychotic drugs against his or her will, provided that the prisoner be (1) mentally ill, and (2) either gravely disabled or likely to do serious harm to others. These two findings were to be made by a committee consisting of a psychiatrist, a psychologist, and an official of the institution in which mentally ill prisoners were held. The state supreme court held that this procedure, which lacked fully adversarial procedural guarantees such as those available in a court proceeding, denied a mentally ill prisoner PROCEDURAL DUE PROCESS OF LAW. The Supreme Court reversed, 6–3.

Justice ANTHONY M. KENNEDY wrote for the Court. The prisoner had a "liberty interest" in being free from arbitrary administration of a psychotropic drug; however, the procedure provided by the state was sufficient to satisfy the demands of due process. A court in a single proceeding cannot adequately evaluate the intentions or likely behavior of a medically ill person; such an evaluation requires ongoing observation of the kind available to the members of the committee given responsibility for the decisions here. The risks of an antipsychotic drug are mainly medical risks, which can best be evaluated by professionals. Although the state's policy does not allow representation by counsel, it does provide for a lay adviser who understands the psychiatric issues; this assistance is sufficient to satisfy due process.

Justice JOHN PAUL STEVENS wrote for the dissenters. In his view, the state policy violated both SUBSTANTIVE DUE PROCESS and procedural due process. In support of the first objection, he argued that the policy authorized invasion of the prisoner's liberty not only for his own medical interests but also to maintain order in the institution. The second objection was that, considering the seriousness of the invasion of the prisoner's liberty interest, the committee was insufficiently independent of the institution's administration to satisfy the requirements of a fair hearing.

KENNETH L. KARST
(1992)

## *WASHINGTON v. SEATTLE SCHOOL DISTRICT NO. 1*

See: *Crawford v. Board of Education*

## *WASHINGTON v. TEXAS*

See: Compulsory Process, Right to; Evidence

## WASHINGTON'S FAREWELL ADDRESS
(September 17, 1796)

When President GEORGE WASHINGTON decided, in the summer of 1796, not to seek a third term, he published an address to the American people embodying his advice on how to insure the survival of the new constitutional order. The first draft was prepared by Washington himself; the final version was drafted under Washington's direction by ALEXANDER HAMILTON, incorporating suggestions from JAMES MADISON and JOHN JAY.

The first, and longest, section of the address comprises an encomium of the federal union and a warning against the dangers of factionalism, and especially of sectionalism. Washington urged that Americans regard the Union as "the support of your tranquility at home, your peace abroad, of your safety, of your prosperity, of that very liberty which you so highly prize." The central section of the address commends religion as a support for free government. Anything that weakened religious belief, he argued, would corrupt public morals, undermine the efficacy of oaths, and threaten the national capacity for self-government. The final section of the address contains Washington's advice on FOREIGN AFFAIRS and defense. Washington opposed permanent alliances and standing armies as incompatible with constitutional democracy.

Advice in the address concerning specific constitutional questions includes Washington's deprecation of the "spirit of encroachment" that would subvert the SEPARATION OF POWERS and his admonition against hasty adoption of constitutional amendments.

DENNIS J. MAHONEY
(1986)

Bibliography

EIDELBERG, PAUL 1974 *A Discourse on Statesmanship: The Design and Transformation of the American Polity.* Chicago: University of Illinois Press.

## WASTE, POLLUTION, AND THE CONSTITUTION

The rise of environmental consciousness since the early 1970s has made solid waste disposal through recycling an important issue of public policy. The disposal of solid wastes raises interstate issues as some states find it difficult to use local landfills for their locally generated wastes. Air and water pollution also have important interstate effects, as pollution generated in one state flows into another.

Most regulation of air and water pollution occurs through federal statutes, the Clean Air and Clean Water Acts. These statutes prescribe federal standards and are largely administered by the federal Environmental Protection Agency. State environmental agencies play a role in enforcing them, but only if the state agencies comply with rather detailed federal requirements. Solid waste disposal is regulated under the Resource Recovery and Conservation Act, which prescribes relatively strict federal standards for disposing of hazardous wastes, and less strict ones for disposing of other solid wastes. States receive federal funds to administer plans that comply with the federal requirements.

States have done relatively little to regulate the interstate effects of air and water pollution. Solid wastes are different. Many local landfills are full or nearly so, and local residents frequently do not wish to expand environmentally unattractive landfills. States and cities have therefore adopted regulations to conserve local landfill space. The Supreme Court has considered the constitutionality of such regulations in five cases.

The leading case is PHILADELPHIA V. NEW JERSEY (1978), invalidating a statute prohibiting the importation of waste generated outside the state. The Court held that the statute expressly discriminated against out-of-state commerce, and was therefore subject to a "virtually per se rule" of invalidity. The state's reason for imposing the ban was simply to conserve a local resource, landfill space. But conservation could be achieved by restricting intakes, no matter what their source. The COMMERCE CLAUSE, the Court said, was designed to prohibit states from addressing their problems by insulating themselves from other states. The Court followed this holding in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources* (1992), invalidating a Michigan statute barring local landfills from accepting waste generated outside the county in which the landfill was located.

The Court also invoked the *Philadelphia* principle to invalidate Alabama and Oregon statutes that taxed the deposit in local landfills of waste generated elsewhere at a higher rate than locally generated waste, *Chemical Waste Management, Inc. v. Hunt* (1992); *Oregon Waste Systems v. Department of Environmental Quality* (1994). The higher fee would discourage out-of-state waste producers from using local landfills, but this was simply another version of the pure conservation goal found insufficient in *Philadelphia.* Nor did the extra fee compensate the state for any special costs it incurred in accepting out-of-state waste for disposal.

Flow-control ordinances are the most important techniques for dealing with solid wastes. They direct all waste generated in a town to a single recycling facility, and are thought to encourage recycling because expensive recycling facilities require a guaranteed flow of waste to be financially viable, while waste producers prefer to dispose of waste at cheaper, nonrecycling landfills. The Court struck down a flow-control ordinance in *C & A Carbone, Inc. v. Clarkstown* (1994), finding that it denied out-of-state waste haulers access to locally generated waste. In the wake of *Carbone,* lower courts have divided over the constitutionality of other flow-control ordinances.

Congress can authorize states to enforce even discriminatory regulations. None of the Court's decisions deals with the question of congressional authorization, but the Court has generally required a rather specific statement by Congress before it will find authorization for discriminatory regulation.

MARK TUSHNET
(2000)

Bibliography

HEINZERLING, LISA 1995 The Commercial Constitution. *Supreme Court Review* 1995:217–276.

VERCHICK, ROBERT R. M. 1997 The Commerce Clause, Environmental Justice, and the Interstate Garbage Wars. *Southern California Law Review* 70:1239–1310.

## WATERGATE AND THE CONSTITUTION

The Watergate scandal, starting with an illegal break-in at Democratic National Committee headquarters in June 1972 and ending with President GERALD R. FORD pardoning RICHARD M. NIXON in September 1974, produced one of the most significant constitutional crises in modern times. It raised a number of unsettling issues central to the constitutional structure of SEPARATION OF POWERS.

The two major constitutional issues Watergate brought into focus were EXECUTIVE PRIVILEGE and the scope of the IMPEACHMENT power. In September 1972 a GRAND JURY indicted the Watergate burglars but the Justice Department closed the investigation despite evidence of a wider conspiracy. Following the November election, the Watergate burglary trial began. In it defendants claimed they had

been pressured to remain silent and plead guilty; that perjury was committed; and that "others" were involved. Such allegations led to the creation of a Senate Watergate Committee, headed by SAM ERVIN, which began taking testimony, revealing a White House program of political espionage that included Watergate. Witnesses suggested that the President was participating in a coverup and that the President had made tape recordings of conversations in his office. The Ervin Committee attempted to subpoena such tapes, but the President refused to surrender them, claiming executive privilege. The committee then went to the courts, which in two cases (*Nixon v. Sirica*, 1973, and *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 1974) attempted to define the line between a committee's power to compel testimony in order to perform its functions and the need for privacy in presidential communications. A third case, UNITED STATES V. NIXON (1974), arose out of a criminal prosecution of the President's aides. Both the prosecutor and the defense sought to subpoena the tapes, and the President again resisted. Chief Justice WARREN E. BURGER, for a unanimous Supreme Court, conceded a "presumptive privilege" for executive communications, but ruled that respect of the integrity of the judicial process required the courts to weigh any such claim against the importance of assuring the production in court of relevant evidence and ultimately of protecting the system of criminal justice. The Court thus ordered certain tapes produced. Their disclosures, which came at the height of the House of Representatives' impeachment process, demonstrated the President's active complicity in the coverup conspiracy from the first moment. This led Nixon to resign to avoid impeachment for "high crimes and misdemeanors."

The impeachment process was fraught with constitutional difficulties. Nixon's firing of a Senate-approved special prosecutor, given sweeping powers to investigate the Watergate scandal, had produced the initial demands for his impeachment. In October the House Judiciary Committee launched an impeachment inquiry. Questions promptly arose as to what constituted an impeachable offense, and what "other high crimes and misdemeanors" might include. Must these be criminal in nature and intent, or might they be quasi-political, involving gross breach of public trust? Was maladministration impeachable, or must a statutory offense or a serious crime be demonstrated? The President's attorneys argued the latter. The committee staff indicated a President might be removed for "substantial misconduct," not necessarily of specific criminal nature. This controversy was mooted by the revelations of the disputed tapes and by the resignation, but not before the House committee recommended three ARTICLES OF IMPEACHMENT to the House at large. Rejecting two articles dealing with income tax violations and the secret bombing of Cambodia, which raised the question of the extent of presidential emergency power in FOREIGN AFFAIRS, the Committee contended that "Richard M. Nixon warrants impeachment and trial and removal from office" for other charges. These were: that he prevented, obstructed, and impeded the administration of justice; that he repeatedly engaged in conduct violating the constitutional rights of citizens, impairing the due and proper administration of justice and the conduct of lawful inquiries, or contravening the laws governing agencies of the executive branch and the purposes of these agencies; and that he failed without lawful cause or excuse to produce papers and things as directed by duly authorized subpoenas issued by the Committee on the Judiciary of the House of Representatives. Included as substantiating detail were fourteen examples of interfering or endeavoring to interfere with conduct of investigations by the Department of Justice of the United States, the Federal Bureau of Investigation, the Watergate special prosecutor, and congressional committees; endeavoring to misuse the Central Intelligence Agency; the electronic surveillance of private citizens; the break-in of a psychiatrist's office; and the unlawful campaign financing practices of the Committee to Re-elect the President.

An unresolved constitutional issue arose in September 1974: whether a subsequent President can issue a pardon in the absence of either a conviction or an INDICTMENT. A final question will trouble historians for years: did the Constitution work in Watergate, or did the crisis demonstrate fundamental failures in the governmental system?

PAUL L. MURPHY
(1986)

Bibliography

KURLAND, PHILLIP 1978 *Watergate and the Constitution.* Chicago: University of Chicago Press.

MILLER, ARTHUR S. 1979 *Social Change and Fundamental Law.* Westport, Conn.: Greenwood Press.

MURPHY, PAUL L. 1979 Misgovernment by Judiciary? Watergate and the Constitution. *Harvard Civil RightsCivil Liberties Law Review* 14:783–799.

## WATER POLLUTION CONTROL ACT

See: Environmental Regulation and the Constitution

## WATER POWER ACT
41 Stat. 1063 (1920)

The failure to capitalize on the vast water power resources of the country led increasingly, in the early twentieth cen-

tury, to efforts to develop and regulate unused power on public lands and navigable rivers. After a number of failed attempts at national legislation, Congress finally passed the Water Power Act in 1920.

The act established a Federal Power Commission (FPC), to be composed of the secretaries of war, agriculture, and interior, with authority to approve water power projects "for the development and improvement of navigation, and for the development, transmission, and utilization of power" on any navigable river or public lands. The act empowered the FPC to license projects for up to fifty years; it also directed preferential treatment for state or municipal projects. The rates charged for the use of water were to include only FPC expenses; moreover, the act required licensees to charge "reasonable, nondiscriminatory and just" rates and prohibited combinations or other agreements to limit output or fix prices. The act stipulated that rate-fixing and regulation be administered according to the procedures outlined in the INTERSTATE COMMERCE ACT.

The Supreme Court approved extensive federal controls in UNITED STATES V. APPALACHIAN ELECTRIC POWER COMPANY (1940).

DAVID GORDON
(1986)

## WATER QUALITY IMPROVEMENT ACT

See: Environmental Regulation and the Constitution

## *WATERS v. CHURCHILL*
511 U.S. 661 (1994)

Cheryl Churchill disliked her supervisor, Cynthia Waters, and the new cross-training program for nurses established at the public hospital that employed her. When Churchill aired some of these complaints in the hospital cafeteria, her conversation was overheard by another nurse. After a short investigation in which that nurse and the other party to the conversation claimed that Churchill had made "unkind" remarks about Waters, Waters fired Churchill. A lower federal court ruled that the firing violated Churchill's FIRST AMENDMENT right to FREEDOM OF SPEECH because she had not, in fact, criticized her boss.

The Supreme Court reversed. The majority held that PUBLIC EMPLOYEES may be discharged on the basis of remarks their supervisors, after a reasonable investigation, thought they said, even when the actual remarks were constitutionally protected speech. The government interest in "efficient employment decisionmaking," Justice SANDRA DAY O'CONNOR'S declared in her PLURALITY OPINION, justified abandoning "the evidentiary rules used by courts" when evaluating the speech rights of public employees. The Justices could not tell from the record whether Churchill was constitutionally fired for expressing distaste for her employer or unconstitutionally fired for criticizing the cross-training program. Hence, the case was remanded to the lower court.

*Waters v. Churchill* highlights the tendency of the REHNQUIST COURT to make case-specific decisions, particularly when O'Connor is the swing vote. Her MAJORITY OPINION gives little indication of what constitutes a reasonable investigation, except to indicate that one was conducted in this case. Nor is the constitutional difference between criticizing a public employer and criticizing a program instituted by a public employer spelled out. The main lesson may be that public employees should not criticize their supervisors in places where others may overhear their conversations.

MARK A. GRABER
(2000)

(SEE ALSO: *National Treasury Employees Union, United States v.; Public Employees and Free Speech.*)

## *WATKINS v. UNITED STATES*
354 U.S. 178 (1957)

## *SWEEZY v. NEW HAMPSHIRE*
354 U.S. 234 (1957)

Watkins, a labor leader called to testify before the House Committee on Un-American Activities, had been told by the union president that he would lose his position if he claimed his RIGHT AGAINST SELF-INCRIMINATION. He thus claimed a FIRST AMENDMENT privilege when he declined to answer the committee's questions about the membership of other people in the Communist party. He also objected that these questions were beyond the scope of the committee's activities. For his refusal to answer, Watkins was convicted of contempt of Congress. The Supreme Court reversed his conviction, 8–1.

Writing for the Court, Chief Justice EARL WARREN rested decision on a narrow point: Watkins had been denied PROCEDURAL DUE PROCESS, for he had not been given a sufficient explanation of the subject of inquiry, and thus could not know whether the committee's questions were "pertinent to the questions under inquiry," as the contempt statute specified. Warren's opinion, however, strongly suggested that the Court would be prepared to confront the whole issue of LEGISLATIVE INVESTIGATIONS into political association. He remarked on the use of such investigations

to subject people to public stigma, and the absence in such proceedings of effective protection of procedural fairness. "We have no doubt that there is no congressional power to expose for the sake of exposure," Warren wrote. "Who can define the meaning of "un-American'?" Justice TOM C. CLARK, the sole dissenter, appeared to object as much to these broad OBITER DICTA as to the actual decision. He complained of the Court's "mischievous curbing of the informing function of Congress."

In *Sweezy*, a COMPANION CASE to *Watkins*, the Court held, 6–2, that a state legislative investigation could not constitutionally compel Sweezy to answer questions about the Progressive party and about a lecture he had given at the University of New Hampshire. Chief Justice Warren wrote a PLURALITY OPINION for four Justices, concluding that Sweezy's contempt conviction violated procedural due process because the state legislature had not clearly authorized the attorney general, who conducted the investigation, to inquire into those subjects. Justice FELIX FRANKFURTER, joined by Justice JOHN MARSHALL HARLAN, concurred, arguing that the state had unconstitutionally invaded Sweezy's FOURTEENTH AMENDMENT liberty—here, his "political autonomy," a plain reference to the First Amendment. Justice Frankfurter used a (for him) familiar BALANCING TEST, but articulated a COMPELLING STATE INTEREST standard for cases of invasions of political privacy. The Frankfurter opinion is notable for its early articulation of the constitutional dimension of ACADEMIC FREEDOM. It also led, the following year, to the Court's explicit recognition of the FREEDOM OF ASSOCIATION in NAACP V. ALABAMA (1958). Justice Clark again dissented, now joined by Justice HAROLD H. BURTON.

A number of members of Congress reacted angrily to these opinions and others decided the same year, such as YATES V. UNITED STATES (1957) and *Jencks v. United States* (1957). (See JENCKS ACT.) Bills were proposed in Congress to limit the Supreme Court's jurisdiction over cases involving controls of subversive activities. In the event, not much "curbing" was done, and in retrospect *Watkins* and *Sweezy* appeared to be no more than trial balloons. Two years later, in BARENBLATT V. UNITED STATES (1959), a majority of the Court backed away from the expected confrontation with Congress.

KENNETH L. KARST
(1986)

## WAYNE, JAMES M.
(1790?-1867)

After service as an elected official and judge in Georgia and as a Jacksonian Democrat in Congress, James Moore Wayne served thirty-two years as an Associate Justice of the United States Supreme Court. Despite this lengthy tenure he produced no significant opinions, though he consistently strove to protect national authority, CORPORATIONS, and SLAVERY. During the CIVIL WAR, his nationalist outlook induced him to remain on the Court as a Unionist.

Wayne, son of a well-to-do Savannah factor and rice planter, was educated at the College of New Jersey (Princeton), read law in New Haven and in his native Savannah, and was admitted to the Georgia bar in 1811. He was a member of the Georgia House of Representatives from 1815 to 1817, mayor of Savannah from 1817 to 1819, and successively judge of a court of common pleas and of the Superior Court. He later served in two state CONSTITUTIONAL CONVENTIONS, the second time as president. In 1829, Wayne was elected to the United States House of Representatives, where he prominently supported ANDREW JACKSON. He promoted Indian removal from his native state, backed Jackson's Bank policies, and stood by the President during the Nullification Crisis in South Carolina. He was the only member of the Georgia delegation to support the FORCE BILL. In his last term, he became chairman of the Foreign Relations Committee.

Jackson nominated Wayne to take the seat of Justice WILLIAM JOHNSON of South Carolina, and he was confirmed in 1835. Justice BENJAMIN R. CURTIS later called Wayne one of the "most high-toned Federalists on the bench," referring to Wayne's tenacious nationalism. This outlook was most apparent in COMMERCE CLAUSE cases. In the PASSENGER CASES (1849), Wayne was one of a majority that held unconstitutional state statutes regulating the ingress of ship passengers on the ground that insofar as such laws "practically operated as regulations of commerce, or as restraints upon navigation," they were unconstitutional. The power to regulate foreign and INTERSTATE COMMERCE was "exclusively vested in congress." Unlike his fellow Southerner, Chief Justice ROGER B. TANEY, he was not troubled by the implications of this position for the states' control of slavery. Wayne joined in Justice JOHN MCLEAN's nationalist dissent in COOLEY V. BOARD OF WARDENS (1851), arguing that Congress's control of interstate and FOREIGN COMMERCE was exclusive of state power.

The same nationalist spirit produced other opinions upholding federal authority. In *Dobbins v. Erie County* (1842) Wayne struck down a local tax on a federal officer. He was an enthusiastic proponent of federal admiralty jurisdiction, and in *Waring v. Clarke* (1847) he extended that jurisdiction to tidal waters of the Mississippi River well above New Orleans. In *Louisville, Cincinnati, and Charleston Railroad Co. v. Letson* (1844) Wayne rejected a rule, origi nally fashioned by Chief Justice JOHN MARSHALL, that restricted the access of corporations to federal courts by requiring that for purposes of DIVERSITY JURISDICTION, all their shareholders be citizens of a state dif-

ferent from all parties on the other side. Wayne instead adopted the rule that a corporation's CITIZENSHIP for diversity purposes is derived from the state where it was chartered and where its officers conducted business.

Wayne was sympathetic to corporate investors, as his CONTRACT CLAUSE opinions reveal. He dissented without opinion in WEST RIVER BRIDGE V. DIX (1848), in which the Court permitted a state to use its EMINENT DOMAIN powers to destroy a corporate charter. In the Ohio Bank Tax cases, Wayne consistently voted to strike down state attempts to modify tax exemptions claimed by banks. One of these cases, DODGE V. WOOLSEY (1856), produced what was probably Wayne's most memorable opinion. Condemning the effort of Ohio Democrats to destroy a tax exemption by an amendment to the state constitution, Wayne sermonized: "moral obligations never die. If broken by states and nations, though the terms of reproach are not the same with which we are accustomed to designate the faithlessness of individuals, the violation of justice is not the less."

Wayne was himself a slaveholder and no less dedicated to his section than other southern jurists such as Taney and PETER DANIEL. He considered slavery a vital component of southern society, beyond control of the federal government except for purposes of protection. But, unlike Taney, Wayne remained coolly assured about the constitutional security of slavery, and he was not blinded by the state-sovereignty dogmatism that warped his Chief's opinions in slavery cases. The Constitution itself, Wayne believed, incorporated express protections for slavery's security. In his concurrence in PRIGG V. PENNSYLVANIA (1842) Wayne went along with JOSEPH STORY's assertion that states need not support enforcement of the federal Fugitive Slave Act, but only on the ground that to admit any state role at all would be to invite Northern states to interfere with the capture and rendition of fugitives.

Wayne played a mischievous role in DRED SCOTT V. SANDFORD (1857) though his brief concurring opinion merely endorsed entirely Taney's opinion. Wayne first urged that the Chief Justice write the opinion for the Court's majority rather than Justice SAMUEL NELSON, whose opinion would evade the larger issues in the case by a narrow jurisdictional ruling, and he formally moved that the Court address itself to all issues, not just the jurisdictional ones. Scholars have suggested that Taney's opinion incorporated portions of a draft opinion that Wayne did not submit. Yet Wayne was no fanatic on the subject of slavery. On circuit, he delivered a vigorous jury charge in the trial of officers of the notorious slave ship *Wanderer,* upholding the power of the federal government to hang slavers.

The Civil War forced a severe test of Wayne's conflicting loyalties. After SECESSION, he supported his son's decision to resign his commission in the United States Army and accept appointment as Georgia's adjutant general, but Wayne elected to remain on the federal bench. Georgia retaliated by confiscating his property and declaring him an enemy alien. In 1861, Wayne denied a HABEAS CORPUS petition from a soldier who claimed that ABRAHAM LINCOLN's call for troops was illegal. In conformity with that position, Wayne joined the five-member majority in the PRIZE CASES (1863), upholding the legality of Lincoln's action in imposing a blockade around the seceding states. He wrote for the Court in EX PARTE VALLANDIGHAM (1864), refusing to review the conviction of an Ohio Copperhead congressman by a military commission. In EX PARTE MILLIGAN (1866), where the majority held that Congress could not authorize military commissions for areas outside the theater of war, Wayne joined the four-man minority who argued for congressional discretion in using military commissions. But there are indications that Wayne's Unionist views would not be extrapolated to accept all aspects of Republican RECONSTRUCTION. He joined the majority in the TEST OATH CASES (1867), holding state and federal proscriptive oaths unconstitutional. He refused to hold CIRCUIT COURTS in his circuit in areas under military occupation. His death on July 5, 1867, ended his grief at the devastation that secession, war, and Reconstruction had brought to his beloved state.

WILLIAM M. WIECEK
(1986)

Bibliography

GATELL, FRANK O. 1969 James M. Wayne. In Leon Friedman and Fred L. Israel eds., *The Justices of the United States Supreme Court 1789–1969: Their Lives and Major Opinions.* New York: Chelsea House Publishers.

LAWRENCE, ALEXANDER A. 1943 *James Moore Wayne: Southern Unionist.* Chapel Hill: University of North Carolina Press.

## *WAYTE v. UNITED STATES*
### 470 U.S. 598 (1985)

After a presidential proclamation directing young men to register for a possible draft, David Wayte did not register, but wrote letters to government officials stating that he did not intend to do so. These letters went into a SELECTIVE SERVICE file of men who had given similar notices or who had been reported by others for failing to register. The government adopted a policy of "passive enforcement" of registration: it would prosecute only men named in this file. Government officials wrote letters warning the men to register or face prosecution, and FEDERAL BUREAU OF INVESTIGATION agents urged Wayte in person to register during a grace period. He refused and was indicted for failure to register. The federal district court dismissed Wayte's indictment, holding that the government had not

rebutted his preliminary showing of selective prosecution. The court of appeals reversed, holding that Wayte had not shown that the government had prosecuted him because of his protest. The Supreme Court affirmed, 7–2.

Justice LEWIS F. POWELL wrote the OPINION OF THE COURT. Claims of selective prosecution, he said, must be judged under ordinary EQUAL PROTECTION standards, which, as the Court held in WASHINGTON V. DAVIS (1976), require a showing of intentional discrimination. Here, the government's awareness that "passive enforcement" would fall disproportionately on protesters was an insufficient showing of intent to punish protest. Given the government's policy of urging compliance after receiving notice of failure to register, Wayte was not prosecuted for protesting, but for persisting in refusing registration.

Wayte's FIRST AMENDMENT challenge also focused on the enforcement system's disparate impact on protesters. Applying the formula of UNITED STATES V. O'BRIEN (1968), Justice Powell concluded that "passive enforcement" passed the test. The government interest in national security was important, and unrelated to the suppression of expression; and the enforcement system burdened speech no more than was necessary to secure registration.

Justice THURGOOD MARSHALL dissented, joined by Justice WILLIAM J. BRENNAN, arguing that Wayte had been denied effective opportunity for DISCOVERY of information concerning the motivations of high government officials for prosecuting him. Thus, he could not fully support his claim that the prosecution was designed to punish his protest. The majority dismissed this argument, saying—contrary to the dissenters' view—that Wayte had not presented the issue to the Supreme Court.

KENNETH L. KARST
(1986)

## WEALTH DISCRIMINATION

Wealth discrimination—the state's allocation of resources on the basis of ability to pay—has received the attention of the courts only recently. Sensitivity to the plight of the poor was an outgrowth of the CIVIL RIGHTS movement of the 1960s. Thus, the first constitutional issue raised by EQUAL PROTECTION claims of the poor was whether poverty-based discrimination is analogous to RACIAL DISCRIMINATION for purposes of the applicable STANDARD OF REVIEW.

Advocates of this analogy stress the poor's lack of political power and the public's antipathy to the poor and to programs, such as welfare, enacted to ameliorate poverty. They argue that the Supreme Court should give less deference to legislative judgments when reviewing poverty discrimination claims than it does when reviewing ECONOMIC REGULATIONS challenged by those able to pursue nonjudicial means of redress. However, at no time during the more than quarter of a century since the Court's first decision in this area, GRIFFIN V. ILLINOIS (1956), has a majority of the Court ever embraced the analogy to race for purposes of equal protection review.

The *Griffin* decision held unconstitutional a state's refusal to provide an INDIGENT convicted criminal defendant with a free transcript necessary to obtain meaningful appellate review. In so holding, *Griffin* enunciated a potentially expansive principle of "equal justice": "[A] state can no more discriminate on account of poverty than on account of religion, race, or color. . . . There can be no equal justice when the kind of trial [or APPEAL ] a man gets depends on the amount of money he has."

Since *Griffin*, the Supreme Court has struck down poverty-based discrimination in only a few other cases, most notably DOUGLAS V. CALIFORNIA (1963) and BODDIE V. CONNECTICUT (1971). *Douglas* held unconstitutional a state's refusal to appoint counsel for an indigent seeking appellate review of a criminal conviction; and *Boddie* held unconstitutional a state's refusal to waive court access fees which deprived an indigent plaintiff of access to the only available forum for obtaining a divorce.

In the vast majority of poverty-based discrimination cases, however, the Supreme Court has treated the poor's claims, whether they involve access to the judicial process itself, equal educational opportunity, or the very means of survival, the same as any other challenged "social and economic" regulation. Thus, the Court has applied the RATIONAL BASIS standard of review to uphold a $50 bankruptcy filing fee against a debtor too poor to pay it; a state financing system that allocated educational resources according to the tax bases of school districts; and an allocation of WELFARE BENEFITS that discriminated on the basis of family size. (See *United States v. Kras*, 1973; SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ, 1973; DANDRIDGE V. WILLIAMS, 1971.)

Several reasons may underlie the Court's refusal actively to scrutinize legislation adversely affecting the poor. If the Court holds a payment requirement unconstitutional as applied to the poor, someone must decide who is poor enough to qualify for this affirmative relief. Moreover, such a holding may require the legislative branch to reallocate its budget to provide the funds necessary to pay for what the poor cannot afford, something which the courts are always reluctant to do, especially in times of economic recession.

Another reason for judicial restraint lies in the need for line-drawing. If not all poverty-based inequalities or deprivations are unconstitutional—as surely they are not in a market economy—then the Court must delineate those interests that are sufficiently "vital" or "fundamental" to justify stricter judicial scrutiny when the state allocates

such interests through a pricing system that deprives poor people from access to them. Obvious candidates include basic necessities such as food, housing, and other means of subsistence. Beginning with its 1971 decision in *Dandridge*, however, the Supreme Court consistently has refused to treat any such interests as entitled to a heightened equal protection standard of review. Moreover, in MAHER V. ROE (1977) the Court carried this refusal to apply a meaningful equal protection standard to any discriminatory "social and economic" legislation to the extreme of validating a provision prohibiting Medicaid funding of abortion although other, including pregnancy-related medical care costs, were funded and the choice to seek an abortion rather than bear a child had been held to be constitutionally protected. Moreover, *Maher* upheld this discrimination even though, unlike the discrimination upheld in all similar prior cases, it cost rather than saved taxpayer dollars. (See HARRIS V. MCRAE, 1980.)

The Court's refusal since 1971 to treat "vital interests" of the poor as comparable to constitutionally guaranteed rights is one matter. In *Maher*, however, the Court validated discrimination only among the poor and solely on the basis of the poor's attempt to exercise a constitutionally guaranteed right of choice otherwise available to everyone. The recent jurisprudence of wealth discrimination legitimates and reinforces a dual system of constitutional rights, leaving the poor—who disproportionately are composed of women, children, the aged, and racial minorities—with paper rights beyond their financial reach.

BARBARA BRUDNO
(1986)

Bibliography

BINION, GAYLE 1982 The Disadvantaged Before the Burger Court: The Newest Unequal Protection. *Law & Policy Quarterly* 4:37–69.

BRUDNO, BARBARA 1976 *Poverty, Inequality, and the Law.* St. Paul, Minn.: West Publishing Co.

——— 1980 Wealth Discrimination in the Supreme Court: Equal Protection for the Poor from *Griffin* to *Maher.* Pages 229–246 in Ron Collins, ed., *Constitutional Government in America.* Durham, N.C.: Carolina Academic Press.

## WEBB-KENYON ACT
37 Stat. 699 (1913)

Although the Supreme Court had generally refused to uphold laws that it characterized as STATE REGULATION OF COMMERCE, a series of decisions in the late nineteenth and early twentieth centuries deferred to such action. Reacting to a clear invitation in the Court's opinion in LEISY V. HARDIN (1890), holding that absent congressional authorization a state could not prevent the importation and first sale of liquor in the original package, Congress passed the Wilson Act. The law subjected intoxicating liquor "to the operation and effect of the laws of [a] State or territory enacted in the exercise of its [STATE ] POLICE POWERS" despite the liquor's journey in INTERSTATE COMMERCE and the ORIGINAL PACKAGE DOCTRINE. The Court sustained that act in *In re Rahrer* (1891).

The Webb-Kenyon Act, passed over the veto of President WILLIAM HOWARD TAFT, divested liquor of its interstate character when introduced in violation of state law. Congress thus effectively allowed state prohibition laws to regulate national commerce in liquor. The Court upheld this act in CLARK DISTILLING COMPANY V. WESTERN MARYLAND RAILWAY CO. (1917).

DAVID GORDON
(1986)

Bibliography

SEMONCHE, JOHN E. 1978 *Charting the Future: The Supreme Court Responds to a Changing Society, 1890–1920.* Westport, Conn.: Greenwood Press.

## WEBSTER, DANIEL
(1782–1852)

As a leading lawyer and politician for forty years, Daniel Webster influenced constitutional development as few others have. When the young New Hampshire representative arrived in Washington in 1813, he immediately became a spokesman for New England interests and remained so until the mid-1820s despite an interruption of congressional service (1817–1823) upon moving to Boston. For most of the time from 1827 to his death in 1852, he was an eloquent nationalist in the SENATE. Except for two periods as secretary of state under Tyler and Fillmore, he spent the last quarter-century of his life in that body, expounding the principles of a perpetual Union and a flexible Constitution. In either role, sectionalist or nationalist, he applied constitutional ideas to political issues with uncommon ability.

During the early years his FEDERALIST partisanship and loyalty to a commercial constitutency led him to oppose Republican policies of embargo and war. Using economic coercion to maintain maritime rights, he believed, intolerably stretched the power to regulate commerce, indeed, it destroyed commerce. And prosecuting an offensive war against Britain caused other constitutional errors: misuse of militia, proposals for federal conscription, encroachment on STATES' RIGHTS. Though not a delegate to the HARTFORD CONVENTION, Webster approved its resolutions. Later he sought, unconvincingly, to dissociate himself

from it. His sectionalism persisted when he opposed the postwar trend toward a protective tariff (1816–1824). Again he voiced a strict constructionist interpretation of the COMMERCE CLAUSE to promote low rates desired by merchants and a system of laissez-faire in the first phase of industrialization.

In the late 1820s, he shifted to a nationalist position concurrently with JOHN C. CALHOUN's shift in the opposite direction. In behalf of rising manufacturers, he joined HENRY CLAY in advocating governmental policies to achieve economic growth and American self-sufficiency. No longer did he oppose use of the commerce power for broad goals. When South Carolina nullified the tariff of 1832, his oratorical duel with Calhoun provided an opportunity to reiterate more comprehensively his constitutional thought, dramatically set forth in his earlier debate with ROBERT HAYNE. Beyond the tariff question, he countered the doctrines of state sovereignty and NULLIFICATION with the concept of a perpetual Union, created by the people, not the states, and composed of two spheres of authority, national and state, both responsible to the people. In event of conflict, Article VI of the Constitution required national supremacy; and the Supreme Court had long performed its proper duty of upholding that rule.

Soon slavery became the focus of politics. Ever since writing a memorial on the Missouri question in 1820, Webster had advocated a national power to prevent western extension of slavery; but he conceded Congress could not touch it in existing states and he soft-pedaled the moral question. Subsequently he opposed ANNEXATION OF TEXAS and further territorial acquisitions from Mexico, fearing they would disrupt the Union. When, in the great congressional debate of 1850, controversy reached a climax, he preferred compromise to save the Union instead of legislation against extension of slavery, constitutionally possible though it was. Antislavery forces attacked him furiously—the more so when the fugitive slave law, a part of the compromise, appeared to violate CIVIL LIBERTIES. As senator, he had inclined toward TRIAL BY JURY for suspected runaways; as secretary of state he insisted upon strict observance of the statute prescribing summary process.

He was very active in the Supreme Court as well as in Congress. Altogether, he argued 168 cases, of which twenty-five involved constitutional questions. He won about half and influenced doctrinal development even in some he lost. Regularly, he set forth nationalistic arguments to limit state power in a day when most congressional powers were dormant. More successful when JOHN MARSHALL was Chief Justice (to 1835) than when ROGER B. TANEY presided, he made a deep impression on the governmental structure. Of the cases strengthening nationalism, MCCULLOCH V. MARYLAND (1819) stands out. Here, though overshadowed by WILLIAM PINKNEY, Webster contributed to a definition of the Union identical to that in his Senate speeches against nullification. And he introduced the aphorism that the power to tax involves the power to destroy. OSBORN V. BANK OF THE UNITED STATES (1824) provided opportunities to advocate expansion of federal court JURISDICTION in the whole field of corporate rights.

The first commerce case the Court heard involved steamboat monopoly (GIBBONS V. OGDEN, 1824). Contending for an exclusive congressional power over INTERSTATE COMMERCE, Webster would have been satisfied with a rule of partially concurrent power. Marshall sympathized with the first option but did not rest his decision on either formula, therefore postponing a judicial guideline. Over the next twenty-five years, Webster participated in several other cases, such as the LICENSE CASES (1847) and the PASSENGER CASES (1849), in an unavailing effort to obtain an exclusive-power decision. At last, in COOLEY V. BOARD OF WARDENS (1851), his protege, Justice BENJAMIN CURTIS, spoke for a majority in laying down a partially concurrent-power standard which preserved about as much exclusive national authority as Webster wished. *Cooley* remains good constitutional law.

Webster's nationalism was not an abstract idea. He connected it with the sanctity of property rights as the very foundation of a dynamic economy. Best illustrating this belief are the CONTRACT CLAUSE cases in which he appeared. DARTMOUTH COLLEGE V. WOODWARD (1819) is a classic in the long history of VESTED RIGHTS shielded from state interference. He relied upon the contract clause of the Constitution as if it were an early version of SUBSTANTIVE DUE PROCESS of law. Though the contract clause, even the concept of vested rights of property, has declined, the notion of active judicial defense of individual constitutional rights flourishes in the area of civil liberties. The *Dartmouth* case was only Webster's first of several dealing with the contract clause.

Webster's career reflected the junction of personal capacity with a favorable setting to establish nationhood and to invigorate a capitalist economy. Still, he may have been flawed by moral oversights and may have encouraged an inequitable distribution of wealth and privilege. Perhaps his contemporaries sensed weaknesses such as these as they passed over him in electing their presidents.

MAURICE G. BAXTER
(1986)

(SEE ALSO: *Constitutional History, 1801–1829; Constitutional History, 1829–1848.*)

Bibliography

BARTLETT, IRVING H. 1978 *Daniel Webster.* New York: W. W. Norton.

BAXTER, MAURICE G. 1966 *Daniel Webster and the Supreme Court.* Amherst: University of Massachusetts Press.
——— 1984 *One and Inseparable: Daniel Webster and the Union.* Cambridge, Mass.: Harvard University Press.
FUESS, CLAUDE M. 1930 *Daniel Webster,* 2 vols. Boston: Little, Brown.

## *WEBSTER v. REPRODUCTIVE HEALTH SERVICES*
### 492 U.S. 490 (1989)

The *Webster* case had been advertised as the one in which the Supreme Court might overrule ROE V. WADE (1973), but in the event the decision offered only minor adjustments at the margins of the constitutional doctrine governing a woman's right to have an ABORTION. The decision's political consequences, however, were anything but minor.

From the time of the *Roe* decision, Missouri has produced a steady stream of legislation designed to restrict women who seek abortions and the doctors who attend them. In this case the Court considered several provisions of a 1986 Missouri law: (1) the preamble, containing the legislature's "findings" that human life begins at conception and that "unborn children have protectable interests in life, health, and well-being"; (2) a prohibition on the use of public facilities or employees to perform abortions; (3) a prohibition against public funding of abortion counseling; and (4) a requirement that a doctor conduct a fetal viability test before performing an abortion. Chief Justice WILLIAM H. REHNQUIST wrote for the Court.

The Court refused to pass on the preamble, saying that, for all the Justices knew, the "findings" had no effect beyond the expression of the legislature's value judgment. The Court upheld the prohibition on using public facilities or public employees in performing abortions, reaffirming the holdings of MAHER V. ROE (1977) and HARRIS V. MCRAE (1980) that the state has no constitutional duty to provide assistance to women who cannot afford abortions. The controversy over the prohibition on using public money for abortion counseling was dismissed for MOOTNESS because the plaintiffs agreed that this part of law did not affect them.

On the validity of the viability-testing provision there was no OPINION OF THE COURT. Chief Justice Rehnquist, for three Justices, interpreted this requirement to conflict with the analysis in *Roe v. Wade* and concluded that, to the extent of the conflict, *Roe* must give way. The testing requirement might make abortions more costly, but it "permissibly further[ed] the State's interest in protecting potential human life" and was constitutional. Justice SANDRA DAY O'CONNOR agreed that the testing requirement was valid, but thought it was consistent with the Court's prior decisions. She thus resisted the invitation to address the question of *Roe*'s continuing force and reaffirmed her earlier position that a law should not be invalidated unless it "unduly burdens" the right to seek an abortion. Justice ANTONIN SCALIA, concurring in upholding the testing requirement, agreed with the dissenters that the Chief Justice's opinion on this issue would effectively overrule *Roe.* He thought, however, that the Court should perform its overruling of *Roe* more explicitly and criticized the majority for failing to do so. In an especially scornful footnote, he rejected Justice O'Connnor's position and lectured her on the vocabulary of "viability."

Justice HARRY A. BLACKMUN, for three Justices, dissented, strongly reaffirming the correctness of *Roe v. Wade* and its successor decisions. He saw the Chief Justice's opinion on Missouri's requirement of viability testing as, in effect, calling for *Roe* to be overruled and added his gloomy prediction of a piecemeal process of overruling "until sometime, a new regime of old dissenters and new appointees will declare what the plurality intends: that *Roe* is no longer good law."

The most important result of *Webster* was political: the mobilization of nationwide support for reproductive freedom. In the year following *Webster,* forty-four legislatures met, and about two-thirds of them considered proposals to restrict abortions; only four adopted restrictions. If *Roe* was a catalyst for the "prolife" movement, *Webster* was a catalyst for the "prochoice" movement. Governors, legislators, and even the President seemed to recognize that two strong views now demanded a hearing.

KENNETH L. KARST
(1992)

## *WEEKS v. UNITED STATES*
### 232 U.S. 383 (1914)

*Weeks v. United States* was the Court's single most creative decision under the FOURTH AMENDMENT. To save the amendment as a living constitutional guarantee, the Court endowed it with an enforcement feature, ordering the exclusion from federal trials of EVIDENCE obtained through unlawful seizure. Without this EXCLUSIONARY RULE, seized evidence, regardless of its origin, would always be admissible. The rule thus has provided the occasion for judicial articulation of Fourth Amendment reasonableness in later cases.

Under COMMON LAW, and for the first century of the Constitution's existence, evidence unlawfully seized by government officers was nonetheless admissible in evidence. In BOYD V. UNITED STATES (1886) the Court implicitly discarded this common law principle, but the exclusionary rule, as it has come to be called, was not explicitly en-

throned until the *Weeks* decision. The reason for admitting unlawfully seized evidence, a standard still followed in nearly all other countries, is readily understood. Unlike coerced confessions, which are excluded from trial in all civilized countries because of their untrustworthiness, the fruit of an illegal search is just as reliable when taken without a shadow of authority as when taken under warrant. To exclude the evidence allows a criminal to go free. Absent the exclusionary rule, however, the Fourth Amendment might become a mere paper guarantee of freedom from UNREASONABLE SEARCHES without an effective enforcement process. Unlike other guarantees in the BILL OF RIGHTS (for example, RIGHT TO COUNSEL), the Fourth Amendment affects the pretrial stage of the case and is—apart from the exclusionary rule—not within the power of the trial court to enforce. The secrecy in which searches are planned and executed makes it impossible to seek the advance protection of an INJUNCTION, a regular practice when FIRST AMENDMENT freedoms are threatened.

The unanimous *Weeks* opinion said that if unconstitutionally seized evidence were admitted, the Fourth Amendment "might as well be stricken from the Constitution." Furthermore, if the evidence were admitted, courts become parties to the misdeeds of the police, thus compromising the integrity of the judicial process.

The opinion did not, however, make clear whether the exclusionary rule was required by the Constitution or merely was the product of the Court's supervisory power over the lower federal courts and thus subject to negation by Congress. Even if the rule is rooted in the Fourth Amendment, the question remains whether it is a personal right of the defendant or just a deterrent against unlawful searches, discardable if other deterrents can be found. The *Weeks* opinion appeared to endorse the first position; use of the evidence, said the Court, would constitute "a denial of the constitutional rights of the accused." More recent decisions, however, favor the deterrent theory. Nonetheless, one who is not himself the victim of an unlawful search but is implicated in crime by the seizure does not have STANDING to challenge admission of the evidence.

JACOB W. LANDYNSKI
(1986)

## *WEEMS v. UNITED STATES*
217 U.S. 349 (1910)

In *Weems*, the Court held that punishment is cruel and unusual if it is grossly excessive for the crime. Paul Weems, a government official in the Philippines, was convicted of falsifying pay records. Under a territorial law inherited from the Spanish penal code, Weems was sentenced to *cadeña temporal*, a punishment involving fifteen years of hard labor in chains, permanent deprivation of political rights, and surveillance by the authorities for life. Since the Philippine Bill of Rights was Congress's extension to the Philippines of rights guaranteed by the Constitution, the meaning of CRUEL AND UNUSUAL PUNISHMENT was the same in both documents.

DENNIS J. MAHONEY
(1986)

# WELFARE BENEFITS

Nothing in the Constitution requires the United States or any state to provide public relief to those unable to earn adequate subsistence. Throughout most of history that relief has been the responsibility of private charity or local government. But several provisions of the Constitution impose an obligation on government officials, where such relief is provided, to refrain from imposing arbitrary standards or procedures. That obligation is generally recognized by legislative bodies and, since the late 1960s, has become a special concern of the federal courts.

The courts have treated questions concerning the extension or withdrawal of public welfare benefits under the PRIVILEGES AND IMMUNITIES, EQUAL PROTECTION, and DUE PROCESS clauses of the Constitution. In SHAPIRO V. THOMPSON (1969) the Supreme Court held that a one-year RESIDENCE REQUIREMENT for welfare eligibility infringed the right of interstate migration, a privilege protected by Article IV and the FOURTEENTH AMENDMENT, and also denied equal protection of the laws to indigent interstate travelers. In GRAHAM V. RICHARDSON (1971) the Court held that denial of benefits to resident ALIENS was a denial of equal protection. However, in DANDRIDGE V. WILLIAMS (1970) the Court decisively rejected argument that WEALTH DISCRIMINATION was a SUSPECT CLASSIFICATION or that welfare subsistence was a FUNDAMENTAL INTEREST. And in *Jefferson v. Hackney* (1972), the Court declined to hold that the equal protection clause required a state to compute the need for public assistance according to the same standard for each of the various welfare programs. Nonetheless in GOLDBERG V. KELLY (1970) the Court held that once benefits were granted they could not be discontinued without PROCEDURAL DUE PROCESS, including NOTICE and FAIR HEARING.

DENNIS J. MAHONEY
(1986)

# WELFARE PROGRAMS

See: Entitlement

## WELFARE RIGHTS

Is there a constitutional right of indigent people to basic survival assistance from the state? The current Supreme Court says no, but there is a strong argument that a future Supreme Court should recognize a positive constitutional right to basic subsistence.

The current Court's view was essentially settled in DANDRIDGE V. WILLIAMS (1971), when the Court ruled that a state law setting a maximum grant of WELFARE BENEFITS to any one family, regardless of family size, was to be categorized as ECONOMIC REGULATION. On this assumption the law should be upheld if it were supported by a RATIONAL BASIS, which the Court found to be present.

For a decade and a half prior to that time, the Court had tantalized scholars and advocates with a series of holdings requiring provision of transcripts to indigent criminal defendants in GRIFFIN V. ILLINOIS (1956), outlawing the POLL TAX because of its impact in barring indigent people from voting in HARPER V. VIRGINIA STATE BOARD OF ELECTIONS (1966), mandating a face-to-face hearing before welfare benefits could be terminated in GOLDBERG V. KELLY (1970), and invalidating durational RESIDENCE REQUIREMENTS for welfare in SHAPIRO V. THOMPSON (1969).

These opinions suggested there was something particularly unacceptable or vulnerable about indigence that required special treatment of indigent people by the state. Some welfare advocates thought the Court might strike down America's patchwork income-maintenance system, in which there was no statutory obligation to help two-parent families and states could set payment levels as they chose.

*Dandridge* was the Court's response, followed as the decade wore on by declarations, in *Lindsey v. Normet* (1972), that there is no constitutional right to any minimum level of housing and, in MAHER V. ROE (1977), that there is no right to any minimum level of health care.

Yet a kernel of DOCTRINE remains to support the notion of a right to subsistence help. Indigence does require the state to take steps it would not otherwise have to take, at least when some other liberty or property interest is also at stake. The state, for example, has no obligation to provide a transcript to the rich, and it can impose durational residential requirements or differential fees for nonresidents applicable to a number of state benefits. But when indigence is involved, the liberty or property interests concerned become vital enough to require a different response from the state.

The Court's handling of public education provides a particularly important clue. In SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIQUEZ (1973), the Court, while upholding Texas's system of school finance, noted that a refusal to provide public education altogether would present a different case, a point it reiterated in *Papasan v. Allain* (1986). Considering that the wealthy can purchase education for their children, these references imply some obligation to provide education for those who cannot afford it. One argument supporting such a claim is that it is difficult to exercise one's political rights effectively without education. The same commonsense argument applies more generally to the status of indigence. Lack of food and shelter impedes political participation, among other things. Insofar as families with children are involved, indigence interferes gravely with the liberty interest in family relations recognized in MEYER V. NEBRASKA (1923). The door left open in *Rodriguez* has important implications.

If the state has a special obligation to protect some liberty and property interests when indigence is also present, it is arguable that there is an analogous liberty interest in not being indigent. Because indigence in an extreme form represents a threat to life itself, it is arguable that the state has an obligation to provide basic subsistence.

The Supreme Court has been reluctant throughout American history to declare any positive constitutional rights—rights creating affirmative obligations for the state to act, even though it has committed no legal wrong. Nonetheless, an alternative stream of doctrine, more muted and episodic, has permitted the Court to impose on the states affirmative obligations to act. For example, the Court's strained efforts to find state action in SHELLEY V. KRAEMER (1948) and MARSH V. ALABAMA (1946) might be characterized as imposing constitutional obligations on states to intervene to nullify unacceptable private arrangements or outcomes of private activities. The claim of a right to a subsistence, or "survival," income can well be said to rest on a similar state obligation to intervene to alter unacceptable market outcomes and vindicate individual liberty interests.

The argument for a right to subsistence does not need to rest solely on the idea of a positive right. For the nonelderly the current welfare system, in terms of cash and cash-equivalent assistance, consists primarily of Aid to Families with Dependent Children (AFDC) and food stamps. Because the states set payment levels for AFDC benefits, combined payment levels under the two programs vary from less than half the poverty level up to a point near the poverty level ($9,435 for a family of three in 1988). The states do not seek to justify this variation by reference to any regional difference in the cost of living—or, indeed, by reference to any other factor. The median state's benefits approximate two-thirds of the poverty-level income. In other words, in half the states welfare assistance brings a family with children up to less than two-thirds of what the government itself says is required to achieve a bare minimum standard of living. No substantial cash or cash-equivalent federal assistance other than food

stamps is available to nondisabled nonelderly individuals or to couples without children.

It is not excessive to argue that this system lacks a rational basis. If any degree of heightened scrutiny were attached to legislation affecting the indigent, it is hard to see how the current welfare system could be justified in the face of an EQUAL PROTECTION challenge. Surely the current Supreme Court would not respond positively to these arguments. Yet similar arguments might be taken seriously by Justices of the future.

PETER B. EDELMAN
(1992)

(SEE ALSO: *Economic Equal Protection; Welfare State.*)

Bibliography

BLACK, CHARLES L., JR. 1985 Further Reflections on the Consitutional Justice of Livelihood. *Columbia Law Review* 86: 1103–1117.

EDELMAN, PETER B. 1987 The Next Century of Our Constitution: Rethinking Our Duty to the Poor. *Hastings Law Journal* 39:1–61.

## WELFARE RIGHTS
(Update)

The twentieth century has witnessed the continuing evolution of a variety of governmental programs aimed at providing aid, in cash or in kind, to the poor. Once a supplement to private and religious charitable programs, governmental aid to the poor has become the single most important source of poverty relief in contemporary America. Some of these programs are denominated insurance programs, providing benefits to people who make, or have made for them, contributions to a fund upon the occurrence of certain events. The most important examples of these types of programs are Social Security and unemployment insurance. The former provides payments to certain categories of the aged, the infirm, and their dependents, and the latter provides for a finite number of periodic payments in the event of certain kinds of job loss. In each case, such payments can significantly exceed and usually bear very little relationship to an individual's contributions to the "fund" from which payments are made. What we have come to know as "welfare" does not include programs such as these. Instead, welfare, or public assistance, has come to mean public programs, financed from federal, state, or local funds, that furnish financial assistance or assistance in kind to families or individuals who meet specific conditions. The most important program of in-kind aid is administered through the Food Stamp Act of 1964, which subsidizes the purchase of food by permitting a recipient to pay for food with program vouchers (or "food stamps"). For able-bodied unemployed men, for women without minor children, or for two-parent families, the most likely sources of public assistance are state or local programs of general assistance. These are the oldest programs of American public assistance and trace their origins directly to the Elizabethan Poor Laws. These programs serve as the last resort of governmental aid for people who are ineligible for unemployment compensation or Social Security related programs, and who are unable to qualify for any other program of governmental assistance.

For roughly sixty years prior to 1996, however, the largest and most significant form of welfare was the elaborate system of federal supplemental payments to states for payments to certain categories of the poor, primarily poor women with minor children. This federal grant program was known as Aid to Families with Dependant Children (AFDC). AFDC was originally conceived as a program to provide supplemental federal assistance to state welfare programs targeted to destitute children where the family breadwinner was dead, disabled, or absent. Most of the beneficiaries were white widows. By the 1990s, it had evolved into a primary source of benefits for poor women who headed their households alone and had minor children. Disproportionate numbers of beneficiaries were Latina or African American. While the federal government provided most of the funds for the program, and imposed significant regulations for the administration and availability of the program, participating states retained great latitude in the construction of their programs. Under AFDC rules, no eligible person could be denied benefits, but states had wide latitude in setting benefit levels and in implementing the minimal program requirements imposed by federal rules. The AFDC program proved highly controversial during the last forty or so years of its existence. Political liberals tended to believe that the program was too restrictive, its benefit levels too low, and its reliance on state administration archaic. Political conservatives insisted that the AFDC program benefits were too high, subsidized out-of-wedlock births and single-parent homes (which they considered an undesirable substitute for MARRIAGE), and created a "culture of dependency" passed down from mothers to children.

By 1995, political conservatives had won the day. Their solution to the problem posed by AFDC was the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). The act eliminated the entitlement status of payments, replacing AFDC with Temporary Assistance for Needy Families (TANF). Federal assistance continues to be delivered to the states as a targeted supplement to state assistance programs, but now such payments are bundled as block grants to the states. TANF grants remain contingent upon com-

pliance with a number of minimum federal requirements, but the quantity and scope of such requirements have decreased substantially from those under the old AFDC program. PRWORA tightens the rules for the receipt of food stamps, permits states the power to deny cash assistance to children born to women while they are receiving benefits, and tightens rules of eligibility for Medicare and Supplemental Social Security Income payments. Under PRWORA, state aid programs must impose significant work requirements on recipients and must meet certain minimum state funding requirements based on the level of state contributions to their AFDC programs. In addition, PRWORA gives a state broad authority to limit the amount of aid recipients may receive over their lifetime and to restrict aid to young mothers and documented and undocumented noncitizen immigrants. PRWORA also creates a comprehensive system for collecting child support payments from absent fathers.

Beyond these minimal federal requirements, PRWORA devolved substantial authority over the scope and means of the provision of benefits to the individual states. Subject to minimal standards set forth in PRWORA or in related regulations, states have authority to set benefit levels, eligibility criteria, and time limits for welfare benefits. Indeed, a state now appears to have power to determine the form of benefit as well as its level. In-kind benefits may be substituted for cash benefits, though few states have chosen to shift significantly to programs of in-kind benefits. States have leeway to define work requirements and the punishments for individual failure to comply, and to set the terms for income and asset acquisition for recipients making the transition from welfare benefits to self-sufficiency. As a result, much of the political conflict over welfare policy has shifted from the federal level to the state level, and the possibility of uniform standards of poverty relief is remote.

The Supreme Court has given great deference to legislative judgments, both state and federal, concerning WELFARE BENEFITS. As the Court wrote in DANDRIDGE V. WILLIAMS (1970), "here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights." "Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level," the Court explained in *Bowen v. Gilliard* (1987). Where the Justices are persuaded that the issue is "economic" or "social," they have declined to extend federal constitutional protection to the substantive right to benefits. Thus, the Court held that the federal Constitution does not create a right to subsistence nor does it compel states to raise benefit levels to some minimally acceptable level. Nor is the federal government constitutionally compelled to maintain programs at any particular funding level. In contrast, several state courts have interpreted their state constitutions as requiring the provision of benefits.

The Supreme Court's deference has extended beyond the realm of welfare benefit programs. In a perversely ironic example of this reasoning, the Court held in *United States v. Kras* (1973) that the poor have no constitutional right to seek the protection of the federal bankruptcy laws without paying filing fees. The Court reasoned that there existed no constitutional right to bankruptcy protection and that the fees did not deny the indigent plaintiff the EQUAL PROTECTION OF THE LAWS. Rather than being a fundamental right, "bankruptcy legislation is in the area of economics and social welfare. This being so, the applicable standard, in measuring the propriety of Congress' classification, is that of the rational justification." A similar result was reached in *Ortwein v. Schwab* (1973), in which the Court held that the Constitution does not prohibit the imposition of a fee for appellate review of state administrative determination of welfare benefits.

On the other hand, the Court has applied federal constitutional principles of procedural fairness to deprivations of property in both the commercial and welfare context. In a celebrated decision, GOLDBERG V. KELLY (1970), the Court held that constitutional DUE PROCESS principles required the state to afford recipients meaningful notice and a meaningful opportunity to be heard before terminating welfare benefits. But the rights accorded under *Goldberg* left the basic structure of welfare untouched. It increased the cost to the state of individual deprivations but did not prohibit the state from limiting or eliminating welfare entirely.

Litigation over programs in aid of the poor has generated a significant body of case law treating issues of FEDERALISM, but not really touching on the fundamental constitutional condition of the poor themselves. In each of these cases, all decided under the AFDC rules, the Court shifted to the federal government the locus of the authority to interpret and control state welfare programs largely dependent on federal support. In these cases, the Court has consistently reasoned that because federal money was being used to subsidize and largely finance state welfare programs, and because the transfer of such money was conditioned by compliance with a host of complicated and far-reaching rules, the proper interpretation and implementation of such programs at the state level became the province of the federal government, subject to limitations, if any, of the federal Constitution.

This reasoning was sharpened in three cases in which the Court chose to concentrate on issues of federalism in the interpretation of the welfare statutes themselves. In *King v. Smith* (1968), the Court interpreted federal welfare rules to preclude Alabama from denying welfare benefits to otherwise eligible families because the mother

might have an intimate relationship with a man who was not her husband. In *Townsend v. Swank* (1971), the Court determined that states had no power to vary the terms of optional programs under federal welfare legislation. In *Carlson v. Remillard* (1972), state rules that denied benefits to the family of a soldier serving in the VIETNAM WAR were voided for conflicting with federal welfare eligibility rules. In each of these cases, the Court focused on a determination of the appropriate level of governmental authority to make and alter the challenged welfare rules, rather than on the substance of the welfare rules themselves. In each of the cases, the Court favored the federal over the state power to regulate welfare. The Court, however, carefully avoided constitutionalizing its placement of power or limiting the power of government to change the substance of the rules at issue. The federal government was constitutionally free to devolve power to the states, or to legislate a different substantive result—just as Congress did when it overhauled the federal government's involvement in welfare in the form of PRWORA.

The poor fare better when deprivations related to their socioeconomic position also directly affect another constitutionally protected right or interest. The most important "fundamental interests" protected by the courts are the RIGHT TO TRAVEL, the right to family life, and the right to liberty. The most significant case in this vein was SHAPIRO V. THOMPSON (1969), which held that special waiting period requirements for eligibility for federal categorical relief programs unreasonably burdened the constitutionally protected right to travel. State residency rules were not at issue in this case; instead, the Court was concerned only with the power of states to create, through waiting period rules, unacceptable local deviations in a federally subsidized program, which might hinder the ability of beneficiaries to take advantage of the program's terms nationally. In a sense, the case held no more than that the right of the poor to travel was no less worthy of protection than the right to interstate commerce in goods.

In SAENZ V. ROE (1999), the Court again visited the issue of state residency rules for the receipt of state government assistance. In striking down a California provision limiting new residents, for the first year they lived in California, to the amount of benefits they would have received in the state of their former residence, the Court reaffirmed the constitutional protection of the right to travel and, more importantly, expanded on the meaning of the PRIVILEGES AND IMMUNITIES clause of the Fourteenth Amendment. The Court held that the privileges and immunities clause guarantees the right of newly arrived citizens of a state to be treated the same as all other citizens. Though the Constitution does not restrict a state's right to limit benefits, a state cannot create different levels of benefits based on the duration of residence of its citizens.

The Court has also been solicitous of a poor person's right to family life. A poor person has a constitutionally protected right to access to a divorce court under BODDIE V. CONNECTICUT (1971). Preservation of the right of indigents to control their family lives has also been protected based on the Court's interpretation of the due process and equal protection clauses of the Fourteenth Amendment. In *Lassiter v. Department of Social Services* (1981), the Court held that under certain circumstances the state is constitutionally required to appoint counsel for an indigent person seeking to defend against state proceedings to terminate parental rights. The poor also have, under M.L.B. V. S.L.J. (1996), the right to access to appeals from decisions terminating their parental rights without having to pay court fees.

In criminal cases, the poor have been conceded the RIGHT TO COUNSEL and access to the courts, without charge, under some circumstances. These include, under GIDEON V. WAINRIGHT (1963), when the indigent defendant is charged with a felony or, under DOUGLAS V. CALIFORNIA (1963), when the indigent defendant is accorded an appeal as of right. Indigents must also, under GRIFFIN V. ILLINOIS (1956), be provided with the record required for a criminal appeal.

LARRY CATÁ BACKER
(2000)

Bibliography

ABRAMOVITZ, MIMI 1988 *Regulating the Lives of Women: Social Welfare Policy From Colonial Times to the Present.* Boston: South End Press.

BACKER, LARRY CATÁ 1995 Medieval Poor Law in Twentieth Century America: Looking Back Towards a General Theory of Modern American Poor Relief. *Case Western Reserve Law Review* 1995:871–1041.

——— 1996 Poor Relief, Welfare Paralysis, and Assimilation. *Utah Law Review* 1996:1–49.

HANDLER, JOEL F. and HASENFELD, YEHESKEL 1991 *The Moral Construction of Poverty: Welfare Reform in America.* Newbury Park, Calif.: Sage Publication.

KATZ, MICHAEL 1989 *The Undeserving Poor: From the War on Poverty to the War on Welfare.* New York: Pantheon Books.

MARMOR, THEODORE 1990 *America's Misunderstood Welfare State: Persistent Myths, Enduring Realities.* New York: Basic Books.

MURRAY, CHARLES 1984 *Losing Ground: American Social Policy, 1950–1980.* New York: Basic Books.

# WELFARE STATE

The United States Constitution, unlike many constitutions in the world, does not mandate WELFARE RIGHTS. For example, the Soviet Constitution of 1977 provided for "guar-

anteed work, health protection, [and] education." In contrast, our Constitution guarantees FREEDOM OF SPEECH, FREEDOM OF THE PRESS, and VOTING RIGHTS that cannot be denied because of race or sex. The people can then use the right to vote and the right of free speech and other such rights to persuade legislators to enact laws providing for welfare rights such as WORKERS' COMPENSATION, public education, aid to dependent children, Social Security benefits, medicare, and so forth. The United States Constitution, in short, guarantees democracy, and with democracy the people can choose to have as much or as little of a welfare state as they wish.

Such is the modern view of the American Constitution, but it was not always so. To understand the modern view we must first look briefly at the historical background. Toward the end of the last century and during the first part of this century until President FRANKLIN D. ROOSEVELT'S 1937 COURT-PACKING plan, the Supreme Court was antagonistic toward the early efforts of the state and federal governments leading to the modern welfare state. The Court, often over biting dissents, invalidated efforts to enact a progressive federal income tax, minimum-wage legislation, maximum-hour laws, child labor laws, and so forth.

Justice OLIVER WENDELL HOLMES, JR., was one who dissented from the Court's efforts (through the use of the DUE PROCESS clause, a belief in "liberty of contract," and a narrow interpretation of federal commerce powers) to limit the power of the government to engage in social welfare legislation. Holmes's dissent in LOCHNER V. NEW YORK (1905) objected to the majority's decision invalidating a state law setting sixty hours as the maximum workweek for bakers. "The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Later, in ADKINS V. CHILDREN'S HOSPITAL (1923), when the Court invalidated a federal law setting minimum wages for women and children in the DISTRICT OF COLUMBIA, Holmes said in dissent, "Pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts."

Within five years of Holmes's leaving the Court (after FDR's Court-packing plan of 1937 failed), the Court effectively overruled more than a quarter-century of opinions and recognized the power of the state and federal governments to engage in a wide range of activities that promoted various aspects of a modern welfare state. Although the constitutional power of government to provide welfare benefits does not constitutionally obligate it to do so, the Constitution does place important limits on the government's discretion.

The Constitution assures that once the state grants welfare rights, those benefits are not distributed in a way that violates substantive guarantees. For example, there is no constitutional requirement that a state enact legislation providing public housing for poor people. However, the Fourteenth Amendment forbids the state, once it has provided for public housing, to pass out such benefits in a way that violates the EQUAL PROTECTION OF THE LAW. Thus, if a state builds public housing, it cannot then exclude poor people who are black, for to do so would constitute RACIAL DISCRIMINATION in violation of the equal protection clause. Similarly, if the state provides for medical services as part of its welfare program, the state cannot deny those medical services to Democrats or Socialists, because that would unconstitutionally deprive someone of a governmental benefit because of that person's beliefs, in violation of the FIRST AMENDMENT as applied to the states through the INCORPORATION DOCTRINE.

Implied constitutional rights, like explicit ones, limit the states when they distribute welfare benefits. For example, the Constitution does not explicitly grant a RIGHT TO TRAVEL within the United States, and yet the right certainly exists. As Justice POTTER J. STEWART noted in UNITED STATES V. GUEST (1966), although the right to travel "finds no explicit mention in the Constitution," the explanation may be that "a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."

Thus, in EDWARDS V. CALIFORNIA (1941) the Court invalidated, under the commerce clause, a California statute that made it a misdemeanor to assist in bringing into that state any indigent person who was not already a resident of California and was known to be an indigent. The Court rejected the state's argument that the migration of poor persons brought severe health and financial problems to the state. The concurring opinion of Justice ROBERT H. JACKSON noted that "indigence' itself is neither a source of rights nor a basis for denying them." Otherwise, the heritage of our constitutional privileges and immunities "is only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will."

Later, in SHAPIRO V. THOMPSON (1969), the Court invalidated several state statutes and a District of Columbia statute that denied welfare benefits to persons who had not resided within the jurisdiction for at least one year. The Court struck these durational RESIDENCE REQUIREMENTS because the state laws violated the equal protection

clause of the Fourteenth Amendment and because the law of the District of Columbia (which is not governed by the Fourteenth Amendment because it is not a state) violated the equal protection component that has been found within the due process clause of the Fifth Amendment (which restricts the federal government).

The Court argued that the effect of the residence requirements was to deter the entry of indigents into jurisdictions with durational residence requirements, thus burdening the indigents' right to interstate travel. Because this right to travel is "fundamental," the Court would invalidate the statutory classification unless the state could show that it was "necessary to promote a *compelling* governmental interest" (emphasis in original). The majority rejected the argument that the durational residence requirement was necessary to deter indigents who migrated solely to obtain another jurisdiction's more favorable welfare benefits, holding that no state has the right to exclude poor persons from its borders. Nor may a state distinguish between new and old residents when that distinction burdens the fundamental right to travel. The states (and the District of Columbia), said the Court, may not create subclasses of citizens based on the length of time that persons have been residents. The states, in short, may require that indigents be residents of the state at the time they apply for welfare benefits, but the states may not impose durational residence requirements.

Similarly, in *Memorial Hospital v. Maricopa County* (1974) the Court invalidated an Arizona statute requiring a one-year durational residence in a county as a condition for receiving nonemergency medical care at the county's expense. The Court said that medical care, like welfare assistance, is "a basic necessity of life"; hence, the case was governed by *Shapiro v. Thompson*.

However, in *Starns v. Malkerson* (1971) the Court upheld a University of Minnesota regulation providing that no student could qualify as a resident for purposes of lower in-state tuition unless the student had been a resident of Minnesota for a year. College tuition, unlike food, clothing, or shelter, is not one of the basic necessities of life.

In HARPER V. VIRGINIA STATE BOARD OF ELECTIONS (1966) the Court invalidated a Virginia law conditioning voting on payment of an annual POLL TAX of $1.50. Voting, said the Court, is a FUNDAMENTAL RIGHT preservative of our other rights, and hence, a state violates the equal protection clause whenever it makes the affluence of the voter or payment of any fee a requirement for voting. The state has the power to fix qualifications for voting, such as requiring residence and voting registration. But "wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process."

The Court has also held that indigents must be granted equal access to various aspects of the criminal process that are basic to the fair determination of their guilt or innocence. Once the state has fulfilled this duty by giving indigents the opportunity for a FAIR TRIAL and access to the initial appellate process, there is no requirement that the state go further and level all economic distinctions by continuing to provide free counsel throughout successive appeals and collateral attacks.

These cases illustrate an important aspect of Supreme Court jurisprudence involving welfare rights and the Constitution. When the Court reviews certain classifications under the equal protection clause—for example, a classification based on race or color—the Court treats the classification as "suspect" and unlikely to be approved unless the state can demonstrate that the SUSPECT CLASSIFICATION is necessary to promote a COMPELLING STATE INTEREST. Thus, in cases like BROWN V. BOARD OF EDUCATION (1954), the Court invalidated state laws requiring school SEGREGATION according to race. Similarly, the Court engages in active review under the equal protection clause of state laws that classify "fundamental" rights (like the right to travel or the right to vote) on the basis of poverty.

Modern Supreme Court Justices have concluded that where suspect classes or fundamental rights are not at issue there is nothing in the Constitution that authorizes judges to decide economic policy regarding the allocation of income and wealth through the review of legislative classifications. Poverty, unlike race, is not a suspect classification. And there is no fundamental constitutional right to be free of poverty. As a general matter, the state constitutionally may engage in legislative classifications that pass out benefits or burdens in ways that disadvantage poorer people so long as the law has a RATIONAL BASIS. Thus, a state may enact a progressive income tax, even though such a law requires richer persons to pay a greater percentage of their income to the states than poorer persons. Or a state may enact a sales tax on food, although such a regressive tax requires poorer persons to pay a greater percentage of their income to the states than do richer persons.

For example, the Court rejected the challenge to the welfare law involved in DANDRIDGE V. WILLIAMS (1970). In that case, the Court upheld state legislation that set a maximum amount for welfare aid to any one family; the law, in effect, offered lessened benefits for children born to families over a certain size. The appellees in that case argued that the law violated the equal protection clause by discriminating against them because of their larger families. The majority rejected the claim: "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification

has some "reasonable basis,' it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality.'" There is a fundamental right to travel; there is no fundamental right to welfare.

Similarly, although a woman may have a constitutional right to an ABORTION under certain circumstances, it is constitutional for the state to deny state funding for medically necessary abortions, even when it is providing funds for childbirth. The state need not provide affirmative assistance to a poor woman to procure an abortion any more than the state must provide subsidized airfare to protect an indigent's right to travel.

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ (1973) upheld the constitutionality of a state property tax system that financed primary and secondary education in such a way as to create different districts with large variations in the amount of money spent on the education of children, depending on where the children lived. Some districts were much richer than others, with the poorer districts having much less taxable wealth subject to the property tax. The majority found nothing in the allocation of education opportunities based on district wealth that furnished a constitutional justification for active and close judicial supervision of the legislative policy. The Court emphasized that it had never adopted an active standard of review solely because the law burdened poor persons in the allocation of benefits, unless those benefits were deemed to be fundamental constitutional rights.

However, in a footnote to the majority opinion in *Rodriguez*, Justice LEWIS F. POWELL suggested that if a state set up an educational system that absolutely deprived poor children of the opportunity for any education, legislative choice might raise problems under the equal protection clause: "If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor' people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today."

In short, the issue in fundamental rights cases is whether the statute in question limits the fundamental right in a way that violates the Constitution, and not whether the statute is fair or unfair to poor people. In fact, the law in question may be unconstitutional, even though it seeks to level wealth distinctions in the exercise of the fundamental right rather than to create wealth distinctions. In BUCKLEY V. VALEO. (1976), for example, the Court invalidated limits on campaign spending by candidates for public office as an unconstitutional burden on the fundamental right to free speech, guaranteed by the First Amendment. Although Congress designed the legislation in part to equalize the ability to run for office between persons of differing wealth, the Court found no interest of a sufficiently compelling magnitude to justify the limitation on free speech rights.

In addition to these substantive guarantees, the Constitution also provides procedural protections for persons entitled to welfare benefits under state or federal law. The due process clause of the Fourteenth Amendment forbids a state to deprive any person of life, liberty, or property without due process of law. The Fifth Amendment similarly restricts the federal government. Since 1970, the Supreme Court has recognized that government welfare benefits may constitute statutory ENTITLEMENTS , a new type of "property" that the government may not take away without offering basic procedural protections.

In GOLDBERG V. KELLY (1970) the Court held that a state could not constitutionally terminate public assistance payments for a recipient without affording her the opportunity for an evidentiary hearing prior to the termination. As the Court later explained in BOARD OF REGENTS V. ROTH (1972):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. . . . He must have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that secure certain benefits and that support claims of entitlements to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly* had a claim of entitlement to welfare benefits that was grounded in the statute defining eligibility for them.

Government need not offer welfare or other such benefits to its citizens. But once government decides to offer such benefits and establishes standards that define when a person is eligible, the government has created an entitlement and cannot arbitrarily deny those benefits. It must provide PROCEDURAL DUE PROCESS. The government may provide benefits in cash, such as social security benefits or farm subsidies; it may offer benefits in kind, such as free housing in a publicly-owned building; it may offer benefits in hybrid forms, such as food stamps, which can only be redeemed for particular items. In all cases, once the government establishes such benefits as entitlements, the

government can withdraw them from particular individuals only after it offers procedural protections such as fair notice and an opportunity to be heard.

The U.S. Constitution does not demand a welfare state. Yet the Constitution is flexible and adaptable enough to allow it. The Constitution guarantees that if the state does provide for welfare protection, the state's largess will be subject to various substantive and procedural limitations.

RONALD D. ROTUNDA
(1992)

(SEE ALSO: *Campaign Finance; Economic Due Process; Economic Equal Protection; Economic Regulation; Poverty Law and the Constitution; Substantive Due Process.*)

Bibliography

NOWAK, JOHN E. and ROTUNDA, RONALD D. 1991 *Constitutional Law*, 4th ed. St. Paul, Minn.: West Publishing Co.

REICH, CHARLES 1964 The New Property. *Yale Law Journal* 73:733–787.

ROTUNDA, RONALD D. et al. 1986 *Treatise on Constitutional Law: Substance and Procedure.* 3 vols. St. Paul, Minn.: West Publishing Co.

VAN ALYSTYNE, WILLIAM 1968 The Demise of the Right-Privilege Distinction in Constitutional Law. *Harvard Law Review* 81:1439–1464.

WINTER, RALPH 1972 Poverty, Economic Equality, and the Equal Protection Clause. *Supreme Court Review* 1972:41–102.

## *WELSH v. WISCONSIN*
466 U.S. 740 (1984)

In *Welsh* the Supreme Court considered and rejected an exception to its rule of PAYTON V. NEW YORK (1984) that the FOURTH AMENDMENT prohibits a warrantless arrest in one's home in the absence of EXIGENT CIRCUMSTANCES. Police made a warrantless night entry of a private home to arrest a man for committing the nonjailable offense of driving while drunk. Justice WILLIAM J. BRENNAN for a 6–2 Court rejected the state's reliance on the hot pursuit doctrine because the police had not in fact engaged in a pursuit. In view of the state's classification of a first-offense drunk-driving offense as a minor crime meriting merely a fine, the Court also rejected the argument that the need to get a blood-alcohol test without delay provided an exigent circumstance.

LEONARD W. LEVY
(1986)

## *WENGLER v. DRUGGISTS MUTUAL INSURANCE COMPANY*
446 U.S. 142 (1980)

Missouri's workers' compensation law provided death benefits to all widows but only to widowers who proved actual dependence on their wives or incapacity to earn a living. The Supreme Court, 8–1, held this SEX DISCRIMINATION invalid, following CRAIG V. BOREN (1976) and CALIFANO V. GOLDFARB (1977).

KENNETH L. KARST
(1986)

## *WESBERRY v. SANDERS*
376 U.S. 1 (1964)

After BAKER V. CARR (1962) held that legislative districting presented a justiciable controversy, the Supreme Court held in *Wesberry*, 8–1, that a state's congressional districts are required by Article I, section 2, of the Constitution to be as equal in population as is practicable. That section provides that representatives are to be chosen "by the People of the several States." Justice JOHN MARSHALL HARLAN dissented on both textual and historical grounds.

Later decisions make clear that no justifications can excuse substantial deviation from population equality in congressional districting.

KENNETH L. KARST
(1986)

## *WEST COAST HOTEL COMPANY v. PARRISH*
300 U.S. 379 (1937)

This decision sustaining a Washington state minimum wage statute in March 1937 signaled a seismic shift in judicial philosophy toward acceptance of the validity of social and economic legislation. Together with the WAGNER ACT CASES, the decision reflected a new, favorable judicial attitude toward the NEW DEAL, thus defusing FRANKLIN D. ROOSEVELT'S COURT-PACKING proposal.

The constitutionality of minimum wage legislation had a peculiar history. In MULLER V. OREGON (1908) and BUNTING V. OREGON (1917) the Justices had approved state laws regulating maximum working hours, including provisions for overtime wages. In 1917, the Court divided evenly on an Oregon minimum wage law. WILLIAM HOWARD TAFT, among others, confidently presumed that LOCHNER V. NEW YORK's (1905) rigorous FREEDOM OF CONTRACT doctrines no

longer applied. Yet in 1923, a 5–3 majority of the Court reaffirmed the *Lochner* ruling, and in ADKINS V. CHILDREN'S HOSPITAL (1923) the Court invalidated a DISTRICT OF COLUMBIA minimum wage statute. New Chief Justice Taft sharply attacked the majority's reasoning. He found no distinction between MAXIMUM HOUR AND MINIMUM WAGE LAWS: one was the "multiplier and the other the multiplicand." Although Taft reiterated his belief that *Lochner* had been tacitly overruled, *Lochner* nevertheless persisted until the *Parrish* decision in 1937.

After *Adkins*, the Court invalidated other state minimum wage laws. The Great Depression, however, stimulated new state laws, perhaps encouraged by Justice GEORGE SUTHERLAND'S OBITER DICTUM that "exceptional circumstances" might justify such legislation. But in MOREHEAD V. NEW YORK EX REL. TIPALDO (1936), a 5–4 majority held to the *Adkins* precedent and invalidated a recent New York law. The Court's opinion masked Justice OWEN J. ROBERTS's uneasiness. Roberts had supported PIERCE & BUTLER, JAMES C. MCREYNOLDS, George Sutherland, and WILLIS VAN DEVANTER in *Tipaldo*, but he later revealed that the state counsel's argument that *Adkins* merely be distinguished, and not overthrown, had obliged him to follow the precedent. Six months later, Roberts provided the key vote to consider the Washington law. On the surface, the procedure was justified on the ground that the state court had upheld the statute, but the combination of the *Tipaldo* dissenters' strongly held views on constitutionality and Roberts's skepticism toward *Adkins* dictated a full-scale review of the issue.

Roberts later stated that he had decided in favor of the statutes after arguments in December 1936 and that he had successfully urged delaying the decision pending HARLAN FISKE STONE's recovery from illness in order to mass a majority. Stone returned shortly after Roosevelt submitted his court-packing proposal in early February. Chief Justice CHARLES EVANS HUGHES then withheld the announcement until March 29, perhaps to avoid appearances of political submission.

Hughes's majority opinion decisively repudiated *Lochner* and *Adkins*. He argued that the Constitution nowhere enshrined freedom of contract and that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is DUE PROCESS." Seeking to deflect the outraged protests of his more conservative brethren, Hughes invoked Taft's *Adkins* dissent: "That challenge persists and is without any satisfactory answer."

Invoking the public interest doctrine of NEBBIA V. NEW YORK (1934), Hughes asked what could be "closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers?" Accordingly, Hughes held that the minimum wage statute was reasonable and not "arbitrary or capricious." That, he concluded, "is all we have to decide."

Sutherland, speaking for the dissenters, passionately reiterated his *Adkins* doctrine. More broadly, Sutherland also implicitly addressed Stone's scathing dissent in UNITED STATES V. BUTLER (1936), which had pleaded for judicial self-restraint and an end to judges' imposition of their own social and economic predilections. The notion of self-restraint, Sutherland retorted, was "ill considered and mischievous"; it belonged "in the domain of will and not of judgment." Judges were bound to enforce the Constitution, he said, according to their own "conscientious and informed convictions." Sutherland concluded that freedom of contract remained the rule. The intervening economic conditions altered nothing, for "the meaning of the Constitution," he said, "does not change with the ebb and flow of economic events." Sutherland's dissent was both an apologia and an obituary for a judicial philosophy eclipsed by new realities.

STANLEY I. KUTLER
(1986)

Bibliography

MASON, ALPHEUS T. 1956 *Harlan Fiske Stone.* New York: Viking Press.

## *WESTON v. CITY COUNCIL OF CHARLESTON*
2 Peters 449 (1829)

The Supreme Court, in an opinion by Chief Justice JOHN MARSHALL, held unconstitutional a city ordinance taxing interest-bearing stock of the United States, on the grounds that the tax burdened the ENUMERATED POWER of the United States to borrow money on its credit. The principle of the opinion, that an instrumentality of the United States is immune from taxation by state and local governments, derived from MCCULLOCH V. MARYLAND (1819).

LEONARD W. LEVY
(1986)

(SEE ALSO: *Intergovernmental Immunity.*)

## *WEST RIVER BRIDGE COMPANY v. DIX*
6 Howard 529 (1848)

The *West River Bridge* case challenged a Vermont law of 1839 authorizing county officials to expropriate the rights of way, real estate, or entire franchises of chartered com-

panies in order to provide their communities with free public roads. County officials condemned the entire franchise and property of the West River Bridge Company, which had been given a hundred-year franchise under a charter of 1795 for a bridge near Brattleboro, an important market town. The stockholders were awarded $4,000 in damages. The company's appeal was rejected by the Vermont Supreme Court, and the case was then carried to the United States Supreme Court.

DANIEL WEBSTER, as counsel for the company, sought in his arguments to reopen virtually all the issues of CHARLES RIVER BRIDGE V. WARREN BRIDGE COMPANY (1837). He contended that rising popular disregard for franchised rights of corporations would legitimate the worst "levelling ultraisms or Antirentism or Agrarianism or Abolitionism." Eminent domain was a power inappropriate to republican government, he contended, and the bridge taking was in blatant violation of the CONTRACT CLAUSE. Nonetheless, the Court, with Justice JAMES M. WAYNE dissenting, upheld Vermont's action. Each of the three opinions filed declared that eminent domain was a power fundamental to the states, had long been exercised by them, was not restrained by the contract clause, and extended as much to franchises as to any other type of property. As the first Supreme Court ruling that dealt directly with the states' power of eminent domain and related procedural matters, *West River Bridge* complemented the *Charles River Bridge* decision; both supported the states' authority to accommodate technological change and social and entrepreneurial needs.

HARRY N. SCHEIBER
(1986)

## *WEST VIRGINIA BOARD OF EDUCATION v. BARNETTE*

See: Flag Salute Cases

## *WHALEN v. ROE*
429 U.S. 589 (1977)

Rejecting a claim based on the constitutional RIGHT OF PRIVACY, a unanimous Supreme Court upheld a New York law requiring storage in a computer file of the names and addresses of persons who obtain, by doctors' prescriptions, such drugs as opium, methadone, cocaine, and amphetamines. Justice JOHN PAUL STEVENS, writing for the Court, noted that previous decisions recognizing a right of privacy had involved two different kinds of interests: (1) "avoiding disclosure of personal matters"; and (2) "independence in making certain kinds of important decisions." Both interests were arguably implicated here; there was some risk of disclosure of a drug user's name, and that risk could have deterred the prescription or use of such drugs even when they were medically advisable. Nonetheless, and despite a district court finding that the state had not proved the necessity of storing this personal information, the Court concluded that the law was valid. The state's interest in DRUG REGULATION was vital; the legislature was entitled to experiment with reasonable means for achieving that end. Balanced against this objective, the invasions of privacy were too slight to constitute invasions of either patients' or doctors' constitutional liberties.

KENNETH L. KARST
(1986)

## WHEATON, HENRY
(1785–1848)

Henry Wheaton read law in his native Providence, Rhode Island, and studied civil law in France in 1805–1806. While in France he translated the new *Code Napoléon* into English. He became the first official reporter for the United States Supreme Court under an 1816 statute creating that position. From 1816 to 1827 Wheaton edited twelve volumes of United States Reports. While official reporter he argued a number of cases, including GIBBONS V. OGDEN (1824). In *Wheaton v. Peters* (1834) he unsuccessfully sued his successor, Richard Peters. The Supreme Court ruled that no individual could hold a COPYRIGHT on Supreme Court opinions. From 1827 to 1846 Wheaton held various diplomatic positions and wrote extensively on international law. His works included *Elements of International Law*, *History of the Law of Nations* (1842) and an essay on the African slave trade (1842). He was the foremost American expert on international law during his lifetime.

PAUL FINKELMAN
(1986)

Bibliography

BAKER, ELIZABETH F. 1937 *Henry Wheaton, 1785–1848.* Philadelphia: University of Pennsylvania Press.

## WHEELER, BURTON K.
(1882–1975)

A Montana Democrat, Burton K. Wheeler ranked with GEORGE NORRIS of Nebraska and William Borah of Idaho as one of the major liberal leaders of the United States

SENATE, where Wheeler served from 1923 to 1946. In the 1924 presidential campaign, ROBERT M. LA FOLLETTE of Wisconsin headed the Progressive party ticket, with Wheeler as his running mate. They attracted more votes than any previous third party, and their platform provided an agenda for the NEW DEAL. One plank urged an amendment to the Constitution providing that a two-thirds majority in both houses of Congress might override any judicial decision holding a congressional enactment unconstitutional. Although Wheeler was a critic of the Supreme Court and of JUDICIAL REVIEW, he insisted that a constitutional amendment was the only proper means of reform; accordingly, he broke with FRANKLIN D. ROOSEVELT in 1937 by opposing his COURT-PACKING plan. It was Wheeler, an ally of Justice LOUIS D. BRANDEIS, who produced the letter by Chief Justice CHARLES EVANS HUGHES that contributed to the 10–8 vote against the bill by the Senate Judiciary Committee. Wheeler remained a liberal, though he was an isolationist in foreign affairs.

LEONARD W. LEVY
(1986)

Bibliography

WHEELER, BURTON K. with HEALY, PAUL F. 1962 *Yankee from the West.* New York: Doubleday.

## WHIG PARTY

The Whig party emerged as a coalition of politicians opposed to ANDREW JACKSON and Jacksonian Democracy. Some prominent Whigs, like DANIEL WEBSTER, traced their political roots to the old FEDERALIST party, while others, like HENRY CLAY, had been Jeffersonian Democrats. Most had also been National Republicans and, as such, supported the presidencies of JAMES MONROE and JOHN QUINCY ADAMS. When the Anti-Masonic party collapsed, most of its members became Whigs. Some extreme STATES' RIGHTS southerners briefly affiliated with the Whigs in reaction to Jackson's heavy-handed response to South Carolina in the NULLIFICATION controversy. A few Democrats joined the Whigs because they disagreed with Jackson over the BANK OF THE UNITED STATES or because they were disillusioned with Old Hickory's successor, MARTIN VAN BUREN. In the 1850s the Whig party collapsed. Most northern Whigs joined the REPUBLICAN PARTY, while southern Whigs became Know-Nothings or Democrats.

Whigs favored high tariffs, federally funded INTERNAL IMPROVEMENTS, a national banking system, a relatively weak presidency, and deference to Supreme Court rulings on constitutional questions. In 1832 the Young Men's National Republican Convention, which nominated Henry Clay for President, resolved "that the Supreme Court of the United States is the only tribunal recognized by the constitution for deciding, in the last resort, all questions arising under the constitution and laws of the United States, and that, upon the preservation of the authority and jurisdiction of that court inviolate, depends the existence of the Union."

The Whig party avoided taking any position on SLAVERY, seeking northern compromise on the issue in return for southern support for northern economic interests. Northern Whigs, like Daniel Webster, ABRAHAM LINCOLN, and WILLIAM H. SEWARD, opposed slavery with differing degrees of passion. In the 1830s some Whig congressmen, led by John Quincy Adams and Joshua Giddings, fought for the right to petition Congress on slavery. Adams viewed this as a constitutional right guaranteed by the petition clause of the FIRST AMENDMENT. However, when Whigs controlled Congress and the White House in the early 1840s, they, too, adopted gag rules to prevent the reading of abolitionist petitions. Southern Whigs supported slavery, but they never supported southern extremists. Indeed, southern Whigs opposed states' rights, southern nationalism, and SECESSION; however, in 1861 southern ex-Whigs, like ALEXANDER STEPHENS, ROBERT TOOMBS, and Judah P. Benjamin, became confederate leaders.

Whigs from both sections opposed the ANNEXATION OF TEXAS, the Mexican War, and other aggressions of Manifest Destiny. During the Mexican War they argued that President JAMES K. POLK had exceeded his constitutional authority by sending troops into southern Texas and Mexico to provoke war.

The Whigs won only two presidential elections. General William Henry Harrison, elected in 1840, died a month after taking office and was succeeded by JOHN TYLER, a former states' rights Democrat who had little sympathy for many Whig positions. Under Tyler the Whigs passed a major but short-lived BANKRUPTCY law and a higher tariff. President Tyler vetoed two Whig-sponsored bills to reestablish a national banking system.

In 1848 the Whigs captured the White House with another war hero, General ZACHARY TAYLOR, by avoiding taking a stand on any major issues. Whigs generally supported the COMPROMISE OF 1850, which was passed as individual pieces of legislation and signed into law by the deceased Taylor's vice-president, MILLARD FILLMORE, a moderate Whig from New York. By 1852, however, the party was deeply divided over the compromise and slavery in general. After 1850 the Whig party collapsed in the South, as southerners abandoned the party that appeared to be dominated by staunch antislavery men such as Senator William Seward of New York. After 1854 most northern Whigs also abandoned the party, either for the nativist American (Know-Nothing) party or the Republican party.

Constitutionally the Whigs stood for a strong Union and

federal intervention in the economy. Whigs argued for a broad reading of federal power under the COMMERCE CLAUSE and an expansive JUDICIAL POWER. Although neither was appointed by a Whig President, Justices JOSEPH STORY and JOHN MCLEAN came to symbolize Whig views of the Constitution. The greatest symbol of the party's constitutional position was not, however, a judge, but the attorney and politician Daniel Webster.

Even before the Whig party was formed, Webster presented "Whig-like" arguments in the DARTMOUTH COLLEGE V. WOODWARD (1819) and GIBBONS V. OGDEN (1824), in which he argued for a strict interpretation of the CONTRACT CLAUSE and a reading of the Constitution that gave Congress exclusive jurisdiction over INTERSTATE COMMERCE. He made similar arguments in GROVES V. SLAUGHTER (1841), the LICENSE CASES (1847), and the PASSENGER CASES (1849). The bedrock of Whig constitutional nationalism was best stated by Webster's 1830 reply to Senator ROBERT YOUNG HAYNE's argument in favor of nullification and Webster's speech supporting the Compromise of 1850. In answering Hayne, Webster declared, "I go for the Constitution as it is, and for the Union as it is." Webster argued, "It is, sir, the people's Constitution, the people's government, made for the people, made by the people, and answerable to the people." He concluded with the ringing plea for "Liberty *and* Union, now and for ever, one and inseparable." In his March 7, 1850, speech Webster supported the compromise measures, declaring, "I wish to speak today, not as a Massachusetts man, nor as a Northern man, but as an American, and a member of the Senate of the United States." He told his colleagues, "I speak today for the preservation of the Union." These measures, introduced by the Whig Clay and supported by Webster, symbolize the constitutional principles of the Whigs—support for the Union and compromise above all else—and the reason for their collapse. By the mid-1850s, compromise based on blind fidelity to the Union was no longer possible in a nation torn by sectional strife and about to go to war over slavery. Significantly, perhaps, the last Whig President, Millard Fillmore, opposed secession but also opposed all of Lincoln's policies to stop secession. By this time, however, the supporters of Whig nationalism and CONSTITUTIONALISM had followed such Whigs as Seward and Lincoln into the Republican party.

PAUL FINKELMAN
(1992)

Bibliography

BARTLETT, IRVING H. 1978 *Daniel Webster.* New York: Norton.

MCCORMICK, RICHARD P. 1966 *The Second American Party System.* Chapel Hill: University of North Carolina Press.

VAN DEUSEN, GLYNDON G. 1973 The Whig Party. In Arthur M. Schlesinger, Jr., ed., *History of U.S. Political Parties.* Vol. 1, pages 332–493. New York: Chelsea House.

## WHISKEY REBELLION
(1794)

The "rebellion" in western Pennsylvania provided the first test of the power of the federal government to suppress insurrections and enforce obedience to its laws. Frontier farmers, who were also small distillers, resisted the whiskey excise from its passage in 1791. When the resistance erupted in violence in July 1794, President GEORGE WASHINGTON issued a proclamation ordering the rebels to submit to the law or face military coercion under an act authorizing employment of the militia in such cases. After a peace mission failed, he called up 15,000 militia from Pennsylvania and neighboring states. The army marched, and the rebellion quickly collapsed without bloodshed; two ringleaders, tried and convicted of TREASON, were subsequently pardoned by the President. FEDERALIST leaders exulted in this crushing of rebellion, which they viewed as part of a plot against the government, while their Republican counterparts denounced the force as excessive and intended to overawe opposition to the administration.

MERRILL D. PETERSON
(1986)

Bibliography

BALDWIN, LELAND D. 1939 *Whiskey Rebels: The Story of a Frontier Uprising.* Pittsburgh: University of Pittsburgh Press.

## WHITE, BYRON R.
(1917– )

In 1962 President JOHN F. KENNEDY appointed Byron R. White to replace CHARLES E. WHITTAKER and become the ninety-third Justice to serve on the Supreme Court. White was forty-four years old and had no previous judicial experience. He had been a CLERK for Chief Justice FRED N. VINSON in 1946–1947, however, and was the first former law clerk subsequently appointed to that tribunal. His only other significant government experience had come during the preceding year, after President Kennedy had appointed him deputy attorney general. White had managed the Justice Department, recruited lawyers, and evaluated candidates for federal judgeships. His CIVIL RIGHTS enforcement experience included a stint in Montgomery, Alabama, where local authorities had failed to prevent mob violence against the freedom riders, an interracial group protesting racial SEGREGATION in public transportation. White restored order with the help of 400 federal

marshals, providing Kennedy with a significant national victory over recalcitrant state officials.

Whatever White lacked in government experience, he made up in personal capacities. Born in rural Colorado, White came of age there during the Depression. He worked in the beet fields as a boy and later won a scholarship to the University of Colorado, where he was first in his class and an all American football player. He played professional football, and for several months, until the European outbreak of World War II, he studied as a Rhodes scholar in England, where he first met John Kennedy. He began studying law at Yale in 1939 and again topped his class. The war interrupted his studies, and he served as a naval intelligence officer in the South Pacific, where he again encountered Kennedy. He was graduated in 1946, and after his clerkship, returned to Colorado to practice law. In 1959 he organized support for Kennedy as the Democratic nominee for President. Following Kennedy's nomination, he chaired Citizens for Kennedy, a nationwide volunteer group. His public service followed.

When White joined the WARREN COURT, its most vigorous efforts to nationalize CIVIL LIBERTIES and limit government power in favor of individual rights and egalitarian values lay just ahead. White voted regularly with the majority to invalidate discrimination against racial minorities and the politically powerless in areas such as school DESEGREGATION and REAPPORTIONMENT, and to sustain the constitutionality of federal civil rights legislation. Nonetheless, he acquired a reputation as a moderate-to-conservative Justice for his frequent dissents in major decisions, such as MIRANDA V. ARIZONA (1966), which imposed new constitutional limits on police discretion; for his willingness to uphold laws excluding communists from government positions; and for his general inclination toward judicial self-restraint.

With President RICHARD M. NIXON's four Court appointments from 1969–1971, the deferential positions White previously had articulated in dissent increasingly became majority views in the BURGER COURT. But White also dissented from decisions undermining egalitarian opinions he had joined in the Warren era. The Court had changed around him—not an uncommon occurrence for Justices serving for long periods.

The Court's shift, together with White's failure to articulate a comprehensive personal vision of an ideal balance of individual liberty and government power, has led some observers to conclude that White lacks a coherent judicial philosophy. The votes and written opinions of this independent, tough-minded jurist, however, do reveal a distinctive vision of the Supreme Court's role in constitutional law, a vision compatible with White's personal history.

One pervasive attitude in White's approach is skepticism and humility about the authority and capacity of the Court to second-guess the efforts of other government officials in dealing with difficult societal problems. White's opinions reflect deference to the good faith assessments and pragmatic judgments of police, administrative officials, and state and federal judges—particularly when he is convinced that they have readier access to relevant information than the Court does, or that government flexibility is needed. He reserves the highest deference for legislative judgments, out of respect for LEGISLATIVE POWER, especially that of the national Congress, as the most legitimate source of law in a democratic society. This second tenet emphasizes the primacy of legislative decisions in allocating the benefits and burdens of government programs, balancing individual rights and community needs, and structuring government operations.

The corollary is that White's deference disappears if good faith and pragmatism are absent. When prejudice infects government decision making, when the interests of the disadvantaged systematically are excluded from consideration in government processes, or when individual liberty is sacrificed for minimal public gain, White readily and consistently supports constitutional prohibitions. He embraces a strongly individualistic ideology that demands fair government treatment of citizens as individuals and holds ordinary citizens and government officials accountable for their individual conduct.

White's individualism produces a powerful egalitarian ethic that takes two different forms. One is constitutional invalidation of government action that treats people stereotypically, with insufficient regard for their individual worth, merits, and capacities. The other is constitutional approval of government efforts to equalize opportunities for the disadvantaged.

These general themes explain much of Justice White's participation in the Court's work. His opposition to stringent constitutional limits on law enforcement practices, absent significant abuse of a particular defendant's liberty, reflects deference to the difficulties of enforcement and the flexibility it requires, as well as to the judgment that guilty individuals have no great claim to benefit from police misconduct that has not harmed them. Deference, pragmatism, and rugged individualism underlie White's position in *Miranda* and his majority opinion in *United States v. Leon* (1984), establishing a GOOD FAITH EXCEPTION to the EXCLUSIONARY RULE. His Court opinions holding that the states must provide TRIAL BY JURY if substantial imprisonment is possible, but that the states may convict with less than unanimous verdicts and with juries of only six members, illustrate a compromise between a belief in the importance of the jury in protecting individual liberty and

tolerance for pragmatic modifications of its traditional features when the modifications do not seriously undermine its basic value. The heavy weight he has placed behind sanctioning guilty individuals gives way, however, when government interferes with a fair presentation of the defendant's side, as by denying the RIGHT TO COUNSEL. In civil cases, too, in contexts as diverse as PROCEDURAL DUE PROCESS and the CONTRACT CLAUSE, he has tolerated pragmatic (and unbiased) responses to perceived governmental needs.

White's deference to national LEGISLATIVE POWER has led him to reject both FEDERALISM objections that Congress has usurped reserved state power, as in OREGON V. MITCHELL (1970) and NATIONAL LEAGUE OF CITIES V. USERY (1976), and SEPARATION OF POWERS objections that Congress has invaded the Court's or the President's power, as in his provocative dissents in NORTHERN PIPELINE CONSTRUCTION CO. V. MARATHON PIPELINE CO. (1982), dealing with the powers of LEGISLATIVE COURTS in BANKRUPTCY cases, and IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983), in which the majority struck down the LEGISLATIVE VETO. He also opposed individual rights challenges to legislative efforts that promote equality, such as the affirmative action program upheld in FULLILOVE V. KLUTZNICK (1980), and Congress's attempt to equalize campaign spending, partially invalidated over White's dissent in BUCKLEY V. VALEO (1976). In these cases, deference and attachment to egalitarian values worked together; when they are in conflict, however, White tends to put aside deference and vote to strike down federal laws that discriminate on such invidious bases as race or sex.

White is as vigorous in opposing biased or arbitrary government judgments as he is in supporting justifiable, pragmatic ones. He will not invoke the Constitution to impose affirmative obligations on government, but will do so to prevent the government from imposing unfair burdens. He is reluctant to recognize constitutional immunities for even the highest level officials, preferring to hold that no one is above the law. That frequent theme appears most prominently in his dissent in NIXON V. FITZGERALD (1982), arguing that the President is legally accountable for abuse of government power, and in his opinions interpreting the SPEECH AND DEBATE CLAUSE as fully immunizing members of Congress from inquiry into legislative conduct, but providing no immunity for nonlegislative acts.

More broadly, White has voted to invalidate government policies founded on prejudice or bad motive without more, but usually would not invalidate laws adopted with proper motives, whatever their impact. Thus, in WASHINGTON V. DAVIS (1976) White led the Court in making proof of intentional discrimination a necessary condition for finding a violation of the equal protection clause. He also would have made intent a sufficient condition, however, as he articulated in dissent in PALMER V. THOMPSON (1971). He has been both generous in finding proof of illicit intent and forceful in insisting that, once wrongdoing is shown, the harm be remedied fully, especially in cases of RACIAL DISCRIMINATION. And when the impact of governmental action significantly impairs the democratic process, as in reapportionment cases, White also has supported judicial intervention.

In FIRST AMENDMENT cases, too, White is strict about disallowing government discrimination against disfavored viewpoints, but tolerant of significant limitations on individual expression that are inevitable byproducts of legitimate government aims, a theme illustrated by his opinion in BROADRICK V. OKLAHOMA (1973). That opinion also represents White's consistent belief that the OVERBREADTH and VAGUENESS doctrines should be used only sparingly to strike statutes with a neutral and uncertain inhibiting effect on the general populace—a position readily held by a believer in hardy individualism. He is likewise unreceptive to arguments that the press needs wide immunity from libel and other actions lest fear of liability deter them from vigorous and important expression. Thus, although this Justice with considerable personal experience as the object of media attention strongly supported First Amendment limits on press liability for reporting about public officials, he vigorously dissented in GERTZ V. ROBERT WELCH, INC. (1974) from the Court's granting the powerful media constitutional immunity from liability to helpless individuals who seek redress for the ravaging of their reputations. Indeed, he generally opposes affording the press any special privileges, except in cases of prior restraint or when the press serves as the public's monitor of government. Finally, White has been relatively deferential to regulations of OBSCENITY and SUBVERSIVE ADVOCACY, the former an example of deference to strong community views which invade little important freedom and the latter an example of deference to the community's right to protect its democratic character.

White's concern for the constitutional obligation to purge arbitrariness from government decision making extends naturally to questions of procedural fairness. Although White would allow government considerable flexibility in defining procedures, he has insisted that appropriate procedures be provided if government deprives a person of a government-created liberty or property entitlement, even if the government was under no initial obligation to create it. So conceived, procedural due process promotes individualized application of law on the basis of personal responsibility and guards against arbitrary decisions.

White's emphasis on equality and fair, if flexible, pro-

cess generally stops short of imposing substantive limits on government policy. His normal disinclination to go beyond constitutional text or history and recognize new fundamental liberties tends to yield, however, when a state restricts personal autonomy by a law that deviates from most other states' laws or is of minimal efficacy in achieving proper objectives. Thus, White dissented in ROE V. WADE (1973), where the Court used SUBSTANTIVE DUE PROCESS analysis to invalidate laws regulating abortion, but he concurred in GRISWOLD V. CONNECTICUT (1965), arguing that the state's atypical law against marital use of contraceptives violated substantive due process because of its "marginal utility to the declared objective" of deterring illicit sexual relationships. Similarly, he initially voted against the death penalty in *Furman v. Georgia* (1972), not because it constituted CRUEL AND UNUSUAL PUNISHMENT but because it was administered arbitrarily and too infrequently to achieve its deterrent aims. Later, he voted to uphold mandatory death penalty laws applied broadly and consistently. Still, he wrote the major opinion in COKER V. GEORGIA (1977), holding the death penalty for rape cruel and unusual, largely because most states had refrained from imposing it for crimes not producing death.

Normally, White's limited belief in NATURAL RIGHTS jurisprudence surfaces as increased scrutiny of legislative means when government policy implicates broadly accepted liberties and the threat of inequality or arbitrariness is high. Perhaps not surprisingly, given his personal experience, he not only finds family choice fundamental, but educational opportunity, too. Thus, he has been especially adamant to invalidate school SEGREGATION, inequality of expenditures among a state's school districts, and school discipline that involves corporal punishment or lacks procedural safeguards. He is equally adamant that public aid to the secular functions of parochial schools, a policy that supports educational choice and quality, does not constitute a prohibited ESTABLISHMENT OF RELIGION—a distinct minority view on the Court.

JONATHAN D. VARAT
(1986)

Bibliography

ISRAEL, FRED 1969 Byron R. White. In Leon Friedman and Fred Israel, eds., *The Justices of the Supreme Court: Their Lives and Major Opinions.* Vol. 4:2951–2961. New York: Chelsea House.

LIEBAMAN, LANCE 1972 Swing Man on the Supreme Court. *New York Times Magazine*, October 8, 1972.

SERNARD, SCHWARTZ 1983 *Super Chief: Earl Warren and His Supreme Court: A Judicial Biography.* New York: New York University Press.

WOODWARD, BOB and ARMSTRONG, SCOTT 1979 *The Brethren: Inside the Supreme Court.* New York: Simon & Schuster.

# WHITE, BYRON R.
## (1917– )
## (Update 1)

When he was appointed to the Supreme Court in 1962, Byron White, at the age of forty-four, was a symbol of the vigor, youth, and intellectual power of the JOHN F. KENNEDY administration. From a poor rural background, he had ranked first in the class of 1938 at the University of Colorado, becoming a football All American and winning a Rhodes Scholarship. By the time he graduated from Yale Law School in 1946, he had briefly studied at Oxford, played two seasons of professional football, served as a naval intelligence officer in the Pacific, and twice encountered John Kennedy (once at Oxford, once in the Pacific). After clerking for Chief Justice FRED M. VINSON, White joined a law practice in Denver where he remained for fourteen years. When Kennedy won the Democratic nomination for President in 1960, White chaired the nationwide volunteer group Citizens for Kennedy. His service as deputy attorney general under ROBERT KENNEDY included screening candidates for judicial appointments and supervising federal marshals protecting workers in the CIVIL RIGHTS MOVEMENT in the South. He had been at the job only fourteen months when the President nominated him to fill the vacancy created by the resignation of CHARLES WHITTAKER.

During his nearly thirty years on the Court, White has generally reflected the commitments of the President who appointed him: to equal opportunity, to effective law enforcement, and to enablement of government as it responds to new challenges—with less concern for individual rights, group rights, and STATES' RIGHTS. To the distress of those who would prefer greater elaboration of a philosophical vision, he has approached the judicial task in a lawyerly and pragmatic fashion, although sometimes in excessively cryptic opinions. His independence and analytic bent of mind have often isolated him from more ideological colleagues. As he has served with twenty other Justices during times of great ferment on the Court, his role has changed considerably. He was in the majority in fewer than half of the 5–4 decisions during the 1960s, in more than sixty percent of the 5–4 decisions during the 1970s, and in nearly three-fourths of the 5–4 decisions during the 1980s—more frequently than any other Justice during that decade. Although profound changes in American society (often shaped by the Court itself) have significantly affected the issues before him and, to a lesser extent, his resolution of particular issues, a review of his work on the Court reveals significant consistency in perspective, method, and conviction.

White knows that judges make law. His time at Yale Law School was the heyday of that school's celebration of LEGAL REALISM. As he explained in dissent in MIRANDA V. ARIZONA (1966), "[T]he Court has not discovered or found the law in making today's decision; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. . . . [I]t is wholly legitimate . . . to inquire into the advisability of its end product in terms of the long-range interest of the country."

White also understands that the triumph of the administrative state, marked especially by an affirmative and vigorous federal government, has forever altered the shape of American political institutions, including the Court. For White, however, neither legal realism nor expanding concepts of national political authority and responsibility justify the exercise of "raw judicial power." A recurring theme of his opinions is that the judiciary undermines its own legitimacy when it seeks to achieve political objectives not sanctioned by the other branches of government or when it promotes social transformation resisted by the democratic institutions of society.

White's confidence in the good faith and capabilities of democratic institutions—Congress especially, but also the executive, state legislatures, and juries—exceeds that of other justices of the "left" or of the "right." For White, the powers of government are limited neither by abstract conceptions of individual autonomy, nor by any extrademocratic mandate for perfection in human affairs. Rather, government power is limited by the very forces that legitimate it: the people acting through fair and free elections and a Constitution that both authorizes and specifically checks government actors.

In the spirit of the NEW DEAL and of President Kennedy, White gives great weight to securing and preserving federal authority, especially Congress's authority. Where Congress has legislated (or federal agencies have acted pursuant to delegated power), he is disposed to find federal PREEMPTION of state law. Where Congress has not legislated, he gives wide berth to the DORMANT COMMERCE CLAUSE. Where states seek to regulate federal entities, he is disposed to place limits on state power. He does not view the TENTH AMENDMENT as a limitation on Congress's regulatory power; he would permit Congress to abrogate state SOVEREIGN IMMUNITY under the ELEVENTH AMENDMENT; and he recognizes significant legislative power to implement the FOURTEENTH AMENDMENT. Where Congress has delegated interpretative authority to ADMINISTRATIVE AGENCIES, he is strongly disposed to defer to agency interpretations of statutes. In many ways, he has been the preeminent nationalist on the Court in the modern era. For instance, White was the only dissenter to the Court's 1978 decision upholding the multistate tax compact, which had not been approved by Congress, because of its "*potential* encroachment on federal supremacy."

White's understanding of the SEPARATION OF POWERS in our national government, as set forth in a series of powerful dissents, is similarly rooted in his recognition that Congress needs latitude to solve economic problems and to reallocate governance authorities in response to the growing demands on national institutions in the post-New Deal era. Thus, he urged in BUCKLEY V. VALEO (1976) that "Congress was entitled to determine that personal wealth ought to play a less important role in political campaigns than it has in the past." He lamented in NORTHERN PIPELINE CO. V. MARATHON PIPE LINE CO. (1982) that "at this point in the history of constitutional law" the Court should not have "looked[ed] only to the constitutional text" to determine Congress's power "to create adjudicatory institutions designed to carry out federal policy." He explained in IMMIGRATION NATURALIZATION SERVICE V. CHADHA (1983) that the LEGISLATIVE VETO "is an indispensable political invention that . . . assures the accountability of independent regulatory agencies and preserves Congress' control on lawmaking." And the budget-balancing legislation of BOWSHER V. SYNAR (1986) was "one of the most novel and far reaching legislative responses to a national crisis since the New Deal."

White conceives of a more limited role for the federal courts, not to supplement or second-guess Congress's policies, but to ensure their implementation by state and federal actors. His concurrence in *Chapman v. Houston Welfare Rights Organization* (1979)—urging that in the CIVIL RIGHTS legislation of the RECONSTRUCTION Congress had provided a remedy for denial not only of constitutional rights but also of rights created by federal statutes—was subsequently adopted by a majority of the Court. White would also more narrowly construe EXECUTIVE IMMUNITY than would a majority of his colleagues. He is less willing than many others on the Court, however, to infer a private cause of action to enforce federal rights where Congress has lodged responsibility for enforcement with a federal agency or has provided for administrative remedies. Nor is he uniformly activist on issues of POLITICAL QUESTION, STANDING, and other prudential limitations on JUDICIAL REVIEW. Although he has sometimes resisted efforts to restrict HABEAS CORPUS jurisdiction, he has joined in limiting the bases on which habeas review may upset a criminal conviction.

To achieve consistency in CONSTITUTIONAL INTERPRETATION, White has taken an expansive view of the Supreme Court's JURISDICTION over state court decisions. Moreover, often dissenting from denial of CERTIORARI, he has regularly urged the Court to use its discretionary jurisdiction

to review apparent inconsistencies in the lower courts. His longstanding extrajudicial campaign for creation of a national court of appeals or similar structure to ensure uniformity in federal law may finally have run its course in view of the reduction in the Supreme Court's workload in recent terms.

White's clear sense of the primacy of democratic institutions is reflected in his commitment to the protection of rights to participate in the electoral process. From AVERY V. MIDLAND COUNTY (1968) to *Board of Estimate of the City of New York v. Morris* (1989), he has led the Court in expansively interpreting the principle of ONE PERSON, ONE VOTE to subject varieties of political apportionment and GERRYMANDERING to judicial review, even as he has taken a relatively permissive and pragmatic approach to apportionment disparities. His dissent in MOBILE V. BOLDEN (1980) effectively became the majority position two terms later in ROGERS V. LODGE (1982), which eased the burden of minority challenges to electoral districting schemes that perpetuate purposeful RACIAL DISCRIMINATION. As indicated in *Buckley* and subsequent cases, White would go further than other Justices in permitting Congress to regulate the electoral processes to root out potential corruption and inequality, even at the cost of some inhibition of free speech.

More generally, his FIRST AMENDMENT jurisprudence permits significant intrusions on the media, whether in the form of the FAIRNESS DOCTRINE as in RED LION BROADCASTING CO. V. FCC (1969); SEARCH WARRANTS, as in ZURCHER V. STANFORD DAILY (1978); SUBPOENAS, as in BRANZBURG V. HAYES (1972); or LIBEL law, as in HERBERT V. LANDO (1979) and his dissent in GERTZ V. ROBERT WELCH, INC. (1974). White is likewise deferential toward regulation and prosecution of OBSCENITY, CHILD PORNOGRAPHY, and SUBVERSIVE ADVOCACY. He has been a leading opponent of a strict, separatist conception of the ESTABLISHMENT OF RELIGION and would, for instance, permit state aid for secular activities in parochial schools.

Although White gives broad scope to LEGISLATIVE POWER, he has usually subjected the legislative product to close scrutiny for invidious purpose or for insufficient relationship to a legitimate purpose. For a time, White's purpose analysis produced a more activist Fourteenth Amendment jurisprudence than the majority of the Court was willing to embrace; for example, he argued in dissent in PALMER V. THOMPSON (1971) that a Mississippi town should not be permitted to close its swimming pool where its purpose was to prevent implementation of a DESEGREGATION order. White's scrutiny of purpose is decidedly nonactivist, however, in the face of minority challenges to government programs that have disparate racial impact without discriminatory intent. In the seminal case of WASHINGTON V. DAVIS (1976), he held for a 7–2 majority that disparate impact alone does not constitute the kind of racial discrimination that presumptively violates the constitutional principle of EQUAL PROTECTION OF THE LAWS. White has not adopted the view that the Constitution prohibits all "reverse discrimination" to counteract diffuse societal discrimination. His joint opinion in REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE (1978), permitting government to take race into account in university admissions, reflects his oft-demonstrated concern for equal educational opportunity. His votes, in FULLILOVE V. KLUTZNICK (1980) and METRO BROADCASTING, INC. V. FEDERAL COMMUNICATIONS COMMISSION (1990), to uphold federal minority "set-aside" and race-preference requirements underscore his deference to Congress even as he voted, in RICHMOND (CITY OF) V. J. A. CROSON CO. (1989), to strike down a LOCAL GOVERNMENT's "set-aside" scheme.

For a decade after he joined the majority opinion in GRIGGS V. DUKE POWER CO. (1971), White appeared content with permitting disparate impact alone to be sufficient for broad RACE-CONSCIOUS remedies in EMPLOYMENT DISCRIMINATION cases brought under Title VII of the CIVIL RIGHTS ACT OF 1964. In 1979, he even joined in endorsing a private employer's use of RACIAL QUOTAS intended to eliminate the effects of societal discrimination. White began to express significant dissatisfaction with aspects of the prevailing Title VII jurisprudence in a series of opinions, mostly dissenting, in the mid-1980s. By the end of the decade, amid indications that the disparate-impact test invited use of racial quotas, White commanded a majority in *Wards Cove Packing Co. v. Antonio* (1989) to shift the BURDEN OF PROOF in disparate-impact cases.

In school desegregation cases, however, White has been as ready as any member of the Court to find evidence of past purposeful discrimination and to approve broad remedies. His majority opinion in COLUMBUS BOARD OF EDUCATION V. PENICK (1979) permitted inference of purposeful discrimination from evidence of long-past misconduct and a continued discriminatory effect, and placed the burden on the defendant school system to prove that it had not caused any current racial SEGREGATION in its schools. In addition, he would hold the state, not the defendant school district, ultimately responsible for removing the effects of purposeful discrimination; in this view, neither the happenstance of school-district boundaries nor state laws impeding school funding may stand in the way of remedial decrees. Thus he was in a minority in MILLIKEN V. BRADLEY (1974) in arguing and a remedy of interdistrict SCHOOL BUSING, and he wrote the 5–4 decision in *Jenkins v. Missouri* (1990) upholding the power of the federal district court to order a defendant school board to impose tax increases in violation of fiscally restrictive state law.

One may infer several reasons for White's different stances in school desegregation cases and employment

discrimination cases. Even outside the race-discrimination context, White has adopted an ethic of group equality in EDUCATION, as demonstrated in his dissent in SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ (1973), where he would have struck down school-financing schemes that leave the poorest school districts with the most impoverished schools. Moreover, the proof of purposeful racial discrimination by school districts is often palpable, but it is difficult to trace disparate racial impact in the job market to purposeful discrimination by a defendant employer. In addition, although busing does not deny schooling to any child, White has expressed particular unhappiness with quota systems that take jobs away from nondiscriminating white workers. Finally, judicial imposition of systems of RACIAL PREFERENCE in employment would cause upheavals in collective bargaining, seniority systems, and other underpinnings of industrial society.

White's belief in the legitimacy of the law in ordering our social life, along with his confidence in the institutions of government, have made him reluctant to impose "decriminalization," either directly (by limiting legislative power to punish) or indirectly (by insisting on perfection from police, prosecutors, and others charged with achieving criminal justice). Even as he joined the holding in *Furman v. Georgia* (1972), striking down a scheme of CAPITAL PUNISHMENT that provided no guidance for the sentencing authority, White noted the good faith of Georgia in granting discretion to sentencing juries out of a "desire to mitigate the harshness" of capital punishment laws. Subsequently, he has voted to uphold carefully structured death penalty laws, rejecting the arguments that juries "disobey or nullify their instructions" and that others who retain discretion, such as prosecutors, inevitably wield it arbitrarily. Invoking the Court's ill-famed journey earlier in this century into the realm of SUBSTANTIVE DUE PROCESS, he has refused to make the judgment that the death penalty cannot comport with the Constitution. White has, however, recognized substantive limitations on the types of crimes for which this penalty may be imposed; he wrote the Court's opinion in COKER V. GEORGIA (1977), holding the death penalty disproportionate for the rape of an adult, and the Court's opinion in ENMUND V. FLORIDA (1982), holding capital punishment improper where a murder conviction was based solely on a theory of felony murder.

The criteria of "reasonableness" and "good faith," at the core of much of White's JURISPRUDENCE, are especially prominent in his approach to the FOURTH AMENDMENT—which has largely become the law of the land. He has been the leading proponent of clear and simple rules governing police SEARCH AND SEIZURE. He understands the Constitution's requirement that searches and seizures be "reasonable" to have broad applicability, if shallow in depth; he wrote the opinion in CAMARA V. MUNICIPAL COURT (1967), which spawned a new jurisprudence upholding an array of regulatory searches on less than PROBABLE CAUSE, but he also wrote TENNESSEE V. GARNER (1985), which prohibited use of deadly force against fleeing felons, and he has recognized the Fourth Amendment's applicability to subpoenas issued by GRAND JURIES. His oft-stated antipathy to the EXCLUSIONARY RULE as a remedy for Fourth Amendment violations finally led to adoption of the GOOD FAITH EXCEPTION to this rule in *United States v. Leon* (1984). White has likewise taken a functional and pragmatic approach to the Sixth Amendment's right to TRIAL BY JURY. He has resisted efforts to limit criminal investigations and forfeitures through broad application of the RIGHT TO COUNSEL; he has dissented from interpretations of the Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION that depart from historical practice and impede reliable administration of justice; and he has been at the forefront of the Court in permitting great leeway in PLEA BARGAINING, as in *Brady v. United States* (1970).

White's opinions on CRIMINAL PROCEDURE reveal not only his perspective on issues of criminal justice but also his unusual commitment to the rule of STARE DECISIS in constitutional adjudication, which has sometimes led to the perception that he is "unpredictable." Like many Justices, White is ready to overrule previous decisions that prove unworkable or ill-advised. For instance, he joined BATSON V. KENTUCKY (1986), which, overruling his own SWAIN V. ALABAMA (1965), subjected preemptory jury challenges to judicial review for racial discrimination; *Batson* acknowledged that *Swain*'s confidence in state prosecutors had not been vindicated. Yet White, more than other Justices and regardless of ideological inclination, has on most issues sought to adhere to constitutional PRECEDENT not yet overruled. Thus, although he dissented forcefully in *Miranda*, he has clearly accepted the major contours of that decision. Indeed, he wrote EDWARDS V. ARIZONA (1981), which went beyond the core of *Miranda* in prohibiting all questioning once the suspect in custody has requested an attorney. Similarly, despite his long, carefully composed dissent in PAYTON V. NEW YORK (1980), which required an ARREST WARRANT to arrest persons in their homes, White ten years later wrote the majority opinion applying *Payton* to the arrest of someone hiding out overnight in a friend's home. Even where he would vote to overrule a precedent, White has sometimes exasperated observers by refusing to cast the fifth vote for simply narrowing the reach of the precedent, insisting he is bound until it is expressly overruled.

The most controversial decision by White upholding government power to invoke the criminal process is BOWERS V. HARDWICK (1986), which refused to strike down a Georgia law forbidding consensual sodomy between men.

White conceived the issue much as he had the issue in the death penalty cases: whether the Supreme Court should bypass political institutions to establish a new social order. White had long objected to the Court's discovery of new constitutional rights deriving from the concept of "privacy." His concurrence in GRISWOLD V. CONNECTICUT (1965) declined to find a general RIGHT OF PRIVACY, emphasizing instead the lack of a rational relationship between the statute's ban on distributing BIRTH CONTROL information to married persons and the purported purpose of the statute. ROE V. WADE (1973), the decision establishing a broad right to ABORTION throughout pregnancy, evoked a response reminiscent of his *Miranda* dissent: "The Court simply fashions and announces a new constitutional right . . . with scarcely any reason or authority." In dissents in subsequent privacy rights cases during the 1970s and early 1980s, including MOORE V. CITY OF EAST CLEVELAND (1977), which struck down a ZONING ordinance that narrowly defined "single family," White even more explicitly compared the Court's "new" substantive due process with the efforts of the Court in LOCHNER V. NEW YORK (1905) to impose its will on a divided polity. By 1986, in THORNBURGH V. AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, he advocated overruling *Roe*, urging that the right it recognized was neither "implicit in the concept of ordered liberty," nor "deeply rooted in the nation's history and traditions." For White, *Bowers* was a replay of *Thornburgh*, with the important difference that he was writing the majority opinion. As White must have anticipated, once the majority had adopted his approach to enunciation of a FUNDAMENTAL RIGHT, it was only a matter of time before *Roe* itself would begin to collapse, as indeed it did in WEBSTER V. REPRODUCTIVE HEALTH SERVICES (1989).

Yet White himself had recognized certain fundamental liberty interests that may be subsumed under the label substantive due process—including, in *Griswold*, "the right to be free of regulation of the intimacies of the marriage relationship" and, in a long series of cases (continuing even after *Bowers*) dealing with ILLEGITIMACY, the rights of natural parents "in the companionship . . . of their children." White's purpose-based jurisprudence might have considered proscriptions of sodomy as different from anti-abortion laws. In the latter, the organized community may have the purpose of protecting human life, whereas in the former, its motiviation may simply be antipathy towards homosexuals—a purpose that could be recognized (but that White in 1986 declined to recognize) as invidious. Here as elsewhere, White's jurisprudence seldom puts the Court ahead of the country. For him, the Court's primary role in constitutional lawmaking is not to pioneer or even to lead, but rather to secure for the whole nation the democratic consensus that has already been reached.

KATE SMITH

(1992)

Bibliography

HUTTON, MARY CHRISTINE 1986 The Unique Perspective of Justice White: Separation of Powers, Standing and Section 1983 Cases. *Administrative Law Review* 40:377–414.

LIEBMAN, LANCE 1987 Justice White and Affirmative Action. *University of Colorado Law Review* 58:471–496.

NELSON, WILLIAM E. 1987 Deference and the Limits to Deference in the Constitutional Jurisprudence of Justice Byron R. White. *University of Colorado Law Review* 58:347–364.

O'DONNELL, PIERCE 1987 Common Sense and the Constitution: Justice White and the Egalitarian Ideal. *University of Colorado Law Review* 58:433–470.

STUDENT NOTE 1987 The Intercircuit Tribunal and Perceived Conflicts: An Analysis of Justice White's Dissents from Denial of Certiorari During the 1985 Term. *New York University Law Review* 62:610–650.

## WHITE, BYRON R.
(1917– )
(Update 2)

When Byron R. White retired from the Supreme Court in 1993, the vacancy he created received more attention than his legacy. For the first time since 1967 (with the appointment of THURGOOD MARSHALL), and only the second time since his own appointment in 1962, a President from the Democratic Party would have the power to nominate a member to the Court. *The New York Times* editorially dismissed White's career: acknowledging that he was "one of the more remarkable people to serve on the Court," the *Times* nonetheless found him to be "more a witness than a moving force." White indirectly demurred and was later quoted as saying, "I don't have a doctrinal legacy; I shouldn't"—implying, as he often said, that the role of Justices is to decide particular cases, not to build theoretical structures.

Notwithstanding his own modesty and the judgments of the press, White had a substantial impact on the work of the Court during his lengthy tenure. He played a major role in the development of FIRST AMENDMENT doctrine, especially in the areas of press shield laws, BRANZBURG V. HAYES (1972); LIBEL, HERBERT V. LANDO (1979); CHILD PORNOGRAPHY; and the PUBLIC FORUM doctrine. He wrote major opinions for the Court in LABOR, ANTITRUST, and FEDERAL JURISDICTION. He was one of the leading exponents, and protectors, of a broad reading of congressional power, particularly vis-à-vis claimed STATES' RIGHTS. From AVERY V. MIDLAND COUNTY (1968) to ROGERS V. LODGE (1982), he was one of the Court's resident experts on VOTING RIGHTS law. He also played a central role in the development of doctrinal exceptions to the EXCLUSIONARY RULE.

White will probably be remembered not for his opinions for the Court but for a number of DISSENTING OPIN-

IONS, in which he took the majority to task—often in fierce terms—for its reasoning and for the practical consequences of its decision. From MIRANDA V. ARIZONA (1966) to ROE V. WADE (1973) to GERTZ V. WELCH (1974) to IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA (1983), White never hesitated to express his misgivings over the Court's craft or what he viewed as its audacity. "Judges have an exaggerated view of their role in our polity," he told a friend privately after a decade on the Court, and his sharply worded separate opinions drove home the point.

The credo manifested indelibly in two areas, SEPARATION OF POWERS and SUBSTANTIVE DUE PROCESS. His first major statement on separation of powers was a separate opinion in BUCKLEY V. VALEO (1976), in which he was prepared to defer to Congress's judgment that limitations on both raising and spending money in federal elections were necessary notwithstanding concerns, embraced by the majority, that FREEDOM OF SPEECH protected spending decisions. He again voted to sustain Congress's device for handling the flood tide of federal litigation in NORTHERN PIPELINE CO. V. MARATHON PIPELINE CO. (1982). In *Chadha*, he dissented heatedly when the Court invalidated the LEGISLATIVE VETO in what he saw as both a wooden and unnecessary reading of the Constitution.

His written record on substantive due process was not fully developed or so widely respected. His dissent in *Roe v. Wade* was more a declaration of conviction than a sustained theoretical statement, and it was not until his dissent in MOORE V. CITY OF EAST CLEVELAND (1977) that he produced a fully expressed critique of the Court's revival of the old doctrine associated with LOCHNER V. NEW YORK (1905). His complaint was that the Court was using vague language in the Constitution to impose its own will on a divided polity—an exercise both illegitimate and, he eventually suggested, dangerous to the Court's own political capital. The issue was fundamental to White's view of his role, and so it is ironic that his final major opinion in the area is among his most widely and severely criticized. In BOWERS V. HARDWICK (1986), he wrote for a five-Justice majority rejecting a claim that consensual homosexual conduct in private between adults was protected by the DUE PROCESS clause of the FOURTEENTH AMENDMENT. To argue that the "claimed right" was "deeply rooted in this nation's history and tradition" or "implicit in the concept of ordered liberty"—the traditional formula used by the Court for upholding such a right—was, White wrote, "at best, facetious." The opinion seemed not to take the claim seriously and was condemned by many as an intellectual "hit-and-run incident." White was not uniformly hostile to claims labeled substantive due process: he joined the majority in GRISWOLD V. CONNECTICUT (1965), where he acknowledged constitutional protection for the "intimacies of the marriage relationship," and was committed—both before and after *Bowers*—to supporting the constitutional claims of natural parents to the "companionship . . . of their children." For White, well-established social norms enjoyed constitutional protection, but novel or controversial claims were beyond the constitutional pale.

Assessment of White's career which focused only on his views or his often difficult opinions tended to obscure the fact that he was one of the hardest working Justices on the Court during the period in which he served. He wrote 1,275 opinions—495 opinions for the Court, 249 concurring opinions, and 572 dissents. He sat during a period in which the Court grew more fractionated and participated in more 5–4 decisions than any other Justice in the Court's history except WILLIAM J. BRENNAN, JR. His tenure was also one of the longest in the institution's history: only nine others sat longer. In retirement, he continued to sit actively on federal courts of appeals and he also chaired a special commission charged with advising Congress on the structure of the federal Court of Appeals for the Ninth Circuit.

DENNIS J. HUTCHINSON
(2000)

Bibliography

HUTCHINSON, DENNIS J. 1998 *The Man Who Once Was Whizzer White.* New York: Free Press.

IDES, ALLAN 1993 The Jurisprudence of Byron White. *Yale Law Journal* 103:419–461.

LEE, REX and WILKINS, RICHARD G. 1994 On Greatness and Constitutional Vision: Justice Byron R. White. *Brigham Young Law Review* 1994:291–312.

## WHITE, EDWARD D.
(1845–1921)

Born and raised in Louisiana, the son of a slaveholding sugar planter and a Confederate veteran, Edward Douglass White was an archetype of the "New South" political leader. The masters of the region's economic and social development from the 1880s until WORLD WAR I combined the interests of antebellum planters with those of northern and local capitalists eager to build railroads and tap the area's coal, iron, and timber. The South's new ruling class "redeemed" Dixie from the egalitarian schemes of Radical Republicans and carpetbaggers by supporting RUTHERFORD B. HAYES for President and accepting the national hegemony of the GOP's conservative wing. In return, these leaders of the "New South" received from the Republicans a promise to remove federal troops from the region, a free hand with respect to the Negro, and a junior partnership in the management of the nation's economic affairs. (See COMPROMISE OF 1877.)

While tending his family's plantation and building a prosperous legal practice in New Orleans, White became

a chief political confidant and ally of Governor Francis Nicholls, the leader of the state's conservative Democrats, who rewarded him with an appointment to the Louisiana Supreme Court and then a seat in the United States SENATE in 1891. While in Washington, the portly, florid, long-haired junior senator from Louisiana adopted a rigid STATES' RIGHTS and laissez-faire posture on most issues. However, he fervently supported high duties on foreign sugar and lavish federal bounties to the planters in his home state. White led the Senate's successful revolt against President GROVER CLEVELAND's efforts to lower the protective tariff in 1893. Nevertheless, the beleaguered head of the Democratic party nominated him to the Supreme Court a year later, following the death of SAMUEL BLATCHFORD and the Senate's rejection of two earlier nominees.

White took his seat as the junior member of the FULLER COURT at one of the important turning points in the history of the federal judiciary. The country seethed with unrest generated by the worst depression of the nineteenth century. Violent confrontations between workers and employers erupted on the nation's major railroads as well as in coal mines, steel mills, and other factories. Debt-ridden farmers formed the radical Populist Party, which demanded government control of the money supply and banking system and nationalization of the major trunk rail lines. Insurgent Democrats nominated the youthful William Jennings Bryan, who ran on a platform promising inflation of the money supply, higher taxes on the wealthy, and a curb on trusts and other monopolies. In this atmosphere of class strife and regional polarization, men of property and standing looked to the Supreme Court to defend the constitutional ark against dangerous innovations. Fuller and most of his colleagues were equal to the task of repelling the radical hordes.

Even before the economic collapse, a majority of the Justices had served warning that they would not tolerate legislative attacks on corporate property and profits. Legislative power to fix railroad rates, they warned, was not without limits; corporations were PERSONS, entitled to the judicial protection of the FOURTEENTH AMENDMENT'S DUE PROCESS clause; and no rate imposed by legislative fiat could be deemed "reasonable" without final judicial review. Then, in a series of cases that reached the Court together during the depths of the depression in 1895, the Justices quashed federal efforts to prosecute the sugar trust under the SHERMAN ANTITRUST ACT in UNITED STATES V. E. C. KNIGHT CO. (1895); upheld the contempt conviction of the labor leader Eugene V. Debs for his role in the Pullman boycott in IN RE DEBS (1895); and declared unconstitutional the first federal income tax levied since the Civil War in POLLACK V. FARMER'S LOAN AND TRUST CO. (1895). These three decisions displayed the FULLER COURT's conservative colors and represented a major victory for big business, the wealthy, and the enemies of organized labor.

Like the majority of his brethren, Justice White showed no sympathy for Debs and the militant working class movement he represented. White also endorsed Fuller's reasoning in the sugar trust case, which limited the scope of the Sherman Act to monopolies of interstate trade or commerce and left to the individual states all authority to curb monopolies over production. But he joined Justice JOHN MARSHALL HARLAN, the outspoken champion of nationalism and federal power, in denouncing the majority's assault on the income tax statute. White had been a member of the Senate that passed the income tax measure as part of the tariff package in 1892, and, although he did not endorse the levy, neither did he doubt the constitutional power of Congress to adopt it. In order to invalidate the law, the majority had to ignore two weighty precedents, one dating from 1796. This was too much for White, who argued eloquently that "the conservation and orderly development of our institutions rests on our acceptance of the results of the past, and their use as lights to guide our steps in the future. Teach the lesson that settled principles may be overthrown at any time, and confusion and turmoil must ultimately result."

The income tax dissent revealed an important aspect of White's jurisprudence which remained constant during his years as an associate Justice and later as Chief Justice after 1911. Although deeply conservative and devoted to the judicial protection of private property, White was also a pragmatist capable of endorsing moderate reforms that had clear constitutional sanction and that served to cap the pressures for more radical change. Though not adverse to overturning a few precedents himself, White usually did so in the pursuit of policies that strengthened rather than weakened the dominant economic forces of corporate capitalism.

In this spirit, he endorsed the judicial imperialism inherent in Justice Harlan's opinion in SMYTH V. AMES (1898), which made the federal judiciary the final arbiter of utility rates, but he also enforced the progressive reforms of the Theodore Roosevelt-William Howard Taft era which revitalized the regulatory authority of the Interstate Commerce Commission (ICC) over the nation's major railroads. In a series of decisions, culminating in White's opinion in INTERSTATE COMMERCE COMMISSION V. ILLINOIS CENTRAL RAILROAD CO. (1910), the majority sustained the ICC's fact-finding and rate-fixing powers as mandated by Congress. White's views were compatible with the interests of the railroads, which looked to the ICC to prevent financially ruinous rate wars, and with those of reformers like Roosevelt, who believed that such regulation would curb the appetite for government ownership of the carriers.

White rendered his greatest service to the conservative

cause in the area of antitrust law by promoting the view that the Sherman Act prohibited only "unreasonable" restraints of trade, a perspective pregnant with possibilities for enlarged judicial control over the country's economic structure, yet wholly compatible with the desires of big business. But it took White over a decade to defeat the contrary views of other Justices, who remained more wedded to the old Jacksonian belief in competition and the dangers of monopoly.

In the wake of the *E. C. Knight* decision restricting federal antitrust efforts to INTERSTATE COMMERCE, the Department of Justice began a campaign to stamp out railroad cartels and pools designed to divide up traffic and fix rates. A majority of the Justices, led by Harlan and RUFUS W. PECKHAM, a passionate spokesman for laissez-faire economics, sustained the government's efforts in this area on the theory that the Sherman Act outlawed *all* restraints of trade, even those that might be deemed "reasonable" in view of particular business conditions such as rate wars and destructive competition. In the first of these cases, UNITED STATES V. TRANS-MISSOURI FREIGHT ASSOCIATION (1897), White wrote a long, rambling dissent which accused the majority of misreading the antitrust law, defying the traditions of the COMMON LAW with respect to restraints of trade, and jeopardizing the economic progress brought to the nation by business combinations and consolidations.

White continued to dissent in the *Joint Traffic Association Case* (1898) and in NORTHERN SECURITIES CO. V. UNITED STATES (1904), where a five-Justice majority upheld the government's suit against the Morgan-Harriman rail monopoly between Chicago and the Pacific Northwest. In each case, White argued that the antitrust law, incorporating the ancient doctrines of the common law, prohibiting only "unreasonable" restraints of trade. Technically, White was correct, but all of the methods condemned in *Trans-Missouri*, *Joint Traffic Association*, and *Northern Securities* would have been indictable at common law as well, because their fundamental objective had been to fix prices contrary to the public interest. This fact seems to have eluded White, who believed that the Harlan-Peckham approach threatened the demise of valuable business enterprises by virtue of judicial abdication to the prosecutorial zeal of misguided reformers in the executive branch. In this perception, he enjoyed the support of three other justices, including OLIVER WENDELL HOLMES, who also looked upon the Rockefellers, Morgans, and Harrimans as agents of social and economic progress.

Four changes in the personnel of the Court between 1909 and 1911 gave White a new majority for his doctrine a year later when the government's suits against Standard Oil and American Tobacco finally reached the Justices after years of litigation. Speaking now as Chief Justice of the United States, having been appointed to the center chair by President Taft, White sustained the government's case against the monopolists but cast aside the Harlan-Peckham interpretation of the Sherman Act. Henceforth, the majority decreed, only "unreasonable" trade restraints would be indictable under the Sherman Act and the Justices on the Supreme Court would determine where the line should be drawn between legal and illegal competitive behavior. Harlan wrote a melancholy dissent against this sharp reversal of doctrine, which seemed to teach that "settled principles may be overthrown at any time, and confusion and turmoil must ultimately result."

White's RULE OF REASON doctrine provoked a storm of protest from progressives in the Congress, who denounced the Justices for mutilating the antitrust law, arrogating to themselves too much power over the economic system, and giving big business a hunting license to continue its predatory ways. Although Congress added the CLAYTON ACT amendments to the antitrust law in 1914, specifically outlawing a substantial list of business practices, White's rule of reason carried the day. The Court quashed the government's efforts to break up the shoe machinery monopoly in 1913 and also threw out the case against United States Steel in 1920, a year before White died. There was extraordinary historical irony in the fact that it was a Southerner and a veteran of the Rebel army who advanced antitrust doctrines that sealed the triumph of industrial capitalism and big business in American life.

For a Southerner, a Democrat, and a spokesman for states' rights in the Senate, White displayed considerable toleration for the expansion of federal economic controls by means of the COMMERCE CLAUSE and the TAXING AND SPENDING POWER. In the Senate he had taken an active role in fighting a federal law to regulate the trade in agricultural "futures," noting that it would invade the JURISDICTION of the states and create "the most unlimited and arbitrary government on the face of God's earth." As a Justice, however, he joined Harlan's path-breaking opinion in the Lottery Case, CHAMPION V. AMES (1903), which greatly expanded the NATIONAL POLICE POWER via the interstate commerce clause. A year later he wrote the Court's opinion in MCCRAY V. UNITED STATES (1904), which affirmed the power of Congress to impose a prohibitive levy upon oleomargarine and thus employ its tax powers for regulatory purposes.

White drew back, however, from the logical implications of the national police power when Congress sought to apply it to other areas of social and economic life. He was willing to permit the extension of the commerce power to federal regulation of adulterated foods and interstate traffic in prostitution, but he joined Justice WILLIAM R. DAY's opinion in HAMMER V. DAGENHART (1918), which declared unconstitutional Congress's attempt to eradicate child labor. He also rejected federal efforts to tax and regulate narcotics traffic in UNITED STATES V. DOREMUS (1919), although the majority found this use of the

federal taxing power compatible with White's own views in *McCray*. He sanctioned Congress's adoption of an eight-hour day for interstate train crews which brought an end to the disastrous nationwide rail strike, but he joined three other dissenters in *Block v. Hirsh* (1921) when Holmes and the majority upheld the national legislature's power to impose rent controls upon property in the DISTRICT OF COLUMBIA during the emergency of World War I.

White displayed equal inconsistency in cases where state ECONOMIC REGULATIONS came under DUE PROCESS challenge. The one thread of coherence seemed to be his growing conservatism and abiding dislike for organized labor. He dissented in LOCHNER V. NEW YORK (1905) along with Harlan and Day, noting that "no evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary . . . should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom, annul statutes that had received the sanction of the people's representatives." He also voted to sustain the Oregon and California maximum hours laws for women in MULLER V. OREGON (1908) and *Miller v. Wilson* (1915). But he balked at the overtime pay provisions and general maximum hours limitation in BUNTING V. OREGON (1917) and sided with the majority in the three leading cases of the period which protected employers' use of YELLOW DOG CONTRACTS against both state and federal efforts to eliminate this notorious antiunion device: *Adair v. United States* (1908), COPPAGE V. KANSAS (1915), and HITCHMAN V. HITCHMAN COAL & COKE CO. (1917).

In 1919, White joined JOSEPH MCKENNA, WILLIS VAN DEVANTER, and JAMES C. MCREYNOLDS in dissent against the Court's opinion in the *Arizona Employers' Liability Cases* (1919), which upheld that state's law shifting the cost of industrial accidents to employers. And during his final term on the Court, he joined the majority in scuttling the anti-INJUNCTION provisions of the Clayton Antitrust Act and affirming the illegality of secondary boycotts. If not the most reactionary member of the Supreme Court with respect to organized labor, White certainly ran a close race for that honor with Justices Day, MAHLON PITNEY, and McReynolds.

White had been elevated to the chief justiceship by William Howard Taft, who coveted the position for himself and feared that a younger nominee might forever prevent that happy development. Taft realized his lifelong ambition in 1921, when White died. Predictably, White's eulogizers compared his career to that of John Marshall and other immortals of the bench, but a more accurate assessment is that constitutional law showed his imprint until 1937.

MICHAEL E. PARRISH
(1986)

Bibliography

DISHMAN, ROBERT 1951 Mr. Justice White and the Rule of Reason. *The Review of Politics* 13:229–248.

HIGHSAW, ROBERT B. 1981 *Edward Douglass White: Defender of the Conservative Faith.* Baton Rouge: Louisiana State University Press.

KLINKHAMER, MARIE CAROLYN 1943 *Edward Douglass White, Chief Justice of the United States.* Washington, D.C.: Catholic University Press.

SEMONCHE, JOHN E. 1978 *Charting the Future: The Supreme Court Responds to a Changing Society, 1890–1920.* Westport, Conn.: Greenwood Press.

## *WHITE, UNITED STATES v.*
## 401 U.S. 745 (1971)

During the reign of OLMSTEAD V. UNITED STATES (1927) the Supreme Court consistently ruled, in cases including ON LEE V. UNITED STATES (1952) and LOPEZ V. UNITED STATES (1963), that government informers who deceptively interrogated criminal suspects and either secretly transmitted the conversations to eavesdropping government agents with concealed recorders or secretly recorded the conversations, had committed no TRESPASS, and therefore the FOURTH AMENDMENT was inapplicable. The use of spies without complying with Fourth Amend ment controls was reaffirmed in HOFFA V. UNITED STATES (1966). KATZ V. UNITED STATES (1967), however, abolished the trespass requirement for Fourth Amendment protection and focused on the personal PRIVACY interests that were entitled to protection. Some therefore thought *On Lee* was no longer good law. In *United States v. White*, however, the Court held otherwise. Though there was no clear majority for either approving or disapproving *On Lee*, four Justices voted to reaffirm that decision, and Justice HUGO L. BLACK concurred to make a majority on the ground that *Olmstead*'s trespass requirement should be retained. The *On Lee* doctrine was thus reaffirmed.

Justice BYRON R. WHITE, for the plurality, ruled that a person is not protected by the Fourth Amendment against a faithless friend, regardless of whether a trespass is involved. An expectation of such protection is not "justifiable" under the *Katz* standard. Police have always been allowed to use the evidence of faithless associates who turn to the police or are informers: "one contemplating illegal activities must realize and risk that his companions may be reporting to the police." The fact that the faithless friend was wired, transmitting the conversation to others or recording it for later replaying, makes no constitutional difference.

The dissents focused on the latter point. Justice JOHN MARSHALL HARLAN rejected the "assumption of risk" rationale of the majority, stressing that the real question was

which risks the law *should* force people to assume. Whereas the use of unwired spies or contemporaneous recording to ensure reliability are both justifiable, simultaneous overhearing by third parties is different; free discourse would be seriously jeopardized if people were forced to assume the risk that their words were being simultaneously transmitted to third parties and transcribed. "Were third-party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life." Justice Harlan emphasized that the dissenters' views would not prohibit the use of wired informers but would only bring the practice under Fourth Amendment warrant and other procedures.

Even though the principal *White* opinion did not command a majority, it kept *On Lee* in effect and freed the government from Fourth Amendment restrictions on the use of spies and informers, wired or otherwise.

HERMAN SCHWARTZ
(1986)

(SEE ALSO: *Electronic Eavesdropping.*)

## WHITE COURT
### (1910–1921)

"The condition of the Supreme Court is pitiable, and yet those old fools hold on with a tenacity that is most discouraging," President WILLIAM HOWARD TAFT wrote in May 1909 to his old friend HORACE H. LURTON. Taft would have his day. One year later, Chief Justice MELVILLE W. FULLER spoke at the Court's memorial service for Justice DAVID J. BREWER: "As our brother Brewer joins the great procession, there pass before me the forms of Mathews and Miller, of Field and Bradley and Lamar and Blatchford, of Jackson and Gray and of Peckham, whose works follow them now that they rest from their labors." These were virtually Fuller's last words from the bench, for he died on Independence Day, 1910, in his native Maine. RUFUS W. PECKHAM had died less than a year earlier. WILLIAM H. MOODY, tragically and prematurely ill, would within a few months have to cut short by retirement one of the few notable short tenures on the Court. JOHN MARSHALL HARLAN had but one year left in his remarkable thirty-four-year tenure. By 1912, five new Justices had come to the Court who were not there in 1909: a new majority under a new Chief Justice.

The year 1910 was a significant divide in the history of the country as well. The population was nearly half urban, and immigration was large and growing. The country stood on the verge of enacting humane and extensive labor regulation. A year of Republican unrest in Congress and THEODORE ROOSEVELT's decisive turn to progressive agitation, 1910 was the first time in eight elections that the Democrats took control of the House. In the same year, the National Association for the Advancement of Colored People was founded. It was a year of progressive tremors that would eventually shake the Supreme Court to its foundations with the appointment of LOUIS D. BRANDEIS in 1916. But the five appointments with which President Taft rehabilitated his beloved Court between 1909 and 1912 had no such dramatic impact. There was a significant strengthening of a mild progressive tendency earlier evident within the Court, but the new appointments brought neither a hardening nor a decisive break with the DOCTRINES of laissez-faire constitutionalism and luxuriant individualism embodied in such decisions as LOCHNER V. NEW YORK (1905) and *Adair v. United States* (1908). Taft's aim was to strengthen the Court with active men of sound, if somewhat progressive, conservative principles. Neither Taft nor the nation saw the Court, as both increasingly would a decade later, as the storm center of pressures for fundamental constitutional change.

Taft's first choice when Peckham died in 1909 was his friend Lurton, then on the Sixth Circuit, and a former member of the Tennessee Supreme Court. Lurton, a Democrat, had been a fiery secessionist in his youth, and in his short and uneventful four-year tenure he combined conservationism on economic regulation, race, and labor relations. Taft's second choice was not so modest. When Taft went to Governor CHARLES EVANS HUGHES of New York to replace Brewer, he brought to the Court for the first of his two tenures a Justice who would emerge as one of the greatest figures in the history of American law, and a principal architect of modern CIVIL LIBERTIES and CIVIL RIGHTS jurisprudence. As governor of New York, Hughes was already one of the formidable reform figures of the Progressive era, and his later career as a presidential candidate who came within a whisper of success in 1916, secretary of state during the 1920s, and Chief Justice during the tumultuous years of the New Deal, mark him as one of the most versatile and important public figures to sit on the Court since JOHN MARSHALL.

Taft's choice of the Chief Justice to fill the center seat left vacant by Fuller was something of a surprise, although reasons are obvious in retrospect. EDWARD D. WHITE was a Confederate veteran from Louisiana, who had played a central role in the Democratic reaction against Reconstruction in that state and had emerged as a Democratic senator in 1891. He had been appointed Associate Justice in 1894 by President GROVER CLEVELAND and had compiled a respectable but unobtrusive record in sixteen years in the side seat. He had dissented with able force from the self-inflicted wound of POLLOCK V. FARMERS' LOAN & TRUST CO. (1895), holding unconstitutional the federal income

tax, and his antitrust dissents in TRANS-MISSOURI FREIGHT ASSOCIATION (1897) and UNITED STATES V. NORTHERN SECURITIES COMPANY (1904) embodied sound good sense. He had done "pioneer work," as Taft later called it, in ADMINISTRATIVE LAW. White had a genius for friendship and, despite a habit of constant worrying, extraordinary personal warmth. OLIVER WENDELL HOLMES summed him up in these words in 1910: "His writing leaves much to be desired, but his thinking is profound, especially in the legislative direction which we don't recognize as a judicial requirement but which is so, especially in our Court, nevertheless." White was sixty-five, a Democrat, a Confederate veteran, and a Roman Catholic, and his selection by Taft was seen as adventurous. But given Taft's desire to bind up sectional wounds, to spread his political advantage, to put someone in the center seat who might not occupy Taft's own ultimate ambition for too long, to exemplify bipartisanship in the choice of Chief Justice, and on its own sturdy merits, the selection of White seems easy to understand.

Along with White's nomination, Taft sent to the Senate nominations of WILLIS VAN DEVANTER of Wyoming and JOSEPH R. LAMAR of Georgia. Van Devanter would sit for twenty-seven years, and would become one of the Court's most able, if increasingly conservative, legal craftsmen. Lamar would last only five years, and his death in 1915, along with Lurton's death in 1914 and Hughes's resignation to run for President, opened up the second important cycle of appointments to the White Court.

The Taft appointees joined two of the most remarkable characters ever to sit on the Supreme Court. John Marshall Harlan, then seventy-eight, had been on the Court since his appointment by President RUTHERFORD B. HAYES in 1877. He was a Justice of passionate strength and certitude, a man who, in the fond words of Justice Brewer, "goes to bed every night with one hand on the Constitution and the other on the Bible, and so sleeps the sleep of justice and righteousness." He had issued an apocalyptic dissent in *Pollock*, the income tax case, and his dissent in PLESSY V. FERGUSON (1986), the notorious decision upholding racial SEGREGATION on railroads, was an appeal to the conscience of the Constitution without equal in our history. The other, even more awesome, giant on the Court in 1910 was Holmes, then seventy, but still not quite recognized as the jurist whom BENJAMIN N. CARDOZO would later call "probably the greatest legal intellect in the history of the English-speaking judiciary." The other two members of the Court were JOSEPH MCKENNA, appointed by President WILLIAM MCKINLEY in 1898, and WILLIAM R. DAY, appointed by President Theodore Roosevelt in 1903.

The Supreme Court in 1910 remained in "truly republican simplicity," as Dean Acheson would recall, in the old Senate chamber, where the Justices operated in the midst of popular government, and in the sight of visitors to the Capitol. No office space was available, and the Justices worked in their homes. Their staff allowance provided for a messenger and one clerk, and their salaries were raised in 1911 to $14,500 for the Associate Justices and $15,000 for the Chief Justice. The Court was badly overworked and the docket was falling further and further behind, not to be rescued until the JUDICIARY ACT OF 1925 gave the Court discretion to choose the cases it would review.

In the public's contemporaneous view, if not in retrospect, the most important cases before the White Court between 1910 and 1921 did not involve the Constitution at all, but rather the impact of the SHERMAN ANTITRUST ACT on the great trusts. UNITED STATES V. STANDARD OIL COMPANY (1911) and *American Tobacco Company v. United States* (1911) had been initiated by the Roosevelt administration to seek dissolution of the huge combinations, and when the cases were argued together before the Supreme Court in 1911, the *Harvard Law Review* thought public attention was concentrated on the Supreme Court "to a greater extent than ever before in its history."

The problem for the Court was to determine the meaning of restraint of trade amounting to monopoly. The answer offered by Chief Justice White for the Court was the famous RULE OF REASON, under which not all restraints of trade restrictive of competition were deemed to violate the Sherman Act, but rather only those "undue restraints" which suggested an "intent to do wrong to the general public . . . thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of riches, which were considered to be against public policy." Under this test, the Court deemed Standard Oil to have engaged in practices designed to dominate the oil industry, exclude others from trade, and create a monopoly. It was ordered to divest itself of its subsidiaries, and to make no agreements with them that would unreasonably restrain trade. The court ruled that the American Tobacco Company was also an illegal combination and forced it into dissolution.

Antitrust was perhaps the dominant political issue of the 1912 presidential campaign, and the rule of reason helped to fuel a heated political debate that produced the great CLAYTON ACT and FEDERAL TRADE COMMISSION ACT of 1914. Further great antitrust cases came to the White Court, notably *United States v. United States Steel Company*, begun in 1911, postponed during the crisis of WORLD WAR I, and eventually decided in 1920. A divided Court held that United States Steel had not violated the Sherman Act, mere size alone not constituting an offense.

The tremendous public interest generated by the antitrust cases before the White Court was a sign of the temper of the political times, in which the regulation of business and labor relations was the chief focus of progressive attention. In this arena of constitutional litigation,

the White Court's record was mixed, with perhaps a slight progressive tinge. On the great questions of legislative power to regulate business practices and working arrangements, the White Court maintained two parallel but opposing lines of doctrines, the one protective of laissez-faire constitutionalism and freedom from national regulation, the other receptive to the progressive reforms of the day.

In the first four years after its reconstitution by Taft, the Supreme Court handed down a number of important decisions upholding national power to regulate commerce for a variety of ends. The most expansive involved federal power to regulate railroads—and to override competing state regulation when necessary. *Atlantic Coast Line Railroad v. Riverside Mills* (1911) upheld Congress's amendment of the HEPBURN ACT imposing on the initial carrier of goods liability for any loss occasioned by a connecting carrier, notwithstanding anything to the contrary in the bill of lading. FREEDOM OF CONTRACT gave way to the needs of shippers for easy and prompt recovery. More significantly, in the second of the EMPLOYERS' LIABILITY CASES (1912), the Court upheld congressional legislation imposing liability for any injury negligently caused to any employee of a carrier engaged in INTERSTATE COMMERCE. This legislation did away with the fellow-servant rule and the defense of contributory negligence, again notwithstanding contracts to the contrary. In 1914, in the famous *Shreveport Case* (*Houston, East & West Texas Railway Company v. United States*), the Court upheld the power of the Interstate Commerce Commission to set the rates of railroad hauls entirely within Texas, because those rates competed against traffic between Texas and Louisiana. The Court overrode the rates set by the Texas Railroad Commission in the process. And in the most important COMMERCE CLAUSE decision of the early years of the White Court, the MINNESOTA RATE CASES (1913), the Court upheld the power of the states to regulate railroad rates for intrastate hauls, even when that regulation would force down interstate rates, so long as there had been no federal regulation of those rates. Thus, state power over rates was not invalidated because of the possibility of prospective federal regulation, and a large loophole between state and federal power was closed.

Outside the area of carrier regulation, the White Court was also friendly to national regulation by expanding the NATIONAL POLICE POWER doctrine. HIPOLITE EGG CO. V. UNITED STATES (1911) upheld the PURE FOOD AND DRUG ACT of 1906 in regulating adulterated food and drugs shipped in interstate commerce, whether or not the material had come to rest in the states. "Illicit articles" that traveled in interstate commerce were subject to federal control, the Court said, although with a doctrinal vagueness and confusion that would come back to haunt the Court in HAMMER V. DAGENHART (1918). In HOKE V. UNITED STATES (1913) the Court upheld the MANN ACT, which punished the transportation in interstate commerce of women "for the purpose of prostitution or debauchery, or for any other immoral purpose."

Taft got his opportunity for a sixth appointment—more appointments in one term than any President in our history since GEORGE WASHINGTON—when Harlan died in 1911. He filled the vacancy with MAHLON PITNEY, chancellor of New Jersey. The reasons for this appointment are obscure, but like other Taft appointments Pitney was a sound, middle-of-the-road, good lawyer with little flair or imagination. As if to prepare for the coming flap over Brandeis, the Pitney appointment ran into trouble because of the nominee's alleged antilabor positions. But Pitney prevailed, and he would serve on the Court until 1922.

If ever in the history of the Supreme Court successive appointments by one President have seemed to embrace dialectical opposites, WOODROW WILSON's appointments of JAMES C. MCREYNOLDS in 1914 and Louis D. Brandeis in 1916 are the ones. McReynolds would become an embittered and crude anti-Semite; Brandeis was the first Jew to sit on the Supreme Court. McReynolds would become the most rigid and doctrinaire apostle of laissez-faire conservatism in constitutional history, the most recalcitrant of the "Four Horsemen of Reaction" who helped to scuttle New Deal legislation in the early 1930s. Brandeis was the greatest progressive of his day, on or off the Court. McReynolds was an almost invariable foe of CIVIL LIBERTIES and CIVIL RIGHTS for black people; Brandeis was perhaps the driving force of his time for the development of civil liberties, especially freedom of expression and rights of personal privacy. What brought these opposites together in Wilson's esteem, although he came to regret the McReynolds appointment, was antitrust fervor. McReynolds's aggressive individualism and Brandeis's progressive concern for personal dignity and industrial democracy coalesced around antitrust law, and this was the litmus test of the day for Wilson. Thus, possibly the most difficult and divisive person ever to sit on the Supreme Court and possibly the most intellectually gifted and broadly influential Justice in the Court's history took their seats in spurious, rather Wilsonian, juxtaposition.

Wilson's third appointment was handed him by the resignation of his rival in the presidential election of 1916. As it became plain that Hughes was the only person who could unite the Republican party, he came under increasing pressure from Taft and others to make himself available. He did. Wilson nominated JOHN H. CLARK of Ohio to replace Hughes. One of the most pregnant speculations about the history of the Supreme Court is what might have happened had Hughes remained on the bench. He might well have become a Chief Justice in 1921 instead of Taft, and under his statesmanlike influence, the hardening of

doctrine that led to the confrontation over the New Deal and the Court-packing plan might not have happened.

Although two of Wilson's three appointments were staunch progressives, the Supreme Court seemed to adopt a somewhat conservative stance as it moved toward the decade of erratic resistance to reform that would follow in the 1920s. Federal reform legislation generally continued to pass muster, but there was the staggering exception of the *Child Labor Case* in 1918. And the Court seemed to strike out at labor unions, in both constitutional and antitrust decisions.

In *Hammer v. Dagenhart* (1918) the Supreme Court stunned Congress and most of the country when it invalidated the first federal CHILD LABOR ACT. The extent of child labor in the United States during the Progressive era was an affront to humanitarian sensibilities. One child out of six between the ages of ten and fifteen was a wage earner. Prohibition and regulation of child labor became the central reform initiatives of the progressive impulse. In 1916, overcoming constitutional doubts, Wilson signed the KEATING-OWEN ACT, which forbade the shipment in interstate or foreign commerce of the products of mines where children sixteen and under had been employed, or of factories where children younger than fourteen worked, or where children fourteen to sixteen had worked more than eight hours a day, six days a week. Child labor was not directly forbidden, but was severely discouraged by closing the channels of interstate commerce.

A narrow majority of the Court, in an opinion by Justice Day, held that this law exceeded the federal commerce power. Day reasoned that the goods produced by child labor were in themselves harmless, and that the interstate transportation did not in itself accomplish any harm. This reasoning was entirely question-begging, because it was the possibility of interstate commerce that imposed a competitive disadvantage in states that outlawed child labor in comparison with less humanitarian states. Moreover, the reasoning was flatly inconsistent with the opinion in *Hipolite Egg* and *Hoke*. But the majority plainly regarded the federal child labor legislation as an invasion of the domestic preserves of the states. Holmes, joined by McKenna, Brandeis, and Clarke, issued a classic dissent.

With the preparations for an advent of American involvement in World War I, the Supreme Court recognized broad federal power to put the economy on a wartime footing. The burden of constitutional resistance to reform legislation shifted to cases involving state laws. Here the main hardening in doctrinal terms came in cases involving labor unions. Otherwise, a reasonable progressivism prevailed. Thus, in BUNTING V. OREGON (1917) the Court upheld the maximum ten-hour day for all workers in mills and factories, whether men or women. However, two minimum wage cases from Oregon were upheld only by the fortuity of an equally divided Supreme Court, Brandeis having recused himself.

The most chilling warning to progressives that laissez-faire constitutionalism was not dead came in COPPAGE V. KANSAS (1915). The issue was the power of a state to prohibit by legislation the so-called YELLOW DOG CONTRACT, under which workers had to promise their employers not to join a union. The Court in *Coppage* held such laws unconstitutional: to limit an employer's freedom to offer employment on its own terms was a violation of freedom of contract.

The Supreme Court's race relations decisions between 1910 and 1921 constitute one of the Progressive era's most notable, and in some ways surprising, constitutional developments. Each of the Civil War amendments was given unprecedented application. For the first time, in the *Grandfather Clause Cases* (1915), the Supreme Court applied the FIFTEENTH AMENDMENT and what was left of the federal civil rights statutes to strike down state laws calculated to deny blacks the right to vote. For the first time, in BAILEY V. ALABAMA (1911) and UNITED STATES V. REYNOLDS (1914), the Court used the THIRTEENTH AMENDMENT to strike down state laws that supported PEONAGE by treating breach of labor contracts as criminal fraud and by encouraging indigent defendants to avoid the chain gang by having employers pay their fines in return for commitments to involuntary servitude. For the first time, in BUCHANAN V. WARLEY (1917), it found in the FOURTEENTH AMENDMENT constitutional limits on the spread of laws requiring racial separation in residential areas of cities and towns, and also for the first time, in *McCabe v. Atchison, Topeka & Santa Fe Railway* (1914), it put some teeth in the equality side of the SEPARATE BUT EQUAL DOCTRINE by striking down an Oklahoma law that said that railroads need not provide luxury car accommodations for blacks on account of low demand.

To be sure, only with respect to peonage could the White Court be said to have dismantled the legal structure of racism in any fundamental way. After the White Court passed into history in 1921, blacks in the South remained segregated and stigmatized by Jim Crow laws, disfranchised by invidiously administered LITERACY TESTS, white PRIMARY ELECTIONS, and POLL TAXES; and victimized by a criminal process from whose juries and other positions of power they were wholly excluded. But if the White Court did not stem the newly aggressive and self-confident ideology of racism inundating America in the Progressive era, neither did it put its power and prestige behind the flood, as had the WAITE COURT and FULLER COURT that preceded it—and, at critical points, it resisted. The White Court's principled countercurrents were more symbols of hope than effective bulwarks against the racial prejudice that permeated American law. But the decisions taken together

mark the first time in American history that the Supreme Court opened itself in more than a passing way to the promises of the Civil War amendments.

World War I generated the first set of cases that provoked the Supreme Court for the first time since the FIRST AMENDMENT was ratified in 1791 to consider the meaning of freedom of expression. The cases, not surprisingly, involved dissent and agitation against the war policies of the United States. The war set off a major period of political repression against critics of American policy.

In the first three cases, SCHENCK V. UNITED STATES, FROHWERK V. UNITED STATES, and IN RE DEBS (1919), following the lead of Justice Holmes, the Supreme Court looked not to the law of SEDITIOUS LIBEL for justification in punishing speech but rather to traditional principles of legal responsibility for attempted crimes. In English and American COMMON LAW, an unsuccessful attempt to commit a crime could be punished if the attempt came dangerously close to success, while preparations for crime—in themselves harmless—could not be punished. With his gift of great utterance, Holmes distilled these doctrinal nuances into the rule that expression could be punished only if it created a CLEAR AND PRESENT DANGER of bringing about illegal action, such as draft resistance or curtailment of weapons production. Given his corrosive skepticism and his Darwinian sense of flux, the clear and present danger rule later became in Holmes's hands a fair protection for expression. But in the hands of judges and juries more passionate or anxious, measuring protection for expression by the likelihood of illegal action proved evanescent and unpredictable.

There were other problems with the clear and present danger rule. It took no account of the value of a particular expression, but considered only its tendency to cause harmful acts. Because the test was circumstantial, legislative declarations that certain types of speech were dangerous put the courts in the awkward position of having to second-guess the legislature's factual assessments of risk in order to protect the expression. This problem became clear to Holmes in ABRAMS V. UNITED STATES (1919), in which a statute punishing speech that urged curtailment of war production was used to impose draconian sanctions on a group of radical Russian immigrants who had inveighed against manufacture of war material that was to be used in Russia. In this case, Holmes and Brandeis joined in one of the greatest statements of political tolerance ever uttered.

In 1921, the year Edward Douglass White died and Taft became Chief Justice, Benjamin Cardozo delivered his immortal lectures, "The Nature of the Judicial Process." Cardozo pleaded for judges to "search for light among the social elements of every kind that are the living forces behind the facts they deal with." The judge must be "the interpreter for the community of its sense of law and order . . . and harmonize results with justice through a method of free decision." Turning to the Supreme Court, Cardozo stated: "Above all in the field of constitutional law, the method of free decision has become, I think, the dominant one today."

In this view, we can see that Cardozo was too hopeful, although his statement may have been offered more as an admonition than a description. The method of "free decision," exemplified for Cardozo by the opinions of Holmes and Brandeis, remained in doubt notwithstanding the inconsistent progressivism of the White Court, and would become increasingly embattled in the decades to come.

BENNO C. SCMIDT, JR.
(1986)

Bibliography

BICKEL, ALEXANDER M. and SCHMIDT, BENNO C., JR. 1984 *The Judiciary and Responsible Government 1910–1921.* Vol. IX of the Holmes Devise History of the Supreme Court. New York: Macmillan.

CARDOZO, BENJAMIN N. 1921 *The Nature of the Judicial Process.* New Haven, Conn.: Yale University Press.

CHAFEE, ZECHARIA 1949 *Free Speech in the United States.* Cambridge, Mass.: Harvard University Press.

HIGHSAW, ROBERT B. 1981 *Edward Douglass White.* Baton Rouge: Louisiana State University Press.

SEMONCHE, JOHN E. 1978 *Charting the Future: The Supreme Court Responds to a Changing Society 1890–1920.* Westport, Conn.: Greenwood Press.

SWINDLER, WILLIAM F. 1969 *Court and Constitution in the 20th Century: The Old Legality 1889–1932.* Indianapolis: Bobbs-Merrill.

## WHITE PRIMARIES

See: *Grovey v. Townsend; Nixon v. Condon; Nixon v. Herndon;* Primary Election; *Smith v. Allwright; Terry v. Adams*

## WHITING, WILLIAM

See: Commentators on the Constitution

## *WHITNEY v. CALIFORNIA*
274 U.S. 357 (1927)

SCHENCK V. UNITED STATES (1919), ABRAMS V. UNITED STATES (1919), GITLOW V. NEW YORK (1925), and *Whitney* are the four leading FREEDOM OF SPEECH cases of the 1920s in which the CLEAR AND PRESENT DANGER rule was announced

but then rejected by the majority in favor of the BAD TENDENCY test announced in *Gitlow*. In *Whitney*, Justice EDWARD SANFORD repeated his *Gitlow* argument that a state law does not violate FIRST AMENDMENT rights by employing the "bad tendency" test as the standard of reasonableness in speech cases. The state may reasonably proscribe "utterances . . . tending to . . . endanger the foundations of organized government." Here Justice Sanford added that "united and joint action involves even greater danger to the public peace and security than the isolated utterances . . . of individuals." Miss Whitney had been convicted of organizing and becoming a member of an organization that advocated and taught CRIMINAL SYNDICALISM in violation of the California Criminal Syndicalism Act of 1919. The Court upheld the act's constitutionality.

After *Schenck*, the clear and present danger position had been reiterated in dissenting opinions by OLIVER WENDELL HOLMES and LOUIS D. BRANDEIS in *Abrams* and *Gitlow*. Brandeis, joined by Holmes, concurred in *Whitney*. Brandeis's reason for concurring rather than dissenting was that Whitney had not properly argued to the California courts that their failure to invoke the danger test was error, and that the Supreme Court might not correct errors by state courts unless those errors were properly raised below.

Brandeis's concurrence was a forceful reiteration of the value to a democracy of freedom of speech for even the most dissident speakers. The framers knew that "fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances . . . and that the fitting remedy for evil counsels is good ones." Brandeis reemphasized the imminence requirement of the danger rule. "To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time . . . to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."

*Whitney* is often cited for an addition by Brandeis to the original clear and present danger formula. The evil anticipated must be not only substantive but also serious. "The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state. . . ."

The Court overruled *Whitney* in BRANDENBURG V. OHIO (1969).

MARTIN SHAPIRO
(1986)

# WHITTAKER, CHARLES
## (1901–1973)

A considerable number of Justices who served on the United States Supreme Court resembled T. S. Eliot's famous Mr. Prufrock: "an attendant lord, one that will do [to swell a progress, start a scene or two. . . .] Deferential, glad to be of use, [Politic, cautious, and meticulous;] Full of high sentence, but a bit obtuse. . . ." Charles Whittaker, a self-made man from Kansas, appointed to the Court by President DWIGHT D. EISENHOWER, was one of these.

Whittaker joined the WARREN COURT in 1957, after earlier service on the Eighth Circuit Court of Appeals. His tenure was distinguished only by its brevity and by his own inability to develop a coherent judicial philosophy apart from the orthodox political and social conservatism of the Republican Middle West. His retirement and that of Justice FELIX FRANKFURTER in 1962 marked the beginning of the Warren Court's most liberal and activist phase.

Several DEPORTATION and coerced confession cases best exemplified Whittaker's ad hoc approach to constitutional issues and the confusion that often plagued his opinions. Writing for a majority of six Justices in *Bonetti v. Roger* (1958), he overturned the federal government's attempt to deport an ALIEN who had entered the country in 1923, joined the Communist party for a brief period during the 1930s, left the country to fight in the Spanish Civil War, and finally returned to the United States without rejoining the party. Earlier, Whittaker had voted to sustain the deportation of another alien who had resided continuously in the United States for forty years and whose only offense did not constitute a crime when he committed it (*Lehmann v. Carson*). Two years after *Bonetti*, he voted to uphold the termination of Social Security benefits to aliens deported for their membership in the Communist party during the Great Depression in *Fleming v. Nestor* (1960).

Whittaker displayed little more consistency in the coerced confession cases. In *Moore v. Michigan* (1957), he voted to reverse the murder conviction of a black teenager with a seventh-grade education and a history of head injuries, who had confessed to the crime without the benefit of a lawyer. During the next term, however, he voted, in *Thomas v. Arizona* (1958), to sustain the murder conviction of a black man in Arizona, who had confessed after a twenty-hour interrogation which included the placing of a rope around his neck by a member of the sheriff's posse.

Sometimes, Whittaker joined the Warren Court's liberal bloc, as in TROP V. DULLES (1958), where five Justices declared unconstitutional a provision of the Nationality Act of 1940 depriving wartime deserters of their CITIZENSHIP. He also joined the liberals in *Perez v. Brownell* (1958)

when they dissented against the EXPATRIATION of American citizens who voted in foreign elections. (See TROP V. DULLES, 1958.) Whittaker also wrote the opinion in *Staub v. Baxley* (1958), invalidating a city ordinance that required union organizers to secure a permit before soliciting new members.

More frequently, however, Whittaker cast his vote with the Court's conservative bloc led by Justices John Marshall Harlan, Tom C. Clark, and FELIX FRANKFURTER. In *Beilan v. Board of Education* (1958) he helped to sanction the firing of public school teachers who refused to answer questions about their possible affiliation with the Communist party. He approved the contempt conviction of a college professor who refused to cooperate with a state legislative committee investigating subversive groups in UPHAUS V. WYMAN (1959). He likewise voted to compel the registration of the Communist party under the Subversive Activities Control Act and to allow bar examiners in California to deny admission to a candidate who refused to answer their inquiries about his past membership in the party. (See COMMUNIST PARTY V. SUBVERSIVE ACTIVITIES CONTROL BOARD, 1961; KONIGSBERG V. STATE BAR OF CALIFORNIA, 1961.)

During his final term on the Court, Whittaker continued to affirm his conservative leanings by dissenting in MAPP V. OHIO (1961). He also joined in the Court's dismissal on jurisdictional grounds of an attack on Connecticut's anti-birth control statute in *Poe v. Ullman* (1961). After retiring from the bench, he became a legal adviser to the General Motors Corporation as well as a shrill critic of the CIVIL RIGHTS and anti-VIETNAM WAR protest movements.

MICHAEL E. PARRISH
(1986)

Bibliography

BERMAN, D. M. 1959 Mr. Justice Whittaker: A Preliminary Appraisal. *Missouri Law Review* 24:1–28.

FRIEDMAN, LEON 1969 Charles Whittaker. Pages 2893–2904 in Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court, 1789–1969: Their Lives and Major Opinions.* New York: Chelsea House.

## *WICKARD v. FILBURN*
317 U.S. 111 (1942)

In 1941, by an amendment to the AGRICULTURAL ADJUSTMENT ACT of 1938, Congress brought the national power to regulate the economy to a new extreme, yet the Supreme Court unanimously sustained the regulation in a far-reaching expansion of the commerce power. The price of wheat, despite marketing controls, had fallen. A bushel on the world market in 1941 sold for only forty cents as a result of a worldwide glut, and the wheat in American storage bins had reached record levels. To enable American growers to benefit from government fixed prices of $1.16 per bushel, Congress authorized the secretary of agriculture to fix production quotas for all wheat, even that consumed by individual growers. Filburn sowed twenty-three acres of wheat, despite his quota of only eleven, and produced an excess of 239 bushels for which the government imposed a penalty of forty-nine cents a bushel. Filburn challenged the constitutionality of the statute, arguing that it regulated production and consumption, both local in character; their effects upon INTERSTATE COMMERCE, he maintained, were "indirect."

Justice ROBERT H. JACKSON for the Court wrote that the question would scarcely merit consideration, given UNITED STATES V. DARBY (1941), "except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm." The Court had never before decided whether such activities could be regulated "where no part of the product is intended for interstate commerce intermingled with the subjects thereof." Taking its law on the scope of the commerce power from GIBBONS V. OGDEN (1824) and the SHREVEPORT DOCTRINE, the Court repudiated the use of mechanical legal formulas that ignored the reality of a national economic market; no longer would the reach of the COMMERCE CLAUSE be limited by a finding that the regulated activity was "production" or its economic effects were "indirect." The rule laid down by Jackson, which still controls, is that even if an activity is local and not regarded as commerce, "it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" (See EFFECTS ON COMMERCE.)

How could the wheat grown by Filburn, which he fed to his own animals, used for his own food, and kept for next year's seed, be regarded as having a "substantial economic effect" on interstate commerce? Wheat consumed on the farm by its growers, the government had proved, amounted to over twenty percent of national production. Filburn consumed a "trivial" amount, but if he had not produced what he needed for his own use in excess of his allotted quota, he would have had to buy it. By not buying wheat, such producer-consumers depressed the price by cutting the demand. His own contribution to the demand for wheat was trivial, but "when taken with that of others similarly situated," it was significant. Congress had authorized quotas to increase the price of the commodity; wheat consumed on the farm where grown could burden

a legitimate congressional purpose to stimulate demand and force up the price. Thus, even if a single bushel of Filburn's infinitesimal production never left his farm, Congress could reach and regulate his activity, because all the Filburns, taken collectively, substantially affected commerce.

LEONARD W. LEVY
(1986)

Bibliography

STERN, ROBERT L. 1946 The Commerce Clause and the National Economy, 1933–1946. *Harvard Law Review* 59:901–909.

## WICKERSHAM, GEORGE
(1858–1936)

Appointed attorney general in 1909 by WILLIAM HOWARD TAFT, George Wickersham argued and won STANDARD OIL COMPANY V. UNITED STATES (1911) and *American Tobacco Company v. United States* (1911). He initiated more prosecutions under the SHERMAN ANTITRUST ACT in four years than his predecessor had in seven, prompting business leaders to call for his resignation. As chairman of the Wickersham Committee from 1929 to 1931, he directed an investigation of the entire system of federal jurisprudence. The commission reported on problems raised by political penetrations of courts, lax criminal law enforcement, abuses of constitutional rights, and various sociological influences contributing to crime.

DAVID GORDON
(1986)

## *WIDMAR v. VINCENT*
454 U.S. 263 (1981)

In order to avoid activity that might constitute an ESTABLISHMENT OF RELIGION, the University of Missouri at Kansas City barred a student religious group from meeting on the campus for religious teaching or worship. The Supreme Court, 8–1, held that the University, having "created a forum generally open for use by student groups," was forbidden by the FIRST AMENDMENT's guarantee of the FREEDOM OF SPEECH to exclude the religious group. Because the exclusion was based on the content of the group's speech, it was unconstitutional unless necessary to serve a COMPELLING STATE INTEREST. The exclusion was not necessary to avoid establishment clause problems, for no state sponsorship of religion was implied when the university provided a forum generally open to all student groups.

Justice JOHN PAUL STEVENS, concurring, said that any university necessarily makes many distinctions based on speech content. Here, however, the university discriminated on the basis of the viewpoint of particular speakers, and that was forbidden by the First Amendment.

Justice BYRON R. WHITE dissented, arguing that the state could constitutionally "attempt to disentangle itself from religious worship."

KENNETH L. KARST
(1986)

(SEE ALSO: *Public Forum.*)

## *WIEMAN v. UPDEGRAFF*
344 U.S. 183 (1952)

In an OPINION written by Justice TOM C. CLARK, the Supreme Court struck down an Oklahoma LOYALTY OATH for state employees that required signers to affirm that they were not and had not been for five years members of organizations designated by the attorney general of the United States as "communist front" or "subversive." Clark, who as attorney general had initiated the federal list in 1947, held that the statute violated the DUE PROCESS clause because it did not distinguish innocent membership from knowing membership in the proscribed organizations.

MICHAEL E. PARRISH
(1986)

## WIGMORE, JOHN HENRY
(1863–1943)

John Henry Wigmore was perhaps the foremost American legal scholar and educator of the twentieth century. A professor of law at Northwestern University Law School for fifty years (1893–1943), nearly thirty of them as its dean (1901–1929), Wigmore played the leading role in developing it into one of the nation's leading law schools. Wigmore also helped to found numerous professional and academic organizations, among them the American Institute of Law and Criminology (1909) and the American Bar Association's Sections on Criminal Law (1920) and on International and Comparative Law (1934).

Wigmore wrote an extraordinary number of books and articles on almost every field of the law, but his most significant works focused on evidence, criminal law and criminology, and international and comparative law. His great *Treatise on Evidence* (1904; third ed., 1940; subsequently revised by others) established itself as the dominant work in its field and was acclaimed as the greatest treatise on

any single subject of the law. Although some critics objected to the *Treatise*'s introduction of new terms, its length and elaborate organization, and its occasional divergence from the current state of the law, most scholars welcomed it as the most systematic overview of its subject, and it had great influence on many states' revisions of their rules of EVIDENCE and on the Federal Rules of Evidence (1969–1975). Wigmore's other major works on evidence were his *Pocket Code of Evidence* (1910; third ed., 1942) and his *Principles of Judicial Proof* (1913, third ed., 1937). His other books include *A Panorama of the World's Legal Systems* (1928; second ed., 1936), *A Kaleidoscope of Justice* (1941), *Problems of Law: Its Past, Present and Future* (1920), and casebooks on evidence (1906; third ed., 1932) and on torts (1910–1912).

RICHARD B. BERNSTEIN
(1986)

Bibliography

ROALFE, WILLIAM R. 1977 *John Henry Wigmore: Scholar and Reformer.* Evanston, Ill.: Northwestern University Press.

## WILKES CASES
### 19 Howell's State Trials (1763–1768)

Counting derivative trials, the Wilkes Cases embraced at least forty cases from 1763 to 1769; all emanated ultimately from a single GENERAL WARRANT issued by the British secretaries of state on April 26, 1763, against *The North Briton*, No. 45, a periodical trenchantly critical of the Grenville administration. Numerous categories of the general warrant, which allowed its bearer to arrest, search, and seize at his discretion, had operated in England for centuries. The warrant of April 26, however, was of an atypical variety, based on custom rather than statute, which the government used against dissident publications; it resulted in the search of at least five houses, the arrest of forty-nine persons, and the seizure of thousands of manuscripts and books.

Although hundreds of such warrants had issued since the Restoration, the latest crop of victims included John Wilkes, a powerful member of Parliament and principal author of *The North Briton.* When Wilkes sued every official connected with the warrant, many of the others arrested promptly did the same.

The trials unfolded in distinct series. In *Huckle v. Money*, the first trial on July 6, 1763, CHARLES PRATT, the Chief Justice of the Court of Common Pleas, criticized the *North Briton* warrant because it specified no person, had been issued without a formal complaint under oath, and thus lacked PROBABLE CAUSE. When this case reached the full Common Pleas, Pratt extended his attack to the general search feature of the warrant, holding that it, as well as its companion power of general arrest, violated MAGNA CARTA.

The outcome of the *North Briton* trials incited suits by earlier victims of secretarial warrants. In the most famous of these trials, *Entick v. Carrington* (1765), which accrued from a general warrant against *The Monitor*, the emphasis shifted to the powers of general, confiscatory seizure in such warrants. Pratt, now ennobled as Lord Camden, condemned the use of seized personal papers against their owner as self-incriminatory. Moreover, Camden continued, because private property was inherently sacred, any invasion of it without express legal authority was a trespass even if it merely involved touching the soil or grass. He conceded that the inspection of private papers was not itself a legal trespass, but he insisted that the disclosure of the personal secrets they contained greatly magnified the harm from the physical trespass of their seizure.

Although Pratt in *Wilkes v. Wood* (1763) had condemned even general warrants authorized by statute, WILLIAM MURRAY (Lord Mansfield), in a final appeal of *Huckle v. Money*, upheld statutory warrants and denounced only those not based on parliamentary enactment. When Pratt shifted to the same grounds in *Entick*, the effect was to confine the assault on general warrants to the variant based on custom, and to preserve a greater number that derived from statute. In 1766 a resolution against general warrants did emerge from the House of Commons, but an effort to transform it into binding, comprehensive legislation failed.

WILLIAM J. CUDDIHY
(1986)

Bibliography

HOLDSWORTH, SIR WILLIAM 1938 *A History of English Law.* 7th ed. 15 vols. Vol. 10:99–100, 658–672. London: Methuen.

NOBBE, GEORGE 1939 *The North Briton.* New York: Columbia University Press.

## WILLIAMS, ROGER
### (1603–1683)

Arriving in New England in 1631, Roger Williams preached in Plymouth and Salem, but almost immediately clashed with the Massachusetts authorities over issues involving both church and state. He attacked Massachusetts's right to its land on the grounds that the land had not been purchased from the Indians—only granted by the king. He claimed that the colonial churches had not broken sharply enough with the Church of England, and he denied that magistrates had power to punish in religious matters. Under sentence of banishment from Mas-

sachusetts, Williams fled to Providence in 1636 and formed a settlement there. By 1644 he had secured a patent from the English government combining his own and neighboring towns into the colony of Rhode Island and Providence Plantations.

Although always a Calvinist, Williams adhered to no church after his departure from Massachusetts except for a brief period as a Baptist; rather, he lived as a Seeker. RELIGIOUS LIBERTY was his abiding passion, and he defended it primarily for its benefits to religion. Drawing the analogy of church as garden and world as wilderness, he insisted that only a wall between the two could preserve the integrity of the church.

Williams believed that allowing the state any power in church affairs made the state the arbiter of religious truth, an area in which its lack of competence only perverted religion. To demonstrate the absurdity of state attempts to proclaim the true church, he cited history, especially the recent multiple changes in religious allegiance on the part of the English government, and he expressed the psychological insights that rulers tended to advance their own religious preferences as truth and that persecutors always justified their actions in religion's name.

Williams's political views flowed from his religious theories. For him the Israel of the Old Testament was a figurative entity and not, as Massachusetts Puritans claimed, a model for government. He saw government as a SOCIAL COMPACT drawn up between citizens for secular purposes only. Just as civil interference ruined religion, so religious interference disrupted government—by accusations of heresy against civil leaders and demands for their removal from office. He believed that governing was an art, for which Christianity did not necessarily constitute a gift.

Carrying his arguments in favor of religious liberty to their logical and remarkably radical conclusions, Williams contended that liberty should be extended to all law-abiding citizens, including Roman Catholics (whom he abhorred), non-Christians, and even those he considered blasphemers. By opposing monopolization of Rhode Island's land by its original settlers, he strove to keep the colony open to newcomers of all religions and to enable them to settle there on an equal social and economic basis with already-established inhabitants.

Beyond Rhode Island's fidelity to his ideals of religious freedom, Williams exerted hardly any influence. His views shocked his contemporaries, and throughout his life he bore the stigma of radicalism. During the colonial years, his writings almost disappeared. Succeeding centuries, however, have restored his reputation by correctly perceiving him as a prophet and forerunner of modern religious liberty.

THOMAS CURRY
(1986)

Bibliography

MILLER, PERRY 1953 *Roger Williams: His Contribution to the American Tradition.* Indianapolis: Bobbs-Merrill.

MORGAN, EDMUND S. 1967 *Roger Williams: The Church and the State.* New York: Harcourt, Brace & World.

## *WILLIAMS v. FLORIDA*
399 U.S. 78 (1970)

The rule of *Williams* is that trial by a jury of six in a noncapital FELONY case does not violate the constitutional right to TRIAL BY JURY in a state prosecution. Trial by jury had historically meant trial by a jury of twelve, neither more nor less. Justice BYRON R. WHITE for the Supreme Court found no rationale for the figure of twelve, which he called "accidental" and "superstitious." If Congress enacted a statute providing for juries of less than twelve in federal prosecutions, the Sixth Amendment would be no bar, according to this case. A jury of six is practical: it can be selected in half the time, costs only half as much, and may reach its verdict more quickly. According to White, "there is no discernible difference between the results reached by the two different-sized juries," but in fact a jury of six hangs less frequently, significantly changes the probability of conviction, and convicts different persons. White claimed that the size of the jury should be large enough to promote group deliberation and allow for a representative cross-section of the community, and he claimed that a jury of six serves those functions as well as a jury of twelve. In fact the Court was wrong. Only Justice THURGOOD MARSHALL dissented on the question of jury size, in an opinion that rested strictly on precedent. Williams also contended that Florida violated his RIGHT AGAINST SELF-INCRIMINATION by its notice-of-alibi rule, but he convinced only Justices HUGO L. BLACK and WILLIAM O. DOUGLAS.

LEONARD W. LEVY
(1986)

(SEE ALSO: *Jury Size.*)

## *WILLIAMS v. MISSISSIPPI*
170 U.S. 213 (1898)

*Williams* is a realistic snapshot of our constitutional law on race at the turn of the century. A black man was tried in Mississippi for the murder of a white, convicted by an all-white jury, and sentenced to death. He alleged that he had been denied the EQUAL PROTECTION OF THE LAWS guaranteed by the FOURTEENTH AMENDMENT, because the laws of the state were rigged in such a way as to exclude mem-

bers of his race from jury service. In Mississippi, to be eligible for jury service one must be qualified to vote. To be a voter one must have paid his POLL TAX and have satisfied registration officials that he could not only pass a LITERACY TEST but also could understand or reasonably interpret any clause of the state constitution; registration officials had sole discretion to decide whether an applicant had the requisite understanding. In Mississippi at that time, a black graduate of Harvard Law School could not satisfy white officials. The state convention of 1890 clearly adopted new qualifications on the right to vote in order to insure white supremacy by disfranchising black voters. Under prior laws there were 190,000 black voters; by 1892 only 8,600 remained, and these were soon eliminated. Blacks disappeared from jury lists after 1892.

A unanimous Supreme Court, speaking through Justice JOSEPH MCKENNA, held that the state constitution and laws passed under it, prescribing the qualifications of voters and jurors, did not on their face discriminate racially. McKenna also declared that the discretion vested in state and local officials who managed elections and selected juries, while affording the opportunity for unconstitutional RACIAL DISCRIMINATION, was not constitutionally excessive. Yet McKenna said, "We gather . . . that this discretion can be and has been exercised against the colored race, and from these lists jurors are selected." The Court recognized that a law on its face might be impartial and be administered "with an evil eye and an unequal hand," but it held that "it has not been shown that their actual administration was evil; only that evil was possible under them."

LEONARD W. LEVY
(1986)

## *WILLIAMS v. VERMONT*
472 U.S. 14 (1985)

Vermont levied a use tax on automobiles, collected upon each car's registration. No tax was imposed if the car was bought in Vermont, and a Vermont sales tax was paid. If the car was purchased outside Vermont, the use tax was reduced by the amount of any sales tax paid to the other state—but only if the registrant was then a Vermont resident. Persons who had bought cars outside Vermont before becoming Vermont residents sued in state court, challenging the constitutionality of this scheme. The Vermont courts denied relief, but the Supreme Court, 6–3, held that the discrimination against newcomers violated the EQUAL PROTECTION clause. Justice BYRON R. WHITE wrote the OPINION OF THE COURT.

As it had done for half a century, the Court avoided the much-discussed question whether a state must give a credit for payment of another state's sales tax in such circumstances. Instead, the Court followed ZOBEL V. WILLIAMS (1982) and held that the discrimination against newcomers to Vermont served no legitimate statutory purpose. As in *Zobel*, Justice WILLIAM J. BRENNAN, concurring, wrote that the discrimination threatened the "federal interest in free interstate migration." (See RIGHT TO TRAVEL.) Justice HARRY A. BLACKMUN, for the dissenters, favored a REMAND to the state courts for clarification whether the law in fact so discriminated. Even if it did, he argued, Vermont could legitimately tax in rough proportion to automobiles' use on Vermont roads.

KENNETH L. KARST
(1986)

## WILLIAMSON, HUGH
(1735–1819)

Hugh Williamson, mathemetician, physician, and Presbyterian minister, signed the Constitution as a North Carolina delegate to the CONSTITUTIONAL CONVENTION OF 1787. A frequent but not very influential speaker, he was the first to propose the six-year term for senators. He supported RATIFICATION in the North Carolina convention and served in the first two Congresses.

DENNIS J. MAHONEY
(1986)

## *WILLIAMSON v. LEE OPTICAL CO.*
348 U.S. 483 (1955)

Justice WILLIAM O. DOUGLAS, for an 8–0 Supreme Court, announced that "the day is gone when this Court uses the DUE PROCESS CLAUSE to strike down state business regulation. Without any inquiry into actual legislative history, Douglas upheld an Oklahoma law regulating eyeglass sales, suggesting various hypothetical reasons why the legislature might have thought it necessary.

DENNIS J. MAHONEY
(1986)

## WILLOUGHBY, WESTEL W.
(1867–1945)

Westel Woodbury Willoughby taught political science at Johns Hopkins University (1894–1933) and was a founder of the American Political Science Association. He wrote nearly two dozen books, including *The Supreme Court of the United States* (1890), *The Nature of the State* (1896), *The American Constitutional System* (1904), and *The Con-*

*stitutional Law of the United States* (1910; second edition, 1922).

Willoughby rejected the notion that FEDERALISM implied division of SOVEREIGNTY between the central government and the states. He described the Constitution in terms of LIMITED GOVERNMENT, but regarded the central government as possessing the ultimate authority in the country and believed that in crisis situations (such as civil war) the rights of both states and citizens must yield to the INHERENT POWER of national self-preservation. Because he thought the government must at other times be limited to constitutionally DELEGATED POWERS he was especially critical of the decisions in the INSULAR CASES.

DENNIS J. MAHONEY
(1986)

## *WILLSON v. BLACK BIRD CREEK MARSH CO.*
2 Peters 245 (1829)

Chief Justice JOHN MARSHALL's opinion for a unanimous Supreme Court cannot be reconciled with his opinions in GIBBONS V. OGDEN (1824) and BROWN V. MARYLAND (1827), neither of which he mentioned in Willson. Delaware had authorized the company to dam a navigable tidewater creek, obstructing the navigation of Willson's sloop, licensed under the same Federal Coastal Licensing Act that had proved decisive in *Gibbons.* The Court sustained the constitutionality of the state statute as a measure calculated to improve marshland property and the health of its inhabitants. The Coastal Licensing Act notwithstanding, the Court found that Congress had chosen not to govern the many small navigable creeks of the eastern coast. In effect, the Court sustained the POLICE POWER in a case involving local circumstances affecting the COMMERCE CLAUSE "in its dormant state," that is, unexercised by Congress.

Marshall's *Willson* opinion is so laconic, almost unreasoned, and uncharacteristic of the great Chief Justice that it has never been satisfactorily explained. FELIX FRANKFURTER, in his book *The Commerce Clause,* surmised that Marshall understood that a completely exclusive commerce power might overdiminish STATES' RIGHTS and that Marshall realized the need for effective state regulation of local problems. Taking into consideration "the circumstances of the case," Marshall acknowledged the state interest in enhancing property values and improving the public health. Accordingly he opened the door to the police power because the state's objectives, unlike the situations in *Gibbons* and *Brown,* were not the regulation of commerce per se. *Willson,* however, left a confused legacy for the TANEY COURT, which divided in MAYOR OF NEW YORK V. MILN (1837) and produced doctrinal chaos in the LICENSE CASES (1847) and the PASSENGER CASES (1849). Not until COOLEY V. BOARD OF WARDENS (1851) did the Taney Court find a formula that purported to reconcile Marshall's doctrines in *Gibbons* and *Willson.*

LEONARD W. LEVY
(1986)

## WILMOT PROVISO
(1846)

The proviso was introduced by Congressman David Wilmot (Democrat, Pennsylvania) as an amendment to a $2,000,000 appropriations bill requested by President JAMES K. POLK to finance the Mexican War. The proviso prohibited SLAVERY in any territory acquired from Mexico, thus enabling northern Democrats, like Wilmot, to support the war without supporting slave expansion and more slave states. The proviso passed the HOUSE, but the SENATE adjourned without acting on the appropriations bill. In 1847 the proviso was added to a new $3,000,000 war appropriations bill. The Senate refused to accept the proviso, and in a bitterly debated compromise, the House agreed to the appropriation without the proviso. Despite its failure in Congress, the proviso raised serious constitutional and political issues. Southerners argued that they had contributed to the war effort and ought to be allowed to settle in the conquered territories without any special disabilities. Northerners condemned the war, especially after the defeat of the proviso, as aggression by an expansionist "slave power." The proviso led to the formation of the Free Soil Party, which was committed to prohibiting SLAVERY IN THE TERRITORIES. Free Soilers ran particularly well in some northern Democratic districts.

PAUL FINKELMAN
(1986)

Bibliography

MORRISON, CHAPLAIN W. 1967 *Democratic Politics and Sectionalism: The Wilmot Proviso Controversy.* Chapel Hill: University of North Carolina Press.

## WILSON, JAMES
(1742–1798)

James Wilson was one of the most influential members of the founding generation. He was born in Scotland and educated as a classical scholar at the University of St. Andrews. He immigrated to America in 1765, whereupon he

served as a tutor at the College of Philadelphia while he studied law with the celebrated JOHN DICKINSON. His keen and perceptive mind, superb classical education, and excellent legal training prepared him to play a major role in the creation of the new American republic. He was a frequent delegate from Pennsylvania to the Second CONTINENTAL CONGRESS, one of six men who signed both the DECLARATION OF INDEPENDENCE and the Constitution, and second only to JAMES MADISON in his contribution to the deliberations of the CONSTITUTIONAL CONVENTION. He produced what was probably the most widely distributed and discussed defense of the new Constitution in his Statehouse Speech of October 6, 1787. He was the principal figure in the efforts to secure RATIFICATION OF THE CONSTITUTION by Pennsylvania, whose approval was indispensable to the success of the whole constitutional movement. He was a major architect of the significant Pennsylvania Constitution of 1790. He was one of the six original Justices of the United States Supreme Court. He was the first professor of law appointed after the founding of the new republic, and he was the only Framer to formulate a general theory of government and law—this in his lectures on law, delivered in 1791–1792 at what would later become the University of Pennsylvania.

Wilson was and remains influential, however, not so much because of the roles he played as for the ideas he articulated, the arguments he made, and the institutional arrangements he favored. Among the principal Framers, Wilson was the most committed to, and trusting of, unmitigated majoritarian democracy. He favored the simplicity of immediate consent and self-restraint to the complexity of procedural protections and constitutional contrivances. Relying heavily on the Scottish moralists (especially Thomas Reid), Wilson argued that men are naturally social; imbued with a sense of goodness, veracity, and benevolence; and possessed of a progressive intuitive sense that can be improved with practice so as to carry society "above any limits which we can now assign." As a consequence, he trusted them to elect leaders who would govern soberly and well, especially over a large and "comprehensive Federal Republic" such as the United States. He saw no need to protect the people from themselves. Madison's "republican remed[ies] for the diseases most incident to republican government" were, he believed, unnecessary. The government would be good to the extent that its branches were prompted, through their competition with one another, to serve the people and to reflect faithfully their wishes. Wilson brought this view of government and his commitment to majoritarianism to the Federal Convention, where his influence was clearly felt. He contributed significantly to the Convention's understanding of SEPARATION OF POWERS, figured prominently in determining the institutional arrangements and powers of the legislative, executive, and judicial branches, and helped to make FEDERALISM possible with his arguments concerning the dual SOVEREIGNTY of the people.

Wilson contributed to the Convention's understanding of separation of powers by arguing that it properly consists not of functionally separated branches but of coordinate and equal branches that perform a blend of functions in order to balance, not separate, powers. As he declared, "The separation of the departments does not require that they should have separate objects but that they should act separately tho' on the same objects." Wilson was aware that the various governmental branches, even though popularly elected, would occasionally be activated by "an official sentiment opposed to that of the General Government and perhaps to that of the people themselves." On those occasions, separation of powers would be necessary to insure the fidelity of these popular agents. Wilson also contributed to the Convention's understanding by stressing that separation of powers not only prevents governmental tyranny but also contributes to governmental efficiency. Aware that the democratic process of mutual deliberation and consent can paralyze government when swift and decisive action is necessary, he argued that government would be more efficient if its different functions were performed by separate and distinct agencies.

Wilson's influence on the legislative branch was felt primarily in the HOUSE OF REPRESENTATIVES and in his promotion of reflective, as opposed to refining, representation. He argued in the Convention that "the Government ought to possess not only first, the force but secondly, the mind or sense of the people at large. The Legislature ought to be the most exact transcript of the whole Society." Wilson regarded representation as a "chain of communication" between the people and those to whom they have delegated the powers of government. Its purpose is not to "refine" the people's sentiments; rather, it is to communicate through links "sound and strong" the exact feelings of the people. Strong as this chain might be, however, Wilson was unwilling to trust it completely. So long as the legislature was perfectly reflective of the people, no problem was presented; however, there was no way to ensure this. On occasion, the legislature might come to possess and perceive an interest distinct from, and perhaps contrary to, the public at large. On that occasion, a single legislature would be dangerous, and thus Wilson argued for a divided legislature with a numerous House of Representatives, so close in political style and feelings to those it represented that it would constitute their "exact transcript," and a popularly elected Senate organized around the principle of proportional representation, thereby providing a "double representation" for the people. Wilson

was one of the first to argue that it is possible for the people, simply through the electoral process, to have two different agents or representatives speaking for them at the same time. He did not fear that this common election would erode the material distinctions, and consequently the benefits that resulted from these material distinctions, between the two branches of the legislature. He trusted in the development of a "point of honor" between the two branches: they would "be rivals in duty, rivals in fame, rivals for the good graces of their common constituents." His views on the Senate, though unsuccessful at the Convention, were largely vindicated with the passage of the SEVENTEENTH AMENDMENT.

Wilson's contributions to the shape and powers of the executive branch were perhaps most significant of all. He was the first delegate to propose "that the Executive consist of a single person." He argued that the executive, no less than the legislature, needed to be restrained and controlled. But, "in order to control the legislative authority, you must divide it. In order to control the Executive, you must unite it." The advantage of clear-cut responsibility would reinforce and assure those other "very important advantages" that are also obtained from a single executive, including energy, vigor, dispatch, firmness, consistency, and stability. Wilson was also the first delegate at the Convention to suggest that the President should be elected directly by the people. When this proposal failed to gain general support, he was then the first to propose an ELECTORAL COLLEGE scheme, a modification of which ultimately found its way into the Constitution. He also favored a relatively brief presidential tenure of three years and reeligibility. These features would insure that the President would become and remain "the Man of the People."

Wilson's "Man of the People" was to be more than simply derived from their midst; he was also to be capable of acting vigorously on their behalf. As Wilson stressed in the Pennsylvania ratifying convention, the President was to be captain of the ship of state, holding firmly to the helm and allowing the vessel to "proceed neither in one direction or another without his concurrence." He was to be powerful and independent enough to protect the people from the excesses, instabilities, and injustices of legislative dominance. Wilson's captain was to take his bearings from the people and set his course according to their dictates. Because the people would not be easily misled, Wilson, unlike THE FEDERALIST, would not have the President provide the people with direction or resist them when they were wrong.

Wilson also labored at the Convention for the establishment of a powerful judiciary. Because the judges would be appointed by the President and confirmed by the SENATE, he understood the judiciary to be "drawn from the same source, animated by the same principles, and directed to the same ends" and therefore "as much the friend of the people" as the other branches. As a consequence, it could be entrusted with the power of JUDICIAL REVIEW. So entrusted, it could serve as a "noble guard" defending the fundamental principles and will of the people as expressed in the Constitution from governmental sentiments—especially legislative sentiments—which from time to time might come to oppose them.

Wilson also helped to make federalism possible by arguing in the Convention that the people could create and assign power to more than "one set of immediate representatives." The delegates could preserve the states and at the same time establish a new national government because of the dual sovereignty of the people. He argued that both the states and the national government receive their authority directly from the people and owe their responsibility directly to them. The people are the sovereign foundation of all governments. As such, they can construct two levels of government and assign different powers to them. They can take powers from the state governments and place them in the national government. Wilson employed this same argument in the Pennsylvania ratifying convention to taunt those Anti-Federalists who contended that the people could not give to the national government whatever powers and for whatever purposes they pleased. He also operated from these premises in CHISHOLM V. GEORGIA (1793), his only truly important Supreme Court decision, in which he declared that the people of the United States had formed themselves into "a nation for national purposes" and that, consequently, states as well as individual persons were subject to the JUDICIAL POWER of the United States.

Wilson embraced and defended the "comprehensive Federal Republic" created by the Constitution not only because the people had chosen to construct such a level of government over them but also because he believed that a reciprocating relationship existed between the structure of government and the character of the people. A petty state would produce, he believed, petty men. The only lessons they would learn would be those of "low Vice" and "illiberal Cunning." Only a large republic would sustain and nourish the good qualities of the people. Only a large republic would produce noble citizens, worthy of the great political trust Wilson would place in them.

Central to Wilson's constitutional thought was his confidence in the good qualities of the people. In this regard, he differed from his fellow Framers, in that he relied upon what The Federalist considered "the weaker springs of human character." This difference was critical then and remains so now: Wilson's commitment to unrestrained majoritarian democracy stands in sharp contrast to the Con-

stitution's more complex mitigated democracy that relies not so much on men as on institutions for our political salvation.

RALPH A. ROSSUM
(1986)

Bibliography

ADAMS, RANDOLPH GREENFIELD, ed. 1930 *Selected Political Essays of James Wilson.* New York: Knopf.

MCCLOSKEY, ROBERT GREEN, ed. 1967 *The Works of James Wilson.* 2 Vols. Cambridge, Mass.: Harvard University Press.

ROSSUM, RALPHY A. 1976 James Wilson and the "Pyramid of Government": The Federal Republic. *Political Science Reviewer* 6:113–142.

SMITH, CHARLES PAGE 1956 *James Wilson: Founding Father.* Chapel Hill: University of North Carolina Press.

## WILSON, WOODROW
(1856–1924)

Dr. Thomas Woodrow Wilson was both a scholar and an active participant in American constitutional development. Trained in history and law, Wilson became one of the first practitioners of the new academic political science that was born in America toward the close of the nineteenth century. He taught at Bryn Mawr College and Wesleyan University, and became a professor at, and later president of, Princeton University.

As a political scientist, Wilson urged fundamental reforms in the American system of government. In his first book, *Congressional Government* (1885), he argued that instead of the balance of powers envisaged by the Founders, American government was dominated by the legislative branch and, in particular, by a few powerful congressional committees. Wilson advocated cabinet government as he supposed it to exist in Great Britain, dominated by a strong executive. In *Constitutional Government in the United States* (1908), Wilson argued that under the Constitution the President had authority to exercise vigorous leadership of the whole American political system. In other works, Wilson advocated the scientific study of techniques of public administration and the training of a new class of civil servants who would be independent of political influence or control. Professional administrators, Wilson believed, should be left free to devise the most efficient means of carrying into effect the general policy decisions of the political branches of the government. (See PROGRESSIVE CONSTITUTIONAL THOUGHT.)

A progressive Democrat, Wilson was elected governor of New Jersey in 1910, and President of the United States two years later, when THEODORE ROOSEVELT broke with President WILLIAM HOWARD TAFT and split the Republican party. Wilson's platform called for a "New Freedom," characterized by a vigorous ANTITRUST policy, reduced tariffs, legislation to benefit organized labor, and creation of the federal reserve banking system.

During Wilson's terms of office, the Seventeenth, Eighteenth, and NINETEENTH AMENDMENTS were added to the Constitution. But ordinary legislation did as much to change the distribution and use of governmental power as did formal constitutional amendments. The FEDERAL RESERVE ACT (1913) placed control of the nation's money and credit in the hands of an independent, semi-private banking system. The FEDERAL TRADE COMMISSION ACT (1914), brainchild of Boston attorney LOUIS D. BRANDEIS, created an independent REGULATORY AGENCY with specific authority to make regulations having the force of law.

Among the least creditable achievements of the Wilson administration was the introduction of official racial SEGREGATION in executive departments of the federal government for the first time since the CIVIL WAR. Wilson himself approved the change of policy, arguing that segregation was in the best interests of black federal employees, but he did not regard it as a matter of major concern.

Wilson asserted a broad conception of executive power in military and FOREIGN AFFAIRS. In 1913 the United States assumed control of the foreign policy of Nicaragua and American marines put down an insurgent movement in that country. Wilson also deployed marines twice, in 1914 and 1916, to suppress insurrections in the Dominican Republic. Between 1913 and 1917 the United States intervened continuously, and ultimately unsuccessfully, in the internal politics of Mexico. For none of these military adventures did Wilson have specific congressional authorization; he relied instead on his power as COMMANDER-IN-CHIEF of the armed forces.

Although Wilson campaigned for reelection in 1916 on the slogan, "He kept us out of war," the United States entered WORLD WAR I just one month after his second inauguration. The war emergency provided the rationale for a vast expansion of federal power. The Overman Act (1917) created a virtual presidential dictatorship over the machinery of the government; the RAILROAD CONTROL ACT commandeered the private rail network and consolidated it under government auspices; the SELECTIVE SERVICE ACT authorized the drafting of millions of young men into the military; and the ESPIONAGE ACT and the SEDITION ACT provided a basis for controlling civilian dissent. In a sense, the war provided the essential basis—a strongly held vision of the public good—for many of the reforms the Progressives had long advocated. For at least two decades afterward, political activists and reformers would hark back to the sense of unity that World War I provided.

American intervention enabled Britain and France to defeat the Germans and their allies, and so the American government was entitled to a leading voice in dictating the peace terms. Wilson was unable, however, to secure ratification of the Treaty of Versailles and the League of Nations Covenant by the United States Senate. Republicans, led by Senator HENRY CABOT LODGE, opposed these measures, which seemingly would have subordinated American SOVEREIGNTY to an international body and permanently involved the United States in European quarrels.

In 1919, exhausted by a national campaign to win support for the Versailles Treaty, Wilson suffered a debilitating stroke. For the last year of his presidency the erstwhile advocate of strong presidential leadership tried, and failed, to govern the country from his sickbed. The constitutional problem of presidential disability would not be resolved until passage of the TWENTY-FIFTH AMENDMENT.

DENNIS J. MAHONEY
(1986)

Bibliography

BETH, LOREN P. 1971 *The Development of the American Constitution: 1877–1917.* New York: Harper & Row.

BRAGDON, HENRY W. 1967 *Woodrow Wilson: The Academic Years.* Cambridge, Mass.: Belknap Press.

LINK, ARTHUR S. 1947–1974 *Woodrow Wilson,* 6 vols. Princeton, N.J.: Princeton University Press.

## *WILSON v. NEW*
243 U.S. 332 (1917)

Congress passed the ADAMSON EIGHT-HOUR ACT in 1916 to avert a threatened nationwide railroad strike and to prevent disruption of INTERSTATE COMMERCE. The act prescribed an eight-hour day for railway workers and prohibited any reduction in pay for the shorter hours. Congress thereby regulated wages (pending the report of a commission established by the act) as well as hours. A United States District Court enjoined enforcement of the act, and that decision was appealed to the Supreme Court.

Chief Justice EDWARD D. WHITE, for a 5–4 Supreme Court, sustained the act as a legitimate exercise of congressional power. Asserting that Congress's power to establish working hours was "so clearly sustained as to render the subject not disputable," White faced the issue: did the COMMERCE CLAUSE give Congress the power to set wages? Despite reservations about government interference with FREEDOM OF CONTRACT, the majority held that the Adamson Act only supplemented contracting parties' rights. Moreover, Congress might set a temporary wage standard to protect interstate commerce when private parties failed to exercise their contract rights. Although the strike threatened an emergency, the emergency created no new powers, but it might provide an occasion for exercise of the commerce power.

The dissenters contended either that the act violated the Fifth Amendment as a TAKING OF PROPERTY or that the act lay outside the scope of Congress's commerce power because wages and hours were only remotely connected with interstate commerce.

DAVID GORDON
(1986)

## *WINONA AND ST. PETER RAILROD CO. v. BLAKE*

See: Granger Cases

## *WINSHIP, IN RE*
397 U.S. 358 (1970)

A 6–3 Supreme Court, speaking through Justice WILLIAM J. BRENNAN, held here that among the constitutional rights available in juvenile proceedings is the standard of proof beyond a REASONABLE DOUBT. A twelve-year-old was charged with a crime which, if done by an adult, would be larceny. The applicable New York statute required only a preponderance of evidence for conviction, and three successive New York courts rejected the contention that the FOURTEENTH AMENDMENT required a higher standard of proof. Tracing the requirement back to early United States history, Brennan found "virtually unanimous adherence" to the reasonable doubt standard in COMMON LAW jurisdictions. He extolled its protective value and spoke of the "vital role" of this "indispensable" standard. "We explicitly hold that the DUE PROCESS Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Moreover, Brennan could find no obstacle to extending this right to juveniles. Justice HUGO L. BLACK, dissenting, charged the majority with amending the BILL OF RIGHTS. "Nowhere in that document is there any statement that conviction of crime requires proof of guilt beyond a reasonable doubt."

DAVID GORDON
(1986)

# WIRETAPPING

Telephone tapping is probably the best known form of electronic surveillance. The Supreme Court originally

ruled in OLMSTEAD V. UNITED STATES (1928) that neither the Fifth nor the FOURTH AMENDMENT could be used to control wiretapping. In KATZ V. UNITED STATES (1967), however, the Supreme Court declared that what people reasonably expect to keep private is entitled to constitutional protection under the Fourth Amendment.

Both before and after the *Katz* decision, wiretapping was regulated by statute. Between 1934 and 1968, Section 605 of the COMMUNICATIONS ACT prohibited virtually all wiretapping except for NATIONAL SECURITY purposes. The Justice Department construed the statute so narrowly, however, that it had little effect: federal and state officials tapped extensively, as did private parties, and there were few prosecutions.

In 1968, Congress enacted Title III of the OMNIBUS CRIME CONTROL AND SAFE STREETS ACT, which prohibits telephone tapping except by federal and state officials who obtain prior judicial approval. Before issuing such approval, the court must have PROBABLE CAUSE to believe that EVIDENCE of a specific crime listed in the statute, and relating to a particular person, will be found by tapping a specific phone. Interceptions must be minimized, and notice of the interception must ultimately be given to the target of the surveillance.

Critics claim that the minimization and judicial supervision requirements are ineffective, that wiretapping is inherently indiscriminate, and that it is of little value for major crimes. Proponents assert that the technique is useful, and that the procedural protections are effective.

Wiretapping within the United States to obtain foreign national security intelligence is governed by the Foreign Intelligence Surveillance Act (1978), which creates a special warrant procedure for judicial issuance of permission to wiretap. Both wiretap statutes have been held constitutional.

HERMAN SCHWARTZ
(1986)

(SEE ALSO: *Criminal Justice and Technology; Electronic Eavesdropping.*)

Bibliography

SCHWARTZ, HERMAN 1977 *Taps, Bugs, and Fooling the People.* New York: Field Foundation.

## WIRT, WILLIAM
(1772–1834)

A Virginian lawyer, William Wirt helped defend James Callender in his SEDITION trial (1800) and helped prosecute AARON BURR for TREASON (1806). As United States attorney general under JAMES MONROE and JOHN QUINCY ADAMS (1817–1829), Wirt initiated the system of preserving the "opinions of the Attorneys General" for future use. While attorney general, Wirt followed the common practice of arguing private cases. In association with DANIEL WEBSTER he helped successfully to argue DARTMOUTH COLLEGE V. WOODWARD (1819), MCCULLOCH V. MARYLAND (1819), and GIBBONS V. OGDEN (1824). Wirt's national perspective in these cases was similar to his official policy as attorney general.

PAUL FINKELMAN
(1986)

Bibliography

KENNEDY, JOHN P. 1850 *Memoirs of the Life of William Wirt.* Philadelphia: Lea & Blanchard.

## *WISCONSIN v. MITCHELL*
508 U.S. 476 (1993)

On October 7, 1989, in Kenosha, Wisconsin, Todd Mitchell, a nineteen-year-old black man, directed and encouraged a number of young black men and boys to attack a fourteen-year-old white boy, Gregory Riddick. Mitchell selected Riddick solely on the basis of his race. Mitchell was convicted of aggravated battery for his role in the severe beating—a crime that carries a maximum sentence of two years under Wisconsin law. His crime also implicated the Wisconsin HATE CRIME statute that provides for the enhanced penalty of bias motivated crimes. Under this statute, the potential penalty for an aggravated battery is increased by five years if the perpetrator of the assault selected his victim on the basis of a set of enumerated group characteristics, including race, ethnicity, and religion.

Mitchell challenged his conviction under the hate crime statute, claiming that the enhancement of his prison term was a violation of his right to FREEDOM OF SPEECH under the FIRST AMENDMENT. The Wisconsin Supreme Court reversed the conviction in an opinion announced the day after R. A. V. V. CITY OF ST. PAUL (1992) was decided by the U.S. Supreme Court, and adopted much the same approach as did Justice ANTONIN SCALIA for the majority of the Court in *R. A. V.* The Wisconsin court held that the penalty enhancement law "punishes the defendant's biased . . . thought and thus encroaches upon First Amendment rights."

The U.S. Supreme Court reversed the Wisconsin court and upheld Mitchell's sentence, including the enhanced portion. In defending its bias crime statute from constitutional attack, Wisconsin emphasized the precise form and content of that statute, particularly stressing that the statute punished discriminatory selection of a victim. Wis-

consin contended that *R. A. V.* had been concerned with the regulation of expression while the Wisconsin bias crime statute proscribed not expression but conduct—the intentional discriminatory selection of a victim.

The U.S. Supreme Court largely based its decision on this speech-conduct distinction. Indeed, this was precisely the basis of the Court's distinction between the St. Paul ordinance that was struck down in *R. A. V.* and the Wisconsin statute. Writing for a unanimous Court, Chief Justice WILLIAM H. REHNQUIST wrote that "whereas the ordinance struck down in *R. A. V.* was explicitly directed at expression (i.e., 'speech' or 'messages' . . .), the statute in this case is aimed at conduct unprotected by the First Amendment."

Although the speech-conduct distinction has been criticized by scholars as deeply flawed, since *Mitchell*, states have defended the constitutionality of their bias crime laws by arguing that their statutes do not interfere with the expression of prejudicial ideas but are addressed solely to the implementation of those views in conduct.

FREDERICK M. LAWRENCE
(2000)

Bibliography

JACOBS, JAMES B. and POTTER, KIMBERLY 1998 *Hate Crimes: Criminal Law and Identity Politics.* New York: Oxford University Press.

LAWRENCE, FREDERICK M. 1999 *Punishing Hate: Bias Crimes Under American Law.* Cambridge, Mass.: Harvard University Press.

## *WISCONSIN v. YODER*
406 U.S. 205 (1972)

Wisconsin's school-leaving age was sixteen. Members of the Old Order Amish religion declined, on religious grounds, to send their children to school beyond the eighth grade. Wisconsin chose to force the issue, and counsel for the Amish defendants replied that while the requirement might be valid as to others, the free exercise clause of the FIRST AMENDMENT required exemption in the case of the Amish.

Chief Justice WARREN E. BURGER, speaking for the Supreme Court, was much impressed by the Amish way of life. He rejected Wisconsin's argument that belief but not action was protected by the free exercise clause, and cited SHERBERT V. VERNER (1963). Nor was the Chief Justice convinced by the state's assertion of a COMPELLING STATE INTEREST. Nothing indicated that Amish children would suffer from the lack of high school education. Burger stressed that the Amish would have lost had they based their claim on "subjective evaluations and rejections of the contemporary social values accepted by the majority."

Justice BYRON R. WHITE filed a concurring opinion in which Justices WILLIAM J. BRENNAN and POTTER STEWART joined. White found the issue in *Yoder* much closer than Burger. White pointed out that many Amish children left the religious fold upon attaining their majority and had to make their way in the larger world like everyone else.

Justice WILLIAM O. DOUGLAS dissented in part. He saw the issue as one of CHILDREN'S RIGHTS in which Frieda Yoder's personal feelings and desires should be determinative. Justice Stewart, joined by Justice Brennan, filed a brief concurrence which took issue with Douglas on this point, and noted that there was nothing in the record which indicated that the religious beliefs of the children in the case differed in any way from those of the parents.

RICHARD E. MORGAN
(1986)

## WISDOM, JOHN MINOR
(1905–1999)

John Minor Wisdom, a patrician son of the Old South who became one of the prime architects of the progressive New South, is, along with LEARNED HAND, HENRY J. FRIENDLY, and Irving Kaufman, one of a select group of judges who never sat on the Supreme Court but is regarded as producing the most long-lasting and profound impact on American jurisprudence in the twentieth century. Although universally known for his learned, literate, and path-breaking opinions in the field of CIVIL RIGHTS, among the more than 1,500 opinions Wisdom authored over the course of his forty-two years as an active and senior judge on the U.S. Court of Appeals for the Fifth Circuit, are numerous seminal opinions in a diverse area of subjects, including trust, railroad reorganization, criminal, tax, and maritime law.

Wisdom's roots run deep in Southern soil. His mother was a descendant of the Minors of Virginia, a wealthy and socially prominent member of the landed gentry whose ancestors arrived in the state from Holland in the 1650s. The Wisdoms emigrated from England to America in 1730 and eventually settled in New Orleans in the 1840s where John Wisdom's grandfather built a successful cotton and tobacco commission business. John Wisdom's maternal grandfather, David Cohen Labatt, a leading Jewish lawyer in New Orleans and distant cousin of Judah P. Benjamin, received the first law degree conferred by the forerunner of what became Tulane Law School. Eighty-one years later, John Wisdom also received a law degree from Tulane.

A legal career, however, was not preordained for young John Wisdom. Following in his father's footsteps, John Wisdom received his undergraduate degree at Washing-

ton & Lee University. (Throughout his career, John Wisdom proudly displayed his father's certificate of scholarly achievement containing the faded signature of the college's president, Robert E. Lee.) Anticipating a career as a literary critic, John Wisdom enrolled at Harvard University in 1925, where he intended to obtain a Master of Arts, and possibly, thereafter, a doctoral degree in English. But after arriving, he learned that his lack of training in Latin or Greek precluded his participation in the program, so he stayed for only one year, choosing to audit courses at the Law School. The experience convinced him that he wanted to become a lawyer, and so he returned home to attend Tulane Law School, where he was graduated at the top of his class in 1929.

While building a highly successful law firm with a law school classmate, Wisdom turned some of his boundless energy to the field of politics. Committed to the notion that a strong two-party system was an essential element of a vibrant democracy, Wisdom committed himself to resuscitating Louisiana's long dormant REPUBLICAN PARTY. With the help of his wife, the former Bonnie Mathews, and a small band of devoted followers, Wisdom built up a political machine in the state and was instrumental in securing the Republican Party presidential nomination for DWIGHT D. EISENHOWER in 1952. Five years later, Eisenhower turned to Wisdom to fill a vacant spot on the Fifth Circuit, the appellate court with JURISDICTION over the entire Deep South—Florida, Georgia, Alabama, Mississippi, Texas, and Louisiana. Wisdom served on that court until his death in 1999, two days shy of his ninety-fourth birthday.

Wisdom's opinions are noted for their unpretentious eloquence, comprehensive and scholarly reliance on history, philosophy, and literature, their vision, and their bedrock commitment to fairness. As the intellectual leader of a group of progressive Fifth Circuit judges derisively called "The Four," Wisdom was the author of opinions that ordered the enrollment of James Meredith into the then-segregated University of Alabama, overturned the racially discriminatory jury selection system in Orleans Parish, mandated the DESEGREGATION of all public parks and playgrounds in New Orleans, struck down Louisiana's racist voter registration law, upheld the use of voluntary, racially based AFFIRMATIVE ACTION by a private employer, and held that involuntarily committed psychiatric patients had a constitutional right to adequate treatment in state mental institutions. In *United States v. Jefferson County Board of Education* (1966), the case Wisdom viewed as his most important opinion, he rejected the widely held view in the South that while the Constitution prohibited discrimination, it did not affirmatively require integration. He held that school boards had an affirmative duty to develop desegregation plans and advised them "the only school desegregation plan that meets constitutional standards is one that works."

JOEL WM. FRIEDMAN
(2000)

Bibliography

BASS, JACK 1981 *Unlikely Heroes.* New York: Simon & Schuster.

READ, FRANK T. and MCGOUGH, LUCY S. 1978 *Let Them Be Judged.* Metuchen, N.J.: Scarecrow Press.

FRIEDMAN, JOEL WM. 1995 John Minor Wisdom's Battle Against the Political Bosses. *Tulane Law Review* 69:1439–1511.

——— 1996 Judge Wisdom and the 1952 Republican National Convention. *Washington and Lee Law Review* 53:33–97.

## WITNESSES, JURORS, AND THE FREEDOM OF SPEECH

The 1990s witnessed a dramatic increase in "checkbook journalism," in which individuals are paid for providing information to the print or electronic media. Although numerous aspects of this practice may be troubling, the greatest concern has been expressed over the prospect of payment to actors in the judicial system who sell their stories to the news. Specifically, the specter of witnesses at trial and jurors realizing financial gain from their service in high-profile trials has caused many to argue for legal restrictions on the ability of certain trial participants to cash in on their fifteen minutes of fame. In turn, such a prospect has raised the fear that critical FIRST AMENDMENT rights to FREEDOM OF SPEECH will be sacrificed.

Obviously, most criminal trials proceed without anyone being compensated by the media for telling his or her story. In the vast majority of crimes, public interest would not sustain the payment of money for the "exclusive" scoop. In high-profile trials, however, the lure of the dollar may very well prevail. Although the frenzy of tabloid journalism surrounding the O. J. Simpson murder trial comes most readily to mind, the practice of checkbook journalism long preceded that case. For example, the woman who assisted the alleged rape victim of William Kennedy Smith—and who later became a pivotal witness at trial—received $40,000 from the media for her story. Two witnesses in the child-molestation charges against pop star Michael Jackson sold their stories to television.

Yet the Simpson trial set new records both for press coverage and for prices paid for stories concerning the double-murder of Nicole Brown Simpson and Ron Goldman. Witness Jill Shively sold her story of seeing O. J. Simpson driving near the murder scene; two other witnesses who worked in a knife store and who testified at a

preliminary hearing that Simpson had purchased a knife were paid $12,500 for their story by the tabloid *National Enquirer.*

Witnesses (or potential witnesses) are not the only ones to cash in on their involvement in the judicial system; jurors have also discovered that jury duty can be profitable. Perhaps the best-known example of juror journalism arose out of the trial of Bernard Goetz, who was accused of shooting several youths after they had attempted to mug him on the New York subway. Two jurors ultimately sold their views about the case to the news media. During another high-profile trial, the boyfriend of the jury forewoman tried to negotiate with several newspapers for the sale of the foreperson's account of the trial. One juror during the Rodney King trial stated that although she had no current plans to sell her story, the idea appealed to her capitalistic instincts.

What, if anything, is wrong about such financial endeavors, either by witnesses or jurors? Simply, the concern is that money corrupts. Permitting witnesses to profit from selling their stories may threaten the integrity of a criminal trial in several ways. It may lead the jury to discredit the testimony of a truthful witness, or even cause an attorney to decide not to call a witness out of fear that the jury will react negatively. Alternatively, a witness may testify falsely on the stand, because the lure of money has prompted the witness to lie or embellish the truth to the media, and that false story has become the version frozen in place.

The integrity of the judicial system is also threatened when a juror sells—or anticipates selling—the story of his or her JURY SERVICE. The lure of the dollar may encourage a potential juror to lie during VOIR DIRE in order to obtain a seat on a high-profile jury. The juror's perception of the testimony may be altered by her conflicting roles of juror and journalist. A juror seeing dollar signs may seek the "truth" that most effectively sells a story. Finally, there is the concern that a juror will manipulate a verdict to ensure the most dramatic—and salable—outcome.

These are legitimate concerns, and they have led several states to adopt laws restricting the ability of witnesses or jurors—or both—to profit from their service. These laws, however, constitute a restriction on speech and hence raise potential First Amendment problems. Information concerning criminal acts—be it about the victim, the alleged perpetrator, the behavior of the police, or others—provides useful information on matters of public concern. Financial remuneration, moreover, may cause a critical witness to come forward who otherwise might not. Suppose this nation faced a scandal on the magnitude of WATERGATE, and the only person with information refused to divulge it without monetary gain.

Similarly, juror speech is valuable. A juror's report may explore or criticize the workings of the judiciary and expose flaws and potential abuses. Explanations of how the deliberations progressed could reinforce notions that the jury system does work, and thus increase public confidence in the justice system.

Ultimately, whether laws restricting juror or witness speech violate the freedom of speech will turn on information that today remains merely a matter of speculation. How real is the risk that the payment of money will subvert a witness's oath to tell the truth or the juror's promise to be impartial? The evidence remains theoretical. Until such time—if ever—that the alleged harm of checkbook journalism becomes more substantiated, it is unlikely that the courts will—or should—sanction a law that decreases expression on critical social and political issues.

MARCY STRAUSS
(2000)

Bibliography

STRAUSS, MARCY 1994 Juror Journalism. *Yale Law and Policy Review* 12:389–423.

——— 1996 From Witness to Riches: The Constitutionality of Restricting Witness Speech. *Arizona Law Review* 38:291–329.

## *WITTERS v. WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND*
474 U.S. 481 (1986)

Suffering from a progressive eye condition, Witters sought state financial assistance to attend a Bible college to prepare himself for a career as a minister. Washington State generally provided aid to visually handicapped persons seeking education or training for careers so they could be self-supporting. Nevertheless, the state denied Witters aid, citing the Washington State constitution's prohibition of public aid to religion. The state supreme court upheld the denial, but on ESTABLISHMENT CLAUSE grounds, holding that aid to Witters would advance religion as its primary effect and thus violate the second prong of the LEMON TEST. The U.S. Supreme Court unanimously reversed.

Writing the opinion of the Court, Justice THURGOOD MARSHALL said it would be inappropriate to view the funds ultimately flowing to the Bible college in this case as the result of state action to aid religion. Marshall noted that the financial assistance "is paid directly to the student, who transmits it to the educational institution of his or her choice. Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." Marshall further emphasized that the program "is in no way skewed toward religion"

and "creates no financial incentive for students to undertake sectarian education." Finally, Marshall stressed that nothing indicated any significant proportion of state money provided under the program would flow to religious institutions if Witters's claim was granted.

That last reason was not dispositive for a majority of Justices, five of whom joined concurring opinions that noted the applicability of MUELLER V. ALLEN (1983) to *Witters.* In *Mueller* the Court had upheld general tax deductions for certain school expenses, despite the fact that over ninety percent of these tax benefits went to those who sent their children to religious schools.

JOHN G. WEST, JR.
(1992)

## *WOLF v. COLORADO*
338 U.S. 25 (1949)

In *Wolf* the Supreme Court held that "the core" of the FOURTH AMENDMENT's freedom from UNREASONABLE SEARCHES was "basic" and thus incorporated in the FOURTEENTH AMENDMENT as a restriction on searches by state officers, but that its enforcement feature, the EXCLUSIONARY RULE (in effect for federal trials since 1914), was not. The refusal to require the exclusionary rule for state trials was largely based on considerations of FEDERALISM. The Court reasoned, first, that the exclusionary rule could scarcely be considered "basic" when the COMMON LAW rule of admissibility was still followed both in the English-speaking world outside the United States and in most of the American states, and second, that suits in tort against offending officers could be "equally effective" in deterring unlawful searches. The experience of the following twelve years proved the suit in tort to be a paper remedy rather than an effective sanction, leading the Court to overrule *Wolf* and impose the exclusionary rule on the states in MAPP V. OHIO (1961).

JACOB W. LANDYNSKI
(1986)

## *WOLFF PACKING COMPANY v. COURT OF INDUSTRIAL RELATIONS*
262 U.S. 522 (1923)

Reversing a trend of broad definitions of public utilities, the Supreme Court voided a Kansas law declaring certain businesses to be AFFECTED WITH A PUBLIC INTEREST, and thus subject to regulation. A unanimous Court could find no justification for the statute and held that affectation derived from the nature of a business, not from the declaration of a state legislature. The Court thus returned to a concept implicit in *Munn v. Illinois* (1877): that a public interest inhered in monopolistic enterprises. (See GRANGER CASES.) Chief Justice WILLIAM HOWARD TAFT defined three categories of businesses clothed with a public interest: public utilities, occupations traditionally regulated (such as innkeepers), and those "businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulation."

DAVID GORDON
(1986)

(SEE ALSO: *Economic Regulation; Public Use.*)

## *WOLMAN v. WALTER*
433 U.S. 229 (1977)

Ohio's aid plan for independent schools had six components: (1) the loan of textbooks; (2) the supply of standardized testing and scoring material; (3) the provision of diagnostic services aimed at identifying speech, hearing, and psychological problems; (4) the provision, off non-public school premises, of therapeutic, guidance, and remedial services; (5) the loan to pupils of instructional materials such as slide projectors, tape recorders, maps, and scientific gear; and (6) the provision of transportation for field trips similar to the transportation provided public school students.

Justice HARRY BLACKMUN delivered what was in part an opinion of the Supreme Court and in part a PLURALITY OPINION in which only Chief Justice WARREN E. BURGER, Justice POTTER STEWART, and Justice LEWIS F. POWELL joined.

The Court upheld the loan of textbooks, the supply of testing materials, the therapeutic services, and the provision of diagnostic services on non-public school premises. The Court found unconstitutional the provisions for lending secular instructional materials and for field trip transportation.

This case indicated the extent to which the "wall between church and state" was in fact a blurred, indistinct, and variable barrier.

RICHARD E. MORGAN
(1986)

# WOMAN SUFFRAGE

When American women voted in the election of 1920, they did so for the first time as a constitutional right protected by the NINETEENTH AMENDMENT. The amendment's ratification marked the end of a long struggle that was bound

up with both the shifting status of the ballot and the political development of a women's movement.

The struggle, which began formally at the women's rights convention at SENECA FALLS, New York, in 1848, emerged when most states had already dropped their property qualifications for white male voters. "Resolved," averred ELIZABETH CADY STANTON, "that it is the duty of the women of this country to secure to themselves the sacred right to elective franchise." Yet in the context of the mid-nineteenth century the right to elective franchise still was not a national, constitutional issue. Moreover, voting embodied so powerful a symbol of personal autonomy that granting it to women was profoundly controversial. In fact, woman suffrage, as contemporaries called it, barely won the support of the delegates at Seneca Falls.

RECONSTRUCTION transformed woman suffrage into a compelling constitutional issue. The second clause of the FOURTEENTH AMENDMENT introduced the word "male" into the Constitution, and the FIFTEENTH AMENDMENT, which prohibited abridging the VOTING RIGHTS of black males, was silent on the disfranchisement of females. Inasmuch as the two amendments seemed at once essential to the rights of freedmen and inimical to the cause of woman suffrage, the women's movement divided over their ratification.

The spacious terms of the first clause of the Fourteenth Amendment, however, sparked numerous challenges to women's disfranchisement. SUSAN B. ANTHONY created a dramatic test in the election of 1872 by registering and voting with fifteen other New York women, thereby violating a federal election statute, but her case did not reach the Supreme Court. The case that did was launched by Virginia Minor, who with her attorney-husband, Francis, sued the state of Missouri for restricting suffrage to males. The plaintiff's brief in MINOR V. HAPPERSETT (1875) argued that women had been empowered to vote in federal elections from the inception of the Constitution, had actually voted for a time in New Jersey, and were simply reaffirmed in their right to vote by the terms of the Fourteenth Amendment. The disfranchisement of women, the brief asserted, was a BILL OF ATTAINDER, an infringement on FREEDOM OF SPEECH, a form of involuntary servitude, and a violation not only of DUE PROCESS but of the constitutional guarantee that every state shall have a REPUBLICAN FORM OF GOVERNMENT. In a unanimous decision drafted by Chief Justice MORRISON R. WAITE, the Court ruled that suffrage was neither protected in the original text of the Constitution nor incorporated in the PRIVILEGES AND IMMUNITIES of CITIZENSHIP guaranteed by the Fourteenth Amendment.

By the 1890s, the drive for suffrage had stalled, despite the unification of the two wings of the women's movement. State-by-state campaigns yielded disappointing results, and after *Minor* a constitutional amendment was needed to ensure suffrage nationwide. Headway came with the bold campaigns of the Congressional Union (later called the Woman's party), an organization founded in 1913 by Alice Paul and Lucy Burns to replicate the militant tactics of English feminists. Picketing, arrests, and hunger strikes generated attention at a time when resistance to women voting was ebbing. Giving women the vote was regarded increasingly as a way of bringing their domestic concerns into the political arena and therefore as a potential instrument of Progressive reform. The final strategy for victory came from the lobbying efforts of Carrie Chapman Catt, president of the National American Woman Suffrage Association, who not only pulled a recalcitrant WOODROW WILSON into the suffrage camp but also capitalized on the temporary gratitude of the nation for the wartime service of its women.

NORMA BASCH
(1992)

(SEE ALSO: *Feminist Theory and Constitutional Law; Gender Rights; Progressive Constitutional Thought; Progressivism; Woman Suffrage Movement; Women in Constitutional History.*)

Bibliography

DUBOIS, ELLEN CAROL 1987 Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820–1878. *Journal of American History* 74:836–862.

FLEXNOR, ELEANOR (1959) 1968 *Century of Struggle: The Woman's Rights Movement in the United States.* Cambridge, Mass.: Harvard University Press.

## WOMAN SUFFRAGE MOVEMENT

The first formal demand for equal political rights for women was made by ELIZABETH CADY STANTON at the 1848 SENECA FALLS CONVENTION. Among the radical pioneers of the early women's rights movement, woman suffrage was at first controversial, because electoral politics was considered disreputable and partisanship fundamentally male. However, after the CIVIL WAR and the abolition of SLAVERY, questions of CITIZENSHIP and enfranchisement had moved to the top of the national political agenda, and woman suffrage was widely accepted by women's rights activists as their foremost demand. At this point we can properly begin to speak about an American woman suffrage movement.

At war's end, woman suffrage leaders expected that white women would win the franchise along with freedmen and freedwomen via the establishment of universal suffrage. However, the Republican authors of the FIFTEENTH AMENDMENT refused to include "sex" alongside

"race, color and previous condition of servitude" as federally prohibited disfranchisements. The woman suffrage forces disagreed over how to deal with this setback, as a result of which two rival organizations were formed. In one last effort to secure woman suffrage as part of RECONSTRUCTION, one of these societies, the National Woman Suffrage Association, developed an innovative constitutional argument. They contended that women as well as men had been made national citizens by the first clause of the FOURTEENTH AMENDMENT; inasmuch as the franchise must be regarded as the defining right of citizenship, women thus already possessed the ballot and had merely to exercise it. In 1875, in MINOR V. HAPPERSETT the Supreme Court ruled against this construction and held that while women were indeed citizens, voting was not a right but a privilege, which could be constitutionally denied to women.

Over the next decades, the woman suffrage movement gained adherents. Of greatest importance was the endorsement of woman suffrage, as the best means to control liquor and protect the home, by the Woman's Christian Temperance Union under the leadership of Frances Willard. By 1890, woman suffrage, which had begun as a radical demand among a handful of antebellum ultraist reformers, was gaining ground among respectable, politically mainstream middle-class American women. That year, the two suffrage societies buried their differences and combined to form the National American Woman Suffrage Association. As woman suffrage became more acceptable, the movement, which had been forged in the fires of abolition and emancipation, became increasingly racist in its arguments and organizations. Nonetheless, in these same years African American women, who well knew the power of the vote, actively pursued votes for women through their own pro-suffrage societies, such as the National Association of Colored Women.

The constitutional upheavals of the Reconstruction era had left unresolved the question of where SOVEREIGNTY over the electorate lay, with the several states or with the federal government. Through the late nineteenth and early twentieth centuries, while the progress to federal woman suffrage was stalled, advocates of votes for women concentrated on securing their goal by amending the constitutions of particular states. In 1869 and 1870, respectively, the territorial legislatures of Wyoming and Utah enacted woman suffrage provisions, which were retained when they became states in the 1890s. In 1893, Colorado became the first state in which the male electorate voted to amend the state constitution so as to grant women full VOTING RIGHTS. Idaho (1896), Washington (1910), and California (1911) followed. By 1912, there were ten "woman suffrage states," all west of the Mississippi. In the East, however, the "state method" could not prevail. In 1915, voters in four major eastern states—New Jersey, New York, Pennsylvania, and Massachusetts—decisively defeated woman suffrage referenda. At this point, woman suffragists turned their attention back to winning a federal amendment.

By the first decade of the twentieth century, the suffrage movement itself was also changing. Steady growth in the female labor force and massive immigration altered both the composition and approaches of suffragism. New suffrage organizations oriented toward wage-earning women were founded in New York, Boston, and San Francisco. Female college graduates, whose numbers were growing, also flooded into the movement. The suffragist tactical arsenal was reinvented as well, as advocates moved their demands into public spaces, organized mass parades, conducted automobile caravans, and became adept at street-corner speaking.

As an expression of these changes, a second national organization, the Congressional Union (subsequently known as the Woman's Party) was formed in 1913. Its goal was to pursue more aggressively a woman suffrage amendment to the federal Constitution. Known as the "militants," this new wing turned to the voting women of the ten "suffrage states," urging women to vote against the reelection of President WOODROW WILSON in 1916 to punish the Democrats for refusing to support a federal suffrage amendment. Once the United States entered WORLD WAR I, however, the militants switched from electoral methods to civil disobedience, picketing the White House, for which many were arrested and jailed. Meanwhile, the majority of American suffragists, who were associated with the moderate National American Woman Suffrage Association, continued to rely on congressional lobbying.

By 1920, the combination of these approaches, plus the political transformations following the war, finally led to the passage and ratification of the NINETEENTH AMENDMENT to the Constitution, which prohibited the states from disfranchising its citizens on the grounds of sex.

ELLEN CAROL DUBOIS
(2000)

Bibliography

DUBOIS, ELLEN CAROL 1978 *Feminism and Suffrage.* Ithaca, N.Y.: Cornell University Press.

——— 1998 *Woman Suffrage and Women's Rights.* New York: New York University Press.

FLEXNER, ELEANOR and FITZPATRICK, ELLEN 1996 *Century of Struggle: The Woman's Rights Movement in the United States.* Cambridge, Mass.: Harvard University Press.

KRADITOR, AILEEN 1965 *Ideas of the Woman Suffrage Movement, 1890–1920.* New York: Columbia University Press.

WHEELER, MARJORIE SPRUILL, ed. 1995 *One Woman, One Vote:*

*Rediscovering the Suffrage Movement.* Troutdale, Oregon: New Sage Press.

## WOMEN IN CONSTITUTIONAL HISTORY

At first glance, women seem missing from much of the historical landscape of the Constitution, and in the few instances where they do appear, they suffer negative consequences for their legal status. Before the CIVIL WAR sex did not even figure as a contested constitutional classification, and for a century after the war virtually every effort to eradicate its discriminatory aspects met with defeat at the hands of the Supreme Court. Indeed, until the 1970s, when the Court began to apply closer scrutiny to sex as a discriminatory category, the Constitution seems to have treated women as women with either casual indifference or zealous paternalism. Yet, on closer inspection, the role of gender in the life of the Constitution has been longer, larger, and more subtle than this first impression suggests. The constitutional status of gender, moreover, has been shaped by shifting conceptions of legal equality, the evolving relationship between the states and the federal government, and the changing circumstances in women's day-to-day lives.

FEDERALISM goes a long way toward illuminating the constitutional role of gender in the first stage of its development. Given the sharp delineation between the appropriate rights and duties of men and women in both the life and the law of the early Republic, the original text of the Constitution, which employs terms such as "persons," is remarkably gender-neutral. The Framers could afford to be gender-neutral in their language precisely because state laws were gender-specific. The Framers were hardly indifferent, then, to gender as a legal classification; rather, federalism obviated the need to frame it in national constitutional terms.

State statutes and constitutions spelled out the exclusion of women from the political process, while COMMON LAW assumptions and precedents informed their legal disabilities. The principles of coverture, which placed a married woman under the tutelage of her husband, influenced legal attitudes toward women in general. Of course, single women, unlike their married counterparts, could enter into contracts, sue, and be sued. However, the tendency of the law to define all women as wives and mothers rather than as citizens, property owners, or wage earners, or as dependent and relative rather than as independent and autonomous, was pervasive in constitutional approaches to gender. But reform efforts to define the role of women more broadly were also pervasive. They began officially in the 1840s when women's rights advocates organized to demand both legal and political equality at the state level, and these efforts have animated new conceptions of constitutional equality from the antebellum era to the present day.

After the Civil War, gender entered into formal constitutional discourse largely as a corollary of race. Although the second section of the FOURTEENTH AMENDMENT incorporated the word "male" into the Constitution, the DUE PROCESS and EQUAL PROTECTION clauses of the first section held the potential to apply to gender as well as to race. The consequences for women were ambiguous. On the one hand, SEX DISCRIMINATION acquired a new legitimacy as a result of constitutional tests of the RECONSTRUCTION amendments; on the other hand, it became a legal issue that was suffused with constitutional import.

Nonetheless, postbellum efforts to enhance the constitutional status of women via judicial decision failed miserably. In BRADWELL V. ILLINOIS (1873), the Supreme Court denied Myra Bradwell's claim that her right to practice law was among the PRIVILEGES AND IMMUNITIES of citizenship protected under the Fourteenth Amendment. In MINOR V. HAPPERSETT (1875), the Court denied that Missouri's restriction of suffrage to males violated the privileges and immunities of Virginia Minor's citizenship. And despite admitting Belva Lockwood to practice before its bar, the Court in *In re Lockwood* (1894) held that states could apply the word "person" in the Fourteenth Amendment to men only.

However, legal equality between women and men was not a consistent goal of the women's movement, and by the turn of the century, female reformers were clearly selective in their support of it. They backed special protective labor legislation for women workers not only in the hope that such legislation would be extended to all workers but also in the belief that long hours and hazardous working conditions were particularly injurious to women as potential mothers. If in hindsight their arguments seem oblivious to the constitutional risks of protecting women exclusively and to the disadvantages created for women in the labor market, in their own day they evoked a powerful appeal.

That appeal was perhaps best encapsulated in the voluminous BRANDEIS BRIEF, written for MULLER V. OREGON (1908), a case in which the Court upheld maximum-hour laws for women and thereby exempted them from a laissez-faire commitment to the principle of FREEDOM OF CONTRACT. The rationale in the brief remained popular among progressive reformers long after *Muller.* Indeed, by the 1920s the vast majority of women who had worked for women's political equality by supporting the NINETEENTH AMENDMENT were against the proposed EQUAL RIGHTS AMENDMENT largely because they feared its effects on special health and labor legislation for women. The

Supreme Court, however, was now prepared to view women as the complete equals of men, at least with regard to their capacity to contract for wages. In ADKINS V. CHILDREN'S HOSPITAL (1923), the Court undermined statutory attempts to put a floor under women's wages by invalidating a DISTRICT OF COLUMBIA MINIMUM WAGE LAW. Underscoring the equality women enjoyed as a result of the Nineteenth Amendment, the *Adkins* opinion applied the principle of freedom of contract to women workers without overtly overturning *Muller,* and *Adkins* itself was not overruled until WEST COAST HOTEL CO. V. PARRISH (1938).

Efforts to apply the equal protection clause to sex as a discriminatory classification met with further defeats in the post-WORLD WAR II era. In GOESAERT V. CLEARY (1948), for example, adjudicated at a time when men were returning to jobs that had been filled temporarily by women, the Court upheld a Michigan statute prohibiting a woman from selling or serving liquor unless she was the wife or daughter of the tavernkeeper. Equal protection, the decision averred, did not require perfect symmetry, and in *Hoyt v. Florida* (1961) the Court relied on similar reasoning to reject an effort to block sex discrimination in the jury selection process.

Yet as women entered the work force in unprecedented numbers after World War II and as the divorce rate soared, it became even harder to sustain the old legal prototype of protection and dependence. As a result of a burgeoning CIVIL RIGHTS MOVEMENT and a revitalized women's movement, the analogies between sex and race as discriminatory categories came to the forefront of constitutional discourse in the 1960s, and they were applied in turn to a host of new federal CIVIL RIGHTS statutes. Significant breakthroughs in the constitutional status of women came in the 1970s not only with the heightened judicial scrutiny of sex discrimination but also with the growing legitimation of REPRODUCTIVE AUTONOMY. No less important symbolically was the 1981 appointment of SANDRA DAY O'CONNOR, the first woman to serve as a Justice of the Supreme Court.

The change in constitutional attitudes toward gender was heralded by *Reed v. Reed* (1971), a decision that invalidated a statutory preference for males in appointing the administrators of intestate estates on the ground of the law's inherent irrationality. Inasmuch as the state's purposes were "as well served by a gender-neutral classification as one that gender-classifies and therefore carries with it the baggage of sexual stereotypes," the Court determined that the state "cannot be permitted to classify on the basis of sex." FRONTIERO V. RICHARDSON (1973), the closest the Court came to regarding sex as a suspect classification, struck down a rule that disadvantaged the dependents of servicewomen, relative to the dependents of servicemen, in calculating dependency benefits. A series of subsequent cases equalized Social Security payments, welfare benefits, and workers' compensation. *Stanton v. Stanton* (1975) ruled that girls were entitled to child support up to the same age as boys; *Orr v. Orr* (1979) held that a state law could not exempt women of means from paying alimony on the same basis as men; and CRAIG V. BOREN (1976) invalidated a law that differentiated between the sexes in setting the statutory age for buying 3.2 percent beer.

Clearly the decision that most dramatically altered both the lives and the status of women in this blizzard of judicial reinterpretation was ROE V. WADE (1973), which followed the rationale the Court had used in GRISWOLD V. CONNECTICUT (1965) to prohibit a state ban on BIRTH CONTROL. The *Roe* decision, which struck down a Texas statute defining ABORTION as a criminal offense, did so not on the equality-based theory that it was a violation of women's rights but rather on the ground that it violated an implied constitutional RIGHT OF PRIVACY. Nonetheless, except for the last trimester of pregnancy, the *Roe* opinion significantly subordinated the power of the state to that of a woman and her doctor.

However, ambivalence toward scrutinizing sex discrimination strictly was evident in many quarters. Even as the Court moved toward upholding equal rights for women through its reinterpretations of the equal protection clause, it never subjected its scrutiny of sex to the same rigorous standards that it applied to race, and there were some indications in the 1980s of a retreat from the stance it had taken in the 1970s. Because the issues were by no means simple, to cite rules on pregnancy leave as one example, there were radical feminists as well as conservative women who continued to support preferential or differential treatment for women. Furthermore, the right of reproductive autonomy, a hotly contested issue that right-to-life adherents elevated into a political litmus test for candidates at all levels of government, became especially vulnerable to inroads by the end of the 1980s. Finally, the political campaign for women's constitutional rights stalled on a distinct note of defeat. The failure of the EQUAL RIGHTS AMENDMENT to be ratified by three-quarters of the states after it had passed Congress meant that the Constitution still stood without a discrete provision on which to ground the eradication of the remaining sex inequalities in state law, much less to prevent new ones from emerging.

NORMA BASCH
(1992)

(SEE ALSO: *Anthony, Susan Brownell; Feminist Theory; Gender Rights; Labor and the Constitution; Labor Movement; Racial Discrimination; Stanton, Elizabeth Cady; Woman Suffrage; Women Suffrage Movement.*)

Bibliography

BAER, JUDITH 1986 *The Chains of Protection: The Judicial Response to Women's Labor Legislation.* Westport, Conn.: Greenwood Press.

BERRY, MARY FRANCES 1986 Why Era Failed: Politics, Women's Rights, and the Amending Process of the Constitution. Bloomington: Indiana University Press.

## *WONG KIM ARK, UNITED STATES v.*
169 U.S. 649 (1898)

This case, decided at a time when prejudice against people of Chinese ancestry was widespread, maintained the integrity of the CITIZENSHIP clause of section one of the FOURTEENTH AMENDMENT. Congressional legislation, known as the CHINESE EXCLUSION ACTS, denied citizenship to Chinese immigrants, and a treaty with China provided that no subject of China in the United States could be naturalized. Neither the exclusion acts nor the treaty applied in this case, however, because Wong Kim Ark had been born in San Francisco. When he was about twenty-one he visited his parents who had returned to China after living in the United States approximately twenty years. On his return to San Francisco, he was denied entry to the United States on the grounds that he was not a citizen. The Supreme Court held, 6–2, that the government's policy in refusing NATURALIZATION to persons of Chinese ancestry could not constitutionally be applied to anyone born in the United States whose parents, regardless of ancestry, were domiciled in this country and did not have diplomatic status.

LEONARD W. LEVY
(1986)

## *WONG SUN v. UNITED STATES*
371 U.S. 471 (1963)

In *Wong Sun* the Supreme Court held that an incriminating oral statement made by a suspect that derives immediately from his unlawful arrest is inadmissible in evidence as a FRUIT OF THE POISONOUS TREE, no less than the derivative EVIDENCE obtained from an unlawful search, as in SILVERTHORNE V. UNITED STATES (1920), or from unlawful wiretapping, as in NARDONE V. UNITED STATES (1939). However, when the taint of the earlier illegality is dissipated (as it was in this case, by a suspect voluntarily returning to make a statement several days after his arraignment and release on his own recognizance), the evidence is admissible.

In addition, *Wong Sun* contributed to the elaboration of PROBABLE CAUSE standards by holding that flight from an officer is not in itself such a strong inference of guilt as to establish probable cause for an arrest.

JACOB W. LANDYNSKI
(1986)

## *WOOD v. STRICKLAND*
420 U.S. 308 (1975)

This was an early case in the development of EXECUTIVE IMMUNITY from DAMAGES in CIVIL RIGHTS actions alleging constitutional violations. The case involved the liability of school board members for alleged violations of students' DUE PROCESS rights. The Supreme Court, in an opinion by Justice BYRON R. WHITE, clarified its holding in SCHEUER V. RHODES (1974) by expressly stating that the good faith defense of executive officials contained both subjective and objective elements. An official must subjectively believe he is doing right and must not act in "ignorance or disregard of settled, indisputable law." *Harlow v. Fitzgerald* (1982) later undermined the subjective component of *Wood*'s test. (See NIXON V. FITZGERALD.)

THEODORE EISENBERG
(1986)

## WOODBURY, LEVI
(1789–1851)

Levi Woodbury was a New Hampshire lawyer, state supreme court justice (1817–1823), governor (1823–1824), United States senator (1825–1831; 1841–1842), secretary of the navy (1831–1834), secretary of the treasury (1834–1841), and United States Supreme Court Justice (1845–1851). A staunch Jacksonian Democrat, Woodbury supported territorial expansion, STRICT CONSTRUCTION, and STATES' RIGHTS, while opposing the BANK OF THE UNITED STATES, abolitionists, and high tariffs. Although a conservative, Woodbury advocated public schools, female education, and prison reform. He personally disliked slavery but believed it was constitutionally protected and that all agitation over it should cease.

On the New Hampshire bench Woodbury supported the state in DARTMOUTH COLLEGE V. WOODWARD (1819). As treasury secretary, Woodbury continued President ANDREW JACKSON's Bank War and advocated an independent treasury. He believed that Congress lacked constitutional power to recharter the Bank, and as late as 1841 he asserted that MCCULLOCH V. MARYLAND (1819) neither set a valid precedent nor determined the constitutionality of any future bank charter.

In 1830, as a senator, Woodbury criticized the Supreme Court for its "manifest and sleepless opposition . . . to the strict construction of the Constitution" which had created

"a diseased enlargement of the powers of the General Government and throwing chains over States-Rights. . . ." Woodbury attempted to stop these tendencies in his brief tenure on the Supreme Court. In the LICENSE CASES (1847), Woodbury joined the majority in upholding state PROHIBITION statues. In the PASSENGER CASES (1849), he asserted, in dissent, that states could constitutionally regulate immigrants without violating the Constitution's COMMERCE CLAUSE. In LUTHER V. BORDEN (1848), he agreed with the majority that the case involved a POLITICAL QUESTION beyond the court's JURISDICTION, but he nevertheless modified his states' rights position to condemn the use of martial law in Rhode Island. In *Warning v. Clarke* (1847), he again dissented, this time to assert state jurisdiction over navigable rivers. In a rare deviation from his states' rights philosophy, Woodbury wrote the majority opinion in *Planters' Bank v. Sharpe* (1848), overturning a Mississippi statute and court decision because both impaired the OBLIGATION OF CONTRACTS in violation of the Constitution.

Woodbury's most important majority opinion was written in *Jones v. Van Zandt* (1847), where he upheld a particularly harsh interpretation of the Fugitive Slave Law of 1793. Van Zandt, an Ohio Quaker, had given a ride to a group of blacks walking on a road in Ohio. Woodbury held Van Zandt financially liable for the escape of these fugitive slaves, even though at the time Van Zandt had no notice they were fugitives. Woodbury asserted that the Constitution had "flung its shield" over slavery, giving masters a COMMON LAW right to recapture their property. Woodbury held that the Fugitive Slave Law was a constitutionally proper enforcement of this right. Somewhat inconsistently, he then asserted that slavery itself was "a political question, settled by each State for itself." In 1848 Woodbury sought the presidential nomination. He was considered a likely candidate in 1852, because his *Van Zandt* opinion gave him southern support, while as a Northerner he might get grudging support from Free Soil Democrats. He campaigned for the nomination from the bench until his death in 1851.

PAUL FINKELMAN
(1986)

Bibliography

GATELL, FRANK O. 1968 Levi Woodbury. Pages 843–872 in Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court, 1789–1969: Their Lives and Major Opinions.* New York: Chelsea House.

## *WOODRUFF v. PARHAM*
8 Wallace 123 (1869)

*Woodruff* produced a retreat from the broad enunciation of the ORIGINAL PACKAGE DOCTRINE in BROWN V. MARYLAND (1827). In that case Chief Justice JOHN MARSHALL had said in an OBITER DICTUM that the DOCTRINE applied "equally to importations from a sister State. . . ." In this case the city of Mobile, Alabama, had taxed various commodities and transactions including goods imported from other states and sold in their original and unbroken packages. Woodruff alleged that this tax violated the constitutional clause forbidding state IMPOSTS or duties on imports. The Court ruled unanimously that the clause applied only to goods imported from foreign countries. Because the tax did not discriminate against the products of other states, it did not burden INTERSTATE COMMERCE.) In effect, the Court limited the original package doctrine to FOREIGN COMMERCE.

LEONARD W. LEVY
(1986)

## WOODS, WILLIAM B.
(1824–1887)

William Burnham Woods of Ohio was appointed to the Supreme Court in 1880 after eleven years of service as United States circuit judge for the Fifth Circuit. His tenure on the Supreme Court was brief (1881–1887); virtually all of his OPINIONS for the Court dealt with private law questions that came up under DIVERSITY JURISDICTION. He is remembered primarily for his collaboration with Justice JOSEPH P. BRADLEY, first on circuit, then on the Supreme Court, in the formulation of a jurisprudence for the FOURTEENTH AMENDMENT. Although initially disposed to give the amendment a BROAD CONSTRUCTION, Woods ultimately retreated in the face of a more circumspect majority on the Supreme Court.

Woods's first meeting with Bradley, who had been assigned to the circuit upon his appointment to the Supreme Court, occurred at New Orleans in 1870. There they advanced a broad interpretation of the Fourteenth Amendment's PRIVILEGES AND IMMUNITIES clause in *Live Stock Dealers & Butchers Assn. v. Crescent City Co. & Board of Metropolitan Police* (1870), the first case, Woods noted in the report, in which the amendment was fully considered by a federal tribunal. The privileges and immunities of United States citizens, they contended, embraced all "fundamental rights," including that of pursuing any lawful employment in a lawful manner. "It is possible," Bradley admitted, "that those who framed the article were not themselves aware of the far reaching character of its terms," but its language clearly applied "as well to white as colored persons" and protected the rights of both against arbitrary state laws. Working from memoranda prepared by Bradley, Woods indicated in *United States v. Hall* (1871) that FREEDOM OF SPEECH and FREEDOM OF ASSEMBLY were among the FUNDAMENTAL RIGHTS guaranteed by the Fourteenth Amendment, opening the door for IN-

CORPORATION of the BILL OF RIGHTS through the privileges and immunities clause. Over the dissents of Bradley and three others, however, the Supreme Court rejected each of these pioneering doctrinal formulations in the landmark SLAUGHTERHOUSE CASES (1873). Eleven years later, in BUTCHERS UNION SLAUGHTERHOUSE CO V. CRESCENT CITY LIVE STOCK CO. (1884), Woods joined with Bradley and Justices STEPHEN J. FIELD and JOHN MARSHALL HARLAN in one last trenchant protest against the majority's emasculation of the privileges and immunities clause. Woods surrendered altogether in *Presser v. Illinois* (1886), where he spoke for a unanimous Court in holding that the Bill of Rights was a limitation only on the power of the federal government and in no way restricted the states.

Woods's initial construction of Congress's affirmative powers under the Fourteenth Amendment was especially spacious. In *Hall*, the case of first impression, Woods overruled defendants' demurrer to a conspiracy INDICTMENT under the Civil Rights Act of 1870. A federal statute punishing private action such as assault, he asserted, was certainly an "appropriate" exercise of national power, for "denying the EQUAL PROTECTION OF THE LAWS included the omission to protect, as well as the omission to pass laws for protection." (See STATE ACTION.) In UNITED STATES V. CRUIKSHANK (1874), however, Bradley led a retreat from this position. There counsel for the defendants again attacked the constitutionality of the conspiracy measure, insisting that it usurped the state's exclusive JURISDICTION over crimes such as murder. Woods disagreed and stood on the DOCTRINE advanced in his *Hall* opinion. But Bradley conceded that protection of rights against private action was primarily the duty of the states, and his views prevailed in the Supreme Court. Woods then abandoned the *Hall* formulation. Seven years later in UNITED STATES V. HARRIS (1883), his most important Supreme Court opinion, Woods prominently displayed his penchant for following the lead of others. The results were tragic. In *Harris* he not only embraced Bradley's *Cruikshank* position but also invalidated the Ku Klux Klan Act (FORCE ACT OF1871) on the grounds that it failed to restrict criminal liability to persons who conspired to divest rights because of the victim's race. As drafted, Woods explained for the Court, the statute covered instances even where whites assaulted whites; consequently it was "broader than is warranted" by the Thirteenth Amendment.

CHARLES W. MCCURDY
(1986)

Bibliography

FILLER, LOUIS 1969 William B. Woods. In Leon Friedman and Fred L. Israel (eds.), *The Justices of the United States Supreme Court 1789–1969: Their Lives and Major Opinions.* Pp. 1327–1336. New York: Chelsea House.

FRANTZ, LAURENT B. 1964 Congressional Power to Enforce the Fourteenth Amendment against Private Acts. *Yale Law Journal* 73:1353–1384.

## *WOODS v. CLOYD W. MILLER COMPANY*

333 U.S. 138 (1948)

A unanimous Supreme Court here upheld the Housing and Rent Act of 1947 which had extended wartime price controls into peacetime. Writing for the Court, Justice WILLIAM O. DOUGLAS declared that legislation adopted under the WAR POWERS could constitutionally be continued in effect in economically essential areas of public policy even after the cessation of hostilities.

DAVID GORDON
(1986)

## *WOODSON v. NORTH CAROLINA*

See: Capital Punishment Cases of 1976

## *WORCESTER v. GEORGIA*

See: Cherokee Indian Cases

## WORKERS' COMPENSATION LEGISLATION

Workers' compensation legislation provides workers compensation for losses resulting from injury, disablement, or death when the losses result from work-related accidents, casualties, or disease. The legislation replaces TORT liability with a schedule of benefits based upon the loss or impairment of the wage-earning capacity of the worker. All fifty states in the Union have workers' compensation statutes.

Under the COMMON LAW, employers often were able to defeat employees' tort actions by invoking the doctrines of contributory negligence, negligence of fellow servants, or assumption of risk. Frequently the employer did not even need these defenses, for the employee first had to prove the employer's negligence in order to recover. Accordingly, many victims of work-related injuries went uncompensated.

In order to extend the protection afforded workers and to contain costly and time-consuming litigation of industrial accidents, states enacted workers' compensation legislation with no requirement of negligence or fault as a prerequisite to liability. Employers were simultaneously

protected against what were perceived to be excessively large JUDGMENTS through a limited and determinant payout. The statutes essentially substitute a system of insurance for liability based on fault.

In *Ives v. South Buffalo Railway Company* (1911) New York's highest court struck down the state's first compulsory compensation requirements as unconstitutional, on the ground that they violated the state and federal DUE PROCESS clauses. However, the Supreme Court held in NEW YORK CENTRAL RAILROAD COMPANY V. WHITE (1917) that a compulsory compensation system does not violate the United States Constitution, at least for "hazardous employment." In the case of the New York statute, New York promptly amended its constitution to authorize compulsory plans.

The general rule in this area of law is that if an injury is fully or partly covered by the statute, the statutory remedy is exclusive. Many jurisdictions do not allow compensation for injuries caused by a worker's willful misconduct or unreasonable failure to observe safety rules or use safety devices.

WILLIAM B. GOULD
(1986)

Bibliography

MALONE, WEX S. et al. 1980 *Cases and Materials on Workers' Compensation and Employment Rights*, 2nd ed. St. Paul, Minn: West Publishing Co.

## WORKPLACE HARASSMENT AND THE FIRST AMENDMENT, I

Workplace harassment law punishes speech that is "severe or pervasive" enough to create a "hostile, abusive, or offensive work environment" based on race, religion, sex, national origin, age, disability, or veteran status and, in some jurisdictions, sexual orientation, marital status, or political affiliation.

This is a broad standard, and courts have applied it broadly. Courts have imposed liability based on religious proselytizing, sexually themed jokes, offensive political statements, and other speech that is generally entitled to full FIRST AMENDMENT protection. They have even gone so far as to enjoin private employees from, for instance, any "remarks or slurs contrary to their fellow employees' religious beliefs," and "any and all offensive . . . speech implicating considerations of race."

The breadth of harassment law is exacerbated by its VAGUENESS, and by the fact that it must be enforced by employers. To prevent liability, a cautious employer must suppress any statement that, when aggregated with other statements, may be found by a jury to create an "offensive work environment." This risk causes many employment experts to urge employers to, for instance, take down even legitimate sexually suggestive art, suppress all sexually themed jokes, and "proscribe all speech . . . that may constitute [religious] harassment."

Does harassment law infringe the FREEDOM OF SPEECH? It is a content- and viewpoint-based restriction on speech. It is imposed by the government acting as sovereign, not as employer or proprietor. It does not fit within the traditional exceptions to free speech protections, such as FIGHTING WORDS or OBSCENITY. It cannot be salvaged through a CAPTIVE AUDIENCE argument, because courts have long recognized that, outside the home, people must often be captive to offensive speech (for instance, picket lines that call them "scab," and that they must see twice a day for many weeks). And it cannot fit into a workplace speech exception, because the cases have (correctly) recognized no such exception: The lunchroom or office water cooler is where many Americans talk about social and political questions; and virtually every place, including a street, a university, or a library is, after all, someone's workplace.

Of course, private employers may restrict their employees' speech without First Amendment problems; the First Amendment applies only to government action. But harassment law involves the *government's* pressuring employers to restrict their employees' speech, on pain of multimillion-dollar liability. Private colleges, private newspaper owners, private commercial landlords, and private employers certainly can restrict speech on their own property; but this right does not empower the government to require that these property owners impose such restrictions.

A useful thought experiment is to imagine a law that says: "Any employer who tolerates speech critical of soldiers shall be liable to lawsuits by veterans and relatives of soldiers killed in action who find that such speech creates an offensive work environment for them." (This is actually not far from what veteran-status harassment law does.) Surely this law would be condemned as unconstitutional; and in most respects, harassment law is structurally similar to this proposal.

Lower courts are all over the map on this question; in coming years, the Supreme Court probably will have to resolve it and decide under what conditions harassment law, when applied to otherwise protected speech, is constitutional. (To the extent that harassment law also punishes sexual extortion, unwanted physical conduct, and speech that is otherwise proscribable, such as threats, it poses no First Amendment difficulty.)

EUGENE VOLOKH
(2000)

(SEE ALSO: *Employee Speech Rights (Private).*)

Bibliography

BROWNE, KINGSLEY R. 1991 Title VII as Censorship: Hostile-Environment Harassment and the First Amendment. *Ohio State Law Journal* 52:481–550.

EPSTEIN, DEBORAH 1996 Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech. *Georgetown Law Journal* 84:399–451.

ESTLUND, CYNTHIA 1997 Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment. *Texas Law Review* 75:687–777.

VOLOKH, EUGENE 1992 Freedom of Speech and Workplace Harassment Law. *UCLA Law Review* 39:1791–1872.

——— 1997 What Speech Does "Hostile Work Environment" Harassment Law Restrict? *Georgetown Law Journal* 85:627–648.

## WORKPLACE HARASSMENT AND THE FIRST AMENDMENT, II

Claims of sexual and racial harassment have been routinely adjudicated by courts on statutory and constitutional grounds as discrimination for twenty-five years in cases in which many or most of the acts being litigated have been words, pictures, and expressive conduct. Although most sexual and racial harassment plaintiffs seek relief for verbal and other arguably expressive conduct, including threats and rape, in only a very few instances have defendants even attempted to claim that such activity, while actionable as discrimination, is nonetheless protected from judicial redress by the FREEDOM OF SPEECH guarantee of the FIRST AMENDMENT. Defendants have not claimed that saying "have sex with me or you're fired" or "sleep with me and I'll give you an A" or hanging a noose over an African American's desk and posting Ku Klux Klan literature is First Amendment protected expression at work and at school, where—unlike in the rest of society—equality is legally guaranteed. Sexual and racial harassment have been treated as acts rather than as speech.

Those cases that have frontally addressed the potential legal conflict between equality and speech at work have centered on the presence and use of PORNOGRAPHY. In the two such cases to date, *Robinson v. Jacksonville Shipyards* (1991) and *Johnson v. Los Angeles* (1994), one court held that the pornography displays were actionable as discrimination; the other held that they were protected speech, so long as the materials were used privately.

In schools, the question of a possible conflict between equality rights and speech rights in the harassment setting has been adjudicated principally in the context of free expression challenges to antidiscrimination procedures in public universities. In two leading actions in which this challenge has been made, *Doe v. University of Michigan* (1989) and *UMW Post, Inc. v. Board of Regents* (1991), both focusing on the schools' prohibitions on racist and homophobic HATE SPEECH, the procedures lost. The equality interest that might have supported the procedures was barely raised, however.

Legal academics have produced a substantial theoretical literature arguing both sides of this question that the world of practice has treated as a virtual nonissue.

The ultimate resolution of any tension in this unsettled area remains in doubt. The Supreme Court's major PRECEDENT in the area, R. A. V. V. CITY OF ST. PAUL (1992), invalidated a local bias-crime ordinance under the First Amendment in its application to an incident of cross-burning as an impermissible restraint on free speech on the basis of content. Yet the ruling appeared to permit the prohibition of sexually derogatory words under Title VII. Although St. Paul's statute was found to reach too broadly into protected expression, the question remains open whether acts legally actionable as sexual harassment, including those found to create discriminatorily hostile environments when sexually abusive conduct is severe or pervasive, will be found to be protected by the free speech guarantee.

Given the fact that, where STATE ACTION exists, sexual harassment claims are also recognized under the FOURTEENTH AMENDMENT EQUAL PROTECTION clause, a potential for conflict between two clauses of the Constitution arises. The First Amendment may thereby be challenged to adapt to equality rights that were not part of the original Constitution.

CATHARINE A. MACKINNON
(2000)

(SEE ALSO: *Employee Speech Rights (Private); Racial Discrimination; Sex Discrimination.*)

Bibliography

BECKER, MARY 1996 How Free is Speech at Work? *UC Davis Law Review* 29:815–873.

BROWNE, KINGSLEY R. 1991 Title VII As Censorship: Hostile Environment Harassment and the First Amendment. *Ohio State Law Journal* 52:481–550.

FALLON, RICHARD H., JR. 1994 Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark. *Supreme Court Review* 1994:1–56.

MACKINNON, CATHARINE A. 1993 *Only Words.* Cambridge, Mass.: Harvard University Press.

VOLOKH, EUGENE 1997 What Speech Does "Hostile Work Environment" Harassment Law Restrict? *Georgetown Law Journal* 85:627–648.

## WORLD WAR I

The United States entered World War I on a note of Wilsonian idealism, but the shattering experience of wartime

mobilization ended the era of PROGRESSIVISM. Broad federal powers, previously used to further domestic reforms, were expanded to meet the demands of international conflict. These changes accelerated the trends toward national centralization and executive authority. Thus, ironically, WOODROW WILSON, who had been elected on a platform of firm but limited government control, brought Leviathan to the nation.

With little in the way of precedents, Congress and the President were pressed to extend national government control to a vast new range of complex subjects. The result was multitudinous delegations of power to President Wilson, designed to allow the executive branch to develop programs to meet the changing requirements of a fluid war situation. The breadth of this legislation was startling. Acts to achieve wartime economic mobilization and efficient use of natural resources were augmented by a SELECTIVE SERVICE ACT vesting the President with authority to raise an army by conscription. Espionage and sedition legislation afforded power to punish dissenting expression that might impede the war effort. The Trading with the Enemy Act gave the government power to control trade with enemy nations and to become an alien-property custodian for the duration of the war. The same measure authorized censorship of all communications by mail, cable, radio, or otherwise with foreign countries, and gave the postmaster general almost absolute censorship powers over the American foreign-language press. More sweepingly, the act empowered the chief executive to take over and operate the rail and water transportation systems of the country, along with the telegraph and telephone systems. In creating a modified executive dictatorship for the war period, these actions also raised complex constitutional questions, the answers to which reflected crisis pressures.

The LEVER FOOD AND DRUG CONTROL ACT of 1917 is a case in point. One of the most important war measures, it authorized broad federal control of the domestic economy, a sphere of regulation traditionally reserved to the states. The law gave the President virtually unlimited discretionary power to license the manufacture and distribution of food and related commodities, to take over and operate mines and factories, to regulate exchanges, and to fix commodity prices. The measures precipitated a bitter debate in Congress. Critics called it a violation of the TENTH AMENDMENT and thus of STATES' RIGHTS, but Congress enacted it on a theory of the WAR POWERS and on the argument that the industries controlled were affected with a public interest. During the war, the act was not challenged in court. In *United States v. L. Cohen Grocery Co.* (1921) the Supreme Court voided the price-fixing provision, which failed to specify what constituted unjust process. By concentrating on the detailed phrasing of only one section, the Court implicitly accepted the broad grant of power. Indeed, it did not reach the issue of the government's authority to regulate prices under the war power. The Court thus recognized that the requirements of modern war left little FEDERALISM in wartime.

Another example of expanding federal power and increased executive authority was presidential seizure and governmental operation of the nation's rail networks. As early as 1916, the Army Appropriations Act had authorized the President "'in time of war . . . to take possession and assume control of any system of transportation." After Wilson took over the railroads in 1917, Congress passed the Railway Administration Act of 1918, providing for government operation of the rails and compensation of their owners. The Court upheld this executive seizure in *Northern Pacific Railway Co. v. North Dakota* (1919), Chief Justice EDWARD D. WHITE invoking Congress's war powers, which, he argued, reach as far as necessary to meet the emergency. The Court also approved the government's takeover of telephone and telegraph lines in a series of cases argued with the railroad suit, notably *Dakota Central Telephone Co. v. South Dakota* (1919).

The wartime period also brought the long crusade for PROHIBITION to a successful conclusion. The Lever Act, under the mandate of preserving scarce food resources, authorized the President to limit or forbid the use of foodstuffs for production of alcoholic beverages. Beginning in December 1917, Wilson issued a series of war proclamations that in effect established near total prohibition. Congress joined in, passing the Wartime Prohibition Act in November 1918, prohibiting the manufacture or distribution of alcoholic beverages until the war came to a formal end and demobilization had been completed.

In the meantime, Congress had approved the EIGHTEENTH AMENDMENT, which the states ratified in January 1919, although not without an attack on the constitutionality of the amendment, the first time such action had taken place. Subsequently, a case reached the Supreme Court, *Rhode Island v. Palmer* (1920), where a large number of "wet" attorneys submitted briefs against the measure. The Constitution, they contended, had not created an unlimited amendment power, and ordinary legislation should not be made part of it. Thus, the Eighteenth Amendment had exceeded legitimate amending limits. Second, they argued that Section 2 altered traditional lines of authority by giving both Congress and the states concurrent enforcement powers, thereby undermining the federal system. The Court brushed aside these and other arguments, seeing no radical invasion of the original POLICE POWER of the states.

The Overman bill came before Congress in early 1918 and provoked substantial resistance to further expansion of presidential authority. The measure was inspired by a

desire to introduce some order and flexibility into the chaotic welter of wartime bureaus, commissions, and other special agencies, and to straighten out overlapping jurisdictions that were creating administrative confusion. The measure gave the President a blank check to reorganize the executive agencies "as he may deem necessary, including any functions, duties, and powers hitherto by law conferred on any executive department." The act was to remain in force until a year after the close of the war. By its terms the President could reassign any function, no matter where it had been lodged previously, even if Congress had specifically given that responsibility to a particular agency. The bill imposed no checks on presidential discretion and provided no standards for evaluating the executive's conduct.

The constitutionality of the measure elicited vigorous debate. Supporting senators argued that the bill was a necessity and that it was limited, for the President could create no new functions but merely transfer those already in existence. But critics argued that the bill could not be justified by the war power, for many departments and functions unrelated to the war might be affected by its terms. Republican Senator Frank Brandagee of Connecticut denounced the bill as an attempt to force Congress to "abdicate completely its legislative power and confer it upon the executive branch of the government." The measure passed in the SENATE in late April, with the majority senators overlooking constitutional doubts. A bitter Brandagee then offered an ironic amendment, providing that "if any power, constitutional or not, has been inadvertently omitted from this bill, it is hereby granted in full." The Overman Act, like the Lever Act, demonstrated that ordinary restraints upon delegation of legislative power to the President had been shelved for the duration of the war. The Supreme Court was not afforded an opportunity to pass on the act's constitutionality.

President Wilson wisely did not exercise the tremendous authority delegated to him by this measure and previous ones. Instead, he used ordinance-making powers to establish a series of commissions, boards, bureaus, and government-owned corporations to carry on wartime functions. These agencies included the Office of Food Administration; the Office of Fuel Administration; the National War Labor Board, for handling labor disputes during the war; and other agencies to deal solely with aspects of wartime transportation. The War Industries Board had complete authority over all war purchases and eventually came to exercise almost total control over all industry.

Wilson also created, by EXECUTIVE ORDER, the Committee on Public Information, whose principal responsibility was to "manufacture" public sentiment favorable to measures necessary to the conduct of the war. Run by a flamboyant journalist, George Creel, the committee operated as a loosely knit, ever-changing, but always powerful organization spreading information and propagating beliefs for the American people. With no authority beyond the executive order that created it, the committee worked alongside the Food Administration, the Fuel Administration, and many other agencies, pouring out publicity and propaganda to promote the war effort. It also worked with the Post Office Department to restrict circulation of news and propaganda, in the process imposing a type of informal censorship.

The CIVIL LIBERTIES implications of the Committee on Public Information were troubling to a number of liberal Americans, yet it faced no court challenge to its actions. Other governmental restrictions on individual freedoms, however, did elicit legal challenges. The Selective Service Act was the first. As opponents of the war questioned its constitutionality, lower courts expedited various draft cases, permitting an early test case in the Supreme Court. In the SELECTIVE DRAFT LAW CASES of January 1918, a unanimous Court found the constitutional authority to impose compulsory military service in Congress's powers to declare war and to "raise and support armies." Pushing aside states' rights challenges and a charge that conscription was "involuntary servitude," forbidden by the THIRTEENTH AMENDMENT, the Court also shrugged off a challenge that the measure's conscientious-objection exception violated the FIRST AMENDMENT because it amounted to an ESTABLISHMENT OF RELIGION. Thus sustained, the act was administered at the local level through "neighborhood" civilian draft boards, the government hoping thereby to create the illusion that the process was democratic and free of national control.

While conscription curtailed the freedom of those drafted, the freedom of critics of the war was constrained through other legislation. Although Congress adopted no general censorship law, it did enact two statutes limiting press and speech freedoms. The ESPIONAGE ACT of 1917 drafted to "outlaw spies and subversiveon expression that might disrupt the war effort by causing disobedience in the armed forces or by obstructing recruitment and enlistment. The Justice Department prosecuted more than 2,000 cases under the 1917 act, and a comparable number of prosecutions were brought under similar state laws. Congress's SEDITION ACT amendment (1918) broadened the scope of punishable criticism, providing criminal penalties for eight offenses, coming generally under the concept of SEDITIOUS LIBEL, or unjustifiably criticizing the government, its officials, and its policies. Again the act was enforced broadly to silence public criticism.

Test cases on the two measures had to await the postwar period. In SCHENCK V. UNITED STATES (1919), OLIVER WENDELL HOLMES, JR., spoke for the Court in sustaining the Espionage Act, finding the expression of a Socialist party

leader presented a CLEAR AND PRESENT DANGER to recruitment. However, in ABRAMS V. UNITED STATES (1919), when the Court sustained the amended Sedition Act, Holmes dissented, contending that the defendant's expression had not met that standard. The Court sustained all federal and state curtailment of unpopular expression, leaving a restrictive set of precedents to govern interpretation of the First Amendment. But criticism of this behavior and of the Palmer raids spawned a civil liberties movement, which in subsequent years became a central feature of American constitutional development.

PAUL L. MURPHY
(1992)

(SEE ALSO: *Executive Power; Executive Prerogative; Presidential Ordinance-Making Power; Presidential Powers; War, Foreign Affairs, and the Constitution.*)

Bibliography

CUFF, ROBERT D. 1973 *The War Industries Board: Business-Government Relations During World War I.* Baltimore, Md.: Johns Hopkins University Press.

KENNEDY, DAVID M. 1980 *Over Here: The First World War and American Society.* New York: Oxford University Press.

MURPHY, PAUL L. 1979 *World War I and the Origin of Civil Liberties in the United States.* New York: Norton.

## WORLD WAR II

The inherent conflict between the organizational needs of a nation at war and individual rights raised several constitutional questions during World War II. Although the Roosevelt administration showed far greater sensitivity to the protection of CIVIL LIBERTIES than did the administration of WOODROW WILSON, restrictions on individual rights did take place, most notably the incarceration of thousands of Japanese American citizens.

As the nation prepared for war even before Pearl Harbor, FRANKLIN D. ROOSEVELT adopted the view that the Constitution allowed the President great flexibility in meeting his obligations as COMMANDER-IN-CHIEF. With Congress reluctant to act, Roosevelt expanded his foreign policy prerogatives by negotiating secret EXECUTIVE AGREEMENTS. In October 1939 the United States and nineteen Latin American states established a "neutrality belt" through the Declaration of Panama. In August 1941, Roosevelt and Winston Churchill defined the war aims of the free world in the Atlantic Charter. The most famous executive agreement involved a swap of fifty overage American destroyers in exchange for British naval bases in the Caribbean. Although conservatives attacked the President's alleged dictatorial behavior, a majority in Congress and of the American people supported the agreements.

In May 1941 the President proclaimed an "unlimited" emergency to justify various defensive measures for the western hemisphere. What this meant, and on what constitutional authority it relied, remained uncertain. Attorney General FRANK MURPHY declared that "the constitutional duties of the Executive carry with them the constitutional powers necessary for their proper performance." Like ABRAHAM LINCOLN and Woodrow Wilson before him, Roosevelt believed in "the adequacy of the Constitution"—that whether or not specific powers were spelled out, the Constitution granted the President and Congress sufficient authority to meet any crisis.

Roosevelt's use of executive agreements and EXECUTIVE ORDERS, revolutionary in themselves, masked the fact that more often than not he sought—and received—legislative authorization. The Neutrality Act of 1939, the Draft Act of 1940, the Lend-Lease Act of 1941 all gave the President broad discretion; following Pearl Harbor, Congress passed a series of measures giving the chief executive extensive powers over the economy and the government. Roosevelt not only fully utilized these powers but told the nation that he would exercise whatever authority he thought necessary for the successful prosecution of the war. At one point, Roosevelt warned that if Congress failed to repeal a portion of the 1942 Price Control Act, "I shall accept the responsibility and I will act. . . . The President has the power, under the Constitution, and under Congressional acts, to take measures necessary to avert a disaster." But, he assured the people, he would always act with due regard to the Constitution, and "when the war is won, the powers under which I act automatically revert to the people—where they belong."

Although wartime measures are often challenged in the courts, unless there is an egregious violation of a specific constitutional prohibition the courts will affirm the law or delay a decision until the end of hostilities. The Supreme Court heard several challenges to the sweeping price-fixing provisions in the Emergency Price Control Act of 1942. Although Congress had set few limitations on presidential discretion and although these delegations of authority far exceeded the scope of those struck down in SCHECHTER POULTRY CORPORATION V. UNITED STATES (1935), the Court rejected all challenges to the law; the judiciary would not second-guess the executive and legislative branches on what had to be done to win the war.

The seizure of property to avert labor disputes, the freezing of wages and prices, and even executive agreements with the force of law are less troubling in wartime than restrictions placed on individual liberties. In World War I the Justice Department and the postal authorities had shown little regard for constitutional protection of dissident speech and publication. Because no pro-German or antiwar sentiment existed between 1941 and 1945 com-

parable to that of the earlier war, the Roosevelt administration expressed—and, for the most part, maintained—a firmer commitment to civil liberties. The wartime Justice Department, headed successively by Frank Murphy, ROBERT H. JACKSON, and FRANCIS BIDDLE, showed itself unwilling to stifle expression in the name of national unity.

Many of the worst abuses during World War I had resulted from prosecutions under state criminal laws, but the Roosevelt administration avoided a repetition of those abuses. It asserted sole federal control over internal security through the ALIEN REGISTRATION ACT of 1940, and a few months later the Supreme Court affirmed federal supremacy. In HINES V. DAVIDOWITZ (1941) the Court overturned a Pennsylvania alien registration statute on the ground that the federal law had preempted the field.

The administration did, however, seek to revoke the citizenship of allegedly disloyal naturalized citizens of German and Italian origin, on the supposition that current disloyal or even dissident behavior proved they had earlier secured citizenship under false pretenses. The case testing this policy happened to involve neither a Nazi nor a Fascist sympathizer but a communist. The government based its case on the claim that membership in the Communist party proved the defendant did not have the "true faith and allegiance to the United States" that citizenship demanded. The Court, by a 6–3 majority, rejected the government's claim in *Schneiderman v. United States* (1943). Although citizenship constituted a privilege granted by Congress, Justice Frank Murphy explained, once a person became a citizen he or she enjoyed all the rights guaranteed by the Constitution, especially freedom of thought and expression. This and other cases reversing denaturalization orders indicated how far the nation had moved from its anti-alien hysteria of World War I, at least in terms of freedom to express unpopular ideas.

The country did, however, deprive one group of basic constitutional rights in what has remained the greatest civil liberties stain on the Roosevelt administration's record—the incarceration of more than 110,000 men, women, and children of Japanese origin, two-thirds of them native-born American citizens, solely on the basis of race. Anti-Japanese sentiment, especially on the West Coast, long predated the war, but the attack on Pearl Harbor whipped it up to hysterical proportions. Fears of fifth-column attacks and sabotage, reinforced by Japanese military victories, led to demands that both Japanese aliens (Issei) and American citizens of Japanese ancestry (Nisei) be removed from the coastal areas and relocated inland.

On February 19, 1942, President Roosevelt signed EXECUTIVE ORDER 9066 authorizing military officials to designate parts of the country as "military areas" from which any and all persons might be excluded. Roosevelt issued the order on his authority as commander-in-chief, but army lawyers feared that so slender a constitutional reed might not support evacuating large numbers of citizens solely on the basis of their race. So they asked for, and received, congressional affirmation of 9066 on March 21.

Three days later, the army declared a curfew along the coastal plain for German and Italian nationals and for all persons of Japanese ancestry. Three days after that, both Issei and Nisei were prohibited from leaving the military areas, and then on May 9, they were excluded from West Coast military zones. Japanese Americans could comply with these contradictory orders only by reporting to central depots, from which they would be transferred to relocation centers in the interior. Although families could stay together, they had to leave homes and jobs and dispose of their property within a matter of days, often sustaining severe losses in the process. Amazingly, the Japanese and Japanese Americans responded cooperatively, and a number of younger Nisei volunteered to serve in the army, where their units turned out to be among the most highly decorated in the European theater of operations.

A race-based policy of such striking dimensions could hardly avoid constitutional challenge, and within a short time the nation's High Court had placed its imprimatur on relocation. In *Hirabayashi v. United States* (1943), a native-born citizen had been arrested for failing to report to a control center and for violating the curfew. The Court, speaking through Chief Justice HARLAN F. STONE, unanimously affirmed the curfew as lying within the presidential WAR POWERS as well as congressional authority. Although any RACIAL DISCRIMINATION was "odious to a free people," the Court would not challenge the discretion of the military in its interpretation of the war powers.

Justices Murphy, WILLIAM O. DOUGLAS, and WILEY B. RUTLEDGE entered concurring opinions that practically amounted to dissents; Murphy in particular noted the "melancholy resemblance" between American treatment of the Japanese and the incarceration of Jews in Nazi-dominated Europe. But the three reluctantly consented to what they perceived as an unconstitutional program because of the supposedly critical military situation.

The Justices heard two other relocation cases in 1944, and in both they shied away from the central question of constitutional authority for the detention of peaceful American citizens. In *Korematsu v. United States,* an American citizen, turned down for voluntary army service because of ulcers, had refused to leave the military zone. Justice HUGO L. BLACK's majority opinion tried to separate the issue of exclusion from that of detention and found the war powers of Congress and the President sufficient to sustain an order excluding certain persons, for whatever reason, from designated military zones. Black rather in-

genuously said that race had nothing to do with the case; Fred Korematsu had been ordered to leave the area not merely because he was Japanese, but because of military necessity. This time Justices Murphy, Jackson, and OWEN J. ROBERTS entered strenuous dissents, with Roberts bluntly declaring that Korematsu had been convicted "for not submitting to imprisonment in a concentration camp."

The same day, in *Ex parte Endo*, the Court unanimously authorized a writ of HABEAS CORPUS to free Mitsuye Endo, a citizen whose loyalty had been clearly established. Although the AMERICAN CIVIL LIBERTIES UNION had hoped to make this case a challenge to the entire relocation program, Justice Douglas carefully skirted that issue. He confined his ruling to the narrow question of whether the government could detain persons whose loyalty had been confirmed. There is evidence that Douglas wanted to go further, but that even this late in the war, other members of the Court still did not feel free to challenge the relocation program.

There has been general condemnation of the relocation program and of the Court's decisions affirming it from that day forward, and the judgment of history has clearly been that the Roosevelt administration and the Court erred badly. In later years, Congress took several steps to apologize to the Japanese Americans and, at least partially, to indemnify them for their suffering and losses. Gordon Hirabayashi, Fred Korematsu, and others also succeeded in overturning their convictions on the basis of the misconduct of government attorneys in misleading the Supreme Court.

The Court also considered constitutional issues involving treason and espionage. Ever since Aaron Burr's trial (1807), the Court had held to a restricted definition of treason, from which it did not depart during World War II. It drew a sharp distinction between civilian trials for treason and military trials for espionage, in which different criteria for evidence and guilt prevailed.

The first case arose from the arrest of eight Germans put ashore from submarines with orders to sabotage American defense plants. Quickly arrested and tried by military tribunals, which sentenced six of them to death, they appealed to the Supreme Court. In *Ex parte Quirin* (1942) a unanimous Court affirmed the powers of the President to establish military commissions with appropriate jurisdiction to try such cases. Chief Justice Stone's elaborate opinion, however, also implied that even spies and prisoners of war had some rights under the Constitution; that implication had no basis in either American or English law, and the Court soon backed down. In *Ex parte Yamashita* (1946) Stone conceded that a Japanese general tried for war crimes had no constitutional rights and could appeal his conviction only to military authorities.

In two treason cases involving American citizens arising from the German saboteur incident, the Court adhered to a strict interpretation of treason, "levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort." In CRAMER V. UNITED STATES (1945), Justice Jackson held for a 5–4 Court that the overt act had to be traitorous in intent by itself, and not merely appear so because of surrounding circumstances. In HAUPT V. UNITED STATES (1947), however, the Court moved away from this rigorous intent standard to sustain the conviction of the father of one of the Germans, whose activities were "'steps essential to his design for treason."

The government then prosecuted other Americans who had aided the enemy during the war, such as Douglas Chandler, who had broadcast English-language programs from Berlin during the war. The Chandler case raised the issue of whether treason could take place only within the territorial limits of the United States. In *Kawakita v. United States* (1952) the Court ruled that treason encompassed activities by American citizens anywhere.

MELVIN I. UROFSKY
(1992)

(SEE ALSO: *Executive Power; Executive Prerogative; Japanese American Cases; Naturalization; Stone Court; War, Foreign Affairs, and the Constitution.*)

Bibliography

HURST, J. WILLARD 1971 *The Law of Treason in the United States.* Westport, Conn.: Greenwood Press.

IRONS, PETER 1983 *Justice at War.* New York: Oxford University Press.

ROSSITER, CLINTON L. 1976 *The Supreme Court and the Commander-in-Chief.* Ithaca, N.Y.:Cornell University Press.

# WORTMAN, TUNIS
(?–1822)

A New York lawyer prominent in Tammany politics, Tunis Wortman contributed significantly to the emergence of a libertarian theory of the FIRST AMENDMENT following the Sedition Act of 1798. His philosophic book, *An Enquiry, Concerning the Liberty, and Licentiousness of the Press* (1800), whose publication ALBERT GALLATIN and other Jeffersonian congressmen helped underwrite, was the era's most systematic presentation of the case for an absolutist interpretion of freedom of publication (excluding personal libels). Wortman regarded prosecutions for SEDITIOUS LIBEL as incompatible with republican government.

LEONARD W. LEVY
(1986)

## WRIGHT, J. SKELLY
(1911–1988)

J. Skelly Wright was serving as the U.S. attorney for New Orleans when he was appointed to the Federal District Court bench by President HARRY S. TRUMAN in 1948. At the time of his appointment, Wright, at thirty-seven, was the youngest judge on the federal bench. From 1956 to 1962, he presided over the DESEGREGATION of the New Orleans school district, becoming in the process "the most hated man in New Orleans." Displaying real boldness, he ruled unconstitutional various state statutes adopted with the apparent goal of thwarting desegregation. In 1962, President JOHN F. KENNEDY wanted to appoint Wright to the Fifth Circuit Court of Appeals (whose jurisdiction then covered much of the South). This appointment, however, was blocked by Senator Russell Long, for reasons of Louisiana politics. Instead, the President ended up appointing Wright to the District of Columbia Circuit. Wright sat on this court for twenty-five years, eventually becoming its Chief Judge.

On the D.C. Circuit, Wright proved to be a liberal activist; indeed, his career is one of the purest examples of this genre of judging. A genuinely humble man, he was distinctly gratified by a judicial position that enabled him, in his words, to "make a contribution." He was the author of a large number of noteworthy opinions, dealing with such issues as the unconscionability defense in contract law, the implied warranty of habitability in residential leases, the broad rule-making powers of the Federal Trade Commission, the impermissibility of ex parte contracts in the course of informal rule making, and the proper scope of the National Environmental Protection Act. Designated in one instance to sit as a district court judge, Wright issued an opinion that required the D.C. school system to equalize spending between schools that were de facto white and those that were black, to cure problems of teacher segregation, and to end a rigid system of student ability grouping. In its time, the Wright opinion was a leader in the development of what was then called the "new equal protection."

Judge Wright's interests in public law were also reflected in his authorship of a significant number of major law review articles, including one advocating the revival of the antidelegation doctrine. In his articles and his opinions as well, Wright was a remarkable stylist, writing with a directness and sense of purpose that gave his work a distinctive voice.

Having retired from the court a year before, Wright died in 1988.

GARY T. SCHWARTZ
(1992)

Bibliography

MILLER, ARTHUR SELWYNE 1984 *A "Capacity for Outrage": The Judicial Odyssey of J. Skelly Wright*. Westport, Conn.: Greenwood Press.

SYMPOSIUM 1980 Judge J. Skelly Wright. *Hastings Constitutional Quarterly*:857–999.

## *WRIGHT v. VINTON BRANCH OF MOUNTAIN TRUST BANK OF ROANOKE*
300 U.S. 440 (1937)

Despite the decision in LOUISVILLE JOINT STOCK LAND BANK V. RADFORD (1935), Congress had to act on behalf of farmers losing their farms through foreclosures. A revised FRAZIER-LEMKE ACT fixed a three-year stay of proceedings with the proviso that a federal bankruptcy court might shorten that period if the economic emergency ended. The new act also provided that the mortgagee retained a lien on the property. But except for a few other minor changes the act remained the same, allowing the bankrupt mortgagor to retain possession of the property and to purchase it at its newly appraised value. Justice LOUIS D. BRANDEIS, for a unanimous Supreme Court, found that the new act was free of the objectionable features of the original and did not violate the Fifth Amendment's DUE PROCESS clause. President FRANKLIN D. ROOSEVELT's COURT-PACKING plan may have influenced the Court to temper its views.

LEONARD W. LEVY
(1986)

## *WRIGHTWOOD DAIRY CO., UNITED STATES v.*
315 U.S. 110 (1942)

## *ROCK ROYAL CO-OP, INC., UNITED STATES v.*
307 U.S. 533 (1939)

These decisions are among the more significant results of the post-1936 interpretation of the COMMERCE CLAUSE as a source of federal power extending to virtually the entire national economy. The AGRICULTURAL MARKETING AGREEMENT ACT of 1937 authorized the secretary of agriculture to fix minimum prices for all milk in INTERSTATE COMMERCE, or burdening or affecting commerce. In *Rock Royal* the price-fixing provisions governed sales by local dairy farmers to dealers who processed the milk and transported it. Those opposing federal authority contended that the regulated transactions included INTRASTATE COMMERCE whose sales were fully completed *before* any inter-

state commerce began. Holding the statute constitutional, the Court declared that the national power to fix production quotas and prices applied to local milk because its marketing was "inextricably intermingled with and directly affected the marketing of milk which moved across state lines." In *Wrightwood,* the milk subject to regulation under the same statute was entirely intrastate and none of it was intermingled with milk that crossed state lines. Nevertheless the Court unanimously held that it was the EFFECT ON INTERSTATE COMMERCE, not the source of the injury to it, that was "the sole criterion of Congressional power." Accordingly, the commerce power extended to intrastate transactions whose regulation made the regulation of interstate commerce effective, including intrastate transactions whose competitive price affected interstate ones. Both cases were decided on a thoroughgoing application of the SHREVEPORT DOCTRINE.

LEONARD W. LEVY
(1986)

## WRIT OF ASSISTANCE

See: Assistance, Writ of

## WRIT OF CERTIORARI

See: Certiorari, Writ of

## WRIT OF ERROR

See: Error, Writ of

## WRIT OF HABEAS CORPUS

See: Habeas Corpus

## WRIT OF MANDAMUS

See: Mandamus, Writ of

## WRIT OF PROHIBITION

See: Prohibition, Writ of

## WRITS OF ASSISTANCE CASE

See: Paxton's Case

## *WYGANT v. JACKSON BOARD OF EDUCATION*
476 U.S. 267 (1986)

Although the *Wygant* decision did not produce a majority opinion, it advanced the growth of constitutional doctrine governing AFFIRMATIVE ACTION. A school board and a teachers' union had approved an affirmative action plan as a response to complaints of past RACIAL DISCRIMINATION in the hiring of teachers. To maintain minority-hiring gains in the event of a contraction in teacher employment, the plan protected some minority teachers against layoffs. When some minority teachers were retained while some nonminority teachers with greater seniority were laid off, the laid-off teachers challenged the layoff provision in federal court. By a 5–4 vote, the Supreme Court held the provision a violation of the EQUAL PROTECTION OF THE LAWS.

Justice LEWIS F. POWELL, for four Justices, concluded that the appropriate STANDARD OF REVIEW was STRICT SCRUTINY. Using this standard, he rejected the lower courts' two justifications for the layoff provision: as a means of keeping minority teachers to serve as role models for students and as a remedy for past societal discrimination. He agreed that past discrimination by the school board itself was a COMPELLING STATE INTEREST that would justify some RACE-CONSCIOUS remedies, assuming that the board had evidentiary support for determining that remedial action was warranted. Here no such determination had been made, but Justice Powell was unwilling to remand the case for exploration of this issue. Even if the purpose were remedial, he concluded, the layoff provision was an impermissible remedy because it was too burdensome on innocent nonminority teachers. Preferential hiring, he intimated, would be acceptable; layoffs, however, placed the whole burden on particular individuals.

Justice SANDRA DAY O'CONNOR concurred separately to emphasize that a public employer that wished to adopt an affirmative action plan need not make a contemporaneous finding of past wrongdoing. Such a requirement would undermine the employer's incentive to meet its civil rights obligations. Rather, the employer could show "a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool" that would support a prima facie case of EMPLOYMENT DISCRIMINATION under Title VII of the CIVIL RIGHTS ACT OF 1964. Justice BYRON R. WHITE added a brief concurrence emphasizing the difference be-

tween a hiring preference and a preference in avoiding layoffs.

Justice THURGOOD MARSHALL dissented, joined by Justices WILLIAM J. BRENNAN, JR., and HARRY A. BLACKMUN. Marshall argued that the case should be remanded to the trial court for further findings about the board's past discrimination, but also disagreed with the majority Justices' disposition on the merits. The board's interest in preserving a valid policy for affirmative action in hiring, he argued, was a sufficient state purpose, and the layoff provision was sufficiently narrowly tailored to pass the test of constitutionality. Justice JOHN PAUL STEVENS also dissented, arguing that the board's interest in educating children justified measures to assure a racially integrated faculty, irrespective of any showing of past discrimination.

*Wygant* was a way station on the road to RICHMOND V. J. A. CROSON CO. (1989), in which a majority of the Supreme Court explicitly adopted the rhetoric of strict scrutiny for reviewing state-sponsored affirmative action programs. Justice Powell's and Justice O'Connor's opinions, taken together, also provided a "how to do it" manual for public employers that want to adopt affirmative-action plans for achieving integrated work forces.

KENNETH L. KARST
(1992)

Bibliography

KARST, KENNETH L. 1989 *Belonging to America: Equal Citizenship and the Constitution*, pages 158–167. New Haven, Conn.: Yale University Press.

SULLIVAN, KATHLEEN 1986 Sins of Discrimination: Last Term's Affirmative Action Cases. *Harvard Law Review* 100:78–98.

## *WYMAN v. JAMES*
400 U.S. 309 (1971)

In *Wyman* the Supreme Court held that a recipient of Aid to Families with Dependent Children must permit a home visit by a caseworker, when the law requires it, or forfeit her right to public assistance. The Supreme Court did not consider it to be a search in FOURTH AMENDMENT terms. Even if the visit were a search, the Court said it was reasonable: it was made for the benefit of the child; it was "a gentle means" of assuring that tax funds are properly spent; the caseworker was not a "uniformed authority"; and the recipient had the choice of invoking her right to refuse or forfeiting the benefits. Three dissenting Justices (WILLIAM O. DOUGLAS, WILLIAM J. BRENNAN, THURGOOD MARSHALL), protested that the Court had granted more protection to a commercial warehouse than to a "poor woman's home."

JACOB W. LANDYNSKI
(1986)

## *WYNEHAMER v. PEOPLE OF NEW YORK*
13 N.Y. 378 (1856)

Although out of joint with its times, *Wynehamer* became a classic case of pre-1937 American constitutional history, exemplifying our constitutional law as a law of judicially implied limitations on legislative powers, drawn from the DUE PROCESS clause for the benefit of VESTED RIGHTS. The case involved the constitutionality of a state prohibition act. More than a dozen states had such legislation before the Civil War. The New York law involved in *Wynehamer* prohibited the sale of intoxicating liquor and the possession of liquors for sale, and it ordered the forfeiture and destruction of existing supplies as public nuicances. The fundamental issue raised by such legislation was whether property which had not been taken for a public use could be destroyed in the name of the public health and morals, without any compensation to the owner. Everywhere, except in New York, the state courts held that a mere license to sell liquor was not a contract in the meaning of the CONTRACT CLAUSE, and that a charter to make and sell liquor was subject to the RESERVED POLICE POWER to alter, amend, or repeal it. Moreover, liquor, like explosives or narcotics, was a peculiar kind of property, dangerous to the public safety, morals, and health. Legislatures could never relinquish their control over such matters, not even by a contract in the form of a charter. As Chief Justice ROGER B. TANEY had said in the 1847 LICENSE CASES, nothing in the United States Constitution prevented a state from regulating the liquor traffic "or from prohibiting it altogether."

The New York Court of Appeals, however, held the state prohibition statute unconstitutional on the grounds that it violated the due process clause of the state constitution. The various opinions of the state judges used the novel concept of SUBSTANTIVE DUE PROCESS about half a century before the Supreme Court of the United States accepted that concept. The conventional and previously sole understanding of due process had been that it referred to regularized and settled procedures insuring mainly a fair accusation, hearing, and conviction. And, the doctrine of vested rights notwithstanding, the orthodox view of the POLICE POWER authorized the legislature, as Chief Justice LEMUEL SHAW of Massachusetts had said, "to declare the possession of certain articles of property . . .

unlawful because they would be injurious, dangerous, and noxious; and by due process of law, by proceeding IN REM, to provide both for the abatement of the nuisance and for the punishment of the offender, by the seizure and confiscation of the property, by the removal, sale or destruction of the noxious article" (*Fisher v. McGirr*, 1854). Accordingly the opinion of the New York court was startling when it said, "All property is alike in the characteristic of inviolability. If the legislature has no power to confiscate and destroy property in general, it has no such power over any particular species." The court showed that the prohibition statute simply annihilated existing property right in liquors. The crucial lines of the opinion declared that the right not to be deprived of life, liberty, or property without due process of law "necessarily imports that the legislature cannot make the mere existence of the rights secured the occasion of depriving a person of any of them, even by the forms which belong to "due process of law.' For if it does not necessarily import this, then the legislative power is absolute."

Thus even if the legislature provided all the forms of due process by laying down proper procedures for prosecuting violators of the statute, as in this case, due process had still been denied. The court, in effect, looked at the substance of the statute, found it denied persons of their property, and then held it unconstitutional for denying "due process," even if it did not deny due process. One can make sense out of this by realizing that the court had rewritten the due process clause to mean that property cannot be deprived with or without due process. The Court in effect redpenciled the due process clause out of the constitution, or as EDWARD S. CORWIN said, *Wynehamer* stands for "nothing less than the elimination of the very phrase under construction from the constitutional clause in which it occurs." The difficulty, however, is that the court had to its own mind kept and relied on the due process clause. It added a new meaning to supplement the old one. It constitutionally changed process into substance by holding that the statute's infirmity lay in what it did, not how it did it. Due process as a substantive limitation on legislative powers was then an absurd concept. Substantive process was oxymoronic, like thunderous silence.

Another way of understanding *Wynehamer*'s substantive due process is to realize that the court believed that due process had substance. The court in effect accused the legislature of retaining the forms of due process without its substance, that is, of providing mere empty formalities and labeling them due process, because the effective deprivation of property was not by judicial process but by legislative fiat.

*Wynehamer*, an aberration at the time, was everywhere repudiated yet destined for ultimate acceptance by the highest court of the land and destined, too, to become the source of a major doctrine in American constitutional history.

LEONARD W. LEVY
(1986)

Bibliography

CORWIN, EDWARD S. 1948 *Liberty against Government.* Chap. 3. Baton Rouge: Louisiana State University Press.

MOTT, RODNEY L. 1926 *Due Process of Law.* Pages 311–326. Indianapolis: Bobbs-Merrill.

## WYTHE, GEORGE
(1726–1806)

George Wythe served almost uninterruptedly in Virginia's House of Burgesses from 1754 to 1775 and was a delegate to the FIRST CONTINENTAL CONGRESS in 1774, later signing the DECLARATION OF INDEPENDENCE. With his pupil Thomas Jefferson (John Marshall and HENRY CLAY were also his students) and EDMUND PENDLETON, Wythe revised Virginia's laws. He was appointed to the Virginia Court of Chancery in 1778; one year later he became the first professor of law in the United States, enabling him to influence the course of American jurisprudence. His opinion in COMMONWEALTH V. CATON (1782) approved, in theory, a court's right to restrain a legislative act violative of the constitution. Wythe was a delegate to the CONSTITUTIONAL CONVENTION OF 1787 and chairman of its rules committee, but judicial duties obliged him to leave the convention early. At the Virginia convention he worked for RATIFICATION OF THE CONSTITUTION. Wythe opposed slavery and freed the slaves he inherited.

DAVID GORDON
(1986)

Bibliography

CLARKIN, WILLIAM 1970 *Serene Patriot: A Life of George Wythe.* Albany, N.Y.: Alan Publications.

## WYZANSKI, CHARLES E., JR.
(1906–1986)

Charles E. Wyzanski, Jr., contributed to constitutional law both as a barrister and as a federal judge. He was the son of a Boston real estate developer and graduated with distinction from Phillips Exeter Academy, Harvard College, and Harvard Law School. He had been attracted to law by a reading of *Freedom of Speech*, by ZECHARIAH CHAFEE, JR. On the recommendation of Professor FELIX FRANKFURTER,

he served successively as law clerk to Judges AUGUSTUS N. HAND and LEARNED HAND, whose broad cultivation, legal acumen, and largeness of spirit became the greatest influence on his professional life.

After a brief association with the Boston law firm of Ropes and Gray, and not yet thirty years old, he was called to Washington to be solicitor of the Labor Department under Secretary Frances Perkins. There he drafted the public works provisions of the Industrial Recovery Act and the Charter of the International Labor Organization. For the Immigration and Naturalization Service, then within the Labor Department, he drew up a plan for collective private guarantees of the welfare of immigrants, which unblocked entry into the United States; this remained his proudest achievement.

He was brought to the Office of the SOLICITOR GENERAL in 1935 to strengthen the presentation of crucial New Deal cases in the Supreme Court. He had a central role in the government's victories in the National Labor Relations Act and the Social Security cases in 1937, although when congratulated on his success he would reply that the cases were won "not by Mr. Wyzanski but by Mr. Zeitgeist." He had been on the point of resigning because of his opposition to the Court-packing plan, but was persuaded by Judge A. N. Hand to remain until he could present the government's arguments in these cases.

After returning to Ropes and Gray, he was appointed by President FRANKLIN D. ROOSEVELT in 1941 to the UNITED STATES DISTRICT COURT in Massachusetts, where he served for forty-five years. As a judge he was morally demanding, bold, and courageous, sometimes testing the limits of judicial power, whether on the side of severity, as in municipal corruption cases, or of leniency, as in cases of draft resistance. Notable among the latter was *United States v. Sisson* (1969), where he rejected the defendant's argument that the VIETNAM WAR was an undeclared war and therefore unconstitutional, holding that this claim presented a POLITICAL QUESTION. Wyzanski then set aside the guilty verdict on the ground, barely advanced by counsel, that the defendant's CONSCIENTIOUS OBJECTION to the conflict, though not strictly satisfying the statutory religious standard for an exemption, nevertheless warranted acquittal under American moral traditions. In his judicial opinions, as in his probing essays and speeches, Wyzanski's search was for enduring, historically attested values.

PAUL A. FREUND
(1992)

(SEE ALSO: *Immigration and Alienage.*)

Bibliography

IN MEMORIAM 1987 In Memoriam: Charles E. Wyzanski, Jr. *Harvard Law Review* 100:705–727.

WYZANSKI, C. E., JR. 1965 *Whereas: A Judge's Premises.* Boston: Little, Brown.

# Y

## *YAKUS v. UNITED STATES*
321 U.S. 414 (1944)

The EMERGENCY PRICE CONTROL ACT of 1942 delegated power to fix prices and rents to the Office of Price Administration (OPA). Under the act, challenges to the legality of OPA regulations could not be made in federal district court enforcement proceedings, even those aimed at imposing criminal penalties, but must be made in separate proceedings in the EMERGENCY COURT OF APPEALS. The Supreme Court sustained this limitation on the district courts in civil enforcement proceedings in *Lockerty v. Phillips* (1944). In *Yakus*, the Court upheld the limitation in the context of a criminal prosecution. The Court also rejected attacks on the act as an unconstitutional DELEGATION OF POWER for failing to provide sufficient guidelines. Chief Justice HARLAN FISKE STONE, for the Court, said that the act contained specific objectives: "to stabilize prices and to prevent speculative, unwarranted and abnormal increases in prices and rents." It also mentioned standards for price-setting: administrators should consult industry and consider current prices. Because the act accorded with earlier decisions and because its standards were "sufficiently definite and precise," Stone could find no unauthorized delegation of power. Justice OWEN ROBERTS, dissenting, believed that the case presented substantially the same issue as SCHECHTER POULTRY CORPORATION V. UNITED STATES (1935) which the majority, he said, had clearly overruled. Justice WILEY RUTLEDGE also dissented, joined by Justice FRANK MURPHY. Rutledge argued that Congress could not constitutionally command the federal courts to enforce administrative orders, disregarding their possible unconstitutionality. The Rutledge view seems likely to prevail in the absence of a wartime emergency.

DAVID GORDON
(1986)

## *YAMASHITA, IN RE*
327 U.S. 1 (1947)

A 6–2 Supreme Court here refused to consider the claim of an enemy officer, charged with war crimes before an American military tribunal in the Philippines, that he had been denied the DUE PROCESS OF LAW guaranteed by the Fifth Amendment. The Court held that it had JURISDICTION only to consider whether the military tribunal had authority to try the accused.

When General Tomoyuki Yamashita surrendered in 1945, an American military commission tried him on charges that he permitted atrocities against both civilians and prisoners of war, in violation of the law of war. Yamashita's military counsel applied to the Supreme Court for leave to file petitions for writs of HABEAS CORPUS and prohibition, challenging the jurisdiction and legal authority of the commission. Chief Justice HARLAN FISKE STONE, for the majority, denied leave to file but wrote an opinion on the jurisdictional issues. He found that Congress had legally authorized the commission's establishment under the WAR POWERS, and that the charge was adequate to state a violation of the law of war. Stone also denied that the American Articles of War (which incorporated the law of war) forbade the admission of hearsay and opinion EVIDENCE.

Justices FRANK MURPHY and WILEY RUTLEDGE, dissenting, argued eloquently for the extension of the due process clause.

DAVID GORDON
(1986)

## *YARBROUGH, EX PARTE*
110 U.S. 651 (1884)

This is the only nineteenth-century case in which the Supreme Court sustained the power of the United States to punish private persons for interfering with VOTING RIGHTS. Yarbrough and other members of the Ku Klux Klan assaulted a black citizen who voted in a congressional election. The United States convicted the Klansmen under a federal statute making it a crime to conspire to injure or intimidate any citizen in the free exercise of any right secured to him by the laws of the United States. The Court, in a unanimous opinion by Justice SAMUEL F. MILLER, held that the United States "must have the power to protect the elections on which its existence depends, from violence and corruption." Miller's reasoning is confused. Congress had passed the statute in contemplation of its power to enforce the FOURTEENTH AMENDMENT. In UNITED STATES V. CRUIKSHANK (1876) the Court had ruled that the same statute could not reach private, rather than state, actions. Miller thought the situation different when Congress sought to protect rights constitutionally conferred, and he stressed Article I, section 4, which empowered Congress to alter state regulations for the election of members of Congress. But that provision did not apply here. In UNITED STATES V. REESE (1876) the Court had ruled that the FIFTEENTH AMENDMENT did not confer the right to vote on anyone, but only a right to be free from RACIAL DISCRIMINATION in voting. Here, however, Miller ruled that "under some circumstances," the Fifteenth Amendment, which was not the basis of the statute, may operate as the source of a right to vote. In the end Miller declared, "But it is a waste of time to seek for specific sources of the power to pass these laws." In JAMES V. BOWMAN (1903), involving the right to vote in a federal election, the Court held unconstitutional an act of Congress without reference to *Yarbrough.*

LEONARD W. LEVY
(1986)

## YATES, ROBERT
(1738–1801)

Judge Robert Yates, who in 1777 had served on the committee that drafted the state constitution, was a delegate from New York to the CONSTITUTIONAL CONVENTION OF 1787. A trusted, if undistinguished, follower of Governor George Clinton, Yates represented the antinationalist viewpoint then dominant in New York politics. He and JOHN LANSING consistently outvoted ALEXANDER HAMILTON and kept New York in the STATES' RIGHTS camp. But on July 10 Yates and Lansing walked out, charging that the Convention was exceeding its authority.

In the contest over RATIFICATION OF THE CONSTITUTION Yates was an active ANTI-FEDERALIST. His "Brutus" letters were an able and articulate presentation of the dangers opponents feared would result from adoption of the Constitution, including annihilation of the states and usurpation by the federal courts. Yates was a delegate to the New York ratifying convention where he voted against ratification.

Yates kept notes of the debates of the federal convention from its first meeting through July 5. He did not publish the notes himself, but they were published in 1821 and are, after JAMES MADISON's, the best record of the early proceedings.

DENNIS J. MAHONEY
(1986)

Bibliography

ROSSITER, CLINTON 1966 *1787: The Grand Convention.* New York: Macmillan.

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

Following DENNIS V. UNITED STATES (1951), Smith Act conspiracy prosecutions were brought against all second-rank United States Communist party officials, and convictions were secured in every case brought to trial between 1951 and 1956. In June 1957, however, the Supreme Court, in *Yates,* reversed the convictions of fourteen West Coast party leaders charged with Smith Act violations. The Court, speaking through Justice JOHN MARSHALL HARLAN, declared that the *Dennis* decision had been misunderstood. The Smith Act did not outlaw advocacy of the abstract doctrine of violent overthrow, because such advocacy was too remote from concrete action to be regarded as the kind of indoctrination preparatory to action condemned in *Dennis.* The essential distinction, Harlan argued, was that those to whom the advocacy was addressed had to be urged to *do* something, now or in the future, rather than merely *believe* in something. Without formally repudiating the "sliding scale" reformulation of CLEAR AND PRESENT DANGER set forth in the *Dennis* opinion, the Court erected a stern new standard for evaluating convictions under the Smith Act, making conviction under the

measure difficult. As to INDICTMENTS for involvement in organizing the Communist party in the United States, the Court also took a narrow view. Organizing, Harlan maintained, was only the original act of creating such a group, not any continuing process of proselytizing and recruiting. Since the indictments had been made some years following the postwar organizing of their party, the federal three-year statute of limitations had run out. The Court cleared five of the defendants, remanding the case of nine others for retrial. The ruling brought an abrupt end to the main body of Smith Act prosecutions then under way.

PAUL L. MURPHY
(1986)

## *YBARRA v. ILLINOIS*
444 U.S. 85 (1979)

Although three dissenting Justices complained that the Supreme Court majority had narrowed the STOP-AND-FRISK RULE of TERRY V. OHIO (1968), Justice POTTER STEWART for the Court did not doubt that an officer may pat down a suspect for a concealed weapon. Stewart regarded *Terry* as an exception to the requirement of PROBABLE CAUSE. Here no such cause existed to search a person suspected neither of criminal activity nor of having a weapon. A police officer, having a warrant to search a tavern and its bartender, patted down a bystander, felt no weapon, but removed from his pocket a cigarette pack containing heroin. The Court reversed the man's conviction, because the warrant did not include him, and probable cause to search him was absent.

LEONARD W. LEVY
(1986)

# YELLOW DOG CONTRACT

The yellow dog contract was a device used by employers prior to the NEW DEAL era to prevent collective bargaining by employees. By a yellow dog contract a worker agreed not to join or remain a member of a labor organization and to quit his job if he joined one. At a time in our history when the courts shaped the law so that its major beneficiary was industrial capitalism, yellow dog contracts were enforceable, even though workers had little choice in accepting their terms. Workers either signed such contracts or forfeited the opportunity of working. In effect, a yellow dog contract blackmailed an employee into promising not to join a union; his supposed free choice to accept a job or look elsewhere for work turned out to be a choice between being blackmailed or blacklisted. In one perspective, yellow dog contracts robbed workers of their FREEDOM OF CONTRACT. The courts thought otherwise, however.

In the 1890s fifteen states enacted laws that promoted COLLECTIVE BARGAINING by outlawing yellow dog contracts, and in 1898 section 10 of the ERDMAN ACT, passed by Congress, also outlawed their use by interstate railroads. In *Adair v. United States* (1908) the Supreme Court held the Erdman Act unconstitutional. SUBSTANTIVE DUE PROCESS of law provided one ground of decision. The Court reasoned that section 10 abridged freedom of contract, a liberty the Court found in the Fifth Amendment's DUE PROCESS CLAUSE, because Congress had violated the right of workers to make contracts for the sale of their labor. In COPPAGE V. KANSAS (1915) the Court applied this reasoning to state statutes that had banned yellow dog contracts.

Having disabled both the national commerce power and the STATE POLICE POWER from forbidding yellow dog contracts, the Court then sustained the legality of such contracts. In HITCHMAN COAL AND COKE CO. V. MITCHELL (1917) the Court reversed a federal circuit court's determination that a yellow dog contract was not an enforceable contract. Justice MAHLON PITNEY for a six-member majority declared, "The employer is as free to make nonmembership a condition of employment as the worker is free to join the union." The Court added that the right to make such a contract was "part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation," which the Court had already voided. The extent to which these decisions thwarted unionization cannot be gauged.

Congress revived the Erdman Act's provision when it passed the Railway Labor Act of 1926, and in the NORRIS-LAGUARDIA ACT of 1932 declared yellow dog contracts to be contrary to American public policy and unenforceable "in any court of the United States." The major industrial states passed "little Norris-LaGuardia acts." By the time these statutes came before the Supreme Court, it found ways to sustain them.

LEONARD W. LEVY
(1986)

## *YICK WO v. HOPKINS*
118 U.S. 356 (1886)

This is one of the basic decisions interpreting the EQUAL PROTECTION OF THE LAWS clause of the FOURTEENTH AMENDMENT. A San Francisco ordinance made criminal the conduct of a laundry business in any building not made of stone or brick, with such exceptions for wooden structures as administrative officials might make. Officials used their discretion in a grossly discriminatory manner, licensing about eighty wooden laundries run by Caucasians and de-

nying licenses to about two hundred applicants of Chinese extraction. The Supreme Court unanimously held, in an opinion by Justice STANLEY MATTHEWS, that the ordinance, though racially neutral on its face, was applied so unequally and oppressively by public authorities as to deny equal protection. Thus the Court looked beyond the law's terms to its racially discriminatory administration and applied the benefits of the Fourteenth Amendment to Oriental ALIENS, that is, "to all persons . . . without regard to any difference of race, of color, or of nationality."

LEONARD W. LEVY
(1986)

## *YOUNG, EX PARTE*
209 U.S. 123 (1908)

The question in this case—one of the most important of the present century—was whether a citizen might resort to a federal court to vindicate a constitutional right against state infringement and, pending a final JUDGMENT, obtain freedom from civil or criminal suits by a temporary INJUNCTION directed to an officer of the state. The Supreme Court held that, the ELEVENTH AMENDMENT notwithstanding, a federal court might issue such an injunction.

A Minnesota statute fixed railroad rates and (to deter institution of a TEST CASE) made the officers and employees of the railroads personally liable to heavy fines and imprisonment if those rates were exceeded. A STOCKHOLDER'S SUIT in EQUITY was filed in federal Circuit Court to prevent enforcement of or compliance with the statute, on the ground that it violated the FOURTEENTH AMENDMENT by depriving the railroads of property without DUE PROCESS OF LAW. The federal court issued a temporary injunction restraining the state attorney general, Edward T. Young, from taking steps to enforce the statute. When Young defied the injunction the court found him in contempt and committed him to the custody of the United States marshal.

Young petitioned the Supreme Court for a writ of HABEAS CORPUS, contending that the suit for injunction was really against the state and that, under the Eleventh Amendment, the state could not be sued in federal court without its consent. The Court denied Young's petition, Justice JOHN MARSHALL HARLAN alone dissenting.

Justice RUFUS PECKHAM, for the Court, argued that if the Minnesota law was unconstitutional, then Young, attempting to enforce it, was stripped of his official character and became merely a private individual using the state's name to further his own illegitimate end. Incongruously, the end Young was furthering was unconstitutional only because it involved STATE ACTION. The "private wrong" was a fiction adopted by the Court to circumvent the Eleventh Amendment.

Congress reacted to the *Young* decision by passing a law (substantially repealed in 1976) requiring that federal court injunctions against enforcement of state laws alleged to be unconstitutional issue only from special THREE-JUDGE COURTS and providing, in such cases, for direct APPEAL to the Supreme Court.

The doctrine of *Young* remains valid law today. Although it originally arose in connection with due process protection of economic liberty, the doctrine provides a remedy for state action infringing CIVIL RIGHTS or CIVIL LIBERTIES. But the doctrine of *Young* applies only to equitable relief, and the Eleventh Amendment remains bar to actions for monetary damages that will be paid out of the state treasury.

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Edelman v. Jordan; Osborn v. Bank of the United States.*)

## *YOUNG v. AMERICAN MINI THEATRES, INC.*
427 U.S. 50 (1976)

In *Young v. American Mini Theatres, Inc.* the Supreme Court upheld a Detroit ZONING ordinance requiring adult theaters to be located certain distances from residential areas and specified businesses. Four Justices led by Justice JOHN PAUL STEVENS argued that adult movies ranked low in the hierarchy of FIRST AMENDMENT values. Four dissenting Justices led by Justice POTTER STEWART argued that the First Amendment recognized no hierarchy for types of protected speech. Justice LEWIS F. POWELL agreed with the dissent, but voted to uphold the ordinance, arguing that the theater owners had asserted no First Amendment interest of their own and that the First Amendment interests of others, including moviemakers and potential audiences, were not endangered.

STEVEN SHIFFRIN
(1986)

## *YOUNGER v. HARRIS*
401 U.S. 37 (1971)

Harris, indicted under California's CRIMINAL SYNDICALISM LAW, sought a federal court INJUNCTION to compel the district attorney to cease prosecution in the state court. The district court held the law unconstitutional and issued the

injunction. The Supreme Court reversed, 8–1, severely limiting DOMBROWSKI V. PFISTER (1965).

Justice HUGO L. BLACK, for the Court, rested decision on two interlocking grounds. First, a state prosecution was pending; because any claim that the underlying state law was unconstitutional could be made in the state proceeding, there was no "irreparable injury" to justify an injunction. Second, the national government should avoid intruding into "the legitimate activities of the state." Although a federal court might enjoin a state prosecution commenced in bad faith to harass the exercise of FIRST AMENDMENT rights, the claim that the law was unconstitutional on its face did not satisfy this bad-faith harassment requirement. (See ABSTENTION DOCTRINES.)

After *Younger*, the California courts held the syndicalism law invalid.

KENNETH L. KARST
(1986)

## *YOUNGSTOWN SHEET & TUBE CO. v. SAWYER*
343 U.S. 579 (1952)

In a landmark restriction on presidential power, the Supreme Court in 1952 held invalid President HARRY S. TRUMAN's seizure of the steel mills. Justice HUGO L. BLACK, joined by five other Justices, delivered the opinion of the Court. Chief Justice FRED M. VINSON, dissenting with Justices STANLEY F. REED and SHERMAN MINTON, believed that military and economic emergencies justified Truman's action.

Each of the five concurring Justices wrote separate opinions, advancing different views of the President's emergency power. Only Justices Black and WILLIAM O. DOUGLAS insisted on specific constitutional or statutory authority to support presidential seizure of private property. Assigning the lawmaking function exclusively to Congress, they allowed the President a role only in recommending or vetoing laws. On existing precedent, this concept of the SEPARATION OF POWERS doctrine was far too rigid. Previous Presidents had engaged directly in the lawmaking function without express constitutional or statutory authority, often with the acquiescence and even blessing of Congress and the courts.

The other four concurring Justices (FELIX FRANKFURTER, ROBERT H. JACKSON, HAROLD BURTON, and TOM C. CLARK) did not draw such a strict line between the executive and legislative branches, nor did they try to delimit the President's authority to act in future emergencies. Frankfurter thought it inadvisable to attempt a comprehensive definition of presidential power, based on abstract principles, without admitting powers that had evolved by custom: a "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on "executive Power." Burton withheld opinion on the President's constitutional power when facing an "imminent invasion or threatened attack," while Clark agreed that the Constitution gave the President extensive authority in time of grave and imperative national emergency.

Jackson identified three categories of presidential power, ranging from actions based on express or implied congressional authorization (putting executive authority at its maximum) to executive measures that were incompatible with congressional policy (reducing presidential power to its lowest ebb). In between lay a "zone of twilight" in which President and Congress shared authority. Jackson said that congressional inertia, indifference, or acquiescence might enable, if not invite, independent presidential action. He further argued that the ENUMERATED POWERS of the President required "scope and elasticity" and said he would "indulge the widest latitude of interpretation" when presidential powers were turned against the outside world for the security of the United States.

Considering the four concurrences and three dissents, the Steel Seizure Case was far from a repudiation of the inherent power doctrine. Nevertheless, a majority of the Court did reach agreement on important principles: presidential actions, including those of an "emergency" nature, are subject to JUDICIAL REVIEW; the courts may enjoin executive officers from carrying out presidential orders that conflict with statutory policy or the Constitution; and independent presidential powers in domestic affairs are especially vulnerable to judicial scrutiny when Congress has adopted a contrary statutory policy. The Steel Seizure Case has supplied the Supreme Court with an important precedent for curbing subsequent exercises of presidential power in areas such as the Pentagon Papers case (NEW YORK TIMES V. UNITED STATES, 1971), electronic surveillance, IMPOUNDMENT, and EXECUTIVE PRIVILEGE.

LOUIS FISHER
(1986)

(SEE ALSO: *Executive Order 10340; Steel Seizure Controversy.*)

Bibliography

MARCUS, MAEVA 1977 *Truman and the Steel Seizure Case: The Limits of Presidential Power.* New York: Columbia University Press.

WESTIN, ALAN F. 1958 *The Anatomy of a Constitutional Law Case.* New York: Macmillan.

# Z

## *ZABLOCKI v. REDHAIL*
434 U.S. 374 (1978)

In LOVING V. VIRGINIA (1967) the Supreme Court had struck down a MISCEGENATION statute flatly forbidding interracial marriage, resting decision on both EQUAL PROTECTION and SUBSTANTIVE DUE PROCESS grounds. In *Zablocki* the Court protected the "right to marry" in a setting where race was irrelevant. Wisconsin required a court's permission for the marriage of a resident parent who had been ordered to support a child not in his or her custody. Permission would be granted only when the candidate proved compliance with the support obligation and showed that the children were not likely to become public charges. Because he could not comply with the law, Redhail was denied a marriage license. The Supreme Court held, 8–1, that this denial was unconstitutional.

The case produced six opinions. Justice THURGOOD MARSHALL, for the majority, rested on equal protection grounds. Marriage was a FUNDAMENTAL INTEREST, protected by the constitutional RIGHT OF PRIVACY. The Wisconsin law interfered "directly and substantially" with the right to marry and was not necessary to effectuate important state interests. Justice POTTER STEWART concurred on due process grounds. Justice LEWIS F. POWELL, also concurring, objected to the Court's STRICT SCRUTINY test; such an inquiry would cast doubt on such limits on marriage as "bans on incest, bigamy, and homosexuality, as well as various preconditions to marriage, such as blood tests." Using a more relaxed STANDARD OF REVIEW, he nonetheless found the statute wanting on both due process and equal protection grounds. Justice JOHN PAUL STEVENS concurred, calling the law a "clumsy and deliberate legislative discrimination between the rich and poor" whose irrationality violated equal protection. Justice WILLIAM H. REHNQUIST, in lone dissent, rejected the notion that marriage was a "fundamental" right and argued for the strict judicial nonscrutiny that had become his trademark.

For all the diversity of the Justices' views, little turns on the choice between equal protection and due process grounds, or on conclusory assertions about the proper standard of review. *Zablocki* makes clear that significant state interference with the freedom to marry demands correspondingly weighty justification.

KENNETH L. KARST
(1986)

## *ZEMEL v. RUSK*
381 U.S. 1 (1965)

In *Zemel* the Supreme Court sustained (6–3) the constitutionality of the secretary of state's refusal to validate passports for travel to Cuba. Chief Justice EARL WARREN, for the majority, rejected two arguments for the petitioner: that he had a RIGHT TO TRAVEL under the DUE PROCESS clause of the Fifth Amendment; and that he had a FIRST AMENDMENT right to travel to Cuba to gather information.

DENNIS J. MAHONEY
(1986)

(SEE ALSO: *Richmond Newspapers, Inc. v. Virginia.*)

## ZENGER'S CASE
(1735)

Had John Peter Zenger, the printer of the *New-York Weekly Journal*, attacked the provincial assembly of New York instead of its hated royal governor, he would have been summarily convicted at the bar of the house, jailed, and forgotten by posterity. But he was tried by a jury, brilliantly defended by a great lawyer, and saved for posterity by James Alexander's report of *A brief Narrative of the Case and Tryal of John Peter Zenger* (1736). Alexander, the editor of the paper which Zenger printed, probably wrote the articles that led to the prosecution and, as a lawyer, prepared the case for Andrew Hamilton.

Scalded by the paper's weekly articles against his administration, Governor William Cosby ordered an information against its printer for SEDITIOUS LIBEL; a GRAND JURY had refused to indict, the assembly had refused to cooperate, and the local government, defending "liberty of the press," protested. Zenger, in other words, symbolized the popular party against a detested administration. Not surprisingly the jury acquitted him after brief deliberation, against the instructions of Chief Justice James DeLancey, who presided at the trial before the Supreme Court of Judicature.

The law was against Zenger. Both the prosecutor and the judge accurately informed the jury that seditious libel consisted of scandalizing the government by adversely reflecting on those entrusted with its administration, by publishing material tending to breed popular contempt for the administration, or by alienating the affections of the people for government in any way. Moreover, the truth of a libel magnified its criminality. But Hamilton's reply had greater appeal. If the people could not remonstrate against the oppressions and villainies of their governors, confining themselves always to truthful accusations, they would in no time lose their liberty and property. Hamilton did not repudiate the law of seditious libel; he argued, rather, that Zenger's statements being true were not libels. When the court rejected the proposition that truth should be a defense to a charge of seditious libel, Hamilton appealed to the jury over the court. He argued that the jury, like the press, was a bastion of popular liberty. It should ignore the court's instruction to return a special verdict on the question whether Zenger had, in fact, published the statements charged; a special verdict would leave to the court a ruling on the question of law whether those statements were criminal. Hamilton urged the jury, instead, to return a general verdict of "not guilty," thus deciding the law as well as the fact. The jury returned a general verdict of "not guilty."

The jury's general verdict was a safe way of striking at the unpopular governor and endorsing the right of the people, through the press, to criticize their government. The jury's verdict did not, however, alter the settled law. Not until the Sedition Act of 1798 (see ALIEN AND SEDITION ACTS) did truth as a defense and the power of the jury to render a general verdict in cases of seditious libel become part of American law; and, as the enforcement of that infamous statute showed, embattled libertarians came to discover that they should have repudiated the doctrine of seditious libel rather than grasp at Zengerian principles.

LEONARD W. LEVY
(1986)

(SEE ALSO: *New York Times v. Sullivan; People v. Croswell.*)

Bibliography

KATZ, STANLEY NIDER 1972 *A Brief Narrative of the Case and Trial of John Peter Zenger . . . by James Alexander.* Cambridge, Mass.: Harvard University Press.

LEVY, LEONARD W. 1960 Did the Zenger Case Really Matter? Freedom of the Press in Colonial New York. *William and Mary Quarterly*, 3d ser., 17:35–50.

## ZOBEL v. WILLIAMS

See: Privileges and Immunities; Right to Travel

## ZONING

When a local government decides how to allocate land uses it acts under the POLICE POWER exercised by the states and their governmental subdivisions to regulate for the public health, safety, and welfare. The first zoning ordinances appeared early in the twentieth century as a result of urbanization and the encroachment of factories and noxious uses in residential neighborhoods. In EUCLID V. AMBLER REALTY (1926) the Supreme Court upheld a comprehensive local zoning ordinance, rejecting a SUBSTANTIVE DUE PROCESS attack. Although today's zoning ordinances are more sophisticated than the simple division of land uses upheld in *Euclid*, the basic constitutional issues raised by zoning decisions remain an unusually stable area of constitutional law.

Because a zoning ordinance is adopted by a legislative body, and because zoning amendments are legislative decisions in most states, the constitutional scrutiny applied to zoning is no different from that applied to LEGISLATION at any governmental level. The courts use the due process analysis of *Euclid* to uphold zoning if they find a reasonable relationship between the zoning and the city's police

power objectives. Like other social and economic legislation, zoning comes to court clothed with a presumption of validity. A court will not question the wisdom or the motives of legislators. If a court finds any RATIONAL BASIS to support zoning as an implementation of the public health, safety, and welfare, the ordinance will be held valid. A court considers factors such as increased traffic and congestion, compatibility with adjacent uses, and impact on land values of neighboring properties. Courts often apply a fairly debatable rule: if reasonable minds can differ on the reasonableness of an ordinance, the municipal decision must be upheld. Some state courts are more willing than the federal courts to use theories of STATE CONSTITUTIONAL LAW to strike down zoning regulations.

Although a court may be reluctant to question the police power objectives of zoning, it may be more inclined to examine the effects of a zoning restriction on the value of property. Even when a zoning ordinance achieves public objectives, it may be held to be a TAKING OF PROPERTY if it denies a property owner all economic use of his land. The leading case is *Pennsylvania Coal Co. v. Mahon* (1972).

Other guarantees may also serve as bases for constitutional challenges to zoning ordinances. The FIRST AMENDMENT repeatedly forms the basis of attacks on local sign ordinances and ordinances regulating adult businesses. In the 1960s and 1970s, a series of "exclusionary zoning" cases challenged a municipal refusal to rezone to allow mobile homes, apartments, or anything other than single family homes on large lots. Arguing that such practices violated the EQUAL PROTECTION clause, landowners and hopeful future residents had varying success. The Supreme Court was originally not interested in fashioning a federal constitutional remedy. In ARLINGTON HEIGHTS V. METROPOLITAN HOUSING DEVELOPMENT CORP. (1977) it severely restricted the authority of the federal courts to find RACIAL DISCRIMINATION in exclusionary zoning. Some state courts have been more aggressive. In *Southern Burlington County NAACP v. Mount Laurel* (1975), for example, the New Jersey Supreme Court held, on both substantive due process and equal protection grounds, that a municipality cannot close its doors to the housing needs of the region, including low-cost housing. Then, in *Cleburne v. Cleburne Living Center, Inc.*, (1985) the Supreme Court gave some indication that it would examine more rigorously the exclusionary classifications in zoning ordinances.

Zoning ordinances also require landowners to obtain development permission under a host of administrative procedures that vary from one JURISDICTION to another. Whether it be subdivision or site plan approval, variances, special or conditional uses, or environmental permits, the process is rife with constitutional pitfalls for local administrative bodies. The standards for approving or denying permits must be made specific in the ordinance; otherwise, a state court may hold that the ordinance unconstitutionally delegates legislative authority to an administrative body. Applicants must be given PROCEDURAL DUE PROCESS, including NOTICE and an opportunity to be heard, and, in some states, even quasi-judicial procedures. The agency's decision must be based on evidence sufficient to support it.

Perhaps the most serious danger to the constitutional status of zoning is the threat of a radical departure in the judicial relief afforded a victorious landowner. Under the SEPARATION OF POWERS doctrine, the traditional judicial relief for invalid zoning has been to grant an INJUNCTION prohibiting its enforcement and allow the municipality to rezone. A few courts in the 1970s held that confiscatory zoning amounted to taking of property for public purposes and required cities to compensate landowners. The Supreme Court has not yet decided the availability of this remedy under the federal Constitution.

Damages for a taking may be available under SECTION 1983, TITLE 42, UNITED STATES CODE. In MONELL V. DEPARTMENT OF SOCIAL SERVICES (1978) the Supreme Court held that municipalities can be sued under Section 1983, and the specter of money damages for any denial of constitutional rights in the zoning process became a reality. The damage to a landowner whose economic return is restricted by zoning and who must proceed through a time-consuming local zoning process perhaps including litigation can be substantial. The traditional constitutional deference afforded local government under its police power remains, but the possible consequences of stepping outside constitutional bounds have become severe.

Zoning ordinances now include sophisticated techniques, such as computer-based point systems for approving new development, incentive and bonus programs, and the transfer of development rights. These new techniques have not yet been extensively tested in the courts, but they raise constitutional problems similar to those raised by conventional zoning. Judicial attention in the years to come will focus on the constitutionality of these techniques and on the suitability of a damage remedy in zoning cases.

DANIEL R. MANDELKER
BARBARA ROSS
(1986)

Bibliography

MANDELKER, DANIEL R. 1982 *Land Use Law.* Charlottesville, Va.: Michie Co.

WILLIAMS, NORMAN, JR. 1974 *American Land Planning Law.* Chicago: Callaghan Co.

# ZONING
## (Update)

Zoning—the public allocation into use categories of privately held land and the subsequent regulation of land development—is by and large a legislative act undertaken by thousands of local governments. As a legislative exercise of the POLICE POWER, zoning determinations have long been presumed to be constitutionally and statutorily valid by the courts. This acceptance has not prevented the leveling of strong criticism at the zoning process. The criticism occurs on two levels: first, there is the belief that expanded social welfare conceptions of the police power are uneasily reconciled with private PROPERTY and the constitutional protection thereof, and second, even if a particular zoning measure is constitutional, its effects may be economically inefficient or socially exclusionary.

The constitutional concern over modern zoning practice is often raised in terms of the Fifth Amendment's prohibition against the TAKING OF PROPERTY for public use without the payment of JUST COMPENSATION. This constraint against the federal government has been judicially incorporated into the Fourteenth Amendment's due process limitations upon state power. Influenced by WILLIAM BLACKSTONE and JOHN LOCKE, the founding generation understood the taking clause as protecting the liberty engendered by private property. The most significant—perhaps only—qualifications of this liberty was that property not be used to injure one's neighbor. The principal drafter of the Fifth Amendment, JAMES MADISON, affirmed this conception by excluding from the idea of private property uses that harmed others by not "leav[ing] to everyone else the like advantage."

Had modern applications of zoning been similarly confined to the prevention of harms or nuisances, such public control would have triggered little controversy. It is scarcely surprising, though now often overlooked, that the initial case favoring zoning's general constitutionality, EUCLID V. AMBLER REALTY (1926), stressed a nuisance-prevention rationale for public land use control. The highly influential AMICUS CURIAE brief filed in favor of the ordinance for the National Conference of City Planning stated that "the Police Power endeavors to prevent evil by checking the tendency toward it and seeks to place a margin of safety between that which is permitted and that which is sure to lend to injury or loss." Fifty years later, however, conceptions of the police power had grown dramatically, and as a consequence, governmental control of land use had become far more intrusive. The opinion of the Supreme Court in PENN CENTRAL TRANSPORTATION CO. V. NEW YORK CITY (1978) boldly asserted that valid exercises of the police power do not depend upon the "noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit."

Recent Supreme Court decisions may curb somewhat this accelerated growth of the police power. Rejecting as constitutionally infirm prior state doctrines that had limited relief for overzealous zoning exercises to invalidation, the Court has now clearly held that the compensation clause of the Fifth Amendment is self-executing; moreover, the Court held in *First English Evangelical Lutheran Church v. County of Los Angeles* (1987) that just compensation is required for either temporary or permanent regulatory takings—that is, substantial deprivations of economic value by regulation. In actual fact, the Court seldom finds a taking based on a single factor of economic loss; generally, the Court also considers the investment expectations of the landowner and the relations between the zoning objective and both the regulatory means chosen to advance it and the landowner's contribution to the land use "problem" to be solved. One closely divided opinion of the Court, *Nollan v. California Coastal Commission* (1987), held that zoning regulations are to be judged by a higher level of judicial scrutiny than that applied in the review of other economic legislation.

Other cases such as LORETTO V. TELEPROMPTER, INC. (1982) make clear that any regulation accompanied by physical invasion or use by the public merits compensation. The total destruction of a "core" PROPERTY RIGHT, such as the ability to transfer property interests at death, is also constitutionally improper, as the Court stated in *Hodel v. Irving* (1987). Overall, the Court's recent decisions in the zoning area have established a constitutional outer limit premised upon the distinction between regulatory burdens that can be fairly placed on an individual property owner and those that more properly should be borne by the community at large through a general tax system. This principle may mean that exotic uses of the zoning power—say, withholding permits until an office developer makes a substantial contribution to the community housing or cultural fund—will be increasingly suspect.

While the Supreme Court has recently addressed the more egregious abuses of zoning, there remains substantial dissatisfaction with zoning in practice. Zoning measures continue to be presumed valid in state and federal courts, notwithstanding the Supreme Court's suggestion of heightened scrutiny, with the frequent result that physically and locationally indistinguishable property may be arbitrarily classed in very different use categories. Because the resulting value differences are profound, zoning measures are under the constant pressure of amendment or variance without meaningful standards. Regrettably, in

some communities the wide-ranging discretion exercised by zoning authorities has invited serious corruption.

Zoning is also heavily reliant upon "specification standards" to accomplish land use objectives indirectly. For example, a typical zoning ordinance employs height, minimum lot, and setback limits to encourage open space and reduce or disperse density. Meeting these limits produces a monotony of design and often is not the most efficient method for accomplishing the open space objective. The advance specification of use requirements also introduces a highly static impediment to change, not to mention the consequent administrative cost and delay. These costs are most often borne by the housing consumer, and recent studies suggest that the regulatory cost burden can be as high as twenty-five percent of the finished price of a home.

The costly administrative burdens of zoning are most strongly felt by the least-affluent. To the extent that the lower economic stratum of society in a given locality is predominantly composed of members of racial or ethnic minorities, this cost obviously worsens racial SEGREGATION in housing. Absent a racially discriminatory intent, this effect does not constitute a denial of federal EQUAL PROTECTION, as the Court held in ARLINGTON HEIGHTS V. METROPOLITAN HOUSING DEVELOPMENT CORPORATION (1977). However, zoning practices that exclude low-income, multifamily structures and have a discriminatory impact may constitute a violation of the federal Fair Housing Act, as was the case in *Huntington Branch, NAACP v. Town of Huntington* (2nd Cir. 1988).

A variety of alternatives have been proposed to overcome these undesirable zoning effects. To supply greater procedural and distributional fairness, some JURISDICTIONS have more closely tied zoning decisions to comprehensive land use planning and have recharacterized zoning as an administrative or quasi-judicial decision. Such reforms not only supply more specific standards but also supply greater judicial supervision of abuse. To enhance the efficiency of zoning, other communities are experimenting with performance zoning systems, which articulate overall community objectives but leave the actual accomplishment of land use goals to plans submitted by individual landowners. Finally, as a general matter, modern subdivisions with detailed private covenants restricting use are less affected by zoning than are land areas within older central cities. Arguably, private controls are more sensitive to market demand and less apt to be applied uniformly over an entire community, and are therefore less exclusionary.

DOUGLAS W. KMIEC
(1992)

Bibliography

BLAESSER, BRIEN et al., eds. 1989 *Land Use and the Constitution.* Chicago: Planners Press, American Planning Association.

ELLICKSON, ROBERT C. and TARLOCK, A. DAN, eds. 1981 *Land Use-Controls.* Boston: Little, Brown.

HAAR, CHARLES M. and KAYDEN, JERROLD S., eds. 1989 *Zoning and the American Dream.* Chicago: Planners Press, American Planning Association.

KMIEC, DOUGLAS W. 1986 *Zoning and Planning Deskbook* (with 1991 Supplement). New York: Clark Boardman.

SYMPOSIUM 1988 The Jurisprudence of Takings. *Columbia Law Review* 88:1581–1794.

## *ZORACH v. CLAUSEN*
343 U.S. 306 (1952)

This was the Supreme Court's second encounter with a RELEASED TIME program. In MCCOLLUM V. BOARD OF EDUCATION (1948), the Court had invalidated an arrangement by which teachers entered public schools to provide religious instruction. *Zorach* involved New York City's released time program in which instruction was offered off school premises. According to the requests of their parents, public school children were allowed to leave school for specific periods of time to go to church facilities. Nonparticipating students remained in their regular classrooms.

Justice WILLIAM O. DOUGLAS delivered the OPINION OF THE COURT sustaining the constitutionality of New York's program. Douglas emphasized that, as opposed to *McCollum*, no public facilities were used. The schools, Douglas said, were merely rearranging their schedules to accommodate the needs of religious people.

Justices HUGO L. BLACK, ROBERT H. JACKSON, and FELIX FRANKFURTER dissented. Black and Jackson argued that children were compelled by law to attend public schools and that to release them for religious instruction used governmental compulsion to promote religion. In a slap at Douglas's presumed presidential ambitions, Jackson said, "Today's judgment will be more interesting to students of psychology and of the judicial process than to students of constitutional law."

RICHARD E. MORGAN
(1986)

## *ZURCHER v. STANFORD DAILY*
436 U.S. 547 (1978)

In *Zurcher v. Stanford Daily* the police chief of Palo Alto, California, appealed from a federal district court decision declaring that a search of a college newspaper's office conducted pursuant to a duly authorized search warrant had infringed upon FOURTH AMENDMENT and FIRST AMENDMENT

rights. There was no contention that the newspaper or any of its staff was reasonably suspected of the commission of a crime, nor was it contended that weapons, contraband, or fruits of a crime were likely to be found on the premises. Rather, the police secured a warrant on a showing of PROBABLE CAUSE for the conclusion that photographic evidence of a crime was to be found somewhere on the premises. The Supreme Court thus addressed the general question of the standards that should govern the issuance of warrants to search the premises of persons not themselves suspected of criminal activity and the specific question whether any different standards should apply to press searches.

The Court ruled that the innocence of the party to be searched was of no constitutional importance. So long as there was probable cause to believe that evidence of a crime was to be found on premises particularly described, no further showing was needed. Specifically, the Court declined to "reconstrue the Fourth Amendment" to require a showing that it would be impracticable to secure a subpoena *duces tecum* before a warrant could be issued.

That the party to be searched was a newspaper the Court regarded as of some moment but not enough to prefer subpoenas over warrants. Instead, the Court observed that warrant requirements should be applied with "particular exactitude when First Amendment interests would be endangered by the search."

The Court expressed confidence that magistrates would safeguard the interests of the press. Magistrates could guard against the type of intrusions that might interfere with the timely publication of a newspaper or otherwise deter normal editorial and publication decisions. Nor, said the Court, "will there be any occasion or opportunity for officers to rummage at large in newspaper files." The Court asserted that "the warrant in this case authorized nothing of this sort." Yet, as the *Zurcher* opinion discloses, the police searched "the Daily's photographic laboratories, filing cabinets, desks, and wastepaper baskets." The Court's application of the particular exactitude standard seems neither particular nor exact.

*Zurcher* is the first case squarely to authorize the search and seizure of mere evidence from an innocent party; it has raised difficult questions of Fourth Amendment reasonableness as applied to searches of other innocent third parties such as lawyers and judges. By suggesting that press values be considered in an assessment of reasonableness, it opens the door for further distinctions between searches of media and nonmedia persons. By suggesting that the reasonableness of a search is a requirement that may go beyond probable cause and specificity, it reopens discussion about the relationship between the two clauses of the Fourth Amendment.

STEVEN SHIFFRIN
(1986)

## Appendix 1

# *The Call for the Federal Constitutional Convention*

RESOLUTION OF CONGRESS

*1787, February 21*

WHEREAS there is provision in the Articles of Confederation & perpetual Union for making alterations therein by the Assent of a Congress of the United States and of the legislatures of the several States; And whereas experience hath evinced that there are defects in the present Confederation, as a means to remedy which several of the States and particularly the State of New York by express instruction to their delegates in Congress have suggested a convention for the purposes expressed in the following resolution and such Convention appearing to be the most probable means of establishing in these states a firm national government

Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.

## Appendix 2

# *Articles of Confederation*

*Articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.*

ARTICLE I. The style of this Confederacy shall be "The United States of America."

ART. II. Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled.

ART. III. The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ART. IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction shall be laid by any State, on the property of the United States, or either of them.

If any Person guilty of or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.

Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

ART. V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States for which he or another for his benefit receives any salary, fees, or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on, Congress, except for treason, felony, or breach of the peace.

ART. VI. No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with any king, prince, or state; nor shall any person holding any office of profit or trust under the United States, or any of them accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties entered into by the United States in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only as shall be deemed necessary by the United States in Congress assembled, for the defence of such State or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only as in the judgment of the United States in Congress assembled shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field-pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state, and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

ART. VII. When land forces are raised by any State for the common defence, all officers of or under the rank of colonel shall be appointed by the legislature of each State respectively, by whom such forces shall be raised, or in such manner as such State shall direct; and all vacancies shall be filled up by the State which first made the appointment.

ART. VIII. All charges of war and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and

direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled.

ART. IX. The United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following:—Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot, and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or, being present, shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the Supreme or Superior court of the State where the cause shall be tried, *"well and truly to hear and determine the matter in question according to the best of his judgment, without favor, affection, or hope of reward,"* provided also that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil, claimed under different grants of two or more States, whose jurisdictions as they may respect such lands and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States—fixing the standard of weights and measures throughout the United States—regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated—establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "A Committee of the States," and to consist of one delegate from each State; to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction; and to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years—to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses—to borrow money, or emit bills on the credit of the United States, transmitting every half-year to the respective States an account of the sums of money so borrowed or emitted—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the legislature of each State shall appoint the regimental officers, raise the men, and cloathe, arm and equip them in a soldier-like manner, at the expense of the United States, and the officers and men so cloathed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled; but if the United States in Congress assembled shall, on consideration of circumstances, judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed, and equipped in the same as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared outside of the same, in which case they shall raise, officer, cloath, arm, and equip as many of such extra number as they judge can be safely spared: and the officers and men, so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on, by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine States assent to the same; nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their

request, shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several States.

ART. X. The Committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with: provided that no power be delegated to the said Committee, for the exercise of which, by the Articles of Confederation, the voice of nine States in the Congress of the United States assembled is requisite.

ART. XI. Canada acceding to this Confederation, and joining in the measures of the United States, shall be admitted into and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

ART. XII. All bills of credit emitted, monies borrowed, and debts contracted by or under the authority of Congress, before the assembling of the United States in pursuance of the present Confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

ART. XIII. Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

AND WHEREAS it hath pleased the Great Governor of the world to incline the hearts of the legislatures we respectively represent in Congress to approve of and to authorize us to ratify the said Articles of Confederation and perpetual Union. KNOW YE, that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained: and we do further solemnly plight and engage the faith of our respective constituents that they shall abide by the determinations of the United States in Congress assembled, on all questions which by the said Confederation are submitted to them. And that the Articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual.

## Appendix 3

# *The Constitution of the United States*

*In the following printed copy of the Constitution, spelling, capitalization, and punctuation conform to the text of the engrossed parchment.*

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

### ARTICLE I.

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to law.

SECTION. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square), as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

## ARTICLE II.

SECTION. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one

who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President: and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

## ARTICLE III.

SECTION. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

## ARTICLE IV.

SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered upon on Claim of the Party to whom such Service or Labour may be due.

SECTION. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

## ARTICLE V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

## ARTICLE VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

## ARTICLE VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. IN WITNESS whereof We have hereunto subscribed our Names:

G° WASHINGTON

Presidt and deputy from Virginia

The Word “the”, being interlined between the seventh and eighth Lines of the first Page, the Word “Thirty” being partly written on an Erazure in the fiftienth Line of the first Page, The Words “is tried” being interlined between the thirty second and thirty third Lines of the first Page and the Word “the” being interlined between the forty third and forty fourth Lines of the second Page.

Attest William Jackson
Secretary

| | |
|---|---|
| DELAWARE | GEO: READ<br>GUNNING BEDFORD jun<br>JOHN DICKINSON<br>RICHARD BASSETT<br>JACO: BROOM |
| MARYLAND | JAMES MCHENRY<br>DAN OF ST. THOS. JENIFER<br>DANL. CARROLL |
| VIRGINIA | JOHN BLAIR—<br>JAMES MADISON JR. |
| NORTH CAROLINA | WM. BLOUNT<br>RICHD. DOBBS SPAIGHT<br>HU WILLIAMSON |
| SOUTH CAROLINA | J. RUTLEDGE<br>CHARLES COTESWORTH PINCKNEY<br>CHARLES PINCKNEY<br>PIERCE BUTLER |
| GEORGIA | WILLIAM FEW<br>ABR BALDWIN |
| NEW HAMPSHIRE | JOHN LANGDON<br>NICHOLAS GILMAN |
| MASSACHUSETTS | NATHANIEL GORHAM<br>RUFUS KING |
| CONNECTICUT | WM. SAML. JOHNSON<br>ROGER SHERMAN |
| NEW YORK | ALEXANDER HAMILTON |
| NEW JERSEY | WIL: LIVINGSTON<br>DAVID BREARLEY<br>WM. PATTERSON<br>JONA: DAYTON |
| PENNSYLVANIA | B. FRANKLIN<br>THOMAS MIFFLIN<br>ROBT. MORRIS<br>GEO. CLYMER<br>THOS. FITZSIMONS<br>JARED INGERSOLL<br>JAMES WILSON<br>GOUV MORRIS |

## AMENDMENT I

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

## AMENDMENT II

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

## AMENDMENT III

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

## AMENDMENT IV

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

## AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor

be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### AMENDMENT VI

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

### AMENDMENT VII

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

### AMENDMENT VIII

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

### AMENDMENT IX

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

### AMENDMENT X

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

### AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

### AMENDMENT XII

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having

one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

## AMENDMENT XIII

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

## AMENDMENT XIV

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

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

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

## AMENDMENT XV

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

## AMENDMENT XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

## AMENDMENT XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

## AMENDMENT XVIII

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

## AMENDMENT XIX

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

## AMENDMENT XX

SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SECTION 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SECTION 3. If, at the time fixed for the beginning of the term of the President, the

President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

SECTION 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SECTION 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SECTION 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

## AMENDMENT XXI

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

## AMENDMENT XXII

SECTION 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

SECTION 2. This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

## AMENDMENT XXIII

SECTION 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

## AMENDMENT XXIV

SECTION 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

## AMENDMENT XXV

SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

SECTION 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

SECTION 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

SECTION 4. Whenever the Vice president and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

## AMENDMENT XXVI

SECTION 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

## AMENDMENT XXVII

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

## Appendix 4

# *Resolution Transmitting the Constitution to Congress*

IN CONVENTION

*Monday, September 17, 1787*

PRESENT, *The States of New-Hampshire, Massachusetts, Connecticut, Mr. Hamilton from New-York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.*

*Resolved*, That the [following] Constitution be laid before the United States in Congress assembled, and that it is the opinion of this convention, that it should afterwards be submitted to a convention of delegates, chosen in each State by the people thereof, under the recommendation of its legislature, for their assent and ratification; and that each convention assenting to, and ratifying the same should give notice thereof to the United States in Congress assembled.

*Resolved*, That it is the opinion of this convention, that as soon as the conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a day on which electors should be appointed by the States which shall have ratified the same, and a day on which the electors should assemble to vote for the President, and the time and place for commencing proceedings under this Constitution; that after such publication the electors should be appointed, and the senators and representatives elected; that the electors should meet on the day fixed for the election of the President, and should transmit their votes certified, signed, sealed, and directed, as the Constitution requires, to the secretary of the United States in Congress assembled; that the senators and representatives should convene at the time and place assigned; that the senators should appoint a president of the Senate, for the sole purpose of receiving, opening, and counting the votes for President; and that after he shall be chosen, the Congress, together with the President, should without delay proceed to execute this Constitution.

*By the unanimous order of the convention.*

GEORGE WASHINGTON, *President.*

WILLIAM JACKSON, *Secretary.*

## Appendix 5

# *Washington's Letter of Transmittal*

IN CONVENTION

*September 17, 1787*

SIR,

WE HAVE now the honor to submit to the consideration of the United States in Congress assembled, that Constitution which has appeared to us the most advisable.

The friends of our country have long seen and desired, that the power of making war, peace, and treaties, of levying money and regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually vested in the general government of the Union: but the impropriety of delegating such extensive trust to one body of men is evident—Hence results the necessity of a different organization.

It is obviously impracticable in the federal government of these States, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all—Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstances as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; and on the present occasion this difficulty was increased by a difference among the several States as to their situation, extent, habits, and particular interests.

In all our deliberations on this subject we kept steadily in our view, that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each State in the Convention to be less rigid on points of inferior magnitude, than might have been otherwise expected; and thus the Constitution, which we now present, is the result of a spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable.

That it will meet the full and entire approbation of every State is not perhaps to be expected; but each will doubtless consider, that had her interest alone been consulted, the consequences might have been particularly disagreeable or injurious to others; that it is liable to as few exceptions as could reasonably have been expected, we hope and

believe; that it may promote the lasting welfare of that country so dear to us all, and secure her freedom and happiness, is our most ardent wish.

With great respect,
We have the honor to be
SIR,
Your Excellency's most
Obedient and Humble Servants,
GEORGE WASHINGTON, President

By Unanimous Order of the Convention
HIS EXCELLENCY
THE PRESIDENT OF CONGRESS

## Appendix 6

# *The Birth of the Constitution: A Chronology*

### 1786

| | |
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| September 11–14 | Annapolis Convention. |
| September 20 | Report of Annapolis Convention, calling for a Constitutional Convention, submitted to Congress. |
| October 11 | Congress sends Annapolis Convention report to committee. |
| November 23 | New Jersey elects delegates. |
| December 4 | Virginia elects delegates. |
| December 30 | Pennsylvania elects delegates. |

### 1787

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| January 6 | North Carolina elects delegates. |
| January 17 | New Hampshire elects delegates. |
| February 3 | Delaware elects delegates. |
| February 10 | Georgia elects delegates. |
| February 21 | Congress calls Constitutional Convention. |
| March 3 | Massachusetts elects delegates. |
| March 6 | New York elects delegates. |
| March 8 | South Carolina elects delegates. |
| March 14 | Rhode Island refuses to elect delegates. |
| April 23–May 6 | Maryland elects delegates. |
| May 14 | Day appointed for beginning of Convention; quorum not present. |
| May 14–17 | Connecticut elects delegates. |
| May 25 | Quorum is present (seven states represented); Convention begins. |
| May 29 | Governor Edmund Randolph introduces the Virginia Plan. |
| June 15 | William Paterson introduces the New Jersey Plan. |
| July 16 | Great Compromise approved: voting power in first house of Congress to be apportioned by population; states to have equal voting power in the second house. |
| August 6 | Committee on Detail submits draft to Convention. |
| September 12 | Committee on Style submits draft to Convention. |
| September 15 | Draft Constitution approved by unanimous vote of the states represented in the Convention. |
| September 17 | Constitution is signed; Convention adjourns. |
| September 26–28 | Proposed Constitution debated in Congress. |

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| September 28 | Congress transmits Constitution to the states for ratification action. |
| September 29 | Pennsylvania calls state convention. |
| October 17 | Connecticut calls state convention. |
| October 25 | Massachusetts calls state convention. |
| October 26 | Georgia calls state convention. |
| October 31 | Virginia calls state convention. |
| November 1 | New Jersey calls state convention. |
| November 6 | Delegates to Pennsylvania convention elected. |
| November 10 | Delaware calls state convention. |
| November 12 | Delegates to Connecticut convention elected. |
| November 19–January 7, 1788 | Delegates to Massachusetts convention elected. |
| November 20 | Pennsylvania convention begins. |
| November 26 | Delegates to Delaware convention elected. |
| November 27–December 1 | Delegates to New Jersey convention elected. |
| December 1 | Maryland calls state convention. |
| December 3 | Delaware convention begins. |
| December 4–5 | Delegates to Georgia convention elected. |
| December 6 | North Carolina calls state convention. |
| December 7 | Delaware convention ratifies Constitution (30–0). |
| December 11 | New Jersey convention begins. |
| December 12 | Pennsylvania convention ratifies Constitution (46–23). |
| December 14 | New Hampshire calls state convention. |
| December 18 | New Jersey convention ratifies constitution (38–0). |
| December 25 | Georgia convention begins. |
| December 31–February 12, 1788 | Delegates to New Hampshire convention elected. |

## 1788

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| January 3 | Connecticut convention begins. |
| January 9 | Connecticut convention ratifies Constitution (128–40). |
| January 9 | Massachusetts convention begins. |
| January 19 | South Carolina calls state convention. |
| February 1 | New York calls state convention. |
| February 6 | Massachusetts convention ratifies Constitution (187–168) and proposes amendments. |
| February 13–22 | New Hampshire convention holds first session. |
| March 1 | Rhode Island calls state referendum on Constitution. |
| March 3–31 | Delegates to Virginia convention elected. |
| March 24 | Rhode Island voters reject Constitution in referendum (2711–239). |
| March 28–29 | Delegates to North Carolina convention elected. |
| April 7 | Delegates to Maryland convention elected. |
| April 11–12 | Delegates to South Carolina convention elected. |
| April 21 | Maryland convention begins. |
| April 26 | Maryland convention ratifies Constitution (63–11). |
| April 29–May 3 | Delegates to New York convention elected. |
| May 12 | South Carolina convention begins. |
| May 23 | South Carolina convention ratifies Constitution (149–73) and proposes amendments. |
| June 2 | Virginia convention begins. |
| June 17 | New York convention begins. |
| June 18 | New Hampshire convention begins second session. |
| June 21 | New Hampshire convention ratifies Constitution (57–47) and proposes amendments. |
| June 25 | Virginia convention ratifies Constitution (89–79) and proposes amendments. |

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| July 2 | New Hampshire's ratification received by Congress; as this is the ninth state ratification, a committee is appointed to effect the transition from government under the Articles of Confederation to government under the Constitution. |
| July 21 | North Carolina convention begins. |
| July 26 | New York convention ratifies Constitution (30–27) and proposes amendments. |
| August 2 | North Carolina convention proposes amendments, but does not ratify the Constitution. |
| September 13 | Congress sets dates for presidential election and for first meeting of Congress under the Constitution. |
| November 20 | Virginia legislature requests Congress to call a second constitutional convention. |
| November 30 | North Carolina calls second state convention. |

1789

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| May 4 | Representative James Madison announces, during congressional debate, his intention to introduce constitutional amendments. |
| May 5–6 | Petitions to Congress from legislatures of Virginia and New York, asking Congress to call a second constitutional convention, are reported and filed. |
| June 8 | Madison, in a speech in the House of Representatives, introduces amendments that will become the Bill of Rights. |
| July 21 | Madison's proposed amendments referred to select committee of the House of Representatives. |
| July 28 | Select committee reports back the proposed amendments; its report is tabled. |
| August 14–18 | Congress debates proposed amendments in Committee of the Whole. |
| August 21–22 | Delegates to second North Carolina convention elected. |
| August 24 | House of Representatives approves and sends to the Senate seventeen proposed amendments, including the provisions of the Bill of Rights. |
| September 2 | Senate begins debate on the Bill of Rights. |
| September 9 | Senate approves a version of the Bill of Rights. |
| September 21 | The Senate and House versions of the Bill of Rights are referred to a conference committee. |
| September 24 | House of Representatives approves (37–14) conference committee version of the Bill of Rights. |
| September 25 | Senate approves conference committee version of the Bill of Rights. Twelve amendments to the Constitution, including the ten now known as the Bill of Rights, are proposed by Congress to the states. |
| November 16 | Second North Carolina convention begins. |
| November 20 | New Jersey legislature ratifies the Bill of Rights. |
| November 21 | North Carolina convention ratifies Constitution (194–77) and proposes amendments. |
| December 19 | Maryland legislature ratifies the Bill of Rights. |
| December 22 | North Carolina legislature ratifies Bill of Rights. |

1790

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| January 17 | Rhode Island calls state convention. |
| January 18 | South Carolina legislature ratifies the Bill of Rights. |
| January 25 | New Hampshire legislature ratifies the Bill of Rights. |
| January 28 | Delaware legislature ratifies the Bill of Rights. |
| February 8 | Delegates to Rhode Island convention elected. |
| February 24 | New York legislature ratifies the Bill of Rights. |

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| March 1 | Rhode Island convention begins. |
| March 10 | Pennsylvania legislature ratifies the Bill of Rights. |
| May 29 | Rhode Island convention ratifies Constitution (34–32) and proposes amendments. |
| June | Rhode Island legislature ratifies the Bill of Rights. (N.B.: exact date in June of Rhode Island's ratification is unknown.) |

1791

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| March 4 | Vermont admitted to the Union. |
| November 3 | Vermont legislature ratifies Bill of Rights. |
| December 15 | Virginia legislature ratifies the Bill of Rights. |

## Appendix 7

# *Important Events in the Development of American Constitutional Law*

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| 1215 | Magna Carta. |
| 1225 | Magna Carta reissued in the modified form that became the English statute. |
| 1295 | Parliament of three estates established, the model for all future English parliaments. |
| 1297 | Confirmatio Cartarum. |
| 1322 | That no statute could be made except by consent of both lords and commons was established and declared. |
| 1354 | The phrase "due process of law" was first used in a statute. |
| 1387 | By statute the king was forbidden to levy imposts, duties, or surcharges without consent of Parliament; the king could no longer legally raise revenue by his own authority alone. |
| 1407 | The king agreed that all revenue measures must originate in the House of Commons; this practice was followed in Article I, section 7, of the Constitution. |
| 1606 | Edward Coke was appointed Chief Justice of Common Pleas. He was made Chief Justice of the King's Bench ("Lord Chief Justice of England") in 1613. |
| | First Virginia Charter. |
| 1608 | *Calvin's Case.* |
| 1610 | *Bonham's Case.* |
| 1619 | The General Assembly of Virginia met, the first representative assembly in the New World. |
| 1620 | Mayflower Compact. |
| 1628 | Petition of Right. |
| 1629 | Charter of Massachusetts Bay Company. |
| 1635 | Massachusetts General Court established a committee to write fundamental laws to limit magistrate, "in resemblance to a Magna Carta." |
| | Roger Williams banished by the General Court of Massachusetts. He founded Providence Plantation in 1636. |
| | In instructions to Governor Wyatt, the Virginia Assembly was officially recognized as a permanent institution, to meet at least annually. |
| 1639 | Fundamental Orders of Connecticut. |
| 1641 | Courts of High Commission and Star Chamber abolished; oath *ex officio* abolished. |
| | Massachusetts Body of Liberties. |
| | The Grand Remonstrance charged King Charles I with various unlawful acts and demanded that executive power be exercised by ministers in whom Parliament had confidence. |
| 1643 | Roger Williams's *The Bloudy Tenent of Persecution*. |
| 1644 | John Milton's *Areopagitica*, a plea against prior restraint and censorship, published. |
| 1644 | Massachusetts General Court became bicameral, as Assistants met separately from Assembly. |
| 1647 | Massachusetts General Laws and Liberties. |

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| 1649 | Maryland Toleration Act. |
| 1652 | Roger Williams's pamphlet *The Bloudy Tenent Yet More Bloudy* published. |
| 1653 | The Instrument of Government, the short-lived written constitution of the English commonwealth, promulgated by Oliver Cromwell. |
| 1660–1696 | Navigation Acts. |
| 1662 | Royal Charter for Connecticut (constitution until 1818). |
| 1663 | Royal Charter of Rhode Island (constitution until 1842). |
| 1664 | New York granted to Duke of York as proprietary colony; the proprietor to have complete power to make laws. |
| 1670 | *Bushell's Case.* |
| 1679 | Habeas Corpus Act. |
| 1682 | Pennsylvania Frame of Government. |
| 1687 | William Penn's *The Excellent Priviledge of Liberty and Property* published; it included the first text of and commentary on Magna Carta published in America. |
| 1689 | Act of Toleration. |
| | English Bill of Rights. |
| | John Locke's *Letter Concerning Toleration*. |
| 1690 | John Locke's *Two Treatises of Government*. |
| 1695 | The last English licensing act, restricting freedom of the press, expired. |
| 1698 | Algernon Sidney's *Discourses Concerning Government*. |
| 1701 | Pennsylvania Charter of Liberties. |
| 1720–1721 | Trenchard and Gordon's essays, *Cato's Letters* and *The Independent Whig*, first published. |
| 1733 | Molasses Act. |
| 1735 | *Zenger's Case.* |
| 1748 | Montesquieu's *Spirit of the Laws.* |
| 1754 | Albany Plan of Union proposed by the Albany Congress. |
| 1758 | Emerich de Vattel's *Law of Nations and of Nature.* |
| 1762 | Massachusetts General Court voted a ban on general warrants; it was disallowed by the Governor. |
| 1763 | *Paxton's Case* (Writs of Assistance Case). |
| 1764 | James Otis, in *The Rights of the British Colonies Asserted and Proved*, denied the right of Parliament to tax the Americans and maintained that a court could judge an act of Parliament void if it was contrary to natural justice. |
| | The Sugar Act (American Revenue Act) was the first attempt by the British Parliament to tax the colonists for revenue purposes. |
| 1765 | *Entick v. Carrington.* |
| | Stamp Act. |
| | Stamp Act Congress. |
| 1765–1769 | William Blackstone's *Commentaries on the Laws of England* published. |
| 1766 | A county court in Northhampton County, Virginia, in an advisory opinion, declared the Stamp Act unconstitutional and therefore void. |
| | Declaratory Act. |
| 1767–1768 | John Dickinson's *Letters from a Farmer in Pennsylvania* published. |
| 1768 | Massachusetts Circular Letter. |
| 1772 | *Somerset's Case.* |
| 1773 | Constitutional debate in Massachusetts; Governor James Hutchinson, in a message to the General Court, asserted that supreme power must rest somewhere; the alternatives were parliamentary rule or independence. The General Court replied that sovereignty could be, and, in fact, already was, divided. |
| 1774 | Coercive Acts (Intolerable Acts), including Administration of Justice Act. |
| | First Continental Congress. |
| | The Association. |
| | Joseph Galloway proposes his Plan of Union. |
| | Thomas Jefferson's *Summary View of the Rights of British America.* |
| 1775 | Second Continental Congress convened. |
| | Declaration of the Causes and Necessity of Taking Up Arms. |

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| 1776 | Thomas Paine's *Common Sense.* |
| | Declaration of Independence. |
| | Dickinson's draft of Articles of Confederation submitted to Congress. |
| 1776–1780 | First state constitutions written. |
| 1777 | Articles of Confederation approved by Congress and submitted to states. |
| 1779 | Congressional resolution asked states to cede their western lands to the United States. |
| 1780 | *Holmes v. Walton* (New Jersey). |
| 1781 | Articles of Confederation ratified and in force. |
| 1783 | *Quock Walker's Case* (Massachusetts). |
| 1784 | *Rutgers v. Waddington* (New York). |
| | James Madison's "Memorial and Remonstrance" against religious assessments. |
| 1786 | Virginia Statute for Religious Freedom. |
| | Ten Pound Act Cases (New Hampshire). |
| | *Trevett v. Weeden* (Rhode Island). |
| | Annapolis Convention. |
| 1787 | *Bayard v. Singleton.* |
| | Congress adopted resolution calling federal Constitutional Convention. |
| | John Adams's *Defense of the Constitutions of Government of the United States.* |
| | Constitutional Convention met in Philadelphia and drafted Constitution of the United States. |
| | Northwest Ordinance. |
| | Congress transmitted Constitution to the states for ratification. |
| 1787–1788 | *The Federalist.* |
| 1788 | Constitution ratified by required nine states. |
| | Congress adopted ordinance to put Constitution into effect. |
| 1789 | George Washington chosen President. |
| | Departments of State, War, and Treasury created. |
| | Judiciary Act of 1789. |
| | Habeas Corpus Act. |
| | Bill of Rights proposed. |
| | President Washington appeared in person to ask the Senate's advice and consent relative to an Indian treaty; failure to act cost the Senate a role as the President's council of advice. |
| 1790 | Alexander Hamilton's Report on the Public Credit. |
| | Treason Act. |
| 1791 | *Champion and Dickason v. Casey.* |
| | Bank of the United States Act. |
| | Bill of Rights ratified and in effect. |
| | Hamilton's Report on Manufactures. |
| 1792 | *Hayburn's Case.* |
| | President Washington used the presidential veto power for the first time, vetoing a reapportionment bill he thought unconstitutional. |
| 1793 | *Chisholm v. Georgia.* |
| | First Fugitive Slave Act. |
| | The Supreme Court, presented with a list of questions from the President and the cabinet concerning relations with France, refused to give an advisory opinion. |
| | Washington's Proclamation of Neutrality in the Wars of the French Revolution. |
| 1794 | Jay's Treaty. |
| | Whiskey Rebellion in Pennsylvania against federal alcohol tax. Suppressed by militia of four states under federal control. |
| 1795 | *Van Horne's Lessee v. Dorrance.* |
| | Post Office Department created. |
| | *Ware v. Hylton.* |
| 1796 | *Hylton v. United States.* |
| | Washington's Farewell Address. |
| | XYZ Affair began three-year undeclared war with France. |
| 1798 | Alien and Sedition Acts. |
| | *Calder v. Bull.* |

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| | Department of the Navy created. |
| | Eleventh Amendment ratified and in effect. |
| | Virginia and Kentucky Resolutions. |
| 1799 | Second set of Kentucky Resolutions claimed states could nullify unconstitutional acts of Congress. |
| 1801 | Electoral College tie between Thomas Jefferson and Aaron Burr resolved in House of Representatives; this led to the Twelfth Amendment. |
| | John Marshall became Chief Justice. |
| | Judiciary Act of 1801. |
| 1802 | Judiciary Act of 1801 repealed; Judiciary Act of 1802 enacted. |
| 1803 | *Marbury v. Madison.* |
| | *Stuart v. Laird.* |
| | Louisiana Purchase Treaty. |
| 1804 | John Pickering, United States District Court judge for New Hampshire, having been impeached by the House of Representatives of malfeasance and intemperance, was convicted by the Senate and removed from office. |
| | Twelfth Amendment ratified and in effect. |
| 1805 | Samuel Chase, Associate Justice of the Supreme Court, having been impeached by the House of Representatives of oppressive and partisan conduct, was acquitted by the Senate. |
| 1807 | *Ex Parte Bollman and Swartwout.* |
| | Abolition of the Slave Trade Act. |
| | Embargo Act. |
| | Trial of Aaron Burr (*United States v. Burr*). |
| 1809 | Massachusetts Resolutions declared the Embargo unconstitutional and not legally binding. |
| | *United States v. Judge Peters* (Olmstead Case). |
| 1810 | *Fletcher v. Peck.* |
| 1812 | *New Jersey v. Wilson.* |
| | *United States v. Hudson and Goodwin.* |
| 1814 | Hartford Convention. |
| 1815 | *Terrett v. Taylor.* |
| | Second Bank of the United States Act. |
| 1816 | *Martin v. Hunter's Lessee.* |
| 1817 | Madison's veto of Bonus Bill (on constitutional grounds). |
| 1819 | Secretary of War Calhoun recommended a program of internal improvements as a defense measure. |
| | *Dartmouth College v. Woodward.* |
| | *McCulloch v. Maryland.* |
| | *Sturges v. Crowninshield.* |
| 1820 | John Taylor of Caroline's *Construction Construed* published, arguing that the Supreme Court was destroying the independence of the states and of the other branches of the federal government. |
| | Missouri Compromise. |
| 1821 | *Cohens v. Virginia.* |
| 1822 | Cumberland Road Bill vetoed by President James Monroe, who also recommended a constitutional amendment authorizing the United States to build and operate internal improvements. |
| 1823 | Monroe Doctrine. |
| | *Corfield v. Coryell.* |
| 1824 | *Gibbons v. Ogden.* |
| | *Osborn v. Bank of the United States.* |
| 1825 | John Quincy Adams (who had finished second in the Electoral College vote) elected president by the House of Representatives. |
| | *Eakin v. Raub.* |
| 1826–1830 | James Kent's *Commentaries on American Law.* |
| 1827 | *Brown v. Maryland.* |
| | *Martin v. Mott.* |
| | *Ogden v. Saunders.* |

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| 1828 | South Carolina Exposition and Protest. |
| | *American Insurance Company v. Canter.* |
| 1829 | *Willson v. Black Bird Creek Marsh Company.* |
| 1830 | Maysville Road Bill vetoed by President Andrew Jackson. |
| | Daniel Webster and Robert Young Hayne participated in a great debate in the Senate on the nature of the Constitution. |
| | *Craig v. Missouri.* |
| | *Providence Bank v. Billings.* |
| 1831 | William Lloyd Garrison founded *The Liberator.* |
| | *Cherokee Nation v. Georgia* (first of the Cherokee Indian Cases). |
| 1832 | Jackson's Veto of the Bank Bill. |
| | Vice-President John C. Calhoun, in his Fort Hill Address, explained his theory of nullification. |
| | South Carolina Ordinance of Nullification of the Tariff Act of 1828. |
| | Jackson's Proclamation to the People of South Carolina. |
| | *Worcester v. Georgia.* |
| 1833 | Force Act of 1833. |
| | Joseph Story's *Commentaries on the Constitution.* |
| | *Barron v. Baltimore.* |
| 1836 | First congressional "gag rule" on antislavery petitions imposed. |
| | Roger B. Taney became Chief Justice. |
| 1837 | Membership of Supreme Court increased from seven to nine. |
| | *New York v. Miln.* |
| | *Briscoe v. Bank of Kentucky.* |
| | *Charles River Bridge v. Warren Bridge Company.* |
| 1839 | *Bank of Augusta v. Earle.* |
| 1841 | *Groves v. Slaughter.* |
| 1842 | Reapportionment Act required representatives to be elected by district. |
| | *Dobbins v. Erie Company.* |
| | *Swift v. Tyson.* |
| | *Prigg v. Pennsylvania.* |
| 1843 | *Bronson v. Kinzie.* |
| 1844 | Texas Annexation Treaty signed; rejected by Senate. |
| 1845 | Congress, by joint resolution, approved the annexation of Texas and provided for admission of Texas as a state. |
| | Congress provided for uniform presidential election day. |
| 1847 | License Cases. |
| 1848 | Oregon Act. |
| | Treaty of Guadalupe Hidalgo. |
| | *West River Bridge Company v. Dix.* |
| 1849 | Passenger Cases. |
| | *Luther v. Borden.* |
| 1850 | Compromise of 1850. |
| | Nashville Convention Resolutions asserted fight of secession. |
| | *Strader v. Graham.* |
| 1850–1858 | Personal Liberty Laws adopted by states: Vermont in 1850; Connecticut and Rhode Island in 1854; Maine, Massachusetts, and Michigan in 1855; Kansas in 1857; Wisconsin in 1858. |
| 1851 | *Cooley v. Board of Wardens.* |
| 1852 | *Pennsylvania v. Wheeling Bridge Company.* |
| | *The Genesee Chief v. Fitzhugh.* |
| 1854 | Kansas-Nebraska Act. |
| | *Ohio Life Insurance & Trust Company v. DeBolt.* |
| | *In re Booth* (Wisconsin Supreme Court held Fugitive Slave Act of 1850 unconstitutional). |
| 1855 | Connecticut adopted law requiring literacy test for voting. |
| | Court of Claims created. |
| 1856 | *Murray's Lessee v. Hoboken Land Improvement Company.* |
| | *Wynehamer v. New York.* |
| | *Dodge v. Woolsey.* |

1857 *Dred Scott v. Sandford.*
1858 Lincoln-Douglas debates.
1859 *Ableman v. Booth.*
1860 Crittenden Compromise proposed.
Senator Jefferson Davis introduced a proposal for a federal slave code.
South Carolina Ordinance of Secession.
1861 First federal income tax imposed as a war measure.
President Abraham Lincoln proclaimed insurrection, called for troops, suspended habeas corpus.
Secession of ten other states; Confederate Constitution adopted.
*Kentucky v. Dennison.*
1862 Abolition of slavery in the territories.
Emancipation Proclamation.
Homestead Act.
1863 Gettysburg Address.
Lincoln's Proclamation of Amnesty and Reconstruction.
1864 Lincoln's pocket veto of the Wade-Davis Bill.
Salmon P. Chase became Chief Justice.
1865 Freedmen's Bureau founded.
Joint Committee on Reconstruction established.
Thirteenth Amendment ratified and in effect.
Writ of habeas corpus restored by presidential proclamation.
1866 Civil Rights Act of 1866.
*Ex Parte Milligan.*
1867 First Reconstruction Act.
Habeas Corpus Act.
Tenure of Office Act.
1868 *Ex parte McCardle.*
Fourteenth Amendment ratified and in effect.
Impeachment of Andrew Johnson.
Johnson's proclamation of general amnesty.
*Texas v. White.*
1869 Wyoming adopts women's suffrage.
1870 Department of Justice established.
Fifteenth Amendment ratified and in effect.
*Hepburn v. Griswold.*
1871 Force Act of 1871.
*Knox v. Lee.*
Ku Klux Klan Act.
1872 Congress established uniform date for congressional elections.
1873 Slaughterhouse Cases.
1874 Morrison R. Waite became Chief Justice.
1875 Civil Rights Act of 1875.
1876 Disputed election: Tilden-Hayes.
*Munn v. Illinois.*
*United States v. Cruikshank.*
*United States v. Reese.*
1877 Compromise of 1877 settled disputed election and ended Reconstruction.
1880 Chinese Exclusion Treaty.
*Strauder v. West Virginia.*
1881 Kansas adopted prohibition of alcohol (first state prohibition statute).
*Springer v. United States.*
*Kilbourn v. Thompson.*
1882 Chinese Exclusion Act (enacted over presidential veto).
1883 Civil Rights Cases.
1884 *Juilliard v. Greenman.*
*Ex parte Yarbrough.*
*Hurtado v. California.*

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| 1886 | *Wabash, St. Louis & Pacific Railway v. Illinois.* |
| | *Boyd v. United States.* |
| | *Yick Wo v. Hopkins.* |
| 1887 | Interstate Commerce Act. |
| 1888 | Melville W. Fuller became Chief Justice. |
| 1890 | *Chicago, Milwaukee & St. Paul Railroad v. Minnesota.* |
| | *Leisy v. Hardin.* |
| | Sherman Antitrust Act. |
| 1892 | *Counselman v. Hitchcock.* |
| 1894 | Force Act of 1871 repealed. |
| | *Reagan v. Farmers' Loan and Trust Company.* |
| 1895 | *United States v. E. C. Knight Company.* |
| | *Pollock v. Farmers' Loan and Trust Company.* |
| | *In re Debs.* |
| 1896 | *Plessy v. Ferguson.* |
| | *Allgeyer v. Louisiana.* |
| 1897 | Trans-Missouri Freight Case. |
| | *Chicago, Burlington & Quincy Railroad v. Chicago.* |
| 1898 | *Holden v. Hardy.* |
| | *Smyth v. Ames.* |
| | *Williams v. Mississippi.* |
| 1899 | *United States v. Wong Kim Ark.* |
| 1901 | New Alabama constitution: literacy and property tests, plus grandfather clause, required for voting (effect was to disenfranchise blacks). |
| 1903 | *Champion v. Ames.* |
| | First direct primary elections (in Wisconsin). |
| | Panama Canal Treaty (Hay-Bunau Treaty). |
| 1904 | *Northern Securities Company v. United States.* |
| 1905 | *Swift & Company v. United States.* |
| | *Lochner v. New York.* |
| 1906 | Hepburn Act. |
| 1908 | *Muller v. Oregon.* |
| | *Adair v. United States.* |
| | *Loewe v. Lawlor.* |
| | *Ex parte Young.* |
| | *Twining v. New Jersey.* |
| 1910 | Edward D. White became Chief Justice. |
| | Mann-Elkins Act. |
| 1911 | *United States v. Grimaud.* |
| | *Standard Oil Company v. United States.* |
| 1913 | Federal Reserve Act (Owen-Glass Act). |
| | Sixteenth Amendment ratified and in effect. |
| 1914 | Federal Trade Commission Act. |
| | *Weeks v. United States.* |
| | Shreveport Rate Case. |
| 1916 | Child Labor Act (Keating-Owen Act). |
| 1917 | Selective Service Act. |
| 1918 | Selective Draft Law Cases. |
| | *Hammer v. Dagenhart.* |
| 1919 | Eighteenth Amendment ratified and in effect. |
| | *Schenck v. United States.* |
| | Senate rejects Treaty of Versailles. |
| | Volstead Act. |
| | *Abrams v. United States.* |
| 1920 | Esch-Cummings Transportation Act. |
| | *Missouri v. Holland.* |
| | *United States v. United States Steel Corporation.* |

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| | Nineteenth Amendment ratified and in effect. |
| | Palmer Raids. |
| 1921 | *Bailey v. Drexel Furniture Company.* |
| | Budget and Accounting Act. |
| | William Howard Taft became Chief Justice. |
| 1923 | *Adkins v. Children's Hospital.* |
| | *Moore v. Dempsey.* |
| | *Massachusetts v. Mellon.* |
| 1924 | Child Labor Amendment proposed by Congress. |
| 1925 | *State v. Scopes* (Tennessee). |
| | *Pierce v. Society of Sisters.* |
| | *Gitlow v. New York.* |
| 1926 | *Meyers v. United States.* |
| 1927 | *Nixon v. Herndon.* |
| 1928 | *Olmstead v. United States.* |
| 1930 | Charles Evans Hughes became Chief Justice. |
| 1931 | *Near v. Minnesota.* |
| 1932 | Norris-La Guardia Act. |
| | *Powell v. Alabama.* |
| 1933 | National Industrial Recovery Act. |
| | Securities Act of 1933. |
| | Tennessee Valley Authority Act. |
| | Twentieth Amendment ratified and in effect. |
| | Twenty-First Amendment ratified and in effect. |
| 1934 | Communications Act. |
| | *Nebbia v. New York.* |
| | *Home Building and Loan Company v. Blaisdell.* |
| | Securities Exchange Act of 1934. |
| 1935 | National Labor Relations Act (Wagner Act). |
| | Social Security Act. |
| | *Schechter Poultry Corporation v. United States.* |
| | *Norris v. Alabama.* |
| | *Humphrey's Executor v. United States.* |
| 1936 | *Brown v. Mississippi.* |
| | *United States v. Butler.* |
| | *Ashwander v. Tennessee.* |
| | *Carter v. Carter Coal Company.* |
| 1937 | Franklin D. Roosevelt announced Court-packing scheme. |
| | *West Coast Hotel Company v. Parrish.* |
| | Wagner Act Cases. |
| | Social Security Act Cases. |
| | *United States v. Curtiss-Wright Export Corporation.* |
| | *Palko v. Connecticut.* |
| 1938 | Fair Labor Standards Act. |
| | Food, Drug and Cosmetics Act. |
| | House of Representatives establishes committee to investigate un-American activities. |
| | *Johnson v. Zerbst.* |
| | *Missouri ex rel. Gaines v. Canada.* |
| 1939 | *Graves, New York ex rel., v. O'Keefe.* |
| | Hatch Act. |
| 1940 | Alien Registration Act (Smith Act). |
| | *Cantwell v. Connecticut.* |
| 1941 | Fair Employment Practices Commission established by executive order. |
| | Harlan F. Stone became Chief Justice. |
| | *United States v. Darby Lumber Company.* |
| 1942 | *Wickard v. Filburn.* |
| | *Betts v. Brady.* |

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| | President Roosevelt approved program of relocation of Japanese Americans. |
| | *Skinner v. Oklahoma.* |
| 1943 | *McNabb v. United States.* |
| | *Hirabayashi v. United States.* |
| | *West Virginia Board of Education v. Barnette* (Second Flag Salute Case). |
| 1944 | *Korematsu v. United States.* |
| | *Smith v. Allwright.* |
| 1946 | Frederick M. Vinson became Chief Justice. |
| 1947 | *Everson v. Board of Education.* |
| | First Hoover Commission established. |
| | National Labor-Management Relations Act (Taft-Hartley Act) passed over President Harry S. Truman's veto. |
| | National Security Act. |
| 1948 | Executive orders banned racial segregation in the armed forces and in civilian federal employment. |
| | *Illinois ex rel. McCollum v. Board of Education.* |
| | *Shelley v. Kraemer.* |
| | Selective Service Act. |
| | *Sipuel v. Board of Regents.* |
| 1949 | *Wolf v. Colorado.* |
| 1950 | *American Communications Association v. Douds.* |
| | Internal Security Act (McCarran Act). |
| | *Sweatt v. Painter.* |
| | *McLaurin v. Oklahoma State Regents for Higher Education.* |
| 1951 | *Dennis v. United States.* |
| | Twenty-Second Amendment ratified and in effect. |
| 1952 | Immigration and Nationality Act (McCarran-Walter Act) became law over Truman's veto. |
| | President Truman ordered seizure of steel mills. |
| | *Youngstown Sheet & Tube Company v. Sawyer* (Steel Seizure Case). |
| 1953 | Earl Warren became Chief Justice. |
| 1954 | *Brown v. Board of Education of Topeka.* |
| | Censure of Joseph McCarthy by the United States Senate. |
| | Communist Control Act. |
| 1955 | *Brown v. Board of Education II* ("all deliberate speed"). |
| 1956 | *Ullmann v. United States.* |
| 1957 | Civil Rights Act of 1957. |
| | President Dwight D. Eisenhower ordered federal troops to enforce desegregation order in Little Rock, Arkansas. |
| | *Watkins v. United States.* |
| | *Yates v. United States.* |
| | *Mallory v. United States.* |
| | *Roth v. United States, Alberts v. California.* |
| 1958 | *Cooper v. Aaron.* |
| 1959 | *Barenblatt v. United States.* |
| 1960 | Civil Rights Act of 1960. |
| 1961 | *Communist Party v. Subversive Activities Control Board.* |
| | *Mapp v. Ohio.* |
| | Twenty-Third Amendment ratified and in effect. |
| 1962 | *Baker v. Carr.* |
| | *Engel v. Vitale.* |
| 1963 | *Edwards v. South Carolina.* |
| | *Gray v. Sanders.* |
| | *Gideon v. Wainwright.* |
| 1964 | Civil Rights Act of 1964. |
| | Gulf of Tonkin Resolution. |
| | *Wesberry v. Sanders.* |
| | *Reynolds v. Sims.* |

*New York Times Co. v. Sullivan.*
*Heart of Atlanta Motel v. United States.*
*Malloy v. Hogan.*
*Escobedo v. Illinois.*

1965 *Pointer v. Texas.*
*Albertson v. Subversive Activities Control Board.*
*Griswold v. Connecticut.*
Voting Rights Act of 1965.

1966 *Miranda v. Arizona.*
*South Carolina v. Katzenbach.*
*Harper v. Virginia State Board of Elections.*
*Miranda v. Arizona.*

1967 *Klopfer v. North Carolina.*
*In re Gault.*
*Warden v. Hayden.*
*Katz v. United States.*
Thurgood Marshall became the first African American Justice of the Supreme Court.

1968 *Duncan v. Louisiana.*
*Jones v. Alfred H. Mayer Co.*
*Terry v. Ohio.*

1969 *Benton v. Maryland.*
*Chimel v. California.*
Warren E. Burger became Chief Justice.

1970 *In re Winship.*
*Williams v. Florida.*

1971 *New York Times Company v. United States* (Pentagon Papers Case).
*Swann v. Charlotte-Mecklenburg County Board of Education.*
*McKeiver v. Pennsylvania*, *In re Burrus.*
*Lemon v. Kurtzman.*
*New York Times Co. v. United States*, *United States v. The Washington Post.*

1972 Equal Rights Amendment proposed by Congress.
*Furman v. Georgia* (Capital Punishment Cases of 1972).
*Kastigar v. United States.*
*Johnson v. Louisiana.*
*Apodaca v. Oregon.*
*Jackson v. Georgia.*
*Branch v. Texas.*
*Argersinger v. Hamlin.*
*Branzburg v. Hayes.*

1973 *Miller v. California.*
*Roe v. Wade.*

1974 Resignation of President Richard M. Nixon.
*United States v. Nixon.*

1976 *Buckley v. Valeo.*
*National League of Cities v. Usery.*
*Gregg v. Georgia*, *Proffitt v. Florida*, *Jurek v. Texas* (Capital Punishment Cases of 1976).

1977 Panama Canal Treaties.

1978 *Ballew v. Georgia.*
*First National Bank of Boston v. Bellotti.*
*Regents of University of California v. Bakke.*
District of Columbia Representation Amendment proposed by Congress.
Simple majority of Congress voted to extend ratification deadline for Equal Rights Amendment (original proposal had required a two-thirds vote).

1979 *United Steelworkers of America v. Weber.*

1981 Sandra Day O'Connor became the first woman Justice of the Supreme Court.

1982 Extended deadline for ratification of Equal Rights Amendment expired.
*Plyler v. Doe.*

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| 1983 | *Immigration and Naturalization Service v. Chadha.* |
| 1985 | Deadline for ratification of District of Columbia Representation Amendment expired. |
| | Gramm-Rudman-Hollings Balanced Budget Act. |
| | *American Booksellers Association v. Hudnut* (7th Cir.; judgment affirmed by U.S. Supreme Court, 1986). |
| 1986 | *Batson v. Kentucky.* |
| | *Bowers v. Hardwick.* |
| | Iran-Contra Affair. |
| | *Pacific Gas & Electric Company v. Public Utilities Commission of California.* |
| | William H. Rehnquist became Chief Justice. |
| 1987 | *McCleskey v. Kemp.* |
| 1988 | *Hustler Magazine and Larry Flint v. Jerry Falwell.* |
| | *Morrison v. Olson.* |
| 1989 | *DeShaney v. Winnebago County Department of Social Service.* |
| | *Richmond (City of ) v. J. A. Croson Co.* |
| | *Texas v. Johnson.* |
| 1990 | Americans with Disabilities Act of 1990. |
| | *Cruzan v. Director, Missouri Department of Health.* |
| | *Employment Division, Department of Human Resources of Oregon v. Smith.* |
| | *Missouri v. Jenkins.* |
| 1992 | *Lee v. Weisman.* |
| | *Lucas v. South Carolina Coastal Council.* |
| | *New York v. United States.* |
| | *Planned Parenthood v. Casey.* |
| | *R.A.V. v. City of St. Paul.* |
| | Twenty-Seventh Amendment ratified and in effect. |
| 1993 | *Nixon v. United States.* |
| | *Shaw v. Reno.* |
| 1994 | *Turner Broadcasting System v. FCC.* |
| | Violence Against Women Act. |
| 1995 | *Adarand Constructors, Inc. v. Peña.* |
| | *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston.* |
| | *Rosenberger v. Rectors & Visitors of the University of Virginia.* |
| | *United States v. López.* |
| | *U.S. Term Limits v. Thornton.* |
| 1996 | Antiterrorism and Effective Death Penalty Act. |
| | *44 Liquormart, Inc. v. Rhode Island.* |
| | *Romer v. Evans.* |
| | *Seminole Tribe v. Florida.* |
| | *United States v. Virginia.* |
| 1997 | *Agostini v. Felton.* |
| | *Boerne v. Flores.* |
| | *Clinton v. Jones.* |
| | *Printz v. New York.* |
| | *Reno v. ACLU.* |
| | *Washington v. Glucksberg* and *Vacco v. Quill.* |
| 1998 | *Clinton v. New York.* |
| | Impeachment of President William J. Clinton. |
| 1999 | *Alden v. Maine.* |
| | *Saenz v. Roe.* |

# *Glossary*

**abstention*** Any of several doctrines by which federal courts delay or avoid decision, allowing issues of state law or entire cases to be decided by state courts.

**action** A court case. Before the unification of law and equity, an "action" at law was distinguished from a proceeding in equity.

**advisory opinion*** A judicial opinion on a question of law, rendered without deciding the rights of parties to an adversary proceeding. In the federal courts, advisory opinions are barred by the "case or controversy" requirement.

**amicus curiae*** [Latin: friend of the court] One who, although not a party to the case, submits a brief suggesting how the case, or certain issues in the case, should be decided.

**appeal*** Review of a court decision by a higher court to determine whether errors of law were made. Appeal is a particular type of review, but the word is sometimes used more generally, to refer to any review of a lower court decision.

**appellate jurisdiction*** The legitimate authority of a higher court to hear and decide appeals from lower courts.

**bail*** Money deposited with a court to guarantee the appearance of a defendant for trial, permitting his release from jail until trial.

**bill of attainder*** A legislative finding of guilt and imposition of punishment without a court trial.

**brief*** A document filed on behalf of a litigant, at trial or on appeal, stating the facts of the case and arguing the legal basis for a decision in the litigant's favor.

**case law** The body of law established in court decisions, as distinct from customary and statutory law. Case law is the most important component of the common law.

**certification*** A procedure by which a lower court requests from a higher court (or a federal court requests from a state court) guidance on questions of law relative to a case pending in the lower court.

**certiorari*** [Latin: to be made more certain] A form of writ directing a lower court to forward the record of a case to a higher court for review; it is the primary form of discretionary appellate review by the U.S. Supreme Court.

**civil law** (1) the body of law dealing with the private rights and duties of individuals, distinguished from criminal law; (2) a body of law derived from the Roman legal codes that is in force in continental Europe and elsewhere, distinguished from common law. Civil law, in the latter sense, is the basis of much of the private law of Louisiana, and it is the original source of some aspects of property law in Texas and in states formed from the Mexican Cession.

* Entries marked with an asterisk have a separate article in the *Encyclopedia*.

**class action*** A legal action brought by one or more litigants in the name of a numerous class of whom the particular litigants claim to be representative, or an action against a numerous class of defendants.

**comity*** The respect owed by one court or governmental agency to the official acts of a court or agency in another jurisdiction.

**common law*** The body of legal custom and accumulated precedent inherited from England, sometimes inaccurately described as "judge-made law."

**concurrent powers*** Governmental powers that may be exercised either by the national or by the state government.

**concurring opinion*** A separate opinion filed by a judge of a multimember court indicating agreement with the decision of a case but setting forth alternative or additional reasons for reaching the result.

**consent decree*** A court order that makes legally binding an agreement between the parties to a case to settle it without further litigation.

**declaratory judgment*** A judicial order determining the legal rights of the parties in a particular case, anticipating future controversy rather than remedying past injury. Equitable in form, declaratory relief is available in federal court by virtue of an act of Congress.

**de facto*** [Latin: in fact] Existing in fact, whether or not existing in law or by right.

**defendant** The party against whom an action is brought. At the appellate level the party moved against is called the appellee or respondent.

**de jure** [Latin: in law] Existing in law or by virtue of official acts; distinguished from de facto (q.v.).

**dictum (pl. dicta)** [Latin: something said] Formerly, an authoritative pronouncement. Now, commonly used as an abbreviation of "obiter dictum" (q.v.).

**dissenting opinion*** An opinion by a judge of a multimember court who disagrees with the court's decision in a case.

**diversity jurisdiction*** The legitimate authority of federal courts to hear cases in which the parties have "diversity of citizenship," that is, when they are citizens of different states or of a state and a foreign country.

**dual federalism*** A doctrine of constitutional interpretation according to which the reserved powers of the states operate as limitations on the power of the national government.

**due process of law*** The fair and regular procedures established by law. Under the Fifth and Fourteenth Amendments, the government may deprive a person of life, liberty, or property only after due process. The due process clauses of the Constitution protect both procedural and substantive rights.

**equity*** A system of jurisprudence parallel to and corrective of the common law, based on principles of fairness rather than on the letter of the law. In most American jurisdictions, law and equity have been merged.

**error*** A form of writ issued by a higher court directing a lower court to submit a case for appellate review. The writ of error is no longer used in the federal courts, having been superseded by appeal (q.v.).

**exclusionary rule*** A rule excluding evidence obtained in violation of a defendant's rights from admission at the defendant's trial as proof of guilt.

**ex parte*** [Latin: from one party; from the part (of)] (1) A hearing or other legal act at which only one side of a case is represented; (2) in the heading of a case, an identification of the party who is applying for judicial relief.

**ex post facto*** [Latin: from after the fact] A law that makes criminal, or that increases the criminal penalty for, an act committed before the law was passed.

**ex relatione** [Latin: from what has been related (by)] Legal actions brought by the state upon information supplied by or at the instigation of a private party are said to be "ex relatione." In reports, it is abbreviated *"ex rel."*

**federal question jurisdiction*** The legitimate authority of a federal court to hear and decide cases "arising under" the Constitution, laws, or treaties of the United States.

**grand jury*** An investigatory body that is usually empowered to issue indictments or presentments charging persons with crimes.

**habeas corpus*** [Latin: you shall have the body] A form of writ directing a custodial official to appear before a judge with the person of a prisoner and to give a satisfactory legal justification for having the person in custody. The writ of habeas corpus is frequently used by state prisoners to obtain federal court review of their convictions.

**immunity** In criminal cases, a grant of exemption from prosecution made in return for testimony; in intergovernmental relations, the exemption of government instrumentalities from taxation by other levels of government. In general, an exemption from a legally imposed duty or liability; along with privileges, immunities are protected by Article IV and by the Fourteenth Amendment.

**incorporation*** (1) A doctrine according to which certain specific provisions of the Bill of Rights are made applicable against state authority by virtue of the "due process" clause of the Fourteenth Amendment; (2) a doctrine according to which certain territories are made so intimately a part of the United States that certain constitutional protections become applicable to the inhabitants.

**indictment*** A formal statement by a grand jury charging a person with a criminal offense.

**in forma pauperis*** [Latin: in the manner of a poor person] A proceeding in which the court waives requirements that a litigant pay certain fees and comply with certain formal requirements, granted because the litigant cannot afford to comply but ought not to be barred from access to the court.

**injunction*** A form of writ prohibiting or .requiring the performance of a specific act by a particular person. An injunction is a form of remedy available under a court's equity power.

**in personam*** [Latin: against the person] A manner of proceeding in a case so that the decision and remedy are directed against a particular person.

**in re*** [Latin: in the matter (of )] A way of titling the report of a case in which there are no adversary parties.

**in rem*** [Latin: against the thing] A manner of proceeding in a case so that the decision and remedy affect the status of property with reference to the whole world rather than to particular individuals.

**judgment*** The official decision by a court of a case or controversy, including the remedy ordered, excluding the reasons for the ruling.

**judicial review*** The power of a court to review legislation or other governmental acts, including the acts of administrative agencies. The term is used especially for court review to determine whether an act is in conformance with the Constitution.

**jurisdiction*** Legitimate authority. The term is sometimes limited to the legitimate authority of courts to hear and decide cases.

**jury** A body of lay citizens exercising responsibility for hearing and deciding facts in the judicial system; a jury is either a grand jury (q.v.) or a petit jury (q.v.).

**justiciability*** The status of a case or controversy indicating that it may appropriately be heard and decided by a court.

**litigant** A party to a legal action.

**magistrate** At the time the Constitution was written and in general, a government official, especially of the executive or judicial branch. In contemporary technical usage, a judicial officer authorized to conduct certain kinds of hearings, to issue certain kinds of orders, or to try minor offenses.

**mandamus*** [Latin: we command] A form of writ directed to a government official or a lower court directing the performance of an act appropriate to that official's or court's duties.

**mootness*** The status of a case or controversy indicating that it no longer involves a legal question appropriate to be heard and decided by a court.

**nolo contendere*** [Latin: I do not wish to contest (it).] A plea entered by a criminal defendant equivalent in effect to a plea of guilty in the criminal case but not amounting to an admission of guilt that might be used in another case, either civil or criminal.

**obiter dictum*** [Latin: said by the way] Any words in a court's opinion that are not required for the decision of the case, and that are therefore, in theory, not binding as precedent. The term is often misleadingly abbreviated to "dictum" or to its plural, "dicta."

**original jurisdiction*** The legitimate authority of a court to hear and decide cases in the first instance. Original jurisdiction is distinguished from appellate jurisdiction (q.v.).

**ordinance** Any statute. In recent times, most commonly used for enactments by cities, counties, or other local governments.

**per curiam*** [Latin: by the court] An unsigned opinion, attributable to the whole court and not to an individual judge as author.

**petit jury*** The ordinary trial jury; a body of lay persons who hear evidence and decide questions of fact in a civil or criminal case.

**plaintiff** The party who brings an action. At the appellate level, the moving party is called the appellant or the petitioner.

**police power*** The general authority of government to regulate the health, safety, morals, and welfare of the public.

**political question*** An issue reserved for decision by the legislative and executive branches of government, and so not appropriately decided by a court.

**precedent*** A past decision, resolving issues of law, which is relied on in the decision of later cases.

**preemption*** A doctrine according to which legislation by the national government explicitly displaces or conflicts with state legislation or has so pervaded a particular area or topic of regulation as to preclude state legislation on the same subject.

**presentment*** A formal report of a grand jury charging a person with a criminal offense; a presentment differs from an indictment in that the former is prepared on the grand jury's own initiative while the latter is initiated by the public prosecutor. Reports of the results of grand jury investigations are often referred to as "presentments" even when they do not contain criminal charges.

**ratio decidendi*** [Latin: reason for being decided] The reasoning supporting the decision of a court in a particular case, establishing a precedent.

**remand*** The action of a higher court in returning a case to a lower court for decision or for further proceedings.

**ripeness*** The status of a case when circumstances have advanced to the point of sufficient specificity and concreteness to justify decision or review.

**seriatim*** [Latin: serially] One at a time, in sequence; used to describe the opinions of judges on multimember tribunals where custom does not permit a single "opinion of the court."

**special master*** A person appointed by a court to perform certain functions in a case, especially to hear evidence and to make findings of fact.

**standing*** The legal status of a litigant indicating that he is a proper party to litigate an issue or a case or controversy.

**stare decisis*** [Latin: to stand by what has been decided] A doctrine requiring that courts, in deciding cases, should adhere to the principles of law established in prior cases, called precedents (q.v.).

**state action*** Official action by a state or under color of state law, an essential element of a claim of right raised under the "due process" or "equal protection" clause of the Fourteenth Amendment.

**statute** A law enacted by a legislature; a part of the formal, written law. Also called an "act" of Congress or of the legislature, a statute is to be distinguished from a constitution and also from customary or common law and case law.

**subpoena*** [Latin: under penalty] An order to appear and testify at a proceeding (*subpoena ad testificandum*) or to produce physical evidence at a proceeding (*subpoena duces tecum*).

**transactional immunity** Immunity from prosecution for any offense mentioned in testimony given in exchange for the grant of immunity, regardless of other evidence that may be acquired independently.

**ultra vires** [Latin: beyond (its) power] An action by a person, corporation, or public agency that is beyond the actor's legitimate authority.

**use immunity** Immunity from prosecution based upon or using evidence of an offense given by a witness in exchange for the grant of immunity. Prosecution may occur only if it is based on independently acquired evidence.

**venue*** The place where a case is to be heard.

**vested rights*** Legally recognized rights, especially property rights, of which a person may not be deprived without due process of law.

**writ** A court order.

# *Case Index*

## HOW TO READ A CASE CITATION

A case citation tells the reader where the decision and opinion in a case have been reported. It gives, in shorthand form, all the information necessary to find a copy of the report.

The elements of a typical citation are the volume number, the name of the reporter or of the compilation, (the series number,) the page number of the first page of the report, (the court or jurisdiction,) and the year in which the case was decided. Any information that is unnecessary or inapplicable is omitted. Thus,

384 U.S. 346 (1966)

is the citation to the case reported in volume 384 of the United States Reports, beginning on page 346; the case (*Miranda v. Arizona*) was decided in 1966 by the Supreme Court of the United States. So far, there is only one series of volumes in the United States Reports, and all cases in the United States Reports are Supreme Court cases or matters disposed of by Supreme Court Justices. And

13 N.Y. 378 (1858)

is the citation to the case reported in volume 13 of the New York Reports beginning on page 378; the case (*Wynehamer v. People*) was decided in 1858 by the New York Court of Appeals (the highest court of New York).

Many volumes of reports, especially reports of older cases, bear the name of the reporter rather than of the jurisdiction. Some volumes of reports, especially specialized volumes, have names indicating neither the reporter nor the jurisdiction. The table that follows lists the reports in which cases cited in this *Encyclopedia* are to be found:

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|---|---|
| U.S. | United States Reports |
| Dall. | Dallas (= United States Reports, vols. 1–4) |
| Cranch | Cranch (= U.S. Reports vols. 5–13) |
| Wheat. | Wheaton (= U.S. Reports vols. 14–25) |
| Pet. | Peters (= U.S. Reports vols. 26–41) |
| How. | Howard (= U.S. Reports vols. 42–65) |
| Black | Black (= U.S. Reports vols. 66–67) |
| Wall. | Wallace (= U.S. Reports vols. 68–90) |
| S.Ct. | West's Supreme Court Reporter (cited only when the citation to U.S. Reports was unavailable at the time of compilation) |

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|---|---|
| F. | Federal Reporter (F. 2d = Federal Reporter, 2d series) |
| F. Supp. | Federal Supplement |
| F. Cas. | Federal Cases |
| Ct. Cl. | U.S. Court of Claims Reports |
| Dane Abr. | Dane's Abridgment of American Law |
| Gill & J. | Gill & Johnson (Maryland) |
| Pick. | Pickering (= Massachusetts Reports vols. 18–41) |
| Metc. | Metcalf (= Massachusetts Reports vols. 42–54) |
| Cush. | Cushing (= Massachusetts Reports vols. 55–66) |
| Gray | Gray (= Massachusetts Reports vols. 67–82) |
| Quincy | Quincy's Reports (Massachusetts) |
| Hals. | Halsted's New Jersey Reports |
| N.J. Super. | New Jersey Superior Court Reports |
| Abb. Prac. | Abbott's New York Practice Reports |
| Hill | Hill's New York Reports |
| Johns. | Johnson's New York Reports |
| Johns. Cas. | Johnson's New York Cases |
| N.Y.S. | New York Supplement (N.Y.S. 2d = N.Y. Supplement, 2d series) |
| Martin | Martin's North Carolina Reports |
| Serg. & R. | Sergeant & Rawles's Pennsylvania Reports |
| Whart. | Wharton's Pennsylvania Reports |
| Bay | Bay's South Carolina Reports |
| P. | West's Pacific Reporter (P. 2d = Pacific Reporter, 2d series) |
| State Abbreviations | Reports of the state's highest court |
| A.C. | Appeal Cases (English) |
| E.R. | East's King's Bench Reports (English) |
| Eng. Rep. | English Reports |
| How. St. Tr. | Howell's State Trials (English) |
| Mod. | Modern English Cases |

*Numbers in **boldface** refer to the main entry on the subject.*

## A


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Adams v. New York [192 U.S. 585 (1904)], 2334

Adams v. Storey [1 F. Cas. 141, No. 66 (C.C.D. N.Y. 1817)], 1635

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